IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

American Society for the Prevention of Cruelty to Animals, et al.,	)	
Plaintiffs,	)	
v.	)	**Civil Action No. 03-2006 (EGS)**
Ringling Brothers and Barnum & Bailey Circus, et al.,	)	
Defendants.	)	

MEMORANDUM IN SUPPORT OF MOTION OF DEFENDANT FELD ENTERTAINMENT, INC. FOR LEAVE TO AMEND ANSWERS TO ASSERT ADDITIONAL DEFENSE AND RICO COUNTERCLAIM

Pursuant to Federal Rules of Civil Procedure 13(e) and 15(a), Defendant Feld Entertainment, Inc. ("FEI") moves this Court for leave to amend its Answer to Plaintiffs' Complaint and Answer to Plaintiff API's Supplemental Complaint to (1) assert the affirmative defense of unclean hands; and (2) to assert a counterclaim pursuant to the provisions of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. 1961 et seq., and the Virginia Conspiracy Act, Va. Code Ann. § 18.2-499-500, against plaintiffs in the instant action, American Society for the Prevention of Cruelty to Animals et al. v. Ringling Bros. and Barnum and Bailey Circus et al., Civil Action No. 03-2006 (EGS), previously filed as Civil Action No. 00-1641 (hereinafter the "ESA Action"): American Society for the Prevention of Cruelty to Animals ("ASPCA"), Animal Welfare Institute ("AWI"), The Fund for Animals ("FFA"), Animal Protection Institute ("API"), and Tom Rider ("Rider"). FEI further moves this Court to

add the Wildlife Advocacy Project ("WAP")[1] as a party to its counterclaim pursuant to Rule 13(h). Finally, FEI moves this Court for leave to amend to assert the doctrine of unclean hands as a defense to the plaintiffs' request for equitable relief pursuant to Rule 15(a).

INTRODUCTION

WAP and the plaintiff organizations [ASPCA, FFA, AWI and API] are paying their individual plaintiff, Tom Rider. None of these entities dispute this, nor could they. Plaintiffs' counsel, Katherine Meyer ("Meyer"), however, claims that "all of the plaintiff organizations have been extremely forthcoming about the funds that they have contributed to either Tom Rider or the Wildlife Advocacy Project." Exhibit 4, Meyer letter to Gasper, at 10 (Jan. 16, 2007).

The truth is, as detailed in FEI's proposed counterclaim (attached as Exhibit 3 to FEI's motion), the plaintiffs, together with WAP and MGC, have been anything but forthcoming and have "hidden the ball" from FEI regarding the so-called "funding" to Rider to "educate the public about Ringling Bros." by submitting false interrogatory answers and false deposition testimony and refusing to produce documents subpoenaed from WAP during discovery in the ESA Action. That is because, in reality, ASPCA, AWI, FFA, API and WAP are not "funding" Rider to "educate the public about Ringling Bros." ASPCA, AWI, FFA, and API, facilitated by WAP and MGC, are paying Rider for his participation as a plaintiff and as a key fact witness in the ESA Action and for his testimony as a legislative witness. Such actions constitute violations of federal and state laws prohibiting bribery of, and paying gratuities to, a witness. Furthermore, when queried about these activities, certain of the plaintiffs have submitted false responses under oath in an effort to cover-up their misdeeds which constitute obstruction of justice. Moreover,

[1] WAP is, as a matter of law, an alter ego of the law firm representing plaintiffs in the ESA Action, Meyer, Glitzenstein & Crystal ("MGC"). There is such a unity of interest and ownership between the two entities that separate personalities no longer exist and treating WAP as distinct from MGC would promote injustice. See Defendant's Motion to Compel Documents Subpoenaed from the Wildlife Advocacy Project and Memorandum of Points and Authorities in Support Thereof (Docket No. 85).

the Rider payment scheme was effectuated by communications that violate the federal mail and wire fraud statutes.

FEI's proposed counterclaim is based on evidence that has been produced in the ESA Action, notwithstanding the plaintiffs' efforts at obfuscation. FEI fully apprehends the seriousness of the claims set forth in the proposed counterclaim and does not make these claims lightly. But, by the same token, the assertions of fact contained in the proposed counterclaim are supported by evidence produced in this very case. Thus, unlike some RICO allegations – which are nothing more than claims that the proponent hopes to prove if allowed to take discovery – the facts underlying the RICO claim here have already been established.

To carry out a scheme to ban Asian elephants in circuses and to defraud FEI of money and property, with the ultimate objective of banning Asian elephants in all forms of entertainment and captivity, ASPCA, AWI, FFA, API, Rider and WAP, together with the encouragement and advice of MGC, formed an association-in-fact enterprise and conspired to conduct and conducted the affairs of that enterprise through a pattern of, among other things, bribery, illegal gratuity payments, obstruction of justice, mail fraud and wire fraud. ASPCA, AWI, FFA and API, facilitated by WAP and MGC, devised an illegal, ethically improper, and fraudulent scheme to pay Rider and hide the fact that Rider was on their payroll by creating the false image of Rider as a purported volunteer championing Asian elephant welfare. Further, after discovery began in the ESA Action, ASPCA, AWI, FFA, API, Rider and WAP, together with the encouragement and advice of MGC, attempted to cover-up the payment scheme.

The illegal, ethically improper, and fraudulent payment scheme has been ongoing since at least May 2001 and continues through the filing of this motion. Since the funding began, the source of the funding to Rider has changed: ASPCA, AWI, FFA and API have funded, and

continue to fund, Rider for varying periods of time. How Rider has received, and continues to receive, the funding has also changed: at times ASPCA, AWI, FFA and API have paid Rider directly and at other times ASPCA, AWI, FFA and API's payments have been funneled through MGC or WAP. But, at least one thing has remained constant: Rider's livelihood is derived from his services to ASPCA, AWI, FFA and API as a paid plaintiff and key fact witness in the ESA Action and as a legislative witness.

Because of the plaintiffs,' WAP's and MGC's continuing cover-up -- submitting false interrogatory answers and false deposition testimony and refusing to produce documents subpoenaed from WAP -- FEI was not fully aware of the extent, mechanics, and purpose of the payment scheme until at least June 30, 2006, when, after discussions with FEI's new counsel, WAP partially responded to FEI's third-party subpoena. Only then did the gravity of plaintiffs,' WAP's, and MGC's actions become clear. Further, FEI was not aware of API's participation in the payment scheme until API responded to discovery requests for the first time on January 15, 2007.

I. FEI SHOULD BE GRANTED LEAVE TO AMEND TO FILE A RICO AND CONSPIRACY COUNTERCLAIM

A. Leave to Amend Should be Freely Given When Justice So Requires

Federal Rule of Civil Procedure 15 governs amendments to pleadings. Under Rule 15(a), leave to amend a pleading "shall be freely given when justice so requires." Fed. R. Civ. P. 15(a); see also Foman v. Davis, 371 U.S. 178, 182 (1962). As a whole, "Rule 15 embodies a generally favorable policy towards amendments." Davis v. Liberty Mutual Ins. Co., 871 F.2d 1134, 1136 (D.C. Cir. 1989). The underlying purpose of Rule 15 "is to facilitate a decision on the merits of [a] case rather than on technicalities." Hisler v. Gallaudet Univ., 206 F.R.D. 11, 14 (D.D.C. 2002). "Although the grant or denial of leave to amend is committed to a district court's

discretion, it is an abuse of discretion to deny leave to amend unless there is sufficient reason, such as 'undue delay, bad faith or dilatory motive ... repeated failure to cure deficiencies by [previous] amendments ... [or] futility of amendment.'" Firestone v. Firestone, 76 F.3d 1205, 1208 (D.C. Cir. 1996) (quoting Foman, 371 U.S. at 182).

Rule 13 governs the pleading and amendment of counterclaims and cross-claims. Specifically, Rule 13(e) applies to a counterclaim "which either matured or was acquired by the pleader after serving a pleading." Fed. R. Civ. P. 13(e). Rule 13's specific guidelines for the pleading and amendment of counterclaims and cross-claims are read in conjunction with Rule 15's general guidelines for amendments to pleadings. United States v. TDC Management Corp., 1991 WL 35528, at *1 (D.D.C. Feb. 23, 1991); Preferred Meal Systems v. Save More Foods, Inc., 129 F.R.D. 11, 12 (D.D.C. 1990). "Indeed, refusal by the district court to allow an amendment to add a counterclaim, where [the] plaintiff has failed to show substantial prejudice, may be an abuse of discretion." Woodward v. DiPalermo, 98 F.R.D. 621, 624 (D.D.C. 1983). District courts have applied Rule 15's liberal amendment policy to motions for leave to file counterclaims pursuant to Rule 13(e). See, e.g., Tommy Hilfiger Licensing v. Bradlees, 2002 U.S. Dist. LEXIS 377, at *13-14 (S.D.N.Y. Jan. 15, 2002); All West Pet Supply Co. v. Hill's Pet Production Division, 152 F.R.D. 202, 204 (D. Kan. 1993); Abex Corp v. Maryland Cas. Co., 1987 WL 19001, at *1 (D.D.C. Oct. 16, 1987).

Because a counterclaim brought pursuant to Rule 13(e) by definition does not mature until after a party has served its pleading, a Rule 13(e) counterclaim is technically not a compulsory counterclaim. 3 Moore's Federal Practice, § 13.42 (Matthew Bender 3d ed.). Once a Rule 13(e) counterclaim matures, the pleader may bring a Rule 13(e) counterclaim, with leave of court, as a permissive counterclaim. See id. In the context of Rule 13(e), "[m]aturity is

synonymous with accrual; that is the point from which a statute of limitations would run." Cabrera v. Courtesy Auto, Inc., 192 F. Supp. 2d 1012, 1015 (D. Neb. 2002).

B. Rule 13(e) Governs FEI's Motion for Leave to File a RICO and Conspiracy Counterclaim

FEI's counterclaim[2] matured or was acquired after FEI was served with and answered both complaints in the ESA Action: (1) Plaintiffs' Complaint, which was filed on September 23, 2003 (Docket No. 1) and answered by FEI on October 8, 2003 (Docket No. 4); and (2) Plaintiff API's Supplemental Complaint, which was accepted for filing on February 23, 2006 (Docket No. 60) and answered by FEI on March 15, 2006 (Docket No. 63).

The proper accrual rule for a civil RICO claim is the "discovery-of-injury" rule, which starts the four year statute of limitations at the point when a victim discovers or reasonably should have discovered his or her injury. Rotella v. Wood, 528 U.S. 549, 559 (2000). FEI first learned about WAP in ASPCA's Responses and Objections to Defendants' First Set of Interrogatories, dated June 9, 2004, and learned more details regarding the payment scheme during ASPCA's deposition, which took place on July 19, 2005. FEI was not fully aware of the extent, mechanics, and purpose of the payment scheme until June 30, 2006, when, after discussions with FEI's new counsel, WAP partially responded to FEI's third-party subpoena. Indeed, the WAP partial production[3] was a key event because only then did it become clear that tens of thousands of dollars in witness payments were being funneled either through MGC or WAP, a shell entity dominated by MGC, counsel of record in this very case. See [Proposed] Counterclaim at ¶¶ 3-126.

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[2] The Court has subject matter jurisdiction over FEI's RICO counterclaim pursuant to 28 U.S.C. § 1331 because that claim arises under a federal statute. Further, the Court may exercise supplemental jurisdiction over FEI's conspiracy counterclaim pursuant to 28 U.S.C. § 1367(a).

[3] WAP did not fully comply with the subpoena and made several baseless objections, all of which is the subject of a pending motion to compel. (Docket No. 85).

More details regarding the payment scheme became known at the plaintiffs' own deposition of Rider, which took place on October 12, 2006. There it was revealed that Rider had been on the plaintiffs' payroll since at least 2001 and had not filed tax returns or declared any of the money (which has been essentially his sole source of support since 2001) as income. See [Proposed] Counterclaim ¶¶ 3-126. It also was revealed that Rider submitted a perjured interrogatory answer in response to a straightforward question about the illicit payments. Id. ¶¶ 154-161. Further, FEI only learned of API's participation in the illegal payment scheme on January 15, 2007, when API responded to discovery requests for the first time.

C. The Court Should Grant FEI's Motion for Leave to File a RICO and Conspiracy Counterclaim

1. The Plaintiffs Will Not be Prejudiced By FEI's Counterclaim

"The most important factor the Court must consider when deciding whether to grant a motion for leave to amend is the possibility of prejudice to the opposing party." Djourabchi v. Self, 2006 U.S. Dist. LEXIS 90136, at *20 (D.D.C. Dec. 14, 2006) (citing Wright, Miller, & Kane, Federal Practice and Procedure § 1487 (2d ed. 1990)). The plaintiffs will not be prejudiced if the Court grants FEI's request for leave to file its counterclaim because: (1) there is no discovery cut-off or trial date in the ESA Action; (2) the conduct forming the basis of FEI's counterclaim is part and parcel of the ESA Action; and (3) any additional discovery necessary will not be unduly burdensome.

a. There is No Discovery Cut-Off or Trial Date in the ESA Action

Currently, there is no discovery cut-off or trial date in the ESA Action. As such, permitting FEI to bring its counterclaim will not prejudice the plaintiffs by permitting them only limited time to conduct discovery or by delaying an impending trial date. Two stipulated pre-

trial schedules have been filed -- the first in December 2003 and the second in July 2004.[4] (Docket Nos. 16 & 19). But, those scheduling orders are outdated, and have never been revised. Only written discovery has closed. See Stipulated Pre-Trial Schedule at ¶ 3 (12/5/03). Plaintiffs, however, have recently disputed even this and claim that there are no current limitations to discovery. See Plaintiffs' Motion to Compel Defendants to Comply with Plaintiffs' Rule 34 Request for Inspections at 2 n.1 (10/26/06) ("discovery in this case is plainly ongoing"). Expert discovery has not commenced, nor have any experts even been disclosed for that matter. No trial date has ever been set for this case.

FEI is unaware of any cases where a district court has denied leave to amend in a case with facts such as this, where discovery is ongoing, no cut-off has been set, and a trial date has not yet been scheduled. District courts have instead refused to grant leave to amend where discovery is closed and the trial date is set and soon approaching. Cf. All West Pet Supply, 152 F.R.D. at 205 (pre-trial order entered and leave to amend sought pursuant to Rule 13(e) less than one month before trial date); TDC Management, 1991 WL 35528, at *1 (discovery closed and leave to amend sought thirteen days before trial date); Preferred Meal Systems, 129 F.R.D. at 13 (leave to amend sought when discovery cut-off only one month away).

By contrast, district courts have granted leave to amend where there is no scheduling order in effect and a trial date has not yet been scheduled. See, e.g., Hisler, 206 F.R.D. at 15 (pretrial order not issued and trial date not scheduled); Cooper v. First Gov't Mortgage, 2001 WL 1704307, at *1 (D.D.C. Aug. 24, 2001) (scheduling order suspended and trial date not scheduled); Kas v. Financial General Bankshares, 105 F.R.D. 453, 459 (D.D.C. 1985) (trial date not scheduled); Woodward, 98 F.R.D. at 624 (trial date not scheduled).

[4] The Second Stipulated Pre-Trial Schedule, which was filed on July 12, 2004, only revised the December 5, 2003 Pre-Trial Schedule with respect to expert discovery. See Second Stipulated Pre-Trial Schedule (Docket No. 19).

Further, courts in this district have granted motions to amend pleadings in cases where the litigation has progressed further than it has in this action. For example, in Hisler, the district court granted the plaintiff's motion for leave to amend her complaint even though discovery was already closed. 206 F.R.D. at 14. The Hisler court exercised its discretion to reopen discovery for the limited purpose of exploring the additional allegations proposed by the plaintiff's amended pleading. Id. at 14. In this case, granting FEI's motion for leave to add its counterclaim would not require the court to re-open discovery; by the plaintiffs' own admission, discovery in the ESA Action is "plainly ongoing." Further, as is discussed below, any additional discovery required by FEI's counterclaim will not be unduly burdensome.

b. The Conduct Underlying FEI's Counterclaim is Part and Parcel of the ESA Action

Even though, pursuant to Rule 13(e), FEI's counterclaim is a permissive counterclaim that could be brought in an independent action, the conduct underlying FEI's counterclaim is part and parcel of the ESA Action and should be adjudicated as part of that Action. But for Rider's involvement, the ESA Action likely would have been dismissed over five years ago. Rider's (undocumented) assertion that FEI's allegedly unlawful conduct has caused him some form of injury is the reason this case was remanded by the Court of Appeals. ASPCA v. Ringling Bros., 317 F.3d 334 (D.C. Cir. 2003). Through discovery, it has become clear that at various times during the past six years, ASPCA, AWI, FFA and API, facilitated by WAP and MGC, have been paying Rider for his involvement in the ESA Action -- as a plaintiff and as a key fact witness -- to the tune of at least $100,000.00. This payment scheme and the plaintiffs,' WAP's, and MGC's attempts to cover-up the payment scheme have both perpetuated the ESA Action and form the basis of the RICO and conspiracy claims in FEI's counterclaim.

Moreover, the payment scheme is directly relevant to FEI's defense of the ESA Action. The payments undermine Rider's credibility. Because Rider's alleged injuries are the reason this case exists and the sole basis upon which the plaintiffs can obtain the relief they request, issues that bear upon Rider's credibility go to heart of FEI's defense. Further, the provision of financial assistance to Rider gives rise to an unclean hands defense to the plaintiffs' request for equitable relief, which FEI now also seeks leave to assert. As such, the facts and issues presented in FEI's counterclaim are so "closely related" to the ESA Action that "there is an interest in avoiding a multiplicity of actions." Abex, 1987 WL 19001, at *1.

c. Any Additional Discovery will not be Unduly Burdensome

Any additional discovery necessitated by FEI's counterclaim will not be unduly burdensome. As discussed previously, discovery in this case is ongoing, and much of what would be necessary for the counterclaim has already been sought, if not produced fully, from plaintiffs. But based on what is known, further discovery on the RICO claims could be pointed and efficient. Thus, the evidence that would tend to prove or disprove the allegations in FEI's counterclaim – such as any communication with and payment to or solicited by Rider, any other current or former employee of FEI, and any potential witness in the ESA Action -- should be easily accessible by the plaintiffs and WAP.[5] See Hisler, 206 F.R.D. at 14. In any event, even though FEI's counterclaim will not require unduly burdensome discovery, "an 'adverse party's burden of undertaking discovery, standing alone, does not suffice to warrant denial of a motion to amend a pleading.'" Id. (quoting United States v. Continental Ill. Nat'l Bank & Trust Co., 889 F.2d 1248, 1255 (2d Cir. 1989); see also Kas, 105 F.R.D. at 458 ("[n]or does the need for

[5] In particular, WAP should not have difficulty locating documents related to FEI's counterclaim given that WAP spent 105% of its 2005 revenue and at least 83% of its 2005 expenses on Rider. Compare Exhibit 6, WAP's IRS Form 990 (reporting $31,893 in revenue and $40,624 in expenses) with Exhibit 7, WAP's IRS Form 1099 for Rider (reporting non-employee compensation of $33,600). Discerning documents that relate to payments to Rider from those few that do not should be particularly straight forward.

additional discovery necessarily constitute sufficient prejudice to deny an otherwise meritorious motion").

A court's prejudice inquiry also includes an examination of whether the amendment is made with undue delay, bad faith, or dilatory motive.

2. There is No Evidence of Undue Delay, Bad Faith, or Dilatory Motive by FEI

"[D]elay alone is an insufficient ground to deny the motion [for leave to amend] unless it prejudices the opposing party." Djourabchi, 2006 U.S. Dist. LEXIS 90136, at *21; cf. Societe Liz v. Charles of the Ritz Group, 118 F.R.D. 2, 5 (D.D.C. 1987) (undue delay actually causing prejudice to the opposing party can sustain denial of leave to amend). As discussed above, because: (1) there are no discovery or trial deadlines in this case, (2) FEI's counterclaim is closely related to the ESA Action, and (3) any additional discovery necessary will not be unduly burdensome, the plaintiffs will not be prejudiced if the Court permits FEI's to file its counterclaim. As such, delay alone does not warrant denial of FEI's motion. See Djourabchi, 2006 U.S. Dist. LEXIS 90136, at *21. Moreover, FEI's delay in requesting leave to file its counterclaim is not "undue" and is not without good reason. See Laprade v. Abramson, 2006 U.S. Dist. LEXIS 86431, at *17 (D.D.C. Nov. 30, 2006). Plaintiffs have engaged in a pattern of hiding evidence called for in discovery by FEI, thereby delaying FEI's knowledge of the underlying conduct and ability to bring it to the court's attention.

Unlike the facts of this case, courts have denied motions to amend for undue delay where the movant sought leave without an explanation for the delay, years after the allegations became known, and previously had abundant opportunity to raise the issue. See e.g., Williamsburg Wax Museum, 810 F.2d 243, 247 (D.C. Cir. 1987) (no explanation for the delay and movant had ample opportunity to raise the issue for six years); Laprade, 2006 U.S. Dist. LEXIS 86431 at *18

(no explanation for delay and movant had three prior opportunities to amend her pleading), Yager v. Carey, 910 F. Supp. 704, 731-32 (D.D.C. 1995) (movant was not unaware of the cause of action at the time the original pleading was filed); TDC Management, 1991 WL 35528 at *2 (only explanation for delay a "bald assertion" that justice required that leave to amend be granted and leave sought over one and a half years after pleading filed); Preferred Meal Systems, 129 F.R.D. at 13 (no explanation for delay and leave to amend sought more than two years after pleading filed); Societe Liz, 118 F.R.D. at 4 (no explanation for delay and leave to amend sought more than two years after events giving rise to allegations occurred).

In contrast to the above cited cases, FEI has acted within a matter of months to bring its counterclaim before the court. FEI only recently learned that: the "grants" support Rider's lifestyle and are not for "media expenses" (June 30, 2006 -- WAP's partial response to FEI's subpoena); the payment scheme is still ongoing (October, 12, 2006 – the plaintiffs' deposition of Rider); and API is involved in the scheme (January 15, 2007 -- API's first discovery responses). Further, any delay in bringing this counterclaim is due to the plaintiffs' own false interrogatory answers, deposition testimony, and "hide the ball" discovery tactics, not any bad faith or dilatory motive on the part of FEI. Ironically, the true nature of the racketeering activity did not become clear until WAP produced some documents (which production was not handled by MGC) and Rider testified in a deposition that the plaintiffs insisted upon taking themselves. Without these crucial events, all of which occurred just months ago, FEI, would still be in the dark on the RICO issues.

II. FEI SHOULD BE GRANTED LEAVE TO AMEND TO JOIN WAP

FEI seeks leave to join WAP pursuant to Rule 13(h). Pursuant to Rule 13(h), "[p]ersons other than those made parties to the original action may be made parties to a counterclaim . . . in accordance with the provisions of Rules 19 and 20." Fed. R. Civ. P. 13(h). In turn, Rule 20

provides that persons "may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action." In this case, FEI's claims against WAP grow out of the same events as FEI's claims against the plaintiffs. Therefore, WAP should be added as a party to FEI's counterclaim. See Woodward, 98 F.R.D. at 625 (party added pursuant to Rule 13(h) where claims grew out of same events as those against plaintiff).

III. FEI SHOULD BE GRANTED LEAVE TO AMEND TO ASSERT AN UNCLEAN HANDS DEFENSE

Finally, FEI seeks leave pursuant to Rule 15(a) to amend its Answer to Plaintiffs' Complaint[6] and Answer to Plaintiff API's Supplemental Complaint[7] to assert the doctrine of unclean hands as a defense. The amendment permitting this defense would conform the pleadings to the evidence discovered in this case. The plaintiffs have sued for an injunction that, if granted, would foreclose FEI from exhibiting elephants in its circus performances. The plaintiffs, however, are not entitled to such relief if they have acted with unclean hands. See, e.g., Keystone Driller Co. v. General Excavator Co., 290 U.S. 240, 245 (1933) ("The equitable powers of this court can never be exerted in behalf of one who has acted fraudulently or who by deceit or any unfair means has gained an advantage."). As discussed previously, leave pursuant to Rule 15(a) should be given freely when justice so requires as it does in this instance. Fed. R. Civ. P. 15(a); Firestone, 76 F.3d at 1208 (leave should be granted unless there is undue delay,

[6] FEI's proposed First Amended Answer to Plaintiffs' Complaint is attached hereto as Exhibit 1. The following amendments are sought: (1) Footnote 1 explains that Ringling Bros. and Barnum & Bailey Circus is not a legal entity, and thus, is improperly named as a defendant; and (2) The Ninth Affirmative Defense adds the unclean hands defense.

[7] FEI's proposed First Amended Answer to Supplemental Complaint is attached hereto as Exhibit 2. The amendment to it is located at the Ninth (Affirmative) Defense, which adds the unclean hands defense.

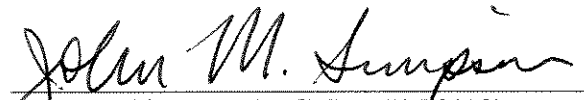
bad faith, or dilatory motive on the part of the movant, undue prejudice to the opposing party or the amendment is futile).

As with FEI's counterclaim, FEI is bringing an unclean hands defense as a result of the discovery recently produced in this case. There simply is no undue delay, bad faith or dilatory motive involved. The only delay present is that of plaintiffs through their efforts to conceal and stall discovery owed to FEI. Further, given that there is no current scheduling order, that the payment scheme is now part and parcel of the ESA Action, and any additional discovery necessary will not be unduly burdensome, the plaintiffs will not be prejudiced by FEI's amendment.

CONCLUSION

For the reasons stated above, Defendant's Motion for Leave to Amend Answers to Assert Additional Defense and RICO Counterclaim should be granted.

Respectfully Submitted,



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Dated this 28th day of February 2007.