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1 P-R-O-C-E-E-D-I-N-G-S

2 (12:35 P.M.; OPEN COURT.)

3 THE DEPUTY CLERK: Please remain seated and come to
4 order. Civil Action 07-1532, Feld Entertainment, Inc. versus
5 American Society for the Prevention of Cruelty to Animals, et
6 al. Would counsel please identify yourselves for the record.

7 MR. SIMPSON: Good morning, Your Honor. John
8 Simpson for the Plaintiff. And with me today is Michelle
9 Pardo, Kara Petteway, Rebecca Bazan.

10 THE COURT: All right. Good afternoon. Sorry. Let
11 me just first apologize to everybody. I'm sorry. I had to --
12 we had to make some minor adjustments because we anticipated
13 public transportation would be not as great as it always is,
14 if it always is great, and then I had a sealed matter that
15 took way too long, but I had to resolve. Sorry. I apologize
16 for keeping you waiting. It was just unavoidable. Sorry.
17 Good afternoon.

18 MR. ZUCKERMAN: Good afternoon, Your Honor. I'm
19 Roger Zuckerman for the Fund for Animals, and with me is my
20 partner Logan Smith.

21 THE COURT: All right. Counsel.

22 MR. BRAGA: Good morning, Your Honor. Stephen Braga
23 for Defendant Wildlife Advocacy Project.

24 MS. STEEL: And good afternoon, Your Honor. I'm
25 Laura Steel. I'm here on behalf of Meyer, Glitzenstein &

1 Crystal, Katherine Meyer, Eric Glitzenstein and Howard
2 Crystal.

3 THE COURT: All right. Good afternoon, Counsel.

4 MR. WEISSMAN: Your Honor, I'm Andrew Weissman from
5 Wilmer Hale on behalf Jon Lovvorn and Kim Ockene, and here
6 with me is Mr. Scott Litvinoff.

7 THE COURT: All right. Counsel, good afternoon to
8 you.

9 MR. NES: Brad Nes, Your Honor, here from Morgan
10 Lewis, here for the Humane Society of the United States.

11 MR. TOMLINSON: Peter Tomlinson from Patterson
12 Belknap on behalf of ASPCA.

13 THE COURT: All right, Counsel. Good afternoon.

14 MR. DICKIESON: David Dickieson from Schertler &
15 Onorato on behalf of Born Free, U.S.A.

16 THE COURT: All right.

17 MS. COLLYER: Hillary Collyer from DiMuro Ginsberg
18 on behalf of Animal Welfare Institute.

19 THE COURT: All right. I guess one of the benefits,
20 if there was any benefit at all, because of the shutdown of
21 the City was that I had even more time to consider your
22 competing arguments and I used that time to do so.

23 The Court has spent a great deal of time on these
24 issues. First, leading up to the issuance of the Court's
25 opinion in July and since then. I have a few questions to ask

1 both sides. I recognize there are multiple attorneys
2 representing various Defendants, and I leave it to them as to
3 who's going to respond to the question, but I don't need six
4 answers to one question.

5 So -- but I do have some questions that I need
6 answers to, and you know, I thoroughly understand your
7 arguments and -- but I need some answers. So, let me first --
8 and that's going to be difficult because you don't know my
9 questions -- invite the attorney to respond to the unknown
10 questions to the podium for the Defendants.

11 Are you speaking for the group? Oh, you both speak
12 for the group.

13 MR. ZUCKERMAN: My task this morning is to both
14 thank Your Honor for taking time in what is now the lunch hour
15 to hear us.

16 THE COURT: Yeah, I'm sorry. I really -- I really,
17 you know, my heart goes -- you know, I was a trial lawyer. I
18 know what this does to your schedules, and I'm sorry. I
19 really am.

20 MR. ZUCKERMAN: We very much appreciate it. To
21 assure Your Honor that we are prepared to be smooth and brief
22 and to introduce Steve Braga who will, I think, speak on
23 behalf of all of the Defendants.

24 THE COURT: All right. That's great.

25 MR. ZUCKERMAN: I know he will very capably respond

1 to Your Honor's questions.

2 THE COURT: All right. Thank you, Mr. Zuckerman, I
3 appreciate that.

4 MR. BRAGA: Your Honor, I've been chosen. It feels
5 like maybe a halloween trick, but here I am.

6 THE COURT: All right. Well, it's a treat for the
7 Court to have you here. It's a treat for the Court to have
8 all of you here.

9 MR. BRAGA: I'll be happy to answer your questions.

10 THE COURT: I'm sorry I don't have any candy to pass
11 out, but I'll be mild with the questions.

12 The Defendants ask for reconsideration of the
13 decision that Feld has adequately alleged a pattern. Looking
14 at the allegations referencing the 2005 fundraiser, that's
15 paragraphs 179 to 183 of the First Amended Complaint, I want
16 you to explain the pleading deficiencies. That's what we're
17 talking about here in view of *Twombly* and *Iqbal*, the pleading
18 deficiencies in alleging donor fraud.

19 It seems to me, and I thought I made it clear in the
20 opinion, that those paragraphs survive *Twombly*, *Iqbal*, as well
21 as the heightened pleading requirements for fraud under Rule
22 9(b) because they allege who, what, when, where, and how. But
23 if somehow or another they are still insufficient, you need to
24 tell me with clarity why they aren't adequate.

25 MR. BRAGA: Yes, Your Honor. I'm happy to do so.

1 There is two ways in which those paragraphs, these allegations
2 are critical to our request with respect to the pattern
3 ruling. The first is, after detailed argument and addressing
4 a lot of attention to this issue at the argument, as Your
5 Honor did, Your Honor recognized under *Western* and *Edmondson*
6 it's virtually impossible to allege a single scheme, single
7 victim, single injury, few victims to make a pattern. You
8 also recognized that this case overwhelmingly was about a
9 single scheme, the ESA action, and then you scrutinized the
10 Amended Complaint for other allegations that might find
11 another scheme, other victims, other injuries, just the way
12 you should have. You focused on those July 2000 fundraising
13 allegations.

14 First issue is, do those allegations raise a second
15 scheme? In those paragraphs, Your Honor referenced 179
16 through 183, FEI alleges that the fundraising activity in
17 those paragraphs either was done to defraud FEI of money and
18 property and/or to unjustly enrich the Defendants. So, it
19 could be both schemes, could be one scheme, could be the
20 other.

21 In fact, the way the rest of the complaint fits
22 together, and under *Iqbal* and *Twombly*, they got to plausibly
23 fit together, those allegations can't be a second scheme. Why
24 not? Because the second scheme alleged to unjustly enrich the
25 Defendants, through donations based on false and misleading

1 materials, doesn't apply to this fundraiser.

2 The other allegations of this complaint make very
3 clear that this money was going to Tom Rider. Your Honor has
4 a finding of fact in your seminal decision in this case,
5 Finding of Fact 39, the money raised by AWI went to WAP, went
6 to Tom Rider. The complaint has allegations, paragraphs 179,
7 this fundraiser was to raise money as an additional source of
8 funding for Rider. Paragraph 180, the funds were being raised
9 to provide Rider with a livelihood. So this money was not
10 going to enrich any of the Defendants, so it can't be that it
11 was part of the second alleged scheme and/or to unjustly
12 enrich the Defendants. It went to Rider. It didn't unjustly
13 enrich anyone.

14 The more plausible way to look at that second scheme
15 allegation is that that was added to the complaint by FEI as
16 part of its request for a disgorgement remedy. Remember, Your
17 Honor, that in the amended complaint they asked all of the
18 organizations to disgorge all of their ill-gotten gains, not
19 realizing, apparently, that after the *Philip Morris* case,
20 disgorgement is not an available remedy under RICO.

21 So, No. 1, those fundraising paragraphs that Your
22 Honor directed me to can't allege a second scheme. They go
23 back to the scheme to defraud FEI.

24 And further proof of that, Your Honor, go back and
25 look at the original complaint. The original complaint in

1 this case, paragraphs 122 to 126 of the original complaint
2 make the exact same July 2005 fundraiser allegations. Right
3 before those paragraphs is a big bold typeset heading in the
4 original complaint. The fund -- it says, The Fundraiser Held
5 in Furtherance of this Scheme to Defraud CEI [sic] of Money
6 and Property.

7 So, at the original complaint, there was just one
8 scheme. At the amended complaint, they're trying to make it
9 into two schemes. It doesn't work for the reasons I've just
10 described, and as the D.C. Circuit recognized in *Western*, you
11 can go back and look at the original complaint to try to
12 figure out what is really plausibly being alleged. So, those
13 fundraiser allegations don't raise a second scheme.

14 Your Honor still could find a distinction from
15 *Western* and *Edmondson* if those fundraiser allegations provided
16 additional victims, additional injuries, and there's
17 references to that in Your Honor's opinion.

18 Our problem with the sufficiency of these pleadings,
19 these paragraphs, for those purposes, are --

20 THE COURT: You raise a good point because that
21 dovetails into the second question I had, is would Feld --
22 let's you said that Feld could not allege multiple victims,
23 all right. So, would Feld still have a pattern under *Western*
24 *Associates* and *Edmondson* under the six factor test established
25 by those cases? In particular, the factors of, one, the

1 number of acts alleged; two, the length of time over which the
2 acts were committed; three, the number of perpetrators; four,
3 the character of the unlawful activity, and here it seems that
4 Feld has alleged over a thousand racketeering acts committed
5 over many years by several perpetrators and of varying
6 character consisting of allegations of fraud, bribery,
7 obstruction of justice, illegal witness payments. So why
8 isn't that enough?

9 MR. BRAGA: Your Honor, going into that six factor
10 test, which Your Honor indicated in your July 9th opinion as
11 the second ground for finding pattern above and beyond the
12 second scheme, which we've talked about, that -- those
13 factors -- let me go through them, Your Honor -- duration,
14 length of the scheme.

15 Eight years in this case, according to Your Honor's
16 opinion; *Western Associates*, eight years.

17 Variety of the unlawful acts. Bribery, illegal
18 gratuities, money laundering looks quite similar to me to the
19 variety of the predicate acts in *Edmondson*, so you've got that
20 carryover.

21 Number of perpetrators, Your Honor focused on 13
22 perpetrators identified in this case. In *Western*, there were
23 actually 15 defendants named in the original complaint. We
24 gave Your Honor a copy of the original complaint and our
25 supplemental authorities to the motion to dismiss. So far

1 length looks the same as *Western*.

2 Variety of predicate acts looks the same as
3 *Edmondson*. Number of perpetrators, *Western* is actually more.
4 And what Your Honor really focused on and what Mr. Simpson
5 hammered on at his argument was the number of predicate acts.
6 You said over a thousand in your opinion, and the argument on
7 the motion to dismiss, Mr. Simpson said 1300.

8 I actually tried to calculate them from the Amended
9 Complaint. I don't know how you can get to a finite number,
10 which is probably why Your Honor said over a thousand, but
11 when you look at *Edmondson* in the six factor test, it doesn't
12 say "number of predicate acts." It says "number of unlawful
13 acts."

14 And why? Because the courts have been careful to
15 recognize that creative lawyers, and Mr. Simpson is certainly
16 a good hard working creative lawyer, can multiply --

17 THE COURT: As is everyone else in this courtroom.

18 MR. BRAGA: Thank you, Your Honor.

19 THE COURT: Everyone. I mean, it's my treat.

20 Really, it is my treat today to be treated by the presence of
21 everyone. Go ahead.

22 MR. BRAGA: Thank you. So, creative lawyers can
23 multiply a single unlawful act into multiple predicate acts
24 and thereby inflate what looks like a predicate act pattern.
25 That's happened in this case.

1 When you look at paragraph 77 through 80 of this
2 Amended Complaint, you'll see that a single payment to
3 Mr. Rider does the following. Payment out to Mr. Rider
4 constitutes mail fraud or wire fraud, invoice back to one of
5 the organizations constitute mail fraud or wire fraud, payment
6 out to Mr. Rider constitutes bribery, payment out to Mr. Rider
7 constitutes legal gratuity, payment into Mr. Rider constitutes
8 bribery, payment into Mr. Rider constitutes illegal gratuity,
9 and the payments constitute money laundering, seven times
10 multiplication of the payments.

11 Now, I will tell Your Honor, in all candor, I have
12 to admit, this case, even if you take away the seven times
13 factor, has more predicate acts than *Western*, has more
14 predicate acts than *Edmondson*, has over 200 predicate acts,
15 even by my defense lawyer calculation. When you pay somebody
16 per month for over ten years and pay their expenses, there's a
17 lot of predicate acts, but *H.J.* says and the cases all say
18 it's not just the number of predicate acts that determines it.
19 It's much more important to look at the nature of the unlawful
20 activity, and that's, I think, where the distinction that Your
21 Honor tried to draw could be refocused on the nature of that
22 activity. That's what *Western* and *Edmondson* are trying to get
23 at with a single scheme.

24 Is the nature of this activity not just a bunch of
25 predicate acts in a single dishonest episode, a defined end

1 point one case, or is it something that looks more like a
2 pattern? More like *Milberg Weiss*, hundreds of fraudulent
3 lawsuits? More like something that has the threat, the
4 pattern, the threat of continued harm that RICO is meant to
5 address? It's not just the number of predicate acts. I hope
6 that answered your question.

7 THE COURT: I may come back to that. Let me move
8 on.

9 The -- You focus on the causation element as in your
10 motion for reconsideration also and you argue that there has
11 been a change in the controlling law or facts as a basis for
12 the motion as a result of the October 2011 opinion, but -- and
13 this is brought to the Court's attention ten months later. I
14 don't understand why. What's the significance of that
15 opinion? I mean, why so late? Why wasn't it an argument made
16 front and center early on if it's such a compelling argument?

17 MR. BRAGA: I think, Your Honor, out of respect for
18 Your Honor's time and the efficient use of judicial resources,
19 if we had just that argument alone, we probably wouldn't have
20 raised it with a reconsideration. We would have come back to
21 it later at trial. Once we decided that the pattern ruling
22 was so unique and so important and that we were going to ask
23 Your Honor to certify it to the Court of Appeals, we thought,
24 well, then we might as well put in this other issue that gives
25 us concern at the same time.

1 THE COURT: All right. Going back to "2." Your
2 answer focused on the predicate acts, but also what the Court
3 considered was the number of the sufficiency of the
4 allegations as well, and there's a distinction that can be
5 drawn between predicate acts and sufficiency of the allegation
6 in considering whether they've met their burden of proper
7 pleading.

8 MR. BRAGA: Sure, sure. Your Honor, with respect
9 to -- you want me to address the sufficiency of the pleading
10 of the fundraiser allegations?

11 THE COURT: Yeah.

12 MR. BRAGA: Because those fundraiser allegations, as
13 I said a minute ago, they either help with the second scheme,
14 we talked about that, or they give Your Honor --

15 THE COURT: I'm just trying to figure out what's
16 missing here. You know, again, we're at the pleading stage.
17 That's all we are, after all these years, we're at the
18 pleading stage. Maybe it goes further. Maybe it goes
19 upstairs, or maybe not. We'll see.

20 MR. BRAGA: Well, we're at the pleading stage, but
21 Your Honor, under a different regime than you and I grew up
22 under. It used to be the old *Conley versus Gibson* standard.

23 THE COURT: Right.

24 MR. BRAGA: Now we're under *Iqbal/Twombly*. It's got
25 to be plausible. In fact, plausible is the test now.

1 THE COURT: And not just possible?

2 MR. BRAGA: Not just possible. Possible is not good
3 enough. If it's an "if," that's possible. That's not good
4 enough. If it's a "might," equally -- then under *Twombly*,
5 equally plausible, that's not good enough. You got to nudge
6 it a little bit ahead of --

7 THE COURT: What's lacking here? Why implausible
8 then?

9 MR. BRAGA: What's lacking here in paragraphs 179
10 through 183 in the fundraiser allegations is any allegation
11 that a single third-party victim acted on the misleading
12 solicitation materials.

13 What we have here -- and it's important that this
14 invitation to this fundraiser, which was submitted as an
15 exhibit to our --

16 THE COURT: They would have needed what,
17 declarations or so from participants of that saying we gave or
18 would not have given but for, or what's -- what's --

19 MR. BRAGA: They would have needed to be able to
20 represent in good faith in a pleading signed under Rule 11
21 that they believed that a victim acted on these false
22 statements.

23 Now, the reason that's important, Your Honor, is
24 this invitation that went out, they don't allege the entire
25 thing to be false. And so there's a statement they say this

1 statement's false but they don't say that statement is. The
2 possibility exists, the plausibility exists, the opportunity
3 exists if somebody gave because of that other statement.

4 And let me give you a good example. From the
5 exhibit, the actual language of the invitation, in the fourth
6 paragraph, text not challenged as false in the Amended
7 Complaint, says, numerous eyewitness accounts and other
8 evidence of the mistreatment of the elephants, including the
9 deaths of several baby elephants, has been collected in the
10 lawsuit. Not challenged as false, that goes out to a
11 potential donor. How do we know that the donor is not giving
12 on the basis of that allegation? Oh, my gosh, the death of
13 baby elephants, I'm going to give \$150 to these people, versus
14 what Mr. Simpson does complain as false, among other things,
15 that, well, you didn't tell them that the nonprofit
16 organizations had millions of dollars in resources.

17 There's -- there's an ambiguity there that's not
18 pled. There's not a single victim pled. There's nothing in
19 the complaint about this victim acted on the basis of these
20 false statements.

21 What the complaint does say, though, Your Honor, and
22 this is telling, I think, in paragraph 182, where one would
23 ordinarily talk about who was going to be deceived by a mail
24 fraud or a wire fraud, paragraph 182 says, this scheme was,
25 quote, reasonably calculated to deceive FEI, the one victim we

1 already have in the case.

2 And then if you go to paragraph 183, even more
3 directly, quote, FEI is the direct victim, close quote, of
4 this fundraising scheme. They pled that they're a victim. We
5 know they're a victim. They're a single victim. They're the
6 single victim in this case. They haven't pled any other
7 victims.

8 Their pleading literally is the poster child for
9 *Twombly*, Your Honor. It sets forth, they sent out a
10 solicitation, some of the solicitation was false and somebody
11 might have acted on that falsity. "Might" is not good enough.

12 THE COURT: So, your argument is that it was
13 incumbent under controlling Supreme Court precedent, it was
14 incumbent for the Plaintiffs to allege, in good faith, that
15 the donors indeed gave money as a result of these false
16 representations then?

17 MR. BRAGA: Yes, that somebody was defrauded. We
18 don't have a victim if nobody was defrauded. And right now we
19 don't have an allegation that's plausible under *Twombly* that
20 anybody was defrauded other than FEI.

21 THE COURT: Does the complaint provide enough notice
22 that money was raised as a result of this fundraiser? Does
23 the complaint allege that?

24 MR. BRAGA: The complaint does allege that money was
25 raised as a result of this fundraising, and as I said a moment

1 ago --

2 THE COURT: It's not enough for them to allege that
3 this money or part of this money could have been raised as a
4 result of false representations then. That's not sufficient.

5 MR. BRAGA: "Could have been" is not enough, Your
6 Honor. "Could have been" is not enough anymore.

7 Anything further?

8 THE COURT: No.

9 MR. BRAGA: Thank you, Your Honor.

10 THE COURT: I'm sorry, I have some other questions.
11 I'm sorry. Not on that point.

12 MR. BRAGA: Was trying to get a halloween treat and
13 get out early.

14 THE COURT: The Circuit's 2011 decision, where in
15 that opinion did the Circuit state that API had standing
16 sufficient to get to trial in the ESA action?

17 MR. BRAGA: I believe that the decision was cast as
18 a failure of proof, and there was a petition for rehearing
19 filed on that that in the event of a ruling that there was a
20 failure of proof, the case should be remanded back to Your
21 Honor --

22 THE COURT: Right.

23 MR. BRAGA: -- for consideration of whether the full
24 record, which wasn't briefed before the Court of Appeals, had
25 such proof.

1 THE COURT: And it was denied without further
2 opinion, I believe.

3 MR. BRAGA: It was. It was, Your Honor, yes.

4 THE COURT: But the Circuit didn't address API's
5 standing, though, did it?

6 MR. BRAGA: The Circuit did not. The Circuit said
7 that the standing theory articulated on behalf of API, the
8 *Havens Realty* information theory was a valid standing theory,
9 that it could have been proven that API had standing had the
10 facts supported that theory.

11 THE COURT: That was speculation on the part of the
12 Circuit, though, was it not?

13 MR. BRAGA: Not speculation. It's a poignant part
14 of the ruling because --

15 THE COURT: Did the Circuit say that API had *Havens*
16 *Realty* standing?

17 MR. BRAGA: No.

18 THE COURT: Did not.

19 MR. BRAGA: Did not, because it wasn't proven at
20 trial.

21 THE COURT: That's exactly right.

22 MR. BRAGA: The reason it wasn't speculation by the
23 Circuit is Mr. Simpson argued that that standing theory is not
24 even proper. So, A, there's no theory that works that way,
25 and B, they didn't prove it. The circuit court said, no, the

1 theory's okay, but they didn't prove it. And Your Honor, they
2 did not say API had standing.

3 THE COURT: Right. Okay. All right. So then
4 what's the value then of the standing argument that you make
5 now? What's the -- what's the precedential value?

6 MR. BRAGA: The value of it is simply as it relates
7 to the *Hemi Group* and the additional progeny, *Bridge*, and
8 those other cases, *Anza*, which say that there's got to be a
9 direct injury in RICO cases.

10 And so, if API could have maintained its standing
11 theory through trial, they would have had to prove it. They
12 didn't prove it factually, but it was a valid theory to come
13 to court on. If API could have been in court on that valid
14 legal theory throughout, then the damages that are claimed,
15 \$20 million for defending the ESA lawsuit because of the Rider
16 fraud, that wouldn't -- they wouldn't be caused necessarily by
17 the Rider fraud because FEI would still be in court on the API
18 theory.

19 THE COURT: *Anza* and *Holmes* don't stand for the
20 proposition, though, that no RICO injury could ever be
21 asserted unless it was solely and completely attributable to
22 the alleged unlawful activity, do they?

23 MR. BRAGA: No, they don't stand for that
24 proposition. They stand for the sort of the corollary of that
25 that if it's too difficult to figure out which injuries are

1 attributable to the RICO fraud, then you can't separate it
2 out.

3 So, the argument here is that in light of the fact
4 that API is lawfully entitled to be in court throughout the
5 history of this case, how do you separate out the Rider stuff?
6 Because the Rider stuff, remember, is not just Rider's
7 standing. It's also Rider evidence about elephant abuse, and
8 even though Your Honor found him not credible --

9 THE COURT: Which we never got to.

10 MR. BRAGA: Yeah, never got to that second issue.
11 And so how would one go about trying to separate out what was
12 attributable to Rider versus what was attributable to API? It
13 seems impossible to me, but it could be possible, and if it
14 was possible, Anza wouldn't preclude that.

15 THE COURT: With respect to circulation, you know, I
16 don't really have an argument with your claim on the first and
17 third factors necessary for certain certification. One, that
18 the pattern issue is a controlling question of law, it is; and
19 three, that a decision on its viability may materially advance
20 the ultimate determination of litigation. I'm persuaded
21 there.

22 I question the applicability of the second factor,
23 that there is a substantial ground for difference of opinion.
24 Where is the authority for that in this case? I mean, what
25 should the Court rely on to find that this factor has been

1 met, as opposed to just a difference of opinion? And everyone
2 on the right side of the courtroom has a difference of opinion
3 about the second factor, but that doesn't carry the day, and
4 I'm not aware of any precedent in which this precise issue has
5 been squarely presented to a circuit court where the Court can
6 look back and say, you know, I'm troubled because there are
7 splits in the country about this issue, but I don't see a
8 substantial ground for difference of opinion other than
9 reasonable people might disagree with that, which is the case
10 in every case we have, because there are two sides and people
11 rarely agree on anything.

12 MR. BRAGA: Yes, Your Honor. It's an interesting
13 case on this factor. It really, really is because it's not
14 like your prototypical case where you can point to this
15 person's dissenting opinion or the Supreme Court said that.

16 THE COURT: It's atypical; would you not agree? And
17 if you don't agree with that --

18 MR. BRAGA: I don't know if I'd go that far.

19 THE COURT: If you don't agree with that, tell me
20 where the other similar cases are or the identical cases that
21 would persuade the Court that, you know, there really is a
22 substantial ground for difference of -- I mean, this is RICO.
23 RICO has been around for decades.

24 MR. BRAGA: Yeah. Part of --

25 THE COURT: But if it's not atypical, why isn't it

1 atypical, this case?

2 MR. BRAGA: Part of it depends on what Your Honor
3 does with the fundraising allegations we just talked about.

4 THE COURT: Yeah.

5 MR. BRAGA: If Your Honor agrees with me that
6 there's no second scheme, then we have a ground for difference
7 of opinion because *Western* and *Edmondson* say --

8 THE COURT: If I agree with you there, then there's
9 no basis for certification, then you win on reconsideration,
10 right?

11 MR. BRAGA: Your Honor, that would be fine.

12 THE COURT: Right?

13 MR. BRAGA: We're happy to go that way.

14 THE COURT: Seriously, though, right?

15 MR. BRAGA: No, no, absolutely. Absolutely.

16 THE COURT: And then they'd be asking -- they'd be
17 rushing downstairs to file something, I'm sure.

18 MR. BRAGA: Somebody would.

19 THE COURT: They would be out of court so they could
20 file as a matter of right, right?

21 MR. BRAGA: Exactly.

22 THE COURT: That's a balancing of the scales, I
23 guess, isn't it?

24 MR. BRAGA: It might be the best way to get the case
25 up there, Your Honor.

1 THE COURT: He's got a smile on his face. That's a
2 balancing of the scales, isn't it?

3 MR. SIMPSON: Sort of, Your Honor.

4 MR. BRAGA: Now Mr. Simpson is wondering whether
5 it's a trick or a treat.

6 Your Honor, we have -- so we have *Western* and
7 *Edmondson* on the one hand saying single scheme, single injury,
8 few victims, virtually impossible. That's a pretty big
9 standard. We have Your Honor saying overwhelmingly this case,
10 the ESA case where Mr. Simpson is saying -- and believe me,
11 both sides have looked all over the world for these kind of
12 litigation fraud cases, Mr. Simpson says two things. *Milberg*
13 *Weiss*, that's not an analogy, that's hundreds of fraudulent
14 lawsuits, that's clearly a pattern. Then he says Eighth
15 Circuit, *Handeen versus Lemaire*, decided before both *Edmondson*
16 and *Western*.

17 So, there's a little bit of a circuit split there on
18 what it means to be a single scheme. In terms of the why
19 there's a ground of difference of opinion, obviously, in the
20 application of *Iqbal* and *Twombly*, they're still relatively
21 new. As Judge Posner says in the *In Re Text Messaging*
22 *Antitrust* case, we said it in our papers, there's foment over
23 what one has to plead in the lower federal courts as a result
24 of this. Combining those standards of plausibility with the
25 virtually impossible --

1 THE COURT: Maybe it's time to go back to *Conley v.*
2 *Gibson*, huh?

3 MR. BRAGA: It'd fine with me, Your Honor. It'd be
4 fine with me. But Your Honor, further, Your Honor has given
5 evidence that there's substantial ground for difference of
6 opinion.

7 Your Honor said at least four to five times at the
8 motion to dismiss hearing, it's in the transcript, I'm
9 troubled by this pattern issue. This pattern issue bothers
10 me. Exactly the kind of --

11 THE COURT: I am troubled by everything. You know,
12 really, in every case, because the stakes are so high. And
13 you look at -- pull up all the transcripts, and you know, I
14 don't encourage you to do that. You see how I pulled my gray
15 out, you know, because these cases, the stakes are so high and
16 they are troubling, and you know, we strive to reach the right
17 decision for the right reason, but just the fact that they're
18 troubling, all the GTMO cases, Guantanamo cases, troubling,
19 the predecessor case was troubling for a decade, troubled me
20 and Judge Facciola, and the Circuit labored over it, you know.

21 I listened to the argument, and you know, I mean,
22 everything is troubling because we all strive to reach the
23 right decision for the right reason, but that's not a basis to
24 send it up, though. They're all difficult cases.

25 MR. BRAGA: Well, it's Your Honor recognizing that

1 there is a potential difference of opinion, that, boy, this is
2 troubling. You know, when I clerked for Judge Flannery, some
3 cases were troubling, some weren't. Some were as clear as
4 day. Boy, that's not troubling.

5 THE COURT: Tom Flannery knew everything. Nothing
6 troubled Tom. He was the quickest around here, you know.

7 MR. BRAGA: Your Honor, I would cite Your Honor to
8 Judge Huvelle's --

9 THE COURT: You didn't learn about being troubled
10 when you worked Judge Flannery, though, did you?

11 MR. BRAGA: I did not, no. It was after I left him.

12 THE COURT: He was quick, right.

13 MR. BRAGA: Your Honor, I would cite Your Honor to
14 the *APCC* case, *Services versus Sprint Communications*, Judge
15 Huvelle. We cite it in our papers.

16 THE COURT: That's one of the five cases I took, and
17 she was troubled for the right reasons because there were
18 cases throughout the country on that point, right, and we're
19 talking about, you know, refunds of vast sums of money, and
20 she -- and she maintained her ground. She stood her ground.
21 She said, I don't doubt the correctness of this, but because
22 the stakes are so high and because other courts have taken
23 different positions, she thought it appropriate to do that.

24 Judge Rothstein just this year -- and you start
25 reading that case, it's about speech and debate. So what's

1 the big deal? I mean, speech and debate was in Ted Stevens.
2 Speech and debate is in all these -- at lot of these cases we
3 get because we get a lot of cases involving things that
4 happen, allegedly happen on Capitol Hill, but those are
5 difficult issues. They're troubling issues. Where does our
6 jurisdiction start? Where is it -- you know, when is it
7 appropriate for senators, congressmen to say things on the
8 floor, and it starts off like why is this case up here, until
9 you read the opinion. Well, of the four opinions, when Judge
10 Kennedy scrutinized the same issue and two judges didn't even
11 weigh in, pretty compelling reason for Judge Rothstein -- I
12 read further -- I said she's absolutely correct to certify it
13 and I believe the Circuit very recently took that case, but
14 you know what, not to minimize this case at all.

15 This case is about, you know, parties against
16 parties over a rather significant sum of money. That's what
17 this case is about. And again, not minimizing it, but it's --
18 and I hate that word "garden variety." And I never use that
19 word. And it's not a garden variety. It's a complicated case
20 that's going to trouble us and trouble Judge Facciola, maybe,
21 down the line, if the case remains here, but it's troubling
22 and complicated.

23 But you know what, so all these cases are. But I
24 don't see the factors. I don't see the -- you mentioned
25 disgorgement, the tobacco case. Judge Kessler certified that

1 issue. She was concerned about the scope of expert
2 examination on direct. She was concerned about disgorgement
3 because the Second Circuit took a view that was different from
4 hers. That was a big case impacting probably the world,
5 whatever she did, and she's still wrestling with it with
6 respect to remedy, but that's another case that cried out for
7 certification.

8 I don't believe I've certified a case. If I have,
9 you'd probably tell me. I don't recall that I've done that.
10 That's not to say I've not been requested to do that over the
11 years, but by and large, we don't. On occasion, the Circuit
12 has counseled against piecemeal consideration of appeals for
13 cogent reasons. And I'm just troubled. Again, I am troubled.
14 Why -- you know, it's an -- it's a discretionary call. I
15 guess I could articulate reasons why it should, but it's a
16 RICO case involving requests, a demand for significant sums of
17 money because of alleged RICO activity involving private
18 parties, and it doesn't seem to fit, unless I'm missing
19 something, the mold for certification.

20 MR. BRAGA: Your Honor, it's a little bit off. It's
21 a one off from the typical certification case. In that
22 decision, Judge Huvelle, I just wanted to point out, says,
23 quote, where proceedings that threaten to endure for several
24 years, certainly this case, depend on an initial --

25 THE COURT: Parties already passed that record,

1 yeah. We're working on the second chapter.

2 MR. BRAGA: When those proceedings depend on an
3 initial question of jurisdiction, exactly what we're talking
4 about here, because if the RICO ruling is reversed, the
5 federal question jurisdiction goes away. Under supplemental
6 pendent jurisdiction doctrine, Your Honor would be fully
7 justified in sending the available remedies to Mr. Simpson to
8 state court.

9 So, the question is whether this case, which is
10 going to be a massive case, not a huge public impact case,
11 like the ones Your Honor just talked about, but a very
12 important, very significant, very intrusive case.

13 THE COURT: Very important case to the parties, and
14 they're all important, and they're important as well to the
15 court and to the public. The public has an interest in this
16 case. The public has been following this case intently over
17 the years.

18 MR. BRAGA: Certainly. And now, in light of the
19 current victim allegations, all the donors to all of these
20 organizations. I mean, are we really going to unleash a case
21 where the donate records from a website of every organization
22 can be looked at to see why they donated; was it chimpanzees
23 or elephants?

24 And the victim problem really in this case, Your
25 Honor, is perhaps most starkly addressed by the allegation in

1 Mr. Simpson's reply that HSUS could be a victim. He says in
2 his paper, if HSUS was defrauded by FFA, then HSUS is a
3 victim, a co-victim of these fundraising allegations. Well,
4 "if" doesn't work under *Twombly*. "If" is a possibility. But
5 if HSUS was defrauded by FFA, then they're going to be a
6 co-victim and go over here even though his complaint is laced
7 with allegations that HSUS did all of this intentional,
8 deceptive, scheming, illegal RICO conduct.

9 You can't have it both ways. You got to go one way
10 or the other under *Twombly*. He's trying to have it one way or
11 both ways. HSUS is a RICO defendant and racketeer, but if I
12 need them to be a victim, they can be a victim. If we could
13 do that, Your Honor, then we could say, well, if FFA was
14 defrauded by, and all the other organizations were defrauded
15 by the lawyers, and the lawyers were defrauded by Rider, then
16 all the organizations, all the lawyers move over here with
17 Mr. Simpson as co-victims. Rider is left standing as the guy
18 who lied to everybody. He takes a default judgment, he
19 doesn't have any money, and we're done.

20 THE COURT: Discovery is the big issue in the case.
21 I mean, it's -- and forgive me, it's the elephant in the
22 courtroom, you know. It is. It seriously is. And the
23 Court's very sensitive to -- to what's being alleged about
24 what's discoverable. And I don't really think I need to focus
25 on that, what's discoverable down the line to drive the

1 Court's decision about whether or not it should reach
2 certification, but I mean, it's something the Court's mindful
3 of.

4 The Court's also mindful of the long line of cases
5 starting with the *NAACP I* and *II* and about donor lists and
6 First Amendment, and this is the -- this is the conflict
7 between RICO and -- to a certain extent, RICO and First
8 Amendment privileges.

9 But that's not to -- so, that's going to be
10 difficult, and it's going to be troubling to sort that out. I
11 think there was a reference into one of the briefs about,
12 well, the Circuit would be in a better position to carve out
13 parameters for discovery. Well, first of all, they aren't
14 going to do that, I don't believe. The circuit court is not
15 going do that on a certification issue. The Circuit Court
16 would, in all elements, speaking for the Circuit, is going to
17 address the issue that it has to address, and if it takes the
18 case, it will decide -- it will decide the sufficiency of the
19 allegations, whether justify RICO or not, but I doubt very
20 seriously whether the Circuit Court would go so far as to say,
21 well, we find the allegation sufficient, and upon remand, the
22 district court is directed to do this, that and the other. I
23 doubt that, but I mean, that's an argument that's made, but I
24 dismiss that because I don't believe the Circuit Court would
25 go down that road.

1 But again, I mean, you know, we deal with these
2 issues every day, national security issues. We deal --
3 majority of issues this court deals with, as well as my
4 colleagues, are sealed from the public's view. You'd be
5 amazed probably and the public would be amazed about what we
6 do deal with and how -- and the complexity of matters that we
7 deal with, and they're sealed because of compelling reasons,
8 but it doesn't mean that we aren't giving time and attention
9 because they are important issues and they are troubling
10 issues, but we resolve them, and more often than not, we
11 resolve them without resorting to the circuit court.

12 They are all complicated. I mean, we started -- if
13 that was the standard, complexity, I mean, you know, we would
14 just, I guess, send everything up there to the circuit court,
15 but it's not. And we saw that -- and if the case remains
16 here, there will be significant issues to address.

17 What are they entitled to? Are they entitled to
18 anything? The First Amendment means a heck of a lot, and we
19 are going to defend that, but that's -- that's a big concern
20 here, but seems to me, that doesn't -- how much weight should
21 the Court give that?

22 We may -- that's going to come down the pike. We
23 know that. There will be requests, and there have been
24 requests already made for anything and everything associated
25 with donors. But we also recognize, you know, there's a

1 large -- there are many Supreme Court cases that have defined
2 the parameters of what can be required to be produced and not,
3 and there will probably be some new parameters defined by this
4 court as to what information, if any, the Plaintiffs are
5 entitled to. But again, that's -- that doesn't seem to
6 counsel in favor of a -- of tipping the balance to
7 certification. Should it?

8 MR. BRAGA: Yes, it should, Your Honor. And I'll
9 tell you why. Because --

10 THE COURT: Well, is there any case anywhere that
11 says that, that focus on discovery? I don't know if a case
12 has been cited, and I was interested in that. Tell me where
13 there's a case where some judge has said, you know what, this
14 is going to -- this is a big intersection here, this is going
15 to pit constitutional concerns against statutory, you know,
16 complaints, and I'm going to certify to have the Court address
17 those. I'm not aware of any. Are you?

18 MR. BRAGA: There's no case, Your Honor, that
19 addresses discovery specifically in the context you're talking
20 about. What the cases address is, and Your Honor said this in
21 the *Judicial Watch* case and others, certification is an
22 exceptional case remedy.

23 THE COURT: It's a task force case. I asked to
24 certify that?

25 MR. BRAGA: Yes.

1 THE COURT: I don't recall, and I denied it and it
2 went up anyway. I was affirmed. I was affirmed en banc, and
3 then I don't know what happened after that.

4 MR. BRAGA: And I must, in all candor, Your Honor
5 asked the one question I was afraid you were going to ask
6 earlier I should come back to, whether you've certified. You
7 haven't. So this is the perfect opportunity to balance the
8 scales. The way that discovery --

9 (LAUGHTER.)

10 THE COURT: I knew you would know the answer to
11 whether I certified. I knew that. Thank you for reminding me
12 that I haven't certified.

13 MR. BRAGA: The way that discovery comes up, Your
14 Honor, is --

15 THE COURT: How did they get to the Circuit anyway?

16 MR. BRAGA: Mandamus.

17 THE COURT: That's right. Exactly. Right.

18 MR. BRAGA: The way the discovery comes in is all
19 the courts recognize, Your Honor, and everyone, and in fact
20 the Judiciary Committee report leading up to 1292(b)
21 recognizes that what we mean by reserving this certification
22 for the exceptional cases is the protracted, the expense of
23 the big cases, especially on a question of initial
24 jurisdiction that we might avoid time, expense, judicial
25 resources, discovery and otherwise. That's exactly what this

1 case is.

2 THE COURT: All right. All right.

3 One other point on that. You mentioned in your
4 pleadings the concern articulated by Justices Kennedy and
5 Souter and concurring opinions about the caution that courts
6 should exercise in dealing with RICO claims and not
7 overlooking constitutional considerations, First Amendment.
8 They didn't say that the First Amendment trumps RICO claim.
9 They didn't say -- and they couldn't have said that. It was
10 all -- well, they said what they said. And you took notice of
11 it and I've taken notice of it, so what does that mean? What
12 does that guidance mean, though?

13 It doesn't mean that a RICO case can't be prosecuted
14 that has -- that presents legitimate First Amendment
15 constitutional issues because this indeed is the case, right?
16 So, what do we do with those concerns articulated by those
17 justices?

18 MR. BRAGA: Right. Your Honor is exactly right. It
19 doesn't mean the First Amendment trumps RICO. What it means
20 is that we should only get into this RICO case, we should only
21 deal with these issues carefully as a matter of last resort.
22 And the cases really talk about invading the First Amendment
23 if it's absolutely necessary. It goes to the very heart of
24 the lawsuit.

25 Now, when you look at the donor allegations in this

1 case, they're peripheral. The case is overwhelmingly about
2 the *ESA* case. They're peripheral. They're not well pled. We
3 contend that they don't make a pattern in the complaint.
4 That's the kind of issue that should be evaluated and vetted
5 fully before we tread close to those First Amendment issues by
6 Your Honor, of course, but also by the Circuit Court.

7 Remember, 1292(b) has a failsafe switch here, right?
8 Your Honor can say I'm going to certify it, but the Court of
9 Appeals doesn't have to take it, and it can go very quickly.
10 It's ten days from Your Honor's order that we have to apply,
11 seven days Mr. Simpson to respond, seven days for reply,
12 submit it as a matter of motion without argument.

13 We have not asked for and 1292(b) does not give us a
14 stay of anything in this court while we wait to see whether
15 they take the appeal. There are things that can be done while
16 we -- while we wait to see whether they take the appeal, and
17 hopefully it gets to Your Honor's other issue about there are
18 going to be some discovery issues no matter what.

19 THE COURT: In the event there is a certification,
20 is it the Defendant's position that discovery could go
21 forward? That's not mentioned in your pleadings.

22 MR. BRAGA: Your Honor, our position would be if
23 there is a certification, there's four things Your Honor can
24 do right now in the case while the appeal is pending. We
25 could have briefing on the collateral estoppel issues, which

1 Mr. Simpson thinks are easy, we think are incredibly hard. We
2 could have briefing on the attorney/client privilege crime
3 fraud waiver, which again the parties are in disputes at. We
4 could have even briefing on the First Amendment donor
5 privilege kind of issues, although that might want to hold in
6 abeyance pending the Circuit Court's resolution, and we could
7 meet on discovery plan.

8 We aren't in a position to begin discovery yet. It
9 hasn't even opened. There's a lot of work to be done on those
10 competing plans that could be very effectively done, and then
11 take it from there.

12 THE COURT: Right. Well, the Court was about to
13 delve into the Rule 16 issues, but then the motion was filed,
14 so we quickly put that on the back-burner.

15 All right, Counsel. Thank you very much.

16 MR. BRAGA: Thank you, Your Honor.

17 THE COURT: Are you okay, or do you want to take a
18 short recess?

19 COURT REPORTER: No, I'm fine.

20 THE COURT: All right. Mr. Simpson, I'd ask,
21 without repeating those questions, I have some separate
22 questions for you, but without repeating those questions,
23 unless you want me to, I'd ask for your -- you to weigh in on
24 any of the questions.

25 MR. SIMPSON: May it please the Court, John Simpson

1 for the Plaintiff. I think it's pretty clear from *Western*
2 *Associates* and *Edmondson*, as well as the Supreme Court's
3 decision in *H.J.* that you do not need more than one victim to
4 have a closed-end pattern of racketeering activity. The only
5 thing that's impossible under the statute itself, 1961(5), the
6 definition of pattern of racketeering activity, is a single
7 predicate act pattern. Above that, everything else is
8 possible.

9 You're going to have -- you can have a two predicate
10 act pattern with one victim or a hundred victims. It's just
11 one factor that Judge Rogers in *Western* and Judge Williams in
12 *Edmondson* say have to be taken into account. The key question
13 on whether there's a pattern of racketeering activity and what
14 is criminal under RICO and what is a tort under RICO is
15 long-term criminal conduct because the predicate acts
16 themselves are already illegal. It's already a felony to
17 bribe a witness. It's already a felony to engage in money
18 laundering or engage in mail fraud. But what makes it a
19 felony under RICO is to engage in a pattern of such conduct
20 over a long enough period of time.

21 They don't dispute, they never have disputed that
22 this lasted long enough to be a pattern. They don't dispute
23 and have never really seriously disputed that 1300-plus
24 predicate acts would constitute a pattern. We satisfied that
25 standard, and there was some business about double counting.

1 It's a crime against the United States to pay a bribe. It is
2 a separate crime to receive one.

3 Those are separate offenses. The fact that that
4 happens in the connection with one payment doesn't eliminate
5 the fact that there's more than one predicate act. So, under
6 these -- under these various -- under the test adopted by the
7 D.C. Circuit in this circuit for this type of analysis, you
8 look at this on a case-by-case basis.

9 Number of victims is one factor. You could have a
10 hundred victims and no pattern of racketeering activity. For
11 example, arson is a predicate act. Two fires could be set in
12 two different buildings in an insurance fraud scam and kill a
13 hundred people in the process. Heinous crime, multiple
14 victims, that's not a pattern of racketeering activity because
15 it's not long-term criminal conduct. It's a single episode,
16 even though it was coordinated by conspiracy between the
17 arsonist and the building owner.

18 On the other hand, it's not at all unusual, although
19 it is rare, as the D.C. Circuit makes clear, that you can have
20 a single victim and have a pattern of racketeering activity.
21 Your Honor found that in the *Oceanic Exploration* case, which
22 was decided in two-thousand-and -- I believe in 2008 after
23 both *Western Associates* and *Edmondson*. It was an allegation
24 by an oil company that they were the victim of a pattern of
25 racketeering activity of bribing foreign officials for

1 offshore oil leases.

2 There was only one victim in that case, the
3 corporation and its wholly owned subsidiary, and these are
4 cases we cited in the original motion to dismiss.

5 Judge Lamberth found a single victim scheme in
6 *Elemary versus Holzmann*, which is another case we cited in the
7 motion to dismiss, which is 533 F.Supp.2d 116. *United States*
8 *versus Palfrey*, which was a criminal prosecution in this
9 district against the so-called D.C. Madam, I think that's an
10 example of perhaps no victims. It was prostitution, adult
11 prostitution, violation of the travel act to commit adult
12 prostitution and money laundering. No focus at all on the
13 victims in that case.

14 So, I think it's one factor to be taken into
15 account, but seriously, do we really think Congress intended
16 to allow this conduct to occur simply because Feld
17 Entertainment may have been the only victim? Because I would
18 submit that that standing alone is enough to allege and has
19 been alleged a closed-end pattern of racketeering activity,
20 and that's all we're talking about here on the motion for
21 reconsideration.

22 For example, we haven't even gotten to the question
23 of whether there's an open-ended pattern of racketeering
24 activity, an issue Your Honor never reached. We briefed it,
25 we pleaded it, so I'm getting a little bit ahead of myself

1 here, but even if you were to agree with everything they said
2 and even if we went upstairs and the D.C. Circuit agreed with
3 everything they said and that got reversed, it's going to come
4 back and then we have to look at the same --

5 THE COURT: I'm mindful of that as well, and
6 actually, I gave some thought to maybe -- maybe I -- depending
7 on what I do or not do, maybe the Court should address that
8 issue, regardless of what the Court does, open-ended. I
9 didn't -- I didn't feel as though it was necessary to do that,
10 but you raise a point that the Court has also thought about.
11 If indeed it went upstairs and they prevailed, it would
12 probably be remanded, so should the Court resolve that issue?

13 MR. SIMPSON: I think you could -- we were perfectly
14 well -- expected that to be resolved in the last motion.

15 THE COURT: It's a motion for reconsideration, so I
16 didn't consider --

17 MR. SIMPSON: It's not squarely presented, but it's
18 one of the factors the courts have said defeats the
19 certification request if there are other issues that are going
20 to make this appeal just a sideshow. All it's going to do is
21 delay things.

22 But my view on this, we don't need more than one
23 victim. There's no reason to believe that this is legal
24 simply because there's one victim. That you can get away with
25 this for a decade, that you can perpetrate a fraud on the

1 Court through what they did, and the only reason that this
2 isn't a pattern of racketeering activity is because some --
3 just one person happen to get nicked by it.

4 But even if --

5 THE COURT: So if the donor fraud allegations went
6 by the wayside, then what?

7 MR. SIMPSON: And that's how we started out. That's
8 how this case started out because we weren't aware of all this
9 donor fraud when we filed the original complaint. The only
10 thing we knew about --

11 THE COURT: Do you need donor fraud allegations to
12 survive?

13 MR. SIMPSON: I don't think so, but it turns out
14 there are these other issues.

15 When we first filed the complaint, we didn't know.
16 This was August of 2007.

17 THE COURT: Who is defrauded? Feld is not defrauded
18 as a result of mail fraud.

19 MR. SIMPSON: They didn't take any money from my
20 client based on their solicitations. What they did is they
21 constructed a fraudulent case in order to try to destroy my
22 client's business of operating a circus with elephants.
23 That's what they did. That's injury to my client. Because
24 without that case, my client is not injured, at least by this.
25 They're not injured by this case.

1 THE COURT: That's sheer speculation as to whether
2 they gained any money as a result of --

3 MR. SIMPSON: And that's the other thing about what
4 he just said is wrong. We did plead. We didn't just
5 speculate about it. We specifically pleaded based on what we
6 knew, based on what we know now about the state of the donor
7 fraud situation.

8 When we first filed this complaint, all we knew
9 about was that 2005 fundraiser, and after you stayed the case,
10 we find out through the deposition of Nicole Paquette that
11 that organization actually used this case to raise money.
12 Then they got their solicitations in discovery, on the last
13 day of discovery, June 30, 2008. That's when they produced
14 that stuff.

15 Then we lived through the lawsuit itself when we see
16 their maneuvering. Why would anybody do what they did if they
17 weren't trying to prolong this case? Why were they trying to
18 prolong this case? One reason is because it's useful to raise
19 funds, and that's why you have this revised RICO claim. It's
20 also why you have a claim for abuse of process, which wasn't
21 in the original complaint because we didn't know about it.
22 And all of the discovery --

23 THE COURT: The donor fraud allegations, though --
24 if I understand you correctly, the donor fraud allegations are
25 irrelevant then to your prosecution of your RICO claim,

1 correct?

2 MR. SIMPSON: If it's required that we have to have
3 more than one victim, we've got plenty. We've got plenty of
4 other victims. The people that went to that fundraiser --

5 THE COURT: You don't believe as a matter of fact
6 and law it's required.

7 MR. SIMPSON: No.

8 THE COURT: Then you're willing to forego discovery
9 with respect to donor allegations?

10 MR. SIMPSON: If that's all I need to get my client
11 to the goalpost, that would be fine. You really think I want
12 to go through --

13 THE COURT: Is that "yes?"

14 MR. SIMPSON: Yes, it is "yes."

15 THE COURT: You're willing to forego donor
16 discovery.

17 MR. SIMPSON: If that's sufficient as a matter of
18 law. I don't have any interest in their donors. I could care
19 less who wants to give money to these people. I don't care.
20 My client doesn't care. All my client wants is to be made
21 whole and to get justice for what they had to go through.

22 THE COURT: You rest on the scheme vis-a-vis Feld
23 itself then perpetrated by Tom Rider, correct?

24 MR. SIMPSON: No. I'm saying -- I'm saying that we
25 don't need the donor fraud, but we pleaded it adequately and

1 it's actually -- it actually took place. And this idea that
2 we didn't actually plead that people parted company with their
3 money is not true. We set it out in paragraph 11.

4 THE COURT: I'm just addressing the issue that, you
5 know, that we've been talking about, First Amendment conflict
6 with RICO, but it doesn't sound as if you're interested in
7 going down that road anyway.

8 MR. SIMPSON: Why would I buy into that if I didn't
9 need to do that? I'm just trying to get my client its money
10 back and to get what it's entitled to get under the RICO
11 statute. If I don't have to go down donor fraud land, that's
12 fine with me. Why would I want to spend more time on this
13 than is necessary?

14 They're the ones saying we got to have the extra
15 victims. And how many do we need? Do we need one? Do we
16 need two? Do we need 500? How many do we need? It's all
17 driven by what they say the law is. My view is you only need
18 one. There's no reason to believe Congress intended to give
19 people a pass simply because, everything else being equal,
20 with a pattern, there's only one victim. It's ridiculous.
21 But there are other victims.

22 THE COURT: It's also ridiculous to think that any
23 of these donors would ever join as a co-plaintiff with --

24 MR. SIMPSON: That's just a hypothetical argument.
25 Seriously, what are we more likely to find in discovery?

1 Additional perpetrators or additional victims. And if
2 somebody else -- if somebody else --

3 THE COURT: I'm not going to go down that road. I
4 have no idea if you find anything at all.

5 MR. SIMPSON: But the standard at this point is
6 plausibility. Plausibility.

7 THE COURT: As opposed to possibility.

8 MR. SIMPSON: As opposed to possibility.

9 THE COURT: Why is it more plausible than possible,
10 though?

11 MR. SIMPSON: Because you have false statements of
12 fact that are set forth not only in the fundraiser invitation
13 that we made reference to but also in that letter that
14 Katherine Meyer wrote and circulated on November 11, 2003,
15 that's in the complaint. They have false statements of fact
16 about the case, about Tom Rider, and we know people paid
17 money. We don't know who they are because Your Honor redacted
18 all the names in the other case, so what am I supposed to do?
19 Does it give them more notice for me to say that John or Mary
20 Doe gave money on the basis of this? That's basically what
21 we've said.

22 Paragraph 11 says that they projected this image of
23 Rider and his false -- this false image of Rider as an
24 elephant advocate and used it to aggressively seek and obtain
25 donations, not just that it possibly happened. It did happen.

1 They did raise money on the strength of this case.

2 Now, who actually gave it to them? I don't know at
3 that point. I had actually, in preparing for this argument,
4 figured out one I could show Your Honor right now, I'm pretty
5 sure, is a victim. We didn't plead it because we're not
6 required under Rule 8, Rule 9 or Rule 12 to get into the weeds
7 like this. *Twombly* and *Iqbal* did not overrule the concept of
8 notice pleading. *Twombly* and *Iqbal* did not overrule the
9 consent of pleading a case based on information and belief.
10 But we clearly stated what he says is lacking in paragraph 11,
11 in paragraph 92, in paragraph 4, in paragraph 9, all of
12 those -- all of those parts of the complaint make a concrete
13 allegation that fraudulent statements were made about Rider,
14 about this case, and people paid money as a result.

15 Is it plausible, for example, that the people that
16 went to that fundraiser thought they were given money to pay
17 legal fees in the case? Is it plausible that had someone
18 said, you know what, we're not actually using it that way,
19 we're actually paying him to be a Plaintiff in the lawsuit,
20 and he's not, by the way, paying taxes on this, but we're
21 sending him tax documents that say that's nonemployee
22 compensation to be a paid advocate, which is what he later
23 told the IRS. Now, is it plausible that when those facts come
24 out that one or more of those donors would say, you know what,
25 I'm not giving you the money; I'm going to give it to somebody

1 else? It's also plausible to go the other way. That's what
2 we're talking about here.

3 THE COURT: It's implausible to suggest, to think
4 that any of those victims -- I'm using the word loosely at
5 this point -- would join as a co-Plaintiff in this lawsuit,
6 and if so, if that's implausible, isn't that a factor for the
7 Court to consider when determining multiple injuries for
8 victims?

9 MR. SIMPSON: I think that's a separate matter. I
10 think that's up for the Court to -- if that ever happened,
11 which I think is highly unlikely, that's up for the Court to,
12 first of all, nobody's coming into this case without my
13 permission because you can't join my case as a Plaintiff
14 unless I agree with it. I'm not going to agree with
15 complicating it that way.

16 THE COURT: At the pleading stage, though, how does
17 the Court -- what does the Court do with that?

18 MR. SIMPSON: I think it's irrelevant at the
19 pleading stage.

20 THE COURT: It's irrelevant?

21 MR. SIMPSON: Because -- I mean, on what principle
22 is discovery in a case stopped simply because it might reveal
23 either additional perpetrators or additional victims to the
24 same conduct that the Plaintiff is complaining of? They've
25 cited no authority for that. None. There isn't any. We

1 should be allowed to pursue that. We should be allowed to
2 pursue it.

3 This idea that we want to turn over all their donor
4 files is incorrect. I'm only interested in what they did with
5 respect to my client.

6 THE COURT: You can't get that information anyway,
7 can you?

8 MR. SIMPSON: Well, according to them, we can't.
9 There's like a First Amendment right to do this.

10 THE COURT: What about Supreme Court precedent?

11 MR. SIMPSON: Well, no, I don't think that's exactly
12 correct. I think when it comes to discovery of this
13 information --

14 THE COURT: I'm sure if the case sticks around,
15 we'll have enough time to debate that, I'm sure.

16 MR. SIMPSON: Right. I think the other question,
17 Your Honor, was the API standing point.

18 THE COURT: Right.

19 MR. SIMPSON: The D.C. Circuit ruled in no uncertain
20 terms that API had no standing to sue, period. Now, what they
21 did say --

22 THE COURT: Wait a minute, wait a minute. In the
23 2011 opinion?

24 MR. SIMPSON: Yes, yes, had no standing because
25 information theory was invalid as a matter of law and wasn't

1 proven. In this resource draining theory, some validity as a
2 matter of law but ultimately never proven.

3 THE COURT: Never proven.

4 MR. SIMPSON: Yeah. And not because this is some
5 accident that Judge Tatel just happened to come up with at
6 argument, what about this. This is their own theory. This is
7 a theory they've been talking about in this case since it was
8 filed. They brought it up during the trial. They submitted a
9 proposed finding on it. They brought it up in the final
10 argument. What they didn't bring it up in is the brief you
11 ordered them to file on standing. But it was raised in the
12 trial court. They never offered any evidence, and I submit
13 it's because they didn't have any such evidence. There is no
14 evidence of a public misperception. There is no evidence that
15 API spent any money countering that.

16 THE COURT: Well, what the Circuit said was API
17 never proved its claim.

18 MR. SIMPSON: That's correct, but --

19 THE COURT: The Circuit didn't say it didn't have
20 standing, though, did it?

21 MR. SIMPSON: They affirmed your determination that
22 they had no standing. They had no standing as a matter of
23 fact. There is no injury. And remember, this is an injury
24 that if you have it, you have to have it when you sue, at the
25 time you sue. So, for the original Plaintiffs, it was 2000,

1 and for API it was 2005.

2 Where's their evidence? It's in your hand when you
3 walk in the courthouse door. Why wasn't it put on during the
4 trial? Is it because the lawyer who did the questioning is
5 incompetent? I don't think so. It's because they didn't have
6 it, and I don't think it matters whether your theory is
7 invalid legally or whether it fails because you never had the
8 proof. You still lost the issue.

9 THE COURT: I don't think it's necessary for the
10 Court to speculate. It wasn't proven. That's the bottom
11 line.

12 MR. SIMPSON: That's correct. And so what do they
13 propose to do now? Prove it in this case after your finding
14 was affirmed, finding 53 was affirmed and rehearing was denied
15 and cert was never sought? Now we're going to have a
16 collateral attack on that finding in this case? I don't think
17 that's how it works. I don't think that's how it works.

18 THE COURT: Let me ask you -- let's go back to those
19 fundraising letters for a second.

20 MR. SIMPSON: Yes.

21 THE COURT: You relied on those 2003 fundraising
22 letters as an additional basis for this donor fraud. Those
23 letters ask for money for Rider to perform advocacy and media
24 work and that's what he was doing. No one disputes he was
25 doing that.

1 The letters list over a dozen appearances, multiple
2 stage performing work for the organizations. That's legal
3 work. How is asking donors for money so he can continue this
4 work donor fraud, unless I'm misunderstanding your theory?

5 MR. SIMPSON: Because that's not all he was doing,
6 Judge. And it's interesting, because in that very letter,
7 which I believe is -- is Exhibit 4 to our opposition, we
8 think, first of all, and we alleged in the complaint that this
9 was not just sent to Catherine Liss. This was disseminated
10 far and wide to other potential donors because it's obviously
11 a form document that's for mass distribution. But over on
12 page 2 of that letter, she says all we need here for
13 Mr. Rogers' media outreach for 2004 is \$10,000. That's all we
14 need. That will fund it for the entire year.

15 The problem, though, is they paid him 24,000. So,
16 yeah, they did pay him to do media work, but they also paid
17 him the other 14 to do something else, and we submit it was to
18 be a witness in the case and to be a Plaintiff. Because, as
19 Your Honor found in the case, he never did enough media work
20 to account for the money he was paid, and this is a classic
21 example of that. They sent him a 1099 for that year, 2004,
22 for nonemployee compensation of \$23,900. It's an exhibit in
23 the trial. So that's our point.

24 It's not an unusual situation where a witness is
25 bribed, and because there's some proper purpose for the money,

1 it's done in order to make it look like something other than
2 what it was. That's not unusual at all. But in this case,
3 it's pretty clear from that document that they spent -- that
4 they had other monies that they paid him for other purposes.

5 THE COURT: The 2005 fundraiser, if -- if your
6 allegations of donor fraud come down to that fundraiser and
7 nothing more, is that enough to pursue a pattern theory?

8 MR. SIMPSON: I think it's -- again, it's a flexible
9 theory. It's a case-by-case situation. There's a situation
10 where I don't know how many people went. Maybe it was a
11 hundred, maybe it was one, but if one person, if one person
12 wrote a check based on a false statement about what Rider was
13 doing or going to do, then that's another victim of the same
14 scheme.

15 THE COURT: But it gets down to "if," as opposed to
16 alleging that someone did.

17 MR. SIMPSON: We allege that it happened. We just
18 don't know who it is, and I think it's entirely unfair at this
19 point --

20 THE COURT: How can you in good faith allege --
21 well, you can allege that it happened, that there was this
22 fundraiser, that invitations were sent out and that people
23 appeared, and based upon discovery, you can allege that money
24 was received, correct?

25 MR. SIMPSON: Yes. But what they're trying to hold

1 me to is a standard that says it is entirely implausible, as a
2 matter of law, that anybody was defrauded. In other words,
3 every single person, whoever wrote a check --

4 THE COURT: It certainly wouldn't be Feld defrauded
5 as a result of --

6 MR. SIMPSON: No, no, I'm talking about donors. No
7 donors, it's impossible, implausible, that any donor, whether
8 it's one, 500 or five million, that any of these people, had
9 they known the truth about Rider, would have made a different
10 decision. It's just so implausible, and that's just
11 ridiculous. There's no -- there's no case that says that. It
12 defies common sense.

13 If I lie to you about what I'm going to do with the
14 money and you give me the money and then you find out the
15 truth, it's implausible you want your money back? I think
16 that's what really drives their argument. It's not that there
17 isn't going to be other victims. They're concerned about
18 collateral consequences when these other victims emerge, but I
19 didn't set this in motion. I'm not the one in here telling
20 you you need all these other victims. It's them. It's them.

21 And again, it leads wherever it leads. I didn't
22 open that door. I didn't create this situation. My client
23 didn't pay Tom Rider. My client didn't bring this case. My
24 client got picked off and targeted and had to deal with this
25 case based on their fraudulent claims, and here we are trying

1 to deal with it ten years later in a case that's been pending
2 for six years with no discovery at all.

3 Just on the certification point, Your Honor, unless
4 you had another question.

5 THE COURT: I did. Wait just one second. I have my
6 *Havens Realty* question. You alluded to it. The motion for
7 reconsideration also focuses on causation, and let's assume,
8 for purposes of this discussion, that API had standing under
9 *Havens Realty* but just failed at trial as a matter of proof.
10 They didn't offer anything. We know that. If Feld would have
11 had to spend some legal fees defending ESA lawsuits, separate
12 and apart from Rider's claims, does that defeat Feld's
13 standing as a matter of law under *Holmes*, *Ansa* and the other
14 causation cases?

15 MR. SIMPSON: No, because we would have had to spend
16 money on Rider. There's a certain amount of money we spent on
17 Rider we never would have spent. If all he was was a fact
18 witness in the case, there wouldn't have been any effort, you
19 know, focused on his standing, his esthetic injury, all the
20 issues that go with that. We filed briefs on that. We had
21 interrogatories directed at that, whole parts of his
22 deposition, and I would submit my entire cross-examination at
23 trial was centrally based on that, was centrally based on the
24 fact that this guy's anchoring this case. So, you take all
25 that out --

1 THE COURT: So Feld would still have standing --

2 MR. SIMPSON: Absolutely, absolutely.

3 THE COURT: If he came in with a itemization of fees
4 spent to defend against other claims --

5 MR. SIMPSON: Absolutely. They can be segregated
6 out. There are certain things that were very Rider standing
7 specific, but it doesn't minimize the misconduct here. It
8 doesn't minimize the misconduct because they still did what
9 they did. They still paid this guy. He still lied under oath
10 and made misrepresentations to the Court of Appeals that
11 induced this case to go on for ten years. That happened.
12 That has to be addressed at some point.

13 Now, whether Feld comes out of this with only
14 standing as to the Rider standing stuff and it's only
15 \$100,000 -- I don't even know if that's accurate; I'm sure
16 it's not -- it's still a violation of the statute.

17 THE COURT: Let me just say, this court never made
18 any finding that he made misrepresentations to the Court of
19 Appeals, and I don't think the Court of Appeals made any
20 findings either. Talking about the first appeal, the Court of
21 Appeals said, look, he's alleged all this, you -- he made
22 allegations that he couldn't prove when put to the test.

23 MR. SIMPSON: Well, I would slightly disagree with
24 that. I think your finding 60 through 63 pretty clearly says
25 that the statements he made to the Court of Appeals were

1 untruthful. I mean, that's the language that was used.

2 THE COURT: All right. Well, I didn't accuse him of
3 perjury or anything.

4 MR. SIMPSON: That's correct. That word was not
5 used.

6 THE COURT: That's academic anyway. So, he was sent
7 back, he got his fair day in court, and yes, it was years
8 later. But you know, the case took the direction that it
9 should have because there was at least one individual that had
10 standing. It was unnecessary for the Court to deal with any
11 other organization at that point because one had standing,
12 correct, or at least --

13 MR. SIMPSON: Well, this is like me. It's like a
14 defendant in an automobile accident on the ground that if I
15 hadn't run you down, then you wouldn't have a claim. Well,
16 that's true, I wouldn't have a claim, but you did run me down.
17 They didn't have the evidence. That's the problem here.

18 If they had this injury, why didn't they prove it?
19 Because they didn't base it on some case that just came out
20 yesterday. It was based on *Spann versus Colonial Realty*, was
21 decided in 1990. Justice Ginsburg, then Judge Ginsburg made
22 it clear, you want to pursue this theory, this is what you got
23 to prove. No. 1, that there is a misperception among renters
24 that this housing is from -- not for minorities, and No. 2,
25 you spent resources on it. It was clear. So why didn't they

1 prove that? They were unaware of the case? They cited the
2 case in every brief they had.

3 No, they didn't have the injury. They didn't have
4 the proof, and so whether you lose it on the law or lose it on
5 the facts, you still lose it. You don't have standing,
6 period, end of story, and that's why --

7 THE COURT: And it can't be resurrected here.

8 MR. SIMPSON: You cannot be resurrecting it after
9 the fact. Collateral estoppel or not, I think that completely
10 bars them, but they had a chance. They could have brought
11 this up to the D.C. Circuit. When they -- when they pursued
12 this appeal, they were fully aware of what my position was in
13 this case about causation because we were briefing the motion
14 to dismiss at the same time. In fact, they got in here and
15 said, "Judge, wait for the appeal, wait for the appeal because
16 we're going to win on standing. API is going to have
17 standing, please wait," and you did.

18 Now, I don't know if it's why you waited, but there
19 was a delay. Of course, it turns out API didn't have
20 standing. They lost.

21 THE COURT: I didn't stay the case, did I? Did I?
22 I don't think I stayed the case.

23 MR. SIMPSON: You didn't stay the case, but there
24 was a delay after that argument was made, so that was my
25 inference that you were waiting for the D.C. Circuit, but be

1 that as it may, what came back from D.C. Circuit, no standing.

2 So they knew what the consequences were. They knew
3 what I was saying. They didn't raise this argument. They
4 could have. They could have made -- taken an issue with that.
5 They didn't do it. It's over. Done.

6 THE COURT: The Defendants argue that if this case
7 goes forward, it puts the donors in a constitutional -- and
8 I'm quoting -- suspect Catch-22. Would they say they would
9 have given money to the organization even if they knew Rider
10 had no standing to maintain the lawsuit? They could be joined
11 as co-Defendants in this case. What do you have to say about
12 that argument?

13 MR. SIMPSON: Well, I think it's again it's making
14 -- it's a construct that has no basis in reality. It has no
15 basis in reality.

16 What you're going to get are people that are
17 either -- they're going to say --

18 THE COURT: Would the donors have a viable RICO
19 claim?

20 MR. SIMPSON: Well, it wouldn't be my position to
21 advise them on that. I don't want to complicate this case
22 with other Plaintiffs. That's not my intention. But again,
23 you don't cut this off simply because discovery in a federal
24 lawsuit might reveal additional victims and perpetrators. You
25 just don't do that. There's no principle for that.

1 The way discovery should be handled in this case is
2 I think illustrated by Judge Norma Holloway Johnson's opinion
3 in the *Greyhound* case where First Amendment arguments were
4 raised about discovery, and she, first of all, ruled that to
5 the extent that the discovery party already knows about who
6 these donors are, the First Amendment doesn't even come into
7 play.

8 THE COURT: Yeah. But that's not -- that's not an
9 issue here, though. I'm sorry, that is an issue here because
10 you don't know who the donors are.

11 MR. SIMPSON: We know some of them, and I could give
12 you an example of one I found getting ready for this argument,
13 somebody I'm pretty confident is a victim. I now know her
14 identity because they produced it in the other case.

15 THE COURT: Was produced subject to protective
16 order.

17 MR. SIMPSON: No. They put her name into the trial
18 record in Exhibit 94A. If your --

19 THE COURT: Without using the person's name, why
20 don't you make your point if you can.

21 MR. SIMPSON: This woman wrote a letter. She went
22 to a rally in Harrisburg, Pennsylvania in November, I believe,
23 of 2003 and listened to a speech made by Tom Rider. And just
24 as we alleged in the complaint, she fell for this image of Tom
25 Rider, the selfless elephant advocate traveling the

1 countryside at great personal inconvenience and at great
2 personal sacrifice, because she wrote a letter to Katherine
3 Meyer saying, I'm so in awe by Mr. Rider and it's so
4 impressive that he's working alone and without pay.

5 Now, he either said that or she was strongly led to
6 believe that based on what went on at that rally. Sure
7 enough, three weeks later, there's a thank you note from WAP
8 to her, name redacted, handwriting is the same, thank you for
9 your check, \$25, Check No. 2467 noted on the letter.

10 Well, you go look at Check 2467, which WAP produced
11 with no redacted signature, it's pretty clearly the same
12 person. That same person who signed that letter signed that
13 check. It's the same person. And not only that, she
14 continued for the next three years to make regular donations
15 to WAP based on, as her note to Mr. Glitzenstein said, based
16 on your humane work for the Ringling Brothers' animals.

17 So, I would say that's a pretty good indication of
18 someone who has no idea how they're spending this money.
19 They're spending this money to give this man a salary. He
20 made a false statement of fact or he clearly led her to
21 believe he was working without pay when in that same
22 timeframe, November 2003, he was being paid \$500 a week and he
23 was working with all these other organizations hand-in-glove.
24 He wasn't alone. He was working for pay as he later told the
25 IRS. He was a paid advocate. That's a woman that we think,

1 in a deposition, might say, likely would say, you know what, I
2 wouldn't have given them money, or you know, what's worse for
3 them maybe, I want it back now.

4 That's just one example. We think there are
5 hundreds of people like that. There are others in that same
6 cluster of thank you notes that they wrote to this person.
7 They wrote notes to three or four other people from the same
8 area of the country, in Pennsylvania. Likely inference, they
9 all went to that same rally. Likely inference, they all gave
10 money based on what Rider said.

11 So we're not talking about something that's totally
12 speculative. We're not talking about "if." We're talking
13 about something that happened. The only thing that's impeded
14 our ability to show it is the fact that in the other case,
15 their identities were redacted. Their identities were
16 redacted.

17 In this -- this scheme that injured my client is the
18 same scheme that injured these donors because they're raising
19 money based on the lawsuit. They're not simply saying we
20 don't like bull hooks and we don't like chains and we don't
21 like Ringling Brothers' use of those instruments, so please
22 give us money. They're saying all that, but they're also
23 saying, by the way, we've got this lawsuit. We're suing them.
24 Please send us money to help us fight this fight. They're
25 using the case. The case doesn't exist without the fraud.

1 The injury my client has incurred doesn't exist without the
2 racketeering, and their ability to raise money on the strength
3 of that case doesn't exist without the racketeering, and
4 that's where they come together.

5 Now, not every predicate act that my client was
6 victimized by victimized every donor and vice versa, but you
7 don't have to have that. You just have to have a pattern of
8 racketeering activity that is sufficiently continuous and
9 consists of related enough acts that it constitutes long-term
10 criminal conduct, and that's what the statute is designed to
11 deal with.

12 THE COURT: If the case is certified, do you agree
13 that discovery can go forward or, as counsel alluded to, that
14 the Court may be in a position to resolve other issues of law
15 that don't require any discovery?

16 MR. SIMPSON: I think that all of that ought to
17 happen, Your Honor. That's what Judge Kessler did in *Philip*
18 *Morris*. That case went forward, notwithstanding the
19 certification.

20 THE COURT: Right. It's very late, almost
21 approaching trial.

22 MR. SIMPSON: Right. They were on the eve of trial.
23 She said, "I'm not going to move this trial date."

24 Judge Hogan, in the *Vitamins* case, stated, "Okay.
25 I'm going to certify this question but we're going to go

1 forward with discovery."

2 So, at minimum, that's got to happen, it seems to
3 me. I mean, this case was filed six years ago.

4 THE COURT: What has to happen?

5 MR. SIMPSON: Discovery has got to go forward. We
6 can do some of these other things. I think you do it all. I
7 think you do it all.

8 THE COURT: Do you agree there are legal issues that
9 could be addressed, if not resolved, that don't require any
10 discovery, or not?

11 MR. SIMPSON: The collateral estoppel point is, I
12 would say, a purely legal issue, and we put that in our
13 discovery plan as something that the Court should consider up
14 front.

15 THE COURT: What's the prejudice to the Plaintiffs
16 then if the Court certifies and allows legal issues to be
17 addressed that can be addressed, allows discovery to go
18 forward that can be? Although I anticipate, if the Court were
19 to certify it, immediately, if not sooner, a motion to stay
20 all discovery will follow.

21 MR. SIMPSON: Exactly. I mean, who are they
22 kidding? They're saying -- they're being coy, but as soon as
23 you issue that order, that's going to be the next filing,
24 either here or in the D.C. Circuit, stay discovery. Oh, we
25 can't do discovery. We're going to have an appeal. We're

1 going to win the appeal. Just like they told you last time,
2 they're going to win the ASPCA appeal. Just like they told
3 you when they stayed discovery in this case, we're going to
4 win the motion to dismiss. So it goes on and on and on.

5 We are in the sixth year of this case. At some
6 point it starts to prejudice the Plaintiff, and I think we've
7 already reached that point. Six years we're into this, we
8 haven't taken a single deposition. We haven't even had the
9 discovery conference, let alone do discovery. And even if
10 they're right --

11 THE COURT: I'm sorry. Wait a minute, you had a
12 conference.

13 MR. SIMPSON: We had a scheduling conference. We
14 haven't had a Rule 26 conference. That got postponed on
15 account of this motion.

16 THE COURT: Right. Yeah. Yeah.

17 MR. SIMPSON: So, we haven't even gotten to the
18 basic groundwork of what is it going to look like, you know,
19 much less get it done. That all that has to continue. It
20 prejudices my client to continue to wait because that's all
21 we're getting is the runaround. Whatever they think they need
22 to tell you to avoid discovery, they're going to say. That's
23 all this motion is. It's just to buy more time. It's what
24 they told you when we were in there on the motion to dismiss.
25 Oh, no, you can't -- it's in the RICO case, no way. This is

1 all about attorney's fees and sanctions. You need to deal
2 with this misconduct in the other case. Go sanction them in
3 the other case, and then Ms. Steel got up here and offered her
4 clients up for that. Just sanction them under 1927 in the
5 other case.

6 So, when we go to the other case and seek sanctions
7 and seek to shift fees --

8 THE COURT: I don't think she offered her clients
9 up, did she?

10 MR. SIMPSON: That's what I interpreted that to
11 mean.

12 THE COURT: I didn't, and I didn't act on that
13 either.

14 MR. SIMPSON: But when we get to the other case,
15 what do they say? No, you're not entitled to anything. You
16 get nothing. You get nothing because everything we did is
17 fine.

18 THE COURT: Your clients don't have to worry. No,
19 no, I wouldn't have done it if she had asked for it.

20 MR. SIMPSON: That's an example. This is just
21 another part of that. This conduct isn't going to go away,
22 Your Honor. This is not a petition that's filed by someone at
23 Guantanamo making up stuff because he thinks that there's some
24 policy against him, like in the *Iqbal* case.

25 This is something -- this is based on facts that not

1 only happened, but you found took place after a trial. And
2 what we're dealing with in this case --

3 THE COURT: You said it's not like GTMO because of
4 what?

5 MR. SIMPSON: Well, like the *Iqbal* case. That
6 guy --

7 THE COURT: *Iqbal*, not the --

8 MR. SIMPSON: He was some kind of detainee. He may
9 not have been in Guantanamo, but he was a detainee.

10 THE COURT: I don't think he was.

11 MR. SIMPSON: He'd been arrested, and his theory was
12 there's --

13 THE COURT: I don't think he was in Guantanamo.

14 MR. SIMPSON: -- this grand policy against detaining
15 people like me, that the Justice Department, Attorney General
16 Ashcroft has adopted based on my national origin, and that's
17 not plausible. There was no such policy. We're talking about
18 facts that actually not only happened but you found happened.
19 We're dealing with a fundamentally different case.

20 I would point out that that -- although they don't
21 like to hear this, there's a public interest that goes with
22 this lawsuit. The RICO --

23 THE COURT: The public is the victim in RICO
24 actions.

25 MR. SIMPSON: This is a private Attorney General

1 case. That's exactly how the Supreme Court of the United
2 States has described the private RICO case. It's precisely
3 because the Justice Department doesn't have time to deal with
4 all the crime in the United States that this cause of action
5 was created, and it's important to get on with it.

6 If we're right, it's really a problem that this
7 happened and that the court system was abused this way. And
8 if we're wrong, then it's important that that be determined as
9 well, but there's a public interest here and it's getting
10 defeated every time we come in here with these side-track
11 motions and these attempts to delay the inevitable, and that's
12 all this is.

13 So, if it -- if it does get certified, then we've
14 got to go forward with these other issues. The one thing I
15 think -- I mean, crime fraud, I think, I would disagree that
16 this is the appropriate thing to be briefing now. I think
17 that's ultimately going to be an issue, but I think until you
18 get a specific context with respect to testimony or with
19 respect to someone's e-mail or with respect to the documents,
20 it's hard to determine that in the abstract, so I think the
21 discovery has to be done first and then you deal with that
22 once the objections are made. Once you get an index, once
23 someone is instructed not to answer a question, because until,
24 you're just dealing with it in the abstract.

25 I don't think there's any doubt, ultimately, that a

1 large part of what they're going to claim the attorney/client
2 privilege for is subject to the crime fraud exception because
3 the lawyers are in the middle of this. They weren't just
4 standing by like the accountants in the *Reves* case doing their
5 little accounting thing while racketeering and conspiracy
6 going on. They're in the middle of it. So I think that's
7 going to be the case, but it's going to be hard for the Court
8 to deal with that in the abstract.

9 The First Amendment point he brought up, I don't see
10 any reason to get into that now either, because again, I think
11 that's discovery driven. It's going to be depending on who
12 we're talking about. I mean, a lot of, part of, you know,
13 this donor fraud discovery has to be linked to this case. I
14 can't just go in there and say I want all your donor records.
15 No, I can't do that.

16 I have reason to believe, based on what we already
17 know, that they used this case to raise money, which means
18 there's correspondence to that effect, which means in the case
19 of the big organization, such as ASPCA and HSUS who use
20 professional fundraising solicitors and professional
21 fundraising advisors, that there's actually either reports,
22 documents and other types of information that analyze this
23 because they pay millions of dollars a year to be advised
24 professionally by inside the beltway-type people on how to
25 raise money and what works and what doesn't work.

1 If -- if they had such analyses done, that has to
2 get produced. If, for example, they had notes like was sent,
3 that unnamed person I discussed with WAP, people send in a
4 donation, oh, I think it's wonderful what Tom Rider is doing,
5 right, that all has to be produced. That all has to be
6 produced. It all has to be related to the case, to Feld
7 Entertainment's elephants and to Tom Rider, because without
8 that, there's no link to a racketeering claim.

9 So, that vastly, I think, overstated how broad this
10 is, and I think there's also, there has never been any proffer
11 by anybody about how burdensome this supposedly really is.
12 Nobody has ever given you any evidence about how many e-mails
13 they have, how many documents they have. They just say, oh,
14 we don't want to do it. It's burdensome.

15 How do I know it's burdensome? How do I know it
16 even still exists? We don't know, because they haven't done
17 the discovery yet. That's why we need to get forward moving,
18 leaning forward and getting this case going because the more
19 delays like this that happened, it's a ship that's dead in the
20 water.

21 THE COURT: All right. Thank you. Did you have
22 anything you wanted to respond to briefly, Counsel?

23 MR. BRAGA: Yes, Your Honor, just a handful of
24 points. I recognize I'm the only thing standing between
25 everybody and lunch. First of all, on behalf of the Defense

1 group.

2 COURT REPORTER: Judge, I have to have just five
3 minutes real quick. I need to maybe switch with another court
4 reporter because I'm supposed to be in another court.

5 THE COURT: All right. That's fine. We'll take a
6 short ten-minute recess.

7 (1:55 P.M.; A BRIEF RECESS WAS TAKEN.)

8 (SWITCH COURT REPORTERS.)

9 *-*-*-*

10 **CERTIFICATE OF REPORTER**

11 I, Catalina Kerr, certify that the foregoing is a
12 correct transcript from the record of proceedings in the
13 above-entitled matter.

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Catalina Kerr

Date

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