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)
RINGLING BROS. AND BARNUM & BAILEY CIRCUS, *et al*.,	:	
Defendant.	:	

DEFENDANT'S RESPONSE TO PLAINTIFFS' MOTION FOR LEAVE TO FILE A SUPPLEMENTAL COMPLAINT

The Animal Protection Institute ("API") has stayed on the sidelines of this dispute through years of litigation, including Court rulings and discovery. Now, with no explanation or showing of reasons for their request, plaintiffs seek leave to add API as a fourth organizational plaintiff in this case. The Court should deny plaintiffs' motion without prejudice, require them to explain why API should be added to this case, and give defendant an opportunity to respond to that showing. If the Court then permits API to join the case, it should impose conditions on API's participation to prevent API from gaining an unfair advantage from its supplemental complaint or from revisiting completed discovery or settled issues.

BACKGROUND

Plaintiffs filed this action in September 2003 to cure a defect in a predecessor case. The predecessor case, captioned *Performing Animal Welfare Society et al. v. Ringling Bros. and Barnum & Bailey Circus et al.*, No. 00-1641, relied on two "notice of intent to sue" letters sent by the Performing Animal Welfare Society ("PAWS"), Pat Derby, and Ed Stewart in December 1998 and November 1999. When those three dismissed their claims against

defendant, plaintiffs for the first time sent a notice letter to defendant. But plaintiffs could not continue the existing case because the Endangered Species Act requires that any citizen-plaintiff provide at least 60 days notice before filing suit. *See* 16 U.S.C. § 1640 ("ESA"). Plaintiffs initially argued that they should be excused from that requirement, but they then filed this new case to try to satisfy the ESA's notice requirement.

On July 22, 2005, API for the first time sent defendant a notice letter that purported to "incorporate by reference" plaintiffs' notice letter from 2001 and the notice letters that PAWS, Derby, and Stewart sent defendant in December 1998 and November 1999. Such a procedure is improper.[1] On October 26, plaintiffs asked defendant to consent to API's supplemental complaint. The next day, we asked plaintiffs' counsel for reasons why they wanted to add API. They refused to provide any explanation, but insisted that we provide an answer to their request that day – only 24 hours after they had made their request. We explained that scheduling concerns made it impossible to respond so quickly, but plaintiffs refused to allow more time and filed this motion the same day.

ARGUMENT

I. PLAINTIFFS SHOULD OFFER AN EXPLANATION FOR THEIR REQUEST.

Plaintiffs offer no reason why API should be added to this case, nor do they point to any efficiency to be gained from having API as a plaintiff. Federal Rule of Civil Procedure 15(d) provides that a party may "serve a supplemental pleading setting forth transactions or

---

[1] API's attempt to "incorporate by reference" notice letters that were sent nearly *seven years* before API sent its own notice letter should be rejected. If parties could continue to incorporate by reference such letters, as API is attempting to do, it would render meaningless any statute of limitations that applies to the ESA. In addition, a defendant could never be certain that it had finally resolved a citizen-plaintiff's claim, because a third party dissatisfied with the result could always re-initiate the case. Such an outcome would reduce the possibility of resolution of citizen suits and is therefore contrary to public policy.

occurrences or events which have happened since the date of the pleading sought to be supplemented." FRCP 15(d). To be sure, this rule permits a supplemental complaint to add parties to a litigation, but the party seeking to supplement its pleading generally must show that events have made the addition of a new party necessary. *See, e.g.,* 6A Charles Alan Wright *et al.*, *Federal Practice and Procedure* § 1504 (2d ed. 1990) ("Litigants also have been allowed to supplement their original pleadings to include new parties when events make it necessary to do so."); *American Civil Liberties Union of Miss., Inc. v. Finch*, 638 F.2d 1336, 1347 (5th Cir. 1981) (supplemental complaint appropriate when change in administration impacts complaint against public officials); *Griffin v. County School Bd. of Prince Edward Cty.*, 377 U.S. 218, 226-27 (1964) ("it follows, of course, that persons participating in these new events may be added if necessary").

Plaintiffs suggest that API should be permitted to join this lawsuit because it sent defendant a notice letter in July of this year. However, they refused to tell us why they wanted to add API to this case, and they offer no explanation in their motion. API's supplemental complaint largely makes the same allegations as plaintiffs' own complaint. (Pltfs. Mem. at 2.) Moreover, the supplemental complaint does not allege any changed circumstances that would give API a greater stake in the case now than it might have had previously. For its own tactical reasons, API decided not to join this case before. The Court should require plaintiffs to refile their motion with some explanation of *why* API should be added to this case now. Defendant should then have an opportunity to oppose the motion.[2]

---

[2] Plaintiffs should also be required to explain API's delay in trying to join this case. *See Wis. Heritages, Inc. v. Harris*, 490 F. Supp. 1334, 1338 (E.D. Wis. 1980) (supplemental complaints not permitted when moving party guilty of inexcusable delay or laches).

II. IF THE COURT PERMITS API TO JOIN THIS CASE, IT SHOULD IMPOSE APPROPRIATE CONDITIONS ON API'S SUPPLEMENTAL COMPLAINT.

If the Court then allows API to join this case, it should impose certain conditions to ensure that API does not gain any advantage or disrupt the litigation. Rule 15(d) permits the Court "to impose such terms and conditions … as are just" on a grant of leave to file a supplemental pleading. *Ashton v. City of Concord, N.C.*, 337 F. Supp. 2d 735, 740 (M.D.N.C. 2004). Here, the Court should hold that (1) API's supplemental complaint does not relate back to plaintiffs' complaint, (2) API is bound by the discovery, agreements, and orders already completed, and (3) API may not raise any new issues in this case. Such conditions are necessary to ensure that API's late addition to the case does not give it an advantage in the litigation.

First, the Court should not permit API's supplemental complaint to relate back to plaintiffs' original complaint under Federal Rule of Civil Procedure 15(c). The "relation back of a supplemental pleading [under Rule 15(c)] should not result in providing unfair procedural advantages to a plaintiff …." Wright *et al.*, *supra*, § 1508; *see also Wis. Heritages*, 490 F. Supp. at 1339 (denying leave to file supplemental complaint in part because it "would be unfair" to the defendant). The ESA permits citizen suits only more than 60 days after "written notice of the violation has been given … to any alleged violator of any such provision." 16 U.S.C. § 1540(g)(2)(A)(i). This notice period is no mere technicality. Rather, the "notice and 60-day delay requirements are mandatory conditions precedent to commencing suit" under the ESA, and a "district court may not disregard these requirements at its discretion." *Hallstrom v. Tillamook Cty.*, 493 U.S. 20, 31 (1989); *see also Building Indus. Ass'n of Southern Cal. v. Lujan*, 785 F. Supp. 1020, 1021 (D.D.C. 1992) (notice provision in ESA is "indistinguishable" from provision at issue in *Hallstrom*). Moreover, the ESA authorizes only injunctive and declaratory relief; it does not permit a claim for damages. *See* 16 U.S.C. § 1540(g)(1)(A). Indeed, as the Supreme

Court has observed, the "interest of a citizen-plaintiff [under the ESA] is primarily forward-looking." *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 59 (1987).[3] Thus, a citizen-plaintiff cannot obtain relief for events that occurred before it sends a notice letter. API cannot therefore obtain relief for events occurring before July 22, 2005 – the date it sent its notice letter to defendant.

Second, API should be bound by agreements between the parties, discovery already taken, and orders entered by the Court. The parties have reached multiple agreements concerning discovery. (*See, e.g.,* Stipulated Pre-Trial Schedule dated Dec. 5, 2003; Joint Status Report Regarding Discovery dated Sept. 23, 2005.) If the Court permits API to join this case, API should not be permitted to broaden discovery or otherwise alter the agreed procedures, and API should be required to respond promptly to the discovery that defendant addressed to plaintiffs.[4] Similarly, Federal Rule of Civil Procedure 32(a) provides that depositions may be used at trial "against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof." FRCP 32(a). API, of course, has not been present at or had notice of the depositions that have taken place in the case to date, because it has not been a party. However, it should not be permitted to avoid the use of these depositions against it at trial, nor should it be permitted to reopen depositions that have already been completed.

Third, the Court should bar API from raising any new issues that plaintiffs have not already presented in this case. As plaintiffs have explained to the Court, their claims in this

---

[3] *Gwaltney* was a citizen suit filed under the Clean Water Act. The citizen-suit provisions of both the Clean Water Act and the ESA require 60 days notice before any suit can be filed and permit claims only against a defendant who is alleged currently "to be in violation" of the act in question. *Compare Gwaltney*, 484 U.S. at 56, *with* 16 U.S.C. § 1640(g)(1)(A).

[4] In particular, API should respond to defendant's documents requests and interrogatories addressed to organizational plaintiffs, as well as defendant's requests for admission.

case are based on their allegations that defendant "forcibly remov[es]" baby elephants from their mothers, "beat[s] them, and chain[s] them." (Tr. dated Nov. 25, 2003, at 27.) API should not be permitted to expand or alter these claims. Otherwise, the litigation would be set back substantially.

CONCLUSION

The Court should deny plaintiffs' motion for leave and require some explanation from plaintiffs as to why API should be added to this case. Failing that, the Court should impose the conditions described above.

Respectfully Submitted,

/s/ Joshua D. Wolson

Harris Weinstein (DC Bar No. 032268)
Eugene D. Gulland (DC Bar No. 175422)
Jeannie Perron (DC Bar No. 456099)
Joshua D. Wolson (DC Bar No. 473082)
Maura Dalton (DC Bar No. 475973)
COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
Washington, DC 20004
(202) 662-6000

Attorneys For Defendant

November 10, 2005