UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FELD ENTERTAINMENT, INC.,

Plaintiff,

v.

AMERICAN SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS, et al.,

Defendants.

Case No. 07-1532 (EGS)

DEFENDANTS' REPLY IN SUPPORT OF MOTION FOR CERTIFICATION OR, IN THE ALTERNATIVE, FOR RECONSIDERATION

INTRODUCTION

Feld Entertainment, Inc. ("FEI") largely ignores its own Amended Complaint, as well as Defendants' central arguments, in opposing Defendants' motion for certification or, in the alternative, for reconsideration. FEI contends that early appellate review in this case is inappropriate because, *inter alia*, FEI is entitled to pursue a theory that "some part of the millions of dollars the organizations raised from February 2003 to December 2009 [ ] 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 to Defs' Mot. for Certification or Reconsideration (Sept. 7, 2012) (DN 114) ("FEI Opp'n") at 9. FEI asserts that it may also conduct highly invasive discovery in an attempt to find *any* donors to multiple nonprofit organizations over a ten-year period who might say that they might not have made donations had they known FEI's theory that Defendants defrauded the courts and FEI to "bring a philosophical debate into federal court to advance a radical 'animal rights' agenda . . . ." *See* First Amended Complaint (Feb. 6, 2010) (DN 25) ("Amended Complaint") ¶ 2. FEI further threatens that these same donors, depending on the answers they provide, may ultimately become either co-victims of FEI or implicate themselves as co-conspirators of Defendants.

As explained below, FEI's arguments underscore the unprecedented nature and weak underpinnings of the RICO "pattern" on which FEI must now rely and also demonstrate that early review by the Court of Appeals is necessary to materially advance the resolution of this otherwise unwieldy case. Contrary to FEI's assertions, FEI Opp'n at 6 n.6, the Court has not endorsed FEI's intended fishing expedition concerning any and all of the donations each of the distinct nonprofit organizations received over the course of a decade. Nor has the Amended Complaint identified a single donor as a "victim." As recognized by the Court's Opinion, the

only allusion to potential co-victims in the Amended Complaint concerns a one-time isolated event, the 2005 fundraiser. Memorandum Opinion (Jul. 9, 2012) (DE 90) ("Mem. Op.") at 31.

As Defendants have explained, there is at least substantial ground for a difference of opinion, warranting early appellate review, as to whether, under *Iqbal/Twombly*, a party states a sufficient claim simply by alleging that a fact *might* have occurred, particularly where it is more plausible and more likely that the fact did not occur and also where the resulting discovery will lead the Court down a path fraught with serious First Amendment implications. *See RSM Production Corporation v. Freshfields Bruckhaus Deringer U.S. LLP*, 682 F.3d 1043, 1048 (D.C. Cir. 2012) (allegations of a "possibility, but not the plausibility" of certain facts insufficient to state a claim); *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). Because FEI has not sufficiently alleged facts supporting its donor victim theory, Defendants respectfully seek certification, or alternatively reconsideration, regarding whether FEI's donor fraud theory is sufficient to plead the additional victims and injuries essential for FEI to state a valid RICO "pattern" here. *E.g., Robertson v. Cartinhour*, 2012 U.S. Dist. LEXIS 35217, at * 46 (D.D.C. Mar. 16, 2012) ("single scheme, a single injury, and few victims" are insufficient to support a RICO claim).[1]

Contrary to FEI's assertions, FEI Opp'n at 1-4, the question of whether some or all discovery should be stayed pending appellate review is distinct from the threshold question of whether certification is warranted. *See* 28 U.S.C. § 1292(b) (providing that certification application does not automatically stay discovery). As contemplated by the provision authorizing interlocutory appeals, should the Court agree that certification is warranted, it can

[1] As discussed below, FEI's suggestion that one or more Defendants here (such as the Humane Society of the United States ("HSUS")) should be considered FEI's co-victims, FEI at 10, is "flimsier than 'doubtful or questionable.'" FEI at 5 (quoting *Tooley v. Napolitano*, 586 F.3d 1006, 1009 (D.C. Cir. 2009)).

make a separate determination as to whether and what kind of discovery or other proceedings should proceed in the meantime. *See also United States v. Philip Morris USA*, 2004 WL 1514215 (D.D.C. June 25, 2004) (granting interlocutory certification on issue of whether disgorgement of ill-gotten gains is proper remedy under RICO without staying impending trial).

FEI's efforts to downplay the scope of this litigation and whether interlocutory review will advance the case do not withstand scrutiny. Indeed, rather than demonstrate that this case will somehow be a limited one, FEI seeks to expand this litigation beyond even FEI's own sprawling Complaint, arguing that FEI's search for purported co-victims must now encompass discovery that implicates all of the Defendant organizations' donors and supporters for many years.

And FEI's assertion that Defendants "will be precluded" from litigating any matters the Court touched on in the ESA Action is wrong on a myriad of fronts and is belied by the very Supreme Court precedent on which FEI seeks to rely. *See* FEI Opp'n at 30 (citing *Taylor v. Sturgell*, 553 U.S. 880 (2008)). In any case, it is premature to address preclusion issues at this stage,[2] and as this Court has previously recognized, FEI's RICO claim cannot possibly be litigated without an enormous expenditure of time and resources by the Court and the parties. This too counsels in favor of early consideration by the Court of Appeals, or reconsideration by this Court, of FEI's tenuous and novel pattern theory.

FEI also ignores the significant impact that the D.C. Circuit's ultimate ruling on organizational standing in the ESA Action should have on this case. FEI Opp'n at 33-38. It is undisputed that a RICO claim may proceed only where a plaintiff will be able to demonstrate

[2] As explained *infra*, collateral estoppel is inappropriate for multiple reasons, given that this case involves different issues, different parties, different statutes, different claims, and different burdens of proof from the ESA Action. Defendants will respond fully to FEI's assertions regarding collateral estoppel at the appropriate time and in the proper context after FEI has formally raised the issue.

"but for" causation between the alleged misconduct and alleged damages. *Hemi Grp., LLC v. City of New York*, 130 S. Ct. 983 (2010). Since FEI's alleged damages are limited to the fees it spent litigating the ESA Action, causation cannot be shown if the ESA Action could have proceeded regardless of the alleged misconduct involving Mr. Rider. The D.C. Circuit's ruling makes clear that the *Havens Realty* standing theory on which the other plaintiffs proceeded in the ESA Action was completely legitimate and failed at the close of the case because of a lack of evidentiary proof at trial. *ASPCA v. Feld Entm't., Inc.*, 659 F.3d 13, 27-28 (D.C. Cir. 2011). Accordingly, while not changing the outcome of the ESA Action, the D.C. Circuit's analysis is critical to the viability of the RICO claim: it confirms that the ESA Action could have proceeded through trial irrespective of Mr. Rider and thus precludes FEI from establishing the necessary causation for its RICO claim demanded by *Hemi* and other Supreme Court precedents.

ARGUMENT

I. FEI'S RELIANCE ON A DONOR VICTIM THEORY TO ALLEGE A RICO PATTERN WARRANTS EARLY CERTIFICATION OR RECONSIDERATION.

A. The Legal Sufficiency Of FEI's Donor Victim Allegations Raises A Controlling Question Of Law As To Which There Are Substantial Grounds For A Difference Of Opinion.

1. FEI Has Failed To Allege Injury To A Single Donor Who Attended The 2005 Fundraiser.

While FEI continues to argue, based on cases from other Circuits, that "a single victim or a single lawsuit" may support a RICO claim, FEI Opp'n at 26, this Circuit's precedents foreclose that approach. *E.g., Western Assocs. Ltd. P'rshp. v. Market Square Assocs.*, 235 F.3d 629, 636-37 (D.C. Cir. 2001). On the contrary, as this Court explained, a RICO claim is "virtually impossible" to state where there is only a "single scheme, a single injury and few victims. . . ."

Mem. Op. at 30 (citations omitted).[3] For this case to proceed, FEI must have plausibly alleged that there are victims other than FEI and that a criminal scheme and injuries exist outside of the contours of the ESA Action. However, as Defendants have explained – and FEI does not meaningfully dispute – FEI's only suggested allegation in this regard is that some unidentified attendees of the 2005 fundraiser might have been victims as well.[4]

As a threshold matter, FEI has no coherent rejoinder to Defendants' argument that FEI has not sufficiently pled other victims. FEI alleges only that the purported fraud was intended to "defraud" "FEI of money and property *and/or* to unjustly enrich defendants" by obtaining donations through fraud. Amended Complaint ¶¶ 181, 182 (emphasis added). As FEI has no evidence to support its conjecture that any such donor has in fact been defrauded, it had no choice but to plead this allegation in the alternative. But whether such a bald allegation is sufficient under *Iqbal* and *Twombly* – particularly in a RICO case that depends on FEI's incongruous effort to align itself with Defendants' own donors and supporters – is a controlling question that warrants certification. It was to eliminate such threadbare grounds for allowing a burdensome and, in this instance, constitutionally fraught case to proceed, that the Supreme Court and lower courts sought to ensure that allegations in such cases would have to be based on more than the "sheer possibility that a defendant has acted unlawfully." *Iqbal*, 556 U.S. at 678; *see also, e.g., Dist. 1199P Health & Welfare Plan v. Janssen*, 784 F. Supp. 2d 508, 523-24

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[3] Contrary to FEI's characterization, FEI at 27 n.22, the D.C. Circuit's recent ruling in *RSM Production Corp.* did not cite *Handeen v. Lemaire*, 112 F.3d 1339 (8th Cir. 1997) "with approval" as regards a "single scheme, single victim RICO case," FEI Opp'n at 27 n.22, but rather distinguished *Handeen* on other grounds. 682 F.3d at 1051.

[4] The Court in *Western Associates* rejected a RICO claim that, although involving "dozens of predicate acts extending over an eight-year period," at its core concerned an allegation of "a single dishonest undertaking," 235 F.3d at 636-37 – precisely what is alleged by FEI here with respect to the only damages it seeks. Thus, contrary to FEI's assertion, FEI at 18, n.17, the other "pattern" factors weigh heavily against a pattern in this case as well.

(D.N.J. 2011) (bald allegation that third parties "relied on Defendants' misrepresentations" insufficient where there "are numerous factors that could influence" the third parties' decisions, and pursuit of the claim would require delving into the basis for those decisions, with no evidence at the outset).[5]

FEI's argument that a plaintiff may plead alternative statements as the basis for its claim is inapposite, *see* FEI Opp'n at 9 n.10, because there is no RICO "pattern" without the inclusion of the donor victim scheme. Thus, as to FEI's two "alternative" allegations, the first (the "or") is indisputably insufficient under this Circuit's precedent; and the second (the "and") is a novel theory that presents a controlling question as to whether FEI can sidestep *Edmondson* and *Western Associates* by asserting merely that an alleged scheme based on donor fraud is within the realm of possibility and accordingly warrants certification.[6] There is no legal support for FEI's implicit proposition that it suffices under *Iqbal/Twombly* for a Complaint to allege two alternative scenarios, only one of which makes out a legally cognizable claim.

2. FEI Also Has Not Pled Any Other Co-Victims.

Evidently cognizant that under *Edmondson* even a "few victims" would not be enough for a pattern, 48 F.3d 1260, 1265 (D.C. Cir. 1995), FEI now asserts that this case may proceed on

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[5] *See Kowal v. MCI Communications Corp.*, 16 F.3d 1271, 1279 n.3 (D.C. Cir. 1994) (cautioning against permitting a wholly unsupported allegation to proceed "as a pretext for the discovery of unknown wrongs") (citations omitted); *see also, e.g., In re Pabst Licensing Gmbh & Co. KG Litig.*, 602 F. Supp. 2d 17, 20 (D.D.C. 2009) (claim may not proceed where complaint does not include "any facts in support of [a] bald allegation" critical to the claims success); *Walters v. McMahen*, 684 F.3d 435, 442 (4th Cir. 2012) (RICO claim dismissed where no factual support for bald allegations).

[6] FEI's Opposition highlights the insufficiency of the allegation, acknowledging that "*if* discovery confirms that there are victims other than FEI, this may be additional evidence establishing a 'pattern of racketeering.'" FEI Opp'n at 11, n.11 (emphasis added). Indeed, FEI amusingly seeks to shift the pleading burden entirely, by contending that "[i]f defendants really believe that they did not violate the RICO statute . . . or commit any intentional torts, the way for that to come out is through discovery and litigation of this case." *Id.* at 3. Under *Iqbal* and *Twombly*, a defendant should not be subjected to years of expensive "discovery and litigation" unless the plaintiff has made legally sufficient allegations at the outset – a burden that FEI has failed to satisfy with respect to its donor fraud allegations.

the basis of *other* purported donor fraud allegations beyond the invitation to the 2005 fundraiser. FEI Opp'n at 4-10. However, even assuming the Amended Complaint contained such allegations (which are in fact conspicuously absent), such allegations are even further removed from any connection to FEI and on shakier legal grounds than the limited 2005 fundraiser allegations. Indeed, in relying on allegations concerning Defendants' "use[of] print and broadcast media," FEI Opp'n at 5-6, FEI ignores that the Court has already determined that these precise kinds of activities are protected by the First Amendment and hence immune from FEI's RICO attack under the *Noerr-Pennington* doctrine. Mem. Op. at 20-21.

FEI also attempts to shift its argument to hypothetical donors who may have given funds in response to various unspecified requests from various unspecified groups at various unspecified times. *See* FEI Opp'n at 6-8. FEI asserts that the RICO claim and the pool of potential co-victims appropriately encompass all donors to the six nonprofit defendant organizations during the 2003 to 2009 time period. FEI claims that any one of these donors may have made a donation based on alleged misrepresentations made "about Rider and the ESA Action." FEI Opp'n at 9. However, the Court has not suggested that it allowed the case to proceed on such a far-flung donor victim theory – *i.e.*, that every single person who may have contributed money to the ASPCA, FFA, HSUS, AWI, API, or WAP between 2003 – 2009 may have been defrauded by one or more of the Defendants. Indeed, the Court has already rejected FEI's earlier effort to assert a pattern by alleging that Defendants victimized other institutions that use bullhooks and chains, explaining that RICO is not cognizable to protect such an amorphous class of "'potential' victims." Mem. Op. at 31 n.12. Yet FEI's reference in its opposition to all donors of the defendant organizations over many years is exponentially *more* amorphous and untethered to any prior judicial finding of a cognizable RICO pattern.

Moreover, contrary to FEI's assertions, FEI has not pled its newly broadened donor-victim theory anywhere in the Amended Complaint.[7] This is hardly surprising, given that FEI never mentions that any donor was a victim in its Opposition to the Motion to Dismiss despite arguing that it had established a pattern of racketeering activity for other reasons. *See* FEI Opp'n to Defs.' Motion to Dismiss (DN 68) at 62-67. While the Amended Complaint repeats allegations of misrepresentations, the only allegation that someone other than FEI might have been defrauded or injured that FEI even *arguably* pled with specificity can be found in Paragraphs 179 through 182, concerning a one-time event, a 2005 fundraiser. FEI purports to have adequately alleged there that donors might have based their donation decisions on allegedly false representations about, *inter alia*, FEI's mistreatment of the Asian elephants, the reasons Mr. Rider left the circus, and the fact that the invitation misleadingly implies that the nonprofit organizations' public interest lawsuit against FEI was akin to "David versus Goliath."[8]

FEI claims that other paragraphs of the Amended Complaint – 69, 127, and 128 (FEI Opp'n at 6-7 & n.6-n.8) – also "clearly allege[ ] that the organizations' donors were victims of

[7] Perhaps recognizing the fact that the Amended Complaint does not contain sufficient allegations that any third party donors were victims, FEI attempts to rely in its Opposition on new materials not referenced in the Amended Complaint. *See, e.g.*, FEI at 8-9. While it is improper to consider such materials at the pleading stage, the contents of such documents similarly fail to establish how any third parties were victims of any fraud, much less what were the specific representations on which donors relied.

[8] FEI's effort to show that a donor fraud allegation is plausible on the grounds that donors were not told that plaintiffs would "in court, abandon any remedy that would have alleviated purported animal 'suffering,'" FEI at 19, is yet another false syllogism – the ESA Action plaintiffs never abandoned such relief, but simply sought an order declaring that FEI is engaged in the unlawful "take" of the Asian elephants, and allowing FEI to apply for a permit for a brief time before considering injunctive relief. *See* ESA case, Trial Transcript at 10 (Jul. 15, 2009); *see also Steffel v. Thompson*, 415 U.S. 452, 466 (1974) ("Congress plainly intended declaratory relief to act as an alternative to the strong medicine of the injunction"). Even accepting FEI's vision for how the case should proceed – by subjecting past donors to conflicting interpretations of what kind of relief the ESA plaintiffs were seeking and whether it would have helped the elephant, and how those alternative scenarios *might* have affected their donations – highlights the bizarre nature of the case FEI now intends to pursue, as well as the intractable causation problems inherent in such a case.

the Rider fundraising fraud." *Id.* at 6, n.6. In fact, those paragraphs only generally allege that the Defendants were engaged in fundraising activities, but they do not allege that there were any third-party victims of those activities who relied on any false or misleading statements. FEI certainly provides no such allegation with the level of specificity required to satisfy Rule 9(b). *See, e.g., Bates v. Northwestern Human Servs., Inc.*, 466 F. Supp. 2d 69, 88 (D.D.C. 2006).[9] Neither the paragraphs FEI references, nor the rest of FEI's Amended Complaint contains any specific allegations regarding donor fraud against other co-victims. FEI does not allege particular fraudulent statements to third parties, who made them, when and where they were made, the identities of the third parties who relied on them, how they relied on them, or what defendants obtained as a result of the donor fraud.

Instead, FEI offers generalized conjecture in its Opposition and unsupported claims of a widespread donor fraud (including pointing to a "donate" link that appears in the general header on the top of every page of the website of one of the nonprofit organizations. *See* FEI Opp'n Ex. 2). For similar reasons, the Court already rejected such nonspecific allegations, when FEI attempted to premise its "pattern" on its claims related to alleged legislative and administrative advocacy: "Upon careful consideration, the Court concludes that FEI cannot [rely on alleged legislative and administrative advocacy to show a pattern], because FEI has not adequately alleged *any other victims* of the alleged legislative and administrative activity." Mem. Op. at 32 n.13 (emphasis in original).

[9] "It is well-settled in this and other Circuits that where acts of mail and wire fraud constitute the alleged predicate racketeering activity, these acts are subject to the heightened pleading requirements of Federal Rule of Civil Procedure 9(b)… Plaintiffs alleging fraud must further 'state the time, place and content of the false misrepresentations, the fact misrepresented[,] and what was retained or given up as a consequence of the fraud…' 'Moreover, [c]ourts have been particularly sensitive to [Rule 9(b)'s] pleading requirements in RICO cases in which the 'predicate acts' are mail fraud and wire fraud, and have further required specific allegations as to which defendant caused what to be mailed ... and when and how each mailing ... furthered the fraudulent scheme.'" *Id.* at 88-90 (internal citations omitted).

FEI's reference to those paragraphs reinforces the anomalous nature of its donor victim theory. Paragraph 127 concerns a fundraising letter from defendant Wildlife Advocacy Project to defendant Animal Welfare Institute that FEI claims contained false statements. Amended Complaint ¶ 127. In the next paragraph, FEI then alleges that the grant was also sent to defendant "FFA/HSUS." *Id.* ¶ 128.[10] Thus, as Defendants have previously surmised, Defendants' Motion for Certification or, in the Alternative, Reconsideration ("Motion") at 11-12, under its circular and ever-expanding pattern theory, FEI apparently purports to be able to rely on the *Defendants themselves* as FEI's "co-victims" in order to establish a RICO pattern.

In fact, in its Opposition, FEI relies on Defendant HSUS as being "at least one fraud victim in addition to FEI." FEI Opp'n at 10 ("[i]f HSUS was 'defrauded' by FFA as to the legality of the Rider payments . . . then it was defrauded by the same fraudulent bribery scheme that victimized FEI"). In FEI's upside-down world, because one or more Defendants may defend themselves – as can only be expected under the circumstances – by asserting that they are innocent of any fraud regardless of any statements made by their co-defendants, FEI can sufficiently allege a "pattern" of "victims" merely by including as victims any or all of the Defendants it has opted to sue. FEI has not identified a single case – and Defendants are not aware of any – in the history of RICO that went forward on such an anomalous basis. The plausible explanation here (per *Iqbal*/*Twombly*) is that Defendants' donors were neither co-victims nor co-conspirators; rather, there was no pattern of racketeering activity and thus no victims or co-conspirators. Hence, Defendants respectfully submit that early appellate review of this unprecedented "pattern" is warranted and appropriate.

[10] Paragraph 128 also contains a threadbare allegation that "upon information and belief" the grant was sent to one unidentified "woman." This allegation does not satisfy the requirements of Rule 9(b), as it is unclear in the Amended Complaint if FEI is alleging that this "woman" is a victim or a co-conspirator (or perhaps both). Nowhere in the Amended Complaint is it alleged how this unidentified person was injured, or on what false representations she specifically relied, or when.

This conclusion is reinforced by FEI's contradictory response to Defendants' contention that FEI may opt to add Defendants' donors and supporters as co-defendants if FEI's inquiries in discovery are not answered in a manner satisfactory to FEI. Thus, while FEI first asserts that Defendants' arguments about '"victims" being added as defendants are "nonsensical," FEI Opp'n at 10 n.11, FEI goes on to say that if it learns through discovery that some of the donors were part of the purported conspiracy, "FEI may amend its pleadings, if appropriate," FEI Opp'n at 11, n.11. Apparently, if a donor were to testify that he or she would not have donated money had he or she known of FEI's current allegations, that person would be a co-victim. If, however, the person were to testify that he or she would have contributed funding to help the elephants irrespective of FEI's contention that Mr. Rider was being bribed, FEI will deem him or her a co-conspirator. It is difficult to imagine a case with a greater potential to deter and punish support for giving to an animal protection organization. In making these assertions, FEI confirms the need for certification here, given the substantial questions raised by allowing a RICO claim to proceed on this tenuous pattern, and given the First Amendment implications where third-party donors will face a Constitutionally-suspect Catch-22. *See infra* at 16-20.

3. FEI Cannot Show That The Fraud Allegedly Directed At Donors Is "Related" To The Fraud That Caused Its Alleged Injuries.

FEI also fails to respond to Defendants' arguments that certification or reconsideration is warranted because the alleged predicate acts directed at donors do not "relate" to those directed at FEI, as required under controlling precedent. *See H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 237, 240 (1989) (a RICO pattern requires that alleged criminal acts be "related" in a "natural and commonsense" way: "'[c]riminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated

events.'" (quoting 18 U.S.C. § 3575(e)). Instead, FEI summarily asserts that the alleged conduct directed against FEI and the alleged donor fraud conduct are "related by false and misleading statements about the lawsuit, Mr. Rider, and how the money was being used." (FEI Opp'n at 18). However, even accepting this premise, FEI ignores the obvious – and irreconcilable – differences between: (1) the types of alleged "victims" – a for-profit circus against which Defendants brought the ESA Action to stop the abuse of elephants, on the one hand, and Defendants' members and donors who pledged their resources in an effort to end that abuse, on the other; (2) the alleged purposes of the "frauds" – *i.e.*, to prevail in the ESA litigation versus fundraising to support the organizations; and (3) the alleged methods of commission – a multi-year litigation in federal court versus general fundraising activities. *See H.J. Inc.*, 492 U.S. at 240 (a RICO pattern must have "the same or similar purposes, results, participants, victims, or methods of commission").

The Court should be especially reluctant to find the necessary "relatedness" here, given that the purported donor fraud scheme is premised exclusively on alleged mail and wire fraud. *See Western Assocs.*, 235 F.3d at 637 ("RICO claims premised on mail or wire fraud must be particularly scrutinized because of the relative ease with which a plaintiff may mold a RICO pattern from allegations that, upon closer scrutiny, do not support it.") (quoting *Efron v. Embassy Suites (P.R.), Inc.*, 223 F.3d 12, 20 (1st Cir. 2000)).

It is simply not plausible as a matter of law that the donors upon whom FEI now relies were somehow "victimized" in the same or a similar manner as FEI – FEI was not induced to donate funds to nonprofit organizations dedicated to ending elephant mistreatment in the circus as a result of any of the alleged misrepresentations about FEI, and FEI certainly did not attend "a benefit to rescue Asian Elephants from abuse by Ringling Bros. and Barnum & Bailey," or

otherwise contribute funding to any of the Defendant organizations. Rather, FEI has alleged only that it was defrauded by the ESA Action, which the Court has found to be "overwhelmingly, the basis for this lawsuit." (Mem. Op. at 32). Defendants did not bring the ESA Action against anyone other than FEI, and they certainly did not bring it against their own donors. Accordingly, this case is easily distinguished from those cases in which an adequately pled pattern was adequately alleged based on allegations of injuries to non-party victims where plaintiffs alleged "essentially the same injuries to other, non-party victims to support a pattern of RICO activity." *See* Mem. Op. at 32 n.13.[11]

Thus, certification or reconsideration is also appropriate because FEI cannot coherently explain how it can satisfy the Supreme Court's test for a "related" pattern between alleged acts against FEI and alleged acts against donors. The victims, purposes, results, and methods of commission, as alleged by FEI, are polar opposites, and thus the alleged fundraising conduct is too dissimilar and unrelated to support a claim under RICO.

B. Early Resolution Of This Issue Will Materially Advance This Case.

1. Resolution of the Unprecedented "Pattern" Issue Will Necessarily Narrow the Issues To Be Resolved In This Litigation.

FEI also fails to rebut Defendants' argument that early resolution of this threshold issue will materially advance the resolution of this case. FEI Opp'n at 24-31. The existence of additional state law claims is of no moment. Just as in *Edmondson*, it would not be appropriate

[11] For example, in *Marshall & Ilsley Tr. Co. v. Pate*, 819 F.2d 806, 809-10 (7th Cir. 1987), the court permitted a pattern to be based on allegations of similar investment fraud schemes committed against a plaintiff and alleged non-parties. *See also, e.g.*, *Pruitt v. Cnty. of Sacramento*, 2010 U.S. Dist. LEXIS 102125 (E.D. Cal. Sept. 15, 2010) (finding allegations of a pattern where plaintiff was alleged victim of baseless drug prosecutions as were unidentified victims); *SKS Constructors, Inc. v. Drinkwine*, 458 F. Supp. 2d 68, 74 (E.D.N.Y. 1987) ("allegations of essentially the same scheme perpetrated on unnamed parties may be alleged to support a claim of closed-ended continuity" where plaintiff and other victims were alleged to have been similarly deceived by defendant as part of "scheme to defraud payments for construction projects which [defendant] did not intend to perform.").

here to resolve these state law claims in this Court should the federal claim be dismissed. 48 F.3d at 166-67. And, even if this Court chose to exercise jurisdiction over such claims, the case, to say nothing of discovery, will be simplified if the nebulous RICO claims (and the problematic donor victim theory undergirding them) are dismissed or narrowed.[12]

The test for interlocutory certification is whether an immediate appeal will "materially advance the litigation," not whether it will completely resolve the entire case on the merits. *See* 28 U.S.C. § 1292; *see also United States v. Philip Morris*, *supra* (granting interlocutory certification on a particular remedy issue having no bearing on the overall RICO liability questions at issue). This test is satisfied here.[13]

FEI's claim that the First Amendment implications of allowing it to pursue its donor victim theory have no bearing on whether certification is appropriate is without merit. *See* FEI Opp'n at 11-16. FEI does not dispute that one of the relevant considerations is whether certification might avoid "protracted and expensive litigation." *Consumer Prod. Safety Comm'n v. Anaconda Co.*, 445 F. Supp. 498, 501 (D.D.C. 1977). FEI's insistence on extensive discovery regarding Defendants' donors (including their identities and communications with them) will subject third parties to harassment, legal expenses, and potential liability as co-defendants. This reality makes plain that allowing FEI to pursue its pattern theory, which rests on an especially weak foundation, particularly in light of the limitations the Court has placed on its contours,

[12] For the same reason, FEI's speculation that it might be able to pursue some of these state law claims in federal court based on diversity jurisdiction is of no moment. *See* FEI at 27 n. 23.

[13] FEI's assertion (FEI at 25 & n. 20) that it may still pursue a claim based on "open-ended" continuity, in light of purported fundraising improprieties committed by several of the organizations on unrelated matters gets it nowhere. The Court allowed this case to proceed based only on a "close-ended" theory which, as demonstrated, raises novel issues warranting early appellate review. Moreover, FEI's reference to totally unrelated matters (that are well beyond the bounds of the allegations in the Amended Complaint) – raised by an entity that apparently may together work with FEI to discredit animal protection organizations, FEI at 25 n. 20 – merely demonstrates how far FEI is willing to go to transform this case into a basis for harassing these animal protection organizations.

would, at a minimum, raise serious and protracted First Amendment disputes. This too counsels in favor of certification. *E.g.*, *APCC Servs. Inc. v. Sprint Communications Co.*, 297 F. Supp. 2d 90, 99-101 (D.D.C. 2003) (finding certification to the D.C. Circuit appropriate in a quintessential big case).

FEI's insistence that because it has alleged "fraud," all First Amendment concerns disappear is wrong. *See* FEI Opp'n at 12 (citing *Illinois ex rel. Madigan v. Telemarketing Assocs.*, 538 U.S. 600, 621 (2003)). That case involved an effort by a State Attorney General to conduct a fraud investigation to protect donors to charitable organizations, rather than the use of civil RICO by a private litigant. Defendants have already explained why *Madigan* establishes that Defendants here have legitimate First Amendment concerns with the retaliatory fishing expedition on which FEI seeks to embark. *See* Motion at 20 n.15.

Moreover, in an effort to bolster its "fraud" allegations and cloak itself in *Madigan*, FEI incorrectly asserts that the Amended Complaint includes plausible allegations that Defendants misrepresented how the funds would be used, because the invitation states that the funding raised would only be used to pay for the litigation. *See* FEI Opp'n at 12 (citing Amended Complaint ¶ 180). The actual invitation itself, which Defendants attached to their Motion, speaks for itself and contradicts FEI in this regard, seeking funds to "successfully wage this battle on behalf of the elephants"[14] and making no specific representations about how contributions would be allocated. *See* Motion Ex. A.

[14] While the Amended Complaint, which is quoted in FEI's brief, asserts that the invitation stated that the money was being raised solely for a "legal 'battle,'" FEI at 12, quoting Amended Complaint ¶ 180, the invitation itself does not include the word "legal" in discussing the effort to "successfully wage this battle on behalf of the elephants." Motion Ex. A. In any event, FEI's argument collapses on itself given that FEI contends that the funds provided for Mr. Rider's living and travel expenses were actually funds to maintain his participation in the lawsuit. Amended Complaint ¶ 180 ("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"). Therefore, even assuming, as FEI contends, that the fundraising sponsors represented that the funds

Although the Court need not resolve these First Amendment issues now, their undeniable gravity counsels in favor of certification. *See* Motion at 15-18 (citing RICO and First Amendment cases certified).[15] The notion that FEI can use this suit not only to identify the donors to nonprofit organizations, but then to subject these individuals to burdensome discovery – and the risk that they might themselves become RICO defendants if they refuse to be considered FEI's "co-victims" – raises grave concerns bearing on First Amendment rights of free association and speech concerns. *See, e.g.*, *Oregon Nat. Res. Council v. Mohla*, 944 F.2d 531, 533-34 (9th Cir. 1991) ("heightened pleading standard" applicable to complaints about otherwise protected First Amendment activity cannot be satisfied simply by recasting disputed issues as "misrepresentations").

One of the cases cited by FEI, *Greyhound Lines, Inc. v. International Amalgamated Transit Union*, 1992 U.S. Dist. LEXIS 10095 (D.D.C. Jul. 9, 1992), confirms this point. The court in *Greyhound Lines, Inc.* permitted donor discovery to go forward despite First

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would only be used for the litigation, and then used the funds for Mr. Rider's living and traveling expenses while he participated in the litigation, *Madigan* – in which organizations were accused of spending money on activities other than those for which funding was sought, *see* 538 U.S. at 606 – is not on point.

[15] FEI's efforts to distinguish these RICO and First Amendment certification cases are unpersuasive. *See, e.g.*, FEI at 28-29 n. 24. Without repeating Defendants' prior analysis in full, a few examples are illustrative. In *Gamboa v. Velez*, the Seventh Circuit, on certified appeal, dismissed a RICO claim on pattern grounds, explaining that "RICO demands more than a straightforward case of malicious prosecution," and emphasizing that for any RICO case to proceed there must be a "'threat of continued criminal activity.'" 457 F.3d 703, 709-10 (7th Cir. 2006). In *DeWit v. Firstar Corp.*, the Court explained that "ground for a difference of opinion as to the adequacy of the pleading of a pattern of racketeering," signified that "interlocutory appeal of the RICO determinations will materially advance the ultimate termination of this litigation." 904 F. Supp. 1476, 1527 (N.D. Iowa 1995). *See also Republic of Colom. v. Diageo N. Am., Inc.*, 619 F. Supp. 2d 7, 11 (E.D.N.Y. 2007) ("whether plaintiffs had adequately pled the proximate cause element of their RICO claim also presented close and difficult issues about which there is a substantial ground for difference of opinion").

FEI's effort to distinguish the First Amendment cases on the grounds that they involved the *Noerr-Pennington* doctrine, FEI at 29-30, is a *non sequitur*. The salient point is that an issue is ripe for certification if early resolution could avoid the expenditure of a "significant amount of the parties' resources," regardless of the underlying issue. *APCC Servs.*, 297 F. Supp. 2d at 99.

Amendment concerns only because the plaintiff in that case was able to show that information concerning the defendant's funding of violent strikers went "to the heart" of the plaintiff's RICO claim – *i.e.*, that the defendant had encouraged violent acts against Greyhound and replacement strikers.[16] Here, however, FEI seeks otherwise protected First Amendment information that does not go to "the heart" of its case – the ESA Action – but rather is necessary for FEI even to plead a viable case – *i.e.*, to allege the requisite RICO "pattern" that would help its case survive the D.C. Circuit's rulings in *Western Assocs.* and *Edmondson*. Defendants are aware of no case – and FEI cites none – that allows a plaintiff to overcome a legitimate First Amendment privilege by alleging that they need the information to plead a viable case at the outset. Such bootstrapping runs counter to the pleading requirements of *Iqbal* and *Twombly* and ignores their overarching rationale – that a plaintiff cannot rely on flimsy or speculative allegations as a foundation for burdensome discovery that would otherwise be foreclosed to them.

As the Court of Appeals has held, "[m]ere speculation that information might be useful will not suffice" to overcome a First Amendment privilege. *Black Panther Party v. Smith*, 661 F.2d 1243, 1268 (D.C. Cir. 1981). That is precisely the case here with respect to FEI's counterintuitive and unsupported assertion that, if allowed to conduct sweeping discovery into donor relationships and communications, FEI might find enough "co-victims" among the defendant organizations' own donors and supporters to resuscitate its RICO "pattern." Such donor information, which is the life-blood of nonprofit organizations, cannot be divulged without impinging on core associational rights of the organizations and the privacy rights of their

[16] FEI's argument that First Amendment protections do not extend to protect donors "already known to be associated" with the defendant organizations is disingenuous. *Greyhound* specifically holds that the disclosure of already known contributors to a specific cause would not result in the chilling effect on associational rights that the First Amendment is intended to protect. 1992 U.S. Dist. LEXIS, at *6 -*7. Known donors to an organization that *may or may not* be associated with the specific cause at issue in this suit – that is, the abuse of Asian elephants perpetrated by FEI – would not be similarly immune from such a chilling effect.

supporters. Indeed, FEI's insistence that it needs this invasive discovery to establish a novel RICO theory reinforces the propriety of early appellate review.

2. This Case Will Not Be Narrowed In Scope Based On Preclusion Principles.

FEI's contention that this case will not be complicated because "Defendants will be precluded" from litigating issues that were part of the ESA Action, FEI Opp'n at 30, is also unavailing. While it is not the appropriate time to resolve this issue, as matters relating to issue preclusion and collateral estoppel are not currently before the Court in any respect and need to be decided in context, Defendants note that FEI's argument is without merit for several reasons.

First, the Court never reached the merits of any issues in the ESA Action, a case the Court itself repeatedly characterized as concerning a "very narrow" issue under the ESA. *See, e.g., ASPCA v. Ringling Bros. And Barnum & Bailey*, 244 F.R.D. 49, 52 (D.D.C. 2007). Regardless, Defendants are entitled to defend themselves here by, among other ways, establishing their good faith basis for believing Mr. Rider's accounts of what he saw at the circus and how it affected him and their good faith basis for making the statements about the mistreatment of the elephants included in the 2005 fundraising invitation which is now essential to survival of FEI's RICO "pattern." Defendants must develop these defenses through related discovery.

Second, many of the Defendants in this massive RICO action were not even plaintiffs in the ESA suit, and for this reason cannot be precluded from litigating even issues that arguably were decided in the ESA litigation. *See also Whelan v. Abell*, 953 F.2d 663, 668 (D.C. Cir. 1992) (issue preclusion could not be invoked against entities who were not previously parties). FEI's contention that any of the Defendants will be precluded from pursuing a vigorous defense – including discovery – concerning any of the wide-ranging allegations made against them in

FEI's Complaint flies in the face of the very Supreme Court decision cited by FEI. In *Taylor v. Sturgell*, the Court rejected the broad, amorphous preclusion argument that FEI is asserting here, *see* 553 U.S. at 898, and in so doing, it emphasized in no uncertain terms the constitutional "due process limitations" that must undergird the lower courts' application of preclusion principles. *Id*. at 891.

Here, even those Defendants who were plaintiffs in the ESA case were certainly not put on notice that the Court's resolution of the "very narrow" issues involved in that case could possibly be used as the basis for foreclosing them from arguing that they did not commit the criminal misconduct alleged in FEI's RICO case. To the contrary, the Court explicitly dismissed and then stayed FEI's RICO case to ensure that defendants and their counsel would not be put in the position of having to rebut FEI's RICO allegations while they were attempting to prosecute the ESA actions. *See Feld Entertainment, Inc. v. ASPCA*, 523 F. Supp. 2d 1, 4 (D.D.C. 2007) ("The Court previously found that defending against this [RICO] claim while simultaneously prosecuting its ESA action would unduly prejudice [ASPCA]"); *see also ASPCA v. Ringling Bros. And Barnum & Bailey*, 244 F.R.D. 49, 52 (D.D.C. 2007) (denying FEI's motion to add the RICO claim as counterclaim in the ESA Action because the "[ESA] Plaintiffs would be required to devote substantial resources to defending against a RICO claim rather than bringing their 'taking' claim to trial").

Having been advised by the Court that they were not obligated to defend themselves in the ESA action against FEI's RICO allegations, it would be inconsistent with *Taylor* and a host of other constitutionally-based precedents for any of the Defendants to be foreclosed from vigorously disputing those same RICO allegations. *See Taylor*, 553 U.S. at 892 (preclusion principles can only apply where parties have had a "full and fair opportunity to litigate" the

precise issues before the court) (quoting *Montana v. United States*, 440 U.S. 147, 153-54 (1979)).[17]

Finally, individual defendants have separate and distinct arguments to make regarding the inapplicability of issue preclusion as to them, based on their particular circumstances. Those arguments are not made in this pleading. It is premature and inappropriate to decide these issues now. If and when FEI makes a motion regarding these issues, Defendants will respond to these issues fully and completely, in their proper context, and will make individualized arguments at that time.

II. THE D.C. CIRCUIT RULING IN THE ESA ACTION WARRANTS RECONSIDERATION OF THE CAUSATION RULING IN THIS CASE.

FEI does not dispute that for its RICO claim to proceed FEI must be able to point to "a direct connection between" the alleged misconduct and the asserted injury. *Greenpeace, Inc. v. Dow Chem. Co.*, 808 F. Supp. 2d 262, 270 (D.D.C. 2011) (dismissing RICO claim on causation grounds); *Hemi Grp., LLC*, 130 S. Ct. at 992; *Bridge v. Phoenix Bond & Indem. Co.* 553 U.S. 639, 654 (2008) ("The direct-relation requirement avoids the difficulties associated with attempting 'to ascertain the amount of a plaintiff's damages attributable to the violation, as distinct from other, independent, factors'") (quoting *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 269 (1992)). Thus, if the ESA Action could have proceeded to trial without Mr.

[17] There are also a plethora of other reasons why FEI cannot meet its burden to demonstrate that preclusion principles will somehow prevent Defendants from vigorously defending themselves against FEI's RICO claims. *See, e.g.*, *Taylor*, 553 U.S. at 907 ("'[A] party asserting preclusion must carry the burden of establishing all necessary elements.'") (quoting 18 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 4405). For example, aside from the fact that the "very narrow" issues that needed to be litigated in the ESA are very different from whether any of the defendants in this case conspired to commit felonies, the burden of proof in the ESA case was on the ESA plaintiffs, whereas the burden of proof in this case is on FEI. It is well-established that preclusion generally cannot be invoked in such circumstances. *See Whelan*, 953 F.2d at 668; *City of Port Arthur v. United States*, 517 F. Supp. 987, 1004-05 n. 119 (D.D.C. 1981); *Cobb v. Pozzi*, 363 F.3d 89, 113 (2d Cir. 2004) ("a shift or change in the burden of proof can render the issues in two different proceedings non-identical, and thereby make collateral estoppel inappropriate").

Rider's participation (and thus his participation was not necessary to FEI's expenditure of funds to defend the ESA Action through trial), then FEI cannot show that its purported injuries – *i.e.*, its legal fees – were caused by the predicate acts alleged in the Amended Complaint.[18]

FEI fails to confront Defendants' central argument that the D.C. Circuit's recent ruling makes it clear that the ESA Action could have gone to trial with or without Tom Rider, because API pled a sufficient injury-in-fact by alleging that it had to expend "additional resources on public education to rebut the misimpression, allegedly caused by Feld's practices, that the use of bullhooks and chains is permissible." *ASPCA v. Feld Entm't, Inc.*, 659 F.3d at 22.[19]

That the D.C. Circuit found that API failed to show "that Feld's use of bullhooks and chains fosters a public impression that these practices are harmless," *id.* at 27, is irrelevant to the causation issue raised in this case, because the D.C. Circuit made it clear that this was a failure of proof at trial, not a pleading failure, or some other defect that could have resulted in resolution at any earlier stage. *See id*. (holding only that "at this stage of the proceedings," API's argument that there is a "'logical inference' that Feld's use of bull hooks and chains creates a public impression that those practices are humane and lawful" is insufficient). The key point – which FEI ignores – is that the ESA plaintiffs' *Havens Realty* standing arguments would have sufficed to take this case through trial even without Mr. Rider.

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[18] This causation argument is in no way a "collateral attack" on the ESA ruling, *see* FEI at 38, as it does not turn on whether the ESA Action plaintiffs would have won their case but, rather, on whether FEI would have incurred its legal fees through the trial based on API's standing allegations. *See Anza v. Ideal Supply Corp.*, 547 U.S. 451, 458 (2000) (rejecting RICO claim where a court cannot readily "'ascertain the amount of a plaintiff's damages attributable to the [alleged RICO] violation, as distinct from other, independent, factors'") (internal quotation omitted).

[19] Each of the organizational plaintiffs initially made these same allegations. *See* Complaint and Supplemental Complaint in the ESA Action. The fact that the groups other than API did not pursue their claims through trial and instead relied on API's organizational standing – and thus avoided presenting overlapping evidence at trial – does not alter the fact that the case could have gone to trial irrespective of Mr. Rider.

This Court's final ruling in the ESA case, on which FEI relies, FEI Opp'n at 33, is thus not dispositive of the issue. *Id.* at 36. Under the D.C. Circuit's ruling, the organizational standing theory suffices as a matter of law, if admittedly not of fact. *See* 659 F.3d at 26-27. The ruling, which was issued long after the RICO motion to dismiss was argued, established that the organizations could have taken the case to trial with or without Mr. Rider and could have prevailed on standing had they demonstrated 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." 659 F.3d at 28 (citations omitted).[20] Accordingly, Defendants respectfully seek reconsideration on this central causation issue.[21]

[20] As FEI notes, the ESA Plaintiffs sought rehearing, presenting evidence that they made the requisite showing. FEI at 37. However, contrary to FEI's suggestion, the D.C. Circuit did not "reject" these arguments. *Id.* Rather, after requiring FEI to file a response, in which FEI argued that such evidence was adduced "too late" in a rehearing petition, *see* FEI Rehearing Response, Docket No. 1348895, No. 10-7007 (D.C. Cir.) (Dec. 21, 2011), the panel simply denied rehearing without opinion. Order (Jan. 11, 2012), Docket No. 1352053.

[21] FEI's assertion that reconsideration is not appropriate because Defendants identify "no harm" resulting from denying reconsideration, FEI Opp'n at 32; *id.* at 33, is specious. Should the Court agree that FEI insufficiently pleads its RICO pattern or causation, Defendants will be relieved of having to spend an enormous amount of time and resources defending themselves against Feld's massive RICO lawsuit, and Defendants' donors will be spared FEI's intrusive discovery.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court grant their motion for certification and/or reconsideration.

Date: September 28, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Defendants' Reply In Support of Motion For Certification, or in the Alternative, for Reconsideration was served via electronic filing this 28th day of September, 2012, to all counsel of record.

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