UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FELD ENTERTAINMENT, INC.	:	Civil Action No. 07-1532
Plaintiff	:	
v.	:	June 23, 2011
AMERICAN SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS, et al.,	:	
Defendants	:	10:10 a.m.

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE EMMET G. SULLIVAN
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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P R O C E E D I N G S

COURTROOM CLERK: Civil action 07-1532, Feld Entertainment, Inc., versus the American Society For Prevention of Cruelty to Animals, et al. Would counsel please introduce yourselves for the record?

MR. SIMPSON: Good morning, Your Honor. John Simpson and Michelle Pardo for the plaintiff.

THE COURT: Good morning, counsel.

MR. BRAGA: Good morning, Your Honor. I'm going to try to identify the counsel who will argue. It would take me about an hour to identify all of the counsel in the room. Stephen Braga from Ropes & Gray on behalf of defendants Rider and Wildlife Advocacy Project; Laura Steel from Wilson Elser on behalf of the law firm of Meyer Glitzenstein and the lawyers Eric Glitzenstein, Katherine Meyer, and Howard Crystal; Harry Clarke from Patterson Belknap on behalf of the ASPCA; Steve Neal from DiMuroGinsberg on behalf of AWI; Brad Nes, in the well, from Morgan Lewis on behalf of HSUS; and Andy Weissman from Wilmer Hale on behalf of lawyers John Lovvorn and Kim Ockene.

THE COURT: All right. Good morning, everyone. I recognize it's defendants' motion. Let me ask Mr. Simpson a question, though, or Ms. Pardo.

First of all, I struck your notice only because we didn't have enough time to deal with 200 additional pages.

That's not to say that the court won't give you and the defendants as appropriate additional time to make whatever point you had to.

MR. SIMPSON: I apologize for the time, Your Honor.

THE COURT: No, it's all right. We're not going to cut our nose off despite our face on that, either. But at the 11th hour I wanted to save your opposing counsel from expending time with respect to that, and we certainly did not have the luxury of time, either. So I did that knowing that I would give both sides a fair opportunity, if I need to hear more from them. And I recognize that some of those cases were decided before even the pleadings were filed.

MR. SIMPSON: Well, that's true. Because some of these authorities came up in the review of the reply briefs, and some of the argument --

THE COURT: Right. No harm, no foul. We'll talk about what's appropriate at the end of this hearing.

But let me ask you this: In your amended complaint at paragraphs 273 and 274 and 272, the plaintiffs talk about limiting -- well, not limiting, but seeking damages in an amount that equals the cost of defending the lawsuit. Is that correct? I just want to be clear about that.

MR. SIMPSON: That's correct, Your Honor.

THE COURT: All right. Although the basis for your cause of action is predicated upon not only what happened during

litigation, but other activities that plaintiffs contend are part and parcel of the enterprise or scheme. Right?

MR. SIMPSON: That's correct.

THE COURT: Is that right? But you aren't seeking monies, compensation --

MR. SIMPSON: That's correct.

THE COURT: -- for those other arguably related activities. Right?

MR. SIMPSON: It's not like there were no damages, but you have to make a tactical judgment about what's practicable to prove. What's practicable to prove in this case are the attorneys' fees. The amount is undisputed. When you get off into these other areas, it becomes more difficult. But it's not like there was no injury.

THE COURT: No.

MR. SIMPSON: The theory of this case is they brought the case; they perpetrated a fraud on the court to manufacture Article III jurisdiction. They brought the lawsuit not only to take my client's property away from him and force my client to spend money, but to gather information to use in the legislative context, to try to pass legislation that would have the same effect. They think they have a First Amendment right to do that; I don't think so. But that's part of the damage here. That's part of the RICO injury that was inflicted.

The other part of it is they used this case as a

fundraiser; prolonged the litigation, dragged it out I think not necessarily to -- that had anything to do with elephant welfare, but to use the case to publicize their cause and to raise money. And they were, we think, probably successful in doing so.

I don't think we can go down all those rabbit trails on a damage theory, but all of that constitutes RICO injury and all of that constitutes evidence of pattern of racketeering activity.

THE COURT: I understand your point. I just want to be clear about that. Even though the damages you seek are limited to the litigation costs - significant litigation costs - nevertheless, you're relying upon other arguably related activities in an effort to prove they're part and parcel of the enterprise or scheme justifying a RICO action.

MR. SIMPSON: Correct.

THE COURT: Okay. Thank you, Mr. Simpson. I think it's appropriate to share a few thoughts with everyone. This motion has been pending - and as everyone knows, I presided over the underlying nonjury lawsuit - and I think it's appropriate for a judge at this particular juncture, a hearing on motion to dismiss, to share thoughts about where the court may be inclined to proceed. And I'm sure that what I'm about to say won't please either side, and that's fine, and I invite your responses in an effort to persuade me that the court's initial thinking may be not appropriate.

But the court is at this juncture of the opinion that a RICO action probably survives with respect to the litigation cost vis-a-vis the litigation only; in other words, query whether that litigation itself and the underlying litigation activities are sufficient to support an enterprise and scheme. And I'm sure I'll hear from defendants that it's not.

The plaintiffs, on the other hand, have, as just confirmed by plaintiff's counsel also, also argued that the enterprise consists of not only the litigation and the fraud and the bribery and the obstruction of justice, the money laundering and every other claim that the plaintiffs raise insofar as litigation is concerned, but part and parcel of the scheme, the enterprise relies on activities outside the court before state legislatures, before the United States Congress, before other entities. And that's the plaintiff's argument at this point.

And everyone should keep in mind, this is not the summary judgment, as you know, stage, where competent evidence needs to be adduced. It's an important stage, but the court is of the opinion that if the RICO survives at all, it may well survive only with respect to litigation-related RICO activity, period, and not the extraneous activities.

I'm sure the defendants will argue that: We agree with you up to that point, but we don't even think it includes litigation. I'm sure I'll hear that. In fact, I should probably start hearing it now, so let me invite defense counsel

back to the bench and I have a few questions.

MR. BRAGA: Certainly, Your Honor.

THE COURT: I want to focus on the pattern requirement, so if there are people designated to deal with certain aspects, then whoever that person is can come up to the microphone.

MR. BRAGA: You have the right person on the firing line, Your Honor.

THE COURT: All right. Now, the pleadings represent that there's no pattern of racketeering activity, mainly relying on two DC Circuit cases, *Edmondson & Gallagher vs. Alban Towers Tenant Association* and the *Western Associates Limited* vs. *Market Square* case. But both of those cases are almost entirely restricted to closed-ended continuity. And how do you really respond to the plaintiff's argument that it's also pled open-ended continuity, because it's clear to the court that that's what they've done?

MR. BRAGA: They have pled open-ended continuity, Your Honor. But in this day and age, unlike the old day with *Conley vs. Gibson*, any possible set of facts that could justify relief for the plaintiff, we have *Iqbal* and we have *Twombly*, *Bell Atlantic Corp. vs. Twombly,* and they require Your Honor to look at the time completely, not just accept that they've said open-ended continuity; okay, they put those magic words in there, but is it plausible that this is an open-ended continuity case. And frankly, it is not, Your Honor, and it's not exactly

because of what motivated the *Edmondson* --

THE COURT: Well, why isn't that a determination that the court makes at the summary judgment stage? I mean, in this multipage amended complaint, why haven't they alleged enough to survive an *Iqbal/Twombley* analysis? 122 pages, I believe.

MR. BRAGA: Certainly, Your Honor. Under the pattern requirement, again, we're not writing on a blank slate here. We have *In Re: HJ*, Supreme Court: Multiplicity of acts is not enough. They have a whole multiplicity of acts; that's not enough. There's got to be relationship plus continuity.

It also says timing --

THE COURT: Well, tell me what's missing. What's missing here? Let's assume that we're just focusing on litigation activities. What's missing insofar as litigation activities here?

MR. BRAGA: What's missing is the pattern. What you have is a single event, a single scheme, a single victim, a single injury. That's not a pattern, that's a single thing.

THE COURT: So the repeated activity would not constitute a pattern, then?

MR. BRAGA: Repeated predicate acts do not alone constitute a pattern. If they did, *HJ* would have said any time you have two or more predicate acts, you have a pattern. The pattern requirement would be meaningless. So it's got to be predicate acts plus something.

And when you look at what the DC Circuit did in *Edmondson* and what they did in *Western*, they said in those cases, just like here, a lawsuit -- the facts in *Edmondson* are actually more egregious in terms of fraudulent litigation than even pled in this case. In *Western Associates* --

THE COURT: We're not talking about just fraudulent. They've alleged bribery, they've alleged money laundering, they've alleged all sorts of other extremely serious activity aside from just fraudulent conduct.

MR. BRAGA: Understood. And if you look at those cases, you will see conduct --

THE COURT: Would you agree that the activities alleged in this case are more egregious than those alleged in *Edmondson*?

MR. BRAGA: No, I would not. I would not. In fact, if you look at *Edmondson* and *Western* carefully, you'll see great parallels. They have more predicate acts than those cases, for sure, but the essence -- again, we're not focusing on predicate acts in this part of the argument, we're focusing on pattern.

What you learn from *Edmondson* and *Western* is that if it's just a single scheme --

THE COURT: All right. Let me stop you for a second. You contend there's just a single scheme. Correct?

MR. BRAGA: Yes.

THE COURT: What's the single scheme?

MR. BRAGA: The single scheme, as admitted by the

plaintiffs, as pled by the plaintiffs, is fraudulent litigation, Your Honor. Opposition to defendants' pattern argument --

THE COURT: It's not just fraudulent. They claim that defendants bribed the plaintiff, they claim that there was money laundering by organizations, they claim obstruction of justice. It's not just fraudulent activity, it's --

MR. BRAGA: Taking the allegations of the complaint as true -- and as Your Honor knows, they're bitterly disputed --

THE COURT: Which I have to do. Right.

MR. BRAGA: It's bitterly disputed. All of that activity is activity within the course of a single lawsuit, except for one thing. The only thing they've pled as predicate acts that is outside the single lawsuit is what Your Honor started asking Mr. Simpson about, and that is legislative and lobbying activities. Those legislative and lobbying activities cannot be considered, I contend --

THE COURT: I already indicated that the court is not inclined to do that. I'm focusing on the lawsuit itself. If I focus on the lawsuit itself, why isn't there enough -- why aren't there enough sufficient allegations to survive the *Iqbal*, *Twombly*, et cetera, at this stage of the proceedings, putting aside the related activities?

MR. BRAGA: Because, Your Honor, the DC Circuit says, interpreting *HJ* -- I will concede, Your Honor, that *HJ* admits, and the DC Circuit admits, pattern of racketeering activity is

not an easily understood term. It's Talmudic; what does it mean? Continuity plus relationship, what does that mean?

So you try to get examples. And in *Western* and in *Edmondson* the DC Circuit said, the example of fraudulent activity, criminal activity, bribery activity in a single lawsuit, a single scheme, is not a pattern. Why? Because it just has one scheme, one victim, one injury.

We don't contend, as Mr. Simpson seemed to think, that you could never have a pattern with a single scheme. We don't contend that you could never have a pattern with a single victim, we don't contend that you could never have a pattern with a single injury. What we do contend is when you combine all three of those elements which are in this case, under *Edmondson* and *Western*, Your Honor is not bound but virtually bound -- they called it virtually impossible to find a pattern in those circumstances. When you read the district courts that have followed those decisions cited in our papers, you will not find another case like this one, where someone is found --

THE COURT: Those are all Fifth Circuit cases that you principally rely on, are they not? And if so, are there any cases --

MR. BRAGA: There's decisions by Judge Lamberth, Judge Urbina, Judge Roberts, all following *Western* and *Edmondson*.

THE COURT: Any appellate decisions from our circuit?

MR. BRAGA: Just *Western* and *Edmondson.* Actually, I believe that the point may be referred to as well in a case called *Pyramid Securities*, which is referred to in our pleadings as well.

THE COURT: Anything in addition to *Pyramid Securities* - I'm asking on the appellate case - that we're aware of?

MR. BRAGA: In this circuit?

THE COURT: Yeah.

MR. BRAGA: *Western* and *Edmondson* and *Pyramid* are it, Your Honor.

THE COURT: You cite a number of cases from the Fifth Circuit, though, for the proposition that continuity is not satisfied when all of the alleged predicate acts took place as part and parcel of a single, discrete, and otherwise lawful commercial transaction. And I think you may have answered, and I just want to confirm, whether or not the analysis adopted by Fifth Circuit have been followed by any other circuit courts.

MR. BRAGA: I think there are a number of other circuit courts, Your Honor. We would be happy to do some supplemental briefing on that --

THE COURT: I don't need a supplemental brief. I assume if there were other arguments and other opinions, you would have cited them, I assume.

MR. BRAGA: Yeah. I mean --

THE COURT: All right. So I'm going to assume that the Fifth Circuit is all that's out there.

The Fifth Circuit's analysis, though, is that limited to open or continued -- to open or closed continuity?

MR. BRAGA: I believe, Your Honor, the way the analysis goes is that a single scheme in the context of a single lawsuit would always be closed-ended. It has a defined ending point. And there's cases in the Fourth Circuit and elsewhere - and this is the principle behind *Edmondson - is that Edmondson* and *Western*, as your question understands, are closed-ended cases. And Mr. Simpson --

THE COURT: They've alleged both, though, haven't they, essentially, the plaintiffs?

MR. BRAGA: They've alleged both, but you can't make what is a closed-ended situation an open-ended situation by calling it such. Any single lawsuit has a defined ending --

THE COURT: We're talking about the pleadings stage, though. We're talking about the pleadings stage now. I mean, there will come a time when parties have to offer competent evidence, but we're talking pleadings stage. What's sufficient in order to withstand a motion to dismiss at this point?

MR. BRAGA: Your Honor, there's nothing that could happen in discovery, nothing that could happen in further development that would change the fact that the conduct at issue in this case is in the context of a single lawsuit, single

victim, single scheme. Nothing is going to change that. And a lawsuit by definition has a defined ending point.

Look at it this way, Your Honor. When Your Honor decided this case on December 30th, 2009, and you told the world Tom Rider was a paid plaintiff, Tom Rider wasn't worthy of belief, that ended the scheme. Tom Rider can't go into the next lawsuit and do this again. Plaintiffs groups can't do this again.

THE COURT: I don't know what Tom Rider can do or not do. I mean, is that really relevant to what's before the court now?

MR. BRAGA: It's relevant in that the context of Your Honor's ruling necessarily was always going to close whatever happened here. The lawsuit ended it. It's not going to be repeated. It can't be repeated. It's a one-time event.

THE COURT: What the plaintiffs have done here is not only allege, in the court's opinion -- and I invite discussion in an effort to persuade the court that it's not correct. But the plaintiffs have not only relied upon everything that happened during the course of the lawsuit, they've looked at everything that Rider did elsewhere, before state legislatures, before United States Congress, any and every opportunity he had to talk about what he perceived to be was abuse of endangered animals. So I think a distinction can be drawn between that being the predicate acts for a RICO action, and what I said

earlier, limiting a RICO action, the damages for a RICO action, for litigation expenses only.

But that's not what they're complaining about, if I understand their complaint correctly. They're complaining about not only bribery, money laundering, fraud, obstruction of justice, and other criminal conduct during the course of litigation and in discovery that led up to litigation, but also what Rider did outside the courthouse. Not necessarily in an effort to say that they're seeking damages for that extra courthouse activity, but as part and parcel of a RICO scheme.

So it's not just the lawsuit. So why isn't that sufficient at this stage of the proceeding?

MR. BRAGA: Well, Your Honor, for a couple of matter-of-law reasons. They have no standing to allege that they've been defrauded --

THE COURT: No standing to allege?

MR. BRAGA: To allege any fraud on behalf of lobbying and legislative activities. Lobbying and legislative activities, by their definition --

THE COURT: I think I may agree with you there, no standing to seek damages for that activity. But that's not what they're doing. They're seeking damages for the litigation expenses only - that's why I asked Mr. Simpson - but they're relying upon the extra court activity of Rider in an effort to justify the litigation costs and damages. They aren't seeking

damages separate and apart from litigation.

So I think I agree with you, they wouldn't have standing. If someone goes before Congress and lies, they've defrauded Congress; someone goes before the Connecticut legislature and lies, they've defrauded the legislature; if someone lies to organizations in an effort to give them money to support a cause, they've probably defrauded the donors. But that's not what they're doing here. The plaintiffs are saying, pay us three times the amount of money, essentially. That's why they're here. Make no mistake about that, it's treble damages, right?

MR. BRAGA: We agree on that, Your Honor.

THE COURT: 60 million bucks litigation costs for this enterprise, and the enterprise was not only everything that happened in your courtroom, Judge, but everything that happened in discovery that led up to it, and everything that Rider did, even though we aren't seeking damages. Because they couldn't sustain an injury. Sure they may have whittled it down, but I don't think they could have argued or pled injury to the plaintiffs for otherwise criminal activity before Congress or state legislatures.

That's what their case is. And the question is: Why isn't that sufficient?

MR. BRAGA: Your Honor, going back to the point about standing and damages - and I appreciate your agreeing with us on

that part - there's two pieces to standing. One is --

THE COURT: You know, I've been known to change my mind a lot, too. I had some initial thoughts when I came in here; I may leave with those initial thoughts. I don't know. But I at least want to share them and get your response.

It seems to me -- and I may be persuaded otherwise. It seems to me that they may be in court with respect to RICO litigation and related activities for which they aren't seeking damages. But go ahead.

MR. BRAGA: Let me finish on that point.

So two aspects to standing; not only standing as what damages does it entitle you to, but standing to bring a RICO claim.

THE COURT: Right.

MR. BRAGA: You've got to be injured by reason of the pattern of racketeering activity. Nothing that happened to Mr. Feld, as Your Honor just indicated --

THE COURT: Well, they incurred damages of 20 million bucks.

MR. BRAGA: In the lawsuit.

THE COURT: That's right. So why isn't that sufficient? They said because of this man, because of him being bribed and all this other criminal activity, they had to defend a lawsuit that, but for Rider, wouldn't have gone anywhere years ago. How many years, nine years? I should know that. At least

nine years of litigation. That's their damages. They said, why should we have to sustain the cost of 20 million bucks? That's not sufficient?

MR. BRAGA: Right. And that goes to the causation argument, and I'll get there in a minute. But let me finish pattern. Because if you're going to look to the lobbying and legislative efforts, they have no standing to complain about it. Second, if any part of this case is protected by the *Noerr-Pennington* --

THE COURT: So there's a distinction between standing to complain about that as part and parcel of RICO versus standing to allege damages as a result of that independent activity. Isn't there a distinction between the two?

MR. BRAGA: There is a distinction between the two, but in this case both of them favor us. They don't have any damages because they weren't injured by it, and because they weren't injured by reason of that activity, they can't raise it in a RICO complaint.

THE COURT: They can't raise it as part and parcel of the litigation criminal activity? They can't do that? Which case says that?

MR. BRAGA: I don't have a case that says that, Your Honor. I'm going on, "by reason of," in the RICO statute. That issue has not been briefed by anybody. If you would like us to, we could brief it.

THE COURT: Isn't that a critical issue? I mean, that's what they're saying here, I think. I don't want to repeat myself, but I think that's what they're saying.

Isn't that what you're saying, or not? Am I wrong?

MR. SIMPSON: Your Honor, the basic proposition is: My client paid $20 million. What caused that? That was being a defendant in this case.

THE COURT: Right.

MR. SIMPSON: And one of the reasons we were a defendant in this case is they wanted to take my client's elephants and they wanted to ban these tools, but they also wanted to use this litigation to promote this legislative agenda.

Now, does Tom Rider, unemployed person from Aurora, Illinois, get on the docket in the Nebraska legislature? No. Tom Rider gets on the docket of the Nebraska legislature because he's portrayed as a whistle-blowing former employee of Feld Entertainment, he's a plaintiff in a ground-breaking case. That's why he gets on there, so he can tell his lies to the Nebraska legislature.

THE COURT: All right. So you are alleging, then, the activities outside this courthouse --

MR. SIMPSON: Right.

THE COURT: -- and the activities outside this lawsuit --

MR. SIMPSON: And all the time --

THE COURT: -- in an effort to prove RICO, although you're not seeking damages per se as a result of those activities. Your damages are limited to the litigation costs --

MR. SIMPSON: That's right. Because my client is having to pay the lawyers --

THE COURT: So the answer is yes --

MR. SIMPSON: -- to defend this case, while they're using it to do this legislative stuff.

Now, do we have standing to complain about a Nebraska legislator being defrauded? No, we don't. But that's not the point. The point is, that activity --

THE COURT: But that's part and parcel of your RICO allegations.

MR. SIMPSON: -- injured my client, because while we were being held hostage, that's what they were doing with the case.

THE COURT: All right. All right. So there's no case. No one cited a case that's close. Actually, there may be a case, an Eighth Circuit case, but we can talk about that.

MR. BRAGA: So moving from that point, Your Honor, again --

THE COURT: That may be one of the points I'll ask for some -- my guess is, if a case was out there that said that, that case would have been cited, that plaintiffs can't rely upon

that outside activity not for an independent assessment of damages but for part and parcel of this scheme or enterprise. I don't think that case has been printed.

Go ahead. Anything else on pattern?

MR. BRAGA: Yes, Your Honor. With respect to that issue, that issue is plainly covered by *Noerr-Pennington* immunity. Legislative lobbying, it doesn't matter if it's deceptive. In *Allied Tube*, Justice Brennan said unethical and deceptive lobbying still covered by *Noerr-Pennington* immunity; in *Noerr* itself, fraudulent and corrupt conduct --

THE COURT: Wait, wait, wait. Unethical? We're talking about criminal activity. That's what they're alleging here. I mean, I sat through that trial.

MR. BRAGA: Understood.

THE COURT: They're alleging criminal activity. It's not unethical activity. You know, what you're alleging is that the plaintiffs essentially -- and this gets into First Amendment. Right?

MR. BRAGA: Yeah.

THE COURT: The plaintiffs essentially -- the ESA plaintiffs essentially had the right to complain about what they were doing. Right. But they certainly had no right to do the criminal activity that the plaintiffs in this action allege, and the First Amendment doesn't protect that.

MR. BRAGA: The First Amendment doesn't protect it in

the context of sham litigation, Your Honor. There's a whole test for that.

But what is clear is that the First Amendment does protect it under *Noerr-Pennington*, when you're lobbying a legislature. Why is that? It's because of the breathing space needed for the First Amendment. Look at *Noerr*, corrupt and fraudulent activity, immune; look at *Allied Tube*, unethical and deceptive activity, immune; look at the Ninth Circuit's decision in *Sosa vs. DirecTV* cited in our papers, unbelievable conduct by DirecTV, fraudulent mailings, protected by the First Amendment. Why? Because of the breathing space needed in the lobbying and legislative arena.

Different when you get to court, Your Honor. There is a sham litigation exception. But *Noerr-Pennington* you have to look at two ways, legislative --

THE COURT: What about the *Whelan* case from our circuit, the *Whelan* case from the DC Circuit?

MR. BRAGA: Sure. Yeah.

THE COURT: That doesn't help you, does it? We're talking about bribery here.

MR. BRAGA: Just one second, Your Honor. Your Honor, that's not legislative activity.

THE COURT: Well, what is it?

MR. BRAGA: So my point is that if Mr. Feld is going to try to complain that lobbying --

THE COURT: Does *Whelen* support your argument?

MR. BRAGA: That does not support my argument. It's not on point with my argument.

THE COURT: Go ahead.

MR. BRAGA: Okay. Your Honor, it's relatively easy to sort of lose sight of what happened --

THE COURT: Just a minute. Just a minute.

MR. BRAGA: Sure.

(OFF THE RECORD.)

THE COURT: I'm quoting from *Whelan*, and for the record the cite is 48 F.3d 1247, wherein the court held that as a threshold matter, attempts to influence governmental action through overtly corrupt conduct, such as bribes - I add my own emphasis - in any context, a misrepresentation in the adjudicatory process and not normal and legitimate exercise of the right to petition and activities of this sort, have been held beyond the protection of *Noerr*. And that's exactly what they're alleging here, among other things, criminal activity.

MR. BRAGA: Could you give me the cite for that, just what page?

THE COURT: It's the *Whelan* case, 48 F.3d 1247 through 1255.

MR. BRAGA: Your Honor, again, I would just suggest that given that that's in the adjudicatory context, it's different than the lobbying point we're arguing here. We do

have a recent decision from the Seventh Circuit which helps us on this point, if Your Honor would like us to --

THE COURT: Was that cited in your pleadings?

MR. BRAGA: It was not. It just came out, Your Honor, May 26th, 2011.

THE COURT: You had time to bring it to my attention. Why didn't you do that?

MR. BRAGA: It was not --

THE COURT: No, I'm not going to listen to it. No. I may give counsel a chance to file supplemental pleadings, but May 26th, that's a month ago. We do read these cases.

MR. BRAGA: Right. Understood.

THE COURT: Anything else on pattern requirement?

MR. BRAGA: Nothing else on pattern, Your Honor, other than to emphasize --

THE COURT: What's the citation? I'll read the case at my leisure. What's the citation?

MR. BRAGA: It is 2011 U.S. App, Lexis 10567, *Mercatus Group vs. Lake Forest Hospital*.

THE COURT: I'll read it. If I need any comment from counsel to decide about the applicability of that case, then I'll let counsel know.

Moving to the standing causation requirement, some of the discussion we've had is already directed -- you've already focused on questions the court had. There's one allegation that

Feld makes that it was directly injured by one particular fundraiser, where the express purpose of the fundraiser was to raise money for the ESA lawsuit. The defendants appear to argue that there's no direct injury to FEI. But why isn't that pretty direct; I mean, a fundraiser to raise money for a lawsuit?

MR. BRAGA: Certainly, Your Honor. The quartet of Supreme Court cases on causation, *Hemi Group*, *Holmes*, *Bridge*, *Anza*, we've cited in our papers, relying on the language I quoted earlier to Your Honor, "by reason of a violation of the RICO statute," say the injury has to be direct. You can only get damages if there's a direct injury. Unless Mr. Feld - who is there and can tell us - contributed at this fundraiser, he didn't suffer any direct injury as a result of that fundraiser.

Again, this is an issue and an allegation that they don't have standing to raise, they didn't suffer any injury from.

THE COURT: They may not have standing to seek damages, but as I understand, that's part and parcel of their RICO allegations. I'll hear from Mr. Simpson. I may be incorrect with respect to that.

Feld relies on -- getting back to the enterprise requirement issue, Feld relies on very heavily a Ninth Circuit case, *Living Designs, Inc., vs. E.I. du Pont de Nemours*, 431 F.3d 353. The Ninth Circuit in that case held that a client and its lawyers and expert witnesses constituted a direct

enterprise in conducting litigation. Why isn't that -- why shouldn't that case inform this court's decision?

MR. BRAGA: Your Honor, Mr. Neal is going to handle the enterprise point.

MR. NEAL: Good morning, Your Honor.

THE COURT: Good morning.

MR. NEAL: What they did, actually, with respect to that case is take one sentence fragment out of a sentence and say that, well, because that court says that you can't band together to accomplish something that you couldn't accomplish on your own, you can therefore establish the enterprise requirement.

In fact, the ESA plaintiffs and their lawyers and Mr. Rider did not band together to engage in the affairs of the enterprise, they banded together to engage in their day-to-day activities. And that point is made absolutely clear --

THE COURT: I'm sorry, they banded together to do what?

MR. NEAL: To engage in their own day-to-day activities. And Cedric Kushner, affirming *Reves*, the Supreme Court's decision in *Reves* in 2001, says that in order to meet the separate and distinct requirement of an enterprise, you have to be able to demonstrate that the RICO persons are engaged in affairs of the enterprise and not simply their own affairs. And if you look at the allegations of the amended complaint - and I have them prepared to do that - they show that the ESA

plaintiffs, the lawyers who represented them, Mr. Rider, were simply engaged in what they do every day.

For instance, if you look at the amended complaint, paragraphs 34 to 36, 38, and 43, Mr. Simpson identifies the organizational plaintiffs in this case, the ASPCA, the AWI, FFA, API, and WAP, and he says they're dedicated to the protection of animals, including elephants and other animals used for entertainment purposes. Perfectly true. That's what they did before the ESA lawsuit, that's what they did during it, that's what they do today.

Now, as to the lawyers, what do they say about the lawyers? Well, in paragraphs 39 to 42, 44 to 45, 255, and 265 --

THE COURT: How do you distinguish the case that they rely on, sir? Is there another case that would more appropriately inform the court's decision other than the Ninth Circuit?

MR. NEAL: Yes. I think *Cedric Kushner,* I think this court's decision in *Prunte*, I think this court's decision in *Bates.* In both of these cases, *Bates* and *Prunte* - which Bates was handed down in 2006 by Judge Walton and *Prunte* in 2007 by Judge Friedman - both of these cases found --

THE COURT: Is there any circuit authority? I mean, I have the highest regard for my colleagues. Any circuit authority that is in conflict with the Ninth Circuit's decision?

I'm not aware of any --

MR. NEAL: The circuit --

THE COURT: I'm not aware of any --

MR. NEAL: I'm not relying --

THE COURT: Just a minute. Can I just say something? I'm not aware of any appeal from either Judge Bates' decision or Judge Friedman's, I don't believe.

MR. NEAL: No.

THE COURT: All right. Any circuit authority anywhere that would better inform the court's opinion at this point?

MR. NEAL: Well, I think that the DC Circuit's opinion in *Philip Morris* and the DC Circuit's opinion in --

THE COURT: But you're talking --

MR. NEAL: -- *Confederate* --

THE COURT: Just a minute. You're referring to the tobacco litigation?

MR. NEAL: Yes, sir.

THE COURT: The Judge Kessler opinion. Is that correct?

MR. NEAL: The one that was on appeal before the DC Circuit, yes.

THE COURT: Yes. How is that remotely relevant to the issues before this court?

MR. NEAL: Because they are adopting the same standard set forth in *Cedric Kushner*, which says that in order to meet

the requirements of 1962(c) and establish a separate and distinct enterprise, that RICO persons have to engage in the affairs of the enterprise and not their own affairs.

And what I was trying to do was go through the allegations and demonstrate to you that all Mr. Simpson has alleged is that these organizations brought a lawsuit to protect animals, which is what they do; they raise funds to protect animals, which is what they do.

THE COURT: Is that your understanding of what he's alleged in the amended complaint?

MR. NEAL: Well, I'm referring to certain paragraphs of the amended complaint.

THE COURT: I mean, is that your understanding? Is that your understanding of just what -- that's all he alleged in that complaint?

MR. NEAL: Mr. Simpson has alleged also that we were paid to do it.

THE COURT: Absolutely. That people were bribed, that there was money laundering, that there was all sorts of nefarious activity. Those are very serious - indeed criminal - allegations that he's made. It's not just what you just referred to, those three isolated paragraphs. I have to view the entire amended complaint in toto, don't I?

MR. NEAL: Yes, you do. And what I'm also suggesting to you, though, sir, is that if indeed the RICO persons are

engaging in their own affairs, even if criminal, even if wrong, that does not mean they're engaged in affairs of the enterprise.

THE COURT: Right. What case says that: Even if criminal, that's not sufficient?

MR. NEAL: I think if you look at *Cedric Kushner*, I think if you look at *Reves*, particularly look at *Bates* and *Prunte*. In both those cases this court dismissed RICO claims at the pleadings stage, following *Cedric Kushner*, because the RICO -- the plaintiff in that case had not demonstrated this distinction.

Another fundamental --

THE COURT: Were there appeals in either of those cases? I don't recall that there were.

MR. NEAL: No, Your Honor.

THE COURT: So the court dismissed RICO claims, no appeals. Correct?

MR. NEAL: In *Bates*, Judge Walton dismissed it without prejudice, giving the opportunity to re-plead. I don't know what happened after that. I saw no subsequent authority. In *Prunte*, Judge Friedman dismissed the case with prejudice at the pleadings stage, again following *Cedric Kushner*.

Now, we've also cited the *Myers* opinion to you, which is out of the Eastern District of Virginia. And I don't know if you had a chance to read it, but *Myers* dismissed an enterprise claim at the pleadings stage, with prejudice, based upon this

very same argument; i.e., the seven or eight defendants were engaging in conduct that even if horrible was not the conduct of an enterprise, it was just their day-to-day activities. And if that's the case --

THE COURT: Was that at the summary judgment stage?

MR. NEAL: It was the motion to dismiss stage, and it was dismissed with prejudice. But in that case Judge Trenga made another very important distinction. He said: In addition to not meeting this test, you haven't met another part of the enterprise requirement, and that you have not established that the RICO persons are different than the enterprise itself.

In other words, in that case we argue that they alleged, just like this case, in paragraph 200, 276, and 277, that all the defendants are the RICO persons. They also alleged that all of the defendants comprise the RICO enterprise. If indeed they are coterminus or coextensive, how can they demonstrate that they're separate and distinct? This raises a real serious problem.

THE COURT: Isn't that an issue that's more appropriately addressed at the summary judgment stage, though, as opposed to the allegations stage?

MR. NEAL: I respectfully disagree. Unless we know what the enterprise is, it's very difficult to defend a lawsuit. Moreover, the enterprise is the first step in establishing a RICO claim. If you don't have an enterprise, you never get to

whether there was a pattern of racketeering activity. Our cases stand for that proposition.

Here's our problem: What is the RICO enterprise? Well, if you look at paragraphs 276 and 277, it seems pretty clear. They're identical. Now, if you look at Mr. Simpson's opposition at page 70, he provides some different explanations into what the enterprise is; some which are similar to what's alleged in the complaint and some which are completely different. Let me show you what I mean.

On page 70 of his opposition: "The enterprise is the plaintiff's side of the ESA case associated to bring the ESA case with plaintiffs' counsel," the lawyer defendants, "and WAP and HSUS, who supplied money to Rider." That's consistent with 276 and 277. They're all RICO persons, they're all RICO defendants. They're exactly the same.

He goes on, however: "None of these persons or entities is named in the first amended complaint as the enterprise." Well, that's not true, because I just told you what paragraphs 276 and 277 say and what his opposition says. But if it is true, then who is the enterprise? What RICO persons comprise the enterprise?

We go on: "All of them are legally distinct from each other." I'm not sure what that means. If he means that they're all independent organizations separately organized, fine. That's not the distinction required by *Cedric Kushner*. If

that's his attempt to say they're separate and distinct --

THE COURT: Should the court allow the plaintiffs to file a more definite statement? That's assuming the court agrees with you.

MR. NEAL: Can I address that after I get through one more point?

THE COURT: I want you to address it now.

MR. NEAL: The answer is I don't think so, because I don't think they can establish an enterprise.

The next point they go on to is truly confusing: "Since at least two of the legally distinct entities is part of an enterprise, the FAC provides sufficient distinction." Well, which two entities are the enterprise? According to the amended complaint, all of the RICO persons - here the defendants - are the enterprise. Is he suggesting that two of them are and then others are not? Well, there's no way to attack an enterprise like this --

THE COURT: Isn't that the purpose for discovery, sir? They've made allegations. There's nothing that precludes inconsistent allegations in a complaint, is there?

MR. NEAL: You can make alternative arguments, absolutely.

THE COURT: Or alternative arguments. Right. So isn't there a need for -- why doesn't this give defendants the appropriate vehicle for discovery, to find out exactly what the

competent evidence is to support any and all of their allegations?

MR. NEAL: My understanding, Your Honor, is you actually have to state a claim before you get discovery. You don't take discovery to see if you have one. Remember, the enterprise is the starting block for a RICO claim. Without it, there is nothing else. They had it in an amended complaint, they had their first complaint. In their motion to dismiss -- I'm sorry, in their opposition to our motion to dismiss, they come up with a whole other theory on the enterprise. They still don't know what the enterprise is. Without an enterprise, there's no RICO claim.

THE COURT: All right. I've heard enough. Thank you.

Who is going to address the wire and mail fraud allegations. Is that you?

MR. NEAL: Briefly, Your Honor --

THE COURT: Just a minute. I want you to respond to my question.

In the motion to dismiss, defendants state that because they did not seek to obtain Feld's money or property for themselves, Feld cannot state a claim for mail or wire fraud. The one case defendants cite for this proposition is *Skilling vs. United States*, which is an honest services fraud case, not a mail and wire fraud case. Is there any other argument, any other authority for this argument; indeed, a wire

or mail fraud case?

MR. NEAL: Not that I'm aware of, Your Honor.

THE COURT: All right. How do defendants square their argument with the plain language of the statute, which provides, and I quote, that, "whoever having devised or intending to devise any scheme or articles to defraud, or for obtaining money or property by means of false or fraudulent pretenses." And it's directly from 18 U.S. Code 1343. It's alternative.

MR. NEAL: Your Honor, I agree. And I think that --

THE COURT: You agree with?

MR. NEAL: I agree that's what the statute says. Our point on the --

THE COURT: Well, my question is: How do you square your argument with the plain language?

MR. NEAL: Well, I think that the point we were trying to make is that the only money or property that they're claiming that is lost is their attorneys' fees, and they're limited to that and you've already addressed that issue. If they're seeking any damages above and beyond that, they can't get them because they didn't obtain the property. But I think you've already --

THE COURT: Do you also agree that the use of the word "or" in that very plain language makes it very clear and plain that others' money or property need not be obtained by the defendants in order for them to be liable for wire fraud?

MR. NEAL: That's what the statute says.

THE COURT: That's what it says. Right? Like it or not, that's what it says. Right?

MR. NEAL: That's what it says, Your Honor. But on the wire fraud and mail fraud, we really were addressing that not only as a frontal attack on the predicate acts, but to address the issue of group pleading, and some of the problems we're having with this group pleading.

It is well settled that in a RICO case you can't simply say the defendants did that, the defendants did this. You have to allege specific facts as to each defendant. There are four problems created in this complaint for our side of the table, mail and wire fraud. The fraud itself, and the representations, have to be pled in accordance with Rule 9(b), which means that you have to say what statement was made, when it was made, where it was made, who made it - critical fact - how it's false, and how there was reliance. Without having the knowledge of who made these statements, it's very difficult to defend against that. Throughout their complaint, they often say "the defendants," or they'll say "the lawyer defendants," or they'll say "the organizational plaintiffs." But most often they say "defendants." And in doing so, we simply can't defend against that.

The second problem, Your Honor, is that mail fraud, wire fraud, bribery, obstruction of justice, extortion, and the

other predicate acts they've alleged - these in particular - are specific intent crimes, which means you have to know who committed the crime. You have to allege that they had a specific intent to defraud. Mr. Simpson is correct, that's --

THE COURT: Is there any circuit authority anywhere that supports what you just said?

MR. NEAL: Sure. The *Philip Morris* case.

THE COURT: The *Philip Morris* case from our circuit?

MR. NEAL: Yeah. There's also *U.S. v. Smith.* That's from the 10th Circuit. There's *U.S. v. Sun-Diamond*, which is a United States Supreme Court case.

THE COURT: The *Philip Morris* case, though, was after a full trial, was it not, after an evidentiary record had been assembled. It wasn't at the MTD stage. Right?

MR. NEAL: Of course. That's correct.

THE COURT: So isn't that distinct? I think it took a year to try that case; it was probably a year or two of discovery. It was after development of a full evidentiary record. I mean, isn't that significant? It was not at the MTD stage, sir.

MR. NEAL: You're correct. You're correct that that is what happened in *Philip Morris*. And on pages 63 to 67 --

THE COURT: The point I'm making is: Why shouldn't the court at least afford the parties some discovery, develop the appropriate evidentiary record, allow everyone to file their

cross motions - voluminous I'm sure they'll be - for summary judgment, and if there's a need for a trial, let a jury determine what happened, and then let this circuit determine whether or not the evidence is sufficient enough to sustain anything that a jury does?

MR. NEAL: Well, because, again, my understanding of the law is you actually have to plead a claim before you get discovery. Rule 9(b) created no exception to that. In fact, Rule 9(b) is a really unfair rule, because fraud in itself is self-concealing.

But there's a higher standard. If you don't meet that higher standard, you don't even get to take discovery. Without knowing who committed these acts, there's no way to determine whether or not they can even state a claim for these underlying predicate acts.

THE COURT: All right. I'm going to move on to the Humane Society issue. Who is addressing that?

In your motion you allege that Feld hasn't adequately pled merger. Feld comes back and argues de facto merger or successor liability. Has Feld pled either of those theories in its amended complaint?

MR. NES: I'm sorry, I didn't catch that.

THE COURT: Has Feld adequately pled those theories in its amended complaint?

MR. NES: Yes. Brad Nes for HSUS. Your Honor, the

answer is no.

THE COURT: What's lacking?

MR. NES: First I'll take the statutory merger. The only allegation of a merger is in I believe two paragraphs, where they state on January 1st, 2005, the two organizations, quote, unquote, "merged." However, for a statutory merger, whether you look to simply treatise or you actually look to New York law, to have a merger, you have to have one independent organization --

THE COURT: This court has to look to New York law. Is that correct?

MR. NES: That's correct.

THE COURT: Why?

MR. NES: You have to have one organization at the end. And under New York law, for example, which we cited in our reply brief --

THE COURT: Why does this court have to look to New York law?

MR. NES: Your Honor, under the asset acquisition agreement, the law that applied to the Fund For Animals was New York law. Also, as we pointed out in both parties' briefing, New York law applies -- to have the Fund For Animals "merge," quote, unquote, with another organization would have to follow New York protocol.

However, even if you look in D.C. law, it's the same,

which is the general sense of a merger is that two organizations come together to become one organization. And there's no factual allegation that at the end of this acquisition agreement that there was one organization, nor could there be such an allegation.

THE COURT: So let's assume the court is in a position to rule at this juncture that Humane Society and FFA did not merge, or that there was not a de facto merger. Is there any basis to keep those individual organizations in this lawsuit as separate, distinct entities?

MR. NES: Well, I won't speak for the FFA. They're represented by Zuckerman Spaeder. However, with the HSUS, I would say no. The factual allegations against HSUS fail whether you look at any other document outside the amended complaint. For example, if you look at --

THE COURT: Doesn't the plaintiff -- I mean, there's still the argument here that the Humane Society is liable for payments it processed - I mean, that's an allegation - that were written on Humane Society's checks after 2005. Right?

MR. NES: That is right, Your Honor. But we have to go, again, to what the predicate acts are.

THE COURT: So at least as of 2005, wouldn't there be a basis to keep that entity in the lawsuit? I mean, if not prior to 2005, at least as of 2005? And if not, why not?

MR. NES: It's a critical question, and the reason goes

to knowledge. To allege the RICO allegations against HSUS specifically, and only against HSUS, there has to be a factual allegation that at some point HSUS learned about this scheme, wanted to participate in this scheme, and knowingly participated in this scheme. There's no allegation.

If we look to the actual factual allegations, if you turn to page 106 of the amended complaint, where it walks through -- 105 and 106 of the amended complaint --

THE COURT: What paragraph?

MR. NES: It doesn't have paragraphs, because once it gets into the -- I guess it would be paragraph A. A, B are regarding bribery. So if you look at paragraph B, it states what the law is, essentially, on bribery. And if you look three or four sentences down, the key issue in bribery is that it's in return for being influenced in testimony under oath or affirmation. So there has to be this quid pro quo; you're getting money to change your influence testimony.

But if you actually look at the allegation against HSUS specifically, you turn to paragraph 160 of the amended complaint and it simply states, "After the merger, WAP received donations from HSUS totaling $11,500 that were intended to be paid to Rider." But it does not say that it was intended to be paid to Rider to influence or change his testimony. And that's critical, because HSUS would have had to learn first --

THE COURT: Isn't that an inference the court can draw

at this point, or not?

MR. NES: Absolutely not --

THE COURT: Why not?

MR. NES: And that goes back to the merger issue --

THE COURT: Why not? Why can't the court draw an inference at this point?

MR. NES: It's a great question. And that is because the HSUS was not a party to the suit --

THE COURT: You don't have to keep complimenting me on my questions.

MR. NES: Pardon me, Your Honor. That's my verbal tic.

THE COURT: Why can't the court --

MR. NES: It's because HSUS was not a party to the litigation, so you can't assume everything that all the plaintiffs in the ESA action knew HSUS knew. That is not a reasonable inference. HSUS would have had to have learned that at some point after the fact.

What this court can take a look at, though, is the asset acquisition agreement, because that is implied by the quote, unquote, "merger" in this paragraph 160. And when you look at the asset acquisition agreement, it expressly denounces this type of activity.

In paragraph 210 on page 11 of the asset acquisition agreement, the Fund For Animals had to make certain representations to the Humane Society. One of those was this:

"No officer, director, employee, or agent of Fund has been or is authorized to make or receive, and Fund knows of no person making or receiving, any bribe, kickback, or other illegal payment at the time." This paragraph, Your Honor, is incorporated into the amended complaint, when they alleged that it was a merger because this is the merger document. So Feld has to establish a factual paragraph that overrides this. There is no factual paragraph in the amended complaint.

So the question is: Well, why can't they simply just have another amended complaint and fix that technical deficiency; an important technical deficiency, but a technical deficiency nonetheless? And that's when you get into the actual testimony that came out in the ESA action. The court doesn't need to use any of that to dismiss the Human Society, but it sure is an important reason why they shouldn't be allowed to amend the complaint, that the dismissal should be with prejudice. Because the testimony in the 30(b)(6) witness of Mike Markarian for the Fund For Animals was that all of the payments that were made, or the donations, were intended --

THE COURT: Isn't that what circuit authority prescribes in situations like this, that because of a pleading default or irregularity, the dismissal should be with prejudice, as opposed to allowing a litigant an opportunity to amend and provide more clarity?

MR. NES: I think that's right, Your Honor. And that's

why I'm using the actual testimony in the ESA action as really a plea to show that there's no good faith basis to allege to have this opportunity to amend. Sure, they could simply amend the complaint and add the necessary paragraphs that HSUS knew about this, but it wouldn't be based on any facts. It couldn't possibly be, because --

THE COURT: It would not be a good faith basis?

MR. NES: Exactly. So that's pretty much the answer to those.

THE COURT: All right. Thank you.

The remaining area I have for defendants' counsel at this point is with respect to Lovvorn and - I hope I'm pronouncing the name correctly - Ockene, O-C-K-E-N-E, the separate counsel issue. Do you represent both counsel?

MR. WEISSMAN: Yes, Your Honor. Andrew Weissman, Wilmer, Cutler, Pickering, Hale & Dorr.

THE COURT: All right. Now, Mr. Lovvorn and Ms. Ockene, they claim that they cannot be held liable for the acts of their former co-partners' RICO violations. They don't concede there were any violations. But they say there's no liability there.

And actually, before I go any further, I'm going to commend you for bringing a case that is adverse to your position to the attention of the court, and that's the *131 Main Street Associates v. Manko* case, the Southern District of New York, a

1995 case. I say that for this reason: That oftentimes that doesn't happen. We don't see attorneys bringing to the court's attention authority that doesn't support them, even though they have an ethical obligation to do so. So whoever found it and put it in the pleadings, if you, then you're to be commended.

I'm thinking back to an argument I had a couple of weeks or so ago in a case - and I don't need to mention the name of the case or the attorneys, the firms, large firms - but one of my brilliant lawyers found a case that was directly on all fours that supported the plaintiff's allegation. The plaintiff had not found it and defendants had not mentioned it, and I couldn't resist the temptation to ask - it took her five minutes or so to find it, it was directly on point, from our circuit - plaintiff's counsel: Why didn't you find this case? We just didn't find it, Judge. The defendant said: Well, we were aware of it, but since they didn't cite it, we weren't going to say anything about it.

And that begs the issue: I think regardless of whether opposing counsel says anything about a case that wins the case for opposing counsel, I think that the other side has an obligation to bring that authority to the attention of the court. That's the only point I'll make there. So you're to be commended, or your firm or whoever found this case.

But in that case, Judge Stanton found that: "General partners are jointly and severally liable for the RICO

violations of their partnerships" - and I don't think it's disputed that these people were partners - "and the other general partners" -- strike that. Judge Stanton found that: "General partners are jointly and severally liable for the RICO violations of their partnerships and the other general partners, even if they have committed no predicate acts or participated in the enterprise."

Now, it seems that this case is indistinguishable from that case, but how do you distinguish it?

MR. WEISSMAN: Your Honor, there are several reasons why that case doesn't apply here, and why my clients are not derivatively liable for whatever misconduct --

THE COURT: But they were partners, general partners.

MR. WEISSMAN: To begin with -- and I'll address your point directly, but to begin with, that only addresses the question of secondary liability derivative based upon the conduct of the partners in the firm.

THE COURT: Right.

MR. WEISSMAN: There's no place in this complaint that that is actually alleged against my two clients. I mean, they could amend the complaint and do that, but in this complaint right now, there is no claim for derivative liability against my clients on the basis of the fact that they were partners of the firm. There's a reason for that. That's because they weren't partners of the firm.

THE COURT: They were not partners?

MR. WEISSMAN: They were not partners of the firm.

THE COURT: I didn't get an answer to my question, so I --

MR. WEISSMAN: And they are not alleged to have been partners of the firm. The allegations are acute --

THE COURT: And is that fatal, then, to a claim against them, because they weren't general partners as opposed to -- suppose they were employees of the firm.

MR. WEISSMAN: As a derivative liability claim, it is fatal. The only liability for a partner is for the general partner -- for the partnership. Thank goodness for the --

THE COURT: So they made a mistake. Let's assume that Mr. Simpson agrees with you and he made a mistake. Should he be allowed to amend to assert the appropriate theory against them being employees or acting within the scope of or something like that?

MR. WEISSMAN: Well, in that instance, "acting within the scope of" would be grounds to hold the firm liable for the employee's conduct, not vice versa.

THE COURT: You don't think there's any theory that's viable that would allow a cause of action of this type to be filed against employees - let's assume they're employees - and not partners?

MR. WEISSMAN: For the acts of their superiors or

supervisors, no, I don't believe there is a cause of action.

THE COURT: What about their individual participation, though, what they did or didn't do in this lawsuit?

MR. WEISSMAN: Well, that is what is addressed in the complaint, and we addressed in our motion and reply brief why the allegations as to these two young lawyers, who were just lawyers in the case, they weren't involved in fundraising --

THE COURT: You say lawyers in the case. What does that mean at this stage, though, lawyers in the case?

MR. WEISSMAN: Well, they participated in the litigation in some respects, in the ESA litigation.

THE COURT: Questioning witnesses?

MR. WEISSMAN: Actually, it's not alleged in the complaint and I don't believe it's true as to both of them. I think they were involved in the litigation process as the people who are the lowest part of the totem pole, and the notion that they somehow have responsibility --

THE COURT: This totem pole is steeped in alleged criminal activity. And so does that expose them to liability?

MR. WEISSMAN: Not unless they engaged in criminal activity, and not unless the complaint adequately alleges grounds for inferring that they engaged in criminal activity.

THE COURT: So it is appropriate, then, for the court to infer certain activities vis-a-vis certain individuals at this stage of the proceedings, and draw appropriate inferences,

then. Is that right?

MR. WEISSMAN: Well, I think under *Iqbal*, it's appropriate if there are facts alleged that lead to plausible inferences.

THE COURT: Right. Yes.

MR. WEISSMAN: But I don't believe there are facts alleged that lead to --

THE COURT: What about an aider and abetter theory, though --

MR. WEISSMAN: -- plausible inferences.

THE COURT: -- has that been pled adequately here?

MR. WEISSMAN: Pardon me? I'm sorry.

THE COURT: An aider and abetter theory.

MR. WEISSMAN: There's no allegation of aiding and abetting here.

THE COURT: Is that an inference that can be drawn by the court at this point, though, that if they weren't principals, they were aiders and abetters of all this criminal activity?

MR. WEISSMAN: No, because the standards of aiding and abetting are not supplied in the allegations in the complaint. The complaint is long and prolix, but nowhere in the complaint is there an allegation of aiding and abetting.

With regard to the question of partnership, the complaint alleges that these two lawyers were, and I'll try to

quote, "employed by and/or was a partner." That doesn't tell you anything. And in fact --

THE COURT: You're telling me that had a response -- no responsive pleading has been filed on their behalf, obviously, I don't believe, has there?

MR. WEISSMAN: No, only the motion.

THE COURT: You're telling me that had there been a responsive pleading filed, they would have denied that they were partners of Meyer Glitzenstein?

MR. WEISSMAN: I think as to -- during the relevant period, I think one of them was denominated a non-equity partner at one stage in the process here. But that is not a general partner for purposes of derivative liability. We address that point in our reply brief.

THE COURT: All right. And the other person was -- now, who is who? Which one was never a partner?

MR. WEISSMAN: Ms. Ockene was a partner, but may not have been ever a -- a non-equity partner, may not have --

THE COURT: I need to know what her status is. You're telling me may or may not have been. What was her status during the time that she worked there at the firm?

MR. WEISSMAN: She was an employee during the time of the lawsuit.

THE COURT: All right. She was not a partner, then. Is that correct?

MR. WEISSMAN: I cannot represent to the Court that at no point during the entire litigation process she wasn't named a partner.

THE COURT: Mr. Lovvorn, what about him?

MR. WEISSMAN: While the case was commencing, was proceeding, he was moved from being an employee to a non-equity partner, and then he left the firm. He was never a general partner, and Ms. Ockene was never a general partner.

THE COURT: Did he leave the firm prior to the lawsuit being concluded, prior to the litigation of the case?

MR. WEISSMAN: Yes. He moved to HSUS as an employee of HSUS. There is no basis alleged in the complaint for derivative liability for these people who are functioning as employees and not as partners.

THE COURT: What about conduct that occur after they left -- both have left the firm, though. Is that correct?

MR. WEISSMAN: Yes.

THE COURT: What about alleged acts that occurred after they left? Any liability there on their part?

MR. WEISSMAN: I don't see how they could. They are not derivatively liable for that. They are not derivatively liable anyway, but they couldn't be derivatively liable for that.

THE COURT: Would a common law partnership theory survive a motion to dismiss now, at this point, in a business

venture?

MR. WEISSMAN: If they could allege the legal standards for holding someone to be a common law general partner, yes. But that's not contained in the complaint.

And I would add, Your Honor, that the issue of derivative liability --

THE COURT: That's very interesting, because no responsive pleading has been filed. They've made allegations that they in good faith believe are true, that during the relevant time period these people were partners --

MR. WEISSMAN: Well, they haven't alleged that.

THE COURT: Pardon?

MR. WEISSMAN: They haven't alleged that. They've alleged --

THE COURT: -- alternatively.

MR. WEISSMAN: They've alleged employees and/or partners.

THE COURT: Well, they've alleged that alternatively, that they were partners.

MR. WEISSMAN: Well, one of the problems is that they haven't tried to state a claim of derivative liability. If you're going to state a claim of derivative liability --

THE COURT: At this point, in good faith, they've alleged that they either were employees or they were partners. There's no responsive pleading, there's no declaration under

oath as to who these people were, what their status was. This is the pleadings stage. Why shouldn't the court allow these claims against these individuals to survive a motion to dismiss? How can I determine at this stage credibility?

MR. WEISSMAN: It's not a question of credibility, Your Honor, it's a question of alleging grounds for a complaint. If I'm going to allege grounds for a complaint on the basis of derivative liability, I'm going to allege the facts from which you can conclude there is derivative liability. He is a general partner in the firm. It's an easy thing to allege; it's not in the complaint. There was a common law general partnership under the standards of D.C. law. It's easy to allege; it's not in the complaint.

I'm not saying the Court needs to look behind those kinds of allegations, but there are no such allegations here. All we have is this equivocal employee and/or partner allegation, which doesn't support derivative liability. I would also add that there's nowhere in the complaint that they actually say these two people are derivatively liable. Nowhere in the complaint. It was introduced --

THE COURT: The words don't appear, do they?

MR. WEISSMAN: -- in their responding brief. It shows up in their responding brief. There are many, many cases that say you can't amend your complaint in your responding brief.

Your Honor, if I could - I realize I'm treading on

someone else's territory here - but we did make this pattern argument with regard to my two clients because they are an extreme example of why the pattern is nonexistent as to them, because they were not involved in any of these other legislative -- they're not alleged to have been involved in any of these other legislative or fundraising or other activities, they just were lawyers working on a case, a case that began and ended and is complete.

THE COURT: Well, that's not necessarily true. It's not complete. It will be complete one day, I'm sure.

MR. WEISSMAN: Well, for their purposes, it's complete.

THE COURT: They would like it to be complete, I'm sure. Maybe it is. I don't know.

MR. WEISSMAN: The critical thing about the pattern analysis that the Court raises, the question of open-ended versus closed-ended, is that whether it's open-ended or closed-ended, the purpose of the pattern requirement and the purpose of the test is to determine whether the defendants involved have engaged in behavior that shows that they have a propensity or likelihood of recurring behavior. That's what the pattern requirement is about.

This statute -- the pattern issue in this statute has been addressed over 30 years, and the courts have struggled to try to figure out exactly how to apply it. But the open-ended concept that the Court addressed is focused on behavior that by

its very nature will recur in the future; for example, conduct that involves repeated, constantly repeating the same thing over and over. You're sending out a fraudulent invoice every month; you're sending it out; the only reason it's stopped is that you got caught. That's open-ended behavior.

THE COURT: So what about the payments here to Rider every month or every week for years?

MR. WEISSMAN: Well, but the payments here have terminated. They are not open-ended. And the payments to Rider are not -- and by the way, there's no allegation that my clients had any contact with Mr. Rider, any contact with Mr. Rider with regard to that.

But the payments to Mr. Rider have terminated. They are not open-ended. There's nothing about the payments to Mr. Rider --

THE COURT: How does anyone know that with any degree of certainty?

MR. WEISSMAN: It's not alleged in the complaint. That's all we can go on. If they wanted to allege that the payments continued and will continue in the future, they could do that. It's not in the complaint.

THE COURT: Is that a necessary condition, that they make that allegation?

MR. WEISSMAN: For open-ended, yes.

THE COURT: Really?

MR. WEISSMAN: For open-ended. And believe me, Your Honor, I've litigated in RICO for years and years and years. It's a morass of a statute. There are thousands and thousands of cases trying to address these things. But the concept of open-ended is: If you look at my tie, if you cut it off here (indicating), you're still going to know what the rest of the tie looks like. It's continuing. It's a repeated behavior that's continuing into the future.

You can't say that here as to the Rider payments. And as to the closed-ended continuity, it has to be -- to have the kind of long-term multifactor analysis that the DC Circuit used in *Edmondson* and in the *Western Associates* case, and under that test I think the Court has showed its inclination to believe that that hasn't been satisfied here.

I just wanted to raise the point, because I think it's important as a legal matter. The open-ended test is really one -- and you will see the cases, and I'm sure they can provide further briefing on it. The open-ended test is one --

THE COURT: I'm sure if there was authority --

MR. WEISSMAN: -- of conduct that projects into the future --

THE COURT: -- your point -- just a minute. I'm sure if there was authority on point, we would have seen it by now. Thank you. I've heard enough.

We'll take a 10-minute recess. I'll give plaintiffs an

equal amount of time. We're not going to get to every argument here, that's for sure. We just don't have the time to do it. But I'll give plaintiffs a fair opportunity to address points previously made, and also to respond to questions that the court will have. There's no need to stand. The court will take a 10-minute recess.

(Recess taken at 11:20 a.m.)

MS. STEEL: Your Honor, if I may, Laura Steel. Before you turn the podium over to Mr. Simpson, if I could be heard briefly on behalf of the lawyer defendants.

THE COURT: I don't have any questions right now. If time permitting, I'll give you an opportunity. But I assume the best arguments have been made in the pleadings submitted, and if there's some time remaining, I'll give you an opportunity.

MS. STEEL: Yes, I appreciate that. It would only be as to the statute of limitations as to the defendants added in 2010.

THE COURT: This is a point you've raised in your pleadings. Correct?

MS. STEEL: Yes, sir.

THE COURT: All right. I'm aware of it.

MR. SIMPSON: May it please the Court, John Simpson for the plaintiff. I think I'll maybe just take the points in the order Your Honor posed them to the other side.

THE COURT: All right. Just one second.

(OFF THE RECORD.)

THE COURT: All right.

MR. SIMPSON: Your Honor, first --

THE COURT: I want to deal with pattern, though. That's the principal issue before me, and that's the one that's causing the court the most concern at this point, pattern; and indeed, whether or not the court can consider this extra litigation activity.

Precisely, if the court were to find that Feld does not have standing to assert a RICO claim for conduct outside the litigation - you know, the Connecticut legislature activity, the Congressional activity, the fundraising activity - can Feld nevertheless use that conduct to establish a pattern - specifically continuity - even though it cannot be used to establish RICO liability? I mean, that's the principal question here.

MR. SIMPSON: Well, if I could first maybe address the legislative activity. The argument has been made that because Tom Rider testified in a legislature, anything to do with that is covered by the First Amendment petitioning clause. That's not true.

THE COURT: Look, I'm not focusing on the First Amendment right now. I don't have any First Amendment questions right now. I'm just concerned about the appropriate utilization of this extra litigation activity - let's just call

it extra litigation, or activity outside of litigation - whether or not that can properly be used to establish a pattern, putting aside the First Amendment.

MR. SIMPSON: I think it can, Your Honor, because Tom Rider is a defendant, he was paid to do it, the defendants paid him to do it. That's part of their predicate acts. It violated the federal bribery statutes and the state law bribery statutes. It was done because they were carrying out a scheme that was partly done in the case, partly done in the media, partly done in the legislative arena. Some of that may have a First Amendment angle to it, but --

THE COURT: Excuse me one second.

(OFF THE RECORD.)

THE COURT: Okay. Go ahead.

MR. SIMPSON: Some of that may have been in connection with media activity that has a First Amendment patina to it, but the crimes we're talking about here, bribing a witness --

THE COURT: In what case -- tell me what case you rely on for this theory. And your theory is that the court, in determining pattern, can rely upon allegations related to litigation and extra litigation activity in an effort to show, not RICO liability, but the pattern that's necessary. What case --

MR. SIMPSON: I'm not sure there's a case exactly on point. But I think the point is, what is this enterprise, what

was their objective, and were they doing.

THE COURT: All right. But I'm looking for that case also. It's not on point. There is no case. What is the closest case?

MR. SIMPSON: I think *Phillip Morris* is pretty close.

THE COURT: The tobacco litigation?

MR. SIMPSON: You have a campaign in the media to deceive the American public about smoking cigarettes; they go to a legislature and testify. Now, Judge Kessler ruled that that Waxman committee testimony was covered by the First Amendment. The DC Circuit didn't reach that, but I think frankly that's wrong. Because the citation was made to *Allied Tube*. *Allied Tube*, if you go to the next page of the opinion, Justice Brennan's opinion at page 504, he makes it very clear that while *Noerr-Pennington* may protect a campaign in assistance to legislature, it may actually protect you going to the legislature, what it doesn't protect you from is bribing someone in connection with that or going to the legislature and lying under oath.

And that's what we're talking about here. Rider was bribed, and he went to these legislatures and lied under oath, and Your Honor's decision of December 30, '09 has already basically found that with respect to Connecticut and with respect to Nebraska. That's covered by this lawsuit. They have no defense to that under the First Amendment. The DC Circuit in

Whelan vs. Abell: Bribes in any context are unacceptable. You have no First Amendment right to bribe someone.

So that's part of this. Whether we could ever show any damages because he was in Nebraska doesn't matter, it's part of our racketeering case because it's part of the racketeering pattern of activity that they did.

THE COURT: You need this outside activity in order to establish pattern, do you not?

MR. SIMPSON: I don't think so. I think even if you excluded it all, we have a pattern based on this lawsuit.

THE COURT: Well, what case says that?

MR. SIMPSON: I think *Handeen vs. Lemaire*, that's exactly what happened. It's a single scheme, it's a single person victimized, and it's a single case. That's all that happened. The Eighth Circuit found that was a pattern of racketeering activity because that guy got together with his lawyers and his parents to defraud the bankruptcy court in order to defeat a collection action by someone he shot and then got sued and got a judgment against him. So they come in, and the lawyer comes up with this scheme. This is what you do: Your parents come in and claim to be creditors, and we'll have the trustee pay those parents and then they'll give you the money back.

And the creditor comes in and tries to defend that, and spends legal fees dealing with that fraudulent bankruptcy case;

the bankruptcy trustee discovers the fraud, the plan is blown, it all comes back in; and then the creditor sues. And his allegation is: I got defrauded here because they cooked up this scheme to dissipate the assets of the case, the bankruptcy case.

The district judge granted summary judgment; the Eighth Circuit reversed. This is a pattern of racketeering activity. This association between the lawyer, the client, and the parents --

THE COURT: The Supreme Court found that there was a basis for a RICO liability there?

MR. SIMPSON: This was the Eighth Circuit.

THE COURT: At the Eighth Circuit?

MR. SIMPSON: Yes. Yes. Single victim, single scheme.

In Your Honor's own decision in *Oceanic Exploration,* which was an oil company that was victimized by a scheme to bribe foreign officials --

THE COURT: The Eighth Circuit case is the strongest case that you rely on.

MR. SIMPSON: I think so. And also in District Court, the *Living Designs* case is -- now, the only real difference between *Living Designs* and this case is instead of one case, it was consolidated litigation. But it was still one scheme. And it was a class of victims. But we have a class of victims here. We don't just have Feld Entertainment, we've got anybody that was going to use the guide and tethers. They were going to be

affected by the outcome of this case. We have the people who were defrauded because they made donations to these organizations on the strength of what they represented this case was about, on the strength of Rider's credibility.

There's a specific example of mail fraud in the complaint involving Ms. Meyer's solicitation letter, where she makes a specific allegation, specific statement: He's credible, he's a credible person. He was found not to be credible in any aspect of his story. That letter was disseminated, we think to hundreds of people. Some of them donated money. Some of these other -- we think other animal rights groups paid this guy as a result of that, gave him additional money. Not just these defendants, but other people. He's already admitted in his deposition he's paid by In Defense of Animals. Now, would they actually join us? Probably not. But that shows you there are other potential victims of this conduct.

Now let's talk about the pattern of racketeering point. We have the six-factor test that the DC Circuit suggested Your Honor should follow in *Western Associates* in terms of how many predicate acts you have --

THE COURT: Wait a minute. What is this case here? Is it open-ended continuity?

MR. SIMPSON: Both.

THE COURT: What is your theory? Or closed-ended?

MR. SIMPSON: Both.

THE COURT: I mean, are they clearly set forth --

MR. SIMPSON: Yes.

THE COURT: -- as separate and distinct legal theories?

MR. SIMPSON: Yes.

THE COURT: All right. Open-ended measured at the time the suit is filed. Right?

MR. SIMPSON: It is.

THE COURT: Continuing now?

MR. SIMPSON: The allegation in paragraph 283 of the complaint, Your Honor, is it continues up through and after the filing of the amended complaint. Other than Mr. Braga said, I don't have any way to know that they've stopped paying Tom Rider. How do we know that?

THE COURT: Don't you have to have a good faith basis for making that allegation?

MR. SIMPSON: I do. I do.

THE COURT: What's the good faith basis?

MR. SIMPSON: Because this activity continued after the trial. He went to Europe and made more false statements in a campaign for the Animal Defenders International. That's pleaded in the complaint. He didn't hitchhike to Europe; somebody paid him to get there. He's not wealthy independently. We know that from his trial testimony. It continued after the trial.

One of the aspects of open-ended continuity is: Is this a regular way that this enterprise does business? And the

answer to that is yes. And we've pleaded it in the complaint. Tom Rider is not the only paid plaintiff, not the only paid plaintiff who was procured for money. We think that was the case with --

THE COURT: In the *HJ* case, the Supreme Court clearly said that the conduct not only be continuing, but be capable of extending indefinitely into the future. You're not able to make that allegation here.

MR. SIMPSON: I think I am.

THE COURT: How, in good faith?

MR. SIMPSON: Because what was the case brought to do? Take elephants out of the circus, ban these tools. Elephants are in the circus; these tools haven't been banned.

Based on what they did and what they've declared their objectives are - particularly API's recent comment, "we'll never quit" - what makes me that's going to stop? What makes me think they're going to give up and not move to Round Two in some other context, with some other plaintiff, like they tried to do in the ESA case, who doesn't come in with the baggage of being paid?

THE COURT: That's just sheer speculation, though.

MR. SIMPSON: Well, we experienced it, Your Honor. We experienced it in the ESA case. They tried to amend the complaint to add three new plaintiffs in November of 2007, after the wheels were coming off their bus with respect to this payment scheme. Why else do you do that? Because these people

don't have the baggage of being bribed, presumably, at least not by these defendants. We know, however, they were orchestrated by PETA; that they didn't show up as volunteers, there was financial consideration of some kind, We know that. We know that from their depositions. They were all deposed in the case. Frank Hagan (ph), who testified -- he's dead, but he testified by deposition in the ESA case, he was paid $10,000 by PETA.

So this is not just limited to Tom Rider and a single case. This is a broader scheme. And open-ended continuity, the DC Circuit case in *Wilson*, it was both; DC Circuit case, *United States vs. Richardson*, both; *Philip Morris vs. United States*, both. Because it depends not just on the time frame, it's what's the seriousness of the crime.

Now, in *Wilson* and *Richardson*, those are drug-trafficking, violent crime cases. I'm not saying that we're in that category. But we're also not over here on the other end of the spectrum, where you have basically a commercial dispute, like you have with *Edmondson* and *Western Associates*. We're somewhere in the middle, but I think more towards the serious crimes end of the spectrum.

THE COURT: What about all of those Fifth Circuit cases that they cite for the proposition that continuity is not satisfied when all the alleged predicate acts took place as part and parcel of a single, discrete, and otherwise lawful commercial transaction?

MR. SIMPSON: I think what you have there - and to the extent they involve cases - a one-off situation of a dispute between two parties that was not capable of being repeated, that had a natural terminus. That's how it was described. This is totally different. This has no natural terminus.

THE COURT: So you're saying it continues as we talk?

MR. SIMPSON: As far as I know, it could very well. I mean, Rider testified at trial he's never giving up; he's going to continue; this case isn't over.

THE COURT: Do you allege that in your complaint, that it continues?

MR. SIMPSON: Yes.

THE COURT: That it continues?

MR. SIMPSON: Yes. I think I gave you that cite. It was paragraph 283.

So this meets the test for both closed-ended continuity and open-ended continuity. I think Your Honor's decision in *Oceanic Exploration,* very close; single scheme, single victim, nine years of activity. It was a closed-end pattern of racketeering activity.

And I say with respect to open-ended racketeering activity, you can't just focus on how long it lasts --

THE COURT: I'm sorry, the numbering may be a little bit different. You said paragraph 283, did you not?

MR. SIMPSON: It's a long paragraph, but if you look at

where it starts --

THE COURT: What's the subsection?

MR. SIMPSON: It's basically page 104, Your Honor, second sentence. It's the third sentence: "Such activity extends over a substantial period of time, up to and beyond the date of this amended complaint."

Now, I haven't had any discovery on this since January of 2008 --

THE COURT: But in good faith you've made that allegation?

MR. SIMPSON: Yes, I have. Now, it's a matter of discovery. If we find out in discovery that all these payments stopped, and that there's no longer this scheme to pursue it, then you have an issue about whether there's open-ended continuity. But you don't finesse the open-ended continuity argument because the scheme got discovered or the perpetrators got arrested and went to jail. That's what the DC Circuit held in *Richardson;* that's what the Fifth Circuit held in the *Singh* case. Just because they got uncovered and you come in, oh, well, we got uncovered, but now based on what you know after you found out, that's not open-ended continuity. That's not how it works. It's the seriousness of the crime: Is this likely to be repeated or not.

And that's all a matter of fact in this case. That's not something you can determine at this stage is a matter of

law, just as...

THE COURT: The closed-ended continuity is just as challenging, and *Edmondson* and *Western Associates*, of course, persuade this court. But those cases also focus on the number of alleged schemes involved in the racketeering activity.

In the amended complaint, as I understand it, they allege four different schemes: To ban elephants in circuses, to ban elephants in captivity, to defraud FEI, and to enrich defendants. Now, let's assume that I agree with you that there's at least an allegation of a scheme to defraud FEI. What about the rest of those schemes, though? Those weren't in an effort to defraud the plaintiff. Are they sustainable in light of the fact that these schemes caused no other injury or harm to FEI?

MR. SIMPSON: I think there's also a scheme to cover this up. We did allege that. And I think all of those together do --

THE COURT: And where is that scheme alleged?

MR. SIMPSON: We've got a separate --

THE COURT: To cover it up?

MR. SIMPSON: We've got an entire section of the complaint related to the coverup of the scheme to pay Tom Rider.

THE COURT: With respect to allegations regarding the instructions to organizations to pay money to the law firm?

MR. SIMPSON: Yeah. It starts at page 78. And as

Justice -- or Judge Urbina noted in *Lopez*, you can have a scheme --

THE COURT: I'll tell him you called him Justice.

MR. SIMPSON: He's very respectable.

THE COURT: He is.

MR. SIMPSON: You can have a racketeering scheme and a scheme to cover it up. They're two separate things. They're two separate things. He didn't find that that plaintiff had a racketeering case, but he noted that you can have a separate scheme to cover it up. And that was one of the reasons I wanted to cite the *American Honda* case. The judge in Maryland said the same thing.

THE COURT: The word "scheme" doesn't appear in the RICO statute at all.

MR. SIMPSON: It doesn't.

THE COURT: And so what weight does this court give to the word "scheme"?

MR. SIMPSON: I don't think you give any to it. I mean, the Supreme Court of the United States has already decided that you don't have to have more than one scheme to have a RICO case. The DC Circuit decision in *Western* says exactly that; Judge Rogers, one scheme may be enough. Because it's not in the statute. Also it's not in the statute that it can only be a single victim. How could that possibly be the law?

You have 1,300 predicate acts, you have 13 defendants.

All these predicate acts are related to each other because these payments aren't randomly happening, these actions aren't randomly happening by people that are operating on their own agenda. You've got nine years, you've got one victim in a potential class of victims, two potential classes of victims.

THE COURT: But walk me through this, though. You see what's troubling the court, and it's this pattern. I understand, I understand your allegations about the lawsuit, because I was there, but all this other activity, I'm having trouble finding that it's part and parcel, that it's a pattern of RICO activity.

Because the court is troubled that plaintiff is able to allege an injury to plaintiff because someone went on Capitol Hill and testified in a manner at a time when he was being paid to perform services. Or go elsewhere, fundraising activities. Sure the donors may have been defrauded, but how does that translate into a scheme that victimizes the plaintiff here?

MR. SIMPSON: Stated that way, it wouldn't, and I don't think we would have any standing to try to bring into this instances in which ASPCA may have appeared before some legislature on some issue.

But what we're talking about is appearing before legislature on the issues in this case, on the issues involving Feld Entertainment, on the issues involving animals in captivity

and Asian elephants being handled with a guide and tethers. That's what they appeared on. That's inextricably linked to this case. That's why we think this case in major reason was brought, to gather information in discovery to use in that legislative context. And they did. They did. We can establish that. That's the problem.

And when the lawsuit itself is fraudulent, and you're being held hostage and having to defend this based on a jurisdictional predicate that you don't have any choice but to go to trial on, that's where you're injured. Because they're holding you here so they can do this legislative activity. They're holding you here in this court so they can raise this money. That's where the injury comes from.

Tom Rider has no stature as a legislative witness unless he's a plaintiff in this case. Nobody cares what he thinks unless he's a plaintiff in this case. And he was marketed that way, and he would come in and talk about it. He's not an expert on elephants; he comes in to talk about what he did at Feld, what he says Feld does. It's all Feld related.

THE COURT: And this lawsuit is referenced on those occasions when he said --

MR. SIMPSON: Yes, most of the time. It's no secret he is who he is. That's his star power. He's a plaintiff in the case. That's why it was done that way. That's why it's relevant to the racketeering pattern.

THE COURT: If the RICO claim goes, do you have viable state claims, local claims?

MR. SIMPSON: I believe we do.

THE COURT: Where, Superior Court or all over the country or what?

MR. SIMPSON: I'm not sure there's not complete diversity. At the time we filed this case, AWI was headquartered in Virginia; they have since moved to the District.

I'm not sure about that. We would have to check that. It could be we have diversity of jurisdiction anyway. I think even if it goes to Superior Court, we have viable state law claims.

This whole concept that you can bring a lawsuit to use it as a fundraising gimmick, to gather information in your legislative agenda or your publicity campaign, it's a classic instance of abuse of process. It's accomplishing something outside the normal intendment of the process. There's nothing in the citizen supervision of the statute that says you can use this case to raise money, you can use this case to collect legislative materials. It's abuse of process. That's what it is.

Malicious prosecution, it's a classic case of malicious prosecution. They claim that the litigation wasn't terminated in Feld Entertainment's favor. As to Rider, it was terminated

with prejudice. That's in our favor. As the *Brown* case indicates, does that reflect on Feld Entertainment's innocence? Absolutely. When his claims get tossed with prejudice, absolutely. ASPCA, AWI, FFA abandoned the lawsuit all together. They don't seek any relief from Your Honor. So how is that not lack of probable cause?

And AWI, which gets tossed on standing, the Supreme Court of the United States says standing is an integral part of the plaintiffs' case . It has to be proven with evidence just like anything else. So why is that not reflecting on the merits?

THE COURT: What about the mail and wire fraud? I'm troubled by that as well. What was obtained? I mean, were assets of Feld obtained as a result of mail or wire fraud?

MR. SIMPSON: No, but you don't need to do that.

THE COURT: I don't have to go that far, do I?

MR. SIMPSON: No, the *Schmuck* case, the defendant, he faked odometer documentation and sold cars to dealers who in turn sold them to ultimate customers. The ultimate customers got victimized. He never got a single dollar.

THE COURT: Any other cases other than *Schmuck*?

MR. SIMPSON: The *Pasquantino* case as well as *Philip Morris* both specifically said mail fraud, it's not the success of the scheme, it's the scheme itself. That's what's criminal, the scheme itself. And in a civil RICO -- in a

criminal case it wouldn't matter, because the injury is to the United States of America. But in a civil RICO case, my client does have to show an injury in order to bring a RICO case predicated on mail fraud, but the injuries are legal fees.

The mails and the wires -- and by the way, Federal Express is covered by the mail fraud statute, on the face of the statute. Mail and wire fraud was used to execute this scheme.

THE COURT: To transfer monies to Rider?

MR. SIMPSON: Exactly. They sent the money to him by Federal Express, they wired it to him by Western Union.

THE COURT: Is that sufficient?

MR. SIMPSON: Yes, it is. The mail and wire fraud itself doesn't have to be misleading; all you have to do is use the mails and wires to do it, which they indisputably did.

THE COURT: And *Schmuck* holds that it's not necessary that plaintiff proves that plaintiffs' money was obtained from defendant by use of the wire fraud?

MR. SIMPSON: That was not exactly the issue in that case, but that's the fact pattern in that case. That's exactly what happened in that case. And it's the scheme to defraud.

In a civil case, does this scheme to defraud injure your client? Yes, it does. Because if it weren't for this scheme to defraud, we wouldn't have had to defend this case, and we wouldn't have had to have spent the money we spent to defend

this case. And if this was a criminal case, I don't think that would matter.

THE COURT: Why is this bribery of Rider? And also, do you allege that others were bribed? And that's in the criminal sense of that word.

MR. SIMPSON: It's bribery, Your Honor, because under 18 U.S.C. 201, they paid this money to him with a corrupt intent to influence his testimony. And that's exactly -- and he received it for the same reason. And why do I say that? Because there's no question they paid him to be a plaintiff in the case. He couldn't have been a plaintiff in the case without being a witness. There's no way around that. And I think the evidence will show as we go through that when he was hired - hired as a plaintiff - the facts that ultimately caused his testimony to get totally discarded at trial were well-known to these lawyers at the time.

This guy testified -- he claims he was in love with the elephants and what he saw bothered him, the Ringling elephants; he told them in March of 2000 on a videotape that they put him under oath and he gave, he was attached to the Chipperfield elephants. Right? Did they ask him about all the inconsistent actions he took after he left Ringling Brothers? Did they ask him about the photograph he had with a bullhook in his hand?

I think a reasonable jury could find that he was paid this money with the corrupt intent to influence his testimony,

which in fact happened, since he was found at trial to be untruthful. That's why I think it's a bribe.

THE COURT: What about others? Are you alleging that others were bribed?

MR. SIMPSON: We think there's a good possibility, based on what we know, which is very little, that this same kind of situation existed at some point in time with Ewell, who was the other plaintiff in this case before he was dismissed without explanation. He was here today, gone --

THE COURT: He voluntarily withdrew, I believe.

MR. SIMPSON: He was here today, gone tomorrow, 30 days later.

THE COURT: Did he voluntarily withdraw?

MR. SIMPSON: Unclear. Complaint with him in it; first amended complaint, he's not in it.

THE COURT: Is that an allegation you've made in the complaint?

MR. SIMPSON: Yes.

THE COURT: Ewell?

MR. SIMPSON: Yes. Hagan, PETA's counsel said in open court in a Virginia case that he was paid $10,000. Hagan was a witness in this case through deposition. Hagan was a witness in this case.

THE COURT: Was he testifying about the monies he received?

MR. SIMPSON: He didn't.

THE COURT: I mean, was he questioned about the monies he received?

MR. SIMPSON: He didn't. But we think the evidence will show he wrote correspondence later in which he admitted being paid, in which he admitted that PETA induced him to sign statements that he didn't necessarily agree with. They put words in his mouth. PETA was involved in this. That's in the complaint. PETA provided documents in this case that we have.

THE COURT: Is that part of the pattern that you allege?

MR. SIMPSON: Yes. This law firm represents PETA, or has represented PETA. They communicated about this. It's not a mystery that Hagan magically showed up as a witness in the case. PETA -- he was represented in a lawsuit that PETA had involvement in. And Hagan is a guy that -- well, had a sorted past with respect to his criminal conduct. But this is another example of why we think it's not limited to Rider.

Hunalena Toms (ph), where did these people come from? Magically they show up one day - they're not even elephant handlers - and they have aesthetic injuries. Well, they're also handled by PETA. That's clear. They showed up, PETA orchestrated their involvement. They didn't do that for free. Now, they've said, well, it was just expenses, but that's matter of proof, because that's taking place at the same time we're

discovering all these other payments. Maybe they got more careful.

THE COURT: The two additional matters the court wants to get into are with respect to the motion to dismiss filed by HSUS and also the individual attorneys. Let's deal with the individual attorneys first.

There's not much with respect to allegations about their activity other than they were associated with the firm either as employees or partners. Counsel makes a point, I'm not sure it's fatal to the complaint, but he says there's no derivative activity language in the complaint. Is that fatal?

MR. SIMPSON: No, it's not.

THE COURT: Why not?

MR. SIMPSON: We specifically allege, I think it's in paragraph 43 -- excuse me, paragraph 39, that Meyer, Glitzenstein & Crystal is a general partner in the law firm -- or is a general partnership; specifically alleged in paragraphs 44 and 45 that Ms. Ockene and Mr. Lovvorn were either employees or partners in that firm.

Now, I don't know what the time on that is because I haven't had discovery in that. What I do know, because it's on their web site or has been on their web site, that both of these lawyers held themselves out as partners in that firm. They didn't distinguish between partners and equity partners or non-equity partners.

THE COURT: Is that fatal, that they were equity partners?

MR. SIMPSON: No, I don't think so. Not under the D.C. partnership law, not under the *Beckman* (sic) case that they cited. The D.C. Court of Appeals in Beckman makes it clear the labels are not really important. What was your actual relationship between the individuals in the firm? You can call yourself a partner, you may not be; you can call yourself an employee, you may be a partner. And that all could work out differently internally with respect to -- from how it is vis-a-vis the general public. You could actually not be a partner -- this is what the Court of Appeals said, Judge Farrell's opinion. You could actually not really be a partner, but to the outside world you are because you held yourself out as such. They did that --

THE COURT: They hold themselves out on the web site. Is that correct?

MR. SIMPSON: Yes. They're also on the letterhead, the firm's own letterhead. Now, when they became partners, when they joined the firm, I don't know the answer to that.

THE COURT: Does the letterhead just list them, though, as attorneys with the firm, or are they listed as partners?

MR. SIMPSON: The inference is they're partners. That's a reasonable inference, because other lawyers and non-partner people were not listed. But that's a matter for

discovery.

THE COURT: I don't recall what their involvement was at trial. One may have questioned witnesses. Is that correct?

MR. SIMPSON: Neither one of these people was involved in actually trying the case, as far as I remember.

THE COURT: So they were not in the well of the court during the trial?

MR. SIMPSON: No. But they were here at various points, as I recall, in the gallery.

THE COURT: Is it significant or not as to whether or not they were employees or partners of the firm at the time when they happened to be in court, and not participated in the well of the court?

MR. SIMPSON: I think that probably is significant from the standpoint of the conspiracy claim. I mean, the basic point here is, these two lawyers -- and this is what we allege without any amendment. These two lawyers were in this firm, we think they were partners for at least part of the time, but in all cases they were counsel of record in this case. They knew about the payments to Rider, and it's specifically alleged that Lovvorn participated in at least four of them himself, personally.

THE COURT: Sending the money, or --

MR. SIMPSON: Yes, sending the money. So they knew this. Even if you look at nothing else, they knew about the

illegal activity and they continued to work in this case and promote it. And I would submit that as an officer of the court, as a member of the D.C. bar, and as a partner in that law firm, they shouldn't have done that.

THE COURT: Well, you've not alleged an aider and abetter theory.

MR. SIMPSON: Yes, we have.

THE COURT: You have? Where?

MR. SIMPSON: The aiding and abetting theory is referred to specifically at pages 105 and 107.

THE COURT: I thought I had asked defense counsel that question and I got a no, and I just couldn't recall whether it was affirmatively or --

MR. SIMPSON: Specifically in the predicate acts incorporated at 18 U.S.C. Section 2.

THE COURT: What subsection, counsel? What paragraph and what subsection? It's at paragraph 283?

MR. SIMPSON: No, actually -- it's paragraph 283, but it would be subsections A all the way down through G.

THE COURT: I see it. No, I see it.

MR. SIMPSON: It's only through the federal predicate acts. And Judge Joyce Green's opinion, which we cite in our brief, *First American vs. Al-Nahyan*, specifically says that aiding and abetting is a viable theory in a civil racketeering case.

THE COURT: No, I don't disagree with that. My question was whether or not that had been adequately pled here. And I see that -- I think that may be the only reference to aiding and abetting.

MR. SIMPSON: Well, if I had to add a sentence in the front end that this constitutes aiding and abetting, I think that's technical. But I think the point is, they facilitated this scheme by just being counsel of record, because they knew it was going on. And this whole idea that --

THE COURT: Are they the only other attorneys at the firm that you're aware of?

MR. SIMPSON: No.

THE COURT: Are there other attorneys who work there who are not joined in this lawsuit?

MR. SIMPSON: Yes.

THE COURT: All right. So why these two and not others at the law firm?

MR. SIMPSON: I didn't have information on the others. I didn't have a reason to believe that they knew about it or that they actually did something materially to advance it.

And Ockene -- I mean, Ms. Ockene, let's not forget that she represented the 30(b)(6) witness in the AWI deposition in which specific questions were asked about payments to Rider that were falsely answered.

THE COURT: Did either one sign the complaint in this

case --

MR. SIMPSON: Yes.

THE COURT: -- sign the complaint in the ESA case?

MR. SIMPSON: Yes.

THE COURT: Which one?

MR. SIMPSON: Both of them signed the complaint in 03-2006. I don't think they were even in the firm in July of 2000, when it was filed; Mr. Lovvorn, however, was involved in the motion to reconsider Your Honor's decision of June 29th, 2001, and his name is on the DC Circuit briefs in that case.

THE COURT: Right. But by all accounts, though, their activities, their association with the firm, ended, though, at some point. What about liabilities subsequent to the termination of their either employment relationship or partnership, where they withdrew from the partnership?

MR. SIMPSON: They didn't -- but the problem is, they may have left Meyer, Glitzenstein & Crystal, but they didn't leave the enterprise. They stayed in the enterprise. They went to work for HSUS. They remained counsel of record in this case.

THE COURT: They didn't withdraw their appearance in this case?

MR. SIMPSON: No. As far as I know, they're still counsel of record in the ESA case. I've never been served with a notice of withdrawal. They're still there.

THE COURT: Is it your theory that any attorney whose

name appears on a pleading, on a complaint, say, to institute an action, and does nothing more, is liable for the damages that you seek?

MR. SIMPSON: No. They're liable because they're partners and they're liable for the torts of their fellow partners, which is what that *131 Main Street* case says, which we cite in our opening brief. It's also in that other -- the *Thomas* case --

THE COURT: Whether they signed the pleadings or not, then. Right?

MR. SIMPSON: That's right.

THE COURT: They could be general partners --

MR. SIMPSON: They could be -- in a civil context, they can be totally unaware that there was racketeering activity, and still be liable for it. The principle that Mr. Weissman talks about is not applicable here. You can't hold, generally, a partner criminally responsible for another partner's crimes - that's generally true - but you can hold the partner generally liable for another partner's crimes if that partner has guilty knowledge, if that partner is an accessory before or after the fact. And that's the case that they cite.

United States vs. Bainbridge Management in turn cites *U.S. vs. A&P Trucking* and a District Court from Illinois case called *Assani* (ph), and both of those two cases together establish that even in a criminal context, if you have guilty

knowledge and you're an accessory before and after the fact, you can be prosecuted for the crimes of the fellow partner.

The 1964(c), which is what we're suing under, is a tort. It's a civil cause of action. And it's well established in partnership law, as well as partnership law applied to RICO claims, that's like any other tort. If the tort was committed in the ordinary course of the business of the partnership, partners in the firm are liable for it, period, even if they weren't even involved.

And that's the point of the *BCCI* case, where the partners in Clifford & Warnke, who were joined in that case because of Robert Altman and Clark Clifford's wrongdoings, moved to dismiss, saying: Well, we're just partners, you can't hold us in here. And the court denied the motion. One of the claims that was made in that case against Robert Altman is that he engaged in activity in violation of the RICO statute.

So they're in this as partners in the firm. Now, their liability will depend on what the time frame for that was. We don't know that yet because we haven't had any discovery.

THE COURT: I think I got a clear answer to this question earlier. But you agree, do you not, that there are adequate remedies for Feld if RICO proves not to be a viable remedy at this point. There are viable state law --

MR. SIMPSON: Yes.

THE COURT: And the court could, though -- even if RICO

fails, the court could assume jurisdiction -- could this court or not assume jurisdiction?

MR. SIMPSON: You have the discretion, even if you find no federal cause of action to continue with the lawsuit.

THE COURT: Why in the world would I want to exercise my discretion to keep this case?

MR. SIMPSON: Why would anybody want to do that? Well, I think here's a reason: Because Your Honor has had 10 years experience with these facts; not necessarily directly relevant to RICO, but, on the other hand, you're not uninitiated, either.

So in exercising your discretion under supplemental jurisdiction, does it make sense to put this on a Superior Court judge who has no background at all in this, or does it make sense to continue in this court? I would submit that it would make sense to continue in this court.

THE COURT: All right. Let me go back to standing and causation, only because it's troubling for the court, significantly, as you can tell from all these questions.

If plaintiffs' injuries are limited to the legal fees in the ESA action - and I accept what you said is true, that's the limitation, and I understand your rationale for limiting or capping those damages - again, I need to know, what is the proximate cause between the alleged non-litigation activity and those injuries? And specifically I refer to your allegations regarding allegedly fraudulent, one, legislative testimony,

administrative testimony, media outreach and efforts, and fundraising. And the second part is: What's Feld's standing to assert RICO injuries based on those alleged predicate acts?

And in answering that, you need to -- how do you allege that Feld has met the proximate cause requirement in light of *Holmes* and *Hemi Group* and *Ideal Steel Group* and *Bridge vs. Phoenix Bond and Indemnity Company?* Those cases are four obstacles to the complaint. How do you get around those?

MR. SIMPSON: Because the activity that we complain of, which is a pattern of racketeering activity to bribe him to bring this case, is a direct result of why my client had to pay $20 million in legal fees. There's no intervening cause. It's not the result of anything else. It's because he brought this case. And it's already been determined in the December 30th, '09 decision that without Rider, they can't maintain the case. He's indispensable to that.

Now, with respect to these other activities, if all this -- I think the point here is, if all this case was about was targeting Feld Entertainment to confiscate Feld Entertainment's elephants, and there wasn't any other part to this scheme, that's just all it was, no legislation, no publicity, none of that, no fundraising, just go get them and get their elephants from them, that's all it was, then I would submit that this case would have been over with in 2000. Because just think about what they had at the time.

Here they're bringing this lawsuit on the basis of elephant mistreatment; their lead plaintiff and lead witness is a man who worked for this company for two and a half years, who rode the trains with these elephants, who, as he said at trial, spent all of his time with these elephants. He's only at that point in time seven months away from the employment, seven months after he left the company, so why did they not seek injunctive relief? If this is an irreparable injury, if this is a take of these animals, why did they not seek injunctive relief?

THE COURT: They did, belatedly. My recollection is they sought it in June of --

MR. SIMPSON: Eight years later. And that's the point. That's the point. Putting aside what that was really about, which was to get a trial date --

THE COURT: Which they got.

MR. SIMPSON: The whole point is: Drag the case out. Why are you dragging the case out if it's all about the elephants and how they're being allegedly horribly treated? You drag it out because you're going to get information from this company. You're going to put them through the discovery grinder.

THE COURT: And indeed, finally plaintiffs never asked for injunctive relief at closing argument. That's my recollection.

MR. SIMPSON: That's another thing that I think demonstrates it's abuse of process: You spend almost a decade getting to the point where a federal judge asks you, what do you want, and you say, well, an injunction is not realistic, so give us a declaratory judgment and order them to go get a permit. I mean, that's ridiculous. Why would you say that unless you're trying to find some way to keep this dispute going? You send it to the Fish and Wildlife Service, there could be another 10 years of proceedings; all in the meantime, you've still got your case against a high profile defendant who everybody recognizes the name. You can't raise money on --

THE COURT: I think the first response was: I'm not sure what relief we want, I believe --

MR. SIMPSON: Well, if it's all about the elephants, you say --

THE COURT: -- after a month long trial.

MR. SIMPSON: -- Your Honor, you enjoin this. This is a horrible take.

That's what we heard for nine years. *TVA vs. Hill*, you have no choice; yet when you get to the point where you might lose the case and lose your ability to fundraise and collect your legislative information, you back away and come up with some jury-rigged remedy that keeps the dispute going. That's our theory. That's why all of that is relevant to the injury my client suffered. Because if it was really about the elephants,

maybe the legal fees would have only been half a million dollars. Maybe this case would have been over with in June of '01, when you threw it out the first time.

They come in and move for preliminary injunction; denied. Tom Rider didn't -- all of what they told you in May of '08: Well, we have the transportation orders. Well, Rider rode the trains. They had that same kind of information about how long the elephants were in the trains, how long they were chained, whether they ever got off, how long the train trips were, they had all of that through him, but they didn't do it. Maybe it's because they didn't believe him. That's one possibility. But I think it's because they wanted to prolong this case and they had other agendas.

And that's why my client got injured in the process, and that's why I get worked up about it. Because it's a fraud on this court. They defrauded -- they defiled the temple of justice. That's exactly what they did. And we had to wait four years to make our case. It was their idea: We've got to sever this out, got to go forward with our elephant case, and they convinced you to do that, and now it's our turn.

THE COURT: There was a lot of other activity going on. Plaintiffs wanted to add other plaintiffs, the defendants wanted to file a counterclaim. We would probably still be in litigation. Not to rehash the rationale for deciding those issues, but they were decided, and plaintiffs weren't allowed to

amend and defendants weren't allowed to assert. That's the reason you filed a separate lawsuit at that point.

MR. SIMPSON: You did. You did, and you stayed it at their request.

THE COURT: At their request.

MR. SIMPSON: So now it's about what they did, not about what they hypothetically could have established in the elephant case. That's over. It's about what they did.

On HSUS, we allege in the complaint that they merged. That was based on what they said about it. They said it.

THE COURT: What they said? They said it where?

MR. SIMPSON: They said it in the press release when they announced the deal: We are merging with FFA. And we attached that or made reference to that in our brief. Not only did they say it then, they said it two years later in their board of directors' meetings, where Markarian called it a merger. That's my basis for making that allegation.

And what counsel gets up and does is basically argue what they're going to say in defense of that, which is fine, but that's all factual, that's all subject to discovery, that's all subject to motions practice. I think it's going to trial.

THE COURT: So in good faith, the plaintiff has alleged a merger based upon a press release by the organizations.

MR. SIMPSON: Yes. And what's interesting about that press release -- because when he produced, attached to his

motion, this asset agreement, there's a specific provision in there --

THE COURT: Can I consider that asset agreement at this stage?

MR. SIMPSON: No.

THE COURT: Well, I can if I convert it to summary judgment, or not?

MR. SIMPSON: You have to convert it to summary judgment.

THE COURT: If I do that, it will open up the flood gates to everything else being --

MR. SIMPSON: Well, and then you've got to give everybody Rule 56 procedures, you've got to give me a chance to have discovery into whether this is in fact just a purchase of assets or what amounts to a merger --

THE COURT: Did you rely on Rule 56(f) in your reply to say, I can't response to this, or is that necessary?

MR. SIMPSON: That's not necessary, because we haven't yet been given notice by Your Honor that you're considering converting it to summary judgment.

THE COURT: Right. I do have to give notice.

MR. SIMPSON: You do. You do. That's what 12(d) plainly says.

But what was interesting about that asset agreement is, there's a specific provision in there that says no press

releases shall be issued about this transaction unless they're approved by both presidents of the organizations. So this wasn't some accident that some low level person said merger when they shouldn't have. They deliberately called it a merger because I believe that's what it was. That's exactly what it was.

And it's also an interesting point, that same agreement contains a specific representation, as he pointed out, by FFA that nobody bribed anybody. Now, why would they want that? This transaction was closed in November of '04. So if you're HSUS and all you're doing is buying equipment from FFA - which is how they portrayed this, some equipment, some money, we're just buying some stuff - why do you need them to represent that they haven't bribed anybody?

These are two public charities, 501(c)(3) organizations. Is this common practice in the charity area, to get antibribery representations? I mean, these aren't companies doing business in Nigeria, as far as I know, so why did they get that representation? I think the evidence is likely to show it's because they did some kind of due diligence and discovered these payments, and got nervous about whether they're criminal or not. That's what I think happened. That's why it's in there.

And, if that's the case and this whole thing was set up to try to hide assets or take FFA's money and property so that

it would be judgment proof when FFA finally figures out -- FEI finally figures out it's been defrauded, then that's a fraud. And that's one of the three reasons, the three exceptions to successor liability: De facto merger, and whether this transaction was a defraud of creditors or potential claimants.

This whole argument that he makes about, well, we didn't specifically allege that HSUS actually paid Rider or knew that the money being paid to Rider was to procure his false testimony; we specifically say at paragraph 17 of the complaint, specifically - in fact, it's the topic sentence - "At various times during the past eight years, all these parties, including FFA/HSUS facilitated by WAP, MGC, Meyer Glitzenstein, provided funding to Rider for his participation as plaintiff and a key fact witness in the ESA action, which Rider testified falsely under oath both in the pretrial phase and during the trial of the case." It goes on and on. I mean, they're tied to all of this.

And we made specific allegations in the complaint that even if this somehow constitutes not a merger, whatever it is, HSUS came into this thing and made six payments that were earmarked for Tom Rider.

THE COURT: So if there is no merger and no factual basis for a merger, or finding that's it a merger, each individual organization is individually liable, then, for the conduct complained of by plaintiffs?

MR. SIMPSON: I think the only distinction would be if you actually determine that it's not a merger, and the clause in the contract where HSUS assumes all the obligations of FFA --

THE COURT: Then possibly as assignee, then, or assignor --

MR. SIMPSON: Yeah. But if that doesn't make them liable for pre-so-called merger activity, then FFA is on its own for the pre-merger --

THE COURT: So that's a summary judgment issue, isn't it?

MR. SIMPSON: Probably. Although I think it's going to be an issue of fact, what was meant by lawful liabilities in that clause. They're saying, well, we didn't agree to assume the bribes that FFA made, but I interpret that to mean, well, that's probably right, but what you did agree to assume is any judgment that gets entered as a result of a bribery claim that is against FFA. You agree to fund such a judgment.

Because think about why that's even in there. Because they're taking, as I understand the contract, most of the assets of this company; all their cash -- most of their cash, most of their property, they're taking over one of their properties and managing it themselves. There are no more FFA employees; they're all going to work for HSUS. There's no more independent board of directors; they're all merged together. They represent themselves to the IRS as parent and sub. So it's a merger, I

think, in fact, but even if it is, HSUS controls them, so anything FFA did after that, they're going to be liable for it as an agent.

And HSUS is in it as an independent racketeer. The Supreme Court in *Reves* said, if you're a total outsider, like the accounting firm in that case was, you become an insider, you become a participant in the management of the affairs of the enterprise if you bribe somebody. That's how you get a management seat. That's how the Supreme Court called it. That's how you get a management position in the enterprise, bribing somebody on the inside.

And they did. They sent six payments to WAP that were earmarked for Tom Rider, and those payments were made, as we showed, out of a HSUS bank account, on HSUS stationery, a HSUS check sent by an HSUS employee, Jonathan Lovvorn, who had been a partner in that firm before he came over there. So the idea that they don't know about this, that they were innocent, that they were duped, it's ridiculous. They were in the middle of this.

They also are clearly a conspirator, as is Lovvorn and Ockene. In *United States vs. Salinas*, you don't have to have an overt act under 1962(d), you just have to further the object of the endeavor, intend to further the object of the endeavor. How is that not satisfied by HSUS making six of the payments? How is that not satisfied by Lovvorn and Ockene being counsel of

record in a fraudulent case, and proceeding in the fraudulent case, which is what we've alleged; but in addition to what we already know, participating in the obstructions themselves, and also participating in any payments.

And Mr. Lovvorn appeared in this courtroom in March of 2008 as an employee of HSUS, and claimed to be counsel of record in the case, and managed to claim attorney-client privilege for all the conversations that had happened about the Rider payments because he was there. If he had not been involved and he didn't have an attorney-client relationship or an attorney-client reason to be there, then his presence would have blown their privilege. He showed up to make that point, so, in my opinion, they could shield the whole thing in the privilege.

So like I said, these are not hapless young lawyers who are being unfairly accused of doing something that they didn't have full knowledge of what was going on.

That's one of the things about this case, Your Honor, that I find really disturbing. Judge Stanley Sporkin was famously quoted in some case - I can't remember the name - of saying, in a fraud situation: Where were the lawyers? And the question here: Where were the lawyers? The lawyers in this case were in the middle of this. Because this didn't just involve the five defendants that we've sued. There were nine lawyers in this enterprise, nine people in this enterprise with law licenses. ASPCA, AWI, API were all represented during part

or all of the period in time in the case by three lawyers. They each had -- their in-house point persons were lawyers. The managing director of WAP at one point was a lawyer. Not one of these people had an ethical issue with what was going on, or a legal question? So that's what's troubling, and that's what makes this case a pattern of racketeering activity.

We're not talking about faxing back and forth financial statements. And it's not even like *Edmondson*, which I wanted Your Honor to have the complaint so you see how different that case is. That was one of my supplemental authorities.

In *Edmondson*, basically you had a commercial dispute between a tenants' group and a building owner, and there was a hot check written, there was a threat to cloud title. It took place over two days, December of '86, and then, as far as I can tell from the RICO claim, nothing. There's a lawsuit, and then in the lawsuit there's two affidavits and deposition that they claim were induced by a bribe. So that's the pattern in that case. That's it. That's what the complaint says. That's totally different than what we're talking about here.

THE COURT: And that was sufficient there?

MR. SIMPSON: No, it wasn't. That's why they're hanging their hat on *Edmondson*. Well, okay, yeah, *Edmondson*, I agree with that, but that's not what this case is about. That is not what this case is about.

Did Your Honor have any other --

THE COURT: Not at this point. I'll take a short recess. Did you want a minute or two to make a point?

MS. STEEL: Thank you, Your Honor. As Your Honor knows, I represent the lawyers, and I would like an opportunity to tell you exactly where the lawyers were in connection with this case.

This whole theory, this whole construct that Mr. Simpson comes up with is based upon a house of cards. The house of cards is, you have a client who you call as a witness who is impeached. I have been practicing for 20 years as a litigator; every single lawyer who is worth his or her salt has a client or a witness who is put up on the witness stand where there is something to impeach them about, whether it's a prior inconsistent statement, whether it's --

THE COURT: I think the word I used during the trial was he was pulverized. And quite frankly, my years on the bench, I don't think I've seen a witness as totally discredited on just about every aspect of his testimony as I did during the course of that trial.

MS. STEEL: Your Honor, that's true.

THE COURT: It wasn't just simple impeachment, it wasn't just a prior inconsistent statement.

MS. STEEL: But just because a witness or a client is impeached doesn't mean --

THE COURT: He wasn't just impeached. He was

thoroughly discredited.

MS. STEEL: But it doesn't mean that the entire lawsuit was fraudulent. If you have a group of lawyers --

THE COURT: Isn't plaintiff entitled to pursue his theory, though? He can demonstrate, and he's alleged, a pattern or practice of Rider being paid for years. Rider didn't work anywhere else, he paid no taxes during the time he was whatever his capacity was on behalf of the -- well, in this lawsuit. And it wasn't as if this was just a part-time job he had. They made a pretty compelling -- they painted a pretty compelling picture of him being literally a paid employee. Essentially that's what I found, a paid plaintiff.

MS. STEEL: Well, *Iqbal* and *Twombly* only allow a case to proceed if the allegations, the theory, the construct is plausible.

I submit to you that it's not plausible to say that just because a witness is impeached necessarily means they're intentionally lying, necessarily means that ergo everybody who comes into contact with him knows he's lying; with ergo everything he does is a lie, everything he advocates for is a lie, ergo every lawyer who comes into contact with him should find he's a liar and not put him on the witness stand; and everybody who comes into contact with him is therefore involved in this RICO conspiracy based upon the initial construct: He was impeached at trial.

Every single one of us have --

THE COURT: You're being generous with your argument that he was impeached --

MS. STEEL: No, Your Honor --

THE COURT: -- and the picture they're trying to portray is that it wasn't just coming in contact with this man, that they've alleged that they were part and parcel of this conspiracy to defraud.

MS. STEEL: Well, the allegations have to -- under *Iqbal*, Your Honor is commanded, in fact, by the DC Circuit and by all of the case law to look at those allegations with your own judicial experience and common sense. And Your Honor found, and I think believed, that my clients really believed -- and particularly Kathy Meyer. Your Honor asked: Ms. Meyer, should I believe Mr. Rider just because Ms. Meyer believes Mr. Rider?

And if you take that plausible construct, that the lawyers actually believed him, and they had good reason to believe him or they had some reason to believe him -- he was, in fact, a real guy. He in fact worked for Feld, FEI, he in fact worked around elephants, and he in fact took care of them and attended to their needs, so he was in fact a real guy.

This is not the kind of situation where a lawyer goes out on to the street corner and hires a hot dog vendor and says, hey, let me pay you $1,000 because I want to bring a lawsuit based upon an allegation that's fraudulent that you worked

around elephants, when you've never seen an elephant in your entire life, and I'm going to bring three lawsuits against three circuses and three zoos. Then the RICO theory would have some, some plausibility.

But that's not what we have here. We have a real guy who really worked around elephants. And in addition, as Your Honor found, there was a lot of evidence to support his observations with respect to the use of chaining and the use of bullhooks, so a reasonable lawyer --

THE COURT: He also used bullhooks, did he not?

MS. STEEL: But a reasonable lawyer who has a client come in, who takes all of this -- and as Your Honor knows, we are bound, all of us are bound by the ethical constraints of the rules of professional responsibility. Well, the rules of professional responsibility require us as lawyers -- in addition to being honest with the Court, they require us to represent our clients with diligence and with zeal. And if there are circumstances of potential impeachment, we as lawyers have an ethical obligation, a fiduciary duty to our clients to advocate on their behalf. It doesn't necessarily automatically rise to the level of: They went out and they found this hot dog vendor, and they put him on the witness stand and they said he worked for Feld. Then I wouldn't be standing here saying that a RICO claim has absolutely no plausibility under these circumstances. That's point number one with respect to the bringing of the

lawsuit initially.

Point number two with respect to the payments to Rider, as Your Honor knows, we very vigorously dispute what those payments were for, obviously. But even if you take the allegations that FEI makes now, that he was paid to be a plaintiff, there's nothing wrong with that under the D.C. Rules of Professional Responsibility. The D.C. Rules of Professional Responsibility allow a lawyer under certain circumstances to make limited payments to allow the plaintiff to proceed. And in particular I would commend the Court's attention to 1.3, if Your Honor would give me a moment.

THE COURT: Sure, go ahead.

MS. STEEL: 1.8. And a lawyer, my clients -- a lawyer, under comment nine, the rules of professional responsibility contemplate that if you have an indigent plaintiff or if you have a plaintiff who has medical expenses, that under Rule 1.8, and I am referring specifically to comment nine, quote, "A lawyer may pay medical or living expenses of a client to the extent necessary to permit the client to continue the litigation."

I submit, under *Iqbal*, that is plausible. If you believe the allegations of the complaint, that he was paid to be a plaintiff, that's permitted. There is nothing wrong with that, even though obviously we disagree.

THE COURT: Even if that's his sole source of income?

MS. STEEL: Even if that's his sole source of income, yes, indeed.

So as lawyers, the considerations of the rules of professional responsibility are different. And the fact of the matter is that as lawyers, they can, under Rule 11, argue for the expansion of existing law with respect to standing issues, with respect to the Endangered Species Act. That's what lawyers do. We advocate for our clients, and consistent with our ethical obligations under Rule 11, we do try to push judges to make new law or expand existing law. That's what we do.

And equally troubling to me is the allegation that can be made that these lawyers, who Your Honor has had experience with, who are devoted public interest professionals, who are advocates on behalf of their clients, are accused of being engaged in criminal activity.

And I submit to Your Honor that leaving aside the payments to Rider and leaving aside bringing him as a witness at the get-go, the only thing that's left in this lawsuit is your run-of-the-mill average discovery disputes, your garden variety, when did you produce this, what arguments did you make. And with respect to all of these activities - and I'm not saying it is warranted or would be warranted - but Your Honor, as any federal court judge does, you had the option of exploring Rule 11 sanctions and you had the option of 1927 sanctions against the lawyer. That is the appropriate mechanism, not a

wholesale RICO case involving 13 different defendants. The appropriate mechanism for you to evaluate the litigation conduct of my clients is either through Rule 11 or 1927.

Now, the one issue that I did want to raise for Your Honor is the statute of limitations. As Your Honor knows, my clients were not added until February of 2010. That's the law firm of Meyer, Glitzenstein & Crystal, Katherine Meyer, Eric Glitzenstein, Howard Crystal, Jonathan Lovvorn - he gets two lawyers, by the way, Your Honor - and Kim Ockene, and she gets two lawyers.

As Your Honor knows from our main papers, we have established that the statute of limitations starts much earlier, way back to 2002. But leaving all of that aside, with respect to my clients, the pleadings make absolutely crystal clear that the statute of limitations starts to run in July 2005. The first amended complaint concedes that. It says -- and I commend the Court's attention --

THE COURT: I don't have any questions about the statute of limitations, counsel. Thank you very much.

MS. STEEL: Thank you.

THE COURT: I'll give you a couple of minutes, but we're just about out of time. The arguments have been fully briefed. I have no questions about statute of limitations.

MR. SIMPSON: Your Honor, just a few points. Whether what we've alleged is plausible I think is clearly shown by

Your Honor's own opinion. I think it's also clearly shown by what happened in *Milberg Weiss*. This isn't some fantasy. Is it conceivable that it isn't a bribe? It is. It's also very conceivable that it is. That's the standard.

This whole thing about -- we don't allege that Tom Rider was simply hired to be a plaintiff, we allege he was hired to be a plaintiff and a witness. He couldn't be a plaintiff without being a witness. He was bribed as a witness.

THE COURT: What about those alternative sanctions? Why aren't they just as viable as a RICO lawsuit against --

MR. SIMPSON: Well, because this is the Third Circuit rule of the *Malley-Duff* case, that even if you could pursue Rule 11, even if you could pursue 1927, you can still bring a RICO case. They don't preclude the RICO case. That was a direct holding of that court.

This whole reference to D.C. Bar Rule at 1.8 doesn't get them anywhere.

THE COURT: Why not?

MR. SIMPSON: They've already characterized what the money was for. Mr. Glitzenstein wrote letters beginning in August of 2005 saying: Tom, here's your grant for media work in St. Louis. He didn't say: Tom, here's your minimal necessary living expenses under Rule 1.8. They were paying him to do something. They were paying him to perform a service. They sent him a 1099 for non-employee compensation. This wasn't a

gift to some indigent pro bono person who you're trying to avoid being held over the barrel by his employer in a Workers' Comp case.

THE COURT: The discovery revealed that he was sent a 1099 every year?

MR. SIMPSON: Well, they sent him -- they, WAP, sent him 1099's every year. WAP paid him. The law firm sent him a 1099 for 2001, PAWS sent him a 1099 for 2000, and a W-2 --

THE COURT: Wouldn't be there a requirement that a 1099 be issued for minimum living expenses?

MR. SIMPSON: That wouldn't be characterized as non-employee compensation. It was compensation for a service rendered. He admitted that in his deposition. He filed an income tax return in which he submitted a Schedule C in which he declared himself to be a sole proprietor, an animal advocate sole proprietor, reporting some of this money, I think, as income. That's not what that rule contemplates.

Plus, it's hardcore champerty to do this. As we alleged in the complaint, you can't, because you've got some gripe with someone, finance a lawsuit and have somebody bring the lawsuit, which we allege, and put that person where he's got no obligation to pay you back any of the expenses you've advanced. You can't do that. That's a tort. You can't do that. And the D.C. Court of Appeals in the *Golden Commissary* case and *Marshall v. Beckwith* (sic) -- the *Marshall* case makes

it clear those two torts are still viable in this district.

So whether or not this is unethical doesn't matter. It's tortious. I think it's unethical, but for this case, that's immaterial. They've already staked themselves out on what this money was for. It was to perform a service, and it turns out after trial, it's a service as a witness; as Your Honor found the primary purpose of this money, not withstanding the, quote, "media work" he did, was to be a plaintiff in this case.

THE COURT: All right. I'm going to take a five-minute recess. Sorry, but I have two other matters on the calendar for today, and we've devoted almost three hours to this hearing.

The issues have been well briefed. I'm unclear as to whether I need any supplemental authority. If I do, I'll let counsel know. But I'm going to take a five-minute recess now. There's no need to stand.

(Recess taken at 12:48 p.m.)

THE COURT: Counsel, I'm still troubled by this pattern argument that you made. I may issue a minute order and ask for more -- ask for something in writing. I may or may not.

You did file 200 pages of supplemental authority, and again, I'm not going to take time this afternoon to determine how I want to proceed with that. But I'll issue an appropriate order that gives both sides an opportunity, if I think it's necessary, to address the authority that you brought to the

court's attention.

But I'm not going to open the flood gates up to another two or three hundred pages of briefs, I can tell you that. Everything has been briefed significantly. I didn't ask questions of a lot of areas because I don't have any questions, and so I don't need counsel to tell me what they've put in writing, because I can read and understand.

And while I'm on that point, I don't recall reading about the D.C. Bar rules in any pleadings at all. You didn't -- there's no mention of the D.C. Bar rules in any pleading that's been filed, is there?

MS. STEEL: No, Your Honor. And the reason --

THE COURT: Well, no, no, no, I don't want to hear any argument. Thank you. I just wanted to be clear about that. I mean, I'm aware of it, obviously, but it's not been raised at this point, and I don't want to devote any time to listening to arguments that haven't been made in writing. Thank you.

Everyone have a wonderful afternoon. Thank you. I'll take the case under advisement and issue a written opinion. Thank you.

(Proceedings adjourned at 12:55 p.m.)

CERTIFICATE OF OFFICIAL COURT REPORTER

I, Rebecca Stonestreet, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

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SIGNATURE OF COURT REPORTER **DATE**

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