UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

PLAINTIFFS' REPLY IN SUPPORT OF THEIR MOTION
FOR RECONSIDERATION OR PARTIAL RECONSIDERATION

Introduction

As demonstrated in their memorandum in support of their request for reconsideration or partial reconsideration of the Court's August 23, 2007 grant of partial grant of summary judgment to defendant, plaintiffs have two separate claims in this case. First, plaintiffs allege that defendant is in violation of the "take" prohibition of the ESA because it beats Asian elephants with bull hooks, keeps them chained for most of the day and night, and forcibly removes baby elephants from their mothers before they are naturally weaned. Complaint ¶ 96. Second, plaintiffs allege that defendant is also in violation of the "Captive-bred wildlife permit" under which it operates because (a) its treatment of the elephants is neither "humane" nor "healthful" as required by that permit, 50 C.F.R. §13.41, and defendant also is not in compliance with "all applicable laws . . . governing the permitted activity," 50 C.F.R. § 13.48, because its treatment of the elephants violates various standards issued by the United States Department of

Agriculture under the Animal Welfare Act, 7 U.S.C. § 2131 *et seq.* Complaint ¶ 97. In their motion for reconsideration, plaintiffs seek reconsideration of the Court's elimination of all of their claims with respect to the 21 captive-bred elephants in Ringling Brothers' possession. Plaintiffs' Reconsideration Motion ("Pl. Mot.") (Docket No. 185). However, they alternatively seek partial reconsideration of the Court's ruling with respect to their "take" claim only, but not their additional claim that defendant's actions also violate the CBW permit under which it operates. Id. at 10-16.

As demonstrated in their opening memorandum, Pl. Mot. at 6-10, the Court's reliance on the May 3, 2005 decision of the Middle District of Florida in Atlantic Green Sea Turtle v. City Council of Volusia County, No. 6:04-cv-1576-Orl-31KRS, 2005 WL 1227305 (M.D. Fla. May 3, 2005) for the proposition that the Court does not have jurisdiction over plaintiffs' challenge to violations of the defendant's CBW permit is misplaced because that decision was subsequently vacated by the Court of Appeals for the Eleventh Circuit, and because the reasoning of that decision also does not apply here. As plaintiffs also demonstrated, Pl. Mot. at 10-16, although the Court appeared to recognize that plaintiffs had an additional claim, the Court did not expressly address that claim – i.e., plaintiffs' statutory claim – with respect to the captive-bred elephants, and since that claim clearly lies under the plain language of the citizen suit provision of the Endangered Species Act, the Court should allow it to go forward with respect to all of the Asian elephants. See 16 U.S.C. § 1540(g) (citizens may seek to enjoin a "violation of any provision" of the statute).

As demonstrated below, nothing that defendant has presented in opposition to plaintiffs' motion for reconsideration defeats plaintiffs' arguments.

A. The Green Sea Turtle Decision Was Vacated.

It is bewildering in the extreme that defendant is unwilling to accept the indisputable fact that the district court's decision in Atlantic Sea Turtle was vacated on the merits by the Eleventh Circuit. This is not a debatable proposition – it is an unassailable fact that is demonstrated by the record of that case and defendant's own Exhibits. Indeed, as defendant itself notes, one of plaintiffs' attorneys (Eric Glitzenstein) represented the appellants in that case in the Eleventh Circuit, see Defendant's Opposition (Docket No. 191) ("Def. Opp.") at 6 n.3, and therefore certainly knows the procedural history of that litigation.

In addition, although defendant unequivocally states that "Plaintiffs cite nothing to support their claim that the May [3], 2005 decision in *Atlantic Green Sea Turtle* was 'vacated on the merits,'" Def. Opp. at 8, in fact plaintiffs cited numerous documents that prove this point, including (1) the plaintiffs-appellants' Statement of Issues in the Eleventh Circuit which demonstrates that the appeal in that case was an appeal of the district court's grant of the motion to dismiss plaintiffs' claims – and not an appeal of any award of attorneys' fees, (Pl. Ex. 3); (2) the government's motion to dismiss that appeal and to vacate the district court's previous May 3, 2005 decision on the grounds that the issues in that case had become moot, (Pl. Ex. 4); (3) the Eleventh Circuit's subsequent January 20, 2006 Order granting the government's motion and vacating the district court's judgment (Pl. Ex. 1); and (4) the Westlaw Keycite History which states that the district court's May 3, 2005 decision was in fact "vacated as moot" on January 20, 2006, (Pl. Ex. 2).

Defendant's own Exhibit further demonstrates that the Florida district court's May 3, 2005 decision on the merits was vacated by the Court of Appeals. Thus, the Docket Sheet

submitted by defendant shows that the only Order that was appealed was the district court's May 3, 2005 Order granting the defendant's motion to dismiss. See Def. Ex. 1 (Notice of Appeal, Docket No. 75 referring to appeal of Docket No. 67 which is the district court's May 3, 2005 decision on the merits). Indeed, the Notice of Appeal for that case clearly states that the plaintiffs were appealing the district court's May 3, 2005 order "dismissing all of Plaintiffs' claims." See Notice of Appeal (attached as Pl. Ex. 7). Therefore, in view of the undeniable history of that case, there simply is no question that the Atlantic Sea Turtle decision was vacated on the merits by the Court of Appeals.

Defendant's insistence that the only "judgment" that could have been "vacated" by the Court of Appeals was a June 7, 2005 Order granting attorneys' fees to the defendant County because this "was the only judgment entered in the case," see Def. Opp. at 5, and that, accordingly, the government "only sought vacatur of [this] judgment," Def. Opp. at 7, demonstrates that defendant's counsel apparently does not understand that a district court order dismissing a case for lack of jurisdiction – as happened in Atlantic Sea Turtle – is in fact an appealable "judgment." See Fed. R. Civ. P. 54 (a) ("judgment" means "a decree and any order from which an appeal lies"); see also Pl. Ex. 7 (Notice of Appeal appealing May 3, 2005 order "dismissing all of Plaintiffs' claims"). Again, the district court's decision in Atlantic Green Sea Turtle dismissing the case for lack of jurisdiction – which is the principal case upon which this Court relied in granting partial summary judgment to defendant – was the only "judgment" that was appealed to the Eleventh Circuit and is the same "judgment" that the Court of Appeals expressly vacated on January 20, 2005. See Pl. Ex. 1. Thus, when the government moved to dismiss the appeal of the district court's May 3, 2005 judgment on the grounds that the case had

become moot, it properly asked that the judgment also be vacated, pursuant to United States v. Munsingwear, 340 U.S. 36, 40-41 (1950). See Federal Government's Motion to Dismiss Appeal As Moot, Pl. Ex. 4, at 2 ("[b]ecause this case as become moot on appeal, the proper disposition is dismissal of the appeal, with an order vacating the judgment of the district court") (emphasis added) (citing U.S. v. Munsingwear).

Plaintiffs can only conclude that defendant continues to deny this readily verifiable fact because the Court relied so heavily on the Atlantic Sea Turtle decision in granting defendant's motion for summary judgment with respect to all of the captive-bred elephants in its possession. Indeed, without that vacated decision – and a California decision that also relied heavily upon it (and which this Court acknowledged plaintiffs had "correctly"distinguished, see Mem. Op. at 20) – this Court's recent grant of partial summary judgment to defendant on the ground that the citizen suit provision of the Endangered Species Act does not allow challenges to violations of "permits," is the only intact ruling in the country on this extremely significant issue.

In any event, because defendant incorrectly assured the Court that the Atlantic Sea Turtle decision had not been vacated – when in fact it has been – plaintiffs respectfully request that the Court revisit its grant of summary judgment to defendant on this point, since the Court relied so heavily on that decision. See also Bonds v. D.C., 93 F.3d 801, 809 n.14 (D.C. Cir. 1996) (noting that vacated opinions "lack[] precedential effect").[1]

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[1] Defendant makes the peculiar allegation that because one of plaintiffs' attorneys was involved in the Atlantic Sea Turtle litigation "there is no reason why any detail about that case that plaintiffs believe is pertinent could not have been included in plaintiffs' original opposition to FEI's motion for summary judgment." Def. Opp. at 6, n.3. However, plaintiffs did point out in their summary judgment opposition that the district court decision in that case has "been vacated by the Eleventh Circuit," and included the Westlaw citation that clearly shows this history. See Plaintiffs' SJ Opp. (Docket No. 96) at 42. Thus, plaintiffs had no reason – nor any

B. To Defeat Plaintiffs' Section 9 Claim Defendant Was Required To Demonstrate To The Court That The "Captive-bred Wildlife Permit" Upon Which It Relies Allows It To Hit Asian Elephants With Bull hooks, Keep Them Chained For Most of Their Lives, and Forcibly Remove Baby Elephants From Their Mothers.

As plaintiffs also explained in their opening memorandum, Pl. Mot. at 10-15, even if the Court nonetheless decides to nonetheless adopt the reasoning of the vacated Atlantic Sea Turtle decision, this would only mean that plaintiffs' Second Claim – i.e., that defendant's treatment of the Asian elephants "violates" the Captive-bred wildlife "permit" upon which it relies. See Complaint at ¶ 97. However, it should not bar plaintiffs' additional claim that defendant is also violating Section 9 of the statute, since nothing in the CBW permit authorizes defendant to strike the elephants with bull hooks, keep them chained throughout most of the day and night, and forcibly separate baby elephants from their mothers in order to train them to perform tricks in the circus. See Complaint ¶ 96. This claim has nothing to do with enforcement of defendant's existing permit. On the contrary, it is based on the allegation that defendant does not have a permit to engage in these particular unlawful activities, and hence is in violation of Section 9 of the statute. See Pl. Mot. at 12-15.

In response, defendant now very clearly asserts its position that since it has a CBW permit it may engage in any kind of "take" it wishes, and therefore that any challenge to defendant's conduct is necessarily a challenge to its compliance with its permit, which, under the reasoning of Atlantic Sea Turtle this Court lacks jurisdiction to entertain under the citizen suit provision of

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further opportunity – to continue to argue about this easily ascertainable fact until this Court relied on defendant's misrepresentation in its reply brief that the Atlantic Sea Turtle decision "was not vacated or otherwise disturbed by the court of appeals," and that the only "judgment" that was vacated by that court was one awarding defendant its attorneys fees, see Def. SJ Reply (Docket No. 100) at 19 – which is precisely why plaintiffs have now sought reconsideration.

the ESA. See Def. Opp. at 14 ("the CBW permit provides FEI with a safe harbor for **any claim** that it is 'taking' its captive-bred Asian elephants") (emphasis in original). Thus, defendant states that "what plaintiffs claim[] happens with respect to the elephants [is] not material to the legal issues before the Court," since the mere existence of its "CBW permit" is "an absolute defense" to plaintiffs' taking claims. Id. (emphasis added). However, it is critical that the Court understand the breadth of this argument: it would mean that even if defendant were charging admission for people to see these animals tortured or even killed, no one with Article III standing could bring a citizen suit under the ESA to enjoin such conduct.

This is an entirely incorrect reading of both the statute and the "permit" upon which defendant relies here. The statute allows citizens to bring suits to "enjoin any person . . . who is alleged to be in violation of any provision" of the ESA, including Section 9 which prohibits the "taking" of any endangered species. See 16 U.S.C. §§ 1540(g)(1)(A) (emphasis added); 1538(a). The statute further provides that once such a citizen suit is brought, any person who claims to have permission to engage in the challenged "take" can raise its permit as a defense to the action, but that person "shall have the burden of proving that the exemption or permit is applicable . . . ." 16 U.S.C. § 1539(g) (emphasis added). As the legislative history to this provision explains, it was added to "provide[] for an affirmative defense where a prima facie violation of the Act is established whereby the holder must show that the permit or exemption is applicable, has been granted, and is valid and in force." H.R. Rep. 94-823 at 6; 1976 U.S.C.C.A.N. 1685, 1689 (1976) (emphasis added).

However, contrary to defendant's truncated statement that the CBW permit "explicitly authorizes FEI to 'take'" the elephants, Def. Opp. at 13, that permit only allows defendant to

"take" Asian elephants "for normal husbandry practices . . . for the purpose of enhancement or propagation or survival." See Permit, Def. Ex. 9 (emphasis added). Therefore, under the plain language of Section 10(g) of the statute, 16 U.S.C. § 1538(g), to prevail on its argument that its "CBW permit . . . is an absolute defense to plaintiffs' 'taking' claims," Def. Opp. at 14, defendant has the burden of proving to this Court that the precise activities which plaintiffs challenge – i.e. striking the elephants with bull hooks, keeping the elephants chained for most of their lives, and forcibly separating baby elephants from their mothers – are in fact "normal husbandry practices" for Asian elephants.

However, critically, defendant made no such showing in connection with its motion for summary judgment. Instead, it moved for summary judgment on the grounds that certain other practices – none of which form the basis of plaintiffs' Section 9 challenge (i.e., "use of the guide, tethering, and weaning") - are "normal husbandry practices." See Def. SJ Mem. at 27 (Docket No. 83). Therefore, as plaintiffs' have explained, to grant summary judgment to defendant on the ground that it has a valid "CBW permit" that is "applicable" here, within the meaning of 16 U.S.C. § 1538(g), the Court is required by statute to find either that (a) in fact, defendant does not beat the elephants with bull hooks, keep them chained for most of their lives, or forcibly separate babies from mothers; or (b) that such conduct falls within the scope of "normal husbandry practices" that are authorized by defendant's CBW permit, and which only the federal government can enforce.

However, defendant did not even purport to make either such showing, since it denies that it engages in any of these practices. On the other hand, plaintiffs submitted voluminous evidence that defendant does engage in these practices, including eye-witness testimony of

several former Ringling Bros. employees, videofootage of these practices, and defendant's own internal memoranda describing such practices, see Pl. SJ Opp. at 27-32, and plaintiffs also demonstrated that such conduct does not by any stretch of the imagination constitute "normal husbandry practices" for Asian elephants, and even included the sworn declaration of an expert elephant veterinarian on this point. See Pl. SJ Opp. at 35-38; Declaration of Dr. Mel Richardson, D.V.M. (Pl. SJ Ex. A). Therefore, the Court – which, again, did not expressly address this issue – could not possibly make either one of the determinations required under 16 U.S.C. §1538(g) to grant partial summary judgment to defendant on plaintiffs' Section 9 claim, without violating basic tenets of summary judgment jurisprudence. See, e.g., Fed. R. Civ. P. 56(c) (the moving party must prove that it is entitled to judgment as a matter or law and that there are no material facts in dispute); see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986) (the court must view the facts in the light most favorable to the non-moving party).

Indeed, it is ironic to say the least that defendant asserts that "[w]hether FEI's actions are within the scope of the CBW permit is an inquiry that the Court correctly ruled it has no jurisdiction to conduct under the 'citizen suit' provision of the ESA," Def. Opp. at 15-16 (emphasis added), when the plain language of the statute imposes the burden on defendant to prove that the conduct challenged by plaintiffs is actually covered by its permit if defendant wishes to rely on that permit as an "absolute defense" to plaintiffs' taking claim. See Def. Opp. at 14; 16 U.S.C. § 1538(g). Therefore, if, as defendant insists, the Court cannot make this inquiry, then defendant necessarily cannot avail itself of this defense.[2]

[2] Indeed, Congress explained that it modeled the burden of proof provision in Section 10(g) on the Comprehensive Drug Abuse Prevention and Control Act of 1970, see H.R. Rep. 94-

Thus, because the Court did not expressly address plaintiffs' separate claim that certain specific actions by defendant violate the "take" prohibitions of the statute – as opposed to the permit conditions imposed on defendant – and because defendant did not even attempt to prove, let alone succeed in proving, that the actions challenged in this case are actually authorized by its CBW permit, plaintiffs request that the Court revisit this matter and allow them to, at the very least, pursue their Section 9 claim with respect to the 21 captive-bred elephants in defendant's possession. Indeed, since the treatment of all of the elephants is extremely relevant to the treatment of the "Pre-Act" elephants who the Court has ruled remain at issue in this case, granting plaintiffs' partial request for reconsideration on this basis will not expand the scope of this litigation to any significant degree – i.e. plaintiffs will in any event be presenting testimony and other evidence regarding the treatment of the captive-bred elephants. Rather, as a practical matter, allowing plaintiffs' Section 9 claim to proceed with respect to these elephants, as well as the Pre-Act elephants, only affects the relief that the Court may ultimately adopt here – i.e., whether, if plaintiffs prevail, defendant must cease the challenged conduct with respect to all or

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823 at 6, under which the government need not disprove the existence of exemptions that may apply to the possession of narcotics when prosecuting a drug case; rather, to escape liability the defendant in such cases bears the burden of demonstrating that such an exemption does in fact apply. See 21 U.S.C. § 885 (a); see also United States v. Rowlette, 397 F.2d 475, 479 (7th Cir. 1968) ("[w]hether a defendant and his activity occupy an exempt status is a matter peculiarly within his knowledge and with respect to which he can be fairly expected to adduce the proof"). Hence, the burden of proof provision for permit defenses that was added to the ESA is very different than the kind of "permit shield" that has been included in other environmental statutes, such as the Clean Water Act, 33 U.S.C. § 1342(k), which provides that anyone in compliance with the permit it has been granted is automatically deemed to be in compliance with the statute as well, and hence the burden of proof in a citizen suit is on the plaintiffs to demonstrate that there has been a violation of the statute. See, e.g., Atlantic States Legal Foundation v. Eastman Kodak, 12 F.3d 353, 357 (2d Cir. 1993).

only some of the Asian elephants that it uses in its circus.[3]

CONCLUSION

For all of the foregoing reasons as well as those set forth in plaintiffs' opening memorandum, plaintiffs respectfully request that their motion for reconsideration be granted either in whole or in part.

Respectfully submitted,

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[3] For the same reason, should the Court grant plaintiffs' motion for reconsideration or for partial reconsideration, the Court should deny defendant's request that it certify that ruling for immediate appellate review, Def. Opp. at 16, since this issue certainly does not constitute a "controlling question of law" with respect to this entire case. See 28 U.S.C. § 1292(b).