

CASE 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,
Appellant.

Appeal from the Superior Court of Hobbs County
Case No. CV-2014-TCS-81013 (EMH)
The Honorable Ellis M. Heiberg

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STATEMENT OF THE ISSUES PRESENTED

- I. Where Samuelson and Mara's Hope have an interest in the outcome of the litigation as an individual and an organization that seek to protect performing animals, including exotic animals like the elephants exhibited in the Circus, did the Superior Court abuse its discretion in denying Samuelson and Mara's Hope's motion for leave to intervene?
- II. Where the Circus has violated multiple provisions of the *Hobbs County Municipal Code* and certain provisions of the *California Penal Code*, giving the Department reasonable grounds to exercise its authority in revoking the permit previously issued, did the Superior Court appropriately use its discretion to deny the Circus's Motion for preliminary injunctive relief?

PROCEDURAL HISTORY

This appeal arises from a judgment entered in the Superior Court of Hobbs County, California, the Honorable Ellis M. Heiberg presiding.

The plaintiff in the underlying action, Grandlands Circus, Inc. ("Circus"), appeals the Superior Court's denial of its motion for a preliminary mandatory injunction.

Chris Samuelson ("Samuelson") and Mara's Hope Wildlife Sanctuary ("Mara's Hope") appeal the Superior Court's denial of its motion for leave to intervene in the Superior Court action.

The matters have been consolidated for hearing. The respondent, Hobbs County Animal Safety Department ("Department"), is also representing Samuelson and Mara's Hope. The Department argues in opposition to the Circus's appeal, as well as in support of the potential intervenors' appeal.

STATEMENT OF FACTS¹

A. The Parties

Plaintiff is Grandlands Circus, Inc. (“Circus”), established in 1962, and operating a traveling circus. In 2013, the Circus put on 22 shows in the United States using human acrobatic and animal performances. (CT at 7.)

Defendant is the Hobbs County Animal Safety Department (“Department”), the governing body in charge of issuing Performing Animal Permits (“permit”) within the County of Hobbs. In June of the past seven years, Hobbs County has issued a 12-month permit to the Circus. The performances in the past were structured as twice per day, with each show being approximately ninety (90) minutes in duration. The September 2013 visit to Hobbs County lasted 17 days (September 6-22, 2013), and earned the Circus approximately \$95,200 in net revenue. (CT at 8.)

Chris Samuelson (“Samuelson”) is a resident of Hobbs County and the Director of Education and Outreach for Mara’s Hope Wildlife Sanctuary (“Mara’s Hope”). His credentials include a Bachelor of Science degree in zoology and a Master of Fine Arts degree in photography from California University. He worked at the Pranayama Animal Sanctuary as an animal caregiver for retired chimpanzees, previously used in research and/or entertainment. In 1997, he co-founded Mara’s Hope, serving as an animal caregiver and Director of Education and Outreach. (CT at 9.)

Mara’s Hope is a privately funded animal shelter specializing in the research and care for, inter alia, abused animals rescued from the entertainment industry. (CT at 9.) The Sanctuary has not yet housed elephants, but it houses a variety of abused mammals

¹ The facts are cited to the record of the Superior Court of Hobbs County in its Memorandum Opinion CV-2014-TCS-81013 (EMH).

similar to elephants. Mara's Hope's mission statement, as stated on its website, includes: "Endeavoring to educate the public about the harms of keeping wild and exotic animals in captivity, and to advocate for protection of wildlife in the United States and elsewhere." (CT at 9.)

B. History Of The Dispute And The Proceeding Before The Department

In April 2012, Samuelson's assistant, Penny Hall (a freshman at California University), visited the Circus for the first time. She told Samuelson (who has not attended the Circus) "that she was concerned about the well-being of the animals, and that they seemed tired and thin compared to the animals she was used to seeing at the Sanctuary." (CT at 11.) She also explained that the Circus had visited her hometown of West Edmond, Texas, but no longer does so for reasons unknown to her. (CT at 11.)

Samuelson, through Hall's brother who pursuant to the Freedom of Information Act Request to West Edmond, obtained a copy of the evaluation from June 2011. The report was prepared for the West Edmond Animal Care and Control while the Circus was visiting West Edmond. (CT at 12.) Samuelson then made a phone call to West Edmond Animal Care and Control. He confirmed that their department had refused to issue a new permit to the Circus. (CT at 12.)

Samuelson, in his name and the name of Mara's Hope, prepared an administrative complaint and filed it with the Department on September 24, 2013 (the Circus having completed its September performances). This complaint, filed with the West Edmond report (Exhibit 1), initiated the administrative inquiry into the Circus, ultimately resulting in the revocation of their permit. (CT at 13.)

Section 63.14 of the Hobbs County Municipal Code is the ordinance concerning

the issuance of Performing Animal Permits. An applicant must be in compliance with California Penal Code § 597, et seq., the full text of the ordinance submitted as Exhibit 2. (CT at 14.)

The Department promptly notified Grandlands Circus that it would hold an evidentiary hearing on September 27, 2013. The notice explained that among other things, the Department would consider: “(1) whether the concerns identified in the 2011 West Edmond report also are applicable to the Hobbs County performances; (2) whether Grandlands Circus was in violation of the requirements and/or prohibitions of California Penal Code § 597, et seq., irrespective of any criminal charges; (3) whether Grandlands Circus would be willing to remediate any identified violations to the satisfaction of the Department; and (4) whether the Grandlands Circus permit ultimately should be revoked.” (CT at 15.)

The Circus opted not to request a continuance of the hearing as a matter of course. Circus personnel and Samuelson attended the hearing.

At the hearing before the Department, the Circus denied the overall findings and conclusions contained in the 2011 West Edmond report, but did stipulate that **the information contained in the medical records, the measurements regarding the transportation cars, and the noted duration of tethered travel time and time spent in the transportation cars generally are accurate.** The Circus also conceded that it **had not supplied the Department with any medical records in connection with its June 2013 Performing Animal Permit application.** No veterinarians or experts testified on behalf of any party during the hearing held by the Department. [Emphasis added] (CT at 16.)

The Circus would not agree to any other concessions except not performing the three oldest elephants in future Hobbs County performances. The Circus argued if the permit is revoked, its income from April 2014 would be lost. The Circus expressed that another venue in Gall Springs, California, with a population of less than half of Hobbs

County, was available in April 2014. Gall Springs has indicated that it would be willing to host the Circus in April 2014. (CT at 17.)

On October 7, 2013, the Department revoked the Grandlands Circus permit and issued its decision in writing, indicating that the Circus was found to be in violation of Hobbs County Municipal Code § 63.14, subdivisions (A)(i)-(iii), and California Penal Code §§ 596.5 and 597t. (CT at 18.) The Circus initiated this suit in response, to which Samuelson and Mara's Hope sought intervenor status.

SUMMARY OF THE ARGUMENT

The Superior Court abused its discretion in denying intervenor status to Samuelson and Mara's Hope because it failed to consider all applicable law and the relevant facts necessary to apply the test for permissive standing. This abuse of discretion supports the denial of preliminary injunctive relief to the Circus, as it provides yet another interest to weigh in balancing the potential harm to be suffered if the injunction is granted. Moreover, because the Circus has violated various provisions of the *Hobbs County Municipal Code* and will thereby not likely prevail on the merits, the Superior Court correctly denied preliminary injunctive relief.

The Superior Court applied the three-part test for permissive intervenor status and found that Samuelson and Mara's Hope should not be permitted to intervene. This conclusion neglects to include the longstanding experience of both intervenor applicants with performing animals, their critical involvement in the administrative process, and their unique interest in the rights of the elephants' ongoing health and safety. The Superior Court's abuse of its discretion is apparent in its perfunctory assessment of each part of the test for permissive intervenor status. On the first part of the test assessing a direct and immediate interest, the Superior Court failed to consider the most similar binding case law, and in doing so did not apply the relevant facts correctly. On the second part of the test regarding a prohibition against enlarging the issues between the litigants, the Superior Court made a decision on the basis that Samuelson and Mara's Hope are morally and ethically opposed to performing animals in circuses—a fact not supported by the record—and in doing so overlooked their experience with and interest in the wellbeing of performing animals. Based on the findings for the first two parts of the

test, the Superior Court did not attempt the balancing requirement of the third part of the test. As a result, the Superior Court's decision was an arbitrary abuse of discretion.

The Superior Court correctly denied the Circus's request for preliminary injunction. In its reasoning, however, the Superior Court failed to apply the *Hobbs County Municipal Code* as it was intended. The Circus violated of §63.14 (A)(i)-(iii) and (vii). The Superior Court failed to consider that §63.14 (A)(i) not only requires that medical records and health certificates for all animals be made available, but also that the elephants on display be shown to be free of tuberculosis. Furthermore, California requires "appropriate" transportation of animals under §63.14 (A)(ii), which is above the American Zoo and Aquarium Association's requirements. The Superior Court failed to apply this higher standard and disregarded the evidence made available in support of the Circus's use of inappropriate transportation vehicles. The Superior Court also changed the requirements of §596.5 of the *Penal Code* by making it applicable only to elephants being used in performances whereas the provision extends to all owners and managers of an elephant, regardless of what activity the elephant is to engage in.

Moreover, the interests of the Department as well as the citizens of Hobbs County to have their laws enforced outweigh the economic harm that the Circus may withstand. The broader public interest in the matter before the court must be given significant weight in addition to the individual litigants' position. Awarding a preliminary injunction in this instance results in protracted litigation. The Circus has not come to seek equity with clean hands and therefore cannot be awarded with equity.

The Court of Appeal should grant intervenor status to Samuelson and Mara's Hope and uphold the denial of preliminary injunctive relief to the Circus.

ARGUMENT

I. THE SUPERIOR COURT ABUSED ITS DISCRETION IN DENYING SAMUELSON AND MARA’S HOPE’S MOTION FOR LEAVE TO INTERVENE.

The Superior Court abused its discretion in denying intervenor status to both Samuelson and Mara’s Hope because it failed to consider all the relevant law and relevant facts necessary to apply the test for permissive standing. The Court based its decision to deny standing to the intervenors on a specious characterization of the nature and scope of their intervention. The court erred by not applying the test in accordance with some of the seminal case law, and also by not considering important facts that could have otherwise tipped the balance in favor of Samuelson and Mara’s Hope.

Further, there are substantial public policy reasons to liberally treat intervenors who have an interest in litigation, where the subject of the litigation are animals rather than pecuniary or non-living proprietary interests.

A. Standard of Review.

To succeed on an appeal for a discretionary decision made by the Superior Court, the appeal must rest on an abuse of discretion. (*PLCM Group v. Drexler* (2000) 22 Cal. 4th 1084, 1095.) The abuse of discretion standard gives significant deference to the trial judge’s opinion, but can be overcome if the decision is “clearly wrong.” (*Serrano v. Priest* (1977) 20 Cal. 3d 25, 49.) This determination can be made based on errors of law, or errors of fact impairing a proper determination of a matter of law. (*Miyamoto v. Dep’t of Motor Vehicles* (2009) 176 Cal. App. 4th 1210, 1218.) An appellant must demonstrate that the trial court’s discretionary opinion was unfounded in the record or in the law, and thus an arbitrary, illogical, or otherwise unjust decision properly fit for reconsideration.

The California Code of Civil Procedure §387 describes the process and requirements for permissive intervention. This statute has been judicially defined to require three conjunctive elements for the granting of permissive intervention status: (1) the intervenor has a direct and immediate interest in the litigation, (2) the intervention will not enlarge the issues in the case, and (3) the reasons for intervention outweigh opposition by the existing parties. (*Hinton v. Beck* (2009) 176 Cal. App. 4th 1378, 1382-83.)

B. The Superior Court has selectively applied case law failed to consider all the relevant facts in its application of the test for permissive intervention.

The sitting judge has broad discretion in granting intervenor status. (*US Ecology, Inc. v. State of California* (2001) 92 Cal.App.4th 113, 139.) This discretion should be exercised through a fact specific treatment under the three factors. (*City and County of San Francisco v. State* (2005) 128 Cal. App. 4th 1030, 1036.)

The Superior Court improperly applied the test when it failed to consider crucial facts in favor of Samuelson and Mara's Hope. The Superior Court also failed to consider the most factually similar case law. In doing so, the Superior Court came to an arbitrary opinion by denying the respondents permissible intervention.

1. The Intervenor Has a Direct and Immediate Interest in the Litigation.

The Superior Court abused its discretion by not considering all the relevant case law addressing the intervenors' direct and immediate interests in the litigation. The Superior Court only noted that California case law does not require that it be a pecuniary interest, but did not define the terms 'direct and immediate' any further. (*San Bernardino County v. Harsh Cal. Corp.* (1959) 52 Cal.2d 341, 345; CT at 24.)

A finding of direct and immediate interest has abundant precedent in California that the Superior Court did not consider. A direct and immediate interest can be drawn from a party's prior engagement in the "procedural context" with the same parties and issues during the administrative process. (*Royal Indem. Co. v. United Enterprises, Inc.* (2008) 162 Cal. App. 4th 194, 204; *Highland Development Co. v. City of Los Angeles* (1985) 170 Cal.App.3d 169, 180 *disapproved of on other grounds by Morehart v. County of Santa Barbara* (1994) 7 Cal.4th 725.) There is also no requirement for the intervenors to show a specific legal or equitable interest. (*Bustop v. Superior Court* (1977) 69 Cal.App.3d 66, 70-71.) Furthermore, §387 should be liberally construed to allow intervention in the interest of fairness. (*Fireman's Fund Ins. Co. v. Gerlach* (1976) 56 Cal.App.3d 299, 302.)

In *Highland Development v City of Los Angeles*, a group of homeowners in a historic district and the chairman of their board actively participated in an administrative hearing on a zoning issue between the city and the developer. The California Court of Appeal, second district, held that the involvement of both the chairman of the board and the homeowners association was sufficient on its own to constitute a direct and immediate interest under §387. (*Highland* 170 Cal.App.3d at 180.) This case is the most factually similar to the instant case, but was not considered by the Superior Court. Samuelson and Mara's Hope similarly demonstrated a direct interest by initiating, attending, and supplying the evidence for the administrative hearing by the Department against the Circus. (CT at 13-16.) Samuelson and his secretary were instrumental in bringing this litigation to the attention of the Department and initiating the administrative process. (CT at 11-13.) Samuelson himself was in attendance at the hearing. (CT at 16.)

As for Mara's Hope, its mandate to "advocate for the protection of wildlife in the United States and elsewhere" was executed by Samuelson when he submitted the formal complain in both his name and the name of Mara's Hope. (CT at 9, 13.) None of these significant facts were discussed by the Superior Court in terms of a 'direct and immediate' interest. As a result, the final discretionary decision to deny intervenor status to both Samuelson and Mara's Hope was an abuse of discretion by the Superior Court.

The fact that Samuelson and Mara's Hope do not have a legal or equitable interest in the outcome of the case does not preclude them from having a direct and immediate interest. In *Bustop v Superior Court*, the court allowed the parents of children in a school facing segregation issues to intervene because they demonstrated an interest "in a sound education system and in the operation of that system in accordance with the law." (*Bustop* 69 Cal.App.3d at 71.) Similarly, both intervenor applicants, through their advocacy at the administrative level, demonstrated their interest for a sound animal treatment and in the operation of that system in accordance with Hobbs County's regulations. The Superior Court neither considered the principles from this case nor the applicability of this standard.

The Superior Court goes on to note that Samuelson and Mara's Hope do not have an interest in the litigation because they do not work with or care for elephants. The Superior Court erred by not considering that the Hobbs County statute is not aimed at elephants specifically, but generally at "any wild, exotic, dangerous or non-domestic animal or reptile" being exhibited in Hobbs County in a "circus, exhibition, television or movie production, act, display, or any other lawful exhibit." (Exhibit 2.) Samuelson has more than twenty years experience as a caretaker for abandoned performing animals

through his work at the Pranayama Animal Sanctuary and through his founding of Mara's Hope. (CT at 8.) Likewise, Mara's Hope is a sanctuary for a variety of animals that were discarded by the entertainment industry. (CT at 9.) Both of these facts draw a direct and immediate interest in the litigation between the Circus and the Department, but were not considered by the Superior Court. As such, the Superior Court failed to liberally construe the facts and come to a fact-specific decision, as required.

There is also a strong public policy concern specifically related to public interest and animal rights groups, which seek to intervene in civil litigation. California case law on intervening parties has developed largely on issues where the objects in contention are pecuniary or non-living property. However, the Court of Appeal has acknowledged that intervenors have a "singular and indeed unique" interest where they are a public interest group; where the original parties did not have an interest in preserving a stretch of Redwood forest, the Court of Appeal found that the circumstances "powerfully militates in favor of intervention." (*Simpson Redwood Co. v. State of California* (1987) 196 Cal.App.3d 1192, 1204.)

This principle should be extended to animal rights litigation. This case began at the administrative level where the only legal rights violated were those of the Elephants. Since Elephants, like Redwood forests or any other natural objects, cannot retain counsel or achieve standing as litigants, public interest intervenors fill an important void to ensure that the legal interests of the animals caught in the litigation are safeguarded. In this case, where the Circus has not remedied the condition of the Elephants for which it was initially charged by the Department, the need for a party to consider the ongoing violation

of the Elephants' rights is crucial in coming to a fair decision on the issue as a whole.
(CT at 47.)

2. The intervention will not enlarge the issues in the case.

The Superior Court abused its discretion by making an unsupported finding on the scope of the issues Samuelson and Mara's Hope intended to present. When intervention is by permission, the intervenors cannot add any new issues in addition to those raised by the original litigants. (*Kuperstein v. Superior Court* (1988) 204 Cal.App.3d 598, 600.)

The court expressed its opinion on this branch of the test in this way:

It appears to this Court that the only ostensible interest of Mara's Hope and Samuelson in the litigation (whether considered jointly or separately) relates to the practice of animals performing in circuses or related activities generally. As such, their intervention would result in a broader consideration of the moral and ethical issues relating to performing animals, which this Court believes is not a necessary or proper consideration in resolving this dispute.
CT at 24.

In coming to this decision, the trial court did not consider numerous important facts in the record. The basis of the Department's decision to revoke the Circus's permit is the *Hobbs County Municipal Code*, aimed at protecting performing animals. (CT at 18.) The substance of each of the issues in this appeal relate directly to the mistreatment of performing animals. As such, the Superior Court abused its discretion by not considering the following key facts; first, it failed to consider that Samuelson and Mara's Hope are highly experienced with performing animals and have extensive knowledge of the issues animals face when displaying symptoms of stress and mistreatment. (CT at 8-9.); second, it failed to consider that the Hobbs County statute and the specific findings of the Department are, by their nature, ethical concerns about animal welfare enacted as legal rights for animals (*see* Exhibit 2); third, there is nothing in the record to suggest that

either Samuelson or Mara's Hope are ethically or morally opposed to the use of performing animals by this Circus or any other circus. A consideration of these three important facts, which the Superior Court ignored, suggests that both Samuelson and Mara's Hope will not enlarge in the issues in the litigation because their interest in the rights of performing animals are at the core of the substantive issues raised by the litigation.

The involvement of the intervenors will not enlarge the issues in the litigation. The *Hobbs County Municipal Code* §63.14, as stated in its preamble, is aimed at those who are "keeping, maintaining, and exhibiting" animals—not merely exhibiting. Whether the Circus exhibits its three oldest elephants or not, the mistreatment of those elephants remains a live issue insofar as the Department's application of the ordinance is concerned. Thus, even if the Circus does not perform those elephants, the intervenors will not be enlarging any of the issues in the litigation.

3. The reasons for intervention outweigh opposition by the existing parties.

The Superior Court, finding that both intervenors did not satisfy the first two branches of the test, did not consider the final part of the test in any detail. Based on the record as a whole, it is clear that reasons for Samuelson and Mara's Hope's intervention will outweigh the opposition by both existing parties.

The reasons for intervention are to represent and protect the legal rights of the mistreated elephants in question. The opposition of the Circus is based on a mischaracterization of the intervenors' interests and broad speculation as to the nature of their submissions. (CT at 20-21.) Had the Superior Court fully and appropriately explored the first two branches of the test, it could have formed an accurate factual basis

for finding that both Samuelson and Mara's Hope's reasons for intervention outweighed the opposition by the Circus.

There is nothing in the record to indicate that the Department has raised any opposition to the continued involvement of Samuelson and Mara's Hope in this litigation. To the contrary, the two parties have, for the purpose of this appeal, made their submissions jointly in order to clarify their position.

The Superior Court abused its discretion by failing to consider the relevant principles of law and the relevant facts in the record. By failing to do so, the respondents on appeal are entitled to a finding that the Superior Court be instructed to reconsider his discretionary opinion in accordance with the ruling of this court.

II. THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION IN DENYING CIRCUS'S MOTION FOR PRELIMINARY MANDATORY INJUNCTIVE RELIEF.

A. Standard of Review.

Preliminary injunctive relief can only be granted pursuant to the fulfillment of two separate and distinct conditions. "The first is the likelihood that the plaintiff will prevail on the merits at trial. [(*Salsedo v. California Department of Parks and Recreation* (2009) 175 Cal.App.4th 1510.)] The second is the interim harm that the plaintiff is likely to sustain if the injunction were denied as compared to the harm that the defendant is likely to suffer if the preliminary injunction were issued." (*Best Friends Animal Society v. Macerich Westside Pavilion Property LLC* (2011) 193 Cal.App.4th 168, 174; *IT Corp. v. County of Imperial* (1983) 35 Cal.3d 63, 69–70, 196 Cal.Rptr. 715, 672 P.2d 121; accord *White v. Davis* (2003) 30 Cal.4th 528, 554, 133 Cal.Rptr.2d 648, 68 P.3d 74.)

In determining the merits of the plaintiff's case, the court must consider that the

Department has discretion to revoke a permit, particularly where any provision of the *Hobbs County Municipal Code* has been violated. (*Vaughn v. Board of Police Commissioners* (1943) 59 Cal.App.2d 771, 775.) In making a determination on the appropriateness of the exercise of the Department's discretion, courts are to interpret California's animal protection statutes by an objective definition. (*People v. Speegle* (1997) 53 Cal.App.4th 1405.)

The balancing of harm to the plaintiff as compared to the defendant must take into account the gravity of public harm in addition to the individual harm that may be sustained by either party. (*IT Corp. v. County of Imperial* (1983) 35 Cal.3d 63, 70-72; accord *Water Replenishment District of Southern California v. City of Cerritos* (2013) 220 Cal.App.4th 1450, 1462-63; *People of the State of California v. Totter*, 2008 WL 5452672.)

B. The Circus failed to establish a likelihood that it will prevail on the merits at trial.

The Circus has violated the *Hobbs County Municipal Code* (Code), which rightly grants the Department grounds to exercise its discretion to revoke the permit, previously issued under the assumption that Circus was not in violation of the Code. The Department has complied with §§63.14 (B) of the Code, and thereby followed the procedure required in exercising its discretion to revoke the Circus's permit.

The Superior Court erred in finding that Circus was not in violation of §§63.14 (A)(i)-(ii) of the Code; the Circus is in violation of §§63.14 (A)(i)-(iii) and (vii).

The Code states, in pertinent part:

- i. Make available medical records and health certificates for all animals, including proof that within the past twelve months a trunk wash culture was performed on any elephant on display that the elephant tested free of tuberculosis.

- ii. Utilize appropriate transport vehicles and transfer cages when moving them to the exhibition location.
- iii. Specify any permits previously held in any other city, county or state that have been revoked by the issuing agency at any time within the past three years.
-
- vii. Be in compliance with the requirements and prohibitions set forth in the California Penal Code relating to animals, including §§596.5 and 597t, irrespective of whether the applicant or permit holder has ever been charged with any criminal violation of such statutes.
Hobbs County Municipal Code, §63.14.

1. The Circus violated §63.14 (A)(i).

The Code not only requires that medical records and health certificated for all animals be made available, but also that the elephants on display be shown to be free of tuberculosis. The Superior Court found that because the Department had not made request for documentation and been outright refused, that Circus did not violate this section. (CT at 38.) This conclusion fails to acknowledge that there is a second requirement concerning tuberculosis.

The notice for a hearing made out to the Circus by the Department on September 27, 2013 directed the Circus to the Code, with which Circus's compliance was to be considered. Not only has the Department conducted a hearing to revoke the permit, but Circus has also appeared before the Superior Court. In none of these proceedings has Circus made available medical records and health certificates.

Additionally, the report from West Edmond, Texas, Dated June 21, 2011 (Exhibit 1) states, "Not all medical records were provided, despite request. However, the available medical records revealed that two of the elephants were treated in the past two years for possible tuberculosis, and leg lameness." Despite a prior finding of possible tuberculosis, the Circus has not to date made available evidence to the contrary. It is common knowledge that tuberculosis, an infectious disease, does not cure or manage itself without

proper treatment. The Department had grounds to suspect that the elephants may be infected with tuberculosis during the hearing it held prior to revoking the Circus's permit; it continues to hold its suspicion since the Circus has yet not established otherwise.

To be free from tuberculosis is a requirement of §63.14 (A)(i) of the Code and regardless of having attended a hearing with the Department and having made a request for preliminary injunctive relief, the Circus has failed to rebut the suspicion that was brought to the attention of the Department. Accordingly, the Circus has failed to make available the required documentation, and thereby, is in violation of §63.14 (A)(i).

2. The Circus violated §63.14 (A)(ii).

The Circus failed to use appropriate transport vehicles. California has opted to have a compliance provision requiring "appropriate" transportation, which is above the American Zoo and Aquarium Association's requirements that state, "There are no specific standards for the transportation of elephants at this time." (Standards for Elephant Management and Care, §1.4.13, adopted 21 March 2001 [updated 5 May 2003]. (2003).) The Department is thereby granted discretion to determine what appropriate consists of by an objective standard. (*People v. Speegle* (1997) 53 Cal.App.4th 1405.) The Superior Court completely disregarded the evidence presented, particularly on the size of the transport vehicles, which establish the Circus's failure to comply with §63.14 (A)(ii) of the Code. (CT at 38.)

The Circus stipulated that there is on average 350 square feet of space per elephant who remains tethered for the entirety of a journey, recorded at least on one occasion to last approximately 30 hours. (CT at 16.) Additionally, in the same West Edmond, Texas, report containing the set of facts that the Circus stipulated to, it was

found that:

Prior to being unloaded from their cars, several of the elephants demonstrated stereotypic behavior of stress, such as exaggerated swaying from side to side. Such stereotypic behaviors can result in nail cracks, caused by abnormal pressure on the nails ... All five elephants appear stiff and unsteady upon being unloaded, with diminished range of motion. The elephants appeared fatigued and showed no interest in their surroundings. Exhibit 1.

The Department relied on facts in support of its finding that the transport vehicles were not appropriate. The observations of evaluators in West Edmond, Texas, refer to stereotypic behaviors of stress, which is demonstrative of an objective determination; Exhibit 1 is in support of the Department's objectively sound determination of inappropriate transportation vehicles.

3. The Circus violated §63.14 (A)(iii).

The Superior Court rightly agreed with the Department's determination that the Circus violated §63.14 (A)(iii) of the Code. "The Circus should have disclosed that its West Edmond permit was not re-issued following preparation of the 2011 West Edmond veterinarian report. West Edmond's refusal to re-issue the permit was, as the Department points out, akin to a revocation." (CT at 37.) The Code only uses the term "revoke" and not both "revoke" and "renew." This is dispositive that in the application of the Code, there is no procedural difference between revocation and failure to re-new, failure to re-issue, or let suspend. Where other California legislation has intended to distinguish between the two terms, both the terms revoke and renew have been used. (See *Don v. Van de Kamp* (1989) 216 Cal.App.3d 348, 359.) Therefore, the Circus's failure to notify the Department of West Edmond's refusal to re-issue its permit constitutes a violation of §63.14 (A)(iii).

4. The Circus violated §63.14 (A)(vi) by failing to remain in compliance with §§596.5 and 597t of California's Penal Code.

Even if no charges have been laid, the Circus must be in compliance with §§596.5 and 597t of the *Penal Code*.

The Superior Court erred in finding that the Circus was not in violation of §596.5 of the *Penal Code*, which addresses engaging in “abusive behavior towards the elephant.” The Superior Court found that because the two youngest elephants were in “adequate condition” according to the West Edmond, Texas, report, and that the Circus had offered not to perform the three eldest elephants, the Circus was not in violation of §596.5. (CT at 41.) This conclusion changes the requirements of the *Penal Code* by making it applicable only to elephants being used in performances whereas §596.5 says nothing about performance; it covers all owners and managers of an elephant, regardless of what activity the elephant is to engage in.

The West Edmond, Texas, report, which cannot be summarized by merely “adequate condition,” found that:

During Performance rehearsal: ... The performances of the younger two elephants were completed without hesitation or noticeable signs of discomfort. **These two elephants seemed disinterested during the performance and performed mechanically. The three oldest elephants approached the rehearsal area slowly and exhibited stiffness and an observable degree of lameness.** However, when they began performing at a rapid pace, these issues became less noticeable. Despite the increased pace during performing, **the oldest elephant showed reluctance to perform hind leg stands.**

.....
Review of medical records: ... **All five elephants had been treated for nail cracks, with the three oldest elephants (ages 32, 25 and 40) having been treated for varying degrees of arthritis ... All elephants are receiving non-steroidal anti-inflammatory drugs (NSAIDs). The oldest elephant had been treated for chronic severe nail bed abscesses.**

[emphasis added]

Exhibit 1.

Abuse by an objective standard encompasses being led to engage in an activity that deteriorates health. None of the elephants are interested in performance and furthermore, the type of activity the elephants are being forced to do is causing each and every single one of them to require NSAIDS. The number of performances done by the three eldest, which have been owned and displayed by the Circus for between 6-12 years (Exhibit 2), has resulted in their reluctance to perform hind leg stands; this is evidence that the physical condition of the youngest elephants is being negatively impacted with every performance. Additionally, all of the elephants have acquired nail cracks while the eldest suffer from chronic severe nail bed abscesses, which is indicative of the abusive conditions the elephants are forced to endure. The elephants demonstrate symptoms of emotional and physical abuse. The Department correctly determined that the Circus was not in compliance with §596.5 of the *Penal Code*, rendering it in violation of §63.14 (A)(vi) of the *Hobbs County Municipal Code*.

Furthermore, the Circus is not in compliance with §597t of the *Penal Code*, as decided by the Superior Court. (CT at 40.) Section 597t states:

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.
Cal. Pen. Code, §597t.

The Circus stipulated that the elephants are kept in the transportation cars while not engaged in an activity related to performance; they are kept tethered in dimensions

providing 350 square feet per elephant (Exhibit 1). (CT at 16 and 40.) The minimum standard for indoor space is 400 square feet of space per animal. (American Zoo and Aquarium Association Standards for Elephant Management and Care, §1.4.1, adopted 21 March 2001 [updated 5 May 2003].) Additionally, the “AVMA [American Veterinary Medical Association] only supports the use of tethers for the shortest time required for specific management purposes.” (AVMA, Policy addresses use of elephant guides, tethers-June 1, 2008, located at www.avma.org [posted 15 May 2008].) “The policy is consistent with the Department of Agriculture's expectations for use of elephant guides and tethers in zoos, circuses, exhibitions, and other activities covered under the Animal Welfare Act.” (*Id.*) The Circus fails to provide the elephants with adequate exercise area and restricts them in a way that does not prevent injury, and thereby contains them in a manner contrary to the *Penal Code*. The Superior Court’s agreement with the Department was well grounded in evidence.

There is no likelihood that the Circus, by an objective standard, will prevail on the merits of the case at trial. The Department, in exercising reasonable and sound discretion, has the authority to revoke the Circus’s permit upon the finding of a single violation of the *Hobbs County Municipal Code*. (§63.14 (B)(iv).) The Circus is in violation of §§63.14 (A)(i)-(iii) and (vii) of the *Code*; however, if the Court of Appeal should disagree and find that only one or more of the provisions have been violated, the Superior Court’s decision must nevertheless be upheld.

C. The harm that the Department is likely to suffer if the preliminary injunction were issued is greater than the harm that the plaintiff is likely to sustain if the injunction were denied.

As the Superior Court correctly determined, the Circus has not provided evidence that, in balance, it will suffer more harm than the Department if a preliminary injunction

is not granted. (CT at 46.) The broader public interest in the matter before the court must be given significant weight in addition to the individual litigants' position. (*IT Corp. v. County of Imperial* (1983) 35 Cal.3d 63, 70-72; accord *Water Replenishment District of Southern California v. City of Cerritos* (2013) 220 Cal.App.4th 1450, 1462-63; *People of the State of California v. Totter*, 2008 WL 5452672.)

The Department is to ensure the enforcement of its county's local ordinance, which includes the *Hobbs County Municipal Code*. The Superior Court appropriately determined that,

“While permit revocation may be a harsh remedy, it is the only remedy that effectively addresses the violations discussed above. Moreover, as the record demonstrates, the Department is subject to complaints by its citizens if it fails to enforce the Hobbs County ordinances and, undoubtedly, would be subject to protracted litigation if a citizen were to be harmed as a result of lax enforcement.”

CT at 46.

Not only does issuing a preliminary injunction undermine the authority of the Department, but it also frustrates the intended purpose of the *Code*. The Department is the body charged with issuance and revocation of permits. Where it has satisfied all procedural requirements, it would be of greater harm as a matter of public policy to ignore its determinations. Additionally, providing animal safety is the intended purpose behind the existence of the Department. As the provisions of §63.14 of the *Code* elicit through their reference to medical records, prior history, the *Animal Welfare Act Regulation*, federal Law, and the *Penal Code*, the Code encompasses safety to persons and animals. The Circus has failed to meet the minim standard of care required to maintain its permit privileges; granting a preliminary injunction so that the Circus can partake in the exact activity that it has been determined unfit subjects the elephants to a

safety risk.

Awarding a preliminary injunction in this instance establishes a precedent that will result in protracted litigation, causing greater financial strain on the Department than the Circus has potential to gain. The Circus has only provided one figure—that of \$95,200 in net revenue earned during its September 2013 visit, while it has in fact had seven years of performances in Hobbs County. This figure on its own is inadequate to allow for an accurate calculation of lost profit should it not be allowed to perform its April, and not necessarily its September, performance (as the trial is set to begin on May 19, 2014). The court should consider the impact of its decision on the financial strain that will be placed on the Department if every unsatisfied individual is given a green light to seek preliminary injunction when its permit has been justifiably revoked. The perpetual future harm to the Department outweighs any one-time financial strain placed on the Circus due to the Circus's own failure to comply with the *Code*.

Furthermore, as presented in Argument I above, Samuelson and Mara's Hope have an interest that ought to be considered in the balancing of harm. As citizens of Hobbs County whose complaints the Department is subject to, Samuelson and Mara's Hope are also harmed when the enforcement of the *Code* is made lax. Citizens of Hobbs have an interest in the proper enforcement of their county's ordinances, as they themselves are subject to the laws they seek to be enforced.

The Circus has not come to seek equity with clean hands and therefore cannot be awarded with equity. It is the Circus's own violation of the *Code* and later failure to rectify that has resulted in the revocation of its permit. It is only if the preliminary injunction is denied, and the Circus actually prevails on the merits of its case at trial, that

the Circus will have sustained any harm at all. The interests of the Department as well as the citizens of Hobbs County to have their laws enforced outweigh the economic harm that the Circus may withstand.

CONCLUSION

For the reasons stated above, the Superior Court's judgment should be reversed in part and affirmed in part. The Court of Appeal should reverse the order of the Superior Court's judgment by granting intervenor status to Chris Samuelson and Mara's Hope Wildlife Sanctuary. The Court of Appeal should affirm the Superior Court's judgment denying Grandlands Circus, Inc., preliminary injunctive relief.

Dated January 17, 2014:

Respectfully Submitted,

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