IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FELD ENTERTAINMENT, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	**Civil Action No. 07-1532 (EGS)**
AMERICAN SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS, et al. ,	)	
	)	
Defendants.	)	
	)	

FELD ENTERTAINMENT INC.'S MOTION TO DISMISS, OR IN THE ALTERNATIVE TO STAY, MEYER GLITZENSTEIN & CRYSTAL'S COUNTERCLAIM

Pursuant to Federal Rule of Civil Procedure 12(b)(6), Plaintiff-Counterclaim Defendant Feld Entertainment, Inc. ("FEI") respectfully moves this Court for an order dismissing Defendant-Counterclaim Plaintiff Meyer Glitzenstein & Crystal ("MGC")'s Counterclaim with prejudice. As set forth in the accompanying Memorandum of Points and Authorities, MGC has failed to state a claim for abuse of process. In the alternative, FEI requests that the counterclaim be stayed pending a final judgment on FEI's RICO and state law claims.

Pursuant to LCvR 7(m), undersigned counsel conferred with counsel for MGC, who has advised that MGC opposes the relief sought by this motion.

WHEREFORE, premises considered, FEI respectfully requests that its motion be granted. A proposed order is attached.

Dated: September 7, 2012

Respectfully submitted,

/s/ John M. Simpson

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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF FELD ENTERTAINMENT INC.'S MOTION TO DISMISS, OR IN THE ALTERNATIVE TO STAY, MEYER GLITZENSTEIN & CRYSTAL'S COUNTERCLAIM

Plaintiff-Counterclaim Defendant Feld Entertainment, Inc. ("FEI"), pursuant to Fed. R. Civ. P. 12(b)(6), respectfully submits its Memorandum of Points and Authorities in Support of its Motion to Dismiss, or, in the Alternative, to Stay, Defendant-Counterclaim Plaintiff Meyer Glitzenstein & Crystal ("MGC")'s Counterclaim.

INTRODUCTION

Not every contentious lawsuit filed between adverse parties is an abuse of process. In this case, FEI has sued MGC and five individual attorneys (and others) for Racketeer Influenced and Corrupt Organizations Act ("RICO") violations as well as for various state law torts (collectively the "RICO case") arising out of conduct that occurred in previous litigation in which MGC represented the plaintiffs against FEI (the "ESA case"). In a transparent effort to change the subject and divert attention from its own actions, MGC has now filed its own "abuse of process" counterclaim against FEI. This frivolous tit for tat maneuver must be rejected.

The counterclaim should be dismissed with prejudice because MGC's allegations, even if true (and they are not), are not actionable as a matter of law. Abuse of process requires that process has been abused. The RICO case against MGC is in its infancy – there has been no material "use," let alone any "abuse," of the judicial process. Unable to point to any misuse of process, MGC instead devotes its entire counterclaim to speculating about various motives FEI could have had for suing MGC. While it is no secret that FEI and MGC are not fast friends, the RICO case was not written on a clean slate. MGC and the other defendants caused FEI to spend more than a decade and more than $20 million defending itself against a case with a fraudulent jurisdictional predicate, in which the main fact witness was a plaintiff for hire, paid by his co-plaintiffs and MGC pursuant to a payment scheme that was deliberately concealed in order to sustain a case that was used as a platform for publicity and to solicit donations. FEI brought the RICO case to recover the money it was forced to spend in its own defense of the fraudulent litigation and to hold defendants responsible for their actions. The RICO case has no other purpose. But even if all of MGC's allegations about FEI's motives for suing MGC and the individual attorneys were true, District of Columbia law is clear that "[t]he mere issuance of the process is not actionable, no matter what ulterior motive may have prompted it; the gist of the action lies in the improper use ***after issuance***." *Morowitz v. Marvel*, 423 A.2d 196, 198 (D.C. 1980) (emphasis added). Because MGC's counterclaim does nothing more than complain about the "mere issuance of the process," *id.*, MGC does not and cannot state a plausible claim.

In the alternative, the counterclaim should be stayed pending a final judgment in the RICO case. Litigating the RICO case and MGC's counterclaim concurrently would be inefficient for all involved. Because MGC's alleged damages are its attorney's fees and costs defending the RICO case, those damages cannot be determined until a final judgment is entered.

Moreover, the facts and evidence at issue in the counterclaim are completely distinct from those at issue in the RICO case: the RICO case focuses on the actions of MGC and the other defendants, while the counterclaim focuses on the actions of FEI. The RICO case has been pending for more than five years. Litigating the main action and the counterclaim concurrently would unnecessarily delay the RICO case, which must be concluded before MGC's counterclaim can be adjudicated.

BACKGROUND

I. PROCEDURAL HISTORY

The procedural history of this case is well known to the Court. On July 11, 2000, clients represented by MGC filed an Endangered Species Act ("ESA") case against FEI. After years of contentious discovery, FEI began to learn the organizational plaintiffs in the ESA case had been paying Tom Rider, a named plaintiff and key fact witness. On February 28, 2007 FEI moved for leave to file a counterclaim, asserting violations of RICO and the Virginia Conspiracy Act, based in part on these activities. After its motion was denied, FEI brought its RICO and Virginia Conspiracy Act claims as a stand-alone lawsuit on August 28, 2007. Case No. 07-1532 (the "RICO case"). MGC was not named as a defendant in the original complaint, because FEI was not aware of MGC's central role in the Rider payments. This was not revealed until the ESA plaintiffs' September 24, 2007 discovery responses and document productions, provided in response to the Court's August 23, 2007 order granting FEI's motion to compel (and one month after FEI filed the original complaint in the RICO case). *See ASPCA et al. v. Feld Entertainment, Inc.*, 677 F. Supp. 2d 55, 83 (D.D.C. 2009), *aff'd*, 659 F.3d 13 (D.C. Cir. 2011) ("The true nature and extent of the payments the organizational plaintiffs had made to Mr. Rider directly ***or through MGC*** or WAP was not fully disclosed until after the Court's order of August

23, 2007, granting FEI's motion to compel the disclosure of such information.") (emphasis added). The Court stayed the RICO case on November 7, 2007, pending final resolution of the ESA case. Docket Entry ("DE") 23.

On December 30, 2009 the Court entered judgment in favor of FEI in the ESA case, finding that no plaintiff had standing, and determining that Rider was "essentially a paid plaintiff and fact witness" whose "sole source of income" throughout the litigation was provided by his co-plaintiffs, counsel, and an organization run by plaintiffs' counsel. *ASPCA*, 677 F. Supp. 2d at 67, 72. The Court also found that the "primary purpose [for the payments] [was] to keep Mr. Rider involved with the litigation," that the ESA plaintiffs were "less than forthcoming about the extent of the payments to Mr. Rider," and that there was "no excuse" for Mr. Rider's "false interrogatory answer" about the payments given that "[t]he lawyer who signed the objections to this answer, Katherine Meyer, was a principal in two of the entities – WAP and MGC – that had paid Mr. Rider." *Id*. at 79, 82. The final judgment in the ESA case lifted the stay in this action.

Thereafter, on February 16, 2010, FEI filed its First Amended Complaint ("FAC") in the RICO case, adding MGC and five individual attorneys as defendants and adding state law claims for abuse of process, malicious prosecution, champerty, and maintenance. DE 25. The defendants moved to dismiss the RICO case on December 3, 2010. DE 53-55. On July 9, 2012, the Court granted in part and denied in part defendants' motions, allowing six of the seven counts in the FAC to proceed. DE 90. All but one of the defendants answered the First Amended Complaint on August 9, 2012. DE 96 (Animal Welfare Institute); 97 (Katherine A. Meyer, Eric R. Glitzenstein, Howard M. Crystal, and Meyer Glitzenstein & Crystal); 98 (Wildlife Advocacy Project); 99 (Tom Rider); 100 (Jonathan R. Lovvorn); 101 (Kimberly D. Ockene); 102 (American Society for the Prevention of Cruelty to Animals); 103 (Humane

Society of the United States); and 104 (Fund for Animals, Inc.). Defendant Born Free USA United with Animal Protection Institute answered on August 29, 2012. DE 112. MGC was the only defendant to assert a counterclaim.

II. THE COUNTERCLAIM

MGC alleges that FEI's claims against MGC and the individual attorneys are designed to cause them to spend time and money defending themselves and ultimately to stifle criticism against FEI. *See* Countercl. ¶ 7 (FEI intended to "impair[] MGC's ability to represent animal protection organizations in future litigation and advocacy …."); ¶ 8 ("FEI seeks to employ the litigation in order to impair the relationship between MGC and its animal protection clients; to compel MGC to expend massive time and resources defending itself … and ultimately, to cause MGC to expend so much time and resources defending the litigation that it must curtail or close its public-interest legal practice."); ¶ 9 ("FEI's ultimate objective in adding MGC and the individual attorneys to the RICO claim in 2010 was to prevent and deter further advocacy … and, ultimately, to cause MGC to curtail or shut down its law practice so that it could never again pursue advocacy concerning FEI or issues about which FEI is concerned, again."); ¶ 12 (FEI brought its "RICO action against MGC for the primary purpose of draining MGC's time and resources and impairing MGC [sic] from engaging in any advocacy or litigation that might affect FEI"); ¶ 13 (FEI is using "litigation for the improper purpose of stifling criticism and preventing any advocacy directed at its treatment of animals"); ¶ 17 (FEI brought "RICO claims against MGC … for the primary purpose of compelling them to expend time and resources defending themselves, and to deter and prevent them from pursuing any litigation or other advocacy that might bear on FEI … ."). MGC alleges that it has suffered damages of "the costs of defending

this lawsuit and attorneys' fees," *id*. ¶ 21, and additionally seeks $100 million in punitive damages and "other appropriate sanctions under 28 U.S.C. § 1927."

All of MGC's allegations, *even if they were true*, point only to the purpose of initiating the lawsuit, not any improper ***use*** of the process, which is essential for, and the hallmark of, an abuse of process case. Unable to point to any actions that FEI has taken in the RICO case that constitute a perversion of the legal process, MGC resorts to dredging up unrelated events from long ago, none of which involved MGC, in an effort to allege that FEI had "past practices [of] us[ing] any means necessary to stifle criticism, deter advocacy directed at FEI's treatment of its Asian elephants and other animals, and retaliat[ing] against those who criticize FEI's practices." Countercl. ¶ 12. Though these allegations are irrelevant to the claim here, even if they suggested – or even proved – that FEI initiated the suit against MGC for an ulterior purpose, the counterclaim still fails because, again, the initiation of process, even if for an ulterior purpose, is not actionable. While MGC undoubtedly would – like any defendant – prefer not to be a defendant in the RICO case, this does not create an action for abuse of process. Moreover, its claim for sanctions under 28 U.S.C. § 1927 must be dismissed because such sanctions are only available against lawyers, not parties. 28 U.S.C. § 1927 ("***Any attorney*** … who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court ***to satisfy personally*** the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct) (emphasis added). Requesting such sanctions against FEI is clearly improper and must be dismissed.

STANDARD OF REVIEW

A motion under Rule 12(b)(6) of the Federal Rules of Civil Procedure "tests the legal sufficiency of a complaint." *Browning v. Clinton*, 292 F.3d 235, 242 (D.C. Cir. 2002). In filing

a complaint or counterclaim, the plaintiff or claimant has an obligation to set forth the grounds of its entitlement to relief, an obligation which requires more than a "formulaic recitation of the elements of a cause of action." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Rather, to survive a motion to dismiss, the pleading must contain "enough facts to state a claim to relief that is plausible on its face." *Id.* at 570.

"Although for purposes of [a Rule 12(b)(6)] motion to dismiss [a court] must take all the factual allegations in the complaint as true, [the court is] not bound to accept as true a legal conclusion couched as a factual allegation," *Papasan v. Allain*, 478 U.S. 265, 286 (1986), or "accept inferences drawn by plaintiff[] if such inferences are unsupported by the facts set out in the complaint." *Kowal v. MCI Commc'ns Corp.*, 16 F.3d 1271, 1276 (D.C. Cir. 1994). Once legal conclusions and unsupported inferences are properly disregarded, if the remaining, well-pleaded factual allegations "could not raise a claim of entitlement to relief, this basic deficiency should … be exposed at the point of minimum expenditure of time and money by the parties and the court." *Twombly*, 550 U.S. at 558 (internal quotation omitted).

When evaluating a motion to dismiss, a Court may consider "matters about which the Court may take judicial notice" without converting the motion into one for summary judgment. *Gustave-Schmidt v. Chao*, 226 F. Supp. 2d 191, 196 (D.D.C. 2002). The slate on which MGC's counterclaim is written is far from blank. So while the instant motion is one to dismiss, the Court has more at its disposal than the allegations in the counterclaim. Indeed, in ruling on the defendants' motions to dismiss the FAC, the Court took "judicial notice of the record in the ESA Action," finding that it could "do so without converting the motion to dismiss into one for summary judgment." DE 90, at 3, n.2 (citing, *inter alia*, *Covad Commc'ns Co. v. Bell Atlantic Corp.*, 407 F.3d 1220, 1222 (D.C. Cir. 2005)). The Court can and should do so here as well. As

the Supreme Court's noted in *Iqbal*, determining whether a pleading withstands a motion to dismiss is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009).

ARGUMENT

I. MGC'S COUNTERCLAIM SHOULD BE DISMISSED FOR FAILURE TO STATE A PLAUSIBLE ABUSE OF PROCESS CLAIM

The tort of abuse of process "exists for the perversion of the court process to accomplish an end which the process was not intended to bring about, or when the process is used to compel the party affected by it to do some collateral thing which he could not legally and regularly be compelled to do." *Hall v. Hollywood Credit Clothing Co.*, 147 A.2d 866, 868 (D.C. 1959). "The mere issuance of the process is not actionable, no matter what ulterior motive may have prompted it; the gist of the actions lies in the improper use after the issuance." *Morowitz v. Marvel*, 423 A.2d 196, 198 (D.C. 1980) (quoting *Hall*, 147 A.2d at 868). Therefore District of Columbia courts have interpreted the tort as requiring "two essential elements …: '(1) the existence of an ulterior motive; and (2) *an act* in the use of process other than such as would be proper in the regular prosecution of the charge.'" *Houlahan v. World Wide Ass'n of Specialty Programs & Sch.*, 677 F. Supp. 2d 195, 199 (D.D.C. 2010) (quoting *Hall*, 147 A.2d at 868) (emphasis in original). Here, MGC's ***only*** relevant allegations involve FEI's alleged improper ***motives*** in initiating the RICO case against it and the individual attorneys. But motives alone are not enough; there must be a ***use*** of the process to accomplish an end not normally associated with the process. The counterclaim fails to plead any such use of the process and therefore fails to state a claim as a matter of law.

A. The Mere Initiation of a Claim, Regardless of For What Purpose, Cannot Constitute Abuse of Process

MGC has alleged two things in its counterclaim: (1) that it was sued; and (2) that it was sued for improper purposes. *See, e.g.*, Countercl. ¶ 7 (suing MGC and attorneys intended to "impair[] MGC's ability to represent animal protection organizations …");¶ 9 ("FEI's ultimate objective ***in adding MGC*** and the individual attorneys … was to prevent and deter further advocacy …");¶ 12 (FEI "***br[ought] a RICO action against MGC*** for the primary purpose of draining MGC's time and resources …");¶ 17 ("FEI ***brought … RICO claims against MGC*** and the individual attorneys … for the primary purpose of compelling them to expend time and resources defending themselves, and to deter and prevent them from pursuing any litigation or other advocacy") (emphasis added). These allegations, *even if they were true*, do not constitute a valid abuse of process claim.

The law in the District of Columbia is clear that "mere initiation of a suit and allegations of an ulterior motive" are not sufficient for an abuse of process claim. *See Nader v. Democratic Nat'l Comm.*, 555 F. Supp. 2d 137, 160-61 (D.D.C. 2008) (rejecting the "expansive formulation of the abuse of process standard" as "superseded" and noting that "[f]iling a lawsuit with the incidental motive to inflict harm on the plaintiff does not arise to abuse of process."), *aff'd on other grounds* 567 F.3d 692 (D.C. Cir. 2009). As the D.C. Court of Appeals has repeatedly stated, ***'"[t]he mere issuance of process is not actionable, no matter what ulterior motive may have prompted it; the gist of the action lies in the improper use after issuance***."' *Morowitz*, 423 A.2d at 198 (D.C. 1980) (quoting *Hall*, 147 A.2d at 868) (emphasis added) (affirming dismissal of doctor's abuse of process claim; the fact that the patient filed the malpractice counterclaim with the ulterior motive of coercing settlement with the doctor in his suit for payment of outstanding medical bills was insufficient to ground liability where there was no

showing that the process was, in fact, used to accomplish an end not regularly or legally obtainable); *Brown v. Hamilton*, 601 A.2d 1074, 1080 (D.C. 1992) ("the institution of litigation in itself is insufficient"); *Nolan v. Allstate Home Equipment Co.*, 149 A. 2d 426, 430 (D.C. 1959) (holding that ulterior motive does not suffice for "malicious abuse of process" because "there was nothing more than the issuance and service of process").[1] Rather, for abuse of process to lie, there must also have been ***an act in the use of the process*** other than such as would be proper in the regular prosecution of the charge. *Houlahan*, 677 F. Supp. 2d at 201; *Brown*, 601 A.2d at 1080 ("in addition to ulterior motive, there must have been a 'perversion of the judicial process ***and achievement of some end*** not contemplated in the regular prosecution of the charge.'") (quoting *Morowitz*, 423 A.2d at 198) (emphasis added); *Nader*, 555 F. Supp. 2d at 160 (The "perversion towards a collateral end must occur ***after the initiation of litigation***.") (emphasis added).

The RICO case against MGC is at such an early stage that ***there have been no acts in the use of process*** beyond its mere initiation. Indeed, FEI never even had to obtain process. Service of the FAC, which added MGC and the other new defendants, was accepted by consent of

[1] MGC's insinuation that FEI knowingly brought a case it knew was time barred, Countercl. ¶¶ 2, 3, 4, 6, 8, 17, gets it nowhere on an abuse of process claim. *See Kopff v. World Research Group, LLC*, 519 F. Supp. 2d 97, 100 (D.D.C. 2007) ("[U]nder District of Columbia law even an allegation that a plaintiff knowingly brought suit on an unfounded claim is not by itself an abuse of process."); *Hall*, 147 A.2d at 868 ("The complaint alleges that appellee knowingly brought suit on an unfounded claim, which by itself is not an abuse of process."). It is also incorrect. As this Court has found, "[t]he true nature and extent of the payments the organizational plaintiffs had made to Mr. Rider directly ***or through MGC … was not fully disclosed until after the Court's order of August 23, 2007, granting FEI's motion to compel the disclosure of such information***." *ASPCA*, 677 F. Supp. 2d at 82 (emphasis added). MGC and the attorneys thus were not included in the counterclaim or the original complaint because FEI did not know the extent of their involvement until after the ESA plaintiffs' September 24, 2007 discovery responses and document productions, provided only in response to that order. FEI had four years thereafter, until September 24, 2011, in which to assert RICO claims against MGC and the individual lawyers. FEI did so more than a year before this deadline, on February 16, 2010. Just because a plaintiff has sufficient information to sue one group of defendants does not mean that the statute of limitations begins to run on all potential defendants. *Firestone v. Firestone*, 76 F.3d 1205, 1210 (D.C. Cir. (1996) (*per curiam*); *Hobson v. Wilson*, 737 F.2d 1, 36 (D.C. Cir. 1984). That MGC now tries to base its counterclaim on FEI's allegedly delayed addition of MGC and the attorneys as defendants is ludicrous. Any delay is solely attributable to the lawyers' own fraud, as has specifically been pleaded by FEI in the FAC. DE 25 ¶ 81.

defense counsel. Ex. 1 hereto. By not challenging the sufficiency of such process in its Rule 12 motion to dismiss, MGC waived any such challenge it may have had. Fed. R. Civ. P. 12(h). If the RICO case really were an "abuse of process," as MGC now claims, one might well ask why MGC voluntarily accepted service of it.

Furthermore, other than ***respond*** to defendants' attempts to get the RICO case stayed or dismissed and ***respond*** to defendants' multiple efforts to avoid discovery, FEI has not been able to take any material action in the RICO case. Therefore, MGC has not and cannot allege an indispensable element of the tort that it has invoked. MGC's abortive counterclaim is thus clearly distinguishable from successful abuse of process cases. *Cf., e.g., Hall,* 147 A.2d at 868 (reversing dismissal of abuse of process claim because issuance of attachment upon a judgment when there was no judgment outstanding was abuse of process "because [defendant] thereby forced [plaintiff] to do something which it could not otherwise legally and regularly compel her to do, that is, relinquish her salary under circumstances and at a time when [defendant] had no right to do it."); *Nienstedt v. Wetzel*, 651 P.2d 876, 880-81 (Ariz. Ct. App. 1982) (affirming judgment for abuse of process where defendants, for improper purposes, "notic[ed] [] depositions, [moved for] the entry of defaults, and [] utilize[ed] various motions such as motions to compel production, for protective orders, for change of judge, and for sanctions and for continuances.") (Arizona law); *Abbott v. United Venture Capital, Inc.*, 718 F. Supp. 828 (D. Nev. 1989) (denying motion for summary judgment on abuse of process claim where plaintiff alleged not only that the defendants filed suit to generate negative publicity and intimidate him, but that they sent a copy of their complaint to the newspaper, filed a grievance against the plaintiff with the state Bar Association, and mailed intimidating newspaper clippings to plaintiff) (Nevada law).

Nor has MGC alleged that FEI has actually ***achieved*** anything. MGC has not alleged, for example, that it has had to shut down its public interest practice, or that it has actually lost any clients or business opportunities, etc. *Cf Nader*, 555 F. Supp. 2d at 152 (abuse of process is a tort "that can only be discerned to exist and remedied retrospectively"); *FOP, D.C. Lodge 1, Inc. v. Gross*, 2005 U.S. Dist. LEXIS 46448, at *6 (D.D.C. Nov. 14, 2005) (holding that plaintiffs' abuse of process claim could not withstand a motion to dismiss because, *inter alia*, they "fail[ed] to allege that [defendant] accomplished any impermissible result after filing his lawsuit.").

Presumably aware of this fatal flaw, MGC tries to suggest that the filing of the FAC itself, adding MGC and the individual attorneys, was the "act in the use of process." *See* Countercl. ¶ 7 ("The addition of MGC and the individual attorneys to the claim in 2010 was intended … to accomplish objectives not regularly or legally obtainable as relief through litigation itself"). This reasoning is totally circular and would make any addition of parties to an existing suit an "abuse of process." MGC was not a defendant in the RICO case before the FAC was filed. The FAC initiated the process against MGC. By MGC's own allegations, the FAC accomplished nothing more than adding MGC and the individual attorneys as defendants – a proper use of an amended complaint (service of which MGC consented to through counsel, Ex. 1 hereto). *See Kopff v. World Research Group, LLC*, 519 F. Supp. 2d 97, 100 (D.D.C. 2007) ("defendants' abuse of process [counter]claim fails because defendants do not allege any misuse of the judicial process by their adversary. Regardless of … the fact that plaintiffs have amended their pleadings to add … defendants, there is no allegation that plaintiff sought a collateral thing which defendants could not legally and regularly be compelled to do.") (internal quotation omitted). Because MGC nowhere alleges that the pleading accomplished something outside the

case, the filing of the FAC, which is the only use of process alleged, cannot serve as the basis for an abuse of process claim. *Hall*, 147 A.2d at 868; *Morowitz*, 423 A.2d at 198.[2]

The most that MGC has pled is that the RICO case was initiated against it for allegedly improper purposes. The only allegation that could possibly be interpreted as describing an improper "use" of process is a red herring – another allegation about the initiation of proceedings in disguise. MGC has thus failed to plead an essential element of the cause of action – the improper use of process after its issuance – and its counterclaim fails as a matter of law. The analysis need go no further. Where, as here, it is clear that "the allegations in [the] complaint, however true, could not raise a claim of entitlement to relief," a court may dismiss the complaint for failure to state a claim upon which relief can be granted. *Twombly*, 550 U.S. at 558.

B. The Collateral Ends Alleged by MGC Are Insufficient to Sustain an Abuse of Process Claim

Though MGC's allegations about FEI's "collateral objectives" are irrelevant because at most they suggest an "ulterior purpose," they also fail. These objectives, such as MGC spending time and resources defending itself (Countercl. ¶¶ 8, 12, 17) and deterring further advocacy

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[2] In addition, that allegation must be rejected as a legal conclusion that merely parrots the elements of the claim. *Compare* Countercl. ¶ 7 *with Hall*, 147 A.2d at 868 (describing abuse of process as "the perversion of the court process to accomplish an end which the process was not intended to bring about, or when process is used to compel a party affected by it to do some collateral thing which he could not legally and regularly be compelled to do."). This mechanical insertion of the buzz words of the cause of action into a complaint is exactly the type of pleading the Supreme Court has rejected. As the Supreme Court in *Iqbal* described of the pleading found insufficient in *Twombly*:

> Recognizing that [the statute] enjoins only anticompetitive conduct effected by a contract, combination or conspiracy, the plaintiffs in *Twombly* flatly pleaded that the defendants 'ha[d] entered into a contract, combination or conspiracy to prevent competitive entry … and ha[d] agreed not to compete with one another.' The complaint also alleged that the defendants' 'parallel course of conduct … to prevent competition' and inflate prices was indicative of the unlawful agreement alleged.
>
> The Court held the plaintiffs' complaint deficient under Rule 8. In doing so it first noted that the plaintiffs' assertion of an unlawful agreement was a 'legal conclusion' and, as such, was not entitled to the assumption of truth.

Iqbal, 556 U.S. at 679-80, quoting *Twombly*, 550 U.S. at 551, 555 (other citation and quotation omitted).

(Countercl. ¶¶ 7, 8, 9, 12, 13 17), are "the natural consequences of a lawsuit and [are] too generic to serve as the predicate for an abuse of process … claim." *Nader,* 555 F. Supp. 2d at 161.

That MGC has to spend time and money defending itself in the RICO case is the natural result of being a defendant in any litigation.[3] *Bannum, Inc. v. Citizens for a Safe Ward Five, Inc.*, 383 F. Supp. 2d 32, 47 (D.D.C. 2005) (dismissing defendants' counterclaim for abuse of process noting that "significant inconvenience and loss of a resources as a result of th[e] case" are "the unhappy incident of almost any litigation and are an insufficient basis for an abuse of process claim."). Thus even if FEI initiated the RICO case to force MGC to expend resources defending itself, "[i]nitiating a lawsuit with the ulterior motive of forcing normal litigation expenses and distractions on an opponent does not constitute the sort of collateral end that is recognized as an abuse of process." *Nader*, 555 F. Supp. 2d at 161.

Courts also have found that bringing a claim for the purpose of deterring an adversary does not create an abuse of process claim. For example, in *Houlahan*, the court held that the allegation of the defendant's intent to silence criticism through the initiation of lawsuits against the plaintiff was insufficient to raise an abuse of process claim. In that case Houlahan alleged that the defendants ("WWASPS") filed a baseless libel lawsuit against him "to deter him from further investigating WWASPS and his publisher from publishing his work." 677 F. Supp. 2d at 197. The defendants argued that "the alleged ulterior purpose of the lawsuit and the stated purpose of the lawsuit are the same," that '"causing [Houlahan] the expense of defending the lawsuit or stopping the publication of the articles, is no different than stating the express purpose of the lawsuit,' since 'the regular prosecution of the libel case against Houlahan would have achieved these ends.'" *Id*. at 200 (quoting defendants' reply brief in support of summary

[3] If MGC's actions being brought to light in the RICO case have impaired its client relationships, this is also an unsurprising and natural consequence of being a RICO defendant.

judgment). The Court agreed with the defendants and rejected Houlahan's abuse of process claim, noting that "[e]ven assuming Houlahan's allegations establish an ulterior purpose, his claim still fails. There is no action for abuse of process when the process is used for the purpose for which it is intended, even though there is an incidental motive of spite or an ulterior purpose of benefit to the defendant." *Id*.

Similarly, in *Gross*, the plaintiffs alleged that the defendant previously filed a case against them with an '"ulterior motive'" '"to silence the plaintiffs in making complaints against him … and by burdening the plaintiffs with the costs of a legal defense so that they would abandon their criticism of him.'" 2005 U.S. Dist. LEXIS 46448, at *2 (quoting complaint). The Court found those allegations insufficient to survive a motion to dismiss, because they had not alleged that the defendant "acted in any way other than what would be expected in the normal course of a lawsuit, or that he accomplished any improper end by filing the lawsuit." *Id*. at *5. This was the case even though the defendant had approached plaintiffs and "told them that his lawsuit would go away if the [they] would stop [their] criticism and complaints of him …" *Id*. at *6. The Court found that "these allegations [did] not amount to a perversion of the judicial process," because defendant's "request that Plaintiffs stop criticizing him was precisely what he sought in his lawsuit." *Id*.

In another recent case, the D.C. Court of Appeals held that a counterclaiming defendant could not assert abuse of process based on the intentional tort case that had been brought by plaintiff, even though plaintiff admitted that she sued defendant not to recover damages, but to create fear of litigation among the members of the condominium board of the defendant's building and to force the board to make changes in the by-laws that would solve the plaintiff's problems with the defendant. *Wood v. Neuman*, 979 A.2d 64, 76-77 (D.C. 2009). The Court

found that seeking "leverage" with the condo Board "was not 'without the regular purview of' the civil litigation process and was not 'some collateral thing which [the Board] could not legally and regularly be required to do.'" *Id*. at 77. There, even the plaintiff's admission that the case was brought for an ulterior purpose was insufficient for an abuse of process claim because the purposes were not outside of the legal process.

The regular prosecution of any case with RICO and intentional tort claims would cause a defendant to expend time and money defending itself and would (hopefully) deter it from engaging in the underlying behavior. RICO provides for the award of treble damages to a private plaintiff, which, in addition to compensating a plaintiff for its damages, was designed to deter racketeering activity. *See Sedima v. Imrex Co.*, 473 U.S. 479, 487 (1985) (treble damages provision modeled after Clayton Act remedy to give those who have been wronged "access to a legal remedy" and to "enhance the effectiveness" of the statute's prohibitions). Similarly, FEI's state law claims allow for punitive damages – otherwise known as "exemplary damages," – to punish and make an example of offenders. "There is no abuse of process," even if "a person 'acts spitefully, maliciously, or with an ulterior motive in instituting a legal proceeding,'" if "the proceeding in question is also used for its intended purpose." *Rogers v. Johnson-Norman*, 466 F. Supp. 2d 162, 175 (D.D.C. 2006) (holding that plaintiff's abuse of process claim should be dismissed because compelling plaintiff to undergo psychiatric and substance abuse counseling "was an entirely proper use of the [civil protection order] process."); *see also Harrison v. Howard Univ.*, 846 F. Supp. 1, 2 (D.D.C. 1993) (In the District of Columbia it is not abuse of process "simply to pursue [litigation] to a conclusion, even if collateral consequences are both desired and expected to ensue."). Holding MGC, along with its co-defendants, responsible for its racketeering and fraud on the court, through the assessment of substantial actual, treble and

punitive damages is "completely within" the intendment of the claims that FEI has asserted. The "collateral objectives" of which MGC complains are merely the "natural consequences" of the lawsuit and cannot serve as a basis for an abuse of process claim.

C. Allegations About Past Actions Cannot Anchor a Counterclaim Here

Presumably because it cannot point to any improper use of process in the RICO case, MGC tries to distract from its deficiencies by trying to draw attention to previous acts of FEI, that have no relationship whatsoever to MGC, which it alleges demonstrate "FEI's past practices to use any means necessary to stifle criticism, deter advocacy directed at FEI's treatment of its Asian elephants and other animals, and retaliate against those who criticize FEI's practices." Countercl. ¶ 12. These "past practices" were already ventilated during the ESA case. Indeed, the ESA Action plaintiffs made many of these same arguments in their failed attempt to sanction FEI under Rule 11 for filing the RICO counterclaim. *See* ESA DE[4] 163 at 49-52. In that motion, the ESA plaintiffs claimed that the RICO counterclaim was filed for improper purposes, consistent with FEI's purported approach to "discredit its critics," and brought up the same acts now included in the MGC counterclaim. Indeed, the allegations about the "Long Term Action Plan" (ESA DE 163 at 50; Countercl. ¶ 16), were among the many statements in the ESA Action plaintiffs' Rule 11 motion that FEI documented as false. *See* Exhibit 2 to FEI's Opposition to Plaintiffs' Motion Under Rule 11, ESA DE 165-3, at 2-3.[5] The ESA Plaintiffs' Rule 11 motion was denied. ESA DE 178. That FEI's claims survived a Rule 11 challenge in the ESA Action is incompatible with MGC's abuse of process claim. *See Pochiro v. Prudential Ins. Co. of Am.*, 827 F.2d 1246, 1253 (9th Cir. 1987) ("though the merits of the substantive claim are not

[4] "ESA DE" refers to Docket Entries in the ESA case, No. 03-2006 (D.D.C.).

[5] The *Salon* magazine article about Jan Pottker (Countercl. ¶ 11) and the placement of "operatives" in animal rights groups (*id*. ¶¶ 14-15) were also briefed in the ESA Action. ESA DE 163 at 51 n.23.

controlling on the question of abuse of process, they are necessarily significant in the assessment of possible ulterior motive.").

Dredging up these relics does not make even MGC's "ulterior purpose" allegations plausible. Facial plausibility is achieved "when the plaintiff pleads factual content that allows the court to draw the ***reasonable inference*** that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678 (emphasis added). This requires more than "a sheer ***possibility*** that a defendant has acted unlawfully"; indeed, "facts that are '***merely consistent*** with' a defendant's liability … 'stop[] short of the line between possibility and plausibility of entitlement to relief.'" *Id.* (quoting *Twombly*, 550 U.S. at 557) (emphasis added). It is not reasonable to infer, from these alleged "past actions" of FEI, that FEI filed the RICO case against MGC for ulterior purposes. More importantly, however, is that even if it did, MGC's claim still fails.

Assuming the truth of <u>all</u> of MGC's allegations, it has failed to state a claim for abuse of process. Assuming that FEI, consistent with its "past practices" of trying to stifle criticism, filed the FAC adding MGC as a defendant in order to make it expend time and resources defending the case and deter it from criticizing FEI, ***<u>this does not constitute abuse of process</u>***. The initiation of process against MGC, even for an ulterior purpose, is not actionable. *Scott v. Dist. of Columbia*, 101 F.3d 748, 755 (D.C. Cir. 1996) ("[T]he fact that a person acts spitefully, maliciously, or with an ulterior motive in instituting a legal proceeding is insufficient to establish abuse of process."). Try as it may, MGC cannot fashion an abuse of process claim out of the circumstances of this case.[6] MGC has not, and could not, allege that FEI has misused any post-

[6] *See Scott*, 101 F.3d at 755-56:

> There is no action for abuse of process when the process is used for the purpose for which it is intended, but there is an incidental motive of spite or an ulterior purpose to benefit the defendant. Thus***, the entirely justified***

initiation legal process, nor that FEI has achieved some illegitimate collateral objective. The pieces just do not fit.

II. IN THE ALTERNATIVE, THE COUNTERCLAIM SHOULD BE STAYED PENDING A FINAL JUDGMENT IN THE RICO CASE

If not dismissed, the counterclaim should be stayed pending the resolution of the RICO case. "A court has inherent power to stay proceedings in control of its docket, after balancing the competing interests." *Dellinger v. Mitchell*, 442 F.2d 782, 786 (D.C. Cir. 1971). This power is "incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936). While a "suppliant for a stay must make out a clear case of hardship or inequity in being required to go forward, if there is even a fair possibility that the stay for which he prays will work damages to someone else," *id.* at 255, here a stay benefits all involved.

Focusing attention and resources on MGC's meritless counterclaim would be an irrelevant frolic and detour which would unnecessarily distract from the matter at hand – resolution of FEI's RICO and state law claims. The same arguments that supported staying the RICO case in 2007 support staying MGC's counterclaim now: (1) MGC's alleged damages are unascertainable until the RICO case is resolved; (2) the public has an interest in the expeditious

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> ***prosecution of another on a criminal charge, does not become abuse of process merely because the instigator dislikes the accused and enjoys doing him harm***.
>
> For abuse of process to occur there must be use of the process for an immediate purpose other than that for which it was designed and intended. The usual case of abuse of process is one of some form of extortion, using the process to put pressure upon the other to compel him to pay a different debt or to take some other action or refrain from it.

(quoting Restatement (Second) of Torts § 682 cmt. b (1977)) (emphasis added).

litigation of the RICO case; and (3) staying the counterclaim serves judicial economy. *See* DE 23 at 8-9.

MGC seeks as damages "the costs of defending this lawsuit and attorneys' fees." Countercl. ¶ 21. Given that the RICO case is ongoing, MGC's alleged damages are unascertainable at this point, and will not be ascertainable until the RICO case has concluded. *See* DE 23 at 8. Additionally, resolution of the RICO case will likely impact the counterclaim. *See Pochiro*, 827 F.2d at 1253 (9th Cir. 1987) ("though the merits of the substantive claim are not controlling on the question of abuse of process, they are necessarily significant in the assessment of possible ulterior motive."); *cf. Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus.*, 508 U.S. 49, 57 (1993) (interpreting the sham exception to *Noerr-Pennington* immunity (which has been compared to the abuse of process, because it is a "private action that is not genuinely aimed at procuring favorable … action") and holding that "an objectively reasonable effort to litigate cannot be [a] sham regardless of subjective intent").

The public interest in the RICO case also weighs in favor of staying MGC's counterclaim. When previously ordering a stay of the RICO case pending the outcome of the ESA case, this Court noted that the public interest was served by moving forward with the resolution of the ESA case because "[t]he citizen suit provision of the ESA encourages private parties … to act as private attorneys general, to enforce the Act's provisions for the benefit of the public interest as a whole." DE 23 at 8-9 (internal citation omitted). Like the ESA citizen suit provision, the private RICO civil action "bring[s] to bear the pressure of 'private attorneys general' on a serious national problem for which public prosecutorial resources are deemed inadequate … ." *Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 151 (1987). *See also* 18 U.S.C. § 1964(c); *Sedima*, 473 U.S. at 493 ("Private attorney general

provisions such as § 1964(c) are in part designed to fill prosecutorial gaps."). Thus the same reasoning follows that the public "has an interest in the expeditious litigation of the [RICO] claim that counsels in favor of a stay." DE 23 at 8. Because the simultaneous prosecution of MGC's counterclaim would unduly delay resolution of the RICO case, in which the public has a substantial interest, and which has already been pending for five years, the counterclaim should be stayed.

Additionally, because of the distinct issues of fact and law and the different evidence required to resolve the two cases, the interests of judicial economy are served by staying MGC's counterclaim. These factors also demonstrate that MGC's counterclaim is permissive, not compulsory. Courts have not taken a consistent position regarding whether an abuse of process counterclaim is compulsory in the action which is allegedly abusive,[7] thus demonstrating that this determination varies based on the circumstances and must be made on a case-by-case basis. *See* DE 90 at 15 (the '"inquiry [into whether a counterclaim arose from the same transaction as the underlying claim] is flexible and attempts to analyze whether the essential facts of the various claims are so logically connected that considerations of judicial economy and fairness dictate that all the issues be resolved in one lawsuit.'") (quoting *Computer Assocs. Int'l v. Altai, Inc.*, 893 F.2d 26, 29 (2d Cir. 1990)).

Here, MGC's abuse of process counterclaim is not compulsory because it did not arise out of the same "transaction or occurrence" that is the subject matter of FEI's RICO case. *See* Fed. R. Civ. P. 13. FEI's RICO case is based on hundreds of alleged acts of racketeering

[7] *Compare Carteret Sav. & Loan Assoc. v. Jackson*, 812 F.2d 36, 38-39 (1st Cir. 1987) (compulsory); *Podhorn v. Paragon Group*, 795 F.2d 658, 660-61 (8th Cir. 1986) (same); *Great Lakes Rubber Corp. v. Herbert Cooper Co.*, 286 F.2d 631, 634 (3d Cir. 1961) (same) *with Cochrane v. Iowa Beef Processors, Inc.*, 596 F.2d 254, 262-64 (8th Cir. 1979) (not compulsory); *Walker v. THI of N.M.*, 803 F. Supp. 2d 1287, 1316 (D. N.M. 2011) (permissive); *Anderson v. Central Point Sch. Dist.*, 554 F. Supp. 600, 604-05 (D. Or. 1982) (not compulsory), *aff'd in part, rev'd in part*, 746 F.2d 505 (9th Cir. 1984).

committed by MGC and the other defendants over more than a decade. MGC's counterclaim is based on the alleged motivations of FEI in initiating the RICO case (which is a legally insufficient bases for an abuse of process claim in any event). The evidence supporting the two claims is therefore entirely different. Moreover, one of the essential elements of MGC's counterclaim, its damages, cannot be determined until the RICO case is resolved. It thus cannot be compulsory. *See* 6 C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 1411, at 93-94 (3d ed. 2010) ("[A] claim that depends upon the outcome of some other lawsuit and consequently does not come into existence until the action upon which it is based has been terminated," such as claims for malicious prosecution, "cannot be compulsory counterclaims in the allegedly wrongfully prosecuted action."). The simultaneous litigation of the claims would unnecessarily delay the resolution of both. Given that MGC's counterclaim should be permissive, and therefore could have been filed as a separate lawsuit, it clearly can be stayed and addressed separately from the RICO case.

Of the thirteen defendants in this case – all of whom face the same RICO and conspiracy claims as MGC – only MGC has counterclaimed. Thus the counterclaim will raise issues peculiar to MGC's dispute with FEI – matters that are not shared by FEI's claim against the other defendants. MGC's counterclaim would therefore be a needless side dispute that would unduly delay prosecution of the main case – a result that MGC seeks but that should not be permitted. The Court reached this conclusion with respect to FEI's counterclaim in the ESA Action in 2007, and it is equally applicable here.

Finally, a stay is appropriate in view of the obvious fact that the MGC counterclaim is merely a tactical ploy, designed to deflect attention away from the wrongdoing that FEI has alleged with respect to both the law firm and its partners. Despite the fact that MGC's

counterclaim alleges that FEI sued it and the individual attorneys, *inter alia*, to interfere with their client relationships, the MGC general partners (Meyer, Glitzenstein, and Crystal) did not themselves join in the counterclaim. This is inexplicable because MGC admits that it is a general partnership, DE 97, ¶ 39, and any damages allegedly inflicted on the partnership would also have been incurred by the partners themselves. Thus, any genuine "abuse of process" claim would have included the partners, unless, as is apparent here, the firm's claim is just a shill to derail the main case while purportedly shielding the partners from personal discovery on the counterclaim issues. Furthermore, while MGC and the other defendants bemoan the donor and lawyer-related discovery and privilege issues necessitated by FEI's RICO claims, DE 105-1 at 17-20, MGC's own counterclaim inconsistently puts the firm's client relationships directly at issue by claiming interference, thereby leading to privilege waiver and opening the door to the very kind of invasive discovery into MGC's client relationships that defendants claim FEI is not entitled to. This is yet another reason why the counterclaim creates needless complications and should be shelved while the main action is resolved.

CONCLUSION

No further time or resources should be expended on MGC's baseless counterclaim. At best, the counterclaim alleges that FEI had ulterior motives in suing MGC. This is legally insufficient because established District of Columbia precedent clearly and repeatedly has held that initiation of a lawsuit, even for improper purposes, does not constitute abuse of process. Because the RICO case against MGC has not proceeded beyond the pleadings stage, the procedural posture of this case makes it impossible for an abuse of process claim to lie. Because MGC has not, and could not have, pled a viable abuse of process claim, the counterclaim must be dismissed with prejudice.

Alternatively, given the distinct issues and evidence involved in MGC's counterclaim, and its dependence on the outcome of the RICO case, the counterclaim should be stayed pending final resolution of the RICO case.

WHEREFORE, premises considered, FEI respectfully requests that its motion be granted and that MGC's counterclaim be dismissed with prejudice, or, in the alternative, be stayed pending final resolution of the RICO case.

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Respectfully submitted,

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