

NO. 13-9876

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

GRANDLANDS CIRCUS, INC.,

Appellant/Cross-Respondent,

vs.

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

BRIEF FOR RESPONDENT

ORAL ARGUMENT REQUESTED

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STATEMENT OF ISSUES PRESENTED

- I. Did the superior court abuse its discretion in denying Mara Hope and Samuelson's motion for leave to intervene?
- II. Did the Superior Court abuse its discretion in denying Circus's motion for preliminary mandatory injunctive relief?

STATEMENT OF THE CASE

Grandlands Circus (hereinafter "Circus" or "Appellant") filed a Complaint in the Superior Court of the State of California for the County of Hobbs against the Hobbs County Animal Safety Department (hereinafter "Department") on October 11, 2013, seeking relief in the nature of mandamus and money damages resulting from lost profits the Circus alleged it will suffer after the Department revoked the 12-month permit Performing Animal Permit (hereinafter "Permit") issued to the Circus.

Chris Samuelson (hereinafter "Samuelson"), an individual and Mara's Hope Wildlife Sanctuary (hereinafter "Mara's Hope" or "Sanctuary") filed a motion for leave to file a complaint in intervention in this matter under California Code of Civil Procedure § 387.

Circus filed a motion for a preliminary mandatory injunction seeking an order compelling the Department to re-issue the Permit the Department revoked on October 7, 2013.

The Honorable Ellis M. Heiberg of the Superior Court of Hobbs County, California denied both Circus' motion for preliminary mandatory injunction and Samuelson and Sanctuary's motion to intervene. Circus appealed the Superior Court's denial of its motion for a preliminary mandatory injunction. Samuelson, Mara's Hope, and the Department (hereinafter collectively "Respondents") oppose Circus' appeal and have cross-appealed the Superior Court's denial of their motion to intervene.

STATEMENT OF FACTS

Appellant Circus operates a traveling circus. In 2013, the Circus performed in 22 cities and counties throughout the United States. R. at 3. The Circus exhibits both animal and human acrobatic performances. R. at 3. The Circus currently uses lions, tigers, elephants, and horses in its performances and uses transportation cars to take its animals from locale to locale. R. at 3.

The Circus has performed in Hobbs County for the past seven years. R. at 4. The Circus performances in Hobbs county take place twice per year, in April and September. R. at 2. When in Hobbs County, the Circus has performed twice a day with each performance lasting approximately ninety minutes. R. at 4. In September 2013, the Circus' visit to Hobbs County lasted 17 days and earned approximately \$95,000 in net revenue. R. at 4.

In order to perform in Hobbs County in any given year, the Circus must request and be granted a Permit from the Department. R. at 4. The Department has issued the Circus a Permit each June for the past seven years. R. at 4. However, on October, 7, 2013, the Department revoked the Permit it had issued to the Circus in June of 2013 after finding the Circus had violated provisions of Hobbs County Municipal Code §63.14 (hereinafter "the Code"). R. at 2.

The Department scheduled an evidentiary hearing on September 27, 2013, to address an administrative complaint filed by Samuelson and Mara's Hope alleging the Circus had violated the provision of the Code that set forth requirements for Permits. R. at 6. Samuelson's employee, Penny Hall, had visited the Circus in April 2012 and observed that the animals appeared thin and tired. R. at 5. Ms. Hall had also noted that the Circus had for a time, but no longer, visited her home town of West Edmond, Texas. R. at 5. Samuelson later found that West Edmond refused to renew the Circus' Permit in January 2012, based on a veterinary report completed in 2011 by West Edmond Animal Care and Control (hereinafter "the Report"). R. at

6-7. Samuelson attached the Report as evidence of the violation Hobbs County Municipal Code regarding Permits. R. at 6.

The Report focused on the Circus's elephants. R. at 5. In the Report, the evaluator noted that "several elephants demonstrated stereotypic behavior of stress, such as exaggerated swaying from side to side." Exh. 1 at 1. The evaluator further noted all five elephants did "appear stiff and unsteady upon being unloaded, with diminished range of motion." Exh. 1 at 1. The evaluator also found the animals were tethered in their transport cars during the duration of each journey, "the most recent journey being approximately 30 hours." Exh. 1 at 1. Per the Report, the elephants were transported in cars that allowed each animal approximately 350 square feet, 50 square feet less than the amount of space outlined in the Association of Zoos and Aquariums' (hereinafter "the AZA") Standards for Elephant and Management Care §1.4.1. The AZA discourages subjecting elephants to prolonged chaining, which it defines as the majority of a 24 hour period. AZA standard §5.5.1.

The elephants perform for approximately three hours per day (R. at 4.), and warm up and cool down for approximately four hours per day. Exh. 1. at 1. The elephants are tethered in their transportation cars for the remaining seventeen hours of each day, a practice that contravenes the standards of the American Veterinary Medical Association (hereinafter "the AVMA"). Exh. 1 at 1. The AVMA "only supports the use of tethers for the shortest time required for specific management purposes." Exh. 1 at 2.

Circus also failed to provide the evaluator with complete medical records for the elephants, as requested. Exh. 1 at 2. The records Circus did provide showed two of the elephants were treated for possible tuberculosis and leg lameness. Exh. 1 at 2. The three older elephants were treated for arthritis. Exh. 1 at 2. Additionally, the evaluator concluded that the three oldest

elephants should be retired, and that “all of the elephants are exposed to forced, non-species typical behaviors that include rigorous and repetitive activities.” Exh. 1 at 2.

In the hearing held by the Department, Circus admitted that “the information contained in the medical records, the measurements regarding the transportation cars, and the noted duration of travel time and time spent in the transportation cars [is] generally accurate.” R. at 7. Circus also failed to provide medical records to the Department in connection with its June 2013 Performing Animal Permit application. R. at 7.

On October 7, 2013, the Department revoked Circus’s Permit prohibiting Circus from performing in Hobbs County in April 2014. Gall Springs, a nearby city, has demonstrated a willingness to serve as an alternate location for the Circus in April. R. at 7. The Department found Circus to be in violation of the Code, subdivisions (A)(i)-(iii), and California Penal Code §§ 596.5 and 597t. R. at 7.

STANDARD OF REVIEW

The granting or denial of a preliminary injunction is within the discretion of the trial court, and its order may be reversed on appeal only if an abuse of discretion is shown. *Socialist Workers etc. Committee v. Brown*, 52 Cal. App. 3d 879, 887 (1975). However, the resolution of factual disputes is reviewed under the substantial evidence rule and the resolution of legal issues is reviewed de novo. *Best Friends Animal Society v. Maerich Westside Pavillion Property LLC*, 193 Cal. App. 4th 168, 174 (2011).

An order denying leave to intervene is reviewed under the abuse of discretion standard. *City and County of San Francisco v. State of California*, 128 Cal. App. 4th 1030, 1036 (2005).

SUMMARY OF THE ARGUMENT

Mara's Hope and Samuelson each have a right to intervene because both have an interest in the outcome of this matter. Furthermore, intervention will provide for enforcement of the law, further judicial efficiency, and further the policies behind Hobbs County Municipal Code § 63.14. Circus' violations of Federal law will be addressed only if the court allows intervention by Samuelson and Mara's Hope. Circus is violating both the Endangered Species Act and the Animal Welfare Act through its abusive treatment of the elephants it exhibits.

Samuelson and Mara's Hope both meet the requirements necessary for the right of intervention. Samuelson has a unique interest in this matter because he devotes his time and energy to the protection of wildlife through advocacy and through his care for the animals at Mara's Hope. Mara's Hope has an interest in this matter because it advocates on behalf of its subscriber/members' interest and it also has a pecuniary interest in the matter. Without their intervention, it is likely that their interests will be impaired. The Hobbs County Animal Safety Department cannot adequately represent Samuelson's and Mara's Hope Wildlife Sanctuary's Interest in this Matter. Therefore, the Court should find that intervention in this matter is proper.

The trial court did not abuse its discretion in denying Grandlands Circus' motion for preliminary injunction because Circus fails to meet the requirements for the granting of a preliminary mandatory injunction. Circus is unlikely to succeed on the merits. Furthermore, the Department will suffer more harm from the preliminary injunction being granted than Circus will suffer if the injunction is denied.

The Department exercised its reasonable and sound discretion when it revoked circus' permit for violations of Hobbs County Municipal Code § 63.14. The Circus violated subdivision (A)(i) of the code when it failed to provide adequate medical records despite having the

opportunity to do so when it applied for the permit and during the hearing conducted on September 23, 2013. The trial court also rightly found that Circus violated Hobbs County Municipal Code § 63.14(A)(iii) by failing to notify the Department that West Edmond Texas refused to renew their Permit in January 2012. Furthermore, Circus violated Hobbs County Municipal Code § 63.14(A)(ii) and California Penal Code §§ 596.5 and 597t by not providing proper transport vehicles when transporting the elephants to exhibition locations.

Circus is also unlikely to suffer irreparable harm if the preliminary mandatory injunction is not granted. Circus will not suffer irreparable harm because Gall Springs is an adequate alternate venue to host the circus during April 2014. Additionally, granting the preliminary injunction would prevent the Department from fulfilling its duties to protect the animals and people within its jurisdiction. Therefore, the Court should not overturn the trial court's decision to deny Circus' motion for preliminary mandatory injunction.

ARGUMENT

I. THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING MARA'S HOPE AND SAMUELSON'S MOTION TO INTERVENE BECAUSE BOTH HAVE A RIGHT TO INTERVENE.

Samuelson and Mara's Hope each assert a statutory right to intervene in this matter. The law allows for two types of intervention: permissive and unconditional. *Mylan Labs. v. Soon-Shiong*, 76 Cal. App. 4th 71, 77 (Cal. App. 2d Dist. 1999). Under California Code of Civil Procedure § 387(a), the right to intervene "is permissive when a person has an interest in the matter in litigation, or in the success of either of the parties, or an interest against both of the parties. *Id.* at 77-78. Under § 387(b), the right to intervene "is unconditional when the person seeking intervention 'claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a

practical matter impair or impede the applicant's ability to protect that interest, and and the interest is not being adequately represented by existing parties.” California Code of Civil Procedure § 387 was adopted “to protect the interests of persons affected by a judgment, to obviate delay, and to avoid multiplicity of actions.” *Deutschmann v. Sears, Roebuck & Co.*, 132 Cal. App. 3d 912, 915 (Cal. App. 2d Dist. 1982).

The language of § 387(b) mirrors the language of Rule 24(a) in the Federal Rules of Civil Procedure. See Fed. R. Civ. P. Rule 24. When the language of a state statute mirrors that of a Federal statute “the Legislature must have intended that they should have the same meaning, force and effect as have been given the federal rules by the federal courts [citations].” *Hodge v. Kirkpatrick Development, Inc.*, 130 Cal. App. 4th 540, 556 (Cal. App. 4th Dist. 2005). As such, the policies behind intervention rulings in analogous Federal cases should be instructive here.

A. Intervention Will Provide for Enforcement of the Law, and Further Judicial Efficiency and the Policies Behind Hobbs County Municipal Code § 63.14.

Both the law and policy favor intervention in this matter. Samuelson and Mara’s Hope both have a right to intervene in this matter. Moreover, intervention ensures that the issues related to the Circus’ permit revocation are judiciously and efficiently addressed.

Samuelson and Mara’s Hope both have an interest in the protection of these elephants; therefore their interests align with those of the Department in enforcement of the Code. However, the Department and the lower court failed to address a number of the violations committed by Circus, including numerous violations of Federal Law and the California Penal Code which in turn create violations under the Code. By allowing Samuelson and Mara’s Hope to intervene, the court will allow for full litigation of these issues, in turn creating guidance for future matters and reducing the likelihood that these issues will require litigation in the

future. Moreover, this would further the policies behind the Department's enforcement of the Code and promote judicial efficiency.

The following are the violations that Samuelson and Mara would raise in this litigation:

1. Circus has violated Hobbs County Municipal Code § 63.14 (A)(v) through violations of Federal Law which will only be reviewed if the court allows intervention.

Subdivision A(v.) of the Code requires that permit holders be in compliance with all applicable Federal law; violation of these laws creates a violation of subdivision A(v.). The Circus is in violation of Federal laws as discussed subsequently and the court will not address these violations without intervention.

a. Circus' treatment of its elephants violates the Endangered Species Act.

Circus is harming its elephants in violation of several provisions of the Endangered Species Act (hereinafter "ESA"). The Circus is "taking" its elephants in violation of the ESA. See 16 U.S.C. § 1538(a)(1)(B). "[I]t is unlawful for any person subject to the jurisdiction of the United States to *take* any endangered species of fish or wildlife "within the United States or the territorial sea of the United States." 16 U.S.C. § 1538(a)(1)(B). Taking means to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19). There is no requirement that the harm to the species be intentional, and both direct and indirect harm can constitute unlawful "takes" of a listed species. *Am. Soc. for Prevention of Cruelty to Animals v. Feld Entm't, Inc.*, 677 F. Supp. 2d 55, 63 (D.D.C. 2009) *aff'd*, 659 F.3d 13 (D.C. Cir. 2011). The Asian elephant was listed as an "endangered species" pursuant to Section 4 of the ESA by the United States Fish and Wildlife Service, Department of Interior, on June 14, 1976. 41 Fed. Reg. 24062, 24066 (June 14, 1976);

Am. Soc. for Prevention of Cruelty to Animals v. Feld Entm't, Inc., 677 F. Supp. 2d 55, 63 (D.D.C. 2009) aff'd, 659 F.3d 13 (D.C. Cir. 2011).

Circus harming the elephants violates the ESA. A court could find Circus' practices have a negative impact on the health and well-being of its elephants. "All of the elephants are exposed to forced, non-species typical behaviors that include rigorous and repetitive activities." Exh. 1 at 2. "[S]everal of the elephants demonstrated stereotypic behavior of stress, such as exaggerated swaying from side to side." Exh. 1 at 1. "[T]he three oldest elephants are suffering from chronic pain, arthritis, and are effectively crippled ... [and] should be retired from performing." Exh. 1 at 2. Despite these findings, the Circus presumably continues these harmful practices. The only concession Circus offered during the Department's evidentiary hearing was "to not perform the three oldest elephants when in Hobbs County..." R. at 7. Because the Circus is causing physical and mental harm to its elephants it is in violation of the ESA.

b. Circus' treatment of its elephants violates the Animal Welfare Act.

The Animal Welfare Act (hereinafter "AWA") was enacted to protect "animals and to regulate their use for exhibition purposes or as pets as well as their use for research purposes." *Haviland v. Butz*, 543 F.2d 169, 172 (D.C. Cir. 1976). The AWA requires that animals used for exhibition must be provided "humane care and treatment." 7 USCS § 2131. Exhibitors under AWA include "carnivals, circuses, and zoos exhibiting such animals whether operated for profit or not..." 7 USCS § 2132(h).

The United States Department of Agriculture (hereinafter "USDA") promulgated the regulations that govern enforcement of the AWA. 57 Agric. Dec. 189, 190 (Agric. Dec. May 18, 1998). "Primary enclosures used to transport live animals shall be large enough to ensure that each animal contained therein has sufficient space to turn about freely and to make normal

postural adjustments: Provided, however, That certain species may be restricted in their movements according to professionally acceptable standards when such freedom of movement would constitute a danger to the animals, their handlers, or other persons. 9 CFR 3.137(c).” Handling of all animals shall be done as expeditiously and carefully as possible in a manner that does not cause trauma, overheating, excessive cooling, behavioral stress, physical harm, or unnecessary discomfort.” 9 C.F.R. § 2.131(b)(1). “Enclosures shall be constructed and maintained so as to provide sufficient space to allow each animal to make normal postural and social adjustments with adequate freedom of movement. Inadequate space may be indicated by evidence of malnutrition, poor condition, debility, stress, or abnormal behavior patterns.” 9 C.F.R. § 3.128.

The Report alleges that Circus is in violation of regulations regarding space and handling evidenced by the disposition of the elephants. “Prior to being unloaded from their cars, several of the elephants demonstrated stereotypic behavior of stress, such as exaggerated swaying from side to side.” Exh. 1 at 1. “The elephants appeared fatigued and showed no interest in their surroundings.” Exh, 1 at 1. The Circus violated § 2143 and the regulations promulgated for its enforcement by transporting its elephants in a stressful state, and in transportation cars with inadequate space. Confining elephants in spaces that are insufficiently large can cause elephants to suffer pain and experience chronic medical issues which can rise to level of abuse. (See *Culp v. City of L.A.*, 2009 Cal. App. Unpub. Lexis 7621, overruled on other grounds.)

In addition to the regulations regarding transportation the AWA grants the USDA authority to set recordkeeping requirements for exhibitors. See 7 USCS § 2140. The USDA requires that “[e]ach dealer or exhibitor ... establish and maintain programs of adequate veterinary care.” 9 C.F.R. § 2.40(b). This requires that veterinary medical records be available

for inspection. *In Re: John D. Davenport, d/b/a King Royal Circus.*, 57 Agric. Dec. 189 (Agric. Dec. May 18, 1998); *In Re: James Michael Latorres.*, 57 Agric. Dec. 53 (Agric. Dec. July 28, 1997). “It is not an unreasonable interpretation of 9 C.F.R. § 2.75(b)(1) for [an exhibitor] to be expected to carry copies of animals' records when the animals are being transported or the regulation would be ineffective for its purpose.” 57 Agric. Dec. 189 (Agric. Dec. May 18, 1998).

The Circus continuously failed to adhere to the USDA regulations regarding medical record keeping. First, Circus failed to provide complete medical records as requested by West Edmond. See Exh. 1 at 2. Additionally, Circus failed to present medical records when it made its application for a Permit in June 2013. R. at 7. Finally, the Circus had another opportunity to present its medical records when it appeared at the Department’s evidentiary hearing. Therefore, the Circus could be held in violation of the USDA regulations regarding medical record keeping and the AWA, charges left unaddressed without intervention.

Both the law and its policies support intervention by Samuelson and Mara’s Hope. The Sanctuary’s and Samuelson’s interest in the protection of these elephants align with those of the Department in enforcement of the Code. Further, the court will further the policy of judicial efficiency by resolving issues that should have been properly raised by the parties. Accordingly, the Court should grant intervention.

B. Samuelson and Mara’s Hope Both Meet the Requirements for the Right of Intervention.

CCCP § 387(b) states in pertinent part, the right to intervene:

is unconditional when the person seeking intervention ‘claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, and and the interest is not being adequately represented by existing parties.

California Code of Civil Procedure § 387.

An intervenor's interest under § 387 must be “direct and not consequential.” *Socialist Workers etc. Comm. v. Brown*, 53 Cal. App. 3d 879, 891, (Cal. Ct. App. 1975). Specifically, the interest in the litigation “must be ... of such a direct and immediate character that the intervener will either gain or lose by the direct legal operation and effect of the judgment.” *People ex rel. Rominger v. Cnty. of Trinity*, 147 Cal. App. 3d 655, 660, (Ct. App. 1983). However, that interest need not be pecuniary in nature. *San Bernardino Cnty. v. Harsh Cal. Corp.*, 52 Cal. 2d 341, 345 (1959). Further, “it is not necessary that his interest in the action be such that he will inevitably be affected by the judgment.” *Timberidge Enterprises, Inc. v. City of Santa Rosa*, 86 Cal. App. 3d 873, 881-882 (Cal. App. 1st Dist. 1978). “It is enough that there be a substantial probability that his interests will be so affected.” *Id.* Moreover, “where law does not usually allow for civil actions, the interests of an intervenor may warrant exception to the rule.” *In re Baby Girl A.*, 230 Cal. App. 3d 1611, 1618 (Cal. App. 4th Dist. 1991).

1. Both Samuelson and Mara’s Hope have the Requisite Interest for the Right to Intervene.

a. Samuelson’s devotion of time and energy to the protection of wildlife creates his requisite interest and right to intervene.

A proposed intervenor must have “some special interest to be served or some particular right to be preserved or protected over and above the interest held in common with the public at large.” *Holmes v. California Nat. Guard*, 90 Cal. App. 4th 297, 315 (2001). A political interest is not sufficient to permit intervention. *City and County of San Francisco v. State of California*, 128 Cal. App. 4th 1030, 1040 (Cal. App. 1st Dist. 2005). However, Court precedent “specifically recognizes that people have a cognizable interest in ‘viewing animals free from ...

inhumane treatment.”” *Animal Legal Def. Fund v. Glickman*, 154 F.3d 426, 433 (D.C. Cir. 1998); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562-63 (1992).

Samuelson has a special interest in this matter; he has made the care of wild and exotic animals and advocacy for protection of wildlife his life’s work. R. at 4. As such, Samuelson’s interest in protection of wildlife is directly affected by the Circus’s treatment of its elephants. Therefore, he has a special interest in the outcome of this matter. Furthermore, as a resident of Hobbs County, Samuelson has an interest in viewing the elephants free from inhumane treatment when the circus comes to Hobbs County. Consequently, he has an interest in the Circus’s compliance with laws regarding humane treatment of the elephants.

b. Mara’s Hope’s subscriber/members’ interest and its own pecuniary interest creates the requisite interest and right to intervene.

"Where [a statute] is expressly motivated by considerations of humaneness toward animals, who are uniquely incapable of defending their own interests in court, it strikes us as eminently logical to allow groups specifically concerned with animal welfare to invoke the aid of the courts in enforcing the statute." *Farm Sanctuary, Inc. v. Department of Food & Agriculture*, 63 Cal. App. 4th 495, 503 (Cal. App. 2d Dist. 1998) (quoting *Animal Welfare Institute v. Krepes*, 561 F.2d 1002, 1007 (D.C. Cir. 1977)). An organization that represents the interests of its members may intervene on behalf of those members who may be directly affected. *City and County of San Francisco v. State of California*, 128 Cal. App. 4th 1030, 1041 (Cal. App. 1st Dist. 2005); *People ex rel. Rominger v. Cnty. of Trinity*, 147 Cal. App. 3d 655, 663, 195 Cal. Rptr. 186 (Ct. App. 1983). Mara’s Hope’s subscription list include members who reside in Hobbs County; those members have an interest in ensuring the humane treatment of the animals they observe when attending the Circus’ performances. Therefore, Mara’s Hope has an interest

as an organization that represents the interests of members who subscribe to and donate to its advocacy efforts.

Further, Mara's Hope has sustained and continues to sustain concrete injury as a result of the Circus' mistreatment of its elephants. Such concrete and demonstrable injury to the organization's activities—with a possible consequent drain on the organization's resources—constitutes far more than simply a setback to the organization's abstract social interests. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379, (1982). Mara's Hope's primary purposes are to care for rescued animals and to educate its donors and the public on issues that affect wild and exotic animals held in captivity. In pursuit of its mission to protect animals from abuse, Mara's Hope is expending resources in an effort to hold the Circus accountable for its animal rights violations. However, Mara's Hope would direct its resources toward its other efforts if not for these violations. Therefore, Mara's Hope is sustaining a direct and concrete injury because it must expend resources that it would not if the circus were in compliance with the laws governing the care of its elephants.

2. Samuelson's and Mara's Hope's Interests May Be Impaired if Not Allowed to Intervene.

Where a proposed intervenor has shown a “a significant protectable interest, [court had] little difficulty concluding that the disposition of this case may, as a practical matter, affect it. *California ex rel. Lockyer v. United States*, 450 F.3d 436, 442 (9th Cir. 2006). Both Samuelson and Hobbs. Moreover, that interest may be impaired if the proposed intervenor has no other adequate means to protect that interest. *United States v. Alisal Water Corp.*, 370 F.3d 915, 921 (9th Cir. 2004) (Where a party may file a separate suit to protect his interests, his interest is not impaired).

Here, both Samuelson and Mara's Hope have both demonstrated a significant protectable interest. Furthermore, Samuelson and Mara's Hope cannot bring a separate action to protect their

interests. Therefore, Samuelson and Mara's Hope have a significant interest that may be impaired by the outcome of this matter.

3. The Hobbs County Animal Safety Department cannot adequately represent Samuelson's and Mara's Hope Wildlife Sanctuary's Interests in this Matter.

“In considering inadequacy of representation, the court should consider ‘(1) whether the interest of a present party is such that it will undoubtedly make all the intervenor's arguments; (2) whether the present party is capable and willing to make such arguments; and (3) whether the would-be intervenor would offer any necessary elements to the proceedings that other parties would neglect.’” *Ctr. for Biological Diversity v. Kempthorne*, C 08-1339 CW, 2008 WL 4542947 (N.D. Cal. Oct. 2, 2008) (quoting *Nw. Forest Resources Council v. Glickman*, 82 F.3d 825, 838 (9th Cir.1996)).

Here, the Department is unlikely to make all the arguments made by Samuelson and Mara's Hope. Samuelson and Mara's Hope have raised violations of the law that the Department failed to make. There is no indication that the Department is willing or intends to raise these violations. And, Samuelson and Mara's Hope have demonstrated they will offer issues that the Department has neglected to raise. Accordingly, this Court should find that the Department cannot adequately represent Samuelson's and the Sanctuary's interests in this matter.

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING GRANDLANDS CIRCUS' MOTION FOR PRELIMINARY INJUNCTION BECAUSE CIRCUS IS UNLIKELY TO SUCCEED ON THE MERITS AND THE DEPARTMENT WILL SUFFER MORE HARM FROM THE PRELIMINARY INJUNCTION BEING GRANTED THAN CIRCUS WILL SUFFER IF THE INJUNCTION IS DENIED.

The trial court correctly denied Grandlands Circus' Motion for preliminary injunction after finding that Circus was unlikely to succeed in its case against the Department and the

likelihood of Circus suffering irreparable harm did not sufficiently outweigh the harm to the Department of granting the injunction. The granting or denial of a preliminary injunction is well within the discretion of the trial court, and its order should be reversed on appeal only if an abuse of discretion is shown. *Socialist Workers etc. Committee v. Brown*, 53 Cal. App. 3d 879 (citing *People v. Black's Food Store* (1940) 16 Cal. 2d 59.)

In ruling on a motion for preliminary injunction a trial court must consider two interrelated factors. First, the likelihood the plaintiff will prevail on the merits at trial. 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*, 193 Cal. App. 4th 168 (2011). The trial court's weighing of the two interrelated factors is reviewed for an abuse of discretion. *Id.* at 174. However, factual disputes are reviewed under the substantial evidence rule and the resolution of legal issues is reviewed de novo. *Id.* A trial court will only be found to have abused its discretion when it has "exceeded the bounds of reason or contravened the uncontradicted evidence." *It Corp v. County of Imperial*, 35 Cal 3d 63, 69 (1983) (quoting *Continental Baking Co. v. Katz*, 68 Cal 2d at 527).

The trial court determined that Circus was unlikely to prevail on the merits of its case against the Department because there was sufficient evidence for the Department to find violations of Hobbs County Municipal Code § 63.14(A)(iii) and California Penal Code § 597t. After determining that Circus was unlikely to succeed on the merits the trial court determined that the balance of the harm was too close to grant the preliminary injunction. This Court can only reverse the trial court if it determines the trial court abused its discretion. The

burden rests with the appellant to make a clear showing of an abuse of discretion. *Socialist Workers etc. Committee v. Brown*, 53 Cal. App. 3d 879, 889 (1975).

Circus will fail to meet the burden required for this Court to reverse the trial court's decision. Circus will not be able to prove a likelihood of success on the merits because the record contains sufficient evidence that Circus not only violated the Code subdivision (A)(iii) and California Penal Code § 597t, like the trial court determined, but also the record supports the department's determination that Circus also violated subdivisions (A)(i) and (ii) of the Code and California Penal Code § 596.5. Furthermore, Circus has failed to demonstrate that it will suffer irreparable harm without the preliminary injunction and cannot overcome the trial court's decision that the balance of equities was too close to grant the preliminary injunction.

A. The preliminary injunction was properly denied because Circus is unlikely to prevail on the merits of its case against the Department.

In reviewing the decision of a local administrative board, the court has to determine merely whether there is substantial evidence in the record to support the findings of the department. *Vaughn v. Board of Police Comm'rs*, 59 Cal. App. 2d 771, 780 (1943). In a proceeding to review an administrative order, the determination of the penalty by the administrative body will not be disturbed unless there has been an abuse of discretion by the administrative body. *Skelly v. State Personnel Board*, 15 Cal. 3d 194. The discretion exercised by an administrative body "is not absolute but must be exercised in accordance with the law, and the provision that it may revoke [or deny] a license for good cause necessarily implies that its decisions should be based on sufficient evidence and that it should not act arbitrarily." *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.*, 100 Cal. App 4th 1066 (quoting *Kirby v. Alcoholic Bev. Etc. Appeals Bd.*, 33 Cal. Ap. 3d 732, 736-77 (1973)). In order to successfully attack the decision of the Department Circus must

allege and prove that the Department acted fraudulently, capriciously, or arbitrarily. 59 Cal. App. 2d at 780. The findings of the Department will not be disturbed if the Department had any substantial evidence to sustain the decision. *Id.*

It is settled law that a preliminary injunction prohibiting enforcement of a valid ordinance on the ground that it has been applied unconstitutionally to particular plaintiffs should rarely be granted: “with all presumptions favoring the validity and constitutionality of the enactments of various legislative bodies, it should be only under extraordinary circumstance that anyone challenging the validity of such a law should immediately be granted the ultimate relief he seeks prior to any trial on the merits.” *Xiloj-Itzep v. City of Aguora Hills*, 24 Cal. App. 4th 620. Circus claims that the Department arbitrarily applied the Code in its decision to revoke its Permit.

1. The Department exercised its reasonable and sound discretion when it revoked Circus’ Permit.

“The discretion legally vested in an administrative body is broad and inclusive and is not subject to judicial control when exercised within its legal limits. *Department*, 100 Cal. App. 4th 1066, 1073 (citing *Walsh v. Kirby*, 13 Cal. 3d 95, 103 (1974)). However, deference to the administrative body’s interpretation of the code is not unlimited. It is subject to review and intervention by the courts in the event that it acts in an arbitrary and capricious manner, or in a manner which is not in conformity with the spirit of the law. *Id.* An administrative body’s decision to exclude or expel an individual may be arbitrary either because in applying a given rule in a particular case, the Department has proceeded in an unfair manner or because the reason for the exclusion is itself irrational. *Pinsker v. Pacific Coast Society of Orthodontists*, 12 Cal. 3d 541, 545 (1974).

Administrative bodies charged with the supervision of certain classes of business may be authorized to investigate a licensee upon a complaint that it has violated the regulatory ordinances or statutes. Vaughn, 59 Cal. App. 2d at 777. “The Department is charged with protecting the animals and people within its jurisdiction and does so, in part, by ensuring that the Hobbs County local ordinances pertaining to animals are enforced.” R. at 15. Samuelson prepared an administrative complaint on September 24, 2013, including the Report marked as exhibit 1, alleging the Circus was violating the Code and demanded the Permit be revoked. The Department held an evidentiary hearing on September 27, 2013 and notified Circus that it would be considering among other things: “(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 should ultimately be revoked.” R at 6.

After the hearing, the Department found violations of the Code subdivisions (A)(i)-(iii) and California Penal Code §§ 596.5 and 597t. The Department revoked Circus’ 2013-2014 Permit based on the above findings. The Code subdivision (B)(iv) states in pertinent part “After conducting such hearing, the Department may *suspend or revoke* any such permit or certificate upon such terms and conditions as, *in the exercise of its reasonable and sound discretion based on the above-listed factors*, it shall determine.” (emphasis added)

a. Circus violated Hobbs County Municipal Code § 63.14(A)(i) when it failed to provide adequate medical records at either the time when it applied for the permit or during the hearing conducted September 23, 2013.

The Code § 63.14(A)(i) states in pertinent part:

A) Permit applicants and permit holders must meet the following conditions:

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 and that the elephant tested free of tuberculosis.

In *Vaughn v. Board of Police Comm'rs*, the appellant contended that the complaint filed by the administrative body did not provide him notice of the nature of the charges as would enable him to formulate a defense. 59 Cal. App. 2d at 777. The court ruled that the complaint filed with the administrative body was sufficient to give the appellant notice of the charges that were being brought against him. The court found that the complaint alleged against the appellant, claiming he had violated the law, was sufficient to put the appellant on notice that the administrative body intended to inquire into that conduct.

Here, Circus was provided notice of the administrative hearing including the complaint filed by Samuelson alleging violations of the California Penal Code and the Code. Additionally, the Report was attached to the complaint filed by Samuelson and the Department specifically notified Circus that it would be inquiring into whether the concerns detailed in the Report applied to performances in Hobbs County. One of the issues addressed in the Report was a review of the medical records. The Report 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. All five elephants had been treated for nail cracks, with the three oldest elephants having been treated for arthritis... All elephants are receiving non-steroidal anti-inflammatory drugs. The oldest elephant has been treated for chronic severe nail bed abscesses." Ex 1 at 1.

Circus had notice that the Department was interested in the medical records of the elephants. As in *Vaughn*, the complaint against Grandlands specifically put the appellant on

notice that medical records was of interest to the department for their investigation into whether or not to revoke the Permit. Furthermore the notice provided to Circus, by the Department, stated that the Department was looking into whether or not the concerns addressed in the Report were applicable to the performances in Hobbs County. Circus had notice that medical records and history of tuberculosis concerns were addressed in the Report, and therefore, sufficient notice that the Department had interest in the medical records and failed to provide them at the hearing in September 2013. Circus' failure to provide all of the necessary medical records is a violation of the Code § (A)(i) and sufficient grounds for the Department to revoke its Permit.

b. The trial court properly found that Circus violated Hobbs County Municipal Code § 63.14 (A)(iii) by failing to notify the Department that West Edmond Texas refused to renew their permit in January 2012.

Hobbs County Municipal Code § 63.14(A)(iii) states in pertinent part:

A) Permit applicants and permit holders must meet the following conditions:

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 and the reasons for such revocation.

A reviewing court must uphold the administrative body's decision unless the administrative findings viewed in light of the entire record are so lacking in evidentiary support as to render them unreasonable. *Cippriotti v. Board of Directors*, 147 Ca. App. 3d 144, 155 (1983). The function of the trial and appellate courts is the same with respect to such review. *Gaenslen v. Bd. of Dirs.*, 185 Cal. App. 3d 563. In a proceeding to review an administrative order, such as revoking a permit, the determination of penalty by the administrative body will not be disturbed unless there is a clear abuse of discretion. *Brown v. Gordon*, 240 Cal. App. 2d 659 (citing *Tracy v. Contractors' State License Board*, 63 Cal. 2d 598, 601).

“Abuse of discretion” in the legal sense is defined as exercising discretion to an end or purpose not clearly justified and against reason, everything being considered. *Id.* In determining whether there has been an abuse of discretion the California Supreme Court has stated, “If reasonable minds might differ as to the propriety of the penalty imposed, this fortifies the determination that the administrative body acted within its area of discretion. *Id.* (quoting *Harris v. Alcoholic Beverage Etc. Appeals Board*, 62 Cal. 2d 589, 594). Where a statute leaves room for the discretion of an administrative body, a challenger must show the official acted arbitrarily, beyond the bounds of reason or in derogation of the applicable legal standards. *Marvin Lieblein, Inc. v. Shewry*, 137 Cal. App. 4th 700.

If the likelihood of prevailing on the merits factor depends on the construction of a statute or another question of law, rather than evidence introduced at trial, this Court reviews that issue de novo. *Marken v. Santa Monica-Malibu Unified School Dist.*, 202 Cal. App. 4th 1250.

The fundamental tenet of statutory construction is to ascertain the legislative intent so the purpose of the law may be effectuated. *Claxton v. Zolin*, 8 Cal. App. 4th 553. Text of a statute should be construed in context and where uncertainty exists, consideration should be given to the consequences which will flow from a particular interpretation. *Id.* (citing *Dyna-Med, Inc. v. Fair Employment & Housing com.*, 43 Cal.3d 1379, 1387 (1987)). Under the plain meaning rule courts look first to the language of the statute; if the language is clear and unambiguous, the court must give effect to its plain meaning. *Socialist Workers etc. Committee v. Brown*, 53 Cal. App. 3d 879. However, a statute should be construed in context and statutes relating to the same subject must be harmonized to the extent possible. *Claxton*, 8 Cal. App. 4th at 559

The Department determined that West Edmond refusing to issue a new permit, after the Report came out, was akin to revoking a permit; and Circus’ failure to notify the Department

about West Edmond's refusal to renew their permit in January 2012 was a violation of the Code. Similarly, the trial court determined that the legislative intent behind the Code, at least in part, required permit holders to alert the Department that there may be cause for concern about or need to investigate a particular company or performance. Therefore, the trial court found sufficient factual basis to affirm the Department's decision to revoke the Permit; or at least, that Circus was unlikely to succeed in its claim on that basis.

Circus will likely contend that the under the "plain meaning" rule this court must determine that the trial court abused its discretion finding that West Edmond's refusal to renew Circus' permit was akin to a revocation of a permit and Circus' withholding the information was sufficient grounds for the Department to revoke the Permit because the plain language of the Code states that permit holders must inform the Department of any "revoked" permits within the past three years. However the "plain meaning rule" does not prohibit courts from determining whether the literal meaning of a statute comports with its purpose or whether such a construction of one provision is consistent with other provisions of the statute.

When a statute is susceptible to multiple interpretations a court should consider an administrative interpretation that is reasonably contemporaneous with the statute's adoption. *Bernard v. City of Oakland*, 202 Cal. App. 4th 1553, 1565 (2012) (citing *Sara M. V. Superior Court*, 36 Cal. 4th 998, 1011-12 (2005)). "[A] contemporaneous administrative construction of [an] enactment by those charged with its enforcement... is entitled to great aweight, and courts generally will not depart from such construction unless it is clearly erroneous or unauthorized. *Id* (quoting *People ex. rel. Lungren v. Superior court*, 14 Cal. 4th 294, 309 (1996)).

The Code grants the Department the ability to suspend or revoke any permit or certificate issued under its authority in the exercise of its reasonable and sound discretion when it determines a permit holder is in violation of the factors listed in Hobbs County Municipal Code § 63.14(A). This court should give deference to the Department's interpretation of the Code.

c. Circus violated Hobbs County Municipal Code § 63.14(A)(ii) and (vii) by not providing proper transport vehicles or transfer cages while transporting the elephants to the exhibition location and violating California Penal Code §§ 596.5 and 597t.

Hobbs County Municipal Code § 63.14(A)(ii) states in pertinent part:

A) Permit applicants and permit holders must meet the following conditions:

ii. Utilize appropriate transport vehicles and transfer cages when moving them to the exhibition location.

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 statute.

As noted above the discretion given to administrative bodies is broad and inclusive. The Department found that Circus violated subdivision (A)(ii) of the Code. There is sufficient evidence in the Report for the Department to make the determination that the transportation vehicles were not proper.

According to the Report "Prior to being unloaded from their cars, several of the elephants demonstrated stereotypic behavior of stress, such as exaggerated swaying from side to side." Exhibit 1 p.1. Furthermore, after unloading all five of the elephants appeared stiff and unsteady with a diminished range of motion. The elephants appeared fatigued and disinterested in their surroundings. Exhibit 1 p. 1.

The Department is entitled to reasonable inferences based on the evidence presented to it. The Department could reasonably determine that the Report depicted atypical behavior for

the elephants and that the cause of the behavior was the transportation cars. If the Department determined the transportation cars caused the elephants to act this way it could reasonably infer that the behavior resulted from improper transport cars or conditions during transportation.

California Penal Code § 596.5 states that it is a misdemeanor for any owner or manager of an elephant to engage in abusive behavior towards the elephants, including several forms of extreme discipline. § 597t requires confined animals to have an adequate exercise area and that animals confined by a tether have it affixed in a manner that prevents the animal from becoming entangled or injured and permits that animal access to adequate shelter, food and water. The Department determined that Circus was in violation of both these statutes and the trial court found there was only sufficient evidence to find violations of § 597t.

California Penal Code § 596.5 only provides an illustrative list of what could be considered abusive. “Although the statute sets forth a list of abusive disciplinary behaviors, the language and structure of the statutory scheme suggests the list is not exclusive.” *Culp v. City of L.A.*, 2009 Cal. App. Unpub. LEXIS 7621, *25 (Cal. App.2d Dist. Sept. 23, 2009) (Overruled on other grounds). “[A]busive behavior’ may include the physical characteristics of the enclosure in which elephants are kept.” *Id.* Elephants suffer “debilitating and life-threatening foot and leg problems when they [are maintained] in small areas where they must traverse the same ground and compact the area day in and day out.” *Id.* at *24.

If the Report is correct, Circus keeps its animals tethered the majority of the day, seventeen of twenty-four hours assuming two hours for warm-up and cooldown for each performance, ninety minutes of performing per show, and two shows a day. Circus kept its elephants in a confined space fifty square feet smaller than the minimum space established from the standards of the AZA. Confining elephants in spaces that are insufficiently large can cause

elephants to suffer pain and experience chronic medical issues and this can rise to the level of abuse. (See *Culp v. City of L.A.*, 2009 Cal. App. Unpub. Lexis 7621, overturned on other grounds.) It is well within the discretion of the Department to determine that prolonged chaining, as defined by the AZA, is abusive behavior under § 596.5.

B. The preliminary injunction was properly denied because the likelihood of Circus suffering irreparable harm in the absence of injunctive relief does not outweigh the harm the department will suffer if the relief is granted.

When deciding a motion for preliminary injunction a trial court determines whether greater injury will result to a defendant from granting an injunction than to plaintiff from refusing it and, in making the determination, evaluates the probability of plaintiff ultimately prevailing. *Jensen v. Keystone Sav. & Loan Ass'n*, 142 Cal. App. 3d 454. In the absence of reasonable probability of plaintiff's success, the court should deny the preliminary injunction. *Id.* As demonstrated above Circus is not likely to prevail on the merits of its case so a preliminary injunction should not be granted. Even if Circus was likely to succeed on the merits of its case a preliminary injunction should not be granted in its favor.

A trial court may deny a preliminary injunction on either (1) determining irreparable harm will not result to the party seeking the injunction, or (2) that the party has failed to demonstrate likelihood of success on the merits. *Id.*

A preliminary injunction that mandates an affirmative act that changes the status quo is highly scrutinized. *Davenport v. Blue Cross of California*, 52 Cal. App. 4th 435. A preliminary mandatory injunction is rarely granted; the California Supreme Court has stated on the matter, "the granting of a mandatory injunction pending the trial, and before the rights of the parties in the subject matter which the injunction is designed to affect have been definitely ascertained ... is not permitted except in extreme cases where the right thereto is clearly established and it

appears that irreparable injury will flow from its refusal.” *Id.* (quoting *Board of Supervisors v. McMahon*, 219, Cal. App. 3d 286, 295-96 (1990)).

California Code of Civil Procedure § 526 states the circumstances when an injunction may or may not be granted. CCCP § 526 states in pertinent part:

(a) An injunction may be granted in the following cases:

(1) When it appears by the complaint that the plaintiff is entitled to the relief demanded, and the relief, or any part thereof, consists in restraining the commission or continuance of the act complained of, either for a limited period or perpetually.

(2) When it appears by the complaint or affidavits that the commission or continuance of some act during the litigation would produce waste, or great or irreparable injury, to a party to the action.

(4) When pecuniary compensation would not afford adequate relief.

(b) An injunction cannot be granted in the following cases:

(4) To prevent the execution of a public statute by officers of the law for the public benefit.

In weighing the potential harm to the parties a court considers things such as the inadequacy of other remedies, the degree of irreparable harm, and the necessity of preserving the status quo. *Abrams v. St. John’s Hospital & Health Center*, 25 Cal. App. 4th 628.

When a trial court denies an application for a preliminary injunction it implicitly determines that the plaintiffs have failed to satisfy either or both of the interim harm and likelihood of prevailing on the merits factors. On appeal, the question becomes whether the trial court abused its discretion in ruling on both factors. Even if the appellate court finds that the trial court abused its discretion as to one of the factors, it nevertheless may affirm the trial court’s order if it finds no abuse of discretion as to the other. *Id.* (quoting *Cohen v. Board of Supervisors*, 40 Cal. 3d 277, 286 (1985)).

In attempting to weigh the potential harms suffered by Circus and the Department the trial court found that the equities tip in favor of the Department.

1. Circus will not suffer irreparable harm in the absence of a preliminary injunction because Gall Springs is an adequate alternate venue to host the circus during April 2014.

Circus contends that it will lose income from the April performance in Hobbs County and that it may lose bookings in other venues when it discloses that the Department revoked its permit if injunctive relief is not granted. Circus' contention that it may lose bookings in other venues is meritless under the circumstances. Circus will have to disclose that the Department revoked its permit even if a court rules that the permit must be reinstated. Therefore, lost income from the April performances in Hobbs County remains the only harm to Circus if this Court affirms the trial court's denial of the preliminary injunction.

The trial court found that no specific dollar value was presented to the Court for consideration. Regardless of the dollar amount, if lost income is the only harm Circus can claim pecuniary compensation affords adequate relief and a preliminary injunction is improper under the circumstances.

Furthermore, Circus has failed to demonstrate irreparable harm because it has not shown that Gall Springs would not be a viable alternative to host the Circus during April. Despite Gall Springs having a population of about half as many people as Hobbs County, Circus cannot demonstrate that performances there would be less successful. Circus has performed in Hobbs County for the past seven years and never performed in Gall Springs. Circus cannot predict turnout in Gall Springs compared to Hobbs County; a higher percentage of people may show up as a result of being offered a new experience in going to the circus.

2. Granting the preliminary injunction would prevent the department from fulfilling its duties of protecting the animals and people within its jurisdiction.

The Department is responsible for protecting the animals and people within the jurisdiction of Hobbs County. The Department fulfills this responsibility, in part, by enforcing the local ordinances pertaining to animals and issuing performing animal permits. The trial court correctly determined that the only effective remedy for addressing the violations discussed above is revocation.

Furthermore, the Department must determine the best way for it to enforce rules and regulations and this Court should give deference to that authority. The Department may have revoked Circus' permit to demonstrate to other permit holders that it considers refusal to renew a permit is akin to revoking a permit and failure to report an administrative body refusing a permit renewal is a violation of Hobbs County Code. If this Court reverses the denial of the preliminary injunction it is restricting the Departments ability to effectively protect performing animals and citizens of Hobbs County. Therefore, this Court should deny the Circus's

CONCLUSION

For all the aforementioned reasons, Samuelson's and Mara's Hope Wildlife Sanctuary respectfully request that the Court grant their motion to intervene and deny Grassland Circus' motion for preliminary mandatory injunction.

Respectfully submitted,

Competition Team Number 14

Team #14

CERTIFICATION OF AUTHENTICITY

We hereby certify that our brief is the product solely of the undersigned and that the undersigned have not received outside assistance of any kind in connection with the preparation of our brief.

1/13/2014
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