UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS, *et al.*,	)	
Plaintiffs,	)	
v.	)	
	)	Civ. No. 03-2006 (EGS/JMF)
RINGLING BROTHERS AND BARNUM & BAILEY CIRCUS, *et al.*,	)	
Defendants.	)	

PLAINTIFFS' REPLY IN SUPPORT OF THEIR MOTION TO QUASH SUBPOENAS TO PLAINTIFFS' COUNSEL OF RECORD OR IN THE ALTERNATIVE FOR PROTECTIVE ORDER

Defendant Feld Entertainment, Inc. ("FEI") has offered several reasons why an evidentiary hearing that FEI previously represented to the Court would be "comprehensive" without testimony by counsel of record now somehow requires their participation. However, none of FEI's proffered reasons withstands legal or factual scrutiny. Indeed, far from demonstrating that counsel's testimony is "crucial and unique," Shelton v. Am. Motors Corp., 805 F.2d 1323, 1330 (8th Cir. 1986), FEI's brief serves only to underscore that FEI is impermissibly seeking to use the hearing to probe core attorney work-product materials and attorney-client communications.[1]

[1] FEI's effort to explain how its present demand for counsel's testimony is reconcilable with its prior representations to the Court "grossly distorts the facts." Feld Entm't, Inc. v. Am. Soc'y for the Prevention of Cruelty to Animals, 523 F. Supp. 2d 1, 4 (D.D.C. 2007). While FEI maintains that at the January 8, 2008 status hearing FEI "stated that, '***at a minimum***,' it anticipated that it would need to call all of the September 2007 declarants," FEI Opp. at 1 n.1 (emphasis in original) (quoting DE 252-2 at 4), FEI also described what additional witnesses would make the hearing "comprehensive" – i.e., a "document custodian" from Meyer Glitzenstein & Crystal and one representative from the Humane Society of the United States ("HSUS"). Id. at 4-5 (emphasis added). Hence, FEI plainly took the position that both a

Moreover, notwithstanding FEI's assurances that counsel's participation as witnesses will not necessitate counsel's withdrawal or otherwise impair plaintiffs' pursuit of their case alleging serious and ongoing mistreatment of the endangered Asian elephants in FEI's care, FEI's arguments in its opposition to the motion to quash and in past pleadings flatly contradict those assurances. More important, FEI does not and cannot dispute that Judge Sullivan cited precisely such concerns in rejecting an equivalent effort by FEI to compel counsel to become witnesses in this case. FEI has offered no compelling rationale for deviating from that ruling in the present context and hence, once again, it should be regarded as the law of the case.[2]

ARGUMENT

I. PLAINTIFFS HAVE COMPLIED WITH THE PLAIN TERMS OF THE AUGUST 23, 2007 ORDER; IN ANY EVENT, THE PARTIES' DISAGREEMENT IS FUNDAMENTALLY A LEGAL, RATHER THAN A FACTUAL, ONE THAT IN NO WAY WARRANTS TESTIMONY FROM COUNSEL OF RECORD.

Before turning to FEI's specific arguments for why counsel of record must testify, it is essential to first set the record straight regarding one overarching, but erroneous, theme that runs throughout FEI's brief. FEI repeatedly suggests that "plaintiffs' failure to comply" with Judge Sullivan's August 23, 2007 discovery Order has already been established, and even that this "failure" has somehow been "admit[ted]" by plaintiffs and/or their counsel. FEI Opp. at 1, 2, 6.

"minimum" and a "comprehensive" hearing did not require testimony by counsel of record.

[2] In addition to the transcripts of the evidentiary hearing (which FEI has filed with the Court along with its opposition) and one exhibit attached hereto, plaintiffs' citations are to various documents that have already been submitted to the Court as exhibits for the evidentiary hearing. Should the Court desire additional copies of any of these materials, plaintiffs will, of course, provide them.

This is false. In reality, plaintiffs' position is that they have scrupulously complied with the plain terms of the August 23, 2007 Order. Moreover, the testimony thus far elicited – i.e., from the very witnesses FEI previously advised the Court were necessary for a "comprehensive" hearing – both buttresses plaintiffs' legal position and undercuts FEI's asserted rationale for now demanding testimony from counsel of record.

Plaintiffs have read Judge Sullivan's ruling, according to its plain terms, as requiring the disclosure of "all funding for [Tom Rider's] public education and litigation efforts related to defendants . . . ." DE 178 at 4.[3] Accordingly, as plaintiffs' representatives have testified at the evidentiary hearing, plaintiffs have exhaustively and painstakingly searched all of their files for such materials and have, to the best of their ability, located and produced to FEI materials reflecting all funding plaintiffs can uncover that has gone to Mr. Rider in any manner or for any purpose whatsoever. Accordingly, FEI can make whatever argument it desires regarding the actual or potential impact of such information on Mr. Rider's credibility.[4]

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[3] As confirmed by the testimony and other evidence adduced at the evidentiary hearing, Mr. Rider's funding has in fact allowed him to travel around the country while he seeks to educate the public concerning the plight of circus animals generally and FEI's elephants in particular. See, e.g., Transcript of 2/26/08 Evidentiary Hearing at 20, 29, 48, 80, 92, 93-94, 96, 108, 141, 157, 165-67, 191-92, 201-02; Transcript of 3/6/08 Evidentiary Hearing at 27, 44, 66, 67; see also Pls. Hearing Ex. 5 (articles and other documents reflecting some of Mr. Rider's public education efforts). While FEI may disparage this media campaign as a "fiasco," FEI Opp. at 12 n.10, it is in fact a vital, albeit modest, response to FEI's own extensive public relations efforts which, in plaintiffs' view, seriously mislead the public concerning the bleak lives endured by the elephants. See, e.g., Petula Dvorak, On the Other Tightrope, Parents Weigh Animal Rights Ethics Against Kids' Enjoyment of the Circus, Wash. Post, April 3, 2008, at B1 (assertion by FEI's head of communications that the "circus is a place to see animals and humans in 'a caring relationship'").

[4] See, e.g., 2/26/08 Tr. at 74 (ASPCA) (Q: "Ms. Weisberg, do you believe that this set of documents reflects every payment or disbursement or any other similar way of characterizing it that's gone to Mr. Rider from the ASPCA directly or indirectly?" A: "Yes, I do." Q: "Is it

On the other hand, as plaintiffs have indeed "openly admit[ted]" from the beginning of this discovery dispute, FEI Opp. at 6, plaintiffs have not provided FEI with documents or information that plaintiffs are not required to produce under the August 23, 2007 discovery Order, either because they constitute "documents, communications, or information concerning the media and legislative strategies of the plaintiffs," DE 178 at 5 – and hence have been held to be "irrelevant to the claims and defenses in this case and would be over burdensome to produce," id. – or because they are not "responsive" documents, id. at 6, i.e., they are not even covered by the discovery requests propounded by FEI.

For example, as is clear from the evidentiary hearing and as reinforced by FEI's brief, FEI Opp. at 6, it is evidently FEI's position that plaintiffs were obligated to produce to FEI all internal documents and information concerning a California fundraiser that was organized by AWI and others concerned about the plight of elephants in circuses. Importantly, there appears to be no dispute that plaintiffs – as well as the non-party Wildlife Advocacy Project ("WAP") – have provided both documents and testimony to FEI reflecting any proceeds from that fundraiser

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your view that the ASPCA has done a thorough search for all documents that are sufficient to reflect payments that have gone to Mr. Rider for any purpose whatsoever?" A: "Yes, I absolutely do."); id. at 151 (Animal Protection Institute ("API")) (Q: "Ms. Paquette, if you can take a look through there and indicate whether you believe if it reflects evidence of all contributions to Mr. Rider's public education campaign that you're familiar with?" A: "It does reflect all contributions or payments that API has made except for that one little dinner that we paid for." Q: "Do you have any reason to believe that there are any other payments than what you just mentioned that have gone to Mr. Rider coming from API directly or indirectly that are not reflected in these documents?" A: "There are no other."); 3/6/08 Tr. at 47 (Animal Welfare Institute ("AWI")) (Q: "Ms. Silverman, do you believe that these documents reflect all payments that AWI has been able to uncover that have gone to Mr. Rider either directly or indirectly?" A: "Yes." Q : "And do you have a high level of confidence that that's the case?" A: "I do. We searched high and low.")); id. at 63 (Fund for Animals ("FFA")) (Q: "Mr. Markarian, is it your understanding that Fund for Animals has produced all of the documents in its or HSUS' files that concern payments to or for Tom Rider?" A: "Yes, it is.")).

that have actually been used to support Mr. Rider's activities, either "directly" or "indirectly through other means such as WAP." DE 178 at 6; see 3/6/08 Tr. at 33-34 (AWI); Pls. Hearing Ex. 7 at AWI 06498, AWI 06499 (checks from AWI to WAP). Yet FEI evidently believes that because such funding occurred, every other document ever generated, and any other communication that has ever occurred, that in any way concerns the fundraiser – such as internal planning, budgeting, coordination, organizing, and similar materials – constitute "payment information" that plaintiffs were obligated to disclose to FEI. FEI Opp. at 2.[5]

Plaintiffs, while readily acknowledging that such documents and communications exist, see 3/6/08 Tr. at 32 (AWI) (Q: "Were there ever any e-mails that related to [the] organizing and planning of this fundraising event?" A: "Yes." . . . Q: "Were there any kind of notes or documents other than e-mails that were created during the process of organizing this event?" A: "Sure.") (emphasis added), maintain that FEI's position that it is entitled to such materials is based on a patently erroneous – indeed, a bizarre – reading of Judge Sullivan's discovery Order. First, such "organizing and planning" materials are not even "responsive" to any of FEI's underlying discovery requests, the threshold condition established by Judge Sullivan for all of plaintiffs' obligations under the Order. DE 178 at 3, 6-7; see also D'onofrio v. SFX Sports Group, Inc., 247 F.R.D. 43, 47 (D.D.C. 2008) (Facciola, J.) ("A motion to compel is appropriate

[5] Although the term "payment information" is used throughout its brief, FEI never defines exactly what it means by the phrase – which, in fact, is nowhere to be found either in the August 23, 2007 discovery Order or in any of the underlying discovery requests that are at issue. Rather, Judge Sullivan ordered the organizational plaintiffs to produce "[a]ll responsive documents and information" – i.e., "responsive" to one or more of the specific discovery requests that are at issue – "concerning payments to Tom Rider," id. at 6, while expressly deeming "irrelevant and over burdensome" the production of "any documents, communications, or information concerning the media and legislative strategies of the plaintiffs." DE 178 at 5. Plaintiffs have complied with that Order.

only where an appropriate request is made of the responding party . . .. The court will not compel discovery that has not been sought.") (internal quotation omitted).[6]

Second, documents concerning the internal "organizing and planning" of a fundraiser – including who will speak at the event and the message to be conveyed by the speakers to those attending it – clearly constitute "documents, communications, or information concerning the media and legislative strategies of the plaintiffs," and hence need not be disclosed under Judge Sullivan's discovery Order declaring such materials to be both "irrelevant" and "over burdensome to produce." DE 178 at 5. Third, even assuming such materials were "responsive"

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[6] As has now been highlighted at the evidentiary hearing, FEI's actual discovery requests are far different from what is implied by FEI's latest brief (or, for that matter, its motion to compel). FEI in fact never propounded discovery asking plaintiffs for all "payment information" (whatever the contours of that phrase) or even all materials in any way relating to Mr. Rider's funding. Rather, the pertinent document production requests asked the organizational plaintiffs for documents concerning certain allegations in their Complaint. See Def. Hearing Ex. 3 ¶¶ 19, 20. Thus, in response to allegations by the organizational plaintiffs that they "spend[] resources each year on advocating protection for endangered and threatened animals, including better treatment for animals used for entertainment purposes," DE 1 ¶ 9, FEI requested "[d]ocuments sufficient to show all resources you have expended in 'advocating better treatment for animals held in captivity, including animals used for entertainment purposes' each year from 1996 to the present." Def. Hearing Ex. 3 ¶ 19 (emphasis added). Hence, with regard to Mr. Rider's media campaign, the materials "responsive" to this request, DE 178 at 6, are those "sufficient to show" all funding that Mr. Rider has received from the organizational plaintiffs, either directly or indirectly. As confirmed at the hearing, FEI has in fact been provided such documents. See supra n.3.

In sharp contrast, contrary to FEI's position, documents reflecting plaintiffs' "organizing and planning" of their funding activities, id. at 32, are not in fact "responsive" to any of the underlying discovery requests. See U.S. ex rel. Fago v. M & T Mortg. Corp., 518 F. Supp. 2d 108, 116 (D.D.C. 2007) ("Moreover, Magistrate Judge Facciola agreed when he denied Plaintiffs' earlier Motion to Compel a supplemental response to the interrogatory, holding that the requested additional information was not responsive to any of Plaintiff's document requests."); see also DE 263, FEI's 2/19/08 Response in Opposition to Plaintiffs' Motion to Compel Discovery from Defendant, at 2 ("The starting point for any document dispute is necessarily the requests themselves.").

and relevant, their compelled disclosure would violate plaintiffs' core First Amendment "freedom[s] to organize, raise money, and associate with other like-minded persons so as to effectively convey the message of the protest." Wyo. v. U.S. Dep't of Agric., 208 F.R.D. 449, 454 (D.D.C. 2002) (internal quotation omitted; emphasis added).[7] Fourth, in rejecting FEI's RICO counterclaim and in staying the related RICO claim, Judge Sullivan admonished FEI for its "numerous discovery-related motions" designed to "learn every detail of the media and litigation strategies of its opponents," DE 176 at 8; if those rulings do not even protect documents bearing on plaintiffs' strategy in "organizing and planning" a fundraising event, it is difficult to fathom what discovery Judge Sullivan put off-limits in his RICO rulings.[8]

In short, plaintiffs' position – as reinforced by the evidentiary hearing – is that FEI has in fact received whatever "limited information about payments to or the behavior of Tom Rider that defendant is entitled to in order to challenge [Mr. Rider's] credibility," DE 176 at 5 (emphasis added) and, moreover, that FEI is demanding exactly what Judge Sullivan held it should not and could not have. What is most critical for present purposes, however, is that this is fundamentally

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[7] Because Judge Sullivan held that "any documents, communications, or information concerning the media and legislative strategies of the plaintiffs are irrelevant to the claims and defenses in this case and would be over burdensome to produce," DE 178 at 5 (emphasis added), it was unnecessary to address whether such materials could also be withheld on First Amendment or other privilege grounds. See also Am. Soc'y for the Prevention of Cruelty to Animals v. Ringling Bros. & Barnum & Bailey Circus, 233 F.R.D. 209, 213 (D.D.C. 2006) (Facciola, J.) ("It should go without saying that there is no obligation to assert a privilege for documents that are not within the scope of a request or that are outside the scope of what could permissibly be requested.").

[8] In fact, Judge Sullivan entered his stay of all discovery in the RICO action knowing that it prominently featured the California fundraiser and FEI's allegation that plaintiffs had made "false and/or misleading" statements in promoting it – including the purportedly "untrue" statement that "FEI mistreats its Asian elephants." Feld Entm't Inc.v. Am. Soc'y for the Prevention of Cruelty to Animals, No. 1:07-cv-01532, Compl. ¶ 123.

a legal disagreement between the parties as to what was required by Judge Sullivan's discovery Order. Resolution of that dispute certainly does not demand that plaintiffs' counsel of record take the stand; indeed, as we discuss next, FEI's peculiar notion that it should be allowed to cross-examine opposing counsel on their understanding of the law and their communications with their clients has no basis in rulings by this or any other Court.

II. FEI HAS NOT SATISFIED ANY OF THE STRINGENT CRITERIA FOR DEMANDING THAT COUNSEL OF RECORD TESTIFY.

A. The Proper Legal Framework For Evaluating FEI's Effort To Subpoena Counsel of Record

Contrary to FEI's characterization, plaintiffs' motion does not make the simplistic argument that Mr. Glitzenstein, Ms. Meyer, and Mr. Lovvorn are "immune" from testifying at the hearing "merely because they are lawyers and counsel of record in this case." FEI Opp. at 4. Rather, plaintiffs contend that this and other courts have established a heavy presumption against such testimony by counsel of record because it may create a conflict and otherwise impair counsel's ability to effectively represent their clients' interests, see, e.g., Jennings v. Family Mgmt., 201 F.R.D. 272, 277 (D.D.C. 2001), and that FEI has not (and cannot) overcome that presumption here. Plaintiffs have further argued that Judge Sullivan – in light of these very concerns – has previously expressed his intent that counsel of record not be pressed into service as witnesses, and that this ruling should be followed as the law of the case. Although FEI now offers a grab-bag of reasons why three of plaintiffs' counsel of record should testify – none of which, once again, was even hinted at when FEI advised the Court that a "comprehensive" hearing did not require such testimony – none passes muster.

To begin with, FEI asserts that "[t]his is not a case where FEI is seeking to take routine

fact discovery from opposing counsel," FEI Opp. at 4, and hence that Shelton, Jennings, and the other cases on which plaintiffs have relied are somehow "inapplicable to the present situation." Id. at 7. In fact, FEI is seeking to use (and, plaintiffs respectfully submit, already has used) the evidentiary hearing to take additional "fact discovery" and, indeed, its brief reinforces this fact.

For example, FEI insists that plaintiffs' lead counsel, Ms. Meyer, must be compelled to testify in her capacity as a WAP official "as to the communications and dealings between herself and Mr. Rider," FEI Opp. at 13, although FEI previously told the Court that there was no need for any witnesses from WAP at the hearing, see DE 252-2 at 26, and despite the fact that both Mr. Rider and WAP's Rule 30(b)(6) deponent have already been "exhaustively examined" with regard to such communications. DE 245 at 1. Hence, because the testimony of plaintiffs' lead counsel is hardly "crucial" to this particular proceeding, Jennings, 201 F.R.D. at 277, FEI plainly is now attempting to use the hearing to take additional "fact discovery" for both this case and the stayed RICO action as well as to manufacture a conflict between plaintiffs and their counsel that might necessitate counsel's withdrawal, i.e., precisely what Judge Sullivan said he wanted to avoid. See DE 176 at 5-6.

In any event, FEI's suggestion that the strong presumption against compelled testimony by counsel of record is somehow "inapplicable" to a hearing in open court, FEI Opp. at 7, makes no sense in view of the reasons for the presumption. Indeed, if anything, the fact that (1) the testimony FEI seeks here will, at bare minimum, distract counsel of record from their vital role in representing their clients at the hearing, and (2) also risk creating the kind of conflict that Judge Sullivan has specifically sought to avoid in this case should create an even higher legal hurdle for FEI to overcome than in the case of routine deposition testimony. See, e.g., Lloyd Lifestyle Ltd.

v. Soaring Helmet Corp., No. C06-0349C, 2006 WL 753243, at *2 (W.D. Wash. 2006) ("[I]f anything, compelled trial testimony (or as here, its functional equivalent) from opposing counsel is even more troublesome than a pretrial discovery deposition.").

Contrary to FEI's insistence, FEI Opp. at 4, nothing in this Court's ruling in Hubbard v. Potter, 247 F.R.D. 27 (D.D.C. 2008), suggests either that the presumption against counsel testimony does not apply here, or that FEI has established a genuine need for such testimony in this particular case. Rather, in the portion of Hubbard on which FEI relies, the Court explained that the U.S. Postal Service had failed to produce specific documents that "clearly" fell within the plaintiffs' enumerated discovery requests and then "in fact labeled them nonresponsive when it did produce them . . . ." Id. at 30. Accordingly, the Court scheduled an evidentiary hearing for the sole purpose of hearing the testimony of one specific attorney for the Postal Service, presumably the attorney who had labeled the "clearly" responsive documents "non-responsive." Id. In other words, under those circumstances, the Court itself evidently determined that the stringent standard for counsel testimony was satisfied, i.e., (1) that "no other means exist[ed] to obtain the information"; (2) that the information sought was "relevant and nonprivileged"; and (3) that the testimony was "crucial" to the specific issue before the Court. Jennings, 201 F.R.D. at 277.

Here, in sharp contrast, neither in its initial Order concerning the hearing, DE 241 at 1, nor at the January 8, 2008 status hearing that addressed the "witnesses to be called," id., nor at any other time, has the Court suggested that it must hear from any counsel of record – let alone the three attorneys unilaterally selected by FEI – in order to effectuate the Court's stated purpose for the hearing, i.e., to make an "extraordinarily preliminary" determination of how plaintiffs

carried out their discovery obligations. DE 252-2 at 21. In particular, when FEI set forth both its "minimum" and its "comprehensive" list of witnesses for the hearing, id. at 4-6 – neither of which included any mention of counsel of record, see supra at n.1 – the Court did not inquire about testimony from counsel, thus suggesting that the Court (as well as FEI itself at that time) did not anticipate the need for it.

On the other hand, the Court did say, even with regard to the testimony that was discussed (i.e., from plaintiffs themselves), that the Court would be (and, indeed, has been) "very sensitive" to the need to avoid disclosure of attorney-client communications and attorney work-product, and that avoiding such disclosure was a "significant consideration" for the Court. DE 252-2 at 27. As we discuss next, notwithstanding FEI's own change of position on the matter, counsel's testimony is in fact not only totally unnecessary in this particular proceeding, but, as described by FEI itself, would invariably infringe on both the attorney-client and work-product privileges.

B. Testimony By Counsel Concerning Their Interpretation Of, And Communications With Plaintiffs Concerning, The Discovery Order Is Both Clearly Privileged And Unnecessary To This Hearing.

Defendant's principal rationale for now seeking testimony of counsel of record is that, although plaintiffs have now testified extensively concerning their own thorough search for materials in response to the August 23, 2007 discovery Order[9], counsel must testify under oath concerning their own understanding of the "contours of the 'media strategy' exception" – i.e.,

[9] Although plaintiffs have understood the primary purpose of the hearing to be whether plaintiffs had conducted an adequate search for responsive materials, FEI's brief is largely silent on that matter. Presumably this is because the testimony reveals that plaintiffs did in fact conduct a thorough, conscientious, and good faith search for responsive documents. See, e.g., 2/26/08 Tr. at 22-24, 39, 68, 75-76 (ASPCA); id. at 122-25, 127, 152-53 (API); 3/6/08 Tr. at 21, 23, 47 (AWI); id. at 70-71, 73, 79, 88-90 (FFA).

Judge Sullivan's holding that "any documents, communications, or information concerning the media and legislative strategies of the plaintiffs are irrelevant and over burdensome to produce." DE 178 at 5.[10] More specifically, FEI maintains that counsel "must be ordered" to testify regarding the "contours (and even existence) of the 'contemporaneous memo'" concerning plaintiffs' discovery obligations that plaintiffs' counsel mentioned to the Court at the January 8, 2008 status hearing. Id. at 11.

It is difficult to imagine a more blatant effort to infringe on the attorney work-product and attorney-client privileges. The memorandum prepared by counsel concerning the proper interpretation and implementation of the August 23, 2007 constitutes what this Court has characterized as "classic opinion work product" and "unquestionably attorney work product." U.S. ex rel. Fago v. M & T Mortgage Corp., 242 F.R.D. 16, 18 (D.D.C. 2007) (Facciola, J.). Likewise, counsel of record's testimony concerning their interpretation and understanding of the "contours" of the August 23, 2007 Order, and their communications with plaintiffs concerning the same, would undoubtedly "reveal counsel's mental impressions and litigation strategy," id., as well as divulge attorney-client discussions regarding how plaintiffs should carry out their search for and production of materials. See, e.g., Tax Analysts v. IRS, 117 F.3d 607, 618 (D.C. Cir. 1997).

Indeed, when FEI has sought exactly this kind of testimony from plaintiffs themselves,

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[10] Although FEI refers to plaintiffs' invocation of a "media strategy 'exception,'" plaintiffs have not invoked any "exception" but, rather, have simply followed the plain terms of Judge Sullivan's ruling, i.e., they have furnished FEI with those documents that Judge Sullivan deemed relevant – i.e., responsive materials reflecting any actual "funding for [Mr. Rider's] public education and litigation efforts related to defendants," DE 178 at 4 – while not providing that which Judge Sullivan deemed "irrelevant" and "over burdensome to produce." Id. at 5.

the Court has sustained plaintiffs' objections on attorney-client and/or work-product grounds. For example, when FEI asked one of plaintiffs' witnesses what "principle" his organization "used to exclude things that you felt were within media and legislative strategy," the Court held that the material was covered by the attorney-client privilege and "[i]t also seems to be work product because it exposes the workings of a lawyer's mind as to the meaning of the term." 3/6/08 Tr. at 87 (FFA); see also 2/26/08 Tr. at 41 (work-product), 135 (attorney-client), 147 (attorney-client); 3/6/08 Tr. at 74 (attorney-client). If such testimony may not be procured from plaintiffs, as the Court has held, then it surely cannot be the case that defendant may circumvent the Court's rulings by asking essentially the same impermissible questions of plaintiffs' counsel of record. See also Disability Rights Council of Greater Wash.v. Wash. Metro. Transit Auth., 242 F.R.D. 139, 143 (D.D.C. 2007) (Facciola, J.) ("Opinion work product, such as would disclose the mental impressions, conclusions, opinions or legal theories of an attorney . . . is entitled to special protection.").

Defendant's novel argument that plaintiffs have somehow "waived" their attorney-client and work-product privileges by invoking them at the evidentiary hearing, FEI Opp. at 20, also makes no legal or logical sense. Thus, FEI argues that because the "organizational plaintiffs have testified that they relied on the advice of counsel in responding to the Court's 8/23/07 Order," id. at 18, plaintiffs have therefore "invoked advice of counsel to defend themselves and in so doing have waived" all of their privileges, id. at 20. In fact, as reflected by FEI's own citations, see FEI Opp. at 19 n.21, the only time that any "advice of counsel" has even come up at the hearing has been when FEI asked plaintiffs questions designed to probe communications with their counsel (such as "how did they know what to look for," 3/6/08 Tr. at 73-74); plaintiffs then invoked a

privilege to protect the substance of such communications, and the Court sustained the privilege, id. at 74, or inquired whether the answer would indeed probe attorney-client or work-product protections. See, e.g., 2/26/08 Tr. at 135 (The Court: "Can you answer the question without disclosing what counsel said to you and what you said to counsel?" A: "No." The Court: "Sustained."). Plainly, invoking privileges to protect confidential communications and information – as plaintiffs have done here – is the very opposite of waiving them.[11]

Further, the counsel testimony FEI seeks is not only clearly privileged, but there surely is no "compelling need" for it. See Jennings, 201 F.R.D. at 279. Hence, it is simply incorrect that, in the absence of such testimony, FEI is "left to hypothesize what categories of documents are in

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[11] Indeed, under FEI's contorted view of the law of privileges, a party is damned if it does and damned if it doesn't: if the party scrupulously invokes the attorney-client privilege, then it is somehow relying on the "advice of counsel" defense and hence waiving its privilege for that reason; yet if a party fails to invoke the privilege for a particular attorney-client communication then, under the very authorities cited by FEI, it will be accused of waiving the privilege for that reason. FEI Opp. at 21 (citing In re Sealed Case, 676 F.2d 793 (D.C. Cir. 1982)).

Equally far-fetched is FEI's contention that plaintiffs have somehow "waived privilege over ***all*** documents and communications concerning their efforts to comply with the Court's 8/23/07 Order," FEI Opp. at 21 (emphasis in original), merely because plaintiffs' counsel – at the status conference focused on the "procedures" to be used for the evidentiary hearing, DE 241 at 1 – advised the Court of the existence of a memorandum to clients concerning the discovery Order, and explored with the Court how the Court might choose to take that document into consideration at the hearing (including the possibility of "in camera review"). DE 252-2 at 28. However, because FEI's counsel responded by stating that it might argue waiver if plaintiffs relied on the memorandum at the hearing, see id. at 29 ("[i]f you decide to use privileged materials, you may be doing so at your risk") (emphasis added), plaintiffs have refrained from any such reliance or otherwise disclosing the substance of the memo. Accordingly, the only time that the matter even arose at the hearing was when FEI raised it with one of the witnesses, who could not recall whether he had "seen a document purporting to summarize the requirements of the Court's August 2007 order." 3/6/08 Tr. at 74. It is difficult to comprehend how plaintiffs' non-reliance on the memo at the hearing could somehow constitute a "waiver," let alone necessitate testimony by counsel of record. See also FEI Opp. at 10 (asserting that counsel must testify because plaintiffs were unable to recall the memo that "counsel sent to the plaintiffs").

existence but are being withheld" on media strategy or other grounds. FEI Opp. at 11. Once again, as FEI acknowledges, both at the hearing and elsewhere, plaintiffs have made no secret of the fact that, while they have provided documents and information reflecting the actual "funding for [Mr. Rider's] public education and litigation efforts," DE 178 at 4, plaintiffs have not construed the discovery Order as compelling the disclosure of materials that would divulge their internal strategies and deliberations regarding the funding and operation of a media campaign designed to highlight the abuse of circus elephants – including because such materials are not "responsive" to any underlying discovery requests, and because they fall squarely within Judge Sullivan's exclusion of "any documents, communications, or information concerning the media and legislative strategies of the plaintiffs." DE 178 at 5, 6. FEI is perfectly free to argue (as it has) that this position is contrary to the August 23, 2007 Order, and even that plaintiffs should be held in contempt for taking it (arguments with which plaintiffs of course vehemently disagree), but that dispute may surely be resolved without the need for counsel's testimony on their thought processes and deliberations with their clients concerning these legal positions.

Thus, once again, FEI evidently maintains that it is entitled under the August 23, 2007 Order to all of plaintiffs' internal deliberations bearing on the "organizing and planning" of the California fundraiser or any other funding activities. 3/6/08 Tr. at 32. FEI even goes so far as to take the Fund for Animals to task for not providing to FEI "publicly available documents, such as press releases," FEI Opp. at 11 n.9 – although such materials are not even remotely responsive to any of the discovery requests presently at issue. Plaintiffs believe that these arguments are totally baseless, but the crucial point is that the Court now has a sufficient factual basis for evaluating the validity of the parties' respective legal positions – which, of course, was the Court's

articulated purpose in holding the evidentiary hearing in the first instance. See DE 252-2 at 21 (Court's explanation that the hearing was designed to "get a sense" of what plaintiffs did "as they responded" to the discovery requests and "when it's over we're kind of back where we started from" with regard to the legal dispute).[12]

By the same token, there is no substance to FEI's assertion that counsel of record are the "only source of information regarding what payment information has been produced, when those productions took place, and what type of information is purposefully being withheld." FEI Mot. at 11 (emphasis added). As for what has "been produced" to FEI by plaintiffs and "when," FEI and its own document custodian obviously know (or should know) all of the materials FEI has received in discovery; in any event, it is not plaintiffs' counsel's job to recapitulate for FEI plaintiffs' entire production history.

As for what "type of information" has been "withheld," it is, of course, almost invariably the case that counsel in discovery disputes must engage in a deliberative process in determining, in consultation with their clients, what specific materials are covered by a discovery request or ruling. If that alone means that counsel of record must testify – as FEI now insists is the case – then such testimony would be routine, rather than rare, and, of even greater concern, courts

[12] Although it is irrelevant to the question of whether counsel must testify, there is no substance whatsoever to FEI's assertion that there is "conflicting testimony" as to what plaintiffs considered to be "media strategy" material, FEI Opp. at 11 n.9, or, more specifically, that FFA's reading of the term was "far broader" than AWI's. Id. Rather, all of the testimony – including that proffered by FFA and AWI – demonstrates that plaintiffs have acted consistently, i.e., as required by Judge Sullivan, they have divulged materials reflecting all funding provided to Mr. Rider, while not producing documents that are not responsive to any of the underlying discovery requests and/or reflect plaintiffs' deliberations and planning concerning their media strategy. The two examples cited by FEI – planning documents for the California fundraiser in the case of AWI and a press release in the case of FFA – are merely different illustrations of the same principle.

would routinely order counsel to divulge both their work-product and their client confidences. See, e.g., Disability Rights Council of Greater Wash., 242 F.R.D. at 142-43 (counsel's process of "cull[ing]" documents from a larger group constitutes protected "work product").

In any event, it was precisely to avoid even the arguable need for such testimony that plaintiffs here compiled and provided to the Court and FEI – as exhibits for the hearing – all of the documents that plaintiffs have produced to FEI that plaintiffs believe are fully responsive to the pertinent portions of the August 23, 2007 Order. See, e.g., Pls. Hearing Ex. 1 (ASPCA), Ex. 3 (API), Ex. 7 (AWI), Tab D (FFA).[13] And, once again, each of the plaintiff representatives has testified that this set of materials in fact reflects the funding of Mr. Rider's activities that has come from that organization either "directly" or "indirectly through other means such as WAP . . .." DE 178 at 6; see 2/26/08 Tr. at 74-75 (ASPCA); id. at 151 (API); 3/6/08 Tr. at 47 (AWI); id. at 64-66 (FFA). Accordingly, FEI has been perfectly free to explore (and has explored) with the plaintiff representatives who actually oversaw the organizations' respective searches whether any additional materials exist that FEI believes should have been produced and to make any arguments it desires on that basis. See, e.g., 3/6/08 Tr. at 32 (Q: "Where there ever any e-mails that related to the organizing and planning of this fundraising event?" A: "Yes."). Critically, however, the fact that such "means exist to obtain the information" sought – and, indeed, have already been employed at the hearing – demonstrates that FEI cannot overcome the strong presumption against compelled testimony by counsel, especially testimony that will invariably impinge on the attorney-client and work-product privileges. Evans v. Atwood, Civ. No. 96-

[13] The FFA exhibits have not yet been received into evidence.

2746(RMU), 1999 WL 1032811, at *2 (D.D.C. 1999).[14]

C. Counsel Of Record Are Not Needed As Witnesses In This Hearing In Their Capacity As Representatives Of WAP.

FEI also argues that Mr. Glitzenstein and Ms. Meyer have "become key fact witnesses," FEI Opp. at 11, because of the funding of Mr. Rider's public education campaign by WAP, which is a non-party to both this lawsuit and the pending discovery motions. This alternative rationale for compelling counsel's testimony should also be rejected because it flies in the face of Judge Sullivan's prior rulings, flatly contradicts FEI's own prior representation to the Court that it needs no testimony from WAP for this proceeding, seeks additional discovery beyond the discovery cut-off date, and is, in any event, factually and legally baseless.

First, compelling counsel's testimony as "key fact witnesses" because of their involvement with WAP – and hence creating a potential "need for new counsel to pursue the 'taking' claim where no need currently exists" – is precisely what Judge Sullivan has already ruled that he did not want to occur, both because it would be "highly prejudicial to plaintiffs" and would "sidetrack this litigation away from the remaining, narrowed 'taking' claim that is the central focus of the litigation." DE 176 at 6. While FEI apparently disagrees with that ruling, it should, once again, be followed as the law of the case unless altered by Judge Sullivan. See Pls. Mem. at 10-12.[15]

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[14] In this respect as well, this case is in a much different posture than Hubbard. Plaintiffs have produced all of the documents that they believe are covered by the August 23, 2007 Order and have not labeled any such "[c]learly" responsive materials as "nonresponsive." Hubbard, 247 F.R.D. at 30.

[15] FEI characterizes plaintiffs' law of the case argument as "convoluted," FEI Opp. at 22, but it is actually quite straightforward: Judge Sullivan has clearly expressed his view that he does not want plaintiffs' counsel to be pressed into service as fact witnesses in this case, and that view

Second, even if Judge Sullivan had not already issued a ruling bearing directly on this issue, FEI has as much as conceded that testimony by WAP officials is hardly "crucial" to this proceeding. Evans, 1999 WL 1032811, at *2. Once again, in response to the Court's specific inquiry concerning WAP at the January 8, 2008 status hearing, FEI's counsel represented that "I didn't contemplate the Wildlife Advocacy Project being a witness" at the hearing. DE 252-2 at 26 (emphasis added). Given that representation at a hearing specifically designed to address the "witnesses to be called," DE 241 at 1, FEI cannot plausibly satisfy its burden of demonstrating that a "compelling need" for such testimony by counsel of record has suddenly materialized. See Jennings, 201 F.R.D. at 275.[16]

Indeed, far from establishing that such testimony is essential, FEI's strained rationale for WAP testimony demonstrates that FEI was correct when it first advised the Court to the contrary. FEI's assertion that counsel of record "are the only source of information as to whether documents and communications were exchanged between WAP and the organizational plaintiffs and Rider," FEI Opp. at 12, is patently incorrect. As FEI itself recognized at the January 8 status hearing, plaintiffs themselves are obviously an alternative, if not the best, "means . . . to obtain"

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should be honored at least in the absence of a compelling reason to deviate from it. Moreover, FEI's blithe assurance that "no 'conflict of interest' would result from counsel's testimony," FEI Opp. at 23, not only contravenes FEI's past position that counsel's involvement as witnesses would indeed create the "'need for the change of counsel,'" see Pls. Mem. at 12 (internal quotation omitted), but ignores the broad subject matter on which FEI is now pressing for such testimony, including plaintiffs' lead counsel's "communications and dealings between herself and Mr. Rider." FEI Opp. at 13. FEI's inquiry into such matters in open court obviously has at least the potential to create a conflict and hence "sidetrack this litigation" in exactly the fashion Judge Sullivan has said should be avoided. DE 176 at 6.

[16] Plaintiffs recognize, of course, that a "witness in a hearing need not be a party to the hearing." FEI Opp. at 12 n.10. The critical point here, however, is that FEI itself represented to the Court that WAP's officials were not needed as witnesses for this particular hearing.

this precise information. Evans, 1999 WL 1032811, at *2. Indeed, the organizational plaintiffs have already testified as to both their search for funding documents and their "communications" (with or without WAP's involvement). See, e.g., 2/26/08 Tr. at 112, 115-16, 118, 120-21, 142-43, 195-96, 201, 207, 209, 213-14; 3/6/08 Tr. at 9, 19.

As for Mr. Rider, the Court has already ruled both that (1) Mr. Rider was "exhaustively examined" at his deposition on the very issue as to which FEI claims it needs testimony at the hearing – i.e., documents and communications pertaining to the funding "made available to him by, for example, the Wildlife Advocacy Project and others as he traveled across the United States to speak generally about his claims of the abuse of circus elephants," DE 245 at 1 (emphasis added) – and (2) the parties may rely on his eleven-hour deposition to raise any issues they wish. DE 252-2 at 24-26. Indeed, as FEI concedes, Mr. Rider has already testified at length regarding his communications with WAP officials as well as with the other plaintiffs. See FEI Opp. at 13 (citing Def. Hearing Ex. 36 at 485-87). Accordingly, if, as it suggests, FEI believes that such communications establish plaintiffs' violation of their discovery obligations, see id., FEI is perfectly free to make that argument, but its conceded ability to do so on the current record argues against, not for, compelling counsel's testimony.

Moreover, FEI's insistence that counsel must testify because they have "made clear that they will not voluntarily produce [Mr. Rider] for testimony," id. at 12, is misleading at best. In fact, counsel raised this matter with the Court at the January 8 status hearing for the very purpose of obtaining a ruling on whether Mr. Rider's deposition testimony – which the Court had "reviewed" in its entirety just days earlier, DE 245 at 1 – would suffice. See DE 252-2 at 24. If the Court had indicated (or indicates now) that Mr. Rider's live testimony is nevertheless crucial

for this proceeding, counsel would of course make him available; otherwise, because Mr. Rider did already "exhaustively" testify on his response to the discovery requests (among other topics) and because Mr. Rider is in fact "travel[ing] across the United States to speak about" the plight of circus animals, DE 245 at 1, plaintiffs will abide by the Court's ruling that the parties may rely on the deposition testimony. That ruling, however, has no legal or logical bearing on whether counsel should testify.[17]

Nor is there any validity to FEI's contention that it must subpoena counsel of record because plaintiffs "may" have sent additional e-mails to WAP that have not been disclosed. FEI Opp. at 15. Plaintiffs themselves have already extensively testified as to the steps they took to preserve and search for e-mail communications. See, e.g., 3/26/08 Tr. at 20, 25, 33, 54, 57-60, 65, 77, 84, 106, 113-14, 124, 127, 130, 132, 150, 153, 154, 156, 194, 203, 204, 211-12; 3/8/08 Tr. at 36-37, 71-72, 89, 92. While plaintiffs believe that this testimony reflects a strenuous effort to comply with plaintiffs' discovery obligations, if FEI believes that it demonstrates otherwise, it

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[17] It is also worth noting that FEI's suggestion that plaintiffs' counsel have somehow prevented FEI from finding Mr. Rider in order to serve him with a subpoena, see FEI Opp. at 13 n.11, is difficult to take seriously in light of the fact that Mr. Rider has continued to engage in public appearances on behalf of circus elephants. For example, in a recent appearance that was sponsored by the League of Humane Voters of New York City and was widely publicized in advance, Mr. Rider appeared in a "major press conference outside of Madison Square Garden, urging the City Council to pass" legislation that "would end the use of elephants and other wild animals by the circus." Ex A.

FEI's other arguments concerning Mr. Rider are equally specious. For example, FEI complains that the Court "limited" Mr. Rider's deposition "to 11 hours," FEI Mot. at 13 n.11 – four more than the ordinary limit – and that plaintiffs' counsel "instructed" Mr. Rider "not to answer questions regarding his [purported] spoliation" of discovery materials. Id. In fact, as plaintiffs have explained in their opposition to FEI's pending motion to compel, Mr. Rider answered all questions relating to his search, production, and retention of materials sought by FEI except for those in which FEI asked for attorney-client communications. See DE 273 at 4-6.

is free to make that argument to the Court. In any case, FEI's belief that there should be more e-mails on the "Rider payment scheme," FEI Opp. at 14, hardly establishes the inadequacy of plaintiffs' response to the August 23, 2007 Order, let alone justifies the extraordinary step of compelling counsel's testimony. Indeed, as this Court held in the case on which FEI heavily relies, "[s]peculation that there is more will not suffice; if the theoretical possibility that more documents exist sufficed to justify additional discovery, discovery would never end." Hubbard, 247 F.R.D. at 29.[18]

Finally, even apart from these alternative avenues of obtaining any necessary information, FEI can establish no need for counsel's live testimony concerning WAP activities and/or documents, especially because WAP's discovery responses are not even at issue in this evidentiary hearing. Moreover, as the Court knows, FEI has served three broad document subpoenas on WAP, as well as conducted a Rule 30(b)(6) deposition of the organization for seven hours over two days. See Def. Hearing Ex. 37. The deposition thoroughly addressed all of the matters on which FEI claims it now needs live testimony, including discussions with Mr. Rider concerning the funding of his media campaign, id. at 80-82, 130-31, 215-18, 391-96, discussions with the organizational plaintiffs, id. at 51-56, 64-65, 188-89, 223-24, 226, 353-57, 395, and WAP's search for and production of e-mails concerning Mr. Rider's activities, id. at

[18] FEI's argument is also based on the erroneous assertion that WAP has produced the only e-mail "of its kind." FEI Opp. at 13. While plaintiffs are uncertain what that means, the fact is that plaintiffs have produced e-mails concerning the funding of Mr. Rider's public education campaign. See Pls. Hearing Ex. 1 at A 46, 73. As for e-mails that were located but not produced – i.e., the "e-mails [that] were exchanged regarding the joint July 2005 'fundraiser,'" FEI Opp. at 14 – it is, once again, plaintiffs' legal position that such materials need not be disclosed pursuant to the August 23, 2007 Order. That FEI disagrees in no way justifies testimony by plaintiffs' counsel any more than it justifies testimony by FEI's counsel concerning their construction of the Order.

185, 220, 312-13, 314-16, 319-22, 326-28, 357-61, 399-400, 407-09. Hence, even assuming that FEI now has any genuine need for WAP testimony – contrary to what FEI represented to the Court on January 8 – FEI has offered no coherent, much less a "compelling," reason, see Jennings, 201 F.R.D. at 279, why it cannot simply rely on the Rule 30(b)(6) deposition in lieu of live testimony from counsel of record.[19]

D. Mr. Lovvorn Is In Fact Counsel Of Record And FEI Has Offered No Compelling Need For His Testimony.

Contrary to FEI's contention that Mr. Lovvorn is not "really 'counsel of record,'" FEI Opp. at 17, as reflected in both the Court's official docket and its many published opinions concerning this case, Mr. Lovvorn has in fact acted, and is continuing to act, in that capacity; indeed, he has fully participated in providing legal advice to plaintiffs concerning all significant strategy decisions in this case both before and after leaving Meyer Glitzenstein & Crystal in

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[19] FEI's suggestion that it needs Ms. Meyer's live testimony concerning her search for e-mails in response to the WAP subpoenas, FEI Opp. at 13, is groundless and serves to highlight that FEI is simply looking for an excuse to take fact discovery from plaintiffs' counsel. Even if WAP's search for documents were at issue here – which it is not – as set forth in the organization's Rule 30(b)(6) deposition, WAP conducted a thorough search of its files (both e-mail and paper) and produced to FEI the responsive documents that it could locate concerning the funding of Mr. Rider's public education campaign. See Def. Hearing Ex. 37 at 325-28, 357-60. In addition, to check whether she had inadvertently placed any WAP e-mails in her litigation file, Ms. Meyer checked on e-mail correspondence that would be most likely to have any such misfiled e-mails (such as all of her correspondence with D'arcy Kemnitz and Mr. Rider). Id. at 359. In any event, FEI's conjecture that Ms. Meyer may have overlooked "unknown . . . e-mails in her 'MGC' file," FEI Opp. at 14, is not only a legally inadequate basis to "justify additional discovery," Hubbard, 247 F.R.D. at 31, but, more important, the "theoretical possibility that other electronic documents might exist" elsewhere in Ms. Meyer's computer, id., has no discernible relationship to whether plaintiffs (and HSUS) have performed an adequate search and production of their materials – i.e., the subject of this hearing. Equally attenuated is FEI's suggestion that for this hearing, FEI must procure a non-party's testimony on the whereabouts of a computer used by an employee of that entity six years ago, FEI Opp. at 15 – testimony that, in any event, has been furnished in WAP's Rule 30(b)(6) deposition. See Def. Hearing Ex. 37 at 311-12.

2005. In addition, although he has not been heavily involved in preliminary discovery matters and did not "sit at counsel table" during the evidentiary hearing, FEI Opp. at 16 – a peculiar test for whether an attorney is "really" counsel of record – he was in fact extensively involved in preparing witnesses for that hearing. Hence, the legal presumption against testimony by other counsel of record applies fully to Mr. Lovvorn.

FEI has not remotely overcome that presumption here. Indeed, contrary to FEI's assertion that Mr. Lovvorn is the "only source of certain information regarding FFA/HSUS's 'contributions' to WAP," FEI Opp. at 17, the testimony cited by FEI actually demonstrates that Mr. Markarian – the representative of FFA and HSUS whose testimony FEI itself called for at the January 8 status hearing (and who is still testifying) – had "'direct involvement'" in the funding of Mr. Rider's public education campaign. Id. (quoting 3/6/08 Tr. at 67). More important, Mr. Markarian has already extensively testified concerning all aspects of FFA's and HSUS's search for and production of discovery materials, including all locations that were searched, id. at 70, 75, 80-81; the process of the search, id. at 63-65, 79, 84, 89-91; the precise files that were searched, id. at 70-73, 79, 81, 87-88; the e-mail accounts that were searched, id. at 71-72, 80, 81, 88-90; the identities of the many individuals who were queried and whose files were searched, id. at 63-65, 76, 80, 83; whether the funding of Mr. Rider's media campaign was discussed with FFA's Board of Directors, id. at 69-70; and FFA's treatment of "media and legislative strategy" material, id. at 86-87.

Nor is Mr. Lovvorn the "only source" of information concerning FFA's oral communications with the other plaintiffs concerning Mr. Rider's public education campaign. Rather, as FEI acknowledges, AWI and API witnesses have already testified regarding the

conference calls that occurred among the organizations. FEI Opp. at 18; see also 2/26/08 Tr. at 115-16, 120-21, 195-96, 201; 3/6/08 Tr. at 9. Accordingly, once again, while FEI may make whatever legal argument it desires concerning these communications, it has as much as admitted that Mr. Lovvorn's testimony is not "crucial and unique," Shelton, 805 F.2d at 1330, and that "other means exist" – and have already been employed by FEI – for gaining access to the information FEI deems pertinent. Evans, 1999 WL 1032811, at *2.

CONCLUSION

The Court should quash the subpoenas to counsel of record. At minimum, particularly in light of FEI's potpourri of rationales for demanding counsel testimony, the Court should craft a protective order (1) delineating the specific factual areas as to which counsel's involvement would, in the Court's judgment, be "crucial and unique," Shelton, 805 F.2d at 1330, and (2) authorizing counsel, in lieu of live testimony, to furnish such information as officers of the Court or through sworn declarations. In any event, especially because FEI is demanding testimony that, in plaintiffs' view, would unavoidably involve disclosure of privileged communications and information and would also contravene Judge Sullivan's earlier ruling on counsel testimony, plaintiffs respectfully urge the Court to rule on this motion sufficiently in advance of the May 30 hearing so that plaintiffs and their counsel can both effectively prepare for the hearing and assess whether to seek reconsideration of any order that counsel must testify.

Respectfully submitted,

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