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' MOTION UNDER RULE 11 AGAINST DEFENDANTS AND THEIR COUNSEL CONCERNING THE BASELESS ALLEGATIONS INCLUDED IN THEIR PROPOSED RICO COUNTERCLAIM AND UNCLEAN HANDS DEFENSE AND FOR THEIR SCURRILOUS ATTACKS ON PLAINTIFF TOM RIDER

Pursuant to Rule 11(b) of the Federal Rules of Civil Procedure, plaintiffs hereby move the Court for sanctions against defendants and their counsel for (1) the completely unfounded and false allegations that plaintiffs and their counsel have engaged in "bribery, illegal gratuity payments, perjury, obstruction of justice, mail fraud and wire fraud," in violation of the Racketeer Influenced and Corrupt Practices Act ("RICO"), and (2) the completely unfounded and scurrilous allegations that plaintiff Tom Rider has committed "perjury" and "destroyed" documents that were requested in discovery. As plaintiffs demonstrate in the accompanying memorandum, not only are these extremely prejudicial statements without any factual foundation whatsoever, which, in an of itself constitutes a violation of Rule 11, but these assertions of "fact" have also been wielded against plaintiffs and their counsel in this case for patently improper purposes – to harass plaintiffs, delay the resolution of their legitimate claims under the Endangered Species Act to the detriment of the

federally listed species at issue, and increase the cost of litigation in an effort to punish the non-profit plaintiffs for bringing this case – all of which also violates Rule 11.

As plaintiffs also demonstrate in their accompanying memorandum, this regrettably is the way that defendant Feld Entertainment Inc. ("FEI") and its attorneys litigate cases – i.e., FEI has a track record of filing motions based on completely unfounded accusations for improper purposes. Indeed, the Virginia Supreme Court recently upheld sanctions against attorneys for FEI's Chief Executive Officer Kenneth Feld for tactics that mirror what FEI has done here. See Williams & Connolly, LLP v. People for the Ethical Treatment of Animals, 643 S.E.2d 136, 139 (Va. 2007) (reciting trial judge's observation that "I've never seen anything like [the language in the Feld Attorneys' motions] outside of something filed by pro se [litigants]" . . . "the tone" of their motion was " "unacceptable [and] contemptuous . . . it's full of distortions of different things, twisting the meanings of things") (emphasis added). Accordingly, plaintiffs not only seek monetary sanctions against FEI's attorneys, but they also seek such sanctions against FEI, as well as an order directing defendants and their counsel to stop making the scurrilous and unfounded statements against plaintiffs and their counsel that now permeate all of defendants' filings in this case.

In support of this motion, plaintiffs submit the accompanying memorandum and Exhibits 1-18. Pursuant to Rule 11(c), the motion, memorandum, and Exhibits were provided to defendants and their counsel for 21 days to provide them an opportunity to cure these flagrant violations of Rule 11.

Respectfully submitted,

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Dated: August 3, 2007

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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Plaintiffs,	)	
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Defendants.	)	

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR SANCTIONS UNDER RULE 11 AGAINST DEFENDANTS' COUNSEL AND FELD ENTERTAINMENT, INC. FOR MAKING BASELESS ALLEGATIONS AGAINST PLAINTIFFS AND THEIR COUNSEL IN FEI'S PROPOSED RICO COUNTERCLAIM AND UNCLEAN HANDS DEFENSE AND FOR THEIR SCURRILOUS ATTACKS ON PLAINTIFF TOM RIDER

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INTRODUCTION

Plaintiffs are moving for sanctions under Federal Rule of Civil Procedure 11(b) against counsel for defendant Feld Entertainment, Inc. ("FEI") for (1) their groundless assertions of "facts" that form the basis for their proposed counterclaim against all of the plaintiffs under the Racketeer Influenced and Corrupt Practices Act ("RICO") and their proposed unclean hands defense, and (2) their scurrilous, baseless personal attacks on plaintiff Tom Rider that are strewn throughout their recent filings with this Court. As demonstrated below, none of these factual assertions has any evidentiary support whatsoever. Moreover, these assertions have clearly been made by defendants' counsel and FEI for a myriad of improper purposes – i.e., to harass plaintiffs and their counsel, drain their resources, divert their attention and resources from litigating this long-pending case under the Endangered Species Act, intimidate the plaintiff organizations and others to stop providing financial support for Mr. Rider's media and public education work, and to improperly delay the Court's ultimate consideration of the merits of this case. Accordingly, plaintiffs seek sanctions against FEI as well.

Indeed, as discussed below, FEI's improper tactics are well established by its own internal documents which show that this kind of razed earth strategy is precisely what this corporation has for many years done to those who criticize the company and its operation of the circus: it "attacks" them with "lawsuits" and charges of "money irregularities," to "keep[] up the pressure . . . [so] they will spend more of their resources in defending their actions." Internal Memorandum to FEI (May 15, 1991), Exhibit 13 to Plfs.' Opp'n To Def.'s Motion To Amend (hereinafter "Plfs. Amend Opp.") (emphasis added); see also Testimony of Charles Smith, FEI Chief Financial Officer, PETA v. Feld Entertainment, Inc., No. 204452 (Cir. Ct. Fairfax County, Va.) (March 9, 2006), Transcript of Trial Testimony at 518-519 (Feb. 28, 2006), Exhibit 1 (hereafter "Ex.") (describing such tactics as "a

pretty good strategy against the organization that's unfairly attacking you").

In fact, the Virginia Supreme Court recently upheld sanctions imposed on other attorneys for FEI's Chief Executive Officer Kenneth Feld for conduct that is similar to defendants' counsel's conduct here, in another lawsuit in which People for the Ethical Treatment of Animals ("PETA") sued Feld for damages as a result of FEI's spying, infiltration, and removal of confidential information from that organization. The Virginia Supreme Court upheld the trial court's imposition of sanctions based on "findings that the Feld Attorneys' motions were not grounded in fact, were not warranted by law, and contained 'contemptuous' language." See Williams & Connolly, LLP v. People for the Ethical Treatment of Animals, 643 S.E.2d 136, 140 (2007) (emphasis added).[1]

Likewise, here, FEI's assertions in their proposed RICO counterclaim and defense of "unclean hands," which they have repeated in their motion to amend their answer, their reply memorandum in support of that motion, and other recent filings with this Court – including that the American Society for the Prevention of Cruelty to Animals ("ASPCA"), other organizational plaintiffs, and attorneys have engaged in "bribery" of witnesses and "obstruction of justice" – as well as defendants' assertions in those filings and others that Mr. Rider has committed "perjury" and "destroyed" responsive documents requested in discovery, are factually baseless and a patent abuse of this Court's process. Accordingly, FEI and its lawyers should be sanctioned for such outrageous conduct.

[1] Although FEI was found not liable for any damages under Virginia law, the fundamental facts of FEI's infiltration, spying, and removal of confidential information were not disputed. See Plfs. Amend Opp. at 10, n.7.

BACKGROUND

This case under the Endangered Species Act ("ESA"), 16 U.S.C. § 1531 et seq., was originally filed by plaintiffs in July 2000 (Civ. No. 00-01641). It challenges the way in which defendants treat the endangered Asian elephants they use in the Ringling Brothers and Barnum and Bailey Circus ("Ringling Bros."). Plaintiffs assert that this treatment, which the evidence will demonstrate includes beating the elephants with "bull hooks" and other violent instruments, keeping the elephants on chains throughout the day and night, and forcibly removing baby elephants from their mothers with the use of ropes and chains, all constitute the illegal "taking" of these endangered animals in violation of Section 9 of the ESA, 16 U.S.C. § 1538(a). See Complaint (Docket No. 1).

The plaintiffs are the American Society for the Prevention of Cruelty to Animals – the nation's oldest and most venerable animal protection organization – the Fund for Animals, the Animal Welfare Institute, the Animal Protection Institute, and Tom Rider, a former employee of the Ringling Bros. circus who worked with the Ringling Bros. elephants for two and a half years, and witnessed the daily abuse of the elephants.

Since Mr. Rider left the circus, he has been traveling around the country speaking out about the abuse that he witnessed when he worked there. As plaintiffs have previously explained to the Court, Mr. Rider has been able to devote himself to this issue with the help of funding and other assistance from the plaintiff organizations, other animal protection groups, including the Wildlife Advocacy Project ("WAP"), and other groups and individuals around the country. That funding pays for Mr. Rider's extremely modest living and travel expenses as he traverses the country in a used Volkswagen Van – usually just ahead of the circus – to speak to the news media and public gatherings about his first-hand experiences at the circus and what he has learned about Ringling's mistreatment of the elephants since

he left there. See, e.g., Plfs. Amend Opp. at 26-28 (Docket No. 130), and accompanying Exhibits 15, 45-47; see also WAP's Opp'n to Mot. to Compel at 7-10 (Docket No. 93). Mr. Rider has also been an important witness in support of various legislative proposals around the country to ban cruel practices directed at elephants and other animals in circuses. See Plfs. Amend Opp. at 26-30.

Defendants have known for years about Mr. Rider's public advocacy work; indeed FEI apparently tracks Mr. Rider's every move. See, e.g., Internal FEI E-Mail (May 28, 2002), Ex. 2 to Plfs.' Opp'n To Mot. To Compel Discovery From Tom Rider (Docket No. 126) (providing a detailed description of what Mr. Rider stated at a hearing on a bill pending in Providence, Rhode Island); Internal E-mail of Julie Strauss, Vice President of FEI (Nov. 4, 2003); Ex. 48 to Plfs. Amend Opp.(reporting on Mr. Rider's presentation at a UCLA Law conference). Indeed, on March 16, 2005, defendants complained to the Court because "Tom Rider . . . used a videotape obtained in discovery in this case to mount a public-relations attack on the care defendant provides to its elephants." See Reply In Support Of Defs.' Mot. For A Protective Order (Docket No. 38) (emphasis added). More recently, on April 30, 2007, defendants' lead counsel wrote plaintiffs' counsel a letter demanding that Mr. Rider "cease and desist" from making "statements to the press" about Ringling Bros.' mistreatment of the elephants. See Letter from John M. Simpson to Katherine A. Meyer (April 30, 2007), Ex. 2. Accordingly, FEI and its counsel know full well that Mr. Rider is traveling around the country and speaking to the media about the elephants' treatment.

Nevertheless, in their proposed RICO counterclaim, defendants' counsel unequivocally assert to this Court that the funding provided to Mr. Rider over the years by the ASPCA and others does "not" in fact fund any of his media and public education efforts, but instead is being paid to Mr. Rider so that he will lie about his basis for standing in this case and about what he witnessed while he worked at the

circus. See Proposed Counterclaim ("PCC") ¶ 73, Ex. 3 to Mot. of Def. Feld Entertainment, Inc. To Amend Answers to Assert Additional Defense and RICO Counterclaim (Docket No. 121) ("Amend Motion") ("[t]he payments actually fund Rider's continued participation in the ESA Action as a paid plaintiff and key fact witness, and **not** his 'media and public education efforts'") (emphasis added); see also Id. ¶ 60 (the grants to Mr. Rider "are in reality payments to fund a 'plaintiff' who has no actual injury in fact").

Thus, on February 28, 2007, in a further effort to delay this long-pending case, to harass the plaintiffs and their counsel for having brought it, to make plaintiffs incur substantial legal fees, and to deter the plaintiff organizations and others from continuing to contribute funding for Mr. Rider's extremely effective media and public education work, defendants filed a motion to amend their Answer to assert a proposed counterclaim under RICO and an "unclean hands" defense. These proposed filings are based on defendants' unsupported and defamatory assertions – which defendants now repeat in virtually every filing they make in this case – that all of the plaintiffs, their counsel, and WAP – a non-party organization – have engaged in "bribery," "obstruction of justice," "wire fraud" and "mail fraud" by paying Tom Rider to assert a "contrived injury in fact" to establish standing in this case, and to present fraudulent eye-witness testimony to this Court and various legislative bodies, and have also conspired to "cover-up" these illegal activities. See, e.g., PCC ¶ 60; Def. FEI's Reply In Support of Motion For Leave To Amend Answers To Assert Additional Defense and RICO Counterclaim (Docket No. 137) ("Amend Reply") at 2. Defendants have asserted that plaintiffs and their counsel have also "made or agreed to make" similar illegal payments "to other witnesses" in this case. PCC at 38, ¶ 121;

Amend Reply at 24.[2]

Defendants further assert that Mr. Rider has solicited and accepted "illegal gratuity payments" in exchange for his standing allegations and eye-witness testimony, and that he has also committed "perjury" and "destroyed relevant documents." See, e.g., Amend Reply at 3 (citing Def. FEI's Motion to Compel Discovery from Plf. Tom Rider (Docket No. 126)).[3] In fact, since defendants were served with plaintiffs' Rule 11 Motion, they have repeated these scurrilous accusations about Mr. Rider. See Reply In Support Of Defendant Feld Entertainment Inc.'s Expedited Motion To Enforce TheCourt's September 26, 2005 Order (Docket No. 158) at 8.

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[2] See also Def.'s Response to "Plfs. Notice of Filing of Supplemental Exhibit In Support of Their Opp'n to Defs.' Mot. for Summ. J." at 2 (Docket No. 147) (asserting that plaintiffs' supplemental exhibit "has nothing to do with, and is not a defense to, the claims that plaintiffs have engaged in bribery, illegal payments, perjury amounting to obstruction of justice, and mail and wire fraud").

[3] Defendants have also made these particular allegations in various discovery briefs that they have filed in this case. See, e.g., Def. FEI's Mot. to Compel Test. of Plf. Tom Eugene Rider at 7-9 (Docket No. 101); Def. FEI's Reply in Support of Mot. to Compel Test. of Tom Eugene Rider at 7-8, 13-14, 16-17 (Docket No. 111); Def. FEI's Reply in Opp'n to Plf. Tom Rider's Mot. for Protective Order at 1, 8-9, 13-15 (Docket No. 115); Def. FEI's Mot. to Compel Disc. from Plf. Tom Rider at 1-2, 6-11, 13-19, 35, 42-43 (Docket No. 126); Def. FEI's Reply in Support of FEI's Mot. to Compel Disc. from Tom Rider at 1-5, 7, 22-24 (Docket No. 144); Def.'s Reply in Opp'n to Rider's Mot. for a Protective Order at 2, 4, 8, 9, 15 (Docket No. 146); Amend Reply at 3-4, 17 (Docket No. 137). However, because these particular false statements about Mr. Rider have been made in support of defendants' motion to add their proposed counterclaim, see Amend Reply at 3, and also do not constitute abuses of the discovery process, and hence cannot be remedied by the sanctions available in Rules 26 through 37, they may properly be asserted as a basis for a Rule 11 motion. See, e.g., Fed. R. Civ. P. 11(d) (Rule 11 is not applicable to "disclosures and discovery requests, responses, objections, and motions that are subject to the provisions of Rules 26 through 37") (emphasis added); Advisory Committee Notes to Rule 11, 1993 Amendments (noting that "Rules 26(g) and 37 establish certification standards and sanctions that apply to discovery disclosures," and that "[i]t is appropriate that Rules 26 through 37 . . . govern such documents and conduct rather than the more general provisions of Rule 11") (emphasis added).

However, as defendants and their counsel well know, none of these scurrilous assertions has any basis in fact, and, moreover, these personal attacks on the integrity of plaintiffs and their counsel are being made for entirely improper purposes – i.e., to harass plaintiffs and their counsel, deter plaintiffs and others who are concerned about the treatment of the elephants from providing any financial support for Mr. Rider's media and public education efforts, delay this litigation, and drain plaintiffs of time and resources that could be spent on litigating plaintiffs' well-founded ESA claims, during which time these endangered animals continue to endure abuse and mistreatment on a daily basis.

ARGUMENT

Rule 11(b) provides that by presenting a pleading or written motion to the court, an attorney "is certifying that to the best of [that] person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, – (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation," and that (2) "the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery." Fed. R. Civ. P. 11(b). The Rule further provides that if the Court finds that either of these obligations is violated, the Court may "impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation." Fed. R. Civ. P. 11(c) (emphasis added).

The "'central purpose of Rule 11 is to deter baseless filings in district court and thus . . . streamline the administration and procedure of the federal courts.'" Marina Management Services, Inc. v. Vessel My Girls, 202 F.3d 315, 325 (D.C. Cir. 2000) (internal citations omitted). Thus, under Rule 11, a court should sanction those who "abuse or misuse the litigation process . . .." Westmoreland v.

CBS, Inc., 770 F.2d 1168, 1179 (D.C. Cir. 1985) (internal citations omitted).

In determining whether there has been a violation of Rule 11, the court is to apply "an objective standard of reasonableness," rather than requiring a showing of "bad faith." See Lucas v. Spellings, 408 F. Supp. 2d 8, 10 (D.D.C. 2006) (citations omitted); accord Taylor v. Blakey, Civ. No. 03-0173, 2006 WL 279103, *6 (D.D.C. Feb. 6, 2002).

Moreover, of particular relevance to defendants' conduct here, as Magistrate Judge Facciola recently explained, when an attorney submits statements to the court that "obliterate again and again the distinction between drawing an inference and stating a fact," such conduct should "be condemned as a violation of the requirement of Rule 11 that the factual allegations in a document have evidentiary support." Lucas, 408 F. Supp. 2d at 13 (emphasis added). Here, as demonstrated below, the most charitable characterization of what defendants have done is to state as facts what are actually self-serving inferences that defendants have elected to draw in this case. For example, it is an undisputable fact – and has been for many years – that ASPCA and the other organizational plaintiffs, along with WAP (a non-profit wildlife protection organization founded by two of plaintiffs' counsel) and other animal protection organizations and concerned individuals, are funding Tom Rider's travels around the country while he tracks the circus. The inference that defendants have conveniently drawn from this fact is that plaintiffs and their counsel are not actually funding a media campaign but, rather, are using that campaign as a pretext for conspiring to bribe Mr. Rider into providing false testimony in this case. However, even if defendants genuinely believed that the media campaign were fictitious (and, as discussed below, they know it is not), this would not shield defendants from Rule 11 sanctions for stating as facts what are actually defendants' own suppositions.

As Judge Facciola has explained, there is a difference between "assembling an argument" for the finder of fact and "stating" something "as fact" – a distinction that warrants the imposition of sanctions when it is intentionally and repeatedly disregarded. See Lucas, 408 F. Supp.2d at 16. This is particularly true when a party uses such inferences and misstatements of fact to assert that someone has violated RICO, since "the commencement of a civil RICO action has 'an almost inevitable stigmatizing effect' on those named as defendants." Katzman v. Victoria's Secret Catalogue, 167 F.R.D. 649, 660 (S.D.N.Y. 1996) (quoting Figueroa Ruiz v. Alegria, 896 F.2d 645, 650 (1st Cir. 1990)).[4]

Moreover, because the record unequivocally demonstrates that defendants are keenly aware that Mr. Rider is conducting an extensive and, indeed, highly effective media and public education project concerning the mistreatment of elephants at the circus – as noted, defendants' counsel have gone so far as to demand that Mr. Rider "cease and desist" from disseminating evidence of defendants' abuse to the media, see Exhibit 2 – defendants' statement in its proposed RICO counterclaim that the funding Mr. Rider receives is nevertheless "not" for this purpose, but instead is a "bribe" so that Mr. Rider will participate as a plaintiff and witness in this case, is totally groundless.[5]

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[4] See also Hoatson v. New York Archdiocese, Civ. No. 05-10467, 2007 WL 431098, *9 (S.D.N.Y. Feb. 8, 2007) (sanctions are particularly appropriate for a baseless RICO claim since "[c]ivil RICO is 'an unusually potent weapon – the litigation equivalent of a thermonuclear device'") (internal citations omitted); Burnette v. Godshall, 828 F. Supp. 1439 (N.D. Cal. 1993) ("an attorney's responsibility to conduct a reasonable prefiling investigation is particularly important in RICO claims: 'Given the resulting proliferation of civil RICO claims and the potential for frivolous suits in search of treble damages, greater responsibility will be placed on the bar to inquire into the legal and factual bases for potential claims or defenses prior to bringing suit or risk sanctions for failing to do so'") (emphasis added) (quoting Chapman & Cole v. ITEL Container Int'l B.V., 865 F.2d 676, 685 (5th Cir. 1989)).

[5] Conspicuously, after plaintiffs' counsel pointed out to defendants' counsel that their request that Mr. Rider "cease and desist" from talking to the press was totally inconsistent with their representation to this Court that Mr. Rider is "not" conducting any media campaign concerning the circus's abuse of endangered Asian elephants," see Letter from Katherine Meyer

Such blatantly false statements in pleadings and motions constitute conduct that is clearly sanctionable. See, e.g., S.E.C. v. Loving Spirit Found., Inc., 392 F.3d 486, 496 (D.C. Cir. 2004) (sanctions are appropriate for "false statements" in filings); Lucas, 408 F. Supp.2d at 8, 13 (lawyer makes a "'false statement of facts or false inferences from such non-existing facts at his peril'") (quoting In re Curl, 803 F.2d 1004, 1006 (9th Cir. 1986)); Pigford v. Veneman, 215 F.R.D. 2, 3 (D.D.C. 2003) (attorney sanctioned when "[d]espite the enormity of [the] accusations" lodged against his opposing counsel, he "provided no factual basis or evidence in support of its charges"); Williams & Connolly, 643 S.E.2d at 142 (sanctions appropriate where "alleged facts on which the Feld Attorneys rely are inaccurate").

The record also shows that defendants have absolutely no basis whatsoever for their repeated assertions that plaintiffs are "covering-up" "bribes" to Mr. Rider and otherwise "obstructing justice;" that Mr. Rider has committed "perjury;" see, e.g., PCC ¶¶ 17-19, 62-64, 68, 135-158, and that he has also "destroyed" documents. See Amend Reply at 3. Nor is there any support for defendants' allegations that plaintiffs and their counsel "have made or agreed to make payments . . . to other witnesses . . . to influence the respective witness' testimony or procure that witness' assistance in obtaining information for use against FEI in the ESA Action or with respect to proceedings before

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to John Simpson (May 3, 2007), Ex. 3, defendants did not withdraw their earlier false representation from their proposed counterclaim. Instead, they decided to omit Mr. Rider's alleged misconduct in talking to the press from their recently filed "Expedited Motion to Enforce The Court's September 26, 2005 Order" in which they allege that the other plaintiffs have "abused the discovery process" by referencing non-confidential documents produced in discovery on their websites. See Docket No. 152. Evidently, defendants and their counsel realized that they could not have it both ways – i.e., they could not insist to this Court that Mr. Rider was "not" engaging in any "media and public education efforts," as alleged in their proposed RICO counterclaim, PCC ¶ 73, and at the same time demand that the Court order Mr. Rider to stop making "statements to the press" about defendants' abuse of the elephants.

various legislative and/or administrative bodies." PCC ¶ 121.

Accordingly, Rule 11 sanctions should be imposed on defendants' counsel for each of these scurrilous, false, and entirely improperly asserted statements of "fact," and defendants' counsel should be ordered to withdraw their motion to amend, to delete these defamatory statements from their other filings, and to cease from including such statements in all future filings. See, e.g., Urban v. United Nations, 768 F.2d 1497, 1500 (D.C. Cir. 1985) ("it is now also well settled that a court may employ injunctive remedies to protect the integrity of the courts and the orderly and expeditious administration of justice").

Defendants' counsel – and FEI – should also be sanctioned for having made these outrageous accusations for "improper purposes," as discussed below. See Fed. R. Civ. P. 11(b)(1); see also Shekoyan v. Sibley Internat'l, 409 F.3d 414, 425 (D.C. Cir. 2005) (Rule 11 "provides for sanctions for filing a paper with the court 'for any improper purpose,' including harassment, delay or increasing the costs of an opponent in litigation") (quoting Fed. R. Civ. P. 11 (b)(1); Fed. R. Civ. P. 11(c) (providing that the court may impose appropriate sanctions upon the attorneys "or parties" that "are responsible for the violation" of the Rule)) (emphasis added).

I. DEFENDANTS' COUNSEL'S BASELESS RICO ALLEGATIONS

A. Defendants' Counsel Have No Factual Basis For Their Factual Assertions That Mr. Rider Is Being "Bribed" To Participate As A Plaintiff In This Case With A "Contrived" Basis For Standing, Or That He Is Accepting "Illegal Gratuity Payments" For That Purpose.

Defendants' principal basis for both their proposed RICO counterclaim and unclean hands defense is their assertion that plaintiffs – with the assistance of their counsel and WAP – are "bribing" Tom Rider to lie about his alleged "injury-in-fact" which forms the basis for the Article

III standing in this case that was upheld by the D.C. Circuit in February 2003, ASPCA v. Ringling Bros., 317 F.3d 334 (D.C. Cir. 2003), and that Mr. Rider, in turn, is accepting "illegal gratuity payments" for that purpose. See, e.g., PCC ¶ 60. Thus, defendants assert that, without Mr. Rider's "contrived" injury in fact, id., this case could not go forward, and hence that defendants have had to pay legal fees for the last six years to defend themselves against an improper lawsuit. PCC ¶¶ 60-61.

Indeed, these are the only damages that defendants have specifically alleged as a consequence of plaintiffs' alleged "illegal" acts of "racketeering." PCC ¶¶ 60-61; see also id. ¶ 68 ("FEI has suffered and continues to suffer significant damages resulting from its substantial costs is had 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") (emphasis added); id. ¶ 169 (identifying the proposed RICO "damages" as those "resulting from the substantial costs incurred by FEI to defend the ESA Action that has continued only due to the racketeering activity of ASPCA, AWI, FFA, API, Rider and WAP which has been ongoing since at least May 2001") (emphasis added); id. ¶ 61 ("with the encouragement and advice of MGC [Meyer Glitzenstein & Crystal]," the plaintiffs and WAP "carried out the illegal and ethically improper payment scheme with the intent to defraud FEI of money and property by forcing it to defend a complaint that would otherwise not exist – the ESA Action – at great expense for more than six years") (emphasis added); Amend Reply at 24 ("[w]ithout Rider, this case would not exist, because without Rider there is no standing to sue").[6]

[6] The sanctionable assertions of fact that are encompassed by the statements reproduced above are strewn throughout defendants' proposed counterclaim, as well as their motion to amend their answers to assert the counterclaim, and, most recently, in defendants' reply in

However, even putting aside the error of defendants' legal analysis that without Mr. Rider this case could not go forward,[7] defendants have absolutely no basis whatsoever for their factual representations to the Court that (1) rather than funding a genuine public education campaign, plaintiffs are instead "bribing" Mr. Rider to participate as a plaintiff in this case and he is accepting "illegal gratuity payments" for that purpose; and (2) on that basis, Mr. Rider has a "contrived injury in fact" and has no actual relationship with the elephants of the kind the D.C. Circuit ruled would be sufficient for standing.

1. Defendants Have No Factual Basis For Their Assertions That Plaintiffs Are "Bribing" Mr. Rider To Be A Plaintiff In This Case, Or That He Is Accepting "Illegal Gratuity Payments."

Defendants have presented no facts – and there are none – to substantiate their outlandish claim that plaintiffs and their counsel are "bribing" Mr. Rider to be a plaintiff in this case. See 18

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support of that motion (Docket No.137). Plaintiffs seek sanctions for all such representations and similar representations – wherever they may appear. See, e.g., Amend Reply at 1 (accusing plaintiffs of "purchas[ing] a plaintiff to cure standing deficiencies") (emphasis added); id. at 2 ("their scheme was deliberately designed to circumvent Article III standing requirements set forth by the Supreme Court"); id. at 13 (stating that plaintiffs are "[p]aying Rider both for his role as a plaintiff to manufacture standing to bring the ESA Action and then to participate as a witness"); id. (plaintiffs are "purchasing a plaintiff"); id. at 14 (stating that Mr. Rider "has been on the animal rights payroll as a professional plaintiff"); id. at 24 ("[w]ithout Rider, this case would not exist . . . 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 . . ."); id. ("FEI has suffered and continues to suffer significant damages resulting from its substantial costs it has incurred [sic] in responding to the ESA Action); id. at 28 (accusing the plaintiffs of "purchasing the services of a plaintiff").

[7] Thus, although the Court of Appeals only addressed the standing of Mr. Rider when it held that this case should proceed, ASPCA v. Ringling Bros., 317 F.3d at 338, the other plaintiffs to this action have also alleged Article III standing – of precisely the kind that was recently upheld by a district court in California. See Cary v. Hall, No. 05-4363, 2006 U.S. Dist. LEXIS 78573 (N.D. Ca. Sept. 30, 2006) (plaintiffs suffer "informational injury" when they are denied information they would have received if regulated entity had applied for permit to conduct otherwise unlawful activities under the ESA); see also Plfs. Amend Opp. at 30, n.26.

U.S.C. § 201(c)(2) (a "bribe" must be "for or because of the testimony under oath of affirmation given or to be given by such persona as a witness") (emphasis added). Thus, their proposed counterclaim does not include any evidence that anyone has stated that he or she is "bribing" Mr. Rider or has paid him to be a plaintiff in this case, or that Mr. Rider himself has ever made any such statements.

Indeed, although, according to defendants themselves, plaintiffs' illegal "racketeering scheme" purportedly began "on or about 2001," PCC ¶ 4 (emphasis added), Mr. Rider's "injury in fact" allegations, which were upheld by the D.C. Circuit, were included in plaintiffs' original July 11, 2000 Complaint. See Original Complaint, Civ. No. 00-01621, ¶¶ 30-35. Therefore, because, according to defendants' own proposed RICO complaint, the "illegal" scheme to "bribe" Mr. Rider to make false standing allegations did not begin until 2001 – a year after those standing allegations were first made – defendants' insistence that Mr. Rider has only made those allegations in exchange for "bribes" is demonstrably false on that basis alone.

Even worse, defendants' entire "proof" for their asserted "bribery" scheme is based solely on the following syllogism: because (a) Mr. Rider has received funding from plaintiffs, WAP, and others concerned about the treatment of elephants, and (b) Mr. Rider is one of the plaintiffs in this case with standing to pursue plaintiffs' claims, then (c) Mr. Rider must be the focus of a vast conspiracy to "bribe" him to make those standing allegations. However, as Judge Facciola recently explained in a comparable case in which he imposed Rule 11 sanctions on an attorney, this kind of fallacious reasoning "obliterate[s] . . . the distinction between drawing an inference and stating a fact and must therefore be condemned as a violation of the requirement of Rule 11 that the factual allegations in a document have evidentiary support." Lucas, 408 F. Supp.2d at 13 (emphasis added);

see also Williams & Connelly, 643 S.E.2d at 139-40 (upholding sanctions against other Feld counsel where some events referred to by them "didn't even happen" and others were "either twisted or distorted").

2. Defendants Have No Factual Basis For Their Assertion That Mr. Rider's Asserted Injury In Fact Is "Contrived."

Defendants have not included any facts in their proposed RICO counterclaim – or accompanying motion and reply brief – that demonstrate that Mr. Rider's "injury in fact" allegations are "contrived." PCC ¶ 61. On the contrary, defendants admit that Mr. Rider "worked for FEI from June 1997 until November 1999 in the position of 'barn man,'" and that he "cleaned up after certain FEI elephants and gave them food and water." PCC ¶ 25. Moreover, Kenneth Feld, FEI's own Chief Executive Officer, testified last year in another case 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." PETA v. Feld, No. 204452 (Cir. Ct. Fairfax County, Va.), Testimony of Kenneth Feld at 2033 (March 9, 2006), Ex. 11 to Plfs. Amend Opp.(emphasis added).[8]

Mr. Feld's own characterization of the kind of relationship that exists between the Ringling Bros. employees who work with the elephants and these animals is precisely the kind of relationship that Mr. Rider has asserted as the basis for his injury-in-fact in this case, and which the D.C. Circuit has already upheld as sufficient for Article III purposes. See ASPCA v. Ringling Bros., 317 F.3d at 336-37. And, once again, Mr. Rider asserted such a relationship before FEI maintains that his Article III standing was somehow purchased by ASPCA, the other organizational plaintiffs, and

[8] Alex Vargas, currently the Superintendent for Animals for Ringling Bros.' Red Unit, also recently confirmed in sworn deposition testimony that the employees who work with the elephants form close relationships with the animals. See Excerpt of Deposition of Alex Vargas at 69-70, Ex. 4.

plaintiffs' counsel. See also id. at 338 ("[w]e can see no principled distinction between the injury that person suffers when discharges begin polluting the river and the injury Rider allegedly suffers from the mistreatment of the elephants to which he became emotionally attached during his tenure at Ringling Bros. – both are part of the aesthetic injury") (emphasis added). Indeed, the USDA Investigator who handled Mr. Rider's complaint against the circus under the Animal Welfare Act concluded in July 2000 – long before defendants allege plaintiffs started "bribing" Mr. Rider to make his Article III standing allegations – that "[t]here is no question that [Mr. Rider] 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, USDA (July 21, 2000), Ex. 5 (emphasis added).

Therefore, not only did defendants provide no basis in their proposed counterclaim for the factual assertion that Mr. Rider has a "contrived injury in fact" here, but that assertion flies in the face of the chronology of the case, the Court of Appeals' ruling based on the allegations in plaintiffs' original Complaint, FEI's own CEO's sworn testimony, and a USDA investigator's independent assessment of Mr. Rider's relationship with the elephants. While defendants are certainly free to attack Mr. Rider's credibility on any basis they choose – including the fact that he has received funding for his media and public education efforts – for defendants to make the unsubstantiated and demonstrably false assertion that Mr. Rider's asserted injury-in-fact (i.e., his relationship with the elephants) was completely fabricated in this case in exchange for "bribes," goes beyond the pale of any reasoned or reasonable advocacy. Accordingly, defendants' outrageous allegations of "bribery" and "illegal gratuity payments" to concoct Article III standing here clearly violate Rule 11.

B. Defendants Also Have No Factual Basis For Their Assertion That Mr. Rider Has "Changed" His Testimony Over Time and Presented "False Testimony."

Nor is there any factual basis whatsoever for defendants' assertions that, since Mr. Rider began receiving funding for his public education and media work, his "answers to interrogatories and deposition testimony . . . [have been] inconsistent with and contradict prior statements that Rider made about the same subjects under oath and penalty of perjury," that Mr. Rider has presented "false testimony" in this case," and that such testimony "amounts to obstruction of justice in violation of 18 U.S.C. § 1503(a)." PCC ¶ 16; see also id. ¶¶ 129-133, 167. Rather, defendants' assertions in this regard rest on two contentions: (1) that in his June 30, 2004 Interrogatory Response that required him to "describe each incident . . . in which you contend that defendants harmed one or more of their elephants," Mr. Rider included more details than he had previously described in other forums, and (2) that he has given "varying, conflicting and ultimately false descriptions of the same elephant incidents" at various times. See PCC ¶¶ 130, 167.

However, neither of these contentions – which actually involve garden-variety witness recollections that the Court sees every day of the week – even remotely supports defendants' scurrilous and defamatory assertions that Mr. Rider has provided "false testimony" or "obstructed justice" in this case. See, e.g., Huggins v. U.S., 337 A.2d 219 (D.C. 1975) (sanctions imposed for accusing someone of "perjury" without any basis in fact since "[s]uch language is unbecoming and hardly necessary to a lawyer's obligation 'zealously' to represent his client") (internal citations omitted); cf. Milkovich v. Lorain Journal Co., 497 U.S. 1, 18-19 (1990) (accusing someone of lying under oath constitutes defamation if not true); Jackson v. Rohm & Haas Co., Civ. No. 05-4988, 2006 WL 680933, *6 n.9 (E.D. Pa. March 9, 2006) (sanctions appropriate for frivolous RICO claim based

on obstruction of justice).

1. The Mere Fact That Mr. Rider Provided A More Exhaustive List Of Incidents Of Mistreatment He Witnessed When Specifically Instructed To Do So By Defendants' Interrogatory Does Not Mean That This Testimony Was "False."

Remarkably, defendants' contention that Mr. Rider has committed perjury is not based on the proposition that he initially denied systemic elephant abuse at the circus and then changed his position. Indeed, FEI has never disputed that, since leaving the circus, Mr. Rider has always maintained that elephants are beaten with bull hooks and otherwise mistreated.

Rather, defendants' accusations that Mr. Rider perjured himself is primarily based on the fact that when he was specifically 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 (emphasis added), Mr. Rider provided defendants with as much detail as possible about the abuse he witnessed, but had not included all of these same specific incidents in either (a) a deposition that he provided to the Performing Animal Welfare Society ("PAWS") in March 2000 after he left the circus; (b) an affidavit that he provided to the USDA on July 20, 2000; and (c) Congressional Testimony that he provided on June 13, 2000 in support of federal legislation to ban elephant acts in circuses and elephant rides. See PCC ¶ 130 (accusing Mr. Rider of providing "false" testimony in his Interrogatory Response because he had "not mentioned" all of these incidents in his earlier statements). Relying on this same observation – i.e., that Mr. Rider provided more detailed information in response to a specific instruction to do so in defendants' Interrogatory – defendants also assert, with no other basis, that Mr. Rider therefore necessarily submitted a "false affidavit to the USDA." PCC ¶ 132.

Even if it were true that there have been slight variations in Mr. Rider's longstanding assertions of systemic abuse, that would at most be fodder for defendants' cross-examination at trial, rather than groundless accusations of criminal behavior. However, it is not even true that FEI can point to material discrepancies in Mr. Rider's testimony.

Thus, when Mr. Rider was deposed by PAWS in March 2000, he was not asked to describe every incident of mistreatment he witnessed. On the contrary, he was asked to describe his experiences with the circus generally. See PAWS Deposition of Tom Rider (March 25, 2000), Ex. 6. In response – and once again, long before he was purportedly bribed for his testimony – Mr. Rider testified that he saw mistreatment of the elephants on a "daily" basis, including the "hooking" of elephants with bullhooks and elephants kept in chains, id., and he described several specific incidents of various Ringling employees beating elephants, including many of the same incidents that he later included in his Interrogatory Responses. See id.

Likewise when, Mr. Rider provided an affidavit to the USDA on July 20, 2000 – also a year before the alleged "RICO conspiracy" began – he stated that he was doing so to "explain the on-going abuse of the elephants that [he] witnessed at Ringling Brothers." See Tom Rider USDA Affidavit, Ex. 7 (emphasis added). He further stated that the abuse at Ringling Brothers is "an on going daily event at every town" where the circus performs. Id. He further explained that in his affidavit he was describing only the "worst abuse" that he witnessed, id., and he gave detailed accounts of those incidents, many of which he also later included in his response to defendants' Interrogatory instructing him to "describe each incident" in which an elephant was harmed during the two and a half years that Mr. Rider worked at the circus. Compare Tom Rider USDA Affidavit, Ex. 7 with Tom Rider Response to Interrogatory 11, Ex. 8.

Thus, as Mr. Rider explained at his recent deposition on October 12, 2006 – months before defendants filed their motion to amend their answer to add their proposed RICO counterclaim – he did not include in his USDA Affidavit every single incident he observed because "[t]he length of time it would have taken to do a day by day [description]" just of the "hooking" of the elephants he witnessed "would have been [a] very, very, very long tedious process." See Oct. 12, 2006 Deposition of Tom Rider at 297 ("2006 Rider Depos."), Ex. 9. Instead, Mr. Rider testified, he "explained that it was an everyday occurrence." Id. (emphasis added). Mr. Rider explained that, for the same reason, he also did not include an exhaustive list of all of the abuse that he witnessed when he testified before Congress on June 13, 2000, regarding a bill that would have banned the use of circus elephants because of the risk they pose to public. See Id. at 298; see also H.R. 2929, "The Captive Elephant Accident Prevention Act," Ex. 10.[9]

Accordingly, defendants' assertion that Mr. Rider has presented "false testimony" and "obstructed justice" merely because some of the specific incidents listed in his Interrogatory Response "were not mentioned" on previous occasions, PCC ¶ 130, completely crosses the line into Rule 11 territory, especially because in all of these forums Mr. Rider consistently testified that he saw elephants mistreated by Ringling Bros. employees on a routine basis, and that this involved beating and hooking elephants with bullhooks. See PAWS Deposition of Tom Rider, Ex. 6; Congressional Testimony of Tom Rider, Ex. 11; Tom Rider USDA Affidavit, Ex. 7; Tom Rider Interrogatory Response, Ex. 8; see also Lucas, 408 F. Supp. 2d at 13 (when an attorney submits

[9] In fact, Mr. Rider actually objected to defendants' March 30, 2004 Interrogatory to "describe each incident" of harm that he witnessed, on the grounds that "[t]hese incidents are too numerous to describe in detail" because "this kind of treatment occurs each day at Ringling Bros." – precisely the reason he did not identify every such incident in his earlier USDA Affidavit. See Tom Rider Interrogatory Response No. 11, Ex. 8.

statements to the court that "obliterate again and again the distinction between drawing an inference and stating a fact," such conduct "must therefore be condemned as a violation of the requirement of Rule 11 that the factual allegations in a document have evidentiary support") (emphasis added).

2. There Also Is No Basis For Defendants' Assertion That Mr. Rider Has Presented "Inconsistent" And "False" Testimony.

Nor is there any factual basis for defendants' assertion that "as a legislative witness," Mr. Rider "has given varying, conflicting and ultimately false descriptions of the same elephant incidents," PCC ¶ 167 (emphasis added), and "inconsistent" testimony. Id. ¶ 16. To the contrary, the two factual "examples" provided by defendants of Mr. Rider's purported criminal conduct merely reinforce why defendants' counsel have clearly violated Rule 11 here.

a) Mr. Rider's Testimony Regarding An Incident In Tupelo, Mississippi

First, defendants state that in his sworn statement to Congress on June 13, 2000, Mr. Rider "misrepresented an incident in Tupelo, Mississippi, in order to create the false impression that Asian elephants in a circus are dangerous to support a proposed ban on elephants in entertainment." PCC ¶ 167 (emphasis added). However, aside from the fact that this statement undermines defendants' overall thesis that Mr. Rider only began providing such testimony after he was paid to do so by the plaintiffs, defendants identify nothing to support their assertion that Mr. Rider "misrepresented" to Congress the incident that occurred in Tupelo, Mississippi – such as, for example, testimony from any other person who was present during the incident. Rather, they rely solely on the fact that in his subsequent July 20, 2000 affidavit for the USDA, Mr. Rider recounted some additional facts about that particular incident. See id.

In his testimony before Congress on H.R. 2929 concerning whether elephants in circuses pose a threat to public safety, Mr. Rider not surprisingly focused on an incident that involved elephants getting loose from their handlers and running down the road:

> My first experience with an elephant running was in Tupelo, Mississippi when we were on the elephant walk returning to the train and a cattle truck stopped to let us pass. Karen, who was in the front, was startled by the cattle and she, Minnie and Mysore took off running straight down the road. Luckily, it was at night and there were some police cars in their path which stopped them and the trainer was able to catch them. If this had occurred during the day, with a lot of people around, it would have caused a lot of injury to innocent people.

Congressional Testimony of Tom Rider at 2 (June 13, 2000), Ex.11 (emphasis added); see also id. at 1 ("[m]y experiences have left me with a considerable respect for the damage that elephants can do even unintentionally"); id. (explaining that "[e]ven though the elephants were chained, they are capable of doing incredible damage").

In his affidavit to the USDA, which was directed at whether Ringling Bros.' mistreatment of the elephants violates the Animal Welfare Act and the USDA's regulations implementing that statute, Mr. Rider focused on "the on going abuse of the elephants that I witnessed at Ringling Brothers." See Tom Rider USDA Affidavit at 1 (July 20, 2000), Ex. 7. Thus, in describing the same incident that occurred in Tupelo, Mississippi that he had recounted in his Congressional Testimony one month earlier, Mr. Rider merely added the fact that, in the course of chasing the elephants who had begun to run, one of the handlers "hooked one elephant . . . in the front of the trunk and brought her down on the ground." See Id.; see also id. ("He did stop them from running, but Mini ends up with a 3 inch cut across the trunk"). Hence, there is nothing even facially inconsistent about the Congressional and USDA testimony, let alone an inconsistency sufficient to support a charge of criminal behavior. While defendants may cross-examine Mr. Rider concerning this or any other

aspect of his recollection, defendants clearly violated Rule 11 when they used this flimsy foundation to support a charge of presenting "false" testimony to Congress or the USDA, PCC ¶ 132, and that Mr. Rider did so to "impede the administration of justice." Id.; see, e.g., Pigford v. Veneman, 215 F.R.D. at 3 (sanctions appropriate when "[d]espite the enormity of [the] accusations" the attorney "provided no factual basis or evidence in support of its charges").

Sanctions are especially appropriate here because the fact that Mr. Rider witnessed all of this conduct in Tupelo, Mississippi could easily have been ascertained had defendants' counsel bothered to ask Mr. Rider about this matter during his October 12, 2006 deposition. However, defendants' counsel chose not to ask Mr. Rider a single question about this supposed "conflicting" testimony, PCC ¶ 167 – apparently because it was more important for defendants to draw worst-case inferences to support their RICO counterclaim than to obtain the truth of the matter. See Hilton Hotels Corp v. Banov, 899 F.2d 40, 43 (D.C. Cir. 1990) (upholding sanctions where the attorney "made no attempt independently" to ascertain the truth of the alleged illegal activity); Stone v. Internat'l Broth. of Teamsters, Chauffeurs, Warehousemen & Helpers of America, No. 87-7216, 1988 WL 145092, *5 (D.C. Cir. 1988) (sanctions appropriate where attorney fails to take advantage of deposition testimony to ascertain the truth of his allegations).

b) Mr. Rider's Testimony Concerning The Elephant Named Karen

The only other example of Mr. Rider's allegedly "false" testimony involves defendants' allegation that "in his sworn statement to Congress on June 13, 2000, [Mr. Rider] falsely characterized the Ringling Bros. elephant 'Karen,' as a 'killer elephant' that he could never touch,

but in sworn testimony on March 4, 2005, before a committee of the Connecticut Legislature, he described the same animal as a gentle elephant that he could actually hug." PCC ¶ 167.[10]

Although defendants now assert that Mr. Rider's description of Karen as a dangerous elephant was "false," other former Ringling Bros. employees have uniformly described this particular elephant in similar terms. Thus, Mr. Rider's full Congressional testimony about Karen was:

> [w]e had an elephant named Karen who was labeled "killer" yet she was kept on the road performing because she was a good performing elephant. Although she was the most dangerous elephant in the group, she is the one they used in the three-ring adventure where the public is allowed to stand around the elephant with no safety net or other protection around her. Karen had a habit of knocking anyone who came into range, slamming them into the ground, yet they allowed her to have contact with the audience.

Congressional Testimony of Tom Rider, Ex. 11 (emphasis added.)

If this is "false" testimony, then many current and former FEI employees have also violated the criminal code. Thus, for example, one employee, who also worked for the Ringling Bros. Blue Unit, stated in his sworn affidavit to the USDA that "I stay away from Karen because she has been known to knock people around," see USDA Affidavit of Ringling Bros. Employee (Jan. 8, 1999) (PL 04338), Ex. 12 (emphasis added) – the same point Mr. Rider made in his 2000 Congressional testimony. Another employee of Ringling's Blue Unit stated in a sworn affidavit to the USDA that "Karen likes her space and does not like strangers," and that "[w]e advise new employees without any elephant experience to stay away from her to avoid getting hurt." USDA Affidavit of Ringling Bros. Employee (January 9, 1999) (PL 04334), Ex. 13 (emphasis added).

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[10] Once again, since the allegedly "false" testimony about Karen occurred on June 13, 2000 – more than a year before the alleged RICO conspiracy began – this allegation contradicts defendants' bribery and other charges against the plaintiffs and WAP.

Similarly, a third employee stated in an affidavit to the USDA that "Karen could be dangerous" to new people, see PL 04336, Ex. 14 (emphasis added), and yet another employee, who also worked for the Blue Unit, stated in a USDA affidavit that "Karen can be aggressive against a person who she does not know," and that it is a circus "policy that no one should get close to her without a trainer or handler who she feels comfortable with." USDA Affidavit of Ringling Bros. Employee (January 8, 1999) (PL 04332), Ex. 15 (emphasis added). In fact, an internal USDA document also refers to Karen as "the one who has a reputation for being dangerous." See Memo to M. Binkley, et al. from S. Taylor (August 24, 2000) (PL 04027), Ex. 16 (emphasis added).

In short, even if Mr. Rider had characterized Karen as a dangerous animal after the alleged RICO conspiracy began, that testimony can hardly be regarded as "false" – let alone testimony that amounts to a violation of criminal law – when many other Ringling Bros. employees, including those in high-level positions who still work for the circus, have similarly described this particular animal.[11]

[11] It is unclear how Mr. Rider's purported reference to Karen in 2006 as a "gentle" animal supports defendants' bribery theory, since plaintiffs, including Mr. Rider, have advocated the view that elephants are potentially dangerous animals that should not be used in circuses. See, e.g., Congressional Testimony of Tom Rider, Ex. 11. In any event, as defendants know – because they did ask Mr. Rider about this matter at his October 12, 2006 deposition – he believes that the transcriber of his Connecticut testimony mistakenly recorded the name "Karen" when Mr. Rider was describing a time when he interacted with another elephant named "Camela" who had an abscessed tooth. See 2006 Rider Depos. at 277, Ex. 9 ("I have to say that this is a misprint[] . . . this is wrong . . . It should have said Kamala, not Karen"). Nonetheless, defendants persisted in their outlandish accusation that this discrepancy somehow supports criminal charges of bribery, perjury, and false testimony. PCC ¶¶ 165, 167; see also Fahrenz v. Meadow Farm Partnership, 850 F.2d 207, 210 (4th Cir. 1988) (sanctions for RICO claim warranted where plaintiff continued to pursue it even after key witness repudiated the accusations that form its basis); Stone, 1988 WL 145092 at *5 (sanctions appropriate where counsel continued to press RICO claim after discovery showed it had no basis).

C. Defendants Know That Mr. Rider, With The Financial Support of Plaintiffs And Others, Is Waging A Media And Public Education Campaign Based On His Experiences At The Circus.

To support their contention that Mr. Rider is being "bribed" by the plaintiffs, WAP, and others, to provide standing and other testimony in this case, and that Mr. Rider is also accepting "illegal gratuity payments" for that purpose, defendants also unequivocally state in their proposed RICO Counterclaim that the funds that have been provided to Mr. Rider over the years by these groups "actually fund Rider's continued participation in the ESA Action as a paid plaintiff and key fact witness, and **not** his 'media and public education efforts." PCC ¶ 73 (emphasis added). However, defendants know full well that for very modest funding – far less than the millions spent each year by FEI on its public relations efforts to convince the public that the elephants are not mistreated – the groups have in fact funded Mr. Rider's efforts to track the circus around the country so that he can pursue what has been a remarkably effective media and public education campaign concerning what really goes on behind the scenes at the circus. See Plfs. Amend Opp. at 26, n.24. Indeed, defendants' true objective here – as underscored by FEI's recent "cease and desist" letter – is to stop Mr. Rider and the animal protection organizations from exercising their First Amendment rights in this fashion.

Even a cursory review of the media that Mr. Rider has been able to generate on this issue over the last six years as he traverses the country, first on a Greyhound Bus and now in a used Volkswagen Van, amply demonstrates the genuine nature of his public education effort. See Plfs. Amend Opp. at 25-27. Thus, Mr. Rider has been featured on dozens of national and local television

and radio news programs covering this issue,[12] and he has also been quoted in a plethora of newspaper articles.[13] Mr. Rider has also been featured in articles appearing on the Internet,[14] and he has also 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 worked with and spoken before many grassroots groups throughout the country about this issue. See e.g. Ex. 47 to Plfs. Amend Opp.

Therefore, there is no factual basis whatsoever for defendants' assertion that the modest funds that have been provided to Mr. Rider over the last six years to pay his living and other expenses while he educates the public on what he observed in the circus – funding that amounts to less than

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[12] These include 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., Ex. 15 to Plfs. Amend Opp. (DVD with samples of broadcast media featuring Mr. Rider).

[13] These include 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., Ex. 44 to Plfs. Amend Opp. (samples of print media mentioning Mr. Rider).

[14] These include The 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 Advocate, 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., Ex. 45 to Plfs. Amend Opp. (samples of Mr. Rider's internet coverage); see also "Notes From The Underbelly: The Elephant Man," by Eric Carlson, Ex. 46 to Plfs. Amend Opp. (a feature article about Mr. Rider).

$20,000 a year – "actually fund[s] Rider's continued participation in the ESA Action as a paid plaintiff and key fact witness, and **not** his 'media and public education efforts." PCC ¶ 73 (emphasis added).

Indeed, defendants' own documents reveal that defendants are intimately familiar with Mr. Rider's efforts to educate the public about what is truly entailed in making these endangered animals perform tricks on demand. Thus, for example, in a March 16, 2005 brief to this Court, defendants complained that Mr. Rider has "mount[ed] a public-relations attack on the care defendant provides to its elephants." See Defs.' Reply In Support Of Mot. for Protective Order at 7 (Docket No. 38) (emphasis added). In addition, an internal FEI electronic message reported that at UCLA Law School in 2003, Mr. Rider "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), Ex. 48 to Plfs. Amend Opp. (underlining emphasis added, capitalization emphasis in original).

As noted, defendants' counsel recently sent a letter to plaintiffs' counsel "demanding" that Mr. Rider "cease and desist" from making "statements to the press" concerning Ringling Bros.' mistreatment of the elephants. See Letter from John Simpson to Katherine Meyer (April 30, 2007), Ex. 2. In other words, FEI's counsel demanded that Mr. Rider "cease" the media work that defendants' proposed RICO counterclaim insists is fictitious. That "demand alone completely undercuts defendants' insistence that Mr. Rider is "not" being funded to engage in "media and public

education efforts." PCC ¶ 73.[15]

Therefore, not only do defendants have no factual basis for stating that the funds that have been provided to Mr. Rider are in reality "bribes" for his testimony in this case, but defendants actually have abundant evidence that Mr. Rider has been using those funds to drive around the country so that he can conduct a media and public education campaign about the ways in which Ringling Bros. mistreats the elephants. For this reason also, defendants' counsel should be sanctioned. See, e.g., Pelletier v. Zweifel, 921 F.2d 1465, 1515 (11th Cir. 1991) (sanctions imposed on attorney and client where RICO claims "had no adequate factual basis"); Scheck v. General Elec. Corp., Civ. No. 91-1594, 1992 WL 13219, *4 (D.D.C. Jan. 7, 1992) (sanctions warranted where RICO complaint "is utterly without merit"); Barlow v. McLeod, 666 F. Supp. 222 (D.D.C. 1986) (counsel's failure to ensure that RICO complaint "was well grounded in fact is clearly a violation of Rule 11"); Davis v. Hudgins, 896 F. Supp. 561, 573 (E.D. Va. 1995) (sanctions imposed where RICO claim was not "well-grounded in fact").

D. Defendants' Counsel Should Also Be Sanctioned For Making Unfounded Accusations That Plaintiffs And Their Counsel Are "Covering Up" Unlawful Activity.

Because there is no evidentiary support for defendants' accusations in their proposed RICO counterclaim that the plaintiffs in this case have engaged in "bribery" and "obstruction of justice," and that Mr. Rider has accepted "illegal gratuity payments," there also is no factual support for defendants' repeated allegations that plaintiffs and their lawyers have also engaged in illegal and

[15] As noted earlier, supra at 9, n.5, FEI and its counsel evidently now recognize this reality, which is why their recent motion asking the Court to halt plaintiffs' media efforts omits any reference to the specific demand made in the April 30, 2007 letter concerning Mr. Rider's activities.

unethical conduct by "encouraging," "facilitating" and "hid[ing]" unlawful acts.[16] These charges are especially outrageous because defendants have known for years that Mr. Rider's media campaign was being funded by plaintiffs and other animal protection groups. See Transcript of September 16, 2005 Hearing at 29-30 ("Your Honor, we have Tom Rider, a plaintiff in this case, he's going around the country in his own van, he gets grant money from some of the clients and some other organizations to speak out and say what really happened when he worked there"); see also id. at 65 ("And Mr. Rider . . . goes around the country, he tries to talk to reporters, [and] tell them what's really going on behind the scenes, because it is an issue of great public debate").

Moreover, WAP – a non-profit organization founded by two of plaintiffs' counsel to further their interests in animals and wildlife protection – has been extraordinarily forthcoming in responding to invasive subpoenas from FEI, including by acknowledging that WAP was providing funding to defray Mr. Rider's expenses in connection with his media work. See WAP Opp'n to Mot. to Compel (Docket No. 93). Thus, to assert that plaintiffs and their counsel have been "hid[ing]" from the Court and defendants anything of substance – let alone non-existent unlawful activity – also

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[16] See, e.g., PCC ¶ 17 ("ASPCA, AWI, FFA, API and WAP, together with the encouragement and advice of MGC, devised a scheme to hide the fact that Rider was on their payroll and to create the false image of Rider as a purported volunteer championing Asian elephant welfare"); id. ¶ 20 ("[t]he [illegal] payment scheme, [] was devised and carried out with the encouragement and advice of MGC"); id. ¶ 39 ("[i]n order to facilitate these funding efforts, MGC [Meyer Glitzenstein & Crystal] encouraged and advised ASPCA, FFA and AWI to donate funds and to solicit donations for the Rider funding . . . in furtherance of the unlawful payment scheme and conspiracy"); id. ¶ 61 ("[t]hese payments to Rider by ASPCA, AWI, FFA and API, which have been funneled through MGC and/or WAP, are illegal under the federal bribery statute . . . and the federal anti-gratuity statute . . . and are impermissible under District of Columbia Rules of Professional Conduct"); id. ¶ 158 ("Meyer and/or MGC knowingly permitted Rider to submit this false interrogatory answer [that he had not received any "compensation for services rendered] to FEI in this ESA Action").

warrants the imposition of sanctions. See, e.g., Carousel Foods of America, Inc. v. Abrams & Co., Inc., 423 F. Supp. 2d 119, 123 (S.D.N.Y. 2006) ("ethical lawyers have no business bringing RICO allegations against another lawyer as a tool to force settlement negotiations, or as a litigation strategy"); Pigford v. Veneman, 215 F.R.D. at 4 ("'[a]busive language toward opposing counsel has no place in documents filed with our courts; the filing of a document containing such language is one form of harassment prohibited by Rule 11'") (internal citation omitted); id. at 5 (imposing Rule 11 sanctions for "scurrilous accusations and inflammatory remarks about opposing counsel"); Williams & Connolly, 643 S.E.2d at 146 (FEI lawyers sanctioned for "[c]ontemptuous language and distorted representations"); id. ("[s]uch language and representations are wholly gratuitous and serve only to deride the [subject of the allegations] in an apparent effort to provoke a desired response").[17]

II. DEFENDANTS' OTHER GROUNDLESS ACCUSATIONS ABOUT MR. RIDER.

There also is no factual basis for defendants' charges that Mr. Rider "has committed perjury and destroyed relevant documents," which defendants allege in support of their proposed RICO counterclaim. See, e.g., Amend Reply at 3 (citing Def.'s Mot. to Compel Disc. From Plf. Tom Rider (Docket No. 126)); see also PCC ¶ 19.

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[17] Remarkably, defendants also accuse plaintiffs' counsel of making "false statements before this Court," see Amend Reply at 4, although defendants do not identify any such "false statements." While defendants later assert in the same brief that certain statements made by plaintiffs' counsel were "disingenuous," id., none of those statements – concerning the fact that Mr. Rider had been "going around the country in his own van" with "money from some of the clients and some other organizations to speak out and say what really happened when he worked [at the circus]" is either "false" or "disingenuous." Thus, it is now well established that Mr. Rider has been traveling around the country with money from some of the plaintiffs and other groups, including WAP, to speak out about what happened at the circus when he worked there. See, e.g., supra at 26-28. Moreover, the van first used by Mr. Rider for this purpose belonged to him, see 2006 Rider Depos. at 144, Ex. 9, and the van that he currently uses for this purpose was provided to him by WAP also for this purpose, and is registered in his name. See id. at 143 .

A. There Is No Validity Whatsoever To Defendants' Accusation That Mr. Rider Has Destroyed Relevant Documents.

Defendants, of course, have no actual evidence that Mr. Rider has "destroyed" any relevant documents in this case. Rather, the "facts" provided by defendants for this extremely severe accusation are that (1) Mr. Rider did not produce certain documents that were sent to him by WAP before he was served with discovery requests in this case and which defendants have now obtained from WAP; and (2) Mr. Rider also did not produce a handful of cover letters that he received from WAP which defendants now also have already obtained from WAP. See Def.'s Mot. To Compel Disc. From Plf. Tom Rider at 16-17 (Docket No.126).[18]

These facts do not reasonably support a charge that Mr. Rider has "destroyed" evidence. To begin with, Mr. Rider had no obligation to save copies of documents that he received before he was served with discovery that have nothing to do with the merits of the litigation. See Arista Records, Inc. v. Salfield Holding Co., 314 F. Supp. 2d 27, 34 n.3 (D.D.C. 2004) (recognizing that a "'litigant is under no duty to keep or retain every document in its possession once a complaint is filed" and only has a duty to preserve "what it knows, or reasonably should know, is relevant in the action'") (internal citations omitted). Moreover, Mr. Rider's inability to locate his copy of every routine cover letter that was sent to him by WAP – and which defendants have already obtained from that group – hardly means that he has "destroyed" evidence in this case. Cf. Rice v. United States of America,

[18] The accusations that Mr. Rider has "committed perjury and destroyed relevant documents" has been repeated in defendants' reply memorandum in support of their Motion to Amend, see Docket No. 142 at 3. In support of these allegations, defendants have in turn cited their Motion to Compel against Mr. Rider (Docket No. 126), which sets forth these allegations in more detail. Accordingly, such baseless statements of "fact" are appropriately sanctionable under Rule 11. See supra at 6, n.3. See also Docket No. 158 at 8 (stating that Mr. Rider has "destroyed discoverable evidence in this case" and "committed perjury in his interrogatory answers").

917 F. Supp. 17, 19 (D.D.C. 1996) (exclusion of evidence based on document destruction requires a showing of "bad faith") (emphasis added).

Indeed, although defendants were given an opportunity to ask Mr. Rider about all of these matters when he was deposed on October 12, 2006, they did not ask him a single question about his supposed "destruction" of documents. Hence, defendants once again failed to conduct the kind of "reasonable inquiry" of the facts that is required by Rule 11 before they accused Mr. Rider of "destroying" evidence in this case. See, e.g., Hilton Hotels Corp., 899 F.2d 43 (sanctions appropriate where attorney made no attempt to corroborate the alleged defamation); Allen v. Utley, 129 F.R.D. 1, 4 (D.D.C. 1990) (party is required to make "an objectively reasonable inquiry" to support its claims).

To support their claim that Mr. Rider intentionally "destroyed" documents, defendants' counsel also state as fact that Mr. Rider's counsel "confirmed" such destruction at a February 7, 2007 "meet and confer" meeting. See Def. Mtn to Compel Disc. from Plf. Tom Rider at 15, 17 (Docket No. 144). However, of course Mr. Rider's counsel made no such statement incriminating her client. Rather, as she has explained in a sworn declaration, she simply attempted to explain to defendants' counsel why Mr. Rider did not have copies of certain WAP documents that were provided to him before he was served with the March 2004 discovery requests.[19]

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[19] See Declaration of Katherine Meyer ¶¶ 3-4, Ex. 1 to Plfs.' Opp'n to Defs.' Mot. to Compel Disc. from Plf. Tom Rider ("in answer to a question concerning why Mr. Rider had not produced copies of certain records that pre-date March 30, 2004, which defendants had obtained from The Wildlife Advocacy Project pursuant to a subpoena, I candidly explained that Mr. Rider simply had not kept his copies of those records. . . . I am absolutely certain that I was only referring to documents that were in Mr. Rider's possession prior to March 30, 2004, and I am also absolutely certain that I went out of my way to clarify this point with defendants' counsel. Accordingly, there is no basis whatsoever for defendants' counsel's representation to this Court that I informed them that Mr. Rider was 'not keeping' documents that are responsive to their

The mere fact that defendants' counsel chose to construe Ms. Meyer's candid representation on this matter as "confirmation" that her client has "destroyed" documents after they were requested in discovery, does not make this self-serving distortion of what was actually said a "fact." See Def. Mtn to Compel Disc. from Plf. Tom Rider at 15, 17 (Docket No. 144); see also Williams & Connolly, 643 S.E.2d at 146 (sanctions upheld against FEI attorneys where trial court found that certain representations made "didn't even happen, and the rest of them were either twisted or distorted") .

B. There Is No Factual Basis For Defendants' Insistence That Mr. Rider Has Committed "Perjury" In This Case.

1. Mr. Rider's Failure To Mention His Military Service When Asked To Identify The "Jobs" He Has Had Does Not Constitute "Perjury."

Nor is there any reasonable basis for defendants' assertion that Mr. Rider committed "perjury" when he did not list his military service in response to defendants' Interrogatory that asked him to "describe each and every job or volunteer position you have held since you completed high school." See Amend Reply at 3 (citing Mot. to Compel (Docket No. 126)); see also Def. Interr. No. 2. Indeed, neither this Interrogatory nor any other specifically asked Mr. Rider whether he served in the military and, if so, to describe his military service. Once again, therefore, the most that can reasonably be said about this matter is that defendants and Mr. Rider had a different understanding of whether a general reference to a "job" or "volunteer position" encompasses military service. However, no reasonable person (or lawyer) would elevate such a routine discovery disagreement to

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March 30, 2004 discovery requests").

the level of "perjury."[20]

Moreover, since Mr. Rider had already disclosed his military service to defendants when he applied for a job with the circus in 1997, see Ex. 17, and he also mentioned his military service in the a July 2000 PAWS deposition, see Ex. 6 – which was produced to defendants in June 2004, see PL 07068 – clearly Mr. Rider was not intentionally hiding from defendants the fact that he had once served in the military. Accordingly, there also is no basis whatsoever for defendants' assertion that Mr. Rider "perjured" himself by not mentioning his military service in response to a generic Interrogatory asking him to describe his past "jobs." See, e.g.,Marina Management Services, 202 F.3d at 324 (where party's "conduct belies an intention to mislead" there is no perjury).[21]

2. Mr. Rider's Failure To Mention Certain Custody Disputes He Had With His Ex-Wife Fifteen Years Ago Was Not "Perjury."

Defendants and their counsel should also be sanctioned for asserting that Mr. Rider "perjured" himself when he failed to identify a child custody dispute that he had with his former wife in 1989. See Amend Reply at 3 (citing Mot. to Compel (Docket No. 126)). Defendants contend that it was "perjury" for Mr. Rider not to furnish this information in response to an Interrogatory

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[20] In sharp contrast, Alex Vargas, Superintendent for Animals for defendants' "Red Unit" was directly asked in a recent deposition whether he had "seen any of this videotape that I showed you today before," and he unequivocally stated "No," "No, I have never seen it," even though his lawyer later reminded him that, in fact, he had seen the videotape just the day before the deposition. See Excerpt of Deposition of Alex Vargas at 242, 252-54 (May 31, 2007), Ex. 4; see also id. at 252 (admitting that he had in fact seen portions of the videotape a day before he was asked this question).

[21] Because the details of his military service implicate his personal privacy, Mr. Rider requested that he be able to provide such information to defendants subject to a confidentiality agreement. When defendants refused this offer and instead moved to compel public disclosure of the information, Mr. Rider moved for a protective order that would allow him to disclose the information to defendants and the Court, but not the public. See Plf. Tom Rider's Mot. For a Protective Order to Protect His Personal Privacy (Docket No. 106).

requesting "any civil litigation to which you have been a party or have testified [sic]." See Tom Rider Interrogatory Response No. 7, Ex. 8. In conducting an investigation into Mr. Rider's past, defendants uncovered two court documents filed in state courts in 1989 which indicate that Mr. Rider and his ex-wife had a dispute about who should have custody of their young children. Because these obviously immaterial proceedings concerning his children were not included in Mr. Rider's June 2004 Interrogatory Response about "civil litigation," defendants now routinely assert in their briefs to this Court that Mr. Rider has committed "perjury" in this case.[22]

However, as Mr. Rider has since explained in a sworn declaration, "it did not even occur to me that those kinds of matters are 'civil litigation' . . . I am not a lawyer and did not realize that filings in court concerning marital disputes are 'civil litigation.'" See Declaration of Tom Rider, ¶¶ 3-4, Exhibit G to Plf. Tom Rider's Motion for a Protective Order To Protect His Personal Privacy (Docket No. 106).

Plainly, the fact that Mr. Rider had a custody dispute with his ex-wife over fifteen years ago is not remotely relevant to this case under the Endangered Species Act. Accordingly, since there is not a shred of evidence of any "willful intent" to present "false testimony" concerning a "material matter," defendants' accusation that Mr. Rider committed "perjury" by not mentioning his custody dispute is frivolous. See U.S. v. Smith, 267 F.3d 1154, 1166 (D.C. Cir. 2001) (factual predicates of perjury require evidence that the witness gave "'false testimony concerning a material matter with

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[22] See, e.g., Amend Reply at 3; citing FEI Mot. to Compel Disc. from Plf. Tom Rider (Docket No. 126); see also FEI's Mot. to Compel Test. of Plf. Tom Eugene Rider at 8-9 (Docket No. 101); FEI Reply in Support of Mot. to Compel Test. of Plf. Tom Eugene Rider at 7-8, 13-14, 17 (Docket No. 111); FEI Reply in Opp'n to Plf. Tom Rider's Mot. for Protective Order at 1, 9, 14-15 (Docket No. 115); FEI Mot. to Compel Disc. from Plf. Tom Rider at 9-10, 14 (Docket No. 126); FEI Reply in Support of Mot. to Compel Disc. from Tom Rider at 23 (Docket No. 144).

the willful intent to provide false testimony'") (emphasis added) (internal citations omitted).

Such deliberately overblown statements about a party – i.e., that he has committed "perjury" merely because he inadvertently omitted facially irrelevant information in response to a discovery request – goes far beyond the pale, especially for lawyers who should appreciate the gravity of such accusations. See, e.g., Williams & Connolly, 643 S.E. 3d at 146 (Feld attorneys sanctioned for using "[c]ontemptuous language and distorted representations in a pleading"); Moldea v. New York Times Co., 22 F.3d 310, 314 (D.C. Cir. 1994) (an accusation of "criminal conduct, such as perjury" "is a classic libel"); Pigford v. Veneman, 215 F.R.D. at 3 (sanctions warranted when "[d]espite the enormity of accusations" there was no basis in fact for them).

3. Mr. Rider Did Not Commit Perjury In Answering An Interrogatory Concerning "Compensation."

There also is no basis for defendants' insistence that Mr. Rider committed "perjury" when he denied that he considers any of the funding he has received over the years "compensation for services rendered." See Amend Reply at 3 (citing Motion to Compel (Docket No. 126)); see also PCC ¶¶ 157-61; Tom Rider Interrogatory Response, Ex. 8. In fact, in response to this same Interrogatory, which asked Mr. Rider to identify "all income, funds, compensation, other money or items . . . you have ever received from any animal advocate or animal advocacy organization," Interrogatory No. 24, (emphasis added), Mr. Rider agreed to provide such information, as long as he could do so "subject to a confidentiality agreement," see Tom Rider Interrogatory Response, Ex. 8 – an offer that defendants have consistently refused to accept. See, e.g., Plfs.' Opp'n to Def. FEI's Mot. to Compel Disc. from Plf. Tom Rider at 4-5 (Docket No. 138). However, as to the second part of the Interrogatory, which stated that "if" any such money or items were given to him "as

compensation for services rendered," he should describe "the service rendered" and the amount of such "compensation," Mr. Rider stated: "I have not received any such compensation" – i.e., he does not regard any of the money that he has received as "compensation for services rendered." See Tom Rider Interrogatory Response No. 24, Ex. 8 (emphasis added).

Defendants know full well that Mr. Rider's answer to this question was based merely on his view of his funding arrangement with the animal protection groups, rather than on any effort to conceal such funding. Thus, in his October 12, 2006 deposition – which, again, occurred before FEI filed its proposed RICO counterclaim – Mr. Rider explained that, in his view, the funding he has received for his media and public education efforts constitutes "grant" money rather than a salary of any kind, and hence he does not view such funding "as compensation for services rendered." See, e.g., 2006 Rider Depos. at 147-48, Ex. 9.

Indeed, as a legal matter, a "grant" that is provided to someone for living expenses while they conduct a particular project is not the same as "compensation for services rendered," such as wages paid to an employee. See, e.g., www.grants.gov/aboutgrants/grants.jsp ("[g]rants are not [b]enefits or [e]ntitlements. A Federal grant is an award of financial assistance from a Federal agency to a recipient to carry out a public purpose") (emphasis added); compare Concise Oxford Dictionary (Seventh Edition) ("compensation" means "salary or wages") (emphasis added). In fact, defendants themselves acknowledge that "Rider is not employed by plaintiffs or WAP." See Amend Reply at 15 (emphasis added).

Again, at most, this is a routine discovery dispute over the wording of a particular Interrogatory. Indeed, if Mr. Rider were seeking to lie about his receipt of funding for his public education work, he would not have readily agreed to provide defendants with the answer to the first

part of Interrogatory No. 24 in June 2004 – i.e., to "identify all income, funds, compensation, [and] other money or items" he has ever received from any animal advocate or animal advocacy organization, as long as he may do so subject to a confidentiality agreement. In light of this undeniable fact – and defendants' failure to take Mr. Rider up on this offer for the last three years – there is no reasonable factual basis for the accusation that Mr. Rider committed "perjury" and "obstruction of justice" in how he answered this particular Interrogatory. See Amend Reply at 3; PCC ¶¶ 157-61; see also U.S. v. Smith, 267 F.3d at 1166 (perjury is "'false testimony concerning a material matter with the willful intent to provide false testimony'") (emphasis added) (internal citations omitted); see also Lucas, 408 F. Supp. 2d at 17 (attorney sanctioned for stating that a witness "refused" to turn over documents when he was instructed by his attorney not to turn them over, since his "not turning them over was not the result of an independent unwillingness to turn them over") (emphasis added).

III. DEFENDANT FEI AND ITS COUNSEL SHOULD BE SANCTIONED BECAUSE THESE BOGUS ACCUSATIONS AGAINST PLAINTIFFS AND THEIR COUNSEL HAVE CLEARLY BEEN MADE FOR AN IMPROPER PURPOSE.

Defendants' counsel – as well as FEI itself – should be sanctioned pursuant to Rule 11(b) and (c) for making these unfounded allegations of "bribery," "illegal gratuity payments," "perjury," and "obstruction of justice" against plaintiffs, and their counsel, for an "improper purpose," including "to harass" plaintiffs and their counsel, "to cause unnecessary delay" and to cause "needless increase in the cost of litigation." See Fed. R. Civ. P. 11(b); see also Fed. R. Civ. P. 11 (c) (the court may impose an appropriate sanction upon "the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation") (emphasis added); O'Malley v. New York City Transit, 896 F.2d 704, 705 (2d Cir. 1990) (use of a pleading for "improper purposes" is an

independent basis for seeking sanctions under Rule 11); Williams & Connolly, 643 S.E.2d at 146, (sanctions imposed on Feld attorneys because "[c]ontemptuous language and distorted representations in a pleading never serve a proper purpose and inherently render that pleading as one 'interposed for an improper purpose'") (emphasis added) (internal citations omitted).

Here, defendants' proposed RICO counterclaim, and their assertions that Mr. Rider has committed "perjury" and "destroyed" evidence, have been imposed for all of the improper purposes expressly prohibited by Rule 11, as well as several additional improper purposes: i.e., to punish plaintiffs and their counsel for challenging FEI's treatment of its elephants, to intimidate the organizational plaintiffs into dropping this case, and to put pressure on the organizational plaintiffs and others to stop contributing funds to Mr. Rider and The Wildlife Advocacy Project for Mr. Rider's media and public education efforts.

Indeed, it is now absolutely clear that this is precisely the scorched earth approach that FEI uses to discredit its critics – i.e., it attacks them with contemptuous accusations, bogus lawsuits, and similar tactics to tarnish their reputations, make them spend money, take the focus off its own misconduct, and generally harass them into ceasing the conduct that FEI dislikes. See supra at 2-3; see also FEI Internal Memorandum (May 15, 1991), Ex. 13 to Plfs. Amend Opp. (outlining strategy of "attacks" on animal protection group with "lawsuits" and charges of "money irregularities" to "keep[] up the pressure . . . [so] they will spend more of their resources in defending their actions" (emphasis added); FEI "Long-Term Animal Plan" at 12-13 (FEI 1480), Ex. 1 to Plfs. Amend Opp. (detailing various ways to "expose and discredit animal activist entities" including targeting "how donations are used" by the groups, as well as "[p]lacing stories in the 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 8, 12 (conducting video surveillance on groups to "dissuade" them from protesting against the circus); id. at 13 (detailing plan for responding to a "negative" story in the media, including threatening editors with legal action); id. (responding to "negative, school children letters by conducting an "intensive campaign to the school itself, principal and Board of Education demanding [an] investigation").[23]

Indeed, in this case, defendants have clearly indicated that if they prevail in their effort to obtain the names of each group and individual that may have contributed funds to Mr. Rider's media and public education efforts they may use this information in an attempt to persuade those donors not to continue to associate themselves with Mr. Rider and the plaintiffs – in clear violation of plaintiffs' First Amendment Rights. See Defs.' Opp'n to Tom Rider's Mot. for a Protective Order with Respect to Certain Financial Information at 14 (Docket No. 146) (arguing that it is important to gain access to the names of donors to Mr. Rider's efforts because "donors may not want to affiliate themselves with the unlawful payment scheme that Rider, his counsel, and his co-plaintiffs have conspired to commit") (emphasis added); see also Internat'l Action Center v. United States, 207 F.R.D. 1, 3 (D.D.C. 2002) (observing that "the essence of First Amendment freedoms" is "the freedom to protest policies and programs to which one is opposed, and the freedom to organize, raise

[23] FEI's Chief Executive Officer Kenneth Feld and other FEI officials have also admitted that they have conducted "covert" operations against animal protection groups that criticize the circus, including 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. See Plfs. Amend Opp. at 10-11. FEI also hired a former CIA official to spy on animal groups and to oversee a project that involved interfering with a free-lance author's ability to write a book about the circus by presenting her with a bogus book contract for another project, which unbeknownst to her was being funded by Feld. See "The Greatest Vendetta on Earth," Salon Magazine (August 30, 2001), Ex. 14 to Plfs. Amend Opp.; see also CBS "60 Minutes" ("Send In The Spies") (May 2, 2003), Ex. 15 to Plfs. Amend Opp.

money, and associate with like-minded persons so as to effectively convey the message of the protest").

In PETA v. Feld, which involved FEI's surveillance and infiltration of an animal protection group, Kenneth Feld also filed a completely baseless counter-claim against PETA, alleging "abuse of process" based solely on the fact that PETA had placed a copy of its public Complaint against Feld on its website. See, e.g., Transcript of Hearing Before The Honorable David T. Stitt at 17-18 (July 30, 2004), Ex. 18 (Feld lawyer admits that the sole basis for its "abuse of process" counterclaim is "the fact that they put [the Complaint] on the website after they filed it"); see also id. at 22 (Judge observes "[s]o basically we're down to the web site," and noting that "for openers you've got a huge First Amendment issue lurking there. It is something that in this day and age is commonly done, putting pleadings on the web after they're filed"); id. at 24 (sustaining demurrer on the ground that Feld's counterclaim failed to state a claim upon which relief could be granted).

Therefore, here this Court need not engage in any speculation about why defendants would seek to assert a baseless RICO counterclaim and unclean hands defense against plaintiffs. FEI's own internal document reveals that attacking animal protection groups with "lawsuits" and charges of "money irregularities" is one of FEI's key strategies for diminishing the effectiveness of such groups, since this requires them to "spend more of their resources in defending their actions," than in criticizing the circus. Report to FEI (May 15, 1991), Ex. 13 to Plfs. Amend Opp. (emphasis added); see also Trout v. Garrett, 780 F. Supp. 1396, 1429 n.79 (D.D.C. 1991) (a party who "is involved" in "the conduct of th[e] litigation" can be sanctioned); Byrd v. Hopson, 108 Fed. Appx. 749, 755-56 (4th Cir. 2004) (sanctions imposed on party where record showed that baseless lawsuit was brought to harass the opposing party). Thus, baseless allegations of bribery, perjury, and the like are part a

parcel of FEI's own documented strategy of attacking and discrediting its critics. Accordingly, defendants' counsel – and FEI itself – should be sanctioned for this reason as well. See also Fed. R. Civ. P. 11(b)(1).[24]

CONCLUSION

For all of the foregoing reasons, defendants and their counsel should be sanctioned under Rule 11 for making false and specious allegations against plaintiffs and their counsel, and for making such allegations for patently improper purposes. The sanctions should include an order that FEI pay plaintiffs' attorneys' fees and costs for having to defend plaintiffs against these scurrilous attacks, as well as their attorneys' fees and costs associated with pursuing this motion. See Fed. R. Civ. P. 11(c) (2). The sanctions should also include monetary fines that will deter defendants and their counsel from engaging in such conduct in the future. Id.

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[24] See also Katzman v. Victoria's Secret Catalogue, 167 F.R.D. at 660 ("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") (internal citations omitted); Hoatson v. New York Archdiocese, Civ. No. 05-10467, 2007 WL 431098 at *9 (S.D.N.Y. Feb. 8, 2007) (Rule 11 sanctions important for unfounded RICO complaint since "[c]ivil RICO is 'an unusually potent weapon – the litigation equivalent of a thermonuclear device'") (emphasis added) (internal citations omitted); Scheck., 1992 WL 13219, at *4 (sanctions warranted for filing of "frivolous" RICO complaint); Barlowe, 666 F. Supp. at 229 (plaintiff sanctioned for filing RICO complaint not grounded in fact "in the hope that discovery would uncover evidence of a claim"); Pelletier, 921 F.2d at 1520-21 (sanctions imposed on attorney and client for filing of RICO complaint with no factual basis); Davis v. Hudgins, 896 F. Supp. at 573 (sanctions imposed where RICO complaint "presented no factual basis for the claims"); Medical Supply Chain, Inc.v. Neoforma, Inc., 419 F. Supp.2d 1316, 1333 (D. Kan. 2006) (sanctions imposed for filing of baseless RICO claim since this suggests that the case "was brought for the purpose of harassing defendants or the court, causing unnecessary delay and/or needlessly increasing the cost of litigation in violation of Rule 11(b)(1)"); Brandt v. Schal Associates, Inc., 960 F.2d 640, 647 (7th Cir. 1992) ("Campbell's attempt to succeed on his RICO complaint by unnecessarily saddling his opponent with an exhausting and costly review of his submissions is an egregious and unjustified abuse of the judicial process").

Moreover, under the circumstances presented here, the sanctions should also include an order from this Court that defendants be required to withdraw their Motion to Amend to add their proposed RICO counterclaim and "unclean hands" defense, as well as an additional order that defendants' counsel delete all of the offensive language addressed here from their filings, and be prohibited from repeating these scandalous allegations in any future filings with this Court. See Fed. R. Civ. P. 11(c)(2) (a sanction imposed for violation of this rule shall be "sufficient to deter repetition of such conduct or comparable conduct") (emphasis added); see also In re Bush, No. 00-5189, 2000 WL 1225766, *1 (July 19, D.C. Cir. 2000) (observing that sanctions "may be monetary, [or] injunctive"); accord, Urban, 768 F.2d at 1500 ("it is now also well settled that a court may employ injunctive remedies to protect the integrity of the courts and the orderly and expeditious administration of justice"); Atkins v. Fischer, 232 F.R.D. 116, 126 (D.D.C. 2005) ("[a]s possible sanctions pursuant to Rule 11, the court has an arsenal of options at its disposal," including "striking the offending paper") (internal citations omitted); Reynolds v. U.S. Capitol Police Bd., 357 F. Supp. 2d 19, 26 (D.D.C. 2004) (noting that the "district court is given discretion to 'tailor Rule 11 sanctions as appropriate to the facts of the case,' striking a balance between equity, deterrence, and compensation") (internal citations omitted).

Respectfully submitted,

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Dated: August 3, 2007

Plaintiffs' Exhibit List

Plaintiffs' Motion Under Rule 11 Against Defendants and Their Counsel Concerning the Baseless Allegations Included in Their Proposed Rico Counterclaim and Unclean Hands Defense and For Their Scurrilous Attacks on Plaintiff Tom Rider
Civ. No. 03-2006 (EGS/JMF)

Exhibit	Description
1	Excerpts from Charles Smith Testimony, PETA v. FELD
2	Letter from John M. Simpson to Katherine Meyer (4/30/07)
3	Letter from Katherine Meyer to John M. Simpson (5/3/07)
4	Excerpts from the Deposition of Alex Vargas(5/31/07)
5	USDA Memorandum from Diane Ward (7/21/00)
6	Tom Rider videotape deposition taken by PAWS (3/25/00)
7	Tom Rider USDA Affidavit (7/20/00)
8	Tom Rider's Original Interrogatory Responses
9	Excerpts from the Deposition of Tom Rider(10/12/06)
10	H.R. 2929, The Captive Elephant Accident Prevention Act
11	Congressional Testimony of Tom Rider, H.R. 2929 (6/13/00)
12	Ringling employee USDA Affidavit (1/8/99)
13	Ringling employee USDA Affidavit (1/9/99)
14	Ringling employee USDA Affidavit (1/9/99)
15	Ringling employee USDA Affidavit (1/8/99)
16	Memorandum to M. Binkley, USDA from S. Taylor, USDA (8/24/00)
17	Tom Rider's job application to Ringling Brothers (6/3/97)
18	Excerpts from Court Transcript, PETA v. FELD (7/30/04)