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.	:	

MOTION TO COMPEL DOCUMENTS SUBPOENAED FROM THE WILDLIFE ADVOCACY PROJECT AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

This lawsuit continues because of Tom Rider's participation as a plaintiff. *See ASPCA et al. v. Ringling Bros., Civ. No. 1:00CV1641, Mem. Op. & Order (June 29, 2001), rev'd, ASPCA v. Ringling Bros.*, 317 F.3d 334, 338 (D.C. Cir. 2003) (Rider's personal allegations "sufficient to withstand a motion to dismiss for lack of standing"). Having had their lawsuit reinstated because of Mr. Rider, the ASPCA, Animal Welfare Institute, and Fund for Animals (the "Organizational Plaintiffs") freely admit that they are relying upon Mr. Rider's allegations to carry them through this case. *See, e.g.*, Exhibit 1, Org. Pls.' Response to Interrog. No. 5 (relying substantially upon incidents described by Tom Rider when asked to list each allegedly harmful act of FEI).

Feld Entertainment, Inc. ("FEI")[1] now moves to compel documents from the Wildlife Advocacy Project ("WAP") that bear heavily upon Mr. Rider's credibility, or lack thereof. Specifically, FEI seeks documents relating to the systematic payments that Mr. Rider has received over the last five years from the Organizational Plaintiffs and WAP, the alter ego of plaintiffs' counsel. FEI believes such payments total more than $100,000.

[1] Ringling Bros. and Barnum & Bailey Circus, although included in the caption of this case, is not a legal entity.

Although discovery is ongoing, enough has occurred to reveal that WAP, established by lead plaintiffs' counsel Katherine Meyer and Eric Glitzenstein, has served as the conduit for payments from the Organizational Plaintiffs and/or plaintiffs' law firm, Meyer Glitzenstein & Crystal, to Mr. Rider himself. When faced with a document subpoena for the records related to these payments, however, WAP initially objected and refused to produce the actual, complete documents commanded. Only after recent demands from FEI's new counsel did WAP produce further responsive documents. It now has been more than a year since FEI served WAP with its document subpoena, and WAP still has not complied fully. Accordingly, FEI now moves this Court to compel the full production of all documents regarding the payments made to Mr. Rider, the role of the Organizational Plaintiffs and plaintiffs' counsel in those payments, and the filtering of funds by WAP.

INTRODUCTION

Based on the evidence taken in discovery thus far, FEI believes that plaintiffs' lead counsel, Eric Glitzenstein and Katherine Meyer, together with the Organizational Plaintiffs are, through WAP, providing money and other financial assistance to Tom Rider in connection with his participation in this litigation. On December 21, 2001, for example, plaintiff ASPCA sent a $6,000 check to WAP, stating that "I trust this will assist in Tom's work on the Ringling Brothers' circus tour and ***litigation***." *See* Exhibit 2, Weisberg letter to Kemnitz (Dec. 21, 2001) (emphasis added). On November 5, 2003, moreover, plaintiffs' counsel Katherine Meyer sent an e-mail to the Organizational Plaintiffs asking if they had ideas about how they could raise more funds for Rider, stating that she was "personally very impressed with … his total commitment to the lawsuit." *See* Exhibit 3, Meyer e-mail to Organizational Plaintiffs (Nov. 5, 2003).[2]

[2] Although Ms. Meyer states in her e-mail that contributions would be tax deductible since they can be provided to WAP, it is unclear why this e-mail exists in WAP files. It was sent from counsel's e-mail address with

Since March 20, 2001, WAP has made at least 193 expenditures on behalf of Mr. Rider and has received at least 48 contributions, including seven from the Organizational Plaintiffs, to help support him. *See* Exhibit 4, Ledger Provided in Lieu of Documents Requested. In fact, WAP provided Rider with approximately $7,800 in 2002, $7,300 in 2003, $23,900 in 2004, and $33,600 in 2005. *See* Exhibit 5, WAP Forms 1099-Misc for Rider.[3] According to Katherine Meyer, this money has been provided to Rider so he could "continue [his] efforts to educate the public about the mistreatment of Asian elephants by Ringling Bros." *See* Exhibit 7, Meyer/WAP Memo to Rider (Apr. 12, 2005) (enclosing check for $5500 "to purchase a used van"). ASPCA testified under oath, moreover, that this money has been provided to Rider "for his general living expenses to travel the country and meet with the media," or more specifically, for "Greyhound bus tickets, to travel the country, basic day-to-day living expenses, food, lodging." Exhibit 8, 30(b)(6) Deposition of ASPCA (hereinafter "ASPCA Depo.") at 46-47. In short, this money has been provided to fund a job for Mr. Rider, which, coincidentally, is aimed at harassing FEI as part of plaintiffs' litigation strategy.

These payments bear directly upon, indeed undermine, Mr. Rider's credibility. Because his alleged injuries are the sole reason this case exists and the sole basis upon which plaintiffs can obtain the relief they request, issues that bear upon his credibility go to the heart of FEI's defense. Furthermore, the provision of financial assistance to Mr. Rider could give rise to an unclean hands defense of which FEI was not previously aware. The *relevancy* of the documents

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her law firm (katherinemeyer@meyerglitz.com) to other plaintiffs. The existence of this document in WAP's files underscores FEI's contention that WAP is the alter ego of plaintiffs' counsel.

[3] Notably, in its 1099 for the IRS, WAP labeled the monies paid to Mr. Rider as "nonemployee compensation." Rider, however, has sworn under oath in these proceedings that he has not received compensation from an animal advocate or animal advocacy organization. *See* Exhibit 6, Rider Response to Interrog. No. 24 ("I have not received any such compensation.").

sought is indisputable. The only question for this court to decide is whether the documents are *discoverable*. As explained below, they are.

In response to FEI's subpoena *duces tecum* (Exhibit 9), which was served on July 27, 2005, WAP has produced some documents, but it has withheld certain documents and redacted numerous others that it did produce. Specifically, WAP has provided a chart in lieu of producing other responsive documents and has alleged a First Amendment privilege. Neither of WAP's alleged bases, however, is sufficient to deny FEI its right to review the documents requested. The documents produced thus far, moreover, indicate that WAP continues to withhold unidentified documents and corroborate FEI's belief that Mr. Rider is receiving money and other financial assistance from plaintiffs' counsel and other plaintiffs.

Pursuant to Fed. R. Civ. P. 45(c)(2)(B), FEI hereby moves the Court for an order compelling WAP's compliance with the subpoena in its entirety. Prior to filing this motion, FEI was willing to make several concessions to accommodate WAP's objection that the subpoena is overbroad and unduly burdensome in order to resolve this matter without the need for judicial intervention. Notwithstanding FEI's efforts to narrow the scope of the subpoena, WAP refuses to comply. Its delay tactics are interfering with FEI's ability to depose Mr. Rider, and sabotaging FEI's potential unclean hands defense.

FACTUAL BACKGROUND

A. A Description of WAP and its Activities Aimed at FEI

WAP "is a non-profit advocacy group founded by Katherine Meyer and Eric Glitzenstein of the Washington, DC public interest law firm, Meyer Glitzenstein & Crystal." *See* Exhibit 10, WAP Homepage, http://www.wildlifeadvocacy.org/ (last visited Aug. 21, 2006). Mr. Glitzenstein serves as the President of WAP while Ms. Meyer serves as the Secretary of WAP.

See Exhibit 11, WAP - Who We Are, http://www.wildlifeadvocacy.org/who.html (last visited Aug. 21, 2006). Together they also serve as two of WAP's three Directors. *Id*. "Mr. Glitzenstein and Ms. Meyer are ***extremely active in daily management and supervision*** of the Wildlife Advocacy Project." *Id*. (emphasis added).

The stated purpose of WAP is "to advocate the conservation of the nation's and world's biodiversity resources, protection of wildlife, and curtailment of animal abuse and exploitation, by providing media, educational, legal, technical, and other forms of support and advocacy to grassroots activists." *See* Exhibit 12, WAP - Mission Statement, http://www.wildlifeadvocacy.org/about.html (last visited Aug. 21, 2006). In practice, however, WAP is simply the lobbying and advocacy extension of the law firm, Meyer Glitzenstein & Crystal ("MGC"). Not only are all six of WAP's "current activities" related to cases litigated by MGC,[4] the organizations' addresses and facsimile numbers are identical:

Wildlife Advocacy Project 1601 Connecticut Ave, NW #700 Washington, DC 20009 Facsimile: (202) 588-5049	Meyer Glitzenstein & Crystal 1601 Connecticut Ave, NW #700 Washington, DC 20009 Facsimile: (202) 588-5049

Both name plates hang on the office door to suite 700.

WAP is, as a matter of law, an alter ego of MGC. There is such a unity of interest and ownership between the two entities that separate personalities no longer exist and treating WAP as distinct from MGC would promote injustice. *Labadie Coal Co. v. Black*, 672 F.2d 92, 97 (D.C. Cir. 1982). Here, as described in detail below, WAP and MGC fail to maintain corporate formalities; they use the same office and equipment; they share many of the same human

[4] *See The Florida Biodiversity Project v. Kennedy*, No. 95-CIV-FTM-24(D) (M.D. Fla. 1995) (restoration of Big Cypress National Reserve); *ASPCA v. Ringling Bros. Barnum & Bailey Circus*, 317 F.3d 334 (D.C. Cir. 2003) (Asian elephant); *Save the Manatee Club v. Ballard*, 215 F. Supp. 2d 88 (D.D.C. 2002) (manatee); *Gerber v. Babbitt*, 294 F.3d 173 (D.C. Cir. 2002) (fox squirrel); *Defenders of Wildlife v. Meissner*, No. 99-2262 (D.D.C.) (ocelot and jaguarundi); *Animal Protection Institute v. Babbitt*, No. 85-365 (D. Nev. 1997) (wild horses and wild burros). *Compare* http://www.wildlifeadvocacy.org/programs/ *with* http://www.meyerglitz.com/wildlife.html (last visited August 21, 2006).

resources; they commingle funds; MGC appears to have diverted to WAP funds billed and collected as attorneys fees; and two of MGC's owners (plaintiffs' lead counsel Katherine Meyer and Eric Glitzenstein) have claimed to anticipate making "substantial contributions" to WAP. *See Johnson-Tanner v. First Cash Fin. Servs, Inc.*, 239 F. Supp. 2d 34, 38-39 (D.D.C. 2003) (ruling that two entities were alter egos of each other where two officers of one were Directors of the other, another officer of one was the President of the other, and their executives shared the same phone and fax lines in performing their dual roles) (One company's "high degree of oversight and management activity . . . is an extremely relevant factor, independent of the sharing of officers."). *See also Shapiro, Lifschitz & Schram, P.C. v. R.E. Hazard , Jr.*, 90 F. Supp. 2d 15, 24-26 (D.D.C. 2000) (ruling that two companies were alter egos where there was a "unity of financial transactions" and where they shared employees as well as office equipment). Not only have WAP and MGC failed to maintain separate personalities, but treating them as separate entities would be unjust. Having provided at least $70,000 to an MGC client without whom this lawsuit would not exist, WAP should not be allowed to hide behind its alleged corporate formalities.

B. Funding the Campaign Against FEI

WAP boasts that one of its six "current activities" is entitled "Ringling Bros.' treatment of Endangered elephants." *See* Exhibit 10, WAP Homepage, http://www.wildlifeadvocacy.org/ (last visited Aug. 21, 2006). WAP's website has a page dedicated to what purports to be "Facts on Ringling Bros.' Treatment of Performance Elephants," and it advertises this lawsuit:

> On June 8, 2000, the American Society for the Prevention of Cruelty to Animals, the Fund for Animals, the Animal Welfare Institute, and Tom Rider — a former Ringling Bros. elephant worker — brought a lawsuit against Ringling Bros.' mistreatment of Asian elephants. The case is pending. The plaintiffs are represented by the law firm Meyer & Glitzenstein.

See Exhibit 13, WAP Website, http://www.wildlifeadvocacy.org/programs/ringling/factsheet.htm (last visited Aug. 21, 2006). As part of its efforts to publicize this case, WAP provides a copy of the Complaint, a press release on this case, and documents obtained from the United States Department of Agriculture. *Id*. It also provides a link to the website of the law firm of Meyer & Glitzenstein. *Id*.

WAP's document production to date, moreover, shows that other plaintiffs and plaintiffs' counsel are providing, through WAP, money and other financial assistance to fund Mr. Rider's campaign against FEI. *See, e.g.*, Exhibit 14, Glitzenstein/WAP weekly letters to Rider (dated August 22, 2005 through September 26, 2005), ("Enclosed is a further grant to continue your invaluable media and public education efforts with regard to Ringling Brothers' mistreatment of elephants in the circus."); Exhibit 7, Meyer/WAP Memo to Rider (Apr. 12, 2005) ("Enclosed is a check … to continue your efforts to educate the public about the mistreatment of Asian elephants by Ringling Bros."). According to WAP's "outside" counsel, "WAP funds provided to Mr. Rider have been utilized … to keep Mr. Rider on the road so that he can serve as an effective spokesperson on behalf of elephants and other circus animals … ." Exhibit 15, Thomas letter to Wolson (Nov. 28, 2005).

Mr. Rider was first employed by Performing Animal Welfare Society ("PAWS") to do "security" until May 2001. *See* Exhibit 16, Rider letter to Derby (May 14, 2001). After PAWS settled its lawsuit with FEI, it told Rider that he "could not do any media against Ringling Bros. anymore." *Id*. As a result, Rider quit his job at PAWS because he "wants to do everything in [his] power to help the elephants." *Id*. Rider's departure from PAWS prompted the following e-mail from Lisa Weisberg, a Senior Vice President of plaintiff ASPCA, to Larry Hawk, President and CEO of plaintiff ASPCA:

> He had wanted to leave PAWS for a while in order to do this and to ensure he would not be taken off the suit. In order to follow the circus he cannot be employed. To pay his travel expenses for the next few months both AWI and The Fund (and [the ASPCA]) have agreed to pay $1,000 each to cover 2 months of road expenses.

Exhibit 17, Weisberg e-mail to Hawk (May 7, 2001). Since that time, Rider's "job" has been funded by WAP and the Organizational Plaintiffs. In his interrogatory answers, Rider identified no other form of gainful employment for the time period in which he has received money either from WAP or the Organizational Plaintiffs. *See* Exhibit 18, Rider Response to Interrog. No. 2.[5]

Plaintiffs' counsel Katherine Meyer has actively solicited donations to WAP that would be used for, among other things, "transportation, lodging, meals, phone expenses, and other administrative and out-of-pocket costs for Mr. Rider." Exhibit 19, Meyer/WAP letter to Liss (Dec. 11, 2003). *See also* Exhibit 20, Meyer/WAP letter to Prospective Donor (Nov. 3, 2003) (detailing Tom Rider's "activities and appearances," stating that "Tom would very much like to continue his efforts, and we believe that there is a tremendous value in having him out there as long as possible," and asking for "additional funding," specifically "another tax deductible grant for this purpose"). Plaintiffs' counsel Eric Glitzenstein repeatedly has sent letters to donors thanking them for their recent "contribution to The Wildlife Advocacy for Tom Rider's efforts to educate the public about what goes on behind the scenes at the Ringling Brothers' circus." Exhibit 21, Glitzenstein/WAP letters (dated December 2003 through September 2005). On at least one occasion, when Rider needed access to such funds, he requested a grant from Mr. Glitzenstein to "allow [him] to continue [his] efforts to educate the public about Ringling Bros.' mistreatment of elephants," *see* Exhibit 22, Rider letter to Glitzenstein/WAP (Nov. 25, 2003).

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[5] In describing each job he has held since high school, Rider stated that, since March 2000, "I have primarily been traveling around the country speaking out about the way elephants are mistreated in the circuses, and I have done some selling of crafts at flea markets." *Id*. Curiously, Rider made no reference to the alleged "security" work that he did for PAWS prior to his resignation in May 2001. Exhibit 16, Rider letter to Derby (May 14, 2001).

Generally, however, WAP provides Rider with $500 per week. *See* Exhibit 4, Ledger Provided in Lieu of Documents Requested. Plaintiffs' counsel Eric Glitzenstein and Katherine Meyer routinely have provided such money under the auspice of their positions at WAP. *See, e.g.*, Exhibit 14, Glitzenstein/WAP weekly letters to Rider (dated August 22, 2005 through September 26, 2005); Exhibit 7, Meyer/WAP Memo to Rider (Apr. 12, 2005).

Because WAP has withheld the identity of individual donors, FEI does not know exactly who is providing, through WAP, this money to Mr. Rider.[6] FEI does know, however, that the Organizational Plaintiffs discussed "how [they] could fund the costs for [Mr. Rider's] travels and how [they] would divide the costs." Exhibit 8, ASPCA Depo. at 51-52. Plaintiff Animal Welfare Institute, in response to plaintiffs' counsel Katherine Meyer's personal request, sent WAP a check for $2,500 "to be used towards the Ringling Bros. Public Education Effort as described in your proposal dated December 11, 2003." Exhibit 25, Liss letter to Meyer/WAP (Feb. 13, 2004). It subsequently sent WAP four additional donations totaling $8,000. *See* Exhibit 4, Ledger Provided in Lieu of Documents Requested. *See also* Exhibit 26, Glitzenstein/WAP letter to Liss (Oct. 7, 2004) (thanking plaintiff Animal Welfare Institute for its contribution "for Tom Rider's important work related to the treatment of elephants by Ringling Brother's").

Plaintiff ASPCA has promised WAP a $24,000 grant to cover "Tom Rider traveling expenses." Exhibit 27, WAP Memo from "D'Arcy" to "Kath" (Feb. 13, 2002). As noted above, plaintiff ASPCA's cover letter enclosing a $6,000 check stated "I trust this will assist in Tom's

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[6] Indeed, because of WAP's obfuscation and refusal to identify donors, FEI has not been able to ascertain whether plaintiffs' counsel provide personal contributions to WAP. Apparently, "Meyer and Glitzenstein provides [WAP] with office space at no charge" and plaintiffs' counsel Eric Glitzenstein and Katherine Meyer are not compensated for their work with WAP. Exhibit 23, 2002 IRS Form 990-EZ of WAP at 2, Sch. A. The 501(c)(3) application of WAP's predecessor entity, moreover, states that "Eric Glitzenstein and Katherine Meyer, officers and board members, ***anticipate being disqualified persons by reason of substantial contributor status***." *See* Exhibit 24, WAP Form 1023 (emphasis added).

work on the Ringling Brothers' circus tour and ***litigation***." Exhibit 2, Weisberg letter to Kemnitz (Dec. 21, 2001) (emphasis added). Plaintiff ASPCA provided a check for $526.16 to "Meyer & Glitzenstein" as "reimbursement for money given to Tom Rider exceeding the $6,000 grant for the Wildlife Advocacy Project for 1st quarter 2002 ($400 of this covers zoom camera …)." *See* Exhibit 28, ASPCA Request for Check to Meyer & Glitzenstein (May 22, 2002). ASPCA has promised to provide a new laptop to Mr. Rider and to pay all of his cell phone expenses. Exhibit 27, WAP Memo from "D'Arcy" to "Kath" (Feb. 13, 2002). In 2002, the financial responsibility for Mr. Rider was apparently transferred to the ASPCA: "after March 10, 2002 the ASPCA be responsible for Tom's expenses and the Wildlife Advocacy Project will not have any further duties regarding Tom's expenses." *Id.* Plaintiff ASPCA informed WAP that it could "direct deposit funds into Tom's Western Union account" at that time. *Id.*

Finally, in May 2003, plaintiff ASPCA provided a $445.00 check to "Meyer & Glitzenstein" for "Tom Rider testimony at MA legislative hrg on anti-circus bill." *See* Exhibit 29, Plaintiff ASPCA Request for Check to Meyer & Glitzenstein (May 23, 2003). At that time, plaintiff ASPCA "had no way of getting the money to [him] because he was on the road" but Meyer & Glitzenstein had a mechanism in place to "wire the money to him." *See* Exhibit 8, ASPCA Depo. at 49.

When plaintiff ASPCA was unable to fund Rider beyond 2003, it discussed the matter with plaintiffs Animal Welfare Institute and Fund for Animals, both of which continued to pay Rider after that conversation. Exhibit 8, ASPCA Depo. at 79-81. Coincidentally, WAP's almost weekly payments of several hundred dollars to Rider, which had stopped in March 2002, re-started in July 2003 and have continued at least through September 2005. *See* Exhibit 4, Ledger Provided in Lieu of Documents Requested. Although WAP classifies this money as a "media

expense" in its accounting ledger, receipts produced by WAP demonstrate that this money is used to purchase Rider's groceries (including things such as cat food, cat toys, Alien v. Predator the movie and tabloids) and to pay for thousands of dollars in improvements to Rider's car. *See* Exhibit 30, Misc. Rider Receipts. WAP, moreover, has paid for Rider's cell phone since January 2004. *Id*. Finally, in July 2005, the Organizational Plaintiffs hosted a fund-raiser "so that [they could] continue to support Tom Rider in his outreach to the public and the media." Exhibit 8, ASPCA Depo. at 205.

C. <u>The Purpose of the Subpoena</u>

But for the involvement of Mr. Rider – a situation which also could be barred by the settlement agreement entered into by FEI and PAWS – this matter likely would have been dismissed five years ago. FEI now seeks to obtain documents that finally could bring a fair and just resolution to this matter, and that will, at the very least, profoundly impact this case by leading to further discoverable evidence regarding improper payments.

First, the fact that Mr. Rider receives thousands of dollars from an organization operated by plaintiffs' counsel and from other plaintiffs bears heavily upon his credibility, which, of course, is integral to this case. His (undocumented) assertion that FEI's allegedly unlawful conduct has caused him some form of injury is the reason this case was remanded by the Court of Appeals. *ASPCA v. Ringling Bros.*, 317 F.3d 334 (D.C. Cir. 2003). FEI is entitled, therefore, to test his motives, as well as his standing, to participate in this case. His veracity on these topics is fairly and properly subject to scrutiny.

Plaintiffs undoubtedly will seek to present testimony from Mr. Rider that he personally witnessed FEI abusing its elephants. FEI has a right to know and a jury has a right to consider, however, whether his testimony is influenced by the fact that he receives thousands of dollars a

year from an organization operated by plaintiffs' counsel and/or from his co-sponsors, the Organizational Plaintiffs.

Second, plaintiffs have sued for an injunction that, if granted, would foreclose the circus from using elephants in its acts. Plaintiffs, however, are not entitled to such relief if they have acted with unclean hands. *See, e.g.*, *Keystone Driller Co. v. General Excavator Co.*, 290 U.S. 240, 245 (1933) ("The equitable powers of this court can never be exerted in behalf of one who has acted fraudulently or who by deceit or any unfair means has gained an advantage."). The documents sought are reasonably likely to bear upon whether, in light of the payments to Mr. Rider, the plaintiffs have acted with clean hands. For example, the District of Columbia's Rules of Professional Conduct prohibit, except under explicitly limited circumstances, attorneys from providing financial assistance to a client. *See* D.C. Rule of Prof. Conduct 1.8(d) ("While representing a client in connection with contemplated or pending litigation or administrative proceedings, a lawyer shall not advance or guarantee financial assistance to the client, except that a lawyer may pay or otherwise provide: (1) The expenses of litigation or administrative proceedings, including court costs, expenses of investigation, expenses or medical examination, costs of obtaining and presenting evidence; and (2) Other financial assistance which is reasonably necessary to permit the client to institute or maintain the litigation or administrative proceedings.").[7] Indeed, one law firm recently has been indicted for an alleged scheme of hiring plaintiffs for civil lawsuits. *See, e.g.*, *United States v. Milberg Weiss Bershad & Schulman LLP*, Crim. No. 05-587 (C.D. Cal. 2006) (indicting Milberg Weiss for obstruction of justice and bribery of witnesses in connection with alleged scheme to hire plaintiffs for civil lawsuits). FEI

[7] This type of rule is intended to, among other things, uphold the integrity of the profession by prohibiting lawyers from "compet[ing] for clients by offering the best financial package," *i.e.* from buying clients. *See Shade v. Great Lakes Dredge & Dock Co.*, 72 F. Supp. 2d 518, 521 (E.D. Pa. 2000) (internal citation omitted).

should be permitted to engage in discovery directed towards whether plaintiffs have acted with clean hands.

D. WAP's Insufficient Response to the Subpoena and FEI's Modifications Thereto

FEI served the subpoena upon WAP on July 27, 2005. In response to objections first raised by plaintiffs' counsel himself, Eric Glitzenstein (in his capacity as President of WAP), that the subpoena was overbroad and burdensome, FEI's prior counsel agreed to modify each of the five requests and granted WAP an additional seven weeks to comply with the subpoena. Exhibit 31, Wolson letter to Glitzenstein (Aug. 26, 2005). On September 29, 2005, WAP produced a folder containing 266 pages of documents, 85 pages of which were news articles that WAP retrieved on Lexis after receiving the subpoena. Not only did WAP produce very few documents, it also redacted 91 documents in part and explicitly withheld 3 documents and 80 pages of receipts.

Six pages of WAP's production, all of which were heavily redacted, constituted an accounting ledger of "receipts and disbursements relating in any fashion to elephants, Tom Rider, Ringling Brothers, or the lawsuit." Exhibit 32, Glitzenstein/WAP letter to Wolson (Sept. 29, 2005). Having produced this heavily redacted ledger, WAP also explicitly withheld without identifying "financial records that merely duplicate the information that is embodied" in the six-page chart. *Id*. After reviewing WAP's abbreviated production, FEI's counsel contacted WAP's outside counsel to address concerns that WAP did not produce all of the requested documents and to negotiate a protective order that WAP said was required before it would produce documents containing its financial information. These issues, however, could not be resolved before FEI changed counsel.

After new counsel for FEI reviewed the abbreviated document production and related correspondence, it sought to confirm with WAP its understanding of the outstanding issues and to set forth its position on such issues. Exhibit 33, Gasper letter to Thomas (June 13, 2006). By the time new counsel assumed responsibility for this matter, the issues were clear: (a) did WAP comply with the request as modified by FEI's prior counsel, (b) did WAP intend to continue asserting its alleged First Amendment privilege and (c) would WAP produce its financial information after executing its protective order as revised by FEI. Because these issues are straight-forward and because the documents at issue could bring the underlying litigation to an abrupt end, FEI requested that WAP produce the remaining responsive documents within ten days. After WAP proposed that it respond to FEI's letter (but not produce documents) one week after the established deadline, FEI granted WAP an additional seven-day extension to produce the responsive documents. Exhibit 34, Gasper letter to Thomas (June 19, 2006). FEI also offered to include within the scope of WAP's requested protective order the information that WAP alleged to be privileged under the First Amendment. *Id*.

On June 30, 2006, WAP partially responded to FEI's request. This time, only after FEI had threatened to file a motion to compel, WAP produced 538 pages (a little more than twice its previous production).[8] Although WAP has decided to produce its financial information without the protective order it once sought, WAP continues to hide the ball. For example, WAP continues to assert a First Amendment privilege over the identity of its individual donors and some of its media strategy.[9] *See* Exhibit 35, Thomas letter to Gasper (June 30, 2006). WAP

[8] WAP did not, however, produce documents created after September 29, 2005, but for a single 1099.

[9] WAP's initial production withheld all information regarding its media strategy, but its second production withheld only some, but not all, such information. It is unclear how WAP determined which media strategy information to disclose and which to hide. WAP should not be permitted to produce only selected documents, and should instead be ordered to produce all media strategy documents that have anything to do with this case and are responsive to the subpoena.

continues to insist that it need not produce certain responsive documents (financial statements, bank statements, and cell phone records) because they merely duplicate information provided in a six-page chart and they contain non-responsive information that would need to be redacted.

Having been confronted with a motion to compel, WAP finally produced a non-redacted version of the six-page chart. *Compare* Exhibit 36, Redacted Ledger Provided in Lieu of Documents Requested *with* Exhibit 4, Ledger Provided in Lieu of Documents Requested. This chart, however, only serves to further underscore FEI's need to review the underlying documents by raising questions about the source of WAP funds used to support Rider. On February 14, 2002, for example, WAP paid Meyer & Glitzenstein $1,639.34 for "11/30; 12/5; 12/14; 12/28 $ paid by M&G but should have come out of Wildlife…" *See* Exhibit 4, Ledger Provided in Lieu of Documents Requested.[10] Also, if this chart reflects (as WAP represents that it does) all "receipts and disbursements relating in any fashion to elephants, Tom Rider, Ringling Brothers, or the lawsuit," Exhibit 32, Glitzenstein/WAP letter to Wolson (Sept. 29, 2005), one would expect the receipts to equal the disbursements (or, in any event, for the receipts to exceed the disbursements if some receipts were not yet distributed). Yet, this chart indicates that WAP spent $67,683.56 on such subjects despite only having received $59,893.19 for such purposes. It is unclear where WAP found the additional $8,000. Finally, WAP's chart indicates that it received $6,000 from plaintiff ASPCA in 2001, yet plaintiff ASPCA indicated under oath that it gave WAP a $7,400 grant in 2001. *Compare* Exhibit 4, Ledger Provided in Lieu of Documents Requested *with* Exhibit 39, Plaintiff ASPCA's Response to Interrog. No. 21. Because WAP's

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[10] In its June 30, 2006 letter, WAP insisted that it had produced all checks. Yet, on July 20, 2006, WAP counsel sent a letter to FEI counsel, indicating that WAP recently "located three cancelled checks that were not produced" earlier. Exhibit 37, Thomas letter to Gasper (July 20, 2006). One of those checks was to "Meyer & Glitzenstein" for $1,639.34. Its memo line states: "Reimburse for money paid to Tom Rider." Exhibit 38, WAP Check to Meyer & Glitzenstein (Feb. 14, 2002).

own chart raises such serious discrepancies, WAP's insistence that it need not produce underlying documentation is not defensible.

WAP also appears to be withholding documents that have not been disclosed to FEI. For example, WAP (again only after being confronted with the possibility of a motion to compel) recently produced one page of an e-mail string among plaintiffs' counsel Katherine Meyer and representatives of the Organizational Plaintiffs that raises various questions about WAP's good-faith compliance with this subpoena. *See* Exhibit 3, Meyer e-mail to Organizational Plaintiffs (Nov. 5, 2003). First, the document's header says page 2 of 3, but it was the only page produced by WAP. Second, this document was initially withheld by WAP on the basis of an alleged First Amendment interest. There is, however, no apparent reason why this e-mail (which notes that Ms. Meyer is personally impressed with Rider's "total commitment to the lawsuit" and asks the Organizational Plaintiffs if they can help fund, through WAP, his next 6 months of work) could arguably give rise to such a First Amendment claim in part, if not in whole. Third, this document was listed in WAP's privilege log as a one-page email from Katherine Meyer to Lisa Weisberg. WAP neglected to reference the other two recipients, or the reply from Lisa Weisberg to Katherine Meyer, in which she offered to provide a funding proposal to some of plaintiff ASPCA's high donors. Finally, the production of this document undermines the representation by WAP's counsel that "WAP has previously provided all documents responsive" to the request for documents that discuss or allude to the litigation. Exhibit 35, Thomas letter to Gasper (June 30, 2006).

This e-mail is merely one example of WAP's continuing efforts to hide the ball. Its initial privilege log identified 80 pages of "receipts for Tom Rider's expenses regarding his public education and media work." Yet, its second production included 125 pages of such

receipts. Moreover, WAP neglected to address FEI's request that it produce all documents that "discuss or allude" to "any communications of any kind, whether in person, by telephone, letter, facsimile, e-mail, or other form, with any other animal advocate or animal advocacy organization, as that term is used in Plaintiffs' Initial Disclosures." WAP previously and defiantly had informed FEI that it only would produce documents that "discuss or *clearly* allude" to such communications. Exhibit 40, Glitzenstein/WAP letter to Wolson (Sept. 2, 2005).

Thus, FEI cannot proceed with this litigation without the documents requested from WAP. As demonstrated below, WAP's alleged bases for failing to comply with the subpoena are unfounded. WAP, accordingly, should be compelled to produce such documents immediately.

ARGUMENT

A. The Subpoena is Enforceable.

Having given notice to WAP, FEI may "move at any time to compel the production." Fed. R. Civ. P. 45(c)(2)(B). "To determine whether to enforce a subpoena under Fed. R. Civ. P. 45 at play in the instant action, the Court needs to balance, (1) the relevance of the information sought in the underlying case, (2) the requestor's need for the information from the subpoenaed source, (3) the burden on the source to produce the information, and (4) the harm, if any, that disclosure of the requested information would have on the source." *Norex Petroleum Ltd. v. Chubb Ins. Co. of Canada*, 2005 U.S. Dist. LEXIS 19127 at *3-4 (D.D.C. 2005), attached hereto as Exhibit 41, (citing *Burka v. U.S. Dep't of Health & Human Servs.*, 87 F.3d 508 (D.C. Cir. 1996)), *modified on recons.*, 384 F. Supp. 2d 45 (D.D.C. 2005).

First, as set forth above, the documents sought by the subpoena are relevant to this action for numerous reasons. They bear heavily upon the credibility of Mr. Rider. They relate directly to FEI's potential unclean hands defense. Each of these reasons meets the requisite relevancy

standard, which is "exceedingly broad" in this context. *Cofield v. LaGrange*, 913 F. Supp. 608, 614 (D.D.C. 1996) ("The relevancy threshold is not high: material sought need not be admissible at trial, but must be relevant to the subject matter of the litigation and reasonably calculated to lead to admissible evidence.") (internal citations omitted).

Second, as the limited documents already produced by WAP demonstrate, relevant documents do not exist elsewhere. For example, an internal WAP memorandum explains, among other things, that plaintiff ASPCA promised WAP a $24,000 grant to cover "Tom Rider traveling expenses," that plaintiff ASPCA has promised to provide a new laptop to Mr. Rider and to pay all of his cell phone expenses, and that plaintiff ASPCA suggested that it, not WAP, be responsible for directly providing funds to Mr. Rider. Exhibit 27, WAP Memo from "D'Arcy" to "Kath" (Feb. 13, 2002). This document would not exist in any other individual's or organization's files. Also, WAP is the only place from which FEI reasonably can obtain the letters that plaintiffs' counsel sent to or received from people who made donations to help fund Mr. Rider. Even if FEI could somehow devise a list of individuals and organizations that it believes might have made a donation to WAP's fund for Mr. Rider, FEI should not be required to serve subpoenas upon every such individual and organization. It would then surely be accused of papering the animal rights' community with subpoenas.

Third, WAP would not be burdened by complying with the subpoena in its entirety. "The burden of proving that a search for information would be unduly burdensome is on the party requesting relief from the subpoena." *Linder v. Calero-Portcarrero*, 183 F.R.D. 314, 319 (D.D.C. 1998). "Whether compliance with a requested search would be unduly burdensome depends on the volume of material requested, the ease of searching for the requested documents

in the form presented, and whether compliance threatens the normal operations of the responding [party]." *Id*. at 320 (internal citations omitted).

To date, WAP has not explained in detail the burden it would face if compelled to comply with the subpoena. *See Coregis Ins. Co. v. Baratta & Fenerty, Ltd.*, 187 F.R.D. 528, 530 (E.D. Pa. 1999) ("The party asserting the objections must show *specifically* how each [request] is privileged or vague or overly broad.") (emphasis added). WAP only has asserted that a "thorough search and review of such documents will take substantial time …," that complying specifically with request no. 5 would require WAP to, at least, "comb through many boxes of documents," and that "WAP is a very small organization with very limited staff." Exhibit 42, Glitzenstein/WAP letter to Wolson (Aug. 10, 2005); Exhibit 35, Thomas letter to Gasper (June 30, 2006). Such assertions are insufficient to support WAP's claim that the subpoena is unduly burdensome. *See, e.g.*, *First Am. Corp. v. Sheik Zayed Bin Sultan Al-Nahyan*, 1996 U.S. Dist. LEXIS 4577 (D.D.C. 1996), attached hereto as Exhibit 43, (holding that subpoena was not unduly burdensome where it would require two non-parties to review forty-one and sixty-six boxes of files, respectively). None of WAP's assertions demonstrate that it faces any kind of a burden, let alone a substantial one, in producing the documents.

Finally, disclosure of these documents would not cause WAP any harm. Indeed, to alleviate WAP's concerns, FEI indicated its willingness to enter a protective order that would govern WAP's production of documents that contain allegedly confidential financial information – the only information about which WAP had requested such an order. FEI, moreover, has offered to include within the scope of the protective order any documents containing information that WAP has withheld thus far on the basis of an alleged First Amendment privilege. Unlike

plaintiffs, who advertise their lawsuit in various press releases, FEI has not made publicity a goal of this lawsuit. FEI simply needs these documents for its defense in this lawsuit.

B. <u>The Documents, Not WAP's Summary of Such Documents, Must be Produced.</u>

In lieu of providing certain documents requested by the subpoena, WAP has provided to FEI a six-page chart, which was initially heavily redacted, containing information about the supposed list of expenditures made or donations received in connection with WAP's effort to fund Mr. Rider's activities. *See* Exhibit 4, Ledger Provided in Lieu of Documents Requested. Having provided this six-page chart, WAP has informed FEI that it is "not producing three additional categories of documents containing the same financial information as part of its continued assertion that production would be duplicative and burdensome: monthly financial statements, monthly bank statements, and cell phone records." *See* Exhibit 35, Thomas letter to Gasper (June 30, 2006). WAP only produced other allegedly duplicative documents (e.g., canceled checks and Form 1099s) after FEI indicated its intent to file a motion to compel.

This is wholly unacceptable. As FEI has explained to WAP, the Federal Rules of Civil Procedure do not allow someone to produce documents purporting to summarize responsive materials in lieu of producing the actual documents requested. *See* Fed. R. Civ. P. 45(d)(1) ("[a] person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand"). A party from whom documents is requested is not permitted to review such documents and provide an alleged summary of the information it believes to be pertinent. FEI has a right to review the documents – without being filtered by plaintiffs, their counsel or their alter ego – in their entirety. If FEI wanted WAP's description of the documents, FEI would have

issued a subpoena requiring WAP to provide testimony. That decision regarding testimony cannot be made until the documents are produced.

A party's provision of a six-page chart in lieu of responsive documents is particularly troublesome where, as here, the party requesting the documents has reason to believe the chart is incomplete and unreliable. For example, as explained above, this chart, which WAP alleges to contain all receipts and disbursements for the relevant subjects, indicates that WAP has spent more money than it has received. WAP's chart, moreover, indicates that it received $6,000 from plaintiff ASPCA in 2001 despite plaintiff ASPCA's statement under oath that it gave WAP a $7,400 grant in 2001. *See* Exhibit 39, Plaintiff ASPCA's Response to Interrog. No. 21. These inconsistencies might be explained by a variety of logical reasons, but the most accurate way to determine such an explanation would be for FEI to review the documents it requested.[11]

C. Neither WAP Nor Its Donors Has a First Amendment Privilege.

WAP has withheld certain information that it believes is privileged on First Amendment grounds. Specifically, WAP has withheld under such an alleged privilege certain information that either identifies WAP's donors or WAP's "media strategy." WAP's compliance with the subpoena, however, would not present any First Amendment issues. Enforcement of a subpoena served in connection with litigation between private parties does not constitute state action. If, moreover, plaintiffs and their counsel have acted improperly, their conduct would not be entitled to First Amendment protection. *See, e.g.*, *United States v. Bell*, 217 F.R.D. 335, 343 (D. Md. 2003) (ruling that alleged right of association did not shield party from discovery request because

[11] One possible explanation for the latter example has been proffered by plaintiff ASPCA. Specifically, it believes that the additional $1,400 "was billed from Meyer & Glitzenstein as part of their general invoice." Exhibit 8, ASPCA Depo. at 57. Because WAP has redacted the identity of its donors, however, FEI is not sure whether plaintiffs' counsel or their law firm has provided any funds to WAP. Indeed, plaintiff ASPCA has acknowledged that part of its 2002 payment of $10,151 to Meyer & Glitzenstein "may have" gone to Mr. Rider or WAP. Exhibit 8, ASPCA Depo. at 75-76. This example, just like the presence of Meyer & Glitzenstein e-mails in WAP files and the note on WAP's chart that money was incorrectly paid by Meyer & Glitzenstein instead of WAP, further underscores FEI's contention that WAP is the alter ego of plaintiffs' counsel and their law firm.

(a) the request was intended to facilitate the litigation, not to chill defendant's associational rights, and (b) the right to freedom of association does not protect unlawful activity). *See also Branzburg v. Hayes*, 408 U.S. 665, 691-92 (1972) (stating that the First Amendment right to freedom of the press, "as every other right enjoyed in human society, is subject to the restraints which separate right from wrong-doing.") (internal citations omitted). Nonetheless, even if the Court concludes that WAP may attempt to invoke the First Amendment under the facts presented here, FEI's need for this information outweighs any alleged harm to WAP's or its members' constitutional rights.

WAP's claim of privilege should be upheld only if its First Amendment interests outweigh FEI's need for the information. *Black Panther Party v. Smith*, 661 F.2d 1243, 1266 (D.C. Cir. 1981), *vacated mem. sub. nom.*, 458 U.S. 1118 (1981). As the party asserting the privilege, WAP bears the initial burden of showing that its or its members' constitutional rights would be harmed if WAP complied with the discovery request. *New York State NOW v. Terry*, 886 F.2d 1339, 1355 (2d Cir. 1989) ("before the burden shifts to plaintiffs to demonstrate the necessary compelling interest in having discovery, defendants must at least articulate some resulting encroachment on their liberties"), *cert. denied*, 495 U.S. 947 (1990). Here, WAP has not demonstrated, nor can it demonstrate, that disclosure of the documents and information sought would injure the organization's or the members' constitutional rights. *See Shelton v. United States*, 404 F.2d 1292, 1299 (D.C. Cir. 1968) (denying constitutional privilege where, among other things, the party seeking protection did not show "the deterrent effect the furnishing of the lists would have on the members' right of association protected by the First Amendment"); *United States v. Duke Energy Corp.*, 232 F.R.D. 1, 3 (D.D.C. 2005) (denying First Amendment protection to a party that made "no showing that enforcement of the subpoenas will chill

associational activities by discouraging membership"). It is particularly doubtful that disclosure of this information would cause harm to WAP or its donors in light of FEI's offer to execute a protective order requiring FEI to maintain the confidentiality of such information and to only use it for purposes of this litigation.

Even if, moreover, WAP can show some privileged interest, any such interest is outweighed by FEI's need for the information. The documents requested would have a substantial effect on FEI's right to present a defense in the underlying litigation. *Compare. NAACP v. Alabama*, 357 U.S. 449, 464 (1958) (quashing subpoena where, unlike here, information requested did not have a "substantial bearing" on the issues presented by the underlying litigation) *with United States v. Duke Energy Corp.*, 232 F.R.D. 1, 3 (D.D.C. 2005) (compelling production of documents that went to the "heart of the lawsuit"). Plaintiffs' standing hinges upon the alleged injury of Mr. Rider and the documents sought bear directly on his motives and credibility. Plaintiffs' request for injunctive relief also requires them to come forward with clean hands and the documents sought, as explained above, could bear directly on whether they have clean hands. The requested documents go to the "heart of the matter." *Black Panther Party v. Smith*, 661 F.2d 1243, 1268 (D.C. Cir. 1981), *vacated mem. sub. nom.*, 458 U.S. 1118 (1981); *Wyoming v. USDA*, 208 F.R.D. 449, 455 (D.D.C. 2002).

The identity of people who donate money to WAP for Rider could prove crucial to this case. FEI has a right to know and a jury has a right to consider whether WAP is being provided with funds by, for example, plaintiffs' counsel, employees of the Organizational Plaintiffs, or anyone otherwise affiliated with the Organizational Plaintiffs or counsel. Plaintiffs have acknowledged, moreover, that their media strategies are inseparable from this lawsuit:

> Moreover, the plaintiffs in this case have a particularly strong interest in conducting pre-trial discovery in full view of the public -- as contemplated by the

> Federal Rules -- unless there is a particular need for confidentiality. Indeed, the treatment of Asian elephants used in circus performances -- a species that is listed as endangered with extinction and entitled to the strictest protections under the ESA -- is an issue of great public interest and concern.

Plaintiffs' Opposition to Defendants' [sic] Motion for a Protective Order at 7 (March 4, 2005) (citing Washington Post article). As such, this information, like the identity of people who donate money to WAP for Rider, goes to the "heart of this lawsuit."

FEI has requested these documents from WAP, moreover, because they cannot be obtained from reasonable alternative sources. *Black Panther Party v. Smith*, 661 F.2d 1243 (D.C. Cir. 1981), *vacated mem. sub. nom.*, 458 U.S. 1118 (1981); *Wyoming v. USDA*, 208 F.R.D. 449 (D.D.C. 2002). As indicated, WAP is the sole source of many of the documents withheld or redacted thus far. *See, e.g.*, Exhibit 44, WAP's Privilege Log at 20 ("Memo to file describing Tom Rider's and WAP's strategy for garnering media and public interest in Ringling Bros. treatment of elephants"). In addition, many of the redacted documents that might have existed in plaintiffs' files presumably are no longer retained by plaintiffs because they were not produced. *Compare, e.g.*, Exhibit 3, Meyer e-mail to Organizational Plaintiffs (Nov. 5, 2003) *with* Exhibit 45, FEI Document Request No. 22 (requesting from each organizational plaintiff "[a]ll documents that refer, reflect, or relate to any communication between you and any other animal advocates or any animal advocacy organization concerning (a) any circus, including but not limited to Ringling Bros. and Barnum & Bailey Circus or (b) the treatment of elephants in captivity"). Finally, while some of these documents might exist in the files of donors who are not parties to this lawsuit, FEI cannot obtain the files from such donors without additional information from WAP.

For the foregoing reasons, defendant respectfully requests that WAP be compelled to comply with the subpoena in its entirety. WAP, moreover, should be compelled to comply with

the subpoena as promptly as possible. The documents requested cast doubt upon the merits of this lawsuit and could obviate the need for further proceedings. A proposed form of order is also attached.

Dated this 7th day of September, 2006.

Respectfully submitted,

/s/

John M. Simpson (D.C. Bar #256412)
Joseph T. Small, Jr. (D.C. Bar #926519)
Lisa Zeiler Joiner (D.C. Bar #465210)
Michelle C. Pardo (D.C. Bar #456004)
George A. Gasper (D.C. Bar #488988)

FULBRIGHT & JAWORSKI L.L.P.
801 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Telephone: (202) 662-0200
Facsimile: (202) 662-4643

Counsel for Defendant Feld Entertainment, Inc.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **Motion to Compel Documents Subpoenaed from the Wildlife Advocacy Project**, and all exhibits and attachments thereto, were mailed, first class mail, postage prepaid, on this 7th day of September, 2006, to:

Mr. Richard Thomas
Attorney for Wildlife Advocacy Project
Lichtman, Trister & Ross, PLLC
1666 Connecticut Ave., N.W., Suite 500
Washington, DC 20009

I further certify that on this 7th day of September, 2006, the foregoing motion, and all exhibits and attachments thereto, were electronically filed with the Clerk of this Court using the CMF/ECF system, which will send notification of such filing to plaintiffs' counsel.

/s/
George A. Gasper