UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FELD ENTERTAINMENT, INC.,	)	
Plaintiff,	)	
v.	)	Civ. Action 07-1532 (EGS)
AMERICAN SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS, *et al.*,	)	
Defendant.	)	

MEMORANDUM ORDER

Pending before the Court is [105] defendants' motion for reconsideration of this Court's July 2012 Memorandum Opinion and Order granting in part and denying in part defendants' motions to dismiss.[1] In the alternative, they seek certification for interlocutory appeal. For the reasons that follow, the motion is **DENIED.**

As the parties know, based on the lengthy opinion that issued this past July, this Court has devoted substantial resources to this case, as well as its predecessor litigation, *ASPCA et al. v. Feld Entertainment, Inc.*, Civil Action 03-2006 ("the ESA Action"). With good reason. The facts are unique,

[1] Familiarity with the predecessor litigation, *ASPCA et al. v. Feld Entm't Inc.*, Case No. 03-2006, including the multiple appeals in that case, as well as the instant litigation, is assumed.

possibly unprecedented. The parties are bitter adversaries. The stakes are high. And the Court has every reason to believe that if this case continues, litigation will consume tremendous additional resources not only for the parties, but also for the Court. As this Court noted over five years ago, progress in the ESA Action was "painfully drawn out due to the conduct of *all* parties to this litigation. The parties have demonstrated their inability or unwillingness to cooperate on even the most insignificant issues. The Court is not optimistic that allowing a second lawsuit to go forward between the same parties would result in anything less cumbersome, protracted, or vitriolic than the first." *Feld Entm't, Inc. v. ASPCA*, 523 F. Supp. 2d 1, 5 (D.D.C. 2007).

However, the fact that a case may be difficult, or time-consuming, is not a proper basis for dismissal or for certification to the Court of Appeals. The primary reasons for amending a judgment are "an intervening change of controlling law, the availability of new evidence, or the need to correct clear error or manifest injustice." *Firestone v. Firestone*, 76 F.3d 1205, 1208 (D.C. Cir. 1996) (citations omitted). Motions for reconsideration "are not simply an opportunity to reargue facts and theories upon which a court has already ruled." *Black*

v. Tomlinson, 235 F.R.D. 532, 533 (D.D.C. 2006) (citations omitted).

Here, defendants have not met this heavy burden. Defendants seek reconsideration of two aspects of the July 2012 decision. First, they ask that the Court reconsider its determination that plaintiff alleged a RICO pattern, on the grounds that the allegations do not meet the pleading standards of *Twombley* and *Iqbal*. Second, they ask that the Court reconsider its finding that the alleged racketeering conduct in the ESA Action – namely, the alleged bribery of Tom Rider – caused Feld's injury, in light of the Circuit's 2011 ruling in the ESA Action regarding organizational standing.

With respect to the pattern analysis, the Court carefully considered Feld's pattern arguments in its July 2012 decision, and, as defendants correctly note, the Court rejected most of them. However, the Court found that the donor fraud allegations in connection with the 2005 fundraiser met both the requirements of *Iqbal* and *Twombly* and the heightened pleading requirements for fraud under Rule 9(b). Yet, these are precisely defendants' arguments for reconsideration. The Court finds these arguments "little more than a rehash of the arguments" previously raised by defendants and rejected by this Court, and accordingly, finds

they are not a basis for reconsideration. *Black v. Tomlinson*, 235 F.R.D. at 533.

With respect to the RICO standing analysis, the defendants argue that the Court of Appeals' 2011 decision in the ESA Action constitutes an intervening change of controlling law. Specifically, defendants claim that the Court of Appeals found that one of the organizational plaintiffs in the ESA Action, Animal Protection Institute ("API"), had standing to pursue that action up until the trial in 2009. Accordingly, defendants claim, Feld would have had to defend the ESA Action through trial even if the ESA Action plaintiffs had not bribed Tom Rider at all, indeed, even if he had not been a plaintiff in that case. Mot. for Reconsid. at 20-23. Therefore, defendants conclude, after the Court of Appeals' decision plaintiff cannot show that the alleged RICO offense – the Rider fraud - was the proximate cause of Feld's injuries in defending the lawsuit. *Id.*

This argument is utterly unpersuasive. As an initial matter, the Court questions defendants' belief in their own argument since defendants waited nearly 10 months after the Court of Appeals decision to bring the issue to this Court's attention. Leaving that argument to the side, however, and considering the substance of the Circuit's decision, it is clear that the Court of Appeals made no finding that API had properly

alleged or demonstrated standing at any stage of the ESA lawsuit. Instead, it *held without deciding*, that even assuming arguendo that API had demonstrated standing earlier in the case, it failed to do so at trial. *ASPCA v. Feld*, 659 F. 3d 13, 25-27 (D.C. Cir. 2011). Accordingly, the Court of Appeals decision does not change the fact that no court has ever held that any of the organizational defendants had standing to maintain the ESA Action at any stage of that litigation. Defendants' request for reconsideration on this basis is denied.

Finally, turning to the motion for certification, a district court may certify an interlocutory order for immediate appellate review when it involves "a controlling question of law as to which there is substantial ground for difference of opinion and [] an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). "A party seeking certification must meet a high standard to overcome the strong congressional policy against piecemeal reviews . . . . the movant bears the burden of showing that exceptional circumstances justify a departure from the basic policy of postponing appellate review until after the entry of final judgment." *Judicial Watch, Inc. v. National Energy Policy Development Group*, 233 F. Supp. 2d 16, 20 (D.D.C. 2002) (internal quotation marks and citations omitted).

Defendants have failed to meet this high standard. Although the question defendants seek to have certified – namely, whether Feld has pled the existence of a RICO pattern – is clearly both controlling and dispositive, defendants have not identified a "substantial ground for difference of opinion." Defendants have identified no split in precedent or significant lack of clarity in the relevant caselaw; rather, their objections are based on the constitutional issues that may arise in discovery, and on policy arguments regarding the proper use of RICO against non-profit organizations.

With respect to the defendants' first argument, regarding constitutional discovery issues, the Court recognizes that discovery in this case may well be difficult and contentious – as it was in the ESA Action. However, defendants have pointed to no authority for the proposition that the anticipated difficulty of discovery, or the fact that constitutional issues may arise during the process, is a basis for certification. By this standard, all difficult and novel cases would be certified for interlocutory appeal, a result that section 1292(b) does not contemplate.

Finally, defendants make strong policy arguments regarding the danger associated with using RICO against non-profit advocacy organizations. This Court is highly sensitive to these

arguments. In response, the Court would only note, along with countless other Courts that have been faced with civil RICO claims, that such questions are outside of the judiciary's proper role in a divided government. "Whatever the merits of [defendants'] arguments as a policy matter, we are not at liberty to rewrite RICO to reflect their – or our – views of good policy . . . It is not for the judiciary to eliminate the private action in situations where Congress has provided it." *Bridge v. Phoenix Bond & Indemnity Co.*, 553 U.S. 639, 660 (2008) (internal citations and quotations omitted).

Accordingly for the foregoing reasons, defendants' motion for reconsideration or certification is **DENIED**.

SO ORDERED.

Signed: Emmet G. Sullivan
United States District Judge
January 8, 2013