

19-2000

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Rowley v. City of New Bedford, MA

APPEAL

from the

DECISION OF THE UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

By:

Joyce Rowley

Appellant, pro se



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I. Jurisdictional Statement

Plaintiff-Appellant Joyce Rowley appeals from a final decision of the U.S. District Court of Massachusetts entered October 1, 2019. The district court had jurisdiction pursuant to the Endangered Species Act (ESA) 16 U.S.C. 1540(g) and 28 U.S.C. 1331 (federal question).

Therefore the U.S. Court of Appeals for the First Circuit has jurisdiction over this appeal. (Federal Rule of Appellate Procedure, Rule 3).

II. Statement of the Issues

This is an ESA citizen suit filed by Rowley on behalf of two Asian elephants, Ruth and Emily, owned by the City of New Bedford and confined at Buttonwood Park Zoo since 1986. Emily also resided at the zoo from 1968 to 1983, when the U.S.D.A. ordered that she be sent to another zoo for training because she was dangerous towards humans.

Rowley appeals on the basis that the district court failed to find that Ruth and Emily were harmed by the City; that the district court incorrectly decided that the relief sought was prospective only and so the court did not consider past, current and ongoing harm; that the district court incorrectly allowed the City an exemption under the definition of "harassment"; and that the district court improperly consolidated the preliminary injunction with the trial on the merits.

Issue 1: Failure to find Asian elephant Ruth and Emily were harmed was clearly erroneous

A. Harm to Ruth. In the course of the litigation, Rowley attempted to have Ruth removed three times by preliminary injunctions as the elephant was being physically harmed by the City. Most recently, Rowley sought a permanent injunction (confiscation) of Ruth.

Quite simply: Ruth's right ear fell off (2017-2019). She lost three inches of her left ear to frostbite (2014). She had 10" of her tail surgically amputated due to frostbite and osteomyelitis (2014). She lost another 6 1/2" of her tail to her conspecific Emily who bit it off and 1-1/2 inches to have it surgically repaired (2006), for a total of 18 inches of an approximately 36" tail. She is lame on her left rear leg (2017-2019). She has lesions on both cheeks of her face (2019). Her trunk is damaged (1986).

Ruth gets pushed off her food on a daily basis by Emily. She has been attacked by Emily 30 times as recorded by the City, 19 times with injuries (2005-2013). Rowley has witnessed several more attacks in addition to those, including one on August 16, 2019 where Ruth was rammed and bitten and which caused Ruth to trumpet loudly for help and to lose bladder control.

All of this was accepted into evidence by the court, yet somehow the district court found that Ruth had not been harmed and is not being harmed by the City.

Rowley appealed as she believes this finding is clearly erroneous.

B. Harm to both Ruth and Emily. Although the district court found that the City had previously harmed Ruth and Emily through its confinement, Rowley also appealed because the underlying premise, that the zoo had improved and therefore no longer harms Ruth and Emily, was clearly erroneous. The shelter housing the two elephants for at least 16 hours per day or 2/3 of their life, has a leaky roof, as the court noted in its decision. But the decision ignored the two pipes that drain directly onto Ruth's stall.

The court overlooked evidence that the stalls are so small, the elephants cannot avoid standing, sleeping, walking and eating in their own considerable waste. Since elephants "dust" using material from the dirt floor, they also end up throwing their own waste on themselves, which causes frequent skin infections, like the ones that Ruth has now on her face.

The court's decision omitted that the veterinary care or lack thereof led to Ruth losing an ear.

The court noted that staff neglected to lock the barn door during a blizzard in 2014 leading to Ruth's exposure when she wandered outside but failed to acknowledge that it led to her subsequent surgical loss of her tail, part of her ear, and to a yearlong struggle with bacterial infections due to filthy conditions in the

barn.

Rowley appealed because changes to the elephant management program that the court cited in their decision have not lessened the harm done by the living conditions, but in fact, increased it.

C. Harm to both Ruth and Emily causes abnormal behavior. The district court claimed to lack the expertise to determine whether the evidence showed the elephants exhibited stereotypy, and disputed Rowley's ability to do so as well. Nonhuman stereotypy, when captive animals sway, bob, pace or self-injure, would constitute interference with their normal behavior under the ESA. Rowley believes the district court's assertions regarding the ability to recognize stereotypy is clearly erroneous.

D. Harm affecting feeding and socialization. In addition to the near-fatal gastro-intestinal blockage, Ruth's feeding is interrupted on a daily or near-daily basis. Emily has both food and spatial aggression, taking Ruth's food even when Emily has food of her own. Emily's aggression comes from not being socialized for the first 14 years at the City zoo, to the point that she was considered a dangerous elephant and had to be removed.

The district court incorrectly stated that Rowley was only seeking relief for prospective harm and harassment. The amended complaint called for declaratory

relief for both past, present and continuing harm and harassment, enjoinder to stop current and continuing harm and harassment and removal to prevent expected future harm.

Issue 2: The district court erred in its legal analysis of the basis for determining "harassment"

In its legal analysis, the district court concluded that harassment of both animals was exempted under the U.S. Fish & Wildlife Services endangered species regulations 50 CFR 17.3 for captive wildlife because the City practiced "generally accepted animal husbandry" in compliance with the Animal Welfare Act (AWA) regarding shelter, food, and veterinary care. The district court relied heavily on the City's documentation from the Association of Zoos & Aquarium (AZA), a trade organization, in these matters.

Rowley appealed on the basis that the U.S. Fish & Wildlife Service exemption does not apply. The regulations define captive wildlife as those held for breeding purposes (50 CFR 17.3). Ruth and Emily have not nor will they ever be bred to propagate the species.

Rowley also appealed because the AZA has no basis in law for establishing standards for animal husbandry.

The AWA, which is administered by the U.S. Department of Agriculture Animal, Plant Health Inspection Services (APHIS) Animal Care division, provides

administration and enforcement for animals used on exhibit or in research. It has no specific husbandry regulations for endangered species, nor for elephants, a unique endangered species and the world's largest land mammal. The City has had two direct violations of the AWA regarding the elephants, the most recent in 2014, and several indirect violations .

Issue 3: The court erred in consolidating the third preliminary injunction with the trial on the merits

The district court ordered a hearing on the third preliminary injunction, but then consolidated it with a trial on the merits at the hearing under Federal Rule of Civil Procedure (FRCP) 65(a). It did so over Rowley's objections that the City had not filed an answer, and there had been no discovery whatsoever.

Because of the lack of notice of consolidation, Rowley was not prepared to request special procedures or to bifurcate the case. None of the preliminary injunctions she had filed included Emily.

III. Statement of the Case

On September 21, 2017, Rowley filed an Endangered Species Act citizen suit on behalf of the Friends of Ruth & Emily, Inc., a non-profit she founded, against the City of New Bedford, MA (City), Defendant-Appellee, for harming and harassing two Asian elephants--Ruth and Emily who reside at the City-owned Buttonwood Park Zoo (17-cv-11809, dkt. 1). She amended the complaint once

prior to an answer being filed (dkt. 47), having been substituted by the court in February 2018 (dkt. 23).

Rowley filed three preliminary injunctions: on December 12, 2017 (dkt. 16/17), June 18, 2018 (dkt. 27/28) and January 18, 2019 (dkt.49/50) for Ruth, the older of the two elephants, who was and is clearly undergoing harm as a direct result of her confinement.

In September 2018, the court ordered a consolidation of the second motion for a preliminary injunction with a trial on the merits, Rowley filed an interlocutory appeal (C.A.1, 18-1961). That appeal was denied on January 15, 2019.

The district court ordered a hearing on the third preliminary injunction for February 12, 2019 (dkt. 52). The City filed a motion in opposition with a 200-page memorandum including an affidavit by an interim veterinarian on February 11, 2019 (dkt. 53). Rowley immediately moved to strike the motion and affidavit pursuant to FRCP 6(b)(2) (dkt. 54).

Instead of holding a preliminary hearing as advertised on the docket, the district court ordered consolidation of the preliminary injunction with a trial on the merits from the bench (dkt. 60). Rowley, who arrived in court ready to testify on Ruth's behalf for a hearing on the injunction, objected due to the lack of an answer

and discovery (dkt. 74, Hearing Transcript, p. 9-10). Without prior notice, Rowley was not prepared to make arguments for special procedures, such as bifurcating the case.

The district court then demanded that she waive a jury trial. Rowley objected to that but again, was not prepared to defend her demand for a jury (Id, dkt. 74, hearing transcript, p. 12:11).

The Court demanded that Rowley set a date for a bench trial. Because of Ruth's condition, Rowley agreed to an expedited trial date of March 4-7, 2019.

Rowley filed a motion to compel access to the barn with the elephants inside and when the keepers first arrive before the barn is cleaned (dkt. 62, 64). The district court only allowed Rowley access to the barn, but not with the elephants inside nor before it was cleaned. (dkt. 65).

The City filed an Answer the day before trial (dkt. 67). The first day of trial was cancelled due to a snowstorm. Although Rowley subpoenaed Zoo Director Keith Lovett for March 4, he was traveling out of the country on March 5 and could not testify as Rowley planned.

A bench trial was held from March 5 through 7, 2019. Rowley subpoenaed two elephant keepers, the Assistant Zoo Director Shara Crook, and the interim zoo veterinarian Dr. Michael Ryer, DVM, to testify under subpoena. The City also

called Dr. Ryer and Shara Crook, and also Susan Mikota, DVM, a consulting veterinarian, to testify. Rowley also testified. Dr. Mikota's testimony was cut short over Rowley's objections (dkt. 76, Tr. Trans., p.132:16-133:5, 134:24, 135:4, 17).

Rowley's testimony included videos of Emily attacking and pulling Ruth's tail just five days after Ruth's tail was surgically amputated, and causing Ruth to trumpet in pain; of both elephants swaying their heads zombie-like; of Ruth limping although the zoo's most recent veterinarian Whitney Greene, DVM, claimed her gait was "WNL" or within normal limits; of a keeper stabbing Ruth with the sharp end of the bullhook, to impeach the keeper who claimed they only used the handle not the pointed end on the elephants; of the accumulated waste in the barn overnight as shown by an intern before the stalls were enclosed by bars; of Emily swaying due to cold before the improvements to the barn and of her swaying while eating due to cold after the improvements to the barn; of Emily ramming the exhibit's back gate in hunger in December 2018 after the improvements to the elephant management program; of Dr. Greene and a veterinary technician discussing Ruth's diet while watching her sway in hunger; and of a comparison between Ruth and Emily regarding Ruth's ear, tail, and inability to use her trunk.

Rowley also provided 13 exhibits, notably: the recent 2014 AWA violation

and USDA Investigation and Enforcement Services (IES) investigation and photographic evidence of Ruth's frostbitten tail and ears leading up to it; photo documentation of Ruth's ear sloughing off during the litigation; photo documentation of the elephants being exhibited in the snow; clinical records on Ruth; an affidavit by Julia Allen, DVM regarding Ruth's records; email from the City indicating there are no current radiographs (x-rays) of either elephant's feet or an expert to read them; photos of the current stalls enclosed by bars and an architect's drawing of the barn stalls; a letter offering and describing sanctuary from The Elephant Sanctuary of Tennessee; a letter offering and describing sanctuary from Carol Buckley, founder of the Elephant Refuge of North America; letters from Dr. Phillip Ensley, DVM, and Dr. Erica Ward, DVM, regarding Ruth's health and ability to be transported, and from Dr. Gay Bradshaw, PhD, animal behaviorist, regarding both elephants' stereotypy; and a complaint to the U.S.D.A APHIS Animal Care division by the international animal advocacy group In Defence of Animals regarding the aggression by Emily against Ruth in violation of the AWA, USDA's response indicating they needed to "protect AC [Animal Care division]" and so required an independent panel be formed.

The district court held a view on March 28, 2019, of the barn but only after it was cleaned and without the elephants inside, and of the exhibit's outer yard

(dkt. 73, 81). The district court then walked the perimeter with Shara Crook. Rowley was not allowed to accompany them.

Rowley filed two subsequent motions: a motion to expedite in June 2019 (dkt. 83) and a motion to confiscate in September 2019 (dkt. 85/86, 88, 91).

In September 2019, the district court denied Rowley's motion to strike as moot (dkt. 89). It then filed its Findings of Fact and Conclusions of Law on September 24, 2019 (dkt. 91) which was entered October 1, 2019 (dkt. 92).

IV. Summary of the Argument

A misinterpretation of Rowley's prayer for relief led to the court's failure to recognize uncontroverted evidence of harm to Ruth and Emily. But the ESA statute does not have an expiration date on harm.

When the court consolidated the motions for preliminary injunction for Ruth's removal with the trial on the merits, the City had not answered nor had the parties conducted any discovery. Nor were the preliminary injunctions seeking Emily's removal.

The court did not notice Rowley that the consolidation would occur. Rowley's objections were overruled for no apparent reason. Without prior notice, Rowley was unable to defend her right to a jury trial, or to request bifurcation or other special proceedings. None of the preliminary injunctions were for Emily.

Rowley argues that, in making its final decision, the court misapplied the appropriate standard of review in its legal analysis. The court erroneously asserted that no harm was occurring to either elephant and applied an incorrect exemption for harassment of the elephants using a trade organization's accreditation report.

V. Argument

Issue 1: Failure to find Asian elephant Ruth and Emily were harmed was clearly erroneous

A. Harm to Ruth.

Despite three motions for preliminary injunctions, photographic evidence, and sworn testimony by the former zookeeper who issued the fateful shot through Ruth's vein in her ear causing it to slough off during the ongoing litigation, the district court does not mention this injury once in its 32-page decision.

Rowley watched Ruth suffer for nine years, the victim of the City's ineptitude and inadequate facilities. She gathered clinical records from the City under the Public Records Access Act back to 2005, then passed them on to a large animal veterinarian with 40 years experience. Rowley knew that the harm Ruth was experiencing was unlike that of any other zoo elephant in the U.S. Ruth is not a "hard luck" elephant as the court claims. The harm she has experienced was not bad luck--it was bad treatment at the hands of the City for 33 years.

History of Ruth's Injuries

Ruth was brought to the City's Buttonwood Park Zoo on October 29, 1986 (Ex. 5, Arrival Report, Ex. 21, Standard Times, "Hot elephant hiding out in city zoo"). According to reports at the time, her former owner abandoned her at a transfer station for two days with only hay but no water in a transport full of dead and dying animals (Ex. 21, Boston Globe article, October 28, 1986).

At that time she could lift her trunk. Ten days after her arrival, the additional notes dated "11/2" and "11/10" show that Ruth had "paralysis at the distal [end] of her trunk." She was also labeled a "striker, although not to the point of killing," and she was "afraid of [bull]hooks." (Ex. 5, p. 2).

Dr. Ryer, a former keeper who was present for her arrival and now an interim veterinarian for the City, testified that Ruth was chained on two legs to the concrete barn wall day and night for her first month at the zoo (Dkt. 76, Tr. Trans., Dr. Ryer, p. 38). The arrival report also notes that 10 days after her arrival, she had an open wound on one leg. (Ex. 5, p. 2).

Although Dr. Ryer said he did not know how elephants are trained to be around humans, he did know what a bullhook was and how it was used on elephants. He denied using a bullhook on Ruth, stating he earned her trust by "working her, putting [his] hands on her...and earning her trust." Dr. Ryer could

not verify whether other keepers used the bullhook on Ruth. (dkt. 76, Dr. Ryer, p.37-38).

The court describes Ruth as becoming "docile" due to her subsequent treatment by the zoo staff after her ordeal. However, the 2010 Elephant Management Policy and Zookeeper Handbook indicated that there were nine incidents reported between 2000 and 2010 where Ruth kicked, bit or otherwise injured a keeper (Ex. 29, Appendix and notes ^{EN1}).

In 2006, the records indicated that Emily bit 6 1/2" off of Ruth's tail overnight (dkt. 75, Tr. Trans. 119:9-14). Dr. Ryer testified that Ruth's tail bone, tendons and tissue were exposed, blood and that he had to surgically remove and additional vertebra and tissue.

The court erroneously referred to this as "the tip" and failed to mention the surgery--or that this was not "typical for elephants" as Dr. Ryer testified.

Emily's aggression was well documented by the City zookeepers in the zoo's records. In the 2010 Manual under "Aggression between conspecifics," staff are advised to visit the exhibit every hour "so Emily knows you are watching her" (Ex. 29, p.10).

During a blizzard in January 2014, a keeper failed to secure the elephant barn door. Ruth was found outside the next morning, hypothermic (Ex. 19). She

was outside for about two hours in subzero temperatures. She developed frostbite on her ears, her tail, her vulva, and her trunk. Her skin began to slough off (Id).

The zoo veterinarian resigned a week after Ruth was exposed to the blizzard (dkt. 77, Tr. Trans., p. 66:18-21, Dr. Sims resignation). A new full-time veterinarian was not hired for six months.

The City was cited and fined \$777 by the U.S.D.A. APHIS Animal Care division for failing to shelter Ruth.

In July 2014, the City had evidence that Ruth's tail needed to have surgery to remove 5" of necrotic [dead] tissue and bone (Ex. 21, Report by DACVR H. Mark Saunders, DVM dated July 2014). However, the City did not have the surgery performed until November 2014 (Id, Clinical surgical notes dated November 5, 2014). At that time, 10" of her tail had to be removed--the 5" of dead tissue and bone, and another 5" of tissue and bone due to osteomyelitis, a painful bone infection.

Ruth had now lost approximately half of her tail ^{EN2}. An elephant's tail is used for balance, for communication, and to swat and remove biting insects.

Ruth was not housed separately from Emily during her recovery from a traumatic surgery, although Emily had a history of biting, ramming and otherwise injuring Ruth from behind.

Five days after the surgery, Emily yanked Ruth's tail so hard she trumpeted in pain (Video 2, Aggression). Two sutures were loosened, although keepers claimed Emily "sniffed" Ruth's tail (Ex. 21, Clinical notes dated November 9, November 12, 2014. (Note: clinical notes are printed in reverse chronological order. These will be found at the end of that printout)).

On December 4, 2014, then-veterinarian Dr. Lizzie Arnett-Chin discussed the ongoing problem of Emily grabbing Ruth's tail and removing the tightly wrapped bandage with the head keeper (Id, Clinical notes December 4, 2014). On that occasion, Emily had pulled the bandage off and swallowed it. Ruth's tail continued to get infected due to Emily's attacks through April 2015. At trial, Dr. Mikota referred to this as "object play."(dkt. 76, Tr. Trans. 120:10).

In 2015, Dr. Toni Frohoff of the international advocacy group, In Defense of Animals, filed a complaint with the USDA APHIS Animal Care division citing the aggression as a violation of the AWA Section 3.133 (Ex. 30). In response, USDA Animal Care required that the City obtain an independent panel review (Id. Email, Dr. Elizabeth Goldentyre, regional administrator).

The complaint identified 30 attacks between 2005-2014, when the City stopped keeping records of them (Ex. 8, IPR, Appendix C). The City zookeeper logs indicate that 19 of those attacks included injury.

Dr. Arnett-Chin left before in July 2015 before the report came out.

In July 2016, Dr. Whitney Greene, DVM, began working at the zoo as its full-time veterinarian. Mid-month, Ruth had a near-fatal gastro-intestinal blockage (dkt. 28/50, Affidavit of Julia Allen, DVM). Elephant veterinarian consultants had to be called in to treat her.

As a result of the GI blockage, Ruth lost 680 lbs, approximately 10% of her weight in two months. Ruth was put on a high fiber diet after the blockage and was seen swaying in hunger. (Video 8, Vet team).

Dr. Arnett-Chin had put Ruth on a non-steroidal anti-inflammatory drug (NSAID) for her abnormal gait (limp) in May 2015. In August 2016, Dr. Greene took her off of in August 2016 for no reason (dkt. 28/50, Affidavit of Julia Allen, DVM).

Dr. Greene also claimed that Ruth's gait was WNL--within normal limits--although she only viewed Ruth recumbent and standing, but not walking (Ex. 24, Clinical notes, March 30 through April 24, 2018). As a result, Ruth did not receive any pain medication for the nearly two years that Dr. Greene was a veterinarian at the City. Clearly, Ruth was in pain (Video 03, She's not limping).

In 2017, on "Elephant Appreciation Day," keeper Avila-Martin administered a single dose injection of ketapofen, an NSAID, to Ruth's ear (dkt.

75, Tr. Trans, p. 75-76). Within two weeks, Ruth's ear began sloughing off. Avila-Martin acknowledged that she is neither a veterinarian nor a veterinarian technician (dkt.75, Tr. Trans. 89:13-19).

During the course of this litigation, Ruth has lost 70% of her ear. An elephant's ear contains a complex vascular system that acts as a thermoregulator, primarily for cooling.

Ruth's ear continues to be infected today (19-2000, Rowley's Emergency motion). She continues to limp, and continues to get attacked by Emily, which possibly causes injuries (Id). The City no longer records the attacks and denies she is limping.

The court did not include any of Ruth's documented injuries in its decision on whether Ruth was harmed by the City, except to mention Ruth's ear condition on arrival and that she lost the "tip" of her tail. Nor did it discuss whether Ruth's host of injuries at the hands of the City meets the definition of harm as defined by the ESA or the USFWS regulations.

B. Past, current and ongoing harm to both Ruth and Emily. The district court intimates that previously Ruth and Emily were harmed through its confinement, but it found that the City made physical improvements and changes to the elephant management program and therefore no longer harms Ruth and

Emily.

Rowley appealed because changes to the elephant management program that the court cited in its decision have not lessened the harm done by the living conditions, but in fact, increased it.

Barn and exhibit causing injuries

Ruth and Emily have been housed together at the City zoo for the past 33 years years. For 26 of those 33 years, Ruth and Emily stood, walked and slept on a concrete floor in the barn for a minimum of 16 hours per day while the zoo was closed (dkt. 75, Tr. Trans., 77:17-78:7). Keepers are not available during that time to clean the barn. (dkt. 75, Trial Trans. 35:1-5) Both elephant had painful pressure sores on their faces and haunches due to sleeping in their waste on the floor.

Both elephants also have degenerative joint disease (DJD) (Ex. 8, IPR, Appendices A and B), a debilitating disease for elephants. But the City no longer takes radiographs (x-rays) to determine if the disease is progressing (Ex. 20, Email from Shara Crook stating no records exist for "Item 5." Item 5 was Rowley's public records request for radiographs.).

In 2012, the City changed out the concrete floor for a soil floor. Bars enclosing three stalls were installed in 2017 (Ex. 22, Floor plan, photos).

The 33-year-old flat roofed concrete shelter housing the two elephants has a

leaky roof, as the court noted in its decision. However, the decision did not consider that any accumulation of water from the leak during heavy downpours will drain to the dirt floor stalls where Ruth and Emily walk and sleep. The decision also omits the two pipes that drain continuously into Ruth's stall from an unknown source (View, 10:14 (Note: there are two leaking drains into Ruth's stall)).

The court overlooked evidence that the stalls are so small, the elephants cannot avoid standing, sleeping, walking and eating in their own considerable waste when confined for those 16 hours each day (Video 04, This is legal, videorecorded copy of a public YouTube video by intern). But the court also refused to allow Rowley to enter the barn prior to its morning cleaning or when the elephants were inside (dkt. 62, 64, Motion to Compel). The court also refused to conduct the "View" with the elephants inside the barn to get a sense of scale from their perspective (View, 11:7-12).

Since elephants "dust" using material from the dirt floor, they also end up throwing their own waste on themselves, which causes frequent skin infections, like the ones that Ruth has now on her face.

An 8,000 s.f. area was added to the exhibit in 2016. However, due to the cold and snow typical of a New England climate, it is not accessible year-round

(Ex. 22, elephants in snow). Also, in order to keep the elephants visible to the public during summer months, they are gated off on the outer area. Closing them off from the inner yard prevents them from accessing the pool for cooling. There is no permanent cooling feature on the outer yard .(View). A small shower head was inadequate to cool two elephants so a fire hose is set up occasionally in extreme heat. Ruth is not always allowed access to it (dkt. 86-89).

The so-called improvements to the exhibit have not helped Ruth. She continues to have an infected ear, and as of this past summer, began exhibiting lesions on both cheeks of her face (19-2000, Emergency motion) The dirt floor, cleaned only for Rowley and the court's view, hasn't been as thoroughly cleaned since.

Emily now had foot infections in 2018 during this litigation. She now has a damaged tusch (tusk) from an unknown origin. An old pressure sore on her haunch is opening up to show raw tissue below.

New harm from the combination of a dirt floor and enclosed stalls includes foot infections (19-2000, Emergency relief motion). Ruth has been suffering from an infection under her left front nail since September 2019. As to the infections, the City's consulting veterinarian Dr. Mikota said, "Everything's a trade-off." (dkt. 76, 114:22-25)

The decision does not acknowledge that there is any current or ongoing harm.

C. Harm to both Ruth and Emily causes abnormal behavior. The district court claimed to lack the expertise to determine whether the evidence showed the elephants exhibited stereotypy, and disputed Rowley's ability to do so as well. Nonhuman stereotypy, when captive animals sway, bob, pace or self-injure, would constitute a "take" under the ESA and U.S. FWS regulations. 50 CFR 17.3 does not limit harm to breeding, feeding and sheltering, but allows that it may include the interruption of other behaviors. Rowley believes the district court's assertions regarding the ability to recognize stereotypy is clearly erroneous.

When Rowley introduced video evidence of Ruth and Emily in stereotypy in 2011, of Emily's stereotypy before and after the improvements, and of the two elephants swaying their heads zombie-like, the City did not object nor offer counter-explanations from its witnesses. Nor did the City question Rowley's expertise at recognizing stereotypy.

The City's witnesses and elephant keepers have been trained by the City and the AZA to call swaying and bobbing "anticipatory behavior" and that stereotypy was "behavior without purpose" (dkt. 75, 41:7). None of the keepers considered themselves elephant experts. (dkt. 75-77, Avila-Martin at 84:1-4, and Crook at

15:12).

There are abundant sources describing elephant behavior including stereotypy that the court could have taken judicial notice of for information on elephants instead of the fictionalized account by a local writer with close ties to the zoo.

Yet the court chose to discount Rowley's testimony that she relied on the information provided by Dr. Gay Bradshaw in her assessment of Ruth's and Emily's stereotypy (dkt. 77, 95:8). Dr. Bradshaw, who has a degree in animal psychology, was nominated for a Pulitzer Prize for her book on elephant behavior in 2009, and is credited with first identifying c-PTSD in translocated African elephants in 1997, had reviewed the videos of Ruth and Emily and provided her learned opinion (Ex. 25).

D. Harm affecting feeding and socialization. In addition to the near-fatal gastro-intestinal blockage in 2016, Ruth's normal feeding is interrupted on a daily or near-daily basis by Emily. Her food and enrichments are taken from her, and there is often no other food or enrichments available on site, so she stands and sways (dkt. 77, p. 78-80).

Emily had a poor diet for the first 14 years of her life at the City zoo (Ex. 21, Standard Times letter from 1971). She was chained in a dirt yard for hours at a

time, and then for hours when the zoo was closed (dkt. 75, Tr. Trans. 92:24-93:4). She became so aggressive she killed a dog that came onto her exhibit (Id, 92:14-17). She possible maimed or killed a human (Id, 93:25, 94:1-3, Ex. 8, IPR, Appendix A, p. 13).

As a result, she exhibits spatial and food aggression towards Ruth, as seen by her shouldering Ruth off of food daily even when she has her own food, and typically ramming Ruth over food or space.

The City acknowledges this occurs but calls it "displacement," not aggression. Dr. Mikota testified that "Ruth didn't run away" so she wasn't of Emily, although she acknowledged that Ruth has an abnormal gait since 2015 and testified that she had observed Ruth on March 5, 2019 (dkt. 76, 95:24, Video 04, "She's not limping" of Ruth walking). Dr. Mikota proposed that the court review a video of African bull elephants in musth sparring, which the court declined (Id, 96:16).

Emily attacked Ruth 30 times between 2005 and 2014 (Ex. 8, IPR, Appendix C). Whether it is called aggression as it was in the original keeper notes, "assertiveness" or "displacement," and regardless of motive, Ruth has been injured 19 times, including lacerations, tusk marks, and loss of her tail.

This is not typical elephant behavior as Dr. Ryer testified. In a (New

Bedford)Standard Times op-ed written in 2014, by Scott Blais, who has over 25 years experience in both zoo and sanctuary settings:

"At Buttonwood, the elephants cannot avoid confrontation--they have nowhere to go. This apparently has led to abberant aggression and painful physical altercations that especially affect Ruth. Emily once bit off 6 inches of Ruth's tail. I would not characterize that as "mild aggression" or glibly write it off as elephants being elephants. This is not natural behavior for female Asian elephants."
(Ex. 27, 4/21/14, "Guest View, Elephant Sanctuary a better option")

The court acknowledged the aggression issue, but determined that the food aggression/displacement had been corrected by the City, even in light of the most recent attack (dkt. 91, p. 31).^{EN3}

Standard of Review

In the First Circuit, the standard of review is to "...review a district court's bench trial findings of fact for clear error." (*La Esperanza de Puerto Rico, Inc. v. Perez Y Cia, de Puerto Rico, Inc.*, 124 F.3d, 16 (1st Circ., 1997)). And the appellate courts consider a finding of fact to be clearly erroneous "only when, after reviewing the entire record, we are `left with the definite and firm conviction that a mistake has been committed.'" (*La Esperanza* quoting *Clement v. United States*, 980 F.2d 48, 53 (1st Cir.1992), et al).

"However, when the district court's factual findings are premised on an incorrect interpretation of the relevant legal principles, we do not owe the court

the same level of deference. See United States v. 15 Bosworth St., 236 F.3d 50, 54 (1st Cir.2001); Vinick v. United States, 205 F.3d 1, 6-7 (1st Cir.2000). "Instead, we treat the trial court's conclusion as a question of law," Vinick, 205 F.3d at 7, and review it de novo. 15 Bosworth St., 236 F.3d at 53.) (Harrison v. United States, 284 F.3d 293 (2002)).

Here, the district court's decision that Ruth and Emily were not and do not continue to be harmed under the ESA is clearly erroneous.

In the district court decision, the term "harm" in the context of endangered species is separate from that of "harass." (Order, dkt. 91, p. 3-4). Citing the U.S. Fish & Wildlife Services endangered species regulations, harm is defined as:

"[A]n act which actually kills or injures wildlife. Such an act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns including breeding, feeding, or sheltering." 50 CFR 17.3

Footnote 8 in the decision incorrectly claims that Rowley only sought prospective relief, and so did not consider the harm done to either elephant (dkt. 91, p. 26).

The amended complaint included by reference the description of injuries to both Ruth and Emily in the Prayer for Relief (dkt. 47, p 37,38) as follows:

"The conditions under which the Zoo maintains Ruth and Emily as described in detail above, take Ruth and Emily in violation of Section 9 of the ESA, 16 U.S.C. §1538(a)(1)(B). These unlawful activities

injure Plaintiff...For the same reasons, the Zoo is currently in possession of two endangered Asian elephants who has [sic] been unlawfully taken, in violation of Section 9 of the ESA, 16 U.S.C. § 1538(a)(1)(D)...These unlawful activities also injure Plaintiff as described above."

And then specific relief was sought, including declaratory relief that these actions of the City violated the ESA.

However, even under the court's incorrect premise, the specific relief is sought for: "3. Enjoining the Zoo from *continuing* to violate the ESA with respect to its treatment of Ruth and Emily;..." (Emphasis added)

Ruth's ear was injected on September 22, 2017, just one day after Rowley filed the complaint and so that injury is clearly contemporaneous with this litigation even today. Further, the continued attacks by Emily, the worsening limp, the new lesions on her face all are current and will continue into the future. The causation is from her confinement--after 33 years it is too late to blame the prior owners.

Emily just recently was reported to have a second injury to her tusch (tusk), according to her clinical records which Rowley continues to receive. Since there was no discovery on Emily, there may be other injuries not yet known to Rowley or the court at the time of trial.

Further, the City has had two direct violations of the AWA regarding the

elephants, meaning that the USDA found injury occurred, the most recent in 2014. The court acknowledged the AWA direct violation for failing to shelter Ruth but failed to acknowledge that it led to her subsequent surgical loss of her tail, part of her ear, and to a year-long struggle with bacterial infections. The flaw in only looking prospectively at the harm is that Rowley would have to sue again should the City again be cited by the USDA for another AWA violation.

Rowley correctly predicted that both elephants would *continue* to be harmed and harassed by their confinement at the City zoo. As she predicted, that is occurring. Hence, the relocation to a facility designed for elephants--in particular "geriatric" zoo elephants--is still sought.

The court's interpretation of the amended complaint is a factual error, not based on law. As such, the standard of review is under the "clearly erroneous doctrine."

If by chance, Rowley's prayer for relief did not accomplish what she thought she clearly stated, corroborated by her declaration in her motion for injunctions, her many pleadings, photographic evidence, and testimony, that she was seeking relief for past, current and ongoing harm, then she asks the appeals court to review the issue of harm *de novo* as a *pro se* litigant's pleadings are to be construed liberally.

More to the point, by ruling out past harm, the court eliminated reviewing whether there was a *likelihood* of future injuries, or harassment as well..

Issue 2: The district court erred in its interpretation of the basis for determining "harassment"

The district court's decision relied on a definition of "harass" in the context of endangered species separate from that of "harm" as:

"Harass in the definition of "take" in the Act means an intentional or negligent act or omission which creates the *likelihood* of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering.

This definition, when applied to captive wildlife, does not include generally accepted: (1) Animal husbandry practices that meet or exceed the minimum standards for facilities and care under the Animal Welfare Act, (2) Breeding procedures, or (3) Provisions of veterinary care for confining, tranquilizing, or anesthetizing, when such practices, procedures, or provisions are not likely to result in injury to the wildlife.
(Emphasis added)

First, inherent in the definition is that it is intended for "captive wildlife" with "captivity" defined as:

"Captivity means that living wildlife is held in a controlled environment that is intensively manipulated by man for the purpose of producing wildlife of the selected species,..."

Neither Ruth nor Emily were, nor will they be, bred to propagate their species.

The district court in Graham cited by the court reviewed the history behind the 1998 amendment to 50 CFR 17 by the USFWS. (Graham v. San Antonio Zoological Society, 261 F.Supp.3d 711 (2017), citing Captive-bred Wildlife Regulation, 63 Fed. Reg. 48634-02, 1998 WL 597499 (Sept. 11, 1998).

"To decide otherwise would place those persons holding captive specimens of a listed species in an untenable position. If providing for the maintenance and veterinary care of a live animal were considered to be "harassment," those persons holding such specimens in captivity would be forced to obtain a permit or give up possession ***since any failure to provide proper care and maintenance would be an unlawful "taking."***"

Since Congress chose not to prohibit the mere possession of lawfully taken listed species in Section 9(a)(1) of the Act, the Service believes that congressional intent supports the proposition that ***measures necessary for the proper care and maintenance*** of listed wildlife in captivity do not constitute "harassment" or "taking."" (Graham, at *739) (Emphasis added)

The 1998 amendment then set the requirement for meeting AWA general husbandry and care as the standard to avoid giving facilities that do not provide proper care and maintenance a free pass.

But in casting exotic captive endangered species' lot with that of native endangered species that were bred to be reintegrated with the wild, the USFWS interpretation was premised on zoos and exhibitors of 1998.

Now, in 2019, the zoo industry is a \$17.3 billion industry annually and capable of filling out and filing permits for its endangered species to determine if

the zoo can actually meet the purpose and goals of the Endangered Species Act. In fact, three zoos did just that to acquire the Zimbabwe elephants described by the district court in the NYT op-ed by Charles Seibert.

It would seem illogical to allow an entity that could *not* obtain a USFWS permit to possess members of endangered species.

The USDA APHIS Animal Care division administers and enforces the AWA for exhibited animals and those used in research. But it has no specific husbandry regulations for endangered species, nor for elephants, a unique endangered species and the world's largest land mammal (Ex. 3, AWA Act).

When the City zoo was relicensed by USDA in 2018, for example, the only requirement was to submit a list of animals and pay a fee. Even the reporting forms submitted by the City as Exhibit 6 for focused inspections of the elephants are essentially blank forms stating "no noncompliant issues." While Ruth's skin was sloughing off from frostbite, the USDA inspector filed that there were no non-compliant issues.

Even so, the general regulations are loosely followed and rarely enforced. Like *Graham*, this court, as well as others, have begun to consider AWA as only one factor in determining compliance with the ESA (*Kuehl v. Sellner*, 161 F.Supp.3d 678 (2016), *Hill v. Coggins*, No. 2:13-cv-27, U.S. Dist., Lexis 42374,

W.D.N.C. (2016)). This court held its own view of the City zoo for that reason.

Absent specific direction from the USDA documents provided by the City, the district court relied heavily on accreditation by the AZA for most of its legal findings. The AZA has no legal authority under the ESA or the regulations of the USFWS. In fact, the accreditation failed to identify several failings of the exhibit (Ex. 28, Rowley's letter of August 2019).

Rowley seeks *de novo* review of the finding that Ruth and Emily weren't and aren't harassed by their confinement at the City zoo under the law..

Issue 3: The district court erred by consolidating the third preliminary injunction with the trial on the merits

After the trial, City Attorney Markey remarked to Rowley, "Of the 50 cases I've tried, you did better than about five of them."

While meant to be consolatory, the reality is that Rowley likely did better than all 50. It is highly unlikely that *any* went to trial without an answer or discovery.

But the district court forced Rowley to do just that.

The district court ordered a hearing on the third preliminary injunction to be held on February 12, 2019 (dkt. 52). The day before the hearing, the City filed a motion in opposition with a 200-page memorandum including an affidavit by an interim veterinarian. Rowley immediately moved to strike the motion and affidavit

under FRCP 6(b)(2) Computing and Extending Time; Time for Motion Papers). Affidavits are to be filed no later than seven days before a hearing.

But when Rowley arrived at court prepared to provide testimony and argue the injunction, the district court instead ordered consolidation of the preliminary injunction with a trial on the merits from the bench.

Rowley objected due to the lack of an Answer and discovery (dkt. 74, Hearing Transcript, p.9:4, 10:5, 10-11). While it reads as if Rowley only was objecting to holding a trial in May, she formally objected to the consolidation under 65(a) and it appears as if that were combined with her objections to the May date. Without prior notice, Rowley was not prepared to make arguments for special procedures, such as bifurcation of the case.

The district court then demanded that she waive a jury trial. Rowley objected to that but again, was not prepared to defend her demand for a jury (dkt. 74, hearing transcript, p. 12:11).

The Court demanded that Rowley set a date for a bench trial. Because of Ruth's condition, Rowley agreed to an expedited trial date of March 4-7, 2019.

At the preliminary hearing, Rowley found out that the City zoo's veterinarian, Dr. Whitney Greene, had resigned in September 2018 and moved out of state so therefore and could not be subpoenaed to testify.

Standard of Review

Federal Rule of Civil Procedure Rule 65(a) Consolidation states that "before or after beginning the hearing on a motion for preliminary injunction, the court may advance the trial on the merits and consolidate it with the hearing."

Although the consolidation is discretionary, a case is not ripe for an advanced trial date when discovery is not complete (*Pughsley v 3750 Lake Shore Drive Co-op Building*, 463 F .2d 1055, 1057, 7th Cir. (192)).

"A litigant applying for a preliminary injunction should seldom be required to either forego discovery to seek emergency relief or to forego a prompt application for an injunction in order to prepare adequately for trial."

And from Wright & Miller & Kane:

"Ordering consolidation during the course of an preliminary injunction hearing is reversible error when little or no notice is given of this change and the effect is to deprive a party of the right to present the case on te merits.
(Wright, Miller, & Kane, Federal Practice & Procedure, 2nd Ed., Vol. 11 , §§ 2951 (2018))

Here, Rowley rightly objected as no answer had been served and no discovery held. Further, the preliminary injunction was only for one of the two elephants. No filings had been made as to Emily's need for a preliminary injunction and the case should have been bifurcated. For these reasons, the decision to consolidate the injunction with the trial was in error and should be

reversed.

V. Conclusion/Prayer for Relief

If this decision is allowed to stand, all of Ruth's and Emily's past harm is not deemed a violation of the Endangered Species Act. The current harassment isn't harassment, because the AZA, an entity set up to promote zoos and aquarium, accredited the City zoo. The AWA violations don't count, because they haven't happened again.

But it also means that keeping members of an endangered species standing, walking, sleeping, and eating in their own waste is not a violation of the ESA. Because the court wouldn't allow Rowley to see it, it doesn't exist. Because the court refused to see it on their visit.

While the court did not consider Rowley an expert, neither are any of the people at the City responsible for the elephants care and maintenance. Yet they allowed, and in some cases caused, the harm to occur, and to continue to occur.

Ruth's pain and suffering from losing most of an ear, most of her tail, and a good bit of skin, is not deemed injury under the ESA. But if it is not, then what is?

This court surely must have found that, upon a review of the entire record, they are 'left with the definite and firm conviction that a mistake has been committed.'

Rowley asks that the decision of the district court be set aside. She sought a permanent injunction for Ruth at both the district court and the appellate court this fall. She again asks that this court grant a permanent injunction for Ruth. Rowley has carried her burden of proof that Ruth's harm meets the definition in the ESA as a take, that it is continuing and will continue into the future if Ruth stays at the City's Buttonwood Park Zoo.

With regards to Emily, Rowley has also proven that Emily has been harmed in the past, and is undergoing harm now and will in the future. That the AWA permits any animal to be kept like this, let alone endangered species and one of the most intelligent species, shows just how out-of-date those regulations are. Rowley asks that Emily be removed from the City as well.

Should Ruth die before this court makes its decision, Rowley seeks custody of her remains for interment at one of the two named sanctuaries. The City's plan calls for interment at the regional landfill at Crapo Hill. After all that the City has done to her, that would be the final insult.

Rowley stands ready to take custody of one or both of the elephants and will work with a team of experienced elephant movers to bring them to either the Elephant Sanctuary in Tennessee or to the Elephant Refuge of North America.

Respectfully submitted,
/s/Joyce Rowley, Plaintiff-Appellant, *pro se*

Endnotes:

EN 1: Michelle Avila-Martins, a former elephant keeper who had been involved in several incidents, testified that Ruth was disciplined with a bullhook, but only by the handle (dkt. 75, Tr. Trans. 60). However, on viewing a video of her stabbing Ruth with the pointed end of a bullhook (Video 3, Bullhook) the witness claimed that the "bull hook point was dull." (Id, Tr. Trans. 80, 81).

EN 2: Ex. 8, IPR, Appendix B, p. 20, midpage: ".. tail has been amputated and is not ~half the normal length."

EN 3: The court misstates Rowley's last filing as evidence that the City has rectified the problem. Rowley identified two issues: Ruth was being kept in an airless barn during a heatwave without access water for cooling. The second issue was that Emily was still attacking Ruth, ramming and biting her over food.

CERTIFICATE OF COMPLIANCE

This document complies with the type volume of Fed. R. App. P. 32(a)(7) (B) because, excluding the parts exempted by Fed. R. App. P. 32(f), this document contains 8,503 words; and

This document complies with the typeface requirements 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionately space typeface using Windows Wordpad in 14-point Times New Roman font.

/s/Joyce Rowley
Appellant, pro se
November 24, 2019

CERTIFICATE OF SERVICE

I hereby certify that on November 24, 2019, I electronically filed this Appeal Brief with the United States Court of Appeals for the First Circuit by using the CM/ECF system. I certify that the following parties or their counsel of record are registered as ECF Filers and that they will be served by the CM/ECF system: Attorney John A. Markey (jmarkey@msmw-law.com) and Attorney Kreg Espinola (kespinola@bevlegal.com).

/s/Joyce Rowley
Appellant, pro se
November 24, 2019

APPEAL,CLOSED

**United States District Court
District of Massachusetts (Boston)
CIVIL DOCKET FOR CASE #: 1:17-cv-11809-WGY**

Rowley v. City of New Bedford
Assigned to: Judge William G. Young
Case in other court: USCA – First Circuit, 18–01961
USCA – First Circuit, 19–02000
Cause: 16:1538 Endangered Species Act

Date Filed: 09/21/2017
Date Terminated: 10/04/2019
Jury Demand: Plaintiff
Nature of Suit: 893 Environmental Matters
Jurisdiction: Federal Question

Plaintiff

Friends of Ruth & Emily, Inc.
TERMINATED: 02/15/2018

represented by **Friends of Ruth & Emily, Inc.**
c/o Joyce Rowley
PO Box 50251
New Bedford, MA 02745
508–542–8297
PRO SE

Plaintiff

Joyce Rowley

represented by **Joyce Rowley**
PO Box 50251
New Bedford, MA 02745
508–542–8297
Email: whos.onfirst2@yahoo.com
PRO SE

V.

Defendant

City of New Bedford
Commonwealth of Massachusetts

represented by **John A. Markey**
Moses Smith and Markey LLC
50 Homers Wharf
New Bedford, MA 02740
508–993–9711
Fax: 508–993–0469
Email: jmarkey@msmw-law.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Kreg R. Espinola
Burke, Espinola & van Colen
15 Hamilton Street, #3
New Bedford, MA 02740–0274
(508) 991–8899
Email: kspino@bevlegal.com
ATTORNEY TO BE NOTICED

Date Filed	#	Page	Docket Text
09/21/2017	<u>1</u>		COMPLAINT against City of New Bedford, filed by Joyce Rowley. (Attachments: # <u>1</u> Civil Cover Sheet, # <u>2</u> JS45 Category Form)(McKillop, Matthew) (Entered: 09/21/2017)
09/21/2017	2		ELECTRONIC NOTICE of Case Assignment. Judge William G. Young assigned to case. If the trial Judge issues an Order of Reference of any matter in this case to a Magistrate Judge, the matter will be transmitted to Magistrate Judge Donald L. Cabell. (Halley, Taylor) (Entered: 09/21/2017)
09/21/2017	<u>3</u>		Summons Issued as to City of New Bedford. Counsel receiving this notice electronically should download this summons, complete one for each defendant and serve it in accordance with Fed.R.Civ.P. 4 and LR 4.1. Summons will be mailed to plaintiff(s) not receiving notice electronically for completion of service. (McKillop, Matthew) (Entered: 09/21/2017)
09/21/2017	4		Filing fee/payment: \$400.00, receipt number 1BST064520 for <u>1</u> Complaint (Coppola, Katelyn) (Entered: 09/21/2017)
10/04/2017	<u>5</u>		SUMMONS Returned Executed City of New Bedford served on 10/3/2017, answer due 10/24/2017. (Paine, Matthew) (Main Document 5 replaced on 10/23/2017) (Paine, Matthew). (Entered: 10/05/2017)
10/16/2017	<u>6</u>		NOTICE of Appearance by Kreg R. Espinola on behalf of City of New Bedford (Espinola, Kreg) Modified on 10/16/2017 to Correct Docket Text and File Motion to Dismiss/Supporting Memorandum As Separate Docket Entries) (Paine, Matthew). (Entered: 10/16/2017)
10/16/2017	<u>7</u>		MOTION to Dismiss by City of New Bedford.(Paine, Matthew) (Entered: 10/16/2017)
10/16/2017	<u>8</u>		MEMORANDUM in Support re <u>7</u> MOTION to Dismiss filed by City of New Bedford. (Attachments: # <u>1</u> Exhibit A)(Paine, Matthew) (Entered: 10/16/2017)
10/17/2017	9		ELECTRONIC NOTICE Setting Hearing on Motion <u>7</u> MOTION to Dismiss : Motion Hearing set for 11/9/2017 02:00 PM before Judge William G. Young. This hearing will be held at Boston College Law School, 885 Centre Street, East Wing, Room 115, Newton, MA. (Gaudet, Jennifer) (Entered: 10/17/2017)
10/18/2017	<u>10</u>		MOTION to Continue Hearing on Motion to Dismiss to December 7, 2017 by City of New Bedford.(Espinola, Kreg) (Entered: 10/18/2017)
10/23/2017	<u>11</u>		EXHIBIT re <u>1</u> Complaint by Friends of Ruth & Emily, Inc.. (Attachments: # <u>1</u> Cover Letter)(Paine, Matthew) (Entered: 10/23/2017)
11/02/2017	12		Judge William G. Young: ELECTRONIC ORDER entered granting <u>10</u> Motion to Continue. (Gaudet, Jennifer) (Entered: 11/02/2017)
11/02/2017	13		Set/Reset Deadlines as to <u>7</u> MOTION to Dismiss. Motion Hearing reset for 12/12/2017 02:00 PM in Courtroom 18 before Judge William G. Young. (Gaudet, Jennifer) (Entered: 11/02/2017)
11/02/2017	<u>14</u>		Opposition re <u>7</u> MOTION to Dismiss filed by Friends of Ruth & Emily, Inc.. (Attachments: # <u>1</u> Cover Letter)(Paine, Matthew) (Entered: 11/02/2017)
11/02/2017	<u>15</u>		

		MEMORANDUM in Opposition re <u>7</u> MOTION to Dismiss filed by Friends of Ruth & Emily, Inc.. (Paine, Matthew) (Entered: 11/02/2017)
12/12/2017	<u>16</u>	MOTION for Preliminary Injunction by Friends of Ruth & Emily, Inc..(Paine, Matthew) (Entered: 12/12/2017)
12/12/2017	<u>17</u>	MEMORANDUM in Support re <u>16</u> MOTION for Preliminary Injunction filed by Friends of Ruth & Emily, Inc.. (Attachments: # <u>1</u> Declaration, # <u>2</u> Exhibit 1, # <u>3</u> Exhibit 2, # <u>4</u> Exhibit 3, # <u>5</u> Exhibit 4)(Paine, Matthew) (Entered: 12/12/2017)
12/12/2017	18	Electronic Clerk's Notes for proceedings held before Judge William G. Young: Motion Hearing held on 12/12/2017 re <u>7</u> MOTION to Dismiss filed by City of New Bedford. Ms. Rowley is informed by the Court that she can't represent a corporation. The Court allows 30 days for the corporation plaintiff to retain counsel and for a notice of appearance to be filed. A prompt hearing will be set re <u>16</u> MOTION for Preliminary Injunction if an attorney files an appearance. The case will be dismissed without prejudice if no appearance is filed within 30 days. (Court Reporter: Richard Romanow at bulldog@richromanow.com.)(Attorneys present: Ms. Rowley appears on behalf of the plaintiff and Attorney Espinola on behalf of the defendant) (Gaudet, Jennifer) (Entered: 01/02/2018)
01/09/2018	<u>19</u>	MOTION for Extension of Time Secure Legal Counsel by Friends of Ruth & Emily, Inc.. (Attachments: # <u>1</u> Cover Letter)(Paine, Matthew) (Entered: 01/10/2018)
01/11/2018	20	Judge William G. Young: ELECTRONIC ORDER entered re <u>19</u> MOTION for Extension of Time Secure Legal Counsel. Motion allowed. The plaintiff corporation shall have an additional thirty days to obtain counsel from the date of this order. There shall be no further continuance. (Paine, Matthew) (Entered: 01/11/2018)
02/12/2018	<u>21</u>	MOTION to Intervene by Joyce Rowley.(Paine, Matthew) (Entered: 02/12/2018)
02/12/2018	<u>22</u>	MEMORANDUM in Support re <u>21</u> MOTION to Intervene filed by Joyce Rowley. (Paine, Matthew) (Entered: 02/12/2018)
02/15/2018	23	Judge William G. Young: ELECTRONIC ORDER entered: Treated as a motion to substitute the plaintiff, motion allowed. re <u>21</u> Motion to Intervene. (Paine, Matthew) (Entered: 02/15/2018)
03/29/2018	<u>24</u>	MOTION for Leave to File a Renewed Response to Deny City's Motion to Strike ECF No. <u>7</u> the Complaint ECF No. <u>1</u> , by Joyce Rowley.(Paine, Matthew) (Entered: 04/02/2018)
03/29/2018	<u>25</u>	MOTION for Leave to file electronically Pro Se by Joyce Rowley.(Paine, Matthew) (Entered: 04/02/2018)
04/02/2018	26	Judge William G. Young: ELECTRONIC ORDER entered granting <u>25</u> Motion for leave to electronically file Pro Se.

		<p>The court grants permission on the condition that the plaintiff satisfies all applicable training and other requirements for pro se litigants as stated in the CM/ECF Administrative Procedures, Page 5. The plaintiff is directed to complete the registration form accessible at https://public.mad.uscourts.gov/ecfreg.html</p> <p>(Paine, Matthew) (Entered: 04/02/2018)</p>
06/18/2018	<u>27</u>	<p>RENEWED MOTION Preliminary Injunction <i>For the Removal of Asian Elephant Ruth from Buttonwood Park Zoo</i> by Joyce Rowley.(Rowley, Joyce) Modified on 6/19/2018 to Correct Docket Text, Removed Exhibits, and Correct CM/ECF Filing Event) (Paine, Matthew). (Entered: 06/18/2018)</p>
06/19/2018	<u>28</u>	<p>MEMORANDUM in Support re <u>27</u> RENEWED MOTION Preliminary Injunction <i>For the Removal of Asian Elephant Ruth from Buttonwood Park Zoo</i> filed by Joyce Rowley. (Attachments: # <u>1</u> Exhibit Dr. Julia Allen Declaration, # <u>2</u> Exhibit 2 – Photo of Ruth's Ear & Facial Injury, # <u>3</u> Exhibit 3 – April 7, 2018 Clinical Records, # <u>4</u> Exhibit 4 – May 28, 2018 Clinical Record)(Paine, Matthew) (Entered: 06/19/2018)</p>
06/19/2018	29	<p>Notice of correction to docket made by Court staff. Correction: Docket Entry 27 Renewed Motion for Preliminary Injunction Corrected Because: The Memorandum of Law and Exhibits Should Have Been Filed As A Separate Docket Entry By The Plaintiff. (Paine, Matthew) (Entered: 06/19/2018)</p>
07/17/2018	<u>30</u>	<p>Judge William G. Young: ORDER entered. (Gaudet, Jennifer) (Entered: 07/17/2018)</p>
08/07/2018	<u>31</u>	<p>BRIEF by Joyce Rowley <i>Supporting Plaintiff's Standing in this matter.</i> (Rowley, Joyce) (Entered: 08/07/2018)</p>
08/16/2018	<u>32</u>	<p>NOTICE of Appearance by John A. Markey on behalf of City of New Bedford (Markey, John) (Entered: 08/16/2018)</p>
08/16/2018	<u>33</u>	<p>Supplemental MEMORANDUM in Support re <u>7</u> MOTION to Dismiss <i>for Lack of Standing</i> filed by City of New Bedford. (Attachments: # <u>1</u> Exhibit Defendant's Memorandum of Law on Standing)(Markey, John) (Entered: 08/16/2018)</p>
09/25/2018	<u>34</u>	<p>Judge William G. Young: ORDER entered. MEMORANDUM AND ORDER"For the foregoing reasons, the Court finds that Rowley has sufficiently demonstrated standing to pursue her claims. New Bedfords motion to dismiss, ECF No. <u>7</u> , is DENIED. This case has already dragged on far too long. Since Rowley seeks preliminary injunctive relief, it is appropriate in this instance that such hearing be joined with trial on the merits pursuant to Federal Rule of Civil Procedure 65(a). The Court will convene a status conference as soon as possible to set an early trial date.SO ORDERED."(Sonnenberg, Elizabeth) (Entered: 09/25/2018)</p>
09/25/2018	35	<p>Judge William G. Young: ELECTRONIC ORDER entered finding as moot <u>16</u> Motion for Preliminary Injunction. <i>Renewed motion filed on 6/18/2018. See docket entry <u>27</u>.</i> (Gaudet, Jennifer) (Entered: 09/25/2018)</p>
09/25/2018	36	<p>ELECTRONIC NOTICE of Hearing. Status Conference set for 10/4/2018 02:00 PM in Courtroom 18 before Judge William G. Young. (Gaudet, Jennifer)</p>

		(Entered: 09/25/2018)
09/28/2018	<u>37</u>	NOTICE OF APPEAL as to <u>34</u> Memorandum & ORDER,, <u>35</u> Order on Motion for Preliminary Injunction by Joyce Rowley NOTICE TO COUNSEL: A Transcript Report/Order Form, which can be downloaded from the First Circuit Court of Appeals web site at http://www.ca1.uscourts.gov MUST be completed and submitted to the Court of Appeals. Counsel shall register for a First Circuit CM/ECF Appellate Filer Account at http://pacer.psc.uscourts.gov/cmecf. Counsel shall also review the First Circuit requirements for electronic filing by visiting the CM/ECF Information section at http://www.ca1.uscourts.gov/cmecf. US District Court Clerk to deliver official record to Court of Appeals by 10/18/2018. (Rowley, Joyce) (Entered: 09/28/2018)
10/01/2018	38	ELECTRONIC NOTICE Canceling Hearing. The status conference set for 10/4/2018 at 2:00 PM is hereby canceled. Due to the filing of Notice of Appeal <u>37</u> , this Court does not have jurisdiction. (Gaudet, Jennifer) (Entered: 10/01/2018)
10/03/2018	<u>39</u>	Certified and Transmitted Abbreviated Electronic Record on Appeal to US Court of Appeals re <u>37</u> Notice of Appeal. (Paine, Matthew) (Entered: 10/03/2018)
10/03/2018	40	USCA Case Number 18–1961 for <u>37</u> Notice of Appeal filed by Joyce Rowley. (Paine, Matthew) (Entered: 10/03/2018)
10/12/2018	<u>41</u>	Transcript of Motion for Preliminary Injunction held on December 12, 2017, before Judge William G. Young. COA Case No. 18–1961. The Transcript may be purchased through the Court Reporter, viewed at the public terminal, or viewed through PACER after it is released. Court Reporter Name and Contact Information: Richard Romanow at bulldog@richromanow.com Redaction Request due 11/2/2018. Redacted Transcript Deadline set for 11/13/2018. Release of Transcript Restriction set for 1/10/2019. (Scalfani, Deborah) (Main Document 41 replaced on 10/12/2018) (Scalfani, Deborah). (Entered: 10/12/2018)
10/12/2018	42	NOTICE is hereby given that an official transcript of a proceeding has been filed by the court reporter in the above–captioned matter. Counsel are referred to the Court's Transcript Redaction Policy, available on the court website at http://www.mad.uscourts.gov/attorneys/general–info.htm (Scalfani, Deborah) (Entered: 10/12/2018)
10/15/2018	43	USCA Appeal Fees received \$ 505.00 receipt number 1BST070846 re <u>37</u> Notice of Appeal, filed by Joyce Rowley(Vieira, Leonardo) (Entered: 10/15/2018)
10/17/2018	<u>44</u>	TRANSCRIPT ORDER FORM by Joyce Rowley (Paine, Matthew) (Entered: 10/17/2018)
01/14/2019	45	Judge William G. Young: ELECTRONIC ORDER entered finding as moot <u>24</u> Motion for Leave to File Document. (Gaudet, Jennifer) (Entered: 01/14/2019)
01/14/2019	46	Judge William G. Young: ELECTRONIC ORDER entered terminating <u>27</u> Renewed Motion for Preliminary Injunction. This matter is on appeal. (Gaudet, Jennifer) (Entered: 01/14/2019)

01/15/2019	<u>47</u>	47	AMENDED COMPLAINT (<i>First</i>) against City of New Bedford, filed by Joyce Rowley.(Rowley, Joyce) (Entered: 01/15/2019)
01/15/2019	<u>48</u>		USCA Judgment as to <u>37</u> Notice of Appeal filed by Joyce Rowley. Appeal Dismissed... (Paine, Matthew) (Entered: 01/16/2019)
01/22/2019	<u>49</u>	85	Third MOTION for Preliminary Injunction by Joyce Rowley.(Rowley, Joyce) (Entered: 01/22/2019)
01/22/2019	<u>50</u>	87	MEMORANDUM in Support re <u>49</u> Third MOTION for Preliminary Injunction <i>For the removal of Asian elephant Ruth from Buttonwood Park Zoo</i> filed by Joyce Rowley. (Attachments: # <u>1</u> Affidavit Julia Allen, DVM, PhD, # <u>2</u> Exhibit Photos of Asian elephant Ruth, # <u>3</u> Exhibit Clinical notes, April 2018, # <u>4</u> Exhibit Clinical notes, May 2018)(Rowley, Joyce) (Entered: 01/22/2019)
02/05/2019	<u>51</u>		MANDATE of USCA as to <u>37</u> Notice of Appeal filed by Joyce Rowley. Appeal <u>37</u> Terminated (Paine, Matthew) (Entered: 02/06/2019)
02/07/2019	<u>52</u>	117	ELECTRONIC NOTICE Setting Hearing on Motion <u>49</u> Third MOTION for Preliminary Injunction : Motion Hearing set for 2/12/2019 02:00 PM in Courtroom 18 before Judge William G. Young. (Gaudet, Jennifer) (Entered: 02/07/2019)
02/11/2019	<u>53</u>		MEMORANDUM in Opposition re <u>27</u> RENEWED MOTION Preliminary Injunction, <u>49</u> Third MOTION for Preliminary Injunction , <u>16</u> MOTION for Preliminary Injunction of <i>Plaintiff</i> filed by City of New Bedford. (Attachments: # <u>1</u> Affidavit Dr. Michael Ryer, # <u>2</u> Exhibit One, # <u>3</u> Exhibit Two, # <u>4</u> Exhibit Three, # <u>5</u> Exhibit Four, # <u>6</u> Exhibit Five, # <u>7</u> Exhibit Six)(Markey, John) (Entered: 02/11/2019)
02/12/2019	<u>54</u>		MOTION to Strike <u>53</u> Memorandum in Opposition to Motion, by Joyce Rowley.(Rowley, Joyce) (Entered: 02/12/2019)
02/12/2019	<u>60</u>	118	Electronic Clerk's Notes for proceedings held before Judge William G. Young: Motion Hearing held on 2/12/2019 re <u>49</u> Third MOTION for Preliminary Injunction filed by Joyce Rowley. The Court collapses the motion for preliminary injunction with trial on the merits in accordance with Rule 65A. Jury waived trial is set for Monday, March 4, 2019 at 9:00 AM. The Court expects live witnesses and any request for a witness to appear by video conference shall be made by motion. A pretrial conference is held in so much as explaining trial procedures to the plaintiff. (Bench Trial Day One set for 3/4/2019 09:00 AM in Courtroom 18 before Judge William G. Young, Bench Trial Day two set for 3/5/2019 09:00 AM in Courtroom 18 before Judge William G. Young, Bench Trial Day Three set for 3/6/2019 09:00 AM in Courtroom 18 before Judge William G. Young.) (Court Reporter: Richard Romanow at bulldog@richromanow.com.)(Attorneys present: Plaintiff appears pro se, Attorney Markey for the defendant) (Gaudet, Jennifer) (Entered: 02/19/2019)
02/13/2019	<u>55</u>		MOTION to Compel <i>Independent Veterinarian Examination of Asian Elephants Ruth & Emily</i> by Joyce Rowley. (Attachments: # <u>1</u> April 2015 Email from Zoo Director Lovett)(Rowley, Joyce) (Entered: 02/13/2019)
02/13/2019	<u>56</u>		Response re <u>55</u> MOTION to Compel <i>Independent Veterinarian Examination of Asian Elephants Ruth & Emily of Plaintiff</i> filed by City of New Bedford.

			(Markey, John) (Modified on 2/14/2019 to Correct Docket Text) (Paine, Matthew). (Entered: 02/13/2019)
02/15/2019	57		Judge William G. Young: ELECTRONIC ORDER entered re <u>55</u> MOTION to Compel Independent Veterinarian Examination of Asian Elephants Ruth & Emily. Motion allowed subject to the restrictions proposed by the City. (Entered: 02/15/2019)
02/15/2019	<u>58</u>		MOTION for Extension of Time to March 25, 2019 to Trial by Joyce Rowley.(Rowley, Joyce). Added MOTION to Modify Court's Order to Compel on 2/15/2019 (Paine, Matthew).). (Entered: 02/15/2019)
02/15/2019	<u>59</u>		Opposition re <u>58</u> MOTION for Extension of Time to March 25, 2019 to Trial filed by City of New Bedford. (Markey, John) (Entered: 02/15/2019)
02/19/2019	61		Judge William G. Young: ELECTRONIC ORDER entered denying <u>58</u> MOTION for Extension of Time to March 25, 2019 to Trial and MOTION to Modify Court's Order to Compel on 2/15/2019 (Paine, Matthew) (Entered: 02/19/2019)
02/21/2019	<u>62</u>	119	MOTION to Compel <i>Access to the Asian elephant barn at Buttonwood Park Zoo</i> by Joyce Rowley. (Attachments: # <u>1</u> Exhibit Nonzoo staff in barn, # <u>2</u> Exhibit An encounter with nonzoo staff in barn)(Rowley, Joyce) (Entered: 02/21/2019)
02/27/2019	<u>63</u>		REPLY to Response to <u>62</u> MOTION to Compel <i>Access to the Asian elephant barn at Buttonwood Park Zoo</i> filed by City of New Bedford. (Markey, John) (Entered: 02/27/2019)
02/27/2019	<u>64</u>	127	REPLY to Response to <u>62</u> MOTION to Compel <i>Access to the Asian elephant barn at Buttonwood Park Zoo</i> filed by Joyce Rowley. (Rowley, Joyce) (Entered: 02/27/2019)
02/28/2019	65	129	Judge William G. Young: ELECTRONIC ORDER entered re <u>62</u> MOTION to Compel Access to the Asian elephant Barn at Buttonwood Park Zoo. The inspection may take place consistent with the conditions imposed by the defense. The issue of the disposal of the elephant waste can be addressed through testimony. (Paine, Matthew) (Entered: 02/28/2019)
03/03/2019	66		ELECTRONIC NOTICE OF RESCHEDULING Bench Trial Day One is reset for Tuesday, 3/5/2019 09:00 AM in Courtroom 18 before Judge William G. Young due to the inclement weather forecast. (Gaudet, Jennifer) (Entered: 03/03/2019)
03/04/2019	<u>67</u>		ANSWER to <u>47</u> Amended Complaint by City of New Bedford.(Markey, John) (Entered: 03/04/2019)
03/05/2019	68		Electronic Clerk's Notes for proceedings held before Judge William G. Young: Bench Trial Day One held on 3/5/2019. Opening statements made. Plaintiff's evidence commences: P-1, Kathryn Harding (sworn); P-2, Shelley

			Avila–Martins (sworn); P–3, Dr. Michael Ryer. Court adjourned at 12:30 and continued to Wednesday, March 6, 2019 at 9:00 AM. (Bench Trial Day Two set for 3/6/2019 09:00 AM in Courtroom 18 before Judge William G. Young, Bench Trial Day Three set for 3/7/2019 09:00 AM in Courtroom 18 before Judge William G. Young.) (Court Reporter: Richard Romanow at bulldog@richromanow.com.)(Attorneys present: Plaintiff appears pro se, Attorneys Markey and Espinola for the defendant) (Gaudet, Jennifer) (Entered: 03/05/2019)
03/06/2019	69		Electronic Clerk's Notes for proceedings held before Judge William G. Young: Bench Trial Day Two held on 3/6/2019. Plaintiff's evidence continues with: P–3, Dr. Michael Ryer. Witness taken out of order, defendant calls D–1, Dr. Susan Mikota. Court adjourned at 1:00 PM and continued to Thursday, March 7, 2019 at 9:00 AM. (Court Reporter: Richard Romanow at bulldog@richromanow.com.)(Attorneys present: Plaintiff appears pro se, Attorneys Markey and Espinola for the defendant) (Gaudet, Jennifer) (Entered: 03/07/2019)
03/07/2019	70		Electronic Clerk's Notes for proceedings held before Judge William G. Young: Bench Trial Day Three held on 3/7/2019. Evidence continues: P–4, Shara Crook (sworn); P–5, Joyce Rowley (sworn). Defendant rests. Videos shown to the Court. Pltf rests. Closing arguments are made. Matter is taken under advisement. The clerk will reach out with a date/time for a view at Buttonwood Zoo. (Court Reporter: Richard Romanow at bulldog@richromanow.com.)(Attorneys present: Plaintiff appears pro se, Attorneys Markey and Espinola for the defendant) (Gaudet, Jennifer) (Entered: 03/12/2019)
03/12/2019	<u>71</u>	130	AFFIDAVIT by Joyce Rowley. (CD Accompanying Affidavit Available in the Clerk's Office) (Paine, Matthew) (Entered: 03/13/2019)
03/14/2019	72		ELECTRONIC NOTICE of Hearing.Hearing (view at Buttonwood Zoo) is set for 3/26/2019 10:00 AM in Courtroom 18 before Judge William G. Young. (Gaudet, Jennifer) (Entered: 03/14/2019)
03/19/2019	73		ELECTRONIC NOTICE OF RESCHEDULING:Hearing (view at Buttonwood Zoo) is reset for 3/28/2019 10:00 AM in Courtroom 18 before Judge William G. Young. (Gaudet, Jennifer) (Entered: 03/19/2019)
03/27/2019	<u>74</u>		Transcript of Motion for a Preliminary Injunction held on February 12, 2019, before Judge William G. Young. The Transcript may be purchased through the Court Reporter, viewed at the public terminal, or viewed through PACER after it is released. Court Reporter Name and Contact Information: Richard Romanow at bulldog@richromanow.com Redaction Request due 4/17/2019. Redacted Transcript Deadline set for 4/29/2019. Release of Transcript Restriction set for 6/25/2019. (Scalfani, Deborah) (Entered: 03/27/2019)
03/27/2019	<u>75</u>		Transcript of Bench Trial held on March 5, 2019, before Judge William G. Young. The Transcript may be purchased through the Court Reporter, viewed at the public terminal, or viewed through PACER after it is released. Court Reporter Name and Contact Information: Richard Romanow at bulldog@richromanow.com Redaction Request due 4/17/2019. Redacted Transcript Deadline set for 4/29/2019. Release of Transcript Restriction set for 6/25/2019. (Scalfani, Deborah) (Entered: 03/27/2019)

03/27/2019	<u>76</u>		Transcript of Bench Trial held on March 6, 2019, before Judge William G. Young. The Transcript may be purchased through the Court Reporter, viewed at the public terminal, or viewed through PACER after it is released. Court Reporter Name and Contact Information: Richard Romanow at bulldog@richromanow.com Redaction Request due 4/17/2019. Redacted Transcript Deadline set for 4/29/2019. Release of Transcript Restriction set for 6/25/2019. (Scalfani, Deborah) (Entered: 03/27/2019)
03/27/2019	<u>77</u>		Transcript of Bench Trial held on March 7, 2019, before Judge William G. Young. The Transcript may be purchased through the Court Reporter, viewed at the public terminal, or viewed through PACER after it is released. Court Reporter Name and Contact Information: Richard Romanow at bulldog@richromanow.com Redaction Request due 4/17/2019. Redacted Transcript Deadline set for 4/29/2019. Release of Transcript Restriction set for 6/25/2019. (Scalfani, Deborah) (Entered: 03/27/2019)
03/27/2019	78		NOTICE is hereby given that an official transcript of a proceeding has been filed by the court reporter in the above-captioned matter. Counsel are referred to the Court's Transcript Redaction Policy, available on the court website at http://www.mad.uscourts.gov/attorneys/general-info.htm (Scalfani, Deborah) (Entered: 03/27/2019)
04/12/2019	<u>79</u>		Proposed Findings of Fact by City of New Bedford. (Markey, John) (Entered: 04/12/2019)
04/26/2019	<u>80</u>		Proposed Document(s) submitted by Joyce Rowley. Document received: Proposed Findings & Conclusions. (Rowley, Joyce) (Entered: 04/26/2019)
05/08/2019	<u>81</u>	131	Transcript of View (Buttonwood Park Zoo) held on March 28, 2019, before Judge William G. Young. The Transcript may be purchased through the Court Reporter, viewed at the public terminal, or viewed through PACER after it is released. Court Reporter Name and Contact Information: Richard Romanow at bulldog@richromanow.com Redaction Request due 5/29/2019. Redacted Transcript Deadline set for 6/10/2019. Release of Transcript Restriction set for 8/6/2019. (Scalfani, Deborah) (Entered: 05/08/2019)
05/08/2019	82		NOTICE is hereby given that an official transcript of a proceeding has been filed by the court reporter in the above-captioned matter. Counsel are referred to the Court's Transcript Redaction Policy, available on the court website at http://www.mad.uscourts.gov/attorneys/general-info.htm (Scalfani, Deborah) (Entered: 05/08/2019)
06/13/2019	<u>83</u>	156	MOTION to Expedite <i>Declaratory Judgment & Injunction</i> by Joyce Rowley.(Rowley, Joyce) (Entered: 06/13/2019)
06/19/2019	84		Judge William G. Young: ELECTRONIC ORDER entered re <u>83</u> MOTION to Expedite Declaratory Judgment & Injunction. The Court is sensitive to the matters raised in this motion and will work to expedite its decision. (Paine, Matthew) (Entered: 06/19/2019)
09/04/2019	<u>85</u>	159	MOTION to Confiscate by Joyce Rowley. (Rowley, Joyce) (Modified on 9/5/2019 to Correct CM/ECF Filing Event, Modify Docket Text, and Refile

			Memorandum and Affidavit as Separate Docket Entries) (Paine, Matthew). (Entered: 09/04/2019)
09/05/2019	<u>86</u>	160	MEMORANDUM in Support re <u>85</u> MOTION to Confiscate filed by Joyce Rowley. (Paine, Matthew) (Entered: 09/05/2019)
09/05/2019	<u>87</u>	165	AFFIDAVIT of Joyce Rowley in Support re <u>85</u> MOTION to Confiscate filed by Joyce Rowley. (Paine, Matthew) (Entered: 09/05/2019)
09/09/2019	<u>88</u>	170	MOTION to Amend <u>85</u> MOTION to Confiscate <i>Asian elephant Ruth at Buttonwood Park Zoo</i> , MOTION for Forfeiture of Property <i>Asian elephant Ruth at Buttonwood Park Zoo</i> (Responses due by 9/23/2019) by Joyce Rowley.(Rowley, Joyce) (Entered: 09/09/2019)
09/11/2019	<u>89</u>		Judge William G. Young: ELECTRONIC ORDER entered finding as moot <u>54</u> Motion to Strike <u>53</u> Memorandum in Opposition. (Gaudet, Jennifer) (Entered: 09/11/2019)
09/23/2019	<u>90</u>	172	ADDENDUM re <u>88</u> MOTION to Amend <u>85</u> MOTION to Confiscate <i>Asian elephant Ruth at Buttonwood Park Zoo</i> MOTION for Forfeiture of Property <i>Asian elephant Ruth at Buttonwood Park Zoo</i> filed by Joyce Rowley. (Attachments: # <u>1</u> Exhibit 1. Email re: management decision, # <u>2</u> Exhibit 2. Email re: barn temperatures)(Rowley, Joyce) (Entered: 09/23/2019)
09/24/2019	<u>91</u>	12	Judge William G. Young: ORDER entered. FINDINGS OF FACT AND CONCLUSIONS OF LAW"For these reasons, the Court finds and rules that there has been no violation of the Endangered Species Act. Judgment shall enter for the City.SO ORDERED."(Sonnenberg, Elizabeth) (Entered: 09/24/2019)
10/01/2019	<u>92</u>	45	NOTICE OF APPEAL as to <u>91</u> Findings of Fact & Conclusions of Law, <u>34</u> Memorandum & ORDER,, 89 Order on Motion to Strike, 65 Order on Motion to Compel, 35 Order on Motion for Preliminary Injunction, 60 Order on Motion for Preliminary Injunction,,,, Motion Hearing,,,, Set Hearings,,, by Joyce Rowley NOTICE TO COUNSEL: A Transcript Report/Order Form, which can be downloaded from the First Circuit Court of Appeals web site at http://www.ca1.uscourts.gov MUST be completed and submitted to the Court of Appeals. Counsel shall register for a First Circuit CM/ECF Appellate Filer Account at http://pacer.psc.uscourts.gov/cmecf. Counsel shall also review the First Circuit requirements for electronic filing by visiting the CM/ECF Information section at http://www.ca1.uscourts.gov/cmecf. US District Court Clerk to deliver official record to Court of Appeals by 10/21/2019. (Rowley, Joyce) (Entered: 10/01/2019)
10/04/2019	<u>93</u>	44	Judge William G. Young: ORDER entered. JUDGMENT. (Gaudet, Jennifer) (Entered: 10/04/2019)
10/04/2019	<u>94</u>		Certified and Transmitted Abbreviated Electronic Record on Appeal to US Court of Appeals re <u>92</u> Notice of Appeal. (Paine, Matthew) (Entered: 10/04/2019)
10/07/2019	<u>95</u>		USCA Case Number 19-2000 for <u>92</u> Notice of Appeal filed by Joyce Rowley. (Paine, Matthew) (Entered: 10/07/2019)
10/07/2019	<u>96</u>		USCA Appeal Fees received \$505.00 receipt number 1BST076673 re <u>92</u> Notice of Appeal, filed by Joyce Rowley (Coppola, Katelyn) Modified on 10/10/2019 to Correct Docket Link to Notice of Appeal (Paine, Matthew). (Entered: 10/10/2019)

		10/10/2019)
10/22/2019	<u>97</u>	Supplemental Record on Appeal transmitted to US Court of Appeals re <u>92</u> Notice of Appeal Documents included: Exhibits Binder 1–30 (Paine, Matthew) (Entered: 10/22/2019)
10/29/2019	<u>98</u>	Supplemental Record on Appeal transmitted to US Court of Appeals re <u>92</u> Notice of Appeal Documents included: Plaintiff's CD of Videos of the Elephants at Buttonwood Zoo (Paine, Matthew) (Entered: 10/29/2019)

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

_____)	
JOYCE ROWLEY,)	
)	
Plaintiff,)	
)	
v.	)	CIVIL ACTION
	)	NO. 17-11809-WGY
CITY OF NEW BEDFORD,)	
MASSACHUSETTS,)	
)	
Defendant.)	
_____)	

YOUNG, D.J.

September 24, 2019

**FINDINGS OF FACT, RULINGS OF LAW, AND
ORDER FOR JUDGMENT**

I. INTRODUCTION

This is a case about elephants -- specifically, Asian elephants.

Asian elephants . . . usually weigh[] well under eleven thousand pounds and st[an]d about seven to nine feet tall at the shoulder, as opposed to African elephants, who could weigh as much as fifteen thousand pounds and reach thirteen feet in height. Both male and female African elephants have tusks, while only some Asian males have tusks, and none of the females do. Their body shapes differ, too: Asians are more compact; Africans lankier, with a more concave back. The Africans' ears are enormous and wide (like maps of Africa, it's said) -- the biggest mammal ears in the world -- while those of the Asian elephant are smaller and closer to square.

In fact, the African and Asian elephants are not only separate species but separate genera -- a whole other level of taxonomic rank, as distinct in genetic heritage as a cheetah is from a lion. And some say it shows in their temperaments -- the Africans active and more high-strung; the Asians more serene.

Physically, all elephants are astonishing. They are the largest animals walking on land. And their appetites are commensurate . . . , gathering their food with those incredible trunks. Longer and heavier than a man, and much, much stronger, the trunks provide elephants with a sense of smell that may be five times more acute than that of a bloodhound. And by narrowing or widening their nostrils like musical instruments, they can modulate the sound of their voices.

They have extraordinary brains built for memory and insight, and they use them to negotiate one of the most advanced and complex societies of all mammals. To those who have spent time with them, elephants often seem philosophical and perceptive, and appear to have deep feelings. They can cooperate with one another and have been known to break tusks trying to hoist injured relatives back on their feet. Further, their behavior suggests they have an understanding of death, something believed to be rare among nonhuman animals.

Vicki Constantine Croke, Elephant Company: The Inspiring Story of an Unlikely Hero and the Animals Who Helped Him Save Lives in World War II 22-23 (Random House 2014). The Court takes judicial notice of these facts. See Fed. R. Evid. 201. Asian elephants are an endangered species. 50 C.F.R. § 17.11(h); see also 41 Fed. Reg. 24062, 24066 (June 14, 1976).

Joyce Rowley ("Rowley") sued the City of New Bedford ("City") under the Endangered Species Act, 16 U.S.C. §§ 1531-1544. Am. Compl., ECF No. 47. She alleged that the City is harming and harassing two geriatric Asian elephants, Emily and Ruth, in violation of the Endangered Species Act. See id.; 16 U.S.C. § 1540(g)(1). This Court has already determined that Rowley has standing to pursue this claim. Rowley v. City of New Bedford, 333 F. Supp. 3d 30, 39-40 (D. Mass. 2018).

II. THE LEGAL FRAMEWORK

A. The Endangered Species Act

Congress first enacted the Endangered Species Act, 16 U.S.C. §§ 1531-1544, in December 1973. Pub. L. No. 93-205, 87 Stat. 884 (Dec. 28, 1973). The tripartite mission of the Endangered Species Act is to (1) "provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved," (2) "provide a program for the conservation of such endangered species and threatened species," and (3) take appropriate steps to carry out the United States' commitments in various international treaties and conventions regarding species conservation. 16 U.S.C. § 1531(b).

Section nine of the Endangered Species Act makes it illegal for any individual to "take" any endangered species. 16 U.S.C. § 1538(a)(1)(B). The Supreme Court has emphasized evidence that Congress intended the word "take" to cover "every conceivable way in which a person can 'take' or attempt to 'take' any fish or wildlife." Babbitt v. Sweet Home Chapter of Cmty. for a Great Or., 515 U.S. 687, 704 (1995) (quoting S. Rep. No. 93-307, at 7 (1973)). Far from prohibiting only intentional acts, section nine reaches "more than the deliberate actions of hunters and trappers." Id. at 705.

The Endangered Species Act itself defines "take" 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). Here, Rowley’s claims rely on the prohibition on harassing and harming endangered species. See Am. Compl. ¶¶ 95, 104-30.

The Fish and Wildlife Service, the agency within the United States Department of the Interior tasked with implementing the Endangered Species Act, see 16 U.S.C. § 1537a(a), has promulgated regulations defining the terms “harm” and “harass” in the context of the Endangered Species Act.

1. Harming an Endangered Species

The Fish and Wildlife Service defines “harm” in the definition of “take” in the Endangered Species Act to mean:

[A]n act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.

50 C.F.R. § 17.3; see also Babbitt, 515 U.S. at 703

(deferring to regulation’s interpretation of “harm”)

(citing Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984)).

2. Harassment of an Endangered Species

The Fish and Wildlife Service defines “harass” in the definition of “take” in the Endangered Species Act to mean:

[A]n 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.

Id.

This definition includes a carve-out that exempts from the definition of "harass":

generally accepted: (1) [a]nimal husbandry practices that meet or exceed the minimum standards for facilities and care under the Animal Welfare Act, (2) [b]reeding procedures, or (3) [p]rovisions of veterinary care for confining, tranquilizing, or anesthetizing, when such practices, procedures, or provisions are not likely to . . . result in injury to the wildlife.

Id.

B. The Animal Welfare Act

Because the City is engaged in animal husbandry practices with "animals intended . . . for exhibition purposes," see 7 U.S.C. § 2131, the Animal Welfare Act exclusion applies to Rowley's harassment claims.

Before the enactment of the Endangered Species Act, Congress enacted the Animal Welfare Act, 7 U.S.C. §§ 2131-2159, Pub. L. No. 89-544, 80 Stat. 350 (Aug. 24, 1966), with the following goals:

(1) to insure that animals intended for use in research facilities or for exhibition purposes or for use as pets are provided humane care and treatment; (2) to assure the humane treatment of animals during transportation in commerce; and (3) to protect the owners of animals from the theft of their animals by preventing the sale or use of animals which have been stolen.

Id. § 2131.

Congress charged the United States Department of Agriculture ("Department of Agriculture") with enforcing this statute. Id. §§ 2132(b), 2133, 2146. To implement the Animal Welfare Act's protections, the Department of Agriculture promulgates regulations that set standards for facilities and care of animals in captivity, see, e.g., 9 C.F.R. §§ 3.125-3.142 (setting standards for the "handling, care, treatment, and transportation of warmblooded animals other than dogs, cats, rabbits, hamsters, guinea pigs, nonhuman primates, and marine mammals"), which it enforces through licensing and compliance inspections, see 7 U.S.C. § 2146(a). Unlike the Endangered Species Act, the Animal Welfare Act does not include a citizen suit provision. See Graham v. San Antonio Zoological Soc'y, 261 F. Supp. 3d 711, 737 (W.D. Tex. 2017).

There are at least four recent District Court cases that have grappled with the interplay between Animal Welfare Act requirements and the Endangered Species Act's harassment-based "take" prohibition. See Graham, 261 F. Supp. 3d at 739-43 (collecting cases).

The general consensus among these courts is that the regulations that the Department of Agriculture promulgates pursuant to the Animal Welfare Act are the substantive standards by which a court ought assess harassment-based "take" claims under the Endangered Species Act. See id. at 745. The findings

of past inspections by the Animal and Plant Health Inspection Service ("USDA-APHIS," the agency within Department of Agriculture charged with enforcing the Animal Welfare Act) are relevant to a court's assessment of whether an entity has violated the Animal Welfare Act by violating its implementing regulations but are not dispositive. See id. at 745-46.

The United States District Court for the Western District of Texas clearly described the role of USDA-APHIS assessments as follows:

APHIS determinations of past and present violations (or a lack thereof) are certainly evidence of [a harassment finding under the Endangered Species Act], but are neither necessary to support nor sufficient to warrant such a finding. Thus, the regulatory definition of "harass," by excluding animal husbandry practices that comply with the [Animal Welfare Act], does not permit a finding of no liability simply because of a previous determination of no [Animal Welfare Act] violation; instead, it substitutes the compliance standards of the [Animal Welfare Act] as the substantive standard for whether an Endangered Species Act violation has occurred, and requires such a determination to be made through the typical adversarial process.

Graham, 261 F. Supp. 3d at 745.

The court in Graham thus concluded that a claim that a zoo has violated the Endangered Species Act by "harassing" a captive endangered species requires the court to determine, first, if the zoo's practices are generally accepted, and, second, whether the zoo's practices comply with the governing Animal Welfare Act regulations. Id. at

745-46. "The burden is on the plaintiffs to show that the Animal Welfare Act's minimum standards were not met," however. Id. at 741 (citing Kuehl v. Sellner, 161 F. Supp. 3d 678, 718 (N.D. Iowa 2016); Hill v. Coggins, No. 2:13-cv-47, 2016 U.S. Dist. LEXIS 42374, at *31-32 (W.D.N.C. Mar. 30, 2016)). The court held that it was to undertake this inquiry independently -- considering, but not simply deferring to -- any prior findings by the USDA-APHIS. Id. at 745-46.

The court in Graham further held that "whether the Zoo committed a take under the Endangered Species Act by 'harming' [a captive elephant] is a separate legal issue requiring a separate analysis of the facts, and is not at all dependent on [Animal Welfare Act] compliance." Id. at 728, 746-48 (citing Kuehl, 161 F. Supp. 3d at 715-16; Hill v. Coggins, 2016 U.S. Dist. LEXIS 42374, at *31-32).¹

In Kuehl v. Sellner, the District Court for the Northern District of Iowa found after a bench trial that the defendants, a rural family-run zoo and its owner-operators, had violated the Endangered Species Act by harassing captive lemurs and both harming and harassing

¹ After the court granted summary judgment on some harassment-based "take" claims but denied it as to others, the parties in Graham settled before trial. Order, Civ. A. No. 5:15-cv-01054-XR (W.D. Tex. Dec. 5, 2017), ECF No. 78.

captive tigers. 161 F. Supp. 3d at 718. The court's determination that the defendants had harassed the lemurs and tigers was based on an evaluation of the zoo's compliance with the substantive standards in the Animal Welfare Act's implementing regulations. Id. at 710-18. While some of the conduct that the court found to constitute harassment had previously been subject to penalties by the USDA-APHIS for non-compliance, the court also found harassment in certain conduct that the USDA-APHIS had not found to violate Animal Welfare Act regulations. Id. For example, relying on the plaintiffs' expert witness, the court found that the social isolation of the lemurs disrupted their behavioral patterns and thus constituted a "take" under the Endangered Species Act (even though the USDA-APHIS had not previously sanctioned the defendants for any conduct related to the animals' social isolation). Id. at 710-11.

In Hill v. Coggins, the United States District Court for the Western District of North Carolina found after a bench trial that the plaintiffs had failed to demonstrate that the defendants, owners and operators of the Cherokee Bear Zoo, had harmed or harassed captive grizzly bears pursuant to the Endangered Species Act. 2016 U.S. Dist. LEXIS 42374, at *37-38. In so finding, the court relied on

the fact that the plaintiffs had failed to show any evidence of instances in which the zoo's treatment of the grizzly bears had violated any Animal Welfare Act regulations governing animal treatment. Id. at *33-34. The court failed to analyze separately whether the defendants' practices were also generally accepted animal husbandry practices, however. See id.; 50 C.F.R. § 17.3. On appeal, the Fourth Circuit corrected this error, clarifying that the exclusion in the Fish and Wildlife Service's definition of "harass" requires that the practice be both (1) "generally accepted" and (2) compliant with the Animal Welfare Act to withstand scrutiny under the Endangered Species Act. Hill v. Coggins, 867 F.3d 499, 509-10 (4th Cir. 2017).

The United States District Court for the Southern District of Florida in People for the Ethical Treatment of Animals, Inc. v. Miami Seaquarium granted summary judgment for the Seaquarium, concluding that People for the Ethical Treatment of Animals ("PETA") had introduced no evidence that the captive killer whale's living conditions "gravely threaten[ed]" her existence, and cast some doubt on the applicability of the Endangered Species Act to endangered species in captivity. 189 F. Supp. 3d 1327, 1355 (S.D.

Fla. 2016).² As the court in Graham noted, this “gravely threatening” standard exists nowhere in the Endangered Species Act or Animal Welfare Act or regulations implementing those statutes, and “was created -- without citation -- by the PETA court.” Graham, 261 F. Supp. 3d at 743 (discussing Miami Seaquarium, 189 F. Supp. 3d at 1351). The Eleventh Circuit affirmed the grant of summary judgment in Miami Seaquarium, holding that -- while it may not require a grave risk of death -- “harassment” and “harm” under the Endangered Species Act require a “threat of serious harm.” People for the Ethical Treatment of Animals, Inc. v. Miami Seaquarium, 879 F.3d 1142, 1144, 1147-50 (11th Cir. 2018) (per curiam).³

² In People for the Ethical Treatment of Animals, Inc. v. Tri-State Zoological Park of W. Md., Inc., the United States District Court for the District of Maryland rejected the Miami Seaquarium court’s reasoning on the potential conflict between the Endangered Species Act and the Animal Welfare Act as they pertain to endangered species in captivity. See Civ. A. No. MJG-17-2148, 2018 U.S. Dist. LEXIS 6638, at *11-14 (D. Md. Jan. 16, 2018). The Maryland District Court noted that the Miami Seaquarium logic represented a minority view among district courts to have addressed the issue, and one that the Fourth Circuit repudiated in Hill v. Coggins, 867 F.3d at 510. Tri-State, 2018 U.S. Dist. LEXIS 6638, at *11-14.

³ The Miami Seaquarium case is less relevant than others the Court addresses here because it analyzed the living conditions of marine mammals, which the National Marine Fisheries Service regulates, instead of the Fish and Wildlife Service. See 189 F. Supp. 3d at 1333.

In responding to a challenge to the Tri-State Zoo in Maryland, the United States District Court for the District of Maryland ruled that PETA's allegations that the zoo housed lemurs, tigers, and a lion in an inappropriate social setting; failed to provide adequate enrichment to lemurs, tigers, and a lion; failed adequately to protect lemurs, tigers, and a lion from the elements; and failed to provide adequate veterinary care to a lion plausibly stated a claim for a harassment- or harm-based "take" violation of the Endangered Species Act. People for the Ethical Treatment of Animals, Inc. v. Tri-State Zoological Park of W. Md., Inc., 2018 U.S. Dist. LEXIS 6638, at *15-18. The Maryland District Court later granted partial summary judgment to PETA, 2019 U.S. Dist. LEXIS 112366, at *1 (D. Md. July 8, 2019), ruling that "the zoo unlawfully took Cayenne," a tiger, through a "lack of basic veterinary care," id. at *18-19.

In sum, this Court must determine whether the City is harming or harassing Ruth and Emily pursuant to the Endangered Species Act. If any of the City's intentional or negligent conduct "creates the likelihood of injury to [the elephants] by annoying [them] to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering," that conduct constitutes

a "take" and violates the Endangered Species Act, unless the conduct is a generally accepted and Animal Welfare Act-compliant animal husbandry practice. See 50 C.F.R. § 17.3. In addition, the City has committed a "take" if its conduct "actually kills or injures" the elephants. See id.

III. FINDINGS OF FACT

The City owns and operates the Buttonwood Park Zoo. The zoo is an Association of Zoos and Aquariums accredited institution. Trial Tr. Day 3 at 39:14-18, ECF No. 77.

In April 1968, the City purchased Emily, a four-year-old Asian elephant, from Southwick's Zoo (then the Mendon Animal Farm), and transferred her to the Buttonwood Park Zoo. Trial Ex. 4, Association Zoos & Aquariums Elephant Profile Form & City New Bedford Board Park Commissioners Letter Dec. 31, 1967 ("Emily Profile & Board Park Commissioners 1967 Letter") 1, 6. There is no evidence to suggest Emily was anything but a healthy, young elephant at the time of the City's purchase. See Trial Tr. Day 3 at 43:25-44:2.

About fifteen years later, however, when Dr. Michael Ryer arrived at the zoo to become a zookeeper, he found that Emily "was not behaviorally adjusted well at all." Trial Tr. Day 1 at 92:11, ECF No. 75. Her living conditions in 1982 were not acceptable, according to veterinarian Dr. Ryer; she was chained in the barn sixteen hours a day on a concrete floor with poor

drainage and no ventilation. Id. at 93:6-19. When Emily returned from her training stay at a zoo in Louisiana, however, she was a changed elephant -- she was able to "be worked without fear of . . . one of the keepers getting hurt," Trial Tr. Day 2 at 18:19-20, ECF No. 76, and she returned to improved living quarters, Trial Tr. Day 1 at 106:9-11.

Ruth is the hard luck elephant. She is somewhat older and a bit (a thousand pounds) smaller than Emily. Trial Tr. Day 1 at 101:24-25; Trial Tr. Day 3 at 78:21-79:6, 80:2-10; Trial Ex. 5, Association Zoos & Aquariums Elephant Profile Form & Arrival Report ("Ruth Profile & Arrival Report") 1. Benson's Animal Farm in New Hampshire once owned her. Ruth Profile & Arrival Report 1.

In 1986, she was found abandoned in a truck on a dump site in Danvers, Massachusetts. Id. at 5-6; Trial Tr. Day 2 at 85:12-17. The Animal Rescue League of Boston apparently took her from there. Ruth Profile & Arrival Report 5, 7. A United States Department of the Interior report from the time she was seized indicates that Ruth suffered several ailments: her ear condition was fair, with one hole and ragged edges on each ear; her skin was fair to poor; her tail and skin had an extreme build-up of necrotic tissue; she had scars on her legs (indicative of excessive chain wear) and chin (more than twenty hook scars); and she was underweight, among other issues. Id.

at 5-6. This report further noted that Ruth was a "striker, hitter, but not to the point of killing," and "[r]epeatedly struck out at keepers." Id.

Ruth's trunk was of particular concern when she was rescued. The 1986 report stated that Ruth had "[l]ittle control of dist[all] area; no fine control of finger; appears paralyzed in proximal area and peduncle; must use head to swing trunk. Does appear to affect her ability to feed." Id. at 6.

The City soon took possession of Ruth. Id. at 7. Dr. Ryer, then a zookeeper at the City's zoo, confirmed Ruth's partial trunk paralysis and overall poor health upon her arrival at the Buttonwood Park Zoo elephant habitat. Trial Tr. Day 1 at 97:4-10.

In the City's care, Ruth has become docile and, at least in the eyes of the City's zookeepers,⁴ she appears affectionate and warmly responsive to her treatment. See Trial Tr. Day 2 at 22:7-17, 77:11-78:6.

Emily is now fifty-five years old. Emily Profile & Board Park Commissioners 1967 Letter 1. Aside from a brief period from November 1983 to July 1985, when she went to Baton Rouge,

⁴ Experts caution against anthropomorphizing elephant behavior and attributing to them human emotions. What is clear is that both zookeepers and attending veterinarians are affectionate toward both Emily and Ruth.

Louisiana for training (during which time the City renovated her barn), Emily Profile & Board Park Commissioners 1967 Letter 1; Trial Tr. Day 1 at 93:21-24, 96:7, Emily has resided at the Buttonwood Park Zoo, for apparently forty-nine of her fifty-five years. Id.⁵

Ruth, however, was approximately twenty-eight years old when she was rescued by the Animal Rescue League of Boston, seized by the United States Department of the Interior, and delivered into the City's care. Ruth Profile & Arrival Report 1, 5. She is thus approximately sixty-one years old and has resided at the Buttonwood Park Zoo for the last thirty-three years, together with Emily. Id.

Emily and Ruth are thus among the oldest living Asian elephants in a zoo setting in America. See Trial Ex. 15, Robert J. Wiese & Kevin Willis, Calculation of Longevity and Life Expectancy in Captive Elephants, 23 Zoo Biology 365-73 (2004) (estimating average life expectancy for Asian elephants in captivity in North America at 44.8 years).

⁵ Indeed, because Emily's captivity predates the classification of Asian elephants as endangered in 1976 and the Endangered Species Act itself in 1973, some of the Endangered Species Act's protections may not apply to her. See 16 U.S.C. § 1538(b). Critically, however, the Endangered Species Act's prohibition on taking does protect Emily. See id.; Am. Soc'y for the Prevention of Cruelty to Animals v. Ringling Bros. & Barnum & Bailey Circus, 502 F. Supp. 2d 103, 107-10 (D.D.C. 2007).

Over the years Emily and Ruth have spent at the City Zoo, elephant husbandry has undergone a near complete reversal. Years ago, elephants were managed by guides or bullhooks -- think a maharajah's mahout with his goad. Touching the elephant at a guidepoint with the guide led a trained elephant to exhibit the desired behavior; i.e. moving, stopping, and the like. Advanced training might include kneeling, stepping up on a pedestal, raising one or two legs, holding a banner in her trunk -- you get the idea.

Today, the zookeepers allow the elephants to roam at will throughout the zoo's habitat, which seeks to replicate -- as far as possible -- the elephants' natural surroundings. Elephants are enticed by the prospect of forage out of their barn to allow for its cleaning. Today, human contact with the elephants is kept to a minimum. While the elephant caretakers routinely have "hands-on" contact with the elephants, they do so almost exclusively "through a protective barrier." Trial Ex. 16, Elephant Mgmt. Policy & Elephant Keeper Handbook (Buttonwood Park Zoo 9th ed. 2018) 4, 9. But see Trial Ex. 17, Buttonwood Park Zoo Protocols for Sharing Unrestricted Space with Elephants 2018.

Rowley faults the City for being behind the curve in every respect. The Court finds the contrary to be true. Indeed, commendably, the City has supported its zoo with an adequate

budget; has attracted a cadre of dedicated, professional, empathetic, and innovative zookeepers; and has employed top notch veterinarians wherever necessary. The pace of change at the City Zoo has been commensurate with the evolution of elephant husbandry. Hydraulic fences limn the elephant stalls within their barn, allowing the elephants to move as the zookeepers desire without the need for guides. The barn's concrete floor has been covered with thick sand (easier on the elephants' feet), and sand is banked up against one wall of each stall so an elephant at rest leans against a sand bank rather than kneeling and lying down (more difficult for geriatric elephants with aging joints). Outside, forage is made available not only on the ground but on a raised, lattice-like wooden structure which seeks to replicate the elephant's natural environment and encourages her to exercise her trunk to seek out food where it would normally be found in the forest.

The zoo's accomplishments are not, however, an unbroken record of evolving improvements (although this is generally so). The elephant barn lacks a hydraulic hoist (to lift an elephant if necessary in case of injury or sickness), and the roof still leaks (although not over the animal spaces). More seriously, human negligence is not unknown. In January 2014, the door to the elephant barn was left unlocked and Ruth wandered out into a New England blizzard, suffering frostbite to her ears, vulva,

and tail. Trial Ex. 19, USDA Settlement Agreement 3; see also Trial Tr. Day 2 at 90:9-91:13.

There are larger issues as well. Asian elephants range naturally across the Indian sub-continent⁶ and throughout Southeast Asia⁷ and the Indonesian archipelago. Now New Bedford, Massachusetts has many fine attractions, but lush tropical forests and mangrove swamps are not among them. The elephant habitat at the City Zoo is somewhat larger than 3/4 of an acre and, while one could possibly conjure the dusty Deccan plains (ignoring the New England white oaks), by no stretch of the imagination could anyone believe these two elephants live in their "natural" surroundings.

The zookeepers ensure that Emily and Ruth have delicacies like bamboo in addition to their normal diet of hay and livestock grains. See Trial Tr. Day 3 at 32:22-33:14; Trial Tr. Day 2 at 70:7-10. Moreover, in collaboration with the Massachusetts College of Art and Design, the zookeepers have

⁶ Alexander faced Porus' Asian elephants at the Hydaspes in 326 B.C.E. The British used them as pack animals on the march from Kandahar to Kabul during the ill-fated invasion of Afghanistan, 1839-1842. See William Dalrymple, Return of a King (Knopf 2013); George MacDonald Fraser, Flashman (Plume 1984).

⁷ See Croke, supra. For a sensitive, albeit Western, discussion of the terrain and its peoples, see generally the distinguished author John Masters, Bugles and a Tiger (Viking 1956) and The Road Past Mandalay (Harper 1961), the autobiography of his service in the 4th Gurkha Rifles in the old Indian Army.

developed "toys" for the elephants which are intended to maximize elephant dexterity. Emily is said to favor the xylophone. See Trial Tr. Day 3 at 37:13-39:6; Laura Crimaldi, MassArt Students Create Toys for Elephants at New Bedford Zoo, Boston Globe (May 13, 2019), <https://www.bostonglobe.com/metro/2019/05/13/massart-students-create-toys-for-elephants-new-bedford-zoo/EGB79VBrSiZB3TgUjpmnpnO/story.html>.

None of this will do, says Rowley, arguing that Emily and Ruth ought be transported to a 34,000 acre elephant sanctuary in Tennessee to live out the remainder of their lives in a setting more closely resembling their natural habitat. Am. Compl. ¶ 97. She is in good company. See Charles Seibert, The Swazi 17, N.Y. Times Mag. 26-33, 42, 45 (July 14, 2019) (arguing that elephants ought not be kept in captivity at all).

Important as these larger issues may be, they are beyond the purview of this Court, immaterial because they are of no legal consequence to the outcome of this action. See Fed. R. Evid. 401. This is an action under the citizen suit provision of the Endangered Species Act. 16 U.S.C. § 1540(g). That Act, as the Fish and Wildlife Service has authoritatively interpreted it and in conjunction with the Animal Welfare Act, contemplates that endangered species may be kept in captivity. See 50 C.F.R. § 17.3 (excluding from the definition of "take," as "applied to captive wildlife," "generally accepted" husbandry practices

satisfying Animal Welfare Act standards); 7 U.S.C. § 2131 (explaining that the Animal Welfare Act is designed to “to insure that animals intended for . . . exhibition purposes . . . are provided humane care and treatment”). The reference standard for an endangered species in captivity is not a goal requiring the least restrictive environment or the most natural possible setting. Rather, it is generally accepted and appropriate animal husbandry. See 50 C.F.R. § 17.3. This is a familiar concept, taught by 4-H groups to youth across the nation. When I was growing up, the Boy Scouts offered a merit badge in Animal Industry. See Boy Scouts of America, Handbook for Boys 509 (New York: Boy Scouts of America, 1943).

Therefore, important as the questions posed by Rowley and Seibert may be, this Court eschews analyzing them and, having made its findings of fact, turns to the specific legal issues which require the Court’s attention. The Court will make additional, issue-specific findings where necessary.

IV. RULINGS OF LAW

A. Veterinary Care

By mandate of the Code of Federal Regulations, “[e]ach . . . exhibitor shall have an attending veterinarian who shall provide adequate veterinary care to its animals.” 9 C.F.R. § 2.40(a). The attending veterinarian must be employed “under formal arrangements,” id. § 2.40(a)(1), and must have the

authority to provide and oversee adequate care, id.

§ 2.40(a)(2). In addition, the "exhibitor shall establish and maintain programs of adequate veterinary care that include . . . [t]he use of appropriate methods to prevent, control, diagnose, and treat diseases and injuries, and the availability of emergency, weekend, and holiday care." Id. § 2.40(b).

A zookeeper inspects Ruth and Emily each morning and completes a "Daily Animal Health Checklist." Trial Tr. Day 1 at 46:10-47:17. If any issue comes up, the zookeeper gets in touch with the Zoo's "elephant manager and the vet staff, the staff veterinarian or even the vet technician" promptly to resolve it. See id. at 47:7-17.

From at least 2000 to 2005, the City employed a full-time on-site veterinarian at the Buttonwood Park Zoo, Dr. Ryer. Id. at 112:8-11, 115:15. It is not clear when in the course of the next ten years the City employed a full-time on-site veterinarian, but the Zoo regularly called in Dr. Ryer for a consultation when medical issues arose. See id. at 118:13-119:1. One witness testified that when the City employed no full-time on-site veterinarian, it contracted with a veterinarian who would visit the elephants once per week. See id. at 47:18-48:3.

As of July 30, 2015, the City once again employed a full-time on-site veterinarian, Dr. Elizabeth Arnett-Chinn. Trial

Ex. 8, Independent Panel Review Buttonwood Park Zoo Elephant Program ("Independent Panel Review") 3. Although she subsequently resigned, the record also reflects that the City employed a full-time on-site veterinarian in 2018, see Trial Ex. 10, Final Report Visiting Committee Accreditation Commission ("Final Report Accreditation Commission") 8, and also did so at the time of the trial, see Trial Tr. Day 1 at 47:18-23.

In 2016, Ruth developed a severe gastrointestinal issue. Absent competent and professional veterinary care, there was a strong probability she would die. Trial Tr. Day 2 at 22:24-24:8, 27:3-9. The City provided such care, providing not only care through the Zoo's staff veterinarian but flying in a renowned large animal veterinarian from Tennessee to care for Ruth. Id. at 24:13-25:8. The medical team employed enemas to re-hydrate Ruth. Id. at 25:13-22. This process consisted of injecting 30 to 60 gallons of an electrolyte solution into the elephant's rectum three or four times a day for one week using clean 30-gallon trash buckets and a hose. Id. at 25:13-26:6. Ruth was compliant throughout the entire process, despite simultaneously undergoing other procedures such as having her blood drawn, a fact that the veterinarian attributed to her own positive relationship with Ruth and to the elephant's trust in the zookeepers. Id. at 26:10-27:2.

Ruth also receives phenylbutazone, a non-steroidal anti-inflammatory medication that treats her arthritis. Trial Tr. Day 1 at 129:1-10; Trial Tr. Day 2 at 4:20-5:5.

As the findings above exemplify, Ruth (and Emily) have received and are receiving adequate veterinary care in all the respects required by 9 C.F.R. § 2.40. The City's veterinary care practices were "generally accepted," 50 C.F.R. § 17.3, given that a qualified professional oversaw them, and, in times of unusual crisis, profitably consulted with between five and ten "elephant veterinarians around the country." Trial Tr. Day 2 at 24:11-20. The veterinary care that Ruth and Emily receive does not "actually injure" them. See 50 C.F.R. § 17.3. Thus, this Court rules that the City has provided generally accepted, Animal Welfare Act-compliant veterinary care for Ruth and Emily. The City's veterinary care for Ruth and Emily neither harms nor harasses them.

B. Food and Shelter

The Court finds and rules that Emily and Ruth are provided wholesome, palatable food free from contamination in sufficient quantity and nutritive value to maintain them in good health. Trial Tr. Day 3 at 33:2-14. Thus, the City complies with applicable nutrition regulations. See 9 C.F.R. § 3.129(a) ("The food shall be wholesome, palatable, and free from contamination and of sufficient quantity and nutritive value to maintain all

animals in good health."). Further, the Visiting Committee to the Accreditation Commission of the Association of Zoos and Aquariums found in 2018 that the Buttonwood Park Zoo provides the animals in its care with "diets of adequate quality and quantity" that are "prepared and stored hygienically" and "provided in a way that promotes the physical and psychological well-being of the animals," which supports the Court's conclusion that the elephants' diet is also generally accepted. See Final Report Accreditation Commission 10.

Regarding shelter, the Code of Federal Regulations requires that elephants, among other warmblooded animals, be housed in "structurally sound" facilities "in good repair," 9 C.F.R. § 3.125(a), with adequate water and power, id. § 3.125(b), as well as proper means of storing food, disposing of waste, and maintaining cleanliness, id. § 3.125(c)-(e). The City's outdoor facilities must provide the elephants shelter from bothersome sunlight and inclement weather, while being properly drained and fenced. Id. § 3.127. And there must be enough "space to allow each animal to make normal postural and social adjustments with adequate freedom of movement." Id. § 3.128.

The Zoo's elephant barn is appropriate to the local New Bedford climatic conditions and is otherwise suitable for housing these two elephants. While USDA-APHIS sanctioned the City in 2014 for allowing Ruth to get out during a blizzard, see

Trial Ex. 1, Citation & Notification of Penalty; Trial Ex. 19, USDA Settlement Agreement 3; Trial Tr. Day 2 at 90:9-12, the City has since made substantial renovations to the barn, and no such incident has recurred. See Final Report Accreditation Commission 27. Specifically, each elephant has adequate freedom of movement within the barn and sufficient space to stand, drink, and sleep. See id.; Trial Tr. Day 1 at 36:10-24 (zookeeper testifying to automated water system in barn that Ruth and Emily can reach with their trunks); Trial Tr. Day 2 at 68:13-24.

Further, the City provides shelter to Ruth and Emily that is in accordance with generally accepted animal husbandry practices. See Final Report Accreditation Commission 7.

The Court thus rules that the City fully complies with 9 C.F.R. §§ 3.125, 127, 128, & 129.⁸ The City's accreditation by the Association for Zoos and Aquariums, which sets standards for animal care above the minimum standards required by Animal Welfare Act regulations, supports the Court's conclusion that the shelter and food that the City provides the elephants are consistent with generally accepted animal husbandry practices

⁸ The Court rules only on Rowley's request for prospective relief. See Am. Compl. ¶¶ 104-06. Although the Court observes that Ruth's frostbite may have constituted "harm" under the Endangered Species Act, the Court holds that the City is not causing Ruth "harm" today. See Final Report Accreditation Commission 27.

and do not harm or harass them. See Final Report Accreditation Commission 7, 10; Trial Tr. Day 3 at 39:14-18.

C. Social Opportunities and Enrichment

The Department of Agriculture has not promulgated any regulations imposing standards for socialization and enrichment for the psychological wellbeing of animals that are not primates. Cf. 9 C.F.R. § 3.81; Kuehl, 161 F. Supp. 3d at 710-11 (ruling that keeping lemurs -- primates -- in social isolation was harassment). In addition, the parties have not introduced evidence that maintaining two Asian elephants in captivity together satisfies the "generally accepted" standard in the captive wildlife exclusion to a harassment-based take. See 50 C.F.R. § 17.3.

Thus the Court considers whether a lack of social opportunities for Ruth and Emily amounts to a "take" under the Endangered Species Act, which is to say, "an act which actually kills or injures wildlife" or "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." See id.

Emily and Ruth (female Asian elephants) are the only two elephants in the care of the City. Although Emily and Ruth may well feel lonely at times, the evidence does not establish that

the City's actions have significantly disrupted their normal behavioral patterns in an injurious manner.⁹

As for enrichment, the general fact-finding above limns the innovative efforts of the City's zookeepers to enrich the elephants' existence. In Kuehl, the court held that captive

⁹ A significant area of dispute at trial was whether Emily and Ruth engage in stereotypic behaviors. Stereotypic behaviors are behaviors with no purpose, Trial Tr. Day 1 at 41:5-9, which can indicate a captive animal's mental stress, see Graham, 261 F. Supp. 3d at 717-18. Rowley suggests that Ruth's and Emily's repetitive behaviors are "abnormal behavior" and thus are per se evidence that the City's actions or inaction "significantly disrupt [their] normal behavioral patterns," 50 C.F.R. § 17.3. See, e.g., Trial Tr. Day 1 at 7:20-8:2.

If the evidence leaned in favor of a conclusion that Ruth and Emily regularly do engage in stereotypic behaviors, not just normal anticipatory ones, that could be evidence of harm or harassment under the Endangered Species Act. Cf. Graham, 261 F. Supp. 3d at 749.

Rowley elicited evidence at trial that Ruth and Emily engage in the behaviors of swaying, bobbing, and pacing. See Trial Tr. Day 1 at 42:4-12, 73:20-74:11. She failed, however, to prove that these behaviors are stereotypic.

The evidence at trial was mixed at best as to whether Ruth and Emily engage in stereotypy. See, e.g., Trial Tr. Day 1 at 39:10-40:8 (zookeeper describing Ruth and Emily's swaying, bobbing, and pacing as anticipatory, not stereotypic, behavior); id. at 42:4-19 (same); id. at 73:20-74:6 (former elephant keeper testifying that the elephants' "swaying" is a result of them "trying to get our attention" and is thus more "anticipatory" than "stereotypic["); Trial Tr. Day 3 at 113:6-114:17 (Rowley describing video footage of Emily and Ruth while eating and swaying as "stereotyping").

Rowley failed to carry her burden of proving that Ruth and Emily regularly engage in stereotypic behaviors, and, moreover, did not prove that the City's action or inaction caused the behaviors that she describes as stereotypy. Accordingly, the Court cannot rule that the elephants' repetitive behaviors evidence that the City has actually injured them or significantly disrupted their normal behavioral patterns.

tigers were not harassed or harmed by a psychologically dull environment even when they were provided only "nominal" enrichment. 161 F. Supp. 3d at 718. Emily and Ruth are not so impoverished. The Court rules that the City follows adequate and generally accepted animal husbandry practices in these regards. Moreover, there is insufficient evidence to establish the likelihood of significant disruption of normal behavioral patterns.

D. Failure to Protect Ruth

This is the most difficult issue in this case.

Rowley claims that the City has allowed Ruth to be harassed and harmed over the years through Emily's aggressive actions toward her. Indeed, years ago, Emily bit off the tip of Ruth's tail. Trial Tr. Day 1 at 63:5-25. Years later, after the frostbite incident, when Ruth's tail was bandaged up, Emily (perhaps out of curiosity) used her trunk to toy with the bandage, causing Ruth to squeal in apparent pain and move away. Sporadically over the years there have been incidents where, while Ruth has been peacefully feeding, Emily has come up and shouldered her out of the way in order to enjoy that particular foodstuff herself. There is ample available food and Ruth, although dispossessed, shambles off to feed elsewhere. Ruth is not malnourished.

Rowley, albeit a keen and frequent visitor to the City's elephants, is neither a zookeeper nor a veterinarian. She characterizes these incidents as "attacks" by Emily upon Ruth. The zookeepers consider them normal dominant animal behavior (Emily being the larger and heavier elephant). See, e.g. Trial Tr. Day 1 at 60:17-18, 62:20-25, 64:1-65:18. The skilled veterinarians who testified tend to side with the zookeepers but are quick to point out that only a specialist in elephant behavior could give a sound answer.

Under the Fish and Wildlife Service's regulations, to "harm" an endangered species means intentionally or negligently to engage in "an act which actually kills or injures wildlife," and encompasses conduct "significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering." 50 C.F.R. § 17.3. As stated above, to "harass" such a species means:

[a]n 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.

Id. One may thus violate the "harassment" requirement without actually causing "harm" to wildlife. See Hill, 867 F.3d at 511 (observing that "the regulatory definition of harass contains requirements that are less demanding . . . than are the requirements contained in the regulatory definition of harm").

In the absence of directly applicable expert testimony about elephant behavior, and recognizing that Rowley bears the burden of proof, this Court concludes that she has not proved that the City was harassing or harming Ruth in violation of the law by negligently allowing Emily to attack her.

Then, a few days ago, Rowley filed a "motion to confiscate" in which she raises some new and disturbing allegations, viz. as a result of increased elephant conflict, the City's zookeepers have restricted Ruth's access to the outer barn, causing her emotional and physical distress. Mem. Favor Confiscation ("Confiscation Mem."), ECF No. 86; see also Suppl. Mem. Favor Forfeiture, ECF No. 90.

Even as alleged by Rowley, it appears that the City's response is precisely what responsible elephant management requires. Rowley's allegations in the motion to confiscate suggest that the zookeepers have decided to provide separate feedings to the two elephants to ensure that Ruth gets adequate nutrition despite Emily's displacement behaviors, see Trial Tr. Day 2 at 95:4-96:15. Confiscation Mem. 3. Rather than proving that the City fails to protect Ruth from Emily's aggression, see id., these allegations demonstrate that the City is proactively responding to changes in the social dynamic between the two elephants to ensure that both animals are comfortable and are able to meet their needs to the extent possible.

Some of Rowley's allegations in her latest motion raise some concerns for the Court about the City's provision of adequate shelter during the summer months. See Aff. Joyce Rowley ¶¶ 6-7, 10-14, ECF No. 87. Rowley is not an elephant expert, however, nor is this Court. Accordingly, Rowley's allegations here do not suffice to persuade the Court that it ought revise its rulings in this case.

V. CONCLUSION

For these reasons, the Court finds and rules that there has been no violation of the Endangered Species Act. Judgment shall enter for the City.

SO ORDERED.

/s/ William G. Young
WILLIAM G. YOUNG
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

JOYCE ROWLEY
Plaintiff

v.

CIVIL ACTION
NO. 1:17-11809-WGY

CITY OF NEW BEDFORD
Defendant

JUDGMENT IN A CIVIL CASE

YOUNG, DJ

 Jury Verdict. This action came before the court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

 X **Decision by the Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED:

Judgment shall enter for the City.

ROBERT M. FARRELL
CLERK OF COURT

Dated: October 4, 2019

By /s/ Jennifer Gaudet
Deputy Clerk

**United States District Court for the
Commonwealth of Massachusetts District
Boston Division**

Joyce Rowley,)	
Plaintiff pro se)	
)	
V.	)	Case No. 1:17-cv-11809
)	
City of New Bedford,)	
Massachusetts, Defendant)	

Notice of Appeal

Notice is hereby given that Joyce Rowley, Plaintiff pro se, hereby appeals to the United States Court of Appeals for the First Circuit from the following orders in the abovenamed case: Order (Dkt. 34) consolidating Plaintiff's second motion for a preliminary injunction (Dkt. 27/28) with the trial on the merits and declaring the preliminary injunction moot (Dkt. 35); an Order (Dkt. 60) consolidating the third preliminary injunction (Dkt. 49/50) with the trial on the merits; an Order (Dkt. 65) denying a portion of Plaintiff's motion to compel access to the elephant barn (Dkt. 62/64); an Order (Dkt. 89) denying Plaintiff's motion to strike (Dkt. 54) Defendant's response to the preliminary injunction (Dkt. 53); and the Final Order (Dkt. 91) granting judgement to the Defendant.

/s/Joyce Rowley, Plaintiffs, pro se
PO Box 50251
New Bedford, MA 02745
508-542-8297

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of October 2019, the foregoing was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/Joyce Rowley
Plaintiff, pro se
PO Box 50251
New Bedford, MA 02745
508-542-8297

**UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS
BOSTON DIVISION**

JOYCE ROWLEY,)
Plaintiff, pro se)

Case No. 1:17-cv-11809-WGY

v.)
)

CITY OF NEW BEDFORD,)
MASSACHUSETTS)
Defendant)

**AMENDED COMPLAINT
FOR DECLARATORY AND INJUNCTIVE RELIEF**

Introduction

Pursuant to Federal Rule of Civil Procedure 15(A)(2), Plaintiff Joyce Rowley hereby amends the Complaint filed on September 21, 2017. On February 15, 2018, Rowley was substituted for the original plaintiff, the Friends of Ruth & Emily, Inc., a non-profit volunteer organization of which Rowley is founder and president. An Answer to the original complaint has not been filed.

Background

1. Since 2010, the Defendant City embarked on plans for the Buttonwood Park Zoo that were contrary to the will of its citizens. It attempted to use the two

Asian elephants, Ruth and Emily, as placeholders while it acquired more elephants.

2. Plaintiff Rowley participated in the public hearings, wrote letters to the local newspaper, and repeatedly requested that Ruth and Emily be allowed to retire to The Elephant Sanctuary in Hohenwald, TN, a 2,700-acre natural reserve that takes in sick, needy and elderly elephants. The Sanctuary is not open to the public as it allows elephants to be elephants, not exhibits.

3. Rowley cited Ruth's and Emily's roles as members of an endangered species in her letters and discussions with Defendant City, zoo staff, and New Bedford City Council, and said that their exhibit at the Zoo does nothing to teach people about endangered species, nor even about elephants in the wild, nor even conservation, other than displaying nominal signage. Instead, people learn that elephants can be treated as disposable spectacles and toys for their children, and that elephants can be held in substandard and dangerous conditions causing them to suffer just for human amusement and "selfies."

4. Rowley has long complained that because of the Defendant City's practices and the cold New Bedford climate, Ruth and Emily have spent over 20 years out of the past 30 years locked in the barn. They are put inside the barn by 4:30 p.m. and not allowed back outside until 7:30 to 8:30 a.m. the next day. During

the winter, the zoo closes early and those hours outside are shorter still. When temperatures drop below 40 degrees Fahrenheit, the elephants must be monitored for hypothermia. During snow storms and frigid conditions, the elephants are kept inside, sometimes for days at a time.

5. By 2013, the Defendant City agreed to close the elephant exhibit after Ruth and Emily die, stating it is too cold a climate and too small a space to keep elephants. Rowley, asked, "Why wait?"

6. The Defendant City had no response, and ignored a (paper) petition signed by over 2,500 New Bedford residents and an online petition signed by over 75,000 people.

7. Ruth's and Emily's needs are not being met by the Defendant City. The elephants spend at least 16 hours a day every day standing, walking, sleeping and eating in their own considerable waste. As a result of their captivity at the City, they suffer a slew of chronic foot problems, gastric problems, food deprivation, skin problems and other illnesses that will likely lead to premature death.

8. Rowley brought this citizens' suit to enjoin the Defendant City from violating the ESA through keeping, confining, exhibiting and so injuring Ruth and Emily; and seeks declaratory and injunctive relief for the release of Ruth and Emily to The Elephant Sanctuary.

Amended Complaint

9. Joyce Rowley, Plaintiff, brings this amended complaint against Defendant City of New Bedford, MA ("the City"), owner of Buttonwood Park Zoo located on its city parkland (the "Zoo") pursuant to the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531-1544. Plaintiff seeks declaratory and injunctive relief against the City for "taking" endangered Asian elephants Ruth and Emily, who are forced to reside at the Zoo against their will, in violation of Section 9 of the ESA, 16 U.S.C. § 1538(a)(1)(B),(D).

10. The City engages in these unlawful activities through (1) keeping Ruth & Emily in a facility (the "Exhibit") that interferes with normal behavior; (2) confining them in a small enclosure and even smaller "barn" with bars and hard substrates that cause physical and psychological harm; (3) preventing them from having appropriate social interactions with each other and other elephants; (4) failing to protect Ruth from Emily's aggression which causes Ruth physical and psychological harm; (5) failing to provide adequate veterinary care which harms both Ruth and Emily; and (6) failing to provide proper food and enrichment. Each of these conditions is an ongoing violation of Section 9 of the ESA, 16 U.S.C. Section 1538(a) et seq.

11. Plaintiff provided the required statutory notice to the City

the conditions in which Ruth and Emily are kept violate the ESA. More than 60 days have passed since the notice was served on the City and the violations have not been corrected. Instead, the City placed tightly-spaced steel bars in the barn, making conditions worse.

12. A study may be underway to "privatize" the Zoo. Plaintiff enjoins the City from transferring any part of their property rights to Ruth and Emily in any such "privatization" as the funding for the study came well after the 60-day Notice to Sue and was likely an attempt to avoid Ruth's and Emily's transfer to a sanctuary by court decree.

Parties

13. Joyce Rowley is a member, founder and president of the Friends of Ruth & Emily, Inc. ("the Friends"). She has resided in New Bedford, MA for over five years and in the Zoo's market area for 11 years. She is also a member of the Buttonwood Park Zoological Society located at the Zoo. Ms. Rowley visits the Zoo on a near-daily basis for the past five years to observe Ruth and Emily and communicates with them regularly. Prior to that, she visited the Zoo on a monthly and then a weekly basis since 2010.

14. Ms. Rowley has developed an aesthetic, emotional, and spiritual relationship with Ruth and Emily over the years. Any enjoyment she has from

befriending the elephants is greatly diminished by observing their ongoing suffering from their captivity.

15. Plaintiff Rowley and the Friends have demonstrated, protested, and handed out educational literature at the Zoo, the area outside of the Exhibit, and at City events elsewhere to inform and educate the public about Ruth's and Emily's living conditions over the past six years.

16. Plaintiff Rowley and the Friends have voiced concerns through letters to the local newspapers, social media and email about Ruth's and Emily's health and living conditions at the City zoo.

17. Plaintiff Rowley derives aesthetic, scientific, educational, spiritual and emotional benefits from observing elephants in the wild in their range lands, but find that those benefits are greatly diminished observing Ruth and Emily at the Zoo.

18. Plaintiff and the Friends were so concerned that they raised \$800 in 2015 to have "Ele-coats" handmade and shipped to the Zoo for Ruth and Emily to wear in the winter, when they are forced to stand on exhibit in snow, ice and freezing temperatures.

19. Plaintiff and the Friends were so concerned about the lack of medical care for Ruth that they raised approximately \$2,000 to bring a veterinarian with

40 years of elephant expertise to the Zoo in 2015. The Zoo refused to allow the veterinarian to examine Ruth and Emily or to visit the inside of the barn. Ruth continues to limp to this day without appropriate treatment.

20. The Plaintiff's injuries will be redressed through the relief sought.

21. The City of New Bedford, MA is the owner of the land that Buttonwood Park Zoo is situated on including the building and structures on the Asian elephant exhibit. The Zoo is a department in the City, and has been for the entire period that elephants were kept there. The staff that work with Ruth and Emily are city employees, including the veterinarian(s).

22. In 1968, the City purchased Emily from the Southwick Zoo in Mendon, MA. In 1986, the U.S. Department of Agriculture (U.S.D.A.) Animal and Plant Health Inspection Services (APHIS) Animal Care Division transferred ownership of Ruth to the City of New Bedford.

23. In 2013, the City's mayor realigned the Parks & Recreation Division and removed the Zoo from the Parks Commission's advisory jurisdiction. The Zoo is now an independent department and directly under the mayor's jurisdiction alone. On information and belief, the City is the only responsible party for the unlawful acts and violations of the ESA described here.

Jurisdiction and Venue

24. This Court has jurisdiction over this case pursuant to the ESA 16 U.S.C. §1540(g) and 28 U.S.C. § 1331 (federal question).

25. Venue in this Court is proper pursuant to 16 U.S.C. § 1540(g)(3)(A) because the violations occurred and continue to occur in Bristol County, in this District. Further, venue is proper under 28 U.S.C. §1391 because a substantial part of the events or omissions giving rise to the claims occurred within this District and Division, and all parties reside in this District and Division.

26. Plaintiff moves for a change of venue to the Worcester District, the next closest division. The City's mayor is a former federal prosecutor who worked in the U.S. District Courts, Boston Division for 15 years before becoming New Bedford's mayor in 2012. On information and belief, Plaintiff will not have a fair and impartial review of this matter without the change of venue.

Factual Background

27. Affected species. Asian elephants (*Elephas maximus*) have been listed as endangered species under the ESA since 1976.41 Fed. Reg. 24062, 24066 (June 14, 1976). The Asian elephant was listed on Appendix I to the Convention on the International Trade in Endangered Species of Wild Fauna and Flora ("CITES") at the time that the Convention took effect on July 1, 1975. See CITES, Appendix I.

28. Asian elephants naturally inhabit tropical and subtropical broadleaf forest and scrub forest. Elephants are physically vigorous and non-territorial, routinely covering 20 miles or more each day foraging, exploring, socializing, and seeking out resources in a core home range of hundreds of square miles.

29. Asian elephants are extremely sociable, forming groups of related females. Female Asian elephants are highly dependent upon relationships with other elephants, relationships that last a lifetime. That affinity for being with other elephants is a basic elephant need.

30. Elephants' feet have thick pads on the bottom that, in nature, protect their feet from the rough surface of the savannah or jungle floor. Elephants' feet, legs and joints have evolved for extensive walking. Female elephants move continuously for approximately 20 out of every 24 hours. Elephants' footpads and nails grow constantly, and in the wild are kept clean and healthy through regular walking. Experts identify foot disease and arthritis in captive Asian elephants as a cause of premature death. If an elephant can't stand, its own weight crushes its internal organs.

31. An elephant's trunk is used to breathe, drink, eat, to vocalize in communication, and for defense and offense. The trunk is used to smell, an important behavior evolved to help elephants find water during dry seasons, to

detect predators and to recognize friends. The trunk is also used to “dust” an important means of removing insects and preventing insect bites. Dusting also provides skin protection from the sun, as elephants have thin skin that can sunburn from overexposure. An elephant’s trunk is also used to pick up sticks to scratch itself and to “browse” or pull down branches in feeding. Its trunk is also used to assist itself when rising from a prone position and for balance when napping.

32. Behaviorally, an elephant’s trunk is used to show affection to other elephants, to help its young, and to lift other elephants that have difficulty standing.

33. Elephants use their tails to communicate, remove insects from areas they cannot reach with their trunk or through dusting, and for balance.

34. Elephants’ ears are used as thermoregulators, cooling the elephant through a complex vascular system. The ears are also used to communicate with other elephants and are often used in greeting.

35. There are only two elephants at the Zoo, known as Ruth and Emily. It is well documented that they do not get along.

36. RUTH. Ruth is a 58-year-old Asian elephant that was captured in 1961. She is the smaller but older of the two elephants, weighing about 6,400 lbs. She

may be the subspecies *Sumatran*, a critically-endangered species of fewer than 2500 worldwide. Ruth was taken to Benson's Wild Animal Park in New Hampshire, whose records indicate she was born in 1960, birth country unknown. At Benson's, Ruth was socialized with at least three other elephants: Liz and Queenie, who were close in age to Ruth, and an older female named Betsy.

37. In 1978, Ruth was sold to Brian Watson, who owned a menagerie in New Hampshire, and rented the animals out for parades, children's parties and commercials. In 1986, Watson was under investigation for several animal deaths at a farm he rented, and his smaller animals were confiscated by the U.S.D.A. Watson stole his animals back and put them and Ruth in a trailer, traveling with them to escape. He later abandoned the trailer at a Danvers, MA refuse transfer station.

38. The U.S.D.A. confiscated Ruth and transferred her ownership to the City on or about October 26, 1986.

39. For the past 32 years, Ruth suffered from chronic foot problems such as abscesses, cracked nails, and also from chronic arthritis in her feet and joints as a direct result of confinement in the barn for 16 hours each day, and for days at a time in the winter.

40. In the past, the Zoo used chains and shackles on Ruth's legs to restrain her overnight. The chaining of elephants is known to cause "stereotypic" behavior among captive elephants: repetitive meaningless motion such as swaying, head bobbing, stepping backwards and forwards or circling. Elephants in the wild do not exhibit stereotypy.

41. Ruth exhibits abnormal stereotypical behaviors indicative of distress on a daily or near-daily basis, including rocking back and forth and swinging her head and trunk, holding the end of her trunk in her mouth, false eating (throwing her trunk at her mouth without food), swinging her head in circular patterns with her mouth open, and even has been observed eating while rocking and swaying. Ruth has been observed exhibiting stereotypy in the elephant barn as well as the yard.

42. The City has claimed this is "anticipatory" behavior when she is expecting to be fed or given a treat. However, Ruth has been observed exhibiting stereotypy even while eating and after being fed and when there is nothing to anticipate.

43. Ruth's trunk is partially damaged. She cannot control the mid-section. The City claims that it happened prior to her arrival, but a photograph of her in the New Bedford Standard Times at the time of her arrival shows her lifting and

holding her trunk in a manner that she can no longer perform. Ruth's inability to use her trunk normally makes it difficult and possibly painful for her to eat, drink, gather browse, and engage in other natural behavioral activities such as scratching herself or using a stick to do so, or to defend herself.

44. Ruth has been attacked repeatedly several times a year by her conspecific, Emily, who outweighs her by about 2,000 lbs. She is unable to defend herself with her trunk, and there is nowhere to escape in the enclosure. There have been 36 attacks by Emily against Ruth recorded by the Zoo between 2005 to 2015, when the Zoo stopped recording them. These included Emily hitting, biting, headbutting, shoving and pushing Ruth down. Often these attacks left Ruth with injuries such as broken skin and lacerations. In 2006, Emily bit 6-1/2" off Ruth's tail.

45. There have been at least six more attacks in the past three years witnessed and recorded by Plaintiff. Since this suit was filed, Emily attacked Ruth twice on September 4, 2017 and September 6, 2017. Another headbutting occurred in August 1, 2018 and another in September 17, 2018.

46. In addition to the injuries Ruth suffered from her conspecific, Ruth has also been injured by the negligence of City staff. On January 2-3, 2014, Ruth suffered hypothermia and severe frostbite when the City failed to lock the barn

during a blizzard. It is unknown exactly how long she was outside, but it was believed to be at least for a 1-1/2 hour duration while temperatures were below zero, snow was falling in a "white-out" condition, and there were gale force winds.

47. Ruth lost skin on her trunk, vulva, and both ears and in particular, lost several inches of her left ear due to frostbite; developed thickening from frostbite scarring on both ears, and had to undergo surgery to remove 5" of her tail due to frostbite and another 5" of her tail due osteomyelitis, a painful bone infection.

48. The City was fined \$777 by the U.S.D.A. APHIS Animal Care Division for a direct violation of the Animal Welfare Act of 1966 et seq, for failing to shelter Ruth during the blizzard, and causing her injuries. (Exhibit 1.)

49. The Zoo's veterinarian of record resigned two weeks after Ruth was exposed to these extreme and dangerous conditions. On January 15, 2014, two weeks after Ruth was found in the blizzard, and despite Ruth's skin beginning to slough off her ears, tail and vulva, the City veterinarian resigned to take a position in Hawai'i. As a result, when Ruth developed secondary infections of staphylococcus and streptococcus, the order for antibiotics was not properly filled or administered for another two weeks. The infections became entrenched, and Ruth developed painful boils on the raw tissue of her ears, tail, vulva where her

skin had sloughed off; and on her legs, causing her grave harm. Secondary infections can be fatal to hypothermia patients.

The infections continued for almost a year.

50. When acquired by the City, records note Ruth is "afraid of hooks," or bullhooks. The bullhook is a long stick with a metal hook at the end, resembling a fire poker. However, the City's records indicate that they verbally and physically disciplined Ruth once each year from 2001 to 2012, and hit her with a bullhook repeatedly on her right front leg as part of the physical "discipline." (Exhibit 2)

51. In May 2014, Ruth began limping on her right front leg.

52. The City did not hire an on-site veterinarian until June 2014. The new veterinarian did not have previous professional employment at a zoo other than externships and failed to recognize the severity of Ruth's condition until May 2015, when she began administering the pain reliever banamine. That veterinarian then left in June 2015.

53. The Zoo was again without an on-site veterinarian, despite Ruth's ailments, until June 2016. The new veterinarian also did not have professional employment at a zoo other than externships. The City's veterinary technician left in January 2016. Due to the lack of expertise on the part of veterinary staff, Ruth's and Emily's medical and behavioral health issues went unnoticed, undiagnosed

and unreported.

54. In July 2016, Ruth suffered a gastrointestinal blockage, a severe and potentially fatal condition for elephants. Ruth was removed from the pain reliever that had helped alleviate the pain in her right front leg.

55. Ruth continues to limp, and was denied access to pain-relieving medication from October 2016 to August 2017, and again in September 2017. The City failed to take radiographs (x-rays) or thermal imaging that would help assess her medical condition. Other than sporadic laser therapy, Ruth received no medical treatment despite her obvious pain.

56. A USDA APHIS Animal Care inspection report dated November 2016 stated that the City veterinarian was treating Ruth with non-steroidal anti-inflammatories. Ruth received one injection of ketaprofen on October 20, 2016 and nothing further until August 2017, a month after a second complaint was filed with USDA. The records show ibuprofen was administered three and one-half times, and discontinued. Ruth continues to move slowly and to limp.

57. Despite her obvious pain and two complaints to the U.S.D.A., the current veterinarian did not prescribe any pain reliever. A consultant veterinarian put Ruth back on the pain reliever in August 2017, but she was not given the full dose and it was discontinued in September 2017.

58. On or about September 22, 2018, Ruth received an injection of ketapofen, an NSAID, in her ear vein. By October 7, 2017, City records show that her ear began to slough off. The City has stated it is due to vasculitis caused by an unknown agent, however, it is likely iatrogenic segmental gangrene. To date, two-thirds or more of her right ear has fallen off. (Exhibit 3).

59. On or about June 2018, Ruth became lame on her rear left leg. Again, no radiographs or thermography were performed to determine the cause. Veterinary clinical notes indicate Ruth had a shortened gait, but did not include a diagnosis or treatment plan.

60. Also over the summer of 2018, Ruth developed abscesses on her feet. It appears that her feet have not yet healed and she is still receiving treatment for them.

61. EMILY. Emily is a 54-year-old female Asian elephant who was captured in Thailand. She was acquired by the City at age four from Southwick Zoo in 1968. From 1968 to 1983, she was confined alone and was chained in a dirt yard for eight hours or more daily. The Zoo operated on a pellet system to feed the animals, and when pellets ran out, zoogoers threw paper, plastic and lit cigarettes at Emily to watch her eat, according to a local newspaper article at the time.

62. In 1983, the U.S.D.A. APHIS Animal Care Division ordered the City to

send her to Baton Rouge Zoo in Louisiana due to the City's lack of adequate shelter for her, and to construct a new barn for her before she could return.

63. Emily was “trained” by Allen Campbell, a notorious elephant trainer, at Baton Rouge Zoo. News reports indicate Emily was sent to Baton Rouge for “discipline training.” According to a prior zoo director, Campbell demonstrated that Emily had a “dominant” character by placing her in a small area with a larger African elephant with “two dozen zoo directors” watching. Emily charged the larger elephant. She was also attacked by a larger female Asian elephant, Savannah, while at Baton Rouge Zoo..

64. These experiences prevented Emily from learning social behaviors normal to Asian elephants. As a result, when she returned to the City in 1986, and Ruth arrived, Emily began attacking Ruth. She now attacks Ruth over food, space, and a favored tree. Her most recent recorded attacks occurred on September 4, 2017 with Zoo staff present and on September 6, 2017, and subsequent attacks in August 2018 and September 2018.

65. At 8,200 pounds, Emily outweighs Ruth by about 2,000 pounds, and is taller than Ruth. She is likely the subspecies *Indian* due to her larger size and pigmentation on her trunk and ears. As noted earlier, Emily has attacked Ruth about 36 times in the past 13 years. Emily has not voluntarily shown affiliative

behavior towards Ruth in the 32 years they have been housed together.

66. Emily suffers from chronic arthritis in her feet and joints, and also suffers from pressure sores on her face and haunches from being housed on concrete flooring for 26 years and hard substrate for the past six. Her toe nails have occasional cracks. Because of the elephant's foot structure, exposure to standing in their waste for long periods can lead to bone infections.

67. In the past year, Emily was treated for two abscesses on her feet.

68. Emily also suffered an injury to the tip of her trunk. The trunk injury was caused by the "chute" or elephant restraining device (See description of the City's elephant exhibit, *supra*). 69. Emily exhibits abnormal stereotypical behavior, too. In winter months, she backs into the empty water feature and rocks and swings her head and trunk for hours at a time. She has also been observed pacing in circles when not allowed into the barn and standing and swinging her head, trunk and body at the locked door of the barn.

70. Although the barn has been modified to provide an outside door to her stall, her stereotypy has not stopped. She has been observed standing in the doorway swinging her head and eating.

71. Emily sways and circles her head from side to side in anger, as on September 6, 2017 before attacked Ruth.

72. On December 13, 2018, Emily was observed shaking the gate to the exhibit with her trunk and then ramming it with her head. The exhibit yard did not appear to have any food available for her to eat. No City staff were present.

73. The City's Elephant Exhibit. The Exhibit is one of the smallest in the country at under 20,000 square feet of accessible area. Up until recently, the 32-year-old concrete barn had a 1200 s.f. stall and an 800 s.f. stall separated by post and cables; a tool shed area, and a protected viewing area. (Exhibit 4).

74. Renovations to the interior divided the two stalls into smaller stalls: one that measures 17 feet by 40 feet, and one that measures 20 feet by 40 feet, with a center walkway, and a connecting chute at one end called an "elephant restraining device" or ERD (Exhibit 5). All of the living space is now enclosed by tightly-spaced vertical steel bars.

75. The barn's concrete floor was partially removed and replaced with a sand and dirt floor in October 2012. The barn's dirt floor becomes compacted by the weight of two 4-ton elephants standing and walking on it. Additionally, it is hosed down, but it is unclear whether this removes the elephants' waste entirely. It was being replaced with new material approximately every month except in the winter. Since the bars were installed, the dirt was not removed for three months in Fall 2017 because the City did not have equipment that could fit

through the stall doors. Since then, the dirt is removed every three months or more and is not thoroughly removed, according to the City records.

76. The exterior yard is comprised of hard-packed sand/dirt and a 100,000-gallon concrete pool in the middle of the exhibit. There are two open air timber shade structures, one on each side of the pool. They do not provide protection from rain, sleet, or snow, nor much actual shade.

77. The pipe to the water feature doubles as a water supply when the elephants are gated off from the area near the barn. This exclusion is done during the summer and high volume visitor days for the benefit of the zoogoers. There is no other permanent water feature in the outer area to use for drinking or cooling.

78. There are no automatic drinking facilities in the barn. On off-hours, the elephants are watered by two large plastic tubs. There is a concrete water tank outside of the barn, but the elephants rarely use it. It freezes over in the winter.

79. The compacted sand/dirt throughout the exhibit and barn is harmful to Ruth and Emily's sensitive feet and cannot be kept clean. Both Ruth & Emily have had staphylococcus bacterial infections on their skin since the dirt floor was installed. Most recently, both elephants had painful abscesses on their feet over the summer of 2018.

80. Zoo staff do not clean the elephant barn on off hours. Therefore, Ruth

and Emily walk, stand, sleep and eat in their own waste for the 16 hour periods that the Zoo is closed.

81. Elephants defecate up to 150 pounds of dung and urinate up to 40 gallons per day each. As mentioned above, the City is unable to completely remove and replace the fetid soil in the barn now that the vertical bars are in place due to the lack of space for the equipment to turn around.

82. Ruth and Emily are approximately eight feet long. Keeping them in stalls that are 17 feet by 40 feet (Ruth's stall) and 20-feet by 40-feet (Emily's stall) they cannot escape their own waste.

83. The City has no equipment in the barn or the yard to lift either elephant if it goes "down." An elephant that can't stand dies under its own weight.

Alternatives: The Elephant Sanctuary

84. All zoos operate on an 8-hour day and leave animals alone overnight. Further, few zoos have the space, facilities, staff or experience to accept two older elephants with health and behavioral issues. Integration to a new herd or environment is exceptionally hard in zoos, where space is limited and there is a push to put elephants on exhibit before they have fully acclimated to their new environment and other elephants--a process that may take months.

85. There are two existing U.S. sanctuaries licensed to house elephants--the

Performing Animals Welfare Society (PAWS) Sanctuary in California and The Elephant Sanctuary (TES) in Hohenwald, TN. A third is being developed in Georgia and is scheduled to be ready by next spring.

86. TES is the closest sanctuary and is able to take in Ruth and Emily. It is licensed by U.S.D.A. APHIS Animal Care Division and certified by the Global Federation of Sanctuaries Association. It is certified by the trade organization, the Association of Zoos & Aquariums (AZA).

87. TES has the facilities, staff and space to accommodate Ruth and Emily. They have a director of veterinary care, an associate veterinarian, registered veterinary technicians, a director of elephant husbandry, an elephant care manager, and 15 caregivers for their 10 elephants that reside on site. Two caregivers stay overnight. Unlike the zoo, this staff is solely dedicated to the care of the elephants.

88. The 15-year-old Asian elephant barn is 9,000 s.f. It has a concrete floor, individual radiant heaters in each stall, multiple access points to the outside, and automatic waterers. The barn is large and airy with good lighting throughout. It also has a hoist that runs down the middle of the building accessible to stalls on each side and which has a capacity to lift 12,000 lbs.

89. The outdoor facilities include smaller fenced yards of five to seven acres

for new elephants, and 2,000 acres overall for the Asian herd. There is a warming/cooling shed that also allows for medical examinations in the field. There are also digital cameras throughout the habitat so caretakers can locate elephants. TES has a large backhoe, capable of lifting an elephant that cannot stand out in the exhibit. A new medical facility is being constructed out in the habitat to take care of elephants in the field.

90. TES has taken in over 27 elephants in the past 22 years of operation. All came from zoos and circuses and all had health and behavioral issues. TES currently has two Asian elephants resident: 70-year-old Shirley and 53-year-old Tarra. Three African elephants are housed on 400 acres elsewhere at TES and have a separate barn. Five quarantined Asian elephants that were exposed to human tuberculosis prior to coming to TES, are housed on 300 acres on the property with separate barn and medical facilities. The quarantined elephants would not interact with Ruth and Emily.

91. The Asian habitat has ponds, a 14-acre lake, forests, and grasslands/meadows. It is in a remote location and closed to the public. However, digital videocameras are connected to the TES website for the public to view and enjoy the sight of elephants swimming in the lake and streams, sleeping and grazing on a sunny hill, browsing on tree branches and otherwise engaging in

natural behaviors at www.elephants.com.

Statutory and Regulatory Framework

92. In enacting the ESA, Congress declared that species in danger of extinction are of “esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people.” 16 U.S.C. § 1531(a)(3). Accordingly, the purpose of the Act is to provide for the conservation of such endangered species. *Id.* § 1531(b).

93. An “endangered species” is “any species which is in danger of extinction.” *Id.* § 1532(6).

94. Section 9 of the ESA prohibits the “taking” of any endangered species, *Id.* § 1538(a)(1)(B), and also makes it unlawful “to possess” any endangered species that has been unlawfully “taken.” *Id.* § 1538(a)(1)(D).

95. The term “take” is broadly defined by the Act as “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.” *Id.* § 1532(19). The term “harm” includes any act that “kills or injures” an endangered animal. 50 C.F.R. § 17.3. Subject to certain limited exceptions for captive animals, the term “harass” includes an “intentional or negligent act or omission which creates the likelihood of injury [to an endangered animal] 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.” Id.

96. Section 10 of the ESA authorizes the federal Fish and Wildlife Service to issue a permit for any act that is otherwise prohibited by Section 9, but only if such act is “for scientific purposes or to enhance the propagation or survival of the affected species.” 16 U.S.C. § 1539(a)(1)(A). On information and belief, the City does not currently have a permit under Section 10 of the ESA to take or possess Ruth and Emily in the ways described here.

Plaintiffs re-allege and incorporate by reference the foregoing paragraphs as if fully set forth herein.

Plaintiff is entitled to Injunctive Relief

97. Plaintiff will suffer irreparable injury if the City does not transfer Ruth and Emily to The Elephant Sanctuary in Tennessee. Plaintiff suffers and will continue to suffer actual injuries as the Exhibit causes substantial aesthetic, emotional, spiritual, and recreational harm to Plaintiff, and physical, psychological, and emotional harm to Ruth and Emily. This harm is irreparable because it cannot be measured, as Plaintiff cannot be adequately compensated for the losses she is currently suffering.

98. The legal remedy is merely illusory in that simply declaring that the

City's treatment of Ruth and Emily violates Section 9 of the ESA does not, in and of itself, remedy the injuries Plaintiff has suffered and continues to suffer.

99. There is a substantial likelihood that Plaintiff will succeed on the merits of this case. For the numerous reasons discussed above, the City's treatment of Ruth and Emily violates Section 9 of the ESA and must be prohibited through a declaratory judgment and injunctive relief.

100. The injuries Plaintiff faces significantly outweighs any injury that the City may sustain as a result of the injunctive relief. The City has repeatedly claimed that there will be no more elephants at the Zoo after Ruth and Emily die and their exhibit will be replaced by rhinoceroses. In fact, the City's Zoo Master Plan presented in August 2016 shows just that. During recent barn renovations, the bars were built into the floor to prevent rhinoceroses from digging under them.

101. Therefore, retaining Ruth and Emily while they suffer daily serves no real purpose. The physical, psychological, and emotional harm to Plaintiff, Ruth and Emily overshadow the City's self-interest in keeping them at the Zoo until the rhinoceroses arrive.

102. The beneficial effect of injunctive relief on non-parties, such as the 2,500 New Bedford residents who signed the petition and the 75,000+ people

worldwide who signed a similar petition online, will likewise substantially outweigh any injury to the City.

103. The injunctive relief Plaintiff seeks will not adversely affect public policy or the public interest. Rather, enjoining the City from continuing to violate the ESA with respect to its possession and treatment of Ruth and Emily will cause a desirable result. Supporting the ESA through prohibiting the City from treating two members of an endangered species as disposable toys for people to gawk at despite their obvious agony and suffering will positively affect public policy and public interest in protecting endangered animals and promoting the “esthetic, ecological, educational, historical, recreational, and scientific value” that the ESA acknowledges such animals provide to the American people.

Count 1. The City is harming and harassing Ruth and Emily in violation of the ESA by failing to provide adequate shelter.

104. The City harasses Ruth and Emily by confining them in a facility that significantly disrupts their normal behavioral patterns, including sheltering. 50 C.F.R. S 17.3. Ruth and Emily have been routinely kept or locked outside in inclement weather without access to shelter, and this causes them discomfort.

105. The City harms Ruth and Emily by possessing and exhibiting them in a cold, snowy climate causing long periods of confinement, exhibiting them in the

snow and ice, often without adequate shelter from inclement weather, which cause Ruth and Emily to suffer from, among other harms, chronic joint and ankle osteoarthritis, foot abscesses, and other skin and foot conditions. Ruth's hypothermia, frostbite and loss of skin, ear, and tail tissue was a direct result of this harm and a direct violation of the Animal Welfare Act for failing to protect Ruth from the effects of a blizzard in 2014.

106. This harassment is not a generally accepted husbandry practice that meets or exceeds minimum standards for facilities and care under the Animal Welfare Act. Animal Welfare Act regulations. See 9 CFR S 3.127 (Facilities, outdoor...(b) Shelter from inclement weather. Natural or artificial shelter appropriate to the local climatic conditions for the species concerned shall be provided for all animals kept outdoors to afford them protection and to prevent discomfort to such animals.”

Count II. The City is harming and harassing Ruth and Emily in violation of the ESA by failing to provide adequate space.

107. The City harms and harasses Ruth and Emily by confining them in a small exhibit with inappropriately hard substrates that disrupt their normal behavioral patterns.

108. Ruth and Emily are confined in the 2,000 s.f. area of the concrete

elephant barn stalls for a minimum of 16 hours per day.

109. Ruth and Emily are unable to avoid contact with their own urine and feces when confined in the barn, leading to “urine scald,” a painful skin condition, and abscesses and infections in their feet.

110. Ruth and Emily must also lie and sleep in their own waste, something that is unnatural to their species.

111. Ruth and Emily are forced to “dust” themselves, a behavioral trait necessary to their well-being, with feces- and urine-contaminated soil while confined in the barn. This use of contaminated material causing skin infections and psychological harm is a direct result of the City’s harm and harassment.

112. Ruth and Emily display neurotic repetitive behaviors--outward signs of trauma, stress and crushing boredom--as a result of the inadequate facility that the City confines them in. The stereotypic behaviors exhibited by both elephants as described above are a result of the City’s harm and harassment.

113. Emily’s aggression towards Ruth is a result of the boredom and frustration as documented in videotapes taken by the City in 2007. This behavior is a direct result of the City’s harm and harassment.

114. Ruth’s injuries received from exposure to subzero temperatures, galeforce winds, sleet and snow on the night and early morning hours of January

2-3, 2014 described above, are a result of the City's harm and harassment.

115. The harassment described above is not a generally accepted husbandry practice that meets or exceeds minimum standards for facilities and care under the Animal Welfare Act. See 9 CFR S 3.125 (the facility in which the City keeps Ruth and Emily be constructed of “such material and of such strength as appropriate for the animals involved. The indoor and outdoor housing facilities shall be structurally sound and shall be maintained in good repair to protect the animals from injury and *to contain the animals.*”) And see 9 CFR S 3.128 (“Enclosures shall be constructed and maintained so as to provide sufficient space to allow each animal to make normal postural and social adjustments with adequate freedom of movement. *Inadequate space may be indicated by evidence of malnutrition, poor condition, debility, stress, or abnormal behavior patterns.*”

Emphasis added)

Count III: The City is harming and harassing Ruth and Emily in violation of the ESA by failing to provide adequate social opportunities.

116. The City harms and harasses Ruth and Emily by failing to provide them with opportunities to socialize with other elephants. Such socialization is an essential behavior pattern in and of itself, and lack of socialization opportunities for Ruth and Emily significantly impairs other essential behavioral patterns.

Emily's life at the Zoo--first 14 years of social isolation, then the past 30 years with only one other elephant, Ruth, who is of a different subspecies and whom she has displayed repeated aggression towards, has deprived her of a normal social life, the center of an elephant's behavioral existence.

117. Although Ruth was socialized when she was young, after spending seven years alone with an owner who then abandoned her, she was put in with an elephant who is not of the same subspecies who constantly attacked her for the past 30 years, and attacked her 36 times just in the past 13 years. This dysfunctional pairing deprived her of a normal social life.

118. This harassment is not a generally accepted animal husbandry practice. The City sought and received a variance from the Association of Zoos and Aquariums standards for appropriate elephant social groups due to Ruth's health conditions and Emily's aggression. However, the Animal Welfare Act does not allow for "variances." See 9 CFR 3.128.

Count IV: The City is harming and harassing Ruth and Emily in violation of the ESA by failing to prevent Ruth from being attacked.

119. The City harms and harasses Ruth by failing to remove her from an unsafe condition. Despite dozens of attacks by Emily against Ruth recorded by zoo staff in the past dozen years, the City kept Emily in with Ruth while she was

recuperating from surgical amputation of 10" of her tail between November 2014 through April 2015. Zoo staff witnessed Emily attack Ruth just five days after her tail was amputated in 2014, and knew that it caused her sutures to be loosened. Emily continued to go after Ruth's tail for the next six months, as witnessed by the City veterinarian, who consulted with the head elephant keeper about ways to keep the wound clean in light of Emily's attacks. Neither the City veterinarian nor Zoo staff prevented the additional attacks.

120. An "independent panel review" of zoo industry consultants commissioned by the City in August 2015 did not address whether Emily's attacks and Ruth's injuries met the AWA Part III Subpart F Section 1.133, Separation. In fact, the panel did not use any standard to make its findings.

121. Emily continues to display aggression towards Ruth, and Ruth continues to experience discomfort and physical harm from it. In August and in November 2016, Emily headbutt Ruth causing her to bellow. Again as recently as September 4, 2017 Emily pushed and headbutt Ruth with Zoo staff present and again on September 6, 2017, Emily pushed Ruth and bit her haunches. Again in August 2018 and as recent as September 2018, Emily has attacked Ruth.

122. The harassment and harm described above is not a generally accepted animal husbandry practice that meets or exceeds Animal Welfare Act standards.

See Animal Welfare Act, 9 CFR S 3.133 (“Separation. Animals housed in the same enclosure must be compatible. Animals shall not be housed near animals that interfere with their health or cause them discomfort.”)

Count V: The City is harming and harassing Ruth and Emily in violation of the ESA by inadequate veterinary care.

123. The City harms and harasses Ruth and Emily by failing to provide adequate veterinary care. In the past four years, the City has had no on-site veterinarian for 18 months.

124. In the past five years, the City Zoo has had three veterinarians, none of whom were elephant experts. One left in the middle of Ruth's medical crisis. The second left after failing to recommend separation for the injuries Ruth suffered by Emily's attacks and failing to recognize Ruth's front leg injury, diagnose it or provide NSAIDS for almost a year. The third nearly starved Ruth in 2016, failing to recognize a 680-lb weight loss as a serious danger to an elephant that was just recuperating from a gastro-intestinal blockage. The veterinarian then took Ruth off of pain relievers for her limp and failed to recognize that Ruth was limping for almost two years.

125. The harassment and harm described above is not a generally accepted animal husbandry practice that meets or exceeds Animal Welfare Act standards.

See Animal Welfare Act, 9 CFR S 2.40, Attending veterinarian care.

Count VI: The City is harming and harassing Ruth and Emily in violation of the ESA caused by improper feeding and lack of enrichment.

126. The City harms and harasses Ruth and Emily by feeding them almost exclusively pellets and dry hay and failing to provide them with adequate amounts of fresh or “wet” browse or similar enrichment, and by failing to have automatic watering facilities inside the barn for the 16 hour periods when they are confined.

127. The City's improper feeding and failure to provide related enrichment and water significantly impairs Ruth's and Emily's essential behaviors, including feeding and hydration, and negatively impacts their health. As a result of improper feeding, Ruth and Emily became overweight and then were required to go on a diet, forcing them to go through periodic food deprivation and stomach disorders.

128. The food deprivation triggers Emily's aggression, and on a near-daily basis Ruth is shoved, shouldered or intimidated away from her food. Oftentimes Ruth engages in stereotypic behaviors when this occurs.

129. Emily also engages in stereotypy from lack of food, in addition to aggression. In December 2018, Emily was recorded first pushing on the gate to the

exhibit and then ramming it with her head. There was no food visible on the exhibit at the time.

130. The harassment described above is not a generally accepted animal husbandry practice that meets or exceeds Animal Welfare Act standards. See 9 C.F.R. 3.129(a) (“The food shall be wholesome, palatable, and free from contamination and of sufficient quantity and nutritive value to maintain all animals in good health. The diet shall be prepared with consideration for the age, species, condition, size and type of the animal.”)

COUNT VII: Declaratory Judgment

131. Plaintiff re-alleges and incorporates by reference the foregoing paragraphs as if fully set forth herein.

132. Plaintiff brings this suit for declaratory relief pursuant to the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202. Declaratory relief is available because this is a civil case of actual controversy for which this Court can declare rights and legal relations of the interested parties.

133. An actual controversy exists between Plaintiff and the Defendant City regarding whether the City's treatment of Ruth and Emily violates Section 9 of the Endangered Species Act.

134. Plaintiffs seek a declaration that the City's current treatment of Ruth

and Emily violates Section 9 of the Endangered Species Act.

Conditions Precedent

135. All conditions precedent to Plaintiffs' claims for relief have been performed or have occurred.

Demand for Jury Trial

136. Plaintiff, pursuant to Rule 38 of the Federal Rules of Civil Procedure, requests a trial by jury of any issues so triable.

Prayer for Relief

The conditions under which the City maintains Ruth and Emily as described in detail above, take Ruth and Emily in violation of Section 9 of the ESA, 16 U.S.C. §1538(a)(1)(B). These unlawful activities injure Plaintiff.

For the same reasons, the City is currently in possession of two endangered Asian elephants who have been unlawfully taken, in violation of Section 9 of the ESA, 16 U.S.C. § 1538(a)(1)(D).

These unlawful activities also injure Plaintiff as described above.

WHEREFORE, Plaintiff requests that this Court enter a judgment:

1. Declaring that the City's treatment of Ruth and Emily violates Section 9 of the ESA;

2. Enjoining the City from euthanizing either elephant;

3. Enjoining the City from continuing to violate the ESA with respect to its treatment of Ruth and Emily;
4. Enjoining the City from continuing to possess Ruth and Emily in violation of the ESA;
5. Enjoining the City from transferring ownership to the Buttonwood Park Zoological Society or other private or public Zoo;
6. Allowing Plaintiff's veterinarian to inspect Ruth and Emily to assess their health;
7. Awarding custody and ownership of Ruth and Emily to Plaintiff and/or her assigns;
8. Awarding Plaintiff transport costs estimated at \$100,000;
9. Awarding Plaintiff custody of Ruth's and Emily's remains should either or both die at the City Zoo;
10. Awarding Plaintiff their reasonable fees and costs in this action pursuant to 16 U.S.C. §1540; and
11. Granting Plaintiff such other and further relief as may be just and proper.

Respectfully submitted,

/s/Joyce Rowley, Pro se
Po Box 50251
New Bedford, MA 02745

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS
BOSTON DIVISION

JOYCE ROWLEY,)	
Plaintiff, pro se)	
	)	Case No. 1:17-cv-11809-WGY
v.)	
)	
CITY OF NEW BEDFORD,)	
MASSACHUSETTS)	
Defendant)	

PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

Plaintiff Joyce Rowley respectfully requests that the Honorable Court grant a preliminary injunction on behalf of Asian elephant Ruth as an emergency action allowed pursuant to Rule 65 of the Federal Rules of Procedure and as described in the attached Memorandum of Support.

Plaintiff seeks a preliminary injunction to:

1. Prohibit the Defendant from euthanizing Ruth;
2. Ordering the City to allow an independent veterinarian familiar with transporting elephants to assess Ruth's health and make recommendations on her medications, nutritional needs, and living conditions;
3. Ordering the Defendant to make the recommended changes to Ruth's diet, medications and living conditions to ready her for transport;
4. Ordering Asian elephant Ruth to be relocated to The Elephant Sanctuary or an alternative warm climate sanctuary;
5. Ordering the Defendant to make such changes as may be necessary to accommodate

the transport team;

6. Ordering the Defendant to assist the transport team and prohibit the Defendant from hampering the transport effort by delay, obstruction, or in any other way;
7. Ordering the Defendant to pay for transport costs of approximately \$100,000.00
8. Ordering these measures be taken immediately to remove Ruth from Buttonwood Park Zoo.

Respectfully submitted,

/s/Joyce Rowley
Joyce Rowley, Plaintiff, pro se
PO Box 50251
New Bedford, MA 02745
508-542-8297

**MEMORANDUM IN SUPPORT OF THE
THIRD PRELIMINARY INJUNCTION**

This third motion for a preliminary injunction is sought under Rule 65 of the Federal Rules of Civil Procedure. Two previous motions for a preliminary injunction were deemed moot (Dkt. #30, and Dkt. #48).

Plaintiff brought an Endangered Species Act complaint to the Court on September 21, 2017. On December 12, 2017, Plaintiff filed a preliminary injunction to allow Asian elephant Ruth to be examined and removed from Buttonwood Park Zoo (Dkt. #16). On February 15, 2018, Plaintiff Joyce Rowley was substituted for Friends of Ruth & Emily, Inc. (Dkt. #23).

The merits of the case are likely to succeed because additional and continuous harm has occurred to Asian elephant Ruth since the suit was filed which substantiates the claims made in the complaint.

This third motion for a preliminary injunction meets Rule 65 requirements for a preliminary injunction as follows.

1. Without receiving the preliminary injunction, irreparable harm has and will continue to occur to Ruth, one of the two endangered species of Asian elephants held captive by Defendant. Plaintiff has suffered and will suffer irreparable harm from Ruth's continued injury and likely death at the zoo.

2. The threat is imminent. If this were a dog kept under these conditions, there would be no doubt that the dog was in imminent danger and that there was sufficient evidence to remove the dog. The Defendant's Animal Control Officer routinely removes animals if they are found to be kept living in their own waste.

3. Old injuries are not healing well and Ruth has incurred new injuries. The records, as

noted previously and as described in the Declaration of Julia Allen, D.V.M., Ph.D., show that Ruth's injury had not healed after five months of various treatments and continues to require treatment as her ear tissue sloughs off.¹ It appears Ruth has lost over 70% of her ear to this injury.²

5. There is additional direct evidence that Ruth's living conditions caused her to get staphylococcus and streptococcus infections on the painfully raw tissue of her ear as the skin sloughed off (Dkt. 17-2 through 17-5).

6. On April 6, 2018, Ruth suffered a more recent injury on her trunk of unknown origin that gouged out a 4" by 2.5" chunk of her trunk.³

7. On May 28, 2018, Ruth suffered a trauma or injury to her rear left leg which now requires treatment.⁴

8. On June 13, 2018, Ruth was observed with a large 3 in. diameter laceration/lesion on her right cheek, of unknown origin.⁵

9. Ruth is not receiving adequate care throughout the day to alleviate her suffering due to her inability to regulate her temperature. As witnessed on many occasions, in 80°F weather on June 14, 2018, Ruth did not have access to adequate shade, mud, or water to cool herself.

10. On that day, Ruth exhibited stereotype behavior for over an hour, swaying and

1. Ex. 1, Declaration of Julia Allen, DVM, PhD.

2. Ex. 2, Photo of Ruth's ear dated May 31, 2010 and dated December 29, 2018.

3. Ex. 3, Clinical records for Ruth, secured through MGL 66, Public Records Access Act from the City of New Bedford, MA, dated April 1, 2018 through April 30, 2018.

4. Ex. 4, Clinical records for Ruth, secured through MGL 66, Public Records Access Act from the City of New Bedford, MA, dated May 1, 2018 through May 31, 2018.

5. Ibid., Ex. 2, Photo of Ruth's face dated June 13, 2018.

rocking her head back and forth while standing facing the barn door and then standing near the door.⁶

11. Ruth's untreated lameness makes her unable to access the concrete water feature. The barn doors were closed as she must be on exhibit to show people what an elephant looks like. Standing in the barn day and night will only increase her lameness and pain.

12. Elephants can die from overheating, and are subject to heat stroke and other heat illnesses as are dogs and humans.

13. Although Ruth is surviving yet more calamities due to her captivity at Buttonwood Park Zoo, each new injury increases the risk of further life-threatening injuries.

14. There is no harm to the Defendant to have Asian elephant Ruth examined or removed. The Defendant has already claimed that it will not replace her if she dies at the zoo.

15. The grant of the injunction will serve the public interest in protecting this captive zoo elephant, and upholding the Endangered Species Act. An online petition that over 300,000 people have signed asking that both elephants be removed from the zoo.

(www.thepetitionsite.com/101/458/190/new-bedford-send-zoos-incompatible-elephants-ruth-and-emily-to-a-sanctuary/). Over 70 people donated to a legal fund for the lawsuit to go forward and for Asian elephants Ruth and Emily to be removed from the zoo and relocated to The Elephant Sanctuary (www.gofundme.com/R-ELegalFund). Previously, over 2,500 New Bedford residents signed a petition for both Buttonwood Park Zoo elephants to be removed and sent to The Elephant Sanctuary.

16. Should Ruth die at the zoo, no public interest would be served.

6. Ex. 6, Videos taken at 2:49 p.m. and 3:50 p.m., June 14, 2018, at <https://youtu.be/lbvSk-K4e4w> and <https://youtu.be/vbJqbi4q6uc>, respectively.

I. FACTUAL BACKGROUND

17. Two days after the complaint was filed on September 21, 2017, Asian elephant Ruth contracted vasculitis on her right ear. This painful condition has resulted in sloughing of the skin on her ear and destroyed parts of her ear tissue. It requires painful "debridement" and physical cutting of the skin with tissue scissors and a scalpel to remove decaying tissue. This injury was described in full in the original preliminary injunction (Dkt. 16, 17).

18. Briefly, on September 23, 2017, Defendant's elephant staff injected Ketapofen as prescribed in Ruth's right ear vein. According to the record, only 50% of the drug was used. On October 3, 2017, clinical records for Ruth indicated that her right ear had a 2-inch infected lesion.

19. By October 30, 2017, the Defendant's veterinarian made a diagnosis of vasculitis.

20. Elephant ears are thermoregulators and control the elephant's temperature through a complex vascular system. As noted in Dr. Allen's declaration, Ruth will have difficulty in the future controlling her temperature.

21. Ruth is at constant risk of additional injuries due to the unsanitary conditions in which she is kept.

22. Elephants "dust" frequently by throwing dirt on themselves to protect themselves from insects.

23. The barn floor is dirt, (Cplt 1:59) leading to staphylococcus and streptococcus skin infections on Ruth in 2014, and staphylococcus skin infections on Emily in 2016. Both elephants had staphylococcal skin infections in 2018.

24. Ruth must spend a minimum of 16 hours standing, walking, sleeping and eating in her own waste (Cplt. 1:64). She cannot escape it.

25. Due to inclement weather, and shorter zoo hours of operation, her confinement increases to 18-20 hours after November 1st. As temperatures drop to freezing and snow prevents the elephants from exiting the barn or being allowed outside, Ruth spends less than 4 hours per day outside. Between December 26, 2017 and January 7, 2018, Ruth spent 13 days continuously inside the barn as temperatures dropped to -11°F at times during the day. As this is written, temperatures are in the single digits, with wind chill factors of -11°F.

26. Ruth's new stall is 17 feet by 40 feet for a total of 680 s.f. Ruth, a 10-foot long animal, cannot avoid contaminating her injured and infected ear, her cracked feet and toenails, and skin abrasions such as pressure sores, with waste-laden dirt in the barn.

27. Regardless of causation, Ruth's painful and dangerous ear condition is a direct result of her captivity at Defendant's Buttonwood Park Zoo. After eight months and multiple treatments, Ruth's ear is not better. Because of her injury, she will have difficulty maintaining her temperature in the cold and cooling in hot weather.

28. Ruth was subjected to extreme heat without relief in the summer of 2018. The Defendant did not install a permanent shower/cooling system adapted to Ruth's needs. However, at the same time, Defendant constructed a children's play area with shower for cooling.

29. Ruth's lameness and/or muscle loss has increased in the past six months. Ruth is now receiving four times the recommended elephant dosage of phenylbutazone, a non-steroidal anti-inflammatory medication used on horses to mask lameness, but banned for human consumption.⁷ As this medication is untested in elephants⁸, it is unclear what the near- and long-term side

7. Wikipedia, Phenylbutazone, Legal status, Uses, In Humans: "FDA Order Prohibits Extralabel Use of Phenylbutazone in Certain Dairy Cattle." Food and Drug Administration. 28 February 2003.

8. Mikota, S., DVM and Plumb, Donald C., Pharm.D., Elephant Formulary, Phenybutazone. www.elephantcare.org, 2003-2017.

effects may be. In humans, side effects include aplastic anemia, hepatic toxicity and gastrointestinal ulcers.⁹ The clinical notes offer no explanation for the use of phenylbutazone at such high dosages.

30. Ruth will not be subjected to unsanitary and dangerous environmental conditions at The Elephant Sanctuary. The Sanctuary has specialized areas in its elephant barns to treat sick elephants. The barn floors are concrete, and can be kept sanitary through daily powerwashing.

31. Although concrete floors can cause harm to elephants' feet in the long term, the climate is such that the elephants can be outside on natural ground for much of the day, and throughout most of the winter. When it does snow in Tennessee, it rarely lasts more than a day.

32. Because the Sanctuary is closed to the public and they have 24-hour staffing, the elephants do not need to be put inside of the barn in the afternoon. Instead, they can remain outside at night if they so choose, weather permitting.

33. In hot weather, elephants can maintain mobility by accessing the barn during the day and accessing the 2,000-acre habitat at night. There are multiple opportunities for cooling during hot weather--ponds, streams, lakes, and deep forest shade.

34. For these reasons, relocation to The Elephant Sanctuary would be more likely to result in healing Ruth's vasculitis and preventing secondary infections, and would address environmental issues relative to temperature control, monitoring, and veterinary care.

35. Left at the defendant's zoo, Ruth's condition will likely worsen and likely lead to premature euthanasia.

9. MacKay RJ, French TW, Nguyen HT, Mayhew IG. Effects of large doses of phenylbutazone administration in horse. *Am J Vet Res* 1983;44:774-780.

II. RELIEF

Plaintiff seeks a preliminary injunction against the Defendant's continued captivity of Ruth, and other relief as set forth in the motion for this injunction.

Respectfully submitted,

/s/Joyce Rowley
Joyce Rowley, pro se
PO Box 50251
New Bedford, MA 02745

(508)542-8297

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS
BOSTON DIVISION

)	
JOYCE ROWLEY, pro se)	
Plaintiff,)	
	)	Civil Action No.
v.	)	1:17-cv-11809-WGY
)	
CITY OF NEW BEDFORD,)	
MASSACHUSETTS)	
Defendant)	

DECLARATION OF JULIA N. ALLEN

I, Julia N. Allen, PhD, DVM hereby declare:

1. I am a licensed veterinarian in Washington and Oregon. I am also a Reserve Veterinary Medical Officer, Reserve Veterinary Medical Corps (WSDA), and have deployed as an Emergency Veterinary Medical Officer, National Animal Health Emergency Response Corps (USDA, APHIS.)
2. I have the following degrees: BS in Wildlife Biology, PhD in Zoology (Terrestrial Ecology, Animal Behavior), and Doctor of Veterinary Medicine.
3. I have observed African elephants in the wild, including their behavior and mobility.
4. As a licensed veterinarian, I am qualified to review and comprehend Veterinary Medical Records, and to evaluate the quality and completeness of veterinary record keeping.
5. I received and reviewed official Medical Records for Asian elephant RUTH (ID #5) for the time period January 13, 2015 through February 21, 2018. It is my understanding that these records were provided by the City of New Bedford, MA Buttonwood Zoo through a

Freedom of Information Act request on the part of Joyce Rowley. My review is based on the Medical Records provided to me for this time period.

6. The Medical Records I received were inconsistent, incomplete, and had numerous errors.
 - a) Laboratory testing would be done, but no results or assessment or interpretation of the results would be entered in the Medical Record.
 - b) Drugs would be administered without any explanation, prescriptions for drugs were not always entered in the Medical Record, drugs and their administration were commonly not tracked, gaps were present between refills of medications that were meant to be on-going, and medications continued to be administered beyond their prescribed time.
 - c) Medical issues would be identified, but there would be no follow-up entered in the Medical Record on assessment, treatment, progress, resolution, conclusion, etc.
 - d) Days or weeks would go by with no entries in the Medical Record, even though RUTH would have on-going medical concerns.
 - e) Entries in the Medical Record about an ongoing treatment or location of a lesion would sometimes change from one day to another (e.g. from "right" leg to "left" leg.)
7. In January 2014, RUTH suffered from life-threatening hypothermia and frostbite due to negligence on the part of Zoo Staff. She almost died. She suffered damage to her ears, her vulva (which was still not healed over a year later), and her distal tail (which ultimately had to be amputated 10 months later and was still not healed over a year later.)
8. In July 2016, RUTH was diagnosed with a gastro-intestinal obstruction. She almost died again. It was 5 days before the veterinarian actually examined her, by which time she

had become “critical” with a “guarded prognosis” for survival. It was another 7 days before RUTH started to show signs of improvement.

9. In October 2017, RUTH was diagnosed with vasculitis affecting her right ear. The skin on her ear has continued to peel away with draining tracts, pockets of pus, and areas of dead tissue persisting after months of treatment which was still on-going as of February 21, 2018. Unfortunately her ears will forever be cold-intolerant and have circulation problems as these issues are the long-term sequelae of the frostbite she endured in 2014.
10. RUTH suffers from chronic degenerative joint disease, chronic osteoarthritis, and foot health issues. For extended periods of time, she received treatment in the form of laser therapy on her right elbow then right carpus, and daily anti-inflammatory medication, all of which reportedly were beneficial and improved her mobility. But then those treatments were each discontinued without explanation (after 19, 15 & 13 months respectively) though the timing coincided with the onset of other (unrelated) medical crises. Recent video footage published by Friends of Ruth and Emily shows RUTH walking slowly in a stiff and stilted manner, especially with her right front leg which she favors (<https://www.youtube.com/watch?v=MACA51YvhFI>.) The Medical Record states her gait is “normal.” This way of walking may now be her day-to-day manner of getting around, but it is NOT the normal gait of an elephant that has the ability to readily move about - elephants walk this way when they are in pain. If there was no pain then there would be no noticeable signs of stiffness or limping, and RUTH would swing and bend her legs freely.
11. RUTH has ongoing medical issues with her ear, and also with her painful joint disease, arthritis, and foot issues, all of which are aggravated by where she lives (small space,

hard surfaces, limited exercise, cold climate.) These well documented medical conditions make it all the more beneficial for RUTH to live in a warm climate with a large natural habitat, at a facility designed specifically for the care of elderly elephants, where she can receive continuous specialized care and monitoring, individualized for her specific needs, with veterinary services available 24/7.

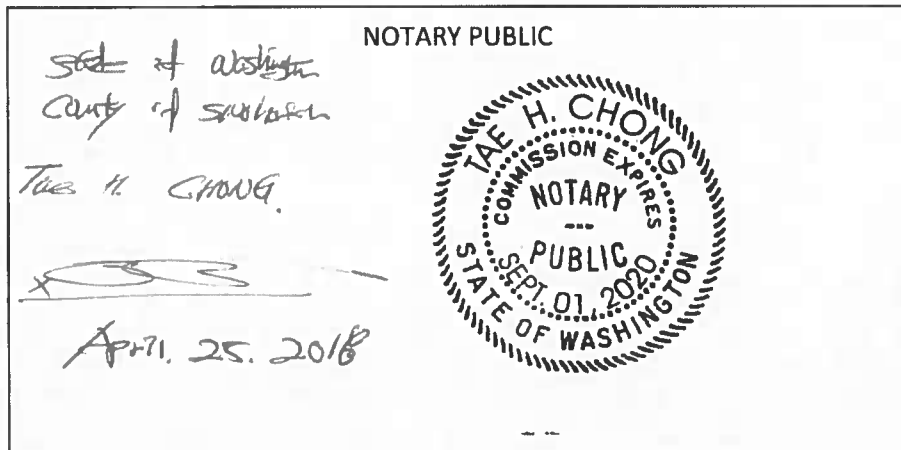
This Affidavit is a complete representation of my testimony to the Court on this matter.

Signed:

Date:

4/25/18

Julia N. Allen, PhD, DVM



PHOTOGRAPHS OF RUTH'S RIGHT EAR



Ruth's right ear, May 31, 2011



Ruth's right ear, June 13, 2018



Ruth's right ear, December 29, 2018

Animal Type	GAN	Preferred ID	Taxonomy	Sex	Birth Date
Individual	MIG12-29545888	5	Elephas maximus/Asian elephant	Female	Oct 29, 1958

May 01, 2018

Clinical note

Date	Time	Note Author
May 01, 2018	00:00	Whitney Greene
Significant	Private	Active Problems
No	No	~

Subjective

Animal presented for a recheck exam and debridement

Objective

Behaviorally laterally recumbent (was standing normally before asked by keepers to lie down). BAR and interactive with keepers
 BCS = 6/9
 Oral: Mucus membranes pink and moist, CRT <3 seconds, appears hydrated. Teeth not visualized.
 EENT: bright and clear bilaterally with no discharge. Right ear has new epithelial growth along the entire line of demarcation along with some white drying skin that peels away on rubbing, no signs of discomfort on palpation of entire region. Next to the re-epithelialization is healthy pink granulation tissue, with multifocal areas of re-pigmentation more cranially on the ear where full epithelialization has completed. There is no swelling, hemorrhage, or other discharge associated with any area of the healing tissue. The most dorsal and ventral aspects of necrotic tissue are debrided and completed excised using a scalpel blade. The necrotic tissue along medial portion of healing margin is excised on both anterior and posterior aspect. A small amount of hemorrhage was associated with the removal of tissue along the most ventral aspect but ceased after gauze was applied.
 CV/resp: No auscultation performed, patient was breathing normally and without difficulty throughout exam and treatments
 Int: No signs of trauma, dry skin, or discharge noted anywhere on the body
 MS: No lameness or atrophy of musculature observed in lateral recumbency or standing
 Neuro: mentally appropriate

Treatment:

- Warm water compresses on right ear using a hose or clean towels, left to soak for about 5-10 minutes
- Debridement of devitalized tissue along dorsal and ventral aspects and medial portion both anterior and posterior aspects
- Applied silver sulfadiazine ointment topically over granulation tissue and new epithelium

Assessment

Animal tolerated procedure and actively engaged with keepers throughout session. Ear is healing well with some areas of dry skin observed.

Plan

1. Continue with current treatment plan
2. Current BagBalm/DMSO mixture has more BagBalm added to increase moisture content
3. Recheck exam in two weeks or sooner if signs change

Written by WG

Animal Care Staff Medical Summary

~

Calendar items			
Date	Title	Assigned To	Done
~	~	~	~

Clinical note

Date	Time	Note Author
May 01, 2018	16:00	Marcy Cocchiola
Significant	Private	Active Problems
No	No	~

Note Subtype: General

Notes/Comments

Laser therapy 6 joules to right lateral and medial carpus, and BL40

MC

Animal Care Staff Medical Summary

~

Calendar items			
Date	Title	Assigned To	Done
~	~	~	~

Animal Type	GAN	Preferred ID	Taxonomy	Sex	Birth Date
Individual	MIG12-29545888	5	Elephas maximus/Asian elephant	Female	Oct 29, 1958

Prescription/Treatment

Basic Info

Date Written May 01, 2018
Start Date May 01, 2018 00:00
Prescribed By Whitney Greene
Prescribed For 1 animal
Reason For Treatment ~

Weight Info

Date May 01, 2018
Measurement Value 2,992 kg
Estimate Yes
Exclude From Reference Intervals Yes

Treatment Detail

Treatment Item/Drug Phenylbutazone
Dose Amount 2 g
Dosage Amount 0.001 g/kg
Administrated Dose Quantity 2 g
Frequency once a day (sid)
Duration 30days
Delivery Route Oral (p.o.)
Loading Dose ~
Form of Drug ~
 Concentration Of Drug ~

Treatment Response

Clinical Response ~
Adverse Effects ~
Adverse Effects Note:
 ~

Staff Instructions

Give two scoops (2 g) of Phenylbutazone, once a day (sid) for 30 days.
 Start treatment on May 01, 2018
 Administration route: Oral (p.o.)

Prescription Notes/Comments

~

Calendar Items

Date	Title	Assigned To	Done
May 30, 2018	5 / Asian elephant / MIG12-29545888 Phenylbutazone treatment is complete	Whitney Greene	No

Dispensing Records

Date Dispensed	Dispensed By	Quantity Dispensed
~	~	~

Administration Records

Administration Date/Time	Administered By	Success	Notes
~	~	~	~

Apr 26, 2018

Clinical note

Date Apr 26, 2018
Time 00:00
Note Author Whitney Greene
Significant Private
Active Problems
 No No ~
Subjective
 Animal presented for brief recheck exam

Animal Type	GAN	Preferred ID	Taxonomy	Sex	Birth Date
Individual	MIG12-29545888	5	Elephas maximus/Asian elephant	Female	Oct 29, 1958

Objective

Mentation: Behaviorally laterally recumbent (was standing normally before asked by keepers to lie down). BAR and Interactive with keepers
 BCS = 8/9
 Oral: Mucus membranes looked pink and moist, appears hydrated. Teeth not visualized.
 EENT: Eyes looked clear with minimal frothy discharge at the medial canthus of the eyes bilaterally. Left ear looks WNL, right ear has new epithelial growth along the entire line of demarcation. Next to the re-epithelialization is healthy pink granulation tissue, with multifocal areas of re-pigmentation more cranially on the ear where full epithelialization has completed. There is no swelling, hemorrhage, or other discharge associated with any area of the healing tissue.
 CV/resp: No auscultation performed, patient was breathing normally and without difficulty throughout exam and treatments
 Int: No signs of trauma, dry skin, or discharge noted anywhere on the body
 MS: No lameness or atrophy of musculature observed in lateral recumbency or standing
 Neuro: No full neuro exam performed, appropriate mentation and CNS appears functional

Treatment:

- Warm water compresses on right ear using a hose or clean towels, left to soak for about 5-10 minutes
- Debridement of devitalized tissue to minimize risk of it catching and tearing using a scalpel
- Applied silver sulfadiazine ointment topically over granulation tissue and new epithelium

Assessment

Animal tolerated exam OK and ear is healing well

Plan

Continue on current course of treatment

Written by WG

Animal Care Staff Medical Summary

~

Calendar Items

Date	Title	Assigned To	Done
~	~	~	~

Apr 15, 2018

Clinical note

Date	Time	Note Author
Apr 15, 2018	16:30	Marcy Cocchiola
Significant	Private	Active Problems
No	No	~

Note Subtype: General

Notes/Comments

Visual recheck of trunk - no signs of irritation or redness apparent, looks to be filling in

MC

Animal Care Staff Medical Summary

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Calendar Items

Date	Title	Assigned To	Done
~	~	~	~

Apr 11, 2018

Clinical note

Date	Time	Note Author
Apr 11, 2018	00:00	Whitney Greene
Significant	Private	Active Problems
No	No	~

Subjective

Animal presented for a recheck exam

Objective

Animal Type	GAN	Preferred ID	Taxonomy	Sex	Birth Date
Individual	MIG12-29545888	5	Elephas maximus/Asian elephant	Female	Oct 29, 1958

Animal is standing and voluntarily participating in treatment session and exam
 EENT: bright and clear bilaterally, no discharge. Ear is cleaned off following warm water soak and small amount of fibrin is removed from healing margin. The healing tissue is filling in with full pigmentation. There is no swelling or hemorrhage associated anywhere on the ear. Some mild crusting observed at most ventral anterior portion of ear.
 Oral: pink mm throughout, teeth visualized and keepers palpated- very worn down
 Integument: lesion on trunk is cleaned and AluSpray applied liberally. There is no swelling, hemorrhage, erythema, or discharge noted with abrasion. Fibrin is filling in along entire periphery. Open area of lesion is ~1. x 0.5 cm.
 MS: improved ROM observed on left front and animal is not compensating on the right front

Assessment

Ear and trunk abrasion are healing well and animal is tolerating treatments OK

Plan

Continue with current course of treatment

Written by WG

Animal Care Staff Medical Summary

~

Calendar Items

Date	Title	Assigned To	Done
~	~	~	~

Apr 10, 2018

Clinical note

Date	Time	Note Author
Apr 10, 2018	00:00	Whitney Greene
Significant	Private	Active Problems
No	No	~

Subjective

Animal presented for recheck exam

Objective

Animal is standing and voluntarily participating in treatment session and exam
 EENT: bright and clear bilaterally, no discharge. Ear is cleaned off following warm water soak and small amount of fibrin is removed from healing margin. The healing tissue is filling in with full pigmentation. There is no swelling or hemorrhage associated anywhere on the ear. Some mild crusting observed at most ventral anterior portion of ear.
 Oral: pink mm throughout, teeth visualized and keepers palpated- very worn down
 Integument: lesion on trunk is cleaned and AluSpray applied liberally. There is no swelling, hemorrhage, erythema, or discharge noted with abrasion. Fibrin is filling in along entire periphery. Open area of lesion is ~1.5 x 0.75 cm.
 MS: animal observed ambulating out of barn and into large field. Both hind legs WNL. Front right leg is swinging out to lateral aspect slightly and this appears to be compensatory for the left leg. Left front is still from carpus up to shoulder with decreased ROM. Keepers report animal was running and very exuberant on Sunday and observed stiff Monday.

Assessment

1. Ear is healing well and animal tolerating treatments
2. Abrasion on trunk is healing well
3. Decreased ROM on left front- most likely due to overexertion on Sunday

Plan

1. Continue with prescribed treatments for ear.
2. Increase Bute dosage to BID for three days
3. Continue with topical treatment of abrasion on trunk
4. Recheck in one week or sooner if signs progress
5. Continue with routine husbandry and care

Written by WG

Animal Care Staff Medical Summary

~

Calendar Items

Date	Title	Assigned To	Done
~	~	~	~

Prescription/Treatment

Animal Type	GAN	Preferred ID	Taxonomy	Sex	Birth Date
Individual	MIG12-29545888	5	Elephas maximus/Asian elephant	Female	Oct 29, 1958

Basic Info

Date Written Apr 10, 2018
Start Date Apr 10, 2018 00:00
Prescribed By Whitney Greene
Prescribed For 1 animal
Reason For Treatment ~

Weight Info

Date Apr 10, 2018
Measurement Value 2,972 kg
Estimate Yes
Exclude From Reference Intervals Yes

Treatment Detail

Treatment Item/Drug Phenylbutazone
Dose Amount 2 g
Dosage Amount 0.001 g/kg
Administrated Dose Quantity 2 g
Frequency twice a day (bid)
Duration 3days
Delivery Route Oral (p.o.)
Loading Dose ~
Form of Drug ~
 Concentration Of Drug ~

Treatment Response

Clinical Response ~
Adverse Effects ~
Adverse Effects Note:
 ~

Staff Instructions

Give two scoops (2 g) of Phenylbutazone, twice a day (bid) for 3 days.
 Start treatment on April 10, 2018
 Administration route: Oral (p.o.)

Prescription Notes/Comments

~

Calendar Items

Date	Title	Assigned To	Done
~	~	~	~

Dispensing Records

Date Dispensed	Dispensed By	Quantity Dispensed
~	~	~

Administration Records

Administration Date/Time	Administered By	Success	Notes
~	~	~	~

April 2018

Clinical note

Date Apr 08, 2018
Time 09:00
Note Author Marcy Cocchiola
Significant Private
Active Problems No
Note Subtype: General
Notes/Comments
 Wound is unchanged, scrubbed with chlorhexidine and applied aluspray. Ear is thickened and has a sour smell to it. keepers noted.
 MC

Animal Type	GAN	Preferred ID	Taxonomy	Sex	Birth Date
Individual	MIG12-29545888	5	Elephas maximus/Asian elephant	Female	Oct 29, 1958

Animal Care Staff Medical Summary

~

Calendar Items

Date	Title	Assigned To	Done
~	~	~	~

Apr 07, 2018

Clinical note

Date Apr 07, 2018 **Time** 09:00 **Note Author** Marcy Cocchiola

Significant Private **Active Problems** No

Note Subtype: General

Notes/Comments

Superficial wound noted on trunk yesterday. Per WG flushed w saline, cleaned with chlorhexidine solution and applied aluspray. Keepers to continue treatment.

MC

Animal Care Staff Medical Summary

~

Calendar Items

Date	Title	Assigned To	Done
~	~	~	~

Apr 06, 2018

Clinical note

Date Apr 06, 2018 **Time** 00:00 **Note Author** Whitney Greene

Significant Private **Active Problems** No

Subjective

Animal presented after keepers noted scrape on trunk

Objective

Animal is BAR

There is a focal, square, 4" x 2.5", superficial lesion on the rostral trunk about 50% down. The area is skinned and bright red but there is no active hemorrhage, erythema, or discharge. The lesion is cleaned with dilute chlorhexidine using gauze. Some dirt and hemorrhage are cleaned away. The entire lesion is flushed out and cleaned again. Topical SSD is applied liberally across the entire lesion.

Assessment

Superficial abrasion with no active hemorrhage
DDX: trauma most likely

Plan

- Clean lesion BID with dilute chlorhexidine and SSD/AluSpray
- Daily monitoring of lesion for progressing signs
- Recheck in a week or sooner if signs change

Written by WG

Animal Care Staff Medical Summary

~

Calendar Items

Date	Title	Assigned To	Done
~	~	~	~

Animal Type	GAN	Preferred ID	Taxonomy	Sex	Birth Date
Individual	MIG12-29545888	5	Elephas maximus/Asian elephant	Female	Oct 29, 1958

Prescription/Treatment

Basic Info

Date Written Apr 07, 2018
Start Date Apr 06, 2018 00:00
Prescribed By Whitney Greene
Prescribed For 1 animal
Reason For Treatment ~

Weight Info

Date Apr 07, 2018
Measurement Value 2,972 kg
Estimate Yes
Exclude From Reference Intervals Yes

Treatment Details

Treatment Item/Drug SSD 1% Cream (10 mg/g Semisolid > Cream) (Silver Sulfadiazine)
Dose Amount 1 piece **Frequency** twice a day (bid) **Form of Drug** Cream
Dosage Amount ~ **Duration** 7days **Concentration Of Drug** 10 mg/g
Administrated Dose Quantity 1g **Delivery Route** Topical
Loading Dose ~

Treatment Response

Clinical Response ~
Adverse Effects ~
Adverse Effects Note:
 ~

Staff Instructions

Apply small amount of SSD 1% Cream to wound, twice a day (bid) for 7 days.
 Start treatment on Apr 06, 2018
 Administration route: Topical

Prescription Notes/Comments

~

Calendar Items

Date	Title	Assigned To	Done
Apr 12, 2018	5 / Asian elephant / MIG12-29545888 SSD 1% Cream treatment is complete	Whitney Greene	No

Dispensing Records

Date Dispensed	Dispensed By	Quantity Dispensed
~	~	~

Administration Records

Administration Date/Time	Administered By	Success	Notes
~	~	~	~

Prescription/Treatment

Animal Type	GAN	Preferred ID	Taxonomy	Sex	Birth Date
Individual	MIG12-29545888	5	Elephas maximus/Asian elephant	Female	Oct 29, 1958

Mentation: Behaviorally laterally recumbent (was standing normally before asked by keepers to lie down). BAR and interactive with keepers
 BCS = 6/9
 Oral: Mucus membranes looked pink and moist, appears hydrated. Teeth worn with age
 EENT: Eyes looked clear with minimal frothy discharge at the medial canthus of the eyes bilaterally. Left ear looks WNL, right ear has new epithelial growth along the entire line of demarcation. Next to the re-epithelialization is healthy pink granulation tissue, with multifocal areas of re-pigmentation more cranially on the ear where full epithelialization has completed
 CV/resp: No auscultation performed, patient was breathing normally and without difficulty throughout exam and treatments
 Int: No signs of trauma, dry skin, or discharge noted anywhere on the body
 MS: No lameness or atrophy of musculature observed in lateral recumbency or standing
 Neuro: No full neuro exam performed, appropriate mentation and CNs appears functional

Treatment:

- Warm water compresses on right ear using a hose or clean towels, left to soak for about 5-10 minutes
- Debridement of devitalized tissue to minimize risk of it catching and tearing using a scalpel
- Applied silver sulfadiazine ointment topically over granulation tissue and new epithelium

Assessment

Ruth's right ear is healing well with the current treatment plan. She is tolerant of her treatments and engaged with keepers throughout session.

Plan

Continue current course of treatments. Recheck exam in one week, or sooner if signs change

-MH / WG

Animal Care Staff Medical Summary

~

Calendar Items

Date	Title	Assigned To	Done
~	~	~	~

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Animal Type	GAN	Preferred ID	Taxonomy	Sex	Birth Date
Individual	MIG12-29545888	5	Elephas maximus/Asian elephant	Female	Oct 29, 1958

May 31, 2018

Clinical note

Date	Time	Note Author
May 31, 2018	00:00	Whitney Greene

Significant	Private	Active Problems
No	No	~

Subjective

Animal presented for recheck exam and debridement

Objective

Animal is in lateral recumbency and behaviorally engaged throughout session.
 BCS = 7/9
 Oral: Mucus membranes pink and moist, CRT <3 seconds, appears hydrated. Teeth visualized and severely worn down and most severe on right upper.
 EENT: bright and clear bilaterally with minimal clear discharge on right eye at medial canthus. Little has changed since last recheck exam but the healing process has progressed and there is less debris at the healing interface. Some necrotic tissue is peeling back at most dorsal and ventral aspects. Lots of new epithelialization throughout healing margin. Tissue along most ventral aspect and posterior portion are trimmed back using a scalpel blade. Following debridement, entire area is rinsed and topical SSD is applied along healing margin.
 CV/resp: No auscultation performed, patient was breathing normally and without difficulty throughout exam and treatments
 Int: No signs of trauma, dry skin, or discharge noted anywhere on the body
 MS: No lameness or atrophy of musculature observed in lateral recumbency or standing
 Neuro: mentally appropriate

- Treatment:
- Warm water compresses on right ear using a hose or clean towels, left to soak for about 5-10 minutes
 - Applied silver sulfadiazine ointment topically over granulation tissue and new epithelium

Assessment

1. Ear is healing well and animal tolerated treatment OK

Plan

1. Continue with current treatment plan and start gently cleaning out and into healing margin on both anterior and posterior aspects whenever possible during treatment schedule
2. Recheck +/- debridement in one week
3. Continue with routine husbandry and care

Written by WG

Animal Care Staff Medical Summary

~

Date	Title	Assigned To	Done
~	~	~	~

May 29, 2018

Clinical note

Date	Time	Note Author
May 29, 2018	15:00	Marcy Cocchiola

Significant	Private	Active Problems
No	No	~

Note Subtype: General

Notes/Comments

Laser therapy 6 joules to left hip GB 28, 29, and 30. Right carpus medial, lateral and S12/13

MC

Animal Care Staff Medical Summary

~

Date	Title	Assigned To	Done
~	~	~	~

Animal Type	GAN	Preferred ID	Taxonomy	Sex	Birth Date
Individual	M/G12-29545888	5	Elephas maximus/Asian elephant	Female	Oct 29, 1958

Clinical note

Date	Time	Note Author
May 29, 2018	00:00	Whitney Greene
Significant	Private	Active Problems
No	No	~

Subjective

Animal presented for quarterly blood collection for vitamin E

Objective

Animal is in lateral recumbency and behaviorally engaged throughout session. 6cc blood collected from medial saphenous voluntarily on first attempt. BAR and interactive with keepers throughout entire session
BCS = 7/9
Oral: Mucus membranes pink and moist, CRT <3 seconds, appears hydrated. Teeth not visualized.
EENT: bright and clear bilaterally with no discharge. Little has changed since last recheck exam but the healing process has progressed and there is less debris at the healing interface. Some necrotic tissue is peeling back at most dorsal and ventral aspects. Animal was observed rubbing healing margin along cable of exhibit and there is mild erythema along the most anterior aspect. Lots of new epithelialization throughout healing margin. Tissue along posterior and most anterior portion are trimmed back using a scalpel blade. Following debridement, entire area is rinsed and topical SSD is applied along healing margin.
CV/resp: No auscultation performed, patient was breathing normally and without difficulty throughout exam and treatments
Int: No signs of trauma, dry skin, or discharge noted anywhere on the body
MS: No lameness or atrophy of musculature observed in lateral recumbency or standing
Neuro: mentally appropriate

Treatment:

- Warm water compresses on right ear using a hose or clean towels, left to soak for about 5-10 minutes
- Applied silver sulfadiazine ointment topically over granulation tissue and new epithelium

Assessment

Animal tolerated procedure and treatments OK and ear is healing well

Plan

1. Vitamin E being sent out for analysis, pending levels determine if a change in Emcelle PO is warranted
2. Continue with routine husbandry and care and current prescribed treatments

Written by WG

Animal Care Staff Medical Summary

~

Calendar Items

Date	Title	Assigned To	Done
~	~	~	~

Prescription/Treatment

Basic Info

Date Written	May 28, 2018
Start Date	May 29, 2018 00:00
Prescribed By	Whitney Greene
Prescribed For	1 animal
Reason For Treatment	~

Weight Info

Date	May 28, 2018
Measurement Value	2,992 kg
Estimate	Yes
Exclude From Reference Intervals	Yes

Animal Type	GAN	Preferred ID	Taxonomy	Sex	Birth Date
Individual	MIG12-29545888	5	Elephas maximus/Asian elephant	Female	Oct 29, 1958

Treatment Detail

Treatment Item/Drug Phenylbutazone

Dose Amount 2 g **Frequency** twice a day (bid) **Form of Drug** ~

Dosage Amount 0.001 g/kg **Duration** 5days **Concentration Of Drug**

Administrated Dose Quantity 2 g **Delivery Route** Oral (p.o.) ~

Loading Dose ~

Treatment Response

Clinical Response ~

Adverse Effects ~

Adverse Effects Note:

~

Staff Instructions

Give two scoops (2 g) of Phenylbutazone, twice a day (bid) for 5 days.

Start treatment on May 29, 2018
Administration route: Oral (p.o.)

Prescription Notes/Comments

~

Calendar Items

Date	Title	Assigned To	Done
~	~	~	~

Dispensing Records

Date Dispensed	Dispensed By	Quantity Dispensed
~	~	~

Administration Records

Administration Date/Time	Administered By	Success	Notes
~	~	~	~

May 28, 2018

Clinical note

Date May 28, 2018 **Time** 15:45 **Note Author** Marcy Cocchiola

Significant No **Private** No **Active Problems** ~

Note Subtype: General

Notes/Comments

Laser therapy 6 joules to right hip GB 28, 29, and 34

MC

Animal Care Staff Medical Summary

~

Calendar Items

Date	Title	Assigned To	Done
~	~	~	~

Clinical note

Date	Time	Note Author
~	~	~

Animal Type	GAN	Preferred ID	Taxonomy	Sex	Birth Date
Individual	MIG12-29545888	5	Elephas maximus/Asian elephant	Female	Oct 29, 1958

May 28, 2018 00:00 Whitney Greene
Significant Private Active Problems
 No No ~

Subjective

Animal presented after keepers noted stiffness in rear leg yesterday
 Keepers have observed animal kicking out at squirrel over the past week

Objective

Animal is BAR, BCS 7/9
 EENT: bright and clear bilaterally, no discharge
 Integument: WNL
 MS: animals left rear has a decreased ROM while ambulating and turns lower part of leg out laterally with each step. Animal is bearing weight evenly on all feet and not exhibiting any sign of pain while standing or on palpation. There is no heat or swelling observed anywhere on the left leg and animal tolerates palpation
 UG: WNL
 Laser administered at left lateral knee and at two points on left hip

Assessment

Decreased ROM and altered gait
 DDX: trauma vs DJD vs other

Plan

1. Laser therapy of left knee and hip SID for five days
2. Increase phenylbutazone to four scoops this afternoon then start BID dosage tomorrow (May 29)
3. Visual recheck June 1 or sooner if signs change

Written by WG

Animal Care Staff Medical Summary

~

Calendar Items

Date	Title	Assigned To	Done
~	~	~	~

May 22, 2018

Clinical note

Date Time Note Author
 May 22, 2018 10:00 Marcy Cocchiola
Significant Private Active Problems
 No No ~

Note Subtype: General

Notes/Comments

Visual recheck of right ear - Dead tissue is pulling away at distal area. Per SC ok to trim - removed about 3 inch section with scalpel. Keepers to continue prescribed Tx
 MC

Animal Care Staff Medical Summary

~

Calendar Items

Date	Title	Assigned To	Done
~	~	~	~

May 19, 2018

Clinical note

Date Time Note Author
 May 19, 2018 00:00 Whitney Greene
Significant Private Active Problems
 No No ~

Animal Type	GAN	Preferred ID	Taxonomy	Sex	Birth Date
Individual	MIG12-29545888	5	Elephas maximus/Asian elephant	Female	Oct 29, 1958

Subjective

Animal presented for recheck exam

Objective

Behaviorally laterally recumbent (was standing normally before asked by keepers to lie down). BAR and interactive with keepers
BCS = 6/9

Oral: Mucus membranes pink and moist, CRT <3 seconds, appears hydrated. Teeth not visualized.

EENT: bright and clear bilaterally with no discharge. Little has changed since last recheck exam but the healing process has progressed and there is less debris at the healing interface. Some necrotic tissue is peeling back at most dorsal and ventral aspects but more so on anterior surface. Lots of new epithelialization throughout healing margin.

CV/resp: No auscultation performed, patient was breathing normally and without difficulty throughout exam and treatments

Int: No signs of trauma, dry skin, or discharge noted anywhere on the body

MS: No lameness or atrophy of musculature observed in lateral recumbency or standing

Neuro: mentally appropriate

Treatment:

- Warm water compresses on right ear using a hose or clean towels, left to soak for about 5-10 minutes
- Applied silver sulfadiazine ointment topically over granulation tissue and new epithelium

Assessment

Ear is healing well

Plan

1. Continue with current treatments, OK to decrease area of SSD application to healing margin along anterior portion and larger area of healing tissue on posterior aspect.
2. Continue with routine husbandry and care

Written by WG

Animal Care Staff Medical Summary

~

Date	Title	Assigned To	Done
~	~	~	~

May 08, 2018

Clinical note

Date	Time	Note Author
May 08, 2018	16:00	Marcy Cocchiola
Significant	Private	Active Problems
No	No	~

Note Subtype: General

Notes/Comments

Laser therapy 6 joules to right lateral and medial carpus, S12/13, BL40

MC

Animal Care Staff Medical Summary

~

Date	Title	Assigned To	Done
~	~	~	~

May 05, 2018

Clinical note

Date	Time	Note Author
May 05, 2018	13:00	Mike Ryer
Significant	Private	Active Problems
No	No	~

Note Subtype: General

Notes/Comments

Animal Type	GAN	Preferred ID	Taxonomy	Sex	Birth Date
Individual	MIG12-29545888	5	Elephas maximus/Asian elephant	Female	Oct 29, 1958

Re-check pinnae AD. Little has changed since last re-check except the healing process has progressed. There is a small amount of debris and purulence at the interface of viable and non-viable tissue but overall much improved.
Recc CWCT

Animal Care Staff Medical Summary

~

Calendar Items

Date	Title	Assigned To	Done
~	~	~	~

May 01, 2018

Clinical note

Date	Time	Note Author
May 01, 2018	16:00	Marcy Cocchiola
Significant	Private	Active Problems
No	No	~

Note Subtype: General

Notes/Comments

Laser therapy 6 joules to right lateral and medial carpus, and BL40

MC

Animal Care Staff Medical Summary

~

Calendar Items

Date	Title	Assigned To	Done
~	~	~	~

Clinical note

Date	Time	Note Author
May 01, 2018	00:00	Whitney Greene
Significant	Private	Active Problems
No	No	~

Subjective

Animal presented for a recheck exam and debridement

Objective

Behaviorally laterally recumbent (was standing normally before asked by keepers to lie down). BAR and interactive with keepers
BCS = 6/9
Oral: Mucus membranes pink and moist, CRT <3 seconds, appears hydrated. Teeth not visualized.
EENT: bright and clear bilaterally with no discharge. Right ear has new epithelial growth along the entire line of demarcation along with some white drying skin that peels away on rubbing, no signs of discomfort on palpation of entire region. Next to the re-epithelialization is healthy pink granulation tissue, with multifocal areas of re-pigmentation more cranially on the ear where full epithelialization has completed. There is no swelling, hemorrhage, or other discharge associated with any area of the healing tissue. The most dorsal and ventral aspects of necrotic tissue are debrided and completed excised using a scalpel blade. The necrotic tissue along medial portion of healing margin is excised on both anterior and posterior aspect. A small amount of hemorrhage was associated with the removal of tissue along the most ventral aspect but ceased after gauze was applied.
CV/resp: No auscultation performed, patient was breathing normally and without difficulty throughout exam and treatments
Int: No signs of trauma, dry skin, or discharge noted anywhere on the body
MS: No lameness or atrophy of musculature observed in lateral recumbency or standing
Neuro: mentally appropriate

Treatment:

- Warm water compresses on right ear using a hose or clean towels, left to soak for about 5-10 minutes
- Debridement of devitalized tissue along dorsal and ventral aspects and medial portion both anterior and posterior aspects
- Applied silver sulfadiazine ointment topically over granulation tissue and new epithelium

Assessment

Animal tolerated procedure and actively engaged with keepers throughout session. Ear is healing well with some areas of dry skin observed.

Plan

1. Continue with current treatment plan
2. Current BagBalm/DMSO mixture has more BagBalm added to increase moisture content

Animal Type	GAN	Preferred ID	Taxonomy	Sex	Birth Date
Individual	MIG12-29545888	5	Elephas maximus/Asian elephant	Female	Oct 29, 1958

3. Recheck exam in two weeks or sooner if signs change

Written by WG

Animal Care Staff Medical Summary

~

Calendar Items

Date	Title	Assigned To	Done
~	~	~	~

Prescription/Treatment

Basic Info

Date Written May 01, 2018
Start Date May 01, 2018 00:00
Prescribed By Whitney Greene
Prescribed For 1 animal
Reason For Treatment ~

Weight Info

Date May 01, 2018
Measurement Value 2,992 kg
Estimate Yes
Exclude From Reference Intervals Yes

Treatment Detail

Treatment Item/Drug Phenylbutazone
Dose Amount 2 g
Dosage Amount 0.001 g/kg
Administrated Dose Quantity 2 g
Frequency once a day (sid)
Duration 30days
Delivery Route Oral (p.o.)
Loading Dose ~
Form of Drug ~
 Concentration Of Drug ~

Treatment Response

Clinical Response ~
Adverse Effects ~
Adverse Effects Note:

~

Staff Instructions

Give two scoops (2 g) of Phenylbutazone, once a day (sid) for 30 days.

Start treatment on May 01, 2018
 Administration route: Oral (p.o.)

Prescription Notes/Comments

~

Calendar Items

Date	Title	Assigned To	Done
May 30, 2018	5 / Asian elephant / MIG12-29545888 Phenylbutazone treatment is complete	Whitney Greene	No

Dispensing Records

Date Dispensed	Dispensed By	Quantity Dispensed
~	~	~

Administration Records

Administration Date/Time	Administered By	Success	Notes
~	~	~	~

MIME-Version:1.0
From:ECFnotice@mad.uscourts.gov
To:CourtCopy@localhost.localdomain
Message-Id:8088677@mad.uscourts.gov
Subject:Activity in Case 1:17-cv-11809-WGY Friends of Ruth & Emily, Inc. v. City of New Bedford Notice of Hearing on Motion
Content-Type: text/html

United States District Court

District of Massachusetts

Notice of Electronic Filing

The following transaction was entered on 2/7/2019 at 2:16 PM EST and filed on 2/7/2019

Case Name: Friends of Ruth & Emily, Inc. v. City of New Bedford

Case Number: 1:17-cv-11809-WGY

Filer:

Document Number: 52(No document attached)

Docket Text:

ELECTRONIC NOTICE Setting Hearing on Motion [49] Third MOTION for Preliminary Injunction : Motion Hearing set for 2/12/2019 02:00 PM in Courtroom 18 before Judge William G. Young. (Gaudet, Jennifer)

1:17-cv-11809-WGY Notice has been electronically mailed to:

John A. Markey jmarkey@msmw-law.com

Kreg R. Espinola kespinola@bevlegal.com

Joyce Rowley whos.onfirst2@yahoo.com

1:17-cv-11809-WGY Notice will not be electronically mailed to:

Friends of Ruth & Emily, Inc. (Terminated)

c/o Joyce Rowley

PO Box 50251

New Bedford, MA 02745

MIME-Version:1.0
From:ECFnotice@mad.uscourts.gov
To:CourtCopy@localhost.localdomain
Message-Id:8103333@mad.uscourts.gov
Subject:Activity in Case 1:17-cv-11809-WGY Rowley v. City of New Bedford Order on Motion for Preliminary Injunction
Content-Type: text/html

United States District Court

District of Massachusetts

Notice of Electronic Filing

The following transaction was entered on 2/19/2019 at 11:08 AM EST and filed on 2/12/2019

Case Name: Rowley v. City of New Bedford

Case Number: 1:17-cv-11809-WGY

Filer:

Document Number: 60(No document attached)

Docket Text:

Electronic Clerk's Notes for proceedings held before Judge William G. Young: Motion Hearing held on 2/12/2019 re [49] Third MOTION for Preliminary Injunction filed by Joyce Rowley. The Court collapses the motion for preliminary injunction with trial on the merits in accordance with Rule 65A. Jury waived trial is set for Monday, March 4, 2019 at 9:00 AM. The Court expects live witnesses and any request for a witness to appear by video conference shall be made by motion. A pretrial conference is held in so much as explaining trial procedures to the plaintiff. (Bench Trial Day One set for 3/4/2019 09:00 AM in Courtroom 18 before Judge William G. Young, Bench Trial Day two set for 3/5/2019 09:00 AM in Courtroom 18 before Judge William G. Young, Bench Trial Day Three set for 3/6/2019 09:00 AM in Courtroom 18 before Judge William G. Young.) (Court Reporter: Richard Romanow at bulldog@richromanow.com.)(Attorneys present: Plaintiff appears pro se, Attorney Markey for the defendant) (Gaudet, Jennifer)

1:17-cv-11809-WGY Notice has been electronically mailed to:

John A. Markey jmarkey@msmw-law.com

Kreg R. Espinola kespinola@bevlegal.com

Joyce Rowley whos.onfirst2@yahoo.com

1:17-cv-11809-WGY Notice will not be electronically mailed to:

Friends of Ruth & Emily, Inc. (Terminated)

c/o Joyce Rowley

PO Box 50251

New Bedford, MA 02745

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS
BOSTON DIVISION

JOYCE ROWLEY,)
Plaintiff, pro se)
) Case No. 1:17-cv-11809
v.)
)
CITY OF NEW BEDFORD,)
MASSACHUSETTS)
Defendant)

MOTION TO COMPEL
ACCESS TO ASIAN ELEPHANT BARN

Plaintiff Joyce Rowley moves to compel access to the Asian elephant barn at Defendant City of New Bedford's Buttonwood Park Zoo. It is necessary to inspect the interior of the barn with the elephants present, and weather-permitting, with them out of the barn as key evidence in Plaintiff's Amended Complaint (C/N 17-cv-11809, Dkt. 48) and the original Complaint filed by the Friends of Ruth and Emily, Inc. (Dkt. 1), Count I, Inadequate Shelter, and Count II, Inadequate Space, Count III, Socialization, and Count IV, Aggression. All are related in part or in whole to the space that the elephants are confined in 16 - 24 hours each day.

Even in good weather, Asian elephants Ruth and Emily are confined to the barn for a minimum of 16 hours per day when the zoo is closed. Much of that time, no staff is present to clean the barn of their waste. Now, as the temperatures drop precipitously low, both must be kept inside up to 24 hours

per day.

Plaintiff sought the Defendant's accommodation prior to filing this motion, which request was denied. Defendant City claimed that Plaintiff wasn't qualified, that the elephants were "sensitive" and so therefore Plaintiff could not access the barn.

It is unknown what special qualifications are needed to inspect a barn. However, Plaintiff did not request to examine (as in physically touch or otherwise inspect) the elephants. She merely wants to examine how the elephants are spatially related to the barn during their confinement.

In September 2017, the elephants were forced to accept a major change to their barn of 30 years. Closely spaced vertical bars were placed so as to create three stalls that do not permit them to extend their trunk through the bars. According to the Zoo's Association of Zoos and Aquariums 2018 re-accreditation application, Ruth's stall is now 17 feet by 40 feet, Emily's is 20 feet by 40 feet. A center aisle is used to hold the elephants while cleaning their stalls by hand.

The elephants are eight- to ten-feet long. Plaintiff wishes to visually observe how the elephants move within the barn and record it for the trier of facts. This does not require any special qualifications.

As to the elephants' "sensitivity," Plaintiff notes that they have been exposed to hundreds and hundreds of total strangers without any

qualifications on Defendant City's special paid "encounters." For a fee that once ranged from up to \$450 per party to \$50/per person for non-member visitors, anyone could go into the barn and feed and pose with Ruth and Emily. (Exhibit 1, photos of encounters, undated, from Google Images of Buttonwood Park Zoo, and Exhibit 2, December 2010, by Plaintiff. The latter depicts Ruth & Emily led across a wet floor on Christmas Day, 2010, for an encounter, and then put back outside when it was done. More recent encounter photos available.) The elephants' sensitivity appears to have taken a backseat to money.

If the Motion to Compel is granted, Plaintiff expects to be accompanied by zoo staff and that she will not share space with the elephants.

Finally, Plaintiff notes that the Zoo and barn are public property on public parkland, that this is a citizen's suit under the Endangered Species Act, and that she is a taxpayer of the City of New Bedford.

Therefore, Plaintiff asks the Court to compel Defendant to make the Asian elephant barn accessible to her at two times: when the zookeepers first arrive at the elephant barn in the morning and prior to removal of the overnight waste and hay and cleaning of the elephants; and during the day when the front door to the barn is closed and the side door is open.

Respectfully submitted,
/s/Joyce Rowley, Pro se
Po Box 50251
New Bedford, MA 02745

CERTIFICATE OF SERVICE

This is to certify that the foregoing was filed February 21, 2019 electronically. Notice to all counsel who filed appearances with the court's electronic filing system have been served electronically.



**Strangers with the elephants
in Buttonwood Park Zoo
Asian Elephant Barn
Undated, Google Images**



**Strangers with the elephants
in Buttonwood Park Zoo
Asian Elephant Barn
Undated, Google Images**



**Toe Jam Puppet Band
Unattended with
Buttonwood Park Zoo
Asian elephants
Undated, Google Images**



**December 2010, Ruth & Emily called into barn for encounter
Buttonwood Park Zoo Asian elephant barn**



**December 2010, Strangers including small children
in Buttonwood Park Zoo Asian elephant barn**



**December 2010, Asian elephants Ruth & Emily
Led back outside after encounter
Buttonwood Park Zoo, New Bedford, MA**

**UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS
BOSTON DIVISION**

)	
Joyce Rowley,)	
Plaintiff, pro se)	
	)	Civil Action No.
v.	)	1:17-cv-11809-WGY
)	
CITY OF NEW BEDFORD,)	
MASSACHUSETTS)	
Defendant)	

**PLAINTIFF'S REPLY TO RESPONSE FOR MOTION TO COMPEL
ELEPHANT BARN ACCESS**

Plaintiff Joyce Rowley has reviewed Defendant's conditions to her request for access and opposes the proposed Condition #2.

Condition #2 is grossly inaccurate. Plaintiff did not prefer viewing an empty barn after it has been cleaned.

Ruth & Emily are subjected to being kept in their own waste for 16 hours per day. Rowley filed the motion to compel for that very purpose of seeing it when the accumulation of waste would be most apparent.

Rowley also prefers to see the spatial relationship between the elephants and their stalls, as stated in her motion to compel.

Ruth & Emily are familiar with Rowley. And, as seen in the photos provided, total strangers have visited the elephants in the barn safely.

To be clear, Rowley must see the barn prior to cleaning with Ruth & Emily in it.

Friday, March 1, 2019 is acceptable with Saturday, March 2, 2019 as an alternative.

Respectfully submitted,

/s/Joyce Rowley, Pro se
Joyce Rowley
Po Box 50251
New Bedford, MA 02745

CERTIFICATE OF SERVICE

This is to certify that the foregoing was filed February 27, 2019 electronically. Notice to all counsel who filed appearances with the court's electronic filing system have been served electronically.

MIME-Version:1.0
From:ECFnotice@mad.uscourts.gov
To:CourtCopy@localhost.localdomain
Message-Id:8120949@mad.uscourts.gov
Subject:Activity in Case 1:17-cv-11809-WGY Rowley v. City of New Bedford Order on Motion to Compel
Content-Type: text/html

United States District Court

District of Massachusetts

Notice of Electronic Filing

The following transaction was entered on 2/28/2019 at 1:35 PM EST and filed on 2/28/2019

Case Name: Rowley v. City of New Bedford

Case Number: 1:17-cv-11809-WGY

Filer:

Document Number: 65(No document attached)

Docket Text:

Judge William G. Young: ELECTRONIC ORDER entered re [62] MOTION to Compel Access to the Asian elephant Barn at Buttonwood Park Zoo.

The inspection may take place consistent with the conditions imposed by the defense. The issue of the disposal of the elephant waste can be addressed through testimony.

(Paine, Matthew)

1:17-cv-11809-WGY Notice has been electronically mailed to:

John A. Markey jmarkey@msmw-law.com

Kreg R. Espinola kespinola@bevlegal.com

Joyce Rowley whos.onfirst2@yahoo.com

1:17-cv-11809-WGY Notice will not be electronically mailed to:

Friends of Ruth & Emily, Inc. (Terminated)

c/o Joyce Rowley

PO Box 50251

New Bedford, MA 02745

FILED
IN CLERKS OFFICE

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

2019 MAR 12 PM 4: 43

U.S. DISTRICT COURT
DISTRICT OF MASS.

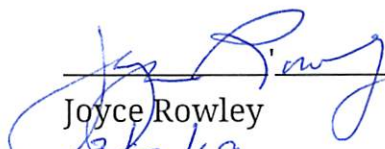
Joyce Rowley,)	
Plaintiff, pro se)	
)	
v.	)	C/N: 17-cv-11809-WGY
)	
City of New Bedford, MA,)	
Defendant)	

AFFIDAVIT OF JOYCE ROWLEY

I, Joyce ROWLEY, do hereby swear and depose:

1. I presented eight videos with my oral testimony in this matter at trial on March 7, 2019;
2. The compact disc (CD) accompanying this affidavit is a true copy of the videos presented at trial;
3. I own and possess the original videos .

Sworn under penalty of perjury this 12th day of March, 2019.



 Joyce Rowley
 3/12/19

 Dated

This is to certify that a copy of this affidavit and the compact disk was sent to the Defendants attorney at 50 Homers Wharf, New Bedford, MA by U.S. Mail on this day.

/S/Joyce Rowley
March 12, 2019

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UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

No. 1:17-cv-11809-WGY

FRIENDS OF RUTH & EMILY, INC.,
Plaintiff

vs.

THE CITY OF NEW BEDFORD,
Defendant

For Hearing Before:
Judge William G. Young

View of Buttonwood Park Zoo
New Bedford, Massachusetts

United States District Court
District of Massachusetts (Boston)
One Courthouse Way
Boston, Massachusetts 02210
March 28, 2019

REPORTER: RICHARD H. ROMANOW, RPR
Official Court Reporter
United States District Court
One Courthouse Way, Room 5510, Boston, MA 02210
bulldog@richromanow.com

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A P P E A R A N C E S

JOYCE ROWLEY
P.O. Box 50251
New Bedford, MA 02745
(508) 542-8297
Email: Whos.onfirst2@yahoo.com
Pro Se Plaintiff

JOHN A. MARKEY, ESQ.
Moses Smith and Markey, LLC
50 Homers Wharf
New Bedford, MA 02740
(508) 993-9711
Email: Jmarkey@msmw-law.com

and

KREG R. ESPINOLA, ESQ.
Burke, Espinola & van Colen
15 Hamilton Street, #3
New Bedford, MA 02740-0274
(508) 991-8899
Email: Kespino@bevlegal.com
For the Defendant

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I N D E X

VIEW OF THE ZOO..... 4

E X H I B I T S

(None marked.)

1 P R O C E E D I N G S

2 (Begins, 2:00 p.m.)

3 THE COURT: All right, so we're on the record,
4 Ms. Rowley and counsel for the City are here as well as
5 the zoo employees. So this is a view and really here
6 are my instructions.

7 I've heard the whole case, so on a view what I
8 expect is -- and I'll tell you what I want to see and
9 see if that can be accommodated, and I do want to tell
10 you what I expect from the parties because there's some
11 limitations.

12 This is not the time to go back and argue the
13 case, it's been argued, but it is a time to point things
14 out to me. So let me say what I want to do. I'd like
15 to go to the elephant exhibit, set up outside, and I
16 have no particular place where, but you all may agree as
17 to the most effective place, and that each place we stop
18 I will turn and say, "Ms. Rowley, anything you want to
19 point out?" And you'll say, "Look at this, look at
20 that, look at the food in the branches or lack thereof."
21 And I'm just giving examples. And Mr. Markey and
22 counsel can do the same thing. I'll say, "Does anyone
23 else want to point anything else out?" I'll have a
24 record of it. I actually may want to make some
25 drawings.

1 Then I thought I want to -- and I don't think I
2 need to be accompanied, but I want to walk around the
3 outside, just physically walk around the outside and
4 look at my own pace at whatever I want to look at. You
5 can all see what I'm looking at. But I want to get an
6 idea of the spaciousness or lack thereof of it and
7 what's in the interior.

8 The only other place I want to go, I want to go
9 into the barn or into the stable, and primarily --
10 though the testimony was very helpful, I have a pretty
11 good idea and I have the plans of what the stable looks
12 like now, but what will be helpful to me is I want to
13 see these physical barriers, um, that play such a role
14 in how the keepers interact with the elephants, and I
15 want to see enough so that I can visualize them with the
16 elephants in their individual stalls, and when they're
17 not in their individual stalls, feeding or going in and
18 out, and that's all.

19 It's less important for me to see the elephants --
20 the talk within the court is that this is some sort of
21 field trip, we get to see the elephants (Laughter.)
22 You may want me to see the elephants. I'm certainly
23 happy to see the elephants. But I'm satisfied that the
24 trial, complete with videos, gave me a good idea about
25 the elephants. But that doesn't mean I won't look at

1 them. Here I am. This is my chance to have the view.

2 So to reiterate, I want to see the enclosure and I
3 physically want to walk around it. I want to see the
4 barn, so I can truly visualize the barriers that today
5 are in place and how they move. And I'll stop.

6 Are there other things -- you know what a "view"
7 is, Ms. Rowley. Are there other things you think I
8 should be looking at on the view?

9 MS. ROWLEY: As I understand, you wanted to do
10 this to get a sense of the spacial component of this,
11 the space and shelter. The barn is one shelter, and
12 within the exhibit there are shelters too. So those are
13 things that I would probably point out as we look.

14 THE COURT: Oh, exactly, and I'm grateful for
15 that. Now we're just sort of sketching my moving
16 around.

17 Mr. Markey?

18 MR. MARKEY: I think everything -- I don't
19 have anything else I want to point out, I'm just
20 thinking of logistics, and my understanding from Ms. --
21 from Shara is that they currently have taken the
22 elephants --

23 THE COURT: Let's have her identify herself.
24 I'm sorry I don't have your name right?

25 MS. CROOK: It's Shara Crook, Assistant

1 Director of --

2 THE COURT: Yes, Ms. Crook. All right.

3 MR. MARKEY: So this morning Ms. Crook,
4 knowing that you might want to see the inside, had the
5 elephants go outside, so we could look inside the barn
6 first, you know without the elephants being there, you
7 can walk and see the entire space. Given where things
8 are, it would seem to me that after we've done that --
9 and I'll refer to Shara, whether the elephants should
10 come back in before you're roaming around the exterior?
11 We should probably have the elephants inside if there's
12 -- does that make sense?

13 MS. CROOK: Yeah, we can work logistics. If
14 you're in the viewing area, the visiting viewing area,
15 you don't have to worry about where the elephants are.
16 But if you want to see the elephants inside the barn,
17 we'd be happy to try and call them back.

18 THE COURT: I don't need to see them inside.
19 So I certainly accept that.

20 So the first place we'll go is the barn, we'll go
21 to the interior of the barn, we'll set up at a place
22 where you all think I can see what I want to see. We'll
23 stop. We'll have -- we'll point this out, the floor
24 out, but I want to understand how these barriers work.
25 Once I've seen enough and you've pointed things out,

1 we'll go outside.

2 I'm happy to go -- our second place, to be the
3 public viewing area, and we'll set up again and we'll do
4 likewise with both sides pointing things out.

5 MS. CROOK: Okay.

6 THE COURT: But it won't -- isn't it possible
7 to walk around it?

8 MS. CROOK: It is. There's one section that
9 is not open to the public but we can certainly let you
10 right through it, you can walk that area.

11 THE COURT: If you don't mind.

12 MS. CROOK: Yup.

13 THE COURT: And I can do it alone. I just
14 want -- for the view to make sense, I want to have a
15 feel of it.

16 MS. CROOK: Sure.

17 THE COURT: And I understand I've got maps and
18 videos.

19 MR. MARKEY: And that makes sense. Sure. And
20 there are portions, if you walk around the outside of
21 the fence, that you're not going to be able to see in.
22 I don't know how that breaks out, what percentage.
23 Because there are some places -- because it's paid to
24 come into the zoo, that, you know, there's the shield
25 you see in a ball field or something, that you can't see

1 in.

2 THE COURT: It's not my -- I think -- if I
3 have a problem, I won't be hesitant to raise it.

4 So let's do that. You'll take us to the barn, and
5 thank you for your preparation, and we'll set up in the
6 barn.

7 (Move to barn.)

8 THE COURT: Let's start here. And I think I
9 can see what I need to see. So we're in the barn.

10 Ms. Rowley, you're familiar with the space. Are
11 there things you'd like to point out?

12 MS. ROWLEY: Um, in terms of space --

13 THE COURT: It isn't -- we could have
14 Mr. Markey go first, if it's more comfortable.

15 MS. ROWLEY: Well, your Honor, I would point
16 out that on your left-hand side typically is the slide
17 where Ruth stays -- and I'm sure Ms. Crook will correct
18 me if I'm wrong, and on the right-hand side is typically
19 the side where Emily stays.

20 MS. CROOK: That's not 100 percent accurate.

21 MS. ROWLEY: Well, I can -- in pointing out
22 the space, what used to be here, approximately where
23 that barrier was -- and again I'm sure I'll be
24 corrected, was a busted cable and now there's vertical
25 bars. On this side it was all open for -- until just

1 approximately September 2017 when I came back in the
2 barn and found that there were bars. There's a set of
3 bars here now that divides it into the three, and that's
4 the plan that I had submitted in the exhibit book.

5 That door is new and Emily tends to stand -- well
6 that door is new. Um, Emily -- I don't know if I should
7 say this, but Emily is often seen there because it
8 provides another kind of barrier for Ruth to get outside
9 and enjoy the weather in the wintertime. And again I
10 don't know if that -- I'm not trying to argue it, just
11 that that's the observation with that door, that that
12 tends to be Emily's side. And we can't get inside
13 Emily's mind, but that's where she is most frequently.

14 On this side there was a small drain leaking
15 water. On this side this again -- this is used by Ruth
16 more overnight, but I don't know -- and Shara Crook
17 could tell you whether they close these, the hydraulic
18 doors that go in and close off so that there's three
19 separate areas. You can have her show you that. If
20 this is Ruth's side, there's a small -- there's only a
21 small bank area. Elephants use that bank area, as they
22 get older, to be able to get up. And on that side at
23 the end there's more space and you'll see there's a
24 larger sand bank.

25 Other than that, well, just in terms of space, um,

1 so this is the space that either elephant occupies. The
2 other part of the space is that -- if Ruth or Emily were
3 here, I would be looking up to the top of their head
4 someplace up there. So that while I can fit in this
5 perfectly well and walk around, you know, I could
6 probably set up a TV or whatever, and even be happy with
7 my internet, the elephant is up there, up closer to the
8 top of this barn. And spatially an elephant in this
9 space has about two steps and four steps. Likewise in
10 the other one, a little bit more. But again, in order
11 to turn around, "normal posturing," I think is the
12 wording, um, it is limited to two steps and four steps.

13 THE COURT: Let me just see -- I'm sorry.

14 MS. ROWLEY: Go ahead.

15 THE COURT: Let me just see if I understand.

16 And you'll permit me to ask Ms. Crook?

17 MR. MARKEY: Please, Judge.

18 THE COURT: The movable doors --

19 MS. CROOK: The hydraulic doors, yeah.

20 THE COURT: The hydraulic doors are the ones
21 that divide these spaces?

22 MS. CROOK: Yup. So this is a hydraulic gate
23 right here that opens and the other end is the hydraulic
24 --

25 THE COURT: Right.

1 (Moves.)

2 MS. CROOK: So this is a -- so there's a total
3 of six hydraulic doors -- two hydraulic doors, four
4 hydraulic gates. So this gate here is between the
5 center stall and this stall here. There's a second one
6 on the far stall. And then the chute doors can be
7 opened or closed.

8 THE COURT: Thank you.

9 Mr. Markey, things you want to point out?

10 MR. MARKEY: Well I have nothing else to point
11 out, your Honor, I think you have a good view of what
12 the capacity is. I don't know if -- I don't really want
13 to provide any testimony, but my understanding is that
14 there are times when all of these gates remain open and
15 the elephants are permitted to walk between spaces with
16 one another, is that correct, Ms. Crook?

17 MS. CROOK: Correct.

18 MR. MARKEY: And that occasionally there will
19 be -- a gate will be closed, for one reason or another,
20 if there was any reason to keep the elephants separate
21 from one another?

22 MS. CROOK: Correct.

23 MS. ROWLEY: Two more things to point out,
24 your Honor?

25 THE COURT: Yes.

1 MS. ROWLEY: One is that during testimony
2 Ms. Crook said that the roof leaks, and I don't know
3 where that leak is or where it comes into the barn, and
4 if she could point that out?

5 MS. CROOK: In the keeper area right next to
6 the window.

7 THE COURT: And that's where we're standing,
8 there's a row of windows?

9 MS. CROOK: Correct.

10 THE COURT: Yes, thank you.

11 MS. ROWLEY: And I don't know the quantity,
12 whether it comes in here.

13 The other important thing I would point out is the
14 automatic waterer on this side. I don't know if that's
15 movable, but there's a thing there and it's the
16 automatic waterer, and I don't know how the elephant
17 would reach to get that.

18 MS. CROOK: They reach their trunk right out
19 through there and place it in the automatic waterer.

20 MS. ROWLEY: It doesn't move over?

21 MS. CROOK: No, it does not need to move over.

22 MS. ROWLEY: All right.

23 And when was it put in?

24 MS. CROOK: The automatic waterers? When
25 construction inside the barn began. Um, I'd have to go

1 back and look at the records.

2 MS. ROWLEY: Okay.

3 THE COURT: No, that's okay, I think we're
4 within the parameters of a good view. So I'm planning
5 now to go to the public viewing space if you all think
6 that's the place to point out the exterior things that I
7 ought to look at.

8 MR. MARKEY: And I think that's great. And
9 just so that it's clear to the Court, and I think you
10 understand, Judge, but the reason for the chute would be
11 that if there was a need for medical treatment, this
12 would be the area which would allow the veterinarian
13 access and, um, but still would not be in direct contact
14 with the elephant.

15 THE COURT: Thank you. All right. So now
16 we'll move to the viewing area.

17 MS. CROOK: Great.

18 (Moves.)

19 THE COURT: Well let's get set up here.

20 MS. ROWLEY: If you would look at the
21 proximity of this dumpster, this is where all of the
22 animal waste from the zoo comes to, with the exception
23 of -- you know this is the waste area, including for the
24 elephants, because it's easier to dump it into. I don't
25 know what that represents in terms of just this

1 morning's waste or whatever, but that's clearly elephant
2 dung. But it is also right there next to the door and
3 in the summertime being an area that's open. It's
4 proximity to the door is what I was pointing out.

5 THE COURT: And if I may ask a question? And
6 I'll put it to Ms. Crook. Walking in and out, I wonder
7 what we're looking at, it looks like bamboo here?

8 MS. CROOK: It is bamboo, it's browse, it's
9 browse for the elephants and the other animals, and the
10 species changes depending on the season. But right now
11 bamboo is an evergreen, so it's still pretty plentiful
12 to get new growth. So the staff goes out to a number of
13 local areas to collect bamboo. We've got a number of,
14 um, you know private residences that are thrilled to be
15 able to donate to the zoo, so.

16 THE COURT: Anything else at this location?

17 MS. ROWLEY: No, sir. Thank you.

18 THE COURT: Hearing not, we'll walk.

19 (Moves.)

20 THE COURT: All right. In this position,
21 again, Ms. Rowley, we'll start with you. And you wanted
22 us to see something down as we came out of the barn and
23 we're walking around, but I -- we certainly will note
24 it. You go ahead.

25 MS. ROWLEY: Um, that gate with the wire and

1 chain, and is the gate out of here, that was the gate in
2 the video where Emily was ramming it and pulling at it.
3 It is kind of a holdover from many years ago. It's the
4 only way to get out. I just wanted to point that out
5 because it was in the video.

6 THE COURT: Yes.

7 MS. ROWLEY: The reason that I'm here, or I
8 asked that the Court set up here, is to look at the
9 grade and the grade of the walkway, it's set up so that
10 people look into the elephant's eyes, um, and you have a
11 human perspective of it. You can -- you feel as if --
12 it's set up -- the exhibit is set up for people to be
13 able to see the elephants close up, but the grade and
14 the wires create an optical illusion that the elephant
15 is smaller than it is.

16 As I pointed out in the barn, were you to stand
17 right next to Emily, you'd be craning your neck up. The
18 top of her head is up there really. In terms of spacial
19 -- in terms of understanding how much space we see and
20 how much space they have.

21 The same goes for Ruth. I have actually stood
22 next to her, and it's not testimony, but I then was
23 surprised that she's way up there, and that from here,
24 you can see with the perspective, she looks relatively
25 small. I mean she's larger than the keeper, but she

1 looks relatively small. And so the exhibit itself is
2 designed to create a space that looks big from human
3 proportions. But from their proportion, um, I can point
4 out, if you look at the path that they've beaten down,
5 they still walk in a semicircle.

6 They are -- I'll point out the gate. If you look
7 at that, that's closed, that keeps them out here. They
8 might not -- that keeps them out on exhibit.

9 I can point out that there's hay in the bag, hay
10 in front of the two elephants, there's no other food
11 that they could eat.

12 I'll point out there's no tall grass. I'll point
13 out there's no muddy ponds. I can point out that
14 there's no deep lakes for them to emerse themselves when
15 the temperatures change.

16 THE COURT: Well what is this trough with the
17 gravel around it?

18 MS. ROWLEY: They are blocked from the other
19 side, which is a water feature that does carry water in
20 the summer, but in order to keep the elephants out, the
21 gate is closed. They drink from the end of that trough
22 in a pipe, that's fresh water, but that's their only
23 source of water. In testimony the zoo said it installed
24 a shower off of this thing that's considered a shelter,
25 that they did so -- my recollection is October, and I

1 don't know if it's connected or not, and that would
2 provide some water for them.

3 As you can see from the shade, if the two
4 elephants just stood there, that would be their shade.
5 There's some shade from the four trees, you have just
6 four trees on this site as opposed to say a forest, um,
7 and they provide some shade, but the sun, by the time
8 it's hot, you know mostly provides shade where the grass
9 is, if you can call it that, you know this little area
10 between the post and the top of the shelter.

11 THE COURT: Your point is, or let me say what
12 I infer here, is that once they come out of the barn on
13 exhibit or to live out here, the actual area that they
14 occupy is bounded by the fence that I'm looking at and
15 now pointing to, the trough that runs across here, and
16 then in an irregular semicircle the fence that -- before
17 which we are standing?

18 MS. ROWLEY: Not always, but for most of the
19 time. And I have to give a caveat. Sometimes the gate
20 is open, sometimes they have access to the other side,
21 sometimes Ruth is put on that side and Emily is here,
22 but the point -- what they typically have for free
23 walking and, you know, where they get served their hay
24 -- let's put it that way, and the elephant will go where
25 the food is, is this area.

1 THE COURT: Right. May I ask Ms. Crook?

2 MS. CROOK: Yes.

3 THE COURT: So, um, one, is that generally
4 accurate and what do you do with the other space out
5 here?

6 MS. CROOK: So the gate is closed today to
7 facilitate you guys being here.

8 THE COURT: Right.

9 MS. CROOK: There are times when we close it.
10 For example, if we need to clean on that side, we use it
11 as a barrier for the keepers to be able to go on that
12 side, um, and, vice-versa, if they need to get out here
13 and periodically clean during the day, we would shift
14 the animals over to the backside to be able to
15 accommodate that. And then there are times when it's
16 fully open. They may or may not have access to the barn
17 depending on weather, depending on temperature,
18 depending on, you know, what the choices are, um, the
19 elephant behavior.

20 As far as the food sources, multiple food sources
21 are placed out in ways that we hope to encourage them to
22 keep moving and walk. You know for right now I know
23 this morning they loaded the hay feeder, they also
24 loaded some of the toys, so you may not see the food,
25 but that doesn't mean there are not food items in them,

1 they actually have to interact with it and they're
2 puzzle feeders. So we are throughout the day adding
3 additional food items for them.

4 MR. MARKEY: Just so that I'm clear on it,
5 because I think the Judge was asking this question, is
6 there a general rule? You explained that if you have to
7 clean the inside or when we're visiting, you keep them
8 out here. What's the general rule about whether that
9 gate is open or closed when they're outside?

10 MS. CROOK: The general rule is to give them
11 as many choices as possible. So on any given day it's
12 open.

13 THE COURT: All right.

14 Mr. Markey, do you want to point things out?

15 MR. MARKEY: Your Honor, I just would point
16 out -- and the Court can see them very evidently, is
17 that there's areas that provide shade both in the
18 external part of the exhibit and in the internal part of
19 the exhibit for them during the warmer days. There are
20 a number of toys and other enrichment activities that
21 are -- some are hanging and related to the shade-giving
22 structure, some are just in the open space. And I think
23 that goes back to the testimony the Court might have
24 heard about the Mass College of Art becoming involved in
25 some of these activities.

1 And I do note that from this side it's true, as
2 the Court noted, that they're not able to access the
3 water, but from the other side they are able to access
4 it.

5 MS. CROOK: Actually if I could correct you,
6 John, they can access the water feature from this side.
7 So if they walk over to the rocks on this side, they can
8 dip their trunk down and get fresh water right from the
9 water feature.

10 MR. MARKEY: To be fed, but to go into the
11 water?

12 MS. CROOK: Oh, for swimming or bathing or
13 splashing, yeah.

14 MR. MARKEY: They can only go from the other
15 side?

16 MS. CROOK: Yeah.

17 MR. MARKEY: Okay.

18 THE COURT: But from the other side they can
19 get into what I call a "trough"?

20 MS. CROOK: Correct.

21 THE COURT: And you call it a "water feature."

22 MS. CROOK: Yes.

23 THE COURT: But all right. I understand.

24 Now if that's it, I propose simply to effectively
25 -- yes, Ms. Rowley?

1 MS. ROWLEY: I unfortunately do have a couple
2 of more things, your Honor.

3 THE COURT: No, you go right ahead.

4 MS. ROWLEY: I would also point out, in terms
5 of the shelter, this one does not really -- this
6 structure here provides perhaps some shade in the
7 summer, it doesn't provide anything from wind, rain,
8 sleet, or snow, or other adverse weather conditions.

9 The one over there is called a "J-structure."
10 Most of the roof is gone, there's a few poles left at
11 the top of it. It provides minimal, if any, shade or
12 shelter from anything.

13 The black sheathing that you see, um, in the
14 wintertime does prevent the wind from coming in at our
15 level, but in the summertime it tends to trap heat. So
16 -- and this has been the point about the space that
17 they're in and why I went into the thing about the trees
18 and the shade, um, is there's very little way for them
19 to cool off.

20 The water feature, um, and Ms. Crook can correct
21 me, is rarely used for total emersion, something that
22 elephants do to cool themselves. There is really
23 nothing here that represents what an elephant would
24 normally have in the wild. They stand around and wait
25 to be fed or play with toys, um, whatever they may be

1 called, and once that toy is done, there's nothing to
2 do.

3 Again the concept of the space and the reason you
4 would look at it is because there's supposedly enough
5 room here for three elephants to walk around without
6 having anything to do really, except wait to be fed, or
7 wait for toys to be propped. There's -- from the
8 elephant's perspective, there's nothing to do here.

9 THE COURT: Well, all right.

10 MS. ROWLEY: Unless a human interacts with
11 them.

12 THE COURT: Well, all right. Thank you.

13 MS. ROWLEY: And finally, and I can't let you
14 leave without this, that if you look at the trees,
15 that's how tall Emily's trunk reaches and there's no
16 natural browse, she's basically taken it all. And that
17 tree should be -- you can see is kind of on a slant.
18 That's the scale of the elephant.

19 THE COURT: Thank you. I follow that.

20 Anything else, Mr. Markey?

21 MR. MARKEY: No, thank you, Judge.

22 THE COURT: All right.

23 What I propose to do -- and anyone can take me
24 because I'm not going to be talking, I'm just going to
25 be walking, but from my point of view this ends the

1 view. I would like to walk around the whole area,
2 because what we've referred to as the "interior area," I
3 can get a little closer to it maybe, and that's all, and
4 then I'll meet you -- whatever is most efficient. I can
5 meet you out as we walked up here.

6 Will you take me around?

7 MS. CROOK: Oh, absolutely.

8 THE COURT: So I -- I thank you all. We won't
9 put other things on the record, and I'm not going to be
10 discussing the case without you, you'll understand I'm
11 just going to be led around. And Ms. Gaudet will go
12 with me.

13 (Walks around.)

14 (Ends, 2:30 p.m.)

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C E R T I F I C A T E

I, RICHARD H. ROMANOW, OFFICIAL COURT REPORTER,
do hereby certify that the foregoing record is a true
and accurate transcription of my stenographic notes
before Judge William G. Young, on March 28, 2019, to the
best of my skill and ability.

/s/ Richard H. Romanow 05-7-19

RICHARD H. ROMANOW Date

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS
BOSTON DIVISION

JOYCE ROWLEY,
Plaintiff, pro se
v.
CITY OF NEW BEDFORD,
MASSACHUSETTS
Defendant
Case No. 1:17-cv-11809-WGY

MOTION TO EXPEDITE

Every day of delay is another day of suffering for Asian elephants Ruth and Emily at Buttonwood Park Zoo. For almost two years, they have waited for a reprieve from their daily 16 hours of confinement in a space that allows them little more than two to four steps in any direction, and no ability to avoid standing in their own waste. Fall turned to winter, to spring, then to a summer of 100 degree days with no access to adequate shade or water

(https://twitter.com/RetireRuthEmBPZ/status/1012150215145607168?s=09, June 28, 2018).

As the seasons turned again, they are now facing another hot summer without adequate shade or water to cool themselves when they are forced to stay outside on exhibit for zoogoers. Neither elephant uses the water feature, as City zoo employee Ms. Crook testified in March at the bench trial. The shelter in the outer area provides little shade, and a black sheathing tied to the fence around the exhibit traps the heat and blocks breezes.

Already Ruth stood for hours underneath a shade shelter that has lost most of its roof as temperatures hit 80 degrees

(https://twitter.com/RetireRuthEmBPZ/status/1136965964627697664?s=09, June 6, 2019). The structure confined her to approximately 20 ft by 20 ft of shade.

There is no shower in the inner yard. The shower in the outer area was not turned on, if it

is indeed connected to the water system. Because Ruth lost most of one ear and a portion of the other, she cannot thermoregulate. The water feature was empty, so she couldn't even throw water on her back. Although she was allowed into the barn to cool, that meant more time in an area of restricted movement. Even the City's veterinarian acknowledged that confinement for long hours causes chronic painful foot and joint conditions.

Therefore, Plaintiff moves the Court expedite the decision, and allow Ruth to be removed immediately to one of the two elephant sanctuaries.

Plaintiff understands the heavy caseload that the Court must consider. However, the first preliminary injunction was filed in December 12, 2017, and renewed in June 18, 2018. The third motion for a preliminary injunction filed January 22, 2019 was consolidated with the trial on the merits on March 5-7, 2019.

The issues that made an injunction imperative have not abated and in fact have only worsened for Ruth.

In that time, one ear fell off. It will not grow back. Ruth is still lame on two legs. Her right front carpus (ankle) is now stiffening up again making it difficult for her to walk. The City has failed to take radiographs for two years to determine the condition of her feet and why she is lame.

Emily's aggression towards Ruth has not abated, either. The Zoo now feeds the two elephants separately by keeping Ruth inside in the morning while Emily eats in the outer yard. However, when Ruth ventures out to the outer yard, Emily still intimidates her and takes her food.

Recently, Emily was seen in the inner yard after regular zoo hours. Ruth was still kept inside, although Ruth is most in need of exercise and mobility.

These factors contribute to her pain and suffering and are a direct result of the harm caused by living at the City's Buttonwood Park Zoo.

Although it may be hotter in Tennessee and Georgia where the elephant sanctuaries are located, there are more opportunities to cool: forests of deep shade, wallows, streams, ponds and lakes. Also, the sanctuaries are staffed with more caretakers who focus on elephants alone, adhere to individualized healing plans for each elephant, and can ensure that Ruth is monitored for overheating. Elephants are allowed out in the cool of morning and evening, and can stay out at night, affording them mobility day and night.

For these reasons, Plaintiff seeks Ruth's immediate removal from Buttonwood Park Zoo to either the sanctuary in Tennessee or the refuge in Georgia.

Respectfully submitted,

/s/Joyce Rowley
Joyce Rowley, *Pro se.*
PO Box 50251
New Bedford, MA 02745
(508)542-8297

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of June, 2019, the foregoing was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS
BOSTON DIVISION

Joyce Rowley,)	
Plaintiff, pro se)	
)	
v.	)	Case No.
	)	17-cv-11809-WGY
City of New Bedford)	
Defendant)	

MOTION TO CONFISCATE

Plaintiff Rowley hereby moves to confiscate Asian elephant Ruth under Rule 64 of the Federal Rules of Civil Procedure. As Ruth is considered property of the City of New Bedford, and as her current confinement is a danger to her health and well-being, Rowley asks the Court for an Order to allow Ruth's immediate removal by Plaintiff.

Respectfully submitted,

s/Joyce Rowley
Plaintiff, pro se

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of September 2019, the foregoing was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/Joyce Rowley
Plaintiff, pro se
PO Box 50251
New Bedford, MA 02745
508-542-8297

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS
BOSTON DIVISION

Joyce Rowley,)	
Plaintiff, pro se)	
)	
v.	)	Case No.
	)	17-cv-11809-WGY
City of New Bedford, MA)	
Defendant)	

MEMORANDUM IN FAVOR OF CONFISCATION

Under Rule 64, Seizing a Person or Property, of the Federal Rules of Civil Procedure, Rowley may seek a provisional remedy as may be allowed equally under State law to secure satisfaction of potential judgement (FRCP 64(a)). Rowley so moves to protect her interest in the Asian elephant Ruth.

I. Background

This is a citizen's action brought under the Endangered Species Act for the removal of Asian elephants Ruth and Emily, currently residing at the Buttonwood Park Zoo, a city-owned and operated zoo located on City parkland. The complaint was filed on September 21, 2017 and amended on January 15, 2018 (Dkt. 47).

Rowley filed three motions for preliminary injunctions, all on behalf of removing Asian elephant Ruth, who has suffered the loss of an ear since the litigation started, among other injuries. The last such motion was consolidated with the trial on merits over Rowley's objections on February 12, 2019 (Dkt. 49). A bench trial was held on March 5-7, 2019, and the Court viewed the zoo on March 28, 2019. Since then, Rowley filed a Motion to Expedite the matter on June 19, 2019 (Dkt. 83), which the Court

acknowledged.

As Ruth is considered property of the City of New Bedford, and as her current confinement is a danger to her health and well-being, Rowley now asks the Court for an Order to allow Ruth's immediate removal.

II. Synopsis

Some time in May 2019, the City made a management decision to restrict Ruth to the inner yard of the exhibit, while allowing Emily access to both the inner and outer yard areas. Both elephants have chronic arthritis and joint problems, as well as foot health issues. Ruth's lameness and arthritis is visibly worse than Emily's. The City's consulting veterinarian testified that a sedentary life and confinement contributes to a captive elephant's chronic foot and joint problems (Ryer testimony, Trial Transcript Day 1).

Also acknowledged, although Rowley and the City disagree on the terms to use, is that Emily, the larger elephant, takes Ruth's food, and has injured Ruth on numerous occasions. Rowley calls this food and spatial aggression; the City refers to it as "displacement" behavior and "object play." Whatever it is called, the City's records are clear that Ruth has been injured 19 times by Emily, including an incident where 6 1/2" of Ruth's tail was bitten off by Emily (Defendants' Exhibit 8, Independent Panel Report, Appendix C, Trial Transcript Day 2).

Since May, however, Rowley witnessed changes to the management of both elephants that has caused Ruth further injury. This includes (1) a failure to change the dirt floor of the barn monthly, combined with Ruth's forced confinement to the barn and resulting in the re-opening of the wound to her right ear; (2) failure to protect Ruth from Emily resulting in a loss of nutrition and causing emotional distress seen by Ruth

stereotyping; (3) confining Ruth to the inner yard thereby reducing her mobility and increasing her lameness and arthritis; (4) preventing Ruth from accessing water during hot weather and during a heat advisory causing her heat stress and emotional distress; and (5) failing to protect Ruth from Emily's aggression resulting in physical and emotional trauma on August 16, 2019. (Exhibit 1, Rowley's Affidavit, September 4, 2019)

The City staff, by feeding Ruth and Emily in separate locations in effect admits that Ruth's nutritional needs are jeopardized by her confinement with Emily. However, separate feedings do not prevent Emily from accessing Ruth's food daily. Further, on August 25, 2019, when Emily became incensed at Ruth in front of several zookeepers and the elephant manager, the staff ordered Emily away from Ruth and then led away. This, too, is an admission that Emily poses a risk to Ruth's health and well-being.

III. State Law

Rule 64 allows for remedies under state law (Hoult v. Hoult, 373 F.3d 47, 54, 1st Cir. (2004) "...the order must comport with the law of the state in which the district court is held (here in Massachusetts), except that any federal statute governs to the extent applicable.")

Looking at Massachusetts anti-cruelty laws, Chapter 272 of Massachusetts General Laws regulate the enforcement and removal of animals. Cruelty laws apply to all animals (Knox v. MSPCA, 12 Mass App Ct, 407 (1981)). Seizure and forfeiture is allowed under MGL Chapter 272 Section 77 which states:

"Whoever ... causes or procures an animal to be ...deprived of necessary sustenance, ...whoever, having the charge or custody of an animal, either as owner or otherwise, inflicts unnecessary cruelty upon it, or unnecessarily fails to provide it with proper food, drink or shelter, sanitary environment, or protection from the weather..." shall be subject to punishment by prison and fined.

And,

"In addition to any other penalty provided by law, upon conviction for any violation of this section..., the defendant shall forfeit to the custody of any society, incorporated under the laws of the commonwealth for the prevention of cruelty to animals..., the animal whose treatment was the basis of such conviction."

Here, Rowley is asking that the Court issue an order seizing and forfeiting Asian elephant Ruth to either The Elephant Sanctuary in Tennessee or to the Elephant Refuge in North America, located in Attapulgus, Georgia. Both are bona fide non-profits whose mission is to provide care for needy, elderly and sick elephants.

Although unusual, confiscation of an elephant is not unheard of. In November 2017, an African female elephant "Nosey" was confiscated while touring in Moulton, Alabama and transferred to The Elephant Sanctuary due to its owner's failure to provide sanitary living conditions and adequate transport. After a hearing, the Lawrence County district judge awarded custody to the Sanctuary in January 2018 (Lawrence County Ex Rel v. Liebel Hugo Tomi, et al; DV-2017-000015.00; found online at Scribd (<https://www.scribd.com/document/369738694/Animal-Control-Officer-Retains-Custody-of-Nosey-the-Elephant>)).

Ironically, Asian elephant Ruth was seized from her prior owner, Brian Watson, by the U.S. Department of Agriculture in 1986 for animal cruelty. She was transferred to Buttonwood Park Zoo at that time.

For these reasons, and as allowed by law, Rowley requests a confiscation order for the immediate removal of Asian elephant Ruth from the City of New Bedford

Buttonwood Park Zoo to either sanctuary where she will receive the appropriate nutritional and medical care, sanitary housing, and a safe environment.

Respectfully submitted,

s/Joyce Rowley
Plaintiff, pro se
PO Box 50251
New Bedford, MA 02745
508-542-8297

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS
BOSTON DIVISION

Joyce Rowley,)	
Plaintiff, pro se)	
)	
v.	)	Case No.
	)	17-cv-11809-WGY
City of New Bedford)	
Defendant)	

AFFIDAVIT OF JOYCE ROWLEY

1. My name is Joyce Rowley. I am a resident and taxpayer in New Bedford, MA. I am a member of the Buttonwood Park Zoological Society.
2. I visit Buttonwood Park Zoo daily, generally spending one to two hours each visit, weather permitting. Occasionally I visit for five to six hours. On each visit I observe the two Asian elephants, Ruth and Emily, as I have since 2010. I also observe the elephants from the adjacent Buttonwood Park as well.
3. On these visits, I take notes, photographs, and videos. I also record the weather, and in particular, I record the temperature of the exhibit with a portable outdoor thermometer.
4. Beginning in May 2019, I observed that Asian elephant Ruth was being treated differently than in the past. Keepers no longer called to her to accompany them to the "outer" yard. They also fed her less hay, and began feeding her exclusively at the "inner" yard or in the barn. The exhibit is divided into two areas--an inner yard that is comprised of a barn, water pool, and log structure. The outer yard is accessed through a metal gate and is comprised of an open area with four trees,

- large rocks, and a new "shelter."
5. Most often, Ruth now stands near the log structure, which provides some shade until about mid-day, at which time she is seen standing at the barn's front door. Zookeepers have been heard to say that she "preferred" to stay on the inner yard.
 6. This change in management adversely affected Ruth physically and emotionally. Physically, the confinement causes her to become more lame and arthritic. Confinement in the barn or on the inner yard (which is blocked from breezes by structures and trees), also causes Ruth heat stress. Ruth lost 3-4" of her left ear to frostbite at the zoo in 2014 and 75% of her right ear to an infection she incurred at the zoo in 2017. An elephant's ears regulate their temperature.
 7. On July 8, 2019, with temperatures 86-88 degrees, I observed Ruth attempt to seek water at the pool or at the pipe feeding the pool. A zookeeper in the barn signalled to Ruth to return to the log structure. Ruth turned and did so.
 8. I complained to the Zoo Director and Assistant Zoo Director who were at the exhibit at the time. They claimed nothing happened and that I was "wrong." Ruth was swaying at the log structure in stereotype behavior. (Video online at: https://www.youtube.com/KfDJyXhyr_8)
 9. However, while further discussing the matter with the Zoo Director, the zookeeper walked by the exhibit, Ruth looked at the keeper and made a beeline for the pool where she cooled herself off by spraying water on her head, face and body. I pointed this out to the Zoo Director. Ruth stayed at the pool for 10-15 minutes. (Video online at: <https://www.youtube.com/dnRdG1lwQPc>).
 10. On July 10, 2019, with temperatures in the shade at 88 degrees, Ruth was again

- denied access to water three times.
11. On the following occasions, Ruth was kept in the barn for an hour or more with both barn doors closed: June 30, July 8, July 10, July 20, and July 21. The barn is not climate controlled, nor are temperatures taken inside the barn.
 12. During a heatwave on July 20, 2019, Ruth was kept in the barn for 4 1/2 hours as temperatures soared to 95 degrees in the shade. The doors were both closed for one hour during that time, and then only one door was opened. When Ruth was finally released at 4 p.m., she immediately went to a hose spraying water, thoroughly immersing herself. (Video online at: <https://www.youtube.com/YVd1owx85c8>, and <https://www.youtube.com/jlQjKIR0gQ>).
 13. Again on July 21, 2019, Ruth was confined to the barn during the heatwave, this time for 3 hours while temperatures were 93 degrees.
 14. Ruth's right ear had healed to 99% by March 2019. However, beginning in May 2019, Ruth's ear opened up again and is again infected as of June 24, 2019 .
 15. The barn has a dirt floor. The dirt has not been thoroughly removed and replaced since May 7, 2019--notably, the sand piled near the door to be used for replacing it has not changed since July. A partial cleaning was done on Ruth's side in July. According to daily keeper logs received under the Public Records Access Act the floor was rotated on June 24, July 16, and July 26, but on those days I was present almost all day and did not see equipment entering or exiting the barn.
 16. At the times that Ruth is not allowed to the outer area, she shows signs of emotional distress such as swaying, swinging her trunk, false eating, holding the tip of her trunk in her mouth, and hanging her head with her tail drooping.

17. About once per week, I have observed Ruth being allowed to access the outer yard.
18. At those times, she appears bright-eyed, energetic and explores the hanging blocks for treats, grazes on the grass, explores the treat dispensers, and eats hay leftover by Emily.
19. Asian elephant Emily is not treated as Ruth has been treated this summer.
20. Confining Ruth to the inner yard has not prevented Emily from taking Ruth's food. In addition to the emotional distress it causes Ruth, this behavior also reduces the nutritional benefit as the elephants are only fed every three hours. When Emily eats all of Ruth's food, Ruth goes without eating for up to six hours. This occurs daily at the 10 o'clock feeding and occasionally at the 1 o'clock feeding.
21. If Ruth ventures to the outer yard when the keepers aren't present, Emily attacks her as occurred on August 16, 2019 (Video online at: <https://www.youtube.com/yh6L2BAoPW0>).
22. On August 25, 2019, several staff were present as Emily and Ruth were fed together in front of a crowd. Emily began swaying angrily after Ruth took back her branch, and likely would have attacked (see video from September 7, 2017). In this instance, a keeper was sent to get more hay, although plenty was present already. Then Emily was called away by the Assistant Zoo Director, and she was fed a batch of hay away from the crowd (Video online at: https://www.youtube.com/LQbW_teLuwc and <https://www.youtube.com/pu3e1CeDUJ4>). When she returned she was very

docile. Emily was then called into the inner yard, where she spent the next two hours until the zoo closed.

23. Ruth's confinement to the barn and the inner yard has not abated; nor has Emily's food and spatial aggression.

Sworn under penalty of perjury this 5th day of September, 2019,

/s/Joyce Rowley
Plaintiff, pro se
PO Box 50251
New Bedford, MA02745
508-542-8297

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS
BOSTON DIVISION

Joyce Rowley,)	
Plaintiff, pro se)	
)	
v.	)	Case No.
	)	17-cv-11809-WGY
City of New Bedford)	
Defendant)	

CORRECTED MOTION FOR FORFEITURE

Plaintiff Rowley hereby requests a Court order for forfeiture of Asian elephant Ruth under Rule 64 of the Federal Rules of Civil Procedure. As Ruth is considered property of the City of New Bedford, and as her current confinement at Buttonwood Park Zoo jeopardizes her health and well-being, Rowley asks the Court for an Order to allow Ruth's immediate transfer of ownership to the Court so she may be relocated to one of the two elephant care facilities named in this lawsuit.

Respectfully submitted,
/s/Joyce Rowley
Plaintiff, pro se

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of September 2019, the foregoing was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

s/Joyce Rowley
Plaintiff, pro se
PO Box 50251
New Bedford, MA 02745
508-542-8297

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS
BOSTON DIVISION

Joyce Rowley,)	
Plaintiff, pro se)	
)	
v.	)	Case No.
	)	17-cv-11809-WGY
City of New Bedford, MA)	
Defendant)	

SUPPLEMENTAL MEMORANDUM IN FAVOR OF FORFEITURE

Under Rule 64, Seizing a Person or Property, of the Federal Rules of Civil Procedure, Rowley may seek a provisional remedy as may be allowed equally under State law to secure satisfaction of potential judgement (FRCP 64(a)).

Rowley so moves to protect her interest in the Asian elephant Ruth.

I. Clarification

As Asian elephant Ruth is considered property of the City of New Bedford, and as her current confinement is a danger to her health and well-being, Rowley now asks the Court for an Order seizing and transferring Ruth to either The Elephant Sanctuary in Tennessee or to the Elephant Refuge in North America, located in Attapulgus, Georgia. Both are bona fide non-profits whose mission is to provide care for needy, elderly and sick elephants.

Rule 64 allows for remedies under state law (Hoult v. Hoult, 373 F.3d 47,

54, 1st Cir. (2004) "...the order must comport with the law of the state in which the district court is held (here in Massachusetts), except that any federal statute governs to the extent applicable.")

In Massachusetts, anti-cruelty laws allow for the seizure of animals prior to criminal conviction. However, a federal marshal is needed to provide enforcement. Rowley will provide coordination with and transport to the receiving facility.

II. Supplemental Documentation

As stated in the original memorandum, some time in May 2019, the City made a management decision to restrict Ruth to the inner yard of the exhibit, while allowing Emily access to both the inner and outer yard areas (Dkt. 87). This was confirmed by Assistant Zoo Director Share Crook Rapoza, who verified Ruth's later confinement on July 10 was a management decision (Exhibit 1, Email from Crook Rapoza re Ruth's confinement). Crook Rapoza also confirmed that the Zoo does not maintain temperature records for the interior of the barn, nor has new cooling equipment been added to it (Exhibit 2, Email from Crook Rapoza responding to a public records request on July 27, 2019).

For these reasons, and as allowed by law, Rowley requests a confiscation order for the immediate removal of Asian elephant Ruth from the City of New Bedford Buttonwood Park Zoo to either sanctuary where Ruth will

receive the appropriate nutritional and medical care, sanitary housing, and a safe environment.

Respectfully submitted,

s/Joyce Rowley
Plaintiff, pro se
PO Box 50251
New Bedford, MA 02745
508-542-8297

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of September 2019, the foregoing was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/Joyce Rowley Plaintiff, pro se
PO Box 50251
New Bedford, MA 02745
508-542-8297

RE: Asian elephant Ruth

From: Shara Crook (SharaC@newbedford-ma.gov)

To: [Redacted]

Date: Wednesday, July 17, 2019, 10:15 AM EDT

Ms. Rowley,

I apologize for the delay in response to this email. My access to email and a computer is restored for the moment so I am taking the time to respond now. Your allegation that Asian Elephant Ruth was not allowed out again on Wednesday afternoon is wrong. Your assumption that the barn temperature was higher than the outside temperature is incorrect. Both doors may have been almost completely closed after Emily went in the barn and then left, but they did not remain that way for the rest of the day. There are always reasons for the animal management decisions made on an on-going basis at the zoo. Retaliation for your complaint to Director Lovett did not factor into the decisions made with regard to Ruth.

Regards,
Shara Crook

-----Original Message-----
From: [Redacted] [mailto:[Redacted]]
Sent: Thursday, July 11, 2019 7:42 AM
To: Shara Crook; Keith Lovett
Subject: Asian elephant Ruth

Good morning,
Yesterday Asian elephant Ruth was called into the barn about 1 pm and was not allowed out again, even for evening hours.

The temperature for that period was 88°F, perhaps higher in the barn. Both doors were almost completely closed after Emily went in the barn and then left.

Is there some reason for this? I hope the keeper isn't retaliating against me for my complaint Monday by punishing Ruth.

Regards,
Joyce Rowley

RE: July 10, 2019 incident

From: Shara Crook (SharaC@newbedford-ma.gov)

To: [REDACTED]

Cc: LisaP@newbedford-ma.gov; KLovett@newbedford-ma.gov

Date: Saturday, July 27, 2019, 11:51 AM EDT

Ms. Rowley,

There are no documents responsive to items #1 and 2 of your request. The City email system is now functioning correctly and I can send you the documents responsive to Item #3 electronically if you wish. If not, the estimate for printing them out would be approximately \$2.25

Shara (Crook) Rapoza
Assistant Director
Buttonwood Park Zoo
425 Hawthorn St., New Bedford, MA 02740
(508) 991-6178 sharac@newbedford-ma.gov

-----Original Message-----

From: [REDACTED]
Sent: Friday, July 19, 2019 9:33 AM
To: Shara Crook <SharaC@newbedford-ma.gov>
Subject: July 10, 2019 incident

Ms.Crook,

Thank you for your response. However, when I tried to reply, my keyboard did not respond properly. Please let your IT know.

Regarding the date in question, I remained in the zoo or in the park until 6:30 pm.

During that time, Ruth was in the barn and both doors closed. This was not her choice, she was called into the barn.

Since you claim the barn is cooler than outside, please consider this a request for the following public records:

1. Temperature records for the Asian elephant barn for the period of June 1, 2019 to the time of fulfillment;
2. Documentation of the method of mechanical cooling such as air conditioning receipts for installation or repair;
3. Keeper logs of the Asian elephants for the period June 16, 2019 to the time of fulfillment.

Since the City's email system may still have glitches, please provide paper documents and a fee estimate.

Regards,
Joyce Rowley
508-542-8297