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.	)	

PLAINTIFFS' OPPOSITION TO DEFENDANT FELD ENTERTAINMENT INC.'S MOTION FOR RECONSIDERATION OR, IN THE ALTERNATIVE, FOR CERTIFICATION PURSUANT TO 28 U.S.C. § 1292(b)

Plaintiffs oppose the motion by defendant Feld Entertainment Inc. ("FEI") for reconsideration of the Court's denial of summary judgment with respect to the "Pre-Act elephants" at issue in this case or alternatively for certification pursuant to 28 U.S.C. § 1292(b). As demonstrated below, defendant has not met the standards for either reconsideration or certification.

ARGUMENT

A. Defendant Has Failed To Demonstrate A Valid Basis For Reconsideration.

A request for reconsideration may be granted if the Court "finds that there is an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice." Firestone v. Firestone, 76 F.3d 1205, 1208 (D.C. Cir. 1996) (internal citations and quotations omitted). Accordingly, the "moving party must show

'new facts or clear errors of law which compel the court to change its prior position.'" Scorah v. District of Columbia, No. 03-160, 2004 U.S. Dist. Lexis 27806 *5 (D.D.C. Dec. 17, 2004) (quoting National Ctr. For Mfg. Sciences v. DOD, 199 F.3d 507, 511 (D.C. Cir. 2000) (internal citation omitted)). Here, defendant has not met any of these standards.

Defendant has not demonstrated any new facts that bear on this issue, nor demonstrated that there has been a "clear error[] of law." Scorah, 2004 U.S. Dist. Lexis at *5. Indeed, the Court already squarely addressed defendant's argument that Bennett v. Spear, 520 U.S. 154 (1997) precludes plaintiffs from asserting their "take" claim against defendant for its treatment of the "Pre-Act" elephants, Def. Mem. at 2. See Memorandum Opinion (Docket No. 173) at 11-12. As a general rule, reconsideration "will not be granted if a party is simply attempting to renew factual or legal arguments . . . that have already been rejected by the court." Scorah, 2004 U.S. Dist. Lexis 27806 at *5; see also Mem. Op. at 11-12.

Moreover, the holding of Bennett v. Spear has no applicability here where, in sharp contrast to Bennett, plaintiffs have not challenged any action by the Fish and Wildlife Service ("FWS"). Thus, in Bennett the Supreme Court held that subsection A of the citizen suit provision of the Endangered Species Act, 16 U.S.C. § 1540(g)(1)(A), which allows "any person" to bring a citizen suit "to enjoin any person . . . who is alleged to be in violation of any provision of this chapter or regulation issued under the authority thereof," does not apply to claims that the FWS has violated the statute, and that, instead, such claims must be brought under the Administrative Procedure Act. See 520 U.S. at 173-74. The Court further held that the only claim against the FWS that may be brought under the citizen suit provision is one challenging the violation of a non-discretionary duty, under subsection C of that provision, 16 U.S.C. §

1540(g)(1)(C). See id. However, here plaintiffs do not assert any claims against the FWS. Rather, their only claims are against defendant for its violations of the ESA – claims that fall within the plain language of subsection A of the citizen suit provision. See 16 U.S.C. § 1540(g)(1)(A).

Thus, contrary to the way in which defendant tries to recast this case, plaintiffs have not brought a "challenge to the FWS pre-Act exemption regulation." Def. Mem. at 2. Instead, defendant raised this regulation as a defense to plaintiffs' Section 9 claims, contending that the regulation allows defendant to "take" any "Pre-Act" elephant. In the course of deciding defendant's motion for summary judgment based on that defense, the Court ruled that the regulation is countermanded by the plain language of the statute which does not allow the "take" of any such animals. See Mem. Op. at 8-14. Therefore, as this Court held, defendant is not entitled to summary judgment on this basis, since the regulation upon which it relies conflicts with the plain language of the ESA. See Mem. Op. at 10-11, citing Nat'l Wrestling Coaches Ass'n v. Dep't of Educ., 366 F.3d 930, 947 (D.C. Cir. 2004) (challenges to agency policies may be aired in lawsuits where the agency is not a defendant "to the extent that the defendant . . . attempts to justify its actions by reference to those policies").

Defendant's second reason for reconsideration – that the Court did not address defendant's argument that plaintiffs' challenge should be limited to the specific Pre-Act elephants with whom plaintiff Tom Rider has an "emotional attachment," Def. Mem. at 5-6, also fails. Defendant did not even move for summary judgment on the issue of Mr. Rider's standing. Rather, it simply asserted this additional point in its reply brief regarding its motion for summary judgment based on entirely different legal arguments. See Defendant's Summary Judgment

Reply Brief at 16-17. Furthermore, there are four additional organizational plaintiffs in this case – all of whom have alleged standing with respect to all of the elephants at issue. See Complaint (Docket No. 1); Supplemental Complaint (Docket No. 180). Accordingly, since defendant also has not moved for summary judgment with respect to the standing of any of these plaintiffs, the Court has no basis for "reconsidering" its ruling by now limiting the scope of this entire case to only those elephants whom Mr. Rider knew when he worked for the Ringling Brothers' Circus.

There also is no basis for "limiting" this case to only the Pre-Act elephants whom Mr. Rider knows when the treatment of all of the elephants is extremely relevant to whether defendant mistreats any specific Pre-Act elephants. See, e.g., 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") (emphasis added); 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, more probable or less probable than it would be with the evidence") (emphasis added). Indeed, defendant certainly has never asserted – let alone proved – that it treats the six Pre-Act elephants Mr. Rider knows any differently than it treats the other elephants in its possession. Accordingly, defendant has not presented any basis for this Court to reconsider its ruling denying summary judgment on the "Pre-Act" elephants issue.

B. Defendant Has Also Failed To Meet The Requirements For Certification.

Nor has defendant presented any basis for certifying the Court's ruling for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). That provision allows a district court to certify an order for immediate appellate review when it "involves a controlling question of law as to which there

is substantial ground for difference of opinion and [] an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). Here, defendant has failed to demonstrate that either of these requirements is met with respect to its argument that, despite the plain language of the ESA which does not allow the "take" of a "Pre-Act" animal, see 16 U.S.C. §§ 1538(a)(1)(B); 1538(b), defendant may nevertheless do so pursuant to a contrary FWS regulation, 50 C.F.R. § 17.4.

As this Court has recognized, "[a] party seeking certification pursuant to § 1292 must meet a high standard to overcome the 'strong congressional policy against piecemeal reviews, and against obstructing or impeding an ongoing judicial proceeding by interlocutory appeals.'" Judicial Watch, Inc. v. National Energy Policy Development Group, 233 F. Supp.2d 16, 20 (D.D.C. 2002) (quoting United States v. Nixon, 418 U.S. 683, 690 (1974)). Thus, the movant for certification "'bears the burden of showing that exceptional circumstances justify a departure from the basic policy of postponing appellate review until after the entry of final judgment.'" Judicial Watch, 233 F. Supp.2d at 20 (quoting Virtual Def. and Dev. Int'l, Inv. v. Republic of Moldova, 133 F. Supp.2d 9, 22 (D.D.C. 2001) (additional citations omitted) (emphasis added).[1]

Here, defendant has not made any such showing. Thus, other than insisting that the argument that it already made in defense to plaintiffs' claim concerning the "take" of the "Pre-Act" elephants was correct when defendant made it the first time around, defendant has not made any showing that this issue involves a "controlling question of law as to which there is substantial ground for difference of opinion." 28 U.S.C. § 1292(b) (emphasis added). However,

[1] The issue for which certification was requested in Judicial Watch was later presented to the Court of Appeal pursuant to a petition for mandamus. See Cheney v. United States Dist. Ct., 542 U.S. 367, 376 (2004).

"[m]ere disagreement, even if vehement, with a court's ruling . . . does not establish a 'substantial ground for difference of opinion' sufficient to satisfy the statutory requirements for an interlocutory appeal." Judicial Watch 233 F. Supp.2d at 20; see also Federal Election Comm'n. v. Club for Growth, Inc., Slip Op., 2006 WL 2919004, *6 (D.D.C. 2006) ("[i]n demonstrating substantial grounds for a difference of opinion, the movant must do more than claim that the district court's ruling was incorrect") (internal quotation and citation omitted).

Moreover, defendant has not demonstrated that there are "conflicting decisions in other circuits" on this issue, or that this Court's decision "conflicts with decisions of several other courts." APCC Services, Inc. v. AT&T Corp., 297 F. Supp.2d 101, 107 (D.D.C. 2003). Furthermore, as demonstrated supra, defendant seeks to create a "substantial ground for difference of opinion" here by recasting plaintiffs' Section 9 claims against defendant as a claim against the FWS. However, "[w]here 'it is only against a mischaracterization of the Court's holdings that the plaintiff can identify substantial ground for a difference of opinion,' a motion to certify under § 1292(b) is properly denied." See Judicial Watch, 233 F.Supp.2d at 28 (quoting Foster v. United States, 926 F.Supp at 203)

Defendant also fails to establish the necessary "substantial ground for difference of opinion," 28 U.S.C. § 1292(b), because it seeks to have the Court ignore both the plain language of the citizen suit provision to the ESA which allows plaintiffs to file suit to "enjoin any person . . . alleged to be in violation of [the ESA]," as well as the statutory construction tenets established by the Supreme Court in Chevron USA, Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984), that require the Court to "give effect to the unambiguously expressed intent of Congress," id. See Judicial Watch, 233 F. Supp.2d at 31 (movant fails to establish a

"substantial ground for difference of opinion" by advocating "in favor or, at best, a different interpretation, and, at most, a dramatic extension of existing precedent with respect to . . . the legal questions they sought to certify") (emphasis added).[2]

Nor would certifying either of the issues requested by defendant "materially advance the ultimate termination of the litigation" – the additional requirement that defendant must meet. 28 U.S.C. § 1292(b). On the contrary, particularly in light of how long this case has already been pending, such certification would only further delay a final resolution of the merits of this ESA case. See, e.g., Mem. Op. (Docket No. 176) at 4 (denying defendant's motion to amend the Answer to add a counterclaim on new defense on the grounds that "[d]iscovery in this case has been going on for more than three and a half years and defendant has already filed a motion for summary judgment "); Order (Docket No. 178) at 11 (ordering that all fact and expert discovery in this case shall close on December 31, 2007); see also Brown v. Pro Football, Inc., 812 F. Supp. 237, 239 (D.D.C. 1992) ("[g]iven that the trial on damages is imminent, it is evident that it would not expedite the ultimate termination of this litigation to delay the proceedings for an interlocutory appeal"); Singh v. George Washington University, 383 F. Supp.2d 99, 105 (D.D.C. 2005) (denying certification because even though "this case has raised a number of important and controversial issues . . . [a]t this point, discovery is complete and the parties' cross-motions for summary judgment have been ruled upon").

[2] Defendant has also failed to demonstrate that its standing argument presents a "controlling question of law as to which there is substantial ground for difference of opinion," since, again, defendant did not even move for summary judgment on the standing of any of the plaintiffs, and, as also demonstrated, supra at 4, defendant's treatment of all of the "Pre-Act " elephants is extremely relevant to the way defendant treats any particular elephant.

Indeed, defendant's argument that certification will "materially advance the ultimate termination of the litigation" presumes that defendant will prevail on its views that Bennett v. Spear controls here or plaintiffs lack Article III standing with respect to all of the "Pre-Act" elephants. However, because defendant's Bennett v. Spear argument only applies to claims brought against the FWS, and defendant did not move for summary judgment on any standing grounds – and hence the Court did not issue any such ruling – it is far from likely that defendant will prevail on either of these issues in the Court of Appeals. See Judicial Watch, 233 F. Supp.2d at 28-29 (denying certification when the likelihood that the moving party will prevail is "far from certain"); see also United States ex rel Hollander v. Clay, 420 F.Supp. 853, 859 (D.D.C. 1976) (denying certification because "[w]hile certainly the ultimate termination of this litigation would be advanced if the Court of Appeals heard and sustained defendant's defense at this time, the court is not of the opinion that this is a likely course of events") (emphasis added).

On the other hand, if the issues raised by defendant are certified and defendant loses on appeal, this ESA case will be delayed again for at least another year – a result that simply is not consonant with the Supreme Court's recognition that endangered species are "to be afforded the highest of priorities." TVA v. Hill, 437 U.S. 153, 174 (1978) (emphasis added). Accordingly, there simply is no sound basis for granting defendant's request for certification.

CONCLUSION

For the foregoing reasons, defendant's motion for reconsideration, or in the alternative, certification for interlocutory appellate review, should be denied.

Respectfully submitted,

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