UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

PLAINTIFF FELD ENTERTAINMENT, INC.'S OPPOSITION TO DEFENDANTS' MOTION FOR CERTIFICATION OR, IN THE ALTERNATIVE, RECONSIDERATION

Defendants' Motion for Certification or, in the Alternative, Reconsideration ("Motion" or "Mot.") is another attempt to delay litigation of this case which has been pending ***for more than five years***. Defendants' denial that their conduct amounts to violations of the RICO statute (as well the Virginia Conspiracy Act and other intentional torts), ongoing since 2007, continues. But mere disagreement with the Court's 7-9-12 Opinion ("Opinion" or "Op.") (Docket Entry ("DE") 90), which lies of at the core of defendants' Motion, is not a basis for certification or reconsideration.

The Court applied "controlling" Circuit precedent in determining that the facts alleged in the First Amended Complaint ("FAC") (DE 25) (2-16-10), state multiple causes of action. The Court held that the FAC alleges a "pattern" of racketeering because, among other things, it "alleges victims and injuries in addition to FEI and its lawsuit related costs: the donors who were allegedly defrauded and lost money as a result." Op. at 32-33. The Court, citing to its 12-

30-09 Opinion in the ESA Action,[1] also held that "Rider's standing was essential to the prosecution of the ESA lawsuit, from which FEI's injuries directly flow." *Id.* at 56 (citing FOF 53). The D.C. Circuit's 2011 Opinion affirmed the 12-30-09 Opinion in its entirety, including FOF 53 and this Court's finding that API never had standing. *ASPCA v. Feld Entm't, Inc.*, 659 F.3d 13 (D.C. Cir. 2011) ("*ASPCA II*"). Accordingly, there is no "substantial difference of opinion" about a "controlling question of law" warranting certification, and there is no intervening change in the law or new evidence warranting reconsideration.

Defendants already have sought to delay, and were granted a stay of discovery in this case on ***two*** separate occasions. First, after this case was filed in August 2007, defendants moved for a stay pending the outcome of the ESA Action because, they contended, the disposition of that case would "have a significant – ***and likely dispositive*** – impact on" FEI's RICO claim. Defs. Mot. to Temporarily Stay All Proceedings (DE 5) (9-25-07), at 13 (emphasis added).[2] This "temporary" stay lasted more than two years. After the Court's finding that Mr.

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[1] This Court has held that it will take judicial notice of the record of the ESA Action, *ASPCA et al. v. Feld Entertainment, Inc.*, No. 03-2006 (D.D.C.), in considering defendants' motions to dismiss. Op. at 3 n.2. Accordingly, citations to "FOF" refer to Findings of Fact set forth in the Court's December 30, 2009 Memorandum Opinion (ESA DE 559), reported at *ASPCA v. Feld Ent. Inc.*, 677 F. Supp. 2d 55 (D.D.C. 2009), *aff'd*, 659 F.3d 13 (D.C. Cir. 2011). A citation to "DX" refers to a trial exhibit of FEI, admitted into evidence, in the ESA Action. For example, "DX 1 at 5" means defendant's Trial Exhibit 1 at .pdf page 5. A citation to "2-_-09" a.m. or p.m. (or "3-_-09" a.m. or p.m.) refers to the transcript of the ESA Action trial which was conducted in February and March, 2009. For example, "3-18-09 a.m. at 14:24-15:24" indicates a citation to the March 18, 2009 day of trial, morning session, at page 14, line 24 through page 15, line 24. "ESA DE" refers to Docket Entries in the ESA Action. "DE" refers to Docket Entries in the instant case.

[2] At the time, defendants must have firmly believed this argument was meritorious, because they repeated it in their stay motion numerous times. *See, e.g.*, Defs. Mot. to Temporarily Stay All Proceedings (DE 5) (9-25-07), at 3 ("The testimony that the Court will hear in the ESA Action, ***particularly from Tom Rider***, will shed significant light on whether FEI should be permitted to pursue its allegations that the *ASPCA* Plaintiffs and WAP have 'bribed' Mr. Rider … ."); *id.* ("[A]llowing the ESA Action to go to trial before this action proceeds will greatly simplify and elucidate any claims that may remain in the Second RICO Suit."); *id.* at 16 ("Since Tom Rider will be a witness in the ESA Action, and the Second RICO Suit centrally concerns Mr. Rider's credibility (i.e., ***is he participating because he cares about the way the elephants are mistreated and seeks to alleviate their suffering, or because he is a 'bribed' witness?***), the Court will be in a ***far better*** position to assess the sufficiency of FEI's allegations in the Second RICO Suit ***once the ESA Action is completed***."); *id.* at 17 ("[I]f the Court concludes that Mr. Rider's testimony is credible (and, indeed, is corroborated by the other testimony and evidence), that that will raise serious questions as to whether FEI has sufficiently pled a claim under RICO.") (emphases added).

Rider was "essentially a paid plaintiff and fact witness" who was "not credible," FOF 1, the Court lifted the initial stay in this case. Minute Order (1-15-10). But before any meaningful discovery could commence, defendants argued that ***another*** stay was necessary – this time, because they believed that their motions to dismiss would be granted. According to defendants, FEI "simply" could not demonstrate a pattern of racketeering under "***controlling*** Circuit precedent." Defs. Discovery Plan (DE 59) (2-11-11), at 3 (emphasis added). The Court rejected this argument too. *See* Op. at 32-33 (denying motion to dismiss because, *inter alia*, FEI alleged a RICO "pattern"). However (even excluding the months spent on an unsuccessful mediation), defendants managed to postpone discovery for nearly another year based on the pendency of their unsuccessful motions to dismiss.

Defendants are now, for the ***third*** time, trying to delay FEI's day in court by seeking certification or, in the alternative, reconsideration of the Opinion even though the authority cited in their own Motion demonstrates that there is no basis for granting either request. Certification will prolong this litigation and result in nothing more than needless delay, prejudicing FEI in the process by denying it prompt and effective resolution of its claims. *See Sec. & Exch. Comm'n v. Dresser Industries, Inc.*, 628 F.2d 1368, 1377 (D.C. Cir. 1980) ("If Justice moves too slowly … witnesses may die or move away, memories may fade … ."); *United States v. Judicial Watch, Inc.*, 241 F. Supp. 2d 15, 18 (D.D.C. 2003) ("As time passes, memories of relevant events will fade and documents will be lost or destroyed."). If defendants really believe that they did not violate the RICO statute or the Virginia Conspiracy Act, or commit any intentional torts, the way for that to come out is through discovery and litigation of this case. FEI has been waiting to pursue its claims for more than ***five years***. Indeed, it has now been more than ***eleven years*** since defendants started paying Rider. It is time to deal with the merits of this action. The Motion

should be denied and discovery should proceed because there is no basis for certification or reconsideration of the Opinion under the law of this Circuit.[3]

I. THERE IS NO BASIS FOR INTERLOCUTORY REVIEW OR RECONSIDERATION OF THE COURT'S DETERMINATION THAT THE FAC PLEADS A PATTERN OF RACKETEERING

Defendants improperly attempt to use their request for certification and reconsideration to relitigate the motion to dismiss (as well as prematurely litigate discovery disputes and questions of fact). But whether the FAC states a claim for relief is not the standard for certification or reconsideration. *See* sections II & III, *infra*. Even if it was, it is clear that the FAC pleads a "pattern" of racketeering, and defendants offer nothing new on that point.

Defendants' Motion is premised on a misleading, and self-serving, characterization of the FAC and the Court's Opinion: defendants contend that the Court held that FEI alleged a "pattern of racketeering" based only on conduct associated with the ESA Action and the joint 2005 fundraiser. *See, e.g.*, Mot. at 5. That is not accurate. Defendants completely ignore numerous allegations in the FAC concerning donor fraud, which has been pled in anything but a "cursory" manner. Indeed, the pleading requirements of *Twombly* and *Iqbal* are more than satisfied here, where plaintiff's detailed allegations come from defendants' own documents and testimony in the ESA Action. Moreover, defendants' Motion makes procedurally improper arguments concerning the donors' intent and whether discovery will be permissible under the First

[3] Even if this Court were to grant defendants' request for certification, discovery should proceed. Otherwise, discovery may not begin until well into 2013—even though this case was filed in 2007, and many of the operative events began in 2000. *See Republic of Colom. v. Diageo N. Am., Inc.*, 619 F. Supp. 2d 7, 13 (E.D.N.Y. 2007) (cited by defendants) ("[I]t simply is not reasonable for Defendants to ask that discovery in this case be stayed pending a second review by the Court of Appeals of issues relevant to this case. If this court were to stay discovery at this time and the Court of Appeals accepted and then denied Defendants' interlocutory appeal, it might be 2009 before discovery began on this case—which was filed in 2004."); *In re Vitamins Litigation*, 2000 U.S. Dist. LEXIS 17412, at *22-23 (D.D.C. Nov. 22, 2000) ("[I]n the interests of facilitating a prompt and effective resolution of this case, the Court will decline the foreign defendants' request for a stay of jurisdictional discovery pending this appeal. A stay of jurisdictional discovery would certainly thwart the prompt resolution of this matter and the Court cannot in good faith allow such delay."). Defendants' Motion is studiously silent on whether discovery should be stayed during the pendency of an interlocutory appeal.

Amendment, assuming it applies. The standard for summary judgment and scope of discovery – which is what defendants' Motion implicates – have nothing to do with whether FEI's "pattern" allegations are "plausible" – or whether the Court's determination that they are "plausible" should be certified or reconsidered.

A. The Donor-Fraud Allegations Are Not Limited to the July 2005 Fundraiser, and the Allegations Are Supported by Defendants' Own Documents and Testimony

The donor-fraud allegations extend well beyond the joint 2005 fundraiser, and they are not "unmoored from any concrete factual underpinning." Mot. at 8. Indeed, it is hard to imagine what more of a "factual underpinning" there could be when the FAC allegations are based on, and in certain instances quote directly from, documents and testimony produced ***by defendants*** in the ESA Action. FEI's donor-fraud allegations thus are anything but "patently insubstantial." *Cf. Tooley v. Napolitano*, 586 F.2d 1006, 1009 (D.C. Cir. 2009) (cited by defendants) (complaint allegations "not realistically distinguishable from allegations of ***'little green men'"*** and "flimsier than 'doubtful or questionable' – essentially fictitious") (emphasis added). Nor can it be said that FEI has failed to "nudge[] [its] claims across the line from conceivable to plausible." *Bell Atlantic v. Twombly*, 550 U.S. 544, 570 (2007) (cited by defendants); *see also Guantanamera Cigar Co. v. Corporacion Habanos, S.A.*, 672 F. Supp. 2d 106, 111 (D.D.C. 2009) (cited by defendants) (complaint dismissed where plaintiff "failed to plead any facts show[ing] a plausibility of a likelihood" of necessary elements of its claims).

For example, the FAC alleges that defendants used print and broadcast media, as well as website postings, to seek donations using the ESA Action and the false image of Rider as a "selfless elephant spokesman," and that third parties made donations on the basis of this false or

otherwise misleading information.[4] These allegations are more than "plausible." The websites of various defendants advertised (and continue ***to this day*** to advertise) the lawsuit and Rider's purported travels when soliciting donations. *See, e.g.*, Ex. 1, ESA DE 167-19 (WAP website), at 63 (soliciting tax-deductible donations by describing Rider's "public education campaign" and travels "in a used van"); Ex. 2, ESA DE 603-7 (HSUS website) (advertising the ESA Action on HSUS's "current docket," next to a "donate" link).

The FAC[5] alleges that ASPCA, AWI, FFA/HSUS and API, in concert with their attorneys, solicited contributions for the Rider funding, to be "donated" to WAP, from their own donors.[6] This allegation, which defendants' Motion also ignores, is based on an email Ms. Meyer sent to the representatives of ASPCA, AWI and FFA/HSUS seeking tax-deductible donations to WAP for the purpose of funding Rider. Ex. 3, DX 65 (Meyer email to Weisberg,

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[4] *See, e.g.*, FAC ¶¶ 11 (Defendants "prominently featured the ESA Action and the romantic, but untrue image of Rider as selfless elephant spokesman in print and broadcast media materials, website postings and in similar outlets and used such materials aggressively to seek and obtain donations. … Defendants were able to enrich themselves unjustly in this manner, in material part, by combining into their fundraising and related messaging (1) the romantic, but false, image of Rider the 'aesthetically injured' elephant man; (2) the public popularity of Asian elephants; and (3) the strong public name recognition of FEI's 'Ringing Bros. and Barnum & Bailey®' brand."); 25 (the Rider payments were sent "in furtherance of schemes to defraud FEI and/or to unjustly enrich defendants through donations obtained from third parties on the basis of false or otherwise misleading information"); 26 (MGC payments to Rider and MGC invoices to ASPCA, AWI and FFA/HSUS were sent "in furtherance of schemes to defraud FEI and/or to unjustly enrich defendants through donations obtained from third parties on the basis of false or otherwise misleading information"); 77 (same). ***Defendants' Motion totally ignores these allegations in the FAC.***

[5] FAC ¶ 69 ("MGC and/or Meyer encouraged and advised ASPCA, FFA/HSUS and AWI to donate funds and to solicit donations for the Rider funding through WAP in furtherance of the unlawful payments scheme and conspiracy").

[6] Defendants' contention that "FEI never even argued in its moving papers that the organizations' own donors could be considered victims for purposes of RICO's pattern requirement," Mot. at 2, is not accurate. *See* Pl. Opp. to Mot. to Dismiss (DE 68) (3-4-11), at 66 ("As the FAC alleges, defendants used the ESA Case as a fund-raising mechanism, a scheme wholly separate from the attack on FEI and its elephants and that did not clearly emerge until API admitted to it in its January 2008 deposition."). In any event, the allegations in the FAC, and not FEI's opposition to defendants' motion to dismiss, control. The FAC clearly alleges that the organizations' donors were victims of the Rider fundraising fraud. *See, e.g.*, FAC ¶ 69 ("MGC and/or Meyer encouraged and advised ASPCA, FFA/HSUS and AWI to donate funds and to solicit donations for the Rider funding through WAP … ."); 128 ("Upon information and belief, WAP and/or Meyer utilized the 'grant proposal' described above … to solicit funds from persons or entities other than AWI. … Upon information and belief, the 'grant proposal' … was what Meyer transmitted on Rider's behalf to an unidentified 'woman' … .").

Markarian and Liss (11-5-03) (Page 2 of 3)). In response to Ms. Meyer's plea, ASPCA apparently made such a solicitation from its "high donors." *Id.* (Weisberg response) ("Kathy – if Tom puts together a proposal (of his work) I can have our development folks run it past some of our high donors"). If ASPCA's donor solicitation was anything like the "Grant/Fundraising Proposal" WAP sent to AWI (Ex. 4, ESA DE 166-9), then it contained ***multiple*** false and misleading statements,[7] including that the funding would be "spent principally" on "administrative and out-of-pocket costs" for Rider, when, in reality, the "primary purpose of the funding … was to secure Mr. Rider's initial and continuing participation as a plaintiff in [the ESA Action]." FOF 53; *see also* Ex. 3, DX 65 ("I am personally very impressed with … [Rider's] total commitment ***to the lawsuit***. I would very much like to keep him out there – so if you guys have any ideas about how we can raise more funds for this effort please let me know.") (emphasis added). Given the materially false statement in this solicitation, that ASPCA's "high donors" were defrauded clearly is "plausible," if not a certainty.

Moreover, WAP itself solicited donations from third-parties, as is alleged in the FAC.[8] Ms. Meyer's November 2003 email identifies a "woman" to whom she sent a "fund-raising

[7] FAC ¶ 127 ("Among other things, the "grant proposal" falsely stated that (1) the proposal was for money to help fund an ongoing grass roots media campaign; (2) Rider quit the circus because he could no longer tolerate the way the elephants were treated; (3) the D.C. Circuit held that plaintiffs in the ESA Action had standing to sue; (4) Rider has 'credibility;' (5) Rider is 'not employed by any group;' (6) the $10,000 sought would 'fund this public education effort for 2004;' and (7) the money was to be spent on out-of-pocket costs' for Rider. All of these statements were shown to be false at the trial of the ESA Action: (1) The primary purpose of the money sought was for WAP to pay Rider to be a plaintiff and witness in the ESA Action. (2) Rider quit the FEI job to go to Europe with Daniel Raffo. (3) The D.C. Circuit never addressed the standing of any plaintiff other than Rider and even as to him only ruled that his claims, if true, showed standing; the claims were not true. (4) Rider had no credibility at trial, and his testimony was given no weight. (5) Rider's entire livelihood when this letter was written by Meyer was derived solely from money he had received from MGC, ASPCA, AWI, FFA/HSUS and WAP, and that money was later claimed as income by Rider derived from a business as a paid advocate. (6) The $10,000 provided Rider with a livelihood. (7) WAP never required Rider to justify the 'grants' he received by accounting for 'out-of-pocket-costs.'").

[8] The FAC pleads these false statements, made to solicit donations, with great specificity – another aspect of the FAC that the Motion completely ignores. *See* FAC ¶ 128 ("Upon information and belief WAP and/or Meyer utilized the 'grant proposal' described above, or a similar version of that document containing the same or similar misrepresentations, to solicit funds from persons or entities other than AWI. The 'grant proposal' was sent to

letter" seeking an ***additional*** "grant" for Rider. Ex. 3, DX 65 ("I have also attached a copy of a fund-raising letter I sent from the Wildlife Advocacy Project on Tom's behalf to the woman who gave him his last grant"). That letter, which also was produced in the ESA Action, thanked this donor for a $5,000.00 "grant" which, according to Ms. Meyer, was used to "support Tom Rider's efforts to shed the light of public scrutiny on Ringling Bros.' treatment of endangered Asian elephants." *See* Ex. 5, ESA DE 86-15 (Meyer letter to individual donor (redacted) (11-3-03)). Ms. Meyer asked for "another tax deductible grant" because "Tom would very much like to continue his efforts, and we believe that there is a ***tremendous value in having him out there as long as possible***." *Id.* (emphasis added); *cf.* FOF 1, 53. Thus, WAP's own correspondence points to additional victims of the fraudulent scheme.

These advertisements and solicitations evidently were successful. The "unidentified" third-party donors are not imaginary. In addition to the "woman" who was the subject of Ms. Meyer's WAP solicitation, described above, defendants' documents show that a number of third-parties in fact made donations to WAP for Rider. *See, e.g.*, Ex. 6, DX 50 (WAP Deposit Ledger) (redacting identities of individual donors; disclosing donations from Glaser Family Foundation (11-6-00); African Elephant Conversation Trust (12-15-03); and PETA (11-2-04)); Ex. 7, ESA DE 86-16 (WAP thank you letters to donors (redacted)). Indeed, Ms. Meyer specifically mentioned the support of "organizations ***and individuals***" when providing Mr. Rider with a "grant" to purchase his "used van to continue to travel around the country."[9] Ex. 8, DX 37 (Meyer letter to Rider (4-12-05)). At trial, Rider himself volunteered that he received additional

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FFA/HSUS. Upon information and belief, the 'grant proposal' or a similar version of that documents containing the same or similar misrepresentations was what Meyer transmitted on Rider's behalf to an unidentified 'woman,' as referenced in Meyer's November 5, 2003 email to ASPCA, FFA/HSUS and AWI.").

[9] The "grant" for the "used van" "came after Rider's false representations through counsel to this Court and to the D.C. Circuit in 2001-03, that Rider was refraining from going to see the elephants in order to avoid 'aesthetic injury.'" FAC ¶ 106; *see also* FOF 61, 67, 69; COL 6-7.

payments from individuals. 2-12-09 a.m. at 90-91 (Rider received "funding" from individuals); 2-17-09 p.m. (2:48) at 42-45 (Rider received cash at speaking events, sometimes as much as $500). Thus, it is more than "plausible" that some part of the millions of dollars the organizations raised from February 2003 to December 2009, FAC ¶ 11, flowed from the misrepresentations to donors that defendants made about Rider and the ESA Action, and were induced from donors who had less than the true picture of Rider and the case he was paid to bring.

FEI's allegations regarding defendants' false and misleading donation solicitations, and third-party donors, are more than "plausible" – which is all that is necessary.[10] *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) ("The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully."). That defendants are attempting to hold FEI to a pleading standard akin to a party who already has had the benefit of full discovery has no basis in the law. Indeed, defendants' argument that the donations, in and of themselves, mean the donors are "aligned" with the organizations, and were not victims, Mot. at 12, merely begs the question. Defendants cite nothing to show that such a proposition of fact is universally true, and it obviously is a matter to be developed in discovery. Defendants' argument assumes that every single donor had actual knowledge of what the money was really going to be used for: to pay Rider to be a plaintiff in the ESA Action and/or unjustly enrich the organizations. Since the true use of the money was

[10] Defendants' argument that "the FAC expressly leaves open the possibility that the fact on which its pattern theory depends *does not even exist*," Mot. at 9, is contrary to the Federal Rules of Civil Procedure. The FAC alleges that the fundraiser invitation was sent to third parties pursuant to a scheme to "defraud" or "depriv[e]" "FEI of money and property and/or to unjustly enrich defendants through donations obtained from third parties." FAC ¶¶ 181-182. Rule 8(d)(2) allows a party to "set out 2 or more statements of a claim or defense alternatively or hypothetically, either in a single count or defense or in separate ones. … [T]he pleading is sufficient if any one of [the alternative statements] is sufficient." Fed. R. Civ. P. 8(d)(2); *see also* Wright, Miller & Cooper § 1282 ("[A] plaintiff may make effective use of the alternative or hypothetical pleading that is permitted by Rule [8(d)(2)] in presenting the factual background or legal theories supporting his claim for relief.").

not disclosed in any of the limited fundraising materials that have been produced to FEI, there is no reason to believe that any of these donations would have been made had the truth been known to the donors. However, that is a matter that remains to be determined in discovery.

While defendants' deride the concept that one of their own donors could be a victim of the fraud, their pleadings purportedly confirm at least one fraud victim in addition to FEI. HSUS made six payments (labeled "donations"/"grants" by HSUS (Ex. 9, DX 67 & ESA DE 605-3), and "donations"/"contributions" by WAP (Ex. 6, DX 50)), to WAP for Rider after it merged/acquired/took over FFA on January 1, 2005, thus continuing the payments that FFA made to WAP for Rider. FAC ¶ 160. However, HSUS now says that these "donations"/"grants"/"contributions" all may have been the result of a fraud by FFA. ***HSUS claims that it was "defrauded" by FFA's representation and warranty that that none of its employees or agents knew about or made "'any bribe, kickback, or other illegal payment at any time.'"*** HSUS Mot. to Strike (ESA DE 598) (6-11-12), at 4 n.4 (quoting DX 68 at 2.10). Indeed, HSUS evidently relies on this FFA "fraud" as an affirmative defense. HSUS Answer (DE 103) (8-9-12) (5th defense) ("Plaintiff's claims against Defendant are barred to the extent that the Asset Acquisition Agreement ('the Agreement') between FFA and Defendant is voidable under Section 2.10 of the Agreement."). If HSUS was "defrauded" by FFA as to the legality of the Rider payments, as it has alleged, then it was defrauded by the same fraudulent bribery scheme that victimized FEI. Therefore, it is certainly "plausible" that other donors were defrauded too, and were victims just as HSUS now would have the Court believe that it was victimized. HSUS cannot have it both ways.[11]

[11] Defendants' arguments concerning (1) defendant organizations being "victims," Mot. at 11-12, and (2) potential "victims" being added as defendants, *id.* at 17, are nonsensical. The documents and testimony in the ESA Action demonstrate that ***all*** of the defendants were knee-deep in the Rider payments, fraud on the courts and donor fraud. None of them were defrauded. And, if they were, it will come out in discovery.

The intent of the organizations' donors is a question of fact development for discovery – and is inappropriately considered at this stage of the litigation on the basis of nothing but defendants' own self-serving and unsupported predictions of what their "supporters" and "members" would do or not do if the truth were known. *See* Mot. at 20 n. 15 ("the organizations' own supporters and members … have shown no intent to join FEI in this case, let alone any indication that they consider themselves to be co-'victims' with FEI"). As this Court held, whether the "fundraising materials were unlawful or that anyone other than FEI was injured by them" are issues for discovery, not a motion to dismiss. Op. at 33; *cf. In re Text Messaging*, 630 F.3d 622, 629 (7th Cir. 2010) (cited by defendants) ("Discovery may reveal the smoking gun or bring to light additional circumstantial evidence that further tilts the balance in favor of liability.").

B. The First Amendment Does Not Shield Defendants' Conduct, Nor Does it Block Litigation of this Case

The First Amendment does not bar FEI from stating a RICO claim, nor does it shield defendants from liability. Neither bribery, deliberate misrepresentations amounting to a fraud on the courts nor donor fraud is protected by the First Amendment. The First Amendment likewise does not *per se* bar discovery concerning the organizations' donors. Defendants' First Amendment arguments seek procedurally premature rulings on discovery issues which are not yet in play.

Moreover, if discovery confirms that there are victims other than FEI, this may be additional evidence establishing a "pattern" of racketeering. If discovery confirms that some of the donors were racketeers and/or co-conspirators, FEI may amend its pleadings, if appropriate. It strains credulity to argue that a victim of defendants' donor fraud, who, for example, was misled regarding how her donations were being used, could somehow become a defendant in this case. Evidently, what defendants really fear is a donor(s) becoming a plaintiff(s) in another case alleging widespread donor fraud. That prospect, however, is not before this Court at this time and is no basis for certification or reconsideration of the Court's ruling that FEI has stated a RICO cause of action.

1. The First Amendment Does Not Protect Donor Fraud

The First Amendment does not protect fraud, including fraud perpetrated by a "charity" or "advocacy" organization when soliciting donations. *Illinois ex rel. Madigan v. Telemarketing Assocs., Inc.*, 538 U.S. 600, 612 (2003) (cited by defendants) ("Like other forms of public deception, fraudulent charitable solicitation is unprotected speech."). "[W]hen fundraisers make false or misleading representations designed to deceive donors about how their donations will be used," those statements may be actionable as fraud. *Id.* at 624. Thus, in *Madigan*, the Supreme Court held that Illinois could bring a fraud action against telemarketers, seeking donations on behalf a Vietnam veterans' charity, that allegedly represented that a significant amount of each dollar donated would be used for specific charitable purposes (rehabilitation services, job training, food baskets, and assistance for rent and bills). *Id.* at 608-09. In reality, only 15 cents, or less, of each dollar donated was being turned over to the charity. *Id.* at 607. "[M]isleading potential donors into believing that a substantial portion of their contributions would fund specific programs or services, knowing full well that was not the case" was not protected by the First Amendment. *Id.* at 622.

The FAC alleges donor fraud falling squarely under *Madigan*, because, contrary to defendants' mischaracterizations, the FAC ***does*** allege that the (1) organizations' donors gave funds on the basis of false information, *cf.* Mot. at 9, and (2) defendants misrepresented how the money would be used. *Cf. id.* at 20 n.15. Defendants' Motion entirely overlooks the last three sentences of paragraph 180 of the FAC, which allege that the joint 2005 fundraiser invitation made misleading statements ***regarding how donations would be used***:

> [T]he invitation misleadingly implies that any funds raised would help ASPCA, AWI and FFA/HSUS 'wage' their legal 'battle' against FEI, when in fact, the funds were being raised to provide Rider with a livelihood for his services as a plaintiff and witness in the ESA Action. According to ASPCA, the fundraiser

> was held 'so [that ASPCA, AWI and FFA/HSUS could] continue to support Tom Rider in his outreach to the public and the media' when the actual purpose of the money was to continue to fund Rider's role as an 'injured' plaintiff and key fact witness. WAP's ledger indicates that AWI made two payments to WAP for Rider using proceeds of the fundraiser.[12]

Moreover, FEI also alleged that defendants unjustly enriched themselves by using the ESA Action, which itself was a fraud on the court, and the false image of Rider as a "selfless elephant spokesman" to seek and obtain donations. *See, e.g.*, FAC ¶ 11, 129 (uses of mail and wires "in furtherance of schemes 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"). FEI's allegations are thus no different from the alleged false and misleading telemarketer statements at issue in *Madigan* regarding how donations for the Vietnam vets would be used – which had no First Amendment protection.

2. The First Amendment Does Not Per Se *Bar Discovery Concerning the Defendant Organizations' Donors*

Defendants' Motion presumes that the identities of, and discovery from, the third-party donors is *per se* blocked by the First Amendment, but that is not the law. That defendants characterize these allegations as potentially having "grave consequences for advocacy groups," Mot. at 12, provides no basis to insulate them from discovery. On the contrary, the nature of the allegations demands judicial resolution that only can come after a meaningful opportunity at discovery. Defendants' argument concerning the donors' identities fails for two reasons.[13]

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[12] "Proceeds from the fundraiser (more than $13,000.00) were provided by AWI to WAP, which in turn disbursed those funds to Mr. Rider." FOF 39; *see also* Ex. 6, DX 50 at 2 ("AWI –From fundraiser in LA" (10-7-05)) ("Grant $ from AWI (from Fundraiser in CA)" (11-23-05)).

[13] Defendants cannot have it both ways by using the donors' identities as a shield and a sword. Defendants insinuate that FEI's allegations are insufficient under *Twombly* and *Iqbal* because the third-party donors are unidentified, but at the same time argue that FEI should not be able to learn the donors' identities because of First Amendment concerns. *Compare* Mot. at 2 (FEI cannot "satisfy the pattern requirement merely by adding a cursory allegation that unidentified third parties were also defrauded") *with id.* at 19 ("The notion that FEI can use a RICO

First, the First Amendment's protections are not absolute: it does not protect the organizations' membership and contribution lists ***under the present circumstances***. The First Amendment protects the freedom of association (*see NAACP v. Alabama*, 357 U.S. 449 (1982) and *Buckley v. Valeo*, 426 U.S. 1 (1976)), but it does not protect donor fraud, *Madigan*, *supra*, or any other type of unlawful activity. *United States v. Bell*, 217 F.R.D. 335, 343 (D. Md. 2003). And, the First Amendment does not protect donors "already known to be associated" with defendants' organizations. *See Greyhound Lines, Inc. v. Int'l Amalgamated Transit Union*, 1992 U.S. Dist. LEXIS 10095, at *6-7 (D.D.C. July 9, 1992) (no chilling effect concerning contributions made to non-profit by organizations "already known to be associated" with labor strike).

Here, ***defendants themselves disclosed some of the donors' identities to FEI during discovery in the ESA Action, which means that they are not as secretive as defendants now contend.*** *See, e.g.*, Ex. 6, DX 50 (WAP Deposit Ledger) (disclosing donations from Glaser Family Foundation (11-6-00); African Elephant Conversation Trust (12-15-03); and PETA (11-2-04)). Moreover, some of the donors' identities are readily accessible in the public domain. For example, the Glaser Foundation publicly touts its grant to WAP on its website.[14] (Apparently while the Glaser grant was intended to be for chimpanzees, some of that money ultimately was used to fund Rider, *see* Ex. 6, DX 50 ("excess grant allocated to Elephants") (11-6-00)). Moreover, ASPCA publicizes the identities of its high donors, including numerous individuals, in its annual report, which ASPCA makes available on the internet. *See, e.g.*, Ex.

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lawsuit … to identify donors to non-profit organizations … raises unavoidable First Amendment associational and free speech concerns … .").

[14] *See* Ex. 10, *Past Grants*, GLASER PROGRESS FOUND., http://www.glaserfoundation.org/grants/2000_animal_grants.asp ($50,000 grant to WAP for "Chimpanzee Collaboratory").

11, ASPCA Annual Report (2011). Thus, because these donors' identities are "already known," the Court may determine that no First Amendment protection applies. *See Greyhound Lines*, 1992 U.S. Dist. LEXIS 10095, at *6-7.

Second, even if First Amendment protection does apply to the donor lists, that does not mean this information is not discoverable. A balancing test applies. Before compelling discovery involving the implication of a First Amendment right, a court must assess (1) whether the information goes to the "heart of the lawsuit" and (2) whether the party seeking the discovery sought the information through alternative sources and has made reasonable attempts to obtain the information elsewhere. *Wyoming v. United States Dep't of Agric.*, 208 F.R.D. 440, 455 (D.D.C. 2002) (citing *Int'l Union v. Nat'l Right to Work Legal Defense and Ed. Found., Inc.*, 590 F.2d 1139, 1152 (D.C. Cir. 1978)); *see also Black Panther Party v. Smith*, 661 F.2d 123, 1266-69 (D.C. Cir. 1981) (same).

There are instances in which constitutionally protected information ***is*** discoverable. *National Right to Work*, 590 F.2d at 1153 ("At some point, the additional burden on a litigant in seeking out alternative sources of discovery may justify compelling disclosure of essential information from one asserting a constitutional privilege."); *see also United States v. Duke Energy Corp.*, 232 F.R.D. 1, 3 (D.D.C. 2005) (Friedman, J.) (rejecting First Amendment objections to third-party subpoena where, *inter alia*, information sought went to "heart of the lawsuit"). Indeed, a court in this district ordered compliance with a plaintiff's third-party subpoena to a non-profit organization in a civil RICO case, where the plaintiff sought discovery regarding, *inter alia*, the identification of the non-profit's contributors. *Greyhound Lines*, 1992 U.S. Dist. LEXIS 10095, at *9. Even though the non-profit had a "substantial claim of constitutional privilege" under *Alabama*, *Buckley* and other authorities, discovery was warranted

because the plaintiff had sought the information through other channels of discovery, but was thwarted by assertions of Fifth Amendment privileges, and the evidence was fundamental to proving the basis for its RICO suit. *Id.* at *8-9.

Once discovery in this case commences, FEI may be able to seek information concerning the defendant organizations' donors for the same reasons the *Greyhound Lines* court found persuasive. In *Greyhound Lines*, the non-profit was a third-party; here, the non-profits are ***defendants*** and the discoverability is even more compelling. This Court's prior ruling denying, in part, FEI's motion to compel certain donor information from WAP, then a non-party to the ESA Action, does not control here. *Cf.* Mot. at 19. There, the Court, citing *Wyoming*, *supra*, denied discovery regarding certain "individual donors or organizations," *see* Discovery Order (ESA DE 178) (8-23-07) at 8-9, because that information was not relevant to the plaintiffs' "taking" claim, Rider's credibility or FEI's defenses. *See id.* The balancing test will yield a different result in this case, where the issues are different. Here, unlike the ESA Action: (1) some of the information may not be protected by the First Amendment, because it is "already known," *see Greyhound Lines*, 1992 U.S. Dist. LEXIS 10095, at *6-7; (2) the donors' identities are fundamental to FEI's fraudulent solicitation theory, *see id.* at *8-9; (3) through discovery, it may be determined that there are no alternatives sources of this information, *see id.*; and (4) the information is being sought from ***parties***. *Wyoming*, 208 F.R.D. at 452 ("Non-party status is one of the factors the court uses in weighing the burden of imposing discovery.").[15]

Defendants claim that it is not plausible that there are other victims of their fraud, but then try to hide behind the First Amendment as a barrier to discovery by FEI on that very point.

[15] Ironically, FEI has offered to conduct discovery in this case pursuant to a protective and confidentiality order, *see* Pl. Discovery Plan (DE 62) (2-11-11), at 20, but defendants rejected that offer. *See* Defs. Discovery Plan (DE 59) (2-11-11), at 16.

This "heads we win, tails you lose" position should be rejected. In any event, discussion of the parameters of discovery concerning the defendants' donors, and the application of the *National Right to Work* balancing test, are entirely premature on a motion to certify or reconsider an order denying defendants' motions to dismiss. ***Discovery has not yet commenced.*** Defendants' Motion confuses the discoverability of information which may establish a RICO "pattern" with whether the FAC states a claim for relief (and whether they should be entitled to interlocutory review of this ruling). Thus, for all of the reasons stated above, defendants' First Amendment arguments are not only lacking in merit but also are irrelevant to the Court's Rule 12(b)(6) determination.[16]

C. The FAC Alleges Predicate Acts Which Are "Related"

The FAC alleges "related" predicate acts of racketeering. Relatedness and continuity are required to establish a RICO "pattern." *H.J., Inc.*, 492 U.S. 229, 239-40 (1989); *see also id.* at 239 ("It is this factor of *continuity plus relationship* which combines to produce a pattern.") (quotation omitted). Criminal acts are "related" when they share "the same or similar purposes, results, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events." *Id.* at 240. Courts are urged to take "a natural and

[16] Defendants' argument that a narrow construction of the RICO statute is necessary to avoid a conflict with the First Amendment, Mot. at 13-14, gets them nowhere. There is no "tension" between RICO and the First Amendment because defendants' (1) alleged bribes, (2) deliberate misrepresentations in the ESA Action and (3) donor fraud receive no First Amendment protection. *See* Op. at 20 (no *Noerr-Pennington* immunity for defendants' ESA Action conduct); *Madigan, supra* (fraudulent charitable solicitations not protected by First Amendment); *cf. NOW v. Scheidler*, 510 U.S. 249, 264 (1994) (Souter, J., concurring) (cited by defendants) ("And even in a case where a RICO violation has been validly established, the First Amendment may limit the relief that can be granted against an organization otherwise engaging in ***protected*** expression.") (emphasis added). While "legitimate free-speech claims may be raised and addressed in individual RICO cases ***as they arise***," *Scheidler*, 510 U.S. at 264 (emphasis added), in this case, the Court already denied defendants' motion to dismiss on the basis of *Noerr-Pennington* immunity. *Cf. id.* ("RICO predicate acts may turn out to be fully protected First Amendment activity, entitling the defendant to dismissal on that basis."). Moreover, as previously discussed, the parameters of discovery concerning the defendants' donors has ***not been established.*** *Cf. id.*

commonsense approach to RICO's pattern element," *id.* at 237, which this Court correctly did. Defendants' Motion offers nothing to warrant certification on this point.

FEI's allegations that it, along with the defendants' donors, were defrauded by defendants' racketeering activity are "not isolated events." *See id.* at 240. This was not a crime spree by perpetrators acting independently of each other who just happened to all victimize FEI, who, in turn, just happened to be in the wrong place at the wrong time. FEI was targeted by a fraudulent scheme, fueled by the Rider payments. The money was supplied by all of the organizations and were for Rider's testimony (bribes and/or illegal gratuities); they were sent through mails or by private carrier (mail fraud); the monies were falsely characterized in the WAP letters to Rider, MGC invoices and other communications ***(including donor solicitations)*** as "grants" or "reimbursements" for "media work" to disguise the illegal proceeds and to assist Rider in evading income taxes, thereby stretching the value of the payments (mail and wire fraud and money laundering); and, the ESA Action plaintiffs made affirmative false statements and omissions about the payments (obstruction of justice). All of this conduct was "related" by false and misleading statements about the lawsuit, Rider and how the money was being used. The same false and misleading statements defrauded donors who made contributions in response to online advertisements of the lawsuit and Rider's "travels," print solicitations regarding the same, and the fundraiser invitation. Their donations were not used for the purposes stated or implied – Rider's "media campaign" or the ESA action plaintiffs' legal fees or court costs.[17]

Defendants again raise improper arguments regarding the donors' intent, Mot. at 10, which is a question of fact for discovery. But, if anything, their argument confirms the fraud: if

[17] The Court "further distinguish[ed]" this case from controlling D.C. Circuit precedent, *Edmondson* and *Western Associates*, because FEI alleged that over 1000 predicate acts, varied in nature, occurred over an eight-year period by thirteen perpetrators. Op. at 34. Defendants' Motion, like their motion to dismiss briefing, "do[es] not acknowledge or address" these additional factors of the *Edmondson* and *Western Associates* "pattern" analysis. *Id.* at 33; *cf.* Mot. at 11 n.6.

donors attended the fundraiser "for the specific *purpose* of helping to alleviate the suffering of FEI's elephants," *id.*, it is at least "plausible" that they did not know that the monies raised were filtered through WAP, fraudulently called "grants" (FOF 39; Ex. 6, DX 50 at 2), and then used to pay for Rider's services as a paid plaintiff and fact witness who would, when he finally got the chance in court, abandon any remedy that would have alleviated purported elephant "suffering." FOF 1; COL 13. Thus, the "natural and commonsense" conclusion is that the predicate acts were "related." *H.J., Inc.*, 492 U.S. at 237.

II. THIS IS NOT A "TRULY EXCEPTIONAL" CASE WARRANTING CERTIFICATION

Certification is not warranted here. Defendants "must meet a high standard to overcome the strong congressional policy against piecemeal reviews, and against obstructing or impeding an ongoing judicial proceeding by interlocutory appeals." *ASPCA v. Ringling Bros.*, 246 F.R.D. 39, 43 (D.D.C. 2007) (Sullivan, J.) (citation omitted). Interlocutory appeals are discretionary, "rarely allowed," *id.*, and "reserved for truly exceptional cases." *Judicial Watch, Inc. v. Nat'l Energy Policy Dev. Grp.*, 233 F. Supp. 2d 16, 20 (D.D.C. 2002) (Sullivan, J.) (cited by defendants); *see also Tolson v. United States*, 732 F.2d 998 (D.C. Cir. 1984) (§ 1292(b) is "meant to be applied in relatively few situations"); *First Am. Corp. v. Al-Nahyan*, 948 F. Supp. 1107, 1116 (D.D.C. 1996) (cited by defendants) (the movant "bear[s] the burden of showing that exceptional circumstances justify a departure from the basic policy of postponing appellate review until after the entry of a final judgment.").[18]

Interlocutory appeals may be certified only where the district court's order involves a controlling question of law as to which there is a substantial ground for difference of opinion and an immediate appeal from the order may materially advance ultimate termination of the

[18] *See also In re Text Messaging*, 630 F.3d at 626 (interlocutory appeals "should not be routine"); *Republic of Colom.*, 619 F. Supp. 2d at 10 (district court granted 2 out of 23 certification motions over an 18 year period).

litigation. 28 U.S.C. § 1292(b). ***None*** of these statutory requirements is met here. The Court's determination that the FAC alleges a "pattern" of racketeering activity was a routine application of well-settled law to the facts of this case, and a piecemeal review of this issue will only further prolong litigation of FEI's RICO claim, ***which already has been delayed for more than five years.*** There is nothing "truly exceptional" warranting interlocutory review.

A. The Court's Application of the "Pattern" Analysis is a Not a "Controlling Question of Law" About Which There is a "Substantial Difference of Opinion"

1. The Court Applied Well Settled Law to the Facts Alleged

First, the Court's "pattern" holding is not a question of law appropriate for interlocutory review. "The antithesis of a proper § 1292(b) appeal is one that turns on whether there is a genuine issue of fact or whether the district court properly applied settled law to the facts or evidence of a particular case." *McFarlin v. Conseco Servs.*, 381 F.3d 1251, 1259 (11th Cir. 2004) (whether plaintiffs' RICO claims were pled with sufficient particularity under Rule 9(b) not appropriate for § 1292(b) certification); *see also Consub Del. LLC v. Schahin Engenharia Limitada*, 476 F. Supp. 2d 305, 309 (S.D.N.Y. 2007) (cited by defendants) ("[T]he 'question of law' must refer to a 'pure' question of law that the reviewing court could decide quickly and cleanly without having to study the record.") (quotation omitted).

Here, the Court applied "controlling" precedent, *Edmondson* and *Western Associates*, to the facts alleged in the FAC. The multi-factor test described by those decisions for determining a "pattern" of racketeering activity is a "'flexible guide'" and not a "'rigid test'" and must be applied on a "'case-by-case'" basis. Op. at 30 (quoting *Western Assocs. v. Market Square*, 235 F.3d 629, 634 (D.C. Cir. 2001)). Defendants do not like how that test has been applied here, but mere disagreement with how the Court applied a standard that inherently varies from case to case

is no basis for interlocutory appellate review. *Cf. Judicial Watch*, 233 F. Supp. 2d at 31 ("At most [movants] have argued for a different application of the law to the facts before the Court …. Defendants can advance such argument on appeal after final judgment, but they have not established the basis for doing so at this time under § 1292(b)."); *see also Keystone Tobacco Co. v. United States Tobacco Co.*, 217 F.R.D. 235, 239 (D.D.C. 2003) (Friedman, J.) ("Where the crux of an issue decided by the Court is fact-dependent, the Court has not decided a 'controlling question of law' justifying immediate appeal; certification of the underlying legal question could only result in the court of appeals improperly wading into the factual pond of an ongoing matter."). Accordingly, the Court's determination that the FAC "alleged more than a single victim and a single injury" and is "distinguishable from *Edmondson* and *Western Associates,*" Op. at 33, in part due to the donor-fraud allegations, is not a question of law appropriate for interlocutory review, and will put the Court of Appeals squarely in the "factual pond" of this ongoing RICO case. *Keystone*, 217 F.R.D. at 239.

2. There is No "Substantial Difference of Opinion"

Second, if there is any "difference of opinion" as to whether the FAC alleges a "pattern" under *Edmondson* and *Western Associates*, it "lies between defendants themselves and the Court, rather than within precedential authority." *Judicial Watch*, 233 F. Supp. 2d at 24. This Court has repeatedly held that "mere disagreement, even if vehement, with a court's ruling does not establish a substantial ground for difference of opinion sufficient to satisfy the statutory requirements for an interlocutory appeal." *ASPCA*, 246 F.R.D. at 43; *see also Judicial Watch*, 233 F. Supp. 2d at 25 ("[T]he mere claim that a decision has been wrongly decided is not enough to justify an interlocutory appeal.") (quotation omitted). Defendants' Motion does nothing more than use shop-worn arguments concerning well-settled, "controlling" precedent in a vain attempt

to generate a "substantial difference of opinion" – even though there plainly is none. *Compare McKenzie v. Kennickell*, 1986 U.S. Dist. LEXIS 18484, at *5 (D.D.C. Oct. 27, 1986) ("the mere existence of novel or complex questions does not in itself create substantial grounds for differences of opinion") *with* Mot. at 3 ("Prompt resolution of this novel issue by the Court of Appeals will almost certainly advance the resolution of this case.").

Defendants' Motion merely rehashes their motion to dismiss argument that "[c]ontrolling precedent flatly forecloses a RICO claim focused on conduct in connection with a single lawsuit … ." Defs. Mot. to Dismiss (DE 54-1) (12-3-10), at 44; *see also* Defs. Reply in Support of Mot. to Dismiss (DE 73) (4-1-11), at 15 (arguing that the FAC is "predicated on a 'single scheme,' (one lawsuit), a 'single injury' (FEI's attorneys' fees and litigation costs), and a 'single victim' (FEI itself) – the *identical* 'combination of factors' that the D.C. Circuit held in both *Edmonson* and *Western Assocs.* renders it 'virtually impossible' for a plaintiff to pursue a RICO claim"). This argument was considered and rejected. The Court held that FEI ***did*** allege more than one victim and more than one injury, even though "the ESA Action is, overwhelmingly, the basis for this lawsuit." Op. at 32-33. Defendants simply disagree with the Court's ruling.

When the Court rejected defendants' "pattern" argument, it applied well-settled D.C. Circuit precedent, *Edmondson* and *Western Associates*. *Cf. Consub Del. LLC*, 476 F. Supp. 2d at 309 ("[T]he 'substantial ground for a difference of opinion' must arise out of a genuine doubt as to whether the district court applied the correct legal standard in its order."); *APCC Servs., Inc. v. ESH AT&T Corp.*, 297 F. Supp. 2d 101, 107 (D.D.C. 2003) (cited by defendants) ("A substantial ground for difference of opinion is often established by a dearth of precedent within the controlling jurisdiction and conflicting decisions in other circuits."). Defendants do not dispute that *Edmondson* and *Western Associates* are the appropriate standard, nor do they offer an

alternative standard. *Cf. Keystone Tobacco Co.*, 217 F.R.D. at 239. Indeed, defendants have argued at least ***twice*** that *Edmondson* and *Western Associates* are ***"controlling."*** *See* Defs. Discovery Plan (DE 59) (2-11-11), at 3; Defs. Mot. to Dismiss (DE 54-1) (12-3-10), at 44; *see also* Mot. at 11 (describing *Edmondson* and *Western Associates* as "leading" pattern cases). Thus, this not a case where there is a lack of circuit precedent, or a split among courts in this or other circuits, on a "controlling" question of law. *Cf. United States v. Philip Morris USA, Inc.*, 396 F.3d 1190, 1192, 1201-02 (D.C. Cir. 2005) (cited by defendants) (no Supreme Court or D.C. Circuit precedent on availability of disgorgement under § 1964(a) in government civil action); *Howard v. United States House of Rep.*, 840 F. Supp. 2d 52, 56 (D.D.C. 2012) (cited by defendants) (on-point D.C. circuit case was heard en banc and produced four opinions, with no consensus as to issue before district court); *Al-Maqaleh v. Gates*, 620 F. Supp. 2d 51, 53-56 (D.D.C. 2009) (cited by defendants) (in case involving three detainees at U.S. base in Afghanistan, no precedent interpreting Supreme Court multi-factor test for jurisdiction over habeas petitions; three cases involving same issue were before the court and others likely to be filed). *Edmondson* and *Western Associates* were decided over ten years ago and they have been applied by courts in this circuit numerous times. *Cf. In re Text Messaging*, 630 F.3d at 626 ("But *Twombly* is a recent decision, and its scope unsettled … ."). The *Edmondson/Western Associates* standard is settled; defendants simply do not agree with how that settled rule has been applied here. This is not a valid basis for a disruptive interlocutory appeal.

3. There are No Pending Cases Which This RICO Action Will Impact

While "[t]he impact that the appeal will have on other cases is also a factor supporting a conclusion that the question is controlling," *APCC Servs.*, 297 F. Supp. 2d at 105, defendants have identified ***no*** pending cases that the present RICO action will actually impact. *See* Mot. at

10-13; *cf. Abur v. Republic of Sudan*, 437 F. Supp. 2d 166, 168, 170 n. 6 (D.D.C. 2006) (cited by defendants) (three "closely related" cases arising out of same terrorist bombings against same defendants, governments of Sudan and Iran); *APCC Servs.*, 297 F. Supp. 2d at 106-07 (five pending cases in D.D.C. and numerous other cases involving same issue pending nationwide). FEI is not the victim of, or aware of, any other comparable case predicated on a fraudulently manufactured claim of Article III jurisdiction. The hypothetical "future" RICO cases offered up by defendants to force the issue of certification, Mot. at 10-13, are irrelevant. Just because the Opinion may serve as precedent for others going forward does not mean that a deviation from the standard process for appellate review at the end of the litigation is warranted. All reported decisions may or may not be precedential for some hypothetical future case.

In sum, this is nothing more than the "typical" case where defendants disagree with the Court's application of well-settled law to the facts. *Cf. Keystone Tobacco*, 217 F.R.D. at 239 (certification denied where movants merely "assert[ed] that the Court applied the [legal] standard incorrectly"). Accordingly, there is no "controlling question of law" about which there is "substantial ground for difference of opinion" or any other factor present that makes this case "truly extraordinary" and warranting interlocutory review.

B. An Intermediate Appeal Will Further Prolong This Litigation

In deciding whether an immediate appeal will further prolong the litigation, "[t]he key factors are whether an appeal would *likely* and *materially* advance the ultimate determination." *McKenzie*, 1986 U.S. Dist. LEXIS 18484, at *6. Here, an interlocutory appeal will do neither. First, defendants have made no showing that it is "likely" that they will prevail on appeal. Given that the Court applied well-settled law to the specific facts of this case, such a "result is far from certain." *Judicial Watch*, 233 F. Supp. 2d at 28. The *Edmondson/Western Associates* test does

not, on its face, preclude FEI's claims, and the particular facts alleged here bring FEI's RICO claims well within the parameters of the multi-factor test these cases establish for determining a "pattern" of racketeering activity.

Second, even if the Court's "pattern" determination was reversed by the D.C. Circuit, neither the RICO claims nor this case would go away. The Court's Opinion left open the issue of open-ended continuity, *see* Op. at 30, a point which defendants conveniently ignore. The FAC pleads open-ended continuity, because, among other things, it alleges that the racketeering activity occurred up to and beyond the filing of the FAC, ¶ 283, and what occurred in the ESA Action with Rider was the enterprise's "regular way of doing business," *see id.* ¶¶ 246-72, which establishes the "threat of continuity." *H.J., Inc.*, 492 U.S. at 242. FEI has a substantial basis to allege that the defendant organizations are, to this very day, continuing to defraud donors. The website advertisements of the ESA Action are still active.[19] And, evidently, within just the past year, complaints have been lodged at the federal and state level concerning the deceptive fundraising practices of defendants HSUS and ASPCA, further supporting the proposition that the fundraising deception that occurred with respect to the ESA Action and that victimized FEI, is a regular way that at least some of the defendant organizations do business.[20] The facts

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[19] *See, e.g.*, Ex. 2, DE 603-7 (HSUS website) (advertising the ESA Action on HSUS's "current docket," next to a "donate" link); *see also* http://www.humanesociety.org/news/resources/docket/ringling_brothers_elephants.html (lasted visited 9-7-12).

[20] *See* Ex. 12, *Deceptive Fundraising Practices of the Humane Society of the United States*, HUMANEWATCH.ORG, at 6 (complaint made to California Attorney General regarding ASPCA's fundraising practices) & 15-17 (over 150 complaints made to Federal Trade Commission regarding HSUS's fundraising practices) (July 12, 2012), http://humanewatch.org/index.php/site/post/deception_report/.

Similar allegations concerning donor fraud have been raised regarding HSUS's fundraising campaigns in response to the Haiti earthquake and Hurricane Katrina. *See* Ex. 13, *Consumer Group: HSUS Must Return Donations after Misleading Haiti Fundraising*, THE CENTER FOR CONSUMER FREEDOM (Jan. 28, 2010), http://www.consumerfreedom.com/2010/01/298-consumer-group-hsus-must-return-donations-after-misleading-haiti-fundraising/. Moreover, some corporate sponsors (including Yellow Tail Wine and Hill's Pet Nutrition) have withdrawn support for HSUS, evidently because of confusion concerning HSUS's agenda. *See* Ex. 14, *Farmers sway companies to end HSUS sponsorship*, OHIO FARM BUREAU (Mar. 26, 2010), http://ofbf.org/news-and-events/news/707/.

concerning the fundraising fraud continue to unfold (which is all the more reason why discovery should commence, and not be delayed further).[21] Open-ended continuity thus is an issue that will have to be resolved by this Court. Where, as here, the underlying decision leaves substantive issues requiring further litigation unresolved, certification is inappropriate. *Judicial Watch*, 233 F. Supp. 2d at 28 ("a number of substantive questions were left unresolved by this Court's July 11, 2002 Order which would require further litigation before this Court … .").

Moreover, even if the Circuit held that the donor fraud theory was somehow defective, the Court could still find that the FAC alleges a close-end pattern of racketeering. A single scheme may give rise to a pattern of racketeering. *H.J., Inc.*, 492 U.S. at 240 ("it is implausible to suppose that Congress thought continuity might be shown *only* by proof of multiple schemes") (finding single scheme stated RICO "pattern"); *see also Western Assocs.*, 235 F.3d at 634 ("[i]t is true … a single scheme may suffice for purposes of RICO"). Moreover, a pattern of racketeering can occur where there is only a single victim or a single lawsuit. *See Living Designs, Inc. v. E.I. du Pont de Nemours & Co.*, 431 F.3d 353, 357, 364-65 (9th Cir. 2005) (fraudulent discovery conduct by defendant in consolidated products liability litigation was a pattern of racketeering); *Handeen v. Lemaire*, 112 F.3d 1339, 1343-44 (8th Cir. 1997) (a single "intricate scheme through which defendant sought to fraudulently obtain a discharge … by manipulating the bankruptcy system" which victimized one person in one case was a pattern of racketeering); *Chevron v.*

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[21] Defendants' argument that the Court should consider that the "unjust enrichment" allegations were not in the original complaint, Mot. at 9 n.4, ignores the record of the ESA Action and this case. First, FEI filed the FAC before this Court made any ruling on whether FEI's original complaint alleged a "pattern" of racketeering. *Cf. Western Assocs.*, 235 F.3d at 634 (plaintiff filed amended complaint, with new "pattern" allegations, after district court denied injunction request on basis that complaint "pattern" allegations were insufficient). Second, some of this information was not known until after the original complaint was filed in August 2007. For example, API testified that it was using "the circus and the lawsuit" as a topic in its "direct mail pieces" and "Action Alerts" in its January 2008 deposition. Ex. 15, API Dep. (1-29-08) at 229-30. At the time that this information surfaced, the RICO action had already been stayed, thus precluding any amendment to the pleadings. Third, the original complaint ***did*** contain certain allegations concerning donor fraud based on what was known by FEI in August 2007. *See* Compl. (DE 1) (8-28-07) ¶¶ 39 ("MGC encouraged and advised ASPCA, FFA and AWI to donate funds and solicit donations for the Rider funding through WAP"), 122-26 (2005 joint fundraiser allegations).

Donziger, 2012 U.S. Dist. LEXIS 67207, at *34-38 (S.D.N.Y. May 14, 2012) (denying motion to dismiss where single scheme, arising out of litigation activity, established "pattern" of racketeering).[22]

At bottom, no matter what the outcome might be on the appeal that defendants seek, this case will not go away. Defendants' argument that dismissal of the RICO claim will "remove the basis for federal jurisdiction in this case," Mot. at 14, gets them nowhere. Even if the RICO claims were dismissed, FEI's Virginia Conspiracy Act and intentional tort claims would remain. This Court could exercise its discretion to maintain supplemental jurisdiction over FEI's state law claims. 28 U.S.C. § 1367(c)(3); *cf. Stevenson v. Severs*, 158 F.3d 1332, 1334 (D.C. Cir. 1998) (in deciding whether to maintain supplemental jurisdiction, district courts may consider judicial economy, convenience, fairness to the parties and comity between the federal and state judiciary). Given the Court's first-hand knowledge of the complex and protracted nature of this dispute, doing so would serve the interests of judicial economy. *Cf. Stevenson*, 158 F.3d at 1334. Defendants will face the same donor-fraud issues in discovery and at trial under the Virginia Conspiracy Act and abuse of process, malicious prosecution, and maintenance claims as they now do under the RICO claims. A dilatory interlocutory appeal, even if defendants prevail, will streamline nothing.[23]

Most importantly, however, an interlocutory appeal will only prolong litigation of this case, which now has been pending ***for more than five years.*** *Cf. Chennareddy v. Dodaro*, 2010

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[22] *Handeen*, *supra*, a single scheme, single victim RICO case, recently was cited with approval by the Circuit in *RSM Prod. Corp. v. Freshfields Bruckhaus Derringer US LLP*, 682 F.3d 1043, 1051-52 (D.C. Cir. 2012).

[23] Even without a federal claim, FEI could proceed with some configuration of the lawsuit on the basis of diversity jurisdiction, because joint tortfeasors are not necessary parties. *Temple v. Synthes Corp., Ltd.*, 498 U.S. 5, 7 (1990) ("[I]t has long been the rule that it is not necessary for all joint tortfeasors to be named as defendants in a single lawsuit."); *Samaha v. Presbyterian Hosp. in City of N.Y.*, 757 F.2d 529, 531 (2d Cir. 1985) ("[U]nless it appears that a non-diverse defendant cannot be dropped from an action without prejudice to the remaining defendants, the [Rule15(a)] motion should be granted and a failure to do so is an abuse of discretion.") (quotation omitted).

U.S. Dist. LEXIS 88757, at *11 (D.D.C. July 22, 2010) (Sullivan, J.) ("Allowing an immediate appeal of this discovery issue would likely only cause further delay to this case."); *McKenzie*, 1986 U.S. Dist. LEXIS 18484, at *6-7 (interlocutory review "would delay rather than advance the ultimate determination of this already long pending discrimination suit"). Even without the time spent on mediation, the two appeals in the ESA Action each took more than a year to resolve. FEI is entitled to its day in court, and so are defendants (although defendants seem determined to avoid it): ***"[D]efendants, as well as plaintiff, are entitled to have the facts developed and the case tried on its merits without undue delay."*** *First Delaware Valley Citizens Television, Inc. v. CBS, Inc.*, 398 F. Supp. 917, 925 (E.D. Pa. 1975) (denying certification motion and ordering discovery to proceed).

C. No Other Factor Warrants Interlocutory Review

Defendants claim that because this is a "big," "unprecedented" RICO case, that may involve the First Amendment, interlocutory review is appropriate. Mot. at 15-20. That is not the law. *First Am. Corp.*, 948 F. Supp. at 1117 ("[N]either unusual facts nor legal issues of first impression require … certification of an interlocutory appeal."). Section 1292(b) "was not intended merely to provide review of difficult rulings in hard cases." *Judicial Watch*, 233 F. Supp. 2d at 24 (quotation and citation omitted).

None of the cases cited by defendants holds that interlocutory review is especially appropriate in a RICO case. *Cf.* Mot. at 18. Indeed, most of the cases defendants cite do not even address the RICO statute. *Tribune Co. v. Abiola*, 66 F.3d 12, 14-18 (2d Cir. 1995) (no consensus among circuit courts on *Burford* abstention issue) (no discussion of RICO); *Republic of Colom.*, 619 F. Supp. 2d at 11-12 (little precedent interpreting revenue and penal law rules; case involved significant legal and policy concerns not previously considered) (no discussion of

RICO); *Miron v. BDO Seidman, LLP*, 2006 U.S. Dist. LEXIS 90758, at *8-11 (E.D. Pa. Dec. 13, 2006) (district courts split on whether RICO claim arising from implementation of tax shelter constituted purchases and sales of securities and thus barred by PSLRA) (no discussion of RICO as to certification); *In re Manag. Care Litig.*, 2002 WL 1359736, at *2 (S.D. Fla. Mar. 25, 2002) (absence of controlling authority, and contrary authority from other circuits, regarding whether a managed-care subscriber who has not actually been denied care could state a RICO claim) (no discussion of RICO as to certification); *DeWit v. Firstar Corp.*, 904 F. Supp. 1476, 1526-27 (N.D. Iowa 1995) (other courts reached different conclusion regarding whether similar cattle feeding investment schemes constituted securities) (no discussion of RICO); *Klapper v. Commonwealth Realty Trust*, 662 F. Supp. 235, 236 (D. Del. 1987) (whether shareholders of a real estate investment trust have standing to sue was a question of first impression) (no discussion of RICO).[24]

Likewise, none of the cases cited by defendants, Mot. at 19, 20 n. 15, holds that interlocutory review is especially appropriate in a case that may involve First Amendment concerns. ***All*** of the cases cited by defendants where "First Amendment issues" were certified address the applicability of the *Noerr-Pennington* doctrine, which is not at issue in defendants' Motion. *See Mark Aero, Inc. v. TWA*, 580 F.2d 288, 289, 293-97 (8th Cir. 1978); *Santana Prods., Inc. v. Bobrick Washroom Equip., Inc.*, 249 F. Supp. 2d 463, 545 (M.D. Pa. 2003);

[24] Defendants cite three cases where certification was granted on an issue concerning the RICO statute, but those cases are inapposite here. *See Gamboa v. City of Chicago*, 2004 U.S. Dist. LEXIS 25105, at *12 (N.D. Ill. Dec. 9, 2004) (granting certification as to whether plaintiffs alleged a RICO "pattern", ***where RICO claim was only claim alleged)***, *rev'd*, *Gamboa v. Velez*, 457 F.3d 703, 710-11 (7th Cir. 2006) (finding no "pattern" against defendant police officers arising out of criminal investigation because, *inter alia*, criminal investigations routinely satisfy three of § 1962(c)'s continuity requirements (time period, police activity, multiple defendants)); *Philip Morris*, 396 F.3d at1192, 1201-02 (no Supreme Court or D.C. Circuit precedent on availability of disgorgement in a government civil action under § 1964(a)); *Schacht v. Brown*, 711 F.2d 1343, 1354-58 (7th Cir. 1983) (in civil RICO action, defendant, *inter alia*, raised significant arguments regarding application of RICO to business fraud claims, before this issue was addressed by the Supreme Court in *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985)).

A.H.D.C. v. City of Fresno, 2003 WL 25948686, at *8-10 (E.D. Cal. Mar. 3, 2003); *Las Vegas Sands, Inc. v. Culinary Workers Union, Local 226*, 2002 WL 32511175, at *1-3 (D. Nev. July 3, 2002); *Bieter Co. v. Blomquist*, 1990 WL 107531, at *9 (D. Minn. May 24, 1990).

Moreover, contrary to defendants' argument, this is not a "quintessential 'big case'" warranting certification. Mot. at 15. The "unique history" of this case, *id.*, is based upon 104 findings of fact that the Court issued after a full blown, nearly seven-week trial. Defendants will be precluded from litigating any factual findings essential to the 12-30-09 Opinion, including that Rider was "essentially a paid plaintiff and fact witness." FOF 1; *cf.* 18 U.S.C. § 201(c) (prohibiting, *inter alia*, giving and receiving "anything of value" "for or because of" testimony under oath). *See Taylor v. Sturgell*, 553 U.S. 880, 892 (2008) (collateral estoppel, or "[i]ssue preclusion, … 'bars successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment,' even if the issue recurs in the context of a different claim").[25] Therefore, the scope of the instant matter is far different from the mammoth multi-district litigation cases cited by defendants.[26] *See In re WorldCom, Inc.*, 2003 U.S. Dist. LEXIS 22718, at *26 (S.D.N.Y Dec. 17, 2003) (cited by defendants) ("In

[25] The preclusive effect of the 12-30-09 Opinion will apply to ***all*** defendants, including defendants who were not parties to the ESA Action. *See Taylor*, 533 U.S. at 893-95 (describing circumstances where non-party preclusion is appropriate).

[26] While discovery disputes are outside the scope of defendants' Motion, defendants' criticism of plaintiff's proposed scope of discovery is ironic given that defendants have represented, in no uncertain terms, that they plan to use the RICO case as an opportunity to re-try the ESA Action, as well as litigate ***its treatment of other species not even subject to the ESA***. Defs. Discovery Plan (DE 59) (2-11-11), at 9 (No. 1) ("The truth of the allegations raised in the underlying ESA litigation, including FEI's mistreatment of elephants and other animals … ."); *see also id.* at 9-10 (Nos. 5, 17, 24-25).

And, while defendants use this Motion as an opportunity to complain about FEI's proposed scope of discovery, Mot. at 16-17, defendants have made no showing that discovery into the Rider payments and donor fraud would be burdensome. Indeed, if they did not make illegal witness payments or commit donor fraud, it is hard to imagine how there could be a voluminous amount of responsive documents and information. Moreover, MGC has directly put the lawyers' tax returns at issue by alleging, through its abuse of process counterclaim, that its business and lawyers' professional livelihood has negatively been affected by the RICO case. MGC Counterclaim (DE 97) (8-9-12), ¶ 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 … ."); *see also id.* ¶¶ 7-8, 12, 17.

multidistrict litigation … the better practice may be to allow appeal of appropriate issues before the transferred cases are returned for trial."); *In re Air Crash off Long Island, N.Y.*, 27 F. Supp. 2d 431, 434 (S.D.N.Y. 1998) (cited by defendants) (multidistrict litigation arising out of airplane crash was an "exceptional case, particularly given the prospect of protracted litigation and multiple appeals in courts through the country … ."). It also is not akin to a large scale antitrust matter. *Cf. Tidewater Oil Co. v. United States,* 409 U.S. 151, 180-81 (1972) (Stewart, J., dissenting) (citing S. REP. NO. 2434, at 3 (1958)) (cited by defendants); *see also APCC Servs.*, 297 F. Supp. 2d at 101 (interlocutory review granted where ***five related cases*** were pending, cost of discovery may have exceeded the possible damages award and certified issue was jurisdictional). Indeed, if there is anything "truly extraordinary" about this case, it is that litigation of it will be significantly ***streamlined*** due to the preclusive effect of the 12-30-09 Opinion. Defendants' request for certification should be denied.

III. THERE IS NO BASIS FOR RECONSIDERATION OF THE COURT'S PATTERN OR CAUSATION DETERMINATIONS

There is no basis for reconsideration of the Court's pattern or causation determinations. Motions for reconsideration "are not simply an opportunity to reargue facts and theories upon which a court has already ruled." *Black v. Tomlinson*, 235 F.R.D. 532, 533 (D.D.C. 2006) (quotation omitted); *see also Chennareddy v. Dodaro*, 2012 U.S. Dist. LEXIS 44139, at *27 (D.D.C. Mar. 30, 2012) (Sullivan, J.) ("continuing disagreement" with a prior ruling not a basis for reconsideration). While reconsideration of an interlocutory decision is available "as justice requires," that phrase "indicates concrete considerations by the court, such as whether the court patently misunderstood the parties, made a decision beyond the adversarial issues presented, made an error in failing to consider controlling decision or data, or whether a controlling or significant change in the law has occurred." *Bryant v. Cent. Intelligence Agency*, 818 F. Supp.

2d 153, 156 (D.D.C. 2011) (Sullivan, J.) (quotations and citation omitted); *see also Firestone v. Firestone*, 76 F.3d 1205, 1208 (D.C. Cir. 1996) (judgment may be amended pursuant to Rule 59(e) based on an "intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice"). Moreover, "the party moving to reconsider carries the burden of proving that some harm would accompany a denial of a motion to reconsider." *Bryant*, 818 F. Supp. at 156 (quotation omitted). ***None*** of circumstances identified in *Firestone* or *Bryant* is present here, nor have defendants identified any harm that would result from the Court's denial of their Motion.

A. There is No Basis for Reconsideration of the Court's Pattern Determination

Reconsideration of the Court's pattern determination should be denied for the same reasons that certification is inappropriate. The Court applied well-settled law to the facts alleged in the FAC to determine that FEI alleged "more than one victim, and more than one injury, associated with defendants' alleged RICO activity." Op. at 33. Defendants do not argue that: there has an intervening change in the law (in fact, they concede that *Western Associates* and *Edmondson* are "controlling"); the Court made a clear error or misunderstood the parties; the Court made a decision beyond the adversarial issues presented on the motion to dismiss; or, that any new evidence is available. *Cf. Firestone*, 76 F.3d at 1208; *Bryant*, 818 F. Supp. 2d at 156. They also have identified no harm that would result from denial of their Motion. *Bryant*, 818 F. Supp. at 156. Defendants' throw-away argument in favor of reconsideration of the Court's "pattern" determination, Mot. at 20 n. 16, is "'little more than a rehash of the arguments' previously argued and rejected by the Court," *ASPCA*, 246 F.R.D. at 41, and accordingly should be denied.

B. There is No Basis for Reconsideration of the Court's Causation Determination

There likewise is no basis for reconsideration of the Court's causation determination. Defendants try to fit the "square peg" of their causation argument into "round hole" of the reconsideration standard by claiming that the D.C. Circuit 2011 affirmed this Court's 12-30-09 Opinion in the ESA Action on a purported "new ground" not addressed in the 12-30-09 Opinion: API's "public misimpression" standing argument. Mot. at 21. Defendants' argument is contrary to the trial and appellate court decisions in the ESA Action, and ***grossly*** distorts the case history. And, even so, defendants make ***no*** argument regarding harm, making reconsideration inappropriate. *Bryant*, 818 F. Supp. at 156.

1. Rider Was the "Sole" Basis the ESA Action was Reinstated, And the Organizations Never Had Standing

This Court has repeatedly held that Rider's fraudulent standing was the "sole" basis the ESA Action was reinstated by the D.C. Circuit. FOF 53 ("On June 29, 2001, the Court dismissed this case on the basis that neither Mr. Rider nor the organizational plaintiffs had standing to sue. The case was reinstated by the Court of Appeals in 2003, but ***solely*** on the basis of what had been alleged by Mr. Rider … .") (emphasis added); *see also* Op. at 56-57 ("This Court has already decided that Rider's standing was essential to the prosecution of the ESA lawsuit, from which FEI's injuries directly flow.") (citing FOF 53). Without Rider's false and paid-for allegations, this Court's June 29, 2001 dismissal would have been affirmed and litigation of the ESA Action, still ongoing, would have ended over a decade ago. FOF 53; *see also* Op. at 56-57 (citing FOF 53).

None of the organizations ever had standing. After the D.C. Circuit reinstated the ESA Action in 2003, the organizational plaintiffs ***never*** sought reconsideration of the Court's 6-29-01

Opinion holding that the organizations lacked standing. Moreover, none of the organizations, including API, sought reconsideration of the Court's 10-25-07 summary judgment order limiting all "***plaintiffs'*** claims" to the pre-Act elephants with whom Rider worked. *ASPCA*, 246 F.R.D. at 42. After trial, this Court held, "[c]onsistent with its June 29, 2001 decision," ESA DE 559 at 50, that API had no standing because its purported informational "injury" failed as a matter of law and fact, COL 21 & 28, and its purported resource "injury" failed as a matter of fact. COL 31. The D.C. Circuit then affirmed the Court's 12-30-09 Opinion ***in its entirety***. *See ASPCA II*, *supra*. ***Thus, API never had standing in the ESA Action.***

2. The "Public Misimpression" Standing Theory Was Considered and Rejected by This Court and the D.C. Circuit

Defendants cannot get a second bite at the organizational standing apple through the "public misimpression" argument. The notion that the organizations were injured because they purportedly had to spend resources to counter the "public misimpression" that FEI's practices are "lawful and humane," Mot. at 21, was ***never pled by any of the organizations.*** Indeed, it was not raised ***until trial*** and even then, it was raised in a vague and oblique fashion, without proof. In any event, the "public misimpression" standing theory was considered and rejected by this Court. The D.C. Circuit affirmed, and appellate rehearing on this very point was denied, which defendants' Motion fails to acknowledge. The D.C. Circuit's Opinion thus does not raise any "new ground" which warrants reconsideration of the Court's "causation" determination.

a. <u>The "Public Misimpression" Theory Was Not Pled By Any of the Organizations</u>

Throughout the litigation of the ESA Action, the organizations advanced two standing arguments: (1) FEI's "taking" deprived them of information to which they were statutorily entitled under section 10 of the ESA, *see, e.g.*, Compl. (ESA DE 1) (9-26-03) ¶ 6 (ASPCA

informational injury allegations); and (2) the organizations had to spend "substantial resources" on "***advocating better treatment*** for animals held in captivity" and "***pursuing alternative sources of information about defendants' actions*** and treatment of elephants in order to obtain such information in [their] work … ." *See, e.g., id.* ¶¶ 4, 6 (ASPCA resource injury allegations) (emphases added). The "public misimpression" resource-drain standing theory was not pled by ASPCA, AWI or FFA/HSUS in the 9-26-03 Complaint. *See id.* It also was not pled in API's Supplemental Complaint, ESA DE 55 ¶¶ 4-6; it was not the subject of a pre-trial proposed finding of fact, *see* ESA DE 341-1 ¶¶ 10-14; nor was it argued in plaintiffs' pre-trial brief. *See* ESA DE 360 at 30-33. It was not even included in plaintiffs' Court-ordered standing brief. No. ESA DE 433 at 7-10.

b. Mr. Glitzenstein Raised the "Public Misimpression" Standing Theory for the First Time During the Rule 52(c) Argument

The "public misimpression" argument evidently was an 11th hour attempt to come up with some way to save the ESA Action after it was apparent that Rider's credibility had been "pulverized." In light of Rider's devastating cross-examination, API's standing became critical. Counsel for API raised the "public misimpression" standing theory ***for the first time*** during the Rule 52(c) argument, ***after*** plaintiffs rested their case and presented all of their evidence on standing. *See* 2-26-09 p.m. at 81-83 (Glitzenstein). Counsel again briefly alluded to it during closing argument. 3-18-09 a.m. at 64-65 (Meyer). Neither argument cited any evidence, proffered by the ESA Action plaintiffs at trial, in support of the "public misimpression" theory. And neither did their post-trial filings. While API submitted just a few proposed findings of fact addressing the "public misimpression" standing theory, API cited to AWI's (not API's)

testimony, even though, by that point, AWI had abandoned all claims for relief.[27] *See* Pls. Prop. Findings of Fact (ESA DE 553) (4-24-09), ¶ 72 ("These efforts are necessary in part to counter the public relations efforts engaged in by FEI, in which it assures the public that the animals used in the circus, including the elephants are healthy, well cared for, and content, and that animal advocacy groups that say otherwise are lying and extremists and should not be trusted."); *see also id.* ¶ 75.

c. This Court Rejected the "Public Misimpression" Standing Theory

API's proposed findings of fact regarding its standing, and counsel's offhand comments at the Rule 52(c) and closing arguments, were implicitly rejected by this Court's 12-30-09 Opinion. Just because the Court did not make an express finding of fact rejecting the "public impression" argument does not mean the Court did not consider and reject it. The Court found that "API has not established that it would actually spend less of its resources on circus elephant related issues than it does now." FOF ¶ 102. It also found that "[t]here was no testimony that API would actually spend less resources on captive animal issues or even on elephants in circuses were FEI's practices declared to be a 'taking.'" COL 31 (citing FOF 102). When making these findings, the Court necessarily rejected API's post-hoc, cobbled together "public misimpression" argument as set forth in API's proposed findings of fact.[28]

[27] AWI, ASPCA and FFA/HSUS "abandoned all of their claims for relief during the [ESA Action] trial." Op. at 2 n. 1.

[28] API's failure to plead and prove its basis for standing cannot now be used to attack the Court's findings. API had a full and fair opportunity to present testimony and evidence on its standing at trial. It offered no testimony or documents on the "public misimpression" standing theory. Thus, to the extent defendants now contend that the "public misimpression" standing theory "was neither argued by FEI nor relied on by this Court in its final decision," Mot. at 21, it is a problem of their own making.

d. The D.C. Circuit Rejected the "Public Misimpression" Standing Theory

The D.C. Circuit rejected the "public misimpression" standing theory, just like this Court did.[29] The Court of Appeals held that API's resource injury claim, ***and in particular the "public misimpression" theory***, failed for total lack of proof. *ASPCA II*, 659 F.3d at 27-28. Moreover, contrary to defendants' present argument, Mot. at 21, the D.C. Circuit did ***not*** hold that API's "public misimpression" theory ***could have*** established organizational standing under *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), as a matter of law, ***if*** API had presented enough poof. The D.C. Circuit expressly left this issue open. *See ASPCA II*, 659 F.3d at 27 ("whether injury to an organization's advocacy supports *Havens* standing remains an open question that we have no need to resolve here").

The D.C. Circuit subsequently rejected the "public misimpression" argument for a ***second time.*** The ESA Action plaintiffs petitioned for panel rehearing, predicated on "the panel's holding, that as a factual matter, [API] did not establish standing pursuant to" *Havens Realty* because API "'failed to demonstrate that Feld's treatment of elephants contribut[es] to the public misimpression particularly in young children, that bullhooks and chains are lawful and humane practices.'" No. 10-7007, 10-7021 (DE 1344292) (11-28-11), at 1. ***API argued that "[t]he district court made no adverse factual finding on this issue (because it resolved the* Havens *issue on different grounds)."*** *Id.* (emphasis added). That petition was denied without opinion. No. 10-7007, 10-7021 (DE 1352053) (1-11-12). The Circuit thus decided that it neither "overlooked" nor "misapprehended" API's "public impression" argument when it decided *ASPCA II*, *see* Fed. R. App. P. 40(a)(2) – which is essentially the same point defendants are now asking this Court to "reconsider." Defendants' Motion fails to mention their unsuccessful

[29] API made only a passing reference to the "public misimpression" standing theory in its opening appellate brief. No. 10-7007, 10-7021 (DE 1312885) (6-13-11), at 27-28.

petition for rehearing. The "reconsideration" that they now seek is essentially an impermissible collateral attack on this Court's 12-30-09 decision, affirmed in its entirety by the D.C. Circuit, reaffirmed on rehearing and for which all avenues of appellate review have now expired.

In sum, the "public misimpression" standing theory, while not pled and only argued as an afterthought, is nothing new. It has been considered and rejected ***three times***. It is not a basis for reconsideration of the Court's causation determination, and in any event, defendants have demonstrated no harm that would result from a denial of their Motion.

IV. CONCLUSION

Under the law of this Circuit, there is no basis for certification or reconsideration of the Court's Opinion. For this and all of the reasons stated above, defendants' Motion should be denied and discovery should proceed. A proposed form of order is attached.

Dated: September 7, 2012

Respectfully submitted,

/s/ John M. Simpson

John M. Simpson (D.C. Bar # 256412)
jsimpson@fulbright.com
Stephen M. McNabb (D.C. Bar #367102)
smcnabb@fulbright.com
Michelle C. Pardo (D.C. Bar # 456004)
mpardo@fulbright.com
Kara L. Petteway (D.C. Bar # 975541)
kpetteway@fulbright.com
Rebecca E. Bazan (D.C. Bar # 994246)
rbazan@fulbright.com
FULBRIGHT & JAWORSKI L.L.P.
801 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2623
Telephone: (202) 662-0200

Counsel for Plaintiff Feld Entertainment, Inc.