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**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

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| **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 COMPEL THE PRODUCTION OF DOCUMENTS SUBPOENAED FROM MEYER GLITZENSTEIN & CRYSTAL**

Feld Entertainment, Inc.'s ("FEI's") Motion seeks the production of unredacted airbills by which numerous payments were sent to Tom Rider by his lawyers in this case. Counsel redacted the names and addresses from this evidence prior to production. Their only excuse for withholding such information is their unsubstantiated allegation that FEI's subpoena arises from an improper motivation: MGC now argues that FEI seeks this information so that FEI can "spy" on Rider. Despite plaintiffs' invocation of bogymen, the legitimacy of the subpoena and relevance to this case of the information sought are clear.

In the first place, Rider's whereabouts go directly to the legitimacy of Rider's allegations of standing and to plaintiffs' frequent claims that he lives in a van and travels the land speaking out about elephant welfare. Is that the case, or does he simply use the money (i) to visit friends and relatives, (ii) to avoid having to get a real job and (iii) occasionally gives an interview to the press about the evidence in this case to cover the fact that he is essentially on retainer as the designated plaintiff with purported standing to sue?

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Second, FEI needs this information, which would identify Rider's likely whereabouts, so that it can subpoena Rider to appear at court proceedings now that plaintiffs have refused to voluntarily make him available for such things. Both the face of a complaint and a party's initial disclosures are supposed to identify the location of plaintiffs and witnesses who may have information pertinent to the case so that they may be found and asked to testify. Rider's location is relevant and not privileged. There is absolutely no reason to suspect FEI intends to use this information for improper purposes. Unlike plaintiffs, FEI has no intention of using information obtained in discovery for any purpose other than ensuring a speedy and just resolution of this lawsuit.

Third, it is now abundantly clear that all of the plaintiffs, with their counsel's knowing assistance, intend fully to rely upon their "media campaign" defense for the six-figure income stream that they have collectively provided to Mr. Rider during this litigation. If that is going to be their justification for the monies they have paid to Mr. Rider, then they need to produce their overdue discovery immediately and stop playing games about their financing of him. As the record in this case now stands, plaintiffs have gone from initially denying the funding to reluctantly confessing it only in part. Plaintiffs have a choice to make: Either they produce the documents and information related to Mr. Rider's funding or they forego their right to rely upon why they were paying him at trial. Plaintiffs cannot be heard to offer the "media campaign" excuse for their payments at trial when they have fought so stridently to prevent FEI from taking discovery related to that campaign, a campaign which is inextricably intertwined with the payments to Rider.

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## ARGUMENT

Quite simply, MGC should be compelled to produce the information it has withheld thus far because its relevance to this litigation far outweighs plaintiffs' unsupported claims of harm from disclosure. In conducting this analysis, the Court should not "disregard FEI's allegation that plaintiffs and their counsel have been involved in some kind of cover-up to mask document destruction by Tom Rider." See Opp. at 7. It is precisely because of this cover-up that FEI had to subpoena MGC in the first place and it is this kind of cover-up that undermines MGC's after-the-fact, self-serving justifications for withholding the relevant information.[1]

The materials FEI has inspected thus far in connection with the subpoena corroborate FEI's allegations. Tellingly, MGC does not deny this in their response.

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.[2] In February 2007, Rider's counsel told FEI that Rider was not keeping such documents. See Joiner Decl. Attached as Ex. 32 to FEI's Reply in Support of Its Mot. to Compel Discovery From Tom Rider (5/7/07) (Docket No. 144). However, when FEI brought that statement to the Court's attention,

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[1] MGC claims incorrectly that FEI should have filed this motion as a separate miscellaneous action. See Opp. at 6 n.5. As indicated by the Motion, however, it is brought pursuant to Rule 45. Because MGC is located here in the District of Columbia, there is no need to initiate a separate case to enforce the subpoena. Thus, regardless of whether MGC "does not object to the Court resolving the motion," the motion has been properly filed. Nonetheless, the argument is bizarre given that plaintiffs recently filed their own motion to compel against PETA, which was not a miscellaneous action. See Pls.' Mot. to Compel Compliance With Third-Party Subpoena Served on PETA (2/15/08) (Docket No. 260).

[2] The Court should not overlook, moreover, the fact that FEI has, for years, argued that Rider has control over documents in his lawyer's files concerning payments to him – regardless of whether those files are in the "MGC" filing cabinet or the "WAP" filing cabinet located in counsel's office. See, e.g., FEI's Mot. to Compel Discovery From Tom Rider, and For Sanctions Including Dismissal (3/20/07) (Docket No. 126) at 19-21. Plaintiffs, however, have fervently argued that Rider does not have control over counsel's "WAP" documents and need not produce them. Pls.' Opp. to FEI's Mot. to Compel (4/19/07) (Docket No. 138) at 10-11. Yet, when Rider was ordered by the Court to produce certain documents (including letters sent to him by his counsel), Rider

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Rider's counsel denied it and claimed she was only referring to documents pre-dating March 2004. Compare FEI's Mot. to Compel Discovery From Tom Rider, and For Sanctions Including Dismissal (3/20/07) (Docket No. 126) at 19-21 with Meyer Decl. Attached As Ex. 1 to Pls.' Opp, to FEI's Mot. to Compel (4/19/07) (Docket No. 138). Thus, Rider's counsel intentionally left the Court with the impression that Rider was preserving all relevant documentation after March 2004. Plaintiffs' counsel continue to deny the statement to this day. See Opp. at 8 n.7.

The evidence, however, demonstrates

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This testimony, like other statements provided under oath by Mr. Rider, was patently false. FEI's subpoena to MGC proved it, and the actual documents were produced at the February 26, 2008 hearing pursuant to subpoena. The original WAP payment letters (signed by Glitzenstein) that Rider received and that Rider testified that he sent back to counsel were all produced by MGC in original form at the evidentiary hearing in this case. ***There were only 27, not 88, such originals.*** See Transcript of Hearing at 179 (Feb. 26, 2008) ("Hearing Tr.") (Pl. Ex. 6, consisting of the materials in plaintiffs' notebook at Tab G); see also Hearing Tr. at 170-74 (testimony of Michelle Sinnott as to Def. Ex. 94). Thus, the record shows that Rider preserved

[3] Mr. Rider's deposition transcript (dated December 18-19, 2007) is cited herein, but is not attached hereto because it was previously submitted to chambers on December 27, 2007 and February 15, 2008. FEI, however, will provide another copy if the Court would like.

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only 27 of the 88 WAP/Glitzenstein letters, hardly REDACTED SEALED PURSUANT TO COURT ORDER

Importantly, Rider preserved only 2 of the 49 letters sent between March 2004 and October 2006, the latter being the date Rider was deposed by plaintiffs and cross-examined by defense counsel. Counsel's *post hoc* claim that her comments regarding Rider's spoliation covered only the period prior to March 2004 is also belied by the evidence.

MGC also argues that the information sought by FEI was sought "for the first time" in January 2008. Opp. at 3. That, however, ignores the reality that the documents at issue were requested four years ago from Rider and three years ago from his counsel (via their alter ego WAP). The alter ego, in fact, produced one such document, thereby undermining MGC's self-serving allegations that none of these documents were responsive to any of FEI's prior requests. MGC, itself, also concedes that REDACTED SEALED PURSUANT TO COURT ORDER Opp. at 5. Yet, MGC does not explain why Rider did not preserve all of them or why Rider was instructed to send some materials back to counsel for production that ultimately were not produced --- until, that is, FEI learned that REDACTED SEALED PURSUANT TO COURT ORDER and FEI issued yet another subpoena, this time to MGC, for the records that Rider again failed to produce.

Counsel's claim that the Court will "search in vain" looking for any document request that could cover the Fed Ex airbills is incorrect. See Opp. at 6. FEI has several requests to Mr. Rider that cover the airbills, including Request No. 21 ("all documents that refer, reflect, or relate to any payments or gifts in money or goods by any animal advocates or animal advocacy organizations to you ...") and Request No. 22 ("all documents that refer, reflect, or relate to any communication between you and any animal advocates or any person affiliated with such a

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group ..."). See Ex. 1 to FEI's Mot. to Compel Discovery From Tom Rider and For Sanctions, Including Dismissal (3/20/07) (Docket No. 126).

If these requests were not enough to convince Rider to produce the materials in his counsel's possession, then the Court's August 23, 2007 Order directing them to do so should have been. Yet FEI had to turn around and issue a subpoena to MGC for these materials. Forcing FEI to repeatedly jump through hoops to obtain the discovery that it requested years ago and that the Court has ordered be produced is outrageous. Plaintiffs are fond of quoting the Court's order that says FEI has been "relentless" in its pursuit of the Rider funding. FEI respectfully submits to both plaintiffs and this Court that had there been even the slightest effort by plaintiffs to be "forthright" about this relevant discovery, as they claim, then FEI would not have been forced to be relentless. As it now stands, the discovery requests and court order enforcing those requests do not seem to mean much to plaintiffs who have decided to continue to ignore them.

This history is pertinent to the underlying issue: MGC should have to produce the information that plaintiffs have withheld for several years because it is relevant to this litigation and its disclosure would present no harm to plaintiffs. Having refused FEI access to this information for years by withholding the documents in the face of other document requests to their clients, MGC now asks the Court to believe that it has new, legitimate reasons for withholding the information now, *i.e.* spying on Mr. Rider and immunity for counsel. That simply is not true. That these documents may be damaging to plaintiffs' case is not the type of harm contemplated by the applicable rules and precedent.

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## A. The Information Withheld by MGC is Highly Relevant

It simply is not true that FEI has "no legitimate reason" for compelling MGC to produce the information it has withheld thus far. In fact, FEI has two legitimate reasons for commanding the information, both of which are situations entirely of plaintiffs' own making. Because plaintiffs refuse to make Mr. Rider available to participate in evidentiary hearings, FEI needs to locate Mr. Rider so that he can be commanded to appear. FEI, moreover, must test the veracity of plaintiffs' heretofore unsupported allegations that Mr. Rider is being paid to live in a van while conducting a media campaign and not being paid to participate in this case while traveling to see friends and family who happen to live in different cities and states. Either of these reasons is sufficient to meet the "exceedingly broad" standard of relevancy in discovery. Norex Petroleum Ltd. v. Chubb Ins. Co. of Canada, 2005 U.S. Dist. LEXIS 19127 at *3-4 (D.D.C. Mar. 9, 2005), modified on recons., 384 F. Supp. 2d 45 (D.D.C. 2005).

### 1. The Information Will Enable FEI and the Court to Command Rider's Appearance at Court Proceedings

Despite voluntarily filing a lawsuit in this Court, Rider has recently refused to appear at an evidentiary hearing concerning his and the other plaintiffs' failure to comply with a Court Order. Because Rider no longer lives at the addresses he previously provided, FEI has been unable to locate him so that it may serve him with a subpoena commanding his appearance at Court proceedings in the case that he filed. By letter dated February 20, 2008, plaintiffs' counsel informed FEI that it would not accept service of a subpoena on Rider's behalf, despite the fact that Rider himself testified in plaintiffs' October 12, 2006 deposition of him that he would not refuse to accept a subpoena for a trial in this case. Ex. 8, Rider Depo. Tr. (10/12/06) at 121-22. FEI, moreover, has attempted to serve Rider at various addresses previously provided, including

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REDACTED SEALED PURSUANT TO COURT ORDER . Yet, Rider no longer lives at those addresses. See Ex. 9, Affidavits of Process Servers.[4]

Having successfully hidden Rider from FEI, plaintiffs and their counsel argue that FEI need not command his appearance at evidentiary hearings because FEI already deposed Rider. Opp. at 10 n.9. That deposition, however, was limited in time by Court Order at plaintiffs' insistence, and it occurred before the Court advised the parties that it would like additional information from the plaintiffs concerning their failure to comply with the Court's prior Order. MGC, not Rider, now refuses to produce Rider voluntarily, refuses to provide Rider's location even though plaintiffs are in frequent telephone contact with him, and now asks that Rider's deposition be held against FEI even though it occurred before FEI had notice of the contempt hearing. FEI does not agree that the deposition of Rider is finished, and if MGC is refusing to disclose Mr. Rider's location, then they should not be heard to object to any further time limits on Mr. Rider's deposition. Nonetheless, even if FEI could have done so (which it could not), the Court is entitled to hear live testimony from Rider – the person without whom this lawsuit in this Court would not exist. Plaintiffs' failure to produce Rider for an evidentiary hearing is not excused merely because he was deposed in this case. If that were true, no plaintiff would ever have to appear at trial.

The locations and addresses where Rider spends his time are the very type of information that not only is discoverable under the Federal Rules, but is a mandatory disclosure required before discovery requests are even made. See Fed. R. Civ. P. 26(a)(1)(A) ("A party must, without awaiting a discovery request, provide to other parties: the name and, if known, the

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[4] It is possible that Rider may have decided because earlier that month a federal tax lien was levied against hi for taxes owed on the money that has been paid to him by his counsel and co-plaintiffs. Ex. 10, Rider's Federal Tax Lien.

address and telephone number of each individual likely to have discoverable information ..."); Biltrite Corp. v. World Rd. Markings, Inc., 202 F.R.D. 359 (D. Mass. 2001) ("The obvious purpose of the disclosure requirement of Rule 26(a)(1)(A), Fed. R. Civ. P., is to give the opposing party information as to the identification and location of persons with knowledge so that they can be contacted in connection with the litigation, either for purposes of serving a proposed amended complaint (as occurred in this case) or for being interviewed or for being deposed or for doing background investigation."). See also In re Faro Techs. Secs. Litig., 2008 U.S. Dist. LEXIS 4789, at *6 (M.D. Fla. Jan. 23, 2008) ("The names and addresses of witnesses are non-privileged and discoverable.") (citing Castle v. Sangame Weston, Inc., 744 F.2d 1464, 1467 (11th Cir. 1984)).

Litigants do not get to hide witnesses, least of all the named plaintiff in a case. The Federal Rules of Civil Procedure are designed expressly to avoid such an outcome. Instead of hiding Rider, plaintiffs should be fulfilling their discovery obligations and supplementing their initial disclosures to provide a current address for him. FEI has a right to know where to find Rider so that it can take the evidence it needs for its defense. MGC is assisting their client with evading service. The Response presents no caselaw to suggest that the Court should embrace such conduct by counsel, and the undersigned are aware of none.

**2. The Information Will Enable FEI and the Court to Test the Veracity of Plaintiffs' Self-Serving Allegations That Payments to Rider Are for a "Media" Campaign and Not For Participating in This Lawsuit**

Aside from the contempt hearing, the information withheld by MGC is relevant to this litigation. Time and time again, plaintiffs have alleged that the payments to Rider by his co-plaintiffs and counsel have been reimbursements to cover Rider's expenses as he travels around the country conducting a media campaign against FEI. FEI, on the other hand, alleges that this case should be dismissed because Rider (the only plaintiff with standing) has been paid by his

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counsel and co-plaintiffs to participate in this litigation.

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The unredacted airbills are reasonably calculated to lead to the discovery of admissible evidence. FEI seeks this information to determine the nature of Rider's travels (to the extent that he actually has any) – travels that are paid for using money provided to him by his lawyers and co-plaintiffs. Plaintiffs, and their counsel, have steadfastly maintained that the payments to Rider were to cover his expenses. FEI is entitled to probe this claim through the airbills, which will show Rider's whereabouts. For example, Rider has already testified that

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has already been listed in plaintiffs' disclosures, so an airbill to his address should not be redacted. Moreover, unless was charging Mr. Rider rent, which we doubt, Rider had no living expenses during his stay with There is no legitimate excuse for hiding the names and locations of potential witnesses. See In re Faro Techs. Secs. Litig., 2008 U.S. Dist. LEXIS 4789, at *6 (M.D. Fla. Jan. 23, 2008) ("The names and addresses of witnesses are non-privileged and discoverable.") (citing Castle v. Sangame Weston, Inc., 744 F.2d 1464, 1467 (11th Cir. 1984)).

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**B. Disclosure of the Information Withheld by MGC Would Present No Harm to MGC or Others**

Plaintiffs' and their counsel's repeated self-serving, yet wholly unsupported, allegations of potential harassment by FEI are untrue. Despite scurrilously alleging that FEI has a "long and well-documented track record," a "well-documented pattern of", and a "long history" of, spying

on and harassing its adversaries, Opp. at 1, 7, 11, plaintiffs offer no evidence of such conduct other than their one-sided versions of events that occurred more than ten years ago and that did not involve plaintiffs.[5] There is absolutely no evidence in the record to support the ridiculous allegation that FEI seeks the addresses withheld thus far by MGC so that it may disrupt Rider's alleged media campaign. First, as FEI has stated on numerous occasions, there is no "media campaign" to disrupt even if it was so inclined, which it is not. Rider appears once or twice a year in stories discussing this lawsuit. Nothing he does (aside from participating in this lawsuit) advances plaintiffs' agenda of harassing FEI and the general public in hopes of removing animals from the circus and putting FEI's circus out of business. All of the parties, moreover, are subject to the Protective Order entered by the Court on September 25, 2007. The Court's Protective Order ensures that the discovery taken in this case is used solely for this case – a concept that FEI endorses and has repeatedly asked the Court to recognize. Unlike plaintiffs, FEI has no interest in using information obtained in discovery for any purpose other than ensuring a speedy and fair resolution of this long-standing litigation.

## C. Plaintiffs Must Conform Their Discovery To Their Trial Intentions

Finally, plaintiffs need to disclose without further delay whether they plan on relying at trial upon Mr. Rider's "media campaign" as their justification for the payments to him. Plaintiffs

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[5] This crucial evidence (or lack thereof), expressly distinguishes this case from the precedent cited by MGC. See Centeno-Bernuy v. Becker Farms, 219 F.R.D. 59 (W.D.N.Y. 2003). There, the plaintiffs were permitted to withhold addresses where the requesting party had claimed on the radio that he already "reported [them] to the INS and attempted to inform the INS where [they] could be located and admit[ted] to having 'been informing other law-enforcement agencies of these illegal aliens.'" Id. at 61. The requesting party, moreover, already had written letters to the plaintiffs' lawyers alleging they are members of a terrorist group and recounting "his efforts to report [them] to law enforcement agencies and his astonishment as to 'why haven't these terrorists/illegal aliens been apprehended and deported?!!.'" Id. It is this kind of conduct that demonstrates the "real threat of intimidation and harassment" that warrants the issuance of a protective order. Id. at 62. Rider is not an undocumented alien, and FEI has certainly not made any claim that it would have him deported. It is telling, therefore, that MGC does not cite a case in which a Court permitted the withholding of witness information based upon unsupported ten-year-old allegations involving people who are not parties to the lawsuit and are either dead or no longer employed by any such party. The only "spying" evidence that has occurred in this case is that done by Ms. Archele Hundley – a PETA prop that made concealed recordings on a return visit to the Red Unit. Thus, plaintiffs apparently have no problem with spying so long as the person doing it is aligned with them and coordinating efforts with them.

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have no right to make sweeping, self-serving proclamations about Rider's funding and his activities related thereto while simultaneously refusing to produce discovery to FEI on the same. In other words, plaintiffs cannot invoke the "media campaign" as a shield at trial for the Rider funding if they persist in their refusal to provide discovery on it. See, e.g., Coles v. Perry, 217 F.R.D. 1, 5 (D.D.C. 2003) (refusing to admit evidence that was not produced during discovery unless the producing party could sustain its burden of proving harmlessness) ("To permit that stratagem and let a party use at trial evidence it did not disclose during discovery under the guise of 'correcting' an earlier disclosure when that party does not even bother to indicate what it is correcting would gut the discovery rules."). See also Fed. R. Civ. P. 37(c)(1) (absent a showing of harmlessness, a party may not rely upon evidence at trial that it did not disclose in supplemental responses to initial disclosures and/or discovery responses). If plaintiffs intend to so proceed, then FEI is hereby providing notice that it will seek to exclude all evidence and any mention of "media work" at trial by plaintiffs in response to and as a justification for FEI's evidence regarding plaintiffs' funding of Rider. Plaintiffs cannot block discovery on this relevant topic and then simultaneously expect the Court to let them invoke it as a shield when convenient to insulate them from the payments.

## CONCLUSION

A subpoena to counsel should never have been necessary. The documents should have been produced by Rider pursuant to the document requests FEI served on him. The subpoena was served in good faith and for good reason as the evidence responsive to it has now shown: The documents subpoenaed have already proved that Rider has provided false testimony regarding his spoliation of evidence. The airbills demonstrate where Rider is and whether his location comports with his alleged "media campaign." Moreover, the names and addresses on

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those airbills are reasonably calculated to test plaintiffs' claim that the Rider funding is for his "expenses." MGC has no right to hide Rider's location and assist him with evading service. For the reasons set forth above, FEI asks that its motion to compel be granted, that MGC be ordered to produce un-redacted copies of the airbills sent to or from Rider within ten days, and that FEI be awarded its costs and fees incurred for having to file this motion.

Dated this 19th day of March, 2008.

Respectfully submitted,

/s/

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## CERTIFICATE OF SERVICE

I, George A. Gasper, do hereby certify that on March 19, 2008 the foregoing **Reply in Support of FEI's Motion to Compel the Production of Documents Subpoenaed from Meyer Glitzenstein & Crystal** was served on the following in the manners stated below:

***FILED PUBLICLY IN REDACTED/UNSEALED FORM VIA ECF to:***

All ECF-registered persons for this case, including plaintiffs' counsel

***FILED WITH THE CLERK OF COURT UNDER SEAL IN UNREDACTED FORM to:***

Clerk's Office
U.S.D.C. for the District of Columbia
E. Barrett Prettyman Courthouse
333 Constitution Ave., N.W.
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***SERVED VIA HAND DELIVERY UNDER SEAL IN UNREDACTED FORM to:***

Katherine Meyer, Esq. (Counsel for Plaintiffs)
Howard Crystal, Esq. (Counsel for Plaintiffs and MGC)
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***COURTESY COPY TO CHAMBERS OF HON. JOHN M. FACCIOLA UNDER SEAL IN UNREDACTED FORM***

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/s/
George A. Gasper