



525 East Cotati Avenue, Cotati, California 94931 T 707.795.2533 F 707.795.7280

September 19, 2016

Via Certified Mail, Return Receipt Requested

Houston Aquarium, Inc.
d/b/a Downtown Aquarium
1510 West Loop S.
Houston, TX 77027-9505

cc: Hon. Sally Jewell, Secretary
U.S. Department of the Interior
1849 C Street, N.W.
Washington, DC 20240

Landry's, Inc.
1510 West Loop S.
Houston, TX 77027-9505

cc: Daniel M. Ashe, Director
U.S. Fish and Wildlife Service
1849 C Street, N.W.
Washington, DC 20240

RE: Notice of Intent to Sue for Violations of Section 9 of the Endangered Species Act for the harm and harassment of four tigers (*Panthera tigris*) at the Downtown Aquarium, in Houston, Texas

Dear Houston Aquarium, Inc. and Landry's, Inc.:

This letter serves as 60 days' notice under the Endangered Species Act's ("ESA") citizen suit provision, 16 U.S.C. § 1540(g). On behalf of the Animal Legal Defense Fund ("ALDF") and Cheryl Conley, represented by Irvine & Conner PLLC, we notify you of our intent to sue the Houston Aquarium, Inc.; Landry's, Inc.; and other related entities and individuals (collectively, "Landry's") based on the improper care and holding conditions of four white tigers exhibited at the Downtown Aquarium in Houston, Texas. For twelve years, Landry's has deprived these tigers of access to sunlight, fresh air, natural surfaces, and species-appropriate environmental enrichment. These conditions violate the ESA.

In an effort to correct these violations of federal law without litigation, ALDF Senior Attorney Carney Anne Nasser met with counsel for Landry's on August 2, 2016. Ms. Nasser offered to rehome the tigers Marina, Nero, Coral, and Reef to reputable, accredited sanctuaries where ALDF has secured placement, at no cost to Landry's. This offer still is open and will remain open for 60 more days from the date of this notice. If Landry's declines ALDF's offer and refuses to remedy their unlawful actions, we will file suit in federal district court under the ESA.



525 East Cotati Avenue, Cotati, California 94931 T 707.795.2533 F 707.795.7280

BACKGROUND

1. **Tigers Nero, Marina, Coral, and Reef Live in a Species-Inappropriate Environment**

The Downtown Aquarium operates a restaurant and amusement park complex in downtown Houston, Texas, on city-owned land located underneath Interstate 45. In December of 2004, after the City approved bans on exotic animal ownership and animal displays in restaurants, Landry's transported four white tigers, named Nero, Marina, Coral, and Reef, to the Downtown Aquarium. As one local journalist quipped at the time: "nothing says 'aquarium' like tigers."¹

Since then, it is believed that the four tigers have not left the Downtown Aquarium's concrete walls and live in what amounts to a Landry's-sponsored dungeon. For twelve years, the tigers have not had access to the outside, let alone to sunlight, fresh air, or natural surfaces. Instead, the tigers spend their days in one of two enclosures: a garish concrete exhibit, supposedly designed to look like a maharajah's temple with a Buddha at its center (the public "Tiger Exhibit"); or one of several small metal holding cages out of public view (the "Tiger Holding Area").

Whether in the Tiger Exhibit or the Tiger Holding Area, the tigers are deprived of a natural sensory experience. The tigers cannot jump or run and live entirely on unnatural and unyielding surfaces. In these confined artificial quarters, their range of vision is limited, and they see only gawking tourists and concrete.

¹ Richard Connelly, *Pretty Please Tilman*, Houston Press (Jul. 29, 2004), available at <http://www.houstonpress.com/news/pretty-please-tilman-6554842>.



525 East Cotati Avenue, Cotati, California 94931 T 707.795.2533 F 707.795.7280

The Tiger Exhibit



(Photo credit: Katie Haugland)

In the Tiger Exhibit, the tigers are exposed to public view at all times; only a glass wall separates the tigers from the public. Tiny windows, located high on the exhibit's walls and frosted over in aquarium-themed blue, offer the tigers their only source of natural light. The Tiger Exhibit lacks any naturalistic features or enrichment and does not offer the tigers any opportunities to mimic their natural behaviors, such as stalk or hunt, or hide from the public view. For example, there are no tree trunks on which the tigers can sharpen their claws and no species-appropriate toys that would allow them to stalk, chase, or pounce.

Further, the substrate is entirely concrete, which easily becomes wet and slippery. Visitors to the Tiger Exhibit have observed the tigers slipping on the hard, wet surface. This slipping greatly increases the chance a tiger will rip a hip muscle, a painful injury causing lifelong lameness in tigers. Living on unnatural, unyielding concrete also increases the cats' risk of painful foot, joint, muscle, and circulatory problems and ulcerated or cracked footpads. Years spent on an unnaturally hard



525 East Cotati Avenue, Cotati, California 94931 T 707.795.2533 F 707.795.7280

surface can more generally cause poor muscle tone and a variety of abnormal, stereotypic behaviors.

Indeed, the tigers have been observed pacing and lunging at the glass wall separating the tigers from the public—all common stress responses for tigers living in close confinement with no ability to seek privacy from the viewing public. Renowned Oxford zoologists Drs. Georgia Mason and Ros Clubb have written at length about the needs of wide ranging carnivores and explained that tigers are among the species exhibiting “the most evidence of stress and/or psychological dysfunction in captivity.”²

The Tiger Holding Area



(Photo Credit: Cheryl Conley)

² See Steve Connor, *Large roaming carnivores suffer the most in zoos*, Independent (Oct. 1, 2003), available at <http://www.independent.co.uk/news/science/large-roaming-carnivores-suffer-most-in-zoos-89406.html>



525 East Cotati Avenue, Cotati, California 94931 T 707.795.2533 F 707.795.7280

The Tiger Holding Area does not offer the tigers any opportunities for stimulation or to perform their natural behaviors. In the Tiger Holding Area, each tiger is housed in a steel cage approximating 10 by 10 feet. The cages have a flat concrete floor and one small elevated wood and steel bench. Like in the Tiger Exhibit, the tigers have no outdoor (or even indoor) exercise or play area.

During the week, only one tiger is permitted inside the public Tiger Exhibit at a time, while the three remaining tigers are locked in the Tiger Holding Area. This means that on average, the tigers are locked in a metal cage for a minimum of 75 % of the time on weekdays—perhaps more, if tigers only are permitted in the Exhibit during opening hours. On the weekends, two tigers are put on display, meaning that the tigers spend an average of no less than 50 % of the weekend locked in a metal cage.

2. The Tigers' Living Conditions Predictably Have Harmed the Tigers

Whether in the public Tiger Exhibit or Tiger Holding Area, Nero, Marina, Coral, and Reef do not receive adequate species-appropriate enrichment. The conditions in which they are kept starkly contrast with the lives tigers lead in the wild. Tigers require large, environmentally rich, natural spaces that allow them to express a wide range of movements and behaviors. In the wild, male tigers may cover a range of up to forty square miles; female tigers maintain a range of around seven square miles. In the Aquarium, the tigers' world is limited to a few hundred square feet. They are unable to run, jump, chase or play.

The conditions in which they are kept also starkly contrast with the decades-long trend to place captive tigers in more natural habitats.³ For example, the Houston Zoo, located less than five miles from the Aquarium, features a naturalistic outdoor tiger habitat with a natural dirt and grass substrate and access to both natural light and shade. This is typical for an Association of Zoos and Aquariums ("AZA")-accredited facility. Of the more than a hundred AZA-accredited facilities housing tigers in the United States that were surveyed, **only two do not have outdoor exhibits for the tigers**: the Downtown Aquarium in Houston and the Downtown Aquarium in Denver. Both are owned and operated by Landry's.

As a result of these unnatural conditions, the four tigers experience pervasive stress and exhibit stereotypic behaviors not observed in the wild, such as incessant

³ See generally *id.*



525 East Cotati Avenue, Cotati, California 94931 T 707.795.2533 F 707.795.7280

spacing.⁴ They also have exhibited overly aggressive behavior, a sign of the stress associated with their confinement.⁵ Landry's has no valid justification for continuing to maintain Nero, Marina, Coral, and Reef in these improper conditions at the Downtown Aquarium. Although Landry's has represented that it is "committed to supporting the conservation of our environment,"⁶ keeping these tigers at the Downtown Aquarium does not serve any conservation purpose.⁷ After twelve years of living with all their senses deprived in physically and psychologically harmful conditions, Nero, Marina, Coral, and Reef deserve to live in conditions that conform to their species' needs—and which do not violate the ESA.

THE ESA PROTECTS LISTED SPECIES, INCLUDING TIGERS

1. Overview of the ESA

The ESA is "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation."⁸ Because fish, wildlife and plants "have been rendered extinct as a consequence of economic growth and development untempered by adequate concern and conservation,"⁹ Congress enacted the ESA to "afford[] endangered species 'the highest of priorities.'"¹⁰ Persons violating the ESA risk civil and criminal penalties.¹¹ Private parties may bring lawsuits to enforce the ESA, so long as they provide adequate notice of sixty days to both the violator and the Secretary of the Interior.¹²

⁴ Mason, Georgia J., *Stereotypes: a critical review*, *Animal Behaviour* 41.6 (1991): 1015-1037.

⁵ See, e.g., Youtube.com, *Tiger Attack at Downtown Aquarium*, Houston, <https://www.youtube.com/watch?v=aZsGJM35gtw> (uploaded Jan. 7, 2012; last viewed Sep. 9, 2012).

⁶ See Downtown Aquarium, Conservation, <http://www.aquariumrestaurants.com/downtownaquarium-houston/conservation.asp> (last visited Sep. 8, 2016).

⁷ See Philip J. Nyhus & Ronald Tilson, *The Conservation Value of Tigers: Separating Science from Fiction*, 1 J. Wildcat Conservation Legal Aid Soc'y 29, 31 (2009), http://works.bepress.com/cgi/viewcontent.cgi?article=1019&context=philip_nyhus ["Separating Science from Fiction"]; White Tigers: All White Tigers Are Inbred and Are Not Purebred, Big Cat Rescue, <http://bigcatrescue.org/abuse-issues/issues/white-tigers/> (last visited Nov. 4, 2015); AZA White Paper, "Welfare & Conservation Implications of Intentional Breeding for the Expression of Rare Recessive Alleles" (June 2011), available at https://www.aza.org/assets/2332/aza_white_paper_inbreeding_for_rare_alleles_18_jan_2012.

⁸ *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 180 (1978).

⁹ 16 U.S.C. § 1531,

¹⁰ *Defenders of Wildlife v. Adm'r, EPA*, 882 F.2d 1294, 1300 (8th Cir. 1989).

¹¹ See 16 U.S.C. § 1540(a)–(b).

¹² *Id.* § 1540(g).



525 East Cotati Avenue, Cotati, California 94931 T 707.795.2533 F 707.795.7280

2. Tigers are Listed Species Under the ESA

The ESA offers its most robust protections to animal species listed as endangered. Since 1970, the U.S. Fish and Wildlife Service (“FWS”) has listed tigers (*Panthera tigris*) as endangered at the species level.¹³ Tigers originally ranged from eastern Turkey to southeastern Siberia and the Malay Peninsula, Sumatra, Java and Bali. Today, more tigers live in captivity in the United States than remain in the wild worldwide. Because the ESA recognizes the importance of captive tigers to the overall conservation of the species, the ESA equally protects wild and captive tigers. Indeed, recent FWS regulations acknowledge that the ESA’s protections reach tigers living in captivity.¹⁴

3. The ESA Protects Listed Species, Including Those in Captivity, From Unlawful Take

ESA Section 9 broadly prohibits the “take” of an endangered species by any person.¹⁵ Congress defined the term “take” to mean “harass, harm, pursue, hunt, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.”¹⁶ The Supreme Court of the United States upheld the broad sweep of this definition “to include every conceivable way in which a person can ‘take’ or attempt to ‘take’ any fish or wildlife.”¹⁷ In its regulations, the FWS has further defined “harass” to include acts that “create 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.”¹⁸ FWS likewise further defined “harm” to mean “an act which actually kills or injures wildlife.”¹⁹

Section 9’s “take” prohibitions apply to all members of listed species, whether living in captivity or in the wild. Not only does the ESA define the term “fish or wildlife” as “any member of the animal kingdom,”²⁰ FWS regulations under the ESA

¹³ 50 C.F.R. § 17.11; 35 FR 8491 (June 2, 1970).

¹⁴ 50 C.F.R. § 17.21(g) (amendments effective May 6, 2016).

¹⁵ *Id.* § 1538(a).

¹⁶ *Id.* § 1532(19).

¹⁷ *Babbitt v. Sweet Home Chapter of Cmty. for a Greater Or.*, 515 U.S. 687, 704 (1995).

¹⁸ 50 C.F.R. § 17.3 (2014).

¹⁹ *Id.*

²⁰ 16 U.S.C. § 1532(8).



525 East Cotati Avenue, Cotati, California 94931 T 707.795.2533 F 707.795.7280

reiterate that “the Act applies to both wild and captive populations of a species”²¹ Courts have reached the same conclusion.²²

THE DOWNTOWN AQUARIUM’S WHITE TIGER CONDITIONS VIOLATE SECTION 9 OF THE ENDANGERED SPECIES ACT

Nero, Marina, Coral, and Reef’s species-inappropriate living conditions constitute a “take” under the ESA. The AZA, which has existed for nearly a century, operates the nation’s only conservation breeding program for tigers, and its guidelines establish the standard of care for tigers in captivity. As explained below, the Tiger Exhibit and Tiger Holding Area fall far short of the AZA’s requirements and give rise to violations of the ESA.

1. The Tiger Exhibit Violates the ESA

The AZA Tiger Care Manual (“AZA Manual”) stipulates that all tiger exhibits should include a complex outdoor space, natural vegetation, and reduced exposure to the public, as well as opportunities for natural behaviors such as running, jumping, and climbing.²³ Exhibits should have a one-meter high, raised wooden platform in each enclosure, large enough to accommodate all animals simultaneously. To promote a wide range of locomotion and resting behaviors, exhibits also should have trees, deadfalls, and other furniture of varying heights.

²¹ 44 Fed. Reg. 30044 (May 23, 1979), *see also* 63 Fed. Reg. 48634, 48636 (Sept. 11, 1998) (explaining that “take” was defined by Congress to apply to endangered or threatened wildlife “whether wild or captive” and the “statutory term cannot be changed administratively”); 79 Fed. Reg. 4313, 4317 (Jan. 27, 2014) (proposed rule to list the captive orca Lolita as a member of the Endangered Southern Resident Killer Whale Distinct Population Segment) (“The ESA does not support the exclusion of captive members from a listing based solely on their status as captive. . . . Section 9(a)(1)(A)-(G) of the ESA applies to endangered species regardless of their captive status.”); *id.* (“Further, based upon the purposes of the ESA and its legislative history, the USFWS has recently concluded that the ESA does not allow captive animals to be assigned different legal status from their wild counterparts on the basis of their captive status.”). (quoting *Tenn. Valley Auth.*, 437 U.S. at 174); 80 Fed. Reg. 7380, 7388 (Feb. 10, 2015) (final rule listing Lolita as a member of the Endangered Southern Resident Killer Whale Distinct Population Segment) (“Congress recognized the value of captive holding and propagation of listed species held in captivity but intended that such specimens would be protected under the ESA, with these activities generally regulated by permit.”).

²² *See, e.g., Safari Club Int’l v. Jewell*, 960 F. Supp. 2d 17 (D.D.C. 2013) (upholding FWS listing of captive-bred antelope as endangered in the face of challenge by commercial hunting outfits).

²³ The AZA’s draft Tiger Care Manual has not yet been issued in final form but has passed through all steps that precede the publication process. *See AZA, Animal Care Manuals*, <https://www.aza.org/animal-care-manuals> (last visited Sep. 13, 2016). The requirements listed here are in the final draft of the Manual.



525 East Cotati Avenue, Cotati, California 94931 T 707.795.2533 F 707.795.7280

The Tiger Exhibit at the Downtown Aquarium meets *none* of these requirements. The Tiger Exhibit is entirely concrete, despite the fact that the AZA Manual states that concrete, by itself, may cause bone trauma to tigers when in normal resting or sleeping positions. Also, the tigers frequently have been observed slipping on the concrete surface. As compared to wood chip floor or substrata, tigers on solely concrete substrata are more likely to develop parasites and sore foot pads.²⁴ Unable to perform their natural behaviors, and unable to retreat from public view, the tigers instead perform stereotypic behaviors, such as lunging at the glass barrier, incessant pacing, and stress-induced panting. The inappropriate substrata “harass” the tigers,²⁵ undermine their health and wellbeing, and constitute a “take” under the ESA.

2. The Design of the Tiger Holding Area Violates the ESA

The AZA Manual directs that holding areas for AZA-accredited facilities with tigers also must reflect careful consideration to the relationship between the area’s size and complexity to the tiger’s overall well-being. This requirement applies with greater force here because the Downtown Aquarium’s tigers spend a significant amount of time in the Tiger Holding Area. (Potentially an average of a *minimum* of 75 % of the time, since only one tiger is permitted in the Tiger Exhibit during opening hours on weekdays.)

The tigers’ cages in the Tiger Holding Area are utterly species-inappropriate: They provide extremely limited concrete floor space and lack any form of enrichment or natural vegetation. Smaller enclosures such as the cages in the Tiger Holding Area are associated with increased stereotypic behaviors in tigers, and pacing in particular.²⁶ As essentially smaller and more barren versions of the Tiger Exhibit, the Tiger Holding Area “significantly disrupts” the tigers’ normal behaviors²⁷ and therefore constitutes a “take” under the ESA.

²⁴ G. Law, A. Macdonald, A. Reid *Dispelling some common misconceptions about the keeping of felids in captivity*, Int. Zoo Ybk., 35 (1997), pp. 197–207.

²⁵ 50 C.F.R. § 17.3 (2014).

²⁶ Breton, G., & Barrot, S., *Influence of enclosure size on the distances covered and paced by captive tigers (Panthera tigris)*, Applied Animal Behaviour Science, 154, 66-75 (2014).

²⁷ 50 C.F.R. § 17.3 (2014).



525 East Cotati Avenue, Cotati, California 94931 T 707.795.2533 F 707.795.7280

PROPOSED SOLUTION & CONCLUSION

ALDF has secured placement for the tigers at award-winning sanctuaries accredited by the Global Federation of Animal Sanctuaries. As stated above, ALDF's offer to rehome the tigers from the Downtown Aquarium to a GFAS-accredited sanctuary at no cost to Landry's remains open and will stay open for 60 days from the date of this letter.

If Landry's does not act within 60 days to correct their ongoing violations of the ESA, we intend to pursue litigation in federal district court pursuant to Section 11(g) of the ESA, 16 U.S.C. § 1540(g), and will seek injunctive and declaratory relief, as well as legal fees and costs.

If you have questions or would like to discuss this matter, please contact us.

Sincerely,

Carney Anne Nasser, Esq.
Senior Counsel for Wildlife and Regulatory Affairs
Animal Legal Defense Fund
525 East Cotati Avenue
Cotati, CA 94931
Phone: 707.795.2533
Email: cnasser@aldf.org

Kristen Schlemmer
Charles Irvine
Irvine & Conner PLLC
4709 Austin Street
Houston, TX 77004
Phone: 713.533.1704
Email: kristen@irvineconner.com
Email: charles@irvineconner.com



525 East Cotati Avenue, Cotati, California 94931 T 707.795.2533 F 707.795.7280

cc: **Mr. Steven L. Scheinthal**
1510 West Loop S.
Houston, TX 77027-9505
sscheinthal@ldry.com
Registered Agent for Landry's, Inc. and Houston Aquarium, Inc.

Robert D. Miller & Neftali Partida
Locke Lord LLP.
JPMorgan Chase Tower
600 Travis, Suite 2800
Houston, TX 77002
rmiller@lockelord.com
npartida@lockelord.com
Counsel for Landry's, Inc. and Houston Aquarium, Inc.

Mayor Sylvester Turner
City of Houston
P.O. Box 1562
Houston, TX 77251

Dr. Benjamin Tuggle, Regional Director
Southwest Regional Office
U.S. Fish & Wildlife Service
500 Gold Avenue SW
Albuquerque, NM 87102