

DISTRICT COURT, EL PASO COUNTY, COLORADO
270 South Tejon
Colorado Springs, CO 80903

Petitioner: NONHUMAN RIGHTS PROJECT, INC., on behalf of Missy, Kimba, Lucky, LouLou, and Jambo,

v.

Respondents: CHEYENNE MOUNTAIN ZOOLOGICAL SOCIETY, and BOB CHASTAIN, in his official capacity as President and CEO of Cheyenne Mountain Zoological Society.

Attorneys for Respondents

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Case Number: 2023CV301236

Div: 8

RESPONDENTS' RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR PERMISSION TO SERVE SUPPLEMENTAL PLEADING AND MOTION TO STRIKE

Respondents hereby submit their Response in Opposition to Petitioner's Motion for Permission to Serve Supplemental Pleading and Motion to Strike the Supplemental Pleading and its attachments filed on Friday, November 3, 2023. In support of this Respondents state as follows:

(1) Counsel for Respondents conferred with counsel for Petitioner regarding the proposed Supplemental Pleading via e-mail on Friday, November 3. Counsel for Petitioner e-mailed counsel for Respondents asking for Respondents' position on the proposed Supplemental Pleading and

accompanying exhibits. Undersigned counsel for Respondents replied that the proposed Supplemental Pleading and accompanying exhibits are improper, untimely, and wholly immaterial to the resolution of the case and that Respondents opposed their submission.

(2) Motions under Colorado Rule of Civil Procedure 15 are subject to denial if the proposed amendment or supplemental pleading would be futile. *See Davis v. Paolino*, 21 P.3d 870, 873 (Colo. App. 2001). A proposed pleading is futile if the pleading would be immediately subject to a motion to dismiss. *Niccoli v. Ayala*, 501 P.2d 138, 140 (Colo. App. 1972). Here, because Petitioner’s Supplemental Pleading merely attempts to buttress allegations that are not actionable for the reasons detailed in Respondents’ fully briefed Motion to Dismiss, the proposed Supplemental Pleading is futile and leave to file it should be denied under Colorado Rule of Civil Procedure 15.

(3) In the alternative, if the Court permits the filing of the Supplemental Pleading, Respondents hereby move to strike the Supplemental Pleading and its attachments. As provided by Colorado Rule of Civil Procedure 12,

Upon motion filed by a party within the time for responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion filed by a party within 21 days after the service of any pleading, motion, or other paper, or upon the court's own initiative at any time, the court may order any redundant, immaterial, impertinent, or scandalous matter stricken from any pleading, motion, or other paper.

Colo. R. Civ. P. 12(f). Motions to strike are committed to the sound discretion of a trial court, and while such motions are typically disfavored, they are appropriate where the pleading at issue “can have no plausible bearing upon the subject matter of the litigation.” *Koch v. Whitten*, 342 P.2d 1011, 1015 (Colo. 1959).

(4) Here, the Supplemental Pleading should be struck because the Supplemental Pleading and exhibits have no plausible bearing upon the subject matter of the litigation. The Petition here is subject to a fully briefed Motion to Dismiss. The Motion to Dismiss argues that the Petition seeks relief—a writ of habeas corpus—which is axiomatically unavailable to non-human animals. No additional allegations—spurious as they may be—regarding Petitioner’s evaluation of the conditions of the Cheyenne Mountain Zoological Society’s elephants can have any bearing whatsoever on the Court’s resolution of the pending Motion to Dismiss. As the Motion to Dismiss expressly notes, Petitioner has not brought a claim under any animal protection law. Hence, the Supplemental Pleading and accompanying exhibits, because they can have no plausible bearing on the subject matter of the litigation, should be struck by the Court.

(5) A proposed order is included with this motion for the Court’s consideration.

Dated November 24, 2023

Brownstein Hyatt Farber Schreck, LLP

/s/ Christopher O. Murray

John W. Suthers, #8492

Christopher O. Murray, #39340

Rosa L. Baum, #56652

*Counsel for Cheyenne Mountain Zoological
Society and Bob Chastain*

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of November 2023, I electronically filed a true and correct copy of the foregoing **RESPONDENTS' OPPOSITION TO PLAINTIFFS' MOTION TO SERVE SUPPLEMENTAL PLEADING AND MOTION TO STRIKE** via the Colorado Courts E-Filing System which will send notification of such filing and service upon all counsel of record:

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s/Christopher O. Murray
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