UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS, et al., **Plaintiffs,** **v.** **FELD ENTERTAINMENT, INC.,** **Defendant.**	**Case No: 03-2006 (EGS)**

REPLY IN SUPPORT OF DEFENDANT FELD ENTERTAINMENT, INC.'S MOTION FOR ENTITLEMENT TO ATTORNEYS' FEES

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GLOSSARY OF TERMS

Term	Explanation
__-__-09 a.m. or p.m. at ___.	A citation to the transcript of the trial in the present case which was conducted in February and March, 2009. Thus, for example, "3-18-09 a.m. at 14:24-15:24" indicates a citation to the March 18, 2009 day of trial, morning session, at page 14, line 24 through page 15, line 24.
API	Born Free USA United with Animal Protection Institute, plaintiff herein.
ASPCA	American Society for the Prevention of Cruelty to Animals, plaintiff herein.
AWI	Animal Welfare Institute, plaintiff herein.
CB-CB	Clyde Beatty – Cole Bros. Circus.
CEC	FEI's Center for Elephant Conservation.
Chipperfield Elephants	Three elephants owned by Richard Chipperfield (Lechame, Meena, and Kamala), with whom Rider worked when they toured with FEI's Blue Unit and subsequently with Daniel Raffo's European circus.
COL	A Conclusion of Law set forth in the Court's December 30, 2009 Memorandum Opinion (DE 559), reported at *ASPCA v. Feld Ent. Inc.*, 677 F. Supp. 2d 55 (D.D.C. 2009), *aff'd*, 659 F.3d 12 (D.C. Cir. 2011).
Crystal	Howard M. Crystal, counsel of record for plaintiffs in the instant case.
DE	A docket entry in the instant case, when it was pending under Civil Action No. 03-2006-EGS (D.D.C.), from and after September 26, 2003.
No. 00-1641 DE	A docket entry in the instant case when it was pending under Civil Action No. 00-1641-EGS (D.D.C.), from July 11, 2000 to September 26, 2003.
DX	A trial exhibit of the defendant, admitted into evidence, in the instant case. "DX 1 at 5" means defendant's trial exhibit 1 at .pdf page 5.
ESA	Endangered Species Act, 16 U.S.C. § 1531 *et seq*.
ESA Action	The litigation styled, *American Society for the Prevention of Cruelty to Animals, et al. v. Feld Entertainment, Inc.*, Civil Action Nos. 00-1641-EGS & 03-2006-EGS (D.D.C.).
Exs. 1-31	An exhibit attached to FEI's Motion, DE 593-2 through DE 593-21 (Exhibits 1-20) or to FEI's Reply (Exhibits 21-31).

Term	**Explanation**
Exs. A-P	An exhibit attached to plaintiffs' Opposition to FEI's Motion, DE 599-2 through DE 599-44.
FEI	Feld Entertainment, Inc., defendant herein.
FFA	The Fund for Animals, Inc., plaintiff herein.
FOF	A Finding of Fact set forth in the Court's December 30, 2009 Memorandum Opinion (DE 559), reported at *ASPCA v. Feld Ent. Inc.*, 677 F. Supp. 2d 55 (D.D.C. 2009), *aff'd*, 659 F.3d 12 (D.C. Cir. 2011).
Glitzenstein	Eric R. Glitzenstein, counsel of record for plaintiffs in the instant case.
HSUS	The Humane Society of the United States.
Liss	Cathy Liss, the representative of AWI during a certain portion of the time period during which the instant case has been pending.
Lovvorn	Jonathan R. Lovvorn, counsel of record for plaintiffs in the instant case, currently in-house counsel at HSUS and previously a partner at MGC.
Meyer	Katherine A. Meyer, counsel of record for plaintiffs in the instant case.
MGC	Meyer, Glitzenstein & Crystal, counsel of record for plaintiffs in the instant case.
Ockene	Kimberly D. Ockene, counsel of record for plaintiffs in the instant case, currently in-house counsel at HSUS and previously a partner at MGC.
Opinion	The Court's December 30, 2009 Memorandum Opinion (DE 559), reported at *ASPCA v. Feld Ent. Inc.*, 677 F. Supp. 2d 55 (D.D.C. 2009), *aff'd*, 659 F.3d 12 (D.C. Cir. 2011).
Paquette	Nicole Paquette, General Counsel of API, during a certain portion of the time period during which the instant case has been pending.
PAWS	Performing Animal Welfare Society, an original plaintiff in the instant case under Civil Action No. 00-1641-EGS (D.D.C.).
PFF	Plaintiffs' Proposed Findings of Fact, DE 533 (4-24-09).
Plaintiffs	Collective reference to all plaintiffs and all counsel of record in the ESA Action.
PWC	A will call trial exhibit of plaintiffs, admitted into evidence, in the instant case. "PWC 1 at 5" means plaintiffs' trial exhibit 1 at .pdf page 5.

Term	**Explanation**
Raffo	Daniel Raffo, a former FEI elephant handler, for whose European circus act Rider left employment with Feld Entertainment.
Rider	Thomas Eugene Rider, plaintiff herein.
Silverman	Tracy Silverman, General Counsel of AWI, during a certain portion of the time period during which the instant case has been pending.
WAP	Wildlife Advocacy Project, an organization operated by Meyer and Glitzenstein.
Weisberg	Lisa Weisberg, Senior Vice President of Government Affairs and Public Policy of ASPCA, during a certain portion of the time period during which the instant case has been pending.

EXHIBIT LIST

Ex. Number	**Description**
21	11-25-03 hearing transcript excerpts.
22	No. 01-8166, Brief of Plaintiffs-Appellants, D.C. Cir. 2002.
23	HSUS Disbursement Request Forms.
24	7-14-09 hearing transcript excerpts.
25	9-12-11 hearing transcript excerpts.
26	Statement of Stephen A. Saltzburg, House Judiciary Committee (12-01-98).
27	D.C. Bar Op. No. 354 (Mar. 2010).
28	D.C. R. Prof. Conduct 1.8(d) and Commentary.
29	*In re Edelstein*, No. 012-02, D.C. Bd. Prof. Resp. (June 30, 2003) (slip op.), *aff'd*, 892 A.2d 1153 (D.C. 2006).
30	*In re Alongi*, No. 399-00, D.C. Bd. Prof. Resp. (July 31, 2001) (slip op.), *aff'd*, 794 A.2d 605 (D.C. 2002).
31	5-22-08 hearing transcript excerpts.

The Opposition ("Opp.") and voluminous declarations[1] confirm that plaintiffs and counsel (hereinafter "plaintiffs" unless otherwise noted) do not recognize the gravity of their situation. Instead, their filing continues the frivolous, bad faith and vexatious conduct. Counsel claims that he "promptly" corrected the record – over two years after his law firm paid Rider to engage in the conduct that made his standing allegations in need of correction. Another attorney claims not "signing" various filings even though his name is on the signature block. Plaintiffs continue to argue that the First Amendment and the legal ethics rules bless purchasing a plaintiff and making false statements to the court if the "cause" is just. These "respected nonprofit charities" and experienced lawyers also pretend that the Court's 12-30-09 opinion ("Opinion") never issued, either ignoring it or trying to re-litigate the comprehensive findings of fact that reject their conduct. A fee award under the ESA is necessary to make clear that even non-profits and attorneys who abuse the system are not above the law and rules of this Court. If a defense award of fees is not "appropriate" in this ESA case, when would it be?

The Opinion establishes FEI's entitlement to fees. Plaintiffs do not deny the facts showing fraud on the court and bad faith: they filed false pleadings relied on by this Court and the D.C. Circuit – as this Court found. FOF 60-73.[2] The Court further found that Rider was a paid plaintiff (FOF 1) who lied (FOF 60-73). (Why Rider lied is not germane to FEI's Motion.) The Court found that without the payments, Rider would not have been a plaintiff, FOF 53; when confronted about the Rider payments, plaintiffs, facilitated by counsel, lied, FOF 55-57; and, without Rider, there was no case. FOF 53. If this is not a fraud on the court or bad faith, nothing would be. Rider (now separately represented) is conspicuously silent and absent from the

[1] The 112 pages of declarations transparently circumvent the 45-page limit. These declarations are inadmissible as they contain legal arguments and citations which should have been in the Opposition, as well as statements that are self-serving, full of hearsay, speculative, without foundation, and irrelevant. FEI will provide a paragraph-by-paragraph response if the Court deems it appropriate.

[2] A glossary of acronyms and defined terms used herein appears after the Table of Authorities, *supra*.

response (as he was during most of the trial) and makes no effort to defend himself. Plaintiffs used Rider to bring the case; now they try to capitalize on his absence by implying it was all his fault. Liss, the original representative of AWI, is another conspicuous no-show in the response, given that AWI provided the bulk of the Rider money, her deposition obfuscated FEI's inquiry and her trial testimony on the primary purpose of the payments was rejected. FOF 33-40, 48, 57.

Plaintiffs minimize FEI's Motion as if it were based on just the credibility lapse of a single witness and then continue their diversionary attacks on FEI.[3] None of this cures the vexatious litigation behavior accompanying the Rider-made fraud that the Opposition and declarations simply ignore. Plaintiffs knew that Rider had no aesthetic, "refraining from" injury and that he could not stick to the untruthful script that was crafted to keep the case alive.[4] Thus, they do not address ***why*** API joined in 2005, even though it long opposed FEI's elephant treatment and knew of this case in 1998 (Mot. at 5 n.8), or ***why*** ASPCA, FFA/HSUS and AWI tried to avoid testifying at trial.[5] *Id.* at 15. Nor do they address the desperate ploy to expand this case with former Red Unit employees Hundley and the Toms, or why those individuals (like Ewell and Stechcon) vanished as separate ESA plaintiffs. *Id.* at 15-16. Plaintiffs still cannot explain the relief they really wanted and why they vacillated on which uses of the bullhook and chains purportedly were "takes," and which weren't. *See id.* at 16-17. The supposed "emergency" that allegedly required "preliminary" injunctive relief ***eight years*** into this case likewise remains a mystery. *Id.* at 17. What ***is*** clear is that this case never had anything to do with redressing Rider's "injury." Plaintiffs balk at the amount of fees they caused, but do not

[3] Plaintiffs' obsessive dwelling on the pre-trial vet records, a matter that the Court already has addressed, in no way absolves plaintiffs of their misconduct.

[4] The organizations do not deny using this case as a fundraiser, nor could they given the donation exploitation that continues to this day on certain websites. *See, e.g.*, DE 603-7 (HSUS current advertisement of lawsuit).

[5] That ASPCA, FFA/HSUS and AWI allegedly attempted to "save time" by "piggy-backing" on API's standing in no way explains why they sought to exclude themselves from ***FEI's case.***

dispute the ability to pay. *See* Ex. 18.[6] However, the issue now is FEI's entitlement, which the Opinion fully establishes under the ESA, the Court's inherent authority and 28 U.S.C. § 1927.[7]

I. THE BAD FAITH CONTINUES IN THE OPPOSITION AND DECLARATIONS

A. Plaintiffs Play Word Games and Pretend that the Opinion Never Issued

1. Counsel's Declarations Fail to Justify Their Conduct

Just like earlier filings that the Court found untruthful, the declarations continue the artfully crafted statements and deception. Glitzenstein misleads on one of the linchpins of the Opinion: Rider's false "refraining from" allegations. FOF 61. Implying no knowledge of what Rider was up to before September 2003, Glitzenstein now states, under oath and penalty of perjury, that he ***"promptly"*** filed an amended complaint (9-26-03) to reflect his ***"then underst[anding]"*** that ***"some of the specific facts"*** regarding Rider's standing had ***"changed somewhat."*** Ex. B ¶ 13. However, his ***own law firm*** repeatedly paid Rider to observe the elephants ***beginning well over two years*** earlier (5-3-01), *see, e.g.,* DX 61 at 3-4, and Glitzenstein does not deny full knowledge of that. Two years and three months is not "prompt." And, if Glitzenstein really thought that Rider's elephant observation did not change the "theory underlying [Rider's] assertion of injury," as he claims (Ex. B ¶ 13), Glitzenstein would have forthrightly disclosed such facts to the courts as soon as he knew them. But that would have been in the middle of court filings seeking reversal of the dismissal, bearing his name and containing false "refraining from" allegations.[8] The 9-26-03 complaint had nothing to do with

[6] *Cf. Brandt v. Schal Assocs., Inc.*, 960 F.2d 640, 648 (7th Cir. 1992) ("[A] party cannot foist its expenses off on adversaries, especially when shallow claims may require costly replies.") (citations omitted). The implication that MGC represented the organizations for free (Ex. A ¶ 3) is contrary to their own invoices in evidence. DX 61.

[7] Plaintiffs have no response to Exhibit 6 and present no FOF chart exonerating themselves.

[8] Glitzenstein likewise does not assist himself with statements that are offensive, Ex. B ¶ 26 (comparing Rider to a British slave ship sailor), or simply inaccurate, *id.* ¶ 29 (claiming that plaintiffs "acknowledged providing Mr. Rider with funding through donations to WAP" in their "initial discovery responses," when the response bearing Glitzenstein's name has no such indication, DX 18R at 10, 12).

"correcting" allegations. Ex. B ¶ 13. It was a continuation of the prior case to (1) fix the notice letter issue and (2) ***preserve Meyer's request for attorneys' fees***. *See* Ex. 21, at 3:18-7:4.

Meyer's declaration fares no better. Freely waiving privilege (*cf.* Ex. A ¶ 1), she divulges the "strategic" reasons why Rider did not attend the Court-ordered inspections (*id.* ¶ 64), even though she used privilege to shut down FEI's deposition questions on the same subject. DE 273 at 6. Moreover, ***over two years after trial***, Meyer now apparently is correcting Rider's false testimony (previously unknown to the Court or FEI) because, when this question was posed to Rider at trial (again waiving the privilege), he testified that he was "afraid." 2-17-09 p.m. at 54:24-55:3. Compounding these machinations, Meyer and Sanerib say that Rider stayed away from the inspections so that the elephants would not sway, even though plaintiffs claimed the elephants swayed at the inspections due to ***chaining.*** PFF ¶¶ 332-34; *cf.* Ex. A ¶ 64; Ex. J. ¶ 11.

Lovvorn's declaration adds to the deceptive wordsmithing. His name is on the signature block of the filings containing the statements the Court found untruthful – the 2001 reconsideration briefing (No. 00-1641, DE 22 & DE 24) and the 2002 appellate briefs (Exs. 7 & 22). Yet Lovvorn claims "signing" only one filing in this case, the 9-26-03 complaint, Ex. H ¶ 11, thus implying he had nothing to do with the others. He offers neither a denial of, nor explanation for, the falsehoods in the other documents bearing his name. Lovvorn also implies that he had no authority to approve HSUS's payments to WAP for Rider, despite personally signing the "approved by" line on the requisitions for those very payments. *Compare* DX 67 (HSUS Letters to WAP) *with* Ex. 23 (HSUS Disbursement Request Forms).[9]

[9] While Lovvorn and Ockene (former MGC partners now in-house at HSUS) state that they were consulted on "strategic" decisions regarding this case (Ex. H ¶ 8; Ex. I ¶ 19), their employer, HSUS, now claims that it "played no role whatsoever in the development or prosecution of this case." DE 598 at 4 n.4; *see* DE 603 at 6-7.

2. Excerpts of the Record are Taken Out of Context

Since the Court's FOF's and COL's bind them, plaintiffs retreat behind a mosaic of stray remarks, taken out of context. This Court's colloquy with Meyer was not a pre-Opinion finding that the payments were not "nefarious." Ex. 24 at 53:6-14. [10] Nor did the Court "recognize[]" that Meyer believed Rider. Opp. at 19. Instead, grappling with the overwhelming impeachment, the Court questioned whether it could credit Rider just "[b]ecause Ms. Meyer believes him." *See* Ex. 24, at 60:4-11.[11] Likewise, FEI's counsel did not tell the D.C. Circuit that API had "serious," *i.e.*, "legitimate," standing arguments. Opp. at 27. He argued that the *sua sponte* ordered briefing on API's standing right after Paquette testified showed that the Court "had a serious issue," *i.e.*, doubt, about API's standing. *See* Ex. 25, at 37:13-17.[12]

3. Plaintiffs Ignore The Court's Opinion

Doing exactly what *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983), warned against, plaintiffs attempt to relitigate the case by relying on their proposed findings, prior legal arguments, and selected evidence – all of which the Court rejected, explicitly or implicitly. The Rider payments are a prime example. Meyer now claims that the payments were Rider's idea, Ex. A ¶ 30, even though the Court already has found that it was hers. FOF 56. Likewise, the arguments that the ethics rules permit the payments (Ex. B ¶ 28) or the money actually "enhanced" Rider's credibility (PFF ¶ 44) already have been considered and rejected. FOF 1, 53. Nor does Judge Facciola's contempt hearing ruling trump the Court's finding that plaintiffs'

[10] "The Court: It wasn't as if he was given a meal every now and then or – I mean, his sole source of income. Ms. Meyer: I understand that, Your Honor. There's nothing nefarious about it. He happens to be an incredibly effective spokesperson for these animals. The Court: Well, you hit the nail on the head, it's about credibility. I'm not suggesting nefarious, but it's about credibility though. Is he believable?"

[11] "The Court: But you understand that after I lay out all the impeachment and everything he testified to support his claims, I should be able to conclude, nevertheless, I find him credible for these following reasons … Because Ms. Meyer believes him, that's the reason. No, but seriously, I have to find a reason."

[12] "And I would point out that Ms. Paquette was not the last witness who testified at trial for the Plaintiff, she testified on February 19th, the same day Judge Sullivan ordered the parties to brief organizational standing because they evidently had a serious issue about it."

"omissions and affirmatively false statements" hid the payments in discovery (FOF 59).[13] Despite the May 2002 email being in evidence (PWC 197), the Court found the "true nature and extent" of the payments was "not fully disclosed" until after the 8-23-07 Order (FOF 57).[14]

Plaintiffs also completely disregard the Court's express finding that injunctive relief was abandoned. *See* DE 559 at 8 n.6 & COL 13. Their argument that this flip-flop was designed to be "fair" to FEI is implausible, given plaintiffs' multiple *ad hominem* attacks on FEI.[15] And, they do not explain how the substituted declaratory remedy would have "improved" the lives of the elephants, much less redress Rider's "injury," the case's ostensible "purpose." The remedy switch was a transparent, but unsuccessful, ploy to save a manufactured case. Plaintiffs' far-fetched responses further justify assessing fees.

B. Meyer's Pre-Filing "Investigation" was Grossly Insufficient

Meyer's description of her pre-filing inquiry says nothing about the organizations' claims.[16] Therefore it is not surprising that these claims went all the way through trial where ***no evidence*** was adduced of API's or any organization's purported "injuries." COL 28, 31.

As to Rider, the Opposition confirms that PAWS and Meyer were itching to sue FEI, and did so when *Laidlaw* and Rider came along. Meyer did not talk to a ***single*** person who could corroborate Rider's purported feelings and observations. *Cf. Blue v. U.S. Army*, 914 F.2d 525, 543 (4th Cir. 1990) ("[C]ounsel cannot simply rely on a client's patently incredible testimony when any reasonable investigation of the factual bases for the client's claims or examination of

[13] Judge Facciola focused only on plaintiffs' conduct in the 30 days between the 8-23-07 Order and the 9-24-07 Court-ordered responses, not the pre-8-23-07 obfuscation. The Opinion, however, did. FOF 55-57. Meyer's September 2005 misleading statement to the Court – on which she now is ***silent*** - likewise does not trump FOF 57. *See* Mot. at 14-15.

[14] The 2004 and 2007 discovery responses make plain what the email did not reveal: by 2002, Rider had received money from all of the organizations directly and through MGC and WAP, to *inter alia*, observe the elephants, directly contradicting what plaintiffs contemporaneously told the courts. *See* DX 18-20.

[15] Meyer's declaration continues the assault, Ex. A ¶¶ 31, 45, making the "fairness" claim frivolous on its face.

[16] Meyer apparently is the ***only*** attorney who conducted a pre-filing investigation. *See* Opp. at 4.

materials obtained in discovery would reveal the paucity of the evidence."). Yet she "fully believed" Rider because other biased animal advocates (Derby and Swart) allegedly did. *Cf.* Ex. A ¶¶ 10, 25, 28. Derby and Swart were associated with PAWS, which already was adverse to FEI. PAWS already had complained about FEI twice to USDA (once based on former FEI employees Ewell and Stechcon's allegations) and sent FEI an ESA notice letter. *Id.* ¶ 11-13; PWC 91 at 1-3.[17]

Tellingly, even with all of this purported "evidence," no ESA citizen-suit was filed when the 60-day notice period expired. If PAWS, Ewell and Stechcon all believed they had standing, they would have sued FEI on day 61. *See* Mot. at 5. The Opposition's silence on this point is deafening. It is clear that Meyer knew that PAWS had no independent organizational standing, and that Stechcon and Ewell had none either under existing caselaw (*i.e.*, *Glickman*). *Cf.* Ex. 4, 13 Animal L. at *6 ("If you don't have standing, you don't get through the door") (Meyer).

The centerpiece of Meyer's pre-filing "belief" in Rider was his *ex parte* PAWS statement, made when he already was receiving animal rights money. FOF 24-28; *cf.* Opp. at 14. However, the statement actually shows that Rider never had an aesthetic injury and that ***the words in the Laidlaw-driven complaint were not Rider's***, but those of plaintiff-shopping animal rights advocates.[18] PAWS gave Rider free rein in the statement, but he never told them that: the Blue Unit elephants were his "girls," *cf.* Compl. DE 1 ¶ 20; he had a "personal and emotional attachment" to them, *cf. id.*; he had an "injury" (past, present, or continuing) caused by FEI's use of the bullhook or chains, *cf. id.*; he quit working in the ***"circus community"*** because of ***FEI's*** elephant treatment, *cf. id.* ¶ 21; he desired to work with, visit, or "continue his personal

[17] USDA investigated ***all*** of these incidents and took no further action. DX 71A at 2-3, 6-7 & 13. Meyer's rehashing of the internal documents that USDA rejected corroborates nothing about a "belief" in Rider.

[18] Any personal or emotional elephant attachment Rider arguably had was to the Chipperfield elephants, not FEI's elephants. *See* FOF 63. Chipperfield, however, was not the targeted defendant; FEI was.

relationship" with the elephants, *cf. id.* ¶ 22; he was "choosing" between observing the elephants and subjecting himself to more "injury," *cf.* Opp. at 11; he believed that the elephants should be relocated to a "sanctuary" (or knew what a "sanctuary" even was), *cf.* Compl. ¶ 22; or, that he would be able to see a change in elephant behavior if the bullhook and chains were banned. *Cf. ASPCA I*, 317 F.3d 334, 338 (D.C. Cir. 2003). None of these alleged facts – critical to the standing theory – came out of the PAWS statement, but they all ended up in the complaint.

Meyer is painfully silent on whether she was aware of, asked about or considered the money when evaluating the credibility of Rider's *ex parte* statement. Her reference to another paid-for statement, Rider's July 21, 2000 USDA affidavit (Ex. A-20), made 11 days ***after*** the No. 00-1641 complaint was filed and ultimately rejected by that agency, DX 71A at 4-5, is unavailing. Meyer ignores that Ward, whom plaintiffs did not depose or call at trial, actually questioned Rider's credibility. Ex. A-12 ("I find this complaint very hard to believe").[19] The FWS also considered Rider's allegations (PWC 91 at 10-12) and brought no ESA action against FEI. These early red flags – two objective third-parties, not animal rights sympathizers, rejecting Rider's allegations – should have been a reason to stop, not plow ahead.

That Meyer apparently "believed" Rider based on his Benjamin, Doc and Angelica hearsay accounts, Ex. A ¶¶ 19-20, further underscores the unreasonableness of her inquiry. Rider never had or even claimed first-hand knowledge of these events. *Chapman & Cole v. Itel Containers Int'l Corp.*, 865 F.2d 676, 684-85 (5th Cir. 1989) (attorney reliance on unverified hearsay unreasonable); *cf. Harris v. Marsh*, 679 F. Supp. 1204, 1386 (E.D.N.C. 1987), *aff'd*, 914 F.2d 525 (4th Cir. 1990) (attorney "should determine if the client's knowledge is direct or hearsay and check closely the plausibility of the client's account - particularly if the information

[19] Meyer ignores that the Court rejected plaintiffs' proposed finding on this exact same issue. PFF 5. She also glosses over the fact that Rider's allegedly corroborative Congressional testimony contained the false statement about why he quit CB-CB. FOF 2; *see also* Ex. 10 (No. 22).

is secondhand"). Ewell and Stechcon's allegations were not corroborative either. Meyer's declaration says nothing about whether either observed anything about their co-worker Rider that would have confirmed an "aesthetic injury," and the clear inference is that, like Raffo, they didn't. FOF 12. Further, neither of them was around to stand as plaintiffs with Rider – or even for depositions as fact witnesses. *Cf. Bryd v. Hopson*, 108 Fed. Appx. 749, 755 (4th Cir. 2004) (attorney reliance on witnesses lacking credibility unreasonable).[20]

Meyer's original belief in Rider notwithstanding significant holes in his story (*e.g.*, why he stayed at Ringling, went to Europe with Raffo, called Chipperfield's, not FEI's elephants his "girls"), was in no way reasonable. Ex. A ¶¶ 52, 60-61; *cf. Byrd*, 108 Fed. Appx. at 755 (attorney "'rel[ied] on the outlandish accusations of a [plaintiff] with a vendetta'"). It certainly became patently unreasonable as discovery confirmed, ***repeatedly***, that Rider's claims were false.[21] *See* Ex. 10. Her purportedly steadfast "belief" in Rider, despite the mountain of contrary, objective evidence, is unreasonable as a matter of law. The hollow "I believed Rider" mantra shared by the other counsel and organizational representatives likewise is no excuse, when they do not deny knowing about the same mountain of contrary evidence. Far from "good faith," this shows deliberate, bad faith action by advocates with blinders on, determined to bring a case that, to be in court, required Rider as a plaintiff, regardless of his mendacity.

[20] The record shows that Ewell and Stechcon were patently incredible. PWC 190C. Meyer now curiously relies on Ewell even though he disappeared early as a plaintiff, perhaps over displeasure with his own compensation. *See* DE 167-17 (Ewell allegation that PAWS promised to pay him for evidence against FEI). The other former employees (Hagan, Ramos, Hundley and the Toms) fare no better. DX 196 (Hagan paid by PETA); PWC 162 (Hagan sued FEI); DX 204 (Ramos convicted of wire fraud charges); 2-23-09 p.m. (5:15) at 64:8-17 (Ramos Dep.) (Ramos claimed working with fictional elephant "Elizabeth"); 2-5-09 a.m. at 82:15-83:21 (Hundley affiliated with PETA); 2-5-09 p.m. at 94:10-21, 117:25-119:8 & 123:18-124:17 (Toms affiliated with PETA; fired by FEI). Plaintiffs have already argued, unsuccessfully, that this same parade of former employees corroborated Rider's story. PFF 17-18.

[21] Meyer's declaration has no explanation for several credibility points in Exhibit 10, such as when she found out Rider paid no taxes (No. 16) and his inexplicable love for Red Unit elephants he never worked with (No. 18).

C. Plaintiffs Ignore the Fraud on the Court

Plaintiffs completely ignore the fraud on the court that caused the D.C. Circuit to remand this case. That fraud alone – putting aside the payments, the lies about the payments, and the vexatious filings – demands a fee award. Meyer, Glitzenstein and Lovvorn (who made the false filings), and ASPCA, AWI and FFA/HSUS (the parties originally complicit in, and benefitted by, the fraud), conspicuously do not deny – let alone explain why – they lied about Rider's "refraining from" "injury" allegations. Nor do they deny that the courts relied on these allegations when determining the seminal issue on appeal, whether Rider's injury was present or imminent. *ASPCA I*, 317 F.3d at 336. (It likewise is undisputed that the courts relied upon Rider's grossly misleading "circus community" allegation.) API says nothing about what it did to verify the false Rider standing allegations when it joined the case. And the other attorneys (Crystal, Ockene, Sanerib, Winders and Saltzburg) say nothing about what they did to verify Rider's claims either. They all knew what FEI claimed and either actively joined the fraud or knew about it and did nothing. None of them stopped it. This universal silence is the most telling aspect of their 150+ page filing. Repeated self-serving declarations of "no intent" to conceal or deceive are insufficient when the Court already has found concealment and deception. The relevant question now is why it happened – a matter plaintiffs fail to address.

Meyer claims that Rider was a *Laidlaw* "refraining from" plaintiff on July 11, 2000 when suit began, but offers nothing ***from Rider*** in support. *Cf.* Ex. A ¶ 43. Meyer does not say ***when*** she or the organizations knew that Rider was observing the elephants, *cf.* Opp. at 12, but it is quite clear that it was ***years*** before they acknowledged it to the courts. Evidently Rider was observing the elephants shortly after suit began, ***as early as August 2000.***[22] By May 2001, over

[22] *See* Ex. 19 (Carbondale, IL lecture) at 4:51:52-4:52:35 (playing video subsequently marked at trial as PWC 132G) ("***we*** were clean out in the street when he hit that elephant"); 2-9-09 a.m. at 75:1-24 (Cuviello authenticating

a month before the ***6-29-01*** dismissal, the organizations and counsel not only knew that Rider was observing the elephants[23] – they were paying him to, ***through MGC.*** FOF 33; *see, e.g.,* DX 61 at 3-4 (***7-16-01*** invoice for ***5-3-01*** wire transfer); *id.* at 1-2 (***6-14-01*** invoice for "cash via Western Union"). Yet, plaintiffs repeated the false "refraining from" allegations in the amended complaints (No. 00-1641, DE 7, 21), and their reconsideration motion falsely stated that FEI's conduct forced Rider to "avoid contact" with the elephants (No. 00-1641, DE 22 (***7-16-01***) at 13).

The payments, and Rider's elephant observations, continued throughout the *ASPCA I* appeal. ASPCA made a December 2001 WAP "grant" for Rider's "***circus tour***," DE 165-11, and then directly paid for his hotel when he was observing the elephants. *See, e.g.,* DX 209 at 19 (Herald Square Hotel, 3-20-21-02); DX 59 at 18 (Blue Unit, Madison Square Garden, 3-21-02-4-17-02). But, in July 2002, plaintiffs told the D.C. Circuit that Rider "must forego visiting or otherwise seeing" the FEI elephants "to avoid suffering additional aesthetic and emotional injury." Ex. 22 at 40. All of this shows a concerted scheme to mislead, not, as Glitzenstein avers, an affirmative effort to "promptly" correct the record. *Cf. Schreiber Foods, Inc. v. Beatrice Cheese, Inc.*, 402 F.3d 1198, 1205 (Fed. Cir. 2005) ("Once counsel became aware that highly material false statements had been made by a witness, in pleadings submitted to the court … [the party] and counsel were under an obligation to promptly correct the record.").

While plaintiffs glibly contend that the complaint did not assert that Rider would "forever refrain from seeing the elephants" and that the "linchpin" of Rider's injury was his "choice" between refraining from or visiting the elephants, Opp. at 11, ***this is not what Rider pled and***

PWC 132 as 2000 Cow Palace footage (time stamp 14:57-15:53)); DX 59 at 11 (Blue Unit, Cow Palace, 8-30-00-9-4-00); *see also* DE 484-2 at 24 (PWC 132G (14:57-15:53) in evidence).

[23] Even now, Meyer relies on pre-dismissal, Rider-generated evidence to demonstrate elephant "abuse," PWC 132P (6-1-01 Rider-made video) (Ex. A ¶ 68), oblivious to how it confirms the fraud on the court.

these allegations are not what the courts relied upon. *Cf. Consequences of Perjury and Related Crimes: Hearing Before the H. Comm. on the Judiciary*, 105th Cong. 95 (1998) (statement of Stephen A. Saltzburg) ("'ducking and dodging' that amounts to deceit or fraud on the court is wrong, it is sanctionable, and it is wrong whether or not it amounts to perjury") (Ex. 26).

Further, that Rider supposedly could have established standing under *Animal Legal Defense Fund, Inc. v. Glickman*, 154 F.3d 426 (D.C. Cir. 1998), is irrelevant ***because this is not what Rider alleged.*** *Cf.* Opp. at 10-11. It is also wrong.[24] *Glickman* held that repeated visits to view animals maintained under inhumane conditions, together with an allegation (assumed true) that those conditions injured the plaintiff's aesthetic sense, established standing. *ASPCA II*, 659 F.3d 13, 21 (D.C. Cir. 2011). Rider's pleading did not allege a *Glickman*-like injury, as the D.C. Circuit observed. *ASPCA I*, 317 F.3d at 337 ("But unlike the *Glickman* plaintiff, if Rider returned to the circus as a member of the audience there is nothing to indicate that he would be in a position to witness the mistreatment again."). Furthermore, whether it was the injury of refraining from seeing the elephants or observing them, the Court rejected it all as false. FOF 1-20, 60-85; COL 6, 11, 18.4; *see also ASPCA II*, 659 F.3d at 21.

The key is that "counsel" deliberately chose to "frame" Rider's pleading after *Laidlaw*, Opp. at 11, and it was false, not only because Rider had no credibility but because counsel said things to the courts that they knew were untrue. FOF 60-73. The *post-hoc* argument that Rider's injuries could have been portrayed as *Glickman* injuries, if anything, underscores that this case was never about a real ***Rider*** "injury," but, instead, a tactical maneuver around Article III to bring a case that was already in the can before the allegedly "injured" plaintiff ever showed up.

[24] *Glickman* did not control in the first appeal, as the court of appeals recognized. *APSCA I*, 317 F.3d at 337. ("In *Babbitt*, we left open the question whether 'emotional attachment to a particular animal … could form the predicate of a claim of injury.' We answer that question in the affirmative today."). Plaintiffs presumably avoided a *Glickman*-based theory because it would have required disclosure of the money; Rider went to see the elephants because plaintiffs paid him to.

Cf. Westmoreland v. CBS, 770 F.2d 1168, 1180 (D.C. Cir. 1985) ("[A]ttorneys do not serve the interests of their clients, of the profession, or of society when they assert claims or defenses grounded on nothing but tactical or strategic expediency.") (citation omitted).

D. The D.C. Legal Ethics Rules do not Validate the Payments

No authority blesses purchasing a "paid plaintiff and fact witness" for "initial and continuing participation" in litigation with regular and systematic payments exceeding $190,000 over more than nine years,[25] by his counsel and co-plaintiffs.[26] FOF 1, 48, 53. This conduct was unlawful. *See* 18 U.S.C. § 201; *see also* Civ. No. 07-1532, DE 90 (FEI stated RICO claim, *inter alia*, alleging payments were bribes); N.Y. Jud. Ct. Acts. Law § 488.2. Neither the First Amendment, the "tester" cases, nor the legal ethics rules is a defense.[27] *Cf. Hamilton v. Gen. Motors Corp.*, 490 F.2d 223, 228 (7th Cir. 1973) (paying fact witnesses "lean[s] toward the procurement of perjury," "the perversion of justice" and "corruption in our courts").

Payments by a lawyer to a litigation client or a witness are prohibited. *See* Rule 1.8(d) ("a lawyer shall not advance or guarantee financial assistance to the client"); Rule 3.4(b) (a lawyer shall not "offer an inducement to a witness that is prohibited by law"). Rule 1.8(d)(2), based on access to the courts, is a "narrow" exception utterly inapplicable here. D.C. Bar Op.

[25] While the payment amount is irrelevant, the claim that the organizations paid Rider a total of "only" $12,100 between May 2001 and November 2003 – "approximately $100 a week" (Opp. at 15) – is just wrong, based on the undisputed evidence admitted at trial and plaintiffs' own Court-ordered interrogatory answers. DX 48A; DX 18-20.

[26] Plaintiffs cannot have it both ways: either the lawyers paid Rider or not. When FEI has argued that WAP is the alter ego of MGC, counsel have vigorously objected; now seeking Rule 1.8(d)(2) cover, they apparently do not mind treating MGC and WAP as one and the same. Regardless of whether MGC and WAP are distinct, the payments directly from the organizations to Rider, FOF 36, in no way fit the Rule 1.8(d)(2) exception.

[27] Plaintiffs' own authority recognizes that the First Amendment does not protect "litigation based on intentional falsehoods or on knowingly frivolous claims." *Bill Johnson's Rests., Inc. v. NLRB*, 461 U.S. 731, 743 (1983) (citation omitted). The First Amendment likewise does not protect perjury or a *quid pro quo* prohibited by 18 U.S.C. § 201. *United States v. Alvarez*, 567 U.S. __ (2012) ("It is not simply because perjured statements are false that they lack First Amendment protection. Perjured testimony 'is at war with justice' because it can cause a court to render a 'judgment not resting on truth.'"); *Citizens United v. Fed. Elec. Comm'n*, 120 S. Ct. 876, 908 (2010).

The "tester" analogy also fails. The *Kyles* plaintiffs were employed as testers, they had an actual injury under Title VII (but not under 42 U.SC. § 1981), and nothing indicates that they lied in their court pleadings or testimony or hid the existence of the payments during discovery. *Kyles v. J.K. Guardian Sec. Servs. Inc.*, 222 F.2d 289 (7th Cir. 2000). Here, Rider never had an injury, and he lied about the injury and the money he received.

No. 354 (Mar. 2010) (Ex. 27) ("While more permissive than similar rules elsewhere, the District of Columbia's Rule 1.8(d) does have limits."). While Rule 1.8(d)(2) permits a lawyer to "pay medical or living expenses of a client ***to the extent necessary to permit the client to continue the litigation***," its purpose "is to avoid situations in which a client is compelled by ***exigent financial circumstances*** to settle a claim on unfavorable terms in order to receive the immediate proceeds of settlement." Rule 1.8(d), cmt. 9 (emphasis added) (Ex. 28). "Bidding" for clients, which is what happened here, is forbidden. *Id.* D.C. lawyers have been sanctioned for payments to clients that were not "strictly necessary," *id.*, to maintain the client during the case.[28]

There is no evidence that Rider could not have held a regular job and been a plaintiff. To the contrary, Rider chose paid litigant as his job.[29] Rider stated that he would conduct his "media campaign" even if he was not paid. PWC 197. And, he admitted being offered and declining full-time employment (working with FFA's elephant). FOF 54. Paid plaintiff and fact witness was the steadiest job Rider ever had. *See* DX 16 at 5-6. Rider was not a personal injury plaintiff being held over a barrel in settlement – the person Rule 1.8(d)(2) protects; he was a mercenary who cashed in on this case. *See* FOF 53 (Rider was "motivat[ed]" by the money).

Moreover, if these were really "Rule 1.8(d)(2) payments," the records – created long before FEI's attorneys' fees motion – would say so. They don't. Even at trial, plaintiffs and WAP stuck to the "grants" for "media" work story. *See, e.g.,* DX 53, 66-67. The W-2's and

[28] *In re Edelstein*, No. 012-02, D.C. Bd. Prof. Resp. (June 30, 2003) (slip op.) (Ex. 29), *aff'd*, 892 A.2d 1153 (D.C. 2006), at 9 (no evidence regarding $20,000 in loans); *In re Alongi*, No. 399-00 D.C. Bd. Prof. Resp. (July 31, 2001) (slip op.) (Ex. 30) (sanctions for, *inter alia*, cash payments, filing fee advances and rental car costs), at 2-5, *aff'd*, 794 A.2d 605 (D.C. 2002); *see also La. State Bar Assoc. v. Edwins*, 329 So. 2d 437, 447-48 (La. 1976) (cited by D.C. Bar. Op. No. 354) (no justification shown for $756.95 in advances).

[29] No evidence shows that $500 per week (or some other amount) was necessary for "minimum" expenses to "sustain" Rider. *Cf.* Rule 1.8(d), cmt. 9 (Ex. 27). What Rider did with the funds for which he lacked receipts, FOF 44 ("Mr. Rider is not expected to produce receipts for expenses totaling the amount of funding that WAP has provided to him."), is unknown because the payments were never intended to be reimbursements. *Id.* ("WAP's regular and systematic payments to Mr. Rider are not reimbursements for expenses actually incurred by him."). There is evidence that the payments covered entertainment expenditures, such as DVDs for reality television shows and cartoons (*see* DX 52 at 94, 120), FOF 43, which are not contemplated by Rule 1.8(d)'s commentary.

Forms 1099's sent to Rider by PAWS, MGC and WAP (and Rider's tardy tax returns) all described the payments as "wages" or "nonemployee compensation" for "service" by a paid "advocate." DX 54-57, 60. MGC's own client invoices called the "cash" "travel expenses," not "Rule 1.8(d)(2) assistance." DX 61. This confirms that there was (and is) something to hide.

The Court's finding regarding the payments' primary purpose, not counsel's revisionist history, controls. Plaintiffs and Glitzenstein (in his "WAP capacity") all testified that the Rider payments were for "media," but the Court found that "unpersuasive." FOF 47-48. ***No one testified that that the payments were for Rule 1.8(d) purposes.*** During the Rule 52(c) argument, Glitzenstein (in his "counsel capacity") asserted that ***"[e]ven if the law firm were in fact compensating him directly, which ha[d] not been the case,"*** the payments were "entirely consistent with the ethical rules, ***as [he] underst[ood] them."*** 2-26-09 p.m. at 72:16-24 (emphasis added); *see* Ex. B ¶ 28.[30] Since this rationale was rejected (*see* FOF 1, 52-53, 59), it is no bar to awarding attorneys' fees now.

E. API's Claim was Frivolous and Without Evidentiary Support

API never had standing; the organizational standing claims were rejected ***four times***. No. 00-1641, DE 20 (dismissing organizations for no standing); DE 213 at 7 (limiting all "***plaintiffs'*** claims" to Rider elephants); DE 559 (API failed to prove standing); *ASPCA II* (same). The D.C. Circuit reinstated this case in 2003 "solely on the basis of what had been alleged by Mr. Rider." FOF 53; *cf.* Opp. at 27.[31] As *ASPCA II* confirms, had the organizations sued without Rider, the 6-29-01 dismissal order would have been affirmed. No change in the law or facts on organizational or informational injury standing occurred from July 2000 through *ASPCA I* or

[30] All plaintiffs offer now is Glitzenstein's self-serving "understanding" of Rule 1.8(d) (Ex. B ¶ 28), no authority.

[31] As this Court observed, the organizations never sought reconsideration of the 6-29-01 order rejecting their standing. Ex. 24, at 4:12-7:3.

II.[32] Thus, without Rider, FEI never would have incurred the costs of the 500+ docket entries in No. 03-2006. *Cf.* Opp. at 28.

API's situation is just as repugnant as Rider's. That Paquette (also now an HSUS employee, Ex. E ¶ 4) did not lie like Rider is commendable, but her credible testimony actually establishes the litigation abuse: API ***knowingly*** went forward ***through trial*** with absolutely no proof of its "injuries," the very reason it was in court. The evidence of API's "injuries" was within its control at the time it sued, a point it does not dispute. *See* Mot. at 5, 25-26. API had no proof because it had no "injuries," and pursued this case knowing that it depended on Rider, which is why it paid him. COL 5 ("This lawsuit could not have been maintained without Mr. Rider's participation as a plaintiff, and the payments to him are linked directly to the litigation itself.").

That the D.C. Circuit left open the legal viability of API's *Havens Realty* economic injury claim gets plaintiffs nowhere.[33] This theory, including the variation cobbled together by appellate counsel (that API spent money combating the "public misperception" created by FEI), failed for total lack of proof at trial and on appeal. COL 28, 31; *ASPCA II*, 659 F.3d at 27-28. [34] Both API and the lawyers are totally silent on why this complete default in essential proof occurred. API's frivolous claims are sanctionable independently of the Rider fraud.

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[32] *HSUS v. U.S. Postal Service*, 609 F. Supp. 2d 85 (D.D.C. 2009), decided post-trial, is irrelevant. There, HSUS presented "substantial" evidence of causation. *Id.* at 92. Here, API did not. And, if *HSUS* bears so directly on API's standing, it is curious that it was not cited in plaintiffs' 2011 appellate briefs.

[33] That court did not "recognize[] the legal legitimacy of [API's] *Havens Realty* argument," Opp. at 27, but expressly left this issue open. *ASPCA II*, 659 F.3d at 27 ("whether injury to an organization's advocacy supports *Havens* standing remains an open question that we have no need to resolve here").

[34] The "counter the misimpression" theory was not pled in API's Supplemental Complaint, DE 55 ¶¶ 4-6; it was not the subject of a pre-trial proposed finding of fact, *see* DE 341-1 ¶¶ 10-14; nor was it argued in plaintiffs' pre-trial brief. *See* DE 360 at 30-33. It was not even included in plaintiffs' Court-ordered standing brief. DE 433 at 7-10.

II. A FEE AWARD IS APPROPRIATE UNDER THE ESA

This case was "frivolous, unreasonable, or without foundation" from its inception, ***and*** it was litigated "after it clearly became so." *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421-22 (1978). Plaintiffs' self-serving "good faith" assertions cannot save them from a fee award, because subjective bad faith is ***not*** required. *Id.* at 421; *cf. U.S. v. POGO*, 616 F.3d 544, 552-53 (D.C. Cir. 2010) (good faith no defense to crimes not requiring bad faith).

A. This Court has Jurisdiction to Award Fees under the ESA

Plaintiffs' lack of standing does not deprive the Court of jurisdiction over FEI's fee claim. None of the cases plaintiffs cite, Opp. at 20-21, is on point. In both *Branson v. Nott*, 62 F.3d 287, 293 (9th Cir. 1995), and *Keene Corp. v. Cass*, 908 F.2d 293, 298 (8th Cir. 1990), the courts had no ***statutory*** subject matter jurisdiction over the plaintiffs' 42 U.S.C. § 1983 claims, and therefore no jurisdiction over the defendants' § 1988 attorneys' fee claims, because § 1988 has no independent grant of subject matter jurisdiction. Here, FEI's attorneys' fee claim is based on ESA § 1540(g)(4), which is in the same statutory provision that gives this Court statutory subject matter jurisdiction over "any actions" under the ESA, including FEI's claim. 16 U.S.C. § 1540(c). Plaintiffs cite nothing to the contrary. In *W.G. v. Sentore*, 18 F.3d 60, 62-65 (2d Cir. 1994), and *Liu v. INS*, 274 F.3d 533, 536 (D.C. Cir. 2001), the courts had no jurisdiction over the plaintiff's complaint on exhaustion and/or mootness grounds and, obviously, no jurisdiction over that ***same plaintiff's*** claim for attorneys' fees. Here, however, the defendant, not the plaintiff who lacks Article III standing, seeks fees, and plaintiffs do not suggest that FEI lacks standing. As *Citizens for a Better Env't v. Steel Co.*, 230 F.3d 923 (7th Cir. 2000), shows, when the

plaintiff's claims fail for lack of standing, the court still has the authority to address the live controversy presented by the ***defendant's*** claim for fees. *Id*. at 926.[35]

Moreover, the Supreme Court has held that federal courts retain jurisdiction over attorneys' fees claims despite no jurisdiction over the underlying claim, ***because a fee claim is a collateral issue***. *See, e.g.*, *Willy v. Coastal Corp.*, 503 U.S. 131, 137 (1992) (Rule 11) (lack of subject matter jurisdiction determination "does not automatically wipe out all proceedings had in the district court at a time when the district court operated under the misapprehension that it had jurisdiction"); *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 395 (1990); *Moten v. Bricklayers, Masons & Plasterers Int'l Union*, 543 F.2d 224, 239 (D.C. Cir. 1976) (awarding attorneys' fees under Title VII where appeal dismissed for lack of subject matter jurisdiction) (cited in *Steel Co.*).[36] Indeed, Judge Collyer, relying on *Cooter & Gell*, specifically found jurisdiction to award fees in an ***ESA case*** dismissed, *inter alia*, for lack of Article III jurisdiction. *Friends of Animals v. Salazar*, 670 F. Supp. 2d 7, 14 (D.D.C. 2009).[37]

B. FEI is a Prevailing Party

"Any party" "whenever appropriate" can obtain an ESA fee award, not just "prevailing parties." 16 U.S.C. § 1540(g)(4). *Cf. Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of*

[35] *Steel Co.* ultimately denied fees because the suit was not frivolous: defendant admitted liability and plaintiff's lack of standing was not clear until the Supreme Court decided the issue. *Id.* at 931. The "frivolousness" facts differ from those here, and plaintiffs' assertion that *Steel Co.* "entirely undermines [FEI's] argument regarding frivolousness," Opp. at 21 n.16, is wrong.

[36] *Willy* and *Cooter & Gell* have led other circuit courts to hold that "a court's jurisdiction to issue sanctions under 28 U.S.C. § 1927 or pursuant to a court's inherent authority is ever present." *Red Carpet Studios v. Sater*, 465 F.3d 642, 645 (6th Cir. 2006); *see also Schlaifer Nance & Co., Inc. v. Estate of Warhol*, 194 F.3d 323, 333 (2d Cir. 1999) (inherent authority and § 1927); *Matos v. Nellis, Inc.*, 101 F.3d 1193, 1196 (7th Cir. 1996) (§ 1927).

[37] Plaintiffs completely ignore FEI' citation to 28 U.S.C. § 1919, which allows a district court to award "costs" when an action is dismissed for want of jurisdiction; *cf.* 16 U.S.C. § 1540(g)(4) (court may award "costs of litigation (including reasonable attorney and expert witness fees) … ."). Since attorneys' fees can be awarded as part of the costs under the ESA, the Court also has jurisdiction to do so under § 1919.

Health & Human Res., 532 U.S. 598 (2001) (Fair Housing Amend. Act & ADA).[38] This legally significant difference leads to different interpretations of "whenever appropriate" and "prevailing party" fee provisions. *Sierra Club v. EPA*, 322 F.3d 718, 719 (D.C. Cir. 2003) (rejecting *Buckhannon*'s application to Clean Water Act "whenever appropriate" fee-shifting provision); *see also Friends of Animals*, 670 F. Supp. 2d at 14 (rejecting *Buckhannon* in ESA case).[39]

But FEI more than satisfies the "prevailing party" standard, even if it applies. A defendant is the prevailing party when (1) there is judgment in its favor; and (2) the judicial pronouncement is accompanied by judicial relief. *Green Aviation Mgmt. Co., LLC v. FAA*, 676 F.3d 200, 203-04 (D.C. Cir. 2012); *Dist. of Columbia v. Ijeabuonwu*, 642 F.3d 1191, 1194 (D.C. Cir. 2011) (same); *Dist. of Columbia v. Straus*, 590 F.3d 898, 901 (D.C. Cir. 2010) (same). Here, the Court entered judgment for FEI (DE 558-59), and dismissed Rider ***with prejudice*** (COL 20).[40] (While plaintiffs now imply the "with prejudice" dismissal was in error, they did not appeal the judgment, which now has been affirmed, on that basis.[41]) Judicial relief was thus awarded and it was affirmed in its entirety on appeal. *Green Aviation*, 676 F.3d at 203-04 ("[A] dismissal with prejudice has res judicata effect" and qualifies as "judicial relief"); *see also Straus*, 590 F.3d at 902 (same).[42] That API was dismissed without prejudice is irrelevant,

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[38] It is not clear if *Buckhannon* is still good law. *See Davis v. DOJ*, 610 F.3d 750, 752 (D.C. Cir. 2010) ("disapproving" *Buckhannon*, FOIA amended to allow fees under catalyst theory), *cert. denied*, 131 S. Ct. 1013 (2011).

[39] *Buckhannon* itself heavily relied on the statutory schemes' "prevailing party" language. 532 U.S. at 607 ("We doubt that legislative history could overcome what we think is the rather clear meaning of 'prevailing party' – the term actually used in the statute.").

[40] Even plaintiffs' own ESA case, *Seto v. Kama'Aina Care, Inc.*, 2011 U.S. Dist. LEXIS 150167, at *6-8 (D. Haw. Nov. 30, 2011) (Opp. at 21 n.17), found that a defendant is entitled to fees when judgment is entered in its favor. Moreover, the district court cases cited by plaintiffs, Opp. at 23-24, do not specify whether the dismissals for lack of standing were ***with prejudice***; presumably they were without prejudice.

[41] In any event, dismissal of Rider with prejudice would have been an appropriate sanction for his misconduct. *Cf. Caribbean Broad. Sys., Ltd. v. Cable & Wireless PLC*, 148 F.3d 1080, 1091 (D.C. Cir. 1998).

[42] FEI's contention that a dismissal with prejudice "can be as rewarding … as a favorable judgment on the merits," Mot. at 21, derives from a D.C. Circuit case. Opp. at 24; *cf. Dist. of Columbia v. Jeppsen*, 514 F.3d 1287, 1290 (D.C. Cir. 2008) ("a defendant might be as much rewarded by a dispositive order that forever forecloses the suit on a

because it never had standing, a result that also was affirmed in its entirety by the D.C. Circuit in 2011. It can never sue FEI again based on this set of facts. Wright, Miller & Cooper § 4435 (dismissal for lack of jurisdiction precludes relitigation of specific issue of jurisdiction).

C. This Case was Frivolous Because Rider was Paid and Utterly Incredible

Plaintiffs cite no case involving a lead plaintiff's false and purchased testimony, making their authorities not even remotely analogous here.[43] This case was frivolous because Rider, who anchored the case, FOF 53, was paid and lied, and the payments and lies created court access for organizations and counsel who did not have it without him. FOF 1, 60-73; COL 19. This was anything but a "routine" case where the fact finder merely "believed one side over the other" or where one item of evidence was "discounted, disproved or disregarded at trial." *Cf. AFL-CIO v. Nassau*, 96 F.3d 644, 652-53 (2d Cir. 1996) (claim non-frivolous where the plaintiffs "offered evidence as to each element of its claim" but statistical expert's testimony not credited); *EEOC v. Consol. Serv. Sys.* 989 F.2d 233, 237-38 (7th Cir. 1993) (claim non-frivolous where it was supported by statistical evidence but "sorry parade of witnesses" failed to demonstrate intentional discrimination); *Buchholz v. Humphrey*, 2007 WL 2572253, at *5 (S.D. Cal. Sept. 5, 2007) ("routine case in which the plaintiff merely failed to achieve success on her claim").

D. Rider's Fraudulent *Prima Facie* Case is No Defense

That Rider's false and purchased allegations survived a motion to dismiss does not make him analogous to a civil rights plaintiff who establishes a bona fide *prima facie* case. And, even so, a *prima facie* case "will not invariably immunize" sanctionable conduct. *Blue*, 914 F.2d at

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procedural or remedial ground as by a favorable judgment on the merits;" "[a] ruling on jurisdictional ground, that the action fails either in law or in fact, might give the defendant all it could receive from a judgment on the merits.").

[43] If anything, this case is more analogous to the "unmitigated tissue of lies" in *Carrion v. Yeshiva University*, 535 F.2d 722, 728 (2d Cir. 1976) (Mot. at 39), which, like Rider's standing allegations, were undermined by the plaintiff's prior conduct and statements under oath. *See* Ex. 10.

537. Plaintiffs cite no case holding that a court ***cannot*** award fees where a plaintiff has established a *prima facie* case or where a plaintiff's claim survives a dispositive motion. Plaintiffs' cases do not address this issue. *Cf. Johnson v. Allyn & Bacon, Inc.*, 731 F.2d 64, 74 (1st Cir. 1984); *Kettering v. Harris*, 2009 WL 1766805, at *5-6 (D. Colo. June 18, 2009); *Sias v. Gen. Elec. Info. Servs. Co.*, 1981 WL 186, at *5 (D.D.C. May 18, 1981).

Moreover, plaintiffs' assertion that FEI "simply answer[ed] the Complaint," Opp. at 41 n.31, is wrong. FEI sought dismissal of No. 00-1641 ***three*** times, for: (1) lack of standing (*ASPCA I*); (2) failure to state a claim upon which relief may be granted (denied, DE 34); (3) judgment on the pleadings due to deficiencies in plaintiffs' notice letters (denied, DE 56). Thereafter, FEI answered the complaint as directed. DE 35 & 43.

Plaintiffs' argument also is contrary to the law. *Blue*, 914 F.2d at 535 ("there is no requirement that a party move for summary judgment as a precondition to the recovery of sanctions."). Rider's standing allegations created issues of material fact inappropriate for summary resolution. Ex. 31, 5-22-08 Hearing Tr. at 11:22-12:2 ("This is a non-jury case and the Court's not going to require the parties to file motions for summary judgment, nor will the Court focus its attention on trying to resolve motions for summary judgment … . There will be a trial."); *see also id.* at 15:13-20. While trial ultimately demonstrated that Rider's allegations were false and devoid of evidentiary support, "a swift conclusion to the litigation by means of summary judgment" was "impossible" given that Rider "continu[ed] to assert," *Chambers v. NASCO*, 501 U.S. 32, 57 (1991) – even post-trial – factual issues concerning his "attachment" to the elephants and his "injury." PFF ¶¶ 4, 46. Rider's standing hinged on his credibility, which only a trial could resolve. Plaintiffs cite no case where a court determined witness credibility on summary judgment. *Cf. Greenberg v. Hilton Int'l Co.*, 870 F.2d 926, 940 (2d Cir. 1989)

(frivolous cases "may well survive … motions for summary judgment in which the evidence may be presented in a sketchy fashion and credibility may not be taken into account.").

The Rider fraud, abetted by his co-plaintiffs and lawyers, avoided dismissal and forced FEI to endure a decade of litigation, trial and second appeal. None of this insulates plaintiffs' conduct. *Union Planters v. L & J Dev. Co., Inc.*, 115 F.3d 378, 386 (6th Cir. 1997) ("defeating summary judgment on the basis of false evidence" no Rule 11 defense); *Calloway v. Marvel Ent. Grp.*, 854 F.2d 1452, 1473 (2d Cir. 1988), *rev'd in part*, 493 U.S. 120 (1989) ("Where baseless allegations are used to prevent summary judgment, sanctions are mandatory if the attorney did not make a reasonable prefiling inquiry … .").[44]

III. INHERENT AUTHORITY SANCTIONS ARE WARRANTED

Inherent power should be exercised with "caution," *Chambers*, 501 U.S. at 43, but exercising it here is warranted. Plaintiffs first claim that there is not clear and convincing evidence of their "wrongdoing," Opp. at 41, with no effort to say how the extensive Opinion is ***not*** clear and convincing evidence of fraud on the court or bad faith. Nor do they identify what additional evidence would make it any "clearer" or more "convincing."

Second, the repeated self-declarations of "good faith" are beside the point. Opp. at 40-42. Bad faith and intent to deceive the court are clearly and conclusively established by the Opinion. The Court flatly held that Rider's and API's claims lacked merit because they were devoid of any evidentiary support, and that Rider's purchased claims were fraudulent. *In re 60 E. 80th St. Equities, Inc. v. Sapir*, 218 F.3d 109, 117 (2d Cir. 2000) ("bad faith here may be

[44] The suggestion that plaintiffs cannot be assessed fees because they were not "warned" is wrong. *Cf. Badillo v. Central Steel & Wire Co.*, 717 F.2d 1160, 1163 (7th Cir. 1983) (where a plaintiff (1) "proceeds in the face of an unambiguous adverse previous ruling" or (2) "is aware with some degree of certainty of the factual or legal infirmity of his claim," fees are assessed). No court should have to "warn" parties not to defraud the court (or other litigants). In any event, API was repeatedly warned that it did not have standing. *See supra* at 15. And, FEI repeatedly warned that it would seek fees, and that the conduct was sanctionable. *See* Mot. at 19.

inferred from the clear lack of merit of the claims"). Furthermore, the Court held that critical allegations relied upon by the courts were untruthful. FOF 60-73. *Fair Isaac Corp. v. Experian Info. Solutions, Inc.*, 650 F.3d 1139, 1148 (8th Cir. 2011) (Lanham Act) ("[B]ecause direct evidence of deceptive intent is rarely available, such intent can be inferred from indirect and circumstantial evidence.").[45] Plaintiffs do not deny making false statements to this Court or to the D.C. Circuit; their voluminous filings are eerily silent on this crucial issue. Nor do they deny the chronology of what they knew about the holes in Rider's story and when they knew it. Ex. 10. Where, as here, the parties facing sanction do not deny the essential elements of fraud and bad faith, both are clearly and convincingly established.

Moreover, there is no dispute concerning the significance of Rider's lies under the bad faith exception. Plaintiffs do not even attempt to distinguish the circuit opinions affirming bad faith sanctions where the plaintiff lied on issues central to the claim. Mot. at 39-40. And, while plaintiffs may dispute whether Rider perjured himself (Opp. at 41 n.31), the Court need not reach that issue. *Rogal v. Am. Broad. Co.*, 74 F.3d 40, 46 (3d Cir. 1996) (district court "need not apply the standard that would be applicable at a criminal trial for perjury" to sanction plaintiff).[46]

IV. § 1927 SANCTIONS ARE FULLY JUSTIFIED

Counsel have no cogent response to the Court's findings and the caselaw cited by FEI clearly and convincingly showing vexatious litigation here.[47] Nothing demonstrates counsel's

[45] Even "artful" and "deceptive" allegations can give rise to intent to deceive the court. *Fair Isaac*, 650 F.3d at 1149. Here, it was much worse: the conduct involved paid-for allegations that were not truthful, where the attorneys sat at the center of the payments and lies. FOF 60-73.

[46] Plaintiffs entirely ignore D.D.C. cases leveling inherent authority sanctions for less egregious conduct (*see* Mot. at 37-39) (unsuccessful attempt to purchase testimony; false interrogatory response and misrepresentation in filing; "patently false" allegations instigated litigation).

[47] Counsel do not distinguish the caselaw sanctioning counsel for presenting fabricated testimony, filing a complaint with false and unsupported allegations, or continuing to litigate a frivolous case. Nor do they distinguish the caselaw holding that an award of fees encompassing the entire litigation is appropriate. *See* Mot. at 42-45.

"good faith," which alone could not save them from § 1927 sanctions anyway. *Cruz v. Savage*, 896 F.2d 626, 634 (1st Cir. 1990).

The extent of each attorney's involvement in this matter will later be relevant to the amount of individual sanctions, but not to their ***culpability*** – the issue raised now. *Cf. Harris v. Marsh*, 123 F.R.D. 204, 216 (E.D.N.C. 1988) ("No lawyer may disclaim responsibility for his own actions or for a paper bearing his name. When others are involved in misconduct with counsel, ***degrees of culpability may vary but ultimate responsibility does not.***"). All of the attorneys listed in FEI's proposed order entered appearances in this case. *In re Mitchell*, 901 F.2d 1179, 1188 (3d Cir. 1990) (attorney is "personal[ly] responsib[le] for compliance with the rules of this court, *and liability for discipline if those rules are not complied with.*"). Through ECF, all counsel were on notice of FEI's allegations, but embraced the misconduct and continued on with the case.[48]

Moreover, even the attorneys now claiming to have had "little" involvement signed documents identified in FEI's Motion as vexatious, and make no attempt to defend their actions. *See* Mot. at 41 n.36.[49] Saltzburg signed (with a "/s/"), the Supplemental Complaint of Hundley and the Toms, DE 181-1.[50] Winders signed (with a "/s/") plaintiffs' motion to exclude themselves, DE 349.[51] Lovvorn's name is on the filings with the false "refraining" claims, *cf.* Ex. H ¶ 11. (Any claim by these lawyers that their names were used without authority would

[48] Counsel's citation to *Oliveri v. Thompson*, 803 F.2d 1265 (2d Cir. 1986) (Opp. at 44-45), ignores the crux of the issue here. Rider's false "refraining from" allegations were known to counsel, ***because counsel was at the center of the fraud.*** *Cf. Cruz*, 896 F.2d at 633 ("The plaintiffs' attorney was in a position to know the claims were unsupported by fact or law prior to bringing the claims and throughout the litigation."). Moreover, ***the Court*** gave clear indications of its assessment of Rider's credibility – but even then counsel persisted on.

[49] FEI specifically identified all of the vexatious litigation conduct in its Motion, including footnote 36. If helpful for the Court, FEI will file a chart mapping out the sanctionable conduct engaged in by each attorney.

[50] Saltzburg's name also is on multiple filings: DE 81, 96, 113, 122, 217-18, 229, 341, 351, 353, 366, 392, 394. He could not have reviewed these filings in the 5-10 hours he claim he spent on this case. Ex. L ¶ 3.

[51] Winders's name also is on multiple filings, including: DE 335, 341, 343-44, 351, 353, 358, 360, 365-66, 372, 37-78, 381-83, 385-86, 389, 390, 392, 394; 396, 398; 400, 404, 406; 408; 414, 416, 418, 423, 425-26, 428, 433, 470, 481, 484, 533-34.

simply be further proof of misconduct. *In re Lenoir*, 585 A.2d 771, 783 (D.C. 1991)). Counsel cite no precedent or reason why the Court should overlook their evident failure to police their own filings. Indeed, if purportedly peripherally involved attorneys like Winders and Saltzburg had objected to what they do not deny knowing about, the misconduct might have stopped.

FEI's fee request is about fraud on the court (and on a litigant), not chilling creativity. *Cf.* Opp. at 45. Creativity does not trump counsel's oath, taken as officers of this Court, to "support the Constitution of the United States," "respect courts of justice and judicial officers," "and in the performance of those duties [] conduct [themselves] with dignity and according to both the law and the recognized standards of ethics of our profession." LCvR 83.8(e). Where counsel of record shirked that duty, the questions here are: Where were the lawyers? "[W]hy didn't any of them speak up or dissociate themselves from [the fraudulent conduct]?" *Lincoln Sav. & Loan Assoc. v. Wall*, 743 F. Supp. 901, 920 (D.D.C. 1990).

V. CONCLUSION

For the reasons stated above, FEI's Motion should be granted.

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Respectfully submitted,

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