

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN SOCIETY FOR THE
PREVENTION OF CRUELTY TO
ANIMALS, et al.,

Plaintiffs,

v.

FELD ENTERTAINMENT, INC.,

Defendant.

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Case No. 03-2006 (EGS/JMF)

DEFENDANT'S MOTION TO ENFORCE THE COURT'S AUGUST 23, 2007 ORDER¹

On August 23, 2007, the Court explicitly ordered plaintiffs to produce documents and information that they had withheld for more than three years. Specifically, the Court ordered Tom Rider ("Rider") to produce:

all responsive documents (with [certain] exceptions) within his possession, custody, or control, including but not limited to, documents in the files of his attorneys ...

all responsive documents and information concerning his income and payments from other animal advocates and animal advocacy organizations ...

and

a sworn declaration or affidavit identifying, to the extent Rider can recall, any responsive documents that were once in Rider's possession (since July 11, 2000) but have been discarded, destroyed, or given to other persons or otherwise not produced, together with a description of each such document and an explanation of why it was discarded, destroyed, spoliated or otherwise disposed of.

Order (8/23/07) (Docket No. 178) ("Discovery Order") at 3. The Court likewise ordered the organizational plaintiffs to produce:

¹ The Court was advised by counsel for FEI of this motion at the October 25, 2007 status conference. The Court granted FEI permission to file it notwithstanding the October 23, 2007 Minute Order prohibiting motions.

all responsive documents and information concerning payments to Tom Rider, regardless of whether such payments were made directly to him or indirectly through other means such as WAP ...

and

a sworn declaration or affidavit identifying, to the extent plaintiffs can recall, any responsive documents that were once in plaintiffs' possession but have been discarded, destroyed, or given to other persons or otherwise not produced, together with a description of each such document and an explanation of why it was discarded, destroyed, spoliated or otherwise disposed of.

Id. at 6-7.

Although the Court denied FEI's request to compel the production of documents and communications related to plaintiffs' media or legislative *strategies*, id. at 4, 5 (emphasis added), it compelled the production of all financial information related to the funding of Rider regarding those efforts:

The Court finds that Rider's funding for his public education and litigation efforts related to defendants is relevant. However, the Court finds that the source of any such funding is irrelevant unless it is a party, any attorney for any of the parties, or any officer or employee of the plaintiff organizations or WAP. . . .

As Rider is a plaintiff in this case, Rider's relevant financial information shall be produced without a protective order but with appropriate redactions approved by this Court.

Id. at 4-5; accord id. at 6-7 (requiring production of all "documents and information concerning payments to Tom Rider").

Notwithstanding the Court's Discovery Order, *plaintiffs still have not produced* all of the documents and information related to the Rider payments as ordered by the Court. Nor has Rider produced a complete and accurate response to FEI's interrogatory on that subject as he was ordered to do. In short, plaintiffs have not produced all documents regarding communications related to payments, they have not produced information regarding those communications in

interrogatory responses, and even though documents have not been provided, their declarations do not explain what happened to them. FEI has already prevailed on its motion to compel these materials. See Discovery Order at 3-7. There should not be any further delay permitted from plaintiffs on this subject. The failure to produce the documents and information ordered continues to interfere with and impede FEI's ability to take discovery, including the deposition of Tom Rider. It also is requiring FEI to divert its time and resources from completing discovery by the end of the year as the Court ordered to, instead, re-litigating a matter that should have been concluded by the Discovery Order. It is not FEI's responsibility to have to continuously prosecute its written discovery, particularly where it has already obtained an order compelling the production of responsive materials. It is plaintiffs' burden at this point to explain and try to justify their noncompliance with the Discovery Order. FEI should be awarded its costs and fees for having to bring this enforcement motion, and plaintiffs should be ordered to produce the remaining payment materials and information immediately.

I. BACKGROUND

The Court's familiarity with the numerous hurdles and constant roadblocks that FEI had to overcome in order to obtain the Rider payment discovery is presumed and will not be repeated here in full. A brief procedural overview will suffice for this Motion. More than three years ago, plaintiffs produced false and incomplete discovery responses that concealed both the scope and the mechanics of the Rider payments that were funneled to him by the organizational plaintiffs. This included their own counsel's participation in the Rider payments. See, e.g., FEI's Motion to Compel Documents Subpoenaed From WAP (9/7/06) (Docket No. 85) at 4-11. Upon learning of this grave matter, FEI sought to resolve plaintiffs' numerous discovery deficiencies by conferring with them. The conference process lasted for several months, and FEI

was advised repeatedly that plaintiffs had produced everything. See, e.g., FEI's Motion to Compel Discovery From Tom Rider, and For Sanctions Including Dismissal (3/20/07) (Docket No. 126) at 11-15. Finding this position to have no credibility, FEI moved to compel discovery, which the Court granted in substantial part and ordered all of the plaintiffs to produce various categories of such material by September 24, 2007. See Discovery Order. As a result of the Discovery Order, plaintiffs produced for the first time on September 24, 2007 nearly 700 pages of documents, the existence of which they previously denied to FEI and the Court. These "overlooked" documents included legal bills reflecting charges to the organizational plaintiffs for payments made to Rider by his counsel that plaintiffs explicitly assured FEI did not exist. See Ex. 12 to FEI's Motion to Compel Discovery From Tom Rider, and For Sanctions Including Dismissal (3/20/07) (Docket No. 126) at 4 (12/15/06 letter from plaintiffs explicitly stating that they did not have such legal bills, which ultimately were produced on 9/24/07).

FEI expected that the Discovery Order would finally yield the Rider payment discovery that had been ordered. It did not. Plaintiffs continue to withhold responsive documents and information compelled by the Court's recent Order. Plaintiffs, yet again, have rebuffed FEI's efforts to resolve these issues without the Court's assistance by insisting that all responsive material has been produced. Ex. 1, Gasper Letters to Meyer (10/3/07 and 10/29/07); Ex. 2, Meyer Letter to Gasper (10/12/07); Ex. 3, Ockene Letter to Gasper (10/29/07). As demonstrated below, plaintiffs' continued pattern of denying that any additional discovery is owed to FEI is false.

The Court's Order is clear: All responsive documents and information concerning payments to Rider (including all communications concerning such payments and all documents in the files of Rider's counsel) must be produced. If any such documents no longer exist, they

must be described in plaintiffs' sworn declarations. Plaintiffs, however, have neither produced nor described the documents and information discussed below. Nor is there any log that was produced containing references to Rider payments. Plaintiffs, instead, have apparently decided to withhold communications concerning payments to Rider under a self-created carve-out for "media work" that does not exist in the Discovery Order. Plaintiffs have yet to provide a straight answer on their discovery responses to either FEI or the Court, and in light of their track-record throughout the discovery process, FEI cannot and will not blindly accept their latest "just trust us" approach. Plaintiffs are behaving as if FEI never briefed or prevailed on its motion to compel the Rider payment discovery from them and as if the Discovery Order was never entered. Previously, this Court showed little patience with FEI and ordered FEI to show cause before the Court had even ruled on plaintiffs' motion to compel discovery from FEI. Here, FEI has an order in hand, and plaintiffs still refuse to abide by it. They should be ordered to show cause as to why the Rider payment documents and information have not been produced and be ordered to fully comply with the Discovery Order *immediately*. FEI should be awarded its costs and fees for having to continue to seek enforcement of the judicial relief already awarded to it. Such an outcome is the only one consistent with the law of this case. See Minute Order (9/19/05); Order (2/23/06) (Docket No. 58); Order (9/26/06) (Docket No. 94).

II. ARGUMENT

Plaintiffs have refused to comply with the Court's Order and should be held in contempt. See Armstrong v. Executive Office of the President, 1 F.3d 1274, 1289 (D.C. Cir. 1993) (A finding of civil contempt is appropriate where "the putative contemnor has violated an order that is clear and unambiguous.") (internal quotation omitted). Plaintiffs' alleged excuses for their failure to comply with the Court's Order are irrelevant. See Food Lion, Inc. v. United Food &

Commercial Workers Int'l Union, 103 F.3d 1007, 1016 (D.C. Cir. 1997) (“[A] finding of bad faith on the part of the contemnor is not required. Indeed, the law is clear in this circuit that ‘the [contemnor’s] failure to comply with the court decree need not be intentional.’”) (quoting Nat'l Labor Relations Bd. v. Blevins Popcorn Co., 659 F.2d 1173, 1183 (D.C. Cir. 1981)). Plaintiffs, therefore, should be compelled to *immediately* comply with the Court’s Order. See Petties v. District of Columbia, 897 F. Supp. 626, 629 (D.D.C. 1995)) (“Civil contempt is a remedial device intended to achieve full compliance with a court’s order.”); Armstrong v. Executive Office of the President, 821 F. Supp. 761, 764 (D.D.C. 1993) (“[I]t is within the court’s civil contempt power to coerce obedience to a lawful Order.”); SEC v. Diversified Growth Corp., 595 F. Supp. 1159, 1170 (D.D.C. 1984) (cited in Armstrong, *supra*); see also Caldwell v. Ctr. for Correctional Health & Policy Studies, Inc., 228 F.R.D. 40, 42 (D.D.C. 2005); Fed. R. Civ. P. 37(b)(2) (the Court may order any relief it deems just when a party has failed to obey a previous order to provide discovery). Specifically, plaintiffs should be compelled to cure each of the three deficiencies discussed below and to pay the fees and costs incurred by FEI in connection with this motion.²

A. Plaintiffs Must Produce All Documents and Information Concerning Payments to or for Rider

Plaintiffs have been ordered to produce “*all* responsive documents and information” concerning payments to Rider. See Discovery Order at 3, 6 (emphasis added). Plaintiffs, however, have neither produced nor identified all such documents, including their

² Plaintiffs should be held to the same standard to which FEI has been held. Plaintiffs, for example, have been awarded fees and costs in connection with their motion to enforce, in which eleven of the fourteen alleged deficiencies were completely unfounded and yielded no additional documents (including, for example, plaintiffs’ insistence that FEI produce documents relating to an elephant that never existed). See FEI’s Notice of Compliance (10/11/06) (Docket No. 98).

communications concerning payments to Rider. The Court's Order is clear, yet plaintiffs simply refuse to comply with it.

1. Plaintiffs Refuse to Produce Communications Concerning Payments to Rider

Despite orchestrating a scheme pursuant to which more than 100 payments (totaling more than \$100,000) have been made to or for Rider over multiple years, plaintiffs would have FEI and the Court believe that they have neither discussed this topic with each other nor communicated in writing about it. On September 24, 2007, plaintiffs produced no e-mails related to the coordination of the Rider payments. Indeed, plaintiffs have produced few, if any, documents reflecting the mechanics and coordination of payments to Rider (including documents that illustrate when, where, and how Rider was paid). It is not believable that communications concerning such mechanics and coordination have not taken place, especially when one considers the other evidence that has finally been produced which shows that certain plaintiffs were responsible for certain payments to Rider at certain times. See, e.g., Ex. 4, FFA Payments Records ("This second check for \$500 to Tom Rider is because we were supposed to send \$500 and the ASPCA was supposed to send \$500 and turns out the A[SPCA] can't send its \$500 until next week, which is too late. (!) They are supposed to reimburse us at a later date."). The Court has already ruled that all communications concerning payments to Rider are relevant to this case. Discovery Order at 3, 6. If plaintiffs retain such documents, they should have been produced. The documents are not in plaintiffs' September 24, 2007 production. Conversely, even if plaintiffs did not retain such documents, they should have nonetheless identified the communications in their interrogatory responses. They did not. Nor did they produce a privilege log that lists payment correspondence or declarations setting forth what happened to the documents (in the event that they no longer exist). Plaintiffs are in contempt of the Court's prior

Order and should be ordered to produce this material immediately – in whatever format, documentary, informational or otherwise, that it remains.

a. Rider Continues to Withhold Responsive Communications

Rider has been ordered to produce all “responsive documents” concerning payments to him. See Discovery Order at 3. Such responsive documents clearly include communications he has had with animal advocates (including his co-plaintiffs and counsel) concerning these payments. See Rider Document Request No. 21 (requesting “all documents that refer, reflect, or relate to any payments or gifts ... made by any animal advocates or animal advocacy organizations to you”).³ Yet, the only such communications Rider has produced are the weekly letters that began to accompany the Wildlife Advocacy Project’s (“WAP’s”) checks to him shortly after FEI first issued a subpoena to WAP in July 2005.⁴

Conspicuously absent from Rider’s production are documents reflecting communications concerning the approximately \$30,000 he has received directly from his organizational co-plaintiffs and counsel. It is inconceivable that no such communications have occurred. Plaintiffs claim that Rider lives on the road. So, for example, neither the organizational plaintiffs nor Rider would have any way to know when, where, or how the payments would arrive in the absence of such communications. Money (often large sums of money) could not have just appeared with Rider’s name on it wherever he happened to be. Plaintiffs also would have FEI and this Court believe that Rider never exchanged e-mails with anyone concerning payments to

³ The discovery requests served upon Rider, and cited herein, are attached as Exhibits 1 and 2 to FEI’s Motion to Compel Discovery From Tom Rider, and For Sanctions Including Dismissal (3/20/07) (Docket No. 126). The discovery requests served upon the organizational plaintiffs, and cited herein, are attached as Exhibits 1 and 2 to FEI’s Motion to Compel Discovery From the Organizational Plaintiffs and API (5/29/07) (Docket No. 149).

⁴ Although Rider has produced some communications with WAP concerning the payments to him, FEI does not believe that Rider has produced all such communications. Rider, for example, allegedly travels around the country in his van. Yet, WAP has been able to find him on a weekly basis such that it mails a check to him. FEI is unwilling to assume that WAP just happens to know where Rider is going to be and how to reach him during any and all weeks of the year absent some communication.

him notwithstanding the fact that the ASPCA provided him with a laptop and monthly e-mail access. Even Rider concedes, for example, that AWI paid for his alleged car repairs in 2007. ASPCA, moreover, paid for Rider's hotel rooms on several different occasions. Absent any communications between Rider and AWI or Rider and ASPCA, FEI is at a loss to understand how AWI and ASPCA knew that Rider needed such financial assistance or, for that matter, to where or to whom they should send the checks, credit card numbers or wire transfers. Rider has obviously been communicating with plaintiffs and counsel about his requests for money and their provision of it to him. To believe otherwise would contradict the evidence already produced by plaintiffs. Yet, Rider has produced none of these communications. The Court Order is clear: Rider must produce all documents and information referring, reflecting, or relating to the payments to him. That includes all communications about such payments. The refusal to produce them is astounding and the Discovery Order should be enforced immediately.⁵

In addition to producing all *documents* reflecting these communications, Rider also must *describe* each such communication (whether oral or written) in response to FEI's interrogatories. See Rider Interrogatory No. 4 ("describe every communication you have had regarding [FEI] with any and all animal advocates or animal advocacy groups"). According to plaintiffs, the payments to Rider help fund his alleged media and advocacy campaign aimed at FEI. See, e.g., Pls.' Opp. to FEI's Motion to Compel Discovery From the Organizational Plaintiffs and API (6/26/07) (Docket No. 156) at 27. While that may be, plaintiffs argued this during the motion to compel phase and lost. The Court specifically ordered that *all payment documents and*

⁵ In producing such documents, Rider must search the files of his attorneys since such documents are within his possession, custody, or control and have been compelled by the Court's Order. Discovery Order at 3. Thus, his attorneys' e-mails (regardless of the author or recipient) concerning payments to him are responsive to the document requests served upon Rider and must be produced. Of course, both Rider and his counsel may redact the identity of certain individuals or organizations who provided such payments or engaged in such communications. Id. at 4. There is no privilege that attaches to the payment of a plaintiff. Id. at 3, 6.

information be produced even though media strategies need not be. See Discovery Order at 3, 6. This was clear. If there is some kind of overlap in the documents where one paragraph discusses payments and another discusses media strategy, then plaintiffs can redact the strategy portion (which has been the standard procedure used by the parties in this case) and produce the material related to the payments. What plaintiffs cannot do, however, is hide this discovery from FEI and the Court by labeling it “media” discovery and ignoring it. The Court has ruled this discovery relevant and has permitted plaintiffs only to redact the names of donors other than themselves and their counsel. To interpret the order as plaintiffs apparently are would be to have a relevance exception (media strategy) swallow the production rule (Rider payments). Communications about such payments, therefore, are communications regarding FEI. Rider, however, has refused to describe any such communication. The Court’s prior Order is clear and unambiguous: all responsive documents and information concerning payments to Rider must be produced and any such documents that no longer exist must be identified in a sworn declaration.

b. The Organizational Plaintiffs Continue to Withhold Responsive Communications

Like Rider, the organizational plaintiffs must *produce* and *describe* any of the communications they have had with him concerning their numerous payments to him. Compare Discovery Order at 6 (plaintiffs must produce “all responsive documents and information” concerning payments to Rider) with Org. Pls. Document Request No. 21 (requesting “all documents that refer, reflect, or relate to any communication between you and plaintiff Tom Rider”) and Org. Pls. Interrogatory No. 16 (“describe every communication that you, any of your employees or volunteers, or any person acting on your behalf or at your behest has had with any current or former employee of [FEI]”). Despite the Discovery Order, the organizational plaintiffs have produced no such documents. Nor have they described these communications in

response to FEI's interrogatory. They have produced no privilege log which indicates the existence of documents related to the payments, and their sworn declarations do not offer any explanation as to where these documents may have gone. They are in contempt of the Court's Order.

Not only have the organizational plaintiffs refused to produce their communications with Rider, they have refused to produce the communications between and amongst themselves. All such communications are responsive to FEI's discovery requests and those concerning payments have been compelled by the Court's order. See Org. Pls. Document Request No. 22 ("all documents that refer, reflect, or relate to any communication between you and any other animal advocates or animal advocacy organizations concerning (a) any circus, including but not limited to Ringling Bros and Barnum & Bailey Circus or (b) the treatment of elephants in captivity"); Org. Pls. Document Request No. 19 ("documents sufficient to show all resources you have expended in 'advocating better treatment of animals in captivity, including animals used for entertainment purposes' each year from 1996 to the present"); Org. Pls. Document Request No. 20 ("all documents that refer, reflect, or relate to any expenditure by you of 'financial and other resources' made while 'pursuing alternative sources of information about [FEI's] actions and treatment of elephants'"); Org. Pls. Interrogatory No. 19 ("describe each communication you have had since 1996 with any other animal advocates or animal advocacy organizations about the presentation of elephants in circuses or about the treatment of elephants at any circus, including Ringling Bros and Barnum & Bailey circus").

Communications about funding Rider's alleged "media" campaign aimed at FEI are communications concerning FEI and must be produced. See Discovery Order at 4 ("The Court finds that Rider's funding for his public education and litigation efforts related to defendants is

relevant.”). To date, however, plaintiffs have produced virtually no such communications. Instead, plaintiffs would have FEI and the Court believe that there was absolutely no coordination between and among them (or their counsel) concerning payments to Rider. This is despite the fact, for example, that such payments appeared on legal bills from counsel as “shared expenses.” Ex. 5, Legal Bills Reflecting Payments to Rider. Who amongst the plaintiffs agreed to do this sharing? And why have those communications still not been produced? The organizational plaintiffs, moreover, would have FEI believe that they never discussed amongst each other which plaintiff would pay for which of Rider’s expenses. That theory is squarely contradicted by plaintiffs’ own documents. See, e.g., Ex. 4, FFA Payment Records (reflecting coordination between FFA and ASPCA). The organizational plaintiffs, moreover, hosted a fundraiser for money ultimately given to Rider but to date still have not produced documents relating to that event save for the invitation. It is, again, beyond credulity that the organizations could decide to host, and ultimately orchestrate, an event to raise money for Rider without ever discussing how the event would be used for payments to Rider. It also is incredulous that the organizational plaintiffs have not discussed these payments within their organizations. AWI, for example, paid Rider \$500 by sending a \$600 check to an employee, who wired the money to Rider, paid the wire transfer fee, and put the rest in petty cash. See Ex. 6, AWI’s Latest Response to Inter. No. 21. Such conduct is anything but normal. FEI, again, is at a loss to understand how the employee knew what to do with the \$600 check or how to find Rider if there were no communications concerning payments to Rider. There obviously were such communications and the Court has already ordered them produced.

AWI’s decision to funnel at least one payment through an employee is just one example of the extreme lengths to which plaintiffs have gone to disguise payments to Rider and hide

information from FEI. Communications concerning payments to Rider are responsive to FEI's discovery requests and have been compelled by Court Order. See Discovery Order at 4. Plaintiffs, however, continue to withhold this responsive Court-ordered material. It is no excuse for plaintiffs to now claim that documents reflecting communications concerning payments to Rider no longer exist. The Court has compelled plaintiffs to produce all such documents and to describe in sworn declarations any such documents that they have destroyed or otherwise discarded. See Discovery Order at 3, 6-7. Plaintiffs have neither produced nor described these documents. Similarly, plaintiffs cannot hide communications concerning payments on the basis that the Court has permitted them to withhold communications regarding "media or legislative strategies." Compare Discovery Order at 4 with Ex. 2, Meyer Letter to Gasper (10/12/07) (arguing that the only communications not disclosed are either protected by the attorney-client privilege or relate to media strategies). The Court's Order is clear: all documents concerning payments are relevant. Plaintiffs did not log any documents identified as payment communications on their privilege log. Compare Discovery Order at 3, 7 with Ex. 7, Plaintiffs' Privilege Logs (identifying no such documents). Plaintiffs cannot ignore the Discovery Order by euphemistically labeling their payment communications as "media strategies." If any part or parcel of plaintiffs' "media strategy" was to pay Rider, the Court has ordered them to produce it. Discovery Order at 4. Plaintiffs are in contempt of the Court's Order and should be required to produce all such communications immediately.

2. Plaintiffs Continue to Withhold Other Records Concerning Payments to Rider

Not only have plaintiffs refused to produce their communications concerning payments to Rider, they have failed to produce several other categories of documents that FEI reasonably expected to receive in connection with plaintiffs' Court-ordered production. Such documents,

which are discussed in detail below, almost certainly exist. If they no longer exist, they must be identified and described in plaintiffs' declarations. See Discovery Order at 3, 7.

As discussed above, Tom Rider has received approximately \$30,000 directly from the organizational plaintiffs and their counsel. Rider, however, has not produced documentation reflecting such payments. Rider, for example, has not produced the wire transfer receipts for payments he has received from them, nor has he produced documents regarding the manner in which he cashed checks that were sent to him.⁶ Rider, moreover, has not produced any cover letters or envelopes that would have accompanied such checks. On the other side of those payments, the organizational plaintiffs have not produced, for example, documents that would normally be used to process the payments such as internal check requests, wire transfer receipts, or Fed-Ex receipts for their payments to Rider. All of these materials would demonstrate to FEI who is paying the cost of delivering money to Rider, which further affects the total amount of money that Rider's co-plaintiffs and counsel have paid for his benefit. Although plaintiffs allege that payments to Rider are "reimbursements" to Rider, the organizational plaintiffs have not produced receipts documenting the expenses that each payment was intended to cover. Plaintiffs have coordinated payments to Rider and have been able to ensure that tens of thousands of dollars have been sent to him. Yet, they have produced no documentation establishing where Rider was when he received these payments, how they knew where to find him, and how they had agreed to divide the tab amongst themselves.

It is beyond credulity that plaintiffs and their counsel have not created or received the types of documents discussed above. The Court's Order is clear: all documents concerning

⁶ Because Rider must produce all responsive documents "from the files of his attorneys," Discovery Order at 3, he must produce any documents in his counsel's files concerning the payments to him. Thus, even if Rider does not have his wire transfer receipts, he must produce those in his counsel's files. Similarly, he must produce any other documents concerning these payments in his attorney's files, such as their check requests and e-mails amongst each other regarding such payments.

payments to Rider are relevant to this case. Plaintiffs have refused to produce (or describe in their declarations) the documents discussed above. However, until plaintiffs produce all documents concerning payments to Rider, including their communications with and amongst each other, they are in violation of the Court's August 23, 2007 Order.

B. Rider Must Provide Complete Answers to FEI's Interrogatories

Rider was ordered to produce "*complete and truthful* answers" to four separate interrogatories. Discovery Order at 4 (emphasis added). One such interrogatory requires Rider to identify all payments and gifts (monetary or otherwise) that he has received from any animal advocate or animal advocacy organization. See Rider Interrogatory No. 24. The Federal Rules of Civil Procedure require Rider to provide a *complete* response based upon *all information* reasonably available to him. See *Trane Co. v. Klutznick*, 87 F.R.D. 473, 476 (W.D. Wis. 1980). Rider, however, has provided an *incomplete* response; he has failed to identify all of the payments to him. His answers, again, are facially wrong. Rider, for example, has declared under oath that AWI paid him "approximately \$1,600" despite the fact that FEI (and Rider's counsel) knows AWI paid Rider at least approximately \$3,000 in cash. Compare AWI's Latest Response to Inter. No. 21 (swearing under oath that it paid Rider approximately \$3,000 in cash) with Rider's Latest Response to Inter. No. 24 (swearing under oath that AWI paid him "approximately \$1,600") (collectively attached as Ex. 6). FEI is unable to get a truthful answer from any of the plaintiffs on this simple question: Who paid Rider, and how much was involved?

FEI must obtain from Rider a complete and truthful response to this Interrogatory because he is the person who knows how much money he has been collectively paid by his counsel, his co-plaintiffs, and other organizations. While FEI has sought portions of this

information from the organizational plaintiffs and WAP, their stonewalled responses have been evasive, vague, and incomplete. The organizational plaintiffs, for example, have now produced at least ten different responses to interrogatories requesting information about their payments to Rider. *These numerous revisions were required each time FEI independently determined that the previous response (sworn under oath) was false or incomplete and demanded that it be amended accordingly.* FEI should not have to play this cat-and-mouse game where plaintiffs do not disclose information until FEI is able to prove from alternative sources that they contain material omissions. Like his co-plaintiffs, Rider has produced a response that FEI knows to be false or incomplete.

It is unclear why Rider cannot provide a complete and truthful response based on all information available to him. When asked to do so, Rider and his counsel insisted that his response is accurate and complete “to the best of his knowledge and recollection.” Ex. 2, Meyer Letter to Gasper (10/12/07) at 2. That, however, is not the standard. Trane Co. v. Klutznick, 87 F.R.D. 473, 476 (W.D. Wis. 1980) (“While a party may not have a duty to search out new information, it is undisputed that a party has a duty to provide all information available to him.”).⁷ Rider must answer the interrogatory based on all information available to him, not just “to the extent he can recall.”⁸

⁷ Rider, for example, must produce a complete response based on all information known by his counsel (which includes, at a minimum), the information contained in the discovery responses of Rider’s co-plaintiffs. See Hickman v. Taylor, 329 U.S. 495, 504 (1947) (“A party clearly cannot refuse to answer interrogatories on the ground that the information sought is solely within the knowledge of his attorney.”).

⁸ For that reason, plaintiffs’ suggestion that FEI discuss any follow-up issues with Rider during his deposition would not alleviate FEI’s concerns, nor would it provide FEI with the information to which it is entitled. Plaintiffs raised this same defense in connection with FEI’s motion to compel, but that argument has been rejected. See Ex. 10 to FEI’s Mot. to Compel Discovery From Tom Rider (3/20/07) (Docket No. 126). While Mr. Rider’s deposition testimony may be limited to the information he recalls at the time, his interrogatory response must be complete based upon all information reasonably available to him.

Rider and his counsel have full knowledge of the amount of money he has been paid by animal advocates and his interrogatory response should be revised accordingly. While FEI is aware that at least some payments have not been disclosed, it cannot be certain that the remainder of Rider's response is complete until he is ordered (again) to provide a complete response in accordance with the Discovery Order and the Federal Rules of Civil Procedure. FEI should not have to continuously spend time and resources independently verifying whether an answer – submitted under oath by a litigant who was compelled by a Court Order – is accurate and complete. That is plaintiffs' obligation.

C. Rider Must Produce All Documents In His Attorney's Files

Rider has been ordered to produce “all responsive documents and information ... within his possession, custody, or control, including but not limited to, documents *in the files of his attorneys*.” Discovery Order at 3 (emphasis added). As detailed in FEI's motion to compel, Rider's attorneys control and operate WAP, a non-profit organization that uses his attorneys' office, files, and e-mail system. See FEI's Mot. to Compel Discovery From Tom Rider, and For Sanctions Including Dismissal (3/20/07) (Docket No. 126) at 19-21. As such, “the files of Rider's attorneys” include many WAP-related documents, all of which must be produced by Rider if they are responsive to the document requests served upon him. Rider, however, refuses to produce them.

Instead of producing *all* responsive documents in his attorneys' files, Rider has simply produced only those that FEI previously received via subpoena from WAP. Concerned that Rider was selectively omitting certain documents, FEI sought confirmation from Rider that *all* of the documents in the files of his attorneys and responsive to his document requests have been produced. Ex. 1, Gasper Letter to Meyer (10/3/07) at 3. Rider, however, refuses to provide such

confirmation; instead, Rider and his counsel insist that he need not produce all such documents. Ex. 2, Meyer Letter to Gasper (10/12/07) at 2-3. According to plaintiffs, Rider requested certain documents from WAP because he is a “grantee” of the organization. Id. The Court’s Order, however, does not require the production of *certain* WAP documents; it requires the production of *all* responsive documents “in the files of Rider’s attorneys,” including those that pertain to WAP.

As discussed above, Rider has produced no e-mails from his counsel concerning these payments. Since counsel uses their law firm e-mail system for WAP-related business, communications about these payments reside in the “files of Rider’s attorneys” but have not been produced. It is irrelevant whether they were acting as Rider’s counsel or as officers of WAP when soliciting and making such payments. The Court has ordered the production of such documents and information. Discovery Order at 3-4. Yet there has been no privilege log produced by plaintiffs that reflects any documents regarding Rider payments. Cf. id. at 2, 7 (compelling privilege log). Nor has Rider produced any non-privileged communications regarding his “funding for his public education and litigation efforts related to defendant.” Id. at 4. It is, again, beyond credulity that Rider’s attorneys have not discussed the Rider payments or his funding of his public education efforts related to this lawsuit in either a privileged or a non-privileged context. WAP actively advertises this lawsuit. Ex. 8, WAP Press Release Discussing This Lawsuit. Documents in the files of Rider’s attorneys reflecting communications about this lawsuit have been compelled by the Court’s Order and should be produced immediately.⁹

⁹ WAP, for example, produced an e-mail from plaintiffs’ counsel (using her law firm e-mail address) to the organizational plaintiffs discussing both this lawsuit *and* payments to Rider. Ex. 9, Meyer E-Mail to Organizational Plaintiffs (11/5/03) (attaching a “fund-raising letter I sent from the [WAP],” describing Rider’s efforts and “total commitment to this lawsuit,” soliciting “ideas about how we can raise more funds for this effort,” and stating that the “funds can be contributed to our [WAP] ... so they are tax-deductible”). This is merely one example of what FEI believes to be many, if not hundreds of, communications that plaintiffs refuse to produce – whether from their own files or their counsel’s.

Rider must produce all documents responsive to the document requests served upon him that are located in his files or the files of his attorneys - regardless of whether such documents relate to counsel's law firm or the firm's alter ego, WAP. The work of Rider's counsel as lawyers in this case is indistinguishable from their work as officers of WAP. Payments that once were made to Rider from the law firm are now being made to Rider from WAP. The Court's Order is clear, yet FEI still does not have the discovery that the Court ordered it to receive.

III. CONCLUSION

FEI asks that its motion be granted and that the Discovery Order be enforced against plaintiffs immediately. Specifically, FEI asks that: (a) Rider and the organizational plaintiffs be compelled to produce *all* responsive documents and information concerning payments to Rider, including *all* communications concerning such payments; (b) Rider be compelled to produce a *complete* response to Interrogatory No. 24 based on all information available to him; and (c) Rider be compelled to produce *all* documents in the files of his attorneys (including their WAP-related documents) that are responsive to the document requests issued to him more than three years ago. This would include any and all documents that plaintiffs refused to identify on their privilege log on September 24, 2007 as previously ordered to do by the Court. See Discovery Order at 3, 7. See also Order (9/26/05) (Docket No. 50) (failing to adequately assert privilege constitutes waiver). FEI further asks that it be awarded its costs and fees incurred for having to file this motion, see Fed. R. Civ. P. 37(b)(2) (compelling, except in limited circumstances, the award of fees and expenses incurred as a result of a party's non-compliance with a Court order to provide or permit discovery), and that the Court grant any other relief that it deems just, see Fed. R. Civ. P. 37(b)(2). A proposed form of order is also attached.

Dated this 6th day of November, 2007.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Lisa Zeiler Joiner", written over a horizontal line.

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