UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

MOTION TO COMPEL DISCOVERY FROM PLAINTIFF TOM RIDER AND FOR SANCTIONS, INCLUDING DISMISSAL

Pursuant to Federal Rules of Civil Procedure 26(g), 37(a), 41(b) and the Court's inherent authority, Feld Entertainment, Inc. ("FEI") hereby moves this Court for an order compelling Plaintiff Rider to produce to FEI:

- all responsive documents within his possession, custody, or control, including, but not limited to documents in the files of the Wildlife Advocacy Project ("WAP"), his attorneys, or the other plaintiffs;
- a sworn declaration identifying any responsive documents that were once in Rider's possession (since July 11, 2000) but that have since been discarded, destroyed, or given to any other person(s) or otherwise not produced, together with a description of each such document and an explanation as to why it was discarded, destroyed, spoliated or otherwise disposed of;

- all responsive documents and information concerning his income and payments from other animal advocates or animal advocacy organizations, including, but not limited to, WAP and the other plaintiffs;
- all responsive documents and information concerning communications with other animal advocates, including, but not limited to, (a) communications between Rider, the other plaintiffs, and outside counsel except those protected by the attorney-client privilege and/or work product doctrines as applied in this Circuit, (b) all communications between Rider and the other plaintiffs at which outside counsel were not present, (c) all communications withheld thus far by Rider on alleged First Amendment grounds, and (d) all communications between Rider and WAP;
- a precise identification of any documents (by bates number) produced by him or his co-plaintiffs that are incorporated by reference in his response to Interrogatories 5, 11, 13, 17, and 19 and Document Requests 2, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 22, 23, 25, 26, 27, 28, 29, 30, 31, and 33;
- a privilege log containing individual entries for each and every document withheld on the basis of an alleged privilege, the authors and recipients as indicated on each such document; and a description of the contents sufficient to adequately assess the claim for privilege; and
- complete and truthful answers to Interrogatories 2, 4, 7, and 24.

As set forth more fully in its brief in support hereof, filed contemporaneously, FEI explains the pattern of discovery misconduct that Rider has engaged in during the course of this litigation. Rider has committed perjury in his interrogatory responses, he has spoliated evidence for years while this litigation was ongoing, he has failed to produce, log or otherwise disclose

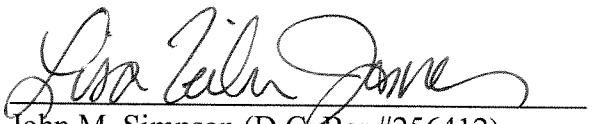
evidence responsive to FEI's written discovery requests, and he has provided a privilege log that is worthless. FEI has presented in its brief clear and convincing evidence which demonstrates that the misconduct at issue was willful and rises to the level of fraud on FEI and the Court. The deceit that has occurred pervasively tainted pretrial discovery, and it warrants dismissal of Rider and his claims from this lawsuit. FEI also moves this Court for its costs and fees incurred in having to bring this matter to the Court's attention. A proposed form of order is attached along with an index of exhibits.

CERTIFICATE OF CONFERENCE

Counsel for FEI hereby certify pursuant to LCvR 7.1(m) that they have conferred in good faith with opposing counsel through the exchange of correspondence (attached as exhibits to the memorandum filed in support hereof) and by meeting in person with them. Notwithstanding these good faith efforts, the parties were unable to resolve their differences, and plaintiffs do not consent to the relief requested.

Dated this 20th day of March, 2007.

Respectfully submitted,



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UNITED STATES DISTRICT COURT
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Plaintiffs,	:	
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RINGLING BROS. AND BARNUM & BAILEY CIRCUS, et al.,	:	
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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF FEI'S MOTION TO COMPEL DISCOVERY FROM PLAINTIFF TOM RIDER AND FOR SANCTIONS, INCLUDING DISMISSAL

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TABLE OF CONTENTS

INTRODUCTION

For years plaintiffs repeatedly have represented to this Court and to Feld Entertainment, Inc. ("FEI") that their discovery responses are models of perfection. Just six months after Tom Rider submitted his written discovery responses and produced documents on June 9, 2004, Plaintiffs boldly proclaimed to FEI and this Court that:

> Plaintiffs complied scrupulously with their obligations under the federal rules to respond to defendants' requests, despite the tremendous inconvenience and burden that responding placed on plaintiffs – non-profit organizations[1] and an individual of limited means.

See Mem. to Plaintiffs' Motion to Compel Defendants' Compliance with Plaintiffs' Discovery Requests at 6 (1/25/05). Two months later, plaintiffs repeated the representation:

> Plaintiffs have complied with their obligations under the Rules and have produced everything defendants requested, except for privileged documents that are meticulously identified on plaintiffs' privilege log; it is time for defendants to do the same.

See Reply in Support of Plaintiffs' Motion to Compel at 1 (3/4/05) (emphasis in original). Six months later, plaintiffs again made the same representation to FEI and the Court:

> Plaintiffs' compliance with their discovery obligations is not in dispute since, as required by the Federal Rules, plaintiffs either produced all of the information requested by defendants, or identified responsive privileged information on a detailed privilege log – thus, defendants have not moved to compel any discovery responses from plaintiffs.

See Plaintiffs' Status Report Regarding Discovery at 1 (9/12/05).

The problem with these representations is that: (1) they were false; ***and*** (2) they were issued ***after*** plaintiff Tom Rider already had failed to produce – without identifying or logging – documents responsive to FEI's discovery requests, had submitted perjured interrogatory responses, and had spoliated evidence. This course of conduct was deliberately misleading, and

[1] Any implication that the Organizational Plaintiffs are financially disadvantaged is disingenuous. The combined net assets of all four of them was *$310.6 million* for 2005.

it was calculated to hide evidence from FEI and the Court, thereby depriving FEI of discovery that it should have received years ago from plaintiffs. FEI has been forced to guess what has been withheld and to re-create the evidence that plaintiffs did not produce. To this date, FEI still does not have complete discovery from plaintiffs. This is despite FEI now having spent ***months*** conferring with plaintiffs to no avail, unsuccessfully trying to convince them to rectify the situation without the Court's intervention.[2] Plaintiffs have unduly delayed discovery and prejudiced FEI in its defense in this case. FEI, for example, cannot complete plaintiffs' depositions until the multitude of discovery deficiencies have been resolved.

Accordingly, FEI moves this Court for an order that, at a minimum, orders Rider to: (1) produce, within five (5) days, all documents responsive to FEI's production requests; (2) provide complete, truthful answers to FEI's interrogatories; (3) provide, within five (5) days, a sworn declaration that accounts for all documents responsive to FEI's production requests that Rider destroyed, discarded, gave to his lawyers or otherwise failed to produce; and (4) to pay for FEI's fees and costs incurred in bringing this motion. This much is dictated by the law of this case. Order (9/26/05) (granting motion to compel); Order (9/26/06) (requiring declarations regarding documents); Order (2/26/07) (awarding fees and costs).

Furthermore, given the seriousness of Rider's conduct, both as it prejudices FEI's defense and obstructs the administration of justice in this case, the Court should also either (1) dismiss Rider and his claims in this case with prejudice (after he has performed the foregoing sanctions); or (2) preclude him from testifying as a witness in this case. The law demands no less.

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[2] As the Court will see from the correspondence involved, plaintiffs try to defend their conduct by blaming FEI for not moving to compel sooner, thus seeking to be rewarded for their concealment and fraudulent responses. Plaintiffs also – as they have demonstrated repeatedly – would like the Court to treat them differently than they have asked the Court to treat FEI. Cf. Pls.' Reply in Support of Motion to Compel at 2 (3/4/05) ("[T]he information at issue was all expressly requested in plaintiffs' initial discovery requests. Therefore, if producing such information now causes any additional burden for defendants, defendants have no one but themselves to blame, since they unilaterally decided not to search for or produce this information when it was initially requested, almost a year ago.").

FACTUAL BACKGROUND

I. FEI's DISCOVERY REQUESTS AND RIDER'S DEFICIENT RESPONSES

Pursuant to the Stipulated Pre-Trial Schedule (12/5/03), FEI issued its first (and only) set of written discovery to Tom Rider on March 30, 2004, which included interrogatories and requests for documents. See generally Ex. 1, Defendants' First Set of Document Requests to Plaintiff Tom Rider (3/30/04) ("Document Request"); Ex. 2, Defendants' First Set of Interrogatories to Plaintiff Tom Rider (3/30/04) ("Interrogatories").[3]

A. FEI's Document Request

FEI requested, *inter alia*, that Rider produce all documents related to FEI's treatment of elephants, Ex. 1, Request No. 1; all news articles or videos in which he is quoted or mentioned, id., Request No. 10; all documents relating to events alleged in notice of intent to sue letters, id., Request No. 11; all documents relating to communications he had with any federal, state or local government agency regarding Ringling Bros., id., Request No. 18; "bank statements or other documents demonstrating [Rider's] sources of income since [he] stopped working in the 'circus community,'" id., No. 20; all documents relating to payments or gifts given to Rider by any animal advocates or animal advocacy organizations, id., Request No. 21; all documents relating to communications between Rider and any animal advocates or animal advocacy organizations, id., Request No. 22; all publications, newsletters, etc. that Rider has received from any animal advocates regarding the use or treatment of elephants in circuses, id., Request No. 23; all documents relating to public statements Rider has made concerning the treatment of animals by FEI or another circus, id., Request No. 25; all documents relating to legislative bans on the presentation of animals in circuses, including proposed legislation and related speeches or

[3] FEI issued two sets of written discovery: one set to Rider and a second set to each organizational plaintiff. FEI, therefore, will file a separate motion to compel discovery from the Organizational Plaintiffs

testimony, id., Request No. 29; any other correspondence or documents supporting or opposing the presentation of elephants in circuses, id., Request No. 31.

FEI's Document Request included two instructions to Rider that are pertinent here. First, Rider was instructed that "[w]henever a document is not produced in full or is produced in redacted form, so indicate on the document and state with particularity the reason or reasons it is not being produced and describe with particularity those portions of the document not being produced." Id., Instruction No. 9. Second, Rider was instructed that "[t]hese document requests are continuing in nature and should be supplemented as required by Federal Rule of Civil Procedure 26(e) and the Stipulated Pre-Trial Schedule in this case." Id., Instruction No. 11.

In response, Rider produced a total of 190 pages in June 2004, consisting primarily of press releases and news articles and copies of his sworn statements provided to Congress and the USDA regarding his allegations against FEI. See Ex. 3, Objections and Responses to Defendants' First Set of Document Production Requests to Plaintiff Tom Rider (6/9/04) ("Rider's Document Responses"). Rider produced no e-mails, no correspondence, and no documentation related to the payments from his co-plaintiffs, the Wildlife Advocacy Project ("WAP") or his lawyers, Meyer Glitzenstein & Crystal ("MGC").

B. FEI's Interrogatories

In its Interrogatories, FEI asked Rider to: describe each job he has held since high school, Ex. 2, Inter. No. 2; describe every communication he has had regarding FEI with any animal advocates or animal advocacy organizations, id., Inter. No. 4; identify any civil litigation to which he has been a party or has testified, id., Interrogatory No. 7; identify the witnesses he expects to call at trial, id., Inter. No. 8;[4] and identify all income, funds, compensation, etc. that he

[4] FEI is not moving to compel responses to this interrogatory at this time. During the meet and confer, counsel for Rider stated that they have no additional witnesses to disclose or that they expect to call at trial. Nor have Plaintiffs'

has received from any animal advocate or animal advocacy organization, id., Inter. No. 24. The Interrogatories incorporated the Instructions contained in FEI's Document Request regarding, *inter alia*, the duty to supplement. Id., Interrogatories at 2, § I. They also explicitly repeated the instruction to supplement: "These interrogatories shall be deemed continuing so as to require supplemental answers if you obtain further information after the answers are served." Id., Instruction No. 1. Rider himself also "reserve[d] the right to amend or supplement his responses and objections to the Interrogatories if additional or different responsive information is discovered." Ex. 4, Objections and Responses to Defendants' First Set of Interrogatories to Plaintiff Tom Rider at General Objection No. 6 (6/9/04) ("Rider's First Responses").

For more than two years, Rider did not correct or supplement either his document production or his interrogatory responses. Instead, he continued to join in the plaintiffs' misrepresentations made to FEI and the Court about the "complete" state of their discovery responses. Rider failed to supplement notwithstanding (i) FEI's repeated instructions to supplement contained in its Document Request and its Interrogatories; (ii) Rider's own reservation of his right to do so in his First Response; (iii) Rider's legal obligations pursuant to F.R.C.P. 26(e); and (iv) numerous warning signs for both Rider and his counsel that were occurring during the litigation such as the ASPCA's sworn deposition testimony that Rider had been paid by them and counsel's alter ego, WAP, the document subpoena dispute that FEI was having with WAP, and ultimately, Rider's own testimony when deposed by plaintiffs on October 12, 2006. Rider elected to ignore all of this, and left in place the false impressions created by his discovery responses and his misrepresentations to FEI and the Court about them. Not until FEI

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updated their witnesses in their Initial Disclosures Pursuant to Rule 26(a)(1) (1/30/04). If necessary, FEI reserves its right to move the court to preclude any and all witnesses from trial that are not properly disclosed in advance by plaintiffs. See F.R.C.P. 37(c)(1); Bonds v. District of Columbia, 93 F.3d 801, 810 (D.C. Cir. 1996) (proper to preclude any witness at trial not disclosed in discovery), cert. denied, 520 U.S. 1274 (1997).

began unraveling plaintiffs' discovery deceptions, and only after FEI threatened Rider with a motion to compel, did he bother to attempt to "supplement" his faulty initial discovery responses.

As shown below, not only did Rider ignore his duty to supplement, but his original responses were never adequate in the first place. He failed to produce responsive materials available to him long before June 2004, and he submitted perjured interrogatory answers. However, this was not apparent until FEI was able recently to pierce the web of deception.

II. FEI LEARNS FROM ASPCA THAT RIDER'S RESPONSES ARE FALSE

Rider's interrogatory responses and document production did not disclose that he received money (let alone tens of thousands of dollars) directly from his co-plaintiffs and WAP, that he had non-privileged communications with his co-plaintiffs regarding FEI, or that he had communications with WAP regarding FEI. Indeed, Rider committed perjury to avoid providing responsive information. Due to Rider's false and incomplete discovery responses, FEI had no means of knowing the true nature or extent of the payments being funneled to Rider by his co-plaintiffs and WAP until the shell game began unraveling at ASPCA's July 19, 2005 deposition. Prior to that deposition, only ASPCA had produced approximately *six pages* that referenced payments to Rider, MGC and WAP. We now know that there are, or at one time existed, hundreds if not thousands of such pages that should have been produced to FEI but were not.

In its July 2005 deposition, ASPCA testified regarding certain aspects of its scheme to pay Rider. First, ASPCA discussed with the other plaintiffs in 2001 how they would divide the costs of funding Rider after he quit his prior job to ensure that he could remain in the litigation. Specifically, ASPCA provided money to Rider in 2001 through WAP and MGC. ASPCA also provided money directly to Rider in 2002 and 2003. ASPCA, moreover, provided Rider with certain non-monetary gifts, including a cell phone, laptop, and camera. Second, when ASPCA

could no longer afford to solely fund Rider in 2003, it discussed with the other plaintiffs how to fund him going forward. Ex. 5, ASPCA Depo. at 42-57, 79-94, 204-211.

ASPCA's testimony triggered a document subpoena issued on July 26, 2005 to WAP, a purported third-party that is really the alter ego of plaintiffs' counsel, MGC.[5] WAP reluctantly has produced some but not all of the documents responsive to FEI's subpoena. FEI has had to move to compel those documents from WAP, and that motion is pending at this time. See FEI's Motion to Compel Documents Subpoenaed From WAP (9/7/06). WAP's partial production to FEI, however, demonstrates that Rider's co-plaintiffs have provided money and other financial assistance to him through WAP since 2001. Id. at 7. WAP itself issued Forms 1099 to Rider for "non-employee compensation" in the following amounts for each year: $7,773 in 2002, $7,336 in 2003, $23,940 in 2004, and $33,600 in 2005. See Ex. 6, Forms 1099 Issued by WAP to Rider.[6]

III. RIDER COMMITS PERJURY

On October 12, 2006, plaintiffs took their own deposition of Rider under oath. During cross-examination, counsel for FEI learned and/or confirmed that Rider had committed perjury in answering at least three interrogatories. First, Rider was again asked about his work history, which was previously the subject of an interrogatory he answered:

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[5] Two MGC partners, Katherine Meyer and Eric Glitzenstein, founded WAP and are "extremely active in [its] daily management and supervision." FEI's Motion to Compel Documents Subpoenaed From WAP (Sept. 7, 2006) at 4-5. (FEI incorporates by reference the factual background of its Motion at 4-17.) WAP is the alter ego of plaintiffs' counsel's law firm. Id. at 5 (citing Johnson-Tanner v. First Cash Fin. Servs, Inc., 239 F. Supp. 2d 34, 38-39 (D.D.C. 2003); Shapiro, Lifschitz & Schram, P.C. v. R.E. Hazard , Jr., 90 F. Supp. 2d 15, 24-26 (D.D.C. 2000)). WAP and counsel's law firm, MGC, use the same office and equipment; they share many of the same human resources; they commingle funds; and two of MGC's directors (plaintiffs' lead counsel Katherine Meyer and Eric Glitzenstein) have claimed to anticipate making "substantial contributions" to WAP. Id. at 5-6.

[6] Rider's co-plaintiffs and WAP continue to fund him to this day. In July 2005, for example, Rider's co-plaintiffs hosted a fundraiser to support his "outreach to the public and the media." Id. at 11 (citing Ex. 5, ASPCA Depo. at 205). See also Ex. 7, Invitation to Fundraiser. Rider, moreover, testified in October 2006 that he was still receiving $500 per week from WAP, and he expected his 2006 receipts to be approximately equal to his 2005 receipts of $33,600. Ex. 8, Rider Depo. at 136-37, 147. WAP refused to produce documents beyond the September 29, 2005 date of its response to FEI's subpoena. FEI, accordingly, issued a new subpoena to WAP on February 2, 2007, but WAP's counsel again objected and claims it is impossible to produce responsive documents before March 30, 2007.

> Describe each and every job or volunteer position you have held since you completed high school (or, if you never completed high school, since your last year of schooling) that you did not describe in response to the previous interrogatory [regarding every job or position with defendants].

Ex. 2, Inter. No. 2. Rider responded, in pertinent part, as follows:

> Mr. Rider objects to this Interrogatory on the grounds that it seeks information that is irrelevant because it has no bearing on Mr. Rider's knowledge about or experiences with the circus community, and because it is overly broad, unduly burdensome, and oppressive, because Mr. Rider cannot recall every job or volunteer position that he has held since he completed high school and the names of his supervisors for every such position and job. Mr. Rider further objects to the Interrogatory on the ground that it seeks privileged information that is protected by his right to privacy. Subject to and without waiving the foregoing or general objections to these Interrogatories, Mr. Rider answers this Interrogatory as follows:
>
> I received my high school diploma in 1970. I then went to work for Caterpillar Tractor Co., as a chip wheeler, and worked the third, "grave yard" shift. I don't remember my supervisor's name. I quit Caterpillar after 7 months because they wouldn't change my job and I was union and I didn't want to clean out the machines. I got married in 1971, and worked at Baker Shoes in Sheraton Village selling women's shoes for a few months. . . . [continuing on chronologically]

Ex. 2, Rider's First Response, Inter. No. 2.

In truth, Rider was in the U.S. Army during the time period he states he was earning his high school diploma and working for Caterpillar. His response makes absolutely no reference to military service, but government records released under FOIA confirm that Rider was in the military from 1967-1971. See Ex. 9, FOIA release at 1. Nor is there any reference on a privilege log that would otherwise reveal Rider's military service. That Rider would "forget" four years in the U.S. Army during the Vietnam era while answering his interrogatory is simply not believable – particularly when the government records indicate that Rider was classified as a deserter for more than a year during that time period and confined as a result. See id.; cf. In re: Amtrak "Sunset Limited" Train Crash, 136 F.Supp.2d 1251, 1257 (S.D. Ala. 2001) (suggestion that person would innocently forget his 18-month confinement in penitentiary is "ludicrous").

Plaintiffs' counsel sought to protect this perjury by obstructing Rider's deposition with frivolous instructions that Rider not answer questions about his military service, thereby interrupting the deposition and forcing FEI to file a motion to compel. FEI will not repeat those arguments fully herein, but instead respectfully directs the Court's attention to that briefing and incorporates it by reference.[7] Plaintiffs' circular position in their comparative briefings is, however, noteworthy. When FEI tried to obtain the information fraudulently omitted from Rider's interrogatory responses at his deposition, Rider and his counsel claimed that FEI should have first moved to compel written discovery. See Plaintiff Tom Rider's Motion for a Protective Order to Protect His Personal Privacy at 2, 4 (11/13/06) (arguing that Rider could not be compelled to answer deposition testimony because he had not first been compelled to answer written discovery). Now that FEI is moving to compel written discovery, Plaintiffs and their counsel have claimed that the information should be sought through deposition. See, e.g., Ex. 10, Meyer letter at 6, 10 (1/16/07) (stating that questions asked of ASPCA should have been asked during its deposition and that questions could have been asked of Rider at his deposition noticed by plaintiffs or at one noticed in the future by FEI). Plaintiffs' antics are contrary to the law and should not be tolerated. Ford v. WMATA, 131 F.R.D. 12, 14 (D.D.C. 1990) ("It is not for plaintiff to decide how defendant should conduct its case or in what form the information provided should be."); F.R.C.P. 26(d) (discovery methods may be used in any sequence).

Second, Rider was asked about his civil litigation history. Interrogatory No. 7 also asked:

> Identify any civil litigation to which you have been a party or have testified, whether in the United States or abroad, including without limitation the parties to the case, the attorneys who represented any of the parties, whether you were a plaintiff or a defendant, the jurisdiction in which the case was filed, the

[7] See FEI's Motion to Compel Testimony of Plaintiff Tom Eugene Rider and For Costs and Fees (10/30/06), Reply in Support of FEI's Motion to Compel Testimony (11/20/06), and FEI's Response in Opposition to Rider's Motion for Protective Order to Protect His Personal Privacy (11/26/06).

> causes of action asserted in the case, the allegations in the case, and the disposition of the case.

Ex. 2, Inter. No. 7. Rider responded, *without objection*, in full as follows:

> Other than the first case that was filed, Civ. No. 00-1641, and this present litigation challenging Ringling's treatment of elephants under the Endangered Species Act, I have not been a party to or testified in any other civil litigation.

Ex. 4, Rider's First Response, Inter. No. 7. Rider's response was blatantly false, and if nothing else, counsel who signed the objections should have corrected it. In fact, seven pages earlier, as part of his work history, Rider states that "[i]n 1995, I got divorced[.]" See id., Inter. No. 2. Rider did not disclose those marital proceedings in his response, and FEI then learned at deposition that he failed to disclose other civil litigation as well. At deposition Rider testified that he was previously a party to a personal injury action. Ex. 8, Rider Depo. at 135.

Third, Rider was asked to identify any payments or compensation (monetary or other) that he has received from animal rights persons or groups:

> Identify all income, funds, compensation, other money or items, including, without limitation, food, clothing, shelter, or transportation, you have ever received from any animal advocate or animal advocacy organization. If the money or items were given to you as compensation for services rendered, describe the service rendered and the amount of the compensation.

Ex. 2, Inter. No. 24 (emphasis added). Rider responded, in full, as follows:

> Mr. Rider objects to this interrogatory on the grounds that it seeks information that is irrelevant, oppressive, and vexatious. Mr. Rider further objects to this Interrogatory on the ground that it seeks privileged information that is protected by his right to privacy and would infringe on his freedom of association. Subject to and without waiving the foregoing or general objections to these Interrogatories, and subject to a confidentiality agreement, Mr. Rider would be willing to provide defendants with the answer to the first sentence of this Interrogatory.
>
> Subject to and without waiving the foregoing or general objections to these Interrogatories, Mr. Rider provides the following answer to the second sentence of this interrogatory: ***I have not received any such compensation.***

Ex. 4, Rider's First Response, Inter. No. 24 (emphasis added). Rider's response that he had received no such compensation was perjury.[8] The answer flatly contradicts Forms 1099 that Rider admitted receiving from WAP listing "non-employee compensation" for $7,773 in 2002 and $7,336 in 2003. See Ex. 6, Forms 1099. This is inexcusable: Rider himself along with his counsel were aware he was being paid by these organizations at the time he verified his answers in June 2004, and he admitted at his deposition that he received the Forms 1099 (although failed to preserve or produce them). Counsel's participation in this is particularly troubling: Meyer was a Director of WAP when it issued those 1099's, and she signed the objections to Rider's First Response, which contained the false answer. Counsel cannot claim ignorance as to the payments Rider was receiving when they themselves were making the payments. Nor can they claim ignorance as to their own obligations, as they have previously have stated to this Court:

> Rule 26(g)(2) requires that "[e]very discovery request, response, or objection made by a party represented by an attorney shall be signed by at least one attorney of record," and that signature "constitutes a certification that to the best of the signer's knowledge, information, and belief, formed after a reasonable inquiry, the request, response, or objection is . . . consistent with the rules [of discovery]." Fed.R.Civ.P. 26(g)(2). Rule 26(g)(3), in turn, authorizes the Court to impose sanctions – "which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including a reasonable attorney's fee" – for violating Rule 26(g)(2). Fed.R.Civ.P. 26(g)(3). Such sanctions may be imposed on the party, the certifying attorney, or both. Id.

Plaintiffs' Reply to Defendants' Response to Show Cause Order at 13-14 (10/5/05).

IV. FEI ADVISES PLAINTIFFS IT WILL MOVE TO COMPEL AND RIDER'S SUBSEQUENT SUPPLEMENTATION

A. The Parties Confer for Months Regarding Plaintiffs' Discovery

Having already raised the perjurious interrogatory responses with the Court in the Motion to Compel Rider's testimony, FEI wrote to plaintiffs in November detailing the additional

[8] The perjurious answer functioned as a cover-up of the payment scheme and impeded the due administration of justice in this case, which constitutes an obstruction of justice. See 18 U.S.C. § 1503.

deficiencies in their discovery responses. See Ex. 11, Gasper letter (11/22/06). Specifically, FEI showed that Rider failed to produce all documents within his possession, custody, or control, that he failed to disclose documents and information relating to payments from other plaintiffs, and that he failed to disclose documents and information relating to communications with other animal advocates. FEI requested that Rider revise his interrogatory answers, provide the documents he failed to produce in June 2004, and update his document production – which he had not done since his original 190-page production in June 2004.

On December 15, 2006, plaintiffs' counsel responded to FEI by insisting that counsel would not cure these deficiencies unless FEI agreed to waive its right to raise any additional deficiencies not yet uncovered and FEI agreed to provide supplemental responses of its own. See Ex. 12, Meyer letter (12/15/06). Plaintiffs' counsel stated that, assuming FEI promptly agreed to these conditions, plaintiffs would respond to the numerous deficiencies by January 15, 2007 and would provide supplemental interrogatory responses and documents by January 31, 2007. Id. at 8. FEI promptly responded, stating that it would supplement its interrogatory responses on January 31, 2007, but that it would not waive any right to raise discovery deficiencies not yet identified. See Ex. 13, Gasper letter (12/22/06).

On January 16, 2007, plaintiffs sent a second letter in response to certain deficiencies raised in FEI's November 22, 2006 letter. See Ex. 10, Meyer letter (1/16/07). Plaintiffs did not, however, address all of the deficiencies and also stated they would not provide amended interrogatory responses until January 31, 2007. Id. at 2 n.2. On January 31, 2007, plaintiffs finally provided revised and supplemental interrogatory responses. They also produced documents that had been omitted previously or created since their previous productions.

Rider's supplemental document production contained *seven pages* covering the time period of June 2004 through the present, consisting of six news articles and one copy of a 2005 1099 from WAP. That brought his entire document production to a meager 197 pages. If Rider is not simply destroying responsive documents, it is highly unlikely that a man who earns a living entirely funded by plaintiffs and counsel could have only seven pages of responsive documents in the last two and a half years. Likewise, he failed to identify *any* privileged documents between June 2004 and December 2006 which, absent spoliation, is highly unlikely since he has been provided a laptop computer and is supposed to be doing "media work."

At FEI's request, counsel met on February 7, 2007 to discuss the remaining issues regarding plaintiffs' discovery. See Ex. 14, Gasper letter (1/19/07); Ex. 15, Gasper letter (2/2/07). During that conference, FEI inquired about Rider's failure to produce documents and was informed that Rider is "not keeping" them. Counsel assured FEI that Rider produced all of the responsive documents that he has except for perhaps one videotape. Counsel also insisted that Rider need not disclose any communications with his co-plaintiffs and WAP – even those that are not protected by the attorney-client privilege. See Ex. 16, Meyer letter at 2 (2/8/07).[9]

B. Rider's Supplemental Discovery Responses

On January 31, 2007, after delaying for over two months, Rider submitted supplemental discovery that consisted of seven pages of documents, a single-entry privilege log, and Plaintiff Tom Rider's Supplemental Responses to Defendants' First Set of Interrogatories ("Rider's Supp. Response"). This time, Rider attempted to cure portions of his previous perjury by finally acknowledging in response to Interrogatory No. 2 that he was in the military and in response to

[9] The parties discussed additional issues, such as Rider's incorporating by reference the entire document production from him and his co-plaintiffs, Rider's insufficient identification of privileged documents, and Rider's refusal to update and disclose the identity of individuals he expects to call as witnesses. The parties corresponded further on the matters, and their remaining differences are explained below. See Ex. 17, Joiner letter (2/8/07); Ex. 18, Sanerib letter (2/14/07); Ex. 19, Joiner letter (3/6/07).

Interrogatory No. 7 that he was involved in civil litigation matters concerning marital disputes with his ex-wife. Rider, however, refused to provide additional details pursuant to an alleged right to personal privacy.[10] Yet Rider still failed to acknowledge in his supplemental response to Interrogatory No. 7 the additional case he testified to at his deposition. Rider continues to hide the details of his communications with his co-plaintiffs and WAP by arguing that they are either covered by the attorney-client privilege because they involve this litigation or because they "are irrelevant and their disclosure would impose an undue burden on [Rider] and the other plaintiffs and infringe upon [his] and the other plaintiffs' First Amendment rights of association and expression." Ex. 12, Rider's Supp. Responses, Inter. No. 4. Continuing their concealment of communications regarding Rider's payments, Rider and the co-plaintiffs have refused to disclose their communications among each other – regardless of whether or not they are privileged. Rider, moreover, has frivolously responded to multiple interrogatories by incorporating by reference the entire internet. See, e.g., Id. at Inter. Nos. 4-5 (suggesting FEI run a Yahoo search for "tom rider elephants"). Finally, in response to Interrogatory No. 24, Rider has attempted to incorporate all of his deposition testimony rather than respond, and has now removed any statement whatsoever regarding compensation. Id., Inter. No. 24.

After the February 7 meeting, FEI received a follow-up letter, where Rider's counsel for the first time suggested that additional documents might follow. Ex. 16, Meyer letter at 1 (2/8/07). On February 25, 2007, counsel advised FEI that Rider had located not one but "some videotapes" that would be produced. Ex. 21, Meyer e-mail (2/25/07). Despite plaintiffs' self-

[10] Because Rider failed to assert such an objection in his original response to Interrogatory No. 7, any such objection – regardless of its validity – has been waived. See, e.g., Order at 2 (9/26/05) (failure to properly object or adequately assert privilege constitutes waiver); Fonville v. District of Columbia, 230 F.R.D. 38, 42 (D.D.C. 2005); Fed. R. Civ. P. 33(b)(4) ("All grounds for an objection to an interrogatory shall be stated with specificity. Any ground not stated in a timely objection is waived unless the party's failure to object is excused by the court for good cause shown.").

righteous assertions in 2005, see, supra, 1-2, that their document production was complete and beyond reproach, despite the fact that Rider had again purported to make a complete supplemental production on January 31, 2007, and despite the fact that his counsel confirmed to FEI at a meeting just one week later that all of Rider's files were produced but for a videotape, Rider made an additional production on March 2, 2007 consisting of seven videotapes and sixteen pages. ***Of those, four videos and nine pages appear to have been created prior to June 2004.*** Without explanation, the production suddenly included for the first time three cover letters signed by counsel Eric Glitzenstein transmitting Rider's weekly payments. Failing to produce these materials, some of which are from 2002, until FEI's motion was imminent is inexcusable.

The dearth of documents produced by Rider results from the spoliation of evidence that he committed and that his counsel has confirmed. Despite spoliating his own copies of relevant documents, Rider still refuses to produce documents in his counsel's possession. Rider insists that documents in WAP's files are not in his "possession, custody, or control," although they relate to his work in this case and are held by his attorneys in their office. Ex. 16, Meyer letter at 1-2 (2/8/07). Rider has likewise refused to produce documents within the possession of his co-plaintiffs. Rider's "possession, custody and control" gambit is particularly outrageous in light of the fact that in lieu of producing his own documents, Rider incorporated by reference documents produced by co-plaintiffs. Having invoked and relied upon such productions, Rider cannot now pretend he is not required to produce documents within the other plaintiffs' possession that are responsive to requests that were served upon him. He cannot have it both ways.

ARGUMENT

The Federal Rules contemplate broad discovery of those materials which are reasonably calculated to lead to the discovery of relevant evidence. Yet Rider and his counsel have engaged

in a pattern of conduct that, rather than facilitating discovery, actively seeks to curtail it by secreting the existence of evidence. Their conduct is entirely inconsistent with what they have previously argued to this Court when seeking discovery from FEI:

> The scope of discovery is broad under the Federal Rules, which entitle a party to "obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter." Fed. R. Civ. P. 26(b); see also Hickman v. Taylor, 29 U.S. 495, 507 (1947) (noting that the discovery rules "are to be accorded a broad and liberal treatment," and that "[m]utual knowledge of all the relevant facts gathered by both parties is essential to proper litigation"); Wyoming v. USDA, 208 F.R.D. 449, 452 (D.D.C. 2002) ("courts construe the scope of discovery liberally in order to ensure that litigation proceeds with 'the fullest possible knowledge of the issues and facts before trial'") (quoting Hickman, 495 U.S. at 501); Campbell v. U.S. Dep't of Justice, 231 F. Supp. 2d l, 13 (D.D.C. 2002) ("The federal rules caution seekers of protective orders that the scope of discovery is very broad").

Pls.' Motion to Compel Discovery Response at 14 (1/25/05). Broad as it is, what Rule 26(b) does not permit is the withholding or outright destruction of documents, nor does it permit parties to commit perjury in interrogatory responses. Rider must be held accountable for this.

V. RIDER HAS REFUSED TO PRODUCE DOCUMENTS WITHIN HIS POSSESSION, CUSTODY, OR CONTROL

A. Rider Has Withheld and/or Destroyed Relevant Documents

Almost seven years after filing his complaint against FEI, Rider has produced a grand total of 213 pages and 7 videos in response to FEI's requests for documents. This is particularly incredulous since FEI has requested all documents that "refer, reflect, or relate to defendants' treatment of elephants" and that Rider supposedly makes a living traveling around the country speaking about that very topic. Although, for example, Rider has been provided with a laptop from co-plaintiff ASPCA and Rider's supplemental privilege log specifically references e-mails between Rider and Katherine Meyer, Rider has produced just two non-privileged e-mails (both from journalists) and does not appear to have produced any documents that he created with his

laptop. If the laptop provided by ASPCA was, indeed, related to Rider's purported "media" work, one would expect that it would have been used to generate hundreds of e-mails and other documents related to FEI, none of which have been produced.

Rider has been discarding responsive documents. His own counsel confirmed this at the February 7 meet and confer. As proof of this, FEI, for example, received in response to its WAP subpoena several documents that were sent by WAP to Rider. See, e.g., Ex. 6, Forms 1099; Ex's 7 & 14 to FEI's Motion to Compel Documents Subpoenaed From WAP (9/7/06) (cover letters to Rider from Meyer and Glitzenstein enclosing checks). WAP also produced receipts that Rider had sent to WAP. All of these materials clearly would be responsive to Document Request No. 21, requiring the production of documents that "refer, reflect, or relate to any payments ... made by any animal advocates or animal advocacy organizations to you" and to Document Request No. 22, requiring the production of documents that "refer, reflect, or relate to any communications between you and any animal advocates or any person affiliated with such a group." Ex. 1, Document Request at 9-10. Although Rider acknowledged receiving such materials from WAP, he has not produced them to FEI. See Ex. 8, Rider Depo. at 123-34 (acknowledging receipt of documents produced to FEI by WAP). At the February 7 meeting, plaintiffs' counsel informed FEI that Rider is "not keeping them" – despite the fact that litigation is ongoing and that Rider has a duty to preserve all responsive documents.

Only after FEI spent months challenging Rider's assertion that all responsive documents had been produced and threatening to file this motion to compel, did Rider finally produce another handful of documents and videotapes. In doing so, moreover, Rider has never explained why these documents were not produced in June 2004 or in January 2007. In his March 2, 2007 production, Rider also produced three cover letters from his counsel (Eric Glitzenstein) enclosing

checks to him. Rider has not yet explained why he has suddenly produced these three letters, but none of the prior ones.[11] Moreover, these documents were produced without any confidentiality protection (as have the payment documents received from WAP), which demonstrates that any such objection Rider purported to have was frivolous to begin with, and in any event, is now waived. The reality is that these materials are neither confidential nor privileged, and Rider simply never bothered to preserve and produce them as required.

A party to an action is "under a duty to preserve what it knows, or reasonably should know, is relevant to the action, is reasonably calculated to lead to the discovery of admissible evidence, is reasonably likely to be requested during discovery and/or is the subject of a pending discovery request." Arista Records, Inc. v. Sakfield Holding Co., 314 F. Supp. 2d 27, 33 (D.D.C. 2004) (quoting Jeanblanc v. The Oliver Carr Co., No. 91-0128, 1992 U.S. Dist. LEXIS 10765 at *5 (D.D.C. 1992)). Rider, as one of the original plaintiffs, controlled the timing of when this suit was filed. At that point, Rider and his attorneys knew or should have known that documents relating to Rider's communications about FEI and any payments he received related thereto would be relevant to this lawsuit. As the lead plaintiff, his allegations of abuse, his statements about FEI, and his credibility obviously would be at issue in this case. At the latest, when Rider received FEI's March 30, 2004 document requests, he was put on notice as to what FEI considered to be relevant documents and, since then, he should have been preserving all responsive documents for production. Rider, instead, routinely discarded his copies of responsive documents – preserving and producing only 14 pages since June 2004, and 213 pages between the period of July 2000 to June 2004. Rider obviously has destroyed responsive

[11] It also is not clear how Rider obtained these letters for production. Perhaps he ***began*** retaining them after FEI inquired about them during his deposition in October contrary to what his counsel stated at the February 7 meeting. Or, perhaps his counsel simply retrieved them from WAP's files, contrary to the frivolous claims that Rider has no control over what his lawyers have. Regardless of how Rider obtained these copies, his failure to produce earlier versions confirms that he either is destroying relevant material or is intentionally withholding it from FEI.

documents, and his apparent cavalier attitude about it is troubling. Rider's actions – and his reason for doing so – must be explained so that FEI and the Court may consider appropriate remedies for plaintiffs' spoliation. Arista Records, 314 F.Supp.2d at 33-34.

B. Rider Has Refused to Produce Existing Documents Within His Control

Concerned that Rider had not properly been preserving relevant documents, FEI informed plaintiffs' counsel on November 22, 2006 that Rider is required to produce documents that are in his "possession, custody, or control." See Ex. 11, Gasper letter at 10-11 (11/22/06). It is no excuse, therefore, that he has not preserved copies in his possession. Specifically, FEI demanded that Rider produce all documents that are maintained by plaintiffs' counsel, counsel's alter ego (WAP), and the organizational plaintiffs. Id. at 11.

Plaintiffs' counsel responded that Rider need not produce documents maintained by WAP. Ex. 12, Meyer letter at 7 (12/15/06). Less than two years earlier, however, plaintiffs argued the opposite in their motion to compel:

> Pursuant to Rule 34, a party may request another party to produce any designated records that fall within the scope of Rule 26(b) and "which are in the possession, custody or control of the party upon whom the request is served." Fed. R. Civ. P. 34(a). Thus, even if a responsive document is not in the possession of a party, it must nevertheless be produced - or identified on the party's privilege log - as long as it is within the party's "control." Id. Moreover, a party has "control" over a document, and its production is therefore required, as long as the party has "the legal right to obtain the document[] on demand." Alexander v. F.B.I., 194 F.R.D. 299 (D.D.C. 2000) (internal citations omitted). This obligation extends to responsive documents in the possession of a party's counsel, which must be produced unless they are subject to a privilege, and such privilege is asserted and described on a privilege log or other comparable format. See, e.g., Axler v. Scientific Ecology Group, Inc., 196 F.R.D. 210, 212 (D. Mass. 2000) ("A party must disclose facts in its attorney's possession even though these facts have not been transmitted to the party .... Similarly, a party must produce otherwise discoverable information that is in his attorneys' possession, custody or control") (internal citations omitted).

Pls.' Motion to Compel Discovery Responses at 14-15 (1/25/05) (emphases added). Magistrate Judge Facciola subsequently agreed with plaintiffs and ruled that documents within the

possession of FEI's counsel must be produced or identified in response to plaintiffs' request for documents. ASPCA v. Ringling Bros. & Barnum & Bailey Circus, 233 F.R.D. 209, 212 (D.D.C. 2006). Having made their argument and obtained judicial relief on that basis, plaintiffs are judicially estopped from taking a contrary position. See Burlington Ins. Co. v. Okie Dokie, Inc., 439 F. Supp. 2d 124, 132 (D.D.C. 2006) ("'[W]hen a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case.'") (quoting Christianson v. Colt. Indus. Operating Corp., 486 U.S. 800, 816 (1988)); see also Virgin Atlantic Airways v. Nat'l Mediation Bd., 956 F.2d 1245, 1255 (2d Cir. 1992) ("[W]here litigants have once battled for the court's decision, they should neither be required, nor without good reason permitted, to battle for it again.").

Accordingly, Rider must produce documents in his counsel's files, which include by definition, documents in WAP's files. A party cannot shield an otherwise responsive document from discovery by giving it to his lawyer. See, e.g., Axler v. Scientific Ecology Group, Inc., 196 F.R.D. 210, 212 (D. Mass. 2000). That principle is not altered by the fact that the attorney has an alter ego. If that were the case, discovery could be blocked by the attorney's establishment of a shell corporation in which to hide documents. The relationship between plaintiffs' counsel and WAP is one they created, not FEI. Rider should not be allowed to use that relationship to conceal discoverable information. WAP is the alter ego of plaintiffs' counsel – it is run by Rider's attorneys, Katherine Meyer and Eric Glitzenstein, from their law office. Indeed, one of the stated reasons for WAP's unilateral extension of time to respond to the second subpoena was that Glitzenstein had to personally preside over the production. It is disingenuous for Rider to claim that he does not have the right to documents that relate to him, were at some point

provided to or from him, and are held by his attorneys and physically maintained in their office.[12]

Rider, moreover, has incorporated by reference his co-plaintiffs' document productions in response to certain requests to him. See, e.g., Ex. 3, Rider's Document Responses, Request Nos. 2, 10, 11, 12, 13, 14, 18, 22, 23, 25, 26, 27, 29 ("Additional responsive documents are being produced collectively by plaintiffs."). By incorporating in his responses documents produced by co-plaintiffs, Rider has asserted control over the documents in their files. "Control" has been broadly construed by federal courts. See Steele Software Sys. v. Dataquick Info. Sys., 237 F.R.D. 561, 564 (D. Md. 2006) ("'Control' has been construed broadly by the courts as the legal right, authority, or practical ability to obtain the materials sought on demand."). Rider cannot rely upon the other plaintiffs' production and then claim he has no control over it.

VI. RIDER HAS REFUSED TO PRODUCE DOCUMENTS AND INFORMATION CONCERNING HIS INCOME / PAYMENTS FROM ANIMAL ADVOCATES AND ADVOCACY ORGANIZATIONS

Because the significant income and/or payments Rider has received from his co-plaintiffs and his counsel's alter ego undermine his credibility as a witness and give rise to an unclean hands defense, FEI has requested documents and information about them. For example, Document Request No. 20 requires Rider to produce documents demonstrating his income since he stopped working for circuses; Document Request No. 21 requires Rider to produce all documents reflecting payments to him by animal advocates or animal advocacy organizations; and Interrogatory No. 24 requires Rider to identify income, funds, compensation, etc. that he has

[12] In a letter to FEI after the parties' meet and confer, plaintiffs continued to evidence their failure to grasp what it is that FEI is seeking. Ex. 16, Meyer letter at 2 (2/8/07) ("insisting that Mr. Rider obtain duplicates of those forms to provide you seems completely unnecessary"). FEI does not merely want duplicate copies of what it has received from WAP – it wants ***all*** of the documents in Rider's possession, custody, or control that are responsive to the document requests served upon him. WAP's production is neither complete nor a substitute for Rider to shirk his own obligations to produce. Hence, the documents produced thus far by WAP are merely examples of documents that Rider at one time received but did not produce to FEI, thus demonstrating to this Court that his production was deficient. Until Rider produces all responsive documents in his possession, custody, or control, FEI cannot be certain that it has received all of the documents to which it is entitled. That includes all documents in, among other places, WAP's files, responsive to the requests served upon Rider.

received from animal advocates or animal advocacy organizations.[13]

In each instance, however, Rider has refused to produce the required documents or information. Rider, instead, has insisted that these requests seek "privileged information that is protected by his right to privacy and would infringe on his freedom of association." Ex. 4, Rider's First Responses, Inter. No. 24; Ex. 3, Rider Document Responses, Request No. 21.[14] In violation of FEI's Instruction No. 9, however, Rider has not identified these documents on his privilege log. Compare Ex. 1, Document Request, Instruction No. 9 with Ex. 22, Pls.' First Privilege Log & Ex. 23, Rider's Supp. Privilege Log. Rider's compliance with FEI's discovery responses, moreover, would not entail the production of any documents or information protected by the First Amendment.

Rider's "freedom of association" claim is frivolous. First, plaintiffs' counsel brazenly asserted in the February 7, 2007 meet and confer that plaintiffs have "nothing to hide" with respect to the money flow to Rider. If that is the case, then obviously no "association" interest would be damaged by production. Second, Rider's claim of privilege is flawed legally. His claim should be upheld only if his First Amendment interests outweigh FEI's need for the

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[13] Document Request No. 20: Bank statements or other documents demonstrating your sources of income since you stopped working in the "circus community." Ex. 1, Document Request No. 20.

Document Request No. 21: All documents that refer, reflect, or relate to any payments or gifts in money or goods made by any animal advocates or animal advocacy organizations to you including but not limited to any payment of your transportation expenses, hotel bills, or food, or other costs of living by any animal advocates or animal advocacy organizations. Id., Document Request No. 21.

Interrogatory No. 24: Identify all income, funds, compensation, other money or items, including, without limitation, food, clothing, shelter, or transportation, you have ever received from any animal advocate or animal advocacy organization. If the money or items were given to you as compensation for services rendered, describe the service rendered and the amount of compensation. Ex. 2, Inter. No. 24.

[14] Rider also has attempted to hide information from FEI by asserting that a protective order is warranted and by committing perjury. Rider, however, has never proposed a confidentiality/protective order to seek FEI's agreement or moved the Court for one. His professed need for such an order also is contrary to the law of the case and how matters in it have been public – at plaintiffs' insistence – but for few exceptions. Rider should be compelled to provide responsive documents and information without a confidentiality order immediately.

information. Black Panther Party v. Smith, 661 F.2d 1243, 1266 (D.C. Cir. 1981), vacated mem. sub. nom., 458 U.S. 1118 (1981). As the party asserting the privilege, Rider bears the initial burden of showing that his constitutional rights would be harmed if he complied with the discovery request. New York State NOW v. Terry, 886 F.2d 1339, 1355 (2d Cir. 1989) ("before the burden shifts to plaintiffs to demonstrate the necessary compelling interest in having discovery, defendants must at least articulate some resulting encroachment on their liberties"), cert. denied, 495 U.S. 947 (1990). Here, Rider has not demonstrated, nor can he, that disclosure of the documents and information sought would injure his constitutional rights. See Shelton v. U.S., 404 F.2d 1292, 1299 (D.C. Cir. 1968) (denying constitutional privilege claim where, among other things, the party seeking protection did not show "the deterrent effect the furnishing of the lists would have on the members' right of association protected by the First Amendment"), cert. denied, 393 U.S. 1024 (1969); U.S. v. Duke Energy Corp., 232 F.R.D. 1, 3 (D.D.C. 2005) (denying First Amendment protection to a party that made "no showing that enforcement of the subpoenas will chill associational activities by discouraging membership").

To date, the documents and testimony that FEI has been able to obtain prove that much of the payments that Rider has received come from the Organizational Plaintiffs, WAP, and at times MGC. Any evidence that refers to these parties or individuals "reveals" nothing that would have a chilling effect on them. Their identities and association are already publicly known by virtue of their participation in this lawsuit as well as their persistent efforts to publicize this lawsuit in the media and use it as a fundraiser. Documents and information relating to payments Rider has received from them could not, therefore, injure his freedom of association. See Ex. 24, Plaintiffs' Press Releases and Webpages Promoting this Lawsuit. Information about some of the specific payments, moreover, already is publicly available due to the 501(c)(3) status of the

organizational plaintiffs. See, e.g., Ex. 25, 2004 Form 990 of AWI at Statement 5 (identifying payment of $1,208 directly to Rider), at http://tfcny.fdncenter.org/990s/990search/990.php?ein=135655952&yr=200506&rt=990&t9=A. Disclosure of the remaining payments or related details would not injure Rider's "freedom of association."

Even if Rider could show some privileged interest, any such interest is outweighed by FEI's need for the information. The documents and information requested would have a substantial effect on FEI's right to present a defense in the underlying litigation. Compare NAACP v. Alabama, 357 U.S. 449, 464 (1958) (quashing subpoena where, unlike here, information requested did not have a "substantial bearing" on the issues presented by the underlying litigation) with Duke Energy Corp., 232 F.R.D. at 3 (compelling production of documents that went to the "heart of the lawsuit"). Plaintiffs' standing hinges upon Rider's alleged injury and, therefore, the documents and information relating to communications among plaintiffs and the payments Rider has received bear directly on his motives and credibility.[15]

Plaintiffs request injunctive relief. The documents sought bear directly FEI's unclean hands defense, and thus, they go to the "heart of the matter." Black Panther Party, 661 F.2d at 1268; Wyoming v. USDA, 208 F.R.D. 449, 455 (D.D.C. 2002). Finally, FEI requested the documents and information from plaintiffs because they cannot be obtained from reasonable alternative sources. Black Panther Party, 661 F.2d at 1269; cf. Wyoming, 208 F.R.D. at 455. Plaintiffs themselves are, in fact, the sources of information relating to their communications

[15] Plaintiffs' counsel recently has asserted that Rider's credibility is now "attenuated" from the underlying issues in this case because plaintiffs have compiled additional evidence. Ex. 16, Meyer letter at 2 n.1 (2/8/07). Notwithstanding that the credibility of all witnesses is a relevant issue for discovery in any case, counsel's position conveniently ignores that this particular case exists solely because of Rider's uncorroborated allegations of personal injury. ASPCA et al. v. Ringling Bros., Civ. No. 1:00CV1641, Mem. Op. & Order (6/29/01), rev'd, ASPCA v. Ringling Bros., 317 F.3d 334, 338 (D.C. Cir. 2003) (finding Rider's personal allegations "sufficient to withstand a motion to dismiss for lack of standing"). His participation in this lawsuit along with his credibility, therefore, is essential to the existence, continuance, and ultimate resolution of this lawsuit.

with each other or to payments provided directly to Rider.

VII. RIDER HAS REFUSED TO PRODUCE DOCUMENTS AND INFORMATION RELATING TO COMMUNICATIONS WITH OTHER ANIMAL ADVOCATES

FEI also requested from Rider documents and information reflecting communications with animal advocates and/or animal advocacy organizations. Specifically, Document Request No. 22 requires Rider to produce all documents relating to communications between him and animal advocates; Document Request No. 23 requires him to produce all documents relating to communications received from animal advocates regarding the treatment of elephants; and Interrogatory No. 4 requires Rider to describe every communication regarding FEI that he has had with animal advocates.[16] The documents for which Rider claims privilege are not logged.

A. Communications with the Organizational Plaintiffs

In his original response to each of these requests, Rider objected based on an alleged attorney-client privilege. Specifically, he objected with respect to communications "he has had with co-plaintiffs, that one or more of his attorneys participated in, and with respect to communications he has had with Lisa Weisberg who is an attorney with the ASPCA, one of the organizational plaintiffs in this action." Ex. 3, Rider's Document Responses, Request Nos. 22-23; Ex. 4, Rider's First Response, Inter. No. 4. Rider also objected on the ground that the requests seek "privileged information that is protected by his right of association, because it

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[16] Document Request No. 22: All documents that refer, reflect, or relate to any communication between you and any animal advocates or any person affiliated with such group, including but not limited to communications while you were working for the Chipperfields or after you left the employ of the Chipperfields but before you returned to the United States. Ex. 1, Document Request No. 22.

Document Request No. 23: All publications, newsletters, pamphlets, letters, and other communications that you have received from any animal advocates regarding the presentation of elephants in circuses, treatment of elephants by circuses, training of elephants, conditions of elephants in the wild and/or in captivity, and the general health and/or well-being of elephants in the care of defendants or any other circus. Ex. 1, Document Request No. 23.

Interrogatory No. 4: Describe every communication you have had regarding defendants with any and all animal advocates or animal advocacy groups prior to working for defendants, while working for defendants, or since leaving defendants' employment. Ex. 2, Interrogatory No. 4.

would require him to identify every animal advocate or animal advocacy group with which he has ever communicated." Id.

In his original response to Interrogatory No. 4, Rider did not disclose any communications with WAP, nor did he describe with any particularity communications with the organizational plaintiffs. Having learned during the organizational plaintiffs' depositions that there were numerous non-privileged communications between Rider and his co-plaintiffs, FEI challenged Rider's privilege claims. See Ex. 11, Gasper letter at 11-12 (11/22/06). In response, plaintiffs' counsel *broadened* its privilege assertion and claimed privilege over any communications between Rider and the organizational plaintiffs purportedly involving "litigation strategy" and "the evidence that plaintiffs may rely on in this case." See Ex. 12, Meyer letter at 9-10 (12/15/06). Counsel also noted that Rider originally objected to the interrogatory as overly broad because he has had hundreds of such communications.[17] Finally, counsel asserted that plaintiff ASPCA already has described to FEI many such conversations and that FEI did not ask Rider about these communications during its cross-examination of Rider at the deposition noticed by plaintiffs, nor has FEI deposed Rider yet. Id. Counsel's position that Rider need not respond to FEI's discovery requests because another plaintiff already provided some of the information and FEI could just ask for the information during a deposition is wrong. Such an approach would render moot any Rule 33 request. If a party need only assert that the issue could

[17] Rider's objection that Interrogatory No. 4 is overly broad because "he has had hundreds of communications that fall within the scope of this Interrogatory, and he cannot possibly describe each such conversation" is of no merit. Ex. 4, Rider's First Response, Inter. No. 4. First, Rider's inability to recall all details does not excuse his refusal to share the details that he does recall. Second, Rider already has provided a description of many conversations that he has had with organizations excluding his co-plaintiffs and WAP. Id.; Ex. 20, Rider's Supp. Response, Inter. No. 4. His claim of inability to recollect is simply designed to withhold from FEI his communications with his co-plaintiffs and WAP. Indeed, Rider claims to recall specific dates and details of 98 separate incidents of alleged abuse that he claims to have witnessed five to seven years earlier, see Ex. 4, Rider's First Response, Inter. No. 11, but asks FEI and this Court to believe that he is unable to recall communications with co-plaintiffs and WAP about his source and/or amount of income.

be raised during deposition, it would never have to comply with written discovery requests. Counsel's position is frivolous. See, e.g., Babcock Swine, Inc. v. Shelbco, Inc., 126 F.R.D. 43, 45 (S.D. Ohio 1989) ("The fact that a party has a choice between using interrogatories and depositions does not bar the use of interrogatories.").[18]

Rider's supplemental interrogatory responses asserted that all conversations with the organizational plaintiffs – whether or not counsel was present – are privileged because they involved the litigation or are protected by the First Amendment because they involved "legislative and media strategies:"

> Since June, 2004, I have also had conversations with the various plaintiff organizations and our lawyers about legal strategies in this case, the evidence that plaintiffs may rely on, and the status of the litigation, all of which are protected by the attorney-client and work product privileges. I have also had conversations with some of the other plaintiffs about their legislative and media strategies for halting the abuse and mistreatment of circus elephants and educating the public about this issue. Additional details of such conversations are irrelevant and their disclosure would impose an undue burden on me and the other plaintiffs and infringe upon my and the other plaintiffs' First Amendment rights of association and expression.

Ex. 20, Rider's Supp. Responses, Inter. No. 4. Rider's seven-page supplemental production contained no documents that refer, reflect, or relate to these communications. His single-entry supplemental privilege log includes nothing on this matter either.

1. Legal Strategy, Evidence, and Status of Litigation

Rider has claimed protection under the attorney-client privilege and/or the work product doctrine for any communications regarding "legal strategies in this case, the evidence that plaintiffs may rely on, and the status of the litigation." Id. While certain communications between plaintiffs and their counsel are privileged, not all of them are – particularly in this case

[18] As stated, counsel's position also is contrary to the position taken by plaintiffs during Rider's deposition. See Rider's Motion for a Protective Order to Protect His Personal Privacy at 2, 4 (11/13/06) (arguing Rider could not be compelled to answer deposition testimony because he had not first been compelled to answer written discovery).

where outside counsel is performing the non-legal function of a 501(c)(3) paying the lead plaintiff. Some communications have occurred in the presence of third parties and/or tangentially relate to this litigation but do not involve legal advice. For example, communications between plaintiffs and counsel regarding payments to Rider do not involve legal advice. Moreover, communications among the plaintiffs – outside the presence of counsel – are not privileged. As to the ones that Rider claims are privileged, he should be compelled to identify and describe them pursuant to this Circuit's privilege standards.

"The attorney client privilege protects confidential communications made by the client to an attorney for the purpose of seeking legal advice." Nesse v. Shaw Pittman, 206 F.R.D. 325, 328 (D.D.C. 2002) (citing Tax Analysts v. Internal Revenue Service, 117 F.3d 607, 617 (D.C. Cir. 1997)). The privilege also protects similar communications from an attorney to a client inasmuch as the attorney's communications disclose the confidential information from the client. Id. (citing Coastal States Gas Corp. v. Dep't. of Energy, 617 F.2d 854, 862 (D.C. Cir. 1980); Brinton v. Dep't. of State, 636 F.2d 600, 603-604 (D.C. Cir. 1980)).

"Like all privileges, however, the attorney-client privilege is narrowly construed and is limited to those situations in which its purposes will be served." Coastal States, 617 F.2d at 862. The privilege "protects only those disclosures necessary to obtain informed legal advice which might not have been made absent the privilege." Id. (quoting Fisher v. U.S., 425 U.S. 391, 403 (1976)). Moreover, the privilege only applies if:

(1) the asserted holder of the privilege is or sought to become a client;
(2) the person to whom the communication was made
    (a) is a member of the bar of a court or his subordinate and
    (b) in connection with his communication is acting as a lawyer;
(3) the communication relates to a fact of which the attorney was informed
    (a) by his client
    (b) without the presence of strangers
    (c) for the purpose of securing primarily either

(i) an opinion on law or
(ii) legal services or
(iii) assistance in some legal proceeding, and not
(d) for the purpose of committing a crime or tort; and
(4) the privilege has been
(a) claimed and
(b) not waived by the client.

In re Sealed Case, 737 F.2d 94, 98-99 (D.C. Cir. 1984) (internal citations omitted). It is Rider's burden to prove this. Id.; see also Alexander v. F.B.I., 192 F.R.D. 12, 16 (D.D.C. 2000).

In addition to the standard outlined above, the D.C. Circuit has added two "black letter statements" to the attorney client privilege. In re Sealed Case, 737 F.2d at 99. First, "[c]ommunications from attorney to client are shielded if they rest on confidential information obtained from the client." Id. (citing Mead Data Central, Inc. v. United States Dep't of Air Force, 566 F.2d 242, 254 (D.C. Cir. 1977)). Second, "when an attorney conveys to his client facts acquired from other persons or sources, those facts are not privileged." Id.

"The work product doctrine provides immunity from discovery for written materials that are prepared by a lawyer in anticipation of litigation." Ex. 26, U.S. v. Philip Morris, Inc., 2004 U.S. Dist. LEXIS 27026, at *19 (D.D.C. June 25, 2004); F.R.C.P. 26(b)(3) ("a party may obtain discovery of documents and tangible things otherwise discoverable . . . and prepared in anticipation of litigation or for trial . . . only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means"). Privileged material includes "documents and tangible things" that disclose "mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation." Id.

Work product protection provides "a working attorney with a 'zone of privacy' within

which to think, plan, weigh facts and evidence, candidly evaluate a client's case, and prepare legal theories." Coastal States, 617 F.2d at 864. "The purpose of the privilege, however, is not to protect any interest of the attorney, who is no more entitled to privacy or protection than any other person, but to protect the adversary trial process itself." Id. The protection is limited:

> The work-product rule does not extend to every written document generated by an attorney; it does not shield from disclosure everything that a lawyer does. Its purpose is more narrow, its reach more modest . . . . [T]he purpose of the privilege is to encourage effective legal representation within the framework of the adversary system by removing counsel's fears that his thoughts and information will be invaded by his adversary. In other words, the privilege focuses on the integrity of the adversary trial process itself . . . . This focus on the integrity of the trial process is reflected in the specific limitation of the privilege to materials "prepared in anticipation of litigation or trial."

Id. (citations omitted).

As to communications involving plaintiffs' counsel, MGC, Rider has not made the requisite showing that all such communications were privileged. Rider's assertion that they all involved litigation strategy, evidence, or litigation status is insufficient because the record here demonstrates otherwise. For example, Rider and the other plaintiffs have acknowledged – albeit after withholding such information in their original interrogatory responses – having conversations with Katherine Meyer in her capacity as an officer of WAP. See Ex. 20, Rider's Supp. Responses, Inter. No. 4; Ex. 27, AWI Supp. Response, Inter. No. 19; Ex. 28, API Response, Inter. No. 19.[19] Such communications are not privileged. Meyer was not acting as an attorney. Ex. 26, Philip Morris, Inc., 2004 U.S. Dist. LEXIS 27026, at *16 (citing Neuder v. Batelle Pac. Northwest Nat'l Lab., 194 F.R.D. 289, 292 (D.D.C. 2000) (attorney-client privilege applies only to legal advice not to business opinions or public relations advice.)).

[19] Ironically, plaintiff ASPCA admitted to such communications during its deposition, but continues to omit those communications in response to Interrogatory No. 19. Compare Ex. 5, ASPCA Depo. at 89 with Ex. 29, ASPCA Supp. Response, Inter. No. 19.

Similarly, Rider acknowledges that he spoke to AWI's Legal Associate at the July 2005 fund-raiser held for Rider by the organizational plaintiffs. According to ASPCA, the event was the idea of the organizational plaintiffs "so [they could] continue to support Tom Rider in his outreach to the public and the media." Ex. 5, ASPCA Depo. at 205. According to the invitation, plaintiffs' counsel was present to provide the attendees (i.e., third parties) with an update on this litigation. Ex. 7, Invitation to Fundraiser. Indeed, although ASPCA has testified that the funds were being raised for Rider's media campaigns, the invitation leads people to believe that their money would be used for this lawsuit. Id. Rider's response to Interrogatory No. 4, however, does not disclose any discussions with counsel at this fund-raiser. It is extremely unlike that every communication among counsel, AWI, and Rider at an event advertised to provide a public update to non-parties and complete strangers about this litigation was privileged.

Plaintiffs, having met together and with counsel to discuss Rider's campaign work against FEI and the payments made to him, have proffered an attorney-client standard designed to cloak all such conversations. Their efforts overreach and are too broad. There clearly were conversations among plaintiffs and outside counsel that were not privileged – either because they did not concern legal advice or because they were in the presence of third parties. Moreover, once FEI challenged the Rider payments, plaintiffs, the WAP and MGC all like to now say that the payments were for "media work." If truly so, then there is ***absolutely no legal privilege*** that attaches to protect the conversations and any related documents.

Similarly, Rider's privilege claim does not protect any of the communications between him and the other plaintiffs outside the presence of attorneys from MGC. Communications among clients – outside the presence of counsel – are not privileged. In Nesse v. Shaw Pittman, 206 F.R.D. 325, 329-30 (D.D.C. 2002), Magistrate Judge Facciola held that notes of a meeting

among clients were not privileged. In doing so, he explained that:

> Any other rule would insulate from disclosure what clients say to each other merely because they have been discussing a matter that their attorney has investigated and, during that investigation, has spoken to one of the participants in the discussion. Shielding the exchange among clients has nothing to do with encouraging them to be candid when they speak to a lawyer and the law has no interest in whether they are candid with each other.

Id. Magistrate Judge Facciola further concluded that the notes were not privileged even though the attorney later learned of the information discussed. Even the attorney's subsequent receipt of the information discussed "could not have anything to do with advancing the societal interest in encouraging clients to be candid when they speak to their lawyers." Id. at 330.

Rider's communications with the organizational plaintiffs outside the presence of MGC attorneys are discoverable. Similarly, there is no privilege for documents and information relating to communications Rider has had with his co-plaintiffs' in-house counsel - specifically, plaintiff ASPCA's in-house counsel, Lisa Weisberg.[20] Plaintiffs' counsel has argued that those communications are privileged because "Ms. Weisberg is both a co-plaintiff and in-house counsel advising the ASPCA on such matters." Ex. 10, Meyer letter at 10 (1/16/07). That simply is not the operative test.

The presence of an in-house counsel who does not represent Rider does not support a privilege claim. First, Ms. Weisberg has admitted under oath that she was not rendering legal advice to Rider, nor was he seeking any during these communications. Ex. 5, ASPCA Depo. at 172-73. Second, Ms. Weisberg is not only in-house counsel for ASPCA; she also is Senior Vice President for Government Affairs. The attorney client privilege applies only to legal advice

[20] Although Rider only has asserted this particular claim with respect to ASPCA's Lisa Weisberg, the same analysis applies to any in-house counsel employed by the organizational plaintiffs. For example, plaintiff AWI has claimed privilege over communications between Rider and AWI's "Legal Associate" Tracy Silverman. Ex. 27, AWI's Supp. Response, Inter. No. 16. It is unclear why Rider did not reference these communications, but, nonetheless, for the reasons discussed immediately herein, they are not privileged. All such communications must be disclosed.

provided by Ms. Weisberg in the confidence of an attorney-client relationship, it does not apply to business opinions or public relations advice from her. Ex. 26, Philip Morris, Inc., 2004 U.S. Dist. LEXIS 27026, at *16 (citing Neuder, 194 F.R.D. at 292; Burton v. R.J. Reynolds Tobacco Co., 200 F.R.D. 661, 669 (D. Kan. 2001)). For this reason, in-house counsel's advice is privileged "only upon a clear showing that [the attorney] gave it in a professional legal capacity." In re Sealed Case, 737 F.2d at 99. Finally, Ms. Weisberg's status as ASPCA's attorney does not cloak in secrecy her communications with non-ASPCA employees. Such communications clearly are not made pursuant to an attorney-client relationship. They, moreover, are not protected by the work product doctrine. Attorneys may not claim work product when asked to describe conversations – even with their clients - in which they did not reveal their thoughts and mental impressions relating to the litigation. Sadowski v. Gudmundson, 206 F.R.D. 25, 27 (D.D.C. 2002).

Rider must produce documents and information relating to his communications about legal strategy, evidence, or litigation status with the organizational plaintiffs at which plaintiffs' counsel was present unless such communications meet the attorney-client privilege and/or work product standard set forth above. Communications about Rider's surveillance, protest, lobbying, campaigning, etc. certainly do not meet this standard. Nor do communications that occurred in the presence of third parties. Rider also must produce documents and information relating to all such communications at which counsel (MGC) was not present. Communications among clients are not privileged.

2. Legislative and Media Strategies

Rider's communications with the organizational plaintiffs regarding "legislative and media strategies" are not protected by the First Amendment. As discussed above, to successfully

assert such a privilege, Rider must show that his First Amendment interests outweigh FEI's need for the information. See, supra, 22-25. Rider, however, cannot demonstrate that harm would flow from the disclosure of the documents and information sought. Plaintiffs' belated objection – that these communications are irrelevant – is frivolous. First, Rider made no such objection in his original interrogatory response. Ex. 3, Rider's First Responses, Inter. No. 4. He, thus, has waived the objection. See Order at 2 (9/26/05) (failure to object constitutes waiver); Fonville, 230 F.R.D. at 42; F.R.C.P. 33(b)(4). Second, FEI's request for documents and information relating to communications among plaintiffs about Rider's campaign against FEI and payments he has received is undoubtedly "reasonably calculated to lead to the discovery of admissible evidence." F.R.C.P. 26(b)(1). Rider must identify and describe these conversations.

B. Communications with Other Advocates and/or Organizations

Rider's original responses to FEI's Document Request and Interrogatories contained no reference to communications with WAP. Rider's counsel promised to revise his response to Interrogatory No. 4 over a year ago. Ex. 30, Ockene Letter (2/13/06). Rider, however, did nothing until called out about this by FEI in November 2006 and faced a motion to compel. Rider now asserts that:

> I also had conversations with D'Arcy Kemnitz of the Wildlife Advocacy Project between March 2001 and February 2002, and with Katherine Meyer of the Wildlife Advocacy Project between March 2001 and June 2004 about these same matters and other public education outreach I was doing on the issue of elephants in circuses with grassroots groups around the country. ... I have also had conversations with Katherine Meyer in her capacity as an official of the Wildlife Advocacy Project concerning my media and public education for the Wildlife Advocacy Project, including which journalists, grass roots groups, or legislative bodies I am talking to or plan to talk to about these matters.

Ex. 20, Rider's Supp. Responses, Inter. No. 4. However, this response does not "describe every communication" as required. For one thing, given that Rider has received a multitude of payments from WAP over the past six years, it is inconceivable that he never had a discussion

with WAP about money. Rider must identify and adequately describe each communication that he has had with WAP. As discussed above, such communications are not protected by the attorney-client privilege or the First Amendment.

With respect to communications that Rider has had with other animal advocates or animal advocacy organizations, he concluded his response to Interrogatory No. 4 by stating that: "More information about which groups I have spoken to can be found by going to the Yahoo search engine on the internet and typing 'tom rider elephants.'" Id. Rider's attempt to incorporate by reference the entire internet is not amusing. It is frivolous. Rider must describe each communication to the best of his recollection. If he believes that reviewing the internet would be useful, then he should do so. He must recount what he can recall and verify the same.

Finally, Rider's supplemental production of January 31, 2007 included only one page that would be responsive to this request. It is not credible that Rider has not had more such communications. He has traveled around the country – working with other animal advocates and advocacy organizations – protesting FEI and lobbying for legislation to put FEI out of business. Rider must produce the requested documents reflecting these communications. If he has elected not to keep these documents despite the ongoing litigation, Rider must exert all efforts to retrieve copies from others and explain under oath his failure to heed his duty to preserve.

VIII. RIDER HAS IMPROPERLY INCORPORATED – WITHOUT PARTICULARITY – DOCUMENTS PRODUCED BY HIM AND/OR HIS CO-PLAINTIFFS

Instead of providing responsive information requested by certain interrogatories, Rider simply incorporated by reference, on a global scale, documents that were produced by him and/or his co-plaintiffs. Specifically, Rider incorporated such documents in his first response to Interrogatories 4, 5, 17, and 19 and in his supplemental response to Interrogatories 11 and 13. See Ex. 4, Rider's First Responses; Ex. 20, Rider's Supp. Responses. This is bad faith. The

option to produce records in Rule 33(d) permits a party to "specify the records from which the answer may be derived or ascertained" but requires that it do so with "sufficient detail to permit the interrogating party to locate and to identify, as readily as can the party served, the records from which the answer may be obtained." See F.R.C.P. 33(d). By incorporating by reference the entire document production of his co-plaintiffs, Rider frivolously has referred FEI to tens of thousands of pages. Rider's response was, in essence: "everything they said." This is patently insufficient. See Ex. 31, Dage v. Leavitt, 2005 U.S. Dist. LEXIS 17958, *5 (D.D.C. Aug. 18 2005) (party must "at least provide the specific range of page numbers in the [report] that respond to [the] interrogatories") (prohibiting incorporation by reference of 600 page report).

In response to FEI's request for additional information, Rider provided specific page numbers for his response to Interrogatory No. 4. He did not, however, do so for Interrogatories 5, 11, 13, 17, and 19. See Ex. 18, Sanerib letter at 5 (2/14/07). Indeed, counsel's letter ironically asserts that, because time has passed since Rider completed his first interrogatory responses, it would be too burdensome for Rider to identify precisely which documents he was incorporating by reference in his First Responses. Id. at 5. That is precisely the purpose of Rule 33. If the ambiguous answers served by Rider in 2004 make it "extremely burdensome" for him and counsel to discern which documents he was referring to, Rider cannot be said to have specified documents in "sufficient detail to permit [FEI] to locate and to identify" them. F.R.C.P. 33(d).

Similarly, in lieu of producing responsive documents, Rider incorporated by reference the document productions of his co-plaintiffs. Ex. 3, Rider's Document Responses, Request Nos. 2, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 22, 23, 25, 26, 27, 28, 29, 30, 31, 33. Rider did not, however, identify with any particularity the specific documents which he was incorporating into his response. See, e.g., id., Request No. 25 ("Additional responsive documents are being

produced collectively by plaintiffs."). When asked to identify with particularity which documents he was incorporating, Rider's counsel asserted that Rider need not do so because he produced his documents "in the usual course of business." Ex. 18, Sanerib letter at 5 (2/14/07). This is ridiculous. Pursuant to Rule 34, a party may produce documents as they are kept in the usual course of business or it may assemble documents according to the specific requests. Rider has done neither in this instance. He has merely incorporated wholesale by reference his co-plaintiffs' production. This kind of generic "incorporation by reference" and responses purporting to rely on documents identified as "including but not limited to" is unacceptable. Either Rider must identify the specific documents on which he relies or refers, or this Court should strike all such non-descript, overbroad references contained in his responses.

IX. RIDER HAS FAILED TO SUFFICIENTLY DESCRIBE THE DOCUMENTS FOR WHICH HE IS CLAIMING PRIVILEGE

Pursuant to F.R.C.P. 26(b)(5) and FEI's Instruction No. 9, Rider is required to provide specific information for each document that he is withholding on the basis of privilege. Ex. 1, Document Request, Instruction No. 9. Rider, however, has (with only two exceptions) not even attempted to describe with any particularity the documents he has withheld. Moreover, Plaintiffs provided a joint privilege log in June 2004 without identifying which particular plaintiff was logging the document. Two generic entries appear to relate to Rider:

Doc Type	Date	Author/Originator	Recipient(s)	Description	Basis for Withholding
Memos and hand-written notes	April – June 2004	Between K.Meyer, K.Ockene and plaintiffs		Memos and hand-written notes of meetings and phone conversations with clients regarding responses to discovery requests	Attorney-client priv.
e-mails	2000-2004	Between K.Meyer, K.Ockene, and clients		Communications regarding status of litigation, advice, recommendation, strategy	Attorney-client priv.; attorney work product

Ex. 22, Plaintiffs' First Privilege Log. Because neither the individual documents nor the party logging them is identified, it is impossible to tell from this log which plaintiff has what documents, the quantity of documents involved, or any description of same that is sufficient to test the validity of plaintiffs' privilege claim. In its present form, the log is worthless, violates Rule 26(b)(5) and constitutes a waiver: improper privilege claims are no claim at all.

Rider's "supplemental log" fares no better. In January 2007, Rider provided his own privilege log that contained the following lone entry:

Doc Type	Date	Author/Originator	Recipient(s)	Description	Basis for Withholding
e-mails	January 2007	Tom Rider	K. Meyer	Information responsive to supplemental discovery	Attorney-client communication

Ex. 23, Rider's Supp. Privilege Log. First, it is not credible that the only documents created after June 2004 that Rider is withholding based on a claim of privilege are the January 2007 e-mails with Katherine Meyer mentioned above, particularly given the overbreadth of the privilege that he is now claiming. Second, Rider's description for all three of these categories of documents, and any others he omitted altogether from the log, is woefully deficient. See U.S. v. Exxon Corp., 87 F.R.D. 624, 637 (D.D.C. 1980) (holding that "this court has recognized the necessity of asserting the attorney-client privilege in a manner specific enough to allow the court to adjudicate the merits of its invocation" and "[a] mere assertion of the privilege, without a description of the document tailored to the assertion, is insufficient."). "This court explicitly rejected [a party's attempt to make a blanket privilege claim] and instead adopted ... requirements for the 'privilege log' that required the defendant to identify each withheld document and 'state the basis upon which the privilege is claimed, . . . state the subject matter, number of pages, author, date created, and the identity of all persons to whom the original or any

copies of the document were shown or provided.'" Alexander v. FBI, 186 F.R.D. 102, 106-07 (D.D.C. 1998) (quoting Director of OTS v. Ernst & Young, 795 F. Supp. 7, 11-12 (D.D.C. 1992)) (emphasis added). "Despite the additional burden imposed on the defendant in that case, this court concluded that such information was necessary to determine whether the documents were truly privileged." Id. When asked to provide more specificity for each of the documents withheld, plaintiffs refused. See Ex. 18, Sanerib letter (2/14/07). Rider should, therefore, be compelled to provide a privilege log that individually identifies each and every document that has been withheld on an alleged basis of privilege. Until he does so, FEI is unable to ascertain, which, if any, of his alleged privilege claims are justified. See F.R.C.P. 26(b)(5) (a party must describe privileged documents/information such that "without revealing information itself privileged or protected, [it] will enable other parties to assess the applicability of the privilege or protection"). Rider should also explain his failure to log privileged materials so that this Court can determine whether a privilege waiver and bad faith has occurred. See Order at 2 (9/26/05).

X. SANCTIONS, INCLUDING DISMISSAL, ARE WARRANTED

"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." Young v. Office of the U.S. Senate Sergeant at Arms, 217 F.R.D. 61, 71 (D.D.C. 2003) (citation omitted) (dismissing case where plaintiff willfully obstructed discovery, defied discovery orders, and attempted to suborn perjury and tamper with witnesses). This is why a "party is entitled to rely on an opposing party's written responses to interrogatory questions. . . . Defendants are not to be penalized for accepting as true [plaintiff's] answers to the interrogatories – answers which were made under oath and were plainly responsive." In re: Amtrak "Sunset Limited" Train Crash, 136 F.Supp.2d 1251, 1260 (S.D. Ala. 2001). Thus, when courts find "deliberate falsehoods told in proceedings, [they] cannot allow such conduct to go unchecked. Turning a blind eye to false

testimony erodes the public's confidence in the outcome of judicial decisions, calls into question the legitimacy of courts, and threatens the entire judicial system." Dotson v. Bravo, 202 F.R.D. 559, 573 (N.D. Ill. 2001) (citations omitted), aff'd, 321 F.3d 663 (7th Cir. 2003).

Knowingly giving false answers to interrogatories constitutes perjury as well as fraud on the defendant and the court. In re: Amtrak, 136 F.Supp.2d at 1257; Dotson, 202 F.R.D. at 567 ("Knowingly incomplete and misleading answers to written interrogatories constitutes perjury, as well as, fraud."). Fraud on the court occurs where, as here:

> it can be demonstrated, clearly and convincingly, that a party has sentiently set in motion some unconscionable scheme calculated to interfere with the judicial system's ability impartially to adjudicate a matter by improperly influencing the trier or unfairly hampering the presentation of the opposing party's claim or defense.

Aoude v. Mobil Oil Corp., 892 F.2d 1115, 1118 (1st Cir. 1989); Chavez v. City of Albuquerque, 402 F.3d 1039, 1044 (10th Cir. 2005) (perjury during discovery constitutes fraud on court).

Dismissal with prejudice is the consequence for committing perjury in interrogatory responses. In re: Amtrak, 136 F.Supp.2d at 1271; Dotson, 202 F.R.D. at 570, 574 (citing Combs v. Rockwell Int'l Corp., 927 F.2d 486, 488 (9th Cir. 1991)); Young, 217 F.R.D. at 70-71 (dismissal particularly appropriate where plaintiff fabricates evidence and fictionalizes testimony). See also Aoude, 892 F.2d at 1122 (upholding dismissals where plaintiff chose to and was caught "playing fast and loose" with the defendant and the court); Martin v. DaimlerChrysler Corp., 251 F.3d 691, 692-94 (8th Cir. 2001) (upholding dismissal where plaintiff lied by denying involvement in prior litigation and failed to fully disclose her medical history and treatment); Chavez, 402 F.3d at 1041-42 (upholding dismissal where plaintiff perjured himself in interrogatories and deposition testimony); Archibeque v. Atchison, Topeka & Santa Fe Ry Co., 70 F.3d 1172, 1173 (10th Cir. 1995) (upholding dismissal for plaintiff's willful

false and misleading interrogatory and deposition testimony); Televideo Systems, Inc. v. Heidenthal, 826 F.2d 915, 915-18 (9th Cir. 1987) (upholding default and subsequent racketeering judgment against plaintiff for perjury which "infected all of the pretrial procedures and interfered egregiously with the court's administration of justice").

The D.C. Circuit has recognized that the willful destruction of evidence, false testimony to the court, and a cover-up scheme regarding the spoliation constitutes a fraud on the court that will also sustain dismissal. Synanon v. U.S., 820 F.2d 421, 427-28 (D.C. Cir. 1987); see also Arista Records, 314 F.Supp.2d at 33-34 (granting leave to file motion for appropriate sanctions due to spoliation of evidence); Synanon, 820 F.2d at 423 n.8, 428 (willful spoliation also gives rise to presumption that destroyed materials would have been adverse to the destroying party).

In this Circuit, the standard for dismissal pursuant to the Court's inherent authority to sanction litigation misconduct requires: (1) clear and convincing evidence, and (2) a showing why lesser sanctions are insufficient. Shepherd v. ABC, Inc., 62 F.3d 1469, 1478-80 (D.C. Cir. 1995); see also Bonds v. District of Columbia, 93 F.3d 801, 808 (D.C. Cir. 1996) (sanctions imposed pursuant to Rule 37 require proportionality to the offense at issue). Such dismissal must be predicated upon a finding of willfulness, bad faith or fault. Weisberg v. Webster, et al., 749 F.2d 864, 871 (D.C. Cir. 1984). But "[t]his does not mean that courts must first *impose* a lesser sanction, for we have suggested, and other courts have expressly held, that a district court need not exhaust other options before dismissing a suit or imposing a default judgment." Shepherd, 62 F.3d at 1479 (citations omitted) (emphasis in original).

Three possible justifications can support the use of dismissal as a sanction for misconduct: (1) the resulting prejudice to the other party; (2) the prejudice to the judicial

system; and (3) the need to punish and deter similar misconduct in the future. Shea v. Donohoe Constr. Co., Inc., 795 F.2d 1071, 1074 (D.C. Cir. 1986).[21]

FEI should have been able to rely on Rider's discovery responses. Instead, Rider's discovery responses are plagued by perjury – including outright falsities (such as his responses to Interrogatory 7 stating he was not a party or deponent/testifier in other litigation and Interrogatory 24 stating he has not received any compensation from animal rights groups) and half-truths (such as his response to Interrogatory 2 omitting his military service from the time period for which he responded) – and spoliation of responsive document evidence. As FEI has demonstrated above through clear and convincing evidence, this conduct was willful, not accidental. Counsel's alter ego, WAP, was issuing 1099's to Rider at the same time it was signing Rider's perjurious interrogatory responses stating he had received no such compensation. Cf. Ex. 4 at 40 (counsel's signature page) with Ex. 6 (2002-05 1099's from WAP). Rider then failed to retain, log or otherwise disclose any of these documents related to these payments. Were it not for the *six* pages produced by ASPCA, FEI would never have discovered – despite requesting and inquiring about it in written discovery to *all of the plaintiffs* – the payment scheme that Rider and several of his other co-plaintiffs decided to cover up and ignore rather than disclose as they were obligated.

Moreover, the subject matter of the perjury and spoliation, including *inter alia*, prior litigation history and improper payments to Rider, go directly to very serious, material matters in this litigation that could easily terminate it due to the nature of the misconduct involved. See Martin, 251 F.3d at 692-94 (lying about involvement in prior litigation resulted in dismissal);

[21] These factors apply to dismissal whether ordered pursuant to Rule 37(b) or the court's inherent powers. Webb v. District of Columbia, 146 F.3d 964, 971 n.15 (D.C. Cir. 1998).

Motion of Defendant FEI for Leave to Amend Answers and to Assert Additional Defense and RICO Counterclaim (2/28/07) (seeking additional defense of unclean hands based on payments).

Lesser sanctions, also known as issue-related sanctions, can include fines, attorneys' fees, adverse evidentiary rulings, preclusion of specific claims, defenses or evidence, and/or deeming certain facts as established. Young, 217 F.R.D. at 70. The sanctions, however, are insufficient where as here the misconduct goes to a dispositive issue such that any issue-related sanction effectively disposes of the merits anyway, Shepherd, 62 F.3d at 1479, where the guilty party has engaged in such widespread spoliation that the court cannot fashion an issue-related sanction, id. or evidence has been fabricated or perjury has occurred. Young, 217 F.R.D. at 70. Perjury has occurred, and dismissal is appropriate. Precluding Rider's testimony and evidence, which would be an appropriate issue-related sanction, would be the same thing as dismissing him from the case. Rider's spoliation appears to have occurred not just for a single document or file, but for all documents related to any payments made to him since at least 2000. FEI knows from other sources, primarily WAP, that there is an abundance of responsive material that Rider apparently never preserved, as he was obligated to, because he no longer has it and has failed to produce it. The payments issue goes to the heart of whether Rider, or any of the other plaintiffs for that matter, should be continued to proceed with this litigation. The Court cannot fashion a remedy to cure this if, in fact, Rider no longer has these documents as he claims.

Finally, even though FEI should be awarded its costs and fees for having to bring this motion, F.R.C.P. 37(a)(4); Order (2/26/07), monetary sanctions alone are likewise inadequate in this instance. Imposing mere monetary sanctions under these circumstances would "suggest that money could cure litigation misconduct even of the magnitude found here, including witness tampering and suborning perjury." Young, 217 F.R.D. at 70. It is questionable whether Rider

himself could pay fines or attorney fees without receiving even more of the improper "grants" from his co-plaintiffs and counsel. At a minimum, any award of monetary sanctions should also include his counsel and be coupled with other forms of sanctions against Rider.

The resulting prejudice to FEI from this discovery fraud is real, not imaginary. The fraud has pervaded every aspect of pretrial discovery: FEI's defense in this case has been interfered with and delayed for years due to Rider's willful suppression of evidence. Rider's deception has unreasonably and vexatiously increased FEI's litigation costs. FEI deposed certain organizational plaintiffs without having the benefit of this discovery that would have clearly been a line of relevant inquiry at the depositions. FEI could have asserted an unclean hands defense against API in March 2006 if it had received documents and truthful interrogatory responses from Rider. Instead, it has now had to move the Court for leave to amend to correct its answers to conform to the evidence produced not by Rider, but by his counsel through WAP. FEI has not, and will not, be able to depose Rider until he fulfills his discovery obligations. FEI has been forced to spend its own time and money to subpoena and then compel WAP to produce documents that should have come directly from Rider, and his other co-plaintiffs, in the first instance. To date, WAP and the plaintiffs continue to hide and withhold documents from FEI.

The deceit involved here is an equal affront to the integrity of this Court. There is simply no excuse for the perjury and spoliation that has occurred. Litigation is supposed to be about the truth, the facts, and the law – not about winning through whatever illicit means a party decides to invoke because it believes in fostering a political cause. The judiciary simply cannot function in the absence of honesty, and it cannot let such conduct stand. Young, 217 F.R.D. at 71. The conduct at issue here is egregious, and it was done to gain an unfair tactical advantage over FEI in this litigation. Under these circumstances, the need to punish Rider and to deter others who

would attempt such conduct in the future is unquestionable. Shea, 795 at 1077-78; Webb, 146 F.3d at 975-76. "The record as a whole dictates dismissal, *with prejudice*, as the only reasonable sanction for [plaintiff's] deceit." Dotson, 202 F.R.D. at 575 (emphasis in original).

CONCLUSION

For the reasons set forth herein and in its Motion, FEI respectfully requests that its Motion be granted, that Rider be dismissed, and that all other appropriate sanctions, including costs and fees, be awarded to FEI pursuant to F.R.C.P. 26(g), 37(a), & 41(b) and the Court's inherent authority. A proposed order is attached.

Dated this 20th day of March, 2007.

Respectfully submitted,

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