UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

PLAINTIFFS' OPPOSITION TO DEFENDANT'S
MOTION TO ENFORCE THE COURT'S AUGUST 23, 2007 ORDER

INTRODUCTION

Defendant Feld Entertainment, Inc. ("FEI")'s motion ("Def. Mot.") contends that plaintiffs are in violation of the Court's August 23, 2007 discovery order (Docket Entry ("DE") 178), which denied FEI's motion to compel discovery in various respects, but required plaintiffs to search for and produce certain materials that might bear on the credibility of plaintiff Tom Rider. However, as explained below, plaintiffs have scrupulously complied with the Court's Order and have gone to great pains to provide FEI with all documents and information encompassed within it. Indeed, contrary to FEI's unfounded representations to the Court, plaintiffs have produced a multitude of documents and other information pertaining to the funding of a public education campaign being conducted by Mr. Rider, who for a number of years has traveled around the country in an effort to publicize the plight of the endangered Asian elephants owned by FEI. In fact, the hundreds of pages of materials that have now been

produced to FEI (both by plaintiffs and non-parties in response to FEI's subpoenas) on this one issue (which has little if any bearing on the merits of plaintiffs' claims) vastly exceeds the very "limited" additional discovery that the Court has suggested was genuinely necessary for FEI to raise whatever challenge it wishes to Mr. Rider's credibility. See Order (August 23, 2007) (DE 176) at 5.

Accordingly, as also explained below, it is now evident that the documents and information defendant continues to seek regarding this matter are not for FEI's legitimate use in this case arising under the Endangered Species Act ("ESA") (which has now been pending for seven years), but, rather, are for defendant's pursuit of its separate recently filed lawsuit against plaintiffs and a non-party here, the Wildlife Advocacy Project ("WAP"), under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968. See Feld Entertainment, Inc. v. American Society for the Prevent of Cruelty to Animals et al., Civ. No. 07-1532 (EGS). In that case, FEI alleges that the animal protection organizations are not really funding Mr. Rider's public education efforts, but are instead engaged in a vast conspiracy to "bribe" Mr. Rider – a former Ringling Bros. employee who worked closely with the elephants for more than two years – to be a fact witness and plaintiff in this lawsuit. Id.[1]

Several weeks ago, however, Judge Sullivan stayed all discovery and other proceedings on defendant's RICO claim (which the Court had also previously disallowed FEI from pursuing in this case, see Order (Aug. 23, 2007) (DE 176) ("Amend Ord.")), precisely to prevent FEI from

[1] As discussed further below, WAP is a separate non-profit advocacy organization established by two of plaintiffs' attorneys to support the efforts of grassroots groups and activists to better educate the public about adverse conditions facing wild and captive animals. See http://www.wildlifeadvocacy.org.

pursuing (while the ESA case is ongoing) far-reaching discovery concerning every detail of plaintiffs' and WAP's internal arrangements and communications regarding Mr. Rider's media and public education campaign. The Court did so because such proceedings – which the Court specifically found had been initiated by FEI for an improper "dilatory" purpose – would shed little if any additional light on Mr. Rider's credibility, but would seriously impair plaintiffs' ability to pursue, and the Court's ability expeditiously to resolve, this case. See Nov. 7, 2007 Mem. Op. in Civ. No. 07-1532 ("RICO Stay Op.") at 8 (Attachment ("Att.") 1). Especially because plaintiffs have now, in accordance with the Court's directive, provided FEI with materials demonstrating all of the amounts of funding provided to Mr. Rider and the sources of that funding – i.e., the information that is arguably pertinent to Mr. Rider's credibility – FEI's "motion to enforce" makes clear that FEI is actually attempting to circumvent Judge Sullivan's stay in the RICO case by pursuing the very discovery the Court has said should not impede the efficient resolution of this case, which Judge Sullivan observed was of "tremendous public import." Id.

BACKGROUND

A. Plaintiffs' Claims

This case concerns plaintiffs' claims under the citizen suit provision of the ESA, 16 U.S.C. § 1540(g), that FEI's Ringling Bros. Circus ("Circus") is unlawfully "tak[ing]" its endangered Asian elephants by "harm[ing], harass[ing], and wound[ing]" them. Id. at §§ 1538(a), 1532(19). Among other harmful practices, plaintiffs allege that the Circus' employees routinely strike the elephants with sharp bull hooks and keep the elephants chained for much of the day and night. Although much of FEI's venom has been trained on Mr. Rider, plaintiffs'

evidence of mistreatment will extend far beyond his testimony. Indeed, as plaintiffs intend to demonstrate when this case goes to trial, FEI's own documents (many of which FEI did not release until the Court twice ordered it to do so, see Sept. 26, 2005 and Sept. 26, 2006 Orders (DE 50 and 94 respectively)), as well as testimony by various eyewitnesses and experts and other information gathered by plaintiffs, fully support plaintiffs' claims of grave, systemic, and unlawful mistreatment of the elephants. See generally Plaintiffs' Opposition to FEI's Motion for Leave to Amend Answers (DE 132) ("Amend Op.") at 19-21.

B. Plaintiffs' Efforts To Obtain Public Relations and Financial Information From FEI

In sharp contrast to what Judge Sullivan called defendant's "relentless" efforts to obtain every scrap of information it can uncover about the organizational plaintiffs' funding of Tom Rider's public education campaign, see Amend Ord. (DE 176) at 8, from the outset of this litigation defendant has refused to produce any of its financial or public relations information concerning, e.g., the profits FEI earns from the elephants, and FEI's extensive public relations efforts to convince the public that it treats its elephants well and that allegations to the contrary are fictitious. See ASPCA v. Ringling Bros., 233 F.R.D. 209, 214 (D.D.C. 2006). Although plaintiffs sought this information early on in the litigation, in part to challenge FEI's witnesses' credibility – on the theory that they have an enormous financial interest in the outcome of this case – Judge Facciola sustained defendant's refusal to divulge any financial or public relations information, concluding that "the profitability of the circus . . . has little, if any, relation to whether defendants' treatment of the elephants violates the statute," and would be "of marginal utility" that was "too far out of proportion to the sensitivity of the financial information sought and the burden that would be placed on defendants in gathering and producing such documents."

Id. Judge Facciola also found that the fact that defendant "freely admitted that [it is] engaged in a for-profit business" was sufficient for plaintiffs' credibility challenge. Id.[2]

C. Tom Rider's Public Education Campaign

As plaintiffs' counsel advised the Court in a hearing in 2005, over the past several years Mr. Rider has been criss-crossing the country conducting a media, public education, and grassroots advocacy effort to educate the public about what really goes on behind the scenes at the circus – an issue of intense public debate. See Amend. Ord. (DE 176) at 7; see also Amend Op. (DE 132) at 6-8, 26-27. Funds to make these efforts possible have been provided by the organizational plaintiffs, and by many other organizations and individuals who share plaintiffs' concerns, including WAP. See Amend. Op. at 24-25.

These funds have been used by Mr. Rider for living expenses as he has traveled around the country for the past six years – first on a Greyhound bus, and then in a used van – to where the circus is performing and to other media, legislative, and grassroots forums. This grassroots public education campaign has been highly effective, at a fraction of the cost of what FEI undoubtedly spends on its public relations efforts. Mr. Rider has discussed the treatment of circus elephants on myriad national and local television and radio news programs, and in dozens of newspaper and internet articles covering this issue. See Amend. Op. at 26-28. He has also testified before the U.S. Congress and other legislative bodies, appeared at press conferences in support of pending state legislation on the use of elephants in circuses in several states, and has

[2] Indeed, as recently as last week, defendant has relied on that ruling to refuse to provide plaintiffs with discovery of documents defendant may be circulating to the media about Tom Rider. See Nov. 16, 2007 Letter from Michelle Pardo to Kimberly Ockene (Att. 2) at 5 (stating that any records FEI provides to the media concerning Tom Rider would not be discoverable because, "[a]s public relations documents, plaintiffs would not be entitled to them.").

spoken before many grassroots groups about his experiences at the circus. See id. at 26-30. Without the funding provided by the animal protection organizations and others for Mr. Rider's travel and living expenses, it would have been impossible for Mr. Rider to communicate effectively with the public concerning this matter of significant public interest and concern.[3]

D. Plaintiffs' Initial Discovery Responses and the Court's August 2007 Orders

When the parties first exchanged discovery in June 2004, plaintiffs produced more than fifteen thousand pages of documents in response to defendant's document requests, as well as detailed responses to defendant's interrogatories. See Exs. 6-8 to Defendant's Motion to Compel Discovery from the Organizational Plaintiffs and API (Document No. 149). For **more than two years**, and despite the fact that the parties were engaged in regular meet and confer discussions concerning defendant's discovery responses, FEI raised no concerns about the adequacy of any of plaintiffs' responses. See Plaintiffs' Opposition to Defendant's Motion to Compel Discovery from the Organizational Plaintiffs and API (DE 156), at 1.

However, earlier this year (and after FEI changed its counsel),[4] FEI began for the first time to file numerous motions not aimed at the merits of plaintiffs' ESA claim case, but instead focused on FEI's new allegation that the animal protection organizations (and their counsel and other "unknown" parties) are actually "bribing" Mr. Rider to be a witness and plaintiff in this case. Thus, in February 2007, FEI filed a motion to amend its Answer in this case to assert a

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[3] This is especially true because FEI has its own extensive public relations campaign designed to convince the public that it is actually helping to "conserve" Asian elephants for future generations. See, e.g., http://www.ringling.com/animals.

[4] FEI was initially represented by Covington & Burling, which withdrew as FEI's counsel in March 2006.

RICO counterclaim, and to also assert a defense of "unclean hands" on this basis. See Motion for Leave to Amend Answers to Assert Additional Defense and RICO Counterclaim (DE 121). The proposed Counterclaim and defense detailed funds the organizational plaintiffs and WAP have provided to Mr. Rider over the years to sustain his public education and grassroots advocacy efforts – based on the information that plaintiffs and WAP had readily produced to FEI in discovery – and asserted that none of this funding was in fact being used for Mr. Rider's public education campaign, despite the fact that FEI has long been aware of Mr. Rider's media and public education efforts. In fact, as Judge Sullivan noted in his August 23, 2007 Order denying defendant's Motion for Leave to Amend, plaintiffs' counsel "admitted in open court on September 16, 2005 that the plaintiff organizations provided grants to Tom Rider to 'speak out about what really happened' when he worked at the circus." Amend Ord. at 7.[5]

FEI also filed a series of motions to compel discovery from plaintiffs, largely aimed at the "funding" information that was the focus of the newly proposed Counterclaim and unclean hands defense. See, e.g., DE 126, 149. Thus, defendant's central argument in these motions was that plaintiffs should produce every piece of paper and each and every communication

[5] Indeed, as plaintiffs explained to the Court in opposing FEI's pursuit of the RICO claim, in addition to seeking to delay resolution of this case, FEI's real purpose in filing (and taking discovery on) the RICO claim is to deter plaintiffs and Mr. Rider from pursuing their highly effective public education campaign, which has informed many concerned citizens about the actual treatment of circus elephants. Indeed, FEI's own documents make clear that FEI is very concerned about Mr. Rider's effectiveness as a public advocate for the elephants. See, e.g, Amend Op. (DE 132), Ex. 48 (FEI internal e-mail discussing how damaging Mr. Rider's media and other outreach activities could be to the Circus's image). FEI also sought – unsuccessfully – to obtain a "cease and desist" order that would have prohibited plaintiffs from discussing this issue with the media and on their websites. See Order (August 23, 2007) (DE 177).

concerning plaintiff Tom Rider's media campaign and, in particular, the funding provided by plaintiffs and others to support Mr. Rider's efforts. Id.

In responding to these motions, plaintiffs explained that they had produced the information they viewed as responsive to defendant's discovery requests, that FEI had not complained about any of these responses for years, and that plaintiffs had in fact produced sensitive financial information that went well beyond what FEI had been required to provide to plaintiffs pursuant to the Court's ruling that FEI need not produce any of its specific financial or public relations information. See generally Plaintiffs' Opposition to Defendant's Motion to Compel Discovery from Tom Rider (DE 138); Plaintiffs' Opposition to Defendant's Motion to Compel Discovery from the Organizational Plaintiffs and API (DE 156). Plaintiffs further explained that the details of plaintiffs' media and legislative strategies, "including their strategies for funding" their public education efforts, DE 156 at 13, are not "relevant to the issues in this case – i.e, defendants' unlawful treatment of the elephants in their custody," DE 138 at 19, and are in any event not properly discoverable in light of plaintiffs' constitutionally-protected First Amendment rights to associate and communicate in furtherance of their public advocacy efforts. See DE 138 at 21-24.

Thus, while plaintiffs acknowledged that FEI is entitled, for purposes of challenging Mr. Rider's credibility, to the actual amounts of funding provided by plaintiffs and others for Mr. Rider's media and public education efforts, they argued that FEI is not entitled to the information concerning how plaintiffs and others raise those funds, or any other aspect of their media and legislative strategies. DE 156 at 4, 13-23. Similarly, plaintiffs explained that, in light of their many communications concerning their efforts to oppose the use of elephants in circuses, it

would be unduly burdensome to require "them to reconstruct or recollect every detail of every such communication." Id. at 9.

On August 23, 2007, in several Orders, Judge Sullivan made clear that he agreed with plaintiffs on these points – i.e., that defendant is entitled to know the amount of funding that has been provided to Mr. Rider, but that it would not be permitted to pursue extensive additional discovery in this case regarding the organizational plaintiffs' internal communications and strategies for funding their media and other advocacy efforts concerning FEI's elephants. See Orders of Aug. 23, 2007 (DE 176, 178). In particular, with regard to defendant's motion for leave to amend its Answer to incorporate FEI's RICO claim that plaintiffs are engaging in an "elaborate scheme . . . to ban Asian elephants from circuses and defraud FEI of money and property," particularly by bribing Mr. Rider to participate in this case, the Court found that "defendant's request to amend its answers to add a RICO counterclaim is made with a dilatory motive, would result in undue delay, and would prejudice the opposing party." Amend. Ord. (DE 176) at 3, 4 (emphasis added).

Of crucial importance to the present discovery motion, the Court explained that the "issues in this case have been narrowed," and hence that "very limited discovery remains," but that "[t]he far-reaching nature of defendant's RICO claim would likely require substantial additional evidence - including, at minimum, numerous additional documents and depositions - beyond the evidence already produced on payments to Tom Rider" – i.e., "beyond" the evidence that FEI legitimately needs to challenge Mr. Rider's credibility with respect to a "very narrow issue - whether or not defendant's treatment of its elephants constitutes a taking under the ESA." Id. at 3-4, 6, 8 (emphasis added). The Court further explained that:

> [t]he focus of the only claim in this case is whether or not defendant's treatment of its elephants constitutes a taking within the meaning of Section 9 of the ESA. Any limited information about payments to or the behavior of Tom Rider that defendant is entitled to in order to challenge the credibility of one plaintiff in this case is far different from the vast amount of information they would be seeking under the guise of attempting to prove an alleged RICO scheme.

Id. at 5 (first emphasis added; second emphasis original); see also id. at 8 ("Through its numerous discovery-related motions, defendant has shown that its efforts to obtain information to impugn Tom Rider and learn every detail of the media and litigation strategies of its opponents are relentless") (emphasis added). Accordingly, it was precisely to avoid discovery beyond the "limited information" specifically bearing on Mr. Rider's "credibility," id. at 5, as well as because FEI had known about the payments to Rider for years, that the Court denied FEI's motion to add the RICO counterclaim.[6]

Similarly, with regard to defendant's motions to compel, the Court expressly rejected FEI's request for any materials concerning plaintiffs' legislative and media strategies. Order (August 23, 2007) (DE 178) ("Discovery Order") at 3. The Court stated that plaintiffs need not produce any "documents or further information related to any media or legislative strategies or communications or any documents or information about litigation strategy," id. at 3, 7 (emphasis

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[6] The Court likewise denied defendant's request to assert an unclean hands defense, finding that defendant's delay in raising the defense also "provides strong evidence of a dilatory motive aimed at prolonging the ultimate disposition of the one issue in this case," and that, in any event, "the unclean hands defense is not a proper defense in a citizen suit seeking an injunction to prevent a 'take' under Section 9 of the ESA." Id. at 9. With regard to FEI's allegation of an "elaborate cover-up" of Mr. Rider's funding – which FEI reiterates in its motion here, see Def. Mot. at 12 (noting efforts to "disguise" payments), the Court found that this assertion "ignores the evidence in this case," including the fact that plaintiffs' counsel had already informed the Court on September 16, 2005 that the plaintiff organizations were providing "grants to Tom Rider to 'speak out about what really happened' when he worked at the circus." Amend. Ord. at 7 (quoting Sept. 16, 2005 Transcript).

added), because "any documents or communications between Rider and others about media or legislative strategies is irrelevant to this litigation and would be over burdensome to produce." Id. at 4 (emphasis added); see also id. at 5 ("any documents, communications, or information concerning the media and legislative strategies of the plaintiffs are irrelevant to the claims and defenses in this case and would be overburdensome to produce"). The Court also rejected as "overburdensome to produce and irrelevant to the claims and defenses in this lawsuit" defendant's request that plaintiffs be compelled to produce "all responsive documents and information concerning communications with animal advocates and animal advocacy organizations," id. at 7, and further found that "the source" of any funding to Tom Rider "is irrelevant unless it is a party, any attorney for any of the parties, or any officer or employee of plaintiff organizations or WAP." Id. at 4.

Consistent with its rationale for rejecting the proposed RICO counterclaim, therefore, the Court limited FEI's discovery to that which arguably bears on Mr. Rider's credibility – i.e., the specific payments and amounts of funding provided to Tom Rider for his advocacy work on behalf of the elephants, and some of the sources of that funding. In particular, the Court directed Mr. Rider to produce within thirty days "[a]ll responsive documents and information concerning his income and payments from other animal advocates and animal advocacy organizations," id. at 3 (emphasis added),[7] and also instructed the organizational plaintiffs to produce within the same time frame "[a]ll responsive documents and information concerning payments to Tom Rider,

[7] Mr. Rider had previously offered to produce all of this financial information to FEI subject to a protective order. The Court concluded that information concerning funding from plaintiffs, their counsel, and WAP should be divulged without such an order, but that Mr. Rider need not identify any other organization or individuals that have contributed to his public education campaign. See Discovery Order at 4-5.

regardless of whether such payments were made directly to him or indirectly through other means such as WAP." Id. at 6-7 (emphasis added). The Court also ordered the plaintiffs to prepare declarations describing any responsive materials they may have once possessed but could no longer produce. Id. at 3, 7.[8]

E. Plaintiffs' Compliance With the Court's Order

In compliance with the Court's Order, plaintiffs conducted an extensive new search for any responsive records they had not previously produced but that had been deemed discoverable by the Court. For example, in an effort to provide FEI with documents on every financial transaction that had been made for Mr. Rider's public education campaign, the ASPCA not only searched its own on-site and off-site records for additional documents, but also went so far as to request "credit card statements directly from American Express for the years 2001, 2002, and 2003." Sept. 26, 2007 Decl. of Lisa Weisberg (Att. 3) at ¶ 2(b) ("ASPCA Decl."); id. at ¶ 1 ("To the best of my knowledge, the ASPCA has produced all records in its possession, custody, or control that are responsive to defendants' Document Production Request and that are required by the Court's Order."). Similarly, Tom Rider performed a "thorough search of all places where documents might be located" and "produced all such documents." Sept. 24, 2007 Decl. of Tom Rider (Att. 4) at ¶ 2 ("Rider Decl."); id. at ¶ 5 ("I believe that I have produced all responsive

[8] As discussed further below, the Court also resolved a separate motion to compel a third-party subpoena against WAP. The Court found that the subpoena sought "a lot of information that is completely irrelevant to the 'taking' claim in this lawsuit, the credibility of Tom Rider, or any claimed defenses," and was therefore "over broad and over burdensome"; hence, consistent with its approach to the discovery aimed at plaintiffs, the Court instructed WAP to produce any additional non-privileged documents "related to payments or donations for or to and expenses of Tom Rider in connection with this litigation." Id. at 8 (emphasis added). As discussed below, WAP has done so.

records that came into my possession since March 30, 2004, [the date Mr. Rider first was served with discovery requests for his financial information] and I am absolutely confident that I did not intentionally destroy, discard, or otherwise dispose of any such documents").[9] In accordance with the Court's directive, see Discovery Order at 7, plaintiffs also provided FEI with declarations accounting for any responsive documents that they may have once had in their possession but could no longer locate. See ASPCA Decl. at ¶ 2; Rider Decl. at ¶ 3; AWI Decl. at ¶ 2; API Decl. at ¶ 2; FFA Decl. at ¶ 2.

Accordingly, in addition to the more than fifteen thousand pages they had produced in 2004 and in several supplemental responses since then, plaintiffs produced several hundred additional documents concerning the funding of Mr. Rider's public education activities. These materials included documents reflecting some additional payments to Mr. Rider several years ago that had previously been overlooked, as well as underlying receipts, and banking and accounting records. Also in compliance with the Court's Order, plaintiffs supplemented their Interrogatory Responses to provide a clear and thorough accounting of the payments they have provided over the years to Mr. Rider or to any other entity for the benefit of Mr. Rider's media and educational

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[9] See also Sept. 24, 2007 Decl. of Tracy Silverman (Att. 5) at ¶ 1 ("To the best of my knowledge, [Animal Welfare Institute] has now produced all records in its possession, custody or control that are responsive to defendant's Document Production Requests and required by this Court's Order.") ("AWI Decl."); Sept. 24, 2007 Decl. of Nicole Paquette (Att. 6) at ¶ 1 ("To the best of my knowledge, [Animal Protection Institute] has now produced all records in its possession, custody, or control that are responsive to defendant's Document Production Requests and required by this Court's Order. API has done a thorough search of all places where such records might be located and has produced all such records.") ("API Decl."); Sept. 24, 2007 Decl. of Michael Markarian at ¶ 1 ("FFA Decl.") (Att. 7) ("To the best of my knowledge, The Fund has now produced all records in its possession, custody, or control that are responsive to defendant's Document Production Requests and required by this Court's Order. The Fund has done a thorough search of all places where such records might be located and has produced all such records.").

outreach efforts. See Attachments 8-11 (Supp. Interrog. responses of ASPCA, AWI, API, Fund for Animals respectively, Resp. No. 21); Att. 12 (Supp. Interrog. response of Tom Rider).

F. FEI's Second RICO Suit And The Court's Recent Ruling Staying That Action

Only a few days after the Court denied the motion to insert the RICO Counterclaim into this case, FEI filed a separate lawsuit presenting the same claim. See Feld Ent., Inc. v. ASPCA, No. 07-1532 (EGS) (D.D.C.) (Complaint filed Aug. 28, 2007) ("RICO Compl."). Remarkably, although the new RICO claim, like the preceding one, is expressly predicated on alleged misconduct by plaintiffs in pursuing this case, see id. at ¶ 8 (alleging that plaintiffs' and their attorneys' "racketeering activity" consists of their "providing funding to Rider for his participation as a plaintiff and as a key fact witness in the ESA Action") (emphasis added), id. at ¶ 7 (accusing plaintiffs of engaging in "bribery and illegal gratuity payments" in connection with their funding of Mr. Rider's activities), FEI filed the RICO case as an "unrelated lawsuit." Id. at ¶ 2 (emphasis added). The case was nevertheless assigned to Judge Sullivan, and plaintiffs here (defendants in the RICO action) promptly moved to stay the entire action – including all discovery – pending resolution of this case. See ASPCA's Sept. 25, 2007 Stay Motion (Document No. 5 in Civ. No. 07-1532).[10]

[10] Plaintiffs of course maintain (and will establish at the appropriate time) that the RICO claim is not only completely baseless and was indeed filed for improper purposes, see Amend. Ord. at 4, but that FEI knows full well that the organizational plaintiffs and other animal protection groups and individuals have been providing funding to Mr. Rider so that he can travel around the country and educate the public concerning FEI's mistreatment of the elephants, and not because they are "bribing" him to participate in this lawsuit. For purposes of defendant's present motion to enforce, however, the salient point is that FEI is trying to cross the line the Court has drawn between the "[v]ery limited discovery" that is pertinent to the ESA case, id. at 4, and the much broader discovery that would be relevant to the sprawling RICO claim that has now been stayed by the Court.

On November 7, 2007, Judge Sullivan granted plaintiffs' motion to stay the RICO action, again finding that permitting discovery to go forward on FEI's claim of a vast conspiracy to bribe Mr. Rider for his testimony would be highly prejudicial to moving toward a resolution of the ESA case, and also that the new RICO suit was "improperly motivated and intended to prolong the ESA action." See RICO Stay Op. (Att. 1) at 6-7. The Court also specifically rejected as "grossly distort[ing] the facts" FEI's contention that the RICO case should proceed because plaintiffs in this case (the RICO defendants) had admitted to "willful document destruction," or had otherwise engaged in any "cover-up scheme," with regard to the funding of Mr. Rider's activities. RICO Stay Op. at 7. To the contrary, and of particular pertinence to defendant's present motion, the Court held that plaintiffs had submitted declarations "compl[ying] precisely with the Court's August 23, 2007 [discovery] order" – i.e., the same Order at issue here – "requiring [plaintiffs in the ESA case] to provide a sworn statement accounting for all responsive documents that may have been destroyed." Id. at 7-8 (emphasis added). The Court further explained that the "public also has an interest in the expeditious litigation of the ESA claim that counsels in favor of a stay" of discovery and all other proceedings in the RICO action, because "ASPCA has put forth serious allegations of mistreatment of an endangered species, allegations which, if true, have tremendous public import." Id. at 8.

ARGUMENT

There is no validity to defendant's contention that plaintiffs have failed to comply with the Court's August 23, 2007 Discovery Order – let alone that plaintiffs should be held in "contempt" and sanctioned for failing to do so. Def. Mot. at 3. To the contrary, as Judge Sullivan has already observed with regard to two of the declarations the Court directed plaintiffs

to prepare in connection with their search for responsive materials, plaintiffs have in fact complied "precisely with this Court's order," RICO Stay Op. at 7, and, in arguing otherwise, FEI has again resorted to "grossly distort[ing] the facts." Id.

Indeed, contrary to FEI's assertion that plaintiffs and WAP have "stonewalled" FEI's requests for documents and information on payments made to Mr. Rider, Def. Mot. at 16, plaintiffs and WAP have conducted exhaustive, multiple searches for responsive records and have provided FEI with many hundreds of pages of materials on Mr. Rider's funding – although many of the produced materials have, at best, only a peripheral relationship to this lawsuit generally or Mr. Rider's credibility in particular, and even though, once again, plaintiffs have not been permitted to obtain any of defendant's financial or public relations information. See Feb. 23, 2006 Order (DE 59), at 9; 233 F.R.D. 209, 214. In light of plaintiffs' extraordinary disclosure of information regarding a single potential witness in this case, as well as the fact that FEI's motion is plainly directed at buttressing its RICO claim rather than obtaining what is genuinely necessary for it to litigate this case, the motion to enforce should be summarily rejected. Should the Court nonetheless find it necessary to address FEI's specific complaints with plaintiffs' production, as demonstrated below those complaints are legally and factually groundless. Plaintiffs' new search, production, and declarations do in fact comply "precisely" with the Court's instructions, RICO Stay Op. at 7, and, in any event, plaintiffs cannot locate any additional materials that fall within the category of materials deemed relevant by the Court.

I. THE MATERIALS FEI IS CONTINUING TO PURSUE RELATE TO THE STAYED RICO LAWSUIT AND THE "UNCLEAN HANDS" DEFENSE THE COURT HAS REFUSED TO ALLOW FEI TO PURSUE, RATHER THAN TO TOM RIDER'S CREDIBILITY.

To begin with, as discussed previously, although the Court has held that documents and other information reflecting the funding actually provided to Mr. Rider are potentially relevant (because FEI may contend it bears on Mr. Rider's credibility), the Court has consistently refused to allow FEI to embark on a more far-ranging inquiry into the organizational plaintiffs' communications and arrangements concerning their media and public education activities in connection with FEI's treatment of its elephants, including the "mechanics," see Def. Mot. at 7, of plaintiffs' funding of those activities. On close inspection, however, it is clear that FEI is now attempting to sidestep these rulings by demanding not the "limited information" that arguably bears on the "credibility of one plaintiff in this case" – information that plaintiffs have produced – but, rather, the "vast amount of information [FEI] would be seeking under the guise of attempting to prove an alleged RICO scheme" or an unclean hands defense. Amend. Ord. at 5 (emphasis in original). However, as the Supreme Court has instructed:

> a court is not required to blind itself to the purpose for which a party seeks information. Thus, when the purpose of a discovery request is to gather information for use in proceedings other than the pending suit, discovery is properly denied.

Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 353 n. 17 (1978) (emphasis added).

Thus, for example, although FEI has extensive documentation concerning the amount of the funds provided to Mr. Rider and the source of those funds (indeed, much of that information is detailed in FEI's RICO Complaint), FEI nevertheless complains that the organizational plaintiffs "have refused to produce the communications between and amongst themselves," Def.

Mot. at 11 (emphasis added), concerning the "mechanics and coordination" of funding Mr. Rider's public education campaign. Def. Mot. at 7; see id. at 14 (complaining that the organizational plaintiffs have "produced no documentation" concerning "how [plaintiffs] agreed to divide the tab amongst themselves") (emphasis added). In reality, however, as FEI's own motion makes clear, plaintiffs have produced such documents. Id. at 7, 12 (describing documents obtained from the organizational plaintiffs discussing and reflecting their arrangements). In any case, in contrast to materials reflecting the funds actually provided to Mr. Rider – the narrow information the Court found could relate to Mr. Rider's credibility as a witness – materials regarding the organizational plaintiffs' deliberations, "communications," "agree[ments]," and "mechanics and coordination" regarding the media campaign are clearly intended to further defendant's RICO (and unclean hands) theories and, indeed, are precisely the kinds of highly invasive and extraneous materials the Court did not want FEI to pursue in this case.

This point is vividly illustrated by FEI's complaint that the organizational plaintiffs "hosted a fundraiser for money ultimately given to Rider but to date [plaintiffs] have not produced documents related to that event save for the invitation." Def. Mot. at 12 (emphasis added). But this very fundraising "event" is prominently featured in the stayed RICO lawsuit, in which FEI asserts that the "fund-raiser was held in furtherance of the [purported] scheme to defraud FEI of money and property," and that the "solicitation materials [for the event] contain materially false and/or misleading statements" (including the statement that "FEI mistreats its Asian elephants"). RICO Compl. at 39-41.

It could hardly be plainer, therefore, that in seeking the organizations' internal "documents related to that event," Def. Mot. at 12 – and not simply materials reflecting any actual funding "ultimately given to Rider," id., which plaintiffs have produced – FEI is casting its net far beyond the "[v]ery limited discovery" the Court has deemed necessary to "challenge the credibility of one plaintiff in this case." Amend Ord. at 4, 5 (emphasis in original). Indeed, if the organizations' internal communications related to a fundraising event and other equally peripheral matters concerning the arrangements and "mechanics" of the groups' funding of Mr. Rider's media campaign are discoverable, then it is difficult to understand what the Court intended when it refused to allow the RICO case to proceed in light of the "vast amount of information [FEI] would be seeking under the guise of attempting to prove an alleged RICO scheme." Id. (emphasis added).[11]

Moreover, consistent with the "dilatory" purpose the Court has previously discerned, FEI is not only improperly seeking discovery in connection with the stayed RICO action and rejected unclean hands defense, but it is clearly attempting to establish a rationale for postponing the

[11] FEI's motion is replete with other examples of sought-after materials that can only pertain to the RICO claim. For example, FEI complains that the organizational plaintiffs have not produced "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." Def. Mot. at 14 (emphasis added). FEI does not argue that it needs such materials to challenge Mr. Rider's credibility, and any such suggestion would be senseless because, once again, plaintiffs (and WAP) have provided materials demonstrating the actual payments themselves, as the Court has ordered them to do. Rather, FEI says only that the "Fed-Ex receipts" and similar "materials would demonstrate to FEI who is paying the cost of delivering money" for the media campaign. Id. (emphasis added). While such a "demonstration" may relate to FEI's RICO allegation that the animal protection organizations, "together with others known and unknown, each participated in the operation and management" of an "enterprise" engaged in a "pattern of racketeering activity," RICO Compl. at ¶¶ 4-5, it is difficult to fathom what relevance of any kind it has to the "narrowed" issues in this case. Amend. Ord. at 4.

discovery cutoff date that has been set by Judge Sullivan (and, thus, a trial on the merits). This is the course of action the Court sought to avoid in its orders regarding FEI's RICO claim and unclean hands defense. See Amend Ord. at 8 ("The Court will not allow a proposed counterclaim to be used as a tool to indefinitely prolong this litigation on a very narrow issue – whether or not defendant's treatment of its elephants constitutes a taking under the ESA."). In sum, FEI should not be permitted to accomplish through the back door what the Court has refused to let it do – on multiple occasions – through the front door. See Oppenheimer, 437 U.S. at 353 n. 17; Shepherd v. Wellman, 313 F.3d 963, 969-70 (6th Cir. 2002) (citing Oppenheimer to affirm an award of sanctions against an attorney who attempted to use the discovery process to investigate post-trial allegations of jury tampering in another case).

II. PLAINTIFFS HAVE COMPLIED FULLY WITH THE COURT'S AUGUST 23, 2007 ORDER.

A. Plaintiffs Have Exhaustively Searched For And Produced All Documents And Information Reflecting Funds Provided To Tom Rider And The Source Of Those Funds.

Even aside from FEI's apparent effort to pursue a claim and defense the Court has ruled out of bounds in this case, FEI's motion should be denied because plaintiffs have done exactly what the Court instructed them to do. Thus, in his August 23, 2007 Order, Judge Sullivan drew a clear line, directing plaintiffs to search for and produce documents reflecting actual payments to or for the benefit of Mr. Rider, but expressly sustaining plaintiffs' position that defendant was not entitled to obtain "documents or further information related to any media or legislative strategies or communications," id. at 3 and 7, or any additional "documents and information concerning communications with animal advocates and animal advocacy organizations" other

than the plaintiffs, WAP, and plaintiffs' counsel. Id. The Court also limited the communications plaintiffs were required to produce between themselves, WAP, and plaintiffs' counsel to only those that concern "the subject matter of this lawsuit" – i.e, plaintiffs' claim that it is FEI practice to hit the elephants with bullhooks, keep them chained for most of their lives, and otherwise "take" them in violation of the ESA. Id. In light of this line-drawing by the Court, defendant has again "seriously misconstrued" and misapplied the Court's rulings. See Stay Op. at 4 (finding that FEI "seriously misconstrued" the Court's rationale for its ruling on FEI's motion to amend).

First and foremost, contrary to defendant's suggestion, at this point defendant has all of the information sufficient to show all funding provided to Tom Rider. Defendant has now received this information directly from Mr. Rider, from the organizational plaintiffs, and from WAP.[12] Indeed, despite the fact that defendant did not even directly request such funding information from plaintiffs in its discovery requests, see Plaintiffs' Opposition to Defendant's Motion to Compel Discovery from the Organizational Plaintiffs and API (DE 156) at 28 (explaining that none of defendant's document requests or interrogatories asked for information concerning funding for Mr. Rider), plaintiffs have produced extensive documentation demonstrating all of the funding they have provided for Mr. Rider's media and legislative

[12] In accordance with the Court's August 23, 2007 Order regarding FEI's third party subpoena to WAP, see Discovery Order at 8-9, WAP has provided FEI with a comprehensive updated "transaction detail report" that lists each of the payments WAP has made to Mr. Rider through September 24, 2007 – the date by when WAP was required to respond to the Court's Order. See Notice of Filing of WAP Declaration (DE 193). The transaction detail report also reflects all of the sources of such funding, except for individual donors to Mr. Rider's media campaign and who are otherwise unrelated to this lawsuit, and whose identities the Court authorized WAP to withhold on First Amendment grounds. See Discovery Order at 8.

campaign, and have also provided detailed Interrogatory Responses explaining the amount and history of that funding. See Supp. Interrog. Responses (Attachments 8-12) (Response No 21).

Given the extensive documentation defendant has obtained on this issue – an issue of questionable significance to begin with that has now occupied countless hours of plaintiffs' (and much of the Court's) time – it strains credulity that defendant insists that it is entitled to still more such information. In any event, as set forth in the Declarations plaintiffs prepared in response to Judge Sullivan's Order, plaintiffs have now conducted not simply a "good faith," but an exhaustive, search for responsive materials – including, e.g., by searching for materials held in off-site storage locations and requesting old records from American Express – and they are simply unable to find materials reflecting any additional funds provided to Mr. Rider. See, e.g., Metro. Opera Ass'n, Inc. v. Local 100, Hotel Employees and Restaurant Employees Int'l Union, 212 F.R.D. 178, 214 (S.D.N.Y. 2003) (the Federal Rules of Civil Procedure require parties only to "conduct a good faith search for responsive materials"). Simply put, plaintiffs' search, production, and declarations comport "precisely" with what Judge Sullivan ordered plaintiffs to do, RICO Stay Op. at 7-8, and there is no legal, practical, or equitable rationale for requiring plaintiffs to do more.

Indeed, putting aside all of defendant's rhetoric, the only "evidence" FEI relies on to support its claim that it has not obtained information on all of the actual amounts of Mr. Rider's funding is a single discrepancy (in the hundreds of pages provided on Mr. Rider's funding) between the interrogatory responses of Mr. Rider and plaintiff Animal Welfare Institute. See Def. Mot. at 15. Thus, while Mr. Rider only recalled having received $1,600 directly from AWI, AWI's records showed that the organization has provided Mr. Rider with approximately $3,000

in direct funding. Id. According to FEI, the fact that Mr. Rider and AWI did not deliberately reconcile their answers (as they would have if they were really trying to engage in a "cover-up" as FEI asserts) is somehow evidence of unrevealed payments. However, the opposite is true: the fact that the plaintiffs have not "compared stories" and endeavored to ensure that their answers always "add up" precisely simply shows that they have been as forthright as possible (consistent with their documents and respective recollections) in trying to reconstruct the funding provided for Mr. Rider's media work over the course of many years.[13]

In short, that plaintiffs' respective financial records and recollections over the course of many years are not in precise parallel is neither surprising nor, more importantly, indicative that plaintiffs have failed to conduct an intensive, good faith search for all documents reflecting funds provided to Mr. Rider – as they have. Plaintiffs have done their utmost to comply with the Court's Order and they need, and can, do no more. See Public Serv. Enter. Group Inc. v. Phila. Elec. Co., 130 F.R.D. 543, 552 (D.N.J. 1990); cf. E. E. O. C. v. Hay Assocs., 545 F.Supp. 1064, 1077 n.11 (E.D. Pa. 1982) ("These figures may not be exact, inasmuch as there are minor discrepancies between the figures produced by Hay in answers to interrogatories and from its billing records. We are satisfied that their import is accurate, however").

B. FEI's Other Complaints Concerning Plaintiffs' Compliance With The Court's Order Are Baseless.

As for the remainder of FEI's complaints, they all concern records and information that the Court has already expressly ruled need not be produced. Thus, while FEI evidently would

[13] Defendant contends that, because Mr. Rider's attorney knew the actual amount based on AWI's responses, Mr. Rider was obligated to disclose the full amount of the funding. See Def. Mot. at 15-16 n.7. However, Mr. Rider was required to certify all of the answers to his interrogatories based on his own personal knowledge.

like more details the specific strategies and "mechanics" that the organizational plaintiffs have used to help fund Mr. Rider's public education campaign so that FEI can use that information in conjunction with its RICO lawsuit, the plaintiffs' communications concerning their strategies in supporting this effort have already been declared irrelevant by the Court in this case.

Thus, contrary to defendant's assertion, the Court did not direct plaintiffs to produce all of the documents or information in their possession that relate in any way to the funding of Tom Rider's media and public education campaign. To the contrary, as noted, the Court ruled only that plaintiffs must provide "[a]ll responsive documents and information concerning payments to Tom Rider," Discovery Order at 6 (emphasis added), and expressly stated that plaintiffs need not produce any "documents, communications, or information concerning the[ir] media and legislative strategies" because such information is "irrelevant to the claims and defenses in this case and would be over burdensome to produce." Id. at 5 (emphasis added).

In accordance with this Order, plaintiffs have produced all responsive documents and information concerning the actual amounts of funding provided for Mr. Rider's media efforts, but have not produced documents or information concerning plaintiffs' strategies, including their efforts and strategies to raise funds for that campaign. This approach is entirely consistent with the Court's August 23, 2007 Discovery Order, as well as the Court's refusal to allow the RICO counterclaim because it would require plaintiffs to produce "substantial additional evidence - including, at minimum, numerous additional documents and depositions - beyond the evidence already produced on payments to Tom Rider." Amend Ord. at 6 (emphasis added). Once again, if the Court intended the organizational plaintiffs to produce every piece of paper generated and describe every phone call made over the last six years relating in any way to their support of Mr.

Rider's media campaign, as defendant evidently contends, then permitting the RICO counterclaim to proceed would have involved little if any additional discovery.

Moreover, as Judge Facciola ruled when he denied plaintiffs access to any information regarding defendant's public relations efforts, the "marginal utility" of the additional information sought by defendant through its motion to enforce is "too far out of proportion to . . . the burden that would be placed on [plaintiffs] in gathering and producing such documents." See ASPCA v. Ringling Bros., 233 F.R.D. at 214. Accordingly, as the Court has already ruled with respect to defendant's public relations materials, the additional information that FEI seeks from plaintiff should also be deemed "irrelevant to this litigation" and "over burdensome to produce," Discovery Order at 5, particularly when plaintiffs "freely admit" that they have been funding Mr. Rider's public education campaign, which should be sufficient for defendant's "asserted purpose" of challenging Mr. Rider's credibility in this case. 233 F.R.D. at 214.[14]

Moreover, with respect to defendant's insistence that it is entitled to every phone call, e-mail, or scrap of paper even remotely related to funding for Mr. Rider's public education campaign, defendant overlooks the fact that the Court did not sua sponte expand defendant's document requests. Instead, the Court directed plaintiffs only to produce any additional payment information that is "responsive" to defendant's existing discovery requests. Id. at 3, 7 (emphasis

[14] Indeed, FEI has already been permitted to learn far more about the funding of plaintiffs' public relations efforts than plaintiffs were permitted to learn of FEI's comparable activities. Accordingly, should the Court allow FEI to learn still more about plaintiffs' internal deliberations and communications concerning such matters, plaintiffs respectfully request that the Court revisit its prior ruling disallowing plaintiffs from taking any such discovery. Simply put, if such financial information is fair game for challenging plaintiffs' credibility, it should also be fair game for challenging the credibility of all of FEI's fact and other witnesses who derive their livelihoods from the Circus.

added). Thus, defendant's interpretation of the Court's Order as a mandate for plaintiffs to produce every bit of information that in any manner relates to Tom Rider's media and legislative campaign is not only fundamentally at odds with the remainder of the Court's Order – which, again, made absolutely clear that any "documents or further information related to any media or legislative strategies" need not be produced, id. at 3 and 7 – but is also at odds with the scope of defendant's actual discovery requests.[15]

Thus, the relevant Document Production requests directed at the organizational plaintiffs called for the following:

> (1) "documents sufficient to show all resources you have expended in 'advocating better treatment for animals held in captivity, including animals used for entertainment purposes' each year from 1996 to the present" (Doc. Req. 19);
>
> (2) "All documents that refer, reflect, or relate to any expenditure by you of 'financial and other resources' made while 'pursuing alternative sources of information about defendants' actions and treatment of elephants each year from 1996 to the present" (Doc. Req. 20);
>
> (3) "All documents that refer, reflect or relate to any communications between you and plaintiff Tom Rider" (Doc. Req. 21); and
>
> (4) "All documents that refer, reflect, or relate to any communication between you and any other animal advocates or animal advocacy organizations concerning (a) any circus, including but not limited to Ringling Bros and Barnum and Bailey Circus or (b) the treatment of elephants in captivity" (Doc. Req. 22).

As to Tom Rider, the sole request at issue is Request Number 21, which sought:

> [a]ll documents that refer, reflect, or relate to any payments or gifts in money or goods made by any animal advocates or animal advocacy organizations to you, including but not limited to any payment of your transportation expenses, hotel bills, or food, or other costs of living by any animal advocates or animal advocacy organizations.

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[15] Indeed, FEI has repeatedly emphasized to plaintiffs that a party may not "broaden [the] scope" of its discovery requests retroactively. See November 16, 2007 Letter from Pardo to Ockene (Att. 2) at 11.

Def. Doc. Req. 21.

Plaintiffs have responded to each of these document requests by producing all responsive materials as required by the Court. Thus, with respect to Document Request 19, the organizational plaintiffs have produced documents "sufficient to show" the resources they have expended with regard to Mr. Rider's media and public education campaign, and no more is required. The request, on its face, does not call for each and every document that may exist that in any way relates to that funding. Document Request No. 20 does not pertain to funding for Mr. Rider's media efforts, and the plaintiffs are not funding Mr. Rider as an "alternative source of information about defendants' actions and treatment of elephants," Doc. Req. 20 – rather, they are funding Mr. Rider to disseminate such information.[16]

With respect to defendant's document requests concerning "communications," i.e., Document Request Nos. 21 and 22, as discussed above, the Court has ruled that plaintiffs need only produce "documents and information concerning relevant, non-privileged communications regarding the subject matter of this lawsuit between plaintiffs, Rider, WAP, and plaintiffs' counsel," Discovery Order at 7, with the further limitation that they need not produce any "documents or further information related to any media or legislative strategy or communications or any documents or information about litigation strategy." Id. The plaintiffs have produced whatever records they have concerning their communications with Mr. Rider that pertain to the subject matter of this lawsuit, but do not pertain to media, legislative, or litigation strategy.

[16] One plaintiff, the ASPCA, did at one point regard some of its funding for Tom Rider to fall within this category, and disclosed that information to defendant in its original responses.

Further, as Mr. Rider has explained (but defendant continues to ignore), the vast majority of communications between the plaintiffs and Mr. Rider have taken place through conversations rather than exchanges of documents. See Rider Supp. Resp. to FEI Interrogs. at 3-7 (Att. 13).[17]

As for the Document Request to Mr. Rider, while FEI now insists it is entitled to every piece of paper that Mr. Rider has received or generated - such as "envelopes," Def. Mot. at 14 - FEI's Document Request Number 21 simply does not seek such information, and Mr. Rider has already produced every document that is currently in his possession, custody or control that "refers, reflects, or relates" to the funding he has received from plaintiffs and others. See Rider Decl. (Att. 4). Indeed, as explained in Mr. Rider's most recent declaration, see id., with regard to actual payments and receipts, Mr. Rider has produced every document he can reasonably obtain.

FEI's pertinent interrogatories to the organizational plaintiffs asked that they:

> (1) "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 defendants since 1996." (Int. 16);
>
> (2) "Describe each communication you have had since 1996 with any other animal advocates or animal advocacy organizations about the presentation of

[17] Plaintiffs' disclosures concerning these conversations, of course, explain how plaintiffs and WAP are able to locate Mr. Rider, Def. Mot. at 4 ("FEI is unwilling to assume that WAP just happens to know where Rider is going to be"), and thus it is plaintiffs who are "at a loss to understand," Def. Mot. at 9, why FEI is so confused about how plaintiffs and WAP communicate with Mr. Rider. See Rider Supp. Resp. (Att. 13) at 7 (noting conversations with the other plaintiffs and the WAP). Similarly, while defendants insist that Mr. Rider should have e-mail that is covered by their discovery requests simply because he uses a laptop computer, see Def. Mot. at 8-9, Mr. Rider has already explained to the Court that he very rarely uses e-mail and that any e-mail communications he has had are either logged on plaintiffs' privilege log as attorney-client communications related to Mr. Rider's discovery responses, or relate to media and legislative strategies, which Judge Sullivan has now ruled is irrelevant and need not be produced. See Plfs. Opp. to Defendant's Motion to Compel Discovery from Tom Rider (DE 138) at 7-8 n.3; see also Discovery Order at 4.

elephants in circuses or about the treatment of elephants at any circus, including Ringling Bros. and Barnum & Bailey Circus." (Int. 19);

(3) "Identify each resource you have expended from 1997 to the present in 'advocating better treatment for animals held in captivity, including animals used for entertainment purposes' as alleged in the complaint, including the amount and purpose of each expenditure" (Int. 21); and

(4) "Identify each expenditure from 1997 to the present of 'financial and other resources' made while 'pursuing alternative sources of information about defendants' actions and treatment of elephants' as alleged in the complaint (Int. 22).

As for Mr. Rider, the Interrogatories asked him to:

(1) "Describe every communication you have had regarding defendants with any and all animal advocates or animal advocacy groups prior to working for defendants, while working for defendants, or since leaving defendants' employment" (Int. 4), and

(2) "Identify all income, funds, compensation, other money or items, including, without limitation, food, clothing, shelter, or transportation, you have ever received from any animal advocate to animal advocacy organization. If the money or items were given to you as compensation for services rendered, describe the service rendered and the amount of compensation" (Int. 24).

Once again, plaintiffs have fully complied with these requests. The organizational plaintiffs have produced all information they reasonably can concerning their communications with current or former FEI employees, including Mr. Rider, and with each other, that concern the subject matter of this lawsuit. See Discovery Order at 7. Further, as explained, the Court has ruled that plaintiffs need not produce any additional information in response to the overly broad request for all "documents and information concerning communications with animal advocates and animal advocacy organizations." Discovery Order at 7.

With respect to Interrogatory Nos. 21 and 22, plaintiffs have provided all of the information responsive to these requests in detail. Indeed, plaintiffs have carefully reconstructed,

to the best of their abilities, the amounts of funding they have provided for Mr. Rider's media work over the past six years and detailed that information in their responses. See Attachments 8-11. Plaintiffs can do no more. Mr. Rider has similarly complied with the Interrogatories, including by providing Supplemental Interrogatory responses explaining in detail all he can recall concerning the funding he has received. See Attachment 12 (No. 24).

C. Mr. Rider Does Not Have "Custody" or "Control" Of All Documents In His Attorneys' Files Or In The Files of WAP

Finally, there is no substance to defendant's assertion that Mr. Rider must produce all records and information in the files of his attorneys. Def. Mot. at 9 n.5; 14 n.6; 16 n.7, 17-19. FEI plainly misreads the Court's Order in this regard. The Court directed Mr. Rider to produce responsive documents that are "within his possession, custody or control, including, but not limited to, documents in the files of his attorneys." Discovery Order at 3 (emphasis added). Certainly, in issuing this Order the Court was not making a legal conclusion that all of Mr. Rider's counsel's files are in his custody and control, as defendant argues. Def. Mot. at 17.

Instead, the Court was simply directing that, to the extent that Mr. Rider's counsel's files are in his control, Mr. Rider must produce any responsive documents from those files. However, the mere fact that the lawyer possesses documents certainly does not mean that they are within the client's control.[18] In any event, as stated in their Declarations, all of the plaintiffs have now

[18] See Alexander v. F.B.I., 194 F.R.D. 299, 301 (D.D.C. 2000) (documents are only in a party's "control" where the party has a legal right to obtain them on demand); Poppino v. Jones Store Co., 1 F.R.D. 215, 219 (W.D. Mo. 1940) ("[t]he mere fact, however, that the attorney for a party has possession of a document does not make his possession of the document the possession of the party.")(emphasis added); see also Norex Petroleum Ltd. v. Chubb Ins. Co. of Canada, 384 F. Supp. 2d 45, 46 (D.D.C. 2005) ("[t]he burden of establishing control over the documents sought is on the party seeking production") (citations omitted).

produced all records in their "possession, custody, or control," including any such documents held by their attorneys. ASPCA Decl. at ¶ 1; AWI Decl. at ¶ 1; Rider Decl. at ¶ 2; API Decl. at ¶1; FFA Decl. at ¶ 1.

Contrary to defendant's counterintuitive claim, the Court's Order certainly does not require that Mr. Rider produce documents in the possession and control of the non-party WAP – a separate non-profit organization that, as noted, has already responded to FEI's third party subpoenas by producing extensive materials regarding the funding of Mr. Rider's media campaign. See Def. Mot. at 18-19. Indeed, it appears that FEI is simply attempting to circumvent this Court's prior ruling declaring that FEI's subpoena to WAP was "over broad and over burdensome" and, on that basis, significantly narrowing what FEI could legitimately seek from WAP for this case. Discovery Order (DE 178) at 8. Simply put, it is the Court's specific discovery order pertaining to WAP that should govern WAP's production of its materials, rather than the separate discovery order directed at plaintiffs.

In any event, even if the Court had not already specifically ruled on WAP's production obligations, FEI's arguments are baseless. To begin with, contrary to FEI's assertion that WAP is nothing but the "alter ego" of plaintiffs' law firm, Def. Mot. at 19, as WAP itself has explained to the Court in the course of responding to FEI's motion to enforce the third party subpoena to that organization, WAP is in fact a separate 501(c)(3) non-profit organization that was founded to assist grassroots activists to undertake public education campaigns on behalf of wildlife and captive animals. See Wildlife Advocacy Project's Sept. 21, 2007 Opp. to Def. Mot. to Compel (DE 93) ("WAP Compel Opp."), at 7-11; Ex. 23 to FEI's Sept. 7, 2006 Mot. to Compel Docs.

Subpoenaed from the WAP (DE 85) (2002 WAP Form 990-EZ as filed with the IRS).[19]

Accordingly, Mr. Rider does not have "custody" or "control" over the records of WAP, which has a distinct "corporate identit[y]" – as FEI itself has recognized by now submitting no less than three third-party subpoenas to that organization. See Inline Connection Corp. v. AOL Time Warner Inc., 2006 WL 2864586 *3 (D. Del. 2006) ("In the case of two *independent* corporate entities . . . production of documents would only occur when the respective business operations of each independent entity are 'so intertwined as to render meaningless' their distinct corporate identities") (internal citation omitted; emphasis in original); cf. Pennwalt Corp. v. Plough, Inc., 85 F.R.D. 257, 263 (D. Del. 1979) (requesting party not entitled to non-party's documents because there was no evidence that the party had "identical Boards of Directors, or that their respective business operations [were] so intertwined as to render meaningless their separate corporate identities").[20]

In any event, because WAP itself has previously responded to FEI's subpoenas (as narrowed by the Court), FEI's effort to compel plaintiffs to produce WAP's materials would be a

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[19] While WAP was founded by two members of the public-interest law firm that represents plaintiffs, see WAP Compel Opp. at 8, its Board includes individuals who do not work with the firm. See http://www.wildlifeadvocacy.org/who.php., Similarly, as WAP has previously advised the Court and as reflected in the organization's web-site, while some of the organization's public education campaigns have been conducted in coordination with the public-interest litigation pursued by plaintiffs' law firm, other projects have had no relationship to the firm's pending litigation. Id. at 8-9; see also http://www.wildlifeadvocacy.org/current (describing West African manatee project and recent Congressional testimony on wind power effects on wildlife).

[20] In addition, the mere fact that Mr. Rider has received funding from WAP for his public education campaign affords him no more control of the organization's documents than he has over the documents of any of the animal protection organizations who have supported his campaign. Moreover, the fact that WAP, as a courtesy to him, provided Mr. Rider with a copy of his Form 1099, hardly establishes that Mr. Rider has "control" over all of WAP's documents.

complete make-work exercise even if it had any legal validity, which it does not. Indeed, FEI has known for years that WAP, in conjunction with the organizational plaintiffs and other animal protection organizations and individuals, has been supporting Mr. Rider's travels around the country while he educates the public, through local media outlets, legislative testimony, and other means, about the sad plight of circus elephants. See WAP Compel Opp. at 9-11.

Thus, in 2005, FEI attempted to subpoena from WAP virtually every document the organization had ever generated or received, including every communication WAP ever had "with any other animal advocate or animal advocacy organization." Ex. 9 to DE 85. WAP provided FEI with extensive materials concerning its funding of Mr. Rider's media campaign (including the "transaction detail report" setting forth disbursements made to Mr. Rider, as well as receipts of funds WAP had received for the media campaign), see WAP Compel Opp. at 13-17, 19-21, 28-33, but FEI nonetheless moved to enforce the expansive subpoena.

Judge Sullivan ruled, however, that FEI was "seek[ing] a lot of information that is completely irrelevant to the 'taking' claim in this lawsuit, the credibility of Tom Rider, or any claimed defenses." Discovery Order at 8. The Court further found that FEI's "request for all communications between plaintiffs, WAP, animal rights advocates, and animal rights organizations generally" is " irrelevant to the claims and defenses in this litigation;" that "information about media and legislative contacts and strategies specifically is not discoverable for the same reasons;" and that "defendant's request for additional financial records is over burdensome and duplicative." Id. at 9. Accordingly, the Court denied FEI's motion to compel except that the Court directed WAP to produce, with enumerated exceptions, any materials "it has not already provided . . . related to payments or donations for or to and expenses of Tom

Rider in connection with this litigation or his public education efforts related to the Circus's treatment of elephants . . . ." Id. at 8 (emphasis added).

On September 24, 2007, WAP filed with the Court a detailed Declaration informing the Court of its compliance with the Court's ruling. See Sept. 24, 2007 Notice of Filing (DE 193). WAP explained that, although the Court's ruling had addressed FEI's July 2005 subpoena, WAP had also provided documents in response to a February 2007 subpoena from FEI, and had even searched for subsequent documents not covered by any outstanding subpoena. Id. at ¶¶ 2-5. Accordingly, WAP provided FEI with an updated comprehensive "transaction detail report" – current as of September 24, 2007, the date by when the Court had ordered WAP to respond – itemizing both disbursements by WAP to Mr. Rider and contributions or other sources of funding for the media campaign from both the organizational plaintiffs and others. Id. at ¶ 5.[21]

In short, FEI has no legal basis for contending that any of the plaintiffs is somehow responsible for obtaining and producing another organization's documents – particularly materials obtained and generated by any of plaintiffs' counsel when they "were acting as . . . officers of WAP." Def. Mot. at 18 (emphasis added). And in any case, in response to FEI's subpoena to WAP itself, the Court delineated the information that WAP should produce, while

[21] As set forth in the Declaration, the transaction detail report and other financial records produced by WAP actually contain considerably more information on Tom Rider's funding than legally required. WAP not only voluntarily produced materials generated after it was served with the subpoena, but it also released (as it has in the past) the identities of animal protection organizations that are not parties to this litigation but have contributed to Mr. Rider's media campaign – information that the Court had ruled could be withheld on First Amendment grounds. Compare DE 193 at ¶ 6 with Discovery Order at 8-9. Even further, as reflected in FEI's own brief, WAP has also provided FEI with e-mails pertaining to the funding of Mr. Rider's media campaign. Def. Mot. at 18 n. 9. Simply put, since a non-party has provided far more extensive financial information than FEI itself has been required to produce in the litigation, it is difficult to fathom what defendant is complaining about.

declaring the vast majority of what FEI sought from that organization "completely irrelevant to the 'taking' claim in this lawsuit, the credibility of Tom Rider, or any claimed defenses." Discover Order at 8. The present motion is plainly yet another effort by FEI to engage in an end-run around this and other rulings by the Court limiting discovery by all parties in the case to that which is truly integral to resolution of the litigation.

CONCLUSION

For all of the foregoing reasons, defendant's motion to enforce should be denied in its entirety. Plaintiffs have performed an exhaustive search in response to the Court's Order and they are withholding nothing that is responsive to FEI's discovery requests and covered by the Court's Order.

Respectfully submitted,

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