UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS, et al.,	:	
Plaintiffs,	:	
v.	:	**Case No. 03-2006 (EGS/JMF)**
FELD ENTERTAINMENT, INC.	:	
Defendant.	:	

DEFENDANT'S OPPOSITION TO PLAINTIFFS' MOTION FOR LEAVE TO FILE A SUPPLEMENTAL COMPLAINT ADDING THREE FORMER RINGLING BROTHERS EMPLOYEES AS ADDITIONAL PLAINTIFFS

Just six days after the Court issued various orders denying Defendant Feld Entertainment, Inc.'s ("FEI's") Motion for Leave to File Amended Answers, substantially narrowing the issues to be tried in this lawsuit and imposing an accelerated discovery cut-off date, plaintiffs have sought to unravel those Orders and further ***expand*** the lawsuit by requesting the addition of ***three*** new plaintiffs to this action. Not only does plaintiffs' request demand that the Court act completely contradictory to its most recent rulings, it highly prejudices FEI's defense of this lawsuit, will create undue delay, and is legally futile. For these reasons, and the arguments asserted herein, plaintiffs' motion should be denied.

On August 23, 2007, the Court issued an order denying FEI's request to add a counterclaim and an unclean hands defense to the instant Endangered Species Act ("ESA") lawsuit, stating that it would result in undue delay and would prejudice plaintiffs. Mem. Op. (8/23/07) (Docket No. 176) at 4, 7. Because the Court also issued an order partially granting FEI's summary judgment motion on that same day, it recognized that this case is "winding

down" and "the issues [involved] have been narrowed." Id. at 4, 6. Indeed, the Court eliminated all of the elephants subject to Captive Bred Wildlife ("CBW") permits from the lawsuit entirely, significantly reducing the number of elephants that would be at issue going forward. Mem. Op. (8/23/07) (Docket No. 173).[1] The focus of the ESA claim, therefore, only should be on the remaining Pre-Act elephants for which plaintiff Tom Rider has standing. See FEI's Mot. for Reconsideration or, in the Alternative, for Certification Pursuant to 28 U.S.C. 1292(b) (9/5/07) (Docket No. 183) at 5-6. In addition to reducing the number of elephants at issue in this lawsuit, the Court set a discovery cut-off date of December 31, 2007 for the completion of all remaining fact and expert discovery.[2] Now that the "remaining, narrowed 'taking' claim," Mem. Op. (8/23/07) (Docket No. 176) at 6, is set to proceed on a tight schedule, plaintiffs seek to inject additional plaintiffs into the lawsuit with only four months left in discovery, and almost one year after such individuals came to plaintiffs' attention. Far from promoting "judicial economy," plaintiffs' request will do exactly what the Court sought to avoid in denying FEI's attempt to amend its pleadings: extend the scope and life of the ESA litigation.

Plaintiffs' eleventh-hour request is highly prejudicial to FEI.[3] The Court already has stated that it may deny leave to amend "where the non-moving party would be put to the additional expense and burden of a more lengthy and complicated trial . . . ." Mem. Op. (8/23/07) (Docket No. 176) at 3. Plaintiffs' motion is little more than a thinly-veiled attempt to

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[1] Plaintiffs do not dispute the elimination of the CBW elephants from this lawsuit. Mem. in Support of Pls.' Mot. for Leave to File a Supp. Compl. Adding Three Former Ringling Brothers Employees as Pls. (8/29/07) (Docket No. 181) ("Pls. Mem.") at 6 n.2.

[2] To date, the parties have not conducted any expert discovery and currently a schedule for expert discovery has not yet been set.

[3] Plaintiffs' argue that any contention by FEI that plaintiffs' addition of three new plaintiffs four months before the close of discovery would be prejudicial is "completely belied" by the fact that FEI filed its RICO claim as a separate, unrelated lawsuit. Pls. Mem. at 7, n.3. Since FEI's RICO claim (Civil Action No. 1:07-CV-01532) (D.D.C.) is a separate lawsuit that is independent of the ESA action, plaintiffs' analysis is confounded.

undo the Court's recent orders narrowing the focus of this case and any necessary trial. When it was beneficial to their position, plaintiffs were indignant about not expanding the focus of the litigation, even when there was no discovery cut-off or trial date. Pls.' Opp. to FEI's Mot. for Leave to Amend (3/30/07) (Docket No. 132) at 40-41. Now, however, with less than four months left in discovery, plaintiffs ask the Court to overlook the delay and prejudice that their own amendment will cause, despite the fact that FEI's discovery efforts have been curtailed while it waited for plaintiffs to be compelled to turn over extensive, relevant information and will continue to be compromised if plaintiffs' hypocritical position is accepted and new plaintiffs are added. Order (8/23/07) (Docket No. 178) at 1-9.

Plaintiffs' belated effort to add additional plaintiffs – seven years from the filing of their initial claim and just four months before the close of discovery – is particularly troubling in light of their acknowledgement that Rider's standing may be in jeopardy. Pls. Mem. at 5-6. While plaintiffs characterize Rider's questionable standing as the driving force behind their request to amend, plaintiffs' tactic is merely an effort to breathe life into a case against FEI that is legally contrived and should be dismissed – not continued with additional individuals whose standing is even more questionable than Rider's. Adding new plaintiffs is prejudicial to FEI because it will significantly expand the scope of any necessary trial and it will prejudice FEI's right to complete and timely discovery on the issues that would be presented. Adding new plaintiffs, moreover, would be futile since they lack Article III standing to bring this lawsuit. Each of these bases is described in detail below and each is a sufficient reason to deny plaintiffs' Motion.

ARGUMENT

A. Amending the Complaint at This Late Stage Would Unduly Prejudice FEI

The Court has broad discretion to deny the instant Motion for any apparent or declared "reason 'such as undue delay, bad faith or dilatory motive on the part of the movant, repeated

failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.'" Mem. Op. (8/23/07) (Docket No. 176) at 2-3 (citing Foman v. Davis, 371 U.S. 178, 182 (1962)). "'The most important factor the Court must consider when deciding whether to grant a motion for leave to amend is the possibility of prejudice to the opposing party.'" Id. at 3 (quoting Djourabchi v. Self, 240 F.R.D. 5, 13 (D.D.C. 2006)). Plaintiffs' Motion would prejudice FEI by substantially expanding the scope of the litigation (together with any necessary trial) and by severely curtailing FEI's right to discovery on the issues that will be presented at trial. See id. ("The Court may deem prejudicial an amendment that substantially changes the theory on which the case has been proceeding and is proposed late enough so that the opponent would be required to engage in significant new preparation. The Court may also deny leave to amend where the non-moving party would be put to the additional expense and burden of a more lengthy and complicated trial or where the issues raised by the amendment are remote to the issues in the case.") (citing Djourabchi). The Court, moreover, cannot ignore the fact that plaintiffs waited ***at least seven months*** before seeking leave to add new parties. See Mem. Op. (8/23/07) (Docket No. 176) at 7 (finding undue delay where FEI waited eight months to file a counterclaim that required extensive legal research and factual development). For all these reasons, plaintiffs' motion for leave to amend should be denied.

1. Adding New Plaintiffs Would Substantially Expand the Scope of This Litigation

Plaintiffs disingenuously imply that adding new parties will not "change the claims that have been asserted" against FEI, yet they candidly acknowledge that adding the new plaintiffs is intended to do exactly that. Compare Pls. Mem. at 6 (citing three cases for the proposition that adding a new party is "ordinarily appropriate" where it would not "change the claims that have

been asserted") with Pls. Mem. at 5 ("Plaintiffs wish to add these three individuals as plaintiffs ***particularly in light of this Court's recent summary judgment which narrowed the scope of plaintiffs' claims***") (the new plaintiffs "sent a formal notice letter in accordance with the ESA concerning . . . the Red Unit, versus the Blue Unit where plaintiff Tom Rider was employed") (emphasis added). As currently postured, plaintiffs' lawsuit should be narrowly focused on six "pre-Act" elephants with whom Tom Rider worked while traveling with FEI's Blue Unit. See Mem. Op. (8/23/07) (Docket No. 173); FEI's Mot. for Reconsideration or, in the Alternative, for Certification Pursuant to 28 U.S.C. 1292(b) (9/5/07) (Docket No. 183) at 5-6. Nonetheless, more than seven years after filing their original lawsuit, plaintiffs now seek to expand the scope of their lawsuit to include ***eight*** additional Red Unit elephants with whom the new plaintiffs claim they have an "emotional attachment."[4]

Allowing plaintiffs to more than double the scope of their claims to include these additional eight elephants would "put [FEI] to the additional expense and burden of a more lengthy and complicated trial." See Mem. Op. (8/23/07) (Docket No. 176) at 3. As currently postured, any trial in this case should be limited to FEI's treatment of six elephants, all of whom reside either on FEI's Blue Unit or at FEI's Center for Elephant Conservation. If the new

[4] The organizational plaintiffs do not have standing in this case. Performing Animal Welfare Society v. Ringling Bros., No. 00-1641 (D.D.C. June 29, 2001) (slip op.) (Docket No. 20). Without Rider, therefore, there would be no ESA Action. Not only would allowing the new plaintiffs to join this litigation expand the scope of it, the Court cannot ignore the fact that plaintiffs' Motion was filed only after FEI explained in detail why it now believes – and can prove to the Court – that Rider's standing allegations (the very ones relied upon by the D.C. Circuit in concluding that he has standing and that this case may proceed) were false and/or intentionally misleading. See FEI's Opp. to Pls. Motion Under Rule 11 (8/16/07) (Docket No. 165) ("FEI's Rule 11 Opp.") at 25-33. Based on the facts now known to FEI (and explained to plaintiffs prior to their filing this motion), it is apparent that Rider's standing allegations may not withstand a motion for summary judgment, let alone a trial. By adding the new plaintiffs, the current plaintiffs seek not only to expand the scope of the litigation but also to insure themselves against the possibility that Rider's standing allegations do not hold water. See Hoffman v. United States, 266 F. Supp. 2d 27, 34 (D.D.C. 2003) ("A plaintiff, quite simply, cannot be permitted to circumvent the effects of summary judgment by amending the complaint every time a termination of the action threatens.") (internal quotations omitted); Equity Group, Ltd. v. Painewebber Inc., 839 F. Supp. 930, 932 (D.D.C. 1993) (denying motion for leave to amend complaint that was "merely a tactic designed to evade summary judgment" and would "protract the litigation and thus prejudice defendant"), aff'd, 48 F.3d 1285 (D.C. Cir. 1995).

plaintiffs are permitted to belatedly join this lawsuit, any trial necessarily would include testimony about eight additional elephants, as well as numerous additional employees who work with these elephants on FEI's Red Unit, but who have never worked with the elephants on FEI's Blue Unit. Granting plaintiffs' motion will vastly expand the scope of any necessary trial. See Societe Liz, S.A. v. Charles of the Ritz Group, Ltd., 118 F.R.D. 2, 5 (D.D.C. 1987) (denying leave to add additional parties that were known to the plaintiffs for more than two years and "at this late date [would] greatly increase the amount of time needed to prepare for trial as well as consume voluminous amounts of trial time to the detriment of a speedy resolution of the case").

2. Adding New Plaintiffs At This Late Stage Would Severely Prejudice FEI's Right to Complete Discovery on The Issues That Will Be Presented At Trial

Not only would adding the new plaintiffs substantially expand the scope of this litigation, doing so at this late stage would substantially prejudice FEI's right to take discovery on the issues that would be presented at trial. Plaintiffs' dilatory behavior should not be rewarded; they waited until the close of discovery is less than four months away to file a motion that could have been filed at least seven months ago.

a. FEI Would Be Prejudiced by Adding Plaintiffs to This "Narrowed" Lawsuit Less Than Four Months Before the Close of Discovery

Adding new plaintiffs to this lawsuit just two weeks after the Court imposed a discovery deadline that is less than four months away would substantially prejudice FEI's right to take complete and timely discovery (from the new plaintiffs, the existing plaintiffs, ***and*** third parties) on ***all*** of the issues that would be presented at trial. Cf. Adair v. Johnson, 216 F.R.D. 183, 188 (D.D.C. 2003) (granting leave to amend in light of its "procedural posture" in that "the parties [had] yet to launch discovery pursuant to a court schedule"). Plaintiffs' argument that there would be no such prejudice because the new plaintiffs could provide discovery responses by the Court-ordered deadline simply ignores plaintiffs' obstructionist history. As demonstrated by the

Court's recent Orders, plaintiffs improperly withheld documents and information that should have been produced years ago. Order (8/23/07) (Docket No. 178) at 1-9 (granting in part FEI's motions and ordering plaintiffs to produce categories of documents previously withheld, to submit complete interrogatory responses, and to provide a privilege log that complies with the law of the Circuit by September 24, 2007). There simply is no reason to believe that the new plaintiffs would timely produce all of the relevant documents and information that FEI would request. See Mem. Op. (8/23/07) (Docket No. 176) at 6 ("no discovery in this case over the last three and a half years has been "pointed and efficient"). Plaintiffs, having successfully argued to the Court that FEI should not be allowed to amend its pleadings because of "the ***inevitable discovery battles*** that will ensue," Pls.' Opp. to FEI's Mot. for Leave to Amend (3/30/07) (Docket No. 132) at 41 (emphasis added), now argue that the new plaintiffs, unlike Rider and the organizations, will promptly and timely produce complete, honest, and accurate responses to FEI's discovery requests. Since none of the existing plaintiffs have done this to date, there is no reason to believe that the proposed plaintiffs will either.

Plaintiffs' argument also ignores the prejudice that would flow to FEI as a result of plaintiffs' belated attempt to add parties. FEI now faces a discovery cut-off that is less than four months away. Because plaintiffs have failed to produce basic discoverable information, FEI must now await their Court-ordered production on September 24, 2007 and determine whether plaintiffs have finally complied with their discovery obligations. Upon reviewing that material once it is ***finally*** produced, FEI will have ***just three months*** to take depositions and issue subpoenas that it has been unable to pursue thus far and, at worst, may have to seek the Court's assistance if plaintiffs' September 24, 2007 production is deficient and/or they fail to supplement their privilege log as required. Because of plaintiffs' discovery violations, FEI has been unable

to proceed with certain aspects of its discovery plan until those violations are cured – which, in this case, will not happen (if at all) until just three months of the discovery period remain.[5] Indeed, had FEI proceeded with depositions without having the requisite documents that the Court has now found it to be entitled to, it would have done so at its peril. FEI, moreover, must find time to complete its cross-examination of Rider in connection with plaintiffs' deposition of him, which was improperly impeded by plaintiffs' counsel. Order (8/23/07) (Docket No. 178) at 1-2.

In light of plaintiffs' numerous discovery violations and the Court's recently imposed discovery cut-off, FEI has a substantial amount of work to complete in the next four months. Plaintiffs offer no reason why FEI should then have to spend additional time crafting discovery requests, reviewing those responses, and engaging in a meet-and-confer process regarding the documents and information that will undoubtedly be withheld, based on past performance alone.[6] Nonetheless, even if FEI is compelled to spend its time and resources preparing discovery requests that could have been prepared months ago, and even if the new plaintiffs manage to timely produce the requisite information, FEI would be prejudiced by receiving those responses

[5] Even the filing of plaintiffs' Motion has delayed FEI's right to take discovery. Immediately prior to being served with this Motion, FEI was preparing to serve the new plaintiffs with document subpoenas now that the Court has resolved the parties' disputes over relevance and plaintiffs' First Amendment objections. Yet, in light of plaintiffs' Motion, FEI is forced to wait until the Court rules on this issue to determine whether subpoenas or document requests are appropriate. FEI, moreover, must await the Court's ruling so that the requests it issues are commensurate with the new plaintiffs' status in this litigation. If they are parties, FEI needs much more additional information than if they are simply witnesses. That is precisely why plaintiffs' argument that FEI has known that the new plaintiffs will testify for a few months is irrelevant. See Pls. Mem. at 7. The discovery required of a party is vastly different than that required of a non-party witness. In any event, had FEI not been forced to divert its resources to brief plaintiffs' baseless motion under Rule 11, moreover, such subpoenas already would have been served. FEI has been unable to complete discovery because of plaintiffs' numerous discovery violations and numerous distractions with unnecessary motions such as this and their Rule 11 motion.

[6] Plaintiffs' argument that FEI would actually have "broader discovery rights" if the new plaintiffs are added to this lawsuit is a smokescreen. FEI is free to subpoena documents and testimony from non-party witnesses. The only additional forms of discovery to which FEI would be entitled if the new plaintiffs are added to this lawsuit would be interrogatory responses. Yet, FEI anticipates that such interrogatory responses would be of no great benefit in any event if they suffer from half of the falsities and deficiencies contained in Rider's responses.

from a party so close to the discovery cut-off. FEI would be unable to await complete discovery responses from all plaintiffs before completing its depositions. FEI also would be unable to issue any necessary third party subpoenas that become apparently necessary in light of the new plaintiffs' discovery responses. Most importantly, however, FEI would be prejudiced by adding new plaintiffs at such a late stage because it would be denied the opportunity to take discovery from all plaintiffs regarding the accusations of these new plaintiffs and their credibility. FEI has already deposed three of the organizational plaintiffs. Those depositions included questions intended to discover information about their communications with Rider, Rider's allegations against FEI, and Rider's credibility. By adding three new plaintiffs, FEI would be denied its right to depose the existing organizational plaintiffs on those very topics, further hindering its defense.[7]

Plaintiffs' desire to add new parties, thereby adding more elephants to this lawsuit and greatly expanding plaintiffs' claims, is nothing but a complication that would prejudice FEI's defense of this action just four months until the close of discovery and greatly expand the scope of trial that the Court most recently narrowed. Plaintiffs' new parties and new claims "would likely require substantial additional evidence – including, at a minimum, numerous additional documents and depositions – beyond the evidence already produced . . . ," Mem. Op. (8/23/07) (Docket No. 176) at 6, and should not be allowed.

[7] In the event that the Court grants plaintiffs' Motion, FEI respectfully requests that the following conditions be incorporated into the Court's Order to reduce further prejudice to FEI: (a) the new plaintiffs shall produce complete responses to FEI's document requests and interrogatories by October 1, 2007; (b) any necessary discovery motions will be considered on an expedited briefing schedule in which oppositions will be filed within 5 business days and replies within 3 business days; (c) if the new plaintiffs fail to produce complete responses by October 1, 2007, the Court automatically will extend FEI's discovery deadline by the amount of days equal to that of the new plaintiffs' belated production (e.g., if the new plaintiffs do not produce certain documents or information until December 1, 2007 – either because they were merely delinquent or because FEI was forced to file a motion to compel – the discovery deadline would automatically be extended until March 1, 2008); (d) FEI should be permitted to take an additional three depositions (beyond the ten currently contemplated for each party) since the parties originally agreed that ten depositions would be sufficient when there were four plaintiffs, not eight; and (e) FEI should be permitted to re-open the depositions of ASPCA, AWI, and FFA to ask questions relating to the new plaintiffs' allegations of abuse and their credibility.

b. Plaintiffs Have Unduly Delayed Seeking Leave to Amend

Although "delay alone is an insufficient basis to deny a motion to amend if there is no prejudice to the opposing party, the length of delay between the last pleading and the amendment sought is a factor in considering bad faith or dilatory motive." Mem. Op. (8/23/07) (Docket No. 176) at 3. Just two weeks ago, the Court ruled that FEI unduly delayed seeking leave to amend its pleadings to reflect information that it learned eight months earlier. Id. at 7 ("Even after allegedly becoming aware for the first time in June 2006 of the amount of payments received by Rider through WAP, defendant waited an additional eight months to file its motion to amend."). Nonetheless, plaintiffs brazenly ask this Court to allow them to amend their pleadings to reflect parties that could have been added ***at least seven months ago*** – a fact, that when it suited plaintiffs, was one that they argued "the Court cannot ignore." See Mem. Op. (8/23/07) (Docket No. 176) at 7. Unlike FEI's proposed counterclaim, moreover, plaintiffs' motion to add new plaintiffs did not require extensive legal research and analysis or intensive document review. Plaintiffs very easily could have filed this Motion more than seven months ago.

Plaintiffs' Motion itself acknowledges that the new plaintiffs went public with their allegations almost one year ago. Ms. Hundley and Mr. Tom submitted affidavits to the USDA on September 29, 2006 and October 10, 2006, respectively. See Pls.' Notice of Filing Supplemental Affidavits (11/22/06) (Docket No. 113). Shortly thereafter, plaintiffs confirmed their awareness of these witnesses by filing the USDA affidavits in this case on November 22, 2006.[8] Yet, plaintiffs did not send a 60-day notice letter to FEI until March 30, 2007 – more than

[8] Plaintiffs carefully avoid disclosing to the Court the date on which they became aware that the new plaintiffs existed and that they alleged mistreatment of animals by FEI. See Pls. Mem. at 7 ("These individuals did not go public about the abuse they witnessed at Ringling Bros. until last Fall."). While "last Fall" is almost a year ago in any event, the Court should not overlook the fact that plaintiffs refuse to state the actual date that matters – the date on which ***plaintiffs*** (not the "public") became aware of the potential new parties.

four months after filing the USDA affidavits in this case and six months after those affidavits were executed. Plaintiffs offer no reason for this undue delay.

Not only did plaintiffs unduly delay sending a notice letter for at least four months, they unduly delayed filing this Motion by another three months. Having sent FEI a 60-day notice letter on March 30, 2007, plaintiffs were free to file this Motion on May 29, 2007. Instead, they waited until August 29, 2007 (an additional three months later) – ***immediately after*** the Court narrowed the issues in this case and imposed a four month deadline until the close of discovery – to seek leave to add the new plaintiffs. Plaintiffs disingenuously imply that the reason for this three month delay was the Court's Order dated August 10, 2007 staying discovery. However, that 13-day stay of discovery does not explain the delay from May 29, 2007 until August 10, 2007. The Court's Order staying discovery had nothing to do with plaintiffs' current Motion.[9]

Plaintiffs vehemently opposed FEI's motion for leave to amend, stating "the timing of defendants' [sic] proposed counterclaim – coming near what should be the end of the discovery process, and at a time when the plaintiffs have urged the Court to set a trial date – is plainly dilatory." Pls.' Opp. to FEI's Mot. for Leave to Amend (3/30/07) (Docket No. 132) at 38. Under plaintiffs' own view of what is "plainly dilatory," their Motion should be denied. Plaintiffs have no one to blame but themselves for waiting at least seven months before seeking leave to add new parties. Not only would FEI be prejudiced by plaintiffs' belated Motion, the Court cannot ignore plaintiffs' dilatory behavior in bringing this issue to the Court's attention.

[9] Plaintiffs' argument that they simply "refrained from" filing this Motion in light of the Court's order staying discovery implies that they took seriously the Court's Order that discovery be stayed. Yet, their argument is belied by the fact that during the stay of discovery, plaintiffs continued to negotiate with the USDA and seek the production of documents that were compelled pursuant to a subpoena issued in this case. See ASPCA v. USDA, Civil Action No. 1:05-cv-00840 (D.D.C.) (action to compel documents subpoenaed in connection with this litigation).

B. Amending the Complaint Would Be Futile: The New Plaintiffs Do Not Have Standing To Sue

Plaintiffs' Motion also should be denied because amending the complaint to add three new plaintiffs would be futile. See Mem. Op. (8/23/07) (Docket No. 176) at 2-3 (citing Foman v. Davis, 371 U.S. 178, 182 (1962)). None of the new plaintiffs could withstand a motion to dismiss for lack of standing.[10] See Stith v. Chadbourne & Parke, LLP, 160 F. Supp. 2d 1, 6 (D.D.C. 2001) (citing Willoughby v. Potomac Elec. Power Co., 100 F.3d 999, 1003 (D.C. Cir. 1996)) ("An amendment is futile if it would not survive a motion to dismiss or for judgment on the pleadings."). Unlike Tom Rider, the new plaintiffs have not alleged, nor can they, facts that, pursuant to the law of this case, sufficiently establish a "personal and emotional attachment" to FEI's elephants. Such a relationship is necessary to distinguish this case from Humane Society of the United States v. Babbitt, 46 F.3d 93 (D.C. Cir. 1995), in which plaintiffs had no standing. Ms. Hundley, moreover, alleges an aesthetic injury based on facts that, while applicable to Rider, were intentionally omitted from his complaint until after the D.C. Circuit ruled that he had standing. Those facts clearly distinguish Ms. Hundley's case from Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167 (2000), the case upon which the D.C. Circuit found that Rider had sufficiently alleged standing, albeit premised upon false and/or misleading allegations in plaintiffs' original complaint. Because none of the new plaintiffs has a basis for the requisite "personal relationship" with FEI's elephants and because Ms. Hundley, moreover,

[10] Although the organizational plaintiffs in this case have been permitted to piggy-back on Tom Rider's standing because they are seeking the same relief, see ASPCA v. Ringling Bros., 317 F.3d 334, 338 (D.C. Cir. 2003), the new plaintiffs would ***not*** be seeking the same relief as Rider. Plaintiffs already have acknowledged that they seek to add the new plaintiffs so that plaintiffs can ***expand*** their claims to include elephants as to which Rider does not have standing. Pls. Mem. at 5-6 ("Plaintiffs wish to add these three individuals as plaintiffs particularly in light of this Court's recent summary judgment which narrowed the scope of plaintiffs' claims . . . and because defendant takes the position that the current individual plaintiff Tom Rider only has Article III standing with respect to [certain] elephants . . . ."). Adding the new plaintiffs would permit Rider and the organizational plaintiffs to obtain injunctive relief with respect to certain elephants that are not currently subject to this lawsuit. Therefore, the new plaintiffs must allege facts sufficient to establish their own standing. Unlike the organizational plaintiffs, they may not piggy-back on Rider.

continues to visit those elephants, the new plaintiffs lack standing and should not be added to this lawsuit.[11] The facts they allege are not analogous to those already ruled upon by the D.C. Circuit. See ASPCA v. Ringling Bros., 317 F.3d 334, 338 (D.C. Cir. 2003) ("Based upon his ***desire to visit the elephants*** (which we must assume might include attending a performance of the circus), his ***experience with the elephants***, his alleged ability to recognize the effects of mistreatment, and what an injunction would accomplish, Rider's allegations are sufficient to withstand a motion to dismiss for lack of standing.") (emphases added).[12]

1. None of the Plaintiffs Has the Requisite Emotional Attachment to, or Personal Relationship With, FEI's Elephants

To survive a motion to dismiss for lack of standing, each of the new plaintiffs must plead a sufficient attachment to FEI's elephants (and a basis therefor) that would comply with this Circuit's precedent regarding Article III standing. See Humane Soc'y of the United States v. Babbitt, 46 F.3d 93 (D.C. Cir. 1995) (an individual who visited an Asian elephant at the zoo "several times" before the elephant was relocated had no standing to sue about the relocation). In Humane Society, the D.C. Circuit expressed doubt that an individual's attachment to an elephant was sufficient to establish that she suffered an "injury in fact" when she could no longer visit the elephant at the zoo. Id. at 97 ("While we can imagine a situation where a frequent zoo visitor's systematic observation of an animal species might be sufficiently threatened by the removal of some or even one animal from the zoo to make out a cognizable claim for standing

[11] As plaintiffs themselves argued in opposing FEI's Motion for Leave to Amend, further delay and prejudice to FEI will occur as it will have to undertake the process of moving to dismiss and/or filing a motion for summary judgment to challenge each new plaintiffs' standing. This, as plaintiffs pointed out, "will only further delay and complicate these proceedings." Pls.' Opp. to FEI's Motion for Leave to Amend (3/30/07) (Docket No. 132) at 41.

[12] Plaintiffs continue to insist that they are entitled to demand that FEI forfeit its elephants. Pls.' Sec. Supp. Compl. ¶¶ 8, 14, 20. Yet, nothing in the D.C. Circuit's opinion grants Rider – or any other plaintiff – standing to obtain such relief. ASPCA, 317 F.3d at 338 (noting that Rider seeks an injunction and forfeiture then concluding that Rider has standing based on what an injunction would accomplish). Indeed, others courts in this District have held that citizen suits under the ESA are limited to injunctive relief, not forfeiture. See PeTA v. Babbitt, No. 93-1836, slip op. at 14 (D.D.C. Feb. 23, 1995) (attached as DX 18 to FEI's Reply in Support of Its Mot. for Summary Judgment (10/30/06) (Docket No. 101)).

purposes, this does not appear to be such a case – or at least it has not been well pleaded."). Like the individuals involved in Humane Society, the new plaintiffs have not pleaded, indeed cannot plead, a sufficient attachment to FEI's elephants. The only reason that the D.C. Circuit distinguished Rider's case from that presented in Humane Society is that it determined that Rider had pleaded a sufficient personal relationship with FEI's elephants and a basis therefor. See ASPCA v. Ringling Bros., 317 F.3d 334, 337-38 (D.C. Cir. 2003) ("Rider's ***personal relationship*** with the elephants eliminates the concern, expressed in Babbitt, that a plaintiff who could continue to observe several animals of a particular species might not be injured if one of the animals were removed.") (emphasis added). Unlike the new plaintiffs, however, Rider alleged that he worked for ***more than two years*** "tending the ***elephant*** barns and working as a 'handler.'" Id. at 335 (emphasis added). These plaintiffs did ***not*** work with the elephants. See Pls.' Sec. Supp. Compl. ¶¶ 3-5, 9-11, 15-17. Indeed, conspicuously absent from the proposed complaint are the very allegations that supported Rider's allegation of a "personal relationship." Mr. Rider, for example, allegedly "spent ***many hours*** with the ***elephants***, and ***knows all of the elephants he worked with by name***. During his ***work with the elephants***, he grew extremely fond of them, and formed a strong, personal attachment to these animals." Pls.' Sec. Am. Compl. ¶ 18 (No. 00-1641, Docket No. 21) (emphases added).

Unlike Rider, who alleged to have ***worked substantially*** with the ***elephants*** for ***more than two years*** and to ***know them by name***, Ms. Hundley and Mr. Tom allege that they worked with ***horses*** but that they ***"observ[ed]"*** and ***"commun[ed]"*** with the elephants by virtue of the general ***"proximity"*** of the elephants to the horses. Pls.' Sec. Supp. Compl. ¶¶ 3, 9. Similarly, Mrs. Tom did not work with the elephants (indeed, she did not work with any animals, or in the animal compounds), but alleges to have ***"observ[ed]"*** the elephants while working backstage as a

"props and backstage hand." Id. ¶ 15. The new plaintiffs are no different than the individual in Humane Society who had no standing. Unlike Rider, they have not alleged an "attachment" to certain of FEI's elephants based on ***working with them*** for ***more than two years*** and ***knowing each one by name***. Rather, they baldly assert in conclusory fashion that such an attachment exists, but allege no facts to make this believable. Indeed, they allege facts that make it impossible to believe that such an attachment exists. Unlike Rider, Ms. Hundley worked with FEI for a mere ***two months*** and the Toms worked with FEI for only fifteen months.[13] During that short period of time, they did not work with the elephants; they did not interact with the elephants; they did not pick-up after the elephants; they do not even allege that they can tell one elephant apart from the next. They merely allege to have observed and communed with them.[14] Such activities do not support a finding that they had an emotional attachment to, or personal relationship with, FEI's elephants. The new plaintiffs, therefore, do not have Article III standing.[15]

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[13] Plaintiffs' proposed complaint ***falsely*** states that the Toms worked with FEI "from the summer of 2004 until August of 2006." Pls.' Sec. Supp. Compl. ¶¶ 9, 15. However the evidence will show that the Toms only worked with FEI from April 19, 2005 until August 5, 2006. Ex. 1, Toms' Employment Eligibility Verification Forms (signed statements confirming date of hire). This discrepancy is not inconsequential. Because plaintiffs must demonstrate a relationship with certain elephants to obtain standing to sue on their behalf, the length of plaintiffs' employment with FEI is a critical issue. By falsely representing that the Toms worked with FEI beginning in the "summer of 2004," plaintiffs have manufactured an extra fictitious year towards a purported relationship with the elephants.

[14] Plaintiffs do not say what specific activities constitute "communing" with the elephants, but there is nothing in the D.C. Circuit's decision in this case to suggest (nor is FEI aware of any case holding) that "communing" is sufficient for an "aesthetic injury" cognizable under Article III. Nonetheless, it would have been impossible for the new plaintiffs to "intimately communicate," see Merriam-Webster Definition of "commune," with the elephants given that they did not work with the elephants, nor would they have had the kind of access necessary to form any attachment to them. Indeed, the new plaintiffs had specific job responsibilities that required their attention in other areas of the animal compound (Mr. Tom and Ms. Hundley), or outside the compound completely (Mrs. Tom).

[15] Even if accepted as true at this point, it should be noted that plaintiffs' bald, conclusory allegations will be shown to be groundless. Contrary to their self-serving allegations, none of them were "very vocal about complaining about the way the animals . . . were being abused," nor were any of them fired for that reason.

2. Ms. Hundley's Allegations Are Distinct From Those Addressed in Laidlaw and Those Addressed by the D.C. Circuit in This Case

Plaintiffs lack the requisite attachment to FEI's elephants to establish that they have standing to pursue this case. Ms. Hundley's allegations, moreover, are distinct from those originally made by Rider and those upon which the D.C. Circuit ruled that he had standing. Rider's standing allegations were intentionally crafted in 2000 to mirror a then-recent Supreme Court decision, Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167 (2000), in which the Court held that a continuing injury-in-fact existed where plaintiffs previously used a river and its environs for recreation, but had ***stopped*** doing so because of the defendant's alleged pollution.[16] Plaintiffs, however, alleged ***false and/or intentionally misleading*** "facts" to more closely analogize Rider's case to that addressed in Laidlaw. See FEI's Rule 11 Opp. at 25-33. Specifically, plaintiffs originally alleged that:

> Mr. Rider ***would very much like to visit the elephants in defendants' possession*** so that he can continue his personal relationship with them, and enjoy observing them. However, he is ***unable to do so*** without suffering

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[16] As plaintiffs' counsel Katherine Meyer explained at a symposium in 2006:

> In the Ringling Bros. case, our ***main argument*** was that ***Tom Rider*** had been a barn man for the elephants and had seen the mistreatment of the Asian elephants. . . . ***The trick for Rider was***, how do you show a continuing injury or a future injury, when the circus is going to argue that the plaintiff only has past injuries, and therefore, those injuries are not cognizable for Article III purposes?
>
> ***When [Laidlaw] was issued, we saw an opening for Rider to have standing***. What we alleged in that case, and will have no problem proving, is that Rider fell in love with the Asian elephants with whom he worked . . . He could not bear seeing them mistreated. He left the circus, because he could not take it anymore. He would like to go back and visit them and see them again, but he is in this position of having to make the choice to avoid going back to see them, because that is the only way he can avoid subjecting himself to more aesthetic injury. ***These are the kind of hoops through which we must jump; this is what you have to do to come up with these standing theories.***
>
> So we used [Laidlaw] . . . and ***came up with the novel argument*** that Rider was suffering Article III injury ***because he had to avoid going back to see his "girls,"*** as he calls them, whom he loved so much.

13 Animal L. 61, 74-75 (2006) (emphases added).

> more aesthetic and emotional injury, unless and until these animals are placed in a different setting, or are otherwise no longer routinely beaten, chained for long periods of time, and otherwise mistreated. ***If these animals were relocated to a sanctuary or other place where they were no longer mistreated, Mr. Rider would visit them as often as possible, and would seek a position that would allow him to work with his 'girls' again.***

Pls.' Sec. Am. Compl. ¶ 22 (No. 00-1641, Docket No. 21) (emphases added).

Those allegations, however, were demonstrably false at the time that this Court ruled on FEI's motion to dismiss and when the parties briefed the issue for the D.C. Circuit. Indeed, based on Rider's allegations that he "***is unable to***" visit the elephants in FEI's possession, the D.C. Circuit held that his situation was analogous to the plaintiffs in Laidlaw where, "because of the pollution, [the plaintiffs] ***had not gone back*** [to the river], but ***would*** if the [alleged misconduct] ceased." ASPCA v. Ringling Bros., 317 F.3d 334, 337 (D.C. Cir. 2003) (emphases added). Therefore, the D.C. Circuit was led to the mistaken impression that Rider had not gone to visit FEI's elephants and that, in fact, he was "unable to do so." Id. at 337 (discussing how Rider was injured because he "would like to 'visit' [the elephants] again"); id. at 338 ("Based upon his desire to visit the elephants . . . , Rider's allegations are sufficient to withstand a motion to dismiss for lack of standing."). However, Rider actually had gone to visit FEI's elephants several times before the court's decision. Ex. 71 to FEI's Rule 11 Opp., Rider's Response to Inter. No. 17 (swearing under oath that Rider saw the FEI elephants that he knows several times between May 2001 and the D.C. Circuit's decision in April 2003).[17] Rider and his counsel did not inform either this Court or the D.C. Circuit that Rider's standing allegations were no longer

[17] In fact, Rider already had gone to visit FEI's elephants prior to this Court's ruling on FEI's motion to dismiss for lack of standing. At no time did plaintiffs bring that highly relevant fact to the Court's attention. See FEI's Rule 11 Opp. at 27-28.

true.[18] Only after the D.C. Circuit granted Rider standing did plaintiffs amend their complaint to state the whole picture. FEI's Rule 11 Opp. at 32-33 (discussing how plaintiffs amended their complaint to conform to the true facts and then misleadingly represented to the Court that their new complaint was "essentially identical" to the previous one).

Ms. Hundley has gone to visit FEI's elephants – a fact which further undermines her standing. Pls.' Sec. Supp. Compl. ¶ 7. While she has disclosed this fact, because she has gone to visit FEI's elephants, her case is not analogous to the one presented by Rider and ruled upon by the D.C. Circuit. Ms. Hundley has not been prevented from going to visit the elephants. Therefore, her injury is not analogous to that addressed by the Supreme Court in Laidlaw and adding her as a plaintiff in this case would be futile. She, like all the new plaintiffs, lacks standing to pursue this action.

C. The ESA Allows Parties to "Commence" a Lawsuit, Not to Join An Existing One

Pursuant to the ESA, an individual may "***commence*** a civil suit on his own behalf" when certain criteria have been met, one of which is that "no action may be ***commenced***" until that person provides notice of the alleged violation to the alleged violator. 16 U.S.C. §§ 1540(g)(1)-(2) (2007) (emphases added). Such statutory "notice" provisions must be strictly construed. Hallstrom v. Tillamook County, 493 U.S. 20, 31 (1989) (Notice provisions "are mandatory conditions precedent to commencing suit . . . a district court may not disregard these

[18] Not only did plaintiffs give this Court and the D.C. Circuit the false impression that Rider was "unable to" visit FEI's elephants, they also gave both courts the false impression that (a) Rider quit his job with FEI because of its alleged animal abuse (when, in fact, Rider quit his job with FEI to go work for another circus with the very same individuals he now claims abused the elephants when they worked together at FEI) and that (b) Rider would visit and seek to work with the elephants if they were placed in a sanctuary or other setting in which they were not abused (when, in fact, Rider had not gone to visit, let alone work with, any of the three elephants that FEI had since donated to a sanctuary – where Rider used to work – and a zoo). See FEI's Rule 11 Opp. at 27-30.

requirements at its discretion.").[19] See also Washington Trout v. McCain Foods, 45 F.3d 1351, 1354 (9th Cir. 1995) (The [Hallstrom] Court held the notice requirement under the regulations was to be strictly construed."). In light of Hallstrom, "failure to strictly comply with the notice requirement acts as an absolute bar to bringing suit under the ESA." Common Sense Salmon Recovery v. Evans, 329 F. Supp. 2d 96, 104 (D.D.C. 2004) (internal quotations and citations omitted). See also Research Air, Inc. v. Norton, No. 05-623, 2006 U.S. Dist. LEXIS 10784, at *32 (D.D.C. Mar. 1, 2006).

The plain meaning of the ESA could not be more clear: once the statutory notice requirement is satisfied, an individual may "commence" an action. "Under Rule 3 of the Federal Rules of Civil Procedure, 'a civil action is commenced by filing a complaint with the court.'" Hallstrom, 493 U.S. at 26. Plaintiffs are not "commencing" anything. To the contrary, their motion is, by definition, an attempt, with a supplemental complaint, to add to an existing lawsuit. Nowhere does the ESA permit an individual to "join" an existing lawsuit, as the new plaintiffs now seek to do. Congress easily could have allowed for a different outcome, id., but it explicitly chose not to allow plaintiffs the option of joining an existing ESA lawsuit. "'In the long run, experience teaches that strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law.'" Id. at 31 (quoting Mohasco Corp. v. Silver, 447 U.S. 807, 826 (1980)).

Allowing new plaintiffs to join an existing ESA lawsuit would explicitly contradict the plain meaning of the statute's notice provision. It, moreover, would frustrate the purpose of that provision, which is to permit an alleged violator the opportunity to accurately evaluate its

[19] Although Hallstrom addressed the notice provision in the Resource Conservation and Recovery Act ("RCRA"), "for this Court's purposes the holding of Hallstrom is equally clear" in this ESA case. Humane Soc'y of the United States v. Lujan, 768 F. Supp. 360, 362 (D.D.C. 1991). In Hallstrom, "the Supreme Court itself has noted that the ESA notice provision would have compelled a similar result." Id. at 362 n.3.

exposure in a lawsuit so that effective negotiation is possible before litigation begins and before the parties' respective positions harden. See Washington Trout, 45 F.3d at 1354 ("As noted by other courts, the purpose of giving a sixty-day notice is to allow the parties time to resolve their conflicts in a nonadversarial time period. Once the suit is filed, positions harden and compromise is less likely. . . . Therefore, ***because neither the EPA nor [the alleged violator] knew other plaintiffs were involved, they were not in a position to negotiate with the plaintiffs or seek an administrative remedy. This made any sort of resolution between the parties during the notice period an impossibility.***"). See also New Mexico Citizens for Clean Air & Water v. Espanola Mercantile Co., 72 F.3d 830, 833 (10th Cir. 1996) ("***If the defendant and the agencies do not know the parties involved, effective negotiation is not possible.***"); Idaho Sporting Congress v. Computrol, 952 F. Supp. 690, 694-95 (D. Idaho 1996) ("Washington Trout, as already noted, stresses that one important purpose of the sixty-day notice requirement in citizen suits under environmental statutes is to afford the parties an opportunity to reach a negotiated settlement to their dispute during the notice period; it is more than simply a means of establishing federal jurisdiction. ***And this purpose – facilitation of a negotiated resolution – cannot be achieved when the parties entitled to receive notice are not informed of the identifies of all other parties to the dispute.***") (internal citation omitted) (emphases added). Both the plain meaning and the purpose of the ESA's notice provision dictate that the new plaintiffs cannot join this lawsuit.

CONCLUSION

For the reasons set forth herein, FEI respectfully requests that plaintiffs' Motion be denied. Proposed forms of order are attached.

Dated this 7th day of September, 2007

Respectfully submitted,

/s/

John M. Simpson (D.C. Bar #256412)
Joseph T. Small, Jr. (D.C. Bar #926519)
Lisa Zeiler Joiner (D.C. Bar #465210)
Michelle C. Pardo (D.C. Bar #456004)
George A. Gasper (D.C. Bar #488988)

FULBRIGHT & JAWORSKI L.L.P.
801 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Telephone: (202) 662-0200
Facsimile: (202) 662-4643
Counsel for Defendant Feld Entertainment, Inc