UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO TEMPORARILY STAY ALL PROCEEDINGS

Defendants successfully delayed plaintiff Feld Entertainment, Inc.'s ("FEI's") discovery of their RICO violation for years by euphemistically packaging their illicit payment scheme; refusing to produce documents that the Court has now ruled they had no right to withhold; falsifying sworn answers to interrogatories and deposition questions, and spoliating evidence. All of this misconduct is documented, can be proven and, astoundingly, continues to unfold. Defendants now ask the Court to "temporarily" stay the RICO Action until the conclusion of the ESA Action.[1] While they call it a "stay," what defendants are really seeking is an order excusing them from having to defend their illegal conduct. Nowhere in defendants' motion do they make a legitimate case for a stay based upon the considerations that normally justify such relief, namely, duplicative litigation of the same issues in two different cases. Indeed, just weeks

[1] The plaintiff in this case (the "RICO Action") is Feld Entertainment, Inc. ("FEI") and the defendants are the American Society for the Prevention of Cruelty to Animals ("ASPCA"), the Fund for Animals ("FFA"), the Animal Welfare Institute ("AWI"), Tom Rider ("Rider"), the Animal Protection Institute ("API") and the Wildlife Advocacy Project ("WAP"). ASPCA, FFA, AWI, Rider and API have sued FEI under the citizen-suit provision of the Endangered Species Act ("ESA") and that case (the "ESA Action") is currently pending before this Court (Civ. Act. No. 03-2006). FEI previously sought leave to amend its answers to assert its RICO claim as a counterclaim in the ESA Action, which the Court denied in its Memorandum Opinion (Civ. Act. No. 03-2006, Docket No. 175, 8/23/07) ("Mem. Op."). FEI then filed its RICO claim as a separate action and the RICO Action was assigned to this Court.

before filing the instant motion, they convinced this very Court that the two matters were so different that a counterclaim in the ESA Action was rejected. Now they claim the two cases are inseparable. Moreover, they cite no case in which a court has stayed a RICO action in circumstances like this. Instead, defendants implore the Court to use its discretion to cover their tracks. That is not how our system of justice works. Defendants are not above the law no matter how moral they believe their cause to be.

Claims that defendants have violated RICO have been made against them pursuant to the pleading requirements of the Federal Rules of Civil Procedure. Those rules are well suited to a determination of whether these claims should proceed. If they fail to pass muster under Rule 12, then that will be the end of them. On the other hand, if the claims are deemed to be valid (which they are), then there is absolutely no reason, and defendants offer none, why those claims should not proceed to the ultimate day of reckoning at trial. Like any other litigant with a viable cause of action, FEI is entitled to its day in court. A "stay" of those claims, simply because defendants would prefer that the Court look the other way when it comes to their own conduct – which is essentially all that this motion amounts to – would be a miscarriage of justice.

The centerpiece of defendants' motion is the invented argument that, somehow, the resolution of the ESA Action will have an effect on the RICO Action. As shown below, it will have no effect whatsoever. No matter what the outcome of the ESA Action, the fact remains that defendants violated the RICO statute and will have to account for their behavior. Contrary to defendants' belief, the ends do not justify the means here. The Court already has held that the RICO Action will require discovery and trial evidence that is wholly separate and distinct from the discovery and trial evidence necessary to resolve the "narrow" issues in the ESA Action. Mem. Op. at 5-6. This is precisely why the RICO claims were not added to the ESA Action and

why they now stand as a separate and independent lawsuit. Defendants vigorously argued for that separation and, now that they have it, should not be allowed to completely reverse their position and claim that there is some kind of critical connection between the two cases that would justify shutting down the RICO Action.

Defendants' insinuation that the RICO Action is some kind of delay tactic also is false. FEI has absolutely no reason to fear any proceeding in which the treatment of its Asian elephants is an issue. The constant chorus of "abuse" – gratuitously included in virtually every filing that defendants make – is untrue and highly offensive to the employees of FEI who have dedicated their lives to the welfare of these animals. Having elephants in captivity is perfectly lawful in this country regardless of whether defendants agree with or approve of it, which they clearly do not. From their perspective, any husbandry tool used on captive elephants – be it the guide, tether or otherwise – should be banned so that elephants cannot be exhibited in captivity, which is the misguided but true outcome they seek in the ESA Action. Yet the law prohibits neither these husbandry practices, nor the exhibition of elephants, and FEI will continue to willingly defend rather than cave in to the meritless claim that it is "taking" its lawfully-owned and exhibited Asian elephants.

The extreme relief that defendants seek here is unwarranted. They ask the Court to permit them to avoid the Federal Rules with which all litigants, including FEI, must comply. The proper procedure here is to permit defendants to proceed with their defense, not to deprive the plaintiff, FEI, of its case.

ARGUMENT

Trial courts have broad discretion to enter a stay of an action before it when there are pending "independent proceedings which bear upon the case." Hisler v. Gallaudet Univ., 344 F.

Supp. 2d 29, 35 (D.D.C. 2004) (quoting Leyva v. Certified Grocers of Cal., Ltd., 593 F.2d 857, 863-64 (9th Cir. 1979)). However, "[t]he proponent of a stay bears the burden of establishing its need." Clinton v. Jones, 520 U.S. 681, 708 (1997); see also Landis v. N. Am. Co., 299 U.S. 248, 255 & 256 (1936) ("the suppliant for a stay must make out a clear case of hardship or inequity in being required to go forward, if there is even a fair possibility that the stay for which [the movant] prays will work damage to some one else") ("the burden of making out the justice and wisdom of a departure from the beaten track lay heavily on the petitioners"). Indeed, the burden on the party moving for a stay is substantial. "The party requesting such a stay must make out a clear case of hardship or inequity in order to prevail . . . ***[T]he right to proceed in court should not be denied except under the most extreme circumstances***." GFL Advantage Fund, Ltd. v. Colkitt, 216 F.R.D. 189, 193 (D.D.C. 2003) (internal citations and quotation omitted) (emphasis added); see also Gordon v. Fed. Deposit Ins. Corp., 427 F.2d 578, 580 (D.C. Cir. 1970) ("The overall interest of the courts that justice be done may very well require that the compensation and remedy due a civil plaintiff should not be delayed (and possibly denied). The court, in its sound discretion, must assess and balance the nature and substantiality of the injustices claimed on either side.").

Defendants have alleged no such "extreme circumstances" to warrant the stay that they request. Indeed, no basis asserted by defendants even comes close to satisfying their heavy legal burden for obtaining a stay. Contrary to defendants' self-serving mischaracterizations of FEI's RICO claim, the RICO Action is ripe, and litigation of the ESA Action will in no way clarify, narrow or moot litigation of it. Moreover, allowing the RICO Action to proceed will not result in any prejudice to defendants of the type necessary to obtain a stay. By definition, being named as a defendant in a lawsuit is inconvenient. If that universal truth were the standard for obtaining

a stay, then FEI could get one in the ESA Action. Such an approach is obviously not the law generally, and it is contrary to the Court's rulings in the ESA Action. When FEI sought to stay discovery for the purpose of containing discovery costs while its motion for summary judgment was pending, this Court refused to grant the request. See Order (Civ. Act. No. 03-2006, Docket No. 94, 9/26/06). Staying the RICO Action would only further prejudice FEI by indefinitely postponing its right to pursue a claim, the existence of which was hidden from it for years by defendants' continued false statements under oath and spoliation of evidence. Defendants' transparent attempts to gain sympathy and special treatment from the Court merely because they are non-profit organizations is likewise not supported by the law. Nor is defendants' unfounded argument that they have a First Amendment right to commit illegal activity under the guise of their political agenda. The Constitution of the United States affords no such protection. FEI, on the other hand, has a right to redress from the RICO activity that was leveled at it in a bad faith effort to exterminate its business. Depriving FEI of the opportunity to seek such redress would be a denial of its due process.

I. LITIGATION OF THE ESA ACTION WILL HAVE NO BEARING UPON THE RICO ACTION

Defendants claim that a stay is warranted because the resolution of the ESA Action will somehow clarify or limit the issues to be litigated in the RICO Action. Defs. Mot. at 16-22. Defendants' argument, however, is premised upon their self-serving mischaracterization and over-simplification of FEI's RICO claim. Nothing that happens in the future of the ESA Action has anything to do with FEI's ability to bring or succeed on the merits of the RICO Action. Rider's decision to join and remain in the ESA Action already has occurred – as have defendants' schemes to pay him and cover-up those payments. Rider's standing is the "but for" cause of the ESA Action, and any future determinations as to the standing of the organizations

(or any requested new plaintiffs) will not moot the injury that FEI already has suffered. In other words, the harm FEI already has incurred over the past seven years cannot be undone.

Further, the Court's determination as to Rider's credibility as a witness in the ESA Action will not be a mini-trial on the RICO conduct because defendants convinced this Court to reject FEI's counterclaim in that suit. Rider's testimony will not clarify or moot whether the payments to, and received by him, violate the federal bribery and illegal gratuity statutes, and the Court will not take up the questions of law and fact associated with those allegations in the ESA Action. Moreover, defendants' contention that one case will bear upon litigation of the other is directly contrary to the Court's August 23, 2007 Memorandum Opinion, which unequivocally held that the ESA and RICO Actions involve different legal issues and will require different evidence. Mem. Op. at 5 ("The focus of the only claim in the [ESA Action] is whether or not [FEI's] treatment of its elephants constitutes a taking within the meaning of Section 9 of the ESA. Any limited information about payments to or the behavior of Tom Rider that [FEI] is entitled to in order to challenge [the] credibility of one plaintiff in [the ESA Action] is far different from the vast amount of information [FEI] would be seeking . . . to prove an alleged RICO scheme."). Litigation of the ESA Action will not clarify, narrow or moot any legal or factual issues to be litigated in the RICO Action and the cases cited by defendant are inapposite.[2]

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[2] Cf. Sevinor v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 807 F.2d 16, 20 (1st Cir. 1986) (staying litigation where pending arbitration may have preclusive, evidentiary, or issue-narrowing effect); S.A. Minercao Da Trindad-Samitri v. Utah Int'l, Inc., 745 F.2d 190, 196 (2d Cir. 1984) (staying litigation pending arbitration where arbitrable claims dominated case and non-arbitrable claims were of "uncertain" validity); IBT/HERE Employee Representatives' Council v. Gate Gourmet Div. Americas, 402 F. Supp. 2d 289, 293 (D.D.C. 2005) (arbitration may affect "scope" of case or resolve issues raised in their entirety); Abbey v. Modern African One, LLC, 305 B.R. 594, 609 (D.D.C. 2004) (staying plaintiffs' claims where "at least some of [those] claims will in all probability be determined by [an ongoing] adversary proceeding"); Cohen v. Carreon, 94 F. Supp. 2d 1112, 1120 (D. Or. 2000) (staying litigation pending ruling in state court where claims in both cases substantially similar); Cullen v. Paine Webber Group, Inc., 689 F. Supp. 269, 283 (S.D.N.Y. 1988) (staying claim pending resolution of arbitration proceeding where scope of arbitral issues uncertain); Terra Nova Ins. Co. Ltd. v. Distefano, 663 F. Supp. 809, 813 (D. R.I. 1987) (staying claim filed in federal court where "viability" of that claim was "contingent upon the outcome of parallel state court proceedings"); Shaw v. Williams, 676 F. Supp. 168, 171 (N.D. Ill. 1987) (staying claim filed in federal court where plaintiff filed state court action two years prior and the court found a substantial likelihood

Having already persuaded the Court that the RICO claims are unrelated to the ESA Action, defendant cannot be heard today to claim that the RICO Action is inseparable from the ESA Action such that the drastic measure of a stay is appropriate.

A. The Standing Of The Organizations And Potential New Plaintiffs Is Irrelevant To The RICO Action

According to defendants, even if Rider's standing is successfully challenged in the ESA Action, either the organizations or the request for new individual plaintiffs[3] will generate standing to bring the ESA Action, no longer making Rider the "but for" cause of the ESA Action and therefore eliminating any harm to FEI by having been made to litigate claims led by Rider. Defs. Mot. at 19-20. This argument fails. The bribery, illegal gratuities, obstruction, mail fraud and wire fraud do not disappear even if Rider disappears. Those acts already have been consummated during the period in which the ESA Action has proceeded on Rider's standing alone. Any future determination as to the standing of any other party will not eliminate the injury that FEI already has incurred. It would serve at most as a limitation on the damages that FEI is entitled to recover.

While defendants would like to re-write the history of the ESA Action on standing, the record is clear: by virtue of this Court's June 2001 opinion, Performing Animal Welfare Society v. Ringling Bros., No. 00-1641 (D.D.C. June 29, 2001), and the decision of the Court of Appeals, ASPCA v. Ringling Bros., 317 F.3d 334 (D.C. Cir. 2003), there is no doubt that Rider is the "but

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that state court litigation would dispose of federal case); Spencer v. Agency-Rent-a-Car, Inc., No. 81-2097, 1981 WL 1707 (D. Mass. Nov. 17, 1981) (staying RICO claim while litigation of the plaintiff's securities fraud claim, which was predicated on the same conduct, proceeded).

[3] The request to replace the individual plaintiffs in the ESA Action remains undecided. Granting the request would be an egregious outcome given the scope of the defendants' conspiracy. FEI has set forth in detail the latest evidence produced by defendants pursuant to the Court's Order in the ESA Action, which further supports FEI's allegations that defendants conspired to, and did indeed engage in, activity that violates the RICO statute. Notice of Supp. Points of Authority in Opp. to Pls. Mot. For Leave to File a Supp. Compl. (Civ. Act. No. 03-2006, Docket No. 199, 10/4/07).

for" cause of the ESA Action because without him there would be no ESA Action.[4] Further litigation of the ESA Action will not change these holdings. They are the law of the case in the ESA Action.

The organizations' argument that they have alleged their own standing in the ESA Action, see Def. Mot. at 20 n.6, and can now prove those allegations, see Defs. Mot. at 19-20 ("the Court may . . . determine that the other plaintiffs in the ESA Action have standing irrespective of Tom Rider"), is a red herring. The standing of the organizations already has been litigated and is not subject to further consideration by the Court. Defendants do not identify any reason why that decision should be reconsidered.[5] Cf. Spirit of the Sage Council v. Kempthorne, No. 98-1873, 2007 U.S. Dist. LEXIS 63684, at *17-18 (D.D.C. Aug. 30, 2007) (Sullivan, J.) (prior ruling of the Court that plaintiffs had standing would be followed as the law of the case because there were no changed circumstances and "the parties should not have to battle for the same judicial decision again without good reason."). But even if the Court were to reverse itself and now find that the organizations have standing independent of Rider, that would not change the fact that the ESA Action has been pursued for the past seven years on the basis of Rider's

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[4] This Court held that the organizations have neither an aesthetic injury nor an informational injury. On appeal, the D.C. Circuit opined only as to Rider's standing; therefore, this Court's holding that the organizations do not have standing remains the law of this case and is not subject to further litigation. ASPCA v. Ringling Bros., 317 F.3d 334, 338 (D.C. Cir. 2003).

[5] Moreover, a public statement by their own counsel makes clear that the defendant organizations (and their counsel) knew that their ability to bring the ESA Action depended entirely on Rider's standing at the time the complaint was filed in 2000 and that their present arguments regarding their own standing are efforts at back-pedaling. Lead counsel for plaintiffs in the ESA Action, Katherine Meyer, explained at a 2006 symposium that it was Rider's standing – as an individual with an alleged aesthetic injury, as opposed to an organizational plaintiff with an alleged informational injury – that was essential for standing to bring the ESA Action:

> In the Ringling Bros. case, ***our main argument was that Tom Rider*** had been a barn man for the elephants and had seen the mistreatment of the Asian elephants . . . When [Laidlaw] was issued, ***we saw an opening for Rider to have standing. . . . So we used [Laidlaw] . . . and came up with the novel argument that Rider was suffering Article III injury*** because he had to avoid going back to see his "girls," as he calls them, whom he loved so much.

13 Animal L. 61, 74-75 (2006) (emphases added).

fabricated "injury in fact" as implemented and facilitated by defendants' racketeering activity. Those actions already have occurred and will not vanish by virtue of some decision on the organizations' standing yet to be made by the Court. That is, for at least the past seven years, the RICO "bell" has been ringing in connection with the ESA Action, and that bell is not going to be "unrung" by any future decision in that case.

For the same reasons, defendants' effort to add three new individual plaintiffs to the ESA Action is beside the point. Whether these parties come in or not (which should be prohibited), and whether they have standing in their own right (which they do not), has absolutely no effect on the RICO violations that have already occurred and the damages that FEI has already suffered as a result. What the effort to add the new ESA Action plaintiffs does confirm, however, is defendants' recognition that it is only a matter of time before Rider is eliminated as a plaintiff once the full extent of the illegal scheme to pay him is made known. It also undercuts the organizations' claim that they do not need Rider because they have standing in their own right. If that is the case, then there would be no need to add more plaintiffs. Defendants have essentially already admitted this. See Reply in Support of Pls. Mot. for Leave to File a Supp. Compl. (Civ. Act. No. 03-2006, Docket No. 187, 9/11/07) at 4 ("[B]ecause Ms. Hundley has alleged that she suffers precisely this kind of injury, her standing is indistinguishable from what the Court of Appeals has already ruled is sufficient to satisfy the requirements of Article III.").

In short, defendants' contrived standing arguments do not justify a stay of the RICO Action. Taking defendants' position on its face still gets them nowhere: Even if the organizational defendants' standing was subject to further litigation and the Court found that the organizations do have a cognizable "informational" injury, and even if other individuals were added as plaintiffs to the ESA Action who actually have some kind of aesthetic injury and are

not participants in racketeering activity, such events would only serve to limit FEI's injury and damages, not eliminate them. While waiting for resolution of the ESA Action would suit defendants, it is not a basis for a stay.

B. Rider's Credibility As A Witness Is Irrelevant To The RICO Action

Contrary to defendants' assertions, Rider's witness testimony in the ESA Action will not serve to clarify, let alone be dispositive of, whether the (now undisputed) payments to and received by Rider are bribes or illegal gratuities. Defendants incorrectly argue that the Court should permit the RICO Action to proceed only if it "doubts the credibility of Mr. Rider's testimony" after first hearing it in the ESA Action. Defs. Mot. at 16-17 ("if the Court concludes that Mr. Rider's testimony is credible (and indeed, is corroborated by the other testimony and evidence), then that will raise serious questions as to whether FEI has sufficiently pled a claim under RICO."). This argument is seriously flawed, legally and logically.

The RICO Action will go to trial unless defendants either get it dismissed under Fed. R. Civ. P. 12 or obtain summary judgment under Fed. R. Civ. P. 56. It is elementary that a disposition under Rule 12 is to be made solely within the four corners of the pleadings. Therefore, regardless of how credible or incredible Rider's testimony in the ESA Action is, it would not be properly considered by the Court pursuant to a motion under Rule 12, either to dismiss for failure to state a cause of action (12(b)(6)) or for judgment on the pleadings (12(c)). See Saddler v. D'Ambrosio, 759 F. Supp. 4, 8 (D.D.C. 1990) ("Much of the resolution of the contradiction in the versions of events . . . will be based on the evaluation of the credibility of witnesses, something not available to the Court in the posture of a motion to dismiss, or a motion for summary judgment."). Indeed, for purposes of a Rule 12 motion in the RICO Action, the Court would be required to assume the truth of the allegations in the Complaint, namely that

Rider's account of the alleged elephant abuse he claims he witnessed is false and has been tailored, in exchange for money, to fit the defendants' "taking" claims and other agenda items. Compl. ¶¶ 127-133. Thus, defendants' assertion (Defs. Mot. at 17 & 18) that "[i]f the Court concludes that Mr. Rider's testimony is credible . . . then that will raise serious questions as to whether FEI has sufficiently pled a claim under RICO" simply reflects defendants' profound misunderstanding of Rule 12 procedures. Whether the RICO claim has been sufficiently pled will turn solely on the allegations in FEI's Complaint.

Nor would Rider's credibility or lack thereof in the ESA Action be a basis for summary judgment in the RICO case. Credibility is inherently factual, and it is also elementary that when a case boils down to the credibility of a witness, summary judgment is improper. Czekalski v. Peters, 475 F.3d 360, 363 & 368 (D.C. Cir. 2007) (on summary judgment, the court "must view the evidence in the light most favorable to the nonmoving party . . . , draw all reasonable inferences in her favor, and ***eschew making credibility determinations or weighing the evidence***") ("This is a dispute we cannot resolve without evaluating witness credibility and weighing the evidence, neither of which is appropriate at the summary judgment stage.") (citations omitted) (emphasis added). Tellingly, defendants cite no case in which a court has determined that a witness is credible as a matter of law in one case based upon the testimony of that witness in another case. Moreover, on a motion for summary judgment by defendants in the RICO Action, the inferences and facts will have to be taken in favor of the non-movant (i.e., FEI). See Czekalski, 475 F.3d at 363. As previewed in the Complaint – the allegations of which are based on evidence actually produced in the ESA Action – there would be more than an ample basis for the proposition that issues of fact exist as to whether Rider, and the other defendants, are truthful.

Thus, there is no legally permissible way that the Court's assessment of Rider's credibility in the ESA Action would be any basis for a determination of the merits of the RICO claims. By their motion for stay, defendants are asking the Court to wait for something to happen in the ESA Action that the Court cannot properly consider in any event in the RICO Action with respect to whether or not the RICO claims should proceed.

Furthermore, "credibility" is not the legal standard for (or even an element of) violation of the federal bribery statute or the federal illegal gratuity statute. See 18 U.S.C. § 201(b)(3)-(4) ("directly or indirectly, ***corruptly*** gives, offers, or promises anything of value to any person, or offers or promises such person to give anything of value to any other person or entity, ***with intent to influence the testimony***") ("directly or indirectly, ***corruptly*** demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally or for any other person or entity ***in return for being influenced in testimony***") & 18 U.S.C. § 201(c)(2)-(3) ("directly or indirectly, gives, offers, or promises anything of value to any person, ***for or because of the testimony***") ("directly or indirectly, demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally ***for or because of the testimony***") (emphases added). The credibility assessment that the Court will make in the ESA Action will simply be whether or not Rider's account of what he claims he witnessed is believable. That does not involve any legal determination as to the intent and purpose of the payments (i.e., whether the payments were made with a "corrupt" intent and were made with an "intent to influence") when the Court hears Rider's testimony in the ESA Action.

Further, even truthful testimony that is purchased violates the federal illegal gratuity statute, making the credibility (and corroboration) of Rider's testimony in the ESA Action irrelevant for purposes of the RICO Action. See 18 U.S.C. § 201(c)(2)-(3) ("for or because of

the testimony under oath"). It makes no difference, therefore, if Rider's accounts regarding elephant abuse are true or false in the context of this statute – a point that defendants conspicuously overlook. As the Court previously ruled in the ESA Action, those legal and factual issues are independent of the issues raised in the ESA Action. See Mem. Op. at 5 ("The focus of the only claim in [the ESA Action] is whether or [FEI's] treatment of its elephants constitutes a taking within the meaning of Section 9 of the ESA."). The purpose and intent of the payments, and ultimately whether they were bribes and/or gratuities for testimony, are questions of fact that can only be decided by a jury in the RICO Action.

Moreover, after trial on the ESA Action, the Court will not be in a better position to make any "assessment" as to whether Rider was bribed because it will have had heard only a small portion of the RICO evidence, further undermining any argument in support of a stay. The Court held that the RICO Action will require substantially more evidence than is relevant to the ESA Action and denied FEI's request for full discovery on the RICO conduct. See Mem. Op. at 5 & 6 ("Any limited information about payments to or the behavior of Tom Rider that defendant is entitled to in order to challenge [the] credibility of one plaintiff in this case is far different from the vast amount of information [FEI] would be seeking . . . . to prove an alleged RICO scheme.") ("The far-reaching nature of defendant's RICO claim would likely require substantial additional evidence . . . beyond the evidence already produced on the payments to Tom Rider, as defendant's alleged scheme is not limited simply to these payments."). To properly make any "assessment" as to the viability and merit of the RICO Action, specifically the bribery allegations, the Court must have the entire record of the extensive RICO conduct before it. As the Court has opined, this will require substantial additional discovery that will not take place

when the "very limited discovery" that remains to be completed in the ESA Action is taken. See Mem. Op. at 4.

Rider's testimony in the ESA Action (assuming he even ultimately testifies in that case), and any determination the Court makes as to his credibility therein, is entirely irrelevant to the legal and factual issues that go to whether the payments he received from the other defendants are bribes or illegal gratuity payments. Because the trial of the ESA Action will have no bearing upon whether Rider was bribed, a stay is inappropriate on this basis.

C. The Court Has Held That The RICO Action And The ESA Action Involve Distinct Legal Issues And Evidence That Do Not Support The Granting of A Stay

Defendants' argument that the ESA Action will bear upon litigation of the RICO Action is directly contrary to the Court's Memorandum Opinion and the Court should deny defendants' motion on the basis of its Opinion alone.[6] The Court unequivocally held that litigation of the ESA Action will determine whether FEI violated section 9 of the ESA and that issue alone. See Mem. Op. at 5 & 8 ("[t]he focus of the only claim [] is whether or not [FEI's] treatment of its elephants constitutes a taking within the meaning of Section 9 of the ESA") (the ESA Action involves "litigation on a very narrow issue – whether or not [FEI's] treatment of its elephants constitutes a taking"). Further, the Court opined that the ESA Action and the RICO Action involve different legal issues and will require different evidence. See Mem. Op. at 6 (FEI's RICO claim involves "an elaborate scheme, including cover-ups" that "would likely require substantial additional evidence – including at minimum, numerous additional documents and

[6] Not only is defendants' argument contrary to the Court's Opinion, it is also contrary to their own prior position on this issue. In opposition to FEI's efforts to add its RICO claim as a counterclaim in the ESA Action, defendants strenuously argued that the two were in no way related. Predictably, since the opposite conclusion now suits defendants' position, they now argue that the two actions are intimately related. Judicial estoppel, however, prevents defendants from doing just that. See Zedner v. U.S., 126 S. Ct. 1976, 1987 (2006) ("judicial estoppel generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase.") (citations omitted).

depositions – beyond the evidence already produced on payments to Tom Rider, as defendant's alleged scheme is not limited to these payments."). And, as argued previously, while the Court may evaluate the payment evidence to determine whether to credit Rider's testimony, the Court's determination as to whether Rider is telling the truth about elephant abuse has ***no*** relevance as to whether Rider was bribed or received illegal gratuities for that testimony (or whether the RICO Action could survive a motion to dismiss or for summary judgment on those issues). In denying FEI's motion for leave to amend, the Court expressly rejected FEI's argument that the RICO conduct had become part and parcel of the ESA Action and that the claims should be litigated at the same time.

Thus, the Court has held that, for a variety of reasons, the RICO issues must be litigated separately from the "narrow" "taking" issue. See Mem. Op. at 4-8. This determination is incompatible with defendants' insistence that the two cases are so closely connected that the RICO case must be stayed pending the outcome of the ESA Action. If such a connection existed, however, then the RICO claims should have been added as a counterclaim to the ESA Action. The Court ruled otherwise, and that determination, standing alone, shows that a stay of the RICO case would be unwarranted.

II. PROCEEDING WITH THE RICO ACTION WILL PRESENT NO RECOGNIZED PREJUDICE TO DEFENDANTS, LET ALONE A "CLEAR CASE OF HARDSHIP OR INEQUITY" AS IS REQUIRED BY CONTROLLING PRECEDENT

Defendants cannot demonstrate "prejudice," let alone a "clear case of hardship or inequity," which is required by a long line of Supreme Court cases prescribing the standards for obtaining a stay of litigation. Clinton v. Jones, 520 U.S. 681, 708 (1997) ("[t]he proponent of a stay bears the burden of establishing its need"); Landis v. N. Am. Co., 299 U.S. 248, 255 (1936)

("the suppliant for a stay must make out a clear case of hardship or inequity in being required to go forward"). Their inability to do so is reason enough to deny their motion for a stay.

Defendants incorrectly contend that the "same considerations" that led the Court to deny FEI's motion for leave to amend "counsel heavily in favor of staying" the RICO Action. Defs. Mot. at 14. In fact, it is exactly the opposite: The Court's prior ruling addressed ***whether*** the ***RICO*** claim ***should delay*** litigation of the ***ESA*** Action while the present inquiry is ***whether*** litigation of the ***ESA*** Action ***should delay*** litigation of the ***RICO*** Action. Since there will be no RICO counterclaim in the ESA Action, it is clear the proceeding with the RICO claims in a totally separate lawsuit can have no delaying or any other effect on the ESA action. Such a delay was the primary basis that defendants would have suffered if the "taking" and RICO claims were adjudicated in one lawsuit. That defendants would be inconvenienced by defending one lawsuit while pursuing another does not establish "prejudice" let alone "hardship." See Baisden v. Bourne, No. 06-517, 2006 U.S. Dist. LEXIS 88114, at *11 (D. Neb. Dec. 5, 2006) ("The interest of the plaintiffs to proceed with one case at a time does not justify the burden of delay a stay may cause the defendants."). Perhaps defendants should have considered that they could be called to account for hiring a plaintiff to procure standing *before* proceeding with such a scheme as the consequences for doing so are not unforeseeable.

Defendants argue that "the prejudice and dilatory motive that the Court deemed sufficient bases to deny FEI's motion to add the RICO claim into the ESA Action are also grounds for staying the Second RICO Suit." Defs. Mot. at 15. This is wrong. The considerations identified are only relevant when determining whether a counterclaim should be added to an ongoing case. Now that the RICO claims are the subject of an independent lawsuit, as defendants insisted that they be, the only operative "timing" issue is whether FEI filed its RICO claim within the four

year statute of limitations (which it has).[7] Whether a proposed counterclaim comes too late in the course of an ongoing case has nothing to do with whether a newly filed lawsuit is barred by limitations, and defendants' effort to conflate the two concepts should be rejected.

Defendants' "prejudice" argument is equally unfounded. In its opinion, the Court's reference to "prejudice" involved the organizations and Rider having to litigate the ESA "taking" claim at the very same trial as the RICO claim, and that adding the RICO claim may have delayed that trial. Mem. Op. at 4-7. Now that it has been filed as a separate lawsuit, litigation of the RICO Action will in no way delay trial of the ESA Action and, as such, it will work no prejudice on defendants. Moreover, given that the Court has established firm deadlines for the close of discovery and for the submission of pre-trial schedules in the ESA Action, it is difficult to imagine how the newly-filed RICO lawsuit could advance at any pace that would interrupt or divert time or resources from the ESA Action – and, in any event, defendants make no argument to the contrary.

Litigants are often required to simultaneously prosecute and defend multiple lawsuits at the same time. That defendants will have to devote attention to the RICO Action at the same time as the ESA Action is no reason to stay the former. Defendants are in this position because, as FEI maintains, they engaged in a pattern of illegal racketeering activity. The Federal Rules provide the framework for determining whether FEI's RICO claims should go forward, namely, Fed. R. Civ. P. 12 & 56. If the claims fail under those rules, then that will be the end of it. However, if they pass muster under those rules, then they clearly should proceed to trial. In neither event is there any basis for staying consideration of the claims.

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[7] Indeed, the Court found that the earliest that FEI could have had notice of a potential RICO cause of action was September 2005, which is well within the four-year statute of limitations. See Mem. Op. at 7.

Tellingly, plaintiffs cite no authority for their position that a lawsuit brought against one party should be stayed while an unrelated lawsuit brought by that party is pursued. Defendants are not immune from defending a lawsuit against them merely because they have filed their own. Indeed, defendants' novel approach would allow any litigant faced with multiple litigation to stay subsequent, unrelated litigation on the basis that it preferred to not spend its time or resources on multiple actions (particularly if it is defendant). FEI certainly has never received such a "free pass" from the judiciary even though the animal rights activists have filed simultaneous, separate lawsuits against it. It had to litigate both simultaneously, as defendants should also be required to do. The reality of what is happening here is that defendants are asking the court to protect them from having to be defendants. They have no reservations whatsoever about filing lawsuits while other matters are pending so long as they get to be the plaintiffs. There is no legal basis for affording them such special protections, and indeed, to do so would be an abuse of discretion.

For this reason, federal courts have expressly rejected the very same argument: "[B]eing required to defend a suit, without more, does not constitute a 'clear case of hardship or inequity' within the meaning of Landis." Lockyer v. Mirant Corp., 398 F.3d 1098, 1112 (9th Cir. 2005); see also Sierra Club v. City of Honolulu, No. 04-00463, 2007 U.S. Dist. LEXIS 67595, at *11-12 (D. Haw. Sept. 11, 2007) (emphasis added) (***no hardship where defendant had to "expend limited resources to . . . defend [civil] lawsuit when [defendant was] pursuing global settlement negotiations involving hundreds of millions of dollars of [the] same issues with" the government***); Am. Honda Motor Fin. Co. v. Coast Dist. Sys., No. 06-04752, 2007 U.S. Dist. LEXIS 19981, at *5 (N.D. Ca. Feb. 26, 2007) (no hardship where defendant subject to "inconvenience because of duplicative discovery requests" in two ongoing proceedings).

Like Sierra Club, the allegedly inconvenient timing of the RICO Action and defendants' supposed "limited resources," are not proper bases for a stay. See Defs. Mot. at 2-3 & 15 ("[P]ermitting the Second RICO Suit to proceed at this time will seriously prejudice the ASPCA Plaintiffs' ability to pursue the ESA Action . . . by diverting their attention and limited resources from that case to this one.") ("[I]t is evident that the upcoming few months are the worst possible time for the ASPCA Plaintiffs and their counsel to be distracted by the Second RICO Suit. . . . [T]he ASPCA Plaintiffs and their counsel will be devoting substantial attention to the ESA Action in the coming few months."). FEI and its counsel will also be busy with both actions, so the complaint itself is hollow.

Moreover, the claim of "limited resources" is not supported by any evidence, and although defendants like to baldly assert this, they have yet to prove it. The Complaint here shows, based on defendants' own IRS Form 990 filings that defendants are (or in the case of FFA are closely associated with) organizations that have millions of (in some cases hundreds of millions) of dollars in assets. Compl. ¶¶ 22-27, 123 (total net assets of ESA Action organizational plaintiffs is over $310 million). The "David vs. Goliath" image that defendants would like to create is disingenuous and tiresome.

Defendants' argument that the RICO Action will distract their counsel during the ESA Action similarly is not a basis to warrant a stay. Despite the fact that Meyer, Glitzenstein & Crystal ("MGC") attorneys have been involved in the RICO activity, and likely will be witnesses in the RICO Action, defendants have voluntarily chosen to retain the same law firm to represent them in the RICO Action. That MGC may have "limited resources" (another unsupported assertion) and may be unable to litigate both cases at the same time is no reason to delay FEI's day in court. Defendants were free to retain entirely different counsel but apparently chose not

to do so. Indeed, it is difficult to understand why counsel would undertake a defense of the RICO Action knowing that they would be material witnesses in the litigation.[8] Defendants (and their counsel) knew of the deadlines approaching in the ESA Action at the time the RICO Action was filed. Defendants cannot shield themselves from their illegal and unethical conduct and delay FEI's day in court by retaining counsel that allegedly are "too busy" or has inadequate resources to properly represent them.

That MGC's representation of defendants creates a potential conflict of interest also is irrelevant to a stay of the RICO Action. The Court recognized that adding the RICO claim to the ESA Action could have created the need for the change of counsel in that case and consequently could have delayed the litigation. See Mem. Op. at 6 ("Allowing a counterclaim to go forward that alleges plaintiffs' counsel's involvement in improper payments would likely involve depositions of plaintiffs' counsel and create a need for new counsel to pursue the 'taking' claim where no need currently exists."). However, defendants cannot now argue the same with respect to the RICO Action: They voluntarily retained the same law firm with full knowledge of that conflict. While it is one thing for a lawyer to become a material witness in a case after a counterclaim has been filed, it is an entirely different matter for a lawyer to take on a case (and for a client to retain that lawyer) knowing at the outset that she will be a material witness in that matter. Defendants' counsel's claimed inability to litigate both cases is the direct result of defendants' own failure or unwillingness to seek independent legal advice and to retain counsel with a conflict. The self-created circumstances by defendants cannot be used to delay or deny FEI's right to prosecute its own claims.

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[8] In fact, the representation may violate District of Columbia Rule of Professional Conduct 3.7(a) ("A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness").

III. ALLOWING DEFENDANTS TO FURTHER DELAY A CLAIM, THE EXISTENCE OF WHICH THEY HID FOR MORE THAN SIX YEARS THROUGH FALSE TESTIMONY UNDER OATH AND SPOLIATION OF EVIDENCE, WOULD SIGNIFICANTLY PREJUDICE FEI'S RIGHT TO ITS DAY IN COURT

Defendants' request for a stay, while not only unsupported by any caselaw, will result in significant prejudice to FEI, which cannot be ignored. As defendant's illegal activity continues – and more evidence of it has emerged since the filing of the RICO complaint – it is exceedingly necessary for FEI to have its day in court to redress these wrongs. Defendants have hidden the basis of FEI's RICO claim for years. As set forth below, since 2001, they have repeatedly lied under oath about the payments to Rider, they have withheld documents requested by FEI, and they have destroyed numerous others. Now, after having concealed this conduct for years, defendants ask the Court to indefinitely stay these proceedings to wait for the trial of another case that has no bearing upon the claims in this case. FEI, like any plaintiff, is entitled to have its claims heard and defendants should not be permitted to further stall litigation of the RICO Action now that their misconduct has been discovered – notwithstanding their best efforts to cover it up. See GFL Advantage Fund, Ltd. v. Colkitt, 216 F.R.D. 189, 193 (D.D.C. 2003) (internal citations and quotation omitted) (emphasis added) (***"[T]he right to proceed in court should not be denied except under the most extreme circumstances***.").

For example, after falsely and repeatedly representing that they have been "forthcoming" with their discovery responses and that they already had disclosed the existence of all payments made to Rider, defendants last month produced approximately 1,000 pages of documents and numerous revised interrogatory responses that provide, for the first time, information not previously known to FEI ***and the existence of which, defendants had denied on multiple occasions***. Defendants and their counsel now claim that this information was just "overlooked," and that counsel's repeated assurances to FEI and the Court that all documents already had been

produced were merely "overstatements," and they apologize for that. See Pls. Resp. to Def. Notice of Supp. Points and Authorities in Opp. to Pls. Mot. for Leave to File a Supp. Compl. (Civ. Act. No. 03-2006, Docket No. 201, 10/5/07), at 3-4. Regardless of what defendants' latest excuse is (and significantly, several have now been proffered), the fact is that this material, including legal bills and a 1099 issued by counsel to Rider, was withheld by defendants for years until the Court ordered them to produce it. Astoundingly, only after being compelled by Court order, defendants produced documents and information that contradict their earlier statements to this Court that they had been "forthcoming" and informed FEI of all funds paid to Rider.[9] Defendants, for example, recently informed FEI for the first time that approximately $10,000 ***was paid to Rider by his counsel*** and billed to the organizations. See Ex. 1, Rider's Latest Response to Inter. No. 24; Ex. 2, 1099 From Law Firm. This single revelation contradicted numerous sworn interrogatory responses and sworn deposition answers provided by defendants while represented by counsel who knew, or clearly should have know, them to be false.[10] The

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[9] See Pls. Opp. to FEI's Mot. to Compel Discovery From the Organizational Plaintiffs (Civ. Act. No. 03-2006, Docket No. 156, 6/26/07) at 4-5 ("Thus, ***defendants already have ... the actual amounts of funding that the groups have donated for Mr. Rider***'s media and educational campaign. ... Accordingly, ***there is no information remaining to compel on this matter that would not simply duplicate information already provided***, without trampling on plaintiffs' First Amendment rights."); id. at 14 ("***[T]he groups and WAP have already provided defendants with documents demonstrating the amounts of such funding for each group.***"); id. at 21 (***Plaintiffs have provided "defendants with information demonstrating the amount and source of funding Mr. Rider."***); id. at 27 ("As plaintiffs have repeatedly stated, ***they have not withheld, and have never intended to withhold, any documents or information concerning the amounts of funding that the groups are providing either to Mr. Rider or to WAP*** ... Indeed, ***defendants now have a complete accounting of all of the funds the groups have provided for Mr. Rider's media work***, both directly and by way of donations to WAP, and all of defendants' complaints about missing information on this issue relate to defendants' desire to force plaintiffs to provide the same information in multiple formats – i.e., in written, documentary, and oral form at depositions. However, ***wasting the Court's and the parties' time in an attempt to compel plaintiffs to provide information that defendants already have is vexatious and harassing to say the least, and the Court should not tolerate this conduct.***"); id. at 29 (***"[D]efendants had already obtained ... an accounting of all of the funding that the organizational plaintiffs had provided to Mr. Rider or to WAP."***). The recently compelled production demonstrates that ***all*** of these statements were false.

[10] See Ex. 3, FFA Depo. at 157-59 (testifying that it only paid Rider on one occasion and omitting any reference to these payments); Ex. 4, AWI Depo. at 142 (omitting any reference to these payments and testifying that it was not aware that it was sharing Rider's expenses with other organizations even though the bills from its law firm identified the payments to Rider as "shared expense"); Ex. 5, ASPCA Depo. at 226-27 (testifying under oath that its payments to Rider were not through its counsel in 2003 notwithstanding that it now conceded such payments were

documents related to these payments also flatly contradict statements to FEI about this topic. Notwithstanding defendants' proclamation that they "have no 'non-privileged portions of the invoices from [our] firm that reflect monies filtered through it for payments to Mr. Rider,'" ***plaintiffs recently produced ten such invoices after being compelled by the Court to do so***. Compare Ex. 9, Meyer letter to Gasper at 5 (12/15/06) (quoting Gasper letter to Meyer (11/22/06)) with Ex. 10, Legal Bills From Law Firm Reflecting Payments to Rider.

Not only have defendants provided false testimony and false interrogatory responses to hide their misconduct (and, thus, hide the existence of FEI's RICO claim), defendants took extraordinary steps to either make the payments to Rider appear legitimate or, at the very least, difficult to trace back to them. In one instance, for example, defendant AWI sought to provide Rider with $500. Yet, instead of wiring the money to Rider itself, however, AWI issued a $600 check to one of its employees who then cashed the check, personally wired $500 to Rider, personally paid the wire transfer fee, and placed the remainder in AWI's petty cash fund. Ex. 7, AWI's Latest Response to Inter. No. 21. Defendant WAP, moreover, resorted to identifying payments to Rider as expenses for "Media" in specific cities. While WAP often chose cities that corresponded to the upcoming schedule of FEI's circus, it appears that Rider has neither produced receipts nor alleged in his interrogatory responses to have been in those cities at those times. Compare Ex. 11, WAP Ledger (reflecting payments totaling $3,500 for "Media" work in Canton, Toledo, Omaha and Chicago in September/October 2006 and another $2,000 for "Media" work in Everett, Salt Lake City, Pittsburgh, and Chicago in September/October 2005) with Ex. 12, Rider's Second Response to Inter. Nos. 4-5 (reflecting no such "media" work in

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made); all of which omitted any reference to such payments); Ex. 6, FFA's Latest Response to Inter. No. 21 (acknowledging inconsistency between current interrogatory response and deposition testimony); Ex. 7 AWI's Latest Response to Inter. No. 21 (same); Ex. 8, Four Sworn Interrogatory Responses to Nos. 21-22 (omitting any discussion of such payments).

those times) and Ex. 13, Schedule of FEI's Circus (performing in or near those cities at the time of WAP's payments). Indeed, WAP paid Rider $1,000 for "Media in Washington, DC" when he was in DC for his deposition in the ESA Action, not for any "media" work. Compare Ex. 11, WAP Ledger with Ex. 14, Rider Depo. at 1-2 and Ex. 12, Rider's Second Response to Inter. Nos. 4-5 (sworn response identifying no "media" work in DC at that time). WAP's efforts are nothing more than an attempt to throw FEI off of its trail and to further hide evidence that supports FEI's RICO claim.

Defendants' misconduct does not stop with mere false testimony and fancy bookkeeping. Defendants, for example, further hid the existence of FEI's RICO Action by destroying documents relevant to the payment scheme. Ex. 15, Rider Decl ¶¶ 3, 5; Ex. 16, ASPCA Decl. ¶ 2(c). Importantly, defendants' spoliation is not limited to past conduct. Rider, himself, has now admitted under oath that he may not be keeping all documents related to the payment scheme because he "lives in a van" and allegedly has a difficult time keeping track of papers. Ex. 15, Rider Decl. ¶ 5. Living in a van is no excuse for Rider to get rid of relevant evidence or for his counsel to continue to permit him to do it unabated. This Court had little sympathy for FEI's difficulties involved with recordkeeping that occurs while traveling. It should not now grant a pass to Rider. Again, it is no excuse for Rider to argue that he cannot keep documents because it is "too hard." In light of defendants' admitted track record related to spoliation, the Court should not give them any more time in which they have the opportunity to continue destroying evidence. FEI has an urgent need to take discovery related to its claims before defendants have any further chance to destroy it.

Although defendants label their request for a stay as "temporary," there is nothing temporary about it. Defendants are asking the Court to freeze the case indefinitely even though

they already have spent several years concealing it through their own misconduct, false testimony, spoliation, and other nefarious deeds. Such behavior is not puffing by FEI – it has been demonstrated through evidence – and it is of such an egregious nature the Court simply cannot ignore it. Granting defendants' request for an indefinite stay cannot be supported by the law. See Landis, 299 U.S. at 254-55 ("[A] court may abuse its discretion if its grants 'a stay of indefinite duration in the absence of a pressing need."). Defendants seek a stay of FEI's claim pending final disposition of the ESA Action, even though no trial date has been set in the ESA Action and, after such a trial, there almost assuredly will be continued litigation relating to the ESA's fee-shifting provision and an appeal of the Court's ultimate finding. The final resolution of the ESA Action is not merely several weeks away. Cf. F.S. v. District of Columbia, No. 06-923, 2007 U.S. Dist. LEXIS 27520, at *17 (D.D.C. April 13, 2007) (Sullivan, J.) ("a stay lasting a matter of weeks" would result in no prejudice). FEI's claims against defendants, based upon hard evidence, are neither *de minimus* nor inconsequential. See United States v. Milberg Weiss Bershad & Shulman L.L.P., Crim No. 05-587 (C.D. Cal. 2006) (alleging criminal conspiracy to, *inter alia*, pay plaintiffs to bring class action and share-holder derivative lawsuits and to serve as witnesses in those actions). The conduct that is at issue here is totally unacceptable, amounting to a fraud upon this very Court and the D.C. Circuit. It cannot be ignored, legitimized, or indefinitely delayed as defendants seek. That result should not be permitted.

IV. THERE IS NO FIRST AMENDMENT RIGHT TO PERPETRATE A FRAUD ON THE COURT THROUGH BRIBERY AND PERJURY

Defendants' constitutional avoidance argument is entirely without merit. The D.C. Circuit has made clear that litigation premised on bribes and false statements receive no constitutional protection: The Noerr-Pennington doctrine does not protect illegal activity when a "party's knowing fraud upon, or its intentional misrepresentations to, the court deprive the

litigation of its legitimacy." Whelan v. Abell, 48 F.3d 1247, 1250-51 (D.C. Cir. 1995) (quoting Liberty Lake Investments, Inc., v. Magnuson, 12 F.3d 155, 159 (9th Cir. 1993)). Whelan observed that: "However broad the First Amendment right to petition may be, it cannot be stretched to cover petitions based on known falsehoods. 'Misrepresentations condoned in the political arena, are not immunized in the adjudicatory process." Whelan, 48 F.3d at 155 (quoting California Motor Transport v. Trucking Unlimited, 404 U.S. 508, 513 (1972)). Moreover, with respect to allegations of bribery, Whelan specifically stated that "[a]ttempts to influence governmental action through overtly corrupt conduct, such as bribes (in any context) and misrepresentation (in the adjudicatory process), are not normal and legitimate exercises of the right to petition, and activities of this sort have been held beyond the protection of Noerr." Whelan, 48 F.3d at 1255 (quoting Federal Prescription Serv., Inc. v. Am. Pharmaceutical Ass'n., 663 F.2d 253, 263 (D.C. Cir. 1981)).

The RICO Action alleges that through, *inter alia*, bribery, illegal gratuity payments and perjury amounting to obstruction of justice defendants have perpetrated a fraud on this Court and FEI, Compl. ¶¶ 3-168; this is precisely the type of conduct that Whelan held is beyond Noerr-Pennington's protection. In any event, this issue should be briefed on a Rule 12 motion to dismiss and is not a proper basis to stay the RICO Action. The resolution of the ESA Action will have no bearing upon defendants' Noerr-Pennington defense to the RICO Action.[11]

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[11] The ESA Action also falls within the "sham" exception to Noerr-Pennington. Among other things, purchasing the services of a plaintiff and then committing perjury and obstruction of justice to cover the payment tracks are sufficient to characterize the ESA Action as an "objectively baseless" lawsuit. Opdyke Investment Co. v. City of Detroit, 883 F.2d 125, 1273 (6th Cir. 1989) (the "sham" exception to Noerr-Pennington immunity applies where, as here, abuse of process arises from "perjury, or bribery, or any other such reprehensible practice"); accord Baltimore Scrap v. The David J. Joseph Co., 237 F.3d 394 (4th Cir. 2001). Defendants' citation to Sosa v. DIRECTV, Inc., 438 F.3d 923 (9th Cir. 2006) is inapposite. In that case, the plaintiffs "declined to invoke the sham exception" to Noerr-Pennington immunity and the only issue before the court was whether RICO "proscribes the sending of pre-litigation demand letters asserting legal claims that may be weak but do not rise to the level of shams." Id. at 940 & 939. Sosa does not govern this Court's analysis of the RICO Action which is predicated on

CONCLUSION

To stay an entire case in this Circuit requires extreme circumstances. Defendants present no such circumstances, because there are none here. That defendants have the audacity to claim a stay is now necessary because this case is indistinguishable from the ESA Action, when just weeks ago they convinced the Court to disallow the RICO counterclaim because the two matters are entirely different, comes as no surprise given the rest of their conduct to date. What has occurred here with the payments to Rider to cure the organizational plaintiffs' standing, so that suit can be brought under a statute that could permit defendants' counsel to recover its fees at its conclusion is ***utterly outrageous***. Defendants elected to play an exceedingly dangerous game by proceeding with this scheme and apparently thought they would never be caught. Moreover, once they were caught and FEI began asking for the evidence, they then lied to both FEI and this Court to conceal its existence. To date, FEI does not believe that it has received what it was owed pursuant to the Court's August 23, 2007 Order because of continued gamesmanship by defendants. The time for defendants to answer for what they have done has come. They are not entitled to any court protection, nor should they be rewarded, for their actions, regardless of whether it comes in the form of a stay or otherwise.

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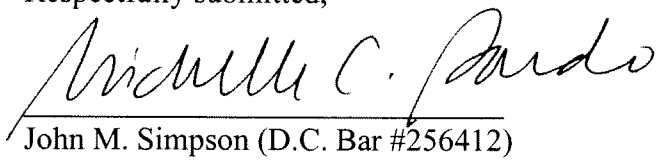
conduct associated with "sham" and fraud litigation. Further, unlike the plaintiffs in Sosa, FEI has clearly stated claims for relief on each and every predicate act alleged in the RICO Action.

For all of the reasons stated above, the Court should deny defendants' stay motion.

Respectfully submitted,



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