UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF CALIFORNIA

SOUTH CAROLINA ADVOCATES FOR CAPTIVE EXOTICS, Plaintiff, v. UNITED STATES FISH AND WILDLIFE SERVICE, Defendant.	Case No. 2:15-cv-3768-PMG(LUD) **MEMORANDUM OPINION**

Plaintiff, South Carolina Advocates for Captive Exotics (SCACE), brought this action challenging Defendant U.S. Fish and Wildlife Service's (FWS) denial of SCACE's petition to amend the definition of the phrase "industry and trade" in the agency's regulations pertaining to the Endangered Species Act (ESA). SCACE contends that this denial is not in accordance with law and should accordingly be overturned pursuant to the Administrative Procedure Act. Before the Court is the FWS's motion for judgment on the pleadings. Upon consideration of the motion, and the opposition thereto, the Court concludes that the motion should be DENIED.

I. BACKGROUND

Because we are at the pleadings stage, the Court must treat as true SCACE's allegations. *Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542, 1550 (9th Cir. 1989).

SCACE is advocates on behalf of captive exotic animals, including tigers, in South Carolina. Compl. ¶ 4. One of SCACE's long-standing campaigns is focused on a tiger named Calixta, who is owned by Mabel Moxie's Cantankerous Cats (MMCC). *Id.* ¶ 17. MMCC is a South-Carolina based for-profit corporation that exhibits animals. *Id.* ¶ 16. Calixta and other animals are frequently on display at MMCA's facility, which is open to the public for a fee. *Id.* ¶ 18.

SCACE advocates on behalf of Calixta and other captive animals primarily by documenting their conditions, conferring with experts about this documentation, reporting apparent violations of animal protection laws to officials, and engaging in public education and media campaigns. *Id.* ¶ 4.

SCACE has been monitoring and documenting Calixta's conditions for years and has shared its documentation, along with related expert statements, with its members, the public, and the media. *Id.* ¶ 20. SCACE has also established a strong relationship with state and local law enforcement officials and has filed complaints based on some of the evidence it has gathered. *Id.* A number of these complaints has resulted in citations from local law enforcement. *Id.* Even when citations are not issued, law enforcement officials routinely follow-up on SCACE's complaints and provide the organization with the results of their investigations, and SCACE incorporates the information that it obtains in this way into its public education and media campaigns. *Id.* Among other things, SCACE has documented MMCA staff striking and jabbing Calixta, as well as shocking her with an electric prod, on multiple occasions. *Id.* ¶ 22. SCACE

has also obtained footage of Calixta pacing back and forth—a sign of poor welfare—in a small enclosure at MMCA's facilities, and footage of wounds on Calixta's face, apparently the result of her repetitively rubbing against the chain link fence that encloses her. *Id.*

Last year, MMCC entered into a long-term contract with the University of Agartha in California, agreeing, for a fee, to transport Calixta to Agartha each September, hold her there throughout the football season, and exhibit her as a mascot at each of the Agartha Tiger's home football games. *Id.* ¶ 25. Thus, last year Calixta was transported to and from California, and will be so transported every year for the foreseeable future. *Id.* ¶ 26. The fee the university pays MMCC exceeds the cost of transporting and caring for Calixta. *Id.* ¶ 25. In addition, the university sells tickets to all of its games, and the contract guarantees MMCC ten percent of all proceeds from home game ticket sales. *Id.* Last year, SCACE sent staff and equipment to these California exhibits to monitor and document Calixta's conditions while at the university, and the organization plans to continue doing so each year in the future. *Id.* ¶¶ 28-29. SCACE also intends to continue to monitor Calixta should MMCC transport her to other states for exhibition. *Id.* ¶ 29. Although in the wild tigers roam vast habitat ranges, while Calixta is held in Agartha, she is confined to an approximately ten foot by ten foot enclosure. *Id.* ¶ 27. During transport she is confined to a trailer that is even smaller, lacks adequate ventilation, and has a hard substrate, which can cause foot and joint problems. *Id.* And although tigers cool themselves by immersing their bodies in water, Calixta does not have access to a pool while in transport or while at the university. *Id.*

A. SCACE's Complaint to the FWS

Because MMCC's exhibition of Calixta outside of the state made it harder for SCACE to monitor and document the tiger's conditions—and appeared to subject her to additional

suffering—SCACE filed a complaint with the FWS. *Id.* ¶¶ 28-29, 32-33. Specifically, SCACE asked the FWS to hold MMCA accountable for violating the following provision of the Endangered Species Act: "it is unlawful for any person subject to the jurisdiction of the United States to— . . . deliver, receive, carry, transport, or ship in interstate or foreign commerce, by any means whatsoever and in the course of a commercial activity, any [endangered] species." 16 U.S.C. § 1538(a)(1)(E); *see* Compl. ¶ 33.

The tiger is listed as endangered under the ESA, 50 C.F.R. § 17.11(h), and SCACE contended that MMCA's transport of Calixta to California to be exhibited as a mascot, constituted "transport . . . in interstate . . . commerce . . . in the course of a commercial activity," 16 U.S.C. § 1538(a)(1)(E), a clear violation. Compl. ¶ 33. SCACE further argued that MMCA did not have a permit authorizing it to engage in this prohibited activity and that it could not qualify for one because permits can only be issued "for scientific purposes or to enhance the propagation or survival of the affected species," 16 U.S.C. § 1539(a)(1)(A), and the transport of Calixta for exhibition as a mascot is neither scientific nor species-enhancing. Compl. ¶ 33; *see also id.* ¶ 10 ("The FWS has recognized that the exhibition of endangered species does not 'enhance the propagation or survival' of the species. Nor is such exhibition 'scientific.'").[1]

[1] The parties agree that the exception set forth at 50 C.F.R. § 17.21(g)(6), which exempts from permitting requirements certain activities involving "inter-subspecific crossed or 'generic' tiger[s] (Panthera tigris) (i e., specimens not identified or identifiable as members of the Bengal, Sumatran, Siberian or Indochinese subspecies (Panthera tigris tigris, P.t. sumatrae, P.t. altaica and P.t. corbetti, respectively)[)]," would not apply here. The Court takes judicial notice that Calixta is most likely "generic," given that the vast majority of tigers in this country are. *See* Shu-Jin Luo et al., *What Is a Tiger? Genetics and Phylogeography*, in Tigers of the World: The Science, Politics and Conservation of *Panthera tigris* 35, 44 (Ronald Tilson & Philip J. Nyhus, eds., 2d ed. 2010). However, the exception applies *only* when the purpose of the otherwise prohibited activity "is to enhance the propagation or survival of the affected exempted species," 50 C.F.R. § 17.21(g)(6)(i), which, as discussed, is not the case here.

The FWS responded, stating that it had determined that SCACE's complaint was unfounded because the transport of Calixta for exhibition as a mascot does not constitute transport "in the course of a commercial activity." *Id.* ¶ 34. The agency explained:

> The ESA defines the term "commercial activity" to mean, "all activities of industry and trade, including, but not limited to, the buying or selling of commodities and activities conducted for the purpose of facilitating such buying and selling: *Provided, however*, That it does not include exhibition of commodities by museums or similar cultural or historical organizations." 16 U.S.C. § 1532(2).
>
> To inform this definition, FWS promulgated a regulation that provides: "Industry or trade in the definition of 'commercial activity' in the Act means the actual or intended transfer of wildlife or plants from one person to another person in the pursuit of gain or profit." 50 C.F.R. § 17.3. Because MMCA never transferred, or intended to transfer, ownership of Calixta, it was not engaged in an "activit[y] of industry and trade" and, thus, the transport of Calixta was not "in the course of a commercial activity" within the meaning of the ESA.

Compl. ¶ 34.

B. SCACE's Petition for Rulemaking

Not to be deterred, SCACE then turned to the next chapter in its efforts on behalf of Calixta and other captive exotic animals that are afforded protection under the ESA—a petition for rulemaking. In a formal petition, SCACE urged the FWS to amend the above-referenced regulatory definition of "industry and trade" to include additional activities beyond transfers of ownership for profit, including activities like MMCA's interstate transport of Calixta to exhibit her at football games. *Id.* ¶¶ 36-37.

The FWS denied SCACE's petition, stating that its current regulatory definition was within the scope of its broad discretion and that it would not be revisiting that definition due to competing priorities and limited resources. *Id.* ¶ 38. SCACE then filed this action challenging the denial. The FWS now seeks judgment on the pleadings contending, first, that SCACE lacks

standing, and, second, that the denial was lawful. SCACE opposes the motion. The two issues are addressed in turn below.

II. STANDING

Standing is a jurisdictional issue, and as the party invoking this Court's jurisdiction, SCACE has the burden of establishing its standing. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (citations omitted).

Here, SCACE asserts standing on its own behalf, rather than on behalf of its members. Like an individual plaintiff, SCACE must show the "three elements" that comprise the "irreducible constitutional minimum of standing":

> First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not 'conjectural' or 'hypothetical.'" Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court. Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

Id. at 560-61 (internal citations omitted); *see also see also Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378–79 (1982) (a plaintiff alleging organizational standing must meet the same requirements as an individual plaintiff).

Each one of these elements "must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation." *Lujan*, 504 U.S. at 561 (citations omitted).

Because we are the pleading stage, SCACE can rely on the allegations in its complaint and the Court must "'accept as true all material allegations of the complaint and . . . construe the complaint in favor of the complaining party.'" *Levine v. Vilsack*, 587 F.3d 986, 991 (9th Cir. 2009) (citation omitted); *see also Lujan*, 504 U.S. at 561 ("At the pleading stage, general factual

allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we 'presume that general allegations embrace those specific facts that are necessary to support the claim.'" (citations omitted)); *Cafasso, U.S. ex rel. v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1054 n.4 (9th Cir. 2011) (the standard for deciding a motion for judgment on the pleadings is "'functionally identical'" to that for a motion to dismiss (citation omitted)); *Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542, 1550 (9th Cir. 1989) ("For purposes of [a] motion [for judgment on the pleadings], the allegations of the non-moving party must be accepted as true . . . ." (citations omitted)).

While this standard is liberal, it does have constraints, and allegations that are "vacuous," "conclusory," "bare bones words and phrases without any factual content . . . . are insufficient to establish standing . . . ." *Perez v. Nidek Co.*, 711 F.3d 1109, 1113 (9th Cir. 2013) (citing *Lujan*, 504 U.S. at 561; *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)); *see also Stevens v. Harper*, 213 F.R.D. 358, 370 (E.D. Cal. 2002) (court cannot rely upon allegations that are "overly generalized, conclusory, or speculative" (citing *Schmier v. U.S. Court of Appeals for the Ninth Circuit*, 279 F.3d 817, 820–21 (9th Cir. 2002)) (additional citation omitted)); *Henson v. Fid. Nat. Fin. Inc.*, 18 F. Supp. 3d 1006, 1009 (C.D. Cal. 2014) ("[C]onclusory allegations and unwarranted inferences are insufficient to defeat a motion for judgment on the pleadings." (citing *In re Syntex Corp. Sec. Litig.*, 95 F.3d 922, 926 (9th Cir.1996))).

A. Injury

The Supreme Court has made clear that a "concrete and demonstrable injury to [an] organization's activities—with the consequent drain on the organization's resources—constitutes far more than simply a setback to the organization's abstract social interests" and is thus an injury that gives rise to standing. *Havens Realty Corp.*, 455 U.S. at 379. Thus, to adequately

allege injury, a plaintiff organization must assert "'both a diversion of its resources and a frustration of its mission.'" *La Asociacion de Trabajadores de Lake Forest v. City of Lake Forest*, 624 F.3d 1083, 1088 (9th Cir. 2010) (citation omitted). Put another way, "An organization may sue only if it was forced to choose between suffering an injury and diverting resources to counteract the injury." *Id.* at 1087 n.4 (citation omitted).

The Court finds that SCACE has indeed alleged that it is forced to choose between suffering an injury—not being able to monitor Calixta and document her conditions, and to then use that documentation to advocate on her behalf—and diverting resources to counteract that injury—i.e., the resources it expends to travel and monitor Calixta, and to advocate on her behalf, in California. More specifically, SCACE alleges that its activities are injured by the FWS's denial of its petition for rulemaking because the agency's refusal to regulate interstate transports of endangered species unless they involve the transfer of ownership of an animal for profit—which SCACE's petition sought to end—impairs SCACE's ability to advocate for these animals. Compl. ¶¶ 40-43. SCACE alleges that the vast majority of its work is done in South Carolina, and that it has had to divert considerable resources to travel to California to monitor and document Calixta's conditions, to research California laws in order to advocate on Calixta's behalf within that state, and also to build connections with California officials, press outlets, and citizens to advocate for the tiger there. *Id.* ¶¶ 4, 40-43. SCACE also alleges that California and Agartha officials have not been responsive to its complaints and that it has not been able to obtain investigatory information about Calixta in the way it normally can in South Carolina. *Id.* ¶ 43. These allegations suffice to survive a motion for judgment on the pleadings. *See People for the Ethical Treatment of Animals (PETA) v. U.S. Dep't of Agric.*, 797 F.3d 1087, 1095 (D.C. Cir. 2015) (where agency action impaired plaintiff organization's access to "investigatory

information, and a means by which to seek redress for [animal] abuse," organization "alleged a cognizable injury sufficient to support standing").

Nevertheless, the FWS contends that the Court should disregard SCACE's injuries because they are, in the agency's view, "self-inflicted." Certainly, harm can be self-inflicted and thus non-cognizable for the purposes of standing—otherwise the injury-in-fact requirement would be rendered meaningless. But harm is only self-inflicted if "'it results not from any actions taken by [the agency], but rather from the [organization's] own budgetary choices.'" *Id.* at 1096 (quoting *Fair Emp't Council of Greater Wash., Inc. v. BMC Mktg. Corp.*, 28 F.3d 1268, 1276 (D.C. Cir. 1994)). "That an organization 'voluntarily, or willfully . . . diverts its resources, however, does not automatically mean that it cannot suffer an injury sufficient to confer standing.'" *Id.* at 1096-97 (citations omitted). The dispositive question is "whether the organization 'undertook the expenditures in response to, and to counteract, the effects of the defendants' alleged' unlawful acts 'rather than in anticipation of litigation.'" *Id.* at 1097 (quoting *Equal Rights Ctr. v. Post Props., Inc.*, 633 F.3d 1136, 1140 (D.C. Cir. 2011)); *see also Nat'l Fair Hous. Alliance v. A.G. Spanos Const., Inc.*, 542 F. Supp. 2d 1054, 1064 (N.D. Cal. 2008) (rejecting a similar "'self-inflicted' injuries" argument where "the alleged diversion of resources was a result of the plaintiff's choice 'to monitor the violations and educate the public regarding the discrimination at issue'" (citing *Smith v. Pac. Props. & Dev't Corp.*, 358 F.3d 1097, 1097 (9th Cir. 2004))); *We Are Am./Somos Am., Coal. of Arizona v. Maricopa Cnty. Bd. of Supervisors*, 809 F. Supp. 2d 1084, 1096 (D. Ariz. 2011) ("The purportedly voluntary nature of the organizations' activities here does not . . . undermine their allegations of standing at this pleading stage.").

B. Causation and Redressability

Because "causation and redressability are two sides of the same coin," "the court addresses these two standing elements together." *Ctr. for Biological Diversity v. EPA*, 90 F. Supp. 3d 1177, 1190 (W.D. Wash. 2015); *see also Gonzales v. Gorsuch*, 688 F.2d 1263, 1267 (9th Cir. 1982) ("There is a close relation between the requirement of power to redress a claimed injury and the requirement of a causal link between the injury asserted and the relief claimed." (citing *Duke Power Co. v. Carolina Envtl. Study Group*, 438 U.S. 59, 74 (1978)). Indeed, the FWS's arguments as to causation and redressability are particularly intertwined in this case.

At bottom, the FWS contends that any injuries SCACE may suffer arise not from the agency's actions, but from the actions of third parties not before the court, such as MMCC, and accordingly cannot be redressed by the court.

To be sure, as the Supreme Court has explained:

> When the suit is one challenging the legality of government action or inaction, the nature and extent of facts that must be averred (at the summary judgment stage) or proved (at the trial stage) in order to establish standing depends considerably upon whether the plaintiff is himself an object of the action (or forgone action) at issue. . . . When . . . a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else*, much more is needed. In that circumstance, causation and redressability ordinarily hinge on the response of the regulated (or regulable) third party to the government action or inaction—and perhaps on the response of others as well. The existence of one or more of the essential elements of standing "depends on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict," and it becomes the burden of the plaintiff to adduce facts showing that those choices have been or will be made in such manner as to produce causation and permit redressability of injury.

Lujan, 504 U.S. at 561-62 (internal citations omitted). And while SCACE specifically challenges the FWS's denial of the organization's own petition for rulemaking, this case clearly is one that involves the agency's regulation (or lack of regulation) of a third party.

At this juncture it is worth underscoring again the procedural posture of the case—because we are only at the pleading stage, it is incumbent on the Court to "'accept as true all material allegations of the complaint and . . . construe the complaint in favor of the complaining party.'" *Levine*, 587 F.3d at 991 (citation omitted). In addition, a plaintiff need not allege "that a favorable decision *will inevitably* redress his injury"; rather, she need allege "only that a favorable decision is *likely* to redress his injury." *Beno v. Shalala*, 30 F.3d 1057, 1065 (9th Cir. 1994) (citing *Lujan*, 504 U.S. at 561); *see also Wash. Envtl. Council v. Bellon*, 732 F.3d 1131, 1146 (9th Cir. 2013) ("Redressability does not require certainty but only a substantial likelihood that the injury will be redressed by a favorable judicial decision." (citation omitted)). Under this standard, SCACE's allegations sufficiently allege causation and redressability.

The FWS relies principally on the Ninth Circuit's decision in *Levine v. Vilsack* in challenging redressability, but this reliance is misplaced. In *Levine*, the court made clear that, before the plaintiffs' alleged injury could be redressed, a series of "speculative steps" would have to occur to coerce the actions of third parties not before the court. 587 F.3d at 993. The court explained, a "'determinative or coercive effect'" on third parties "would not run from this court's ruling," but would instead turn on additional, highly speculative regulatory action under a statute not even at issue in the case. *Id.* at 995. No such additional speculative steps are involved here. In contrast to *Levine*, only one statutory scheme—with clear enforcement mechanisms, *see* 16 U.S.C. § 1540—is at issue here.

In contending that SCACE fails to adequately plead causation and redressability, the FWS seems to misconstrue SCACE's alleged injuries. Those injuries arise not from MMCC's alleged mistreatment of Calixta. Rather, as discussed above, SCACE's alleged injuries result from the impairment of its advocacy work, including "a lack of redress for its complaints and a

lack of information for its membership, both of which," the organization also alleges, would be redressed if the relief SCACE seeks here were granted and MMCC were prevented from transporting Calixta to California to be exhibited. *PETA*, 797 F.3d at 1095; *see* Compl. ¶¶ 40-43. That the FWS can speculate about hypothetical situations in which SCACE's alleged injuries "*might* not" be redressed is of no moment. *Beno*, 30 F.3d at 1065; *see also Utah v. Evans*, 536 U.S. 452, 464 (2002) (redressability exists where the "practical consequence" of a judicially ordered change "would amount to a significant increase in the likelihood that the plaintiff would obtain relief that directly redresses the injury suffered" (citations omitted)).

Indeed, it is well established that "those adversely affected by a[n] . . . agency decision generally have standing to complain that the agency based its decision upon an improper legal ground. If a reviewing court agrees that the agency misinterpreted the law, it will set aside the agency's action . . . ." *Fed. Election Comm'n v. Akins*, 524 U.S. 11, 25 (1998) (citations omitted). For the purposes of causation and redressability, it is sufficient that the challenged agency action authorizes the conduct that injures the plaintiff, when, as here, such conduct "would have been illegal without that action." *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 45 n.25 (1976) (citations omitted); *see also Nat'l Wrestling Coaches Ass'n v. Dep't of Educ.*, 366 F.3d 930, 940 (D.C. Cir. 2004) ("[A] federal court may find that a party has standing to challenge government action that permits or authorizes third-party conduct that would otherwise be illegal in the absence of the Government's action." (citations omitted)); *Int'l Ladies' Garment Workers' Union v. Donovan*, 722 F.2d 795, 811 (D.C. Cir. 1983) (redressability existed where "the relief sought . . . would make the injurious conduct of third parties complained of . . . illegal" and where "only by taking extraordinary measures—*i.e.*, violating the law . . .—could third parties prevent redress of the appellants' injuries"); *Artichoke Joe's v. Norton*, 216 F. Supp. 2d 1084,

1109 (E.D. Cal. 2002) (in assessing redressability, "the court is entitled to expect" that the law will be followed).

Having found that SCACE has adequately alleged standing, the Court now will review the FWS's denial of SCACE's petition for rulemaking.

III. DENIAL OF THE PETITION FOR RULEMAKING

A. Standard of Review

The question before the Court is whether—accepting all of SCACE's material allegations as true and construing them in the light most favorable to SCACE—the FWS is entitled to judgment as a matter of law. *See Enron Oil Trading & Transp. Co. v. Walbrook Ins. Co.*, 132 F.3d 526, 528 (9th Cir.1997).

Judicial review of an agency's denial of a rulemaking petition is "'extremely limited' and 'highly deferential,'" *Massachusetts v. EPA*, 549 U.S. 497, 527-28 (2007) (citation omitted), and an agency's denial of a rulemaking petition will be overturned "only for compelling cause, such as plain error of law or a fundamental change in the factual premises previously considered by the agency," *Nat'l Customs Brokers & Forwarders Ass'n of Am., Inc. v. United States*, 883 F.2d 93, 97 (D.C. Cir. 1989) (citation omitted).

SCACE maintains that the FWS's denial of the group's rulemaking petition contravenes the plain language of the definition of "commercial activity" in the ESA and that the denial is therefore "not in accordance with law," 5 U.S.C. § 706(2)(A). "When 'reviewing an agency's statutory interpretation under the APA's "not in accordance with law" standard,'" courts "'adhere to the familiar two-step test of *Chevron.*'" *Nw. Envtl. Advocates v. EPA*, 537 F.3d 1006, 1014 (9th Cir. 2008) (quoting *Holland v. Nat'l Mining Ass'n*, 309 F.3d 808, 815 (D.C. Cir.

2002)) (additional citations omitted); *see Chevron, U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984) (setting forth the test).

Under *Chevron*, the Court must first determine "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842–43. But if "the statute is silent or ambiguous with respect to the specific issue," then "the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843.[2] Applying this standard, the Court finds that the FWS is not entitled to judgment as a matter of law.

B. *Chevron* Step 1

SCACE argues that the only possible reading of the ESA is that the phrase "industry and trade" encompasses more than the FWS's regulatory definition of the term which, again, is "the actual or intended transfer of wildlife or plants from one person to another person in the pursuit of gain or profit." 50 C.F.R. § 17.3. As previously noted, the ESA defines the term "commercial activity" to mean: "all activities of industry and trade, including, but not limited to, the buying or

[2] The Court rejects the FWS's contention that the lawfulness of its regulatory definition has already been resolved in the agency's favor. While it is true that another organization previously challenged the provision at issue here unsuccessfully, the U.S. Court of Appeals for the District of Columbia Circuit subsequently vacated that district court opinion. *See Humane Soc'y of the U.S. v. Babbitt*, 46 F.3d 93 (D.C. Cir. 1995). Even if this Court were to improperly ignore the "non-precedential nature of a district court opinion from another circuit," *Gordon v. Virtumundo, Inc.*, 575 F.3d 1040, 1065 n.23 (9th Cir. 2009), certainly it could not rely on a *vacated* district court opinion from another circuit, *see Durning v. Citibank, N.A.*, 950 F.2d 1419, 1423 n.2 (9th Cir. 1991) ("a decision that has been vacated has no precedential authority whatsoever" (citations omitted)). Moreover, the Court does not find the district court's opinion in that case persuasive.

selling of commodities and activities conducted for the purpose of facilitating such buying and selling: *Provided, however,* That it does not include exhibition of commodities by museums or similar cultural or historical organizations." 16 U.S.C. § 1532(2). SCACE contends that Congress's use of the phrase "including, but not limited to" and of the word "all" precludes the FWS's regulatory definition as a matter of law. The FWS, on the other hand, argues that the fact that only buying and selling and related facilitative activities are expressly referenced in the statutory definition affords the agency discretion to refrain from including additional activities.

Notwithstanding the extremely deferential standard of review, the Court must agree with SCACE. At *Chevron* Step 1, the Court is to "employ[] traditional tools of statutory construction," *Chevron*, 467 U.S. at 843 n.9, which includes, of course, the "fundamental canon of statutory construction that a statute should not be construed so as to render any of its provisions mere surplusage." *United States v. Wenner*, 351 F.3d 969, 975 (9th Cir. 2003) (citations omitted); *see also TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (It is a "'cardinal principle of statutory construction' that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'" (citations omitted)); *Bennett v. Spear*, 520 U.S. 154, 173 (1997) (It is the Court's "duty 'to give effect, if possible, to every clause and word of a statute . . . rather than to emasculate an entire section.'" (additional quotation marks omitted) (citations omitted)). Application of this canon makes clear that the ESA is unambiguous on the issue before the Court.

1. "Including, but Not Limited to"

As the Ninth Circuit explained in *Turtle Island Restoration Network v. Nat'l Marine Fisheries Service*, when Congress uses the phrase "including, but not limited to," the list that follows that phrase is not meant to be exhaustive. 340 F.3d 969, 975 (9th Cir. 2003) (citations

omitted); *see also FTC v. EDebitPay, LLC*, 695 F.3d 938, 943 (9th Cir. 2012) ("'[I]ncluding but not limited to' language 'is a phrase of enlargement.' It indicates an intention that enumerated examples following the phrase should not be construed as an exhaustive listing." (citations omitted)). In *Turtle Island*, the Court of Appeals accordingly rejected an agency's interpretation that would have read the phrase out of a statute. 340 F.3d at 975. The court explained: "The Fisheries Service's interpretation . . . is not entitled to *Chevron* deference because it is contrary to the unambiguous language of the statute. If given credence, the agency's interpretation effectively omits the "including but not limited to" language from the statute . . . ." *Id.*; *see also Hamilton v. Madigan*, 961 F.2d 838, 841 n.4 (9th Cir. 1992) (phrase "including, but not limited to" does not give an agency discretion to "'pick and choose'").

Indeed, in rejecting an argument similar to that raised here by the FWS, now-Justice Alito, explained:

> In arguing that this provision is ambiguous, [plaintiff] relies on the fact that sales by [defendant] to local retailers . . . are not specifically mentioned in the list contained in the provision. But since this list is prefaced by the phrase "including but not limited to," this argument is unconvincing. The list merely gives examples of entities . . . . By using the phrase "including, but not limited to," the parties unambiguously stated that the list was not exhaustive.

Cooper Distrib. Co. v. Amana Refrigeration, Inc., 63 F.3d 262, 280 (3d Cir. 1995) (citations omitted). The Tenth Circuit has similarly explained that when the phrase "including, but not limited to," is used, what follows is intended "to serve as an example, an illustration, a representation of what's encompassed . . .—not to crab or limit its plain language . . . ." *McKissick v. Yuen*, 618 F.3d 1177, 1185 (10th Cir. 2010). An example following the phrase "including, but not limited to," the court continued, "was obviously meant to put illustrative meat on the . . . bones, not to grind those bones to dust." *Id.* (citations omitted). Any other reading

would lift the example following "including, but not limited to" "from its humble station as one illustration . . . to a new and exalted prominence as the central governing principle." *Id.*

2. "All" Means All

The FWS's current regulatory definition also impermissibly renders the word "all" in the statutory definition of "commercial activity" meaningless surplusage. "Dictionaries can aid in applying step one of the *Chevron* analysis," *Lagandaon v. Ashcroft*, 383 F.3d 983, 988 n.5 (9th Cir. 2004) (citing *MCI Telecomms. Corp. v. AT & T Co.*, 512 U.S. 218, 225–28 (1994)), and dictionaries make clear that the word "all" means, unambiguously, just what it says and cannot, as the FWS suggests, mean "some," *see, e.g.*, Merriam-Webster Dictionary, http://www.merriam-webster.com/dictionary/all (defining "all" as "the whole amount, quantity, or extent of"; "as much as possible"; "every member or individual component of"; "the whole number or sum of"; "every"); *In re Nice Sys., Ltd. Sec. Litig.*, 135 F. Supp. 2d 551, 569 (D.N.J. 2001) ("'All' means 'every member or individual component of.'" (quoting Black's Law Dictionary 74 (6th ed. 1990))).

As the Ninth Circuit explained in addressing the lawfulness of an agency's interpretation of the word "all" in another statute,

> "All" means every. . . . The plain meaning of the statute could not be broader. . . . The plain language of this provision leaves no room for exceptions. . . . As a result, the Secretary's interpretation . . . , must give way to the plain language of the statute.

Lopez v. Espy, 83 F.3d 1095, 1100 (9th Cir. 1996), as amended on denial of reh'g (July 3, 1996) (citation omitted and additional quotation marks omitted); *see also Knott v. McDonald's Corp.*, 147 F.3d 1065, 1067 (9th Cir. 1998) ("'[A]ll' is an all-encompassing term . . . . In short, "all" means all.").

Yet, rather than capturing "all" activities of industry and trade as Congress unambiguously intended, the FWS's regulatory definition limits itself to a single type of activity—"transfer . . . in the pursuit of gain or profit." 50 C.F.R. § 17.3. Because the FWS's regulation—and its denial of SCACE's petition—renders the statutory term "all" "void," the agency is not entitled to judgment as a matter of law. *TRW Inc.*, 534 U.S. at 31; *see also Bennett*, 520 U.S. at 173 (the court must "'give effect, if possible, to every clause and word of a statute . . . rather than . . . emasculate an entire section'" (additional quotation marks omitted) (citation omitted)).

3. Conclusion

In summary, Congress's statement in the ESA that "[t]he term 'commercial activity' means *all* activities of industry and trade, *including, but not limited to,* the buying or selling of commodities and activities conducted for the purpose of facilitating such buying and selling" makes unambiguously clear that Congress intended that the phrase "industry and trade" means *more than* "the buying or selling of commodities and activities conducted for the purpose of facilitating such buying and selling." 7 U.S.C. § 1532(2) (emphases added). Because "Congress has directly spoken to the precise question at issue [and] . . . . the intent of Congress is clear, that is the end of the matter." *Chevron*, 467 U.S. at 842.

Because the FWS's regulatory definition of "industry and trade" limits the phrase in precisely the way Congress intended it not be limited, the agency is not entitled to judgment as a matter of law

C. *Chevron* Step 2

Although the Court has found it unnecessary to reach Step 2 of *Chevron*, it is worth briefly making a few observations. For one, Congress intended the ESA to have a "broad scope

of prohibitions," H.R. Rep. No. 94-823 (1976), at 7, reprinted in 1976 U.S.C.C.A.N. 1695, 1689, and the FWS's regulatory definition limits—rather extremely—the prohibition on commercial activity, in contravention of this intent. *See also Aransas Project v. Shaw*, 835 F. Supp. 2d 251, 270-71 (S.D. Tex. 2011) ("[A] broad interpretation of ESA Section 9" is "in harmony with the ESA's purpose, legislative history, and interpretation of the Supreme Court."); *Tenn. Valley Auth. v. Hill*, 437 U.S. 154, 188 (1978) (noting the ESA's "broad sweep").

It is further worth noting that in addition to making it unlawful to "deliver, receive, carry, transport, or ship in interstate or foreign commerce, by any means whatsoever and in the course of a commercial activity, any such species," 16 U.S.C. § 1538(a)(1)(E)—the prohibition at issue in this case—the ESA *separately* prohibits "sell[ing] or offer[ing] for sale in interstate or foreign commerce any such species," *id.* § 1538(a)(1)(F). The FWS's current narrow regulatory definition of "industry and trade" appears to render the separate prohibition on sales a nullity—yet another reason that the agency is not entitled to judgment as a matter of law. *See Wenner*, 351 F.3d at 975 (It is a "fundamental canon of statutory construction that a statute should not be construed so as to render any of its provisions mere surplusage." (citations omitted)).

Finally, the exceptions set forth in the statutory definition of "commercial activity"—for the "exhibition of commodities by museums or similar cultural or historical organizations," 16 U.S.C. § 1532(2)—warrant attention. Had Congress intended for the prohibition to be limited to sales, there would have been no need for such exceptions. Again, the Court cannot, if avoidable, construe any portion of a statute as "mere surplusage." *Wenner*, 351 F.3d at 975.

CONCLUSION

For the reasons set forth above, the Court DENIES Defendant's Motion for Judgment on the Pleadings.

IT IS SO ORDERED this 22nd day of May, 2014.

Hon. Phoebe M. Garcia
United States District Judge