UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

DEFENDANT'S OPPOSITION TO PLAINTIFFS' MOTION UNDER RULE 11

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GLOSSARY

Annotated RICO CC	Annotated Version of FEI's Counterclaim
Annotated Counterclaim	Annotated Version of FEI's Counterclaim
API	Animal Protection Institute (Plaintiff)
ASPCA	American Society for the Prevention of Cruelty to Animals (Plaintiff)
AWI	Animal Welfare Institute (Plaintiff)
Chipperfield	Graham Chipperfield
Counterclaim	Proposed Counterclaim of Feld Entertainment, Inc. (filed as Attachment 3 to FEI's Motion to Amend) (2/28/07) (Docket No. 121)
Decl.	Declaration
Dep.	Deposition
ESA	Endangered Species Act
ESA Action	Lawsuit Filed by Plaintiffs Alleging Violations of the Endangered Species Act by FEI (Nos. 00-1641 and 03-2006)
FEI	Feld Entertainment, Inc. (Defendant)
FFA	Fund for Animals (Plaintiff)
Fundraiser	"Benefit to Rescue Asian Elephants" Hosted by ASPCA, AWI, and HSUS in Pacific Palisades, California on July 21, 2005 to Raise Money for Rider
Gasper	George Gasper, Attorney for Defendant
Glitzenstein	Eric Glitzenstein, Attorney for Plaintiffs
Hawk	Larry Hawk, Former CEO of ASPCA
HSUS	Humane Society of the United States
Interrog. Resp.	Interrogatory Response
ISC	Initial Status Conference

Meyer	Katherine Meyer, Attorney for Plaintiffs
MGC	Meyer Glitzenstein & Crystal
Mot.	Motion
Motion to Amend	FEI's Motion for Leave to Amend to File Amended Answers to Assert Additional Defense and RICO Counterclaim (2/28/07) (Docket No. 121)
Org. Pls.	Organizational Plaintiffs (including, at various times, API, ASPCA, AWI, FFA, and PAWS)
Opp.	Opposition
PAWS	Performing Animal Welfare Society (Former Plaintiff)
PETA	People for the Ethical Treatment of Animals
Pl.	Plaintiffs
Plaintiffs	API, ASPCA, AWI, FFA, and Rider
Pl. Mem.	Memorandum in Support of Plaintiffs' Motion Under Rule 11 Against Defendants And Their Counsel (8/3/07) (Docket No. 163)
Pl. Mot.	Plaintiffs' Motion Under Rule 11 Against Defendants And Their Counsel (8/3/07) (Docket No. 163)
RICO	Racketeer Influenced and Corrupt Organizations Act, codified at 18 U.S.C. § 1961, *et seq.*
RICO CC	Proposed Counterclaim of Feld Entertainment, Inc. (filed as Attachment 3 to FEI's Motion to Amend) (2/28/07) (Docket No. 121)
Rider	Tom Rider (Plaintiff)
Rider PAWS Statement	Testimony Provided Under Oath by Tom Rider In Response to Questions by an Attorney for PAWS (3/25/00)
Rider Cong. Statement	Testimony Provided Under Oath by Tom Rider to the United States Congress (6/13/00)
Rider USDA Aff.	Written Statement Provided Under Oath by Tom Rider to the USDA (7/20/00)
Simpson	John Simpson, Attorney for Defendant

Statement to Conn. State Legis.	Testimony Provided Under Oath by Tom Rider to the Connecticut State Legislature (3/4/05)
Supp. Interrog. Resp.	Supplemental Interrogatory Response
Tr.	Transcript
Trister	Michael Trister, Attorney for WAP
Vargas	Alex Vargas, FEI's Superintendent of Animals
WAP	Wildlife Advocacy Project
Weisberg	Lisa Weisberg, V.P. for Public Affairs of ASPCA

TABLE OF AUTHORITIES

FEDERAL CASES

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FEDERAL STATUTES

MISCELLANEOUS

INTRODUCTION

Plaintiffs' Rule 11 motion is another wholly baseless attempt at deflecting attention from the serious illegal activity uncovered by FEI and its counsel during discovery in this case. Desperately attacking FEI's Counterclaim before it has even been filed, plaintiffs have categorized FEI's RICO claims as factually "baseless" and ripe for Rule 11 sanctions. The claims in FEI's Counterclaim, however, as well as the other FEI statements challenged by plaintiffs, are all supported by facts well known to plaintiffs; the pleading itself, in painstaking detail, often refers specifically to documents and testimony. Plaintiffs have not, and indeed cannot, point to a single factual allegation contained in the Counterclaim that is false. Indeed, every single factual allegation made in FEI's Counterclaim is supported by documents (most of which have been created by plaintiffs themselves) and/or plaintiffs' own sworn testimony. Ex. 1, Annotated RICO CC.[1] Plaintiffs' assertion that the RICO counterclaim has no basis in fact is frivolous.

Plaintiffs may not like FEI's allegation that their conduct violates RICO (in part because the evidence shows a pattern of bribery, illegal gratuities, obstruction of justice, mail fraud, and/or wire fraud), but this does not mean that FEI does not have a factual basis for its claims. Nor does it mean that FEI should yield to plaintiffs' use of Rule 11 as a means to intimidate FEI or its counsel from pursuing these claims. The Rule 11 motion is nothing more than a ***second*** attempt by plaintiffs to get the Counterclaim out of the case. As with their hysterical opposition to FEI's motion for leave to amend, the Rule 11 motion simply takes issue on the merits of what has been alleged. None of plaintiffs' arguments has anything to do with the sufficiency of FEI's

[1] Attached hereto as Exhibit 1 is an annotated version of the Counterclaim which demonstrates, paragraph by paragraph, that every single statement of fact in that pleading is supported by evidence produced in discovery herein and/or information in the public domain.

pleading. That there is even something to argue about as to whether plaintiffs violated RICO in and of itself shows that the RICO claim satisfies Rule 11. Indeed, based on the specificity of the proposed pleading and the evidence of plaintiffs' conduct submitted herewith, the proposed RICO claims would survive a Rule 12(b)(6) motion to dismiss or a Rule 56 motion for summary judgment.

The Rule 11 motion not only has no legal integrity, it is brought in bad faith on the basis of factual misrepresentations to the Court. Plaintiffs' Rule 11 motion and brief are replete with false statements of fact – indeed, at least ***nineteen***. Ex. 2, False Statements in Pl. Rule 11 Motion.[2] Plaintiffs' tactics are patently improper and illustrate that their Rule 11 motion is nothing more than a strategy to punish FEI and its counsel for lodging serious, yet entirely factually-based, allegations against them. While plaintiffs may disagree with FEI's conclusions of law, they cannot dispute the existence of the facts upon which those conclusions are based, which is the key distinction in the Rule 11 analysis. Attached hereto are 65 exhibits (cited more than 175 times), almost all of which are documents created by plaintiffs themselves (including 11 sworn statements), demonstrating the factual basis of FEI's claims.[3] And since plaintiffs make no Rule 11 argument as to the legal basis for FEI's claims, plaintiffs' argument that these

[2] Attached hereto as Exhibit 2 is a list of the false statements of fact in plaintiffs' Rule 11 motion and brief – all of which are known or clearly should be known by plaintiffs' counsel to be untrue. Indeed, FEI explicitly informed plaintiffs' counsel (more than two weeks before their Rule 11 motion was filed) that the motion contained more than 20 such statements. Ex. 97, Simpson Letter to Meyer (7/19/07). While plaintiffs have corrected certain of these false statements, they nonetheless have filed with this Court a brief containing 19 false statements of fact notwithstanding the explicit warning from FEI.

[3] Along with this brief, FEI is filing in excess of 100 exhibits with the Court. Each such exhibit is either cited in this brief, the Annotated Counterclaim (attached hereto as Exhibit 1), the List of False Statements in Plaintiffs' Rule 11 Motion (attached hereto as Exhibit 2), and/or the ESA Action Payment Timeline (attached hereto as Exhibit 3). So that there can be little doubt that FEI's Counterclaim is well grounded in fact, all of the documents that FEI relied upon in preparing the Counterclaim or this brief are attached hereto. Not all of those documents, however, are discussed herein as the record is too voluminous to reasonably address each in one brief.

facts do not constitute RICO violations simply means there is a dispute for the Court to resolve and a basis for FEI's claim to proceed. It is not a basis for sanctions.

Plaintiffs' motion is flawed legally as well. Plaintiffs fail to cite one instance in which sanctions were imposed in any case remotely analogous to this one. Indeed, plaintiffs would be hard-pressed to find a Rule 11 case in which a court sanctioned attorneys or the client for claims that were as well-grounded in the law and the facts – even before the opportunity for discovery – as is the case with FEI's Counterclaim. Plaintiffs' motion is wholly unfounded and can only be understood as an attempt to intimidate FEI into withdrawing its RICO claims. FEI is entitled to its day in Court on these valid claims, and plaintiffs' efforts to delay that inevitable reckoning are without merit.

ARGUMENT

Fed. R. Civ. P. 11(b) provides, in pertinent part: "By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion or other paper, an attorney . . . is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances," the claims, defenses and other legal contentions: (1) have evidentiary support; (2) are warranted by existing law or by a nonfrivolous argument for the extension of the law; and (3) are not being presented for an improper purpose. Fed. R. Civ. P. 11(b); Marina Mgt. Servs. v. Vessel My Girls, 202 F.3d 315, 322 (D.C. Cir. 2000). Because Rule 11 sanctions are an extreme punishment, "[a] motion for sanctions under Rule 11 should not be lightly made by a party or granted by a court." Barlow v. McLeod, 666 F. Supp. 222, 229 (D.D.C. 1986); see also Trout v. Garrett, 780 F. Supp. 1396, 1428 (D.D.C. 1991) ("[T]he relatively blunt instrument of sanctions against individual attorneys ought to be applied with restraint."); Fed. R. Civ. P. 11(b) advisory committee note ("The rule is not intended to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories.").

Rule 11 does not require success on the merits of the claim or otherwise heightened pleading. See, e.g., Atkins v. Fischer, 232 F.R.D. 116, 140 (D.D.C. 2005). "When a party's motion is sufficiently well grounded and warranted by existing law the party's failure to sustain his or her burden of proof on the motion does not ipso facto violate the standards of Rule 11." Dove v. Wash. Metro. Area Transit Auth., No. 03-2156, 2005 U.S. Dist. LEXIS 17955, at *7-8 (D.D.C. Aug. 18, 2005) (internal quotations and citation omitted). Moreover, at the time of filing a new claim, such as FEI's counterclaim, the proponent "is under no duty to exhaust every avenue of discovery before filing a lawsuit." Allen v. Utley, 129 F.R.D. 1, 15 (D.D.C. 1990) (citing Oliveri v. Thompson, 803 F.2d 1265, 1279 (2d Cir. 1986)); see also Hilton Hotels v. Banov, 899 F.2d 40, 43 (D.C. Cir. 1990) (declining to adopt a rule that attorneys may not rely on hearsay statements as the basis for filing suit; "[t]he important question is whether the client's statement furnishes a *reasonable basis* for surmising the existence of facts supporting the claim"); Atkins, 232 F.R.D. at 140 (parties should be granted "leeway" in filing counterclaims because "counterclaims are filed before discovery has commenced, often when a party, uncertain of how the facts will turn out, simply wants to preserve their rights"); Davis v. Hudgins, 896 F. Supp. 561, 573 (E.D. Va. 1995) ("[f]or a complaint to be reasonable, the factual investigation must have uncovered ***some*** information to support the allegations in the complaint") (emphasis added) (internal citations and quotations omitted).

Plaintiffs ignore the vast amount of evidence already collected and presented in the counterclaim itself. Instead, they carp at the margins, assigning exaggerated significance to the absence of additional pieces of information, such as an actual admission by the parties that their payments to Rider were bribes. See, e.g., Pl. Mem. at 14 ("their Counterclaim does not include any evidence that anyone has stated he or she is 'bribing' Mr. Rider"). The fact that some

evidence is yet to be uncovered in discovery, particularly where, as here, it is something within the sole control of plaintiffs, does not establish a Rule 11 violation. Hilton Hotels, 899 F.2d at 43 (pre-filing inquiry may be reasonable where "relevant information was largely in the control of the defendant[]") (citing Kamen v. Am. Tel. & Tel. Co., 791 F.2d 1006, 1012 (2d Cir. 1986)). In fact, it further supports FEI's need for discovery on the RICO counterclaim.

While it comes as no surprise that plaintiffs' defense to the proposed RICO allegations is to accuse FEI and its counsel of a Rule 11 violation, it is utterly without merit. The RICO counterclaim was the result of extensive pre-filing inquiry and analysis; it is fully supportable by the evidence discovered to date (and likely will find additional support after the opportunity for discovery on these issues); it meets all of the elements of the RICO statute and existing RICO case law; and it was not submitted for an improper purpose. Plaintiffs have not cited, and FEI has not located, a single Rule 11 decision finding frivolous a claim that is based upon the amount of evidentiary support present in this case. Notwithstanding the fact that FEI's proposed RICO counterclaim, and the arguments made with respect to Rider's perjury and document destruction, bear no resemblance to the Rule 11 cases cited by plaintiffs, plaintiffs frivolously have sought Rule 11 sanctions, and in doing so, have made at least 19 factual misstatements in the process. See Ex. 2, False Statements in Pl. Rule 11 Motion. Courts, however, do not tolerate the use of Rule 11 as a litigation strategy to make another party back down from an objectively reasonable position. Greeley Publishing Co. v. Hergert, 233 F.R.D. 607, 612 (D. Col. 2006) ("Rule 11 should never be used as a litigation tactic").

As discussed more fully below, FEI and its counsel have complied with every aspect of Rule 11 and can establish, in painstaking detail, the factual basis for each and every allegation in the RICO counterclaim as well as the factual basis for the other statements that plaintiffs

challenge. FEI respectfully requests, therefore, not only that plaintiffs' motion be denied but that FEI be awarded its costs and attorney's fees incurred in opposing the motion. See Fed. R. Civ. P. 11(c)(1)(a). FEI also is filing a motion pursuant to 28 U.S.C. § 1927 concurrently herewith.

I. FEI CONDUCTED A THOROUGH PRE-FILING INVESTIGATION

Rule 11 requires only that counsel filing the document have made an adequate, pre-filing inquiry as to its factual and legal basis. Fed. R. Civ. P. 11(b) (requiring an "inquiry reasonable under the circumstances"). "The test under Rule 11 is an objective one: that is, whether a reasonable inquiry would have revealed that there was no basis in law or fact for the asserted claim." Washington Bancorporation v. Said, 812 F. Supp. 1256, 1275 (D.D.C. 1993) (citing Cooter & Gell v. Hartmarx Corp., 496 U.S. 384 (1990); Westmoreland v. CBS, Inc., 770 F.2d 1168, 1174 (D.C. Cir. 1985)). Plaintiffs, however, suggest that FEI's counsel should have first secured the type of proof necessary to withstand a motion for summary judgment and/or to prevail at trial before filing the counterclaim. See, e.g., Pl. Mem. at 14 ("their Counterclaim does not include any evidence that anyone has stated that he or she is 'bribing' Mr. Rider"). Rule 11 imposes no such burden. See Dove, 2005 U.S. Dist. LEXIS 17955, at *11-12 ("Although the claims contained in the plaintiff's amended complaint were sufficiently ill-founded to merit the granting of summary judgment, a consideration of Rule 11 sanctions involves more than an inquiry into the objective merits of a complaint. Simply stated, the defendant fails to persuade the court that the plaintiff and his counsel did not exercise due diligence in investigating the plaintiff's allegations, or that they brought this action in an effort to harass [defendant] or to frustrate judicial proceedings.") (internal citations omitted).

FEI conducted an extensive pre-filing investigation. Firm records indicate that undersigned counsel and their colleagues spent more than 500 hours over the course of several months analyzing, preparing, and filing the claim. The factual investigation included a detailed

review of more than 30,000 pages of documents produced unwillingly and belatedly by plaintiffs and by third-party WAP in the ESA Action; the review of more than nineteen sworn statements and/or interrogatory responses provided by plaintiffs, either in the ESA Action, in USDA investigations or before various legislatures; and independent research of publicly available information such as the websites and IRS filings of the organizational plaintiffs, the website of their counsel's alter ego, and press releases and news articles discussing this case and/or plaintiffs' characterizations of FEI's business. Ex. 6, Simpson Decl. ¶¶ 2-3. The exacting nature of FEI's factual investigation is demonstrated by the Annotated Counterclaim, which shows that each and every factual allegation in the Counterclaim is supported by documentary, testimonial or other evidence. See Ex. 1, Annotated RICO CC. The claim was deliberately drafted to accurately reflect the supporting evidence – no more and no less.

The legal investigation, moreover, included extensive research regarding the RICO statute and numerous RICO predicate acts, some of which were not ultimately included in the claim; discussions with various firm attorneys (including attorneys who have handled RICO claims, who have published writings on RICO, and/or practice tax law); the preparation of several memoranda regarding the RICO statute and the underlying predicate acts and their application to the facts; the review of those memoranda and the underlying case law by multiple attorneys; the preparation of several drafts of the counterclaim; the review of the counterclaim by multiple attorneys (including attorneys who are not counsel of record in this case, one of whom is a member of the law firm's Professional Responsibility Committee); and multiple meetings of multiple attorneys to discuss the application of the facts to the law and comment on the

counterclaim.[4] Ex. 6, Simpson Decl. ¶ 4. Therefore, plaintiffs' argument that FEI's allegations are akin to cases such as Allen v. Utley, 129 F.R.D. 1 (D.D.C. 1990) – in which the plaintiff alleged, without even reviewing the governing contract, wrongful death and breach of contract simply because a woman passed away shortly after the defendant bank dishonored her $20 check – makes a mockery of this case and underscores that plaintiffs, not FEI, fail to comprehend the seriousness of FEI's claim and the plethora of facts and legal authority in support thereof.

Ironically, the time spent by FEI's counsel in analyzing the facts and law has been seized upon by plaintiffs as evidence of a purported "delay" by FEI in moving for leave to amend to assert the Counterclaim. Pl. Opp. to Mot. for Leave to Amend (3/30/07) at 37-44. As has been explained many times before (see FEI's Mot. to Compel Documents From WAP (9/21/06) at 13-17; FEI's Reply Supporting Mot. for Leave to Amend (4/27/07) at 3-7), the story started to reveal itself only after WAP produced documents in the summer of 2006 and when Rider was deposed in October 2006, Ex. 3, ESA Action Payment Timeline.[5] Once those revelations began to surface, it took time to analyze their legal significance. FEI and its counsel did not leap to the conclusion that plaintiffs had violated RICO, but once it became clear that such was the case, FEI prepared and submitted its claim for relief just as any aggrieved party would do. Unlike most Rule 11 cases in which the pre-filing inquiry is hasty or non-existent, plaintiffs have

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[4] FEI will provide whatever further detail regarding its pre-filing investigation that the Court deems necessary to consider for *in camera* review. See Fed. R. Civ. P. 11 advisory committee note (Rule 11 "does not require a party or an attorney to disclose privileged communications or work product in order to show that the signing of the pleading, motion, or other paper is substantially justified. The provisions of Rule 26(c), including appropriate orders after *in camera* inspection by the court, remain available to protect a party claiming privilege or work product protection."); see also Int'l Bus. Counselors v. The Bank of Ikeda, No. 89-8373, 1991 U.S. Dist. LEXIS 4112, at *3-4 (S.D.N.Y. Apr. 3, 1991) (granting request for *in camera* examination of privileged documents in connection with Rule 11 motion).

[5] Attached hereto as Exhibit 3 is a timeline of each and every payment from the organizational plaintiffs to MGC and/or WAP; from the organizational plaintiffs directly to Rider; and from MGC and/or WAP to Rider. The ESA Action Payment Timeline also tracks the date and source of production of the evidence underlying each and every payment to FEI, and shows very clearly that the details of the payment scheme only began to unravel on June 30, 2006 at the earliest.

accused FEI of the opposite: waiting ***too long*** to bring the RICO claims. Pl. Mem. at 5, 29-31; Pl. Opp. to Mot. for Leave to Amend at 37-44. Plaintiffs' blatant attempt to have it both ways further underscores that their Rule 11 motion is being pursued in bad faith.

II. FEI HAS A FACTUAL BASIS FOR EACH OF ITS ALLEGATIONS

Despite the overwhelming evidence gathered to date by FEI and attached hereto (which plaintiffs knew about before they filed their Rule 11 motion), plaintiffs insist that FEI's proposed RICO claims are lacking "any evidentiary support whatsoever," Pl. Mem. at 1, or are "factually baseless," id. at 2. These sweeping challenges are simply false and unsupportable. Plaintiffs do not deny that they have been Rider's sole source of income for years. Nor do they deny that a large portion of the payments to Rider went through an entity controlled and dominated by plaintiffs' own lawyers. Plaintiffs, moreover, do not deny that witnesses other than Rider have been paid in connection with this lawsuit.[6] Instead, plaintiffs contend that they have legitimate explanations for their payment scheme and false statements under oath. The fact that plaintiffs offer an alleged defense for their actions does not require FEI or the Court to accept it as true (particularly where the facts suggest otherwise) or make FEI's Counterclaim "baseless." While plaintiffs try to suggest otherwise, their different view of the evidence is merely an interpretive difference; none of plaintiffs' explanations provides a basis for FEI to abandon its claims on pain

[6] Plaintiffs chafe at, but do not deny, FEI's allegation that, upon information and belief, plaintiffs have made or agreed to make payments to other witnesses in the ESA Action. See Pl. Mem. at 5-6 & 10-11; RICO CC ¶ 121. FEI's allegation is based on the following documentary evidence: (1) an internet posting by a former FEI employee and former plaintiff in this case, Glenn Ewell, stating that PAWS (another former plaintiff) offered to pay him money for "turning [over] evidence against [R]ingling [B]ros.;" (2) an unsolicited e-mail to FEI from a former FEI employee, Frank Hagan, stating that PETA paid him money to give a false affidavit about FEI's treatment of its lions; and (3) documents from PETA evidencing payments to Hagan. Ex. 64, Documents Evidencing Potential Payments to Other FEI Employees. In addition to these documents, Hagan was deposed as a witness in this case at the behest of plaintiffs' counsel; plaintiffs' counsel has represented PETA; PETA has marshaled other ex-FEI employees who have provided affidavits in support of plaintiffs (Archele Hundley, Margaret Tom, and Robert Tom, Jr.); and plaintiffs evidently have provided discovery items in this case to PETA (*i.e.*, the birth video of elephant Ricardo, which FEI has produced nowhere but in this litigation but which showed up on the "circuses.com" website operated by PETA). All of this is more than sufficient "information and belief" to make the allegation that Rider may not be the only compensated and therefore, bribed, witness in this case.

of "sanctions." Plaintiffs' "defense" of their conduct has no legs in any event. For example, plaintiffs' argument that the Rider payments are not bribes really boils down to nothing more than an assertion that "they are not bribes because we say so." Plaintiffs offer no countervailing evidence. This "defense" would be woefully insufficient on the merits of the claim, let alone is it a basis for having the claimant "sanctioned."

Plaintiffs' arguments merely demonstrate that they and FEI have a disagreement about how the law should be applied to the facts at hand. That is the basis for a lawsuit to be resolved by the trier of fact; it is not the basis for a Rule 11 violation. United States v. Excellair, Inc., 637 F. Supp. 1377, 1397 (D. Col. 1986) ("Rule 11 was not designed for the purpose of factual resolution appropriately left for trial.").

A. FEI HAS A FACTUAL BASIS FOR EACH OF THE ALLEGATIONS IN ITS COUNTERCLAIM

FEI has a basis for each and every factual allegation contained in its Counterclaim.[7] Ex. 1, Annotated RICO CC (citing, paragraph by paragraph, the documents and other evidence upon which each allegation is based). This is not a case, like those cited by plaintiffs, where there is "no factual basis for the [RICO] claims." Davis, 896 F. Supp. at 573; cf. id. (complaint "fell far short" of *prima facie* RICO claim where facts alleged did "not support any 'pattern of racketeering activity,' or the existence of an 'enterprise'"); Pelletier v. Zweifel, 921 F.2d 1465 (11th Cir. 1991) (plaintiff and his counsel knew RICO claim had no factual basis but filed complaint anyway); Stone v. Int'l Broth. of Teamsters, Nos. 87-7216, 88-7005, 88-7053, 1988 U.S. App. LEXIS 18809, at *5 (D.C. Cir. Dec. 30, 1988) (plaintiff's alleged RICO injury

[7] Plaintiffs also (incorrectly) contend that FEI's unclean hands defense violates Rule 11, yet only cursorily reference the defense in their memorandum. See Pl. Mem. at 1, 2, 5, 11, 42, 44. Because FEI's defense and counterclaim are premised upon the same misconduct by plaintiffs and the same evidence, the facts and exhibits set forth in this Opposition equally support FEI's defense and its counterclaim. As explained herein, FEI has a factual basis for its RICO allegations. It, therefore, by definition, also has a factual basis for its unclean hands defense, which requires only a showing of improper (instead of illegal) conduct by plaintiffs.

"belied" by his own deposition testimony); Pigford v. Veneman, 215 F.R.D. 2, 4 (D.D.C. 2003) (plaintiffs failed to offer "any evidence" of claim of racism and Court found nothing in the record supporting such a charge); Barlow v. McLeod, 666 F. Supp. 222, 229 (D.D.C. 1986) (no factual basis for bringing RICO action "strongly suggest[ed]" where complaint and summary judgment opposition "woefully lacking in details"). Nor can it be said that the Counterclaim is premised on "blatantly false statements." Pl. Mem. at 10. Although plaintiffs baldly assert otherwise, they fail to identify a single factual allegation in the Counterclaim that is demonstrably false. Cf. S.E.C. v. Loving Spirit Found., Inc., 392 F.3d 486, 496 (D.C. Cir. 2004) ("obvious falsehoods" submitted in briefing and in a "good faith" affidavit).

Moreover, the Counterclaim does not state unreasonable inferences as facts, as plaintiffs contend. Pl. Mem. at 8. In this respect, plaintiffs' repeated citation to Lucas v. Spellings, 408 F. Supp. 2d 8 (D.D.C. 2006), is flawed. In Lucas, the plaintiff's counsel, in the context of an opposition to a motion for summary judgment and a statement of "undisputed facts" in support thereof: "(1) t[old] a judge that it [was] undisputed that the incumbent received[] interview questions in advance when what [was] undisputed [was] merely that one individual overheard the incumbent thanking another individual for information; (2) ke[pt] from the judge the inconsistencies in [his] client's testimony as to a crucial fact; and (3) ke[pt] from the judge the fact that a witness excised from the declaration the very words that [plaintiffs' counsel] attribute[d] to her." Id. at 25-26. Instead of arguing whether genuine issues of material fact existed, the plaintiff's counsel drew impermissible inferences to state disputed facts as "truths." See id. at 16. Indeed, the court found that some of the statements made by plaintiff's counsel were "unquestionably" false. Id. at 15.

FEI's allegations made in connection with the Counterclaim contain no such "unquestionably" false statements or even confusing distinctions between facts and inferences, as in Lucas. Plaintiffs argue that the existence of their media campaign (assuming its legitimacy) by definition negates any valid RICO claim, and they thereby conclude that any allegation by FEI to the contrary is an unsupported inference. Plaintiffs, however, are not quibbling with a fact that is capable of verification by reading an exhibit, as was the case in Lucas. Instead, plaintiffs disagree with FEI's application of the law to the facts as pled. This is not a proper basis for Rule 11 sanctions.[8] Indeed, it would not even be a proper basis for dismissing the claim under Rule 12(b)(6).

In sharp contrast to Lucas, FEI's Counterclaim sets forth the details of the alleged payment and cover-up schemes, such as communications between the plaintiffs and WAP regarding the payments and how the payments were handed off from the organizational plaintiffs to WAP and from WAP to Rider, and draws legal conclusions thereon; all of the allegations of fact are supported by testimonial and documentary evidence produced in this action. See Ex. 1, Annotated RICO CC (documenting the basis for each and every allegation). It is telling that plaintiffs have not identified a single paragraph or a single phrase within FEI's Counterclaim that they allege is false. Plaintiffs object, not to the factual basis of the counterclaim, but to the conclusions that FEI has drawn from the facts. That plaintiffs disagree with FEI is not a basis for sanctions; it is a basis to proceed with the lawsuit. Nonetheless an examination of the factual basis for FEI's counterclaims clearly establishes that FEI's allegations are well-grounded in fact and exceed Rule 11's requirements.

[8] Notably, plaintiffs' Motion does not contend that FEI's allegations of mail and/or wire fraud in violation of 18 U.S.C. §§ 1341, 1343 violate Rule 11. Moreover, FEI's allegation that AWI committed obstruction of justice in violation of 18 U.S.C. § 1503(a) also is not challenged.

1. FEI's Allegations of Bribery/Illegal Gratuities Are Supported by Documents and Sworn Testimony Produced in the ESA Action[9]

FEI has more than an ample factual basis to allege that Rider has received bribes and/or illegal gratuity payments from his co-plaintiffs and WAP. As discussed below, the payments to Rider exceed $150,000 and represent his sole source of income for the last seven years. Plaintiffs themselves have inextricably linked the payments to this lawsuit. Not only have they solicited funding for such payments under the auspices of raising money to pay for this lawsuit, they have stated in writing that the money being funneled through WAP is intended to support Rider's work on this litigation. Although plaintiffs now attempt to explain away the payments to Rider as reimbursements for his alleged "media" work, their own conduct over the last seven years belies their defense and supports FEI's allegations. Plaintiffs have hid from FEI responsive documents and information that would disclose the extent and purpose of the payments. Plaintiffs, moreover, have not disclosed all of the payments to the IRS and have used an alleged 501(c)(3) organization set up by counsel to further disguise them.[10] These facts alone demonstrate that, from their inception, the payments were set up to be hard to trace back to the payors and to be hidden from or misidentified to the outside world – hardly the model of a legitimate payment mechanism.

That the payments bear no relation to their allegedly "proper" purpose further supports FEI's allegations. Rider, for example, receives $500 per week regardless of whether he conducts any "media" work at all. The payments to him can hardly be considered reimbursements.

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[9] Since plaintiffs contend that their alleged "media" campaign is a defense to FEI's allegations of bribery and/or illegal gratuities, FEI will address herein the factual basis for its allegations concerning "bribery, "illegal gratuity," and Rider's alleged "media and public education campaign," which are separately addressed in plaintiffs' Motion as Sections I(A)(1) and I(C).

[10] Although the organizational plaintiffs at times paid Rider directly, none of them has produced a W-2 or Form 1099 for those payments. Similarly, Rider did not file income tax returns from 2000 through 2006; although his counsel recently claimed that he has now done so, it was only ***after*** his tax evasion came out in his deposition. Pl. Surreply Regarding FEI's Mot. to Enforce (7/18/07) at 2-3.

Indeed, a jury could reasonably conclude that the payments to Rider are for his participation in this lawsuit. That Rider has asserted a "contrived injury" and "false testimony" in this litigation, see infra Sections II(A)(2) and II(A)(3), also further supports FEI's allegations. For all of these reasons, FEI has a factual basis to allege that the payments to Rider constitute bribery and/or illegal gratuity payments.[11]

a. The Evidence Demonstrates that Rider Has Received Substantial and Extensive Payments From His Co-Plaintiffs and WAP for the Duration of the ESA Action

Rider's only source of income since this lawsuit commenced more than seven years ago is the payments he has received from the original and/or current organizational plaintiffs and WAP. Ex. 73, Rider Dep. at 136; see also RICO CC ¶¶ 10-11, 15, 31-121. Contrary to plaintiffs' repeated attempts to downplay what has been given to Rider, the payments have been anything but "modest." See Mem. at 3. ***To date, Rider has received at least $150,000 in "grant" money.*** Exs. 54-55, WAP to Rider Ledgers (6/30/06) (3/30/07); Exs. 56-58, WAP Deposit Ledgers (9/29/05) (6/30/06) (3/30/07); Ex. 83, WAP Forms 1099 to Rider (2002-05); Ex. 86, AWI Form 990 (2004-05); Ex. 87, AWI Form 990 (2005-06); Ex. 76, ASPCA Dep. at 34-36, 224-27; Ex. 78, AWI Dep. at 138-39; Ex. 80, FFA Dep. at 156-59; Ex. 73, Rider Dep. at 147-53; see also RICO CC ¶¶ 31-121 (detailing the amount and manner of the payments to Rider). Rider, for example, received $23,940 and $33,600 from WAP alone in 2004 and 2005,

[11] Plaintiffs falsely insist that FEI's Counterclaim is based on the following (conveniently over-simplified) 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." Pl. Mem. at 14. Plaintiffs' syllogism, however, omits crucial allegations in the Counterclaim, not the least of which are the facts that Rider's only funding comes from plaintiffs; he has submitted false and conflicting testimony in this case and other sworn contexts; he has spoliated evidence relating to the payments; he has tendered a false interrogatory answer in response to a question about the payments; and the allegations he made to obtain the judicial ruling that he has standing were untrue when he made them. All of these matters are discussed herein.

respectively.[12] Ex. 83, WAP Forms 1099 to Rider (2004-05). Rider testified that he continues to receive at least $500 per week from WAP. Ex. 73, Rider Dep. at 147. Indeed, Rider is being paid more by his co-plaintiffs and WAP than he was paid by FEI to perform legitimate work as a "barn man." Moreover, whether or not the payments are "modest" by some measure, Rider is totally beholden financially to the organizational plaintiffs.

Plaintiffs do not deny that Rider has received this money, nor do they explain how FEI's allegation that these payments were made is "baseless." Instead, they argue that that FEI's bribery and illegal gratuity payment allegations "fl[y] in the face of the chronology of the case" because, as plaintiffs assert, FEI's Counterclaim alleges that the pattern of racketeering began on or about May 2001, almost one year after the original Complaint was filed in the ESA Action. Pl. Mem. at 14, 16, 19. Plaintiffs' argument, however, blatantly ignores RICO CC ¶ 32, which specifically alleges that Rider's livelihood was funded by a former organizational plaintiff until that plaintiff withdrew from this litigation. RICO CC ¶ 32. It is indisputable that Rider was receiving "grant" money and free housing from former plaintiff PAWS from March 2000, before this lawsuit was filed, until PAWS withdrew from the case and Rider was forced to terminate his "relationship" with PAWS in May 2001. Ex. 73, Rider Dep. at 204-11. Upon PAWS's withdrawal from this lawsuit, Rider "quit" his association with that organization so that he could continue as a plaintiff in the ESA Action. Ex. 8, Rider Letter to PAWS (5/14/01). It was then

[12] Plaintiffs' assertion that the funding amounts to "less than $20,000 a year," therefore, is simply untrue. See Pl. Mem. at 27-28. The number itself contradicts plaintiffs' previous representation to this Court that "Mr. Rider has received an average of less than $17,000 a year for his media and public education work." Pl. Opp. to Mot. for Leave to Amend (3/30/07) at 26 n.24. Plaintiffs continually change their representations of how much Rider has been paid every time FEI learns about additional payments that were made. Compare WAP's Opp. to Mot. to Compel (9/21/06) (stating that payment to Rider averaged $17,000 per year after FEI alleged in its Motion that the total payments it knew of exceeded $100,000) with Pl. Mem. at 27-28 (stating that the payments to Rider averaged $20,000 per year now that FEI has evidence of payments approximating $150,000). Moreover, during some years, Rider has received much more than this average figure. Ex. 83, WAP Forms 1099 to Rider (2005) (more than $33,000 in "non-employee compensation" to Rider). In any event, the amount of a bribe or illegal gratuity is irrelevant as to its illegality. It is a crime to provide a witness with, and for a witness to accept, "***anything of value***." 18 U.S.C. § 201(b)(3) & (b)(4), § 201(c)(2) & (c)(3) (emphasis added).

that the remaining organizational plaintiffs took over the task of paying Rider. Ex. 7, Weisberg E-mail to Hawk (5/7/01) (Rider "wanted to leave PAWS … to ensure he would not be taken off the suit. In order to follow the circus he cannot be employed. To pay his travel expenses for the next few months both AWI and The Fund (and us, by Nancy) have agreed to pay $1,000 each to cover months of on the road expenses."); see also RICO CC ¶¶ 32-33, 38-121.

FEI has a factual basis for its allegations of bribery and illegal gratuity given that (a) when this lawsuit started, Rider was receiving money from one of the organizational plaintiffs' (b) when that plaintiff withdrew from the litigation, the other organizations assumed responsibility for making the payments to Rider; and (c) the payments have continued at all times from that date forward. FEI's allegations are further supported, moreover, by the language used by plaintiffs themselves in describing the purpose of, and circumstances surrounding, these payments. See Ex. 8, Rider Letter to PAWS (5/14/01); Ex. 7, Weisberg E-mail to Hawk (5/7/01). FEI, therefore, has a factual basis to allege that Rider has received substantial payments from one or more of the organizational plaintiffs at all times since this lawsuit was filed.

b. The Evidence Demonstrates That Plaintiffs Have Sought to Conceal the Purpose of the Payments and the Underlying Documentation

FEI has a factual basis to allege that the payments to Rider were for an improper purpose. If they were not, one would expect that plaintiffs would be able to consistently articulate the allegedly proper purpose and would not have actively sought to hide from FEI, the Court, the IRS and/or others the documents and information relating to the payments.[13] Yet, plaintiffs have

[13] Plaintiffs and WAP have characterized the "funding" to Rider as "grants," which is the basis upon which Rider claimed he did not have to file tax returns (a position that he evidently has now abandoned). See RICO CC ¶¶ 17, 62-67, 73. Only after FEI filed its Counterclaim in February 2007 did Rider admit that he was required to, but did not, file tax returns for the years 1998-2006. Ex. 74, Rider Decl. ¶¶ 2-3. It is unclear who informed Rider that

done precisely the opposite. They have consistently revised the alleged purpose for which the payments have been solicited and/or given and they have consistently hid the underlying documentation.

While plaintiffs now characterize the payments to Rider as a "funding arrangement," Pl. Mem. at 38, they previously have attempted to hide the payments by calling them, at various times, "donations," "contributions," "non-employee compensation," and, most frequently, "grants." See, e.g., Exs. 56-57, WAP Deposit Ledgers (9/29/05) (6/30/06); Ex. 83, WAP Forms 1099 to Rider; see also RICO CC ¶¶ 64-65, 73, 84, 93, 102, 110. Moreover, the purpose of the "grants"/"donations"/"contributions"/"non-employee compensation" according to plaintiffs has continuously evolved. At various times, plaintiffs have represented that the payments were for "media"/"public education"/"PR efforts"/"Ringling Brother and Barnum & Bailey Case." See, e.g., Exs. 56-57, WAP Deposit Ledgers (9/29/05) (6/30/06); Ex. 83, WAP Forms 1099 to Rider; Ex. 84, WAP Forms 990; Ex. 43, API Letter to WAP and Payment Record (4/21/06); Ex. 48, API Letter to WAP and Payment Record (7/20/06); Ex. 54, API Letter to WAP and Payment Record (1/3/07); see also RICO CC ¶¶ 64-65.

FEI's allegation that the "grants"/"donations"/"contributions"/"non-employee compensation" are actually bribes and/or illegal gratuities for purposes of this lawsuit is even further supported by the deceiving manner in which the organizations and their counsel have raised money for Rider. Plaintiffs, for example, have raised money for Rider's "media" work by implying to prospective donors that the money would be used to pay the costs of this lawsuit, when in fact, the funds raised were actually going to "provide additional funding for Tom Rider

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the payments to him were "grants," but that very terminology is the basis upon which Rider now defends his perjured response to FEI's Interrogatory No. 24 and his failure to file tax returns for several years. Both of his concealments, however, furthered plaintiffs' cause of hiding the payments from others.

to continue his outreach." Compare Ex. 35, Fundraiser Invitation with Ex. 76, ASPCA Dep. at 205 & 210; see also RICO CC ¶¶ 122-26. Plaintiffs' counsel, herself, has conflated the reasons for which plaintiffs appear to be raising money. In an e-mail to the organizational plaintiffs, counsel solicited ideas to "raise more funds" for Rider – that could be "contributed" to WAP – and noted that she was "personally very impressed with . . . [Rider's] total commitment to ***the lawsuit***." Ex. 16, Meyer E-mail to Org. Pl. (11/5/03) (emphasis added); see also RICO CC ¶ 120.

Not only have plaintiffs raised money for Rider by telling donors it would be used for this lawsuit, the documents exchanged directly between the organizational plaintiffs and WAP further support FEI's allegation that the payments are bribes and/or illegal gratuities. Two of the organizations have specifically referenced Rider's participation in this case in letters enclosing payments to WAP. See Ex. 10, ASPCA Letter to WAP (12/21/01) (enclosing grant that was intended to "assist[] Tom's work on the Ringling Brothers' circus tour ***and litigation***" (emphasis added); Ex. 48, API Letter to WAP and Payment Record (7/20/06) (enclosing grant "towards ***support of the 'Ringling Brothers and Barnum & Bailey Case'***") (emphasis added). One of the organizations, moreover, created an internal document linking the payments to Rider to his participation in this case. Ex. 7, Weisberg E-mail to Hawk (5/7/01) (stating that Rider "had wanted to leave PAWS for a while . . . to ensure he would not be taken off the suit" and that the three organizational plaintiffs at that time (ASPCA, AWI and FFA) agreed to pay $1,000 each to cover his travel expenses for two months). A jury could reasonably conclude that the money therefore was paid to keep Rider in "the suit." This evidence, which plaintiffs cannot dispute, is a sufficient factual basis for FEI's allegations that the payments to Rider are connected to this lawsuit.

That connection is confirmed by other documents and actions by plaintiffs. For example, after FEI filed its motion to compel against WAP in September 2006 (where FEI explained for the first time that the recently discovered payments to Rider were extensive and potentially corrupt), API conspicuously changed the way it described these ongoing payments in its letters to WAP. Suddenly, they were not for the "Ringling Brothers and Barnum & Bailey Case," they were for ***"Ringling Brothers and Barnum & Bailey PR efforts."*** Ex. 43, API Letter to WAP and Payment Record (4/21/06); Ex. 48, API Letter to WAP and Payment Record (7/20/06) (emphasis added); see also RICO CC ¶¶ 110 & 136. Plaintiffs, moreover, have claimed the attorney-client privilege for communications amongst themselves relating to the organizations' payments to Rider. Ex. 76, ASPCA Dep. at 80. Plaintiffs' obscure privilege assertion, which implies that these payments relate to this litigation, further support FEI's allegations. Taken together with the fact that Rider's testimony has changed over time in a way that better suits plaintiffs' case and their campaign against FEI, see infra Section II(A)(3) & Ex. 4, Rider's Evolving Story, a jury could reasonably conclude that the money was paid to Rider for his testimony as a witness. In light of all of these documents and other evidence, FEI has more than an ample factual basis to allege that the payments to Rider constitute "bribery" and/or "illegal gratuity" payments to a witness.

c. The Evidence Demonstrates that the Payments Have No Relation to Their Alleged Purpose – Rider's Alleged "Media" Campaign

Plaintiffs' argument that the payments to Rider are solely for the purpose of an alleged "media" campaign against FEI is an issue for the trier of fact to resolve, not an issue upon which to impose Rule 11 sanctions. See, e.g., Pl. Mem. at 3-4, 8, 16, 26-27, 29, 30. Even if it were now time to address the merits, plaintiffs' argument ignores copious documentary and testimonial evidence already produced in the ESA Action which demonstrates that the payments

to Rider have little, if any, relation to Rider's alleged "media" campaign. Contrary to plaintiffs' claim that the payments to Rider are for Rider's expenses, there is no correlation between Rider's actual expenses and the money paid to him. While Rider apparently submits some receipts to WAP, those receipts do not begin to account for the money he has received from his co-plaintiffs and WAP. Compare Ex. 62, Rider's Receipts with Ex. 57, WAP to Rider Ledger (6/30/06). Moreover, Rider's receipts document that the payments and/or "funding" largely support Rider's livelihood and not "media" expenses. Among other things, Rider has used his "media" "grants" to buy clothes, cat food, cat toys, "Alien v. Predator" the movie, tabloids, magazines, film, birch beer, Krispy Kreme donuts, smoked clams, candles, the New York Post, cooked shrimp, videos and DVDs. Ex. 62, Rider's Receipts; see also RICO CC ¶ 65. This is not a reimbursement for expenses; it is a systematic series of payments, which happen to be Rider's sole source of income.

Rider, moreover, receives $500 per week regardless of what expenses he actually incurs and what "media" work he actually performs. Ex. 73, Rider Dep. at 147; Exs. 54-55, WAP to Rider Ledgers (6/30/06) (3/30/07). Rider, for example, receives $500 per week even when he is not conducting any "media" work. Compare Ex. 71, Rider Interrog. Resp. Nos. 4-5 (swearing that he conducted no alleged "media" or "public education" work from November 2002 to June 2003 or from November 2003 through July 2004) with Ex. 76, ASPCA Dep. at 34-36, 224-27 (swearing that ASPCA was paying Rider thousands of dollars directly and/or through WAP during the 2002-2003 time period) and Ex. 57, WAP to Rider Ledger (6/30/06) (demonstrating payments from WAP to Rider in the 2003-2004 time period).[14] See also Ex. 3, ESA Action Payment Timeline; Ex. 83, WAP Forms 1099 to Rider (2003-04); RICO CC ¶¶ 39, 43, 47-51,

[14] Rider did report certain "media" work to which he did not assign a specific date. Ex. 71, Rider Interrog. Resp. Nos. 4-5.

54-56, 75-79, 82-83.[15] A simple comparison of Rider's own discovery responses and documents produced in this case further supports FEI's allegations of an unlawful payment scheme.

Not only is Rider paid the same amount of money when he is allegedly performing "media" work as when he is not, he receives the same amount of money regardless of how much work he is allegedly performing. For example, Rider received roughly the same amount of money for "media" services performed in May 2005 – when he claims to have spoken with individuals at a rally and with three reporters – as he did in June 2005 – when he performed no "media" services – and August 2005 – when he claims to have spoken with individuals at a rally and with one reporter:

Month	**Cash Payments from WAP to Rider** Source: Ex. 57, WAP to Rider Ledger (6/30/06)	**Total Cash Payments** Source: Ex. 57, WAP to Rider Ledger (6/30/06)	**Description of "Media" Work** Source: Ex. 71, Rider Interrog. Resp. Nos. 4-5
May	5/04/05: $600 5/09/05: $500 5/13/05: $500 5/19/05: $500 5/31/05: $500	$2600	Hartford, CT: Spoke to Karen Laski and some individuals at a rally there; Talked to reporter for Fox and NBC news; talked to reporter at the Boston Herald
June	6/06/05: $500 6/13/05: $500 6/20/05: $500 6/23/05: $500 6/29/05: $500	$2500	NONE
August	8/02/05: $500 8/08/05: $500 8/15/05: $500 8/22/05: $500 8/29/05: $500	$2500	San Diego, CA: Talked to reporter for Fox TV; spoke to people who were demonstrating against the circus

[15] In addition to these two examples, there have been other periods of time where Rider reported no "media" work in his answer to Interrogatory No. 5 but during which he received regular payments from WAP: March - April 2005; November - December 2006; February - March 2006; November - December 2006. Ex. 3, ESA Action Payment Timeline; Ex. 71, Rider Interrog. Resp. Nos. 4-5; Ex. 75, Rider Supp. Interrog. Resp. Nos. 4-5; Exs. 54-55, WAP to Rider Ledgers (6/30/06) (3/30/07); Ex. 83, WAP Forms 1099 to Rider (2005-06).

FEI has more than an ample factual basis to allege that, at a minimum, some of the payments to Rider are not for legitimate "media" expenses. Plaintiffs' attempt to hide behind their allegedly "proper" purpose for paying Rider gets them nowhere. The law is clear that illegal activity may have occurred even where there is some legal or legitimate activity. See United States v. Biaggi, 909 F.2d 662, 683 (2d Cir. 1990) ("A valid purpose that partially motivates a transaction does not insulate participants in an unlawful transaction from criminal liability."); United States v. Schaffer, 183 F.3d 833, 843 (D.C. Cir. 1999) ("[H]uman beings rarely act for a single purpose alone. Rather, activity is more typically multi-causal, and directed towards achieving several rather than a single ends. . . [The question is] whether the acts in question were substantially, or in large part, motivated by the requisite intent to influence").

"[A] payment may be found to constitute a bribe [in violation of § 201(c)(2)] . . . where it is sought and paid for both lawful and unlawful purposes." Biaggi, 909 F.2d at 683. For example, in Biaggi, a jury was entitled to conclude that a payment to a law firm was in part a bribe to a U.S. Congressman and in part for legal services rendered, where the payment at issue: followed a prior extortionate demand by the Congressman, who had family ties to the law firm; the "bill" to the law firm was submitted one week after the need for the Congressman's political "services" became apparent; the bill was paid immediately after the governmental action on which the Congressman had assisted; and the bill "was not accompanied by normal law firm time records." Id. at 684. It is irrelevant, therefore, whether some of the payments to Rider have been for allegedly legitimate "media" work and/or expenses. A jury could find that the "funding" to Rider constitutes bribes and/or illegal gratuity payment because part – if not all – of the "funding" has been for an unlawful purpose: Rider's participation and testimony in the ESA Action. A jury also could reasonably conclude that the purportedly "legitimate" media work (in

which Rider is largely simply repeating his testimony as a court witness) is a cover for the improper payments.[16] The fact that Rider may have participated in "some" legitimate media activity does not nullify the claim that there has been an illegal payment scheme.[17]

d. Plaintiffs' Insistence That FEI Lacks a Factual Basis for Its Allegations Just Because Plaintiffs Have Not Admitted to Bribing Rider is Legally Incorrect

Plaintiffs cite multiple Rule 11 decisions (and some that have nothing to do with Rule 11)[18] in which courts found claims to be frivolous. However, no such case even comes close to the factual allegations and corresponding evidentiary basis presented by FEI. Cf. Pelletier, 921

[16] Nor can plaintiffs justify their payments as permissible witness payments or as permissible expenses paid by attorneys for a party. The only "witness payments" permitted under the federal bribery and anti-gratuity statutes are those that compensate a witness for costs of travel and time lost from work. 18 U.S.C. § 201(d). The payments to Rider, however, cannot be for "time lost" in connection with Rider's participation in the ESA Action given that Rider admittedly has no job from which he has lost time and compensation. See Ex. 73, Rider Dep. at 123-28, 136-37, 147-48; Pl. Opp. to Mot. for Leave to Amend at 24 n.20 ("it is Mr. Rider's position that he is not receiving any 'such compensation' as would be true if he were an employee of one of the groups") (citation omitted). Plaintiffs and WAP, moreover, cannot justify their payments to Rider under the auspices of the D.C. Rules of Professional Conduct. The payments to Rider are neither "expenses of the litigation" nor "other financial assistance which is reasonably necessary to permit the client to institute or maintain the litigation." Rule 1.8 (d)(1) & (2). Lawyers are expressly forbidden from "offer[ing] an inducement to a witness that is prohibited by law," including payments prohibited by the federal bribery and anti-gratuity statutes. Rule 3.4(d). In other words, under existing precedent and ethical rules, plaintiffs' conduct simply is not justified.

[17] Plaintiffs themselves have apparently become confused about which payments to Rider relate to his alleged "media" work and which relate to legitimate litigation expenses permissible under § 201(d) and the ethical rules. For example, in connection with Rider's stay in Washington, D.C. for plaintiffs' deposition of him, WAP – not MGC – made a hotel reservation for Rider and reported to FEI that the reservation was "in connection with his public education campaign." Ex. 96, Trister Letter to Gasper (4/24/07) ¶ 5 (emphasis added). Leslie Mink, the office manager of MGC, who also "assists WAP with bookkeeping activities" id. ¶ 2, made that reservation. This is precisely the type of expense that ***counsel*** can pay on behalf of a witness. If plaintiffs themselves cannot tell the payments apart from each other, FEI cannot be said to have frivolously alleged that the payments to Rider are for improper purposes in violation of Rule 11. Ultimately, it is up to a jury to determine whether, and what portion of, those payments were for an unlawful purpose.

[18] Plaintiffs, for example, rely upon Urban v. United Nations, 768 F.2d 1497, 1500 (D.C. Cir. 1985), for the proposition that a court may "employ injunctive remedies to protect the integrity of the courts and the orderly and expeditious administration of justice." Pl. Mem. at 11, 44. Yet, that case did not involve Rule 11; it involved a Court order enjoining the plaintiff from filing any more civil actions in federal court without first obtaining leave of court. In dismissing the plaintiff's case, the court stated that the complaint, unlike here, set forth claims that "each share common attributes: irrationality, incoherence, and a complete lack of any substantive allegations over which this court might maintain jurisdiction." Urban, 768 F.2d at 1499. The court noted further that: "For example, in his first visit to this court, Mr. Urban sought an emergency stay of the second inauguration of President Reagan. Revealing himself at that time to be a self-proclaimed presidential candidate, Mr. Urban cited his residency in the Milkyway Galaxy as a jurisdictional basis for that action." Id.

F.2d at 1515-16 (plaintiff's complaint had no factual basis where plaintiff knew that defendant had not defrauded him, but pleaded fraudulent inducement anyway); Davis, 896 F. Supp. at 573 (plaintiff "failed to conduct a reasonable investigation of either fact or law"); Barlow, 666 F. Supp. at 222 (at summary judgment stage, RICO claim lacked even the slightest factual support); see also Scheck v. Gen. Elec. Corp., No. 91-1594, 1992 U.S. Dist. LEXIS 134, at *4 (D.D.C. Jan. 7, 1992) (refusing to award Rule 11 sanctions against pro se plaintiff even though complaint failed to meet nearly every legal requirement under RICO). If plaintiffs and WAP can prove that the payments to Rider bear a relation to his alleged "media" work and not to his participation in this lawsuit, it would behoove them to comply with FEI's discovery requests and stop hiding the underlying documents. If the documents at issue would prove FEI wrong, one would not expect Rider, the organizational plaintiffs, and WAP to put up such a fight about producing documents relating to the elaborate payment scheme they have devised.[19]

Nonetheless, plaintiffs argue that Rule 11 sanctions are appropriate because FEI has not alleged direct evidence of bribery in its Counterclaim. Pl. Mem. at 14 (the 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***") (emphases added). Plaintiffs' argument is grossly misconceived. Even in a criminal case where the charge of bribery or illegal gratuity must be proven beyond a reasonable doubt,

[19] Plaintiffs incorrectly assume that FEI's "cease and desist" letter is inconsistent with the allegations in its Counterclaim. See Pl. Mem. at 29 n.15. Rider's actions are in fact challenged by FEI's Motion to Enforce the Court's Order of September 26, 2005. See FEI's Reply Supporting Mot. to Enforce (7/3/07) at 10-11. Rider was omitted from the original motion because FEI suspected, but did not have direct evidence, of Rider's violation. After the motion was filed, a Rider interview was broadcast in which he improperly exhibited and read from discovery material, id. at 3-4, 10-11 & Exs. 3-4 thereto – facts that plaintiffs' opposition to the motion concealed from the Court. Plaintiffs also incorrectly assume that FEI has argued that Rider must "'cease and desist' from 'making statements to the press' concerning Ringling Bros. mistreatment of elephants." Pl. Mem. at 28-29. FEI has argued only that Rider must cease and desist from distributing to the media and/or discussing with it the documents produced in discovery by FEI. All of this has been pointed out in previous filings by FEI with the Court that plaintiffs ignore. FEI's Reply Supporting Mot. to Enforce (7/3/07) at 3, 10-11.

circumstantial evidence is sufficient.[20] If an admission of bribery is not needed to convict a criminal defendant, it clearly is not required to plead a civil RICO claim.

FEI has more than an ample factual basis to allege that the payments to Rider constitute bribes and/or illegal gratuities. For the last seven years, Rider's sole source of income has been supplied by his co-plaintiffs and/or WAP. That income, which far exceeds his salary at FEI, has been hidden from this Court, FEI, and even the IRS. Not only have plaintiffs failed to consistently articulate a legitimate purpose for the payments, their most recent explanation (that the payments are reimbursements for Rider's "media" campaign) is belied by the fact that he has constantly received the same amount of money regardless of what expenses he incurs and by the fact that they have attached the payments to correspondence indicating that they are intended for this litigation. Those facts, taken together with Rider's contrived injury and false testimony, provide a sufficient factual basis for FEI to allege that the payments to Rider are unlawful.

2. FEI's Allegations of Rider's Contrived Injury Are Supported by Documents and Sworn Testimony Produced in the ESA Action

FEI's allegations regarding Rider's contrived injury also are supported by plaintiffs' own documents and sworn testimony. FEI's Counterclaim alleges that Rider's standing allegations are "contrived" because: (a) Rider's allegations of aesthetic injury are the only basis upon which plaintiffs have standing; (b) Rider only made these allegations while he was receiving "funding" from one or more co-plaintiffs; and (c) Rider's standing allegations were intentionally

[20] See United States v. Williams, 216 F.3d 1099, 1103 (D.C. Cir. 2000) (upholding a criminal conviction under § 201(b)(2) where the government only presented circumstantial evidence at trial) ("The sort of direct evidence [the defendant] thinks was needed was not needed. As the Supreme Court has said, 'direct evidence of a fact is not required. Circumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence.'") (quoting Michalic v. Cleveland Tankers, Inc., 364 U.S. 325, 330 (1960)); United States v. Schaffer, 183 F.3d 833, 843 (D.C. Cir. 1999) (stating that direct evidence is not necessary to support a criminal conviction under the federal anti-gratuity statute, § 201(c)) ("[I]t may be near impossible to establish the requisite mens rea through direct evidence. In the absence of any specific statement or other contemporaneous documentation of the defendant's subjective motivation, the trier of fact can do no more than ascribe an intent on the basis of the circumstances surrounding the defendant's actions.") (citations omitted), vacated and remanded as moot, 240 F.3d 35 (D.C. Cir. 2001).

misleading and/or false. Facts uncovered in the ESA Action not only support FEI's allegations of this contrived injury-in-fact, but also demonstrate that plaintiffs and their counsel willfully misled this Court and the D.C. Circuit.

a. FEI Has a Factual Basis to Allege That Rider's Injury Is Contrived Because It Is Essential to Plaintiffs' Case, It Was Only Alleged After He Began Receiving Payments from Co-Plaintiffs, And It Is Demonstrably False and/or Intentionally Misleading

Plaintiffs' standing depends entirely upon Rider. But for Rider's participation in this case, the organizational plaintiffs would be unable to pursue the ESA Action. Plaintiffs' argument to the contrary, see Pl. Mem. at 13 n.7, is wrong. This Court previously held that the organizational plaintiffs have neither an aesthetic injury nor an informational injury. Performing Animal Welfare Society v. Ringling Bros., No. 00-1641 (D.D.C. June 29, 2001) (slip op.) (Docket No. 20). On appeal, the D.C. Circuit opined only as to Rider's standing; therefore, this Court's holding that the organizational plaintiffs do not have standing remains the law of this case. ASPCA v. Ringling Bros., 317 F.3d 334, 338 (D.C. Cir. 2003). Without Rider, therefore, there would be no ESA Action – which provides the obvious motivation for the consistent funding he has received from his fellow plaintiffs.[21]

Not only is Rider essential to the ESA Action, his standing allegations were only made once he began receiving funding from the organizational plaintiffs. Contrary to plaintiffs' argument, FEI's racketeering allegations do not "fl[y] in the face of the chronology of this case." See Pl. Mem. at 16. As discussed above, Rider was on an organizational plaintiffs' payroll

[21] Plaintiffs argue that under Cary v. Hall, No. 05-4363, 2006 U.S. Dist. LEXIS 78573 (N.D. Cal. Sept. 30, 2006) – which was decided over six years after plaintiffs filed their original complaint in July 2000 – they have standing to sue based on their alleged "informational" injury. Pl. Mem. at 13 n.7. As previously explained to the Court, plaintiffs' analysis is flawed because that case addressed § 10(c) of the ESA and not § 9, which is the provision at issue in this case. See FEI's Reply Supporting Mot. for Leave to Amend (4/27/07) at 12 n.14. Moreover, as evidenced by Katherine Meyer's statements at a 2006 "animal law" symposium, discussed herein, it is apparent that plaintiffs knew that Rider was essential for standing at the time they filed the original complaint in July 2000. See 13 Animal L. 61, 74-75 (2006).

(PAWS) at the time that he made the standing allegations in the original complaint filed in July 2000. See RICO CC ¶¶ 32, 127. Rider, in fact, has received "funding" for the duration of the ESA Action which coincides with the same time frame for all of the statements under oath he has made about alleged elephant abuse, some which have now proven to be false.[22]

It also is now clear that Rider's standing allegations were ***intentionally misleading and/or false.*** Plaintiffs' Second Amended Complaint alleged that

> Mr. Rider stopped working in the ***circus community*** because he could no longer tolerate the way the elephants were treated ***by defendants.***
>
> Mr. Rider ***would very much like to visit the elephants in defendants' possession*** so that he can continue his personal relationship with them, and enjoy observing them. However, he is ***unable to do so*** without suffering more aesthetic and emotional injury, unless and until these animals are placed in a different setting, or are otherwise no longer routinely beaten, chained for long periods of time, and otherwise mistreated. ***If these animals were relocated to a sanctuary or other place where they were no longer mistreated, Mr. Rider would visit them as often as possible, and would seek a position that allow would him to work with his 'girls' again.***

Pls. Second Am. Compl. ¶¶ 21-22 (No. 00-1641, Docket No. 7, 8/11/00) (emphases added).

This Court subsequently relied on two aspects of Rider's misleading allegations that are now demonstrably false. For example, this Court relied on Rider's misleading allegation that he stopped working in the "circus community" because of "defendant['s]" treatment of its elephants. See Order (6/29/01) at 3 ("Rider alleges that he ceased working for defendant because he could no longer tolerate working in such an environment.") Rider's use of the vague term "circus community" and his reference to "defendants" treatment was intended to, and did,

[22] Rider was being paid by PAWS at the time he submitted his USDA affidavit and when USDA investigator Diane Ward wrote her Memorandum regarding Rider's Animal Welfare Act complaint in July 2000. See Pl. Mem. at 16. Ironically, while plaintiffs claim that USDA cannot be trusted to enforce the Animal Welfare Act against FEI, plaintiffs rely on a USDA employee to vouch for Rider's credibility.

mislead this Court into believing that Rider left FEI because of its elephant abuse, when in fact Rider left FEI to work for ***another*** circus. Ex. 73, Rider Dep. at 177-96.[23]

This Court also relied on Rider's allegation that he was precluded from visiting, or was otherwise unwilling to visit, the elephants because of FEI's alleged conduct. See Order (6/29/01) at 3, 6 (Rider "states that he wishes to visit and work with defendant's elephants again, but is precluded from doing so long as the alleged mistreatment of animals persists.") ("Plaintiff Rider admits that he has no intention of returning to the circus unless the elephants in question are transferred to an undetermined sanctuary or other setting."). That allegation, however, was demonstrably false when this Court granted FEI's motion to dismiss. What ***plaintiffs never told this Court*** was that, prior to the Court's ruling on FEI's Motion to Dismiss, ***Rider had actually gone back to see "his girls" while they were traveling with FEI's circus***. See Ex. 71, Rider Interrog. Resp. No. 17 (Rider stating under oath that he saw the elephants he knows, i.e., FEI's Blue Unit elephants, in Madison, Wisconsin in May 2001). Those facts were revealed only after the judicial standing decisions. Plaintiffs' reliance upon false allegations is not excused merely because this Court denied Rider standing, particularly because that ruling was later reversed by

[23] Not only did Rider leave FEI to work in another circus, he left specifically to work with individuals (Daniel Raffo and Graham Chipperfield) whom he believed treated elephants "inappropriately" when they worked with him at FEI, Ex. 73, Rider Dep. at 180-83. Indeed, Rider alleges that those individuals used bull hooks on the elephants in Europe and chained the elephants for "basically" the same amount of time as they did at FEI. Id. at 183-87, 197. This testimony supports FEI's claim that Rider's alleged injury is contrived. There simply is no evidence supporting Rider's allegation that he quit the "circus community because he could no longer tolerate the way the elephants were treated by [FEI]." Rider's allegations, which were made only after his co-plaintiffs began paying him, were intentionally misleading.

Moreover, based on Rider's own conduct, there is a substantial issue of fact whether Rider even has an "aesthetic injury." FEI does not dispute the point that humans can bond with elephants. See Pl. Mem. at 15-16. Indeed, the human/elephant bond is one of the reasons plaintiffs' baseless claims of "abuse" are so deeply offensive to FEI employees who have devoted their lives to caring for the elephants. But it is highly questionable whether Rider really has such a bond. He claims he quit the Clyde Beatty-Cole Bros. Circus as a result of elephant abuse, and joined FEI's circus only to see allegedly the same thing. Yet he worked for FEI for 2.5 years only to leave that job to work for yet another group of alleged elephant abusers. And throughout this time frame, he never complained to anyone at USDA or any FEI executive despite having ample opportunity to do so. Ex. 73, Rider Dep. at 157-63, 183-87, 197, 202-04. Rider began to speak out about FEI's elephants only after he was paid to do so. These are not the actions of a man whose conduct is motivated by a bond with the elephants.

the D.C. Circuit on the basis of those very same allegations, which both Courts assumed to be true for purposes of FEI's motion to dismiss.

Like this Court, the D.C. Circuit relied upon Rider's intentionally misleading allegation regarding his work in the "circus community," see ASPCA, 317 F.3d at 335 & 337 ("Rider left his job at Ringling Bros. because of the mistreatment of the elephants.") ("We can be sure that the prospect of his working in the elephant barns again is nil."), as well as Rider's intentionally misleading allegation that he was unable to visit the elephants while the alleged abuse continued, see id. ("Rider would also like to visit the elephants, but is unwilling to do so because he would suffer 'aesthetic and emotional injury' from seeing the animals unless they are placed in a different setting or are no longer mistreated. . . . Rider says he became attached to the elephants when he worked with them and would like to 'visit' them again 'so that he can continue his personal relationship with them, and enjoy observing them.'"). Again, however, in stark contrast to his standing allegations, Rider had gone to visit FEI's Blue Unit elephants – not only prior to the D.C. Circuit's decision – but ***prior to plaintiffs' briefing and arguing this issue before the Circuit Court***. See Ex. 71, Rider's Interrog. Resp. No. 17 (Rider stating under oath that he saw the elephants he knows several times between November 2001 and the D.C. Circuit's decision in April 2003). Again, Rider did not reveal his elephant visits until after the case had been remanded from the D.C. Circuit – in September 2003 when a new complaint was filed, and in June 2004 when Rider answered interrogatories.

The D.C. Circuit, moreover, relied on a third allegation by Rider that became demonstrably false after this Court issued its opinion but before the parties briefed and argued the matter for the D.C. Circuit. By the time of the D.C. Circuit decision, three of the FEI elephants with whom Rider had allegedly bonded had been donated to a zoo or sanctuary where

Rider could visit them. Ex. 107, Elephant Studbook. Yet, despite plaintiffs' allegation that "[i]f these animals were relocated to a sanctuary or other place where they were no longer mistreated, Mr. Rider would visit them as often as possible, and would seek a position that allow would him to work with his 'girls' again," ***Rider (almost six years later) still has not gone to visit the two that were donated*** to the "sanctuary or other place where they [are allegedly] no longer mistreated."[24] See Pls. Sec. Am. Compl. ¶ 22. The sanctuary involved, PAWS, is where Rider once worked and from which he used to receive "grant" money; he, therefore, is personally familiar with the location of the PAWS sanctuary. Yet, Rider still has not gone to visit his "girls" there. Nor has he sought "a position that would allow him to work with his 'girls' again" at the PAWS sanctuary.[25] Id.

Notwithstanding that Rider's standing allegations were demonstrably false, ***plaintiffs never informed the D.C. Circuit of these developments***. The D.C. Circuit, believing these allegations to be true for purposes of FEI's motion to dismiss, held that Rider had standing and reinstated this lawsuit based on allegations that have since been proven intentionally false and/or misleading. Because Rider's standing allegations are essential to the existence of this case, because they were made only after he began receiving payments from his co-plaintiffs, and because they are demonstrably false and/or misleading, FEI has an ample factual basis for alleging that Rider's injury is "contrived."

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[24] Rider testified in October 2006 that he knows FEI donated one of the elephants with whom he worked, Rebecca, to the PAWS sanctuary but that he has not gone to visit her "because she is in a sanctuary." Ex. 73, Rider Dep. at 273 & 298. Even when Rider's counsel attempted to solicit an explanation from Rider as to why he has not gone to "visit" or "work with" Rebecca, Rider insisted that it was she "doesn't need me to go see her." Id. at 298. Similarly, in 2003, FEI donated to a zoo in Illinois another elephant (Sophie) with whom Rider used to work. Yet, Rider testified in October 2006 that he still had not gone to visit Sophie either. Only after being confronted on this subject at his deposition did Rider finally go visit the elephant – nearly four years after she was donated by FEI. Compare Ex. 73, Rider Dep. at 272-73 with Ex. 75, Rider Supp. Interrog. Resp. No. 17.

[25] Presumably, Rider could not work with "his girls" at the PAWS sanctuary and at the same time participate as a (paid) plaintiff in the ESA Action, which is precisely why Rider left PAWS to begin with in May 2001. Ex. 7, Weisberg E-mail to Hawk (5/7/01); Ex. 8, Rider Letter to PAWS (5/14/01).

b. FEI's Allegations of a Contrived Injury Are Further Supported by Plaintiffs' Abundant Efforts to Mislead the Court On That Very Subject

Rider's false standing allegations are no coincidence. Plaintiffs needed this Court and the D.C. Circuit to believe that Rider would like to visit or work with FEI's elephants again but that he could not do so as long as FEI's alleged abuse continued. Just six months before this lawsuit was filed, the Supreme Court held that a continuing injury-in-fact existed for Article III standing purposes where plaintiffs previously used a river and its environs for recreation, but had stopped doing so because of the defendant's alleged pollution. Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167 (2000). As plaintiffs' counsel Katherine Meyer explained at a symposium in 2006:

> In the Ringling Bros. case, our ***main argument*** was that ***Tom Rider*** had been a barn man for the elephants and had seen the mistreatment of the Asian elephants. . . . ***The trick for Rider was***, how do you show a continuing injury or a future injury, when the circus is going to argue that the plaintiff only has past injuries, and therefore, those injuries are not cognizable for Article III purposes?
>
> ***When [Laidlaw] was issued, we saw an opening for Rider to have standing***. What we alleged in that case, and will have no problem proving, is that Rider fell in love with the Asian elephants with whom he worked . . . He could not bear seeing them mistreated. He left the circus, because he could not take it anymore. He would like to go back and visit them and see them again, but he is in this position of having to make the choice to avoid going back to see them, because that is the only way he can avoid subjecting himself to more aesthetic injury. ***These are the kind of hoops through which we must jump; this is what you have to do to come up with these standing theories.***
>
> So we used [Laidlaw]. . . and ***came up with the novel argument*** that Rider was suffering Article III injury ***because he had to avoid going back to see his "girls,"*** as he calls them, whom he loved so much.

13 Animal L. 61, 74-75 (2006) (emphases added).[26] The problem with plaintiffs' "novel

[26] Meyer's statement emphasizes that plaintiffs knew that it was Rider's standing – as an individual with an alleged aesthetic injury, as opposed to an organizational plaintiff with an alleged informational injury – that was essential to bring the ESA Action. Plaintiffs' recent argument to the contrary, see Pl. Mem. at 13 n.7, is frivolous.

argument," however, is that it was premised upon false allegations of fact, which this Court and the D.C. Circuit were obligated to assume were true for purposes of FEI's motion to dismiss. See ASPCA, 317 F.3d at 336-338. Moreover, at the same symposium, Eric Glitzenstein, Rider's other lawyer, intimated that Rider's participation in this case is "functional" only, which further questions the veracity of Rider's standing allegations:

> ***[T]o me, it does not matter really who the plaintiff is, as long as you can bring a lawsuit and effectively accomplish the result you want***. I think animals may be different from human beings in at least one respect, which is that as long as their interests are being addressed, I do not think they care that much what their designation under the law is. I may get some disagreement on that, but to me it has to be an entirely functional test. Are you in fact accomplishing the result of reducing the cruel, inhumane treatment of animals, or are you not? ***And if John Doe is the one who is bringing the case, who cares?***

13 Animal L. 87, 106 (emphasis added).

Based solely on Rider's false allegations, plaintiffs and their counsel obtained what they sought: an opportunity to bring this case against FEI notwithstanding that no one has suffered a cognizable injury-in-fact. Even on remand, however, plaintiffs' efforts to mislead the Court have continued. Only after the D.C. Circuit granted plaintiffs the right to sue FEI did plaintiffs finally amend Rider's standing allegations to accurately reflect the facts that have come to light through discovery (but which were known to Rider when plaintiffs' standing was being contested). Specifically, when FEI moved to dismiss this lawsuit upon remand based on plaintiffs' failure to provide notice prior to filing their original complaint, this Court mooted that issue by requesting that plaintiffs initiate a new action by filing the same complaint revised only to address the notice issue. Ex. 90, ISC Transcript (9/25/03) at 9 ("You're going to file an amended complaint that extensively addresses this notice issue, and your complaint is identical to the complaint that's pending before the Court."). Plaintiffs, however, did ***not*** file an identical complaint, apparently understanding that doing so would necessarily include Rider's false standing allegations.

Therefore, the complaint for the new action (No. 03-2006) included an entirely ***new*** paragraph that directly contradicted the inaccuracies that were previously relied upon by this Court and the D.C. Circuit:

> ***Mr. Rider [] still makes efforts to see the animals, and he has been able to observe the elephants he knows,*** as well as other Ringling elephants, on several occasions during the last couple of years by going to the cities where the circus is performing. . . . ***Because of his love for these animals, Mr. Rider continues to visit them, and will continue to do so in the future,*** even though, each time he does so, he suffers more aesthetic injury.

Compl. ¶ 23 (emphasis added). Those allegations are quite different than the Laidlaw-driven allegations that supported plaintiffs' allegations of standing. And it was entirely misleading for plaintiffs to represent to the Court that their new complaint was "essentially identical" to the complaint filed in the previous action.[27] These circumstances further support the claim that Rider's alleged injury is "contrived." The case went forward on the basis of a claimed current injury-in-fact – said at the time to be the avoidance of further aesthetic injury in the manner of the Laidlaw plaintiffs. Plaintiffs' own pleadings, however, now admit that there has been no such avoidance of further aesthetic injury, i.e., that the original claim of injury-in-fact is untrue.

3. FEI's Allegations of Rider's Evolving Story and False Statements Are Supported by Documents and Sworn Testimony Produced in the ESA Action

The proposed RICO counterclaim rests, in part, on the predicate acts of bribery of, and illegal gratuity payments to, Rider. These predicate acts, in turn, arise from the money that plaintiffs paid Rider directly or through WAP and from Rider's multiple statements under oath and penalty of perjury that are false and/or were fashioned to suit the agenda of Rider's

[27] The Court opened the parties' next hearing by stating: "My understanding is that the complaint in Civil Action 03-2006 is essentially identical to the second amended complaint that was filed in 00-1641. Is that right?" Counsel for plaintiffs, Katherine Meyer, responded: "That's correct, your Honor." Based on that affirmation, the Court responded: "I'm inclined to dismiss Civil Action 00-1641 without prejudice, dismiss that case without prejudice to the prosecution of the new complaint that's pending in 03-2006. Certainly, they're identical complaints, and there's no need for two cases on this Court's docket." Ex. 91, Hearing Tr. (11/25/03) at 2-3.

benefactors or the context in which the statements were made. RICO CC ¶¶ 127-33, 179. Plaintiffs try to brush this off as "slight variations" in testimony that "would at most be fodder for defendants' [sic] cross examination at trial, rather than groundless accusations of criminal behavior." Pl. Mem. at 19. It is a lot worse than "slight variations."[28] On multiple occasions, Rider has given completely different accounts of the same incident, all of which were under oath and all of which occurred when he was accepting money from either the current organizational plaintiffs or PAWS. The examples that FEI alleged in the Counterclaim are merely the tip of the iceberg. Abundant evidence already has been produced in this case of Rider's constantly evolving story. Under penalty of perjury, Rider has given conflicting accounts of the same set of facts with respect to at least 30 incidents. Ex. 4, Rider's Evolving Story.[29] This has spanned a period of almost seven years and has included the following: Ex. 67, Rider PAWS Statement (3/25/00); Ex. 68, Rider Cong. Statement (6/13/00); Ex. 69, Rider USDA Aff. (7/20/00); Ex. 71, Rider Interrog. Resp. (6/9/04); Ex. 73, Rider Dep. (10/12/06); and Ex. 75, Rider Supp. Interrog. Resp. (1/30/07). As demonstrated below, plaintiffs' effort to side-step Rider's numerous false statements and his constantly shifting statement of the "facts," are to no avail.

a. Rider's False Statements Cannot Be Explained Away On The Ground That He Forgot Immaterial Details Or Was Asked Different Questions

In his 2004 interrogatory answer in this case, Rider provided a list of nearly 100, separately identified and dated incidents of alleged elephant abuse that Rider claimed that he

[28] Plaintiffs' argument that any such "slight variations" should be overlooked simply because Rider has "consistently testified that he saw elephants mistreated by Ringling Bros. employees on a routine basis" is ridiculous. Pl. Mem. at 20. It is akin to arguing that a criminal defendant should be found guilty if a witness testifies on one day that he saw the defendant kill the victim on a Tuesday afternoon with a knife and then testifies the next day that he saw the defendant kill the victim on a Sunday evening with a handgun. Who cares about the discrepancies? The witness "consistently testified" that the defendant killed the victim.

[29] Attached hereto as Exhibit 4 is a chart identifying more than thirty conflicting statements and more than sixty omissions in Rider's sworn statements under oath.

witnessed when he worked for FEI in 1997-99. Ex. 71, Rider Interrog. Resp. No. 11. This was five to seven years after the events in question. However, more than four years earlier, on March 25, 2000 – less than four months after he left the employ of FEI – Rider was asked to provide the ***same information***, under oath, in a video-taped statement in Galt, California, conducted by a lawyer representing PAWS. Rider PAWS Statement at 2-3.[30] Yet the answer given to PAWS was vastly different. To PAWS, Rider related fewer than 20 such incidents. Ex. 67, Rider PAWS Statement (*passim*). By July 20, 2000, when Rider gave an affidavit to the USDA, the list had grown to 24 incidents. Ex. 69, Rider USDA Aff. (*passim*). By June 20, 2004, when Rider submitted his interrogatory answers, the list had ballooned with an additional ***sixty-seven*** incidents – all purportedly observed during the same period of time that was covered by the earlier statements. Ex. 71, Rider Interrog. Resp. No. 11. Plaintiffs do not claim that such testimony was never given or that it is being quoted inaccurately, nor can they. Objectively, plaintiffs cannot dispute that the testimony cited by FEI is stated accurately and that differences indeed exist. That plaintiffs disagree with the conclusion or consequence of differing testimony does not, however, negate the fact that the conflicts are there. Plaintiffs' attempts to explain Rider's impressive memory improvement are flimsy and simply further underscore the point that this is all a fact question for a jury and no basis whatsoever, for a "Rule 11 violation."

In the first place, plaintiffs' statement that Rider's statements in 2000 came "long before he was purportedly bribed for his testimony," Pl. Mem. at 19, is simply untrue. All of his statements were made when he was on a current or former plaintiff's payroll, and the 2000

[30] Plaintiffs submitted the videotape of the Rider PAWS Statement as Ex. 6 to their motion. FEI had the videotape transcribed by a certified court reporter, and that transcript is submitted herewith as Ex. 67. Plaintiffs' reference to this statement as a "deposition" is inaccurate. It was totally *ex parte*. No adversary was present to object or to cross-examine. Moreover, although PAWS and the other plaintiffs brought the instant lawsuit in July 2000, less than four months after this statement was made, neither PAWS nor any other plaintiff made any attempt to comply with the procedures in Fed. R. Civ. P. 27 for depositions before an action is filed. Thus, Rider's PAWS Statement has no effect as a "deposition."

statements are no exception. Rider has admitted that he returned to the United States on March 22-23, 2000, and that, within three days of his return, he formed a "relationship" with PAWS in which PAWS paid him $50 per week for food and gave him a place to live, which was his only source of support for more than a year. Ex. 71, Rider Interrog. Resp. No. 4; Ex. 73, Rider Dep. at 204-05. Rider gave a sworn statement to PAWS on March 25, 2000 – which is exactly the same time at which the financial support from his PAWS "relationship" began. And that financial support continued until May 2001, and therefore throughout the period in which Rider's other sworn statements to Congress and the USDA were made. Ex. 73, Rider Dep. at 205. Thus, Rider was receiving money from one of the original plaintiffs in this case at the very inception of his purported advocacy on behalf of FEI's elephants.[31]

Conspicuously absent from their brief is any effort by plaintiffs to explain why Rider's statement to PAWS (essentially contemporaneous with the events allegedly witnessed) was so dramatically less detailed than his 2004 interrogatory answer more than four years later. There is no indication whatsoever in the PAWS statement that the parties were operating under some kind of time constraint. This was an *ex parte* interview in which only a PAWS lawyer (and perhaps a PAWS representative) was present. Ex. 67, Rider PAWS Statement at 2. No adversary was there to cross-examine or object. Therefore, there is no reason why Rider could not have provided a full and complete statement of what he had allegedly witnessed while employed by FEI. Plaintiffs assert that Rider "was not asked to describe every incident of mistreatment." Pl. Mem. at 19. This is inaccurate. In fact, the PAWS lawyer specifically told Rider "we are going

[31] In his 2006 deposition, Rider denied that he had "worked" for PAWS, but he admitted writing a letter to PAWS dated May 14, 2001 in which, admittedly in his own words, Rider stated that PAWS had "hired me to do security," that he was "on PAWS's payroll" and that he had "quit my security job at PAWS last week." Ex. 73, Rider Dep. at 204-06; Ex. 8, Rider Letter to PAWS (5/14/01). Therefore, the statement that Rider "never worked" for PAWS is false based on a letter that Rider himself claims he wrote and sent to PAWS. That same letter, which admits the "job" that Rider had with PAWS, also demonstrates that his post hoc characterization of the money he received from PAWS as a "grant" is untrue as well.

to go over a lot of information," Ex. 67, Rider PAWS Statement at 2; asked him to describe the "kind of things you [saw]," id. at 9-10; and had a circus itinerary that she showed to Rider to guide his testimony city by city, id. 40 ("I wanted to . . . sort of go through the itinerary . . .[a]nd kind of walk through, see what your experience was at different locations"). This was apparently exactly the same approach that was employed to draft Rider's interrogatory answer in 2004 which, on its face, also tracked the cities and dates that the Blue Unit visited during Rider's employment with FEI. Ex. 71, Rider Interrog. Resp. No. 11. Thus, the PAWS lawyer placed no restrictions on what Rider could say, and there is no reason why he could not have been as detailed in 2000 as he projected himself to be in 2004.

These same problems befall Rider's USDA affidavit which came just three months after the PAWS statement. While plaintiffs claim that Rider chose to describe to USDA the "worst" incidents that he allegedly witnessed, plaintiffs do not identify any limitation placed by USDA on what Rider could say. Indeed, this was another *ex parte* exercise in which Rider was free to say whatever he truthfully could say. If Rider's claimed love for the elephants and injury-in-fact are to be believed, there would have been no reason to hold anything back from the USDA. Yet this affidavit contains only a fraction of the events related by Rider in his 2004 interrogatory answer. Plaintiffs now claim, based on Rider's 2006 deposition, that any omissions from the USDA affidavit are covered by Rider's explanation to USDA that the alleged abuse was "'an everyday occurrence.'" Pl. Mem. at 20 (quoting Ex. 73, Rider Dep. at 297). However, this after-the-fact explanation also is untrue. Despite its obvious exaggerations, even Rider's USDA affidavit states that the abuse was "6 out of 7 days a week." Ex. 69, Rider USDA Aff. at 1. "Six out of seven" days is not "every day."

Despite plaintiffs' efforts to spin FEI's allegations as false and "unsupported," the evidence shows very clearly that Rider's story gets better for plaintiffs' agenda each time he tells it. As time passes and more distance develops between the actual events, more and more incidents of alleged abuse are related. None of this is explicable on the grounds of memory lapses or the different contexts in which the statements are made. The fact that plaintiffs would present a such defense or "excuse" for this at trial does not mean that FEI's allegations are baseless for Rule 11 purposes. Cf. United States v. Libby, 416 F. Supp. 2d 3, 5 (D.D.C. 2006) (while "confusion, mistake, faulty memory or another innocent reason" may, if believed by a jury, be a defense to obstruction of justice and perjury, they do not preclude a prosecution of those crimes from proceeding). A jury reasonably could find that the improvement in Rider's story corresponded with the improvement in his financial situation with the other plaintiffs. In 2000, when he gave the PAWS Statement and the USDA Affidavit, Rider was only getting $50 per week and a place to live from PAWS. By 2004 when the interrogatory answer was submitted, he was being paid $500 per week which, given the facts that he filed no tax returns and paid no income tax, was a tidy sum.[32] In short, plaintiffs accusations do not change the fact that FEI had ample evidence on which to base its allegations.

b. Rider's Statements About Tupelo are Inconsistent and False

Rider's statements about Tupelo, Mississippi are more than "facially inconsistent;" they flatly contradict each other and the basis for this conclusion is well-grounded in evidence already discovered to date. Pl. Mem. at 22. In Rider's March 2000 PAWS Statement, which plaintiffs

[32] The case law cited on page 17 of plaintiffs' Memorandum is inapposite. Cf. Milkovich v. Lorain Journal Co., 497 U.S. 1, 18-19 (1990) (addressing whether a newspaper article – not a court pleading – implying that an individual lied under oath could be defamatory); Jackson v. Rohm & Haas Co., No. 05-4988, 2006 U.S. Dist. LEXIS 10211, at *5 (E.D. Pa. Mar. 13, 2006) (Rule 11 sanctions appropriate where, inter alia, plaintiff filed RICO claim again even though the district court had already held that plaintiff lacked standing because alleged injury not proximately caused by alleged RICO violation). A case titled "Huggins v. U.S." is not found at the citation listed by plaintiffs, 337 A.2d 219 (D.C. 1975).

conveniently neglect to mention, see Pl. Mem. at 21-23, Rider claimed that he "remember[ed]" Tupelo "very specifically" and recalled, in detail, how Graham Chipperfield – with whom Rider later went to Europe to work with another circus, supra note 23, – made the elephant Karen push a dumpster. Ex. 67, PAWS Statement at 43-44 ("She hit the dumpster and sunk about a 3-foot hole in that brand new dumpster and flipped it over sideways."). This was ***all*** Rider said about Tupelo to PAWS.

Just months later, when testifying as to the "dangerousness" of elephants before a Congressional committee, Rider omitted any reference to the dumpster from his testimony regarding Tupelo and instead recalled how a cattle truck "startled" ***three*** elephants – Karen, Minnie and Mysore – and "some police cars in their path[] stopped them and the trainer was able to catch them." Ex. 68, Rider Cong. Statement. Just one month later, in his USDA affidavit, Rider reiterated a new version of the cattle truck incident in which there were ***four*** runaway elephants. In this statement, which was made concerning alleged elephant abuse, it was not "police cars" that stopped the four elephants; it was Chipperfield's use of a bullhook. Ex. 69, Rider USDA Aff. Chipperfield allegedly struck ***Minnie*** so hard that she "end[ed] up with a 3 inch cut across [her] ***trunk***." Id. (emphasis added).

Rider's next statement about Tupelo changed the cattle truck incident yet again. In his interrogatory answers, which are also not mentioned in plaintiffs' argument, see Pl. Mem. at 21-23, Rider claims that Chipperfield struck ***Karen*** with a bullhook ***"under her leg."*** Ex. 71, Rider Interrog. Resp. No. 11 (emphasis added). And, it was not just Chipperfield who was using a bullhook, as Rider stated in his USDA affidavit. Rather, "***everybody*** was hooking and poking and stabbing the elephants." Id. (emphasis added).

At plaintiffs' 2006 deposition, Rider changed his story again. Rider testified that ***one*** elephant, ***Karen***, was running from the cattle truck in Tupelo, but that he was not in a position to see whether Chipperfield used a bullhook at all: "I was far enough back that ***I couldn't see what he did with his bull hook***, but I knew Graham had a bullhook." Ex. 73, Rider Dep. at 235 (emphasis added). In sum, even putting aside Rider's lone recitation of the dumpster incident, there are discernable contradictions in Rider's statements about Tupelo that cannot be explained away as "additions" of fact. Pl. Mem. at 21-23. see also Ex. 4, Rider's Evolving Story at 3-5 (analyzing Rider's statements about Tupelo). Rider has made seven sworn statements about Tupelo, each of which is different in a material way. FEI did not invent these inconsistencies for the purpose of the counterclaim; it simply reviewed and relied upon Rider's own sworn testimony. Plaintiffs' post hoc explanations for these inconsistencies do not change the fact that they occurred, they were documented, and they were presented by FEI as part of a factually-grounded counterclaim. Such a scenario is not sanctionable, nor does any case cited by plaintiffs come close to establishing this. It is for a jury to decide whether Rider's testimony regarding Tupelo, together with other inconsistencies and falsehoods, amounted to obstruction of justice.[33]

[33] Plaintiffs incorrectly argue that sanctions are warranted because FEI could have questioned Rider about Tupelo during his October 2006 deposition. Pl. Mem. at 23. The October 2006 deposition was a purported trial deposition noticed ***by plaintiffs*** and not a discovery deposition noticed by FEI. (Even that was an abortive exercise because, contrary to Fed. R. Civ. P. 32, Rider has every intention of testifying at trial, and no known conflict that would prevent him from doing so. Ex. 73, Rider Dep. at 119-22. Thus, the deposition has no proper foundation for use by plaintiffs as trial testimony.) FEI was under no obligation to conduct a discovery deposition of Rider at a time selected by plaintiffs before FEI had full discovery from Rider or plaintiffs. Plaintiffs have in fact admitted that FEI is entitled to take its own discovery deposition of Rider. See, e.g., Ex. 95, Meyer Letter to Gasper (1/16/07) at 10. Moreover, FEI did question Rider regarding Tupelo at this trial deposition. Ex. 73, Rider Dep. at 235-41. Further, neither case cited by plaintiffs supports their argument. Cf. Hilton Hotels Corp, 899 F.2d at 42 (sanctions appropriate where plaintiff's attorney failed to make an adequate pre-filing inquiry on defamation claims where attorney "either . . . relied solely on plaintiff's unverified hearsay statement when he drafted the amended complaint or [] knew that the claims lacked basis in fact"); Stone, 1998 U.S. App. LEXIS 18809 at *5 (plaintiff's deposition about key issue – alleged injury – negated plaintiff's' RICO claim).

c. Rider's Statements About Karen are Inconsistent and False

Rider's statements about the elephant Karen also are irreconcilable. In Rider's statement to PAWS in July 2000, Rider testified that he did not "know for a fact that Karen ever killed anybody;" he "never physically touched Karen;" and, generally speaking, Karen is a dangerous elephant. Ex. 67, PAWS Statement at 102-03. Yet, at his October 2006 deposition, Rider testified that another FEI employee told him that Karen was "responsible for the death of two people," Rider Dep. at 40, and that he touched Karen on her trunk. Id. at 274. Moreover, in direct contradiction to Rider's PAWS Statement, his deposition testimony, and his statement to the Congressional committee in June 2000 (where he also testified that Karen was "dangerous"), Rider testified to the Connecticut State Legislature that Karen is so "gentle" that on one occasion, Rider put his "arms around her" and touched her cheek with his finger. Ex. 71, Statement to Conn. State Legis. Significantly, plaintiffs do not allege that the Connecticut transcript was contrived or that FEI misquoted it – facts that might indicate FEI's allegations regarding the transcript are "baseless." Instead, plaintiffs attempt to explain away Rider's irreconcilable representations of Karen as "dangerous" and "gentle" as a typographical error by the Connecticut stenographer. Plaintiffs ask this Court to believe that Rider actually said "Kamala" and that the stenographer mistook "Kamala" for "Karen." See Pl. Mem. at 23-25. Again, however, having access to a valid transcript, FEI need not take plaintiffs' self-serving, post hoc explanations as true – particularly where FEI has evidence that Rider has changed his story before to suit plaintiffs' position. Plaintiffs' argument, moreover, is not even credible given that (1) Rider repeated the name "Karen" at least three times during the same portion of testimony and (2) the stenographer had no independent knowledge regarding the names of FEI's elephants. How would the stenographer know that FEI had an elephant named Karen at all?

Again, the fact that there is disagreement among the parties does not show that FEI's allegations are groundless. These factual differences are questions for the trier of fact. At a minimum, there is a question of fact as to whether Rider's statements regarding Karen, together with other inconsistencies and falsehoods, amounted to obstruction of justice.[34] See Ex. 4, Rider's Evolving Story at 32-34 (analyzing Rider's statements about Karen). This, however, does not warrant Rule 11 sanctions.

d. Rider Presented Inconsistent and False Testimony Regarding Numerous Other Incidents

The record is replete with other instances of inconsistent and false testimony from Rider that are omitted from Plaintiffs' Memorandum. Rider's testimony regarding alleged elephant abuse at specific times and locations has changed to fit plaintiffs' "taking" allegations, as the following examples demonstrate. Compare Ex. 67, PAWS Statement at 44 (elephants were "out" in a "very cold rain" and a "hard" "blowing" wind in Jackson, Mississippi); with Ex. 71, Rider Interrog. Resp. No. 11 ("[a] lot of hooking and hitting of the elephants" in Jackson, Mississippi); compare Ex. 67, PAWS Statement at 46 ("only thing" Rider remembers is extreme heat in Houston, Texas) with Ex. 71, Rider Interrog. Resp. No. 11 (elephants "chained up" and only allowed to go outside to get water in Houston, Texas); compare Ex. 67, PAWS Statement at 47-48 ("only thing" Rider remembers is heat and lack of water in Wichita, Kansas) with Ex. 71, Rider Interrog. Resp. No. 11 ("[a] lot of hooking went on" in Wichita, Kansas); compare Ex. 67, PAWS Statement at 50 (three and a half mile walk in Detroit, Michigan) with Ex. 71, Rider Interrog. Resp. No. 11 ("there was hooking and hitting by Jeff [sic] Pettigrew" in Detroit,

[34] Fahrenz v. Meadow Farm P'ship, 850 F.2d 207, 210 (4th Cir. 1988) is distinguishable from the instant case. See Pl. Mem. at 25 n.11 (citing Fahrenz). In Fahrenz, plaintiffs' behavior was found to be "objectively frivolous" in violation of Rule 11 where plaintiffs proceeded with RICO claims premised on the statements of three witnesses that a fraud/illegality occurred, even though all of those witnesses later recanted critical portions of their statements at deposition by testifying that they had no such knowledge. Id. No such recantation has occurred in this case. Rider's "explanation" for his irreconcilable accounts of Karen creates a question of fact for a jury as to whether his statements have amounted to an obstruction of justice.

Michigan); Ex. 67, PAWS Statement at 83 ("I don't remember anything at the armory" in Washington, D.C.) with Ex. 71, Rider Interrog. Resp. No. 11 (five new employees told "to get a bull hook" at the armory in Washington D.C.); see also Ex. 4, Rider's Evolving Story at 5-7, 9-13, 47.

Further, there are additional examples of irreconcilable versions of the very same incidents, akin to Rider's testimony regarding Tupelo and Karen. Compare Ex. 67, PAWS Statement at 60-61 (Randy Peterson beat Karen after an argument with his wife) with Ex. 71, Rider Interrog. Resp. No. 11 (Randy Peterson beat Nicole after an argument with his wife); see also Ex. 4, Rider's Evolving Story at 41-42. Plaintiffs cannot possibly explain away all of Rider's inconsistent statements under oath. Nonetheless, whatever post hoc explanations they come up with do not mean that Rule 11 sanctions are warranted. They would merely present a dispute to be resolved by the trier of fact. FEI has a factual basis to allege that Rider has lied under oath. That basis is the transcripts of Rider's own sworn statements.

4. FEI's Allegations of a "Cover-Up" Are Supported by Documents and Sworn Testimony Produced in the ESA Action

FEI's allegations that plaintiffs and their counsel are "covering up" unlawful activity are well-based upon the facts and evidence obtained in the ESA Action. Neither plaintiffs, their counsel, nor their counsel's alter ego (WAP) have been "forthcoming" with anything. See Pl. Mem. at 30. In fact, the extent and purpose of the payments to Rider as well as the cover-up of them only began to unravel in June 2006 – more than two years after plaintiffs should have disclosed ***all*** of this in their discovery responses. Ex. 3, ESA Action Payment Timeline (indicating when FEI discovered each payment to Rider that should have been candidly disclosed in June 2004). Plaintiffs' discovery responses and their deposition testimony, for example, contain at least ***fifty*** deficiencies with respect to this issue. Ex. 5, Pl. Cover-Up Efforts

Throughout Discovery.[35] FEI certainly has a factual basis to allege that plaintiffs have sought to cover-up their payments to Rider and the purpose for them.[36]

While they are indignant that it has been brought to the Court's attention, it is also clear that plaintiffs' counsel has participated in concealing the extent and the purpose of the payments to Rider. Counsel, for example, was fully aware of the details behind the payment scheme yet willingly served upon FEI discovery responses that were false and/or incomplete. See, e.g., Ex. 70, Rider Interrog. Resp.; Ex. 5, Pl. Cover-Up Efforts Throughout Discovery. Indeed, setting aside the money that was filtered through WAP,[37] some of the money that went to Rider and that was omitted from plaintiffs' interrogatory responses actually was funneled through counsel's law firm and counsel has used their law firm e-mail addresses and their status as attorneys in this case to solicit tax-deductible donations on Rider's behalf. See Ex. 14, ASPCA Check Request (4/4/02); Ex. 15, ASPCA Check Request (5/23/03); Ex. 17, ASPCA Check Request (11/19/03); Ex. 76, ASPCA Dep. at 52-53, 224-25; Ex. 13, WAP Check to MGC (2/14/02); Ex. 57, WAP to

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[35] Attached hereto as Exhibit 5 is a chart demonstrating the deficiencies in plaintiffs' discovery responses and deposition testimony. All such deficiencies are further explained in FEI's Motion to Compel Discovery From Tom Rider and For Sanctions, Including Dismissal (3/20/07), its Motion to Compel Discovery From the Organizational Plaintiffs and API (5/29/07), and the replies thereto. The applicable page citations for each such deficiency are referenced in Exhibit 5.

[36] Plaintiffs' efforts to cover-up this scheme were not limited to their original discovery responses and deposition testimony. Such efforts continue today. Even though evidence in this case demonstrates beyond a doubt that payments have been made to Rider by AWI, ASPCA, and FFA, each of the organizations refuses to identify the amount of each such payment in response to FEI's straightforward interrogatories.

[37] Two MGC partners, Katherine Meyer and Eric Glitzenstein, are directly involved in the day to day operations of WAP as they relate to its payments to Rider. Meyer sent Rider the $5500 "grant" to buy his used "Volkswagen Van." Ex. 31, Meyer Letter to Rider (4/12/05); Ex. 57, WAP to Rider Ledger (6/30/06); Ex. 73, Rider Dep. at 142-44; see also RICO CC ¶ 66. The packages that Rider receives from WAP usually contain a check and a cover letter from WAP that is signed by Eric Glitzenstein. Ex. 73, Rider Dep. at 128-29, 132-34; Ex. 36, Glitzenstein Letters to Rider (8/22/05 – 12/30/05); see also RICO CC ¶ 73. On at least one occasion, Rider wrote a letter to Glitzenstein requesting an additional grant, which WAP paid to Rider just days later. Ex. 18, Rider Letter to Glitzenstein (11/25/03); Ex. 57, WAP to Rider Ledger (6/30/06). Counsel also assisted in the cover-up as officers of WAP by virtue of WAP's revising its website. Once FEI began to unravel the payment scheme, WAP's website was promptly revised to address FEI's allegations that it was the alter ego of counsel. Ex. 65, WAP's Changing Website; see also RICO CC ¶¶ 18, 135. Indeed, WAP has recently revamped its entire website in a transparent effort to refute FEI's allegations that the payments filtered through it are nothing more than part of plaintiffs elaborate bribery and/or illegal gratuity scheme.

Rider Ledger (6/30/06); Ex. 16, Meyer E-mail to Org. Pl. (11/5/03); Ex. 35, Fundraiser Invitation ("the benefit will include" "a question and answer session led by the attorneys handling the lawsuit against Ringling Bros."); see also RICO CC ¶¶ 78, 80-83, 120, 122-26.

In September 2005, moreover, plaintiffs' counsel, Katherine Meyer, disingenuously represented to this Court that Rider was "going around the country in his own van" and was getting "money from some other organizations to speak out and say what really happened when he worked" at FEI. Ex. 92, Hearing Tr. (9/16/05) at 29-30. While plaintiffs now claim that this statement to the Court put FEI on notice regarding the payment scheme, Pl. Mem. at 30, Meyer's statement was anything but candid because: (1) "his own van" was actually paid for by a $5,500 "grant" from WAP, that Meyer herself sent to Rider; (2) "money" actually meant Rider's only source of income and tens of thousands of dollars in cash and non-cash compensation; (3) the "money" had not just come "from some of the clients" but from all of the organizational plaintiffs that were a party to the ESA Action at that time and a large portion of the "money" "from some of the clients" was funneled through WAP; (4) "some other organizations" included WAP, plaintiffs' counsel's alter ego; and (5) a large portion of the "money" was not just for Rider to "speak out" or other legitimate "media" expenses, but rather supports Rider's livelihood. See FEI's Reply Supporting Mot. for Leave to Amend (4/27/07) at 4-5 (dissecting Meyer's statement to the Court).[38]

Like plaintiffs and their counsel, WAP has fought long and hard to cover up information that is relevant to the ESA Action and responsive to FEI's subpoena. As discussed in FEI's

[38] FEI has not named MGC or any of its lawyers as counterclaim-defendants, making plaintiffs' citation to Carousel Foods of Am., Inc. v. Abrams & Co., Inc., 423 F. Supp. 2d 119, 123 (S.D.N.Y. 2006), a case where the lawsuit was brought against opposing counsel to force settlement negotiations, unavailing. Plaintiffs' citation to Pigford v. Veneman, 215 F.R.D. 2 (D.D.C. 2003), is similarly unpersuasive because that case involved "groundless" accusations of racism that were patently unrelated to the motion in which such accusations were raised. By contrast, the allegations made by FEI regarding the cover-up scheme are central – not patently unrelated – to its Counterclaim and are far from "groundless" because counsel's actions are undisputed.

Motion to Compel Documents from WAP (9/7/06), WAP originally withheld from production at least 272 pages of responsive documents and redacted a large portion of what actually was produced to FEI. Compare Ex. 56, WAP to Rider Ledger (9/29/05) with Ex. 57, WAP to Rider Ledger (6/30/06); see also Ex. 3, ESA Action Payment Timeline (detailing production of redacted and unredacted documents to FEI). Once FEI obtained the withheld material in June 2006, it learned for the first time that, among other things, large sums of money were paid to Rider by WAP, Ex. 57, WAP to Rider Ledger (6/30/06), and that HSUS, after its merger and/or combination with FFA, was also making payments to WAP in care of Rider. Ex. 106, Press Release, The HSUS and the Fund for Animals Join Forces; Ex. 60, WAP Deposit Ledger (6/30/06); Ex. 24, HSUS Letter to WAP (3/1/05); Ex. 25, HSUS Invoice (3/1/05); Ex. 29, HSUS Letter to WAP (4/4/05); Ex. 30, HSUS Invoice (4/4/05); Ex. 32, HSUS Letter to WAP (5/24/05); Ex. 33, HSUS Invoice (6/7/05). These pertinent facts were previously withheld under the frivolous objections that it would be too burdensome to produce an unredacted ledger and would violate the First Amendment to disclose that HSUS (which has merged with FFA since this lawsuit was filed) and Rider were associating together. See Ex. 66, WAP's Bad-Faith Redactions.[39]

For all of the above reasons, FEI has a factual basis to allege that plaintiffs and WAP have covered-up the payments to Rider as well as the purpose for them. Plaintiffs' argument that

[39] Not only did WAP refuse to comply with FEI's first subpoena, it has refused to comply with the second subpoena that it required FEI to serve upon it earlier this year. WAP, for example, has redacted the face of certain documents without any indication, thereby hoping FEI would not notice that documents were being altered. WAP also refuses to search the files of its Directors for documents responsive to the subpoena. WAP, moreover, refuses to produce documents relating to payments made to other Meyer Glitzenstein & Crystal clients. FEI has attempted to confer in good-faith with WAP on these issues, but it is clear that FEI must now file a second motion to compel against WAP if the Court lifts the stay of discovery. See Ex. 98, WAP's Second Subpoena and Related Correspondence.

they have been "forthcoming" with such information is simply untrue.[40] Nonetheless, that plaintiffs disagree with FEI's conclusion does not mean Rule 11 sanctions are warranted; it means that there is a basis for a lawsuit and for FEI's claim to proceed.

B. FEI HAS A FACTUAL BASIS FOR THE ALLEGATIONS IN ITS DISCOVERY MOTIONS

Plaintiffs may not seek Rule 11 sanctions for allegations contained in a discovery motion. Fed. R. Civ. P. 11(d). Yet, they seek to side-step the plain language of Rule 11(d) by arguing that they may seek sanctions for such allegations merely because FEI cited to its discovery motions and/or replies in support of its motion for leave to file the Counterclaim. See Pl. Mem. at 6 n.3. Notwithstanding that plaintiffs cite no authority in support of their novel argument, FEI will briefly address each challenged allegation and respectfully directs the Court's attention to the prior briefing of these issues.

1. FEI's Allegations of Rider's Document Destruction Are Supported by Documents and Sworn Testimony Produced in the ESA Action

It is undisputed that by the time Rider produced documents in June 2004, he had received from WAP numerous checks and two Forms 1099 and he had sent to WAP at least one letter concerning his alleged "campaign" against FEI. Ex. 63, WAP Checks to Rider; Ex. 83, WAP

[40] Plaintiffs' assertion that FEI has known "for years about Mr. Rider's public advocacy work" misses the mark. Pl. Mem. at 4. FEI was merely under the (false) impression that Rider was being reimbursed for expenses actually incurred. What FEI only recently learned – in June 2006 at the earliest – is that together, the organizational plaintiffs, Rider and MGC and/or WAP have been disguising a complex payment scheme involving bribery, illegal gratuity payments, obstruction of justice and mail and/or wire fraud as "public advocacy work" and/or a "media" campaign, and that they have attempted to cover-up their illegal activity. There is a substantial difference between reimbursing a co-plaintiff for expenses actually incurred and paying that co-plaintiff his sole source of income for more than six years irrespective of how much work he allegedly performed or how many expenses he allegedly incurred. The documents cited on page 4 of plaintiffs' memorandum do not demonstrate otherwise. At the time FEI's internal e-mails were sent, in 2002 and 2003, neither plaintiffs nor WAP had produced ***any*** documents regarding the "funding" to Rider. Indeed, FEI had no knowledge regarding WAP whatsoever until it received ASPCA's interrogatory responses in June 2004. Therefore, even though one of these e-mails references reimbursements from ASPCA to Rider, FEI certainly could not be said to have "knowledge" of plaintiffs' and WAP elaborate payment and cover-up schemes on the basis of these two internal e-mails. Moreover, FEI still had only minimal details – six documents, to be precise – regarding the "funding" at the time it filed its reply in support of its motion for a protective order (Docket No. 38) in March 2005. Plaintiffs' argument, therefore, is unpersuasive and at most raises a question of fact as to when FEI first had sufficient knowledge of plaintiffs' and WAP's activity to bring its Counterclaim.

Forms 1099 to Rider (2002-03); Ex. 18, Rider Letter to Glitzenstein (11/25/03). Moreover, it is undisputed that by the time Rider produced documents in 2007 he had received from WAP at least 50 letters and almost twice that many checks, as well as two additional Forms 1099 concerning the same subject. Ex. 63, WAP Checks to Rider; Ex. 83, WAP Forms 1099 to Rider (2004-05); Ex. 36, Glitzenstein Letters to Rider (8/22/05 – 12/30/05); Ex. 52, Glitzenstein Letters to Rider (1/12/06-12/18/06). Yet, Rider did not produce any of these documents in 2004 and only produced four such documents in 2007 (one Form 1099 and three letters). Although Rider claimed confidentiality over certain financial documents in 2004, his 2007 production of some, but not all, of the letters and Forms 1099 from WAP evidences Rider's belief that these financial documents are not confidential at all. These facts alone provide ample support for FEI's assertion that Rider has destroyed the remaining documents, which are highly relevant to this case.[41] Why or how Rider destroyed the documents is immaterial to FEI's allegations of spoliation. See Webb v. District of Columbia, 189 F.R.D. 180 (D.D.C. 1999) (imposing sanction of default, in part, for spoliation where documents were destroyed, not in an effort to hide evidence, but as part of routine document retention policy).

While plaintiffs complain that FEI has repeatedly alleged that Rider destroyed documents, none of them, including Rider, has ever denied the allegation. Nor has Rider ever come forward to declare that no documents were destroyed – or to produce the "missing" documents. His silence is deafening. Instead, plaintiffs seek to divert the Court's attention with arguments that (1) Rider had no obligation to keep the documents until 2004, when discovery

[41] Indeed, FEI's allegations are further supported by the fact that (1) Rider has produced a mere 213 pages and 7 videos notwithstanding that FEI has requested all documents that "refer, reflect, or relate to defendants' treatment of elephants," and that Rider supposedly makes a living traveling around the country speaking about that very topic; and (2) Rider has been provided with a laptop from co-plaintiff ASPCA but has only produced two e-mails and does not appear to have produced any other documents that he created with his laptop. FEI's Mot. to Compel Rider (3/20/07) at 16-17.

began and (2) FEI already has obtained all of the relevant documents from WAP. Pl. Mem. at 32-33. Both of these arguments, however, are without merit. First, as discussed above, FEI has more than an ample factual basis to allege that Rider has destroyed documents that he created or received after June 2004. Plaintiffs' insistence that Rider was not obligated to keep documents until June 2004 gets them nowhere.[42] Their insistence, moreover, is incorrect. Since the filing of the original complaint in July 2000 (if not before), Rider has been under a duty to preserve what "'[he] knows, or reasonably should know, is relevant in [this] action.'" Pl. Mem. at 32 (quoting Arista Records, Inc. v. Salfield Holding Co., 314 F. Supp. 2d 27, 33 (D.D.C. 2004) (duty to preserve arose when defendant aware that "litigation was imminent")); see also Rice v. United States, 917 F. Supp. 17, 21 (D.D.C. 1996) (duty to preserve arose when defendant had notice of plaintiff's "potential" claim). Rider and his counsel, upon filing the original complaint, either knew or should have known that Rider's communications with other animal advocates (including his co-plaintiffs and his counsel's alter ego) relating to his "media"/"lobbying"/"public education" "campaign" against FEI would be relevant to the ESA Action, particularly since both the "campaign" and the ESA Action are premised upon the very same allegations of abuse.[43] Furthermore, every letter that Glitzenstein wrote to Rider with the checks contained the words "elephants" and "Ringling." Ex. 36, Glitzenstein Letters to Rider (8/22/05 – 12/30/05); Ex. 52, Glitzenstein Letters to Rider (1/12/06-12/18/06). If these were not key words requiring preservation of the documents by Rider, it is difficult to imagine what would be. If relevant

[42] Indeed, the sworn declaration from Rider's counsel appears to acknowledge that certain documents generated or obtained by Rider prior to June 2004 were destroyed. See Rider's Opp. to Mot. to Compel (4/19/07), Ex. 1 ¶ 3 ("Mr. Rider simply had not kept his copies of those records").

[43] These documents, as well as those relating to payments to Rider by his co-plaintiffs to conduct this alleged campaign, are relevant to the underlying litigation for a plethora of reasons set forth in prior briefing. See FEI's Mot. to Compel Discovery from Rider (3/20/07) at 18; FEI's Reply Supporting Mot. to Compel Discovery from Org. Pls. and API (7/13/07) at 6-7.

documents have not been destroyed, Rider and his counsel would have simply stated as much instead of arguing about the date on which Rider's obligations to preserve arose.

Second, FEI's allegations of Rider's spoliation are not undermined merely because FEI obtained some of the destroyed documents from WAP. That FEI obtained documents from WAP instead of Rider supports, not undermines, FEI's allegations. Nonetheless, plaintiffs wish to pretend, yet again, that the only documents destroyed and the only documents to which FEI is entitled to receive from Rider are those that it has already received from WAP. As FEI has repeatedly explained:

> Rider and his counsel persist in their failure to comprehend that FEI does not merely want duplicates of the incomplete set of documents it already has. It wants all of the documents that it requested and is entitled to, to the extent they still exist. FEI is simply using the documents that it has been forced to obtain from other sources to demonstrate that Rider has destroyed or withheld innumerable relevant, responsive documents that he once had. Rider's failure to preserve and produce his own documents is not excused merely because FEI got copies of some of them via a subpoena to the alter ego of plaintiffs' counsel.

FEI's Reply Supporting Mot. to Compel Rider (5/7/07) at 5. See also FEI's Mot. to Compel Rider (3/20/07) at 21 n.12.[44]

As outlined previously to plaintiffs, FEI has a factual basis to allege that Rider destroyed documents. That basis is only further enhanced by the statement of Rider's counsel at the parties' meet and confer that he "is not keeping" documents that he has received from WAP. See FEI's Mot. to Compel Discovery From Rider (3/20/07) at 17; Reply in Support Thereof (5/7/07) at 3-4 & Ex. 32. Counsel's denial of this statement is nonsensical. Reply Ex. 32 ¶ 3 (explaining

[44] Although WAP appears to have sent Rider almost weekly payments since at least 2004, the earliest letter it has produced to FEI is dated August 22, 2005. Ex. 57, WAP to Rider Ledger (6/30/06); Ex. 36, Glitzenstein Letters to Rider (8/22/05 – 12/30/05). Assuming WAP's production is complete, therefore, the letters to Rider themselves arguably support FEI's allegations of bribery and/or illegal gratuity payments and a cover-up scheme. A jury could determine that the "grant" letters (which began accompanying the payments to Rider just three weeks after FEI subpoenaed WAP for documents relating to such payments) were a post hoc attempt to make the $500 weekly payments to Rider appear legitimate.

that counsel's statement was made during discussion of Rider's production of documents that post-dated June 2004). Her semantics, moreover, are irrelevant. Whether or not Rider is destroying, discarding, or "not keeping" documents does not matter. He has spoliated relevant documentation and information. At most, however, counsel's denial only serves to place FEI's allegation at issue, not to prove it is baseless.

FEI conducted a reasonable inquiry before alleging that Rider destroyed relevant documents. FEI undertook an extensive review of documents produced by each plaintiff and by a third-party to determine the sufficiency of Rider's production. FEI, moreover, engaged in a meet and confer process with plaintiffs on this very issue for more than five months. See FEI's Mot. to Compel Discovery from Rider (3/20/07) at 11-13 (explaining parties' correspondence from November 2006 - March 2007). Plaintiffs' argument, for which they cite no persuasive authority, that FEI's failure to raise this issue at Rider's October 2006 deposition is sanctionable makes no sense.[45] FEI would not have had reason to raise the issue of Rider's spoliation at that time. That deposition occurred before the meet and confer conference in February 2007, and before January 2007, when Rider produced some, but not all, documents from WAP. Only then could FEI confirm that Rider's prior claim of confidentiality was disingenuous and had been made apparently to conceal the fact that Rider had not "kept" the documents. Second, as discussed supra note 33, Rider's October 2006 deposition was a trial deposition noticed by plaintiffs; it was a not a discovery deposition noticed by FEI. FEI reasonably believed that the

[45] The case law cited by plaintiffs does not support their argument that FEI's failure to obtain a sworn statement from Rider regarding his document destruction constitutes an "unreasonable inquiry." See Hilton Hotels, 899 F.2d at 43 (imposing sanctions for an attorney's persistence in pursuing a claim that was premised solely upon unverified hearsay statements even after those statements were proven to be untrue during discovery); Allen v. Utley, 129 F.R.D. 1 (D.D.C. 1990) (imposing sanctions for breach of contract and wrongful death claims premised upon allegation that a bank was liable for the death of a woman as a result of dishonoring her check where court found that the contract at issue explicitly warranted the bank's conduct and that plaintiff did not even look at the contract prior to filing the lawsuit). Indeed, the Allen court explicitly recognized that "a plaintiff is under no duty to exhaust every avenue of discovery before filing a lawsuit." Allen, 129 F.R.D. at 6. FEI, certainly, was not required to do so before making an allegation of fact in a discovery motion.

transcript may be presented as evidence at trial and only asked questions appropriate for cross-examination in the courtroom. FEI cannot be expected to have asked questions to which it did not know the answer, particularly before it had its own opportunity to depose Rider in a discovery deposition.[46] Regardless, it is irrelevant that FEI did not obtain a sworn statement from Rider confirming that he destroyed documents. For all of the reasons discussed above, FEI has more than an ample factual basis to support its allegations.

2. FEI's Allegations of Rider's Perjury Are Supported by Documents and Sworn Testimony Produced in the ESA Action

FEI has repeatedly cited authority in support of its allegation that a civil litigant's submission of a false interrogatory response constitutes perjury. FEI's Opp. to Rider's Mot. for Protective Order (11/27/06) at 12-13 & FEI's Mot. to Compel Discovery from Rider (3/20/07) at 39-40 (citing Dotson v. Bravo, 202 F.R.D. 559, 567 (N.D. Ill. 2001) ("Knowingly incomplete and misleading answers to written interrogatories constitutes perjury, as well as, fraud."); In re Amtrak "Sunset Limited" Train Crash, 136 F. Supp. 2d 1251, 1258 (S.D. Ala. 2001) (plaintiff's interrogatory answer "so knowingly incomplete and misleading that it constituted perjury as well as fraud on defendants and the court")). Plaintiffs have never refuted this point, nor have they cited any authority to the contrary. FEI, therefore, plainly has a legal basis to allege that Rider has committed perjury. It is of no moment that plaintiffs believe Rider did not intend to lie and/or his lies were immaterial. Pl. Mem. at 34-39. Plaintiffs' arguments are without merit and premised upon nothing but misleading citations to irrelevant cases.[47] Nonetheless, plaintiffs'

[46] Plaintiffs concede that FEI has the right to take a discovery deposition of Rider. Ex. 95, Meyer Letter to Gasper (1/16/07) at 10. That deposition, however, has not yet taken place because plaintiffs have logged-jammed the document production process with meritless objections.

[47] Plaintiffs' citation to Williams & Connolly, LLP v. PETA, 643 S.E.2d 136 (Va. 2007) for the proposition that FEI and its counsel should "should appreciate the gravity of such accusations" is absurd. Pl. Mem. at 37. FEI was not a party to that case and none of its actions or filings as a non-party were the subject of sanctions. Furthermore, that case bears no factual or legal similarity to this case.

arguments, at best, only establish that a question of fact exists on this issue and that, therefore, Rule 11 sanctions are patently unreasonable. See United States v. Excellair, Inc., 637 F. Supp. 1377, 1397 (D. Col. 1986) ("Rule 11 was not designed for the purpose of factual resolution appropriately left for trial.").

Plaintiffs' citation to Marina Mgt. Services v. Vessel My Girls, 202 F.3d 315, 324 (D.C. Cir. 2000), for the proposition that "where party's 'conduct belies an intention to mislead' there is no perjury" is mind-boggling. Pl. Mem. at 35. That case has nothing do with perjury; the word "perjury" does not even appear in that decision. Rather, the D.C. Circuit ruled that an order imposing sanctions for misleading the trial court should be vacated because the trial court was confused, not misled. That intent to mislead is required to impose sanctions for intentionally misleading the Court does not mean that Rider did not commit perjury merely because plaintiffs do not believe he intended to lie.

Plaintiffs' citation to United States v. Smith, 267 F.3d 1154, 1166 (D.C. Cir. 2001), for the proposition that a false statement does not constitute perjury unless it "concern[s] a material matter," is similarly inapposite. Pl. Mem. at 36-37. That decision addressed an enhancement under the sentencing guidelines for perjury; it did not address perjury as a stand-alone allegation. Nonetheless, plaintiffs' attempt to explain away Rider's falsehoods as "immaterial" does not demonstrate that FEI lacks a basis for its allegations of perjury. Each of Rider's false answers is highly material to this case. Each one was made in the very set of interrogatory answers that contains Rider's account of all the alleged elephant abuse he claims to have witnessed. If he lied about certain details (those that plaintiffs now portray as unimportant), then why should the rest of it (those that plaintiffs would portray as important) be believed? The lies, therefore, are

crucial to Rider's credibility, which as explained above, is essential and material to this litigation.[48]

Plaintiffs' citation to Pigford v. Veneman, 215 FRD 2 (D.D.C. 2003), for the proposition that "sanctions warranted when '[d]espite the enormity of accusations' there was no basis in fact for them," is similarly disingenuous. Pl. Mem. at 37. That case involved "deplorable" "groundless accusations" of racism on the part of the USDA's attorney and employees that were patently unrelated to the motion at issue. FEI, however, has simply alleged, ***based on documentary evidence and Rider's own sworn testimony***, that Rider has committed perjury.[49] Not only does Pigford have no parallel to the issue at hand, it illustrates plaintiffs' cavalier and disingenuous strategy with respect to citations of legal precedent.[50] Pigford, in which the "charges" at issue were baseless accusations of racism against the government's attorney, only serves to highlight that plaintiffs' motion is devoid of any remotely analogous Rule 11 authority.

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[48] That Rider's falsehoods are material is demonstrated by Martin v. Daimler Chrysler Corp., 251 F.3d 691, 692-94 (8th Cir. 2001), in which a court entered judgment against the plaintiff for submitting two false discovery responses, one of which was a sworn response, like Rider's, that she had never been a party to a civil litigation matter other than the pending matter. Rider has lied about material matters, and therefore, FEI's allegations are factually grounded.

[49] Contrary to plaintiffs' complaints, FEI has not "routinely assert[ed] in [its] briefs" that Rider has "'committed 'perjury.'" Indeed, two briefs cited by plaintiffs to support their proposition contain no such allegations of "perjury." See Pl. Mem. 36 at n.22 (citing FEI's Mot. to Compel. Test. From Rider (10/30/06) and FEI's Reply in Support Thereof (11/20/06)). Each of FEI's assertions regarding Rider's perjury have come in contexts in which it was germane to the issue – specifically, (a) in reference to Rider's motion for a protective order, which he alleged would help him prove his previous statements under oath were accurate, (b) in reference to FEI's motion to compel discovery that sought sanctions for, inter alia, Rider's perjury and (c) in reference to FEI's Counterclaim that alleges Rider's perjury constitutes obstruction of justice. FEI could not possibly be expected to brief these matters for the Court without referencing Rider's perjury. FEI, moreover, did not accuse Rider of perjury in its Reply Supporting Its Motion to Enforce. See Pl. Mem. at 6. In that brief, FEI simply stated that if plaintiffs' interpretation of this Court's prior Orders allows them to distribute FEI's documents to the media, then FEI should be free to similarly distribute plaintiffs' documents that demonstrate the basis of FEI's arguments in this case including, inter alia, Rider's perjury. FEI's Reply Supporting Its Mot. to Enforce (7/3/07) at 8.

[50] Plaintiffs also represent that the D.C. Circuit has stated that "an accusation of 'criminal conduct, such as perjury' 'is a classic libel.'" See Pl. Mem. at 37 (purportedly quoting Moldea v. New York Times Co., 22 F.3d 310, 314 (D.C. Cir. 1994)). The D.C. Circuit, however, did not say that; it actually said that "an accusation of criminal conduct is a classic libel." Indeed, the phrase "such as perjury" that plaintiffs represent as a direct quote from the D.C. Circuit never appears in that decision.

Finally, plaintiffs' citation to Lucas v. Spellings, 408 F. Supp. 2d 8 (D.D.C. 2006), for the proposition that sanctions were imposed where a party alleged that an individual "refused" to turn over documents when, in fact, he was instructed by an attorney not to do so, is inexplicable. Pl. Mem. at 39. FEI has not alleged that Rider "refused" to produce a truthful response; it has alleged that he produced a perjured response. Nonetheless, sanctions were imposed in Lucas not just because the individual was instructed not to turn the documents over but because the sanctioned party failed to inform the Court that the individual later produced the documents at issue. Lucas, 408 F. Supp. 2d at 17-18. If Rider actually had produced a complete and honest response after providing his perjured response, FEI would inform the Court of that. Rider, however, persists in his defense of his perjury instead of his correction of it. [51]

Rider's legal arguments, even if they had merit, do not mean that Rule 11 sanctions are appropriate. Indeed, they mean the opposite. Rider's arguments only serve to establish that the parties have a bona fide dispute. They do not change the fundamental fact that FEI has a factual basis to allege that Rider has committed perjury. Plaintiffs' argument to the contrary is without support in the record. Plaintiffs' representation of the facts underlying each instance of Rider's perjury can only be explained as grossly misleading. FEI has more than an ample array of evidence to allege that Rider has committed perjury.

a. FEI Has a Basis to Allege That Rider Perjured Himself By Omitting His Military Employment

Rider willfully omitted his military employment in response to FEI's interrogatories. Not only did Rider fail to disclose the fact that he was employed by the U.S. Army from 1967-1971, he made it look like he graduated from high school in 1970 and then took what he strongly

[51] See, e.g., FEI's Mot. to Compel Discovery from Rider (3/20/07) at 13-14 (explaining that Rider's supplemental responses attempted to cure his perjury with respect to his previous child custody disputes but continued to perjuriously omit his previous personal injury action).

implies was his first job. Ex. 71, Rider Interrog. Resp. No. 2 ("I received my high school diploma in 1970. I then went to work for . . . ."). It is not unreasonable for FEI or the Court to conclude that Rider's response was intentionally untruthful. It is likely that Rider sought to hide his Army employment for the obvious reason that once it was explored, it was going to lead to damaging facts for Rider, including the facts that he had been declared a deserter and placed in confinement. Ex. 104, Rider Military Records.

That plaintiffs believe Rider's perjury should be excused because he did not understand the term "employment" and/or because he previously disclosed the information does not mean that FEI has no factual basis for its allegations. Plaintiffs cite no authority to support their novel argument. The interrogatory answer was false; that another document served to catch Rider in the falsehood is beside the point. FEI is not required to review its own records to supplement and cure Rider's perjurious response. Nor is Rider's perjury excused merely because he informed PAWS of his military employment four years prior to submitting his interrogatory responses to FEI. Pl. Mem. at 35. In fact, Rider's *ex parte* statement to PAWS supports FEI's allegation of perjury. When asked by PAWS to describe his "professional experience," Rider began his response with his military employment and then continued on to identify the numerous other jobs that he has held since then. It is incredulous that Rider would believe in 2000 that his military employment constituted "professional experience" and that he would include it in an answer describing his other jobs, but then believe in 2004 that his military employment was not a "job" and, therefore, outside the bounds of FEI's interrogatory. Compare Ex. 67, PAWS Statement at 3-5 with Pl. Mem. at 35.[52] Regardless, that plaintiffs do not believe Rider

[52] Plaintiffs' attempt to disparage FEI's Superintendent of Animals is deplorable. Pl. Mem. at 35 n.20. Contrary to plaintiffs' misleading characterization, Mr. Vargas' lawyer did not "remind him that, in fact, he had seen the videotape." Id. Rather, as the transcript of the cross-examination clearly establishes, Mr. Vargas was simply confused about the parameters of the attorney-client privilege. Ex. 105, Vargas Dep. at 252-53. Having been

intentionally lied has no bearing on the issue at hand: FEI has a factual basis to allege that Rider committed perjury. See Libby, 461 F. Supp. 2d at 5.

b. FEI Has a Basis to Allege That Rider Perjured Himself By Omitting Previous Litigation Matters

FEI asked Rider to identify any "civil litigation" to which he has been a party or has testified. Despite having been a party to three previous lawsuits, Rider stated under oath, and without objection, that other than this litigation, "I have not been a party to or testified in any other civil litigation." Rider's response was indisputably false; thus, FEI has a factual basis for its allegation.

That Rider now claims to have not understood what "civil litigation" means is not only irrelevant to the issue of sanctions, see Libby, 461 F. Supp. 2d at 5 (specific intent is jury issue), but is incredible since he used those very words in his false answer. More troublesome, however, is plaintiffs' willingness to deceive this Court with allegations that Rider merely omitted "a child custody dispute" in response to FEI's interrogatory. Rider omitted at ***least two*** child custody disputes (pending in ***two*** separate states) ***and*** a personal injury case to which he was a party. That plaintiffs would misrepresent those relevant facts in a Rule 11 motion of all places is astounding. Plaintiffs' insistence that Rider simply did not understand that his "child custody dispute" constituted a civil litigation matter is worthless and, at the very least, hardly makes FEI's allegations that he offered a perjured response groundless. He omitted two such disputes and omitted a ***wholly separate type*** of civil litigation. It is outrageous that plaintiffs simultaneously assert that FEI has no basis for alleging that Rider has committed perjury without

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instructed that his conversations with counsel the day prior to his deposition were privileged, Mr. Vargas believed the fact that he watched the videotape with counsel also was privileged. Unlike Rider and his counsel, Mr. Vargas and his counsel affirmatively corrected any misleading impression that plaintiffs might have gotten from Mr. Vargas' incomplete answer. On cross-examination, Mr. Vargas and his counsel disclosed that he had seen the tape the day before and explained the reason for his incomplete answer. Rider and his counsel, on the other hand, insist upon waiting until FEI catches them in their lies before concocting after-the-fact explanations that defy logic.

ever having explained (and, essentially, hoping to hide from the Court) why Rider continues to omit from his interrogatory response a civil litigation matter to which FEI knows he was a party. Compare Ex. 73, Rider Dep. At 164-65 with Ex. 75, Rider Supp. Interrog. Resp. No. 7. See also FEI's Mot. to Compel Discovery from Rider (3/20/07) at 13-14 (explaining Rider's continuing failure to produce a complete non-perjurious response); Rider's Opp. (4/19/07) at 6-7, 28 (making no argument in response). FEI not only has a factual basis to allege that Rider committed perjury by submitting a false interrogatory response, it has a factual basis to allege that plaintiffs and their counsel continue to mislead the Court on this very subject. That plaintiffs disagree with the importance or relevance of the perjured response has no bearing on the Rule 11 analysis.

c. FEI Has a Basis to Allege That Rider Perjured Himself By Stating That He Has Received No Compensation

FEI has a factual basis for its allegation that Rider committed perjury by stating under oath that he has not received compensation for services rendered. It is undisputed that, prior to making this statement, Rider already had received from WAP (the alter ego of the attorneys who signed Rider's false interrogatory responses) at least two IRS Forms 1099 identifying the payments to Rider as ***"compensation."*** Ex. 83, WAP Forms 1099. Rider, himself, admits having received these IRS Forms. Ex. 73, Rider Dep. at 123-25. Plaintiffs, moreover, claim that the payments to Rider are for his alleged "media" campaign. See, e.g., Pl. Mem. at 38. FEI, therefore, has a factual basis to allege that the payments were ***"for services rendered."***[53]

[53] It is wholly irrelevant that FEI acknowledges "Rider is not employed by plaintiffs or WAP." Pl. Mem. at 38. One need not be an employee of another to receive compensation for services rendered. Any independent contractor (e.g., lawyer, cab driver, etc.) is not an employee of the people whom they serve yet they receive compensation for services rendered.

That Rider calls the payments "grants" instead of "compensation" does not mean that FEI lacks a factual basis for its allegation of perjury. Notwithstanding that Rider's semantics are disingenuous,[54] they, at best, demonstrate that a question of fact exists; they do not demonstrate that Rule 11 sanctions are appropriate. See Libby, 461 F. Supp. 2d at 5. In any event, as with Rider's other perjury, this false statement is more than semantics; it was designed to hide facts that are bad for plaintiffs. See Sears, Roebuck & Co. v. Sears Realty Co., 932 F. Supp. 392, 409 (N.D.N.Y. 1996) (Rule 11 motion should not be made "'to intimidate an adversary into withdrawing contentions that are fairly debatable'") (quoting advisory committee note); Greeley Publ'g, 233 F.R.D. at 612 ("Rule 11 should never be used as a litigation tactic"); Rateree v. Rockett, 630 F. Supp. 763, 778 n.26 (N.D. Ill. 1986) (an improper "Rule 11 motion may well call into play the well known legal proposition that people who live in glass houses shouldn't throw stones"). By lying, Rider avoided describing the services that he allegedly performed in exchange for the payments (of far more than $100,000). By avoiding such a disclosure, Rider and his counsel have prohibited FEI from comparing the amount of money Rider has received to the extent of the services he has allegedly rendered. Plaintiffs, therefore, have inhibited FEI's ability to determine how much of the money exceeded the value and/or cost of the services rendered. Only after FEI subpoenaed (and fought for) documents from WAP, did it begin to receive some of the information to which it is entitled and to decipher that money paid to Rider

[54] Plaintiffs' argument that a "grant" is not compensation is incorrect. Pl. Mem. at 38. Even if the payments to Rider were "grants", a grant is still income to the grantee. In fact, if the payments to Rider were "grants", it appears that Rider's failure to pay taxes was aided by WAP's improper failure to withhold federal income tax at the source. See Treas. Reg. § 1.117-2(b)(2) (when the grant work results in services performed for the benefit of the grantor, the grant money has to be reported as wages with a W-2 issued by the grantor). Rider's "grant work" was for the benefit of WAP because he was pushing the anti-circus agenda of WAP and the organizational plaintiffs, and his activities were used by all of them to raise money. Plaintiffs' reliance upon the definition of a Federal grant is particularly inapt. None of the payments to Rider was from the federal government. In any event, Rider's counsel is fully aware that the payments to him were not federal "grants." Otherwise, their organization would have issued him a 1099-G instead of a 1099-MISC. In any event, each and every inconsistency with respect to the Rider payments provides another factual basis upon which FEI based its allegations.

bore no relation to the services allegedly rendered and, instead, appeared linked to his participation in this lawsuit. FEI has a factual basis for alleging that Rider perjured himself by declaring that he had not received compensation for services rendered. The documents upon which FEI relies are not rendered irrelevant merely because Rider calls his payments "grants."[55]

III. FEI'S COUNTERCLAIM IS WARRANTED BY EXISTING LAW

In addition to having a well-grounded factual basis, FEI's Counterclaim, and the additional statements plaintiffs' challenge, "are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of a new law." Fed. R. Civ. P. 11(b)(2). Plaintiffs do not attempt to argue – nor can they – that existing law does not support a RICO counterclaim based on the facts as alleged by FEI. Cf. Taylor v. Blakey, No. 03-0173, 2006 U.S. Dist. LEXIS 6859, at *22-23 (D.D.C. Feb. 6, 2006) ("wonder[ing]" how plaintiff's counsel did not know claims "quite simply" barred by res judicata were "unwarranted by existing law"). In contrast to the cases cited throughout plaintiffs' Memorandum, where garden variety business and employment disputes were improperly brought as RICO claims, FEI has alleged a continuous, complex scheme of bribery, illegal gratuity payments, mail and wire fraud and obstruction of justice, carried out over at least six years by at least five organizations and one individual. See FEI's Reply Supporting Mot. for Leave to Amend at 11-25; cf. Brandt v. Schall Assoc., 960 F.2d 640, 644 (7th Cir. 1992) ("mere

[55] Plaintiffs' insistence that Rider offered to provide information about his income pursuant to a protective order also gets them nowhere. There was never any basis for Rider to seek a protective order. If plaintiffs were serious about their offer, they would have complied with the Federal Rules of Civil Procedure and moved for one so that Rider could complete his discovery. Instead, plaintiffs waited until FEI filed its motion to compel before seeking such an order. As discussed in that briefing, however, there is no basis for Rider's request and his insistence upon such an order can only be understood as an attempt to hide the ball from FEI. Indeed, Rider has never offered to produce all documents that FEI requested on this subject. Rider only has offered to produce certain self-selected documents that he proclaims will give FEI all of the information it needs to evaluate his credibility. Rider never has had any intention of producing all of his financial documents. And his offer to produce some of them under a protective order does not excuse his perjury, which was designed to hide from FEI information that is not even contained in whatever documents he continues to withhold.

breach of contract" action plead as a "concocted [fraud-based RICO] claim in the absence of any evidence to support it"); Hoatson v. New York Archdiocese, No. 05-10467, 2007 U.S. Dist. LEXIS 9406, at *21-22 (S.D.N.Y. Feb. 8, 2007) (employment termination dispute improperly plead as RICO claim); Carousel Foods of Am., Inc. v. Abrams & Co., Inc., 423 F. Supp. 2d 119, 121-22 (S.D.N.Y. 2006) ("simple breach of contract suit . . . arising out of ordinary business dealings" "inappropriately" plead as RICO claim); Scheck v. Gen. Elec. Corp., No. 91-1594, 1992 U.S. Dist. LEXIS 134, at *12-13 (D.D.C. Jan. 7, 1992) (employee's grievance against supervisors improperly plead as RICO claim); Barlow v. McLeod, 666 F. Supp. 222 (D.D.C. 1986) (loan dispute improperly plead as RICO claim).[56] FEI has pleaded, with specificity, each and every requirement of the RICO statute and each and every element of eleven different RICO predicate acts. Cf. Figueroa Ruiz v. Alegria, 896 F.2d 645, 649 n.3 (1st Cir. 1990) ("of the various so-called 'predicate acts' charged in the complaint the only ones falling within the statutory definition of 'racketeering activity' . . . consist of vague references to mail and wire fraud"); Katzman v. Victoria's Secret Catalogue, 167 F.R.D. 649, 660 (S.D.N.Y. 1996) (plaintiffs failed to "properly plead a single cognizable 'predicate act' of 'racketeering activity' much less a 'pattern of racketeering activity'"). Tellingly, plaintiffs make no argument — and therefore concede — that FEI's allegations are in accordance with existing law. Rule 11 sanctions, therefore, are not warranted on this basis.[57]

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[56] Plaintiffs point out that FEI's alleged damages are its legal fees incurred in defending the ESA, but fail to link FEI's damage allegations to any Rule 11 violation. Pl. Mem. at 11-12. As previously shown, attorneys' fees are a compensable injury in civil RICO claims when proximate cause has been properly alleged. See FEI's Reply Supporting Mot. for Leave to Amend (4/27/07) at 25. Plaintiffs make no argument to the contrary.

[57] It is worth noting that plaintiffs incorrectly assert that "[d]efendant's 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 . . . and that Mr. Rider, in turn, is accepting 'illegal gratuity payments' for that purpose." Pl. Mem. at 11-12; see also id. at 26. The Counterclaim alleges that ASPCA, AWI, FFA/HSUS, WAP and Rider ***each*** violated the federal bribery statute, 18 U.S.C. §

IV. FEI'S COUNTERCLAIM WAS NOT BROUGHT FOR AN IMPROPER PURPOSE

Plaintiffs also argue that FEI and its counsel should be sanctioned because the RICO counterclaim was brought for an improper purpose, "including 'to harass' plaintiffs and their counsel" as well as to "to cause unnecessary delay" and "needless increase in the cost of litigation." Pl. Mem. at 39. Aside from plaintiffs' pure speculation, they cannot point to any evidence that would support these conclusions.

Neither FEI, nor its counsel, expected to uncover during the course of discovery in the ESA litigation that Rider had been paid to participate in the lawsuit against FEI – to date in excess of $150,000 which was funneled in part through an organization set up by none other than plaintiffs' attorneys in this very action. That payment scheme was entirely of plaintiffs' own making. FEI did not counter-sue plaintiffs because it disagrees with plaintiffs' allegations or "animal rights" agenda. Had plaintiffs not devised the system of paying Rider (which resulted in Rider's continued participation in the lawsuit, his sole source of income, and his evolving story), FEI would have no claim. FEI sought leave to amend to add its RICO claims because it has been aggrieved by the very conduct that RICO prohibits: it has been required to defend, at great expense, a bribe-induced lawsuit that has no legal basis and that is predicated on the alleged injury of a paid plaintiff whose purported standing rests on false statements of fact to the Court. In the course of discovery, FEI's counsel uncovered a well-established scheme to pay Rider, which is supported by documents in this case. This is simply not a case where a party has acted upon an "idea" for a lawsuit without any factual inquiry. Indeed, it is the polar opposite – each and every allegation is well-supported by documentary evidence and/or reasonable inferences

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201(b)(3) & 18 U.S.C. § 201(b)(4), and the federal anti-gratuity statute, 18 U.S.C. § 201(c)(2) & 18 U.S.C. § 201(c)(3). See RICO CC ¶¶ 13-14, 34-35, 60, 176, 179(a)-(d), 188(a)-(d).

that may well be supported by additional documentary or testimonial evidence obtained in future discovery. See Ex. 1, Annotated RICO CC.

The case law shows (and plaintiffs have cited nothing to the contrary) that a factually-based and objectively reasonable claim at the time of filing cannot otherwise be deemed to have been brought for an improper purpose. See Ponce Fed. Bank v. Munoz, No. 92-1331, 1996 U.S. Dist. LEXIS 15103, at *50-52 (D.P.R. July 23, 1996) (concluding that evidence did not support that RICO claim was filed for any improper purpose). The fact that FEI's RICO claims are factually grounded, see supra Section II(A), belies any argument that an improper purpose is fueling the counterclaim. However, even a cursory glance at plaintiffs' "improper purpose" argument reveals it has no merit and is completely disingenuous.

A. PLAINTIFFS HAVE CONCOCTED THEIR "SCORCHED EARTH" THEORY TO DEFLECT ATTENTION FROM THEIR OWN ILLEGAL ACTIVITY

Plaintiffs have concocted a theory – based on nothing but pure speculation – that FEI has an established history of bringing frivolous lawsuits. Pl. Mot. at 2 ("***FEI*** has a track record of filing motions based on completely unfounded accusations for improper purposes.") (emphasis added). This representation, however, is factually baseless, for several reasons. First, FEI has ***never*** been found to have brought a frivolous motion or claim, as plaintiffs allege. Nor has it ever filed a claim or counterclaim for "money irregularities" against any animal activist group, as plaintiffs speculate. Pl. Mem. at 42. Second, plaintiffs' citation to the Williams & Connolly decision as an example of the type of conduct FEI has engaged in is completely disingenuous, factually inaccurate, and irrelevant to the issues at hand.

Curiously, although plaintiffs are eager to accuse FEI of making misrepresentations in court filings, plaintiffs' own sanctions motion is riddled with factual misrepresentations and inaccuracies. See, e.g., Ex. 2, False Statements in Pl. Rule 11 Motion. One of the most obvious

is plaintiffs' misleading suggestions (and outright false allegations in other instances) that FEI was a party to the lawsuit involving animal activist organization PETA in Fairfax County, Virginia. Pl. Mot. at 2; Pl. Mem. at 2, 37, 41, 42 (disingenuously referencing "Feld" attorneys). ***FEI, however, was not a party to that lawsuit***. Moreover, plaintiffs' misrepresentation to the Court is all the more egregious, because an exhibit from the PETA trial as well as factual representations about that lawsuit, already have been made a part of the record in this case – thereby putting plaintiffs clearly on notice of the proper parties. The fact that plaintiffs – in a sanctions motion no less – see fit to manipulate the facts to try to contrive a "pattern" of disingenuous litigation on the part of FEI is outlandish. Plaintiffs' behavior should not be tolerated.

Aside from being factually inaccurate, plaintiffs' comparison to the sanctions lodged against Williams & Connolly in the PETA matter have no bearing on whether FEI acted with an improper purpose with respect to its RICO claims in the instant matter. See Pl. Mem. at 39-43 (citing Williams & Connolly, 643 S.E.2d 136 (Va. 2007)). Despite plaintiffs' alleged "pattern" – which clearly was concocted for their Rule 11 motion – FEI was not a party to the PETA matter, nor were the undersigned or their firm sanctioned in that case.[58] First, as previously mentioned, far from a "pattern" of improper conduct, FEI was ***not*** even a defendant in that lawsuit – a fact which plaintiffs obscure from the Court.[59] Second, Williams & Connolly has ***never*** represented FEI and has no role in the defense of this action, which plaintiffs, again, cannot dispute.

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[58] Plaintiffs incorrectly have stated that "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." Pl. Mem. at 2 n.1. This statement also is false. First, FEI was never a party to that action. Second, a jury rejected PETA's claims and awarded them nothing, and PETA's appeal was denied by the Virginia Supreme Court. Plaintiffs' speculation that, notwithstanding this outcome, the facts against Kenneth Feld were "undisputed" is a fabrication. These bold and repeated misstatements should not be tolerated.

[59] The version of the Rule 11 motion and accompanying memorandum served on FEI's counsel under the Rule's 21-day safe harbor provision actually contained the repeated, blatant misrepresentation that FEI was a party

Third, to further bolster their sanctions motion and create a non-existent "pattern" of bad conduct specifically related to counterclaims, plaintiffs also misrepresent the disposition of Kenneth Feld's counterclaim in the PETA matter. In doing so it is obvious that plaintiffs conducted no factual investigation of their own before making such accusations. Had plaintiffs done so, they would have discovered that their description of a "completely baseless counter-claim against PETA", Pl. Mem. at 42, is untrue. Indeed, after the Fairfax County court granted a demurrer with respect to the original abuse of process counterclaim, Kenneth Feld was permitted to re-file an amended version of that counterclaim, which survived both a demurrer and a motion to strike (the Virginia equivalent of a Rule 50 motion) and ***was presented to the jury in that case***. Ex. 100, PETA v. Feld, Hearing Tr. (10/8/04) at 13-14 (denying demurrer and allowing abuse of process claim to proceed); Ex. 101, PETA v. Feld, Trial Tr. at 2526 (court denial of motion to strike); Ex. 102, PETA v. Feld Verdict Form (showing that abuse of process claim went to jury). Plaintiffs are well aware of this fact, as the verdict form in that case has been made an exhibit in this litigation. See FEI's Reply Supporting Mot. to Compel Documents From WAP (10/3/06) at Ex. 46. Plaintiffs' assertions, therefore, that the abuse of process claim in the PETA case was an example of frivolous litigation is a blatant factual misrepresentation. The counterclaim was meritorious because it survived legal challenges and reached the jury. This misrepresentation alone illustrates the lengths to which plaintiffs will go to invent a history of improper purposes.

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to the PETA v. Feld matter in Fairfax County. Cf. Ex. 108, Plaintiffs' [Served] Rule 11 Mem. at 2, 14, 31, 34, 39, 42. After FEI's counsel notified plaintiffs that their brief contained multiple factual misrepresentations, see supra note 2, plaintiffs finessed some of the references in the filed brief to FEI and the PETA v. Feld matter, but by no means fully clarified the misrepresentation and, in some instances, neglected to correct all the citations that affirmatively represent FEI to have been a party to that litigation. See, e.g. Pl. Mot. at 2; Pl. Mem. at 31, 34. Despite plaintiffs' games, they continue to accuse FEI of a history or "pattern" of improper conduct.

Finally, the Williams & Connolly decision, and the sanctions affirmed therein, bear no resemblance to the issues before this Court. That case involved a recusal motion based on allegations of bias against the judge for violating his ethical duties by, among other things, engaging in *ex parte* contacts with plaintiff's attorneys. The trial court found the allegations to be without merit, and the Virginia Supreme Court affirmed. See Williams & Connolly, 643 S.E.2d at 138, 142.[60] The sanctions at issue were not imposed due to an attack on the opposing party, nor did they involve any substantive claims or allegations, as plaintiffs' argument suggests. There is no parallel between Williams & Connolly and the instant case. Neither FEI, nor its attorneys, have made any such ethical allegations against the Court. Instead, FEI has proposed filing a counterclaim, based on evidence produced by plaintiffs themselves, that states a potential claim under an Act of Congress that was passed to outlaw the very actions that FEI has had to contend with in this case. Despite plaintiffs' efforts to cover their tracks, FEI discovered a scheme of payments to fuel a lawsuit against it by parties riding the wake of a paid plaintiff whose very standing to sue rests upon false statements to this Court and the Court of Appeals. This is a core RICO violation and once it emerged, FEI could not have been expected to "look the other way" out of purported deference to plaintiffs' counsel or the alleged venerability of one or more of the organizational plaintiffs.

Plaintiffs state that FEI's proposed RICO claim was brought for "all the improper purposes expressly prohibited by Rule 11," Pl. Mem. at 40, but can point to nothing in support of this conclusion. See Ponce Fed. Bank v. Munoz, No. 1331, 1996 U.S. Dist. LEXIS 15103, at *50-52 (D.P.R. 1996) (concluding that evidence did not support that RICO claim was filed for any improper purpose). For example, plaintiffs claim that the RICO claim would cause

[60] That same day, the Virginia Supreme Court also reversed the trial court's order holding a Williams & Connolly attorney in contempt and vacated the trial court's imposition of sanctions. Petrosinelli v. PETA, 643 S.E.2d 151 (Va. 2007).

"unnecessary delay." Pl. Mem. at 39. In connection with its Motion to Amend briefings, FEI already dispelled the notion that the RICO claim would cause any unreasonable delay, particularly in a matter where discovery did not close, no trial date is set, and plaintiffs have gone through additional steps to add new plaintiffs to this action. FEI's Reply Supporting Mot. For Leave to Amend (4/27/07) at 6-10.[61] Nor can plaintiffs point to any "needless increase" in the cost of litigation – indeed, they advance nothing other than speculation on this point. Pl. Mem. at 39. Additionally, plaintiffs have suggested that FEI's Counterclaim and other statements made in this litigation are somehow abusive and constitute harassment. Pl. Mem. at 31 (citing Pigford v. Veneman, 215 F.R.D. 2, 4 (D.D.C. 2003) ("[a]busive language toward opposing counsel has no place in documents filed with our courts . . . "). Plaintiffs, however, fail to identify a single example of "abusive" language. Their citation of Pigford to support this point, however, is itself offensive. In Pigford, plaintiff's counsel, who represented a class of African American farmers, filed a document that accused the defendant of racism. The court determined that there was no such evidence of the government attorney's "racist attitude" and that such accusations were "deplorable" and "groundless" and "beyond the pale" and struck the plaintiff class attorney's filing. Id. at 4, 5. That plaintiffs equate FEI's factually supported RICO claim based on the payment scheme that plaintiffs participated in – regardless of how they now characterize it – with unfounded accusations of racism makes a mockery of Pigford.

Plaintiffs' theory that FEI's counterclaim is designed simply to "harass" or "punish" plaintiffs is groundless. The counterclaim stems solely from plaintiffs' own actions in formulating an elaborate and camouflaged payment scheme for their key plaintiff and witness. While it may be convenient to claim that they are being "harassed" by FEI's proposed RICO

[61] Indeed, plaintiffs indicated recently that they will file a motion for leave to add additional plaintiffs. Ex. 109, Ockene E-mail to Simpson (8/7/07).

claim, FEI has, in fact, suffered an injury at the hands of plaintiffs, which is recognized in existing law (a point which plaintiffs do not dispute) and it is entitled to redress for this injury. Moreover, plaintiffs' philosophical agenda should not shield them from liability for their illegal activity, even if it does advance their campaigns against animals in captivity and/or entertainment.

Plaintiffs "scorched earth" theory about FEI's previous actions is nothing more than baseless exaggeration designed to deflect attention from plaintiffs' illegal activity.[62] While plaintiffs have made this their mantra, their argument lacks any credibility or basis in reality. And, in making such an accusation, plaintiffs have misrepresented facts in the record. For example, throughout this case, plaintiffs are fond of citing to a "Long Term Animal Plan" – a plan that FEI has explained – on at least 2 occasions – was proposed in the early 1990s (by an employee that has been deceased for years) and was never adopted or implemented. See FEI's Opp. to Rider's Mot. for Protective Order (5/15/07) at 16 & Ex. 9 thereto; FEI's Reply Supporting Mot. to Enforce (7/3/07) at 10 n.5. Indeed, no such plan exists today – which plaintiffs know from their own discovery. Despite the unrefuted record about this document, plaintiffs continue to use it as fodder for their theory that FEI has a stated mission to discredit plaintiffs and other animal activists. See Barlow v. McLeod, 666 F. Supp. 222 (D.D.C. 1986)

[62] Plaintiffs jointly move for sanctions against both FEI and its counsel for Rule 11 sanctions. Pl. Mem. at 1, 43. While courts have awarded Rule 11 sanctions against counsel and pro se clients, it is certainly not typical for courts to impose such sanctions on a client as well. Other than misrepresenting the facts related to prior litigation (indeed, for cases in which FEI was not even a party), plaintiffs can point to no facts that support its allegations of a "pattern" of conduct on the part of FEI that could even warrant sanctions and, as argued above, plaintiffs' allegations of a "pattern" of improper conduct are contrived and factually baseless. Indeed, plaintiffs' allegations that FEI has brought "lawsuits" against all of its attackers is, again, patently false, and it is no surprise why plaintiffs fail to cite any such "lawsuits" for this baseless allegation. Pl. Mem. at 40, 42. Nor do plaintiffs cite a case for the proposition that sanctions can be warranted against a client absent specific evidence of the client's wrongdoings in the course of litigation. See Trout v. Garrett, 780 F. Supp. 1396, 1428-29 (D.D.C. 1991) (finding that the client – the U.S. Navy – was the decision maker on whether to comply with settlement terms (promotions) as to 5 claimants, and directly responsible for "delay" and "undue procrastination"). Notably, the Trout court found that where no evidence of improper conduct or decisions on the part of a co-defendant existed, sanctions against this party were not warranted. Plaintiffs' bald accusations against FEI for its conduct in this litigation are just that. Plaintiffs have offered no such examples of sanctionable misconduct on the part of FEI, nor can they.

(imposing sanctions where attorney opposed summary judgment notwithstanding that discovery yielded no support for the claims).[63] However, there is and has been no lawsuit in ***any*** court by FEI against any of its activist critics. Nor is there ***any*** evidence of FEI criticizing any of its critics for "money irregularities." Pl. Mem. at 42. Indeed, the proposed RICO counterclaim would be the ***first*** such instance, and plaintiffs cite nothing to the contrary (nor can they). How plaintiffs can satisfy their own pre-filing investigation obligation by alleging other "money irregularity" lawsuits when, indeed, none exists is perplexing. Plaintiffs' reference to "bogus lawsuits," Pl. Mem. at 40, also is completely unfounded, and certainly seeks to leave the Court with the impression that other lawsuits by FEI exist when they do not. Cf. Hoatson v. New York Archdiocese, 2007 U.S. Dist. LEXIS 9406, at *40-42 (awarding sanctions due in part to plaintiff's counsel's repeated filings of other frivolous RICO claims in other federal district courts which were all previously dismissed).

Plaintiffs also misrepresent the record when they argue that "defendant[s] [sic] ***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

[63] In addition to misleading the Court about the parties, counsel, and procedural history in the PETA v. Feld matter, plaintiffs also misrepresent the testimony in that case. See Pl. Mem. at 41, n.23. Plaintiffs allege that Mr. Feld and others have "***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." Id. The only citation for this allegation is plaintiffs' Opposition to FEI's Motion for Leave to Amend -- a brief that contains nothing discussing membership and donor lists, bank statements, and/or credit card numbers, let alone anything that constitutes an admission that such materials and/or social security cards have been obtained. Indeed, certain portions of the transcript that plaintiffs cited as testimony from Mr. Feld is actually testimony from FEI's former CFO, Chuck Smith. See Ex. 11 to Pl. Opp. to FEI's Mot. for Leave to Amend (3/30/07) at 526-27. Nonetheless, the portions of Mr. Smith's testimony that plaintiffs appear to cite are actually the questions phrased by PETA's counsel, not any answers given by Mr. Smith. It is unclear how PETA's recitation of its allegations when Mr. Smith was on the stand would constitute an admission by Mr. Feld. Moreover, plaintiffs' repeated citations to other litigation against FEI as evidence that there has been sanctionable conduct in this case is of no moment. While it is no secret that FEI has been sued by individuals in the past, these allegations are simply that – allegations. No case referenced by plaintiffs has been put to a jury and decided for or against FEI. Significantly, none of these cases even involve a animal activist organization or "money irregularities."

associate themselves with Mr. Rider and the plaintiffs . . . ." Pl. Mem. at 41 (citing FEI's Opp. to Rider's Mot. for Protective Order (5/15/07) at 14)) (emphasis added). FEI, however, stated no such thing. In the section of the Opposition quoted by plaintiffs, FEI was pointing out Rider's failure to cite to any real or specific harm that would have stemmed from not sealing his purportedly confidential information. FEI's Opp. to Rider's Mot. for Protective Order at 14. While FEI went on to state that Rider's allegations were difficult to believe, particularly in light of the fact that both the ASPCA and API ***published*** their donors on the internet, FEI speculated that "equally, if not more plausible, is the possibility that donors may not want to affiliate themselves with the unlawful payment scheme that Rider, his counsel, and his co-plaintiffs conspired to commit." Far from a "clear indication" as characterized by plaintiffs, FEI's statements do not evidence an intent to act – but rather, merely make an observation about the irony of Rider's quest for confidential treatment.[64]

B. THE IMPROPER PURPOSE CASES CITED BY PLAINTIFFS BEAR NO RESEMBLANCE TO FEI'S CONDUCT IN THIS LITIGATION

Plaintiffs fail to cite to a single case which awards sanctions based solely on the moving party's bare allegations regarding improper purpose. Indeed, the cases cited by plaintiffs which contain "improper purpose" analysis do not base this conclusion on the moving party's speculation. Rather, they rely on concrete evidence, for example, that the parties engaged in proven patterns of frivolous litigation in the past, used the frivolous litigation as a platform in the public media, used the frivolous litigation as part of their activist agenda, manufactured evidence to bolster a claim stemming from a personal vendetta, or admitted that the claim was brought as a

[64] Plaintiffs also imply that any action by FEI would infringe upon their First Amendment rights. Pl. Mem. at 41-42 (citing Int'l Action Center v. United States, 207 F.R.D. 1, 3 (D.D.C. 2002)). As discussed above, FEI has not taken, nor does it intend to take, any such action. Nonetheless, plaintiffs seem to have lost sight of a basic legal principle: FEI is not the government and, therefore, it cannot infringe upon plaintiffs' constitutional rights. Indeed, Int'l Action Center v. *United States* addressed the government's request for information. Plaintiffs' efforts to romanticize their ideological attack on FEI with notions of First Amendment rights have no support in the law.

settlement tool or to take advantage of treble damages provisions. See, e.g., Byrd v. Hopson, 108 Fed. Appx. 749, 755 (4th Cir. 2004) (improper purpose where complaint was based on "outlandish accusations of a woman with a vendetta;" demonstrable example of how attorney multiplied proceedings, and the discovery of a likely staged tape recording manufactured to bolster the frivolous claims); O'Malley v. New York City Transit Auth., 896 F.2d 704, 709 (2d Cir. 1990) (plaintiff's complaint "perhaps the most 'baseless' RICO claim ever encountered by this court" and plaintiff persevered notwithstanding magistrate's warning that pursuing claims may warrant Rule 11 sanctions), Rule 11 superseded as stated in Hoatson v. New York Archdiocese, 2007 U.S. Dist. LEXIS 9406; Fahrenz, 850 F.2d at 210 (plaintiffs "continued dogged pursuit" of claims persisted after key witnesses recanted all testimony that provided the basis for the fraud); Medical Supply Chain, Inc. v. Neoforma, Inc., 419 F. Supp. 2d 1316 (D. Kan. 2006) (plaintiffs attempted to re-litigate claims previously barred by issue preclusion and ignoring prior judges' warnings regarding frivolity of claims); Katzman, 167 F.R.D. at 661 (claims completely unfounded by existing law and plaintiffs immediately held a press conference following filing of complaint forcing defendant to respond to unwarranted adverse publicity); Burnette v. Godshall, 828 F. Supp. 1439 (N.D. Cal. 1993) (claims completely unsupported by the law and plaintiff counsel's admitted adding RICO claim for its treble damages provision); Trout v. Garrett, 780 F. Supp. 1396 (D.D.C. 1991) (defendant repudiated its prior position with respect to settlement of 5 claims); Barlow, 666 F. Supp. at 229-31 (complaint utterly frivolous and in conflict with existing law and plaintiff proceeded despite being warned by magistrate that complaint lacked merit ***after*** opportunity for discovery).

Neither FEI's RICO counterclaim, nor the other statements challenged by plaintiffs in its sanctions motion, bear any resemblance to the improper purpose cases cited by plaintiffs. FEI's

Counterclaim is factually based and clearly not frivolous (thus establishing its "proper" purpose), and plaintiffs' bald accusations of improper purpose regarding harassment, delay and cost are unfounded and should be rejected. See Shekoyan v. Sibley Int'l, 409 F.3d 414, 425 (D.C. Cir. 2005) (affirming district court's finding of no improper purpose or bad faith where challenged motion was "justified"); Ponce Fed. Bank v. Munoz, No. 92-1331, 1996 U.S. Dist. LEXIS 15103, at *50-52 (D.P.R. July 23, 1996) (concluding that evidence did not support that RICO claim was filed for any improper purpose).

CONCLUSION

For the reasons set forth herein, FEI respectfully requests that plaintiffs' Motion be denied and that FEI be awarded its reasonable expenses and attorney's fees incurred in opposing the Motion.

Dated this 16th day of August, 2007

Respectfully submitted,

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