UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS, et al.,	)	
Plaintiffs,	)	
v.	)	**Civ. No. 03-2006 (EGS/JMF)**
RINGLING BROTHERS AND BARNUM & BAILEY CIRCUS, et al.,	)	
Defendants.	)	

REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR LEAVE TO FILE A SUPPLEMENTAL COMPLAINT ADDING THREE FORMER RINGLING BROTHERS EMPLOYEES AS PLAINTIFFS

Plaintiffs make the following points in reply to defendant's opposition to their motion to file a Supplemental Complaint to add three new plaintiffs – all of whom worked for Ringling Brothers Circus until last summer.[1]

1. Rather than serve the interests of avoiding the additional cost, delay, and waste of judicial resources that would be entailed by having these three individuals file their own separate law suit on the same claim that is already pending before this Court – i.e., whether defendant's treatment of the endangered Asian elephants violates the "taking" prohibition of Section 9 of the Endangered Species Act ("ESA") – defendant insists that these individuals should be required to file their own lawsuit raising that same claim. See Defendant's Opposition ("Def. Opp.") (Docket No. 184) at 18-20 (insisting that these three individuals must bring their own new suit). However, not only is this

[1] Taking to heart the Court's concerns that this case has already been substantially delayed because of the parties' "poisoned relationship and hostile attitude toward each other," Order (August 23, 2007) (Docket No. 178) at 12, plaintiffs will refrain from addressing the various ad hominem attacks and self-serving misstatements of the proceedings and this Court's rulings that are included in defendant's opposition.

not required under the citizen suit provision of the ESA,[2] it is also at odds with the plain language of Rule 15, which permits "supplemental pleadings" precisely for this purpose – i.e. to set forth "transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented." In view of how long the present case has been pending before this Court, it would be a waste of the parties' and the Court's time and resources to have two cases going forward simultaneously on the same claim. Thus, as the Supreme Court has held, such supplemental complaints – especially when the original case has been pending for many years – "are well within the basic aim of the rules to make pleadings a means to achieve an orderly and fair administration of justice." Griffin v. School Bd. of Prince Edward County, 377 U.S. 218, 227 (1964) (emphasis added).

2. Defendant has failed to demonstrate that it would suffer any significant prejudice by the granting of plaintiffs' motion. Indeed, defendant concedes that it was already preparing to take discovery from these three individuals by way of third-party subpoenas, since plaintiffs notified defendant in March 2007 that they planned to rely on these individuals as fact witnesses. See Def. Opp. at 8, n.5. Moreover, in testing the individuals' credibility as fact witnesses, defendant most assuredly would have asked them questions about their relationships with the other plaintiffs in this case. See Def. Opp. at 9. Therefore, at most, defendant appears to be complaining that if these three individuals are allowed to participate as plaintiffs in the case, defendant would have to ask them some additional questions about their standing allegations – e.g., how well they know the elephants,

[2] The language of the citizen suit, which allows "any person" to "commence" an action under the statute once the 60-day notice period has expired, 16 U.S.C. § 1540(g), is amply met by allowing these three individuals, all of whom have given the requisite notice, to "commence" their action by filing a Supplemental Complaint. See Fed. R. Civ. P. 3 ("[a] civil action is commenced by filing a complaint with the court") (emphasis added).

the nature of their aesthetic injuries, etc. See, e.g., Def. Opp. at 12-18 (contesting the standing of each of these individuals). However, this is marginal prejudice at most and hardly warrants denying plaintiffs' motion. See Hall v. C.I.A., 437 F.3d 94, 101 (D.C. Cir. 2006).

Furthermore, as plaintiffs already represented in their motion, they are willing to ensure that these three individuals provide defendant with all required discovery within the time-frame set by the Court. See Plaintiffs' Motion (Docket No. 181) at 7. Indeed, if defendant will identify which set of Interrogatories and Document Requests it wishes these individuals to answer, see Def. Opp. at 9, n.7, they are willing to provide that discovery as soon as possible after the Court grants the requested motion. Plaintiffs will also agree to allow defendant to take the depositions of these three additional plaintiffs in addition to the ten depositions to which the parties are entitled, as requested by defendant, id., and they are also willing to provide defendant with interrogatory answers from the ASPCA, Fund for Animals, and Animal Welfare Institute, concerning the "new plaintiffs' . . . credibility." See id.[3]

For all of these reasons, defendant would not suffer any undue prejudice or delay by allowing these three individuals to become plaintiffs to this case.

3. In comparing plaintiffs' request to add three new plaintiffs to the existing claim before the Court with defendant's own unsuccessful attempt to add entirely new counterclaims and defenses, defendant fails to accept the fundamental reality that these three new plaintiffs will be asserting the very same claims that have been before the Court for the last seven years, as recently narrowed by the Court. Thus, as this Court recently emphasized, "[t]he focus of the only claim in

[3] However, plaintiffs see no reason, and defendant did not provide any, why the groups should also be required to provide additional discovery from these groups "relating to the new plaintiffs' allegations of abuse." Id.

this case is whether or not defendant's treatment of its elephants constitutes a taking within the meaning of Section 9 of the ESA." Mem. Op. (August 23, 2007) (Docket No. 176) at 5. Therefore, in sharp contrast to defendant's proposed counterclaims and defense – which, in the words of this Court would have "dramatically change[d] the nature of the litigation," id. – the claim these three new plaintiffs wish to pursue is precisely the same as the one that is presently before the Court.

4. Defendant also wrongly insists that because in their view this case "should" be limited to the issue of how the Blue Unit elephants whom plaintiff Tom Rider knew are treated, adding new plaintiffs who know the "Red Unit" elephants will necessarily "expand" the scope of the litigation. Def. Opp. at 4 - 6. Defendant is confusing the nature of the plaintiffs' claim here with, at most, the ultimate relief the Court will grant if plaintiffs prevail on that claim.[4]

All evidence on what the Court itself has said is the central issue in this case – i.e., "whether or not defendant's treatment of its elephants constitutes a taking within the meaning of Section 9 of the ESA," Mem. Op. (Docket No. 176) at 5 – is highly relevant here, regardless of which particular elephants Mr. Rider personally knows. Therefore, plaintiffs are entitled to discover, and will also be entitled to present at trial, evidence concerning how both the Red Unit elephants and the Blue Unit elephants, as well as other elephants in defendant's possession, are treated. See Fed. R. Civ. P. 26(b) ("parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party"); Rule of Evidence 401 ("relevant" evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action,

[4] Moreover, plaintiffs intend to demonstrate that the organizational plaintiffs in this case have standing with respect to all of the Pre-Act elephants. See, e.g., Plfs. Opp. to Def. Mtn. for Summ. J. (Docket No. 96) at 10 n.5.

more probable or less probable than it would be with the evidence") (emphasis added).

Indeed, rejecting defendant's earlier argument that plaintiffs could only seek discovery with respect to the "specific kinds of violations" alleged in their 60-day notice letters, this Court has already ruled that "Plaintiffs are entitled to take discovery regarding all of defendants' practices that plaintiffs allege violate the Endangered Species Act and that statute's implementing regulations, including past, present, and on-going practices." Order (November 25, 2003) (Docket No. 15) (emphasis added). In fact, plaintiffs have already taken substantial discovery regarding both the "Blue Unit" elephants and the "Red Unit" elephants, with no complaint from defendant on this point. See, e.g., Motion to Compel Defs.' Compliance with Plfs.' Discovery Request (Docket No. 27); see also Deposition of Alex Vargas (May 31, 2007) (an official who has worked for both the Blue Unit and the Red Unit).

Accordingly, since plaintiffs challenge defendant's routine mistreatment of all of its Pre-Act elephants, and all evidence regarding the treatment of any elephant is extremely relevant to that claim, the addition of three new plaintiffs who worked for the Red Unit does not in any way "expand[] the scope of the litigation." Def. Opp. at 4.

5. Defendant's contention that the motion to supplement would be "futile" because all three of the new plaintiffs lack Article III standing, Def. Opp. at 12-18, is also wrong. All three of the proposed new plaintiffs allege that they have a "strong personal attachment" to the elephants on the Red Unit, see Proposed Supplemental Complaint (Ex. 1) ¶¶ 3, 9, 15 – precisely the kind of relationship that the D.C. Circuit held was adequate to "form the predicate of a claim of injury" in ASPCA v.Ringling Bros., 317 F.3d 334, 337 (D.C. Cir. 2003).

Contrary to defendant's argument, the Court of Appeals did not rest its standing analysis on the fact that Mr. Rider worked "with" the elephants, so that a person who worked around the elephants every day but not directly "with" them could not allege sufficient standing under ASPCA v.Ringling Bros. See Def. Opp. at 14. Rather, the Court based its standing ruling on Mr. Rider's allegation of an "emotional attachment to a particular animal." ASPCA, 317 F.3d at 337. It was for this reason – not because of the length of time Mr. Rider had actually worked with the animals – that the Court distinguished this case from Humane Society v. Babbitt, 46 F.3d 93 (D.C. Cir. 1995), upon which defendant relies. In that case none of the plaintiffs had alleged a personal relationship with the specific elephant at issue, but instead alleged that her absence from the zoo would make it more difficult for them to enjoy captive elephants in general. See Id. at 97 ("Ms. Mannes does not actually explain how Lota's departure – which reduced the number of Asian elephants from four to three – threatened her opportunity to observe Asian elephants"). In contrast, Mr. Rider has alleged sufficient standing here because, as the Court of Appeals explained, "[i]n *Babbitt*, we left open the question whether 'emotional attachment to a particular animal . . . could form the predicate of a claim of injury[,]'" – a question which the Court in ASPCA answered "in the affirmative." ASPCA, 317 F.3d at 337 (emphasis added).

In further asserting that Ms. Hundley's allegations of harm are "distinct" from those that the Court of Appeals upheld in ASPCA v.Ringling Bros., Def. Opp. at 16, defendant misconstrues the nature of the injury that was upheld by the D.C. Circuit. Relying on Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., 528 U.S. 167 (2000), the Court of Appeals held that Mr. Rider had alleged sufficient aesthetic injuries because he has to choose between not seeing the animals with whom he has formed a "strong personal attachment," ASPCA, 317 F.3d at 337, or seeing them in their

mistreated state. Id. at 338; see also Second Amended Complaint ¶ 22 (Docket No. 21, Civ. No. 00-1641) (Mr. Rider alleged that he is "unable" to see the elephants "without suffering more aesthetic and emotional injury . . .") (emphasis added). The Court of Appeals agreed that, under the reasoning of Laidlaw, having to make this choice was sufficient to demonstrate injury in fact. See ASPCA, 317 F.3d at 337 (explaining that if he goes to visit the animals, Mr. Rider "might observe either direct physical manifestations of the alleged mistreatment or the elephants, such as lesions, or detect negative effects on the animals' behavior,"and that "[t]his takes his claim out of the category of a generalized interest in ensuring the enforcement of the law" for purposes of Article III standing) (emphasis added).

Accordingly, because Ms. Hundley has alleged that she suffers precisely this kind of injury, her standing is indistinguishable from what the Court of Appeals has already ruled is sufficient to satisfy the requirements of Article III.

6. Finally, plaintiffs did not unduly delay in filing their motion to add these three new individual plaintiffs. See Def. Opp. at 10-11. Rather, in light of (a) the fact that plaintiffs did not even know about these three former employees until last fall; (b) the fact that these three individuals had to decide whether they wanted to file a lawsuit against their former employer to enjoin the way the elephants are treated; (c) the requirement that these individuals provide defendant and the federal government with 60-days notice before they could assert their claims; and (d) the inordinate number of motions that have been filed in this case over the last year, plaintiffs acted as expeditiously as possible in filing this motion.

Moreover, although defendant complains that by allowing these individuals to join this ongoing litigation defendant has somehow been hampered in "effective negotiation" of a resolution

of this case, Def. Opp. at 20, defendant did not provide any response to the new notice letter sent by these individuals on March 30, 2007, nor has defendant ever made any attempt to negotiate a resolution of this case in the over seven years that it has been pending.

Respectfully submitted,

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