UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

MOTION TO COMPEL THE DEPOSITION TESTIMONY OF TOM EUGENE RIDER, THE ANIMAL PROTECTION INSTITUTE AND THE WILDLIFE ADVOCACY PROJECT AND FOR COSTS AND FEES

Defendant Feld Entertainment, Inc. ("FEI") hereby moves to compel the testimony of (1) Plaintiff Tom Eugene Rider ("Rider"); (2) Plaintiff the Animal Protection Institute ("API"); (3) and third-party Wildlife Advocacy Project ("WAP") as to questions that remain unanswered from prior depositions.[1] FEI further moves for costs and fees related to the filing of this motion pursuant to Fed. R. Civ. P. 30(d)(4) and Fed. R. Civ. P. 37(a)(4).

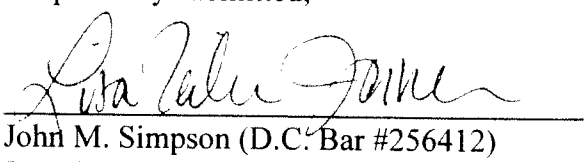
The reasons supporting this Motion are set forth more fully in the accompanying Memorandum in Support of Motion to Compel the Deposition Testimony of Tom Eugene Rider, the Animal Protection Institute and the Wildlife Advocacy Project and for Costs and Fees.

WHEREFORE, FEI requests that its motion be granted.

[1] In a status telephone hearing before Magistrate Judge Facciola on February 7, 2008, the Court instructed FEI to file a consolidated motion to compel for Rider, API and WAP.

Dated this 15th day of February, 2008.

Respectfully submitted,



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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

MEMORANDUM IN SUPPORT OF MOTION TO COMPEL THE DEPOSITION TESTIMONY OF TOM EUGENE RIDER, THE ANIMAL PROTECTION INSTITUTE AND THE WILDLIFE ADVOCACY PROJECT AND FOR COSTS AND FEES

Defendant Feld Entertainment, Inc. ("FEI") has moved to compel the testimony of (1) Plaintiff Tom Eugene Rider ("Rider"); (2) Plaintiff the Animal Protection Institute ("API"); and (3) third-party Wildlife Advocacy Project ("WAP") as to questions that remain unanswered from depositions conducted in December 2007 and January 2008. Counsel for plaintiffs and counsel for WAP improperly instructed the deponents not to answer questions based on erroneous – and self-serving – interpretations of Judge Sullivan's 8/23/07 Order (Docket No. 178) ("Order") and inappropriate claims of privilege. The information sought by FEI is discoverable and neither plaintiffs nor WAP have posited a proper objection or claim of privilege justifying the deponents' failure to comply with Fed. R. Civ. P. 30. The Court, therefore, should order Rider, API and WAP to complete their depositions within ten (10) days of its order and award FEI costs and fees related to filing this Motion.

ARGUMENT

The Federal Rules authorize "discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party." Fed. R. Civ. P. 26(b)(1). When discovery proceeds by deposition "[a]ll objections made at the time of the examination ... shall be noted ... upon the record of the deposition; but the examination shall proceed, with the testimony being taken subject to the objections." Fed. R. Civ. P. 30(c). The circumstances under which counsel may instruct a deponent not to answer a question are specific and limited. "A person may instruct a deponent not to answer ***only*** when necessary to preserve a privilege, to enforce a limitation directed by the court, or to present a motion under Rule 30(d)(4)." Fed. R. Civ. P. 30(d)(1) (emphasis added). It is evident that none of counsel's instructions at issue here implicates any privilege or limitation on discovery established previously by the Court. Instead, counsel for the deponents obstructed FEI's depositions with frivolous assertions of privilege and objections rooted in nonsensical interpretations of a clear Order of this Court.[2]

I. RIDER'S REFUSAL TO TESTIFY WAS UNWARRANTED AND HE MUST PRODUCE ADDITIONAL TESTIMONY

FEI deposed plaintiff Tom Eugene Rider on December 18-19, 2007. See Ex. 1, Rider Deposition Transcript ("Rider Dep."). During that deposition, **REDACTED**

[2] Thus, the instructions not to answer could have been appropriate only if counsel were to have filed a motion pursuant to Fed. R. Civ. P. 30(d)(4), which provides that:

> At any time during a deposition, ***on motion of a party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party***, the court in which the action is pending or the court in the district where the deposition is being taken may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in Rule 26(c). If the order made terminates the examination, it may be resumed thereafter only upon the order of the court in which the action is pending. ***Upon demand of the objecting party or deponent, the taking of the deposition must be suspended for the time necessary to make a motion for an order.*** The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

Fed. R. Civ. P. 30(d)(4) (emphases added). None of the grounds set forth in Rule 30(d)(4) was asserted as a basis for any of the instructions not to answer, and neither plaintiffs nor WAP has filed a motion for protective order.

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Cf. Google, Inc. v. American Blind & Wallpaper Factory, Inc., No. C 03-5340 (N.D. Ca. April 27, 2007) (Docket No. 309) (slip op.) (attached hereto as Ex. 2) ("American Blind's concern about attorney-client privilege was unwarranted because it did not need to disclose attorney-client communications to establish the nature and extent of its preservation and collection efforts."). Indeed, the record makes clear that

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Cf. id. ("American Blind need not disclose *any* of the communications between its counsel and its employees. Rather, the employees should state what they *did* with respect to preserving and collecting documents."); In re eBay Antitrust Litigation, No. C 07-01882, 2007 U.S. Dist. LEXIS 75498, at *7-8 (N.D. Ca. Oct. 2, 2007) ("To the extent ... that eBay is seeking to foreclose *any* inquiry into the contents of [its document retention notices] at deposition or through other means, such a position is not tenable. Although plaintiffs may not be entitled to probe into what exactly eBay's employees were told by its attorneys, they are certainly entitled to know what eBay's employees are doing with respect to collecting and preserving [electronically stored information]."). Rider's factual testimony about

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REDACTED Cf. In re eBay Antitrust Litigation, 2007 U.S. Dist. LEXIS 75498, at *8 ("[W]hile plaintiffs should not inquire specifically into how the [document retention notices] were worded or to how they described the legal issues in this action, ***plaintiffs are entitled to know what kinds and categories of [electronically stored information] eBay employees were instructed to preserve and collect, and what specific actions they were instructed to undertake to that end."***) (emphasis added). Rider, therefore, should be compelled to testify as to:

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See In re Lindsay, 148 F.3d 1100, 1103 (D.C. Cir. 1998) ("The attorney-client privilege protects confidential communications made between clients and their attorneys when the communications are for the purpose of securing legal advice or services.").

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See Compl. ¶ 22 ("Mr. Rider would very much like to visit the elephants in defendants' possession so that he can continue his personal relationship with them, and enjoy observing them. ") & ¶ 23 ("Because of his close personal relationship with the elephants, Mr. Rider nevertheless still makes efforts to see the animals ... . Because of his love of these animals, Mr. Rider continues to visit them, and will continue to do so in the future, even though, each time he does so, he suffers more aesthetic injury.")

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Rider bears the burden of demonstrating why the attorney-client privilege should apply. See Federal Trade Comm'n v. TRW, Inc., 628 F.2d 207, 213 (D.C. Cir. 1980) ("The party that asserts the existence of the attorney-client privilege possesses the burden of demonstrating its applicability."). Counsel's conclusory assertion that the attorney-client privilege applies is of no moment. See Cobell v. Norton, 213 F.R.D. 16, 23 (D.D.C. 2003) ("Not only the privileged relationship but all essential elements of the privilege must be shown by competent evidence and cannot be discharged by merely conclusory or ipse dixit assertions.") (internal quotations and citation omitted). Rider cannot make such a showing and therefore, should be compelled to testify as to REDACTED

II. THE ANIMAL PROTECTION INSTITUTE'S REFUSAL TO TESTIFY WAS UNWARRANTED AND IT MUST PRODUCE ADDITIONAL TESTIMONY

FEI conducted a Rule 30(b)(6) deposition of the Animal Protection Institute on January 29-30, 2008. See Ex. 3, API Deposition Transcript ("API Dep."). At that deposition,

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These instructions not to answer were improper. In the first place, regardless of what the contours of Judge Sullivan's order of August 23, 2007 may be with respect to documents and answers to interrogatories, there is nothing in that order that forecloses a deposition question about **REDACTED** Indeed, the Court has required FEI's witnesses to answer deposition questions under similar circumstances. For example, the Court granted summary judgment in favor of FEI on all of its captive-bred wildlife ("CBW") elephants and, in so doing specifically ruled that none of the Rule 34 inspections would include such animals. See Order at 10 ("Consistent with the Court's ruling on the motion for summary judgment, however, plaintiffs are only entitled to inspect those elephants which are not subject to a captive-bred wildlife permit."). Notwithstanding the fact that CBW elephants are out of the case and that the Court had deemed them irrelevant as a matter of law for at least one mode of discovery, the Court ruled that it was not proper for counsel for FEI to instruct a witness not to answer deposition questions about the CBW elephants on the basis of these Court orders. See Order (11/5/07) (Docket No. 220). If FEI's instructions not to

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answer were not appropriate, then neither are the instructions that counsel for plaintiffs gave API. The circumstances are indistinguishable.

Furthermore

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The Court specifically ordered that all payment documents and information be produced even though media strategies need not be. See Order at 4 ("The Court finds that Rider's funding for his public education and litigation efforts related to defendants is relevant."); id. at 6 (ordering 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"); & id. at 7 ("plaintiffs need not produce documents or further information related to any media or legislative strategies") (emphasis added).

Counsel's improper instructions not to answer that are now at issue are yet another example of plaintiffs' nonsensical – and self-serving – interpretation of the Court's Order to mean that some "payment" information – ***all*** of which they have been ***ordered*** to produce – is encompassed by the "media strategy" exception. They do not deny that they are hiding payment information under the veil of a so-called "media strategy." See Ex. 4, Hearing Transcript (1/8/08) at 9-10 ("The legal dispute is, what did Judge Sullivan mean in his order by 'media strategy' and what exactly did he mean by 'documents concerning payments to Mr. Rider.' ... Now, Plaintiffs believe we drew the line absolutely correctly ... ."). In an effort to evade the production of potentially damaging information, plaintiffs have posited the incredulous argument that the language of the Court's Order is in some way ambiguous. See id. at 11 ("[T]he most you

have in this case is a legitimate disagreement among the parties as to exactly where Judge Sullivan drew the line between media strategy, on the one hand, and payments to Mr. Rider on the other hand, as to which we have produced all pertinent documents.") (asking the Court to determine "whether or not there's any ambiguity in the order").

"All responsive documents and information concerning payments to Tom Rider" means just that: "All responsive documents and information concerning payments to Tom Rider." Order at 6 (emphasis added). Plaintiffs' efforts to play with the plain English wording of the Court's Order are repugnant. Plaintiffs, including API, cannot ignore the Court's Order by euphemistically labeling information related to payments as "media strategy" – and thereby hide discovery from FEI. The Court has ordered the production of any and all information concerning the Rider payments – including how those payments were apportioned among the organizational plaintiffs.

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III. WAP'S REFUSAL TO TESTIFY WAS UNWARRANTED AND IT MUST PRODUCE ADDITIONAL TESTIMONY

FEI issued a subpoena in November 2007 to take the Rule 30(b)(6) deposition of WAP, an allegedly non-profit organization founded by plaintiffs' counsel, Eric Glitzenstein and Katherine Meyer, and operated by them out of their law firm's offices. Despite the fact that

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However, this second deposition was interfered with by an improper instruction not to answer and with repeated, yet inaccurate, assertions by the witness that certain information was not

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It is elementary, both in this Circuit and others, that it is improper for a witness to refuse to answer a deposition question (or to be instructed not to answer) on grounds of relevance. See Pro-Football, Inc. v. Harjo, No. 99-1385, 2003 U.S. Dist. LEXIS 2917, at *2 n.1 (D.D.C. Mar. 4, 2003) (Facciola, J.) (counsel's instruction to witness not to answer questions that were supposedly "beyond the scope" of Court's prior order constituted a "practice highly disfavored by the Federal Rules of Civil Procedure"); Pilates Inc. v. Georgetown Bodyworks Deep Muscle Massage Centers, Inc., 201 F.R.D. 261, 262 (D.D.C. 2000) ("[W]here there is no claim of privilege in relation to questions asked on deposition, Rule 30(d)(1) and Rule 26 relating to the scope of discovery should be strictly applied."); Drew v. Sulphite & Paper Mill Workers, 37 F.R.D. 446, 449-50 (D.D.C. 1965) ("[T]he better practice is for attorneys to note their objections, but permit their clients to answer questions leaving resolution of the objection to pre-trial or trial.").

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In addition, even if the Court's Order were construed as a limit on deposition questions, it

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The ***only*** areas excluded by Judge Sullivan's Order are: (1) information reflecting plaintiffs' or WAP's media strategy, see Order at 9; and (2) the identity of donors that are not plaintiffs or counsel in this case, see id. at 8-9. WAP has not argued, and indeed cannot argue, tha

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Judge Sullivan has explicitly ordered WAP and plaintiffs to produce ***all*** responsive documents and information concerning payments to Tom Rider. Id. at 8. WAP's refusal to answer the questions at deposition, therefore, directly contradict the language in Judge Sullivan's prior Order.

WAP, moreover, cannot not refuse to testify about

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. The Court permitted WAP to redact the "identity" of unknown individual donors because of plaintiffs' assertion of freedom of association concerns. See WAP's Opp. to FEI's Mot. to Compel (9/25/06) (Docket No. 93) at 22 ("[T]he identities of individual contributors and activists who choose to associate with WAP are clearly covered by a well-recognized First Amendment privilege."). No such concern can arise with respect to a payor whose identity is already well known to FEI. Furthermore, withholding heretofore undisclosed donor identity is all the Order permits. It in no way relieves WAP of its

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In fact, the Court Order compels the opposite. See Order at 8 ("In ***producing*** such information, WAP may ***redact*** the ***names and identifying information*** of individual donors or organizations who are not parties to this litigation, attorneys for any of the parties or employees or officers of any of the plaintiff organizations or WAP.") (ordering WAP to produce "***any*** non-

privileged documents or information that it has not already provided, with the exceptions discussed below, related to payments or donations for or to and expenses of Tom Rider.") (emphases added).

Even if the Court were to modify its prior Order and permit WAP to withhold all

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HSUS and FFA merged and/or otherwise "combined" more than three years ago. Ex. 7, Press Release, The HSUS and the Fund for Animals Join Forces (11/22/04). FFA's participation

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represented to FEI that it has made payments to WAP, for Rider, on behalf of FFA. Ex. 8, Stowe letter to Gasper (12/17/07) ("these were check requests issued by the FFA that were simply processed through the HSUS accounting department"). WAP, therefore, must testify concerning

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30(b)(6) notice. In such a case, the deponent is no longer a corporate designee, but merely another fact witness, ***and he can respond to any question about which he has personal knowledge, within the general limits of Fed. R. Civ. P. 26.***" Swangain v. Aon Corp., No. 05-

[9] Although both Mr. Glitzenstein and Ms. Meyer have taken offense to providing testimony in this case given the fact that they are serving as counsel for plaintiffs, it is a situation of their own making. By organizing and managing WAP and the substantial payments to Mr. Rider (in which they are lead counsel), plaintiffs' counsel has willingly and deliberately blended the roles of counsel and WAP officers and this structure should not penalize FEI from discovering relevant information of the business dealings of WAP, particularly how they funded Rider.

326BS, 2006 U.S. Dist. LEXIS 63964, at *3 (S.D. Miss. Sept. 6, 2006) (emphasis added); see also Detoy v. City and Cty. of San Francisco, 196 F.R.D. 362, 367 (N.D. Ca. 2000) ("Rule 30(b)(6) cannot be used to limit what is asked of a designated witness at deposition."); Overseas Private Investment Corp. v. Mandelbaum, 185 F.R.D. 67, 68 (D.D.C. 1999) (Facciola, J.) ("[O]nce a corporation has produced someone capable of speaking to the matters described in the notice of deposition, the scope of the inquiry is guided only by the general discovery standard of Fed. R. Civ. P. 26(b)(1).") ("I am hard pressed to see why corporate officials should have an immunity from ordinary discovery that no one else could claim."). Here, the information sought

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See Overseas Private Investment Corp., 185 F.R.D. at 69 ("[U]pon being deposed, witnesses must provide all the information he has which is relevant or likely to lead to relevant

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capacity.[10] Cf. id. ("I cannot excuse Hanson from this responsibility merely [because] he works for a corporation.").

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[10] "[C]ounsel may note that answers to questions beyond the scope of the Rule 30(b)(6) designation are not intended as the answers of the designating party and do not bind the designating party. Prior to trial, counsel may request from the trial judge jury instructions that such answers were merely the answers or opinions of individual fact witnesses, not admissions of the party." Detoy, 196 F.R.D. at 367.

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client privilege. See United States v. Fago, 238 F.R.D. 3, 11 (D.D.C. 2006 (Facciola, J.) ("[T]he privilege applies to only communications made to an attorney in his capacity as legal advisor. ... Relatedly, communications by a corporation with its attorney, who at the time is acting solely in his capacity as a business advisor, would not be privileged.") (internal citations and quotations omitted); United States v. Philip Morris, Inc., No. 99-CV-2496, 2004 U.S. Dist. LEXIS 27026 (D.D.C. June 25, 2004) ("The privilege applies only to legal advice and not to business opinions ... or public relations advice.") (citation omitted). Furthermore, plaintiff Tom Rider was

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corporate in-house counsel attempts to cloak a routine business decision in the attorney-client privilege; such practice is not warranted and cannot be used as a strategy to block the disclosure of otherwise discoverable information. See, e.g., Neuder v. Battelle Pacific Northwest Nat'l Lab., 194 F.R.D. 289, 293-95 (D.D.C. 2000) (in-house counsel's participation in personnel committee meeting was merely incidental to primary business function and therefore not privileged).

WAP, therefore, should be compelled to testify concerning the following four subject

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CONCLUSION

For all of the reasons stated above, Feld Entertainment, Inc. respectfully requests that its Motion to Compel the Deposition Testimony of Tom Eugene Rider, the Animal Protection Institute and the Wildlife Advocacy Project and for Costs and Fees be granted.

This 15th day of February, 2008.

Respectfully submitted,

John M. Simpson (D.C. Bar #256412)
Joseph T. Small, Jr. (D.C. Bar #926519)
Lisa Zeiler Joiner (D.C. Bar #465210)
Michelle C. Pardo (D.C. Bar #456004)
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Counsel for Defendant Feld Entertainment, Inc.

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COURT ORDER

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CERTIFICATE OF SERVICE

I, Lisa Zeiler Joiner, do hereby certify that on February 15, 2008 the foregoing **Motion to Compel the Deposition Testimony of Tom Eugene Rider, the Animal Protection Institute, and the Wildlife Advocacy Project and for Costs and Fees** was served on the following in the manners stated below:

FILED PUBLICLY IN REDACTED/UNSEALED FORM VIA ECF to:

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

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

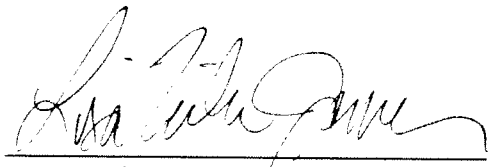
Clerk's Office
U.S.D.C. for the District of Columbia
E. Barrett Prettyman Courthouse
333 Constitution Ave., N.W.
Washington, D.C. 20001

SERVED VIA HAND DELIVERY UNDER SEAL IN UNREDACTED FORM to:

Katherine Meyer, Esq.
Meyer Glitzenstein & Crystal
1601 Connecticut Ave., N.W., Ste. 700
Washington, D.C. 20009
Counsel for Plaintiffs

COURTESY COPY TO CHAMBERS OF HON. JOHN M. FACCIOLA UNDER SEAL IN UNREDACTED FORM

Chambers
U.S.D.C. for the District of Columbia
E. Barrett Prettyman Courthouse
333 Constitution Ave., N.W.
Washington, D.C. 20001



Lisa Zeiler Joiner

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

[PROPOSED] ORDER

Upon consideration of Defendant Feld Entertainment, Inc.'s Motion to Compel the Deposition Testimony of Tom Eugene Rider, the Animal Protection Institute and the Wildlife Advocacy Project and for Costs and Fees ("Motion"), it is by the Court, this _____ day of _____, 2008, hereby:

ORDERED that the Motion is GRANTED; and it is further

ORDERED that Plaintiff Tom Eugene Rider ("Rider") shall reappear for the completion of the deposition noticed by Defendant within ten (10) days of this Order and shall answer all questions that were posed to him by counsel for Feld Entertainment, Inc. at his December 18-19, 2007 deposition and to which an objection and instruction was interposed by counsel, as well as any related follow-up questions; and it is further

ORDERED that Plaintiff the Animal Protection Institute ("API") shall reappear for the completion of the deposition noticed by Defendant within ten (10) days of this Order and shall answer all questions that were posed to it by counsel for Feld Entertainment, Inc. at its January

29-30, 2008 deposition and to which an objection and instruction was interposed by counsel, as well as any related follow-up questions; and it is further

ORDERED that third-party Wildlife Advocacy Project ("WAP") shall reappear for the completion of the deposition noticed by Defendant within ten (10) days of this Order and shall answer all questions that were posed to it by counsel for Feld Entertainment, Inc. at its December 21, 2007 and January 29, 2008 deposition and to which an objection and instruction was interposed by counsel, as well as any related follow-up questions; and it is further

ORDERED that Plaintiffs shall pay the costs and fees to Feld Entertainment, Inc. for the preparation of this Motion; and it is further

ORDERED that Feld Entertainment, Inc. shall submit a statement of its fees and expenses within thirty (30) days of the date of this Order.

_____
UNITED STATES DISTRICT JUDGE