UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS, et al.,	)	
Plaintiffs,	)	**Case No.: 03-2006 (EGS/JMF)**
v.	)	
FELD ENTERTAINMENT, INC.,	)	
Defendant.	)	

DEFENDANT'S MOTION FOR ENTITLEMENT TO ATTORNEYS' FEES

In accordance with the Court's Minute Order of February 10, 2012, Fed. R. Civ. P. 54(d)(2) and LCvR 54.2, defendant Feld Entertainment, Inc. ("FEI") hereby moves the Court for an order determining that FEI is entitled to recover the attorneys' fees that it incurred in defending the above-captioned action pursuant to (1) section 11(g) of the Endangered Species Act, 16 U.S.C. § 1540(g); (2) the Court's inherent authority, *see, e.g.*, *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44 (1991); and (3) 28 U.S.C. § 1927. FEI requests that its entitlement to recovery of attorneys' fees and liability therefor be determined jointly and severally against the following persons and entities in an amount to be determined after further proceedings: Thomas Eugene Rider; Born Free U.S.A. United with Animal Protection Institute; the American Society for the Prevention of Cruelty to Animals; Animal Welfare Institute; the Fund for Animals; the Humane Society of the United States; the law firm of Meyer, Glitzenstein & Crystal; Katherine A. Meyer, Eric R. Glitzenstein, Howard M. Crystal, Jonathan R. Lovvorn, Kimberly D. Ockene, Tanya Sanerib, Stephen A. Saltzburg, and Delcianna J. Winders.

A Memorandum of Points and Authorities and exhibits thereto in support of this motion and proposed order are submitted herewith.

Pursuant to LCvR 7(m), undersigned counsel states that, following the 2011 appellate decision in this case, *see ASPCA v. Feld Ent. Inc.*, 677 F. Supp. 2d 55 (D.D.C. 2009) (Docket Entry 559), *aff'd* 659 F.3d 13 (D.C. Cir. 2011), *pet. for panel reh'g den.* (Jan. 11, 2012), counsel for defendant consulted with counsel for plaintiffs regarding FEI's claim for recovery of attorneys fees. No resolution of that matter was reached, which led to the briefing schedule set forth in the Court's Minute Order of February 10, 2012. Plaintiffs oppose the relief requested by this motion.

WHEREFORE, premises considered, FEI respectfully requests that its motion be granted.

Dated: April 10, 2012

Respectfully submitted,

/s/ John M. Simpson

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MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION FOR ENTITLEMENT TO ATTORNEYS' FEES

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RULES AND STATUTES

GLOSSARY OF TERMS

Term	Explanation
__-__-09 a.m. or p.m. at ___.	A citation to the transcript of the trial in the present case which was conducted in February and March, 2009. Thus, for example, "3-18-09 a.m. at 14:24-15:24" indicates a citation to the March 18, 2009 day of trial, morning session, at page 14, line 24 through page 15, line 24.
API	Born Free USA United with Animal Protection Institute, plaintiff herein.
ASPCA	American Society for the Prevention of Cruelty to Animals, plaintiff herein.
AWI	Animal Welfare Institute, plaintiff herein.
CB-CB	Clyde Beatty – Cole Bros. Circus.
CEC	Ringling Bros. Center for Elephant Conservation.
Chipperfield Elephants	Three elephants owned by Richard Chipperfield (Lechame, Meena, and Kamala), with whom Rider worked when they toured with FEI's Blue Unit and subsequently with Daniel Raffo's European circus.
COL	A Conclusion of Law set forth in the Court's December 30, 2009 Memorandum Opinion (DE 559), reported at *ASPCA v. Feld Ent. Inc.*, 677 F. Supp. 2d 55 (D.D.C. 2009), *aff'd* 659 F.3d 12 (D.C. Cir. 2011).
Crystal	Howard M. Crystal, counsel of record for plaintiffs in the instant case.
DE	A docket entry in the instant case, when it was pending under Civil Action No. 03-2006-EGS (D.D.C.), from and after September 26, 2003.
No. 00-1641 DE	A docket entry in the instant case when it was pending under Civil Action No. 00-1641-EGS (D.D.C.), from July 11, 2000 to September 26, 2003.
DX	A trial exhibit of the defendant, admitted into evidence, in the instant case.
ESA	Endangered Species Act, 16 U.S.C. § 1531 *et seq*.
ESA Action	The litigation styled, *American Society for the Prevention of Cruelty to Animals, et al. v. Feld Entertainment, Inc.*, Civil Action Nos. 00-1641-EGS & 03-2006-EGS (D.D.C.).
Ex.	An exhibit attached to the instant Memorandum in Support of Defendant's Motion for Entitlement to Attorneys' Fees and Costs.
FEI	Feld Entertainment, Inc., defendant herein.

Term	**Explanation**
FFA	The Fund for Animals, Inc., plaintiff herein.
FOF	A Finding of Fact set forth in the Court's December 30, 2009 Memorandum Opinion (DE 559), reported at *ASPCA v. Feld Ent. Inc.*, 677 F. Supp. 2d 55 (D.D.C. 2009), *aff'd* 659 F.3d 12 (D.C. Cir. 2011).
Glitzenstein	Eric R. Glitzenstein, counsel of record for plaintiffs in the instant case.
HSUS	The Humane Society of the United States.
Lovvorn	Jonathan R. Lovvorn, counsel of record for plaintiffs in the instant case.
Meyer	Katherine A. Meyer, counsel of record for plaintiffs in the instant case.
MGC	Meyer, Glitzenstein & Crystal, counsel of record for plaintiffs in the instant case.
Ockene	Kimberly D. Ockene, counsel of record for plaintiffs in the instant case.
Paquette	Nicole Paquette, General Counsel of API, during a certain portion of the time period during which the instant case has been pending.
PAWS	Performing Animal Welfare Society, an original plaintiff in the instant case under Civil Action No. 00-1641-EGS (D.D.C.).
PWC	A will call trial exhibit of plaintiffs, admitted into evidence, in the instant case.
Raffo	Daniel Raffo, a former FEI elephant handler, for whose European circus act Rider left employment with Feld Entertainment.
Rider	Thomas Eugene Rider, plaintiff herein.
Silverman	Tracy Silverman, General Counsel of AWI, during a certain portion of the time period during which the instant case has been pending.
WAP	Wildlife Advocacy Project, an organization operated by Meyer and Glitzenstein.
Weisberg	Lisa Weisberg, Senior Vice President of Government Affairs and Public Policy of ASPCA, during a certain portion of the time period during which the instant case has been pending.

EXHIBIT LIST

Ex. Number	**Description**
1	3-23-10 hearing transcript excerpts.
2	6-23-11 hearing transcript excerpts.
3	List of MGC cases listed on MGC website.
4	Symposium: Confronting Barriers to the Courtroom for Animal Advocates, 13 Animal L. 1 (2006).
5	Printouts of API and WAP websites.
6	Chart: Findings of Fact and Conclusions of Law Demonstrating FEI's Entitlement to Attorneys' Fees.
7	No. 01-8166, Reply Brief of Pls.-Appellants, D.C. Cir. 2002.
8	Nos. 10-7007 & 10-7021, Brief of Appellants, D.C. Cir. 2011.
9	No. 00-1641, 9-23-03 hearing transcript excerpts.
10	Chart: Pre-Trial Rider Evidence Relied Upon in the Court's 12-30-09 Opinion
11	3-25-00 Rider *ex parte* sworn PAWS statement excerpts. (PWC 184)
12	10-12-06 Rider deposition excerpts.
13	12-18&19-07 Rider deposition excerpts.
14	9-16-05 hearing transcript excerpts.
15	*PETA v. Babbitt*, No. 93-1836, Mem. Op. (2-25-05) (D.D.C.).
16	6-11-08 hearing transcript excerpts.
17	5-22-08 hearing transcript excerpts.
18	Chart: Financial Information Appearing on Internal Revenue Service Form 990, "Return of Organization Exempt from Income Tax" (2010).
19	Carbondale lecture (9-02) (TR 00203) (produced by plaintiffs on 3-2-07).
20	*Waterkeeper Alliance, Inc. v. Hudson Farm et al.*, No. WMN-10-487, Letter Decision (3-1-12) (D. Md.).

After a decade of needless and expensive litigation, FEI is now the prevailing party and seeks to recover its attorneys' fees. Plaintiffs dispute FEI's entitlement, but the grounds have already been found in the Court's December 30, 2009 opinion, which was affirmed in its entirety. *ASPCA v. Feld Ent. Inc.*, 677 F. Supp. 2d 55 (D.D.C. 2009) (DE 559), *aff'd* 659 F.3d 13 (D.C. Cir. 2011) (*ASPCA II*), *pet. for panel reh'g den.* (1-11-12).

Far from a garden-variety protracted lawsuit, this case presented the uniquely troubling situation in which a defendant had to overcome a fraud on the court to win the case on the same grounds – *twice*. Remarkably, Tom Rider testified at trial and was found to be a plaintiff for hire who was completely untruthful. FOF 1.[1] Rider's purchased lies fraudulently opened the courthouse door by creating federal jurisdiction where none existed, and are the sole reason that this case has been ongoing since July 2000. FOF 53.

This case should have ended with this Court's 2001 dismissal of all plaintiffs, No. 00-1641, DE 20, but purposeful deception kept it alive. The D.C. Circuit's 2003 decision held that Rider's standing allegations – the "strongest case for standing" – sufficed, based upon:

> his desire to visit the elephants (which we must assume might include attending a performance of the circus), his experience with the elephants, his alleged ability to recognize the effects of mistreatment, and what an injunction would accomplish … .

ASPCA v. Ringling Bros., 317 F.3d 334, 335 & 338 (D.C. Cir. 2003). However, ***each*** of these allegations, which the D.C. Circuit relied on and assumed true, was patently false, misleading, and never capable of evidentiary support. Counsel and plaintiffs knew this because, at the time, they were paying Rider to do and say things that later proved these assertions were not truthful. Rider never had an "attachment" to ***FEI's*** elephants. FOF 1, 63; COL 3, 18.1; *cf. ASPCA*, 317 F.3d at 337 ("Rider says he became attached to the elephants when he worked with them"). Nor

[1] A glossary of acronyms and defined terms used herein appears after the Table of Authorities, *supra*.

was he "refraining from" "visiting" FEI's elephants. FOF 61; COL 6, 11, 18.4; *cf. ASPCA*, 317 F.3d at 335 ("Rider would [] like to visit the elephants, but is unwilling to do so because he would suffer 'aesthetic and emotional injury'"). Plaintiffs and counsel knew this was not true because ***they were paying Rider to see the elephants***, well before the 2001 dismissal. PWC 132P (6-1-01 Rider-made elephant video). When the D.C. Circuit decided the 2003 appeal, Rider already had pocketed more than $36,000. FOF 48; DX 48A (undisputed payment chart). Rider's prior "experience with the elephants" included his own use of the bullhook on them. FOF 16-18; COL 4, 18.2. At trial, plaintiffs had no evidence that Rider's "powers of perception" would allow him to "recognize the effects of mistreatment." COL 15, 18.4. Nor was there any evidence that an injunction would effect "some kind of change" in elephant behavior. COL 14-15, 18.4. And, in any event, plaintiffs abandoned their request for injunctive relief ***in final argument***. COL 13; *cf. ASPCA*, 317 F.3d at 338 ("If Rider wins the case, we must assume – because the case is at the pleading stage – that his injury will be resolved.").

The truth about Rider was deliberately misrepresented to, and concealed from, the D.C. Circuit. But for that fraud, the 2001 dismissal would have stood, and this case would have ended in 2003 – just as it did more than six years and millions of dollars later when the truth about Rider ***was*** revealed on the witness stand. (FEI's attorney fee hemorrhage and the squandering of judicial resources[2] also would have stopped.) But, the Rider misrepresentations revived the case, and FEI was forced through burdensome pre-trial proceedings, trial and a second appeal.

Plaintiffs did not just lose the case. Ex. 1, 3-23-10 Hr'g Tr. at 15:1 ("***[W]e lost. We recognize that.***") (Glitzenstein; erroneously attributed to Crystal) (emphasis added). Rider "wasn't just impeached." Ex. 2, 6-23-11 Hr'g Tr. at 101:25-102:1. He was "pulverized," DE

[2] "Significant judicial resources were expended, particularly during the more than five years of discovery in this matter, in order to advance this litigation to trial." DE 559 at 5 n.5.

559 at 19-20 n.12, prompting this Court's observation that it probably had never "seen a witness as totally discredited on just about every aspect of his testimony … ." Ex. 2 at 101:15-19. Rejecting Rider's trial testimony in its entirety, the Court found that it lacked credibility or was unpersuasive ***eighteen*** separate times. DE 559 at 19-23, 33, 37-41, 44, 49.

Rider was "pulverized" because he lied to instigate claims that were made up (and purchased). His standing allegations mixed factual absurdities and fictions to mirror the Supreme Court's decision in *Friends of the Earth v. Laidlaw*, 528 U.S. 167 (2000). Even in the unlikely event that Rider was not a paid puppet, but a master manipulator bent on fooling his co-plaintiffs and counsel, evidence available to them ***before*** the complaint was filed showed that Rider's claims were a charade. If plaintiffs and their counsel did not know Rider was a fraud in 2000, they should have. However, Rider's credibility evidently was immaterial to them because Fed. R. Civ. P. 12(b)(6) required the courts to accept his allegations as true. Rider's false and misleading allegations got these sophisticated litigants and experienced counsel[3] what they needed: access to federal court. Hiring Rider side-stepped Article III of the Constitution (which plaintiffs' counsel see as "largely a sham"[4]) and hijacked the ESA citizen-suit provision as a vehicle to advance plaintiffs' ulterior purposes, not to preserve an endangered species. FOF 52 ("these payments were primarily intended to – and indeed did – keep Mr. Rider involved with the litigation and advance plaintiffs' purposes for this litigation"). Whether the "purposes" were ending animals in entertainment; publicity for "animal rights"; fundraising (*see, e.g.*, Ex. 5 (API

[3] *See, e.g.*, Ex. 3, MGC Docket (listing MGC cases, many brought by the organizational plaintiffs in this case).

[4] In a 2006 NYU symposium entitled "Confronting Barriers to the Courtroom for Animal Advocates," attorneys Meyer, Glitzenstein and Lovvorn appeared as "leading scholars and practitioners" in "the field of animal law." Ex. 4, 13 Animal L. 1 (2006). Of Article III standing, Mr. Lovvorn stated: "***I agree that the Article III standing test is largely a sham in most cases, but it also shows that there is a method by which you can play and win this particular game. And cases like Laidlaw certainly help in that regard***." *Id*. at 77 (emphasis added).

& WAP websites)); bleeding FEI dry through costly litigation; or all of the above, they certainly were not to redress Rider's purported "injury."

Now, after more than eleven years of protracted litigation; well over 500 trial court docket entries; a six-week bench trial with approximately 30 witnesses and hundreds of exhibits; hundreds of pages of post-trial submissions; two appeals to the D.C. Circuit; and more than $20 million in FEI legal fees, the parties have returned to square one: this Court's initial 2001 determination that no plaintiff has a right to even be in court. FOF 1; COL 18-20 (Rider); COL 21, 32 (API). FEI therefore should be awarded its attorneys' fees, jointly and severally[5] against all plaintiffs[6] and all counsel of record, pursuant to: (1) section 11 of the ESA; (2) the Court's inherent authority; and (3) 28 U.S.C. § 1927. The Court should declare FEI's entitlement, and then set the matter for determination of amount.

FEI's motion is not an opportunity for plaintiffs to re-litigate the ESA Action. *See Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983) ("A request for attorney's fees should not result in a second major litigation."). Nor can plaintiffs avoid responsibility through denial. What plaintiffs and their counsel dismissed in 2006-07 as merely groundless allegations by FEI have since been proven and found by the Court to have occurred. The 136 findings and conclusions in this Court's December 30, 2009 decision, DE 559, establish all three bases of liability here.[7]

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[5] Whether crafting Rider's false standing allegations and paying him to make them were the handiwork of plaintiffs, counsel, or both, they are all jointly and severally liable for FEI's fees. *See Turner v. D.C. Bd. of Elections & Ethics*, 354 F.3d 890, 898 (D.C. Cir. 2004) (joint and several liability for attorneys' fees where claims are "centered on a set of common issues").

[6] FEI refers to FFA and HSUS herein as "FFA/HSUS" as did the Court. DE 559 at 30 n.15. HSUS disputes FEI's contention that these entities merged, effective January 1, 2005, but that is irrelevant here. In the relevant document, HSUS expressly agreed to an assumption of liability covering any claim by FEI against FFA for attorneys' fees in this case, DX 68 (§ 1.3), thereby rendering HSUS responsible for any award entered against FFA.

[7] Ex. 6 hereto is a summary of the voluminous FOFs and COLs that support each of FEI's claims. *See* Fed. R. Evid. 1006.

I. FACTUAL BACKGROUND

A. Rider's *Laidlaw*-Driven Standing Allegations Were Concocted

"This lawsuit could not have been maintained without Mr. Rider's participation as a plaintiff … ." COL 5. To sue, plaintiffs and their counsel knew they needed someone alleging an aesthetic injury. Ex. 4 at 66 (Meyer) ("[Standing] is a complete barrier to the courtroom. If you do not have standing, you do not get through the door."). They got through the door here by manipulation. Rider was just another expendable "John Doe" willing to claim an alleged "aesthetic injury." *Id*. at 106 (Glitzenstein) ("***[I]t does not matter really who the plaintiff is, as long as you can bring a lawsuit and effectively accomplish the result you want.*** … And if John Doe is the one who is bringing the case, who cares?") (emphasis added).

If any organizational plaintiff really believed it had "informational" or "economic" injury standing, it would have sued in 1999, shortly after the original notice letters were sent. PWC 91.[8] By then, the principal cases ultimately cited to support the organizational standing arguments (*Public Citizen*; *Akins*; *Havens Realty*; *Spann*) were all decided. COL 24-27. The purported "informational" or "economic" injury facts did not change between December 21, 1998 (the date of the first notice letter) and July 11, 2000 (the date suit began).[9] The organizational standing theories (brought later through API), failed at trial in 2009 and on appeal in 2011 because API failed to present ***any*** evidence of its purported "informational" and "economic" injuries – proof that was entirely within API's knowledge and control. COL 28, 31. API had no proof because it had no injury, hence the organizations' need for Rider's purported "aesthetic injury" to anchor the case.

[8] Indeed, API has opposed FEI's elephant treatment since 1998, DE 60; *ASPCA II*, 659 F.3d at 18, and knew of the lawsuit's initial filing in 2000, but did not attempt to join the suit until late 2005, after it had started an elephant/circus fundraising campaign. 2-19-09 a.m. at 65:23-67:01, 74:06-75:22.

[9] PAWS, a party to the first notice letter, alleged "informational" and "economic" injuries in 2000 identical to what the other organizations claimed. No. 00-1641, DE 1 ¶¶ 6, 11, 16, 21; No. 03-2006, DE 1 ¶¶ 6, 11, 16; DE 180 ¶ 6.

What changed between the first notice letter and the filing of the first complaint was *Laidlaw*, the appearance of Rider (recruited through the "animal rights" network, *see* FOF 23-28), and the exchange of money and other things of value for his participation and testimony in this case. As Ms. Meyer publicly stated in 2006:

> In the Ringling Bros. case, ***our main argument was that Tom Rider had been a barn man for the elephants*** and had seen the mistreatment of the Asian elephants. … ***The trick for Rider was, how do you show a continuing injury or a future injury,*** when the circus is going to argue that the plaintiff only has past injuries, and therefore, those injuries are not cognizable for Article III purposes?
>
> ***When [Laidlaw] was issued, we saw an opening for Rider to have standing***. … ***These are the kind of hoops through which we must jump; this is what you have to do to come up with these standing theories.***
>
> ***So we used [Laidlaw]*** … and ***came up with the novel argument*** that Rider was suffering Article III injury ***because he had to avoid going back to see his "girls,"*** as he calls them, whom he loved so much. We lost on this theory on a motion to dismiss in the district court, on the grounds that Rider would never suffer that kind of injury again, because he is not allowed to come back and see the elephants. ***We said, "Well, all he has to do is buy a ticket to the circus,"*** and we prevailed on appeal.

Ex. 4 at 74-75 (emphasis added).

Deliberately tracking *Laidlaw*, the complaint alleged that Rider (1) "stopped working in the circus community because he could no longer tolerate the way the elephants were treated by defendants" and (2) "would very much like to visit the elephants in defendants' [sic] possession" but was "unable to do so without suffering more aesthetic and emotional injury." No. 00-1641, DE 1 ¶¶ 33-34. As Ms. Meyer's comments indicate, the *Laidlaw*-driven imminence of Rider's "injury" was the key issue. *See* No. 00-1641, DE 20 at 6; DE 22 at 8-11; DE 25 at 1-2. Plaintiffs aggressively argued on appeal in 2002 that Rider's present and continuing "injury" was his "refraining from" seeing his "girls." *See, e.g.*, Ex. 7, No. 01-8166, Rep. of Pls.-Appellants at 13 ("Mr. Rider alleges an aesthetic injury akin to the one that survived a motion for summary judgment in *Laidlaw* – *i.e.*, the present, ongoing injury of having to *refrain* from visiting or

observing the elephants with whom he has formed a personal attachment in order to avoid additional aesthetic injury.").[10] Accepting as true Rider's crucial "refraining from" allegations – which counsel and plaintiffs knew were false – the D.C. Circuit reversed and revived the case "solely" based on Rider's standing. *ASPCA*, 317 F.3d at 337-38; FOF 53. (As this Court observed, the D.C. Circuit noted the pleading standard five times in its five-page opinion. DE 559 at 16.) The organizational plaintiffs stayed in the case, not because they had standing in their own right, but because they were allowed to ride Rider's coattails. 317 F.3d at 338. This outcome foreshadowed the fatal flaw in plaintiffs' "novel" theory: at trial, plaintiffs would have to actually prove what they had Rider allege – an impossibility since it was not true.

B. Plaintiffs and Counsel Continued to Make Critical Misrepresentations Regarding Rider's Standing Allegations

It became apparent through discovery and was established at trial that Rider's assertions were never true. FOF 60 ("Mr. Rider's allegations of aesthetic and emotional injury … ***are not credible***. Mr. Rider's allegations, which both this Court and the Court of Appeals were required to accept as true … for purposes of ruling on this issue of standing in 2001 and 2003, ***were not truthful***.") (emphases added). Counsel made critical misrepresentations to the courts which were neither semantic nor immaterial; they lay at the very heart of Rider's claims of "imminent" injury. Rider had no attachment to FEI's elephants, COL 3, nor was he injured by "refraining from" seeing them. FOF 61; COL 6, 11, 18.4.

Plaintiffs' pleadings and other filings told the courts that Rider formed a '"strong, personal attachment"' to the elephants and that he '"would like to work with the elephants again and would attempt to do so if the elephants were relocated.'" DE 559 at 18-19 (quoting 317 F.3d

[10] That story changed in the 2011 appeal. Ex. 8, Nos. 10-7007 & 10-7021, Br. of Appellants at 41 (after FEI, "Rider visited the elephants between '10 or 15 times per year,'" and "has traveled across the country, year after year, following Defendant's Asian elephants."). Trial showed it all to be lies: Neither "refraining from" nor actually "visiting" the elephants "injured" Rider. FOF 1-20, 60-85; COL 6, 11, 18.4.

at 335 & 337). This was not true. COL 18.1 ("Mr. Rider does not recognize the seven elephants …"; "he struggles to remember the elephants' names"; "he referred to … Karen derogatorily as a 'bitch'"; and "with the exception of one visit, he has made no effort to visit the elephants who are no longer with the circus, despite having the opportunity and means to visit them"); COL 18.3 ("Mr. Rider has made little or no effort to even *visit* the three elephants … who have been relocated to non-circus environments, and he has not sought employment with either the zoo where Sophie has been located since 2003 or with the PAWS sanctuary where Rebecca has been located since 2002.").

Further, the artfully-crafted allegation that Rider stopped working in the "circus community" because of "defendant['s]" treatment of its elephants was intended to, and did, deceive the courts into believing that Rider left the "circus community" when he left FEI. *See* No. 00-1641, DE 20 at 3 ("Rider alleges that he ceased working for defendant because he could no longer tolerate working in such an environment."); *ASPCA*, 317 F.3d at 335 ("Rider left his job at Ringling Bros. because of the mistreatment of the elephants."). Plaintiffs and their counsel knew this was not true. They deliberately omitted Rider's complete "circus community" work history – *i.e.*, that he moved from circus (CB-CB), to circus (FEI), to circus (Raffo), all of which used the bullhook and chains – because it totally undermined the claim that Rider suffered an aesthetic injury when working for FEI. FOF 3, 15-17; COL 4, 18.2. Indeed, when the truth was revealed, it was damning. FOF 3 ("The Court finds it unlikely that a person who claims he quit one job (CB-CB) due to elephant abuse would continue to work – for two and a half years – for a subsequent employer (FEI)" allegedly engaged in the same practice); *see also* FOF 20 (Rider quit these jobs for personal reasons, such as higher wages, *etc.*).

The misleading "circus community" allegation was neither coincidental nor an innocent factual mistake: Rider gave a sworn video statement to PAWS nearly four months ***before*** the complaint was filed admitting that FEI was the second of three circuses for which he worked. PWC 184 at 5, 108. Indeed, the difference between Rider's allegations ("stopped working in the ***circus community***") and former FEI employee Glen Ewell's ("stopped working for ***Ringling Bros.***") is telling. *Compare* No. 00-1641, DE 1 ¶ 33 (Rider) *with* ¶ 39 (Ewell).

Further, while the complaint alleged that, like in *Laidlaw*, Rider was "refraining from" seeing "his girls" to "avoid" subjecting himself to further injury, those allegations were false. COL 6; *see also* FOF 61; COL 11, 18.4. Rider was not like the *Laidlaw* plaintiffs after all. He was observing "his girls" on a payment plan ***directly involving ASPCA, AWI, FFA/HSUS and their counsel who signed the briefs in this Court and the D.C. Circuit.*** COL 6 ("Shortly after he began taking money from the organizational plaintiffs and/or their counsel (and his), Mr. Rider began following FEI's circus units and observing the elephants, including the elephants on the Blue Unit. Therefore, ***contrary to his representations to the Court***, Mr. Rider was not refraining from seeing his 'girls.'") (emphasis added).

In September 2003, ***after*** the appellate remand, the Court directed plaintiffs to file an "identical" complaint in a new civil action to address the 60-day notice letter issue. Ex. 9, 9-23-03 Hr'g Tr. at 9:22-25 (The Court: "You're going to file an amended complaint that extensively addresses this notice issue, ***and your complaint is identical to the complaint that's pending before the Court***.") (emphasis added). Contrary to this instruction, however, the complaint in No. 03-2006 included an entirely new paragraph:

> ***Mr. Rider [] still makes efforts to see the animals, and he has been able to observe the elephants he knows,*** as well as other Ringling elephants, on several occasions during the last couple of years by going to the cities where the circus is performing.

DE 1 ¶ 23; *cf.* No. 00-1641, DE 1 ¶ 34. Counsel did not advise the Court or FEI that they altered the new complaint in No. 03-2006 in any way, let alone that one of the ***central*** issues on the motion to dismiss – Rider's alleged "refraining from" injury – had inexplicably morphed.[11] This alteration, nine months after the appellate victory, anticipated the inevitable: sooner or later FEI would discover that Rider never had a *Laidlaw* "refraining from" injury. However, plaintiffs had achieved their goal of surviving dismissal. On remand, Rider's standing allegations (the litigation anchor point) involved disputed factual claims that were entirely dependent on Rider's credibility and were intertwined with the merits of his ESA "taking" claim. FEI was now hostage to a case that was escapable only through trial.

C. Evidence Available to Plaintiffs and Counsel Showed that Rider Had No Credibility

The "pulverization" of Rider's credibility at trial did not result from "smoking guns" revealed for the first time on cross-examination. It rested in major part on information available to plaintiffs and their counsel ***before the complaint was filed*** in July 2000. The rest of it, generated by Rider or the other plaintiffs themselves, was known to them ***years*** before trial. Contrary to the pleadings, it was evident that, *inter alia*, Rider was not opposed to the use of the bullhook and chains, he was not "attached" to the FEI Blue Unit elephants, he had no desire to visit the FEI elephants, and that he was a paid plaintiff. The Court found Rider thoroughly discredited. The discussion below merely highlights some of Rider's myriad lies and inconsistent statements and actions which plaintiffs and counsel were aware of before fact discovery closed in January 2008.[12]

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[11] Indeed, nearly one month later, plaintiffs represented that they "believe[d] that the claims in the two cases [were] identical" and that "this Court also seems to have been operating under the same assumption … ." No. 00-1641, DE 54 at 5.

[12] Ex. 10 hereto summarizes the Rider evidence as known to plaintiffs and counsel before trial, the time when it became known to them, and the Court's subsequent findings. *See* Fed. R. Evid. 1006.

Four months before the original complaint was filed, Rider gave PAWS a sworn *ex parte* statement which revealed some of the very same inconsistencies that undid him at trial (excerpts attached hereto as Ex. 11). Rider admitted that (1) FEI was the second of his three circus jobs where the bullhook and chains were used (Ex. 10, No. 2); (2) he knew of bullhook use at FEI "from the get-go" but continued to work there for two and a half years (*id*., No. 3); (3) he identified Raffo three times as an alleged elephant abuser, yet stated that he went to work with a European circus act where Raffo also was working (*id*., No. 4); and, (4) his "three girls" were the Chipperfield elephants, not the Blue Unit elephants (*id*., No. 5). Moreover, stunning photographic evidence pre-dating the complaint demonstrated that Rider himself was a bullhook user, even though his notice letter (PWC 91) condemned use of that instrument (*id*., No. 1).

Additional evidence surfaced in discovery which further undermined Rider's story at trial. Ironically, plaintiffs and counsel paid Rider to do some of it. Rider gave a videotaped September 2002 lecture in Carbondale, Illinois, and stated, *inter alia*, that (1) the real reason he continued to work for FEI was his attachment to the Chipperfield elephants (*id*., No. 5); and (2) he knew that FEI had donated former Blue Unit elephant Rebecca to a sanctuary (*id*., No. 6).[13] Ex. 19; DE 445 at 2 (Carbondale lecture marked as impeachment evidence). Plaintiffs and counsel cannot feign ignorance of Rider's Carbondale remarks. Not only did they pay him at the time he gave the lecture, ***they produced the video of Rider's lecture to FEI in discovery*** (TR 00203), and Rider described it in his 2004 interrogatory responses. DX 16 at 11.

Also in Rider's 2004 interrogatory responses, he admitted that he had observed FEI's elephants on numerous occasions. Ex. 10, No. 7. His responses also made it clear that while at

[13] This was a key admission because the complaint alleged that if Rider's "girls" were "relocated to a sanctuary or other place where they were no longer mistreated [he] would visit them as often as possible and would seek a position that would allow him to work with [them] again." DE 1 ¶ 34. Rider testified at trial that he was not precluded from visiting PAWS, but, he had not visited Rebecca in the more than 6 years since Carbondale. FOF 67.

FEI he did not complain about alleged elephant abuse, even though he had many opportunities to do so. *Id*., No. 9. Moreover, they included his false response about the payments to him. *Id*., No. 10. Ms. Meyer signed the objections to those responses (FOF 56), making her acutely aware of these holes in Rider's credibility more than ***four years*** before trial.

In 2006, further warnings to plaintiffs and their counsel materialized about Rider's dishonesty. Rider made an August 2006 videotape (produced by plaintiffs in discovery) in which he called his "girl" Karen a "bitch." Ex. 10, No. 11. Then, in an October 2006 deposition noticed by his own co-plaintiffs and counsel, (excerpts attached hereto as Ex. 12), Rider admitted that (1) FEI reprimanded him for insubordination, even though he falsely told the Nebraska legislature that it was for animal abuse complaints (*Id*., No. 12); (2) at FEI, he could have, but failed to complain about alleged elephant abuse to veterinarians and management (*id*., No. 9); (3) he had no real job, his sole livelihood being the money funneled to him from his co-plaintiffs and counsel through WAP (*id.*, No. 15); and, (4) he had filed no tax returns since 1999 (*id.*, No. 16).

When deposed by FEI in 2007 (excerpts attached hereto as Ex. 13), Rider confirmed that his "desire" to "visit" the FEI elephants in a "sanctuary-like," or indeed any other, environment, DE 1 ¶ 34, was not genuine. Rider ***again*** admitted actual awareness that Rebecca and Minnie were at PAWS, but he had not bothered to visit either elephant. Ex. 10, No. 6. Rider also admitted that he had visited former Blue Unit elephant Sophie at the Niabi Zoo ***one time*** – for ***one hour*** (*id*., No. 19), a visit which the Court subsequently found to be merely "litigation posturing." FOF 62. Rider testified that although he had prior notice of the Court-ordered Blue Unit and CEC inspections, he nevertheless failed to attend and see the elephants. Ex. 10, No. 20. Rider further admitted doing nothing to locate the Chipperfield elephants, the ones, he stated for the ***third*** time, that he was "really attached to." *Id*., No. 5.

During the 2007 deposition, Rider testified that his "attachment" to the Red Unit elephants was as strong as his "attachment" to his Blue Unit "girls," even though he never worked with the Red Unit elephants. *Id*., No. 18. And, like his 2004 interrogatory answer which omitted elephant Meena and his 2006 deposition where he forgot elephant Zina, Rider struggled in the 2007 deposition to remember the Blue Unit elephants' names. *Id*., No. 8;[14] *cf*. DE 1 ¶ 18.

D. Rider was Purchased as a Plaintiff and Witness *Before* the Original Complaint was Filed

The substantial pre-filing evidence and discovery information detailed above all underscored the patent falsity of Rider's standing allegations. No reasonable co-plaintiff or counsel would have brought Rider's claims, let alone paid him to make them, and then litigate them all the way through trial and beyond.

"From the time he returned to the United States on March 20, 2000 through December 31, 2008, Mr. Rider [was] paid at least $190,000.00 by PAWS, ASPCA, AWI, FFA/HSUS and API (directly or through MGC or WAP) and by WAP itself." FOF 48. Rider was paid because he was "the only plaintiff who allege[d] a personal and emotional attachment to the elephants and an aesthetic injury based on the alleged mistreatment he claim[ed] to have witnesse[d] while working for FEI." *Id*. The "primary purpose of the funding … was to secure Mr. Rider's ***initial and continuing*** participation as a plaintiff in this litigation." FOF 53 (emphasis added). "[T]he financial support in this case began before the advocacy efforts and suggests that absent the financial incentive, Mr. Rider may not have begun or continued his advocacy efforts or his participation as a plaintiff in this case." *Id.*; *see also* FOF 28 ("After meeting with Pat Derby of PAWS, and after accepting money and other things of value from PAWS, Mr. Rider agreed to be

[14] The 2007 deposition undermined Rider's credibility further with: (1) his inconsistent reasons for leaving CB-CB for FEI (Ex. 10, No. 22); (2) his admission that the payments from co-plaintiffs and counsel would stop when the litigation stopped (*id.*, No. 23); and, (3) his admission of seeing no mistreatment of any of the seven Blue Unit elephants since December 1, 1999 (*id.*, No. 21).

a plaintiff in this case."). From March 2000 through at least his 2009 trial testimony, Rider's job as a paid plaintiff and witness was his only source of income and support. FOF 21.

Plaintiffs and counsel attempted to cover-up the payments by calling them "grants;" filtering them through counsel's law firm (MGC) and a "501(c)(3)" organization (WAP) run by counsel; and, failing to disclose them in discovery, for years, "both by ***omissions and affirmatively false statements***." FOF 59 (emphasis added). The Court found that Rider flatly lied – under oath – in an interrogatory answer about payments from animal advocates and advocacy organizations, and that Ms. Meyer had direct knowledge of the responsive payment information and signed the objections to that false response. FOF 55-56; *see also* FOF 56 ("[T]he Court finds ***no excuse*** for this false response.") (emphasis added). ASPCA, FFA/HSUS, and AWI likewise were "less than forthcoming" about the Rider payments by failing to disclose them in written and oral discovery. FOF 57.

Indeed, more than two years before judicially compelled disclosure, Ms. Meyer disingenuously represented to the Court: "[W]e have Tom Rider, a plaintiff in this case, ***he's going around the country in his own van***, he gets ***grant money*** from ***some of the clients*** and some other organizations to speak out and say what really happened when he worked there." Ex. 14, 9-16-05 Hr'g Tr. at 29:03-11 & 29:25-30:05 (emphases added). What Ms. Meyer failed to say was that: "grant money" meant a steady stream of payments and Rider's only livelihood ***for years –*** even before suit began (FOF 48, 53); the "grant money" came from not just "some" of her clients – but from ***all*** of the organizational plaintiffs, MGC and WAP (FOF 48); the "grant money" never reimbursed Rider for expenses actually incurred (FOF 44); the "grant money" was filtered through MGC and WAP (FOF 35, 37-47, 52); Ms. Meyer, via WAP, sent Rider the funds to purchase his "own van" (FOF 43; DX 37); Rider used the van to visit the elephants in FEI's

circus (which he originally claimed he had to "refrain" from) but did not use the van to visit Rebecca or Minnie (which he claimed he would readily do once they were out of the circus) (FOF 67; COL 6); and Rider's efforts to "speak out" were intermittent at best (FOF 48-50). Ms. Meyer's statement also came after FEI specifically had asked for information about the Rider payments in discovery, and had received false and misleading responses. Only with ***a court order*** years later did the fraud and its concealment come out. FOF 57 ("The true nature and extent of the payments the organizational plaintiff had made to Mr. Rider directly or through MGC or WAP was not fully disclosed until after the Court's order of August 23, 2007, granting FEI's motion to compel the disclosure of such information.").

E. The Parties, Claims and Requests for Relief Were Moving Targets Through Trial

Plaintiffs abruptly came and went. Former FEI employee Glen Ewell, a party to the December 1998 60-day notice letter to FEI, disappeared just three weeks after the original complaint was filed. *Compare* No. 00-1641, DE 1 *with* DE 7; PWC 91. API, the sole organizational plaintiff to make it through trial, did not appear until late 2005, almost two years after discovery started, even though API had opposed FEI's elephant treatment since 1998. DE 55; *ASPCA II*, 659 F.3d at 18. FEI expended resources taking discovery (necessitating a motion to compel and court order) from original plaintiffs ASPCA, AWI, and FFA/HSUS, ***since 2004***, only to learn ***at trial, in 2009***, that those organizations no longer advanced standing arguments or sought any relief. DE 559 at 17-18 n.10; *see also* 3-18-09 p.m. at 3:14-4:03. These plaintiffs actually filed a meritless motion to exclude ***themselves*** as trial witnesses, which was a transparent attempt to avoid testifying about their Rider payments. *See* DE 349.

In a March 2007 ploy (demonstrating their awareness that the organizational standing allegations were inadequate, and that Rider's purchased testimony was vulnerable to fatal

impeachment), counsel sent FEI 60-day notice letters on behalf of three former FEI "Red Unit" employees (Archele Hundley, Robert and Margaret Tom). Tellingly, these parties waited months after these claims became ripe before seeking to join the case, and did so just days after the Court significantly narrowed the case through summary judgment. DE 181. Magically, all three proposed plaintiffs, none of whom had worked with elephants, pleaded the same sort of elephant "attachments" and "aesthetic injuries" as Rider. DE 181-1 ¶¶ 3-5, 9-11, 15-17. When the Court refused to add these parties, their threatened lawsuit evaporated. *Cf.* DE 181 at 1 (movants "could file their own related lawsuit against defendant"). If Hundley and the Toms truly were "attached" to the elephants and "aesthetically injured" by their treatment, they would have sued FEI on day 61. But they never did; they were merely pawns, like Rider himself.

Plaintiffs' claims for relief likewise shifted.[15] ***In final argument***, plaintiffs radically changed the remedial theory pleaded by abandoning their request for immediate injunctive relief. DE 559 at 8 n.6; *cf.* DE 341 at 38-39 (pre-trial, six of nine requests for relief were injunctive). (Plaintiffs did, however, keep alive their request for attorneys' fees. 3-18-09 a.m. at 15:21-22 (Meyer)). Other than admitting that an injunction was not "realistic," *id.* at 15:3, plaintiffs could not intelligibly articulate what relief they ***were*** seeking: "sort of a cross between declaratory judgment and an injunction." DE 559 at 8 n.6. Counsel backed away from her own witnesses' testimony that *any* use of the bullhook was a "take," arguing only that using a bullhook to get an elephant to do a "circus trick" was unlawful. 3-18-09 a.m. at 11:20-12:3 (Meyer). Counsel likewise did not oppose elephant chaining *per se*, just the way FEI used chains to transport

[15] Plaintiffs dropped the forfeiture claim shortly before the first trial date. DE 559 at 8 n.6. Plaintiffs asserted this claim even though their own lawyers had handled another ESA case where it had been rejected as a matter of law. *See PETA v. Babbitt*, No. 93-1836, Mem. Op. (2-25-05) (D.D.C.) (Ex. 15 hereto). Plaintiffs evidently dropped it here, however, because FEI argued that forfeiture, if even available, required a jury trial, Ex. 16, 6-11-08 Hr'g Tr. at 17:10-18, which plaintiffs presumably wanted to avoid. Furthermore, even though none of the notice letters (which define the Court's ESA jurisdiction) mentioned any of these subjects, plaintiffs submitted evidence on tuberculosis, standing on hard surfaces, hot shots, rail transportation, forced defecation, circus tricks, and watering, all of which FEI was forced to defend. *See* 3-18-09 p.m. at 78:1-81:10; PWC 91.

elephants by rail for the circus. *Id*. at 67:4-68:11; *cf.* DE 297 at 34 n.22 (requesting total ban on chaining, except for veterinary care). Both shifts confirmed the unreasonable and vexatious nature of this case.

Plaintiffs asked the Court to enter "findings" and extend the litigation further by requiring FEI to seek a permit. 3-18-09 a.m. at 15:11-20. While this would have kept this dispute alive for ***years*** (preserving its potential for publicity, fund-raising and attorneys' fees), what it would never do is redress Rider's supposed aesthetic and emotional injury – the basis for his claimed standing, and hence, the litigation itself. Indeed, the only two remedies that could have done that were forfeiture and an injunction. *See* DE 559 at 17; COL 13 ("[C]entral to the [D.C. Circuit's] analysis was plaintiffs' request for an injunction. The Court proceeded on the premise that the remedy sought would, if granted, bring a 'cessation of the defendant's actions.'"). But plaintiffs had ***withdrawn*** both requests before this case was ripe for decision.

This about-face in the 59th minute of the eleventh hour was outrageous, particularly since, in May 2008, less than one year prior, plaintiffs boldly proclaimed that they were likely to prevail on the merits of their chaining claim and sought preliminary injunctive relief. DE 297. The Court found the timing and substance of the motion "curious" since it sought "emergency" relief ***on only one issue*** almost ***eight years*** after the case was filed (and almost ***ten years*** after the first notice letter). Ex. 17, 5-22-08 Hr'g Tr. at 2:14-24; PWC 91. Since Rider was the main purported eyewitness, had the case really been about elephant chaining, plaintiffs would not have waited for years to seek a preliminary injunction against chains. And were the case really about "taking" elephants, plaintiffs certainly would not have abandoned injunctive relief entirely in favor of years of future administrative wrangling over a permit that, if granted, would simply allow FEI to "take" its elephants indefinitely.

None of these contortions would have occurred had there been a legitimate plaintiff with a real injury. These maneuvers, however, demonstrated that plaintiffs and their counsel would do anything to keep this action alive. The pleadings were patently false, and this case should never have been brought.

F. At Trial, Rider was Discredited and API Had No Evidence of Injury

While Rider's fiction survived a motion to dismiss, it evaporated on cross-examination, where plaintiffs' and counsel's sham collapsed like a house of cards. Rider's credibility was "pulverized." "The impeachment of Mr. Rider was indeed overwhelming, prompting the Court to question counsel several times over the course of the remainder of the trial regarding Mr. Rider's standing, his credibility, and what weight to give his testimony." DE 559 at 19 n.12. Not only was Rider overwhelmingly impeached, he failed to present any evidence regarding the redressability of his alleged injury, *i.e.*, whether he could detect the effects of an injunction: "There was no evidence as to Mr. Rider's powers of perception in this regard." COL 15. Astoundingly, more than eight years after suit began, Rider had no evidence on an indispensible part of his case. The truth is what plaintiffs and counsel knew or should have known from the outset: Rider had no standing; he served simply as a vessel to carry made-up standing allegations.

API's claims likewise were frivolous and without evidentiary support. API failed to present any evidence of its alleged "informational" and "economic" injuries – matters totally within its own control and which, if they did exist, had to exist at the outset of litigation. *Laidlaw*, 528 U.S. at 191. Even if FEI were obligated to provide API with information (which the Court ***again*** held, and the D.C. Circuit agreed, FEI is not obligated to do), API presented ***no*** evidence of any additional "information" that it would receive that it did not already have. FOF 103 ("API has not demonstrated that a Section 10 proceeding would yield any information from

FEI that API has not already received in this litigation."); *see also* COL 28. Like Rider, it is inconceivable that if API really had an injury – the very reason it claimed to be in court – it could not say so in response to questioning at trial. Moreover, API failed to support its "economic" injury with any competent evidence. COL 31 ("There was no testimony that API would actually spend less resources on captive animal issues or even on elephants in circuses were FEI's practices to be declared a 'taking.'") API grasped at additional straws on appeal by asserting that it had standing due to the resources it allegedly spends countering the alleged "public misperception" caused by FEI's elephant handling. *ASPCA II*, 659 F.3d at 27. This also failed for total lack of proof. *Id*. at 27-28.

Trial demonstrated what became clear through years of discovery: plaintiffs' standing claims were baseless (and in Rider's case, also fraudulent). During the Rule 52(c) argument, the Court itself stated that Rider was "pulverized" and questioned whether plaintiffs needed him. 2-26-09 p.m. at 85:13-16 ("The Court: Do you need Rider? Mr. Glitzenstein: Do we need Rider? I think we'd like to have Rider. The Court: How do you keep Rider in this case?") & 90:23-91:04 ("The Court: Maybe I shouldn't use that word, but it was – there was powerful cross-examination."). Yet, plaintiffs and counsel obstinately embraced Rider's lies to the very end, despite clear warnings throughout the case that FEI intended to seek recovery of all fees. *E.g.*, DE 4 at 14; DE 63 at 5; DE 100 at 25; DE 342 at 44; DE 391 at 46; DE 536 at 34; DE 541 at 20.

II. FEI IS ENTITLED TO ATTORNEYS' FEES

Plaintiffs' and counsel's "ends justifies the means," "win at all costs" strategy to this case cost FEI more than $20 million in attorneys' fees, a number which continues to grow. The "ends" failed after it was revealed that the "means" were fraudulent. The conduct in this case is egregious, and, based on FEI's research, is far worse than the conduct reported in any caselaw in this Circuit, or any other. This case is unprecedented, but for the worst of reasons. Hiring

someone to testify falsely as to a jurisdictional predicate perverts the ESA, undermines the integrity of the federal judicial process, and violates the duties owed by any officer of the court. Justice requires that the expense that FEI incurred now be shifted to those who willfully and wantonly caused it. That plaintiffs and their counsel claim to act in the name of the "public interest" is irrelevant to the present motion. Non-profits and their counsel are subject to the law just like everyone else.

A. The Court Should Award FEI Attorneys' Fees Pursuant to § 11 of the ESA

1. Section 11 of the ESA Provides for a Fee Award to FEI

The ESA empowers the Court to "award costs of litigation (including reasonable attorney and expert witness fees) to ***any party***, whenever … such award is appropriate." 16 U.S.C. § 1540(g)(4) (emphasis added).[16] The statute does not require that the claimant be a "prevailing party." *See id*. Nor has the D.C. Circuit read such a requirement into environmental fee-shifting statutes. *See Sierra Club v. EPA*, 322 F.3d 718, 725 (D.C. Cir. 2003). However, FEI clearly prevailed in this case. Ex. 1 at 15:1 ("[W]e lost. We recognize that.") (Glitzenstein). The Court entered judgment for FEI and dismissed the case against Rider with prejudice after a six-week trial on the entire case, and this judgment was affirmed in its entirety. COL 20; DE 558; *ASPCA*

[16] That plaintiffs ultimately had no standing does not deprive the Court of jurisdiction over FEI's motion. "[A] court may lack authority to resolve the merits of a claim yet have jurisdiction to award costs and attorneys' fees to the prevailing party." *Citizens for a Better Env't v. Steel Co.*, 230 F.3d 923, 926 (7th Cir. 2000) ("*Steel Co.*"); *see also Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 395 (1990) ("It is well established that a federal court ... may award costs after an action is dismissed for want of jurisdiction.") (Rule 11); *U.S. ex rel. Grynberg v. Praxair, Inc.*, 389 F.3d 1038 (10th Cir. 2004) (jurisdiction retained over attorneys' fees motion despite dismissal for lack of jurisdiction, because the defendant "has expended significant funds . . . [as a] result of a frivolous lawsuit, an alleged injustice which may be redressed by an award of attorney fees as contemplated by statute."). Moreover, since attorneys' fees under the ESA are awarded as costs, 16 U.S.C. § 1540(g), the court retains jurisdiction under 28 U.S.C. § 1919.

Indeed, defendants often have obtained fee awards in cases dismissed for want of jurisdiction. *See, e.g.*, *U.S. ex rel. Vuyyuru v. Joadhav*, 555 F.3d 337 (4th Cir. 2009) (False Claims Act); *Md. Minority Contractors Ass'n, Inc. v. Lynch*, 2000 U.S. App. LEXIS 1636 (4th Cir. Feb. 7, 2000) (*per curiam*) (civil rights action); *Hispanos Unidos v. Scab Rock Feeders, Inc.*, 1995 U.S. App. LEXIS 9091 (9th Cir. Apr. 18, 1995) (Clean Water Act); *Sierra Club v. Shell Oil Co.*, 817 F.2d 1169 (5th Cir. 1987) (Clean Water Act); *Wisdom v. Centerville Fire Dist., Inc.*, 2009 U.S. Dist. LEXIS 124614 (D. Idaho May 11, 2009) (Title VII); *Access Now, Inc. v. Town of Jasper*, 2004 U.S. Dist. LEXIS 905 (E.D. Tenn. Jan. 7, 2004) (ADA).

II, 659 F.3d at 28. That the judgment turned on plaintiffs' lack of standing is irrelevant. The elements of standing "are not mere pleading requirements but rather an indispensable part of the plaintiff's case." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). A judgment that the plaintiff is forever barred from bringing suit due to lack of standing can be as rewarding for a defendant as a favorable judgment on the merits. *See Dist. of Columbia v. Jeppsen*, 514 F.3d 1287, 1290 (D.C. Cir. 2008). This Court's judgment for FEI "was a triumph in the war, not just in a battle or even a campaign." *Steel Co.*, 230 F.3d at 930.

Neither the Supreme Court nor the D.C. Circuit has defined when it is "appropriate" to award attorneys' fees to an ESA defendant. The Supreme Court has suggested that environmental fee-shifting statutes be interpreted similarly to their civil rights counterparts. *See Pennsylvania v. Delaware Valley Citizen's Council*, 478 U.S. 546, 559-60 (1986). This is because, *inter alia*, these provisions share common purposes: (1) to enable plaintiffs of limited means to bring ***meritorious*** suits, and, ***equally importantly***, (2) to deter plaintiffs from filing lawsuits that are baseless or harassing. *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 420 (1978) (Civil Rights Act); *Marbled Murrelet v. Babbitt*, 182 F.3d 1091, 1095 (9th Cir. 1999) (ESA). *Marbled Murrelet* followed this rationale to hold that courts should "apply to the ESA the civil rights standard for awarding fees to prevailing defendants." 182 F.3d at 1095. This standard allows a defendant to recover fees when "the plaintiff's action was frivolous, unreasonable, or without foundation," or that "the plaintiff continued to litigate after it clearly became so." *Christiansburg*, 434 U.S. at 421-22.

Whether *Christiansburg* applies in this or any other ESA case is not a foregone conclusion in this Circuit. *See Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 534 (1994) (rejecting *Christiansburg*'s application to prevailing Copyright Act defendant's fee claim because

prevailing plaintiffs and defendants should be treated even-handedly). *Fogerty* emphasized that copyright cases do not always involve the same power disparity between plaintiffs and defendants that justifies the dual standard in civil rights cases: '"entities which sue for copyright infringement as plaintiffs can run the gamut from corporate behemoths to starving artists; the same is true of prospective copyright infringement defendants.'" *Id*. at 524 (quoting *Cohen v. Virginia Elec. & Power Co.*, 617 F. Supp. 619, 622-23 (E.D. Va. 1985)); *see also Cohen*, 617 F. Supp. at 622 ("Who may be a plaintiff and who may be a defendant doesn't define the difference between good guys and bad guys. Nor can we assume that plaintiffs are inherently impecunious while defendants have deep pockets."). The instant case was not an individual, citizen conservationist suing to restrain the powers of the federal government. It was brought by sophisticated, national "animal rights" organizations with more than a ***quarter billion dollars*** in aggregate net assets, Ex. 18 hereto, who could well afford to pay Rider $190,000 as a hired plaintiff. The *Christiansburg* rationale loses meaning in such a scenario, and the Circuit, which has yet to rule on the issue, may well agree. Nonetheless, even if *Christiansburg*'s "frivolous, unreasonable, or without foundation" standard applies here, the facts as found by the Court after a full trial easily satisfy it.

Christiansburg does not require a showing of bad faith. 434 U.S. at 419 (Congress did not intend to "giv[e] the private plaintiff substantial incentives to sue, while foreclosing to the defendant the possibility of recovering his expenses in resisting even a groundless action unless he can show that it was brought in bad faith."). However, "needless to say, if a plaintiff is found to have brought or continued such a claim in bad faith, there will be an even stronger basis for charging him with the attorney's fees incurred by the defense." *Id.* at 422.

2. An Award of FEI's Attorneys' Fees is Appropriate

It is difficult to imagine a more "appropriate" case for a defense award of attorneys' fees: a fraud was perpetrated on the courts by plaintiffs, together with their counsel, who paid a pawn to lie about an aesthetic injury he never had (FOF 1); then collectively covered up and lied about those payments (FOF 52, 55-57, 59); and ultimately forced FEI to spend more than eleven years and over $20 million in fees to win this case twice.[17] Much less egregious conduct has warranted fee awards against plaintiffs under *Christiansburg*: where the plaintiff's claim was so baseless it never should have been brought;[18] the plaintiffs failed to prove any injury-in-fact, and the individual, "nominal plaintiff" was involved solely "to conjure up and invent some basis for [the organization] to have standing";[19] the plaintiff was found to be not credible and to be conducting a vendetta against the defendant;[20] and, the plaintiff purposely tried to obscure the truth of facts and events relevant to her claim.[21] Defense fee awards were "appropriate" in each of these cases. What makes this case unlike any other, and a fee award uniquely "appropriate," is that FEI had to defend itself against ***all of the above***, and much more.

a. Plaintiffs and Counsel Filed and Pursued Claims that were Frivolous, Unreasonable, and/or Without Foundation

Pursuing a case with no legal or factual basis is "frivolous," "unreasonable," "without foundation" and "groundless." *Harris*, 662 F.2d at 874; *see also U.S. ex rel. J. Cooper & Assoc., Inc. v. Bernard Hodes Group, Inc.*, 422 F. Supp. 2d 225, 238 (D.D.C. 2006) ("A claim is

[17] *Cf. Murphy v. Bd. of Educ.*, 420 F. Supp. 2d 131, 135 (W.D.N.Y. 2006) ("if ever there were a case in which fees should be awarded to a prevailing defendant, this is it. From its inception, this case was meritless and without foundation ... Furthermore, ... plaintiff brought and pursued this litigation in bad faith, for the improper purpose of attacking the [defendants] about matters that had nothing to do with the original basis for this lawsuit.").

[18] *Harris v. Group Health Ass'n, Inc.*, 662 F.2d 869 (D.C. Cir. 1981).

[19] *Access Now*, 2004 U.S. Dist. LEXIS 905, at *26-27.

[20] *Copeland v. Martinez*, 603 F.2d 981 (D.C. Cir. 1979).

[21] *Fisher v. Fashion Inst. of Tech.*, 491 F. Supp. 879 (S.D.N.Y. 1980).

frivolous if it is utterly lacking in legal merit and evidentiary support."); *Moss v. ITT Cont'l Baking Co.*, 468 F. Supp. 420, 421 (E.D. Va. 1979) ("The total absence of any basis for suit renders its filing frivolous."). The ESA Action was just that. Plaintiffs had no possibility of a favorable outcome on the merits because no plaintiff ever had standing, "an indispensable part of [] plaintiff[s'] case." *Lujan*, 504 U.S. at 561; COL 1. *Cf. Harris*, 662 F.2d at 873-74 (awarding defendant fees for the entirety of plaintiff's appeal, which "should not have been taken," because the "record as established in the trial court was barren of any possible justification for a favorable outcome to appellant."). Here, plaintiffs and their counsel knew, or should have known, that all plaintiffs' standing arguments lacked legal merit and evidentiary support from the start.

As to Rider, the Court found that actions "undertaken long before this lawsuit was filed" revealed that his claim of emotional attachment to the FEI elephants was not credible. COL 4. Information about these "actions," including Rider's own bullhook use, his continued employment at multiple circuses using the bullhook, and his "attachment" to the Chipperfield elephants, was known or available to plaintiffs and counsel before the complaint was filed. *See supra*, at 10-13; Ex. 10, No. 1, 2, 5. The Court cited numerous examples of Rider's actions, inactions, and inabilities demonstrating he never had a "strong, personal attachment" to FEI's Blue Unit elephants. *See* FOF 12, 20, 60, 62-73; COL 3-10, 18.1. Furthermore, even if Rider's false allegations of elephant attachment had been believable, ***he had no injury***: from witnessing bullhook use (*see* FOF 4-9, 15-18, 20; COL 4, 5, 18.2); from "refraining from" visiting the elephants (*see* FOF 61; COL 6, 11, 18.4); or from his paid visits (*see* FOF 77-85; COL 11, 18.4).[22] Rider's standing claim also foundered on complete lack of proof of redressability. FOF

[22] Nor could Rider detect elephant mistreatment through observation, FOF 76; COL 18.4, a requisite for his standing claim. *See* COL 15 (The D.C. Circuit assumed that Rider "can detect the effects of the mistreatment by observing the elephants' behavior and likewise could detect the effects on that behavior of an injunction against the bullhook and chains. However, at trial, Mr. Rider was required to prove this allegation. He did not do so.").

74-76; COL 12-17, 18.4, 18.5. If the bullhook and chains were enjoined, the two Rider "girls" still on the road would have to go to the CEC with the other five, where Rider would never see them again because he has no access. FOF 74, 75; COL 16, 17, 18.5. Because Rider never had a redressable injury – one of the "irreducible constitutional minimum[s]" of standing, *Lujan*, 504 U.S. at 560, – his claim was frivolous, unreasonable, and without foundation.

The organizational plaintiffs' "informational" and "economic" injury standing arguments were also "utterly lacking in legal merit and evidentiary support." *See J. Cooper*, 422 F. Supp. 2d at 238; *see also* COL 1 (organizational plaintiffs lack standing); COL 21, 23 (API has not suffered any "injury in fact" "as a result of anything that FEI has done or failed to do"; "API's 'informational injury' stems from FWS's action or inaction, not from any action or inaction of FEI."). This Court rejected the "informational" injury theory in 2001 on legal grounds that were just as applicable in 2011 when the D.C. Circuit affirmed this Court's ***second*** rejection of the same argument. *See* No. 00-1641, DE 20 at 12; *ASPCA II*, 659 F.3d at 22, 24; *see also* FOF 101 (API attempted to establish standing based on same injury the Court rejected in 2001). API's "informational" injury claim failed for the most elementary of reasons – FEI has no duty to provide any information. FOF 102; COL 21, 24, 27. Thus, "***there [was] no legal basis to sustain [API's] approach***," COL 30 (emphasis added). API's "informational injury" also had no factual foundation, as this Court found that API already had all of the information it claimed it lacked. FOF 103; COL 28.

API's "economic injury," amounting to a claim that it was injured by its own advocacy, fared no better. Cases decided before suit commenced made clear that pure advocacy is not an injury-in-fact. *See, e.g.*, *Sierra Club v. Morton* 405 U.S. 727, 739-40 (1972); *Nat'l Treas. Employee's Union v. U.S.*, 101 F.3d 1423, 1429 (D.C. Cir. 1996). Even if it were legally

cognizable, however, API presented no evidence of such an injury. *See* FOF 102; COL 31 ("API has not established that it would actually spend less of its resources on circus elephant related issues than it does now"; this claim "is not supported by any competent evidence."). During Rule 52(c) argument, counsel for plaintiffs pivoted, arguing cryptically that API was injured by expending funds to counter a public misperception created by FEI. However, API had not put on any evidence at trial that (1) FEI had created any public misperception or (2) that API spent any money countering it. *ASPCA II*, 659 F.3d at 27-28. Evidence of the second, if it existed (*e.g.* API's spending records), would have been within API's control throughout the case. That no evidence was produced demonstrates that none existed. Since ASPCA, AWI, and FFA/HSUS completely abandoned their own claims ***at trial***, the organizational standing theories died with API. FOF 100. The outcome for the organizations demonstrates what the Court found: they knew they had no standing, which is why they hired Rider. FOF 48, 52, 53, 59; COL 5.

While bringing a case that is "without foundation" is sufficient in and of itself to make an award of attorneys' fees to a defendant "appropriate," *see Christiansburg*, 434 U.S. at 421-22,[23] plaintiffs' conduct here went much further. Plaintiffs used Rider to compensate for their own lack of standing to get them through the federal courthouse door. Very similar facts in *Access Now* resulted in a defense award of fees under *Christiansburg*.[24] There the organizational plaintiff (Access Now) and an individual sued a city for alleged ADA violations. Defendant deserved fees because "it should have been obvious to an objectively reasonable litigant … that the plaintiffs clearly lacked standing," but plaintiffs "unreasonably persisted in litigating and

[23] *See also EEOC v. Peoplemark, Inc.*, 2011 U.S. Dist. LEXIS 38696, at *7 (W.D. Mich. Mar. 31, 2011) (defendant awarded fees under *Christiansburg* because "the complaint turned out to be without foundation from the beginning," and once the EEOC knew or should have known that, "it was unreasonable for [it] to continue to litigate on the basis of that claim, driving up defendant's costs, because it knew it would not be able to prove its case.").

[24] That Access Now was a "not-for-profit corporation" "engage[d] in activities and litigation designed to … correct ADA violations," *Access Now*, 2004 U.S. Dist. LEXIS 905, at *10, was no defense.

pursuing [the claim] right up to the eve of trial." 2004 U.S. Dist. LEXIS 905, at *9. Indeed, the court determined that the individual plaintiff was only named in the case to "conjure up and invent some basis for [the organization] to have standing … ." *Id*. at *26-27. Filing the claim when Access Now ***either knew or reasonably should have known that it did not have sufficient facts to establish standing***," made the claim "frivolous, unreasonable, and groundless from its inception." *Id*. at *15-16 (emphasis added). This was inexcusable, because Access Now's prior litigation experience made it "very familiar with the requirement that it must be prepared to prove standing when filing lawsuits in federal district court … ." *Id*. at *15. *See* Exs. 3 & 4.

Similarly here, experienced and sophisticated organizational plaintiffs and counsel were abundantly familiar with standing requirements. That is precisely why they knew they needed Rider to "conjure up" a basis for standing. In fact, Ms. Meyer lectured on a panel in 2006 entitled "Legal Standing for Animals and Advocates," and was introduced as "one of the most experienced attorneys in the United States when it comes to the issue of standing for animal advocates." Ex. 4 at 62. Ms. Meyer's lecture described the "trick" to coming up with a "standing theory" for Rider, a "novel argument" that plaintiffs used to jump through the standing "hoops." *See id.* at 74-75. Plaintiffs' and counsel's pursuit of claims that no party had standing to bring was not an innocent mistake borne from inexperience; it was a calculated and improper maneuver designed to circumvent Article III.

What makes this case even worse than *Access Now* is that here the other plaintiffs and their counsel ***paid Rider*** to play. FOF 1 ("The Court finds that Mr. Rider is essentially a paid plaintiff and fact witness … ."); FOF 28 ("… ***after accepting money and other things of value from PAWS, Mr. Rider agreed to be a plaintiff in this case***") (emphasis added); FOF 48 ("the primary purpose [for the payments] is to keep Mr. Rider involved with the litigation, because he

is the only plaintiff who alleges a personal and emotional attachment to the elephants and an aesthetic injury … ."); FOF 53 ("the primary purpose of the funding … was to secure Mr. Rider's initial and continuing participation as a plaintiff in this litigation.").[25]

These payments were Rider's sole source of income for at least nine years, and ensured that Rider would continue the fraudulent case as long as he was getting paid. FOF 21 ("At no point in the period after March 2000 has Mr. Rider held a job or had any source of income or financial support other than the money and other financial benefits that Mr. Rider has received from animal advocacy organizations or others sympathetic to such groups."); FOF 52 ("these payments were primarily intended to – and indeed did – keep Mr. Rider involved with the litigation … ."); FOF 51 ("Mr. Rider testified that he has no expectation of further payments from either the organizational plaintiffs or WAP once the litigation has been concluded, assuming the plaintiffs prevail.").

But plaintiffs and counsel did not stop there. Not only did they try to subvert Article III by getting into federal court with a paid stand-in, they used a *Laidlaw*-modeled script that was never true. Rider's standing allegations about his emotional attachment to FEI's elephants and his *Laidlaw* "refraining from" injury, the "sole" basis for the D.C. Circuit's reversal, FOF 53, were adjudicated to be not truthful. *See* DE 559 at 19 ("The Court concludes that Rider's evidence … was not credible with respect to the allegations the Court of Appeals had to accept as true … to support Rider's Article III standing to sue."); FOF 60-73 ("Mr. Rider Has No Aesthetic or Emotional Injury"); COL 4 (Rider's own actions showed his allegations of attachment to FEI's elephants are not credible); FOF 61; COL 6, 11, 18.4 (Rider's "refraining

[25] S*ee generally* FOF 21-59 (subsection header: "Prior to Becoming a Plaintiff in this Lawsuit and Throughout the Entire Nine Years of this Litigation, Mr. Rider's Sole Source of Income Has Been Provided By Animal Advocacy Organizations Involved With This Lawsuit"); *see also* COL 19 (finding Rider to "not be a credible witness" based *inter alia*, on "the timing, amount, and circumstances surrounding the payments that Mr. Rider has received from the plaintiff organizations and WAP throughout the courts of this litigation").

from" allegations not true). The D.C. Circuit has affirmed an attorneys' fee award under *Christiansburg* where, as here, the district court found, post-trial, that the plaintiff had no evidence other than her own incredible allegations. *Copeland*, 603 F.2d at 983; *see also Fisher*, 491 F. Supp. at 883 (Title VII defense fee award under *Christiansburg* where the plaintiff's testimony was "incredible," "evasive and untrustworthy").

The misrepresentations about Rider's standing allegations were not the only untruthful acts perpetrated by plaintiffs and counsel. They also made misrepresentations about the existence and purpose of the Rider payments. FOF 48 (plaintiffs misrepresented purpose of payments); FOF 55 (Rider's false interrogatory answer regarding payments); FOF 56 (no excuse for Rider's false answer because attorney who signed objections, Ms. Meyer, "was a principal in two of the entities … that had paid Mr. Rider … ."); FOF 57 (organizational plaintiffs "less than forthcoming" about payments); FOF 59 (plaintiffs attempted to conceal the Rider payments *inter alia*, "by both omissions and affirmatively false statements" in discovery). Intentional deception about facts going to the heart of the case is the embodiment of unreasonableness. *Cf. Fisher*, 491 F. Supp. at 888 (awarding fees to defendant where plaintiff "purposely tried to obscure the truth by claiming ignorance of, or that she could not recall, facts and events relevant to her claim.").

Finally, while *Christiansburg* does not require bad faith, there was bad faith here because the litigation lacked a proper purpose. *Compare id.* (awarding fees to defendants where it "became increasingly apparent during the course of the trial" that the plaintiff brought the suit for improper purposes) *with* FOF 52 (Rider payments were "were primarily intended to – and indeed did – keep Mr. Rider involved with the litigation ***and advance the organizational plaintiffs' purposes for this litigation***") (emphasis added). It does not matter what plaintiffs' "purposes for this litigation" were, because it is clear that they did not bring the case for the

stated purpose of enjoining an alleged ESA "taking." If this case was really about "taking" elephants, plaintiffs never would have abandoned the only two remedies (forfeiture and injunction) that can stop a "take." That plaintiffs did not sue for a proper purpose highlights the manifest unreasonableness of the case, and why FEI is entitled to recoup its fees.

A case without standing has no foundation. A claim of any kind lacking legal merit and evidentiary support is frivolous. Paying a plaintiff to push a manufactured theory of Article III jurisdiction while lying to courts about the essential facts and the money facilitating the fraud is beyond unreasonable. That an award of fees in these circumstances would be "appropriate" is a profound understatement.

b. Plaintiffs and Counsel are Not Immune from Responsibility for Fees

While plaintiffs and counsel may believe that it is unfair that they be held accountable for their actions, non-profits, like all other litigants, are not immune from assessments of attorneys' fees when they pursue actions that are frivolous, unreasonable, or without foundation. *See, e.g.*, *Sierra Club*, 817 F.2d 1169 (affirming Clean Water Act attorneys' fee award against non-profit); *Sierra Club v. Cripple Creek*, 509 F. Supp. 2d 943 (D. Colo. 2006) (assessing attorneys' fees under Clean Water Act against non-profit for continuing to litigate case after it became clear that the claim was without foundation); *Access Now*, 2004 U.S. Dist. LEXIS 905 (ADA attorneys' fee award against non-profit).

Nothing in the legislative history of the ESA or other environmental fee-shifting provisions shows that Congress intended to create an exception for public interest organizations or attorneys. Congress, however, *did* anticipate plaintiff abuse of citizen-suit provisions. That is why defendants can recover fees in certain cases. *See Marbled Murrelet*, 182 F.3d at 1095 ("*Christiansburg* … adopted the frivolity standard for prevailing defendants because the

legislative history of the Civil Rights Act indicated Congress' desire to prevent 'frivolous' or 'unjustified' suits. The legislative history of the ESA suggests a similar desire on the part of Congress.") (citation omitted); *see also Ruckelshaus v. Sierra Club*, 463 U.S. 680, 692-93 (1983) (the "central purpose" of the Clean Air Act fee-shifting provision "was to check the multiplicity of potentially meritless suits that Congress feared would follow the authorization of suits under the Clean Air Act.") (quotation omitted); *Clean Air Council v. Sunoco, Inc.*, 2003 U.S. Dist. LEXIS 5346, at *23-24 (D. Del. Apr. 2, 2003) (Congress recognized "that the broad access provided for by the [Clean Air Act] citizen suit provision could result in 'frivolous and harassing litigation' against private parties.") (*citing* 116 Cong. Rec. 33103 (remarks of Sen. Muskie)); *Waterkeeper Alliance, Inc. v. Hudson Farm et al.*, No. WMN-10-487 (D. Md. filed Mar. 1, 2012 at 3) (Ex. 20) (expressing concerns about Clean Water Act plaintiff's motivations and warning that Act grants the Court authority to award attorney's fees to a prevailing defendant).

A substantial fee award in this case advances the deterrent purpose of the ESA fee-shifting provision. *Andrade v. Jamestown Hous. Auth.*, 82 F.3d 1179, 1193 (1st Cir. 1996) (the award must be substantial enough to "fulfill the deterrent purpose of [the Civil Rights fee-shifting statutes] in discouraging plaintiffs from bringing frivolous claims."). '"A fee must be assessed which will serve the deterrent purpose of the statute, and no fee will provide no deterrence.'" *Kreager v. Solomon & Flanagan, P.A.*, 775 F.2d 1541, 1544 (11th Cir. 1985) (quoting *Durrett v. Jenkins Brickyard, Inc.*, 678 F.2d 911, 917 (11th Cir. 1982)). It is "important to remember that the amount of the fees incurred by defendant[] was plaintiff[s'] own doing. [Their] filing and prosecution of this frivolous lawsuit caused the fees to be as high as they are. [They] must recognize that there are consequences to such improper actions." *Murphy*, 420 F. Supp. 2d at 139. If plaintiffs and their counsel are allowed to file a complaint based on

knowingly false standing allegations with impunity, "the risks associated with the filing of [such] a complaint would be significantly diminished; and as the price of such misconduct fell, of course, its frequency would rise." *See Danik, Inc. v. Hartmarx Corp.*, 875 F.2d 890, 894 (D.C. Cir 1989) (Rule 11); *see also Moss*, 468 F. Supp. at 421 ("Plaintiffs cannot be suffered to file baseless, groundless, frivolous suits, without circumspection or without consideration of the costs, expense, trouble, time, and effort which will have to be expended by defendant, by Court personnel, [and] by opposing counsel"). The public, the next defendant targeted with such a case, and the judicial system all suffer if this kind of meritless litigation is not deterred.[26]

And while it is clear that the ESA Action was the product of sophisticated counsel, the plaintiffs cannot avoid liability by blaming their attorneys. Where a party has

> [v]oluntarily chose[n] th[ese] attorney[s] as his representative[s] in the action … he cannot … avoid the consequences of the acts or omissions of th[ese] freely selected agent[s]. Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered to have notice of all facts, notice of which can be charged upon the attorney[s].

Pioneer Inv. Servs. Co v. Brunswick Assocs. L.P., 507 U.S. 380, 397 (1993) (citations and internal quotation omitted); *see also Murphy*, 420 F. Supp. 2d at 137 ("The law is well established … that reliance on the advice of one's attorney is no defense to a motion for attorney's fees, because it is the *litigant* that is ultimately responsible for the filing and prosecution of the action."). This is especially true here since the decision-makers and/or

[26] Nor would such an award "chill" legitimate citizen suits. Any alleged "chill" "on potentially valid litigation would occur only if [plaintiffs] with meritorious … suits believed that courts were likely so to mischaracterize those suits as to find them not only without merit, but wholly vexatious as well. We do not believe either that courts are likely so thoroughly to misapprehend the character of claims or that prospective plaintiffs are likely to expect such errors." *Copeland*, 603 F.2d at 990-91. Moreover, fraudulent litigation *should* be "chilled."

representatives for the organizational plaintiffs were, in many instances, attorneys themselves.[27] Awarding attorneys' fees to FEI is clearly appropriate because it would serve one of the main purposes behind the ESA fee-shifting statute by deterring future frivolous and unjustified suits.

B. The Court Should Award FEI Attorneys' Fees Pursuant to its Inherent Authority

As the foregoing demonstrates, the Court's December 30, 2009 findings of fact and conclusions of law provide more than ample basis for shifting attorneys' fees under the ESA to plaintiffs. That could be the end of the matter. But the conduct here also was a fraud on the court and "bad faith" litigation, both of which are sanctionable under the Court's inherent authority.[28] *Auode v. Mobil Oil Corp.*, 892 F.2d 1115, 1119 (1st Cir. 1989) ("There is an irrefragable linkage between the courts' inherent powers and the rarely encountered problem of fraud on the court."); *In re Nat'l Student Mktg. Litig.*, 78 F.R.D. 726, 728 (D.D.C. 1978), *aff'd Lipsig v. Nat'l Student Mktg.*, 663 F.2d 178 (D.C. Cir. 1980) ("One [exception to the American Rule], drawn from the inherent power of the courts … allows the assessment of fees against a losing party who has 'acted in bad faith, vexatiously, wantonly, or for oppressive reasons … .'").

"As old as the judiciary itself, the inherent power enables courts to protect their institutional integrity and to guard against abuses of the judicial process." *Shepherd*, 62 F.2d at 1472. "When rules alone do not provide courts with sufficient authority to protect their integrity and prevent abuses of the judicial process, the inherent power fills the gap." *Id.* at 1474 (citation omitted). While the Court's inherent powers are "poten[t]" and "must be exercised with restraint

[27] Organizational representatives were attorneys Lisa Weisberg (ASPCA); Tracy Silverman (AWI); and Nicole Paquette (API). Two former MGC partners, who remain counsel of record for all plaintiffs (Jonathan Lovvorn and Kimberly Ockene), are now in-house counsel for HSUS.

[28] Inherent authority "encompasses the power to sanction attorney or party misconduct." *Shepherd v. Am. Broad. Co., Inc.*, 62 F.3d 1469, 1474 (D.C. Cir. 1995).

and discretion," the egregious facts of this case warrant their application here. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44 (1991).[29]

1. Plaintiffs and Counsel Perpetrated a Fraud on the Court

Where, as here, "the very temple of justice has been defiled," *Universal Oil Prod. Co. v. Root Ref. Co.*, 328 U.S. 575, 580 (1946), an award of attorneys' fees is warranted. "'Fraud upon the court' ... embrace[s] only that species of fraud which does or attempts to, subvert the integrity of the court itself, or is a fraud perpetrated by the officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases ... ." *Synanon Church v. U.S.*, 579 F. Supp. 967, 974 (D.D.C. 1984), *aff'd*, 820 F.2d 421 (D.C. Cir. 1987). "Not all fraud is 'fraud on the court.'" *Great Coastal Express, Inc. v. Int'l Bhd. of Teamsters*, 675 F.2d 1349, 1356 (4th Cir. 1982). While "fraud between the parties or fraudulent documents, false statements or perjury," in and of themselves, are not fraud on the court, "fraud which is directed to the judicial machinery itself" is. *Baltia Air Lines, Inc. v. Transaction Mgmt., Inc.*, 98 F.3d 640, 642 (D.C. Cir. 1996). "[E]gregious misconduct directed to the court itself," includes "bribery of a judge or jury or fabrication of evidence by counsel." *Pfizer v. Int'l Rectifier Corp.*, 538 F.2d 180, 195 (8th Cir. 1976). Fraud on the court undeniably occurred here, where a paid plaintiff told critical lies upon which the courts had to rely, and counsel sat at the center of those lies and payments.

The judicial machinery in this case was activated by the fraud. Plaintiffs, together with their counsel, lied about the jurisdictional predicate for this case in the July 2000 complaint, repeated those lies in filings with this Court, and repeated them again to the D.C. Circuit. They actually paid Rider ***not*** to be a *Laidlaw*-like "refraining from" plaintiff, and then falsely claimed

[29] Other inherent power sanctions available to the Court include, *inter alia*, fines, contempt citations, and disqualifications or suspensions of counsel. *Shepherd*, 62 F.3d at 1475.

that he was one. FOF 60-61; COL 6, 11, 18.4; *see supra*, at 5-7, 9. Rider's false and purchased standing allegations capitalized on the 12(b)(6) requirement of assumed truth and were relied upon by both courts. Federal jurisdiction was manufactured where none existed. FOF 53.

Rider's standing allegations were made with an "intent to deceive or defraud the court," and they did just that. *Cobell v. Norton*, 334 F.3d 1128, 1150 (D.C. Cir. 2003) (citation omitted). FEI, as well as the courts themselves, which had to accept Rider's paid falsities as truth, were all victims of the fraud. *See Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238 (1944) (fraud on the court where circuit court relied on fraudulent article created and submitted by counsel); *In re Levander*, 180 F.3d 1114, 1120 (9th Cir. 1999) (fraud on the court where bankruptcy court relied on perjury and non-disclosure in deposition testimony); *Fraige v. Vinyl Prod. Mfg.*, 996 F.2d 295, 295 & 298 (Fed. Cir. 1993) (fraud on the court where district court relied on false and forged documentation in, *inter alia*, denying preliminary injunction). As in *Hazel-Atlas*, *Levander*, and *Fraige*, plaintiffs and their counsel "deliberately planned and carefully executed a scheme to defraud" both courts. *Hazel-Atlas*, 322 U.S. at 245.[30]

Plaintiffs' and counsel's fraudulent conduct went directly "to the heart of the case." *Landmark Legal Found. v. EPA*, 272 F. Supp. 2d 70, 87 (D.D.C. 2003) (awarding attorneys' fees where destruction of the very FOIA documents requested and subject to a preliminary injunction went "to the heart of the case"); *cf. Baltia Air Lines*, 98 F.3d at 643 (no fraud on the court where "any misrepresentations to the District Court were not relevant to the Court's decision"). False allegations on an issue "pivotal" or "material" to the theory of the case, such as the false standing allegations that were "indispensable," *Lujan*, 504 U.S. at 561, to Rider's case, are fraud on the

[30] The fraud here was not ordinary fraud, *cf. Bowie v. Maddox*, 677 F. Supp. 2d 276, 279 n.2 (D.D.C. 2010), nor was it "simply between the parties." *Cf. Lockwood v. Bowles*, 46 F.R.D. 625, 632 (D.D.C. 1969). And, this is not a case of an "isolated incidence of perjury" by Rider, where his co-plaintiffs and counsel did not know about it or were not involved in it. *Cf. Synanon Church*, 579 F. Supp. at 972.

court. *Nichols v. Klein Tools, Inc.*, 949 F.2d 1047, 1049 (8th Cir. 1991) (fraud on the court where plaintiff "repeatedly and pointedly lied under oath regarding *the* pivotal issue in the case"); *Auode*, 892 F.2d at 1120 (fraud on the court where plaintiff attached fraudulent document to the complaint "when [plaintiff] and his counsel … plainly thought it material").

That counsel are at the center of the conduct makes this a fraud on the court.[31] *Cleveland Demolition Co. v. Azcon Scrap Corp.*, 827 F.2d 984, 986 (4th Cir. 1987) ("the involvement of an attorney, as an officer of the court, in a scheme to suborn perjury should certainly be considered fraud on the court") (quotation omitted); *see also Lockwood*, 46 F.R.D. at 632 (fraud on the court includes "the involvement of an attorney (an officer of the court) in the perpetration of the fraud"). Counsel filed the original complaint knowing that Rider's "refraining from" injury allegations were false, pursued those arguments on appeal and presented his zero-credibility testimony at trial, all the while funneling payments to Rider, from his co-plaintiffs, via their law firm and a 501(c)(3) organization they operated.[32] DX 48A; *cf. Synanon Church*, 579 F. Supp. at 975 (seriousness of misconduct "magnified" by "complicity" of in-house counsel).

"[T]ampering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society." *Hazel-Atlas*, 322 U.S. at 246. Plaintiffs' and

[31] While an attorney "should represent his client with singular loyalty that loyalty obviously does not demand that he act dishonestly or fraudulently; on the contrary his loyalty to the court, as an officer thereof, demands integrity and honest dealing with the court. And when he departs from that standard in the conduct of a case he perpetrates a fraud on the court." *Kuperman v. Consol. Research & Mfg. Corp.*, 459 F.2d 1072, 1078 (2d Cir. 1972) (quoting Moore's 7 Fed. Practice § 60.33 (1971)).

[32] *Cf. Schreiber Foods, Inc. v. Beatrice Cheese, Inc.*, 402 F.3d 1198, 1205 (Fed. Cir. 2005) ("Once counsel became aware that highly material false statements had been made by a witness, in pleadings submitted to the court and in response to discovery requests, and that highly material documents had not been produced as requested, [plaintiff] and its counsel were under an obligation to promptly correct the record.").

counsel's "unconscionable plan" to pay Rider to make false standing allegations (and then lie about such conduct) is a fraud on the court and fully justifies an award of attorneys' fees.

2. Plaintiffs and Counsel Acted in Bad Faith, Vexatiously, Wantonly and for Oppressive Reasons

Courts have inherent authority to assess fees when a party has "acted in bad faith, vexatiously, wantonly, or for oppressive reasons … .'" *Chambers*, 501 U.S. at 45-46 (quotation omitted). Bad faith litigation "may be found, not only in the actions that led to the lawsuit, but also in the conduct of the litigation." *Hall v. Cole*, 412 U.S. 1, 4 (1973); *see also Am. Hosp. Ass'n v. Sullivan*, 938 F.2d 216, 219-20 (D.C. Cir. 1991) (bad faith includes "the filing of a frivolous complaint or meritless motion, or discovery-related misconduct"). Bad faith occurred here over the entire course of the litigation, from filing through trial (and appeal), for all of the reasons that this case is a fraud on the court. Moreover, plaintiffs and counsel relied on Rider's perjured testimony and filed and pursued the baseless claims of the organizational plaintiffs. This is not a case where plaintiffs and counsel merely took aggressive litigation postures. *Lipsig*, 663 F.2d at 181. Indeed, plaintiffs and counsel were "substantially motivated by vindictiveness, obduracy [and] mala fides." *Id*. at 182.

Rider's false, misleading, and purchased standing allegations (including, *inter alia*, his "refraining from" injury allegations), were the "key 'fact[s]'" used to "instigate [the] litigation," *Ellipso, Inc. v. Mann*, 594 F. Supp. 2d 40, 44 (D.D.C. 2009), and key facts that kept the case alive after the initial appeal through trial. Those facts were "patently false." *Id.* As in *Ellipso*, plaintiffs and counsel in this case "repeatedly made [Rider's] false [standing] allegations" to this Court and the D.C. Circuit, and they "were the critical fact[s] upon which the litigation turned," because without them the litigation would have ended. *Id.*; *cf.* FOF 53. The "central allegation[s] that gave rise to the plaintiff[s'] claims" were untrue, and those falsities were relied

upon by both courts. *Id.* at 43 & 44 n.5; *cf.* FOF 60-73; COL 4-11. Had the case only involved the organizations, it would have ended with the first dismissal. But Rider's false claims, dependent entirely on his witness credibility, guaranteed that the matter would have to be tried.

The organizational plaintiffs and counsel also made false statements regarding the Rider payments to the Court and to FEI in discovery responses. *See supra*, at 14-15; FOF 55-57, 59. Such deliberate and repeated falsities, on a central issue (Rider's standing and its financial underpinning), constitute bad faith. *Compare Richardson v. Union Oil Co.*, 167 F.R.D. 1, 2-3 & 5 (D.D.C. 1996) (awarding attorneys' fees due to, *inter alia*, defendants' false interrogatory answer and direct misrepresentations in a court filing – all on the "***central***" issue)[33] *with Assoc. of Am. Physicians & Surgeons v. Clinton*, 187 F.3d 655, 661 (D.C. Cir. 1999) (reversing fee award where an alleged misrepresentation "if false, was ***not material*** and therefore [could not] be characterized as made in bad faith"); *Shepherd*, 62 F.3d at 1480 (reversing default judgment where defendant's alleged document alteration had only a ***"tangential connection"*** to the merits).

Moreover, this case involved a coordinated scheme to purchase testimony "on the dispositive facts underlying [this] lawsuit." *Young v. U.S. Senate Sergeant at Arms*, 217 F.R.D. 61, 70 (D.D.C. 2003) (dismissing action where plaintiff unsuccessfully attempted to purchase the testimony of two witnesses). In *Young*, the attempt to purchase testimony was unsuccessful. Here, it actually happened. FOF 1. When sanctioning the *Young* plaintiff, Judge Friedman noted that "[c]oercing or seeking to obtain or manufacture false testimony '***strikes at the heart of the judicial system***. Lying cannot be condoned in any formal proceeding. … Our legal system is dependent on the willingness of the litigants to allow an honest and true airing of the real facts.'"

[33] In *Richardson*, defendant's "bad faith" conduct actually was exposed by plaintiff before trial. Fees, however, were still awarded. *Richardson*, 167 F.R.D. at 5.

Id. at 71 (citation omitted) (emphasis added). In this case, "an honest and true airing" of Rider's lies did not occur until trial, more than eight years after the case was first filed. Like the *Young* plaintiff, plaintiffs here – together with their counsel – not only "sought to undermine," but also "jeopardized the integrity of the judicial process" itself. *Id*.

Apart from the payments, Rider's perjury ***alone*** warrants awarding attorneys' fees under the bad faith exception.[34] *Whitney Bros. Co. v. Sprafkin*, 60 F.3d 8, 14 (1st Cir. 1995) ("[w]hen a party [] materially perjure[s] himself, this, standing alone, is sufficient grounds for finding bad faith"). This Court totally rejected Rider's standing testimony because it was incredible or unpersuasive ***eighteen*** times. The Third Circuit has held that it is an abuse of discretion for a district court ***not*** to award attorneys' fees pursuant to the bad faith exception where a plaintiff, like Rider, "lied about matters going to the heart of the case." *Perichak v. Int'l Union of Elec. Radio & Mach. Workers*, 715 F.2d 78, 83 n.9 (3d Cir. 1983) (Plaintiff's "materially false statements [made] under oath are, having been critical to the success of his case, alone, are enough to support a finding of bad faith."); *see also Carrion v. Yeshiva Univ.*, 535 F.2d 722, 728 (2d Cir. 1976) (trial testimony that was "an unmitigated tissue of lies" justified fee award).

Blue v. U.S. Army, 914 F.2d 525, 542 (4th Cir. 1990), affirmed a bad faith attorneys' fee award where, as here, "the resolution of [the] case turned upon far more than routine credibility determinations." [35] Although not "every instance in which a district court credits one side's witnesses over another's" justifies sanctions, the *Blue* plaintiffs perjured themselves and their testimony, like Rider's, "reveal[ed] contradictions and evasions on the most central of issues." *Id.* at 543-44. One plaintiff's story was "a tortured path of inconsistent, evasive and wholly

[34] As discussed *supra* at 34, while perjury alone, without attorney involvement, may not be fraud on the court, *Baltia Air Lines*, 98 F.3d at 642, it ***is*** bad faith.

[35] The *Blue* district court invoked several bases (Rule 11, Rule 16, 28 U.S.C. § 1927, and bad faith). The Fourth Circuit noted that "[i]n a proper case, several of the theories can be invoked to justify punishment of the same conduct," but found no need to "dissect the particulars of each theory." 914 F.2d at 534.

incredible explanations … ." *Id.* at 544. The other's contained "insidious and less than subtle shift[s]." *Id.* The Fourth Circuit's summation of *Blue* parallels the instant case:

> This case is not one of a district court sanctioning attorneys and their clients for forwarding novel legal claims. Rather, it is a case in which a district court imposed sanctions because the parties and counsel pressed on a massive scale insubstantial claims unsupported by any credible evidence. The parties were found not to have abandoned their frivolous claims until the very eve of trial, to have maintained plainly baseless suits, and to have perjured themselves on the witness stand, all in an effort to harass the defendant. Counsel was found to have shirked its responsibility to explore the factual bases for the clients' suits and to examine the materials obtained in discovery, instead charging forward with the litigation in disregard of its manifest lack of merit. Such conduct cannot be condoned.

914 F.2d at 550. Rider was "pulverized" on the most central of issues, such as his own bullhook use on elephants (FOF 16-18), his claimed emotional attachment to the "killer" "bitch" elephant Karen (FOF 73), and whether he "desired" to "visit" "his girls." FOF 66-69. Rider did not even truthfully answer questions on issues like his work history (*i.e.*, the reason he left working for CB-CB (FOF 2), the reason he left working for Raffo (FOF 19-20)) or the reasons he received written warnings while employed with FEI. FOF 10-11. Like *Blue*, Rider's allegations were "unsupported by any credible evidence." 914 F.2d at 550.

It was not just Rider who "maintained [a] plainly baseless suit[]." *Blue*, 914 F.2d at 550. The organizational plaintiffs' claims were legally and factually hollow from the start, which is why they hired Rider in the first place. *See supra*, at 18-19 & 25-26; *Am. Hosp. Ass'n*, 938 F.2d at 219-20 (bad faith includes "the filing of a frivolous complaint"); *Nepera Chemical, Inc. v. Sea-Land Serv., Inc.*, 794 F.2d 688, 702 (D.C. Cir. 1986) (bad faith to bring or maintain an unfounded suit). At trial, API had ***no*** evidence of its "injuries." FOF 102-03; COL 28, 31. Such an "absence of evidentiary support" ***at trial*** of an injury required to exist at the outset of litigation shows that the organizational claims were "known to be bogus from the beginning." *Lockary v. Kayfetz*, 974 F.2d 1166, 1175 (9th Cir. 1992).

Nor can plaintiffs or their counsel claim non-profit or "public interest" special treatment. The inherent authority sanction leveled in *Blue* stood against prominent civil rights attorneys. *See* 914 F.2d at 547; *see also Oliveri v. Thompson*, 803 F.2d 1265, 1280 (2d Cir. 1986) (rejecting argument that attorney handling unpopular civil rights claims should be given "special treatment" in the context of fee awards). "'***[S]tatus as a public interest law firm or the nature of a claim does not confer immunity from attorneys' fees for bringing and maintaining frivolous lawsuits***.'" *Lockary*, 974 F.2d at 1172 (emphasis added) (quoting *Avirgan v. Hull*, 932 F.2d 1572, 1582-83 (11th Cir. 1991)); *see also Lockary*, 974 F.2d at 1171 (non-profit's use of "the nominal plaintiffs [as] merely pawns or puppets" in its effort to create precedent merited sanctions). Accordingly, for all of the reasons stated above, plaintiffs' and counsel's conduct constituted bad faith, and an award of attorneys' fees is warranted.

C. The Court Should Sanction Counsel Pursuant to 28 U.S.C. § 1927

Counsel of record also should be sanctioned under 28 U.S.C. § 1927, which affords this Court discretion to sanction "[a]ny attorney … who [] multiplies the proceedings in any case unreasonable and vexatiously … ." *id.*; *U.S. v. Wallace*, 964 F.2d 1214, 1218 (D.C. Cir. 1992) ("Section 1927 recognizes by statute a court's power to assess attorney's fees against an attorney who frustrates the progress of judicial proceedings."). Conduct must be "at least reckless" to be sanctionable under § 1927. *Wallace*, 964 F.2d at 1217; *see also Healey v. Labgold*, 231 F. Supp. 2d 64, 68 (D.D.C. 2002) (recklessness under § 1927 "is less than the bad faith required to authorize a court's invocation of its inherent authority"). [36]

[36] The award should be made against MGC and attorneys Meyer, Ockene, Sanerib, Winders, Glitzenstein, Crystal, Lovvorn and Saltzburg, because all of them were listed as counsel of record for plaintiffs at least through the 2009 trial of this action where Rider's lies became crystal clear. *See* Civil Docket Sheet in No. 00-1641 and 03-2006. Furthermore, several of these lawyers participated in the Rider payments and the discovery misconduct about those payments detailed above, as well as the false and/or frivolous filings that were made with the courts. *See supra*, at 6-10, 13-19, 23-30, 34-39 & n.27 and *infra* 43-45; No. 00-1641, DE 1, 22; No. 03-2006, DE 1, 180, 181, 181-1, 297, 349; DX 16, 18-R, 19, 20-R, 37, 51, 53, 65, 67; Ex. 7 hereto. Moreover, counsel may be held jointly and severally

While proving "recklessness" is a "high threshold" that "requires deliberate action in the face of a known risk, the likelihood or impact of which the actor inexcusably underestimates or ignores," *Wallace*, 964 F.2d at 1219-20, that standard is met here. Counsel's conduct was not "unintended, inadvertent or [] negligent," and it certainly was "more than a mistake in professional judgment." *Huthnance v. Dist. of Columbia*, 793 F. Supp. 2d 177, 181 (D.D.C. 2011). It was "the kind of purposeful, intentional action" that is sanctionable under § 1927. *Healey*, 231 F. Supp. 2d at 68. Counsel "consciously [chose] a course of action," *Wallace*, 964 F. 2d at 1220, and multiplied the proceedings in this case.

"At its core, this was an opportunistic and attorney-driven lawsuit," and from the start, neither Rider nor the organizational plaintiffs had an actual "injury." *U.S. v. ITT Educ. Svs.*, 2012 U.S. Dist. LEXIS 40646, at *37 (D. Ind. Mar. 26, 2012). In preparing the complaint, counsel "fabricated testimony" and used a "deceptive style to mask [Rider's] shortcomings," which took FEI ***years*** to discover. *Avirgan*, 932 F.2d at 1582 (false statements were the "impetus" for two years of discovery); *cf. Alexander v. FBI*, 541 F. Supp. 2d 274, 305 (D.D.C. 2008) ("no evidence" that defendants or their counsel "knowingly submitted false testimony" or that they acted "with an intent to mislead [the] Court"); *Mona v. Hersh*, 1989 U.S. Dist. LEXIS 9651, at *4 (D.D.C. Aug. 15, 1989) ("no basis for believing the counsel … participated in a scheme to commit perjury or continued to prosecute the case knowing it to be totally lacking in merit"). While certain of Rider's allegations were false, others neither had nor were capable of evidentiary support. FOF 76, 18.4-18.5. The organizational standing arguments likewise were frivolous when made (FOF 101) and were without foundation. FOF 102-103; COL 28, 31. Circuit courts have affirmed § 1927 sanctions where, as here, counsel filed a complaint with

liable for the opposition's attorneys' fees as a § 1927 sanction. *Wilson-Simmons v. Lake Cty. Sheriff's Dept.*, 207 F.3d 818, 825 (6th Cir. 2000).

false and unsupported allegations. *Cf. Johnson v. Univ. of Rochester Med. Ctr.*, 642 F.3d 121, 124 & 126 (2d Cir. 2011) (counsel knowingly included a false accusation in amended complaint and knowingly and "relentlessly" pursued claims without basis in law or fact); *Footman v. Cheung*, 139 Fed. Appx. 144, 146 (11th Cir. 2005) (counsel, *inter alia*, filed an amended complaint that "contained false and unsupported allegations").

Rider's false, misleading and purchased allegations formed the "sole" basis for reinstatement of this case, FOF 53, and it follows that counsel's conduct "led to additional litigation …, the situation that 28 U.S.C. § 1927 is intended to address." *See Atkins v. Fischer*, 515 F. Supp. 2d 138, 142 (D.D.C. 2007). Indeed, the 500+ docket entries in No. 03-2006 ***would never have happened*** but for the fraud perpetrated on the courts as to Rider's standing and is, *per se*, an unreasonable and vexatious multiplication of proceedings. Where, as here, a "misrepresentation is responsible for preserving an otherwise meritless suit," such a "factual misrepresentation can form the basis for a punitive award." *Tuf-Flex Glass v. NLRB*, 715 F.2d 291, 298 (7th Cir. 1983); *see also Wang v. Gordon & Inland Real Estate Corp.*, 715 F.2d 1187, 1190 (7th Cir. 1983) (fee award affirmed where plaintiff's complaints "were attempts to manufacture federal claims … where plaintiff knew or should have known that none existed").

Not only did counsel bring fraudulent (Rider) and frivolous (API) claims, they doggedly pursued them for more than eleven years. In discovery it became patently obvious that Rider had no credibility. *See supra*, at 10-13; Ex. 10. But counsel did not withdraw Rider's claims. Instead, they engaged in various (unsuccessful) attempts to save this case, such as adding additional plaintiffs ***after*** this court entered summary judgment, and moving for preliminary

injunctive relief on ***one*** issue (chaining) eight years after the case was filed.[37] When none of these worked, counsel continued on with Rider's and the organizational plaintiffs' claims to trial. Counsel filed an absurd motion to exclude ASPCA, AWI, and FFA/HSUS as witnesses, and shortly thereafter, those plaintiffs abandoned their claims. FOF 100. API's cross-examination at trial revealed that API could not answer fundamental questions about how it was allegedly "injured," prompting the Court, *sua sponte* that very day, to order briefing on API's standing. Minute Order (2-19-09). And, during the Rule 52(c) argument, the Court made it abundantly clear that Rider's credibility was shot. 2-26-09 p.m. at 85:13-16 & 90:23-91:04. Even with these red banners, counsel kept on, forcing FEI to proceed with its case and two more weeks of trial. At the conclusion of FEI's case, at closing argument, counsel dropped the only remaining form of relief that could have redressed Rider's claimed injury: an injunction. COL 12-13. Whatever the reason for this maneuver, at this point it was abundantly clear that Rider's "injury" could not be redressed by declaratory relief, but counsel ***still*** did not drop Rider as a plaintiff. Extensive post-trial briefing and an appeal to the D.C. Circuit followed. At each and every step of the way counsel had an opportunity to drop either Rider or API or both (and put an end to FEI's mounting legal expenses). Yet they did not. Instead, they embraced Rider's lies and API's meritless and hollow allegations, which, at a minimum, "reflect[s] a reckless indifference to the merits of a claim," *Reliance Ins. Co. v. Sweeney*, 792 F.2d 1137, 1138 (D.C. Cir. 1986), and is sanctionable. *Hilton Hotels Corp. v. Banov*, 899 F.2d 40, 45 n.9 (D.C. Cir. 1990) (§ 1927 sanctions follow when attorney "acts in bad faith to continue nonmeritorious litigation."); *see also Cruz v. Savage*, 896 F.2d 626, 634 (1st Cir. 1990) ("[There] is a point beyond which zeal

[37] Ironically, while plaintiffs' and counsel sought "emergency" relief on chaining in May 2008, in final argument, when asked what relief her clients were seeking, counsel ordered her requests as follows: (1) declaratory relief on the use of the bullhook; ***(2) attorneys' fees***; and (3) "and then" relief on chaining. 3-18-09 a m. 14:24-15:24.

becomes vexation, the 'novel' approach to a legal issue converts to frivolity and steadfast adherence to a position transforms to obdurateness.").

This is one of the few instances[38] where counsel engaged in a "serious and studied disregard for the orderly process of justice," making their conduct sanctionable. *Huthnance*, 793 F. Supp. 2d at 180 (quotation omitted). Where, as here, counsel's "unreasonable and vexatious conduct began with the filing of the complaint and persisted throughout the pendency of the case," an award of fees encompassing the entire litigation is appropriate. *Ridder v. City of Springfield*, 109 F.3d 288, 299 (6th Cir. 1997).

III. CONCLUSION

For the reasons set forth herein, FEI's motion should be granted.

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Respectfully submitted,

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[38] Conduct previously sanctioned in this circuit under § 1927 actually is less egregious than the instant case (*ex parte* action filed in state court without disclosing related pending federal court action, *Laprade v. Kidder Peabody*, 147 F.3d 899 (D.C. Cir. 1998); "repeated[]" actions with no intention of pursuing case, requiring defendant to spend time and money, *Fritz v. Honda Motor Co.*, 818 F.2d 924 (D.C. Cir. 1987); re-filing a claim already adjudicated in another court, *McLaughlin v. Bradlee*, 803 F.3d 1197 (D.C. Cir. 1986); identifying no disputed facts in appeal of summary judgment order, *Reliance*, 792 F.2d at 1138-39; moving to quash the production of documents which counsel and his client already agreed to produce, and filing a motion contrary to prevailing precedent, *Robertson v. Cartinhour*, 711 F. Supp. 2d 136 (D.D.C. 2010); and, failing to appear for a scheduled trial date, *Morrison v. Int'l Programs Consortium*, 240 F. Supp. 2d 53, 58 (D.D.C. 2003)).