

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

EXHIBIT 11
TO

MEMORANDUM OF POINTS AND AUTHORITIES IN
SUPPORT OF FEI’S MOTION TO COMPEL
DISCOVERY FROM PLAINTIFF TOM RIDER
AND FOR SANCTIONS, INCLUDING DISMISSAL

FULBRIGHT & JAWORSKI L.L.P.

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November 22, 2006

VIA FACSIMILE AND U.S. MAIL

Katherine A. Meyer
Meyer Glitzenstein & Crystal
1601 Connecticut Avenue, N.W.
Suite 700
Washington, DC 20009-1056

Re: ASPCA v. Feld (No. 03-2006)(EGS): LCvR 7(m) Conference Regarding
Plaintiffs' Discovery Deficiencies

Dear Ms. Meyer:

We are writing pursuant to LCvR 7(m). Upon reviewing the discovery responses produced by your clients, we have identified the following deficiencies. Please produce the requested material discussed below or adequately substantiate your objections by December 15, 2006. Wherever possible, we would like to narrow or even eliminate the discovery disputes between the parties concerning plaintiffs' documents production and interrogatory responses. We are available to discuss this over the phone or in person as you would prefer. Should we discover additional deficiencies as our review continues, we will promptly notify you.

DISCOVERY SOUGHT FROM THE ORGANIZATIONAL PLAINTIFFS

The nine categories set forth below reflect the deficiencies we have identified thus far in the discovery responses of plaintiffs ASPCA, AWI, and Fund for Animals. We note at the outset that plaintiff API – in violation of the Court's Order - has not yet provided any discovery responses. See Order Granting Leave to Amend (2/23/2006) ("the API is to abide by all of the agreed-upon and ordered procedures in this case such as outstanding scheduling and discovery orders and agreements"). API therefore is subject to the discovery requests that were issued to the other organizational plaintiffs. Please provide API's discovery responses by December 8, 2006.

(1) Communications Between the Organizational Plaintiffs and Tom Rider:

Interrogatory No. 16 requires the organizational plaintiffs to describe every communication they have had with current or former employees of FEI since 1996. Document Request No. 21, moreover, requires them to produce all documents that relate to communications

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with Tom Rider. As discussed below, however, each of the plaintiffs has failed to adequately respond to Interrogatory No. 16. Their objections to Document Request No. 21 on the basis of an alleged attorney-client privilege, moreover, are baseless.

a. Communications Between ASPCA and Rider

ASPCA objected to Interrogatory No. 16 because "Lisa Weisberg has had numerous such communications with Mr. Rider, but those communications are protected by the attorney-client relationship. In addition, Ms. Weisberg has had conference calls with Mr. Rider, the other plaintiffs, and plaintiffs' attorneys. All of those communications are also protected by the attorney-client privilege."¹ Based upon Ms. Weisberg's deposition, however, her conversations with Rider clearly are not privileged. First, Ms. Weisberg has testified about numerous ("weekly") conversations she had with Rider that involved ASPCA's efforts to fund his activities targeting FEI. ASPCA Depo. at 168. Neither Ms. Weisberg nor Ms. Ockene believed those communications to be privileged when Ms. Weisberg was asked about them at her deposition. They, accordingly, should have been described in response to Interrogatory No. 16 and relevant documents should have been produced in response to Document Request No. 21.

During Ms. Weisberg's deposition, she also referred to communications she has had with Tom Rider about matters relating to this litigation. ASPCA Depo. at 171. Ms. Ockene and Ms. Weisberg refused, however, to discuss those communications, asserting that they were privileged. This assertion was baseless. Ms. Weisberg testified under oath that she was not rendering legal advice to Rider, nor was he seeking any. ASPCA Depo. at 172-73. The communications between her and Rider – whether or not they related to this litigation – are not privileged and must be disclosed. Once ASPCA has supplemented its interrogatory responses and document productions accordingly, FEI reserves its right to re-open Ms. Weisberg's deposition to obtain answers to this line of inquiry.

In response to Interrogatory No. 16, ASPCA also stated that Rider had communications with three people in its media department, its former President, and one of its Vice Presidents. ASPCA, however, did not describe those communications. The answer must be amended to include those communications and any others that have been omitted.

Also, FEI's notice of ASPCA's deposition required ASPCA to put forth one or more designees who could testify about, among other things, communications or financial relationships between ASPCA and other plaintiffs, including Tom Rider. During the deposition, however, Ms. Weisberg could not recall sufficient detail about the financial decisions to fund Rider and could not answer questions about communications between Rider and other ASPCA personnel. ASPCA Depo. at 165, 175. ASPCA was required to provide a witness who would

¹ As explained in sections (3) and (4) below, not all of the aforementioned conference calls with Rider, plaintiffs, and counsel are privileged. Any conversations that did not involve legal advice (e.g., conversations about how you, WAP, and plaintiffs would fund Mr. Rider's employment aimed at harassing FEI) are not privileged and must be included in the discovery responses.

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testify to information reasonably available to ASPCA, and Ms. Weisberg's testimony did not discharge that obligation. Please let us know when a new designee will be available to testify regarding these matters.

b. Communications Between The Fund and Rider

In response to Interrogatory No. 16, The Fund stated that "Michael Markarian, President of the Fund for Animals, has had several conversations with Tom Rider regarding this litigation and regarding media interviews on circus issues." This response does not adequately "describe every communication" as required. Similarly, The Fund's response does not adequately "describe" Mr. Schubert's or Ms. Prescott's conversations with Rider. Please also identify on what basis you are claiming attorney client and work product privileges.

Please supplement this response appropriately. The Fund's response should include an adequate description of the conversation during which Mr. Schubert offered Rider a job at Black Beauty Ranch. See The Fund Depo. at 166. Such an adequate description must include, but is not limited to, the reasons that Rider gave for turning down that offer.

c. Communications Between AWI and Rider

In response to Interrogatory No. 16, AWI stated that "Ms. Liss and Christine Stevens – then President of AWI – met with Tom Rider at AWI headquarters sometime during 2001. They discussed Ringling Bros.' mistreatment of its elephants and their common interest in pursuing this law suit." This response does not adequately describe this communication as required. Please supplement this response appropriately. This response also includes an objection for attorney client privilege and work product protection. Please identify the basis for the same.

This response is also deficient because AWI has had several more communications with Rider. Ms. Liss has personally testified under oath as such. AWI Depo. at 143-46. In addition to conversations about funding and travel for Rider, AWI clearly has coordinated its media efforts with him. See, e.g., Document Numbers AWI 05905 – AWI 05908. Please supplement this response to include all communications with Rider.

In supplementing the responses to Interrogatory No. 16 and Document Request No. 21, we remind you that the plaintiffs' objections on the basis of attorney-client privilege or work-product do not protect all communications between plaintiffs and counsel – particularly those where plaintiffs and counsel are discussing their efforts to fund Rider's employment and participation in this lawsuit. In addition, plaintiffs' response to Document Request No. 21 should include, but is not limited to, letters or 1099s sent to Rider, Fed-Ex receipts reflecting packages shipped to Rider, e-mails to or from Rider, e-mails (within an organization or to another organization), memos, or notes summarizing a conversation with Rider, recordings of telephone messages, telephone records, invoices and credit card receipts, reimbursement requests, and money wires and checks to Rider.

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(2) Communications Between Lisa Weisberg and Other ASPCA Personnel:

Document Request No. 3 requires ASPCA to produce documents that relate to organizational meetings during which there was discussion of elephant treatment or the complaint. ASPCA, however, has objected because these documents would include privileged communications between Ms. Weisberg and ASPCA's President and because they would include Ms. Weisberg's work product.

This response is inappropriate for a number of reasons. First, no documents appear on the privilege log that would be consistent with this objection.² Second, Ms. Weisberg, though having earned a law degree, serves many functions for ASPCA that are entirely unrelated to her status as a lawyer. For example, she performs media and government relations work that has nothing to do with her law degree or with legal advice. In addition, Ms. Weisberg was tendered as a Rule 30(b)(6) witness by ASPCA – a role that she cannot fulfill by claiming privilege for the responsive testimony. The documents that you believe to be privileged because Ms. Weisberg was acting as an attorney must be logged. The documents in which she was not acting as an attorney (e.g., documents relating to her media work or to ASPCA's funding of Tom Rider) must be produced. ASPCA's response to this request should include, but is not limited to, minutes of any such meetings as well as notes, e-mails, or memos reflecting or following-up on any such meetings.

(3) Communications Between Plaintiffs and Other Animal Advocacy Organizations:

Interrogatory No. 19 requires the organizational plaintiffs to describe all communications with animal advocacy organizations about the presentation and treatment of elephants at any circus, including FEI's. Similarly, Document Request No. 22 requires them to produce documents that relate to communications with other animal advocacy organizations concerning FEI. The plaintiffs' responses to these requests, however, are deficient because they are premised upon a baseless privilege, they do not identify communications with WAP, and they do not adequately describe the few communications that are identified.

ASPCA has objected to the Interrogatory on the grounds that "Lisa Weisberg has had numerous conversations with the other organizational plaintiffs and their attorneys, all of which are privileged under the attorney-client and work product privileges." AWI has objected on the grounds that "Cathy Liss has had numerous conversations with the other organizational plaintiffs in this case, and their attorneys, concerning the litigation, most of which are protected by the attorney-client privilege" (emphasis added). Finally, the Fund has objected on the grounds that "Michael Markarian has had numerous conversations with the other organizational plaintiffs and their attorneys in this case concerning the litigation, most of which are protected by the attorney-

² Ms. Ockene's February 13, 2006 letter to FEI's prior counsel seems to indicate that plaintiffs did not identify responsive documents on the privilege log if an "objection was indicated in the responses to individual discovery request." If plaintiffs have, in fact, not identified in the privilege log all documents withheld on the basis of an alleged attorney-client and/or work product privilege, please do so by December 8, 2006.

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client privilege" (emphasis added). The organizations also have objected to Document Request No. 22 on the grounds that it would require "the production of documents protected by the attorney-client or the work produce privileges."

At the outset, we note the obvious: conversations among the plaintiffs during which attorneys were not present are not privileged. Moreover, not every communication among plaintiffs in the presence of attorney(s) is privileged. For example, communications relating to Ms. Weisberg's media and government relations work are not privileged. Nor are communications relating to the organizations' decisions to fund Mr. Rider's participation in this lawsuit and employment aimed at harassing FEI. AWI and the Fund apparently recognize that not all such communications are privileged, as they have claimed privilege only over most of them. "Most" does not mean "all," and they have failed, however, to identify and describe the non-privileged communications. Each organization must describe the non-privileged communications and produce the responsive documents.

The organizations, moreover, did not identify or describe any communications with WAP. Nor did they produce any responsive WAP documents. This is simply unfathomable. WAP is clearly an animal advocacy organization, established as an alter-ego of plaintiffs' counsel, and is intimately involved in this case. See <http://www.wildlifeadvocacy.org/about.html> ("The purpose of the Wildlife Advocacy Project is to advocate the ... protection of wildlife, and curtailment of animal abuse and exploitation ..."). In addition, Ms. Weisberg testified under oath that ASPCA employee Nancy Blaney had conversations with WAP employee D'Arcy Kemnitz. ASPCA Depo. at 88. WAP, moreover, has produced documents relating to communications with plaintiffs concerning FEI. Those documents include e-mail correspondence between you and plaintiffs. Please describe the communications between plaintiffs and WAP that are required by Interrogatory No. 19. Please also produce the documents that are required by Document Request No. 22. Such documents include, but are not limited to, e-mails to or from WAP, e-mails to or from anybody at the law firm of Meyer, Glitzenstein & Crystal pertaining to WAP, e-mails to or from others regarding communications with WAP, memoranda regarding the same, recorded messages of telephone calls from WAP, phone records reflecting calls with WAP, cancelled checks that were sent to WAP, etc.

Finally, ASPCA merely stated that it has had such communications with six animal advocacy organizations. Although ASPCA identified the relevant organizations, ASPCA failed to "describe" the communications as requested. Please do so or explain in greater detail how this request is objectionable.

(4) Communications Among Plaintiffs and Counsel Discussed During Depositions:

In addition to asserting a baseless privilege objection in response to Interrogatory No. 19 and Document Request No. 22 regarding communications among plaintiffs and counsel, ASPCA and AWI relied upon the same objection during their depositions.

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During ASPCA's deposition, FEI asked about conversations ASPCA has had with other plaintiffs regarding funding for Rider. ASPCA Depo. at 80. Ms. Ockene objected on attorney-client grounds and instructed Ms. Weisberg not to answer to the extent it would include such conversations if attorneys were present: "To the extent that you had discussions that didn't involve us, your lawyers, you can answer the question." This instruction, however, was inappropriate. If the conversations were not related to rendering legal advice – whether or not lawyers were present, they are not privileged. For example, conversations relating to funding Rider's employment and participation in this lawsuit are not privileged. Similarly, conversations where you or Mr. Glitzenstein were acting as Officers of WAP, not as lawyers, also are not privileged. To the extent that you are contending that yourself or Mr. Glitzenstein, as officers of WAP, establish the attorney-client privilege, it has been waived by the numerous letters and memoranda from you and Mr. Glitzenstein on WAP letterhead that have already been produced in this case.

During AWI's deposition, FEI asked whether AWI has spoken to Rider other than to arrange logistics for his travel. AWI Depo. at 144-145. While Ms. Liss was responding that those discussions were "only as plaintiffs," Ms. Ockene interjected: "don't answer to the extent that any of these conversations reveal attorney-client privilege material." FEI then asked Ms. Liss whether Rider was employed when she met with him for the first time. Again, Ms. Ockene interjected an oddly placed instruction not to reveal privileged communications. FEI responded that whether or not Rider was employed has nothing to do with legal advice being given. Ms. Ockene insisted, nonetheless, that the communications were privileged because an attorney was present. When FEI continued to argue that this objection was not proper, Ms. Ockene instructed Ms. Liss not to describe communications "if there was an attorney present and it was in the context of the litigation." Ms. Ockene's instruction was not proper. That is simply not the standard for attorney-client privilege. In particular, we already know that some of the conversations involved attorneys and might have been in the context of this litigation but had nothing to do with rendering legal advice. They revolved around plaintiffs' and WAP's efforts to fund Rider while this lawsuit was pending.

Please explain how these communications, particularly those involving fund-raising activities, are all privileged. The depositions of Ms. Weisberg and Ms. Liss are yet to be completed regarding this line of inquiry. FEI also requests that you amend any interrogatory response or document production that was affected by this baseless privilege claim.

(5) Payments to Tom Rider and/or WAP:

Interrogatory No. 21 requires plaintiffs to identify each resource expended since 1997 in advocating better treatment for animals held in captivity. Interrogatory No. 22 requires plaintiffs to identify each expenditure since 1997 of financial and other resources made while pursuing alternative sources of information about FEI's actions. Document Request Nos. 19 and 20, moreover, require plaintiffs to produce the related documents.

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As you know, the record in this case is replete with documentation that each of the plaintiffs has provided money or other gifts to Tom Rider either directly or through your organization, WAP. ASPCA has provided funding as well as materials (including a laptop and cell phone) to Rider and The Fund has paid for his vehicle to be repaired. In addition, according to Rider's deposition testimony, ASPCA has provided Rider with approximately \$15,000 directly and AWI has also provided him directly with cash. The Fund, moreover, has provided Rider with at least \$1,000 directly. Fund Depo. at 158. Of course, plaintiffs have also funneled money to Rider through WAP. AWI, for example, has provided WAP with at least \$10,500 according to documents produced by WAP.

Despite the vast amount of money and other resources provided to Rider (whether directly or through WAP), none of the plaintiffs identified these expenditures in response to Interrogatory No. 21. Similarly, the only reference to these payments in response to Interrogatory No. 22 is ASPCA's statement that it provided a grant of \$7,400 to WAP in 2001. Please amend and correct the plaintiffs' responses to Interrogatory Nos. 21 and 22 to include all payments to Rider and WAP.

In addition to omitting information about payments to WAP or Rider from their Interrogatory Responses, plaintiffs have omitted documents about the same from their responses to Document Request Nos. 19 and 20. Although a handful of these documents have been produced, conspicuously absent from plaintiffs' production are check requests for payments made to Rider, cancelled checks, letters enclosing or acknowledging payments, 1099s given to Rider, receipts of materials purchased for Rider, etc. Moreover, plaintiffs' objection to produce invoices from your law firm are baseless. ASPCA has already testified that it provided part of its grant to WAP in a payment to your firm. ASPCA Depo. at 57. If the invoices contain privileged information, plaintiffs may redact and log that information. Plaintiffs, however, must produce the non-privileged portions of the invoices from your firm that reflect monies filtered through it for payments to Rider.

(6) ASPCA's Alleged "Confidential / Proprietary" Documents and Information:

During Ms. Weisberg's deposition, FEI asked why ASPCA stopped paying Tom Rider in 2003 and Ms. Weisberg testified that she believed it had to do with budgetary decisions. When asked what other issues the money was directed towards, Ms. Weisberg responded "I believe that's privileged and confidential based on ASPCA activities and strategic planning." ASPCA Depo. at 141. When FEI pressed for an explanation, Ms. Ockene stated that "I think she's objecting based on – and I'll object on her behalf based on proprietary concerns, confidential and proprietary information concerning ASPCA's strategic planning." We will certainly do so unless you are willing to withdraw the frivolous objection.

Later in the deposition, FEI returned to the subject matter and asked Ms. Ockene under what basis in the rules she was objecting. Ms. Ockene responded that "it's burdensome and irrelevant and also goes to confidential proprietary concerns that we're simply not going to talk about. You can take it up with the judge if you want." ASPCA Depo. at 220. Again, we will

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certainly do so unless you are willing to withdraw the frivolous objections. The assertion of a "privilege" for information by a 501(c)(3) organization is baseless.

Similarly, Interrogatory No. 21 requires ASPCA to identify the resources it has expended since 1997 in advocating for better treatment of animals held in captivity and Document Request Nos. 19 and 20 require related documents. ASPCA, however, has objected on the grounds that these responses would require the disclosure of confidential proprietary financial information.

Please let us know whether you will produce this information under an agreed-upon protective order. We note that FEI offered during Ms. Weisberg's deposition to enter the information under a protective order, but that Ms. Ockene responded that she would continue to instruct the witness not to answer and that FEI "can move to compel if [it] want[s]." ASPCA Depo. at 221.

(7) ASPCA Documents and Information Relating to Circus Inspections:

Document Request No. 9 requires ASPCA to identify all documents relating to inspections of any circus, including FEI's. Similarly, Interrogatory Request No. 12 requires ASPCA to describe each inspection that it has conducted of FEI.

In response to the Document Request, ASPCA produced certain files relating to inspection reports together with a letter to Ms. Weisberg noting that these are the files she requested. The letter to Ms. Weisberg stated that the 1997 records were destroyed and that there were no records in 1998. During the deposition, however, FEI pointed out that one of the documents attached to that letter was from 1998. Ms. Ockene promptly interjected that a reasonable search was performed but that ASPCA could search again. ASPCA Depo. at 118-19. We understand that additional pre-2005 inspection records were included in your supplemental production of July 2006. Please produce any and all additional responsive records dating back to January 1, 1996.

In response to the Interrogatory, ASPCA only referred to its document production. ASPCA has failed to describe the inspections as required. Please describe each inspection as required. In connection with your response, we remind you that ASPCA must describe each inspection regardless of whether or not documents exist. As you know, Ms. Ockene's February 13, 2006 letter promised to supplement the response to this Interrogatory "to account for the inspections for which no records have been located."³ The documents produced to date are irrelevant for purposes of answering this Interrogatory.

³ Please also supplement the response to Interrogatory No. 20 as promised in Ms. Ockene's letter.

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(8) AWI's Knowledge of Payments to Rider:

During AWI's deposition, Ms. Liss testified that she was not "not aware" that AWI was sharing Rider's expenses with other organizations and that she did not know whether other organizations were providing similar reimbursements to Rider. AWI Depo. at 142.

This testimony contradicts an ASPCA email, indicating that these conversations took place. Document Number A 00046. It also contradicts documents produced by WAP, specifically, the grant proposal that you sent to Ms. Liss and your e-mail to plaintiffs (including Ms. Liss) that WAP was looking for more funds for Rider.

Ms. Liss was tendered as a 30(b)(6) witness. If she does not have the information, then another witness must be produced who does have it. This information is clearly available to AWI, and it must therefore produce a witness who is properly prepared and competent to testify to such matters.

(9) Confirmation That All Documents Have Been Produced:

Please confirm that the organizational plaintiffs have produced all responsive documents. After reviewing all of the discovery conducted thus far, the ASPCA ought to have produced check requests for "grants" paid to Rider (as it produced such requests for your bills and WAP's grants) as well as letters/Fed-Ex slips/Western Union receipts, etc. related to Rider's "grants," and records of the cell phone and laptop that it supplied to Rider. It also should have produced documents relating to the charges that were put on Ms. Weisberg's (or anybody else's) corporate credit card on behalf of Rider. See ASPCA Depo. at 226. Overall, there appears to be very little e-mail correspondence that has been produced by any of the plaintiffs. This does not seem correct, particularly in light of the fact that the ASPCA gave Rider a laptop. It also seems that each of the organizational plaintiffs would have additional documents reflecting communications with each other about their funding of Rider and documents reflecting communications with you or Mr. Glitzenstein about the same (at least one of those has been produced by WAP). In particular, it is astonishing that only one document has been produced in connection with the fund-raiser that the organizational plaintiffs hosted for Tom Rider in 2005. See Document Number AWI 05921 – AWI 05923 (advertising "benefit to rescue Asian Elephants from abuse by Ringling Bros. and Barnum & Bailey" and noting that Tom Rider would speak as would the attorneys handling this litigation); ASPCA Depo. at 207-08.

As indicated in the January 24, 2006 letter to Ms. Ockene from FEI's prior counsel, plaintiffs' document production should include the following:

... any photographs or videos in plaintiffs' possession that show treatment of defendant's elephants, including all photographs or footage to which plaintiffs, including but not limited to Mr. Rider, have referred in public appearances, such as, but not limited to, government hearings, media interviews or press releases, and any 'undercover' or other audio or visual footage of defendant that is in

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plaintiffs' possession or that plaintiffs intend to use in this litigation (responsive to, inter alia, Doc. Request Nos. 2, 13, and 26). It should include information about press conferences or other meetings among any plaintiffs and other animal activist organizations in connection with any referenda, lobbying or legislative efforts, or press conferences involving one or more plaintiffs discussing defendant or Asian elephants (responsive to, inter alia, Doc. Request Nos. 2, 4, 6, 22, 26, and 30). It should also include information about any fundraising events held or attended by any plaintiff or plaintiffs to raise money for this case or for use in opposing or discussing the presentation of Asian elephants in circuses (responsive to, inter alia, Doc. Request Nos. 22, 24, 26, and 30).

Please confirm, as Ms. Ockene promised you would in her February 13, 2006 letter to FEI's prior counsel, that there are no additional responsive documents in the files of the Society of Animal Protective Legislation (a division of AWI) or the Humane Law Enforcement (a division of ASPCA). If there are, plaintiffs must produce them immediately.

Please also update your document production. As you know, ASPCA and AWI have not updated their production since July. The Fund and Plaintiffs (collectively) have not updated their production since August.

Finally, please explain why old documents (e.g., those dated 2000, 2002, 2003, etc.) were not produced until July and August of 2006. See, e.g., Document Numbers PL 08371-72, PL 08382-83, PL 08384, PL 08385-86, F 04060-61, F 04062-64, F 04065, F 04066-67, etc. These should have been produced years ago rather than being withheld. This is one of several examples that indicates the inadequacy of plaintiffs' searches for documents and the production of them. Plaintiffs should explain how they are going to correct the inadequacy of the searches and provide a date certain within the next month by which the renewed searches will be completed.

DISCOVERY SOUGHT FROM TOM RIDER

(1) Incomplete Responses to Document Requests:

There are two blatant procedural defects with Rider's responses to FEI's document requests. First, many of the responses do not state whether Rider is producing all of his responsive documents. For example, it is insufficient for Rider to state in response to Request Nos. 3 and 4 that "In response to this request, Mr. Rider is producing a document marked TR - 00002."

It also is no excuse that Rider no longer physically has copies of documents that were provided to him by animal advocacy organizations such as plaintiffs or WAP. If those organizations continue to retain copies of those documents, Rider is obligated to retrieve and produce them. WAP, for example, has produced to FEI letters and 1099's that were provided to Rider but that Rider has never produced to FEI. It is troubling that Rider did not produce them.

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They are clearly covered by FEI's production requests and should have been produced. If Mr. Rider has failed to retain responsive documents, that must be explained. Copies of all documents that were given to Rider but that exist in the files of an organization are still in Rider's possession, custody, or control and are subject to production. He must retrieve and produce any responsive documents that are in his possession, custody or control, whether they are located with you, the WAP, the organizational plaintiffs, or any other third party. It is similarly insufficient for Rider to merely assert that documents have been produced by plaintiffs collectively. He must identify and produce his own documents.

(2) Documents and Information Concerning Rider's Income / Payments From Plaintiffs:

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. Finally, Interrogatory No. 24 requires Rider to identify income, funds, compensation, etc. that he has received from animal advocates or animal advocacy organizations.

In each instance, 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." There is no such privilege.

In light of Rider's deposition, which was not conducted under a protective order, there is no reason why these matters ought to be cloaked with a protective order. Rider already has testified under oath in an open setting about the money he has received from WAP and the other contributions he has received directly from plaintiffs. His alleged "freedom of association" objection, moreover, is baseless. To support such an objection, he must be able to show that harm would flow from the disclosure of the information sought, which he cannot do.

We further note that Rider stated in response to Interrogatory No. 24 that he has not received compensation from an animal advocacy organization. We know that this is patently false given the documents produced by WAP such as 1099's. Regardless of whether Rider considers the money that he receives from WAP, PAWS, ASPCA, AWI, the Fund, etc. to be "compensation," he must amend his response to Interrogatory No. 24. Moreover, however the money is characterized, the request covers funds, so a complete answer on all of the funds received by Rider must be provided, rather than the evasive answer that now exists.

(3) Communications Between Rider and Animal Advocates:

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. Interrogatory No. 4 also requires Rider to describe every communication regarding FEI that he has had with animal advocacy organizations.

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In 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." As demonstrated by Ms. Weisberg's own testimony, this objection is meritless. A communication is not privileged merely because an attorney was present – particularly here, where you and Mr. Glitzenstein have communicated with Rider as officers of WAP and have produced such communications to FEI. Rider must produce those documents and any other non-privileged documents in response to these requests. Similarly, Rider has not had any privileged communications with Lisa Weisberg. The fact that she has a law degree does not cloak their communications in privilege. She has testified under oath that Rider did not seek legal advice from her, nor did she render it to him. ASPCA Depo. at 172-73. Rider must produce these documents.

Similarly, as discussed immediately above, Rider's objection on the grounds of his alleged "freedom of association" is baseless. He cannot demonstrate that harm would flow from the disclosure of the information sought. Rider's response to these Document Requests should include, but is not limited to, letters or 1099s sent to Rider, e-mails to or from advocacy organizations (including plaintiffs and WAP), telephone records, etc.

Conspicuously absent from Rider's Interrogatory response – like that of the other plaintiffs – is any reference to communications with WAP. Ms. Ockene promised in her February 13, 2006 letter to supplement this response to include such communications. Please do so now without any further inordinate delay. Also absent from Rider's response is a description of conversations he has had with the organizational plaintiffs without an attorney present. Those would include discussions regarding the funding he receives as well as discussions regarding the media efforts targeting FEI on which he has worked in connection with the organizational plaintiffs and this case.

Finally, Rider objected to the Interrogatory because "he has had hundreds of communications that fell within the scope of this Interrogatory, and he cannot possibly describe each such conversation." Whether or not Rider can recall the details of all such communications does not excuse him from describing what he does recall. Please supplement this information to reflect Rider's knowledge.

(4) Confirmation That All Documents Have Been Produced:

As with the organizational plaintiffs, please update Tom Rider's document production and confirm that all responsive documents have been produced. His original production contained a paltry 190 pages, and we have not received documents from him since June 2004. We find it inconceivable that Rider only has 190 pages of responsive documents. Although Rider has been provided with a laptop from ASPCA, we have not received any e-mails from him. Moreover, we now know, for example, that WAP has produced (and still needs to produce) many responsive documents that were provided to Rider but that he never produced to FEI. As stated

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above, it is irrelevant whether Rider still maintains copies of documents. If they are in his possession, custody, or control, they must be produced.

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Your response is requested no later than December 15, 2006. These documents should have been produced years ago, and it is time to ensure that this matter is promptly resolved. If you have any questions or would like to further discuss this, please let us know. Ultimately, if the parties are unable to resolve their differences on these issues, FEI will be forced to move to compel as the deficiencies are interfering with its right to take discovery necessary to its defense.

Very truly yours,



George A. Gasper