UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO COMPEL DISCOVERY FROM PLAINTIFF TOM RIDER AND FOR SANCTIONS, INCLUDING DISMISSAL

INTRODUCTION

Continuing their quest to overwhelm the Court with paper, derail the merits of this litigation, harass Mr. Rider and stop him from participating in this lawsuit, defendants now move to compel certain discovery responses from plaintiff Tom Rider. As demonstrated below, defendants' allegations concerning deficiencies in Mr. Rider's discovery responses have no merit. Indeed, when the Court looks past defendants' tired and unfounded accusations of "perjury" and "cover-ups," it will see that almost all of what defendants now complain about – most of which concerns funding that Mr. Rider has received to pursue his public education campaign – has either already been produced, or offered to be produced subject to a voluntary protective order that defendants never pursued. The only materials Mr. Rider is actually withholding relate to plaintiffs' various legislative and media strategies to end the abuse of

elephants and other animals in captivity, which are completely irrelevant to this case and are also protected by Mr. Rider's First Amendment right of association, or concern the plaintiffs' litigation strategy for this case, which is protected by the attorney-client and work product privileges.

Moreover, under no circumstances is there any basis for sanctions here, even if there were any deficiencies in Mr. Rider's discovery responses, since there is no arguable prejudice to defendants for any delay in receiving the disputed materials. Indeed, for one and a half years after discovery responses were first exchanged by the parties in June 2004, defendants never raised a single concern about any of plaintiffs' responses, and it was not until November 2006 – two and a half years after the parties exchanged responses – that defendants first raised most of the concerns at issue in their Motion.

Thus, until recently plaintiffs were operating under the reasonable assumption that defendants did not have any concerns. This assumption was especially reasonable given that, when plaintiffs questioned the adequacy of defendants' discovery responses only four months after the parties exchanged discovery, defendants complained bitterly about plaintiffs' "long delay in initiating the meet-and-confer process." Memorandum in Opposition to Plaintiffs' Motion to Compel Defendants' Compliance with Plaintiffs' Discovery Requests at 2 (Docket No. 29); see also id. at 1 (noting that plaintiffs "were silent" for four months and "[t]hus, until October 19, when plaintiffs first sent a letter about defendants' responses, defendants had no reason to believe that plaintiffs' deemed any of their discovery responses inadequate"). As discussed further below, since June 2004 defendants have had all of the information they needed to make the arguments they now make concerning Mr. Rider's responses, and there is no excuse for this inordinate delay.

Because the Court has enough paper to contend with, plaintiffs will focus their argument only on the actual issues that appear to be relevant to defendants' Motion. Plaintiffs do not address every false and irrelevant statement made in the "Background" section of defendants' brief, particularly since the bulk of these inflammatory allegations are not even relied upon in defendants' argument section.[1]

ARGUMENT

A. Mr. Rider Has Not Committed Perjury.

In a transparent attempt to justify their delinquency in initiating the meet and confer process and convince the Court to dismiss Tom Rider from this case, defendants rehash the same unfounded perjury accusations they have made elsewhere. See Def. Mem. at 6-11; see also Statement of Points and Authorities In Support of Defendant Feld Entertainment, Inc.'s Motion to Compel Testimony of Tom Eugene Rider (Docket No. 101); Defendant Feld Entertainment, Inc.'s Motion for Leave to Amend Answers to Assert Additional Defense and RICO Counterclaim (Docket No. 121). As plaintiffs have explained in their own filings with the Court, see Plaintiffs' Opposition to Defendants' Motion to Compel Testimony of Tom Eugene Rider (Docket 107); Plaintiffs' Opposition to Defendant Feld Entertainment, Inc.'s Motion for Leave to Amend Answers to Assert Additional Defense and RICO Counterclaim ("Amend Opp.")

[1] For example, defendants state – without any citation – that "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." Memorandum of Points and Authorities in Support of FEI's Motion to Compel Discovery From Plaintiff Tom Rider and for Sanctions, Including Dismissal ("Def. Mem.") at 6. This statement is simply false, which is why there is no citation in its support. The witness for the ASPCA never stated that the plaintiffs discussed funding Mr. Rider so that he "could remain in the litigation." In any event, this has absolutely no bearing on the discovery matters at issue in defendants' Motion. See also Declaration of Katherine A. Meyer, Exhibit 1 to Plaintiffs' Opposition to Defendants' Motion to Compel Discovery From Plaintiff Tom Rider and for Sanctions, Including Dismissal ("Plfs. Exh. 1") (discussing false statements attributed to Ms. Meyer by defendants' counsel).

(Docket 132), these accusations are utterly baseless, and demonstrate the lengths to which defendants will go in order to eliminate Mr. Rider's participation in this case – including his eye-witness testimony based on his two and a half years of working as a caretaker for the Ringling Bros. elephants.

First, defendants contend that Mr. Rider failed to disclose that he received funding from his co-plaintiffs and the Wildlife Advocacy Project ("WAP"), and that, therefore, "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." Def. Mem. at 6. There was no shell game. On the contrary, as discussed below, almost three years ago Mr. Rider made clear in his original discovery responses that he would willingly provide all of the funding information that defendants requested if defendants would agree to a voluntary confidentiality agreement to protect Mr. Rider's sensitive financial information and the names of individual donors. See Exhibit 3 to Def. Mem. ("Def. Exh. 3") at 12-13 (responses to Document Request Nos. 20, 21) (agreeing to provide the responsive information subject to confidentiality agreement); Def. Exh. 4 at 20 (response to Interrogatory No. 24) (agreeing to provide the responsive information subject to confidentiality agreement). Defendants' decision not to pursue Mr. Rider's request certainly does not amount to willful deceit on Mr. Rider's part.[2]

[2] Defendants make much of Mr. Rider's statement, in response to Interrogatory No. 24, that he has not received "compensation" from animal advocacy groups "for services rendered," see Def. Mem. at 10-11, because Mr. Rider does not deem the grants that he receives to pursue his public education work to be "compensation for services rendered." Rather, as Mr. Rider has explained under oath, he considers the funding he has received – and which he has always agreed to identify for defendants – to be grants that cover his expenses in connection with conducting his media and public education efforts on this issue. In any event, defendants' semantic disagreement with Mr. Rider as to what constitutes "compensation" is completely irrelevant in light of the fact that Interrogatory No. 24 also asked Mr. Rider to identify all "money or items,

In addition, although defendants purport to have been ignorant of the fact that Mr. Rider's public education activities were being funded in part by his co-plaintiffs until "the shell game began unraveling" in July 2005, Def. Mem. at 6, documents produced by defendants make clear that this simply is not true. Indeed, defendants knew at least as early as 2002 that the ASPCA was funding Mr. Rider's public education activities. See Plfs. Exh. 2, FEI 38333, 38336 (internal FEI memorandum indicating that Mr. Rider stated at a legislative hearing that "ASPCA pays his expenses for traveling"). Defendants also had records from the ASPCA in June 2004 demonstrating contributions by the ASPCA to both Mr. Rider and WAP, see Def. Mem. at 6, as well as, by the Fall of 2005, all of the WAP records concerning grants provided to Mr. Rider to pursue his work on behalf of the elephants. See Wildlife Advocacy Project's Opposition to Defendants' Motion to Compel at 7 (Docket No. 93-1) (explaining that "WAP has already divulged to FEI the amount of every grant made by the organization to Tom Rider for his public education efforts; every organization or foundation that has supported that work (including non-plaintiff organizations); and every communication between WAP and any of the plaintiffs in the case concerning Tom Rider or the treatment of elephants"); id. at 14 (noting that "[o]n September 29, 2005, WAP provided FEI's counsel with hundreds of pages" of records). Accordingly, defendants' contention that they were completely in the dark as to Mr. Rider's sources of funding until recently – and hence could not bring this motion until now – is false.

Defendants also accuse Mr. Rider of intentionally failing to include his military service in response to an interrogatory asking him to list his "job[s]" or "volunteer position[s]" he has held

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including, without limitation, food, clothing, shelter, or transportation, you have ever received from any animal advocate or animal advocacy organization." Def. Exh. 2 at 7. As discussed, Mr. Rider has consistently agreed to provide such information, which would give defendants all the information they seek. Mr. Rider never stated that he has received no such "money or items."

since he completed high school. Def. Mem. at 7-9. The interrogatory did not ask for military service, however, and the omission of this information was entirely inadvertent, as plaintiffs have already explained. See Reply In Support of Plaintiff Tom Rider's Motion for a Protective Order to Protect His Personal Privacy at 14 (Docket No. 111) (explaining that "Mr. Rider never intended to hide from defendants the fact that he served in the military, since he long ago disclosed this fact on his employment application for Ringling"); see also Memorandum In Support of Plaintiff Tom Rider's Motion for a Protective Order to Protect His Personal Privacy at 16 n.3 ("Tom Rider's Motion for Protective Order") (Docket No. 106). Accordingly, Mr. Rider did not "forget" that he served in the military, Def. Mem. at 8, he simply did not realize that the interrogatory called for such information. In any event, Mr. Rider has since supplemented his interrogatory with information concerning his military service, and has also moved for a protective order that would prevent the public release of further details concerning that service. See Def. Exh. 20 at 2 (providing information concerning Mr. Rider's military service and stating that "Mr. Rider regards any further details concerning his military service to be extremely personal," and therefore is seeking a protective order from the Court on the matter).

Finally, defendants insist that Mr. Rider deliberately omitted his "marital proceedings" from his response to an interrogatory concerning civil litigation to which Mr. Rider had been a party. See Def. Mem. at 10. However, as plaintiffs have explained, and as Mr. Rider has stated in a declaration under oath, Mr. Rider did not understand the term "civil litigation" to encompass such disputes. See Tom Rider's Motion for a Protective Order at 10-11. Indeed, as defendants acknowledge, Def. Mem. at 10, Mr. Rider openly admitted that he "got divorced" in response to another interrogatory, see Def. Exh. 4 at 6 ("In 1995, I got divorced"), and therefore plainly had no intention to hide that fact from defendants. In any event, Mr. Rider's marital history has

absolutely no relevance to any of the issues in this case, which is why plaintiffs have moved for a protective order to prevent defendants from further inquiring into this extremely private matter. See Tom Rider's Motion for a Protective Order.

B. Mr. Rider Has Produced All Responsive Documents In His Possession, Custody or Control.

Because Mr. Rider "supposedly makes a living traveling around the country speaking about elephants," Def. Mem. at 16, defendants are "incredulous" at the fact that he has only produced 213 documents and seven videos, and they therefore assume that Mr. Rider must have more documents that he has either withheld or destroyed. However, not only have defendants failed to produce any evidence to support their assumption, but in fact, there is no basis for it.

Indeed, as defendants state, Mr. Rider – who is a former caretaker of the elephants with no formal education beyond a GED – travels around the country "speaking" about the abuse of elephants in the circus, Def. Mem. at 16, not writing about it, and it should therefore not be at all surprising that he does not create or collect a lot of written materials. Moreover, as defendants have also acknowledged, Mr. Rider lives on the road in a van, see Exhibit 3 to Motion of Defendant Feld Entertainment, Inc. for Leave to Amend Answers to Assert Additional Defense and RICO Counterclaim at 18 ("In reality, Rider lives in a Volkswagen van"), and accordingly has very little room to collect or store the alleged "thousands of . . . pages that should have been produced to FEI but were not." Def. Mem. at 6. Accordingly, defendants have no basis whatsoever for contesting that Mr. Rider has produced all responsive records in his possession as of December 31, 2006.[3]

[3] Mr. Rider owns a laptop computer, but uses it primarily to search the internet for the purpose of tracking Ringling Bros.' public activities, or occasionally to send or receive e-mails. He has produced a couple of these e-mails and listed others on plaintiffs' privilege log. As discussed further below, other e-mail communications to or from Mr. Rider are related to media and

Nor has Mr. Rider destroyed or "spoliated" any responsive documents.[4] Prior to the time discovery requests were served in 2004, Mr. Rider did not routinely preserve every last scrap of paper that came into his possession – nor was he required to. Mr. Rider did, however, keep records in his possession that he reasonably should have known were relevant to this litigation – i.e., records related to his employment with Ringling Bros., records related to his advocacy work on behalf of elephants, and records related to the treatment of the Ringling Bros. elephants. All of these records – approximately 200 pages – were produced in June 2004. See Arista Records, Inc. v. Sakfield Holding Co., 314 F.Supp. 2d 27, 34 n.3 (D.D.C. 2004) (internal citations omitted) ("'While a litigant is under no duty to keep or retain every document in its possession once a complaint is filed, it is under a duty to preserve what it knows, or reasonably should know, is relevant in the action.'") (internal citations omitted). Accordingly, defendants' assumption that Mr. Rider has intentionally destroyed responsive documents is baseless.

Even more baseless – indeed completely false – is defendants' statement that plaintiffs' counsel "confirmed" at the meet and confer that Mr. Rider has destroyed "responsive documents." Def. Mem. at 17; see also Def. Mem. at 15 ("The dearth of documents produced by Rider results from the spoliation of evidence that he committed and that his counsel has confirmed."). Plaintiffs' counsel stated no such thing, and it is highly improper and unethical for defendants' counsel to make such broad and definitive statements of fact without any supporting

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legislative strategy concerning elephants in circuses, which is not relevant to this case, as Judge Facciola has ruled, and is also protected by Mr. Rider's First Amendment right of association and expression.

[4] Although defendants certify that they have "conferred in good faith with opposing counsel" concerning the matters raised in their Motion, see Motion to Compel Discovery From Plaintiff Tom Rider And For Sanctions, Including Dismissal at 3, defendants did not raise the issue of destruction or "spoliation" of evidence – clearly a serious (and baseless) allegation – during the meet and confer process.

sworn declaration. See, e.g., Carson v. DOJ, 631 F.2d 1008, 1015 n. 30 (D.C. Cir. 1980) ("[T]he Department's assertions were not made on personal knowledge of counsel and they were not made on oath. Neither this court nor the district court will ordinarily take cognizance of 'facts' supplied by way of such assertion.") (internal citations omitted). As stated in the attached declaration of Katherine Meyer, Ms. Meyer certainly did not make any representation whatsoever concerning Mr. Rider's failure to keep any documents that were generated or obtained by him after March 30, 2004 – the date of defendants' discovery requests. See Meyer Declaration, ¶¶ 3-4. Rather, Ms. Meyer was simply explaining why Mr. Rider had not produced copies of certain records that pre-dated March 30, 2004, which defendants had obtained from the Wildlife Advocacy Project pursuant to a third-party subpoena – i.e., because he simply had not kept his copies of these documents. See id. at ¶ 3.

As to certain documents that WAP has separately produced to defendants, such as 1099s and receipts from purchases made with WAP grant funds, see Def. Mem. at 17, it is not clear why FEI is wasting the Court's and the parties' time seeking to compel the production of duplicates of materials already in FEI's possession. Indeed, defendants already have in their possession a copy of every check, every Form 1099, and every cover letter sent to Mr. Rider by WAP, and Mr. Rider has produced whatever copies of these materials – and any other responsive materials – he has in his own possession. As for the receipts – contrary to defendants' statements – such materials certainly are not "clearly responsive" to a request for documents relating to "payments of gifts in money or goods made by animal advocacy groups to you." See Def. Mem. at 17 (emphasis added). Receipts for gas, food, and lodging do not reflect "payments of gifts" made "to" Mr. Rider by any animal advocacy group. Nor do these receipts reflect "communications between [Mr. Rider] and any animal advocates." Def. Mem. at 17. Rather,

these receipts reflect expenditures Mr. Rider made to others while he was on the road conducting his public education campaign. As such, they were properly turned over to the WAP, which has provided Mr. Rider grants for this purpose, and the WAP has in turn provided these materials to defendants pursuant to a subpoena that was served on that organization. As explained below, moreover, Mr. Rider does not have control over WAP's files. However, if defendants for some reason want Mr. Rider to produce a duplicate set of these same materials that WAP has already produced, Mr. Rider is willing to make a request to WAP for copies of these materials.

Defendants are incorrect that Mr. Rider has "control" over all documents in WAP's or his co-plaintiffs' files, and he should therefore obtain and produce any records in these other groups' files that are responsive to discovery requests to Tom Rider. See Def. Mem. at 19-21. Defendants contend that because Mr. Rider's lawyers are also involved in the administration of the Wildlife Advocacy Project, Mr. Rider should accordingly have a "legal right to obtain" all records in WAP's files, or list such records on a privilege log as falling within a legitimate privilege. Id. at 19-20; see also id. at 20 ("Accordingly, Rider must produce documents in his counsel's files, which include by definition, documents in WAP's files."). Defendants contend that this is no different than the argument plaintiffs made with respect to the production of documents in FEI's counsel's files that were obtained in conjunction with counsel's representation of FEI, and therefore plaintiffs are "estopped" from "taking a contrary position." Id.

However, plaintiffs certainly did not argue that FEI should produce relevant documents in its lawyers' files that were obtained on behalf of another client, which is tantamount to what FEI now argues with respect to Mr. Rider's control over WAP's files. Ms. Meyer's records that she maintains in her capacity as an officer of the WAP are not generated or kept for the purpose

of representing Mr. Rider in this lawsuit, and hence Mr. Rider has no "legal right to obtain [such] documents on demand," Alexander v. FBI, 194 F.R.D. 299, 301 (D.D.C. 2000), just as defendants have no right to demand copies of materials maintained by their counsel on behalf of other clients. See Poppino v. Jones Store Co., 1 F.R.D. 215, 219 (W.D. Mo. 1940) ("It is quite true that if an attorney for a party comes into possession of a document as attorney for that party his possession of the document is possession of the party").[5]

Defendants also make the perplexing argument that, because Mr. Rider produced certain documents jointly with the other plaintiffs, he has therefore "asserted control over the documents in their files." Def. Mem. at 21. Defendants cite no legal authority for this novel position other than a case stating that "control" is broadly construed. See id. Whatever "control" means, however, it surely does not mean that any time co-parties produce documents jointly they thereby gain control over all of the other documents in each other's files. The plaintiffs produced – and will continue to produce – certain materials collectively because these are materials that were responsive to defendants' discovery requests that were collected by plaintiffs' counsel, through Freedom of Information Act requests and other means, on behalf of all of the plaintiffs. Accordingly, it made sense to produce these materials collectively rather than make several copies of the same materials for production by each plaintiff separately. However, this efficient way to produce such materials certainly does not mean that each plaintiff has asserted "control" over all of the other plaintiffs' files.

[5] As plaintiffs' attorneys have already explained to defendants' counsel, at most, Mr. Rider would have the right to obtain copies of Form 1099s that were issued to him, which WAP has already produced pursuant to a third-party subpoena. See Def. Exh. 16 at 1-2 (Feb. 8, 2007 letter from Meyer to Gasper). Plaintiffs' counsel has also agreed to obtain and produce a duplicate set of these materials for defendants. See id. at 2.

C. Mr. Rider Has Consistently Offered to Produce Documents and Information Concerning His Sources of Funding.

Defendants also falsely contend that Mr. Rider "has refused to produce the required documents or information" in response to two document requests and an interrogatory concerning funding Mr. Rider has received from animal advocacy groups or individuals. Def. Mem. at 22. On the contrary, as demonstrated by Mr. Rider's actual responses to these requests, see Def. Exh. 3 at 12-13 (responses to Document Request Nos. 20, 21); Def. Exh. 4 at 20 (response to Interrogatory No. 24), although Mr. Rider did legitimately object to these requests on the grounds that seek "information that is irrelevant, oppressive, and on the grounds that the Request[s] [are] vexatious" and "seek[] privileged information that is protected by his right to privacy, and would infringe on his freedom of association," Def. Exh. 3 at 13, Mr. Rider nevertheless specifically stated that he would provide this information subject to a confidentiality agreement, see, e.g., Def. Exh. 3 at 13 ("subject to a confidentiality agreement, Mr. Rider would be willing to provide defendants with information that is responsive to this request") – a request that plaintiffs' counsel has since reiterated, see Def. Exh. 10 at 9 (January 17, 2007 letter from Meyer to Gasper). Mr. Rider seeks a confidentiality agreement because of the highly personal and sensitive nature of the information, and because of serious privacy and First Amendment considerations involved in revealing the identities of every group or individual that has ever given him funds so that he can continue to speak to the public about the way the elephants are mistreated at the circus.

Thus, despite defendants' repetitive and tiresome accusations that Mr. Rider and the other plaintiffs are engaging in "discovery deceptions" concerning funding to Mr. Rider, see Def. Mem. at 6, since June 2004 defendants have had access to all of the information they seek on this point. Yet defendants never followed-up on this offer to produce the information subject to a

voluntary protective order, either by accepting it (in which case they would have had the information in 2004) or by rejecting it (in which case plaintiffs would have immediately moved for a protective order). Rather, as with their other concerns related to plaintiffs' June 2004 discovery responses, defendants never raised any concern about alleged "deficiencies" with that response for almost two and a half years.

However, as soon as defendants did raise a concern about this matter, plaintiffs' counsel reiterated Mr. Rider's offer to provide such information subject to a confidentiality agreement:

> Regarding the answers to Document Requests 20 and 21, and Interrogatory No. 24 . . . Mr. Rider is willing to provide a more complete list to defendants of his sources and amounts of income since he stopped working for circuses – as he has consistently stated he would do since June 2004. However, because he still believes much of this information is personal and confidential, he continues to request that he provide this information to defendants subject to a confidentiality agreement. If you agree to this approach, I will draft a proposed agreement for your review as soon as possible.

Def. Exh. 10 at 9 (January 17, 2007 letter from Meyer to Gasper) (emphasis added). However, although defendants insist that this information is absolutely crucial to their defense of this action, they have now refused to allow Mr. Rider to submit the information subject to a confidentiality agreement. See Def. Exh. 13 at 4 (Dec. 22, 2006 letter from Gasper to Meyer). Accordingly, Mr. Rider is filing a motion for a protective order that will allow defendants access to this information while protecting the privacy of Mr. Rider and the groups and individuals who fund his public interest work.[6]

[6] Although for two and a half years defendants never pursued plaintiffs' offer to provide the information subject to a confidentiality agreement, they now appear to contend – albeit weakly – that plaintiffs should have actually drafted such an order before seeking defendants' agreement or moved the Court for one without even first seeking defendants' consent to a voluntary agreement. See Def. Mem. at 14 n. 22. However, such an approach is not the usual practice, and it is not how the parties have conducted such matters in this case either. Indeed, defendants themselves have repeatedly sought plaintiffs' agreement for voluntary protective orders for certain discovery materials prior to drafting or moving the court for such orders. See, e.g., Nov. 30, 2005 Letter from Ockene to Wolson at 3 (Plfs. Exh. 3) (agreeing "to enter into a

In light of this history, it is clear that defendants do not really want or need the information concerning Mr. Rider's sources of funding; instead, they would prefer to fabricate a scenario in which they can complain about Mr. Rider's "deception," Def. Mem. at 6, and file additional unnecessary motions with the Court. Plaintiffs, in contrast, have agreed to several protective orders that defendants have insisted on before releasing certain discovery materials, not because plaintiffs agreed that defendants were entitled to such protective orders as a legal matter, but because plaintiffs were actually more interested in obtaining the information than in fighting over the issue of confidentiality. See Joint Stipulated Protective Order Concerning Recordings of Ringling Bros. and Barnum & Bailey Circus Performances (Aug. 15, 2006) (Docket No. 77); Joint Stipulated Protective Order Regarding Video Recordings (Aug. 4, 2006) (Docket No. 76); Plaintiffs' Proposed Protective Order (Docket No. 49) (regarding medical records).

Indeed, it is clear that defendants do not need the financial information from Mr. Rider because they already have obtained much of the information concerning Mr. Rider's funding from the organizational plaintiffs and the Wildlife Advocacy Project, and none of the plaintiffs have ever concealed the fact that Mr. Rider's media and public education work is funded through grants from the organizational plaintiffs and other animal advocates. See Amend Opp. at 4 (Docket No. 132) (noting that "it is precisely because plaintiffs and WAP have been so forthcoming with this [financial] information that defendants are able to present the detailed data recounted in their frivolous RICO claim, including detailed "charts" of when and from whom such grant money was received and when it was provided to Mr. Rider"). In fact, since at least

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confidentiality agreement with defendants" to protect information contained in certain videos defendants were producing for plaintiffs' review, prior to any such agreement actually being drafted).

2002 defendants have been aware that Mr. Rider's public education efforts were being carried out with grants from the organizational plaintiffs, because Mr. Rider has freely acknowledged that fact. See FEI 38333, 38336 (Plfs. Exh. 2) (indicating that Mr. Rider stated at a legislative hearing that "ASPCA pays his expenses for traveling").

Plaintiffs' patience and cooperation with defendants' relentless quest for every shred of information concerning Mr. Rider's funding – no matter how burdensome, duplicative, vexatious, or tangential – is particularly laudable in light of the fact that, when plaintiffs sought financial information from defendants concerning the enormous profits FEI makes from the animals, defendants refused to produce it, even though such information is not only relevant to one of defendants' arguments in this case – i.e., that they are not engaged in a "commercial activity," see Memorandum of Points and Authorities in Support of Defendant's Motion for Summary Judgment at 12-22 (Docket No. 82-1) – but also clearly bears on defendants' credibility concerning their witnesses' denials that they engage in any mistreatment of the elephants. However, Judge Facciola agreed with defendants, stating that:

> the fact that defendants' financial information may have some value regarding defendants' witnesses' credibility is of marginal utility and is too far out of proportion to the sensitivity of the financial information sought and the burden that would be placed on defendants in gathering and producing such documents. Moreover, defendants have freely admitted that they are engaged in a for-profit business – that should be sufficient for plaintiffs asserted purposes.

Order (Feb. 23, 2006) at 9 (emphasis added). The same is true here: plaintiffs have freely admitted that Mr. Rider is funded by the organizational plaintiffs and other animal advocates, and indeed have provided many pages of documents reflecting this fact. That should be enough for defendants' asserted purposes, and defendants should not be allowed to continue to burden and harass plaintiffs – and the Court – with still more requests for Mr. Rider's financial information, including duplicates of documents already produced to them. Cf. Def. Mem. at 20

(stating that "[h]aving made their argument and obtained judicial relief on that basis, plaintiffs are judicially estopped from taking a contrary position," and citing cases for that proposition).

Nevertheless, plaintiffs are not even attempting to withhold the information from defendants, but instead simply seek to have this highly sensitive material produced to defendants under a protective order. If defendants truly wanted the information, they would have agreed to this reasonable request nearly three years ago. Therefore, any delay in obtaining this information is nobody's fault but their own.

D. Mr. Rider Has Produced All Non-Privileged Information and Documents Concerning Communications With Other Animal Advocates.

In response to defendants' discovery requests concerning all communications Mr. Rider has had with other "animal advocates," Mr. Rider provided detailed information describing the communications that he could recall, including communications with his co-plaintiffs that did not involve legal strategy, and he also produced non-privileged responsive documents. See Def. Exh. 1 at 13-15; Def. Exh. 2 at 8-10; Def. Exh. 20 at 3-7. He objected, however, to providing information related to his communications with his attorneys and co-plaintiffs that concerned litigation strategy, on the grounds that such communications are protected by the attorney-client or work product privileges. See id. He also objected to providing information or documents related to communications he has had with his co-plaintiffs concerning media or legislative strategies, which are both irrelevant to this case, overly burdensome to produce, and protected by the First Amendment. See id. All of these objections were proper, and Mr. Rider is not withholding any information related to communications with animal advocates that does not fall within one of these objections.

1. Mr. Rider's Communications With His Attorneys and Co-Plaintiffs Concerning Litigation Strategy Are Privileged.

Mr. Rider is withholding communications he has had with his attorneys and co-plaintiffs (all of whom are "animal advocates") concerning litigation strategy and legal advice – including strategic considerations such as evidence, counsel's thoughts concerning plaintiffs' legal claims and defendants' defenses, expert witnesses, and the like. These communications are plainly protected by the attorney-client and the work-product privileges. See Tax Analysts v. Internal Revenue Service, 117 F.3d 607, 618 (D.C. Cir. 1997) ("The attorney client privilege protects confidential communications from clients to their attorneys made for the purpose of securing legal advice or services. . . . The privilege also protects communications from attorneys to their clients if the communications rest on confidential information obtained from the client") (internal citations and quotation marks omitted); Hickman v. Taylor, 329 U.S. 495, 510-11 (1947) (according protection to attorney's thoughts and mental impressions and litigation strategy).[7]

[7] Defendants assert that "[a]s to communications involving plaintiffs' counsel, MGC, Rider has not made the requisite showing that all such communications were privileged." Def. Mem. at 30. However, Mr. Rider has not asserted that all such communications are privileged, as defendants concede in the very same paragraph. See Def. Mem. at 30 (citing to Mr. Rider's supplemental response to interrogatory No. 4 in which he produces information concerning conversations with Katherine Meyer in her capacity as an officer of the Wildlife Advocacy Project); Def. Exh. 20 at 7 ("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 work 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"). However, as explained infra, such communications concern the plaintiffs' media and legislative strategies that are (a) irrelevant, (b) unduly burdensome to produce; and (c) are protected by plaintiffs' First Amendment rights of speech and association. Moreover, although defendants insist that Mr. Rider must have had non-privileged conversations with his counsel at a 2005 fundraiser or otherwise, see Def. Mem. at 31, such conversations would not even be responsive to a request for information concerning communications with "animal advocates" or "animal advocacy groups," since Mr. Rider's lawyers do not qualify as such "advocates." Indeed, defendants specifically defined the term "animal advocates" or "animal advocacy organization" to mean "any individual or organization as that term is used in plaintiffs' initial disclosures." See Def. Exh. 1 at 2. Plaintiffs in fact used that phrase to refer to documents in their files from other animal protection groups and individual

Mr. Rider is also withholding information related to communications that may have occurred between him and in-house counsel for the organizational plaintiffs concerning strategic and evidentiary issues that had been shared among Mr. Rider, his co-plaintiffs, and their outside counsel. These communications are also protected by the attorney-client privilege, as well as by the "common interest" doctrine of the work product privilege, through which co-parties may discuss the advice, thoughts, and strategy of counsel without waiving the work product privilege. See United States v. American Telephone and Telegraph Co., 642 F.2d 1285, 1298-1300 (D.C. Cir. 1980) (discussing common interest doctrine); In re United Mine Workers of America Employee Benefit Plans Litigation, 159 F.R.D. 307, 313 (D.D.C. 1994) ("The 'common interest rule' provides that parties with shared interests in actual or potential litigation against a common adversary may share privileged information without waiving their right to assert the privilege") (citations omitted); see also Independent Petrochemical Corp. v. Aetna Cas. and Sur. Co., 654 F. Supp. 1334, 1364 (D.D.C. 1986) (recognizing that certain "communications made between corporate employees and a corporation's counsel are privileged") (citing Upjohn Co. v. United States, 449 U.S. 383 (1981)); Bruce v. Christian, 113 F.R.D. 554, 560 (S.D.N.Y. 1986) ("Confidences employees reveal to in-house counsel acting as attorneys are accorded the same privilege that they would be accorded if they were revealed by a client to outside counsel"). Accordingly, defendants are incorrect that discussions among co-plaintiffs outside the presence of outside counsel are never privileged. See Def. Mem. at 31.

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animal activists. However, in using that term they certainly were not including plaintiffs' lawyers.

2. Mr. Rider's Communications With His Co-Plaintiffs And Other "Animal Advocates" Concerning Media and Legislative Strategy Are Irrelevant and are Protected by the First Amendment.

Mr. Rider has provided defendants a general description of communications he has had with his co-plaintiffs and other "animal advocates" regarding media, legislative, and public education strategies. See Def. Exh. 20 at 3-6; Exh. 4 at 8-10. Indeed, Mr. Rider has recounted numerous such conversations that he has had over the years, including conversations he had with, for example, plaintiff AWI's legal counsel and representatives of other animal protection groups at a fundraiser held in 2005. See id.; see also Def. Mem. at 31 (accusing Mr. Rider of concealing communications he had at the fundraiser).[8] Mr. Rider has objected, however, to providing additional details about these communications on the ground that "details of such conversations are irrelevant and their disclosure would impose an undue burden on [Mr. Rider] and the other plaintiffs and infringe upon my and the other plaintiffs' First Amendment rights of association and expression." Def. Exh. 20 at 7. This objection was absolutely proper.

First, the details of Mr. Rider's and the organizational plaintiffs' media and legislative strategies are not remotely relevant to the issues in this case – i.e., defendants' unlawful treatment of the elephants in their custody. Nor do defendants even offer any rationale as to why this information is relevant to the case, other than baldly stating, in characteristically conclusory fashion, that "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

[8] Because Mr. Rider knows that his activities are sometimes reported over the internet or in the media, he also indicated in his interrogatory response that additional information concerning his activities and groups he has worked with can be found by doing an internet search for "tom rider elephants." See Def. Exh. 20 at 7. Mr. Rider did not make this statement in an effort to be "amusing," Def. Mem. at 35, but rather to direct defendants to the information they seek. Nor did Mr. Rider provide this information in lieu of answering the interrogatory, as defendants falsely state – since, as noted, he recounted the conversations he could recall – but simply as a supplement.

'reasonably calculated to lead to the discovery of admissible evidence.'" Def. Mem. at 34. In addition, again, plaintiffs have always acknowledged that defendants have a right to challenge Mr. Rider's credibility based on the fact that over the years he has received grants from the organizational plaintiffs and the WAP for his public education and legislative advocacy work. See, e.g., Amend Opp. at 22-23 (Docket No. 132). However, as now demonstrated many times, Mr. Rider, the organizational plaintiffs, and the WAP have always been forthcoming about this fact, and have provided defendants with documents showing the amounts of funding provided to Mr. Rider, by which groups, and when. See id. at 24-25 (describing provision of documents and testimony to defendants by plaintiffs on this issue).

Moreover, as discussed supra, Mr. Rider has also offered more than once over the last three years to provide defendants with a complete list of funds he has received for this purpose, as long as he could do so subject to a confidentiality agreement. Therefore, defendants have all the information they need to make their credibility arguments, and allowing them to further probe every conversation Mr. Rider has had during his six years of traveling around the country advocating for better treatment of these animals on the ground that this may uncover some additional relevant information regarding this issue is simply not justified.

Defendants are also (yet again) taking a drastically different position now than they took when plaintiffs were trying to obtain information concerning defendants' public relations efforts in support of their position that they do not mistreat their elephants, and that plaintiffs and others who say they do are lying to the public. Thus, in 2005 defendants argued that their public relations materials were "not relevant" because such materials were "far afield from the question of whether defendants' treatment of elephants violates the ESA." Memorandum in Opposition to Plaintiffs' Motion to Compel Defendants' Compliance With Plaintiffs' Discovery Requests at 9

(Docket No. 29) (emphasis added). Defendants further argued that "the acknowledged fact that defendants are conducting a for-profit business is all that plaintiffs need to make their point" concerning defendants' credibility in this case, or the fact that defendants are engaged in a "commercial activity" within the meaning of the Endangered Species Act. Id. at 11.[9]

Judge Facciola agreed with defendants on this point, and ruled that they were, therefore, not required to produce their public relations material, because even though such information "may have some value regarding defendants' credibility," this was "too far out of proportion to the sensitivity of the financial information and the burden that would be placed on defendants in gathering and producing such documents." Order (Feb. 23, 2006) at 9. Instead, Judge Facciola ruled that "defendants have freely admitted that they are engaged in a for-profit business – that should be sufficient for plaintiffs' asserted purposes." Id. Again, in defendants' own words, "[h]aving made their argument and obtained judicial relief on that basis, plaintiffs are judicially estopped from taking a contrary position." Def. Mem. at 20.[10]

Second, even if there were some "marginal" relevance to Mr. Rider's communications concerning media and legislative strategy, see Order (Feb. 23, 2006) at 9, it is far outweighed by

[9] Thus, for example, although defendants contend that they are exempted from the "take" prohibition of the ESA with respect to animals they obtained before the ESA was enacted, see Memorandum of Points and Authorities in Support of Defendant's Motion for Summary Judgment at 13-14 (Docket No. 82-1), that exemption does not apply to any entity engaged in a "commercial activity," 16 U.S.C. § 1538(b)(1), which in turn is defined as "all activities of industry and trade, including, but not limited to, the buying and selling of commodities and activities conducted for the purpose of facilitating such buying and selling." 16 U.S.C. § 1532(2).

[10] Nor has Mr. Rider waived his relevance objection. See Def. Mem. at 34. Mr. Rider made this objection in his supplemental interrogatory responses, Def. Exh. 20 at 7, and in his original responses he objected that the request for "all communications" Mr. Rider has ever had with animal advocates concerning defendants was "overly broad" and "unduly burdensome and oppressive," and hence encompassed irrelevant material such as that related to his media strategy. See Def. Exh. 3 at 8. Mr. Rider also made a general objection to producing irrelevant information. See id. at 2.

the burden involved in detailing all such numerous communications, and by the grave First Amendment issues that are implicated in compelling Mr. Rider to reveal such information. Indeed, Mr. Rider's communications concerning his and his co-plaintiffs' media and legislative strategies go to the heart of well-recognized First Amendment rights of speech and association. As Judge Kessler of this Court recently stated in International Action Center v. United States, 207 F.R.D. 1 (D.D.C. 2002), in ruling that certain information concerning the activities of political activists was not subject to discovery:

> [I]t is crucial to remember that we are considering the essence of First Amendment freedoms – the freedom to protest policies and programs to which one is opposed, and the freedom to organize, raise money, and associate with other like-minded persons so as to effectively convey the message of the protest. The courts have long recognized the sensitivity of information related to such activities and have ruled that the following information is protected by the First Amendment: . . . past political activities of plaintiffs and of those persons with whom they have been affiliated.

Id. at 3 (emphasis added). This is precisely the sort of information defendants are seeking to compel here – i.e., information concerning the plaintiffs' efforts to organize, raise money, and associate with one another and other like-minded individuals in an effort to strategize about ways to publicly convey their message and effect social and legislative change. See also Wyoming v. USDA, 208 F.R.D. 449, 454 (D.D.C. 2002) (noting that "courts have held that the threat to First Amendment rights may be more severe in discovery than in other areas because a party may try to gain advantage by probing into areas an individual or group wants to keep confidential") (internal citations omitted).

Moreover, compelling disclosure of information concerning plaintiffs' and other animal advocates' media and legislative strategies would have a very real "potential 'for chilling the free exercise of political speech and association guarded by the First Amendment.'" Wyoming, 208 F.R.D. at 454 (quoting FEC v. Machinists Non-Partisan Political League, 655 F.2d 380, 388

(D.C. Cir. 1981)). Indeed, as plaintiffs have explained in detail in their Opposition to Defendants' Motion for Leave to Amend Answers To Assert Additional Defense and RICO Counterclaim, the concern that plaintiffs' exercise of their First Amendment rights would be chilled in this context is not at all hypothetical, since defendants have a long history of harassing and interfering with the free speech activities of their adversaries. See Amend Opp. at 6-11 (Docket No. 132) (describing defendants' tactics of spying on, conducting surveillance on, and interfering with the legitimate activities of animal protection organizations and activists).

Thus, should the Court force Mr. Rider to disclose information concerning his and his co-plaintiffs' media and legislative strategies, it is highly likely that defendants will use that information in an attempt to harass, intimidate, and discredit plaintiffs and their colleagues, for the purpose of thwarting those strategic efforts. Indeed, it is far more likely that defendants seek information concerning plaintiffs' media and legislative strategies so that defendants can attempt to derail those efforts, rather than because the information is at all relevant to this lawsuit. See, e.g., FEI's "Long Term Animal Plan Task Force," FEI 1480, Plfs. Exh. 1 to Amend Opp. at 12-13 (detailing FEI's "aggressive" approach to media and public relations, including an operation to "expose and discredit animal activist entities," including videotaped surveillance, "placing stories in all media . . . with negative information about activists," and "[f]ormulating a plan to discredit IRS Section 501(c)(3) status of" animal protection organizations) (emphasis added); see also Amend Opp. at 9-11 (noting that FEI president Kenneth Feld has admitted in sworn testimony that FEI placed covert "operatives" in animal protection organizations who provide FEI with highly confidential and personal information about the groups and their officers); Testimony of Charles Smith, Plfs. Exh. 13 to Amend Opp. (stating FEI's "plan" to counter the

effectiveness of animal protection efforts, including by attacking them with "lawsuits . . .[and] money irregularities," so they will "spend more of their resources in defending their actions").

To justify overriding these serious First Amendment concerns, defendants must demonstrate that the information sought goes to the "'heart of the matter,' that is, [that it is] crucial to the party's case." Black Panther Party v. Smith, 661 F.2d 1243, 1268 (D.C. Cir. 1981) (internal citations omitted), vacated as moot, cited subsequently with favor, Steffan v. Cheney, 920 F.2d 74 (D.C. Cir. 1990). Defendants cannot meet this burden. Indeed, as noted above, defendants have not even stated why this particular information concerning plaintiffs' media and legislative strategies is at all relevant to the lawsuit – let alone at the "heart" of the lawsuit. And, any argument concerning relevance to Mr. Rider's "credibility" has already been addressed by providing defendants with information demonstrating the amount and source of funding Mr. Rider has received for these efforts, and Mr. Rider's willingness to provide additional information on this matter pursuant to a confidentiality agreement. In the words of Judge Facciola, "that should be sufficient for [defendants'] purposes." Order (Feb. 23, 2006) at 9. Accordingly, defendants' efforts to compel this classic First Amendment material should be denied.[11]

[11] Defendants also complain that Mr. Rider has not adequately described every communication he has had with the Wildlife Advocacy Project. Def. Mem. at 34. However, Mr. Rider did generally describe the communications he has had with WAP, and it would be overly burdensome to require Mr. Rider to attempt to reconstruct every detail of every conversation he has ever had with WAP, and also interfere with his First Amendment rights of speech and association to do so.

E. Defendants Have Waited Far Too Long To Raise Technical Issues Related To Mr. Rider's Incorporation By Reference of Documents And Privilege Log Descriptions, And There Is No Merit To Their Arguments.

Defendants complain that, in response to certain Interrogatories, Mr. Rider incorporated by reference documents that he and/or his co-plaintiffs produced, without specifically identifying the documents. First, however, Mr. Rider did not refer to such documents "instead of providing responsive information," as defendants falsely contend. Def. Mem. at 35 (emphasis added). On the contrary, Mr. Rider provided detailed narrative responses to each of the interrogatories defendants reference, see Def. Exh. 4 at 8-10 (Interrogatory 4), 10-13 (Interrogatory 5), 33-34 (Interrogatory 17), 35-37 (Interrogatory 19); Exh. 20 at 12-14 (Interrogatory 11), 15 (Interrogatory 13), and referenced the documents in addition to those narratives. In addition, Mr. Rider provided specific Bates number references in his supplemental interrogatory responses. See, e.g., Def. Exh. 20 at 12-14, 15; Def. Exh. 18 at 3 (letter from Tanya Sanerib to Lisa Joiner). Mr. Rider also objected to each of the interrogatories defendants reference on the grounds that they were overly broad, unduly burdensome, or oppressive and, accordingly, Mr. Rider could not be expected to identify each and every document that might contain responsive information. See Id. Defendants never challenged these objections.[12]

Second, and more importantly, however, even if there were any deficiency in Mr. Rider's omission of specific Bates numbers for the documents he was referencing in his original Responses, it is far too late for defendants to be raising this issue – an issue they could have raised almost three years ago, in June 2004, when discovery responses were exchanged. See,

[12] For the same reason, Interrogatory Responses stating that they "include, but are not limited to" the listed documents was proper, since that clause was specifically included because Mr. Rider objected to the Interrogatories as being overly broad, unduly burdensome, or oppressive. See Def. Exh. 18 at 3 (letter from Tanya Sanerib to Lisa Joiner).

e.g., Pearce v. E.F. Hutton Group, Inc., 117 F.R.D. 477, 478 (D.D.C. 1986) (finding a delay of four months in raising discovery concerns to be "unacceptable," and accordingly denying motion to compel).[13]

It is also far too late in the day for defendants to be raising technical issues related to the extensive privilege log that plaintiffs produced three years ago with their June 2004 discovery responses. See Def. Mem. at 37-39. In any event, plaintiffs' privilege log is entirely sufficient. Plaintiffs identified and described numerous documents individually, and for others – namely classically privileged material such as attorneys' memos and documents reflecting litigation strategy, thought processes, or legal advice to clients – plaintiffs identified them by category. See generally Plaintiffs' Privilege Log, Def. Exh. 22. This was entirely adequate to enable defendants to test the validity of the withholdings, and any additional description would reveal the very advice, thoughts, and mental impressions sought to be protected by withholding the materials. See Order (Feb. 23, 2006) at 6 (Judge Facciola's ruling sustaining defendants' argument that "they should not be required to list the documents because it would disclose their attorneys' mental processes . . . [and because] defendants have already provided plaintiffs with enough information to enable them to assess the applicability of the privilege").

Moreover, although defendants complain about plaintiffs' description of certain materials by category – such as e-mails between Meyer Glitzenstein & Crystal attorneys and their clients, and attorney memoranda, see Def. Mem. at 37-38 – in their own privilege log defendants have not identified such responsive materials at all, let alone with the detail they insist plaintiffs must

[13] Defendants are also revealing their hypocrisy once again, since defendants themselves did not specifically identify documents upon which they relied in answering interrogatories. See, e.g., Defendants' Response to Interrogatory No. 6 (Plfs. Exh. 4) (stating that "defendants will provide records in their custody . . .that concern ankuses," without identifying Bates numbers) (emphasis added); see also Id. at Responses to Interrogatory Nos. 8, 9, 11, 18.

provide. See Defendants' Privilege Log (Plfs. Exh. 5) (containing no reference at all to attorney memoranda or communications between Covington & Burling or Fulbright & Jaworski attorneys and FEI concerning this lawsuit). Nor have defendants logged any communications between FEI in-house counsel and others at FEI concerning this lawsuit, although such communications have certainly occurred.[14]

Defendants apparently also expect Mr. Rider to log materials for which he has asserted a relevance, burdensome, or First Amendment objection to producing, such as materials related to his communications with his co-plaintiffs concerning legislative and media strategy. However, because Mr. Rider has lodged objections to producing these materials, they need not be listed on a privilege log until the Court rules on the validity of the objections, as defendants have previously argued (successfully) to this Court. See Order (Feb. 23, 2006) at 5 ("If, however, an objection is made and that objection has not been ruled on, then the objected to documents are not yet 'otherwise discoverable' within the meaning of Rule 26(b)(5). . . . Because there is no evidence that defendants believed anything other than that their objection was justified, defendants were not required to assert any privilege for the documents gathered by co-counsel to cross-examine and impeach Rider until after the objection was ruled on."). Accordingly, Mr. Rider has either provided responsive information, logged it on his privilege log, or lodged an objection to providing the material at all. Thus, defendants' inordinately long delay in raising their complaints aside, Mr. Rider has acted entirely properly.

[14] Defendants' counsel has asserted in a letter to plaintiffs' counsel that "[I]n looking at FEI's February 23, 2006 supplemental privilege log, the documents . . . include those created by both inside and outside counsel . .. ." March 6, 2007 Letter from Lisa Joiner to Tanya Sanerib and Howard Crystal (Plfs. Exh. 6) at 1. However, a review of that privilege log reveals that defendants have not logged any communications created by in-house and outside counsel related to this lawsuit, but, rather, only communications related to other matters, such as USDA investigations. See, e.g., Plfs. Exh. 6 at 3 (listing correspondence between FEI in-house counsel Julie Strauss and FEI outside counsel Jeanne Perron concerning USDA investigation).

F. No Sanctions Are Warranted Here

In yet another attempt to remove Mr. Rider from this case, defendants ask this Court to impose the most extreme sanction possible on Mr. Rider for his alleged "perjury" and "deception": dismissal from the case. See Def. Mem. at 40; see also Jackson v. Washington Monthly Co., 569 F.2d 119, 123-24 (D.C. Cir. 1977) (extreme sanction of dismissal not appropriate if lesser sanctions have not first been imposed). However, no sanction is appropriate here, let alone dismissal.

Defendants' argument for seeking sanctions against Mr. Rider and his attorneys rests almost entirely on their unsupported allegations of "perjury" and "deception" concerning, primarily, the "payments" made to Mr. Rider by WAP and Mr. Rider's co-plaintiffs. See Def. Mem. a 43; 39-45. However, as explained supra, Mr. Rider has never willfully withheld any information in any of his discovery responses, see 18 U.S.C. § 1621 (willfulness is an element of "perjury"), and his omissions concerning his marital dispute and military service were entirely accidental. Moreover, with respect to the issue of Mr. Rider's sources of funding for his public education advocacy – the issue defendants appear to be the most concerned about and contend "could easily terminate [the litigation]," Def. Mem. at 42 – there was no deception or omission of any kind. On the contrary, as explained, Mr. Rider has consistently stated – since June 2004 – that he would provide all of the information concerning his income or sources of funding pursuant to a confidentiality agreement. See Def. Exh. 3 at 12-13 (responses to Document Request Nos. 20, 21); Def. Exh. 4 at 20 (response to Interrogatory No. 24). This hardly amounts to deception or a "fraud on the court." Def. Mem. at 41. Accordingly, there is absolutely no basis for finding Mr. Rider in violation of his discovery obligations, and no basis for imposing sanctions.

Indeed, as noted, defendants are the ones who are lying when they purport to have been ignorant of Mr. Rider's sources of funding until recently, since as early as 2002 they were aware that Mr. Rider was being funded by the ASPCA. See FEI 38333, 38336 (Plfs. Exh. 2). They also had all of the information they needed to make their bogus credibility and "unclean hands" arguments from the ASPCA's June 2004 document production and from the Wildlife Advocacy Project's September 2005 document production – all of which occurred long before 2006. See Def. Mem. at 44 ("FEI could have asserted an unclean hands defense against API in March 2006 if it had received documents and truthful interrogatory responses from Rider"). Thus, there is absolutely no discernible prejudice to defendants even if the Court were to find that Mr. Rider's answers to discovery requests were somehow deficient, which they were not.[15]

Moreover, because defendants never followed-up on Mr. Rider's offer to produce his funding information pursuant to a confidentiality agreement, any arguable prejudice to their case was of defendants' own doing. If defendants truly wanted Mr. Rider's funding information – rather than an opportunity to falsely claim that Mr. Rider was "willfully suppressing" this information from them and the Court, Def. Mem. at 44 – they should have accepted Mr. Rider's offer to produce this information long ago. They cannot now blame Mr. Rider for their own strategic missteps, and waste his time compelling him to do something he long ago agreed to do. See, e.g., Alsco-Harvard Fraud Litigation, 523 F. Supp. 790, 799 (D.D.C. 1981) (denying defendants' request to take more discovery because "[d]efendants have had, during the long course of this litigation, many opportunities to pursue discovery efforts of their own . . . The

[15] As demonstrated in Ms. Meyer's Declaration, defendants' counsel also falsely stated that Ms. Meyer "confirmed" that Mr. Rider has "destroyed" responsive records, and that she also stated that there was only "one" videotape that had not been produced. See Meyer Declaration at ¶¶ 3-5. Accordingly, neither of these false allegations – nor defendants' incorrect assumption that Mr. Rider is withholding or destroying any responsive records – supports any order against Mr. Rider.

Court cannot now delay this litigation further because of their failure to complete discovery. Indeed . . . it appears that defendants do not need additional discovery to successfully oppose plaintiff's motion for summary judgment.").

Similarly, with respect to Mr. Rider's innocent omissions concerning his marital disputes and military service, there is absolutely no showing at all as to why these omissions have prejudiced defendants in any way. As noted above, defendants were aware of Mr. Rider's military service because he listed it in his job application to Ringling Bros., see Tom Rider's Motion for a Protective Order at 16 n. 3. Similarly, defendants were aware of Mr. Rider's divorce because he referred to it in a separate interrogatory response, and, in any event, the details of such matters are extremely personal and completely irrelevant to this lawsuit. See Def. Exh. 4 at 6; see also Tom Rider's Motion for a Protective Order at 10-12.

Accordingly, because Mr. Rider has produced, logged on a privilege log, or properly objected to producing materials called for by defendants' discovery requests, there is no basis for defendants' motion to compel, or for imposing any sanctions on Mr. Rider or his attorneys.

CONCLUSION

For the foregoing reasons, defendants' motion to compel discovery from plaintiff Tom Rider should be denied.

Respectfully submitted,

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