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.	)	

DEFENDANTS' REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT

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I. INTRODUCTION

Leaving aside the Opposition's groundless accusations and inflammatory rhetoric, in crucial respects FEI has not only failed to rebut defendants' various *legal* arguments for dismissing this improperly motivated RICO action, but it has actually strengthened those arguments. Most importantly, FEI again concedes that the *only* "damages" it asserts in this case are its "ESA Case attorneys' fees." Opp. at 14.[1]

This concession underscores why the Court should dismiss FEI's RICO claim, and hence the entire lawsuit (since FEI makes no argument that the Court has independent subject matter jurisdiction over the state law claims), because it is now even more clear that this case, when stripped to its essence, involves *exactly* the "combination of [] factors (*single scheme, single injury, and few victims*)" that the D.C. Circuit has held requires dismissal at the pleading stage, and has twice emphasized "makes it *virtually impossible*" to state a RICO claim. *Edmondson & Gallagher v. Alban Towers Tenants Ass'n*, 48 F.3d 1260, 1265-67 (D.C. Cir. 1995) (emphasis added); *Western Assocs. Ltd. P'shp. v. Market Square Assocs.*, 235 F.3d 629, 633-34 (D.C. Cir. 2001). Under controlling Circuit precedent, the Court need go no further to dismiss this lawsuit.

However, FEI also fails to rebut defendants' entitlement to dismissal on other legal grounds. Thus, although the sole asserted damages are its expenses in defending the ESA case, FEI has presented no persuasive response to defendants' arguments that the RICO claim is barred by both Fed. R. Civ. P. 13(a) and RICO's four-year statute of limitations, because FEI's *own* records show that it has known since *2002 at the latest* that Mr. Rider was receiving funding from the organizational co-plaintiffs – the gravamen of the RICO claims.

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[1] For purposes of this Reply, defendants' Memorandum in support of their Motion to Dismiss will be cited as "MTD at __" and FEI's Opposition Brief will be cited as "Opp. at __."

In addition, the animal protection organizations that were plaintiffs in the ESA action were not acting as part of a distinct RICO "enterprise," but plainly pursuing their *own* organizational interests in that litigation (*i.e.*, to curtail the mistreatment of captive elephants), especially because they always asserted arguments for standing independent of Mr. Rider. For the same reasons, FEI also cannot establish the causation necessary for RICO standing when its sole asserted damages (attorneys' fees and litigation costs) would have been incurred as a result of FEI's having to defend the ESA case against the organizational plaintiffs, whose standing indisputably remained a live issue until the Court's final ruling (and, indeed, remains a live issue in the Court of Appeals). Additionally, because FEI has an alternative, more tailored mechanism for pursuing its only damages (its attorneys' fees in the ESA case), it could not be more clear that the real purpose of *this* far-reaching RICO case is to "stifle public debate" on a matter of "public concern" – which, as the Supreme Court recently reaffirmed, affords a compelling First Amendment defense to civil litigation. *Snyder v. Phelps*, 131 S. Ct. 1207, 1220 (2011).

Before addressing these issues, it is important to correct several of FEI's misstatements. First, in granting a motion to dismiss, it is beyond dispute that this Court may rely on all "matters of public record" in the ESA case, particularly court rulings, hearing transcripts, and exhibits admitted into evidence. 5B Wright & Miller 1357 (3d ed. 2004 and Supp. 2007); *see* MTD at 5-6.[2] In addition, as FEI itself acknowledges, the Court may consider documents "referred to" in the Amended Complaint, including, crucially, portions of those documents omitted by FEI. Opp. at 50 n.28. *See, e.g.*, *Nader v. Democratic Nat'l Comm.*, 567 F.3d 692 (D.C. Cir. 2009) (in

[2] Such matters can be considered on a motion to dismiss, but are not substitutes for allegations that are missing from the Complaint. Moreover, FEI cannot pick and choose which matters the Court may rely upon, as it attempts to do when it asserts that the Court cannot consider FEI's *own* highly damaging 2002 e-mail, merely because it was moved into evidence by the ESA plaintiffs. *See* Opp. at 49-50. Under applicable precedent, MTD at 5-6, it makes no legal or logical difference how the document became a part of the public trial record, *especially since FEI consented to its admission. See* ESA Case. Tr. 63, March 17, 2009.

directing dismissal on statute of limitations grounds, court relied on information in newspaper article referenced in complaint).

Second, although FEI's lengthy factual diatribe against defendants is largely irrelevant to the legal grounds for dismissal, FEI's Opposition suffers from the same tendency to "grossly distort[] the facts" and the record, as the Court has found to have afflicted FEI's past submissions. *Feld Entertainment, Inc. v. American Soc'y for the Prevention of Cruelty to Animals*, 523 F. Supp. 2d 1, 4 (D.D.C. 2007) (hereinafter "*RICO Stay Ruling*"). Accordingly, before relying on any representations or record citations proffered by FEI, defendants respectfully urge the Court to carefully verify their accuracy.[3]

Third, FEI's contention that the Supreme Court's rulings in *Twombly* and *Iqbal* have no major significance for the standard of review,[4] Opp. at 26, particularly for a case that threatens to pose an enormous burden on the court system and the parties, ignores the explicit rationale for those rulings.[5] Under *Iqbal*, this Court most assuredly may dismiss this lawsuit based not only on the compelling legal reasons raised by defendants, but also because, as a *factual* matter, there are far "more likely explanations," 129 S. Ct. 1937, 1950-51 (2009), for the actions of the ESA

[3] By example, FEI repeatedly accuses counsel for the ESA plaintiffs of "illegal[ly]" "procuring Rider's absence from the 2008 contempt hearing" before Judge Facciola, *e.g.*, Opp. at 74, 75, 87, when, in fact, counsel expressly *asked* Judge Facciola whether Mr. Rider needed to attend the hearing in light of the fact that he had just been deposed by FEI for two days, including on the very subject of the hearing, *see* 1/8/08 Tr. In No. 03-2006, at 24-26, and Judge Facciola (who had just reviewed the deposition), declined to order Mr. Rider's participation. *Id.* Similarly, far from "stone-wall[ing]" inquiries concerning Mr. Rider's funding, Opp. at 5, the ESA organizational plaintiffs and the Wildlife Advocacy Project ("WAP"), not only acknowledged such funding in discovery before a single motion to compel had been filed, but their counsel voluntarily raised the issue at a status hearing in 2005 and, as subsequently held by Magistrate Facciola in the course of rejecting FEI's "fallacious" arguments for contempt citations, *all* of the ESA plaintiffs made a "conscientious and diligent effort" to produce every document subject to the Court's discovery order concerning Mr. Rider's funding. ESA DE 374 at 10.

[4] *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007)*; Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950-51 (2009).

[5] FEI also inappropriately relies on *Aktieselskabet AF 21 November 2001 v. Fame Jeans Inc.*, 525 F.3d 8, 15 (D.C. Cir. 2008), Opp. at 26, since, as subsequently explained by the Court of Appeals, that case was decided *before Iqbal* applied and extended the reasoning in *Twombly*. *See Tooley v. Napolitano*, 586 F.3d 1006, 1007 (D.C. Cir. 2009).

organizational plaintiffs and their counsel than the scurrilous one posited by FEI – *i.e.*, that their purported "extreme views" led them all, for the first time in their long organizational histories and careers, to simply "assum[e] arrogantly" that they were "above the law" and therefore they agreed to "manufacture" Mr. Rider's standing allegations out of whole cloth. Opp. at 2, 27.

Rather, the far "more likely explanation," *Iqbal*, 129 S. Ct. at 1950-51, indeed, the obvious one, is that the ESA organizational plaintiffs and counsel pursued the ESA case with Mr. Rider because they *believed* that Mr. Rider – *who actually took care of the FEI elephants for 2½ years*, and whose claims of systemic bullhook use and extensive chaining were overwhelmingly corroborated by other evidence, including FEI's *own* documents – genuinely cared about the elephants and wanted to improve their lives. In any event, FEI's far-fetched theory certainly does not cross the legally required "line . . . to plausible," *id*., particularly for a case that, as this Court has recently stressed in staying discovery, will be "extraordinarily extensive and burdensome" for all concerned, and particularly for the federal judiciary, 3/8/11 Status Hearing Tr. at 31, and that also has grave First Amendment implications. Accordingly, for these and the many legal reasons presented, the case should be dismissed.

II. THE COMPLAINT IS BARRED ON *NOERR-PENNINGTON* GROUNDS

Recent developments since defendants first advanced their arguments for dismissal on *Noerr-Pennington* grounds,[6] MTD at 30-42, have made that rationale for dismissal even more compelling. In particular, the Supreme Court has recently issued a First Amendment ruling reinforcing the principle that all forms of public policy advocacy are entitled to broad protection from civil claims. Additionally, FEI has now made crystal clear that a major, if not principal, purpose of this litigation is to deter and punish public advocacy with which it disagrees.

[6] *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc*., 365 U.S. 127 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965).

In *Snyder*, the Supreme Court addressed whether various tort claims, including one for "civil conspiracy," could be successfully pursued against picketers who, near a soldier's funeral, held up signs with messages such as "Thank God for IEDs" and "God Hates You." 131 S. Ct. at 1213. Although a jury found the picketers liable for intentional infliction of emotional distress, conspiracy, and other torts, the Court held that, because the picketing addressed matters of "public concern" and "public import," it was necessarily insulated from tort liability by virtue of the First Amendment. *Id*. at 1217. Thus, the Court explained, "[a]s a Nation we have chosen . . . to protect even hurtful speech on public issues to ensure that we do not stifle public debate." *Id*. at 1220. If the "particularly hurtful" speech at issue in *Snyder* warranted broad First Amendment protection from civil liability, then public advocacy aimed at improving the lives of circus elephants is surely deserving of such solicitude. Thus, there can be no question, and this Court has already recognized, that the treatment of the elephants in FEI's care is a matter of "tremendous public import." *RICO Stay Ruling* at 5.

Further, in its Opposition, as well as in its other actions to date, FEI has left little doubt that the principal, if not sole, objective of this litigation is to bankrupt, distract, and punish those who have publicly criticized FEI's treatment of elephants. For instance, although FEI has now made clear that none of its damages arises from its claim that the organizational defendants defrauded their members and supporters regarding FEI's elephant treatment, the Opposition and other filings to date reveal that FEI intends to use this case to conduct highly invasive discovery into the organizations' communications with their members and other "donors" regarding the purpose of their donations – exactly the kind of inquiry that courts, including this one, have held would "tread on core First Amendment rights." ESA Action, Order of Aug. 23, 2007 (DE 178), at 9; *compare NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958) (NAACP membership

lists entitled to First Amendment protection) *with* Opp. at 69 n.40 (explaining FEI's intention to "query" the organizations' donors and members "as to whether they would have made" contributions" had they known the "truth about where the money was going"); *id*. at 7 n.9 (explaining that FEI intends to use this case to pursue extensive discovery into the "media strategy" of its opponents).[7]

Likewise, since FEI has available to it a far more streamlined mechanism for asserting its claim for attorneys' fees and costs, but has instead chosen to prosecute a massive and costly lawsuit for the same relief, it could hardly be clearer that FEI's true purpose is to penalize and stifle public discourse. Contrary to FEI's arguments, Opp. at 54-58, because *Noerr-Pennington* immunity was created for just such situations, it plainly precludes this lawsuit.

FEI does not dispute that *Noerr-Pennington* immunity may be invoked to bar otherwise viable RICO or common law claims. Instead, FEI contends that, so long as it makes blanket assertions that all of the defendants were engaged in "fraud," "bribery," and "obstruction of justice," this First Amendment protection necessarily evaporates. Opp. at 54-61. By such reasoning, FEI seeks to completely eviscerate the *Noerr-Pennington* doctrine, particularly where it is most essential, *i.e.*, when an entity such as FEI is willing to say or do virtually anything in pursuit of its "relentless" effort to silence and bankrupt its perceived adversaries on a matter of

[7] Indeed, as the Court has explained, FEI "seeks extremely broad discovery against Defendants, including but not limited to all Defendants' handling of grants and related matters" since 1998, "the creation, maintenance and/or alteration of Defendants' websites since 1998; the identification of all litigation involving exotic animals which any Defendant filed *or contemplated or proposed or anticipated filing since 1998*; and all [WAP] activities and records from its inception to the present." 3/8/11 Status Hrng. Tr. at 30 (emphasis added). Accordingly, it is difficult to imagine litigation that could more obviously designed to delve into, and chill, the exercise of First Amendment rights by FEI's perceived opponents; *see also* DE 60 (FEI's Discovery Plan). To underscore the point, FEI also has made clear its intention to take discovery from virtually every animal protection organization that has ever publicly criticized FEI's treatment of elephants, regardless of their involvement in the ESA Action. *See, e.g.*, DE 59-1 (FEI's Initial Disclosures) (FEI intends to take discovery from People for the Ethical Treatment of Animals, In Defense of Animals, Last Chance for Animals, Animal Defenders International, and others).

legitimate public concern. *See ASPCA v. Ringling Bros.*, 244 F.R.D. 49, 52 (D.D.C. 2007) (hereinafter "*ESA Counterclaim Ruling*).

However, as the case law makes clear, the Court itself must look behind the labels affixed by FEI in order to assess whether genuine petitioning conduct warranting First Amendment protection is being targeted here. *See* MTD at 30-34; *see also Nat'l Org. for Women v. Scheilder*, 510 U.S. 249, 263-65 (1994) (Souter, J., concurring) ("caution(ing)" courts that "RICO actions could deter protected advocacy" and to "bear in mind the First Amendment interests that could be at stake"; "Conduct alleged to be Hobbs Act extortion, for example, or one of the other, somewhat elastic RICO predicate acts *may turn out to be fully protected First Amendment activity, entitling the defendant to dismissal on that basis*.") (emphasis added). As for FEI's (erroneous) allegations that Mr. Rider provided "varying, conflicting and ultimately false testimony" concerning FEI's treatment of the elephants before various federal, state, and local legislatures, as well as its claims that Mr. Rider as well as other defendants, made "false statements" to the USDA concerning FEI's elephant treatment, such legislative and executive branch advocacy has absolutely nothing to do with the sole injury now being asserted by FEI – its attorneys' fees and costs in defending the ESA Action. Therefore, regardless of *Noerr-Pennington* immunity, such advocacy cannot legally or logically be employed by FEI to buttress its otherwise legally deficient RICO claims.

In any event, defendants' alleged association with each other for the purpose of lobbying elected officials to change public policy concerning the treatment of captive elephants lies at the very core of *Noerr-Pennington* immunity, and cannot be eradicated based simply on FEI's convenient and self-serving assertions that (well-founded) claims of elephant mistreatment were "false." Opp. at 57-58. The Supreme Court has specifically held that even a lobbying campaign

that "employs unethical and deceptive methods" is generally entitled to *Noerr-Pennington* immunity so long as it is genuinely aimed at changing public policy. *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 499-500 (1988). Indeed, the lobbying campaign at issue in *Noerr* itself was alleged to be "vicious, corrupt, and fraudulent," yet the Supreme Court held that it was immune from attack under the Sherman Act because it entailed "solicitation of governmental action with respect to the passage and enforcement of laws." *Noerr*, 365 U.S. 127 at 137-38.[8]

With regard to FEI's allegation that Mr. Rider was "bribed" to advocate for the elephants before various legislative bodies around the country, Opp. at 55, and before the USDA, because his living and traveling expenses while he "lived in a van" were being paid by ESA organizational plaintiffs and others who desired to help the elephants, Am. Compl. at ¶ 116, FEI's position would, as a practical matter, strip virtually *all* legislative or executive branch advocacy out of *Noerr-Pennington* immunity. Here, not only is it indisputable that Mr. Rider openly acknowledged to a legislative body in 2002 that his expenses were being paid by others, *see* MTD at 8, but almost *any* representative of an organization or coalition of interests that advocates a public policy position before a legislative or executive branch body receives some funding in the course of doing so.[9]

[8] It is difficult to understand how FEI can assert that the ESA plaintiffs' contentions of elephant mistreatment will not be "re-litigated" should this lawsuit proceed, Opp. at 2, while simultaneously accusing defendants of committing "fraud" by accurately advising legislative and executive branch officials about FEI's use of bull hooks, chains and other practices that many would regard as mistreatment. *Id*. at 55-56.

[9] For example, executives who testified that tobacco products are not addictive were paid very large salaries, and had traveling expenses defrayed, yet even that testimony was held to be petitioning activity entitled to *Noerr-Pennington* immunity. *See* MTD at 34-35. Likewise, FEI would presumably seek First Amendment protection for the activities of its own lobbyists and others who, while on *its* payroll, assure policymakers that the elephants are happy and healthy, even though they take positions that many would deem objectionable, if not intentionally fraudulent. *See Snyder*, 131 S Ct. at 1217. A different standard cannot apply to Mr. Rider's advocacy and those who have supported it merely because he is a man of limited means and the funding allowed him to live (albeit far more modestly than any of FEI's advocates)

As this Court itself observed at final argument, even if Mr. Rider served as the "chief spokesperson for the plaintiffs" in their advocacy campaign for the elephants, and this bore on his "credibility" and personal motives in the ESA Action, ESA Trial Tr. 53:11-53:17, July 14, 2009, this does not "suggest" anything "nefarious" about the arrangement. *Id.* It if did, FEI's own public policy spokesmen, who receive far greater payment than Mr. Rider, would be equally culpable whenever they convey FEI's positions to policymakers and the public. As pled, Mr. Rider's advocacy on behalf of the elephants in legislative hearings and other public forums around the country, and the financial support he received, *see* MTD at 36, are at the very heart of conduct protected by *Noerr-Pennington* immunity and other First Amendment precedents concerning fundamental rights of association and speech.[10]

As demonstrated, MTD at 27, 44-49, once defendants' protected non-litigation advocacy – as to which FEI asserts no distinct injury – is eliminated from the alleged pattern of racketeering activity, there is no need for the Court to even consider whether the ESA Action was "sham" litigation and hence exempt from *Noerr-Pennington* immunity that would otherwise apply. However, if the Court nonetheless proceeds to reach that issue, FEI's Opposition brief only strengthens the applicability of such immunity here.

FEI readily concedes that it bears the burden of establishing that the sham exception applies, *see* Opp. at 59 n.33, but it has utterly failed to demonstrate that the ESA Action as a whole was "'objectively baseless'"– which FEI acknowledges is the threshold test for invocation of the exemption. *Id.* at 59 (quoting *Prof'l Real Estate Inv., Inc. v. Columbia Pictures Indus.*,

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while he traveled the country communicating with legislative and executive branch decisionmakers. *See Scheidler*, 510 U.S. at 265 (Souter, J., concurring) (the fact that "even protest movements need money" does not mean that they should be "left exposed to harassing RICO suits").

[10] *See, e.g.*, ESA Case Trial Tr. March 3, 2009 (p.m.) at 88-93 (FEI's Chief Executive Officer testified that FEI spends more than $100,000 a year on public relations, and "millions" a year on advertising).

Inc., 508 U.S. 49, 60-61 (1993)).[11] First, far from establishing that the ESA Action was "not genuinely aimed at procuring favorable governmental action," *Allied Tube & Conduit Corp.,* 486 U.S. at 499-500, FEI explicitly admits that the ESA case was indeed "brought *for the very reason of creating precedent*" that could benefit captive wildlife under the ESA, Opp. at 66 (emphasis added), a concession that not only undermines FEI's sham litigation argument, *see Prof'l Real Estate Inv., Inc.*, 508 U.S. at 60-61, but totally contradicts FEI's own implausible (in fact absurd) theory that the animal protection organizations and their counsel "never really cared about the welfare of the elephants" on whose behalf they spent years advocating. Opp. at 28.

Second, FEI has not even attempted to establish that the ESA plaintiffs' position on the merits was "objectively baseless" – a position that could not possibly be sustained, particularly because FEI's own counsel admitted during his closing argument in the ESA case that he "might as well sit down" if the plain language of the "take" prohibition of the ESA were applied to FEI's use of the bullhook on elephants. MTD at 40. This concession alone is sufficient to establish that a "reasonable litigant could realistically expect success on the merits." *Prof'l Real Estate Inv.*, 508 U.S. at 60-61. Nevertheless, in its effort to avoid *Noerr-Pennington* immunity, FEI distorts the Court's ruling on standing, which did not find that *all* of the ESA plaintiffs' standing arguments were "objectively baseless," let alone intentionally "fabricated." Opp. at 59.

[11] FEI argues that the particularly heavy burden imposed by the Ninth Circuit to overcome *Noerr-Pennington* immunity for litigation brought to pursue a public, rather than private, purpose does not apply in this Circuit, but its citation merely demonstrates that the issue has not yet been specifically joined in Circuit rulings. *See* Opp. at n. 31, 33. However, given this Court's prior holding that the ESA citizen suit provision was specifically designed to "encourage[] 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, it would be in keeping with *Noerr-Pennington* principles, as well as the Supreme Court's renewed emphasis on broadly protecting all "[s]peech deal[ing] with matters of public," rather than "private concern," *Snyder*, 131 S. Ct. at 1216, for the Court to impose an especially heavy burden on FEI under the circumstances presented here. *See also Scheidler*, 510 U.S. at 264-65 (Souter, J., concurring) (citing with approval the Ninth Circuit precedent "applying a heightened pleading standard to a complaint based on presumptively protected First Amendment conduct").

Indeed, far from sustaining its burden, FEI has instead committed the fundamental fallacy against which the Supreme Court has warned, *i.e.*, "engag[ing] in *post hoc* reasoning by concluding" that an unsuccessful lawsuit "must have been unreasonable or without foundation." *Christianburg Garment Co. v. EEOC*, 434 U.S. 412, 421-22 (1978) (*per curiam*). Simply put, because the ESA plaintiffs' various standing arguments did not carry the day *does not mean* that they were "objectively baseless," and, to the contrary, the record in the ESA Action compels the opposite conclusion.

As for the standing arguments of the other ESA plaintiffs, FEI flatly admits that the "organizational plaintiffs contended throughout the ESA Action that they had standing independent of Rider," Opp. at 61, and, indeed, it is indisputable that these matters remained hotly contested until the Court's final ruling (and remain so in the Court of Appeals). Further, FEI's contention that from "June 29, 2001 [the Court's *initial* standing ruling] through the end" it was somehow definitively resolved that the "organizations had no standing," *id*., is totally belied by FEI's own conduct following the Court of Appeals' remand (FEI took *extensive discovery* into the organizational standing allegations, did not object to API's entry in the case in 2006 on the grounds that *any* organizational standing issue had already been definitively resolved[12] and, most revealing, *never even moved for summary judgment* on the issue, *see infra*). In any event, there is nothing to suggest, and the record reflects otherwise, that the ESA plaintiffs' position on the issue was "objectively baseless." Crucially, neither the Court's initial standing ruling nor, more importantly, the final decision – rendered after extensive supplemental briefing and several

[12] In fact, far from arguing that the organizations' involvement in the case was a moot issue when API sought leave to become a plaintiff, FEI (represented by other counsel), instead argued that the Court should "bar API from raising *any new issues that plaintiffs have not already presented* in this case," and that "API should *respond to defendants' document requests and interrogatories* addressed to [the] organizational plaintiffs," ESA Case DE 56 at 5 & n. 4 (emphasis added), thus plainly conceding that the organizational plaintiffs remained parties with their own claims.

oral arguments – even remotely suggests that "no reasonable litigant" could argue that the Supreme Court and D.C. Circuit organizational standing rulings upon which the ESA plaintiffs relied – and on which they continue to rely in the appeal pending in the D.C. Circuit have no possible relevance here.[13]

Although the foregoing is a more than sufficient basis upon which to find that FEI has not met its burden to establish that the entire ESA case was sham litigation, FEI's arguments concerning Mr. Rider's standing also are inadequate to overcome *Noerr-Pennington* immunity. In a critical concession, FEI flatly admits, as it must, that the "Court in the ESA Case *did not find that no reasonable person could have believed*" that Mr. Rider had a genuine attachment to the elephants with whom he had *in fact* worked for years. Opp. at 60 (emphasis added). Nor is there any basis for FEI's unfounded insistence that the ESA plaintiffs and their counsel somehow "fabricated" or "manufactured" Mr. Rider out of thin air. Opp. at 2, 59. Mr. Rider is not a figment of anyone's imagination. Rather, it is undisputed that he *really worked* at FEI, Am. Compl. ¶ 4; that he did, *in fact, have contact* with the elephants while employed there, *id.*; and that, *in reality, he took care of the elephants* – including feeding them, keeping them company, and cleaning up after them – on almost a daily basis for more than two years. *Id.* And, as the Court has specifically found (and as FEI consistently and conveniently ignores), there also is

[13] FEI's assertion that the ASPCA, AWI and FFA "abandoned any claim for relief during the trial," and that this "demonstrates the objective baselessness of their claims," Opp. at 61, is simply false. In truth, as FEI knows, the ESA plaintiffs explained to the Court that they did not put on standing testimony on behalf of certain organizations simply because their organizational standing arguments *overlapped* with those of API, *see* MTD at 12 n.8, and, under abundant Supreme Court and D.C. Circuit precedent, if one plaintiff has standing, the Court should *not* expend its time and resources establishing whether others have the same standing. *Id.*; *see also Massachusetts v. EPA*, 549 U.S. 497, 518 (2007). It would be the height of injustice to punish the ESA plaintiffs' effort to avoid duplicative testimony, which this Court itself had repeatedly urged, by holding that the streamlining of proof at trial was somehow indicative of "sham" litigation. The unavoidable reality is that the organizational standing issue was an entirely legitimate one throughout the entire ESA Action for the organizational plaintiffs notwithstanding that API was the vehicle through which the standing argument was advanced at trial.

evidence that Mr. Rider complained about the mistreatment of the elephants to "the elephant handlers," his "direct supervisor," and "the union." *ASPCA v. Feld Entertainment, Inc*., 677 F. Supp. 2d 55, 68-69 (D.D.C. 2009) (Findings of Fact 5, 9) (hereinafter "*ESA Final Ruling*").

Although such facts ultimately proved insufficient to persuade the Court of Mr. Rider's credibility with respect to his aesthetic injury, they certainly defy any notion that Mr. Rider's co-plaintiffs and counsel lacked any "objective" basis for believing that he was genuinely motivated by a desire to assist the elephants with whom he had worked. Indeed, a USDA investigator, after investigating Mr. Rider's allegations of elephant mistreatment in 2000, informed her superiors that "[*t*]here *is no question that [Tom Rider] loves the elephants that he worked with (in the blue unit) and wants to help them find a better life than what is provided in the circus*"). ESA PWC Ex. 93, at 1 (emphasis added). If a federal investigator carrying out a formal investigation under the Animal Welfare Act could arrive at this conclusion after meeting with Mr. Rider, so too could the ESA plaintiffs and their attorneys. There was unquestionably at least some "objective" basis for them to believe in the genuineness of his concern for, and desire to alleviate the suffering of, the elephants as they and others did. For these reasons, FEI has fallen far short of shouldering its burden to establish that the ESA case was "objectively baseless."[14]

[14] Even FEI's counsel conceded during a colloquy with the Court that Mr. Rider "may have loved" the elephants with whom he worked. ESA Tr. at 123, Feb. 26, 2009 (am). It is also relevant to this inquiry that Mr. Rider's testimony that the elephants are routinely struck with and live in fear of the bullhook, and that they spend much of their lives on chains, *was corroborated by reams of additional evidence*, including FEI's *own* testimony and documents. Indeed, the Court itself stated at the trial that videotapes of the FEI elephants being hit with the bull hook led the Court to "pull back because I sense the pain." ESA Case, Tr. 101, Feb. 18, 2009; *see also id.* at 102 (noting, that there were a "couple of times I closed my eyes" when watching the videotapes). Because abundant additional evidence tended to corroborate Mr. Rider's accounts of how the elephants are treated, and since the Court itself suggested that it found at least some such evidence disturbing, it was surely not "objectively baseless" for Mr. Rider's co-plaintiffs and counsel to credit his account of his relationship with the elephants and his subjective emotional reaction to their ongoing treatment. In this regard, FEI's reliance on *Whelan v. Abell*, 48 F.3d 1247, 1255 (D.C. Cir. 1995), is completely unavailing. In that case, relying on *Noerr-Pennington*, the district court set aside a jury verdict despite a finding of "deliberate falsity" in filings with "state securities administrators and a federal court." *Id.* at 1249, 1255. The Court of Appeals held that the First

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

As defendants demonstrated in their opening memorandum, MTD at 42-68, the Amended Complaint cannot satisfy many of the basic elements required for RICO claims.

A. FEI Cannot Establish A "RICO Pattern" As A Matter Of Law.

Especially now that it has expressly limited its damages to its fees and costs in the ESA case, FEI cannot satisfy either the open-ended or closed-ended pattern of racketeering required by the RICO statute. *See* MTD at 44-49. This Circuit has adopted the Third Circuit's multi-factor test for determining whether an alleged pattern of racketeering has sufficient *closed-ended* continuity to satisfy the necessary "pattern." *Edmondson*, 48 F.3d at 1265. In this case, as in *Edmondson*, "some factors will weigh so strongly in one direction as to be dispositive." *Id*.

The scheme repeatedly alleged by FEI is "the corrupt payment scheme" to "manufacture" Article III jurisdiction in a single lawsuit. Opp. at 2, 6. The remainder of the predicate acts comprise what FEI describes as an on-going cover-up of the same scheme, the nature and extent of which FEI states it was "fully aware" by June 30, 2006. ESA DE 121-2 at 4. In fact, as explained in defendants' opening brief, and more fully herein, FEI was actually aware of the funding that is the gravamen of its alleged "scheme" in 2002, if not before. In any event, especially now that it has expressly limited its damages to its expenses in defending the ESA

Amendment "cannot be stretched to cover petitions based on known falsehoods." *Id*. Here, however, there is no plausible basis for a finding that the entire lawsuit was based on "known falsehoods." The only specific example cited by FEI – that Mr. Rider went to visit the elephants after advising the court that he was refraining from doing so, Opp. at 59, continues to misstate the standing argument that the ESA plaintiffs actually made. *See* MTD at 42 n.22. Even more important for present purposes, it cannot conceivably satisfy the *Whelan* standard *since the ESA plaintiffs filed an Amended Complaint in 2003 stating point-blank that Mr. Rider had been to visit the elephants and would continue to do so. See id*. If FEI truly believed that this development undermined Mr. Rider's theory of standing, as it now contends, then it would have at least moved for summary judgment on that basis *six years* before the trial in the ESA case. In any event, the ESA plaintiffs and their counsel can hardly be accused of a "deliberate falsehood" when they revealed in their 2003 Amended Complaint the very fact now highlighted by FEI.

Action, FEI has alleged a RICO claim that, on its face, is predicated on a "single scheme," (one lawsuit), a "single injury" (FEI's attorneys' fees and litigation costs), and a "single victim" (FEI itself) – the *identical* "combination of factors" that the D.C. Circuit held in both *Edmondson* and *Western Assocs*. renders it "virtually impossible" for a plaintiff to pursue a RICO claim. *Edmondson*, 48 F.3d at 1265; *Western Assocs*., 235 F.3d at 634.

Under binding Circuit precedent, this case simply does not involve the kind of conduct that poses a "threat of continuing criminal activity," and hence, by its very nature, it cannot be deemed the sort of "pattern" at which RICO was aimed. *H.J. Inc.*, *Northwestern Bell Tel. Co*., 492 U.S. 229, 238 (1989). A single lawsuit – even one that, like the ESA Action, was "drawn out" due in large measure to FEI's own dilatory litigation tactics – is inherently finite in nature, and hence, under *Western Assocs*., *Edmondson*, and other Circuit precedent, "fail[s] to satisfy the continuity prong of RICO's 'pattern of racketeering' requirement."[15]

[15] FEI's assertion that defendants' alleged scheme spanned the period from May 2001 through Mr. Rider's testimony in March 2009, Opp. 62, is the linchpin of its closed-ended continuity argument. However, this grossly distorts the history of the litigation, inasmuch as the Court has previously held that FEI *itself* was directly responsible for much of the delay that plagued the ESA action. *See e.g.*, Order (Sept. 26, 2005) (ESA DE 50) (compelling production of veterinary records requested in March 2004); Order (Aug. 23, 2007) (ESA DE 174)) (granting second motion for attorneys' fees for FEI's refusal to produce veterinary records for more than a year and a half); *ESA Counterclaim Ruling* at 51 referencing Sept. 8, 2004 Order (explaining that fact discovery that had been going on for more than three and a half years had to be extended as a result of FEI's failure to timely produce thousands of pages of veterinary records); *id*. at 52-53 (characterizing FEI's proposed RICO counterclaim as a tool to indefinitely prolong the litigation and denying FEI's motion for leave to amend for reasons of undue delay and dilatory motive); *RICO Stay Ruling*, 523 F. Supp. 2d at 3-5 (explaining that the Court rejected FEI's RICO counterclaim because it found, *inter alia*, that "the claim was made with a dilatory motive, would cause undue delay" and "was filed for the improper purpose of interfering with and delaying resolution of the ESA action," and lamenting the fact that the "[p]rogress in the underlying ESA Action has been painfully drawn out due to the conduct of *all* parties to this litigation"). Among many other examples of FEI's own delay tactics was its insistence on pursuing contempt proceedings, culminating in Judge Facciola's finding, after a lengthy evidentiary hearing, that FEI's charges were "without merit" and that the ESA plaintiffs had fully complied with the Court's discovery orders. *See* ESA Case DE 374 at 1; MTD at 9-11. There is no legal, equitable, or logical basis on which FEI should be permitted to delay the ESA Action and then rely on that same delay in support of its RICO "pattern" argument.

Similarly, FEI's futile efforts to distinguish *Edmondson* and *Western Assocs*. do not withstand scrutiny. Nor does FEI's suggestion that *Edmondson's* central holding – that it is "virtually impossible" to plead a viable "single scheme," "single victim," "single injury" RICO case – was narrowly limited to the facts "*in that case*," Opp. at 66, hold water. Identical factors were applied by the D.C. Circuit in affirming the dismissal of the RICO claim in *Western Assocs.* which, as FEI points out, Opp. at 66-67, entailed very different facts, but at bottom, also alleged a single scheme directed at a single victim. *See Western Assocs*., 235 F.3d at 634. Obviously, therefore, the D.C. Circuit did not view its "pattern" analysis as narrowly fact-based.[16]

FEI also attempts to distinguish *Edmondson,* which like this case involved allegations of abusive litigation conduct, on the grounds the RICO scheme alleged in *Edmondson* concerned an effort to destroy a large real estate transaction instead of a lawsuit directed at FEI's treatment of circus elephants. Opp. at 66. However, this is a distinction without a difference inasmuch as the *Edmondson* plaintiffs alleged an array of predicate acts in addition to nearly identical litigation conduct. *Edmondson & Gallagher v. Alban Towers Tenants Ass'n,* 829 F. Supp. 420, 424 (D.C. Cir. 1993) aff'd in part, vacated in part, 48 F.3d 1260 (D.C. Cir. 1995) (preventing the sale and rehabilitation of commercial real property, delivering a bad check, attempting to commit

[16] Indeed, since *Edmondson* and *Western Assocs.*, this court has repeatedly found that a single scheme with a single or few victims is simply not sufficient to form the basis of a pattern of racketeering activity. *See, e.g., Lopez v. Council on American-Islamic Relations Action Network,* Inc., 657 F. Supp. 2d 104, 115 (D.D.C. 2009) (facts comprising only one scheme with "only four identified victims" deemed "inadequate under the precedent of this Circuit to indicate that the RICO defendants engaged in a 'pattern of racketeering activity.'") (citing *Western Assocs*. and *Edmondson*); *Zernik v. Dep't of Justice*, 630 F. Supp. 2d 24, 27 (D.D.C. 2009) (dismissing RICO claim where plaintiff "fail[ed], at a minimum, to allege a pattern of racketeering activity as his claims relate to a single alleged scheme, for which he was the sole injured party") (quoting *Western Assocs.*); *Ellipso, Inc. v. Mann*, 541 F. Supp. 2d 365, 376 (D.D.C. 2008) (alleged conduct that was best characterized as a single scheme to defraud plaintiff was legally insufficient to satisfy RICO's pattern requirement, quoting *Western Assocs*.' "virtually impossible" language in cases involving a single scheme, a single injury and a few victims).

extortion by improperly clouding title, submitting fraudulent affidavits to the court, bribing witnesses and deliberately concealing materials sought to be discovered in a lawsuit).

Hence, the *Edmondson* plaintiffs alleged not only the functionally identical "litigation activity," but a far broader pattern of predicate acts and categories of injuries than alleged by FEI, including acts purportedly aimed at the ultimate objective of derailing a large scale commercial real estate transaction and "extort[ing] money" from the plaintiffs. *Id*. The district court, nonetheless, dismissed the RICO claim on the grounds that the alleged predicate acts did not demonstrate a pattern of racketeering" but rather "a single scheme, directed at a single victim, and resulting in a single, distinct injury" insufficient to satisfy the pattern requirement. *Id*. at 424. The Court also made clear that "alleging multiple predicate acts" that were "part of a single litigation process *will not magically transform what are at best state law tort claims into a federal RICO action*," *id*. (emphasis added), exactly what FEI has attempted here. Similarly, without more, FEI cannot "magically transform" the already pending fee claim in the ESA Action into a federal RICO action. Nor can it be permitted to succeed in its "vain attempt to make a RICO claim seem more viable by parsing one scheme into multiple schemes" for which it claims no additional injuries – *exactly* what *Western Assocs*. forbids. *Western Assocs*., 235 F.3d at 635.[17]

Distilled to their essence, *Edmondson* and *Western Assocs*. – in which the Court of Appeals determined the plaintiffs could not assert a sufficient RICO "pattern" – involved efforts by the defendants to interfere with the plaintiffs' multiple business interests, which involved far more diverse interests and injuries than the harm alleged by FEI here because they threatened

[17] FEI's assertion that the potential for creating precedent (as exists with any case) and defendants' alleged use of the ESA Action as a "fund-raising mechanism" constitute separate schemes, Opp. at 66, is precisely what Circuit precedent expressly forecloses. While plainly not RICO violations in any event, they are, if anything, activity that is part and parcel of FEI's central claim that the ESA plaintiffs "manufactured" a single lawsuit for improper purposes.

entire business transactions. *See, e.g., Western Assocs.,* 235 F.3d at 634-35 (where the plaintiffs asserted "continuous criminal activity" for more than eight years, including an elaborate effort to steal a partnership interest that caused $89 million in damages). By contrast, FEI itself admits that the single lawsuit at the heart of FEI's RICO claim was limited to one aspect of one component of FEI's extensive business operations – its treatment of circus elephants – and would, at worst, if successful, affect only a portion of the circus program. Notwithstanding FEI's unsupported exhortations that defendants' purpose in bringing the ESA Action was to keep litigation going as long as possible, maximize its utility for recovery of legal fees, extort FEI into removing elephants from the circus, and drain FEI's resources, Opp. at 3, the only conceivable "harm" that FEI could be expected to suffer from the so-called scheme to "manufacture" Article III jurisdiction would be an adverse judicial determination on the merits of one case – which alone dramatically demonstrates the absence of the requisite "pattern" of activity required under *Edmondson* and *Western Assocs.*

FEI's attempt to satisfy open-ended continuity also fails especially since FEI has asserted no injury whatsoever in connection with the *non*-litigation elephant advocacy referred to in its Complaint, and that advocacy is, in any event, plainly protected by *Noerr-Pennington* immunity. *See supra*. Open-ended continuity requires a pattern of racketeering activity that poses a threat of continuing criminal conduct beyond the period during which the predicate acts were performed, in other words, "past conduct that by its nature projects into the future with a threat of repetition" *H.J. Inc*., 492 U.S. at 241; *See also Spool v. World Child Int'l Adoption Agency,* 520 F.3d 178, 185 (2d Cir. 2008). As shown, the racketeering activity repeatedly described by FEI as the "corrupt Rider payment scheme" is a single scheme involving one lawsuit that is by its nature self-limiting and bears no resemblance to the type of ongoing criminal activity required to

establish open-ended continuity. *See Jackson v. Bellsouth Telecomms.*, 372 F.3d 1250, 1265 (11th Cir. 2004). The remainder of FEI's self-styled predicate acts comprise what it describes as an "on-going cover-up" of the scheme, the nature and extent of which FEI was aware since 2002 or before. In any event, actions allegedly taken by any of the defendants as part of the "on-going cover-up" do not threaten future harm or repetition and cannot establish open-ended continuity. *Jackson*, 372 F.3d at 1268 (ongoing acts aimed at concealing an initial wrongdoing do not establish open-ended continuity); *Aldridge v. Lily-Tulip, Inc.*, 953 F.2d 587, 594 (11th Cir. 1992) (acts allegedly performed to conceal initial wrongdoing did not threaten future harm or repetition of their illegal acts, and did not impart any new injury).

All of the alleged racketeering activity relied on by FEI took place during the course of litigating the ESA Action, a single, discrete and otherwise lawful endeavor with the narrow goal of litigating the merits of ESA claims against FEI. Similar lawful activities known to FEI involving Mr. Rider and other witnesses – specifically, that Mr. Rider received funding for publicly promoting "his story" in Europe, and that other former FEI employees have also associated with animal protection organizations (other than the ESA plaintiffs) to advocate for elephants, Opp. at 63, (activities fully protected by the First Amendment and for which FEI asserts no injury) do not increase the likelihood of continued criminal activity, nor do they approach the type of conduct required to establish open-ended continuity. *See, e.g, United States v. Wilson*, 605 F.3d 985, 1021 (D.C. Cir. 2010) (open-ended continuity shown where defendant in drug conspiracy was recorded making clear that criminal behavior would continue").[18]

[18] Because Mr. Rider's assertion of standing was based on his relationship with FEI elephants and since he has already testified, it is clear that any alleged racketeering acts cannot recur after the lawsuit against FEI has concluded. *See Spool*, 520 F.3d at 185 (while an enterprise that made a practice of submitting false information in lawsuits might very well indicate a pattern of unlawful activity, such actions in the context of a single lawsuit do not necessarily constitute a pattern as contemplated by the RICO statute).

Defendants do not suggest that attorneys' fees and litigation costs could never be *part* of the damages sought in a RICO claim that properly asserted a genuine "pattern" of racketeering activity. However, a claim centered on conduct in connection with one lawsuit, with a limitation of damages to fees and costs expended on that single case, clearly does not constitute such a "pattern" under binding Circuit precedent. None of the cases cited by FEI remotely holds or suggests otherwise.[19] Accordingly, this quintessentially single scheme, single victim, single harm RICO claim does not sufficiently allege a pattern of racketeering activity and must therefore be dismissed, no matter how much rhetoric FEI tries to cloak it in.[20]

[19] The only other D.C. Circuit cases cited by FEI involved vast criminal conspiracies so demonstrably at odds with the elephant protection goals alleged here that they underscore the *lack* of a genuine RICO pattern in this case. *See, e.g.*, *Wilson*, 605 F.3d at 997 (a criminal gang that "operated a massive drug ring" that sold PCP, as well as ecstasy and crack cocaine, was guilty of a pattern of racketeering); *United States v. Richardson*, 167 F.3d 621, 623 (D.C. Cir. 1999) (affirming convictions of members of a "criminal enterprise" responsible for multiple violent crimes including "armed robbery, assault with intent to murder, assault with a deadly weapon," and many other "serious crimes"); *cf. United States v. Palfrey*, 499 F. Supp. 2d 34, 38 (D.D.C. 2007) (refusing to dismiss criminal indictment of defendants charged with operating an extensive prostitution ring); *Oceanic Exploration Co. v. ConocoPhillips, Inc.*, 2006 WL 2711527, at *17 (D.D.C. Sept. 21, 2006) (alleging a decade long RICO pattern where the defendants were accused of bribing multiple Indonesian and East Timorese "government officials" in order to win contracts, to the detriment of multiple competitors); *Elemary v. Holzmann*, 533 F. Supp. 2d 116, 120, 143 (D.D.C. 2008) (holding that a "construction magnate" who pled guilty to an elaborate "big-rigging scheme" that "defrauded the United States government of millions of dollars," could be sued for civil RICO damages by one of his victims). The cases by FEI from other Circuits also favor defendants' position. *See, e.g. Abraham v. Singh*, 480 F.3d 351, 355 (5th Cir. 2007) (explaining that although "alleged RICO predicate acts [that] are part and parcel of a single, otherwise lawful transaction" are *not* sufficient to demonstrate a RICO pattern, a claim involving hundreds of victims who were alleged to have been mistreated in both India and the United States could be pursued); *Parcoil Corp. v. Nowsco Well Service, Ltd.*, 887 F.2d 502, 503 (4th Cir. 1989) (affirming dismissal of a RICO claim that did "not allege sufficient *continuity* to the scheme to bring it within RICO's purview"); *Resolution Trust Corp. v. Stone*, 998 F.2d 1534, 1543-45 (10th Cir. 1993) (finding pattern in view of, *e.g.*, the "complexity and size" of the alleged schemes; the "number of victims," and whether the "injuries caused were distinct").

[20] Indeed, FEI's reliance on the indictment in *United States v. Milberg Weiss LLP, et al.*, 2:05-cr-00587(D)-JFW (C.D Cal.) further reinforces the lack of any alleged pattern here. *Milberg Weiss* involved a 26-year kickback scheme orchestrated by a law firm and several of its partners involving secret payments to individuals who served as representative plaintiffs in approximately 175 separate class action and shareholder derivative action law suits brought by the law firm. *Milberg Weiss*, 2:05-cr-00587 (Doc 353-2), Second Superseding Indictment, filed 09/20/07, at 13-14. The law firm paid or caused to be paid more than $11 million in secret and illegal kickbacks, including a portion of the approximately $251 million in attorneys' fees and partnership profits earned by the firm. *Id*. at 14. The racketeering activity alleged by the government also included a scheme to conceal the illegal kickback arrangements from the

B. FEI Cannot Demonstrate That Its Injuries Were Caused Solely By The Standing Alleged By Mr. Rider In The ESA Case.

To have standing to bring a private civil RICO claim, a plaintiff must have been caused "injur[y] in his business or property *by reason of a violation of section 1962*." 18 U.S.C. §1964(c) (emphasis added). As the Supreme Court has repeatedly explained, this "by reason of" language "requires 'some direct relation between the injury asserted and the injurious conduct alleged.'" *Hemi Group, LLC v. City of New York*, 130 S.Ct. 983, 989 (2010). FEI now concedes that its only "injury to FEI's business here is *the money spent defending the ESA case*," because of the allegedly fraudulent standing of Mr. Rider in the ESA Action. Opp. at 67 (emphasis added); *see also* FEI Initial Disclosures (DE 59-1) at 30.

In particular, FEI asserts that "*[h]ad Rider not been paid to claim falsely that he had an 'aesthetic injury' there never would have been an ESA case*, and FEI would not have spent the money it spent defending that case." Opp. at 68 (emphasis added). However, FEI's position ignores the inescapable fact that several organizations also brought the ESA Action against it. Arguing that the three original organizational plaintiffs were dismissed for lack of standing in June 2001, "*in a ruling that remained undisturbed up to and through the point at which they totally abandoned the case at trial*," Opp. at 68 (emphasis added), also fails. In February 2003, the D.C. Circuit "reversed" this Court's June 2001 standing ruling, 317 F.3d at 339, and, hence, that decision was certainly *not* "undisturbed." Moreover, as a result of that reversal, the D.C. Circuit expressly *left open* the question of whether the organizational plaintiffs who had sued FEI

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courts presiding over the approximately 175 actions, the other parties to the lawsuits, and absent class members and shareholders whose interests the firm purported to represent. FEI, on the other hand, alleges a racketeering scheme involving a single lawsuit under the ESA citizen suit provision, with only one purported victim and what FEI now concedes is a single injury for which it may seek relief in the form of an attorneys' fee petition. The vast scale and scope of the criminal racketeering activity averred in *Milberg* underscores the *absence* of any actionable "pattern" here, and why this case is clearly controlled by *Edmondson* and *Western Assocs.*

had standing, s*ee* 317 F.3d at 338, thus making it subject to further litigation – *as FEI itself repeatedly recognized.*

Accordingly, after remand, the three organizations and Mr. Rider all filed an Amended Complaint against FEI in 2003, which became the operative claims document for the litigation. ESA DE 1. FEI filed an Answer to the organizational plaintiffs' claims, ESA DE 4, the organizations were subjected to detailed discovery by FEI, including Rule 30(b)(6) depositions, *see, e.g.*, ESA DE 56 at 5 & n.4, and they in turn pursued discovery of their own from FEI. Never once did FEI interpose objections or refuse to respond to this discovery on the grounds that the organizations were no longer proper parties to the case. *Id*. Nor did FEI ever move for summary judgment based upon a perceived lack of standing of the organizational plaintiffs. Moreover, as the Court is also aware, when yet another organization – API – sought to become an additional plaintiff and asserted what this Court found to be "credible" organizational standing, *see ESA Final Ruling* at 60, FEI did not object on the grounds that organizational standing was a moot issue, *see* ESA DE 56, *supra* at n.10. The Court granted API's Motion because it found that FEI's "claims are identical to those of the *existing plaintiffs.*" ESA DE 60 at 1 (emphasis added). These factors reinforce defendants' position that the organizational plaintiffs remained full parties with their own claims.

Furthermore, as previously explained, this Court had extensive briefing and argument on both the factual and legal bases for the organizational standing arguments both during and after the trial, although it ultimately disagreed with the position of the ESA plaintiffs. *See, e.g.*, 2/19/09 Minute Order in No. 03-2006 ("directing each side to file a brief . . . addressing the plaintiff organizations standing to bring suit in this case"); ESA Tr. at 81-90 (2/26/09); ESA Tr. at 62-65, 93-96 (3/18/09); 7/14/09 ESA Tr. at 10-32 (7/14/09). None of this would have been

necessary if the question of the organizations' standing had "already been determined" by June 2001, when the court issued its initial ruling. Indeed, the Court's ruling on organizational standing during the trial would also have been completely unnecessary. Given this record, it is untenable for FEI to maintain that "at a minimum, the Rider payments were the *sole* cause of FEI's RICO injury from and after June 2001." Opp. at 68 (emphasis added). Mr. Rider was *never* the "sole" plaintiff in the ESA Action, and, as a result, was never "the sole cause" of FEI's alleged damages.

Having no substantive answer to the causation dilemma presented by its inability to identify Mr. Rider as the sole source for its alleged injuries, FEI tries to dismiss that difficulty, asserting that the inquiry regarding how much of FEI's fees and costs would have been expended if only organizational standing had been advanced from the outset "*is hypothetical and pointless*." Opp. at 69 (emphasis added). To the contrary, however, the Supreme Court has directed that a RICO standing analysis be focused on this very point. An attempt to discern among multiple direct and indirect causes of RICO injuries is *precisely* the type of attenuated causation theory forbidden by the key Supreme Court decisions cited in defendants' opening brief, and wholly ignored by FEI. *See* MTD at 49-57 (citing, *inter alia*, *Hemi Group LLC v. City of New York, supra*; *Bridge v. Phoenix Bond & Indemnity Co.*, 553 U.S. 639 (2008); *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451 (2006); *Holmes v. Securities Investor Protection Corporation*, 503 U.S. 258 (1992)). As the Supreme Court has explained, RICO's "direct-relation [injury] requirement avoids the difficulties associated with attempting 'to ascertain the amount of a plaintiff's damages attributable to the violation, *as distinct from other, independent, factors.*'" *Bridge*, 553 U.S. at 654 (quoting *Holmes*)(emphasis added). Here, such "other, independent factors" are unavoidable. Although Mr. Rider may have had "[t]he strongest case

for standing," 317 F.3d at 335, he did not have the "only" case for standing. *At all times during the ESA Action*, multiple plaintiffs with different claims of standing were before this Court. Therefore, this Court need not parse out the relative contribution that each of these independent individual and organizational plaintiffs added to FEI's defense bill in that case, when this is exactly what Supreme Court case law prohibits.[21]

Given the history of the ESA Action, this Court cannot apply Supreme Court RICO precedent to conclude that all of FEI's claimed damages were caused solely by Mr. Rider's assertion of standing. As a result, there can be no "direct relation between the injury asserted and the injurious conduct alleged.'" *Hemi Group, LLC v. City of New York, supra.*[22]

C. FEI Has Failed To Allege A Distinct "Enterprise" As Required By RICO.

As explained in defendants' opening brief, it is well-established under Supreme Court and Circuit precedent that, in view of the plain language of RICO, a plaintiff must delineate in its

[21] The non-Supreme Court and non-D.C. Circuit cases relied upon by FEI in its Opposition do nothing to alter the foregoing standing analysis. *Bankers Trust Company v. Rhoades*, 859 F.2d 1096 (2d Cir. 1988) and *Malley-Duff & Associates v. Crown Life Insurance*, 792 F.2d 341 (3d Cir. 1986) aff'd, 483 U.S. 143 (1987) were both decided well before the quartet of Supreme Court decisions charting out the limits on standing and injury causation in RICO cases. Neither these cases nor *Handeen v. Lemaire*, 112 F.3d 1339 (8th Cir. 1997) addressed the type of multiple overlapping injury causation factors at issue in this case. The remaining cases cited by FEI, *Stochastic Decisions v. DiDomenico*, 995 F.2d 1158 (2d Cir. 1993) and *Burger v. Kuimelis*, 325 F. Supp. 2d 1026 (N.D.Ca. 2004), actually support defendants' argument here. In *Stochastic*, the Second Circuit recognized that the Supreme Court had then recently articulated the proximate cause requirements for RICO in the *Holmes* case, applied the proper particularized proximate cause analysis to the facts before it, and ruled that "it cannot plausibly be contended that efforts to impede the collection of the New jersey judgments proximately caused Stochastic's prior expenditure of legal fees in obtaining the judgments." *Id.* at 1167. The same analysis applies here – *i.e.*, "it cannot plausibly be contended" that Rider's standing issues alone "proximately caused" FEI's expenditure of legal fees in defending against the other plaintiffs and many merits claims at issue in the ESA Action. *Burger v. Kuimelis* likewise requires detailed factual analysis of proximate cause allegations, specifically including "whether it will be difficult to ascertain the amount of the plaintiff's damages attributable to defendant's wrongful conduct." 325 F. Supp. 2d at 1035-1036.

[22] As explained, FEI itself was directly responsible for much of the delay, and hence much of the fees and costs, that afflicted the ESA Action. *See supra* at n. 13. Under any theory of causation, it could not be the case that RICO damages should be awarded *to FEI* for, *e.g.*, the "considerable amount of time and resources" that were "wasted" due to FEI's own discovery misconduct concerning the elephants' medical records. *See* 8/23/07 Mem. Op. and Order at 1 (DE 174) and other abuses in the ESA Action. This further reinforces why all issues regarding attorneys' fees and costs should be resolved in the ordinary way, *i.e.*, through a motion in the ESA Action, rather than a RICO claim.

Complaint how the "persons" alleged to have violated RICO are "distinct" from the alleged RICO "enterprise" for purposes of liability under Section 1962(c), because "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); *see also United States v. Philip Morris*, 566 F.3d 1095, 1113 (D.C. Cir. 2009) ("the RICO defendant must be distinct from the RICO enterprise"); MTD at 57-58. FEI does not dispute this unassailable legal proposition, but instead seeks to distance itself from its own Amended Complaint, which suffers from the *precise* flaw that has led many courts in this and other Circuits to dismiss RICO claims. *Id.*

Whereas FEI's *own allegations in the Amended Complaint* expressly assert a complete *identity* between the RICO "persons" (namely, the animal protection organizations, their lawyers, and Mr. Rider) and the purported RICO enterprise,[23] FEI's Opposition attempts to assert that the enterprise was somehow distinct from the defendants. Opp. at 70 (citing Am. ¶¶ 2-12, 34-46, 275-81). FEI's new enterprise theory should be rejected. These new arguments of counsel are not only completely at odds with the express allegations of the Complaint, which must govern here, but the paragraphs relied on by FEI simply reinforce that there is no difference between the RICO "persons" and the purported enterprise, *i.e.*, they simply repeat that the enterprise consists of the defendants, their agents, and employees. *See e.g.*, Am. Compl. at ¶ 277 (description of the Enterprise). Therefore, because the Complaint not only fails to allege with specificity the existence of an enterprise that is "distinct from the defendants," but instead alleges a "complete overlap between the defendants, their alleged agents, and the enterprise," the RICO claim simply

[23] The Amended Complaint alleges that the RICO persons and the RICO enterprise are *identical*. *See* Am. Compl. at ¶ 276 ("*each* defendant was a 'person'" within the meaning of RICO and "defendants," including their "agents and employees" were the "enterprise") (emphasis added). FEI also alleges that "[f]rom on or about 2000, continuing through the filing of this Amended Complaint, *defendants*, and others known and unknown**,** *including agents and employees of the defendants*, formed an associated-in-fact enterprise." *Id*. at ¶ 277 (emphasis added); *see also id*. at ¶ 13 (same).

cannot proceed consistent with the plain language of the statute. *Myers v. Lee*, 2010 WL 3745632, at *6 (E.D. Va. Sept. 21, 2010).[24]

Yet, even more important than this pleading problem is FEI's failure to come to grips with defendants' argument that the distinctiveness requirement is crucial here because RICO's language and purpose dictate that RICO defendants must be conducting or participating in the affairs of a separate illicit enterprise, not just their *own* affairs. *Reves v. Ernst & Young*, 507 U.S. 170, 185 (1993); *Cedric Kushner*, 533 U.S. at 163. In other words, to come within the rubric of the statute, the activities of the alleged enterprise "must be distinguishable from the normal day to day activities" of the RICO "persons." *Myers*, 2010 WL 3745632, at *5. As defendants have demonstrated, it is not enough to allege, as FEI does here, that various animal advocates, certain

[24] FEI's reliance on *Boyle v. United States*, 129 S.Ct. 2237, 2244 (2009), *United States v. Wilson*, 605 F.3d 985, 1020 (D.C. Cir. 2010) and *Allstate Ins. Co. v. Linea Latina DeAccidentes., Inc*., 2011 U.S. Dist. Lexis 16221 *13 (D. Minn. Feb. 16, 2011) is misplaced. Opp. at 70. Those cases address the structural requirements of an enterprise and/or its relationship to the pattern of racketeering activity, not the distinctiveness requirement embraced by *Cedric Kushner*, the D.C. Circuit, and every other Circuit court in the country. Indeed, *Boyl*e stands for the proposition that the affairs of the defendants and the affairs of the enterprise must be distinct even if the pattern of racketeering engaged in by the defendants is not distinct from the affairs of the enterprise, *id*. at 2244-45, and recognizes that an "association-in-fact enterprise" "must have a structure" and a "common purpose" that renders it distinct from the ordinary affairs of the defendants themselves, although that structure need not be formal or "hierarchical." 129 S. Ct. at 2245-46. As another court recently held, therefore, in *Boyle*, the "Supreme Court liberally construed the structure requirements of an association-in-fact enterprise," but "did *not alter the distinctiveness required between the RICO person and the RICO enterprise*." *Myers*, 2010 WL 3745632, * 3 n. 4 (emphasis added). Likewise, none of the other cases cited by FEI, *United States v. Phillip Morris*, 327 F. Supp. 2d 13, 18 (D.D.C. 2004), *United States v. Phillip Morris USA Inc.*, 566 F.3d 1095, 1111 (D.C. Cir. 2009), and *Living Designs, Inc. v. E.I. du Pont de Nemours & Co.*, 431 F.3d 353, 362 (9th Cir. 2005), *cert. denied*, 546 U.S. 1192 (2006) assist its position. Opp. at 70-71. *Phillip Morris* and *Living Designs*, each followed *Cedric Kushner*, but found that the defendants/RICO persons were alleged to be sufficiently distinct from the enterprise. As such, these cases are distinguishable because FEI's pleading alleges that the RICO persons and the RICO enterprise are identical and that defendants were engaged in their own affairs, not the affairs of the enterprise. FEI also cites *Phillip Morris* for the proposition that "members of the association may be both part of the 'enterprise' and liable as 'persons' under RICO if they conduct the enterprise's affairs through racketeering activity." Opp. at 70. While this is true, it does nothing to obviate the Supreme Court's rulings in *Reves* and *Cedric Cushner* that the RICO persons and RICO enterprise must be distinct. Of particular note, in *Philip Morris*, the D.C. Circuit not only reaffirmed that "one entity may not serve as the enterprise and the person associated with it," 566 F.3d at 1113 (internal quotation omitted), but the question in that case was whether an enterprise could *ever* consist of a "mixed group" of individuals and corporations, *id*. at 1111, an issue not before this Court. Indeed, none of the cases relied upon by FEI involved a Complaint that does not even aver the distinctiveness required under § 1962(c).

of their counsel, and Mr. Rider, each engaged in conduct to *further their own interests* – the protection of elephants through advocacy, fundraising, and litigation – which cannot constitute a RICO enterprise. *See* MTD at 58-60. Specifically, FEI's Amended Complaint alleges that: (1) defendants ASPCA, AWI, FFA/HSUS, API and WAP are dedicated to the protection of animals, including elephants and other animals used for entertainment purposes (s*ee, e.g.*, Am. Compl. ¶¶ 34-36, 38, 43); (2) Rider cared for elephants while at FEI and advocated for them with legislative and executive branch decisionmakers (*id.* at ¶¶ 37, 279, 283); (3) the lawyer defendants brought the ESA Action and bring other litigation to protect elephants and other animals (*id.* at ¶¶ 39-42, 44-45, 255, 265); and (4) defendants engaged in fund raising and advocacy efforts to help elephants and advance their other organizational interests (*id.* at ¶¶ 179, 236-39). Thus, FEI has not alleged that the affairs of the enterprise are distinct from the affairs of the defendants/RICO persons – which alone is fatal to its ability to pursue this case under *Reves, Cedric Kushner*, and other precedents.

In its Opposition, FEI contends that the defendants/RICO persons were conducting the affairs of the enterprise in that they "banded together in the ESA Action in an effort to accomplish ends that they could not achieve on their own: ending elephants in FEI's circus with a lawsuit based on a fabricated claim of 'aesthetic injury' standing." Opp. at 71. FEI further contends that "[n]one of the lawyers or the organizations could have sued FEI on their own, and as proven at trial, Rider never would have been a plaintiff without being paid to be one." *Id*. at 71-72 (citing 677 F. Supp. 2d. at 80-81, FOF 53). To support these contentions, FEI relies heavily upon, and takes out of context, a single sentence from a factually inapposite case for the proposition that "if defendants band together to commit [violations] they cannot accomplish

alone," then they could meet the distinctiveness requirement of an enterprise. *Id*. at 71 (quoting *In re Ins. Brokerage Antitrust Lit*., 618 F.3d 300, 378 (3d Cir. 2010)). FEI is again mistaken.

First, as set forth above, FEI's own Complaint makes clear that, in pursuing the ESA Action and otherwise advocating for the protection of elephants, defendants were plainly pursuing their own "goals and objectives" of protecting animals from mistreatment, not carrying out some separate mission of an alleged enterprise. *Myers*, 2010 WL 3745632, at *5. Second, defendants have consistently maintained that the organizational plaintiffs (in addition to Mr. Rider) had standing to sue FEI under the ESA – an issue not definitively resolved by this Court until its final judgment, and which is presently pending before the Court of Appeals. Regardless of how the appeal is resolved, that the organizations have advocated their *own* institutional interests in the ESA Action leaves no doubt that they did not "band together" simply to commit activities that they could not engage in on their own. Finally, FEI cannot avoid dismissal by summarily alleging that the purported "enterprise has existed separate and apart from defendants' racketeering acts and their conspiracy to commit such acts" because such conclusory allegations are plainly inadequate under *Iqbal* and *Twombly*. The Complaint not only fails to allege how "any of the defendants were 'conduct[ing] or participat[ing] in the conduct of the *enterprise's* affairs, not just their own affairs," *Bates v. Northwestern Human Services*, 466 F. Supp. 2d 69, 85 (D.D.C. 2006) (quoting *Cedric Kushner*, 533 U.S. at 163), but FEI's pleading actually undermines any such finding, warranting dismissal on this legal ground as well. MTD at 60.[25]

[25] Although FEI's enterprise argument must fail in any event, this Court did not find that "Rider never would have been a plaintiff without being paid to be one." Opp. at 71-72. Rather, the Court found that, although Mr. Rider *did* engage in public education and advocacy for the elephants, the "*primary* purpose of the funding provided by the organizational plaintiffs . . . was to secure Mr. Rider's initial and continuing participation as a plaintiff" in the ESA Action, that "absent the financial incentive, Mr. Rider *may* not have begun or continued his advocacy efforts or his participation as a plaintiff" in the ESA Action, and that "ensuring Mr. Rider's continued participation as a plaintiff was *a motivating factor* behind the payments to him." 677 F. Supp. 2d. at 80-81, FOF 53 (emphasis added). Thus, there has been

At the end of the day, all that FEI alleges here is that defendants – the RICO persons – are identical to the "enterprise" and that they all joined together for the purpose of conducting their own affairs, *i.e*, the protection of elephants. Accordingly, as a matter of law, there is no RICO enterprise.

D. FEI Has Also Failed To Allege The Necessary Predicate Acts Against All Defendants To Support Its RICO Claims.

FEI goes to great lengths to defend the plausibility of its individual predicate act offenses. Opp. at 26-28. In doing so, however, FEI truly loses sight of the forest for the trees. As explained in defendants' opening brief, MTD at 65-68, the single unifying touchstone among all of FEI's predicate act allegations is "concealment." However, simply put, no one "bribes" a witness while telling the opposing party – as well as the Court – that it is in fact funding that witness, just as no one commits "obstruction of justice" out in the open, or "launders money" in plain view, and, as the public record in the ESA Action establishes, the ESA plaintiffs *never* hid the fact that Mr. Rider was receiving funding while the ESA litigation was pending. To the contrary, as defendants have demonstrated, by May 2002, long before any charges of impropriety were raised about the payments at issue here, Mr. Rider had publicly disclosed how his efforts were being supported financially, and, in 2005, counsel for the ESA plaintiffs also candidly – and on her own – disclosed to this Court, as well as FEI's counsel, that Rider was being funded by the plaintiff organizations in the ESA Action. *See* MTD at 8-9. There are certainly no crimes in that, and, without a unifying theme of intentional concealment supporting FEI's alleged predicate acts, those allegations must all collapse like a house of cards.

Once the absence of concealment – and its implications – are properly understood, it is readily apparent that the gravamen of FEI's RICO predicate act claims is a series of litigation

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no finding by the Court that Mr. Rider would not have participated in the ESA Action without the funding, let alone that he was paid to lie or alter his testimony in any manner.

complaints, nothing more and nothing less. It is well-established, however, that a RICO action is not the appropriate vehicle for asserting complaints, over, *e.g.*, whether various discovery materials should have been "disclosed earlier" than they were in the ESA action, Opp. at 7; whether the ESA plaintiffs' offer to produce certain information subject to a protective order was "disingenuous," *id*. at 5 n.7; whether some of the ESA organizational plaintiffs' *initial* answers to interrogatories were adequate, *id*. at 6; or a host of similar (and unfounded) complaints that FEI has about how the ESA plaintiffs and their attorneys complied with their discovery and other litigation obligations. *Id*. at 5-9. Rather, these are the sorts of complaints that could be leveled to one degree or another against almost any party in a case, especially one litigated for ten years.

To find such "litigation activities" sufficient to establish a RICO claim, especially those connected to a single underlying lawsuit, "would lead to absurd results," including the "inundation of federal courts with civil RICO actions that could potentially subsume all other state and federal litigation in an endless cycle where any victorious litigant immediately sues opponents for RICO violations." *Curtis & Associates, P.C. v. Bushman*, _ F. Supp. 2d _, 2010 WL 5186795, at *14 (E.D.N.Y. Dec. 15, 2010) (citing cases). Indeed, as one court recently noted in refusing to allow RICO to be used for just such purposes, "were this [C]ourt to permit plaintiff['s] Complaint in this action to move forward, defendants could conceivably countersue plaintiffs for RICO conspiracy violations" based on exactly the sort of actions that FEI contends constitute predicate acts sufficient to support a RICO claim. *Id*.

For example, when an expert witness is paid an extraordinarily large fee and then proceeds to provide facially absurd testimony that traveling on a train for days at a time replicates the elephants' natural migratory behavior as occurred with FEI's witness Ted Friend, *see* ESA Tr. 89-92, 125-26 (March 9, 2009 am) – does this mean that his testimony was

purchased or that he was paid an illegal gratuity? When a witness who has agreed to testify as both a fact and expert witness receives a unique compensation arrangement through "grants" to his university worth more than $700,000 (as did FEI's witness Dennis Schmitt, ESA Tr. 68-77 (3/13/09)), does this lead to the conclusion that the witness has been improperly influenced or provided an illegal gratuity? When sophisticated counsel are somehow "unable to locate" specific documents that were in their possession and which then became subject to a Court order for *in camera* review (as occurred with certain veterinary health certificates that Magistrate Facciola ordered FEI to produce, *see* ESA DE 332 at 3), does this signal that justice has been obstructed by the lawyers in the case? When a party fails for years to produce documents *twice* compelled by the Court (as FEI did with respect to elephant medical records in the ESA Action, ESA DE 176 at 5), does this reflect conduct rising to the level of "obstruction of justice" by FEI and its counsel?

If so, then defendants could presumably pile their own RICO claim on top of FEI's. But the far better legal and common-sense answer is that the federal courts should not be "inundat[ed]" with RICO claims based on such "litigation activities" that arise in the course of such complex and contentious civil litigation. *Curtis & Associates*, 2010 WL 5186795 at *14; *cf. Hallmark Cards, Inc. v. Monitor Clipper Partners, LLC*, _F. Supp. 2d_, 2010 WL 4980235, at *6 (W.D. Mo. Dec. 2, 2010) (refusing to consider litigation documents as predicate acts for RICO purposes to avoid a result under which "every dispute in which the parties' counsel exchanged letters could give rise to RICO litigation") (internal quotation omitted). By the same token, FEI's *post hoc* complaints with how the ESA plaintiffs answered discovery in the ESA Action cannot be deemed predicate acts for RICO purposes. Similarly, when a witness is ultimately found not credible by a court or jury, as was the case with Mr. Rider's assertion of

aesthetic injury, it does not follow, *ipso facto* that the witness was paid to, or did, intentionally lie in order to further some nefarious ulterior motives – especially when the witness *actually* worked at FEI and cared for the elephants at issue and where there was voluminous evidence, including from FEI itself, corroborating the witness's testimony concerning FEI's bull hook use and chaining practices. Under these circumstances, there is no plausible legal basis for FEI's contention that its predicate act allegations are sufficient to support a RICO claim.[26]

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

As demonstrated, because FEI's RICO claims "arise[] out of the transaction or occurrence" that was the subject of the ESA Action, and this Court already held that FEI waited too long to assert those claims when it tried to do so on February 28, 2007, under the plain language of Fed. R. Civ. P. 13(a), those claims were "compulsory counterclaims," and FEI is now "forever barred" from bringing them. *See* MTD at 20-25. In response, FEI makes several assertions of law and fact – none of which has merit.

A. The Doctrine Of Judicial Estoppel Does Not Apply Here.

Asserting that defendants' Rule 13(a) position is "totally incompatible" with what some of them "said and did" when FEI unsuccessfully sought to assert its RICO counterclaim in February 2007, FEI unsuccessfully attempts to avail itself of the judicial estoppel doctrine, Opp.

[26] Because FEI's RICO claim is heavily dependent on litigation activities that cannot form the basis for a RICO claim, there is no need for the Court to parse the particular allegations as to each defendant. The court need not do so, but at the very least the individual defendants as to whom the sole or central allegations involve conduct of the litigation itself (particularly, Howard Crystal, Jonathan Lovvorn, and Kimberly Ockene) should be dismissed for the additional reasons discussed in the Supplemental Motion to Dismiss filed by Mr. Lovvorn and Ms. Ockene. Even if the Court were to reach the issue, FEI's brief confirms that it has engaged in impermissible "group pleading" and failed to apply the requisite test as to each defendant. *See* MTD at 61-63. For example, simply asserting that particular defendants had "knowledge" of Mr. Rider's funding, or were partners in the law firm that brought the case, Opp. at 76, is certainly insufficient to establish that the individual defendant engaged in the "operation or management" of a criminal enterprise. *Reves v. Ernst & Young*, 507 U.S. 170, 183 (1993); *see also Progressive N. Ins. Co. v. Alivio Chiropractic Clinic, Inc.*, 2005 U.S. Dist. LEXIS 27538 *9 (D. Minn. Oct. 22, 2005) ("an attorney or other professional does not conduct an enterprise's affairs through run-of-the-mill provision of professional services"; even allegations that the attorney falsely notarized document and submitted misleading documents in arbitration proceedings deemed insufficient).

at 28-32, which is inapplicable here. To begin with, because this doctrine only applies to arguments asserted by the *same party in a prior proceeding*, it simply cannot be used to preclude arguments made by those defendants who were added to this case in 2010. *See New Hampshire v. Maine*, 532 U.S. 742 (2001).

More importantly, there simply is no "incompatibility" in the positions taken in 2007 by the ESA plaintiffs – who addressed and successfully defeated FEI's effort to add its RICO claim as a *permissive* counterclaim under Rule 13(e) – and the defense position taken here that the RICO claims constitute a compulsory counterclaim under Rule 13(a). Because FEI sought leave to add its counterclaim *only* under *Section (e)* of Rule 13 (for permissive counterclaims), *not* Rule 13 (a), the parties did not address, and the Court did not decide, whether the RICO claim was compulsory in nature. Nor has FEI cited any authority for its self-serving proposition that a party somehow waives its right to challenge an adverse party's failure to timely raise a compulsory counterclaim under Rule 13(a). The *plain language* of Rule 13(a) governs here – it mandates that, if FEI's claim arose "out of the same transaction or occurrence" as the ESA Action, then FEI "must" state it as a counterclaim at the time it serves a responsive pleading. As the Supreme Court has made clear, if a party fails to do so, that claim is "thereafter barred." *Baker v. Gold Seal Liquors, Inc.*, 417 U.S. 467, 469 n.1 (1974).[27]

Nor is there any merit to FEI's false assertion that the ESA plaintiffs argued that the RICO counterclaim was "unrelated" to the ESA Action, let alone that this was the basis for the Court's ruling denying FEI's motion to add the counterclaim under Rule 13(e). Opp. at 30-31.

[27] Contrary to FEI's assertion, Opp. at 41, n. 20, this statement in *Baker* is not "dictum" that need not be followed by this Court. Rather, it is well settled that where the Supreme Court's reasoning is central to the "rationale upon which the Court based the result[]" that it reached – as was the case in *Baker* – it is binding on all courts. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 67 (1996); *see also Doughty v. Underwriters at Lloyd's, London*, 6 F.3d 856, 861 n. 3 (1st Cir. 1993) (it is a "truism" that Supreme Court dictum "generally must be treated as authoritative").

Indeed, this same assertion by FEI was categorically rejected as "*patently incorrect*" by this Court in 2007 – when it decided to stay this case after FEI filed it as a separate action. *See* 523 F. Supp. 2d 1, 3 (D.D.C. 2007) ("*Nowhere in its opinion did the Court determine the claims are too different to be tried in the same lawsuit or that the outcome of the ESA action is irrelevant to the RICO claim*.) (emphasis added).

This passage from the Court's 2007 stay ruling also summarily disposes of FEI's judicial estoppel theory, since the doctrine applies only where a party's position is both "clearly inconsistent" with its prior position, and was also *the basis for the court's previous ruling*. *See New Hampshire v. Maine*, 532 U.S. at 750-51.[28]

B. FEI's RICO Claims Constituted A Compulsory Counterclaim.

FEI cannot avoid dismissal since its RICO claims both meet the definition of a "compulsory counterclaim" under Rule 13(a), and, as this Court already ruled in 2007, was filed way too late and are forever barred. *Baker*, *supra*. There can be no doubt that, under the "flexible" construction of Rule 13(a)'s requirement that a claim "arise out of the same transaction or occurrence," FEI's RICO claim unquestionably satisfies this long established test. *See Moore v. New York Cotton Exchange*, 270 U.S. 593, 610 (1926); *see also* MTD at 21-22.[29]

[28] Nor, as FEI asserts, Opp. at 33, did the ESA plaintiffs contend that FEI would be able to file its RICO claim in another jurisdiction. Rather, to ensure that *this* Court would be the one to ultimately pass on whether RICO claims inextricably intertwined with the ESA case should proceed, the ESA plaintiffs merely suggested holding in abeyance FEI's motion to add that claim, because otherwise FEI "would almost certainly refile it in another jurisdiction" in an attempt to convince a *different* court that these claims should proceed, *see* ESA DE 132 at 31 – precisely what FEI tried to do when it attempted to file this clearly related case as "unrelated" to the ESA Action. *See* DE 1 (Civil Cover Sheet).

[29] Neither of the cases cited by FEI, Opp. at 33, helps its arguments. In fact, *Burlington N. R. Co. v. Strong*, 907 F.2d 707, 711 (7th Cir. 1990), supports defendants' position and reiterates that the test for whether claims "arise out of the same transaction or occurrence" is whether there is a "logical relationship" between the claims – a test that is met here. *See* MTD at 21. Likewise, *Columbia Plaza Corp. v. Sec. Nat'l Bank*, 525 F.2d 620, 626 (D.C. Cir. 1975), recognizes that this test is easily met where there will be overlaps in the evidence and discovery that is used in both actions – a situation that also is readily present here since FEI is relying on much of the same evidence and discovery produced in the ESA Action to support its RICO claims. *See* FEI's Initial Disclosures at 2-29 (DE 59-1).

Indeed, FEI's own Opposition repeatedly concedes that the RICO claim is predicated on conduct that purportedly occurred in the ESA Action (including FEI's central claim that the ESA plaintiffs and their counsel "manufactured" jurisdiction and fabricated Tom Rider as a plaintiff), and that FEI's *sole* damages consist of its legal fees and costs in defending the ESA Action. Opp. 2-10, 12-13, 14, 27-28, 73-75.[30]

This Court should also reject FEI's assertions that its RICO claim had not "matured" by the time it filed a responsive pleading. Opp. at 33-40. As defendants have shown, and FEI apparently agrees, the test for whether the RICO counterclaim should have been asserted at an earlier point is whether, by the time it filed its responsive pleadings, FEI had the "essential facts" that form the basis for its claims, *see* MTD at 22; Opp. at 33 – *not* whether FEI knew *all* facts that give rise to its claims. *See also Moore v. New York Cotton Exchange*, 270 U.S. 593, 610 (1926). Here, FEI unquestionably knew the "essential facts" forming the basis for its RICO claims in 2003 when it filed its *original* Answer, and it had extensive *additional* facts for those claims when it filed its Supplemental Answer on March 15, 2006.

Thus, the "essential facts" that form the basis of the RICO claims are that: (1) Mr. Rider worked for FEI from 1997 to Nov. 1999; Am. Compl. ¶ 37; (2) during the two and a half years he worked there, he "never complained to anyone in authority about any alleged elephant

[30] FEI cannot now disavow its own filings in the ESA Action, in which it repeatedly admitted that the claims are "so closely related," "part and parcel" of one another, and indeed inseparable. *See FEI Mem. in Support of Motion For Leave to Amend* (ESA DE 121-1), 3 ("[T]he assertions of fact contained in the proposed counterclaim are supported by evidence produced in this very case. Thus, unlike some RICO allegations - which are nothing more than claims that the proponent hopes to prove if allowed to take discovery - the facts underlying the RICO claim here have already been established."); *Id.* at 10 ("As such, 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.'") (case citation omitted); *FEI Reply to Non-Party Wildlife Advocacy Project's Response to Defendant's Motion For Leave to Amend* (ESA DE 137), 13 ("WAP does not even attempt to challenge FEI's argument, *see* FEI's Motion for Leave to Amend at 9, that the conduct forming the basis for the counterclaim is part and parcel of the ESA Action, thereby conceding that point."); *FEI Reply In Support of Motion For Leave to Amend* (ESA DE 142), 2-3 ("[T]he conduct underlying FEI's RICO and unclean hands allegations now cannot be separated from the ESA Action.").

mistreatment," and hence the treatment of the elephants did not really bother him – *i.e.*, he "had no 'aesthetic injury,'" *id.* ¶ 4; (3) at some point the ESA plaintiff organizations began giving Mr. Rider money "to say that he was in fact 'aesthetically injured,'" when in fact he was not, *id.*; (4) "[b]ased on this false facade, defendants created the romantic, but totally untrue, image of Rider as the heroic champion of elephant welfare who quit his FEI job because of 'aesthetic injury' and who was now speaking out for the elephants," *id.*; (5) "*[o]n this basis*, defendants *created a fraudulent claim of standing to sue in the ESA Action . . .*" *id.* (emphasis added); and (6) as a result, FEI incurred damages in the form of the attorneys' fees and costs that it was required to spend in defense of that case. *Id.* at ¶ 108.[31]

However, as FEI's own Amended Complaint reveals, and as confirmed by court records from the ESA Action that this Court should consider in deciding FEI's motion to dismiss, every one of these "essential facts" was well known to FEI in October 8, 2003 when it filed its original Answer. Thus, since FEI was Mr. Rider's employer from 1997 to 1999, FEI knew in 2000 (when the original ESA Complaint was filed) whether Mr. Rider "complained to anyone in authority about any alleged mistreatment," Am. Compl. ¶ 4, and it also knew that, contrary to its assertion that Mr. Rider had not suffered *any* aesthetic injury from what he observed when he worked there, he, his co-plaintiffs, and their counsel, were nonetheless asserting otherwise in the Complaint that they had filed with this Court. *See, e.g.*, Complaint, Civ. No. 01-1641 (DE 1).

It is also indisputable from FEI's own internal documents admitted into evidence at trial, that by May 2002 – more than a year before it filed its 2003 Answer in the ESA Action – FEI also knew that Mr. Rider was meeting with legislative representatives and the media and informing them that, when he worked at the circus from 1997 to 1999, he witnessed the

[31] Obviously, defendants dispute the vast majority of these allegations, but repeat them here because the crucial question under Rule 13(a) is whether these "facts," if they exist at all, were known to FEI by the time it filed each of its Answers in the ESA case.

elephants being mistreated, that he was speaking out about this mistreatment because he purportedly loved the elephants and wanted them to have a better life, and that he was receiving money for his expenses from the ASPCA, who was then the lead plaintiff in the ESA case. *See* MTD at 8-9. Therefore, it is beyond dispute that, by at least the time FEI filed its 2003 Answer, FEI knew *all* of the "essential facts" of the RICO claim it seeks to pursue here.[32]

In an effort to avoid the clear ramifications of its own internal document, FEI illogically suggests, even though its May 2002 email conceded its knowledge of funding but did not expressly state that organizational plaintiffs "are paying [Rider] to be a plaintiff and witness," that FEI somehow lacked knowledge of the "essential facts." Opp. at 35. However, as already demonstrated, MTD at 21-22, there simply is no requirement that a plaintiff have ironclad *proof* (let alone an admission) of every single element of its claim before being required merely to plead under Rule 13(a), and, in any event, such an approach would eviscerate the purpose of the Rule – "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. Pickard*, 371 U.S. 57, 60 (1962) (emphasis added).

The record amply demonstrates that FEI had even greater knowledge of the facts underlying its RICO claim when it filed its 2006 Answer. In June 2004, FEI had received in discovery from the ASPCA an internal email (that FEI introduced into evidence at trial as DX

[32] Although FEI complains that the Court should not take into consideration the statement in its Amended Complaint that Mr. Rider was employed by PAWS in 2001 as an admission that FEI *knew* that fact in 2003 when it filed an Answer, Opp. at 34, FEI conspicuously does not *deny* that it knew this information in 2003, nor could it credibly make such a denial in light of the fact that one of the main purposes of FEI's 2001 settlement with PAWS of another lawsuit was to ensure that all other employees of PAWS – including Mr. Rider (who by then, according to FEI, had been falsely asserting in public forums that Ringling Bros. abuses its elephants) – would no longer publicly criticize the circus. *See* ESA Tr. At 111, March 3, 2009 (FEI CEO admits that the settlement prohibited anyone who worked for PAWS from speaking out against the circus)*; see also* ESA DE 85 at 11 (FEI argued that "the settlement agreement entered into by FEI and PAWS" should have "barred" Mr. Rider from continuing to be a plaintiff in the ESA Action).

46), which stated that the ASPCA, AWI, and FFA were all contributing money for Mr. Rider's living and traveling expenses as he traveled around the country. *See* DX 46; MTD at 23-24. This same email also set forth that Mr. Rider had "just left the employ" of PAWS "in order to follow the circus and speak out about its training/abuse of elephants." *Id*. Therefore, by June 2004, FEI definitely knew both that the original lead plaintiff in the ESA lawsuit (PAWS) had been funding Mr. Rider and that, since May 2001, the ASPCA, AWI, and FFA were paying his living and traveling expenses.[33]

Moreover, based upon the documents incorporated into the Amended Complaint by reference, it is undisputed that FEI knew *by 2005* many of the *additional* facts upon which it relies for its RICO claim.[34] Thus, for example, in the 30(b)(6) deposition taken on July 19, 2005, Lisa Weisberg testified that the ASPCA had advanced money to Mr. Rider "to reimburse [him] for his general living expenses" as he advocated for the elephants. Weisberg Dep. (attached hereto as Def. MTD Ex. A) at 46 – 47. She further testified with reference to particular documents that the ASPCA had produced to FEI in June 2004 that: (1) the organization had reimbursed the law firm Meyer & Glitzenstein "for money given to Tom Rider," *id.* at 43-44, 52; (2) ASPCA provided a grant in the amount of $6,000 to WAP "to enable Tom Rider to do his public outreach and education about the treatment by Ringling Bros.," *id.* at 45; and (3) WAP was a "501(c)(3) organization . . . created by Meyer & Glitzenstein to advocate for the humane treatment of wildlife and preservation of habitat." *Id.* at 43-45. Likewise, at the May 26, 2005

[33] Indeed, FEI itself asserted in its *original* Complaint in this case that "[t]he payment scheme . . . became known to FEI *in June 2004 when one or more of the defendants submitted their discovery responses in the ESA Action*," s*ee* Original RICO Complaint (DE 1) at ¶ 20 (emphasis added), a fact that this Court can certainly take judicial notice of in deciding this issue. *See Western Assoc.*, 235 F.3d at 634 (in deciding a motion to dismiss "it is appropriate for the court to look beyond the amended complaint to the record, *which includes the original complaint*") (emphasis added).

[34] As explained, because FEI specifically relies in its Amended Complaint on the deposition testimony of representatives of the ASPCA, AWI, and FFA, *see* Am. Compl. at ¶¶ 32, 206, 217, the Court may consider *other* portions of those same documents in ruling on the Motion to Dismiss.

Rule 30(b)(6) deposition of AWI, Cathy Liss acknowledged that AWI had "contributed" money towards Mr. Rider's expenses, "to educate the public about what he had observed," Liss Dep., Def. Ex B, at 140-41, and, at the June 22, 2005 Rule 30(b)(6) deposition of FFA, Michael Markarian testified that FFA had also provided money to Mr. Rider "to assist with his travel expenses to participate in [a] Denver press conference," concerning "a city ballot measure dealing with circuses." Markarian Dep., Def. Ex. C, at 156-158.

Therefore, as of June 2005, in addition to all of the other "essential facts" FEI already knew regarding the basis for its RICO claim, it *also* had knowledge that at least four of the plaintiff organizations – PAWS, ASPCA, AWI, and FFA – had all provided money to Mr. Rider, and it *also* knew that some of this money was either provided to Mr. Rider directly, reimbursed to Meyer & Glitzenstein, or provided as a grant to WAP – facts that are heavily relied upon by FEI as a basis for its RICO Complaint.[35] Moreover, as this Court itself emphasized in denying FEI's belated motion to add the counterclaim in 2007, on September 16, 2005, "Plaintiffs' counsel admitted in open court . . . that the plaintiff organizations provided grants to Tom Rider to 'speak out about what really happened' when he worked at the circus." 244 F.R.D. at 52. Notwithstanding that FEI had all of this information – which forms the basis for its RICO claim – it *still* did not raise such a claim when it filed a Supplemental Answer on March 16, 2006. FEI's failure to do so is fatal to its effort to pursue this claim here.

FEI's proffered excuses for failing to plead its RICO claim when it filed its Answers in the ESA Action simply cannot suffice to salvage that claim now. FEI asserts that, notwithstanding all of its knowledge of the above information that had been provided in pleadings, documents, 30(b)(6) depositions, and by counsel in open court, "the picture on the

[35] *See, e.g.*, Am. Compl. ¶¶ 1-3, 6, 11, 17, 19-21, 23-26, 43, 60-63, 67-70, 72, 76-77, 82, 85-88, 93, 98-100, 102, 104-105, 109, 116-117, 125. 128. 131-143, 144, 150, 156, 163, 200, 206-207, 209, 211-215, 217-218, 221-222.

Rider payments at that point was completely obscure." Opp. at 39.[36] However, not only was Mr. Rider's receipt of funding from plaintiff organizations not so "obscure," but it begs the question – the relevant test as to whether FEI's RICO claim had matured when it filed a responsive pleading is not whether FEI had every single fact upon which it now relies for that claim, but whether it had the "essential facts." *Moore*, 270 U.S. at 610. Moreover, as this Court observed in denying FEI's motion to add this claim in 2007 as being too late – "[a]lthough [FEI] alleges an 'elaborate cover-up' that prevented it from becoming 'fully aware of the extent, mechanics, and purpose of the payment scheme until at least June 30, 2006 . . . *such a statement ignores the evidence in this case that was available to [FEI] before*" that date. ESA *Counterclaim Ruling*, 244 F.R.D. at 52 (emphasis added).

Nor can FEI excuse its failure to raise its RICO counterclaim on the grounds that it was not "required" to file its March 2006 Answer. Opp. at 36. The plain language of Rule 13(a) mandated that FEI assert that claim when it chose to file its March 15, 2006 Answer. Furthermore, in their Supplemental Complaint, the ESA plaintiffs incorporated by reference all of the "claims for relief" that were set forth in their original Complaint, *see* ESA DE 55 ¶ 15 – which FEI expressly *denied* in its 2006 Answer on the grounds that *none* was entitled to any relief. ESA DE 63 ¶ 15 ("Defendant denies . . . that *Plaintiffs* are entitled to any relief") (emphasis added). Therefore, because FEI filed a "pleading" on March 15, 2006 in the ESA Action asserting that none of the ESA plaintiffs, including those that were included in the original Complaint, were entitled to relief, pursuant to the plain terms of Rule 13(a) it was required to plead its related counterclaim against those "opposing part[ies]."

[36] The vast majority of the documents relied on by FEI, Opp. at 39, were not admitted into evidence in the ESA Action (*e.g.*, ESA DE 87-13, 85-5, 166-26, 166-21, 166-14, 166-19, 166-22, 166-24), nor were they incorporated by reference into FEI's Amended Complaint. While erroneously insisting that the Court cannot consider matters of public record in the ESA Action, such as exhibits that were formally admitted into evidence, FEI has not cited *any* authority for its reliance on *these* documents.

The cases relied on by FEI, Opp. at 39-40, do not assist its position. For example, *Waddell &. Reed Financial, Inc. v. Torchmark Corp.*, 292 F. Supp. 2d 1270 (D. Kan. 2003), raised the question of whether an earlier judgment in one state court precluded the filing of a different state court action. FEI takes out of context the court's reference that a "continuing course of conduct" may give rise to a separate lawsuit, Opp. at 40, which actually refers to *different* actions causing *different* injuries occurring "beyond the date when [the plaintiffs] filed their Alabama counterclaims." 292 F. Supp. 2d at 1281-82. This is a far cry from what is present here, where FEI's *sole* damages are those arising from having to defend against what it contends was a single "fraudulent" case. Indeed, in *Waddell*, the court rejected the notion that the incursion of additional *damages* arising from a cause of action that had already been filed constitutes a separate cause of action that may be brought in a second court. *Id.* at 1278.

Likewise inapposite is *Universal Underwriters Ins. Co. v. Sec. Indus., Inc.*, 391 F. Supp. 326 (W.D. Wash. 1974), where the court held that an insurance company's claim to recoup its attorneys' fees and costs against its insured's co-defendant that was found solely liable in a personal injury case did not exist until after a jury had determined that the insured was not liable. *See id.* at 329 ("[t]he claim herein to recover attorney fees and investigation costs, although it could have been contemplated at the time of the *Whitaker* [personal injury] action, had *no existence until Universal Underwriters' insured was absolved of liability to the third party plaintiff in the prior action*") (emphasis added). Here, in sharp contrast, FEI contends, as it did in 2007, that it began incurring *its* damages – *i.e.*, its attorneys' fees in the ESA case – from the moment the allegedly fraudulent ESA case was launched. *See e.g.,* Am. Compl.¶ 108 ("FEI has suffered and continues to suffer significant damages from the *substantial costs it has incurred in*

responding to the ESA Action – which has been ongoing for more than nine (9) years . . .") (emphasis added).[37]

V. FEI HAS FAILED TO REFUTE DEFENDANTS' SHOWING THAT THE RICO CLAIMS ARE BARRED BY EXPIRATION OF THE STATUTE OF LIMITATIONS.

FEI's RICO claims are also barred by the applicable four-year statute of limitations. MTD at 25-30. In response, FEI does not dispute that this limitations period runs from the date FEI discovered its injury – *i.e.*, it had "some evidence" of its claim. *See* Opp. at 42-43; *see also Rotella v. Wood*, 528 U.S. 549, 552, 555 (2000); *Nader*, 567 F.3d at 700. Rather, FEI makes several arguments that simply cannot save its untimely claims.

First, FEI erroneously asserts that in determining when it first knew of the injuries giving rise to its claim – *i.e.*, its attorneys' fees in defending the ESA Action – this Court may only rely on the allegations set forth in FEI's Amended Complaint. Opp. at 44. However, not only is this a misstatement of the well-established law as to what matters a court may consider in deciding a motion to dismiss, but FEI's pleading explicitly states that it began incurring damages from

[37] None of the other cases relied on, Opp. at 39-40, support FEI's position that the counterclaim was not compulsory. In *Burlington N. R. Co. v. Strong* , 907 F.2d 707 (7th Cir. 1990), the court held that a subsequent suit by the defendant railroad under an employee's disability benefit program to offset a personal injury judgment against it did not mature until a judgment was entered against the railroad, *id.* at 712 – whereas here, again, FEI alleges that it has suffered damages as a result of defendants' "fraudulent standing" in the ESA Action since 2000. *See* Am. Compl. ¶ 108. Similarly, in *Dillard v. Sec. Pac. Brokers, Inc.*, 835 F.2d 607, 609 (5th Cir. 1988), the court held that because a plaintiffs' civil RICO claim is based on actions his brokers took *after* he filed his answer in an earlier case it did not constitute a "compulsory counterclaim" under the plain language of Rule 13(a). Similarly, *Kuschner v. Nationwide Credit, Inc.*, 256 F.R.D. 684, 690 (E.D. Cal. 2009) held that a state claim based on the unauthorized recording of a telephone conversation did not mature until after defendant became aware of the recording, and in *Steinberg v. St. Paul Mercury Ins.*, 108 F.R.D. 355 (S.D. Ga. 1985), the court held that a counterclaim based on a promissory note was not compulsory because the defendant's answer was filed "three (3) months *before* the insurer's claim on the promissory note and security deed arose." (emphasis added). Further, all of the cases cited by FEI for the proposition that a compulsory counterclaim under Rule 13(a) does not bar the filing of a separate action as long as the related action is still pending, Opp. at 41, involve situations where the second lawsuit was filed at a time when the claim *would not have been out of time* had it been filed as a compulsory counterclaim. Here, however, as this Court already ruled when FEI tried to assert its RICO claim as a *permissive* counterclaim, this claim was simply filed too late.

having to defend against what it believes was a "fraudulently" filed lawsuit *in 2000*. Am. Compl ¶ 108. As demonstrated *supra*, FEI certainly had "some evidence" before August 23, 2003 – when the statute of limitations began to run with respect to the original defendants – that Mr. Rider's claims of aesthetic injury were, in its view, bogus, and that he had also been receiving money from several of the organizational plaintiffs.[38]

As to the additional defendants added in February 2010, FEI's own Amended Complaint concedes that it began to "uncover the payment scheme" that is at the heart of its RICO claim during the 30(b)(6) deposition of ASPCA in the ESA Action "on July 19, 2005." Am. Compl. ¶ 32. While this is more than a year *after* the date FEI claimed it knew of the same "payment scheme" when it filed its *original* Complaint, *see* DE 1 at ¶ 20, in either event, FEI's own allegations establish that FEI's RICO claims fall well outside the relevant statute of limitations with respect to all of the defendants added to its Complaint on February 16, 2010, including the law firm of Meyer, Glitzenstein & Crystal, five of the ESA plaintiffs' lawyers, and the Humane Society of the United States.[39]

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[38] For these reasons, FEI's reliance on the Fourth Circuit's decision in *CSX Transp. v. Gilkison*, 2010 WL 5421361 (4th Cir. Dec. 30, 2010), Opp. at 46, is completely misplaced. In *Gilkison*, the court found that there was nothing upon which it could rely to find that plaintiff knew or should have known that asbestos litigation (upon which it relied for its RICO claims) was fraudulently concocted, and hence the mere bringing of that lawsuit itself did not put plaintiff on sufficient notice of its RICO injury for purposes of starting the 4-year statute of limitations to run. *See CSX Transp.*, at *4. Here, however, in direct contrast, there is considerable evidence that FEI knew well before August 28, 2003 – four years preceding the date it filed its original RICO complaint – that, in its view, there was a "fraudulent" basis asserted for standing by Mr. Rider, and that he was receiving funding. Unlike *CSX Transp*., there was plenty of reason for FEI to know that "the alleged fraud was afoot," which started the clock running for purposes of limitations in August 2003, if not before.

[39] FEI's suggestion that it did not have to actually name the additional defendants in its 2010 Amended Complaint because they were already covered by the defendants included in 2007, Opp. at 44 n. 23, is an admission that FEI already knew that all of these additional entities were involved in the allegedly fraudulent "payment scheme" that is at the heart of its RICO claim. For example, FEI certainly knew, on February 28, 2007 when it filed its original Complaint, that Meyer Glitzenstein & Crystal had been representing plaintiffs in the ESA litigation for many years, that attorneys Lovvorn and Ockene had signed the 2003 Complaint in the ESA Action, *see* Am. Compl. ¶¶ 39-41, 44-55, and continued to be listed as attorneys of record on the docket even after they left the firm. FEI also knew from at least July

FEI's contention that this Court's stay of the original RICO case somehow tolled the statute of limitations with respect to the *new* defendants, Opp. at 44-45, is unsupported by the cases it cites. In both, *Selph v. Nelson*, Reabe & Synder, Inc., 966 F.2d 411 (8th Cir. 1992) and *Bixby Food Sys. v. McKay*, 2001 U.S. Dist. Lexis 3355 (N.D. Ill. Mar. 19, 2001), the plaintiff discovered new, related claims against *existing* defendants during the period the case was stayed; similarly, in *Javier v. Garcia-Botello*, 239 F.R.D. 342 (W.D. N.Y. 2006), the new defendants were omitted from the original complaint "*because plaintiffs counsel lacked knowledge of their existence* until counsel was able to review the evidence used in the criminal prosecution" of the original defendants, *id*. at 348 (emphasis added). Here, in sharp contrast, FEI indisputably knew, long before February 16, 2006, of the existence of all of the defendants it named for the first time in 2010. Accordingly, there is no legitimate basis for asserting an equitable tolling of the statute of limitations with respect to *these* parties. Indeed, FEI – which has shown no reluctance to otherwise aggressively assert its interests – could easily have filed a motion seeking leave to amend its Complaint while the ESA Action was pending to add any additional defendants to preserve its claims against them.

Moreover, not only is FEI unable to argue that all positions taken by the original defendants are somehow binding on the new parties to this case, Opp. at 45, but, contrary to FEI's suggestion, *id.*, the original defendants certainly never suggested, much less agreed, that

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2005, when it deposed the ASPCA's corporate representative, that Meyer & Glitzenstein had provided funding to Mr. Rider that was reimbursed by the ASPCA; that WAP had provided grants to Mr. Rider; and that Katherine Meyer and Eric Glitzenstein had founded WAP. *See supra*. As of June 22, 2005, FEI also knew from the deposition testimony of FFA's representative, that FFA had also provided money to Mr. Rider, *see supra*, and it also knew on January 1, 2005 of the organizational relationship between FFA and HSUS, s*ee* Rule 30(b)(6) Deposition of Mike Markarian Ex. C at 25-27; *see also* Am. Compl. ¶ 160 ("FFA/HSUS and HSUS merged effective January 1, 2005). Therefore, by June 2005, FEI had more than "some" evidence of its claims that all of these additional entities were also involved in the allegedly fraudulent "payment scheme" that forms the basis for its RICO claims, and, accordingly, it has no legitimate excuse for its failure to timely name these defendants.

FEI had a *valid* basis for pursuing its RICO claims against *anyone* once the stay was lifted. To the contrary, the original defendants simply argued that a stay would not be prejudicial because "FEI will still be able to seek recovery of [its] alleged damages after the ESA reaches a final judgment, *should FEI have a basis for doing so*." Def. Mot. For Stay at 4 (emphasis added); *see also id.* at 16-17 ("*the Court may determine whether to permit the Second RICO Suit to proceed*" following conclusion of the ESA case) (emphasis added). Now that the stay has been lifted, the original RICO defendants, as well as the newly added ones, have asserted numerous reasons why, as a matter of well established law, FEI has *no basis at all* for this spurious case.

FEI's third argument to avoid the bar of limitations – that the original defendants argued, and this Court ruled, that FEI would not be injured by the alleged RICO violations until after the ESA Action was resolved, Opp. at 47 – is both factually wrong and contrary to law. Much as FEI may wish it otherwise, the limitations period begins to run from the date that plaintiff knew or should have known of its alleged injury. *Rotella v. Wood*, *supra*. Moreover, at no time did any of the original defendants assert that FEI did not yet know that it was allegedly *injured* by having to spend attorneys' fees to defend itself in the ESA litigation; rather, they averred that allowing FEI's RICO case to go forward at that late date would greatly prejudice the prosecution of the long pending ESA Action, the resolution of which would, "at bare minimum, significantly narrow" the issues presented by FEI's RICO claim. DE 5 at 19. Such an assertion was not, and cannot be construed as, a waiver by the original defendants of a legally compelling statute of limitations defense. In agreeing that a stay was warranted, this Court found that FEI had "not articulated any actual prejudice" that would be imposed by a stay, and that "because FEI has no choice but to continue to defend the ESA suit regardless of the outcome of its RICO claim, FEI's damages are unascertainable at this point," *RICO Stay Ruling,* 523 F. Supp. 2d at 4 – an

observation that is certainly not tantamount to a finding that FEI did not suffer *any* injury for purposes of RICO's statute of limitations before issuance of this Court's December 30, 2009 opinion, as FEI now appears to advance.

Indeed, under FEI's misguided view of the law, the statute of limitations would not even commence until the Court of Appeals resolves the pending cross-appeals in the ESA case, and perhaps until there is a final appellate decision of entitlement to any attorneys' fees. However, such a theory not only contravenes existing Supreme Court precedent, *see* MTD at 25-29, but flies in the face of this Court's explicit finding that FEI unduly delayed raising its claims when it tried to do so in 2007. FEI cannot self-servingly transform this court's legitimate rationale for *staying* the untimely and "improperly motivated" RICO claims into an indefinite tolling of those claims for the purpose of avoiding dismissal based upon the expiration of the applicable statute of limitations.[40]

[40] FEI's reliance on a passage from *In re Merrill Lynch Ltd. P'ship Lit.*, 154 F.3d 56, 59 (2d Cir. 1998) (per curiam), Opp. at 47, n. 25, is misplaced. The cases cited there involved assertions that a RICO claim became ripe the moment a lender made what turned out to be fraudulently secured loans. In rejecting that proposition, the courts reasoned that the lender suffered no injury – and hence had no basis for its alleged RICO claim – until it had some evidence that the loans would in fact not be repaid. *See First National Bank v. Gelt Funding Corp.*, 27 F.3d 763, 768 (2d Cir. 1994) ("the amount of loss cannot be established until it is finally determined whether the collateral is insufficient to make the plaintiff whole"); *Cruden v. Bank of New York*, 957 F.2d 961, 977 (2d Cir. 1992) ("[t]he type of injury required under § 1964(c) cannot be said to have occurred where the damages arising from defendant's conduct are 'speculative' . . ," *cited by In re Merrill Lynch*, at 59. Hence, the Court in *Merrill Lynch* simply explained that such cases "hold that when a creditor alleges he has been defrauded RICO injury is speculative when contractual or other legal remedies remain which hold out a real possibility that the debt, *and therefore the injury*, may be eliminated . . ." (emphasis added). Here, however, FEI alleges that *its* alleged injury – *i.e.*, the cost of defending itself in the ESA Action – is based on an assertion that Mr. Rider's standing was fraudulent *from the beginning of the ESA case*. Accordingly, with respect to the fraud alleged in *this* RICO case, the relevant inquiry for purposes of when the four-year statute of limitations began to run is when FEI knew or should have known of *this* injury. The answer to that question for the original defendants is May 2002, and, for the new defendants – according to FEI's own Amended Complaint – is July 2005 at the absolute latest. Accordingly, the limitations period for both the original August 28, 2007 RICO claims, and the amended February 16, 2010 claims, had expired before those claims were filed.

Fourth, in yet another attempt to salvage its untimely claims, FEI resorts to misstating the holdings of courts in other jurisdictions, and wrongly asserting that the statute of limitations begins to run anew each time FEI spends money to defend the ESA litigation under some version of a continuous tort theory, which is simply not supported by the law. Opp. at 47-48. Rather, it is well established that the statute of limitations period does not start again unless there is evidence of a "new and independent injury," not simply *more* injuries of the same kind, caused by the *same* pattern of allegedly unlawful conduct. *See* MTD at 20; *Merrill Lynch*, 154 F.3d at 59.

FEI relies on case law that supports defendants' position and simply reaffirm this point. *Bankers Trust Co. v. Rhoades*, 859 F.2d 1096 (2d Cir. 1988) repeats the rule that "when a *new and independent injury* is incurred," a plaintiff's "right to sue for damages for that injury accrues at the time he discovered or should have discovered *that injury*." *Id.* at 1103 (emphasis added). As the Second Circuit emphasized, "where the plaintiff has already suffered injury and will continue to suffer that *same* injury in the future . . . an award of past and *future damages* may be entirely appropriate," as long as the claim is filed within the requisite statute of limitations period. *Id.* at 1103 (first emphasis in original, second emphasis added). Moreover, in *Bankers Trust*, the "new and independent injuries" asserted involved a *series* of "frivolous lawsuits" that were brought to delay the plaintiff, a bank, from collecting on its debt. *See id.* at 1099. Hence, it was in that context that the court observed that the attorneys' fees spent litigating *each of those separate lawsuits* gave rise to a new cause of action. *Id.* at 1105. Here, however, all FEI's claimed injuries stem from the defense of a *single* lawsuit commenced in 2000.[41]

[41] FEI takes out of context a quote from *Reisner v. Stoller*, 51 F. Supp. 2d 430, 451 (S.D.N.Y. 1999), Opp. at 48, which simply differentiates the four-year statute of limitations that applies to RICO claims from the statutory RICO requirement that to allege a "pattern of racketeering activity," a plaintiff must assert "at least two acts of racketeering activity" within ten years of each other, 18 U.S.C. § 1961(5). There, the court noted that "the four-year statute of limitations only limits the amount of damages recoverable by plaintiffs (*i.e.*, injuries occurring with the four years before commencement of the action) -

Fifth, despite having *actual* notice of the basis for its claim, FEI nevertheless insists that the statute of limitations was tolled by the "fraudulent concealment" of these facts by defendants until FEI had "the full story" in July 2005. Opp. at 51-52. However, this fraudulent concealment theory is both legally and factually flawed. Under the law in this Circuit, it is axiomatic that, where a plaintiff has *actual* notice of "some evidence" that forms the basis for its claims, "*the doctrine of fraudulent concealment does not come into play, whatever lengths to which a defendant has gone to conceal the wrongs*." *Nader*, 567 F.3d at 700 (emphasis added) (quoting *Riddle v. Riddle Washington Corp.*, 866 F.2d 1480, 1494 (D.C. Cir. 1989); MTD at 28, n. 18.[42]

Here, as a factual matter, it is undisputed that Mr. Rider conceded in *public* legislative testimony in 2002 that he was being funded by the ASPCA, and that the organizations also admitted such funding in their Rule 30(b)(6) depositions and in open court, *see supra*. Because FEI indisputably knew in 2002 that Mr. Rider was receiving funding from his co-plaintiffs, such actual knowledge defeats any claim of equitable tolling.[43]

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the term within which the predicate acts in support of the claim must occur is governed by the RICO statute itself," and therefore "plaintiffs may recover damages for all injuries which they discovered or should have discovered within the four years prior to filing the complaint, regardless of dates of RICO violations causing the injuries," *Reisner*, 51 F. Supp. 2d at 451 – the quote FEI includes in its brief to contend (erroneously) that, if the injuries continue beyond that date, so does the statute of limitations. Opp. at 48.

[42] Indeed, this is exactly the argument FEI and its counsel herein advanced in *Sparshott v. Feld Entertainment*, 311 F.3d 425 (D.C. Cir. 2002), which affirmed the dismissal of a lawsuit against FEI and Ringling Brothers for violations of the federal wiretapping act based on FEI's arguments that (1) plaintiff knew of defendants' illicit surveillance years before the complaint was filed, (2) plaintiff's lack of complete knowledge of "the whole scheme" was no excuse; and (3) allegations of "fraudulent concealment" did not stop the limitations period from running.

[43] FEI's lack of due diligence provides an additional reason why it cannot rely on the fraudulent concealment doctrine here: in June 2004, although Mr. Rider denied that his funding was properly characterized as "compensation for services rendered," he offered to provide FEI with information concerning "all income, funds . . . other money or items, including, without limitation, food, clothing, shelter, or transportation," that he had "received from any animal advocate or animal advocacy organization," as long as he could do so pursuant to a confidentiality agreement, DX 16 at 12 – *an offer that FEI refused to accept although it would have shed much more light on what FEI now conveniently contends was "fraudulently concealed." See, e.g., Nader*, 567 F.3d at 700-701 ("fraudulent concealment" does not toll the statute of limitations where the plaintiff could have obtained the additional information

VI. FEI CANNOT AVOID DISMISSAL OF THE STATE LAW CLAIMS.

If the RICO claims are dismissed, there is no basis for the Court to retain jurisdiction over the state law claims which, in any event, also cannot withstand scrutiny. For example, FEI tries to get around the well-established case law that the "favorable termination" requirement for malicious prosecution is not satisfied "where the underlying proceeding was resolved based on matters of standing and jurisdiction," *Parrish v. Marquis*, 172 S.W.3d 526, 532 (Tenn. 2005) (citations omitted), by arguing that the underlying suit need only "reflect on the merits." Opp. at 82. However, FEI cites no case in which a court found that a *standing ruling* reflected on the merits to satisfy the favorable termination requirement for a subsequent malicious prosecution claim. Rather, the only case upon which FEI relies for this proposition, *Brown v. Carr*, 503 A.2d 1241, 1245 (D.C. 1986), did not hold that plaintiff had stated a claim for malicious prosecution based on a ruling that only "reflected on the merits." Instead, the court in *Brown* explained that the rationale for the favorable termination requirement "is that it tends to indicate the innocence of the accused . . . ." *Id.* at 1244-45. Here, however, it is indisputable that there were no judicial findings indicating "the innocence" of FEI in connection with the ESA claims. To the contrary, this Court specifically stressed that it did not need reach "the merits of plaintiffs' allegations that FEI 'takes' its elephants in violation of Section 9 of the ESA." *ESA Final Ruling* at 60; *see* 3/8/11 Status Hearing Tr. at 11-12. As in *Brown*, no cause of action for malicious prosecution lies.

FEI's abuse of process claim fares no better because even its own allegations about defendants' conduct do not constitute sufficient "perversion of the judicial process and

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for his claim by the exercise of "due diligence," including by "read[ing] about it in the paper") (emphasis added); *see also Hardin v. Jackson*, 648 F. Supp. 2d 42, 47 (D.D.C. 2009) (statute of limitations expired where plaintiff could "have easily requested" from the government the information upon which it relies for its claim).

achievement of some end not contemplated in . . . regular prosecution." *Brown v. Hamilton*, 601 A.2d 1074, 1080 (D.C. 1992) (citation omitted). Courts in this district have held that neither the filing of a lawsuit to obtain "public relations advantages," *Houlahan v. World Wide Ass'n of Specialty Programs and Schools*, 677 F. Supp. 2d 195, 199-200 (D.D.C. 2010), nor the ulterior motive of forcing normal litigation expenses and distractions upon an opponent, *Nader v. The Democratic Nat'l Comm.*, 555 F. Supp. 2d 137, 161 (D.D.C. 2008), give rise to an abuse of process claim. Moreover, defendants' professed desire that FEI remove its inhumanely treated elephants from its circus cannot support an abuse of process claim absent some distinct act outside of the mere initiation of process. *See Houlahan*, 677 F. Supp. 2d at 199 n.3.[44]

VII. CONCLUSION

For all of the foregoing reasons, as well as those set forth in defendants' opening memorandum, FEI's Second Amended Complaint should be dismissed in its entirety with prejudice.

[44] To the extent champerty even remains a viable cause of action in 2011, the claim is fatally flawed because the ESA plaintiffs sought injunctive relief, not monetary damages. FEI unsuccessfully tries to get around this legal roadblock by relying on the ESA plaintiffs' claim for attorneys' fees under the Act. Judge Lamberth rejected this same argument in *Kerner v. Cult Awareness Network*, 843 F. Supp. 748, 751 (D.D.C. 1994). There, the underlying plaintiff brought an action for injunctive relief under a provision that also allowed the court, in its discretion, to award attorneys' fees. *See id.* at 749. FEI's claim for maintenance is even more fatally outdated than its other state law claims. To the extent this claim even exists as a cause of action, it fails because maintenance only applies in situations in which the defendant stirs up litigation despite having no interest in the subject matter of the case. As the court in *JPMorgan Chase Bank, N.A. v. KB Home*, 740 F. Supp. 2d 1192 (D. Nev. 2010) recognized, "a legitimate interest does not necessarily equate to standing or ability to bring the litigation in its own right." *Id.* at 1204. Here, the animal protection defendants were no strangers to the ESA litigation; on the contrary, they legitimately believed they would be the beneficiaries of the result of the litigation: the humane treatment of elephants. Finally, because only the slightest injury is required to start the running of the limitations period under Virginia law and it is of no consequence that the total amount of damage is not ascertainable until a later date, FEI's claim based on the Virginia Conspiracy Act is time-barred. *See Int'l Surplus Lines Ins. Co. v. Marsh & McLennan, Inc.*, 838 F.2d 124, 129 (4th Cir. 1988).

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 1st day of April, 2011, copies of the foregoing Defendants' Reply Memorandum In Support Of Motion To Dismiss Plaintiff's Amended Complaint, with Exhibits were served by ECF on the following counsel of record:

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

- - - - - - - - - - - - - - - - X
AMERICAN SOCIETY FOR THE :
PREVENTION OF CRUELTY TO :
ANIMALS, et al., :
Plaintiffs, :
V. : Case No. 03-2006 (EGS)
RINGLING BROS. AND BARNUM & :
BAILEY CIRCUS, et al., :
Defendants. :
- - - - - - - - - - - - - - - - X

Washington, D.C.
Tuesday, July 19, 2005

Videotaped deposition of LISA WEISBERG, a witness herein, called for examination by counsel for Defendants in the above-entitled matter, pursuant to notice, the witness being duly sworn by MARY GRACE CASTLEBERRY, a Notary Public in and for the District of Columbia, taken at the offices of Covington & Burling, 1201 Pennsylvania Avenue, N.W., Washington, D.C., at 9:40 a.m., Tuesday, July 19, 2005, and the proceedings being taken down by Stenotype by MARY GRACE CASTLEBERRY, RPR, and transcribed under her direction.

Q. What is the Wildlife Advocacy Project?
A. It's a 501(c)(3) organization.
Q. And is it associated with Meyer & Glitzenstein?
A. Yes.
Q. How so?
A. It is a -- I'm not sure I can fully answer that.
Q. Just whatever you know about it.
A. My understanding is it is an organization that was created by Meyer & Glitzenstein to advocate for the humane treatment of wildlife and preservation of habitat.

MS. DALTON: I would like to mark Exhibit Number 7.

(ASPCA Exhibit No. 7 was marked for identification.)

BY MS. DALTON:

Q. And this is another check request for Meyer & Glitzenstein dated April 4th, 2002, correct?
A. Correct.
Q. And it was requested by you?
A. Yes.
Q. And the reason given for the reimbursement is -- it says, "Reimbursement for money given to Tom

Rider exceeding the $6,000 grant to the Wildlife Advocacy Project for first quarter 2002."

A. Correct.

Q. And I can't really read this writing in the parenthetical. It looks as though it says 400 of this, and I don't know if you can help me out with the end of that.

A. Covers zoom camera, charge to capital budget with a question mark.

Q. Okay, thank you. And you said that the Wildlife Advocacy Project was an organization that was created by Meyer Glitzenstein to advocate the humane treatment of wildlife and preservation of habitat?

A. That's correct.

Q. Can you tell me a little bit more about what the Wildlife Advocacy Project does in more concrete terms?

A. I can't.

Q. Do you know if certain people at Meyer Glitzenstein are involved in the Wildlife Advocacy Project?

A. Yes.

Q. And who is involved in the Wildlife Advocacy Project?

A. I believe it's Kathy Meyer and Eric Glitzenstein.

Q. What is the ASPCA's role in the Wildlife Advocacy Project?

A. We provided a grant to them to enable Tom Rider to do his public outreach and education about the treatment by Ringling Bros. of its Asian elephants.

Q. And that was what the -- I'm sorry, the $6,000 referred to in the check request was this original grant, correct?

A. Correct.

Q. And the check request for $526.16 is additional funding over the original allotment in the budget for this project?

A. Correct.

Q. And $400 of this was for a zoom camera?

A. Correct.

Q. Was the zoom camera to be used by Mr. Rider?

A. Yes.

Q. And for what purpose was the zoom camera to be used by him?

A. To gather additional information about the treatment and chaining of the elephants by Ringling

Bros.

Q. What other activities were covered in the $6,000 grant?

A. They were to reimburse Tom Rider for his general living expenses to travel the country and meet with the media.

Q. Did you have any direct -- did you provide Mr. Rider with any direct payments or were all of your -- that's my question. Did you provide him with any direct payments?

A. Yes, in 2003, I believe.

Q. Did you provide that check request to us?

A. I believe I did.

MS. DALTON: I don't recall that, so Kim, if we could perhaps discuss that. We didn't receive any check request for Mr. Rider specifically.

THE WITNESS: Well, they weren't to Mr. Rider, the check requests. We would either advance money to him to purchase a Greyhound bus ticket or to reimburse him for his daily living expenses or I would prepay his hotel rooms. So there was never any checks written to Mr. Rider.

BY MS. DALTON:

Q. So there aren't any documents that would reflect any of those purchases or any of those

monetary advances?

A. The hotel rooms were oftentimes put on my American Express corporate card, and then some of the other smaller items were reimbursed to him through petty cash.

Q. And those were all in 2003?

A. Correct.

Q. Can you think of any other direct payments or in-kind reimbursements to Mr. Rider for any of the years besides 2003?

A. No.

Q. Returning to Exhibit 7. So if you could tell me -- if you could go into more detail as to what the $6,000 grant was originally for.

A. Again, it was to reimburse Mr. Rider for his Greyhound bus tickets, to travel the country, basic day-to-day living expenses, food, lodging.

Q. And this was all provided through the Wildlife Advocacy Project?

A. Correct.

Q. Did Mr. Rider know that the ASPCA was providing this funding through the Wildlife Advocacy Project?

A. I believe so.

Q. Did Mr. Rider, to your knowledge, receive

costs.

Q. So you spoke with the two other plaintiffs, the AWI and the Fund For Animals, regarding this?

A. Yes.

Q. Did you decide to pay these expenses directly?

A. Directly to Mr. Rider?

Q. Yes.

A. I believe at the time, because one of the difficulties was how to get the money to him because he was always on the road and didn't have a permanent home.

Q. Yes, you said that, because one of the difficulties, so --

A. So --

Q. So you were paying him directly because he was out on the road?

A. We were not paying him directly at the time.

Q. Okay. So let's just clear -- because you answered yes. I think my question was a little convoluted. So did you pay him directly for these travel expenses?

A. No, not at that time.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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AMERICAN SOCIETY FOR THE :
PREVENTION OF CRUELTY TO :
ANIMALS, et al., :
Plaintiffs, : Case No. 03-2006(EGS)
v. :
RINGLING BROS. AND BARNUM & :
BAILEY CIRCUS, et al., :
Defendants. :
- - - - - - - - - - - - - - - - - X

Washington, D.C.
Wednesday, May 18, 2005

Videotape Deposition of CATHY LISS, a 30(b)(6) witness herein, called for examination by counsel for Defendants in the above-entitled matter, pursuant to notice, the witness being duly sworn by SUSAN L. CIMINELLI, a Notary Public in and for the District of Columbia, taken at the offices of Covington & Burling, 1201 Pennsylvania Avenue, N.W., Washington, D.C., at 9:38 a.m., Wednesday, May 18, 2005, and the proceedings being taken down by Stenotype by SUSAN L. CIMINELLI, CRR, RPR, and transcribed under her direction.

A. For him to do -- to speak at events.
Q. What events has he spoken at on behalf of AWI?
A. He has never spoken on behalf of AWI.
Q. What events has AWI paid him to speak at?
A. We haven't paid him -- we paid his transportation costs so that he could go to Atlanta, for example, to speak.
Q. Okay. Tell me all the events for which you paid his transportation costs so he could go speak.
A. I couldn't tell you. It's not very many.
Q. What do you mean by not very many? How many are we talking about?
A. Given that the -- it's $2,000 for a hotel and transportation, it doesn't go very far. Maybe three.
Q. How did you decide when to, when to pay for Mr. Rider's -- let me rephrase that. Has it been at your request that Mr. Rider has gone to speak at these events?
A. Yes.
Q. And why have you decided to ask Mr. Rider to speak at these particular events?
A. They were in conjunction with appearances

of the circus and we thought it was important to educate the public about what he observed.

Q. And when you say the circus, do you mean specifically Ringling Bros.?

A. Yes.

Q. So you paid Mr. Rider's expense -- travel expenses to go speak about Ringling Bros. in cities where Ringling Bros. was performing?

A. That's correct. We contributed towards. Yes.

Q. Was it always at your initiative that you contributed towards it?

A. No.

Q. Whose initiative was it?

A. It might have been his, too.

Q. He approached you to ask you to contribute?

A. Yes.

Q. Has he ever asked for anything more than his travel expenses?

A. No.

Q. Is all the money that you paid him for travel expenses?

A. Yes.

Q. On the times that you've reimbursed him,

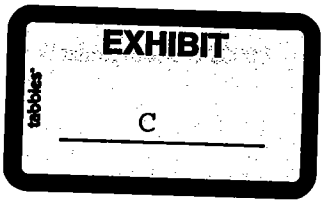
IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
Case No. 03-2006 (EGS)

- X
AMERICAN SOCIETY FOR THE PREVENTION OF)
CRUELTY TO ANIMALS, et al.,)
Plaintiffs,)
v.)
RINGLING BROS. AND BARNUM & BAILEY)
CIRCUS, et al.,)
Defendants.)
- X

Washington, D.C.
June 22, 2005

CERTIFIED COPY

Deposition of MICHAEL MARKARIAN, a witness herein, called for examination by counsel for defendant, taken at the offices of COVINGTON & BURLING, 1201 Pennsylvania Avenue, Suite 1100, on the 22nd day of June, 2005, at 9:41 a.m. before Mary Ann Payonk, RPR, RMR, RDR, Certified Realtime Reporter and Notary Public.



A I believe I did, yes.
Q Okay. Did you review it in preparation for your deposition?
A No, I didn't.
Q Okay. Did you talk to anyone from any of the other plaintiffs in this action about this deposition?
A No.
Q The Fund for Animals and the Humane Society of the United States merged at the beginning of this year, is that right?
A It was not a -- a formal merger, it was a -- a corporate combination of the two organizations.
Q What do you mean by "a corporate combination"?
A The organizations remain distinct, distinct entities, but our management structures are coordinated and we take advantage of some efficiencies of administration, including accounting and -- and payroll. But the two organizations are -- are -- are still in -- both in existence.
Q Your current employment's with the Humane Society, is that right?
A Yes, I'm -- I'm paid by the Humane Society of the United States.

Q Is there a current president of the Fund for Animals?
A Yes, that's -- that's me.
Q That's you also?
A Yes.
Q Okay. When did the -- when did the two groups first start discussing this corporate combination?
A Late -- mid to late last year, 2004.
Q How did the idea first come up?
A The -- the CEO of the Humane Society of the United States, Wayne Pacelle, and I discussed the idea first.
Q And when was that? Do you recall?
A It was -- it was mid 2004.
Q Was there a -- a negotiation process then that took place?
A Our -- our -- our boards of directors and our legal counsels for both organizations did negotiate and enter into a -- a -- an agreement.
Q Can you tell me what issues were most important to the fund during the course of those discussions?
A I mean, the most important issue to the fund was that we would -- we would enhance our ability

to carry out our mission to promote animal protection, and we believed that, in alignment with the Humane Society of the United States, a group that had a common mission, would help us do more for animals and accomplish more.

Q Why did you think it would help you do more or accomplish more?

A We believe that there's -- there's strength in numbers and that a -- that two groups can do more together than they can accomplish individually. By joining our two staffs together, we -- we would benefit from several efficiencies in terms of administrative expenses and we would collectively be able to put more emphasis on our programs.

Q Do the two entities maintain separate boards of directors?

A Yes.

Q Have -- prior to your merger with the Humane Society or your corporate combination with the Humane Society did the Fund for Animals discuss a merger or a combination with any other animal group?

A Not to my knowledge.

Q Have you discussed such a combination since the merger with any other group?

Q Has the Animal Welfare Institute given the fund any money since 1996?
A Not that I can recall.
Q When did you first meet Tom Rider?
A I can't recall exactly when I first met him.
Q Do you know when the first time any employee from the fund met him?
A I don't know.
Q Do you know how you were put in touch with him for the first time?
A I don't recall.
Q Was it in connection with this case?
A I believe it was, yes.
Q Other than this case, has the fund worked on any other projects with Mr. Rider?
A We have in -- in some cases worked with him on the broader issue of -- of circuses in general, outside of the -- the scope of this case.
Q And what cases were those that you've worked with him?
A He and I both attended a press conference in Denver last summer in -- in relation to a -- supporting a -- a city ballot measure dealing with circuses.

I know he has attended legislative hearings in -- in some states and -- and press conferences in some states to -- to discuss the treatment of animals in circuses, and we have worked with him on some of those issues.

Q What do you mean when you say you've worked with him in connection with those legislative hearings and press conferences?

A I -- for example, staff member of the Fund for Animals was at a -- a -- a press conference and rally in Harrisburg, Pennsylvania dealing with the treatment of animals in circuses. Mr. Rider was also present there.

Q Was that a protest in Harrisburg?

A I don't particularly know if it was a protest. I was not personally present. I believe it was a -- a press conference and a rally to -- to educate the public about the issue of circuses and the treatment of animals in circuses.

Q Okay. Has the fund ever -- has the fund ever paid Mr. Rider any money?

A Yes.

Q On how many occasions?

A I believe there was one occasion. Last July of 2004 we gave Mr. Rider $1,000 to assist with

his travel expenses to participate in the Denver press conference, which I mentioned earlier.

Q When you say you gave him $1,000, did you pay for him to -- to attend that press -- let me rephrase that.

Did you -- is the $1,000 reflective of expenses you incurred to purchase and make travel arrangements for him, such as air fare, or did you actually hand over the $1,000 to make his own arrangements?

MS. MEYER: Objection to the form.

BY MR. WOLSON:

Q You can answer.

A We gave the $1,000 directly to Mr. Rider. He made his own travel arrangements.

Q Did he submit any receipts for those -- that thousand dollars?

A I believe that we did receive one receipt from him.

Q Was that receipt for $1,000?

A I don't -- I don't recall how -- the exact amount.

Q Do you know what the receipt was for?

A My recollection is that he -- he -- that it was a receipt for some repairs to his vehicle which