UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

REPLY IN SUPPORT OF FEI'S MOTION TO COMPEL DISCOVERY FROM PLAINTIFF TOM RIDER AND FOR SANCTIONS, INCLUDING DISMISSAL

In his Opposition to Feld Entertainment Inc.'s ("FEI's") Motion to Compel Discovery and For Sanctions, Including Dismissal (4/19/07) ("Opp."), Tom Rider asks this Court not to concern itself with his numerous willful discovery violations because: (a) he has now offered to produce a minutia of the requested material pursuant to an unnecessary confidentiality agreement; and (b) FEI heard Rider tell a state legislature in 2002 that ASPCA was paying his "traveling" or "business" expenses. Opp. at 5 & Ex. 2 thereto. The "confidentiality" gambit is a stalling tactic that either has no basis or has been waived. The 2002 statement was untrue. ASPCA was not just paying certain expenses; ASPCA and its plaintiff cohorts were Rider's sole source of financial support. That this falsehood misled FEI is no defense for Rider now.

Rider's pattern and practice of discovery violations is no different than that of other parties that have been dismissed in this District. He has willfully destroyed evidence, provided false testimony, and orchestrated a cover-up scheme. Synanon v. United States, 820 F.2d 421, 427-28 (D.C. Cir. 1987). His "pervasive combination of illegal document destruction and

unreasonably reticent discovery practice in this litigation effectively prevented [FEI] from litigating [its] case." Webb v. D.C., 189 F.R.D. 180, 189 (D.D.C. 1999).

According to Rider, FEI's request for sanctions rests "almost entirely" on his failure to produce documents and information relating to the payments his co-plaintiffs and counsel have made to him. Opp. at 28. That is not true. Rider merits sanctions for his willful document destruction, perjured interrogatory responses – which included withholding numerous facts from his original interrogatory responses – and bold refusal to properly amend those responses when FEI caught his perjury. Each of these discovery violations is described in detail in FEI's Memorandum in Support of its Motion (3/20/07) ("Mem.") and herein. For evidence of Rider's bad-faith throughout the discovery process, however, the Court need look no further than Rider's circular objections with respect to his communications with counsel and co-plaintiffs regarding their advertising and promoting of this lawsuit.[1] First, Rider argued they were privileged. Then, after FEI challenged that privilege claim, Rider argued they were either privileged, irrelevant, or protected by the First Amendment. Further obscuring this issue, Rider has refused to provide a privilege log describing these communications in any detail so that FEI and the Court can determine which privilege he is asserting for which communication and whether that privilege applies. Rider has obfuscated at every turn of this process and, when confronted about those misrepresentations, has concocted an ever-evolving string of excuses.

FEI's Motion is not merely about Rider's failure to disclose information regarding payments he has received. Nor is it true that "since June 2004 defendants have had access to all

[1] Rider's bad-faith and circular arguments are not limited to this issue. When FEI asked Rider during his deposition about other information withheld from his discovery responses, he refused to answer, arguing that FEI could have compelled that information through written discovery. Then, when FEI requested that Rider amend his responses to written discovery, he refused, arguing that FEI could have sought that information in his deposition. Mem. at 9.

of the information they seek" regarding such payments. Opp. at 12.[2] For three years, FEI has sought all documents relating to these payments. Rider, however, refuses to produce them and disingenuously implies to the Court that his offer to provide certain information pursuant to a confidentiality agreement would satisfy FEI's discovery requests. That is not true. FEI is entitled to receive all documents on this point. Each such document is relevant to show when and why the organizational plaintiffs and counsel were providing money to Rider without whom this case would not exist. Rider's offer to provide certain information is insufficient and does not justify his numerous other discovery violations including document destruction and perjury. Conveniently, Rider's offer to produce "information" in lieu of documents would only further conceal the context in which payments were made and the extent of his spoliation.

FEI has sought complete, accurate, and honest discovery responses from Rider. He refuses to provide them. Rider has left FEI no choice but to seek a Court order compelling discovery about which he has prevaricated and asserted frivolous objections to conceal. The Court should compel the requested discovery and dismiss him from this case.

I. RIDER HAS DESTROYED RESPONSIVE DOCUMENTS AND REFUSED TO PRODUCE OTHERS IN HIS POSSESSION, CUSTODY, OR CONTROL

A. Rider Admits Document Destruction and Fails to Produce Many Others

Since filing his complaint in 2000, Rider has been "under a duty to preserve what [he] knows, or reasonably should know, is relevant in [this] action." Arista Records, Inc. v. Sakfield Holding Co., 314 F. Supp. 2d 27, 34 n.3 (D.D.C. 2004). It is undisputed that Rider discarded relevant, responsive documents after suit was filed. Ex. 1 to Opp. (admitting that Rider did not keep certain documents prior to March 30, 2004). Rider also has not produced several other

[2] Rider complains that FEI alleges "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." Opp. at 3 n.1. That simply is not true. FEI cited to, and attached, portions of ASPCA's deposition testimony. See Mem. at 6 (citing Ex. 5, ASPCA Depo.).

documents that FEI has been forced to gather from others despite the fact that the documents were once in Rider's possession and are relevant to this action. See Ex. 14 to FEI's Motion to Compel WAP (Docket No. 85). The only logical inference is that Rider destroyed those documents as well. When asked what happened to Rider's documents, his counsel responded that he is "not keeping them" because he lives in a van and that is how he operates.[3] Ex. 32, Joiner Decl. ¶ 5.

Rider's claim that he preserved certain categories of relevant documents prior to 2004 is worthless because he failed to preserve all categories of relevant documents. Opp. at 8. Even if, moreover, 2004 were the relevant starting point, Rider and his counsel ***noticeably*** fail to state affirmatively that he actually preserved all records responsive to defendant's document requests since 2004. Indeed, FEI has obtained documents from other sources such as WAP, but not from Rider. See, e.g., Ex. 14 to FEI's Motion to Compel WAP (Docket No. 85). This too was discussed with Rider's counsel at the February 7 meeting. When the documents already produced by WAP were used to exemplify the type of documents missing from Rider's production, his counsel responded nonsensically that if FEI wanted a duplicate copy of the 1099's from WAP then WAP's 1099's to Rider would be re-copied and then produced by Rider. Ex. 32, Joiner Decl. ¶ 6. Since others (*e.g.*, WAP) have produced post-2004 materials that Rider himself should have kept but clearly did not, there is no other conclusion than Rider discarded these documents too. In fact, Rider's counsel admitted this during the February 7 meeting even though she now tries to explain this away. The only questions that remain are (a) how extensive was Rider's spoliation and (b) what is the appropriate sanction.

[3] As set forth in Ex. 32, FEI's counsel disagrees with Ms. Meyer's characterization of her statements at the parties' meet and confer. Ms. Meyer's declaration that her client did not retain his copies of documents that pre-date March 30, 2004 which FEI ultimately was forced to obtain from the Wildlife Advocacy Project ("WAP") makes no sense. Nonetheless, the Court need not be distracted by counsel's disagreement. Rider has admittedly destroyed documents that pre-dated March 30, 2004 and has not produced several documents that post-date March 30, 2004.

Rider attempts to change the subject by explaining why he has far fewer documents than expected. First, Rider argues that because he "lives on the road in a van ... [he] has very little room to collect or store" documents. Opp. at 7. This is ridiculous. A party does not get a free pass to destroy relevant documents merely because it ran out of room to store them. Indeed, parties have been sanctioned for destroying, pursuant to a routine document retention policy, documents that were relevant to an existing lawsuit. See Webb, 189 F.R.D. at 182.

Second, Rider claims he has few documents because he "speaks," not "writes," about elephant treatment. Opp. at 7. FEI, however, is not only requesting what Rider has written on this topic. It is requesting all documents relating to his alleged "advocacy work." This includes any communications about his work (substantively or logistically), any discussion points that he uses, any hand-outs or flyers that he has distributed, etc. Rider has not produced these and it is not believable that they never existed. His co-plaintiffs gave him a laptop for his advocacy work, so its contents obviously are responsive, but virtually no laptop materials have been produced.

Third, Rider and his counsel persist in their failure to comprehend that FEI does not merely want duplicates of the incomplete set of documents it already has. See Opp. at 10. It wants all of the documents that it requested and is entitled to, to the extent they still exist. FEI is simply using the documents that it has been forced to obtain from other sources to demonstrate that Rider has destroyed or withheld innumerable relevant, responsive documents that he once had. Rider's failure to preserve and produce his own documents is not excused merely because FEI got copies of some of them via a subpoena to the alter ego of plaintiffs' counsel.

Finally, Rider argues that records – such as receipts for which he has been reimbursed by animal advocacy organizations – are not responsive to FEI's requests. Rider argues that these do not reflect "payments of gifts." Opp. at 9-10. Unfortunately for Rider, that is not what FEI

requested. FEI requested documents relating to "payments or gifts." Ex. 1, Request No. 21 (emphasis added). Rider must comply with FEI's requests, as written.

B. Documents in WAP's Files Were Created or Gathered Pursuant to Meyer Glitzenstein and Crystal's ("MGC's") Representation of Rider

WAP documents are under Rider's control. His counsel started and still operates WAP, which has been used as a conduit to funnel money to him from his co-plaintiffs. Thus, expecting Rider to produce documents maintained by his lawyers in their capacity as Directors of the alter ego that pays him under cover of a "media" campaign aimed at FEI is not at all, as Rider claims, "tantamount" to arguing that one client can obtain its lawyer's files relating to another client. The files at issue were not created by MGC for another client – they were created to facilitate its alter ego's work, *i.e.*, paying Rider what amounts to a professional plaintiff's "salary."

Rider argues that a party need only produce its attorney's files if the "attorney comes into possession of a document as attorney for that party." Opp. at 11 (citing Poppino v. Jones Store Co., 1 F.R.D. 215, 219 (W.D. Mo. 1940)). As Judge Facciola previously explained in this case, "a client has the right, and the ready ability, to obtain copies of documents gathered or created by its attorneys pursuant to their representation of that client." ASPCA v. Ringling Bros., 233 F.R.D. 209, 212 (D.D.C. 2006) (emphasis added). Indeed, that is exactly the case here. WAP exists to support MGC's litigation matters and WAP started an alleged campaign against FEI for the sole purpose of raising money so that Rider would remain in this case. Its work, therefore, is pursuant to MGC's representation of Rider. Indeed, documents produced by WAP prove that there is absolutely no distinction between the work of Rider's counsel as officers of WAP and as counsel in this case. MGC has sent e-mails to its attorneys and Rider's co-plaintiffs discussing his alleged "media" (*i.e.* WAP) work. Ex. 33. One of the e-mails to Rider's co-plaintiffs discusses ways to raise money for him (through WAP) while noting that counsel is "personally

very impressed with ... his total commitment to the lawsuit." Id. Rider, moreover, has received (via WAP) money solicited by his co-plaintiffs through a fundraiser seeking donations for this litigation and featuring keynote speech(es) from his counsel/WAP officer(s). Ex. 7, Invitation to Fundraiser; Ex. 34, WAP Ledger (reflecting donations from AWI/fundraiser). The documents relating to this case and WAP's "campaign" against FEI are in the possession of Rider's counsel pursuant to their representation of him. Counsel's voluntarily assumed dual roles are indistinguishable. But for their representation of Rider, the documents at issue would not exist.

II. RIDER'S OFFER TO PRODUCE A SELF-SELECTED "LIST" OF "HIS SOURCES AND AMOUNTS OF INCOME" IS NOT SUFFICIENT

It simply is not true that "since June 2004 defendants have had access to all of the information they seek" regarding the funding Rider has received. Opp. at 12. Rider went so far as to commit perjury to ensure that this information was withheld. Rider, moreover, has never offered to produce all of the documents and information that FEI requested; rather, he has offered to produce some information under a confidentiality agreement and thereby refused to produce the remainder. Rider asks FEI and the Court to allow him, in lieu of producing the actual documents requested by FEI, to produce his and counsel's summary of the information they unilaterally deem pertinent. FEI will not accept this and neither should the Court.

In 2004, FEI sought from Rider a description of the services he performed in exchange for compensation from animal advocacy organizations. Ex. 2, Inter. No. 24. In response Rider perjured himself by declaring that he has not received any such compensation. Ex. 4, Inter. No. 24. This response, which Rider has stood by since 2004, was signed by counsel who also was the Director of an animal advocacy organization (WAP) that had in fact paid Rider such compensation and had sent him IRS forms to document it. Ex. 6, Forms 1099 Issued by WAP to Rider. This deliberate concealment, perpetrated for more than two years, was outrageous.

In 2004, FEI also sought "all documents that refer, reflect, or relate to any payments or gifts" that Rider has received from any animal advocates or animal advocacy organizations. Ex. 1, Request No. 21 (emphasis added). Rider has never offered to produce what FEI seeks. Rather, Rider claimed that, "subject to a confidentiality agreement, [he] would be willing to provide defendants with information that is responsive to this Request." Ex. 3, Request No. 21 (emphasis added). FEI requested all documents – not a synopsis of the information that Rider believes to be pertinent. Nonetheless, Rider's counsel recently stated that any response by Rider would be limited to a "list ... of his sources and amounts of income since he stopped working for circuses." Ex. 10, Meyer letter at 9 (1/16/07). This is unacceptable. It is analogous to Richard Nixon's offer to produce "summaries" of the Watergate tapes. FEI has a right to all documents relating to or reflecting payments or gifts given to Rider – the documents it requested – without having those documents reviewed, filtered, censored and withheld by Rider and his counsel. Rider's belated "offer" is simply a device to conceal the extent of his spoliation.

Rider seeks to divert the Court's attention from his refusal to produce all of the requested material with his purported justification for now belatedly seeking a confidentiality agreement. That issue is not before the Court at this time. Plaintiffs have waived their right to seek such protection due to their conduct.[4] The issue here is whether – with or without a protective order – Rider must produce all of the documents and information that FEI has requested. He must.

Rider has not refuted FEI's argument that his "'freedom of association' claim is

[4] Now that Rider has finally moved for a protective order, FEI will respond fully to that Motion. FEI submits here, however, that it did not consent to such an order because of plaintiffs' improper gamesmanship and the absence of any valid basis for an order pursuant to the law of this case resulting from plaintiffs' insistence upon litigating in the public view. Plaintiffs cannot demand openness and then seek secrecy for their own bad acts. Rider's assertion that plaintiffs previously agreed to similar requests is disingenuous. In the 2005 instance cited by Rider, plaintiffs initially rejected FEI's request and only submitted a proposed order after the Court ruled that FEI was entitled to one. In the other two instances, FEI – unlike Rider – did precisely what the Federal Rules contemplate. FEI informed plaintiffs that it was going to move for a protective order, provided plaintiffs with a proposed order, and asked whether plaintiffs would consent. FEI did not make an amorphous promise to give plaintiffs some of the information they sought in lieu of the actual documents if a confidentiality agreement was reached.

frivolous" with respect to the payments he has received. Mem. at 22. Rider makes no effort to show that payment documents should be suppressed on "freedom of association" grounds. Having abandoned this claim, Rider now argues that he should not be compelled to provide the requested documents and information because (a) FEI already has some of it, (b) Judge Facciola ruled that FEI need not produce its profitability documents, and (c) FEI has known for a few years that the ASPCA has paid his travel/business expenses. All three theories fail.

First, that FEI has managed to obtain some of "the information concerning Mr. Rider's funding from the organizational plaintiffs and [WAP]," Opp. at 14, does not insulate Rider. FEI has not obtained all of the material it requested from anyone, and what it has received, had to be fought for. Plaintiffs' obstructionist behavior forced FEI to subpoena WAP, which originally withheld hundreds of pages of responsive documents until FEI stated its intention to seek the Court's assistance. See Motion to Compel Documents Subpoenaed From WAP (Docket No. 85). Even now, WAP continues to withhold responsive documents. Id. Only after FEI reviewed the documents that WAP produced, did the extent of plaintiffs' obstructionist behavior become clear. Rider's claim that "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" is false. Compare Opp. at 14 with Ex. 42 to Pls.' Opp. to FEI's Motion for Leave to Amend (Docket No. 132) (AWI testimony that it is "not aware" whether other organizations also are funding Rider). Although ASPCA, AWI, and FFA have paid Rider directly, not one of them has disclosed such payments in their discovery responses – even after FEI explicitly stated that it knows such payments have occurred and requested that plaintiffs amend their responses.[5] Despite plaintiffs' repeated claims of being "forthcoming," FEI has

[5] See, e.g., Ex. 35, First and Supplemental Responses of AWI, ASPCA, and FFA, Inter. Nos. 21-22 (each failing to disclose payments to Rider).

never received a complete and accurate answer, and certainly not a "forthcoming" answer, to its questions regarding the funding of Rider.[6]

Second, Judge Facciola's decision that FEI need not produce its profitability information is irrelevant. Judge Facciola concluded that the sensitivity of FEI's profitability information together with the burden of "gathering and producing" it outweighed its alleged relevancy. ASPCA v. Ringling Bros., 233 F.R.D. 209, 214 (D.D.C. 2006). Here, Rider has not alleged (nor could he) that "gathering and producing" the information that FEI requested would be burdensome. Moreover, unlike plaintiffs, FEI has requested documents that are relevant to this case. Plaintiffs requested FEI's profitability documents to show that its exhibition of elephants constitutes "commercial activity" under the Endangered Species Act ("ESA"). Judge Facciola concluded, however, that the documents requested by plaintiffs would have no relevance to this case because "commercial activity" under the ESA encompasses the "actual or intended transfer" of Asian elephants, not the exhibition of them. Id. (citing HSUS v. Babbitt, 46 F.3d 93, 96 (D.C. Cir. 1995) (upholding FWS regulation 50 C.F.R. § 17.3)). Here, the amount of money that Rider has received is relevant to evaluating his credibility – a fact that plaintiffs now admit, as they must. Pls.' Opp. to FEI's Motion for Leave to Amend (Docket No. 132) at 39.

Counsel's acknowledgement that Rider has received "some money" does not render the underlying documentation irrelevant. The documentation requested goes not only to the amount that Rider has been paid but also to the timing and purpose of each payment. Complete production of all documents is crucial because plaintiffs and their allies have conflated the reasons for the payments to camouflage them. For example, WAP paid for Rider's hotel

[6] See, e.g., Ex. 27, AWI Supp. Resp., Inter. No. 19 (asserting for the ***first time*** a First Amendment privilege for documents that were requested almost three years earlier but were neither produced nor identified); Ex. 29, ASPCA Supp. Resp., Inter. No. 19 (same); Deposition Testimony of ASPCA at 140-41, 220 (Ex. 5 to FEI's Motion for Leave to Amend) (refusing to provide information regarding Rider payments, even subject to protective order, on the bogus ground that it was "confidential and proprietary" and insisting that FEI "can take it up with the judge").

reservation for his trip to Washington for his ***deposition in this case*** and recently characterized it as an expense for Rider's "public education campaign." Ex. 36. Thus, even a reimbursement that was obviously for the purpose of this litigation has been swept into the "public education campaign." FEI can uncover this gamesmanship only with complete document production. FEI is entitled to see the raw data, not just plaintiffs' counsel's interpretation of it.

Finally, Rider must produce all of the responsive documents and information notwithstanding that he once told a state legislature in 2002 that ASPCA pays his "expenses for traveling" and other "business expenses." Ex. 2 to Rider's Opp. As addressed above, this statement was false. It is one thing to say, as Rider did, that he was only being reimbursed for "traveling" and other "business" expenses. Such limited payments would not necessarily suggest misconduct on Rider's or plaintiffs' part. However, what was really going on was Rider was receiving a regular stream of payments from plaintiffs that funded his livelihood from soup to nuts – all expenses, personal as well as "business." Rider said nothing about that, which is what made his statement untrue and which is the reason why FEI (as well as the legislator asking the question) was misled. Rider's legislative veracity is no better than his judicial veracity.

III. RIDER IMPROPERLY WITHHOLDS DISCOVERY AS TO COMMUNICATIONS WITH OTHER ANIMAL ADVOCATES

A. Communications That Did Not Involve Legal Advice Are Not Privileged

Rider claims attorney-client privilege for communications (in the presence of counsel) that did not involve legal advice and for communications (outside the presence of counsel) with his co-plaintiffs. Rider fails to carry his burden of proving that any of these communications is privileged. None is, and all of them must be disclosed.

1. Communications With Counsel Are Not Privileged If They Did Not Involve Legal Advice, *i.e.* If They Involved Media Advice or Paying Rider

Not everything between plaintiffs and their counsel is privileged. For example, the communications between plaintiffs and their counsel relating to their publicity of this lawsuit or to the funding of Rider (whether in exchange for his participation in this case or for his promotion of it) are not privileged. The issue here is not whether Rider has had privileged conversations with counsel, it is whether he has identified and described all non-privileged communications, *i.e.* those that do not relate to legal advice. He has not. See Mem. at 31.[7]

Rider's numerous discovery deficiencies go hand-in-hand. Because Rider has failed to sufficiently identify the communications for which he is claiming privilege, FEI cannot tell which privilege is asserted for which communications and whether that privilege applies. His blanket assertion that the attorney-client privilege protects all of his communications with counsel about "the evidence that plaintiffs may rely on and the status of this litigation" simply is not true. They have discussed this litigation in a non-privileged context.

2. Rider's Communications With His Co-Plaintiffs Are Not Privileged

None of Rider's communications with his co-plaintiffs outside the presence of counsel are privileged. Rider's reliance on the "common interest" doctrine and on cases analyzing communications between employees and in-house counsel of the same company is misplaced.

First, the common interest doctrine does not make a communication privileged merely because parties to that communication have a common interest. Rather, the doctrine allows parties who share a common interest to share with each other privileged information without fear

[7] Rider's assertion that Katherine Meyer is not an animal advocate is frivolous. Opp. at 17 n.7. Rider's newly concocted (and ridiculously) narrow interpretation of "animal advocate" is contradicted by his very own discovery responses. See Ex. 4, First Response, Inter. No. 4 ("I have talked to hundreds of individuals and groups that fall within this description."); Ex. 20, Supp. Response, Inter. No. 4 (referring to communications with Katherine Meyer in response to request for description of communications with animal advocates).

of waiving the privilege. In re United Mine Workers of Am., 159 F.R.D. 307, 313 (D.D.C. 1994) (Parties with a common interest "may share privileged information without waiving right to assert the privilege."). The common interest doctrine is not a privilege – it is an exception to the waiver rule. Id. at 315 ("[T]he common interest rule prevents the waiver of the applicable privilege."). Here, the doctrine would not convert an unprivileged communication between Rider and an organizational plaintiff into a privileged one. Rather, it only would allow them to share otherwise privileged information, which publicity and funding are not.

Second, Rider has cited no cases holding that the common interest doctrine applies to the disclosure of privileged attorney-client communications. Indeed, in the D.C. Circuit case cited by Rider, the court explicitly distinguished the sharing of privileged work product from the sharing of privileged attorney-client communications. United States v. AT&T Co., 642 F.2d 1285 (D.C. Cir. 1980). Noting that the attorney-client privilege exists to ensure someone seeking legal advice that his or her statements "will be kept strictly confidential," the D.C. Circuit stated that "any voluntary disclosure ... is inconsistent with the confidential relationship and thus waives the privilege." Id. at 1299. With respect to work product, however, the court noted that its purpose was to protect the "fruits of an attorney's trial preparations from the discovery attempts of the opponent." Id. Thus, the D.C. Circuit concluded, parties with a common interest may share *work product* without fear of waiving the privilege.[8]

Not only are Rider's communications with his co-plaintiffs not cloaked in privilege by the common interest doctrine, they are not cloaked in privilege simply because Rider spoke to in-

[8] In the only other case cited by Rider, the court noted that "the parties appear to assume that the common interest rule is equally applicable to communications protected by the attorney-client privilege and those protected by the attorney work product privilege" even though the D.C. Circuit's decision in AT&T Co. would suggest otherwise. In re United Mine Workers of Am., 159 F.R.D. at 313 n.4. Although the court agreed to follow the parties' assumption, it should be noted its reliance on In re Sealed Case, 29 F.3d 715 (D.C. Cir. 1994), is not applicable here. Rider is not relying upon the common interest doctrine to protect communications between him, his lawyer, and another client. He is seeking to protect his communications with co-plaintiffs – outside the presence of counsel.

house counsel for his co-plaintiffs. In support of his theory, Rider cites to two cases holding that communications between "corporate employees and a corporation's counsel are privileged." Opp. at 18. Those cases are inapposite. Rider is not an employee of his co-plaintiffs. Plaintiffs have cited no support for their novel theory that communications between an organization's in-house counsel and a third-party are privileged.[9]

B. Rider's Communications With His Co-Plaintiffs Are Neither Irrelevant Nor Constitutionally Protected

Rider alleges that he has provided FEI with a general description of communications he has had with his co-plaintiffs regarding "media, legislative, and public education strategies," but that he is withholding "additional details about these communications." Opp. at 19. However, Rider neither refutes nor explains why he only disclosed the existence of numerous such communications in his supplemental interrogatory responses after FEI learned about them from other sources and asked that his responses be amended accordingly. Mem. at 26. Rider, moreover, is withholding more than mere "details" of communications. Indeed, he has failed to disclose that many such communications even occurred. See, e.g., Ex. 38, ASPCA Supp. Response, Inter. No. 16 (identifying conversation between Rider and Dale Reidel regarding FEI); Ex. 20, Rider's Supp. Response, Inter. No. 4 (identifying no such conversation). Regardless of Rider's semantics, he must disclose the existence and details of his communications with co-

[9] It is particularly troubling that Rider is now implying that his privilege claim is limited to his communications with his co-plaintiffs' in-house counsel. See Ex. 10, Meyer letter (1/16/07) at 10 (claiming privilege over all of Rider's conversations with his co-plaintiffs and specifically claiming additional source of privilege where he spoke to in-house counsel). FEI knows that Rider has spoken about this lawsuit to his co-plaintiffs' employees other than in-house counsel and his co-plaintiffs are claiming privilege over such communications. See, e.g., FFA Supp. Response, Inter. No. 16; API First Response, Inter. No. 16 (attached hereto as Ex. 37). Rider has neither disclosed these communications to FEI nor argued to the Court that they are privileged. Rider's "hide the ball" tactics must stop.

plaintiffs regarding their media campaign. These communications are neither irrelevant nor privileged.[10]

1. Rider's Relevancy Objection Is To No Avail

Rider waived any "relevance" objection by failing to assert it in his original response to FEI's discovery requests. See Order (9/26/05) (Docket No. 50). Rider's previous "overly broad" and "unduly burdensome and oppressive" objections do not encompass an "irrelevant" objection, particularly since Rider expressly objected on relevance grounds to other interrogatories.[11] Even if he had not waived the objection, communications between Rider and his other plaintiffs regarding a "media" or "legislative" strategy are relevant to this case. Rider, for example, has had communications with other animal advocates about FEI, its treatment of elephants, and the presentation of elephants in circuses. Any statement by Rider about elephants is a potential admission against interest.[12]

Moreover, contrary to Rider's claim that plaintiffs and WAP "have provided defendants with documents showing the amount of funding provided to Mr. Rider, by which groups, and when," Opp. at 20, AWI, ASPCA, and FFA have not provided to FEI the underlying documentation of the payments they made to Rider – let alone accurate discovery responses

[10] Conspicuously absent from Rider's opposition brief is any argument supporting his counsel's prior objection that Rider need not respond to FEI's discovery requests since ASPCA already explained some of these communications and because FEI could have, but did not, ask Rider follow-up questions during his depositions. Ex. 10, Meyer letter (1/16/07) at 10. As explained in FEI's Motion, counsel's position was frivolous and plaintiffs' willingness to assert frivolous objections should not go unnoticed by the Court. While plaintiffs did not make such arguments to the Court, FEI has had to spend its time and money responding to such frivolous arguments.

[11] See Ex. 4, Rider's First Response, Inter. No. 2 ("on the grounds that it is irrelevant ... and because it is overly broad, unduly burdensome, and oppressive") (emphasis added); id., Inter. No. 6 ("on the ground that it is overly broad, seeks irrelevant information ... "). Rider's Opposition, moreover, recognizes that relevance and burdensomeness are two distinct concepts. See Opp. at 21-22 (arguing that relevant documents need not be produced if it is unduly burdensome to do so).

[12] As stated above, moreover, documents reflecting communications relating to the payments Rider has received also would demonstrate for FEI and this Court the timing of such payments, the services rendered for such payments, and the expectations with which such payments were made.

regarding these payments.[13] It is simply not true that Rider's providing FEI with a list of the payments he has received from other animal advocates would alleviate FEI's need for these communications. FEI has requested these communications for multiple reasons. Rider continues to claim willingness to provide certain limited information as an excuse for his failure and refusal to retain and produce scores of responsive documents and information owed.

2. FEI's Request for Rider's "Media" and "Legislative" Communications Is Not Analogous to Plaintiffs' Request for FEI's "Public Relations" Files

Rider argues that he should not have to disclose his "media" strategies because FEI did not have to produce its "public relations" files. Opp. at 20. Rider, again, misapplies Judge Facciola's ruling. Judge Facciola held that FEI's public relations files were not relevant to this case because the only reason that plaintiffs proffered for requesting them was to show that FEI's exhibition of Asian elephants constituted "commercial activity" under the ESA. As explained above, however, the exhibition of Asian elephants cannot constitute such "commercial activity." ASPCA, 233 F.R.D. at 214. Judge Facciola's ruling has no bearing on whether plaintiffs' and counsel's "media" campaign against FEI are relevant to this case.[14]

3. Rider's "Media" and "Legislative" Communications Are Not Protected by the First Amendment

Despite alleging a "right of association," Rider has yet to identify the constitutionally protected activity that he is engaging in or the constitutionally protected associating that he is doing. FEI is aware of no case – and Rider has not cited any – holding that the First Amendment shields documents and information concerning a coordinated effort to use the media against

[13] See, e.g., AWI Depo. at 138-39 (testifying that it made payments to Rider); ASPCA Depo. at 46-47 (same); FFA Depo. at 157-58 (same); AWI IRS Forms 990 (disclosing to IRS that it made payments directly to Rider) (collectively attached hereto as Ex. 39). See also supra p. 9 n.5.

[14] The comparison is further inapt because FEI, unlike plaintiffs, has not combined its public relations with commentary on, or discovery in this case. FEI also does not use this case to raise money as do plaintiffs.

another private party. The cases cited by Rider all address the First Amendment right to associate for purposes of core political activities and/or to petition the government.[15] This case involves neither.

The right to associate is not absolute. DKT Mem'l Fund Ltd. v. Agency for Int'l Dev., 887 F.2d 275, 292 (D.C. Cir. 1989) (the freedom of association protects the right "to associate for the purpose of engaging in . . . activities protected by the First Amendment") (emphasis added). That Rider's attack on FEI is not protected by the First Amendment is illustrated by United States v. Duke Energy Corp., 232 F.R.D. 1 (D.D.C. 2005), in which an organization formed for the purpose of advancing the common legal interests of its members by participating in administrative and judicial proceedings was compelled to produce – over its First Amendment objections – documents and information to the federal government. The Court denied the First Amendment claim because the association sought to

> expand the cases on which it relies beyond the principles announced therein and the context in which those cases arose. In those cases, the parties seeking protection either were invoking core associational rights and/or were engaged in political expression and association concerning elections and politics, the "very heart of the organism which the First Amendment was intended to nurture and protect." ... "Similar concerns [as those raised in the cases cited] are not raised by enforcement of the civil subpoenas in this case, which seek business information that is relevant to specific alleged violations in ongoing litigation and is shared with members [and sometimes non-members] of [the association]."

Id. at 2-3 (internal citations omitted) (emphasis added). Rider's argument is no different than that which already has been rejected. He is associating with other private parties to conduct

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[15] See FEC v. Machinists Non-Partisan Political League, 655 F.2d 380, 388 (D.C. Cir. 1981) (holding that the federal government could not discover information regarding political campaign organizations' association with a "multi-candidate political committee"); Wyoming v. USDA, 208 F.R.D. 449, 454 (D.D.C. 2002) (holding that the state of Wyoming could not discover information regarding an "advisory committee" that was formed to petition/influence the federal government); Int'l Action Center v. United States, 207 F.R.D. 1 (D.D.C. 2002) (holding that the federal government could not discover information regarding the activities of several political action organizations and individuals who had assembled for the purpose of opposing the government). See also U.S. Const. Amend. 1 ("or the right of the people peaceably to assemble, and to petition the government for a redress of grievances") (emphasis added).

activity for the purpose of damaging the business and reputation of another private party. Indeed, Rider's argument is weaker than that previously presented because he is not being compelled to produce documents and information to the government, a non-party. Despite alleging a First Amendment privilege, Rider has yet to articulate and identify his constitutionally protected activity.

Rider bears the burden of proving that any potential harm to conduct protected by the First Amendment outweighs FEI's need for the documents and information in question. New York State NOW v. Terry, 886 F.2d 1339, 1355 (2d Cir. 1989); Int'l Action Center v. United States, 207 F.R.D. 1, 4 (D.D.C. 2002) (claim of privilege should only be upheld if plaintiffs' First Amendment privilege "outweighs" defendant's need for the information sought). Rider cannot discharge this burden. As shown above, he is not engaging in conduct protected by the First Amendment. Second, the only evidence Rider cites as a threat to the purported protected activity are decade-old allegations made in two lawsuits, one of which is still pending, and in the other, a jury found no liability for the allegedly "harassing and interfering" activities that Rider describes. Ex. 46 to FEI's Motion to Compel WAP (Docket No. 85). Finally, FEI's need for the material clearly outweighs the other two factors even if Rider could substantiate them because the communications at issue go the "heart of the matter." Black Panther Party v. Smith, 661 F.2d 1243, 1268 (D.C. Cir. 1981). Since he is being paid to agitate about FEI's elephant treatment, it is likely that Rider's communications with his co-plaintiffs involve both subjects and both subjects bear on the merits of the case as potential admissions against Rider or go to his credibility. Thus, FEI's request is based upon far more than "mere speculation that the information might be useful." Int'l Action Center v. United States, 207 F.R.D. 1, 4 (D.D.C. 2002).

C. Rider's Communications With Other Animal Advocates Are Relevant and Rider's Belated Privilege Claims Are Futile

1. Rider's Communications With Other Advocates Must Be Disclosed

Rider has waived any "relevance" objection for communications with all other animal advocates by failing to assert it timely. Supra p. 15. Such communications are relevant for the same reasons as the communications with co-plaintiffs are relevant: as potential sources of admissions against interest and for impeachment. Nor are these communications protected by the First Amendment. Rider cannot show (a) a constitutionally protected activity that (b) would be threatened by disclosure of the information that FEI seeks and that (c) any such injury to any such constitutionally protected activity outweighs FEI's need for the requested material. Supra pp. 16-18. Rider should be ordered to disclose the responsive documents and information concerning these communications.

2. Rider's Description of Communications With WAP Is Insufficient

Rider argues that he has adequately described his communications with WAP and that it would "be overly burdensome to require Mr. Rider to attempt to reconstruct every detail of every conversation he has ever had with WAP ... ." Opp. at 24 n.11. Rider misses the point. FEI did not request that he provide "every detail of every conversation." FEI asked him to "describe every communication." Ex. 2, Inter. No. 4. That he has failed to do.

Rider's original interrogatory response omitted any reference to his communications with WAP. Ex. 4, Rider's First Response, Inter. No. 4. After FEI pointed out that such communications in fact occurred, Rider acknowledged in a supplemental answer:

> I also had conversations with D'Arcy Kemnitz of [WAP] between March 2001 and February 2002, and with Katherine Meyer of [WAP] between March 2001 and June 2004 about these same matters and other public education outreach I was doing on the issue of elephants in circuses with grassroots groups around the country. ... I have also had conversations with Katherine Meyer in her capacity as an official of [WAP] concerning my media and public education work for

> [WAP], including which journalists, grass roots groups, or legislative bodies I am talking to or plan to talk to about these matters.

Ex. 20, Rider's Supp. Response, Inter. No. 4. This is still inadequate because it does not "describe every communication." Nor is it a "general description" as Rider alleges. It is not overly burdensome for Rider to describe which purported speaking engagements, testimony, or media interviews he discussed with WAP. Glaringly absent, moreover, is any description of communications with WAP regarding the cost of his activities or the "grants" that WAP was giving Rider. It is not overly burdensome for Rider to describe such communications, including communications in which he requested money or other items for certain expenses related to his alleged "media and public education work." Also glaringly absent is any description of communications he has had with any WAP official other than Katherine Meyer or D'Arcy Kemnitz, such as Eric Glitzenstein or Leslie Mink. Such communications in fact occurred. See Ex. 33; Exs. 14, 22 to FEI's Motion to Compel WAP (Docket No. 85). Because Rider refuses to adequately describe his communications with WAP, he must be compelled to do so.

IV. RIDER HAS FAILED TO SUFFICIENTLY IDENTIFY DOCUMENTS THAT HE PURPORTS TO INCORPORATE BY REFERENCE AND TO SUFFICIENTLY DESCRIBE DOCUMENTS FOR WHICH HE HAS CLAIMED PRIVILEGE

A. These Are Not Merely "Technical Issues" Nor Has FEI Waived Its Rights to Receive Complete, Accurate, and Honest Discovery Responses

Rider must adequately identify documents that he incorporated by reference in his interrogatory responses and he must adequately describe documents for which he is claiming privilege. See Fed. R. Civ. P. 26(b)(5)(A); Fed. R. Civ. P. 33(d). These are not merely "technical issues" as Rider claims. See Opp. at 25. They are obligations that are imposed on litigants by the Federal Rules of Civil Procedure and that have been enforced by this Court. See Dage v. Leavitt, 2005 U.S. Dist. LEXIS 17958, at *5 (D.D.C. Aug. 18 2005) (party must "at least provide the specific range of page numbers in the [report] that respond to [the]

interrogatories"); Alexander v. FBI, 186 F.R.D. 102, 106-07 (D.D.C. 1998) (requiring party to provide privilege log that identifies each withheld document, the basis upon which privilege is claimed, and additional information that would assist the requesting party to assess the applicability of privilege). Rider has cited no support for his argument that these obligations are entitled to any less enforcement because they are merely "technical issues."

Nor is there any support for Rider's argument that FEI has waited too long to raise these points. In Pearce v. E.F. Hutton Group, Inc., 117 F.R.D. 477, 478 (D.D.C. 1986) – the only case Rider cites – the court denied in part a motion to compel that was filed just seven weeks before the close of discovery because "[w]ith discovery due to close on January 9, 1987 counsel should now be engaged in their respective final rounds of depositions." Id. That rationale has no application here since there is no discovery cut-off. Moreover, Pearce in fact compelled the defendant to "furnish a further supplemental specific answer" to two separate interrogatories that the Magistrate believed to reflect a "line of inquiry to be relevant as to issues raised" in the claims. Id.[16]

B. Rider Must Describe In More Detail the Documents For Which He Is Claiming Privilege

Rider's failure to sufficiently describe documents he has withheld as privileged is not a "technical issue," nor is FEI too late in raising it. Judge Facciola's prior decision regarding internet printouts that FEI's attorneys had compiled to help prepare FEI's defense in this case likewise does not assist Rider. FEI was not required to log these documents because (1) FEI already had "provided plaintiffs with enough information to enable them to assess the

[16] Rider states that he provided some information in response to the interrogatories for which he also incorporated documents by reference and, therefore, argues FEI has "falsely contend[ed]" that he incorporated documents by reference "instead of providing responsive information." Opp. at 25. Rider fails to comprehend, however, that it is irrelevant whether he also provided some additional information. The issue is that, instead of providing a complete narrative response, he elected to provide a partial response and to try to incorporate unidentified documents by reference for the rest of his response. Now he must identify the incorporated documents or this portion of all such responses must be stricken.

applicability of the privilege" and (2) the act of providing a privilege log "would disclose [FEI's] attorneys' mental processes." ASPCA, 233 F.R.D. at 213. Neither factor is present here.

Rider has only generically described documents created from "2000-2004" as "communications regarding status of litigation, advice, recommendation, strategy," and has not identified – by category or otherwise – any privileged communications since June 2004 except some "e-mails" in "January 2007" regarding "information responsive to supplemental discovery." See Ex. 22, Plaintiffs' First Privilege Log; Ex. 23, Rider's Supp. Privilege Log. Neither FEI nor the Court can assess the applicability of his privilege claims with this skimpy description. The attorney-client privilege is routinely logged with the author, recipients, date, and general subject matter of each allegedly privileged document so that the requesting party can assess the applicability of privilege. See Mem. at 38-39. Yet Rider provides none of that elementary detail in his log to support his privilege claims. Such information, moreover, would not divulge privileged material. None of this discloses any lawyers' "mental impressions" which was the issue in Judge Facciola's prior ruling.

V. SANCTIONS, INCLUDING DISMISSAL, ARE WARRANTED

Rider has perjured himself at least three separate times. First, when asked to describe each job since high school, Rider concealed the fact that he was in the U.S. Army between 1967 and 1971. Instead of the truth, Rider made it look like he graduated from high school in 1970 and then took what he strongly implies was his first job with Caterpillar Tractor Co. Ex. 4, Rider's First Response, Inter. No. 2. Rider's explanation that his four years in the Army was not a "job" is ridiculous. Opp. at 5-6. And his intent to deceive is obvious. He omitted the Army

because he was declared a deserter and was confined – inconvenient facts for a self-proclaimed champion of the public interest.[17]

Second, Rider stated falsely under oath that, apart from the instant case, "I have not been a party to or testified in any other civil litigation." Ex. 4, Rider's First Response, Inter. No. 7. In fact, there were three other cases. Rider's passing reference to being divorced in another interrogatory answer does not protect him, because people get divorced without going to court. What Rider was hiding with this falsehood is unknown at this point, but the answer was perjurious, pure and simple.[18]

Third, as discussed above, Rider committed perjury when he stated that he has received "no compensation" from animal advocates or animal advocacy organizations. See supra pp. 7-8.

Rider's discovery violations go far beyond the "allegations of 'perjury' and 'deception' concerning, primarily, the payments made to Mr. Rider," Opp. at 28 – although that would be enough. They include two other false interrogatory answers, clear-cut and willful spoliation of relevant evidence, multiple steps to conceal relevant information, frivolous incorporation of the entire internet into interrogatory answers, and meaningless privilege logs. No protective order will legitimize this abuse.

Rider's Opposition pretends that this never happened – that the "perjury accusations [are] unfounded." Opp. at 3-7. However, FEI has set forth the full factual and legal basis for why Rider's misconduct is indeed perjury according to the law in this Circuit and elsewhere. (Mem. at 1-2, 6-11, 39-45). ***Rider totally ignores the cases cited by FEI and presents no authority***

[17] Rider's purported "supplement" to this response gets him nowhere. See Opp. at 6. Rider changed his answer only after FEI caught him in the falsehood. This action confirms, rather than erases, the perjury.

[18] Rider has not even bothered to amend this answer to include all of his previous civil litigation experience. See Ex. A to FEI's Motion to Compel Rider's Testimony (Docket No. 101), Rider Depo. at 165 (indicating third civil case that is still omitted from the interrogatory response).

whatsoever to exculpate himself. Instead, Rider refers to the statute and claims that he really did not "intend" to perjure himself. Opp. at 28.

Dismissal is appropriate where, as here, a party willfully destroys evidence, provides false testimony, and orchestrates a cover-up scheme. Synanon, 820 F.2d at 427. See also Shea v. Donohoe Constr. Co., Inc., 795 F.2d 1071, 1074 (D.C. Cir. 1986); Webb, 189 F.R.D. at 189 (default judgment where one party's "pervasive combination of illegal document destruction and unreasonably reticent discovery practice in this litigation effectively prevented the [other party] from litigating his case"). Rider's persistent and severe misconduct has prejudiced FEI and pervaded every aspect of pretrial discovery. See Mem. at 44. Rider does not refute the hardship to FEI but instead, tries to blame FEI for not catching him sooner. Rider's arguments are simply unconvincing, as shown above.[19]

[19] Rider continues his falsehoods in the very brief submitted to defend his perjury. **(1) Rider:** "[D]efendants also had ... 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." Opp. at 5. **Fact**: WAP refused to provide such records (almost 300 pages) until June 2006 after FEI threatened court intervention. See FEI's Motion to Compel WAP at 14-15 (Docket No. 85). WAP continues to withhold additional such records, thereby necessitating FEI's September 2006 motion to compel. **(2) Rider:** "[D]efendants never followed-up on this offer to produce the information subject to a voluntary protective order, either by accepting it ... or by rejecting it (in which case plaintiffs would have immediately moved for a protective order)." Opp. at 12-13. **Fact**: FEI rejected Rider's offer in a letter to his counsel six months earlier. Ex. 11, Gasper letter at 11 (11/22/06). **(3) Rider:** "[N]one 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." Opp. at 14. **Fact**: AWI testified falsely on this subject and the organizational plaintiffs have submitted six sworn interrogatory responses that withhold information on this subject. Supra p. 9. Also, the "grant" euphemism was not known to FEI until WAP's 2006 production. **(4) Rider:** "Mr. Rider, the organizational plaintiffs, and the WAP ... have provided defendants with documents showing the amounts of funding provided to Mr. Rider, by which groups, and when." Opp. at 20. **Fact**: AWI, ASPCA, and FFA all paid Rider directly but have not produced documentation of such payments. Supra pp. 15-16. **(5) Rider:** FEI did not raise the issue of "destruction or 'spoliation' of evidence ... during the meet and confer process." Opp. at 8 n.4. **Fact**: FEI certainly did. Ex. 11, Gasper letter at 11 (11/22/06) ("If Mr. Rider has failed to retain responsive documents, that must be explained."); Ex. 1 to Rider's Opp. (declaration of counsel's discussion of this topic). These additional falsities also bear on the issue of appropriate sanctions sought by FEI against Rider.

CONCLUSION

For the reasons set forth herein and previously, FEI's Motion should be granted.

Respectfully submitted,

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