UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

REPLY 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 deposition testimony of (1) Plaintiff Tom Eugene Rider ("Rider"); (2) Plaintiff the Animal Protection Institute ("API"); and (3) third-party Wildlife Advocacy Project ("WAP"). See Motion to Compel Deposition Testimony of Tom Eugene Rider, The Animal Protection Institute and the Wildlife Advocacy Project and For Costs and Fees (2/15/08) (Docket No. 256) ("Motion"). Neither Plaintiffs' Opposition (3/7/08) (Docket No. 273) ("Pl. Opp.") nor WAP's Opposition (3/7/08) (Docket No. 275) ("WAP Opp.") sets forth proper objections or claims 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 its Motion.

ARGUMENT

I. RIDER MUST PROVIDE ADDITIONAL TESTIMONY

Rider must demonstrate the applicability of the attorney-client privilege to the deposition testimony he has refused to provide. 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."). Rider, however, has not done so. Specifically, Rider has failed to demonstrate how the privilege applies

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. See Cobell v. Norton, 213 F.R.D. 68, 72 (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).

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See In re Ebay Antitrust Litigation, No. C 07-01882, 2007 U.S. Dist. LEXIS 75498, at *7-8 (N.D. Ca. Oct. 2, 2007) ("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")***.

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Cf. Cobell v. Norton, 213 F.R.D. 68, 73 (D.D.C. 2003) (communications themselves are protected by the attorney-client privilege) (cited by plaintiffs).[1] The record makes that abundantly clear.

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See Lightfoot v. Rosskopf, 374 F. Supp. 2d 69, 72 (D.D.C. 2005) (Facciola, J.) (ordering plaintiff to provide a privilege log with: "1) a ***description*** of the document, 2) the document's ***author***, 3) the document's ***intended recipient***, 4) ***the date of the document***, and 5) the specific privilege or privileges claimed.") (emphases added).

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[1] The only other case cited by plaintiffs on this issue, Tri-State Hosp. Supply Corp. v. United States, 238 F.R.D. 102, 105 (D.D.C. 2006), is inapposi

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addressed whether the crime-fraud excepti e attorney-client privilege over certain documents; the Court's opinion focused on whether the documents contained "exculpatory evidence." Id. The documents at issue did not. Id.

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See In re Ebay Antitrust Litigation, 2007 U.S. Dist. LEXIS 75498, at *7-8 ("plaintiffs are entitled to know ***what kinds and categories of [electronically stored information]*** eBay employees ***were instructed*** to preserve and collect") (emphases added).

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Cf. Google, Inc. v. American Blind & Wallpaper Factory, Inc., No. 03-5340 (N.D. Ca. April 27, 2007) (slip op.) at 2 (ordering not only employees to provide declarations as to their document preservation and collection efforts, but also any attorney who personally participated in document preservation and collection to do the same).[2]

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[3] For example, it is clear that Rider saved only 27 of the 88 cover letters that counsel for plaintiffs wrote to him (on WAP letterhead) to accompany the money that was sent to Rider. See Ex. 11, Hearing Tr. (2/26/08) at 170-73, 179-80 & Pl. Hearing Ex. 6. Furthermore, almost all of the letters saved are dated after March 1, 2007, which

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Mr. Rider has alleged as a plaintiff that he has been injured due to his alleged inability to "visit with [FEI's] elephants" and "continue his personal relationship with them," yet

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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 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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Again, plaintiffs' conclusory assertion of the privilege fails to demonstrate why it should apply. See Federal Trade Comm'n, 628 F.2d at 213 ("The party that asserts the existence of the attorney-client privilege possesses the burden of demonstrating its applicability.").

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The Court should order Mr. Rider to appear for the purpose of concluding his deposition and answering FEI's questions, and it should also order Mr. Rider to do so without discussing his testimony in advance.

II. API MUST PROVIDE ADDITIONAL TESTIMONY

A. Judge Sullivan Unequivocally Held That *All* Payment Information is Relevant

API's refusal to testify regarding

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of FEI's Motion to Enforce the Court's 8/23/07 Order and the evidentiary hearings held before this Court on February 26 and March 6, 2008: ***Plaintiffs openly admit that they are withholding certain payment documents and information under the guise of Judge Sullivan's narrow "media strategy" exception.*** See Ex. 11, Hearing Tr. (2/26/08) at 21 ("But the point that Judge Sullivan is protecting there is quite narrowly defined.").[4] Plaintiffs are flatly refusing to comply with the Court's 8/23/07 Order because it ***"seems"*** and ***does not make "legal or logical sense"*** to them that when Judge Sullivan said "all responsive documents and information concerning payments" he actually meant "all responsive documents and information concerning payments." See Pl. Opp. at 16 n. 6 ("Accordingly, when Judge Sullivan held that "any documents, communications, or information concerning the media or legislative strategies of the plaintiffs" could be withheld on relevance grounds ... and that 'plaintiffs need not produce documents or further information related to any media or legislative strategies or communications ... **REDACTED**

(emphases and internal citations omitted).[5]

Plaintiffs' argument is a brazen affront to this Court. If plaintiffs had any uncertainty about the contours of the 8/23/07 Order, they should have sought clarification from the Court. Indeed, plaintiffs have done so in the past. See Emergency Motion Clarification September 25, 2007 Order (9/26/07) (Docket No. 196). Yet, in the almost seven months since the Court issued the Order, plaintiffs have never sought clarification. Instead, plaintiffs unilaterally decided to

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4 This precise issue surfaced several times during the February 26 and March 8 hearings.

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: Court's November 5, 2007 Order overruled FEI's objections, based upon on a prior order that placed limits on discovery under Rule 34, to deposition questions about captive-bred ("CBW") elephants. See Order (11/5/07) (Docket No. 220). The same result should follow here as to

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withhold documents from FEI, hoping that FEI would not catch them at their game. None of these conference calls discussing Rider's funding was identified in the interrogatory responses submitted by the plaintiffs in response to the August 23, 2007 Order. See FEI Hearing Ex. 19 (ASPCA's Supp. Interrog. Resp. Nos. 16 & 19 (9/26/07 & 10/26/07)); FEI Hearing Ex. 23 (AWI's Supp. Interrog. Resp. Nos. 16 & 19 (9/24/07)); FEI Hearing Ex. 27 (FFA's Supp. Interrog. Resp. Nos. 16 & 19 (9/24/07)); FEI Hearing Ex. 30 (API's Supp. Interrog. Resp. Nos. 16 & 19 (9/24/07)).

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Plaintiffs' post-hoc, convoluted interpretation of the Court's 8/23/07 Order is nothing more than an attempt to hide their unwillingness to comply with that Order (and to produce troubling information) behind legalese and novel definitions of plain and simple words.

All of the payment documents and ***all*** of plaintiffs' communications about the payments are crucial to FEI's defense of the ESA Action. The purpose of the payments bears not only upon Rider's credibility as an alleged witness of elephant mistreatment, but also upon the credibility of his standing allegations without which this case would not exist. Despite plaintiffs' repeated argument to the contrary, the role of the organizational plaintiffs in making the payments to Rider is a key facet of impugning his (and their) credibility. "[T]he financing of [Rider's] public campaign regarding the treatment of elephants is relevant to his credibility in this case." Order (8/23/07) (Docket No. 178) ("Order") at 5. FEI, therefore, "is entitled to information concerning the payments to Tom Rider and the role of the organizational plaintiffs and WAP in making those payments." Id. at 8. See also id. at 4 ("The Court finds that Rider's funding for his public education and litigation efforts related to defendants is relevant.").

Moreover, while plaintiffs continue to protest that FEI has documents sufficient to show the amount of each payment, and even asked such lines of questioning at the evidentiary hearings, what is key here is the ***purpose*** of the payments. Compare Order at 6 (plaintiffs must produce "all responsive documents and information concerning payments") with Ex. 11, Hearing Tr. (2/26/08) at 75 (Plaintiffs' counsel asking the witness not whether ASPCA searched for all documents concerning payments but whether ASPCA searched for "all documents that are ***sufficient to reflect payments***"). Whether the payments are for legitimate work and expenses (as plaintiffs allege) or whether they are, in whole or in part, for Rider's participation in this lawsuit (as FEI alleges) should be reflected in the documents and information – **REDACTED** – regarding the payments. If Judge Sullivan was of the opinion that the amount of the payments was the only relevant information, then, he could have ordered plaintiffs to provide a declaration stating the amount of such payments, or ordered plaintiffs to produce all documents sufficient to show such payments. But the Order is far broader: plaintiffs were unequivocally ordered to produce "***all payment documents.***" In fact, Judge Sullivan expressly compelled WAP to produce additional payment documents notwithstanding that it already had provided FEI with a list of its payments to Rider. See Order at 11.[6] See also Pl. Opp. to FEI's Mot. to Compel Rider (4/19/07) (Docket No. 138) at 20, 24; Pl. Opp. to FEI's Mot. to Compel Org. Pl. (6/26/07) (Docket No. 156) at 14, 16, 21 (plaintiffs arguing in

[6] The only documents WAP was permitted to withhold in light of its "chart"were the monthly bank records and financial statements, which it explained would be technically relevant to the payment issue but would require massive redactions and be duplicative of the information contained in the chart. It is beyond credulity that Judge Sullivan would expressly permit WAP to withhold certain payment documents if he did not intend for WAP (and plaintiffs) to produce all of the other documents concerning payments.

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opposition to FEI's motions to compel that no more payment documents need be produced because FEI already knew the amount of money given to Rider).[7]

Plaintiffs' theory makes no sense. The argument that the Court only compelled them to produce the amount of their payments to Rider is a rehash of their opposition to FEI's motion to compel that lead to the August 23 Order, which they lost. If plaintiffs' claim were true, the Court would have accepted (not rejected) plaintiffs' argument that no additional documents need be produced because the ***amount*** of all payments had been disclosed. Moreover, the reason payments to Rider are relevant is because they could be used to impugn his credibility and bear on his standing. While plaintiffs vehemently argue that the payments have not influenced Rider's testimony or his decision to remain in this litigation, they also seek to conceal everything about the payments but for the actual dollar amount. The amount of the payments, however, is just one component of why the funding is relevant.

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FEI has managed, without any cooperation by plaintiffs, to piece together much of the payment jigsaw as to the amounts and timing.

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FEI should not have to come back repeatedly to this Court to force plaintiffs to divulge the information that they have already been ordered to produce.

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[7] Not only was plaintiffs' argument rejected by Judge Sullivan, the factual predicate of the argument was false: Plaintiffs had not disclosed all of the payments to Rider. For example, only after being compelled to produce additional documents did plaintiffs finally disclose payments (totaling approximately $10,000) that had been filtered from the organization plaintiffs to Rider through counsel's law firm. See, e.g., Pl. Hearing Ex. 1 (A01203-20: MGC invoices to ASPCA).

Yet, plaintiffs now ask the Court to believe that the Court only compelled them to produce the amount of the payments (i.e., the circumstantial evidence of the payments' purpose) but not the

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This is just a further attempt to conceal material already deemed relevant and to disregard the Court's prior Order.

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B. There Is No Applicable First Amendment Privilege

Plaintiffs' interpretation of the Court's August 23, 2007 Order, no matter how bizarre it may be, has no bearing upon the instant motion. API may not refuse to provide deposition testimony on the basis that plaintiffs believe a prior Court Order did not compel written discovery on the same issue. See Order (11/5/07) (Docket No. 220) (ordering the deponent, Jacobson, to provide testimony on CBW elephants that had been held to be excluded from inspections and out of the case on summary judgment). Nonetheless, plaintiffs' interpretation is beyond novel and it ignores the history of this case leading up to the Court's Order.

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In fact, Judge Sullivan rejected that argument notwithstanding plaintiffs' numerous attempts to brief it.[8]

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[8] That is, perhaps, why plaintiffs again feel compelled to brief for the Court their belief that the First Amendment protects their
Plaintiffs already advanced these arguments and lost. FEI is at a loss to understand why, at this stage, plaintiffs continue to make arguments that were made several times before and rejected in each instance.

FEI previously argued that there is no applicable First Amendment privilege in the following briefing, all of which was ruled upon in the Court's 8/23/07 Order: Motion to Compel Documents Subpoenaed from the Wildlife Advocacy Project (9/7/06) (Docket No. 85) at 21-24; Reply in Support of Motion to Compel Documents

It is important to recall that the organizational plaintiffs did not even object at first to FEI's discovery requests concerning communications on First Amendment grounds. See, e.g. See FEI Hearing Ex. 17 (ASPCA's First Resp. to FEI's Interrog. Nos. 16 & 19) (6/9/04)) (no objection raised as to First Amendment); FEI Hearing Ex. 21 (AWI's First Resp. to FEI's Interrog. Nos. 16 & 19) (6/9/04)) (no objection raised as to First Amendment); FEI Hearing Ex. 25 (FFA's First Resp. to FEI's Interrog. Nos. 16 & 19) (6/9/04)) (no objection raised as to First Amendment) (collectively "Original Responses"). Rather, the organizational plaintiffs sought to conceal their communications about payments by asserting the attorney-client privilege for communications that happened outside the presence of counsel and that concerned payments to Rider. See Original Responses (asserting the attorney-client privilege). Simply put, if the payments to Rider are truly for a "media campaign" and not for participating in this litigation, there would be no attorney-client privilege attaching to these communications. Indeed, Tracy Silverman testified that Katherine Meyer participated in the funding conference calls in her WAP, not her MGC, capacity. See Ex. 11, Hearing Tr. (2/26/08) at 197 ("When Ms. Meyer has been participating in the conference calls when we've been talking about litigation she's been a member of Meyer, Glitzenstein & Crystal. On the occasion that Ms. Meyer sat on conference calls and we talked about media strategy it's my understanding she was a member of the Wildlife Advocacy Project.").

Almost three years after FEI's discovery requests were issued – and only after FEI challenged plaintiffs' other privilege claims – did the organizational plaintiffs actually object that

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Subpoenaed from the Wildlife Advocacy Project (10/3/06) (Docket No. 95) at 13-15; Motion to Compel Discovery From Plaintiff Tom Rider and For Sanctions, Including Dismissal (3/20/07) (Docket No. 126) at 22-25, 33-34; Reply in Support of Motion to Compel Discovery From Plaintiff Tom Rider and For Sanctions, Including Dismissal (5/7/07) (Docket No. 144) at 16-18; Motion to Compel Discovery from the Organizational Plaintiffs and API (5/29/07) (Docket No. 149) at 20-23; Reply in Support of Motion to Compel Discovery from the Organizational Plaintiffs and API (7/13/07) (Docket No. 159) at 8-12.

the communications sought by FEI's discovery requests were protected by the First Amendment because they involved "media strategy." With that objection, the organizational plaintiffs continued their "catch-us-if-you-can" game in which they asserted the attorney-client privilege and/or a First Amendment privilege for all of their communications in desperate hopes that they need not disclose their communications about payments. All of this maneuvering clearly was intended to conceal the organizational plaintiffs' communications with each other and their lawyers concerning payments to Rider. This elaborate dichotomy resulted in multiple motions to compel and elongated briefs. All of this briefing, however, resulted in an Order (despite plaintiffs' numerous attempts to hide their payment material) compelling plaintiffs to provide "all responsive documents and information concerning payments" to Rider. Just because Judge Sullivan ruled that plaintiffs' actual "media strategy" is irrelevant to this lawsuit does not mean that the Court agreed with plaintiffs that the communications about payments constitute "media strategy," let alone that such communications should be protected by the First Amendment. In fact, it means the opposite. Having argued strenuously that the First Amendment applied to their "media strategy" communications, plaintiffs were compelled by Court Order (which made no mention of communications being privileged under the First Amendment) to produce all payment-related documents and information.[9]

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[9] In fact, throughout all of the briefing associated with the motions to compel, plaintiffs and WAP argued that the identity of certain donors ***and*** the groups' communications about payments are irrelevant and protected by the First Amendment. Importantly, the Court held that disclosing the identity of certain donors "would be irrelevant and would tread on core First Amendment rights," Order at 9, but did not make a similar First Amendment comment as to "media" strategy communications themselves. The Order, therefore, leads any reasonable person to the logical conclusion that Judge Sullivan rejected plaintiffs' argument that the First Amendment cloaks in privilege communications about "media strategy." The First Amendment provides for the freedom ***of*** the press, not the freedom to discuss how you might use the press to further your own private interests. Ironically, plaintiffs themselves note that Judge Sullivan was familiar with the cases they now seek to rely upon. According to plaintiffs, however, the fact that Judge Sullivan cited one of the cases in the discussion concerning the identity of non-party donors means that he also meant to apply that case to the discussion concerning the plaintiffs' communications about payments. Plaintiffs are right about one thing: Judge Sullivan clearly was aware of the cases plaintiffs sought to rely upon.

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Plaintiffs have taken great unlicensed liberty with the meaning of "media strategy" and expanded it to the point of engulfing all of the payment information in an effort to shield it from production. The Order evidences no such intent. Otherwise, the Court would have just denied FEI's motion to compel.

The Court's August 23, 2007 Order cannot be used to shut down deposition testimony about a subject, even if that subject were deemed irrelevant for purposes of the Court's Order concerning written discovery. See Order (11/5/07) (Docket No. 220). Nonetheless, the Court's August 23, 2007 order actually makes clear that API must disclose

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st, the Court repeatedly stated that plaintiffs must disclose "all responsive documents and information concerning" the payments to Rider. See Order at 3, 6, 8. Importantly, the Court emphasized that this material "is relevant to [Rider's] credibility in this case." Id. at 5. See also id. at 4 ("The Court finds Rider's funding for his public education and litigation efforts related to defendants is relevant."). The only exception to this rule is that plaintiffs were permitted to redact the "identity" of any "source" of funding who is not a party or counsel in this case. Id. at 4, 8-9.

Plaintiffs' argument that the Order only requires the disclosure of documents sufficient to show the amount of Rider's payments fails. Pl. Opp. at 15. As described above, plaintiffs and WAP tried to avoid producing additional payment documents on the basis that FEI already knew the amount of payments to Rider. Yet, the Court compelled them to produce "all responsive documents and information" concerning payments. If the only thing relevant to Rider's

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credibility was the amount of the payments, the Court would not have compelled plaintiffs to produce any additional payment documents or information.[10]

Similarly flawed is plaintiffs' argument that the Court created an exception to the rule that plaintiffs must produce "all responsive documents and information" concerning payments such that plaintiffs need not produce payment-related material if it pertained to "irrelevant" media strategy. Pl. Opp. at 15. To believe that, however, one would have to believe that the Court, after noting several times that the payments to Rider were "relevant," then decided that communications about payments were "irrelevant." Such an interpretation is illogical. It makes no sense that the Court would rule that a topic is "relevant" and that all responsive documents and information concerning that topic must be produced while simultaneously ruling that communications about that "relevant" topic are "irrelevant."

It is abundantly clear that the Court attempted to cut-through the dichotomy created by plaintiffs. If a document, a piece of information, a communication, or any other form of evidence pertained to payments by the organizational plaintiffs to Rider or to the subject matter of this litigation, it was highly relevant and must be produced. If a document, piece of information, or communication did not concern payments or the subject matter of this litigation, then the Court concluded it must have pertained to "media strategy" and would be irrelevant to

[10] Importantly, the Court also granted FEI's motion to compel documents subpoenaed from HSUS despite HSUS's argument that it should not have to produce additional documents because it already gave FEI a list of its payments to Rider (via WAP). Order (12/3/07) (Docket Nos. 231-32). That Order, moreover, flatly contradicts plaintiffs' argument that communications about payments are "media" communications and subject to a First Amendment privilege. In December 2007, Judge Facciola explicitly stated that "Like Judge Sullivan, I find that Rider is a central player in this litigation" and he compelled HSUS to produce its payment-related documents. Consistent with FEI's and any other logical understanding of the Court's August 2007 Order, Judge Facciola explicitly drew the line that documents concerning payments must be produced while documents concerning media strategy need not be produced. Nowhere did the Court state, or imply, that communications about payments are not really documents concerning payments, but actually documents pertaining to media strategy. There are two Court orders directing parties to produce all documents concerning plaintiffs' payments to Rider. Plaintiffs, themselves, are the only ones who seem convinced that "all documents and information" concerning such payments does not include communications about such payments but is instead still limited to their "amounts only" definition argued in their initial opposition.

this litigation. To hold that communications about payments (which are relevant) constitute media strategy (which is irrelevant) and need not be produced would allow the exception to swallow the rule. Therefore, it is abundantly clear that, even if API could validly invoke the August 23, 2007 Order regarding document production as a basis for refusing to answer FEI's deposition questions, that Order nonetheless compels plaintiffs to disclose all responsive information concerning their payments to Rider. In other words, the Order does not give API's Rule 30(b)(6) witness cover for her refusal to answer

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III. WAP MUST PROVIDE ADDITIONAL TESTIMONY

A. WAP Improperly Refused to Answer Questions

The Court already has ruled that FEI is entitled to depose WAP about the payments it made to or for Tom Rider, about WAP's role in making such payments, and about plaintiffs' role in making such payments. See Order (12/12/07) (Docket No. 237). Notwithstanding this explicit Order to provide such testimony,

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explained away on the basis that WAP answered the applicable questions (it did not) or on the basis that a prior Court Order prohibited such testimony (it did not). See WAP Opp. at 3-4.[11]

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[11] WAP also goes out of its way to emphasize that FEI's Motion only challenges a "single instance in seven hours of deposition testimony in which WAP's counsel purportedly issued an 'improper instruction,'" as though WAP is somehow entitled to make one improper instruction per seven hours. See WAP Opp. at 3. It should go without saying that the Federal Rules of Civil Procedure prohibit WAP and its counsel from giving any improper instructions not to answer. There is no such safe harbor. This approach ("we only made one, so what's the big deal?") mirrors what WAP and plaintiffs have argued about the Rider payments themselves ("it's only a 'modest sum' – nearly $200,000 to date – so what's the big deal?").

Similarly irrelevant is plaintiffs' argument that

Court has previously ruled that FEI's advertising documents are irrelevant. Pl. Opp. at 17. The analogy is inapt. FEI has never sought to discover how much money each of these organizations spend in total on their advertising or public relations efforts. FEI presumes that because these organizations are well-funded, they spend high dollar amounts on their advertising and public relations efforts, but that information, just like FEI's information, is irrelevant to this litigation.

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It is undisputed that the Humane Society of the United States ("HSUS") began to make payments for Tom Rider at the request of plaintiff FFA only after HSUS purchased substantially all of FFA's assets, assumed responsibility for hiring all of FFA's employees, and hired Jonathan Lovvorn (a former partner at Meyer Glitzenstein & Crystal when the payments to Rider began) to run its litigation section. These payments, though issued from HSUS bank accounts and accompanied by cover letters on HSUS letterhead and signed by HSUS's Executive Vice President, have been identified in FFA's interrogatories as payments made to WAP by FFA. Mr. Markarian testified to the same at the March 6, 2008 hearing.[12]

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For more than three years, FFA hid these payments from FEI by failing to disclose them in written discovery. Only after FEI learned of these payments and subpoenaed HSUS for the related documentation did FFA acknowledge that these payments had been made. FEI does not understand why plaintiffs and their counsel continue to rely upon a meaningless distinction between FFA and HSUS to hide relevant information, but they do.

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required in order to foresee that payments to one's client and co-plaintiff (particularly one who has no other source of income or livelihood), it will become a relevant issue in the litigation.

[12] The March 6, 2008 hearing transcript is not yet available at the time of this filing. FEI will submit it for the Court should it so desire once it is finished.

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WAP Opp. at 4.

Rather, it just continues the charade that has existed for years. Yet again, plaintiffs and their counsel seek to hide information about payments to Rider behind a meaningless distinction between two organizations that as of January 2005 operate as one. When it suited plaintiffs, the payments were allegedly made by FFA and HSUS should not be expected to possess, let alone produce, documents about the payments in response to FEI's subpoena. Ex. 12, Stowe/HSUS letter to Gasper (12/17/07). Then, just a month later, when it suited plaintiffs differently, the payments were allegedly made by HSUS and the related communications should not be disclosed because HSUS is not a plaintiff. WAP Opp. at 4. Nonetheless, regardless of which entity made the payments (and it is now clear that both HSUS and FFA were involved in the payments made on FFA's behalf to WAP),

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After years of hiding crucial information behind a meaningless distinction, plaintiffs and their counsel cannot be trusted to candidly acknowledge when someone is "acting on behalf of FFA" and when they are "acting on behalf of HSUS."

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The testimony sought by FEI is neither privileged nor prohibited by Court Order (the only two grounds upon which WAP can justify its refusal to testify). As discussed supra, there is no First Amendment privilege that **SEALED PURSUANT TO COURT ORDER** See supra at 11-15. Nor is there an Order prohibiting WAP's testimony. See Order (11/5/07) (Docket No. 220) (ruling that FEI may not rely upon 8/23/07 Order concerning written discovery to instruct a witness not to answer deposition questions). Nothing in Judge Sullivan's Order pertains to, or anticipates, WAP's deposition. Nonetheless, even if it did, WAP's refusal to testify actually runs afoul of two Court Orders – Judge Sullivan's August 23, 2007 Order (which compelled plaintiffs and WAP to provide all responsive documents and information concerning plaintiffs' payments to Rider) and Judge Facciola's December 12, 2007 Order (which compelled WAP to provide a corporate designee knowledgeable to testify about the payments to Rider, WAP's role in such payments, and plaintiffs' role in such payments). In light of these two Court Orders, it is beyond credulity that WAP refuses to testify

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the Court's prior Order permits WAP to refuse to answer deposition questions. In fact, two prior Court Orders compel WAP to do so and WAP should be required to produce a corporate designee so that FEI can complete its deposition.

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. See Cobell, 213 F.R.D. at 72 ("'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.'") (quoting In re Lindsey, 148 F.3d 1110, 1102 (D.C. Cir. 1998)).

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In fact, Tracy Silverman (from the

[13] WAP's Opposition also makes clear that even it cannot distinguish "public education"/"media"/"public relations" and the litigation. In response to FEI's waiver argument, see Motion at 18, WAP boldly proclaims that

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Animal Welfare Institute) testified that Meyer participated in the funding conference calls in her WAP capacity. See Ex. 11, Hearing Tr. (2/26/08) at 197.

Further,

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. See Ex. 13, ASPCA Dep. at 205 & 210 (ASPCA testifying that the fundraiser was held so that the plaintiffs could "continue to support Tom Rider in his outreach to the public and the media"). At least $13,000 that was raised at the event was funneled to WAP – and not MGC – in the form of "grants" from AWI. Ex. 14, WAP Deposit Ledger (grant from AWI to WAP "[f]rom fundraiser in LA" on 10/7/05 and grant from AWI to WAP "from [f]undraiser in CA" on 11/23/05).

The other lines of questioning are no different.

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Plaintiffs' counsel has willingly and deliberately blended the roles of counsel and WAP officers. They, not FEI, should have to bear any risk associated with that choice.

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this is no reason to penalize FEI from discovering relevant, non-privileged information.

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astounding given that AWI testified in open court that it is withholding documents related to the fundraiser because those documents implicate its ***"media strategy."*** AWI, however, made no reference to the attorney-client privilege, and did not log any documents related to the fund-

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WAP, therefore, has failed to meet its burden in demonstrating that the attorney-client privilege applies to the disputed lines of inquiry. Its conclusory, and nonsensical, arguments are of no merit. See Federal Trade Comm'n, 628 F.2d at 213 ("The party that asserts the existence of the attorney-client privilege possesses the burden of demonstrating its applicability."). And,

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See Swangain v. Aon Corp., No. 05-326BS, 2006 U.S. Dist. LEXIS 63964, at *3 (S.D. Miss. Sept. 6, 2006) ("A corporate designee may be questioned regarding matters outside the 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."); Detoy v. City and Cty. of San Francisco, 196 F.R.D. 362, 267 (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.

1990 (Facciola, J.) ("[O]nce a corporation has produced someone capable of speaking to the matters described in the notice of deposition, the scope of inquiry is guided only by the general discovery standard of Fed. R. Civ. P. 26(b)(1)."). WAP does not refute this point or the caselaw cited by FEI. Compare WAP Opp. at 8 n.6 with Motion at 16-17.

In sum:

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For all of these reasons, FEI's motion to compel WAP should be granted.

CONCLUSION

FEI asks that its motion to compel be granted, that Rider, API, and WAP be ordered to answer the deposition questions discussed above (as well as any applicable follow-up questions), and that FEI be awarded its costs and fees incurred for having to file this Motion.

Dated this 19th day of March, 2008.

Respectfully submitted,

/s/

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CERTIFICATE OF SERVICE

I, George A. Gasper, do hereby certify that on March 19, 2008 the foregoing **Reply in Support of FEI's Motion to Compel the 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

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SERVED VIA HAND DELIVERY UNDER SEAL IN UNREDACTED FORM to:

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

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