No. 13-9876

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT, DIVISION 3

GRANDLANDS CIRCUS, INC.,

Appellant/Cross-Respondent,

v.

HOBBS COUNTY ANIMAL SAFETY DEPARTMENT,

Respondent,

CHRIS SAMUELSON & MARA'S HOPE WILDLIFE SANCTUARY,

Appellants.

On Appeal from the Superior Court of Hobbs County

BRIEF FOR APPELLANT/CROSS-RESPONDENT

Team 18
Counsel for Appellant/Cross Respondent

ORAL ARGUMENT REQUESTED

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I. Whether the superior court abused its discretion when it denied Samuelson and Mara's Hope's motion to intervene, who could not show a direct and imminent interest in the outcome of the litigation between Grandlands Circus, Inc. and the Hobbs County Animal Safety Department.

II. Whether the superior court abused its discretion when it denied Grandlands Circus, Inc.'s motion for preliminary injunction where Grandlands Circus, Inc. can show a likelihood of success on the merits and that it will receive irreparable harm if the injunction is not granted.

STATUTORY PROVISIONS

California Code of Civil Procedure § 387

(a) Upon timely application, any person, who has an interest in the matter in litigation, or in the success of either of the parties, or an interest against both, may intervene in the action or proceeding. An intervention takes place when a third person is permitted to become a party to an action or proceeding between other persons, either by joining the plaintiff in claiming what is sought by the complaint, or by uniting with the defendant in resisting the claims of the plaintiff, or by demanding anything adversely to both the plaintiff and the defendant, and is made by complaint, setting forth the grounds upon which the intervention rests, filed by leave of the court and served upon the parties to the action or proceeding who have not appeared in the same manner as upon the commencement of an original action, and upon the attorneys of the parties who have appeared, or upon the party if he has appeared without an attorney, in the manner provided for service of summons or in the manner provided by Chapter 5 (commencing with Section 1010) Title 14 of Part 2. A party served with a complaint in intervention may within 30 days after service move, demur, or otherwise plead to the complaint in the same manner as to an original complaint.

(b) If any provision of law confers an unconditional right to intervene or if the person seeking intervention claims an interest relating to the property or transaction which is the subject of the action and that person is so situated that the disposition of the action may as a practical matter impair or impede that person's ability to protect that interest, unless that person's interest is adequately represented by existing parties, the court shall, upon timely application, permit that person to intervene.

California Penal Code § 596.5

It shall be a misdemeanor for any owner or manager of an elephant to engage in abusive behavior towards the elephant, which behavior shall include the discipline of the elephant by any of the following methods: (a) Deprivation of food, water, or rest. (b) Use of electricity. (c) Physical punishment resulting in damage, scarring, or breakage of skin. (d) Insertion of any instrument into any bodily orifice. (e) Use of martingales. (f) Use of block and tackle.

California Penal Code § 597t

Every person who keeps an animal confined in an enclosed area shall provide it with an adequate exercise area. If the animal is restricted by a leash, rope, or chain, the leash, rope, or chain shall be affixed in such a manner that it will prevent the animal from becoming entangled or injured and permit the animal's access to adequate shelter, food, and water, Violation of this section constitutes a misdemeanor. This section shall not apply to an animal, which is in transit, in a vehicle, or in the immediate control of a person.

STATEMENT OF THE CASE

Chris Samuelson ("Samuelson") and Mara's Hope Wildlife Sanctuary ("Mara's Hope" or "Sanctuary") filed an administrative complaint with the Hobbs County Animal Safety Department ("Department") alleging that the Grandlands Circus, Inc. ("Circus") has violated the Hobbs County ordinance respecting Performing Animal Permits, and demanded that Circus' permit be revoked. R. at 6. The Department held an evidentiary hearing on September 27, 2013. R. at 6. Following the hearing, the Department revoked the Circus' Performing Animal Permit. R. at 7.

On October 11, 2013, the Circus filed an action against the Department seeking relief in the nature of mandamus and money damages resulting from lost profits the Circus will suffer if forced to cancel future performances pending the outcome of this litigation. R. at 2. The Circus filed a separate motion for a preliminary mandatory injunction seeking an order compelling the Department to re-issue its permit pending the outcome of this action. R. at 2. In addition to the Circus's motion for injunctive relief, Samuelson and Mara's Hope filed a motion for leave to file

a complaint in intervention in the action between the Circus and the Department under California Code of Civil Procedure § 387, which the Circus opposes. R. at 3.

The Superior Court of Hobbs County, California consolidated both motions for hearing at the same time and rendered its decision on both motions on October 28, 2013. R. at 3. The superior court denied Samuelson and the Sanctuary's motion for leave to intervene in its entirety. R. at 3. The superior court also denied the Circus's motion for a preliminary mandatory injunction. R. at 3.

The Circus now appeals to this Court the lower court's denial of their preliminary mandatory injunction. Additionally, Samuelson and Mara's Hope have also appealed to this Court their denial of motion for leave to intervene.

STATEMENT OF THE FACTS

The Circus is a traveling circus that put on 22 shows across the United States in 2013. R. at 3. The Circus sought to perform a show in Hobbs County. R. at 4. The show would include skilled acrobatics and an assortment of animal performers including, lions, tigers, elephants, and horses. R. at 3. The Circus applied for and was granted a Performing Animal Permit from the Department. R. at 4. The Department only issues these permits once every year in June. R. at 4.

Samuelson is a resident of Hobbs County. He is the co-founder and Director of Education and Outreach for Mara's Hope. R. at 4. He has a Masters of Fine Arts in photography but only a Bachelors of Science in zoology. R. at 4. Samuelson has a background as freelance photographer of wildlife in East Africa from 1989 until 1992 and when he returned, he worked at Pranayama Animal Sanctuary. R. at 4. Samuelson's current place of employment, the Sanctuary, takes care of animals that have been discarded by private owners, zoos, or the entertainment industry. R. at

4. The Sanctuary houses African Lions, black bears, mountain lions, serval cats, ostriches, and horses, but does not house any elephants. R. at 4.

In April 2012, Ms. Hall, an assistant to Samuelson, made a comment to him about how the animals in the Circus seemed thin and tired compared to the animals that were kept at the Sanctuary. R. at 5. She also commented on how the Circus has not returned to West Edmond in a while and asked her brother to look up more information regarding the Circus's absence. R. at 5. Ms. Hall's brother found a veterinarian's report from the West Edmond Animal Care and Control in June 2011, which recommended that the older elephants be retired from performing. R. at 5. After reading this report, Samuelson and the Sanctuary submitted a complaint to the Department, demanding that the Circus have its permit revoked. R. at 5. The Department revoked the Circus's permit on October 7, 2013, after an evidentiary hearing. R. at 7.

The Circus sued, seeking preliminary mandatory injunction to re-issue the permit. R. at 9. The court denied the Circus's motion. R. at 15. Meanwhile, Samuelson and the Sanctuary filed a motion to intervene, which was also denied by the court. R. at 9. The Circus appealed, stating that the court abused its discretion by not granting the preliminary injunction. Samuelson and the Sanctuary appealed, stating that the court abused its discretion by not granting their motion to intervene. The case is now before the Court of Appeal of the State of California First Appellate District, Division Three.

SUMMARY OF THE ARGUMENT

For the first issue of motion to intervene, it is clear that Samuelson and Mara's Hope do not have a direct interest in the outcome of the litigation between the Circus and the Department, therefore, the lower court correctly denied their motion to intervene. This case is about the Circus and their Performing Animal Permit. The Circus's ability to perform a show in April is at

the heart of this case. If third parties, Samuelson and the Sanctuary, wish to be a part of this litigation, they need to show a direct interest in the original lawsuit, which they have not. This Court should affirm the decision of Superior Court of Hobbs County because there was no abuse of discretion in denying the motion for leave to intervene.

In this case, the lower court did not abuse its discretion. Samuelson wishes to intervene in this case only as a citizen of Hobbs County. He has never seen a single show of the Circus and he does not have experience providing care to elephants. Samuelson will be in no way affected by the decision of this Court in the case of Circus and the Department. Similarly, Mara's Hope seeks to intervene merely as an organization that provides sanctuary to animals and has interest in animal related issues. But, Mara's Hope does not and has never provided sanctuary to elephants. No matter what the outcome is in this case, Mara's Hope will be able to continue it's business as usual.

If this Court were to allow them to intervene, it will bring up discussions of moral and ethical issues related to animal care, which is not an issue in the original lawsuit. Lastly, if they are allowed to intervene, the Circus will have to spend more time and money to discuss these new issues that it did not wish to discuss originally in its own lawsuit. Hence, the purpose served in allowing Samuelson and the Sanctuary to intervene does not outweigh the Circus's interest in conducting its own lawsuit on its own terms. For these reasons, it is clear that the lower court did not abuse its discretion when it denied Samuelson and Mara's Hope's motion for leave to intervene. In conclusion, this Court should affirm the decision of the Superior Court of Hobbs County for this issue.

However, the Superior Court for the State of California for Hobbs County abused its discretion when it denied the Circus's motion for preliminary mandatory injunction.

The Circus demonstrates that it has a near certain likelihood of success on the merits for two reasons. First, the Department contends that West Edmond's "refusal" to grant the Circus a permit was the same as the Circus's permit being "revoked." That because the Department requires notification of permits that have been "revoked," the Circus violated the Hobbs County Municipal Code by not providing notice of the West Edmond "refusal." However, this is not the case. Refusal and revocation do not have the same definitions, are not synonyms, and their effects occur at different times. Because a refusal is not the same as a revocation, the Circus had no duty to submit or notify the Department about West Edmond's refusal to grant a permit. Additionally, the lower court put a great amount of weight on the allegations that the Circus was transporting its elephants in containers that were below the minimum recommended size. Nonetheless, the lower court overlooked the fact that the minimum recommendation for container size expressly does not extend to animals in transit, which is the only container size that the West Edmond report took issue with. The lower court incorrectly calculated that the above two points would remove the Circus's likelihood of success on the merits.

Second, the lower court also incorrectly weighed the amount of harm each party would suffer. The lower court stated that the Circus would clearly suffer some harm but decided that the Circus's harm was outweighed by the Department's harm because the Circus did not provide any solid figures for comparison. Conversely, the Circus has provided figures that would accurately represent the potential loss it would suffer if the mandatory injunction is not put into place. This number is near $100,000. The Department's harms, on the other hand, amount only to speculative court fees should a spectator be injured by a sick elephant; a harm that the record does not support having happened or come close to happening.

Finally, the Department's decision to revoke the Circus's permit was a knee-jerk reaction to a veterinarian report from West Edmond. The purpose of preliminary injunctions is to reduce the permanent harm that can be caused by such swift and thoughtless reactions. By denying the preliminary injunction the lower court has practically assured that the Circus will suffer permanent harm due to the overly-hasty decision by the Department. This only promises to cause further litigation and costly fees for all parties involved.

For these reasons, it is respectfully requested that this Court reverse the lower court's decision for this issue and grant the Circus's motion for preliminary injunction.

ARGUMENT

I. The Superior Court Did Not Abuse Its Discretion When It Denied Chris Samuelson and Mara's Hope Wildlife Sanctuary's Motion For Leave To Intervene.

This Court should affirm the decision of the Superior Court denying Samuelson and Mara's Hope's motion for leave to intervene in the present action between the Circus and the Department. The court should do this for three reasons. First, Samuelson and Mara's Hope (together as well as separately) do not have an interest in the outcome of the litigation to allow permissive intervention. Second, Samuelson and Mara's Hope do not have an interest relating to the property or transaction which is the subject of the action, therefore, they cannot be granted intervention as a matter of right. Last, they do not have standing to bring a claim against Circus separately.

California Code of Civil Procedure section 387 governs a motion for leave to intervene. There are essentially two forms of intervention available to interested third parties under section 387: (1) permissive intervention and (2) unconditional intervention. Cal. Civ. Code § 387 (2013). Samuelson and the Sanctuary did not limit their motion to any one form of intervention, so we

address both forms of intervention in this brief. R. at 8. The standard of review for an appellate court reviewing a trial court's denial of motion for leave to intervene is whether there has been an abuse of discretion. *Kuperstein v. Superior Court*, 204 Cal. App. 3d 598, 600 (1988).

A. Chris Samuelson And Mara's Hope Wildlife Sanctuary Do Not Have An Interest In The Outcome Of The Litigation For The Court To Allow Permissive Intervention.

The right to intervention is a statutory right controlled by California Code of Civil Procedure section 387. *People ex rel. State Lands Com. v. Long Beach*, 183 Cal. App. 2d 271, 274 (1960); *Timberidge Enterprises, Inc. v. City of Santa Rosa*, 86 Cal. App. 3d 873, 881 (1978). California Code of Civil Procedure section 387 subsection (a) provides in pertinent part that "a person 'may' intervene, and that intervention takes places when a third person is 'permitted' to become a party, and that the application for leave may be 'filed by leave of court.'" *In re Yokohoma Specie Bank, Ltd.*, 86 Cal. App. 2d 545, 554 (1948). Right to intervene is not an absolute right. *In re Yokohoma Specie Bank, Ltd.*, 86 Cal. App. 2d at 554. The interested third party must request 'leave' of court and the power to grant or deny the request rests with the trial court. *In re Yokohoma Specie Bank, Ltd.*, 86 Cal. App. 2d at 554. The trial court is vested with discretion and it cannot be reversed on appeal unless the decision is arbitrary and without any substantial basis. *Continental Vinyl Products Corp. v. Mead Corp.*, 27 Cal. App. 3d 543, 552 (1972). There are a lot of cases discussing the motion for leave to intervene in the state of California but there is nothing factually similar to the current case. Therefore, whether intervention should be granted is "best determined by a consideration of the facts of that case, and the decision is ordinarily left to the sound discretion of the trial court." *Fireman's Fund Ins. Co. v. Gerlach*, 56 Cal. App. 3d 299, 302 (1976); *Isaacs v. Jones*, 121 Cal. 257, 261 (1898).

As stated in the Code, section 387 subsection (a): "any person, who has an interest in the matter in litigation, or in the success of either of the parties, or an interest against both, may

intervene in the action or proceeding." There are three factors that guide the trial court to grant or deny the intervention: "(1) the interested party's interest in the outcome of the litigation must be direct and immediate rather than consequential (2) [the interested party may not present new issues that were not raised by the original parties and] (3) intervention must be denied if the reasons [for intervention] are outweighed by the rights of the original parties to conduct their lawsuit on their own terms." *People ex rel. Rominger v. County of Trinity*, 147 Cal. App. 3d 655, 660-661 (1983).

1. Chris Samuelson And Mara's Hope Wildlife Sanctuary Do Not Have Direct And Immediate Interest In The Outcome Of The Litigation.

Any interested third party does not automatically have a direct and immediate interest in the outcome of the litigation. The California Second Appellate District Court, Division One noted that, "[n]ot every interest in the outcome gives to its possessor the right to intervene." *Continental Vinyl Products Corp.*, 27 Cal. App. 3d at 549. The interest "must be direct and not consequential, and it must be an interest which is proper to be determined in the action in which the intervention is sought." *Isaacs*, 121 Cal. at 261. There are many cases discussing the right of intervention under California Code section 387, but in none of those cases "has there been any attempt to define the right in any clearer terms than those of the section itself." *Isaacs*, 121 Cal. at 261.

There have been many attempts in defining what direct and immediate interest means. In *Elliot v. Superior Court*, 168 Cal. 727, 734 (1914), the Supreme Court of California stated that "the interest … must be in the matter in litigation and of such direct and immediate character that the intervener will either gain or lose by the direct legal operation and effect of the judgment." In another case, the Supreme Court of California explained that "the matter in litigation" should be "in the suit as originally brought" or in the success of one of the original parties, or an interest

against both of the original parties. *Jersey Maid Milk Products Co. v. Brock*, 13 Cal. 2d 661, 664-665 (1939).

The appellate courts have applied their understanding of this definition in various cases. The word 'interest' is of prime significance and it "has a definite legal meaning in intervention proceedings." *People ex rel. State Lands Com. v. Long Beach*, 183 Cal. App. 2d 271, 274 (1960). This interest is normally pecuniary but that is not a requisite, *People ex rel. Public Utilities Com. v. Ryerson*, 241 Cal. App. 2d 115, 119 (1966), it could be a specific legal or equitable interest. *People ex rel. Rominger v. County of Trinity*, 147 Cal. App. 3d at 661. Courts have found direct interest where the judgment in the pending action adds to or detracts from the third party's legal rights without referring to their rights and duties. *Olson v. Hopkins*, 269 Cal. App. 2d 638, 643 (1969). It is not necessary that their interest be inevitably affected by the judgment, only that there is substantial probability that the interest will be affected. *People ex rel. Rominger*, 147 Cal. App. 3d at 663; *Timberidge Enterprises, Inc.*, 86 Cal. App. 3d at 881. Although it seems like there is a general consensus about when the interest will be regarded as direct and immediate, but there has been some confusion between the courts applying this understanding to different situations. The *Timberidge Enterprises, Inc.* Court stated that where one has "no possible chance of gaining by intervention," then that intervention must be denied. 86 Cal. App. 3d at 881 (citing *In re Yokohoma Specie Bank, Ltd.,* 86 Cal. App. 2d 545 (1948)). In *Continental Vinyl Products Corp.*, the court held an interest indirect "when the action in which intervention was sought did not directly affect it, although the results of the action may indirectly benefit or harm its owner." 27 Cal. App. 3d at 550. It also stated that sometimes a consequential interest might become a direct interest justifying intervention when actual parties to the litigation act in bad faith. *Continental Vinyl Products Corp.*, 27 Cal. App. 3d at 551. But, that is not a problem here, since

Samuelson and the Sanctuary, neither of them have even a consequential interest to the current litigation.

Applying these rules to the current case, it is clear that Samuelson and Mara's Hope, together or separately, do not have a direct and immediate interest in the matter of the litigation. Neither Mara's Hope nor Samuelson has a direct claim against the Circus. Samuelson is seeking to intervene in this action merely as a resident of Hobbs County, where the Circus's permit was revoked. Samuelson and Sanctuary must have an interest in claiming what is sought by the Circus, or in resisting Circus's claim, or must demand something which is involved in the litigation adversely to both the Circus and the Department to be able to intervene. *Isaacs*, 121 Cal. at 262. Both of them do not have a specific interest that would be directly affected in a substantial way by the outcome of the litigation, i.e. revocation of Circus' permit to perform in Hobbs County. *People ex rel. Rominger v. County of Trinity*, 147 Cal. App. 3d at 662. In *Allen v. California Water & Tel. Co.*, 31 Cal. 2d 104, 109 (1947), the court denied intervention because the intervener stood in the "same position as that of other water users whose needs were served by the defendant." Similarly, Samuelson and Mara's Hope stand in the same position as that of any other resident or any sanctuary in Hobbs County who have some interest in animal-related issues. *Allen*, 31 Cal. 2d at 109. Primarily, their interest is that of the discussion of ethical issues related to animal safety. The Department is in charge of animal safety issues in Hobbs County, therefore, it will serve the needs of Samuelson and Mara's Hope in the current litigation.

The Supreme Court of California found no direct interest when there could be an adjudication that holds valid a said act that would have precedential effect on any action brought against the interveners in the future but it would have "no binding effect upon the interveners, as it would upon the parties to this proceeding, and would in no way directly affect them" in the

present proceeding. *Jersey Maid Milk Products Co. v. Brock*, 13 Cal. 2d at 664. Since neither Samuelson nor Mara's Hope have a claim directly against the Circus, and the adjudication of current proceeding will have a binding effect only on the Circus and the Department, their interest could not be held as direct and immediate. Any judgment rendered in the present proceeding will have no direct effect upon any entity other than the Circus and the Department. If the judgment should be in favor of the Circus, the defendant will be required to reinstate the Circus' permit and if it should be in favor of the Department, then the latter would be free to keep the permit revoked. This judgment would in no way be binding upon Samuelson and Mara's Hope and they will be as free to pursue their business after the rendition of said judgment, as they were before. Therefore, they would neither gain nor lose by the direct operation of the judgment. *Jersey Maid Milk Products Co.*, 13 Cal. 2d at 664.

Samuelson has never attended any of Circus' performances and therefore, if Circus' permit was revoked, he would in no way be directly affected by it. R. at 8. Similarly, Mara's Hope does not provide sanctuary to elephants and because the permit revocation was prompted by a report on the condition of elephants, Mara's Hope also has no substantial interest in the subject matter of the present litigation. R. at 8. No adjudication of the Circus's permit will directly affect the rights of either Samuelson or Mara's Hope. Their only interest in the litigation is that the judgment may establish whether Circus will be able to continue performing in Hobbs County in the future with the elephants mentioned in the report. If the Circus is allowed to use the elephants in the future performance and Mara's Hope starts providing sanctuary to elephants, they may have a claim against Circus at that time. *Kenney v. Wolff*, 88 Cal. App. 2d 163 (1948). But, this is too far fetched. Currently, they do not provide sanctuary to elephants and no matter what the judgment is in the present litigation, they will be able to go about their business just as

usual. This is not a sufficient interest in the subject matter of the litigation that "the intervener will either gain or lose by the direct operation" (*People ex rel. Public Utilities Com. v. Ryerson*, 241 Cal. App. 2d 115, 119 (1966)) and "the effect of the judgment." *People ex rel. State Lands Com. v. Long Beach*, 183 Cal. App. 2d at 275. Henceforth, their interest is indirect and such an interest may not serve as a proper subject for intervention.

2. New Issues Will Be Presented If Chris Samuelson And Mara's Hope Wildlife Sanctuary Are Allowed To Intervene In The Present Proceeding.

Samuelson and Mara's Hope will present new issues to the current lawsuit if they are allowed to intervene in the case between the Circus and the Department. The Supreme Court of California stated in *Wright v. Jordan*, 192 Cal. at 714 that "[i]nterveners were permitted to intervene to the extent and for the purpose of sustaining or opposing the respective contentions of the petitioners and respondent herein, their rights as interveners herein go no further..." An intervener cannot be allowed to broaden the scope of proceedings "by urging claims or contentions which have their proper forum elsewhere" *Brophy*, 49 Cal. App. 2d at 35 or "enlarge the issues so as to litigate matters not raised by the original parties." *Wright*, 192 Cal. 714. See *Muller v. Robinson*, 174 Cal. App. 2d 511, 515 (1959). Also, if the interveners do not share an interest in getting the matters resolved in the same way as the original parties, then the court should not allow the third party to intervene. *Kuperstein*, 204 Cal. App. 3d 598, 600 (1988). Furthermore, the California First Appellate District Court, Division One held that "even if otherwise proper, intervention will not be allowed when it would ... require a reopening of the case for further evidence, ... or change the position of the original parties." *Simpson Redwood Co. v. Cal.*, 196 Cal. App. 3d 1192, 1202 (1987). See *Allen v. California Water & Tel. Co.*, 31 Cal. 2d 104 (1947).

In the present case, if this Court allows Samuelson and Mara's Hope to intervene, it will not only greatly enlarge the issues of the present case but it would completely change the nature of the case by involving moral and ethical issues relating to performing animals. R. at 9; *Muller*, 174 Cal. App. 2d at 516. The California Appellate Court of Fourth District denied intervention when the direct legal effect was only on the original party. *Kuperstein*, 204 Cal. App. 3d at 600. The court held that "if judgment is for the plaintiff, how Kuperstein pays this and whether he has insurance to cover it are collateral. Permitting intervention in such circumstances necessarily expands the scope of the lawsuit to include issues necessary to determining coverage." *Kuperstein*, 204 Cal. App. 3d at 600-601. The court further noted that allowing intervention when "insured and insurer seek different factual resolutions of certain issues [and therefore intervention will necessarily] inject[] the possibility [that] the defendants will not be able to conduct the lawsuit on their own terms[,]" is an abuse of discretion. *Kuperstein*, 204 Cal. App. 3d at 601. In the present case, if this Court does not reinstate the Circus's Performing Animal Permit, it will only have direct legal effect on the Circus; what happens to the elephants and other animals is an issue collateral to the current litigation.

If this Court allows intervention, it will inject the possibility that the Circus will not be able to conduct the lawsuit on its own terms and it will have to discuss issues related to animal health, which adds to the current scope of litigation. See *Bame v. City of Del Mar*, 86 Cal. App. 4th 1346, 1364 (2001); *People ex rel. Rominger v. County of Trinity*, 147 Cal. App. 3d 655, 660 (1983). Neither Samuelson nor Mara's Hope has a personal complaint against the Circus, which deals directly with the Performing Animal Permit. Their only interest (together as well as separately) in the current litigation is to check if the Circus is taking care of its animals, especially elephants, which is the focal point of the dispute. R. at 9. If they are allowed to

intervene, the court will be bound to discuss collateral issues. Therefore, it is clear that the superior court did not abuse its discretion when it denied Samuelson and Mara's Hope's motion for leave to intervene.

3. Purposes Served In Allowing Samuelson And Mara's Hope To Intervene Do Not Outweigh The Interest Of The Circus In Conducting Its Own Lawsuit On Its Own Terms.

The interests of the Circus in conducting its lawsuit on its own terms outweigh the interests of allowing Samuelson and Mara's Hope to intervene. The Supreme Court of California stated that even if there is a direct interest, the trial court must use its discretion to deny intervention when "the interests of the original litigants outweigh the interveners' concerns of potential delay and multiplicity of actions." *County of San Bernardino v. Harsh California Corp.*, 52 Cal. 2d 341, 346 (1959); *People v. Superior Court of Ventura County*, 17 Cal. 3d 732, 737 (1976). The main purpose of allowing intervention is "to promote fairness by involving all parties potentially affected by a judgment." *Simpson Redwood Co.*, 196 Cal. App. 3d at 1199. The Supreme Court of California specified in another case that the trial court "must balance the desirability of intervention to protect a direct interest against the normal right of the original parties to the litigation to conduct their lawsuit on their own terms and the potential of unduly extending the litigation." *County of San Bernardino*, 52 Cal. 2d at 346.

As mentioned above, Samuelson and Mara's Hope did not have direct and immediate interest in the current litigation between the Circus and the Department. So, the lower court correctly denied their motion for leave to intervene. Even then, if this Court finds that interest to be direct and immediate interest (together or separately), the superior court still had the discretion to deny intervention. The superior court denied their motion after an evidentiary hearing. It found that Samuelson and Mara's Hope had no justiciable interest in the litigation

and that their intervention would have served no purpose except to delay the reinstatement of the Circus's animal-performing permit. See *In re Yokohoma Specie Bank, Ltd.*, 86 Cal. App. 2d 545 (1948). Also, as discussed above, allowing intervention would enlarge the scope of this litigation and the purposes of intervention are not only to protect the interests of those who may be affected but also to avert any delay and multiplicity of action.

If this Court allows the discussion of expanded issues, it would clearly delay the trial of the action in that the amount of time to collect additional evidence would require. *People ex rel. State Lands Com. v. Long Beach*, 183 Cal. App. 2d 271, 274 (1960). This in turn goes against the core purpose of intervention. The main interest of the Circus in conducting its lawsuit on its own terms is that it would only need a discussion of the harm suffered by the Circus if this Court did not reinstate its Performing Animal Permit and its likelihood of success on the merits at trial. The main interest of Samuelson and Mara's Hope is to discuss the moral and ethical issues relating to performing animals and the conditions they are kept in while not performing. Undoubtedly, this is an important interest but when compared with the interests of the Circus conducting its own lawsuit on its own terms, it does not outweigh that interest. The First Appellate District court, Division One held that "[l]iberal rules of intervention may interfere with the right of existing parties to pursue their litigation separately rather than to join with others. The test of intervention, therefore, cannot be as loose as that governing permissive joinder..." *Fireman's Fund Ins. Co. v. Gerlach*, 56 Cal. App. 3d 299 (1976) (citing 3 Witkin. Cal. Procedure (2d ed. 1971) Pleading, §196, pp. 1869-1870). Hence, it is established that the superior court did not abuse its discretion in denying Samuelson and Mara's Hope's motion for leave to intervene.

In conclusion, it is clear that the lower court correctly denied Samuelson and Mara's Hope's motion for leave to intervene. Samuelson and the Sanctuary (together as well as

separately) do not have a direct and immediate interest in the outcome of the litigation, their intervention would bring in new issues for the court to discuss and their interest in intervention does not outweigh the Circus's interest in conducting its own lawsuit on its own terms, their interest. Hence, the Superior Court of Hobbs County did not abuse its discretion.

B. Chris Samuelson And Mara's Hope Wildlife Sanctuary Do Not Have An Interest Relating To The 'Property Or Transaction Which Is The Subject Of The Action,' Therefore, They Cannot Be Granted Intervention As A Matter Of Right.

Under section 387 of the California Code of Civil Procedure subdivision (b), Samuelson and Mara's Hope do not have an interest relating to the 'property or transaction, which is the subject of the action.' Therefore, they should not be granted intervention as a matter of right. A third party is allowed intervention as a matter of right when the result of the action "may impair or impede the person's ability to protect that interest, and the interest is not being adequately represented by existing parties." *Mylan Labs. v. Soon-Shiong*, 76 Cal. App. 4th 71, 78 (1999). The significant phrase in section 387, subsection (b) is 'the property or transaction which is the subject of the action.' *California Physicians' Service v. Superior Court*, 102 Cal. App. 3d 91, 96 (1980).

There is a dearth of case law interpreting section 387 of the California Code of Civil Procedure, subsection (b). *California Physicians' Service v. Superior Court*, 102 Cal. App. 3d at 96. Black's Law Dictionary defines the term 'transaction' as: "Act of transacting or conducting any business; negotiation, management; proceeding; that which is done; an affair. It may involve selling, leasing, borrowing, mortgaging or lending. Something *which has taken place, whereby a cause of action has arisen.*" *California Physicians' Service*, 102 Cal. App. 3d at 96 (citing Black's Law Dict., p. 1341, col. 1; italics added). Also, the *California Physicians' Service* Court held that a tort action does not qualify as 'property' in the context of section 387, subdivision (b).

102 Cal. App. 3d at 96. To qualify for mandatory injunction, first there has to be a property or transaction as the subject of the action.

In the present case, the main subject is revocation of Circus' performing animals permit. There is no 'property' or 'transaction' as the main issue of the action. Additionally, the California Appellate Court of Second District, Division Five held that 'property' that would be used as evidence in the lawsuit does not succeed a motion for intervention because that property is not the subject of the action. *Mylan Labs. v. Soon-Shiong*, 76 Cal. App. 4th at 79. The superior court did not even discuss intervention as a matter of right because they found no basis on the facts set forth in the motion to intervene to consider such an intervention. R. at 8. Hence, it is clear that Samuelson and Mara's Hope cannot intervene as a matter of right and therefore the lower court did not abuse its discretion in denying intervention.

C. Chris Samuelson And Mara's Hope Wildlife Sanctuary Do Not Have Standing To Bring A Claim Against Circus Separately.

Samuelson and Mara's Hope need standing to bring a claim against Circus separately to be allowed to intervene in this action, which they do not have. Samuelson and Mara's Hope have the burden to show that theirs (together as well as separately) is a proper case for intervention. *People v. Brophy*, 49 Cal. App. 2d 15, 34 (1942). The Court of Appeal of California Second Appellate District, Division One stated that the intervener's pleading "must state sufficient, if true, to establish the right or interest which he claims, or else he has no longer a standing in court as a litigant if proper objection is made." *Brophy*, 49 Cal. App. 2d at 34; Cal. Code Civ. P. §367 (2013). A third party cannot be allowed to intervene if the sole purpose of intervention is for being able to have standing to assert a privilege in the ongoing case. *Mylan Labs.*, 76 Cal. App. 4th at 78.

In the instant case, Samuelson and Mara's Hope do not establish the right or interest in their motion to intervene. They merely stated that, "their interests are aligned with the interests of the Department, and that they have an interest in the outcome of the litigation as residents of Hobbs County and as an organization and individual that seek to protect animals." R. at 7. This is a conclusory statement and it does not in and of itself establish the right or interest. Samuelson has never attended even a single performance by the Circus and therefore he would be affected in no way if the Circus's permit were reinstated. R. at 8. Additionally, the main reason Circus's permit was revoked was due to a report on the condition of Circus elephants. R. at 8. Mara's Hope does not provide sanctuary to elephants, so they also have no interest in the current lawsuit. R. at 8. Accordingly it is evident that Samuelson and Mara's Hope do not have standing to bring a claim against the Circus (together or separately) and this Court, therefore, should not grant them intervention for the mere sake of giving them standing. In conclusion, the lower court did not abuse its discretion when it denied Samuelson and Mara's Hope's motion for leave to intervene.

II. The Superior Court Abused Its Discretion When It Denied Grandlands Circus Inc.'s Motion for Preliminary Injunction.

This Court should reverse the decision of the superior court and hold that Circus's motion for preliminary injunction should have been granted and that the superior court abused it's discretion. The Court should do this for two reasons. First, the Circus can sufficiently show that it meets the requirements for granting a preliminary injunction, which are a likelihood of success on the merits, and a comparison between the harm the Circus would suffer and the harm the Department would suffer. *Best Friends Animal Society v. Macerich Westside Pavilion Property, LLC.*, 193 Cal. App. 4th 168, 174 (2011). Second, the purpose of a preliminary injunction is to

limit the amount of irreparable harm that is caused by quick decisions and in this case, the decision to revoke the Circus's permit was an overreaction to a veterinarian report which threatens to permanently harm the Circus. John Luebsdorf, *The Standard for Preliminary Injunctions*, 91 Harv. L. Rev. 525 (1978). The appropriate standard of review for this issue is abuse of discretion. *Walczak v. EPL Prolong, Inc.*, 198 F. 3d 725, 730 (9th Cir. 1999).

A. The Circus Has Demonstrated that it has Both a Likelihood of Success on the Merits and that It Will Suffer Irreparable Harm Greater than the Harm the Department Will Suffer.

The Court of Appeal of the State of California Fourth Appellate District, Division Two, held in *Best Friends Animal Society v. Macerich Westside Pavilion Property, LLC* that in order for a party to be granted a preliminary injunction it must first show that it has a likelihood of success on the merits and that the harm it will suffer would be greater than the harm the opposite party would suffer. 193 Cal. App. 4th at 174. See also *IT Corp. v. County of Imperial*, 35 Cal. 3d 63, 125 (1983). Additionally, while the granting of a preliminary injunction is within the trial court's discretion, the court will be found to have abused its discretion when its decision has "exceeded the bounds of reason or contravened the uncontradicted evidence." *IT Corp,* 35 Cal. 3d at 125. See also *City of San Diego v. F Street Corp.*, 2002 Cal. App. Unpub. LEXIS 1310 (Cal. App. 4th Dist. May 21, 2002). This Court should hold that the lower court abused its discretion because Circus sufficiently showed that it had a likelihood of success on the merits and that it would suffer a greater harm than the Department. Because Circus can fulfill both of these requirements the lower court's decision was beyond the bounds of reason and went against the evidence.

1. Circus Sufficiently Demonstrated a Likelihood of Success on the Merits.

The United States Court of Appeals for the Ninth Circuit held in *In re Excel Innovations, Inc.*, 502 F.3d 1086, 1093 (9th Cir. 2007) that "These two formulations represent two points on a sliding scale in which the required degree of irreparable harm increases as the probability of success decreases. They are not separate tests but rather outer reaches of a single continuum." Put less elegantly, the requirements of each part of the test are affected by each other. A showing of greater likelihood of success on the merits warrants a showing of less probable or less severe harm and a showing of severe irreparable harm permits a showing of lesser likelihood of success on the merits.

The lower court stated in its opinion, "[w]hether the Circus is likely to succeed on the merits depends ultimately on whether the Department will be able to demonstrate that it acted within its discretion..." R. at 12. While this may be true, the court's analysis of the evidence contradicts the idea that the Department acted within its discretion when it revoked the Circus's permit. The lower court states that the Circus should have disclosed the West Edmond report to the Department. R. at 13. However, this is not required by Hobbs County Municipal Code § 63.14 (HCMC). The HCMC only requires that medical records be made available and that the applying entity specify any permits that it previously held in any other state, city, or county that had been revoked. Exhibit 1 at A(i), A(iii). Revocation is not the same as refusal. Merriam-Webster defines revoke as "to officially cancel the power or effect of (something, such as a law, license, agreement, etc.)" and "to annul by recalling or taking back." Merriam-Webster Dictionary, *revoke*, http://www.merriam-webster.com/dictionary/revoke?show=0&t=1386809594 (Dec. 11, 2013, 7:13pm). Additionally, the United States Supreme Court adopted this definition of "revoke" as the official federal

definition of the term in *Johnson v. United States*, 529 U.S. 694, 1804 (2000). See *United States v. Ramirez*, 347 F.3d 792, 799 (9th Cir. 2003) where the Ninth Circuit held that "[i]n determining the meaning of 'revocation' under the Guidelines, we must apply a uniform, federal definition, "not dependent upon the vagaries of state law."

Merriam-Webster defines "refuse" as "to not allow someone to have (something)" and "to show or express unwillingness to do or comply with." Merriam-Webster Dictionary, *refuse*, http://www.merriam-webster.com/dictionary/refuse (Dec. 11, 2013, 7:13pm). Essentially, the HCMC only requires that the applying entity report situations where it successfully applied for and was granted a permit but that permit was then revoked. Exhibit 1, at A(iii). The HCMC does not require applying entities to report situations where they unsuccessfully applied for a permit, presumably because the Department is aware of differing standards or requirements. Since the West Edmond permit is not a persistent permit and must be re-applied for, its refusal is not a revocation of a pre-existing permit but simply a refusal to grant a permit. R. at 13. This demonstrates that the Circus did not violate section A(iii) of the HCMC and therefore has a slight chance of success on the merits.

Adding to the slight chance of success on the merits is that the lower court found that there was "no factual basis" to support the claim that the Circus had violated HCMC A(i) or A(ii). R. at 13. The court quickly dismissed contentions over A(ii) stating that "[t]he provision requires only that transport vehicles be reasonable; the record before this court concerns only the size of the transportation containers, which the court finds to be a separate issue." R. at 13. With regards to HCMC A(i), the court states that the Department should have known that it did not receive the required medical records, but chose to issue the permit anyway. R. at 13. Essentially, the lower court determined that because the Department seemed to be negligent in this aspect,

revocation on that basis would be "unreasonable and unnecessarily harsh." R. at 13. The fact the lower court correctly found that revocation based on HCMC A(i) would be unreasonable and harsh, raises the Circus's likelihood of success on the merits.

Additionally, the lower court properly found that the Circus was not in violation of California Penal Code Section 596.5, which prohibits the abusive behavior of elephants. The lower court stated that there was no evidence to support such a claim in the record nor was there evidence that showed that the Circus had disciplined the elephants at any time. R. at 14. The court appropriately mentioned that the West Edmond report demonstrated that the younger elephants performing for the Circus were in good health and noted that the Circus had offered not to perform the three older elephants while in Hobbs County. R. at 14. The lower court's proper findings on all of these issues supports this Court's holding that the Circus has demonstrated a strong likelihood of success on the merits.

The final contention against the Circus was that its transport containers fell below the minimum requirements for the animals. R. at 13. If this were true then the Circus would clearly be in violation of California Penal Code Section 597t and the Circus's likelihood of success would be destroyed. However, this is not the case and the lower court was incorrect in determining that the Circus had violated 597t. The relevant section of 597t states, "[e]very person who keeps an animal confined in an enclosed area shall provide it with an adequate exercise area." Cal. Penal Code. § 597t. The Circus agrees that the figures in the West Edmond report are correct. R. at 13, 14. Therefore, the transportation cars for the elephants were 350 square feet instead of the recommended 400 square feet. However, Section 597t states, "[t]his section shall not apply to an animal which is in transit, in a vehicle, or in immediate control of a person." Cal. Penal Code. § 597t. Therefore, the Department's contention and the lower court's

finding, that the Circus violated the California Penal Code by providing inadequate space for its elephants, are clearly erroneous. The space recommendations do not apply to animals in transit and because the West Edmond report only addresses the size of the transport containers and not holding stalls (which are not mentioned in the record) there is no violation of Section 597t. The lower court based its decision to deny the preliminary injunction on the perceived fact that the Circus violated section 597t, which meant that the Department acted within its discretion when revoking the permit. However, because it has been undeniably shown that there was no violation of 597t, the Circus's likelihood of success is almost a certainty and the lower court abused its discretion when it held otherwise.

2. The Balance of Harms Weighs in Favor of the Court Granting the Preliminary Injunction for Grandlands Circus, Inc.

Because the Circus has shown a near certain likelihood of success on the merits, it does not need to show that it will suffer severe irreparable harm according to the Ninth Circuit in *In re Excel Innovations*. See *IT Corp,* 35 Cal. 3d at 72,73 where the California Supreme Court held that a trial court may decide to grant an injunction if the plaintiff might clearly succeed on its merits even if the plaintiff fails to prevail in the balancing of harms. See also *Right Site Coalition v. Los Angeles Unified School Dist.*, 160 Cal. App. 4th 336, 338, 339 (2008) where the Court of Appeal for California Second District, Division 3 held that the more likely it is that the plaintiffs will ultimately prevail, the less severe must be the harm that they allege will occur if the injunction is not issued. However, the Circus can still demonstrate that it will suffer a severe and permanent harm if the preliminary injunction is not granted and it cannot perform in April within Hobbs County.

The second part of the test requires that the court compare the likelihood of harm to be done to the plaintiff if the injunction is not granted to the likelihood of the harm done to the

defendant if the injunction is granted. *Best Friends Animal Society*, 193 Cal. App. 4th 174. See also *White v. Davis*, 30 Cal. 4th 528, 669 (2003). In this case, the lower court improperly held that the balance of harms tipped in favor of the Department. R. at 15. The lower court spoke lengthily about how the Department's purpose is to maintain a safe environment for animals and people within its jurisdiction. R. at 15. The court also contradicts its earlier statement that a revocation would be unnecessarily harsh by stating that revocation is the only remedy that appropriately addresses the violations (of which it has been shown that there are none). R. at 13, 15. Additionally, the lower court states that the Department is subject to complaints of its citizens and that it could be embroiled in litigation if a citizen were to be injured due to negligent enforcement of its rules. R. at 15. The record does not support the lower court's speculations about harm to the Department. R. at 15. However, no citizen has been injured nor does the record support the contention that a citizen was nearly injured. This suggests that the court was considering only harms that might occur to the Department, which is proper. See *Stuhlbarg Int'l Sales Co., Inc. v. John D. Brush & Co.,* 240 F.3d 832, 841 (9th Cir. 2001) where the Ninth Circuit held that evidence need only support a possibility of irreparable harm.

However, this same analysis of possible harm was not afforded to the Circus. The lower court stated, "[w]e are sensitive to the Circus's argument that it will lose income from the April performance in Hobbs County, and may possibly lose bookings in other venues if the injunctive relief is not granted. However, no specific dollar amount has been presented to the court for consideration." R. at 15. This is an improper analysis by the lower court. Specific dollar amounts are not necessary to demonstrate irreparable harm, only that there be a possibility of the harm occurring. *Stuhlbarg Int'l*, 240 F.3d 832 at 841. But, the Circus has provided specific dollar amounts to the lower court. The record states that during its seventeen-day long September visit

to Hobbs County, the Circus made $95,200. R. at 4. It is reasonable to assume that the April 2014 visit will provide similar funds and therefore the Circus will be deprived of nearly $100,000 of revenue if it is not allowed to perform. Additionally, as was held in *Stuhlbarg Int'l*, loss or goodwill or reputation among customers supports a showing of irreparable harm. 240 F.3d 832 at 841. The court states that the Circus may lose venue bookings and customers if it is not allowed to perform in Hobbs County. R. at 15. If the lower court were only analyzing a possibility of harm, then the Circus may have failed to show that its harms outweighed the Department's harms. However, this would not have supported the court's denial of the preliminary injunction because the Circus's likelihood of success was so high.

Also, in *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S 7 (2008) the United States Supreme Court ruled that the Ninth Circuit's standard of a possibility of irreparable harm was too lax. *Winter*, 555 U.S at 22. The Court took the position that plaintiffs must demonstrate a likelihood of irreparable harms. While the lower court addressed only the possibility of harms to both parties, only the Circus's harms were certain to occur if the preliminary injunction was not granted. The Circus is scheduled to perform in April of 2014, which can be expected to provide revenue of nearly $100,000. R. at 4. If the Circus's permit is not re-issued the Circus will unarguably lose that revenue. In this case, even though the Department may demonstrate harms that are possibly more costly than the harms the Circus will incur, those harms are only possibilities. The harms the Circus will suffer are near certainties and should be given greater weight.

For these reasons it is clear that the lower court's decision to deny the preliminary injunction was against the weight of the evidence and therefore was an abuse of discretion. It is

respectfully requested that this Court hold that the lower court abused its discretion when it denied the Circus's motion for preliminary injunction and reverse the lower court's decision.

B. The Department's Revocation of the Circus's Permit was an Erroneous Decision Made in Haste and the Purpose of Preliminary Injunctions is to Limit the Harm Caused by Such Decisions.

As stated by the lower court, "revocation on the current factual record under this subdivision would be unreasonable and an unnecessarily harsh remedy," and as supported by the arguments above, the Department's decision to revoke the Circus's permit was unreasonable, unnecessary, and made in reaction to a report that it did not receive or ask for.

As the United States Supreme Case stated, "[t]he purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held." *University of Texas v. Camenisch*, 451 U.S. 390, 395 (1981) See. *Continental Baking Co. v. Katz*, 68 Cal. 2D 512, 528 (1968). Basically, the purpose of a preliminary injunction is to ensure that a party is not irreparably damaged before they have a chance to prove their case in court. In this case, the Department revoked the Circus's permit unreasonably and the Circus seeks to have the permit re-issued so that it can perform in April 2014. R. at 7. If the Circus succeeds in its litigation but the preliminary injunction were not to be issued, the entire purpose of the Circus's lawsuit would be completely destroyed. As suggested by Professor John Leubsdorf in the Harvard Law Review, "the preliminary injunction standard should aim to minimize the probable irreparable loss of rights caused by errors incident to hasty decision." John Luebsdorf, *The Standard for Preliminary Injunctions*, 91 Harv. L. Rev. 525 (1978). In this case, the court's decision to deny a preliminary injunction amplifies the Circus's harms because it puts the Circus in the situation of pursuing litigation which may ultimately fail to prevent the foreseeable harm due to time restrictions and not the merits. The Circus would then pursue litigation to recover the

amount of revenue lost. This in turn will only create more court fees for both parties and waste the court's time because the situation could have been avoided had a preliminary injunction been granted in the first place.

The Ninth Circuit has held, "that it is so well settled as to not require citation to authority that the usual function of a preliminary injunction is to preserve the status *quo ante litem* pending a determination of the action on the merits." *Tanner Motor Livery, Ltd. v. Avis, Inc.*, 316 F.2d 804, 808 (9th Cir. 1963). The purpose of a preliminary injunction is so well known, and the facts in this case are so clear, that it is obvious that the lower court abused its discretion when it denied Circus's motion for preliminary injunction.

CONCLUSION

For the aforementioned reasons, we ask this Court to affirm the decision of the superior court for the issue of motion to intervene and hold that the superior court did not abuse its discretion in denying Samuelson and the Sanctuary's motion for leave to intervene. Furthermore, it is respectfully requested that this Court hold that the lower court's decision on mandatory preliminary injunction was an abuse of discretion and reverse that decision of the superior court.

Respectfully submitted,

Team 18
Counsel for Appellant/Cross Respondent