UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

REPLY TO NON-PARTY WILDLIFE ADVOCACY PROJECT'S RESPONSE TO DEFENDANT'S MOTION FOR LEAVE TO AMEND ANSWERS TO ASSERT ADDITIONAL DEFENSE AND RICO COUNTERCLAIM

Feld Entertainment, Inc. ("FEI"), through counsel, hereby submits its reply in response to Wildlife Advocacy Project's ("WAP") Response to Defendant's Motion for Leave to Amend Answers to Assert Additional Defense and RICO Counterclaim ("Response").

INTRODUCTION

Much like plaintiffs, WAP has taken the arrogant position that if something is done in the name of animal activism, the rules do not apply to it. WAP would like the Court to believe that, as a "small non-profit organization," its involvement in a scheme to pay Tom Rider for his participation as plaintiff and key witness in this Endangered Species Act ("ESA") litigation, and a scheme to cover-up the illegal payments, is completely beyond reproach. While WAP dismisses FEI's allegations as "fanciful," "completely laughable," and "fascinating," Response at 7 n.3, there is nothing funny about bribery, illegal gratuity payments, obstruction of justice, and mail and wire fraud. WAP can make light of this, but the facts as alleged in FEI's RICO

counterclaim point to a grave situation that FEI never expected to uncover in discovery; indeed, the discovery itself by FEI was no small feat given WAP's and plaintiffs' efforts to keep the nature and amount of the payments to Rider hidden from FEI. WAP's Response never squarely addresses the unlawful conduct that is the real issue here – the payments to Rider – and instead pretends that WAP is being persecuted for its speech. This is nonsense. Moreover, WAP's opposition to FEI's Motion, while relying heavily on recycled news clips and a recitation of the political agenda of WAP and plaintiffs, is noticeably devoid of caselaw, or any credible argument, that supports its position.

ARGUMENT

I. WAP HAS NO STANDING TO FILE ITS RESPONSE

As a threshold matter, WAP, as a non-party to this lawsuit, has no right to file a brief in opposition to FEI's Motion for Leave to Amend. Should the Court grant FEI's Motion and permit the filing of the counterclaim, WAP will have every opportunity to challenge the complaint pursuant to Fed. R. Civ. P. 12(b)(6). However, that exercise is premature at this stage. Rather, WAP sees fit to completely disregard the Federal Rules of Civil Procedure, by failing to petition the Court to intervene in order to participate in briefing, or to request leave to file an *amicus* brief. WAP's opposition is therefore inappropriate and should be stricken from the record. See FEI's Motion for Expedited Ruling To Strike Non-Party WAP's Response to FEI's Motion for Leave to Amend Due to Untimeliness and Lack of Standing (4/2/07) (Docket No. 133).[1] However, if the Court permits WAP's Response to stand, FEI hereby submits this reply to it.

[1] As this motion currently is pending before the Court, FEI will not re-brief the arguments made therein, but rather incorporates by reference those arguments regarding WAP's lack of standing, untimeliness, and disregard for the Federal Rules of Civil Procedure. See FEI's Motion for Expedited Ruling To Strike Non-Party WAP's

II. NONE OF WAP'S ARGUMENTS IS SUFFICIENT TO DEFEAT AMENDMENT

While WAP has recognized that an amendment to the pleadings under Rule 15 is committed to the "sound discretion" of the Court, WAP points to no compelling example of undue delay, bad faith, or dilatory motive that supports its Response.[2] Instead, WAP's entire argument focuses on the fact that the original ESA case was filed nearly seven years ago (even though discovery did not commence until 2004) and that FEI's proposed counterclaim should be prohibited by anti-SLAPP legislation, even though no such statute applies here. WAP conveniently omits, however, that neither the date this case began, nor the anti-SLAPP legislation, has any bearing on the issue before the Court. In addition to being almost entirely unsupported by relevant caselaw, WAP's assertions are neither compelling nor credible, as FEI explains below.

A. WAP'S "SLAPP" Suit Argument Has No Merit

Much like the plaintiffs in this case, WAP has alleged that FEI's Motion to Amend should be disregarded as merely a tactic to effectuate retribution on plaintiffs. Without citing any binding caselaw, including any case that holds that anti-SLAPP statutes apply in federal court, or in the District of Columbia, for that matter, WAP boldly asserts that FEI's RICO claim is a "paradigmatic" "Strategic Lawsuit Against Public Participation" or "SLAPP" lawsuit, Response at 2 & Sec. I, and that this supposedly is a basis upon which to deny FEI's Motion.

WAP's attempt to analogize the facts of this case to a SLAPP lawsuit is entirely inappropriate. The classic SLAPP lawsuit is one that is brought in response to efforts by

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Response to FEI's Motion for Leave to Amend Due to Untimeliness and Lack of Standing (4/2/07) (Docket No. 133).

[2] WAP appears to take issue with FEI's recitation of the rules governing joinder. Response at 13. WAP's confusing analysis, however, does not clarify what WAP believes is deficient about FEI's argument. Significantly, WAP makes no argument as to why FEI has not, or cannot, comply with the rules governing joinder.

individuals or groups to petition the government for a redress of grievances in order to chill the exercise of such First Amendment rights. Flatley v. Mauro, 39 Cal. 4th 299, 316 (2006).[3] In the minority of states that have SLAPP legislation, of which the District of Columbia is not one, such suits are not barred outright, but rather are subjected to hybrid procedural rules which provide a defendant with an expedited motion to strike and an award of attorneys fees if such a suit is dismissed. See, e.g. CAL. CIV. PROC. CODE § 425.16(b)(1) & (c) (2007).

Even assuming that anti-SLAPP legislation or interpretive caselaw applies here, which it does not, WAP's comparison to the SLAPP scenario is absurd. The so-called "paradigmatic" SLAPP lawsuit is not a RICO claim based upon seven years of illegal payments to a plaintiff and key witness. Response at 17.[4] WAP's novel argument that it has a First Amendment right to bribe witnesses, make illegal gratuity payments, obstruct justice through demonstrably false testimony and interrogatories, and commit mail and wire fraud defies logic, and is completely unsupported by Supreme Court or SLAPP caselaw, or any other legal commentary cited by WAP.[5] See Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 498 (1988) ("It rarely has been

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[3] While only a minority of states has adopted anti-SLAPP legislation, California continues to be the leader in litigation interpreting and applying anti-SLAPP legislation. CAL. CODE CIV. PROC. § 425.16 (2007). Even California's statute, which is completely inapplicable to this lawsuit, has no absolute ban on bringing suit against an organization or individual purporting to exercise First Amendment rights (as WAP suggests) and requires a defendant seeking its protection to show that his actions are constitutionally protected. Id. § 425.16(b)(1). The statute's appeal is a motion to strike provision which, among other things, accelerates the briefing schedule and provides for attorneys' fees for a defendant subjected to a frivolous lawsuit. With respect to the California anti-SLAPP statute, in determining whether to strike the lawsuit, the statute requires that the court consider the substantive merits of plaintiff's complaint, as well as all available defenses to it. Id. § 425.16(b)(1) – (b)(2).

[4] Ironically, WAP's Response includes the following quotation: "a distinguishing factor of the SLAPP suit is that the [target] is generally advancing causes of genuine public interest and ***is not motivated by pecuniary or personal gain***." Response at 18 (citing Glover & Jimison, SLAPP Suits: A First Amendment Issue and Beyond, 21 N.C. Cent. L.J. 122, 127-28 (1995)) (emphasis added). It is hard to conceive of a more patent example of motivation by pecuniary gain than Rider's acceptance of payments – nearly $150,000 to date, on which he paid no taxes, and which constitutes his entire source of income since 2001 – from WAP and plaintiffs for his continued participation in the this lawsuit.

[5] WAP's meager citation to caselaw also is misleading. Specifically, WAP simultaneously attributes a quote to both a Colorado Supreme Court case and the United States Supreme Court; however, there exists no Supreme

suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute. We reject the contention now."). Further, WAP's failure to cite a single case in support of its SLAPP argument is indicative of the fact that it has no legal basis.

1. WAP's Illegal Conduct Is Not Constitutionally Protected

WAP's characterization of the "paradigmatic" SLAPP lawsuit conveniently omits the most distinguishing factor – that plaintiffs and WAP have been funding Rider's existence with an illegal scheme to secure his participation in this lawsuit. WAP argues that "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 to the public or its political representatives about child abuse [or] invidious discrimination in employment . . .. " Response at 16-17. Not only is the comparison legally indefensible given WAP's illegal payment scheme, it is insulting to organizations who pursue political agendas legitimately. To state that WAP's and plaintiffs' situation is "*identical*" to any other organization's First Amendment activity conveniently ignores the most salient fact in the analysis—that WAP (the alter ego of plaintiffs' counsel) and plaintiffs made illegal payments to Rider to ensure that they would have a plaintiff – with constitutional standing – to pursue their political agenda in court. In short, the apparent righteousness of a cause does not justify bribery, obstruction of justice, illegal gratuity payments, and mail and wire fraud. Such a distinction is critical.

In those states with SLAPP statutes, courts consistently have held that illegal activity is not a valid exercise of constitutional rights and, therefore, is not entitled to the benefits of anti-SLAPP procedures. See, e.g., Paul for Council v. Hayecz, 85 Cal. App. 4th 1356, 1366 (2001),

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Court case under this citation. See Response at 15 (citing to Protect Our Mountain Env't, Inc. v. NLRB, 461 U.S. 731 (1983))[sic].

overruled on other grounds, Equilon Enterprises v. Consumer Cause, Inc., 29 Cal. 4th 53, 68 n.5 (2002)[6]; Lam v. Ngo, 95 Cal. App. 4th 853 (2002) (violence and other criminal acts are not constitutionally-protected activities even if committed out of political motive; anti-SLAPP statute affords no protection from this conduct). See CAL. CODE CIV. PROC. § 425.16 (defendant seeking to apply anti-SLAPP procedure must first show that it acted within its constitutionally protected rights). See also Giboney, 336 U.S. at 498 (First Amendment offers no protection for speech in furtherance of illegal activity).

The Paul case is highly illustrative on this point. In Paul, the plaintiff was a city council member seeking re-election. 85 Cal. App. 4th at 1360-61. After losing the election, plaintiff filed an action against several individuals alleging that they "interfered with plaintiff's candidacy by influencing the election with *illegal* campaign contributions for one of his opponents." Id. at 1361. Defendants moved to strike the complaint under California's anti-SLAPP statute, arguing that their money laundering was "in furtherance of [their] constitutional rights of free speech" and arose "out of acts in furtherance of [their] constitutionally protected conduct." Id. at 1361-62. The court of appeals, while acknowledging that making a campaign contribution was a type of free speech, held that defendants' campaign money laundering was not a valid activity undertaken in furtherance of their constitutional right of free speech and denied their motion to strike. Id. at 1365-67. In examining the purpose of anti-SLAPP legislation, the court stated:

> [T]he probability that the Legislature intended to give defendants [anti-SLAPP] protection from a lawsuit based on injuries they are alleged to have caused by their *illegal* campaign money laundering scheme is as unlikely as the probability that such protection would exist for them if they injured

[6] Paul and other SLAPP cases were overruled on other grounds by Equilon, which essentially eliminated the need to allege a subjective "intent to chill" on the part of plaintiffs in order to take advantage of the SLAPP statute. Paul, however, continues to be cited with approval (for FEI's argument and others) in subsequent decisions. See, e.g., Flatley, 39 Cal. 4th at 316 ("Paul's interpretation of [the California anti-SLAPP statute] has been unanimously accepted in the court of appeal").

> plaintiff while robbing a bank to obtain money for the campaign contributions or while hijacking a car to drive the campaign contributions to the post office for mailing . . . Thus, while it is technically true that laundering campaign contributions is an act in furtherance of the giving of such contributions, that is, is in furtherance of an act of free speech, we reject the notion that [the anti-SLAPP statute] exists to protect such illegal activity.

Id. at 1366; see also Flatley, 39 Cal. 4th at 316 (extortion is not a valid exercise of constitutional rights and therefore does not fall within the California anti-SLAPP statute).

Similarly, in Novartis Vaccines & Diagnostics, Inc. v. Stop Huntington Animal Cruelty, USA, Inc., 143 Cal. App. 4th 1284, 1289-91 (2006), animal rights protestors, working in concert with Stop Huntington Animal Cruelty USA (SHAC USA) to end animal testing, targeted a biopharmaceutical company's employees and their family members with "home visits" which included vandalizing employees' homes and cars, setting off ear-piercing alarms in their yards, leaving excrement on their doorsteps, as well as other tactics, including publishing personal information about employees' spouses and children on the internet. When the company sued SHAC USA for injunctive relief, the activist organization claimed, among other things, that its activities were constitutionally protected and that the lawsuit should be dismissed pursuant to California's anti-SLAPP statute. Id. at 1296. The activists contended that they were entitled to First Amendment protection "even if the complaint is viewed as involving a mixture of protected and unprotected activities." Id. The court rejected the activist organization's position, recognized that the gravaman of plaintiffs' complaint was not speech, but illegal acts of harassment, intentional infliction of emotional distress, trespass and intrusion, and that the conspiracy activity between SHAC USA and the protestors who carried out such acts was not protected activity under the First Amendment or entitled to anti-SLAPP protection. Id. at 1296-97.

Here, rather than rewarding WAP with additional protection for carrying out unlawful activity under the guise of a First Amendment right, WAP should be called to account for its attempt to perpetuate racketeering activity to damage FEI and commit a fraud on the Court. There simply is no "overriding societal interest" in overlooking WAP's and plaintiffs' bribery, illegal gratuity payments, obstruction of justice, or mail and wire fraud. WAP's cavalier attitude in its Response makes a mockery of the First Amendment and the judicial system. See Response at 19.

2. FEI's RICO Counterclaim Is Aimed At Racketeering Activity, Not Speech

Similarly, the gravaman of FEI's RICO counterclaim is not speech, but rather, the illegal scheme to pay Rider to participate as a plaintiff and witness in this case, and the scheme to cover-up the illegal activity. In framing the issue, WAP has repeatedly left out this critical distinction: indeed, FEI has not alleged a RICO counterclaim simply because Tom Rider has expressed his view about the treatment of FEI's elephants. Rather, FEI has asserted that plaintiffs, together with WAP (the alter ego of plaintiffs' counsel, Meyer Glitzenstein & Crystal) ("MGC")) have been making illegal payments to Tom Rider to influence his testimony and to pay for his participation as a plaintiff in this lawsuit. This obvious distinction takes FEI's RICO counterclaim out of the realm of First Amendment concerns. WAP and plaintiffs created the situation they find themselves in.

WAP and plaintiffs chose to devise the fraudulent payment scheme and tried to cover up that scheme through several acts of obstruction of justice. Absent WAP's and plaintiffs' own illegal conduct, FEI would have no cause of action against WAP simply for its political agenda. And, while WAP's recitation of newspaper articles and website references to Rider is clearly an attempt to focus the Court's attention on Rider's alleged "media" work – and away from the

illegal activity – such an effort falls flat. See Response at 8-10. The fact that WAP engaged in, at best, a "mixture" of protected (pursuing a campaign of animal activism "media" work) and unprotected (illegally paying a plaintiff and witness) activities provides no basis for denying FEI's Motion for Leave to Amend. See Novartis, 143 Cal. App. 4th at 1296-97 (mixture of protected and unprotected constitutional activity does not support application of the anti-SLAAP statute). Under WAP's flawed analysis, an organization has a First Amendment right to break the law as long as it is conducting some legitimate activity in the name of free speech. Were the Court to accept this analysis, any racketeer who also engaged in legitimate activity would have an escape hatch to excuse the unlawful conduct. As in Novartis, the fact that WAP might have engaged in some constitutionally protected activity will not insulate it from the consequences of other illegal conduct that it engaged in concurrently.

Importantly, WAP cites no authority supporting a claim under SLAPP as a federal common law cause of action, or that permits a federal court to dismiss a case based upon anti-SLAPP policy, particularly where, as here, there is no substantive rule existing in the respective state or local jurisdiction.[7] Indeed, FEI has not located a single federal case that has applied anti-SLAPP procedures to a motion for leave to amend or to otherwise establish a "bad faith" analysis.[8] See Hotel St. George Assocs. v. Morgenstern, 819 F. Supp. 310, 323 (S.D.N.Y. 1993)

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[7] In fact, it appears that many federal courts avoid applying anti-SLAPP statutes, even where the underlying substantive claims originated in an anti-SLAPP jurisdiction. See Competitive Techs. v. Fujitsu, Ltd., 286 F. Supp. 2d 1118, 1156-59 (N.D. Cal. 2003) (federal court holding that California's anti-SLAPP statute was inapplicable to a non-resident's counterclaims premised on a wrongful prosecution of a proceeding in the District of Columbia).

[8] Most federal court cases considering anti-SLAPP statutes have determined that they have no application in federal court. See, e.g., Stuborn Ltd. P'ship v. Bernstein, 245 F. Supp. 2d 312 (D. Mass. 2003). For example, in Stuborn, a real estate developer and its partner sued condominium owners in state court. After removing the case to federal court, the owners sought to dismiss plaintiffs' suit pursuant to Massachusetts's anti-SLAPP statute. Plaintiffs argued that the anti-SLAPP procedures cannot be enforced in federal court under Erie v. Tompkins, 304 U.S. 64 (1938) and Hanna v. Plumer, 380 U.S. 460 (1965), and that a 12(b)(6) standard – not the expedited, hybrid procedure dictated by the statute – would apply. Id. at 315. The court determined that the plain language of the anti-SLAPP statute "reflects procedural mandates that rearrange the course of litigation as prescribed by the Federal Rules" and that such procedures were in "direct conflict" with the Federal Rules. Id. at 315-16. Accordingly, the

(allegations that the underlying litigation constituted a SLAPP suit was not enough to demonstrate "bad faith" necessary for sanction, even where state law permitted dismissal of SLAPP suits). WAP's entire SLAPP argument therefore is inapposite and should be disregarded.

B. There Was No Undue Delay In Filing FEI's Motion For Leave To Amend

1. WAP and Plaintiffs Have Hardly Been "Forthcoming"

WAP next argues that FEI's Motion for Leave to Amend should be denied because the amendment was unduly delayed. Response at 19. Essentially, WAP argues that FEI's Motion should be denied because WAP and its alter ego successfully concealed the payment scheme from FEI for two years of this litigation. Far from being unsupported by the facts, what is even more galling about WAP's "delay" argument is that WAP considers itself to have been "forthcoming" with information that would have allowed FEI to uncover WAP's and plaintiffs' racketeering activity sooner. Response at 10. However, it was WAP's own resistance to producing documents required by a subpoena that contributed to FEI's difficulty in uncovering the illegal activity. For example, WAP relies upon the statements by plaintiffs' counsel to the Court in September 2005 that "Tom Rider . . . gets grant money from some of the clients and some other organizations." See Transcript of Sept. 16, 2005 Motions Hearing at 30 (Ex. E to WAP's Opposition to Motion to Compel (9/21/06) (Docket No. 93)); Response at 10.[9] That was,

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court held that "[b]ecause of the collision between the federal and state procedures . . . in a diversity action the Federal Rules of Civil Procedure supplant the state Anti-SLAPP procedures as the Supreme Court has instructed . . . " and such expedited anti-SLAPP procedures would not apply. Id. at 316.

[9] WAP's and plaintiffs' continued use of the euphemistic term "grant money" is further suggestive of their plan to conceal the nature and amount of the payments to Rider (a theme which Rider perpetuated while he committed tax evasion). This terminology certainly does not suggest that WAP's and plaintiffs' "grants" were actually Rider's entire source of income since 2001 and that he had no other income during this time period. Further, plaintiffs' counsel made an outright misrepresentation to the Court in this hearing when she stated that only "***some*** of the clients" were paying Rider, knowing full well that ***all*** of the organizational plaintiffs in this case were paying him. Ex. E to WAP's Opposition to Motion to Compel at 30 (Sept. 16, 2005 transcript).

at best, the proverbial tip of the iceberg. At ***no point*** during that hearing did counsel identify its alter ego WAP by name. At ***no point*** during that hearing did counsel confess that they wrote checks to Rider and that they were involved with orchestrating the payment scheme. At ***no point*** in that hearing did plaintiffs' counsel come forward with any detail about the nature and extent of the scheme to funnel nearly $150,000 from plaintiffs – sometimes directly and sometimes through WAP – to Tom Rider, or that the Rider's entire livelihood has come from this source. Indeed, under the rationale now proffered by WAP, FEI should have somehow known from the half-truth uttered by plaintiffs' counsel to immediately file a counterclaim against the amorphous group, so "forthcomingly" identified as "some of the clients and some other organizations." Id.

WAP's characterization of counsel's statements as examples of "extremely forthcoming" behavior and efforts to be "extraordinarily open" about the payments to Rider are ludicrous. In fact, counsel's statements suggest that WAP was funding typical travel expenses, like tolls and gas mileage. This was deliberately false in light of what was not disclosed, i.e. the fact that Rider had no job and his only livelihood was derived from the payments the organizational plaintiffs funneled to him through counsel's organization, WAP. The statements made, if anything, further obscured the issue from FEI. This and other highly relevant information was deliberately concealed from FEI through WAP's and plaintiffs' cover-up: (1) WAP's own frivolous objections to its subpoena; (2) AWI's false deposition testimony; and (3) perjured interrogatory responses by AWI and Rider. See [Proposed] Counterclaim ¶¶ 134-161. Had ASPCA not fortuitously leaked limited portions of this information in discovery, the racketeering activity might never have come to light.

Nor does WAP's characterization of its "forthcoming" document production bear any resemblance to what actually transpired in this case. See FEI's Motion to Compel Documents

Subpoenaed From WAP (9/7/06) (Docket No. 85). During ASPCA's deposition, it became clear to FEI that payments from the organizational plaintiffs that were intended for Tom Rider were being made to WAP – the alter ego of plaintiffs' counsel.[10] Immediately thereafter, FEI issued a document subpoena to WAP. In response, Eric Glitzenstein (WAP's president and plaintiffs' counsel, and the person who sent the vast majority of the WAP checks to Rider)[11] sought to limit the documents that WAP would produce and to delay the date on which such documents would be produced. FEI acceded to WAP's requests in good faith to accommodate scheduling, but WAP used the extra time to continue hiding information from FEI. As discussed fully in FEI's Motion to Compel Documents Subpoenaed From WAP at 13-17 (9/7/06) (Docket No. 85), WAP originally withheld from its original production at least 272 pages of responsive documents. Those documents were only produced to FEI in the summer of 2006 (almost nine months after WAP's original production) – after FEI threatened to file its motion to compel. Moreover, WAP also originally redacted portions of numerous documents, relenting only when confronted by FEI's intention to file a motion to compel. To date, there still are documents (or portions thereof) that WAP refuses to produce and that are subject to FEI's pending motion. Given this behavior, WAP's assertion that it, or any of the other plaintiffs, has been "forthcoming" is simply untrue. Having successfully "hidden the ball" from FEI, WAP should now not reap the benefits of this behavior by arguing that FEI acted with undue delay in asserting its RICO counterclaim when it did.

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[10] WAP professes not to understand the concept of "alter ego." Response at 3. Yet WAP's own participation in this litigation further illustrates that WAP and plaintiffs' counsel are, and likely have been, working in concert in all aspects of this lawsuit. For example, in its Response, WAP alerted FEI to arguments that plaintiffs would be making in their own brief over seven hours before plaintiffs' brief was filed electronically. Response at 2 n.1. WAP also saw fit to piggy-back onto the extension of time afforded to plaintiffs to respond to FEI's Motion for Leave to Amend – although neither WAP, nor its alter ego, MGC, had requested this on WAP's behalf.

[11] Glitzenstein still is listed on the docket of this case as counsel of record for plaintiffs. Although Glitzenstein's name vanished from plaintiffs' pleadings at or about the time that the subpoena dispute between FEI and WAP developed, Glitzenstein has never formally withdrawn his appearance in this case.

2. The Amendment Would Not Cause Prejudice to WAP or Plaintiffs

The relevant inquiry surrounding the timeliness of an amendment is not when a case was originally filed, but rather, whether the amendment will cause prejudice to plaintiffs going forward, an analysis that WAP conveniently ignores.[12] WAP has failed to demonstrate any prejudice that would follow from granting this amendment. First, WAP does not even attempt to challenge FEI's argument, see FEI's Motion for Leave to Amend at 9, that the conduct forming the basis for the counterclaim is part and parcel of the ESA Action, thereby conceding that point. Second, WAP cannot refute the fact that there is no trial date in this case, there is no discovery cut-off (indeed no phase of expert discovery has even occurred) and therefore nothing in this case can be categorized as being "too late" regardless of the filing date on this case caption. Significantly, WAP has not cited a single case involving similar facts in which a court characterized an amendment as "undue delay." WAP cites Doe v. McMillan, 566 F.2d 713, 720 (D.C. Cir. 1977) for the proposition that undue delay is a basis for denial of a motion to amend. Response at 19. Doe, however, also recognizes that a valid or "sound reason" as to why an amendment could not have been made at an earlier time could provide a basis to grant the amendment, even if it came 38 months after the filing of the Complaint. See Doe, 566 F.2d at 720. FEI's sound reason for requesting leave to amend at this time is due to new information obtained from WAP and plaintiffs during discovery. See also Williamsburg Wax Museum v. Historic Figures, Inc., 810 F.2d 243, 247 (D.C. Cir. 1987) (denying motion to amend in part because extensive new discovery would be required, appellant offered "no explanation for its

[12] WAP (and plaintiffs) suggest that this matter has been languishing on the docket for seven years. Response at 1, 14. As WAP surely knows (given the great detail that it, as a "non-party," can recite about this litigation) the case as originally filed was on appeal for a number of years. However, this particular case was filed in 2003 and discovery requests were not even issued until 2004. Since FEI retained current counsel, they have done their best to accelerate and move this case forward. In any event, WAP, having no involvement in the originally-filed case, or the current case (and is, at best, a "potential party") has failed to explain how the so-called "delay" affects WAP.

tardiness" and the court already had granted a motion for summary judgment against appellants). WAP simply omitted these factors from its summary of the court's analysis. See Response at 20.

Third, WAP has not challenged FEI's assertion that any additional discovery, if necessary, could be "pointed and efficient," see FEI's Motion for Leave to Amend at 10, thereby conceding that point.

Moreover, WAP's argument regarding untimeliness is belied by the RICO statute of limitations itself. RICO has a four year statute of limitations which WAP admits began to run no earlier than 2005. Response at 20. If FEI's RICO claims are not barred by the applicable statute of limitations, then, by definition, it is not "too late" to be added as a counterclaim. Ultimately, the timeliness argument is of no moment. Even if the Court denies FEI's Motion for Leave to Amend, FEI can file the counterclaim as a separate lawsuit, where it will have to be dealt with in the normal course, once again.

Finally, it is unclear how WAP can argue that FEI's amendment would be inappropriate and/or prejudicial when plaintiffs recently have added the Animal Protection Institute as a new plaintiff to this lawsuit and presumably are planning to try to add three additional new plaintiffs. See Order Adding Animal Protection Institute as Additional Plaintiff (Sullivan, J.) (2/23/06) (Docket No. 60); 60-day Notice Letter, Exhibit 52 to Plaintiffs' Opp. to FEI's Motion for Leave to Amend (3/30/07) (Docket No. 132). Plaintiffs cannot have it both ways: continually adding new plaintiffs, and presumably welcoming any attendant discovery delay that advances their cause, while simultaneously curtailing FEI's efforts to assert defenses and a counterclaim based upon newly discovered evidence. The one-sided approach that WAP demands is patently unfair, and more importantly, not supported by the law.

C. WAP Cannot Show That Amendment Is Inappropriate

WAP has asked the Court to turn a blind eye to its and plaintiffs' unlawful conduct, and to exclude WAP from this lawsuit, simply because it is a "small non-profit organization." Response at 1, 14. However, WAP's role in the racketeering activity, and the subsequent cover-up of the same, as alleged in great detail in the counterclaim, is undeniable. See [Proposed] Counterclaim ¶¶ 3-20; 42-75. There is no RICO exemption for "small non-profit organizations," and WAP's Response makes no other credible argument to deny FEI's Motion for Leave to Amend.

1. The Amount of Payments to Rider Does Not Undercut Their Illegality

WAP's Response suggests that the dollar amount of payments made to Rider was small enough to be ignored and advances the ridiculous notion that FEI's bribery and illegal gratuity payment allegations are "laughable" because the payments only average, by WAP's calculation, about $17,000 per year. Response at 7 n.3. WAP's calculation assumes, of course, that FEI has knowledge of all payments to Rider, which is of course unknown to FEI at this time. However, based on just known payments, the totals are staggering.

At the time of filing its Motion for Leave to Amend, FEI reasonably believed that the documents it had compiled thus far demonstrated payments to Rider totaling approximately $100,000 – a figure that WAP does not dispute. WAP goes on seemingly to divide that total by six to arrive at its $17,000 per year estimate. Since filing its Motion, however, FEI has received additional documents from WAP (in response to a second subpoena that it was forced to issue). FEI now believes that the total amount of payments it is aware of is approximately $150,000 – or approximately $25,000 per year. Since FEI does not have documentation of each payment to Rider, none of these averages can be exact. FEI does know, however, that WAP (alone) has paid

Rider $23,940, $33,600, and $32,900 for the last three years, respectively. WAP's and plaintiffs' payments are currently providing Rider with more than $35,000 per year. Since Rider has taken this money tax-free – an illegal tax evasion bonanza (which Rider now admits)[13] – it is the equivalent of a $50,000 per year job. That is no meager amount.

Now that WAP's and plaintiffs' illegal payments have been exposed, WAP takes great pains to minimize the value of such payments. See Response at 6 ("extremely modest funding"); id. at 5; ("shoestring budget"); and id. at 16 ("modest funding").[14] FEI, however, is not aware of any safe harbor in the applicable law that exempts bribes or illegal gratuity payments below a certain dollar amount. See 18 U.S.C. § 201(b)(3) & (4) ("anything of value"); § 201(c)(2) & (3) ("anything of value"). Payments made to a plaintiff for far less than those at issue here have been regarded as "suspicious" by a federal court that permitted discovery into the same. See Mauldin v. Wal-Mart Stores, Inc., No. 01-CV-2755, 2006 U.S. Dist. LEXIS 85189, at *11 (N.D. Ga. Nov. 22, 2006) (re-opening discovery to determine if a plaintiff's filing with the EEOC was "procured by illegal and unethical payments" after the plaintiff acknowledged receiving from her attorney approximately $2,250 - or less than 1/60th of the amount that Rider has been paid) (attached hereto as Exhibit A); Affidavit of G. Stein, Exhibit 4 to Plaintiff's Opposition to Motion to Re-Open Discovery (6/6/06) (Docket No. 138) (attached hereto as Exhibit B). In Mauldin, plaintiffs moved for voluntary dismissal just sixteen days after the discovery order,

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[13] Rider apparently now is trying to clean up his act by filing several years of back tax returns. See Ex. 38 to Plaintiffs' Opposition to FEI's Motion for Leave to Amend Answers To Assert Additional Defense and Counterclaim (2/28/07) (Docket No. 121). This action – coming only after FEI brought this conduct to light – is a stark admission of Rider's tax evasion.

[14] WAP back-pedals further when faced with explaining its funding of Rider's transportation, lodging, meals, and entertainment, stating that "***some*** of the funding is necessarily used to meet Mr. Rider's basic needs," Response at 7 n.3 (emphasis added). Neither WAP's accounting of its payments to Rider, nor its actual documentation of the same, reveals what the nearly $150,000 in payments has covered. Glaringly absent from the documents produced by WAP and plaintiffs are receipts for expenditures used in his "media" campaign, particularly for a significant total expenditure such as this.

which the court granted. See Order Granting Plaintiff's Unopposed Motion for Voluntary Dismissal. (12/20/06) (Docket No. 154) (attached hereto as Exhibit C).

WAP's $17,000 per year calculation does not even take into account the $33,000 that Rider received in 2005 and at least that much in 2006. Even if Rider only did receive $17,000 per year – tax free, as a result of Rider's tax evasion – this is quite a windfall compared to the salary he received while working at the circus as a barn man, or in any other legitimate endeavor in his life to date.

2. The Evidence Supports the RICO Counterclaim

The assertion that FEI has not offered a "shred of evidence" to support its "frivolous" claim[15] that plaintiffs are paying Rider to be a plaintiff and key witness is rebutted by the detailed allegations alleged in the counterclaim, which, ironically, is based in large part on WAP's own documents. See Response at 5; [Proposed] Counterclaim §§ 75, 93, 102 (charts based on WAP's accounting records). That WAP can make this argument with a straight face after having read the detailed payment transactions – obtained from WAP's own documents – is incredible. In any event, a debate about evidence is a matter of proof, and does not provide a basis for which to deny FEI's Motion for Leave to Amend. That Rider has done some public outreach, or even disguised the illegal payments with the outreach itself, does not legitimize WAP's and plaintiffs' racketeering activity. Apart from engaging in its usual, but predictable,

[15] WAP claims that the "frivolous nature of the proposed RICO claim" is evidenced by FEI's citation to changes in WAP's website that came after FEI revealed to the Court that plaintiffs' counsel, Katherine Meyer and Eric Glitzenstein, were the alter ego of WAP. Response at 11 n.6. WAP suggests that FEI erred in noting that the website since deleted any reference to Meyer and Glitzenstein as officers and now refers to them only as "members of the Board of Directors." Id. Far from the "false statement" that WAP accuses FEI of making, even WAP's protracted explanation of this confirms that WAP did, indeed, "drop" the reference to both as officers of WAP. That WAP confuses the distinction between an "officer" and a "director" is irrelevant to the amendment analysis. The timing of the change is highly suspect and is an issue for the trier of fact.

meritless character assassination on FEI,[16] WAP asserts no credible argument as to why FEI's proposed RICO counterclaim would be futile, as it is required to do to defeat FEI's amendment. James Madison Ltd. v. Ludwig, 82 F.3d 1085, 1099 (D.C. Cir. 1996) (citing Foman v. Davis, 371 U.S. 178, 181-82 (1962)).

CONCLUSION

For the reasons stated above, together with its Motion and Memorandum in Support thereof, FEI's Motion for Leave to Amend Answers To Assert Additional Defense and Counterclaim thereof should be granted.

Dated this 11th day of April, 2007.

Respectfully submitted,

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[16] WAP, following the lead of plaintiffs in prior responses, has lodged attacks on FEI in an attempt to "scare" the Court into believing that FEI plans to go on a search and destroy mission for other contributors to WAP and Tom Rider. Response at 11 n.5. FEI has no interest in WAP's "woman in Pennsylvania" (whose identity, although referred to generically here, has already been disclosed by WAP (surname) and AWI (full name) in discovery) and WAP, significantly, has no evidence to the contrary. WAP's repeated attempts to deflect attention away from itself should be construed as just that.