UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

PLAINTIFFS' POST-HEARING BRIEF REGARDING PLAINTIFFS' COMPLIANCE WITH THE COURT'S AUGUST 23, 2007 ORDER

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INTRODUCTION

Defendant Feld Entertainment, Inc. ("FEI") has not sustained its "heavy burden of proof, often described as proof by 'clear and convincing evidence,' that [plaintiffs] violated the court's prior order." DE 241 at 1 (quoting Wash.-Baltimore Newspaper Guild, Local 35, of the Newspaper Guild, AFL-CIO-CLC v. Wash. Post Co., 626 F.2d 1029, 1031 (D.C. Cir. 1980)). To the contrary, the testimony and other evidence adduced at the evidentiary hearing demonstrates that plaintiffs conducted a thorough search for documents responsive to the Court's August 23, 2007 Order (i.e., the discovery Order at issue that applies to plaintiffs) and that, by divulging documents and other information on every payment made to or for Mr. Rider, plaintiffs have complied with the plain terms of that Order and the underlying discovery requests on which it was predicated. In response to the Order, Mr. Rider provided documents and interrogatory answers providing, among other items, a detailed accounting of all funds he has received since 2001, including all funding he has received either directly or indirectly through the plaintiff organizations. Similarly, the plaintiff organizations supplemented their prior discovery responses by providing both written documentation and detailed interrogatory responses on the funding furnished to Mr. Rider over the last seven years.

Accordingly, plaintiffs have satisfied both the letter and spirit of Judge Sullivan's Order by going to great lengths to search for and produce materials reflecting any and all of Mr. Rider's "funding for his public education and litigation efforts related to defendants," the information that Judge Sullivan deemed "relevant" because it might bear on Mr. Rider's credibility. DE 178 at 4. As discussed further below, FEI's contrary position, in effect, asks this Court to disregard not only the testimony at the evidentiary hearing, but the actual terms of the August 23, 2007 Order and defendant's own discovery requests. That is something the Court should be loathe to do in any context, and particularly one in which a party is asking the Court to impose the extreme sanction of contempt.

Furthermore, even if there were some question as to whether plaintiffs' understanding of the August 23, 2007 Order was correct, FEI has certainly not satisfied its "high" burden of proffering "clear and convincing proof that [plaintiffs] violated a clear and unambiguous order." Athridge v. Aetna Cas. and Sur. Co., 184 F.R.D. 181, 198 (D.D.C. 1998) (Facciola, J.) (citing Wright, Miller, & Kane, Federal Practice and Procedure § 2960). This is especially true when, as FEI concedes is required, the Court considers all of the "circumstances surrounding the issuance of the order." FEI Mem. at 8 (citing Cobell v. Babbitt, 37 F. Supp. 2d 6, 16 (D.D.C. 1999)). As also discussed below, those "circumstances" here include Judge Sullivan's refusal – at the very same time that he issued the discovery Order at issue – to allow FEI to pursue a RICO counterclaim against plaintiffs based on the funding of Tom Rider's public education campaign. DE 176 at 4-7.

Indeed, in rejecting that claim and then staying all discovery in FEI's subsequently-filed RICO case, Judge Sullivan explained that FEI was entitled to only "limited information about payments" to Mr. Rider, and that Judge Sullivan did not want plaintiffs to be burdened with producing "substantial additional evidence . . . beyond the evidence already produced on payments to Tom Rider." Id. at 5, 6 (emphasis added). Consequently, defendants' insistence that plaintiffs were somehow obligated not only to divulge documents and other information reflecting all of the funding of Mr. Rider's public education campaign – as plaintifffs have done – but also to attempt to reconstruct every conversation they have had over the last eight years concerning such funding not only lacks support in FEI's own discovery requests (which in fact never sought such information although FEI has known about this funding for years) but disregards contemporaneous "circumstances," FEI Mem. at 8, that make it impossible for the Court to conclude that plaintiffs' approach to the August 23, 2007 Order was "obviously prohibited" by the "clear and unambiguous" terms of the Order. Athridge, 184 F.R.D. at 198.

Moreover, even if the Court were to nevertheless conclude that one or more of the plaintiffs somehow fell short in their efforts to comply with the August 23, 2007 Order, the Court should still conclude that a contempt finding is unwarranted here. As FEI acknowledges, courts in this Circuit "have recognized the defense of good faith substantial compliance for contempt." FEI Mem. at 9. Here, as underscored by plaintiffs' testimony, plaintiffs have made strenuous efforts to locate the information they believed to be covered by Judge Sullivan's Order, and have now accounted for every payment they have made to Mr. Rider, either directly or indirectly. Accordingly, while plaintiffs contend that their course of conduct reflects complete compliance with the August 23, 2007 Order, at bare minimum it surely is enough to establish that the draconian remedy of contempt is not called for here.

As explicated below, therefore, the Court has a sufficient factual and legal basis to conclude that FEI's motion for contempt should be denied without making any referral of the matter to Judge Sullivan. See Athridge, 184 F.R.D. at 198-99 (explaining that a Magistrate Judge may deny a motion for contempt although "he does not have jurisdiction to adjudicate contempt"); id. at 198 ("Since resolution of the motion would not impose contempt sanctions against a party . . . I will rule on plaintiffs' motion and deny it.").[1]

[1] As explained in Athridge, a "plain reading" of 28 U.S.C. § 636(e) "suggests that magistrate judges have neither civil nor criminal contempt power." 184 F.R.D. at 197. However, magistrates may either deny contempt motions or determine whether "conduct has risen to a level at which he or she must certify the facts of the conduct to a district judge for adjudication." Id. at 198. This is also consistent with the Court's explanation that the purpose of the evidentiary hearing in this case was to facilitate an "extraordinarily preliminary" determination of how plaintiffs carried out their discovery obligations in response to the August 23, 2007 Order. DE 252-2 at 21 (transcript of 1/8/08 status hearing).

BACKGROUND

A. FEI's Discovery Requests And Plaintiffs' Provision Of Extensive Information Concerning The Funding Of Mr. Rider's Public Education Campaign Prior To The August 23, 2007 Order

Because FEI's Proposed Findings of Fact and Conclusions of Law ("FEI Prop.") rely heavily on plaintiffs' actions and responses to discovery requests that occurred before issuance of the August 23, 2007 Order, see, e.g., FEI Prop. ¶¶ 20-21, 49, 53, 74, 82, 85-86, 109, 112 (complaining about various matters that were not disclosed to FEI "until [plaintiffs'] September 2007 Court-ordered production"), and because Judge Sullivan's August 23, 2007 discovery Order expressly required plaintiffs to disclose materials that are "responsive" to FEI's discovery requests, DE 178 at 3, 6-7, it is essential to briefly set the record straight as to what FEI did – and did not – ask for in the discovery requests at issue, as well as how plaintiffs actually responded even before issuance of the August 2007 Order. See also D'Onofrio v. SFX Sports Group, Inc., 247 F.R.D. 43, 47 (D.D.C. 2008) (Facciola, J.). (courts ordinarily do "not compel discovery that has not been sought").

As Judge Sullivan has recognized, FEI has in fact known for years that Mr. Rider was traveling around the country (first by greyhound bus, and then in a used van) in order to speak to representatives of the news media, state and local legislators, and ordinary citizens about the mistreatment of Asian elephants in circuses, and that the plaintiff organizations (among others) were contributing funding to that public education campaign. See DE 176 at 7 ("Plaintiffs' counsel admitted in open court on September 16, 2005 that the plaintiff organizations provided grants to Tom Rider to 'speak out about what really happened' when he worked at the circus.") (quoting 9/16/05 Hr'g Transcript).[2]

[2] As confirmed by the testimony and other evidence adduced at the evidentiary hearing, Mr. Rider's funding has in fact facilitated his travels throughout the country while he seeks to

Yet although nothing prevented FEI from doing so during the many years allowed for discovery in this case, defendant has never submitted to the organizational plaintiffs either interrogatories or document production requests specifically demanding materials relating to Mr. Rider's public education campaign and/or plaintiffs' contributions to it. Instead, FEI has throughout this lengthy litigation relied on an initial set of document production requests and interrogatories that, as has been illuminated at the evidentiary hearing, are far different from the discovery requests that FEI now purports to have proffered to plaintiffs.[3]

Thus, the only document requests ever submitted by FEI to the organizational plaintiffs never demanded that they produce documents relating to Mr. Rider's media campaign or plaintiffs' funding of it. Instead, as FEI now acknowledges, see FEI Prop. ¶¶ 42-43, the

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educate the public concerning his eyewitness accounts of the plight of circus animals generally and FEI's elephants in particular. See, e.g., 2/26/08 Tr. at 20, 29, 48, 80, 92, 93-94, 96, 108, 141, 157, 165-67, 191-92, 201-02; 3/6/08 Tr. at 27, 44, 66, 67; 5/30/08 Hearing Tr. at 61, 79, 96, 102, 115, 121, 125; see also Pfs. Hr'g Ex. 5 (articles and other documents reflecting some of Mr. Rider's public education efforts). Although FEI emphasizes the total amount of funding provided to this effort by the organizational plaintiffs over the last eight years, see FEI Prop. ¶ 13, that funding – which averages out to less than $ 20,000 per year since 2001 – is in fact an extremely modest, albeit vital, response to FEI's own extensive public relations efforts which, in plaintiffs' view, seriously and consistently mislead the public concerning the bleak lives endured by the elephants. See, e.g., 4/3/08 Washington Post, On the Other Tightrope, Parents Weigh Animal Rights Ethics Against Kids' Enjoyment of the Circus, Metro Section, B1 (assertion by FEI's head of communications that the "circus is a place to see animals and humans in 'a caring relationship'"). In this connection, it is also worth noting that there is a long tradition of social and political activists relying heavily on individuals in positions analogous to Mr. Rider's to advocate for social change. For example, British abolitionists relied heavily on sailors who worked on slave ships to publicize the conditions endured by slaves and sailors during the cross-Atlantic slave trade. See M. Rediker, The Slave Ship 325-28 (2007).

[3] In fact, FEI has known since at least 2002 – long before it submitted even its initial document production requests and interrogatories – that Mr. Rider was receiving funding from one or more of the plaintiff organizations. Thus, an e-mail exchange between FEI employees in May 2002 specifically discusses the fact that Mr. Rider, in a hearing before a committee of the Rhode Island legislature that was considering banning elephants in circuses in that State, acknowledged that the "ASPCA pays for hotels, bus fare, meals," and other expenses while Mr. Rider followed the circus in an effort to "to protect 'my girls [the elephants].'" Ex. A (FEI 38336).

pertinent document production requests only asked the organizational plaintiffs for documents concerning the factual basis for certain organizational standing allegations made in their Complaint. See FEI Hr'g Ex. 3 ¶¶ 19, 20. Thus, in response to allegations by the organizational plaintiffs that they have standing because they "spend[] resources each year on advocating protection for endangered and threatened animals, including better treatment for animals used for entertainment purposes," DE 1 ¶ 9, FEI requested "[d]ocuments sufficient to show all resources you have expended in 'advocating better treatment for animals held in captivity, including animals used for entertainment purposes' each year from 1996 to the present." FEI Hr'g Ex. 3 ¶ 19 (emphasis added).

Likewise, while FEI now says that the organizational plaintiffs should be held in contempt for failing to account for all "conference calls" and other communications "among each other" concerning their funding of Mr. Rider's public education campaign, FEI Prop. ¶ 16, the unavoidable fact is that FEI never propounded interrogatories asking for such information. Rather, the first – and only – interrogatories submitted to the organizational plaintiffs requested (in pertinent part) that plaintiffs "[d]escribe each communication you have had since 1996 with any other animal advocates or animal advocacy organizations about the presentation of elephants in circuses or about the treatment of elephants at any circus, including Ringling Bros. and Barnum & Bailey Circus." FEI Hr'g Ex. 16 ¶ 19 (emphasis added).

Although plaintiffs objected to these and other document production requests and interrogatories on various grounds (including that they were over broad and sought information protected by the First Amendment, attorney-client, and attorney work-product privileges) plaintiffs nonetheless responded to them – long before the August 23, 2007 Order – by providing FEI with documents and interrogatory answers that included information about Tom Rider's activities and funding. For example, in its initial June 2004 response, see FEI Hr'g Ex. 4 at

Addendum (enumerating the documents then being released), ASPCA provided to FEI internal e-mails explaining that Mr. Rider had voluntarily left employment with the Performing Animal Welfare Society (a former plaintiff in this case which settled with FEI) "in order to follow the circus and speak out about its training/abuse of elephants," that Mr. Rider had already "been doing some impressive p.r. work" for ASPCA, and that ASPCA would therefore commit funding to his "road expenses" so that he could continue his public education activities. Pfs. Hearing Ex. 1 at A46, A73.

In addition, ASPCA disclosed to FEI that it had given a grant to the Wildlife Advocacy Project ("WAP") – a non-profit organization that conducts public advocacy on behalf of wild and captive animals – for "public education about Ringling Bros.'s mistreatment of Asian elephants," FEI Hr'g Ex. 17 at 33, and it further divulged that Mr. Rider "had numerous communications" with ASPCA's counsel Lisa Weisberg concerning his activities, and also that, among other ASPCA employees, "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." Id. at 26.[4]

With regard to Mr. Rider's June 2004 answers to the separate document production requests and interrogatories directed at him, FEI has also inaccurately characterized both its discovery requests and Mr. Rider's responses to them. Indeed, by selectively quoting from Mr.

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[4] See also Pfs. Hr'g Ex. 8 at F1945-1947 (Fund for Animals document provided to FEI in June 2004 reflecting December 11, 2003 "Grant/Funding Proposal" from WAP to FFA requesting funding for a "grass-roots media campaign to educate the public about what goes on behind the scenes of the Ringling Bros. circus with respect to endangered Asian elephants . . . With some very minimal grass-roots support, Mr. Rider has been touring the country for the past two years, staying just ahead of Ringling, doing media interviews and television spots on the subject, and assisting grass-roots groups in educating the public about this issue . . . The $ 10,000 requested would fund this public education effort for the year 2004. Funds would be spent principally on transportation, lodging, meals, phone expenses, and other administrative and out-of-pocket costs for Mr. Rider to continue these efforts.").

Rider's responses, FEI has suggested that Mr. Rider denied until his "Court-ordered response" in September 2007 receiving any funding from plaintiffs or others for his public education campaign. See FEI Prop. at ¶¶ 19-20. That is simply incorrect.

Thus, the pertinent interrogatory to Mr. Rider had 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 from 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 Hr'g Ex. 12 at 39 (emphasis added). According to FEI, "[i]n June 2004, Mr. Rider objected to this interrogatory but also stated under oath that 'I have not received any such compensation.'" FEI Prop. ¶ 8 (quoting FEI Hr'g Ex. 12 at 39). FEI, however, has omitted critical information from Mr. Rider's response.

> In fact, what Mr. Rider stated (after invoking objections and privileges) was that
>
> [s]ubject to and without waiving the foregoing or general objections to these interrogatories, and subject to a confidentiality agreement, Mr. Rider would be willing to provide defendants with the answer to the first sentence of this Interrogatory.

Id. (emphasis added). Hence, far from denying that he had received funding from plaintiffs or others, Mr. Rider in 2004 expressly offered to provide FEI with all such information – i.e., all of his funding from the plaintiff organizations or anyone else – subject to an appropriate protective order. That Mr. Rider did not (and still does not) view such funding as "compensation for services rendered" to those supporting his efforts – but, rather, as "grants" to cover his expenses so that he could continue the public education campaign he has pursued for many years, DE 176 at 7 – does not mean, as FEI now implies, that Mr. Rider (or plaintiffs in general) have ever refused to acknowledge the existence of such funding or to provide FEI with documents reflecting it. See also FEI Hr'g Ex. 2 at 12-13 (in response to document production

request for "[b]ank statements or other documents demonstrating your sources of income since you stopped working in the 'circus community,'" Mr. Rider's answer that "subject to a confidentiality agreement, Mr. Rider would be willing to provide defendants with information that would identify his sources of income since he stopped working in the 'circus community'") (emphasis added); FEI Hr'g Ex. 36 at 54, pp. 212-13 (12/18/07 Rider Dep.) (Q: "What do you do for a living?" A: "I go around the country speaking to the media, and to legislative branches of the government and states, and I speak to . . . grassroots groups that want me to speak about what I witnessed at Ringling." Q: "You regard that as a job?" A: "No." . . . Q: "Are you providing a service?" A: "To the elephants, yes.").[5]

FEI, however, never took Mr. Rider up on this offer to detail all of his funding; nor, once again, did FEI submit any follow-up interrogatories or document production requests concerning Mr. Rider's activities or funding. Nonetheless, in January 2007 – seven months before issuance of the Order at issue – plaintiffs supplemented their responses to the initial discovery requests, including by providing additional information concerning the funding of Mr. Rider's public education campaign. For example, AWI supplemented its interrogatory response by stating that it "has made contributions to the Wildlife Advocacy Project for advocacy work for public education on the issue of the treatment of elephants held in captivity," FEI Hr'g Ex. 22 at 16, and it produced documents reflecting that such payments were in fact being used for Mr. Rider's expenses. Id. (indicating that "[d]ocuments reflecting these contributions have been produced by

[5] Indeed, had FEI accepted Mr. Rider's proposal – first made in 2004 and subsequently reiterated to FEI on various occasions – FEI would have obtained more information concerning Mr. Rider's funding than it was ultimately entitled to under Judge Sullivan's August 2007 Order, because Mr. Rider had offered to provide information identifying all of his sources of income since he stopped working with the circus. Under the August 23, 2007 Order, however, FEI was entitled to receive (and now has received) 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.

AWI and are hereby incorporated by reference, AWI 06494-06506"); Pfs. Hr'g Ex. 7 at AWI 06494-06506 (canceled checks from AWI to WAP reflecting funding for "Tom Rider Campaign," "Tom Rider," "Ringling Bros. P.R.," "elephant media," and "Tom's van repairs."). AWI further stated that it 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 Hr'g Ex. 22 at 14-15.[6]

Similarly, in his supplemental interrogatory responses provided in January 2007, Mr. Rider stated (in response to an interrogatory asking about every "job" he had held), that "[a]though Mr. Rider does not consider his public advocacy work for the Wildlife Advocacy Project to be a 'job,' he nevertheless states, as he also testified about in his October 12, 2006 deposition, that he has received grants from that organization for his travel, living, and other expenses in connection with public education, media, and general advocacy work that he is doing on behalf of captive elephants;" that "this effort includes contacting and speaking to journalists and others about the treatment of elephants in circuses, including the Ringling Bros. Circus, speaking to and assisting grassroots groups who are working on this and similar issues, and speaking to and testifying before federal, state, and local legislative entities about such matters"; and that, "[i]n furtherance of this effort, Mr. Rider travels throughout the country to the

[6] See also FEI Hr'g Ex. 29 at 31 (API's January 2007 responses stating that it "has had communications with the other plaintiffs about media and public education strategies for informing the public about the mistreatment of elephants in circuses, including Ringling Brothers. Information concerning the amount and financial contributions API has made toward such efforts is reflected in documents that have been produced by API"); id. at 28 ("Ms. Paquette has also had limited communications with the Wildlife Advocacy Project on this topic as evidenced by documents that API has produced"); Pfs. Hr'g Ex. 3 at API 2868, API 2870, API 2872 (letters disclosed by API in January 2007 reflecting grants from API to WAP).

cities where the Ringling Bros. Circus performs and elsewhere." FEI Hr'g Ex. 13 at 2 (emphasis added).[7]

In addition, in depositions that also occurred before the August 2007 Order, both Mr. Rider and the organizational plaintiffs acknowledged funding of Mr. Rider's expenses while he conducted his public education campaign, and provided additional information about such funding and their communications concerning it. See FEI Hr'g Ex. 32 at 36-37 (5/18/05 Liss Dep.) (Q: "Has he ever asked for anything more than his travel expenses?" A: "No." Q: "Is all the money that you paid him for travel expenses?" A: "Yes."); see also FEI Hr'g Ex. 33 at 40-44 (6/22/05 Markarian Dep.) (describing FFA's funding of Mr. Rider's travel expenses to participate in media events as well as FFA's communications with Mr. Rider); FEI Hr'g Ex. 35 at 32-40 (10/12/06 Rider Dep.) (describing Mr. Rider's funding by WAP and plaintiff organizations); FEI Hr'g Ex. 34 at 12-15, 20-24, 57 (Weisberg Dep.) (describing funding of Mr. Rider's activities by ASPCA, FFA, AWI, as well as ASPCA's contributions to funding of Mr. Rider's activities through both WAP and plaintiffs' counsel); id. at 21, p. 81 (description of discussion between ASPCA, FFA, and AWI "about what those [travel] expenses typically would amount to and whether [FFA and AWI] could fund them as well").[8]

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[7] See also id. at 4, 7 (describing "conversations" with WAP "about these same matters and other public education outreach I was doing on the issue of elephants in circuses"); id. at 3 (explaining that he had "regular conversations" with ASPCA concerning his public education campaign, including "which reporter I was meeting with in which city, the substance of my media interviews, discussions about which city I would go to next and which reporters to talk to, and any subsequent news coverage that was generated").

[8] In its proposed findings, FEI asserts that plaintiffs "did not disclose" that certain payments to their counsel "included reimbursement for payments" to Mr. Rider until plaintiffs' submitted their "September 2007 Court-ordered interrogatory responses." FEI Prop. ¶ 49. This assertion is irrelevant to whether plaintiffs have complied with the August 23, 2007 Order but, in any event, is wrong. In her July 2005 deposition, ASPCA's Rule 30(b)(6) witness specifically advised FEI that some of the funding to Mr. Rider was "included in [plaintiffs'] regular payments to [their] attorneys"). FEI Hr'g Ex. 34 at 57, p. 224; see also id. at 20, p. 75.

In short, notwithstanding FEI's present effort to portray plaintiffs as hiding their funding of Mr. Rider's media outreach around the country – an accusation that FEI evidently believes is relevant to its contention that the draconian sanction of contempt is appropriate here – the reality is that FEI learned as early as 2002 that such funding was occurring, that plaintiffs' counsel volunteered to Judge Sullivan in 2005 that Mr. Rider's activities were being supported by the plaintiff organizations and others, and that, long before the August 2007 Order, plaintiffs had already provided FEI with extensive information on that topic, in response to both interrogatories and document production requests that did not even directly ask for such information, as well as in deposition answers.

B. The August 2007 Discovery Order And Plaintiffs' Response To It

FEI stresses that the discovery requests at issue "were served over four years ago," FEI Mem. at 18, thus suggesting that plaintiffs have somehow been responsible for delays in the litigation. This is revisionist history. FEI neglects to mention that for more than two years it raised no concerns whatsoever about the adequacy of any of plaintiffs' discovery responses, either with respect to information bearing on the funding of Mr. Rider's public education campaign or anything else. See DE 227 at 6; DE 156 at 1. Hence, as Judge Sullivan has already made clear, it was not because of plaintiffs' delays that the discovery process dragged on but, rather, it was a "result of defendant's failure to timely produce thousands of pages of veterinary records" that "the Court allowed discovery to continue in this case." DE 176 at 5 (emphasis added). Moreover, it was only after FEI changed counsel in 2007 that FEI even began to contend that plaintiffs' discovery responses had been deficient in any manner; it was only then that FEI abruptly changed tactics by filing "numerous discovery-related motions" as part of what Judge has Sullivan called a "relentless" campaign "to obtain information to impugn plaintiff

Tom Rider and learn every detail of the media and litigation strategies of its opponents . . . ." DE 176 at 8.

Accordingly, in response to the motions culminating in the August 23, 2007 Order at issue, plaintiffs, while acknowledging FEI's legitimate interest in learning about Mr. Rider's funding – so that FEI could challenge Mr. Rider's credibility on that basis – urged Judge Sullivan to protect, on both First Amendment and relevance grounds, their internal deliberations and communications "concerning their media and legislative strategies with respect to captive elephants, including their strategies for funding those efforts." DE 156 at 7 (emphasis added). Plaintiffs argued that such strategic communications – which FEI sought in part to bolster an "unclean hands" defense and RICO counterclaim Judge Sullivan subsequently rejected – were not only irrelevant, but protected by a First Amendment privilege.

In particular, plaintiffs relied heavily on rulings from Judges Kessler and Urbina of this Court holding, specifically in the context of discovery disputes, that the "essence of First Amendment freedoms" encompasses the freedom by non-profit advocacy groups to "'organize, raise money, and associate with other like-minded persons so as to effectively convey the message of the protest.'" Id. at 17 (emphasis added) (quoting Intern'l Action Ctr. v. United States, 207 F.R.D. 1, 3 (D.D.C. 2002)); see also Wyoming v. USDA, 208 F.R.D. 449, 454 (D.D.C. 2002). Plaintiffs specifically advised Judge Sullivan that they "have not produced additional documentation" concerning the 2005 fundraiser held in California "beyond the invitation" because the "additional documentation is correspondence between and within the groups that is not relevant" to any of the issues in the litigation "and is protected by the groups' First Amendment rights of association." DE 156 at 33 n.17.

The organizational plaintiffs also stressed to Judge Sullivan the precise nature of the discovery requests on which FEI was relying to obtain information concerning Mr. Rider's

funding. DE 156 at 28. In particular, the organizational plaintiffs explained that, although FEI had known about plaintiffs' funding of Mr. Rider's campaign for many years (and, indeed, had asked plaintiffs many questions about it at their depositions), in the particular document production requests and interrogatories at issue "defendants merely quoted the standing allegations plaintiffs made in their Complaint." Id. For his part, Mr. Rider emphasized to the Court that, subject to an agreement to protect his privacy, he had repeatedly offered to provide FEI with a complete itemized list of funds he had received for his travel (or any other) expenses, as well as the sources for all such funds. See DE 138 at 12-16.

Judge Sullivan clearly took these arguments into account in crafting the August 23, 2007 discovery Order. Thus, while finding that the actual "financing of [Mr. Rider's] public campaign regarding the treatment of elephants is relevant to his credibility in this case," DE 178 at 4 (emphasis added) – as plaintiffs had acknowledged – Judge Sullivan sustained plaintiffs' position that "any documents, communications, or information concerning the media and legislative strategies of the plaintiffs are irrelevant to the claims and defenses in this case and would be over burdensome to produce." Id. at 5 (emphasis added); see also id. at 4 ("The Court finds 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.") (emphasis added). Because Judge Sullivan found that "any documents, communications, or information concerning the media or legislative strategies of the plaintiffs are irrelevant," he had no need to – and hence did not – address plaintiffs' alternative argument that such materials are also privileged on First Amendment grounds. Indeed, Judge Sullivan also specifically instructed that plaintiffs' privilege log "need not include information determined by the Court to be irrelevant or over burdensome to produce." Id. at 7 (emphasis added).

Moreover, that Judge Sullivan was clearly cognizant of plaintiffs' arguments concerning the specific contours of the underlying discovery requests at issue is evidenced by the fact that every one of the specific directives to plaintiffs is expressly predicated on the condition that plaintiffs produce "responsive documents and information" – i.e., they must have been "responsive" to one or more of the initial document requests or interrogatories propounded by FEI. See DE 178 at 6 (requiring the organizational plaintiffs to produce "[a]ll responsive documents and information concerning payments to Tom Rider, regardless of whether such payments were made directly to him or indirectly through other means such as WAP") (emphasis added); id. at 7 (requiring Mr. Rider to produce "responsive documents and information concerning his income and payments from other animal advocates and animal advocacy organizations"). With regard to "communications," Judge Sullivan further limited plaintiffs' obligation to the production of "responsive documents and information concerning relevant, non-privileged communications regarding the subject matter of this lawsuit," id. at 7 (emphasis added) – i.e., the "very narrow issue" of "whether or not defendant's treatment of its elephants constitutes a taking under the ESA." DE 176 at 8.

Judge Sullivan gave plaintiffs thirty days within which to comply with this Order and to submit a declaration "identifying, to the extent plaintiffs can recall, any responsive documents that were once in plaintiffs' possession but have been discarded, destroyed, or given to other persons or otherwise not produced, together with a description of each such document, and an explanation of why it was discarded, destroyed, spoliated or otherwise disposed of." DE 178 at 7 (emphasis added).

On the same day that Judge Sullivan issued the discovery Order, he also emphatically rejected FEI's request to amend their Answer by adding a RICO counterclaim and unclean hands defense – both of which were predicated on the proposition that the organizational plaintiffs

were not really funding Mr. Rider's efforts to speak out about the treatment of circus animals but, rather, were engaged in an "elaborate scheme" to "pay[] Tom Rider for his participation as a key fact witness in this lawsuit." DE 176 at 4. Judge Sullivan rejected FEI's motion to add the counterclaim and new defense precisely in order to prevent FEI from taking any further discovery regarding this allegation of an "elaborate corruption scheme." DE 176 at 4.

Thus, finding that the counterclaim and unclean hands defense were made with a "dilatory motive, would result in undue delay, and would prejudice the opposing party," id., Judge Sullivan stressed that he did not want "substantial additional evidence – including, at a minimum, numerous additional documents and depositions – beyond the evidence already produced on payments to Tom Rider." Id. at 6 (emphasis added). To the contrary, Judge Sullivan held that "[a]ny limited information about payments to or the behavior of Tom Rider that defendant is entitled to in order to challenge the credibility of one plaintiff in this case is far different from the vast amount of information they would be seeking under the guise of attempting to prove an alleged RICO scheme." Id. at 5.[9]

After carefully reviewing both of these Orders expressly addressing the nature of the discovery that should (and should not) take place concerning Mr. Rider's public education campaign, plaintiffs, as reflected by the testimony at the evidentiary hearing, embarked on a strenuous effort to search for and provide FEI with the documents and information that they

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[9] As discussed further below, several days after Judge Sullivan rejected the RICO counterclaim, FEI filed the identical claim as a freestanding lawsuit. Once again, the "gravamen" of the "complaint is that defendant Tom Rider has been bribed by the organizational defendants to participate in the ESA Action against FEI in violation of federal law." Feld Entertainment, Inc. v. Am. Soc'y for the Prevention of Cruelty to Animals, 523 F. Supp. 2d 1, 2 (D.D.C. 2007). Reiterating his finding that the RICO claim was being pursued "for the improper purpose of interfering with and delaying resolution of the ESA action," and stressing that FEI learned of Mr. Rider's funding by at least 2004, Judge Sullivan stayed all discovery and other proceedings in the RICO case until this lawsuit is decided on the merits. Id. at 3, 4.

understood to be covered by Judge Sullivan's Order, "while still protecting the media strategy materials from disclosure." DE 300 at 1. Thus, in the course of searching for all "documents concerning financing of Mr. Rider's public education campaign," 2/26/08 Tr. at 152 (API), "anything that had to do with payments or his work," id. at 20 (ASPCA), any "documents that would reflect any payments to Mr. Rider," 3/6/08 Tr. at 47 (AWI), and "every document that relates to any payments to Tom Rider," id. at 78 (FFA), plaintiffs, among other steps, searched all offices, files, and other locations likely to contain responsive information, retrieved old files from off-site storage facilities, and even obtained records from American Express when no other documentation of an expense could be located. See, e.g., 2/26/08 Tr. at 22-24, 39, 68, 75-76 (ASPCA); id. at 122-25, 127, 152-53 (API); 3/8/08 Tr. at 21, 23, 47 (AWI); id. at 70-71, 73, 79, 88-90 (FFA); 5/30/08 Tr. at 67-68 (FFA); id. at 92, 104, 116, 133-35 (AWI); see also FEI Hr'g Ex. 36 at 471-73 (12/18/07 Rider Dep.).

As a consequence of this extensive search, plaintiffs provided FEI with "nearly 700 pages of documents," DE 223 at 4, including extensive documents and information reflecting any of Mr. "Rider's funding for his public education campaign and litigation efforts related related to defendants," DE 178 at 4 – i.e., the specific materials that Judge Sullivan deemed "relevant" because it might bear on Mr. Rider's credibility. Thus, in his supplemental interrogatory answers, Mr. Rider provided a detailed accounting of the funds he has received since 2001, including all funding he has received either directly or indirectly from the plaintiff organizations. See FEI Hr'g Ex. 14 at 13-16. In addition, he furnished FEI with extensive documentation concerning his receipt and use of funds, including: form1099s, see Pfs. Hr'g Ex. 4 at TR 197, 456-61, 613, 626; receipts for purchases of food, gasoline, van repairs, and other

expenses while he followed the circus around the country, id. at TR 221-375, 466-545, 612, 614, 627-703; tax returns, id. at TR 546-611; and cover letters. id. at TR 376-455, 619-625.[10]

Likewise, the organizational plaintiffs supplemented their prior discovery responses by providing detailed interrogatory answers and documentation reflecting the funding furnished to Mr. Rider over the last seven years. See, e.g., FEI Hr'g Ex. 19 at 12-15 (ASPCA interrogatory response); id. at 12 ("To the best of ASPCA's knowledge, the amount of funding it has provided for Tom Rider's media and public education efforts on behalf of elephants in the circus is included herein. All of the funds that the ASPCA provided to Mr. Rider were for living expenses in connection with his important advocacy efforts as he traveled throughout the country on behalf of the elephants, including travel, lodging, phone, internet access, food, and other general expenses while he was on the road."); Pfs. Hr'g Ex. 1 (ASPCA documents); FEI Hr'g Ex. 27 at 11-14 ("The Fund supplements and amends its prior responses to this Interrogatory by providing the following information concerning funding for media and public education efforts with respect to the treatment of elephants in the circus."); Pfs. Hr'g Ex. 8 (FFA documents).[11]

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[10] FEI has complained, incongruously, that it received too much information from Mr. Rider in September 2007 because plaintiffs' counsel furnished to FEI copies of both the original 1099s and cover letters that had been retained by Mr. Rider and subsequently forwarded to his attorneys, see FEI Hr'g Ex. 94, 94A, as well as copies of some documents that Mr. Rider had not retained but had been obtained by his counsel from other sources. Far from supporting a contempt finding, this was done in an effort to provide FEI with as complete a response as possible, and in accordance with Judge Sullivan's direction in the August 23, 2007 Order, that Mr. Rider furnish responsive documents "within his possession, custody, or control, including but not limited to, documents in the files of his attorneys." DE 178 at 3.

[11] See also FEI Hr'g Ex. 23 at 11-14 (AWI interrogatory response); id. at 11-12 (""AWI supplements and amends its prior responses to this Interrogatory by providing the following information concerning both direct and indirect funding for Tom Rider's media and public education campaign concerning the treatment of elephants in circuses . . . [T]he funds were to cover 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."); Pfs. Hr'g Ex. 7 (AWI documents); FEI Hearing Ex. 30 at 13-14 (API interrogatory response) ("API has made contributions to the Wildlife Advocacy Project for its advocacy and public

ARGUMENT

A. The Stringent Standards For Civil Contempt.

"'The judicial contempt power is a potent weapon.' In light of the remedy's extraordinary nature, courts rightly impose it with caution." Joshi v. Prof'l Health Servs., Inc., 817 F.2d 877, 879 n.2 (D.C. Cir. 1987) (quoting Int'l Longshoremen's Ass'n v. Philadelphia Marine Trade Ass'n, 389 U.S. 64, 76 (1967)); see also Cal. Artificial Stone Paving Co. v. Molitor, 113 U.S. 609, 618 (1885) ("Process of contempt is a severe remedy, and should not be resorted to where there is fair ground of doubt as to the wrongfulness of the [party's] conduct."); Plumbers & Steamfitters Local 342 v. NLRB, 598 F.2d 216, 224 (D.C. Cir. 1979) (describing "sanction of contempt" as "harsh"); Am. Ass'n of Collegiate Registrars & Admissions Officers v. Am. Univs. Admission Program, Inc., No. 06-137, 2007 WL 2258457, at *4 (D.D.C. Aug. 6, 2007) ("Courts rightly exercise the contempt power with caution, as it is a potent weapon.") (citing Teamsters Local Union No. 96 v. Wash. Gas Light Co., 466 F. Supp. 2d 360, 362 (D.D.C. 2006)); Landmark Legal Found. v. EPA, 272 F. Supp. 2d 70, 85 n. 9 (D.D.C. 2003) (describing contempt as a "drastic remedy").

Accordingly, "'[c]ivil contempt will lie only if the putative contemnor has violated an order that is clear and unambiguous, and the violation must be proved by clear and convincing evidence.'" Broderick v. Donaldson, 437 F.3d 1226, 1234 (D.C. Cir. 2006) (quoting Armstrong v, Executive Office of the President, 1 F.3d 1274, 1289 (D.C. Cir. 1993)). If either of these two elements is not satisfied, a party cannot be held in contempt. See Broderick, 437 F.3d at 382

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education efforts on the issue of the treatment of elephants held in captivity. It is API's understanding that these funds are used to support Tom Rider's media and public education campaign concerning the treatment of elephants in circuses. Documents reflecting these contributions have been produced by API and are incorporated by reference."); Pfs. Hr'g Ex. 3 (API documents).

("Both prongs of the Armstrong standard therefore militate against a finding of contempt . . . Under these circumstances, the district court would have abused its discretion if it *had* held the SEC in contempt.") (emphasis in original); see also Cobell v. Babbitt, 37 F. Supp. 2d 6, 9 (D.D.C. 1999) ("Two requirements must be met before a party or its attorneys may be held in civil contempt. First, the court must have fashioned an order that is clear and reasonably specific. Second, the defendant must have violated that order. Generally, to hold a party or its attorneys in civil contempt, the court must find facts meeting these two elements by clear and convincing evidence.") (citing Food Lion v. United Food and Commercial Workers Int'l Union, 103 F.3d 1007, 1016-17 (D.C. Cir. 1997) and NLRB v. Blevins Popcorn Co., 659 F.2d 1173, 1183-84 (D.C. Cir. 1981)) (other citations omitted).

Further, the "court must employ an objective standard" when assessing whether the court has fashioned a clear and specific order. Cobell, 37 F. Supp. 2d at 16. "This objective test includes the language of and circumstances surrounding the issuance of the order." Id. (emphasis added) (citing United States v. Young, 107 F.3d 903, 907 (D.C. Cir. 1997)).

Even when the moving party satisfies its heavy burden of making a "prima facie case for civil contempt, the alleged contemnor may defend against contempt by showing a justification for his noncompliance," including that the party has engaged in "good faith substantial compliance" with the Court's Order. Am. Ass'n of Collegiate Registrars, 2007 WL 2258457, at * 3. This defense has two elements: (1) a "'good faith effort to comply with the court order at issue'"; and (2) "'substantial compliance with that court order.'" Landmark Legal Found., 272 F. Supp. 2d at 78 (quoting Cobell, 37 F. Supp. 2d at 10).

Here, FEI has not sustained its burden of demonstrating that plaintiffs should be held in contempt. First, far from proving through "clear and convincing evidence" that plaintiffs are in violation of August 23, 2007 Order, the evidence actually demonstrates that plaintiffs have

complied with the Order as well as the underlying discovery requests on which the Order is based. Second, FEI has certainly not demonstrated that plaintiffs have violated a "clear and unambiguous" command issued by Judge Sullivan, especially in light of all of the circumstances surrounding issuance of the August 23, 2007 Order. Third, even if the Court were to conclude that plaintiffs have failed to comply with the Order in some particular respect, the evidence adduced at the evidentiary hearing at the very least establishes that plaintiffs have made a "substantial good faith" effort to comply with the Order. We address each point in turn.

B. FEI Has Not Proven Through Clear And Convincing Evidence That Plaintiffs Violated The August 23, Order; To The Contrary, The Evidence Demonstrates That Plaintiffs Complied With It.

The most straightforward reason for denying defendant's contempt motion is that, far from FEI carrying its heavy burden to demonstrate through clear and convincing evidence that plaintiffs are in violation of the August 23, 2007 discovery Order, the evidence before the Court demonstrates that plaintiffs in fact complied with the Order. Thus, plaintiffs have read the Order, according to its plain terms, as requiring the disclosure of "all funding for [Tom Rider's] public education and litigation efforts related to defendants." DE 178 at 4; see id. at 5 (the "financing of [Mr. Rider's] public campaign regarding the treatment of elephants is relevant to his credibility in this case"). As plaintiffs' representatives have testified at the evidentiary hearing, therefore, and as also reflected in what the Court has characterized as Mr. Rider's "exhaustive" deposition testimony concerning the "money available to him by, for example, the Wildlife Advocacy Project, and others as he traveled across the United States to speak generally about his claims of the abuse of circus elephants," DE 245 at 1, all of the plaintiffs have painstakingly searched for such materials and have, to the best of their abilities, located and

produced to FEI documents and interrogatory answers reflecting all funding that has gone to Mr. Rider in any manner or for any purpose whatsoever.[12]

Indeed, in light of these materials, FEI now plainly has in its possession far more than the "limited information about payments to or the behavior of Tom Rider" that Judge Sullivan believed FEI was entitled to "in order to challenge [Mr. Rider's] credibility." DE 176 at 5 (emphasis added). In this connection, FEI's contentions that the plaintiffs were obligated to search for and produce even more materials reflecting the same funding by the organizational plaintiffs that they have already documented, and/or materials revealing the organizations'

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[12] As FEI acknowledges, "[e]ach of the Organizational Plaintiffs was asked . . . whether the documents that each organization produced reflected all of the payments that said organization made to or for Mr. Rider; and they all testified in the affirmative." FEI Prop. at ¶ 18; see, e.g., 2/26/08 Tr. at 74 (ASPCA) (Q: "Ms. Weisberg, do you believe that this set of documents reflects every payment or disbursement or any other similar way of characterizing it that's gone to Mr. Rider from the ASPCA directly or indirectly?" A: "Yes, I do." Q: "Is it your view that the ASPCA has done a thorough search for all documents that are sufficient to reflect payments that have gone to Mr. Rider for any purpose whatsoever?" A: "Yes, I absolutely do."); id. at 151 (API) (Q: "Ms. Paquette, if you can take a look through there and indicate whether you believe if it reflects evidence of all contributions to Mr. Rider's public education campaign that you're familiar with?" A: "It does reflect all contributions or payments that API has made except for that one little dinner that we paid for." Q: "Do you have any reason to believe that there are any other payments [other] than what you just mentioned that have gone to Mr. Rider coming from API directly or indirectly that are not reflected in these documents?" A: "There are no other."); 3/6/08 Tr. at 47) (AWI) (Q: "Ms. Silverman, do you believe that these documents reflect all payments that AWI has been able to uncover that have gone to Mr. Rider either directly or indirectly?" A: "Yes." Q : "And do you have a high level of confidence that that's the case?" A: "I do. We searched high and low." Q: "And so you believe you did a thorough search for documents that would reflect any payments to Mr. Rider?" A: "I do."); 5/30/08 Tr. at 67-68 (FFA) ("Other than that payment, as described in that declaration, do you believe that what's now been marked as Plaintiffs' Exhibit 8 behind Tab D reflects all payments that have gone to Mr. Rider, either directly or indirectly emanating from the Fund for Animals" A: "Yes, it does." Q: "Do you believe that's true with a high degree of confidence?" A: "Yes, I'm very confident that that's true."); id. at 129-30 (AWI) (Q: "Ms. Liss, if you can take a look at in particular pages 11 through 14, the supplemental response to Interrogatory No. 21, and my question is whether you believe . . . this does reflect an accurate accounting, to the best of your knowledge, of all the funds that have gone to Mr. Rider from AWI either directly or indirectly?" A: "Yes, that is, and that followed an exhaustive search."); id. at 133 ("We searched quite thoroughly, and I'm quite comfortable that this represents any monies provided for media work by Tom Rider.").

internal strategies for raising and allocating funds that were ultimately furnished to Mr. Rider – i.e., materials that could not remotely have any bearing on Mr. Rider's credibility – are inconsistent with both the letter and spirit of the August 23, 2007 discovery Order and the related Order denying FEI's request to pursue a RICO counterclaim and unclean hands defense.

For example, FEI maintains that AWI is in contempt because it did not search for and produce multiple records documenting the same funding that went to Mr. Rider. See FEI Prop. at ¶ 78 ("In February 2005, AWI made two payments totaling $ 1100.00 to Mr. Rider via wire transfer. The only document that AWI has produced regarding these payments is a copy of Ms. Liss's credit card statement showing this payment . . .AWI did not produce any other documents regarding these payments.") (emphasis added); id. at 26 ("AWI paid for repairs to Mr. Rider's van in the amount of $ 1,657.58 on or about December 8, 2006. The only document AWI has produced regarding this payment is a copy of Ms. Liss's AWI credit card statement showing this payment.") (emphasis added).

In addition, FEI again insists that plaintiffs were obligated to produce to FEI all internal documents and information concerning a California fundraiser that was organized by AWI and others concerned about the plight of elephants in circuses. Importantly, there appears to be no dispute that plaintiffs – as well as WAP – have produced documents and interrogatory answers reflecting any proceeds from that fundraiser that have actually been used to support Mr. Rider's activities, either "directly" or "indirectly through other means such as WAP." DE 178 at 6; see FEI Prop. ¶ 87; Pfs. Hr'g Ex. 7 at AWI 6498, 6499 (checks from AWI to WAP). Yet FEI contends that because such funding occurred, every other document ever generated, and any other communication that has ever occurred, that in any way concerns this fundraiser – such as

internal planning, budgeting, coordination, organization, and similar materials – are documents "concerning payments to Tom Rider" that plaintiffs should have produced. FEI Prop. at ¶ 18.[13]

However, FEI's arguments that plaintiffs were obligated not only to produce materials accounting for all funding provided to Mr. Rider (as they have done following tremendous effort) but to also unearth and produce multiple records documenting the same funding already documented, and/or to divulge the organizational plaintiffs' internal strategies for funding a public education campaign, do not comport with the plain terms and apparent intent of Judge's Sullivan's August 23, 2007 Orders, let alone constitute clear and convincing evidence that plaintiffs have violated the discovery Order.

First, FEI's contention that "[d]ocuments 'concerning payments to Tom Rider' are the operative terms in the Court's August 23, 2007 Order," FEI Prop. at ¶ 18, is simply mistaken. In fact, FEI has subtly, but significantly, omitted "operative terms" from Judge Sullivan's Order to suit FEI's own purposes. As discussed above, all of the Court's directives to both Mr. Rider and the organizational plaintiffs are expressly premised on the qualifier – conspicuously deleted from FEI's quotation – that plaintiffs need only produce "responsive" documents and information falling within certain categories. DE 178 at 3, 6-7 (emphasis added). This limitation – which, once again, was evidently incorporated by Judge Sullivan in light of plaintiffs' arguments concerning the precise contours of the discovery propounded by FEI, see supra at 14 – is entirely consistent with the general principle that a court ordinarily "will not compel discovery that has

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[13] Notwithstanding FEI's contrary implication, see FEI Prop. ¶ 87, plaintiffs have consistently acknowledged that some of the proceeds from this fundraiser were used to fund Mr. Rider's public education campaign. Indeed, as explained above, plaintiffs specifically argued to Judge Sullivan that the California fundraiser was an example of a funding strategy as to which plaintiffs should not be required to divulge their internal deliberations. See supra at 13. Moreover, AWI's witness testified truthfully that, although funds AWI raised from the California event "did not go to pay Tom Rider" directly, proceeds were provided to WAP to support Mr. Rider's public education work. 3/6/08 Tr. at 33-34.

not been sought." D'Onofrio, 247 F.R.D. at 48 ("A motion to compel is appropriate only when an appropriate request is made of the responding party . . . The court will not compel discovery that has not been sought.") (citations omitted).

In short, the August 23, 2007 Order expressly embodies the well-established principle that, as FEI itself has previously argued to the Court, the "starting point for any document dispute is necessarily the requests themselves." DE 263, FEI's 2/19/08 Resp. in Opp. to Pl. Mot. to Compel Discovery from Def., at 2 (emphasis added). Here, once again, although FEI certainly could have worded its requests to the organizational plaintiffs differently, it elected to frame them by reference to plaintiffs' own standing allegations. See also Fautek v. Montgomery Ward & Co., Inc., 96 F.R.D. 141, 145 (N.D. Ill. 1982) (parties are obligated only to "take reasonable steps to insure that their responses to requests to produce are complete and accurate") (emphasis added).

Thus, in response to allegations by the organizational plaintiffs that they have standing because they must "spend[] resources each year on advocating protection for endangered and threatened animals, including better treatment for animals used for entertainment purposes," DE 1 ¶ 9, FEI's interrogatories requested that plaintiffs "[i]dentify each resource you have expended from 1997 to the present in 'advocating better treatment for animals held in captivity, including animals used for entertainment purposes' as alleged in the complaint, including the amount and purpose of each expenditure," FEI Ex. 16 ¶ 21 (emphasis added); and FEI's document requests also demanded "[d]ocuments sufficient to show all resources you have expended in 'advocating better treatment for animals held in captivity, including animals used for entertainment purposes' each year from 1996 to the present." FEI Hr'g Ex. 3 ¶ 19 (emphasis added).

Accordingly, with regard to Mr. Rider's public education campaign – on which all of the organizational plaintiffs are relying to satisfy their standing allegation that they "advocat[e]

protection" for endangered Asian elephants in circuses – the materials "responsive" to these requests, DE 178 at 6, are those that (1) "identify" each contribution made towards Mr. Rider's public education campaign in any fashion whatsoever; (2) describe the "purpose" of the funding; and (3) include documents that are "sufficient to show" the funding that Mr. Rider has received from the organizational plaintiffs, either directly or "indirectly through other means such as WAP." DE 178 at 6. As confirmed at the evidentiary hearing, following painstaking searches by plaintiffs, FEI has in fact been provided all such information and documents.[14]

Second, documents concerning non-profit organizations' internal organizing, planning, and coordination of their funding activities – including, e.g., who will speak at a fundraiser, the message to be conveyed at the event, and how different organizations choose to contribute to a public advocacy effort – clearly fall within the category of "any documents, communications, or information concerning the media and legislative strategies of the plaintiffs," and hence need not be disclosed under Judge Sullivan's discovery Order declaring such materials to be both "irrelevant" and "over broad to produce." DE 178 at 5. Indeed, as stressed previously, when

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[14] Based on another standing allegation in plaintiffs' Complaint, FEI's interrogatories asked plaintiffs to "[i]dentify each resource you have expended from 1997 to the present of 'financial and other resources' made while 'pursuing alternative sources of information about defendants' actions and treatment of elephants,' as alleged in the Complaint," FEI Hr'g Ex. 16 at ¶ 22, and FEI's document requests sought documents concerning any such expenditure on which plaintiff are relying for that standing allegation. FEI Hr'g Ex. 3 at ¶ 20. As reflected in their amended interrogatory responses submitted in response to the August 23, 2007 Order, API is the only organizational plaintiff relying on resources expended on Tom Rider's public education campaign for purposes of this specific standing allegation. See FEI Hr'g Ex. 30 at 14 ("API has made five contributions to the Wildlife Advocacy Project for advocacy work for public education concerning the issue of the treatment of elephants held in captivity, which in turn also resulted in the generation of additional information to API about Ringling Brothers and its treatment of elephants."); compare FEI Hr'g Ex. 23 at 11-14 (AWI); FEI Hr'g Ex. 19 at 12-15 (ASPCA); FEI Hr'g Ex. 27 at 11-14 (FFA). Consequently, it is in response to the interrogatory and document production requests seeking information about each resource expended in "advocating better treatment" of circus animals that all of the organizational plaintiffs have supplied information and documents on all funding they have provided to or for Mr. Rider. Id.

plaintiffs requested that Judge Sullivan place such strategy deliberations off-limits, they specifically explained that such materials should include the "details of all their communications with each other and other 'animal advocates' concerning their media and legislative strategies with respective to captive elephants, including their strategies for funding those efforts." DE 156 at 13 (emphasis added). They also specifically pointed to "correspondence between and within the groups" concerning the California fundraiser as the kind of material that is "not relevant" to any issue in this litigation, and that "is protected by the groups' First Amendment rights of association." Id. at 33 n.17.

Plainly, therefore, if Judge Sullivan had believed that such materials could not be withheld on "strategy" grounds, he would have said so. Instead, the August 23, 2007 Order makes clear that, while the actual "financing of [Mr. Rider's] public campaign" is relevant and therefore must be disclosed, on the other hand, "any documents, communications, or information concerning the media and legislative strategies of the plaintiffs" – including their strategies for how to fund Mr. Rider's media and legislative campaign – "are irrelevant to the claims and defenses in this case" because they have no discernible bearing on Mr. Rider's credibility. DE 178 at 5 (emphasis added). Moreover, the only specific directive in the Order regarding any "communications" that either Mr. Rider or the organizational plaintiffs must produce are those non-privileged communications "regarding the subject matter of this lawsuit," DE 178 at 3, 7 (emphasis added) – which, once again, Judge Sullivan has described as the "very narrow issue" of "whether or not defendant's treatment of its elephants constitutes a taking under the ESA," DE 176 at 8; see aslso id. at 9 (the "one issue in this case" is "whether or not defendant's treatment of its elephants constitutes a 'taking' under the ESA"). Accordingly, FEI's notion that plaintiffs were obligated to recapitulate every "communication" they have ever had concerning their support for Mr. Rider's public education campaign flies in the face of the plain terms of the

Order itself. See also id. ("As 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.").

Third, FEI's reading of the August 23, 2007 Order also necessitates the counterintuitive conclusion that Judge Sullivan, sub silentio, rejected plaintiffs' invocation of the First Amendment privilege for strategy documents bearing on non-profit groups' funding of a public education and lobbying campaign. As noted previously, see supra at 13, plaintiffs argued to Judge Sullivan that the compelled disclosure of such materials would violate plaintiffs' core First Amendment "freedom[s] to organize, raise money, and associate with other like-minded persons so as to effectively convey the message of the protest." Wyoming. v. USDA, 208 F.R.D. at 454 (internal quotation omitted; emphasis added); see also 3/10/08 Opp'n to Def. Mot. to Compel Dep. Test. of Tom Eugene Rider and the Animal Protection Institute (filed under seal) at 10-18 ("Pfs. 3/10/08 Opp.").

However, because Judge Sullivan found that such strategy information was irrelevant, it was unnecessary for him to address whether it was also protected on First Amendment or other privilege grounds. Indeed, it was evidently for this reason that Judge Sullivan specified that plaintiffs' privilege log "need not include information determined by the Court to be irrelevant or over burdensome to produce." DE 178 at 7; see also Am. Soc'y for the Prevention of Cruelty to Animals v. Ringling Bros. and Barnum & Bailey Circus, 233 F.R.D. 209, 213 (D.D.C. 2006) (Facciola, J.) ("It should go without saying that there is no obligation to assert a privilege for documents that are not within the scope of a request or that are outside the scope of what could permissibly be requested."). Consequently, once again, to accept FEI's position here would require the Court to read the August 23, 2007 Order in a fashion that is not only unsupported by

its plain terms but is also legally tenuous, i.e., as rejecting a claim of First Amendment privilege without even saying so, without conducting the balancing test required by Circuit precedent for First Amendment materials, see Pfs. 3/10/08 Opp. at 15 n.6, and without even affording plaintiffs an opportunity to prepare a privilege log for specific documents withheld on First Amendment grounds.[15]

Fourth, that plaintiffs have fully complied with the discovery Order is strongly reinforced by Judge Sullivan's contemporaneously articulated reasons for rejecting FEI's RICO counterclaim – a crucial "circumstance surrounding the issuance of the order" that simply cannot be ignored here. Cobell, 37 F. Supp. 2d at 16. Once again, in rejecting the proposed counterclaim and unclean hands defense, Judge Sullivan contrasted the "[v]ery limited discovery" that he contemplated remaining in this case with the "substantial additional evidence . . . beyond the evidence already produced on payments to Tom Rider" that would be necessary for pursuit of the RICO claim. FE 176 at 4, 6 (emphasis added). It was precisely to avoid such "burdensome" discovery that Judge Sullivan refused to allow the RICO claim to go forward while plaintiffs are attempting to "bring[] their 'taking' claim to trial." Id. at 6.

If, however, defendants are entitled to now obtain all that they claim was covered by the August 23, 2007 discovery Order in addition to documents and information reflecting all of Mr. Rider's funding – including, e.g., multiple documents reflecting the same payments plaintiffs have already accounted for, a written reconstruction of every "communication" plaintiffs have ever had concerning the funding of Mr. Rider's public education campaign, and all documents

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[15] Accordingly, if the Court should now conclude that any of the materials that plaintiffs have withheld based on their understanding of the August 23, 2007 Order are covered by the disclosure obligations imposed by that Order, plaintiffs should have an opportunity to prepare a privilege log for such materials, particularly those that plaintiffs believe are protected by a First Amendment privilege. See Am. Soc'y for the Prevention of Cruelty to Animals, 233 F.R.D. at 213.

reflecting the organizational plaintiffs' internal funding strategies and deliberations – then Judge Sullivan's finding that the RICO-related "discovery would sidetrack this litigation," DE 176 at 6, makes no sense. Simply put, if all of these items are discoverable in this case, then it is difficult to comprehend what, if anything, Judge Sullivan intended to put off-limits in his RICO rulings. Thus, on the necessary assumption that Judge Sullivan really meant it when he said that he intended to obviate the need for "substantial additional" discovery "beyond the evidence already produced on payments to Tom Rider," id. at 5, it is FEI's interpretation of Judge Sullivan's rulings that runs counter to a common-sense understanding of them.[16]

In sum, FEI has in fact received substantially more than the "limited information about payments to or the behavior of Tom Rider that defendant is entitled to in order to challenge [Mr. Rider's] credibility," DE 176 at 5 (emphasis added) and, moreover, FEI is demanding exactly what Judge Sullivan held it should not and could not have at this time. Therefore, because plaintiffs have in fact complied with the most straightforward reading of the August 23, 2007 Order – especially when viewed in conjunction with the RICO Order issued the very same day – FEI's request for contempt sanctions should be rejected.

C. FEI Has Not Proven Through Clear And Convincing Evidence That Plaintiffs Violated A Specific And Unambiguous Judicial Directive.

As the foregoing discussion demonstrates, plaintiffs believe that they have conscientiously complied with the August 23, 2007 discovery Order. However, even if FEI had

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[16] As noted earlier, Judge Sullivan entered his stay of all discovery in the RICO action knowing that it prominently featured the California fundraiser and FEI's allegation that plaintiffs had made "false and/or misleading" statements in promoting it – including the purportedly "untrue" statement that "FEI mistreats its Asian elephants." Feld Entm't Inc. v. Am. Soc'y for the Prevention of Cruelty to Animals, No. 1:07-cv-01532, Compl. ¶ 123. Hence, plaintiffs believe that, in continuing to press for materials relating to this fundraiser and other materials bearing on plaintiffs' strategy decisions – and in forcing plaintiffs to expend considerable resources on the matter – FEI is in fact violating the spirit, if not the letter, of the Order staying all discovery in the RICO case.

some legitimate basis for disagreeing with plaintiffs' approach to implementation of the Order, that is not the standard for contempt. Rather, once again, FEI must prove through clear and convincing evidence that plaintiffs have violated a reasonably specific and unambiguous judicial decree; or, as this Court has explained in another case, that plaintiffs' reading of the Order is "so farfetched" and "so obviously prohibited" as to raise a "prima facie case of violating" the Order. Athridge, 184 F.R.D. at 198. That burden has not been satisfied here. Instead, as evidenced by the fact that FEI finds it necessary to omit key words and phrases from Judge Sullivan's ruling, FEI's position actually amounts to no more than that FEI regards its reading of the ruling as preferable to that of plaintiffs. That, however, cannot form the basis for a contempt finding.

To begin with, at the very least, it was hardly "farfetched" for plaintiffs to read Judge Sullivan's discovery Order as focusing specifically on plaintiffs' production of materials that would identify their actual funding of Mr. Rider's activities – since, once again, that is exactly what Judge Sullivan said would potentially bear on Mr. Rider's credibility as a witness. See DE 178 at 4 ("The Court finds that Rider's funding for his public education and litigation efforts related to defendants is relevant."). Hence, plaintiffs' strenuous effort to locate documents and information identifying every receipt of funds by Mr. Rider and/or every expenditure by the organizational plaintiffs on Mr. Rider's public education campaign cannot be reconciled with a finding that plaintiffs violated a "clear and unambiguous" decree. Broderick, 437 F.3d at 1234.

By the same token, plaintiffs' reading of the Order as being confined to those specific materials that are in fact "responsive" to FEI's underlying discovery requests is, at minimum, not "obviously prohibited" by the discovery Order. Athridge, 184 F.R.D. at 198. To the contrary, it was at least permissible for plaintiffs to read the Order as meaning what it said – i.e., as being limited to the obligation to produce only "responsive" materials, DE 178 at 3, 6, 7, especially because, once again, that plain language construction of the Order is consistent with the well-

established principle that courts will not ordinarily expand a party's discovery obligations beyond those embodied in the specific discovery requests at issue. See supra at 24-25; see also In re Williams, 215 B.R. 289, 301-02 (D.R.I. 1997) (a party may not be held in contempt in the discovery context unless the court has specifically ordered the disclosure of particular discovery pursuant to Fed. R. Civ. P. 37(a) and that command has been disobeyed).

Stated differently, because FEI, despite having years to do so, never proffered discovery requests specifically seeking what defendant now claims it was entitled to, plaintiffs can hardly be held in contempt for failing to locate and/or produce materials that are not in fact "responsive" to the underlying discovery requests at issue. See also Meijer, Inc. v. Warner Chilcott Holdings Co., III, Ltd., 245 F.R.D. 26, 30 (D.D.C. 2007) ("'In drafting discovery requests, the party who seeks discovery 'bears the burden of fashioning such requests appropriately.'") (quoting Washington v, Thurgood Marshall Academy, 232 F.R.D. 6, 10 (D.D.C. 2005)).

Similarly, plaintiffs' understanding that Judge Sullivan's holding that "any documents, communications, or information concerning the media or legislative strategies of the plaintiffs are irrelevant to the claims or defenses in this case," DE 178 at 5, encompasses materials bearing on the organizational plaintiffs' strategy decisions on how to fund a media campaign (as distinguished from the actual funding expended on the campaign) is also, at minimum, not a "farfetched" reading of the August 23, 2007 Order. Athridge, 184 F.R.D. at 198. Such strategy materials not only have nothing whatsoever to do with Mr. Rider's credibility – the sole basis on which any of the funding materials were deemed discoverable, see DE 178 at 5 – but they clearly fall within the category of "any documents, communications, or information concerning" plaintiffs' "media or legislative strategies." Id. (emphasis added). Plaintiffs can hardly be faulted – let alone held in contempt – for reading this phrase (which is not otherwise defined in

the Order) to include plaintiffs' strategy deliberations and decisions regarding, e.g., how to raise funds and how to divide up such funding amongst themselves for a public relations campaign targeted at the treatment of elephants in circuses. Cf. Dep't of Hous. and Urban Dev. v. Rucker, 535 U.S. 125, 131 (2002) ("the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind'") (internal citation omitted).

Further, holding plaintiffs in contempt for reading the Order in this manner would be especially unwarranted because, as previously stressed, in arguing for the exclusion of strategy materials on both relevance and First Amendment grounds, plaintiffs made crystal-clear that, in their view, such materials included internal communications bearing on their funding strategy. See DE 156 at 13. Accordingly, particularly because nothing in the August 23, 2007 Order suggests any disagreement with this understanding of "media and legislative strategies" – or, for that matter, rejects plaintiffs' argument that such materials are fully protected by a First Amendment privilege – it was at the very least a permissible reading of the Order as including funding strategy materials within the non-discoverable category of "any documents, communications, or information concerning" plaintiffs' "media or legislative strategies." DE 178 at 5.

That plaintiffs' approach to carrying out the August 23, 2007 Order was, at minimum, not "obviously prohibited" by Judge Sullivan, Athridge, 184 F.R.D. at 198, is also underscored by the "circumstances surrounding the issuance of the order." Cobell, 37 F. Supp. 2d at 16. While FEI would evidently prefer that the Court blind itself to the other Order issued by Judge Sullivan on August 23, 2007, it would be plain legal error for the Court to do so.

The unavoidable fact, therefore, is that the Order rejecting FEI's proposed unclean hands defense and RICO counterclaim also expressly addressed the discovery that was (and was not) required vis-a-vis Mr. Rider's public education campaign, and hence that Order is a highly

material "circumstance" that the Court must take into account in determining whether plaintiffs should be held in contempt for violating a "clear and unambiguous" judicial decree. Broderick, 437 F.3d at 1234. It was at the very least reasonable for plaintiffs, in construing their obligations under the August 23, 2007 discovery Order, to rely on Judge Sullivan's simultaneously issued statements concerning the "[v]ery limited discovery remain[ing]" and the "limited information about payments to or the behavior of Tom Rider that defendant is entitled to in order to challenge [the] credibility of one plaintiff in this case," DE 176 at 4, 5 (emphasis added), as well as Judge Sullivan's explanation that he was rejecting the RICO counterclaim specifically to foreclose any need for "substantial additional evidence . . . beyond the evidence already produced on payments to Tom Rider." Id. at 6 (emphasis in original).

Particularly in this legal context, FEI's additional arguments as to why plaintiffs are in contempt of the August 23, 2007 discovery Order do not pass muster. First, defendant's belief that plaintiffs should have produced more e-mail communications, see, e.g., FEI Prop. ¶¶ 16, 17, 56, hardly amounts to clear and convincing evidence that plaintiffs have violated a specific and unambiguous judicial command. As this Court has explained, this and other federal courts have "consistently concluded that a party's complaint that there must be more than they received is insufficient in itself to require any further inquiry," let alone to hold a party in contempt. DE 300 at 3. Thus, "'[s]peculation that there is more will not suffice; if the theoretical possibility that more documents exist sufficed to justify additional discovery, discovery would never end.'" Id. (quoting Hubbard v. Potter, 247 F.R.D. 27, 29 (D.D.C. 2008)).

Moreover, in this case, FEI's "speculation," id., has been rebutted by plaintiffs, who testified extensively as to the steps they took to search for any arguably responsive e-mail communications. See, e.g., 3/26/08 Tr. at 20, 25, 33, 54, 57-60, 65, 77, 84, 106, 113-14, 124, 127, 130, 132, 150, 153, 154, 156, 194, 203, 204, 211-12; 3/8/08 Tr. at 36-37, 71-72, 89, 92;

5/30/08 Tr. at 73, 88-89. In addition, contrary to FEI's contention that these searches should have yielded more e-mails "concerning payments to Mr. Rider," FEI Prop. at ¶¶ 15, 16, none of the plaintiffs testified that they had a general practice of discussing the funding of Mr. Rider's public education campaign by e-mail. Rather, while acknowledging several conference calls concerning their strategy for funding the media campaign, the organizational plaintiffs specifically disclaimed any practice of communicating about the funding by e-mail. See, e.g., 2/26/08 Tr. at 57-58, 60, 106, 113-14, 154, 194, 203, 204; 5/30/08 Tr. at 72. And, as for communications with Mr. Rider, none of the representatives of the organizational plaintiffs testified that she or he ever communicated with Mr. Rider by e-mail concerning the funding of his public education campaign. See also FEI Hr'g Ex. 36 (Rider Dep.) at 55-58 (indicating that any of his e-mail communications with the organizational plaintiffs were for "media purposes"); DE 178 at 3 ("Rider need not produce documents or further information related to any media or legislative strategies or communications").

With respect to e-mails concerning the "fundraiser in California in July 2005," FEI Prop. at ¶ 55, plaintiffs, while never denying the existence of such e-mails reflecting the planning and execution of that event, do vehemently dispute that such materials were required to be disclosed to FEI by the August 23, 2007 discovery Order. Once again, it is plaintiffs' position that FEI is not entitled to any of these documents because (among other reasons) they (1) reflect absolutely no funding that has gone to Mr. Rider that has not otherwise been disclosed to FEI; (2) they have no discernible relevance to Mr. Rider's credibility; (3) they are quintessential strategy documents bearing on non-profit organizations' internal deliberations and discussions for how to raise funds to conduct a campaign against the mistreatment of elephants in circuses; (4) they are not "responsive" to any of FEI's specific discovery requests; and (5) they are precisely the kinds of extraneous materials that Judge Sullivan intended to place off-limits to discovery both in his

ruling rejecting the RICO counterclaim (which, once again, focuses heavily on the California fundraiser) and in his decision shortly thereafter to stay all discovery in FEI's related RICO lawsuit. See DE 23 in Civ. No. 07-1532. At bare minimum, these reasons are sufficient to rebut any argument that plaintiffs violated a clear and unambiguous Order when they reasonably determined that they were under no obligation to produce such materials, which plaintiffs also believe to be clearly covered by a First Amendment privilege because their release would "directly frustrate the organizations' ability to pursue their political goals effectively by revealing to their opponents activities, strategies, and tactics . . . ." AFL-CIO v. FEC, 333 F.3d 168, 177 (D.C. Cir. 2003); see also Pfs. 3/10/08 Opp. at 10-15.

Second, equally bankrupt, especially as a basis for a contempt finding, is FEI's complaint that plaintiffs have failed to provide sufficiently detailed descriptions of their "communications" in their interrogatory responses. See, e.g., FEI Prop. at ¶ 17. As discussed previously, despite having literally years to do so, FEI never even specifically asked in any of its interrogatories for a detailed description of all communications plaintiffs have ever had concerning "why Mr. Rider was being paid, how much he should be paid, [and] what (if anything) he was expected to do in return for the payments," etc. – i.e., the specific topics which FEI now pinpoints as a rationale for holding plaintiffs in contempt. See FEI Prop. at ¶ 14.

Rather, once again, for four years FEI was content to rely on generic interrogatories asking Mr. Rider to describe "every communication you have had regarding defendants with any and all animal advocates or animal advocacy groups," FEI Ex. 13 at 3 (emphasis added), and asking the organizational plaintiffs to describe their communications "with any other animal advocates or animal advocacy organizations about the presentation of elephants in circuses or about the treatment of elephants at any circus." FEI Ex. 16 at 19 (emphasis added). However, especially because the August 23, 2007 discovery Order is not only expressly limited to

discovery answers that are in fact "responsive" to FEI's underlying requests, DE 178 at 3, 6, 7, but is even more carefully confined to "communications regarding the subject matter of this lawsuit," id. at 3, 7 (emphasis added) – i.e., "whether or not defendant's treatment of its elephants constitutes a taking under the ESA," DE 176 at 8 – the notion that plaintiffs could be deemed to have violated an unequivocal Order by inadequately answering interrogatories that FEI actually never proffered is baseless.

Moreover, while this is alone a sufficient basis for rejecting FEI's contention that plaintiffs should be held in contempt for not describing their "communications" in more detail, the reality is that plaintiffs in fact did provide abundant information – both in their interrogatories and in other forms – answering the questions FEI now claims it was entitled to get responses to but never actually posed in any interrogatory. Thus, for example, with regard to "why" the organizational plaintiffs were contributing to Mr. Rider's public education campaign and what he was "expected to do" with such funding, FEI Prop. at 5, plaintiffs' interrogatories (as well as the deposition testimony) answer those precise questions.[17]

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[17] See, e..g., FEI Hr'g Ex. 14 at 14 (Rider) ("Since May 2001, I have received grant money from other animal advocacy groups to do media and legislative advocacy and public education concerning the way elephants in circuses are treated. That funding has been used for my living expenses while I travel around the country to do this advocacy, first by Greyhound bus (I usually slept on the bus, but occasionally stayed in an inexpensive motel room), and then (and continuing to today) in a used van which I usually park in a camping ground or parking lot and sleep in (but sometimes stay in a motel room). Those expenses have included Greyhound bus tickets, hotel bills, camping registration fees, food, clothing, gas money, gas for a generator, and other necessities of every day living – while I travel back and forth across the country and visit numerous cities each year to talk to reporters, editors, producers, legislative bodies, grass roots groups, and individuals about what really goes on behind the scenes at the circus and the systematic daily abuse that the elephants must endure."); FEI Hr'g Ex. 17 at 14 (describing ASPCA's conversations with "Tom Rider on approximately a weekly basis," including "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."); id. at 12 ("All of the funds that the ASPCA provided to Mr. Rider were for living expenses in connection with his important advocacy efforts as he traveled throughout the country on behalf of elephants, including travel, lodging, phone, internet

Likewise, as discussed previously, both the documents that plaintiffs have produced, as well as the depositions FEI has taken – including Mr. Rider's own 11-hour, two-day deposition – have "exhaustively" addressed the purpose of the "money made available to him by, for example, the Wildlife Advocacy Project, and others as he traveled across the United States to speak generally about his claims of abuse of circus elephants." DE 245 at 1; cf. Sendi v. Prudential-Bache Securities, 100 F.R.D. 21, 23 (D.D.C. 1983) ("where complete answers are contained in prior depositions, then a motion to compel answers to subsequent interrogatories seeking to elicit the same information should be denied as burdensome, vexatious, oppressive and totally without justification"). That FEI evidently does not like (or believe) the answers it has received is surely not a basis for holding that plaintiffs have violated a specific judicial decree in providing them – especially, once again, when FEI made no effort to frame more particularized interrogatories even long after it knew about the funding of Mr. Rider's public education campaign. See 8a Charles Alan Wright et al., Federal Practice & Procedure § 2177 (2008) ("when the answers as a whole disclose a conscientious endeavor to understand the questions and to answer fully those questions as are proper, the rule has been satisfied").

Finally, FEI's contention that plaintiffs have violated a clear and unambiguous judicial decree by failing adequately to describe potentially responsive documents no longer in their possession is also devoid of merit. See, e.g., FEI Prop. at ¶¶ 35, 36, 52-55, 57. Judge Sullivan required plaintiffs to file declarations "identifying, to the extent [plaintiffs] can recall, any responsive documents that were once in [plaintiffs'] possession (since July 11, 2000) but have

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access, food, and other general expenses while he was on the road."); FEI Ex. 23 at 11-12 (AWI) ("Since 2000, AWI has provided funds directly to Mr. Rider, or has paid directly for Mr. Rider's expenses, on several occasions. On each such occasion the funds were to cover 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.").

been discarded, destroyed, or given to other persons or otherwise not produced . . . ." DE 178 at 3, 7 (emphasis added). As Judge Sullivan has already ruled with regard to the declarations submitted by Mr. Rider and ASPCA, plaintiffs have "compl[ied] precisely" with this Order, DE 23 in No. 1:07-cv-01532, and FEI's contrary argument, as before, "grossly distorts the facts." Id. Thus, all of the plaintiffs submitted declarations identifying any particular responsive documents that they could in fact "recall" but have been destroyed or otherwise not produced.[18]

On the other hand, none of the witnesses at the evidentiary hearing testified as to the existence of any specific responsive documents – not identified in their Court-ordered declarations – that they could in fact recall but that had been destroyed or discarded. To the contrary, they made clear that if they had remembered any such documents, they would have identified them, as they did with respect to other documents they could recall. See, e.g., 2/26/08 Tr. at 79 (emphasis added) (Q: "If you had recalled any specific documents that had been destroyed or spoliated would you have made mention of them in your declaration?" Q: "Yes."). Accordingly, Judge Sullivan's earlier finding that plaintiffs "compl[ied] precisely" with this

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[18] See, e.g., FEI Hr'g Ex. 44 at 2 (ASPCA) ("The ASPCA has been unable to locate any documentation or receipt concerning the laptop computer that it gave to Mr. Rider for use in connection with his media and public education advocacy on behalf of the elephants. I do not know whether any such receipt was discarded or has simply been misplaced."); id. at 3 ("The ASPCA has also been unable to locate any documentation or receipt concerning the value of the cell phone that the ASPCA gave to Mr. Rider for use in connection with his media and public education efforts."); FEI Hr'g Ex. 40 at ¶ 3 (describing Western Union receipts that Mr. Rider may not have kept prior to receiving FEI's discovery requests in March 2004). Each of the organizational plaintiffs also acknowledged that, while "there may have been additional responsive records in [the plaintiff's] possession, custody, or control at some point over the last seven years since this lawsuit began, [the plaintiff] does not know of any such records." FEI Ex. 41 (AWI) at ¶ 2; see also FEI Hr'g Ex. 42 (FFA) at ¶ 2; FEI Hr'g Ex. 43 (API) at ¶ 2; FEI Hr'g Ex. 44 (ASPCA) at ¶ 3. In addition, Mr. Rider explained that he was "confident that I did not intentionally destroy, discard, or otherwise dispose of" any responsive documents since receipt of FEI's discovery requests and that if "I failed to produce every such document, this would only be because of the way I live – out of a used van; I do not have a home or office. I have tried my best to keep track of all documents I have received that in any way relate to this case and to produce all such documents to defendant." FEI Hr'g Ex. 40 at ¶ 5.

aspect of his Order remains valid and, in any case, plaintiffs have surely not taken an approach that is so "farfetched" as to warrant a contempt citation. Athridge, 184 F.R.D. at 198.[19]

In sum, even if the Court were to disagree with some aspect of plaintiffs' approach to the August 23, 2007 discovery Order, that would not mean that the "potent weapon" of contempt is proper under these circumstances. Joshi, 817 F.2d at 879 n.2. Rather, especially if, as is required in any contempt context, the "benefit of every doubt" is afforded to plaintiffs, Food Lion, 103 F.3d at 1015-16, and any "ambiguities in the underlying order [are] resolved in favor of the alleged contemnor," Teamsters Local Union No. 96 v. Wash. Gas Light Co., 466 F. Supp. 2d 360, 362 (D.D.C. 2006), FEI has not proven through "clear and convincing evidence" that any of the plaintiffs "violated an order that is clear and unambiguous," id.

D. At Minimum, Plaintiffs' Responses To The August 23, 2007 Order Reflect Substantial Good Faith Compliance.

Even if, despite all the foregoing arguments, the Court were to conclude that FEI had somehow made out a prima facie case for civil contempt on some aspect of plaintiffs' response to the August 23, 2007 discovery Order, this is clearly a situation in which the defense of substantial good faith compliance would apply. Once again, this defense has two elements – a "good faith effort to comply with the court order at issue" and "substantial compliance with that

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[19] FEI's Proposed Findings allude to various documents that plaintiffs did not describe in their Court-ordered declarations but, with regard to each such document, FEI has failed to establish that a particular plaintiff in fact recalled the specific document but then neglected to describe it in his or her declaration. Moreover, the documents FEI refers to are not even "responsive" to any of the discovery requests at issue. For example, FEI faults plaintiffs for not describing in their Court-ordered declaration e-mails and other documents pertaining to their organizing of the California fundraiser. See, e.g., FEI Prop. at ¶ 122. As discussed previously, however, those are not documents that are "responsive" to the discovery Order or FEI's underlying discovery requests. See supra at 26. The same is true with respect to FEI's contention that plaintiffs should have explained in their Court-ordered declarations why they did not locate or produce multiple records documenting the very same funding for which plaintiffs have already accounted. See, e.g., FEI Prop. at ¶¶ 77, 78.

court order." Landmark Legal Found., 272 F. Supp. 2d at 78. Here, FEI advances no argument that plaintiffs did not act in good faith in attempting to carrying out the discovery Order within the time allotted to them, and the testimony at the evidentiary hearing at the very least reflects a conscientious, earnest effort by plaintiffs to determine, in consultation with their counsel, "how to comply with [Judge Sullivan's] Order while still protecting the media strategy materials from disclosure." 5/29/08 Mem. Op. at 1 (DE 300). Indeed, plaintiffs testified that they conducted multiple searches for documents and spent extensive time and effort in endeavoring to locate all materials covered by the Order, even to the extent of diverting their attention from their organizational missions to protect animals from abuse and neglect.[20]

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[20] See, e.g., 2/26/08 Tr. at 75 (ASPCA) (Q: "And do you believe that you undertook a thorough good faith search [for responsive documents]"? A: "Absolutely." Q: "Did you spent a considerable amount of time doing that?" A: "I sure did as did my assistant."); id. at 75 (Q: "After Judge Sullivan's order that was obtained in August of 2007, did ASPCA do an additional search?") A: "Yes, we did." Q: "Why did you do that?" A: "To abide by the court's order and make sure that there wasn't anything that we hadn't inadvertently [not] produced."); id. at 122-27 (API) (describing three extensive searches undertaken by API for responsive documents); id. at 153 (Q: "And when you undertook that search did you make what you considered to be a conscientious effort to find all materials covered by Judge Sullivan's order?" A: "Yes." Q: "And did you and other staff spend considerable time on that effort?" A: "Yes." Q: "Is there any area you can think of that would be likely to have such materials that you did not explore?" A: "No."); 3/6/08 Tr. at 47 (AWI) (Q: "And so you believe you did a thorough search for documents that would reflect any payments to Mr. Rider?" A: "I do." Q: "And did you carry that search out in good faith?" A: "Yes, I did." Q: "Did you carry it out in a conscientious way that would be designed to search all files and locations where such funding might be located?" A: "Yes, I did."); 5/30/08 Tr. at 67-68 (FFA) ("[T]here have been numerous searches. We have searched several departments and the files of several employees multiple times, and we are confident that we've produced everything in our possession that relates to any payments to Tom Rider." Q: "Do you believe that the organization has expended significant effort in . . . carrying out that search in response to Judge Sullivan's August 23, 2007 order?" A: "Yes. I believe we've spent tens of thousands of dollars in staff time and other resources to comply with the order." . . . Q: "Do you believe that your search and effort to carry out the terms of the order diverted the organization's attention away from other matters it was engaged in?" A: "Yes, it absolutely diverted our attention away from our programmatic mission to protect animals." Q: . . . "So why did you do that at the expense of the programmatic mission?" A: "Because we felt it was necessary to comply with the Court's order."); id. at 133-34 (AWI) (Q: "And from your standpoint, as head of the organization, do you believe that the organization committed substantial resources to engage in that search?" A: "Absolutely." Q: "Why do you say that?"

Consequently, the only question is whether plaintiffs engaged in "substantial compliance," which entails a consideration of whether plaintiffs took "'all reasonable steps within [their] power to comply with the court's order.'" Stewart v. O'Neill, 225 F. Supp. 2d 6, 10 (D.D.C. 2002) (quoting Food Lion, 103 F.3d at 1017). As FEI acknowledges, the "measuring stick for substantial compliance should be the percentage of documents produced that in fact exist, not simply the number of documents produced that should in theory exist." Cobell, 37 F. Supp. 2d at 19 (emphasis added).

When these factors are applied here, the testimony at the hearing establishes that plaintiffs, at the very least, took "reasonable steps" to locate responsive materials and produce them to FEI. Once again, all of the witnesses testified that they searched for responsive documents in all locations that they were reasonably likely to be located and they spent considerable time and effort doing so. See supra at n. 20. Indeed, while quibbling with a few aspects of plaintiffs' searches, even FEI does not appear to dispute that plaintiffs engaged in a painstaking effort to locate documentation reflecting every payment made to Mr. Rider for the last seven years. See FEI Mem. at 15.[21]

A: "It took a great deal of time to go through files, to look and be as thorough as we might, particularly going back over many years, including pulling out the old archives from New York and going through those as well.") . . . Q: "And considering your small organization, do you believe that this made it difficult for your organization to carry out some other activities that you regarded as important? A: "Certainly . . . but [we] felt it important, obviously, to do a complete and thorough search.").

[21] FEI refers to several "examples of materials that [plaintiffs] either had not searched, had not accounted for, or had not produced," FEI Mem. at 14, but none of these "examples" even remotely suggests that plaintiffs did not take reasonable steps to carry out Judge Sullivan's Order. For instance, FEI complains that the ASPCA "did not search certain files of [the] former President" of the organization, id., but ASPCA's witness specifically testified that "any correspondence he would have had I would have had," and that he "basically left it up to me once he gave the okay to join the lawsuit." 2/26/08 Tr. at 77. Similarly, FEI asserts that ASPCA "withheld materials on alleged 'propriety' grounds," FEI Mem. at 14, when, in reality the testimony merely referred to oral "discussions in-house for budgeting purposes" and did not

Moreover, with respect to the "percentage of documents produced that in fact exist," Cobell, 37 F. Supp. 2d at 19, FEI has conceded, once again, that plaintiffs produced "nearly 700 pages of documents" in response to the August 23, 2007 Order. See DE 223 at 4. FEI's mere conviction that plaintiffs "should" have uncovered many more documents during the thirty days that Judge Sullivan gave them to respond to the discovery Order in no way demonstrates that a large percentage of documents "exist" that plaintiffs should have located but did not. See DE 300 at 3 (" a party's complaint that there must be more than they received is insufficient in itself to require any further inquiry"). Indeed, far more pertinent to this inquiry is Judge Sullivan's expectation when he issued the discovery Order that only "limited information" about Tom Rider's funding remained to be located and produced. DE 176 at 5 (emphasis added). Although, as discussed previously, plaintiffs believe that this statement belies any notion that they have violated the discovery Order – because plaintiffs have in fact produced far more than "limited information" about Mr. Rider's funding – at the very least it undercuts FEI's contention that plaintiffs did not even substantially comply with Judge Sullivan's expectations when he issued the Order.[22]

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even intimate that those discussions had anything to do with any undisclosed funding of Mr. Rider. 2/26/08 Tr. at 48. And, once again, FEI harps on the fact that "AWI withheld emails concerning [the California] fundraiser," FEI Mem. at 14, which plaintiffs searched for and collected but have consistently maintained are not, as a legal matter, subject to disclosure for a variety of reasons. Accordingly, as these "examples" illustrate, FEI simply has no persuasive argument that the "defense of good faith substantial compliance does not apply here." FEI Mem. at 14.

[22] The notion that plaintiffs have not even substantially complied with the discovery Order is also belied by FEI's own submissions in this case and the related RICO case. Thus, FEI has not only obtained a full accounting of the "financing of [Mr. Rider's] public campaign regarding the treatment of elephants," DE 178 at 5 – which is all that Judge Sullivan said was "relevant to his credibility in this case," id. – but it has also obtained enough information from discovery in this case to file a massive RICO claim against plaintiffs that is centrally based on the funds provided to Mr. Rider. See Compl. in 1:07-cv-01532-EGS. Although Judge Sullivan has stayed that action because it was "improperly motivated and intended to prolong the ESA action," DE 23 in

Further, especially given what plaintiffs have already produced and also taking into account the depositions taken of all of the plaintiffs, even if the Court were to conclude that plaintiffs should have searched for and/or produced some additional documents, or provided some more detailed interrogatory answers, there is no reason to believe that this has had any actual effect on FEI's ability to "challenge [the] credibility of one plaintiff in this case." DE 176 at 5. In other words, particularly if the Court takes into account what has been provided to FEI through all forms of discovery, as well as the sole issue as to which any of this material has been deemed relevant in this case, there is absolutely no reason to believe that any shortfall the Court may perceive in plaintiffs' response to the August 23, 2007 Order has had more than a de minimis effect on FEI's ability to make whatever argument it wishes concerning Tom Rider's credibility as a witness. For that reason as well, this is a textbook case where the Court should sustain plaintiffs' defense of good faith substantial compliance if the Court finds it necessary to travel that far in its legal analysis.[23]

No. 1:07-cv–1532-EGS, at 7, the fact that FEI advised Judge Sullivan that it already knows enough about the "extent, mechanics, and purposes" of Mr. Rider's funding to pursue a RICO claim contradicts any notion that plaintiffs have not been sufficiently forthcoming in discovery even to serve the far narrower purpose for the discovery here. See DE 176 at 6 ("Defendant further alleges that this scheme has been going on since at least May 2001 but that defendant was not fully aware of the extent, mechanics, and purposes of the scheme until at least June 2006.") (emphasis added).

[23] None of the materials collected in plaintiffs' search but not produced to FEI reflect any funding of Mr. Rider's public education campaign that plaintiffs have not otherwise disclosed to defendant. Rather, the only materials plaintiffs have withheld involve their strategy discussions concerning the California fundraiser, other internal deliberations over how the organizations should contribute to public advocacy work, and several records that reiterate funding that has otherwise been documented. In the context of what has already been provided to FEI, none of these materials has any bearing whatsoever on Mr. Rider's credibility.

CONCLUSION

For all of the foregoing reasons, the Court should deny FEI's motion for contempt sanctions without referring the matter to Judge Sullivan.[24]

Respectfully submitted,

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[24] Even when a court finds that contempt citations are appropriate, the law in this Circuit requires that the party must be afforded an opportunity to bring itself into compliance with the order before the court imposes any contempt sanctions. See Blevins Popcorn, 659 F.2d at 1184-85. Accordingly, even if the Court finds that any of the plaintiffs has engaged in conduct warranting a contempt finding, the Court should recommend that Judge Sullivan first afford the plaintiff a reasonable time to cure whatever deficiency the Court identifies.