UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

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

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INTRODUCTION

FEI's Motion set forth in detail how the organizational plaintiffs, inter alia, omitted relevant, material information from interrogatory responses and failed to disclose the existence of – much less produce – responsive documents. Plaintiffs' Opposition does not refute the basic facts set forth in FEI's Motion. Plaintiffs argue, not that the facts or the law upon which FEI's Motion is based are incorrect, but that FEI waited "too long" to ask for complete and accurate responses and that the deficiencies at issue relate only to FEI's defenses instead of plaintiffs' claims. Plaintiffs, however, cite no authority for their novel arguments, nor is FEI aware of any that would permit them to benefit from their misconduct in such a manner.

Similarly, instead of disputing the specific facts presented in FEI's Motion, plaintiffs respond with non-specific generalizations that they have been "extremely upfront" about the underlying issues and that FEI is engaging in some open-ended fishing expedition. This is no expedition. The issues presented in FEI's Motion are limited and straight-forward. For example, if plaintiffs truly wanted to be "extremely upfront" about their payments to Rider, they could easily provide sworn interrogatory responses identifying in just a few words each such payment. Rather, plaintiffs allege in conclusory fashion that they have been "extremely upfront" about such payments because they finally have admitted to making certain of them only, in fact, after FEI discovered them on its own. Hiding the ball for three years and then coming clean with the information only after it is provided by a third party is not being "extremely upfront." Moreover, there is no basis for the suggestion that FEI has independently obtained from other sources all of the information it is entitled to receive from plaintiffs. FEI should not have to jump through such hoops with third parties to obtain the information that plaintiffs themselves are obligated to, and should, be producing in accordance with the law. Based on plaintiffs' prior conduct in

discovery, there is no reason to believe that FEI will ever receive the full and truthful responses to which it is entitled unless this Court orders plaintiffs to produce them.

More than three years ago, plaintiffs submitted sworn discovery responses that blatantly omitted topics (such as their payments to Rider) that they did not want FEI to know about. Only after FEI learned about these topics did plaintiffs begin to defend their discovery misconduct with a slew of post hoc frivolous objections and privilege assertions. However, when plaintiffs' inconsistent arguments are viewed in their entirety, the circularity and disingenuousness of them are evident. Plaintiffs, for example, argue that communications with HSUS, which merged with FFA in 2005, are attorney-client privileged. At the same time, plaintiffs assert that HSUS's documents and information need not be produced as part of FFA's discovery responses. Which is it? If HSUS is an identity closely related enough to be covered by FFA's privilege then it should be producing documents in this case as well.

Plaintiffs also claim that all of their communications relating to this lawsuit are either (a) covered by the attorney-client privilege (even when counsel was not present) or (b) covered by an elusive "media" privilege that they did not even bother to assert for more than two years. In some instances, astoundingly, plaintiffs contend that certain communications are simultaneously covered by an attorney-client privilege and a "media" privilege. Notwithstanding the novel privilege arguments, plaintiffs then refuse to actually provide a privilege log for most of the allegedly privileged material. At every turn, when FEI has identified a deficiency in plaintiffs' production, they have come up with a new tactic to avoid production. Such behavior can hardly be considered "extremely upfront." Because plaintiffs continue to ignore their straightforward discovery obligations, they must be compelled to do what they should have done more than three

years ago: to produce complete and accurate responses to each of FEI's discovery requests, not just the portions that they believe support their claims.[1]

ARGUMENT

Plaintiffs complain, "as an initial matter," that FEI waited too long to raise its concerns regarding their numerous discovery deficiencies. See Opp. at 7. Any delay, however, was the result of plaintiffs' willful discovery violations designed to hide from FEI the nature and extent of the organizations' payments to Rider. Conspicuously absent, moreover, is any reference by the organizations to the lone case cited by Rider in support of this same theory. See Pls.' Opp. to FEI's Motion to Compel Discovery From Tom Rider (4/19/07) (Docket No. 138) ("Rider Opp.") at 26 (citing Pearce v. E.F. Hutton Group, Inc., 117 F.R.D. 477, 478 (D.D.C. 1986)). Now that FEI has explained to the Court why it was disingenuous for Rider to rely upon that case, the organizational plaintiffs are at a loss to provide any precedent supporting their complaints of any delay. See FEI's Reply in Support of Motion to Compel Discovery From Tom Rider and For Sanctions, Including Dismissal (5/7/07) (Docket No. 144) ("Reply to Rider") at 21.

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

Having previously alleged that they have been "extremely forthcoming" regarding payments to Rider (notwithstanding their inaccurate sworn discovery responses omitting that

[1] The term "plaintiffs" as used herein refers to the organizations that filed an Opposition to FEI's Motion. Where applicable, the conduct of individual organizations is addressed separately, as it was in FEI's Motion. That is precisely why plaintiffs' repeated complaints that API was included within FEI's Motion even though it is not accused of each discovery violation that the other organizations have committed make no sense. See, e.g., Opp. at 33 n.16. API, for example, has asserted the same frivolous attorney-client and "media" privileges as the other organizations. Plaintiffs' insistence that FEI did not initiate a meet and confer regarding API's responses is similarly nonsensical. The only reason API provided discovery responses at all was because FEI initiated a meet and confer process with plaintiffs. Requiring FEI to repeat the entire process and to file additional identical briefs would only waste the Court's time given that API's discovery violations are not unique; they are the same as those of the other organizations. Counsel clearly was on notice of the issues FEI had with the discovery responses served by the organizations, and their entire argument now is simply a delay tactic to avoid an inevitable discovery ruling.

very information, their false testimony under oath regarding that very information, and their complete refusal to produce documents containing that very information), plaintiffs have added another falsity to their repertoire of misleading allegations in defense of their discovery violations. Plaintiffs allege each organization "provided extensive written responses and numerous documents" regarding their communications with other animal advocates, while simultaneously admitting that they did not describe each communication as required. See Opp. at 8-9 (explaining that, in response to interrogatory commanding a "description" of such communications, ASPCA "not[ed]" that they occurred and AWI and FFA "specifically and generally list[ed]" them). Plaintiffs, moreover, do not contest (and conspicuously omit from their Opposition) at least seven documented inadequacies in their response to the discovery questions related to this topic.[2]

A. The Organizational Plaintiffs and API May Not Claim Attorney-Client Privilege For Communications That Did Not Involve Legal Advice or That Occurred Outside the Presence of Counsel

In their Opposition, plaintiffs continue their typical tactic of claiming a privilege without facts to support the claim. Plaintiffs' empty assertions of attorney-client privilege, however, simply are not credible. Instead of addressing the cases cited by FEI, Plaintiffs' Opposition is a moving target, continuously altering the basis for the privilege claim. This is particularly true with respect to their allegedly privileged communications among each other outside the presence of counsel. Compare Ex. 7, AWI First Response, Inter. No. 19 (alleging that they are privileged

[2] Nowhere does ASPCA refute that (1) its original and supplemental interrogatory responses omitted any reference to communications with WAP or (2) its original interrogatory responses omitted any reference to non-privileged communications between Lisa Weisberg and Tom Rider despite later acknowledging under oath that such communications occurred on a "weekly" basis. Similarly, nowhere does AWI refute that (1) its original interrogatory responses omitted any reference to communications with WAP, (2) its supplemental interrogatory responses purported to disclose all, but ultimately omitted certain, communications with WAP, or (3) its sworn original interrogatory responses omitted any reference to non-privileged communications with Rider despite later acknowledging under oath that such communications occurred. Finally, nowhere does FFA refute that (1) it refused to supplement its response to Interrogatory No. 19 with respect to anyone other than co-plaintiffs, or (2) its original and supplemental interrogatory responses omitted any reference to communications with WAP.

because they all "concern[ed] the litigation"); and Ex. 28, AWI Supp. Response, Inter. No. 19 (alleging, after FEI insisted that "concerning the litigation" is not the proper standard, that they all related to "legal strategies in this case, the evidence that plaintiffs may rely on, and the status of the litigation"); and Rider Opp. at 18 (alleging, after FEI refuted plaintiffs' earlier claims with numerous case citations in its Motion to Compel Rider, that they all are privileged under the common interest doctrine); with Opp. at 11 (alleging, after FEI explained that the common interest doctrine – even if applicable to attorney-client communications in the D.C. Circuit – only shields certain portions of certain communications outside the presence of counsel, that they all were nothing more than recitations of the "advice, thoughts, and strategy of counsel"). Over the course of two years, plaintiffs' description of their "privileged" communications outside the presence of counsel has evolved from "concerning the litigation" to the recitation of the "advice, thoughts, and strategy of counsel." Conveniently, plaintiffs' revisions have always followed shortly after FEI challenged their previous claim of privilege. Plaintiffs' willingness to consistently rewrite the basis upon which they claim privilege and/or re-describe the communications for which they are claiming privilege does not make the communications privileged. Indeed, it suggests just the opposite.

Similarly, there is no basis for crediting plaintiffs' claim that all of the allegedly privileged communications relate to "legal advice." Contrary to plaintiffs' insistence, their communications with attorneys from Meyer Glitzenstein & Crystal are not "classic attorney-client and work-product material." Opp. at 11. Even plaintiffs do not dispute that those very same attorneys have provided them with non-legal advice regarding a "media" campaign against FEI premised upon the same allegations of abuse upon which they base this lawsuit. Since plaintiffs admit that their lawyers have provided advice concerning this litigation or the merits

thereof that cannot be privileged, their privilege claims over all communications with counsel concerning the litigation are demonstrably overbroad.

B. Plaintiffs Must Produce Their Communications Relating to Legislative and Media Strategies: They Are Neither Irrelevant Nor Privileged

1. Plaintiffs' Communications Relating to Legislative and Media Strategies Are Relevant

Plaintiffs allege that the only reason documents and information relating to communications concerning their legislative and "media" campaigns against FEI are relevant is that such material might be used to impeach Rider's credibility. That, however, is not the only reason such material is relevant. Plaintiffs' "campaigns" purport to be premised upon the same allegations of abuse as their lawsuit. Any prior statements by plaintiffs about these incidents are relevant because they would identify for FEI each such alleged incident and how, if at all, plaintiffs believe each such incident constitutes alleged abuse. They are all potential admissions against interest. These communications, moreover, are relevant for FEI to determine whether plaintiffs and/or the alleged eyewitnesses they associate with have changed their story with respect to alleged incidents of abuse. FEI and the Court are entitled to know whether plaintiffs and their witnesses are telling the Court one story after having told the media another one. These communications also likely contain statements regarding plaintiffs' desire to put FEI and other circus operators out of business by associating with individuals who purport to have witnessed alleged incidents of abuse. Plaintiffs' conduct in procuring alleged witnesses for their "media" campaign is indistinguishable from their conduct in procuring the same alleged witnesses for the same alleged incidents that they have put at issue in this lawsuit. For a plethora of reasons, these communications are relevant to this case.

It is disingenuous for plaintiffs to argue that these communications are only relevant for the purpose of evaluating Rider's credibility. See Opp. at 21. Nonetheless, even if that were

true, plaintiffs cannot escape their obligations by insisting that FEI already knows the amount of money Rider has been paid and, therefore, does not need to review the other substantive communications to evaluate his credibility. Plaintiffs' allegation is demonstrably false and wholly irrelevant. See infra pp. 18-21. Plaintiffs have never provided a "complete accounting" of the payments to Rider and, even if they did, that does not allow them to boldly and unilaterally refuse to provide a complete response to FEI's discovery requests.

Plaintiffs, unable to defend their relevancy objection on its merits, also complain that it would not be fair for them to disclose these communications since Judge Facciola ruled that FEI need not produce its "public relations" and "advertising" documents. Opp. at 15-16. As FEI already has explained, however, FEI's request for documents concerning plaintiffs' "media" campaign against FEI is not analogous to plaintiffs' request for documents concerning FEI's advertisements aimed, not at attacking plaintiffs, but at selling tickets. Reply to Rider at 16 (discussing Judge Facciola's decision that the documents sought by plaintiffs to show that FEI's exhibition of elephants constitutes "commercial activity" under the ESA were not relevant because, by definition, the exhibition of an animal cannot constitute "commercial activity" under the ESA).[3] Indeed, perhaps because plaintiffs recognize their objection is not analogous to that which Judge Facciola already ruled upon, they implore the Court not order them to produce documents "on the basis of fairness alone." Opp. at 16. Plaintiffs, however, cite no authority in

[3] Plaintiffs wrongfully accuse FEI of inaccurately describing Judge Facciola's prior ruling to mean that the only basis upon which plaintiffs sought FEI's "public relations" and "advertising" files was to establish the presence of "commercial activity" under the ESA. Compare Opp. at 16 n.7 with ASPCA v. Ringling Bros., 233 F.R.D. 209, 213-14 (D.D.C. 2006). Judge Facciola explicitly stated that plaintiffs sought (a) profitability, public relations, and advertising information to show FEI was engaged in "commercial activity" and (b) profitability information to attack the credibility of FEI's witnesses. Judge Facciola, moreover, went on to analyze why FEI's "profitability, public relations, and advertising" documents were not relevant to plaintiffs' "commercial activity" allegation and then to separately analyze why FEI's "profitability" documents were not sufficiently relevant to plaintiffs' desire to impeach the credibility of FEI's witnesses. The only basis that Judge Facciola considered in determining the relevancy of FEI's "public relations" and "advertising" documents was plaintiffs' allegation that they would establish FEI's operation of a "commercial activity."

support of their novel theory that one party need not produce a certain type of its documents, no matter how relevant they may be, because the other party's documents of that same nature are irrelevant and need not be produced. Plaintiffs' communications with other animal advocates, including those relating to alleged "media" strategy, are highly relevant and must be produced.

2. Plaintiffs' Communications Relating to Legislative and Media Strategies Are Not Protected by the First Amendment[4]

a. Plaintiffs Have Waived Any First Amendment Objection

Plaintiffs have waived any alleged privilege for their legislative and "media" strategies. See Motion at 21 (citing a prior Order in this case together with other precedent from this District holding that a party's failure to properly object or adequately assert privilege in response to discovery requests constitutes waiver). Plaintiffs do not dispute that they waited more than two and a half years to assert this alleged privilege. Nor do they dispute that the alleged privilege was conspicuously asserted only after FEI pointed out the numerous deficiencies that it had discerned in plaintiffs' discovery responses. Plaintiffs, moreover, do not refute the cases cited by FEI for the proposition that failure to assert an objection or a privilege at the time of providing discovery responses constitutes waiver. Indeed, plaintiffs made this same argument successfully in this very case against FEI, see Order (9/26/05) (Docket No. 50), yet they provide no explanation why this same result should not apply to them.

Instead, plaintiffs suggest that they cannot waive a claim with an alleged "constitutional" interest. Plaintiffs, however, cite nothing to support this self-serving theory. Two of the four

[4] Plaintiffs begin their First Amendment discussion with a citation to Management Info. Tech., Inc. v. Alyeska Pipeline Serv. Co., 151 F.R.D. 471, 478 (D.D.C. 1993), together with a lengthy quote purportedly from that decision regarding "fundamental First Amendment rights." Opp. at 17. Yet, no such quote actually appears in that decision. (To be clear, no such quote appears in either Management Info. Tech. decision, one of which was published at 151 F.R.D. 471 and one of which was published at 151 F.R.D. 478.) Even if Management Info. Tech. had been accurately cited, it is wholly inapposite to plaintiffs' argument. At issue there was a motion to compel a reporter's disclosure of confidential sources. That case specifically analyzed the reporter's privilege, not an alleged freedom of association. Id. at 477 (stating that "the reporter's privilege is to be entitled to great weight" and making no reference to alleged freedom of association).

decisions cited by plaintiffs have nothing do with an individual's constitutional rights; rather, they addressed the constitutional authority of the executive branch and the separation of Church and State. Opp. at 22 (citing Nixon v. Sirica, 487 F.2d 700 (D.C. Cir. 1973); Hollins v. Methodist Healthcare, Inc., 474 F.3d 223 (6th Cir. 2007)). In United States v. Wilson, 26 F.3d 142 (D.C. Cir. 1994), moreover, the court actually held that the defendant had waived his right to a fair trial by not timely objecting to a transfer of venue. That supports, not undermines, FEI's argument that plaintiffs waived their objection. Finally, in Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967), the Court held that no "known" waiver occurred because the privilege that was allegedly waived was not even recognized by any court in America until after the time that the party seeking production alleged that it should have been asserted. Unlike the party in that case, however, even plaintiffs do not contend that there was a plausible justification for their failure to timely assert the alleged privilege. Indeed, the only thing that has changed since June 2004 when their responses were due is plaintiffs' need for a post hoc explanation of willful discovery violations. There simply is no basis in the record to believe that plaintiffs' waiver was anything but voluntary and known.

Even if the cases cited by plaintiffs were relevant, they, at most, show that a waiver must be proven by clear and compelling evidence. That is clearly the case here. Plaintiffs have briefed and argued First Amendment issues throughout this case, beginning in 2003, see Pls.' Opp. to FEI's Motion for Protective Order (10/22/03) (Docket No. 10), so they obviously were aware of these issues when they responded to the written discovery in 2004. But they did not raise the claim then or in the parties' meet and confer letters. It was only when each organization submitted supplemental interrogatory responses under oath in January 2007 that they first asserted this privilege to justify continuing to omit any alleged "media" discussions. Plaintiffs

did not assert this alleged privilege until FEI discovered that they were withholding, without any justification, discovery material relating to communications that they simply hoped FEI would never find out about. Plaintiffs waived any alleged First Amendment objection.

b. Plaintiffs' First Amendment Objection Has No Merit

In reply to Tom Rider's defense of his First Amendment objections, FEI previously explained that:

> FEI is aware of no case – and Rider has not cited any – holding that the First Amendment shields documents and information concerning a coordinated effort to use the media against another private party. The cases cited by Rider all address the First Amendment right to associate for purposes of core political activities and/or to petition the government. This case involves neither.

Reply to Rider at 16-17. FEI then discussed in detail the cases cited by Rider and distinguished them from this case. FEI, moreover, demonstrated how Rider's claim of First Amendment privilege was no different than that which has already been rejected by this Court in United States v. Duke Energy Corp., 232 F.R.D. 1 (D.D.C. 2005):

> He is associating with other private parties to conduct activity for the purpose of damaging the business and reputation of another private party. Indeed, Rider's argument is weaker than that previously presented because he is not being compelled to produce documents and information to the government, a non-party.

Reply to Rider at 17-18.

Plaintiffs attempt to sweep away FEI's detailed argument, which was supported by numerous decisions within the D.C. Circuit, in a mere footnote alleging that FEI is "reaching" to make this argument. Opp. at 19 n.8. Nowhere, however, do plaintiffs cite any cases that undermine FEI's argument. Plaintiffs cite no cases holding that the "the First Amendment shields documents and information concerning a coordinated effort to use the media against another private party." Reply to Rider at 16-17 (emphasis added). The only case they cite in which a private party, not the government, sought to compel documents over First Amendment

objections is an unpublished decision from Kansas in which a private party sought to compel the production of documents related to an undisputed lobbying campaign.[5] Even if the Court were to adopt the analysis applied in that decision from Kansas, plaintiffs have not cited any cases supporting their alleged First Amendment right to craft and implement an alleged "media" strategy. This omission is telling. This is now the third time that plaintiffs or their counsel's alter ego have briefed their alleged "media" privilege and they have yet to cite any cases that recognize such a privilege. See Opp. at 17-23; Rider Opp. at 19-24; WAP's Opposition to FEI's Motion to Compel Documents Subpoenaed From WAP (9/21/06) (Docket No. 93) at 21-26.

Plaintiffs have never cited any authority supporting their alleged First Amendment right to craft and implement a "media" strategy; the documents and information withheld thus far on that basis must be produced. With respect to plaintiffs' alleged "lobbying" strategy, even if the Court adopts the analysis undertaken in Kansas and recognizes a viable constitutional interest, the Court must balance FEI's need for the material against any harm that might flow from disclosure of it. It is plaintiffs' burden to demonstrate that their First Amendment interests would be harmed by disclosure. See FEI's Motion to Compel Discovery From Tom Rider and For Sanctions, Including Dismissal (3/20/07) (Docket No. 144) at 23. To meet that burden, plaintiffs rely upon their conclusory and unfounded allegations premised upon a purported "Long Term Animal Plan Task Force" that is more than ten years old and, as FEI has informed them on numerous occasions, has never been implemented by FEI – and is not in existence today. See, e.g., Response in Opposition to Rider's Motion for a Protective Order With Respect to Certain

[5] It is ironic, indeed, that plaintiffs have resorted to citing a decision from Kansas in which the Court explicitly instructed the party claiming an alleged First Amendment privilege to "produce a privilege log ... detailing the application of the First Amendment privilege to any documents ... ." Heartland Surgical Specialty Hospital, LLC v. Midwest Div., Inc., No. 05-2164, 2007 WL 950282, at *22 (D. Kan. March 26, 2007). Even the most arguably relevant case cited by plaintiffs demonstrates their bad faith throughout the discovery process. As discussed below, plaintiffs have refused to log or otherwise describe such allegedly privileged documents.

Financial Information (5/15/07) (Docket No. 146) at 16 and Ex. 9 thereto. Unlike plaintiffs, however, FEI is looking for evidence to use in this case and not, as plaintiffs have, to launch unfounded media attacks and to distribute discovery information to members of the media.

FEI's (and the Court's) need for these documents is clear. The documents at issue, for example, are essential to evaluating Rider's credibility. This case exists for the sole purpose that Rider alleges to have suffered an aesthetic injury. Because plaintiffs' standing is premised upon this single allegation by Rider, his credibility is fundamental to the Court's determination of whether or not it should properly be hearing this case at all. Plaintiffs' insistence that FEI and the Court need not review the underlying documents because they have already said how much Rider was paid is unavailing. Despite their claims, plaintiffs have never accurately said how much they have paid Rider. Moreover, only the underlying documents will fully inform the Court of the true purpose of such payments. Indeed, if the underlying documents were really exculpatory for plaintiffs (*i.e.*, if they showed that Rider was being reimbursed for actual expenses for actual work being performed), one would not expect them to put up such a fight about turning them over. As explained above, the documents at issue are relevant to this case for a variety of reasons as well. See supra pp. 6-8.

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

Plaintiffs imply that FEI is asking them to log traditional litigation files even though FEI has not done the same. Opp. at 24. That, however, is not true. FEI specifically informed plaintiffs (orally and in writing) that it does not expect them to log traditional litigation materials:

> We would like to reiterate what we stated at our February 7, 2007 meeting in case there is some misunderstanding as to what we seek. We do not expect outside counsel to log their internal e-mail communications with each other, nor do we expect their litigation and/or correspondence to be inventoried.

Ex. 35, Joiner letter (3/6/07). Plaintiffs need not log all of their communications with counsel regarding pleadings that have been filed or discovery that has been served in this case. FEI does not seek a privilege log containing true litigation material; rather, it seeks a privilege log containing the material that is unique to the situation that plaintiffs have created, specifically the material that "concern[s] the litigation" only to the extent that it discusses plaintiffs' media campaign or the payments to one plaintiff by counsel and the other plaintiffs. If plaintiffs cannot distinguish between the two, any burden imposed upon them is entirely of their own making.

Plaintiffs do not dispute or distinguish the three cases from this Court cited in FEI's Motion for the proposition that their categorical assertions of privilege are insufficient and that plaintiffs must provide specific information so that FEI and the Court may assess whether the documents at issue are truly privileged. Instead, plaintiffs rely upon four cases from other jurisdictions to argue that their categorical privilege log entries are proper. Unlike those cases, however, these are not the "appropriate circumstances" to allow such categorical entries. Opp. at 25. Nor would FEI or this Court "be foolish to believe" that the documents at issue may not be privileged. Id. at 26.

Contrary to plaintiffs' unsupported allegation, the documents at issue are not "classically privileged." Plaintiffs have invoked novel theories of privilege. They have, for example, claimed privilege over (a) communications that occurred outside the presence of counsel; (b) communications between the organizations' in-house counsel and individuals who are not employees of the organizations; (c) communications involving the organizations' in-house counsel who primarily serve other functions (such as ASPCA's Senior Vice President for Government Affairs and Public Policy); and (d) communications with outside counsel who (when acting not as attorneys, but as alleged officers of their law firm's alter ego) also allegedly

provide "media" advice focused on the publication of this lawsuit and plaintiffs' theories regarding the underlying merits. FEI's suspicion that plaintiffs are broadly and improperly claiming the attorney-client privilege over non-privileged communications is not imaginary. Indeed, plaintiffs themselves confirmed in their Opposition that there are several documents for which they are claiming both a First Amendment privilege because they relate to "media" advice and the attorney-client privilege because they involved people from their counsel's law firm. See Opp. at 24 n.10 (arguing that plaintiffs have not yet been obligated to identify in their attorney-client privilege log certain documents relating to "media" strategy or to their communications with counsel when they were acting on behalf of WAP because plaintiffs have a pending First Amendment objection to producing any such documents).

In lieu of providing a complete privilege log, plaintiffs ask the Court to believe that they can be trusted to make the distinction between Katherine Meyer the lawyer and Katherine Meyer the WAP officer because they allegedly have been "extremely forthcoming" about WAP and they allegedly have produced "many" communications with WAP. Opp. at 24 n.10. Plaintiffs, however, have been anything but "forthcoming" when it comes to their relationships with WAP. See, e.g., Ex. 9 (sworn interrogatory responses of ASPCA, AWI, and FFA omitting any references to communications with WAP that were clearly responsive). Nor have plaintiffs produced "many" communications with WAP. Even the exhibit they compiled in support of their own statement contains just four communications with WAP in the seven years since the filing of this lawsuit. Three of those communications, moreover, particularly underscore the need for plaintiffs to provide a complete privilege log. Plaintiffs assert that these are communications with WAP. Yet, they are communications with a WAP officer and other attorneys from Meyer Glitzenstein & Crystal who are not employees or officers of WAP. These

documents do not establish that plaintiffs have been "forthcoming" about WAP; rather, they establish that (a) plaintiffs themselves are not sure when their counsel is acting as a lawyer or as a WAP officer and (b) plaintiffs have engaged their attorneys – even those with no apparent connection to WAP – in connection with their "media" strategy. This very confusion further supports the point that plaintiffs' assertions of privilege cannot be trusted without reviewing the underlying information that is traditionally provided in a privilege log.

Like Rider, when all else fails, the organizations resort to defending their conduct with a misleading citation to Judge Facciola's prior ruling in this case and with unsupported claims of delay. Opp. at 26. As FEI previously has explained, Judge Facciola held that a party need not provide traditional privilege log information for work product materials where (a) there was no reason to doubt the applicability of privilege and (b) disclosing such information (in that instance, the titles of publicly available documents that had been gathered by counsel in connection with this case) would reveal the very mental impressions that the privilege was meant to protect. Reply to Rider at 21-22. Neither of these factors support the bold refusal by plaintiffs (who have asserted novel and ever-evolving theories of privilege) to log attorney-client communications (which are logged in almost every case without disclosing anything protected by the privilege). Plaintiffs' complaints of delay, moreover, are particularly irrelevant. Not only do plaintiffs fail to cite any cases in support of their theory, the Federal Rules affirmatively require them to provide the privilege log information sought by FEI, regardless of whether or when FEI asked for it. See Fed. R. Civ. P. 26(b)(5)(A). Plaintiffs' presumption that any delay in seeking this information was caused by FEI's change in counsel is absurd. The actual reason for any delay is plaintiffs' willful discovery violations. FEI had no reason to doubt plaintiffs' claims of privilege until it began to unravel their numerous discovery deficiencies and until they

belatedly began asserting evolving (and novel) theories of privilege to defend themselves. Having hidden documents and information from FEI for almost three years, plaintiffs should not be rewarded when they complain that FEI took too long to discover their misconduct.

The sole issue here is whether, in light of plaintiffs' ever-evolving, circular, and novel theories of privilege, FEI and the Court are entitled to know with specificity which documents are being withheld and why. The reason plaintiffs refuse to log the documents at issue is because they do not want to produce them; plaintiffs would prefer if FEI and the Court just trusted them when they said such documents are privileged (either as attorney-client legal advice or as First Amendment-protected "media" advice, and sometimes both). Given plaintiffs' numerous discovery deficiencies and their novel theories of privilege, however, there is simply no basis for FEI or the Court to do that. Plaintiffs' claim that all of the documents referred to in their privilege log relate to "strategy, evidence, or legal advice" simply cannot believed.[6]

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

FEI's discovery requests require each organization to identify their payments to Rider (whether direct or indirect) and to produce all documents relating to such payments. Plaintiffs do not deny that they have withheld the relevant documents and information. They allege, instead, that the rules of discovery do not apply to them because FEI already knows how much money has been paid to Rider. As FEI has told plaintiffs on several occasions, however, plaintiffs' allegation is demonstrably false and utterly irrelevant. Neither plaintiffs' deficient discovery responses, nor the independent research FEI has been forced to conduct because of those faulty responses, has produced a complete and accurate answer to FEI's interrogatory. Nonetheless,

[6] Plaintiffs do not respond at all to FEI's argument that each organization must produce its own privilege log. Motion at 33-34. Until plaintiffs do so, FEI is unable to determine which party has what documents and whether any alleged privileges have any merit.

even if plaintiffs' statement was true, FEI's perseverance to learn the answer from third parties does not alter each organization's obligation to produce all documents relating to each such payment. Plaintiffs would also like to pretend that because the specific information sought relates to FEI's defense (instead of to plaintiffs' claims) the organizations need not comply with their discovery obligations and the Court should pay little attention to any alleged deficiencies. The only thing more astounding than plaintiffs' bold refusal to provide complete discovery responses is their brazen argument that they should not have to.[7]

A. Documents and Information Concerning Payments to Rider and WAP Are Responsive to FEI's Discovery Requests

Plaintiffs complain that documents and information concerning payments to Rider and WAP are not even responsive to FEI's discovery requests. Opp. at 28. This defies the plain language of FEI's requests. Plaintiffs alleged in their complaint that they have expended resources on "advocating better treatment for animals held in captivity, including animals used for entertainment purposes" and on "pursuing alternative sources of information about [FEI's] actions and treatment of elephants." FEI has requested, in plain English, that plaintiffs identify (and produce documents relating to) each resource that has been expended on these activities. Contrary to plaintiffs' newfound interpretation, FEI's request has never been limited to only those portions of these activities that plaintiffs relied upon in drafting their complaint.[8] FEI

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[7] Plaintiffs' reliance on their objection of "overbreadth, burden, and oppression" gets them nowhere. Opp. at 29 n.12. FEI seeks to compel "all responsive documents and information concerning payments to lead plaintiff Tom Rider," whether direct or indirect. Motion at 2. Plaintiffs fail to explain how producing this limited material – concerning payments that they themselves describe as "modest" – would be "burdensome" or "oppressive." Although plaintiffs may not want to produce it, the Rules provide for no such objection.

[8] Indeed, even ASPCA's original response contradicts any argument by plaintiffs that payments to Rider are not responsive. Plaintiffs ask the Court to believe that the only reason ASPCA identified some of the money it gave to WAP is because it was the only plaintiff relying upon such expenditures. In order to believe that nonsense, however, the Court also would have to believe that (since ASPCA did not disclose any direct payments to Rider or all of its payments to WAP) ASPCA, in drafting the complaint, was only relying upon certain activities conducted by Rider and that ASPCA could ascertain that, of the tens of thousands of dollars it paid Rider, the activities relied upon in the complaint cost them $7400. Plaintiffs' argument simply defies any semblance of logic or reason.

meant what it said: identify each resource expended on these activities. The organizations' payments to Rider (whether direct or indirect) fall squarely within the scope of FEI's requests.[9]

B. Plaintiffs' Claim That FEI Knows the Amount of Money That Has Been Paid to Rider is Irrelevant

Plaintiffs similarly seek to avoid their discovery obligations by pretending that FEI already knows how much money they have given to Rider and/or WAP and that, therefore, the rest of the requested information is irrelevant. Even if FEI knew the actual amount of money that has been paid (which it does not), that is irrelevant. Plaintiffs presume that FEI seeks the documents and information concerning such payments for the sole reason of determining the grand total that Rider has been paid. That presumption is false. As FEI has already stated:

> The documentation requested goes not only to the amount that Rider has been paid but also to the timing and purpose of each payment. Complete production of all documents is crucial because plaintiffs and their allies have conflated the reasons for the payments to camouflage them. ... FEI can uncover this gamesmanship only with complete document production. FEI is entitled to see the raw data, not just plaintiffs' counsel's interpretation of it.

Reply to Rider at 10-11 (emphasis added).

C. Plaintiffs' Claim That FEI Knows the Amount of Money That Has Been Paid to Rider is False

Even if it were relevant, plaintiffs' claim that FEI now has "a complete accounting of all of the funds the groups provided for [Rider]" is demonstrably false. Opp at 27. Plaintiffs reason that FEI either got the information from them, from WAP, or from its own independent research and that, therefore, insisting upon the production of accurate discovery responses is a waste of time. This argument either manifests plaintiffs' failure to comprehend a simple point or their willingness to plead ignorance in the name of their political agenda. Plaintiffs conveniently

[9] Plaintiffs base their newfound interpretation on the phrase "as alleged in the complaint" that appears in FEI's interrogatories. Plaintiffs brazenly ignore that such language does not appear in FEI's document requests. Even if the Court adopts plaintiffs' newfound interpretation of FEI's interrogatories, there certainly is no such limitation contained within FEI's document requests. Regardless of how one interprets FEI's interrogatories, plaintiffs must respond to FEI's document requests by producing all documents relating to their payments to Rider.

ignore altogether that FEI should never have been put to the extra burden of having to piece together discovery that should have in the first instance been produced by plaintiffs themselves.

Plaintiffs' interrogatory responses would have FEI believe that the organizations' payments to Rider equal approximately $45,000 but FEI knows from the documents it has received from WAP and/or from its own research of publicly-available documents that such payments likely equal at least twice that much. There is no reason to believe, however, that the information FEI has been forced to gather on its own because of plaintiffs' refusal to produce it constitutes a complete and accurate response to the question of how much money has been paid to Rider and/or WAP. If that were so, it would be easy for plaintiffs to provide under oath an amended response to FEI's interrogatory. Instead, plaintiffs have orchestrated a game of "catch me if you can" and, now caught, have resorted to misleading the Court. For example, AWI has provided sworn interrogatory responses (original and supplemental) that omit any reference to its direct payments to Rider and it has produced absolutely no documents related to such payments. AWI now argues, however, that it need not produce accurate interrogatory responses or any documents because (a) it told FEI in 2005 that it provided Rider with a "couple thousand dollars ... over the course of five years, roughly 2000 forward," see Ex. 13, AWI Depo. at 138-39, and (b) FEI retrieved AWI's IRS filings (to demonstrate to the Court the inadequacy of AWI's discovery) that show payments to Rider of approximately $2,000 from July 2004 through June 2006, see Ex. 38, IRS Form of AWI. Neither AWI's deposition testimony nor its IRS filings provide complete responses to FEI's interrogatories, let alone its document requests.[10] Sadly,

[10] In response to FEI's Motion, AWI has finally produced a cancelled check (payable to WAP) for a payment that it previously had not disclosed. Opp. at 32-33. That AWI only discloses certain payments and produces certain documents after FEI finds out about them from third parties is outrageous in and of itself. Nonetheless, AWI's belated production further manifests its attempt to mislead the Court. Plaintiffs imply that, by producing copies of checks, it has produced documentation of each payment. FEI's document requests, however, seek the production of all documents relating to each payment. Producing cancelled checks for each payment only after FEI finds out a payment occurred does not amount to producing "all documents," nor is it "forthcoming" behavior.

this is merely one example of plaintiffs' facially-flawed argument that is intended to mislead the Court and to justify their bold refusal to provide full and accurate discovery responses.[11]

Plaintiffs provide no authority for their proposition that they need not furnish complete discovery responses because FEI has obtained some (again, not all) of the responsive information on its own. For that very reason, plaintiffs' reliance on Fed. R. Civ. P. 26(e)(2) and various caselaw is grossly misplaced. Both Fed. R. Civ. P. 26(e)(2) and U.S. ex rel. Miller v. Bill Harbert Intern. Const., No. 95-1231, 2007 WL 861111 (D.D.C. March 20, 2007), stand for the proposition that parties need not supplement discovery responses if the requesting party already has the exact same information. Notwithstanding plaintiffs' frivolous argument that these authorities support their refusal to actually correct (not supplement) their original responses, such authorities are not even applicable here since the documents and information FEI seeks is not the exact same which it already knows. FEI does not know the information or the content of the documents that it has requested. Plaintiffs' reliance on Sendi v. Prudential-Bache Securities, 100 F.R.D. 21 (D.D.C. 1983), is similarly misplaced. In that case, the court denied a motion to compel where the party already had "complete answers" to its discovery requests. Id. at 23-24. FEI has no such "complete answers." Even if FEI knew how much each organization has paid

[11] As another example, plaintiffs allege that ASPCA need not provide a complete interrogatory response or all responsive documents because it testified in "excruciating detail" about payments to Rider during its July 2005 deposition and because a document produced by WAP shows that ASPCA gave Rider a laptop and a cell phone. Opp. at 31. The extent of ASPCA's testimony regarding direct payments to Rider was that it would "either advance money to him to purchase a Greyhound bus ticket or to reimburse him for his daily living expenses or [it would] prepay his hotel rooms. So there was never any checks written to Mr. Rider." Ex. 15, ASPCA Depo. at 46. This does not constitute "excruciating detail"; it is vague and, evidently, purposefully so. ASPCA, for example, never testified about the date or the amount of any payment to Rider, let alone each such payment. ASPCA, moreover, never provided accurate testimony about the total amount of money that it paid to Rider. It, moreover, testified about hotel rooms and bus tickets but omitted any reference to paying for Rider's cell phone and laptop. ASPCA's omission of these items is not excused by WAP's production of a document reflecting them. That document makes no reference to how much those items cost, why they were provided, or whether anything else also was provided. Indeed, that FEI had to learn of such payments from WAP underscores the need for a Court order compelling plaintiffs to produce all responsive documents; it does not excuse ASPCA's misconduct.

Rider, that is not a "complete answer" to any of its requests, let alone its document requests.[12]

FEI requested, and is entitled, to know each expenditure made and to receive all documents relating to each such expenditure. Because FEI does not know the actual amount of money that each organization has given to Rider and/or WAP, plaintiffs must amend and supplement their original interrogatory responses. Plaintiffs' argument, moreover, is particularly inapplicable to their deficient document productions. Nowhere have plaintiffs cited to any authority in support of their position that a party need not make a complete document production because the requesting party already knows a single piece of information about which those documents relate. Plaintiffs must identify each such payment in response to FEI's interrogatories and produce each document related thereto in accordance with FEI's document requests. Only after such accurate information has been provided and such complete document production has been made will FEI have what it asked for more than three years ago.

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

Plaintiffs allege that FEI's Motion seeks to compel information related to ASPCA's deposition. That simply is not true. Nowhere in the Motion or in its proposed order is there a reference to compelling additional deposition testimony; rather, the Motion seeks to compel the documents and information that were withheld from ASPCA's document production and interrogatory responses on the basis of an alleged "confidential and proprietary" objection. See

[12] Plaintiffs' reliance on Sanders v. District of Columbia, No. 97-2938, 2002 WL 648965 (D.D.C. April 15, 2002) is particularly curious. The issue for that court was not whether parties must provide complete responses to discovery requests, but what the penalty should be for a party's failure to do so. In assessing the harm caused by such failure, the Court looked to whether or not the other party learned the information notwithstanding the discovery violations. Id. at *1. It did not conclude, as plaintiffs ask this Court to do, that a party need not comply with the Federal Rules and provide complete, accurate, and honest responses to discovery requests.

Motion at 39-41.[13] The reason that ASPCA's deposition was discussed in FEI's motion was to demonstrate that ASPCA previously asserted this frivolous objection to hide relevant information that it did not want to discuss. If, as plaintiffs contend, the publicly-available 2003 Annual Report contained a complete response to FEI's deposition question, then the alleged "confidential and proprietary" objection was more than frivolous. It was an astounding waste of everyone's time and a thinly-veiled effort to avoid answering the question asked.[14]

FEI's Motion seeks to compel documents and information that ASPCA explicitly claimed to withhold in response to FEI's document requests and interrogatories. Motion at 40. In a mere footnote, plaintiffs claim that no such documents or information have been withheld. This is now the second time that plaintiffs, when asked to substantiate an objection, have been unable to do so and have alleged, instead, that no such documents or information were actually withheld. See Motion at 33 n.12. ASPCA's claim is dubious. If it truly is not withholding any documents or information pursuant to this baseless objection, which it clearly claimed in its discovery responses, ASPCA should be required to so state under oath and to pay FEI's costs of seeking documents and information pursuant to an objection that, while asserted, was neither defensible nor actually utilized. FEI raised this concern with plaintiffs more than seven months ago. Ex. 24, Gasper letter (11/22/06) at 8 (specifically referencing Interrogatory No. 21 and Document Request Nos. 19-20 and offering to accept this information pursuant to a protective order).

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[13] FEI reserves the right to move to compel any and all deposition testimony that was improperly impeded by plaintiffs for any reason, including their failure to disclose and produce discovery.

[14] Plaintiffs' contention that the Annual Report constitutes a complete response to FEI's deposition question is false. Opp. at 33-34 n.18. When asked why it stopped paying Rider (payments for which it has produced no documents), ASPCA testified that it had other budgetary needs. It then objected, however, when asked what those needs were. ASPCA, therefore, did not provide a complete response to the question of why Rider was no longer being paid. Plaintiffs are similarly incorrect in arguing that their objection was appropriate. The only basis to assert such an objection is to seek a protective order, yet ASPCA rejected FEI's offer to do just that. Its objection was blatantly improper and can only be described as an effort to avoid discussing a topic that ASPCA would prefer to ignore: its payments to Rider and the reasons for them.

Plaintiffs never once told FEI that no documents or information were being withheld pursuant to this objection. Plaintiffs must be deterred from continuously wasting FEI's and the Court's time.

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

Interrogatory No. 12 requires ASPCA to "describe each inspection" that it has conducted of FEI's circus. Ex. 2, Inter. No. 12 (emphasis added). This straightforward interrogatory seeks a description of each inspection – meaning, for example, the dates, locations, participants, and/or results of each such inspection. Indeed, ASPCA apparently acknowledged that this information was responsive to FEI's interrogatory when, in lieu of providing a narrative response, it incorporated by reference its inspection reports which contain those very same details. Nowhere does this interrogatory seek ASPCA's editorial opinion regarding the procedures of inspections or the adequacy thereof. Nonetheless, that is precisely what ASPCA has provided in response to FEI's request that it describe each inspection for which it has produced no reports.

ASPCA argues that its supplemental response to this interrogatory adequately describes each inspection for which no records exist (*i.e.*, those inspections that should have been described almost three years ago but were omitted from ASPCA's original response). ASPCA's supplemental response, however, does no such thing. Instead of providing descriptive information of each inspection (*e.g.*, the dates, names, locations, and results), the new response espouses ASPCA's political opinion about the ways in which it wishes its inspections of FEI were more invasive. See Ex. 27, ASPCA Supp. Response, Inter. No. 12 ("ASPCA inspections of circus elephants are generally superficial in nature. The inspectors are not elephant experts and do not inspect each animal during their circus inspections.") Perhaps it is because ASPCA's inspections have not yielded evidence of abuse that ASPCA wishes not to describe each such inspection, which would, by definition, include the results thereof. This is not a minor issue.

This is potentially important evidence for FEI because if ASPCA's own inspection reports are not citing FEI for "cruelty" with respect to the practices that ASPCA is challenging in their case then why would there be any reason to conclude that such practices are a "taking" either? ASPCA must describe each inspection, not its desire that the inspections be more invasive. Absent a Court order, it is clear that ASPCA has no intention of doing what the Federal Rules require it to or what its counsel promised it would do more than a year ago: describe each inspection for which reports have not been produced.[15]

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

Plaintiffs imply that the Court need not concern itself with their improper incorporation by reference of more than 35,000 pages of documents since they only did so "with respect to two interrogatories." Opp. at 37. Notwithstanding that FEI is entitled to a complete and proper response to each of its interrogatories, the two at issue here are crucial as they seek a description of the incidents that plaintiffs allege to constitute an unlawful "taking" in violation of the Endangered Species Act. Plaintiffs are making the claim so they must identify and describe such incidents. Plaintiffs' response that the Court should disregard this discovery violation because it only affects "two interrogatories" is unavailing. Plaintiffs must provide a complete and accurate response to each of FEI's interrogatories, not just the ones that they choose to.

Plaintiffs must adequately identify any and all documents that they incorporated by reference in their interrogatory responses. See Fed. R. Civ. P. 33(d). FEI's Motion does not "misrepresent the facts", see Opp. at 38; rather, plaintiffs simply fail to grasp a basic concept. It

[15] Contrary to plaintiffs' allegations, FEI did raise with them during the meet and confer process the issue of whether or not ASPCA's document production was complete. See Opp. at 35. FEI has twice requested that ASPCA verify that it has produced all responsive documents to Document Request No. 9. See Ex. 24, Gasper letter (11/22/06) at 8 ("Please produce any and all additional responsive records dating back to January 1, 1996."); Ex. 52, Ockene letter (2/13/06) (responding to FEI's January 24, 2006 letter raising the issue of whether ASPCA's document production was complete).

is entirely irrelevant whether or not they also provided some information in narrative form. Instead of providing a complete narrative response, plaintiffs chose to provide a partial response and sought to incorporate unidentified documents by reference for the rest of their response. Now, they must identify those incorporated documents or, if unwilling or unable to do so, drop the purported incorporation clause. Just as it is irrelevant that plaintiffs provided a partial response in narrative form, it is wholly irrelevant that plaintiffs lodged an "unduly burdensome" objection. Having elected to incorporate by reference certain documents, they must now identify those documents so incorporated or this portion of all such responses must be stricken.[16]

CONCLUSION

For the reasons set forth herein and in its Motion together with the Memorandum in support thereof, FEI respectfully requests that its Motion be granted and that it be awarded all appropriate sanctions, including the costs and fees of bringing its Motion.

Dated this 13th day of July, 2007

Respectfully submitted,

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[16] Although the organizational plaintiffs adopt Rider's uninformed position that they need not identify the documents incorporated by reference because they provided partial (though not complete) interrogatory responses, conspicuously absent from their Opposition is Rider's claim that any such violation of Fed. R. Civ. P. 33 is a mere "technical issue" or any citation to the case relied upon by Rider that was later distinguished by FEI. See Rider Opp. at 25-26; Reply to Rider at 20-21. It is telling that certain arguments raised by Rider and rebutted in FEI's Reply Brief have been omitted from the organizational plaintiffs' defense.