UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Feld Entertainment, Inc., Plaintiff, v. **American Society for the Prevention of Cruelty to Animals**, *et al.*, Defendants.	Civ. No. 07-1532 (EGS)

MEMORANDUM IN SUPPORT OF MOTION FOR CERTIFICATION OR, IN THE ALTERNATIVE, FOR RECONSIDERATION

Pursuant to 28 U.S.C. § 1292(b), Defendants respectfully request that the Court certify for interlocutory appeal one discrete and dispositive legal issue adjudicated in the Court's July 9, 2012, Memorandum Opinion (DE 90) ("Op."). Defendants recognize that interlocutory appeal is appropriate only in rare cases. However, the Court's conclusion that FEI sufficiently alleged a pattern of racketeering activity under RICO presents such a rare, appropriate, case. The Court recognized that this alleged pattern is "overwhelmingly" based on the underlying lawsuit (the "ESA Suit") against Feld Entertainment, Inc. ("FEI") pursuant to the Endangered Species Act, Op. at 32, but nevertheless distinguished *Western Assocs. Ltd. Partnership. v. Market Square Associates.*, 235 F.3d 629 (D.C. Cir. 2001) and its progeny because FEI has cursorily alleged that unidentified donors to non-profit organizations *may* have made donations based on allegedly false or misleading statements. Whether FEI's cursory allegation warrants a departure from Circuit precedent raises a controlling legal issue warranting certification. Alternatively, Defendants respectfully urge the Court to reconsider this ruling on the pattern issue, as well as one crucial aspect of the decision on RICO causation, in light of the D.C. Circuit's ultimate

ruling in the ESA Suit.[1]

In concluding that FEI adequately pled a RICO pattern of racketeering activity, the Court relied principally on FEI's allegation that the organizational plaintiffs in the ESA Suit may have engaged in "unlawful fundraising activity" in connection with representations concerning FEI's treatment of Asian elephants, Mr. Rider, and the ESA Suit, and therefore their donors may have been RICO victims along with FEI. Op. at 32. However, FEI never even argued in its moving papers that the organizations' own donors could be considered victims for purposes of RICO's pattern requirement, presumably because there is no precedent for permitting a single victim of alleged misconduct that itself falls short of a RICO pattern to satisfy the pattern requirement merely by adding a cursory allegation that unidentified third parties were also defrauded by misleading descriptions of the alleged conduct – let alone for allowing a party on one side of a public policy dispute to pursue a RICO claim by alleging that its opponents *may* have victimized their own like-minded supporters in pursuing their advocacy.

Even aside from the Constitutional thicket into which such a novel pattern unavoidably takes RICO -- *i.e.,* by allowing an opponent of advocacy organizations to pry into the identities of its opponent's supporters as well as the bases for their funding decisions -- a claim predicated on the bare (and counterintuitive) allegation that donors who attended an event designed to benefit Asian elephants were FEI's co-victims conflicts with Supreme Court and Circuit precedents requiring that the factual allegations necessary to survive a motion to dismiss, particularly in a case like this one, be pled with sufficient specificity to be "plausible" as to all necessary elements of the claim. *See, e.g., RSM Prod. Corp. v. Freshfields Bruckhaus Deringer U.S. LLP*, 682 F.3d 1043 (D.C. Cir. 2012); *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Bell Atlantic*

[1] Counsel for Defendants conferred with Counsel for Plaintiff, who has advised that the present motion is opposed.

Corp. v. Twombly, 550 U.S. 544 (2007).

Prompt resolution of this novel issue by the Court of Appeals will also most certainly advance the resolution of this case. If, as Defendants maintain, FEI's allegations concerning the animal protection organizations' fundraising activities are insufficient to support a RICO pattern, the RICO claim fails as a matter of law, and years of complex litigation will be avoided. Moreover, even if the D.C. Circuit were to find that FEI may, in effect, employ the ESA Suit plaintiffs' own supporters in the service of FEI's RICO claim, the Court of Appeals may well place limits on discovery in a manner that will save considerable time and resources for this Court and the parties. Indeed, FEI has already made plain that it intends to pursue highly invasive discovery going to the heart of the ability of non-profit advocacy organizations to communicate with and solicit funding from donors and supporters. *See, e.g.*, *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958) ("compelled disclosure of affiliation with groups engaged in advocacy may constitute" an "effective [] restraint on freedom of association").

Early appellate resolution of the threshold pattern issue may obviate a host of otherwise inevitable and complex First Amendment disputes that will face the Court. To prove its pattern of racketeering activity, FEI will use the discovery process not only to attempt to identify each of the donors who attended the 2005 fundraiser, but to subject them to harassing discovery about why they attended the event, their positions on issues addressed at the event, what they knew about the ESA case and Mr. Rider, the bases for their decisions to contribute funding. In other words, FEI's disingenuous pursuit of a RICO pattern will have the perverse effect of impairing the interests of the very individuals that FEI alleges are its co-victims. Such an anomalous and Constitutionally disfavored result – which, again, appears to be unprecedented in the history of RICO jurisprudence – warrants appellate review at the outset. Accordingly, this is the unusual

case where a discrete legal issue warrants certification, before it unleashes "a Hydra that [will] require from the court nothing short of a herculean effort in time and attention to even maintain a semblance of control over it." *ASPCA v. Ringling Bros.*, 244 F.R.D. 49, 52 (D.D.C. 2007) (internal quotation omitted).

Alternatively, Defendants respectfully request that the Court reconsider its ruling on a particular aspect of its decision regarding causation, based on the D.C. Circuit's recent conclusion that one of the ESA Suit plaintiffs' organizational standing theories failed only as a matter of proof at trial of one element of standing, not as a matter of law. *ASPCA v. FEI*, 659 F.3d 13, 27-28 (D.C. Cir. 2011). That decision, which was issued long after briefing and argument regarding Defendants' Motion to Dismiss, makes it plain that the ESA Suit could have proceeded to trial *irrespective* of Tom Rider's participation. This development fatally undermines FEI's claim that Tom Rider's standing allegation was the sole reason that FEI had to defend the ESA Suit throughout the litigation, and thus eliminates a critical element of injury causation in a civil RICO case. Because the D.C. Circuit's reasoning was not briefed as part of Defendants' Motion to Dismiss, Defendants respectfully request that the Court reconsider this narrow but crucial issue.

BACKGROUND

As this Court has recognized**,** when a plaintiff alleges only "a single scheme, a single injury and few victims," it is "virtually impossible" to state a RICO pattern. Op. at 30 (quoting *Western Assocs.* 235 F.3d at 633; *see also Edmondson & Gallagher v. Alban Towers Tenants Ass'n*, 48 F.3d 1260 (D.C. Cir. 1995). As the Court has also explained, FEI's allegation of misconduct in connection with "the ESA Action is, *overwhelmingly*, the basis for this lawsuit," and the sole injury FEI has alleged are its attorneys' fees from that case. Op. at 32 (emphasis

added). Therefore, the Court evaluated whether FEI had sufficiently alleged the presence of additional victims and injuries. While rejecting all but one of FEI's purported bases for overcoming the application of Circuit precedent,[2] the Court permitted the case to continue at this stage of the proceedings largely because of the presence of limited allegations regarding unidentified third party donors of the ESA plaintiff organizations who were allegedly victimized.

Specifically, FEI's allegations survived as a "pattern of racketeering activity" consisting of the ESA lawsuit against FEI plus a 2005 fundraiser at which some of the ESA Suit plaintiffs raised funds that were allegedly used to bribe Mr. Rider to lie about his standing allegations in the ESA Suit. *See* First Amended Complaint ("FAC") ¶ 177-181; *see also* Op. at 16 ("In order to prove its RICO claim, FEI must prove that the ESA Suit plaintiffs and their attorneys bribed Rider to testify falsely about his aesthetic and emotional injury"). Claiming that the funds were solicited "based on 'materially false and/or misleading statements about Rider, the ESA Action, and FEI,'" Op. at 31, quoting FAC ¶ 179, FEI alleged that the ESA Suit plaintiffs raised these funds "to defraud FEI of money and property *and/or* to unjustly enrich defendants through donations obtained from third parties on the basis of false or otherwise misleading information." FAC ¶ 181 (emphasis added).

Although the Court recognized that "FEI may ultimately be unable to demonstrate that the fundraising materials were unlawful or that anyone other than FEI was injured by them," the Court concluded that this aspect of the FAC was sufficient to allege "more than one victim, and more than one injury, associated with defendants' alleged RICO activity," Op. at 33, because FEI

[2] FEI alleged that legislative and administrative advocacy could expand the RICO pattern, but the Court held that FEI suffered no injury from these activities. Op. at 19-20, 32 n. 13, 52-53. FEI also sought to bring in Defendants' participation in press conferences, statements to news outlets, and website postings, but the Court concluded that these activities are "entitled to *Noerr-Pennington* immunity." Op. at 21. FEI further asserted that other institutions using bullhooks or chains on Asian elephants also were somehow victims, but the Court also rejected this argument, since those entities have suffered no injury as a result of the ESA Suit. Op. at 31, n. 12.

had alleged additional victims – *i.e.* "the donors who were allegedly defrauded and lost money as a result." *Id.; see also id.* at 55 (regarding as sufficient the allegation that donors relied on the allegedly fraudulent statements). Accordingly, it was principally on this basis that the Court distinguished, at the pleading stage, *Western Assoiates* and *Edmondson.* However, such a pattern – dependent on FEI's reliance on the ESA plaintiff organizations' own supporters and funders, who have *not* joined FEI in its lawsuit against the very organizations that these individuals *support* – is not only unprecedented, but raises a number of important legal issues that warrant consideration by the Court of Appeals before a very costly RICO suit is permitted to proceed any further.

ARGUMENT

A. THE COURT SHOULD CERTIFY WHETHER THE RICO CLAIMS MAY PROCEED BASED ON FEI'S SPECULATION THAT THE ANIMAL PROTECTION GROUPS' SUPPORTERS GAVE DONATIONS BASED UPON ALLEGEDLY FRAUDULENT REPRESENTATIONS.

Pursuant to 28 U.S.C. § 1292(b), a district court may certify an otherwise interlocutory decision for potential appellate review where the court is "of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). As this Court has explained, through § 1292(b), "'Congress . . . chose to confer on District Courts first line discretion' and 'circumscribed authority to certify for immediate appeal interlocutory orders deemed pivotal and debatable,'" *Judicial Watch, Inc. v. Nat'l Energy Policy Dev. Grp.*, 233 F. Supp. 2d 16, 19, 20 (D.D.C. 2002) (quoting *Swint v. Chambers County Comm'n*, 514 U.S. 35, 46 (1995), where "exceptional circumstances justify a departure from the basic policy of postponing appellate review until after the entry of final judgment." *Nat'l Cmty. Reinvestment Coal. v. Accredited Home Lenders Holding Co.*, 597 F.

Supp. 2d 120, 122 (D.D.C. 2009) (quoting *Virtual Def. & Dev. Int'l, Inc. v. Republic of Mold.*, 133 F. Supp. 2d 9, 22 (D.D.C. 2001)).

While certification is the exception, and "'[m]ere disagreement, even if vehement, with a court's ruling on a motion to dismiss does not establish'" a basis for Section 1292(b) review, *Judicial Watch, Inc.*, 233 F. Supp. 2d at 20 (quoting *First Am. Corp. v. Al–Nahyan*, 948 F. Supp. 1107, 1116 (D.D.C. 1996)), courts in this Circuit certify cases for immediate appellate review where the relevant criteria are satisfied, and particularly where an important threshold legal issue may avoid the need for protracted legal proceedings. *See, e.g., Howard v. Office of the Chief Admin. Officer of U.S. House of Representatives*, 840 F. Supp. 2d 52 (D.D.C. 2012) (granting certification); *Al Maqaleh v. Gates*, 620 F. Supp. 2d 51 (D.D.C. 2009) (same); *Abur v. Republic of Sudan*, 437 F. Supp. 2d 166, 169 -70 (D.D.C. 2006) (same). This is such a case.

1. The Legal Sufficiency Of FEI's Donor Victim Theory Presents A Controlling Question Of Law As To Which There Is A Substantial Ground For A Difference Of Opinion.

"Under section 1292(b), a controlling question of law is one that would require reversal if decided incorrectly or that could materially affect the course of litigation with resulting savings of the court's or the parties' resources." *In re Vitamins Antitrust Lit.*, 2000 WL 673936, at *2 (D.D.C. Jan. 27, 2000) (citation omitted) (quoted in *Judicial Watch, Inc.*, 233 F.Supp.2d at 19); *Howard*, 840 F. Supp. 2d at 55. "Controlling questions of law include issues that would terminate an action if the district court's order were reversed," such as an issue that would resolve the Court's jurisdiction to hear the claim. *APCC Servs., Inc. v. Sprint Commc'ns Co.*, 297 F. Supp. 2d 90, 96 (D.D.C. 2003). Moreover, where "'proceedings that threaten to endure for several years depend on an initial question of jurisdiction . . . or the like,' certification may be justified even if there is a relatively low level of uncertainty." *APCC Servs.*, 297 F. Supp. 2d at

98 (quoting 16 WRIGHT & MILLER, FED. PRACTICE AND PROCEDURE, § 3930 at 422 (1996)).

Here, the controlling question of law is both one as to which there is a substantial ground for a difference of opinion, and one which could significantly simplify and shorten these proceedings: whether FEI can allege a RICO pattern under Circuit precedent based on a bare allegation that the animal protection groups' own donors and supporters' decisions to attend a fundraiser were influenced by the alleged misrepresentations contained in the invitation quoted at Paragraph 179 of the FAC.[3] The totality of FEI's allegations with respect to the alleged impact on the donors is as follows:

> 181. AWI sent the invitation to the July 2005 fundraiser on behalf of ASPCA, FFA/HSUS, and itself . . . in furtherance of schemes to defraud FEI of money and property *and/or unjustly enrich defendants through donations obtained from third parties on the basis of false or otherwise misleading information . . . .*"
>
> 182. When AWI sent the fundraiser invitation . . . AWI, together with ASPCA and FFA/HSUS, intentionally devised or participated in schemes reasonably calculated to deceive FEI with the purpose of either obtaining from or depriving FEI of money and/or property *and/or to unjustly enrich defendants through donations obtained from third parties on the basis of false or otherwise misleading information.*

FAC ¶¶ 181-182 (emphasis added).

Whether these allegations suffice to support a pattern of racketeering activity sufficient to allow RICO claims to proceed is a controlling issue of law. To begin with, aside from the important First Amendment issues raised by FEI's reliance on the organizational plaintiffs' donors and supporters as FEI's co-victims, under the Supreme Court's *Iqbal* and *Twombly* rulings, a plaintiff may not cast a conclusion of law as a fact, nor may a claim be pursued based on a bald allegation unmoored from any concrete factual underpinning. As the D.C. Circuit

[3] As the Court recognized, FEI would not be able to show any injury caused by the alleged unlawful representations associated with the fundraiser unless the donors *relied* on those representations as the *only* basis for their decisions to attend the event or otherwise contribute funding. Op. at 55 (citing *Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639, 659 (2008)).

recently concluded in dismissing a RICO claim on such grounds, where the allegations "demonstrate[ ] only a possibility, but not the plausibility" of a plaintiff's theory, a RICO claim may not proceed. *RSM Prod. Corp.*, 682 F.3d at 1048-1049; *see also Walters v. McMahen*, 684 F.3d 435, 442 (4th Cir. 2012) (dismissing RICO claim where plaintiff provided no factual basis to support the bald allegations in the complaint); *Tooley v. Napolitano*, 586 F.3d 1006, 1007 (D.C. Cir. 2009); *Guantanamera Cigar Co. v. Corporacion Habanos, S.A.*, 672 F. Supp. 2d 106, 108-09 (D.D.C. 2009).

Here, however, FEI has made the barest of allegations concerning donors' reliance on the animal protection groups' fundraising invitation. Indeed, the Complaint expressly leaves open the possibility that the fact on which its pattern theory depends *does not even exist*, alleging that the invitation was to "defraud" or depriv[e]" "FEI of money and property and/or to unjustly enrich defendants through donations obtained from third parties on the basis of false or otherwise misleading information." FAC ¶¶ 181, 182. In other words, FEI's own Complaint does not even allege that the organizations' donors gave funds on the basis of purportedly false information – let alone set forth specific facts supporting such a proposition -- but merely asserts that it is *possible* that they did so. *See also In re Text Messaging*, 630 F.3d 622, 625-26 (7th Cir. 2010) (explaining that *Twombly* and *Iqbal* are "designed to spare defendants the expense of responding to bulky, burdensome discovery" and thus allowing a case to proceed that does not satisfy the pleading standard creates "unjustifiable harm to the defendant that *only an immediate appeal can avert*") (emphasis added).[4]

[4] It also bears emphasizing that the allegation that defendants "unjustly enrich[ed]" themselves "through donations obtained from third parties on the basis of false or otherwise misleading information," FAC ¶¶ 181, 182, was not even present in the original Complaint. *See* DE 1 ¶¶ 124, 125. As recognized in *Western Associates*, it is entirely appropriate for the Court to consider the *original* complaint in resolving whether a plaintiff has sought to "*create the appearance of multiple injuries to multiple victims in an apparent effort to satisfy the statutory language of RICO*." 235 F.3d at 634 (emphasis added; other citations omitted); *see also, e.g., Robertson v. Cartinhour.*, 2012 U.S. Dist. LEXIS 35217, at *46 (D.D.C. Mar. 16, 2012) (reaffirming that allegations amounting to "a single scheme,

There are also substantial grounds to view FEI's remaining donor-victim theory with particular skepticism in light of the Supreme Court's "relatedness" requirement under *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229 (1989). Under the Court's analysis, "predicate acts" are only related if they "have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events." *Id*. at 240. Here, individuals who allegedly attended a fundraiser for the specific *purpose* of helping to alleviate the suffering of FEI's elephants, *see* FAC ¶ 183 ("[t]he fundraiser's sole targets were FEI and its Asian elephants"), cannot plausibly be viewed as "victims" who are "related" to FEI within the meaning of *H.J. Inc.* Once again, this presumably explains why FEI did not even rely on such incongruous co-victims in any of its briefing on the pattern argument but, rather, relied principally on other entities that possess captive Asian elephants but, as the Court has ruled, have suffered no injury from the alleged misconduct. *See supra* at n. 2.[5]

The Court's ruling has important implications for future RICO cases as well – an additional factor that militates in favor of immediate appeal. *See APCC Services*, 297 F. Supp. 2d at 96 ("The impact that the appeal will have on other cases is also a factor supporting a

---

a single injury, and few victims" are insufficient to support a RICO claim); *Chapin Home for the Aging v. McKimm*, 2012 U.S. Dist. LEXIS 82079, at *12 (E.D.N.Y. June 12, 2012) (dismissing a RICO claim based on "a single scheme," explaining that courts should "take care to ensure that the plaintiff is not artificially fragmenting a singular act into multiple acts simply to invoke RICO") (internal citation omitted).

[5] When the fundraising invitation is reviewed in its entirety – which the Court may do at this stage because the invitation is expressly incorporated into FEI's Complaint, *see, e.g.*, *Nader v. DNC*, 567 F.3d 692 (D.C. Cir. 2009) (directing dismissal based on a newspaper article referenced in the complaint) – FEI's pattern becomes even more tenuous. Supporters of animal protection organizations were asked to join actors Ed Begley Jr. and Valerie Harper "at a benefit to rescue Asian Elephants from abuse" and it referred, among other matters, to "video footage of mistreatment of elephants at the Ringling Bros. Circus," a "unique opportunity to end the abuse of circus elephants who are beaten and chained for most of their lives," and "other evidence of the mistreatment of the elephants, including the deaths of several baby elephants." *See* Exhibit A (Joint Fundraiser Invitation). The notion that organizational supporters attending such an event could somehow be viewed as the co-victims of FEI, whose conduct they were expressly trying to stop, is not plausible and stretches the notion of "relatedness" beyond the Supreme Court's limits.

conclusion that the question is controlling") (other citations omitted). As noted, the Court distinguished the leading D.C. Circuit pattern cases – *Edmondson* and *Western Associates* – principally by relying on FEI's conclusory allegation that the animal protection groups' *own* supporters and donors *may* also have been FEI's co-victims of the alleged fraud. But, under that approach, *Edmondson* and *Western Associates* could also have gone forward if the plaintiffs had simply alleged that some of the purported participants in the alleged scheme were *also duped by their alleged co-conspirators*. Thus, for example, in *Edmondson*, which had over fifty defendants, the plaintiff could have asserted that some of those defendants actually may not have known about the purported fraud, and were themselves victims by participating in the alleged illegal activity based on misrepresentations from others.[6]

Indeed, in this case, even without the fundraiser, under the donor-victim theory recognized by the Court, the organizational defendants in this case could also potentially be construed as victims.[7] For instance, under this theory, it would have been sufficient for FEI to have refrained from suing one of the defendant organizations – *e.g.*, the Animal Protection Institute, which did not join the ESA Suit until 2006 – and instead allege that when API joined the case the other Defendants may not have told API about their purported scheme to pay Tom Rider to lie about his standing, and that API was thus also a victim. Alternatively, FEI could also have alleged that an original organizational plaintiff was not told that its funds were being

[6] As for the additional elements that are relevant to whether there is a pattern of racketeering activity, the alleged pattern in *Western Associates* took place over eight years and involved numerous alleged predicate acts relating to a single scheme, 235 F.3d at 635-36, but that was deemed insufficient given the Court of Appeals' analysis of RICO's pattern requirement. Accordingly, as this Court has recognized, the critical factor on which FEI is relying to distinguish this case from *Western Associates* and *Edmundson* is its allegation that the organizations' own supporters are FEI-s co-victims.

[7] Indeed, FEI even leaves open the possibility that its donor co-victims could be transformed into co-conspirators who "worked in concert with" defendants. *See* FAC ¶ 17 ("At various times during the past eight years, defendants . . . working in concert with . . . nonparties such as . . . other entities or individuals to be determined in discovery, provided funding or inducements for Rider . . . ."). In other words, once FEI uses the discovery process to ascertain the identities of individuals who contributed money at the fundraiser, it may discard them as victims and instead pursue them as *participants* in the alleged conspiracy.

used as bribes instead of funding Mr. Rider's living and traveling expenses while he engaged in advocacy for the elephants, and it would also be converted into a "victim."

In short, if a RICO plaintiff can sufficiently plead a RICO pattern by simply alleging that certain parties – who are otherwise aligned with the alleged participants of the alleged single scheme – may also be victims of such groups' alleged misstatements, the pattern requirement as defined in this Circuit will largely be eviscerated, or at least easily circumvented in the very manner that the Court of Appeals has cautioned against. *See Western Assocs.*, 235 F.3d at 634 ("The court need not accept inferences drawn by plaintiffs if such inferences are unsupported by the facts set out in the complaint") (other citations omitted); *see also Al Maqaleh*, 620 F. Supp. 2d at 55 ("interlocutory appeal is warranted where the jurisdictional determination will impact numerous cases").[8]

Although the donor-victim theory on which the litigation is now proceeding has far-reaching implications for RICO cases generally, it has particularly grave consequences for advocacy organizations. For example, under FEI's purported pattern theory, an anti-abortion group could assert a RICO claim against abortion rights groups on the theory that by virtue of alleged misrepresentations concerning the consequences of abortion, they are injuring both the pro-life group and the abortion rights groups' own supporters and donors. Similarly, the coal industry could assert a RICO claim against environmental groups engaged in climate change advocacy, claiming that the groups have used misrepresentations about the causes and severity of climate change to both attack the industry (through litigation or otherwise) and to defraud their

[8] The fact that FEI certainly might have attempted to include the animal protection groups' donors, now treated as victims, as additional RICO *defendants* in this case on the theory that they were part of the purported conspiracy simply serves to further highlight the far-reaching and paradoxical implications of the pattern on which FEI is now relying. Indeed, FEI's effort to support its purported "pattern" at oral argument on the Motion to Dismiss highlights this very anomaly. FEI's specific example of an alleged co-*victim* was In Defense of Animals, *see* Exhibit B (Transcript of June 23, 2011 Hearing) at 63:23–64:16 – the same organization that FEI alleged in its FAC was an additional *participant* in activities targeted at FEI. *See* FAC ¶¶ 17, 246.

own members out of donations.

Of course, in both cases, such claims may be characterized as implausible, particularly in the abstract and without a concrete example of any such "victims" – just as it is extremely unlikely, if not impossible, for FEI to ever prove that Defendants' own donors, who were seeking to support advocacy aimed at mistreatment of elephants in FEI's circus, were truly FEI's co-victims. Yet, under the pattern theory advanced by FEI and allowed by the Court at this stage, RICO is now available to punish opponents in public policy debates through the simple expedient of a blanket assertion by a plaintiff that the "victims" of an alleged fraud might also include supporters of the other side. The serious First Amendment and other potential legal and practical consequences of allowing a RICO case to move forward based on this kind of pattern should at least be considered by the Court of Appeals before proceeding through enormously costly and invasive discovery.

The First Amendment implications make certification particularly appropriate, because allowing the RICO claim to proceed based on the bare and counterintuitive allegation that the organizations' own supporters have been victimized by the organizations' statements concerning, among other matters, the mistreatment of the elephants, creates serious tension between RICO and the First Amendment. Such tensions can and should be resolved by finding that a RICO claim cannot move forward based on slim allegations that third party donors and supporters attending a fundraiser may have been misled. *See, e.g.*, *NOW v. Scheidler*, 510 U.S. 249, 265 (1994) (Souter, J., concurring) (emphasizing that "RICO actions could deter protected advocacy" and "caution[ing] courts applying RICO to bear in mind the First Amendment issues that could be at stake"); *accord Weaver v. United States Info. Agency*, 87 F.3d 1429, 1436 (D.C. Cir. 1996) ("'A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is

unconstitutional but also grave doubts upon that score.'") (quoting *United States v. Jin Fuey Moy*, 241 U.S. 394, 401 (1916)) (additional citation omitted)).

Accordingly, the Court's ruling concerning this aspect of the RICO pattern presents a controlling question of law as to which there is, at minimum, a substantial ground for a difference of opinion in light of *Western Associates* and *Edmondson*'s construction of the pattern requirement, and the Court should certify this issue.

2. Immediate Appeal Of This Legal Issue Will Materially Advance The Disposition Of This Litigation.

In considering the second prong of the certification analysis, this Court should consider whether the issue to be certified will largely or completely resolve the case, and the institutional efficiencies to be gained, particularly where "protracted and expensive litigation may needlessly result if this court's decision is ultimately overturned." *Consumer Prod. Safety Comm'n v. Anaconda Co.*, 445 F. Supp. 498, 501 (D.D.C. 1977); *Al Maqaleh*, 620 F. Supp. 2d at 55 ("It would pain the Court to see both attorneys . . . [and parties] proceed to judgment after considerable expense and delay, only to discover that the judgment must be overturned on appeal because the federal judiciary lacks subject matter jurisdiction.").

As to the first part of the analysis, resolution of this controlling legal issue in favor of Defendants will not only materially advance the case, it will almost certainly resolve the litigation in its entirety and a minimum will remove the basis for federal jurisdiction in this case. The Court expressly rejected FEI's other efforts to establish a pattern by relying on: (a) legislative and administrative advocacy (for which there is no alleged injury); (b) press conferences, news statement and website postings (which are protected by the First Amendment); and (c) purported injuries to other institutions (as to which no specific injury was alleged). Op. at 19-21, 31-32. Accordingly, because the RICO claim will likely be barred in its

entirety if the Court of Appeals concludes that FEI may not pursue a novel, unprecedented RICO pattern based on mere allegations that certain unidentified allies of an organization also may be deemed "victims" – and the remaining state law claims would thus likely need to be dismissed as well, *Edmondson*, 48 F.3d at 1265-66 (finding dismissal of state common law claims appropriate upon dismissal of RICO claim) – certification of this discrete, controlling legal issue is appropriate. *Cf. Fair Emp't Council of Greater Wash. v. BMC Mktg. Corp.*, 28 F.3d 1268 (D.C. Cir. 1994) (reversing denial of motion to dismiss on Section 1292(b) certified appeal); *see also Fannin v. CSX Transp. Inc.*, 1989 WL 42583, *5 (4th Cir. Apr. 26, 1989) ("Certainly the kind of question best adapted to discretionary interlocutory review is a narrow question of pure law whose resolution will be completely dispositive of the litigation, either as a legal or practical matter, whichever way it goes").

As to the second component of Section 1292(b), the Supreme Court has explained that the "legislative history of section 1292(b) indicates that its primary benefit was expected to occur in the protracted or 'big' cases." *Tidewater Oil Co. v. United States*, 409 U.S. 151, 180 (1972) (citing S. Rep. No. 2434, 85th Cong., 2d Sess. 2, 4 (1958)); *see also APCC Servs.*, 297 F. Supp. 2d at 99 (granting certification where case "will no doubt consume a significant amount of the parties' resources in the months and years to come").[9]

This is the quintessential "big case" that will "consume a significant amount of the [Court's and] parties' resources in the months and years to come." *APCC Servs.*, 297 F. Supp. 2d at 99. Indeed, unlike many other cases, the unique history of this dispute – which began in 2000 – dictates that these issues should be resolved before engaging in years of costly discovery and

[9] *See also, e.g., In re WorldCom, Inc. § Litig.*, 2003 WL 22953644, at *4 (S.D.N.Y. Dec. 16, 2003) (in "so called 'big' cases courts may grant certification more freely") (quotation ommitted); *In re Air Crash off Long Island, N.Y. on July 17, 1996*, 27 F. Supp. 2d 431, 436 (S.D.N.Y. 1998) ("Because the district court's efficiency concerns are greatest in large, complex cases, certification may be more freely granted in so-called 'big' cases.").

motions practice. In the ESA Suit, the Court explained that FEI was "relentless" in its efforts to pursue information concerning not only Tom Rider and the ESA Suit plaintiffs' support of his living and travel expenses, but "every detail of the media and litigation strategies of its opponents." *See ASPCA v. Ringling Bros.*, 244 F.R.D. at 52. Given the nature of the pattern on which FEI's RICO claims now depend, FEI can be expected to be even more "relentless" in its efforts to use this case to uncover every scrap of information it can concerning the "strategies of its opponents." *Id.*

Indeed, this is also a case where the Court need not speculate but, rather, can readily predict the myriad of complex issues that will have to be resolved in discovery as the case moves forward. For example, FEI's proposed Discovery Plan identifies as among the topics for discovery:

> 1. [S]upport for Tom Rider . . . by defendants *or any other individual or organization*.
>
> 18. Creation, maintenance and/or alteration of Defendants' websites.
>
> 22. Fundraising/donations, marketing and/or advertising plans, programs or campaigns that refer to or contemplate using the ESA Action to raise funds or to gain media attention or publicity, including proposed plans, strategies, campaigns or programs that were not implemented and what funds were spent on.[10]

Plaintiffs' Discovery Plan (DE 62) at 6-7 (emphasis added). Similarly, before the Court stayed discovery, *see* Minute Order of March 9, 2011, FEI served Document Requests on defendants demanding, *inter alia*, the following:

> 19. All documents that refer, reflect, or relate to any solicitation of or request for donations, contributions, payments or financial support of any kind, regardless

[10] FEI also intends to pursue highly invasive discovery directed at the individual attorney defendants, seeking their individual tax returns, as well as all documents concerning the law firm defendant's "[o]rganization, ownership structure, and formation." *Id.* at Request Number 25. As the target of these requests is a small public-interest firm, such burdensome and invasive discovery will make it exceedingly difficult for these defendants to both defend this lawsuit and conduct their regular practice – evidently the real reason FEI added the firm to this lawsuit in 2010, despite the obvious statute of limitations problems. *See* Op. at 24-29.

> of label or characterization, concerning the ESA Action, the presentation of elephants in circuses, Tom Rider, Defendants, and/or WAP, by the ESA Action plaintiffs, MGC and/or WAP;[11]
>
> 20. All documents that refer to or contemplate using the ESA Action to raise funds or donations, including but not limited to proposed plans, strategies, campaigns or programs that were not implemented, and what such funds or donations were spent on;
>
> 21. All documents that refer, reflect, or relate to donations (whether financial or in kind) that were designated or otherwise earmarked by the donor, for use in connection with the ESA Action.[12]

Id. (emphasis added).

Given the breadth of this discovery, which will also include FEI's effort to depose numerous organizational representatives and supporters – with the attendant risk that FEI will seek to add them to the case as defendants should FEI decide that they are actually co-conspirators rather than FEI's co-victims, *see supra* at 7, 8[13] – taken together with the unprecedented nature of the pattern on which FEI is relying, this is a case where certification is appropriate. *See, e.g.*, *Consub Del. LLC v. Schahin Engenharia Limitada*., 476 F. Supp. 2d 305, 309 (S.D.N.Y. 2007) ("Interlocutory appeal is limited to extraordinary cases where appellate review might avoid protracted and expensive litigation") (internal quotations omitted); *Republic of Colombia v. Diageo N. Am., Inc.*, 619 F. Supp. 2d 7, 9 (E.D.N.Y. 2007) ("Because the district court's efficiency concerns are greatest in large, complex cases, certification may be more freely granted in so-called 'big' cases").

For these reasons, courts have frequently found RICO cases in particular to be

---

[11] The FAC also specifically states that FEI intends to pursue "identities" of donors "in discovery." FAC ¶ 92.

[12] *See* Exhibit C (FEI's First Request for Production of Documents to Defendant ASPCA). FEI served substantially identical discovery requests to the other organizational defendants.

[13] Indeed, FEI's own Complaint raises the prospect that, should any of the donors acknowledge that they would have provided funding irrespective of FEI's allegations that they were provided with misleading information concerning elephant mistreatment or other matters, they would thereby be exposing themselves to potential RICO liability. *See* FAC at ¶ 17 (alleging that anyone who "provided funding . . . for Rider" may be RICO "co-conspirators").

appropriate for Rule 1292(b) certification. *See, e.g. United States v. Philip Morris U.S.A., Inc.*, 396 F.3d 1190, 1193 (D.C. Cir. 2005) (resolving RICO issue certified for appeal under Section 1292(b)); *Tribune Co. v. Abiola*, 66 F.3d 12, 14-15 (2d Cir. 1995) (resolving appeal of RICO motion to dismiss certified under Section 1292(b)); *Schacht v. Brown*, 711 F.2d 1343, 1344-45 (7th Cir. 1983) (same); *Diageo N. Am. Inc*., 619 F. Supp. 2d at 10-14 (1292(b) certification on "whether the elements of a RICO claim have been adequately pled"); *Gamboa v. City of Chicago*, 2004 U.S. Dist. LEXIS 25105 (N.D. Ill., Dec. 9, 2004) (certifying for appeal whether plaintiffs had adequately pled a RICO pattern); *Miron v. BDO Seidman, L.L.P.*, No. 04-968, 2006 U.S. Dist. LEXIS 90758 (E.D. Pa. Dec. 13, 2006) (certifying RICO issue); *In re: Managed Care Litig.*, 2002 WL 1359736, at *1-2 (S.D. Fla. Mar. 25, 2002) (certifying for appeal denial of motion to dismiss a RICO claim); *Klapper v. Commonwealth Realty Trust*, 662 F. Supp. 235 (D. Del. 1987) (certifying RICO standing issue for interlocutory appeal); *see also Van Cauwenberghe v. Biard*, 486 U.S. 517, 529-30 (1988) (recognizing availability of Section 1292(b) review of civil RICO motion to dismiss); *accord DeWit v. Firstar Corp.*, 904 F. Supp. 1476, 1527 (N.D. Iowa 1995) ("[T]he complexity of the claims and issues presented here, the extensive discovery and huge amount of the documentary evidence involved, suggest that this case is one of those 'exceptional cases' involving the prospect of expensive and protracted litigation for which sparing use of 1292(b) is particularly appropriate in order to move this matter more rapidly to a just and proper conclusion.").

The propriety of immediate review here is further highlighted by the fact that FEI's pursuit of its donor-victim allegations raises serious, far-reaching First Amendment concerns that will have to be addressed as discovery unfolds. To pursue its allegations that individuals who attended the 2005 fundraiser might not have supported the ESA Suit had they known about the

purported misrepresentations in the invitation, FEI will undoubtedly endeavor to pursue – as it has already made clear it intends to do – both the identity of these donors and third party discovery from them directly. The notion that FEI can use a RICO lawsuit not only to identify donors to non-profit organizations, but to subject these individuals to burdensome discovery, a concomitant need for legal representation, and even the risk of becoming RICO defendants themselves under FEI's theory – all so that FEI may attempt to prove its threadbare allegation that they were its co-victims – itself raises unavoidable First Amendment associational and free speech concerns that will require extensive consideration by the Court. *See, e.g., NAACP v. Button*, 371 U.S. 415 (1963) (recognizing First Amendment rights of expression and association in pursuit of litigation); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958) (compelled disclosure of union membership lists violates constitutionally protected rights of association).[14]

This Court itself recognized the First Amendment implications of such discovery when it rejected FEI's motion in the ESA Suit to compel production of the "name[s] and identifying information of individual donors" of the Wildlife Advocacy Project, because such disclosure "would *tread on core First Amendment rights*." DE 178 at 9 (emphasis added). Thus, courts have frequently certified cases for early appellate review where serious First Amendment issues are present at the outset, as is undoubtedly the case here. *See, e.g., Santana Prods., Inc. v. Bobrick Washroom Equip., Inc.*, 249 F. Supp. 2d 463, 545 (M.D. Penn. 2003) (certifying

[14] The Associational Privilege protects an "organization's associational activities," including "contributor lists," where there is a "reasonable probability" that disclosure would subject contributors to threats, harassment, or reprisal from . . . private parties." *Buckley v. Valeo*, 424 U.S. 1, 74 (1976) (citing *NAACP v. Alabama*, 357 U.S. at 462). Again, especially given the Court's recognition of FEI's "relentless" efforts to obtain discovery in the ESA Suit, as well as FEI's explicit representation that it may opt to pursue donors as co-conspirators if it decides they are not victims, it is readily apparent that allowing FEI to pursue a pattern expressly predicated on the animal protection groups' donors and supporters will inevitably raise all of these grave concerns. Indeed, it is difficult to imagine a purported RICO claim with greater potential to deter and intimidate potential supporters of animal advocacy organizations, and hence to threaten the associational and other First Amendment interests of the organizations and their supporters.

decision involving First Amendment issues).[15]

In sum, because immediate review would materially advance resolution of what will otherwise undoubtedly be a classic "big case" with highly contentious issues, including far-reaching issues under the First Amendment, certification of this controlling issue of law regarding the alleged RICO pattern is appropriate.[16]

B. ALTERNATIVELY, THE COURT SHOULD RECONSIDER WHETHER FEI CAN SUFFICIENTLY PLEAD RICO CAUSATION IN LIGHT OF THE D.C. CIRCUIT'S RULING IN THE ESA ACTION.

Rule 54(b) permits the Court to reconsider its interlocutory rulings at any time. Fed. R. Civ. P. 54(b) (an order "may be revised at any time before the entry of a judgment . . . ."); *see, e.g., Holland v. Valley Servs., Inc.*, 845 F. Supp. 2d 220 (D.D.C. Feb. 28, 2012) (reconsideration may be granted "as justice requires") (quoting *Childers v. Slater*, 197 F.R.D. 185, 190 (D.D.C 2000); *Musick v. Salazar*, 839 F. Supp. 2d 86 (D.D.C. 2012) (granting reconsideration). We

---

[15] *See also Mark Aero, Inc. v. TWA*, 580 F.2d 288 (8th Cir. 1978) (reversing district court's denial of motion to dismiss on First Amendment grounds, upon certification from the district court); *Bieter Co. v. Blomquist*, 1990 WL 107531 (D. Minn. May 24, 1990) (certifying decision with First Amendment implications for immediate appeal); *Las Vegas Sands, Inc. v. Culinary Workers Union, Local 226*, 2002 WL 32511175 (D. Nev. July 3, 2002) (same); *A.H.D.C. v. City of Fresno*, 2003 WL 25948686 (E.D. Cal. Mar. 3, 2003) (certifying decision in light of First Amendment issues).

To be sure, the Supreme Court has ruled that a state Attorney General may prosecute for fraud a for-profit "fundraiser who intentionally misleads" as to how funding will be used. *Illinois ex rel. Madigan v. Telemarketing Assoc.*, 538 U.S. 600, 621 (2003). That, obviously, is a far cry from FEI, in a civil RICO case, seeking to use the organizations' own supporters and members who have shown no intent to join FEI in this case, let alone any indication that they consider themselves to be co-"victims" with FEI. Indeed, in *Madigan*, the Court made it clear that "charitable organizations that engage primarily in advocacy or information dissemination could get and spend money for their activities *without risking a fraud charge*." *Id.* at 621-22 (emphasis added). As noted, FEI has not alleged that Defendants misrepresented how the money would be used. Rather, FEI alleges that the fundraising invitation contained various other statements with which FEI professes disagreement – *e.g.*, that FEI mistreats the elephants by beating them with bull hooks and keeping them chained for much of their lives – which plainly implicate vital First Amendment interests. *Id.* at 622, n.11 (explaining that calls seeking donations to Mothers Against Drunk Driving would not be subject to a fraud charge simply because they do not disclose that MADD "devotes a large proportion of its resources to fundraising calls"); *see also United States v. Alvarez*, 132 S. Ct. 2537 (2012) (even lies concerning military service are protected by the First Amendment).

[16] If the Court does not agree that the pattern issue warrants interlocutory review, we respectfully urge the Court to reconsider its ruling on this issue, based on the considerations set forth above, and especially the cursory nature of the allegations in the FAC concerning the fundraiser as well as the important First Amendment implications raised by allowing FEI to pursue a pattern on this basis.

respectfully seek reconsideration of one aspect of the Court's ruling on RICO causation which did not exist at the time the Motion to Dismiss was briefed and argued.

In seeking dismissal of the RICO claim, Defendants argued that FEI could not demonstrate that the alleged conduct caused its purported injuries – the fees paid to litigate the ESA Suit through trial – because one of the organizational plaintiffs also had pursued the case through trial. Mot. to Dismiss (DE 54-1) at 56. The Court rejected this argument by relying on the final opinion in the ESA Suit, in which the Court concluded that it was "crucial" that Mr. Rider be a plaintiff in order for the case to have proceeded. Op. at 56-57.

However, although the Court of Appeals affirmed this Court's ruling that the ESA Suit organizational plaintiffs lacked Article III standing, it did so on a new ground that was neither argued by FEI nor relied on by this Court in its final decision – *i.e.*, that the plaintiffs failed to *prove at trial* that FEI's "treatment of elephants 'contribut[es] to the public misimpression, particularly in young children, that bullhooks and chains are lawful and humane practices.'" *ASPCA v. FEI*, 659 F.3d at 28 (citation omitted). While that analysis had no bearing on the ultimate outcome of the ESA Suit, it is crucial to the viability of FEI's ability to show the necessary causation for its RICO claims – *i.e.* that its damages in defending the ESA Suit were caused solely by Mr. Rider's participation as a plaintiff.

Thus, the D.C. Circuit did not accept FEI's central contention that the organizational plaintiffs' standing must fail as a matter of law because "issue advocacy" is not permitted as a basis for resource injury under *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982) and Circuit precedents applying it. *See ASPCA v. FEI*, 659 F. 3d at 26; *see also id.* at 27 (explaining that "API's claims closely mirror those we found sufficient to support standing in *Spann v. Colonial Village, Inc.*, 899 F.2d 24 (D.C. Cir. 1990)."). Rather, the Court of Appeals concluded

that, in light of the evidence that API spends significant resources educating the public concerning the harmful effects of bullhooks and chains on FEI's elephants, API established sufficient evidence of injury-in-fact and could have demonstrated Article III standing under *Havens Realty* if the organization had also proven causation by submitting evidence at trial demonstrating that FEI's use of bull hooks and chains "fosters a public impression that these practices are harmless." *Id.* at 27.

In response to plaintiffs' argument that this "public impression" could have been "inferred" from the facts in the record, the Court held that such an inference is not adequate at the trial stage of the proceeding. *Id.* at 28 (noting that while "API put on numerous experts [at trial], it failed to provide any expert testimony" on this specific issue). Thus, the Court found only that API's standing claim "falters on causation grounds" because API had not adduced evidence at trial *proving* the logical inference by actually demonstrating (*e.g.*, through expert testimony) that "Feld's unlawful practices injure its advocacy and public education efforts because use of bullhooks and chains by the well-known circus creates a public impression, particularly among children, that bullhooks and chains are not harmful to the elephants." *Id.*

In light of the Court of Appeals' reasoning, therefore, even without Mr. Rider the organizational plaintiffs' standing allegations would have been sufficient for them to pursue the ESA claim up until and through the trial, and FEI would have been required to spend its resources defending that action as well. Accordingly, since organizational standing was not, contrary to FEI's contention, deemed to be foreclosed as a matter of law, it is legally impossible for FEI to establish, as it must, that the alleged activities concerning Mr. Rider were the sole cause of FEI's defending the lawsuit until trial. *See Hemi Grp., LLC v. City of New York*, 130 S. Ct. 983 (2010); *see also Johnson-Parks v. D.C. Chartered Health Plan*, 806 F. Supp. 2d 267, 269

(D.D.C. 2011) (reconsideration appropriate where, *inter alia*, "a controlling or significant change in the law or facts [has occurred] since the submission of the issue to the court").[17]

[17] The Court also rejected Defendants' argument that the RICO claims are barred due to the difficulty of distinguishing the attorneys' fees paid due to the alleged misconduct and the fees FEI paid relating to organizational standing issues, on the grounds that the FEI's incurring attorneys' fees at all was "the direct result of the alleged RICO offenses involving Rider's involvement in the litigation." Op. at 57, n.17. However, because the D.C. Circuit's ultimate ruling demonstrates that fees could have been incurred through trial *even without Mr. Rider's participation*, the Court of Appeals' reasoning precludes FEI from demonstrating the "causal relationship" that is essential to RICO liability. *E.g. In re Schering Plough Corp. Intron/Temodar Consumer Class Action*, 678 F.3d 235, 247 (3d Cir. 2012) ("[T]o establish standing," the RICO plaintiff "must allege facts showing a causal relationship between the alleged injury . . . and [defendants'] alleged wrongful conduct").

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court certify for immediate appeal, or reconsider, whether FEI has adequately pled a RICO pattern of racketeering activity. Alternatively, Defendants request that the Court reconsider its ruling on RICO causation, given the reasoning in the Court of Appeals' ruling which postdated briefing and argument on the Motion to Dismiss.

Dated: August 9, 2012

Respectfully submitted,

/s/
Roger E. Zuckerman (D.C. Bar No. 134346)
Logan D. Smith (D.C. Bar No. 474314)
Zuckerman Spaeder LLP
1800 M Street, N.W., Suite 1000
Washington, DC 20036
Telephone: (202) 778-1800
Facsimile: (202) 822-8106
Emails: rzuckerman@zuckerman.com; lsmith@zuckerman.com

Counsel for The Fund for Animals, Inc.

and

/s/
Bernard J. DiMuro (D.C. Bar No. 393020)
Stephen L. Neal, Jr., (D.C. Bar No. 441405)
DiMuroGinsberg, P.C.
1101 King Street, Suite 610
Alexandria, Virginia 22314
Telephone: (703) 684-4333
Facsimile: (703) 548-3181
Emails: bdimuro@dimuro.com; sneal@dimuro.com

Counsel for Animal Welfare Institute

and

/s/
Daniel S. Ruzumna (D.C. Bar No. 450040)
Peter W. Tomlinson (admitted *pro hac vice*)
Patterson Belknap Webb & Tyler LLP
1133 Avenue of the Americas, Suite 2200
New York, NY 10036-6710
Telephone: (212) 336-2000
Emails: druzumna@pbwt.com;
ptomlinson@pbwt.com

Counsel for American Society for the Prevention of Cruelty to Animals

and

/s/
David H. Dickieson (D.C. Bar No. 321778)
Schertler & Onorato, LLP
575 7th Street, N.W., Suite 300 South
Washington, DC 20004
Telephone: (202) 628-4199
Facsimile: (202) 628-4177
Email: ddickieson@schertlerlaw.com

Counsel for the Animal Protection Institute

and

/s/
Laura N. Steel (D.C. Bar No. 367174)
Kathleen H. Warin (D.C. Bar No. 492519)
Wilson Elser Moskowitz Edelman & Dicker LLP
700 11th Street, NW
Suite 400
Washington, DC 2001
Telephone (202) 626-7681
Facsimile: (202) 628-3606
Email: steell@wilsonelser.com;
kathleen.warin@wilsonelser.com

Counsel for Meyer, Glitzenstein & Crystal, Katherine A. Meyer, Eric R. Glitzenstein, and Howard M. Crystal

and

/s/
Andrew B. Weissman (D.C. Bar No. 245720)
WilmerHale
1875 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
Telephone: (202) 663-6612
Facsimile: (202) 663-6363
Email: Andy.Weissman@wilmerhale.com

Counsel for Jonathan R. Lovvorn and Kimberly D. Ockene

and

/s/
William B. Nes (D.C. Bar No. 975502)
Morgan Lewis and Bockius, LLP
1111 Pennsylvania Avenue, NW
Washington, D.C. 20004
Telephone: (202) 663-6612
Facsimile: (202) 663-6363
Email: bnes@morganlewis.com

Counsel for the Humane Society of the United States

and

/s/
Stephen L. Braga
Ropes & Gray LLP
700 12th Street, N.W., Suite 900
Washington, D.C. 20005
Telephone: (202) 508-4655
Facsimile: (202) 383-9821
Email: stephen.braga@ropesgray.com

Counsel for Wildlife Advocacy Project and Tom Rider

Certificate of Service

I HEREBY CERTIFY on this 9th day of August, 2012, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send a notification of such filing to all counsel of record.

/s/
Roger E. Zuckerman