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/JMF)
v.	
RINGLING BROS. AND BARNUM & BAILEY CIRCUS, et al.,	
Defendants.	

EMERGENCY MOTION OF NON-PARTY WILDLIFE ADVOCACY PROJECT TO QUASH DEPOSITION SUBPOENA AND/OR FOR PROTECTIVE ORDER

INTRODUCTION

Pursuant to Fed. R. Civ. P. 45(c)(3)(A), the Wildlife Advocacy Project ("WAP") hereby moves to quash a deposition subpoena recently served on it by defendant Feld Entertainment Industries ("FEI") because the subpoena "requires disclosure of privileged or other protected matter" – including information that pertains to another pending lawsuit in which all discovery has been stayed by Judge Sullivan – and would also subject WAP to an "undue burden," id., in light of the extensive discovery previously directed at the organization. Because FEI scheduled the deposition for **this Friday, December 14, 2007** (with no prior consultation with below-signed counsel) and has thus far refused to postpone it, WAP respectfully requests emergency consideration of this motion.[1]

[1] WAP is aware that the Court has required the parties to seek the Court's permission before making further filings in the case. See DE 221. Because WAP is not a party and hence its

WAP, a non-profit animal protection and conservation organization that is not a party to these proceedings, has already produced extensive materials in response to three of defendant Feld Entertainment Industries ("FEI's") expansive document subpoenas. In response to FEI's motion to compel regarding the first of those subpoenas, Judge Sullivan ruled that "defendant's subpoena is over broad and over burdensome and seeks a lot of information that is completely irrelevant" to this lawsuit. August 23, 2007 Order (DE 178) ("Discovery Order") at 8. Accordingly, the Court disallowed the vast majority of the discovery sought, and instead ordered WAP to produce (by September 24, 2007) only information that might specifically bear on plaintiff Tom Rider's credibility as a potential fact witness, along with a Declaration making attestations regarding specific categories of information that the Court found could be withheld on privilege or other grounds. Id. at 8-9. WAP has complied with that Order, see Sept. 24, 2007 Notice of Filing (DE 193) ("WAP Decl."); see also 12/3/07 Mem. Op. (DE 232) at 6, and, in fact, has exceeded the obligations Judge Sullivan imposed on it by providing financial information that the Court ruled could be withheld on privilege grounds.

Nonetheless, more than two months after WAP's Declaration was filed, as part of what Judge Sullivan has summarized as FEI's "relentless" efforts to "learn every detail of the media and litigation strategies of its opponents," 8/23/07 Mem. Op. (DE 176) ("First RICO Opinion") at 8, FEI has now served a sweeping Rule 30(b)(6) subpoena on WAP that, once again, seeks a mass of information that is "completely irrelevant" to any claim or defense in this case –

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non-party motion to quash pursuant to Rule 45 is WAP's only available procedural mechanism for seeking appropriate relief from the Court, WAP assumes that the Court did not intend its Order to apply to such a third party request for relief. Obviously, however, WAP will abide by whatever process the Court deems appropriate for resolving the issues raised in this motion.

including, for example, information on the "formation and corporate structure of WAP." See 11/27/07 Subpoena (Exhibit A). To compound matters, although such information has nothing to do with this Endangered Species Act ("ESA") lawsuit, it does clearly relate to FEI's RICO claim against WAP – a claim that Judge Sullivan first refused to allow FEI to incorporate into this case because it was filed with an improper "dilatory motive," First RICO Opinion at 6, and then stayed in its entirety when FEI filed it four days later as a freestanding lawsuit. See 11/7/07 Mem. Op. (DE 23) in Feld Entertainment, Inc. v. American Society for the Prevent of Cruelty to Animals et al., No 1:07-cv-01532-EGS ("Second RICO Opinion").

As discussed further below, under these circumstances, the deposition subpoena should be quashed because the discovery now aimed at WAP violates Judge Sullivan's Order staying all discovery in the RICO case and, in any event, clearly crosses the line that separates necessary factfinding from harassment. As noted, because FEI has scheduled the WAP deposition for this Friday, December 14, 2007, and has refused to postpone the deposition, and because WAP believes that compliance with the subpoena would require WAP to violate the letter and spirit of Judge Sullivan's stay of discovery in the RICO case, WAP respectfully requests a ruling on this motion prior to Friday unless FEI agrees to defer the deposition pending resolution of this motion.[2]

[2] As discussed further below, WAP has conferred with FEI in an attempt to avoid this motion or at least narrow the areas of disagreement, but those discussions have not borne fruit. WAP has also advised FEI that the deposition should, of course, not occur before this Court has an opportunity to rule on this motion and, in any event, that the WAP representative who will be deposed has a preexisting obligation on December 14. However, FEI's counsel have indicated that they will not agree to defer the deposition in the absence of a Court order, thus necessitating the filing of this motion as an emergency motion.

BACKGROUND

A. WAP AND ITS PUBLIC EDUCATION CAMPAIGN REGARDING FEI'S MISTREATMENT OF ITS ASIAN ELEPHANTS.

As WAP has previously explained to the Court, WAP is a 501(c)(3) non-profit organization that was established to assist grassroots activists to undertake public education campaigns on behalf of wildlife and captive animals. See Wildlife Advocacy Project's 9/21/06 Opposition to Defendant's Motion to Compel (DE 93) ("WAP Compel Opp."), at 7-11. As set forth in the organization's filings with the Internal Revenue Service, WAP was founded to assist with, promote, and fund such public education efforts for the purpose of

> achiev[ing] long-term protection of wildlife and the environment, and in stopping the abuse and exploitation of animals held in captivity. The project advocates the recognition and respect for the innate wild nature of all animals – including those in confinement, as well as those in the wild.

Exh. 23 to FEI's 9/7/06 Motion to Compel Documents Subpoenaed from WAP (DE 85) (2002 WAP Form 990-EZ). WAP was founded by two members of the public-interest law firm that represents plaintiffs (Katherine Meyer and Eric Glitzenstein) and they continue to serve as officers. See WAP Compel Opp. at 8. The organization's Board includes additional individuals who have no involvement in the firm. See http://www.wildlifeadvocacy.org/who.php. While some of the organization's public education campaigns have been conducted in coordination with the public-interest litigation pursued by plaintiffs' law firm,[3] other projects have no relationship

[3] Meyer Glitzenstein & Crystal ("MGC") is a public-interest law firm that represents non-profit organizations and individuals at well below market rates, and often for no compensation at all. The firm has won many legal victories on behalf of wildlife and animal protection organizations, environmental groups, and other non-profit entities. See http://www.meyerglitz.com.

to the firm's pending cases.[4]

In accordance with its organizational mission, WAP has, for a number of years, been pursuing a public education campaign designed to educate the public about the abuse and neglect inflicted on the elephants who perform in FEI's Ringling Bros. and Barnum & Bailey Circus ("Circus"). To pursue this campaign, WAP, in conjunction with the organizational plaintiffs in this case as well as other animal protection organizations and individuals around the country who object to FEI's mistreatment of the elephants, has defrayed the costs of Tom Rider's living and travel expenses while he traverses the country in a used van in an effort to educate the public – through local media outlets, appearances before state legislative bodies, and other means – regarding the mistreatment of the elephants.

WAP and other animal protection organizations have supported Mr. Rider's efforts for a very basic reason: the public has a compelling interest in learning that FEI's treatment of the elephants involves hitting them with bull hooks and other instruments, keeping them chained on concrete for many hours each day, forcibly separating babies from mothers, and other forms of

[4] For example, when the firm brought litigation designed to reduce the number of Florida manatees killed and injured by motorized watercraft, see Save the Manatee Club v. Ballard, 215 F. Supp. 2d 88 (D.D.C. 2002), WAP spearheaded a public relations campaign intended to highlight the increasing numbers of manatees being killed and injured in such collisions. The litigation – which culminated in a consent decree requiring, among other things, the creation of new manatee sanctuaries and refuges – together with the public education campaign, in fact resulted in new comprehensive protections for manatees throughout Florida. See WAP Compel Opp. at 9. Although the manatee litigation has long since been resolved, WAP continues to pursue public education and other projects on behalf of manatees, including by supporting a project to protect and conserve the West African manatee in the Ivory Coast. See http://www.wildlifeadvocacy.org/current/westafricanmanatee.php. WAP has also been involved in other wildlife protection issues that have nothing to do with the firm's pending litigation. See http://www.wildlifeadvocacy.org/current/wind_power.php (Congressional testimony by WAP's President regarding the impact of wind power projects on wildlife).

grave mistreatment. Mr. Rider is an extremely knowledgeable, effective, and even eloquent spokesman on behalf of the elephants – in no small measure because he knows them personally, and has formed a deep emotional bond with them. Cf. ASPCA v. Ringling Bros., 317 F.3d 334, 338 (D.C. Cir. 2003) (describing Mr. Rider's "personal relationship with the elephants" and his "emotional[] attach[ment]" to them in the course of finding that Mr. Rider had "made a sufficient allegation of injury in fact to satisfy" Article III standing requirements).[5]

B. Judge Sullivan's Ruling On FEI's Overbroad Subpoena And WAP's Compliance With The Court's Ruling.

To fully appreciate why FEI's fourth subpoena to WAP should be quashed, it is necessary to place the subpoena in the context of the discovery previously directed at the organization. In July 2005, FEI first attempted to subpoena from WAP a vast array of materials, including virtually every document reflecting the organization's communications "with any other animal advocate or animal advocacy organization." Exh. 9 to DE 85. However, WAP and FEI's prior counsel (Covington & Burling) engaged in a series of good faith discussions aimed at narrowing the subpoena to the information bearing specifically on the funding of Tom Rider's public education campaign. See WAP Compel Opp. at 11-16. In connection with those discussions, WAP provided FEI with hundreds of pages of responsive materials. Id. at 14; Exh. 15 to DE 85.

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[5] FEI's "relentless" efforts to uncover "every detail of the media" strategies of its opponents, First RICO Opinion at 8, is easily explained by the fact that Mr. Rider has in fact done a remarkable job of traveling the country on a shoestring budget while speaking out about the Circus's treatment of the elephants. See, e.g., Exhs. B, C to WAP Compel Opp. (local television pieces based on Tom Rider's public education efforts); see also Plaintiffs' Opp'n to Def. Motion to Enforce the Court's August 23, 2007 Order (DE 227), at 5-6. Indeed, FEI's own internal documents make clear that FEI is extremely concerned about Mr. Rider's communications with the public precisely because he has proven to be such an effective public advocate for the elephants. Id. at 7 n. 5.

For nearly seven months, FEI voiced no complaint with WAP's production or in any way suggested that it needed more information from WAP to litigate this case. See WAP Compel Opp. at 17. However, shortly after FEI changed counsel in 2006, FEI asserted a litany of complaints with WAP's production. Id. at 18-20. In an effort to avoid litigation, WAP produced additional documents, some of which the organization believed (and the Court subsequently confirmed) could be withheld on privilege grounds. WAP also provided FEI with a "transaction detail report" reflecting all disbursements made by the organization to Mr. Rider and all receipts of funding from other organizations and individuals for Mr. Rider's public education campaign. Id. at 20; Exh. 4 to DE 85. WAP also produced canceled checks and check stubs in its possession and Form 1099s issued to Mr. Rider. WAP Compel Opp. at 20.

Nonetheless, FEI filed a motion to compel, arguing that WAP was obligated to comply in full with the sweeping subpoena served on it in 2005. The Court ruled, however, that FEI was "seek[ing] a lot of information that is completely irrelevant to the 'taking' claim in this lawsuit, the credibility of Tom Rider, or any claimed defenses." Discovery Order at 8 (emphasis added). Judge Sullivan further found that FEI's "request for all communications between plaintiffs, WAP, animal rights advocates, and animal rights organizations generally" is "over broad and . . . irrelevant to the claims and defenses in this litigation;" that "information about media and legislative contacts and strategies specifically is not discoverable for the same reasons;" that much of what FEI sought was protected by the First Amendment; and that "defendant's request for additional financial records [beyond the transaction detail report] is over burdensome and duplicative." Id. at 8-9.

Accordingly, Judge Sullivan denied FEI's motion to compel, with the limited exception

that the Court directed WAP to produce, with certain enumerated exceptions, any materials "it has not already provided . . . related to payments or donations for or to and expenses of Tom Rider in connection with this litigation or his public education efforts related to the Circus's treatment of elephants . . . ." Id. at 8. In addition, the Court directed WAP to file a Declaration attesting to certain specific matters, i.e., that any "donors" to Mr. Rider's public education campaign whose identities are being withheld are "not plaintiffs' counsel, employees or officers of the organizational plaintiffs or employees or officers of WAP," id. at 9, and that the "transaction detail reports, canceled checks, and 1099s already provided detail every financial transaction made by WAP concerning elephants, defendants, or Tom Rider." Id. ("WAP's other financial information is irrelevant.").

As this Court has recently noted, "[c]onsistent with th[e] obligation" imposed by Judge Sullivan, on September 24, 2007, WAP's President (Eric Glitzenstein) submitted a Declaration describing the documents made available to FEI pursuant to the subpoenas served on it and "attest[ing] that he located no additional documents responsive to Judge Sullivan's Order." 12/3/07 Mem. Op. (DE 232) at 6; see 9/24/07 Notice of Filing (DE 193). WAP explained that, although the Court's ruling had addressed FEI's July 2005 subpoena, WAP had also provided documents in response to a February 2007 subpoena from FEI, and had even gone so far as to voluntarily search for and produce subsequently generated and obtained documents that were not covered by any outstanding subpoena. WAP Decl. at ¶¶ 2-5. In particular, WAP provided FEI with an updated "transaction detail report" – current as of September 24, 2007, the date by when the Court had ordered WAP to respond – itemizing disbursements by WAP to Mr. Rider as well as contributions or other sources of funding for the media campaign from both the organizational

plaintiffs and others. Id. at ¶ 5.

Indeed, as also set forth in the Declaration, the transaction detail report and other financial records produced by WAP actually contain considerably more information on Mr. Rider's funding than was required by Judge Sullivan's Order. WAP not only voluntarily produced materials generated since February 2007 reflecting funding by the organizational plaintiffs, but it also released (as it has in the past) the identities of animal protection organizations that are not parties to this litigation but have contributed to Mr. Rider's media campaign – information that the Court had specifically ruled could be withheld on First Amendment grounds. Compare WAP Decl. at ¶ 6 with Discovery Order at 8-9.

With regard to the withheld identities of individuals who have contributed to Mr. Rider's public education campaign because they support his efforts to alleviate the suffering of FEI's elephants, WAP provided the specific attestation required by Judge Sullivan – i.e., that "none of the donors whose names or other identifying information has been deleted are 'plaintiffs' counsel, employees or officers of the organizational plaintiffs or employees or officers of WAP.'" WAP Decl. at ¶ 6 (quoting Discovery Order at 9). WAP also provided the requisite attestation that the "financial information underlying the transaction detail reports exists," and that the report "detail[s] every financial transaction made by WAP concerning elephants, defendant, or Tom Rider.'" Id, at ¶ 5 (emphasis added) (quoting Discovery Order at 9); see also 10/4/07 Letter from Michael Trister to George Gasper (Exhibit B) at 2.

Although not required to do so by Judge Sullivan's Discovery Order, WAP's Declaration also specifically addressed FEI's request for information regarding "anything of value" provided to certain identified individuals who have also said that they observed serious mistreatment of

FEI's elephants. WAP explained that, "as [it] has advised defendant's counsel, WAP had (and has) no such documents in its possession other than those pertaining to Tom Rider's public education campaign." WAP Decl. at ¶ 7.

Despite WAP's compliance with the Court's August 23, 2007 Order, on November 19, 2007, FEI served on the organization a third document subpoena, demanding – by November 30, 2007 – (1) "[a]ll documents created, generated, or received, since September 24, 2007 that refer, reflect, or relate to Tom Rider," and (2) "[a]ll documents created, generated, or received since March 30, 2007 that refer, reflect, or relate to anything of value that was requested by or on behalf of, given to, directed to, or made at the direction of" seven identified individuals. Although WAP objected to the subpoena as being "unreasonably cumulative or duplicative" of what was previously provided to FEI, and because FEI "now has more than enough information to raise whatever issue it desires concerning Tom Rider's credibility," WAP nonetheless provided documents concerning the funding of Tom Rider's public education campaign that were generated or obtained by the organization between September 24, 2007 and November 30, 2007 (the date of the response). November 30, 2007 Letter from Michael Trister to George Gasper (Exhibit C) at 2. In addition, WAP again confirmed that it had "no responsive documents" with regard to any of the individuals (other than Mr. Rider) identified in the subpoena. Id. at 1.

C. Judge Sullivan's Refusal To Allow FEI To Pursue A RICO Claim And Unclean Hands Defense In This Case, And His Stay Of All Discovery In The Separate RICO Case Subsequently Filed By FEI.

In August 2007, Judge Sullivan refused to allow FEI to amend its Complaint to assert a RICO counterclaim against plaintiffs, and to add WAP as a party to the case. See First RICO Opinion at 2. As explained by the Court, the RICO claim asserts that plaintiffs and WAP are not

really funding Mr. Rider's public education campaign (notwithstanding the extensive media he has in fact generated) but are instead engaged in an "elaborate scheme . . . to ban Asian elephants from circuses and defraud FEI of money and property," primarily by bribing Mr. Rider to participate in this lawsuit. Id. at 3.

The Court denied FEI's motion to add this counterclaim because, the Court found, the counterclaim was "made with a dilatory motive, would result in undue delay, and would prejudice the opposing party." Id. at 4. Judge Sullivan further explained that "very limited discovery remains," but that the "far-reaching nature of defendant's RICO claim would likely require substantial additional evidence . . . beyond the evidence already produced on payments to Tom Rider." Id. at 3-4, 6, 8 (emphasis added); see also id. at 5 ("Any limited information about payments to or behavior of Tom Rider that defendant is entitled to in order to challenge the credibility of one plaintiff in this case is far different from the vast amount of information they would be seeking under the guise of attempting to prove an alleged RICO scheme.") (emphasis in original).

Of particular relevance to the deposition subpoena now aimed at WAP, Judge Sullivan explained that:

> [i]n addition, defendant seeks as part of its counterclaim to add WAP as a party. Defendant alleges that WAP is the alter ego of plaintiffs' counsel and that improper payments to Tom Rider have been funneled through WAP. Allowing a counterclaim to go forward that alleges plaintiffs' counsels' involvement in improper payments would likely involve depositions of plaintiffs' counsel and create a need for new counsel to pursue the 'taking' claim where no need currently exists. Such a turn in the litigation would be highly prejudicial to plaintiffs in pursuit of their ESA claim.

First RICO Opinion at 6-7 (emphasis added). Accordingly, it was precisely to avoid any "need" for depositions of plaintiffs' counsel (who are also officers of WAP) that the Court refused to

allow FEI to pursue its RICO counterclaim against WAP.[6]

Nonetheless, several days after the Court rejected the RICO counterclaim, FEI filed a separate lawsuit raising the identical claim against WAP and plaintiffs. See Feld Entertainment, Inc. v. ASPCA, No. 07-1532 (EGS) (D.D.C.) (Complaint filed August 28, 2007). The RICO complaint specifically alleges that "in reality, WAP is the alter ego of MGC [Meyer Glitzenstein & Crystal," id. at ¶ 18, and that both WAP and the law firm have conspired with the ASPCA and the other organizational plaintiffs to bribe Tom Rider "for his participation as a plaintiff and as a key fact witness in the ESA action," id. at ¶ 8, as well as to engage in the "obstruction of justice, mail fraud, and wire fraud" in connection with this "scheme." Id. at ¶ 7. The RICO Complaint contains an entire section devoted to FEI's allegations concerning "WAP's Payments to Rider" and FEI's claims that Mr. Rider's public education efforts are actually a "cover up" for an elaborate bribery scheme. Id. at ¶¶ 42-75.

Plaintiffs and WAP promptly moved to stay all discovery and other proceedings in the new RICO case pending resolution of this lawsuit. On November 7, 2007, Judge Sullivan granted that motion, finding – again – that FEI's filing of the RICO claim at this time is "improperly motivated and intended to prolong the ESA action." Second RICO Opinion at 6-7 (emphasis added). The Court also found that FEI had "grossly distort[ed] the facts" in asserting that the RICO case should move forward because of "willful document destruction or evidence of a cover-up scheme" by plaintiffs and WAP. Id. at 7.

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[6] The Court likewise denied FEI's request to assert an unclean hands defense, finding that FEI's delay in raising the defense also "provides strong evidence of a dilatory motive aimed at prolonging the ultimate disposition of the one issue in this case" and that the "unclean hands defense is not a proper defense in a citizen suit seeking an injunction to prevent a 'take' under Section 9 of the ESA." Id. at 9.

D. FEI's Fourth Subpoena to WAP

FEI's latest subpoena to WAP – at issue in this motion – identifies thirteen "subject matters for inquiry" at a deposition. See Exhibit A. These "subject matters" fall into the following categories:

(1) the internal workings of WAP, including the "formation and corporate structure of WAP, including but not limited to the relationship and overlap with Plaintiffs' counsel," (No. 9), how the funding of Mr. Rider's public education campaign was "planned, executed, managed, coordinated, tracked and delivered" (Nos. 3, 4), WAP's internal accounting procedures (No. 10), and WAP's "record/document management practices and policies" (No. 12.);

(2) any payments made to seven individuals other than Tom Rider (Nos. 5-8);

(3) funds provided to Tom Rider and funds received by WAP for the benefit of Tom Rider (Nos. 1, 2); and

(4) WAP's "efforts to comply with the document subpoenas" (No. 11) and the "authenticity of documents" produced by WAP in response to the subpoenas (No. 13).

By letter dated December 6, 2007, WAP advised FEI that it objected to this subpoena because WAP had already produced extensive information on the funding of Mr. Rider's media campaign in compliance with Judge Sullivan's August 23, 2007 Order, and most of the other information sought clearly related to the stayed RICO action rather than any issue in the ESA case. See Exhibit D. In particular, WAP explained that "[q]uestions concerning WAP's internal workings have nothing to do with this case or Tom Rider's credibility" and, "[a]ccordingly, such discovery plainly violates Judge Sullivan's stay of the RICO case." Id. at 2. Nevertheless, in an effort to avoid further litigation, WAP suggested an approach for addressing several of the items in the subpoena. Id.

In particular, with regard to the "subject matters" concerning specific individuals other

than Mr. Rider, WAP explained again – and offered to furnish FEI with yet another Declaration confirming – that it has no materials concerning these individuals "because WAP has never provided funding of any kind to these individuals, nor has it ever received any funding for their benefit." Id. at 2. In addition, with regard to the authenticity of documents provided by FEI, WAP explained that it would be willing to provide a Declaration attesting to the authenticity of any documents it had produced and that "[s]uch a process certainly does not warrant a deposition." Id. Finally, WAP indicated that, should the FEI and WAP be unable to resolve the propriety and scope of any deposition, a resolution by this Court should "precede the deposition" and, in any case, that "due to a preexisting scheduling conflict, WAP could not participate in a December 14 deposition." Id. at n. 1.[7]

By letter dated December 7, 2007, FEI advised WAP that it would proceed with the deposition as set forth in the subpoena. See Exhibit E. FEI conceded that WAP has, as required by Judge Sullivan, already produced information "reflecting the dates and amounts" of funding it had provided to Mr. Rider, but FEI did not explain what more it needs (from WAP) in order to challenge to Mr. Rider's credibility. Id. at 1. Rather, FEI continued to insist that it has a "right" to obtain information concerning the internal workings of WAP – such as the "relationship between WAP and plaintiffs' counsel," id. – although FEI made no effort to explain how such information might bear on any claim or defense in the ESA case (in contrast to the stayed RICO action).[8]

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[7] The WAP representative who would be deposed has a long scheduled doctor's appointment on November 14.

[8] FEI's letter asserts that WAP's "objection, therefore, that questions concerning the 'role of WAP' 'have nothing to do with this case or Tom Rider's credibility' is baseless." Exhibit E at

Nor did FEI agree to WAP's proposal for addressing the other subpoena "topics" without the need for a deposition. Hence, FEI reiterated its intention to "depos[e] WAP about any payments it might have made" to seven enumerated individuals (other than Mr. Rider), but FEI failed to explain the need for such a deposition in view of WAP's specific representations that it has no information concerning these individuals, nor did FEI address WAP's offer to produce another Declaration confirming that fact. Id. at 2. FEI also did not explain why WAP's proffered Declaration regarding the authenticity of documents it had produced would be inadequate to resolve that matter; instead, FEI insisted that WAP, to avoid a deposition, must somehow produce a "signed document from plaintiffs" stipulating not only to the authenticity of the documents but also that they could not be "excluded from evidence" on other grounds, id. (emphasis added) – a concession that, of course, FEI could not obtain from WAP in a deposition in any event.

Finally, FEI declared that it has no intention of voluntarily postponing the deposition until this Court can address the issues raised by this motion, or in light of WAP's conflict on December 14. Instead, FEI asserted that "we will plan to depose WAP at the time and place set forth in the subpoena unless there is a Court Order that says otherwise." Id. at 2 (emphasis added). Consequently, WAP is now requesting such a Court Order.

ARGUMENT

Fed. R. Civ. P. 45(c)(3)(A) provides that on "[t]imely motion, the issuing court must

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1. But that was (and is) not WAP's "objection." Rather, WAP's objection is that "[q]uestions concerning WAP's internal workings have nothing to do with this case or Tom Rider's credibility," Exhibit D at 2 (emphasis added); that Judge Sullivan has made clear that such questions relate instead to the stayed RICO action; and that WAP has already produced extensive documentation on its "role" in providing funding for Mr. Rider's public education campaign.

quash or modify a subpoena" that "requires disclosure of privileged or other protected matter" or "subjects a person to undue burden." See also Fed. R. Civ. P. 45(c)(1) ("[a] party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena") (emphasis added). Fed. R. Civ. P. 26(b) likewise provides that courts must limit the frequency or extent of discovery otherwise allowed by [these rules] or by local rule if it determines" that (1) "the discovery sought is unreasonably cumulative or duplicative," (2) the "party seeking discovery has had ample opportunity to obtain the information by discovery in the action" or (3) the burden of expense of the proposed discovery outweighs its likely benefit . . . ." (emphasis added).

Hence, it is well-established that courts should "limit discovery to that which is proper and warrranted in the circumstances of the case." Katz v. Batavia Marine & Sporting Supplies, Inc., 984 F.2d 422, 424 (Fed. Cir. 1993). Of particular pertinence here, "[]non-party status is one of the factors the court uses in weighing the burden of imposing discovery." Wyoming v. U.S. Dep't of Agriculture, 208 F.R.D. 449, 452 (D.D.C. 2002) (emphasis added); see also In re Lloyd's Am. Trust Fund Litig., 1998 WL 50211 *17 (S.D.N.Y. 1998) ("Although the term 'relevant' has been construed broadly . . . discovery is not without ultimate and necessary limits. Rather, the court has a duty to ensure that discovery requests remain within reasonable limits") (internal citations omitted); EEOC v. District of Columbia Public Schools, 217 F.R.D. 12, 14 (D.D.C. 2003) ("Although the standard for discovery is a broad one, it is not boundless."); Public Service Enterprise Group Inc. v. Philadelphia Electric Co., 130 F.R.D. 543, 551 (D.N.J. 1990) (the "discovery of marginally relevant evidence may be circumscribed by the court").

When these principles are applied here, the fourth subpoena should be quashed. First, as

with its earlier subpoenas, much of what FEI seeks is "completely irrelevant to the 'taking' claim in this lawsuit, the credibility of Tom Rider, or any claimed defense." 8/23/07 Discovery Order at 8. Instead, it seeks precisely the kind of discovery that Judge Sullivan intended to prevent by refusing to allow the RICO claim to proceed while the ESA case is pending. Second, with regard to the funding of Tom Rider's activities, the subpoena is burdensome, redundant, and harassing in light of WAP's response to FEI's three earlier subpoenas and Judge Sullivan's ruling circumscribing WAP's specific discovery obligations. Third, with respect to the remaining "subject matters," a deposition can accomplish nothing except waste WAP's and the parties' time and resources. We address each point in turn.

I. FEI'S "SUBJECT AREAS" ENCOMPASS TOPICS THAT ARE NOT ONLY IRRELEVANT TO THIS CASE BUT ARE CLEARLY COVERED BY JUDGE SULLIVAN'S STAY OF DISCOVERY IN THE RICO CASE.

When Judge Sullivan's rulings on FEI's RICO claims and motion to compel against WAP are viewed together it is apparent that the Court intended to limit WAP's discovery obligations to information that might bear directly on the credibility of Tom Rider as a witness, i.e., information actually reflecting "payments or donations for or to and expenses of Tom Rider in connection with this litigation or his public education efforts related to the Circus's treatment of elephants . . .." Discovery Order at 8. While authorizing this "limited discovery," First RICO Opinion at 4 – which WAP has long acknowledged its duty to furnish, see WAP Compel Opp. at 11-20 – the Court has also made crystal-clear that FEI could not take discovery aimed at the "vast amount of information [it] would be seeking under the guise of attempting to prove an alleged RICO scheme." First RICO Opinion at 5. Of particular relevance here, in refusing to allow FEI to pursue its RICO case at this time, the Court instructed that it did not see the need for

"substantial additional evidence . . . beyond the evidence already produced on payments to Tom Rider," id., and the Court specifically did not intend that FEI pursue discovery concerning its allegations that "WAP is the alter ego of plaintiffs' counsel" including because such discovery "would likely involve depositions of plaintiffs' counsel . . . ." Id. at 6.

Yet this is exactly the impermissible course on which FEI has now embarked in violation of the stay of discovery in the RICO case. Indeed, most of the "subject matters" delineated in the subpoena have nothing to do with the amounts of funding received by Mr. Rider or the sources of such funding (information that has already been furnished to FEI by both WAP and plaintiffs) but, rather, concern WAP's internal operations and functions, including its "relationship and overlap with Plaintiffs' counsel," its "formation and corporate structure," its "record/document management practices and policies," how WAP and plaintiffs "planned, executed, managed, coordinated, tracked and delivered" funding for the public education campaign, and "how WAP accounted" for its funding activities. Exhibit A (emphasis added).

These topics have no discernible relationship to Mr. Rider's credibility or, for that matter, to the "very narrow issue" in this case – "whether or not defendant's treatment of its elephants constitutes a taking under the ESA." First RICO Opinion at 8. Instead, they can only be aimed at buttressing either the RICO claim that has been stayed – which "involves all the plaintiffs, their counsel, and a non-party," id. (emphasis added) – and/or the "unclean hands" defense Judge Sullivan has also rejected in this case. Even further, these topics necessitate a deposition of plaintiffs' counsel – who, as FEI knows, are the only ones who can opine, e.g., on the "relationship" between WAP and the public-interest law firm that represents plaintiffs – which is exactly what Judge Sullivan said he did not see a need or justification for as part of the ESA case.

Id. at 6; cf. Simmons Foods, Inc v. Willis, 191 F.R.D. 625, 630 (D. Kan. 2000) ("experience teaches that countenancing unbridled depositions of attorneys often invites delay, disruption of the case, harassment, and unnecessary distractions into collateral matters") (internal quotation omitted).

In short, the Court should quash FEI's deposition subpoena to WAP because it expressly seeks to delve into "protected matter[s]," Fed. R. Civ. P. 45(c)(3)(iii), that are squarely covered by the Court order staying all discovery in the RICO case. See also Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 353 n. 17 (1978) ("a court is not required to blind itself to the purpose for which a party seeks information. Thus, when the purpose of a discovery request is to gather information for use in proceedings other than the pending suit, discovery is properly denied.").

II. WAP HAS ALREADY PRODUCED EXTENSIVE INFORMATION AND A COURT-ORDERED DECLARATION CONCERNING TOM RIDER'S FUNDING; ACCORDINGLY, A DEPOSITION ON THE SAME TOPIC IS UNNECESSARY, DUPLICATIVE, AND DESIGNED TO HARASS WAP RATHER THAN OBTAIN INFORMATION GENUINELY NECESSARY FOR THIS LAWSUIT.

As to the limited information concerning WAP that Judge Sullivan did find to be potentially relevant, WAP has already produced it in response to FEI's three document subpoenas, and has also filed with the Court a Declaration making the specific attestations required by the Court's August 23, 2007 Order. Once again, the transaction detail reports and other documents already produced reflect all of the disbursements provided to Tom Rider by WAP as of November 30, 2007, as well as the sources of the funding. In fact, as previously noted, WAP went considerably beyond what was legally required, both by furnishing information not even subject to any extant subpoena, as well as by providing specific information that Judge Sullivan found could be withheld on First Amendment grounds.

Under these circumstances, a testimonial subpoena designed to yet again address "[p]ayments made to or for Tom Rider," and "[p]ayments made to WAP that are/were designated, used, held, spent, or transferred for the benefit of Tom Rider," Exhibit A, imposes an "undue burden" on WAP, Fed. R. Civ. P. 45(c)(3)(A)(iv), by compelling it to furnish information that essentially replicates that which WAP has already gone to great pains to produce, and/or represents an impermissible effort to sidestep Judge Sullivan's prior discovery ruling by seeking to use a deposition to obtain the very information that Judge Sullivan has deemed privileged – such as WAP's media "strategies" and the identities of unaffiliated individuals who have contributed to Mr. Rider's public education campaign. Discovery Order at 8-9. In any case, especially in light of the extensive information that has already been produced by WAP and plaintiffs on this single topic – which relates at most to the "credibility of one plaintiff in this case," First RICO Opinion at 5 (emphasis in original) – any conceivable "marginal utility" of a deposition is clearly outweighed by the burden imposed on a non-party non-profit organization that has already produced a large amount of "sensit[ive] [] financial information" in response to three of FEI's prior subpoenas. 2/23/06 Discov. Ord. (DE 59) at 9 (holding that discovery into FEI's financial information is only of "marginal utility and is too far out of proportion to the sensitivity of the financial information sought").

III. THERE IS NO NEED FOR A DEPOSITION REGARDING THE REMAINING TOPICS ENUMERATED IN THE SUBPOENA.

Nor is there any need or justification for WAP to be deposed with regard to the remaining topics enumerated in the subpoena. First, with regard to the specified individuals other than Mr. Rider, WAP has already told FEI – including in a sworn Declaration – that it has no documents concerning these individuals. See supra at 9-10. WAP has no documents concerning them

because the organization has had no dealings with them whatsoever. While this should be sufficient to address all of the subpoena "topics" concerning these individuals (Nos. 5-8), WAP is willing, if the Court deems it necessary, to proffer an additional Declaration to that effect that obviates any possible need for a deposition regarding them.

Finally, with respect to FEI's desire for authentication of "documents produced by WAP in response to the document subpoenas" (No. 13), that hardly warrants a deposition, as FEI has essentially conceded. As WAP has already advised FEI, WAP is perfectly willing to authenticate any such documents it has produced through a Declaration – which provides FEI with all it could possibly get out of a deposition of WAP concerning the organization's documents. Contrary to FEI's notion that WAP is responsible for also procuring a statement from plaintiffs, including on the admissibility of the documents, see Exhibit E at 2, that is a matter to be resolved between the parties and has nothing to do with a deposition of WAP.

CONCLUSION

The subpoena demanding that WAP be deposed on December 14 should be quashed pursuant to Fed. R. Civ. P. 45(c)(3)(A) and Fed. R. Civ. P. 26(b).

Respectfully submitted,

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