UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

MOTION TO COMPEL DISCOVERY
FROM THE ORGANIZATIONAL PLAINTIFFS AND API

Pursuant to Federal Rules of Civil Procedure 26(g) and 37(a), Feld Entertainment, Inc. ("FEI") hereby moves this Court for an order compelling the American Society for the Prevention of Cruelty to Animals ("ASPCA"), the Animal Welfare Institute ("AWI"), the Fund for Animals ("FFA"), and the Animal Protection Institute ("API") to produce to FEI:

- all responsive documents and information concerning communications with animal advocates or animal advocacy organizations, including, but not limited to, (a) communications between or among each other and outside counsel except those protected by the attorney-client privilege and/or work product doctrines as applied in this Circuit, (b) all communications between or among each other at which outside counsel were not present, (c) all communications withheld thus far on alleged First Amendment grounds, (d) all communications between or among each other and the Wildlife Advocacy Project ("WAP") and/or any person from the office of Meyer Glitzenstein & Crystal acting on behalf of WAP, and (e) all communications with animal advocates or animal advocacy

organizations that have been identified but not adequately described in their discovery responses;

- all responsive documents and information concerning communications with plaintiff Tom Rider, including, but not limited to, (a) communications in the presence of outside counsel except those protected by the attorney-client privilege and/or work product doctrines as applied in this Circuit, (b) all communications at which outside counsel were not present, (c) all communications withheld thus far on alleged First Amendment grounds, and (d) all communications with Rider that have been identified but not adequately described in their discovery responses;
- a privilege log from each plaintiff containing individual entries for each and every document withheld on the basis of an alleged privilege, the authors and recipients as indicated on each such document, and a description of the contents sufficient to adequately assess the claim for privilege;
- all responsive documents and information concerning payments to lead plaintiff Tom Rider, regardless of whether such payments were made directly to him or indirectly through any other means such as plaintiffs' counsel or their alter ego, WAP;
- a precise identification of any documents (by bates number) produced by plaintiffs that are incorporated by reference in response to Interrogatory Nos. 13 and 15; and
- a sworn declaration identifying any responsive documents that were once in their possession 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.

FEI further moves this Court for an order compelling ASPCA to produce to FEI:

- all responsive documents and information that have been withheld thus far based on claims that such documents and information are "confidential and proprietary"; and
- all responsive documents and information relating to ASPCA's inspections of any circus.

In its brief in support hereof, filed contemporaneously, FEI explains the pattern of discovery misconduct that the plaintiffs have engaged in during the course of this litigation. Plaintiffs intended to conceal from FEI and this Court discoverable and responsive material. FEI, however, ultimately discovered plaintiffs' attempts to avoid their discovery obligations, and thus, moves this Court for an order awarding the costs and fees incurred in having to bring this matter to the Court's attention. A proposed form of order is attached along with an index of exhibits.

CERTIFICATE OF CONFERENCE

Counsel for FEI hereby certify pursuant to LCvR 7(m) that they have conferred in good faith with opposing counsel through the exchange of correspondence (attached as exhibits to the memorandum filed in support hereof) and by meeting in person with them. Notwithstanding these good faith efforts, the parties were unable to resolve their differences, and plaintiffs do not consent to the relief requested.

Dated this 29th day of May, 2007.

Respectfully submitted,

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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF FEI'S MOTION TO COMPEL DISCOVERY FROM THE ORGANIZATIONAL PLAINTIFFS AND API

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INTRODUCTION

Like their lead plaintiff Tom Rider, the Organizational Plaintiffs[1] have misled Feld Entertainment, Inc. ("FEI") and the Court into believing that plaintiffs' discovery responses (originally submitted almost three years ago) were accurate and complete. See FEI's Motion to Compel Discovery From Tom Rider at 1 (3/20/07) (Docket No. 126) ("Rider Motion") (quoting plaintiffs' repeated misrepresentations to this Court about the adequacy of their discovery responses). This motion is brought against each of the plaintiff organizations who were served by FEI with identical sets of written discovery. There is little difference between the written discovery FEI served on those organizations and on Rider, so that many of the issues presented herein overlap with those presented in the Rider Motion.[2]

The Organizational Plaintiffs have been anything but forthcoming in their discovery responses. For almost three years they have managed to conceal responsive information from FEI and this Court by: (1) selectively omitting certain documents and information, (2) providing false testimony, (3) asserting frivolous objections, and (4) refusing to identify with any semblance of particularity the documents they have withheld based on claims of various privilege. But for FEI's persistence that all of the requested discoverable information be produced, plaintiffs would have succeeded in concealing from FEI and this Court the very information that has since given rise to FEI's proposed additional defense and counterclaim. See FEI's Motion for Leave to File Amended Answers to Assert Additional Defense and RICO

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[1] This motion defines the "Organizational Plaintiffs" to be the American Society for the Prevention of Cruelty to Animals ("ASPCA"), the Animal Welfare Institute ("AWI"), and the Fund for Animals ("FFA"). For sake of clarity, the Animal Protection Institute ("API"), which joined this lawsuit in February 2006 and only recently produced discovery responses, is referred to separately.

[2] The Court's familiarity with the Rider Motion is presumed, and FEI will not repeat that motion in its entirety here but incorporates it by reference. The Rider Motion was filed on March 20, 2007. Rider responded on April 19, 2007, and FEI replied on May 7, 2007.

Counterclaim (2/28/07) (Docket No. 121). Even now, despite FEI's having conferred for months with plaintiffs, they continue to withhold discoverable documents and information.

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

FACTUAL BACKGROUND

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

I. FEI's DISCOVERY REQUESTS AND THE ORGANIZATIONAL PLAINTIFFS' DEFICIENT RESPONSES THERETO

A. FEI's Document Requests

FEI requested, *inter alia*, that the Organizational Plaintiffs produce all documents relating to FEI's treatment of elephants, Ex. 1, Request No. 2; documents relating to meetings at which there was any discussion of FEI's treatment of elephants, the treatment of elephants in captivity,

or the complaint in this matter, id., Request No. 3; all documents relating to inspections or investigations of FEI or any other circus, id., Request No. 9; all documents relating to information received from current or former employees of FEI regarding FEI's treatment of elephants, id., Request No. 10; documents sufficient to show all resources expended in advocating for better treatment of animals held in captivity, id., Request No. 19; all documents relating to any expenditure made while pursuing alternative sources of information about FEI's actions and treatment of elephants, id., Request No. 20; all documents relating to communications with plaintiff Tom Rider, id., Request No. 21; all documents relating to communications with animal advocates or animal advocacy organizations concerning any circus or the treatment of elephants in captivity, id., Request No. 22; all documents relating to communications with current or former employees of FEI, id., Request No. 23; all documents relating to communications with members, volunteers, donors, or employees regarding the events alleged in the complaint or the presentation of elephants in circuses, id., Request No. 24; all publications or other communications published by them or received from other animal advocates relating to the presentation of elephants in circuses, id., Request No. 25; all documents relating to public statements made by them or at their behest relating to animal care by any circus, id., Request No. 26; all documents relating to legislative bans on use of animals in circuses, id., Request No. 30; and all speeches, presentations, testimony, or correspondence that relate to FEI or other circuses, id., Request No. 34.

FEI's Document Request included two instructions that are pertinent here. First, the Organizational Plaintiffs were instructed that:

> Responsive documents that are not produced because you claim a privilege must be identified on a privilege log. The log must identify the grounds for withholding the document, the date of the document, type (e.g., letter, notes,

> memo), nature and subject matter of the document, the authors or originators, and the addressees/recipients of the document or information or copies thereof. Each author or recipient who is an attorney should be noted as such.

Id., Instruction No. 9. Second, they were instructed that "[t]hese document requests are continuing in nature and should be supplemented as required by Federal Rule of Civil Procedure 26(e) and the Stipulated Pre-Trial Schedule in this case." Id., Instruction No. 12.

In response, the Organizational Plaintiffs submitted to FEI a combined, single set of Responses and Objections. Ex. 3, Plaintiffs ASPCA, FFA, and AWI's Responses and Objections to Defendants' First Set of Document Production Requests (6/9/04) ("Document Response"). The Document Response was riddled with frivolous assertions of attorney-client privilege – including one that has since been withdrawn as "simply over-inclusive." Ex. 4, Meyer letter at 5 (1/16/07). Notably, this Document Response also contained *no reference* to a coordinated media and legislative campaign among the Organizational Plaintiffs and Tom Rider, and *no claim of any First Amendment privilege* – a privilege that the Organizational Plaintiffs have only recently asserted after FEI discovered that responsive materials were being withheld. Finally, the Organizational Plaintiffs submitted a single privilege log to FEI that did not identify which plaintiff has possession, custody, or control of which document and that did not identify with any particularity individual documents for which plaintiffs have claimed privilege. Ex. 5, Plaintiffs' Original Privilege Log (6/9/04).

B. FEI's Interrogatories

In its Interrogatories, FEI asked the Organizational Plaintiffs to: (1) describe each inspection that they have conducted of FEI in the course of any official duties to enforce statutes or ordinances, Ex. 2, Inter. No. 12; (2) describe every communication they have had with current or former employees of FEI, id., Inter. No. 16; (3) describe each communication they have had

with any other animal advocates or animal advocacy organizations regarding the presentation of elephants in, and the treatment of elephants by, circuses including Ringling Bros., id., Inter. No. 19; (4) identify each resource they expended since 1997 in "advocating better treatment for animals held in captivity, including animals used for entertainment purposes," as alleged in the complaint, id., Inter. No. 21; and (5) identify each expenditure since 1997 of "financial and other resources" made while "pursuing alternative sources of information about [FEI's] actions and treatment of elephants," as alleged in the complaint, id., Inter. No. 22. The Interrogatories incorporated the Instructions contained in FEI's Document Request regarding, *inter alia*, the duty to supplement. Id. at 2, § I. They also explicitly repeated the instruction to supplement: "[t]hese interrogatories shall be deemed continuing so as to require supplemental answers if you obtain further information after the answers are served." Id., Instruction No. 2. Each of the Organizational Plaintiffs, moreover, "reserve[d] the right to amend or supplement its responses and objections to the Interrogatories if additional or different responsive information is discovered during discovery or otherwise hereafter." Ex. 6, ASPCA's Responses and Objections to Defendants' First Set of Interrogatories at General Objection No. 6 (6/9/04) ("ASPCA's First Response"); Ex. 7, AWI's Responses and Objections to Defendants' First Set of Interrogatories at General Objection No. 6 (6/9/04) ("AWI's First Response"); Ex. 8, FFA's Responses and Objections to Defendants' First Set of Interrogatories at General Objection No. 6 (6/9/04) ("FFA's First Response").

In response to these straightforward interrogatories, each of the Organizational Plaintiffs chose not to disclose all of their non-privileged communications with each other. ASPCA's First Response, Inter. No. 19; AWI's First Response, Inter. No. 19; FFA's First Response, Inter. No. 19 (collectively attached as Ex. 9). With few exceptions, they also chose not to disclose their

non-privileged communications with Tom Rider. ASPCA's First Response, Inter. No. 16; AWI's First Response, Inter. No. 16; FFA's First Response, Inter. No. 16 (collectively attached as Ex. 10). Each Organizational Plaintiff also chose not to disclose information about payments they had made to Tom Rider. ASPCA's First Response, Inter. Nos. 21, 22; AWI's First Response, Inter. Nos. 21, 22; FFA's First Response, Inter. Nos. 21, 22 (collectively attached as Ex. 11). AWI, moreover, chose not to disclose payments it made to the Wildlife Advocacy Project ("WAP") that were intended to be funneled to Rider. Ex. 7, AWI's First Response, Inter. Nos. 21, 22. Finally, ASPCA chose to cite documents in lieu of describing inspections of FEI that it has conducted, but then failed to identify all such documents or to inform FEI that documents no longer exist for many inspections. Ex. 6, ASPCA's First Response, Inter. No. 12.

II. FEI'S DEPOSITIONS OF AWI AND ASPCA ARE THWARTED BY FALSE TESTIMONY AND FRIVOLOUS OBJECTIONS

After plaintiffs failed to provide complete, accurate, and honest responses to FEI's written discovery, FEI sought to learn more about such matters during the depositions of the Organizational Plaintiffs. FEI's efforts to obtain discoverable information, however, were thwarted by false testimony as well as frivolous objections.

A. AWI Provides False Testimony

The Deposition Notice served on AWI required it to produce one or more persons qualified to "testify on its behalf as to all matters known or available to AWI" regarding "all financial relationships between AWI and other plaintiffs," "all communications between AWI and other plaintiffs," and "the circumstances surrounding and amount of any money or other form of remuneration, reimbursement, or coverage for expenses paid by any Plaintiff or any

animal activist to any former employee ... of [FEI]." Ex. 12, Notice of Deposition of AWI at Attachment A, ¶¶ 1, 2, 15.

At the time of AWI's testimony, it already had agreed with ASPCA and FFA that each Organizational Plaintiff would provide $1,000 to Rider. See Ex. 17 to FEI's Motion to Compel WAP (9/7/06) (Docket No. 85). AWI - indeed, its 30(b)(6) witness herself - also had received an e-mail from Katherine Meyer prior to AWI's deposition, indicating that Rider received a grant from an unnamed individual. Id. at Ex. 3. At the time of the deposition, moreover, AWI had provided to WAP at least $10,500, knowing that WAP intended to give most – if not all – of the money to Rider. Id. at Ex. 4.[3] Despite FEI's explicit notice that such matters were topics of testimony noticed for AWI's 30(b)(6) deposition and despite these clear facts, AWI proceeded to testify under oath that it was "not aware" that it was sharing Rider's expenses with other organizations and that it did not know whether other organizations were providing reimbursements to Rider. Ex. 13, Deposition of AWI (5/18/05) ("AWI Depo.") at 142.

AWI testified further that it had "no plans to give [Rider] additional moneys [sic] at this time." Id. at 139. Yet the documents again indicate otherwise. AWI was apparently in the midst of planning and hosting a fundraiser for Rider: Less than ten weeks later, AWI co-hosted a fundraiser for Rider. Ex. 14, Fundraiser Invitation (noting that checks should be made payable to AWI).[4]

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[3] AWI has not produced the e-mail from Katherine Meyer nor did it originally produce documents or information relating to its payments to WAP. FEI only discovered these documents and information after it subpoenaed documents from WAP. The proof of AWI's payments to WAP was finally disclosed – in part – eighteen months after its deposition. AWI did not produce these critical documents to FEI until January 2007, and only then, after FEI had threatened a motion to compel.

[4] Although it seems highly likely that AWI already had begun planning, or at least contemplating, this fundraiser that occurred less than ten weeks later, FEI cannot be certain whether AWI's testimony in this specific regard was false because the Organizational Plaintiffs have refused to produce documents and information relating to the fundraiser (other than the invitation itself). Ex. 1, Document Request Nos. 19-26.

B. ASPCA and AWI Assert Frivolous Objections

In addition to AWI's false testimony, two of the Organizational Plaintiffs withheld discoverable information by frivolously asserting baseless privileges. ASPCA, for example, refused to testify about matters that involved allegedly "confidential and proprietary information." Ex. 15, Deposition of ASPCA (7/19/05) ("ASPCA Depo.") at 140-41. Counsel's objection was meritless - there is no such privilege. Specifically, after ASPCA testified that it stopped paying Rider in 2003 because of budgetary decisions, FEI asked what other issues the money was directed towards. ASPCA and its counsel refused to disclose that information, arguing that it was "confidential and proprietary information concerning ASPCA's strategic planning." Id. at 219-21. ASPCA and its counsel refused FEI's offer to accept the information under a protective order, stating that "it's burdensome and irrelevant and goes to confidential proprietary concerns that we're simply not going to talk about. You can take up with the judge if you want."[5] Id. at 220. The improper objection was calculated to thwart a relevant line of inquiry. It also is further proof of the efforts taken to hide the information related to Rider payments.

ASPCA also refused to testify regarding certain conversations between Lisa Weisberg (ASPCA's Senior Vice President for Government Affairs and Public Policy who also is an attorney) and Tom Rider, while simultaneously admitting that Rider was *not* a client of Ms. Weisberg's, that he was *not* seeking legal advice from her, and that she was *not* rendering legal advice to him. Id. at 171-74. The privilege objection was frivolous, particularly in light of the

[5] When FEI informed ASPCA that it would indeed raise this issue with the Court, ASPCA stated that the money "would have been dispersed throughout the entire budget for 2003" and produced to FEI ASPCA's publicly-available 2003 Annual Report for a list of such issues. Ex. 4, Meyer letter at 8 (1/16/07). ASPCA's incorporation by reference of a publicly-available document (after objecting at deposition and refusing to testify because the response would reveal "confidential and proprietary information") only serves to underscore the frivolous nature of its original deposition objections.

lack of foundation for the privilege to which the witness testified. ASPCA also refused to testify regarding conversations it had with other plaintiffs related to funding for Rider. Id. at 80. If – as plaintiffs claim elsewhere – the funding of Rider is not related to his participation in this case, such conversations are not subject to an attorney-client privilege. Conversations with plaintiffs' counsel Katherine Meyer and Eric Glitzenstein, are likewise not privileged if they were acting in their capacity as Directors and Officers of WAP and therefore not dispensing legal advice.

Similarly, AWI refused to testify regarding all of its communications with Rider. Specifically, AWI claimed an attorney-client privilege in response to a question as to whether or not Rider had a job when AWI's President first met him. Ex. 13, AWI Depo. at 145-46. This is a simple "yes" or "no" question for which no conceivable privilege applies. Rider's employment status has nothing to do with legal advice, and communications about his employment are not privileged.

III. FEI LEARNS THAT THE ORGANIZATIONAL PLAINTIFFS' DISCOVERY RESPONSES ARE FALSE AND INCOMPLETE

A. Deposition Testimony Reveals the Extent of Plaintiffs' Discovery Deficiencies

For more than one year, the Organizational Plaintiffs succeeded in concealing from FEI the deficiencies in their discovery responses. Although the Organizational Plaintiffs produced discovery responses in June 2004, it was not until they were deposed in the Summer of 2005 that FEI began to unravel the nature and extent of the deficiencies in their discovery responses. Although, as discussed above, significant portions of those depositions were thwarted by plaintiffs' and their counsel's conduct, FEI learned for the first time several pieces of relevant, discoverable information that should have been – but were not – disclosed in the written discovery responses. For example:

- ASPCA testified that the Organizational Plaintiffs discussed in 2001 and again in 2003 how they would divide the costs of funding Rider after he quit his job to ensure that he could remain in the litigation. ***None of the Organizational Plaintiffs, however, disclosed these communications in their interrogatory responses.*** Compare ASPCA Depo. at 80-81, 89 with ASPCA's First Response, Inter. No. 19; AWI's First Response, Inter. No. 19; FFA's First Response, Inter. No. 19 (collectively attached as Ex. 16).
- Each of the Organizational Plaintiffs also testified that they previously provided money directly to Tom Rider. ***Such payments, however, were omitted from plaintiffs' discovery responses.*** Compare ASPCA Depo. at 46-47 with ASPCA's First Response, Inter. No. 21-22; compare AWI Depo. at 138-39 with AWI's First Response, Inter. No. 21-22; compare FFA Depo. at 157-58 with FFA's First Response, Inter. No. 21-22 (collectively attached as Ex. 17).
- ASPCA testified that its Lisa Weisberg had "weekly" non-privileged conversations with Tom Rider about "outreach" and media work. Previously, ASPCA claimed that all of the conversations between Ms. Weisberg and Rider "are protected by the attorney-client privilege." Compare ASPCA Depo. at 166 with ASPCA's First Response, Inter. No. 16 (collectively attached as Ex. 18).
- FFA testified that its Michael Markarian also had non-privileged conversations with Tom Rider relating to media work. Previously, FFA refused to describe such conversations, noting instead that most of the conversations between Markarian and Rider were privileged. Compare FFA Depo. at 166-171 with FFA's First Response, Inter. Nos. 16, 19 (collectively attached as Ex. 19).

- AWI testified that it, too, had non-privileged communications with Rider. Previously, however, such communications were not disclosed in AWI's interrogatory responses. Compare AWI Depo. at 143 with AWI's First Response, Inter. No. 16 (collectively attached as Ex. 20).
- ASPCA testified to conversations with WAP that were not previously disclosed in response to an interrogatory requesting a description of communications with animal advocacy organizations. Compare ASPCA Depo. at 88-89 with ASPCA's First Response, Inter. No. 19 (collectively attached as Ex. 21).
- ASPCA testified that it did not believe notes of an inspection were responsive to FEI's request for documents that "refer, reflect, or relate to" any such inspection. Ex. 15, ASPCA Depo. at 116-17. ASPCA also testified that it had no records of inspections from 1998. Id. at 118. Previously, however, ASPCA declined to describe each inspection as required by FEI's interrogatories, relying instead upon the documents it produced. Ex. 6, ASPCA's First Response, Inter. No. 12. In light of ASPCA's testimony, however, it is clear that ASPCA, although purporting to rely on documents in response to the interrogatory, did not produce documents relating to *all* inspections. Nor did ASPCA produce until July 2006 *all* of the inspection documents that still exist.

B. Documents Produced by WAP Reveal the Organizational Plaintiffs' Additional Discovery Deficiencies

During ASPCA's deposition, FEI learned that payments from the Organizational Plaintiffs that were intended for Tom Rider were being made through WAP – the alter ego of plaintiffs' counsel. Immediately thereafter, FEI issued a document subpoena to WAP. In response, Eric Glitzenstein (WAP's president and plaintiffs' counsel) sought to limit the

documents that WAP would produce and to delay the date on which such documents would be produced. Although FEI acceded to WAP's requests, WAP – like plaintiffs – continued to hide information from FEI. As discussed in FEI's Motion to Compel Documents Subpoenaed From WAP (9/7/06) (Docket No. 85), WAP originally withheld from its original production at least 272 pages of responsive documents. Those documents were only produced to FEI in the Summer of 2006 (almost nine months after WAP's original production) – after FEI threatened to file its motion to compel. Initially, WAP also redacted portions of numerous documents. Some redactions were later withdrawn, but again, this was only when confronted by FEI's intention to file a motion to compel. To date, there are still documents (and/or portions thereof) that WAP refuses to produce and that are subject to FEI's pending motion. Moreover, WAP just produced for the first time in March and April of 2007, documents sent to and from the Organizational Plaintiffs that were responsive and should have been produced previously by the Organizational Plaintiffs. Ex. 22, Responsive Documents Produced by WAP in March/April 2007.

WAP's document productions provided FEI with numerous additional examples of the deficiencies in the Organizational Plaintiffs' discovery responses. For example, WAP produced letters and checks that were previously exchanged with AWI. Ex. 23, AWI Documents Produced by WAP. ***AWI, however, had not included these documents in its original production, nor had it identified these payments in its Interrogatory responses.*** See Ex. 7, AWI's First Response, Inter. No. 21-22. Again, not until FEI threatened this motion, did AWI begin producing these documents in January 2007, and only then in part. Indeed, some of them still have not been produced by AWI.

If FEI had not served a subpoena upon WAP, insisted that WAP produce documents that it originally withheld, and conducted independent research (e.g., learning that AWI's IRS forms

reflect direct payments to Rider that were not disclosed – and still have not been disclosed – in response to interrogatories), the Organizational Plaintiffs' false and incomplete discovery responses would have served their intended purpose: they would have hidden from FEI and this Court relevant and discoverable information that plaintiffs never intended to see the light of day.

IV. FEI ADVISES PLAINTIFFS IT WILL MOVE TO COMPEL

A. The Parties Confer for Months Regarding Plaintiffs' Discovery

As explained in the Rider Motion, FEI wrote to plaintiffs in November 2006 detailing the deficiencies in their discovery responses. See Ex. 24, Gasper letter (11/22/06). Specifically, FEI demonstrated that the Organizational Plaintiffs withheld documents and information relating to communications with each other, relating to communications with Rider, WAP, and other animal advocates, and relating to payments they made to Rider and WAP. FEI also showed that ASPCA refused to disclose documents and information relating to its inspections of FEI and relating to its allegedly confidential proprietary information. FEI requested that the Organizational Plaintiffs cure these deficiencies and supplement their document productions – as they had not done for months. FEI also requested that new plaintiff API provide its discovery responses, as required by Court order.

Each of the Organizational Plaintiffs failed to adequately cure or explain the deficiencies in their discovery responses.[6] API, moreover, joined its co-plaintiffs in asserting new and

[6] As further explained in the Rider Motion: "On December 15, 2006, plaintiffs' counsel responded to FEI by insisting that counsel would not cure these deficiencies unless FEI agreed to waive its right to raise any additional deficiencies not yet uncovered and FEI agreed to provide supplemental responses of its own. Plaintiffs' counsel stated that, assuming FEI promptly agreed to these conditions, plaintiffs would respond to the numerous deficiencies by January 15, 2007 and would provide supplemental interrogatory responses and documents by January 31, 2007. FEI promptly responded, stating that it would supplement its interrogatory responses on January 31, 2007, but that it would not waive any right to raise discovery deficiencies not yet identified. On January 16, 2007, plaintiffs sent a second letter in response to certain deficiencies raised in FEI's November 22, 2006 letter. Plaintiffs did not, however, address all of the deficiencies and also stated they would not provide amended interrogatory responses until January 31, 2007. On January 31, 2007, plaintiffs finally provided revised and supplemental interrogatory

baseless privileges. At FEI's request, counsel met on February 7, 2007 to discuss the remaining issues regarding plaintiffs' discovery. See Ex. 30, Gasper letter (1/19/07); Ex. 31, Gasper letter (2/2/07). During that conference, plaintiffs' counsel insisted that plaintiffs need not disclose any communications with each other and WAP – even those that are not protected by the attorney-client privilege. See Ex. 32, Meyer letter at 2 (2/8/07).[7]

B. API's Original Discovery Responses

By Court Order dated February 23, 2006, API was added to this lawsuit and was instructed to "abide by all of the agreed-upon and ordered procedures in this case such as outstanding scheduling and discovery orders and agreements." Order Granting Leave to Amend (2/23/06). The Order was issued after FEI specifically requested that, if the Court allows API to join this lawsuit, API be "bound by agreements between the parties, discovery already taken, and orders entered by the Court." Defs.' Response to Pls.' Motion for Leave to Amend (11/10/05) (Docket No. 56). FEI specifically stated that API should provide discovery responses to the requests previously served upon the Organizational Plaintiffs. Id. at 5 n.4. Despite the Court's clear instruction, API did not provide its discovery responses.

After the Court rejected FEI's motion to stay all discovery pending resolution of its summary judgment motion, FEI requested that API do what the Court had ordered it to: produce

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responses. They also produced documents that had been omitted previously or created since their previous productions." Rider Motion at 12 (internal citations omitted). See also Ex. 25, Meyer letter (12/15/06); Ex. 26, Gasper letter (12/22/06); Ex. 4, Meyer letter (1/16/07); Ex. 27, ASPCA's Supplemental Responses and Objections to Defendants' First Set of Interrogatories (1/31/07) ("ASPCA's Supp. Response"); Ex. 28, AWI's Supplemental Responses and Objections to Defendants' First Set of Interrogatories (1/31/07) ("AWI's Supp. Response"); Ex. 29, FFA's Supplemental Responses and Objections to Defendants' First Set of Interrogatories (1/31/07) ("FFA's Supp. Response").

[7] The parties discussed additional issues, such as plaintiffs' incorporating by reference their entire document production and plaintiffs' insufficient identification of privileged documents. The parties corresponded further on the matters, and their remaining differences are explained below. See Ex. 33, Joiner letter (2/8/07); Ex. 34, Sanerib letter (2/14/07); Ex. 35, Joiner letter (3/6/07).

discovery responses. When FEI requested that API provide its responses by December 8, 2006, plaintiffs' counsel expressed surprise that FEI expected API to produce discovery responses pursuant to the Court Order and stated that API would not be able to do so until January 15, 2007 – almost eleven months after the Court's explicit instruction. Ex. 36, Sanerib letter (12/8/06). Even when API finally produced its discovery responses to FEI on January 16, 2007, it chose to conceal from FEI the same type of documents and information that the other Organizational Plaintiffs have concealed for years. And, as explained below, API joined in the Organizational Plaintiffs' frivolous (and new) objections. See Ex. 37, API's Response to Interrogatories (1/16/07) ("API's Response"), Inter. No. 19.

C. The Organizational Plaintiffs' Supplemental Responses

Despite FEI's repeated efforts to obtain complete and accurate responses to their discovery requests, the Organizational Plaintiffs insist upon withholding information. ***To this day, none of the Organizational Plaintiffs has disclosed in response to FEI's interrogatories the payments that it has given directly to Rider.*** Compare ASPCA's Supp. Response, Inter. Nos. 21 and 22 with ASPCA Depo. at 46-47; compare AWI's Supp. Response, Inter. Nos. 21 and 22 with AWI Depo. at 138-39 and IRS Form of AWI; compare FFA's Supp. Response, Inter. Nos. 21 and 22 with FFA Depo. at 157-58 (collectively attached as Ex. 38). Nor have they produced such documents. The Organizational Plaintiffs also have not disclosed their non-privileged communications with each other or Tom Rider. Nor have they produced such documents. The Organizational Plaintiffs first objected on the basis that all such communications were protected by the attorney-client privilege. They now seek to object that only some are protected by the attorney-client privilege and that the others are irrelevant and/or protected by the First Amendment. Compare ASPCA's First Response, Inter. Nos. 16 and 19

with ASPCA's Supp. Response, Inter. Nos. 16 and 19 (collectively attached as Ex. 39). ASPCA also continues to withhold responsive information relating to its inspections of circuses, including FEI's. Each of the continued deficiencies in the Organizational Plaintiffs' discovery responses are set forth below. Despite FEI's repeated efforts to obtain discoverable information without Court intervention, the Organizational Plaintiffs and API insist on withholding the discoverable information owed.[8]

I. ARGUMENT

I. THE ORGANIZATIONAL PLAINTIFFS AND API HAVE REFUSED TO PRODUCE DOCUMENTS AND INFORMATION RELATING TO COMMUNICATIONS BETWEEN EACH OTHER OR WITH OTHER ANIMAL ADVOCATES, INCLUDING WAP AND PLAINTIFF TOM RIDER

The Organizational Plaintiffs and API have withheld responsive documents and information relating to communications they have had with other animal advocates, including each other. Interrogatory No. 19 requires them to describe all communications with animal advocates or animal advocacy organizations about the presentation and treatment of elephants at any circus, including FEI's; and Document Request No. 22 requires them to produce documents that relate to communications with animal advocates or animal advocacy organizations concerning FEI.[9] The plaintiffs' responses to these requests, however, are deficient because they

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[8] In addition to omitting various categories of responsive documents and information, plaintiffs' supplemental discovery responses (produced in January 2007) included documents that pre-date their original document production in June 2004. See, e.g., Ex. 40, AWI Documents Originally Withheld. Plaintiffs' failure to produce these documents earlier has never been explained to FEI and, simply stated, this belated production – only after FEI insisted that such documents be produced – casts further doubt on plaintiffs' position that all responsive material has now been provided.

[9] Interrogatory No. 19: Describe each communication you have had since 1996 with any other animal advocates or animal advocacy organizations about the presentation of elephants in circuses or about the treatment of elephants at any circus, including Ringling Brothers and Barnum & Bailey Circus.

Document Request No. 22: All documents that refer, reflect, or relate to any communication between you and any other animal advocates or animal advocacy organizations concerning (a) any circus, including but not limited to Ringling Bros. and Barnum and Bailey Circus or (b) the treatment of elephants in captivity.

withheld information due to baseless privilege claims and did not adequately describe the few communications that are now identified.

A. The Organizational Plaintiffs and API Must Produce Documents and Information About Various Communications With Each Other

Each of the Organizational Plaintiffs originally objected to disclosing these communications, claiming attorney-client privilege.[10] They also objected to Document Request No. 22 on the grounds that it would require "the production of documents protected by the attorney-client or the work produce privileges." Ex. 3, Document Response. After FEI obtained documents and information that the Organizational Plaintiffs withheld from their original discovery responses, however, it became clear that not all of the communications among them were subject to the attorney-client privilege. First, communications among the Organizational Plaintiffs outside the presence of counsel are not privileged. Compare Nesse v. Shaw Pittman, 206 F.R.D. 325, 329-30 (D.D.C. 2002) (holding that notes of a meeting among clients were not privileged) with Ex. 15, ASPCA Depo. at 172 (testifying that communications that occurred outside the presence of counsel are being withheld from discovery responses as privileged). Second, as FEI advised plaintiffs almost six months ago, communications among the Organizational Plaintiffs relating to their decision to fund Rider's participation in this lawsuit are not privileged as they do not involve a request for legal advice. Fisher v. United States, 425 U.S.

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[10] ASPCA objected to the Interrogatory on the grounds that "Lisa Weisberg has had numerous conversations with the other organizational plaintiffs and their attorneys, all of which are privileged under the attorney-client and work product privileges." Ex. 6, ASPCA's First Response, Inter No. 19. AWI objected on the grounds that "Cathy Liss has had numerous conversations with the other organizational plaintiffs in this case, and their attorneys, concerning the litigation, most of which are protected by the attorney-client privilege" Ex. 7, AWI's First Response, Inter No. 19 (emphasis added). Finally, FFA objected on the grounds that "Michael Markarian has had numerous conversations with the other organizational plaintiffs and their attorneys in this case concerning the litigation, most of which are protected by the attorney-client privilege." Ex. 8, FFA's First Response, Inter No. 19 (emphasis added). Although AWI and FFA were astute enough to recognize that not all such communications were privileged, they failed to identify and describe the non-privileged communications.

391, 403 (1976) (The attorney-client privilege "protects only those disclosures - necessary to obtain informed ***legal advice*** - which might not have been made absent the privilege.") FEI, accordingly, requested that each organization describe the non-privileged communications and produce the responsive documents. Ex. 24, Gasper letter 1-5 (11/22/06).

For the first time, in the discovery responses produced in January 2007, the Organizational Plaintiffs and API now assert that they

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

See, e.g., Ex. 28, AWI's Supp. Response, Inter. No. 19. As explained in the Rider Motion, plaintiffs' attorney-client privilege claims are overbroad and their new-found First Amendment privilege claims are meritless as well as waived.

1. Plaintiffs' Communications That Did Not Involve Legal Advice or That Occurred Outside the Presence of Counsel Are Not Privileged

Plaintiffs' newly-inserted boilerplate language that their communications involved "legal strategy, evidence, and the status of this litigation" is overbroad. Not all of their communications are privileged as FEI has previously explained to this Court:

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

pursuant to this Circuit's privilege standards.

Rider Motion at 27-28. Those standards are meticulously defined in the Rider Motion and are incorporated by reference herein. Id. at 28-30. As FEI further explained:

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

Rider Motion at 31.

It is plaintiffs' burden to demonstrate the privileges they claim. Cobell v. Norton, 212 F.R.D. 24, 27 (D.D.C. 2002) (citing FTC v. TRW, Inc., 628 F.2d 207, 213 (D.C. Cir. 1980)). As to communications among the Organizational Plaintiffs and API involving plaintiffs' counsel, MGC, they have not made the requisite showing that all such communications were privileged. Specifically, not all of these communications related to "legal advice." The attorney-client privilege "protects only those disclosures - necessary to obtain informed ***legal advice*** - which might not have been made absent the privilege." Fisher v. United States, 425 U.S. 391, 403 (1976) (emphasis added). In order to be privileged, a "communication must be with an attorney for the express purpose of securing ***legal advice***." SEC v. Gulf & Western Industries, Inc., 518 F. Supp. 675, 681 (D.D.C. 1981) (emphasis added). "[T]he communication must have been reasonably believed to be necessary to the decision-making process concerning a problem on which ***legal advice*** was sought." United States v. Western Elec. Co., 132 F.R.D. 1, 8 (D.D.C. 1990) (internal quotations omitted) (emphasis added). The Organizational Plaintiffs' belated boilerplate assertion that all of these communications involved litigation strategy, evidence, or

litigation status is flatly contradicted by the record. WAP, for example, has produced documents reflecting communications among the Organizational Plaintiffs and plaintiffs' counsel that have nothing to do with legal advice but that have not been produced by plaintiffs. See Ex. 22, Responsive Documents Produced by WAP in March/April 2007. Such communications are not privileged and should be produced.

Similarly, plaintiffs' privilege claim does not protect any of the communications among them outside the presence of attorneys from MGC. Communications among clients – outside the presence of counsel – are not privileged. See Nesse v. Shaw Pittman, 206 F.R.D. 325, 329-30 (D.D.C. 2002) (holding that notes of a meeting among clients were not privileged). As Judge Facciola has stated:

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

Id. Because not all of the Organizational Plaintiffs' and API's communications in the presence of counsel relate to legal advice and because none of their communications outside the presence of counsel are privileged, the law of this Circuit dictates that the Organizational Plaintiffs and API be compelled to describe all such non-privileged communications in response to FEI's Interrogatories and to produce all of the responsive documents that they have withheld thus far.

2. Plaintiffs Have No First Amendment Interest In Their Communications Relating to Legislative and Media Strategies

As a threshold matter, the Organizational Plaintiffs did not assert a First Amendment privilege in their original discovery responses. See ASPCA's First Response, Inter. No. 19; AWI's First Response, Inter. No. 19; FFA's First Response, Inter No. 19 (collectively attached

as Ex. 9). They have, therefore, waived any such objection. See, e.g., Order at 2 (9/26/05) (failure to properly object or adequately assert privilege constitutes waiver); Fonville v. District of Columbia, 230 F.R.D. 38, 42 (D.D.C. 2005) (objections asserted 50 and 125 days after being served with discovery requests were waived because the Federal Rules require that responses be served within 30 days); Fed. R. Civ. P. 33(b)(4) ("All grounds for an objection to an interrogatory shall be stated with specificity. Any ground not stated in a timely objection is waived unless the party's failure to object is excused by the court for good cause shown.").

In addition to plaintiffs' waiver of this objection, the assertion of a First Amendment privilege is not an absolute bar to production. Wilkinson v. FBI, 111 F.R.D. 432, 436 (C.D. Cal. 1986) (finding that the privilege is qualified, not absolute, and "cannot be used as a blanket bar to discovery"). Plaintiffs must – but cannot – show that disclosure of these communications presents a harm that outweighs FEI's need for this information. Black Panther Party v. Smith, 661 F.2d 1243, 1266 (D.C. Cir. 1981), vacated mem. sub. nom., 458 U.S. 1118 (1981). Plaintiffs have not demonstrated, nor can they, that disclosure of the documents and information sought would injure their constitutional rights. See Shelton v. U.S., 404 F.2d 1292, 1299 (D.C. Cir. 1968) (denying constitutional privilege claim where, among other things, the party seeking protection did not show "the deterrent effect the furnishing of the lists would have on the members' right of association protected by the First Amendment"), cert. denied, 393 U.S. 1024 (1969); U.S. v. Duke Energy Corp., 232 F.R.D. 1, 3 (D.D.C. 2005) (denying First Amendment protection to a party that made "no showing that enforcement of the subpoenas will chill associational activities by discouraging membership"). This step in the analysis is critical. For the documents at issue, there exists no First Amendment concerns, as plaintiffs' identities and association are already publicly known by virtue of their participation in this lawsuit as well as

their persistent efforts to publicize this lawsuit in the media and to use it as a fundraiser. Ex. 41, Plaintiffs' Press Releases. "Surely the [Supreme] Court did not intend to provide ***publicly identified members*** of dissident organizations with a nearly impenetrable shield (in the form of heightened scrutiny) to block general discovery requests." Anderson v. Hale, Action No. 00-2021, 2001 U.S. Dist. LEXIS 6127, *21 (N.D. Ill. May 10, 2001) (emphasis added) (citing NAACP v. Alabama, 357 U.S. 449, 462-63 (1958)).

Without the requisite potential injury, plaintiffs' waived claim of privilege must fail. Plaintiffs present no evidence of any chilling effect that would occur from the discovery. As FEI has already advised the Court, however, the evidence sought bears directly on Rider's standing, his motives, and credibility as a witness, and FEI's defense of unclean hands against all plaintiffs. FEI's need for the information, thus, outweighs any constitutional interest plaintiffs claim. U.S. v. Duke Energy Corp., 232 F.R.D. 1, 3 (D.D.C. 2005) (compelling production of documents that went to the "heart of the lawsuit"); Savola v. Webster, 644 F.2d 743, 746-47 (8th Cir. 1981) (compelling responses to interrogatories over First Amendment objections based on defendant's "need for this information in preparing its defense"). See also Rider Motion at 22-25.

The Organizational Plaintiffs' and API's relevancy objection also is without merit. It contradicts their own statement to the contrary: "[P]laintiffs recognize that defendants are entitled to know that Mr. Rider has received funding for these efforts, because this may bear on his credibility in the ESA case ... ." Pls.' Opp. to Def.'s Mot. For Leave to Amend at 39 (Docket No. 132) (3/30/07). FEI's request for documents and information relating to communications among plaintiffs about Rider's campaign against FEI is undoubtedly "reasonably calculated to lead to the discovery of admissible evidence." Fed. R. Civ. P. 26(b)(1). Plaintiffs must identify and describe these conversations. Because the Organizational

Plaintiffs and API have waived their objections, made privilege objections which are not supported by the law, and have chosen not to disclose all of their non-privileged communications with each other, they should be compelled to complete this discovery immediately.

B. The Organizational Plaintiffs and API Must Produce Documents and Information About Their Communications with Other Animal Advocacy Organizations

1. Communications with WAP Must Be Disclosed

Not only did the organizations fail to disclose communications among each other, their original discovery responses did not identify or describe any communications with WAP. See ASPCA's First Response, Inter. No. 19; AWI's First Response, Inter. No. 19; FFA's First Response, Inter. No. 19 (collectively attached as Ex. 9). This is simply unfathomable as ASPCA testified that such communications have taken place and at least one document proves it. Ex. 15, ASPCA Depo. at 88-89. See also Ex. 3 to FEI's Motion to Compel WAP (9/7/06) (Docket No. 85), E-mail Among Katherine Meyer and the Organizational Plaintiffs Produced by WAP. WAP is clearly an animal advocacy organization and is intimately involved in this case. See http://www.wildlifeadvocacy.org/about.html ("The purpose of the Wildlife Advocacy Project is to advocate the ... protection of wildlife, and curtailment of animal abuse and exploitation ... .").

The Organizational Plaintiffs have had communications with WAP that are responsive to these discovery requests, and FEI explicitly requested that the plaintiffs' responses be amended to reflect such communications. Ex. 24, Gasper letter (11/22/06) at 5. To this day, despite having testified under oath that it has had such communications, ASPCA continues to omit these communications from its discovery responses. Compare ASPCA Depo. at 89 with ASPCA's Supp. Response, Inter. No. 19 (collectively attached as Ex. 42). FFA, similarly, still has not identified any communications with WAP. Ex. 29, FFA's Supp. Response, Inter. No. 19.

Only after FEI's explicit request did AWI finally disclose *in January 2007* such communications in response to FEI's interrogatories. Ex. 28, AWI's Supp. Response, Inter. No. 19. AWI's belated description of such communications, however, is woefully inadequate. AWI's statement that "Ms. Silverman has also had conversations with Katherine Meyer in her capacity as an official of [WAP] concerning Tom Rider's media and public education work for [WAP]" does not sufficiently describe each such communication. AWI, moreover, fails to disclose conversations between Cathy Liss and WAP that FEI knows occurred due to the documents originally produced by WAP. See, e.g., Exs. 3, 19, and 25 to FEI's Motion to Compel WAP (9/7/06) (Docket No. 85).

Like AWI, new plaintiff API has now disclosed that it has had communications with WAP, but it has not adequately described them as required by FEI's interrogatory. API's one-sentence reference to "limited communications with [WAP]" does not "describe" each such communication as required by Interrogatory No. 19. Ex. 37, API's Response, Inter. No. 19.

Because the Organizational Plaintiffs and API have refused to voluntarily describe each communication with WAP and to produce all responsive documents, they should be compelled to respond fully to FEI's requests. Responsive documents include, but are not limited to, e-mails to or from WAP, e-mails to or from anybody at the law firm of Meyer Glitzenstein & Crystal pertaining to WAP, e-mails to or from others regarding communications with WAP, memoranda regarding the same, recorded messages of telephone calls from WAP, phone records reflecting calls with WAP, cancelled checks that were sent to WAP, etc. See Ex. 1, Document Request, Request Nos. 2, 10, 19, 20, 21, 22, 23, 25, 30, and 34. If the Organizational Plaintiffs and API no longer maintain copies of such documents – or any other documents responsive to FEI's document requests – they should be required to produce a sworn declaration identifying such

documents, together with a description of each such document and an explanation as to why it was discarded, destroyed, spoliated or otherwise disposed of. Each of the Organizational Plaintiffs and API, as parties to this action, is "under a duty to preserve what it knows, or reasonably should know, is relevant to the action, is reasonably calculated to lead to the discovery of admissible evidence, is reasonably likely to be requested during discovery and/or is the subject of a pending discovery request." Arista Records, Inc. v. Sakfield Holding Co., 314 F. Supp. 2d 27, 33 (D.D.C. 2004). See also Jeanblanc v. The Oliver Carr Co., No. 91-0128, 1992 U.S. Dist. LEXIS 10765 at *5 (D.D.C. 1992) (dismissing portions of plaintiff's claims where he destroyed relevant documents prior to receiving discovery requests). Thus, the Organizational Plaintiffs were under such a duty as early as the filing of this lawsuit on July 11, 2000 but no later than March 30, 2004 when served with FEI's written discovery. API has been under such a duty since it first had reason to believe it may become a party to this lawsuit, and certainly no later than when it filed its motion to become a plaintiff on October 27, 2005.

2. Communications With Other Animal Advocates or Animal Advocacy Organizations Must Be Disclosed

Not only have the Organizational Plaintiffs failed to identify and describe communications with each other and with WAP, they have failed to adequately identify and describe communications concerning FEI with other animal advocates or animal advocacy organizations.

ASPCA, for example, originally responded that it has had conversations with individuals from six organizations. Ex. 6, ASPCA's First Response, Inter. No. 19. Although ASPCA identified the six organizations, it refused to describe the nature of the conversations. When asked to amend this response, plaintiffs' counsel insisted that ASPCA need not provide

additional details because FEI waited too long to request them and because FEI could have requested them during the deposition of ASPCA. Counsel's position that a complete interrogatory response is not required because the same question could have been asked during a deposition is frivolous. See, e.g., Babcock Swine, Inc. v. Shelbco, Inc., 126 F.R.D. 43, 45 (S.D. Ohio 1989) ("The fact that a party has a choice between using interrogatories and depositions does not bar the use of interrogatories."). Counsel's assertion that FEI waited too long, moreover, is undermined by ASPCA's supplemental response to Interrogatory No. 19. Having been put on notice in November 2006 that its first response was insufficient, ASPCA supplemented its response to identify four more organizations with whom it has had such communications, but again refused to describe these communications. Ex. 27, ASPCA's Supp. Response, Inter. No. 19. Plaintiffs' argument defies logic: FEI cannot inquire fully at deposition about topics which are unknown due to plaintiffs' concealment of them in written discovery.

Like ASPCA, FFA also has refused to describe the communications it has had with other animal advocacy organizations. FFA's supplemental response to Interrogatory No. 19 simply states that: "With respect to 'animal advocates' or 'animal advocacy organizations' other than plaintiffs, any such communications by the Fund are reflected in supplemental documents that it has provided to defendants." Ex. 29, FFA's Supp. Response, Inter. No. 19. FFA has neither identified any documents that it is relying on in response to this interrogatory, nor has it demonstrated that those documents sufficiently answer the question or have been produced in full. Given the track record in discovery by all plaintiffs in this case, FEI has no reason to believe that it has all documents owed to it in discovery. Nor should it have to hunt for and guess as to which documents FFA purports to rely on. FFA is required to identify those documents it is referencing in lieu of providing a response. See Fed. R. Civ. P. 33(d).

Similarly deficient is API's response to Interrogatory No. 19. API also seeks to avoid describing these conversations on the purported basis that its communications with PAWS and PETA have been "too frequent" and/or "too numerous" to recall in detail. Ex. 37, API's Response. Having received a request for interrogatories, API is obligated to provide, after a reasonable inquiry, the responsive information to the best of its knowledge, information, and belief. See Fed. R. Civ. P. 26(g)(1). API's failure to recall the details of all communications with PAWS or PETA does not excuse its obligation to describe the communications that it does recall – or that it can recall after a reasonable inquiry. Indeed, if API has such "frequent" and "numerous" communications, it is curious that there is such a dearth of them included in API's document production.

The Organizational Plaintiffs also have withheld responsive documents. For example, they hosted a fundraiser in 2005 for Tom Rider. Invitations were sent to prospective donors and it appears that AWI collected over $10,000 from this event. Ex. 43, WAP Ledger Reflecting AWI Payments From Fundraiser. None of the plaintiffs, however, have produced any documents reflecting the expenditures made to organize this event, the activities for which this money was used, or the communications about the purpose and timing of the fund-raiser. Although ASPCA has testified that such communications occurred, see Ex. 15, ASPCA Depo. at 207-08, the Organizational Plaintiffs have not produced any such information. Moreover, the documents sent to other organizations (or individual animal advocates) would be responsive to Document Request Nos. 22, 24, 25, and/or 34. So would the responses (and checks) that the Organizational Plaintiffs (particularly, AWI) received in return. Id.

Because the Organizational Plaintiffs and API have failed to adequately describe their communications with other animal advocates or animal advocacy organizations and to produce

the documentation, they should be compelled to provide complete and accurate responses to FEI's discovery requests on this subject. Not only must the Organizational Plaintiffs and API produce all responsive documents, they must describe each communication with other animal advocates or animal advocacy organization. Specifically, they must provide the dates on which such communications occurred, the individuals who participated in such communications, and the particular subject matter of each such communication.

C. The Organizational Plaintiffs and API Must Produce Documents and Information About Their Communications with Tom Rider

The Organizational Plaintiffs' communications with Tom Rider are responsive to Interrogatory No. 19 and Document Request No. 22, as Mr. Rider considers himself an "animal advocate." Such communications also are responsive to Interrogatory No. 16, which requires the Organizational Plaintiffs to describe every communication they have had with current or former employees of FEI since 1996, and to Document Request No. 21, which requires them to produce all documents that relate to communications with Tom Rider.[11]

In their original discovery responses, the Organizational Plaintiffs claimed attorney-client privilege over some communications with Rider and identified only a handful of non-privileged communications, which they failed to adequately describe. Only when FEI was able to depose the Organizational Plaintiffs did it learn about the vast amount of non-privileged communications that had been concealed. Compare ASPCA Depo. at 166 (testifying about "weekly" non-privileged communications with Rider) with ASPCA First Response, Inter. No. 16

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[11] Interrogatory No. 16: Describe every communication that you, any of your employees or volunteers, or any person acting on your behalf or at your behest has had with any current or former employee or defendants since 1996.

Document Request No. 21: All documents that refer, reflect, or relate to any communication between you and plaintiff Tom Rider.

(making no reference to such communications); compare AWI Depo. at 142-43 (testifying to non-privileged communications with Rider) with AWI's First Response, Inter. No. 16 (making no reference to such communications) (collectively attached as Ex. 44).

After FEI learned that the Organizational Plaintiffs' responses were not complete, it requested that plaintiffs amend these responses to include all non-privileged communications with Rider. Ex. 24, Gasper letter (11/22/06) at 1-4. In response, each of the Organizational Plaintiffs and API asserted – verbatim – the same response that they used to conceal their communications with each other. Specifically, they have asserted that all such communications are protected by the attorney-client and/or First Amendment privileges.

As discussed above, plaintiffs' newfound claims of a First Amendment privilege are without merit. Such claims were not only waived (because they were not asserted until two and a half years after plaintiffs' submitted their original discovery responses), see, supra, p. 20, they fail because plaintiffs cannot show that any constitutional interest they have outweighs FEI's need for the information. Similarly, as discussed above, plaintiffs' newfound boilerplate language to describe its claims of attorney-client privilege and work-product is overbroad and not supported by the record in this case.

As discussed above, many communications between the Organizational Plaintiffs, API and Rider that purportedly relate to "legal strategy, evidence, and status of this litigation" are not privileged. This privilege claim is simply overbroad. The communications that relate to media and legislative strategies, moreover, are not protected by the First Amendment. The disclosure of such communications will not injure plaintiffs' right to association, nor would any such injury outweigh FEI's need for the requested information that substantially supports its defense in this case. The Organizational Plaintiffs and API should be compelled to describe all non-privileged

communications with Rider, including all communications that occurred outside the presence of counsel, all communications that did not relate to legal advice as outlined by caselaw in this Circuit, and all communications relating to media and legislative strategies. See, supra, pp. 18-20. Considering that ASPCA provided a laptop to Rider so that he could purportedly do media work for plaintiffs, it is simply not credible that no media-related e-mails between Rider and the Organizational Plaintiffs exist, and it is astounding that none have been produced. The Organizational Plaintiffs also should be compelled to produce all of the documents reflecting such communications – including internal e-mails that have heretofore been withheld.

The Organizational Plaintiffs, moreover, should be compelled to more fully describe the few communications they have identified. Their current descriptions are insufficient. They must provide the dates on which such communications occurred, the individuals who participated in such communications, and the particular subject matter of each such communication. ASPCA, for example, must do more than simply state that communications occurred between it and Rider between 2001-2003, involving any or all of three individuals, and "concerning his efforts to educate the public about Ringling Bros.' treatment of Asian elephants." See Ex. 6, ASPCA's First Response, Inter. No. 16. Similarly, AWI and FFA have withheld known information from their descriptions of communications with Rider. Compare AWI's First Response, Inter. No. 16 (identifying communication between Rider and AWI) with AWI Depo. at 134-36 (testifying that Katherine Meyer also was present); compare FFA's First Response, Inter. No. 16 (identifying communications between it and Rider over a five-year span "regarding circus issues and Black Beauty Ranch") with FFA Depo. at 165-66 (testifying that FFA offered Rider a job at the ranch during one of those communications) (collectively attached as Ex. 45). The Organizational Plaintiffs and API must produce complete and accurate responses to FEI's request for documents

and information relating to their non-privileged communications with Rider.

II. THE ORGANIZATIONAL PLAINTIFFS AND API HAVE FAILED TO SUFFICIENTLY DESCRIBE THE DOCUMENTS FOR WHICH THEY ARE CLAIMING PRIVILEGE

Pursuant to Fed. R. Civ. P. 26(b)(5) and FEI's Instruction No. 9, the Organizational Plaintiffs are required to provide specific information for each document that they are withholding on the basis of privilege. Director of OTS v. Ernst & Young, 795 F. Supp. 7, 11-12 (D.D.C. 1992) (holding that party cannot submit sworn statement that all withheld documents are privileged, but must provide specific information for each document); Ex. 1, Document Request, Instruction No. 9. The Organizational Plaintiffs have not, however, even attempted to describe with any particularity the e-mails among each other prior to June 2004 or the "memos and notes and emails" among each other from 2004 through 2007. Their failure to do so is particularly egregious where, as here, they are broadly and boldly claiming privilege over communications that have taken place outside the presence of counsel and over communications that have taken place in the presence of counsel but that admittedly do not relate to legal advice. See, supra pp. 18-20. The following entries in the Organizational Plaintiffs' collective privilege logs are woefully inadequate:

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

Ex. 5, Plaintiffs' First Privilege Log.

Doc Type	Date	Author/Originator	Recipient(s)	Description	Basis for Withholding
emails	2004-Dec. 31, 2006	Between and among plaintiffs' attorneys and clients		Communications regarding litigation, advice, recommendations, strategy	Attorney-client priv.; attorney work product
emails	2006	Between and among attorneys and clients		Email communications regarding pending rulemaking petition	Attorney-client priv.; attorney work product
Memos and notes and emails	2004-Jan. 2007	Between and among plaintiffs' attorneys and clients		Written communications among plaintiffs and MGC attorneys regarding further responses to discovery request, including memos and notes of meetings and conversations, and email	Attorney-client priv.; attorney work product

Ex. 46, Organizational Plaintiffs' Supplemental Privilege Log.

Each of these five entries is improper. Plaintiffs must assert "the attorney-client privilege in a manner specific enough to allow the court to adjudicate the merits of its invocation." U.S. v. Exxon Corp., 87 F.R.D. 624, 637 (D.D.C. 1980). "A mere assertion of the privilege, without a description of the document tailored to the assertion, is insufficient." Id. Plaintiffs cannot meet this burden by merely stating that there were "e-mails" between and among them for nearly three years without specifically identifying each such document. Indeed, this court rejected a party's offer to make such an assertion under oath and required that party to produce a privilege log that would "identify each withheld document and state the basis upon which the privilege is claimed, . . . state the subject matter, number of pages, author, date created, and the identity of all persons to whom the original or any copies of the document were shown or provided." Director of OTS v. Ernst & Young, 795 F. Supp. 7, 11-12 (D.D.C. 1992) (emphasis added); see also Alexander v. FBI, 186 F.R.D. 102, 106-07 (D.D.C. 1998); Rider Motion at 38-39.

Courts require that privilege logs identify and describe each document being withheld in such a manner that the requesting party and the court can "determine whether the documents at issue are truly privileged from production." Director of OTS, 795 F. Supp. at 11-12. That is particularly important where, as here, a party attempts to invoke new-found theories of privilege. As discussed above, plaintiffs may not claim privilege for communications that occurred outside the presence of counsel, communications that did not relate to legal advice, or communications for which they claim a First Amendment privilege. Yet, FEI has been left to guess as to what communications plaintiffs are concealing under their blatantly overbroad and bold privilege assertions. Conspicuously absent from plaintiffs' privilege log are any entries relating to (1) payments made to Rider, (2) their alleged "media strategy," (3) communications outside the presence of counsel related to FEI, (4) communications in which plaintiffs' counsel was acting in their capacity as Directors of WAP, etc. Until plaintiffs identify the author(s), recipient(s), and subject matter of each such document, FEI has absolutely no basis to discern the impropriety of plaintiffs' numerous privilege claims.

Not only have the Organizational Plaintiffs failed to describe with particularity each of the documents for which they have claimed privilege, they have failed to identify which plaintiff has which documents in its possession. Because they have provided a joint privilege log, FEI is unable to discern, for example, whether a privileged document between AWI and counsel has been shared with another plaintiff – in which case the privilege might have been waived.[12] In

[12] Plaintiffs' failure to take seriously its obligation to provide a complete privilege log is demonstrated by ASPCA's original frivolous objection to Document Request No. 3. When asked to substantiate its objection that the request would require the production of privileged communications between Ms. Weisberg and ASPCA's President and the production of Ms. Weisberg's work product, ASPCA responded that no such documents exist and that the objection was merely overinclusive. Ex. 4, Meyer letter (1/16/07) ("There are no documents in response to Document Request No. 3; this claim of privilege was simply over-inclusive."). Notwithstanding the disingenuous conduct of claiming privilege over a set of documents one day and then claiming they do not exist another, ASPCA candidly acknowledges that these documents were never identified on the privilege log – even when ASPCA

their present form, the plaintiffs' privilege logs are worthless, violate Rule 26(b)(5) and constitute a waiver: improper privilege claims are no claim at all. Each plaintiff must create its own log. Each document must be separately identified. The date, author(s), recipient(s) and subject matter must be disclosed. A single entry spanning four years of communications is patently insufficient and useless in determining whether the privilege claim is justified. Like their lead plaintiff Tom Rider, the Organizational Plaintiffs and API have refused to describe with any semblance of particularity the documents for which they have claimed privilege. The Federal Rules of Civil Procedure apply to all parties, including plaintiffs. They must describe privileged documents in a manner that will allow FEI to assess the applicability of the alleged privilege.

III. THE ORGANIZATIONAL PLAINTIFFS HAVE REFUSED TO PRODUCE DOCUMENTS AND INFORMATION CONCERNING THEIR PAYMENTS TO PLAINTIFF TOM RIDER AND/OR WAP

Nearly three years after receiving FEI's discovery requests, the Organizational Plaintiffs continue to withhold responsive documents and information regarding their payments to Rider and/or WAP. Amazingly, their counsel asserts that "all of the plaintiff organizations have been extremely forthcoming about the funds they have contributed to either Tom Rider or the Wildlife Advocacy Project." See Ex. 4, Meyer letter (1/16/07) at 7, 10.[13] Only if "forthcoming" is

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believed them to exist. Until ASPCA – and the other Organizational Plaintiffs – provide a complete log of privileged documents that actually do exist, FEI cannot make heads or tails of plaintiffs' ambiguous and incomprehensible claims of privilege.

[13] The record in this case is replete with documentation that the Organizational Plaintiffs are providing tens of thousands of dollars each year to Tom Rider. See, e.g., FEI's Motion to Compel Documents Subpoenaed from WAP (9/7/06); FEI's Motion to Compel Discovery From Tom Rider (3/20/07). They have done so by funneling money through WAP (counsel's alter ego) and by paying Rider directly. The fact is, however, the documents and information relating to this scheme are responsive to FEI's discovery requests and, with very few exceptions, were not provided in the Organizational Plaintiffs' original discovery responses. But for FEI's persistence that plaintiffs comply with their discovery obligations, plaintiffs would have succeeded in concealing their scheme from FEI and this Court. Now that FEI has uncovered plaintiffs' scheme, the question is how many other documents and how much information have plaintiffs withheld. They must produce ALL responsive documents and information – not

defined as recalcitrant and evasive is counsel's statement true. Otherwise, the behavior of all plaintiffs in discovery has been anything but forthcoming. ASPCA, for example, has not produced any documents related to the cash and other items (e.g., laptop and cell phone) that it provided directly to Rider for almost two years, back in 2002 to 2003. According to Rider, ASPCA provided Rider two payments totaling $6,000 and then payments of $250 per week. Ex. 47, Deposition of Tom Rider at 148-49. Yet, no documents have been produced. Nor has ASPCA identified the amount of money or other benefits it provided directly to Rider. Similarly, AWI (unlike Rider) disclosed payments to Rider in filings with the IRS, but (like Rider and ASPCA) did not disclose such information in its discovery responses. Compare AWI's IRS Form 990 at 15 (identifying payment to Rider) with AWI's Supp. Response, Inter. Nos. 21-22 (no indication of such payment) (collectively attached as Ex. 48). In addition, the organizations co-hosted a fundraiser for Rider in July 2005. Ex. 14, Fundraiser Invitation. To date, the only related document that FEI has received is the invitation itself. The Plaintiffs have collectively refused to produce any other documents related thereto.

FEI has requested documents and information relating to the Organizational Plaintiffs' funding of Rider: Interrogatory No. 21 requires plaintiffs to identify each resource expended since 1997 in advocating better treatment for animals held in captivity; Interrogatory No. 22 requires plaintiffs to identify each expenditure since 1997 of financial and other resources made while pursuing alternative sources of information about FEI's actions; and Document Request Nos. 19 and 20 require plaintiffs to produce the related documents.[14]

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just those that they would like to produce or copies of those that FEI has received by issuing (and enforcing) subpoenas to third parties.

[14] Interrogatory No. 21: Identify each resource you have expended from 1997 to the present in "advocating better treatment for animals held in captivity, including animals used for entertainment purposes" as alleged in the

A. The Organizational Plaintiffs' Interrogatory Responses Are Deficient

Payments by the Organizational Plaintiffs and API to Rider or WAP are resources purportedly expended in "advocating better treatment for animals held in captivity" and/or expenditures "made while pursuing alternative sources of information about defendants' actions and treatment of elephants." The Organizational Plaintiffs' original interrogatory responses in June 2004, however, contained only one reference of payments to Rider or WAP. Specifically, ASPCA stated that it gave WAP $7,400 in 2001 "for public education about Ringling Bros.'s mistreatment of Asian elephants." Ex. 6, ASPCA's First Response, Inter No. 22. Although ASPCA provided substantial amounts of money, as well as a laptop and cell phone, directly to Rider in 2002 and 2003, it did not disclose these payments. Ex. 27 to FEI's Motion to Compel WAP (9/7/06) (Docket No. 85), WAP Memo Reflecting Discussion With ASPCA. Similarly, AWI did not disclose the money that it gave to Rider and WAP, nor did FFA disclose the money it gave directly to Rider or the money it spent for repairs to Rider's car.[15] See AWI Depo. at 140; AWI's IRS Form 990 at 15; FFA Depo. at 157-58 (collectively attached as Ex. 49).

Despite FEI's repeated demands that plaintiffs amend their interrogatory responses to

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complaint, including the amount and purpose of each expenditure.

Interrogatory No. 22: Identify each expenditure from 1997 to the present of "financial and other resources" made while "pursuing alternative sources of information about defendants' actions and treatment of elephants" as alleged in the complaint.

Document Request No. 19: Documents sufficient to show all resources you have expended in "advocating better treatment of animals in captivity, including animals used for entertainment purposes" each year from 1996 to the present.

Document Request No. 20: All documents that refer, reflect, or relate to any expenditure by you of "financial and other resources" made while "pursuing alternative sources of information about defendants' actions and treatment of elephants" each year from 1996 to the present.

[15] FEI understands that the Humane Society of the United States ("HSUS") (which merged with FFA) has made payments to WAP. Ex. 43, WAP Ledger. Although HSUS and FFA operate jointly (and an HSUS attorney is counsel of record in this case), FEI has been informed at the February 7th meet and confer that FFA is not producing discovery on behalf of both entities.

include all of the requisite information, they continue to withhold discoverable information. ASPCA continues to conceal the amount of money that it has paid directly to Rider. Ex. 27, ASPCA's Supp. Response, Inter. Nos. 21 and 22. Similarly, AWI continues to conceal the amount of money that it has paid directly to Rider – despite having acknowledged such payments (or at least some such payments) to the IRS. Ex. 28, AWI's Supp. Response, Inter. Nos. 21 and 22. Finally, FFA continues to conceal the payments that it (not HSUS) made directly to Rider. Compare FFA's Supp. Response, Inter. Nos. 21 and 22 with FFA Depo. at 157-58 (collectively attached as Ex. 50).

In addition to concealing payments made directly to Rider, AWI has attempted to conceal payments to WAP by incorporating by reference documents that it has produced while simultaneously failing to produce all documents relating to each such payment. Documents obtained from WAP demonstrate that at least one payment was made by AWI that is not accounted for in AWI's incorporated documents. Compare WAP Ledger (indicating payment by AWI in November 2006) with AWI's Purported Documents Reflecting All Such Contributions (no indication of such payment) (collectively attached as Ex. 51).[16] Because it is clear that the Organizational Plaintiffs continue to conceal the payments made to Rider and WAP, they should be compelled to provide complete and accurate responses to Interrogatory Nos. 21 and 22. It is unclear why the Organizational Plaintiffs and API cannot, or more accurately, will not provide the total amount of money that they have paid their lead plaintiff and counsel's alter ego, WAP.

B. The Organizational Plaintiffs' Document Productions Are Deficient

Not only did the Organizational Plaintiffs fail to disclose payments to Rider and WAP,

[16] AWI did, in fact, produce on January 16, 2007 a document reflecting its February 2004 payment to WAP, but neglected to reference that document in its interrogatory response. FEI is not aware of any documents produced by AWI reflecting the November 2006 payment.

they failed to produce the related documentation, as required by Document Requests 19 and 20. ASPCA's document production did not include documentation of its payments to Rider, such as cancelled checks, money wiring receipts, cover letters, receipts for expenses, etc. Similarly, neither AWI nor FFA produced documentation of their payments to Rider. AWI, moreover, failed to produce documentation of its payments to WAP. FEI did not know about such payments until WAP produced documents pursuant to a third-party subpoena – nearly eighteen months after the Organizational Plaintiffs' responded to discovery.

Despite FEI's explicit request that such documentation be promptly produced, the Organizational Plaintiffs continue to hide the ball. ASPCA still has not produced documentation of its direct payments to Rider. Neither has AWI or FFA. Conspicuously absent from the Organizational Plaintiffs' supplemental production are documents relating to the 2005 fundraiser that they organized for Tom Rider. The only related document that has been produced is the invitation itself – and that was produced only after FEI learned about the fundraiser from its own independent research and then pressed plaintiffs on the matter.[17] Finally, although AWI has produced copies of some checks that it has sent to WAP, AWI has not produced all of the documents relating to such payments. For example, AWI has not produced the cover letters accompanying these checks or any internal documents discussing or reflecting such payments. Because the Organizational Plaintiffs have chosen not to produce these documents voluntarily, they should be compelled to produce all documents responsive to Document Requests 19 and 20.

[17] As indicated above, communications among the Organizational Plaintiffs about this event would be responsive to Interrogatory No. 19 and Document Request No. 22. Although ASPCA has testified that such communications occurred, see Ex. 15, ASPCA Depo. at 208, the Organizational Plaintiffs have not produced any such information.

IV. PLAINTIFF ASPCA HAS REFUSED TO PRODUCE DOCUMENTS AND INFORMATION RELATING TO ALLEGED "CONFIDENTIAL AND PROPRIETARY" MATTERS

As explained above, during ASPCA's deposition, FEI asked why ASPCA stopped paying Tom Rider in 2003 and ASPCA testified that it had to do with budgetary decisions. Ex. 15, ASPCA Depo. at 140-41. When asked what other issues the money was directed towards, ASPCA responded "I believe that's privileged and confidential based on ASPCA activities and strategic planning." Id. at 141. When FEI pressed for an explanation, ASPCA's counsel stated that "I think she's objecting based on – and I'll object on her behalf based on proprietary concerns, confidential and proprietary information concerning ASPCA's strategic planning." Id. Later in the deposition, FEI returned to the subject matter and asked ASPCA's counsel under what basis in the rules she was objecting. Counsel responded that "it's burdensome and irrelevant and also goes to confidential proprietary concerns that we're simply not going to talk about. You can take it up with the judge if you want." ASPCA Depo. at 220.

Counsel's objection and ASPCA's refusal to answer was frivolous. There is no exemption from producing "confidential and proprietary" material in litigation. If anything, such information can be produced under an order, either stipulated or imposed, that will control such material's use and dissemination. See Fed. R. Civ. P. 26(c). And plaintiffs' counsel's rebuked FEI's offer to take the testimony under such a confidentiality agreement. Ex. 15, ASPCA Depo. at 220-21. Counsel then subsequently directed FEI to ASPCA's published annual report, further undermining the privilege claim invoked to block the deposition testimony. [18]

[18] With respect to the deficient deposition testimony, ASPCA has now, in lieu of answering the questions posed (specifically, what budgetary needs caused it to stop paying Rider), stated that "the funds would not have been spent on any particular project, but would have been dispersed throughout the entire budget for 2003. Those issues are reflected in the ASPCA's 2003 Annual Report which is enclosed, A01144." Ex. 4, Meyer letter to Gasper (Jan. 16, 2007) at 8. ASPCA's belated response is outrageous. First, it is incredulous that ASPCA claimed at deposition

The Federal Rules of Civil Procedure are clear. Because the information at issue is not privileged and was not related to a limitation directed by the court, counsel's only recourse would be to instruct the witness not to answer and then to present the Court with a motion under Rule 30(d)(4). See Fed. R. Civ. P. 30(d)(1). Counsel and ASPCA never moved the Court for such protection. Instead, they waited until FEI raised this issue with them in November 2006. At that time, FEI also challenged ASPCA's objection to Interrogatory No. 21 and Document Request Nos. 19 and 20 on the grounds that responses would require the disclosure of confidential proprietary information. FEI reiterated, moreover, that it would be willing to enter a protective order for these matters despite its belief that ASPCA's objection was frivolous. See Ex. 24, Gasper letter (11/22/06) at 8; Ex. 15, ASPCA Depo. at 221.

To date, plaintiffs have not even bothered to respond to FEI's statement that ASPCA's responses to Interrogatory No. 21 and Document Request Nos. 19 and 20 are incomplete. See Ex. 25, Meyer letter to Gasper (12/15/06) at 5-6 (discussing deposition testimony but making no mention of discovery requests); Ex. 4, Meyer letter to Gasper (1/16/07) at 8 (same); Ex. 27, ASPCA's Supp. Response, Inter No. 21 (incorporating previous objections). As recited above, Interrogatory No. 21 requires ASPCA to provide information about expenditures it has made in advocating for better treatment of animals as alleged in the complaint and Document Request Nos. 19 and 20 require ASPCA to produce documents relating to these expenditures as well as those expenditures relating to their pursuit of alternative sources of information about FEI's actions as alleged in the complaint. ASPCA's objections were baseless and it should be

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that the answer was highly proprietary and confidential, then later stated it could be answered by reviewing a publicly-available document. Second, merely producing the 2003 Annual Report is not a sufficient response. The question posed at deposition was why the Rider payments stopped, not what else did ASPCA spend money on. The Annual Report does not answer the question. Ex. 15, ASPCA Depo. at 140-41.

compelled to amend its responses and supplement its productions accordingly.

V. PLAINTIFF ASPCA HAS REFUSED TO PRODUCE DOCUMENTS AND INFORMATION RELATING TO ITS INSPECTIONS OF FEI

Document Request No. 9 requires ASPCA to identify all documents relating to inspections of any circus, including FEI's, and Interrogatory No. 12 requires ASPCA to describe each inspection that it has conducted of FEI.[19] In its original response, ASPCA refused to describe each inspection as required, choosing instead to simply incorporate by reference its document production. Ex. 6, ASPCA's First Response, Inter. No. 12. ASPCA, however, failed to produce all of its responsive documents, and it also conducted inspections for which it admittedly does not have any documents.

During ASPCA's deposition, it testified about a document indicating that an agent took notes of an inspection. Ex. 15, ASPCA Depo. at 116-17. Because those notes were not produced, FEI asked ASPCA if it considered the notes to be responsive to FEI's request for documents relating to inspections and ASPCA testified that it did not. Id. at 117. ASPCA testified, moreover, that it did not have records for all inspections in 1998. After FEI noted that one of the produced reports was from 1998, ASPCA's counsel promptly interjected that a reasonable search was performed but that ASPCA would search again. Id. at 118-19. More than one year later, ASPCA finally produced inspection records that were previously withheld. ASPCA has not, however, produced the notes that were discussed during the deposition.

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[19] Document Request No. 9: All documents that refer, reflect, or relate to any inspection or investigations of defendants or any other circus, including but not limited to inspections or investigations conducted by federal, state, or local government agency or official, you or any organization affiliated with you, another animal advocacy group, a media outlet, or any other organization or individual.

Interrogatory No. 12: Describe each inspection that you have conducted of Defendants in the course of any official duties to enforce any statutes or ordinances, including but not limited to any animal welfare laws, from 1996 to the present, including the names of inspectors who conducted each inspection.

Although ASPCA now purports to have produced all responsive inspection reports that still exist, it has not provided an appropriate response to FEI's interrogatory. Specifically, ASPCA's original response only referred to its document production, which as discussed above, FEI later learned was deficient. Although FEI asked that ASPCA describe each inspection, ASPCA elected not to do so – regardless of whether it produced documents for all inspections. After FEI requested that ASPCA amend this response, ASPCA only provided a generic explanation of the history of such inspections and the means in which ASPCA wishes they could be more invasive. Ex. 27, ASPCA's Supp. Response, Inter No. 12. ASPCA, however, persists in its refusal to describe each such inspection. Its refusal to do so is particularly egregious where, as here, it now has stated (almost three years after its original response) that there were some inspections for which it has no documentation. Id. Moreover, ASPCA cannot answer the interrogatory in part by providing what it wishes the inspectors included while simultaneously omitting what the inspections do entail, i.e., the personnel involved, the procedures involved, and the end results – which are exculpatory for FEI.

Although plaintiffs' counsel promised FEI back in February 2006 that ASPCA would supplement the response to this Interrogatory "to account for the inspections for which no records have been located," Ex. 52, Ockene letter (2/13/06), ASPCA failed to do so until FEI explicitly requested it again in November 2006. Even then, ASPCA failed to adequately amend its response to this Interrogatory. Having chosen not to voluntarily provide this straightforward, discoverable information, ASPCA should be compelled to provide a complete and accurate response to Interrogatory No. 12.

VI. THE ORGANIZATIONAL PLAINTIFFS AND API HAVE IMPROPERLY INCORPORATED, WITHOUT PARTICULARITY, DOCUMENTS PRODUCED BY THEM AND TOM RIDER

Like Rider, instead of providing responsive information requested by two separate interrogatories, the Organizational Plaintiffs have simply incorporated by reference, on a global scale, documents that they produced, which the rules do not permit them to do. Compare Fed. R. Civ. P. 33(d) (when incorporating business records into interrogatory response, the "specification shall be in sufficient detail to permit the interrogating party to locate and to identify" such records) with Ex. 7, AWI's First Response, Inter. No. 13 ("there are additional descriptions of elephants beings chained that are reflected in other documents that plaintiffs are producing, including, but not limited to the USDA Report that is referenced herein"); Ex. 7, AWI's First Response, Inter. No. 15 ("Further incidents are reflected in additional materials that are being produced by plaintiffs in response to defendants' document production requests.").

When asked to specifically identify which documents the Organizational Plaintiffs were incorporating by reference, plaintiffs refused. Instead, they insisted that FEI waited too long to request this information and referred FEI to their supplemental responses. The Organizational Plaintiffs cite no case in support of this position. First, plaintiffs' position that FEI waited too long to expect them to reasonably identify the documents they had in mind is directly at odds with the very purpose of Rule 33(d)'s particularity requirement. Second, the Organizational Plaintiffs' supplemental responses to Interrogatory No. 15 do not specifically identify any documents. See, e.g., Ex. 27, ASPCA's Supp. Response, Inter. No. 15. Their responses to Interrogatory No. 13, moreover, only specifically identify two documents that were produced with their original document production – after their original responses asserted that the incidents at issue are too numerous to describe in response to an interrogatory. Compare ASPCA's First

Response, Inter. No. 13 with ASPCA's Supp. Response, Inter. No. 13 (collectively attached as Ex. 53).

Plaintiffs' incorporation by reference of their entire document production is bad faith. The option to produce records in Rule 33(d) permits a party to "specify the records from which the answer may be derived or ascertained" but requires that it do so with "sufficient detail to permit the interrogating party to locate and to identify, as readily as can the party served, the records from which the answer may be obtained." See F.R.C.P. 33(d). By incorporating by reference their entire document production, they frivolously have referred FEI to tens of thousands of pages. This is patently insufficient. See Dage v. Leavitt, No. 04-0221, 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") (prohibiting incorporation by reference of 600 page report).

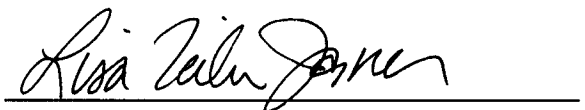
This kind of generic "incorporation by reference" and responses purporting to rely on documents identified as "including but not limited to" is unacceptable. Either the Organizational Plaintiffs must identify the specific documents on which they rely or refer, or this Court should strike all such non-descript, overbroad references contained in their responses.

CONCLUSION

For the reasons set forth herein and in its Motion, FEI respectfully requests that its motion be granted. FEI further requests that, pursuant to Fed. R. Civ. P. 37(a) and the law of this case, see Order (2/26/07) (awarding fees and costs), it be awarded all appropriate sanctions, including the costs and fees of bringing this motion. A proposed order is attached.

Dated this 29th day of May, 2007.

Respectfully submitted,



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