UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS, et al.,	:	
Plaintiffs,	:	
v.	:	**Case No. 1:03-CV-02006 (EGS)**
RINGLING BROS. AND BARNUM & BAILEY CIRCUS, et al.,	:	
Defendants.	:	

DEFENDANT FELD ENTERTAINMENT INC.'S MOTION FOR REIMBURSEMENT OF EXCESS COSTS, EXPENSES AND ATTORNEYS' FEES PURSUANT TO 28 U.S.C. § 1927 FROM PLAINTIFFS' COUNSEL

Pursuant to 28 U.S.C. § 1927, Defendant Feld Entertainment, Inc. ("FEI") hereby moves the Court for an order requiring counsel for plaintiffs to reimburse FEI for the excess costs, expenses and attorneys' fees incurred by FEI in responding to "Plaintiffs' Motion Under Rule 11 Against Defendants [*sic*] and Their Counsel Concerning the Baseless Allegations Included in Their Proposed Counterclaim and Unclean Hands Defense and for Their Scurrilous Attacks on Plaintiff Tom Rider" ("Pl. Rule 11 Motion") and the memorandum in support of that motion ("Pl. Rule 11 Mem.") (Aug. 3, 2007) (Docket No. 163). Plaintiffs' motion has no legal or factual integrity and, because it was filed with multiple misstatements of fact that were known or clearly should have been known by plaintiffs' counsel to be false, the motion was filed in bad faith and/or reckless disregard for the truth. Because plaintiffs' Rule 11 motion has "unreasonably and vexatiously" multiplied the proceedings in this case, the lawyers listed on plaintiffs' motion and brief should be ordered, jointly and severally, to "satisfy personally the excess costs,

expenses, and attorneys' fees reasonably incurred by [FEI] because of such conduct." 28 U.S.C. § 1927.

Pursuant to Local Rule 7.1(m), counsel for defendant hereby certify that they have conferred with counsel for plaintiffs in good faith about the subject of this motion and are advised that counsel for plaintiffs oppose the motion.

STATEMENT OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR REIMBURSEMENT OF EXCESS COSTS, EXPENSES AND ATTORNEYS' FEES PURSUANT TO 28 U.S.C. § 1927 FROM PLAINTIFFS' COUNSEL

INTRODUCTION AND BACKGROUND

Beginning in the summer of 2006, counsel for FEI came upon disturbing information in pre-trial discovery in this case about the actions of plaintiffs and their counsel. Documents produced by the Wildlife Advocacy Project ("WAP") (an entity controlled and dominated by plaintiffs' counsel) in June 2006 as well as information coming to light in plaintiffs' counsel's deposition of their own client – Tom Rider ("Rider") – in October 2006 revealed that, since March 2000, well before this litigation commenced, Rider had regularly been paid tens of thousands of dollars – indeed, the entirety of his livelihood – by the organizational plaintiffs or a predecessor plaintiff entity (the Performing Animal Welfare Society ("PAWS")). *See* Ex. 1 (¶¶ 31-121) & Ex. 3 to Defendant's Opposition to Plaintiffs' Motion Under Rule 11 ("FEI Rule 11 Opp.") (filed contemporaneously herewith). It was also revealed that the money, for the most part, flowed from the organizational plaintiffs through WAP or the law firm representing plaintiffs in this case, was characterized by WAP and plaintiffs' counsel as "grant" money in the correspondence to Rider but as "compensation" in filings with the Internal Revenue Service and that Rider had not filed an income tax return since he left the employment of FEI in 1999. *Id.*; FEI Rule 11 Opp. at 14-25. This new information further revealed that sworn discovery

responses by the organizational plaintiffs and Rider in 2004 and 2005 (interrogatory answers and deposition testimony) on the nature and extent of these payments had been false or misleading, and had essentially thrown prior defense counsel off the trail. Ex. 1 (¶¶ 134-161) to FEI Rule 11 Opp.

Once this payment scheme surfaced, an examination of the course of proceedings in this case demonstrated the motivation. Under the law of this case, Rider was the only plaintiff adjudicated by the D.C. Circuit to have Article III standing. *ASPCA v. Ringling Bros. & Barnum and Bailey Circus*, 317 F.3d 334, 339 (D.C. Cir. 2003). That standing was in turn based upon a claimed injury in fact consisting of the dual allegation (1) that Rider avoided a continuing aesthetic injury by quitting the circus and not going back to see the elephants he had formed an alleged "bond" with; and (2) that he would visit those elephants regularly if they were in a different environment. *Id.* at 335. However, these claims, which were accepted by this Court and the D.C. Circuit under Fed. R. Civ. P. 12(b)(6) as true for purposes of the standing decisions, were not true. Rider had not, in fact, avoided seeing the elephants in the circus and had never bothered to go visit three of them that were no longer with the circus. FEI Rule 11 Opp. at 25-33. None of this was disclosed until ***after*** the standing decisions had been rendered by this Court and the D.C. Circuit. *Id.* at 33. Thus, it became clear why Rider needed to be paid: the organizational plaintiffs (who this Court ruled have no standing, in a decision that remains undisturbed to this day[1]) needed a vehicle in which to bring their claims. It was equally clear that Rider's claimed "aesthetic injury" was contrived and purely the result of artful (and false) pleading.

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[1] *ASPCA v. Ringling Bros. & Barnum and Bailey Circus*, No. 00-1641 (D.D.C. June 29, 2001) (holding that the organizational plaintiffs have no standing to sue because they have no "aesthetic" or "informational" injury).

Moreover, Rider had given a series of sworn statements in this case, in the legislative and administrative arenas and other contexts as to what he claimed he witnessed about the treatment of the elephants when he was employed by FEI. Ex. 4 to FEI Rule 11 Opp. Yet Rider's story, as he told it, was inconsistent and conflicting, was tailored to fit the particular context in which the statement was made and became more and more favorable to plaintiffs' position in this case as time passed and as the amount of money paid to Rider by the organizational plaintiffs and WAP increased. *Id.*

Furthermore, all of Rider's (and the organizational plaintiffs') allegations about how FEI treats its elephants had already been presented to the United States Department of Agriculture ("USDA"), the agency charged by Congress with administration and enforcement of the Animal Welfare Act ("AWA"), 7 U.S.C. § 2131 *et seq.*, and were well known to the United States Department of Interior, Fish and Wildlife Service ("FWS"), the agency charged by Congress with administration and enforcement of the Endangered Species Act ("ESA"), 16 U.S.C. § 1531 *et seq.* Yet FWS had never taken the position that FEI was "taking" its Asian elephants, and USDA specifically ruled that Rider's claims raised no violation of the AWA either. Memorandum of Points and Authorities in Support of Defendant's Motion for Summary Judgment at 6-7 (Sept. 5, 2006) ("FEI SJ Mem.") (Docket No. 82); Reply in Support of Defendant's Motion for Summary Judgment at 4 & DX 17 thereto (Oct. 27, 2006) ("FEI SJ Reply") (Docket No. 100).

Thus, after Rider's deposition in October 2006, FEI was confronted with a stunning development: It discovered that it had spent the better part of six years defending, at great expense, a lawsuit fueled by a payment scheme – that plaintiffs tried to hide – to support an individual plaintiff who had made false claims about his standing to sue and whose story about

alleged elephant abuse had evolved to fit the organizational plaintiffs' agenda of abolishing animals in entertainment. And all of this was occurring with respect to conduct by FEI that two federal agencies had never found to be a violation of the governing regulatory statutes and pursuant to claims by plaintiffs that are not even cognizable by private parties under either the AWA or the ESA. FEI SJ Mem. at 6-7, 12, 29.

Accordingly, FEI investigated its options for obtaining redress for this course of conduct. After an extensive evaluation of the matter, FEI Rule 11 Opp. at 6-9, FEI filed a motion on February 28, 2007, for leave to amend its answer in this case to assert (1) the defense of unclean hands; and (2) a counterclaim against plaintiffs under the civil provisions of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 *et seq.*, based upon the predicate acts of bribery, illegal gratuity payments, obstruction of justice, mail fraud and wire fraud, *id.* §§ 201(b)-(c), 1503(a), 1341 & 1343. (Docket No. 121). FEI's 65-page, 197-paragraph counterclaim set out in elaborate detail the basis for FEI's RICO claims, all of which were based on documents and information produced by plaintiffs themselves in this litigation, available on plaintiffs' websites or otherwise available in the public domain. *See* Ex. 1 to FEI Rule 11 Opp.

Plaintiffs opposed FEI's motion for leave to amend. (Docket No. 132). Plaintiffs had no credible argument under the standards prescribed by Fed. R. Civ. P. 15 & 13(e) for why an amendment to the pleadings should not be allowed.[2] Nor could plaintiffs seriously contend that, assuming the facts alleged in the counterclaim to be true under the tests prescribed by Fed. R. Civ. P. 8 & 12(b)(6), FEI had failed to state a cause of action under RICO. Instead, under the guise of arguing that the counterclaim and proposed defense were "futile," plaintiffs attempted to

[2] In fact, as recently as August 7, 2007, plaintiffs announced their intention to seek their own amendments to the pleadings – in complete contradiction of their arguments about "delay" and related points in their opposition to FEI's motion for leave to amend. Ex. 109 to FEI Rule 11 Opp.

offer evidence that they had not violated RICO – an inquiry that was totally irrelevant at the motion-for-leave-to-amend stage. They also executed a "data dump" of all of their purported elephant abuse evidence – evidence that has nothing to do with the RICO claims in any respect.

On June 28, 2007, plaintiffs served FEI's counsel by hand delivery with "plaintiffs' motion for Rule 11 sanctions." Ex. A hereto (cover letter). The cover letter was signed manually by Katherine A. Meyer, *id.*, and the attached motion and brief bore an electronic signature of Ms. Meyer and the names of Messrs. Glitzenstein and Crystal and Ms. Ockene and Sanerib, Ex. A hereto (Motion at 2-3; Memorandum at 44-45). The Rule 11 motion and brief, as served by counsel for plaintiffs, contained ***twenty-three (23)*** false statements fact that were known, or clearly should have been known, by counsel for plaintiffs to be untrue. *See* Ex. B hereto (chart listing the false statements in the June 28 documents and evidence showing why each such statement is false).

The purported Rule 11 motion also had no integrity as a matter of fact or law. Plaintiffs did not cite a single case in which any litigant or its counsel had been sanctioned under Rule 11 for filing a complaint or counterclaim that pleaded a RICO claim with the detail found in FEI'S counterclaim or that was based on an already-existing evidentiary foundation as elaborate as the evidence that support's FEI's RICO claims. Furthermore, plaintiffs could not show that a single allegation of fact in FEI's RICO counterclaim was untrue. Nor did plaintiffs make any argument that FEI's claims had no legal basis under the RICO statute or RICO case law. Indeed, although plaintiffs spent much effort on the facts with respect to the claims of bribery and illegal gratuity payments, they never even took issue with any of the mail and wire fraud claims or the obstruction of justice claims against plaintiff Animal Welfare Institute. Instead, as with their improper opposition to the motion for leave to amend, plaintiffs used the purported Rule 11

motion as a vehicle to rehearse the evidence that they apparently think will exonerate them from FEI's RICO claims – an approach that, not only has nothing to do with Rule 11, but actually serves as further confirmation that FEI's allegations are well grounded in fact and law.

On July 19, 2007, counsel for FEI responded by letter within the 21-day period prescribed by Rule 11 between service and filing of such a motion. *See* Fed. R. Civ. P. 11(c)(1)(A). Counsel for FEI advised counsel for plaintiffs that the RICO counterclaim and other challenged pleadings and statements would not be withdrawn because FEI could and would demonstrate that every single paragraph in the counterclaim has a basis in fact and law, and that the same showing could and would be made for every other statement that plaintiffs had challenged. Ex. C hereto at 1. FEI counsel further pointed out that the arguments in the Rule 11 motion had nothing to do with Rule 11 but instead all went to the merits of the claims asserted, not to whether there was a basis under Rule 11 for FEI to make them. *Id.* Finally, FEI counsel observed that the Rule 11 motion and memorandum, as served and signed by counsel for plaintiffs, "misstate the case law, rely upon irrelevant authorities and ***contain several (more than 20) false statements of fact that you know or clearly should know are untrue.*** We shall point all of this out to the Court at the appropriate time and shall seek whatever remedies are appropriate." *Id.* at 2 (emphasis added).

By letter dated July 20, 2007, counsel for plaintiffs asked FEI counsel to "identify these alleged 'false statements of fact' so that we may take this into consideration before we file the Rule 11 motion with the Court." Ex. D hereto. Plaintiffs' counsel sent another letter in this respect on July 27, 2007. Ex. E hereto. By letter dated July 31, 2007, counsel for FEI responded as follows:

> Our position on your Rule 11 motion was stated in my letter to you of July 18 [*sic*], and we have nothing more to add at this time.

> ***Since you signed the motion as an officer of the Court and served it prior to my July [19] letter, you evidently were satisfied that your motion had a basis and accurately stated the facts. It is not our responsibility to perform your pre-filing inquiry for you.*** Should you file the motion, we will state our position formally to the Court at the appropriate time and will seek available remedies, including sanctions, as appropriate.

Ex. F hereto (emphasis added).

On August 3, 2007, plaintiffs filed their Rule 11 motion and brief with the Court. (Docket No. 163). By their own actions, plaintiffs admitted that the version of the Rule 11 motion and brief that they had served on June 28 contained false statements of fact, because they deleted ***some*** of them from the version filed on August 3. *See* Ex. B hereto, nn. 1-2, 4-5, 7. However, plaintiffs did not correct all of their false statements or even all of the ones that plaintiffs themselves had evidently concluded were untrue. The Rule 11 motion and brief, as filed with the Court, contain ***nineteen (19)*** false statements of fact that are known, or clearly should be known, by plaintiffs' counsel to be untrue. *See* Table I at pp. 10-18, *infra*. In all other respects the filed version of the Rule 11 motion and brief remained the same (down to the same typographical errors). That is, plaintiffs' Rule 11 motion did not show why, under Rule 11, there is no basis in fact or law for the RICO claims that FEI has asserted or for the other statements that FEI has made about Rider in its filings with the Court. Instead, plaintiffs argued the claims on their merits, further underscoring the point that there is a viable claim under RICO for the fact finder to resolve.

ARGUMENT

Section 1927 of Title 28, United States Code, provides:

> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the

> excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

"Section 1927 recognizes by statute a court's power to assess attorney's fees against an attorney who frustrates the progress of judicial proceedings." *United States v. Wallace*, 964 F.2d 1214, 1218 (D.C. Cir. 1992). "Although the standard under section 1927 is somewhat unsettled, attorney behavior must be at least 'reckless' to be sanctionable under that section . . . ." *Id.* at 1217. *See also id.* at 1218 (*quoting Reliance Ins. Co. v. Sweeney Corp.*, 792 F.2d 1137, 1138 (D.C. Cir. 1986) ("While the language of § 1927 suggests deliberate misbehavior, subjective bad faith is not necessary; attorneys have been held accountable for decisions that reflect a reckless indifference to the merits of a claim")).

As shown below, whether judged by a recklessness standard – "deliberate action in the face of a known risk, the likelihood or impact of which the actor unexcusably underestimates or ignores," *Wallace*, 964 F.2d at 1220 – or by a standard of bad faith – "an intent unreasonably to delay the proceedings," *id.* at 1219 – plaintiffs' Rule 11 motion and brief merit sanctions under section 1927.

I. PLAINTIFFS' RULE 11 MOTION AND BRIEF ARE LITTERED WITH FALSE STATEMENTS OF FACT

As one court has aptly noted, "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." *Rateree v. Rockett,* 630 F. Supp. 763, 778 n.26 (N.D. Ill. 1986). Here, plaintiffs, who argue that FEI's RICO counterclaim is "without any factual foundation whatsoever," Pl. Rule 11 Motion at 1, make their argument with a motion and brief that contain ***nineteen (19)*** separate false statements of fact. These false statements and the evidence that proves their falsity – all of which was known to or easily available to counsel for plaintiffs before they filed the Rule 11 motion and brief – are set forth in Table I below:

TABLE I
FALSE STATEMENTS OF FACT IN PLAINTIFFS' RULE 11 MOTION AND SUPPORTING MEMORANDUM

Page Ref.	False Statement of Fact	The Truth
Pl. Rule 11 Motion at 2.	"FEI has a track record of filing motions based on completely unfounded accusations for improper purposes. Indeed, the Virginia Supreme Court recently upheld sanctions against attorneys for FEI's Chief Executive Officer Kenneth Feld for tactics that mirror what FEI has done here."	Plaintiffs cite nothing here or in the memorandum to support the claim of an FEI "track record." FEI was never a party to the Virginia case, nor was FEI sanctioned in that case.
Pl. Rule 11 Mem. at 1.	"FEI's improper tactics are well established by its own internal documents which show that this kind of razed earth strategy is precisely what this corporation has for many years done to those who criticize the company and its operation of the circus: it 'attacks' them with 'lawsuits' and charges of 'money irregularities' to 'keep[] up the pressure . . . [so] they will spend more of their resources in defending their actions."	There is no evidence of any "lawsuit" by FEI against any of its critics. Plaintiffs cite no case in which FEI has sued any animal rights organization or any other "critic." There is no evidence of FEI accusing any of its critics of "money irregularities." Indeed, the proposed RICO counterclaim would be the first and only instance in which FEI has made any such claim against an animal rights group or other "critic." Plaintiffs cite the Long Term Animal Plan Task Force report. As has already been explained, at least twice in this case, this document is more than 10 years old, and this "plan" was never adopted or implemented by FEI. Response in Opposition to Rider's Motion for a Protective Order With Respect to Certain Financial Information at 16 (May 15, 2007) ("FEI Opp. to Rider Motion for Protective Order") and Ex. 9 thereto (Docket No. 146); Reply in Support of Defendant Feld Entertainment, Inc.'s Expedited Motion to Enforce the Court's Order of September 26, 2005 at 10 n. 5 (July 3, 2007) ("FEI Reply on Mtn. to Enforce") (Docket No. 158).

Page Ref.	False Statement of Fact	The Truth
Pl. Rule 11 Mem. at 2 n. 1.	"Although FEI was not found liable for any damages under Virginia law, the fundamental facts of FEI's infiltration, spying, and removal of confidential information were not disputed."	FEI was not a party to the *PETA* case and therefore could not have been found liable for anything. The facts about what happened obviously were disputed since a jury trial was held on the issue, and the jury found for the defendant. The allegations of "infiltration, spying, and removal of confidential information" were directly disputed in the testimony of the defendant. *PETA v. Feld*, No. 2004-220181 (Fairfax Cty. Cir. Ct.), Trial Tr. at 2355-56, 2368-69, 2397-98 (K. Feld) (Ex. 101 to FEI Rule 11 Opp.). Furthermore, PETA's claims of "infiltration, spying and removal of confidential" information" were put before a jury, and the jury found for the defendant. *Id.*, Jury Verdict and Special Interrogatories (Mar. 15, 2006), Ex. 46 to Reply in Support of Motion to Compel Documents Subpoenaed from the Wildlife Advocacy Project (Oct. 6, 2006) ("FEI Reply in Support of WAP Mtn. to Compel") (Docket No. 95). PETA's appeal of the jury verdict against it was refused by the Virginia Supreme Court. *PETA v. Feld*, No. 061206 (Va. Dec. 18, 2006) (Ex. 103 to FEI Rule 11 Opp.).
Pl. Rule 11 Mem. at 3.	"Since Mr. Rider left the circus, he has been traveling around the country speaking out about the abuse that he witnessed when he worked there."	Rider left the employment of FEI in November 1999 to work for another circus act operated by Daniel Raffo that traveled in Europe. That act involved some of the same elephants and the same alleged elephant abusers that Rider claims he witnessed when he was on FEI's Blue Unit. Deposition of Tom E. Rider at 177-82 (Oct. 12, 2006) ("Rider Dep.") (Ex. 73 to FEI Rule 11 Opp.).
Pl. Rule 11	"[Defendant] decided to omit Mr.	Rider's actions are at issue in the

Page Ref.	False Statement of Fact	The Truth
Mem. at 9-10 n.5; 29 n.15.	Rider's alleged misconduct in talking to the press from their recently filed 'Expedited Motion to Enforce The Court's September 26, 2005 Order' in which they allege that the other plaintiffs have 'abused the discovery process' by referencing non-confidential documents produced in discovery on their websites. See Docket No. 152. Evidently, defendants and their counsel realized that they could not have it both ways – i.e., they could not insist to this Court that Mr. Rider was 'not' engaging in any 'media and public relations efforts,' as alleged in their proposed RICO counterclaim, PCC ¶ 73, and at the same time demand that the Court order Mr. Rider to stop making 'statements to the press' about defendants' abuse of their elephants." * * * "FEI and its counsel evidently now recognize this reality, which is why their recent motion asking this Court to halt plaintiffs' media efforts omits any reference to the specific demand made in the April 30, 2007 letter concerning Mr. Rider's activities."	motion to enforce. *See* FEI Reply on Mtn. to Enforce at 10-11. As has already been explained, Rider was not addressed in the opening motion -- not because of some purported recognition that defendant could not "have it both ways" -- but because FEI suspected, but did not then have direct evidence, that Rider was also involved in the abuse of the discovery process. *Id.* at 10 n.6. Rider has since confirmed that he was heavily involved in plaintiffs' abuse of the discovery process. *Id.* at 10-11; Notice of Supplemental Authority by Feld Entertainment, Inc. (July 18, 2007) (Docket No. 160). Furthermore, counsel for FEI rejected the assertion that Rider could not be spokesman and a bribed witness at the same time in the correspondence that preceded the motion to enforce. FEI Reply on Mtn. to Enforce at 10 n.6. The assertion that FEI counsel "recognized" some kind of inconsistency between Rider's violations of the Court's September 26, 2005 order and that fact that he is a compensated witness therefore is false. Plaintiffs have done considerably more than "reference" discovery documents "on their websites." They have given the documents in their entirety to the press. Plaintiffs failed to disclose that fact to the Court in their memorandum in opposition to the Motion to Enforce and have failed to disclose it here. Nowhere in FEI's Motion to Enforce, the brief in support, the reply brief or the proposed order is there any request that the Court order plaintiffs to "stop making 'statements to the press' about defendants' abuse of their elephants."

Page Ref.	False Statement of Fact	The Truth
		The motion seeks an order to stop plaintiffs from referring – outside the litigation -- to material produced in discovery in this case by FEI.
Pl. Rule 11 Mem. at 14.	"Thus, their proposed counterclaim does not include any evidence that anyone has stated that he or she . . . has paid him [Rider] to be a plaintiff in this case."	Paragraph 46 of the proposed counterclaim refers to a December 21, 2001 letter from ASPCA describing a $6000 payment to WAP for the "Tom Ryder [*sic*] project" to pay for Rider's "work on the Ringling Brothers' circus tour ***and litigation.***" Ex. 1 to FEI Rule 11 Opp., (Annotated RICO CC ¶ 46 (citing Ex. 10 to FEI Rule 11 Opp. (ASPCA letter to WAP (12/21/01))) (emphasis added). Paragraphs 110 and 111 of the proposed counterclaim describe three payments made by API to WAP to support the "***Ringling Brothers and Barnum & Bailey Case***," and paragraph 136 notes that API changed the word "***Case***" to "PR Efforts" after FEI its motion to compel subpoena compliance against WAP. Ex. 1 to FEI Rule 11 Opp. (Annotated RICO CC ¶¶ 110-11, 136 (citing Exs. 43, 48 & 54 to FEI Rule 11 Opp. (API letters to WAP (4/21/06, 7/20/06, 1/3/07))) (emphasis added). Paragraph 120 of the proposed counterclaim quotes from an email by Katherine Meyer soliciting payments of the funds at issue (which eventually were paid to Rider) in which Meyer comments upon Rider's ***"total commitment to the lawsuit."*** Ex. 1 to FEI Rule 11 Opp., (Annotated RICO CC ¶ 120 (citing Ex. 16 to FEI Rule 11 Opp. (Meyer E-mail to organization plaintiffs (11/5/03))) (emphasis added).
Pl. Rule 11 Mem. at 13 n. 7.	"Thus, although the Court of Appeals only addressed the standing of Mr. Rider when it held that this case	Judge Sullivan's ruling that the organizational plaintiffs have no standing based on "informational

Page Ref.	False Statement of Fact	The Truth
	should proceed . . . the other plaintiffs to this action have also alleged Article III standing – of precisely the kind that was recently upheld by a district court in California."	injury" was left undisturbed on appeal. *ASPCA v. Ringling Bros. and Barnum & Bailey Circus*, 317 F.3d 334, 336 & 338 (D.C. Cir. 2003). The district court's ruling binds the plaintiffs unless and until it is either reconsidered by that court or overruled by the D.C. Circuit.
Pl. Rule 11 Mem. at 14.	"Therefore, because, according to defendants' own proposed RICO complaint, the 'illegal' scheme to 'bribe' Mr. Rider to make false standing allegations did not begin until 2001 – a year after those standing allegations were first made – defendants' insistence that Mr. Rider has only made those allegations in exchange for 'bribes' is demonstrably false on that basis alone."	Paragraph 32 of the proposed counterclaim specifically alleges that Rider has been paid by one or more of the current or former plaintiffs in this case from and after the filing of the original complaint on July 11, 2000 and that in May 2001, the current organizational plaintiffs took over the funding of an ongoing program to pay Rider. Ex. 1 to FEI Rule 11 Opp. (Annotated RICO CC ¶ 32 (citing FEI Rule 11 Opp. Ex. 7 (Weisberg email to Hawk (5/7/01)); Ex. 8 (Rider letter to PAWS (5/14/01)); Ex. 73 (Rider Dep. at 204-11))). The record also is undisputed that Rider began receiving compensation from former plaintiff PAWS in March 2000. Rider Dep. at 204-05 (Ex. 73 to FEI Rule 11 Opp.).
Pl. Rule 11 Mem. at 15.	"[S]ee also Williams & Connelly *[sic]*, 643 S.E. 2d at 136-40 (upholding sanctions against other Feld counsel . . .").	Counsel for FEI in the present case do not represent Kenneth Feld in any pending matter and did not at the time that the *Williams & Connolly* decision was issued or the actions addressed in that opinion occurred.
Pl. Rule 11 Mem. at 27-28.	Describing the money paid to Rider as "funding that amounts to less than $20,000 a year . . ."	WAP's own Form 1099's for 2004 and 2005 show total annual payments to Rider of $23,940 and $33,600, respectively, and Rider admits that WAP paid him at least as much in 2006 as it paid him in 2005. Ex. 83 to FEI Rule 11 Opp. (WAP 1099 Forms to Rider); Rider Dep. at 123-24, 136-37

Page Ref.	False Statement of Fact	The Truth
		(Ex. 73 to FEI Rule 11 Opp.).
Pl. Rule 11 Mem. at 30.	"See Transcript of September 16, 2005 Hearing at 29-30 ('Your Honor, we have Tom Rider, a plaintiff in this case, he's going around the country in his own van, he gets money from some of the clients and some other organizations to speak out and say what really happened when he worked there') . . . ."	Rider has received money from ***all*** of Katherine Meyer's clients in this case, not just "some" of them. The van is Rider's, but only because Meyer sent him a $5500 check from WAP to pay for it. Rider Dep. at 142-43 (Ex. 73 to FEI Rule 11 Opp.); Ex. 31 to FEI Rule 11 Opp. (Meyer letter to Rider (4/21/05)).
Pl. Rule 11 Mem. at 31.	"See . . . Williams & Connolly, 643 S.E.2d at 146 (FEI lawyers sanctioned for '[c]ontemptuous language and distorted representations') . . . ."	FEI was not sanctioned and no filing in that case on behalf of non-party FEI was the subject of sanctions.
Pl. Rule 11 Mem. at 32.	"Defendants, of course, have no actual evidence that Mr. Rider has 'destroyed' any relevant documents in this case."	The Declaration of Lisa Joiner ¶ 5 (May 7, 2007) documents an admission by counsel for Rider that Rider was not keeping responsive documents during at least part of the time in which this case has been pending. Ex. 32 to Reply in Support of FEI's Motion to Compel Discovery from Plaintiff Tom Rider and for Sanctions, Including Dismissal (May 7, 2007) (Docket No. 144). The Meyer declaration admits that Rider did not keep WAP documents dated prior to March 2004. "Not keeping" is synonymous with "destruction." In addition, neither Rider nor plaintiffs have ever denied the assertion that Rider has destroyed documents responsive to FEI's production requests, nor has Rider come forward with a declaration or other sworn statement to the effect that he has not in fact destroyed documents that are responsive to FEI's production requests. Furthermore, Rider has failed to produce documents that a third party (WAP) has confirmed exist, that Rider

Page Ref.	False Statement of Fact	The Truth
		once had, that are responsive to FEI's production requests and as to which Rider had an affirmative obligation as a plaintiff in this case to preserve. The failure to deny an assertion of fact when there is a duty to do so and the failure to perform when there is a duty to do so both have evidentiary significance.
Pl. Rule 11 Mem. at 34.	"[S]ee also Williams & Connolly, 643 S.E.2d at 146 (sanctions upheld against FEI attorneys where trial court found that certain representations made 'didn't even happen, and the rest of them were either twisted or distorted')."	FEI was not sanctioned, and no filing action in that case on behalf of non-party FEI was the subject of sanctions.
Pl. Rule 11 Mem. at 37.	Characterizing Rider's omission of the "child custody" cases from his interrogatory answer as "inadvertent."	The Rider declaration that plaintiffs cite states that "I did not mention these custody disputes in my Answer to Interrogatory No. 7 because, when I was providing that answer, it did not even occur to me that those kinds of matters are 'civil litigation.' I am not a lawyer and did not realize that filings in court concerning marital disputes are 'civil litigation.'" Declaration of Tom Rider ¶¶ 3-4 (Nov. 2, 2007 [*sic*]) (Ex. G to Docket No. 106). Thus, the information was known to Rider but intentionally not included on the basis of what he claims now he understood then as "civil litigation." The omission was deliberate, not "inadvertent." Notably, this misdated declaration was not made by Rider "under pain of perjury" as required by 28 U.S.C. § 1746.
Pl. Rule 11 Mem. at 40.	"Indeed, it is now absolutely clear that this is precisely the scorched earth approach that FEI uses to discredit its critics – i.e., it attacks them with	There is no evidence, and plaintiffs cite none, that FEI has ever sued any of its critics or made contemptuous statements about them. The implied

Page Ref.	False Statement of Fact	The Truth
	contemptuous accusations, bogus lawsuits, and similar tactics to tarnish their reputations, make them spend money, take the focus off its own misconduct, and generally harass them into ceasing the conduct that FEI dislikes."	link that plaintiffs make to the *Williams & Connolly* case is false because FEI was not a party to the *PETA v. Feld* case, and no filing in that litigation on behalf of non-party FEI was the subject of sanctions. The other claimed actions -- forcing adversaries to spend money, etc. -- all are based on a document outlining actions that the record in this case shows were never undertaken. FEI Opp. to Rider Motion for Protective Order at 16 and Ex. 9 thereto; FEI Reply on Mtn. to Enforce at 10 n.5.
Pl. Rule 11 Mem. at 41 n.23.	"FEI's Chief Executive Officer, Kenneth Feld . . . [has] admitted that they have conducted 'covert' operations against animal protection groups that criticize the circus . . . ." "FEI also hired a former CIA official to spy on animal groups . . . ."	Nothing cited here shows that Kenneth Feld has ever made such an "admission." Indeed, he testified to precisely the opposite in *PETA v. Feld. PETA v. Feld*, No. 2004-220181 (Fairfax Cty. Cir. Ct.), Trial Tr. at 2355-56, 2368-69, 2397-98 (K. Feld) (Ex. 101 to FEI Rule 11 Opp.). Plaintiffs cite nothing for the claim that Clare George was hired to "spy" or did in fact "spy" on any "animal group." In fact, George's activities had nothing to do with animal rights or animal rights groups. *Id.* at 2339, 2346, 2349 (K. Feld).
Pl. Rule 11 Mem. at 42.	Plaintiffs cite the transcript of a July 30, 2004 hearing in *PETA v. Feld* for the proposition that the court sustained a demurrer with respect to a "baseless" abuse of process counterclaim by Kenneth Feld against PETA, thereby implying that the counterclaim was dismissed.	In a portion of the same hearing (pp. 24-25) -- that plaintiffs ***omit*** from the hearing excerpts attached to their brief -- the court granted Feld leave to replead his counterclaim which he did, and the amended abuse of process counterclaim against PETA survived a second demurrer by PETA. *PETA v. Feld*, No. 2004-220181 (Fairfax Cty. Cir. Ct.), Hearing Tr. at 24-25 (7/30/04) (Ex. 99 to FEI Rule 11 Opp.); Hearing Tr. at 13-14 (10/8/04) (Ex. 100

Page Ref.	False Statement of Fact	The Truth
		to FEI Rule 11 Opp.). Feld's counterclaim was ultimately tried and submitted to the jury in that case. Ex. 46 to Reply in Support of WAP Mtn. to Compel (Docket No. 95) (Ex. 102 to FEI Rule 11 Opp.). Thus, the assertion that a "completely baseless counter-claim against PETA" by Feld for abuse of process was dismissed by the Virginia court is false. The counterclaim had enough basis to warrant a trial to, and decision by, a jury. In fact, during the trial at the close of Feld's evidence, the court denied PETA's motion to strike the counterclaim which is the Virginia equivalent of a Rule 50 motion for judgment. *PETA v. Feld*, No. 2004-220181 (Fairfax Cty. Cir. Ct.), Trial Tr. at 2526 (court denial of motion to strike) (Ex. 101 to FEI Rule 11 Opp.).
Pl. Rule 11 Mem. at 42.	"FEI's own internal document reveals that attacking animal protection groups with 'lawsuits' and charges of 'money irregularities' is one of FEI's key strategies for diminishing the effectiveness of such groups, since this requires them to 'spend more of their resources defending their actions,' than in criticizing the circus."	There is no evidence that this "is" or ever was FEI's strategy. The cited document is more than ten years old and describes actions that the record in this case shows were never carried out. FEI Opp. to Rider Motion for Protective Order at 16 and Ex. 9 thereto; FEI Reply on Mtn. to Enforce at 10 n. 5. Plaintiffs cite no lawsuit filed by FEI against any animal protection group or any instance in which FEI has charged an animal protection group with "money irregularities."

None of these false or misleading statements was "inadvertent" or "accidental." Plaintiffs' counsel were warned about this before they filed their motion, Exs. C & F hereto, but, in their haste to deflect attention away from plaintiffs' own misconduct with a baseless Rule 11 motion against FEI and its counsel, they proceeded in disregard of the known risk that they were

filing a document with false statements. Indeed, plaintiffs' counsel essentially have admitted this by their own actions. In the June 28 version of the Rule 11 motion and brief, plaintiffs represented ***nine*** separate times either that FEI was a party to *PETA v. Feld*, No. 2004-220181 (Fairfax Cty. Cir. Ct.), or that sanctions against attorneys for taking actions on behalf of FEI had been upheld in *Williams & Connolly, LLP v. PETA*, 643 S.E.2d 136 (Va. 2007), *pet. for rehearing filed*, No. 061195 (Va. May 18, 2007). *See* Ex. B hereto. Both allegations are false. FEI was never a party to *PETA v. Feld,* and nothing filed in that lawsuit on behalf of FEI as a non-party witness was ever the subject of sanctions. In the version of the Rule 11 motion and brief filed on August 3, plaintiffs corrected five of these false statements but left the rest of them unchanged. *See* Ex. B hereto, nn.1-2, 4-5, 7.

The facts about the *PETA* case could easily have been verified by counsel for plaintiffs. Their own Rule 11 brief cites to a transcript from the *PETA* matter, Pl. Rule 11 Mem. at 42, so they obviously have access to some of the materials in that case. Moreover, the jury verdict in favor of the defendant in *PETA v. Feld* was made an exhibit to the instant case nearly a year ago. Ex. 46 to Reply in Support of Motion to Compel Documents Subpoenaed from the Wildlife Advocacy Project (Oct. 6, 2006) (Docket No. 95). A simple review of these and other easily accessible materials would have revealed the falsity of these statements.

Equally egregious are plaintiffs' statements that FEI has a history of filing "lawsuits" against "animal protection groups" or other "critics" or making "charges" against them of "money irregularities." Pl. Rule 11 Motion at 1; Pl. Rule 11 Mem. at 1, 42. The empty allegation is outrageous. Plaintiffs do not cite a single lawsuit brought by FEI against an "animal protection group" or "critic" because there are no such "lawsuits." Plaintiffs do not cite a single instance in which FEI has made a charge of "money irregularities" against any such group or

critic because there have been no such "charges." Plaintiffs cite to a "Long Term Animal Plan Task Force" report, but ignore the undisputed evidence that that document, drafted ten years ago by a person who is now deceased, was never adopted or implemented by FEI, let alone does it describe some kind of "strategy" currently in effect. This has been explained at least twice in this very case. Response in Opposition to Rider's Motion for a Protective Order With Respect to Certain Financial Information at 16 (May 15, 2007) and Ex. 9 thereto (Docket No. 146); Reply in Support of Defendant Feld Entertainment, Inc.'s Expedited Motion to Enforce the Court's Order of September 26, 2005 at 10 n. 5 (July 3, 2007) (Docket No. 158). Plaintiffs have nothing to rebut this; they simply plowed ahead with their unsupported, irresponsible accusations.

The other false statements of fact listed in Table I, as illustrated by the contravening evidence set forth therein, also are matters that counsel for plaintiffs could easily have verified. A brief filed with the Court – a Rule 11 brief no less -- strewn with this many false statements of fact is "vexatious" in the extreme. As one Judge of this Court recently described the standard: "'Vexatious' conduct, especially, is not hard to spot. Vexatious is defined as 'without reasonable or probable cause or excuse; harassing; annoying.'" *Newborn v. Yahoo! Inc.*, 437 F. Supp.2d 1, 10 n.13 (D.D.C. 2006) (*quoting* BLACK'S LAW DICTIONARY 1559 (7th ed. 1999)). The falsehoods in plaintiffs' Rule 11 motion and brief fit this standard to a tee and warrant sanctions under section 1927. *Sangui Biotech Int'l v. Kappes*, 179 F. Supp.2d 1240, 1245-46 (D. Colo. 2002) (misstatements of fact by plaintiffs' attorney in support of contempt motion warranted § 1927 sanctions: "Such overstatements constitute a reckless disregard for the duty owed by counsel to the court. . . . I consider the failure to disclose such information to be vexatious and unreasonable and the conduct multiplied the proceedings because it resulted in an [order to show cause] being issued and a hearing held").

II. PLAINTIFFS' RULE 11 MOTION IS SIMPLY AN IMPROPER DIVERSIONARY TACTIC

As FEI has already demonstrated, *see* FEI Rule 11 Opp., plaintiffs' Rule 11 motion has no basis as a matter of fact or law. FEI fully satisfied each of the requirements imposed by Rule 11 with respect to the RICO counterclaim as well as the statements in the other filings that plaintiffs challenge.

All of the allegations in the RICO counterclaim "have evidentiary support" or "if specifically so identified, are likely to have evidentiary support" after a reasonable opportunity for discovery. Fed. R. Civ. P. 11(b)(3). The facts that are pleaded to establish the RICO predicate acts all have evidentiary support. They are all based either on documents that were produced by plaintiffs in this case (or WAP) or on statements that one or more plaintiffs has made in this case in either depositions or answers to interrogatories. *See generally* Ex. 1 to FEI Rule 11 Opp. Plaintiffs do not cite a single case in which a party violated Rule 11 with a comprehensive counterclaim as detailed and grounded in existing evidence as the one the FEI has submitted in this case. *Id.*

Moreover, plaintiffs do not isolate a single proposition of fact -- in either the proposed counterclaim or in any of the motions that are attacked -- that was stated as a fact but that is in reality false. Instead, they disagree with the reasonable inferences that can be drawn from the facts that are alleged. And the facts that are alleged are all based on evidence already produced or available in this case. Whether plaintiffs like it or not, the facts that Rider has received his sole source of financial support from plaintiffs or through WAP for the last seven years, that he has made false allegations about his standing to sue and that his testimony has conflicted and/or evolved in ways that support the plaintiffs' theory of the case give rise to the inferences that the money was paid to influence his testimony and that it has in fact influenced his testimony. These

would be a reasonable inferences for a juror to draw notwithstanding plaintiffs' argument that a reasonable juror could also draw the opposite inferences. Indeed, the fact that competing inferences could be drawn is, itself, proof that the claim is well grounded in fact.

It is equally clear that FEI's claims are "warranted by existing law." Fed. R. Civ. P. 11(b)(2). Plaintiffs do not cite a single authority to suggest that any of the RICO claims is not well grounded in existing law. Again, they argue with the legal conclusions that can be drawn from the facts as pleaded. However, this is not a Rule 11 issue. If the facts, as pleaded, make out the claim for bribery of a witness, then the pleader is entitled to allege the legal conclusion of bribery of a witness. Plaintiffs believe that they have another side of the story that would show that Rider was not bribed, but that is for the fact finder; it does not make out a case for violation of Rule 11.

Finally, FEI's counterclaim, was not "presented for any improper purpose, such as to harass or cause unnecessary delay or needless increase in the cost of litigation." Fed. R. Civ. P. 11(b)(1). As shown above, plaintiffs' "improper purpose" argument is fabricated, based on false statements of fact as well purported actions that plaintiffs have no basis for asserting have ever happened. The counterclaim was submitted because plaintiffs' conduct invades FEI's rights under RICO and has caused FEI damage. The claim is brought to seek monetary damages for a legal injury. Plaintiffs do not contest the point that legal fees incurred in having to defend a bribe-induced case are recoverable under RICO. Whether it was one dollar or three million dollars, FEI has suffered compensable damage.

Nor should there be any surprise that plaintiffs have been countersued. Plaintiffs are seeking, essentially to destroy the main part of FEI's business. They are expressly seeking a "forfeiture" of all of FEI's Asian elephants, which are the hallmarks of FEI's circus

performances. That plaintiffs evidently expected that FEI would simply look the other way when it discovered evidence of a RICO claim is astounding Moreover, the ESA case itself has no factual or legal merit. The elephants are all either pre-Act and therefore not subject to the ESA "taking" provision or subject to a Captive Bred Wildlife permit that has essentially the same effect. FEI SJ Mem. at 7-35. And even if there were ever a point where the Court has to deal with the merits of plaintiffs' claims of abuse, the elephant treatment they are complaining about has been well known to the two federal agencies with regulatory authority over FEI but neither has ever found any of this to be illegal or abusive. *Id.* at 6-7; FEI SJ Reply at 4. Indeed, Rider's claims were specifically found by USDA not to make out a violation of the Animal Welfare Act. DX 17 to FEI SJ Reply. So, a when a case is brought that essentially is a publicity stunt to promote an "animal rights" agenda; that has no legal basis; that is propelled by conduct that constitutes bribery and obstruction of justice; and that has absorbed significant resources to defend, it is entirely appropriate for the defendant to have counterclaimed under RICO -- as FEI has done here

FEI did not invent the facts upon which the counterclaim is based. No one forced plaintiffs to pay Rider or to disguise the payments to him -- a salary masquerading as "grants" -- that were run through a shell organization controlled by plaintiffs' counsel. And despite all of the self-serving protestations of innocence, plaintiffs have yet to explain why, if this monetary flow to Rider was legitimate, it was necessary to run the money through WAP.

In short, plaintiffs' Rule 11 motion is simply a diversionary tactic to focus attention away from plaintiffs' own misconduct. However, responding to such a make-weight motion required FEI to expend significant time and resources. On pain of "sanctions," FEI has been required to come forward with the evidentiary basis for its claims – before the counterclaim has even been

allowed by the Court to be filed. FEI has made that showing, but such an exercise is totally unnecessary. Plaintiffs' use of Rule 11 in this regard was completely improper, and their counsel should be required to reimburse FEI for the costs, expenses and attorneys' fees incurred by FEI in responding to the Rule 11 motion. All of these amounts are, by definition, "excess" under section 1927 because the Rule 11 motion should never have been filed in the first place. *See Bernstein v. Boies, Schiller & Flexner, L.L.P.*, 416 F. Supp.2d 1329, 1333-34 (S.D. Fla. 2006) ("[b]ecause of Mr. Kleppin's [plaintiff's counsel's] misrepresentations the instant motion has been filed and the Court has had to expend time and resources in parsing through the fabrications that now make up the record in this case. Furthermore, Defendants have had to expend time and funds on responding to each of Mr. Kleppin's unwarranted and misleading motions. Mr. Kleppin's conduct amounts to an abuse of the judicial process by conduct tantamount to bad faith. Mr. Kleppin has engaged in litigation tactics that needlessly obstruct the litigation of non-frivolous claims in this suit"), *aff'd*, 2007 U.S. App. Lexis 13392 at *14 (11th Cir. 2007) ("because of Kleppin's misleading and unnecessary filings, both BSF and the district court were forced to spend additional time and resources on this case. Therefore, we cannot say that the district court abused its discretion in sanctioning Kleppin" under § 1927). *See also LaPrade v. Kidder Peabody & Co.*, 146 F.3d 899, 904-07 (D.C. Cir. 1998) (§ 1927 sanctions against plaintiff's counsel affirmed for seeking state court order staying arbitration previously ordered by federal court), *cert denied*, 525 U.S. 1071 (1999); *Fritz v. Honda Motor Co.*, 818 F.2d 924, 925 (D.C. Cir. 1987) (affirming § 1927 sanctions against plaintiff's counsel for actions "which required Honda to expend unnecessary time and money, even though [plaintiff's counsel] had no intention of pursuing this litigation in federal court"); *Healey v. Labgold*, 231 F. Supp.2d 64, 68-69 (D.D.C. 2002) (Facciola, J.) (§ 1927 sanctions imposed on plaintiff's counsel for pursuing

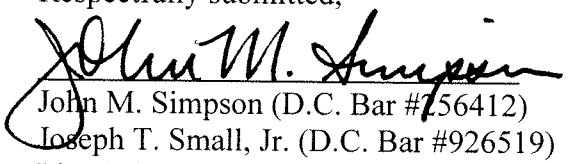
claims that had been determined to be part of bankruptcy estate with complaint that contained multiple misrepresentations and "half truths").

CONCLUSION

For the reasons stated herein, defendant's motion should be granted.

Dated this 16th day of August, 2007.

Respectfully submitted,



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