UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

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

Plaintiff-Counterclaim Defendant Feld Entertainment, Inc. ("FEI") has moved to dismiss or, in the alternative, stay the abuse of process counterclaim filed by Defendant-Counterclaim Plaintiff Meyer Glitzenstein & Crystal ("MGC"). FEI contends that MGC has failed to state a claim on which relief may be granted or, in the alternative, that the counterclaim should be stayed pending a final judgment in the massive RICO case that FEI has brought against MGC and ten other organizational and individual defendants. As discussed below, FEI is wrong on both counts – MGC's allegations are more than sufficient to support a counterclaim and, since the counterclaim stems from, and is inextricably intertwined with, the RICO case, the interests of judicial economy and efficiency would not be served by staying the counterclaim. Accordingly, FEI's motion should be denied and MGC should be permitted to pursue its counterclaim in tandem with defending itself against the RICO claim.

BACKGROUND

Although there is an extensive background to this dispute, MGC will simply highlight

those developments that bear most directly on the allegations in the counterclaim. As alleged in the counterclaim, FEI has known since 2002 at the latest that at least one of the organizational plaintiffs in the Endangered Species Act ("ESA") litigation brought against FEI was providing funding for ESA plaintiff Tom Rider's living and traveling expenses, *see* MGC Counterclaim at ¶ 2; *see also Am. Soc'y for the Prev. of Cruelty to Animals et al. v. Feld Entertainment, Inc.*, No. 03-2600 ("ESA Action"), Plaintiffs' Will Call Trial Exhibit 197, DE 475, Att. 16 (Mar. 17, 2009) (FEI's May 2002 internal e-mails stating that Mr. Rider had acknowledged in a public hearing and to a newspaper reporter that he was receiving funding from the ASPCA).[1]

However, FEI did not pursue any RICO or any other claim concerning such funding until February 2007, at which time FEI sought to amend its Answer in the ESA action to assert counterclaims and an unclean hands defense based on the funding. *See* ESA Action, DE 121. Although FEI's proposed counterclaim was replete with allegations that MGC had played a central role in the purported scheme on which the RICO claim is based, the proposed counterclaim was not asserted against MGC or any of the individual attorneys in the ESA Action. MGC Counterclaim at ¶ 2; *see also* ESA Action, DE 121-5 at ¶ 8 (FEI's proposed counterclaim alleging that MGC "facilitated" the funding of Mr. Rider on behalf of the ESA organizational plaintiffs); *see also id.* at ¶¶ 11, 15, 17, 18, 20, 27, 33, 39, 50, 57, 58, 74, 77, 80, 81, 82, 83, 84, 87, 91, 100, 118, 118-121, 122, 129, 135, 138, 139, 146, 150, 154-159, 165, 167, 168.

[1] As the Court held in its ruling on the motion to dismiss FEI's Amended Complaint, the Court may "take judicial notice of the record in the ESA Action in considering the motion to dismiss" the counterclaim. DE 90 at 3 n. 2 (citing, *e.g.*, *Covad Commc'ns Co. v. Bell Atlantic Corp.*, 407 F.3d 1220, 1222 (D.C. Cir. 2005). In addition, the Court may consider materials that are expressly incorporated into MGC's counterclaim. *See Nader v. DNC*, 567 F.3d 692 (D.C. Cir. 2009).

On August 23, 2007, the Court denied FEI's motion to file a RICO counterclaim in the ESA Action, explaining that FEI "has been aware that plaintiff Tom Rider has been receiving payments from the plaintiff organizations for more than two years," that FEI "was aware of the payments to Tom Rider that underlie its defense of unclean hands at least as early as 2005," and that "[s]uch delays provide strong evidence of a dilatory motive" in asserting the RICO claim. *Am. Soc'y for the Prev. of Cruelty to Animals v. Ringling Bros. and Barnum & Bailey Circus*, 244 F.R.D. 49, 52, 53 (D.D.C. 2007); *see also* DE 90, Motion to Dismiss Ruling ("MTD Ruling") at 11 (reaffirming that the Court had denied FEI's motion to "bring its claims underlying this lawsuit" in the ESA Action because the "claims were made with a dilatory motive – namely, to indefinitely delay and dramatically change the nature of the ESA Action.").

FEI filed this lawsuit (the "RICO Action") five days after the Court's ruling disallowing a RICO counterclaim. Once again, FEI alleged throughout its original Complaint, which was virtually identical to its proposed counterclaim, that MGC was centrally involved in the purported RICO scheme to bribe Mr. Rider "to testify falsely about his aesthetic and emotional injury" in the ESA Action. MTD Ruling at 16; s*ee*, *e.g.*, DE 1 at ¶ 8 (alleging that MGC "facilitated" the funding); *id.* at ¶ 11 (alleging that "payments have been funneled through MGC"); *id.* at ¶ 17 (alleging that MGC, along with the ESA plaintiffs, "devised a scheme to hide the fact that Rider was on their payroll"); *id.* at ¶ 33 (alleging that "Rider has received steady and continuous funding by and/or through" the organizational plaintiffs "and MGC"); *see also id.* at ¶¶ 15, 18, 27, 39, 50, 57, 58, 74, 77, 80, 81, 82, 83, 84, 87, 91, 100, 118, 118-121, 122, 129, 135, 138, 139, 146, 150, 154-159, 165, 167, 168. FEI also specifically alleged that the purported "payment scheme" involving MGC "became known to FEI in June 2004 when one or more of the

[ESA plaintiffs] submitted their discovery responses in the ESA Action." *Id.* at ¶ 20. Nonetheless, FEI's original Complaint did not name MGC or any of the individual attorneys as defendants.[2]

On November 7, 2007, the Court stayed this case pending completion of the ESA Action, explaining that the Court had previously "rejected FEI's RICO counterclaim because it found the claim was made with a dilatory motive," and had been "filed for the improper purpose of interfering with and delaying the resolution of the ESA Action." DE 23 at 5. The Court further held that "FEI has waited a significant amount of time before bringing this claim" and that "[t]his Court has already held that the delay was improperly motivated and intended to prolong the ESA action." *Id.* at 6-7.

When FEI amended its RICO complaint in March 2010, following the resolution of the ESA Action, it added MGC, along with five of the individual attorneys who were involved in the case, as defendants for the first time. However, evidently aware of the statute of limitations and related issues this action would raise, FEI *deleted* the statement from its original Complaint that it had known about MGC's participation in the purported scheme since at least 2004. *See* MGC Counterclaim at ¶ 6. In their subsequent motion to dismiss, MGC and the individual defendants argued that FEI's decision to add them to the case in 2010 was barred by RICO's four-year statute of limitations. *See* MTD Ruling at 23 ("Civil RICO actions face a four year statute of limitations, which begins to run from the date of discovery of the injury.").

In its MTD Ruling, the Court stated that it "is troubled by the statute of limitations

[2] Instead, FEI confined its original Complaint to the plaintiffs in the ESA action and the Wildlife Advocacy Project ("WAP"), a non-profit organization that FEI alleged (erroneously) is the "alter ego" of MGC. DE 1 at ¶ 27.

arguments with respect to the new defendants," particularly because "defendants point to not-insignificant information at FEI's disposal before February 16, 2006 that, defendants may be able to show, *may well have triggered the statute of limitations for RICO against the new defendants*." MTD Ruling at 29 (emphasis added). However, the Court held that because FEI's *Amended Complaint* "does not clearly" establish that the RICO claim against MGC and the other defendants added in 2010 violates RICO's statute of limitations, and "given the stringent standards defendants must meet to warrant dismissal on statute of limitations grounds on a 12(b)(6) motion, FEI's RICO claim will not be dismissed as time barred at this stage of the litigation." *Id.*[3]

[3] While this is not the appropriate time or juncture for the Court to resolve the statute of limitations issue, the Court had good reason to be "troubled" by the addition of MGC and the individual attorneys in 2010. Indeed, FEI's latest explanation for why it waited for RICO's four-year statute of limitations to run before asserting claims against them – *i.e.*, that it lacked "sufficient information" to do so, FEI Mem. at 10 n. 1 – is disingenuous in light of FEI's counterclaim and original complaint, which are rife with allegations that MGC was involved in every aspect of the purported conspiracy to bribe Mr. Rider. FEI's explanation is also belied by FEI's Amended Complaint, which asserts (in conflict with the original complaint) that "FEI did not begin to uncover the payment scheme described herein *until the Rule 30(b)(6) deposition of ASPCA, taken on July 19, 2005*," DE 25 at ¶ 32 (emphasis added) – still more than four years *before* MGC and the individual attorneys were added. That Rule 30(b)(6) deposition *specifically* addressed MGC's role in the funding of Mr. Rider's living and traveling expenses (along with many other aspects of the funding). *See* DE 73-1 (excerpts of the deposition of Lisa Weisberg).

Consequently, as MGC will establish at the appropriate juncture, FEI's explanation for why it could not level its allegations against the firm and the individual attorneys within RICO's four-year statute of limitations is groundless. *See, e.g.*, *Nader*, 567 F.3d at 702 (so long as a plaintiff has "some evidence" to support its allegations against purported participants in a conspiracy, the statute of limitations begins to run). At this stage, it is sufficient that the allegations in the counterclaim – particularly that FEI added MGC in 2010 for an improper collateral purpose notwithstanding the "statute of limitations barrier to subjecting them to a RICO claim many years after FEI itself conceded that it knew about the activities that purportedly comprise the 'scheme' at the core of its RICO claim," MGC Counterclaim at ¶ 6 – is certainly "plausible" on the record now before the Court. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950 (2009).

In its abuse of process counterclaim, MGC – a small public-interest law firm that represented the plaintiffs in the ESA Action and routinely represents non-profit organizations in animal protection and environmental litigation – alleges, among other matters, that:

> – the addition of MGC and the individual attorneys to the claim in 2010 was intended primarily, if not solely, to accomplish objectives not regularly or legally obtainable as relief through the litigation itself, including by impairing MGC's ability to represent animal protection organizations in future litigation and advocacy, including but not limited to litigation and other advocacy pertaining to FEI's treatment of the Asian elephants and other animals;
>
> – FEI seeks to employ the litigation in order to impair the relationship between MGC and its animal protection clients; to compel MGC to expend massive time and resources defending itself against baseless claims that, in any event, FEI knows, or should know, are barred by the statute of limitations; and, ultimately, to cause MGC to expend so much time and resources defending the litigation that it must curtail or close its public-interest legal practice. These collateral objectives are not within the ordinary purview of relief that FEI may pursue through litigation;
>
> – FEI's ultimate objective in adding MGC and the individual attorneys to the RICO claim in 2010 was to prevent and deter further advocacy, including, but not limited to, litigation, directed at FEI's practices involving Asian elephants and other animals and, ultimately, to curtail or shut down its law practice so that it could never again pursue advocacy concerning FEI or issues about which FEI is concerned ....

MGC Counterclaim at ¶¶ 7, 8, 9.

The counterclaim additionally alleges that FEI has a long track record of taking "extraordinary and extreme measures . . . in an effort to monitor, harass, intimidate, and divert and drain the resources of its perceived adversaries and critics," MGC Counterclaim at ¶¶ 10-12 (describing past efforts to spy on, infiltrate, and deter animal protection organizations and others) so that "bringing a RICO action against MGC for the primary purpose of draining MGC's time and resources and impairing MGC from engaging in any advocacy or litigation that might affect FEI is entirely consistent with FEI's past practices to use any means necessary to stifle criticism,

deter advocacy directed at FEI's treatment of its Asian elephants and other animals, and retaliate against those who criticize FEI's practices." *Id.* at ¶ 12.

The counterclaim further alleges that FEI's "use of litigation for the improper purpose of stifling criticism and preventing advocacy directed at its treatment of animals is also entirely consistent with testimony provided by FEI's own officials and documents," including a sworn affidavit by a former head of covert operations for the CIA, who testified that he was hired by FEI to engage in "surveillance of and efforts to counter the activities of various animal rights groups," and a "Long Term Action Plan" produced in discovery in the ESA Action, which "proposed an extensive operation to 'expose and discredit animal activist entities' through myriad means," including "specifically, attacking animal protection advocates with 'lawsuits,' the purpose of which would be to force them to 'spend more of their resources in defending their actions' so that little or not time or resources could be devoted to advocacy that might affect FEI or its use of elephants and other animals." *Id.* ¶¶ 14-16. Accordingly, as alleged by the counterclaim:

> [c]onsistent with FEI's own proposed Long Term Action Plan, FEI brought time-barred RICO claims against MGC and the individual attorneys in 2010 for the primary purpose of compelling them to expend time and resources defending themselves, and to deter and prevent them from pursuing any litigation or other advocacy that might bear on FEI or its treatment of animals. These are purposes that are distinct from and collateral to the ordinary purpose for which litigation may be pursued, and hence the RICO claim against MGC and the individual attorneys constitutes an abuse of process.

Id. ¶ 17.

As relief, MGC requests "compensatory damages limited to compensation for the time and resources it must expend in defending against this action, in an amount to be determined at trial," as well as punitive damages. MGC Answer at 76.

ARGUMENT

I. MGC'S COUNTERCLAIM SHOULD NOT BE DISMISSED FOR FAILURE TO STATE A CLAIM.

A counterclaim, like a Complaint, "must contain 'a short and plain statement of the claim showing that the pleader is entitled to relief, in order to give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" MTD Ruling at 13 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). When ruling on a motion to dismiss, the Court "must accept as true all of the factual allegations" on which the counterclaim is predicated, *Atherton v. D.C. Office of the Mayor*, 567 F.3d 672, 681 (D.C. Cir. 2009) (internal quotation omitted), and "grant the [counterclaim] plaintiff 'the benefit of all inferences that can be derived from the facts alleged.'" MTD Ruling at 13 (quoting *Kowal v. MCI Cmmc'ns Corp.*, 16 F.3d 1271, 1276 (D.C. Cir. 1994). So long as a claim pleads sufficient facts to "state[] a plausible claim for relief [it] survives a motion to dismiss." *Iqbal*, 129 S. Ct. at 1949.

A. MGC Has Sufficiently Pled An Abuse Of Process Counterclaim, And FEI's Contrary Arguments Are Groundless.

Here, MGC has pled sufficient facts to support far more than merely a "plausible" abuse of process claim. As the D.C. Circuit recently observed, the "exact elements" of an abuse of process claim under District of Columbia jurisprudence are "far from clear," but the District of Columbia Court of Appeals has instructed that "abuse of process 'lies where the legal system has been used to accomplish some end which is without the regular purview of the process, or which compels the party against whom it is used to do some collateral thing which he could not legally and regularly be required to do.'" *Nader*, 567 F.3d at 698 (quoting *Bown v. Hamilton*, 601 A.2d 1074, 1079 (D.C. 1992)). The "District of Columbia Court of Appeals has yet to provide precise

guidance on the question of how 'collateral' the 'thing [that] could not legally and regularly be required' must be to support an abuse of process claim, which represents the essential question in determining the boundary between everyday litigation and tortious abuse of court procedures." *Nader,* 567 F.3d at 698 (*quoting Bown*, 601 A.2d at 1079). However, MGC's allegations here – that FEI added MGC to a long-pending RICO Complaint for the purpose of compelling the firm to expend time and resources defending itself against time-barred claims and to preclude MGC from pursuing other animal protection litigation that might affect FEI – certainly sufficiently alleges an effort by FEI to employ the "legal system" to "accomplish some end which is without the regular purview of the process." *Id.*

Thus, as explained in the Restatement of Torts, the "'usual case of abuse of process is one of some form of extortion, using the process to put pressure upon the other compel him to pay a different debt or to take some other action *or refrain* from it.'" *Scott v. District of Columbia*, 101 F.3d 748, 755-56 (D.C. Cir. 1997) (emphasis added; quoting Restatement (Second) of Torts (1977) at § 682 Comment b)). Adding time-barred defendants to a RICO case for the purpose of compelling them to refrain from pursuing litigation or other advocacy that might enhance protections for elephants and other animals, particularly those in FEI's possession, is precisely the "type of extortionate activity that the *Restatement* and the case law describe." *Scott*, 101 F.3d at 756; *see also* Prosser and Keeton on Torts, 5th Ed., § 121 ("The improper purpose usually takes the form of coercion to obtain a collateral advantage, not properly involved in the proceeding itself . . . by the use of the process as a threat or a club."); *General Refractories Co. v. Fireman's Fund Insurance Co.*, 337 F.3d 297, 306 n. 4 (3d Cir. 2003) (explaining that "'[e]xtortion,' defined as 'obtaining from by coercive means, by threats or

intimidation,'" may encompass litigation tactics seeking to compel a party to "abandon" claims that it could otherwise pursue).

Nonetheless, FEI maintains that MGC cannot prevail on its abuse of process claim under these circumstances because "MGC's ***only*** relevant allegations involve FEI's alleged improper ***motives*** in initiating the RICO case against it and the individual attorneys," but that "motives alone are not enough; there must be a ***use*** of the process to accomplish an end not normally associated with the process." FEI Mem. at 8 (emphasis in original). According to FEI, the "counterclaim fails to plead any such use of the process and therefore fails to state a claim as a matter of law." *Id.*; *see also Houlahan v. World Wide Ass'n of Specialty Programs & Sch.*, 677 F. Supp. 2d 195, 199 (D.D.C. 2010) (explaining that an abuse of process claim requires the "existence of an ulterior motive" and an "*an act* in the use of the process other than such as would be proper in the regular persecution of the charge").[4]

But FEI never coherently explains why the action of *adding* plainly time-barred defendants to a long-pending Complaint for the impermissible purposes of forcing those parties to expend resources defending themselves against the time-barred claims, attempting to impair their relationship with their clients, and preventing them from engaging in a public interest law practice aimed at ameliorating the abuse and mistreatment of animals – as the counterclaim alleges here – is not easily sufficient to qualify as a "***use*** of the process to accomplish an end not

[4] FEI evidently concedes that MGC has adequately alleged an improper ulterior motive, one of the elements for an abuse of process claim; FEI could hardly do otherwise given the Court's express findings that the RICO Action was initially filed with a dilatory and improper purpose, *see supra* at 2-3, and in light of MGC's specific allegations that adding it and the individual attorneys to the case simply continues an established pattern by FEI of using extreme, draconian measures to punish and deter criticism and advocacy directed at its treatment of elephants and other animals.

normally associated with the process." FEI Mem. at 8 (emphasis in original). Indeed, FEI cites no D.C. Court of Appeals ruling or other controlling precedent that holds that the time-barred expansion of preexisting litigation to encompass new defendants under such circumstances cannot qualify as the "'improper use'" of litigation *after* a lawsuit has been commenced. *Id.* at 9 (quoting *Morowitz v. Marv el*, 423 A.2d 196, 198 (D.C. 1980)).

To the contrary, the very excerpts cited and quoted by FEI clearly encompass MGC's allegations here. Using the Court's "process"[5] to add time-barred defendants to a long-pending RICO case plainly constitutes an act undertaken "'***after the initiation of litigation.***'" FEI Mem. at 10 (emphasis in original; quoting *Nader* v. *Democratic National Committee,* 555 F. Supp. 2d 137, 160-61 (D.D.C. 2008), *aff'd on other grounds*, 567 F.3d 692 (D.C. Cir. 2009)). Such an act, undertaken for the purpose of draining the resources of the newly added defendants and destroying their ability to practice law – including litigation that might affect FEI's treatment of elephants and other animals – is, on its face, the quintessential "***act in the use of process*** other

[5] The "word 'process' in the context of abuse of process means causing papers to be issued by a court to bring a party or property within its jurisdiction." *Vittands v. Sudduth*, 730 N.E. 2d 325, 406 (Mass. App. Ct. 2000); *see also Rosen v. American Bank of Rolla*, 627 A.2d 190, 192 (Pa. Super. Ct. 1993) ("The word process as used in the tort of abuse of process . . . encompasses the entire range of procedures incident to the litigation process."); *Crackel v. Allstate Insurance Co.*, 92 P.3d 882, 888 (Ariz. Ct. App. 2005) ("an abuse-of-process claim may be based on the full range of court procedures provided by the civil litigation process"); *Cochrane v. Iowa Beef Processors, Inc.*, 803 F. Supp. 2d 1287, 1332 (D. N. Mex. 2011) ("[M]isuse of proposed pleadings . . . may constitute procedural irregularities" sufficient to support an abuse of process claim.). FEI does not dispute that "process" has been employed within the meaning of the tort, but argues that because MGC's counsel accepted service of process, this somehow "waived" the right to assert a counterclaim for abuse of process. FEI Mem. at 10-11. Not surprisingly, FEI cites no precedent to support that novel notion, which also makes no sense since a party need not *evade* the court's jurisdiction in order to maintain that the process whereby it became subject to the court's jurisdiction was abusive. *See* Restatement (Second) of Torts § 682 ("The gravamen of the misconduct is the misuse of process, no matter how properly obtained, for any purpose other than that which it was designed to accomplish.").

than such as would be proper in the regular prosecution of the charge," FEI Mem. at 10 (emphasis in original; citing *Houlahan*, 677 F. Supp. 2d at 201), and constitutes the "'perversion towards a collateral end'" that FEI acknowledges may undergird an abuse of process claim. FEI Mem. at 10 (emphasis in original; quoting *Nader,* 555 F. Supp. 2d at 160-61).[6]

In any event, even at this purportedly "early stage," MGC has not only already been compelled to spend many hundreds of hours responding to FEI's time-barred claims, but FEI has already made clear its intention to use those claims to pursue massive, highly invasive discovery requests against the firm and the individual attorneys, seeking, among other items, all documents concerning the firm's "[o]rganization, ownership, structure, and formation," as well as the attorneys' individual tax returns. *See* Plaintiff's Discovery Plan (DE 62). In addition, FEI has already served far-reaching discovery requests on the firm and individual attorneys, which

---

[6] Accordingly, since the addition of the time-barred defendants is an "act in the use" of process beyond the "***mere initiation***" of the RICO litigation, FEI Mem. at 10 (emphasis in original), the entire premise underlying FEI's motion is erroneous. Moreover, FEI's assertion that the RICO litigation "is at an early stage"and hence that MGC cannot have already suffered a cognizable injury from having time-barred RICO claims asserted against it, *id.*, has no legal or logical support. *See also* FEI Mem. at 12 (asserting that FEI has not "actually ***achieved*** anything" yet because MGC has not yet had to "shut down its public interest practice") (emphasis in original). As the D.C. Circuit has observed – in explaining when the statute of limitations begins to run on an abuse of process claim – "every victim of a baseless suit *immediately* knows their injury and its cause in fact." *Nader*, 567 F.3d at 172 (emphasis added). Indeed, FEI's addition of MGC to the RICO case in February 2010 has compelled the firm to spend enormous amounts of time and resources on its defense, including many months spent on mediation, engaging in initial discovery, formulating discovery plans, briefing the motion to dismiss, answering FEI's sprawling complaint, and other tasks. Further, FEI's acknowledgment that many courts have held that abuse of process claims are *compulsory* counterclaims, *see* FEI Mem. at 21 & n. 7 (collecting cases) – meaning that they *must* be asserted in an initial pleading under Fed. R. Civ. P. 13(a)(1) – contradicts any notion that such claims cannot become manifest before the underlying litigation is at an advanced stage and/or until the allegedly abusive litigant has actually accomplished its ultimate abusive purpose (*e.g.*, succeeding in shutting down MGC).

highlights FEI's intention to use the allegedly time-barred claims to improperly delve into MGC's litigation strategies and relationships with clients, in a transparent effort to deter and distract MGC's ability to pursue any litigation or other advocacy that might bear on FEI's use of elephants. *See, e.g.,* Doc. 105-1 at 17 & Exh. C (describing document production requests served on defendants for, among other items, all documents relating to the "presentation of elephants in circuses"). Accordingly, any notion that it is too "early" for MGC to allege that FEI's addition of time-barred defendants was an abuse of process, or that MGC must wait for FEI's tactics to become even more abusive before seeking to add a counterclaim, is meritless.

Hall v. Hollywood Credit Clothing Co., 147 A.2d 866 (D.C. 1959), which FEI cites, FEI Mem. at 8, 9, involved analogous allegations, which the D.C. Court of Appeals deemed sufficient to support an abuse of process claim. In that case, the complaint alleged that the defendant had brought litigation in the first instance "on an unfounded claim that resulted in a subsequently vacated judgment, which by itself is not an abuse of process." 147 A.2d at 868. However, the court further held that the issuance of a "*second* attachment upon a judgment at a time when there was no judgment outstanding was an abuse of process, because appellee thereby *forced appellant to do something which it could not otherwise legally and regularly compel her to do*, that is, relinquish her salary under circumstances and *at a time when appellee had no right to it*," and that "[f]urther, the existence of an ulterior motive may be inferred from this action which appellee is alleged to have done with full knowledge of the situation." *Id.* (emphasis added). Consequently, the court held that the party asserting abuse of process "should have been given an opportunity to introduce proof in support of her allegations." *Id.*

Likewise, here, MGC alleges that FEI abused process to improperly *expand* previously-

filed litigation so as to encompass time-barred defendants "under circumstances and at a time when [FEI] had no right" to do so, and, indeed, with "full knowledge" of the statute of limitations barrier to its employing process in that manner. Under the reasoning in *Hall*, this is adequate to allege "an *act* in the use of process" sufficient to support an "opportunity to introduce proof in support of [MGC's] allegations." *Id.* at 868-69 (emphasis in original); *see also Richardson*, 787 P.2d at 422 (litigation actions "designed to intimidate" a party into settling on unfavorable terms constituted an abuse of process); *Three Lakes Ass'n v. Whiting*, 255 N.W. 2d 686 (Mich. Ct. App. 1977) (an effort to use the court's process to end opposition to a development project constituted an "abuse of process").

B. Contrary To FEI's Contention, Adding Time-Barred Defendants To A Pending RICO Case For The Purpose Of Bankrupting Them And Destroying Their Public Interest Law Practice, As MGC Alleges Here, Is Not A "Natural Consequence" Of Litigation.

FEI's further contention that compelling MGC to "spend[] time and resources defending itself" and "deterring further advocacy" against FEI are the "'natural consequences of a lawsuit,'" FEI Mem. at 14 (quoting *Nader*, 555 F. Supp. 2d at 161), is likewise misplaced. It may be correct that expending resources to defend oneself is the unavoidable consequence of being a defendant in any litigation, *id.*, but that is hardly tantamount to the conduct alleged here: adding time-barred parties to pending litigation for the purpose of bankrupting resources, deterring public advocacy that might affect FEI, and destroying a public-interest law practice.[7] There is nothing "natural" about that use of process; rather, it falls squarely within the "gist of the tort of

[7] Remarkably, FEI appears to acknowledge that it may have added MGC as a defendant for the purpose of "deterring" advocacy directed at its treatment of elephants. *See* FEI Mem. at 14 ("bringing a claim for the purpose of deterring an adversary does not create an abuse of process claim").

abuse of process," which "is the misuse or misapplication of legal process to accomplish an end *other than that which the process was designed to accomplish.*" *Volk v. Wisconsin Mortgage Assurance Co.*, 474 N.W. 2d 40, 43 (N.D. 1991) (emphasis added).

Accordingly, adding time-barred defendants in an effort to "harass and [] cause them financial . . . injury," and to effectively drive them out of the business of animal protection and other litigation and advocacy, is "illegitimate in the context of any civil proceeding," and, if true – as the Court must assume – is sufficient to support an abuse of process claim. *Shiner v. Moriarty*, 706 A.2d 1228, 1236 (Pa. Sup. Ct. 1998); *see also Scott*, 101 F.3d at 756 (explaining that in *Neumann v. Vidal*, 710 F.2d 856 (D.C. Cir. 1983), the plaintiff had adequately alleged a "collateral purpose to the litigation" sufficient to support an abuse of process claim: the alleged impermissible "goal of the employer's lawsuit was to stifle competition by dissuading third parties from investing in the plaintiff's business venture"); *Int'l Motor Contest Ass'n, Inc. v. Staley*, 434 F. Supp. 2d 650, 677 (N.D. Iowa 2006) (allegations that an action was being "used as a form of extortion to put pressure on [the defendants] to compel them to cease pursuing their legitimate business" was sufficient to support an abuse of process claim). On the other hand, "[w]ere [the court] to accept [FEI's] view" that an abuse of process claim is unavailable in such circumstances, it "would render the tort largely impotent, inapplicable to those cases where a legal process is pursued in a perverted manner in order to directly harm an adversary." *General Refractories Co.*, 337 F.3d at 306.[8]

[8] Indeed, the D.C. Code of Professional Responsibility specifically prohibits an attorney from exacting, as part of a settlement, an agreement restricting an attorney's ability to practice law in the future. *See* D.C. Rule of Prof. Resp. 5.6; *id.* at Comment 1 (explaining that this rule is designed to protect attorneys' "professional autonomy" as well as the "freedom of clients to choose a lawyer"). Yet that is precisely what MGC's counterclaim alleges that FEI is attempting

FEI also erroneously contends that MGC may not support an abuse of process claim by making allegations about FEI's past practices and declared policy specifically to use litigation to deter advocacy and stifle criticism. FEI Mem. at 17. Although the allegations in the counterclaim are sufficient to support an abuse of process claim even without reference to FEI's long history of using such tactics to suppress criticism and advocacy, when a corporation's own documents *announce* its intention to deploy litigation to drain the resources of its adversaries and punish them for speaking out against the corporation – as MGC alleges is the case here, *e.g.*, in FEI's "Long Term Action Plan," MGC Counterclaim at ¶¶ 16-17 – this certainly underscores the plausibility of allegations that time-barred RICO claims are being used "to accomplish an end not regularly or legally obtainable." FEI Mem. at 10 (citing *Morowitz*, 423 A.2d at 198); *see also Crackel*, 92 P.2d at 890-91 (in allowing an abuse of process claim to proceed, the court relied heavily on insurance company's written policies that appeared designed to harass and intimidate claimants into surrendering legitimate claims; "*[a]lthough Allstate was entitled to present information to the jury explaining why those policies might have been misunderstood or taken out of context, these policies at minimum created a factual question whether Allstate had intended to use court processes to achieve corporate goals inconsistent with the proper purpose of those court processes*") (emphasis added).[9]

---

to accomplish here by adding the firm to the RICO case after the statute of limitations expired. *See, e.g., Shiner*, 706 A.2d at 1236 (invoking Rules of Professional Conduct in ascertaining what constitutes legitimate litigation objectives). In contrast, in cases such as *Kopff v. World Research Group, LLC*, 519 F. Supp. 2d 97 (D.D.C. 2007), on which FEI relies, there was "no allegation that plaintiffs sought a 'collateral thing which [defendants] could not legally and regularly be compelled to do.'" *Id.* at 100 (internal quotation omitted).

[9] FEI's assertion that these "'past practices' were already ventilated during the ESA case," FEI Mem. at 17, has no legal or logical relationship to whether they support the plausibility of

C. If The Court Believes That The Counterclaim Is Deficient, The Court Should Afford MGC An Opportunity To Amend The Counterclaim Instead Of Dismissing It.

Although MGC believes that the existing allegations are easily sufficient to support its abuse of process claim, should the Court conclude otherwise, MGC requests the opportunity to amend the counterclaim in lieu of dismissal. Fed. R. Civ. P. 15(a) provides that leave to amend a pleading "shall be freely given when justice so requires." *See also General Refractories*, 337 F.3d at 309-310 (applying Rule 15(a) to an abuse of process claim). While, as explained above, the expansion of a RICO case to encompass new, time-barred defendants for improper purposes plainly qualifies as a discrete act for purposes of an abuse of process claim, *see also Givens v. McElwaney*, 75 S.W. 3d 383, 403 (Tenn. 2002) ("[o]nce a suit has been filed *and other processes have been unjustifiably issued*, a plaintiff is not then also required to show some further misuse of that process to state a claim for relief.") (emphasis added), FEI has taken additional abusive steps.

For example, as noted, FEI has already made clear its intention to pursue highly burdensome, costly, and invasive discovery against the law firm and its partners that is designed to ferret out the firm's legal strategies and otherwise destroy its relationships with current and

---

MGC's counterclaim here. As the Court has explained, the ESA Action involved the "very narrow" issue of whether FEI was "taking" Asian elephants in violation of the ESA. *Am. Soc'y for the Prev. of Cruelty to Animals v. Ringling Bros. and Barnum & Bailey Circus*, 244 F.R.D. 49, 52 (D.D.C. 2007). Accordingly, although the ESA plaintiffs referred to some of these practices in their (successful) opposition to FEI's effort to litigate the RICO claim as part of the ESA Action, the Court never addressed the implications of the Long Term Action Plan or the other developments alleged in the Counterclaim. However, the Court *did* expressly find – twice – that the RICO case (which had not yet been asserted against MGC) was brought for "improper" and "dilatory" reasons. *Id.*; *see also* DE 23 at 5. If anything, that supports the plausibility of MGC's counterclaim that it was added to the RICO case for improper reasons.

prospective clients. *See supra* at 12-13; *see also Am. Soc'y for the Prev. of Cruelty to Animals*, 244 F.R.D. at 52 ("Through its numerous discovery-related motions [in the ESA case, FEI] has shown that its efforts to obtain information to . . . learn every detail of the media and litigation strategies of its opponents are relentless."); *cf.* MTD Ruling at 77 (FEI's allegation that discovery in the ESA case was pursued to "achieve an end not contemplated in the regular persecution of the charge" supported FEI's abuse of process claim).

In addition, FEI has already issued several press releases, still readily available on the company's web-site, highlighting the scurrilous allegations in its complaint that MGC has committed "racketeering violations." *See* http://www.ringlingbrostrialinfo.com/ (7/9/12 press release); *id.* (10/28/11 press release with quote from FEI's lead counsel describing the "company's pending federal suit" against the "animal special interest groups and their lawyers" for "racketeering . . . and other illegal acts"). This is conduct that FEI *itself* appears to concede supports an abuse of process claim. *See* FEI Mem. at 11 (*citing Abbott v. United Venture Capital, Inc.* 718 F. Supp. 828 (D. Nev. 1989) as an example of a "successful abuse of process claim" because, in that case, the defendants took various steps to use their complaint to destroy an individual's reputation, including by "sen[ding] a copy of their complaint to the newspaper" and "mail[ing] intimidating newspaper clippings"). Consequently, should the Court conclude, for whatever reason, that the existing allegations in the Counterclaim are inadequate, the Court should allow MGC an opportunity to amend. *See also Foman v. Davis*, 371 U.S. 178, 182 (1962); *Davis v. Liberty Mutual Ins. Co.*, 871 F.2d 1134, 1136 (D.C. Cir. 1989) ("Rule 15 embodies a generally favorable policy towards amendments.").

II. THE COUNTERCLAIM SHOULD NOT BE STAYED.

FEI's alternative request that the counterclaim be stayed while the RICO case proceeds should also be denied. Contrary to FEI's contention, the "same arguments that supported staying the RICO case in 2007" do not counsel in favor of a stay here. FEI Mem. at 19. On the contrary, the Court's reasons for granting a stay of the RICO case at that time support denial of a stay here. In granting a stay in 2007, the Court stressed that FEI had "already long delayed is day in court" on the RICO claim because "FEI has waited a significant amount of time before bringing this claim" after learning about the conduct that purportedly supported the claim. DE 23 at 6. Further, the Court had "already held that the delay was improperly motivated and intended to prolong the ESA action." *Id.* at 6-7. By the same token, the Court found that, especially in view of FEI's "improperly motivated" delay in bringing the RICO claim "so late in the ESA litigation," it would be "highly prejudicial" to the ESA plaintiffs to force them and their attorneys to defend against a newly added RICO claim at the same time that they were seeking to bring their "very narrow" ESA claim to trial. *Id. at 5.*

These same factors counsel *against* staying the counterclaim here. Far from being brought too late in the process, FEI contends (incorrectly) that it has been brought too soon. Accordingly, the Court has no basis at this stage for concluding that the counterclaim has been brought for the purpose of delay or that its pursuit would, in fact, "unduly delay resolution of the RICO case," as FEI asserts. FEI Mem. at 21. Rather, as FEI concedes, many courts view abuse of process claims as compulsory counterclaims that *should* generally be pursued in tandem with the main case, *see* FEI Mem. at 21 & n. 7, precisely because the issues raised by the main case and the counterclaim are often inextricably intertwined. *See, e.g.*, *Carteret Savings and Loan*

Ass'n, F.A. v. Jackson, 812 F.2d 36, 38-39 (1st Cir. 1987) (finding that an abuse of process claim should have been brought as a compulsory counterclaim so that it could be addressed most efficiently in a "single litigation"); *Podhorn v. Paragon Group*, 795 F.2d 658, 661 (8th Cir. 1986) (same); *Great Lakes Rubber Corp. v. Herbert Cooper Co., Inc.*, 286 F.2d 631, 634 (3d Cir. 1961) (an abuse of process claim based on assertion that the main claim was brought for harassment purposes is a compulsory counterclaim that should be tried along with the main claim).

That reasoning governs here, where a central issue underlying the counterclaim – whether FEI added MGC to the RICO case for improper purposes long after the statute of limitations had expired – will also be a central issue in the RICO case, especially in view of the Court's analysis in its motion to dismiss ruling. Thus, far from being "entirely different," there is a clear overlap in the "evidence supporting the two claims." *Id.* at 22. Accordingly, in the present context, the Court's own interest in managing its "docket with economy of time and effort for itself, for counsel, and for litigants," *Landis v. North American Co.*, 299 U.S. 248, 254 (1936), supports allowing the counterclaim – which stems directly from FEI's case and that MGC has asserted at the very first opportunity it could do so – to be litigated along with FEI's case.[10]

[10] In arguing that MGC's counterclaim "cannot be compulsory" and should not be pursued until after the RICO case is resolved, FEI Mem. at 22, FEI improperly blurs the line between a *malicious prosecution* claim – which cannot be brought until an underlying case has been resolved – and an abuse of process claim, which may be pursued as soon as "abusive process" has issued and need *not* await a final resolution of the underlying case. *Nader*, 567 F.3d at 171. Consequently, FEI's suggestion that an abuse of process claim cannot be brought until the underlying litigation has concluded and all "damages" can then be "determined," FEI Mem. at 22, is legally baseless.

CONCLUSION

For the foregoing reasons, FEI's motion to dismiss or in the alterative stay the counterclaim should be denied.[11]

Respectfully submitted,

/s/ Laura N. Steel
Laura N. Steel (D.C. Bar 367174)
Kathleen H. Warin (D.C. Bar 492519)
WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP
700 11th Street, N.W., Suite 400
Washington, D.C. 20001
Tel: (202) 626-7660
Fax: (202) 628-3606
Email: laura.steel@wilsonelser.com
kathleen.warin@wilsonelser.com
Counsel for Defendants, Meyer, Glitzenstein & Crystal, Katherine Meyer, Eric Glitzenstein and Howard Crystal

[11] FEI's unadorned conjecture as to why various defendants did or did not pursue counterclaims, FEI Mem. at 22-23, is irrelevant to whether MGC has pled a plausible counterclaim that it is entitled to pursue under the pertinent standards.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Opposition of Defendant Meyer Glitzenstein & Crystal to Plaintiff's Motion to Dismiss or in the Alternative to Stay Counterclaim and proposed order were served via electronic filing this 5th day of October, 2012, to:

John M. Simpson, Esquire
Richard C. Smith, Esquire
Michelle C. Pardo, Esquire
Joseph T. Small, Esquire
Steven McNabb, Esquire
Kara Petteway, Esquire
Rebecca Bazan, Esquire
FULBRIGHT & JAWORSKI LLP
801 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

Stephen L. Braga, Esquire
3079 Woods Cove Lane
Woodbridge, VA 22192

Bernard J. DiMuro, Esquire
Stephen L. Neal, Jr., Esquire
DIMURO GINSBURG, PC
908 King Street
Suite 200
Alexandria, VA 22314

William B. Nes, Esquire
Christine J. Mixter, Esquire
MORGAN LEWIS AND BOCKIUS, LLP
1111 Pennsylvania Avenue, NW
Washington, D.C. 20004

Daniel S. Ruzumna, Esquire
Peter Tomlinson, Esquire
PATTERSON BELKNAP WEBB & TYLER, LLP
1133 Avenue of the Americas
New York, NY 10036-6710

Andrew B. Weissman, Esquire
Scott Litvinoff, Esquire
WILMER CUTLER PICKERING HALE & DORR, LLP
1875 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

David H. Dickieson, Esquire
SCHERTLER & ONORATO, LLP
601 Pennsylvania Avenue, N.W.
North Building, 9th Floor
Washington, D.C. 20004

Roger E. Zuckerman, Esquire
Logan D. Smith, Esquire
Zuckerman Spaeder, LLP
1800 M Street, NW, Suite 1000
Washington, DC 20036

/s/ Laura N. Steel
Laura N. Steel

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

ORDER

UPON CONSIDERATION OF Plaintiff Feld Entertainment, Inc.'s Motion to Dismiss, or in the Alternative to Stay, Meyer Glitzenstein & Crystal's Counterclaim, Defendant Meyer Glitzenstein & Crystal's Opposition, and the record as a whole, good cause having been shown, it is this ___ day of _____, 2012;

ORDERED that Plaintiff's Motion to Dismiss, or in the Alternative To Stay, Meyer Glitzenstein & Crystal's Counterclaim is **DENIED**.

_____
The Honorable Emmet G. Sullivan
U.S. District Court for the District of Columbia

Copies to:

John M. Simpson, Esquire
Richard C. Smith, Esquire
Michelle C. Pardo, Esquire
Joseph T. Small, Esquire
Steven McNabb, Esquire
Kara Petteway, Esquire
Rebecca Bazan, Esquire
FULBRIGHT & JAWORSKI LLP
801 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

Stephen L. Braga, Esquire
3079 Woods Cove Lane
Woodbridge, VA 22192

Bernard J. DiMuro, Esquire
Stephen L. Neal, Jr., Esquire
DIMURO GINSBURG, PC
908 King Street
Suite 200
Alexandria, VA 22314

William B. Nes, Esquire
Christine J. Mixter, Esquire
MORGAN LEWIS AND BOCKIUS, LLP
1111 Pennsylvania Avenue, NW
Washington, D.C. 20004

Daniel S. Ruzumna, Esquire
Peter Tomlinson, Esquire
PATTERSON BELKNAP WEBB & TYLER, LLP
1133 Avenue of the Americas
New York, NY 10036-6710

Andrew B. Weissman, Esquire
Scott Litvinoff, Esquire
WILMER CUTLER PICKERING HALE & DORR, LLP
1875 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

David H. Dickieson, Esquire
SCHERTLER & ONORATO, LLP
601 Pennsylvania Avenue, N.W.
North Building, 9th Floor
Washington, D.C. 20004

Roger E. Zuckerman, Esquire
Logan D. Smith, Esquire
Zuckerman Spaeder, LLP
1800 M Street, NW, Suite 1000
Washington, DC 20036

Laura N. Steel, Esquire
Kathleen H. Warin, Esquire
WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP
700 11th Street, N.W., Suite 400
Washington, D.C. 20001