

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

|                             |   |                          |
|-----------------------------|---|--------------------------|
| AMERICAN SOCIETY FOR THE    | : |                          |
| PREVENTION OF CRUELTY TO    | : |                          |
| ANIMALS, et al.,            | : |                          |
|                             | : |                          |
| Plaintiffs,                 | : |                          |
|                             | : |                          |
| v.                          | : | Case Nos. 00-1641 (EGS), |
|                             | : | 03-2006 (EGS)            |
| RINGLING BROS. AND BARNUM & | : | JUDGE: Emmet G. Sullivan |
| BAILEY CIRCUS, et al.,      | : |                          |
|                             | : |                          |
| Defendants.                 | : |                          |
|                             | : |                          |

---

**REPLY MEMORANDUM IN SUPPORT OF  
DEFENDANTS’ MOTION FOR RECONSIDERATION OF  
ORDER GRANTING PLAINTIFFS’ MOTION FOR CONSOLIDATION**

In opposing defendants’ motion for reconsideration of the Order granting consolidation, plaintiffs now acknowledge exactly the point that prompted us to seek reconsideration. Plaintiffs take the position that “the cases should remain consolidated, and defendants’ motion for judgment on the pleadings should continue to be held in abeyance.” (Opp. at 2 (emphasis added).) Just as we feared, plaintiffs seek to misuse consolidation to block a ruling on defendants’ motion for judgment on the pleadings in case no. 00-1641.

At the status conference on September 23, 2003, the Court suggested the filing of the new case to protect plaintiffs if the motion for judgment on the pleadings were granted in the old case, not to block a ruling on that motion. (Tr. at 7.) In this spirit, defendants agreed to dispense with formal service of the new complaint and to respond to the new complaint in 10 days – on the understanding that the Court would promptly rule on the pending motion for judgment on the pleadings. (Tr. at 8 (“We

would still take the position that the existing claims ought to be dismissed out....”).)

Plaintiffs now are engaging in a bait-and-switch: having filed their new case, they seek to block a ruling on the motion in the first case.

Plaintiffs identify two reasons for the Court to maintain the first case on its docket, neither of which holds up to scrutiny.

First, plaintiffs contend that if they prevail in the second case, then they will seek attorneys' fees for work done in the first case. (Opp. at 4.) They do not explain how they could recover attorneys' fees in the first case based on their success in the second case, or why the Court should refuse to rule on defendants' pending dispositive motion in the first case in order to keep alive attorneys' fees for a case that should be dismissed. If, as defendants have argued, the Court lacks subject matter jurisdiction over the first case, then plaintiffs should not recover attorneys' fees for that case.

Second, plaintiffs contend that the Court should permit them to maintain the first case on the Court's docket as insurance against defendants' assertion of a meritorious defense in the second case. (Opp. at 5-6.) Once again they do not explain why the Court should refuse to rule on defendants' dispositive motion in the first case in order to protect plaintiffs if they lose the second case. Each of plaintiffs' two cases must stand or fall on its own merits. Plaintiffs cannot hold their first case in reserve against contingencies. For the reasons we have already presented, we urge the Court to dismiss the first case, either because (1) of the notice letter defects addressed in defendants' motion for judgment on the pleadings or (2) the first case is substantially duplicative of the second case.

## CONCLUSION

Plaintiffs simply do not confront this Court's observations at the September 23 status conference that it saw no "need for the old case to remain" and that "at some point, what's pending is going to give way to the amended complaint." (Tr. at 9, 11.) If plaintiffs do not voluntarily dismiss the first case, the Court should do so, either (a) because of plaintiffs' failure to satisfy the ESA's statutory requirement of written notice prior to filing a citizen suit or (b) pursuant to the Court's inherent power to control its docket.

Respectfully Submitted,

COVINGTON & BURLING

/s/ Eugene Gulland

Harris Weinstein (DC Bar No. 032268)  
Eugene D. Gulland (DC Bar No. 175422)  
Jeannie Perron (DC Bar No. 456099)  
1201 Pennsylvania Avenue, N.W.  
Washington, DC 20004  
(202) 662-6000

ATTORNEYS FOR DEFENDANTS

October 31, 2003