UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FELD ENTERTAINMENT, INC.,	)	
	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civ. No. 07-1532 (EGS/JMF)
	)	
	)	
ANIMAL WELFARE INSTITUTE, *et al.*,	)	
	)	
Defendants.	)	

REPLY MEMORANDUM IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT BY DEFENDANTS KATHERINE MEYER, ERIC GLITZENSTEIN, AND MEYER GLITZENSTEIN & CRYSTAL

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BACKGROUND

Nowhere in the course of its lengthy opposition does Feld Entertainment Inc. ("FEI") even address the repeated judicial admissions in its own Complaints that it learned of the alleged "scheme" that underlies its RICO claims *before* February 16, 2006 – the date that FEI concedes is determinative for purposes of evaluating the statute of limitations on the RICO claims against the MGC Defendants. This is simply astonishing, and quite telling.

FEI's 2007 Complaint stated that the alleged "payment scheme" underlying its RICO claim "was devised *with the encouragement and advice of MGC*" *and* first "***became known to FEI in June 2004.***" ECF No. 1 ¶ 20 (emphasis added). FEI's 2010 Amended Complaint states ***as fact*** that FEI learned of the alleged "payment scheme described herein" when it took the "Rule 30(b)(6) deposition of ASPCA . . . in the ESA Action ***on July 19, 2005***." ECF No. 25 ¶ 32 (emphasis added). As the Second Circuit succinctly explained in *United States v. McKeon,* 738 F.2d 26 (1984):

> The law is quite clear that such pleadings constitute the admissions of a party-opponent and are admissible in the case in which they were originally filed as well as in any subsequent litigation involving that party. *Contractor Utility Sales Co. v. Certain-Teed Products Corp.*, 638 F.2d 1061, 1084 (7th Cir. 1981); *Raulie v. United States,* 400 F.2d 487, 526 (10th Cir. 1968); D. McCormick, Handbook of the Law of Evidence 633-36 (2d ed.1972). *A party thus cannot advance one version of the facts in its pleadings, conclude that its interests would be better served by a different version, and amend its pleadings to incorporate that version, safe in the belief that the trier of fact will never learn of the change in stories*.

(Emphasis added).

The multiple admissions in FEI's Complaints ***alone*** establish that, well before February 2006, FEI had more than sufficient evidence of its alleged "injury" to trigger RICO's four-year statute of limitations for the claims against the MGC Defendants. *Rotella v. Wood*, 528 U.S. 549, 554 (2000). Although FEI would clearly like those admissions to be ignored by this Court,

they cannot be. FEI's counsel filed both Complaints under Rule 11's admonition that they be prepared in good faith and be factually well-grounded. As such, there is no reason not to hold FEI to its own judicial admissions as to its own state of knowledge in its own prior Complaints.

Rather than confront – or even acknowledge – its own damning admissions, FEI repeatedly resorts to simply repeating its scurrilous RICO *allegations* against the MGC Defendants, as if that were a substitute for applying the statute of limitations analysis dictated by Supreme Court and Circuit precedent. In truth, the MGC Defendants did not engage in *any* of the "illegal conduct" attributed to them in FEI's latest incendiary brief. Opposition to Motion for Partial Summary Judgment ("FEI Opp.") at 14. Thus, if, as FEI repeatedly contends, definitive evidence establishing these purported "facts" and the ultimate validity of FEI's claims is necessary merely to trigger the statute of limitations, then the limitations period will *never* run. However, FEI's argument is not the relevant test in *any* case involving a statute of limitations defense, let alone one under RICO. *See, e.g., Solano v. Delmed, Inc.*, 759 F. Supp. 847, 855 (D.D.C. 1991) (rejecting the plaintiffs' notion that a "written confession addressed to plaintiffs" was necessary for "actual notice" of the basis for the RICO claim); *Sprint Commc's Co. v. FCC*, 76 F.3d 1221, 1228 (D.C. Cir. 1996) ("Accrual does not wait until the injured party has access to or constructive knowledge of *all the facts required to support its claim*.") (emphasis added); *Molecular Diagnostics Labs. v. Hoffman-La Roche, Inc.*, 402 F. Supp. 2d 276, 284 (D.D.C. 2005) ("The law does not require that a claim be proven by a preponderance of the evidence, and then affirmed on appeal, before a party is held to be on notice of a claim.").

Instead, as the MGC Defendants have explained, and as the Court has already ruled and even FEI is forced to concede, the relevant inquiry is whether FEI had "'*some* evidence'" of the purported RICO injury *on which FEI* relies to support its claim against the MGC Defendants.

ECF No. 90 (7/9/12 Motion to Dismiss Ruling) at 23 (explaining that "*some* evidence" of the alleged wrongdoing is the appropriate standard) (quoting *Chalabi v. Hashemite Kingdom of Jordan*, 503 F. Supp. 2d 267, 274 (D.D.C. 2007), *aff'd*, 543 F.3d 725 (D.C. Cir. 2008)); *see also* FEI Opp. at 27 (acknowledging that "***some*** evidence" is the standard). As the MGC Defendants have demonstrated, and as discussed further below, FEI not only had "some" evidence on which it relies for its RICO theory against the MGC Defendants, it had vastly *more* evidence than other courts have deemed sufficient to grant summary judgment for violating the statute of limitations.

Further, because FEI had abundant *actual* notice of the asserted basis for its claims before February 16 2006, FEI's voluminous discussion of what it (erroneously) claims was "fraudulently concealed" from it, FEI Opp. at 32-38, is completely irrelevant as a matter of law. *See* MGC Mem. 33-34. Thus, under controlling precedents, actual notice renders immaterial the diversionary mud-slinging to which FEI primarily devotes its brief.[1]

ARGUMENT

I. FEI'S POSITION CONFLICTS WITH *ROTELLA*, WHICH DICTATES THAT THE STATUTE OF LIMITATIONS ON FEI'S RICO CLAIM AGAINST THE MGC DEFENDANTS BEGAN TO RUN WHEN FEI HAD ACTUAL KNOWLEDGE OF ITS RICO "INJURY," NOT WHEN IT LEARNED ABOUT THE PURPORTED PATTERN.

By arguing that it did not know *enough* to trigger the statute of limitations prior to February 16, 2006, FEI effectively advocates the same argument that was rejected by a unanimous Supreme Court in *Rotella v. Wood*, 528 U.S. 549 (2000). There the Court explained

[1] Rather than respond to every baseless accusation leveled by FEI, the MGC Defendants will focus on how the *undisputed* facts reflected in their exhibits and FEI's responses to *those* facts are sufficient to establish that the statute of limitations was triggered before February 2006. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) ("Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. *Factual disputes that are irrelevant or unnecessary will not be counted*.") (emphasis added). Along these lines, although FEI's brief asserts that "virtually all of the 'material facts' proffered by the movant" are "disputed," FEI Opp. at 3, upon inspection, FEI has actually *not* disputed that *any* of the factual materials *on which MGC has relied* were in fact known to FEI prior to February 2006. *See Alyeska Pipeline Service Co. v. U.S. EPA*, 856 F.2d 309, 314 (D.C. Cir. 1988) (where the party opposing summary judgment submitted an affidavit that did "not draw into issue any factual premise essential to the position elucidated" in the summary judgment motion, there was no factual dispute foreclosing entry of summary judgment).

that the Courts of Appeals had applied different approaches to applying RICO's four-year statute of limitations: (1) a "last predicate act" rule under which the limitations period "began to run anew upon each predicate act forming part of the same pattern"; (2) the "injury and pattern discovery rule . . . under which a civil RICO claim accrues *only when the claimant discovers, or should discover, both an injury and a pattern of RICO activity;*" and (3) an "injury discovery accrual rule starting the clock when a plaintiff *knew or should have known of his injury*." 528 U.S. at 553-54 (emphasis added). The Court had already "rejecte[ed] the last predicate act rule" in *Klehr v. A.O. Smith Corp.*, 521 U.S. 179 (1997), because "[p]reserving a right of action for such a vast stretch of time would have thwarted the basic objective of repose underlying the very notion of a limitations period." 528 U.S. at 554 (citing *Klehr*, 521 U.S. at 189).

In *Rotella*, "guided by principles enunciated in *Klehr*," the Supreme Court also rejected the "pattern discovery rule," and instead held that the RICO limitations period begins to run as *soon as a plaintiff has sufficient notice of an "injury*." 528 U.S. at 554-55 (emphasis added). The Court explained that its "have been at pains to explain that *discovery of the injury, not discovery of the other elements of a claim, is what starts the clock.*" *Id*. at 555 (emphasis added). The Court further explained that deferring the limitations period until the plaintiff had uncovered the alleged "pattern" underlying its RICO claim would "undercut every single policy" underlying RICO and would:

> *bar repose, prove a godsend to stale claims, and doom any hope of certainty in identifying potential liability*. Whatever disputes may arise about pinpointing the moment a plaintiff should have discovered an injury to himself would be dwarfed by the controversy inherent in divining when a plaintiff should have discovered a racketeering pattern that might well be complex, concealed or fraudulent, and involve harm to parties wholly unrelated to an injured plaintiff. *The fact, as Rotella notes, that difficulty in identifying a pattern is inherent in civil RICO . . . only reinforces our reluctance to parlay the necessary complexity of RICO into worse trouble in applying a limitations rule***.**

Id. at 558-599 (emphasis added) (citing *H.J. Inc. v. Nw. Tel., 492* U.S. 229, 235, n.2 (1989)). Consequently, because the undisputed facts in *Rotella* demonstrated that the plaintiff knew of his *injury* long before the statute of limitations had run – although he arguably did not know about the alleged *pattern* of racketeering until much later – the Court affirmed a ruling *entering summary judgment* for the defendant on statute of limitation grounds.[2]

FEI's position is precisely the one rejected in *Rotella* because FEI certainly knew about the injury it claims to have suffered long before February 16, 2006, but contends that it did not then know *all* of the facts that support its alleged pattern of "racketeering" activities. FEI Opp. at 32. Crucially, FEI does not dispute that, *from the very beginning of the ESA Action in 2000*, it was FEI's position that Mr. Rider was lying about his standing, as well as his allegations concerning FEI's treatment of the elephants. Indeed, FEI does not dispute – and has, in fact, conceded – that long before February 2006 it knew about the core "issues" on which it relied to argue that Mr. Rider had no "credibility." FEI Opp. at 32; *see also* Response to Statement of Material Facts ("RSMF") No. 21 at 32 (not disputing that *at the time the ESA Action was filed in 2000*, FEI "was 'in possession of facts that were sufficient for FEI to ascertain whether Tom Rider was telling the truth concerning his allegations of elephant treatment by FEI").[3]

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[2] Consequently, the Supreme Court itself has made clear that, contrary to FEI's contention, it is perfectly appropriate to resolve statute of limitations issues on summary judgment in cases such as this one. Indeed, as discussed further below, many post-*Rotella* cases have also done so.

[3] *See also* RSMF No. 16 at 29 (admitting that FEI *knew when the ESA Action was filed in 2000* that Mr. Rider "left employment with FEI in order to work with elephants in a traveling circus in Europe, and that Mr. Rider's work entailed working with Daniel Raffo," but asserting that its knowledge of these facts is "not relevant"); RSMF No. 18 at 30 (admitting that FEI had "knowledge" even *before the ESA Action was filed* that "Rider was 'working in collaboration with animal activist groups,'" but asserting that this is "not relevant"); RSMF No. 19 at 31 (admitting that, beginning in 2000, FEI had "knowledge of Rider's failure to complain[] to FEI management about the mistreatment of elephants when he worked for the circus," but asserting that this fact is "not relevant"); RSMF No. 22 at 33 (admitting that FEI, prior to February 2006, believed that it had "[k]knowledge that Rider was a compensated spokesperson making false statements to the media"); RSMF No. 75 at 84 (admitting that the ESA plaintiffs' *2003 Complaint* stated that Mr. Rider had not been refraining from seeing the elephants but, rather, had been making efforts to see them, including by going to cities where the circus was performing).

FEI further admits that, by June 2004 at the latest, it knew that Mr. Rider was receiving at least "episodic" and "intermittent" funding from various ESA plaintiffs organizations. RSMF No. 8 at 16; RSMF No. 42 at 59; RSMF Nos. 35-38 (admitting that, in their June 2004 document production, the organizational plaintiffs provided FEI with documents revealing funding of Mr. Rider's living and traveling expenses, and that MGC played a role in that funding); FEI Ex. 2 at 4 (identifying documents disclosed in June 2004 reflecting payments to Mr. Rider).[4]

FEI additionally admits that the ASPCA's Rule 30(b)(6) witness in July 2005 specifically put FEI on notice that funding was provided "directly, ***through MGC*** *and WAP, to Rider . . . .*" FEI Opp. at 13 (emphasis added); *see also* FEI Ex. 2 at 5 (conceding that in July 2005 "ASPCA testifie[d] that it paid Rider directly, through MGC and through WAP"); RSMF No. 54 at 70 (FIE does not dispute that Ms. Weisberg testified in July 2005 that money was wired to Mr. Rider by MGC).[5] Indeed, FEI's responses to MGC's statement of material facts, as well as FEI's

[4] Rather than respond to Plaintiffs' statement of material facts with a "***concise*** statement of genuine issues setting forth all material facts as to which it is contended there exists a genuine issue necessary to be litigated," as required by the Local Rules, LCvR 7(h)(1) (emphasis added), FEI has filed a rambling, ***84-page*** supplement to its brief that fails to "concise[ly]" specify what "genuine issues" must be litigated for purposes of the pending motion. Rather, the document largely consists of "objections" asserting that Plaintiffs' proffered facts are legally irrelevant in light of *other* assertions that FEI contends support its fraudulent concealment argument. In view of this violation of the Local Rules, the Court would be well within its rights to disregard FEI's entire response to the statement of material facts. *Burke v. Gould*, 286 F.3d 513, 517 (D.C. Cir. 2002) ("This circuit has long upheld strict compliance with the district court's local rules on summary judgment when invoked by the district court."). At the very least, the overwhelming majority of the specific facts proffered in MGC's statement that are not clearly and specifically disputed in FEI's 84-page tome should be deemed admitted. *See* LCvR 7(h)(1) ("In determining a motion for summary judgment, the court may assume that facts identified by the moving party in its statement of material facts are admitted, unless such fact is controverted in the statement of genuine issues filed in opposition to the motion."); *see also Jackson v. Finnegan, Henderson, Farabow, Garrett & Dunner*, 101 F.3d 145, 153 (D.C. Cir. 1996) (agreeing with the district court that a "*twenty-nine* page" response to a statement of material facts "hardly compli[ed] with the [local] rule's requirement that the statement of genuine disputed material issues be 'concise,'" and therefore affirming the district court's decision to disregard the response and assume the validity of the moving party's statement).

[5] Although FEI asserts that the ASPCA's witness was not the "model of candor that MGC claims," FEI Opp. at 13, not only was the witness in fact forthcoming about Mr. Rider's funding and the role played in it by the organizational plaintiffs, MGC, and WAP, s*ee* MGC Ex. EE, but, more important, "model of candor" is not the standard for triggering a statute of limitations. Again, FEI's own Complaint concedes that the ASPCA deposition allowed FEI to "uncover" the alleged "payment scheme" on which its RICO claims are predicated, ECF No. 25 ¶ 32, and that is more than sufficient to "start the clock." *Rotella*, 528 U.S. at 554. ***FEI has also misstated the deposition testimony***. For example, FEI states that "ASPCA falsely testified that it made only one payment to MGC that

own exhibits, are replete with admissions that FEI in fact knew about funding that was being provided to Mr. Rider before February 2006.[6]

Consequently, FEI's own brief and supporting papers establish that FEI knew well before February 2006 that the organizational plaintiffs, in concert with the MGC Defendants, were providing money to an individual plaintiff who *FEI claims it knew was intentionally falsifying his entire basis for standing, as well as lying about his allegations of elephant mistreatment,* and who FEI also believed was indispensable to the ESA Action and hence to FEI's expenditure of legal fees – i.e., the only damages that FEI is asserting in this case. *See, e.g.,* Amended Compl. ¶ 2 (alleging that the MGC Defendants and other Defendants used Mr. Rider to "circumvent well established limits on the Article III jurisdiction of the federal courts," thereby compelling FEI to expend attorneys' fees); *id.* ¶ 4 ("defendants created the romantic, but totally untrue, image of Rider as the heroic champion of elephant welfare" and, "[o]n that basis, defendants created a

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included funds that were intended to go to Rider." FEI Opp. at 14. In fact, the ASPCA testified to *multiple* instances in which MGC paid for Mr. Rider's living and traveling expenses and then was reimbursed by ASPCA. *See* MGC Exh. EE at 51-53 (explaining the process whereby "money was wired to wherever he [Mr. Rider] was through Western Union by Meyer & Glitzenstein and then we would be invoiced for it").

[6] *See, e.g.* RSMF No. 22 at 33 (admitting that FEI knew, prior to February 2006, that Mr. Rider was a "***compensated*** spokesperson" who FEI also believed was "making false statements" concerning FEI's elephant treatment) (emphasis added); RSMF No. 34 at 47-52; RSMF No. 42 at 58 (admitting that the ASPCA's organizational representative testified in July 2005 that it was paying for Mr. Rider's "living and traveling expenses"); RSMF No. 48 at 65 (admitting that Lisa Weisberg testified in July 2005 that ASPCA had provided a grant to WAP intended for Mr. Rider, while asserting that Mr. Rider "did not engage in 'public outreach and education'"); RSMF No. 49 at 65 (admitting that Lisa Weisberg testified in July 2005 that ASPCA provided funding for a zoom camera for Mr. Rider, while asserting that "Rider did not engage in media work."); RSMF No. 50 at 66 (admitting that Lisa Weisberg testified in July 2005 that a $ 6,000 grant was for Mr. Rider's "general living expenses"); RSMF No. 51 at 66-67 (not disputing that Ms. Weisberg testified in July 2005 that an ASPCA check request was intended to reimburse MGC the firm for providing funding for Mr. Rider); RSMF No. 56 at 71 (not disputing that Ms. Weisberg testified in July 2005 that the AWI and the Fund were also providing funding to Mr. Rider); RSMF No. 62 at 75 (admitting that "WAP's September 29, 2005 production included redacted copies of cover letters from Glitzenstein to Rider, enclosing WAP's grant checks to Rider"); RSMF No. 62 at 76 (admitting that WAP's September 29, 2005 production included a redacted copy of a grant letter from Meyer to Rider"); RSMF No. 63 at 77 (not disputing that the WAP "Transaction Detail Report" produced to FEI in September 2005 "specifically identified a $ 6,000 'Grant from ASPCA to WAP for Tom Rider'"; a $ 1,500 "AWI donation to T. Rider"; a $ 3,500 "AWI donation for Tom Rider" and other "Tom Rider contributions"); RSMF No. 68 at 79 (not disputing that "[d]ocuments produced to FEI by WAP in September 2005 include proposals by Katherine Meyer and Eric Glitzenstein requesting funding for Mr. Rider's advocacy"); RSMF No. 73 at 83 (not disputing that the "documents produced to FEI by WAP in September 2005 included a grant proposal to WAP from Tom Rider," as well as "letters from both Eric Glitzenstein and Katherine Meyer forwarding him grant money").

fraudulent claim of standing to sue in the ESA Action"). Indeed, FEI even concedes – as it must – that its own officials repeatedly insisted to the public as early as *2000 and 2002* that Mr. Rider was ***being paid by*** the original organizational plaintiff in the ESA Action and other "animal activist groups" ***to lie about his allegations of FEI's elephant mistreatment***. *See* FEI Opp. at 4 n. 2 (citing MGC Ex. C, E, H, L, N).[7]

Thus, even accepting FEI's own slanted view of the facts, the RICO claim against the MGC Defendants is doomed, because FEI unquestionably knew long before the triggering date for the statute of limitations about its "injury," and that this injury stemmed in part from the MGC Defendants' alleged conduct – which, under *Rotella*, as well as the law of the case set forth in the Court's motion to dismiss ruling, dictates the conclusion that the RICO claims against the MGC Defendants *must* be time-barred. *Rotella*, 528 U.S. at 555 ("*discovery of the injury, not discovery of the other elements of a claim, is what starts the clock*") (emphasis added); *see also* ECF No. 90 at 23 (Court's Motion to Dismiss Ruling) (explaining that under RICO, the statue of limitations "begins to run *from the date of discovery of the injury*") (emphasis added); *see also* FEI Opp. at 27 (conceding that the injury discovery standard is the "law of the case" and that any "knowledge" by FEI prior to February 16, 2006 that the ESA Action "*could* be the product of racketeering" would trigger the statute of limitations) (emphasis added).

On the other hand, what FEI now asserts it did *not* know prior to February 2006 (such as the allegedly "systematic" nature of the funding Mr. Rider received, FEI Opp. at 4) is precisely what *Rotella* held is *unnecessary* to trigger the statute of limitations – *i.e.*, ostensible proof of the "pattern" on which FEI is relying to pursue its RICO claim. *See* 528 U.S. at 557-58 (rejecting a

[7] The MGC Defendants did not believe, and still do not believe, that Mr. Rider lied about his attachment to the elephants or about FEI's mistreatment of them. But that dispute is irrelevant to the narrow question here – which is whether and when, *given FEI's theory of its RICO claim and the facts underlying it, FEI knew enough about its purported injury to trigger the statute of limitations against the MGC Defendants.*

"pattern discovery feature"); *see also* C*halabi*, 503 F. Supp. 2d at 274 ("[w]hen a [RICO] cause of action accrues upon plaintiff's discovery of his injury, *[i]t is inconsequential that he did not then know the full extent or duration of the injury.*") (quotations omitted) (emphasis added).

Accordingly, to grant the instant summary judgment motion this Court need go no further than the black letter law in *Rotella* and what FEI *admits* (or fails to dispute) in its brief and supporting papers that it knew prior to February 2006. What makes the MGC Defendants' motion even easier to resolve is that, in contrast to *Rotella* – in which the plaintiff at least contended from the outset of the case that he could not satisfy RICO's *pattern element* claim until less than four years before he filed suit, *see* 528 U.S. at 559 – here, *FEI's own Complaints repeatedly admit that FEI was also aware of the purported "pattern" before February 2006*.

Once again, FEI's original 2007 Complaint – which the Court of Appeals has instructed should be considered in ruling on statute of limitations issues, *W. Assocs. v. Mkt. Square Assocs.*, 235 F.3d 629, 634 (D.C. Cir. 2001) – could not have been clearer in stating that FEI learned of the alleged "payment scheme" – and that MGC had an alleged role in it – by June 2004. ECF No. 1 ¶ 20 (emphasis added). In its Amended Complaint, FEI (without explanation) adjusted the date by when it learned of the "scheme" by thirteen months. ***Nonetheless***, ***even that new date was more than half a year before the triggering date***. *See* Amended Compl. ¶ 32.

Accordingly, by virtue of its own admissions in *both* versions of its Complaints, FEI knew well before February 2006 about the purported racketeering "scheme" in which it alleges MGC was centrally involved. Therefore, even if the Supreme Court had adopted the broader "minority injury *and* pattern discovery rule," *Rotella*, 528 U.S. at 555, FEI's claims against MGC would ***still*** have been time-barred in light of the concessions in FEI's own Complaints. However, because FEI could not even fit its case through the "larger hole" for belated RICO

claims that the Supreme Court has squarely rejected, FEI surely "cannot squeeze it through a smaller one." *Klehr*, 521 U.S. at 192; *see also Molecular Diagnostics*, 402 F. Supp. 2d at 284 ("awareness of sufficient facts to identify . . . the particular cause of action at issue" warrants rejection of a claim on statute of limitations grounds) (internal quotation omitted).

II. FEI'S FRAUDULENT CONCEALMENT ARGUMENT IS DIVERSIONARY AND LEGALLY IRRELEVANT.

In their opening brief, the MGC Defendants relied on *Nader v. Democratic National Committee*, 567 F.2d 692 (D.C. Cir. 2009), for two related and unassailable propositions: first that "*some* evidence" of the actual factual basis for a claim triggers the statute of limitations, *see* MGC Mem. 1, 7 (quoting *Nader*, 567 F.3d at 553) (emphasis added), and, second, that "'[c]learly, the doctrine of fraudulent concealment does not come into play, whatever the lengths to which a defendant has gone, *if a plaintiff has notice of a potential claim*.'" MGC Mem. 33-34 (*quoting Nader*, 567 F.3d at 700) (emphasis added). However, faced with the seemingly insurmountable legal obstacles demonstrated above, FEI seeks to muddy the legal waters by arguing that Plaintiffs' motion "incorrectly assumes *Nader* should apply" and that "*Nader* is not controlling . . . ." FEI Opp. at 35. This argument must fail.

Aside from the fact that FEI's position falls completely afoul of the Supreme Court's ruling in *Rotella* – which even FEI does not dispute is controlling here, *see* FEI Opp. at 27 – both propositions for which the MGC Defendants have cited *Nader* apply squarely to RICO as well as common law claims, as both FEI's own brief and the cases on which it relies also confirm. Indeed, given the Supreme Court's adoption of RICO-specific rules designed to avoid the pursuit of RICO claims "remote" in time from the alleged conduct and to effectuate the "basic policies" of "repose, elimination of stale claims, and certainty about a plaintiff's opportunity for recovery and a defendant's potential liabilities," *Rotella*, 528 U.S. at 550, if anything, the propositions on

which Plaintiffs have relied apply with even *more* force in the RICO context than under common law. *See also Klehr*, 521 U.S. at 195 (in view of RICO's purposes, plaintiffs must be encouraged "diligently to investigate" their potential claims).

As for whether "***some*** evidence" supporting a claim is sufficient to trigger the limitations period, *Nader*, this Court's motion to dismiss ruling has already recognized that this is *also* the standard that applies in RICO cases, as FEI's own brief concedes. *See* FEI Opp. at 27 (quoting Motion to Dismiss Ruling at 23, which in turn quotes *Chalabi*, 503 F. Supp. 2d at 274). As to whether fraudulent concealment is legally irrelevant when a RICO plaintiff had *actual* notice of its alleged injury – as FEI did here – not only is that proposition not "at odds" with *Riddell v. Riddell Washington Corp*. 866 F.2d 1480 (D.C. Cir. 1989) and other D.C. Circuit RICO cases, as FEI suggests, *see* FEI Opp. at 32, but *Riddell* itself expressly reaffirmed, *specifically in the RICO context*, that "[c]learly, the doctrine of fraudulent concealment does not come into play, whatever the lengths to which a defendant has gone to conceal the wrongs, *if a plaintiff is on notice of a potential claim*." 866 F.2d at 1494 (emphasis added); *id*. ([i]f it can be determined as a matter of law, therefore, that a plaintiff had *timely notice of the causes upon which he belatedly sues*, then his showing of fraudulent concealment *will not prevent the statute of limitations from having run*") (emphasis added). Indeed, *Nader quotes Riddell for this precise proposition. See* 567 F.3d at 700 (quoting *Riddell*, 866 F.2d at 1494).[8]

[8] Even FEI appears to concede, albeit obliquely, that where there is "actual notice" of a potential RICO injury, fraudulent concealment is legally irrelevant. See FEI Opp. at 34 (courts apply an "actual notice standard to federal claims involving fraudulent concealment"). Yet MGC has shown that FEI had abundant "actual notice" of its alleged RICO injury well before February 2006; *see also Hu George Washington University*, No. 11-7014, 2011 WL 3241457 (D.C. Cir. July 6, 2011) (applying to *both* the federal and common claims in the case the principle that the "doctrine of "fraudulent concealment . . . 'does not come into play . . . if a plaintiff is on notice of a potential claim'") (quoting *Nader*, 567 F.2d at 700); *Molecular Diagnostics*, 402 F. Supp. 2d at 283 (dismissing a federal claim on statute of limitations grounds where "'plaintiff had timely notice of the causes upon which he belatedly sues," and hence "his showing of fraudulent concealment will not prevent the statue of limitations from having run'") (quoting *Riddell*, 866 F.2d at 1494)).

FEI goes to such lengths to sew confusion in Circuit precedent where none exists precisely because FEI cannot prevail under the standards that *do* apply. Indeed, even FEI's own responses to the MGC Defendants' statement of materials facts contain multiple concessions that at least "some" of the evidence on which FEI relies to support its claims was known to it prior to February 16, 2006. *See* RSMF No. 10 at 24 (admitting that "[s]ome allegations" in FEI's August 28, 2007 Complaint "specifically concerning the MGC defendants' involvement in the payment to Rider" "***were based on information available to FEI before February 16, 2006***") (emphasis added); RSMF No. 14 at 27 (FEI admits that "[s]ome of the allegations in the First Amended Complaint" regarding MGC's "involvement in the racketeering conduct" were "based on information produced before February 16, 2006").[9] This is enough under controlling precedent, and the mere fact that "*additional* information concerning those allegations was subsequently produced pursuant to Court order," *id*. (emphasis added), has no bearing on when the statute of limitations *began* to run.[10]

FEI's self-serving assertion that statute of limitations issues are rarely resolved before trial is also wrong. FEI Opp. at 27-28. In fact, especially in view of *Klehr* and *Rotella* – in which the Supreme Court itself affirmed dismissal of a RICO case *on a motion for summary*

[9] *See also* RSMF No. 5 at 4 (admitting that "some allegations" concerning MGC in FEI's proposed RICO counterclaim in the ESA Action – which was identical to the RICO Complaint filed in 2007 – "were based on information available to FEI before February 2006"); RSMF No. 11 at 25 (again conceding that "[s]ome allegations" in the original Complaint concerning MGC "were based on information available to FEI before February 16, 2006"); RSMF 12 at 26 (acknowledging "[s]ome allegations" in the original Complaint "concerning the MGC defendants' involvement in the payments to Rider" were in fact "based on information available to FEI before February 16, 2006").

[10] Accordingly, FEI erroneously relies on the Court's finding in the ESA Action that "[a]fter the Court entered its August 23, 2007 discovery order . . . the 'true nature and extent of the payments the organizational plaintiffs had made to Mr. Rider directly or through MGC or WAP was *fully disclosed*,'" FEI Opp. at 25 (quoting Finding of Fact 57) (emphasis added). As discussed, in the context of determining when a RICO statute of limitations *begins* to run, "full" disclosure of every detail that may form the basis of the plaintiff's complaint is simply not the legal test. Indeed, if it were, then this Court would not have said, even at the motion to dismiss stage, that it was "troubled by the statute of limitations argument with respect to the new defendants," and that "information available at FEI's disposal before February 16, 2006 . . . *may well have triggered the statute of limitations for RICO*" against the MGC Defendants. ECF No. 90 at 29 (emphasis added).

judgment – many courts have dismissed RICO claims in response to such motions, including where the plaintiff had far less information than FEI had before the relevant date. For example, in *Hargraves v. Capital City Mortgage Corp.*, 140 F. Supp. 2d 7, 14 (D.D.C. 2000), the plaintiffs asserted a RICO claim based on an ongoing "pattern or practice of predatory and racially discriminatory lending" by the defendant, and submitted declarations contending that they "remained unaware of the defendants' racketeering activities," or even that "their injuries arose out of such activities," until after the pertinent triggering date. However, because the plaintiffs indisputably were aware of their *injuries – i.e.*, that they had "been billed, made payments, and been exposed to at least *some of the consequences of the allegedly illegal and discriminatory loans*" prior to that date – the Court granted summary judgment against them, explaining:

> *Rotella* makes clear that *knowledge of the injury, rather than knowledge of the pattern of RICO activity, starts the clock running for statute of limitations purposes*. For the most part, the supporting documentation cited by the plaintiffs does not suggest the plaintiffs were unaware of their injuries, but merely that they were unaware of the defendants' discrimination and racketeering. *Awareness of the pattern of RICO activity is not necessary to start the statute of limitations period running*.

Id. at 16-17 (emphasis added).

Where, as here, FEI had *far* more information on which it has based its claims, and even concedes in *both* Complaints that it knew about the purported "pattern of RICO activity" before February 2006, dismissal at the summary judgment stage is clearly appropriate. *See also Pac. Harbor Capital, Inc. v. Barnett Bank, N.A.*, 252 F.3d 1246, 1251-52 (11th Cir. 2001) (applying *Rotella* in granting summary judgment on statute of limitations grounds against the plaintiff in a RICO case where the plaintiff knew of its injury prior to the triggering date but did not "discover[] the pattern of RICO predicate acts" until later) (internal quotation omitted)[11]; *Cory v. Aztec Steel Bldg., Inc.*, 468 F.3d 1226, 1234 (10th Cir. 2006) (affirming grant of summary

[11] Pacific Harbor is especially instructive, because the court originally denied summary judgment to the defendant and then, following the more stringent test announced in *Rotella*, reversed its ruling. *See* 252 F.2d at 1250.

judgment to RICO where undisputed evidence demonstrated that the plaintiff knew of its injury and yet "failed to initiate litigation within four years" thereafter); *Cetel v. Kirwan Fin. Grp.*, 460 F.3d 494, 508-09 (3rd Cir. 2006) (dismissing RICO claim on statute of limitations grounds at summary judgment stage); *Youkelsone v. FDIC*, 910 F. Supp. 2d 213, 226 (D.D.C. 2012) (finding a RICO claim barred by the statute of limitations where the "alleged injury underlying [the] RICO claim is one of which she was certainly aware well before" the limitations period).[12]

III. FEI'S CONTENTION THAT THE MOTION TO DISMISS RULING FORECLOSED ENTRY OF SUMMARY JUDGMENT FOR THE MGC DEFENDANTS COMPLETELY MISCHARACTERIZES THE COURT'S RULING.

FEI's argument that the Court's Motion to Dismiss ruling somehow forecloses entry of summary judgment for the MGC Defendants is based on a glaring misstatement of the Court's ruling. FEI ignores the Court's explanation that, even at that early stage – when the Court was severely constrained by what it could consider – it was "troubled by the statute of limitations argument with respect" to the MGC Defendants, specifically observing that "*defendants point to non-insignificant information at FEI's disposal before February 16, 2006 that, defendants may be able to show, may well have triggered the statute of limitations for RICO against the new defendants.*," ECF No. 90 at 28, 29 (emphasis added). However, the Court explained, "given the stringent standards that defendants must meet to warrant dismissal on statute of limitations *on a 12(b)(6) motion***,** FEI's RICO claim will not be dismissed *at this stage of the litigation*." *Id*. at 29 (emphasis added).

FEI's further assertion that MGC's summary judgment motion "cites to nothing" of substance beyond what the Court considered at the motion to dismiss stage, FEI Opp. at 29, is

[12] In fact contrary to FEI's apparent view that statute of limitations issues are generally resolved at trial, FEI Opp. at 27, the Supreme Court and D.C. Circuit have repeatedly endorsed resolution of this dispositive issue at the summary judgment stage. *See,e.g., Wallace v. Kato*, 549 U.S. 384, 391-92 (2007) (affirming dismissal on statute of limitations grounds at summary judgment stage); *Keohane v. United States* 669 F.3d 325, 330 (D.C. Cir. 2012) (same); *Earle v. District of Columbia*, 707 F.3d 299, 301 (D.C. Cir. 2012) (same).

absurd. Indeed, because of the strictures that govern a ruling on a 12(b)(6) motion, the overwhelming majority of the exhibits on which the MGC Defendants are now relying were not even *submitted* to the district court, let alone considered in the Court's prior decision. In fact, the MGC Defendants did not submit any exhibits in support of their Motion to Dismiss, see ECF No. 54, and then submitted only three exhibits in their reply brief – none of which the Court considered. See ECF No. 73; ECF No. 90 at 25 n.11.[13]

Moreover, even as to the fraction of materials relied on by the MGC Defendants at the 12(b)(6) stage, the Court also *declined* to consider most of *that* information. Most important, the C*ourt expressly refused to consider any of the ASPCA's Rule 30(b)(6) deposition transcript. See* ECF No. 90 at 25 n.11 ("*The Court declines to consider these excerpts here*") (emphasis added). However, as the MGC Defendants have explained, and FEI's own Amended Complaint concedes, that testimony *alone* is sufficient to have put FEI on notice of "some evidence" of not only FEI's claimed injury, but also the alleged "pattern" that *Rotella* says is unnecessary to trigger the statute of limitations. *See* MGC Mem. 21-23; MGC Ex. EE; Amended Compl. ¶ 32 (FEI "uncover[ed] the payment scheme at the ASPCA deposition).[14]

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[13] Excerpts from the same depositions have been submitted in support of MGC's summary judgment motion, *see* MG Exh. EE, GG, HH, and the following ***46 exhibits*** that are being relied on in support of the pending summary judgment motion were not even submitted or cited in the briefing at the motion to dismiss stage: MGC Exh. A, B, C, D, E, F, G, H, J, K, L, M, N, O, P, Q, R, S, T, U, V, X, Y, Z, AA, BB, CC, DD, FF, JJ, LL, MM, NN, OO, PP, QQ, RR, SS, TT, UU, VV, WW, XX, YY, AAA, and BBB.

[14] FEI objects that the ASPCA's witness testified that funding was used (as it was) to support a "traveling media campaign" by Mr. Rider. FEI Opp. at 13-14. However wrong this objection is, it is irrelevant to the instant motion – because whatever Mr. Rider was doing, FEI was certainly on notice that someone it believed to be lying about his standing was receiving funding from the organizational plaintiffs, including through MGC. Yet it is telling that FEI cannot get even its own story straight on whether Mr. Rider was or was not engaging in various forms of advocacy for the elephants. On the one hand, FEI now contends that Mr. Rider "did not engage in 'public outreach and education,'" RSMF No. 48 at 65; RSMF No. 60 at 73; he "did not do media work" *at all*, RSMF No. 55 at 70; RSMF 49 at 65 (same); and he "did not actually travel" anywhere with the funding given to him. RSMF 54 at 70. On the other hand, FEI itself cites to newspaper articles in which its *own employees* criticized Mr. Rider's statements *to the media*, *see* FEI Opp. at 4 n. 3 (citing MGC Exh. C, E, H, L, N) and FEI's *own* internal e-mails reported that "Tom Rider ***has been touring the country***" criticizing FEI's elephant treatment practices. MGC Exh. R (FEI's own document explaining that Mr. Rider "spoke against the circus industry at the City Council meeting in Huntington Beach, CA" and that he also spoke at the UCLA law school) (emphasis added). As pointed out in

IV. WHILE THE COURT NEED NOT ADDRESS THE ISSUE, THERE IS ALSO NO GENUINE DISPUTE THAT, PRIOR TO FEBURARY 2006, FEI DID NOT EXERCISE "DUE DILIGENCE" IN PURSUING ITS RICO CLAIMS.

Given the abundant *actual* notice that FEI had of its alleged injury prior to February 16, 2006, there is no need for the Court to address whether FEI's assertion of "fraudulent concealment" is *also* foreclosed by FEI's failure to exercise due diligence in further investigating its RICO claim. *See Klehr*, 521 U.S. at 194 ("[W]e conclude that 'reasonable diligence' does matter, and a *plaintiff who is not reasonably diligent may not assert 'fraudulent concealment*.'") (emphasis added). However, FEI is also wrong with regard to whether it has that burden.

FEI relies on pre-*Klehr* precedents to argue that Defendants have the burden to demonstrate that FEI "could have discovered . . . the cause of action if [it] had exercised due diligence." FEI Opp. at 34 (internal citations omitted). But one of the Supreme Court's *holdings* in *Klehr* is that, in a RICO case, the "concealment requirement is satisfied only *if the* ***plaintiff shows*** that he neither knew *nor, in the exercise of due diligence, could reasonably have known of the offense*" at an earlier time. 521 U.S. at 195 (emphasis added) (citations omitted). Thus, as dictated by *Klehr*, FEI has this evidentiary burden completely *backwards*.

MGC's opening brief – with no refutation by FEI – FEI even went so far as to complain in the ESA Action that Mr. Rider had so extensively "entered the public spotlight ***through his legislative and media appearances***" that he had become a "public figure" regarding the elephant treatment issue. ESA Action ECF No. 46 at 11 (emphasis added).

FEI's assertion that Mr. Rider "did not actually travel," RSMF 54 at 70, is also contradicted by its own Amended Complaint, which asserts that Mr. Rider did "regularly observe the [FEI] elephants and videotape them" while they were touring the country, Amended Compl. ¶ 52; that he in fact "appear[ed] as a witness testifying on behalf of legislative proposals . . . before the United States Congress and various state legislatures and bodies concerning FEI and/or captive Asian elephants," id. ¶ 17, including in Connecticut, Massachusetts, Nebraska, and the City of Chicago, id. ¶¶ 239-243; and that he "continued to peddle his story and seek publicity" in Europe even after the ESA trial. Id. ¶ 245 (emphasis added); see also FEI Ex. 8 at 3 n.1 (indicating that Federal Express labels subpoenaed by FEI from MGC in the ESA Action demonstrate that Mr. Rider traveled to at least 47 different cities in 24 states while the ESA Action was being pursued). While's FEI's internally contradictory position on this issue is not material to resolution of the pending motion, it will be of importance should this abusive RICO claim against the MGC Defendants proceed, especially now that FEI has declared that funding Mr. Rider for the very activities that FEI has elsewhere conceded he in fact engaged in would be entirely "lawful." FEI Opp. at 2.

Further, notwithstanding its mammoth filing, FEI has not even come *close* to making such a showing here. In fact, tellingly, its brief *does not even focus on the relevant time-frame*. Thus, the overwhelming majority of FEI's brief and supporting materials are devoted to addressing what measures FEI pursued and purportedly learned *after* February 16, 2006, rather than focusing on the steps it took *before* the pertinent triggering date. However, as the Court has already held in rejecting FEI's RICO counterclaim in the ESA Action and then staying this case, FEI was in fact "dilatory" in filing and pursuing this claim, *ASPCA v. Ringling Bros. and Barnum & Bailey Circus*, 244 F.R.D. 49, 51 (D.D.C. 2007), ESA Action ECF No. 176 at 4, 7, and "*long delayed its day in court on [the RICO claim*]," particularly because "*FEI allege[d] in its [original] complaint that it first learned of payments to Tom Rider in June of 2004 . . . .*" *Feld Entm't, Inc. v. ASPCA*, 523 F. Supp. 2d 1, 4 (D.D.C. 2007), ECF No. 23 (emphasis added).

In fact, FEI concedes that it knew *even earlier than 2004* that Mr. Rider was receiving funding from the ESA plaintiff organizations, *see* FEI Opp. at 4 (admitting that the "evidence ***available to FEI from 2000 to 2004***" confirmed that Mr. Rider was receiving money from "animal activist groups") (emphasis added), *id*. at nn.2, 3 (repeating statements from FEI officials in *2000, 2002, and 2003*, that Mr. Rider "is being paid by animal rights organizations," including the ASPCA, and that he "isn't telling the truth"), and that it also believed that he was lying both about his attachment to the elephants and his allegations of elephant mistreatment. *Id*. Nevertheless, FEI does not dispute that it failed to submit a single interrogatory or document request to *any* of the organizational plaintiffs *specifically* asking them for all records and information relating to Mr. Rider's funding. *See* MGC Mem. 34. That omission alone is sufficient to dispel any notion that FEI exercised due diligence in pursuing its belated 2010 RICO claim against the MGC Defendants. *See* MGC Mem. 36 & n. 20 (cases showing that

where a plaintiff had the opportunity to actually learn relevant information through a formal discovery process, the statute of limitations is clearly triggered).

Further, while FEI predictably harps on the Court's findings in the ESA Action concerning Mr. Rider's response to the second sentence of an interrogatory to him that asked whether he had received "compensation for services rendered," FEI's explanation for why it did not accept counsel's offer to provide FEI (in response to the *first sentence of the same interrogatory*) "all" information concerning his funding subject to a confidentiality agreement, *see* MGC Mem. 34-36, makes no sense. FEI admits that the "offer of a confidentiality agreement was made," but emphasizes that it was made "*only as to Rider's response to the first sentence of Interrogatory No. 24*." FEI Opp. at 6 (emphasis added). That sentence, however, was far *broader* than the second: it encompassed "***all** income, funds . . . other **money** or items, including without limitation food, clothing, shelter, or transportation, [he] [had] **ever received from any animal advocate or animal advocacy organization***." MGC Ex. ZZ (emphasis added). Indeed, as explained in the MGC Defendants' opening brief, had FEI simply taken Mr. Rider up on his repeated offers of a confidentiality agreement, FEI would have obtained *more* information than the Court allowed it to obtain *without* such an agreement. *See* MGC Mem. 36 n.19.[15]

In any event, *in the context of a RICO "due diligence" inquiry*, it is inexplicable (and FEI does not coherently explain) how FEI can be said to have exercised such diligence by *refusing* to accept an offer of "all" information "without limitation" reflecting *anything* of value that Mr. Rider had ever received from "any animal advocate or animal advocacy organization." *See* FEI Interrog. No. 24. FEI certainly cannot (and does not) contend that it was somehow misled by the

[15] Thus, although FEI states that the Court "denied this request [for a protective order] completely," FEI Opp. at 7, this is an overstatement – the Court clearly took into consideration Mr. Rider's argument that he should not be required to tell FEI the names of every person who gave him financial assistance, since the Court ordered Mr. Rider to disclose all of the money he had received, but to redact the names of "individual donors or organizations unless they are parties, or employees or officers of any of the plaintiff organizations or WAP." S*ee* Aug. 23, 2007 Ruling, DE 178, at 3.

answer to the *second* sentence of the interrogatory into believing that Mr. Rider had *never* received any money from "any animal advocate or animal advocacy organization." To the contrary, FEI admits that, at the time it received the interrogatory response in 2004, it ***knew,*** including from Mr. Rider's *own public statements,* that Mr. Rider *had* in fact received funding from the ASPCA, as well as other "animal rights organizations." FEI Opp. at 4 & nn.2, 3. Particularly in this context, a party genuinely interested in pursuing a RICO claim, fails the due diligence test. Indeed, it is the antithesis of "due diligence" to ignore for months an express offer of "all" information bearing on the critical fact that forms the basis of FEI's RICO claim.

Nor are the MGC Defendants "re-litigat[ing]" the question of *FEI's due diligence.* FEI Opp. at 7. The Court made no findings in the ESA Action that FEI in fact exercised such diligence prior to February 2006 in pursuing its RICO claim, either with regard to how FEI responded to Mr. Rider's interrogatory answer or anything else. Indeed, if anything, it is *FEI* that is attempting to "re-litigate" the Court's findings that FEI was in fact "dilatory" and "long delayed its day in court" on its RICO claims.[16]

V. FEI'S ARGUMENT CONCERNING THE RELATIONSHIP BETWEEN THE MGC DEFENDANTS AND WAP HAS NO BEARING ON WHETHER THE STATUTE OF LIMITATIONS WAS TRIGGERED AGAINST THE MGC DEFENDANTS.

FEI attempts to shore up its position – and to insist that it is entitled to discovery – with the patently absurd assertion that MGC's motion "repeatedly presumes that knowledge of

[16] It is also pertinent to the due diligence issue that less than a month after February 16, 2006, FEI abruptly changed counsel, which resulted in a dramatic change in litigation tactics. *See* ESA Action, ECF Nos. 61 (3/10/06) (entry of appearance by present counsel); 62 (withdrawal of appearance by Covington & Burling). The decision by FEI and its new counsel to take what FEI concedes had been addressed *prior* to February 2006 as a "***credibility***" issue focusing on Mr. Rider's attachment to the elephants and allegations of their mistreatment, *see* FEI Opp. at 32, and transform it into grist for a massive RICO case against all of the plaintiff and their counsel, is not, under the law, a legally valid justification for tolling the statute of limitations. *See Pac. Harbor Capital, Inc.*, 252 F.3d at 1252 ("The RICO plaintiff, like the Clayton Act plaintiff, is expected to promptly get the legal advice necessary to discern the wrong, if wrong there be."); *cf. Fitzgerald v. Seamans*, 553 F.2d 220, 226-27 (D.C. Cir. 1977) (the fact that the plaintiff's counsel initially "focused" on an administrative remedy rather than a judicial one for "understandable" tactical reasons, that did not justify tolling the statute of limitations on the claim brought in federal court).

WAP's involvement in the payments equals knowledge of MGC's involvement in the payments." FEI Opp. at 38. As suggested by the fact that FEI never actually *quotes* MGC to that effect, our motion "presumes" nothing of the sort. Nor has MGC's motion "apparently" conceded that WAP – a non-profit organization approved for 501(c)(3) status by the IRS *years before* the ESA Action was even brought or contemplated – "is a sham." FEI Opp. at 39; *see also* MGC Ex. A (September 1997 application for non-exempt status); RSMF 74 at 83 (not disputing that WAP's counsel provided this application and IRS approval to FEI in December 2005).

To the contrary, MGC has relied on WAP's 2005 document production merely to demonstrate that FEI indisputably had even *more* evidence prior to February 16, 2006, on which FEI could have pursued its *alleged RICO theory*, including *FEI's* (baseless) contention that WAP is a "sham" established by the MGC Defendants as part of FEI's imagined conspiracy. Hence, WAP's September 2005 production provided still *more* information confirming what was already clear from the ASPCA deposition and many other sources: that funding was in fact provided to Mr. Rider; that money was being raised for that purpose from multiple sources, including the ESA organizational plaintiffs and WAP; and that the MGC Defendants were involved in those activities and in WAP. *See, e.g,* MGC Ex. JJ, LL, MM, NN, OO, PP, KK, LL, MM, NN, OO, PP, QQ, RR, SS, TT, UU, VV, WW, XX, ZZ.[17]

[17] *See also* RSMF No. 45 at 60-61 (not disputing that the ASPCA testified in July 2005 that WAP was created by Meyer & Glitzenstein); RSMF No. 47 at 63 (not disputing that Weisberg testified in July 2005 that Meyer and Glitzenstein were "involved in operating WAP"); RSMF No. 69 at 81 (not disputing that "[d]ocuments produced to FEI by WAP in September 2005 included copies of pages replicating WAP's website, which state that WAP is a 'non-profit advocacy group founded by Katherine Meyer and Eric Glitzenstein of the Washington DC public-interest law firm, Meyer Glitzenstein & Crystal"); RSMF No. 74 at 83-84 (not disputing that the IRS application provided to FEI's counsel in December 2005 specifically identified that MGC had a "'relationship' with the law firm Meyer & Glitzenstein", and identified "Mr. Glitzenstein and Ms. Meyer as President and Secretary of the organization, respectively").

FEI argues that it obtained still more information from WAP after February 2006, but, again, that has nothing to do with when the statute of limitations on its RICO claim *began* to run. Moreover, FEI neglects to

Especially in these circumstances, FEI's reliance on *Krupski v. Costa Crociere*, 560 U.S. 538, 130 S. Ct. 2485 (2010) in response to the MGC Defendants' argument that FEI made a tactical decision *not* to sue them in 2007, is baseless. FEI Opp. at 39. *Krupkski* construed Fed. R. Civ. P. 15(c)(1)(C) – the federal rule concerning the "Relation Back of Amendments" – which FEI makes no effort to demonstrate is satisfied with respect to the MGC Defendants, and for good reason. Of relevance here, Rule 15(c)(1)(C) applies only when (1) an "amendment [to a pleading] *changes the party or the naming of the party against whom a claim is asserted*," and (2) if the party to be substituted by amendment "knew or should have known that the action would have been brought against it, *but for a mistake concerning the proper party's identity*." *Id*. (emphasis added). Thus, in *Krupski* the Supreme Court held that one corporate entity could be substituted for another when the plaintiff concededly had a "misunderstanding" about the identity of the proper defendant and had not made an "informed decision" about which entity to sue before the limitations period ran. 130 S. Ct. at 2495-96.

Here, in contrast, FEI's February 2010 Complaint did not seek to "change" the identity of WAP to MGC but, rather, *added the MGC Defendants along with WAP*. However, as many courts have held – including post-*Krupski* – the plain terms of Rule 15(c)(1)(C) do not apply in such circumstances.[18] Moreover, FEI does not even argue, nor can it, that it made a "mistake" in

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mention that it took more than *half a year* for FEI's new counsel even to send a letter raising any concern with WAP's initial document production, *see* FEI Ex. 6 (6/3/0/06 letter from Michael Trister to George Gasper) ("[y]our June 13, 2006 letter represented the first communication from your client in more than six and half months") – further undermining any notion that FEI exercised "due diligence" in pursuing a RICO claim.

[18] *See In re U.S. Ins. Grp.*, 441 B.R. 294, 297 (Bankr. E.D. Tenn. 2010) (emphasis added) (*Krupke* "merely involved the *substitution of a proper defendant for an erroneously named one, not the addition of a second defendant*"); *id*. ("Unlike *Krupski*, this case did not involve a misidentification of one party for another; rather . . . the trustee had added allegations regarding new parties *in addition* to the allegations" in the original complaint) (emphasis added); *Venezia v. 12th & Division Props., LLC*, No. 3:09-cv-430, 2010 WL 3122787, at *2 (M.D. Tenn. Aug. 6, 2010) (notwithstanding *Krupski*, "Plaintiffs' proposed amendment is barred because the statute of limitations has run, and Plaintiffs seek to *add* new parties, rather than to substitute the correct parties for parties erroneously named in the original, timely pleading"); *Asten v. City of Boulder*, No. 08-cv-00845-PAB-MEH, 2010 WL 5464298, at *6 (D. Colo. Sept. 28, 2010) ("The proposed additions of [two defendants] fails under the plain

2007 when it sued WAP but purposefully omitted the MGC Defendants, although "*[e]stablishing the existence of a mistake is a threshold requirement in a 15(c)(1) inquiry*, and is independent of the determination of whether the party to be brought in had knowledge of the action." *Pierce v. City of Chicago*, No. 09 C 1462, 2010 WL 4636676, at **2, 5 (N.D. Ill. Nov. 8, 2010) (emphasis added) (rejecting relation back argument post-*Krupski* because the "Plaintiff *cannot be said to have made a mistake regarding any defendant's identity*"; therefore, the court "*need not reach the issue of whether [the newly added defendant] knew or should have known that Plaintiff's action could be instituted against him*") (emphasis added).[19] On the contrary, where, as here, FEI made an "informed decision as opposed to a mistake" in omitting the MGC Defendants from the 2007 Complaint – and does not even argue otherwise – Rule 15(c)(1)(C) could not possibly justify belatedly adding these Defendants in February 2010.[20]

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language of Rule 15(c)(1)(C) "); *Pierce v. City of Chicago*, 2010 WL 4636676, at *2 (the "fact that Plaintiff seeks to add . . . a defendant, rather than substitute him in place of [an original defendant] further distinguishes this case from *Krupski*").

[19] *See also Lelieve v. Orosa*, No. 10-23677-CIV, 2011 WL 5103949, at *6 (S.D. Fla. Oct. 27, 2011) ("Plaintiff's reliance on *Krupski* is misplaced in part because the Court in *Krupski* assumed a mistake and then asked whether it was covered under Rule 15"); *Rodriguez v. City of New York*, No. 10 Civ. 1849 (PKC), 2011 WL 4344057, at *2 (S.D.N.Y. Sept. 7, 2011) (explaining the plaintiff's amended complaint did not relate back to her original complaint because her original complaint was not based on a "mistake").

[20] Consequently, FEI's cursory assertion that it should be "afforded the opportunity to take discovery into the relationship between MGC and WAP," FEI Opp. at 39 – the *only* specific topic as to which FEI claims it needs discovery for the purposes of this motion – is legally untenable. Not only has FEI failed even to *argue* that Rule 15(c)(1)(C)'s strictures are satisfied here, but even if it had, "[t]he relevant inquiry for determining whether Plaintiff *made a mistake* concerning the identity of a proper defendant is what Plaintiff knew or thought he knew *when he filed the original complaint*." *Singh v. Life Ins. of Am.*, No. C 08-1353 SBA, 2010 WL 3515755, at *6 (N.D. Cal. Sept. 8, 2010). Again, FEI makes no argument, nor can it, that it was "mistaken" concerning MGC's identity when it filed suit in 2007, and no amount of discovery regarding MGC's "relationship" with WAP can possibly have a bearing on that question. "Simply put, mistake does not mean lack of knowledge" within the meaning of Rule 15(c). *Lelieve*, 2011 WL 5103949, at *4; *Watson v. Williamson*, No. 11-3093, 2013 WL 3353866, at *3 (C.D. Ill. July 3, 2013) (an alleged "lack of knowledge about a defendant's identity is not a mistake within the meaning of Federal Rule of Civil Procedure 15(c)"); *see also Moses v. Dodaro*, 774 F. Supp. 2d 206, 215 (D.D.C. 2011) (Sullivan, J.) ("[A] plaintiff who 'offer[s] no specific reasons demonstrating the necessity and utility of discovery to enable her to fend off summary judgment' is not entitled to discovery") (quoting *Strang v. United States Arms Control & Disarmament Agency*, 864 F.2d 859, 861 (D.C. Cir. 1989)).

VI. FEI PROFFERS NO REASON WHY THE COURT SHOULD ADDRESS ITS SWEEPING "ISSSUE PRECLUSION" ARGUMENT AT THIS TIME.

FEI devotes six pages at the end of its brief to a sweeping issue preclusion argument, but sets forth no reason why the Court should address that issue in the context of this particular motion. Resolving the narrow issue of whether FEI had "some" evidence on which to pursue its RICO theory against the MGC Defendants prior to February 16, 2006 – as FEI concedes in its own Complaints was the case here – does not necessitate revisiting *any* of the specific findings in the ESA Action. Accordingly, the Court should decline FEI's invitation for an advisory opinion on the scope of issue preclusion and to whom it applies, and should instead defer resolution of those matters until they are presented in a concrete setting in which they must be addressed to resolve a specific issue before the Court, and where *all* parties can participate fully in the briefing of this critical issue. *See PDK Labs., Inc. v. U.S. DEA*, 362 F.3d 786, 799 (D.C. Cir. 2004) (Roberts, J., concurring in the judgment) (applying the "cardinal principle of judicial restraint" that "if it is not necessary to decide more, it is necessary not to decide more").

Indeed, deferring the issue until it must be resolved in a concrete setting is especially appropriate because the issue has important constitutional as well as other legal implications. As the Supreme Court has made clear, the application of issue preclusion is "of course, subject to due process limitations." *Taylor v. Sturgell*, 553 U.S. 880, 891 (2008); *id*. at 895 (issue preclusion may be invoked only where that is "otherwise consistent with due process") (internal quotation omitted); *see also Yamaha Corp. v. United States*, 961 F.2d 245, 254 (D.C. Cir. 1992) ("preclusion in the second must not work a basic unfairness to the party bound by the first determination").

Here, the parties to the ESA Action, as well as the MGC Defendants and the other *non*-parties to that action, were specifically put on notice by the Court that they were ***not*** obligated to

defend against FEI's sweeping RICO allegations against them. Indeed, that was one of the central reasons why the Court *refused to allow a RICO claim to proceed while the ESA Action was pending*. *See* ESA Action ECF No. 176 at 5-6 (explaining the huge gulf between the issues raised in the ESA Action and the RICO claim, and that the Court wanted to avoid compelling the plaintiffs and their counsel to "devote substantial resources to defending against a RICO claim rather than bringing their 'taking' claim to trial"); ECF No. 23 at 5 (staying this case because it would be "highly prejudicial" to the ESA plaintiffs for them to defend a RICO case while the ESA Action was being tried).

Contrary to these rulings, however, FEI contends that the ESA Action somehow broadly precludes not only the ESA plaintiffs but also all of their attorneys and other non-parties to the ESA Action from fully and fairly defending themselves in this case, which involves a host of *criminal* accusations that the Court explicitly held were *not* being litigated in the ESA Action. FEI's extraordinary position has enormous due process as well as other important legal implications, and hence, at an absolute minimum must be deferred until its resolution is truly necessary. *See, e.g.*, *Camreta v. Greene*, 131 S. Ct. 2020, 2031 (2011) ("[A] 'longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them'") (internal quotation omitted).[21]

[21] Deferring resolution of FEI's sweeping issue preclusion argument, as to which FEI has the "'burden of establishing all necessary elements" as to *each* specific issue for which FEI claims preclusion, Taylor, 553 U.S. at 907, until it can be fully briefed in a concrete setting is warranted for other reasons as well. For example, as FEI concedes, "[i]ssue preclusion bars successive litigation" only "of an issue of fact or law *actually* litigated and resolved in a valid court determination *essential* to the prior judgment," FEI Opp. at 40 (quoting quoting *Taylor*, 553 U.S. at 892) (emphasis added); *see also Taylor*, 553 U.S. at 892 (preclusion can apply only where all parties had a "full and fair opportunity to litigate" the precise issues before the court). Yet, in the ESA Action, the Court repeatedly stressed that the "very narrow" issue that needed to be resolved was whether FEI was "taking" the Asian elephants in violation of the Endangered Species Act, *ASPCA* v, *Ringling Bros*., 244 F.R.D. at 52 – an issue that the Court itself stressed was vastly different from those raised by FEI's RICO claims. *Id.*; *see also* ECF No. 90 at 16 (Motion to Dismiss Ruling) (explaining that the issues in the ESA Action were "*entirely distinct from the issues of fact and law raised in the RICO case*") (emphasis added). FEI's effort to preclude the MGC Defendants and other *non* parties to the ESA action from waging an effective defense is even more tenuous, as *Taylor v. Sturgell* makes clear. *See* 553 U.S. at 885 (rejecting preclusion based on the concept of "virtual representation" in a prior

CONCLUSION

For the foregoing reasons, as well as those set forth in the MGC Defendants' opening brief, their motion for partial summary judgment should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, this 16th day of December, 2013, I have caused the foregoing to be served on all counsel of record through filing on the Court's electronic filing system.

/s/ Stephen L. Braga

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proceeding, and delineating the narrow circumstances in which non-parties may be estopped). This is especially true here, where the Court expressly *refused* to allow non-parties to participate in briefing when FEI first raised its RICO allegations in the ESA Action. *See* ESA Action ECF No. 176 at 11-12 (*striking* WAP's response to FEI's motion to add a RICO counterclaim because "*WAP is not a party to this case*") (emphasis added).