

EXHIBIT A

To Plaintiffs' Response To Defendants'
Motion To Enforce the Court's December 3,
2007 Order Concerning the Humane Society
of the United States
Civ. No. 03-2006 (EGS/JMF)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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In the Matter of:	:	
	:	
AMERICAN SOCIETY FOR THE	:	
PREVENTION OF CRUELTY TO	:	
ANIMALS, et al.,	:	
	:	
Plaintiffs,	:	
	:	
vs.	:	Civil Action No. 03-2006
	:	
FELD ENTERTAINMENT, INC.,	:	
	:	
Defendant.	:	
	:	Washington, D.C.
----- x	:	January 8, 2008

TRANSCRIPT OF STATUS HEARING
BEFORE THE HONORABLE JOHN M. FACCIOLA
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

For the Plaintiff:	ERIC R. GLITZENSTEIN, ESQ. KATHERINE A. MEYER, ESQ. KIMBERLY D. OCKENE, ESQ.
For the Defendant:	JOHN M. SIMPSON, ESQ. MICHELE C. PARDO, ESQ. GEORGE A. GASPER, ESQ. KARA PETTEWAY, ESQ.

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P R O C E E D I N G S

THE CLERK: Civil Case Number 03-2006. This is the matter of American Society for Prevention of Cruelty to Animals, et al., versus Feld Entertainment, Inc. For the Plaintiff, present in the courtroom is Eric Glitzenstein, Katherine Meyer, Kimberly -- is that Ockene? For the Defendant, present in the courtroom is John Simpson, Michelle -- is it Pardo? George Gasper and Kara Petteway. This is scheduled for a status.

THE MAGISTRATE JUDGE: Good afternoon, everyone.

COUNSEL: Good afternoon, Your Honor.

THE MAGISTRATE JUDGE: We are assembled today, pursuant to my order of December 20th, 2007, to set a date for an evidentiary hearing held on the application by the Defendants to hold the Plaintiffs in contempt. As noted in my order, they have the burden of proving that contempt by clear and convincing evidence and I wanted to do two things today. One would be set a date for an evidentiary hearing. The second thing I wanted to do was set some basic ground rules for the exchange of information and the names of witnesses who would be called for that hearing.

Before we proceed any further, I should note that I have now read the deposition of Mr. Roger that was taken pursuant to my order. I don't know if that moots out any of these issues, but I have read it and reviewed it and,

1 indeed, have issued an order with reference to it yesterday.

2 So where do we stand? You're the moving party.

3 MR. SIMPSON: Good afternoon, Your Honor.

4 THE MAGISTRATE JUDGE: Good afternoon.

5 MR. SIMPSON: John Simpson for the Defendant.

6 I don't know whether you want me to rehearse the background
7 of this or not, but --

8 THE MAGISTRATE JUDGE: Well, you can assume that
9 I'm familiar with the background. That's why I issued the
10 order. I know of the applications you've made and of the
11 documents you claim that they should have produced and they
12 haven't, so that brings us to this pass. I've got to make
13 findings of fact; obviously, I can't do that until we hear
14 from witnesses.

15 MR. SIMPSON: Yes, sir. I think that the basic
16 issue before Your Honor is whether the Plaintiffs have
17 complied with Judge Sullivan's order of August 23rd, 2007,
18 in which he ordered all the Plaintiffs to produce all
19 responsive information and documents concerning payments to
20 Tom Rider. And we don't think they've done that. We don't
21 think they've produced all the documents that they have, we
22 don't believe they've produced all the information they
23 have, we also don't believe that they've accounted for the
24 information they no longer have, and that was the second
25 aspect of the order, was to provide declarations, identify

1 what you no longer have and what happened to it.

2 And it's frustrating for us, because in one form
3 or another Feld Entertainment has been trying to get this
4 information since 2004 and we have run into roadblocks at
5 every turn in this saga, each point of which we've been
6 assured by the other side that all the information's been
7 produced and, lo and behold, when a Court order is issued
8 more information is produced, some of which, by the time it
9 was produced, was six years old. So we're, as you might
10 imagine, skeptical about their compliance with Judge
11 Sullivan's order.

12 We have reason to believe that they are in
13 possession of information that has to exist. We know it
14 exists.

15 But be that as it may, Your Honor, I think the
16 way to proceed here is we believe that at a minimum, for
17 purposes of a hearing to enforce Judge Sullivan's order,
18 that we would need to hear testimony from Tom Rider, from
19 Tracy Silverman, from Nicole Packette, from Michael
20 Markarrian, and from Lisa Weisberg. Who are the principal -
21 - well, they are the declarants who've provided declarations
22 in response to Judge Sullivan's order.

23 In addition, we believe that there is an issue of
24 fact concerning the document production with respect to
25 Mr. Rider and his testimony, as Your Honor remembers in his

1 deposition, in which he testified that all documents that
2 he received from the Wildlife Advocacy Project as well as
3 his own counsel, in terms of the 1099s that both of those
4 organizations sent him and the cover letters that came with
5 his checks were, in their original form, transmitted back to
6 his lawyers. So we think the document custodian for Meyer,
7 Glitzenstein and Crystal has to be subpoenaed to produce the
8 original of all those documents.

9 Just one other thing, and this is really not part
10 of the motion but I think if we want to be comprehensive
11 here it ultimately is, and that is we served a third-party
12 subpoena on the Humane Society of the United States, which,
13 as you understand, now controls one of the Plaintiffs in
14 this case, the Fund for Animals. And they have done the
15 same basic thing with their subpoena, which Your Honor
16 enforced in an order dated after Judge Sullivan's order.

17 And while they're not technically part of this
18 motion and their noncompliance did not come to light till
19 after this motion was filed and the ban on motions was
20 entered, we believe ultimately they were actually part of
21 this as well. They control the Fund for Animals and
22 basically what we've got with those two organizations is
23 they both are pointing the finger at the other organization
24 as to who has the documents. And we believe that most
25 likely, although we can't say for sure, that Mr. Markarrian

1 would be the appropriate witness for the Human Society as
2 well, as he is an employee of both organizations.

3 THE MAGISTRATE JUDGE: Let's talk dates and times.
4 How much time do you think you'll need to present your case?

5 MR. SIMPSON: I wouldn't think this would take
6 more than a day.

7 THE MAGISTRATE JUDGE: All right. How much time
8 does the opposing party think they will need to present
9 their case?

10 MR. GLITZENSTEIN: Your Honor, should Your Honor
11 actually have that hearing we think that a day would
12 probably be sufficient.

13 THE MAGISTRATE JUDGE: In addition to the day he
14 wants?

15 MR. GLITZENSTEIN: Oh, I think that one full day,
16 we would think.

17 THE MAGISTRATE JUDGE: All right, one full day.

18 MR. GLITZENSTEIN: There are some issues that I
19 wanted to raise on this _____ may bear on this, and
20 they require some --

21 THE MAGISTRATE JUDGE: Okay, sure, but let me hear
22 him out and then I'll hear from you. Thank you, counsel.

23 So one full day, okay.

24 MR. SIMPSON: I don't think it would take any more
25 than that, Your Honor. And I think timing-wise, we've got

1 some things set in this case for next week, as well as I
2 have a hearing out of state in a case next week. I would
3 think the week after that, any time a week after that would
4 be perfectly fine with us.

5 THE MAGISTRATE JUDGE: All right. Counsel?

6 MR. GLITZENSTEIN: Thank you, Your Honor. Eric
7 Glitzenstein on behalf of the Plaintiffs.

8 Your Honor, as a preliminary matter, Your Honor
9 did say that you wanted the parties to address the
10 procedure. And we would respectfully submit that one aspect
11 of that procedure and a threshold aspect of it should be for
12 the parties to address the process and standards for a
13 contempt proceeding. Which, at this point, there has been
14 no briefing on.

15 And in this connection I would note that there are
16 some critical aspects of this which have really not been,
17 I don't think, yet explored, including some aspects that
18 were discussed by Your Honor in a case that I think you're
19 already quite familiar with, the Atheridge versus Aetna
20 Casualty case, 184 F.R.D., 181, and then over at page 197,
21 continuing to the end of that opinion, Your Honor did talk
22 about the nature of civil contempt proceedings as well as
23 the jurisdiction of a Magistrate Judge over civil contempt.
24 And I think there are a couple of aspects of that which we
25 would respectfully suggest are quite important here.

1 One is, that while Your Honor certainly could
2 refer, I think, a contempt issue to a District Court,
3 ultimately the statute that's discussed in that opinion does
4 talk about that ultimately being a matter that a District
5 Court Judge would have to adjudicate. And I think the
6 second aspect of it, which I think is important and I think
7 lends itself, quite frankly, to further consideration by the
8 Court is whether or not, as a legal proposition, a contempt
9 is even conceivable under the circumstances here.

10 And by that, what I mean by that, Your Honor, is
11 quite simply that, as Your Honor suggests in the opinions
12 that you referred to in your order, certainly one aspect of
13 any contempt proceeding is whether or not the parties that
14 are being accused of violating an order have done so.

15 But another very critical aspect of it that all
16 the D.C. Circuit precedents talk about is whether or not the
17 order was sufficiently clear and unambiguous to expose the
18 party to contempt. And under a decision -- it's one of the
19 Bell decisions from Judge Lamberth, a D.C. Circuit decision
20 in Young, that has to be explored, not only by virtue of the
21 specific order in front of the Court, but by virtue of all
22 of the surrounding circumstances. Now, we would
23 respectfully submit -- and we would like the opportunity,
24 Your Honor, to convince you, if we can -- that as a legal
25 proposition, it is inconceivable that Plaintiffs could be

1 held in contempt under these circumstances.

2 Let me say at the outset that our view is that the
3 Plaintiffs have not only complied to the letter with what
4 Judge Sullivan ordered them to do, but they actually have
5 gone through extraordinary lengths to provide every document
6 reflecting payments to Mr. Rider and the source of those
7 payments, and what ultimately this argument largely reduces
8 to, Your Honor, is the following legal dispute. We would
9 respectfully submit that the evidentiary aspect of it is
10 secondary. The legal dispute is, what did Judge Sullivan
11 mean in his order by "media strategy" and what exactly did
12 he mean by "documents concerning payments to Mr. Rider."

13 Because if you look at Judge Sullivan's order,
14 which followed on the heels of Plaintiff's argument that
15 Your Honor had in fact not required FEI to produce extensive
16 materials regarding its own media strategy, Plaintiffs
17 argued that they in fact had a media strategy with
18 Mr. Rider, and that media strategy involved payments to
19 Mr. Rider, which they said they would provide materials
20 reflecting, but that documents relating to fundraising
21 strategy, for example, how they would go out and have
22 fundraisers, which is one of the areas of information that
23 the Defendants are asking for, that material would be
24 subject to a media strategy withholding.

25 When Judge Sullivan issued his order, which the

1 relevant portions of which run a couple of pages in length,
2 on the one hand he said media strategy materials can be
3 withheld. All documents relating to media strategy. On the
4 other hand, he said documents on funding of Mr. Rider should
5 be disclosed. Now, Plaintiffs believe we drew the line
6 absolutely correctly, especially in light of another
7 critical circumstance which we've alluded to in our papers
8 so far, Your Honor, and that is his simultaneous denial of
9 a motion to add the RICO counterclaim.

10 Now, the reason I hedged a little bit when you
11 asked me how long would the hearing go on, Defendants act
12 like the RICO counterclaim they tried to bring before Judge
13 Sullivan, which extensively talks about the funding of
14 Mr. Rider, and I'd be happy to give you a copy of the
15 complaint because it's kind of ironic in light of their
16 claim that they haven't gotten enough information. They
17 have 75 pages of allegations in the RICO complaint, all of
18 which come from the information that we've given to them.
19 But they act like in this proceeding that, "Oh, it's kind of
20 like the Wizard of Oz in the corner, you know, 'Ignore that
21 man standing behind the curtain.'"

22 You can't do that in this case. Because Judge
23 Sullivan, in his August 23rd order denying the RICO
24 counterclaim, said specifically the reason he was doing that
25 was because it was going to involve too much discovery,

1 including discovery on communications between the Plaintiffs
2 about the media strategy, which is exactly what Defendants
3 said they wanted to produce in the case.

4 So I guess what I -- that's one example, Your
5 Honor, of where I think if we have an opportunity to provide
6 some additional briefing on the standards for contempt you
7 may well decide that it does not meet what Your Honor
8 yourself said in the Atheridge decision has to be a crystal-
9 clear order that has been violated. We believe we've
10 complied with it, but we think you will agree, we hope, that
11 if you look at the surrounding circumstances and what has
12 been produced and what is at issue in this case, is that the
13 most that you have in this case is a legitimate disagreement
14 among the parties as to exactly where Judge Sullivan drew
15 the line between media strategy, on the one hand, and
16 payments to Mr. Rider on the other hand, as to which we have
17 produced all the pertinent documents.

18 Another example of that, if Your Honor will bear
19 with me for another moment, is that Judge Sullivan was quite
20 specific when he ordered Plaintiffs to produce documents,
21 in saying that the documents that had to be produced were
22 not only in the subject areas but were, quote/unquote,
23 "responsive" documents.

24 Now, as Your Honor knows, we've discussed to some
25 degree in the papers we've filed to date that if you look

1 back at the underlying discovery requests, it's extremely
2 clear why Judge Sullivan put in the phrase "responsive."
3 Because, contrary to what Defendants say today, that they
4 asked pointblank for every document conceivably related to
5 Tom Rider and his activities on the road, that is not what
6 the discovery requests ask for. They were much different
7 than that, and I'll give you one example.

8 One discovery request taken from an allegation in
9 Plaintiff's complaint said, "We would like all documents
10 that are sufficient to demonstrate the funding of
11 Mr. Rider's activities." It did not say every document that
12 might conceivably bear on it, including, for example,
13 Federal Express envelopes and the kinds of what we frankly
14 submit are minutiae at this stage.

15 And so once again, not only do we think we've
16 complied, but for the purposes of what I'm trying to suggest
17 to Your Honor today, the more important point is if you
18 apply the extremely stringent standards for contempt, which
19 is that not only do you look at compliance but you look at
20 whether or not there's any ambiguity in the order, we just
21 don't see that legally it's possible.

22 And we would at least ask for an opportunity, Your
23 Honor, before we go through an evidentiary hearing and call
24 all the people that were mentioned by Mr. Simpson, of
25 course, are employees of Plaintiffs, we recognize that if

1 Your Honor believes that this hearing should proceed we'll
2 of course make those people available. But these are people
3 at non-profit organizations doing important work. We
4 understand the business of this Court takes precedence over
5 everything else they might be doing. But I guess what I'm
6 asking for is an opportunity to submit to your Court a brief
7 on the procedure and legal standards applicable to contempt
8 and essentially move for summary judgment on the
9 availability of contempt under these circumstances.

10 THE MAGISTRATE JUDGE: Thank you. Counsel?

11 MR. SIMPSON: Very briefly, Your Honor. This
12 isn't hard. Judge Sullivan said, "Produce all responsive
13 documents that relate to payments to Tom Rider."

14 Now, the argument that a document they have that
15 concerns payments to Tom Rider is not responsive is
16 ridiculous. And all you have to do, we listed the requests
17 that cover this information in footnote 6 on page 13 of our
18 reply brief, and just going through those requests, there is
19 no way that any document they have that concerns a payment
20 to Rider or any communication that they engaged in that
21 concerns a payment to Rider, is not responsive to those
22 requests. So they're chasing their tails on this.

23 The second thing that Judge Sullivan -- we've been
24 through this exercise once before in this case with respect
25 to the Defendants' veterinary records. The same kind of

1 thing. Where the veterinary records were produced, it was
2 incomplete, and he was very clear, "You have got to tell me,
3 yes or no, did you produce all the records." And we did.
4 We produced 29-some-odd declarations to that effect.

5 They haven't done that. And he's basically just
6 stood up here and admitted to you that there's an entire
7 body of information that they're sitting on right now that
8 concerns payments to Rider that they haven't produced under
9 some lawyer's interpretation of Judge Sullivan's order,
10 which I think is pretty clear in plain English.

11 Now. This idea about there being some ambiguity?
12 Judge Sullivan closed that loop on page 8 of his order,
13 where he discussed the media strategy. And by the way, you
14 know, a big argument, the high-sounding argument was made
15 about how all this media strategy is covered by the First
16 Amendment. Judge Sullivan didn't agree with that. All he
17 said is, it's irrelevant to this case.

18 But in discussing the media strategy argument, he
19 made it very clear, on page 8 of his order, "The Defendant,
20 however, is entitled to information concerning the payments
21 made to Tom Rider and the role of the organization of
22 Plaintiffs and WAP in those payments."

23 That was made in the context of discussing the
24 question of whether media strategy documents need to be
25 produced. We don't care about their media strategy. But

1 what we do care about is information that they have that
2 relates to these payments.

3 He wants to talk about minutiae? The Federal
4 Express documents are minutiae? Well, one thing the Federal
5 Express documents will show is where these checks were sent.
6 Is it true that Mr. Rider is a man who lives in a van and
7 travels the United States arguing the welfare of the Asian
8 elephants, or is he somebody who basically spends most of
9 his time in one place? The Federal Express envelopes would
10 show that. Unfortunately, Mr. Rider destroyed them all.
11 Whether their law firm kept copies of them, I don't know.
12 That's something to be hashed out in this hearing.

13 The same thing with the check-cashing receipts.
14 That's another minutiae. Same issue. Where was he when he
15 cashed the checks? Does he travel the country or does he
16 live basically in a van in his daughter's driveway, which is
17 what he testified to in his lawsuit -- or, in his
18 deposition. So while they may call it minutiae, we think
19 it's a relatively important detail.

20 They want to brief contempt? That's fine with me,
21 but it seems to me that's part of the trial brief they
22 should submit on the hearing. There's no reason to waste
23 time with another document filed in this case. We think you
24 ought to set the hearing and let's just get on with this.

25 MR. GLITZENSTEIN: May I just respond briefly,

1 Your Honor?

2 Just to set the record straight. It is
3 Plaintiffs' position that we have produced every single
4 document that we were required to produce by Judge Sullivan.
5 We have produced documents reflecting every single payment
6 that we can possibly find involving Mr. Rider. Wildlife
7 Advocacy Project has produced not only all of the documents
8 it was required to produce, but even information that was
9 not required by Judge Sullivan, such as funding of his
10 public education campaign by other organizations. So any
11 suggestion that Plaintiffs have not scrupulously complied
12 with the order which is belied by declarations, the sworn
13 declarations submitted in this case, is simply false.

14 And Judge Sullivan in his denial -- his decision
15 to stay the RICO case, Your Honor, and this is why we
16 believe all of this is relevant, said that Plaintiffs in
17 fact had done precisely what he ordered in terms of talking
18 about a document production. So Judge Sullivan's already on
19 record as to one aspect of compliance with his order.

20 What we're talking about here is whether or not
21 there are aspects of Mr. Rider's public education campaign
22 that Judge Sullivan said were off-limits. They keep acting
23 as if he didn't draw a line. He did draw a line. He said,
24 "You do not have to produce documents relating to public
25 education and media activities." And again, this is in

1 large measure a legal issue. It's not simply a factual
2 question.

3 Judge Sullivan, in his RICO case, specifically
4 said the discovery that remained was very limited discovery,
5 and he said it was limited discovery because Plaintiffs had
6 produced most, if not all, of what they needed to produce on
7 Mr. Rider. We fail to understand, quite frankly, Your
8 Honor, that if in fact everything that Mr. Simpson is
9 talking about had to be produced, despite the line that
10 Judge Sullivan drew, then what was off-limits in the RICO
11 case? Why did Judge Sullivan say that he did not want to
12 inflict the burden on Plaintiffs of producing all the
13 materials relating to how they were funding and how they
14 were pursuing this media strategy?

15 One aspect of this, I think, which is important,
16 Your Honor, and of course I leave it up to the Court as to
17 how to deal with this, we are in a bit of a quandary because
18 we think we're dealing not only with one order in this case
19 but, frankly, four orders. Not only are we dealing with the
20 specific discovery order which itself has tension -- we
21 concede -- tension between payments to Tom Rider on the one
22 hand, which we have given all information about, and on the
23 other hand how the Plaintiffs were going to pursue their
24 media strategy which we have not, because we believe Judge
25 Sullivan said we didn't have to.

1 There is also Judge Sullivan's two orders where he
2 said he did not want discovery relating to the RICO case to
3 proceed, which specifically included the materials that
4 Mr. Simpson is now talking about, communications involving
5 the media campaign.

6 And then finally there is Your Honor's order,
7 which talked about how FEI, for its part, did not have to
8 produce even a single piece of paper on the profit it was
9 getting from the circus or our media strategy. And this may
10 be a matter where, from a legal standpoint, we need some
11 clarification from Judge Sullivan as to where he was drawing
12 the line. But any notion that Plaintiffs did not earnestly
13 and conscientiously spend time that they spent searching for
14 documents, getting materials out of storage, producing
15 everything that FEI could conceivably need in order to go
16 after Mr. Rider, we just think is frankly false.

17 And so, again, we would think that if we're going
18 to produce a brief like that, it should be done as a
19 threshold proposition, we would like the opportunity to
20 convince Your Honor that, again, we have complied, but at
21 bare minimum there is sufficient ambiguity in the orders
22 that would preclude any kind of further contempt proceeding
23 which, Your Honor, is what you said in the case that I
24 referred to at the outset. You looked at the materials,
25 you said, "Look, at minimum it's not crystal clear what was

1 required of Plaintiffs, therefore I'm not going to even go
2 further any kind of a contempt proceeding."

3 And our view is _____ further contempt
4 proceeding and adjudication would have to go before Judge
5 Sullivan in any event, it may make sense to get some
6 indication from him as to where he was intending to draw the
7 line in light of all of these orders. But at bare minimum,
8 we would respectfully submit that an opportunity to submit
9 some materials relating to that would make sense.

10 THE MAGISTRATE JUDGE: In terms of my
11 jurisdiction, I don't remember what I said in the Atheridge
12 case about this, but if there was a failure to comply with a
13 Court order in a case in which I was supervising discovery,
14 didn't that contempt occur before me? Under the statute?
15 In the same sense it occurred if somebody threw a water
16 bottle at me?

17 MR. GLITZENSTEIN: As we read the case, Your
18 Honor, and I think this is one of the reasons why it would
19 be valuable to brief this, I think it's an important
20 question and I think it would be unfortunate for Your Honor
21 to go down a road and then say later that, you know, you had
22 more limited authority over it. As I read the case, Your
23 Honor was dealing with an order issued by Judge Greene.
24 I think it was Harold Greene in that case. And so the
25 question was whether or not there was a violation of Judge

1 Greene's order.

2 We see it as identical to the situation here,
3 where there's a question as to whether or not there was a
4 violation of Judge Sullivan's order, particularly in the
5 context of other orders issued by Judge Sullivan that we
6 believe can't be ignored in analyzing this one. So as I
7 read the decision, it's exactly the same circumstance as we
8 have, and therefore Your Honor's analysis of the statute
9 would be the same.

10 But I think that would be one of the values of --
11 it's hard for me to see how Your Honor embarks on this
12 approach without getting some additional briefing on the
13 legal framework.

14 THE MAGISTRATE JUDGE: Okay. Let me ask you about
15 my jurisdiction.

16 MR. SIMPSON: Well, Your Honor, he's brought up a
17 case that he hasn't, of course, let us read in advance, but
18 I, based on 30 --

19 THE MAGISTRATE JUDGE: All right, so there's no
20 point. Let me --

21 MR. SIMPSON: -- 30 years in law practice, I would
22 think you have --

23 THE MAGISTRATE JUDGE: -- explain something to
24 you. In doing what I did here, I was trying to simplify
25 matters. I went through these materials as carefully as I

1 possibly could and I kept finding myself running into the
2 same problem of not really understanding and knowing what
3 people did as they responded. Because the papers didn't
4 tell me that. So hence, my question would be to get a sense
5 of that, by just hearing people as to the interpretations
6 they made of the orders and what they did.

7 MR. GLITZENSTEIN: Your Honor, could I just --

8 THE MAGISTRATE JUDGE: Why can't we do that?

9 I mean, it seems to me we're going to have this
10 extraordinarily preliminary determination of something,
11 and when it's over we're kind of back where we started from.
12 I'm trying to expedite this --

13 MR. SIMPSON: I think you're exactly right.

14 THE MAGISTRATE JUDGE: -- not trying to see how
15 much time it could take.

16 MR. SIMPSON: I mean, we can write a King's
17 English brief that cites every case we can find that
18 supports our position, but at the end of the day the
19 question is did they do what Judge Sullivan ordered. And
20 it's going to boil down to what these people did and why
21 they worded their declarations the way they worded it.

22 If it's true, if it's true that they produced
23 every single piece of information that concerns payments to
24 Tom Rider, then why didn't they say it? And if they'd said
25 it under oath, we might not be here today. But they didn't

1 say that. That's the problem.

2 THE MAGISTRATE JUDGE: Well, that's -- that's the
3 point I'm trying to get at.

4 MR. SIMPSON: Exactly. And that's why we think
5 putting these people on the stand --

6 THE MAGISTRATE JUDGE: And I can't make that
7 determination until I hear from folks.

8 MR. SIMPSON: That's why we think putting them on
9 the stand will get to bottom of this.

10 THE MAGISTRATE JUDGE: All right. I need a few
11 minutes to give this some thought. I'll be right back.
12 Stay in the courtroom.

13 (Whereupon, a brief recess was taken.)

14 THE MAGISTRATE JUDGE: -- years since I decided
15 the Atheridge case that I think it's fair _____
16 remember my own decisions. I'm kidding, of course.

17 But I need some time to look at the jurisdictional
18 issue. But my general indication, the way I want to move at
19 this point, is I'm going to look at the jurisdictional issue
20 on my own and make a determination of whether I need any
21 more from you. Assuming for the sake of the argument that
22 I find that I do have jurisdiction or that there is another
23 way that Judge Sullivan can order me to give him a report
24 and recommendation on these issues, I am not going to have
25 any preliminary briefing on whether summary judgment, if you

1 want, whether contempt is available here. I'm going to
2 proceed to the evidentiary hearing. So I'm going to ask
3 counsel to remain in the courtroom and at least confer as to
4 a day. I understand you both think we can get this done in
5 one day?

6 MR. SIMPSON: That's my best estimate, Your Honor.

7 THE MAGISTRATE JUDGE: Well, but do I understand
8 both of you to -- is that one day or two days?

9 MR. SIMPSON: I would say one day for the whole
10 thing. I didn't want to be misunderstood.

11 THE MAGISTRATE JUDGE: Do you agree?

12 MR. GLITZENSTEIN: Yes, Your Honor. Talking about
13 the other issue, could I ask about a couple of the specific
14 aspects of the hearing that Mr. Simpson brought up?

15 THE MAGISTRATE JUDGE: Yes. I anticipate that --
16 it's his burden of proof, so he has to produce the evidence.
17 What I'm going to insist the parties do, and I'll do this
18 in a written order, is exchange, 10 days before the date we
19 set, the documents they intend to offer into evidence.
20 After they've done that, by the same deadline to send to
21 each other a witness list, and then we'll proceed to the
22 hearing on the date that is agreed upon. Then there'll be
23 post-trial briefing if I think it's necessary. All of that,
24 of course, would be vacated if I conclude that I don't have
25 jurisdiction to do so. Okay?

1 MR. GLITZENSTEIN: Yes, Your Honor. For the
2 purposes of conferring, we're relying upon Mr. Simpson's
3 representation as to the witnesses he would intend to call
4 and obviously check on their availability.

5 He did mention two specific people who I wanted to
6 ask about. One is Mr. Rider who, as you know, was just
7 deposed at length, including on this very topic, about his
8 maintenance of documents and what he did to search for
9 documents, and so we would ask that in lieu of Mr. Rider
10 being brought back here that Your Honor, instead, consider
11 the pertinent parts of his deposition which we can designate
12 for the Court. Obviously, we could do that now or we could
13 submit that to Your Honor, but I think that would avoid
14 having Mr. Rider be brought back. That's one aspect.

15 The second one is on a person from the Wildlife
16 Advocacy Project, which was not the subject specifically of
17 the motion for contempt, and the only specific document
18 referred to by Mr. Simpson were 1099s. The 1099s have been
19 produced. They've been given to FEI. And I would ask Your
20 Honor at absolute minimum not to put this beyond the scope
21 that it needs to be. If Your Honor decides they should
22 bring in the organizational Plaintiff representatives, we
23 understand that. But Tom Rider has already been extensively
24 questioned about these issues, and the Wildlife Advocacy
25 Project has produced the 1099s. So I would ask that that be

1 taken off the table at the outset.

2 And I would also, in terms of the time that it
3 takes, the one other thing that I would say is however Your
4 Honor decides to proceed, we do want the time necessary to
5 make a legal argument.

6 THE MAGISTRATE JUDGE: You will. You'll have that
7 opportunity.

8 MR. GLITZENSTEIN: Based upon the facts.

9 THE MAGISTRATE JUDGE: You'll have that
10 opportunity. This may wash out on the facts, I don't know.
11 We'll see.

12 All right, what are you going to do about Rider?
13 If he's still living in his van, how do you subpoena him?

14 MR. SIMPSON: Well, Your Honor, I would be happy
15 to use those parts of his deposition --

16 THE MAGISTRATE JUDGE: All right.

17 MR. SIMPSON: -- that are relevant, but the
18 problem is I asked these questions and they instructed him
19 not to answer

20 THE MAGISTRATE JUDGE: Well, I don't know about
21 that. I have reviewed the deposition, but I don't know
22 about that.

23 MR. SIMPSON: I asked him about --

24 THE MAGISTRATE JUDGE: Well, look, it's your
25 problem. You got to get Rider here if they're not going to

1 produce him, so you know how to do that or if you can't do
2 it, if he's more than a hundred miles away, that's that.
3 Then you could use his deposition in lieu of that, so that's
4 the problem.

5 Second thing is, what about the Wildlife Project
6 and the 1099s?

7 MR. SIMPSON: I didn't contemplate the Wildlife
8 Advocacy Project being a witness in this case.

9 THE MAGISTRATE JUDGE: Okay.

10 MR. SIMPSON: Our basic problem with them is not
11 part of this motion, it's how they answered the 30(b)(6)
12 deposition questions, which is a separate matter.

13 What I did mention, however, was the Humane
14 Society of the United States, which has appeared in this
15 case, is subject to a third-party subpoena that Your Honor
16 has enforced. Their compliance was not technically part of
17 that order, but for comprehensiveness and dealing with this
18 one time, I would --

19 THE MAGISTRATE JUDGE: They're not before the
20 Court now, though.

21 MR. SIMPSON: They're not before the Court now,
22 that's true. But Your Honor could issue --

23 THE MAGISTRATE JUDGE: You may have to get them
24 here if you want them to do that, before this hearing.
25 You've got to make some sort of a motion, you've got to get

1 something before me. And they've got to be permitted to
2 respond.

3 MR. SIMPSON: Do we have your permission to file
4 such a motion?

5 THE MAGISTRATE JUDGE: Yes, you do.

6 MR. SIMPSON: Okay. We'll do so.

7 THE MAGISTRATE JUDGE: All right. All right, so
8 confer with each other and with my law clerk and get a date,
9 and I'll look at the jurisdictional issue and go from there.

10 MR. GLITZENSTEIN: Your Honor, I'm sorry to
11 belabor this, but one more point.

12 We do anticipate that one of the problems we're
13 going to have -- and I understand Your Honor's conundrum
14 about _____ exactly what the Plaintiffs look at. We
15 did submit declarations for them saying that they had done a
16 thorough search. One of the problems we're having is doing
17 this in a way that doesn't get into attorney-client
18 communications.

19 THE MAGISTRATE JUDGE: It's going to be a
20 significant consideration. I'm very sensitive to it. I was
21 very sensitive to it when I reviewed the materials.

22 MR. GLITZENSTEIN: And along those lines, Your
23 Honor, we do have a --

24 THE MAGISTRATE JUDGE: And you remember, I
25 reviewed all those documents in terms of work product

1 privilege.

2 MR. GLITZENSTEIN: And in that regard, Your Honor,
3 I did want to make clear to the Court we do, for example,
4 have a contemporaneous memo that we sent out to the clients.
5 We believe we would be willing to make that available to
6 Your Honor for in camera review, because I think it reflects
7 what we think was a conscientious effort to go about doing
8 what Judge Sullivan told us to do. We just wanted to make
9 it clear that we think that one aspect of this would have to
10 be Your Honor's understanding of why the Plaintiffs did what
11 they did and the efforts made to look for every single
12 document that we deemed to be subject to Judge Sullivan's
13 order.

14 THE MAGISTRATE JUDGE: I'm very sensitive to the
15 fact that there are attorney-client privilege and work
16 product privileges here that are pertinent.

17 MR. GLITZENSTEIN: And I just wanted to make clear
18 that I don't know what the best way to deal with this here
19 is, Your Honor, but to the extent Your Honor would want to
20 look at our materials in camera to see what they reflected
21 in terms of our instructions to our clients, to avoid having
22 our clients be asked questions on the stand about what the
23 lawyer said to them, while at the same time giving Your
24 Honor some assurance that this was done in a thorough way,
25 I think that's at least an issue for consideration.

1 THE MAGISTRATE JUDGE: We'll have to consider
2 that.

3 You're not claiming any kind of waiver of these
4 privileges, are you?

5 MR. SIMPSON: I think it's dependent entirely on
6 what they did and how they went about complying with this
7 order, Your Honor. I mean, when a Judge orders you to do
8 something, you need to set it up in a way that you can prove
9 you complied. If you decide to use privileged materials,
10 you may be doing so at your risk, so we'll just have to see.

11 THE MAGISTRATE JUDGE: I think that's probably
12 right.

13 MR. GLITZENSTEIN: Well, again, we're not -- all
14 we're saying is that part of the analysis I think would have
15 to be why did the Plaintiffs search for the documents that
16 they did, and again, this goes back to our point that Judge
17 Sullivan drew a line between --

18 THE MAGISTRATE JUDGE: I understand.

19 MR. GLITZENSTEIN: -- what was pertinent and what
20 wasn't pertinent. So to the extent Your Honor believes that
21 reviewing that kind of material would be critical, I just
22 wanted to make it clear that we can discuss with the Court
23 how best to go about doing that.

24 THE MAGISTRATE JUDGE: Certainly.

25 MR. GLITZENSTEIN: So I think with those caveats,

1 and our position on Mr. Rider and -- it's not clear to me
2 how we resolve --

3 THE MAGISTRATE JUDGE: Rider's not your problem.
4 It's his problem.

5 MR. GLITZENSTEIN: Right.

6 THE MAGISTRATE JUDGE: He's got to get Rider here.
7 I don't know how he does that, but he's got to get him here.

8 MR. GLITZENSTEIN: On the 1099 --

9 THE MAGISTRATE JUDGE: Or he's stuck with the
10 deposition. There's nothing I can do about that.

11 MR. GLITZENSTEIN: Right. I mean, the 1099s they
12 have, so I'm hoping that that's off the table and we don't
13 have to pursue that issue any further.

14 THE MAGISTRATE JUDGE: Well, talk to them about
15 that. If it isn't, we'll grapple with it. Just make sure
16 you give me a date.

17 Thank you.

18 (Whereupon, the proceedings were concluded.)

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