

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF IOWA  
EASTERN DIVISION**

**TRACEY K. KUEHL, an individual;  
LISA K. KUEHL, an individual; KRIS  
A. BELL, an individual; NANCY A.  
HARVEY, an individual; JOHN T.  
BRAUMANN, an individual, and;  
ANIMAL LEGAL DEFENSE FUND, a  
non-profit corporation,**

**Plaintiffs,**

**vs.**

**PAMELA SELLNER, an individual;  
TOM SELLNER, an individual; and  
CRICKET HOLLOW ZOO, a non-  
profit corporation,**

**Defendants.**

**No. C14-2034**

**ORDER DENYING MOTION TO  
STAY AND MOTION FOR  
APPOINTMENT OF A SPECIAL  
MASTER**

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This matter comes before the Court on the Motion to Stay Execution of Injunction (docket number 95) filed by the Defendants on April 6, 2016, and the Resistance (docket number 96) filed by the Plaintiffs on April 20.

Also before the Court is the Motion for Appointment of a Special Master (docket number 97) filed by the Plaintiffs on April 20, 2016, and the Resistance (docket number 99) filed by the Defendants on April 28. Pursuant to Local Rule 7.c, the motions will be decided without oral argument.

## ***I. PROCEDURAL HISTORY***

On June 11, 2014, Plaintiffs filed a complaint seeking declaratory and injunctive relief. Following a nonjury trial, the Court entered an Order on February 11, 2016, granting most of the relief requested. Specifically, the Court ordered Defendants to transfer the endangered lemurs and tigers in their possession to an appropriate facility licensed by the USDA, which is capable of meeting the needs of the endangered species, not later than 90 days after the filing of the Order. The deadline for compliance is May 11, 2016.

On March 9, 2016, Defendants filed a notice of appeal. On April 6, Defendants filed the instant motion to stay the Court's Order pending their appeal. Plaintiffs resist Defendants' request for a stay, and ask in their instant motion that a special master be appointed to oversee the placement and transfer of the tigers and lemurs in compliance with the Court's Order.

## ***II. DEFENDANTS' MOTION TO STAY***

While an appeal from a final judgment that grants an injunction is pending, the court may suspend the judgment — *i.e.*, order a “stay” — on such terms that secure the opposing party's rights. *See* FED. R. CIV. P. 62(c). The factors regulating the issuance of a stay include: “(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.” *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987). *See also Knutson v. A.G. Processing, Inc.*, 301 F. Supp. 2d 1023, 1034 (N.D. Iowa 2004). The first two factors are “the most critical.” *Nken v. Holder*, 556 U.S. 418, 434 (2009).

In support of their motion to stay, Defendants seek to introduce evidence not offered at the time of trial. For example, Defendants point to perceived shortcomings in the operation of the Blank Park Zoo in Des Moines. An undated animal inventory filed with

the motion as Attachment B, which is apparently associated with the Blank Park Zoo, indicates that there are only 3 ring-tailed lemurs. Peter Klopfer, Ph.D., of the Duke Lemur Center, testified at trial that ring-tailed lemurs are a very social species and generally live in groups of 8 to 20. At the Cricket Hollow Zoo, two ring-tailed lemurs shared a cage, while Lucy, a red ruffed lemur, lived alone.<sup>1</sup> According to Dr. Klopfer, living in relative isolation is harmful to the animals. Even *if* one concludes that the care of the lemurs at the Blank Park Zoo fails to comply with the Endangered Species Act, however, Defendants fail to explain how that would justify their noncompliance.

Also filed with Defendants' motion are newspaper articles referencing the death of a tiger at the Blank Park Zoo in February 2014, and the death of a second tiger in July 2015. The tigers were 15 years old and 18 years old, respectively. According to Pamela Sellner's affidavit filed in support of the instant motion, the average lifespan for a tiger is 14-16 years.<sup>2</sup> It should be recalled that five tigers died at the Cricket Hollow Zoo during a 25-month period, including three deaths during the 16 months between the filing of Plaintiffs' complaint and the time of trial. One of the tigers was old (age 20), but the others were not. In any event, Defendants fail to explain how tiger deaths at the Blank Park Zoo somehow excuses them from providing appropriate veterinary care to the tigers in their possession.

Defendants note that they have reached a new agreement for veterinary services with Dr. John Pries of the Elkader Veterinary Clinic. Instead of visiting the Zoo once each year, Dr. Pries will now visit the Zoo once a month "to inspect the big cats and the

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<sup>1</sup> The Court notes parenthetically that the habitat provided for the lemurs at the Blank Park Zoo, as described in the transcript filed with the instant motion as Attachment A, is substantially different than the spare cages provided to the lemurs at the Cricket Hollow Zoo. *See* Attachment A, 810:19-811:5.

<sup>2</sup> Affidavit of Pamela Sellner (docket number 95-1) at 4, ¶ 9.

lemurs located at the facility.”<sup>3</sup> Furthermore, the agreement provides the Zoo will call the veterinary clinic and “an in-person inspection” will be conducted by a veterinarian for any ill or injured big cat. Finally, if any big cat dies for a reason “that is not apparent to the examining DVM,” then a necropsy will be conducted at Iowa State University. While the new agreement will presumably benefit the lions living at the Zoo, the Court believes the new protocol described in the agreement comes too late to change the outcome in this case. As detailed in the Court's prior Order, Defendants have long neglected the veterinary needs of the endangered tigers in their possession.

As further support for their motion for stay, Defendants note that two lemurs apparently escaped from the Duke Lemur Center in June 2010.<sup>4</sup> The significance of that fact is unclear. Clearly, it does not diminish the qualifications of Dr. Klopfer, a professor emeritus and research scientist at the Duke Lemur Center. As the Court noted previously, Dr. Klopfer appears to be one of the country's foremost lemur experts.

More substantively, Defendants' motion for stay is supported by an affidavit by Defendant Pamela Sellner. Sellner notes that the Zoo has reached a new agreement for expanded veterinary care of the big cats, and has found a volunteer to help care for the big cats five to seven hours per week. Sellner also expresses “huge concerns” about transporting the tigers, and concerns regarding the tigers' ability to acclimate to colder weather.<sup>5</sup>

Defendants' concerns regarding the placement and transportation of the animals were addressed in a letter from Plaintiffs' attorney to Defendants' attorney, which was filed with the instant motion as Attachment D. According to the letter, Plaintiffs have

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<sup>3</sup> See Attachment H.

<sup>4</sup> See Attachment F.

<sup>5</sup> Ms. Sellner also refers to her “deceased son's old lioness,” who will be 18 years old in July, but that animal is not part of this lawsuit.

spoken with the owners of the Wild Animal Sanctuary (“TWAS”), Lions, Tigers, and Bears (“LTB”), and the Endangered Primate Foundation (“EPF”). Another possible placement for the tigers is Keepers of the Wild (“KW”) in Valentine, Arizona. Plaintiffs claim that TWAS, LTB, and KW have “decades of experience caring for and transporting large carnivores.” The founder and director at LTB has apparently offered to transport all of the tigers, regardless of where they are rehomed. Plaintiffs assert that large transport trucks with appropriate transport cages would be used, citing a U.S. Fish and Wildlife Service website.

To obtain a stay of the judgment, Defendants must make a “strong showing” that they are likely to succeed on the merits. Here, Defendants merely point to perceived shortcomings at other zoos, and provide Ms. Sellner's opinions regarding the difficulties associated with transportation and acclimation when animals are moved to another location. In attempting to make a showing that they are likely to succeed on the merits, Defendants cannot rely on facts not made part of the record at trial. The burden of showing a likelihood of success “is a heavy one and most movants will be unable to meet this standard.” *Knutson*, 302 F. Supp. 2d at 1035. Simply restating arguments made at trial, and subsequently rejected by the Court, does not meet this heavy burden.

Defendants have also failed to show that they will be “irreparably injured absent a stay.” Mr. and Mrs. Sellner have exhibited “exotic” animals since at least 1992, and have operated the Cricket Hollow Zoo since 2002. The Zoo presently has 300-350 birds and animals. While the four endangered tigers and three endangered lemurs which are the subject of this lawsuit presumably added to the attraction of the Zoo, there is no evidence that Defendants will change their operation of the Zoo after the tigers and lemurs are removed, or will otherwise be significantly harmed. Defendants do not even allege an economic injury if a stay is not granted. Instead, Defendant's brief refers to Pam Sellner's concerns regarding transportation of the animals and their acclimation at the new facilities.

The mere “possibility” of irreparable injury fails to satisfy the second factor. *Nken*, 556 U.S. at 434-35.

The third *Hilton* factor requires the Court to consider whether a stay “will substantially injure the other parties interested in the proceeding.” Here, Plaintiffs seek to protect the endangered species. When viewing the Endangered Species Act, “Congress has spoken in the plainest of words, making it abundantly clear that the balance has been struck in favor of affording endangered species the highest of priorities.” *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 194 (1978). Three tigers died during the 16 months between the filing of the complaint and the time of trial. While Defendants assert they have now secured additional volunteer help with the big cats, and have reached a new agreement regarding veterinary care, the record in this case supports Plaintiffs’ concerns regarding the welfare of the animals while the appeal is pending.

Finally, the Court is required to consider “where the public interest lies.” The Court in *Nat’l Wildlife Federation v. Harvey*, 440 F. Supp. 2d 940, 958 (E.D. Ark. 2006), opined that “[w]hen an endangered species is allegedly jeopardized, the balance of hardships and public interest tip in favor of the protected species.” I agree.

After considering all of the facts and circumstances, the Court concludes that Defendants are not entitled to a stay pursuant to FEDERAL RULE OF CIVIL PROCEDURE 62(c). The motion for stay will be denied.

### ***III. MOTION FOR APPOINTMENT OF A SPECIAL MASTER***

Plaintiffs ask that a special master be appointed “to implement the Court’s Order and oversee the disposition of Defendants’ tigers and lemurs to their new USDA-compliant facilities.” FEDERAL RULE OF CIVIL PROCEDURE 53(a)(1)(C) permits the appointment of a master to “address pretrial and posttrial matters that cannot be effectively and timely addressed by an available district judge or magistrate judge of the district.” Defendants resist the appointment of a special master, asserting that “[i]n this instance there is no need for appointment of a special master and the Court can deal with any issues as they arise.”

On February 11, 2016, the Court ordered Defendants to “transfer the lemurs and tigers in their possession to an appropriate facility which is licensed by the USDA and is capable of meeting the needs of the endangered species.” Defendants assert in their resistance to the instant motion that they have “made arrangements for facilities to take the animals” if the Court denied their motion for stay. However, Plaintiffs assert they “have spent many months researching and preparing appropriate sanctuaries for the tigers and lemurs at the Cricket Hollow Zoo and would certainly object if Defendants place the animals in the roadside zoos owned by their friends.”

The Court's Order requires Defendants to transfer the endangered animals to an “appropriate” facility which is “capable of meeting the needs of the endangered species.” *If* Defendants transferred the lemurs and tigers to facilities which are not appropriate and capable of meeting the needs of the animals, then it would likely result in additional litigation. Potentially, Plaintiffs could file a motion in this action asking that Defendants be found in contempt of Court for failing to comply with the Court's Order. In addition, Plaintiffs could potentially sue the new facilities, alleging violation of the Endangered Species Act.

Presumably, both sides agree that the animals should not be moved a second time, if possible. To ensure the animals are transferred to an appropriate facility capable of meeting their needs in compliance with the Court's Order, the Court finds that a hearing should be held for that purpose. The appointment of a special master is not required. Rather, Defendants must appear at the hearing and provide the Court with details regarding where the animals will be placed and how they will be transported. Plaintiffs will also be permitted to provide recommendations regarding placement and transportation of the animals. The Court expects the parties to present evidence regarding the proposed facilities and their respective capabilities and experience in providing for tigers and lemurs. The deadline for Defendants to comply with the Court's prior Order will be extended until after the Court rules on the placement of the endangered animals.

## ORDER

IT IS THEREFORE ORDERED as follows:

1. The Motion to Stay Execution of Injunction (docket number 95) filed by Defendants is **DENIED**.

2. The Motion for Appointment of a Special Master (docket number 97) filed by Plaintiffs is **DENIED**.

3. This matter will come on for hearing on **May 25, 2016 at 1:30 p.m.** at the United States Courthouse, Courtroom 3, 4th Floor, 111 7th Avenue SE, Cedar Rapids, Iowa, for the purpose of determining where the endangered animals will be placed, and how they will be transported. The parties should be prepared to make specific recommendations to the Court regarding placement options and transportation details. The Court expects the parties to introduce evidence regarding the capability of the respective facilities to meet the needs of the tigers and lemurs.

4. Not later than **May 11**, each side must provide the other side with details regarding its proposal for the placement and transportation of the animals.

5. Defendants must not move the tigers and lemurs from the Cricket Hollow Zoo until the Court enters a further order regarding placement and transportation of the animals. The Court will establish a new compliance deadline in its supplemental order.

DATED this 29th day of April, 2016.

  
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JON STUART SCOLES  
CHIEF MAGISTRATE JUDGE  
NORTHERN DISTRICT OF IOWA