**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

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| **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.** | : | |

**RESPONSE IN OPPOSITION TO RIDER'S MOTION FOR A PROTECTIVE ORDER WITH RESPECT TO CERTAIN FINANCIAL INFORMATION**

Rider's latest motion for protective order represents at least the third time in which Rider asks this Court to establish a double-standard in this case whereby FEI's discovery materials are open to all while Rider's discovery materials are protected as "confidential." See Rider's Motion for Protective Order with Respect to Certain Financial Information (4/25/07) (Docket No. 141) ("Motion"); see also Rider's Opposition to FEI's Motion to Compel His Deposition Testimony (11/13/06) (Docket No. 107); Rider's Motion for Protective Order to Protect His Personal Privacy (11/13/06) (Docket No. 106). The Motion is frivolous. Not only does it misrepresent the record in this case (a disturbing yet repeated tactic in plaintiffs' filings), but it also now asks this Court to believe, quite incredibly, that neither Rider nor his counsel know what an "animal advocate" is. As FEI has previously informed this Court, it sees no reason why it should be forced to defend itself in secret while plaintiffs attack it in public. (Response to Rider's Motion to Protect His Personal Privacy at 6 (11/27/06) (Docket No. 114)). Such a hypocritical approach is unwarranted, particularly here, where Rider has not shown good cause to support his Motion.

FEI, therefore, respectfully requests that the Court deny the Motion and award FEI its costs and fees for having to respond to it.

## I. PROCEDURAL BACKGROUND

### A. The Latest Excuse Regarding the Definition of "Animal Advocate" to Defend Rider's Perjury and Spoliation of Evidence Is Dishonest and Absurd

Now that Rider's systematic discovery misconduct has been revealed in this case, Rider comes forward belatedly with a new excuse for his perjury and withholding of evidence: Outrageously, Rider now claims that FEI never asked, and thus, he was never obligated to produce discovery related to any income, payments or gifts he has received over the past decade because of the definition of the terms "animal advocates or animal advocacy organizations" used in two of those requests. See Motion at 2 (citing Interrog. No. 24 and Doc. Request Nos. 20 & 21). The claim is inherently incredible due to the actual definition involved and lack of any objection thereto, the specific requests FEI made, and the discovery responses Rider provided under oath. Perhaps most importantly, Rider's latest argument defies all common sense. At some point there must be an end to plaintiffs' repeated mockery of these proceedings. It is clear from the Motion that discovery is nothing but a game to plaintiffs, and one which they do not take seriously. FEI now has to invest its time and resources to demonstrate to this Court why Rider's latest ridiculous claim is also untrue.

The Motion's argument regarding the definition of "animal advocate" and "animal advocacy organization" is built upon only the first sentence of that definition, and therein lies its fallacy. (Motion at 2-3). The Motion never advises the Court that the definition continues on:

> The term ***includes but is not limited to*** the American Society for the Prevention of Cruelty to Animals ("ASPCA") or any local or regional Society for the Prevention of Cruelty to Animals ("SPCA"), the Fund for Animals ("FFA"), the Animal Welfare Institute ("AWI"), the People for the Ethical Treatment of Animals ("PETA"), the Performing Animal Welfare Society ("PAWS"), the Earth

> Liberation Front ("ELF"), the Animal Liberation Front ("ALF"), Animal Protection Institute ("API"), the Captive Animals' Protection Society ("CAPS"), In Defense of Animals ("IDA"), and Compassion over Killing.

Ex. B to Motion at 2 (Definition No. 1) (emphasis added). Contrary to the Motion's argument, "animal advocate" was thus expressly defined more broadly than the term as used in Plaintiffs' Initial Disclosures. Nothing in the definition, for example, excludes the Wildlife Advocacy Project ("WAP") as Rider now argues.[1] Id. It is the discovery definitions and requests – not the responses – which drive and establish the discovery obligations. Instead, Rider ignores this and presents the circular argument that the scope of whatever documents plaintiffs had in their possession as of January 30, 2004 controls the definition. (Motion at 3).[2] This logic is backwards and fails woefully.

Due to the incomplete reading of the definition, the Motion erroneously claims that only two portions of plaintiffs' Initial Disclosures regarding correspondence with the USDA and the Department of Interior are now relevant, and hence, define the scope of any discovery answers. See Motion at 3 & Ex. C (attaching unsigned excerpt from plaintiffs' Initial Disclosures). This approach ignores the full definition of "animal advocate," which explicitly included groups such as PAWS and PETA as well as all of the plaintiffs. Id. at Ex. C. Even under the Motion's backward logic, other portions of the Initial Disclosures identifying witnesses from these groups such as Pat Derby and Ed Stewart (PAWS), Joyce Friedman (PETA), Carol Haft (PAWS) or Miyun Park (Compassion over Killing) were covered by the definition as well as anybody from the plaintiffs' organizations. See Ex. 1, Signed copy of Plaintiffs' Initial Disclosures. Rider does not disclose this in his Motion.

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[1] Had FEI known what WAP was at the time, it would have included it specifically in this definition. That is precisely why the definition is qualified by the phrase "includes but is not limited to."

[2] This is also, of course, directly contradictory to the legal requirements that documents within a party's "possession, custody or control" must be produced. Fed.R.Civ.P. 34(a).

Next, when the Court looks at the language of the actual requests, it will see that the Motion fails – even when analyzed under the Motion's own twisted logic. Rider relies upon three requests, Interrogatory 24 (where he committed perjury) (Rider [Initial] Interrogatory Responses attached hereto as Exhibit 2), and Document Request Nos. 20 and 21 (Rider [Initial] Document Request Responses attached hereto as Exhibit 3). (Motion at 2). Interrogatory Number 24 is quoted only in part for the Court, omitting the second sentence of it which asks: "If the money or items were given to you as compensation for services rendered, describe the service rendered and the amount of compensation." Rider perjured himself by answering "I have not received any such compensation." (Ex. A to Motion). This perjurious response remains false and deceptive even under the Motion's latest "animal advocate" definitional excuse. As indicated above, the definition ***explicitly*** included PAWS, and thus also Pat Derby and Ed Stewart. ***The very first document in Rider's 2004 document production is his resignation letter from PAWS, dated May 14, 2001, quitting his "security job."*** Rider even testified under oath that PAWS gave him a "grant" of $50 per week and free housing for his "security" work. See Rider Letter to Derby (5/14/01) and Rider Depo. at 203-05 (collectively attached hereto as Exhibit 4). Yet Rider went ahead and answered Interrogatory Number 24 by affirmatively stating under oath that he never received any such compensation. His latest Motion just pretends that such information was not called for. See Motion at 4 (purporting to limit FEI's discovery requests to whatever documents plaintiffs had on January 30, 2004).

The Motion next misquotes Document Request No. 21. That document request actually calls for all documents related to "payments ***or*** gifts" not "payments ***of*** gifts" made by any animal advocates or animal advocacy organization. See, Ex. 3, at 9 (Doc. Request No. 21); cf. Motion at 2. Rider responded by objecting and stating that pursuant to a confidentiality

agreement he would agree to produce responsive "information." FEI did not ask for "information" that Rider and his counsel self-select to provide. FEI asked for all responsive documents, which again, even under Rider's own flawed argument would include payments by any of the plaintiffs, as well as other groups such as PETA or PAWS. During 2002-03 ASPCA made direct payments to Rider, but no such documents were ever produced by Rider. FEI now knows that he has not bothered to keep them, *i.e.*, he spoliated the evidence. See FEI's Motion to Compel Discovery From Rider and for Sanctions, Including Dismissal at 16-19 (3/20/07) (Docket No. 126).

Finally, the recently concocted definitional excuse is altogether inapplicable to Document Request No. 20. The Motion cites, but does not attach, Request No. 20, which states in full: "Bank statements or other documents demonstrating your sources of income since you stopped working in the circus community." Ex. 3, at 12-13 (Doc. Request No. 20). ***The request does not even contain the terms "animal advocate or animal advocacy organization." It clearly called for all sources of income, which based on the facts now known by FEI, would irrefutably include WAP, the plaintiffs, his counsel, and any other income source Rider had during the relevant time period. There is no legitimate excuse for Rider's hiding of this evidence.*** This request in particular demonstrates the ludicrous nature of Rider's definition argument presented in his Motion. Rider also responded to this request with objections and stated that pursuant to a confidentiality order, he would provide "information." Id. Again, FEI did not ask for "information" that Rider and his counsel can manipulate prior to production. FEI asked for documents, and if Rider no longer has them, then he should be sanctioned accordingly.

Moreover, none of Rider's responses to the other discovery requests at issue here, Interrogatory No. 24, Document Request Nos. 21 & 22, contain a specific objection to the term

"animal advocate" or "animal advocacy organization," or to the request itself as being unclear or vague. See Exs. A & B to Motion, Exs. 2 & 3 hereto. Rider knew exactly what was sought, as the Court will see below from his other discovery responses, and proceeded to answer the requests. To the extent that he now claims otherwise, his objections are waived. See Order at 2 (9/26/05).

The Court need only look at Rider's other discovery responses to realize that the recent definitional excuse is entirely disingenuous. When Rider was asked to identify his communications regarding FEI with all animal advocates or animal advocacy groups, he responded back in 2004 that he "has had hundreds of communications that fall within the scope of this Interrogatory." See Ex. 2, at 8 (Interrog. No. 4) (6/9/04). Rider then references communications with the following in his response: ASPCA, **Animal Defenders in London, England**, PAWS, Fund for Animals, the Animal Welfare Institute, In Defense of Animals, **Last Chance for Animals**, PETA, **the Elephant Alliance, the Elephant Sanctuary, "some other groups I can't recall," Citizens for Cruelty Free Circus in California, Compassion in Entertainment in Connecticut, Lehigh Valley Animal Rights Coalition in Pennsylvania**, and **"other groups that I do not know or recall the names of**," as well as **"a lot of individual animal rights advocates all over the US."** Id. (emphasis added). The bolded names above are those identified by Rider in his response to Interrogatory No. 4 regarding his communications with animal advocates or animal advocacy organizations, even though not specifically identified by name in FEI's definition or in plaintiffs' initial disclosures. Moreover, Rider supplemented his answer to this Interrogatory on January 31, 2007 to include, *inter alia*, conversations that occurred between 2001 and June 2004 with D'Arcy Kemnitz and Katherine Meyer of the Wildlife Advocacy Project. Id., Ex. 5, Rider Supplemental Responses at 4, No. 4 (1/31/07).

Again, Rider's supplemental response contained no objection to the definition of "animal advocate," and proceeded to answer the interrogatory under oath.

The Motion's definition argument is directly contrary to Rider's prior interrogatory responses submitted under oath. This latest bad faith argument asks the Court to ignore: (1) the ***complete*** definition provided by FEI in its document requests and interrogatories to Rider; (2) the actual language contained in FEI's discovery requests; (3) Rider's own responses to the same, including his failure to object; and (4) plain English. Rider, and apparently his counsel, would now have this Court believe that FEI never asked for information or documents related to payments or compensation that he received from any group (including WAP and his counsel) since leaving the circus, because plaintiffs had no such correspondence between the groups and the USDA back in January 2004. This is complete nonsense. See, e.g., Ex. 2, at 8 (Interrog. No. 4); Ex. 3, at 12-13 (Doc. Request No. 20).

Moreover, the definition argument defies all common sense. WAP is a self-described animal advocacy group whose own name contains the word "advocacy" in it:

> The purpose of the Wildlife Advocacy Project is to advocate the conservation of the nation's and world's biodiversity resources, protection of wildlife, and curtailment of animal abuse and exploitation, by providing media, educational, legal, technical, and other forms of support and advocacy to grassroots activists. The Project has been created by the nationally-known public-interest law firm, Meyer Glitzenstein & Crystal, which represents dozens of non-profit conservation, wildlife, and animal protection groups throughout the country.

See http://www.wildlifeadvocacy.org/about.html. Both plaintiffs' Initial Disclosures as well as Rider's initial document response (conveniently omitted from the Motion's exhibits) were signed personally by Katherine Meyer and included Eric Glitzenstein on the signature block, both of

whom were founders, officers and directors of WAP. See Exs. 1 & 3.[3] WAP and Meyer herself were both included and identified as "animal advocates" in Rider's January 2007 supplemental responses. See Ex. 5, at 3-7 (Interrog. No. 4).[4] Rider now asks this Court to believe that neither he nor his counsel knew to include WAP or those related to it as "animal advocates" when responding to discovery. As demonstrated, the argument is dishonest, lacks the requisite candor with the Court, contradicts the record and Rider's prior actions taken in discovery, and is made in bad faith. Rider should be sanctioned for making it.

**B. Rider's Deplorable Track Record in Discovery Has Not Been "Willing"**

Equally as farcical is Rider's rendition of events during discovery. Rider now claims that "defendants have never asked Mr. Rider to identify all of his sources of funding." (Motion at 4 (emphasis in original)). This is patently false. See, e.g., Ex. 3, at 12-13 (Doc. Request No. 20). Rider also claims that he "has always been willing to provide defendants with information concerning all individuals and groups that can even arguably be described as 'animal advocacy organizations' or 'animal advocates' without regard to how those terms were used in plaintiffs' Initial Disclosures." (Motion at 4). To date, Rider's "willingness" regarding discovery has included: (1) perjurious interrogatory responses, Motion to Compel Discovery from Rider at 7-11; (2) widespread spoliation of evidence spanning years, id. at 16-19; (3) an inadequate privilege log, id. at 37-39; (4) his refusal to answer deposition questions, some of which he had

[3] Since FEI issued its subpoena to WAP, Eric Glitzenstein's name has vanished from the signature block of plaintiffs' papers. This cosmetic alteration, however, does not change the fact that he is still counsel of record to Rider, and has been throughout the duration of the payment scheme.

[4] For these same reasons, plaintiffs' recent assertion that lawyers, including Katherine Meyer, cannot be an "animal advocate" because only those persons or entities identified in their documents can qualify as such is equally disingenuous. See Plaintiffs' Opposition to Motion to Compel Discovery from Rider and for Sanctions, Including Dismissal at 17 n.7 (4/19/07) (Docket No. 138). Again, it also makes no sense even when analyzed under the Motion's convoluted logic: Katherine Meyer signed, on the letterhead of Meyer & Glitzenstein, the various Notice of Intent to Sue and Complaint letters sent to the USDA and Department of Interior upon which this case is purportedly brought. Thus, both Meyer and her firm constituted "animal advocates" even under the Motion's strained rationale.

already answered in his interrogatories, that were reasonably calculated to lead to the discovery of admissible evidence, Motion to Compel Rider Testimony at 7-10 (10/30/06) (Docket No. 101); and (5) his coaching from counsel regarding his incomplete deposition testimony while the deposition questions not only remained pending but were raised via motion with the Court, see Rider's Motion for Protective Order to Protect His Personal Privacy at Ex. G (11/13/06) (Docket No. 106) (declaration submitted after deposition attempting to explain away one of his false interrogatory responses about which he refused to answer questions in his deposition). Given this record, FEI submits to the Court that Rider's participation in discovery in this case has been anything but "willing."

Rider also claims that he has "produced IRS 1099 Forms, which demonstrate his 'sources of income' pursuant to Document Request No. 20." (Motion at 3). This too is false. ***Rider has produced exactly one 1099, TR 197, and only then in his supplemental production dated January 31, 2007.*** See Ex. 6, 2005 1099 to Rider from WAP (TR 197). Rider has not produced any other Forms 1099 from anybody, including WAP or his co-plaintiffs. Similarly, Rider claims that the "other plaintiffs have already identified all of the funding that they have provided Mr. Rider." (Motion at 3 n.1 (emphasis in original)). This is also false. In fact, ASPCA, AWI, and FFA each have submitted sworn interrogatory responses omitting their direct "grants" to Rider. See Motion to Compel Discovery from Rider at 9-10 & Ex. 35. Although FEI knows such direct "grants" were provided, none of the organizations have produced to FEI documentation of such grants. See id. at 9-10 & Ex. 39.[5] Plaintiffs, moreover, have failed to

[5] Plaintiffs have neither "identified all of the funding that they have provided Mr. Rider" nor accurately identified which organization, either WAP or MGC, was used to funnel such money. Compare Ex. 7, ASPCA Form 990, 2001 (disclosing $1400.00 "grant" to WAP in 2001) and ASPCA Letter to WAP (12/21/01) (produced by WAP, not ASPCA) (enclosing $6000.00 check to Meyer Glitzenstein & Crystal for "2002 first quarter grant money for the Tom Ryder [sic] project") with Ex. 35 to FEI's Motion to Compel Rider, ASPCA Interrogatory Answer No. 22 (disclosing $7400.00 "grant" to WAP in 2001).

identify or document all of the payments they have made to WAP for Rider. See id. at Ex. 34 (Updated Ledger in Lieu of Documents Requested) (reflecting $3,000.00 payment by AWI on November 21, 2006 that AWI has neither identified nor produced documentation of).

It is against this collective backdrop of misconduct that the Court should consider the Motion, one in which Rider now audaciously characterizes his overdue discovery responses as a "long-standing offer to provide defendants with the requested financial information, subject to an appropriate confidentiality agreement." (Motion at 5). Rider's dilatory request for a confidentiality order comes too late: FEI has already moved the court to compel the information owed, WAP already produced large portions of Rider's financial information without a confidentiality order, Rider already testified about his financial matters without a protective order, and Rider cannot show good cause to support his Motion. Moreover, Rider lacks standing to argue on behalf of his donors.

## II. ARGUMENT

### A. Rider's Privacy Interests Have Been Waived

Rider asks that his "personal financial information – ***to the extent that it has not already been disclosed by those organizations or individuals themselves***" be kept shielded from the public. (Motion at 2, 8). Rider presumably is referencing the cache of documents produced by WAP that reflect Rider's financial information, and apparently, his co-plaintiffs. In responding to the subpoena issued by FEI, WAP asked that certain financial materials be produced under a protective order. Although FEI agreed to such an approach - for the financial materials as well as others - and provided to WAP proposed revisions to the protective order, WAP abruptly abandoned its demand. See Exs. 15, 33, 35 to FEI's Motion to Compel Documents Subpoenaed from WAP (9/7/06) (Docket No. 85). WAP then proceeded to produce financial information

regarding Rider (including copies of receipts submitted by Rider, checks provided by WAP to Rider, and checks provided by donors to WAP for Rider) without any confidentiality order and redacted information on documents that would identify individual donors to Rider.

Rider relies on Judge Facciola's Order (2/23/06) to claim that his financial information is "extremely sensitive."[6] Yet WAP has publicly produced much of it already. Moreover, Rider himself voluntarily testified publicly to a state legislator about his finances. See Ex. 2 to Plaintiffs' Opposition to Motion to Compel Discovery from Rider at FEI 38336 (4/19/07) (testifying that ASPCA pays his travel and business expenses and that he has no living expenses). Having now willingly — albeit selectively — disclosed certain financial information, Rider cannot now seek to seal the rest of it. See PHE, Inc. v. DOJ, 139 F.R.D. 249, 251-52 (D.D.C. 1991) (where party had already voluntarily disclosed 50 documents without limitation, it was precluded from later objecting on confidentiality grounds to "full and complete disclosure of similar documents"); see also Motion at 5 (admitting that Rider testified at deposition regarding financial funding without confidentiality order). Both Rider and WAP have engaged in selective disclosure of Rider's financial information. By opening that door and also inviting publicity, there is no legitimate basis now for keeping the rest of Rider's financial information sealed as "confidential."[7]

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[6] Notably, this remark by Judge Facciola caused plaintiffs no hesitation whatsoever when it came to publicizing FEI's financial information. Just two months after the opinion, plaintiffs gratuitously attached FEI's consolidated 2004 tax return to their Reply to their Motion for Attorneys' Fees (4/24/06) (Docket No. 66). (The exhibit prompted a surreply, which the Court permitted. See FEI's Surreply (4/28/06) (Docket No. 67)). Apparently, plaintiffs deem themselves free to publish any materials they like (regardless of its confidential or sensitive nature), yet ask this Court to enter such an onerous confidentiality order that it would prohibit FEI from even so much as using documents as exhibits to briefs. See Proposed Order to Motion ¶¶ 3-4 (purporting to require parties, the Court and its personnel, court reporters and expert witnesses to sign agreement to be bound by protective order and making no provision for filing materials with Court).

[7] Rider's own counsel has acknowledged as much. See Ex. 12 to FEI's Motion to Compel Discovery from Rider, Meyer letter at 7 ("Now that defendants have obtained much of this information ... we will check with Mr. Rider to ascertain whether he is willing to provide a complete response to this discovery without a confidentiality agreement.").

Moreover, Rider has willingly entered the public spotlight through his legislative and media appearances. He is thus a "public figure" entitled to lesser, not heightened, protections for his conduct. See Bartnicki v. Vopper, 532 U.S. 514, 534 (2001) ("One of the costs associated with participation in public affairs is an attendant loss of privacy."); see also Herbert v. Lando, 441 U.S. 153, 156-57 (1979) (heightened standards public figures face in pursuing claims) (cited by Rider). As such, there is no reason to permit Rider to publicly criticize FEI and then simultaneously protect him from public scrutiny regarding his motivations for doing so.

**B. Rider Lacks Standing to Argue on Behalf of the Organizational Plaintiffs' Members**

Rider next claims that disclosure of his financial information, including the names of his supporters, would interfere with his First Amendment rights of speech and association. (Motion at 9) (citing Wyoming v. USDA and FEC v. Machinists). The two cases cited by Rider are inapposite. Rider admits here that the information sought is relevant; the Motion presents only the issue as to whether it should be sealed under a confidentiality order. Id. at 8. In Wyoming v. USDA, et al., 208 F.R.D. 449 (D.D.C. 2002), the Court held that the documents sought were not relevant to the cause of action, and that they could be obtained more easily from the parties rather than the third-parties who were subpoenaed. Id. at 454-55 (D.C. Circuit considers three factors in First Amendment context). The case did not establish an absolute ban on discovery that has a potential chilling effect as Rider implies. Compare id. with Motion at 9. Similarly, in FEC v. Machinists, 655 F.2d 380, 390 (D.C. Cir. 1981), the Federal Election Commission lacked subject matter jurisdiction to issue a subpoena, which the court then quashed. Id. at 390. By contrast, Rider selected this forum to file suit, and the Court clearly has jurisdiction over him to order discovery from him. Unlike in Wyoming and Machinists, the issue here is not whether the

discovery is appropriate, which it is, but whether the discovery should be afforded heightened protection under a confidentiality order, which it should not.

What is unclear is why Rider even has standing to make this argument. Rider claims that if the names of his supporters are revealed, then FEI will use the information to pressure them to stop donating. (Motion at 9-10). Apart from the complete lack of evidence to support this claim, see infra § II(D), Rider has no standing to raise this objection. Rider must assert his own legal rights and interests – he cannot rest his claim for a confidentiality order on the rights and interests of third parties. See FEC v. GOPAC, Inc., 897 F.Supp. 615, 617-18 (D.D.C. 1995). It appears from the discovery that FEI has obtained thus far that most donations are made to the organizational plaintiffs or WAP rather than to Rider directly. Rider then receives his payments from these groups. Nevertheless, the concept of "members," "donors," and "contributors" are not interchangeable, id. at 618, and Rider has no standing to make First Amendment claims on behalf of any third party contributors. Moreover, FEI maintains that the payments and the conspiracy through which they have been made are unlawful, and thus, no First Amendment protection applies. See, e.g., United States v. Bell, 217 F.R.D. 335, 343 (D. Md. 2003) (ruling that alleged right of association did not shield party from discovery request because (a) the request was intended to facilitate the litigation, not to chill defendant's associational rights, and (b) the right to freedom of association does not protect unlawful activity); see also Branzburg v. Hayes, 408 U.S. 665, 691-92 (1972) (stating that the First Amendment right to freedom of the press, "as every other right enjoyed in human society, is subject to the restraints which separate right from wrong-doing.") (internal citations omitted).

### C. Rider Has Not Satisfied the "Good Cause" Requirement Necessary to Obtain a Confidentiality Order

Good cause is required to obtain a protective order. Fed.R.Civ.P. 26(c). "To show good cause, the movant must articulate specific facts to supports its request and cannot rely on speculative or conclusory statements." Tequila Centinela v. Bacardi & Co., Civ. Act. No. 04-02201, 2007 U.S. Dist. Lexis 22887, at *4 (D.D.C. March 29, 2007). No protective order will enter where the Court has to speculate to determine what general harm may occur if the "alleged 'confidential material' became public." Id. at *5; accord PHE, Inc., 139 F.R.D. at 252 (good cause requires movant to articulate "real and specific harm" and "not just 'stereotyped and conclusory statements.'").

Rider submits no evidence of any real and specific harm that would flow from not sealing his purportedly confidential information. The claim is difficult to believe in light of the fact that both the ASPCA and API have published their list of donors on the internet. See Ex. 8, ASPCA 2003 & 2005 Annual Reports (excerpts containing donor list); API 2005 Annual Report (excerpt containing donor list). Rider likewise attaches no declarations from anyone stating they would cease their support of him if their names were revealed. See GOPAC, Inc., 897 F.Supp. at 618-19 (no real injury in absence of declarations stating same). Equally, if not more plausible, is the possibility that donors may not want to affiliate themselves with the unlawful payment scheme that Rider, his counsel, and his co-plaintiffs have conspired to commit. That dilemma, however, is entirely of their own making and does not constitute "good cause" for shielding evidence of their misconduct from the public.

Rider also points to FEI's motion to amend and to add a RICO counterclaim as some type of prohibited SLAPP suit that justifies a confidentiality order. Notably, Rider miscites the testimony of Charles Smith to make its point. (Motion at 10). Mr. Smith testified to precisely

the opposite of what Rider claims. When asked if he authorized the activity (cited by Rider), Smith answered: "No, I think he's making suggestions." (Pl. Amend. Opp. Ex. 10 at 519:14.) In any event, all of this is irrelevant to the issue at hand, a confidentiality order, especially since there is no applicable SLAPP statute that applies to this case, which FEI has previously explained at length. See Reply to Non-Party Wildlife Advocacy Project's Response to Defendant's Motion for Leave to Amend at 3-10 (4/11/07) (Docket No. 137) (anti-SLAPP statutes do not apply in federal court or in the District).[8]

Rider also claims that FEI is "obviously very concerned about the effectiveness of Mr. Rider's efforts to inform the public about the animal abuse that goes on behind the scenes at the circus," and thus, the Court should assume that FEI will act inappropriately outside of the litigation in response to discovery produced within in the litigation. See Motion at 10-11 (citing Pl. Amend. Opp. Ex. 48). There is no evidence to support this allegation. Rider's basis for this claim is an unsolicited e-mail sent to FEI purporting to contain information from a third party,

[8] Nor do anti-SLAPP statutes apply to the current protective order analysis and facts related thereto. As explained in FEI's Reply (4/11/07) (Docket No. 137), the classic SLAPP lawsuit is brought in response to individuals' or groups' efforts to petition the government for a redress of grievances in order to chill the exercise of such First Amendment rights, Flatley v. Mauro, 39 Cal. 4th 299, 316 (2006), and not a RICO claim based upon years of illegal payments to a plaintiff and key witness. Plaintiffs' novel argument that they have a First Amendment right to bribe witnesses, make illegal gratuity payments, obstruct justice through demonstrably false testimony and interrogatories, and commit mail and wire fraud defies logic, and is completely unsupported by Supreme Court or SLAPP caselaw, or any other legal commentary. See Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 498 (1988) ("It rarely has been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute. We reject the contention now.").

In fact, courts consistently have held that illegal activity is not a valid exercise of constitutional rights and, therefore, is not entitled to the benefits of anti-SLAPP procedures. See, e.g., Paul for Council v. Hayecz, 85 Cal. App. 4th 1356, 1366 (2001), overruled on other grounds, Equilon Enterprises v. Consumer Cause, Inc., 29 Cal. 4th 53, 68 n.5 (2002); Lam v. Ngo, 95 Cal. App. 4th 853 (2002) (violence and other criminal acts are not constitutionally-protected activities even if committed out of political motive; anti-SLAPP statute affords no protection from this conduct); Novartis Vaccines & Diagnostics, Inc. v. Stop Huntington Animal Cruelty, USA, Inc., 143 Cal. App. 4th 1284, 1289-91 (2006) (recognizing that the gravaman of plaintiffs' complaint was not speech, but illegal acts of harassment, intentional infliction of emotional distress, trespass and intrusion, and that the conspiracy activity and other such acts were not protected activity under the First Amendment or entitled to anti-SLAPP protection). Plaintiffs' tiresome efforts to re-cycle this ill-conceived analogy to SLAPP statutes is simply a means to re-direct the court away from the issue at hand: whether Rider satisfies the good cause requirement necessary to obtain a protective order. It should therefore be disregarded.

Linda Roberson, who is not employed by or affiliated with FEI. It cannot be inferred from this e-mail that FEI is "very concerned" about Rider, and therefore, Rider's financial information must be sealed. Rider has not met his burden of coming forth with real evidence of specific harm to satisfy the good cause standard. At most, he invites the Court to speculate that some kind of harm could occur. The Court should decline his invitation and deny the Motion.

### D. Rider's Conclusory Stereotypes of Other Litigation Involving FEI Are Speculative and Present No Evidence of Real or Specific Harm

Rider states that FEI has a "well established pattern of spying on, harassing, intimidating, reporting to the IRS, suing, and otherwise oppressing those who criticize [its] operations" such that Rider needs a protective order from the Court for himself and on behalf of all (unidentified) others. Rider's statement of injury is conclusory and without factual support, and is thus insufficient to meet his burden of demonstrating good cause. See GOPAC, Inc., 897 F. Supp. at 618-19. Rider tries to support his bald conclusions by relying upon the report of the Long Term Animal Plan Task Force, which is more than a decade old. See Motion at 11-12 (citing Pl. Amend. Opp. Ex. 1). Rider fails to inform this Court that the plan was never adopted or implemented. Ex. 9, Depo. Tr. of Jerome S. Sowalsky (1/23/06). Quite ironically, Rider seems to lament proposals in the plan that are constitutionally protected by FEI's own First Amendment free speech and freedom to petition rights. Apparently, Rider and his co-plaintiffs believe that they are the only ones who can contact the media, videotape adversaries, and ask the government to act. FEI clearly disagrees with this one-sided application of First Amendment rights, particularly when they are due in no small part to the unlawful threats that certain animal rights advocates have lodged against FEI and its employees and patrons. See Pl. Amend. Opp. Ex. 1 at FEI 1502-03 (regarding plans for responding to bomb/arson/life threats and physical attacks).

### 1. FEI's Other Litigation Is Irrelevant

Rider and his co-plaintiffs also like to discuss two other lawsuits that are entirely unrelated to this case.[9] The PETA lawsuit went to trial last year. Plaintiffs' repeated references to that case is truly bizarre given its outcome – Mr. Feld won. Plaintiffs consistently fail to tell the Court that once PETA was required to move beyond its bombastic media hyperbole and present real evidence at trial, the jury completely rejected its claims. Mr. Feld was exonerated. See Ex. 10, Jury Verdict Form and Entry of Final Judgment; Denial of Petition for Appeal, PETA v. Feld, Circuit Court No. 2002-204452 (Dec. 18, 2006). PETA's petition for appeal was then denied. Id. Furthermore, that case contained no evidence related to any of the plaintiffs in this case, nor was there any evidence of "spying on, harassing, intimidating, reporting to the IRS, suing or otherwise oppressing" of any donors or contributors. FEI simply defended itself from PETA, a group of zealots who would harm FEI in any manner possible and who support people such as Rodney Coronado, a convicted arsonist linked to animal lab vandalism, and the Animal Liberation Front, an underground criminal group on the FBI's domestic terrorist list.

Finally, and inexplicably, Rider references the Pottker case pending in D.C. Superior Court. (Motion at 12). The only evidence Rider cites from that case is the Clair George affidavit, in which Mr. George says he surveilled animal rights groups. Id. (Mr. George has done no work for FEI in over a decade.) This does not explain why Rider's financial information should be sealed as he asks. It is simply another example of plaintiffs' "do as I say, not as I do" approach to litigation. FEI is under constant surveillance by the animal rights advocates: PETA has dispatched Robert Hutton to follow its Red and Blue Units around the country and do

[9] FEI will briefly address those cases here because Rider insists on arguing about them, even though he and his co-plaintiffs were not part of the proceedings and do not know what has or has not occurred in them. FEI believes that such detours into these other irrelevant cases are unnecessary and will not burden the Court with details. As FEI has repeatedly advised the Court, however, it will provide the Court with any further information regarding the cases should the Court so desire.

nothing but videotape them. Two of plaintiffs' witnesses, Deniz Bolbol and Patrick Cuviello, videotape the circus non-stop in San Jose, California. Apparently videotape surveillance is permissible conduct so long as plaintiffs and their allies are the only ones engaging in it.[10] Rider's other two citations regarding the Pottker case are to publicity, a web article and a television news story. (Motion at 12). Rider's reliance upon them in this case is again odd, particularly where he is seeking a confidentiality order, because the 60 Minutes piece actually resulted in the ***loss of a confidentiality order*** for plaintiff Pottker due to the media interview she gave. Ex. 11, Pottker v. Feld, Civ. Act. No. 99-8068, slip. op. at 4-10 (D.C. Super. Ct. April 5, 2004) (Long, J.).

In sum, Rider presents nothing but bald conclusions to claim that FEI will harass anybody if the Court does not issue a confidentiality order. Unlike plaintiffs (in this case and the others referenced), however, FEI does not court the media to comment on litigation, and it does not use this litigation as a fundraiser. There is no evidence presented by Rider, nor could there be, that FEI uses discovery received in litigation for publicity or other purposes outside of the litigation. This stands in stark contrast to what plaintiffs have done in this case. See http://www.circuses.com/feat/babykillers/shirley.html (last visited May 15, 2007) (PETA's website that now plays the video footage produced by FEI in this case of Riccardo elephant's birth under the heading "baby killers"). FEI's repeated inquiries to plaintiffs in this case as to how PETA obtained that videotape have gone unanswered.

**2. Rider's Caselaw Is Inapposite**

The caselaw cited by Rider is inapposite and does not advance his argument. Centeno-Bernuy v. Becker Farms, 219 F.R.D. 59 (W.D.N.Y. 2003) and Topo v. Dhir, 210 F.R.D. 76

[10] Notably, yet another one of plaintiffs' most recently identified witnesses, Archele Hundley, has admitted under oath that she recently secretly videotaped employees at FEI when she went to back to FEI to seek re-hire under false pretenses for the purpose of infiltrating and spying on FEI. See Ex. 12, Hundley Aff. at 5.

(S.D.N.Y. 2003) both involved issues related to the respective plaintiffs' immigration status, and whether if disclosed to defendants, could terminate the litigation through their deportation. See Centeno-Bernuy, 219 F.R.D. at 61-62 (defendant had made public threats to lobby for plaintiffs' deportations); Topo, 210 F.R.D. at 78 (courts recognize heightened potential for harm related immigration status discovery). There exists no such issue in this case.

Two other cases involved quashing ***deposition*** subpoenas altogether. See Elvis Presley Enter., Inc. v. Elvisly Yours, Inc., 936 F.2d 889, 892, 894 (6th Cir. 1991) (quashing deposition subpoena for Priscilla Presley after she submitted affidavit attesting she had no personal knowledge of events related to claims); Nocal, Inc. v. Sabercat Ventures, Inc., Civ. Act. No. 04-0240, 2004 U.S. Dist. LEXIS 26974, at *8-11 (N.D. Cal. Nov. 15, 2004) (quashing subpoena issued to counsel where information was already in issuing party's possession, they had not sought the discovery from other sources, and the deposition would infringe on the attorney-client privilege). This also is not at issue.

Finally, in Management Information Technologies, Inc. v. Alyeska Pipeline Service Co., 151 F.R.D. 478 (D.D.C. 1993), the issue was whether the identities of defendant's employees who had provided defendant's documents to plaintiffs could be discovered. Id. at 481-83. The court held that the identities were, at most, marginally relevant, and that the risk of the whistleblowers losing their jobs after disclosure outweighed the need for the discovery. Id. This too is not an issue in this case.

**E. Rider's Motion Comes Too Late**

Although Rule 26(c) is silent as to when a motion for protective order must be brought, courts have imposed a "seasonable" requirement. 6 MOORE'S FED. PRACTICE, ¶ 26.102[2] (3d ed. 2007). "A party may not simply note its objection to a request for written discovery and wait

for the requesting party to move to compel discovery. The party seeking protection is responsible for initiating the process in a timely manner." Id. As a result, in the absence of extraordinary circumstances, "the outside limit within which a motion for a protective order for written discovery may be made is the time set for the response to a motion to compel written discovery." Id.; see also Brittain v. Stroh Brewery Co., 136 F.R.D. 408, 413 (M.D.N.C. 1991).

Rider never bothered to draft and propose a confidentiality order until after FEI advised plaintiffs that it would move to compel. See Ex. E to Motion at 9 (offering to draft a protective order on ***January 15, 2007***). Contrary to Rider's current claim that he "has always been willing to provide defendants with this information," the evidence indicates that he objected to it, took no action, and clearly hoped he could get away with not producing the discovery. Indeed, he never even filed his Motion until after FEI had moved to compel (3/20/07) (Docket No. 127) and he responded (4/19/07) (Docket No. 138). A motion for protective order, such as Rider's, that is brought after the discovery responses are due and a motion to compel has been filed is untimely. See Brittain, 136 F.R.D. at 413.

Rider has no good cause to excuse his delay in bringing his Motion. He clearly recognized that the discovery sought was responsive, see, e.g., Ex. 2 (Inter. No. 4); Ex. 3 (Doc. Request Nos. 20 & 21, but made no effort to propose a confidentiality order to FEI or move the Court to enter one despite having ample time to do so. Cf. Brittain, 136 F.R.D. at 414-15 (good faith existed for delay in bringing motion for protective order where party first attempted to draft and negotiate one by consent). Rider chose instead to do nothing, thereby withholding evidence from FEI that delayed the proceedings and FEI's taking of discovery. See Ayers v. Continental Cas. Co., 240 F.R.D. 216, 20 (N.D.W.Va. 2007) (denying untimely motion for protective order); Nestle Foods Corp. v. Aetna Cas. & Sur. Co., 129 F.R.D. 483, 486-87 (D.N.J. 1990) (same);

U.S. v. Panhandle Eastern Corp., 118 F.R.D. 346, 350-51 (D. Del. 1988) (same); Maxey v. General Motors Corp., Civ. Act. No. 95-6, 1996 U.S. Dist. Lexis 21149, at *5 (N.D. Miss. Nov. 18, 1996) (party seeking to protect confidentiality has the burden of taking the initiative to do so) (citing Brittain). Rider's Motion should be denied as untimely (in addition to lacking good cause), and FEI should be awarded its costs and fees for having to respond to it. See Brittain, 136 F.R.D. at 414 (costs and expenses may be assessed for the delay and extra expense caused by dilatory action).

**F. Rider's Proposed Order Is Unworkable**

No confidentiality order should be entered pursuant to the Motion for the reasons already demonstrated above. One additional basis for denying the Motion, however, is the unworkable nature of the proposed order Rider submits for consideration. Rider's proposed order contains no provision for filing documents with the Court. It simply prohibits that any such documents Rider deems to be confidential "may not be publicly disseminated or otherwise disclosed by defendants' counsel in any manner, without prior permission of this Court." (Proposed Order ¶ 3). Even within the litigation, the proposed order is overly restrictive, seeking to limit access and review of the documents to the parties, their counsel, expert witnesses and consultants, the Court and its employees, and court reporters. It also purports to make all such persons within this restricted group sign an acknowledgement, including the Court, its employees and court reporters. Id. ¶ 4. This is obviously unnecessary. It also purports to prohibit FEI from using the documents at deposition with any non-expert witness. There is no legitimate basis for such a restriction on materials that Rider has already selectively disclosed to the public.

Paragraph 5 purports to prohibit FEI from using the materials in any other "governmental," "administrative," or "judicial proceeding." Plaintiffs, however, are in the

business of constantly requesting that the USDA inspect and take action against FEI. There is no reason for prohibiting FEI from providing whatever information it deems necessary in response to such actions prompted by plaintiffs, including any and all documentation produced by plaintiffs.

Paragraph 6 is the most offensive one in the proposed order. It purports to give plaintiffs' counsel the right to monitor in advance and control the discovery that FEI conducts. See id. ¶ 6 (prohibiting FEI from contacting potential witnesses, suing individuals or organizations, reporting same to any governmental entity, or subpoenaing or otherwise taking discovery). Notably, the Motion cites no authority, and counsel for FEI is unaware of any, that makes one party beholden to its adversary prior to conducting any discovery. FEI does not need plaintiffs' permission to take discovery in this case. The process is governed by the Court and the Federal Rules of Civil Procedure. If evidence exists that FEI has legitimate causes of action previously unknown to it, then it is FEI's decision whether to pursue suit – not plaintiffs'. Moreover, the language contained in Paragraph 6 that purports to prevent FEI from "spying, surveilling, intimidating, or oppressing" whomever it is that Rider intends to disclose is simply baseless and constitutes harassment to FEI. As explained above, Rider has no evidence to support such wild accusations. Paragraph 6 is a brazen attempt by plaintiffs to obtain a mechanism whereby they can monitor and "permit" what discovery FEI takes or does not take in this case. Such an approach is unheard of and unwarranted. Paragraph 7 is entirely redundant – LCvR 7(m) sets the standard for when counsel are obligated to meet and confer.

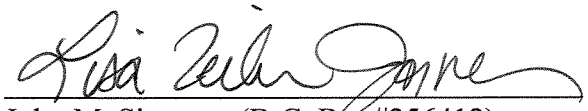
The proposed order is unworkable. There is no good cause for its entry. It is simply a vehicle for plaintiffs to try and monitor and prevent FEI from taking discovery necessary to a full and fair defense. The Court should reject it outright and deny the Motion.

## III. CONCLUSION

For the reasons stated herein, the Court should deny Rider's Motion, order him to immediately produce any outstanding discovery he still owes (or if he no longer has the materials, explain why), and award FEI its costs and fees for having to respond to this dilatory Motion. A proposed form of order is attached.

Dated this 15th day of May, 2007.

Respectfully submitted,



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**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

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

**ORDER**

Upon consideration of Rider's Motion for a Protective Order with Respect to Certain Financial Information (4/25/07) ("Motion") and Feld Entertainment, Inc.'s Response in Opposition thereto and for good cause shown, it is this _____ day of May, 2007,

ORDERED that the Motion is DENIED; and it is further

ORDERED that Rider shall produce all responsive financial information (sought by interrogatories) or responsive documents (pursuant to any document requests) within five (5) days of this Order; and it is further

ORDERED that Rider shall provide a sworn declaration identifying any responsive documents that were once in Rider's possession (since July 11, 2000) but that have since been discarded, destroyed, or given to any other person(s) or otherwise not produced, together with a description of each such document and an explanation as to why it was discarded, destroyed, spoliated, or otherwise disposed of; and it is further

ORDERED that Defendant shall file with the Court a statement of fees and costs incurred with the filing of the Motion within (30) days of the entry of this Order.

_____

UNITED STATES DISTRICT JUDGE