UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO COMPEL DISCOVERY FROM THE ORGANIZATIONAL PLAINTIFFS

INTRODUCTION

Having waited two and a half years to raise any complaints concerning the adequacy of plaintiffs' 2004 discovery responses, despite the fact that several of those complaints are based on the face of plaintiffs' responses, defendants now move to compel the production of materials from all four of the organizational plaintiffs.[1] As demonstrated below, as with their motion to compel discovery from plaintiff Tom Rider, defendants' allegations concerning deficiencies in the organizational plaintiffs' discovery responses have no merit.

Indeed, all but one of the issues defendants complain about relate exclusively to defendants' concocted theory that plaintiffs are "bribing" Tom Rider to be a plaintiff in this case,

[1] The organizational plaintiffs are the American Society for the Prevention of Cruelty to Animals (the "ASPCA"), the Animal Welfare Institute ("AWI"), the Fund for Animals (the "Fund"), and the Animal Protection Institute ("API") (collectively, the "plaintiffs' or the "groups").

and not to the merits of this ESA litigation. Moreover, the only matter that actually relates to the merits of this case – i.e. defendants' contention that the ASPCA has withheld some alleged "notes" of an inspection it conducted of the Ringling Bros. circus – is a complete non-issue, and defendants were clearly scraping the bottom of the barrel to come up with something to complain about beyond the collateral issue of Mr. Rider's funding. However, as discussed below, a review of the record makes clear that these alleged "notes" apparently did not even relate to the ASPCA's inspection, but to an inspection conducted by a local SPCA, and therefore were not discovered when the ASPCA searched for responsive records. Moreover, defendants did not even raise the issue of these "notes" during the meet and confer process, so plaintiffs did not have an opportunity to explain why they were not produced.

None of the other issues raised by defendants relates to the substantive issues in this case. Indeed, it appears that defendants have little defense on the merits, and so they are harassing the plaintiffs and wasting the Court's time attempting to squeeze every last drop of information out of the groups related to the collateral issue of their funding of Mr. Rider's media and public education campaign concerning the mistreatment of elephants in the circus – even though plaintiffs have been extremely upfront about the fact that they have been funding this campaign, and have also disclosed to defendants how much money was contributed to Mr. Rider or the Wildlife Advocacy Project ("WAP") for this purpose over the years. Nevertheless, defendants will apparently stop at nothing to obtain every scrap of information on this matter – no matter how far removed from any claim or defense it may be, no matter how burdensome to plaintiffs, and no matter that any such additional information will add nothing material to the argument that defendants apparently intend to make – i.e. that Tom Rider is not to be believed because he is

being funded by the groups – since, as noted, and as further demonstrated below, defendants already know the amounts of funding the groups are providing to Mr. Rider and non-party WAP.

However, although the Federal Rules admittedly allow for broad discovery, they do not allow parties to engage in unbridled fishing expeditions for duplicative material that has little to no bearing on the issues in the case. See, e.g., Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 351 (1978) (discovery has "ultimate and necessary boundaries"); see also Fed. R. Civ. P. 26(b)(2) (providing that discovery "shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues").[2]

For example, defendants ask the Court to order the groups to produce documents and information related to all of the communications they have had over the past decade with each other, with Mr. Rider, and with other "animal advocates" concerning FEI or any other circus. As discussed below, while the groups provided numerous documents and extensive narrative information in response to the incredibly broad requests that called for this information, they also lodged objections based on relevance, burden, and First Amendment grounds. In particular, the groups have withheld documents and information related to their media and legislative strategies

[2] See also United States ex rel. Fisher v. Network Software Assocs., 227 F.R.D. 4, 9 (D.D.C. 2005) (noting that "courts remain concerned about fishing expeditions, discovery abuse, and inordinate expenses involved in overbroad and far-ranging discovery requests and have therefore limited discovery to the issues involved in the particular case) (citations omitted); In re Linerboard Antitrust Litig., 223 F.R.D. 357, 363 (E.D. Pa. 2004) ("even in complex litigation, discovery does not require leaving no stone unturned"); Rubin v. Islamic Republic of Iran, 349 F. Supp. 2d 1108, 1111 (N.D. Ill. 2004) (noting that "open-ended fishing expeditions will not be tolerated").

concerning the plight of captive elephants – materials which are not relevant to the merits of this case except to demonstrate plaintiffs' consistent position that elephants do not belong in circuses, yet would, if released to defendants, chill the groups' ability to engage in classic First Amendment activities of organizing, advocating, and associating with other like-minded individuals to effect change on an issue of substantial public interest. Moreover, when plaintiffs attempted to obtain defendants' media and public relations material on the grounds that such information does bear directly on defendants' credibility, defendants refused, arguing that such materials were not relevant to the case and were too sensitive to release. Judge Facciola agreed with defendants. See Order (February 23, 2006) at 9. Plaintiffs – who unlike FEI are not for-profit organizations – certainly should not be held to a different standard, especially where, again, unlike defendants, they have already disclosed how much they have contributed to Mr. Rider's public education project.

Thus, defendants already have the only information to which they are arguably entitled concerning the funding issue – i.e., the actual amounts of funding that the groups have donated for Mr Rider's media and educational campaign. Indeed, plaintiffs have always conceded that this type of information may be relevant to Mr. Rider's credibility, and, despite defendants' tired accusations, have never sought to "conceal" this information or "mislead" defendants into thinking that such funding was not occurring. As discussed in detail below, even though defendants' discovery requests to the plaintiff organizations never specifically asked for information related to the funding of Mr. Rider or WAP, the groups have provided and will continue to provide such information. In addition, the plaintiffs provided extensive testimony on this subject during their depositions, and defendants have also obtained from WAP the complete amounts of funding the groups have donated to it. Accordingly, there is no information

remaining to compel on this matter that would not simply duplicate information already provided, without trampling on plaintiffs' First Amendment rights.[3]

In addition, as demonstrated below, there is no basis for compelling any information based on defendants' additional contentions that plaintiffs have produced an inadequate privilege log, have inappropriately incorporated certain documents by reference into their interrogatory responses, or that the ASPCA has withheld any responsive information. For these reasons also, the Court should deny defendants' motion.

Several additional points bear mentioning up front. First, many of the statements that defendants make in their "background" section are simply untrue and also have no relevance to defendants' Argument section. For example, among the many misrepresentations made in defendants' brief is their now oft-repeated assertion that Cathy Liss, president of the Animal Welfare Institute, "provide[d] false testimony" at her deposition. Memorandum of Points and Authorities In Support of FEI's Motion to Compel Discovery From the Organizational Plaintiffs and API ("Def. Mem.") at 6. As plaintiffs have already explained, see Plaintiffs' Opposition to Defendant Feld Entertainment, Inc.'s Motion for Leave to Amend Answers to Assert Additional Defense and RICO Counterclaim (Docket No. 132) at 25 n.22, this gratuitous attack is completely unfounded: Ms. Liss was only answering the questions she was asked – i.e., was she "aware" of whether, "on the times that [AWI has] reimbursed" Mr. Rider directly for his travel expenses, the other groups were sharing those expenses – to which she confirmed that she was not aware. Def. Ex. 13, Deposition of Cathy Liss at 141-142.

[3] Defendants, in contrast, as with their public relations materials, refused to provide any information concerning their financial affairs and the amount of money they make off of the elephants, despite its clear relevance to defendants' witnesses' bias. On this point also, Judge Facciola agreed with defendants. See Order (February 23, 2006) at 9. Thus, plaintiffs have been far more cooperative and forthcoming on these matters than defendants have ever been.

Defendants also misstate the course of events with respect to API's discovery responses when they state that the Court issued a "clear instruction" that API "should provide discovery responses to the requests previously served upon the Organizational Plaintiffs." Def. Mem. at 14-15. A review of the Court's actual Order reveals that it stated no such thing. See Order (February 23, 2006) (Docket No. 60). Rather, after the Court granted plaintiffs' motion to add API as an additional plaintiff, the Court ordered API "to abide by all of the agreed-upon and ordered procedures in this case such as outstanding scheduling and discovery orders and agreements," id., but did not state that API must respond to the same discovery requests propounded on the other parties. API was ready and willing to respond to discovery requests once it received them, which it has now done. See, e.g., Def. Ex. 37, API's Responses to Interrogatories; see also Fed. R. Civ. P. 33, 34, 36 (each party must be "served" with discovery requests). Moreover, although API became a party in February of 2006, defendants did not even raise the issue of API's discovery responses until November of 2006, despite the fact that the parties had undertaken a series of discussions related to discovery and scheduling matters in the case.[4]

In addition, there are several issues that defendants raise in their motion to compel that they never raised during the meet and confer process, and hence these matters are not properly included in defendants' motion to compel. See Local Rule 7(m). For example, defendants have never undertaken a meet and confer process with respect to API's responses to the discovery requests. Accordingly, even if defendants assume that API might take positions that are

[4] See Def. Ex. 36, December 8, 2006 Letter from Tanya Sanerib to George Gasper (explaining that "although the parties had extensive discussions in August and September of this year regarding the schedule for this case, defendants' counsel never mentioned that defendants were waiting for discovery responses from API, or that this matter was outstanding and needed to be resolved").

consistent with the other plaintiffs, they still have an obligation under Local Rule 7(m) to address the matter with plaintiffs before moving to compel against API. In addition, as mentioned, defendants never raised their concern that ASPCA was withholding certain "notes" of inspections. See Def. Mem. at 41. Instead, defendants are wasting the parties' and the Court's time addressing an issue that could have been resolved during the meet and confer process.

Accordingly, because there is no merit to any of defendants' arguments, and because they did not even raise some of these concerns with plaintiffs before moving to compel on them, defendants motion to compel should be denied. In addition, the Court should order defendants to pay plaintiffs' costs and attorneys' fees associated with having to oppose this motion. See Fed. R. Civ. P. 37(a)(4)(B).

ARGUMENT

As an initial matter plaintiffs note that, because defendants waited so long to raise their concerns, until recently plaintiffs were operating under the reasonable assumption that defendants did not have any concerns. This assumption was especially reasonable given that, when plaintiffs questioned the adequacy of defendants' discovery responses only four months after the parties exchanged discovery, defendants complained bitterly about plaintiffs' "long delay in initiating the meet-and-confer process." Memorandum in Opposition to Plaintiffs' Motion to Compel Defendants' Compliance with Plaintiffs' Discovery Requests at 2 (Docket No. 29); see also id. at 1 (noting that plaintiffs "were silent" for four months and "[t]hus, until October 19, when plaintiffs first sent a letter about defendants' responses, defendants had no reason to believe that plaintiffs' deemed any of their discovery responses inadequate").

Defendants' inordinately long delay notwithstanding, plaintiffs worked hard during the meet and confer process to understand and address defendants' concerns. Indeed, as the Court

will see when it reviews the meet and confer correspondence – as opposed to defendants' repeated misrepresentations of that correspondence – plaintiffs provided defendants with numerous additional materials and supplemental information, even in instances where plaintiffs did not necessarily agree that such information was responsive. See, e.g., Exhibit 4 to Defendants' Motion to Compel Discovery From the Organizational Plaintiffs and API ("Def. Ex.") at 7 (noting that AWI was providing additional information concerning funding even though it was not responsive to the discovery directed at AWI). In any event, there is no merit to any of defendants' arguments.

I. The Organizational Plaintiffs Have Produced All Relevant Non-Privileged Documents and Information Concerning Their Communications With Each Other and With Mr. Rider, and Their Communications With Other "Animal Advocates."

Defendants' Interrogatory Number 16 sought a description of all communications with current or former employees of Ringling Brothers (which includes Tom Rider), Interrogatory Number 19 sought a description of "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," and Document Request Number 22 sought "[a]ll 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 & Bailey Circus or (b) the treatment of elephants in captivity." The plaintiff organizations all provided extensive written responses and numerous documents responding to these requests. See Def. Ex. 9, ASPCA Response to Interrogatory No. 19 (noting that Ms. Weisberg has had conversations with individuals from six listed organizations, and also incorporating by reference numerous documents that reflect such communications between the

ASPCA and other animal advocates), AWI Response to Interrogatory No. 19 (specifically and generally listing conversations with other organizations and the subject matter of those conversations), Fund for Animals Response to Interrogatory No. 19 (specifically and generally listing conversations with other organizations and the subject matter of those conversations); Def. Ex. 37, API's Response to Interrogatory No. 19 (providing a six-page enumeration of conversations and other communications employees of API have had with other individuals and organizations concerning the circus); Def. Ex. 10 (collecting groups' responses to Interrogatory No. 16, which all provide substantive information responsive to the request); Def. Ex. 3, Groups' Document Request Responses at 12 and Addendum (listing hundreds of documents produced in response to this request).

However, the groups also reasonably objected to these discovery requests on the grounds that they were overly broad, unduly burdensome, oppressive, and called for irrelevant information. Indeed, because the groups interact on a regular basis with other animal advocacy organizations, it is impossible for their employees to recall every such communication concerning circuses, and unduly burdensome – indeed impossible – for them to reconstruct or recollect every detail of every such communication. See Fed. R. Civ. P. 26(b)(1) (court may limit discovery if, inter alia, "the discovery is unduly burdensome or expensive"). Accordingly, plaintiffs' general descriptions of the communications that they could recall is entirely adequate here, see Def. Ex. 9; Def. Ex. 37 at Interrogatory No. 19, and defendants attempt to force the plaintiffs to reconstruct additional details of all of these conversations must fail. See Def. Mem. at 25-27.[5]

[5] Defendants have completely mischaracterized plaintiffs' position during the meet and confer process as to why plaintiffs could not provide additional details concerning communications that had already been generally described in the plaintiffs' interrogatory responses. See Def. Mem. at

The groups also objected to providing information responsive to these discovery requests to the extent they called for documents or information that would reveal attorney-client communications or information protected by the work product privilege, in particular, communications between the groups, Mr. Rider, and their attorneys that concern litigation strategy or the evidence that will be relied on in this case. See Def. Ex. 9; Def. Ex. 3 at 12; Def. Ex. 37 at 26. Finally, the groups objected that providing some of the information and documents called for by these incredibly broad requests would infringe on the groups' First Amendment rights of association and expression, since it would implicate the groups discussions with other like-minded groups and individuals concerning media and legislative strategies concerning elephants in captivity. See Def. Ex. 27 at 14, 16; Def. Ex. 28 at 13-15; Def. Ex. 29 at 13, 15. The groups' responses, as well as each of these objections, were entirely appropriate.

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26 (stating, inaccurately, that plaintiffs' insisted that "a complete interrogatory response [was] not required because the same question could have been asked during a deposition"). What plaintiffs in fact said was that, in light of the fact that defendants waited two and a half years to raise any concerns about the adequacy of plaintiffs' interrogatory responses, they could not now expect the plaintiffs to recall and reconstruct additional details about those conversations and that, in any event, the defendants could have asked for additional details about those conversations during the depositions of the organizational plaintiffs' 30(b)(6) representatives. See Def. Ex. 4 (January 16, 2007 Letter from Katherine Meyer to George Gasper at 6) (stating that "it would be an undue burden for the ASPCA to ask Ms. Blaney whether she remembers additional details about conversations she had with [WAP representatives] more than four and a half years ago. . . . Defendants have waited far too long to expect the ASPCA to provide more details about those conversations. In addition, Ms. Weisberg was deposed by defendants on July 19, 2005 for approximately six and a half hours. If defendants had additional questions about any of those conversations, they should have asked them at that time."); see also More v. Snow, 2007 WL 949779, at *15 (D.D.C. March 30, 2007) (noting that "plaintiffs have still been able to obtain evidence of Ashton's decision-making process because they have been able to depose her"); Alexander v. FBI, 186 F.R.D. 188, 192 (D.D.C. 1999) (denying plaintiffs' request for additional discovery where plaintiffs already had an opportunity to explore the subject area at deposition, and failed to demonstrate relevance of additional information) Cf. H.M. Sendi v. Prudential-Bache Securities, 100 F.R.D. 21, 23 (D.D.C. 1983) ("where complete answers are contained in prior depositions, then a motion to compel answers to subsequent interrogatories seeking to elicit the same information should be denied as burdensome, vexatious, oppressive and totally without justification").

A. The Groups' Communications With Each Other, Mr. Rider, And Plaintiffs' Attorneys Concerning Litigation Strategy Are Privileged.

The groups are withholding information or documents related to communications they have had with their attorneys and each other concerning litigation strategy and legal advice – including strategic considerations such as evidence, counsel's thoughts concerning plaintiffs' legal claims and defendants' defenses, expert witnesses, and the like. See generally Def. Exs. 5, 46 (plaintiffs' privilege logs). These communications are classic attorney-client and work-product material. See Tax Analysts v. Internal Revenue Service, 117 F.3d 607, 618 (D.C. Cir. 1997) ("The attorney client privilege protects confidential communications from clients to their attorneys made for the purpose of securing legal advice or services. . . . The privilege also protects communications from attorneys to their clients if the communications rest on confidential information obtained from the client.") (internal citations and quotation marks omitted); Hickman v. Taylor, 329 U.S. 495, 510-11 (1947) (according protection to attorney's thoughts and mental impressions and litigation strategy).

The groups have also had communications among themselves and with Mr. Rider outside the presence of counsel from the law firm Meyer Glitzenstein & Crystal ("MGC") concerning litigation and strategy matters previously discussed with MGC counsel. Some such communications are protected by the attorney-client privilege because they involved in-house counsel from the groups who advise their respective clients on legal strategy, and they are also protected through the "common interest" doctrine, through which co-parties may discuss the advice, thoughts, and strategy of counsel without waiving the work product privilege. See United States v. American Telephone and Telegraph Co., 642 F.2d 1285, 1298-1300 (D.C. Cir. 1980) (discussing common interest doctrine); In re United Mine Workers of America Employee Benefit Plans Litig., 159 F.R.D. 307, 313 (D.D.C. 1994) ("The 'common interest rule' provides

that parties with shared interests in actual or potential litigation against a common adversary may share privileged information without waiving their right to assert the privilege") (citations omitted). Accordingly, defendants are incorrect that discussions among co-plaintiffs outside the presence of outside counsel are never privileged. See Def. Mem. at 20.

Defendants are correct, however, that "[n]ot all of [the groups'] communications are privileged," Def. Mem. at 18, nor have plaintiffs ever made any such claim.[6] Indeed, as noted above, the plaintiffs have produced numerous documents evidencing communications with one another that did not involve legal strategy or advice. See, e.g. Plaintiffs' Exhibit ("Plfs. Ex.") 1 (collecting only a few of the many documents plaintiffs have produced relating to communications between each other and other "animal advocates"). However, as discussed below, other communications that are not privileged have not been produced because they are simply not relevant to this case, would be overly burdensome to produce, and/or are protected by the groups' First Amendment right of association.

[6] Defendants' attempts to convince this Court that plaintiffs are concealing discoverable information through characteristically misleading assertions such as the statement that "communications relating to [the groups'] decision to fund Rider's participation in this lawsuit are not privileged" – as though it were fact that any such "decision" had ever been made – should be disregarded by this Court. Plaintiffs are not "fund[ing] Mr. Rider's participation in this lawsuit," and have already told defendants that there were no conversations relating to any such "decision." See Def. Ex. 4 at 6 (stating that "[t]here were no 'conversations relating to funding Rider's employment and participation in this lawsuit'").

B. The Groups' Communications With Each Other, Mr. Rider, And Other "Animal Advocates" Concerning Media and Legislative Strategies Are Irrelevant, Protected By The First Amendment, And Would Be Unduly Burdensome To Produce.

In addition to materials that are clearly protected under the attorney-client and work-product privileges, plaintiffs have not produced the details of all of their communications with each other and other "animal advocates" concerning their media and legislative strategies with respect to captive elephants, including their strategies for funding those efforts. This would include communications among the plaintiff organizations and Mr. Rider concerning Mr. Rider's media and public education campaign, communications with the Wildlife Advocacy Project concerning Mr. Rider's media and educational work, as well as communications with each other and other "animal advocates" concerning legislative proposals to ban the use of certain training tools such as the bull hook, efforts to obtain media coverage for the issue of captive elephants, and the like.

1. The Details of Plaintiffs' Discussions With Each Other And With Other "Animal Advocates" Concerning Their Media and Legislative Strategies Are Not Relevant.

None of this information is relevant to the merits of this litigation – i.e., whether Ringling Brothers is harming the elephants in its care – nor is there any legitimate argument that such information would provide any information for purposes of impeaching Mr. Rider or any other witness beyond the information defendants have already obtained concerning the groups' admitted funding of Mr. Rider's media and public education efforts.

Indeed, defendants do not offer any specific rationale as to why the details of the plaintiffs' media and legislative strategies are relevant to the issues in this case. Defendants only restate their conclusory mantra that "the evidence sought bears directly on Rider's standing, his motives, and credibility as a witness, and FEI's defense of unclean hands," without providing

any explanation as to why this is true. Def. Mem. at 22. However, as noted, defendants do not explain how requiring plaintiffs to describe all such communications will impeach Mr. Rider's "standing," "motives," or "credibility," when plaintiffs have already provided them with information demonstrating the amounts of funding they have provided to Mr. Rider and WAP for Mr. Rider's media and public education work. Thus, plaintiffs have always acknowledged that defendants have a right to challenge Mr. Rider's credibility based on the fact that he has received funding from the organizational plaintiffs and WAP for his advocacy work, and the groups and WAP have already provided defendants with documents demonstrating the amounts of such funding for each group. See Amend Opp. at 22-23 (Docket No. 132) at 24-25 (describing provision of documents and testimony to defendants by plaintiffs on this issue).

In addition, Mr. Rider himself has offered more than once over the last three years to provide defendants with a complete list of funds he has received for this purpose, as long as he could do so subject to a confidentiality agreement. See Plaintiffs' Opposition to FEI's Motion to Compel Discovery from Plaintiff Tom Rider (Docket No. 138) at 12-16. Therefore, defendants have all the information they need to make their credibility arguments. Allowing them to further probe every communication employees of the groups have had over the years with each other or other animal groups concerning the circus on the vague assertion that this may uncover some additional bit of relevant information is simply not justified, especially in light of the considerable burden that would be placed on the groups in reconstructing and retrieving all such communications over the past decade. See United States ex rel. Fisher v. Network Software Assocs., 227 F.R.D. 4, 9 (D.D.C. 2005) ("courts remain concerned about fishing expeditions, discovery abuse, and inordinate expenses involved in overbroad and far-ranging discovery

requests and have therefore limited discovery to the issues involved in the particular case") (citations and quotation marks omitted).

Notably, defendants are once again taking a drastically different position than they took when plaintiffs attempted to obtain information concerning defendants' public relations efforts in support of defendants' position that they do not mistreat their elephants, and that plaintiffs and others who say they do are lying to the public. Plaintiffs sought such information to show that defendants were engaged in "commercial activity" and hence were not entitled to rely on the "grandfather clause" with respect to any elephants they obtained prior to the enactment of the Endangered Species Act. Plaintiffs also sought this information for purposes of challenging defendants' credibility in this case – e.g., by showing (a) the huge amount of resources and effort defendants expend to convince the public that they do not mistreat the animals, and (b) how much money and energy they spend on such public relations efforts versus "conservation" of the species. See, e.g., Reply in Support of Plaintiffs' Motion to Compel Defendants' Compliance With Plaintiffs' Discovery Requests (Docket No. 33) at 19-21 (noting, among other things, that defendants public relations materials are relevant to "the extent to which defendants are willing to go to protect" the use of elephants in the circus)

In response, defendants argued that their public relations materials were "not relevant" because such materials were "far afield from the question of whether defendants' treatment of elephants violates the ESA." Memorandum in Opposition to Plaintiffs' Motion to Compel Defendants' Compliance With Plaintiffs' Discovery Requests (Docket No. 29) at 9 (emphasis added). Defendants further argued that "the acknowledged fact that defendants are conducting a for-profit business is all that plaintiffs need to make their point" concerning defendants'

credibility in this case, or the fact that defendants are engaged in a "commercial activity" within the meaning of the Endangered Species Act. Id. at 11.

Judge Facciola agreed with defendants, and ruled that defendants were, therefore, not required to produce any of their public relations material, because even though such information "may have some value regarding defendants' credibility," this was "of marginal utility and [was] too far out of proportion to the sensitivity of the financial information and the burden that would be placed on defendants in gathering and producing such documents." Order (Feb. 23, 2006) at 9. Instead, Judge Facciola ruled that "defendants have freely admitted that they are engaged in a for-profit business," and that this "should be sufficient for plaintiffs' asserted purposes." Id. (emphasis added).

Similarly, here, plaintiffs have freely admitted that they are funding Mr. Rider's media and educational outreach, and have provided underlying records and information demonstrating the amounts and sources of that funding, and this should also "be sufficient for [defendants'] purposes." Id. (emphasis added). Indeed, on the basis of fairness alone, since defendants have been permitted to withhold all of their public relations materials, plaintiffs should not be forced to disclose theirs.[7]

[7] In their Reply in Support of FEI's Motion to Compel Discovery from Plaintiff Tom Rider (Docket No. 144), defendants inaccurately contend that plaintiffs are "misapply[ying] Judge Facciola's ruling" because "Judge Facciola held that FEI's public relations files were not relevant to this case because the only reason that plaintiffs proffered for requesting them was to show that FEI's exhibition of Asian elephants constituted 'commercial activity' under the ESA." Reply in Support of FEI's Motion to Compel Discovery From Plaintiff Tom Rider at 16 (emphasis added). Judge Facciola "held" no such thing, and this statement is demonstrably false. Indeed, as discussed above, Judge Facciola addressed plaintiffs' contention that defendants' public relations materials also bear on defendants' witnesses' credibility. See Order (Feb. 23, 2006) at 7.

2. The Details Of The Plaintiffs' Discussions With Each Other And With Other Animal Advocates Concerning Their Media And Legislative Strategies Are Protected By The First Amendment.

Even if the groups' communications concerning their legislative and public relations strategies bore some "marginal" relevance to the claims or defenses in this case, see Judge Facciola's Order (Feb. 23, 2006) at 9, this is far outweighed by the burden involved in detailing all such communications, and, more importantly, by the grave First Amendment concerns that are implicated in compelling the groups to reveal this strategic information to their very opponents on this issue. See Management Info. Tech., Inc. v Alyeska Pipeline Serv. Co., 151 F.R.D. 471, 478 (D.D.C. 1993) ("A simple balance of the marginal benefit of the information sought against the gargantuan amount of discovery that has already taken place in this case would, as a preliminary matter, suggest that this motion [to compel] should be denied. . . . The additional consideration of fundamental First Amendment rights makes the decision compelling. The need for the information is clearly outweighed by the rights to be protected.") (emphasis added). Indeed, the groups' communications with each other, with Mr. Rider, and with other like-minded groups and individuals concerning their media and legislative strategies go to the heart of well-recognized First Amendment rights of speech and association.

Thus, as Judge Kessler of this Court stated in International Action Ctr. v. United States, 207 F.R.D. 1 (D.D.C. 2002), in ruling that defendants were not permitted to discover certain information concerning the activities of plaintiffs' political activities:

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

Id. at 3 (emphasis added). This is precisely the sort of information defendants are asking the Court to compel here – i.e., information concerning the plaintiffs' efforts to organize, raise money, associate with one another and other like-minded individuals, and to strategize about the best means of conveying to the public their message concerning the plight of captive elephants.

Other cases further support the notion that a Court should not compel the production of materials related to the strategic communications of an organization absent an extremely important reason to do so. For example, noting that "[m]embership lists are not the only information afforded First Amendment protection," Judge Urbina of this Court refused to compel the production of correspondence between and within certain organizations concerning particular environmental regulations that were being challenged in the lawsuit. See Wyoming v. USDA, 208 F.R.D. 449, 454 (D.D.C. 2002) (also emphasizing that "courts have held that the threat to First Amendment rights may be more severe in discovery than in other areas because a party may try to gain advantage by probing into areas an individual or group wants to keep confidential"). Similarly, in a case where the Federal Elections Commission was seeking the production of internal communications and communications among various organizations, the D.C. Circuit stated that compelling the release of such material "carries with it a real potential for chilling the free exercise of political speech and association guarded by the first amendment." FEC v. Machinists Non-Partisan Political League, 655 F.2d 380, 388 (D.C. Cir. 1981). See also Heartland Surgical Specialty Hospital, LLC v. Midwest Div., Inc., 2007 WL 950282, at *21-22 (D.Kan. March 26, 2007) (finding that "documents related to [a group's] lobbying strategy are protected by the First Amendment").

Likewise, here, contrary to defendants' contention, compelling the disclosure of plaintiffs' strategic communications would have a very real potential "for chilling the free

exercise of political speech and association guarded by the first amendment." Machinists, 655 F.2d at 388. Indeed, as plaintiffs have explained in detail in their Opposition to Defendants' Motion for Leave to Amend Answers To Assert Additional Defense and RICO Counterclaim ("Amend Opp."), the concern that plaintiffs' exercise of their First Amendment rights would be chilled in this context is not at all hypothetical, since defendants have a long history of harassing and interfering with the free speech activities of their adversaries. See Amend Opp. at 6-11 (Docket No. 132) (describing defendants' tactics of spying on, conducting surveillance on, and interfering with the legitimate activities of animal protection organizations and activists).[8]

Thus, should the Court force the groups to disclose information concerning their media and legislative strategies, it is highly likely that defendants will use that information to thwart those strategic efforts through harassment, intimidation, and attempts to discredit plaintiffs and their colleagues. Indeed, it is far more likely that defendants seek information concerning plaintiffs' media and legislative strategies so that defendants can attempt to derail those efforts, rather than because the information is at all relevant to this lawsuit. See, e.g., FEI's "Long Term Animal Plan Task Force," FEI 1480, Plfs. Ex. 1 to Amend Opp. at 12-13 (Docket No. 132) (detailing FEI's "aggressive" approach to media and public relations, including an operation to "expose and discredit animal activist entities," including videotaped surveillance, "placing stories in all media . . . with negative information about activists," and "[f]ormulating a plan to discredit IRS Section 501(c)(3) status of" animal protection organizations) (emphasis added); see

[8] Defendants are reaching if they contend that plaintiffs' media and legislative advocacy activities do not constitute "political" activities and are therefore not protected. See Reply in Support of Motion to Compel Discovery from Tom Rider at 17-18. The communications between plaintiffs and other like-minded organizations concerning their strategies for advocating to the public and law-makers for better treatment for captive elephants is precisely the sort of association "with other like-minded persons so as to effectively convey the[ir] message" that the cases address. International Action Ctr., 207 F.R.D. at 3.

also Amend Opp. at 9-11 (noting that FEI president Kenneth Feld has admitted in sworn testimony that FEI placed covert "operatives" in animal protection organizations who provide FEI with highly confidential and personal information about the groups and their officers); Testimony of Charles Smith, Plfs. Exh. 13 to Amend Opp. (stating FEI's "plan" to counter the effectiveness of animal protection efforts, including by attacking them with "lawsuits . . .[and] money irregularities," so they will "spend more of their resources in defending their actions").

Accordingly, contrary to defendants' contention, the fact that "plaintiffs' identities and association are already known by virtue of their participation in this lawsuit," Def. Mem. at 22-23, has no bearing on the analysis here, where it is the plaintiffs' First Amendment right to freely "organize, raise money, and associate with other like-minded persons so as to effectively convey the message of the protest" that will be chilled should the Court compel the disclosure of plaintiffs' strategic communications. International Action Ctr., 207 F.R.D. at 3; see Wyoming, 208 F.R.D. at 454 ("[m]embership lists are not the only information afforded First Amendment protection").[9]

To justify overriding these serious First Amendment concerns, defendants must demonstrate that the information sought goes to the "'heart of the matter,' that is," that it is "crucial to the party's case." Black Panther Party v. Smith, 661 F.2d 1243, 1268 (D.C. Cir. 1981) (internal citations omitted), vacated as moot, cited subsequently with favor, Steffan v. Cheney, 920 F.2d 74, 76 (D.C. Cir. 1990). Defendants cannot even begin to meet this burden. Indeed, as noted, the only arguments defendants can muster as to why these materials supposedly

[9] Although defendants have stated that they never "adopted or implemented" their Long Term Animal Plan, see Response in Opposition to Rider's Motion for a Protective Order With Respect to Certain Financial Information at 16 (Docket No. 146), their own exhibit demonstrates that the only reason it was never formally adopted was because it wasn't "necessary" because defendants "already have most of [these strategies] in place." See id. at Ex. 9 (emphasis added).

go to the "heart of the matter" is that they "bear[] directly on Rider's standing, his motives, and credibility as a witness, and FEI's defense of unclean hands." Def. Mem. at 22. However, privileged or otherwise protected material may of course always have some bearing on a party's claims or defenses, but such speculative assertions as to the relevance of the material is certainly not sufficient to overcome the high bar for discovery of protected First Amendment material. See also Australia/Eastern U.S.A. Shipping Conference v. United States, 537 F. Supp. 807, 810-812 (D.D.C. 1982) (noting the "overwhelming weight of authority [] to the effect that forced disclosure of first amendment activities creates a chilling effect which must be balanced against the interests in obtaining the information"); Heartland Surgical Specialty Hosp., LLC v. Midwest Div., Inc., 2007 WL 950282, at *22 (D.Kan. March 26, 2007) ("The parties should note the heightened standard of relevance applicable to documents protected by the First Amendment privilege.").

In addition, as noted above, any argument concerning relevance to Mr. Rider's "credibility" has already been addressed by providing defendants with information demonstrating the amount and source of funding Mr. Rider has received for these efforts, and Mr. Rider's willingness to provide additional information on this matter pursuant to a confidentiality agreement. Such information "should be sufficient for [defendants'] purposes." Order (Feb. 23, 2006) at 9. Accordingly, defendants' efforts to compel this classic First Amendment material should be denied.

Moreover, contrary to defendants' contention, plaintiffs have not "waived" their right to assert their First Amendment objection to producing their strategic communications. See Def. Mem. at 20-21. Indeed, there is a strong presumption against waiver of any constitutional rights. See, e.g., U.S. v. Wilson, 26 F.3d 142, 152 (D.C. Cir. 1994) (noting that "courts indulge

every reasonable presumption against waiver[] of fundamental constitutional rights") (internal citations and quotation marks omitted); Nixon v. Sirica, 487 F.2d 700, 759 (D.C. Cir. 1973) (noting that "[i]t is well established in the law that the presumption is against waiver of fundamental or constitutional rights"). Thus, before finding any such waiver with respect to First Amendment guarantees, the evidence must be "clear and compelling" that that it would be appropriate to do so. See Curtis Pub. Co. v. Butts, 388 U.S. 130, 145 (1967) (noting, with respect to the argument that a party had waived his First Amendment argument, that "the constitutional protection which Butts contends that Curtis has waived safeguards a freedom which is the 'matrix, the indispensable condition, of nearly every other form of freedom.' . . . Where the ultimate effect of sustaining a claim of waiver might be an imposition on that valued freedom, we are unwilling to find waiver in circumstances which fall short of being clear and compelling") (internal citations omitted); Hollins v. Methodist Healthcare, Inc., 474 F.3d 223, 226 (6th Cir. 2007) ("When First Amendment rights are at issue, 'the evidence must be clear and compelling that such rights were waived.'") (quoting Sambos Restaurants, Inc. v. City of Ann Arbor, 663 F.2d 686, 690 (6th Cir. 1981)). There is no such "clear and compelling" evidence here.

Indeed, Judge Facciola has previously ruled – in response to defendants' argument that they had not waived their right to assert privileges – that a party may wait to assert specific objections to producing documents if the party is already withholding the same documents on the grounds that they "are outside the scope of what could permissibly be requested," e.g., are not relevant within the meaning of Rule 26(b) or the request is overly broad. Order (Feb. 23, 2006) ("It should go without saying that there is no obligation to assert a privilege for documents that are not within the scope of a request or that are outside of the scope of what could permissibly be

requested."), citing United States v. Philip Morris, Inc., 347 F.3d 951, 954 (D.C. Cir. 2003). Here, plaintiffs' initially objected to defendants' requests for all communications with animal advocates based on, among other things, the overbreadth of the requests and the fact that they called for irrelevant materials. See Def. Ex. 9 (collecting groups' responses to Interrogatory 19); Def. Ex. 10 (collecting groups' responses to Interrogatory 10); Def. Ex. 3 at 12 (groups' document request responses). Therefore, based on Judge Facciola's ruling, plaintiffs would have been within their rights to wait until their broad objections were ruled on before asserting their First Amendment privilege. Here, plaintiffs have instead asserted their First Amendment privilege without awaiting a ruling on their broader objections. Therefore, there is certainly no "clear and convincing" evidence to find a waiver of First Amendment protections here. See Curtis Pub. Co., 388 U.S. at 145 (1967); see also Fed. R. Civ. P. 33(b)(4) (belated objection excused for "good cause shown").

II. The Plaintiffs' Privilege Log Is More Than Adequate.

For two and a half years defendants said nothing about the adequacy of plaintiffs' 11-page privilege log, despite the fact that their complaints about the log stem from the face of the document itself, see Def. Mem. at 31, and there is no plausible explanation for having waited this long, other than a change in counsel. But see, e.g., Ansam Assocs., Inc. v. Cola Petroleum, Ltd., 760 F.2d 442, 446 (2d Cir. 1985) (upholding denial of motion to amend complaint where substitute counsel discovered new information forming the basis for the proposed amendment); Zubulake v. UBS Warburg LLC, 231 F.R.D. 159 (S.D.N.Y. 2005) (where defendants "waited twenty-two months" to assert a new defense, fact that defendants' newly substituted counsel apparently made a strategic decision to assert the defense did not excuse the delay).

In any event, plaintiffs' privilege log is entirely sufficient. Plaintiffs identified and described numerous documents individually, including the date, author, subject matter, recipient if applicable, and privilege claimed. See Def. Ex. 5. For other privileged documents – namely classically privileged material such as attorneys' litigation memoranda, and correspondence between the lawyers and their clients concerning litigation strategy – plaintiffs identified these records by category. See id. All of the documents that plaintiffs listed by category are attorney memoranda or notes or communications with clients that were generated in the course of this litigation and relate to strategy, evidence, or legal advice. It is only these entries that defendants are apparently challenging. See Def. Mem. at 31-32. However, this approach was entirely reasonable given the nature and number of these materials.[10]

As an initial matter, it is shocking that defendants have the audacity to complain about plaintiffs' description of certain materials by category – such as e-mails between outside counsel and their clients, and attorney memoranda concerning this litigation – when, in their own privilege logs, defendants have not identified such otherwise responsive materials at all, let alone with the detail they insist plaintiffs must provide. See Plfs. Ex. 2 (Defendants' Privilege Logs) (containing no reference at all to attorney memoranda or communications between Covington & Burling or Fulbright & Jaworski attorneys and FEI concerning this lawsuit). Nor have

[10] None of these categorically described documents include discussions related to "[p]ayments made to Rider," "media strategy," "communications outside the presence of counsel related to FEI," or "communications in which plaintiffs' counsel was acting in their capacity as Directors of WAP." Def. Mem. at 33. As discussed above, plaintiffs have objected to the scope of the requests calling for all communications with each other and other "animal advocates" to the extent such requests call for communications concerning media strategy (aside from the actual amounts of that funding provided for Mr. Rider's media and educational work, which plaintiffs and the WAP have already provided and will continue to provide on a supplemental basis). Accordingly, those communications have not yet been logged. See Judge Facciola's Order (Feb. 23, 2006); United States v. Philip Morris, Inc., 347 F.3d 951, 954 (D.C. Cir. 2003). Further, as noted, many communications from WAP officers or between the groups that do not concern media or litigation strategy have been produced by plaintiffs. See, e.g., Plfs. Ex. 1.

defendants logged any communications between FEI in-house counsel and others at FEI concerning this lawsuit, although there are undoubtedly hundreds or thousands of such communications that have occurred over the course of this litigation. Defendants should not expect plaintiffs to individually log documents that defendants themselves have not even logged categorically.[11]

Defendants' double-standard notwithstanding, there is no basis for compelling plaintiffs to go through the burdensome task of itemizing each categorically described document. Courts frequently permit parties to provide a privilege log listing categories of privileged documents, rather than requiring the party to itemize and describe each document individually, particularly where it would be burdensome to do so, and the documents are of such an obviously privileged nature – e.g., documents created by attorneys in the course of the litigation at issue – that little additional benefit would derive from requiring such individualized descriptions, or where requiring such itemization could reveal the very information sought to be protected. See, e.g., Securities Exch. Comm'n v. Thrasher, 1996 WL 125661, at *1 (S.D.N.Y. March 20, 1996) (noting that "in appropriate circumstances, the court may permit the holder of withheld documents to provide summaries of the documents by category"); United States v. Magnesium Corp. of America, 2006 WL 1699608, at *5-6 (D. Utah June 14, 2006) (permitting categorical descriptions of documents where "compilation of a detailed privilege log identifying each

[11] Defendants' counsel has asserted in a letter to plaintiffs' counsel that "[I]n looking at FEI's February 23, 2006 supplemental privilege log, the documents . . . include those created by both inside and outside counsel . .. ." Def. Ex. 35, March 6, 2007 Letter from Lisa Joiner to Tanya Sanerib and Howard Crystal at 1. However, a review of that privilege log reveals that defendants have not logged any communications created by in-house and outside counsel related to this lawsuit, but, rather, only communications related to other matters, such as USDA investigations. See, e.g., Plfs. Ex. 2, February 23, 2006 privilege log at 3 (listing correspondence between FEI in-house counsel Julie Strauss and FEI outside counsel Jeanne Perron concerning USDA investigation). The same is true for the most recent supplemental privilege log defendants have produced. See id., May 11, 2007 privilege log.

document . . . would be an expensive and time-consuming undertaking," and "most of the documents at issue would be protected from disclosure by the work product privilege, the attorney-client privilege, or the joint defense privilege"); In re Imperial Corp. of America, 174 F.R.D. 475, 479 (S.D. Cal. 1997) (allowing categorical privilege log where "it would be foolish to believe that very many of those documents would be other than protected by the attorney-client privilege or work product"); United States v. Gericare Medical Supply, Inc., 2000 WL 33156442, at *3-4 (S.D. Ala Dec. 11, 2000) (permitting categorical approach to privilege log). The categories at issue here – i.e., notes and memoranda generated by counsel in the course of this litigation and e-mails between and among plaintiffs' counsel and their clients concerning matters related to the litigation – encompass hundreds if not thousands of records, spanning several years of litigation. It would take an inordinate amount of time to sort through and log each of these records individually, and little benefit would be derived from requiring plaintiffs to do so given the clearly privileged nature of the material. See Imperial Corp. of America, 174 F.R.D. at 479.

Moreover, any additional description of these materials would potentially reveal the very advice, thoughts, and mental impressions sought to be protected by withholding the materials. Indeed, for this same reason, Judge Facciola upheld defendants' argument that they should not be required even to identify certain documents they had in their possession concerning Mr. Rider, since this "would disclose their attorneys' mental processes . . . [and because] defendants have already provided plaintiffs with enough information to enable them to assess the applicability of the privilege." See Order (Feb. 23, 2006) at 6 For example, one of the entries that defendants are challenging states that plaintiffs are withholding "memos and hand-written notes . . [b]etween K, Meyer, K. Ockene [plaintiffs' outside counsel] and plaintiffs," and are described as

"memos and hand-written notes of meetings and phone conversations with clients regarding responses to discovery requests." Def. Mem. at 31 (emphasis added). If plaintiffs were forced to further describe each such memo or note in further detail, they would have to reveal information about the conversations or notes themselves. It is not clear what more needs to be said other than that these materials relate to discussions between attorneys and their clients about how to respond to discovery requests.

III. The Organizational Plaintiffs Have Not "Refused to Produce" Responsive Information Concerning Funding of Tom Rider's Educational and Media Campaign.

As plaintiffs have repeatedly stated, they have not withheld, and have never intended to withhold, any documents or information concerning the amounts of funding that the groups are providing either to Mr. Rider or to WAP for Mr. Rider's media and educational campaign concerning the plight of elephants in the circus, since plaintiffs have always agreed that such information may be relevant to Mr. Rider's credibility. Indeed, defendants now have a complete accounting of all of the funds the groups have provided for Mr. Rider's media work, both directly and by way of donations to WAP, and all of defendants' complaints about missing information on this issue relate to defendants' desire to force plaintiffs to provide the same information in multiple formats – i.e., in written, documentary, and oral form at depositions. However, wasting the Court's and the parties' time in an attempt to compel plaintiffs to provide information that defendants already have is vexatious and harassing to say the least, and the Court should not tolerate this conduct. See Sendi v. Prudential-Bache Securities, 100 F.R.D. 21, 23-24 (D.D.C. 1983) ("where complete answers are contained in prior depositions, then a motion to compel answers to subsequent interrogatories seeking to elicit the same information should be

denied as burdensome, vexatious, oppressive and totally without justification") (citations omitted).

To begin with, it bears emphasizing that none of defendants' interrogatory or document requests specifically asked for an accounting of funds that the groups have directly or indirectly donated to Mr. Rider's media and educational outreach campaign, even though defendants have known for some time that Mr. Rider is engaged in such efforts with the assistance of plaintiffs. See, e.g., Plfs. Ex. 3, FEI 38333-38340, at 38334 (noting that the ASPCA pays Mr. Rider's expenses); see also id., PL 08371 (2002 article in which FEI's John Kirtland states that Mr. Rider "works for an extremist hate organization and he gets paid to do it"). Instead, defendants merely quoted the standing allegations plaintiffs made in their Complaint, and requested that the groups (1) "identify each resource you have expended from 1997 to the present in 'advocating better treatment for animals in captivity, including animals used for entertainment purposes' as alleged in the complaint," Def. Ex. 2 at 6 (Interrogatory No. 21) (emphasis added); and (2) "identify each expenditure from 1997 to the present of 'financial and other resources' made while 'pursing alternative sources of information about defendants' actions and treatment of elephants' as alleged in the complaint," id. (Interrogatory No. 22) (emphasis added). The document requests quoted the same language and sought documents related to those particular expenditures. See Def. Ex. 1 at 9 (Document Request Nos. 19, 20).

Thus, the plaintiffs provided honest answers to these requests based on the expenditures of resources upon which they were relying in support of their standing allegations, as plaintiffs specifically explained to defendants during the meet and confer process, as follows:

> As of June 2004, when these Interrogatories were answered, none of the plaintiffs were relying on any funds provided to either Mr. Rider or the Wildlife Advocacy Project with respect to the standing allegations contained in paragraphs 4, 9, or 14 of the Complaint, which is quoted in Interrogatory No. 21. As of June 2004, the

> ASPCA is the only plaintiff organization that was relying on funds paid directly to the Wildlife Advocacy Project with respect to the standing allegations made in paragraphs 6, 11, or 16 of the Complaint, which is quoted in Interrogatory No. 22, and the ASPCA identified such funds and also provided documents concerning those funds.

Def. Ex. 4, January 16, 2007 Letter from Katherine Meyer to George Gasper, at 7 (emphasis added). This is the reason why the Fund for Animals and AWI did not provide information concerning their funding of Mr. Rider's media campaign in their original responses.[12]

When defendants nevertheless stated during the meet and confer process that they viewed these discovery requests as calling for information related to the amount of funding provided to Mr. Rider directly or by way of donations to the Wildlife Advocacy Project, plaintiffs agreed to provide this information in their supplemental discovery responses, see Def. Ex. 4 at 7 (noting that "the plaintiffs intend to provide additional information concerning such funding in their supplemental discovery"), which they subsequently did, and will continue to do. See Def. Ex. 28 at 16 (AWI supplemental response to Interrogatory No. 21); Def. Ex. 51 (AWI documents reflecting funding provided to WAP); see also Def. Ex. 37 at 33-34 (API's response to Interrogatories 21, 22).

However, because defendants had already obtained – through interrogatories, questioning at the plaintiffs' depositions, and from WAP – an accounting of all of the funding that the organizational plaintiffs had provided to Mr. Rider or to WAP prior to June 2004 when the original discovery responses were served, and because all of the plaintiffs did not originally view this information as responsive, the groups did not go back and amend their original responses to

[12] In addition, the plaintiffs objected to these interrogatories and document requests as being overly broad, unduly burdensome, and oppressive – objections the defendants have never challenged. See Def. Ex. 6, ASPCA's Interrogatory Responses at 29, 33; Def. Ex. 7, AWI's Interrogatory Responses at 28-29; Def. Ex. 8, Fund For Animals' Interrogatory Responses at 31, 37.

provide this same information. Indeed, the Rules do not require plaintiffs to amend their discovery responses with information already in the hands of the requesting party. Thus, Rule 26(e)(2) plainly states that "[a] party is under a duty seasonably to amend a prior response to an interrogatory, request for production, or request for admission if the party learns that the response is in some material respect incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing." Fed. R. Civ. P. 26(e)(2); see also U.S. ex rel. Miller v. Bill Harbert Intern. Const., 2007 WL 861111, at *1 (D.D.C. March 20, 2007) (noting that "a party's obligations under Rule 26(e)(2) to amend its responses to discovery requests is not absolute," and that "though a party is required to make relevant information available to its opponent, it is not expected to point out to its opponent information that the opponent can clearly glean on its own during discovery"); Sanders v. District of Columbia, 2002 WL 648965, *1 (D.D.C. April 15, 2002) (denying defendants' motion to strike a claim based on plaintiffs' failure to reveal the theory in their interrogatory responses, where defendants explored the theory during depositions, and quoting Rule 26(e) advisory committee notes); Sendi, 100 F.R.D. at 23-24 ("where complete answers are contained in prior depositions, then a motion to compel answers to subsequent interrogatories seeking to elicit the same information should be denied as burdensome, vexatious, oppressive and totally without justification") (emphasis added). Here, as noted, defendants already had in their possession "the additional or corrective information," Fed. R. Civ. P. 26(e)(2), and a review of the particular points raised in their Memorandum with respect to each plaintiffs' alleged shortcomings makes that absolutely clear.[13]

[13] In addition, the fact that none of this information goes to the merits of the lawsuit makes this exercise especially vexatious. There is no question that defendants already have – in spades – all of the information they need to make their credibility or "standing" arguments about Mr. Rider.

With respect to the ASPCA, defendants assert that "[a]lthough 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 those payments." Def. Mem. at 36; see also id. at 38 (complaining that the ASPCA has not produced documents of its "payments to Rider"). However, as defendants' own brief and exhibits demonstrate, defendants already know the amounts of funding the ASPCA provided to Mr. Rider in 2002 and 2003. Thus, Lisa Weisberg testified in excruciating detail at her deposition in July 2005 concerning the ASPCA's funding of Mr. Rider from 2001-2003, including a description of the ASPCA's direct funding provided to Mr. Rider to cover his media and travel expenses. See Plfs. Ex. 4, Deposition of Lisa Weisberg at 34-36; 43-92; 224-227. Mr. Rider also testified about the funding the ASPCA had provided to him during 2002-2003, see Def. Ex. 47, and, as defendants note, WAP has provided additional records showing that the ASPCA provided a laptop to Mr. Rider and covered his cell phone expenses for media work. See Def. Mem. at 36. Requiring the ASPCA to rehash the same information in a different format would accomplish nothing but additional wasted time and expense for plaintiffs; it would provide defendants with no additional material information.[14]

Defendants similarly assert that AWI is also "continu[ing] to conceal the amount of money that it has paid directly to Rider," Def. Mem. at 37; see also id. at 36 ("AWI did not disclose the money that it gave to Rider"), while simultaneously conceding that they already know the amounts based on AWI's IRS filings and the deposition of Cathy Liss, the president of

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To put plaintiffs and the Court through this burdensome process of responding to and resolving a motion to compel over duplicative information that will add nothing to the merits of this litigation is reprehensible.

[14] Moreover, given the detail with which Ms. Weisberg testified concerning the ASPCA's funding of Mr. Rider, defendants are plainly working with a novel definition of "conceal[ment]." See Def. Mem. at 37 (accusing ASPCA of "continuing to conceal" funds provided to Mr. Rider).

AWI. Indeed, Ms. Liss testified at her deposition as to the total amounts of funding provided directly to Mr. Rider from 2000 through the date of her deposition in May 2005. See Def. Ex. 49, Deposition of Cathy Liss at 138-141 (testifying that AWI had provided a "couple thousand dollars" directly to Mr. Rider for his public education campaign "over the course of five years"). AWI has also disclosed the amounts of money it has provided to WAP for this media and public education work, see Def. Ex. 28 at 16, and will continue to do so in accordance with the federal rules' supplementation requirement. In addition, WAP has also provided defendants with this information. See, e.g., Def. Ex. 43. However, aside from the amounts about which Ms. Liss testified, AWI has provided no additional funding directly to Mr. Rider and, accordingly, requiring plaintiffs to amend their discovery responses to provide precisely the same information that defendants already have would be a complete make-work exercise. See Sendi, 100 F.R.D. at 23-24; Fed. R. Civ. P. 26(e)(2). Defendants' only purpose here appears to be to harass and punish plaintiffs for bringing this lawsuit, and to continue to delay the resolution of this case.

Defendants also accuse AWI of "attempt[ing] 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" because "[d]ocuments obtained from WAP demonstrate that at least one payment was made by AWI that is not accounted for in AWI's incorporated documents." Def. Mem. at 37 (emphasis added). However, this statement alone says all that needs to be said about the vexatious nature of what is going on here: defendants concede that AWI produced documents accounting for all but one donation made to WAP. See id.; see also Def. Ex. 51 (numerous cancelled checks produced by AWI demonstrating donations made to WAP). The obvious oversight by AWI of this one check, the amount of which was already disclosed by WAP, cannot possibly demonstrate an intentional

effort to "conceal" donations made to WAP. Indeed, now that AWI has been made aware of this oversight, it has searched for and located this particular cancelled check, which is attached as Exhibit 5.[15]

Similarly, defendants also already know all of the amounts of funding that the Fund for Animals has provided directly to Mr. Rider, as again evidenced by their own brief and exhibits. Michael Markarian, the Fund for Animal's 30(b)(6) deposition witness, testified under oath that there was only "one occasion" on which the Fund provided funds directly to Mr. Rider, in the amount of "$1,000," and that the Fund has not given Mr. Rider "any other sort of compensation." See Def. Ex. 50, Deposition of Michael Markarian at 157-159. Therefore, defendants will gain no additional information by forcing the Fund to put this very same information in an interrogatory response or to search for documentation demonstrating the same information.[16]

Accordingly, the Court should deny defendants' motion to compel plaintiffs to produce this duplicative information.[17]

IV. Defendants Have Waited Too Long To Compel Information Related to The ASPCA's July 15, 2005 Deposition.

During the meet and confer process, defendants stated that they were dissatisfied with the position the ASPCA had taken during the July 2005 deposition of Lisa Weisberg, the ASPCA's

[15] This check will be sequentially labeled and produced to defendants shortly.

[16] Defendants include API in their motion to compel this information, see Def. Mem. at 37 ("It is unclear why the Organizational Plaintiffs and API . . . will not provide the total amount of money . . ."), but they provide absolutely no evidence that API has done anything but scrupulously produce information concerning all of the amounts they have provided to WAP.

[17] Plaintiffs have not produced additional documentation concerning their 2005 benefit for this case and for their media efforts beyond the invitation, see Def. Mem. at 35, because the additional documentation is correspondence between and within the groups that is not relevant to this litigation, and is protected by the groups' First Amendment rights of association. See supra at 13-21.

30(b)(6) deponent, when the ASPCA refused to respond to questions concerning the organization's internal budgetary matters. See Def. Ex. 24, November 22, 2006 Letter from George Gasper to Katherine Meyer at 7. Indeed, defendants waited a full year and a half before even mentioning that they might move to compel anything related to the budgetary matters that were mentioned during the deposition of Ms. Weisberg. This is an inexcusable delay under any reasonable analysis. See, e.g., In re Sulfuric Acid Antitrust Litig., 230 F.R.D. 527, 533 (N.D. Ill. 2005) (delay of eleven weeks in moving to compel testimony provided at deposition was undue delay). Nevertheless, when defendants asked plaintiffs during the meet and confer process to provide additional information concerning the issues for which the ASPCA allocated money that, prior to 2003, had been allocated for Mr. Rider's public education and media campaign, plaintiffs attempted to provide defendants with as much information as possible.

Thus, in plaintiffs meet and confer letter to defendants, plaintiffs counsel stated that:

> in response to your November 22 letter, we have asked Ms. Weisberg if she can provide any additional information concerning this matter, and she has responded 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.

See Def. Ex. 4, January 16, 2007 Letter from Katherine Meyer to George Gasper at 8.[18] There is nothing more that the ASPCA can say about the use of the funds that were previously budgeted

[18] Defendants state in a footnote that "producing the 2003 Annual Report is not a sufficient response," because the question posed at deposition was why the Rider payments stopped, not what else did ASPCA spend money on." Def. Mem. at 40 n. 18. This is incorrect, however, as demonstrated by the deposition transcript:

> Q: You said the reason why there was no funding for Mr. Rider past 2003 was because of budgetary concerns?
>
> A: Other issues that we wanted to pursue that we needed to provide for monetarily.
> . . .
> Q: And what were those other issues that you wanted to provide more money for?

for Mr. Rider's public education and media campaign, and, accordingly, no basis for granting defendants' motion to compel.[19]

V. The ASPCA Has Produced All Relevant And Responsive Information Concerning Its Inspections Of Ringling Bros. Circus.

Having searched mightily for something to complain about that actually goes to the merits of this litigation, rather than defendants' concocted "bribery" theory, defendants assert that the ASPCA has failed to produce some "notes" related to one inspection of the Ringling Bros. circus that the ASPCA apparently conducted in 1998, see Def. Mem. at 41 (noting that the ASPCA has produced all inspection records but has not "produced the notes that were discussed during the deposition") -- an issue that was never even raised by defendants during the meet and confer process. However, the ASPCA has given defendants all of the inspection documents it has in its possession. See Def. Ex. 4, January 16, 2007 Letter from Katherine Meyer to George Gasper, at 8. Moreover, a review of the actual deposition testimony about which defendants complain makes clear that these alleged "notes" are not even related to the ASPCA's inspection, but, rather, are related to an inspection conducted by an agent of "the Suffolk County SPCA" – a

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> A: I believe that's privileged and confidential based on ASPCA activities and strategic planning.

Def. Ex. 15 at 140-141 (emphasis added). Accordingly, even though there was nothing improper with the ASPCA's objection, see, e.g., Judge Facciola's Order (February 23, 2006) at 9 (allowing defendants to withhold financial information due to its "sensitive" nature), the ASPCA has now nevertheless answered the question posed at the deposition. See Def. Ex. 4, January 16, 2007 Letter from Katherine Meyer to George Gasper at 8.

[19] Defendants also make a vague argument concerning the ASPCA's objections to Interrogatory No. 21 and Document Request Nos. 19 and 20. See Def. Mem. at 40. However, as noted above, the ASPCA has already provided the information called for by these requests, and will continue to supplement its responses to these requests on an ongoing basis. See supra at 27-31. The ASPCA has not specifically withheld any information from these responses based on concerns related to confidential proprietary financial information.

completely separate entity from the ASPCA. Def. Ex. 15, Deposition of Lisa Weisberg at 116 (noting that it was not clear based on the ASPCA's inspection record whether the ASPCA found any violations, because the case was "closed based on special agent Gary Rogers' inspection, and he's a special agent with the Suffolk County SPCA") (emphasis added).[20]

Defendants also make a convoluted argument concerning the ASPCA's supplementation of its Interrogatory response regarding the ASPCA's inspections of the Ringling Bros. Circus. See Def. Mem. at 42. In its original response to Interrogatory No. 12, which requested a description of the inspections, the ASPCA referred to documents it was producing which describe such inspections. See Def. Ex. 6 at 22; see also Fed. R. Civ. P. 33(d) (allowing production of business records in response to an interrogatory "[w]here the answer to [the] interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served"). Later, when it became clear that there were no documents related to an inspection that likely took place in 1997, the ASPCA agreed to amend its Interrogatory response to account for that inspection. The ASPCA has done so, and has also provided further information to supplement its response to Interrogatory No. 12, as defendants also requested during the meet and confer process. See Def. Ex. 4, January 16, 2007 Letter from Katherine Meyer to George Gasper, at 8; Def. Ex. 27, ASPCA's Supplemental Interrogatory Responses at 8-9.

Now defendants complain that they do not like the response the ASPCA has provided, which detailed the superficial nature of the inspections and the fact that their specifics were "all

[20] Defendants fail to point out in their Memorandum that the assumption that "notes" of the Suffolk County SPCA's inspection exist was made by defendants' counsel at the deposition, and Ms. Weisberg herself never referred to the existence of any such notes. See Def. Ex. 15, Deposition of Lisa Weisberg at 117.

arranged in conjunction with Ringling Brothers, and Ringling Brothers employees accompanied ASPCA inspectors throughout the inspections," Def. Ex. 27 at 8-9, and on that basis alone, defendants assert that the ASPCA has somehow violated its discovery obligations here. However, the fact remains that the ASPCA has now provided defendants with all of the information it has in its possession concerning this matter. Accordingly, defendants desire to control the content of plaintiffs' responses notwithstanding, there is nothing left to compel on this issue.

VI. Plaintiffs Have Not Inappropriately Incorporated Documents By Reference In Their Interrogatory Responses.

With respect to two Interrogatories – i.e., Interrogatory 13, which asked the plaintiffs to "[d]escribe each incident in which [plaintiffs] contend that one of defendants' elephants has been 'chained' for 'long periods of time, up to 20 hours a day, and longer when the elephants are traveling,'" Def. Ex. 2 at 5, and Interrogatory 15, which asked plaintiffs to "[d]escribe each incident in which you contend that one of defendants' elephants has exhibited 'stereotypic behavior,'" id. – plaintiffs incorporated by reference documents that they produced "instead of providing responsive information" requested by those interrogatories. Def. Mem. at 43. Again, defendants waited two and a half years to raise this concern – a delay that is inexcusable, particularly given that, as with the privilege log, defendants' complaints stem from the interrogatory responses on their face.

Nevertheless, during the meet and confer process plaintiffs again attempted to address defendants' concerns by providing, to the best of their ability, extensive lists of specific documents incorporated by reference in the supplemental interrogatory responses. See Def. Exs.

27, 28, 29 at Interrogatories 13, 15 (organizational plaintiffs' supplemental interrogatory responses); Def. Ex. 37 at Interrogatories 13, 15 (API interrogatory responses).[21]

Moreover, defendants completely misrepresent the facts when they say that plaintiffs incorporated documents "instead of providing responsive information" in response to these Interrogatories. Def. Mem. at 43. On the contrary, a review of the actual responses demonstrates that plaintiffs have provided detailed narrative responses to both Interrogatories 13 and 15. See Def. Exs. 6, 7, 8 at Interrogatories 13, 15 (organizational plaintiffs' original interrogatory responses); Def. Exs. 27, 28, 29 at Interrogatories 13, 15 (organizational plaintiffs' supplemental interrogatory responses); Def. Ex. 37 at Interrogatories 13, 15 (API interrogatory responses). The groups simply referenced documents in addition to those narratives as containing further information responsive to these questions. See id. And, as noted, in their supplemental responses the groups provided detailed lists of specific documents that contained additional responsive information. See Def. Exs. 27, 28, 29 at Interrogatories 13, 15; see also Def. Ex. 37 at Interrogatories 13, 15 (API interrogatory responses). [22]

In addition, as plaintiffs' counsel explained to defendants' counsel during the meet and confer process, plaintiffs specifically objected to both Interrogatories 13 and 15 on the grounds

[21] Defendants have again included API in their Motion, see Def. Mem. at 43 (argument heading), but have provided no information as to why they believe API has violated its discovery obligations. Indeed, as noted, API has provided extensive lists of documents in its responses to Interrogatories 13 and 15.

[22] Once again, defendants exhibit a "do as I say, not as I do" approach to discovery, since defendants themselves did not specifically identify documents upon which they relied in answering certain Interrogatories that plaintiffs posed. See, e.g., Exhibit 4 to Plaintiffs' Opposition to Defendants' Motion to Compel Discovery From Plaintiff Tom Rider (Docket No. 138), Defendants' Response to Interrogatory No. 6 (stating that "defendants will provide records in their custody . . .that concern ankuses," without identifying Bates numbers) (emphasis added); see also id. at Responses to Interrogatory Nos. 8, 9, 11, 18.

that they were "overly broad," "unduly burdensome," and "oppressive." See Def Ex. 34, February 14, 2007 Letter from Tanya Sanerib to Lisa Joiner, at 3; see also Def. Exs. 6, 7, 8 at Interrogatories 13, 15 (organizational plaintiffs' original interrogatory responses). Accordingly, there was nothing inappropriate about plaintiffs' response to these Interrogatories. See Def. Ex. 34 at 3 (noting that defendants were "asking plaintiffs to provide defendants with the very information they have objected to producing"). Defendants never challenged these legitimate objections. Accordingly, the Court should deny defendants' motion to compel additional responses to Interrogatory Numbers 13 and 15.[23]

CONCLUSION

For the foregoing reasons, defendants' motion to compel discovery from the organizational plaintiffs should be denied.

Respectfully submitted,

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[23] For the same reason, the statement in plaintiffs' Interrogatory Responses that they "include, but are not limited to" the listed documents was proper, since that clause was specifically included because of plaintiffs' objection that the Interrogatories were overly broad, unduly burdensome, and oppressive. See Def. Exh. 34, February 14, 2007 Letter from Tanya Sanerib to Lisa Joiner, at 3.