FILED UNDER SEAL

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.	:	

DEFENDANT FELD ENTERTAINMENT, INC.'S OPPOSITION TO PLAINTIFFS' MOTION TO QUASH SUBPOENAS TO PLAINTIFFS' COUNSEL OF RECORD OR IN THE ALTERNATIVE FOR A PROTECTIVE ORDER

Plaintiffs' Motion to Quash Subpoenas to Plaintiffs' Counsel Of Record Or In The Alternative For Protective Order (3/17/08) (Docket No. 282) ("Motion"), argues only that because Mr. Glitzenstein and Ms. Meyer (of the law firm Meyer, Glitzenstein & Crystal ("MGC")), and Mr. Lovvorn (of the Humane Society of the United States ("HSUS")) are counsel of record, they should not be commanded to testify, period.[1] That is not the standard.

At issue in Feld Entertainment, Inc.'s ("FEI") Motion to Enforce the Court's 8/23/07 Order (11/6/07) (Docket No. 223) ("Motion to Enforce") and the related ongoing evidentiary hearing is plaintiffs' failure to comply with the order requiring them to produce documents and information regarding payments to plaintiff Tom Rider. See Order (8/23/07) at 2 & 6-7

[1] Plaintiffs take great pains to point out that FEI's counsel did not identify Mr. Glitzenstein, Ms. Meyer or Mr. Lovvorn as potential witnesses at the January 8, 2008 hearing. In fact, FEI's counsel stated that ***"at a minimum,"*** it anticipated that it would need to call all of the September 2007 declarants. Ex. 1, Hearing Tr. (1/8/08) at 4 (emphasis added). Plaintiffs' counsel then continued on at the hearing and disclosed that the plaintiffs were purposefully withholding payment information pursuant to the "media strategy" exception to the Court's order. Moreover, once FEI began preparation for the hearing, it realized that additional witnesses would be necessary. This was clearly contemplated by the Court: If the parties were going to be irrevocably held to their representations as to "likely" witnesses at the January hearing, the Court would not have ordered the exchange of witness lists. It is not disputed that Mr. Glitzenstein, Ms. Meyer and Mr. Lovvorn were all listed on FEI's witness list and that the witness list was served on the date established by the Court. Furthermore, these witnesses now have months to clear their schedules and prepare their testimony for the May 30, 2008 hearing.

(ordering Rider and the organizational plaintiffs to produce all payment documents and information). Through briefing, argument and hearing testimony, it is evident that there are at least two categories of payment information that have not been produced or described in accordance with the Court's 8/23/07 Order: (1) payment information that was intentionally withheld from plaintiffs' Court-ordered production on the basis of a so-called "media strategy" exception; and (2) payment information that was destroyed, discarded, or otherwise not preserved. The lawyers who seek to have their subpoenas quashed are crucial witnesses on both categories.

FEI is still in the dark as to the full contours of plaintiffs' unilateral interpretation of the "media strategy" exception and only counsel can testify as to what has been withheld and why. Several of the organizational plaintiffs do not even know what information has been produced or withheld: ASPCA and API both testified that they thought certain payment documents were produced at certain points in time when in fact they were not, and both ASPCA and API testified that they have turned over information to MGC but have not reviewed MGC's productions to FEI to see what was produced and what was not. Moreover, the organizational plaintiffs themselves are unclear as to whether any information was even withheld on the basis of the "media strategy" exception: While AWI and FFA/HSUS testified that some information has been withheld pursuant to the "media strategy" exception, ASPCA testified that no information has been withheld pursuant to it.

Further underscoring that only counsel can testify as to what has been withheld and why is that counsel authored a "contemporaneous memo" interpreting the Court's 8/23/07 Order. Presumably this "memo" set forth what was to be produced and what was to be withheld. Yet, the organizational plaintiffs could not (or would not) even testify as to the existence of the

"memo" itself: While counsel openly admitted that such a document existed during the January 8, 2008 hearing before this Court, Mr. Markarian, the witness for FFA/HSUS, was conspicuously unable to "recall" whether he had seen such a document.

Aside from counsel's participation in plaintiffs' Court-ordered discovery responses, counsel's testimony is also necessary because counsel themselves are in effect "fact witnesses" to the very payment information now at issue. Counsel's first-hand involvement in the Rider payment scheme means that they themselves created and participated in certain of the payment documents and communications. And, if any payment documents were gathered or created by counsel, or maintained in counsel's files, those documents are within the plaintiffs' "control" and should have been produced. Only counsel, therefore, can testify whether certain payment communications took place and whether certain payment documents ever existed, and if so, what happened to them.

Plaintiffs' Motion in effect argues that the witnesses' status as "lawyers" and "counsel of record" automatically immunizes them from testifying and that, in any event, all of their testimony would automatically be cloaked in the attorney-client and work product privileges. That is not so. Even assuming *arguendo* that all of counsel's testimony is privileged – which it is not – plaintiffs have waived the attorney-client and work product privileges by invoking the advice of counsel defense. Plaintiffs repeatedly testified at the hearing that counsel guided their response to the Court's 8/23/07 Order. Mr. Glitzenstein stated in open court that counsel instructed plaintiffs how to respond to that Order ***in writing.*** Plaintiffs cannot use "advice of counsel" as both a shield and a sword: By justifying their response to the Court's Order (and their interpretation of it) based on what their counsel told them, plaintiffs have waived all privileges and protections over that advice.

FEI cannot be left to guess what types of payment information existed at one time and have since been destroyed or discarded, and it cannot be left to surmise what categories of payment information plaintiffs have unilaterally decided to withhold on the basis of the "media strategy" exception. Only counsel can testify to these issues. Accordingly, Mr. Glitzenstein, Ms. Meyer and Mr. Lovvorn must be ordered to testify at the May 30, 2008 evidentiary hearing.

ARGUMENT

I. Plaintiffs' Counsel Are Not Immune From Testifying In This Evidentiary Hearing

Mr. Glitzenstein, Ms. Meyer and Mr. Lovvorn are not immune from testifying in the Court-ordered evidentiary hearing merely because they are lawyers and counsel of record in this case. FEI's subpoenas properly command counsel's testimony for a hearing regarding plaintiffs' compliance with a Court order. This is not a case where FEI is seeking to take routine fact discovery from opposing counsel. Indeed, as in Hubbard v. Potter, 247 F.R.D. 27 (D.D.C. 2008) (Facciola, J.), a case recently before this Court, at issue here is "discovery about the discovery." Plaintiffs' counsel's testimony is necessary to establish what plaintiffs did in response to the Court's 8/23/07 Discovery Order, how they have interpreted that Order, and what additional information has not been produced. No other "substitutes" for live testimony are necessary, or will even suffice.

Even in the discovery context, there is no blanket rule prohibiting testimony from counsel under any and all circumstances. Counsel may be compelled to testify, where as here, counsel is the only source of relevant, non-privileged information that is crucial to the opposing party's case. Counsel's first-hand involvement both in the plaintiffs' responses to the order and in the Rider payment scheme itself necessitates their testimony.

A. The Subpoenas Seek Testimony Regarding Compliance With A Court Order, Not Fact Discovery

Counsel's testimony at the evidentiary hearing is essential given plaintiffs' repeated representations that:

- ***Plaintiffs withheld certain Rider payment information from their June 2004 and January 2007 discovery responses because plaintiffs considered that information to be "non-responsive,"*** see Hearing Ex. 23,[2] AWI's Court-ordered Response to Interrogatory No. 21 (9/24/07) ("AWI states that although ***it did not originally view this information as responsive to this Interrogatory,*** ... .") (emphasis added); Hearing Ex. 27, FFA's Court-ordered Response to Interrogatory No. 21 (9/24/07) ("***The Fund did not originally view this information as responsive to this Interrogatory*** ... .") (emphasis added).

- ***Not only did plaintiffs initially withhold certain Rider payment information, they also failed to preserve it,*** see Hearing Ex. 40, Rider Decl. (9/24/07), ¶ 3 ("***I did not keep such receipts prior to March 30, 2004*** ... because I did not know that such records had anything to do with the plaintiffs' claims in this case or defendant's defenses.") (emphasis added); Ex. 2, Hearing Tr. (2/26/08) at 68 ("Q. You didn't [think] you had an obligation to save your credit card statements concerning payments to Rider? A. Not once they were paid and they were going to be reflected elsewhere.") (testimony of ASPCA).

- ***Plaintiffs still consider certain Rider payment documents to be non-responsive,*** see Hearing Ex. 40, Rider Decl. (9/24/07), ¶ 4 ("Although with few exceptions ***I do not***

[2] As used herein, "Hearing Ex. _" refers to the exhibits identified by FEI for the evidentiary hearing. FEI's Exhibit List is attached hereto as Exhibit 6. These exhibits were already provided to the Court, and FEI is citing to those exhibits without re-attaching them due to their size. If the Court would like additional copies of any exhibit, FEI will provide it in the Court's preferred format.

regard any such information to be responsive to either Document Request No. 20 or Document Request No. 21, I have produced as many receipts as I could find that show how I spend the grant money I receive.") (emphasis added); and

- ***Plaintiffs openly admit that certain Rider payment documents are still being withheld, even in light of the Court's 8/23/07 Order, on the basis of the "media strategy exception,"*** see Ex. 1, Hearing Tr. (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.'") ("[D]ocuments relating to fundraising strategy, for example, how [plaintiffs] would go out and have fundraisers, which is one of the areas of information that the Defendants are asking for, that material would be subject to a media strategy withholding."); Ex. 3, Hearing Tr. (3/6/08) at 48 ("Q. With respect to the fundraiser that we were discussing before, are you aware that documents relating to the fundraiser have in fact been withheld on media strategy grounds. A. Yes.") (testimony of AWI).

That plaintiffs' prior discovery responses were incomplete with respect to payment information because they considered it to be "non-responsive," that plaintiffs openly admit that they spoliated certain payment documents, that plaintiffs continue to consider certain payment information to be "non-responsive" and that plaintiffs acknowledge that they are withholding certain payment information pursuant to their own "interpretation" of the Court's 8/23/07 Order all bear directly on the adequacy of their September 2007 Court-ordered responses.

Indeed, in similar circumstances, where categories of responsive documents were not initially produced and were then labeled as "nonresponsive" when produced pursuant to a Court order, this Court commanded counsel of record to testify in open court at an evidentiary hearing

regarding compliance with the Court's order. See Hubbard, 247 F.R.D. at 30 ("The fact that defendant ***failed to initially produce these documents,*** and in fact ***labeled them as non-responsive when it did produce them***, is certainly troubling and warrants further inquiry. Therefore, the court will set a date for an evidentiary hearing to take the testimony of Elisabeth Boyen, attorney for the United States Postal Service.") (emphases added).

The issue here is, as in Hubbard, "discovery about the discovery," or whether plaintiffs complied with the Court's 8/23/07 Order. See 247 F.R.D. at 29. This is ***not*** the "typical" case where routine fact discovery is being sought from opposing counsel rather than witnesses, nor is FEI trying to depose plaintiffs' counsel regarding their general litigation strategy. This is also not the case where FEI is probing into irrelevant lines of inquiry for the purpose of learning privileged information or conflicting out plaintiffs' counsel: it was the Court that ordered this evidentiary hearing to determine whether plaintiffs complied with the 8/23/07 Order. Accordingly, FEI seeks counsel's testimony regarding whether plaintiffs produced and described ***all*** of the Rider payment information as they were ordered to do, and the scope of the payment information that is still being withheld pursuant to the "media strategy" exception. The witnesses called to date have been unable to answer those questions and instead claimed they relied upon counsel. The discovery caselaw cited by plaintiffs, therefore, is inapplicable to the present situation. Those cases do not deal with "discovery about the discovery" or waiver of privileges and protections. Cf. Jennings v. Family Management, 201 F.R.D. 272 (D.D.C. 2001) (discovery deposition of counsel sought); Evans v. Atwood, No. 96-2746, 1999 U.S. Dist. LEXIS 17545 (D.D.C. Sept. 29, 1999) (same); Harriston v. Chicago Tribune Co., 134 F.R.D. 232 (N.D. Ill. 1990) (same); In Re Sause Brothers Ocean Towing, 144 F.R.D. 111 (D. Or. 1991)

(same); N.F.A. Corp. v. Riverview Narrow Fabrics, Inc., 117 F.R.D. 83 (M.D.N.C. 1987) (same).[3]

Moreover, even under plaintiffs' discovery analogy, there is no blanket rule prohibiting all discovery from any counsel of record. Discovery from counsel can be properly sought where counsel is the only source of relevant, non-privileged information that is crucial to preparation of the case. See Jennings, 201 F.R.D. at 276-77 ("The Federal Rules do not prohibit attorney depositions ... Federal courts typically consider whether 1) no other means exists to obtain the information sought; 2) the information sought is relevant and non-privileged; and 3) the information is crucial to preparation of the case.") (citations omitted). That is case the here. Mr. Glitzenstein, Ms. Meyer and Mr. Lovvorn are the ***only*** sources of certain information that is crucial in determining whether plaintiffs complied with the 8/23/07 Order.

B. Counsel Are the Only Source of Information Regarding Plaintiffs' Discovery Responses and Certain Payment Information

Counsel's testimony in this evidentiary hearing is critical because, as the testimony of the organizational plaintiffs has confirmed, counsel are the only source of information regarding what payment information was produced, when that information was produced, and whether and to what extent certain payment information has been withheld pursuant to the so-called "media strategy" exception. Moreover, the present situation is unique in that the subpoenaed counsel were all ***directly*** involved in the Rider payments in their "non-counsel" capacities and therefore are in effect "fact witnesses" as to whether certain payment information ever existed, in what form it occurred and whether it was preserved.

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[3] Plaintiffs' citation to Shelton v. American Motors Corporation, 805 F.2d 1323 (8th Cir. 1986), is similarly unavailing. In that case, the defendant offered to answer plaintiffs' questions regarding the existence of additional documents through the depositions of certain company officials that were not in-house counsel. As is further discussed infra, in this case, even in-house counsel for the organizational plaintiffs were unable to testify as to the existence, production and withholding of certain payment information. Moreover, unlike the present case, Shelton "did not involve [a] refusal to produce the documents inquired about ... ." Id. at 1328. That is squarely the issue here: what documents plaintiffs have refused to produce pursuant to the "media strategy" exception.

1. Only Counsel Knows What Information Has Been Produced And Withheld

Plaintiffs' interpretation of the "media strategy" exception, and what payment information have been withheld pursuant to it, goes to the heart of FEI's Motion to Enforce the Court's Order and the very purpose of the evidentiary hearing. The parameters of the types of payment information and documentation that has been intentionally withheld in response to the Court's 8/23/07 Order remains unclear. Only counsel can testify to this issue.

ASPCA's witness stated, for example, that invoices (dating from 2001-2003) that it received from MGC for certain Rider payments were produced in 2004, when in fact those invoices were only produced to FEI in September 2007 in response to the Court's 8/23/07 Order.[4] API, moreover, searched for certain communications that it had with the other plaintiffs and thought that they were produced to FEI in January 2008, when in fact they were not.[5] And, even more troubling, ASPCA and API both testified that they do not know whether all of the information that they turned over to MGC was in fact produced to FEI.[6] Moreover, the

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[4] Compare Ex. 2, Hearing Tr. (2/26/08) at 66 ("Q. These numbers in here reflect monies that in one way or another Meyer Glitzenstein provided to Tom Rider, correct? A. Right. ... A. And it is your testimony, ma'am, these document[s] were produced to defendant in 2004? A. ***Yes, I believe it was or that Meyer Glitzenstein had provided.*** A. So as far as you know we've had these for the last three or four years? A. ***My understanding is they turned over any and all documents that they were required to turn over.***") (testimony of ASPCA) (emphases added) with Hearing Ex. 83, Meyer, Glitzenstein & Crystal Invoices Produced by ASPCA (A 1203-15, 1218-20) and Ex. 4, ASPCA Production Letter (9/26/07) (producing A 1202-1248).

[5] See Ex. 2, Hearing Tr. (2/26/08) at 128-129 ("Q. And on your third search that's when you looked for all communications; is that correct? A. That's correct. Q. Did you find any communication[s]? A. Again I printed out everything that I had saved so I'm assuming there was some in there. What I did was I looked at the documents I found every single [one] that was responsive and I sent them to our attorneys. Q. Do you know whether your attorneys actually produced them? A. I don't know. Q. Are you aware that the January 30th, 2008 production by API does not contain communications between plaintiffs. ... THE COURT: Are you familiar at all with the production made in January by the way? THE WITNESS: I'm unfamiliar with if they had sent the documents. "). (testimony of API)

[6] Ex. 2, Hearing Tr. (2/26/08) at 128-29 (***Q. Do you know whether your attorneys produced all of those documents to us. A. I don't know if they produced all of them.*** I have imagined they did. I just don't know. ... ***Q. Do you know whether your attorneys actually produced them? A. I don't know.*** ... THE COURT: Did you ever get a copy for yourself [] those documents that counsel turned over to plaintiffs with a note to you saying, dear Ms. Paquette, please find enclosed the documents were surrendered to defendants this day? THE WITNESS: No. THE COURT: Your information is [] made available to counsel and they did what they did but nobody ever gave you

organizational plaintiffs gave inadequate and conflicting testimony as to whether any documents were withheld pursuant to the "media strategy" exception: While AWI and FFA/HSUS admitted that certain payment information has been withheld, ASPCA (which testified that it turned over documents to MGC but did not review what documents MGC actually produced to FEI), was not even aware that ***any*** information was withheld on this basis.[7] The organizational plaintiffs do not know what information was produced, when it was produced – or if it was produced at all. MGC served as the conduit between them and FEI. Only counsel, therefore, can testify as to what has been produced, when it was produced, and what has been withheld and why.

That only counsel can testify as to the contours of the "media strategy" exception is further emphasized by the inadequacy of the organizational plaintiffs' testimony regarding the "contemporaneous memo" that counsel sent to the plaintiffs regarding compliance with the Court's 8/23/07 Order. See Ex. 1, Hearing Tr. (1/8/08) at 28 ([Counsel for plaintiffs:] "[W]e do, for example, have a contemporaneous memo that we sent out to the clients. ... I think it reflects what we think was a conscientious effort to go about doing what Judge Sullivan told us to do.") Presumably this "memo" provides guidance as to how plaintiffs determined which payment information to produce and which payment information to withhold. Yet, despite Mr.

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copies of what counsel gave defendant? THE WITNESS: That's correct.") (emphases added); see also supra note 4 (ASPCA's testimony on the same issue)

7 Compare Ex. 2, Hearing Tr. (2/26/08) at 22 ("THE COURT: Did you exclude pursuant to the permission granted you by that portion of the order [the media and legislative strategy exception] any materials and not turn them over? THE WITNESS: No.") (testimony of ASPCA) with Ex. 1, Hearing Tr. (1/8/08) at 9 & 10 ("[Counsel for plaintiffs:] [D]ocuments relating to fundraising strategy, for example, how [plaintiffs] would go out and have fundraisers, which is one of the areas of information that the Defendants are asking for, that material would be subject to a media strategy withholding.") and Ex. 3, Hearing Tr. (3/6/08) at 48 ("Q. With respect to the fundraiser that were discussing before, are you aware that documents relating to the fundraiser have in fact been withheld on media strategy grounds? A. Yes.") (testimony of AWI) and id. at 86-87 ("Q. Sir, was your definition of, quote, media or legislative strategies influenced by anything your lawyers told you? A. Yes. In consultation with our attorneys, we did discuss the scope of media and legislative strategies. ... THE COURT: Did you discuss what the words 'media and legislative strategy' mean with your lawyers? THE WITNESS: Yes. ... THE COURT: And was that the principle you then used to exclude things that you felt were within media and legislative strategy? THE WITNESS: Yes, Your Honor.") (testimony of FFA/HSUS).

Glitzenstein's representations about the "memo" in open court, FFA/HSUS's witness, when directly asked about the existence of the "memo" at the evidentiary hearing, testified that he could not "recall" whether such a memorandum existed.[8] If the organizational plaintiffs are unable to testify as to the contours (and even existence) of the "contemporaneous memo," then counsel must be ordered to do so. FEI, and the Court, cannot be left to hypothesize what categories of documents are in existence but are being withheld, and the testimony of the organizational plaintiffs has made clear that only counsel can testify on this issue.[9]

2. *Meyer and Glitzenstein Have First-Hand Knowledge About Payment Information*

Not only is counsel the only source of information regarding what payment information has been produced, when those productions took place, and what types of information is purposefully being withheld pursuant to the so-called "media strategy" exception, counsel is also the only source of information regarding certain payment documents and communications themselves. This case is unique in that counsel themselves have become key fact witnesses to the existence and preservation of certain payment documents and information, and only they can answer questions regarding the same. Mr. Glitzenstein and Ms. Meyer were directly involved in the Rider payments when acting in their "non-counsel" "WAP" capacities. They themselves created and participated in the very documents and communications now at issue. That Mr.

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[8] See Ex. 3, Hearing Tr. (3/6/08) at 74 ("Q. Were these instructions reduced to writing? A. I don't recall. A. Have you ever seen a document purporting to summarize the requirements of the Court's August 2007 order? A. I don't recall.").

[9] The witnesses for the organizational plaintiffs gave conflicting testimony on what was withheld based on the "media strategy" exception. While AWI only gave testimony indicating that information regarding the joint 2005 fundraiser was withheld, FFA/HSUS testified that its withholding was far broader – so broad that in fact publicly available documents, such as press releases, were withheld. Compare Ex. 3, Hearing Tr. (3/6/08) at 48 ("Q. With respect to the fundraiser that we were discussing before, are you aware that documents relating to the fundraiser have in fact been withheld on media strategy grounds? A. Yes.') (testimony of AWI) with id. at 85 ("For purposes of this declaration, how did you define media or legislative strategies? A. We defined that as any strategy that was related to our media campaign to inform the public about circus issues, about the abuse of elephants in circuses, and we also included press releases, any documents that were publicly available on our web site, such as a press release which simply stated the organization's position on circus issues.") (testimony of FFA/HSUS).

Glitzenstein and Ms. Meyer may have sometimes acted as litigation "counsel" and sometimes participated in "media/payment" campaign in "non-counsel" capacities (and indeed may have indistinguishably blended those roles) cannot now be used as a shield to protect them from their own testimony.

Mr. Glitzenstein and Ms. Meyer, in their "WAP" capacities, are the only source of information as to whether documents and communications were exchanged between WAP and the organizational plaintiffs and Rider. If such documents currently or previously existed, and if communications between WAP and the organizational plaintiffs and/or WAP and Rider took place, then this information should have been produced and described in response to the Court's 8/23/07 Order.

No one but Mr. Glitzenstein and Ms. Meyer can testify to these matters. Only three people have been at WAP during when the Rider payments have taken place: Mr. Glitzenstein, Ms. Meyer, and Ms. D'Arcy Kemnitz, formerly WAP's Executive Director. The Court has already heard from Ms. Kemnitz, who was not able to testify in any detail ***at all*** regarding WAP's involvement in the Rider payments. Ms. Kemnitz's testimony made clear that only Mr. Glitzenstein and Ms. Meyer were privy to the details of WAP's Rider payments. See Ex. 2, Hearing Tr. (2/26/08) at 158-169 (testimony of D'Arcy Kemnitz).[10]

This point is particularly salient with respect to Rider because counsel has made clear that they will not voluntarily produce him for testimony, and to date, FEI has been unable to serve

[10] Plaintiffs make much of the fact that WAP is not a party to FEI's Motion to Enforce and this evidentiary hearing. That is correct and is also irrelevant. A witness in a hearing need not be a party to the hearing. Moreover, WAP is no stranger to this payment fiasco: WAP is run by counsel for plaintiffs and at their direction, WAP sits at the center of the Rider payments. Consequently WAP has had extensive dealings with Rider and all of the organizational plaintiffs. WAP, therefore, may be in possession of, or may be aware of, payment information that should have been produced or described by the plaintiffs but that was not. Its knowledge of the payment documents and information, therefore, is directly relevant to the present evidentiary hearing.

him with a subpoena.[11] Without Mr. Rider's live testimony, Ms. Meyer is the only witness who can testify as to the communications and dealings between herself and Mr. Rider concerning payments, none of which are privileged and none of which were produced or described in Mr. Rider's Court-ordered interrogatory answers.

REDACTED

SEALED PURSUANT TO
COURT ORDER

By further way of example, only Ms. Meyer can testify as to whether any additional payment e-mails exist in her "MGC" e-mail file.[12] It is not disputed that Ms. Meyer communicated via e-mail regarding the Rider payments: WAP produced ***one*** (partial) e-mail from Ms. Meyer to Ms. Weisberg (ASPCA), Mr. Markarian (FFA), and Ms. Liss (AWI) regarding payments to WAP for Rider. See Hearing Ex. 51, Partial E-mail (pages 2 and 3) from Katherine Meyer to Lisa Weisberg, Michael Markarian and Cathy Liss (11/5/03) (WAP 270). This is the only payment e-mail of its kind that has been produced to FEI. It is inconceivable

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[11] FEI has attempted to subpoena Mr. Rider's testimony at the February 26, March 6 and now May 30, 2008 hearings, but to date, FEI has been unable to serve him with a subpoena. Plaintiffs' representation that Mr. Rider has "already been extensively deposed" on his compliance with the Court's 8/23/07 Order, see Motion at 7, is grossly misleading. Mr. Rider was instructed not to answer questions regarding his spoliation, and those improper instructions are currently the subject of a Motion to Compel. See Mot. to Compel the Dep. Testimony of Rider, API and WAP (2/15/08) (Docket No. 256) at 2-5. And, in any event, Rider's deposition was limited to 11 hours, and it was taken before FEI knew that an evidentiary hearing would occur and before FEI knew that Rider would not honor his previous commitment, made under oath, that he would accept a subpoena for a trial in this case. See Hearing Ex. 35, Rider Dep. (10/12/06) at 119-122.

[12] Ms. Meyer files certain e-mails in an "MGC" e-mail file and certain e-mails in a "WAP" e-mail file.

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COURT ORDER

that the Rider payment scheme, which has spanned over eight years and involved at least 125 separate cash payments from WAP to Mr. Rider alone (aside from WAP's in-kind payments, such as payments to Sprint and Cingular Wireless for his cell phone use), was coordinated without a single additional e-mail even though ASPCA, API, and AWI all testified that they e-mailed with each other before and after this case arose. Specifically, ASPCA's witness testified that she communicated with Ms. Meyer via e-mail and AWI's witness testified that e-mails were exchanged regarding the joint July 2005 "fundraiser," yet none of those e-mails have been produced.[13]

While WAP maintains that it has produced all the payment e-mails that Ms. Meyer filed in her "WAP" file, what remains unknown is whether Ms. Meyer filed any payment e-mails in her "MGC" file. Any payment e-mails that Ms. Meyer filed in her "MGC" file should have been produced by the organizational plaintiffs because those documents are deemed to be within their "control." See ASPCA et al. v. Ringling Bros. et al., 233 F.R.D. 209, 212 (D.D.C. 2006) (Facciola, J.) ("Because a client has the right, and the ready ability, to obtain copies of documents gathered or created by its attorneys pursuant to their representation of that client, such documents are clearly within the client's control.").

Moreover, Ms. Meyer's testimony regarding the existence of any additional payment e-mails is crucial because it has become clear that the organizational plaintiffs have (1) intentionally not produced them and/or (2) have not preserved them.[14] While ***WAP*** partially

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[13] Ex. 2, Hearing Tr. (2/26/08) at 57 ("Q. How many times do you think you've sent an e-mail to Katherine Meyer since July 11th 2000? A. I have no idea. ... Q. Well, do you use e-mail with her? A. Yes, I do.") (testimony of ASPCA); Ex. 3, Hearing Tr. (3/6/08) at 32 ("Q. Were there ever any e-mails that related to [the] organizing and planning of this fundraising event? A. Yes.") (testimony of AWI).

[14] ASPCA's witness testified that she did not retain the electronic copies of her e-mails but rather printed them and maintained them in a paper file. See Ex. 2, Hearing Tr. (2/26/08) at 77 ("Q. Did you have a practice of purging any e-mails relating to this topic? A. I would also print-out a copy of any e-mail of any kind of substance whether it be for this case or other matters that I deal with and file it in my folder.") & 84 ("Q. Your counsel ...

produced the above-mentioned November 5, 2003 e-mail in response to subpoena, ASPCA, FFA and AWI have still not produced it to date, and none of them described it in their Court-ordered declarations even though it is clearly responsive to FEI's document requests. If this e-mail was not produced or not preserved by the organizational plaintiffs, then it follows that additional payment e-mails may also have been either withheld or spoliated, and Ms. Meyer may have knowledge of their existence. Therefore, Ms. Meyer's knowledge regarding the existence of additional payment e-mails between herself and the organizational plaintiffs (or anyone else for that matter) – whether they be in her "WAP" or "MGC" e-mail files – is paramount to FEI's Motion to Enforce.[15]

Mr. Glitzenstein and Ms. Meyer, in their "WAP" capacities, are the only sources of information as to what ultimately became of Ms. Kemnitz's WAP computer.[16] Like e-mails exchanged between Ms. Meyer and the organizational plaintiffs, documents (including e-mail communications) on Ms. Kemnitz's computer are crucial because they may demonstrate that Mr. Rider and the organizational plaintiffs, namely ASPCA, may have additional payment documents and information that either were (1) not produced to FEI or (2) their whereabouts not accounted for. Ms. Kemnitz, for example, testified that as executive director at WAP during a time period when the payments from WAP to Rider were taking place, she did have a WAP e-

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asked you a question about purging e-mails. You recall that? A. Yes. Q. [Y]ou stated you did not purge any of yours; is that correct? A. I would print-out any e-mails that were on point. Q. But you got rid of the electronic copies; is that right? A. Yes.").

[15] Plaintiffs make much ado that Ms. Meyer and Mr. Glitzenstein were identified with both entities that they run (MGC and WAP). See Motion at 5 n.5. Yet in light of the shell game that has occurred with who has "possession, custody and control" of a document on any given day, FEI had no choice to make clear that both witnesses would be required to testify regardless of whether they were claiming to wear their MGC or their WAP hat. We have no doubt that plaintiffs know exactly what the nature and significance of this dual role by their counsel is despite their purported ignorance regarding the so-called fictional entity of "WAP/MGC."

[16] Ms. Kemnitz testified that she left her WAP-provided computer "on [her] desk" when she left her employment there. Ex. 2, Hearing Tr. (2/26/08) at 161. The contents of this computer's hard drive are important as shown by the fact that Kemnitz generated written communications about the Rider payments with this computer.

mail address but did not know for certain whether she exchanged e-mails with Lisa Weisberg and Mr. Rider, or whether the e-mails that she exchanged with Ms. Meyer pertained to Mr. Rider. See Ex. 2, Hearing Tr. (2/26/08) at 159-160, 165-169.

3. Lovvorn Should Be Treated No Differently Than The Other In-House Counsel, And He Also Has First-Hand Knowledge About Payment Information

Mr. Lovvorn, as an in-house attorney for HSUS, should be treated no differently than the respective in-house counsel at the co-plaintiff organizations. All of those individuals have testified at this evidentiary hearing (Lisa Weisberg on behalf of ASPCA, Nicole Paquette on behalf of API, and Tracy Silverman on behalf of AWI), and Mr. Lovvorn should be ordered to do the same. Although Mr. Lovvorn was previously employed by MGC, and in fact signed the complaint filed in this action, to FEI's knowledge, Mr. Lovvorn has not acted as "counsel of record" since he left MGC to go in-house with HSUS in November 2004. See Ex. 3, Hearing Tr. (3/6/08) at 60; Compl. (9/26/03) (Docket No. 1). To the best of FEI's knowledge, Mr. Lovvorn has not signed any of the many filings in this case since that time, nor has he authored any correspondence on plaintiffs' behalf or taken or defended any depositions (let alone even sat in on any depositions) in this case since he left MGC's employ. And notably, although Mr. Lovvorn was present at both the February 26 and March 6 hearings, at neither hearing did he enter an appearance on behalf of all plaintiffs or sit at counsel table. See Ex. 2, Hearing Tr. (2/26/08) at 1 (listing Eric Glitzenstein, Katherine Meyer and Kimberly Ockene on behalf of the plaintiffs); Ex. 3, Hearing Tr. (3/6/08) at 1, 3 (listing Eric Glitzenstein, Howard Crystal and Kimberly Ockene on behalf of the plaintiffs, and Matthew Stowe on behalf of HSUS).

If anything, since November 2004, Mr. Lovvorn has acted as in-house counsel for HSUS, and not as counsel of record for ASPCA, AWI, API and Mr. Rider. In fact, both API and AWI testified that Mr. Lovvorn participated in conference calls regarding the Rider funding that were

conducted by the other in-house counsel for, and representatives of, the organizational plaintiffs (Ms. Silverman on behalf of AWI, Ms. Paquette on behalf of API, Ms. Weisberg on behalf of ASPCA, and Ms. Liss on behalf of AWI), and on which no outside counsel participated. Neither API nor AWI identified Mr. Lovvorn as acting as counsel of record in those calls – instead both identified him as acting on behalf of FFA.[17] If either API or AWI regarded Mr. Lovvorn as their "counsel," then they certainly would have so identified him. Moreover, when directly asked about these conference calls, neither API nor AWI asserted the attorney-client privilege.

Aside from whether Mr. Lovvorn is really "counsel of record" in this case, Mr. Lovvorn, like Mr. Gliztenstein and Ms. Meyer, has been directly involved in the Rider payments and is the only source of certain information regarding FFA/HSUS's "contributions" to WAP. Ex. 3, Hearing Tr. (3/6/08) at 67 ("[Mr. Lovvorn] and I had direct involvement in donations to the Wildlife Advocacy Project to support media and campaign efforts."). Mr. Lovvorn signed each and every one of FFA/HSUS's WAP "contribution" letters. See, e.g., Hearing Ex. 65, Letter from Jonathan Lovvorn / HSUS to Eric Glitzenstein (5/24/05). And, Mr. Lovvorn requested that the payments be made. Ex. 3, Hearing Tr. (3/6/08) at 67 ("Q. Which individuals requested that the payments be made? A. I believe that I approved the payments. The requests would have come either from myself or from John Lovvorn.").

Like Mr. Glitzenstein and Ms. Meyer, it is clear that only Mr. Lovvorn can testify as to certain payment information. Again by way of example only, Mr. Markarian was unable to

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[17] See Ex. 2, Hearing Tr. (2/26/08) at 115 ("Q. Have you had conference calls with your co-plaintiffs regarding payments to Mr. Rider? A. I know we had one. ... Q. And who was on that conference call? A. I don't remember everybody. Maybe I could have everybody but the only ones I do remember are myself, Tracy Silverman, Lisa Weisberg and Jon Lovvorn. ... Q. And Jon Lovvorn was there on behalf of which co-plaintiff? A. The Fund for Animals.") (testimony of API); id. at 214 ("Q. The conference calls that related to the funding can you identify for us which of the co-plaintiffs participated in those? A. Sure. Would have been sometimes Cathy Liss. Generally I've been on all of those calls since February of 2005. Nicole Paquette, Lisa Weisberg, Jon Lovvorn.") (testimony of AWI).

testify as to whether Mr. Lovvorn had communications regarding the Rider payments and if so, whether they were produced or described.[18] Yet, the testimony of AWI and API makes clear that, at a minimum, oral communications did take place: According to both AWI and API, Mr. Lovvorn was involved in at least one conference call among the organizational plaintiffs. This conference call, however, was not described in FFA's interrogatory responses, see Hearing Ex. 27, FFA's Court-ordered Response to Interrogatory No. 19 (9/24/07), and indeed Mr. Markarian was unaware that it was excluded. Given the inadequacy of Mr. Markarian's testimony, Mr. Lovvorn is the only source of information as to whether he had communications regarding the Rider payments.[19]

In sum, counsel deliberately put themselves at the center of the Rider payments. And now, as the above examples highlight, only Mr. Glitzenstein, Ms. Meyer and Mr. Lovvorn know whether certain payment documents and information exist and, if so, whether it was preserved. They all must be commanded to testify at the evidentiary hearing accordingly.

II. The Attorney-Client And Work Product Privileges Do Not Shield Counsel's Testimony

Mr. Glitzenstein, Ms. Meyer and Mr. Lovvorn cannot hide behind the attorney-client and work product privileges simply because they are lawyers. The organizational plaintiffs have testified that they relied on the advice of counsel in responding to the Court's 8/23/07 Order, and

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[18] See Ex. 3, Hearing Tr. (3/6/08) at 72-73 ("Q. So you don't know sir, whether or not all of Mr. Lovvorn's files concerning payments were searched by Fund for Animals? A. I believe that all of his files were searched if we felt they were likely to contain any information that might be responsive.") & 78-79 ("Q. The question, sir was whether or not your understanding is that communications Mr. Lovvorn has had concerning payments to Tom Rider were identified in Fund for Animals interrogatory responses? Is it your understanding that those communications are described in the interrogatory responses? A. Yes. Q. You think they're in there; is that your testimony? A. We have produced every document that related to payments to Tom Rider. We queried staff about conversations that they have had and included any responsive statements in the interrogatories.") & 80 ("Q. Were Mr. Lovvorn and Mr. Eddy asked if they had any e-mails about payments to Mr. Rider? A. Yes, they were. Q. Did they have any? A. I can't recall if there were any that were responsive to the request.").

[19] FEI has not completed its examination of Mr. Markarian, so there may be other areas of inquiry to which Mr. Markarian is unable to testify.

in fact, Mr. Glitzenstein himself stated in open court that MGC issued a "memo" to the plaintiffs to guide their response. Plaintiffs cannot use counsel's advice as both a sword to justify their response to the Court's Order and a shield against testimony regarding what advice they were given. Furthermore, counsel cannot cloak their "non-counsel" "media"/"public relations" dealings in the attorney-client privilege. There is no privilege for communications, even those by a lawyer, that do not occur for the purpose of rendering confidential legal advice.

A. Plaintiffs Have Invoked the Advice of Counsel Defense And In So Doing Have Waived the Attorney-Client And Work Product Privileges

Plaintiffs openly admit that they are withholding certain payment documents and information under the guise of Judge Sullivan's narrow "media strategy" exception[20] and that they relied on the advice of counsel when preparing their responses to the Court's 8/23/07 Order and determining which payment information to withhold.[21] Moreover, plaintiffs' counsel admitted in open court that MGC prepared a "contemporaneous memo" instructing the plaintiffs how to respond to the Court's Order – and presumably what types of information to produce and what types of documents to withhold. See Ex. 1, Hearing Tr. (1/8/08) at 28 ([Counsel for

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[20] See Ex. 2, Hearing Tr. (2/26/08) at 21 ("But the point that Judge Sullivan is protecting there is quite narrowly defined."); see also Pl. Opp. to FEI's Mot. to Compel Dep. Testimony (3/7/08) (Docket No. 273) 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 ... it seems clear that he was including funding strategies in this category, as plaintiffs have urged.") (emphases and internal citations omitted).

[21] Ex. 2, Hearing Tr. (2/26/08) at 246 ("THE COURT: Prior to gathering information did you have a conversation with your counsel as to what was the proper interpretation of the words and what you were being obliged to do? THE WITNESS: Yes. THE COURT: And did you base your activity on that guidance from counsel? THE WITNESS: Based on the – yes, I did to check my documents.") (testimony of API); Ex. 3, Hearing Tr. (3/6/08) at 73-74 ("Q. Sir, the individuals whose files were searched in September of 2007, how did they know what to look for? A. They were instructed by our attorneys on what to look for. Q. And which attorneys were those? A. I believe they would have been instructed by our counsel at Meyer and Glitzenstein, as well as our counsel within the organization and our general counsel's office, as well. ... Q. Okay. So, sir, the people who were looking for documents, did they rely on these instructions by your outside and inside counsel? A. Yes, I'm sure they did.") & 74 ("Q. Was your understanding of that order influenced by anything lawyers have told you? A. We, obviously, consulted with our attorneys on how to interpret the order.") (testimony of FFA/HSUS).

plaintiffs:] "[W]e do, for example, have a contemporaneous memo that we sent out to the clients. ... I think it reflects what we think was a conscientious effort to go about doing what Judge Sullivan told us to do.").[22] Plaintiffs, therefore, have invoked advice of counsel to defend themselves and in so doing have waived the attorney-client and work product privileges (assuming those privileges even apply) over their efforts to comply with the 8/23/07 Order.

Where, as here, the client places otherwise privileged matters in controversy, the attorney-client and work product privileges are waived. See, e.g., Ideal Elec. Security Co. v. Int'l Fidelity Ins. Co., 129 F.3d 143, 152 (D.C. Cir. 1997) (where plaintiff brought action for indemnification for attorney's fees, plaintiff put the reasonableness of the fees at issue and waived the attorney-client privilege with respect to the billing statements and any other communications going to the reasonableness of the amount billed).

Courts in this district have held that "a client waives his attorney-client privilege when he brings suit or raises an affirmative defense that makes his intent and knowledge of the law relevant." United States v. Exxon Corp., 94 F.R.D. 246, 247-48 (D.D.C. 1981) (where Exxon raised affirmative defense of "good faith reliance" on government regulations in making pricing decisions, Exxon waived privilege over attorney-client communications regarding its interpretation of various government policies and directives).

Plaintiffs cannot unilaterally select waiver for only certain documents and communications. In other words, plaintiffs cannot use privilege as both a "shield" and a "sword" by waiving privilege as to information they perceive as helpful and claiming privilege for those

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22 Even though plaintiffs contend that their non-compliance was in "good faith" and based on "advice of counsel," a finding of bad faith is not required in contempt proceedings. See Food Lion, Inc. v. United Food & Commercial Workers Int'l Union, 103 F.3d 1007, 1016 (D.C. Cir. 1997) ("the [contemnor's] failure to comply the a court order need not be intentional."). Moreover, "[r]eliance upon advice of counsel may be considered in mitigation of the sanction but does not constitute a defense to contempt of court." SEC v. First Financial Group, 659 F.2d 660, 670 (5th Cir. 1981) (citing In re Door, 195 F.2d 766, 770 n.6 (D.C. Cir. 1952)).

they perceive as harmful. See In re Sealed Case, 676 F.2d 793 (D.C. Cir. 1982) ("Implied waiver deals with an abuse of a privilege ... . Where society has subordinated its interest in the search for truth in favor of allowing certain information to remain confidential, it need not allow that confidentiality to be used as a tool for manipulation of the truth-seeking process ... . [A party asserting attorney-client privilege] cannot be allowed, after disclosing as much as he pleases, to withhold the remainder."). Plaintiffs, therefore, have waived privilege over ***all*** documents and communications concerning their efforts to comply with the Court's 8/23/07 Order. See, e.g., Exxon, 94 F.R.D. at 247-48 (rejecting the defendant's request to limit the waiver to specific communications relied upon by Exxon in supporting its defense.). "Otherwise, [plaintiffs would be] free to interpose only those documents that are most favorable to [their] defense; this is precisely the inequitable result that the waiver doctrine seeks to avoid." Id. at 249.[23]

B. Counsel's "Media"/"Public Relations" Dealings Are Not Privileged

Just because Mr. Glitzenstein, Ms. Meyer and Mr. Lovvorn happen to be attorneys in this case does not mean, contrary to plaintiffs' argument otherwise, that their "media"/"public relations" dealings in the Rider funding scheme are automatically, and entirely, cloaked in the attorney-client privilege. See United States v. Fago, 238 F.R.D. 3, 11 (D.D.C. 2006 (Facciola,

[23] In any event, MGC's "memo" is not protected by the attorney-client privilege because it has not been described as being based on any confidential communications from the plaintiffs to MGC. Communications from a lawyer to a client are privileged only insofar as they disclose communications from the client to the lawyer which were intended to be confidential and made for the purpose of seeking legal advice. The D.C. Circuit has expressly held that opinions of counsel which do not disclose any information transmitted to the attorney by a client who was expecting that it be kept confidential are not protected by the attorney-client privilege. See, e.g., Athridge v. Aetna Casualty & Surety Co., 184 F.R.D. 181, 188 (D.D.C. 1998) (Facciola, J.) (citing Mead Data Central v. United States Dep't of Air Force, 566 F.2d 242, 253 (D.C. Cir. 1977)) ("In this Circuit, a document created by an attorney is protected by the attorney-client privilege only if the disclosure of its contents will necessarily and inevitably disclose a communication from the client which the client intended to be confidential.").

The Court's Order of August 23, 2007 specifically ordered each plaintiff to submit a declaration that, among other things, explained why any responsive information or document was not being produced. Consequently, any communication by the clients here regarding a subject (document gathering and production or non-production) that ultimately was going to be divulged to the Court and the defendant, could not have been made with a genuine expectation of confidentiality.

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). Indeed, this situation is no different than when 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). Counsel, therefore, cannot play the "lawyer" card to avoid questioning on the Rider payments, which in no way implicate legal advice and/or client confidences. See Evans, 1999 U.S. Dist. LEXIS, at *16 n. 6 ("For instance, questions pertaining to the substance of communications between Mr. Sosebee and agency officials on matters which are not strictly legal might not be protected by the attorney-client privilege[.]").

III. There Is No Law Of The Case Relevant To This Evidentiary Hearing, And Plaintiffs' Counsel Will Not Face A Conflict As A Result Of Their Testimony

Plaintiffs' convoluted arguments regarding Judge Sullivan's RICO Order and a potential "conflict of interest" should they be called to testify are red herrings. See Mem. Op. (8/23/07) (Docket No. 176) ("RICO Order"). The "law of the case" doctrine could only apply if this Court has previously ruled upon the very same issue that is being contested here: whether counsel may be commanded to testify in an evidentiary hearing regarding plaintiffs' compliance with the Court's 8/23/07 Order. See Spirit of The Sage Council v. Kempthorne, 511 F. Supp. 2d 31, 38

(D.D.C. 2007) ("The doctrine instructs [] that where litigants have once battled for the court's decision, they should neither be required, nor without reason permitted, to battle for it again.") (internal quotations and citation omitted). That issue has not yet been decided in this case.

Judge Sullivan's RICO Order is inapposite here. The RICO Oder was issued contemporaneously with the Court's 8/23/07 Discovery Order. At that time, Judge Sullivan could not have foreseen plaintiffs' failure to comply with that Order and their novel interpretations of it when he authored the RICO opinion. Nobody, including FEI and Judge Sullivan, had reason even to suspect that an evidentiary hearing on plaintiffs' responses to the Court's discovery order would be necessary. Moreover, Judge Sullivan's RICO Order contemplated that plaintiffs' counsel may be fact witnesses to the merits of the RICO Action, and that consequently they would be subject to discovery depositions. See RICO Order at 6 ("Allowing a counterclaim to go forward that alleges plaintiffs' counsel's involvement in improper payments would likely involve depositions of plaintiffs' counsel and create a need for new counsel to pursue the 'taking' claim where no need currently exists."). Again, that is not the issue here. FEI is not seeking depositions from counsel; rather, it seeks counsel's testimony regarding plaintiffs' compliance with the Court's 8/23/07 Order and the existence and preservation of certain payment documents and information.

Furthermore, no "conflict of interest" would result from counsel's testimony at this evidentiary hearing. Indeed, no such "conflict" arose in Hubbard, supra, where this Court ordered counsel to testify in an evidentiary hearing regarding compliance with a Court order. And, tellingly, plaintiffs make no affirmative representation that such a "conflict" would develop should they testify, nor do they explain what that "conflict" would be and why they would have to withdraw. Indeed, Mr. Glitzenstein has already provided testimony under oath in this case as

WAP's Rule 30(b)(6) witness, and no "conflict" prevented him from so testifying or from continuing to represent plaintiffs simultaneously.

The RICO stay briefing is likewise irrelevant to the present dispute. In that context, where FEI argued against a stay of its independently filed RICO lawsuit, FEI contended that ASPCA, AWI, FFA, Mr. Rider and API's voluntary retention of MGC to defend them in that action – whilst knowing that MGC was litigating the present case concurrently and that Mr. Glitzenstein and Ms. Meyer were likely to be called as fact witnesses in the very same action – was no reason to stay that case. See Pls. Opp. to Defs. Mot. To Temporarily Stay All Proceedings, Civil Act. No. 07-1532 (10/9/07) (Docket No. 6) at 19-20 ("Defendants were free to retain entirely different counsel but apparently chose not to do so. Indeed, it is difficult to understand why counsel would undertake a defense of the RICO Action knowing that they would be material witnesses in the litigation."). That conflict argument has no application here. FEI is not seeking to make counsel "star" fact witnesses to the ESA Action.

FEI did not file its Motion to Enforce and subsequently subpoena plaintiffs' counsel in order to have them disqualified. That is not the remedy FEI seeks. If it wanted to disqualify counsel, it would file a motion to do so. Rather, FEI seeks plaintiffs' compliance with the Court's 8/23/07 Order so that it may to proceed to a trial, if any, on the merits of this case equipped with all of the discovery necessary to mount its defense. It has become apparent that the only method of determining whether the plaintiffs complied with the 8/23/07 Order is to have counsel testify under oath in open court.

IV. There Are No "Other Means" "Short of Having Plaintiffs' Counsel's Provide Live Testimony"

Plaintiffs' argument regarding "other means" or "alternatives" to live testimony is of no merit. Plaintiffs imply that the mere status as "counsel" should shield their attorneys from live

testimony, period. That argument, however, is not grounded in the law. This Court squarely rejected such an approach in Hubbard, where counsel gave live testimony, and not a declaration as requested. See Hubbard, No. 03-1061 (D.D.C.), Defs. Notice of Position Concerning Testimony of Agency Counsel (1/16/08) (Docket No. 123) (arguing defendant should first be given "the opportunity to provide a declaration addressing the Court's questions") & Order (1/25/08) (Docket No. 125) ("At the hearing, I heard the testimony of Elisabeth Boyen, attorney for the U.S. Postal Service.") (collectively attached hereto as Ex. 5); see also Evans, 1999 U.S. Dist. LEXIS 17545, at *3 & *17 (ordering counsel's deposition and denying request to submit declaration). Plaintiffs' claim that "privilege problems" may arise during the hearing, see Motion at 13, is unavailing. The Court is well adept at handling privilege issues and the Court may rule upon any privilege objections as they arise. To submit declarations, and engage in further briefing regarding the applicability of any privileges and the sufficiency of those declarations, is not only unnecessary but also a waste of the resources of this Court.

CONCLUSION

For all of the reasons stated above, Plaintiffs' Motion must be denied.

Respectfully submitted,

/s/

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Dated this 31st day of March, 2008.

CERTIFICATE OF SERVICE

I, Lisa Zeiler Joiner, do hereby certify that on March 31, 2008 the foregoing **Opposition Plaintiffs' Motion to Quash Subpoenas to Plaintiffs' Counsel Of Record Or In The Alternative For Protective Order** 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. (Counsel for Plaintiffs)
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COURTESY COPY TO CHAMBERS OF HON. JOHN M. FACCIOLA UNDER SEAL IN UNREDACTED FORM

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