UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT

Come now defendants, by counsel, pursuant to Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6), and respectfully move this Court to dismiss plaintiff's Amended Complaint with prejudice.

Defendants respectfully invite the Court's attention to the attached Memorandum of Points and Authorities in support of this Motion, which is adopted and incorporated as if fully set forth herein. For the reasons set forth therein, coupled with those appearing to the Court, defendants respectfully request that this Court grant their Motion to Dismiss plaintiff's Amended Complaint.

Date: December 3, 2010

Respectfully submitted,

/s/ Stephen L. Braga (with permission)
Stephen L. Braga (D.C. Bar # 366727)
ROPES & GRAY LLP
700 12th Street, N.W., Suite 900
Washington, D.C. 20005
Telephone: (202) 508-4655
Facsimile: (202) 383-9821
Email: Stephen.braga@ropesgray.com
Counsel for Defendants American Society for the Prevention of Cruelty to Animals, Animal Welfare Institute, The Fund for Animals, Tom Rider, the Animal Protection Institute d/b/a Born USA United With Animal Protection

Institute, the Wildlife Advocacy Project and the Humane Society of the United States

and

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

and

/s/ Stephen L. Neal, Jr. (with permission)
Bernard J. DiMuro (D.C. Bar # 393020)
Stephen L. Neal, Jr. (D.C. Bar # 441405)
DIMURO GINSBURG, PC
908 King Street, Suite 200
Alexandria, VA 22314
Telephone: (703) 684-4333
Facsimile: (703) 548-3181
Email: bdimuro@dimuro.com
sneal@dimuro.com
Counsel for Defendant, Animal Welfare Institute

and

/s/ Daniel S. Ruzumna (with permission)
Daniel S. Ruzumna (D.C. Bar # 450040)
Peter W. Tomlinson (admitted pro hac vice)
Harry S. Clarke, III (admitted pro hac vice)
PATTERSON, BELKNAP, WEBB, & TYLER, LLP
1133 Avenue of the Americas
New York, New York 10036
Telephone: (212) 336-2000
Facsimile: (212) 336-2222
Email: druzumna@pbwt.com
pwtomlinson@pbwt.com
hclarke@pbwt.com
Counsel for Defendant, American Society for the Prevention of Cruelty to Animals

and

/s/ Barbara Ann Van Gelder (with permission)
Barbara Ann Van Gelder (D.C. Bar # 265603)
William B. Nes, Esquire (D.C. Bar # 975502)
MORGAN LEWIS AND BOCKIUS, LLP
1111 Pennsylvania Avenue, NW
Washington, DC 20004
Telephone: 202-739-3000
Facsimile: 202-739-3001
Email: bvangelder@morganlewis.com
bnes@morganlewis.com
Counsel for the Humane Society of the United States

REQUEST FOR ORAL HEARING

Defendants hereby request a hearing on the foregoing Motion to Dismiss Plaintiff's Amended Complaint.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 3rd day of December, 2010, copies of the foregoing Defendants' Motion to Dismiss, accompanying Memorandum and proposed Order were served by ECF and first class mail to the following:

John M. Simpson. Esquire
Joseph T. Small, Jr., Esquire
Richard C. Smith, Esquire
Michelle C. Pardo, Esquire
Fulbright & Jaworski LLP
801 Pennsylvania Avenue, N.W.
Washington, D.C.
Attorneys for Plaintiff

and that on December 3rd, two copies of the foregoing in three ring binders along with a CD-ROM containing a copy of the foregoing were delivered to the U.S. District Court for the District of Columbia in accordance with Judge Sullivan's Minute Order of November 3, 2010.

/s/ Laura N. Steel
Laura N. Steel

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

MEMORANDUM AND POINTS OF AUTHORITIES IN SUPPORT OF MOTION OF DEFENDANTS TO DISMISS PLAINTIFF'S AMENDED COMPLAINT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

TREATISES

MISCELLANEOUS

I. INTRODUCTION AND SUMMARY OF ARGUMENT

This is not the first time this Court has been confronted with an effort by Feld Entertainment, Inc. ("FEI"), an extremely wealthy corporation, to use the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968, to bankrupt and punish these animal protection groups and their lawyers for challenging FEI's treatment of Asian elephants. Indeed, this Court rejected FEI's pursuit of essentially the same RICO allegations as a counterclaim in *American Soc'y for the Prevention of Cruelty to Animals et al. v. Feld Entertainment, Inc.*, No. 03-2006 (D.D.C.) (hereafter "ESA Case"), and then stayed the claims when they were filed several days later as a separate lawsuit, finding that the RICO claims were filed too late and were "improperly motivated." *Feld Entertainment, Inc. v. American Soc'y for the Prevention of Cruelty to Animals*, 523 F. Supp. 2d 1, 3-4 (D.D.C. 2007) (hereafter "*RICO Stay Ruling*") ("The Court rejected FEI's RICO counterclaim because it found that the claim was made with a dilatory motive . . . ."); *see also American Soc'y for the Prevention of Cruelty to Animals v. Feld Entertainment, Inc.*, 244 F.R.D. 49, 51-52 (D.D.C. 2007) (hereafter "*ESA Counterclaim Ruling*").

Now that the ESA case has been dismissed on standing grounds, this "improperly motivated" and punitive RICO case should also be dismissed with prejudice. Indeed, the *only* specific damages that FEI asserts in its Amended Complaint are the attorneys' fees and costs it spent defending the ESA case, which FEI is seeking in the ESA case. However, Congress crafted a specific attorneys' fee provision in the Endangered Species Act ("ESA") that will govern whether the Court should award fees and costs to FEI. *See* 16 U.S.C. § 1540 (g). FEI should not be permitted to circumvent the statutory standards and precedents of the ESA by attempting to transform an attorneys' fee claim into a massive RICO lawsuit that can only lead to years of

unnecessary and complex litigation. As the Supreme Court has instructed, a "request for attorneys' fees *should not result in a second major litigation.*" *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983) (emphasis added).

FEI's Amended Complaint is legally defective for other compelling reasons as well. Because this Court has already held that FEI was "dilatory" and "improperly motivated" in pursuing its RICO claim, *RICO Stay Ruling,* 523 F. Supp. 2d at 3-4 — which led this Court to long ago disallow pursuit of the RICO counterclaim in the ESA case, *ESA Counterclaim Ruling,* 244 F.R.D. 49 — FEI's claims should be dismissed with prejudice in their entirety pursuant to Rule 13(a) of the Federal Rules of Civil Procedure since they constitute a compulsory counterclaim that was filed too late. As this Court has previously recognized (and FEI has expressly conceded), the RICO claims arise out of, and are intricately related to, the ESA action. It is well established that when a party fails to timely plead a compulsory counterclaim under Rule 13(a), the same claim is lost forever and cannot be raised in a separate lawsuit. *See Baker v. Gold Seal Liquors, Inc.*, 417 U.S. 467, 469, n.1 (1974).

Similarly, FEI's claims are also barred by RICO's four-year statute of limitations. Indeed, the pleadings show that FEI knew as early as *2000* that Tom Rider was receiving funds from the original lead organizational plaintiff, and its own documents, admitted into evidence in the ESA case, establish that FEI officials knew in 2002 that another of the ESA plaintiff organizations was funding Mr. Rider's living and traveling expenses when he testified concerning FEI's treatment of the elephants, *i.e.*, the same "pattern" of conduct that underlies FEI's RICO claims.

Further, because FEI's Amended Complaint directly challenges the exercise of core First Amendment rights to petition the government to adopt particular public policy positions – by advocating such positions to legislatures and executive branch officials, as well as courts – the

RICO case is not only a transparent effort to stifle any criticism of FEI's elephant treatment practices, but is clearly barred by the long-established *Noerr-Pennington* doctrine which broadly immunizes such petitioning conduct from legal claims. *See Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 138 (1961) ("The right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade those freedoms.").

In addition, FEI's Amended Complaint does not remotely satisfy the legal elements that must be met for a RICO claim to proceed, particularly because controlling Circuit precedent establishes that conduct in connection with a single lawsuit directed at a single entity (which, at core, is all that FEI complains about, or *could* complain about consistent with *Noerr-Pennington* immunity), cannot constitute a "pattern of racketeering activity" within the meaning of RICO. 18 U.S.C. § 1962; *see Edmondson & Gallagher v. Alban Towers Tenants Ass'n*, 48 F.3d 1260, 1265-67 (D.C. Cir. 1995); *Western Assocs. Ltd. Pship. v. Market Square Assoc.*, 235 F.3d 629 (D.C. Cir. 2001).

Nor can FEI satisfy RICO's standing or causation requirements because, other than the costs of defending the ESA action, the harms alleged in the Amended Complaint — such as those flowing from defendants' purported conspiracy to convince legislators or other policymakers to "ban elephants from circuses and ultimately from entertainment and captivity altogether," Am. Compl. at ¶ 9 — not only implicate First Amendment rights but are, *as a matter of law*, far too attenuated to any concrete injury suffered by FEI. *See Hemi Group, LLC v. City of New York*, 130 S. Ct. 983, 989 (2010) (affirming district court's dismissal of a RICO claim where the harm asserted was deemed, as a matter of law, to be "too remote," "purely contingent" and "indirect") (internal quotation omitted).

As for any alleged monetary injury from having to defend the ESA lawsuit, even if this were alone sufficient for a RICO claim, FEI cannot, as a matter of law, prove such damages here, because the organizational ESA plaintiffs raised standing arguments on their own behalf that were distinct from those asserted by Tom Rider, and which will remain in the ESA case until final judgment. In other words, even if FEI could prove its baseless theory that the organizational defendants and their attorneys illegally conspired to bribe Mr. Rider (rather than merely working with a former FEI employee whom *they* believed did care about, and was an effective advocate for, the elephants he had tended to), FEI *still* could not show that it would not have had to defend the ESA lawsuit, and thus incur attorneys' fees and costs, "but for" Mr. Rider's participation in the case. *Hemi*, 130 S. Ct. at 989.

Finally, the Amended Complaint also fails to allege facts establishing the existence of any "enterprise" that is distinct from the defendants themselves, as is necessary for a RICO claim, *see Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 161 (2001), and FEI has failed to allege how each defendant has "participated in the operation or management of the enterprise itself." *Reves v. Ernst & Young*, 507 U.S. 170, 184 (1993). Indeed, the allegations against several of the specific defendants are so gossamer and legally deficient as to compel dismissal, especially in view of the Supreme Court's recent directive that for a Complaint to survive a motion to dismiss, particularly in a massive case like this one, there must be far more than the "sheer possibility that a defendant has acted unlawfully," *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) — a test that simply cannot be met here.

For these and other reasons detailed below, this is the quintessential case in which FEI should not be permitted to transform its request for attorneys' fees – which it is separately

seeking in the ESA case — into a "second major litigation," *Hensley*, 461 U.S. at 437, and hence the RICO and related common law claims should be dismissed with prejudice.[1]

II. FACTUAL BACKGROUND

Because, as FEI has previously acknowledged, the alleged "conduct underlying" its RICO and related claims are "part and parcel of the ESA Action," ESA Case, Feb. 28, 2007 Motion for Leave (DE 121-2) at 9, and because much of what FEI alleges in its Amended Complaint is simply at odds with what *actually* occurred in the ESA litigation, it is crucial to highlight certain aspects of that litigation that bear directly on FEI's claims. These facts underscore not only why those claims must be dismissed as a matter of law, but why the validity of FEI's arguments should be considered solely in the context of a request for attorneys' fees under the ESA, rather than in a separate, massive lawsuit.

It is well-established that the Court may, in granting a Fed. R. Civ. P. 12(b)(6) motion, take judicial notice of procedural developments as well as pleadings and exhibits admitted into evidence in related cases without converting a motion to dismiss into a motion for summary judgment. *See Jovanovic v. US-Algeria Bus. Council*, 561 F. Supp. 2d 103, 107 n. 1 (D.D.C. 2008) (citing *Jankovic v. Int'l Crisis Group*, 494 F.3d 1080, 1088 (D.C. Cir. 2007)) (rejecting contention that district court's reliance on exhibits that were "public record information" from a party's filing in another matter converted a motion to dismiss into a motion for summary judgment).

Accordingly, in ruling on the motion to dismiss here, this Court may take judicial notice of developments, filings and exhibits admitted into evidence in the ESA case without converting

[1] Defendants are moving to dismiss under Fed. R. Civ. P. 12(b)(1) and 12(b)(6). Not only does the Amended Complaint fail to state a claim upon which relief can be granted, but the Court lacks subject matter jurisdiction over the RICO claims based upon FEI's lack of standing, among other reasons, and therefore over state law claims.

the motion into one for summary judgment. *See also Veg-Mix Inc. v. U.S. Department of Agriculture*, 832 F.2d 601, 607 (D.C. Cir. 1987) ("[i]t is settled law that the court may take judicial notice of other cases including the same subject matter or questions of a related nature between the same parties."); *Truesdale v. U.S. Dep't of Justice*, 657 F. Supp. 2d 219, 224 n. 2 (D.D.C. 2009) ("The Court may take judicial notice of the records of another court"); *United States ex rel. New v. Rumsfeld*, 350 F. Supp. 2d 80, 88-89 (D.D.C. 2004) ("The Court may, however, 'take judicial notice of matters of a general public nature, such as court records, without converting the motion to dismiss into one for summary judgment.'") (internal citation omitted).

Thus, for example, in assessing whether FEI is improperly seeking to use a RICO claim to rehash a host of discovery disputes in the ESA case — as it attempts here — nothing precludes the Court from taking into account that Judge Facciola already addressed in the ESA case essentially the same allegations raised in FEI's Amended Complaint. *See Covad Comm. Co. v. Bell Atl. Corp.,* 407 F.3d 1220, 1222 (D.C. Cir. 2005) (a "court may look to [the] record of another proceeding 'to avoid unnecessary proceedings when an undisputed fact on the public record makes it clear that the plaintiff does not state a claim upon which relief could be granted.'") (quoting *Marshall County Health Care Auth. v. Shalala*, 988 F.2d 1221, 1228 (D.C. Cir. 1993)).

A. The ESA Litigation

The ESA case was originally brought by four non-profit animal protection organizations and former FEI employee Tom Rider under the ESA's citizen suit provision, which provides that "any person" may "commence a civil action" against "any person . . . who is alleged to be in

violation of any provision" of the ESA or one of the Act's implementing regulations. 16 U.S.C. § 1540(g).[2]

The ESA plaintiffs alleged that FEI was violating Section 9 of the ESA, which makes it unlawful for any person to "take" an endangered species without authorization from the U.S. Fish and Wildlife Service ("FWS"). *See* 16 U.S.C. § 1538(a)(1)(B). The ESA plaintiffs contended that "FEI 'takes' the Asian elephants in its possession by "routinely hitting them with bullhooks" and "chaining them on hard surfaces for many hours each day, and for even longer durations while the elephants are transported on train cars from one location to the next." *American Soc'y for the Prevention of Cruelty to Animals v. Feld Entertainment, Inc.*, 677 F. Supp. 2d 55, 58-59 (D.D.C. 2009); *see also* 16 U.S.C. § 1532(19) (definition of unlawful "take").

To establish standing, the ESA plaintiffs asserted aesthetic injury on behalf of Mr. Rider, who worked at the circus for two-and-a-half years, and resource and informational injury on behalf of the plaintiff organizations, based on FEI's failure to apply for a permit under Section 10 of the statute to engage in otherwise prohibited activities. *See* 16 U.S.C. § 1539(c).[3]

---

[2] The original lead organizational plaintiff in the ESA case was the Performing Animal Welfare Society ("PAWS"). However, after PAWS filed a RICO complaint against FEI alleging that FEI "engag[ed] in a pattern of racketeering activity involving predicate acts of mail fraud, wire fraud, and interstate transportation of stolen property" belonging to PAWS, s*ee Performing Animal Welfare Society v. Feld Entertainment, Inc.*, Civ. No. S-00-1259-GEB-DAD (E.D. Ca. 2000), PAWS and FEI reached a confidential settlement and PAWS withdrew from the ESA litigation. *See* Notice of Voluntary Dismissal, Civ. No. 00-1641 (D.D.C. Jan. 8, 2001) (original case number in which the ESA case was filed).

[3] The ESA plaintiffs alleged that Mr. Rider had formed a special bond with the elephants, was aesthetically injured by seeing them hit with bull hooks and kept in chains, and wanted to see them again, but could not do so "*without suffering more aesthetic and emotional injury. . . .*" ESA Case, Sept. 26, 2003 Complaint ¶ 22 (emphasis added).

B. FEI's Longstanding Knowledge Of Mr. Rider's Funding

As FEI's present Complaint acknowledges, while the ESA case was pending, Mr. Rider testified before state legislative bodies and otherwise advocated on behalf of the elephants. *See, e.g.*, Am. Compl. at ¶¶ 97, 106, 161, 236-43. The ESA plaintiffs and others who supported his advocacy efforts provided Mr. Rider with his basic living and traveling expenses, while he lived and traveled in a used van. *Id.* at ¶¶ 137, 161.

Notwithstanding FEI's present attempt to resurrect discovery disputes that were already decided in the ESA case (most of which were resolved *against* FEI), it is indisputable that FEI has in fact known for many years about Mr. Rider's funding. For example, FEI knew in 2000 that Mr. Rider was employed by the original organizational plaintiff in the ESA case. *See* Am. Compl. at ¶ 61 ("At the time that the original complaint was filed on July 11, 2000, Rider was employed as a 'security guard' by one of the plaintiffs named in the original complaint"). Further, a May 2002 exchange of e-mails among high-ranking FEI officials that was admitted into evidence at the ESA trial demonstrates that *FEI knew more than eight years ago and shortly after the ESA case was filed* that the ASPCA was paying for Mr. Rider's living and traveling expenses while he testified at a legislative hearing about elephant treatment. *See* ESA Case, Plaintiffs' Will Call Trial Exhibit 197, DE 475, Att. 16 (Mar. 17, 2009) (email attaching email with verbatim account of legislative hearing and newspaper article). As FEI's email observes, Mr. Rider expressly *acknowledged his source of funding in response to a question from a state legislator at a public hearing* at which Mr. Rider was testifying, *id.* ("Tom said he follows Ringling around to protect" the elephants, and that the ASPCA "pays his expenses for traveling"

and his "living expenses"), and he also disclosed this fact to a reporter for the Philadelphia News, *id.* at 2.[4]

Moreover, as this Court has previously observed, long before FEI had raised any issue concerning Mr. Rider's funding, the ESA plaintiffs' lead counsel, in September 2005, *volunteered* at a status hearing that the organizations and others were providing funding to Mr. Rider. *See ESA Counterclaim Ruling,* 244 F.R.D. at 52 ("Plaintiffs' counsel admitted in open court on September 16, 2005 that the plaintiff organizations provided grants to Tom Rider to 'speak out about what really happened' when he worked at the circus.") (quoting 9/16/05 Hr'g Transcript). Therefore, the record in the ESA case establishes that, *before FEI had even filed a single discovery motion*, FEI already knew that Mr. Rider was receiving funding from the ESA organizational plaintiffs.[5]

Moreover, when FEI eventually moved to obtain additional details concerning Mr. Rider's funding, this Court held that, while FEI could obtain what it needed to challenge Mr. Rider's credibility, invasive discovery concerning individual or organizational contributors who were not connected to the litigation was both irrelevant and "would tread on core First Amendment rights." ESA Case, Order of Aug. 23, 2007 (DE 178), at 9 (citing *Wyoming v. U.S. Dep't of Agriculture*, 208 F.R.D. 449, 454 (D.D.C. 2002)). The Court likewise rejected FEI's

---

[4] In 2004 Mr. Rider also agreed to provide FEI with a list of all the funding he had received, subject to a confidentiality agreement. *See* ESA Case, Defendants' Will Call Exhibit 16, DE 476, Att. 14 (Mar. 17, 2009), at 39.

[5] FEI's Amended Complaint concedes that various witnesses for the animal protection organizations furnished additional information concerning Mr. Rider's funding in deposition testimony in 2005, long before the Court had issued *any* order requiring the disclosure of such information. *See e.g.*, Am. Compl. at ¶ 212 (stating that ASPCA's witness, in 2005 deposition testimony, discussed Rider's funding by ASPCA, AWI, and "FFA/HSUS"); *see also id.* at ¶ 32 (asserting that FEI "did not begin to uncover the payment scheme described herein until the Rule 30(b)(6) deposition of ASPCA, taken in the ESA action on July 19, 2005"); *id.* at ¶ 218 (asserting that in deposition testimony in 2005, the witness for "FFA/HHS" testified that those organizations had funded Rider's expenses).

effort to employ discovery to obtain "information concerning the media and legislative strategies" of the organizational ESA plaintiffs and other animal protection organizations. ESA Case, Order of Aug. 23, 2007 (DE 178), at 5.

Further, in keeping with FEI's contentious litigation tactics, when FEI subsequently moved to hold the ESA plaintiffs and the Humane Society of the United States ("HSUS") in contempt for failing to abide by the Court's disclosure orders relating to Mr. Rider's funding, Judge Facciola held an evidentiary hearing to address FEI's charges – many of which also underlie the pending RICO claims – and then categorically rejected them. *See* ESA Case, Memorandum Order of Oct. 16, 2008 (DE 374), at 1 ("the Court concludes that [FEI's motions challenging the ESA plaintiffs' and HSUS's compliance with their discovery obligations] *are both without merit and no further action should be taken.*") (emphasis added).[6]

Thus, finding all of the live witnesses for the organizational ESA plaintiffs and HSUS to be "eminently credible and trustworthy," ESA Case, Mem. Order of Oct. 16, 2008 (DE 374), at 11, and based on the extensive materials produced concerning Mr. Rider's funding and activities, Judge Facciola concluded that "*there is absolutely no showing that plaintiffs did anything but attempt to find whatever was responsive to [FEI's] demands and the Court's order and produce it.*" *Id.* at 17 (emphasis added); *id.* at 10-11 ("Having heard their testimony, I fully credit their testimony and *conclude that they did make a diligent search and fully complied with the obligations Judge Sullivan imposed.*") (emphasis added). Judge Facciola further reaffirmed that, although the ESA plaintiffs and HSUS were obligated to furnish all information that "could be used to impeach" Mr. Rider – and that they had fully complied with that obligation – the Court

[6] Nevertheless, FEI's RICO count specifically complains about the organizational plaintiffs' production of documents concerning Mr. Rider's funding, *see, e.g.*, Am. Compl. at ¶ 235 – the *precise* matter addressed by Judge Facciola at the evidentiary hearing and resolved in the ESA plaintiffs' favor.

had indeed intended, on First Amendment and other grounds, to "preclude any discovery of plaintiffs' efforts, through Rider or otherwise, to influence legislators and the media of the validity of their complaint about FEI's treatment of elephants." *Id.* In another order, Judge Facciola denied FEI's motion to obtain still more information concerning Mr. Rider's funding, explaining again that the ESA plaintiffs had fully complied with their discovery obligations, and that "given the history of this case, to permit [additional discovery concerning Mr. Rider's funding] would not be to merely abuse my discretion; *it would be sinful.*" ESA Case, Order of Aug. 5, 2008 (DE 326), at 6 (emphasis added).

C. The RICO Counterclaim And Separate Complaint

Although FEI knew by May 2002, at the latest, that Mr. Rider's basic living and traveling expenses were being paid by animal advocates, it was not until after FEI changed counsel in 2006, that it began to make sweeping assertions of a so-called RICO conspiracy against Mr. Rider, the animal protection organizations and, ultimately, their litigation counsel. Indeed, FEI waited nearly five years, until February 2007, to try and add RICO claims against certain of the ESA plaintiffs, by way of an untimely counterclaim in the ESA litigation. In its motion to amend its answer to add that counterclaim, FEI argued that the purported "conduct underlying FEI's counterclaim is *part and parcel of the ESA Action and should be adjudicated as part of that Action.*" ESA Case, Feb. 28, 2007 Motion for Leave (DE 121-2), at 9 (emphasis added).

In August 2007, this Court rejected FEI's motion to amend, finding that FEI's request to add a RICO claim was "made with a dilatory motive," and that FEI had no excuse for its extreme delay in bringing the claim. *ESA Counterclaim Ruling*, 244 F.R.D. at 51-52 ("[T]he Court cannot ignore the fact that [FEI] has been aware that plaintiff Tom Rider has been receiving payments from the plaintiff organizations for more than two years . . . Plaintiffs' counsel admitted in open court on September 16, 2005, that the plaintiff organizations provided grants to Tom Rider . . .

[FEI], however, waited a year and a half after that hearing to file its counterclaim."). This Court also observed that "[t]hrough its numerous discovery-related motions, [FEI] has shown that its efforts to . . . learn every detail of the media and litigation strategies of its opponents are relentless." *Id.* at 52.[7]

Yet, only four days later, FEI filed the very same claim as a separate lawsuit. In considering a stay of the case, this Court explicitly rejected FEI's protestation that it was not circumventing the Court's previous rejection of the counterclaim. This Court characterized as "patently incorrect" FEI's assertion that the RICO claim was "unrelated" to the underlying ESA litigation. *RICO Stay Ruling*, 523 F. Supp. 2d at 3. The Court made clear that it had rejected FEI's RICO counterclaim *not* because it was not integrally interwoven with the ESA case but, rather, because it "was filed for the improper purpose of interfering with and delaying resolution of the ESA action." *Id.* In granting the request for a stay, the Court further reaffirmed its views that "FEI itself has *already long delayed its day in court on this claim*" and "waited a significant amount of time before bringing this claim." *Id.* at 4 (emphasis added). The Court also flatly rejected FEI's aspersions of "ongoing 'nefarious' document destruction," finding that "FEI grossly distorts the facts." *Id.*

D. The ESA Trial

In their pretrial brief and at trial, in addition to relying on Mr. Rider for standing, the ESA plaintiffs relied on testimony by API's organizational representative to establish their organizational standing.[8] Because the organizational standing question remained fully in play,

---

[7] At the same time, the Court refused to allow FEI's new counsel to assert an "unclean hands" defense, explaining that FEI "was aware of the payments to Tom Rider that underlie its defense of unclean hands at least as early as 2005. . . . *Such delay provides strong evidence of a dilatory motive* . . . ." *Id.* at 52-53 (emphasis added).

[8] The ESA plaintiffs made clear to the Court that they were relying solely on API at trial to establish organizational standing because all of the organizations had a similar stake in the

the Court sought additional briefing on that issue during the trial. *See* ESA Case, Minute Order of Feb. 19, 2009 ("directing each side to file a brief . . . *addressing the plaintiff organizations' standing to bring suit in this case*") (emphasis added); *see also* ESA Case, Organizational Standing Briefs (DE 432, 433). Further, when FEI unsuccessfully moved for a directed verdict following the presentation of plaintiffs' case, the Court engaged in an extensive colloquy with counsel concerning the Supreme Court and D.C. Circuit precedents on which the ESA plaintiffs were relying for organizational standing, and their applicability to this case. *See* ESA Case, Tr. Tr. 81-90, Feb. 26, 2009 (DE 492).

With regard to Mr. Rider's testimony regarding his standing, the Court stated that the funding issues went to *his* credibility. On this issue, the Court specifically noted that it was not suggesting that there was anything "nefarious" about the funding of Mr. Rider's advocacy efforts, but that it did bear on his "believability." ESA Case, Tr. Tr. 53:11-53:17, July 14, 2009 ("*[I]t's all about credibility. I'm not suggesting nefarious, but it's about credibility, though, believability.* Is he believable . . . or is he the chief spokesperson for the plaintiffs because he was hired to say what they wanted him to say?").[9]

---

litigation and the ESA plaintiffs wished to avoid wasting the Court's and parties' time by presenting overlapping standing arguments. *See* ESA Case, Trial Tr. 84-85, Feb. 26, 2009 (DE 492); *see also Animal Legal Defense Fund v. Glickman*, 154 F.3d 426, 429 (D.C. Cir. 1998) (*en banc*) (finding that since one of the plaintiffs had standing to sue, there was no "need" to "pass on the standing of the other" plaintiffs).

[9] It also merits noting that, in contrast to FEI's labeling of the ESA plaintiffs' counsel as "racketeers," at the end of the trial (*after* hearing all of the testimony and other evidence concerning Mr. Rider's funding), the Court praised counsel on their skill and "professionalism." *See* ESA Case, Trial Tr. 7:21-8:17, Mar. 18, 2009 (DE 532) ("Indeed, the battle, has been quite intensive, but, nevertheless, *fought very fairly and with the utmost skill and professionalism exhibited by counsel.* Indeed, I applaud the efforts of counsel and I'm quite sincere when I say it's been a pleasure to preside over this trial.").

E. The Court's Ruling On Standing

In its December 30, 2009 ruling, this Court concluded that the ESA plaintiffs "failed to prove the standing required by Article III of the United States Constitution." *American Soc'y for the Prevention of Cruelty to Animals v. Feld Entertainment, Inc.*, 677 F. Supp. 2d 55, 57 (D.D.C. 2009) (hereafter "*ESA Final Ruling*"). In so doing, the Court stressed that it "does not – and indeed cannot – reach the merits of plaintiffs' allegations that FEI 'takes' its elephants in violation of Section 9 of the ESA." *Id.* at 66.[10]

In rejecting Mr. Rider's standing, the Court found that Mr. Rider "is not credible" with respect to his asserted emotional and aesthetic injury. *ESA Final Ruling*, 677 F. Supp. 2d at 88-94 (Mr. Rider lacked a sufficient "personal and emotional attachment" to the elephants that could be remedied by a favorable ruling for the ESA plaintiffs). With respect to the funding issue, the Court stated that "[p]laintiffs certainly established during the trial that Mr. Rider engages in media and educational outreach activity regarding FEI's Asian elephants, including speaking out about what he allegedly witnessed regarding elephant mistreatment and publicizing his involvement in this litigation." *Id.* at 79. While the Court did "not doubt that the plaintiff organizations willingly support those efforts," which were seen "as a benefit" in the advocacy for the elephants, it nevertheless concluded that the "primary purpose" of the funding was to "keep Mr. Rider involved with the litigation, because he is the only plaintiff who alleges a personal and

[10] While not resolving the merits, in its background description of the ESA, the Court did note the breadth of the Act and the "take" prohibition in particular, *id.* at 63, and specifically referenced ESA implementing regulations that apply *solely* to captive wildlife. *Id.* at 63-64 (explaining that, to obtain a permit from the FWS, the Service "must find that the animals are being 'maintained' under humane and healthful conditions") (quoting 50 C.F.R. § 13.41) ("Any live wildlife 'maintained' under a [FWS] permit must be maintained under humane and healthful conditions."). Nonetheless, part of FEI's kitchen-sink RICO claims is that the ESA plaintiffs, as well as their attorneys, pursued an ESA claim although they "knew" that Congress did *not* intend the ESA's take prohibitions and requirements to extend to "circus elephants." Am. Compl. at ¶ 10.

emotional attachment to the elephants . . . ." *Id.* However, consistent with the Court's statement that there was nothing "nefarious" about the funding, there was no finding that the animal protection organizations or their lawyers believed that Mr. Rider was lying about his attachment to the elephants.[11]

With respect to organizational standing, the Court specifically found that the testimony of API's organizational representative was "credible," *ESA Final Ruling*, 677 F. Supp. 2d at 95, but insufficient as a matter of law to satisfy Article III strictures. The Court found that API had expended "significant resources" on education and advocacy efforts focused on FEI's elephants, *id.*, and that if FEI were to pursue a permitting process under section 10 of the ESA, API would use the information generated by that process to further its advocacy and legislative efforts concerning circus elephants. *Id.* at 96. However, the Court found that any Section 10 permitting process "would be under the control of FWS," and that "API has not demonstrated that a Section 10 proceeding would yield any information from FEI that API has not already received in this litigation." *Id.* at 96-97. This Court did not suggest that the organizational standing arguments were legally or factually frivolous, or that the ESA plaintiffs had not pressed them vigorously or in good faith throughout the litigation.

F. FEI's Amended RICO Complaint

On February 16, 2010, FEI filed an Amended Complaint adding several new legal theories and seven new parties, including five of the ESA plaintiffs' lawyers and HSUS, which was never even a party to the ESA case. FEI's Amended Complaint asserts that the ultimate

[11] Although FEI's Complaint alleges that Mr. Rider was not only necessary for standing in the ESA case, but was also the ESA "plaintiffs' key fact witness," Am. Compl. at ¶ 1, Mr. Rider's testimony was in fact only a fraction of the evidence relied on by the ESA plaintiffs – including FEI's *own* internal documents and testimony – to support their claims that FEI's employees routinely hit and wound elephants with bullhooks, and that the elephants are kept chained on concrete and in rail cars for many hours at a time.

"scheme" of the ESA plaintiffs, their attorneys, HSUS, and other elephant advocates with whom they have associated, was to "permanently ban Asian elephants in circuses" and in all forms of captivity, Am. Compl. at ¶ 16, which, even if true (it is not), is a quintessential public policy purpose that is protected by the First Amendment pursued through "legislative, administrative and other judicial forums." *Id.* at ¶ 3. Paradoxically, however, FEI also complains that the ESA plaintiffs failed to press for precisely the relief that would have advanced that alleged "scheme." *Id.* at ¶ 12 (complaining that the ESA plaintiffs "abandoned" the forfeiture and injunctive remedies that, according to FEI, *would* have resulted in the complete removal of the elephants from the circus).

FEI's Amended Complaint is also internally inconsistent regarding the purpose for the funding that lies at the core of the RICO claims. On the one hand, FEI complains that Mr. Rider was compensated to do *nothing* but serve as a plaintiff and witness in the ESA case, *see, e.g.*, Am. Compl. at ¶ 5; yet, on the other hand, FEI complains that Mr. Rider did engage in extensive public advocacy on behalf of the elephants but that he purportedly misled the public about FEI's treatment of the elephants when he did so. *See, e.g.*, Am. Compl. ¶ 97 (funding was used to pay his expenses so that he could testify before the Nebraska legislature); *id.* at ¶ 106 (funding was used so that Rider could travel to legislative bodies and convey information about elephant treatment); *id.* at ¶ 159 (he received travel expenses so he could travel to and participate in a press conference in Denver); *id.* at ¶ 172 (API paid his expenses so that he could testify before state legislature); *id.* at ¶¶ 236-43 (his funding allowed him to testify to the Chicago City Council and other legislative bodies).[12]

[12] Because FEI broadly alleges that Mr. Rider's accounts of FEI's "mistreatment of elephants were fraudulent," and that the organizational plaintiffs also defrauded their members and other supporters by maintaining that FEI's bull hook, chaining, and other practices constitute

III. STANDARD OF REVIEW

As the United States Supreme Court has held in two recent rulings that strengthened the hand of district courts in weeding out tenuous claims at the pleading stage – especially claims that promise to entail highly intrusive, time-consuming discovery and other pretrial proceedings – to survive a motion to dismiss under Fed. R. Civ. P. 12(b)(6), a complaint must set forth a "'claim for relief that is *plausible on its face.*'" *Iqbal*, 129 S. Ct. at 1949 (emphasis added) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). The "plausibility standard" established by the Supreme Court "asks for more than a sheer possibility that a defendant has acted unlawfully," and "where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of 'entitlement to relief.'" *Iqbal*, 129 S. Ct. at 1949 (quoting *Twombly*, 550 U.S. at 557).

The Supreme Court has also instructed that a "pleading that offers 'labels and conclusions' or a formulaic recitation of the elements of a cause of action will not do," and "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 129 S. Ct. at 1949 (quoting *Twombly*, 550 U.S. at 555). Hence, "[d]etermining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense," and "where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged – but it has not 'show[n] – 'that the pleader is entitled to relief.'" *Iqbal*, 129 S. Ct. at 1950 (quoting Fed. R. Civ. P. 8(a)(2)).[13]

---

mistreatment, *see, e.g.,* Am. Compl. at ¶¶ 119, 180, should this case proceed it will necessarily require re-litigation of whether FEI mistreats the elephants, including in ways that were excluded from the ESA case.

[13] *Iqbal* and *Twombly* expressly "retired" the "no-set-of-facts" test for dismissing complaints on which lower courts had long relied, *i.e.*, that a complaint could not be dismissed

Iqbal and *Twombly* relied on these principles to affirm Rule 12(b)(6) dismissals of cases that, if allowed to proceed, would have inevitably embroiled the courts in protracted and problematic discovery disputes and other pretrial proceedings. In *Twombly*, the Court rejected an antitrust claim requiring proof of a "conspiracy" to restrain trade where the Complaint made extensive factual allegations that were no more consistent with the existence of an impermissible conspiracy than with the existence of "parallel conduct" by the defendant companies that "could just as well be independent action." 550 U.S. at 557. In holding that such "[f]actual allegations must be enough to raise a right to relief above the speculative level," *id.* at 556, the Court went to great pains to stress that district courts must be able to dismiss cases that fail to meet a threshold of "plausibility," precisely to avoid the kind of "sprawling, costly, and hugely time-consuming undertaking" that would otherwise ensue. *Id.* at 559-60 (internal quotation omitted). Accordingly, the Court found that the detailed complaint at issue there "warranted dismissal" not because it was "insufficiently 'particularized,'" but, rather, because "it failed *in toto* to render plaintiffs' entitlement to relief plausible." *Id.* at 569 n.14.

"In *Iqbal* the Supreme Court applied [the *Twombly*] ruling on pleading standards," *Tooley v. Napolitano*, 586 F.3d 1006, 1007 (D.C. Cir. 2009), to an extensive civil rights complaint setting forth a litany of abuses allegedly suffered by the plaintiff and asserting that high-ranking government officials had been involved in violating his constitutional rights. Emphasizing that *Twombly* "expounded the pleading standard for '*all* civil actions,'" *Iqbal*, 129 S. Ct. at 1953 (emphasis added; internal citation omitted), the Court held that allegations in the complaint that various federal officials had adopted policies with discriminatory intent failed to cross the "line from conceivable to plausible," especially because "given more likely explanations" for the

---

unless there was no possible set of facts that could support a claim. *Iqbal*, 129 S. Ct. at 1944 (citing *Conley v. Gibson*, 355 U.S. 41 (1957)).

officials' conduct, "they do not plausibly establish" an invidious motive. *Id.* at 1950-1951 (internal citation omitted).[14]

In addition, the heightened pleading standards embodied in Fed. R. Civ. P. 9(b) apply to FEI's RICO claims, which are based in large measure on allegations of mail and wire fraud. *See, e.g.*, Am. Compl. at ¶ 11 (asserting that defendants engaged in "mail fraud" and "wire fraud" in order to "perpetrate multiple schemes to permanently ban Asian elephants in circuses"). Rule 9(b) "is designed, in part, 'to allow a District Court to distinguish valid from invalid claims . . . and to terminate needless litigation early in the proceedings." *Bates v. Nw. Human Servs., Inc.*, 466 F. Supp. 2d 69, 88 (D.D.C. 2006) (internal quotation omitted). The rule mandates that "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." This heightened pleading standard is applicable to civil RICO claims such as those asserted here. *Prunte v. Universal Music Group*, 484 F. Supp. 2d 32, 42 (D.D.C. 2007).

For myriad reasons enumerated below, FEI's Amended Complaint – which hinges on the fictitious premise that several of the nation's leading animal protection organizations and their counsel, who are devoted to advancing the interests of animals, "never really [cared] about improving conditions for elephants in the circus" or about "stopping elephant 'abuse,'" but,

[14] Courts in this Circuit have relied on *Iqbal* and *Twombly* to dismiss complaints advancing a variety of claims. *See, e.g., U.S. ex rel. Miller v. Bill Harbert Intern. Const., Inc.*, 608 F.3d 871, 882 (D.C. Cir. 2010) (following the "recent teachings of *Iqbal* and *Twombly*" in declining to allow complaint amendments to relate back to inadequate allegations); *Amiri v. Gelman Management Co.*, No. 08-1864 (JDB), 2010 WL 3271247, at ** 3-5 (D.D.C. Aug. 19, 2010) (applying *Iqbal* and *Twombly* in finding allegations of discrimination insufficient to avoid dismissal); *Guantanamera Cigar Co. v. Corporacion Habanos*, 672 F. Supp. 2d 106, 108-109 (D.D.C. 2009) (relying on *Iqbal* and *Twombly* in "find[ing] that plaintiff has failed to plead enough factual content to find that defendant is liable for the alleged misconduct" because the complaint "failed to provide sufficient evidence" to satisfy several elements of the proffered unfair competition claim); *cf, Harris v. Koenig*, No. 02-618 (GK), 2010 WL 2560038, at *3 (D.D.C. June 10, 2010) (in assessing ERISA complaint, applying principle that the "complaint must plead facts that are more than 'merely consistent' with a defendant's liability") (quoting *Iqbal*, 129 S. Ct. at 1940).

rather, were merely seeking improperly to enrich themselves through the ESA lawsuit, Am. Compl. at ¶ 9 – is legally defective and cannot survive "plausibility" review under *Iqbal* and *Twombly*, let alone meet Rule 9(b)'s heightened pleading requirements.

IV. THE RICO CLAIMS ARE BARRED UNDER RULE 13(a).

FEI's RICO claims should be dismissed with prejudice in their entirety pursuant to Rule 13(a) of the Federal Rules of Civil Procedure because they constitute a compulsory counterclaim that this Court already ruled in 2007 was filed too late.

It is well established that if a party fails to assert a compulsory counterclaim in a timely fashion, it is forever lost and that party may not assert that claim in a separate lawsuit. *Baker*, 417 U.S. at 469, n.1 ("A counterclaim which is compulsory but is not brought is thereafter barred"); *Polymer Industrial Products Co. v. Bridgestone/Firestone, Inc.*, 347 F.3d 935, 938 (Fed. Cir. 2003) (a party who fails to timely assert a compulsory counterclaim is "forever barred from revisiting the issue"); *New York Life Ins. Co. v. Deshotel*, 142 F.3d 873, 882 (5th Cir. 1998) ("It is well settled that a failure to plead a compulsory counterclaim bars a party from bringing a later independent action on that claim"); *Crown Life Ins. Co. v. American Nat'l Bank and Trust*, 35 F.3d 296, 300 (7th Cir. 1994) (a compulsory counterclaim that is filed too late is waived); *Local Union No. 11, International Brotherhood of Electrical Workers v. G.P. Thompson Electric*, 363 F.2d 181, 184 (9th Cir. 1966) ("If a party fails to plead a compulsory counterclaim, he is held to waive it and is precluded by res judicata from ever suing upon it again") (additional citations omitted).

The purpose of Rule 13(a) is "to prevent multiplicity of actions and to achieve resolution in a single lawsuit of all disputes arising out of common matters." *Southern Constr. Co. v. United States ex rel. Pickard*, 371 U.S. 57, 60 (1962). In that regard, the Rule provides that:

> A pleading must state as a counterclaim any claim that – at the time of its service – the pleader has against an opposing party if the claim: (A) arises out of the transaction or occurrence that is the subject matter of the opposing party's claim; and (B) does not require adding another party over whom the court cannot acquire jurisdiction.

Fed. R. Civ. P. 13(a).

As demonstrated below, FEI's RICO claims — which focus on Mr. Rider's receipt of funding for his basic living and traveling expenses — easily satisfy these elements of a compulsory counterclaim.

As a threshold matter, the RICO claims clearly arise out of the same "transaction or occurrence" that was the subject matter of the ESA case. The Supreme Court has given this operative term a "flexible meaning" that "may comprehend a series of many occurrences, depending not so much upon the immediateness of their connection as upon their logical relationship . . . ." *Moore v. New York Cotton Exchange*, 270 U.S. 593, 610 (1926) (emphasis added); *see also Columbia Plaza Corp. v. Security Nat'l Bank*, 525 F.2d 620, 625 (D.C. Cir. 1975) (in determining whether a counterclaim is compulsory, the court "must assess the degree of 'logical relationship' between the two actions," and "must also remain mindful that the term 'transaction' [in Rule 13(a)] is to be *construed generously to avoid the unnecessary expense inherent in multiplicious litigation*") (emphasis added). As long as the "essential facts" are already at issue in the underlying case, a counterclaim based on those facts is compulsory, and "[t]hat they are not precisely identical, or that the counterclaim embraces additional allegations... does not matter." *Moore, supra*, 270 U.S. at 610.

FEI has already conceded this element of Rule 13(a). When it unsuccessfully moved in 2007 to have its RICO claims added as a counterclaim in the ESA case, FEI stressed that "the conduct forming the basis of FEI's counterclaim is *part and parcel of the ESA Action*." ESA

Case, FEI Motion For Leave To Amend Answers To Assert Additional Defense And RICO Counterclaim ("FEI Motion To Amend") (February 28, 2007)(DE 121) at 7 (emphasis added); *see also id.* at 9 ("the conduct underlying FEI's counterclaim is part and parcel of the ESA Action and *should be adjudicated as part of that Action*") (emphasis added); *id.* at 10 ("the facts and issues presented in FEI's counterclaim are *so 'closely related' to the ESA Action that 'there is an interest in avoiding a multiplicity of actions*'") (emphasis added) (citation omitted); ESA Case, FEI's Reply In Support Of Motion For Leave To Amend (April 27, 2007) (DE 142) at 8 ("Judicial economy dictates that the ESA Action, FEI's counterclaim, and FEI's unclean hands defense be adjudicated concurrently to avoid 'piecemeal litigation'"); *id.* at 9 ("Judicial economy and efficiency dictates that FEI's RICO Counterclaim be joined to the ESA Action").

Further, in granting a stay of the present case in 2007, this Court itself recognized that "FEI's allegations in this case *stem directly from [the ESA plaintiffs'] conduct in prosecuting the ESA Action.*" *See RICO Stay Ruling*, 523 F. Supp. 2d at 2 (emphasis added). Therefore, FEI's RICO case clearly "arises from the same transaction or occurrence" as the ESA case, within the meaning of Fed. R. Civ. P. 13(a). In addition, the "essential facts," *Moore*, *supra*, were known to FEI when it filed its 2003 Answer in the ESA case, *see* ESA Case, Oct. 8, 2003 Answer (DE 4), and augmented by the time it filed its Supplemental Answer on March 15, 2006. *See* ESA Case, Mar. 15, 2006 Answer to Suppl. Complaint (DE 63). Therefore, under the plain language of Rule 13(a), FEI was required to plead its counterclaim "at the time" it served those Answers.

As explained above in Section II(B) of this Memorandum, FEI knew in 2000 that Mr. Rider was on PAWS' payroll. In addition, as further explained, a May 29, 2002 internal FEI email exchange among high level FEI officials, including its then Vice President Richard Froemming, FEI official Todd Willens, and FEI's Director of the Center for Elephant

Conservation, Gary Jacobson, demonstrates that FEI knew that Mr. Rider's living and travel expenses were then being paid by the ASPCA. *See* ESA Case, Plaintiffs' Will Call Trial Exhibit 197, DE 475, Att. 16 (Mar. 17, 2009) at 4 (reporting that when asked at a legislative hearing where he lived, what he does, and who pays his expenses, "Tom said he follows Ringling around to protect 'my girls' . . . and *ASPCA pays his expenses for traveling*. When pressed by [Representative] Caprio, Tom said *ASPCA pays for hotels, bus fare, meals, a new set of luggage, and other business expenses*.") (emphasis added). Thus, although FEI was aware in 2000 that Mr. Rider's expenses were being paid by the lead plaintiff in the ESA case, and it knew by 2002 that Mr. Rider's expenses were then being paid by the ASPCA — the *new* lead plaintiff after PAWS withdrew from the case, *see supra* at n.2 — no counterclaim based on these facts was included in its 2003 Answer. *See* ESA Case, Oct. 8, 2003 Answer (DE 4).

Additional evidence introduced by FEI in the ESA case makes clear that, by June 2004, FEI had also received in discovery an internal email from ASPCA official Lisa Weisberg to the organization's President stating that the ASPCA, as well as ESA plaintiffs Animal Welfare Institute and Fund for Animals, were all contributing to Mr. Rider's living and traveling expenses. *See* ESA Case, Defendants' Exhibit 46, DE 457, Att. 8 ("To pay [Mr. Rider's] travel expenses for the next few months, both AWI, the Fund (and us, by Nancy) have agreed to pay $1,000 each to cover 2 months of on the road expenses."). Indeed, FEI readily acknowledged in its original RICO Complaint that "[t]he payment scheme . . . first became known to FEI in June 2004 when one or more of the defendants submitted their discovery responses in the ESA Action." *See* Original RICO Complaint (DE 1) at ¶ 20.[15]

[15] FEI's Amended Complaint now avers that "FEI did not begin to uncover the payment scheme . . . until the Rule 30(b)(6) deposition of ASPCA, taken in the ESA Action on July 19,

Furthermore, as this Court itself observed in finding that FEI had inexcusably delayed bringing its RICO counterclaim, "Plaintiffs' counsel admitted in open court on September 16, 2005 that the plaintiff organizations provided grants to Tom Rider to 'speak out about what really happened' when he worked at the circus." *ESA Counterclaim Ruling*, 244 F.R.D. at 52 (quoting Sept. 16, 2005 hr'g Transcript).

Despite this clear pre-existing knowledge, when FEI filed its Supplemental Answer in the ESA case on March 15, 2006, it still did not include a RICO counterclaim. *See* ESA Case, Mar. 15, 2006 Answer To Suppl. Compl. (DE 63). Instead, FEI waited nearly another year – until February 2007 – to move to amend its Answer to assert this claim. *See* ESA Case, FEI Motion To Amend (February 28, 2007) (DE 121).

In light of the extensive evidence admittedly available to FEI by September 2005 concerning the "essential facts" that form the basis of its RICO claims, its failure to include such claims in its March 16, 2006 Supplemental Answer is fatal to its ability to raise these claims here in a separate suit, because these claims were available to FEI "at the time" it filed that responsive pleading. *See, e.g., Hans v. Homesite Indemnity Co.*, No. 08-0393, 2009 WL 2169170, *3-4 (D. Ariz. July 17, 2009) (because defendant had documents showing facts giving rise to counterclaim in its possession at the time he filed his answer, compulsory counterclaim had accrued by then); *Crown Life Ins.*, 35 F.3d at 300 (compulsory counterclaims are waived when not filed along with the answer). Accordingly, the RICO claims constitute a "compulsory counterclaim" within the plain language of Fed. R. Civ. P. 13(a), that FEI was required to assert

---

2005." *See* Am. Compl. at 20. However, even this revision in the averred chronology shows that FEI knew the basic facts of its RICO claim by July 2005.

in either its 2003 Answer or its 2006 Supplemental Answer, and which has now been inexorably waived. *See* Fed. R. Civ. P. 13(a); *Baker*, 417 U.S. at 469 n.1.[16]

Indeed, this Court has already ruled that FEI inexcusably delayed asserting its RICO claims. In its August 23, 2007, Memorandum Opinion denying FEI's motion to add the RICO counterclaim, the Court specifically observed that the untimely claim was being raised "three and a half years after filing [FEI's] original answer in this case and almost seven years after the central issues in this case were first brought to the Court's attention in a companion case." *ESA Counterclaim Ruling*, 244 F.R.D. at 50. Rejecting FEI's dilatory tactics, the Court indicated that it "cannot ignore the fact that [FEI] has been aware that plaintiff Tom Rider has been receiving payments from the plaintiff organizations for more than two years," *id.* at 52, and that FEI's protestations that it lacked details of the "payment scheme" "*ignores the evidence in this case that was available to [FEI] before June 30, 2006 and does not excuse defendant's delay from June 30 forward.*" *Id.* (emphasis added).

Therefore, under the plain language of Rule 13(a), FEI's RICO claims constitute a compulsory counterclaim that should have been filed when FEI filed its Answers in the ESA case, and this Court has already ruled that the counterclaim was filed too late. Accordingly, FEI is barred from bringing the claims here in a separate lawsuit.[17]

V. THE RICO CLAIMS ARE BARRED BY EXPIRATION OF THE STATUTE OF LIMITATIONS.

For similar reasons, this Court should dismiss the RICO claims because they are barred by the expiration of the statute of limitations. It is well established that there is a four-year

[16] The remaining requirement for a compulsory counterclaim – that it does "not require adding another party over whom the court cannot acquire jurisdiction" – is also easily satisfied here.

[17] For the same reasons, FEI is also barred from pursuing the pendent state claims that are premised on Mr. Rider's funding and that could also have been asserted years ago.

statute of limitations for civil RICO claims, which begins to run from the date of the "discovery of the injury," *not* "discovery of the other elements of the claim." *Rotella v. Wood*, 528 U.S. 549, 552, 555 (2000).

Here, the pleadings specifically aver that FEI's alleged injury is the cost "it has incurred in responding to the ESA Action – which has been ongoing for more than nine (9) years." *See* Am. Compl. ¶ 108. As such, any injury – namely, the cost of defending the ESA case – commenced and became known to FEI as early as July 11, 2000, when the original ESA case against FEI was filed. *See, e.g.*, Am. Compl. ¶ 61. Having waited more than seven years thereafter – until August 23, 2007 – to file its original RICO Complaint against the originally-named defendants (Mr. Rider and several of the animal protection organizations), the RICO claims are time-barred. *See Rotella,* 528 U.S. at 555-557. Compounding its dilatory tactics, FEI waited another two-and-a-half years, until February 16, 2010, to add several *new* defendants (including HSUS and the lawyers). The RICO claims, filed respectively more than seven and ten years after the discovery by FEI of its alleged injury, were filed long after the statute of limitations expired and are therefore untimely.

FEI cannot avoid dismissal by arguing that the relevant statute of limitations commenced at the time FEI first learned that certain organizations were paying for Mr. Rider's expenses incurred in connection with his advocacy work — the central basis for FEI's entire RICO claim. As explained above, it is clear from both the face of FEI's pleadings, as well as filings in the ESA case, that FEI was aware of this fact sometime in 2000, and by May 29, 2002 at the absolute latest.

Again, FEI knew as early as 2000 that Mr. Rider was employed by the original lead plaintiff in the ESA case. *See* Am. Compl. at ¶ 61. Indeed, FEI even suggested in the ESA action

that because Mr. Rider had been employed by PAWS at that time, his involvement in the ESA Action was "barred by the [2001] settlement entered into by FEI and PAWS." *See* ESA Case, FEI's Sept. 7, 2006 Motion To Compel (DE 85), at 11; *see also* note 1 *supra.* It is also indisputable that FEI officials knew by May 29, 2002 that Tom Rider's living and traveling expenses were being paid by the ASPCA – which had replaced PAWS as the lead plaintiff in the case. *See* Plaintiffs' Will Call Trial Exhibit 197, DE 475, Att. 16 (Mar. 17, 2009) at 4 (internal email between FEI officials reporting that Tom Rider told the Rhode Island legislature that "the *ASPCA pays his expenses for traveling*," and that this includes paying "*hotels, bus fare, meals, a new set of luggage, and other business expenses*") (emphasis added); *see also* Am. Compl. ¶ 61 ("in May 2001, the funding of Mr. Rider *transitioned to the other plaintiffs in the case at that time*") (emphasis added).

In fact, according to the May 29, 2002 email, FEI's official Todd Willens had already commenced an investigation to gather evidence that Mr. Rider was *not* "covering all of his own expenses," but rather was receiving funding as he spoke out about his experiences at the circus. *See* Plaintiffs' Will Call Trial Exhibit 197, DE 475, Att. 16 (Mar. 17, 2009) at 2 ("Todd, when you and I talked after the Greenburg hearing last week, you said Tom Rider claimed he was covering all of his own expenses – and *you asked me to look up quotes refuting that, since up until last week, he has admitted to ASPCA paying his way*") (emphasis added). As the email further reveals, Mr. Rider admitted to both a Philadelphia Daily News Reporter and a Representative of the Rhode Island legislature that his living expenses were being paid by the ASPCA. *See id.* at 4, 5. The email chain also shows that the funding arrangement by the ASPCA, which was anything but secret, was disseminated to FEI officials in 2002 to be used at "future

[legislative] hearings" involving Mr. Rider's allegations of mistreatment of the elephants. *Id.* at 1.

Therefore, FEI's own statements and records show that, by May 2002 at the latest, FEI in fact knew that Mr. Rider had received funding from at least two of the organizations that had been his co-plaintiffs in the ESA case. Yet, such funding is the essential core of the RICO claims that FEI did not seek to assert until more than five years later. However, because FEI certainly had at least "*some evidence*" forming the basis for its RICO claims well more than four years prior to August 2007 when it filed its RICO Complaint, it waited far too long to file this claim. *See Nader v. Democratic National Committee*, 567 F.3d 692, 700 (D.C. Cir. 2009) (quoting *Diamond v. Davis*, 680 A.2d 364 (D.C. 1996)) (emphasis added); *see also Chalabi v. Hashemite Kingdom of Jordan*, 503 F. Supp. 2d 267, 274 (D.D.C. 2007) ("a cause of action accrues when the plaintiff has knowledge of . . . (1) the existence of the injury; and (2) *some* evidence of the wrongdoing") (quoting *Goldman v. Bequai*, 19 F.3d 666, 671-72 (D.C. Cir. 1994)) (emphasis in original); *Chalabi*, 503 F. Supp. 2d at 274) (when a 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.") (quoting *Wiggins v. State Farm Fire & Cas. Co.*, 153 F. Supp. 2d 16, 21 (D.D.C. 2001)); *see also Fitzgerald v. Seamans*, 553 F.2d 220, 227 (D.C. Cir. 1977).[18]

It is of no moment that FEI has included in its Amended Complaint subsequent acts of alleged fraud and obstruction of justice, and has recently added new defendants to its original

[18] Because FEI was on *actual* notice of the injury that forms the basis for its RICO claim more than four years before it filed its original Complaint, it may not avail itself of the argument that the statute of limitations was tolled by "fraudulent concealment." *See Nader*, 567 F.3d at 700 ("Clearly, the doctrine of fraudulent concealment does not come into play, whatever lengths to which a defendant has gone to conceal the wrongs, *if a plaintiff is on notice of a potential claim*") (emphasis added) (quoting *Riddle v. Riddle Washington Corp.*, 866 F.2d 1480, 1494 (D.C. Cir. 1989)).

2007 RICO claim — all of which have no bearing on when the four-year statute of limitations began to run. The Supreme Court has firmly rejected the argument that the statute of limitations for a civil RICO case does not begin until the plaintiff discovers both its injury and the pattern of racketeering activity, *Rotella*, 528 U.S. at 555, and it has also rejected the argument that the statute runs from the date of "the last predicate act." *See Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 187 (1997).

Furthermore, while it is true that evidence of a "new and independent injury," can begin the statute of limitations to run anew, *see In re Merrill Lynch, Ltd. Partnerships Litigation*, 154 F.3d 56, 59 (2d Cir. 1998), it is well established that such injuries must be both "new" and completely "independent" of the original injury that forms the basis of the RICO claims. *See id.; see also Pilkington v. United Airlines*, 112 F.3d 1532, 1537 (11th Cir. 1997); *Bingham v. Zolt*, 66 F.3d 553, 560 (2d Cir. 1995). Where, however, subsequent acts are alleged to be in furtherance of the original fraudulent scheme — precisely what FEI alleges here with respect to its obstruction of justice/abuse of process allegations — this does not constitute either a "new" or "independent" injury for purposes of renewing the time for filing a complaint. *See e.g., Merrill Lynch*, 154 F.3d at 59-60 (finding that "later communications which put a gloss on the losing investments were *continuing efforts to conceal the initial fraud" and were "not separate and distinct fraudulent acts resulting in new and independent injuries*;" and that "[s]imilarly, the collection of annual fees occurred in each year of the life of the partnerships . . . cannot be viewed as a separate and distinct fraud creating new injuries as it was simply a part of the alleged scheme") (emphasis added).[19]

[19] *See also Pilkington*, 112 F.3d at 1537-38 (additional acts of harassment are "not *new and independent*" for purposes of restarting the statute of limitations; the subsequent injuries allegedly suffered "are merely recharacterizations and continuations of the same injuries"

Here, FEI has alleged that all of the payments to Mr. Rider, as well as alleged efforts to conceal those payments and alleged misrepresentations to the public, legislatures, and the courts about the basis for Mr. Rider's standing, were part of the same scheme being perpetrated by the defendants to cause financial injury to FEI – *i.e.*, to make FEI spend money defending itself in the ESA Action. *See* Am. Compl. ¶ 16. Accordingly, based on FEI's own averments in its Amended Complaint, there is nothing either "new" or "independent" about the alleged injuries it suffered *after* the statue of limitations had already run in this case. Hence, FEI's RICO claims should be dismissed with prejudice on statute of limitations grounds.[20]

VI. THE CASE SHOULD BE DISMISSED UNDER THE NOERR-PENNINGTON DOCTRINE.

A. Noerr-Pennington Principles

FEI's claims also clearly run afoul of the *Noerr-Pennington* doctrine, which is predicated on the right to petition under the First Amendment to the U.S. Constitution, and provides that

---

previously asserted) (emphasis in original); *Grimmett v. Brown*, 75 F.3d 506, 514 (9th Cir. 1996) (later acts of alleged obstruction of justice by concealing documents and falsely testifying in depositions are not "new and independent" injuries, but rather all part of the same corporate reorganization/bankruptcy scheme, and the injuries the plaintiff claims to have previously suffered — "neither the acts nor the injuries are new"); *Bingham*, 66 F.3d at 560 (additional financial losses resulting from the defendant's decision to use defective equipment was not "independent" of the original actionable injury – "[a] mere recharacterization or continuation of damages into a later period will not serve to extend the statute of limitations for a RICO claim").

[20] Based on the foregoing, FEI's Amended Complaint against the defendants first added in 2010 is clearly barred by RICO's statute of limitations because that complaint was filed more than seven years after FEI indisputably learned of Mr. Rider's funding (and more than four years after FEI's own Amended Complaint asserts that FEI "uncover[ed] the payment scheme" on which the RICO claims are based, Am. Compl. at ¶ 32). FEI's August 2007 original complaint is also time-barred because it was filed more than five years after FEI's own documents show that it learned of the funding.

"those who petition any department of the government for redress are generally immune from statutory liability for their petitioning conduct." *Sosa v. DIRECTV, Inc.*, 437 F.3d 923, 929 (9th Cir. 2006). The "doctrine holds that defendants who petition the government for redress of grievances, 'whether by efforts to influence legislative or executive action or by seeking redress in court,' are immune from liability for such activity under the First Amendment." *Nader v. Democratic National Committee*, 555 F. Supp. 2d 137, 156 (D.D.C. 2008) (quoting *Covad Communs Co. v. Bell Atl. Corp.*, 398 F.3d 666, 677 (D.C. Cir. 2005), *aff'd on other grounds, Nader v. Democratic National Committee*, 567 F.3d 692 (D.C. Cir. 2009)).

In *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 128 (1961), the Supreme Court held that the Sherman Act could not lawfully be applied to a claim by trucking companies that a coalition of railroads and their associates had illegally conspired to "conduct a publicity campaign against the truckers designed to foster the adoption and retention of laws and law enforcement practices destructive of the trucking business." *Id.* at 131. Although the trucking companies alleged that the campaign against them was "vicious, corrupt, and fraudulent," and specifically designed to "destroy [the plaintiffs] as competitors" in violation of the Sherman Act, the Court held that the railroads' efforts to "influence legislation" and otherwise affect public policy could not be deemed unlawful without bringing the Sherman Act in tension with the First Amendment. *Id.* at 130-32, 137-38. The Court reasoned that:

> [i]n a representative democracy such as this, these branches of government act on behalf of the people and, to a very large extent, the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives . . . [S]uch a construction of the Sherman Act would raise important constitutional questions. *The right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade those freedoms . . . For these reasons, we think it clear that the Sherman Act does not apply to the activities of the railroads at least insofar as those*

> *activities comprised mere solicitation of governmental action with respect to the passage and enforcement of laws.*

Id. at 137-38 (emphasis added); *accord United Mine Workers v. Pennington*, 381 U.S. 657, 670 (1965) ("*Noerr* shields from the Sherman Act a concerted effort to influence public officials regardless of intent of purpose . . . . Joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition. Such conduct is not illegal, either standing alone or as part of a broader scheme itself violative of the Sherman Act.").

Noerr-Pennington immunity applies not only to conduct bearing on direct communications with federal and state policymakers, but also to public statements aimed at influencing the passage of favorable legislation or other governmental actions. *See also Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 499-500 (1988) ("Concerted efforts to restrain or monopolize trade by petitioning government officials are protected from antitrust liability under the doctrine established by *Noerr* . . . . A publicity campaign directed at the general public, seeking legislation or executive action, enjoys antitrust immunity even when the campaign employs unethical and deceptive methods.").

In addition, the Supreme Court has expressly extended these "immunity principles" to "situations where groups 'use . . . *courts* to advocate their causes and points of view,'" including litigation against both government agencies and private parties. *BE & K Construction Co. v. NLRB*, 536 U.S. 516, 525 (2002) (emphasis in original) (quoting *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 511 (1972)). The Court has explained that:

> [t]he same philosophy [underlying *Noerr*] governs the approach of citizens or groups of them to administrative agencies (which are both creatures of the legislature, and arms of the executive) and to courts, the third branch of Government. *Certainly the right to petition extends to all departments of the Government. The right of access to the courts is indeed but one aspect of the right to petition.*

Cal. Motor Transp. Co., 404 U.S. at 510-11 (emphasis added); *id.* ("[w]e conclude that it would be destructive of rights of association and of petition to hold that groups with common interests may not, without violating the antitrust laws, use the channels and procedures of state and federal agencies and courts to advocate their causes and points of view"); *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 741-44 (1983) (limiting the ability of the National Labor Relations Board to penalize the filing of lawsuits against employees because "the right of access to the courts is an aspect of the First Amendment right to petition the Government for redress of grievances" and "[w]e should be sensitive to these First Amendment values in construing the [National Labor Relations Act] in the present context").[21]

Further, because the "text of the First Amendment" does not "speak in terms of successful petitioning – it speaks simply of the 'right of the people . . . to petition the Government for a redress of grievances'" – "even unsuccessful but reasonably based suits advance some First Amendment interests" and hence are deserving of *Noerr-Pennington* protection. *BE & K Construction Co.*, 536 U.S. at 532. Thus, "[l]ike successful suits, unsuccessful suits allow the 'public airing of disputed facts' . . . and raise matters of public concern. They also promote the evolution of the law by supporting the development of legal theories that may not gain acceptance the first time around." *Id.*

Indeed, to afford sufficient "breathing space" to the right of citizens to petition for redress through the courts, *id.*, the Supreme Court has held that even a demonstrably improper

---

[21] *See also Freeman v. Lasky, Haas & Cohler*, 410 F.3d 1180, 1183 (9th Cir. 2005) (*Noerr-Pennington* "doctrine extends to all three branches of government, and thus exempts bringing a lawsuit – that is, petitioning a court – from" liability); *id.* at 1184 ("A complaint, an answer, a counterclaim and other assorted documents and pleadings, in which plaintiffs or defendants make representations and present arguments to support their request that the court do or not do something, can be described as petitions"); *Sosa*, 437 F.3d at 930, 933 ("communication[s] to the court" are "petitions" within the protection of the First Amendment).

motivation underlying private litigation — which is completely lacking in this case — is insufficient to deprive the litigants of *Noerr-Pennington* immunity. *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, 508 U.S. 49 (1993). Rather, the Court has "outline[d] a two-part definition of 'sham' litigation" that falls outside of First Amendment purview: first, the litigation "must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits"; if an "objective litigant could conclude that the suit is reasonably calculated to elicit a favorable outcome, the suit is immunized under *Noerr*"; second, "[o]nly if a challenged litigation is objectively meritless may a court examine the litigant's subjective motivation" to use litigation to harm a party without regard to the "*outcome* of that process." *Id.* at 60-61 (emphasis in original); *see also BE & K Construction Co.*, 536 U.S. at 534 ("As long as a plaintiff's *purpose* is to stop conduct he reasonably believes is illegal, petitioning is genuine both objectively and subjectively.") (emphasis in original). Unless a plaintiff can demonstrate that both of these conditions are satisfied, the "presumption of . . . immunity for litigating" cannot be overcome.

Noerr-Pennington immunity applies to RICO claims, *see U.S. v. Phillip Morris USA, Inc.*, 449 F. Supp. 2d 1, 886-87 (D.D.C. 2006), *aff'd*, 566 F.3d 1095, 1123-24 (D.C. Cir. 2009) (finding that legislative testimony and communications with legislator "merited *Noerr-Pennington* immunity" and hence were "not actionable" elements of government's RICO claim), and has also been "extended to include common-law torts such as malicious prosecution and abuse of process." *Nader*, 555 F. Supp. 2d at 157; *see also Whelan v. Abell*, 48 F.3d 1247, 1254 (D.C. Cir. 1995) ("it is hard to see any reason why, as an abstract matter, the common law torts of malicious prosecution and abuse of process might not in some of their applications be found to violate the First Amendment"); *Video Int'l Prod., Inc. v. Warner-Amex Cable Commc'ns, Inc.*,

858 F.2d 1075, 1084 (5th Cir. 1988) ("There is simply no reason that a common-law... doctrine can any more permissibly abridge or chill the constitutional right of petition than can a statutory claim such as antitrust."); *cf. Sosa,* 437 F.3d at 930, 934 (*Noerr-Pennington* immunity applies to any statutory interpretation that could implicate the rights protected by the Petition Clause).

B. Noerr-Pennington Immunity Applies Here To Bar The Amended Complaint.

In an effort to transform its attorneys' fees claim into a purported "pattern" of racketeering activity as required for a RICO claim, *see infra*, FEI's Amended Complaint alludes to amorphous "multiple schemes to permanently ban Asian elephants in circuses," with the "ultimate objective of banning Asian elephants in all forms of entertainment and captivity"; at the same time, the Amended Complaint asserts that these goals were pursued in "legislative" and "administrative" forums through lobbying, testifying about, and otherwise advocating policy positions *concerning elephant treatment* before federal and state legislative and executive branch officials. Am. Compl. at ¶¶ 3, 16 (summarizing FEI's "overview of the racketeering activity"); *id.* at ¶¶ 279, 282 (asserting that the "ultimate objective" of defendants' purported "enterprise" and "pattern of racketeering activity" was "banning Asian elephants in all forms of entertainment and captivity").

These alleged advocacy actions directly implicate *core* First Amendment petitioning rights and cannot possibly form the basis for a RICO claim under *Noerr-Pennington* and its progeny. *See Pennington*, 381 U.S. at 670 (*Noerr* immunizes a "concerted effort to influence public officials regardless of intent"); *cf. Citizens United v. FEC*, 130 S. Ct. 876, 907 (2010) ("The First Amendment protects the rights of corporations to petition legislative and administrative bodies.") (citing *Noerr* and *Pennington*).

Similarly, FEI's allegations that certain organizations at various times funded Mr. Rider's living and traveling expenses so that he could "appear[] as a witness testifying on behalf of legislative proposals advanced and supported by certain of the defendants before the United States Congress and various state legislatures and other bodies . . . or other forums where they testified" concerning the treatment of elephants in circuses, Am. Compl. at ¶ 17, go to the very heart of defendants' First Amendment rights of petition, association, and expression.

Indeed, given that testimony and other direct communications with members of Congress by tobacco companies disputing that cigarettes are addictive were held to be entitled to *Noerr-Pennington* protection, *U.S. v. Phillip Morris USA, Inc.*, 449 F. Supp. 2d at 886-87 & n. 64, so too are activities such as funding Mr. Rider to stay in a hotel "while he testified before the Nebraska legislature regarding a bill concerning Asian elephants," Am. Compl. at ¶¶ 97, 172; providing a used van "so that Rider could travel to various legislative bodies before whom he has appeared," *id.* at ¶ 106; defraying car repair and other travel expenses so that Mr. Rider could "participate in a press conference in Denver, Colorado that was held in connection with a proposal to ban circus animal acts" in that city, *id.* at ¶¶ 159, 161; associating with a non-party non-profit organization that defrayed the expenses of ex-FEI employees in connection with "legislative and public relations events," *id.* at ¶¶ 269-70; and posting on a web-site a letter to the Chicago City Council that a non-party organization allegedly drafted for an ex-FEI employee. *Id.* at ¶ 271.

Just as those advocating for civil rights, a balanced budget, or any other cause, have First Amendment rights to associate for the purpose of petitioning policymakers to adopt their agenda without suffering a retaliatory RICO lawsuit, so too do advocates for elephants under the First Amendment. *See United Mine Workers of America, District 12 v. Illinois State Bar Ass'n,* 389

U.S. 217, 222 (1967) (union members were entitled to "join together and assist one another in the assertion of their legal rights" because the right to petition is "among the most precious of the liberties safeguarded by the Bill of Rights" and is "intimately connected, both in origin and in purpose, with other First Amendment rights of free speech and free press"); *Citizens United*, 130 S. Ct. at 928 ("[T]he individual person's right to speak includes the right to speak *in association with other individual persons*") (emphasis in original).

Even FEI's Amended Complaint belies any notion that any alleged actions by Mr. Rider, the animal protection organizations and their lawyers directed at legislators, executive branch officials, or other policymakers were anything other than a "genuine effort to influence governmental action," *Allied Tube & Conduit Corp.*, 486 U.S. at 503, which is deserving of *Noerr-Pennington* immunity for that reason. *See* Am. Compl. at ¶¶ 236-238, 244 (referencing introduction of bills and participation in "these federal and state legislative efforts" to "ban Asian elephants in circuses."). As such, the pleadings themselves assert an actual "attempt to persuade the legislature or the executive to take particular action with respect to a law,'" *U.S. v. Philip Morris USA, Inc.*, 566 F.3d 1095, 1123 (D.C. Cir. 2009) (quoting *Noerr,* 365 U.S. at 136); *Allied Tube*, 486 U.S. at 502 — precisely the kinds of activities that are immunized under *Noerr-Pennington.*

Once the RICO claims are stripped of all legislative and executive branch advocacy efforts that must receive *Noerr-Pennington* protection, all that remains are unfounded accusations about the prosecution of a single ESA lawsuit. DE 23 at 8. Because, as discussed below, Circuit precedent dictates that alleged misconduct in connection with a single lawsuit aimed at one entity is inadequate as a matter of law to establish a pattern of racketeering activity, this Court should grant dismissal regardless of any claim by FEI that the ESA lawsuit cannot

itself receive *Noerr-Pennington* protection. However, although the Court need not address the issue to dismiss the RICO claim, if the Court does so, FEI cannot satisfy its stringent burden of demonstrating that the entire ESA case was a "sham." *See Nader*, 555 F. Supp. 2d at 157 ("The plaintiff [seeking to base a claim on the pursuit of litigation] bears the burden to demonstrate that the sham exception applies.") (citing *Federal Prescription Serv., Inc. v. Am. Pharm. Ass'n*, 663 F.2d 253, 262-63 (D.C. Cir. 1981)).

As noted, it has long been settled that the pursuit of litigation constitutes petitioning activity that is presumptively entitled to *Noerr-Pennington* immunity, *Cal. Motor Transp.*, 404 U.S. at 510, and courts have held that "such protection is particularly appropriate" where, as here, litigation involves efforts by non-profit organizations to further "political" goals. *Oregon Natural Resources Council v. Mohla*, 944 F.2d 531, 535 n. 3 (9th Cir. 1991) (holding that unsuccessful litigation by environmental organization that sought to "achieve a political goal of preventing the cutting of old-growth forest" was entitled to *Noerr-Pennington* immunity) (citing *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982)).

As this Court previously recognized, the "citizen suit provision of the ESA encourages private parties . . . to act as 'private attorneys general'" in order "to enforce the Act's provisions for the benefit of the public interest as a whole," *RICO Stay Ruling,* 523 F. Supp.2d at 5 — a fact that imposes a particularly high hurdle for FEI to overcome to avoid the presumption of *Noerr-Pennington* immunity. *See also ESA Counterclaim Ruling,* 244 F.R.D. at 53 ("[T]he purposes of the Endangered Species Act – to protect endangered and threatened species – are best served by insuring that a private right of action by citizens promoting the public interest in the preservation of such species will remain an ever-present threat to those seeking to unlawfully harm such species . . . [T]he law encourages citizen suits under the ESA to further the overriding public

policy in favor of protecting animals from unlawful harassment or harm that constitutes an impermissible 'take' under Section 9 of the ESA.").

Leaving aside FEI's unfounded efforts to rehash the discovery disputes it lost in the ESA litigation, there is no factual predicate on which the Court could find that the entire ESA case was merely a "sham" as defined by the Supreme Court, *i.e.*, that "no reasonable litigant could realistically expect success on the merits," *Professional Real Estate Investors*, 508 U.S. at 60-61, and that the litigation was "not genuinely aimed at procuring favorable governmental action" at all. *Allied Tube & Conduit Corp.,* 486 U.S. at 500 n. 4, 508 n. 10. To the contrary, accepting FEI's own allegations as true, one purpose of the ESA lawsuit was to achieve the public policy goal of "ban[ning] elephants from circuses and ultimately from entertainment and captivity altogether," Am. Compl. at ¶ 9 — results that could *only* be brought about by "favorable governmental action," and that *certainly* could have been facilitated by a favorable ruling from the Court. Thus, since FEI cannot establish that the ESA action was "objectively baseless," it cannot satisfy the test for "sham" litigation, thus rendering irrelevant any inquiry into the underlying motivation of the ESA plaintiffs in bringing the case. *See also Coastal States Marketing v. Hunt*, 694 F.2d 1358, 1372 (5th Cir. 1983) ("A litigant should enjoy petitioning immunity from the antitrust laws so long as a genuine desire for judicial relief is a significant motivating factor underlying the suit.").

For purposes of this argument, it is of no moment that the ESA case was ultimately dismissed on standing grounds. The Supreme Court has instructed that a "court must 'resist the understandable temptation to engage in *post hoc* reasoning by concluding' that an ultimately unsuccessful 'action must have been unreasonable or without foundation.'" *Id.* at n. 5 (quoting *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421-22 (1978) (*per curiam*)).

Moreover, any notion that the entire ESA litigation was "objectively baseless" is impossible to harmonize with multiple developments in the case, including: (1) the Court's rejection of FEI's overarching legal position (based on a FWS regulation) that certain elephants in its possession are entirely exempt from the ESA's take prohibitions, *see American Soc'y for the Prevention of Cruelty to Animals v. Feld Entertainment, Inc.*, 502 F. Supp. 2d 103, 107-110 (D.D.C. 2007) – a ruling with important precedential implications for ESA implementation as it applies to all captive members of listed species; (2) the Court's recognition that "ASPCA has put forth serious allegations of mistreatment of an endangered species, allegations which, if true, have tremendous public import," *RICO Stay Ruling*, 523 F. Supp. 2d at 5; (3) the Court holding a six-and-a-half week trial on the ESA claims; (4) extensive testimony on the ESA plaintiffs' behalf by some of the world's leading elephant experts; (5) the Court's rejection of FEI's motion for a directed verdict after the ESA plaintiffs had presented their case; (6) the Court's suggestion, including at the end of the trial, that the "Court might be interested in what the view is of the executive branch" concerning the ESA claims, ESA Case, Trial Tr. 122, Mar. 18, 2009 (DE 524); (7) the concession by FEI's counsel that, if the Court were to apply the "ordinary definition" of "wound," then "I might as well sit down because . . . there's never been any dispute that [the bullhook] penetrates the skin, so if that's what a wound is, then the case is over," *id.* at 6; (8) the Court's post-trial observations that it was a "fascinating trial," that "[c]ounsel have been outstanding in every way," and that "I've really enjoyed your presence here and your arguments," *id.* at 122; and (9) that the case is still being pursued on appeal by *both* sides. Under the circumstances, it cannot be said that the ESA prosecution in its entirety was so "objectively baseless" as to strip the ESA plaintiffs and their counsel of the presumptive *Noerr-Pennington* protection.

Further, although the Supreme Court's definition of "objectively baseless" litigation specifically refers to whether there is a "realistic" prospect of "success *on the merits*," *Professional Real Estate Investors, Inc.*, 508 U.S. at 60 (emphasis added) — which the Court did not reach here — plaintiffs' standing arguments, although ultimately rejected, also were not "objectively meritless." As for the ESA plaintiffs' organizational standing, which the ESA plaintiffs advanced from the outset and throughout the litigation, at various points in the trial the Court engaged in extended colloquies with counsel concerning the applicability of various Supreme Court and Circuit precedents, and, due to the complexity of the issue, the Court also ordered supplemental briefing on organizational standing during the trial. Hence, the record compels the conclusion that the ESA plaintiffs at the very least "advanced reasonable arguments" regarding organizational standing that the court, in its final ruling, "went to some lengths to reject." *Covad Communs Co.*, 398 F.3d at 677.

As to Mr. Rider's standing, although the Court found that he was not a credible witness with respect to his asserted aesthetic harm, the Court's ruling does not find that "no reasonable litigant" could possibly have believed that Mr. Rider – who did in fact work closely with the elephants at FEI for several years – formed an emotional attachment with them sufficient to support standing. *Professional Real Estate Investors, Inc.*, 508 U.S. at 60. In fact, the Court specifically held that there *was* evidence that Mr. Rider *had* complained about elephant mistreatment while he worked at FEI (*i.e.*, before he received any funding from anyone to support his advocacy for the elephants) by complaining to "the elephant handlers," his "direct

supervisor," and "the union." *See ESA Final Ruling*, 677 F. Supp. 2d at 68-69 (Findings of Fact 4, 9).[22]

Because the ESA litigation was indeed an "objectively plausible effort to enforce rights," *Professional Real Estate Investors, Inc.*, 508 U.S. at 65, all actions taken in connection with that litigation are entitled to *Noerr-Pennington* immunity regardless of FEI's spurious allegations about their "motivation in bringing suit." *Id.* at 66; *Sosa*, 437 F.3d at 934 ("in the litigation context, not only petitions sent directly to the court in the course of litigation, but also 'conduct incidental to the prosecution of the suit' is protected" by *Noerr-Pennington* immunity) (internal quotation omitted).

VII. THE AMENDED COMPLAINT FAILS TO SATISFY THE NECESSARY RICO ELEMENTS.

As also demonstrated below, FEI's Amended Complaint should be dismissed for failing to satisfy the most elementary elements of a RICO claim.

A. Statutory Framework

"RICO's major purpose was to attack the 'infiltration of organized crime and racketeering into legitimate organizations.'" *Reves,* 507 U.S. at 185 (quoting S. Rep. No. 91-617, 91st Cong. 1st Sess. 161, at 76 (1969)); *see also Yellow Bus Lines, Inc. v. Drivers, Chauffeurs & Helpers Local Union 639*, 883 F.2d 132, 139 (D.C. Cir. 1989), *modified on other grounds*, 913

[22] Nor is there any basis for FEI's assertion that defendants intentionally misled either this Court or the Court of Appeals regarding the basis for Mr. Rider's standing. The original Complaint did not assert that Mr. Rider would never visit the elephants again; rather, it asserted that Mr. Rider was unable to visit the elephants "*without suffering more aesthetic and emotional injury* unless and until these animals are placed in a different setting, or are otherwise no longer routinely beaten, chained for long periods of time and otherwise mistreated." Civ. No. 00-1641, July 11, 2000 Complaint ¶ 34. Because by the time the case was remanded to this Court in 2003, Mr. Rider had in fact had opportunities to see the elephants again, the 2003 Complaint stated that "he has been able to observe the elephants on a number of occasions," but also continued to allege that he could not do so without suffering more aesthetic injury. *See* ESA Case, Sept. 26, 2003 Complaint ¶¶ 18-24.

F.2d 948 (D.C. Cir. 1990) (Congress enacted RICO "to target . . . the exploitation and appropriation of legitimate businesses by corrupt individuals.").

Although the statute, by its terms, is not limited to organized crime, courts have routinely recognized its potential for abuse "as a springboard for dubious private actions," Hon. Jed. S. Rakoff and Howard W. Goldstein, *RICO Civil and Criminal Law and Strategy*, at 1-6 (2010), and have not hesitated to dismiss cases that strive to take "garden variety" disputes and "dress them up as elaborate racketeering schemes." *Uniroyal Goodrich Tire Co. v. Mutual Trading Corp.*, 63 F.3d 516, 522 (7th Cir. 1995); *see also Edmondson*, 48 F.3d at 1265 (affirming district court's dismissal of a RICO claim that was focused on alleged litigation and related acts in connection with a "single scheme, directed at few victims, and 'resulting in a single, distinct injury.'") (internal quotation omitted); *Spoto v. Herkimer County Trust*, Case No. 99-1476, 2000 WL 533293, at *1 (N.D.N.Y. Apr. 27, 2000) ("the civil provisions of [RICO] are the most misused statutes in the federal corpus of law").

Section 1962(c) of RICO makes it unlawful "for any person employed by or associated with any enterprise . . . to conduct or participate, directly or indirectly, in the conduct of such enterprises' affairs through a pattern of racketeering." 18 U.S.C. § 1962(c). To prevail on a civil RICO claim, a "person" asserting injury must establish that each defendant has engaged in "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity.'" *Western Assocs.*, 235 F.3d at 633 (quoting *Pyramid Securities Ltd. v. IB Resolution, Inc.*, 924 F.2d 1114, 1117 (D.C. Cir. 1991)). The statute defines "racketeering activity" to include certain enumerated offenses, 18 U.S.C. § 1961(1), and a "pattern" of such activity requires at least two acts of racketeering activity within a ten year period by each defendant. *Id.* at § 1961(5). However, only

a "person injured in his business or property by reason of a violation of section 1962" may bring a private right of action. *Id.* at § 1964(c).

Here, FEI attempts to do what the case law specifically disallows — dress up a basic complaint about attorneys' fees in another case as an elaborate racketeering scheme. This is "exactly the type of bootstrapping use of RICO that the federal courts abhor." *Williams v. Aztar Indiana Gaming Corp.*, 351 F.3d 294, 300 (7th Cir. 2003). As discussed in greater detail below, FEI does not, and indeed cannot, satisfy the necessary RICO elements, warranting dismissal of the RICO claims with prejudice.[23]

B. The Amended Complaint Does Not Set Forth An Actionable RICO "Pattern" Since Conduct With Respect To One Lawsuit Involving One Alleged Victim Is Legally Insufficient.

Controlling precedent flatly forecloses a RICO claim focused on conduct in connection with a single lawsuit, and, hence, cannot satisfy the essential statutory element of a "pattern of racketeering activity." As the Supreme Court has explained, "[c]onducting an enterprise that affects interstate commerce is obviously not in itself a violation of § 1962, nor is mere commission of the predicate offenses." *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 (1985). Instead, Congress predicated liability on a "pattern of racketeering activity," and "[i]n normal usage, the word 'pattern' here would be taken to require more than just a multiplicity of

[23] FEI has also asserted a claim under subsection 1962(d), which prohibits any person from "conspir[ing] to violate" the provisions of subsection (c). 18 U.S.C. § 1962(d). Since, as discussed below, the "pleadings do not state a substantive RICO claim under § 1962(c), [FEI's] RICO conspiracy claim fails as well." *GE Inv. Private Placement Partners II v. Parker*, 247 F.3d 543, 551, n.2 (4th Cir. 2001)); *see also*; *Edmondson*, 48 F.3d at 1266 (because the complaint failed to allege a "pattern of racketeering" sufficient for a subsection (c) claim, the district court properly dismissed the subsection (d) claim as well); *Myers v. Lee*, No. 10-131, 2010 WL 3745632, at * 6 (E.D. Va. September 21, 2010) (Because the plaintiff "failed to adequately plead the existence of an enterprise distinct from the defendants," the plaintiff's "alleged RICO conspiracy must be dismissed" as well) (citing *Beck v. Prupis,* 529 U.S. 494, 505 (2000)).

racketeering predicates." *H. J., Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 238 (1989).

In construing this phrase, the Supreme Court has held that the "term 'pattern' itself requires the showing of a relationship between the predicates, and of 'the threat of continuing activity.'" *Id.* at 238-239 (quoting *Sedima*, 473 U.S. at 496 n. 14) (other internal quotations omitted). Accordingly, "'it is this factor of *continuity plus relationship* which combines to produce a pattern,'" and hence to establish a "pattern of racketeering activity a plaintiff or prosecutor must show that the racketeering predicates are related, *and* that they amount to or pose a threat of continued criminal activity." *H. J., Inc.*, 492 U.S. at 239 (emphasis in original; internal quotation omitted). "The continuity element of a pattern of racketeering activity is crucial to a valid RICO claim in order to ensure that the crime alleged is the sort of offense that RICO is designed to address – one that is part of ongoing, continued criminality or that involves criminality that promises to continue into the future." *Jackson v. Bellsouth Telecommunications*, 372 F.3d 1250, 1265 (11th Cir. 2004); *Williams v. Equity Holding Corp.*, 498 F. Supp. 2d 831, 843 (E.D. Va. 2007) (The pattern "inquiry's focus is on whether the predicate acts indicate ongoing criminal activity of sufficient scope and persistence to pose a special threat to social well-being.").

In applying the Supreme Court's test and in "provid[ing] more guidance" on how district courts should approach the "issue of what constitutes a pattern of racketeering activity," *Western Assocs.*, 235 F.3d at 633, the D.C. Circuit has held that any RICO claim that, on close inspection, is centered on a "single scheme, directed at few victims, 'and resulting in a single distinct injury,'" cannot satisfy the "pattern of racketeering" element. *Edmondson*, 48 F.3d at 1265 (internal quotation omitted); *see also Western Assocs.*, 235 F.3d at 634 (affirming dismissal of

RICO claim that "failed to satisfy the continuity prong of RICO's 'pattern of racketeering' requirement").

While finding that the RICO plaintiffs alleged an adequate number of predicate offenses by a tenant's association and its attorneys, "including bribery, extortion, wire and mail fraud, and interstate travel in aid of racketeering activity," the Court of Appeals in *Edmondson* affirmed the district court's ruling that their allegations were nonetheless legally insufficient to satisfy RICO's "pattern" requirement. 48 F.3d at 1265. The Court reasoned that, because the complaint focused on *one* principal "scheme – to prevent or delay the sale of [an apartment building], or to secure a ransom for allowing the sale to proceed" – plaintiffs could assert nothing more than a "'hypothetical possibility of further predicate acts.'" *Id.* at 1265 (quoting *Pyramid Securities, Ltd.*, 924 F.2d at 1119). In addition, because the "scheme entail[ed] but a single discrete injury, the loss of the sale (or payment of the ransom), suffered by a small number of victims," the Court concluded that *the combination of these factors (single scheme, single injury, and few victims) makes it virtually impossible for plaintiff to state a RICO claim.*" *Id.* (emphasis added).

In *Western Assocs.*, the D.C. Circuit applied the same reasoning to hold that another RICO claim did not satisfy the "continuity prong of the 'pattern of racketeering activity' requirement," notwithstanding allegations that "for more than eight years" the defendant had "violated partnership agreements, transmitted fraudulent accounting statements, and stole the value of Western's partnership interest," 235 F.3d at 630-31, resulting in "over $ 89 million in damages." *Id.* Affirming the district court's dismissal of the RICO claim, the Court of Appeals agreed that the complaint articulated "only a single scheme, a single injury, and a single victim (or set of victims)." *Id.* at 634. Further, the court emphatically rejected the plaintiff's "vain

attempt to make a RICO claim seem more viable by parsing one scheme into multiple schemes," *id.* at 635, explaining that the defendant's alleged

> conduct is more accurately characterized as a single effort to diminish the value of Western's partnership interest . . . Indeed, Western's four-scheme division appears specious on its face. Comparing the amended complaint with the original complaint further demonstrates that Western's four purported schemes are merely a cosmetic disguise of a single scheme . . . "[The plaintiff] appears to have distorted the allegations against [the defendant] *to create the appearance of multiple victims in an apparent effort to satisfy the statutory language of RICO.*"

Id. at 634 (internal quotation omitted) (emphasis added).[24]

The holdings of *Edmondson* and *Western Associates* compel dismissal of FEI's claims because FEI similarly makes a feeble attempt to cloak its core complaint — that FEI had to defend itself in the ESA action — in the garb of multiple purported schemes, in an effort to create the appearance of many victims and injuries necessary to satisfy the "pattern requirement" of RICO. However, as this Court has previously recognized, "FEI's allegations in this case *stem directly* from [defendants'] conduct in prosecuting the ESA Action," *RICO Stay Ruling,* 523 F. Supp. 2d at 2 (emphasis added), and the "gravamen of plaintiff's complaint is that defendant Tom Rider has been bribed by [the organizations] to participate in the ESA Action against FEI in violation of federal law." *Id.* Leaving aside the falsity of this spurious accusation, the instant lawsuit – which involves only a "single scheme, single injury, and few victims," *Edmondson*, 48 F.3d at 1265 – simply cannot survive as a viable RICO case. *Id.*

Indeed, FEI's RICO claims fall far short of those that were unsuccessfully alleged in *Edmondson* and *Western Associates*. The Amended Complaint here specifically identifies only

---

[24] The D.C. Circuit also observed that "RICO claims premised on mail or wire fraud must be particularly scrutinized because of the relative ease with which a plaintiff may mold a RICO pattern from allegations that, upon closer scrutiny, do not support it.'" *Western Assocs.*, 235 F.3d at 637 (internal quotation omitted).

one actual "victim" – FEI itself – and, equally fatal, the *only* concrete "injuries" to which FEI can (or does) point are the "costs incurred by FEI *to defend the ESA Action* . . . ." Am. Compl. at ¶ 273 (emphasis added); *id.* at ¶ 274 ("FEI is obligated to pay said attorneys a reasonable fee for their services and the costs necessitated by the ESA Action"). As such, FEI does not satisfy the D.C. Circuit's clearly articulated test for a "pattern of racketeering," and therefore cannot transform into a federal conspiracy claim what is at bottom a fee dispute.[25]

FEI cannot salvage its deficient RICO claims by making transparent and amorphous references in the Amended Complaint to "multiple schemes" and a "network of animal rights groups and sympathizers" who have allegedly associated with each other and former circus employees for the purpose of participating in "other forums, including legislative, administrative and other judicial forums." Am. Compl. at ¶ 3. Not only is such activity clearly entitled to *Noerr-*

[25] The D.C. Circuit's reasoning has also been applied by many other courts in refusing to allow RICO claims focused on a single legal dispute to proceed. *See, e.g., Jackson*, 372 F.3d at 1267 (rejecting RICO claim against employer and attorneys where "[t]he alleged racketeering activity was related to the settlement of a *single* lawsuit, and, notably, was not designed to perpetrate racketeering with respect to a *series* of cases") (emphasis in original) (citing *Edmondson* and other cases); *In re Burzynski*, 989 F.2d 733, 743 (5th Cir. 1993) (dismissing a RICO claim for lack of a "pattern" where the "alleged predicate acts took place during the course" of a prior lawsuit); *Delta Truck & Tractor, Inc. v. J.I. Case Co.*, 855 F.2d 241 (5th Cir. 1988)(affirming the dismissal of a RICO claim where multiple acts of fraud were part and parcel of a single, discrete and otherwise lawful commercial merger transaction where the conduct did not constitute or threaten long-term criminal activity); *Bradley v. Phillips Petroleum Co.*, 527 F. Supp. 2d 625, 650 (S.D. Tex. 2007) ("In this case, all of the alleged predicate acts took place during the settlement of claims associated with the '1999 lawsuit' . . . This conduct does not constitute or threaten long-term criminal activity. Moreover, 'where alleged RICO predicate acts are part and parcel of a single, otherwise lawful transaction, a 'pattern of racketeering activity' has not been shown.'") (internal quotations omitted); *Utz v. Correa*, 631 F. Supp. 592, 595 (S.D.N.Y. 1986) ("[E]very action allegedly taken by the Attorney Defendants . . . was in the furtherance of an isolated fraudulent episode: an alleged scheme to defraud plaintiff into delivering the releases and the letter of apology in exchange for nothing of value. These misleading statements do not create a 'pattern' under RICO because they were merely parts of a 'single, unified, activity.'") (internal quotation omitted); *cf. United States v. Pendergraft*, 297 F. 3d 1198, 1207 (11th Cir. 2002) (noting that alleged "malicious prosecution" in connection with one lawsuit is insufficient for a RICO violation).

Pennington immunity, but there is no concrete injury pled (either to FEI or anyone else) flowing therefrom, including the purported "objective" to end the "free contact handling" of elephants. Am. Compl. at ¶¶ 4, 9; *see also Sedima*, 473 U.S. at 496 ("[A RICO] plaintiff only has standing if, and can only recover to the extent that, he has been injured in his business or property by the conduct constituting the [RICO] violation."). Therefore, where, as here, the only alleged activity that FEI can complain about was related to the prosecution of a *single* lawsuit – the ESA litigation – there can be no "pattern of racketeering" as a matter of law, and the RICO claims should be dismissed. *Jackson*, 372 F.3d at 1267; *In re Burzynski*, 989 F.2d at 743.

C. As A Matter Of Law, FEI Cannot Establish Either But For Or Proximate Cause Of The Injuries Alleged In the Amended Complaint.

Even if a Complaint adequately alleges a pattern of racketeering activity, a civil RICO action may only be brought by a "person injured *in his business or property* by reason of a violation of section 1962" of the statute. 18 U.S.C. § 1964(c) (emphasis added). Here, the *only* concrete injury that FEI alleges – its expense in defending the ESA action – cannot support a RICO claim, not only because it is inadequate by itself to demonstrate a RICO pattern, but also because it is impossible for FEI to establish that it would not have had to defend itself in the ESA case but for the conduct alleged in the Amended Complaint. Evidently recognizing this problem, the Amended Complaint vaguely alludes to other alleged impacts – *i.e.*, the organizational defendants' purported efforts to "ban" elephants from circuses and entertainment, and the defendant organizations' attempts to mislead their members as to FEI's elephant treatment – but those allegations also cannot pass muster under the Supreme Court's construction of RICO's related standing and causation requirements.

Thus, based on RICO's plain language, the Supreme Court has instructed that a RICO "plaintiff has standing if, and can only recover to the extent that, he has been injured in business

or property by the conduct constituting the violation." *Sedima*, 473 U.S. at 496; *see also UFCW Local 1776 v. Eli Lilly and Co.*, 620 F.3d 121, 131 (2nd Cir. 2010). The courts have further held that the "phrase 'business or property' . . . retains restrictive significance,'" *Bradley v. Phillips Petroleum Co.,* 527 F. Supp. 2d 625, 646 (S.D. Tex 2007) (quoting *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979)), so that "'[t]o state a claim under RICO, a plaintiff 'must allege facts demonstrating . . . that plaintiff's injury is to his business or property – and not physical, emotional[,], *or reputational harm or any economic aspect of such harm . . . .*'" *Bradley*, 527 F. Supp. 2d at 646 (quoting *Justin F. v. Maloney*, 476 F. Supp. 2d 141, 161 (D. Conn. 2007) (other internal quotations omitted) (emphasis added)).

In addition, even when a RICO plaintiff properly alleges an injury to a cognizable business or property interest, "the plaintiff is required to show that a RICO offense 'not only was a 'but for' cause of his injury, but was the proximate cause as well.'" *Hemi*, 130 S. Ct. at 989 (quoting *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 268 (1992)). "Proximate cause for RICO purposes" must be "evaluated in light of its common-law foundations; proximate cause thus requires 'some direct relation between the injury asserted and the injurious conduct alleged'"; a "link that is 'too remote,' 'purely contingent,' or 'indirec[t]' is insufficient." *Hemi*, 130 S. Ct. at 989 (quoting *Holmes*, 503 U.S. at 271). Invoking that principle, the Supreme Court has repeatedly required dismissal of RICO claims that alleged violations that, even if arguably the "but for" cause of an asserted injury, relied on a theory of causation that was, as a matter of law, simply too "attenuated." *Hemi*, 130 S. Ct. at 989 (quoting *Holmes,* 503 U.S. at 271).

In directing dismissal of a RICO claim in *Holmes*, the Court held that a private entity could not recover for injuries allegedly caused by a stock-manipulation scheme that prevented two broker-dealers from meeting obligations to their customers, thereby triggering the

company's duty to reimburse the customers. *Holmes,* 503 U.S. at 270-74. The "very unlikelihood that Congress meant to allow all factually injured plaintiffs to recover persuades [the Court] that RICO should not get such an expansive reading." *Id.* at 266 (footnotes omitted). Instead, relying on proximate cause principles, the Court held that there must be a "*direct relationship* between the injury asserted and the injurious conduct alleged," because the "less direct an injury is, the more difficult it becomes to ascertain the amount of a plaintiff's damages attributable to the violation, as distinct from other independent, factors." *Id.* at 269; *see also Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 459-60 (2006) (applying these causation principles to preclude recovery of profits allegedly lost when a rival business was able to lower its prices by not charging the requisite tax on cash sales since the lost sales "could have resulted from factors other than [the defendants'] alleged acts of fraud.").

Last term, in *Hemi*, the Supreme Court emphatically rejected another "attenuated" "causal theory" in a RICO case brought by the City of New York alleging that a cigarette vendor had committed mail and wire fraud by failing to file required customer reports, resulting in a loss of "tens of millions of dollars in recovered cigarette taxes." *Hemi,* 130 S. Ct. at 986, 989. Finding that the City "has no RICO claim" because it could not show that the tax revenue was lost "'by reason of' the alleged RICO violation," *id.* at 986, 984, the Court explained that the City's claim depended on several steps in a causal chain:

> as we reiterated in *Holmes*, '[t]he general tendency of the law, in regard to damages at least, is not to go beyond the first step.' *Our cases confirm that the 'general tendency' applies with full force to proximate cause inquiries under RICO. Because the City's theory of causation requires us to move well beyond the first step, that theory cannot meet RICO's direct relationship requirement.*

Id. at 989 (emphasis added; internal quotations and citations omitted); *cf. Bridge v. Phoenix Bond & Indemnity Co.*, 553 U.S. 639, 654-55 (2008) (although a RICO claim based on mail and

wire fraud need not assert reliance on the fraudulent statements, the plaintiff must assert how it was "directly injured" by a third party's reliance on the misrepresentation).

Applying these principles here, FEI's RICO claims are predicated on causal theories that, to the extent any are articulated at all, are far too attenuated as a matter of law to survive a motion to dismiss. To begin with, as to FEI's ultimate (and fanciful) allegation that defendants conspired "to ban elephants from circuses and ultimately from entertainment and captivity altogether," Am. Compl. at ¶ 9, since no such "ban" has been adopted, FEI obviously cannot (and does not) assert that it has suffered any injury to its "business or property" as a consequence of such efforts. Indeed, by all accounts, FEI is still using elephants in its circus acts and even continues unabated in the specific elephant handling practices that were the subject of the ESA litigation. *See* Am. Compl. ¶ 33. Even if FEI had claimed to have sustained some business losses as a consequence of defendants' alleged advocacy (*i.e.*, some undisclosed decline in circus attendance) – an allegation that is entirely absent from the Amended Complaint – any such losses "could have resulted from factors other than [the defendants'] alleged acts of fraud," *Anza*, 547 U.S. at 459, such as a general downturn in the economy. Therefore, because it would be impossible for FEI to establish a "direct causal relationship" based upon an "attenuated connection" between the alleged "scheme" and some undefined injury to its business or property, proximate cause is fatally lacking. *Id.*[26]

The absence of causation is further underscored because the objectives of the so-called RICO conspiracy (a "ban" on elephants in circuses or in captivity generally and/or any restriction on the use of bullhooks, chaining, or any other specific elephant handling practices) obviously

[26] It is defendants' position that any public policy advocacy involving any elephant keeping or handling practices is clearly protected by the First Amendment and could not form the basis for a RICO claim, regardless of any allegation FEI might have made (but did not) concerning the impact on its business.

could not be brought about by the activities of a "network of animal rights groups and sympathizers" *alone*. Am. Compl. at ¶ 3. As FEI implicitly concedes, such aims could *only* be accomplished through several rather complicated steps in a causal chain — *i.e.*, successful advocacy in the "legislative, administrative, and ... judicial forums," *id.*, and only then if the decision-makers in these various processes agreed that such public policy proscriptions were appropriate. Thus, FEI could not possibly satisfy the Supreme Court's "direct causal connection" requirement because any restriction on the use of elephants and/or certain handling practices can only be adopted after *an independent assessment* by a legislative, judicial, or administrative body. *Anza*, 547 U.S. at 458-59 (there is a fatal "discontinuity between the RICO violation and the asserted injury" when the injury "could have resulted from factors other than the alleged" violation). The existence of these critical independent processes "cuts off" the already extremely "attenuated connection" implicit in FEI's theory. *Id.* at 459.

Equally remote and attenuated is any theory advanced by FEI that the animal protection organizations and their lawyers presented to the public a "romantic, but false, image" of Mr. Rider and/or the purpose of the ESA Action so as to generate more than "one billion dollars" in "donations" – which FEI mischaracterizes as "ill-gotten gains" that should be "disgorged" *to FEI*. Am. Compl. at ¶¶ 11, 180 (alleging that certain organizations held a fundraiser "to unjustly enrich defendants *through donations from third parties* on the basis of false or otherwise misleading information," including statements that "FEI mistreats its elephants," and that Mr. Rider "witnessed [elephant abuse] on a daily basis.")(emphasis added).[27]

[27] FEI's claim is based on an assertion of the *total donations* that the organizations raised from *all sources* between July 2000 and this Court's final ruling in the ESA case. Am. Comp. at ¶ 11. However, FEI's assertion that public interest organizations working on myriad animal protection and cruelty issues – such as puppy mills, dog fighting, etc. – could have raised *all* of their funds because of a single lawsuit highlighting elephant mistreatment simply cannot pass the

Leaving aside the obvious and unacceptable intrusion into core First Amendment rights,[28] FEI's unjust enrichment theory fails on both "but for" and proximate causation grounds. Even if such facially "implausible" allegations regarding fundraising could survive under *Iqbal*, 129 S. Ct. at 1949, there is no allegation of any harm sustained by FEI or its "business or property" as a result. Without any allegation of a statutorily recognized injury, it is of no moment that (or how) any of the organizations elicited contributions by publicizing FEI's treatment of its elephants and/or the prosecution of the ESA litigation. Moreover, FEI cannot show the necessary "but for" element of causation — *i.e.*, that such members and supporters would have withheld their contributions had they received *different* information regarding the ESA case and/or how FEI *actually* treated its elephants.

FEI's fundraising theory, by its very nature, necessitates an inquiry "well beyond the first step" of causation that the Supreme Court has repeatedly rejected. *Hemi*, 130 S. Ct. at 989. To prove such an attenuated theory, FEI would have to establish multiple steps in the causation chain, including: (1) the identities of the organizations' respective members, contributors, and supporters since July 2000 (when FEI claims the organizational defendants began to be unjustly enriched, *see* Am. Compl. at ¶ 11); (2) whether each such member/contributor gave a donation specifically because of the organizations' representations regarding the ESA litigation or FEI's

---

"facial plausibility" test that applies here. *Iqbal*, 129 S.Ct. at 1949. Moreover, any actual pursuit of FEI's theory would demand far more than the inherently "complex assessment" of causation rejected by the Supreme Court. *Anza*, 547 U.S. at 459. Rather, it would not only allow FEI to conduct an extraordinarily invasive inquiry into the organizations' entire fundraising history and apparatus, but would ultimately require the Court to conduct an impossible "calculati[on] [of] the portion" of defendants' combined fundraising for the last ten years that is "attributable to the alleged pattern of racketeering activity." *Id.* This is exactly the sort of road that the Supreme Court has repeatedly said lower courts should *not* start down. *Id.*

[28] FEI's theory could only be pursued through precisely the kind of discovery aimed at "individual or organizational donors" that the Court specifically disallowed in the ESA case as infringing on First Amendment rights. ESA Case, Order of Aug. 23, 2007 (DE 178), at 9 (quoting *Wyoming v. U.S. Dep't of Agriculture*, 208 F.R.D. at 454).

treatment of its elephants; (3) whether each such contributor was misled in doing so; (4) whether each such monetary contribution would have been made had different information been provided about the ESA litigation and/or FEI's treatment of its elephants; (5) whether each such donor gave money after the ESA suit was filed; and (6) whether FEI *itself* has been injured in any way (as yet unarticulated) by charitable donations given to animal protection organizations. Even just one step in this chain reflects the inherently "speculative nature of the proceedings that would follow if [FEI] were permitted to maintain its claim." *Anza*, 547 U.S. at 459.

The Supreme Court has made crystal-clear that the "element of proximate causation recognized in *Holmes* is meant to prevent these types of intricate, uncertain inquiries from overrunning RICO litigation." *Anza*, 547 U.S. at 460. Here, FEI's claim relies on "link[s]" that are even more "remote," contingent," and "indirect" than those deemed legally inadequate by the Supreme Court. *Hemi*, 130 S. Ct. at 989.[29]

Yet FEI has evidently found it necessary to rely on these legally insufficient allegations because it recognizes that the only concrete injury it does assert – its fees and costs from defending the ESA case – are insufficient to satisfy the "pattern" element of a RICO claim. *See supra* at Section VII(B). Moreover, even if defending a single lawsuit could give rise to a RICO

[29] Notably, the D.C. Circuit has held that "disgorgement (*i.e.*, forfeiture of ill-gotten gains from past conduct) is not a permissible remedy" even in the RICO action *brought by the government* against private tobacco companies. *Philip Morris*, 449 F. Supp. 2d at 27-28. Although FEI's claim relies upon a different section of RICO, its contention that animal protection organizations should be forced to disgorge *to FEI* "more than one billion dollars" in money raised from those seeking to advance animal protection interests presents a far less "plausible" claim for relief than that rejected in *Philip Morris*, *Iqbal*, 129 S. Ct. at 1949, especially since FEI does not claim to have donated any funds on false pretenses, and the alleged victims – the members and supporters of the organizations – are not before the Court. *Cf. Holmes*, 503 U.S. at 269-70 (the "need to grapple with these [causation] problems is simply unjustified by the general interest in deterring injurious conduct, since directly injured victims can generally be counted on to vindicate the law as private attorneys general, without any of the problems attendant upon suits by plaintiffs injured more remotely").

cause of action, and even putting aside the Supreme Court's instruction that an attorneys' fees claim should not "result in a second major litigation," *Hensley*, 461 U.S. at 437, FEI cannot establish that it would not have had to expend resources defending the ESA action but for Mr. Rider's assertion of legal standing. This is because of the *independent* assertion of organizational standing arguments that were vigorously advanced throughout the entire ESA litigation, which are *still* being pursued in the Court of Appeals, and which were briefed and debated extensively during the trial and not definitively rejected by this Court until its final ruling.

Therefore, there is no discernible way for the Court (or a jury) to assess how much of FEI's fees and costs would have been expended if only organizational standing had been advanced from the outset. Especially where, as here, it is impossible to "'ascertain the amount of a plaintiff's damages attributable to the [alleged] [RICO] violation, *as distinct from other, independent, factors*,'" Supreme Court precedent forecloses a RICO claim. *Anza*, 547 U.S. at 458 (emphasis added) (quoting *Holmes*, 503 U.S. at 269). These considerations also underscore why any claim for fees and costs is more appropriately evaluated in the context of the specific provision created by Congress for addressing fee disputes in ESA cases, rather than under the guise of a multi-party federal RICO conspiracy claim. *Cf. Traynor v. Turnage*, 485 U.S. 535, 548 (1988) (a statute dealing with a "narrow, precise, and specific subject" should apply in lieu of a more general statute).[30]

[30] This conclusion is further strengthened by this Court's finding that FEI itself was, at the least, a major contributing cause of the cost, delay, and complexity that engulfed the ESA case. *See, e.g.*, *ESA Counterclaim Ruling*, 244 F.R.D. at 51 ("*As a result of [FEI's] failure to timely produce thousands of pages of veterinary records*, the Court allowed discovery to continue in this case.") (emphasis added); *RICO Stay Ruling, 523 F. Supp. 2d at 5* ("Progress in the underlying ESA Action has been painfully drawn out due to the conduct of *all* parties to this litigation.") (emphasis in original). Especially under these circumstances, the ESA's attorneys' fees provision, rather than a RICO claim, is the proper vehicle for evaluating whether a fee or cost award is "appropriate" here, 16 U.S.C. § 1540(g), and, if so, the amount of such an award.

In any case, under Supreme Court precedents, FEI's RICO claims, which rely on theories of causation that are, as a matter of law, simply too "attenuated," *Hemi,* 130 S. Ct. at 989, should be dismissed.

D. FEI's Amended Complaint Fails To Allege A Sufficiently Distinct "Enterprise."

FEI also cannot satisfy another essential element of a RICO claim — establishing the existence of a separate "enterprise," 18 U.S.C. § 1962(c), which is defined as "any individual, partnership, corporation, association or other legal entity, and any union or group of individuals associated in fact, although not a legal entity." *Id.* at § 1961(4). Interpreting the plain language of the statute, the "[c]ourts are in agreement that for purposes of liability under Section 1962(c), a RICO person must be distinct from the RICO enterprise." *Myers*, 2010 WL3745632, at *3; *id.* at n.3; *see also Bates*, 466 F. Supp. 2d at 80 ("The District of Columbia Circuit, along with eleven other Circuits, has conclusively held that the same entity cannot be [named as] the RICO enterprise and [as] a RICO defendant.") (citing *Confederate Mem'l Ass'n v. Hines*, 995 F.2d 295, 300 (D.C. Cir. 1993)). As the Supreme Court has explained:

> to establish liability under § 1962(c), one must allege and prove the existence of two distinct entities: (1) a "person"; and (2) an "enterprise" that is not simply the same 'person' referred to by a different name. The statute's language, read as ordinary English, suggests that principle. The Act says that it applies to 'persons' who are 'employed by or associated with' the 'enterprise.' In ordinary English one speaks of employing, being employed by, or associating with others, not oneself.

Cedric Kushner Promotions, Ltd. v. King, 533 U.S. 158, 161 (2001) (internal citation omitted).

Because there "must be 'some distinctness between the RICO defendant and the RICO enterprise,'" *Prunte*, 484 F. Supp. 2d at 42 (quoting *Cedric Kushner Promotions, Ltd.*, 533 U.S. at 161-162), and "liability depends on showing that the defendants conducted or participated in the conduct of the '*enterprise's* affairs,' not just their *own* affairs," *Reves*, 507 U.S. at 185

(emphasis added), the courts routinely dismiss RICO claims that "do ... not satisfy this test." *Prunte*, 484 F. Supp. 2d at 42.[31]

FEI's Amended Complaint suffers from the insurmountable legal flaw that it fails to allege any distinction between the RICO persons themselves (namely, the animal protection organizations, their lawyers, and Mr. Rider) and the so-called "enterprise." To the contrary, its pleading belies the existence of any such distinction by asserting that that the defendants —the RICO persons — "*collectively have constituted an associated-in-fact enterprise.*" Am. Compl. at ¶ 13 (emphasis added); *see also id.* at ¶¶ 276-77 (alleging that "each defendant" is a "person" for purposes of RICO, and that these *same* persons and their agents are also the "enterprise"). By completely "lumping together" the actors and the enterprise, FEI fails to allege the requisite distinction that could conceivably support the existence of a "RICO enterprise that operates or functions in a way distinct from the defendants themselves." *Myers*, 2010 WL 3745632, at * 4. For example, although the pleading is replete with allegations that the various animal protection organizations in different ways and at different times funded Mr. Rider's basic living and traveling expenses, *e.g.*, Am. Compl. at ¶ 116 (alleging that funds provided to Mr. Rider "paid for everything and anything it takes to live in a Volkswagen van"), the Amended Complaint is conspicuously silent regarding whether and how the "defendants conducted or participated in the conduct of the '*enterprise's* affairs, not just their *own* affairs," in furthering the interests of

[31] *See also Yellow Bus Lines, Inc. v. Drivers, Chauffeurs & Helpers Local Union 639*, 913 F.2d 948, 951 (D.C. Cir. 1990) (*en banc*) (affirming dismissal based on a failure to satisfy the "nonidentity requirement" because "[l]ogic alone dictates that one entity may not serve as the enterprise and the person associated with it.") (internal quotation omitted); *Myers*, 2010 WL 3745632, at *4 ("The Amended Complaint fails to allege a RICO enterprise that operates or functions in a way distinct from the defendants themselves. There is a complete overlap between the defendants, their alleged agents, and the enterprise."); *Bates,* 466 F. Supp. 2d at 87-88 (dismissing RICO claim where the court "cannot determine [from the allegations] whether the alleged RICO persons and the alleged RICO enterprises are sufficiently distinct").

elephants as they see fit. *Reves*, 507 U.S. at 185 (emphasis in original).[32] In essence, all that FEI has alleged is that the various animal advocates simply engaged in conduct to further their own interests — the protection of elephants — which cannot constitute a RICO enterprise.

FEI cannot avoid dismissal by regurgitating the required legal element in only the most general and conclusory terms. It is not enough to merely conclude, with no supporting facts, that "the Enterprise has existed separate and apart from defendants' racketeering acts and their conspiracy to commit such acts" and "has an ascertainable structure and purpose beyond the scope and commission of defendants' predicate acts." Am. Compl. at ¶ 281. Such legal conclusions, without more, are woefully inadequate to establish *how* the "Enterprise" "has existed separate and apart" from the alleged participants' *own* animal protection missions and activities.

As such, FEI's RICO claims fail as a matter of law because they do not distinguish the purported enterprise from defendants' conduct of their "*own* affairs," as longstanding animal advocates, *Reves*, 507 U.S. at 185 (emphasis in original) – which is alone fatal to the claim. *Id.; see also United States v. Goldin Indus.*, 219 F.3d 1268, 1270 (11th Cir. 2000) (collecting cases). By the same token, FEI's Amended Complaint cannot cure this defect by impermissibly relying

---

[32] *See also Baker v. IBP, Inc.*, 357 F.3d 685, 691-92 (7th Cir. 2004) ("The nub of the complaint is that IBP operates *itself* unlawfully . . . . Without a difference between the defendant and the 'enterprise' there can be no violation of RICO.") (emphasis in original); *In re Burzynski*, 989 F.2d at 743 ("Can a 'RICO person' . . . employ or associate with itself? The answer appears to be 'no' with respect to a section 1962(c) claim. Under that subjection, RICO 'persons' must be distinct from the RICO 'enterprise.'"); *Bradley*, 527 F. Supp. 2d at 652 ("Having failed to allege an external enterprise, the . . . Plaintiffs have necessarily asserted that Defendants are 'employed by or associated with' themselves"); *Boyle v. United States*, 129 S. Ct. 2237, 2247 (2009); *see also United States v. Turkette*, 452 U.S. 576, 583 (1981) ("The 'enterprise' is not the 'pattern of racketeering activity'; it is an entity separate and apart from the pattern of activity in which it engages."). In *Boyle*, the "Supreme Court liberally construed the structure requirements of an association-in-fact enterprise," but "[i]t did not alter the distinctiveness required between the RICO person and the RICO enterprise." *Myers*, 2010 WL 3745632, at * 3 n. 4.

on "legal conclusion[s] couched as . . . factual allegations[s]." *Bates*, 466 F. Supp. 2d at 77 (quoting *Trudeau v. FTC*, 456 F.3d 178, 193 (D.C. Cir. 2006)).

Indeed, even before *Iqbal* and *Twombly*, it was well-established that such "[b]are conclusions of law and sweeping and unwarranted averments of fact will not be deemed admitted for the purposes of a Rule 12(b)(6) motion." *Bates*, 466 F. Supp. 2d at 77 (quoting *M.K. v. Tenet*, 99 F. Supp. 2d 12, 17 (D.D.C. 2000)). In the aftermath of the Supreme Court's landmark decisions on the threshold standards for surviving such a motion, it is beyond peradventure that FEI's "pleading that offers 'labels and conclusions' or a formulaic recitation of the elements of a cause of action will not do," and that "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 129 S. Ct. at 1949 (quoting *Twombly*, 550 U.S. at 555). Where, as here, the Amended Complaint makes no specific allegations of a distinction between the RICO "persons" and the purported RICO "enterprise," and instead alleges they are identical, the Amended Complaint should also be dismissed as a matter of law on this basis.

E. The Amended Complaint Engages In Impermissible "Group Pleading" And Does Not Plead Sufficient Facts To Subject Particular Defendants To Liability.

RICO does not render it unlawful for a "person" to have some incidental or nebulous relationship to a purported "enterprise." Rather, the statutory provision upon which FEI relies makes it unlawful to "*conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs* through a pattern of racketeering activity." 18 U.S.C. § 1962(c) (emphasis added). The Supreme Court has construed this language and the relevant legislative history to mean RICO liability under § 1962(c) "does not extend beyond those *who participate in the operation or management of an enterprise*," so that "one is not liable under that provision *unless*

one has participated in the operation or management of the enterprise itself." *Reves*, 507 U.S. at 183 (emphasis added). Accordingly, although "RICO liability is not limited to those with a formal position in the enterprise . . . *some* part in directing the enterprise's affairs is required." 507 U.S. at 179 (emphasis in original).

Conspicuously absent from FEI's pleading are any specific allegations as how the animal protection organizations, their lawyers, or Mr. Rider participated in the operation or management of the so-called "enterprise." This fatal deficiency is not surprising given FEI's complete failure to delineate the purported "enterprise" in any manner distinct from the activities of the "RICO persons." *See supra* at Section VII(D). Without any specific allegations as to the manner in which Mr. Rider, any of the organizations or their lawyers "direct[ed] the enterprise's affairs," the RICO claims fail as a matter of law. As with the other requisite RICO elements, it is not enough to aver generally in the most conclusory terms, as FEI does, that "[d]efendants, together with others known and unknown, each participated in the operation of the Enterprise." Am. Compl. at ¶ 13. Such generic allegations are clearly impermissible in the aftermath of *Twombly* and *Iqbal*, especially when the consequences of subjecting an organization or individual to a groundless RICO claim are so grave.

Indeed, by way of example, some of the alleged "RICO persons" who served as litigation counsel in the ESA case — Howard Crystal, Kimberly Ockene, and Jonathan Lovvorn — are only briefly mentioned in the most general terms in a few paragraphs in the Amended Complaint, none of which remotely satisfies the legal requirement of "directing" an "enterprise's affairs." *Reves*, 507 U.S. at 179; *see, e.g.*, Am. Compl. at ¶ 42 (alleging that Mr. Crystal was "counsel of

record" and "had actual knowledge of the payments to Rider"); *id.* at ¶¶ 44, 45 (same allegation as to Ms. Ockene and Mr. Lovvorn).[33]

The allegations against HSUS, which was not even a party to the ESA action, are equally defective and fail to show that the organization was in any way involved in, let alone "directing" or "managing," the affairs of the so-called "enterprise." In that regard, FEI can do nothing more than allege incorrectly that the organization "merged" with the Fund for Animals in 2005 – five years *after* the ESA litigation began. Am. Compl. at ¶ 36. Such patently insufficient allegations cannot sustain a RICO claim against HSUS, the nation's largest animal protection organization.[34] FEI's transparent attempt to drag HSUS into this dispute as a "deep pocket," *see id.* (FEI's allegations as to HSUS's "net assets"), must be rejected in the absence of any averment that it played any role in helping to direct the so-called "enterprise."

---

[33] In *Reves*, the Court held that allegations against accountants who performed an audit and allegedly conveyed fraudulent information did not satisfy the "operation or management' test." 507 U.S. at 179. Thereafter, courts have generally held that the "provision of traditional legal services does not constitute the 'operation or management' of an enterprise for purposes of RICO liability," *Kelly v. Palmer, Reifler & Assoc.*, 681 F. Supp. 2d 1356, 1381 (S.D. Fla. 2010) (other citations omitted), even where the "lawyer's conduct fell below the professional standards expected of a lawyer in his community." *Id.* ("Whether the services the firm provided were proper or fell below the standard of care recognized for lawyers in Florida, they were provided as an agent for an employer, and RICO liability will not attach."). In fact, these very principles were successfully urged by the same law firm representing FEI here — Fulbright & Jaworski — to defeat a RICO claim asserted against lawyers in that firm in connection with the handling of a client's financial assets. *See* Fulbright & Jaworski Brief in *Hatteberg v. Adair Enterprises, Inc.*, Case No. 00-50074, 2000 WL 34029837 (5th Cir. June 12, 2000) ("Plaintiff argues that the racketeering acts were committed by the enterprises or agents of the enterprises during the course of their regular business. Fulbright & Jaworski L.L.P. is in the business of practicing law, and it was in the course of defending a lawsuit in which the Plaintiff alleges that the predicate acts were committed by the Fulbright Defendants. . . . Since the alleged predicate acts, if they were committed at all, were committed by the agents of the enterprises within the conduct of the enterprises' normal business operations, they cannot support a RICO cause of action. As a matter of law, the Law Firm, the Plan and its sponsor are not enterprises and Plaintiff's claim was properly dismissed.").

[34] *See* HSUS Supplemental Brief.

This overall lack of particularized pleading is fatal to the Amended Complaint. Indeed, throughout its pleading, and especially in its fraud allegations, FEI continues in its impermissible practice of group pleading, by "lumping together" the animal protection organizations, their attorneys, and Mr. Rider, who are all alleged to have, as a group, engaged in various predicate acts, without distinguishing between or among them. *See, e.g.*, Am. Compl. at ¶¶ 283(a)-(n). However, a "RICO plaintiff must plead specific facts as to each defendant. It cannot avoid Rule 12(b)(6) by 'lumping together the defendants.'" *Bradley*, 527 F. Supp. 2d at 649, n.46; *see also Phillip Morris*, 566 F.3d at 117 (to be subject to RICO liability, each defendant must have engaged in at least two predicate acts of racketeering as part of the alleged pattern).

The particularity requirement, and the avoidance of group pleading, is especially crucial where, as here, mail and wire fraud are alleged to underlie the RICO claim, since the specific intent and "'particularity requirement of Rule 9(b) demands that the pleader specify what [fraudulent] statements were made and in what context, when they were made, *who made them*, and the manner in which those statements were misleading.'" *Bates*, 466 F. Supp. 2d at 89 (emphasis added) (quoting *Intex Recreation Corp. v. Team Worldwide Corp.*, 390 F. Supp. 2d 21, 24 (D.D.C. 2005)). FEI's vague, conclusory and repetitive allegations regarding the organizational defendants' fundraising, advertising and disseminating of materials regarding Mr. Rider and his "image," *e.g.* Am. Compl. at ¶¶ 4, 11, are patently inadequate, particularly without any elucidation regarding which specific communications or acts by particular defendants or by employees of the defendant organizations are sufficient to constitute actionable fraud, let alone to demonstrate the "specific intent to defraud" necessary for a RICO case based on such fraud. *Agostino v. Quest Diagnostics, Inc.* 256 F.R.D. 437, 457 (D.N.J. 2009) (internal quotation omitted); *see also Philip Morris USA Inc.*, 566 F.3d at 1118 ("to determine whether a

corporation made a false or misleading statement with specific intent to defraud, [courts] look to the state of mind of the individual corporate officers and employees who made, ordered, or approved the statement").

Even leaving aside the unacceptable trampling upon core First Amendment rights that would be occasioned by any inquiry into the organizations' communications with their members and supporters, FEI's "unmitigated vagueness regarding which defendant played which role in the alleged fraudulent conduct is surely inconsistent with the heightened pleading requirements of Rule 9(b)." *Bates*, 466 F. Supp. 2d at 90; *see also Ironworkers Local 16 Pension Fund v. Hilb Rogal & Hobbs Co.*, 432 F. Supp. 2d 571, 579, 594-95 (E.D. Va. 2006) (dismissing "group pleading" complaint under Rule 9(b)); *D'Addario v. Gellar*, 264 F. Supp. 2d 367, 397 (E.D. Va. 2003) (finding allegations of mail fraud underlying RICO claims deficient where they were "vaguely attributed to all defendants, rather than specifying each alleged fraudulent act committed by each defendant"); *Browning Ave. Realty Corp. v. Rosenshein*, 774 F. Supp. 129, 143 (S.D.N.Y. 1991) (RICO allegations that a particular defendant "knew or should have known" and "could not have been unaware" of alleged fraudulent scheme were insufficient to allege defendant's specific intent to defraud).

FEI's impermissible vagueness is at its zenith when it comes to pleading the facts necessary to support, either in general or as against individual defendants, the RICO predicates sprinkled throughout the Amended Complaint. While the Court certainly need not address the elements of the predicate acts in order to dismiss this retaliatory lawsuit, the fact is that FEI's own allegations, as well as the record from the ESA case, fatally undermine the *legal* validity of FEI's predicate act allegations.

For example, the touchstone for the federal crimes of mail and wire fraud is not only a "specific intent" to defraud pled with particularity as to *each* defendant – which is entirely lacking here – but also an effort to "obtain" the money or property of another, *see* 18 U.S.C. §1341, §1343, or a situation "in which the victim's loss of money or property supplied the defendant's gain, with one the mirror image of the other." *Skilling v. United States*, 130 S. Ct. 2896, 2904 (2010). However, FEI's own allegations belie any such effort in this case because FEI squarely admits in its Amended Complaint that the only damages it asserts – *i.e.*, the fees FEI was required to pay its attorneys "for their services and the costs necessitated by the ESA Action," Am. Compl. ¶ 274 -- were "obtained" by its litigation counsel, not by any of the RICO defendants. *See, e.g.*, *Tamayo v. Blagojevich*, 526 F.3d 1074, 1086 (7th Cir. 2008) ("[O]ur pleading rules do not tolerate factual inconsistencies in a complaint . . . ."); *Sparrow v. United Air Lines, Inc.*, 216 F.3d 1111, 1116 (D.C. Cir. 2000) ("In some cases, it is possible for a plaintiff to plead too much: that is, to plead himself out of court by alleging facts that render success on the merits impossible.").

Similarly, FEI's attempt to plead an obstruction of justice predicate under 18 U.S.C. § 1503(a) based on the alleged "covering up" of payments to Mr. Rider, *see* Am. Compl. at ¶¶ 192-235, ignores the indisputable fact that FEI has known for eight years (because Mr. Rider openly acknowledged it) that Mr. Rider was receiving funding for his living and traveling expenses from some of the other ESA plaintiffs while he engaged in the very legislative and other advocacy that FEI refers to in its Amended Complaint, as well as the fact that counsel for the ESA plaintiffs informed the Court about such funding in open court in September 2005. *See supra* at Section II(B). The Amended Complaint's obstruction of justice predicate thus fails the "plausibility" requirement of *Twombly* and *Iqbal*.

Moreover, FEI's effort to boostrap its disputes with how the ESA plaintiffs handled their discovery obligations (most of which FEI *lost* in the ESA case) into "obstruction of justice" for RICO purposes has been emphatically rejected by other courts. *See, e.g., Nolan v. Galaxy Scientific Corp.*, 269 F. Supp. 2d 635, 643 (E.D. Pa. 2003) (rejecting argument that an alleged failure to produce records in response to a civil discovery request constituted obstruction of justice because under that theory "any discovery dispute . . . could become a RICO case"); *Richmark Corp. v. Timber Falling Consultants, Inc.*, 730 F. Supp. 1525, 1532 (D. Or. 1990) ("In light of the extensive framework of rules and remedies provided for the resolution of civil discovery disputes, the court declines to stretch the definition of obstruction of justice to include the concealment or withholding of discovery documents").

For similar reasons, FEI has not pled a "plausible" claim of money laundering in furtherance of the alleged scheme to "conceal or disguise the nature of the source of [the] proceeds" used to pay Mr. Rider's living and traveling expenses, Am. Compl. ¶ 283, since the hallmark of a violation of 18 U.S.C. § 1956, is also intentional concealment from public view. *See, e.g., U.S. v. Law*, 528 F.3d 888, 896 (D.C. Cir. 2008) (for money laundering conviction, the transaction at issue must have been "motivated by a desire to conceal or disguise the source or the ownership of the money") (citation and internal quotations omitted); *U.S. v. Adefehinti*, 510 F.3d 319, 322 (D.C. Cir. 2007) ("The money laundering statute criminalizes behavior that masks the relationship between an individual and his illegally obtained proceeds."); *United States v. Cota*, 953 F.2d 753, 760-11 (2d Cir. 1992) (holding that an unusual "degree of secrecy" supports conviction for money laundering). Where, as here, Mr. Rider publicly acknowledged in 2002, and the ESA plaintiffs' counsel volunteered in open court in 2005, that his living and traveling

expenses were being funded by the ESA organizational plaintiffs, FEI's predicate act allegations are, once again, impossible to harmonize with *Iqbal* and *Twombly* "plausibility" standards.

FEI likewise fails adequately to plead predicate acts of bribery based on an alleged scheme to improperly influence Mr. Rider's testimony concerning his attachment to the elephants with whom he worked, Am. Compl. ¶ 283, since bribery also requires that the acts in question be undertaken "corruptly," *see* 18 U.S.C. § 201 (the state bribery laws cited by FEI are to the same effect), which typically involves acts undertaken in secrecy outside of public view. *See, e.g., United States v. Weiss*, 752 F.2d 777, 787 (2d Cir. 1985) (affirming district court's judgment finding criminal RICO defendant guilty of "*secretly and corruptly* extract[ing] and accept[ing] case bribes") (internal quotations omitted) (emphasis added); *CNBC, Inc. v. Alvarado,* Civ. No. 93-2261, 1996 U.S. Dist. Lexis 20891, at *4 (S.D.N.Y. May 13, 1996) (finding that "[i]n return for the cash bribes . . . [one defendant] secretly and corruptly provided the [other] defendants with inside information on bids").[35]

Finally, the indisputable facts that the ESA plaintiffs openly informed this Court years ago of the funding of Mr. Rider and that Mr. Rider himself conceded such funding in a public hearing in 2002, also renders it impossible for FEI to satisfy the "specific intent" element necessary for mail and wire fraud, money laundering, bribery, and obstruction of justice. *See, e.g., United States v. Smith*, 133 F.3d 737, 742 (10th Cir. 1997) (mail fraud requires *specific intent to defraud*); *U.S. v. Gurolla*, 333 F.3d 944, 957 (9th Cir. 2003) ("Money laundering is a *specific intent* crime") (emphasis added); *U.S. v. Sun-Diamond Growers of California*, 526 U.S. 398, 404-05 (1999) ("[F]or bribery there must be a quid pro quo – a *specific intent* to give or

[35] FEI's predicate act allegations are defective on many additional grounds that will have to be addressed should this case proceed. For example, many of the alleged acts of mail fraud do not involve use of the U.S. mails, and thus cannot qualify as mail fraud. *See, e.g., Utz*, 631 F. Supp. at 596.

receive something of value in exchange for an official act") (emphasis added); *Pyramid Securities Ltd,* 924 F.2d at 1119; *U.S. v. Guzzino*, 810 F.2d 687, 696 (7th Cir. 1987) ("To prove a violation of section 1503 (obstruction of justice), the government must show that each defendant knew of the pending judicial proceeding and *specifically intended* to impede its administration.") (emphasis added).

This defect, standing alone, is fatal to the Amended Complaint. *Republic of Panama v. BCCI Holdings*, 119 F.3d 935, 949 (11th Cir. 1997) (under the RICO statute, a plaintiff's allegations that defendants possessed the requisite fraudulent intent "cannot be merely conclusory and supported by any factual allegations"); *Ouaknine v. MacFarlane*, 897 F.2d 75, 80 (2d Cir. 1990) ("[a]llegations of scienter [are] only sufficient if supported by facts giving rise to a strong inference of fraudulent intent").

VIII. BECAUSE PLAINTIFF'S RICO CLAIMS FAIL AS A MATTER OF LAW, THE COURT SHOULD NOT EXERCISE SUPPLEMENTAL JURISDICTION OVER THE STATE LAW CLAIMS; IF THE COURT DOES SO, THEY SHOULD BE DISMISSED ON OTHER GROUNDS.

Based entirely on jurisdiction over its federal RICO claims, FEI alleges that the Court has supplemental jurisdiction over its claims for relief under state law "pursuant to 28 U.S.C. § 1367(a)." Am. Compl. ¶ 48. However, because, as explained above, the Court lacks jurisdiction over the RICO claims, and FEI has asserted no alternative basis for asserting federal jurisdiction over the state claims, the Court also lacks jurisdiction over the state claims. *See, e.g.*, *Gondel v. PMIG*, Case. No. 08-1768, 2009 U.S. Dist. LEXIS 9507, *18 (D. Md. Jan. 22, 2009).[36] Indeed,

[36] Should the Court dismiss the RICO claims, the Court will lack subject matter jurisdiction over the state law claims that plaintiff has alleged against these defendants. FEI bases its claim for federal jurisdiction exclusively on its federal causes of action under RICO. Thus, absent the RICO claims, the remaining claims are pled entirely under state law. As plaintiff has not alleged complete diversity of citizenship under 28 U.S.C. § 1332 as a basis for bringing the state claims in federal court, there is no alternative for this Court to exercise subject

as the Court of Appeals has instructed, it is generally proper for the Court to decline to exercise supplemental jurisdiction over state claims when federal RICO claims that are the sole basis for federal jurisdiction are dismissed before trial for any reason. *See* 28 U.S.C. § 1367(c)(3); *Edmondson*, 48 F.3d at 1265-67.

Exercising pendent jurisdiction is discretionary and not a plaintiff's right. *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966). The Supreme Court has held that needless decisions of state law should be avoided and, if federal claims are dismissed before trial, the state claims should be dismissed as well. *See id.* 28 U.S.C. § 1367 "essentially codifies" the leading decision on supplemental jurisdiction, *United Mine Workers of America v. Gibbs*, 383 U.S. 715 (1966). The statute provides that "the district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if . . . (3) the district court has dismissed all claims over which it has original jurisdiction." 28 U.S.C. § 1367(c).

When a district court has dismissed all federal law claims, "the balance of factors to be considered under the pendent jurisdiction doctrine — judicial economy, convenience, fairness and comity — will point towards declining to exercise jurisdiction over the remaining state-law claims." *Bates v. Nw. Human Servs.*, 583 F. Supp. 2d 138, 146 (D.D.C. 2008); *see also Cohen v. D.C.*, Case No. 08-480 (RMC), 2010 U.S. Dist. LEXIS 107975, *37-39 (D.D.C. October 8, 2010).

---

matter jurisdiction over the defendants. *Gondel*, 2009 U.S. Dist. LEXIS at *18 (after dismissing RICO claims, court also dismissed remaining state law claims where there was no other basis for jurisdiction); *D'Addario v. Gellar*, 264 F. Supp. 2d 367, 387-88 (E.D. Va. 2003) (when a court "determines that the federal claim(s) should be dismissed against a defendant, the state claims against that defendant would also have to be dismissed, unless another basis for asserting personal jurisdiction exists"). In the absence of original jurisdiction over any claim against these defendants, the Court does not have supplemental jurisdiction over the state law claims, particularly since they are not based on the same facts or circumstances.

Accordingly, should the Court dismiss the RICO claims, it should dismiss all of FEI's state court claims as well. *See Edmondson*, 48 F.3d at 1265-67 (D.C. Circuit overturning district court's exercise of supplemental jurisdiction after dismissal of RICO claims); *Murray v. Mulgrew*, 704 F. Supp. 2d 45 (D.D.C. 2010) (dismissing RICO claims and declining to exercise supplemental jurisdiction over state law claims). Indeed, this would be especially appropriate here, since, once again, the federal ESA attorneys' fees provision should in any event be the appropriate context for evaluating the propriety of any award of fees.[37]

However, should the Court exercise its discretion to address the state law claims, they should also be dismissed with prejudice. Not only do these claims run afoul of *Noerr-Pennington* immunity for the same reasons as the RICO claim, *see supra* at Section VI, but they are all legally defective for additional reasons.

A. The Malicious Prosecution Claim (Count V) Should Be Dismissed Because There Was No Decision On The Merits Of The ESA Lawsuit.

In the absence of a favorable termination of the underlying litigation *on the merits*, a malicious prosecution claim does not lie as a matter of law. Here, this Court explicitly stated that it never reached, and made no determination regarding, the merits of the allegations in the underlying ESA litigation. The only issue decided was the lack of legal standing, which is not a

[37] Indeed, not only has the Supreme Court instructed that attorneys' fees disputes should not generate another "second major litigation," *Hensley*, 461 U.S. at 437, but it has also made clear that where Congress has enacted a comprehensive environmental statute, including a citizen suit provision that delimits how claims should be pursued under that statute, common law claims overlapping with the federal cause of action are ordinarily preempted. *See Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*, 453 U.S. 1, 13-14, 21-22 (1981). The same principle should foreclose FEI's pursuit of attorneys' fees under state common law theories, especially where FEI has already made clear that it is seeking fees under the ESA's attorneys' fees provision, and hence the standards, purposes, and precedents applicable to that provision should govern, rather than common law claims totally divorced from, or even in conflict with, those authorities.

favorable determination on the merits and therefore cannot give rise to a malicious prosecution claim as a matter of law.

In *Morowitz v. Marvel*, 423 A.2d 196 (D.C. 1980), the D.C. Court of Appeals delineated the elements of a malicious prosecution action: a plaintiff "must plead and prove four things: (1) the underlying suit terminated in plaintiff's favor; (2) malice on the part of defendant; (3) lack of probable cause for the underlying suit; and (4) special injury occasioned by plaintiff as the result of the original action." *Morowitz*, 423 A.2d at 198 (citing *Ammerman v. Newman*, 384 A.2d 637, 639 (D.C. 1978) (*per curiam*)); *see also Chapman v. Anderson*, 3 F.2d 336 (D.C. 1925); *Chatterton v. Janousek*, 280 F.2d 719 (D.C. 1960).

Termination in the plaintiff's favor only occurs where "it tends to indicate the innocence of the accused." *Lucas v. District of Columbia*, 505 F. Supp. 2d 122, 127 (2007) (citing *Brown v. Carr*, 503 A.2d 1241 (D.C. 1986)). Termination is not favorable in the context of a malicious prosecution suit if the termination does not reflect on the responsibility for the alleged misconduct. *Rice v. District of Columbia*, 626 F. Supp. 2d 19, 25 (2009) (citing *Brown*, 503 A.2d at 1245, n.2). In the civil context, the D.C. Court of Appeals has held that with regard to preliminary rulings, "[n]o favorable termination is found where the earlier action is dismissed on the ground of statute of limitations, or laches, because these dispositions *do not reflect on the merits of the underlying claim*." *Lucas*, 505 F. Supp. 2d at 127 (emphasis added).

It has been universally held that an action for malicious prosecution will not lie either as an independent action or as a cross-claim in the same suit before such a final and favorable conclusion occurs. Ronald E. Mallen & Jeffrey M. Smith, *Legal Malpractice*, Malicious Prosecution — The Cause Of Action — Favorable Termination, § 6.13 (4th Ed. 1996) (and cases cited therein); *see also*, David J. Meiselman, *Attorney Malpractice Law and Procedure*,

Malicious Prosecution § 20:1 (1980) (since there must be a termination of the underlying action, a counterclaim for malicious prosecution cannot exist).

Courts throughout the country have therefore dismissed malicious prosecution claims where the prior suit was dismissed for lack of jurisdiction or standing, rather than on the merits of the plaintiff's claims. *See Fish v. Watkins,* 298 Fed. Appx. 594, 597 (9th Cir. 2008) (under Arizona law, dismissal for lack of jurisdiction is a procedural or technical dismissal that is not a termination in favor of plaintiff); *Hudis v. Crawford,* 125 Cal. App. 4th 1586, 193, 24 Cal. Rptr. 3d 50 (Cal. Dist. Ct. App. 2005) (holding that dismissal for lack of standing is a jurisdictional defect that does not involve the merits and cannot constitute a favorable termination); *Parrish v. Marquis,* 172 S.W.3d 526 (Tenn. 2005) (dismissal of underlying claim for lack of standing does not constitute decision on the merits to give rise to a malicious prosecution claim); *Bearden v. Bellsouth Telecomm.*, 29 So. 3d 761 (Miss. 2010) (Supreme Court of Mississippi held that dismissal for lack of jurisdiction does not indicate innocence or guilt and cannot serve as basis for malicious prosecution claim).

Here, this Court dismissed the ESA case based upon a lack of standing, and did not reach the merits or decide the ultimate issue of whether FEI's treatment of elephants violated the "take" provision of the ESA. The Court explicitly acknowledged that it was not reaching the merits of the case:

> [b]ased on the following findings of fact and conclusions of law, the Court concludes that plaintiffs have failed to prove the standing required by Article III of the United States Constitution. This Court therefore lacks jurisdiction over plaintiffs' claims. Because the Court concludes that plaintiffs lack standing, the *Court does not — and indeed cannot — reach the merits of plaintiffs' allegations* that FEI "takes" its elephants in violation of Section 9 of the ESA.

ESA Final Ruling, 677 F. Supp. 2d at 66 (emphasis added). As a result, there was no adjudication related to the merits of the ESA case, and a malicious prosecution claim based upon the

dismissal (for lack of standing) simply does not lie. Moreover, even the Court's dismissal on standing grounds is now on appeal.

For these reasons, FEI's malicious prosecution claim fails as a matter of law and should be dismissed with prejudice.[38]

B. The Abuse Of Process Claim (Count IV) Is Legally Deficient.

FEI's claim for abuse of process (Count IV) also fails as a matter of law because it is not alleged that Mr. Rider, the animal protection organizations, or their counsel, used process to accomplish an improper or unrelated end outside the relief sought in the ESA action.

An abuse of process is the use of the legal system to "accomplish some end which is without the regular purview of the process, or which compels *the party* against whom it is used to do some collateral thing which he could not legally and regularly be required to do." *Bown v. Hamilton*, 601 A.2d 1074, 1079 (D.C. 1992) (emphasis added) (citing *Morowitz*, 423 A.2d at 198); *see also Scott v. D.C.*, 101 F.3d 748, 755 (D.C. Cir. 1996). There are two elements to an

[38] Even if FEI could overcome this insurmountable obstacle, which it cannot, it has not pled the requisite "special injury ... as the result of the original action" — another essential element of the claim. *Morowitz*, 423 A.2d at 198; *Ammerman*, 384 A.2d at 639. In reviewing a similarly defective pleading, the D.C. Court of Appeals in *Morowitz* affirmed the dismissal of an amended complaint for malicious prosecution for failure to state a claim where the plaintiffs did not allege "special injury." *See also Epps v. Vogel*, 454 A.2d 320, 324 (D.C. 1982) ("we again are troubled by the lack of specificity in the malicious prosecution claim. Appellants allege they suffered 'damages and special damages, including but not limited to loss of income, which were not recoverable as costs in the [underlying] case.' In our view, the generality of the damages alleged does not satisfy the [legal] standards."); *Ammerman*, 384 A.2d at 641. "[L]oss of income and substantial expense in defending have all been held to fall outside the scope of the definition of special injury." *Joeckel v. Disabled Am. Veterans*, 793 A.2d 1279, 1282 (D.C. 2002) (internal quotation marks omitted) (quoted in *Nader v. Democratic Nat'l Comm.*, 567 F.3d 692, 697 (D.C. Cir. 2009)). Special injury has been interpreted by the D.C. Court of Appeals to include seizure of property, arrest of the person, repeated malicious prosecution of unsuccessful suits asserting different groundless claims, or unsuccessful prosecution of a suit after promising it would be dismissed and set aside. *In re Robert Whitaker*, Case No. 95-00325, 1995 Bankr. LEXIS 2106, *6 (Bankr. D.D.C. October 27, 1995) (citations omitted). Here FEI's defense costs do not constitute the requisite special injury.

abuse of process claim: (1) ulterior motive; and (2) perversion of the judicial process and achievement of some end not contemplated in the regular prosecution of the charge. *See Morowitz*, 423 A.2d at 198. A regular and legitimate use of process does not constitute abuse of process even if it is done with an ulterior motive. *See Geier v. Jordan,* 107 A.2d 440, 441 (D.C. 1954).

"The *sine qua non* of an abuse of process claim . . . is that a defendant has used process to compel a party to do a collateral thing that they would not otherwise do." *Nader*, 555 F. Supp. 2d at 161. The typical case of abuse of process is some form of extortion, improperly using the process to put pressure on the party to compel some action. *Scott,* 101 F.3d at 755 (citing Restatement (Second) of Torts § 682 cmt b (1977)). The mere initiation of litigation is never actionable as abuse of process "no matter what ulterior motive may have prompted it." *Bown,* 601 A.2d 1080*; Morowitz* 423 A.2d 198. "Rather, in addition to the ulterior motive, there must have been a 'perversion of the judicial process and achievement of some end not contemplated in the regular prosecution of the charge.'" *Id.* An abuse of process claim fails when the process is used for the purpose for which it was intended even if there is an incidental benefit to the defendant. *Houlahan v. World Wide Ass'n of Specialty Prgms.*, 667 F. Supp. 2d 195, 200 (D.D.C. 2010).

The District of Columbia courts have interpreted the doctrine of abuse of process very narrowly to avoid the chilling effect it might otherwise have on the filing and prosecution of claims. In this regard, the D.C. Court of Appeals has cautioned:

> It is the announced policy of this jurisdiction to allow unfettered access to our courts. In an effort to avoid infringing upon the right of the public to utilize our courts, we are cautious not to adopt rules which will have a chilling and inhibitory effect on would-be litigants of justiciable issues. We are likewise cognizant of our obligations to protect the innocent against frivolous litigation and to make victims of groundless lawsuits

> whole where they suffer special injury as result of the suit. Predictably our decisions have evolved in response to these competing interests.

Bown, 601 A.2d at 1080 (quoting *Morowitz*, 423 A.2d at 198)).

Here, FEI has no legitimate abuse of process claim because it does not allege that there was any perversion of the regular and contemplated judicial process and the mere initiation of the ESA litigation is simply not actionable as abuse of process. *Bown,* 601 A.2d 1080. Rather, FEI claims that the ESA suit was brought for three purposes: (1) attracting publicity; (2) soliciting fundraising/donations; and (3) eliminating the use of elephants in circuses. *See* Am. Compl. ¶ 302-322. Under the applicable legal precedents, motive is irrelevant, and none of these articulated purposes perverted the use of the judicial process or compelled FEI to do something it could not otherwise be compelled to do — the dispositive element of an abuse of process claim. *See Houlahan v. World Wide Ass'n of Specialty Prgms.*, Case No. 04-1161 (HHK), 2006 U.S. Dist. LEXIS 71858 (D.D.C. September 29, 2006) (holding that plaintiff failed to show any evidence that defendants sought to compel plaintiff to do something which he could not regularly or legally be compelled to do). Accordingly, the abuse of process claim should also be dismissed as a matter of law.[39]

C. The Related Champerty And Maintenance Claims (Counts VI And VII) Fail As A Matter Of Law.

[39] An abuse of process claim cannot be premised on the conclusory allegation that Mr. Rider, the organizations and their counsel sought "the end of Asian elephants in FEI's circus" Am. Compl. ¶ 318, which is not an "end" that was separate and apart from the relief sought in the ESA action. *Id.* From the inception of the ESA case, Mr. Rider, the organizations and their counsel consistently sought to extend the statutory safeguards of the ESA to Asian elephants, seeking declaratory and injunctive relief. *ESA Final Ruling,* 677 F. Supp. 2d at 61. At all times, the ESA plaintiffs engaged in a regular and legitimate use of process consistent with the regular prosecution of ESA laws and the applicable court rules.

1. The Champerty Claim Fails For Several Independent Reasons.

FEI alleges that the law firm Meyer, Glitzenstein & Crystal, and its individual current and former attorneys, Katherine Meyer, Eric Glitzenstein, Howard Crystal, Jonathan Lovvorn and Kimberly Ockene (collectively "the lawyers") are somehow liable for the obscure tort of "champerty" because they were alleged to receive two benefits upon conclusion of the ESA suit: (1) attorneys' fees under the "citizen suit" provision of the ESA; and (2) the forfeiture of elephants to a former client who operated an elephant sanctuary and who is neither named in this suit nor was a plaintiff in the ESA case. Am. Compl. ¶¶ 358-359. This claim fails for three independent reasons — first, because the ESA case ultimately sought only non-monetary relief, the essential elements of the tort cannot be met; second, FEI has no standing to challenge the arrangements between the lawyers and their clients (to which FEI is clearly not in privity); and third, any claim, even if viable, is untimely and barred by the expiration of the statute of limitations.

Champerty is not even explicitly recognized as a tort in this jurisdiction. Rather, both the D.C. Court of Appeals and D.C. Circuit view champerty as a contractual cause of action. Under District of Columbia law, champerty is defined as: "an agreement by an attorney at law to prosecute at his own expense a suit to recover land in which he personally has and claims no title or interest in consideration of receiving a certain portion of what he may recover." *Marshall v. Bickel*, 445 A.2d 606, 609 (D.C. 1982) (citing *Merlaud v. National Metropolitan Bank of Washington, D.C.*, 84 F.2d 238, 240 (D.C. 1936)). Champerty seeks to prevent an attorney from speculating in lawsuits at the attorney's own expense. *Marshall*, 445 A.2d at 608. There are three elements of common law champerty: (1) the attorney's fee must come from the recovery in a successful lawsuit; (2) the lawyer must have no independent claim to the recovery fund; and (3)

the costs and expenses must be borne by the attorney with no expectation of reimbursement from the client. *Id.* at 609.

FEI cannot meet any of these elements. As an initial matter, FEI's claim fails because there were no monetary proceeds at stake in the ESA case. Champerty is a bargain to divide the proceeds of a litigated claim between the owner of the claim and the party supporting the litigation. *Kerner v. Cult Awareness Network*, 843 F. Supp. 748, 751 (D.D.C. 1994) (denying defendants' request for attorney's fees under the doctrine of champerty because there were no proceeds at stake in the litigation: "[t]his is an action for injunctive, not monetary, relief, so champerty does not lie."). Champerty occurs where the party paying the costs and expenses does so in return for a share of the proceeds of the litigation. Joseph M. Perillo ed., 15 *Corbin on Contracts* § 83.10 (2010) ("If the suit is for the recovery of land, the consideration for maintaining it is either a conveyance of an interest in the land or a promise of such a conveyance. If the suit is for money, whether as a debt or damages, the consideration is a share of the money."). Since the ESA action sought declarative and injunctive relief, and there were no monetary proceeds at stake, a claim of champerty fails as a matter of law.[40]

Second, because champerty has been interpreted in D.C. only as a contractual claim, only parties to that contract or third party beneficiaries have standing to sue to challenge the terms of the retention agreement. Here, because FEI is neither a party to the contract nor a third party beneficiary of the legal retention, it cannot sue the lawyers who were its adversaries in the ESA litigation.

[40] The mere fact that the statute under which the case was brought allows for an award of attorneys' fees to the prevailing party does not convert the claim to one for monetary relief. *See Kerner*, 843 F. Supp. at 751.

The common law ban on champerty was designed to eliminate "schemes to promote litigation for the benefit of the promoter rather than for the benefit of the litigant." *Design for Business Interiors, Inc. v. Herson's, Inc.*, 659 F. Supp. 1103, 1108 (D.D.C. 1986) (citing 14 W. Jaeger, *Williston on Contracts*, § 1711 at 869 (3d ed. 1972). Accordingly, "[i]n general, only the parties to the contract of maintenance or champerty have standing to assert those defenses/causes of action." *In re Eugene E. Brown and Debra R. Brown*, 354 B.R. 100, 105 (N.D. W. Va. 2006); 15 Corbin on Contracts § 83.13 (2010) ("the defendant cannot rely on the champertous contract as a defense to liability. Although such actions might not have been brought but for the champertous bargain, defendants must rely on such defenses as they may have on the cause of action asserted by the plaintiff.") As a litigation adversary that is not a party to the agreement, nor a third party beneficiary, FEI unquestionably lacks standing to bring a champerty claim based upon a retention agreement between the lawyers and their clients (the animal protection organizations and Mr. Rider).

Third, even if FEI could assert a claim of champerty, such a claim is barred by the three year statute of limitations set forth under D.C. Code § 12-301(8)(2010). Leaving aside the other insurmountable flaws, any champerty claim based on the retention of the lawyers by Mr. Rider and the animal protection organizations is untimely since FEI was unquestionably aware of the lawyers' retention by 2000, when the original ESA Complaint was first filed against FEI. *See* Complaint for Declaratory and Injunctive Relief (July 11, 2000) in No. 00-1641. Hence, FEI's champerty claim, brought against the lawyers nearly ten years later on February 16, 2010, is clearly untimely and should be dismissed with prejudice.

2. <u>The Maintenance Claim Is Also Legally Defective.</u>

FEI alleges that the ESA organizational plaintiffs, as well as WAP and the HSUS, are liable for the tort of maintenance because they "officiously stirred up litigation and strife" with

FEI and encouraged litigation in which they had no interest. Am. Compl. at ¶ 337. The tort of "maintenance," which is all but a dead letter in the District of Columbia and most other jurisdictions, *see Golden Commissary Corp. v. Shipley*, 157 A.2d 810, 814 (D.C. 1960) ("Although the common law action for maintenance and champerty, in some modified form, probably exists in this jurisdiction, the action for maintenance is so rare in modern times that the law on the subject is neither settled nor clear"), allows an action against one who has stirred up litigation despite having no "concern in the subject matter." *Id.* (citing 10 Am.Jur., Champerty and Maintenance, § 1). Even if maintenance were still a viable cause of action in this jurisdiction, which is not at all clear given that the last case to directly address the issue was decided fifty years ago, *id.*, there are no grounds for it here where all of the organizational defendants did in fact have an undeniable interest in prevailing on the merits the ESA litigation.

Indeed, ASPCA, FFA, AWI, and API — all well-established national animal protection organizations — all had a strong interest in advancing the humane treatment of performing animals, as do both the HSUS and the Wildlife Advocacy Project ("WAP"). *See, e.g., ESA Final Ruling,* 677 F. Supp. 2d at 94-95 ("the organizational mission of Plaintiff API is to advocate against cruelty and exploitation of animals"); *see also JPMorgan Chase Bank, N.A. v. KB Home,* No. 08-CV-01711, 2010 WL 3786342, *7-8 (D. Nev. Sept. 27, 2010) (noting that "any interest whatever in the subject matter of the suit is sufficient to exempt a party giving aid to the suitor from the charge of illegal maintenance. Whether this interest is great or small, vested or contingent, certain or uncertain, it affords a just reason to the party who has such an interest to participate in the suit of another." *Id.* (citing 14 C.J.S. Champerty & Maintenance § 26 (1939)).

In any event, a maintenance claim would be barred by the applicable statute of limitations, which in this case would be, at most, the default three year statute of limitations. *See*

D.C. Code § 12-301 (8).[41] The cause of action accrues on the date of the injury or the date on which the injury and its cause reasonably should have been discovered. *See Morton v. National Medical Enterprises, Inc.*, 725 A.2d 462, 468 (D.C. 1999). Because the injury FEI alleges is its attorneys' fees, it was aware of that injury as early as 2000 when the first ESA Complaint was filed. Further, even if the claim were to have accrued when FEI became aware that the organizational defendants provided funds to Mr. Rider, this claim is still barred because FEI was aware of that funding by May 2002 at the latest, *see supra* at Sections II(B) and V, and the statute of limitations therefore expired in 2005.

D. FEI'S Virginia Conspiracy Act Claim (Count III) Is Barred By The Expiration Of The Statute Of Limitations.

FEI's statutory claim under the Virginia Conspiracy Act is also barred by the expiration of the applicable statute of limitations since FEI's first alleged injury occurred more than five years before suit was brought.

The Virginia Conspiracy Act is delineated in two statutes and provides:

> [a]ny two or more persons who combine, associate, agree, mutually undertake or concert together for the purpose of (i) willfully and maliciously injuring another in his reputation, trade, business or profession by any means whatever or (ii) willfully and maliciously compelling another to do or perform any act against his will, or preventing or hindering another from doing or performing any lawful act, shall be jointly and severally guilty of a Class 1 misdemeanor. Such punishment shall be in addition to any civil relief recoverable under § 18.2-500.

Va. Code Ann. § 18.2-499 (2010). The statute permits the recovery of civil damages if § 18.2-499 is violated: "[a]ny person who shall be injured in his reputation, trade, business or profession by reason of a violation of § 18.2-499, may sue therefore and recover three-fold the damages by

[41] The statute of limitations in this case is arguably one year, as that is the limitations period applicable to malicious prosecution claims. D.C. Code § 12-301(4) (2010).

him sustained, and the costs of suit, including a reasonable fee to plaintiff's counsel, and without limiting the generality of the term, 'damages' shall include loss of profits." Va. Code Ann. § 18.2-500(a)(2010).

Under Va. Code Ann. § 8.01-243 (2010), the statute of limitations for a conspiracy claim is five years: "[e]very action for injury to property . . . shall be brought within five years after the cause of action accrues." *Id.; see also, Detrick v. Panalpina, Inc.*, 108 F.3d 529, 543 (4th Cir. 1997) (applying Virginia law)(holding that Virginia Conspiracy Act imposes a 5-year statute of limitation); *Federated Graphics Cos. v. Napotnik*, 424 F. Supp. 291, 293 (E.D.Va. 1976) (finding that a claim under Virginia Conspiracy Act is subject to 5 year statute of limitations).

A cause of action under the conspiracy statute accrues at the time a plaintiff first suffered any damages resulting from the acts committed in furtherance of the conspiracy. *Eshbaugh v. Amoco Oil Co.*, 234 Va. 74, 77(Va. 1987). Specifically,

> [i]n every action for which a limitation period is prescribed, the right of action shall be deemed to accrue and the prescribed limitation period shall begin to run from the date the injury is sustained in the case of injury to the person or damage to property, which the breach of contract occurs in actions ex contractu and not when the resulting damage is discovered, except where the relief sought is solely equitable or where otherwise provided under § 8.01-233, subsection C of § 8.01-245, § 8.01-249, § 8.01-250 or other statute.

Va. Code Ann. § 8.01-230 (2010).

According to the Virginia Supreme Court, "where an injury, though slight, is sustained in consequence of the wrongful or negligent act of another and the law affords a remedy therefore, the statute of limitations attaches at once. It is not material that all the damages resulting from the act should have been sustained at the time and the running of the statute is not postponed by the fact that the actual or substantial damages do not occur until a later date." *Stone v. Ethan Allen, Inc.*, 232 Va. 365, 369 (Va. 1986); *see also Int'l Surplus Lines Ins. Co. v. Marsh & McLennan,*

Inc., 838 F.2d 124, 129 (4th Cir. 1988) ("In Virginia, only the slightest injury is required to start the running of the limitations period . . . . It is of no consequence that the amount of damages [is] not ascertainable until a later date."); *Detrick,* 108 F.3d at 543 (applying Virginia law).

Here FEI's conspiracy claim is untimely because it was not brought within five years of the commencement of its alleged initial injury. To the extent FEI claims that it was injured by having to expend attorneys' fees to defend against the ESA case (the purported result of this hypothetical conspiracy), its injury commenced on July 11, 2000, when the ESA case was originally filed and FEI had to retain its own counsel to defend the litigation. Moreover, as explained above at Section II(B), it is undisputed that FEI knew by May 2002 that Mr. Rider's expenses were being paid by some of the organizational plaintiffs in the ESA case. Using either date, FEI's Virginia Conspiracy Act claim was filed after the five-year statute of limitations had expired, and is time-barred.

IX. CONCLUSION

For the reasons set forth herein, FEI's Amended Complaint should be dismissed with prejudice in its entirety.

Date: December 3, 2010

Respectfully submitted,

/s/ Stephen L. Braga (with permission)
Stephen L. Braga (D.C. Bar # 366727)
ROPES & GRAY LLP
700 12th Street, N.W., Suite 900
Washington, D.C. 20005
Telephone: (202) 508-4655
Facsimile: (202) 383-9821
Stephen.braga@ropesgray.com
Counsel for Defendants American Society for the Prevention of Cruelty to Animals, Animal Welfare Institute, The Fund for Animals, Tom Rider, the Animal Protection Institute d/b/a Born USA United With Animal Protection Institute, the Wildlife Advocacy Project and the Humane Society of the United States

and

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

and

/s/ Stephen L. Neal, Jr. (with permission)
Bernard J. DiMuro (D.C. Bar #393020)
Stephen L. Neal, Jr. (D.C. Bar #441405)
DIMURO GINSBURG, PC
908 King Street, Suite 200
Alexandria, VA 22314
Telephone: (703) 684-4333
Facsimile: (703) 548-3181
Email: bdimuro@dimuro.com
sneal@dimuro.com
Counsel for Defendant, Animal Welfare Institute

and

/s/ Daniel S. Ruzumna (with permission)
Daniel S. Ruzumna (D.C. Bar#450040)
Peter W. Tomlinson (admitted pro hac vice)
Harry S. Clarke, III (admitted pro hac vice)
PATTERSON, BELKNAP, WEBB, &
TYLER, LLP
1133 Avenue of the Americas
New York, New York 10036
Telephone: (212) 336-2000
Facsimile: (212) 336-2222
Email: druzumna@pbwt.com
pwtomlinson@pbwt.com
hclarke@pbwt.com
Counsel for Defendant, American Society for the Prevention of Cruelty to Animals

and

/s/ Barbara Ann Van Gelder (with permission)
Barbara Ann Van Gelder (D.C. Bar # 265603)
William B. Nes, Esquire (D.C. Bar # 975502)
MORGAN LEWIS AND BOCKIUS, LLP
1111 Pennsylvania Avenue, NW
Washington, DC 20004
Telephone: 202-739-3000
Facsimile: 202-739-3001
Email: bvangelder@morganlewis.com
bnes@morganlewis.com
Counsel for the Humane Society of the United States

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT

UPON CONSIDERATION of the Motion of Defendants to Dismiss Plaintiff's Amended Complaint, any opposition thereto, and the record as a whole, there appearing good cause therefore, it is this __ day of _____, 2011, by this Court, hereby

ORDERED, that the Motion of Defendants to Dismiss Plaintiff's Amended Complaint be and hereby is GRANTED; and it is

FURT 395693.1HER ORDERED, that the Amended Complaint be and hereby is DISMISSED WITH PREJUDICE in its entirety as to all defendants.

_____

The Honorable Emmet G. Sullivan
United States District Court for the District of Columbia

Copies to:

John M. Simpson, Esquire
Joseph T. Small, Jr., Esquire
Richard C. Smith, Esquire
Michelle C. Pardo, Esquire
Fulbright & Jaworski LLP
801 Pennsylvania Avenue, N.W.
Washington, D.C.

Stephen L. Braga, Esquire
Ropes & Gray LLP
700 12th Street, N.W., Suite 900
Washington, D.C. 20005

Laura N. Steel, Esquire
Kathleen H. Warin, Esquire
Wilson, Elser, Moskowitz, Edelman & Dicker LLP
700 11th Street, N.W., Suite 400
Washington, D.C. 20001

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

Barbara Ann Van Gelder, Esquire
William B. Nes, Esquire
Morgan Lewis and Bockius, LLP
1111 Pennsylvania Avenue, NW
Washington, DC 20004

Daniel S. Ruzumna, Esquire
Peter Tomlinson, Esquire
Harry Clarke, Esquire
Patterson Belknap Webb & Tyler LLP
1133 Avenue of the Americas
New York, NY 10036-6710