

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION**

STATE OF MICHIGAN, STATE OF)	
WISCONSIN, STATE OF MINNESOTA,)	
STATE OF OHIO, and COMMONWEALTH)	
OF PENNSYLVANIA,)	
)	
Plaintiffs,)	
)	
v)	No. 10 CV 4457
)	
UNITED STATES ARMY CORPS OF)	Hon. Robert M. Dow, Jr.
ENGINEERS and METROPOLITAN WATER)	
RECLAMATION DISTRICT OF GREATER)	
CHICAGO,)	
)	
Defendants.)	

**INTERVENOR, WENDELLA SIGHTSEEING COMPANY INC.’S
POST HEARING MEMORANDUM**

NOW COMES Intervenor, Wendella Sightseeing Company, Incorporated (“Wendella”), an Illinois corporation, by and through its attorneys, STUART P. KRAUSKOPF and KURT A. KAUFFMAN, as and for its Post Hearing Memorandum, and in support thereof states as follows.

I. PLAINTIFFS FAIL TO MEET THEIR BURDEN OF PROOF, BECAUSE: 1) DR. LODGE’S eDNA RESEARCH IS NOT RELIABLE; AND 2) THERE IS NO EVIDENCE THAT ASIAN CARP WILL DESTROY LAKE MICHIGAN AND THE GREAT LAKES FISHING INDUSTRY.

Plaintiffs called only one witness at the hearing, Dr. David Lodge, who did not support Plaintiffs’ request for a preliminary injunction, because his testimony was inconsistent, unreliable and unsupported by eDNA science. Plaintiffs offered no live witness for their conclusory statement that Asian carp will thrive in the Great Lakes and will destroy the Great Lakes fishing and tourism industry. Instead, they cross-examined Duane Chapman who testified that the outcome if Asian carp were to enter the Great Lakes is uncertain and that further

research needs to be completed. Wendella's brief will focus primarily on the lack of scientific evidence elicited by Plaintiffs.

A party seeking a preliminary injunction must demonstrate that: (1) the moving party has a reasonable likelihood of success on the merits; (2) no adequate remedy at law exists; (3) the moving party will suffer irreparable harm without injunctive relief; (4) the irreparable harm suffered without injunctive relief outweighs the irreparable harm the defendant will suffer if the injunction is granted; and (5) the injunction will not harm the public interest. *Nalco Chemical Co. v. Hydro Technologies, Inc.*, 984 F.2d 801, 802 (7th Cir. 1993); *Mil-Mar Shoe Co., Inc. v. Shonac Corp.*, 75 F.3d 1153, 1156 (7th Cir. 1996). In order to prevail, the plaintiff must satisfy each element of this five-part test. *Roland Machinery Co. v. Dresser Industries, Inc.*, 749 F.2d 380, 386-388 (7th Cir. 1984). The threshold factor is likelihood of success on the merits. See *O'Connor v. Board of Ed. of School Dist. No. 23*, 645 F.2d 578, 580 (7th Cir. 1981), certiorari denied, 454 U.S. 108, 102 S. Ct. 641, 70 L. Ed. 2d 619. See, also, [*Rust Env't & Infrastructure v. Teunissen*, 131 F.3d 1210, 1213 \(7th Cir. 1997\)](#); [*Platinum Home Mortg. Corp. v. Platinum Fin. Group*, 149 F.3d 722, 726 \(7th Cir. 1998\)](#).

Plaintiffs neglect to show any reasonable likelihood that they will succeed on the merits. Plaintiffs failed to prove that: 1) Asian carp are, in fact, above the electric barrier system; and, 2) should these fish reach Lake Michigan, Plaintiffs will suffer irreparable harm: that is, the ruination of the Great Lakes fishing and tourism industries.

II. DR. LODGE'S RESEARCH DOES NOT PROVE THAT THERE ARE ASIAN CARP ABOVE THE ELECTRIC BARRIER SYSTEM

In Dr. Lodge's attempt to sell himself as the preeminent eDNA expert, he proved only that he is an advocate for permanent separation of the Chicago Area Waterway System

(“CAWS”) and that he has some stake in the outcome of his eDNA research. As discussed below, Dr. Lodge’s research has not been peer reviewed, is incomplete, and is unreliable.

Dr. Lodge ignores the risk of false positives in his eDNA research. He all but ruled out the possibility that his eDNA research contained false positives. Dr. Lodge testified that “...false positives would not result from the choice of your fragment length.” See, Dr. Lodge testimony at p. 140. Dr. Ficetola strongly disagrees with this statement. Dr. Ficetola testified that the size of the strands of the eDNA matter as to whether or not false positive results exist. He testified that short eDNA strands can exist longer in the environment, but there is a higher risk of contamination. See, Dr. Ficetola testimony at p. 237-238. The use of short strands can result in false positives, meaning that the researcher may believe that there are live fish present, when in fact, they are not.

Dr. Lodge used short strands that required repeated amplification to determine if they matched with his primers. See, Dr. Lodge testimony at p. 39. Dr. Lodge’s strand lengths were capable of false positive results. See, Dr. Ficetola testimony at p. 255. Yet, Dr. Lodge does not seem to equivocate when he concludes (in live testimony, Declarations and reports to Congress) that there are multiple live Asian carp present above the barrier system.

Dr. Lodge had never addressed the false positive issue until his cross examination at the hearing. He touts the USEPA audit as a confirmation of his work. But he is unwilling to accept the fact that there may be false positives in his research. Dr. Lodge claims that his conclusions are confirmed by the “temporal and special pattern” he sees in his research. However, this assertion is nothing more than a gut feeling – one that is not actually supported by sound science.

Dr. Ficetola testified that a false positive means that there is no “live” species in the area tested. Instead, a positive result could come from tissue from a dead fish and/or feces containing the DNA of the target species. See, Dr. Ficetola testimony at p. 256. This would support the

theory that there are alternatives to live fish above the barrier. Dr. Lodge is so fixed on his conclusion that he rules out alternatives for possible Asian carp eDNA in the water, without a scientific analysis of any of the possibilities. Because Dr. Lodge rejects the idea of a correlation between false positives and the fragment length used in his research, his “temporal and special” determination that multiple live Asian carp are above the barrier system is severely undermined.

Dr. Lodge never backed off of his conclusion that the only plausible explanation derived from his research is the presence of at least multiple Asian carp, even when faced with compelling evidence otherwise. In spite of various administrative agencies having poisoned areas of the CAWS, electrofished areas of the CAWS, and engaged in netting operations in the CAWS, with no resulting Asian carp having been captured and killed, Dr. Lodge still does not accept the possibility that his eDNA findings may not be wrong. Rather than admit that his research may be wrong, he makes the excuse that although his team reported positive results in the area where the capture or kill operation took place, there were also times when his team did not locate Asian carp eDNA in those areas. See, Dr. Lodge testimony at p. 70. He says, in response, “the deployment wasn’t really exactly in the area where we had seen positive hits.” *Id.*

Dr. Lodge also argues that a negative result of an eDNA sample does not imply that no Asian carp are present. See, Lodge testimony at p. 175. He reasons that in the case of a negative finding, there was a lack of concentration of eDNA levels, which were below his research teams’, “...detection limits of our current eDNA protocols.” See, Dr. Lodge January Declaration at p. 40. Yet, Dr. Lodge admitted that these detection limits were not derived from a scientific evaluation. See, Dr. Lodge testimony at p. 176. The USEPA audit team noted that it could not assess the potential for false negatives because Dr. Lodge’s laboratory had not conducted the experiments necessary that could be done to the detection limits of eDNA in this environment. At the hearing, when confronted with what Dr. Lodge’s team did to rectify this problem, he

stated, “I believe that we have done experiments since then, but I don’t recall the details of those.” See, Dr. Lodge testimony at p. 178. Dr. Lodge’s failure to address false negative results is another example that his work is incomplete.

Dr. Lodge ignored the possibility of false positive results with the size of the primers that he used. Dr. Lodge did not provide any evidence that he scientifically addressed the possibility of false negative results. Plaintiffs cannot meet their burden of proof as to likelihood of success on the merits, because Dr. Lodge’s research is simply unreliable.

Dr. Lodge also failed to take reasonable steps to confirm his findings. Dr. Ficetola discussed the importance of “sequencing,” which assists the researcher in helping, “to be sure that you actually identified the DNA of the target species.” See, Dr. Ficetola testimony at p. 239. Sequencing is used after you have obtained a positive hit to compare the sequence with the known sequences of the target species. *Id.* Dr. Lodge testified that his team did not begin sequencing until after the USEPA Audit, which was issued on February 5, 2010. Thus, for a large part of the time, Dr. Lodge did not engage in a method by which to confirm what he believed to be positive eDNA hits.

Dr. Lodge also failed to sequence other species of fish in order to verify that his findings were accurate. Dr. Lodge dismissed sequencing as, “...just one additional step.” See, Dr. Lodge testimony at p. 178. It is easy to understand why Dr. Lodge did not see sequencing as a vital part of his eDNA research – he did not do a complete sequencing study. Dr. Lodge’s study involved the use of primers made up of the DNA of the two species of fish that he was targeting. If the base pairs which were amplified matched, he regarded this as a positive hit. See, Dr. Lodge testimony at pps. 38 – 41. After February, 2010 (months after he started his research), Dr. Lodge sequenced his positive hits against DNA sequences of only the Asian carp that he was targeting.

Dr. Lodge's failure to conduct the necessary sequencing to screen the primers is another basis for possible false positive results.

Dr. Ficetola did his sequencing study by comparing the DNA sequences that were believed to be positive hits with the target species (bullfrogs) and with other species that were in the subject environment. See, Dr. Ficetola testimony at p. 239. Dr. Ficetola did this, "...to be sure that you identify the right sequence." Dr. Ficetola saw no evidence that Dr. Lodge sequenced species other than the target. Id.

Dr. Lodge's team also did not perform a calibration study, which would have provided them a scientific basis by which to correlate the number of positive eDNA hits with the possible abundance of the target fish. See, Dr. Ficetola testimony at p. 237. A calibration study is a critical part of an eDNA study. Id. Dr. Lodge admitted that his team did not perform such a study. See, testimony of Dr. Lodge at p. 149. To his defense, Dr. Lodge understood the importance of a calibration study but testified that he did not get the funding to perform this study. Id.

Absent this study, Dr. Lodge had no scientific basis by which to render an opinion as to the possible abundance of fish based on his positive DNA hits. Although Dr. Lodge quibbled on the issue, he finally testified: "Q: But again, that's as you believe it, not as been scientifically tested, true? A: Would you like to know why I believe it?" See, testimony of Dr. Lodge at p. 149. With this answer, Dr. Lodge admits that his opinion had not been scientifically tested.

Although Dr. Lodge didn't conduct a calibration study, he made several affirmative statements that his team's "...eDNA results indicate that at least a few individuals of both silver and bighead carp have already accessed to Lake Michigan via the O'Brien Lock and Dam." See, testimony of Dr. Lodge at p. 149, also, see, Dr. Lodge's January, 2010 Declaration at par. 49. His statement would make it seem that his eDNA research resulted in a definitive finding of

multiple live Asian carp above the barrier system. Yet, he neglected to share that he did not perform a calibration study or any other scientific study to confirm his results. Dr. Lodge was scientifically irresponsible in making this statement to the USACE and to the public.

One can only conclude that Dr. Lodge is an advocate for permanent separation of the CAWS from the Great Lakes and his statements are colored by this bias instead of sound science.¹ Why else would a qualified scientist make such unsupported and untested conclusions? His advocacy has led the Plaintiffs to take it on faith that the Lodge team's eDNA findings are a sufficient basis for equitable relief. But, absent a true scientific method, this Court must disregard Dr. Lodge's conclusions as being his "belief" and not his scientific opinions.

Dr. Lodge's eDNA research has never been peer reviewed, nor has it been published. Plaintiffs would like to convince this Court that the USEPA audit constitutes scientific peer review, but it does not. Dr. Lodge adopts Plaintiffs' argument that his research has been peer reviewed, but the evidence says otherwise. See, testimony of Dr. Lodge at p. 117. The USEPA Audit was performed by a group which did not include anyone who has participated in an eDNA study. See, testimony of Dr. Lodge at p. 145. The Audit focused on the "analytical procedures employed by the laboratory," and did not include an interpretation of the eDNA results with regard to the presence or absence or abundance of silver or bighead carp. See, USEPA Audit at p. iv. The Audit noted the need for further research in these areas. Id.

Dr. Lodge testified that his research is currently subject to an external peer review. See, Dr. Lodge testimony at p. 116. At the present time, he is submitting his information to a group who will perform this peer review. Id. He will not, however, release his primer or other data,

¹ There is no question that Dr. Lodge is an advocate for permanent separation, which has skewed his ability to follow a reliable scientific method. In light of the serious questions about the reliability of his methods, Dr. Lodge said at the hearing, "Yes, I think there is a risk, a very urgent and imminent risk of invasion given the demonstrated presence of bighead carp with unimpeded access to Lake Michigan and the indication from eDNA that the same situation applies to silver carp." See, Lodge testimony at p. 91.

since he considers them to be proprietary. See, testimony of Dr. Lodge at p. 136. Dr. Lodge states that it is commonplace for scientists to withhold data collected so that he can be the first to publish his results. See, testimony of Dr. Lodge at p. 183. While this may be true generally, Dr. Lodge must understand that this secrecy prevents any analysis or vetting of his methods and his claimed results.

From the time that Dr. Lodge's team began its sampling to the date of the hearing, it was impossible for any scientist to verify Dr. Lodge's study and findings. Yet, Dr. Lodge said that he did not withhold information relevant to the United States Army Corps of Engineers ("USACE") need to make management decisions. See, Dr. Lodge testimony at p. 183. But, in fact, Dr. Lodge did withhold the primers and other data that would be vital to the USACE in making management decisions. See, Peabody testimony at 256-257. Without scientific support, Dr. Lodge has asserted before Congress, before the Supreme Court, and before this Court that there are multiple Asian carp above the electric barrier system. Wendella, having recognized that it cannot survive closures of the Locks, hired the scientist who developed the use of eDNA in water, Dr. Ficetola. See, Dr. Ficetola testimony at p. 234. Based on his review, Dr. Ficetola offered an Affidavit which described his inability to fully assess Dr. Lodge's work, due to the lack of information Dr. Lodge made available to the public and the USACE.²

To aid courts in assessing the reliability of scientific expert testimony, the Supreme Court set forth the following, non-exhaustive list of "guideposts" for consideration: (1) whether the scientific theory can be and has been tested; (2) whether the theory has been subjected to peer review and publication; (3) the theory's known or potential rate of error when applied; and (4) whether the theory has been "generally accepted" in the scientific community. [*Daubert v. Merrell Dow Pharmaceuticals, Inc.* 509 U.S. 579, 593-94](#); see also [*Chapman v. Maytag Corp.*](#),

² Wendella made a FOIA request for the primers and other data, prior to Dr. Ficetola's report.

[297 F.3d 682, 687 \(7th Cir. 2002\)](#). Having set forth the defects with Dr. Lodge's methods and conclusions contained in his testimony, Wendella submits that Dr. Lodge's testimony is unreliable under all of these criteria.

Dr. Lodge's process was anything but cooperative. He has been withholding vital information that may have afforded the Plaintiffs a chance to reconsider their pursuit of the legal remedies sought here, and allowed the USACE to take more informed management action. General Peabody testified that he was not provided the opportunity to review Dr. Lodge's raw data, even though Dr. Lodge was working under a cooperative agreement with the USACE. See, General Peabody testimony at pps. 256 – 257. The numerous problems Dr. Lodge's research and his testimony are glaringly apparent, yet Plaintiffs continue to rely on his work. As a matter of scientific integrity, one would expect Dr. Lodge to withhold public comment until his work could have been peer reviewed and reproduced by scientists to determine its validity. Dr. Lodge chose to skip this vital step in the scientific process to protect his "proprietary information" pending publication.

III. PLAINTIFFS HAVE OFFERED NO EVIDENCE TO SHOW THAT THE OUTCOME OF ASIAN CARP IN LAKE MICHIGAN WOULD CAUSE IRREPARABLE HARM.

Plaintiffs have not proven that irreparable harm will result if Asian carp find their way into southern Lake Michigan. The only witness offered by Plaintiffs in this regard, Dr. Newcomb, has no expertise in the area of Asian carp biology, nor has she studied the environment of southern Lake Michigan, the alleged gateway to an Asian carp invasion. Plaintiffs' reliance on Dr. Lodge is equally unfounded, since Dr. Lodge, himself, coauthored an article describing his study which concludes that silver carp, "...would neither spread quickly not be perceived as a nuisance in the Great Lakes." See, Dr. Lodge testimony at p. 134. In his

redirect testimony, he qualified the quote from his article, stating, "...so we were less confident in these results than for other fishes."

Plaintiffs' attempt to use Duane Chapman as a proponent of the idea that Asian carp will destroy the Great Lakes fishing industry is equally unpersuasive. The crux of Mr. Chapman's testimony is that the outcome of Asian carp in the Great Lakes is uncertain. See, Duane Chapman testimony at p. 377. In this regard, he noted that there are no environments exactly like the Great Lakes in the world. See, Duane Chapman testimony at p. 378. He stated that it is uncertain if all of the 22 rivers that lead into the Great Lakes would be adequate spawning habitats for Asian carps. See, Duane Chapman testimony at p. 378. He believes that Dr. Cooke's modeling study is "a good place to start," "it's well done," and it "seems to work." See, Duane Chapman testimony at p. 381. On cross examination he said that it is, "within the range of possibility that Asian carps could establish a population in the Great Lakes and become problematic..." See, Duane Chapman testimony at p. 404. Uncertainty is the best that Plaintiffs can do. But uncertainty cannot support a claim for extraordinary relief as a matter of law.

A plaintiff may suffer irreparable harm if the nature of the loss makes monetary damages difficult to calculate. *Somerset House, Inc. v. Turnock*, 900 F.2d 1012, 1018 (7th Cir. 1990), [E. St. Louis Laborers' Local 100 v. Bellon Wrecking & Salvage Co.](#), 414 F.3d 700, 705 (7th Cir. 2005). A plaintiff cannot obtain a preliminary injunction by speculating about hypothetical future injuries. [Tom Doherty Assocs. v. Saban Entm't, Inc.](#), 60 F.3d 27, 37 (2d Cir. N.Y. 1995).

Plaintiffs' only retained expert, Dr. Newcomb, has performed no studies of her own regarding the potential outcome of Asian carp in the Great Lakes.³ Notably, in her Affidavit, she never mentions the most detailed study of this issue to date which was published in February of

³ Dr. Newcomb did not testify that the hearing and no reason was provided to the Court as to why Plaintiffs did not offer their only retained expert's live testimony. Her written submission has been challenged in Wendella's Motion to Strike Dr. Newcomb's testimony. In that Motion, Wendella notes that Dr. Newcomb is unqualified to testify as to any of the scientific issues presented in this case.

2010 and co-authored by Dr. Sandra Cooke. Wendella has provided this court with Dr. Cooke's Affidavit and a published report of her study, which is the most reliable study on this topic to date.⁴

Dr. Cooke studied the attributes of these fish and used predictive modeling to determine the possible outcome of Asian carp in the Great Lakes. See, Dr. Cooke and Dr. Hill's article titled, "Can filter-feeding Asian carp invade the Laurentian Great Lakes? A bioenergetic modeling exercise" (hereinafter referred to as the "Modeling Study"), which is attached to Wendella's Response to Plaintiff's Motion for Preliminary Injunction as Exhibit "C." Dr. Newcomb based her conclusion that Asian carp will subsist in Lake Michigan because of their ability to thrive in the Mississippi River Basin. See, Dr. Newcomb Affidavit at par. 9. Dr. Cooke opined that while Asian carp can subsist in a river system, it is unlikely that Asian carp will not survive in southern Lake Michigan, because of the lack of an adequate food source. See, Dr. Cooke Affidavit at pars. 12 and 18.⁵ Dr. Newcomb's assertions fail to consider the obvious fact that Lake Michigan and the Mississippi River are completely different habitats.

Dr. Newcomb relies on work performed by Duane Chapman to reach her conclusions. See, e.g. Dr. Newcomb Affidavit at par. 11. Although Duane Chapman opined that the outcome of Asian carp in the Great Lakes is uncertain, Dr. Newcomb opined without equivocation that these fish will subsist and harm the Great Lakes. See, Dr. Newcomb Affidavit at par 23, ("**When** silver and bighead carp alter the plankton communities of the great Lakes..." emphasis added).

Dr. Newcomb believes that there are sufficient levels of plankton in the Great Lakes and their tributaries to support sustainability. See, Dr. Newcomb Affidavit at par 13. In contrast, the

⁴ Wendella flew Dr. Cooke to Chicago to testify at the hearing, but due to time constraints, she was unable to provide live testimony.

⁵ Dr. Cooke does conclude her Affidavit that she cannot say that Asian carp will not sustain in the Great Lakes with certainty, but she does say that it is unlikely that these fish will not subsist there.

Modeling Study, which considered known concentrations of chlorophyll (a common proxy for plankton levels) referred to southern Lake Michigan as a “plankton desert.” See, Dr. Cooke Affidavit at par. 12, Modeling Study at p. 12. Her Modeling Study concludes that because of the low plankton levels in southern Lake Michigan, Asian carp cannot maintain the energy levels to survive there. See, Modeling Study at p. 8.

Dr. Newcomb states that there are small tributaries and shallows in which Asian carp could survive once the fish moves north into the Great Lakes. See, Dr. Newcomb Affidavit at par 13. Dr. Cooke concluded that there are other factors that would seriously constrain the carp’s ability to consume sufficient food for growth in these areas. See, Dr. Cooke Affidavit at par. 19. Significantly, the Modeling Study predicts that even “[I]f Asian carp were to enter the ‘plankton desert’ of Lake Michigan via the CSSC, it seems unlikely (but not impossible) that they would be able to derive enough energy to support the energetic costs of traveling to Green Bay or another ‘plankton oasis.’” See, Modeling Study at p. 12.

The Modeling Study involved the use of a bioenergetics model, which compared the energy requirements of Asian carp to the energy available in the plankton in the Great Lakes. The Modeling Study considered the biology of the bighead carp and the silver carp, in order to determine the outcome if these fish entered the Great Lakes through southern Lake Michigan. The Modeling Study considered the “swimming costs,” which is the energy needed for the fish to move throughout Lake Michigan. Dr. Cooke’s and Dr. Hill’s methods included the use of several variables that go to the metabolism of these fish, which were used to determine whether the fish had the energy levels by which to survive in the Great Lakes.

The Modeling Study simulated three different body sizes of the fish, along with their consumption requirements. Then, it considered how much food would be needed to maintain swimming speeds needed for reproduction and survival. The Modeling Study considered the

water temperatures for all four seasons. The Modeling Study considered the environment of rivers where these fish have survived. The study modeled the known biology of the fish with the environment of four separate sites in southern Lake Michigan.

The Modeling Study concludes:

- a) that these fish require higher plankton consumption to attain the swimming speeds needed for reproduction;
- b) in open-water regions of southern lake michigan, these fish would not have sufficient growth potential to survive;
- c) the low plankton level in many open water regions of the great lakes cannot support the growth of these fish; and,
- d) the threat of these fish disrupting food supplies of other fish are small.

See, Modeling Study at pps. 7 -8.

Dr. Cooke acknowledges that her study is a “first attempt” at a modeling study for these fish and that her further research should be done to expand on their work. See, Modeling Study at p. 11. However, taking into account the need for further study, she opines that the plankton level of southern Lake Michigan is so low, that these fish will likely not be able to survive in Lake Michigan and ultimately, the Great Lakes.

Plaintiffs have not met their burden to prove that Asian carp are an imminent threat to the Great Lakes. Their only retained expert, Dr. Newcomb, has not studied the real science of Asian carp. Dr. Newcomb offers opinions in areas where she has no level of expertise. She picked and chose only those parts of studies that she believed supports Plaintiffs’ case. She accepted the results of Dr. Lodge’s eDNA research as a truth, without having the ability or seeming desire to discern the reliability of the study. She opted to include portions of Duane Chapman’s research in her Affidavit, without considering his opinion that the outcome of Asian carp in Lake Michigan is uncertain. She failed to consider the Cooke and Hill Modeling Study, which is the most recent and the most reliable study to date on the outcome of these fish in the

Great Lakes. Plaintiffs did not even produce her to give live testimony so her claims could be questioned.

This Court must give little to no weight to the Affidavit offered by Dr. Newcomb. Combined with the live testimony of Dr. Lodge and Duane Chapman, Plaintiffs have not demonstrated anything other than an uncertain and hypothetical claim of harm, and cannot show any reasonable likelihood of success on the merits of this case.

IV. CONCLUSION

For the reasons set forth herein, the live testimony of the witnesses and all of the submissions filed by all of the parties, Plaintiffs have not met their burden of proof to obtain the equitable relief sought here.

WHEREFORE, Intervenor, Wendella Sightseeing Company, Inc. respectfully requests this Honorable Court for an Order denying Plaintiffs' Motion for Preliminary Injunction and for any other relief which this Court deems just and reasonable.

Respectfully submitted,

WENDELLA SIGHTSEEING COMPANY,
INCORPORATED,

By: /s/ Stuart P. Krauskopf
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