IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

DEFENDANT FEI'S REPLY IN SUPPORT OF MOTION FOR LEAVE TO AMEND ANSWERS TO ASSERT ADDITIONAL DEFENSE AND RICO COUNTERCLAIM

Having been caught in the middle of a self-created, illegal financing scheme that poisons this litigation to its very core, plaintiffs respond to FEI's Motion for Leave to Amend ("Motion") by attempting (unpersuasively albeit quite predictably) to deflect the Court's attention away from their own misconduct. Plaintiffs devote more than half of their response to rehashing their beliefs about why elephants do not belong in any circus, and therefore, FEI's elephants should be confiscated. See Opposition to Motion for Leave to Amend Answers to Assert Additional Defense and RICO Counterclaim at 1-29 (3/30/07) ("Resp."). Plaintiffs further argue that ***their*** views are the only "merits" to be considered in this case. Id. at 30.

However, the key question here is: should FEI be permitted to amend its pleadings under the liberal governing standard? Once the matter moves beyond this routine issue, the question becomes: how much does it cost to purchase a plaintiff to cure standing deficiencies? The correct answer should be that there is no such pricetag – plaintiffs and witnesses are not lawfully for sale. Yet in this case, the "grants" systematically paid for years to Rider now exceed six

figures and continue to rise. The misconduct at issue here is too severe to ignore. FEI diligently has pursued the evidence in this case (evidence which, contrary to plaintiffs' representations, FEI has had to fight for every step of the way), and that evidence supports the defense of unclean hands and a RICO counterclaim. It also shows that sitting in the center of this orchestrated payment scheme is WAP, counsel's alter ego. Accordingly, FEI's Motion arising from this evidence should be granted, and plaintiffs present no cogent reason for its denial.

I. THE COURT SHOULD GRANT FEI'S MOTION FOR LEAVE TO AMEND

Plaintiffs do not contest that Rules 15 and 13(e) govern this Motion. Instead of focusing on these issues of law, the Response presents a misleading version of the facts in this case (the "ESA Action") and in other cases not pending before the Court. Plaintiffs, their counsel, and WAP, however, willingly created the situation in which they now find themselves: their scheme was deliberately designed to circumvent the Article III standing requirements set forth by the Supreme Court. Plaintiffs try to excuse their conduct by claiming that they have paid Rider only "modest funding," a "few payments," "very little money," and "such a small amount." Resp. at 24 n.21, 25 n.22, & 26; id., Ex. 38 ¶ 2 (Rider Decl.). Such claims not only are untrue, see [Proposed] Counterclaim at ¶¶ 42-117 (payment record), but they also are irrelevant under the federal bribery and illegal gratuity statutes. See 18 U.S.C. § 201(b)(3) & (4) ("anything of value"); 18 U.S.C. § 201(c)(2) & (3) ("anything of value"). Plaintiffs also try to legitimize their conspiracy on grounds of incompetence by claiming that they are "the most inept co-conspirators ever to stumble upon the courthouse steps." Resp. at 5. While that may be, this is like saying Watergate was just a second-rate burglary – accurate but irrelevant. None of these facts, even if true, is a defense to plaintiffs' illegal conduct which threatens the legitimacy (if there ever was any) of the ESA Action as a whole. Moreover, the conduct underlying FEI's RICO and unclean

hands allegations now cannot be separated from the ESA Action. Even plaintiffs admit this, as they must. See Resp. at 39 ("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[.]").

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

FEI acted promptly to bring its counterclaim and unclean hands defense before the Court. Plaintiffs' assertion that they have been "forthcoming" regarding the Rider payments and that FEI has known the same "for years" is simply false. Plaintiffs, along with WAP, have produced materials that FEI requested years ago, some as early as 2004, only after FEI threatened to, and in most instances, had to seek the Court's intervention. The record in this case is replete with repeated instances of plaintiffs' and WAP's efforts to obfuscate, delay, and withhold evidence. See, e.g., Motion to Compel Documents Subpoenaed From WAP (Docket No. 85) (WAP withheld hundreds of pages of responsive documents until FEI threatened to file a motion to compel and continues to withhold responsive documents); Motion to Compel Testimony of Plaintiff Tom Eugene Rider (Docket No. 101) (Rider was instructed to and thus refused to answer questions related to, inter alia, his military service and litigation history); Motion to Compel Discovery From Plaintiff Tom Rider (Docket No. 126) (Rider has committed perjury and destroyed relevant documents); Deposition Testimony of ASPCA at 140-41, 220 (attached hereto as Exhibit 5) (refusing to provide information regarding Rider payments, even subject to protective order, on the bogus ground that it was "confidential and proprietary" and insisting that FEI "can take it up with the judge"); AWI Supplemental Interrogatory Response No. 19 (attached as Exhibit 27 to Motion to Compel Discovery From Rider (Docket No. 126)) (asserting for the ***first time*** that AWI now claims a First Amendment privilege for documents that were requested by FEI almost three years earlier but were neither produced nor identified by AWI);

ASPCA Supplemental Interrogatory Response No. 19 (attached as Exhibit 29 to Motion to Compel Discovery From Rider (Docket No. 126)) (asserting for the ***first time*** that ASPCA now claims a First Amendment privilege for documents that were requested by FEI almost three years earlier but were neither produced nor identified by ASPCA).

Any delay in bringing FEI's Motion is due to: (1) plaintiffs' false interrogatory answers, false deposition testimony, withholding of documents, spoliation/failure to preserve relevant documents, and other such "hide the ball" discovery tactics; and (2) plaintiffs' false statements before this Court. Plaintiffs cannot be permitted to benefit from their discovery misconduct by now claiming that FEI should have caught them sooner. FEI has a right to reasonably rely upon the discovery responses of its adversary, both written and testimonial, and cannot be faulted for having been misled by plaintiffs, as happened here. In re Amtrak, 136 F. Supp. 2d 1251, 1260 (S.D. Ala. 2001) (party is entitled to rely on opposing party's written responses to interrogatories because perjurious answers deceive party into believing that there is no reason to ask questions about the responses). Plaintiffs' concealment is exemplified by its own counsel's statement made in open court, which has now proven to be disingenuous. Counsel was anything but "candid," see Resp. at 37, when proclaiming to the Court and FEI on September 16, 2005 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***[1] . . . that we are whacky [sic] 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,***[2] he

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[1] By this time, AWI had already given false statements in its interrogatory answers and in its deposition. See [Proposed] Counterclaim ¶¶ 138-153. Rider had also already given false statements in his interrogatory answers and in an affidavit to the USDA. See id. ¶¶ 127-133, 154-161.

[2] "His own van" was actually purchased using a $5,500.00 "grant" from WAP. Meyer sent Rider a cover letter and the purchase money via Federal Express on April 12, 2005, approximately five months before the September 16, 2005 hearing. FEI received a heavily redacted version of the "grant" letter in WAP's first document production on September 29, 2005 and ***an unredacted version of the "grant" letter in WAP's second document production on June 30, 2006***, Letter from Meyer to Rider, 4/12/05 (redacted and unredacted versions) (attached hereto as Exhibit 6).

> gets ***money***[3] from ***some of the clients***[4] and some ***other organizations***[5] to ***speak out***[6] and say ***what really happened***[7] when he worked there.

See Resp. Ex. 30 (9/16/05 Hearing Transcript) (emphases added).

Conspicuously, plaintiffs' Response cites no case refuting FEI's (legally correct) contention that courts in this Circuit "have denied motions for leave to amend where the movant sought leave without any explanation for the delay, years after the allegations became known, and previously had abundant opportunity to raise the issue." Motion at 11-12 (citing case law from the D.C. Circuit). That is not the case here. Cf. Caribbean Broadcasting System, Ltd. v. Cable & Wireless P.L.C., 148 F.3d 1080, 1084 (D.C. Cir. 1998) (reversing denial of leave to amend complaint where "no indication that amendment was in any cognizable way 'untimely'");

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[3] "Money" actually means: (1) Rider's only source of funding since 2001 and (2) tens of thousands of dollars in cash and various non-cash compensation – more than Rider made when working for FEI. According to WAP's Forms 1099, by the time of the September 16, 2005 hearing, Rider had received more than $39,000.00 in payments from WAP and was on track to receive another $33,600.00 from WAP for 2005. ***WAP produced these Forms 1099 to FEI for the first time on June 30, 2006.*** See WAP 2002-05 Forms 1099 to Rider (attached as Exhibit 6 to Motion to Compel Discovery From Rider (Docket No. 126)). The WAP 1099s do not reflect: (1) cash payments from the organizational plaintiffs directly to Rider; (2) non-cash compensation from the organizational plaintiffs to Rider, including a lap top computer, zoom camera, and cell phone usage; and (3) whatever additional money flowed to Rider that remains to be discovered.

[4] By September 16, 2005, the "money" had not just come from "some of the clients" but had come from all of the organizational plaintiffs that were a party to the ESA Action at that time: ASPCA, AWI, and FFA/HSUS. Moreover, a large portion of this "money" "came" to Rider through WAP, an alter ego of plaintiffs' counsel. ***FEI was unaware of the amount of the payments to Rider until WAP produced an unredacted version of its "ledger" of disbursements to Rider on June 30, 2006. Moreover, FEI was unaware that FFA/HSUS was making payments to WAP that were intended for Rider until WAP produced the unredacted version of its ledger on June 30, 2006.*** Compare Ledger Provided in Lieu of Documents Requested (produced to FEI on June 30, 2006) with Redacted Ledger Provided in Lieu of Documents Requested (produced to FEI on Sept. 29, 2005) (attached as Exhibits 4 & 36 to Motion to Compel WAP (Docket No. 85)).

[5] Counsel did not disclose that "some other organizations" included WAP, the alter ego of plaintiffs' counsel MGC, that is run by the very speaker of this quote to the Court, Katherine Meyer. See [Proposed] Counterclaim ¶ 27.

[6] Instead of being used for photocopies, mailings, taxi cabs, or other "media" expenses necessary to "speak out" against FEI, the "grant" money actually supports Rider's livelihood. See [Proposed] Counterclaim ¶ 65. ***FEI was not aware how Rider used his "media" "grants" until WAP produced Rider's receipts in its second document production on June 30, 2006.*** See Miscellaneous Rider Receipts (attached as Exhibit 30 to Motion to Compel WAP (Docket No. 85)).

[7] Rider himself seems unsure of "what really happened" at FEI, given that he has made six separate and inconsistent statements under oath and penalty of perjury. [Proposed] Counterclaim ¶¶ 127-133.

see also Atchison v. District of Columbia, 74 F.3d 418, 427 (D.C. Cir. 1996) (affirming district court's denial of leave to amend in part due to "substantial delay" where leave sought via oral motion on day trial was scheduled to begin); Douglass v. First Nat. Realty Corp., 437 F.2d 666, 669 (D.C. Cir. 1971) (affirming denial of leave to amend where defendant sought to file amended answer on day of summary judgment hearing and had failed to take advantage of previous extensions).

By contrast, here (1) the amendment's timing resulted from plaintiffs' attempts to hide their illegal and unethical conduct; (2) the starting point for any "delay" analysis is, ***at the earliest, June 30, 2006*** (WAP's second document production), see Motion at 6, when the details of the illegal, ethically improper and fraudulent payment scheme and the cover-up scheme began to unravel -- if not ***October 12, 2006*** (Rider's deposition), when it became clear that the payment scheme was ongoing, or ***January 15, 2007*** (API's first discovery responses), when FEI learned that newly added plaintiff API was also involved in the illegal conduct; and (3) FEI had no previous opportunity to raise the issue of plaintiffs' illegal conduct.

Moreover, FEI's proposed amendment is driven by evidence that plaintiffs have engaged in illegal conduct that questions the legitimacy of the entire ESA Action rather than any bad faith or dilatory motive on the part of FEI. FEI does not seek to delay an approaching trial date – there is no such date in this case – or to punish plaintiffs for "exercising" their "First Amendment" rights.[8] Any "delay" by FEI – after it learned the details, mechanics, and scope of

[8] Plaintiffs do not have a First Amendment right to engage in unlawful conduct, and no such constitutional protection attaches. The case law cited on page 39 of plaintiffs' opposition regarding freedom of association for lawful conduct and whether membership lists are thus deserving of protection is therefore irrelevant. NAACP v. Alabama, 357 U.S. 449, 466 (1958) (First Amendment right to freedom of association protected disclosure of NAACP membership lists); FEC v. Machinists Non-Partisan Political League, 655 F.2d 380, 389 (D.C. Cir. 1981) ("the FEC's demand for a list of all members and volunteers of this political group implicates the rigorously protected first amendment interest in privacy of political association"); Wyoming v. U.S. Dept. Agric., 208 F.R.D. 449, 455 (D.D.C. 2002) (compliance with subpoena would infringe on non-party witnesses' First Amendment rights to free association and to petition the government); Int'l Action Ct. v. United States, 207 F.R.D. 1, 3 (D.D.C. 2002)

the payment and cover-up schemes – on June 30, 2006, October 12, 2006, and January 15, 2007 – was warranted by the extensive legal research and factual development necessary to assert the detailed allegations in FEI's RICO Counterclaim in accordance with both the legal and evidentiary standards of Rule 11 and the heightened pleading requirements of Rule 9(b).

B. Plaintiffs Will Not be Prejudiced by FEI's Counterclaim and Unclean Hands Defense

Plaintiffs' opposition fails to refute the three points made in FEI's Motion: (1) there is no discovery cut-off or trial date in the ESA Action; (2) the conduct forming the basis of FEI's counterclaim and unclean hands defense is now part and parcel of the ESA Action; and (3) any additional discovery necessary will not be unduly burdensome. Accordingly, plaintiffs cannot show substantial prejudice, and the Court should grant FEI's Motion. Woodward v. DiPalermo, 98 F.R.D. 621, 624 (D.D.C. 1983) ("Indeed, refusal by the district court to allow amendment to add a counterclaim, where [the] plaintiff has failed to show substantial prejudice, may be an abuse of discretion.").

Plaintiffs do not cite a single case in which a court has denied a motion for leave to amend where discovery is ongoing, no cut-off date has been set, and a trial date has not yet been scheduled. This is not a case where a party seeks amendment late in the proceedings where a scheduling order is in effect, all discovery has closed, or a set trial date is a matter of days or months away. Cf. Atchinson, 73 F.3d at 427 (affirming denial of leave to amend where amendment sought on first day of trial); Steinert v. The Winn Group, Inc., 190 F.R.D. 680, 683 (D. Kan. 2000) (denying leave to amend where amendment required substantial additional discovery, discovery was set to close, and trial and pre-trial conference dates scheduled); Koch v.

(membership, volunteer, and contributor lists, and past political activities of plaintiff and persons whom they have been affiliated with protected by the First Amendment).

Koch Industries, 127 F.R.D. 206, 210 (D. Kan. 1989) (denying leave to amend where additional three to five years of discovery would be necessary and scheduling order already in effect).

Plaintiffs' argument that FEI's amendment will delay the resolution of their "takings" claim has no credibility given their own dilatory tactics in what appears now to be seeking to continually add new plaintiffs to the ESA Action. API joined as a plaintiff in February 2006 (Docket Nos. 55 & 60). Now, plaintiffs say that they intend to add three additional individual plaintiffs, Archele Hundley, Robert Tom, Jr. and Margaret Tom. Resp. at 30 n.26; id., Ex. 52. Even if addition of these plaintiffs were possible,[9] it only would further delay ultimate resolution of the case. Discovery would start anew with these three plaintiffs, given that they all worked at FEI at different times, in different jobs and on a different unit than did Rider.

In contrast, plaintiffs have made their illegal conduct part and parcel of the ESA Action. Judicial economy dictates that the ESA Action, FEI's counterclaim, and FEI's unclean hands defense be adjudicated concurrently to avoid "piecemeal litigation." Millar, 236 F. Supp. 2d at 1123 (one factor weighing in favor of amendment is "avoiding piecemeal litigation and conserving the Court's and the parties' resources by resolving related matters in one proceeding"); see also Adair v. Johnson, 216 F.R.D. 183, 189 n.10 (D.D.C. 2003) (leave to amend granted because proposed amendment avoided additional lawsuits based on the same or similar claims); Childers v. Mineta, 205 F.R.D. 29, 33 (D.D.C. 2001) (leave to amend granted where additional claims related closely to scope of litigation and doing so combined two civil actions).

Furthermore, plaintiffs will not escape the consequences of their actions no matter what the outcome of the Motion may be. FEI can file its RICO and conspiracy counterclaim as a

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[9] See 16 U.S.C. § 1540(g)(1) (providing that a citizen may "commence a civil suit on his own behalf," not join a pre-existing suit).

separate lawsuit. For the same reasons, plaintiffs' request to hold the Motion in abeyance has no basis and should be denied.[10] As indicated, even without an amendment, all of the RICO and unclean hands evidence will come up anyway in the ESA Action. The payments to Rider, Rider's use of those payments, Rider's purported "media"/"PR efforts"/"public education" conduct, Rider's employment status (or lack thereof) since 2001, Rider's eight years of tax evasion, AWI's, ASPCA's, and FFA/HSUS's "fund-raiser" held for Rider, Rider's evolving story and statements under oath, and AWI's statements under oath all go to credibility and are grounds for cross-examination of plaintiffs at any trial. From a practical standpoint, it makes no sense to have two trials on the same thing. Judicial economy and efficiency dictates that FEI's RICO Counterclaim be joined to the ESA Action.

Plaintiffs make the conclusory assertion that FEI's RICO claim will require extensive discovery and delay litigation of the ESA Action, Resp. at 41, but fail to refute FEI's point that any additional discovery necessary will be pointed and efficient. That the necessary RICO and unclean hands discovery may be inconvenient or embarrassing for plaintiffs does not make it "prejudicial" or "unduly burdensome." Adding FEI's counterclaim would not "unleash a Hydra" of burdensome discovery. Unless plaintiffs have destroyed or concealed evidence on a monumental scale, much of the RICO evidence has already been uncovered or is now pending before the Court and is recited in or supports the proposed counterclaim. Whatever discovery gaps remain can be filled as expeditiously as plaintiffs want to make it, and plaintiffs do not

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[10] Plaintiffs cite no cases where a court has stayed or held in abeyance a motion for leave to amend. Moreover, plaintiffs cite no cases where a court has stayed or held in abeyance a counterclaim, once added, in an ongoing case. Instead, plaintiffs cite a number of cases where courts have stayed or held in abeyance RICO claims where other proceedings, such as state court civil or criminal proceedings or arbitration, could simplify litigation of the RICO claim. There are no other proceedings that bear upon litigation of FEI's RICO Counterclaim. As argued with respect to proximate cause, FEI's RICO Counterclaim is not dependent on the resolution of plaintiffs' "takings" claim – the illegal conduct has already occurred and FEI has already incurred its damages. In any event, FEI will fully brief this issue if and when plaintiffs make an appropriate motion for abeyance. Further, FEI will fully brief bifurcation of FEI's counterclaim and plaintiffs' "takings" claim if and when plaintiffs make a Rule 13(i) motion.

show otherwise. See Djourabchi v. Self, 240 F.R.D. 5, 22 (D.D.C. 2006) (granting amendment where issues raised by it were related to other claims and likely relevant to the trial of those claims). Cf. Koch, 127 F.R.D. at 210 (denying leave to amend where additional discovery would require an additional three to five years to complete); Societe Liz, 118 F.R.D. 2, 5 (D.D.C. 1987) (denying leave to amend where addition of 14 new defendants would greatly increase the amount of time needed to prepare for trial). That plaintiffs may be required to conduct some additional discovery is no reason to deny FEI's Motion: "[w]here the proponent of the amendment establishes that the additional claim would not 'unduly increase discovery or delay the trial . . . the amendment should be allowed." Djourabchi, 240 F.R.D. at 20.

II. FEI'S RICO COUNTERCLAIM IS NOT A FUTILE AMENDMENT

A. A Motion to Dismiss Standard Governs the Court's Futility Analysis

Courts may deny a motion to amend as futile only if the proposed claim would not survive a motion to dismiss or a motion for judgment on the pleadings. James Madison Ltd. v. Ludwig, 82 F.3d 1085, 1099 (D.C. Cir. 1996) (citing Foman v. Davis, 371 U.S. 178, 181-82 (1962)); Stith v. Chadbourne & Parke, L.L.P., 160 F. Supp. 2d 1, 6 (D.D.C. 2000). A counterclaim should not be dismissed pursuant to Rule 12(b)(6) unless the "counterclaimant 'can prove no set of facts in support of his claim which would entitle him to relief.'" Djourabchi, 240 F.R.D. at 12 (quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957)). "As with a complaint, a counterclaim must be liberally construed and the counterclaimant 'given the benefit of all inferences that can be derived from the facts alleged.'" Djourabchi, 240 F.R.D. at 12 (quoting Johns v. Rozet, 141 F.R.D. 211, 219 (D.D.C. 1992)). The truth of the allegations must be assumed at the 12(b)(6) stage. ACLU v. Barr, 952 F.2d 457, 467 (D.C. Cir. 1991) (dismissal based on disbelief of allegations or ability to prove them is inappropriate under Rule 12(b)(6)).

FEI's RICO claims easily satisfy this standard.[11] Plaintiffs maintain that their conduct was not illegal but that is a fact matter for the jury. It has nothing to do with whether an amendment to the pleadings should be allowed.

B. Plaintiffs Have Not Challenged the Sufficiency of FEI's Allegations of Mail Fraud, Wire Fraud, and Conspiracy to Violate § 1962(c)

Although they fervently allege that FEI's RICO counterclaim is futile, plaintiffs do not contend that the counterclaim fails to state a claim upon which relief could be granted under the federal mail fraud statute, 18 U.S.C. § 1341, and the federal wire fraud statute, 18 U.S.C. § 1343, both of which are independent predicate acts of racketeering under 18 U.S.C. § 1961(1).[12] In addition, plaintiffs do not contend that FEI's RICO Counterclaim fails to state a § 1962(d) claim for conspiracy to commit a pattern of racketeering in violation of § 1962(c). Therefore, plaintiffs have conceded the sufficiency of these allegations, and amendment should be permitted.

C. FEI Has Properly Alleged Numerous Counts of Bribery of a Witness and Illegal Gratuity Payments to a Witness[13]

Plaintiffs make two arguments regarding FEI's bribery allegations: (1) bribery of a plaintiff is not prohibited by federal or state law, and (2) FEI has failed to adequately plead bribery of, and illegal gratuity payments to, a witness. Neither argument has any merit.

Regardless of whether it is a crime to bribe a plaintiff, it is difficult to conceive of a plaintiff in any case who would not also be a witness of some kind. Be that as it may, it ***is*** a

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[11] Since they do not respond at all, plaintiffs evidently concede that FEI's Proposed Virginia Conspiracy Act Counterclaim is not "futile." See Resp. at 36 n.28.

[12] FEI's RICO Counterclaim alleges numerous violations of each of those two statutes: each mailing or wiring of a payment is a violation of the federal mail fraud statute, 18 U.S.C. § 1341, or the federal wire fraud statute, 18 U.S.C. § 1343, and is an independent predicate act under 18 U.S.C. § 1961. [Proposed] Counterclaim ¶¶ 15, 58-59, 72-75, 86-89, 95-98, 105-108, 114-117. Further, FEI's RICO Counterclaim alleges that the mailing and/or wiring of the "fund-raiser" invitation violated the federal mail and/or wire fraud statutes. Id. ¶¶ 122-126.

[13] Plaintiffs apparently do not know differentiate between bribery and illegal gratuity payments because they refer to the illegal gratuity statute, 18 U.S.C. § 201(c), when discussing "bribery," 18 U.S.C. § 201(b). In any event, FEI's allegations are sufficient under either statute, as demonstrated herein.

crime to bribe a witness who is also a plaintiff, which is the case with Rider. Rider's roles as a plaintiff and as a witness are one and the same. Rider's allegations of "injury-in-fact" – necessary for his and for the organizational plaintiffs' standing to bring the ESA Action[14] – necessarily implicate Rider's "eye-witness" testimony. See ASPCA v. Ringling Bros., 317 F.3d 334, 337 (D.C. Cir. 2003) ("Rider claims to have ***witnessed*** inhumane treatment of animals while he was working for the circus") (emphasis added); Compl. ¶ 19 (Docket No. 1) (describing what Rider allegedly saw and heard while working for FEI). The organizational plaintiffs intend on calling Rider as a witness as trial. See, e.g., ASPCA Supplemental Interrogatory Response No. 1 (attached hereto as Exhibit 7). Rider has already given testimony under oath in the ESA Action during his deposition and in sworn written discovery responses.

Payments for amounts far less than those here have raised judicial concern. See Mauldin v. Wal-Mart Stores, Inc., No. 01-2755, 2006 U.S. Dist. LEXIS 85189, at *11 (N.D. Ga. Nov. 22, 2006) (ordering discovery on four "irregular" payments totaling approximately $2,250.00 from Milberg Weiss's local counsel to a class action named plaintiff) (attached as Exhibit A to FEI's Reply to Non-Party WAP's Response (Docket No. 137)); Affidavit of G. Stein, Exhibit 4 to Plaintiff's Opposition to Motion to Re-Open Discovery (6/6/06) (attached as Exhibit B to FEI's Reply to Non-Party WAP's Response (Docket No. 137)); see also United States v. Milberg

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[14] Without Rider and his "injury-in-fact," the organizational plaintiffs would not have standing to bring this lawsuit. Citing Cary v. Hall, No. 05-4363, 2006 U.S. Dist. LEXIS 78573 (N.D. Ca. Sept. 30, 2006), see Resp. at 3 n.26, the organizational plaintiffs claim that they have standing, but their analysis is flawed. Cary narrowly addressed whether ESA § 10(c) – not ESA § 9 (which is what the instant case is based upon) – creates a right to information. Standing existed in Cary because the court found that "§ 10(c) creates an enforceable right to information" that affords the public "an opportunity to participate in the notice and comment process that is to accompany each § 10 permit application." Cary, 2006 U.S. Dist. LEXIS at *34. Because the Defenders of Wildlife alleged that it "regularly" followed comments on applications for permits under the ESA, and that the challenged regulation "effectively denie[d] Defenders information required to be made publicly available under § 10(c)," the district court found that Defenders alleged a "concrete injury that comes within the zone of interest protected by § 10(c)." Id. at *33. In this case, ***the Court has already held that the organizational plaintiffs do not have standing based on their alleged "informational" injury, and that decision was not disturbed on appeal.*** ASPCA v. Ringling Bros., No. 00-1641, slip op. at 9-12 (D.D.C. June 29, 2001) (Sullivan, J.).

Weiss Bershad & Shulman L.L.P., Crim. No. 05-587 (C.D. Cal. 2006) (alleging criminal conspiracy to pay plaintiffs for purpose of securing their testimony). Paying Rider both for his role as a plaintiff to manufacture standing to bring the ESA Action and then to participate as a witness in it is similar to what the defendants in Milberg Weiss did, who also bought plaintiffs with standing to bring the class action and shareholder-derivative lawsuits and to serve as witnesses in those actions.[15]

Plaintiffs audaciously contend that even if "anyone had advanced Tom Rider funding to be a plaintiff in this action, such payment would neither be unlawful nor unethical in any respect, and defendants have not cited any authority to the contrary." Resp. at 45 (emphasis in original).[16] As evidenced by the Milberg Weiss indictment, the Justice Department views purchasing a plaintiff to be a crime.

Further, purchasing a plaintiff is unethical under District of Columbia Rule of Professional Conduct 1.8(d). While Rule 1.8(d) permits a lawyer to "pay medical or living expenses of a client to the extent necessary to permit the client to continue the litigation," the commentary to that rule makes clear that "[t]he purpose of permitting such payments is to avoid situations in which a client is compelled by exigent financial circumstances to settle a claim on unfavorable terms in order to receive the immediate proceeds of settlement."[17]

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[15] Moreover, even accepting plaintiffs' contention that Rider's role as a plaintiff and a witness are severable, only the trier of fact could decide what portion of the payments is for Rider's participation as a plaintiff and what portion of the payments is for Rider' testimony as a witness, or if the payments can be apportioned at all.

[16] Plaintiffs contend that FEI has not cited any case law in the counterclaim to support its allegation that the Rider payments are illegal and unethical. Citation of authority in a pleading is not required, and, as discussed in the text, ample authority exists for the proposition that a plaintiff for hire is not lawful.

[17] Rule 1.8(d) was intended to "allow counsel to pay the medical and living expenses of the plaintiff during the litigation to ensure that financial hardship does not induce the plaintiff to accept a low settlement offer." Rand v. Monsanto Co., 926 F.2d 596, 600 (7th Cir. 1991) (interpreting District of Columbia Rule of Professional Conduct 1.8(d)).

This is not a suit for damages. Rider has no financial stake in the ESA Action because the only relief available are an injunction and attorneys' fees. See 16 U.S.C. § 1540(g)(1)(A) & (4). Rider thus will receive no financial compensation as a result of a favorable disposition of the ESA Action, and plaintiffs cannot justify their payments to him as necessary to prevent a forced financial settlement on "unfavorable terms."[18]

Rule 1.8(d) authorizes limited assistance to a client in "exigent financial circumstances" so that the client can "continue the litigation." According to Rider, he would be doing what he is doing in the ESA Action regardless of the money, so Rule 1.8(d) offers no cover. Moreover, Rule 1.8(d)'s provision for "necessary" assistance does not legalize what is going on here: funding of a professional plaintiff who has chosen to be a paid litigant in lieu of gainful, legitimate employment. Rider has not had a real job since May 2001, and it is not because he is unable to work. Instead, Rider has been on the animal rights payroll as a professional plaintiff funded by ASPCA, AWI, FFA and API either directly or through MGC and/or WAP, [Proposed] Counterclaim ¶¶ 10, 31-41, so that he can coast on a tax-free wave of payments, now totaling approximately $150,000.00. This stands Rule 1.8(d) on its head.

Plaintiffs' authorities are inapposite. Resp. at 45-46. NAACP v. Button, 371 U.S. 415 (1963), held that the NAACP's outreach to potential civil rights plaintiffs and paying the lawyers who represented them was constitutionally protected under the First Amendment. Id. at 421.

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[18] Although plaintiffs also seek the remedy of forfeiture, for which there is a monetary reward, the citizen suit provision on which they rely, 16 U.S.C. § 1540(g)(1), makes clear that the only remedy available for such a suit is injunctive relief. Forfeiture is not a remedy available for private plaintiffs. Rather "forfeiture under the ESA is to be conducted by the Secretary . . . [T]he decision whether to seek forfeiture is left to the discretion of the agency." People for the Ethical Treatment of Animals v. Babbitt, No. 93-1836, slip op. at 15 (D.D.C. Feb. 23, 1995) (Richey, J.), at 15 (citation omitted). Nor could Rider lawfully split an attorneys' fee award with counsel. District of Columbia Rule of Professional Conduct 5.4(a) ("a lawyer or law firm shall not share legal fees with a nonlawyer . . . ."); see also Milberg Weiss, ¶ 27 ("MILBERG WEISS . . . and others known and unknown to the Grand Jury agreed to and did pay to certain individuals a substantial portion of the attorneys' fees MILBERG WEISS obtained in actions in which such an individual served, or caused a relative or associate to serve, as a named plaintiff for MILBERG WEISS.").

Similarly, United Mine Workers of America v. Illinois State Bar Association, 389 U.S. 217 (1967), held that the First Amendment's protection of speech and assembly applied to a union's employment of an attorney on a salary basis to represent union workers in workers' compensation cases. Id. at 221-22. Neither Button nor United Mine Workers even mentions, much less approves, payments to a plaintiff by other plaintiffs or by counsel for participation in a lawsuit.

Plaintiffs argue that FEI's allegations regarding bribery are "conspicuously insufficient" – without citing ***any*** case law interpreting the applicable federal or state bribery statutes. Resp. at 46. Plaintiffs first contend that FEI's payment of its employees, who also happen to be fact witnesses in the ESA Action, is no more a violation of the federal and state bribery statutes than plaintiffs' and WAP's payments to Rider. The distinctions between FEI's employees who may be called as fact witnesses and Rider are obvious. Rider is not employed by plaintiffs or WAP. In fact, plaintiffs and WAP have vehemently argued otherwise. See Resp. at 24 n.20 ("it is Mr. Rider's position that he is not receiving any 'such compensation' as would be true if he were an employee of one of the groups"). Even the Forms 1099 that WAP issued to Rider specifically classify its payments to Rider as "non-employee compensation." [Proposed] Counterclaim ¶¶ 64-65. Further, FEI's employees have real jobs for which they were hired are compensated. They were not hired for the purpose of participating in this lawsuit. Rider has no job other than being a plaintiff and a witness in the ESA Action or a general mouthpiece for plaintiffs' animal rights agenda which frequently is about this case.

Plaintiffs challenge the sufficiency of FEI's bribery allegations with the farcical claim that FEI's RICO counterclaim "does not identify a scintilla of evidence that any funding Rider has received has been for the purpose of securing his eye-witness testimony." Resp. at 47

(emphasis in original). FEI's Counterclaim is replete with such allegations: ¶¶ 7-16, 31-41 (alleging the purpose, length, and organization of the payment scheme); ¶¶ 42-126 (mechanics of the illegal, ethically improper, and fraudulent payment scheme, including specific payments made directly to Rider and specific payments made to WAP and/or MGC that were intended for Rider); ¶¶ 127-133 (impact of the illegal, ethically improper, and fraudulent payment scheme on Rider's testimony); ¶¶ 162-168 (illegal, ethically improper, and fraudulent payment scheme extended to Rider's testimony as a state legislative witness). The detailed allegations in FEI's RICO Counterclaim satisfy the purpose of Rule 9(b)'s heightened pleading requirements: "'to allow a District Court to distinguish valid from invalid claims,'" Bates v. Northwestern Human Services, Inc., 466 F. Supp. 2d 69, 89 (quoting Blount Fin. Servs., Inc. v. Walter E. Heller & Co., 819 F.2d 151, 152 (6th Cir. 1987)), and to "guarantee all defendants sufficient information to allow preparation of a response." United States ex rel. Williams v. Martin-Baker Aircraft Co., 389 F.3d 1251, 1256 (D.C. Cir. 2004).

The tome filed by plaintiffs in opposition to the Motion clearly shows that they have "notice" of FEI's claims, which is all that matters now. The purpose of the multitude of payments is a fact question, not a pleading issue. It is not impossible – which is essentially what plaintiffs have to show for futility purposes – that an individual whose sole source of support is from his fellow plaintiffs has been influenced in his testimony by the money. Whether or not that has influence on his testimony is for a jury to decide.

Third, plaintiffs characterize the ***amount*** of their Rider "funding" as "a rate far below the amount spent by defendants," "modest," a "few payments," "very little money," "an average of less than $17,000 a year," and "far less than plaintiffs would have to pay a professional public relations firm." Resp. at 2, 24 n.21, 25 n.22, 26 & n.24. Rider himself also characterizes the

payments as "such a small amount." Resp. Ex. 38, ¶ 2 (Rider Decl.), although he now admits that he should have filed tax returns and reported the money to the IRS.[19] This back-pedaling is ludicrous on its face. It is undisputed that Rider has received approximately $150,000.00 in cash alone from the organizational plaintiffs, either directly or camouflaged and funneled through WAP, plus considerable other non-cash benefits and emoluments. A debate about how large the bribe was is irrelevant. The amount of the bribe or illegal gratuity has nothing to do with whether FEI has stated a claim for bribes and illegal gratuities. Nor is the amount of the bribe or illegal gratuity a defense; there is no safe harbor for "small amounts." It is a crime to provide a witness "***anything of value***." 18 U.S.C. § 201(b)(3), 201(c)(2) (emphasis added). See also Mauldin, 2006 U.S. Dist. LEXIS at *11 (ordering discovery on four "irregular" payments totaling approximately $2,250.00 – for which defendant sought class decertification and dismissal).

D. FEI Has Properly Alleged Four Counts of Obstruction of Justice

Plaintiffs challenge FEI's obstruction of justice allegations on the ground that "since defendants have failed to adequately plead [bribery], 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." Resp. at 47-48. Since, as shown above, FEI has adequately pleaded bribery, plaintiffs' argument fails. Moreover, obstruction of justice in violation of 18 U.S.C. § 1503 is a separate crime and a predicate act of racketeering ***independent*** of the federal bribery statute and the applicable state bribery statutes. An individual need not commit bribery to commit an obstruction of justice. FEI's allegations of bribery and illegal

[19] In an effort to clean up his act, Rider apparently is now filing eight years of overdue tax returns, thereby admitting his tax evasion. Resp. Ex. 38 (Rider Decl.). Whatever this may portend down the road in a criminal case between Rider and the IRS, for purposes of the ESA Action, it only serves to confirm the illegality of the payment scheme that lies at the heart of the RICO counterclaim.

gratuity payments, which center on ASPCA, AWI, FFA, API, and WAP's payments to Rider and Rider's receipt and acceptance of those payments, [Proposed] Counterclaim ¶¶ 3-133, 162-167, and FEI's allegations of obstruction of justice, which center on Rider's false interrogatory responses and false affidavit (¶¶ 127-137, 154-161), AWI's false interrogatory responses (¶¶ 138-144), and AWI's false deposition testimony (¶¶ 145-153), are independent criminal acts. The false interrogatory answers and false statements under oath with the specific intent to impede the due administration of justice are independent of the improper payment scheme. Moreover, the extent to which this conduct is intertwined is an issue of fact to be decided by a jury.

Plaintiffs dispute the claim that they have committed obstructions of justice. Thus, plaintiffs make arguments regarding the corroboration and truthfulness of Rider's "eye-witness" testimony, Resp. at 3, 19, 21, 28, 29; "Mr. Rider's position" with respect to his interrogatory answers, id. at 24 n. 20; Ms. Liss's interpretation of questions posed to her at deposition and the "truthful[ness]" of her testimony, id. at 25 n.22; and AWI's interpretation of FEI's interrogatories, id. at 25-26. Plaintiffs' characterizations of their conduct, however, are not relevant to the inquiry which is before the Court: whether, assuming the facts alleged in the counterclaim to be true, FEI has stated a cause of action under the liberal pleading standards of Rules 8 and 12(b)(6). That plaintiffs would dispute the cause of action on its merits is beside the point, and their factual arguments should be saved for the jury.

E. FEI Has Properly Alleged the Existence of an "Association-in-Fact" Enterprise

Plaintiffs contend that FEI has failed to "allege[] 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." Resp. at

48. This is simply not the law. Courts in this Circuit have held that "'[i]t is not necessary that the enterprise . . . have any particular or formal structure." United States v. Philip Morris, 449 F. Supp. 1, 868 (D.D.C. 2006) (quoting Perholtz, 842 F.2d at 364). All that is necessary is that the enterprise's members "function[ed] and operated together in a coordinated manner in order to carry out the common purpose alleged." Id.; see also United States v. Cooper, 91 F. Supp. 2d 60, 71 (D.D.C. 2000) (interpreting Perholtz as setting "low threshold" for the necessary structure and organization of an enterprise).

> Establishing that the members of the enterprise operated together in a coordinated manner in furtherance of a common purpose may be proven by a wide variety of direct and circumstantial evidence including, but not limited to: inferences from the members' commission of ***similar racketeering acts in furtherance of a shared objective; financial ties***; ***coordination of activities; a community of interests and objectives***; the interlocking nature of the members' schemes; and the ***overlapping nature of the wrongful conduct***.

Philip Morris, 449 F. Supp. 2d at 868 (emphases added).

FEI's RICO Counterclaim alleges with more than adequate specificity that ASPCA, AWI, FFA, API, Rider and WAP operated together with sufficient organization to form an association-in-fact enterprise in accordance with precedent in this Circuit. See, e.g., [Proposed] Counterclaim, ¶¶ 38-39, 120, 150 (ASPCA, AWI, FFA, and MGC made joint decisions and had several discussions and/or communications regarding Rider's "funding"); ¶¶ 10-11, 42-57, 58-75, 84, 93, 102, 110-11, 120 (ASPCA, AWI, FFA/HSUS, API, and WAP were linked financially because ASPCA, AWI, FFA/HSUS and API made numerous payments to WAP that were intended for Rider, and WAP disbursed these payments to Rider); ¶¶ 122-126 (ASPCA, AWI, and FFA/HSUS held a "fund-raiser" for Rider); ¶¶ 162-168 (ASPCA, AWI, FFA and MGC worked together on federal and state legislative initiatives, other litigation and a report).

As the above-cited paragraphs demonstrate, FEI has alleged with specificity that ASPCA, AWI, FFA, API, Rider and WAP committed similar racketeering acts in furtherance of a shared objective, shared financial ties, coordinated their activities, and shared a community of interests – and thus an associated-in-fact enterprise with "organization" sufficient to withstand a motion to dismiss. Compare Oceanic Exploration Co. v. Conoco Phillips, Inc., No. 04-332, 2006 U.S. Dist. LEXIS 72231, at *56-57 (D.D.C. Sept. 21, 2006) (Sullivan, J.) (denying motion to dismiss civil RICO claim where the plaintiffs alleged that the defendants sought a common goal and purpose – financial and economic benefits flowing from contracts that required government approval -- and that goal motivated members of the enterprise to commit bribery of government officials) with Scheck v. General Elec. Corp., No. 91-1594, 1992 U.S. Dist. LEXIS 134, at *10 (D.D.C. Jan. 7, 1992) (granting motion to dismiss civil RICO claim where the plaintiff's "sole description" of the enterprise was a "naked assertion" that "Defendants AC through SC and AW through WW through their relationships with one another are an enterprise[.]").

Moreover, even though FEI has sufficiently alleged the existence of an "organized" enterprise, plaintiffs' challenge to FEI's allegations of an association-in-fact enterprise is inappropriate at this stage of the proceedings: "At the motion to dismiss stage, [a complainant] need only plead the existence of an enterprise." Oceanic, 2006 U.S. Dist. LEXIS 72231 at *56 (Sullivan, J.) (citing Ago v. Begg, No. 85-2229, 1988 WL 75224 (D.D.C. Feb. 24, 1988)).

F. FEI Has Properly Alleged a "Pattern of Racketeering"

Plaintiffs claim that FEI failed to plead facts sufficient to show a "pattern of racketeering." Resp. at 49. This argument is also flawed. The counterclaim pleads both closed-ended and open-ended continuity sufficient to establish a "pattern of racketeering" under 18 U.S.C. § 1961. H.J., Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 230 (1989).

A closed period of racketeering turns on (1) the number of unlawful acts; (2) the length of time over which the acts were committed; (3) the similarity of the acts; (4) the number of victims; (5) the number of perpetrators; and (6) the character of the unlawful activity. W. Assocs. Ltd. P'ship v. Mkt. Square Assocs., 235 F.3d 629, 633-34 (D.C. Cir. 2001) (discussing Edmondson & Gallagher v. Alban Towers Tenants Assoc., 48 F.3d 1260, 1264-65 (D.C. Cir. 1995)). These six factors do "not establish a rigid test, but rather present[] a flexible guide for analyzing RICO allegations on a case by case basis." W. Assocs., 235 F.3d at 634.

Plaintiffs argue that FEI's RICO Counterclaim alleges one victim and one scheme – the third and fourth Edmondson factors. Resp. at 49. First, even if FEI had only alleged one scheme, this factor is not in and of itself dispositive: "depending on the specific circumstances a single scheme may suffice for purposes of RICO." W. Assocs., 235 F.3d at 634. In H.J., Inc., the Supreme Court specifically "rejected the idea that multiple schemes must be proved to establish a pattern of racketeering." Id. (interpreting H.J. Inc., 492 U.S. at 240). "'Scheme' is hardly a self-defining term." H.J. Inc., 492 U.S. at 241 n.3. Because "[a] 'scheme' is in the eye of the beholder[,] . . . whether a scheme exists depends on the level of generality at which the criminal activity is viewed." Id.

Second, plaintiffs mischaracterize the number of schemes alleged in FEI's Proposed RICO Counterclaim.[20] Plaintiffs omit any reference to the allegations of a distinct second scheme: ASCPA, AWI, FFA, API, Rider and WAP's attempt to cover-up the illegal, ethically improper, and fraudulent payment scheme. The cover-up involves three counts of obstruction of

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[20] In addition to mischaracterizing FEI's RICO Counterclaim, Plaintiffs misquote FEI's RICO Counterclaim. Plaintiffs state that FEI alleges "only one scheme – i.e. 'to ban Asian elephants from circuses, and in so doing, defraud FEI of money and property.'" Resp. at 49. Tellingly, plaintiffs do not cite a paragraph or page number for this "quotation." In reality, FEI's Proposed RICO Counterclaim alleges that "ASPCA, AWI, FFA, API, Rider and WAP have perpetrated and continue to perpetrate a scheme to permanently ban Asian elephants in circuses and to defraud FEI of money and property, with the ultimate objective of banning Asian elephants in all forms of entertainment and captivity." [Proposed] Counterclaim ¶ 7.

justice relating to Rider and AWI's representations about the payment scheme that delayed FEI's discovery of the payment scheme. [Proposed] Counterclaim ¶¶ 17-19, 134-161. These are distinct from, and rest upon predicate acts of racketeering that differ from, the illegal payment scheme itself. Id. ¶¶ 7-16, 31-133, 162-168. That FEI has alleged two distinct schemes involving different predicate acts of racketeering, different alleged conduct, and different alleged injuries distinguishes its RICO Counterclaim from "a vain attempt to make a RICO claim seem more viable by parsing one scheme into multiple schemes." W. Assocs., 235 F.3d at 634. Cf. id. (attempt to parse one scheme into four schemes where all four schemes were similar in nature and purpose and resulted in a single harm rather than separate injuries).

Nor is there only one victim. Although only one victim is suing plaintiffs in this case, the schemes have multiple victims. Plaintiffs objective in this case is to end the participation of Asian elephants in any form of entertainment, which would affect any circus, zoo, wild animal park and other person or entity exhibiting Asian elephants in the United States.

The most relevant Edmondson factor is the character of the conduct alleged in FEI's RICO Counterclaim. The case that plaintiffs cite employed the single scheme, single injury and few victim analysis to find that a "pattern" of racketeering did not exist because the § 1962(c) claim was predicated largely on mail and wire fraud and the dispute at issue was a business dispute or a garden-variety law fraud claim that could be better prosecuted under state law. See W. Assocs., 235 F.3d at 636-37 (most of the alleged predicate acts were mailings or faxes relating back to a single misrepresentation, making the dispute "to be more in the nature of an ordinary business deal gone sour" than racketeering activity); see also Efron v. Embassy Suites (Puerto Rico), Inc., 223 F.3d 12, 16 (1st Cir. 2000) (only predicate acts alleged were mail and wire fraud and dispute was a business dispute over a real estate deal); Al-Abood ex rel. Al-

Abood v. El-Shamari, 217 F.3d 225, 238-39 (4th Cir. 2000) (main predicate acts alleged were mail and wire fraud and dispute was a feud between formerly close family friends).

This case is anything but an ordinary business dispute or garden-variety fraud claim. FEI has alleged a real "pattern" of racketeering activity. Cf. H.J. Inc. (holding that pattern of racketeering activity pleaded was sufficient to survive a motion to dismiss where plaintiffs alleged that defendants made numerous bribes to government officials – with some frequency and in several different forms – with a common purpose, over the course of at least six years); Oceanic, 2006 U.S. Dist. LEXIS 72231 at *58-59 (Sullivan, J.) (denying motion to dismiss civil RICO claim where plaintiffs alleged that defendants continuously bribed government officials over a period of at least ten years). FEI's RICO Counterclaim is directly analogous to the racketeering activity alleged in H.J., Inc. and Oceanic. FEI has alleged a continuous, complex scheme of bribery which occurred in several different forms (direct cash payments to Rider, direct non-cash compensation to Rider and payments to Rider that were funneled through a supposed 501(c)(3) organization, WAP) and was carried out over at least six years by at least five organizations and one individual to achieve a common purpose: to permanently ban Asian elephants in circuses and to defraud FEI of money and property, with the ultimate objective of banning Asian elephants in all forms of entertainment and captivity.

Further, FEI's RICO Counterclaim alleges open-ended continuity, i.e., that plaintiffs' illegal activity continues each and every day this lawsuit goes forward. See, e.g., [Proposed] Counterclaim ¶¶ 4-7, 10, 15. Plaintiffs do not address, and therefore concede, open-ended continuity which is an additional reason to permit the counterclaim to go forward. FEI's allegations show "far more than a hypothetical possibility of further predicate acts." Edmondson, 48 F.3d at 1264 (quoting Pyramid Securities Ltd. v. IB Resolution, 924 F.2d 1114,

1119 (D.C. Cir. 1991)). Moreover, FEI has alleged that, upon information and belief, ASPCA, AWI, FFA, API, WAP and/MGC have agreed to make similar payments to other witnesses. [Proposed] Counterclaim ¶ 121. Despite their many vociferous (and immaterial denials) plaintiffs do not deny ***this*** allegation. If proven, such payments would establish open-ended continuity by "showing that the predicate acts or offenses are part of an ongoing entity's regular way of doing business" and threaten to continue into the future, even beyond litigation of the ESA Action. H.J., Inc., 492 U.S. at 242. FEI, therefore, has pleaded both open-ended and closed-ended continuity sufficient to survive a motion to dismiss.

G. FEI Has Properly Alleged that its Damages were, and Continue to be, Proximately Caused by Plaintiffs' Pattern of Racketeering

Finally, plaintiffs contend that FEI "cannot satisfy [RICO's] proximate cause requirement" because "plaintiffs' ability to prove their taking claims here does not rest, by any stretch of the imagination, on Mr. Rider's testimony." Resp. at 50. This completely misses the point. Without Rider, this case would not exist, because without Rider there is no standing to sue. See [Proposed] Counterclaim ¶¶ 8-9, 28, 60-61, 68. Rider's participation has in turn been procured through an illegal, unethical and fraudulent payment scheme that has been executed through numerous acts of bribery, illegal gratuity payments, mail fraud and wire fraud, all of which plaintiffs then tried to cover-up by giving false and misleading responses in discovery. As a direct result, as alleged in the counterclaim, "FEI has suffered and continues to suffer significant damages resulting from its substantial costs it has incurred in responding to the ESA Action – which has been ongoing for the past six years and continues to this day because of the illegal, ethically improper, and fraudulent 'grants' to Rider." Id. ¶ 69. Thus, the actual and proximate cause of the claimed injury has been clearly alleged.

Moreover, attorneys' fees are a compensable injury in civil RICO claims when proximate cause has been properly alleged. Compare Handeen v. Lemaire, 112 F.3d 1339, 1354 (8th Cir. 1997) (plaintiff raised a genuine issue of material fact as to whether his injury – attorneys' fees incurred in objecting to allegedly fraudulent claims – was proximately caused by a predicate act of racketeering) and Bankers Trust Co. v. Rhoades, 859 F.2d 1096, 1105 (2d Cir. 1988) (plaintiff-creditor alleged RICO injury of attorneys' fees associated with: defending frivolous suits filed by defendant-debtor, overcoming decisions made by judge bribed by defendant-debtor, and obtaining revocation of initial bankruptcy organization plan) with Evans v. City of Chicago, 434 F.3d 916, 932 (7th Cir. 2006) (plaintiff failed to establish what portion, if any, of attorneys' fees he incurred were caused by a RICO predicate act) and Miller Hydro Group v. Popovitch, 851 F. Supp. 7, 13 (D. Me. 1994) (complaint "fail[ed] to supply any factual basis for determining whether a connection exist[ed] between the litigation costs incurred [which were the damages alleged] . . . and [d]efendant's RICO violations").[21]

H. Plaintiffs' Illegal Conduct is Not Protected by the *Noerr-Pennington* Doctrine

Plaintiffs maintain that even if they have engaged in bribery, illegal gratuity payments, false statements amounting to obstruction of justice, mail and wire fraud, and violations of the Rules of Professional Conduct, they are immune from suit due to the Noerr-Pennington doctrine. This argument is grossly misconceived. Noerr-Pennington affords ***antitrust*** immunity to unions exercising their First Amendment right to petition the government, in particular legislatures, for redress. E. R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961); United Mine Workers v. Pennington, 381 U.S. 657 (1965). The doctrine was later extended to petitions of courts and administrative agencies. California Motor Transp. Co. v. Trucking

[21] Plaintiffs make no proximate cause argument with respect to the four alleged instances of obstruction of justice or the hundreds of alleged of instances of mail fraud and wire fraud. Therefore, plaintiffs have conceded proximate cause with respect to these allegations.

Unlimited, 404 U.S. 508 (1972). Plaintiffs cite no cases in the D.C. Circuit applying Noerr-Pennington to allegations of bribery or to a RICO claim.

Moreover, Noerr-Pennington, even if it were applicable, is a defense and not part of the elements of a RICO claim. FEI has no obligation in its counterclaim to anticipate and negate plaintiffs' defenses. Whelan v. Abell, 48 F.3d 1247, 1250-51 (D.C. Cir. 1995) (permitting defendants to raise Noerr-Pennington defense in post-verdict motion even though defendants previously failed to assert the defense). And at the purported "futility" stage, a defense can preclude amendment only if it is absolutely certain to be dispositive. Since plaintiffs can cite no case in this Circuit or the Supreme Court to support their Noerr-Pennington argument, it is obvious that the RICO claim is not "futile" due to this purported "defense."

Even if Noerr-Pennington were extended to RICO by this Court, it would get plaintiffs nowhere. The D.C. Circuit recognizes two exceptions to Noerr-Pennington immunity: (1) petitions based on known falsehoods, or "fraud" litigation, and (2) "sham" litigation. See Whelan, 48 F.3d at 1255. Both exceptions apply here.

The D.C. Circuit has held that Noerr-Pennington does not protect illegal activity when a "party's knowing fraud upon, or its intentional misrepresentations to, the court deprive the litigation of its legitimacy." Whelan, 48 F.3d at 1255 (quoting Liberty Lake Investments, Inc. v. Magnuson, 12 F.3d 155, 159 (9th Cir. 1993)). Whelan observed that: "However broad the First Amendment right to petition may be, it cannot be stretched to cover petitions based on known falsehoods. 'Misrepresentations, condoned in the political arena, are not immunized when used in the adjudicatory process.'" Whelan, 48 F.3d at 1255 (quoting California Motor Transport, 404 U.S. at 513). Moreover, with respect to allegations of bribery, Whelan specifically stated that "[a]ttempts to influence governmental action through overtly corrupt conduct, such as bribes (in

any context) and misrepresentation (in the adjudicatory process), are not normal and legitimate exercises of the right to petition, and activities of this sort have been held beyond the protection of Noerr." Whelan, 48 F.3d at 1255 (quoting Federal Prescription Serv., Inc. v. American Pharmaceutical Ass'n, 663 F.2d 253, 263 (D.C. Cir. 1981)). See also California Motor Transport, 404 U.S. at 512-13 (Noerr-Pennington immunity does not extend to "unethical conduct in the setting of the adjudicatory process," such as "[p]erjury of witnesses . . . [u]se of a patent obtained by fraud to exclude a competitor from the market may involve a violation of the antitrust laws . . . [and] bribery of a public purchasing agent") (citations omitted); Baltimore Scrap v. The David J. Joseph Co., 81 F. Supp. 2d 602, 619 (D. Md. 2000) ("Baltimore Scrap I"), aff'd 237 F.3d 394 (4th Cir. 2001) ("Baltimore Scrap II") ("The central tenet of Noerr-Pennington immunity is that attempts to influence the process of government . . . are protected absent fraud. There is no evidence [that the defendant] influenced the 1991 appeal through fraudulent means such as bribery.").

The counterclaim alleges that through bribery, illegal gratuity payments, and perjury amounting to obstruction of justice plaintiffs have perpetrated a fraud upon this Court and FEI. See [Proposed] Counterclaim ¶¶ 3-161. The D.C. Circuit has explicitly stated that bribes in any context have no Noerr-Pennington immunity. Federal Prescription Servs., 663 F.2d at 263. The Supreme Court has specifically stated that perjury and bribery have no Noerr-Pennington immunity. California Motor Transport, 404 U.S. at 512-13; accord Baltimore Scrap I, 81 F. Supp. 2d at 619. Noerr-Pennington thus does not shield plaintiffs' illegal conduct.[22] See Whelan, 48 F.3d at 1255 (quoting Liberty Lake, 12 F.3d at 159).

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[22] Although Baltimore Scrap I required a showing of reliance to invoke the "fraud" exception to Noerr-Pennington immunity, see 81 F. Supp. 2d at 618-20, Whelan (which controls here) did not express such a requirement. Any such reliance element would be satisfied in any event since it is clear that the Court of Appeals relied on Rider's standing allegations (without knowing about the payment scheme) when opining on Rider's

This case likewise falls within the "sham" exception to Noerr-Pennington. Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc., 508 U.S. 49, 60 (1993) ("PRE"). Among other things, purchasing the services of a plaintiff and then committing perjury and obstruction of justice to cover the payment tracks are sufficient to characterize the ESA Action as an "objectively baseless" lawsuit.[23] Opdyke Investment Co. v. City of Detroit, 883 F.2d 1265, 1273 (6th Cir. 1989) (the "sham" exception to Noerr-Pennington immunity applies where, as here, abuse of process arises from "perjury, or bribery, or any other such reprehensible practice"); accord Baltimore Scrap II, 237 F.3d at 400. FEI's detailed allegations center on precisely the abuses of process identified by Opdyke and Baltimore Scrap II: perjury amounting to obstruction of justice, [Proposed] Counterclaim ¶¶ 127-161; bribery, id. ¶¶ 3-133, 162-167, mail and wire fraud, id. ¶¶ 3-126, and violations of District of Columbia Rules of Professional Conduct 1.8(d) and 3.4(b), id. ¶ 60. At the futility-of-amendment stage, it cannot be said as a matter of law that it is impossible for FEI to show that the ESA Action is an objectively baseless lawsuit. Cf. Covad Commc'ns Co. v. Bell Atlantic Corp., 398 F.3d 666, 677 (D.C. Cir. 2005)

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standing to sue. See id. at 618. Further, FEI relied on Rider's fraudulent standing allegations in defending the ESA Action until it recently became clear that Rider, the organizational plaintiffs, and WAP were engaged in the illegal, ethically improper payment scheme and the cover-up scheme.

[23] The Fifth Circuit's observation is directly applicable to plaintiffs' apparent belief that Noerr-Pennington allows them to purchase standing to sue:

> We do not believe that Noerr-Pennington extends to a litigant who has not properly invoked a court's power to act in a case, even though the petitioner may otherwise genuinely desire relief on a meritorious claim. Unlike the legislative arena, substantial limits exist on the ability of persons to pursue claims in the courts. In particular, a person whose interest in a controversy is not sufficient to confer standing has no right to petition the court as a party and obtain relief. Thus, a person cannot reasonably claim that his participation in a lawsuit in which he has no standing is a genuine attempt to influence governmental decision making.

In re Burlington Northern, Inc., 822 F.2d 518, 530 (5th Cir. 1987). In PRE, the Supreme Court cited a different portion In re Burlington Northern as an example of the inconsistent and contradictory ways that the Courts of Appeals defined "sham" prior to the Court's PRE decision 508 U.S. at 55 n.3.

(on motion to dismiss, plaintiff interposed no issue of fact and joined issue of law as to whether patent suit was "objectively baseless").[24]

Plaintiffs' reliance on Sosa v. DIRECTV, Inc., 437 F.3d 923 (9th Cir. 2006) for the proposition that Noerr-Pennington immunity has been applied to RICO claims is misplaced. In Sosa, the Ninth Circuit found that the plaintiffs failed to allege violations of the federal mail and wire fraud statutes, and therefore RICO. See id. at 940-41. The Sosa plaintiffs' RICO claim was predicated on the mailing of pre-suit demand letters that allegedly contained misrepresentations of law and fact. Id. The Sosa court found that the mail and wire fraud allegations did not survive a motion to dismiss because: (1) misrepresentations of law are not actionable as fraud under the mail and wire fraud statutes, id. at 940; (2) the misrepresentations of fact "could not amount to mail fraud where the sender kn[ew] that the recipient [would] not be deceived by the falsehoods;" id.; and (3) the plaintiffs failed to adequately allege proximate cause and specific intent. See id. at 941.

The Sosa court emphasized that the plaintiffs "declined to invoke the sham exception" to Noerr-Pennington immunity, id. at 940; the only issue before the court was whether RICO "proscribes the sending of prelitigation demand letters asserting legal claims that may be weak but do not rise to the level of shams." Id. at 939. The Ninth Circuit underscored that "neither the Petition Clause nor the Noerr-Pennington doctrine protects sham petitions, and statutes need not be construed to permit them." Id. at 932. The Sosa court's narrow construction of the federal

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[24] Several cases have addressed whether Noerr-Pennington immunity applies to non-litigants who pay the legal expenses of plaintiffs bringing a lawsuit. See, e.g., Baltimore Scrap II, supra; Liberty Lake Investments, supra; Opdyke, supra; In re Burlington Northern, supra. There are three key distinctions between these cases and the conduct alleged in FEI's RICO Counterclaim. First, the non-party financed the costs of the litigation, e.g., attorneys' fees, and did not provide those plaintiffs with their only source of income for over six years, as is alleged in FEI's RICO Counterclaim. Second, the non-party did not make payments to those plaintiffs with the intent to influence their testimony as a witness or for or because of their testimony as a witness, as is alleged in FEI's RICO Counterclaim. Third, there were no allegations of perjury amounting to obstruction of justice in those cases, as is alleged in FEI's RICO Counterclaim.

mail and wire fraud statutes – which was explicitly guided by principles of constitutional avoidance, see id. at 932 n.5 – does not govern this Court's analysis of FEI's RICO Counterclaim, which is predicated on conduct associated with "sham" and fraud litigation.[25] Further, unlike the plaintiffs in Sosa, FEI has clearly stated claims for relief on each and every predicate act alleged in its RICO Counterclaim.

III. THE COURT SHOULD GRANT FEI'S MOTION TO ASSERT THE DEFENSE OF UNCLEAN HANDS

Although plaintiffs argue that equitable defenses are prohibited in ESA actions, they cite no authority where a court has held that the defense of unclean hands was not permissible in an ESA § 9 injunction case such as this. Plaintiffs claim that Tennessee Valley Authority v. Hill, 437 U.S. 153 (1978) "rejected any role for the courts to 'strike a balance of equities.'" Resp. at 53. Hill interpreted and applied § 7 of the ESA, which at that time required federal agencies to insure that their actions did not jeopardize the existence of an endangered species or destroy its habitat.[26] Hill, 437 U.S. at 173. It also was uncontested that operation of the Tellico Dam would destroy the habitat of an endangered species, the snail darter, and cause its extinction. Id. The Court found that Congress' plain intent in enacting the ESA was to "halt and reverse the trend toward species extinction, whatever the cost." Id. at 184. It declined to second-guess the priority Congress gave to protecting endangered species for the sake of permitting the Tellico Dam project to proceed further. Id.

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[25] The Sosa court implied that the outcome of that case may have been different had the pre-suit litigation letters been associated with sham litigation. Even though misrepresentations of the law are not actionable as mail or wire fraud, the Ninth Circuit stated that "representations so baseless that the threatened litigation would be a sham" may be subject to liability under the mail and wire fraud statutes. Id. at 940. The plaintiffs in Sosa, however, failed to make such an argument. Accordingly, the Sosa court narrowly held that RICO and the predicate statutes at issue – mail and wire fraud – did not "permit the maintenance of a lawsuit for the sending of a prelitigation demand to settle legal claims that do not amount to sham." Id. at 942.

[26] Congress amended § 7 of the ESA after the Court's decision in Hill. Under the amended § 7, federal agencies are now required only to "insure that any action. . . is *not likely* to jeopardize the continued existence of any endangered species." § 7(a)(2) (emphasis added).

Subsequent to Hill, the Supreme Court reversed the First Circuit for interpreting Hill to prohibit the trial court from undertaking a traditional balancing of the parties' interests. Weinberger v. Romero-Barcelo, 456 U.S. 305, 310-11 (1982) (FWPCA case). It reiterated that the "grant of jurisdiction to ensure compliance with a statute hardly suggests an absolute duty to do so under any and all circumstances, and a federal judge sitting as chancellor is not mechanically obligated to grant an injunction for every violation of law." Id. at 313 (citing Hill). The Court explained that in Hill Congress had foreclosed an equity court's exercise of discretion because the statute itself contained a flat ban on the destruction of habitat, a fact which was conceded. Id. at 313-14. Nevertheless, "a major departure from the long tradition of equity practice should not be lightly implied." Id. at 320.

Building on the principle that a court's equitable discretion is a "practice with a background of several hundred years of history," id. at 313 (quoting Hecht v. Bowles, 321 U.S. 321, 329 (1944)), and that the "comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command," FEI should be permitted to assert an unclean hands defense to this ESA § 9 citizen-suit. Romero-Barcelo, 456 U.S. at 313 (quoting Porter v. Warner Holding Co., 328 U.S. 395, 398 (1946)). Plaintiffs cite no discussion of the defense of unclean hands in the legislative history of the ESA and no cases holding that a private party may not assert same in an ESA citizen suit. Therefore: "The great principles of equity, securing complete justice, should not be yielded to light inferences, or doubtful construction." Romero-Barcelo, 456 U.S. at 313 (quoting Porter, 328 U.S. at 398).

Furthermore, § 11(g) of the ESA (codified as 16 U.S.C. § 1540(g)), the only section under which private citizen suits may be filed, is silent as to permissible defenses. Plaintiffs claim that defenses to the ESA are restricted to only one – defense of self or others from bodily

harm by an endangered species. Resp. at 54 n.46. Yet, plaintiffs cite § 11(a), which is the civil penalties provision of the ESA. Civil penalties are only available in government enforcement proceedings, not § 11(g) private citizen suits.

Plaintiffs cite to numerous other cases decided under the anti-trust and securities laws for their argument that all equitable defenses are barred. Those cases are inapposite. As indicated above, plaintiffs do not cite a single case that prohibits the application of an unclean hands defense in § 9 citizen suits. At least two district court judges here have concluded the ESA has not foreclosed courts' traditional equitable discretion. See Defenders of Wildlife v. Norton, 239 F. Supp. 2d 9, 23 (D.D.C. 2002) (citing § 1540(g)(5) in support of finding that Congress did not foreclose district court's discretion under the ESA citizen-suit provision); Colorado River Cutthroat Trout v. Kempthorne, 448 F. Supp. 2d 170, 178 (D.D.C. 2006) ("Congress did not limit district courts' authority to provide equitable relief under the ESA, and indeed, specifically reserved their traditional equitable authority to fashion appropriate equitable relief"); see also Am. Rivers v. U.S. Army Corps Engs., 271 F. Supp. 2d 230, 249 (D.D.C. 2003) (stating that the D.C. Circuit has not "definitively ruled" on whether courts' equitable discretion has been foreclosed under the ESA and applying traditional four-part balancing test for preliminary injunction).

Plaintiffs certainly do not provide any authority to show that Congress intended to let citizen suits proceed via whatever means (lawful or unlawful) are invoked by those filing suit. Nor do they cite any authority to show that Congress has stripped the courts of their power to fashion remedies for victims of the unlawful conduct of the opposing party. The Court should therefore permit FEI to proceed with amending its answers to include an unclean hands defense.

IV. THE COURT SHOULD DISREGARD PLAINTIFFS' FALSE AND MISLEADING REPRESENTATIONS OF FACT

Plaintiffs' Response resorts to their now predictable formula that appears in almost every motion pending before this Court: (1) FEI is bringing its motion for leave to amend as retribution against one individual and several "small" non-profit organizations for exercising their "First Amendment" rights; and (2) FEI has a history of "dirty-tricks" in litigation and is generally a bad actor. Most of plaintiffs' response is a thinly-veiled attempt to distract attention from their own (well-documented) illegal conduct and their unconvincing legal arguments. FEI does not concede that plaintiffs have accurately portrayed the facts of this and other cases for the Court. However, plaintiffs' false and misleading factual "background" is not relevant to the Court's decision on FEI's Motion, which presents issues of law and not issues of fact for the Court's consideration.[27] Therefore, FEI declines to respond to the majority of these factual misrepresentations at this time. It certainly will do so should the Court so desire.

CONCLUSION

For the reasons stated above, together with its Motion and Memorandum in Support thereof, FEI's Motion for Leave to Amend Answers to Assert Additional Defense and RICO Counterclaim should be granted.

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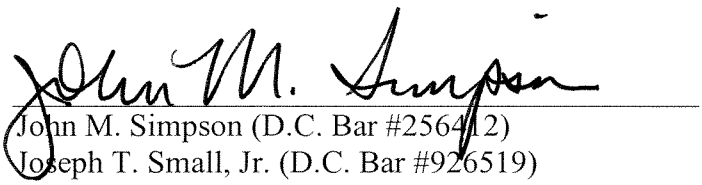
[27] Although irrelevant, FEI briefly addresses the most egregious of these misrepresentations. First, plaintiffs reference conduct alleged and documents produced in actions not pending before this Court. Plaintiffs cite to the "Long Term Animal Plan Task Force" which was produced by FEI in People for the Ethical Treatment of Animals v. Feld, No. 204452 (Cir. Ct. Fairfax Cty.) (Mar. 9, 2006). Apart from the fact that this document is from the early 1990s, does not relate to the plaintiffs in this case, and was never implemented, the jury in that case found for defendant, rejecting PETA's common law and statutory conspiracy claims. Plaintiffs also rehash the allegations of Pottker v. Feld Entertainment, Inc., Civil Act. No. 999-008068 (Sup. Ct. D.C.), the resolution of which is currently pending in D.C. Superior Court. No trier of fact has found for or against FEI in that case.

Second, plaintiffs claim that Rider's statement under oath on March 25, 2000 occurred "long before he began his public education campaign." Resp. at 14. In fact, at this time, Rider was receiving "grants" and free housing from a former plaintiff and spoke at several press conferences regarding FEI's elephants.

Third, none of the organizational plaintiffs was a party to FEI's settlement with PAWS and therefore were not and are not privy to the details of and motivations behind that settlement. Fourth, FEI's motion to dismiss for lack of standing, motion for judgment on the pleadings, and motion for summary judgment all presented good faith legal arguments to this Court.

Respectfully Submitted,



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