UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

RESPONSE BY NON-PARTY WILDLIFE ADVOCACY PROJECT TO MOTION OF DEFENDANT FELD ENTERTAINMENT, INC. FOR LEAVE TO AMEND ANSWERS TO ASSERT ADDITIONAL DEFENSE AND RICO COUNTERCLAIM AGAINST PLAINTIFFS AND WILDLIFE ADVOCACY PROJECT

INTRODUCTION

The Wildlife Advocacy Project ("WAP"), presently a non-party to these proceedings, makes this special appearance for the sole purpose of opposing the motion of Feld Entertainment, Inc. ("FEI") to add WAP as a party to this litigation seven years after the litigation was initiated. While WAP will defer to plaintiffs with regard to how the Court should handle the proposed "RICO" counterclaim as a whole, WAP will, in this brief, explain why, even if the Court allows the counterclaim to proceed against plaintiffs, it should not allow FEI to compel WAP, a small non-profit organization, to become a party.

As discussed below, because FEI is so clearly seeking to exact retribution against WAP for engaging, along with like-minded groups and individuals, in protected First Amendment activities, the Court should exercise its "sound discretion" to deny the motion to add WAP as a

party. *Carabillo v. Uillico*, 357 F. Supp. 2d 249, 255 (D.D.C. 2004). Indeed, as discussed further below, this kind of abuse of the legal process is not unfamiliar to the courts – rather, it has now been labeled by numerous academic commentators and courts a "Strategic Lawsuit Against Public Participation" – *i.e.*, a "SLAPP suit" – because it is designed to "punish activists for exercising the constitutional right to speak and petition the government for redress of grievances." Waldman, SLAPP Suits: Weaknesses in First Amendment Law and In the Courts Responses to Frivolous Litigation, 39 U.C.L.A. L. Rev. 979, 982 (1992). The motion to add WAP should also be denied because it simply comes too late, many years after the litigation was initiated and even long after FEI learned of the activities that purportedly form the basis for its proposed "RICO" counterclaim.[1]

BACKGROUND

While WAP vehemently disputes much of what is in FEI's motion and proposed counterclaim, WAP will, in this response, only highlight those features of the factual background that bear specifically on the request to force a non-party into this lawsuit at this late date. In the course of doing so, however, we will also highlight some of the many ways in which FEI's motion and Proposed Counterclaim are based on factual assertions that defendants and

[1] It is WAP's understanding that, as a matter of judicial economy and efficiency, plaintiffs are proposing that the Court hold the entire counterclaim motion in abeyance pending resolution of plaintiffs' claims. WAP also has no objection to the Court's holding in abeyance the subsidiary request to add WAP as a counterclaim-defendant and only if necessary addressing the issues raised in this response following the resolution of plaintiffs' claims.

their attorneys should know to be false in light of documents previously provided to them.

To begin with, contrary to FEI's misleading description of WAP as an "organization *claiming to be* a non-profit advocacy group," Prop. Counterclaim at ¶ 27 (emphasis added), WAP is *in fact* a non-profit organization established to advocate on behalf of wildlife and captive animals. Thus, as WAP has previously explained to the Court, WAP is a non-profit organization that was established for the purpose of educating the public regarding issues of public concern bearing on the treatment of wildlife, including animals held in captivity. *See* Wildlife Advocacy Project's Opposition to Defendants' Motion to Compel ("WAP Opp."), at 7-10. As set forth in documents requested by, and made available to, FEI's attorneys years ago, the organization was founded by public-interest attorneys Katherine Meyer and Eric Glitzenstein for the specific purpose of "'*assist[ing] grassroots activists* in . . . stopping the abuse and exploitation of animals held in captivity.'" *Id*. at 8 (internal citation omitted; emphasis added).

"Assisting grassroots activists" to help "stop[] the abuse and exploitation of animals" is in fact what the organization has done since its founding, in a number of contexts. For example, WAP, in conjunction with other animal protection and conservation organizations publicized the plight of endangered Florida manatees being killed and injured by power boats, which was instrumental in winning broad protections for those animals. *Id*. at 9.[2]

[2] Although WAP was founded by Mr. Glitzenstein and Ms. Meyer to expand their efforts (beyond litigation) to conserve wildlife and alleviate the suffering of animals, the fact is that the organization is not, and never has been, the "alter ego" of the public-interest law firm Meyer Glitzenstein & Crystal, *see* FEI Mot at 2 n.1, although it is not even entirely clear what FEI means by that characterization. The organizations are separate corporate entities, the vast majority of cases on which the firm works have nothing to do with WAP, and there are WAP projects that have nothing to do with the firm's docket. For example, WAP is presently supporting manatee protection projects both in the U.S. and in Africa that have nothing to do with any pending lawsuit. Where the firm and WAP work towards a common objective – *e.g.*, to

end the abuse of the Ringling Bros. elephants – it is because, as in many public-interest endeavors, litigation and public education efforts often play complementary roles in a coordinated campaign to improve conditions for animals.

This is also precisely the kind of work the organization has done, *successfully*, in publicizing the abuse and neglect of endangered Asian elephants in the Ringling Bros. Circus ("Circus"). Accordingly, contrary to FEI's groundless assertion – which undergirds its entire motion and Proposed "RICO" Counterclaim – that WAP has no actual campaign to "educate the public about Ringling Bros." and its abuse of Asian elephants, FEI Mot. at 2, FEI knows that this is what the organization has been doing in concert with Tom Rider. Mr. Rider is a former Ringling Bros. employee who is both extremely knowledgeable concerning the deplorable conditions confronting animals in the Circus *and* who has the additional benefit (from a public education standpoint) of *knowing the elephants personally and therefore being able to speak about them in very moving and personal terms*. *See ASPCA v. Ringling Bros*., 317 F.3d 334, 338 (D.C. Cir. 2003). For several years now, Mr. Rider has literally devoted his life, at extraordinary personal sacrifice, to work with WAP, ASPCA, and other animal protection organizations to win some measure of relief from the torment and hardship the elephants must endure on a daily basis.

Thus, contrary to FEI's allegation that WAP, along with plaintiffs and others, are "paying Rider for his participation as a plaintiff and a key witness in the ESA action," FEI Mot. at 2 – another factual assertion that FEI does not offer a *shred* of evidence to support – the truth, as WAP informed the Court in response to FEI's motion to compel, is that WAP and plaintiffs, along with other animal protection groups and concerned individuals, are funding Tom Rider's strenuous efforts to travel around the country on a shoestring budget while Mr. Rider publicizes the plight of the elephants in the cities and towns where the Circus is performing. As discussed further below, that is not only *core* First Amendment activity deserving of judicial solicitude, but it highlights what this motion is really about: FEI's effort to manipulate the judicial process so as

to *punish* WAP, Mr. Rider, ASPCA, and other critics of FEI for speaking out against the elephant abuse and, by the same token, to deter other potential critics of FEI and the Circus from doing the same.

Ironically, FEI's own Proposed Counterclaim actually manages to reaffirm the existence of the very public education campaign that FEI elsewhere asserts is fictitious. Thus, the Proposed Counterclaim states that, "[i]n reality, Rider *lives in a van.*" Prop. Counterclaim at ¶ 65 (emphasis added). But Mr. Rider must "live[] in a van" precisely *because* that is the means that he uses – in view of the extremely modest funding provided to him – to *tirelessly travel around the country to where the Circus performs so that he can speak out on behalf of the elephants*. Thus, WAP – along with plaintiffs and other animal protection groups and concerned individuals deeply disturbed by the plight of the elephants – do indeed fund what "it takes Rider to live in that van," *id*., because, once again, that is how Mr. Rider engages in his First Amendment right to contact local media outlets, grassroots groups, local policymakers, and others to publicize and attempt to improve the condition of the elephants he is striving to

protect.[3]

[3] FEI's fanciful notion that WAP, ASPCA, and the other animal protection organizations and individuals are bribing Mr. Rider for his testimony by providing him with funding that averages out to *$ 17,000 per year* so that he can live a grueling existence on the road in a used van would be completely laughable if the allegations FEI is leveling, and its concerted effort to suppress core First Amendment rights, were not so serious. In this connection, it is also true that, when Mr. Rider follows the Circus all over the country in his van (he does occasionally sleep in a cheap motel), he must – like any other human being who engages in a such a campaign or any similar endeavor – eat food, drink liquids, and even read the newspaper. *See* Prop. Counterclaim at ¶ 65. Thus, that some of the funding is necessarily used to meet Mr. Rider's basic needs *while* he tracks the Circus advocating on behalf of the elephants, while apparently fascinating to FEI, has no bearing whatsoever on whether Mr. Rider is in fact engaging in a legitimate effort to educate the public and policymakers about the elephant abuse he observed in the Circus.

Indeed, FEI's effort to now pursue a "RICO" claim against WAP and other non-profit organizations based on the demonstrably false premise that WAP, ASPCA, and other groups are *not* in fact funding a *bona fide* public education campaign targeted at the ongoing abuse of the Ringling Bros. elephants is simply bizarre *because WAP has already provided the Court with some of the media stories that Mr. Rider has successfully generated, during his travels, regarding the deplorable condition of the elephants*. *See* WAP Opp. at 10. There are many more such examples which establish that not only has Mr. Rider (with the assistance of WAP, ASPCA, and others) indeed engaged in such constitutionally protected activities around the country, but that he has been effective at them precisely *because* of his first-hand familiarity with the elephants and defendants' deplorable treatment of them.[4]

For example, when the Circus traveled to Las Vegas in June 2006, Mr. Rider also traveled to that venue – in his used van – and was prominently featured in an article in a local newspaper:

> Rider alleges that he saw cruel treatment of the elephants on a daily basis and that the company violates the Endangered Species Act . . . 'When you see all that [I saw], you know why I filed the lawsuit,' *Riders says by phone from the van where he both lives and tours the country to speak out against circuses with animals. His living and travel expenses are paid for by private donations and several animal welfare groups.*

www.lasvegascitylife.com/articles/2006/06/15/local_news/news01 (emphasis added). As he

[4] Accordingly, when FEI asserts in its motion – as usual, with no citation to anything – that, "in reality [plaintiffs] and WAP are not 'funding' Rider to 'educate the public about Ringling Bros.'," FEI Mot. at 2, both FEI and its attorneys know that Mr. Rider is *in fact* traveling around the country to educate the public about the Circus's treatment of the elephants.

generally does when discussing this important issue with reporters, Mr. Rider described specific incidents of elephant abuse, including

> the July 1999 day when the 4-year-old Asian elephant 'Baby Benjamin' drowned. According to Rider and video footage of the incident on the Animal Welfare Institute's website, the elephant is seen preferring the deeper part of a pond out of fear of his Ringling Bros. handler, *who witnesses say often beat Benjamin with a bullhook. A bullhook is a long stick with a curved, sharp hook on the end often used to train elephants*.
>
> 'Ringling might say [it was] drowning. I'm telling you now that the [U.S. Department of Agriculture] said it was from poking and prodding with sharp instruments, like a bullhook,' Rider says.
> . . .
> *Rider says during his time working for the circus he saw elephants injured by the bullhooks, especially in the delicate skin behind their ears and their anus. 'I saw aggressive hooking,' Rider says*.

Id.

Likewise, Mr. Rider was featured in news coverage of Chicago's consideration of an ordinance that would restrict the use of bullhooks and other painful "training" methods in circuses:

> Tom Rider, a former elephant-keeper for Ringling Brothers, testified at the hearing that elephants in circuses 'live in extreme confinement and endure miserable, inhumane conditions.'
>
> 'Ringling handlers beat elephants named Nicole and Sophie for not performing well, and the elephants' screams could be heard outside the tent,' said Rider . . . .

http://newstandardnews.net/content/?action=show.

Similarly, Mr. Rider's first-hand understanding of what occurs at the circus, and his travels to where the Circus is performing to speak out about elephant abuse, was featured in a 2006 Associated Press article in connection with legislation introduced by a Nebraska legislator to prohibit the use of bullhooks, electrical prods, ax handles and other painful devices on

elephants in Nebraska:

> The bill is not about stopping circuses, said Tom Rider, who worked as an elephant handler with Ringling Bros. From 1997 to 1999 *and now travels around the country speaking out against how circus animals are trained.*
>
> What the bill would do is stop circus handlers from hitting or hurting elephants, Rider said.
>
> Rider . . . said the top priority for those who care about elephants is banning the use of the bullhook. 'I saw the use [of] the bullhook. They beat, hit and poked these animals every day,' *Rider said from Orlando, Fla., where he was following the circus protesting the use of the device.* 'The bullhook is a weapon. It's not a guide or a tool like the circus likes to say.'

http://www.journalstar.com/articles/2006/01/10/legislature/doc43c42702e3802535567728.txt (emphasis added).

Finally, as these examples also illustrate, far from the imaginary "cover-up" of Mr. Rider's activities depicted by FEI, Prop. Counterclaim at ¶ 135, Mr. Rider, WAP, and others have always been extremely *forthcoming* about both his activities and his association with animal protection groups who share the same concerns that he does. Indeed, Mr. Rider, WAP, plaintiffs, and other animal protection organizations and individuals concerned about the treatment of the Ringling Bros. elephants are associating in *precisely* the manner that plaintiffs' counsel related in open court *eighteen months ago*, i.e., "Tom Rider, a plaintiff in this case, he's going around the country in his own van, he gets grant money from some of the clients and some other organizations to speak out and say what really happened when he worked" at the Circus. Transcript of Sept. 16, 2005 Motions Hearing, at 30 (Exh. E. to WAP Opp.). Accordingly, far from "covering up" these protected First Amendment activities, the organizations and Mr. Rider have been extraordinarily open about them to this Court, in the media, and, most tellingly, *to FEI itself*.

Indeed, in response to FEI's third party subpoena in 2005, although WAP could have sought to withhold all of its internal financial information on relevance and privilege grounds, WAP *released* to FEI extensive records reflecting financial support of Mr. Rider's activities, along with a November 28, 2005, cover letter from WAP's counsel reinforcing

> [w]hat is obvious from the materials that have been provided to you – *Mr. Rider has traveled around the country so that he can educate the public about the treatment of elephants and other circus animals. The WAP funds provided to Mr. Rider have been utilized for this purpose, i.e., to keep Mr. Rider on the road so that he can serve as an effective spokesperson on behalf of elephants and other circus animals*, including in areas where the circus is performing.

Exh. 15 to FEI Motion to Compel Documents from WAP (emphasis added). Even further, WAP went so far as to release to FEI the identity of every single animal protection organization that has contributed to the funding of Mr. Rider's public education campaign (including non-plaintiffs), although that information likely also could have been withheld on relevance and privilege grounds. *See* WAP Opp. at 19.[5] This is the very opposite of a "cover up"; rather, in what has proven to be an unsuccessful effort to *avoid* tangential litigation, WAP has gone out its way to *disclose* its association with Mr. Rider and plaintiffs, as well as the purpose of that association to influence public opinion and public policy on the treatment of elephants in circuses.[6]

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[5] WAP has continued to withhold the identities of *individual* contributors to Mr. Rider's activities, such as a woman in Pennsylvania who was so moved by a speech given by Mr. Rider that she provides WAP with a modest contribution every month to support his activities. *See* WAP Opp. at 21-25. FEI's punitive proposed counterclaim has, if anything, reinforced the rationale for WAP's assertion of privilege with respect to such individuals. One can reasonably assume that if FEI learns their identities it will similarly seek to punish *them* for supporting Mr. Rider's work, by joining them in its frivolous "RICO" claim and/or in some other manner.

[6] The frivolous nature of the Proposed "RICO" claim against WAP is also evidenced by the allegation of a "cover-up" by WAP in particular. Because FEI cannot accuse WAP of

actually hiding the fact that the organization funds Tom Rider's First Amendment activities (since FEI has known of that funding for well more than a year), FEI is instead reduced to accusing WAP of a "cover-up" based on changes that have been made in the organization's "Who We Are" page on its *public* web-site, *see* Prop. Counterclaim at ¶ 135 – particularly the fact that this page was not "functional" during some period of time over the last several months. *Id*. To highlight the sheer absurdity of the Proposed Counterclaim against WAP – and why it would be an abuse of process to let this "claim" proceed any further – the "Who We Are" page was under construction because WAP made changes in its Board of Directors as the organization is, of course, legally entitled to do. In particular, one of the prior Board members changed jobs from an environmental organization to a position with the United States Attorney's Office, and hence had to resign from the Board for that reason. Two additional individuals then joined the Board, including one of the nation's leading scientific experts on Florida manatees. Moreover, contrary to FEI's false statement that the current version of the web-site "delete[s] reference to Glitzenstein and Meyer's positions as officers of WAP," the "Who We Are" page *lists them as the first two members of the Board of Directors*. *See* http://www.wildlifeadvocacy.org/who.html. Accordingly, while it is gratifying to know that someone is actually reading WAP's web-site, FEI's allegations of a "cover-up" based on it are beyond ludicrous.

In short, it is precisely *because* Mr. Rider has proven to be such an effective spokesperson with such limited resources that FEI is doing everything in its power to deter Mr. Rider and WAP from continuing to speak out in this fashion, including by now seeking to manipulate the judicial process to accomplish that result. As WAP has previously advised the Court, this is par for the course by FEI, which has proven in the past that it is perfectly willing to engage in such razed earth tactics (and even worse) to exact retribution from its perceived adversaries. *See* WAP Opp. at 23-24 (describing "60 Minutes" piece and other media exposes of FEI's long history of harassing, spying on, and ruining the careers of its perceived critics, including journalists).

ARGUMENT

Under Fed. R. Civ. P. 13(h), "[p]ersons other than those made parties to the original action may be made parties to a counterclaim or cross-claim in accordance with the provisions of Rules 19 and 20." In its one paragraph explanation of the legal basis for adding WAP, FEI makes no argument that joinder under Rule 19 is appropriate. *See* FEI Mot. at 13. Instead, FEI asserts that the "*permissive* joinder" standard of Fed. R. Civ. P. 20 applies here. *See* FEI Mot. at 12-13. Accordingly, in "determining whether to grant a motion to amend to join" WAP to the counterclaim on that basis, the Court must "consider both the general principles of amendment provided by Rule 15(a) and also the more specific joinder provisions of Rule 20(a)." *Hinson v. Norwest Financial South Carolina, Inc.*, 239 F.3d 611, 618 (4th Cir. 2001). In applying Fed. R. Civ. 20, "[w]hether particular circumstances warrant joinder is left *to the sound discretion of the district courts*." *Carabillo*, 357 F. Supp. 2d at 255 (emphasis added) (citing *American Directory Service Agency, Inc. v. Beam*, 1988 WL 33502 *3 (D.D.C. 1988)). Likewise, it is well-

established that the threshold "decision to grant or deny leave to amend" a pleading under Fed. R. Civ. P. 15 is also "vested in the sound discretion of the trial court." *Doe v. McMillan*, 566 F.2d 713, 720 (D.C. Cir. 1977).

Under the "particular circumstances" of this case, *Carabillo*, 357 F. Supp. 2d at 255, WAP respectfully submits that the "sound" exercise of judicial "discretion" counsels overwhelmingly *against* allowing FEI to compel WAP to join this seven year old case. This is both because the Court should not in any way sanction FEI's flagrant abuse of the litigation process to punish a small non-profit organization for its exercise of First Amendment rights, and for the more prosaic reason that the motion to add a new party to these already protracted proceedings, by any reasonable yardstick, simply comes too late in the process.

I. THE COURT SHOULD NOT ALLOW FEI TO ADD WAP TO A COUNTERCLAIM THAT, ON ITS FACE, SEEKS TO PUNISH THE ORGANIZATION FOR EXERCISING ITS FIRST AMENDMENT RIGHTS TO SPEECH, ASSOCIATION, AND PETITIONING GOVERNMENTAL BODIES FOR REDRESS OF GRIEVANCES.

As noted previously, the Proposed Counterclaim against WAP is the paradigmatic SLAPP lawsuit brought by a large corporation against a small non-profit organization "simply for exercising one of our most cherished constitutional rights – 'speaking out' on political issues" in a manner that offends the corporation. Pring & Canan, *Strategic Lawsuits Against Public Participation ('SLAPPS'): An Introduction for Bench, Bar and Bystanders*, 12 Bridgeport L. Rev. 937, 938 (1992). The Colorado Supreme Court has succinctly summarized why courts should be loathe to allow such punitive actions to proceed:

> 'The First Amendment to the United States Constitution guarantees 'the right of the people . . . to petition the government for a redress of grievances.' Citizen access to the institutions of government constitutes one of the foundations upon which our republican form of government is premised. In a representative democracy government acts on behalf of the people, and effective representation depends to a large extent upon the ability of the people to make their wishes known to government officials acting on their own behalf. The right to petition has been characterized as one of 'the most precious of the liberties safeguarded by the Bill of Rights.' . . . While the right to petition obviously encompasses activities of a traditionally political nature, its sweep is much broader and includes other forms of activity as well.'

Id. at 943 (quoting *Protect Our Mountain Env't, Inc. v. NLRB*, 461 U.S. 731, 740-41 (1983)).

Moreover, this is one of the truly remarkable situations in which the Proposed RICO Counterclaim is *expressly predicated* on the the exercise of core First Amendment rights, and particularly the "most precious" right to petition governmental bodies for changes in public policy. Thus, the Proposed Counterclaim actually goes so far as to contend that the "scheme" of WAP, ASPCA, and the other advocates for the Ringling Bros. elephants is to "ban Asian elephants in circuses," with the "ultimate objective of banning Asian elephants in all forms of entertainment and captivity" and that, to carry out this "scheme," the "counterclaim-defendants *have supported legislation pending in Congress and in a number of states."* Prop. Counteclaim at ¶ 162 (emphasis added). The Proposed Counterclaim even recounts legislative testimony by Mr. Rider in various states – to which he traveled in the van with the financial support of WAP and other animal protection groups and individuals – for the specific purpose of petitioning those legislative bodies to curb practices that Mr. Rider, WAP, ASPCA, and their associates believe are abusive, painful, and harmful to elephants and other circus animals.[7]

[7] While it matters little to the present motion, for the sake of accuracy, it is not correct that all of the animal protection organizations and individuals who support Mr. Rider's efforts seek to ban Asian elephants "in all forms of entertainment," and FEI, as with so many of its

Other than by expressly declaring that "we hereby seek to file this counterclaim to punish WAP and plaintiffs for exercising their First Amendment rights and to deter others from challenging conditions in the Circus," it is difficult to imagine how FEI could be any more blatant about its impermissible motive. At the end of the day, therefore, here is what the proposed "RICO" is based on: Mr. Rider, who has sued Ringling Bros. *because* he believes that the Circus is abusing animals with whom he forged a close bond, *see ASPCA v. Ringling Bros.*, 317 F.3d at 338, is also – and for exactly the same reasons – exercising his First Amendment rights to speak out about this abuse in the "court of public opinion" and to beseech federal, state, and municipal legislators to enact protections for the animals he loves. ASPCA, WAP, and other animal protection groups, which share the same interest in protecting the elephants, are supporting Mr. Rider's efforts by providing him with modest funding to drive around the country (and to subsist while doing so) so that he can further this shared public policy objective. If that kind of activity is properly subject to a "RICO" claim for damages, then First Amendment safeguards are meaningless.

Indeed, from a legal standpoint, the situation here is no different than if FEI had sought to file a "RICO" claim because non-profit groups and individuals were seeking to convey concerns

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baseless allegations, has no factual foundation for that assertion. It *is* accurate to say that the non-profit organizations targeted by FEI, as well as Mr. Rider and others who share their views, seek immediately to ban the use of bullhooks, electric prods, and other "training" devices that the Circus uses to inflict pain and suffering on the elephants in order to force these huge and highly intelligent animals to perform Circus tricks.

to the public and their political representatives about child abuse, invidious discrimination in employment, or any other activity as to which there is legitimate public concern. For example, if an individual alleging that FEI was refusing to promote any women in that company filed a lawsuit as a class representative and then, with the financial support of women's groups, also traveled to state, federal, and local legislative to seek legislative redress and to educate legislators and the public about the issue, under FEI's peculiar view of the law, it could file a "RICO" counterclaim against that individual and all others who have chosen to associate with and support her efforts. The situation here is *identical* except that the subject of public concern is animal abuse rather than discrimination.

To be sure, the proposed "RICO" claim here has *every single one* of the "definition[al]" elements of an impermissible SLAPP suit that have been identified by both academic commentators and courts addressing such abusive tactics, *i.e.*, (1) it involves a "civil complaint *or counterclaim*"; (2) it is "filed against nongovernment individuals or organizations,"; (3) it is specifically based on these organizations' and individuals' "communications to government (government bodies, officials, or the electorate)"; (4) it involves a "substantive issue of some public interest or concern"; (5) it asserts a grand "[c]onspiracy" – *i.e.*, here, a "scheme" to accomplish the legitimate public policy objective of alleviating the pain and suffering of elephants and other animals in circuses; and (6) it seeks to punish WAP and plaintiffs for advancing an "animal rights" objective (other common targets of SLAPP suits are "[e]nvironmental protection," "[c]ivil rights," and "[c]onsumer" campaigns). Pring & Canan, *supra*, 12 Bridgeport L. Rev. at 946-48 (emphasis added); *see also* Glover & Jimison, *SLAPP Suits: A First Amendment Issue and Beyond*, 21 N.C. Cent. L.J. 122, 127-28 (1995) (a

"distinguishing factor of a SLAPP suit is that the [target] is generally advancing causes of genuine public interest and is not motivated by pecuniary or personal gain. The classic [target] is a citizen (or perhaps a non-governmental advocacy group) who attempts to sway the opinion of some governmental entity by petitioning for redress of grievances.").

As judges and academic commentators have both suggested, "[c]ourts must not let themselves become part of the chill" of First Amendment rights that this kind of abusive litigation strategy entails. *Id*. Indeed, as the Supreme Court ruled in finding that a public campaign aimed at educating the public and petitioning the government could not be subject to *antitrust* penalties, "[t]he right of the people to inform their representatives in government of their desires with respect to the passage or enforcement of laws" is constitutionally protected activity and does not lose that protected status *even where* the public campaign "deliberatively deceive[s] the public and public officials." *Eastern Railroad Presidents' Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 139, 145 (1961).

Unfortunately, FEI's effort to "intimidate" WAP and others "into silence" is *already* having some of its intended effect. Glover & Jimison, *supra*, 21 N.C. Cent. L. J. at 122. While WAP has no intention of curtailing its efforts, in collaboration with Tom Rider and any others who share the organization's views, to publicize the sorry status of Asian elephants and other animals in the Circus, WAP must divert its time and very limited resources to defending against this baseless "RICO" claim – which, of course, is one of the principal reasons why SLAPP suits are brought in the first instance. Pring & Canan, *supra*, 12 Bridgeport L. Rev. at 943-44. As a related matter, the proposed "RICO" claim may already be having its intended effect of "chilling" potential supporters of WAP's and Tom Rider's efforts because they know that they

too may be sued (or otherwise harassed) merely for challenging the Circus's treatment of the elephants. *Id*. Thus, as eloquently explained by a judge addressing a SLAPP suit in New York:

> '*SLAPP suits function by forcing the target into the judicial arena where the SLAPP filer foists upon the target the expenses of a defense. The longer the litigation can be stretched out, the more litigation than can be churned, the greater the expense that is inflicted and the closer the SLAPP filer moves to success*. The purpose of such gamesmanship ranges from simple retribution for past activism to discouraging future activism. Needless to say, an ultimate disposition in favor of the target often amounts merely to a Pyrrhic victory . . . *The ripple effect of such suits in our society is enormous. Persons who have been outspoken on issues of public importance targeted in such suits or who have witnessed such suits will often choose in the future to stay silent. Short of a gun to the head, a greater threat to First Amendment expression can scarcely be imagined.'*

Id. (quoting *Gordon v. Marrone*, No. 185 44/90, Sup. Ct., Westchester County, N.Y. (April 13, 1992), Decision at 26-28).

In sum, both because WAP itself should not be exposed to the *further* expense of litigation simply because of the organization's exercise of First Amendment rights, and because there is an overriding societal interest in safeguarding "'public participation' in government, long viewed as essential in our representative democracy," Pring & Canan, *supra*, 12 Bridgeport L. Rev. at 944, the Court should exercise its "sound discretion" by refusing, on First Amendment grounds, to allow FEI to add WAP as a defendant to the counterclaim. *Carabillo*, 357 F. Supp. 2d at 255.

II THE REQUEST TO ADD WAP IS TOO LATE.

The more mundane but equally compelling reason for denying the Rule 13(h) motion is that it is far too late. "Among the more common reasons for denying leave to amend are that the amendment . . . is unduly delayed." *Doe*, 566 F.2d at 720 (internal quotation admitted). Indeed, FEI itself acknowledges that "courts have denied motions to amend for undue delay where the

movant sought leave without explanation for the delay, *years after the allegation became known*, and previously had abundant opportunity to raise the issue." FEI Mot. at 11 (emphasis added); *see also Williamsburg Wax Museum v. Historic Figures, Inc.*, 810 F.2d 243, 247 (D.C. Cir. 1987) (affirming denial of motion to amend a pleading where the motion was filed years after the original complaint, the parties had already conducted extensive discovery, and the amendment was "not related to the issues" in the original complaint).

But that is *exactly* the situation here. Not only was this litigation initiated many years ago but, once again, WAP's counsel specifically advised FEI *in 2005* that WAP is providing funds to Mr. Rider "to keep Mr. Rider on the road" while he travels to where the Circus is performing. *See supra* at 9-10. Absolutely nothing FEI has learned since that time is at variance with that representation. Accordingly, FEI could have attempted to pursue its baseless "RICO" claim against WAP in 2005, and has no legitimate excuse for waiting until 2007 to do so. Accordingly, the motion to force WAP into the case at this late date should be denied for that reason as well.

CONCLUSION

For the foregoing reasons, the motion to add WAP as a party should be denied.

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/s/
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