UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS, *et al.*,	)	
Plaintiffs,	)	
v.	)	
	)	Civ. Nos. 00-1641, 03-2006 (EGS)
RINGLING BROTHERS AND BARNUM & BAILEY CIRCUS, *et al.*,	)	(Consolidated Cases)
Defendants.	)	

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR RECONSIDERATION OF ORDER GRANTING PLAINTIFFS' MOTION FOR CONSOLIDATION

Plaintiffs oppose defendants' motion for reconsideration of the Court's October 3, 2003 Order consolidating these two cases and holding in abeyance defendants' motion for judgment on the pleadings which is pending in Civ. No. 00-1641. The only stated reason provided by defendant Ringling Brothers *et al.* ("Ringling") as to why the two cases should not have been consolidated – i.e., that this somehow "allow[s] the litigation to continue in a *confusing procedural posture*," Defendants' Motion For Reconsideration ("Def. Mot.") at 4 (emphasis added) – is disingenuous, since there should be nothing "confusing" about the present procedural posture.

Rather, as explained further below, although defendants suggest that the two cases are identical, and therefore there is no reason for both cases to continue, upon closer scrutiny, it appears that defendants may contend that there are claims in the first case, Civ. No. 00-1641, that are not encompassed by the second case, Civ. No. 03-2006 – although Ringling has yet to

explain to plaintiffs and the Court what, exactly, it believes those differences are. In any event, especially because plaintiffs have already incurred substantial attorneys' fees in the first suit that may eventually be recoverable from Ringling if plaintiffs prevail on the merits, the cases should remain consolidated, and defendants' motion for judgment on the pleadings should continue to be held in abeyance. Otherwise, plaintiffs could be severely prejudiced, whereas, other than being "confused,"defendants have not demonstrated they will suffer any prejudice whatsoever from this approach.

BACKGROUND

Civ. No. 00-1641 was filed on July 11, 2000 by all of the current plaintiffs, as well as several additional plaintiffs. More than a year and a half before the lawsuit was filed, several of the plaintiffs provided notice to defendants of the alleged violations of the Endangered Species Act ("ESA"). See Letters (December 21, 1998) (November 15, 1999). While the case was pending on defendants' motion to dismiss for lack of standing, several plaintiffs, including those who had provided Ringling with the notice letter, withdrew from the case for reasons that had "nothing to do with the allegations or arguments" in the ESA case, and, on April 10, 2001, the remaining plaintiffs amended their Complaint to reflect that fact. See Notice of Voluntary Dismissal (January 8, 2001); Second Amended Complaint.

On April 12, 2001, plaintiffs sent another notice letter to Ringling concerning its "continuing violations" of the ESA, which also expressly incorporated by reference the notice of ESA violations that had been provided in the earlier notice letters dated December 21, 1998 and November 15, 1999. See Letter to Kenneth Feld (April 12, 2001). After the case was remanded by the Court of Appeals, defendants moved for judgment on the pleadings, arguing, for the first time since the case was brought, that this Court lacks subject matter jurisdiction because,

although Ringling was provided notice of the alleged violations of the ESA 60-days prior to commencement of the action – as required by the plain language of the ESA notice provision, 16 U.S.C. § 1540(g)(2)(A) – that notice somehow became defective when the plaintiffs who actually provided notice subsequently withdrew from the action. Hence, defendants maintain that, under the notice provision of the ESA, the district court loses jurisdiction over the case if the entities who originally provided notice withdraw from the litigation, even if their co-plaintiffs remain in the case – a proposition that is completely unsupported by any case decided under the ESA.

Plaintiffs have opposed that motion on the grounds that, contrary to defendants' suggestion, all that is provided by the plain language of the ESA's notice provision is that "[n]o action may be commenced . . . prior to sixty days after written notice of the violation has been given to the Secretary [of the Interior], and to any alleged violator of any such provision or regulation . . .," 16 U.S.C. § 1540(g)(2)(A) (emphasis added), and that here, it is undisputed that this case was not commenced prior to sixty days after written notice was provided to Ringling by several of the original plaintiffs. Therefore, because the Supreme Court has held that notice provisions must be construed "literally" and according to their "plain language," Hallstrom v. Tillamook County, 493 U.S. 20, 24, 28 (1989), this Court had subject matter jurisdiction when this case was commenced, and nothing in the statute somehow deprives the Court of such jurisdiction years later because the plaintiffs who actually provided the original notice are no longer involved in the case. See Plaintiffs' Opposition to Defendants' Motion for Judgment on the Pleadings (September 8, 2003).

At the September 23, 2003 status conference in this matter, this Court suggested that one way to "remove" this issue was for plaintiffs simply to file a new case based on the April 12, 2001 notice letter that all of the current plaintiffs sent to Ringling. See Transcript of September

23, 2003 Status Conference (attached) at 6. While continuing to believe that there was no reason for them to do so, since, under the plain language of the ESA, this Court had subject matter jurisdiction over Civ. No. 00-1641, plaintiffs nevertheless agreed to file a new case, as long as it would be consolidated with this one and proceedings in the first case would be held in abeyance for the time being, so that plaintiffs could determine whether, for example, they should voluntarily dismiss the first case. See id. at 7, 11, 23. The Court agreed to that course of action, and, on October 3, 2003, issued an Order to that effect. Defendants have now moved the Court to reconsider that action and instead to dismiss Civ. No. 00-1641 on the grounds that, otherwise, the litigation will "continue in a confusing procedural posture," and that the Court lacks jurisdiction over that case. Def. Mot. at 4. However, because dismissal of the original action is neither warranted nor necessary at this time, and could also severely prejudice plaintiffs, there is no reason for the Court to reconsider its decision about how to proceed here.

ARGUMENT

Plaintiffs oppose defendants' motion for reconsideration for two reasons. First, plaintiffs, which include one former Ringling Bros. employee and three non-profit animal welfare groups, have already incurred substantial attorneys' fees in connection with more than three years of litigating Civ. No. 00-1641, including the time spent obtaining a favorable ruling from the Court of Appeals on Article III standing. Therefore, should these plaintiffs ultimately prevail in these consolidated cases on the merits, they may very well be entitled to an award of attorneys' fees from Ringling for that time, pursuant to the citizen suit provision of the ESA, 16 U.S.C. § 1540(g)(4). Accordingly, to the extent that dismissal of Civ. No. 00-1641 would foreclose plaintiffs from recouping those fees even if they prevail on the merits and even if defendants' motion for judgment on the pleadings is without merit, they would be severely prejudiced.

Second, although plaintiffs believe that the claims in the two cases are identical – and this Court also seems to have been operating under the same assumption in suggesting that plaintiffs simply file a new case to "avoid" having the Court decide defendants' motion in the first case for judgment on the pleadings, see Transcript at 10 – defendants apparently do not believe that the second case encompasses all of the claims covered by the first case. Thus, for example, in their Answer to plaintiffs' new Complaint in Civ. No. 03-2006, defendants have stated as an Affirmative Defense that the Court "does not have jurisdiction over plaintiffs' allegations exceeding the scope of the allegations in the *'right-to-sue' letter* referenced in paragraph 95 of the Complaint," which refers to the April 12, 2001 notice letter. See Answer, Civ. No. 03-2006, at 13 (emphasis added); Complaint, Civ. No. 03-2006, ¶ 95. In addition, in response to plaintiffs' allegation that the April 12, 2001 notice letter "specifically referenced the December 21, 1998 and November 15, 1999 notice letters" and also "expressly incorporated those letters by reference," defendants conspicuously state in their Answer that the April 12, 2001 notice letter only "*purported to* incorporate by reference" the two earlier notice letters. See Answer ¶95 (emphasis added).

Therefore, although defendants certainly have not asserted this as a basis for their motion to reconsider the Court's consolidation Order, it appears from their Answer, that, at some point, Ringling may argue that plaintiffs' new case somehow does not include all of the claims and allegations of unlawful conduct that are also included in the two previous notice letters – and that strategy, rather than defendants' ostensible "confus[ion]" is the real reason that defendants want the Court to reconsider its approach here. Indeed, in the second case, defendants have raised both a "Statute of Limitations" and a "Laches" defense. See Answer at 13. Hence, defendants apparently intend to make some argument that plaintiffs' new case has been brought too late to

challenge certain practices that were included in the 1998 and 1999 notice letters – an argument that defendants clearly would have more difficulty making with respect to the first case, which was filed on July 11, 2000.

Although plaintiffs believe there would be no merit to any such arguments, they certainly should not be put in the position of arguing these points after the first case has been dismissed – when it may be too late to have that case reinstated should this Court (or the Court of Appeals) agree with plaintiffs on any of these matters. Indeed, in suggesting that plaintiffs file a new case to avoid a ruling on the notice question, this Court specifically stated that it "would not dismiss [the first case] in any way to adversely impact on the merits of your pending Complaint." Transcript at 10. Therefore, unless defendants are willing to stipulate that all of the claims raised in Civ. No. 00-1641 can also be pursued in Civ. No. 03-2006, and that, should they prevail on the merits, plaintiffs are also entitled to seek attorneys' fees for the time they have spent litigating Civ. No. 00-1641, plaintiffs could be prejudiced by the dismissal of the first case at this juncture.

In any event, if Ringling's position is that there are claims and issues raised in the first case that cannot be litigated in the second case for some reason, then Ringling should be required to come forth with those arguments now – so that plaintiffs may rebut them and the Court can determine whether it is necessary to resolve those arguments. However, what Ringling should not be permitted to do is to suggest to the Court that it makes little substantive difference whether the first case is dismissed, if in fact Ringling contends that plaintiffs cannot use the second case as a vehicle to pursue all of the issues raised in the first case – as the Court evidently contemplated.

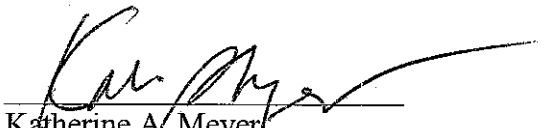
In short, either the defendants' agree that the claims in the two cases are functionally identical – in which case defendants are not prejudiced in the slightest by the Court's decision to

hold the motion for judgment on the pleadings in abeyance until there is some concrete reason or need to address it – or defendants' position is that the two cases are different, and that is why the Court needs to now resolve defendants' motion for judgment on the pleadings, in which case defendants should spell out their view of these differences. However, at this juncture, there certainly is no reason for the Court to depart from its present course of action.

CONCLUSION

For the foregoing reasons, defendants' motion for reconsideration should be denied.

Respectfully submitted,



Katherine A. Meyer
(D.C. Bar No. 244301)
Eric R. Glitzenstein
(D.C. Bar No. 358287)
Jonathan R. Lovvorn
(D.C. Bar No. 461163
Kimberly D. Ockene
(D.C. Bar No. 461191)

Meyer & Glitzenstein
1601 Connecticut Ave., N.W.
Suite 700
Washington, D.C. 20009
(202) 588-5206

Date: October 21, 2003

CERTIFICATE OF SERVICE

I certify that the foregoing has been served on defendants by having a copy thereof mailed this 21st day of October, 2003 to:

Harris Weinstein
Eugene D. Gulland
Joshua Wolson
Covington & Burling
1201 Pennsylvania Ave., N.W.
Washington, D.C. 20004-2401

Katherine A. Meyer