

<p>4th Judicial District El Paso County El Paso County Judicial Building 270 S Tejon St Colorado Springs, CO 80903</p> <hr/> <p>Petitioner:</p> <p>NONHUMAN RIGHTS PROJECT, INC., on behalf of Missy, Kimba, Lucky, LouLou, and Jambo,</p> <p>v.</p> <p>Respondents:</p> <p>CHEYENNE MOUNTAIN ZOOLOGICAL SOCIETY and BOB CHASTAIN, in his official capacity as President & CEO of Cheyenne Mountain Zoological Society.</p>	<p style="text-align: center;">▲ ▲</p> <p style="text-align: center;">COURT USE ONLY</p>
<p>NONHUMAN RIGHTS PROJECT, INC. Jake Davis, Esq. Bar No. 54032 525 Skyles Pl, Ste 302 Whitefish, MT 59937 Tel.: (513) 833-5165 Email: jdavis@nonhumanrights.org</p>	<p>Case Number: 2023CV301236</p> <p>Division: 8</p>
<p style="text-align: center;">PETITIONER’S REPLY IN SUPPORT OF PETITIONER’S MOTION FOR PERMISSION TO SERVE SUPPLEMENTAL PLEADING AND OPPOSITION TO RESPONDENTS’ MOTION TO STRIKE</p>	

Petitioner Nonhuman Rights Project, Inc. (“NhRP”) submits this reply in support of NhRP’s Motion for Permission to Serve Supplemental Pleading (“Supplemental Pleading Motion”), and opposition to Respondents’ motion to strike. The NhRP states in support:

On November 3, 2023, the NhRP filed the Supplemental Pleading Motion pursuant to C.R.C.P. 15(d).¹ On November 24, 2023, Respondents filed their response opposing the NhRP’s motion (“Response”), and included in that Response was a motion to strike (“Strike Motion”) the NhRP’s proposed Supplemental Pleading should this Court permit the latter filing. For the reasons set forth below, the Supplemental Pleading Motion should be granted and Respondents’ Strike Motion must be denied.

A. REPLY IN SUPPORT OF PETITIONER’S MOTION FOR PERMISSION TO SERVE SUPPLEMENTAL PLEADING

C.R.C.P. 15(d) provides that “[u]pon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit him to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented.” This Court “must be mindful of the liberal policy of amendment contemplated by C.R.C.P. 15.” *Eagle River Mobile Home Park, Ltd. v. Dist. Court In & For Eagle Cnty.*, 647 P.2d 660, 664 (Colo. 1982) (citing cases). *Accord Super Valu Stores, Inc. v. Dist. Court In & For Weld Cnty.*, 906 P.2d 72, 77 (Colo. 1995) (recognizing that “C.R.C.P. 15(a) reflects a liberal policy of amendment and encourages trial courts to look favorably on requests to amend”); *Benton v. Adams*, 56 P.3d 81, 85 (Colo. 2002) (“A trial court should not impose arbitrary restrictions on making timely amendments.”).²

Since the Supplemental Pleading Motion is made in good faith and Respondents would not be prejudiced by the filing of the proposed Supplemental Pleading, this Court should grant the motion. *See Eagle River*, 647 P.2d at 664 (amendment should have been allowed since

¹ The NhRP’s motion contains the proposed Supplemental Pleading, with two exhibits, and a proposed order.

² “Exercise of the trial court's discretion under Rules 15(a) and 15(d) is substantially similar and should be governed by the same considerations.” *Eagle River*, 647 P.2d at 662 n.4.

“[n]othing in the record before us indicates that the motion to amend was made in bad faith or for a dilatory purpose, and there is no indication that the parties would be prejudiced by any delay in the trial necessitated by the amendment”); *Union Ins. Co. v. Kjeldgaard*, 820 P.2d 1183, 1185 (Colo. App. 1991) (“Leave to amend should be freely given in the absence of resulting delay, undue expense, or demonstrable prejudice to the opposing party.”).

Significantly, Respondents do not allege that the Supplemental Pleading Motion is made in bad faith or that they would suffer any prejudice. Their sole reason for opposing it is that the proposed Supplemental Pleading would be futile because it cannot withstand their motion to dismiss, which is incorrect.³ For the reasons explained in NhRP’s Opposition to Respondents’ Motion to Dismiss, Respondents’ motion to dismiss must be denied; this is because the NhRP’s habeas corpus petition states a prima facie case that Missy, Kimba, Lucky, LouLou, and Jambo are entitled to immediate release.⁴

A central contention at the heart of the prima facie case is that, based on the expert evidence, the Cheyenne Mountain Zoo is an unacceptable place for elephants. The proposed Supplemental Pleading confirms this contention, setting forth occurrences and events that have arisen since the filing of the petition: specifically, (a) videos taken on October 27, 2023, showing

³ Respondents filed their motion to dismiss on August 31, 2023; the NhRP filed its opposition on October 5, 2023; and Respondents filed their reply on October 19, 2023.

⁴ That Respondents’ motion to dismiss must be denied is reinforced by their patently deficient reply, which is full of overwrought conclusory assertions. In their reply, Respondents double down on the indefensible notion that legal personhood and the right to bodily liberty require the capacity to bear responsibilities, notably without addressing the noted flaws with that position. They rely almost exclusively on the erroneous majority decision in *Nonhuman Rights Project, Inc. v. Breheny*, 38 N.Y.3d 555 (N.Y. 2022). They dismiss the 80+ page opinions of two high court judges who support the NhRP’s arguments as “scant legal analysis”—a preposterous and unserious characterization—while providing no adequate response to the NhRP’s extensive refutations. Given Respondents’ complete failure to defend their motion to dismiss, they have implicitly conceded its obvious weakness.

LouLou and Jambo exhibiting stereotypic behavior—a sign of brain damage caused by chronic stress; and (b) the cold winter weather in Colorado Springs, which is especially problematic for elephants.

Accordingly, because granting the NhRP’s good-faith Supplemental Pleading Motion would not prejudice Respondents, and the proposed Supplemental Pleading is not futile, this Court should permit the NhRP to serve its proposed Supplemental Pleading.

B. OPPOSITION TO RESPONDENTS’ MOTION TO STRIKE

In the alternative, Respondents moved to strike the proposed Supplemental Pleading pursuant to C.R.C.P. Rule 12(f).⁵ Response 2. However, their Strike Motion is procedurally improper and must be denied for this reason alone.

C.R.C.P. 121, § 1-15(1)(d) provides that “[a] motion shall not be included in a response or reply to the original motion.” *Accord Turoff v. Itachi Capital, Inc.*, 527 P.3d 436, 438 (Colo. App. 2022) (“the Colorado Rules of Civil Procedure don't allow a motion to be ‘included in a response ... to the original motion.’”) (citing C.R.C.P. 121, § 1-15(1)(d)); *id.* (noting that a party’s “embedded request in its responsive pleading was not procedurally proper”); *Patterson v. James*, 454 P.3d 345, 349 (Colo. App. 2018). By including a motion to strike in their response to the Supplemental Pleading Motion, Respondents did exactly what the Colorado Rules of Civil Procedure prohibit.

Respondents’ Strike Motion is also wholly deficient on the merits. As they acknowledge, motions to strike are disfavored. *Koch v. Whitten*, 342 P.2d 1011, 1017 (Colo. 1959) (“Motions

⁵ C.R.C.P. Rule 12(f) provides: “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.”

to strike alleged redundant, immaterial, impertinent or scandalous matter are not favored. . . .

Even if the allegations are redundant or immaterial, they need not be stricken if their presence in the pleading cannot prejudice the adverse party.”) (citation omitted). Indeed, “[m]atter will not be stri[c]ken from a pleading unless it is clear that it can have no possible bearing upon the subject matter of the litigation.” *Id.* (emphasis added). While Respondents cite this statement in *Koch*, they misquote it. *See* Response 2 (misquoting *Koch* as stating that motions to strike are appropriate where the pleading at issue “can have no plausible bearing upon the subject matter of the litigation”) (emphasis added).

Under *Koch*, the proposed Supplemental Pleading cannot be stricken for it bears centrally on the subject matter of the litigation—the elephants’ unlawful confinement at the Cheyenne Mountain Zoo, which is established by the harmful nature of their confinement. Even under Respondents’ incorrect “plausibility” standard, their contention that the proposed Supplemental Pleading has “no plausible bearing upon the subject matter of the litigation” is simply wrong. Response 2. The proposed Supplemental Pleading is centrally relevant to the question of whether Missy, Kimba, Lucky, LouLou, and Jambo are being unlawfully confined because it further confirms that the Cheyenne Mountain Zoo is an unacceptable place for elephants. *See Nonhuman Rights Project, Inc. v. Breheny*, 38 N.Y.3d 555, 620 (N.Y. 2022) (Wilson, J., dissenting) (“[G]iven what the information Happy has submitted reveals about how she experiences the world as an elephant and about her environment at the Bronx Zoo, has Happy made a prima facie showing of possible unjust confinement that grants her a full hearing to decide the merits of her habeas petition? She has. . . . Happy has established a prima facie case that her confinement at the Bronx Zoo stunts her needs in ways that cause suffering so great as to be deemed unjust.”); *id.* at 634 (Rivera, J., dissenting) (“In support of the petition for the common-law writ of habeas

corpus seeking Happy's release and in opposition to the motion to dismiss, the Nonhuman Rights Project submitted affidavits from several internationally renowned elephant experts to establish Happy's autonomy and the inherent harm of her captivity in the Zoo.”).

Respondents erroneously contend that, since their motion to dismiss argues that habeas corpus is “axiomatically unavailable to non-human animals,” the proposed Supplemental Pleading cannot have “any bearing whatsoever on the Court’s resolution of the[ir] pending” motion to dismiss. Response 2. As detailed in NhRP’s Opposition to Respondents’ Motion to Dismiss, Respondents’ arguments for the irrational and arbitrary notion that only members of the human species may invoke the protections of the Great Writ are erroneous. Most significantly, they fail to refute the prima facie case made in the NhRP’s habeas corpus petition.⁶

Respondents’ Strike Motion must be denied as it is procedurally improper and fails on the merits.

Dated: December 1, 2023

Nonhuman Rights Project, Inc.

By: /s/ Jake Davis
 Jake Davis, Esq.

Attorney for Petitioner Nonhuman Rights Project, Inc. on behalf of
Missy, Kimba, Lucky, LouLou, and Jambo

⁶ Contrary to Respondents, it is irrelevant that the NhRP has not “brought a claim under any animal protection law.” Response 3. Such laws do not address the unrelenting, sustained deprivation of the elephants’ autonomy, along with the inevitable harms that result. Animal protection laws, in other words, do not address the violation of the elephants’ right to bodily liberty—which the Proposed Supplemental Pleading confirms. *See Breheny*, 38 N.Y.3d at 637 (Rivera, J., dissenting) (noting NhRP’s “core argument that the writ should issue because Happy's confinement at the Zoo was a violation of her right to bodily liberty as an autonomous being, regardless of the care she was receiving”).

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of December 2023, I electronically filed a true and correct copy of the foregoing **PETITIONER’S REPLY IN SUPPORT OF PETITIONER’S MOTION FOR PERMISSION TO SERVE SUPPLEMENTAL PLEADING AND OPPOSITION TO RESPONDENTS’ 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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