

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

_____)	
AMERICAN SOCIETY FOR THE)	
PREVENTION OF CRUELTY TO)	
ANIMALS, <u>et al.</u> ,)	
)	Civ. No. 03-2006 (EGS/JMF)
Plaintiffs,)	
)	
v.)	
)	
FELD ENTERTAINMENT, INC,)	
)	
Defendant.)	
_____)	

**PLAINTIFFS’ RESPONSE TO DEFENDANT’S PROPOSED
FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Plaintiffs hereby respond to defendant’s proposed findings of fact (“FOF”) and conclusions of law.

RESPONSE TO PROPOSED FINDINGS OF FACT

Many of defendant’s proposed findings of fact are inaccurate, incomplete, and misleading, and most are also simply irrelevant to a determination of whether plaintiffs complied with Judge Sullivan’s August 23, 2007 discovery Order. Plaintiffs detail their responses below to defendant’s enumerated proposed findings. If plaintiffs do not respond to an enumerated proposed finding, plaintiffs do not have an objection to that proposal.

1. The Court’s August 23, 2007 Order further stated that “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.” Docket Entry (“DE”) 178 at 4. In addition, in June 2004 Mr. Rider offered to provide

- defendant with all of the information defendant sought concerning Mr. Rider's funding subject to a confidentiality agreement that would protect sensitive financial information and the names of individual donors. See Feld Entertainment Inc's Evidentiary Hearing Exhibit ("FEI Hearing Ex.") 12 at 39 (agreeing to provide the responsive information subject to confidentiality agreement)
5. The Court's August 23, 2007 Order further stated that "any documents, communications, or information concerning media and legislative strategies of the plaintiffs are irrelevant to the claims and defenses in this case and would be over burdensome to produce." DE 178 at 5.
 6. The Court's August 23, 2007 Order further stated that, "[a]s to defendant's request for all responsive documents and information concerning communications with animal advocates and animal advocacy organizations, the Court finds this request over broad, over burdensome to produce and irrelevant to the claims and defenses in this lawsuit." DE 178 at 7.
 9. One of the citations in FOF ¶ 9 is taken from the Order directed solely to the Wildlife Advocacy Project. See FOF ¶ 9, citing to DE 178 at 8. In that same Order directed to WAP the Court also stated that "[t]he Court finds that defendant's subpoena is over broad and over burdensome in its requests and seeks a lot of information that is completely irrelevant to the 'taking' claim in this lawsuit, the credibility of Tom Rider, or any claimed defenses." DE 178 at 8.
 13. The funds provided to Mr. Rider by the plaintiff organizations have been for the purpose of allowing Mr. Rider to travel the country educating the public and generating media interest in the plight of the elephants in defendant's care. See,

e.g., FEI Hearing Ex. 19 at 12; FEI Hearing Ex. 23 at 11-12; FEI Hearing Ex. 27 at 12; FEI Hearing Ex. 30 at 13; FEI Hearing Ex. 32 at 36-37 (Liss Deposition); FEI Hearing Ex. 33 at 40-44 (Markarian Deposition); FEI Hearing Ex. 35 at 32-40 (Rider Deposition); FEI Hearing Ex. 34 at 12-15 (Weisberg Deposition). These funds cover Mr. Rider's living and travel expenses, including food, gas, and lodging. See id. As a result of his efforts Mr. Rider has generated considerable media attention for the plight of the elephants. See Plaintiffs' Hearing Exhibit ("Pfs. Hearing Ex.") 5; see also Transcript of Hearing ("Hearing Tr.") (2/26/08) at 80, 93-94, 108, 157, 165-67; 191-92; 201-02; Hearing Tr. (3/6/08) at 27, 66.

In response to the Court's August 23, 2007 Order, all of the organizational plaintiffs have conducted extensive searches in an effort to produce documents reflecting all of their funding to or for Mr. Rider. See Hearing Tr. (2/26/08) at 74-76 (American Society for the Prevention of Cruelty to Animals ("ASPCA")); Hearing Tr. (2/26/08) at 151-153 (Animal Protection Institute ("API")); Hearing Tr. (3/6/08) at 47-48 (Animal Welfare Institute ("AWI")); Hearing Tr. (5/30/08) at 67-72 (Fund for Animals ("FFA")). All of the organizational plaintiffs have also made exhaustive efforts to detail all of their funding in their Interrogatory responses. See FEI Hearing Ex. 19 at 12-15 (ASPCA); FEI Hearing Ex. 23 at 11-14 (AWI); FEI Hearing Ex. 27 at 11-14 (FFA); FEI Hearing Ex. 30 at 13-14 (API).

14, 15. None of defendant's discovery requests specifically asked for communications pertaining to Mr. Rider's public education campaign – including the items

enumerated in proposed FOF ¶ 14 – although FEI had years to propound such discovery requests. The Court’s August 23, 2007 Order required plaintiffs to produce certain records that were “responsive” to FEI’s discovery requests, and further limited the kinds of “communications” that plaintiffs were required to produce or describe to “relevant, non-privileged communications regarding the subject matter of this lawsuit between plaintiffs, Rider, WAP, and plaintiffs’ counsel, except that plaintiffs need not produce documents or further information related, [inter alia,] to any media or legislative strategies or communications.” DE 178 at 7 (emphasis added). The subject matter of this lawsuit, as defined by Judge Sullivan, is the “very narrow issue” of “whether or not defendant’s treatment of its elephants constitutes a taking under the ESA.” DE 176 at 8.

Nevertheless, plaintiffs have searched for any communications pertaining to Mr. Rider’s funding. See, e.g., Hearing Tr. (2/26/08) at 20, 25, 57-60, 77, 84, 124-125, 130, 132, 150, 153, 154, 156, 211-12; Hearing Tr. (3/6/08) at 71-72; Hearing Tr. (5/30/08) at 73, 88-89. The organizational plaintiffs testified that it has not generally been their practice to communicate by e-mail about how to pursue their media and public education efforts. See, e.g., Hearing Tr. (2/26/08) at 57-60, 72, 110, 113-114, 154, 194. Instead, they testified that they had conference calls to discuss their support for the media campaign. See, e.g., Hearing Tr. (2/26/08) at 47, 115-118, 195, 201; Hearing Tr. (3/6/08) at 66-67; Hearing Tr. (5/30/08) at 81-82. In addition, plaintiffs have been extensively deposed concerning such communications. See FEI Hearing Ex. 32 at 36-37 (Liss Deposition); FEI Hearing Ex. 33 at 40-44 (Markarian Deposition); FEI Hearing

Ex. 35 at 32-40 (Rider Deposition); FEI Hearing Ex. 34 at 12-15, 20-24, 57 (Weisberg Deposition); FEI Hearing Ex. 38 at 170-200 (Paquette Deposition).

16. The organizational plaintiffs testified that it has not generally been their practice to communicate by e-mail about how to pursue their public education and media efforts. See, e.g., Hearing Tr. (2/26/08) at 57-60, 72, 110, 113-114, 154, 194; see also Hearing Tr. (2/26/08) at 47, 115-118, 195, 201; Hearing Tr. (3/6/08) at 66-67; Hearing Tr. (5/30/08) at 81-82. Moreover, the Court's August 23, 2007 Order required plaintiffs to produce certain "responsive" records, and none of FEI's interrogatories or document production requests asked plaintiffs to identify all communications concerning funding or payments to Mr. Rider. In addition, the Court's discovery Order expressly limited the kinds of "communications" that plaintiffs were required to produce or describe to "communications regarding the subject matter of this lawsuit" that are not "related to any media or legislative strategies or communications." DE 178 at 7. Internal communications concerning plaintiffs' strategy for funding Mr. Rider's media efforts are inextricably related to plaintiffs' media and legislative strategies.
17. As plaintiffs explained in their depositions and at the hearing, the organizational plaintiffs participated in some conference calls with each other to discuss their joint strategy for pursuing a media campaign concerning the plight of the elephants in defendant's custody, including Mr. Rider's role in that campaign and their strategies for funding Mr. Rider's efforts. See, e.g., FEI Hearing Ex. 38 at 184-192; 242-244 (Paquette Deposition); Hearing Tr. (2/26/08) at 213-14. These discussions involved consideration of the cost of pursuing media in certain

- venues, the availability of organizational funds, and other strategic considerations that bear on core First Amendment associational rights. Id. Accordingly, plaintiffs have not only identified these “communications,” but their testimony has also reinforced that their discussions concerning funding for Mr. Rider were inextricably intertwined with strategic considerations. The existence of such discussions about the media campaign was disclosed in each of the organizational plaintiffs’ interrogatory responses, See FEI Hearing Exs. 18 at 16; 22 at 14; 26 at 15; 29 at 26, although plaintiffs did not describe them in further detail, including because of Judge Sullivan’s ruling that plaintiffs’ strategic deliberations are irrelevant and would be overburdensome to produce. See DE 178 at 5, 7.
18. The actual “operative terms in the Court’s August 23, 2007 Order,” FOF at 7, are the following: “All responsive documents and information concerning payments to Tom Rider . . .” DE 178 at 6 (emphasis added). Defendant’s FOF ¶ 18 omits the term “responsive” from this sentence. Because FEI’s discovery propounded to the organizational plaintiffs requested “documents sufficient to show all resources you have expended in ‘advocating better treatment of animals in captivity, including animals used for entertainment purposes,’” FEI Hearing Ex. 3 at 9 (emphasis added), and because the organizational plaintiffs are relying on Mr. Rider’s campaign for such advocacy, documents reflecting all funding provided to or for Mr. Rider complies fully with the discovery Order. The plaintiff organizations have provided such documents to defendant. See Pfs. Hearing Exs. 1 (ASPCA); 3 (API); 4 (Rider); 7 (AWI); 8 (FFA).

19. The interrogatory directed at Mr. Rider pertaining to his funding contained two parts, the first of which asked Mr. Rider to “[i]dentify all income, funds, compensation, other money or items, including, without limitation, food, clothing, shelter, or transportation, you have ever received fro any animal advocate or animal advocacy organization,” and the second of which asked that “[i]f the money or items were given to you as compensation for services rendered, describe the service rendered and the amount of compensation.” FEI Hearing Ex. 12 at 39.
20. Mr. Rider responded to this interrogatory by stating that, “subject to a confidentiality agreement, Mr. Rider would be willing to provide defendants with the answer to the first sentence of this Interrogatory. Subject to and without waiving the foregoing or general objections to these Interrogatories, Mr. Rider provides the following answer to the second sentence of this Interrogatory: I have not received any such compensation.” FEI Hearing Ex. 12 at 39. Accordingly, Mr. Rider never denied that he had received funding from plaintiffs or others. On the contrary, in 2004 Mr. Rider expressly offered to provide information concerning all such funding if he could do so subject to a confidentiality agreement. Moreover, Mr. Rider’s statement that he did not receive “compensation for services rendered” simply reflected Mr. Rider’s understanding that the funding he has received to pursue his educational and media campaign concerning the circus elephants constitutes grants for a project he is pursuing on behalf of the elephants, rather than “compensation for services rendered.” See also FEI Hearing Ex. 36 at 54, pp. 212-13 (12/18/07 Rider Deposition).

21. Although Mr. Rider's June 2004 response to this Interrogatory is not relevant to the current proceeding, the purpose of which is to determine whether the plaintiffs' complied with Judge Sullivan's August 23, 2007 discovery order, Mr. Rider's original response was not "false," as defendant's FOF ¶ 21 states. Indeed, had defendant agreed to receive Mr. Rider's funding information pursuant to a confidentiality agreement, as Mr. Rider proposed in June 2004, defendant would have received not only information on plaintiffs' contributions to his public education campaign, but also any other source of funding, which is more than FEI was entitled to receive under the August 23, 2007 Order, which required Mr. Rider to disclose only the identities of funders who are "parties to this litigation, attorneys for any of the parties, or employees or officers of any of the plaintiff organizations or WAP." DE 178 at 3.
22. After the Court issued its August 23, 2007 Order, Mr. Rider provided a detailed accounting of all funds he has received since 2001, including all funding he has received either directly or indirectly from the organizational plaintiffs. See FEI Hearing Ex. 14 at 13-16. The fact that Mr. Rider only recalled receiving "approximately \$1,600" from AWI, whereas AWI's records reveal that the organization provided \$2,952 in direct funds to Mr. Rider, does not mean that Mr. Rider's answer was "incomplete." FOF ¶ 22. Because Mr. Rider was required to swear to the contents of his responses under oath and based on his personal knowledge, he did not endeavor to coordinate his responses with the other groups to ensure that his recollection was accurate to the dollar.

23. Neither Interrogatory No. 4 – which seeks “every communication you have had regarding defendants with any and all animal advocates,” FEI Hearing Ex. 11 at 4 (emphasis added) – nor any other Interrogatory, asked Mr. Rider to recount all communications he has had concerning the funding he has received from the organizational plaintiffs, WAP, or anyone else. Nor has Mr. Rider ever “conceded” “that communications with animal advocacy organizations about his alleged media campaign” are responsive to Interrogatory No. 4, as defendant asserts, FOF ¶ 23, and he has never “conceded” that discussions concerning funding are responsive to that Interrogatory. The conversation with Wayne Pacelle was included in Mr. Rider’s supplemental interrogatory response because the conversation specifically referenced the mistreatment of the Ringling Bros. elephants. See FEI Hearing Ex. 13 at 6.
24. Mr. Rider’s September 24, 2007 response to Interrogatory No. 4 is not “incomplete.” FOF ¶ 24. Communications concerning “payments” for or funding of a media campaign are not responsive to a request for communications “regarding defendants.” Moreover, communications concerning Mr. Rider’s media strategy, including strategy for funding his media campaign, were deemed irrelevant and overburdensome to produce by the Court in its August 23, 2007 Order. DE 178 at 4.
25. While the conversations that Mr. Rider described at his deposition concerning his funding, see FEI Hearing Ex. 36 at 181-91, 485-91, 494-95, highlight the make-work nature of FEI’s insistence that Mr. Rider recount the same conversations in an interrogatory response, the fact is that such conversations were not responsive

to Interrogatory No. 4, which sought only communications “regarding defendants.” In addition, Judge Sullivan further narrowed the “communications” that Mr. Rider was required to produce to those “regarding the subject matter of the lawsuit.” DE 178 at 4.

26. Mr. Rider did not appear at the evidentiary hearing because Mr. Rider had just been deposed for two days by defendant on December 17-18, 2007, and plaintiffs’ counsel specifically raised with the Court at the January 8, 2008 status hearing the option of relying on Mr. Rider’s eleven-hour deposition testimony, Hearing Tr. (1/8/08) at 24, which the Court had previously read and found to have “exhaustively” addressed funding for Mr. Rider’s media efforts. DE 245 at 1. Although plaintiffs made clear that they would make Mr. Rider available at the evidentiary hearing if the Court wanted to be there, see DE 288 at 20-21 (Plaintiffs’ Reply in Support of Motion to Quash Subpoena), the Court never indicated that the extensive deposition would be inadequate for purposes of this hearing. See Hearing Tr. (5/30/08) at 141-142; Hearing Tr. (1/8/08) at 24-25. Moreover, although Mr. Rider previously testified that he would accept a subpoena for a trial in this case, FEI Ex. 35 at 119-22, that has nothing to do with whether his deposition would suffice for purposes of the evidentiary hearing regarding defendant’s motion to enforce. Finally, defendant easily could have served Mr. Rider with a subpoena for the evidentiary hearing since Mr. Rider was appearing at well-publicized press conferences after the evidentiary hearing had been set. See Ex. A to DE 288.

27. The funding that the ASPCA provided in support of Mr. Rider's media and public education efforts were for his living expenses while on the road, including for his phone and internet service, and for lodging. Pfs. Ex. 1; FEI Hearing Exs. 19, 77, 34 at 225; Hearing Tr. (2/26/08) at 19. Mr. Rider did describe conversations with Ms. Weisberg in response to Interrogatory No. 4 to the extent that they were actually responsive to that request – i.e., to the extent that the conversations were “regarding defendants.” See FEI Hearing Exs. 12-15 at Interrogatory 4. The Court's August 23, 2007 Order further limited this Interrogatory by requiring Mr. Rider to describe only those communications that were “regarding the subject matter of this lawsuit.” DE 178 at 3.
28. Ms. Silverman testified that her conversations with Mr. Rider generally concern “media strategy,” Hearing Tr. (2/26/08) at 207, which the Court has ruled to be irrelevant to this litigation, DE 178 at 4, and that she does not “talk about the amounts of the funding” with Mr. Rider, Hearing Tr. (2/26/08) at 209. Mr. Rider's responses to Interrogatory No. 4 did explain that he speaks with Ms. Silverman regularly. See FEI Hearing Ex. 15 at 2 (describing conversations generally and noting in particular that he “had conversations with Ms. Meyer, Ms. Silverman, and Ms. Liss for the purpose of telling them which address to use to send funding for my media, legislative, and public education efforts”). In addition, communications that Mr. Rider had with Ms. Silverman regarding such matters as his “van repairs” and other living expenses on which he spent funding, FOF ¶ 28 are not communications “regarding defendants.” Interrogatory No. 4.

29. Ms. Liss did not testify that she “had oral communications with Mr. Rider regarding AWI’s payments to him,” as defendant states. Instead, she testified that she discussed with him “providing support to enable him to cover expenses to do media at various locations.” Hearing Tr. (5/30/08) at 79. These discussion pertain to AWI’s media strategy. Moreover, such discussions are not communications “regarding defendants” and are therefore not responsive to Interrogatory No. 4. In addition, pages 122-23 of the hearing transcript, which defendant also cites as testimony “regarding AWI’s payments to” Mr. Rider, make no mention at all of funding or payments of any kind. See Hearing Tr. (5/30/08) at 122-23.
30. The Fund for Animals provided funding to Mr. Rider so that he could travel to Denver and participate in a press conference concerning the abuse of elephants at the circus. See FEI Hearing Ex. 33 at 157-59. Mr. Rider’s response to Interrogatory No. 4 stated that “I spoke to Mike Markarian of the Fund for Animals in Denver Colorado in connection with a press conference that was held on the steps of City Hall about a bill that was pending there, and I had at least one conversation with him or someone on his staff about logistics of getting to that press conference.” FEI Ex. 13 at 5.
33. The Court’s August 23, 2007 Order further narrowed Document Request No. 22, which called for “[a]ll documents that refer, reflect, or relate to any communication between you and any animal advocates,” FEI Hearing Ex. 1 at 10, to require only “documents . . . concerning relevant, non-privileged communications regarding the subject matter of this lawsuit” that were not

- “related to any media or legislative strategies or communications or . . . about litigation strategy or . . . protected by the attorney-client or work product privileges, including under the ‘common interest doctrine.’” DE 178 at 3 (emphasis added).
34. Mr. Rider’s document production is complete and contains all responsive documents in his possession, custody, or control that the Court’s Order required him to produce. See Pfs. Ex. 4.
35. Mr. Rider did not produce any e-mails because he did not locate any that involved funding of his activities; rather, any emails concerned “media or legislative strategies or communications or . . . [were] about litigation strategy.” DE 178 at 3; see FEI Ex. 36 at 217-226 (Rider Deposition). None of the organizational plaintiffs testified that they had any communications with Mr. Rider by email concerning funding for his public education campaign.
36. Mr. Rider produced all of the check-cashing receipts in his possession, custody or control. See Pfs. Hearing Ex. 4. The Court’s August 23, 2007 Order required Mr. Rider to produce a “sworn declaration or affidavit identifying, to the extent Rider can recall, any responsive documents that were once in Rider’s possession . . . but have been discarded, destroyed, or given to other persons or otherwise not produced . . .” DE 178 at 3 (emphasis added). Because Mr. Rider could not recall that he ever obtained any other check-cashing receipts, he did not include a description of any such receipts in his declaration. See FEI Hearing Ex. 36 at 512 (Rider Deposition). Judge Sullivan subsequently observed that Mr. Rider’s

declaration “compl[ied] precisely” with the August 23, 2007 Order. See FEI v. ASPCA et al., 523 F. Supp. 2d 1, 7-8 (D.D.C. 2007).

37. Mr. Rider has produced all of the cover letters from the Wildlife Advocacy Project that accompanied the WAP grant checks. Pfs. Hearing Ex. 4 at TR 207-09, 376-465. These included all of the originals that were in Mr. Rider’s possession, and that he forwarded to his attorneys, as well as copies of other letters that Mr. Rider was able to obtain from WAP.
38. All of the 1099s that were issued to Mr. Rider have been produced both by Mr. Rider and by WAP. See Pfs. Hearing Ex. 4 at TR 197, 456-461; FEI Hearing Ex. 94; FEI Hearing Ex. 59.
39. Federal Express Airbills are not responsive to defendant’s document production requests or the Court’s August 23, 2007 Order. In any event, all such Airbills have been produced by Meyer Glitzenstein & Crystal as well as by Mr. Rider. See FEI Hearing Exs. 79, 80.
40. Each of the organizational plaintiffs objected to Interrogatory No. 16 on the grounds that it was overly broad, unduly burdensome, called for information protected by the attorney-client and work product privileges, and called for information protected by the organizations’ First Amendment rights of association. See FEI Hearing Exs. 17, 18, 21, 22, 25, 26, 29 at Interrogatory No. 16. The Court’s August 23, 2007 Order further limited the kinds of “communications” that plaintiffs were required to produce or describe to “relevant, non-privileged communications regarding the subject matter of this

- lawsuit” that are not “related to any media or legislative strategies or communications.” DE 178 at 7.
41. Each of the organizational plaintiffs objected to Interrogatory No. 19 on the grounds that it was, inter alia, overly broad, unduly burdensome, oppressive, sought irrelevant information, information protected by the attorney-client and work product privileges, and information protected by the organizations’ First Amendment rights of association. See FEI Hearing Exs. 17, 18, 21, 22, 25, 26, 29 at Interrogatory No. 19. The Court’s August 23, 2007 Order further limited the kinds of “communications” that plaintiffs were required to produce or describe to “relevant, non-privileged communications regarding the subject matter of this lawsuit” that are not “related to any media or legislative strategies or communications.” DE 178 at 7.
42. The allegation in plaintiffs’ complaint referring to resources “expended in advocating better treatment of animals held in captivity, including animals used for entertainment purposes,” was made for purposes of satisfying Article III standing requirements. All four organizational plaintiffs consider the money spent on Mr. Rider’s media and public education campaign as resources expended advocating for better treatment of captive animals.
43. Similarly, the allegation in plaintiffs’ complaint referring to “financial and other resources” expended in “pursuing alternative sources of information” concerning defendant’s treatment of the elephants was also made for purposes of satisfying Article III standing requirements. API is the only organization relying on that

- allegation for standing purposes, as reflected in plaintiffs' Court-ordered interrogatory responses. See FEI Exs. 19, 23, 27, 30 at Interrogatory No. 22.
- 44, 45. The Court's August 23, 2007 Order further limited the kinds of "communications" that plaintiffs were required to produce to "relevant, non-privileged communications regarding the subject matter of this lawsuit" that are not "related to any media or legislative strategies or communications." DE 178 at 7.
46. At the time of the evidentiary hearing, Ms. Weisberg was Senior Vice President of Government Affairs and Public Policy for the ASPCA. Hearing Tr. (2/26/08) at 5-6.
47. The funding that the ASPCA provided to or for Mr. Rider was for the purpose of enabling Mr. Rider "to go around the country and speak with the media about this case," Hearing Tr. (2/26/08) at 19, and spanned several years. The ASPCA detailed all of this funding in its September 26, 2007 interrogatory responses, FEI Hearing Ex. 20 at 12-15, and also made clear that the funding was used to pay for Mr. Rider's living expenses while he engaged in his media and public education campaign, id.
48. The funding that the ASPCA provided to or for Mr. Rider through MGC, which is included in the total amount of funding asserted in defendant's proposed FOF ¶ 47, was also for the purpose of enabling Mr. Rider "to go around the country and speak with the media about this case." Hearing Tr. (2/26/08) at 19.
49. Because the only issue currently before the Court is whether the plaintiffs complied with Judge Sullivan's August 23, 2007 Order, what the ASPCA

produced prior to that Order is not relevant here. Indeed, although plaintiffs believed that they had adequately complied with defendant's discovery requests prior to the Court's Order, the Court ordered plaintiffs to search again and produce any additional responsive materials concerning Mr. Rider's funding, DE 178, which plaintiffs have now done. In any case, defendant's assertion that "ASPCA did not disclose that its payments to MGC included reimbursement for payments by MGC to Mr. Rider until its September 2007 Court-ordered interrogatory responses," FOF ¶ 49, is incorrect. In her July 2005 deposition, Ms. Weisberg specifically testified that some of the funding for Mr. Rider's public education campaign was "included in [our] regular payments to [our] attorneys." FEI Hearing Ex. 34 at 224-225; see also id. at 75.

50. The funding that the ASPCA provided to or for Mr. Rider directly, which is included in the total amount of funding asserted in defendant's proposed FOF ¶ 47, was for the purpose of enabling Mr. Rider "to go around the country and speak with the media about this case." Hearing Tr. (2/26/08) at 19.
51. In response to the Court's August 23, 2007 Order, the ASPCA undertook a search for, and located and produced, to the best of the ASPCA's ability, documentation sufficient to show all funds ever provided by the ASPCA to Mr. Rider, directly or indirectly. Hearing Tr. (2/26/08) at 74; see Pfs. Hearing Ex. 1. FEI accordingly has information demonstrating all of the funds that the ASPCA has provided to Tom Rider, and complains only that it did not receive additional documentation of the same payments. See FOF ¶ 51 ("ASPCA has not produced any other documentation underlying these payments") (emphasis added). In any case, the

- ASPCA did search for all documents related to funding for Mr. Rider, and did not locate any “other documentation” underlying the same wireless phone charges, internet access, or travelers checks for which defendant has already been provided sufficient documentation. See Hearing Tr. (2/26/08) at 20. As for defendant’s assertions as to what the ASPCA produced prior to the Court’s August 23, 2007 Order, that is not relevant to the issues currently before the Court.
52. The ASPCA has produced copies of Ms. Weisberg’s American Express credit card statements reflecting payments for Mr. Rider’s lodging. Pfs. Hearing Ex. 1 (A 01240-50). The ASPCA is not aware of any other documentation that would “underly[] these payments” – nor would such additional documentation be responsive to defendant’s document requests – and accordingly did not account for any such documents in its Court-ordered declaration. Moreover, what the ASPCA produced prior to the Court’s August 23, 2007 Order is not relevant to the issue currently before the Court, which concerns whether the ASPCA has complied with that Order.
53. Ms. Weisberg’s misunderstanding as to what the ASPCA produced prior to the Court’s August 23, 2007 Order is not relevant to the issues currently before the Court, which concerns whether the ASPCA complied with that Order. The ASPCA has now produced the general ledger statements which account for funds provided to support Mr. Rider’s media and public education campaign.
54. The ASPCA produced documentation sufficient to demonstrate the \$6,000 grant made to the Wildlife Advocacy Project in support of Mr. Rider’s media efforts. Pfs. Hearing Ex. 1 (A-01221). Accordingly, there was no other “responsive”

document concerning this funding that the ASPCA was obligated to account for, either in its Court-ordered declaration or otherwise. However, the ASPCA's declaration accurately stated that "although there may have been additional records responsive to defendant's discovery requests and the Court's Order that existed at some point over the last seven years since this lawsuit began that we have not located, the ASPCA does do not know of any such records." FEI Hearing Ex. 44 (emphasis added).

55. The ASPCA had "very limited participation" in the fundraiser held in California. Hearing Tr. (2/26/08) at 38. Defendant has received documents demonstrating any funds that were raised at the fundraiser and provided to WAP for Mr. Rider. FEI Hearing Exs. 57, 58. Additional information concerning the fundraiser is neither responsive to defendant's document requests, which did not call for all information that might in some conceivable way be traced to funding for Mr. Rider, nor to the Court's Order, which required plaintiffs to produce only "responsive" information and authorized plaintiffs to withhold any information concerning the plaintiffs' media or legislative strategies, as well as any communications that were not "relevant." DE 178 at 7. Additional information concerning the fundraiser is not relevant to any of the issues in this litigation and relates to plaintiffs' strategies for funding their campaigns against the abuse of elephants in circuses. See DE 156 at 33 n. 17.

56, 57. Although Ms. Weisberg testified that some emails were not kept, she did not specifically state that any such emails "concern[ed] payments to Mr. Rider," as defendant asserts. FOF ¶ 57. Rather, she testified that her general practice would

be to print out and save any emails in hard copy and, indeed, ASPCA has produced such emails. See FEI Hearing Exs. 54, 55. Ms. Weisberg also testified that, with respect to direct communications with Mr. Rider, “most of those [discussions concerning funding] were conversations” over the phone “because as he was traveling he would not have internet access so they were mostly conveyed by phone.” Hearing Tr. (2/26/08) at 52. Ms. Weisberg reiterated that “any payments to Tom Rider directly or indirectly would be reflected in the financial documents that were produced.” Hearing Tr. (2/26/08) at 52. Notwithstanding Ms. Weisberg’s recollection as to the contents of her declaration, there is no evidence that either she or any other employee of the ASPCA “recall[ed] any responsive [emails] that were once in plaintiffs’ possession but have been discarded, destroyed, or given to other persons or otherwise not produced,” DE 178 at 7. Moreover, Ms. Weisberg’s declaration accurately stated that “although there may have been additional records responsive to defendant’s discovery requests and the Court’s Order that existed at some point over the last seven years since this lawsuit began that we have not located, the ASPCA does do not know of any such records.” FEI Hearing Ex. 44.

58. Ms. Weisberg testified at the evidentiary hearing that her discussions concerning funding with Mr. Rider were generally “conversations because as he was traveling he would not have Internet access so they were mostly conveyed by phone.” Hearing Tr. (2/26/08) at 52. The ASPCA produced whatever emails it located that were responsive to defendant’s discovery requests and required by the Court’s Order. The ASPCA did not specifically “recall[] any responsive [emails]

- that were once in plaintiffs' possession but have been discarded, destroyed, or given to other persons or otherwise not produced," DE 178 at 7, and therefore Ms. Weisberg did not describe any such emails in her declaration. Ms. Weisberg's declaration accurately stated that "although there may have been additional records responsive to defendant's discovery requests and the Court's Order that existed at some point over the last seven years since this lawsuit began that we have not located, the ASPCA does do not know of any such records." FEI Hearing Ex. 44.
59. Ms. Weisberg testified that she was the person at the ASPCA who was responsible for all matters related to Mr. Rider's funding, Hearing Tr. (2/26/08) at 40, and that Mr. Hawk would not have had any additional e-mails or information concerning Mr. Rider beyond what Ms. Weisberg has located, id. at 77.
60. Ms. Weisberg testified that the emails she exchanged with Ms. Meyer were primarily for purposes of scheduling conference calls, Hearing Tr. (2/26/08) at 58-59, and those with the other organizational plaintiffs simply concerned "stories in the media about Ringling Brothers and the circus." Id. at 59. Any such emails were not required to be produced by the Court's August 23, 2007 Order.
61. The ASPCA did not locate the email contained in FEI Hearing Ex. 51 in its search for documents. In addition, because Ms. Weisberg did not specifically recall having this email, she did not include a description of it in her court-ordered declaration. Ms. Weisberg's declaration accurately stated that "although there may have been additional records responsive to defendant's discovery requests and the Court's Order that existed at some point over the last seven years since

this lawsuit began that we have not located, the ASPCA does do not know of any such records.” FEI Hearing Ex. 44.

62. After the Court’s August 23, 2007 Order, the ASPCA undertook a thorough accounting of the funds it had expended in support of Mr. Rider’s media and public education efforts, and revised its responses to Interrogatories 21 and 22 in light of that accounting. The ASPCA listed all of the funds provided to or for Mr. Rider in its amended response to Interrogatory No. 21, which called for resources expended “advocating better treatment for animals held in captivity, including animals used for entertainment purposes,” as alleged in the standing allegations in plaintiffs’ Complaint. FEI Hearing Ex. 19 at 12-15. This included all funds provided to the Wildlife Advocacy Project for Mr. Rider’s media work. On the other hand, the ASPCA’s Court-ordered interrogatory response did not list any of the funds provided for Mr. Rider’s media work in response to Interrogatory No. 22. Accordingly, the ASPCA did not “admit[] that all documents that refer, reflect or relate to any payments to Mr. Rider are responsive to Document Request No. 20,” FOF ¶ 62, which seeks documents relating to a separate standing allegation in the Complaint.
63. The ASPCA objected to Interrogatory No. 16 on the grounds that it was overly broad, unduly burdensome, called for information protected by the attorney-client and work product privileges, and called for information protected by the ASPCA’s First Amendment right of association. See FEI Hearing Ex. 17 at 25-26; FEI Hearing Ex. 18 at 13-14. The Court’s August 23, 2007 Order further limited the kinds of “communications” that plaintiffs were required to produce or

describe to “communications regarding the subject matter of this lawsuit” that were not “related to any media or legislative strategies or communications.” DE 178 at 7.

Nevertheless, the ASPCA’s original response to Interrogatory 16 stated that “Lisa Weisberg has had numerous [] communications with Mr. Rider,” and that “individuals from the ASPCA’s media department have had communications with Mr. Rider during 2001-2003, concerning his efforts to educate the public about Ringling Bros.’s treatment of Asian elephants,” and listed all such individuals. FEI Hearing Ex. 17 at 25-26. The ASPCA’s supplemental responses further stated the following:

During 2002-2003, Lisa Weisberg . . . spoke with Tom Rider on approximately a weekly basis concerning Mr. Rider’s public education and media efforts on behalf of captive elephants. These conversations included the outcome of Mr. Rider’s media interviews in various cities that he visited to educate the public about the circus, where Mr. Rider was going next, and steps to coordinate his and ASPCA’s media and public education efforts.

FEI Hearing Ex. 18 at 14.

64. As noted, the ASPCA objected to Interrogatory No. 16 on numerous grounds, see FEI Hearing Ex. 17 at 25-26; FEI Hearing Ex. 18 at 13-14, and the Court’s discovery Order further limited the kinds of “communications” that plaintiffs were required to produce or describe to “communications regarding the subject matter of this lawsuit,” that were not “related to any media or legislative strategies or communications.” DE 178 at 7.

Nevertheless, the ASPCA’s original response to Interrogatory 16 stated that “individuals from the ASPCA’s media department have had communications

with Mr. Rider during 2001-2003, concerning his efforts to educate the public about Ringling Bros.'s treatment of Asian elephants," and listed all such individuals. FEI Hearing Ex. 17 at 25-26.

65. None of defendant's interrogatories required the identification of internal communications concerning funding provided to Tom Rider. The only interrogatory that defendant apparently asserts called for this information is Interrogatory No. 19, which sought "communication[s] . . . about the presentation of elephants in circuses or about the treatment of elephants at any circus, including Ringling Brothers. And Barnum & Bailey Circus." FEI Ex. 16 at 6. This request does not require the disclosure of discussions concerning the funding of a media campaign.

The Court's August 23, 2007 Order required plaintiffs to produce only "responsive" information, DE 178 at 6, 7, and further limited the kinds of "communications" that plaintiffs were required to produce or describe to "relevant, non-privileged communications regarding the subject matter of this lawsuit," that were not "related to any media or legislative strategies or communications." DE 178 at 7. Ms. Weisberg's discussions with Ms. Blaney concerned media strategy. See FEI Hearing Ex. 34 (ASPCA Dep.) at 51; FEI Hearing Ex. 54 (email from Ms. Weisberg that was the subject of the questioning on p. 51 of Ms Weisberg's deposition, and which refers to Mr. Rider's desire to "follow the circus and speak out about its training/abuse of elephants").

- 66, 67. None of defendant's interrogatories requested communications with the other plaintiffs concerning funding for Tom Rider. Moreover, the plaintiffs have also

testified that their discussions concerning their strategy for funding Mr. Rider's media efforts were inextricably intertwined with their media strategy. See, e.g., Hearing Tr. (2/26/08) at 213-214 (testimony of Tracy Silverman); FEI Hearing Ex. 38 at 184-185 (API Deposition). Plaintiffs have described conversations that they can recall that do not bear on their media strategy. Mr. Lovvorn's participation in the conference calls was on behalf of FFA and as counsel of record in the lawsuit. Hearing Tr. (5.30.08) at 144-45.

- 68, 69. None of defendant's interrogatories requested oral communications with the Wildlife Advocacy Project concerning the funding of Mr. Rider's media campaign. The Court's August 23, 2007 Order required plaintiffs to produce only "responsive" information, DE 178 at 6, 7, and further limited the kinds of "communications" that plaintiffs were required to produce or describe to "communications regarding the subject matter of this lawsuit" that are not "related to any media or legislative strategies or communications." DE 178 at 7. Moreover, Lisa Weisberg testified in her deposition that the ASPCA had communicated with WAP by, inter alia, providing WAP "with a grant to them to enable Tom Rider to do his public outreach and education" about the treatment of elephants at the circus. FEI Hearing Ex. 34 at 45.
72. The total amount of funding cited in defendant's FOF ¶ 72 has spanned the course of seven years, from 2001 to 2008. FEI Hearing Ex. 23 at 11-14. All of the funding that AWI has provided to or for Mr. Rider has been for the purpose of covering "Mr. Rider's travel and living expenses so that he could continue his

- important public education and media work concerning the treatment of elephants in the Ringling Bros. Circus.” FEI Hearing Ex. 23 at 11-12.
73. The funds that AWI provided to Mr. Rider through reimbursements to the law firm Meyer & Glitzenstein, which are included in the total amount listed in defendant’s FOF ¶ 72, were for the purposes of funding “Mr. Rider’s public education and media efforts.” FEI Hearing Ex. 23 at 13.
74. Because the only issue currently before the Court is whether the plaintiffs complied with Judge Sullivan’s August 23, 2007 Order, what AWI produced prior to that Order is not relevant here. Indeed, although plaintiffs believed that they had adequately complied with defendant’s discovery requests prior to the Court’s Order, the Court ordered plaintiffs to produce any additional responsive materials concerning Mr. Rider’s funding, DE 178 at 6, which plaintiffs have now done.
75. AWI produced all responsive invoices from Meyer & Glitzenstein, i.e., those that contained information related to payments or reimbursements provided to Mr. Rider.
76. The funds that AWI has provided directly to Mr. Rider over the years, which is included in the total amount listed in defendant’s FOF ¶ 72, have also all been for the purpose of covering Mr. Rider’s travel and living expenses so that he could continue his important public education and media work concerning the treatment of elephants in the Ringling Bros. Circus. FEI Hearing Ex. 23 at 11-12.
- 77, 78. In response to the Court’s August 23, 2007 Order, AWI undertook a search for, and located and produced, to the best of AWI’s ability, documentation sufficient to show all funds ever provided by the ASPCA to Mr. Rider, directly or

- indirectly, Hearing Tr. (3/6/08) at 47-48; Pls. Hearing Ex. 7, including the \$1,102 grant provided directly to Mr. Rider, FEI Ex. 53 (A-09968). FEI complains only that it did not receive multiple documents concerning the same payments. See FOF ¶ 77 (“AWI did not produce a check, check request, wire transfer receipt or any other type of document regarding this payment.”). Such additional documentation of the same payment, if it ever existed, was not required either by the defendant’s document requests, see FEI Ex. 3 at 9 (Document Request No. 19) (seeking documents “sufficient to show all resources you have expended in ‘advocating better treatment for animals held in captivity’”), or by the Court’s August 23, 2007 Order, which required plaintiffs to produce only “responsive” documents concerning funding for Mr. Rider’s media campaign, DE 178 at 6-7, and accordingly did not need to be accounted for in AWI’s declaration.
79. Defendant has been provided with documentation concerning the \$500 that was sent to Mr. Rider, which is all that defendant’s document requests, or the Court’s August 23, 2007 Order, require. See FEI Ex. 3 at 9 (Document Request No. 19) (seeking documents “sufficient to show all resources you have expended in ‘advocating better treatment for animals held in captivity’”). Additional records related to the same contribution, if they ever existed, are neither responsive to defendant’s requests nor required by the Court’s Order, and were not required to be accounted for in AWI’s declaration.
81. In response to the Court’s August 23, 2007 Order, AWI undertook a search for, and located and produced, to the best of AWI’s ability, documentation sufficient to show all funds ever provided by the ASPCA to Mr. Rider, directly or

indirectly. Hearing Tr. (3/6/08) at 47-48; Pls. Hearing Ex. 7. Therefore, although Ms. Silverman testified that she “believed” that AWI paid the invoice for Mr. Rider’s van repairs, Hearing Tr. (3/6/08) at 34, it appears from the documents that the repairs were actually paid for by WAP, using in part a contribution from AWI, as defendant details in its proposed FOF ¶ 81. Because AWI produced documentation “sufficient to show” the payment to WAP for Mr. Rider’s van repairs, neither defendant’s document requests, see FEI Ex. 3 at 9 (Document Request No. 19) (seeking documents “sufficient to show all resources you have expended in ‘advocating better treatment for animals held in captivity’”), nor the Court’s August 23, 2007 Order, which required plaintiffs to produce “responsive” documents concerning payments to Mr. Rider, DE 178 at 6-7, required anything further.

82. FEI again complains that it did not receive multiple records documenting the same payment for repairs to Mr. Rider’s van for which it already has been provided adequate documentation. See FOF ¶ 82 (“The only document AWI has produced regarding this payment is a copy of Ms. Liss’s credit card statement showing this payment”). Such additional documentation of the same payment, if it ever existed, was not required either by the defendant’s document requests, see FEI Ex. 3 at 9 (Document Request No. 19), or by the Court’s August 23, 2007 Order, which required plaintiffs to produce “responsive” documents concerning payments to Mr. Rider, DE 178 at 6-7, and accordingly did not need to be accounted for in AWI’s declaration.

83. The funds provided by AWI to WAP over the course of several years are all included in the total amount listed in defendant's FOF ¶ 72. These funds were also provided "to support Mr. Rider's important public education and media efforts concerning the treatment of elephants in the circus." FEI Hearing Ex. 23 at 12.
- 85-86. Although the issue before the Court is whether plaintiffs have complied with the Court's August 23, 2007 Order to produce certain documents and information, FEI's characterization of what occurred at Ms. Liss's May 2005 deposition is inaccurate, as well as irrelevant. In fact, at her deposition Ms. Liss responded truthfully to the questions that were posed to her. Thus, Ms. Liss was asked whether AWI "ever paid Mr. Rider any money," FEI Hearing Ex. 32 at 138, which she understood to mean funds provided directly by AWI to Mr. Rider to support his public education efforts. See id. at 138-141; FEI Hearing Ex. 23 at 13 n. 1. When Ms. Liss was subsequently asked whether, "on the times that you've reimbursed him . . . has it been only the Animal Welfare Institute that was paying for his travel expenses," FEI Hearing Ex. 32 at 141-42, Ms. Liss responded, "To my knowledge. Yes." Id. She further agreed that she was "not aware" that AWI was "sharing" these expenses – i.e., the expenses that AWI paid for directly – with other groups. Id. at 142. At the evidentiary hearing, Ms. Liss reiterated this interpretation of the questions she was asked at her deposition. Hearing Tr. (5/30/08) at 101 ("My understanding was that this whole line of questioning related to payments made directly from the Animal Welfare Institute to Mr. Rider. These were responses in relation to that."); id. at 104 ("My understanding was I

was referring to payments made directly to Tom . . . I was not speaking of payments made through the Wildlife Advocacy Project. This was direct payments to Mr. Rider”).

Therefore, to the extent that it has any relevance here at all, Ms. Liss’s testimony at the evidentiary hearing that she interpreted the line of questioning at her deposition to refer to direct payments to Mr. Rider is accurate and credible. Hearing Tr. (5/30/08) at 101, 104. Furthermore, defendant’s assertion in FOF ¶ 86 that Ms. Liss’s testimony is not credible because the only payments made by AWI to or for Mr. Rider between January 1, 2005 and May 18, 2005 were to WAP is incorrect. In fact, as described in AWI’s September 24, 2007 supplemental interrogatory responses, “[i]n 2005 AWI twice provided Mr. Rider with funds by wire transfer so that he could travel and continue his public education work – once on February 14, 2005, in the amount of \$600, and the other on February 22, 2005, in the amount of \$500.” AWI also produced documentation demonstrating these wire transfers. Pls. Hearing Ex. 7 (AWI-09941).

Finally, plaintiffs note that, while the May 2005 deposition testimony on which FEI focuses has little relevance here, it does relate to FEI’s RICO claim against plaintiffs, see FEI v. ASPCA et al., Civ. No. 07-1532, DE 1 (Complaint) ¶¶ 145-153, as to which Judge Sullivan has ordered that all proceedings be stayed. See FEI v. ASPCA et al., 523 F. Supp. 2d 1, 3-4 (D.D.C. 2007).

87. AWI produced documents reflecting proceeds from the 2005 fundraiser that were donated to WAP to support Mr. Rider’s public education efforts. See Pfs.

- Hearing Ex. 7 (AWI 6494, 6499). Moreover, Ms. Silverman testified truthfully that, although proceeds from the 2005 fundraiser “did not go to pay Tom Rider” directly, proceeds from the fundraiser were provided to WAP to support Mr. Rider’s public education work. Hearing Tr. (3/6/08) at 32. FFA was not a “co-sponsor” of the fundraiser. FEI Hearing Ex. 64.
88. Documents or information related to plaintiffs’ planning and execution of the 2005 fundraiser go to the heart of the non-profit organizations’ First Amendment rights of association, and they are covered by that part of the Court’s August 23, 2007 Order excluding “any documents, communications, or information concerning the media and legislative strategies of the plaintiffs.” DE 178 at 5. They are also not “responsive” to any of FEI’s discovery requests. DE 178 at 6, 7. Moreover, all proceeds from that fundraiser that actually were used to support Mr. Rider’s media efforts have been disclosed to defendant, which is all that is required by the discovery requests and the Court’s Order. See Pfs. Hearing Ex. 7 (AWI 6494, 6499).
- 89, 90. AWI did not locate any responsive emails regarding funding provided to Mr. Rider, and hence the record does not indicate that “responsive emails involving AWI did exist.” Indeed, the plaintiffs testified that they generally did not discuss funding for Mr. Rider’s media campaign by e-mail, but rather by phone or in person. See, e.g., Hearing Tr. (2/26/08) at 57-58, 60, 106, 113-114, 154, 194, 203-04; Hearing Tr. (5/30/08) at 72.
91. AWI did not locate the e-mail located at FEI Ex. 51 despite a thorough search. Because AWI did not specifically recall the existence of this email, it did not

account for it in Ms. Silverman's declaration. Ms. Silverman's declaration accurately stated that "although there may have been additional responsive records in AWI's possession, custody or control at some point over the last seven years since this lawsuit began, AWI does [] not know of any such records." FEI Hearing Ex. 41.

92. Ms. Silverman testified that the emails that she exchanged with the other organizational plaintiffs and counsel from Meyer Glitzenstein & Crystal "generally [] involved the litigation." Hearing Tr. (2/26/08) at 203. Such emails were not produced because, while they do not reflect funding of Mr. Rider's activities, they do involve litigation strategy and are protected by the attorney-client and work product privileges. Although they have nothing to do with the issues before the Court, such emails were not listed on AWI's privilege log because the Court's Order required plaintiffs to produce a privilege log "consistent with the privilege log provided by defendant." DE 178 at 7. Because defendant has taken the position that material exchanged among counsel and between counsel and the clients that concerns litigation strategies and plans for this lawsuit need not be logged, plaintiffs did not log those kinds of materials. See Ex. 1 to FEI's Memorandum in Support of its Proposed Findings of Fact and Conclusions of Law (Sept. 24, 2007 letter from Kimberly Ockene and Katherine Meyer to Lisa Joiner) (stating that, consistent with FEI's privilege logs, plaintiffs' logs "no longer contain 'true litigation material,'" as FEI had previously defined that term).

93. AWI did not locate any emails with Mr. Rider that were responsive to defendant's discovery requests and did not concern "the media and legislative strategies of the plaintiffs." DE 178 at 5.
94. AWI objected to Interrogatory No. 16 on the grounds that it was overly broad, unduly burdensome, and called for the disclosure of information protected by AWI's First Amendment right of association. FEI Hearing Ex. 21 at 24; FEI Hearing Ex. 22 at 13. The Court's August 23, 2007 Order further limited the kinds of "communications" that plaintiffs were required to produce or describe to "communications regarding the subject matter of this lawsuit" that were not "related to any media or legislative strategies or communications." DE 178 at 7. Although Ms. Liss's communications with Mr. Rider concerning funding for his media campaign were therefore not required to be disclosed by the Court's August 23, 2007 Order, they were, in any event, disclosed in Ms. Liss's deposition, as FEI acknowledges. See FEI Ex. 32 at 140-144.
95. Ms. Silverman testified that she and Mr. Rider talk regularly, and that they "talk about generally media strategy," as well as "what he witnessed when he was at Ringling Brothers and how best to sort of strategize and convey the message that we're trying to convey [about] the abuse and mistreatment of the elephants at Ringling Brothers." Hearing Tr. (2/26/08) at 207. Ms. Silverman testified that Mr. Rider "understands that [AWI is] funding" his media campaign and that they discuss that funding "in a general sense," id. at 208, but they do not discuss specific amounts of money, id. at 209.

AWI objected to Interrogatory No. 16 on the grounds that it was overly broad, unduly burdensome, FEI Hearing Ex. 21 at 24, and called for the disclosure of “conversations with former employees of defendants regarding various legislative and media strategies for halting the abuse and mistreatment of circus elephants and educating the public about this issue. Additional details of such conversations are irrelevant and their disclosure would impose an undue burden on AWI and infringe upon AWI’s and the former employees’ First Amendment rights of association and expression.” FEI Hearing Ex. 22 at 13. The Court’s August 23, 2007 Order further limited the kinds of “communications” that plaintiffs were required to produce or describe to “communications regarding the subject matter of this lawsuit” that were not “related to any media or legislative strategies or communications.” DE 178 at 7. Although Ms. Silverman’s communications with Mr. Rider concerning funding for his media campaign were therefore not required to be disclosed by the Court’s Order, AWI nevertheless stated in its interrogatory responses that Ms. Silverman has regular conversations with Mr. Rider, including with regard to where he is located so that he can receive funding for his travel expenses. See FEI Hearing Ex. 24 at 6 (noting that Ms. Silverman and Mr. Rider “have also had numerous discussions concerning their mutual efforts to obtain media and legislative interest in the plight of circus elephants,” and that Ms. Silverman “has had conversations with Mr. Rider concerning his location so that either AWI or the Wildlife Advocacy Project can send him funds to enable him to pursue his public education and media campaign.”).

96. Discussions between Ms. Silverman and Ms. Meyer about contributions to the Wildlife Advocacy Project relate to AWI's media strategy. See, e.g., Hearing Tr. (2/26/08) at 213-214 (testimony of Tracy Silverman). Nonetheless, AWI's interrogatory responses disclosed that "Ms. Silverman has also had conversations with Katherine Meyer in her capacity as an official of the Wildlife Advocacy Project concerning Tom Rider's media and public education work for the Wildlife Advocacy Project." FEI Hearing Ex. 22 at 14-15; see also FEI Hearing Ex. 24 at 8 (explaining that AWI and WAP representatives have had conversations "concerning strategies for obtaining media and legislative attention for the issue of elephants in circuses," and that Ms. Silverman has discussed Mr. Rider's location with WAP representatives to facilitate providing funds for Mr. Rider's expenses "while he continues to pursue his public education and media campaign on behalf of elephants").
- 97, 98. None of defendant's interrogatories requested internal communications concerning funding for Mr. Rider's expenses. The only interrogatory that defendant apparently asserts called for this information is Interrogatory No. 19, which sought "communication[s] . . . about the presentation of elephants in circuses or about the treatment of elephants at any circus, including Ringling Brothers and Barnum & Bailey Circus." FEI Ex. 16 at 6; see Hearing Tr. (3/6/08) at 12-14, 18. The Court's August 23, 2007 Order further limited the kinds of "communications" that plaintiffs were required to produce or describe to "communications regarding the subject matter of this lawsuit" that were not "related to any media or legislative strategies or communications." DE 178 at 7.

Neither Ms. Silverman's communications with Ms. Umphlett concerning the mechanics of transmitting funds to Mr. Rider, nor Ms. Silverman's communications with Ms. Liss concerning check requests, were required to be produced by the Court's Order.

- 99, 100. Plaintiffs testified that their discussions concerning how to fund Mr. Rider's media efforts were inextricably intertwined with their media strategy. See, e.g., Hearing Tr. (2/26/08) at 213-214 (testimony of Tracy Silverman); FEI Hearing Ex. 38 at 184-185 (API Deposition). Nevertheless, the plaintiffs' interrogatory responses did disclose discussions with one another concerning their media strategies. See FEI Hearing Ex. 17 at 26; FEI Hearing Ex. 18 at 14, 16; FEI Hearing Ex. 22 at 14; FEI Hearing Ex. 23 at 8; FEI Hearing Ex. 26 at 15; FEI Hearing Ex. 29 at 26. The plaintiffs also described their communications concerning Mr. Rider's funding during their depositions. See FEI Hearing Ex. 32 at 36-37; FEI Hearing Ex. 33 at 40-44; FEI Hearing Ex. 35 at 32-40; FEI Hearing Ex. 34 at 12-15, 20-24, 57.
103. Mr. Markarian testified that he was "not 100 percent sure" that Roger Kindler is General Counsel of FFA. Hearing Tr. (5/30/08) at 34.
105. There is no evidence that all of HSUS's files are within the possession, custody or control of the Fund for Animals. Nevertheless, it is irrelevant who has custody or control over the particular records within HSUS or FFA, because all of the files within the custody, control, or possession of either organization that could conceivably contain information concerning funding for Mr. Rider have been thoroughly searched for any such records. Hearing Tr. (3/6/08) at 89-90 ("Many

of these staff members' files were checked and then rechecked and checked again, both in terms of the Fund for Animals' searches and then later the Humane Society of the United States' searches"); see also Hearing Tr. (3/6/08) at 78 ("We have produced every document that related to payments to Tom Rider"); Hearing Tr. (5/30/08) at 67 ("Q: Other than that payment, as described in that declaration, do you believe that what's now been marked as Plaintiffs' Exhibit 8 . . . reflects all payments that have gone to Mr. Rider, either directly or indirectly emanating from the Fund for Animals or the Humane Society of the United States? A: Yes, it does.").

107. FFA provided \$1,000 to Mr. Rider to enable him to travel to and participate in a press conference in Denver, Colorado concerning a proposed ban on the exhibition of elephants in circuses. FEI Hearing Ex. 33 at 157-59. Mr. Markarian testified as to this amount at his deposition, id., and the Fund provided both documents and an interrogatory response disclosing this funding in its September 24, 2007 discovery responses. FEI Hearing Ex. 52; FEI Hearing Ex. 27 at 12.
109. The issue before the Court is whether plaintiffs complied with the Court's August 23, 2007 Order, and therefore what occurred prior to that Order with respect to FFA's interrogatory responses is not relevant. Nevertheless, FFA explained in its September 24, 2007 response to Interrogatory No. 21 that it "did not originally view [the funding for Mr. Rider's media efforts] as responsive to this Interrogatory because the Fund believed the Interrogatory's reference to 'resources you have expended . . . in 'advocating better treatment for animals held in captivity . . . ' referred only to funds expended by the Fund's own staff," i.e.,

funds that financed FFA's own activities and programs. FEI Hearing Ex. 27 at 11-12.

110. FEI has received a copy of all of the cover letters from Mr. Lovvorn that accompanied the contributions to the Wildlife Advocacy Project. It complains only that FFA did not produce duplicate copies of such cover letters already in FEI's possession. See FOF ¶ 110 ("FFA has not produced at least three of the cover letters from Mr. Lovvorn") (citing the letters that were produced by WAP). Moreover, because the applicable document production request sought documents "sufficient to show all resources expended in advocating better treatment of animals held in captivity," FEI Hearing Ex. 3 at 9, FFA was not required, either by the document production requests or the Court's Order, to produce duplicative documentation concerning the same contributions. For the same reason, FFA was not required to account for such records in its Court-ordered declaration.
111. As FFA explained in its September 24, 2007 interrogatory responses, "when Mr. Markarian was asked at his June 2005 deposition whether 'the Fund ever paid Mr. Rider any money,'" he interpreted the question to mean "direct payments from the Fund to Mr. Rider." FEI Hearing Ex. 27 at 13.
112. The issue before the Court is whether plaintiffs' complied with the Court's August 23, 2007 Order, and therefore what occurred prior to that Order with respect to FFA's interrogatory responses is not relevant. Nevertheless, FFA explained in its September 24, 2007 response to Interrogatory No. 21 that it "did not originally view [the funding for Mr. Rider's media efforts] as responsive to this Interrogatory because the Fund believed the Interrogatory's reference to

‘resources you have expended . . . in ‘advocating better treatment for animals held in captivity . . .’ referred only to funds expended by the Fund’s own staff . . .”

FEI Hearing Ex. 27 at 11-12. The contribution to the Captive Wild Animal Protection Coalition was included in FFA’s original interrogatory responses because FFA staff were active participants in that Coalition, and the Coalition was considered to be an FFA program.

114. Mr. Markarian’s testimony that FFA produced all the documents in its files that concern payments to or for Mr. Rider was accurate and credible. Moreover, Mr. Markarian’s specific recollection as to what was contained in FFA’s interrogatory responses is irrelevant, since the Court can review those responses, which speak for themselves.

115. FFA conducted a thorough search for records related to funding for Mr. Rider. Hearing Tr. (5/30/08) at 67. Despite this search, FFA did not locate the email at FEI Hearing Ex. 51. Because Mr. Markarian did not recall having received this email, he did not include it in FFA’s Court-ordered declaration. Moreover, the email reflects the organizations’ media strategy, and thus would not be required to be produced by the Court’s August 23, 2007 Order in any event. See DE 178 at 5, 7. In addition, FFA produced a formal grant proposal that superseded the email in question, which fully explains the purpose of Mr. Rider’s media campaign and the reasons why the organizational plaintiffs were funding it. See Pfs. Hearing Ex. 8 at F 1945-1947.

116. Mr. Markarian could not recall that there even were any communications with Ms. Meyer concerning the November 5, 2003 email, Hearing Tr. (5/30/08) at 18-

19. In fact, he could not recall the email itself. Id. Accordingly, FFA did not account for any such communications in its interrogatory responses. However, in response to Interrogatory No. 19, FFA did state that it “has . . . had conversations with the other plaintiffs about their legislative and media strategies for halting the abuse and mistreatment of circus elephants and educating the public about this issue.” FEI Hearing Ex. 26 at 15.
117. Mr. Markarian testified that the he did not recall FFA’s discussions with the ASPCA concerning the funds provided to Mr. Rider, Hearing Tr. (5/30/08) at 21, and he therefore would not be able to describe those communications. However, FFA did state in its interrogatory responses that it “had conversations with the other plaintiffs about their legislative and media strategies for halting the abuse and mistreatment of circus elephants and educating the public about this issue.” FEI Hearing Ex. 26 at 15.
118. None of defendant’s interrogatories requested internal communications concerning funding for Mr. Rider’s media campaign, and the Court’s August 23, 2007 Order further limited the kinds of “communications” that plaintiffs were required to produce or describe to “communications regarding the subject matter of this lawsuit” that are not “related to any media or legislative strategies or communications.” DE 178 at 7.
119. The issue before the Court is whether plaintiffs complied with the Court’s August 23, 2007 Order, and therefore what occurred prior to that Order with respect to FFA’s discovery responses is not relevant. In particular, Mr. Markarian’s misstatement as to the chronology of when FFA produced certain documents has

- no relevance to the issues before the Court. Nevertheless, in compliance with the Court's August 23, 2007 Order, FFA has now produced documents sufficient to demonstrate all amounts of funding it has ever provided either directly or indirectly to Mr. Rider. Hearing Tr. (5/30/08) at 67-68.
120. Mr. Markarian testified that he did not "remember discussing the payments [from] seven years ago" that were reflected in Meyer & Glitzenstein invoices. Hearing Tr. (5/30/08) at 30. See also id. ("I don't recall the discussions."). Accordingly, there would be no basis for including such discussions in FFA's interrogatory responses. However, in response to Interrogatory No. 19, FFA stated that it "has . . . had conversations with the other plaintiffs about their legislative and media strategies for halting the abuse and mistreatment of circus elephants and educating the public about this issue." FEI Hearing Ex. 26 at 15.
121. FFA has disclosed what responsive communications it could recall that do not bear on media strategy. Thus, it is not correct that FFA "did not disclose" communications with the other plaintiffs concerning Mr. Rider's media campaign. In response to Interrogatory No. 19, FFA stated that it "has . . . had conversations with the other plaintiffs about their legislative and media strategies for halting the abuse and mistreatment of circus elephants and educating the public about this issue." FEI Hearing Ex. 26 at 15. In addition, in interrogatory responses as well as during Mr. Markarian's deposition, FFA described its discussions with Mr. Rider concerning his public education efforts and FFA's financial contributions to those efforts. See FEI Hearing Ex. 25 at 26-27; FEI Hearing Ex. 26 at 13-14; FEI Hearing Ex. 156-161.

122. There is no such entity as “FFA/HSUS.” Documents or information related to the planning, coordination, and execution of the 2005 fundraiser have nothing to do with Mr. Rider’s credibility. In addition, such information goes to the heart of the organizations’ First Amendment rights of association, and are exempt from disclosure under the Court’s August 23, 2007 Order excluding “any documents, communications, or information concerning the media and legislative strategies of the plaintiffs.” DE 178 at 5. Moreover, all proceeds from that fundraiser that were in fact contributed to Mr. Rider’s media efforts have been disclosed, which is all that is required by the Court’s discovery Order. See supra at ¶ 87-88.
123. Despite an exhaustive search, see Hearing Tr. ((3/6/08) at 89-90; Hearing Tr. (5/30/08) at 67-68, FFA has not located any emails concerning its contributions to or for Mr. Rider’s media campaign. Hearing Tr. (3/6/08) at 72.
124. FFA searched for any records related to funding provided to or for Mr. Rider. Hearing Tr. (5/30/08) at 67-68. FFA could not locate or recall any reference to funding to or for Mr. Rider in Board Minutes, and, accordingly, no such Minutes were produced. Hearing Tr. (3/6/08) at 70 (“At the Fund for Animals’ board meetings, we have discussed this litigation in general. We have not to my recollection discussed donations that were made to the Wildlife Advocacy Project to support media and campaign efforts on the circus issue.”).
125. FFA did not locate any emails in Mr. Lovvorn’s possession that are responsive to any of defendant’s document requests and that are neither privileged nor related to “any media or legislative strategies.” DE 178 at 7. Indeed, FFA conducted “exhaustive” searches, Hearing Tr. (5/30/08) at 67, and produced any emails or

- other documents related to payments for Mr. Rider. Id. at 67-68 (“We have searched several departments and the files of several employees multiple times, both print documents and electronic files, and we are confident that we’ve produced everything in our possession that relates to any payments to Tom Rider.”); Hearing Tr. (3/6/08) at 78 (“We have produced every document that relates to any payments to Tom Rider.”).
126. Mr. Markarian testified that FFA conducted “exhaustive” searches for records related to contributions to or for Mr. Rider’s media efforts, and produced any such records. Hearing Tr. (5/30/08) at 67-68. Mr. Markarian’s declaration on behalf of FFA stated accurately that “[a]lthough there may have been additional responsive records at some point over the last seven years since this lawsuit began that we have not located, The Fund does do not know of any such records or what they may have been.” FEI Hearing Ex. 42.
129. API’s contributions to the Wildlife Advocacy Project were for the purpose of supporting “advocacy and public education efforts on the issue of the treatment of elephants held in captivity.” FEI Hearing Ex. 30 at 13.
130. Neither the defendant’s interrogatories to the Organizational plaintiffs nor the Court’s August 23, 2007 Order required the organizational plaintiffs to produce communications concerning funding for Mr. Rider’s media campaign. In any event, during her deposition, Ms. Paquette did describe API’s communications with the other plaintiffs and WAP concerning funding for Mr. Rider’s media efforts. See FEI Hearing Ex. 38 at 175-194. There is no such entity as “FFA/HSUS.”

131. Neither defendant's interrogatories to the organizational plaintiffs nor the Court's Order required plaintiffs to describe internal communications concerning funding of a media campaign. In addition to the fact that such communications are not responsive to the interrogatories, they are inextricably related to API's strategy for funding a media campaign. See FEI Ex. 38 at 183-191, 242-244. In any event, Ms. Paquette did generally describe such communications at her deposition. See id. at 170-172.
132. API has produced all documents that it has located concerning funding for Mr. Rider. Hearing Tr. (2/28/08) at 152-153.

RESPONSE TO PROPOSED CONCLUSIONS OF LAW

Plaintiffs oppose each of defendant's proposed conclusions of law for the reasons stated in plaintiffs' accompanying Post-Hearing Brief Regarding Plaintiffs' Compliance With The Court's August 23, 2007 Order.

Respectfully submitted,

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