UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS, *et al.*,	)	
Plaintiffs,	)	
v.	)	
	)	Civ. No. 03-2006 (EGS/JMF)
RINGLING BROTHERS AND BARNUM & BAILEY CIRCUS, *et al.*,	)	
Defendants.	)	

PLAINTIFFS' OPPOSITION TO DEFENDANT FELD ENTERTAINMENT, INC.'S MOTION FOR LEAVE TO AMEND ANSWERS TO ASSERT ADDITIONAL DEFENSE AND RICO COUNTERCLAIM

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INTRODUCTION

Plaintiffs oppose the motion by defendant Feld Entertainment, Inc. (hereinafter "FEI" or "Ringling Bros.") to amend its Answer in this case under the Endangered Species Act to add an affirmative defense of "unclean hands" and a counterclaim against plaintiffs under the Racketeer Influenced and Corrupt Practices Act ("RICO"). However, while plaintiffs urge the Court to deny the motion to add the "unclean hands"defense, for reasons of judicial economy and efficiency set forth below the Court should hold in abeyance the motion to add the RICO counterclaim until plaintiffs' ESA claims have been heard by the Court, which plaintiffs respectfully urge the Court to do as soon as practicable. Moreover, once this motion is resolved, plaintiffs reserve the right to seek sanctions under Rule 11 against defendants, and their counsel, for filing their frivolous motion which lacks any legal or factual basis, and is a classic "SLAPP" suit filed for the sole improper purpose of intimidating plaintiffs in this case and punishing them for exercising their First Amendment rights. See, e.g., Arco, B., "When Rights Collide: Reconciling The First Amendment Rights of Opposing Parties in Civil Litigation," 52 U. Miami L. Rev. 587 (1998).

As demonstrated below, this latest tactic by defendants to delay this Court's consideration of plaintiffs' ESA case – which has already been pending for over six years – has no merit whatsoever. On the contrary, it is clear that as the evidence continues to mount of Ringling Bros.' systematic abuse of the endangered Asian elephants in its care, this latest strategy to derail the case has been hatched by defendants as part of what their own internal document describes as Ringling's "Long-term Plan" to "discredit animal activists," teachers, and even reporters who exercise their First Amendment rights to inform the public about what really goes on behind the scenes at the circus – i.e. the routine brutality required to make a 10,000 lb. wild animal stand on its head, walk on two legs, and dance on cue. See Ringling Bros. "Long Term Animal Plan Task Force," FEI

1482, Plaintiffs' Exhibit ("Pl. Ex.") 1.

As further demonstrated, Ringling's attempt to turn this case around to attack the motives of plaintiffs and their counsel – instead of confronting the merits of plaintiffs' ESA claims – certainly does not serve the interests of justice, as required by Rule 15(a) of the Fed. R. Civ. P. Rather, it is simply a bad faith effort to punish plaintiffs – and particularly Tom Rider – for bringing this case and speaking out about defendants' unlawful conduct, and, if permitted to stand, will greatly prejudice plaintiffs and their counsel by requiring them to shift their time and resources from litigating the validity of their ESA claims to defending against these scurrilous accusations – precisely what defendants intended when they filed their motion.

Granting the motion – and hence allowing Ringling to wage a collateral litigation battle against plaintiffs – would also create a huge additional burden on the Court. It would also greatly delay the ultimate resolution of this case to the grave detriment of the Asian elephants plaintiffs seek to protect, and who, as the evidence overwhelming demonstrates, continue – day after day, year after year – to be beaten with bull hooks and confined in chains.

Moreover, both the proposed "unclean hands" defense and RICO counterclaim ("PCC") are completely baseless, and hence granting the motion to amend would be completely futile – an independent basis for denying the motion. Foman v. Davis 371 U.S. 178, 182 (1962). As the record demonstrates, Mr. Rider, a former employee with the Ringling Bros. circus, is certainly not being paid by the plaintiff organizations to be a plaintiff in this case – one of the central bases for defendants' counterclaim, and even if Mr. Rider were being reimbursed for that purpose, it would not violate any laws or ethical rules. Nor can defendants proffer a stitch of evidence that the plaintiff organizations are "bribing" Mr. Rider to be a fact witness in this case or in any other proceeding –

the only other basis for the predicate RICO violations alleged by defendants in their proposed counterclaim, and the centerpiece of defendants' "unclean hands" defense.

On the contrary, as the record shows, Mr. Rider has received grant funding, at a rate far below the amount spent by defendants on their public relations efforts, to conduct a constitutionally protected public education campaign on a matter of intense public debate in this country, i.e. whether circuses should be allowed to beat and chain endangered animals to make them perform tricks for commercial profit – a campaign that defendants' own internal documents acknowledge is extremely effective.

Nor is there any substance to defendants' allegations that Mr. Rider's testimony on this matter somehow "evolved" to fit plaintiffs' theory of the case. On the contrary, the facts are that from the first time he went public in 2000 about the abuse and mistreatment he witnessed at the circus, Mr. Rider has consistently testified, under oath in depositions, before Congress, and in a sworn affidavit to the United States Department of Agriculture, that during the two and a half years he worked at Ringling, he witnessed elephants routinely beaten and struck with bull hooks and chained for most of the day and night – precisely the facts that form the basis of plaintiffs' ESA claims in this case. As the record also shows, and totally at odds with the entire premise of the proposed counterclaim, Mr. Rider's eye-witness accounts have now been substantiated by voluminous additional evidence of defendants' on-going and routine violations of the ESA, including videotape recordings of elephants being struck with bull hooks, testimony of several recent former employees of Ringling Bros. that this kind of treatment goes on every day at the circus, and Ringling's own internal documents.

Even further, plaintiffs have been extremely forthcoming with this Court about the fact that they are providing grants either to the Wildlife Advocacy Project ("WAP") or to Mr. Rider directly to allow him to travel around the country to educate the public about the elephants' condition – indeed, plaintiffs' counsel informed the Court of this fact at a hearing on September 16, 2005. Moreover, the plaintiff organizations have answered every question posed to them about how they have contributed to WAP and/or Mr. Rider's media and public education efforts, and they have provided Ringling with the documents that show the amount of such grants and when those grants were provided. WAP – which is not a party to this action, and is specifically approved by the IRS as a 501(c)(3) organization to "promote . . . curtailment of animal abuse and exploitation, primarily be providing media, educational, legal, technical, and other forms of support and advocacy to grassroots activists"[1] – has also provided defendants, pursuant to a third party subpoena, documents showing the precise amounts of money it has received and expended to fund Mr. Rider's media and public education outreach, and all documents showing the plaintiff organizations' contributions to that effort. Accordingly, defendants' allegation of a "cover-up" is utter nonsense, as defendants know.

Indeed, although Ringling asserts that plaintiffs are all "obstructing justice" by withholding such information from defendants, it is precisely because plaintiffs and WAP have been so forthcoming with this information that defendants are able to present the detailed data recounted in their frivolous RICO claim, including detailed "charts" of when and from whom such grant money was received and when it was provided to Mr. Rider, and even the minutiae of what Mr. Rider eats

[1] See WAP's "Statement of Activities," in response to IRS Form 1023, Plaintiffs' Exhibit ("Pl. Ex.") 2.

for lunch, what he feeds his cat, and what movies he is watching. See Proposed Counterclaim at 18-19, 22-27. If this constitutes a "cover-up," plaintiffs and WAP are the most inept co-conspirators ever to stumble upon the courthouse steps. In truth, of course, in an effort to facilitate resolution of this case, plaintiffs have provided defendants with reams of information having nothing to do with the treatment of the elephants, that probably could have been withheld on relevance and/or privilege grounds.

For all of these reasons, in addition to the prejudice, delay, and basic injustice that would result from granting defendants' motion, allowing defendants to add either their new affirmative defense or their RICO counterclaim would be futile, because defendants could not conceivably prevail on either, and because defendants' actual motivation is to punish plaintiffs for bringing their case and publicizing Ringling's abuse of the elephants.

Finally, defendants' proposed RICO claim rests entirely on their ability to demonstrate that the only damages they have specifically alleged – i.e. the legal fees incurred to defend themselves against plaintiffs' ESA claims, PCC at 17, 19, 53 – are actually caused by Mr. Rider's allegedly "bribed" testimony in this case. However, since there is now voluminous additional evidence of defendants' routine violations of the ESA, it will be impossible for Ringling to meet this burden. Holmes v. Securities Investor Prot. Corp., 503 U.S. 258, 268 (1992).

Accordingly, although there are ample grounds for the Court simply to deny defendants' motion to file its proposed counterclaim, plaintiffs suggest that the Court instead defer a ruling on that part of the motion until after the Court has heard all of the evidence that supports plaintiffs' case on the merits. That course of action will ensure that if, at the end of this case, there is any basis whatsoever for defendants to pursue their claim for damages, the merits of the proposed counterclaim

can be heard by the Court at that time. It will also ensure that defendants' efforts to add their collateral counterclaim now will not unduly delay this case, prejudice plaintiffs, intrude on their First Amendment rights, or involve the Court in an additional morass of discovery disputes and motions that may prove completely irrelevant once the Court has considered the abundant evidence that supports plaintiffs' claims, including Ringling's own materials.

For these reasons, and as more fully explained below, plaintiffs respectfully request that the Court deny the motion to add the unclean hands defense as untimely, prejudicial, and futile, and that it hold in abeyance defendants' proposed counterclaim until the Court has held a trial on the merits of plaintiffs' ESA claims. In addition, because further delay will invite further, abusive tactics like this one, plaintiffs respectfully urge the Court to set a trial date, as well as a pre-trial schedule with a discovery cut-off, as soon as practicable.

BACKGROUND

To place defendants' latest attempt to derail the merits of this case in context, it is necessary to describe the ongoing public debate concerning the mistreatment of elephants in circuses, Ringling Bros.' vigorous strategies for quashing that debate – of which this motion is a part – the basis for plaintiffs' claims in this case, and the proceedings to date.

A. The Movement To Improve The Lives Of Circus Elephants And Ringling Bros.' Efforts To Stifle That Movement.

As evidence has emerged over the last decade and a half concerning the way wild animals, and particularly elephants, are "trained" to perform tricks in circuses – i.e. with force, fear, intimidation, and punishment – numerous jurisdictions throughout the United States and Canada have enacted legislation to ban the use of elephants and other animals in circuses. Bans on the exhibition

of elephants and other exotic animals have already been enacted in cities in California, Colorado, Connecticut, Florida, Indiana, Massachusetts, New York, North Carolina, Vermont, Virginia, and Washington,[2] and various localities in other countries.[3] Several other jurisdictions – in the U.S. and abroad – are currently considering similar legislation to ban the use of elephants in circuses or the implements that are used to control them, such as bull hooks and chains.[4] Among these jurisdictions are California, see Bill A 777, and Connecticut, see Bill H 6599, Pl. Exhs. 5, 6. In 1999, a bill was also introduced in the U.S. Congress that would have made it a federal crime to use an elephant "in a traveling show or circus" or for elephant rides. See Captive Elephant Accident Prevention Act of

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[2] These jurisdictions include: in California – Corona (Chapter 6.16 Display of Wild or Exotic Animals); Encinitas (Ch. 9.22, Display of Wild or Exotic Animals); Huntington Beach (Municipal Code Chapter 7.14); Rohnert Park (6.40.030 Display of Wild or Exotic Animals Prohibited); and Santa Ana (Ordinance No. NS-2669); in Colorado – Boulder (Health, Safety, and Sanitation 6-1-4); and Estes Park (Initiative 200); in Connecticut – Stamford (Sec. 74-6. Prohibited Acts); in Florida – Hollywood (§ 92.60 Animal Displays or Exhibits); and Pompano Beach (Ordinance No. 2000-63); in Indiana – St. John (Sec. 3-11 Performing Animal Exhibitions); in Massachusetts – Braintree (6.04.180 Displaying Non-Domesticated Animals for Entertainment); Provincetown (Article 64, Ban Use of Exotic Animals for Public Entertainment); Revere (6.04.031 Nondomesticated animals displayed for public entertainment or amusement); and Weymouth (Order No. 02-109); in New York – Greenburgh (City Code Chapter 345) and Southampton (Resolution 2005-654, 150-8); in North Carolina – Orange County (Sec. 4-182); in Vermont – Burlington (Resolution 9.0 The Mistreatment of Circus Animals in Burlington); Virginia – Richmond (Bill No. 02-26, An Ordinance of the City of Richmond Prohibiting the Display of Wild and Exotic Animals for Public Entertainment or Amusement); and in the state of Washington – Redmond (Chapter 7.08); and Port Townsend (Ordinance No. 2758, 9.44.010 Display of Wild and Exotic Animals Prohibited).

[3] See http://crymn.org/Pages/worldlegislation.html.

[4] These include Chicago, Minneapolis, and Buffalo. See Virginia Soto, No More Elephants in Chicago's Zoos? About; Minneapolis, John Reinan, Circus animals: Entertaining or inhumane? Minneapolis Star Tribune., March 11, 2007; Brian Meyer, Cruelty Alleged In The Big Top The Buffalo News Jan. 31, 2007; Pl. Ex. 3. Abroad, Singapore, Sweden, Finland, and Israel have all introduced bans on the use of certain animals in circuses. See Animals Banned from Big Top BBC Dec. 29, 2000, Pl. Ex.4.

1999, H.R. 2929, 106th Cong. (1999).

As public concern continues to mount about the way elephants are "trained,"and the public also becomes aware of the unique biological and social attributes of these magnificent animals, some circuses have voluntarily stopped using elephants, including The Big Apple Circus (in 2000) and Circus Vargas (in 2005). See Pl. Exhs. 7, 8. Several leading zoos have also closed their elephant exhibits out of concern for the animals' welfare.[5]

Ringling Bros., which makes tens of millions of dollars each year from its traveling circus, and which features the endangered Asian elephant as its star attraction, has taken a very different approach: it has decided to wage a vicious attack on the animal protection groups and others who exercise their First Amendment rights to enlighten the public about what goes on at the circus. Thus, during the 1990s FEI developed a "Long Term Animal Plan Task Force," FEI 1480, Pl. Ex.1, to counter the fact that animal "activists are increasing their activities to effectuate their ultimate goal of banning the exhibition of animals in entertainment." Task Force Plan at 1. This involved the creation of an "Animal Issues Department" that is responsible for carrying out an "aggressive approach to media and public relations," including a daily operation to "expose and discredit animal activist entities." See id. at 2 12, 28 (emphasis added). The Plan states that "[s]pecific targets of this campaign may include how donations are used [and] the terrorist activities of the activists," as well as "[p]lacing stories in all media (print, t.v., radio)" with "negative information about activists" and "[f]ormulating a plan to discredit IRS Section 501(c)(3) status of" animal protection organizations. Id. at 12-13.

[5] Among the "major zoos across the country" that have given up their elephants are "San Francisco, Chicago, Detroit, Philadelphia, [and] the Bronx Zoo in New York City." Lemonick, Who Belongs in the Zoo, Time Magazine (June 11, 2006) (Pl. Ex. 9).

FEI's "Plan" also involves aggressive surveillance and harassment of all animal groups who raise concerns about the circus. It sets forth various steps for suppressing the exercise of First Amendment rights, such as "[a]ll activities of animal activists will be videotaped" for "several" purposes, including: (1) turning the tapes "over to local law enforcement and, if appropriate, to the FBI;" (2) using the tapes "to physically identify activists" and to "profile local animal activists," id. at 8, 12; and (3) "dissuad[ing] activist activity if they know their actions are being memorialized." Id. at 8 (emphasis added).

The Plan also outlines strategies for dealing with reporters and even teachers who may disseminate information about Ringling's mistreatment of animals. It states that "immediately upon learning about negative stories about Ringling Bros." that may appear in the media, "[t]he Animal Issues Department will directly contact the editor/news director demanding an immediate meeting . . . to demand a retraction or equal time," and "[i]f the editor/news director refuses the request, Legal will be informed to determine what recourses exist." Id. at 13 (emphasis added). The Plan further provides that if Ringling receives any "negative, school children letters," the Animal Issues Department will activate an "intensive campaign to the school itself, principal and Board of Education demanding [an] investigation, since such letters typically are due to an activist teacher or to a PETA spokesperson at the school." Id. at 13 (emphasis added).

At about the same time that it developed its "Plan," FEI also launched a massive "covert" operation of infiltration and surveillance of various animal protection groups, which included placing "operatives" acting as volunteers inside the groups who forwarded to FEI highly confidential information, including membership and donor lists, bank statements, credit card numbers, and social security cards. All of this information, including videotapes and photographs of circus protests, was

compiled in weekly "reports" that were sent directly to Kenneth Feld, FEI's Chairman and Chief Executive Officer, as well as several other high-level officials at FEI – at a cost of millions of dollars.[6]

Thus, in sworn trial testimony provided just last year in a lawsuit brought by People for the Ethical Treatment of Animals ("PETA") for damages as a result of FEI's spying, infiltration, and theft of confidential information, Mr. Feld admitted that FEI paid various individuals, including a former Vice President of FEI, Richard Froemming, and former Deputy Director of the CIA, Clair George – to conduct an "intelligence gathering operation" to "find out what the animal activists were doing," and that this involved having individuals infiltrate some of the organizations. See Trial Testimony of Kenneth Feld ("Feld Tr. Testimony"), People for the Ethical Treatment of Animals v. Kenneth Feld, et al., No. 204452 (Cir. Ct. Fairfax County, Va.) (March 9, 2006), Pl. Ex. 11 at 2114-15. According to Mr. Feld, the surveillance and infiltration was necessary because FEI felt that the animal groups "were misrepresenting to the public how we treated the animals." Id. at 2040; see also Feld Tr. Testimony at 1985, 2111, 2414, 2096-97 (Mr. Feld testified that he received "reports" concerning the activities of the animal groups "on a regular basis," that these reports contained information obtained by the "operatives" that had been placed within the animal protection groups, including "complete bios" on the leaders of the groups, and social security numbers).[7]

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[6] While plaintiffs do not know precisely how much money FEI has spent on its "covert" operations, it has certainly been many millions of dollars. In fact, FEI's Chief Financial Officer testified that in one year alone the head of the program was paid $1.1 million for his work "to protect the company from attack" from demonstrators who were disseminating "invalid information." See Testimony of Charles Smith, Pl. Ex. 10 , at 666; see also Feld Tr. Testimony, Pl. Ex. 11, at 2069 (Smith was "chief financial officer" for FEI).

[7] Although Mr. Feld and other FEI executives admitted that they had conducted covert surveillance against PETA and other groups for the purpose of discrediting the groups and undermining their effectiveness, on March 15, 2006, a jury in Virginia found FEI not liable for common law and statutory conspiracy.

In a sworn affidavit presented in yet another case pending against FEI, for conducting surveillance and tortiously interfering with a free-lance author's effort to write a book about the circus, Pottker v. Feld Entertainment, Inc., et al., Civ. No. 99-008068 (Sup. Ct. D.C.), Clair George, former "deputy director of operations" of the CIA, stated that, after leaving the CIA, he worked as a "consultant to Feld Entertainment and its affiliates," and that "as part of my consulting work for Feld Entertainment, I was also asked to review reports from Richard Froemming and his organizations, based on their surveillance of and efforts to counter the activities of various animal rights groups," and that he "discussed these reports in meetings in which Mr. Feld was present." See Affidavit of Clair George, Pl. Ex. 12.[8]

Finally, FEI's "Plan"also involves attacking animal protection groups with "lawsuits . . . [and] money irregularities," since "[b]y keeping up the pressure" on those fronts, the groups "will have a hard time keeping demonstrators on the front line," since they "[w]ill spend more of their resources in defending their actions." Smith Tr. Testimony at 519; Report to FEI (May 15, 1991), Pl. Ex. 13 (emphasis added).[9]

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[8]FEI's covert interference with Dr. Pottker's book project concerning the circus has been the subject of both a two-part series in Salon Magazine and a CBS "60 Minutes" piece. See "The Greatest Vendetta on Earth," Salon, Pl. Ex. 14; 60 Minutes piece, Pl. Ex. 15 (DVD). Dr. Pottker's case is still pending in Superior Court.

[9] Plaintiffs do not know all of the targets of FEI's covert operations. However, FEI definitely had covert operatives working at PAWS – originally the lead plaintiff in this case – as well as PETA and the Elephant Alliance – two other organizations that oppose the use of elephants in circuses. See, e.g. Testimony of Steven Kendall, Pl. Ex. 16, at 1384. FEI also apparently planned to place an "operative" at plaintiff Fund for Animals' Black Beauty animal sanctuary in Texas, because "[t]he Fund for Animals was opposed to the Ringling Bros. Circus." See Feld Tr. Testimony at 527; Kendall Tr. Testimony at 1469.

B. Plaintiffs' Claims Under The Endangered Species Act

Meanwhile, evidence began surfacing of Ringling Bros.' mistreatment of the endangered Asian elephants it used in its circus. Thus, in January 1998, the United States Department of Agriculture ("USDA") charged Ringling with multiple violations of the Animal Welfare Act in connection with its decision to have a 3 yr. old elephant named Kenny appear in three different shows in one day even though he was extremely ill and the attending veterinarian had advised that he "remain in the barn." Within an hour of the last performance, Kenny died. See Affidavit of Gary West, DVM (Feb. 5, 1998), Pl. Ex. 17; see also USDA Memo (March 6, 1998), Pl. Ex. 18 ("[t]he case shows that orders from the attending veterinarian to leave Kenny in his stall during the 3rd performance on the day he died were not followed by the trainers, Mark Oliver Gebel and Gunther Gebel Williams").[10]

Then, in December 1998, two Ringling Bros. employees who had recently left the circus, submitted sworn testimony to the USDA concerning their eye-witness accounts of routine beatings of elephants with bull hooks, especially a baby elephant named Benjamin. See, e.g., Letter to Michael Dunn, USDA (Dec. 21, 1998), Pl. Ex. 19.

In February 1999, USDA inspectors observed two elephants under two years old with "large visible lesions" on their legs at Ringling's elephant breeding farm in Polk City, Florida, which it calls the "Center for Elephant Conservation" ("CEC"). See USDA Inspection Report, Pl. Ex. 20. Ringling officials cavalierly explained this was the result of "rope burns" caused by the "routine" process Ringling uses to "separate" baby elephants from their mothers to begin training them for use in the

[10]Ringling eventually settled this case with the USDA, after agreeing to contribute $10,000 to an elephant sanctuary in Thailand and $10,000 for research relating to elephant diseases.

circus, although in the wild elephants are not naturally weaned until they are at least four years old. See Memo to File From Miava Binkley (Feb. 16, 1999), Pl. Ex. 21. After consulting several elephant experts, the USDA's Deputy Administrator for Animal Care informed Ringling that "the handling of these two elephants . . . caused unnecessary trauma, behavioral stress, physical harm and discomfort to these two elephants." See Letter to Julie Strauss (May 11, 1999), Pl. Ex. 22 (emphasis added).[11]

On July 26, 1999, a 4-yr. old elephant named Benjamin – the same elephant that the two former Ringling employees had reported was routinely beaten by his trainer – suddenly "drowned" in a pond while the circus was on the road, although elephants are naturally good swimmers. According to the USDA's internal Investigative Report – which plaintiffs obtained under the Freedom of Information Act – the trainer's use of the bull hook on the elephant when he refused to leave the pond "created behavioral stress and trauma which precipitated in the physical harm and ultimate death of the animal." See USDA Report of Investigation (Sept. 1, 1999), Pl. Ex. 23 at 2 (emphasis added); see also DVD, Pl. Ex. 15.

In August 1999, a month after Benjamin died, inspectors for the Santa Clara Valley Humane Society in California conducting an unannounced inspection of Ringling observed seven elephants with multiple lacerations and puncture wounds behind their left ears. See Report by Christine Franco (Sept. 1999), Pl. Ex. 24 at 2 (emphasis added). Photographs of the injuries were reviewed by both the Director and Curator of the Oakland Zoo who concluded that "the wounds documented on these

[11] The USDA, however, took no enforcement action, evidently because any such action were quashed at the highest levels of the agency. See, e.g., Inspector General's Report (September 2005), Pl. SJ Opp. Ex. K, at 4 (finding that the USDA "is not aggressively pursing enforcement actions against violators of the AWA").

elephants were consistent with control wounds caused by an ankus," the device Ringling uses to "train" the elephants. See Pl. Ex. 53.[12]

Then, in the spring of 2000, Mr. Rider, who worked for Ringling for two and a half years as a "barn man" for the elephants, reported that he also had witnessed the daily abuse of elephants while he was working at Ringling. In sworn testimony on March 25, 2000 – long before he began his public education campaign – Mr. Rider recounted in detail the routine beating and striking of the elephants with bull hooks "in every town" that the circus visited during his two and-a-half years with the circus. Deposition of Tom Rider (March 25, 2000), Pl. Ex. 25 (DVD). He further testified that the handler for the baby elephant named Benjamin was particularly vicious, and he identified the other trainers and handlers who he saw routinely strike elephants. Id. On June 13, 2000, in connection with hearings on H.R. 2929, The Captive Elephant Accident Prevention Act, Mr. Rider also testified before the House Judiciary Committee that the elephants "live in confinement and [] are beaten all the time." See Pl. Ex. 26. In a subsequent sworn affidavit to the USDA dated July 20, 2000, Mr. Rider likewise stated that "[t]he abuse at Ringling Brothers is 6 out of 7 days a week," and he gave detailed descriptions of specific incidents of abuse that he had witnessed. See Pl. Ex. 55. [13]

Based on all of the foregoing evidence, on July 11, 2000, the Performing Animal Welfare Society ("PAWS"), the American Society for the Prevention of Cruelty to Animals ("ASPCA"), the Fund for Animals, Animal Welfare Institute, and Tom Rider brought this lawsuit under the citizen suit provision of the ESA, 16 U.S.C. § 1540(g), to stop Ringling from continuing to engage in acts that "take" the endangered Asian elephants – which includes "harming, harassing, and wounding" the

[12]Again, the USDA took no action.

[13] Again the USDA took no enforcement action against Ringling.

animals, 16 U.S.C. § 1532(19). Plaintiffs allege that Ringling violates prohibitions against "taking" members of an endangered species, see 16 U.S.C. § 1538(a), on a routine basis, by: (1) beating and striking the elephants with sharp bull hooks; (2) keeping the elephants chained for most of the day and night; and (3) forcibly removing baby elephants from their mothers, which the USDA itself has concluded causes the animals "unnecessary trauma, behavioral stress [and] physical harm." See supra at 13.

C. Ringling's Delay and Diversionary Tactics

From the moment this case was filed, consistent with its "Long Term Plan" to suppress all public debate about this issue, Ringling has tried every trick in the book to keep the case from going forward. At the same time, also pursuant to its "Long Term Plan," Ringling has waged a major "discrediting" campaign against plaintiffs and their supporters, accusing them of being "extremist animal rights activists" who are "lying" about what goes on at the circus, while Ringling spends millions of dollars on its own public relations campaign assuring the public that it provides the elephants with the finest of care. Defendants have also attempted numerous ways to sidetrack the litigation, and to remove Mr. Rider from this case, evidently because they are greatly concerned about his testimony as a former circus employee.

1. Ringling's Initial Attempts To Eliminate Tom Rider From This Case.

Defendants first moved to dismiss the entire case on several grounds, including on standing. See Docket No. 8 (Civ. No. 00-1641) (hereinafter "PAWS Docket No."). In response, plaintiffs made standing arguments with respect to all of plaintiffs, and specifically explained that Mr. Rider, who had worked with the elephants for two and a half years, had formed a special bond with them and is aesthetically injured by the way they are treated. See ASPCA v. Ringling Bros., 317 F.3d 334, 336-

337 (D.C. Cir. 2003). While the motion to dismiss was pending, Ringling pressured the then lead plaintiff, PAWS, to withdraw from the case as a condition of the "voluntary resolution" of litigation PAWS had brought against FEI in California for placing covert "operatives" at PAWS. See Performing Animal Welfare Society et al. v. Feld Entertainment, Inc., et al., No. S-00-1259-GEB-DAD (E.D. Ca.); see also Notice of Voluntary Dismissal of Three Of The Plaintiffs (January 8, 2001), (PAWS Docket No. 14).[14]

FEI also apparently believed that, by requiring PAWS to withdraw from this case, it was also removing Tom Rider as a participant, because at the time of the settlement Mr. Rider was living at the PAWS sanctuary and helping with security there. See Rider Dep. (Oct. 12, 2006), Pl. Ex. 27 at 204-07. Thus, in one of its filings in this case, FEI asserted that Mr. Rider's involvement here should have somehow been "barred by the settlement agreement entered into by FEI and PAWS." See Memorandum In Support of Defendants' Motion to Compel Documents Subpoenaed From the Wildlife Advocacy Project (September 7, 2006) (Docket No.85) at 11; see also Rider Depos., Pl. Ex. 27, at 286-87 ("there was an out-of-court settlement reached at which time Pat Derby [President of PAWS] said myself . . . and no employee of PAWS can ever speak out against Ringling Brothers"). However, because Mr. Rider never even saw that settlement, let alone signed it, he was never bound by its terms. See id. In any event, soon after PAWS withdrew from this case, Mr. Rider left the PAWS sanctuary because he "want[ed] to do everything in [his] power to help the elephants.'" See Pl. Ex. 28 (emphasis added).

On June 21, 2001, this Court granted defendants' motion to dismiss the case for lack of standing. On February 4, 2003, however, the D.C. Circuit ruled that Mr. Rider had alleged sufficient

[14] The complete terms of that settlement were placed under seal.

standing, and it remanded the case for further proceedings. ASPCA v. Ringling Bros., 317 F.3d at 338–39. The Court did not reach the standing of the other plaintiffs. Id. at 338.

2. Defendants' Further Attempts To Stall The Case After Remand From The Court of Appeals.

On remand, defendants then renewed their motion to dismiss on the additional grounds that had not been decided by this Court, and, on July 30, 2003, that motion was denied. Order (July 30, 2003). On August 25, 2003, defendants moved for judgment on the pleadings on the ground that since the original 60-day notice letter had only been sent on behalf of PAWS, the Court lacked jurisdiction to hear the claims of the remaining plaintiffs. To resolve the matter, the Court authorized plaintiffs to file a new Complaint – i.e., the present one – and the Court dismissed the original case "without prejudice to the prosecution of the identical case," and then denied the motion for judgment on the pleadings as moot. Order (November 25, 2003) (Docket No. 15).

Defendants also requested a ruling that plaintiffs should not be permitted to take discovery concerning any information other than the specific instances of mistreatment of the elephants described in the notice letters plaintiffs had sent to defendants. However, the Court rejected that position as well, ruling that "Plaintiffs are entitled to take discovery regarding all of defendants' practices that plaintiffs allege violate the Endangered Species Act and that statute's implementing regulations, including past, present, and on-going practices." Id.

Defendants then moved for a blanket protective order that would have kept all of the information they produced in discovery under seal unless plaintiffs were able to demonstrate that particular information should be made public. See Memorandum in Support of Defendants' Motion for a Protective Order (October 8, 2003) (Docket No. 6). However, the Court also denied that motion,

Order (November 25, 2003) (Docket No. 15), and in November 2003, the parties were finally permitted to begin the discovery process. The parties exchanged Initial Disclosures on January 30, 2004, set an extremely expedited pre-trial schedule for the completion of both fact and expert discovery, and served their first set of discovery requests on March 30, 2004.[15]

However, as the Court knows, discovery in this case was bogged down for years when defendants first failed to produce highly relevant documents to plaintiffs, including the medical records of the elephants at issue. The, even after being compelled by this Court to produce those records, defendants still failed to produce important records that had been requested by plaintiffs, requiring plaintiffs to file a "motion to enforce" the Court's previous Order, which the Court also granted. See Order (Sept. 26, 2006) (Docket No. 94).[16]

Because of defendants' failure to comply with its discovery obligations, the pre-trial schedule for this case, which had originally set a discovery cut-off of December 20, 2004, see supra at note 15, was set aside. As a result, and because on September 6, 2006, defendants also filed a pending motion for summary judgment in this case – despite the existence of numerous factual disputes – there presently is no pre-trial schedule or trial date set for this case. See Minute Order (Sept. 26, 2006). The Court did, however, deny defendants' motion to stay all discovery pending resolution of defendants' latest effort to prevent the case from being heard on the merits. Order (Sept. 26, 2006) (Docket No. 94).

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[15] Pursuant to the original Stipulated Pre-Trial Schedule, all discovery in this case would have been closed by December 20, 2004, and all post-discovery motions would have been fully briefed by March 28, 2005. See Stipulation (Docket No. 16).

[16] Defendants also initially refused to provide plaintiffs with any of the thousands of videotapes that are responsive to plaintiffs' March 2004 discovery requests, and only in the last year were plaintiffs able to begin reviewing those highly relevant records.

3. The Evidence Of Abuse Continues To Mount

Meanwhile, as a result of discovery, and through other means, plaintiffs have amassed additional compelling evidence of Ringling's continuing violations of the ESA. Thus, plaintiffs have obtained additional video footage from recent years of elephant handlers striking elephants with bull hooks, and of elephants, including very young elephants, chained for hours, unable to interact with other elephants, and displaying stereotypic "swaying" behavior symptomatic of extreme psychological trauma and stress. See, e.g., Video Compilation Submitted, Ex. M to Plaintiffs' Opposition to Defendants' Motion for Summary Judgment (hereinafter "SJ Opp. Ex."). Plaintiffs have also obtained Ringling's own videotapes of the birth of baby elephants at the "CEC" which show mother elephants chained for hours – sometimes days – on concrete floors while they are in labor, and baby elephants separated from their mothers from the moment they are born. See id.; see also Pl. Ex. 15 (DVD). In addition, another former Ringling employee, Frank Hagan, who worked at Ringling for ten years until 2004, corroborated at a deposition that Ringling Bros. employees in fact routinely strike elephants with bull hooks to "discipline" them.[17]

And on August 4, 2004 another baby elephant – 8 month old Riccardo – died when he purportedly "fell off a platform" at Ringling's "Center for Elephant Conservation" – the third very young male elephant to have died abruptly in Ringling's "care" in recent years. See Washington Post

[17] See, e.g., Deposition Testimony of Frank Hagan, Pl. SJ Opp. Ex. R at 14 (when the elephants "moved out of line," the head elephant handler "would usually whack them across the trunk or the foot" – i.e. "strike him with a bullhook"); id. at 15 (elephants who get out of line "usually get hooked or whacked"); id. at 16-17 (stating that, using the bull hook, Mr. Metzler hits both baby and adult elephants with "[a] baseball swing at the trunk"); id. at 18-19 (testifying that he has seen the head handler hit the elephants on "[t]he trunk, the chin, under the chin, the legs and the anus area"); id. at 36 (stating that the handlers hit the elephants "all the time") (emphasis added).

(August 8, 2004), Pl. Ex. 29.[18]

Internal Ringling documents also show that a "hot shot" – i.e., a device that inflicts a strong electric shock – was being used to "manage" the elephants, and that one elephant was beaten so badly that she had 22 "puncture wounds" caused by "sharp" bull hooks. See "Animal Activity Report." FEI 38273, Pl. Ex. 31 at 2-3. Another internal Ringling document that plaintiffs obtained in discovery states that an elephant was "dripping blood all over the arena floor during the show from being hooked," and that "[l]ast night in the show . . . [a handler] hook[ed] Lutzi under the trunk three times and behind the leg once in an attempt to line her up for the T-mount." Memorandum from Deborah Fahrenbruck to Mike Stuart, (General Manager of Ringling Bros.' "Blue Unit") (January 8, 2005), FEI 15025 - 27, (Pl. SJ Opp. Ex. C); see also id. ("[a]fter the act I stopped backstage and observed blood in small pools and dripped along the length of the rubber and . . . all the way inside the barn") (emphasis added).

Another of FEI's own documents states that "[a]fter this morning's baths, at least 4 of the elephants came in with multiple abrasions and lacerations from the hooks," e-mail from William Lindsay to Strauss, et al. (July 25, 2004) (FEI 166646), Pl. SJ Opp. Ex. N , at 3 (FEI 16648) (emphasis added), and, in fact, in a recent deposition, one of Ringling's own elephant handlers testified that he sees "puncture wounds caused by bullhooks . . . three to four times a month." See Transcript of Deposition of Robert Ridley (August 25, 2006), SJ Opp. Ex. D, at 55 (emphasis added).

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[18] As plaintiffs' counsel demonstrated to the Court in September 2005, despite the fact that these three baby elephants – Kenny, Benjamin, and Riccardo – were all dead, Ringling continued to feature these animals in the "souvenir" program it disseminated to the public, as evidence that it is "conserving" this endangered species "for future generations." See Hearing (Sept. 16, 2005), Pl. Ex. 30, at 65-70; see also Defendants' Response to Plaintiffs' Admissions (June 2004), Pl. SJ Opp. Ex. BB (admitting that none of the elephants it produces at the "CEC" are returned to the wild).

A January 8, 2005 E-Mail to Mike Stuart, the General Manager of the "Blue Unit," states that Troy Metzler – Ringling's "Superintendent of Elephants" for that Unit – "was observed hitting Angelica 3 to five times in the stocks before unloading her and then using a hand electric prod within public view after unloading," and that Mr. Metzler also "carried an electric prod in his back pocket throughout most of the California tour," even though "use of an electric prod in California is strictly forbidden by state law." See E-mail from Fahrenbruck to Stuart, FEI 15024 (Pl. Ex. 32) (emphasis added). Other documents state that one of the handlers on the Red Unit has been observed "hitting elephants on [their] head[s] with [a] hook," E-mail from Weidner to Lindsay, FEI 32492-94 (Aug. 30, 2004), Pl. Ex. 33, and that "elephants are not receiving enough water so as to minimize the amount they urinate." See E-mail from Case to Andacht (July 26, 2004), Pl. Ex. 34 (emphasis added).

Furthermore, in recent months, four more recent Ringling employees have testified that they observed elephants routinely struck with bull hooks and kept in chains for hours on end. See Plaintiffs' Notice of Filing (Docket No. 113), Affidavit of Archele Hundley, Pl. SJ Opp. Ex. MM; Affidavit of Robert Tom, Jr., Pl. SJ Opp. LL; see also Plaintiffs' Notice of Filing Deposition of Gerald Ramos (Docket No. 122). In addition, at least one other baby elephant has died at Ringling's breeding compound – although neither the elephant's birth nor her death eleven days later was publicly disclosed by Ringling until Senator Barak Obama began making inquiries to the USDA about the incident. See USDA Letter to Senator Obama (Dec. 1, 2005), Pl. Ex. 35. As discussed further below, in light of this accumulating mountain of evidence in support of plaintiffs' claims, it is not surprising that FEI is doing everything in its power to put off the resolution of the merits of plaintiffs' claims, including by now seeking to file a frivolous "RICO" counterclaim.

4. Defendants' Bogus Discovery Disputes

Indeed, to keep plaintiffs from pursuing still more damaging discovery, and to distract the Court with baseless allegations of nefarious activities by plaintiffs and their counsel, defendants filed a groundless motion to compel testimony from Tom Rider, even though the only information Mr. Rider has refused to provide them is both completely irrelevant to this case and extremely personal – i.e., information concerning marital disputes that he had with his ex-wife fifteen years ago, and information concerning whether he has ever been arrested for a crime for which he was not convicted. See Plaintiff Tom Rider's Opposition to Defendants' Motion to Compel (Docket No. 107); Plaintiff Tom Rider's Motion for a Protective Order To Protect His Personal Privacy (Docket No. 106).[19]

Moreover, although for two-and-a-half years defendants discerned absolutely no deficiencies in any of plaintiffs' original June 2004 discovery responses, suddenly in November 2006 – after defendants' abrupt change in counsel from Covington & Burling to Fulbright & Jaworski – defendants conveniently began accusing plaintiffs of violating their discovery obligations and hiding crucial evidence, including how Tom Rider was being funded to conduct his media and public education efforts.

As the record shows, however, while defendants have engaged in years of obfuscation to keep plaintiffs from obtaining highly relevant information in this case – requiring Court Orders to compel the production of such information, see supra at 18-19, plaintiffs have never refused to provide this or any other arguably relevant information to defendants. Indeed, plaintiffs have been extremely

[19] Mr. Rider agreed to provide other highly personal information, i.e. his military history and whether he has ever been convicted of a misdemeanor, pursuant to a confidentiality agreement – an offer which defendants refused to accept because plaintiffs opposed defendants' earlier attempt to have a blanket protective order for all discovery in this case. See Plaintiffs' Reply In Support of Motion for Protective Order (Docket No. 117).

forthcoming with both the Court and defendants about the fact that Mr. Rider has been going around the country in a used Volkswagen van to educate the public about the abuse he personally witnessed when he worked at the circus, and that he has received grants from the plaintiff organizations for this totally legitimate purpose. In fact, plaintiffs' counsel mentioned this in open court over a year and a half ago, in connection with defendants' second attempt to have this Court impose a gag order on plaintiffs' ability to discuss these matters in public so that defendants could completely control the public debate on this issue.

Specifically, plaintiffs' lead counsel advised the Court that:

> [r]ight now [defendants] are out there on a daily basis making all kinds of statements about the wonderful care they give their elephants . . . and that our clients are lying . . . that we are whacky animal rights activists [and] cannot be trusted . . . And what we have on the other side, Your Honor, we have Tom Rider, a plaintiff in this case, he's going around the country in his own van, he gets money from some of the clients and some other organizations to speak out and say what really happened when he worked there.

See Transcript of September 16, 2005 Hearing, Pl. Ex. 30 at 29-30 (emphasis added). Accordingly, FEI's assertion of a "cover-up" of this First Amendment activity, Def. Mem. at 4, is totally baseless and, in fact, sanctionable, because FEI and its lawyers have known for years what Mr. Rider is doing.

Moreover, in June 2004, in response to defendants' Interrogatory that Mr. Rider "[i]dentify all income, funds, compensation, other money or items . . . you have ever received from any animal advocate or animal advocacy organization," Interrogatory No. 24, Mr. Rider agreed to provide defendants all such information, so long as he could do so pursuant to a confidentiality agreement, see Rider Resp. to Interrog. 24, Pl. Ex. 36 – an offer that he repeated as recently as January 16, 2007 in connection with his supplemental discovery responses. See Letter from Katherine Meyer to George Gasper (Jan. 16, 2007), Pl. Ex. 37, at 9. However, defendants have never taken Mr. Rider up on that

offer, apparently because that would thwart their ability to insist to this Court that plaintiffs are refusing to provide this very information.[20] Indeed, Mr. Rider also answered every question posed to him on this subject by defendants when Mr. Rider was deposed on October 12, 2006. See Rider Depos. (Oct. 12, 2006) at 123 - 154.[21]

In addition, all of the plaintiff organizations have also been extremely forthcoming about the grants they have made to either Tom Rider or WAP for media, public education, and other advocacy concerning the mistreatment of elephants in circuses. Thus, for example, in response to defendants' March 2004 discovery requests, the ASPCA disclosed that it "gave the Wildlife Advocacy Project a grant for $7,400 for public education about Ringling Bros.'s mistreatment of Asian elephants," and it produced the documents that reflected this fact. See ASPCA Responses to March 2004 Discovery Requests at 33 (Response to Interr. No. 22), Pl. Ex. 39. In addition, all three of the plaintiff organizations that were deposed by defendants in the summer of 2005 answered every single question

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[20] While defendants make much of the fact that, in response to a separate part of that same Interrogatory, Mr. Rider denied that he was receiving any "compensation for services rendered" from anyone, see Rider Resp. to Interrog. 24, it is Mr. Rider's position that he is not receiving any "such compensation," id., as would be true if he were an employee of one of the groups, but that, because he is not on the payroll of any group and is not directly supervised by any organization, he is instead acting as a traditional grant recipient in connection with his highly effective cross-country media and public education effort – a position that Mr. Rider further explained to defendants' counsel when he was deposed on October 12, 2006. See, e.g., Rider Depos. at 122, 147. While defendants may quibble with Mr. Rider's characterization of his relationship with the organizations, the crucial fact for present purposes is that neither plaintiffs not WAP have ever denied that Mr. Rider is receiving funding for his public education efforts.

[21] At that deposition, Mr. Rider also candidly admitted that he had not filed a tax return with the IRS with respect to the grant money that he had received because he believed that a grant is not considered "income" by the IRS, and that, in any event, the modest funding he received each year was not enough to require him to file a return. See Rider Depos. at 125, 147. However, Mr. Rider now realizes that he was mistaken concerning his obligation to file such returns, and he has since prepared those returns and will be filing them with the IRS by April 15, 2007. See Declaration of Tom Rider, Pl. Ex. 38.

they were asked concerning the grants to Mr. Rider and contributions to the Wildlife Advocacy Project. See Deposition of Lisa Weisberg (July 19, 2005) at 43-92, 224-227, Pl. Ex. 40; Deposition of Mike Markarian (for the Fund for Animals) (June 22, 2005) at 157-58, Pl. Ex. 41; Deposition of Cathy Liss (for the Animal Welfare Institute) at 138-43, Pl. Ex. 42.[22]

Furthermore, all of the groups – and the newest organizational plaintiff, the Animal Protection Institute, which joined this case in February, 2006 – have either testified about or given defendants documents at least through December 31, 2006 reflecting the grants they have provided either to Mr. Rider directly or to WAP concerning this matter. Indeed, the only document that defendants contend was somehow "withheld" from them – i.e., the Animal Welfare Institute's February 4, 2004 contribution of $ 2500 to the Wildlife Advocacy Project, see PCC at 45-46 – was in fact voluntarily produced to defendants without any resistance from plaintiffs whatsoever, even though that particular

[22] Defendants' insistence that Ms. Liss, the Executive Director of the Animal Welfare Institute, "testified falsely" at her May 18, 2005 deposition, PCC at 46-49, is completely unfounded. Defendants contend that Ms. Liss testified that AWI was "'not aware' that AWI was sharing Rider's expenses with other organizations and that it did not know whether other animal welfare organizations were providing reimbursements to Rider." Id. at ¶ 145. However, a review of Ms. Liss's actual deposition testimony reveals that, as usual, defendants have taken statements out of context to serve their purposes. The questions Ms. Liss was responding to concerned the few payments (amounting to approximately $2,000) that AWI made directly to Mr. Rider for travel expenses, rather than money AWI contributed to WAP. See Liss. Depos. at 138-142. Thus, Ms. Liss was asked whether "Animal Welfare Institute ever paid Mr. Rider any money," id. at 138 (emphasis added), to which Ms. Liss stated "yes . . . [a] couple thousand dollars . . . over the course of five years" so that Mr. Rider could travel to speaking engagements. Id. Later, in the same series of questions about money paid directly to Mr. Rider for these speaking engagements, Ms. Liss was asked whether it was only AWI that was paying these expenses to Mr. Rider, id. at 142, and Ms. Liss answered "yes," because to her knowledge it was only AWI that funded Mr. Rider directly for those engagements. Id. She also stated that she did not know whether other organizations were providing "similar reimbursements" to Mr. Rider – i.e., payments made directly to Mr. Rider for travel expenses. Thus, Ms. Liss testified truthfully based on the questions she was asked.

document fell outside the scope of defendants' 2004 discovery request to AWI.[23] The Wildlife Advocacy Project has also disclosed all of this information to defendants in great detail. See WAP Opposition to Motion to Compel (Docket No. 93).

D. Tom Rider's Extremely Effective Media and Public Education Efforts.

Although defendants' entire RICO claim and unclean hands defense are premised on the false allegation that Mr. Rider is being paid to be a plaintiff and witness in this case, defendants and their attorneys well know that, in fact, for very little money – and far less that Ringling spends each year on its public relations efforts – Mr. Rider in fact is using these funds to conduct a highly effective media, public education, and grassroots advocacy effort to inform the otherwise unsuspecting public about the animal abuse that really goes on behind the glitz and glamour of the circus. Indeed, since Mr. Rider started speaking out about this issue, he has criss-crossed the country many times – first on a Greyhound Bus, and now in a used Volkswagen van – to talk to reporters, grass roots groups, and legislative bodies about the systematic animal abuse that he witnessed during the two and a half years that he worked at Ringling Bros., and that he has learned about since that time. [24]

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[23] See Letter from Katherine Meyer to George Gasper (December 15, 2006), Pl. Ex. 43, at 5 (explaining that the reason AWI did not previously identify this particular contribution to WAP is because it did not fall within the expenditures that were relied on for AWI's standing allegations that were specifically quoted in defendants' Interrogatory request).

[24] Despite Ringling's attempt to make it look like Mr. Rider is living in the lap of luxury – by aggregating the amount of funding he has received for his media and public education efforts over the last six years – in fact, using defendants' own $100,000 figure, PCC at 4, this means that Mr. Rider has received an average of less than $17,000 a year for his media and public education work. This amount pales in comparison to what Ringling pays for its public relations on this issue, and is also far less than plaintiffs would have to pay a professional public relations firm for comparable work that simply would not be as effective. See, e.g., Feld Tr. Testimony, Pl. Ex. 11, at 2069 (FEI may spend $1 million on advertising in New York City alone). Indeed, it is precisely because Mr. Rider is a former employee for the circus, with first-hand knowledge of the elephant abuse, that he is such a valuable spokesperson for these animals.

Thus, Mr. Rider has been featured in dozens of national and local television and radio news programs covering this issue, including CBS Evening News, CNN, NBC 30, the BBC, KCD-TV World News Tonight, CBS 4 (Miami, Fl), Telamundo, KVBC-TV (Las Vegas, NV), ABC (Raleigh, NC). WTAF-TV (Pittsburgh, PA), CBS (Denver, CO), CBS News (San Diego), Fox News (Los Angeles, CA), ABC (Hartford, CT); WIVB TV 4 (Buffalo, NY), ABC (New Orleans), WISC-TV (Madison, WI), WKRN-TV (Nashville, TN), WLVI-TV (Boston, MA), WTVD-TV (Raleigh, NC), NBC (Orlando, FL), Fox TV (Omaha, Nebraska), "Citizen Smith" Radio Show (Bridgeport, CT). See, e.g., Pl. Ex. 15 (DVD with samples of broadcast media featuring Mr. Rider). He has also been quoted in dozens of newspaper articles including The Washington Post, United Press International, Associated Press, Tampa Tribune, Sacramento Bee, San Diego Union Tribune, Peoria Journal Star, Press-Telegraph (Long Beach, CA), Mercury News (San Jose, CA), Mountain Express (Ashville, NC), Herald-Dispatch (Huntington, W.VA), State Journal-Register (Springfield, IL), Patriot News (Harrisburg, PA), San Mateo County Times, Philadelphia Daily News, Kansas City Star, the Roanoke Times, Lexington Herald-Leader, and Denver Post. See, e.g., Pl. Ex. 44 (samples of print media mentioning Mr. Rider).

Mr. Rider has also been featured in articles appearing on the Internet, including National Geographic, The Christian Science Monitor, Entertainment News Daily, the Washington Post, Berkeley Daily Planet, ABC News Chicago, Tampa Tribune, San Jose Mercury News, New Haven Advocat, CNN, the Animals Agenda, Channel 3 News (Madison, WI), KARK News 4 (Little Rock, AK), Rocky Mountain News, Journal Star, and ABC Local. See, e.g., Pl. Ex. 45 (samples of Mr. Rider's internet coverage); see also "Notes From The Underbelly: The Elephant Man," by Eric Carlson, Pl. Ex. 46 (a feature article about Mr. Rider). He has also proved to be an invaluable

advocate for the elephants in the legislative arena. He has testified before both Congress and the Nebraska Legislature, appeared at press conferences in support of pending legislation in California, Colorado, Connecticut, and Massachusetts, and has also worked with and spoken before many grassroots groups throughout the country about this issue. See e.g. Pl. Ex. 47.

Indeed, far from Mr. Rider's public education campaign being fictitious – the demonstrably false premise underlying FEI's proposed counterclaim – Ringling's own internal document reveals that its real concern is precisely the opposite, i.e., that Mr. Rider is doing exactly what he says he is doing, and, in fact, has proven to be an extremely effective advocate for these animals. Thus, an e-mail sent from one Ringling official to Ringling's Vice President, reported that Mr. Rider spoke at a UCLA Animal Rights Law Series, "during which time he showed very damaging clandestine video of circus elephants on different shows," and that "[i]f a member of the public had no idea about it one way or another - Mr. Rider's presentation could easily be considered VERY damaging to our industry." E-mail from Peggy Williams to Julie Strauss (Nov. 4, 2003), Pl. Ex. 48 (capitals in original, emphasis added).

Thus, consistent with their "Long-Term Plan" to "discredit" anyone who has the temerity to speak out about the elephant abuse, see supra at 8-9, defendants are portraying Mr. Rider to the public – and this Court – as someone who is being "paid" to provide false testimony, PCC at 5, although his allegations have now been corroborated by multiple other witnesses, as well as defendants' own internal documents and videotapes. Consistent with its "Plan," however, Ringling also consistenly accuses all others who speak out about this issue as liars, "animal extremists," or both. See, e.g. Buffalo News (Jan. 31, 2007), Pl. Ex. 49 (Ringling accuses Archele Hundley, another former employee who has gone public about abuse at the circus, of lacking "credibility"; Opinion Piece by

Deborah Fahrenbruck, Ringling's "Animal Behaviorist" (May 17, 2004), Pl. Ex. 50 (referring to the ASPCA as an "extremist group"); Feld 0025819, Pl. Ex. 51 (calling PAWS "an extreme animal rights organization" for telling the public about the "large visible lesions" on the legs of baby elephants at the CEC).

Moreover, although Ringling now accuses Mr. Rider of "changing" his testimony over the years as he continues to travel around the country to educate the public and public policy makers PCC at 5, 18-19 – a charge that, at most, goes to the weight of his testimony when this case is finally heard on the merits – in fact Mr. Rider's eye-witness accounts have remained fundamental the same as when he first began speaking out about this issue seven years ago: i.e., he saw elephants routinely struck and beaten with bull hooks in every city the circus toured, and he saw elephants chained for most of the day and night. [25]

In any event, once again, Mr. Rider's testimony has now been corroborated by voluminous additional evidence that plaintiffs have amassed in this litigation, including defendants' own documents, i.e. the materials defendants struggled in vain to keep from plaintiffs. Thus, contrary to defendants' attempt to portray this case as rising or falling on Mr. Rider's eye-witness testimony –

[25] Indeed, defendants' contention that Mr. Rider has "changed" his story is primarily based on the unsurprising fact that when he was instructed by defendants in their March 2004 Interrogatory to "describe each incident . . . in which you contend that defendants harmed one or more of their elephants," Def. Interrog. No. 11, he provided defendants with as much detail as possible about the abuse he witnessed. See also Tom Rider's Answer to Interrog. No. 11, Pl. Ex. 36 (objecting to the Interrogatory on the grounds that it is "overly broad, unduly burdensome, and oppressive," since "Mr. Rider saw mistreatment of elephants almost every day that he worked at Ringling Bros., from June 3, 1997 to November 25, 1999," and that "this included, but was not limited to, handlers and trainers hitting elephants with bull hooks and other instruments, beating elephants, and keeping the elephants chained for most of the day"); see also id. ("[t]hese incidents are too numerous to describe in detail . . . this kind of treatment occurs each day at Ringling Bros . . . the incidents of harm are too numerous to list"). Id.

a contention upon which their proposed counterclaim is entirely dependent – plaintiffs now have extensive additional evidence to prove their claims in this case. Accordingly, and as further demonstrated below, there simply is no basis whatsoever to allow defendants to further delay the merits of this case, especially because the issue that FEI now seeks to inject in the case is nothing more than an effort to punish plaintiffs and WAP for exercising their First Amendment rights.[26]

ARGUMENT

I. DEFENDANTS SHOULD NOT BE PERMITTED TO ASSERT THEIR FRIVOLOUS RICO COUNTERCLAIM AT THIS TIME.

While defendants cursorily assert that they satisfy each of the factors governing a motion to amend under Rule 15, Def. Mem. at 7-12, in fact, as demonstrated below, all of those factors weigh heavily against permitting defendants to inject their RICO counterclaim into this case – i.e., the motion to amend is extremely tardy, motivated by bad faith, would unduly dely this action, and would cause plaintiffs severe prejudice. See Atchinson v. District of Columbia, 73 F.3d 418, 425-26 (D.C. Cir. 1996), quoting Foman v. Davis, 371 U.S. 178, 182 (1962). As further demonstrated, the proposed amendment would also be futile on many different grounds – an additional basis for denying the motion. Foman v. Davis, 371 at 182.

However, in light of the fact that the proposed counterclaim may simply evaporate on its own in light of the evidence the Court considers at the trial on the merits of plaintiffs' claims – e.g., if the

[26] It should also be noted that, contrary to defendants' assumption that they can get rid of this case by continuing with their longstanding campaign to discredit Mr. Rider, all of the other plaintiffs also have standing to pursue the case. See, e.g., Cary v. Hall, Civ. No. 04363 (N. D. Ca. Oct. 3, 2006), Pl. SJ Opp Ex. G (organizational plaintiffs who allege informational injury under Section 10 of the ESA have Article III standing). In addition, several other former Ringling Bros.' employees have now also sent a 60-day notice letter to defendants concerning these same illegal practices. See Pl. Ex. 52.

Court agrees that there is abundant evidence to support plaintiffs' claims apart from Mr. Rider's allegations – judicial economy and efficiency counsel in favor of simply holding the motion regarding the counterclaim in abeyance pending resolution of plaintiffs' claims, as the Court is expressly authorized to do by the Federal Rules of Civil Procedure. This course of conduct is also prudent because, given that FEI is now obviously committed to harassing plaintiffs as much as it possibly can, if the Court were simply to deny the motion, defendants would almost certainly refile it in another jurisdiction. In that event, the claim would likely end up being transferred back to this Court, because, irrespective of the merits of defendants' bogus counterclaim, it plainly makes allegations that pertain to the pending case. Therefore, although there are more than adequate grounds for the Court to summarily deny defendants' entire motion outright, plaintiffs propose instead that the Court hold consideration of the motion concerning the counterclaim in abeyance until plaintiffs' ESA claims are resolved. At that time, the Court will be in a far superior position to address whether there is any need or justification to allow FEI to proceed with its counterclaim.

A. The Court Should Hold The Motion To Add The Counterclaim In Abeyance At This Time.

It is well-recognized that courts possess the inherent authority to stay proceedings in the interests of judicial economy and efficiency. See Airline Pilots Assn v. Miller, 523 U.S. 866, 879, n.6 (1998) ("'[t]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants. How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance'"), quoting Landis v. North Am. Co., 299 U.S. 248, 254-55 (1936); see also SEC v. Dresser Inds., 628 F.2d 1368, 1375 (D.C. Cir. 1980) (en

banc) ("a court may decide in its discretion to stay civil proceedings, postpone civil discovery, or impose protective orders and conditions when the interests of justice seem to require such action") (other citations and internal quotations omitted).

Here, there are ample grounds to stay consideration of defendants' motion to add the counterclaim until after the Court resolves plaintiffs' ESA claims. First, plaintiffs have an absolute First Amendment right both to petition legislative bodies to address the mistreatment of elephants in circuses, and to petition this Court for such remedies under the Endangered Species Act. See Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 137 (1961) (citizens enjoy a First Amendment right to "inform the government of their wishes"); California Transport v. Trucking Unlimited, 404 U.S. 508, 510 (1972) ("[t]he right of access to the courts is indeed but one aspect of the right of petition" protected by the First Amendment to the Constitution) (emphasis added).

Therefore, absent some demonstration by defendants that Tom Rider's legislative work and plaintiffs' entire Section 9 taking case are in fact both "shams," these activities are completely protected from defendants' proposed RICO claim under the well established "Noerr-Pennington" doctrine. That doctrine – which has been held to apply specifically to a RICO claim, see Sosa v. DIRECTTV, 437 F.3d 923, 929 (9th Cir. 2006) – "ensures that those who petition the government for redress of grievances remain immune from liability for statutory violations, notwithstanding the fact that their activity might otherwise be proscribed by the statute involved." White v. Lee, 227 F.3d 1214, 1231 (9th Cir. 2000), citing Professional Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc., 508 U.S. 49, 56 (1993).

Of course, it would be extremely difficult, if not impossible, for defendants to show that Mr. Rider's advocacy efforts are a "sham" here since, according to their own proposed counterclaim, these efforts are in fact being undertaken as part of an entirely legitimate "scheme to ban elephants from circuses," PCC at 3 – a public policy objective that is in fact central to Mr. Rider's legislative advocacy. And in the litigation context, to deprive plaintiffs of their Noerr-Pennington immunity, defendants would not only have to allege that plaintiffs' entire case is a "sham" - which they simply have not done here – but they would also eventually have to prove this by demonstrating that the entire case is "objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits." Prof. Real Estate Invest., 508 U.S. at 60 (emphasis added); see also Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731, 743-44 (1983) (even an "improperly motivated" lawsuit may not be enjoined under the National Labor Relations Act as an unfair labor practice unless such litigation is "baseless").

Here, however, in light of all of the evidence that has been amassed already showing defendants' routine actions that "take" endangered elephants – including not only videotape of handlers striking elephants with bull hooks and defendants' own internal documents detailing bloody "wounds" on the animals, see supra at 19-22, but the USDA's own conclusion that defendants' "routine" handling of elephants causes them "unnecessary trauma, behavioral stress, [and] physical harm," see Pl. Ex. 32 (emphasis added) – defendants would have a hard time making this showing. See, e.g., 16 U.S.C. § 1532(19) (the term "take" in the ESA means "harass, harm . . . [or] wound") (emphasis added). In any event, the Court will obviously be in a much better posture to address that matter after it considers plaintiffs' case on the merits.

Indeed, in light of the fact that plaintiffs' lawsuit and legislative activities are constitutionally protected, it could hardly be clearer that defendants seek to add their RICO counterclaim for the sole and improper purpose of harassing plaintiffs and deterring them from exercising their First Amendment rights – conduct that is clearly sanctionable. See, e.g., Katzman v. Victoria's Secret Catalogue, 167 F.R.D. 649, 660 (S.D.N.Y. 1996) ("Rule 11's deterrence value is particularly important in the RICO context as the commencement of a civil RICO action has an almost inevitable stigmatizing effect on those named as defendants").

Second, as a related matter, it is absolutely clear under RICO law that if, at the conclusion of the trial on plaintiffs' ESA claims, the Court concludes that the alleged "bribed" eye-witness testimony of Tom Rider was not the proximate cause of defendants' only alleged damages here – i.e., the cost of their defense – the Court will also lack jurisdiction to entertain the counterclaim. See, e.g., Holmes v. Securities Investor Prot. Corp., 503 U.S. 258, 268 (1992) (a claimant must allege that there is "some direct relation between the injury asserted and the injurious conduct alleged").[27] Therefore, rather than expend considerable judicial resources on matters that may never have any relevance, the Court should stay consideration of the motion to add the counterclaim until plaintiffs have presented all of the evidence that supports their ESA claims here.

Third, as explained more fully below, permitting the counterclaim to proceed at this time will severely prejudice plaintiffs by (a) forcing them to devote their time and resources to defending themselves against defendants' frivolous counterclaim, and (b) delaying the presentation of their ESA case, which has already been pending in this Court for over six years. On the other hand, staying

[27] See also Evans v. City of Chicago, 434 F.3d 916, 924 (7th Cir. 2006) ("whether an alleged RICO injury was caused 'by reason of' a violation of the statute – has also been considered a component of standing"), quoting Beck v. Prupis, 529 U.S. 494 (2000).

defendants' proposed counterclaim will not prejudice defendants in any way. Thus, defendants certainly cannot contend that they would suffer any irreparable harm unless the claim proceeds at this time, since they seek only money damages, see, e.g. Wisconsin Gas Co. v. FERC, 758 F.2d 669, 674 (D.C. Cir. 1985), and the merits of their RICO claim have no bearing on the merits of plaintiffs' ESA claims. Therefore, a stay would both avoid prejudice to plaintiffs, yet ensure that if, in fact, plaintiffs' case is completely "baseless," Bill Johnson's Restaurants, 461 U.S. at 743-44 , defendants could seek to have the Court entertain their counterclaim at a later date.

Not surprisingly, numerous courts have taken precisely this approach where a party seeks to inject a complicated and time-consuming RICO claim into a pre-existing suit that presents much more straightforward claims. See, e.g., Spencer Co., Inc. v. Agency Rent-a-Car, Inc., No. 81-2097-S, 1981 WL 1707, *4 (D. Mass.1981) (staying a RICO claim because "prudent and economical case management requires that courts insist that the plaintiff show that the defendant has caused it legally compensable injury before it be allowed to expand the case"); Terra Nova Ins. Co. Ltd. v. Distefano, 663 F.Supp. 809 (D.R.I. 1987) (staying RICO claim pending resolution of other proceedings); Cullen v. Paine Webber Group, Inc., 689 F. Supp. 269 (S.D.N.Y. 1988) (staying RICO claim pending arbitration); Shaw v. Williams, 676 F. Supp. 168 (N.D. Ill. 1987)(staying RICO claim pending state court proceedings).

Moreover, as plaintiffs urge here, courts have also stayed RICO claims where other proceedings "'could serve to clarify and perhaps even simplify the remaining issues which must be litigated.'" Sevinor v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 807 F.2d 16, 20 (1st Cir. 1986) (internal citation omitted); see also S.A. Minercao Da Trindade-Samitri v. Utah International, Inc., 745 F.2d 190, 196 (2d Cir. 1984) (upholding stay pending arbitration); IBT/Here Employee Rep.

Council v. Gate Gourmet Div. Am., 402 F.Supp. 2d 289, 292-93 (D.D.C. 2005) (where other proceeding "may reorient the parties' arguments, may catalyze a settlement of this matter, may moot the defendants' motion to dismiss, or may resolve the issues raised in this lawsuit in their entirety," a stay is appropriate); Cohen v. Carreon, 94 F.Supp. 2d 1112, 1118-19 (D. Or. 2000)(stay appropriate where resolution of other claims will simplify or eliminate RICO claims, while permitting them to proceed would prejudice other party by generating potential conflicts of interest and permitting "a second chance at discovery").

For all of these reasons, plaintiffs urge the Court to hold defendants' motion to add their counterclaim in abeyance until the Court has decided plaintiffs' ESA claims.[28] Likewise, the Court should hold in abeyance defendants' request to add the Wildlife Advocacy Project as a party to this case, since defendants' desire to add this group is entirely dependent on their ability to assert their counterclaim.[29]

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[28] This same analysis applies to defendants' proposed Counterclaim under the Virginia Conspiracy Act, Va. Code Ann. § 18.2-499 (PCC, Count III), which the Court should likewise hold in abeyance at this time. Indeed, even putting aside the many deficiencies in this particular claim (which plaintiffs will not detail here), the Court is unlikely to have supplemental jurisdiction under 28 U.S.C. § 1367 to consider the state law claim should the RICO counterclaim eventually be dismissed. See, e.g., Doe by Fein v. District of Columbia, 93 F.3d 861, 871 (D.C. Cir. 1996) (explaining that supplemental jurisdiction depends on whether the state and federal claims arise from a "common nucleus of operative facts") (other citations omitted).

[29] Moreover, adding WAP to this case at this time will not only cause additional delay and prejudice to plaintiffs – by adding yet another ancillary component to this case – but it could cause plaintiffs additional severe prejudice, since it will mean that two of plaintiffs' attorneys, Ms. Meyer and Mr. Glitzenstein who are also officers of WAP, will potentially be subjected to discovery, and perhaps even asked to be disqualified from continuing to represent plaintiffs, on the grounds that they may have to participate as fact witnesses in the case – one of defendants' other obvious objectives in filing this motions. See, e.g., Rosen v. N.L.R.B., 735 F.2d 564, 574 (D.C. Cir. 1984) ("[s]ince Mr. Rosen and members of his firm should have appeared as witnesses, they should have withdrawn from the case").

B. All Of The Standards Governing A Motion To Amend Weigh Heavily Against Allowing Defendants To Proceed With Their Counterclaim.

In deciding a motion to amend, the Court must consider whether the amendment appears to be motivated by any "bad faith or dilatory motive," or threatens to cause "undue delay" to the underlying action. Atchinson, 73 F.3d at 426. The Court must also consider the extent to which the amendment may prejudice the opposing party, and whether the proponent's proposed amendment would be futile. Id. Accordingly, if the Court does not hold defendants' motion in abeyance, for all of these reasons the motion should be denied.

1. The RICO Counterclaim Is Dilatory, Motivated By Bad Faith, And, If Permitted To Proceed Now, Would Severely Delay Plaintiffs' Pursuit Of Their Claims.

The proposed counterclaim is plainly dilatory. Defendants' protestations that they had no reason to suspect the underlying conduct that they now contend gives rise to their RICO counterclaim, Def. Mem. at 4, is entirely specious. As defendants themselves acknowledge, Def. Mem. at 6, from the very first exchange of evidence in this case – in June 2004 – plaintiff ASPCA provided defendants with discovery showing that it had provided grant money to WAP "for public education about Ringling Bros.' mistreatment of Asian elephants." See supra at 25 . In addition, in June 2004, Mr. Rider agreed to provide defendants with a list of all "income, funds . . . other money or items" he had received, as long as he could do so pursuant to a confidentiality agreement – an offer that was never accepted by defendants. See id. Furthermore, all three of the plaintiff organizations that were deposed in the summer of 2005 disclosed that they had provided grants either to Mr. Rider, WAP, or both, id., see supra at 26, and on September 16, 2005, plaintiffs' counsel also candidly acknowledged in open court that the plaintiff organizations have provided grants that have been used for Mr. Rider's

public education efforts. See Transcript at 29-30.

Thus, the two basic facts that defendants contend permit them to assert a federal RICO claim predicated on "bribing" a witness, i.e., (1) that Tom Rider is a fact witness in this case, and (2) that plaintiffs have provided grants that support his media and public education efforts, have been known to defendants for over a year and a half – and could have been ascertained much earlier had defendants bothered to take Mr. Rider up on his June 2004 offer to provide such information pursuant to a confidentiality agreement. See supra at 24. Consequently, the timing of defendants' proposed counterclaim – coming near what should be the end of the discovery process, and at a time when plaintiffs have urged the Court to set a trial date – is plainly dilatory.[30] Defendants' proposed counterclaim is also plainly interposed in bad faith, and in particular in an effort to punish plaintiffs for exercising their First Amendment rights. See Woodward v. DiPalermo, 98 F.R.D. 621, 623 (D.D.C. 1983) (it is proper to "examine the acts and motives of defendants"). Indeed, as plaintiffs demonstrate below, the proposed counterclaim is facially deficient in several respects, and hence would not survive a motion to dismiss. See infra at 46-52. Thus, it is apparent that what defendants truly seek to accomplish here is to use their frivolous counterclaim to delay a presentation of the

[30] See, e.g., Societe Liz, S.A. v. Charles of the Ritz Group, 118 F.R.D. 2, 5 (D.D.C. 1987) ("the Court cannot overlook the plain fact that the plaintiff knew more than two years ago of the occurrences of which it now complains and at least some of the parties that it claims were responsible"); Caribbean Broadcasting System, Ltd. v. Cable & Wireless P.L.C., 148 F.3d 1080, 1084 (D.C. Cir. 1998) (noting that "[t]he length of a litigation is relevant only insofar as it suggests either bad faith on the part of the moving party or potential prejudice to the non-moving party should an amendment be allowed"); Atchinson, 73 F.3d at 426 ("undue delay is a sufficient reason for denying leave to amend"); Douglass v. First Nat. Realty Corp., 437 F.2d 666, 669 n.1 (D.C. Cir. 1971) (upholding district court's denial of motion to amend answer where defendant's "procrastination in this matter was potentially prejudicial"); Djourabchi v. Self, 2006 U.S. Dist. Lexiz 90136 at *20, 2006 WL 3635333 *7 (D.D.C. Dec. 14, 2006) (precluding amendment that would "'substantially change[] the theory on which the case has been proceeding and is proposed late enough so that the opponent would be required to engage in significant new preparation").

evidence in plaintiffs' ESA case, require plaintiffs to spend substantial additional resources in response to defendants' completely unsubstantiated allegations, and harass plaintiffs and their counsel for having the temerity to bring this case and otherwise advocate on behalf of the endangered elephants – all quintessential hallmarks of "bad faith" litigation tactics.[31]

It is also clear that defendants have manufactured their bogus RICO claim in an effort to find out as much as possible about plaintiffs' media, public education, and legislative strategies to end the abuse of elephants in circuses. While, once again, plaintiffs recognize that defendants are entitled to know that Mr. Rider has received funding for these efforts, because this may bear on his credibility in the ESA case, further details of plaintiffs' media and legislative strategies are not only completely irrelevant to the present case, but would also greatly intrude on plaintiffs' and others' core First Amendment rights. See, e.g. NAACP v. Alabama, 357 U.S. 449, 466 (1958); Int'l Action Ctr. v. United States, 207 F.R.D. 1, 2 (D.D.C. 2002); Wyoming v. U.S. Dept of Agric., 208 F.R.D. 449, 455 (D.D.C. 2002); FEC v. Machinists Non-Partisan Political League, 655 F.2d 380, 388 (D.C. Cir. 1981).[32]

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[31] See, e.g., Millar v. Bay Area Rapid Transit Dist., 236 F. Supp. 2d 1110, 1113 (N.D. Cal. 2002) (explaining that "bad-faith" includes "use of the motion to postpone the trial date" or "impose additional expense on the opposing party"); see also Thornton v. McClatchy Newspapers, Inc., 261 F.3d 789, 799 (9th Cir. 2001) (finding "bad faith" based on the party's "history of dilatory tactics and the doubtful value of the proposed amendment"); Texas Co. v. Borne Scrymser Co., 68 F.2d 104, 107 (4th Cir. 1933) (efforts "to hinder and delay the plaintiff, and to make more difficult the prosecution of his claim" should be rejected).

[32] Indeed, Magistrate Facciola refused to allow plaintiffs to obtain in discovery any of defendants' "public relations efforts"on the grounds that, although such information "may have some value regarding defendants' witnesses credibility," it is "of marginal utility and far out of proportion to the sensitivity of the financial information sought and the burden that would be placed on defendants in gathering and producing such documents." Memorandum Opinion (Feb. 23, 2006) (Docket No. 59) at 9 (emphasis added). Similarly, and particularly because plaintiffs have already disclosed to defendants all of the information concerning the grant money they have

Permitting defendants to inject their RICO claim into this case will also seriously delay the resolution of plaintiffs' ESA claims, which have already been pending for more than six years – a fact that strongly counsels against permitting defendants to assert their claim at this time.[33] Indeed, courts have been particularly concerned about the delay generated by adding a sprawling RICO claim to an existing lawsuit. Thus, given the inherent complexity of such claims – which require the court to consider such issues as the nature of the alleged predicate acts, the existence of the "enterprise" and its relationship to the defendants, and the relationship between the predicate acts, and the alleged damages, see, e.g., United States v. Philip Morris, Inc., 449 F.Supp. 2d 1 (D.D.C. 2006) (989 page RICO decision concerning the tobacco industry) – courts have been especially reluctant to permit parties to add satellite RICO claims to suits that raise much more straightforward issues, as is the case here.[34] As one district court noted in considering such a request, "to permit plaintiffs now the opportunity to assert RICO claims of their proposed breadth would unleash a Hydra that would require from the court nothing short of a herculean effort in time and attention to even maintain a semblance of control over it." Koch, 127 F.R.D. at 212 (emphasis added); see also Kirk, 423 F. Supp.

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provided to WAP or Mr. Rider for media and public education efforts, defendants are not entitled to additional information that would reveal plaintiffs' media and legislative strategies.

[33] See, e.g., DJourabchi v. Self, Civ. No. 06-810, 2006 U.S. Dist. Lexis 90136, 2006 WL 365333 *7 (D.D.C. Dec. 14, 2006)(explaining that the "added expense and the burden of a more complicated and lengthy trial" is a basis to preclude an amendment);Societe Liz, S.A.,118 F.R.D. at 2, 5 (D.D.C. 1987) (precluding amendment that would "increase [ ] expenses and inevitably delay trial" including by the "largely repetitious discovery"); Laprade v. Abramson, Civ. No. 97-10, 2006 WL 3469532, *4 (D.D.C. Nov. 29, 2006).

[34] See, e.g., Steinert v. The Winn Group, Inc., 190 F.R.D. 680, 683 (D. Kan. 2000) (denying motion to add RICO claim that "would require substantial additional evidence"); Koch v. Koch Industries, 127 F.R.D. 206, 211 (D. Kansas 1989) ("[t]his court finds that plaintiffs have unduly delayed in playing their RICO card"); Kirk v. Heppt, 423 F. Supp. 2d 147, 151 (S.D.N.Y. 2006).

2d at (cautioning that "[a]lthough leave to amend shall be freely granted, courts also 'must be wary of putative civil RICO claims that are nothing more than sheep masquerading in wolves' clothing'") (internal citations omitted).[35]

Moreover, plaintiffs – four non-profit animal protection organizations and Tom Rider – may require separate counsel to defend against the RICO claim, which, once again, will only further delay and complicate these proceedings.[36] Furthermore, if the claim is permitted, the next phase will be a motion to dismiss that claim on many of the same grounds raised here, the resolution of which will further delay a decision on plaintiffs' underlying claims. And, in the event that the Court permits the RICO claim to proceed past that stage, both parties will take extensive discovery with respect to that claim, and the inevitable discovery battles that will ensue will substantially complicate and delay the underlying case even more – which, of course, is precisely the outcome defendants seek to engineer here, while they continue with business as usual, i.e., the conduct that plaintiffs believe violates Section 9 of the ESA.

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[35] See also Dussouy v. Gulf Coast Inv. Corp., 660 F.2d 594, 598 (5th Cir. 1981) ("it is appropriate for the court to consider judicial economy and the most expeditious way to dispose of the merits of the litigation"); Millar, 236 F. Supp. 2d at 1113 (among the factors to consider regarding a proposed amendment is the "impact on judicial economy, judicial resources and the Court's ability to manage cases and control its dockets"); see also Adair v. Johnson, 216 F.R.D. 183, 189 n.10 (D.D.C. 2003) (considering "judicial economy" in deciding whether to permit amendment); accord, Childers v. Mineta, 205 F.R.D. 29, 33 (D.D.C. 2001).

[36] In this regard, defendants have specifically targeted plaintiffs' lead counsel, Katherine Meyer, and her law firm, Meyer Glitzenstein & Crystal – which have a long history (as do many of the plaintiff organizations) of litigating lawsuits seeking better treatment for animals in captivity and in the wild. See www.meyerglitz.com . The likelihood that part of defendants' strategy here is to force the disqualification of plaintiffs' law firm also counsels strongly against granting defendants' motion. See Atchinson, 73 F.3d at 427 (noting that need for different counsel can be prejudicial). Once again, however, the Court will be in a better position to make that judgment after plaintiffs are heard on the merits.

Thus, at a bare minimum, dealing with these many collateral issues – i.e., defendants' entitlement to present this claim, and the kind of discovery that may be permitted in light of the First Amendment concerns at stake – will indefinitely delay the resolution of plaintiffs' ESA claims, which, again, is more than adequate grounds for denying defendants' motion. See, e.g., Hall v. C.I.A., 437 F.3d 94, 101 (D.C. Cir. 2006) ("[d]elay and prejudice are precisely the matters to be addressed in considering whether to grant motions for supplemental pleadings; such motions are to be 'freely granted [only if they] . . . will not cause undue delay or trial inconvenience, and will not prejudice the rights of any of the other parties to the action'") (internal citation omitted) (emphasis added).

2. Contrary To Defendants' Self-Serving Assertions, Permitting Defendants To Insert Their RICO Counterclaim Will Severely Prejudice Plaintiffs.

As Judge Lamberth recently reiterated, "[t]he 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, 2006 WL 3635333 at *7 (citing Wright, Miller & Kane § 1487); Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 330 (1971). Therefore, proposed amendments that add "additional, complex issues," Campania Management Co., Inc. v. Rooks, Pitts & Poust, 290 F.3d 843, 850 (7th Cir. 2002), but are "'not peculiarly relevant' to the basic action," Insurance Concepts, Inc. v. Western Life Ins. Co., 639 F.2d 1108, 1114 (5th Cir. 1981), are routinely denied. See also Mississippi Ass'n of Cooperatives v. Farmers Home Admin., 139 F.R.D. 542, 544 (D.D.C. 1991) (amendment without "a substantive relationship" with the case should not be permitted); Williamsburg Wax Museum v. Historic Figures Inc., 810 F.2d 243, 247 (D.C. Cir. 1987) (denying amendment "not related to the issues" raised in the case); DJourabchi, 2006 WL 3635333 at *7 (noting that denial is appropriate where the amendment would raise issues that "are remote from the

other issues in the case"). Here, for all of the reasons discussed above, there can be no serious dispute that permitting defendants to insert their RICO counterclaim into this case will severely prejudice plaintiffs' ability to litigate this case and bring it to conclusion, and also seriously intrude on their and others' First Amendment rights.

Defendants' contention that plaintiffs will suffer no prejudice because "there is no discovery cut-off or trial date in the ESA Action," Def. Mem. at 7, is quintessential bootstrapping in light of the fact that it is solely because of defendants' obstructionist behavior here that there currently is no discovery cut-off or trial date. Thus, as explained, supra at 8, there was originally a very tight pre-trial schedule in this case, under which discovery would have closed on December 20, 2004. See Stipulated Pre-Trial Schedule (Dec. 5, 2003) (Docket No. 16). Indeed, plaintiffs agreed to such a schedule precisely because they seek to obtain a judgment – and relief for these endangered animals – as soon as possible.

However, when defendants failed to provide crucial evidence requested by plaintiffs in their March 2004 discovery requests, including the medical records for the animals – and then also hid that fact from plaintiffs – this original schedule had to be stayed, and plaintiffs were forced to file two separate motions to obtain these extremely relevant records. See Plaintiffs' Motion to Compel (Docket No. 27); Plaintiffs' Motion to Enforce The Court's September 26, 2005 Order (Docket No. 69); see also Transcript of September 16, 2005 Hearing, Pl. Ex.30 at 36 (Court: "someone is going to respond and tell me why [defendants] could not respond to a clear English request for a production of all medical and veterinarian records . . . And if they don't, if they can't do it, I'm going to hold them in contempt . . . [b]ecause I am sick and tired of all these efforts by litigants to hide the ball") (emphasis added).

Furthermore, although on September 1, 2006, plaintiffs asked the Court to hold a hearing for the precise purpose of setting a new schedule and trial date for this case (Docket No. 81), the Court declined to do so solely because, on September 6, 2006, defendants filed a motion for summary judgment – although there is a plethora of factual issues in dispute in this case, and although many of the issues raised in that motion recapitulate arguments previously rejected by this Court. See Order (Sept 26, 2006) (denying plaintiffs' motion for a status hearing "[i]n view of the pending motion for summary judgment"); see also Plaintiffs' Summary Judgment Opp. (Docket No. 96).

Therefore, for all of these reasons discussed above – the extensive additional proceedings and discovery and concomitant delay in a trial date – permitting defendants to inject their counterclaim here will severely prejudice plaintiffs. Indeed, allowing the proposed counterclaim now will literally add years to a final resolution of plaintiffs' ESA claims, while defendants continue to harm these endangered animals on a daily basis.[37]

3. Defendants' Proposed Amendment Would Be Futile.

Defendants' motion to add a RICO counterclaim should be denied because their claim would be completely futile for a number of reasons – i.e., it could not survive a motion to dismiss. Resolution Trust Corp. v. Gardner, 798 F. Supp. 790 (D.D.C. 1992); Stith v. Chadbourne & Parke, LLP, 160 F.Supp 2d 1, 6 (D.D.C. 2001); see also Kirk v. Heppt, 423 F. Supp. 2d 147, 151 (S.D.N.Y.

[37] In light of the risk of substantial delay, should the Court nevertheless permit the proposed counterclaim to proceed, plaintiffs will ask the Court to do so on an entirely separate track, as provided by Rule 13(i), so that defendants cannot succeed in using this claim as a pretext for delaying the resolution of plaintiffs' longstanding claims. See Fed. R. Civ. P 13(i); see Chubb Integrated Systems, Inc. v. National Bank of Washington, 658 F. Supp. 1043, 1052-53 (D.D.C. 1987) (ordering separate trials where little overlap of evidence to be presented).

2006) (denial of motion to add a RICO claim on futility grounds where the claimant failed to adequately plead "the jurisdictional standing requirements of 'racketeering activity' and causation").

First, as discussed supra, plaintiffs' legislative and litigation activities about which defendants complain – i.e. their "scheme to ban elephants from circuses," PCC at 3 – are absolutely protected under the First Amendment, and therefore immune from attack under the Noerr Pennington doctrine. And since defendants have not alleged that all of the voluminous evidence of defendants' mistreatment of the elephants has been fabricated here, and hence that plaintiffs' ESA claims are "objectively baseless," Prof'l Real Estate Investors, 508 U.S. at 60, plaintiffs' claims are completely immune from defendants' RICO attack. See supra at 34.

Second, one of defendants' central contentions for their proposed counterclaim is that Tom Rider is being "bribed" to be a plaintiff in this case. See Def. Mem. at 2. However, while that assertion certainly is false – and defendants have not provided any evidence to support it – even if Mr. Rider were being paid to be a plaintiff, that would be irrelevant to the underlying predicate act alleged here – i.e., bribery of a "witness," 18 U.S.C. § 201. Indeed, assuming that anyone had advanced Tom Rider funding to be a plaintiff in this action, such payments would neither be unlawful nor unethical in any respect, and defendants have not cited any authority to the contrary. In fact, the D.C. Rules of Professional Conduct expressly permit a lawyer to advance funds to his own client as "reasonably necessary to permit the client to institute or maintain the litigation . . .." Rule 1.8(d)(2), and this includes "living expenses of a client to the extent necessary to permit the client to continue the litigation . . . such as medical expenses and minimum living expenses." Id. (explanatory notes) I-18 (emphasis added); see also NAACP v. Buttons, 371 U.S. 415, 443-45 (1963) (lawyers may solicit and pay fees for plaintiffs needed to advance important issues of public policy); accord, United Mine

Workers of Am. v. Ill. State Bar Assn, 389 U.S. 217, 224-25 (1967).[38]

Third, as to Mr. Rider's role as a witness in this case (and before various legislative bodies) – i.e., the only conduct that could implicate the underlying federal statutes defendants have invoked here – defendants' conclusory baseless allegation that Mr. Rider has been paid for his testimony as a witness is conspicuously insufficient, and, indeed, particularly in light of its scurrilous nature, also warrants the imposition of Rule 11 sanctions. Thus, while defendants repeatedly assert that the funds provided to Mr. Rider by the plaintiffs or the WAP constitute "bribery," under the plain terms of the statute simply paying an individual who happens to be a witness in a lawsuit is not a crime. In fact, defendants intend to call their own employees as witnesses in the case, including trainer Troy Metzler, who makes $74,000 a year at Ringling – far more per year than the support Mr. Rider is getting for his extremely successful public education efforts. See FEI's Second Supplemental Objections And Responses To Plaintiffs' First Set of Interrogatories (January 31, 2007) (listing Troy Metzler as a fact witness for Ringling); see also Deposition Testimony of Troy Metzler, Pl. Ex. 54, at 99 (stating that he makes $74,000 a year at the circus). Yet this does not necessarily mean that defendants have

[38] Defendants allege that Mr. Rider has asserted a "contrived" "injury in fact" for purposes of standing in this case, PCC at 16-17, i.e., that he did not really form an emotional bond with the elephants with whom he worked almost every single day for two and a half years – the main basis for the Court of Appeal's conclusion that he had alleged sufficient injury here. See ASPCA v. Ringling Bros., 317 F.3d at 337. Of course, defendants are free to test Mr. Rider's allegations of injury through the normal adversarial process. However, not only did the USDA investigator who handled Mr. Rider's complaint against the circus under the Animal Welfare Act conclude that "[t]here is no question that he loves the elephants that he worked with . . . and wants to help them find a better life than what is provided by the circus, " see Memorandum from Diane Ward (July 21, 2000), Pl. SJ Opp Ex. M at 1, but Kenneth Feld himself has testified that there is a "real bond" that forms between the employees and the elephants, that is "no different than what any of us would have with our dogs or other pets." Feld Tr. Testimony, Pl. Ex.11, at 2033 (emphasis added). Moreover, as noted supra at 26, all of the other plaintiffs in this case also have standing to pursue their ESA claims.

unlawfully "bribed" Mr. Metzler to deny that elephants are routinely hit with bull hooks and kept in chains at the circus.

Thus, to violate the federal bribery statute, a party must offer the payment "with intent to influence the testimony" of the witness, 18 U.S.C. § 201(b)(3)(emphasis added) – i.e., the payments must be sought, or offered, for the purpose of having the witness testify. Id. § 201(b)(4)(emphasis added) (prohibiting the accepting of "anything of value . . . in return for being influenced in testimony"); § 201(c)(2)(prohibiting offer of "anything of value to any person, for or because of the testimony under oath or affirmation given or to be given by such person as a witness upon a trial)(emphasis added); id. § 201(c)(3) (prohibiting accepting "anything of value personally for or because of the testimony under oath or affirmation given or to be given by such person as a witness upon any such trial") (emphasis added).[39]

Here, however, defendants' proposed counterclaim does not identify a scintilla of evidence that any funding Mr. Rider has received has been for the purpose of securing his eye-witness testimony in this case – an omission that, by itself, is fatal to their proposed RICO claim. See e.g., Bates v. Northwestern Human Services, Inc., 466 F.Supp. 2d 69, 88-89 (D.D.C. 2006) (discussing heightened pleading requirements associated with allegations of mail or wire fraud); U.S. v. Marin-Baker Aircraft Co., 389 F.3d 1251, 1256 (D.C. Cir. 2004)(explaining that Rule 9(b) "'discourages the initiation of suits brought solely for their nuisance value, and safeguards potential defendants from frivolous accusations of moral turpitude'"), quoting U.S. ex rel. Joseph v. Cannon, 642 F.2d 1373, 1385 (D.C. Cir. 1981). And, since defendants have failed adequately to plead this

[39] The same holds true for defendants' alleged state law bribery violations. See Conn. Gen. Stat. Ann. §§ 53a-149, 150; Nev. Rev. Stat. Ann. § 28-918; PCC ¶¶ 179h-179k.

predicate act for their RICO claim, their additional allegations of "obstruction of justice" must also fail, since those allegedly unlawful acts are premised on an alleged "cover-up" of the underlying bribery scheme.[40]

Fourth, defendants' allegations also completely fail to satisfy the standards for establishing the existence of either an "associated-in-fact enterprise" as required by RICO, 18 U.S.C. § 1961(4), or a "pattern of racketeering activity," as also required. See 18 U.S.C. §§ 1961(4) and (5). Thus, it is well-established that, to prove the existence of an associated-in-fact enterprise, defendants must allege that the members of the enterprise have a common purpose; that the enterprise have some organizational structure apart from the alleged acts of racketeering activity; and that there is continuity within the membership of the enterprise. See Perholtz, 842 F.2d 343, 354, 363 (D.C. Cir. 1988).

However, defendants have not alleged facts remotely sufficient to show that the enterprise in which they contend plaintiffs are engaged has any organizational structure, such as a discrete hierarchy or organized, coordinated division of labor among the members. See, e.g., id. at 363; United States v. Cooper, 91 F. Supp.2d 60, 71 (D.D.C. 2000) ("Cooper led his racketeering group . . . to act in an organized, concerted, and coordinated manner"). Indeed, the entirety of defendants' allegations concerning any "organization" to the alleged enterprise beyond the alleged racketeering acts amounts to the following conclusory statement: "[t]he Enterprise has an ascertainable structure and purpose beyond the scope and commission of counterclaim-defendants' predicate acts." PCC at 55. However, simply stating the legal standard that defendants are required to meet does not provide

[40] In addition, as explained supra at 22-26, none of plaintiffs' conduct remotely qualifies as a "cover-up" here. On the contrary, plaintiffs have provided defendants with all of the information to which they are legitimately entitled concerning Mr. Rider's media and public education efforts.

the necessary allegations of fact that would meet this standard.[41]

Nor have defendants even pled facts sufficient to show that plaintiffs and the WAP are engaged in a "pattern of racketeering activity," as RICO also requires. Thus, the Supreme Court has held that to constitute such a "pattern," there must be both a relationship between the predicate acts, and a continuing threat of criminal activity. See H.J., Inc. v. Northwestern Bell Telephone Co., 492 U.S. 229, 238 (1989). In elaborating on the Supreme Court's holding, the D.C. Circuit has further held that "if a plaintiff alleges only a single scheme, a single injury, and a few victims it is 'virtually impossible for plaintiffs to state a RICO claim.'" Western Associates Ltd. v. Market Square Associates, Ltd., 235 F.3d 629, 634 (D.C. Cir. 2001) (emphasis added) (quoting Edmondson & Gallagher v. Alban Towers Tenants Assoc., 48 F.3d 1260, 1265 (D.C. Cir. 1995). Accordingly, because here defendants have alleged only one "victim" – FEI – it is "virtually impossible" for their claim to succeed. Moreover, defendants appear to have alleged only one scheme – i.e. "to ban Asian elephants from circuses, and in so doing, defraud FEI of money and property" – and for that reason as well their RICO claim is futile.

Finally, even assuming that there were any merit whatsoever to defendants' conclusory and entirely unsubstantiated allegation that Mr. Rider was being paid for his testimony in this case, even that would make no difference here in light of the fact that the only RICO damages defendants have alleged are their attorneys' fees in defending against plaintiffs' ESA action. PCC at 53. It is well-

[41] See Manax v. McNamara, 842 F.2d 808, 811 (5th Cir. 1988) ("[p]laintiffs in a RICO claim must plead specific facts, not merely conclusory allegations, which establish the enterprise"); Scheck v. General Elec. Corp., 1992 WL 13219, 3 (D.D.C. 1992) ("[t]o plead a RICO claim, plaintiff must identify and specifically describe the alleged enterprise"), quoting Manax, 842 F.2d at 811; see also United States v. Perholtz, 842 F.2d 343, 363 (D.C. Cir. 1988) (the "same groups of individuals who repeatedly commit predicate offenses do not necessarily comprise an enterprise. An extra ingredient is required: organization").

established that one of the jurisdictional requirements for pursuit of a private civil RICO claim is an allegation that the alleged predicate acts are the "proximate cause" of defendants' alleged injury to their business or property. Holmes v. Securities Investor Prot. Corp., 503 U.S. 258, 268 (1992); 18 U.S.C. § 1964(c) (permitting remedy for "[a]ny person injured in his business or property by reason of a violation of section 1962"). In other words, a claimant must allege that there is "some direct relation between the injury asserted and the injurious conduct alleged." Holmes, 503 U.S. at 268; Evans v. City of Chicago, 434 F.3d 916, 924-25 (7th Cir. 2006) ("whether an alleged RICO injury was caused 'by reason of' a violation of the statute – has also been considered a component of standing"), quoting Beck v. Prupis, 529 U.S. 494 (2000).

Here, defendants plainly cannot satisfy the proximate cause requirement, particularly before the Court even addresses plaintiffs' claims. Indeed, as demonstrated, in light of all the other extensive evidence that defendants do routinely strike and beat their elephants with bull hooks and keep them chained for hours on end – including scores of videotape, the sworn testimony of other former Ringling employees, and defendants' own internal documents – plaintiffs' ability to prove their taking claims here does not rest, by any stretch of the imagination, on Mr. Rider's testimony. In fact, by the time the trial of this case is over, Mr. Rider's testimony will be a relatively minor part of plaintiffs' overall evidence of Ringling's unlawful conduct, and therefore not remotely the proximate cause of defendants' alleged "damages" here. Accordingly, the Court simply will not have jurisdiction to hear the counterclaim. See Evans, 434 F.3d at 931-933 (7th Cir. 2006) (there is no RICO claim where plaintiff "has failed to prove that his payment of attorneys' fees was proximately caused by the alleged racketeering activity" or "the evidence concerning the attorneys' fees is far too speculative

to confer RICO standing").[42]

II. THE COURT SHOULD DENY DEFENDANTS' MOTION TO AMEND THEIR ANSWER TO ADD THE AFFIRMATIVE DEFENSE OF UNCLEAN HANDS.

For all of the same reasons that they oppose the addition of defendants' proposed counterclaim – i.e. delay, prejudice, and bad faith – plaintiffs also oppose defendants' dilatory and clearly sanctionable motion to add an "unclean hands" defense.[43]

In addition, as defendants acknowledge, Def. Mem. at 13, an "unclean hands" defense only comes into play once a court finds that the defendant has acted unlawfully, and the Court must decide whether, despite that finding, it should deny plaintiffs relief because they have pursued the case for some improper purpose. See e.g., National Cable Television Assn, Inc. v. Broadcast Music, Inc., 772 F.Supp. 614, 652 (D.D.C. 1991) ("[u]nclean hands calls for the denial of an otherwise meritorious claim where the claimant has acted so improperly as to make punishment of the claimant outweigh the defendants' unlawful conduct") (emphasis added); Memorex Corp. v. International Business

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[42] See also Miller Hydro Group v. Popovitch, 851 F.Supp. 7, 13-15 (D. Me. 1994) (no RICO claim seeking attorneys fees where "a proximate-cause analysis indicates that [the] legal fees stemmed from [plaintiff's] decision to file a breach-of contract action"); American Special Risk Ins. Co v. Greyhound Dial Corp., No. 90-2066, 1997 WL 115637 (S.D.N.Y. Mar. 14, 1997) (where allegedly bribed witness testimony was not the proximate cause of the alleged injury, the RICO claim must fail).

[43] Defendants candidly admit that they did not decide to assert their new affirmative defense until "after discussion with FEI's new counsel." Def. Mem. at 4. However, particularly because plaintiffs and WAP have always been forthcoming about the funding of Mr. Rider's media and public outreach, defendants' change in counsel cannot legally excuse their inordinate delay in asserting their proposed "unclean hands" defense. See, e.g., Ansam Assocs., Inc. v. Cola Petroleum, Ltd, 760 F.2d 442, 446 (2d Cir. 1985) (denial of motion to amend complaint where substitute counsel discovered new information forming the basis for the proposed amendment); Zubulake v. UBS Warburg LLC, 231 F.R.D. 159, 162 (S.D.N.Y. 2005) (precluding a new defense where defendants "waited twenty-two months," after "defendants' newly substituted counsel made a strategic decision to assert the defense").

Machines Corp., 555 F.2d 1379, 1381 (9th Cir. 1977) (explaining that under the "'[u]nclean hands" defense a plaintiff "is not permitted to recover despite the wrongfulness of the defendant's action").

Yet, it is for this precise reason – i.e., that this particular defense could only be invoked after a Court concludes that Ringling is in fact, unlawfully "taking" these endangered Asian elephants in violation of the ESA – that defendants' "unclean hands" defense has no application here. Thus, a long line of cases makes clear that where a plaintiff seeks to vindicate a public, rather than private, interest, the only relevant inquiry is defendants' culpability, and that plaintiffs' motives or conduct are completely irrelevant. See, e.g., Perma Life Mufflers v. Internat'l Parts, 392 U.S. 134, 139 (1968) (no "unclean hands" defense in private anti-trust action; a "fastidious regard for the relative moral worth of the parties would only result in seriously undermining the usefulness of the private action as a bulwark of antitrust enforcement"), overruled on other grounds, Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 773 (1984); Bateman Eichler, Hill Richards, Inc. v. Berner, 472 U.S. 299 (1985) (rejecting the closely related in pari delicto defense as contrary to the "primary objectives" of securities law to "protect[ ] the investing public and the national economy"); Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211, 214 (1951) ("[t]he alleged illegal conduct of petitioner, however, could not legalize the unlawful" conduct of respondents).

Applying these principles here, such a defense, even if it had any merit whatsoever – which it does not – is completely unavailable because plaintiffs' claims seek to vindicate the public interest in preventing the "take" of an endangered species, as specifically authorized by the ESA's citizen suit provision, 16 U.S.C. § 1540(g). See, e.g., Bennett v. Spear, 520 U.S. 154, 165 (1997) (Congress included a citizen suit provision in the ESA "to encourage enforcement by so-called 'private attorneys

general') (internal citation omitted).[44]

This principle applies with even greater force here, since ESA jurisprudence makes clear that equitable defenses – which would include the defense of "unclean hands" – ordinarily have no applicability when plaintiffs seek relief on behalf of an endangered species. Thus, in the seminal ESA case TVA v. Hill, 437 U.S. 153, 194-95 (1978), the Supreme Court expressly considered whether, upon finding violations of the ESA, it is appropriate for a Court to nevertheless consider equitable factors before imposing a remedy for those violations. However, rejecting any role for the courts "to strike a balance of equities," the Court – in words fully applicable here – explained that "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, thereby adopting a policy which it described as 'institutionalized caution.'" Id.[45] Therefore, because plaintiffs are not only pursuing a claim in the public interest, but one that arises under a statute that the Supreme Court has specifically

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[44] See also Chrysler Corporation v. General Motors Corp., 596 F. Supp. 416, 418 (D.D.C. 1984) (where "private suits serve important public purposes it is inappropriate to allow common law defenses such as in parti delicto to bar recovery"); Association of American Medical Colleges v. Princeton Review, Inc., 332 F.Supp. 2d 11, 25 (D.D.C. 2004) ("Courts that have considered the issue have found that an unclean hands defense does not bar a trade secrets misappropriation claim"); Alpo Petfoods, Inc. v. Ralston Purina Co., 720 F.Supp. 194, 214 (D.D.C. 1989) ("equitable defenses raised cannot bar relief which is necessary and in the public interest") (internal citations omitted), rev'd on other grounds 913 F.2d 958, 970 (D.C. Cir. 1990) (noting that the district court "reject[ed] both parties' 'unclean hands' defenses, a ruling that neither party appeals").

[45] See also Weinberger v. Romero-Barcelo, 456 U.S. 305, 314 (1982) (reiterating that equitable factors have no role in an ESA claim); American Rivers v. U.S. Army Corps. of Engs., 271 F. Supp.2d 230, 248-49 (D.D.C. 2003) ("traditional balancing of equities for issuance of an injunction under the ESA is abandoned in favor of an almost absolute presumption in favor of the endangered species"); Nat. Wildlife Fed. v. Burlington, 23 F.3d 1508, 1511 (9th Cir. 1994) (in the ESA "Congress removed from the courts their traditional equitable discretion in injunction proceedings of balancing the parties' competing interests").

concluded bars consideration of such equities, defendants' "unclean hands" defense is simply a legal non sequiter.[46]

CONCLUSION

For all of the foregoing reasons, this Court should hold in abeyance defendants' motion to amend their Answer to add a counterclaim under RICO until after a trial on the merits of plaintiffs' ESA claim, deny the motion to add WAP as a new party to the counterclaim, and deny defendants' motion to add a new defense of "unclean hands."

Respectfully submitted,
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March 30, 2007

[46] Indeed, the ESA contains only one express equitable defense to a "take" claim – self-defense. 16 U.S.C. § 1540(a)(3) ("Notwithstanding any other provision of this chapter, no civil penalty shall be imposed if it can be shown by a preponderance of the evidence that the defendants committed an act based on a good faith belief that he was acting to protect himself or herself, a member of his or her family, or any other individual from bodily harm, from any endangered or threatened species"). See also General Elec. v. Litton Industrial Automation Systems, Inc., 920 F.2d 1415, 1418 (8th Cir. 1990) (no "unclean hands" defense where statute enumerates specific available defenses), abrogated on other grounds, Key Tronic Corp. v. U.S., 511 U.S. 809 (1994); Cal. Dept of Toxic Substances Control v. Neville Chem. Co., 358 F.3d 661, 672 (9th Cir. 2004) ("Every court of appeal that has considered the precise question whether [CERCLA] permits equitable defenses has concluded that it does not"); Blasland, Bouck & Lee, Inc. v. City of North Miami, 283 F.3d 1286, 1304 (11th Cir. 2002).

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS, et al.,	)	
Plaintiffs,	)	
v.	)	Civ. No. 03-2006 (EGS/JMF)
RINGLING BROTHERS AND BARNUM & BAILEY CIRCUS, et al.,	)	
Defendants.	)	

CERTIFICATE OF SERVICE

I certify that copies of plaintiffs' DVDs Exhibits 15 and 25 will be provided by first class mail, this 30th day of March, 2007 to counsel for defendants:

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