UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS, *et al.*,	)	
Plaintiffs,	)	
v.	)	Case No. 1:03-cv-02006 (EGS/JMF)
RINGLING BROS. AND BARNUM & BAILEY CIRCUS, *et al.*,	)	
Defendants.	)	

REPLY IN SUPPORT OF DEFENDANT FELD ENTERTAINMENT, INC.'S MOTION TO COMPEL TESTIMONY OF PLAINTIFF TOM EUGENE RIDER AND FOR COSTS AND FEES

Defendant Feld Entertainment, Inc. ("FEI" or "defendant") hereby replies to Plaintiff Tom Rider's Opposition to Defendants' [sic] Motion to Compel (Nov. 13, 2006) ("Pl. Opp.").

INTRODUCTION

After obstructing Mr. Rider's testimony at deposition, invoking the extreme measure of instructing him not to answer, and then coaching him after-the-fact on what to say while those very questions are pending for Court resolution, plaintiffs' excuse for their sanctionable conduct is that they thought FEI was kidding when it cross-examined Mr. Rider. *See* Pl. Opp. at 3. Plaintiffs' opposition is outrageous. It demonstrates that plaintiffs have deliberately flouted the Federal Rules of Civil Procedure in order to frustrate FEI's cross-examination of Rider and that plaintiffs should be sanctioned for their obstructionist tactics. Plaintiffs admit that none of the questions posed to Rider in his deposition, and which are at issue here, implicated a privilege or transgressed any prior limitation on discovery directed by the Court. Nor can plaintiffs dispute the point

that the information at issue – Rider's military service record, his criminal record and whether he has been a party to prior civil litigation – are matters of public record. Plaintiffs likewise ***cite nothing*** to support their claim that matters of public record are properly placed under a protective order or that it was an appropriate tactic for plaintiffs to impede FEI's questioning by insisting upon such a protective order.

Thus, on October 30, 2006, when FEI moved to compel, plaintiffs were in bare default under Fed. R. Civ. P. 30. They had obstructed a purported "preservation" deposition by instructing a witness not to answer questions, which is an extraordinary disruption of any opposing party's examination[1] that is allowed under Rule 30 in only very limited conditions, and which conditions plaintiffs did not come close to satisfying. Rule 30 commands that "[a]ll objections . . . shall be noted by the officer upon the record of the deposition; ***but the examination shall proceed, with the testimony being taken subject to the objections.***" Fed. R. Civ. P. 30(c) (emphasis added). The only exceptions to this overarching rule of disclosure are the narrow grounds in Rule 30(d)(1) for instructions not to answer to (1) "preserve a privilege" (no privilege has ever been asserted); (2) to "enforce a limitation directed by the Court" (there is none); or (3) "to present a motion under Rule 30(d)(4)" by suspending the deposition (plaintiffs neither suspended the deposition nor made any statement at the time of the instructions of any intent to file a Rule 30(b)(4) motion). Indeed, by the time FEI filed its motion to compel, plaintiffs had had ample time – nearly three weeks – in which to file a motion for protective order. But they had not done so. These facts, none of which are disputed,

[1] *See* 1993 ADVISORY COMMITTEE NOTE TO FED R. CIV. P. 30 ("Directions to a deponent not to answer a question can be even more disruptive than objections. The [1993 amendment to Rule 30(d)] prohibits such directions except in the three circumstances indicated: to claim a privilege or protection against disclosure (*e.g.*, as work product), to enforce a court directive limiting the scope or length of permissible discovery, or to suspend a deposition to enable presentation of a motion under paragraph (3) [now paragraph (4)]").

provide more than an ample basis for the Court to find a violation of Rule 30 and to grant the relief that FEI has sought.

Of course, plaintiffs have now filed a motion for protective order on behalf of Rider. However, that motion came only ***after*** plaintiffs' attempts to string this matter out through an endless exchange of correspondence, including an inappropriate effort to negotiate the terms of how, if ever, Mr. Rider would respond ***after*** his counsel had coached him, and ***after*** FEI had shouldered the unnecessary burden of a motion to compel Rider to answer these deposition questions. It is crystal clear that if FEI had not taken the initiative to bring this matter to the Court's attention, FEI would still be waiting for a motion for protective order by plaintiffs. This scenario – stymieing a deposition with instructions not to answer – is why Rule 30(d) sharply curtails the grounds for such instructions ***and*** places the burden on the instructing party to seek relief from the Court -- a burden that plaintiffs pretend does not exist for them. *See* Pl. Opp. at 3-4 (claiming surprise that defense counsel requested when plaintiffs would be filing for protective order because defense counsel did not "clarify" for plaintiffs at the deposition that "they would nevertheless insist that Mr. Rider provide all of this information").

Furthermore, by failing to file a motion for protective order until prodded by FEI's motion to compel, plaintiffs should be deemed to have waived any basis that they otherwise may have had for avoiding answering the questions that have been posed to Rider. *In re Stratosphere Corp. Securities Litigation*, 182 F.R.D. 614, 619 (D. Nev. 1998) ("If such a judicial determination is not sought, this Court will presume that there were not sufficient grounds for the objection and instruction not to answer, or the termination of the deposition, and that the action was undertaken merely to obstruct the

discovery process."). And as demonstrated below, plaintiffs have no legitimate basis for the instructions not to answer that were given, which is presumably why they sought to avoid bringing the matter to the Court's attention as required by Fed.R.Civ.P. 30(d)(4).

ARGUMENT

I. FEI PROCEEDED IN GOOD FAITH AND IN COMPLIANCE WITH THE APPLICABLE RULES

Plaintiffs' assertion that FEI's motion to compel did not include the "certification" required by Rule 37(a)(2), *see* Pl. Opp. at 7, is baseless. Plaintiffs' counsel made the drastic decision at the deposition to give instructions that interfered with the testimony and obstructed the witness's answers. Once made, the damage is done – the flow of the deposition is impeded and the risk that the counsel, rather than the witness, will answer is presented. And the Rules are clear that if plaintiffs are going to invoke them, then they have an obligation to immediately seek a protective order. FEI brought this point to plaintiffs' attention in correspondence. The motion laid out in plain detail the efforts that were properly undertaken by FEI's counsel to obtain compliance with the Federal Rules.[2] If anything, the record amply demonstrates plaintiffs' inappropriate obstructionist tactics and *post hoc* efforts to delay and negotiate special terms by which Mr. Rider could provide testimony.

It should be recalled that the Rider deposition was a deposition that ***plaintiffs*** themselves noticed, out of the blue, before fact discovery had been completed in this case and, indeed, before many significant issues about Rider's own document production and other discovery defaults had been resolved. *See* Defendant's Objections to Plaintiffs'

[2] *See* Statement of Points and Authorities in Support of Defendant Feld Entertainment, Inc.'s Motion to Compel Testimony of Plaintiff Tom Eugene Rider and for Costs and Fees at 3-4 (Oct. 30, 2006) ("FEI Mem.").

"Preservation" Deposition of Plaintiff Tom Rider (Oct. 11, 2006) (Ex. A to Pl. Opp.).[3] Furthermore, plaintiffs maintained at the time, and since, that this deposition was "an effort to preserve Mr. Rider's eye-witness testimony for trial in this case . . . ." *See* Pl. Opp. at 2. Thus, for reasons that remain a mystery, plaintiffs' counsel proposed to take a deposition of their own client for use at trial.[4] By the same token, FEI was entitled, as any other defendant in a civil case is entitled, to conduct a trial cross-examination of the witness.

However, that cross examination was precipitously interrupted by instructions from plaintiffs' counsel to Rider not to answer questions – not on grounds of privilege, not on the basis of prior Court limitations and not to suspend the deposition to move for a protective order. Instead, the instructions were on grounds of purported lack of "relevance." Alleged lack of relevance is *per se* an improper objection in a deposition, let alone a basis for instructing a witness not to answer. *Compare* Fed. R. Civ. P. 30 (testimony shall be taken "subject to the objections") *with* Fed. R. Civ. P. 32(d)(3) ("[o]bjections to . . . relevancy . . . are not waived by failure to make them before or during the taking of the deposition . . ."). By making such objections and instructions, counsel truncated and interfered with the cross examination. At a trial, such interference

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[3] FEI intends shortly to address Rider's and the other plaintiffs' multiple failures to comply with FEI document requests.

[4] It turns out that the assertion that Rider needed to be deposed by plaintiffs for trial "preservation" purposes is highly suspect. Fed. R. Civ. P. 32(a)(3) permits a plaintiff to use his own deposition at trial but only if the plaintiff is either dead, more than 100 miles from the courthouse, unable to testify due to age, illness, infirmity or imprisonment, unwilling to accept a trial subpoena or under other extraordinary circumstances. Plaintiffs' counsel made no effort whatsoever in the deposition to lay the foundation for use of Rider's deposition at trial, which, of course, would be indispensable if the deposition were ever offered for that purpose. *See generally* Deposition of Tom E. Rider (Oct. 12, 2006). Indeed, on cross-examination, Rider admitted than ***none*** of the grounds for use by plaintiffs of his deposition at trial under Rule 32(a)(3) exist or are likely to exist in the next two years and that he is ready, willing and able to testify live. *Id.* at 118-22. Thus, the unorthodox attempt by plaintiffs to take their own deposition of Rider for "preservation" purposes was itself a total waste of time and resources and borders on bad faith.

would be avoided or minimized significantly because the Court would rule immediately on the objections. Here, however, no such ruling was possible and counsel was able to block what was supposed to be the trial cross of the witness with a tactic that would never have succeeded had the witness testified live at trial.

For this reason, FEI did not have the luxury of waiting the alleged undefined "few weeks" that plaintiffs' counsel claimed it would take to get her motion for protective order on file. The trial cross examination of this witness remains open and incomplete (even assuming that this deposition is even proper for use at trial). According to plaintiffs, the witness presumably could become "unavailable" at any time – ergo, the only litigation need for a "preservation" deposition in the first place. In such case, however, Rider's cross examination would remain unfinished.

Furthermore, if, as plaintiffs claim, this was a "preservation" deposition for trial, then the witness is, in effect, still on the stand, *and questions remain pending but unanswered.* The law in this district is established and clear that communications between witness and counsel regarding the testimony are not to occur during the course of such testimony. *See Minebea Co. Ltd. v. Papst*, 355 F.Supp.2d 526, 527 n.1 (D.D.C. 2005) (court instructed counsel and witnesses (1) not to engage in conferences during depositions, breaks or recesses, and (2) "once a deposition begins, the witness and the witness's counsel do not have the right to discuss documents privately before the witness answers questions about them"); *Minebea Co. Ltd. v. Papst*, 374 F.Supp.2d 231, 236 n.4 (D.D.C. 2005) ("It should go without saying that *no* lawyer in this civil case (including in-house counsel) or a lawyer's agent or employee may talk to any witness *during* his or her testimony – including during recesses, lunch breaks and overnight recesses.")

(emphasis in original); *U.S. v. McLaughlin*, 955 F.Supp. 132, 134-35 (D.D.C. 1997) (Sixth Amendment provides absolute right to consultation with lawyer *before* testimony begins; no such right exists to interrupt testimony to confer with counsel) (*quoting Perry v. Leeke*, 488 U.S. 272, 281-84 (1989)), *aff'd in part*, 164 F.3d 1 (D.C. Cir. 1998); *U.S. v. Philip Morris Inc.*, 212 F.R.D. 418, 420 (2002) (during deposition consultation with counsel appropriate only for issues of privilege). The purpose of the rule is to ensure that the witness is not coached, and that it is the witness, not counsel, who testifies. *Philip Morris*, 212 F.R.D. at 420 (citing *Hall v. Clifton Precision*, 150 F.R.D. 525, 529 (E.D. Pa. 1993)).

> There is no proper need for the witness's own lawyer to act as an intermediary, interpreting questions, deciding which questions the witness should answer, and helping the witness to formulate answers.
> ...
> To allow private conferences initiated by the witness would be to allow the witness to listen to the question, ask his or her lawyer for the answer, and then parrot the lawyer's response. Again, this is not what depositions are all about – or, at least, it is not what they are supposed to be all about. If the witness does not understand the question, or needs some language further defined or some documents further explained, the witness can ask the deposing lawyer to clarify or further explain the question. After all, the lawyer who asked the question is in a better position to explain the question than is the witness's own lawyer. There is simply no qualitative distinction between private conferences initiated by a lawyer and those initiated by a witness. Neither should occur.

Hall v. Clifton Precision, 150 F.R.D. 525, 528-29 (E.D. Pa. 1993). At no time during the deposition did Rider ever claim confusion or ask for clarification as to what "civil litigation" meant. Instead, he answered the question by providing information about yet another previously undisclosed lawsuit in which he participated. *See* FEI Mem., Ex. A at 164:9-166:4.

While unanswered questions remain pending and before the Court has ruled on the matter, Mr. Rider and his counsel have brazenly discussed his after-the-fact explanation as to why he has yet another answer for how many cases he has been a party to. *See In re Stratosphere*, 182 F.R.D. at 621 ("When there is a question pending, neither the deponent nor his or her counsel may initiate the interruption of the proceeding to confer about the question, the answer, or about any document that is being examined, except to assert a claim of privilege (conform to a court order or seek a protective order)."). He has submitted a declaration purporting to answer one of the questions that he refused to answer at his deposition (*i.e.*, why he falsely answered the interrogatory asking him to list all civil cases he had been a party to). Ex. G to Pl. Opp.[5] This is outrageous. It is inconceivable that this declaration came about without Rider consulting with his lawyers about his pending, unanswered "trial" testimony. Plaintiffs' counsel were reminded of their obligation not to confer with Mr. Rider regarding the matters on which they had instructed him not to answer, and they blatantly ignored the warning. Ex. E to Pl. Opp. ("We further remind you that until this matter is concluded, Mr. Rider is not to be consulted regarding his testimony"). By conferring with Mr. Rider before the Court could resolve the matter, plaintiffs' counsel have tampered with his testimony. They should be sanctioned for doing so. *American Directory Service Agency, Inc. v. Beam*, 131 F.R.D. 15, 19 (D.D.C. 1990) (counsel personally sanctioned for instructions not to answer). Thus, FEI was entirely justified in promptly bringing this matter to the Court's attention rather than following the leisurely schedule suggested by plaintiffs. There is no

[5] The submission of the declaration itself is an issue separate and distinct from the fact that the explanation offered "I did not understand what civil litigation meant" makes no sense and is completely at odds with Mr. Rider's prior testimony and sworn interrogatory responses.

way of telling how much more of the testimony that counsel instructed Mr. Rider not to answer has now been discussed with him.

Plaintiffs claim that, because Rider made similarly frivolous objections to FEI's interrogatories, plaintiffs were somehow entitled to believe that FEI "had accepted Mr. Rider's position on those matters." Pl. Opp. at 3. A frivolous objection does not become meritorious through the passage of time. FEI had no obligation to expend resources on a motion to compel interrogatory answers before asking such questions at deposition. Indeed, Rule 26(d) specifically provides that "methods of discovery may be used in any sequence," so it was entirely appropriate for FEI to get to the heart of the matter by bringing these matters up in Mr. Rider's deposition rather than wasting time with a motion to compel answers to interrogatories.

Furthermore, the fact that FEI's prior counsel apparently acquiesced in the improper refusal by a prior witness (Mr. Hagan) to answer deposition questions, *see* Pl. Opp. at 10-11, proves nothing helpful to plaintiffs. It is clear that Hagan's refusals to answer were improper under Rule 30(d) because no privilege or prior judicial limit was involved, and there is nothing to indicate that counsel for Hagan suspended the deposition for purposes of seeking a protective order.[6] *See* Ex. F to Pl. Opp. In fact, the record in this case indicates that no such motion was ever filed by Hagan. Obviously Hagan's violations of Rule 30(d) in no way legitimize Rider's violations. Ironically, the Hagan

[6] Indeed, while present counsel for FEI did not attend the deposition of Mr. Hagan, the excerpts attached by plaintiffs amply demonstrate the appalling nature of Ms. Jochen's conduct during Hagan's deposition. Even in the limited quotes provided, Ms. Jochen made speaking objections and repeated frivolous instructions not to answer. Plaintiffs' logic that because Ms. Jochen shirked her responsibilities under the rules, so should they, is obviously flawed. Moreover, if Ms. Jochen is the model for plaintiffs' counsel's behavior, then it should likewise be noted that when counsel for FEI offered to take the testimony under protective order, that was flatly refused as well. *See* Ex. F to Pl. Opp. at 124:21-25. Now we are all supposed to believe that plaintiffs counsel has undergone a change of heart, and while they made no offer to give testimony under protective order during the deposition, will do so now that they have had the opportunity to coach the witness.

deposition shows the potential futility of the approach that plaintiffs espouse. Hagan refused to answer the questions even though defense counsel offered to put the answers under protective order, and then Hagan's lawyer never filed a motion for protective order of his own. In the meantime, Hagan died, so the questions will never be answered. FEI's current counsel chose not to risk a similar result with Rider who was appearing to preserve his testimony.

In short, FEI has proceeded entirely in good faith and has "narrow[ed] the areas of disagreement" to the extent that they are susceptible of being narrowed. Local Rule 7(m). FEI's counsel had no obligation at the deposition or thereafter to explain why the questions to Rider were relevant because, apart from the obvious fact that they are relevant on their face (*see* pp. 15-17, *infra*), relevance is not a basis upon which a witness can be instructed not to answer a deposition question. Nor did FEI's counsel have any obligation to debate counsel's duties under the Federal Rules or to remind counsel of those duties. Rider was represented at the deposition by a lawyer licensed to practice in the District of Columbia with more than 30 years experience. When his lawyer instructed him not to answer on any basis other than privilege or Court order, it was incumbent upon her pursuant to Rule 30(d)(4) to suspend the deposition and move for a protective order. She was either unaware of that rule or chose not to follow it. She did so at her peril.

The proper procedure was for the objections to be noted and the questions answered. Rider and his counsel did not do that. If plaintiffs' counsel truly believed that Rider was being "harassed" by questions to him based on public records, then the proper procedure was to instruct the witness not to answer and then suspend the deposition to

move for a protective order. Rider and his lawyer did not do that either, and indeed, evinced no awareness of such a procedure. If there were a genuine interest in answering the questions under temporary protective agreement so that the Court could sort matters out (as plaintiffs now belatedly argue they are interested in), then that should have been proffered by plaintiffs at the time the questions were posed. Rider and his counsel did not do that either. Instead, they simply blocked the questioning in its entirety. None of plaintiffs' *post hoc* efforts to justify this conduct with offers of a "voluntary protective order" and so forth pass muster. More importantly, none of these measures would even have been suggested if Rider and his counsel had not been called out by FEI – which FEI never had the burden of doing in the first place. Rider's and his lawyer's actions are an absolute violation of Rule 30(d) and are sanctionable. No amount of conferring or letter-writing will change it, undo it or narrow it down further.

II. THERE WAS NO REASON TO PLACE ANY OF RIDER'S ANSWERS UNDER A PROTECTIVE ORDER

Plaintiffs suggest that FEI refused to enter into a protective order for Rider's answers in order to "'punish' plaintiffs for refusing to agree to a 'global protective order' for all discovery that defendants had proposed, but the Court had denied." Pl. Opp. at 8 (original emphasis). This is nonsense. All that FEI's counsel's letter did was to remind plaintiffs that ***they*** had established, that, with few exceptions, this matter will be litigated in full public view. Indeed, counsel for plaintiffs have repeatedly stressed this during hearings before the Court. *See* Hearing Tr. at 30:1-13 (9/16/05) (Meyer stating that plaintiffs should not have to litigate this case in secret, the presumption is open proceedings, and good cause must be shown for a protective order). FEI is not seeking to "punish" plaintiffs for anything. FEI's current counsel is simply litigating this case in the

manner in which they found it, *i.e.*, in full public view. There is nothing that exempts Rider from this principle, particularly when the lines of inquiry are matters of public record.

FEI refused to agree to a protective order for Rider's answers to deposition questioning because there is no legal basis for one in these circumstances. As engineered by plaintiffs' counsel, this was not a discovery deposition but, instead, purportedly a "preservation" deposition that would memorialize Rider's ***trial*** testimony. No trial of this case (if there is one) will be held in secret or under some kind of protective order. So nothing that would come out on any cross-examination of Rider at trial would be secret either.

Moreover, all of the questions that Mr. Rider refused to answer were based on publicly available materials. The questions concerning the facts that Rider deserted the Armed Forces of the United States on multiple occasions and was apparently incarcerated as a result were based on information obtained from the United States Government under the Freedom of Information Act. *See* FEI Mem., Ex. F. Plaintiffs cite no authority for the proposition that information in the public domain and accessible under FOIA is properly placed under protective order pursuant to Fed. R. Civ. P. 26(c).

Similarly, the questions posed about Mr. Rider having been a party to prior civil litigation were based upon publicly available court records. *See* FEI Mem., Ex. G. Plaintiffs cite no authority for the proposition that information available to the public in freely accessible court files is properly placed under protective order pursuant to Fed. R. Civ. P. 26(c). Moreover, plaintiffs offer no evidence that any part of the custody cases

was ever placed under seal by the Florida or Illinois courts, so there would be no basis for any protective order in this case for such pleadings.

In any event, Rider waived any purported "privacy" objection to his civil litigation history when he failed to object to the interrogatory that requested such information. Instead of the objection his counsel now makes, Rider simply answered the interrogatory falsely without qualification. FEI Mem., Ex. E at pp. 13-14 (Response to Interrogatory No. 7). Plaintiffs claim that defendant has not explained why the "substance of Mr. Rider's 15-year old marital disputes . . . [is] relevant." Pl. Opp. at 8. However, the questions posed to Mr. Rider were simply whether he had been a party to the case. Plaintiffs' counsel did not even let him answer that foundational question, and hence, no questions about substance were ever posed. *See* Rider Dep. at 165-66 ("Q The question is, were you a party, not what it was about. Were you a party to such a case? MS. MEYER: I am going to object and instruct you not to answer").[7]

Having been caught making a false statement under oath, Rider now tries to explain why he omitted from his interrogatory answer the domestic relations cases that FEI independently found. According to Rider, "I am not a lawyer and did not realize that filings in court concerning marital disputes are 'civil litigation.'" Pl. Opp., Ex. G, ¶ 4. This *post hoc* rationalization has no weight. It has been made unilaterally without cross-examination, indeed after cross has been improperly blocked. It also is obviously the product of improper coaching of a witness who, due to plaintiffs' tactics, is still

[7] This is not to say that the subject matter of the prior cases in which Rider was involved would not be relevant. In his motion for protective order, Rider cites several cases to the effect that evidence about "domestic violence" would not be admissible here, thereby clearly suggesting that the prior custody cases did involve claims of domestic violence. Rider's Motion for Protective Order at 10-11 (11/13/06). If so, such facts would be highly relevant to Rider's credibility, standing to sue and clean hands in this litigation. To say the least, a man who engages in domestic violence is in no position to comment about alleged elephant abuse.

effectively on the stand. Beyond that, the answer is simply incredible. While Rider now claims that he does not understand what "civil litigation" means, he had no problem with that concept before. In response to Interrogatory No. 7, which asked for an identification of all civil litigation to which Rider had been a party, Rider answered that, other than the present Endangered Species Act case, "I have not been a party to or testified in any other ***civil litigation.***" FEI Mem., Ex. E at 14 (emphasis added). Rider claims that he wrote these answers himself, FEI Mem., Ex. A at 154-55, so the words, "civil litigation," in his interrogatory answer are Rider's own words. And he used them without any objection that he did not understand what those terms meant. Rider would have us now believe that he really does not know what "civil litigation" means after all.

Moreover, when asked in his deposition whether his interrogatory answer was a "true statement," Rider immediately volunteered a personal injury case that he had been a party to (but had not disclosed), stating that that was the only one that he could "recall." *Id.* at 165. Again, there was no objection to what the words "civil litigation" meant. It was only when the public filings from the custody case were exhibited – further demonstrating the falsity of not only his interrogatory answer but also his just-given deposition testimony – that an objection was made and the witness instructed not to answer. *Id.* at 165-66.

Nor was there any basis to put answers about Mr. Rider's apparent criminal past under protective order. It was clear that Mr. Rider was trying to conceal something in his interrogatory answers, for in response to the question whether he had ever been arrested for, charged with or convicted of a crime, he objected on grounds of "privacy" and being "vexed" but nonetheless answered that he had "never been convicted of a felony." FEI

Mem., Ex. E at 13 (Response to Interrogatory No. 6). If as plaintiffs maintain, this line of questioning should only have been undertaken pursuant to protective order, then why did Rider provide ***any*** information in response to the interrogatory? Instead, he decided to pick and choose – to volunteer what he considered helpful to himself but to hide what was not. However, by answering the question in part, Rider opened the door to the entire subject matter. Furthermore, Rider has submitted no evidence that prior felony charges against him and misdemeanor convictions (and there appears to be evidence in both categories) are matters that are secret or not in the public domain. There is no basis for putting any of this under a protective order, and FEI was perfectly justified in not acceding to Rider's after-the-fact demand that his peccadilloes be hidden from public view.

III. THE QUESTIONS POSED TO MR. RIDER ARE HIGHLY RELEVANT TO THIS CASE

Rider is the only plaintiff whom the D.C. Circuit has found has standing to sue in this case. FEI Mem. at 9-10. He is the only witness that plaintiffs have ever identified who purportedly witnessed any "abuse" of FEI's elephants. *Id.* And Rider is touted by plaintiffs as their public spokesman as he travels the country on plaintiffs' payroll agitating against elephants in the circus before various legislatures and other fora. Thus, Rider's credibility as a witness is critical. And his virtual celebrity status among animal rights activists makes claims about his "privacy" hollow. *See Bartnicki v. Vopper*, 532 U.S. 514, 534 (2001) ("One of the costs associated with participation in public affairs is an attendent loss of privacy."); *Wolf v. Regardie*, 553 A.2d 1213, 1218 (D.C. App. 1989) ("Similarly, it is hardly persuasive to argue that appellant's seclusion is somehow intruded upon by a person's consultation of public records concerning him.").

Based on what has already been revealed in his deposition, Rider's ability to tell the truth is highly suspect. He admitted in his deposition that he worked for at least three different circus organizations over a period of more than three years, continuously witnessing what he now claims was elephant abuse, but he likewise admitted that he never complained to anyone in a position of authority who could have done something about such alleged abuse. *See* Ex. J, Rider Dep. at 175:19-182:17; 194:7-198:9; 257:5-264:17.[8] Indeed, he allegedly quit two circus jobs over alleged elephant abuse only to accept, each time, employment with another circus that also allegedly abused elephants. *Id.* It was only after he apparently discovered that he could make a living from animal rights activists by telling his purported story that Rider began to champion the cause of the elephants. *Id.* at 198:10-22; 203:20-205:12. Thus, he became a compensated spokesman for plaintiffs as well as a paid plaintiff in this case. He has no job or income other than what he gets from plaintiffs' counsel to do their bidding, funneled as "grants" through a shell organization owned and operated by plaintiffs' counsel. *Id.* at 123:1-125:11. And to top it off, Rider has not filed an income tax return since 1998 even though he has received close to $100,000 in what he admits was "non-employee compensation" from either plaintiffs or their counsel since 2002. *Id.* at 125:12-129:2; 148:12-152:9.

All of these matters bear on Rider's credibility, and the questions that he refused to answer are all similarly germane. That Rider deserted the army and evidently went to jail as a result, is relevant, not only because he submitted a false interrogatory answer on those subjects in this case in 2004, but also because the acts themselves, like his apparent

[8] Exhibits A through I were attached to FEI's Motion to Compel Rider's Testimony (10/30/06).

income tax evasion, demonstrate a person of low or non-existent honesty. Desertion is not honest conduct; nor is deliberately failing to file income tax returns.

That Rider failed to disclose his complete civil litigation history thereby providing a half-truth is relevant, not only because he falsified it in his interrogatory answer, but also because FEI is entitled to probe that history, just as plaintiffs have probed the history of FEI witnesses, for information that could lead to admissible evidence. By just asking the question – "is your interrogatory answer true?" – FEI discovered yet another case that it did not know about. How many more are there?

Finally, FEI is entitled to probe Rider's entire criminal history, not simply the part that Rider chooses to disclose, whether or not each and every part of that history is admissible. Admissibility is not the standard; relevancy is. Crimes involving dishonesty and the like are obviously relevant to Rider's capacity for telling the truth. Crimes of violence also would be pertinent in assessing the *bona fides* of someone who professes to be against the abuse of animals.

Plaintiffs have obstructed the testimony of their key witness, sought to avoid their obligation to seek protection from the court, and tampered with the testimony on open, unanswered questions. Not surprisingly they present no caselaw to justify their sanctionable conduct, but quite surprisingly have the audacity to ask this Court for their own costs and fees. Litigation is not a game for plaintiffs to play as they see fit. There are consequences for behaving in such an outrageous manner. *See* Fed.R.Civ.P. 37(a)(4).

WHEREFORE, defendant respectfully requests that its motion be granted.

Respectfully Submitted,

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