UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS, et al.,	:	
Plaintiffs,	:	
v.	:	**Case No. 03-2006 (EGS/JMF)**
FELD ENTERTAINMENT, INC.,	:	
Defendant.	:	

REPLY IN SUPPORT OF DEFENDANT'S MOTION TO ENFORCE THE COURT'S AUGUST 23, 2007 ORDER

Plaintiffs have been ***ordered*** to produce "all responsive documents and information concerning payments to Tom Rider." Discovery Order (8/23/07) (Docket No. 178) ("Order") at 6. Plaintiffs do not dispute this, nor do they dispute that they have withheld such documents and information. Plaintiffs, instead, rehash the arguments already raised during the briefing that culminated in the Order: Their position is that the documents they have been ***ordered*** to produce are of marginal utility to FEI and are burdensome to produce. See Opp. at 9, 11, 24, 25. Plaintiffs, however, already lost that argument. The Court has already overruled these objections. See Order at 3-7. At this stage of the proceedings, plaintiffs needed to show cause why it is that they have not complied with the Order. They have failed to do so. Instead, plaintiffs continued to arrogate to themselves the power to decide which of the relevant documents they will or will not produce.

The sole issue presented by FEI's motion is whether plaintiffs have produced all of the documents and information compelled by the Court's prior Order. Plaintiffs' response indisputably demonstrates that they have not complied with the Court's Order. Rather than

addressing this issue, however, they devote most of their brief to arguing about the RICO case – a lawsuit that they insisted be severed from this action and then stayed, yet they freely invoke and raise it whenever doing so suits their needs. (This is despite the Court's order that ad hominem attacks should cease. See Mem. Op. (10/25/07) (Docket No. 213) at 13.) Plaintiffs refuse to recognize, however, that on the same day that Judge Sullivan denied FEI's efforts to bring the RICO suit as a counterclaim, he also issued the order compelling the discovery on the Rider payment scheme. Cf. Order with Order Denying Counterclaim (8/23/07) (Docket No. 175). This material already has been held relevant ***to this case as it stands regardless of the RICO action***: "The Court finds that Rider's funding for his public education and litigation efforts related to defendants is relevant." (Order at 4).

Instead of confronting this narrow issue head-on, plaintiffs distract the Court with twenty-three pages of background and other material that is wholly irrelevant to the dispute at hand. As part of their revisionist history, plaintiffs, for example, attempt to rely on Judge Facciola's prior ruling that FEI need not produce its public relations documents, see Opp. at 4-5. Unlike plaintiffs' public relations campaign, however, FEI's public relations are not linked to this case, do not comment on the claims in this case, and do not have any potential for impacting standing in this case. Comparing the two is inapt, and Judge Facciola's ruling has absolutely nothing to do with Judge Sullivan's Order that plaintiffs must produce "all" documents concerning payments to Rider.

Tellingly, moreover, when plaintiffs finally do address the narrow issue presented by FEI's motion – whether they have produced all of the documents subject to the Court's Order – plaintiffs proffer carefully-crafted, yet wholly misleading, allegations regarding their efforts to comply with the Court's Order. Plaintiffs, for example, allege that they cannot locate any

"materials reflecting any ***additional funds*** provided to Mr. Rider." Opp. at 22 (emphasis added). What matters, however, is whether plaintiffs have any ***additional materials*** reflecting any funds provided to Mr. Rider. Plaintiffs' opposition says a lot, most of which is irrelevant, but what it does not say is what speaks the loudest. Plaintiffs do not say that they have produced "all of the responsive documents and information concerning payments to Rider," Order at 6, nor do they say that they have produced "all responsive documents ... in the files of [Rider's] attorneys," Order at 3. FEI is confident that had plaintiffs actually done what the Order requires, they would have loudly and willingly confirmed that for both FEI and the Court.

FEI already has an Order requiring the production of this material. It still has not, however, received the materials plaintiffs were compelled to produce by that Order. FEI should not have to file repeated motions and continually seek the Court's intervention to force plaintiffs into compliance with the Order. At this point, it is plaintiffs' burden to show cause why they have not done so. Plaintiffs, instead, persist in their refusal to comply with their discovery obligations (first those that are imposed by the Federal Rules and now those that have been explicitly ordered by the Court) apparently because the documents ordered to be produced relate to plaintiffs' credibility rather than the alleged "merits" of plaintiffs' ESA allegations. Yet the two concepts – witness credibility and the "merits" – are inseparable. The credibility of all of the plaintiffs bears directly upon their claims. It is ironic, indeed, that plaintiffs consistently refer to this case as a "matter of significant public interest and concern," see, e.g., Opp. at 6, yet they refuse to produce documents that *the Court has deemed relevant* to this dispute that relate to whether plaintiffs are even properly in court to begin with. FEI agrees that it is a matter of significant public interest and concern whether well-funded organizations can pay high dollar

amounts to an individual who also just happens to anchor their claim in federal court. The information related those payments is relevant and must be produced. (Order at 3-7).

ARGUMENT

I. PLAINTIFFS' IRRELEVANT "BACKGROUND" AND OTHER DISTRACTIONS SHOULD BE DISREGARDED

FEI will not waste the Court's time refuting the factual inaccuracies in plaintiffs' "background" and other irrelevant sections devoted to diverting the Court's attention from the issues relevant to FEI's motion to enforce. As explained below, several of the themes and sections in plaintiffs' opposition have nothing to do with the simple question of whether or not plaintiffs have produced everything that Judge Sullivan ordered them to produce.

A. Plaintiffs' Discussion of Prior Decisions and Separate Lawsuits Has No Bearing Upon Their Obligation To Produce Documents That Judge Sullivan Has Ruled Are Relevant to This Case.

Instead of denying that they have withheld Court-ordered discovery material, plaintiffs attack FEI's motives for seeking the very documents that plaintiffs *have been ordered to produce*. Plaintiffs' repeated allegations that FEI's motion seeks documents for purposes other than this litigation are flatly contradicted by Judge Sullivan's Order just a few months ago that all of these documents are *relevant to plaintiffs' ESA litigation* and *must be produced.* Compare Opp. at 16 ("FEI's motion is plainly directed at buttressing its RICO claim rather than obtaining what is genuinely necessary for it to litigate this case") with Order at 4 ("The Court finds that Rider's funding for his public education and litigation efforts related to defendants ***is relevant***.") (emphasis added). Similarly misplaced are plaintiffs' allegations that FEI's motion is intended to prolong discovery and delay a trial on the merits. See Opp. at 19-20. Plaintiffs' argument is particularly outrageous given that, just hours before filing their opposition, plaintiffs were present for FEI's counsel's statement in open court that it sees no reason why fact discovery

cannot be completed by the Court's December 31, 2007 discovery cut-off. If plaintiffs were interested in moving this case to trial as they claim, then they would honor the Court's Order and comply with it. FEI will gladly debunk the myths perpetuated by plaintiffs when and if this case proceeds to trial. In the meanwhile, it will take the discovery necessary for its defense at trial.

B. Plaintiffs' Allegations That the Documents at Issue Are Relevant Only to the Credibility of a "Single" Witness Have No Bearing Upon Their Obligation to Produce Documents Judge Sullivan Has Ruled Are Relevant to This Case.

Plaintiffs imply that the information compelled by the Court Order need not be produced because it allegedly relates only to the credibility of witnesses, not to the alleged "merits" of their claim. See Opp. at 16. Plaintiffs' efforts to permit only that evidence which supports their claims to come to light in this case are misguided. Plaintiffs cannot justify their failure to comply with the Court's Order simply because the documents and information they have been *ordered to produce* concern the credibility of "one" witness, instead of the substance of their ESA allegations. Opp. at 16. First, as the other discovery taken by FEI now demonstrates, the documents at issue affect the credibility of ***all*** of the plaintiffs, not just Rider. Second, as already explained above, witness credibility is inseparable from the "merits," or lack thereof, in plaintiffs' case. The Order recognizes this. Here, in particular, the credibility of Tom Rider is a dispositive issue: The sole reason this case was reinstated by the D.C. Circuit was because of Tom Rider's uncorroborated allegations that he has an emotional attachment to certain elephants, that he quit the circus because of the way those elephants were treated, that he has been unable to view the elephants without suffering aesthetic injury, and that he would seek to work with the elephants if they were treated differently. See ASPCA v. Ringling Bros., 317 F.3d 334 (D.C. Cir. 2003) (holding that plaintiffs had standing based on Rider's uncorroborated allegations, which had to be accepted as true for purposes of FEI's motion to dismiss). If any of these are

found to be untrue, plaintiffs' standing, along with this case, would end.[1] Thus, it should come as no surprise to plaintiffs that FEI requested, and the Court ordered, that the payment documents and information be produced. Their refusal to abide by the Order and produce this material is unduly and unfairly prolonging this litigation, and it is interfering with FEI's defense. It is clear that plaintiffs' approach to discovery is to stall until the deadline passes and then force FEI to proceed to trial without the discovery to which it is entitled. FEI will not oblige plaintiffs in this effort, and the Court should prohibit it immediately.

C. Plaintiffs' Characterization of the Discovery Material They Have Produced Has No Bearing Upon Their Obligation to Produce All of the Discovery Material Subject to Judge Sullivan's Order.

Also irrelevant is plaintiffs' claims that they have exerted significant efforts to comply with their discovery obligations. See, e.g., Opp. at 1, 12-14, 16 (arguing that plaintiffs have produced a "multitude" of documents and that they have made an "extraordinary disclosure of information"). FEI can say the same thing threefold, but that does not mean that FEI's discovery obligations are over. More importantly, however, FEI's motion addresses the documents subject to the Order that plaintiffs ***continue to withhold***, not those that plaintiffs reluctantly produced after FEI was forced to obtain a Court order.[2] Plaintiffs' argument can be distilled as follows: Since we already provided many documents, that should be good enough. This, however, does

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[1] As FEI previously has advised the Court, many of the allegations in plaintiffs' complaint concerning their standing are demonstrably false. See FEI's Opp. to Pls.' Motion Under Rule 11 (8/16/07) (Docket No. 165) at 25-33. Although such allegations were presumed true for purposes of FEI's motion to dismiss, FEI and the Court need not accept them as true any longer.

[2] Plaintiffs' belated retrieval and production of ASPCA's credit card statements, see Opp. at 12, is irrelevant to the issue of whether they are withholding other Court-ordered documents. Nonetheless, it is ironic that plaintiffs cite this behavior as evidence of their efforts to produce all relevant material. First, plaintiffs offer no explanation for why these records (and all other records reflecting these expenses) were withheld in the first place. Plaintiffs, moreover, do not explain why, as they suggest, ASPCA took the extraordinary step of requesting records from its credit card company in lieu of producing their own internal documents about these payments. Whether ASPCA is withholding its internal documents because they were destroyed or because they contain damaging evidence, the production of these few receipts does not show that plaintiffs have been forthcoming. Instead, it shows the lengths to which plaintiffs will go to conceal documents and/or the spoliation thereof.

not satisfy the Court's Order. The Order does not say that plaintiffs can self-select and cherry pick which payment documents it will disclose and hide the rest. The Order compels plaintiffs to produce them ***all.***

Nonetheless, as long as plaintiffs insist upon arguing that they have conducted a thorough search and produced a multitude of documents, the Court should not overlook the fact that plaintiffs only recently produced several damaging documents after being ordered by the Court to do so.[3] This was after repeated, indignant assurances to the Court that they already had produced "everything" – assurances that were proven false once the Court compelled production. Also conspicuously absent from plaintiffs' response is any acknowledgement that they withheld relevant, responsive, non-privileged, and damaging evidence until the Court ordered them to produce it. *Nor have plaintiffs denied that they continue to withhold such evidence to this day.*[4] Conspicuously absent from plaintiffs' "history" of this case is any mention of the fact that most of the issues presented in FEI's motions to compel have been resolved in FEI's favor. See, e.g., Order & Mem. Op. (12/3/07) (Docket Nos. 231 & 232). Plaintiffs have been anything but

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[3] In opposing FEI's Motion to Enforce, plaintiffs offer a revisionist history of their discovery misconduct in this case, which has included multiple instances of false testimony, false interrogatory responses, and spoliation. Because plaintiffs apparently believe their prior discovery behavior to be relevant to the narrow issue of whether they complied with the Court's order, FEI respectfully suggests that the Court examine the veracity of plaintiffs' revisionist history. Mindful of the Court's admonition regarding what plaintiffs consider to be *ad hominem* attacks, FEI will not repeat the litany of discovery misconduct that has occurred here, but respectfully directs the Court's attention to the prior briefing on this issue in the event that it determines plaintiffs' prior conduct is relevant to this narrow inquiry. See, e.g., FEI's Mot. to Compel Discovery From Rider and For Sanctions, Including Dismissal (3/20/07) (Docket No. 126) at 7-11 (describing three false interrogatory responses from Rider); FEI's Mot. to Compel Discovery From the Organizational Plaintiffs and API (5/29/07) (Docket No. 149) at 6-13 (describing false deposition testimony from AWI and false interrogatory responses from AWI, ASPCA, and FFA); FEI's Mot. to Compel FEI's Notice of Supplemental Points (10/2/07) (Docket No. 198) at 2-7 (describing additional examples of false interrogatory responses, false deposition testimony, and the withholding of critical evidence regarding the credibility of the plaintiff without whom this lawsuit would not exist). While plaintiffs have characterized these events as "ad hominem" attacks, they have never refuted them.

[4] In lieu of stating that all responsive documents and information have been produced, plaintiffs misleadingly cite to Judge Sullivan's opinion in another lawsuit that plaintiffs' declarations comply with the Court's prior Order in this case to imply that the Court has somehow approved of their inadequate search and production. See Opp. at 16 ("Plaintiffs' new search, production, and declarations do in fact comply 'precisely' with the Court's instructions.").

forthcoming – and now they complain that FEI has asked for all of the documents that the Court ***ordered*** plaintiffs to produce.

Importantly, plaintiffs do not deny the existence of the materials covered by the Order FEI seeks to enforce. Plaintiffs, instead, argue that the material at issue is irrelevant, burdensome to produce, and/or of marginal utility to FEI. All of that, however, is contrary to the law of the case and has no bearing upon the issue presented by FEI's motion. Plaintiffs already made – and lost – those arguments when briefing FEI's motion to compel. Nor are any of those arguments legitimate reasons to disobey a Court's discovery order compelling production. Once the Court granted FEI's motions to compel, plaintiffs were required to do what was ordered. They should not be permitted to continuously fight a rear-guard action in the hopes that FEI will lose its resolve and give up, or that the Court will tire of hearing that plaintiffs have failed to produce documents. While this subject may well be an unpleasant one for plaintiffs to address, they have no license to ignore the Court's order. See, e.g., Fed. R. Civ. P. 37(b).

II. PLAINTIFFS DO NOT DISPUTE THE NARROW PREMISE OF FEI'S MOTION

While most of plaintiffs' opposition attempts to distract the Court with irrelevant material and after-the-fact arguments about relevancy and burden, it tellingly does not deny that the documents and information addressed by FEI's motion exist and have been withheld. Rather, plaintiffs claim that the material at issue need not be produced because "all responsive documents and information" apparently does not mean that, nor does "all responsive documents ... in the files of [Rider's] attorneys" apparently mean that either. Plaintiffs' efforts to creatively interpret the plain language of the Court's command falls flat.

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

Plaintiffs basically admit withholding documents and information concerning payments to Rider and argue that they were not required to produce the communications related to payments. They complain that FEI is seeking "every piece of paper" on the subject. Yet, that is precisely what plaintiffs have been ***ordered*** to produce. Order at 6 ("***all*** responsive documents and information concerning payments to Tom Rider") (emphasis added). There is nothing ambiguous about "all." Plaintiffs mischaracterize both what FEI now seeks and what the Court has ordered plaintiffs to produce. FEI's request is not "far-reaching." See Opp. at 2. It simply asks that plaintiffs produce documents and information that have already been held relevant to this case. Cf. Order at 3-7.

1. FEI's Motion Seeks the Production of Communications Concerning Payments, Not Communications Concerning Media Strategy or Public Relations

Plaintiffs seek to cloud the issue by inaccurately suggesting that FEI is seeking communications concerning "media strategy," rather than communications concerning payments. This is false. FEI does not dispute that plaintiffs need not produce communications concerning their alleged media ***strategy***. See Mot. at 9 n.5. But, by the same token, plaintiffs may not withhold communications concerning ***payments*** to Rider by euphemistically labeling them communications concerning ***"media strategy."*** If the communications involved Rider's funding, they must be produced regardless of whether there is an overlap with "media strategy." FEI has stated repeatedly that it has no objection to plaintiffs redacting ***only*** those portions related to media strategy if found in the same document. This is precisely why plaintiffs' carefully crafted statements (such as the one that Rider's communications are either privileged or relate to media strategy, see Opp. at 28 n.17) are irrelevant. FEI is not seeking Rider's media communications,

but it is seeking (and is entitled to) plaintiffs' communications concerning payments. Plaintiffs cannot hide the documents related to payment communications by categorizing them as "media strategy" documents.

Because FEI is not requesting that plaintiffs produce communications regarding their alleged media strategy, plaintiffs' argument that such communications need not be produced is wholly irrelevant. See Opp. at 24-25. It also is irrelevant that FEI was not required to produce its public relations documents. See Opp. at 4-5. Unlike plaintiffs, FEI's public relations never included a coordinated plan by counsel and co-parties to pay the lead plaintiff in this case for his "advocacy." See Exhibit 10 (Rider's 2005 and 2006 tax returns stating his "principal business or profession" as "advocacy"). The only relevant portion of the Court's Order is the one commanding plaintiffs to produce "***all***" documents concerning payments to Rider. Plaintiffs cannot evade the command of this Order by misstating what FEI seeks.

2. "All Responsive Documents Concerning Payments to Tom Rider" Means ***ALL*** Responsive Documents Concerning Payments to Tom Rider.

"***[A]ll*** responsive documents and information concerning payments to Tom Rider," Order at 6 (emphasis added), leaves no room for interpretation, yet plaintiffs attempt to use other portions of the Court's Order and, even, other Court orders to argue that the Court did not mean what it said. Plaintiffs, for example, now argue that portions of the Court's August 23, 2007 Orders discussing the "limited discovery" remaining in this case somehow modified the Court's instruction that they produce ***all*** responsive documents concerning payments to Rider. Opp. at 9. This argument gets plaintiffs nowhere. Discovery has indeed been limited to certain subjects – and payments to Rider is one of them. For example, as to Rider, his marital history is off limits, Order at 1, but by the same token, the payments to him are not. Order at 3, 6, 8. And, as to

payments – which remain in bounds – there is no limit. Indeed, the Court denied Rider's motion for a protective order concerning his financial affairs. (Order at 5).

Notwithstanding the Order of "all responsive documents and information concerning payments to Tom Rider," plaintiffs insist the Court really meant they need only produce the limited few documents and information relating to the "amounts" and "sources" of the payments to Rider. Compare Order at 3 (plaintiffs must produce "all responsive documents and information concerning payments to Tom Rider") with Opp. at 3 ("plaintiffs have now ... provided FEI with materials demonstrating all of the amounts of funding provided to Mr. Rider and the sources of that funding"). "All" means "all"; it does not mean that plaintiffs can selectively choose which documents to produce. The Court specifically has held that "Rider's funding for his public education and litigation efforts related to defendants is relevant." (Order at 4). Nowhere has the Court limited relevant information to include only the "amounts" and "sources" of such funding.[5] Plaintiffs' approach is akin to requiring the production of a computer but not the passwords necessary to access and interpret the data on it – which is precisely what they are trying to do by urging the Court to reconsider and now limit the Order to just "amounts." Plaintiffs' efforts are patently unwarranted and further suggest that their recalcitrance to producing such discovery stems from the problematic nature of the documents for them.

Instead of stating that "all responsive documents and information concerning payments to Tom Rider" have been produced, plaintiffs only allege that the documents and information

[5] Plaintiffs' curious interpretation that the Court's Order to produce "all" documents really means they must produce "some" documents is wholly inconsistent with the plain meaning of the Court's Order and with the Court's ruling with respect to WAP. See Order at 11 ("WAP shall provide ***any*** non-privileged documents or information ... 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.") (emphasis added).

withheld do not "reflect[] any additional funds provided to Mr. Rider." Opp. at 22. That, however, is not the standard. The Court ordered that all documents and information be produced, not just those that reflect additional funds. Similarly irrelevant are plaintiffs' assurances that Rider has produced all of the documents they can "reasonably obtain." See Opp. at 28. "Reasonably obtain" is not the standard required by the Federal Rules or by the Court's Order. Plaintiffs must produce all responsive documents that are within their possession, custody, or control, and must describe all other responsive documents that are no longer within their possession, custody, or control. See Order at 3, 7.

Finally, the Court's Order that plaintiffs produce "all responsive documents and information concerning payments to Tom Rider" explicitly commands them to produce their communications concerning such payments. Nowhere does the Court's Order permit plaintiffs to withhold these communications. Cf. Opp at 27 (arguing that the only communications plaintiffs must produce are those which discuss this lawsuit). "All documents and information concerning payments to Tom Rider," by definition, include all communications about such payments. Contrary to plaintiffs' argument, the portion of the Court's Order commanding them specifically to produce their communications about this lawsuit does not mean that no other communications must be produced. See Opp. at 27. The only reason that provision appears in the Court's Order at all is because plaintiffs withheld non-privileged communications about this lawsuit that occurred outside the presence of counsel or in the presence of counsel but also with third-parties, all of which prevents privilege from attaching. See FEI's Mot. to Compel Discovery From Rider and For Sanctions, Including Dismissal (3/20/07) (Docket No. 126) at 27-33 and FEI's Corresponding Reply (5/7/07) (Docket No. 144) at 11-14; FEI's Mot. to Compel Discovery From the Organizational Plaintiffs and API (5/29/07) (Docket No. 149) at 17-20 and

FEI's Corresponding Reply (7/13/07) (Docket No. 159) at 4-6. Plaintiffs, having been ordered to produce communications for which they improperly claimed privilege, now seek to use that portion of the Order to their benefit by arguing that no other communications need be produced. Plaintiffs' argument makes no sense. Nor was that the implication of the Order.

3. Plaintiffs Are Withholding Responsive Documents Concerning Payments to Tom Rider

In a last-ditch effort to justify their non-compliance, plaintiffs argue that the documents and information they have withheld are not responsive to FEI's underlying discovery requests. This argument again comes too late in the proceedings: Once a discovery Order compelling production attaches, it is inappropriate to withhold responsive materials by repeating arguments and issues related to the underlying discovery requests. The Court already has ruled on what plaintiffs must produce, and the Court should not permit plaintiffs to engage in these delay tactics and avoid the Order.

In case the Court is inclined to indulge plaintiffs on this, it should know that materials covered by the Order were likewise covered by FEI's discovery requests. First, FEI's document requests explicitly require plaintiffs to produce their written communications concerning payments to Rider and FEI's interrogatories explicitly require plaintiffs to describe all communications concerning payments.[6] Indeed, plaintiffs do not dispute this. Thus, by plaintiffs' acknowledgement, documents and information concerning payments to Rider are

[6] See Motion at 8, 10-12 (citing ***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"); ***Org. Pls.*** Document Request No. 21 (requesting "***all documents that refer, reflect, or relate to any communication between you and plaintiff Tom Rider***"); ***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"); ***Rider*** Interrogatory No. 4 ("***describe every communication*** you have had ***regarding [FEI]*** with any and all animal advocates or animal advocacy groups"); 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]***").

"responsive documents and information concerning payments to Tom Rider." (Order at 6). Plaintiffs' only excuse for not producing this material is that the Court ordered them to produce communications discussing this lawsuit. As discussed above, however, the Court's Order commanding the production of communications concerning this lawsuit does not mean communications concerning payments need not be produced. Indeed, because the Court has held that the payments to Rider are relevant to this case, then any communication about such payments necessarily is a communication about this case which must be produced.[7]

Second, plaintiffs continue to withhold not just communications concerning payments to Rider, but ***other documents*** reflecting those payments as well. Rider was ordered to produce ***"all documents that refer, reflect, or relate to any payments or gifts*** ... made by any animal advocates or animal advocacy organizations to [him]." See Rider Document Request No. 21; Order at 3, 7 ("all responsive documents" concerning payments). Yet, conspicuously absent from his production are documents that establish when and how such payments were received and deposited (e.g., wire transfer and check-cashing receipts). Similar documents, moreover, also are conspicuously absent from the organizational plaintiffs' document productions. The non-communication documents being withheld by the organizational plaintiffs are responsive to 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

[7] Plaintiffs proffer yet another novel interpretation of the Court's Order. Specifically, the Court held that the organizational plaintiffs need not produce ***all*** communications with all animal advocacy organization. Order at 7. That concept, however, does not nullify the Court's explicit Order that "all responsive documents" concerning payments to Rider must be produced. Id. Plaintiffs' argument to the contrary also conveniently overlooks the reality that this portion of the Court's Order relates only to the organizational plaintiffs. See Opp. at 29. If the Court intended to exclude communications concerning payments (a) it would not have ordered that all documents concerning payments be produced and (b) it would have also ruled that the document request served upon Rider (requiring disclosure of all communications concerning FEI) was overbroad. It is beyond credulity that the Court's ruling that not all communications with all animal advocacy organizations are relevant limits in any way the Court's explicit ruling that all documents concerning Rider payments must be produced. Plaintiffs' argument cannot be reconciled with the fact that Rider has been ordered to produce all communications concerning FEI.

purposes' each year from 1996 to the present") because they would reflect additional costs of providing money to Rider. For example, Federal Express and wire transfer receipts would show FEI the true costs of providing a given check to Rider as well as his whereabouts when receiving payments.[8] Such documents are reasonably calculated to lead to the discovery of admissible evidence, including the issues of whether Rider was actually conducting media work in exchange for his payments and whether additional steps were taken by plaintiffs to hide the payments to Rider, such as AWI's issuing a check to its own employee with instructions to wire money to Rider so that it would not be traced to AWI. All of this impacts Rider's, as well as the other plaintiffs', credibility in this case.

Nowhere does the Order permit plaintiffs to withhold documents that they unilaterally deem to be nothing more than "mechanics." Even if plaintiffs are correct that the documents they continue to withhold relate only to the mechanics of the payments to Rider, all such documents are responsive to FEI's requests and, pursuant to the Court Order, must be produced or, if plaintiffs have not preserved them, described in their declarations. Plaintiffs do not deny that the documents at issue exist, yet they have neither produced nor described them. Until they do so, plaintiffs are in contempt of the Court's Order. The blatant refusal to comply with the Order is inexplicable.

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[8] All such documents also are responsive to 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'"). At one point, ASPCA considered its payments to Rider to be responsive to this inquiry. See Opp. at 20 n.16. Plaintiffs cannot now withhold documents by using a new euphemism for the payments to Rider. Even if other plaintiffs do not consider the payments to Rider as resources for pursuing alternative sources of information, ASPCA does and must produce all of the related documents. Plaintiffs, moreover, cannot withhold documents on the basis that they allege Rider is being paid to disseminate information, not to pursue it. See Opp. at 20. If, as FEI alleges, the payments to Rider were intended to keep him in this lawsuit (which is, at its heart, a mere avenue for plaintiffs to gather information from FEI during discovery and misleadingly distribute it in their media campaign), the payments to Rider are precisely payments to pursue "alternative sources of information about FEI."

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

Plaintiffs do not deny that Rider refuses to answer Interrogatory No. 24 based upon all information ***available to him***, including information known by his attorneys. See Mot. at 15-17 (citing Hickman v. Taylor, 329 U.S. 495, 504 (1947); Trane Co. v. Klutznick, 87 F.R.D. 473, 476 (W.D. Wis. 1980)). Instead, plaintiffs insist that Rider need only answer based upon the limited information he can "recall[]" from his "own personal knowledge." Opp. at 22-23.[9] That, however, simply is not the standard required by the Federal Rules of Civil Procedure. See Mot. at 15-17.

Rider's failure to comply with Fed. R. Civ. P. 33 ***and*** with the Court's Order is neither difficult to cure nor inconsequential. If, as plaintiffs claim, Rider and his attorneys have not destroyed documents concerning payments to him, Rider should easily be able to assemble those documents and provide a complete and accurate response to FEI's interrogatory based upon all information available to him, as required by Fed. R. Civ. P. 33. FEI, moreover, knows of at least one instance in which Rider failed to disclose the actual amount of money he has been paid by one of his co-plaintiffs. FEI will not know, however, how many more payments Rider is concealing by virtue of his refusal to answer FEI's interrogatory based upon all information available to him. By refusing to answer Interrogatory No. 24 based upon all information available to him, Rider is concealing relevant information that FEI is entitled to and that Rider has been ordered to produce. See Order at 4 ("The Court finds that Rider's funding for his public education and litigation efforts related to defendants is relevant."); id. at 3 (Rider shall

[9] The cases cited by plaintiffs are wholly inapposite to Rider's obligation to provide complete and accurate interrogatory responses based upon all information available to him. The first case, Public Serv. Enter. Group Inc. v. Phila. Elec. Co., 130 F.R.D. 543, 552 (D.N.J. 1990), addressed the relevancy of certain information; the Court, however, already has ruled that information concerning payments to Rider is relevant. Moreover, the second case cited by plaintiffs, E.E.O.C. v. Hay Assocs., 545 F. Supp. 1064, 1077 n.11 (E.D. Pa. 1982), has absolutely nothing to do with a party's failure to provide complete and accurate discovery responses. Instead, it is an opinion regarding the Court's post-trial conclusions of law. Plaintiffs, however, would have the Court believe that a footnote in the opinion's facts section is somehow relevant to the current issues pending in FEI's Motion. It is not.

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

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

Plaintiffs ***do not deny*** that Rider is withholding documents in the files of his attorneys that are responsive to the document requests served upon him. Instead, plaintiffs argue that the explicit language in the Court's Order does not mean what it says. Compare Order at 3 (Rider shall produce "all responsive documents ... in the files of his attorneys.") with Opp. at 30 (Rider must produce all responsive documents in the files of his attorneys that *he believes to be within his control.*). The Court's prior Order is clear: all documents concerning payments to Rider must be produced, regardless of whether they are in the files of plaintiffs, their counsel, or WAP. Plaintiffs and WAP cannot withhold such documents by hiding them in the files of Rider's counsel.

The issue here is straightforward: Upon receiving Rider's court-ordered document production, FEI simply sought confirmation that he produced (as he was ordered to) all responsive documents from his attorneys' files. Specifically, FEI was concerned because it appeared that most of the documents produced by Rider, with the exception of a very few "new" documents, appeared to be mere duplicates of the documents produced by WAP with only the Bates label changed to appear as Rider's. FEI, moreover, reasonably believes that additional documents concerning payments to Rider exist in the files of Meyer Glitzenstein & Crystal but have not been produced by WAP – and now, have not been produced by Rider. FEI is not trying to "end-run around" the Court's Order, see Opp. at 35; rather, it is trying to ensure that plaintiffs do not get away with an end-run around the Order. The documents and information appear to be treated like a hot potato – every time FEI asks Rider, WAP, or the plaintiffs for them, it is told

that one or the other has them. If there are no more documents concerning payments to Rider in his attorneys' files, plaintiffs could have so stated. They did not. Instead, plaintiffs attempt to justify their non-compliance with the Court's Order by launching unfounded accusations that FEI is trying to obtain irrelevant material, which again signals that documents exist. FEI simply wants the documents that the Court has already ruled it is entitled to and has already ***ordered*** plaintiffs to produce.[10]

This issue could have been resolved months ago with a simple confirmation from plaintiffs that all documents concerning payments to Rider that exist in his attorneys' files have been produced – either by Rider or WAP. Or, if responsive documents have been discarded, they could have identified such materials and explained what happened to them. Plaintiffs refused to do so. It remains unclear what exactly plaintiffs are hiding, but it is certainly clear that the Court has ordered Rider to produce all responsive documents in his attorneys' files. Plaintiffs' argument that the Court was "simply directing" Rider to produce the documents in his attorneys' files that are within his control, see Opp. at 30, ignores the fact that this issue was explicitly raised in FEI's motion to compel and fully-briefed by both parties. See FEI's Mot. to Compel Discovery From Rider and For Sanctions, Including Dismissal (3/20/07) (Docket No. 126) at 19-21; Pls.' Opp. (4/19/07) (Docket No. 138) at 10-11; FEI's Reply (5/7/07) (Docket No. 144) at 6-7. There is no need to re-argue this issue that the Court already has explicitly settled. Indeed, plaintiffs' argument (and related cases) that Rider does not have control over documents in his attorneys' files were previously asserted and ***rejected***.[11] By using such explicit language in

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[10] The Court's Order is similarly clear that Rider must produce all non-privileged communications in his attorneys' files discussing this lawsuit. See Order at 3. Thus, if any of Rider's attorneys affiliated with Meyer Glitzenstein & Crystal have had non-privileged communications (e.g., e-mails) concerning this lawsuit (i.e., e-mails to other animal advocacy organizations or to third-parties, such as the USDA and counsel for PETA), all such communications must be produced.

[11] As FEI has previously explained, all of the documents in the files of Rider's attorneys concerning payments to him are in their files pursuant to their representation of him.

its Order (Rider shall produce "all responsive documents ... in the files of his attorneys"), the Court clearly was ruling that such documents were within his control.

The Order is clear: Plaintiffs cannot withhold documents concerning payments to Rider by hiding them in his counsel's files so that neither he nor WAP have to produce them. All such documents are subject to the Court's Order and must be produced immediately.

CONCLUSION

Plaintiffs do not deny withholding documents and information concerning payments to Tom Rider; rather, they argue that the documents and information withheld is of marginal utility to FEI and burdensome to produce. The Court ordered plaintiffs to produce all responsive documents and information concerning payments to Rider by September 24, 2007. Plaintiffs have failed to show cause why they should not be held in contempt for their failure to do so. It is not for plaintiffs to self-select which material concerning payments to Rider it will produce. FEI asks, therefore, that its motion be granted and that the Discovery Order be enforced against

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> Rider argues that a party need only produce its attorney's files if the "attorney comes into possession of a document as attorney for that party." Opp. at 11 (citing Poppino v. Jones Store Co., 1 F.R.D. 215, 219 (W.D. Mo. 1940)). As Judge Facciola previously explained in this case, "a client has the right, and the ready ability, to obtain copies of documents gathered or created by its attorneys pursuant to their representation of that client." ASPCA v. Ringling Bros., 233 F.R.D. 209, 212 (D.D.C. 2006) (emphasis added). Indeed, that is exactly the case here. WAP exists to support MGC's litigation matters and WAP started an alleged campaign against FEI for the sole purpose of raising money so that Rider would remain in this case. Its work, therefore, is pursuant to MGC's representation of Rider. Indeed, documents produced by WAP prove that there is absolutely no distinction between the work of Rider's counsel as officers of WAP and as counsel in this case. MGC has sent e-mails to its attorneys and Rider's co-plaintiffs discussing his alleged "media" (*i.e.* WAP) work. Ex. 33. One of the e-mails to Rider's co-plaintiffs discusses ways to raise money for him (through WAP) while noting that counsel is "personally very impressed with ... his total commitment to the lawsuit." Id. Rider, moreover, has received (via WAP) money solicited by his co-plaintiffs through a fundraiser seeking donations for this litigation and featuring keynote speech(es) from his counsel/WAP officer(s). Ex. 7, Invitation to Fundraiser; Ex. 34, WAP Ledger (reflecting donations from AWI/fundraiser). The documents relating to this case and WAP's "campaign" against FEI are in the possession of Rider's counsel pursuant to their representation of him. Counsel's voluntarily assumed dual roles are indistinguishable. But for their representation of Rider, the documents at issue would not exist.
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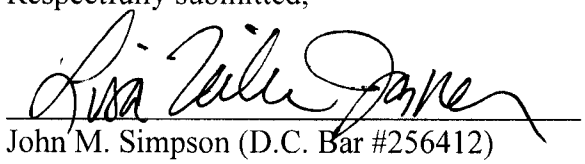
> FEI's Reply (5/7/07) (Docket No. 144) at 6-7.

plaintiffs immediately. FEI further asks that it be awarded its costs and fees incurred for having to file this motion and that the Court grant any other relief that it deems just.

Dated this 3rd day of December, 2007.

Respectfully submitted,



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