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.	

WILDLIFE ADVOCACY PROJECT'S OPPOSITION TO DEFENDANTS' MOTION TO COMPEL

INTRODUCTION

In the guise of a motion to compel, defendant Feld Entertainment, Inc. ("FEI") actually devotes far more space to its position on the merits of the underlying litigation than it does to arguing why it needs additional documents from the Wildlife Advocacy Project ("WAP"), the non-party target of the motion. This is unsurprising since WAP – a small non-profit organization – has actually gone to great pains to respond to FEI's sweeping subpoena, including by spending many hours searching through its records and producing a plethora of materials that can have, at most, a marginal relationship to this case. The few categories of documents that remain at issue – including the identities of individual donors to WAP – add nothing of substance to what has already been provided to FEI, and/or implicate important First Amendment concerns that have been recognized by the Supreme Court in similar discovery contexts. Even as to those

documents, however, WAP offered to negotiate an appropriate protective order with FEI – yet received no response to that overture prior to the filing of FEI's motion to compel.

For these and other reasons that will be fully discussed below, WAP respectfully requests that the Court deny the motion. Before turning to those reasons, however, there are two threshold procedural problems with the motion that warrant its rejection without a detailed consideration of the specific issues raised by FEI.

I. THE MOTION VIOLATES THE COURT'S RULES.

First, since the motion seeks court-ordered relief against a *non-party* to the pending case, as a procedural matter, FEI should file its motion as a separate, miscellaneous action. See Fed. R. Civ. P. 37(a)(1) (providing that only applications "for an order to a party shall be made to the court in which the action is pending") (emphasis added). Indeed, the Local Rules suggest that any discovery motion directed at a non-party should be filed as a separate "miscellaneous case." See Local Rules 40.3, 40.5; see also Wyoming v. U.S. Dep't of Agriculture, 208 F.R.D. 449, 452 n. 2 (D.D.C. 2002) (noting that a motion to compel against a non-party was "properly filed" as a "miscellaneous action in this court"). Accordingly, the motion should be denied without prejudice to its renewal in the proper procedural form.[1]

[1] WAP does not dispute that the District of Columbia is the appropriate venue for the filing of the motion to compel, see Fed. R. Civ. P. 37(a)(1) ("An application for an order to a person who is not a party shall be made to the court in the district where the discovery is being, or is to be, taken"). WAP also recognizes that any separately filed action would appropriately be deemed related to this case under the Court's related case rules. See Local Rule 40.5(a)(1) (3) ("Civil, including miscellaneous, cases are deemed related when the earliest is still spending on the merits in the District Court and they . . . grow out of the same event or transaction") (emphasis added). Nonetheless, there are sound reasons for the Court not to allow FEI to sidestep the correct procedures for filing its application. For example, as a non-party, WAP should not be bound by any general orders the Court issues regarding relief, protective orders, or the like.

Second, and more important, FEI did not comply with the requirement in Fed. R. Civ. P. 37(a) to provide "reasonable notice to other parties and all persons affected thereby" before "apply[ing] for an order compelling disclosure . . . ." Nor did FEI comply with Local Rule 7(m), which requires that, "[b]efore filing any nondispositive motion in a civil action, counsel shall discuss the anticipated motion with opposing counsel, either in person or by telephone, in a good-faith effort to determine whether there is any opposition to the relief sought and, if there is opposition, to narrow the areas of disagreement."

Rather, FEI's own filing makes clear that FEI circumvented the federal and local rules, and intentionally bypassed an opportunity to avoid, or at least further narrow, the "areas of disagreement." Thus, on June 30, 2006, WAP released a large volume of financial and other information to FEI, and also set forth a detailed recitation of WAP's position with regard to the few remaining categories of information at issue. See FEI Exh. 35. Critically, however, even with regard to those few categories, WAP made clear that it was perfectly willing to work with FEI in an effort to avoid, or at least further narrow, any remaining areas of concern.

For example, with regard to the financial information, WAP explained that it was disclosing detailed

> [c]harts[], which are based on the contemporaneously entered computerized financial data maintained by WAP in the ordinary course of its business activities, and that reflect *all* relevant disbursements and receipts of funding by WAP regarding elephants, Tom Rider, Ringling Bros. (FEI) or the underlying litigation. The entries reflected in the Charts were made contemporaneously into a database at the time the income was received or expenditure made.

FEI Exh. 35 at 4. WAP further explained that it would be "duplicative and burdensome" for WAP to produce "three additional categories of documents containing the same financial

information" reflected in the comprehensive charts released to FEI: "monthly financial statements, monthly bank statements, and cell phone records." Id. However, in an effort to resolve the matter without the need for judicial involvement, WAP expressly offered that:

> [i]f necessary, WAP is willing to provide you with a sample bank statement, sample monthly statement, and sample monthly cell phone bill that discloses all relevant information to demonstrate the duplicative nature of these documents and the burden it would place upon WAP to go through each bank statement, monthly bank statement and cell phone record to produce this duplicative information.

Id. at 4-5 (emphasis added).

With regard to the identities of individual contributors and others who have chosen to associate with it, WAP explained that WAP not only has a First Amendment privilege with regard to such information, id. at 5 (citing NAACP v. Alabama, 357 U.S. 449, 459 (1958)), but also that, "in view of your clients' past admitted actions in conducting surveillance on individuals and organizations which it considers to be at odds with FEI, WAP has every reason to be concerned about potential harassment or hostility directed against these individuals by your client." FEI Exh. 35 at 5.

Nonetheless, despite these concerns, WAP did not advise FEI that it would refuse, under any circumstances, to disclose even the identities of individual contributors. To the contrary, WAP stated that "WAP might be willing to agree to disclose such information subject to an appropriately crafted protective order that would ensure that such individuals were not subject to any harassment" by FEI. Id. at 5.

Yet FEI did not accept WAP's offer to review samples of the withheld financial documents in order to assess whether they are indeed duplicative of the comprehensive financial information already disclosed (as they are). Nor did FEI respond to WAP's suggestion that FEI

and WAP attempt to work out the terms of a protective order for the identities of individual contributors. Instead, FEI sent an obscure letter that was clearly designed to facilitate, rather than avoid, unnecessary litigation.

Hence, in that letter – which is omitted from FEI's voluminous filing – FEI stated that "[w]e understand" WAP's June 30, 2006 letter to "mean that the [WAP] is not voluntarily producing any additional documents." August 30, 2006 Letter from George A. Gasper to Richard Thomas (attached as WAP Exh. A). While misstating WAP's position, the letter said nothing about the specific issues addressed in WAP's June 30 letter or WAP's proposed approaches to resolving them. Instead, the letter raised an entirely different issue:

> I am writing to confirm that WAP has no responsive documents that were created after September 29, 2005, as it has not produced any, but for a single 1099. Please let me know immediately if that is correct, or whether WAP has withheld them.

Id. (emphasis added).[2]

Only five business days afer sending the August 30 letter – and without even awaiting a response from WAP's counsel or making any other effort to contact them to ascertain their position on a motion to compel – FEI filed its motion. Surely, this does not demonstrate a

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[2] The temporal scope of the documents produced in response to the subpoena – the only issue raised in the letter sent by FEI immediately prior to the filing of the motion to compel – is a red herring, as evidenced by the fact that it is mentioned in a single footnote in FEI's motion. See FEI Mot. at n. 8. The subpoena was dated July 26, 2005, and WAP responded to the subpoena in September 2005, in accordance with WAP's agreement with FEI's prior counsel. See FEI Exh. 31. A third party, of course, is under no obligation to update responses to subpoenas in the same manner that a party must update responses to document production requests or interrogatories. Compare Fed. R. Civ. P. 26(e)(1) ("[a] party who has made a disclosure under subdivision (a) or responded to a request for discovery with a disclosure or response is under a duty to supplement or correct the disclosure or response to include information thereafter acquired") (emphasis added) with Fed. R. Civ. P. 45 (imposing no such "duty" on non-parties).

"good-faith effort to determine whether there is any opposition to the relief sought and, if there is opposition, to narrow the areas of disagreement." Local Rule 7(m). It represents just the opposite, i.e., an effort to proceed to Court without first exhausting even the specific, reasonable avenues suggested by WAP for resolving the remaining issues. This is further reinforced by FEI's failure – which constitutes a distinct violation of the Local Rules, id. – to "include in its motion a statement that the required discussion occurred, and a statement as to whether the motion is opposed." FEI could not include this mandatory statement because the "required discussion" concerning the specific issues raised in FEI's motion in fact did not occur before FEI opted to file its motion.

Accordingly, for this reason as well, the Court should, in conformance with the Local Rules, summarily deny the motion and instruct FEI to confer with WAP's counsel in good faith on the specific issues raised in the motion to compel. If any issues then remain – e.g, if FEI and WAP are unable to agree on the terms of a protective order for the identities of WAP contributors – FEI can then file a miscellaneous action raising only the remaining issues that actually warrant judicial intervention.

Should the Court nonetheless deem it necessary to consider the merits of the motion at this juncture, WAP will first summarize the facts that bear on the issues raised by FEI, and then briefly explain why FEI's legal arguments lack merit.

II. FACTS PERTINENT TO THE MERITS OF THE MOTION.

There is much sound and fury in FEI's motion directed at plaintiffs, their counsel, and WAP. Indeed, the vast majority of the motion is devoted to disparaging plaintiffs and their counsel for their advocacy on behalf of the Ringling Bros. elephants, while very little addresses

the few categories of WAP materials actually covered by the motion to compel. Compare Mot. at 1-20 (reciting FEI's criticisms of plaintiffs' and WAP's advocacy efforts and general legal standards for resolving discovery disputes) with Mot. at 20-25 (substantive arguments regarding specific WAP materials remaining at issue).

Indeed, far from presenting facts establishing that WAP has been unresponsive to the subpoena, the motion actually proves the opposite. Plainly, the reason why FEI is able to present its detailed discussion of plaintiffs and their counsel is because WAP has been extraordinarily forthcoming in its response to the subpoena, even by divulging financial details and internal organizational communications. Hence, WAP has already divulged to FEI the amount of every grant made by the organization to Tom Rider for his public education efforts; every organization or foundation that has supported that work (including non-plaintiff organizations); and every communication between WAP and any of the plaintiffs in the case concerning Tom Rider or the treatment of the elephants. What little information remains at issue is redundant of what has already been provided, does not appear to be remotely relevant to the underlying legal issues, and/or is clearly privileged.

Since FEI has so little to complain about with regard to what has been withheld from it, and its motion appears instead to be a vehicle for disparaging plaintiffs, their counsel, and WAP, before turning to the specific facts that bear on the narrow legal issues actually raised in the motion, we will first briefly describe the relationship between WAP, plaintiffs' counsel, and Tom Rider.

A. The Relationship Between Plaintiffs, Their Counsel, And WAP.

Plaintiffs' counsel – Meyer Glitzenstein & Crystal ("MGC") – is a public-interest law

firm that represents non-profit organizations and grassroots activists at vastly reduced rates or, frequently, for no compensation at all. See http://www.meyerglitz.com. The firm was founded in 1993 (the firm's original name was Meyer & Glitzenstein) by public-interest attorneys Katherine Meyer and Eric Glitzenstein, and, since that time, it has brought and won many significant legal victories on behalf of endangered species, other wildlife, and animals in captivity. Id.

WAP is a non-profit corporation that was established by Ms. Meyer and Mr. Glitzenstein to complement the public-interest litigation pursued by MGC and to carry out other projects, by assisting grassroots activists to undertake public education campaigns on behalf of wildlife and captive animals. As explained in the organization's filings with the Internal Revenue Service (which WAP provided to FEI's counsel):

> The Wildlife Advocacy Project is a non-profit advocacy group founded by the public interest law firm, Meyer & Glitzenstein, to assist grassroots activists in achieving 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.

FEI Exh. 23 (2002 WAP Form 990-EZ).

As noted, WAP carries out its organizational mission by educating the public about threats to wildlife and animals in captivity. Frequently, although not always, these public education efforts are pursued in conjunction with the public-interest litigation brought by MGC on behalf of non-profit conservation and animal protection organizations. This is because, as any effective public-interest advocate will attest, public-interest litigation pursued in tandem with a public education campaign is far more effective in bringing about a change in public policy and

practice than either such effort pursued in isolation.

For example, on behalf of a large coalition of non-profit groups, MGC brought groundbreaking 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). At the same time, WAP spearheaded a public relations campaign intended to highlight the increasing numbers of manatees being killed and injured in such collisions, and the urgent need for new safeguards. See http://www.wildlifeadvocacy.org/programs. 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 endangered manatees throughout Florida.[3]

The current campaign on behalf of the Ringling Bros. elephants follows the same model. MGC is pursuing litigation under the Endangered Species Act ("ESA") on behalf of four national animal protection organizations while, at the same time, WAP, consistent with its organizational mission, is spearheading a public education campaign designed to educate the public about the abuse and neglect inflicted on the elephants who perform in the circus. To pursue this campaign, WAP, supported by the plaintiffs and some other organizations and individuals, is providing modest funding to Tom Rider to travel around the country (to where the Ringling Bros. circus is traveling) and educate the public, through local media outlets, about the mistreatment of the elephants. WAP is supporting Mr. Rider's efforts for a very basic reason: he is an extremely

[3] Although the manatee litigation has been resolved, WAP continues to pursue public education and other projects on behalf of the manatee. Accordingly, while it is totally irrelevant to the discovery dispute before the Court, it is not correct, as FEI asserts, that WAP is MGC's "alter ego" and only works on matters as to which the firm has pending litigation.

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).

It is perfectly understandable why FEI does not like this particular public education project – Tom Rider has done a remarkable job of traveling around the country on a shoestring budget and educating the public about Ringling Bros.' mistreatment of the elephants. See, e.g., Exhs. B, C (local television pieces based on Tom Rider's public education efforts); see also Jennifer Santiago, Allegations of Severe Elephant Abuse Against Ringling Bros. Circus, CBS4 Evening News (Jan. 4, 2006), http://cbs4.com/video/?id=11749@wfor.dayport.com; Leslie Griffith, Examines Ringling Brothers - Animal Rights Lawsuit, KTVU Special News Report (2005), http://www.ktvu.com/video/4936923/detail.html. But FEI's dislike for what Mr. Rider is doing hardly means that WAP has "acted improperly," FEI Mot. at 21, let alone that the organization has been a party to ethical violations or even criminal acts, see FEI Mot. at 12, simply because WAP – which, once again, was established for the precise purpose of assisting grassroots efforts such as those by Mr. Rider to campaign on behalf of animals – is raising limited funds to support Mr. Rider's public education efforts.[4]

[4] While FEI claims that it is seeking to attack Mr. Rider's credibility, it is worth noting that the very documents on which it has relied support his credibility, as well as demonstrate why WAP views him as such an effective spokesman for the elephants. For example, FEI has attached, as an Exhibit, a May 14, 2001 letter from Mr. Rider resigning from a job with the Performing Animal Welfare Society – which had "settled [its] lawsuit with Ringling" – because

B. FEI'S VASTLY OVERBROAD SUBPOENA AND SHIFTING POSITIONS ON WHAT IT IS SEEKING FROM WAP, AND WAP'S PROVISION OF EXTENSIVE FINANCIAL AND OTHER INFORMATION IN RESPONSE.

Far from establishing that WAP has been less than forthcoming in response to FEI's subpoena – as FEI insists – the history of the subpoena, and WAP's responses to it, actually serve to demonstrate that FEI embarked on a "fishing expedition" directed at a small non-profit organization; that FEI's change in counsel is what in fact resulted in a lengthy delay in resolving the remaining issues; and that, at the end of the day, WAP, although a non-party, has bent over backwards to provide internal organizational documents to FEI.

1. The Overbroad Subpoena And WAP's Good Faith Efforts To Narrow The Areas of Disagreement With FEI's Prior Counsel.

To begin with, the subpoena first served on WAP in July 2005 was vastly overbroad and burdensome, requesting the production of virtually every document ever generated or received by WAP. For example, the subpoena demanded the production of "[a]ll documents that refer,

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"I want to do everything in my power to help the elephants, and this means speaking out as much as possible about how Ringling Bros. beats them and especially mistreats the babies." FEI Exh. 16; see also FEI Exh. 19 (WAP grant/funding proposal stating that Mr. Rider "quit the circus when he could no longer tolerate the way the elephants are treated, and he has been speaking out on this issue ever since. Mr. Rider has video footage and photographs of animals being mistreated.").

Not only do FEI's own Exhibits demonstrate that Mr. Rider has consistently taken the position that Ringling Bros. beats and otherwise mistreats the elephants, but these Exhibits also demonstrate that Mr. Rider is pursuing his public education efforts at enormous personal sacrifice – i.e., living in cheap motels and driving around the country while he follows the circus. See FEI Exh. 30. If FEI wishes to argue that Mr. Rider is lying about the mistreatment of the elephants so that he can stay in Super 8 motels and drive hundreds of miles a day in a used van that keeps breaking down, id., it is certainly free to take that position, no matter how silly it may appear. However, the fact that FEI already knows such intimate details about how Mr. Rider is living on a day-to-day basis while he tracks the circus around the country only serves to underscore that WAP (and Mr. Rider) have already been extraordinarily forthcoming in responding to FEI's invasive discovery requests.

reflect, or relate 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 . . . ." FEI Exh. 9 at 4 (emphasis added). Accordingly, the subpoena demanded that WAP even produce documents having nothing whatsoever to do with Ringling Bros.' elephants or Tom Rider including, for instance, all records relating to WAP's extensive manatee work.

Pursuant to Fed. R. Civ. P. 45(c)(2)(B), by letter dated August 10, 2005, WAP advised FEI's prior counsel that the subpoena was "'facially overbroad'" and would "require WAP to "generate 'mountains of irrelevant documents,' thus requiring a small non-profit organization to expend an 'inordinate amount of time and resources' pouring through records that have nothing to do with this case.'" FEI Exh. 42 at 1 (internal citations omitted).[5] WAP also advised FEI that many of the materials subject to the subpoena were "clearly privileged," including because they "implicate First Amendment rights of WAP and those organizations and individuals who have chosen to support its work." Id. at 2. In particular, WAP explained that:

> [t]he Supreme Court has held that non-profit organizations have First Amendment associational rights that may be abridged by overbroad subpoenas. See National Ass'n for the Advancement of Colored People v. State of Alabama, 357 U.S. 449, 459 (1958) ("Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly . . . It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech.").

Id. at 2-3.

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[5] As reflected in WAP's 2002 organizational return that FEI opted to file with the Court, WAP is a tiny organization. See FEI Exh. 23 (reflecting that WAP's total revenue in 2002 was $ 44,421).

WAP further explained that:

> [h]ere, the subpoena encompasses information that goes to the heart of the First Amendment free speech and associational rights of WAP and its supporters and contributors. For example, every month, WAP receives a modest contribution from an individual in Pennsylvania who wishes to support Mr. Rider's public education and media work. There is no legitimate interest in disclosing the identity of this individual in response to this subpoena, and release of that information would have precisely the chilling effect that the Supreme Court and other courts have sought to avoid, i.e., it would chill and deter the exercise of associational rights by this and other existing and potential WAP supporters and contributors. Similarly, documents reflecting WAP's strategy for dealing with the media, the organization's media contacts, and similar materials clearly implicate First Amendment interests and may be withheld.

Id. at 3.

Although WAP could have simply refused to comply with the facially overbroad subpoena until it was properly narrowed, in an effort to bring the matter to resolution without litigation, WAP did not take that approach. Rather, WAP indicated that it would produce non-privileged documents that might be deemed relevant to the litigation, and even that it would produce internal financial information "pursuant to an appropriate protective order to be negotiated between defendants and counsel for WAP." Id. at 4. WAP also stated that, by the same day, it would produce an "itemization of specific materials being withheld as privileged." Id. at 5.

WAP and FEI's prior attorneys then engaged in a series of productive oral and written communications designed, e.g., to narrow the terms of the subpoena and agree on the language of a protective order for sensitive financial information. See, e.g.. FEI Exh. 31 (August 26, 2005 letter from Covington & Burling "agree[ing] to limit this Request" in various ways); FEI Exh. 40 (Sept. 2, 2005 letter from WAP explaining that "your August 26, 2005 letter [] largely, though

not entirely, recapitulates our discussion of August 22"). Among other things, WAP and FEI's then-attorneys agreed on a September 30, 2005 date for the disclosure of responsive materials and the production of a privilege log, see FEI Exh. 31 ("I agreed that WAP may take until September 30, 2005, to produce the documents responsive to this subpoena."), and that FEI's counsel would "review WAP's production before having further discussions" about WAP's invocation of a First Amendment privilege as to particular materials. Id.

On September 29, 2005, WAP provided FEI's counsel with hundreds of pages of "documents that the Wildlife Advocacy Project believes are responsive to the subpoena, as narrowed and clarified by our subsequent discussions and correspondence." FEI Exh. 32. WAP also enclosed a "detailed privilege[] log which identifies all materials being withheld and reasons for the withholding." Id. WAP indicated that "some financial information is being withheld that WAP will make available subject to an appropriate protective order," and that, if FEI "wish[ed] to pursue these materials," it should "contact the Project's outside counsel . . . ." Id. WAP also specifically explained that a "transaction detail report" that was being furnished to FEI "contains a comprehensive compilation of receipts and disbursements relating in any fashion to elephants, Tom Rider, Ringling Brothers, or the lawsuit. Accordingly, we are not providing or identifying financial records that merely duplicate the information that is embodied in this comprehensive report – i.e., monthly financial statements, monthly phone bills, or canceled checks." Id.

Following WAP's production, WAP and FEI's prior counsel continued to have productive communications concerning the remaining areas of disagreement. Indeed, as reflected in the last letter sent to WAP's counsel by FEI's prior counsel on November 16, 2005, most of the remaining issues had been resolved, and WAP and FEI were discussing concrete ways of

amicably addressing the rest of them. See Nov. 16, 2005 Letter from Covington & Burling to Lichtman, Trister & Ross (attached as WAP Exh. D).[6]

Hence, that letter asked for confirmation of certain oral representations that WAP had made concerning the documents – including that WAP "does not have any e-mails with Tom Rider" and that "WAP has not had any communications with any current or former employees of defendant other than Mr. Rider." Id. FEI's former counsel also asked that WAP confirm that it had "produced all responsive grant proposals in its possession," and that "you [WAP's counsel] would prepare a proposed protective order governing information that WAP has redacted from its current production on grounds of confidentiality." Id.

Of particular relevance here, in response to WAP's invocation of a First Amendment privilege for certain information, FEI's November 16, 2005 letter stated that FEI continued to believe that the "names of donors are discoverable, regardless of whether they are parties to the litigation," but FEI expressly limited its request for such non-party donors to organizations:

> [I]f animal activist organizations other than the plaintiffs in this case have given money to WAP to fund Mr. Rider's activities, then defendant will likely want to know the identities of those organizations. You said you would consider our position. I also asked that, for any document from which WAP redacts the identity of a donor, you provide information on a log about the amount of the donation made by the donor, so that we can evaluate whether further discussions about the redaction are necessary.

Id. at 2 (emphasis added).[7]

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[6] It is noteworthy that, while FEI purports to set forth a detailed description of all communications between and FEI and WAP concerning the subpoena, it omitted this crucial communication that does not comport with its version of events.

[7] As discussed further below, WAP has complied with this proposed resolution precisely. It has now disclosed the identities of all organizational donors to Mr. Rider's work – both plaintiff and non-plaintiff – and has also itemized for FEI the amounts of all contributions,

This final communication from FEI's former counsel said nothing about obtaining information concerning individual contributions to WAP – information at the core of the organization's First Amendment privilege. Nor did it in any way suggest that WAP needed to produce monthly financial reports, bank statements, or individual phone records, i.e., FEI, at that time, evidently accepted WAP's representation that this information simply duplicated the comprehensive transaction report that WAP had already produced.[8]

Less than two weeks later, by letter dated November 28, 2005, WAP responded to FEI's former counsel by proposing further concrete steps for resolving the few remaining issues. See FEI Exh. 15. Hence, in order to maintain its First Amendment privilege while also accommodating FEI's stated interest in determining whether "animal activist organizations" other than plaintiffs had contributed to WAP for Tom Rider's work, WAP stated that, subject to an agreed-upon protective order (a proposed draft of which was provided to FEI), WAP would "disclose the following information . . . (1) for each of the deposits listed on the 'transaction detail report' . . . to provide a log indicating the general status ('animal protection organization,' 'individual,' or 'private foundation') of the donors, whose names would remain redacted; and (2) the aggregate amount contributed by each different redacted donor identified as an 'animal protection organization.'" Id. at 2.

WAP indicated that it was continuing to withhold, on both relevance and First

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including those from individuals. See FEI Exh. 4 (detailing the amount of every contribution WAP has received in connection with Tom Rider's public education work).

[8] FEI's former counsel did ask for "WAP's tax exemption application and supporting documentation." Exh. D at 2. WAP complied with that request, although FEI had conceded that this material "was not something that we viewed as covered by the subpoena." Id.

Amendment grounds, "several documents, and parts of documents, that involve communications with Mr. Rider and that reflect WAP's ongoing media strategy concerning the treatment of elephants in circuses, which is a matter of ongoing public debate and controversy." Id. However, "[w]ithout waiving this privilege as to particular materials," WAP's counsel also

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

Id.

In short, as of November 28, 2005, WAP and FEI's prior attorneys were doing precisely what is contemplated by the federal and local rules, i.e., they were making a good faith attempt to narrow and clarify their areas of disagreement concerning the subpoena, and exploring mechanisms for avoiding litigation entirely. Indeed, as of that date, it appeared that FEI and WAP were well on their way to resolving this matter without burdening the Court with a motion to compel.

2. FEI's New Approach Following Its Change of Counsel.

That cooperative approach changed markedly when FEI's new attorneys became involved. Indeed, WAP received no further written or oral communication from FEI regarding this matter until nearly seven months after the November 28, 2005 letter. Then, by letter dated June 13, 2006, FEI's new counsel suddenly asserted that "[t]his matter has dragged on far too long over something that is straightforward," FEI Exh. 33 at 6 – as if WAP were somehow responsible for FEI's change in counsel and FEI's more than half year delay in responding to

WAP's November 2005 letter. Even worse, FEI's new counsel retracted much of the subpoena narrowing and understandings that had previously been reached between WAP and FEI. Id. at 6 ("all of our prior concessions to reach resolution of this without the need for court intervention are withdrawn").

For example, while FEI had previously stated that it "wanted to know the identities of those [animal activist] organizations" that had provided funding to WAP, Exh. D (emphasis added), FEI's new counsel insisted on obtaining the "identity of the individual" supporters of the WAP, FEI Exh. 33 at 4 (emphasis added) – although the letter did not explain at all how such information could be relevant to any issues in this case. Similarly, while Covington & Burling's final letter had made no mention of other kinds of information that WAP had withheld on relevance and privilege grounds – such as receipts reflecting such mundane matters as how much money Mr. Rider spends on groceries and car repairs – FEI's new lawyers asserted that such information must be divulged. Id. at 3.

Although WAP could have reasonably responded to this letter by insisting that FEI abide by the positions it had adopted six months earlier, WAP did not do so. Instead, again attempting to avoid the motion that FEI has now seen fit to file, WAP produced additional materials that it believes have no apparent relevance to this case and that could easily have been withheld – such as, for example, the details of what kinds of food Mr. Rider buys, and where he purchases gas while following the circus around the country. See FEI Exh. 30.[9]

[9] According to FEI, by agreeing to release such irrelevant materials – which FEI has now opted to file in a publicly accessible document – WAP somehow conceded that it previously responded to the subpoena in an improper manner. Precisely the opposite is true; by going out of its way to produce additional materials on which FEI's new counsel has insisted, WAP has merely demonstrated the lengths to which it has been willing to go to avoid burdening the Court

Likewise, in a further effort to avoid unnecessary litigation, and consistent with FEI's previously stated interest in learning whether "animal activist organizations" other than plaintiffs had contributed funding to WAP for Tom Rider's work, WAP also provided FEI with the identity of every organization or foundation that has contributed such funding, see FEI Exh. 4 – although, once again, it is difficult to understand how such information will bear on any of the issues in the case. See FEI Exh. 35 at 5. WAP also produced, in the comprehensive transaction chart, the amount of every contribution – from any source – used to support Tom Rider's work. See FEI Exh. 4.[10]

Accordingly, the only contribution information that WAP continued to withhold reflected the identities of individual contributors to the non-profit organization. As to that information, as well as the identities of "other individuals who have associated with WAP's activities," WAP continued to assert a First Amendment privilege, FEI Exh. 35 at 5, and also explained that, in view of FEI's "past admitted actions in conducting surveillance on individuals and organizations which it considers to be at odds with FEI, WAP has every reason to be concerned about potential harassment" of WAP's individual supporters. Id. Nevertheless, as discussed earlier, see supra at 4-5, WAP expressed its willingness to disclose even this information "subject to an appropriately crafted protective order" that would safeguard the individuals from harassment, so long as FEI is

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with a tangential discovery dispute.

[10] The information provided to FEI reflects that, in five years, less than $ 31,000 was contributed by individuals – an average of only $ 6,200 per year – and most of the individual contributions have been for amounts of $ 50 or less. See FEI Exh. 4. In total, during the five year period, Mr. Rider received from WAP about $ 68,000 – or less than $ 14,000 per year – for his public education work. Id. Plainly, therefore, while the limited funding Mr. Rider has received from WAP has allowed him to survive while he follows the circus around the country, he has hardly become wealthy as a consequence of this activity.

"able to articulate a legitimate basis for obtaining the names" of such individuals. Id.[11]

With regard to the redundant financial information sought by FEI, WAP again explained that the financial transaction charts being produced, see FEI Exh. 4, "which are based on the contemporaneously entered computerized financial data maintained by WAP in the ordinary course of its business activities . . . reflect *all* relevant disbursements and receipts of funding by WAP regarding elephants[,] Tom Rider, Ringling Bros. (FEI) or the underlying litigation." FEI Exh. 35 at 4. To dispel any possible doubt about the way in which the charts were prepared, WAP explained that they did not reflect any subjective selection of information by WAP at all but, rather:

> [t]he entries reflected in the Charts were made contemporaneously into a database at the time the income was received or expenditure made. The actual printout of this information was the only act WAP undertook after receiving the subpoena request from your client.

Id. at 4.

However, in yet another effort to resolve the matter short of litigation, WAP even went so far as to produce all "cancelled checks, check stubs and Form 1099s issued to Tom Rider," id. – although the same information contained in those documents is, as WAP had advised FEI, also detailed in the financial transaction charts. Accordingly, WAP explained that the only records not being produced were those containing exactly the same financial information as reflected in the charts and canceled checks, but whose production would be extremely burdensome because of the need to redact extraneous information that is non-responsive to the subpoena, i.e., data that have nothing to do with elephants, Tom Rider, or Ringling Bros.

[11] WAP also produced an updated, detailed privilege log that reflected the limited information now being withheld as privileged on First Amendment grounds. See FEI Exh. 44.

As noted earlier, even as to those materials – monthly financial statements, monthly bank statements, and cell phone records – WAP offered to provide FEI with sample documents in each category so that FEI could satisfy itself "as to the duplicative nature of these documents and the burden it would place upon WAP" to produce them. Id. at 4. Once again, FEI did not respond to that suggested resolution, nor did it make any other effort to resolve or narrow the remaining areas of disagreement prior to filing its motion.

ARGUMENT

A. The Identities of Individual Supporters And Other Associates Of WAP Are Irrelevant, Subject To A First Amendment Privilege, And Their Disclosure Could Expose These Individuals To Harassment By FEI.

As explained previously, the only substantive information regarding the funding of Tom Rider's media efforts that remains at issue involves the identities of individuals who have provided contributions to WAP. WAP has properly withheld that information, as well as the identities of grassroots activists with whom WAP associates, as both irrelevant and clearly covered by a First Amendment privilege, especially in light of WAP's legitimate concerns that such individuals may be exposed to harassment if FEI learns of their support for WAP's activities.

WAP and plaintiffs have readily conceded – as plaintiffs' counsel advised the Court at a motions hearing on September 16, 2005 – that plaintiffs and others concerned with the plight of Ringling Bros.' elephants are funding Tom Rider's public education campaign. See Transcript of Sept. 16, 2005 Motions Hearing, at 30 (WAP Exh. E) ("we have Tom Rider, a plaintiff in this case, he's going around the country in his own van, he gets grant money from some of the clients and some other organizations to speak out and say what really happened when he worked there").

Accordingly, to the extent that FEI wishes to argue that Mr. Rider's credibility is somehow undermined by this public education campaign, the information that has long been in FEI's possession allows it to do so. Id.[12]

Moreover, the identities of individual contributors and activists who choose to associate with WAP are clearly covered by a well-recognized First Amendment privilege. As recently explained by Judge Urbina in denying a comparable motion to compel information sought from non-party environmental organizations:

> [i]n rejecting a request for an organization's membership lists, the Supreme Court has addressed the protection the First Amendment provides parties against compelled disclosure of discovery. NAACP v. Alabama, 357 U.S. 449, 460-61 (1958). '[I]t is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious, of cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.' Id. In addition, courts have held that the threat to First Amendment rights may be more severe in discovery than in other areas because a

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[12] FEI's only concrete suggestion for why it needs the identities of individual contributors is that "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." FEI Mot. at 23. Aside from the fact that there will be no jury trial in this case – since plaintiffs are only seeking injunctive relief and not damages – this assertion does not withstand scrutiny. First, once again, since plaintiffs and WAP have already acknowledged that they are supplying funding for Tom Rider's media campaign on behalf of the Ringling Bros.' elephants, even if FEI's speculation were correct – which it is not – the limited information withheld would add nothing of substance to what FEI already knows.

Second, in any case, the small number of individual contributors whose identities have been deleted in fact are not plaintiffs' counsel or employees of the Organizational Plaintiffs." FEI Mot. at 23 (emphasis added). Nor does WAP have any basis for believing that they are "otherwise affiliated with the Organizational Plaintiffs or counsel," id., except by virtue of their contributions to Mr. Rider's public education efforts. While we would hope that this representation would be sufficient to resolve the matter, WAP would, of course, be willing to submit the identities of the individuals to the Court for in camera review and/or to supply affidavits attesting to the fact that the individual contributors have no employment or other formal affiliation with MGC, WAP, or any of the plaintiffs.

> party may try to gain advantage by probing into areas an individual or group wants to keep confidential. Britt v. Superior Court of San Diego County, 20 Cal. 3d 844, 574 P. 2d 766, 744 (1978).

Wyoming, 208 F.R.D. at 454.

The information sought by FEI here – the identities of contributors and others who have opted to associate with WAP for the purposes of supporting Tom Rider's public advocacy on behalf of the Ringling Bros. elephants – is at the very core of the First Amendment privilege. As further explained by Judge Urbina:

> [m]embership lists are not the only information afforded First Amendment protection. In blocking the government's discovery request of political action groups, this court recently stated, 'it is crucial to remember that we are considering the essence of First Amendment freedoms – the freedom to protest policies to which one is opposed, and the freedom to organize, raise money, and associate with other like-minded persons so as to effectively convey the message of the protest.' Int'l Action Ctr. v. United States, 207 F.R.D. 1, 2 (D.D.C. 2002). The First Amendment's protection 'extends not only to the organization itself, but also to its staff, members, contributors, and others who affiliate with it.' Int'l Union v. Nat'l Right to Work Legal Defense and Ed. Found., Inc., 590 F.2d 1139, 1147 (D.C. Cir. 1978).

Wyoming, 208 F.R.D. at 454 (emphasis added).

In the very manner that the courts have cautioned about, compelled disclosure of the information sought here would have an enormous "potential 'for chilling the free exercise of political speech and association guarded by the First Amendment.'" Id. (quoting FEC v. Machinists Non-Partisan Political League, 655 F.2d 380, 388 (D.C. Cir. 1981)). Indeed, this concern is especially acute in this context since FEI has a long history of harassing, spying on, and otherwise attacking those whom it regards as antagonistic to its interests. See WAP Exh. B (news report on FEI's infiltration and harassment of critics of its treatment of circus animals); WAP Exh. F (May 4, 2003 "60 Minutes" segment on Kenneth Feld's effort to derail the career of

a journalist who had criticized him); Stein, The Greatest Vendetta on Earth: Why would the head of Ringling Bros.- Barnum & Bailey hire a former top CIA honcho to torment a hapless freelance writer for eight years?, Salon (Aug. 30, 2001) (WAP Exh. G). Even apart from its clear First Amendment privilege, WAP has a legitimate concern that these same kinds of tactics will be employed in a manner that will deter individuals from supporting and otherwise associating with WAP's campaign to expose and end Ringling Bros' mistreatment of its elephants.

Before this Court may compel discovery that implicates such important First Amendment concerns, the D.C. Circuit has instructed that such information must go to the "heart of the lawsuit." Int'l Union, 590 F.2d at 1152. As discussed above, however, the information sought by FEI has, at most, a peripheral relationship to the issues in the litigation, particularly in view of what FEI already knows about how Mr. Rider's public education efforts are being funded. Compelling disclosure of the names of individual contributors and supporters of a non-profit organization, while seriously compromising the organization's First Amendment rights, will have no foreseeable bearing on the underlying issues in this litigation.

For example, as noted previously and as FEI has long known, one of the individual contributors to WAP is a woman who saw Mr. Rider speak about the Ringling Bros. elephants at an event in Harrisburg, Pennsylvania. This individual was apparently deeply affected by what she heard and, therefore, every month she sends WAP a modest contribution to "wholeheartedly support Mr. Tom Rider in his work to protect the circus animals." WAP Exh. H (cover notes with checks). At the risk of understatement, this woman's identify is not at the "heart of the lawsuit." On the other hand, both she and WAP – along with WAP's other individual supporters – have a compelling First Amendment right to associate based on their shared interest in

advocating in the public arena for an end to Ringling Bros' mistreatment of its elephants.

FEI's feeble arguments for why it "need[s]" such information, FEI Mot. at 22, have already been answered. In particular, FEI asserts that "[p]laintiffs' standing hinges upon the alleged injury of Mr. Rider and the documents sought bear directly on his motives and credibility." Id. at 23. Once again, however, FEI never spells out how the identities of individual contributors to WAP may bear even remotely, let alone "directly on [Tom Rider's] motives and credibility" – especially in view of what plaintiffs and WAP have made clear all along, i.e., that the plaintiff organizations and others concerned about the elephants' well-being are, in fact, funding Mr. Rider's public education campaign. As already discussed, when this case comes to trial, if FEI wants to try and attack Mr. Rider's "motivation and credibility" on that or any other basis, it is perfectly free to do so, but the name of the WAP supporter from Pennsylvania – or any of the other individual contributors – adds nothing of substance to what is already abundantly clear. See also Boody v. Township of Cherry Hill, 997 F. Supp. 562, 573 (D.N.J. 1997) (affirming denial of request for details about "ticket reward system" because defendants have "conceded the existence of the [] system and have already produced documents consistent with this admission").

As for FEI's suggestion that the identities of WAP contributors may bear on whether plaintiffs have "clean hands," FEI Mot. at 23, that amorphous argument also hardly justifies overriding the First Amendment rights of WAP and its supporters. Once again, the argument appears to turn on FEI's speculation that WAP is "being provided with funds by . . . plaintiffs' counsel" or "employees of the Organizational Plaintiffs . . . ." Id. Even if plaintiffs' counsel or employees of the ASPCA or other plaintiff groups were donating personal funds to a non-profit

group in order to publicize Ringling Bros' mistreatment of its animals, that would hardly amount to "unclean hands;" rather, it would merely mean that these individuals would be exercising their own First Amendment rights to help advocate for animals who are in desperate need of advocates. But, in any case, this is simply a non-issue; once again, the identities of the individual contributors are not those of plaintiffs' counsel or employees of the plaintiff organizations.[13]

Finally, while WAP does not believe that FEI has come even close to shouldering its heavy burden to justify the compelled disclosure of WAP's individual contributors and associates, if the Court believes otherwise, WAP is willing – as it has previously advised FEI – to attempt to negotiate an appropriate protective order. In WAP's view, given FEI's history of harassment of those it regards as hostile to its interests, such a protective order should not only confine the use of the identities to the litigation, but be fashioned in such a manner as to ensure that such individuals are fully protected from such tactics.

B. WAP Has A First Amendment Privilege Regarding Its Media Contacts And Strategy And FEI Has Suggested No Overriding Need For Such Information.

As discussed previously, and as reflected in its detailed privilege log, WAP has also withheld a few documents and portions of documents on the grounds that they reflect the organization's media contacts and its internal strategy for contacting the media. See FEI Exh. 44 at 17-20, 22. Frankly, WAP is astonished that FEI is even raising this issue, since it argued to the Court – successfully – that all documents bearing on its "public relations" concerning the elephants was totally "irrelevant information." ASPCA v. Ringling Bros., Civ. No. 03-2006

[13] As noted previously, while this unequivocal representation to FEI and the Court should be sufficient, WAP will, at the Court's direction, submit the deleted identities for in camera review and/or file a sworn declaration making the same representation.

(EGS/JMF), Slip Op. at 9 (D.D.C. Feb. 23, 2006) ("2/23/06 Discovery Order"). Given Judge Facciola's ruling that FEI's "public relations" efforts and contacts are only of "marginal utility" in the litigation, and are "too far out of proportion to the sensitivity" of the information, id. at 9, the same result should apply to such information in the possession of a non-party.

In any event, a non-profit advocacy organization's media contacts and strategy obviously are integral to the organization's exercise of its First Amendment rights of expression and association. See supra at 22-23. At the same time, FEI has not even begun to explain why this limited information is essential to its defense, other than to assert that "[p]laintiffs have acknowledged . . . that their media strategies are inseparable from this lawsuit." FEI Mot. at 23. As sole support for that purported "acknowledge[ment]," FEI quotes an earlier brief from plaintiffs to the effect that "'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.'" FEI Mot. at 24.

WAP is at a loss to understand exactly what argument FEI is advancing. The fact that plaintiffs have advised the Court that the treatment of Ringling Bros.' elephants is of "great public interest and concern" – as it is – hardly means that every one of WAP's or plaintiffs' media contacts, or their strategy for contacting the media, is somehow relevant to the underlying legal issues of whether defendants' are "taking" elephants within the meaning of section 9 of the ESA. On the other hand, the fact that this issue is of "great public interest and concern" simply reinforces that WAP and plaintiffs have a compelling First Amendment interest in presenting their views to the public without being forced to divulge to their adversary in the public arena the identities of their media contacts and how they intend to advance the public debate in a manner

that is favorable to the outcome they seek. See Wyoming, 208 F.R.D. at 454 ("courts have held that the threat to First Amendment rights may be more severe in discovery than in other areas because a party may try to gain advantage by probing into areas an individual or group wants to keep confidential").[14]

C. The Court Should Not Compel WAP To Undertake The Extremely Burdensome Exercise of Providing Monthly Reports And Other Financial Materials That Merely Duplicate What WAP Has Already Furnished To FEI.

Under Fed. R. Civ. P. 26(b)(1), federal courts may limit discovery where it is "unreasonably cumulative or duplicative," or where "the burden or expense of the proposed discovery outweighs its likely benefit . . . ." Fed. R. Civ. P. 45(c)(1) also specifically provides that "[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).

Hence, it is well-established that courts "are authorized to limit discovery to 'that which

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[14] The fact that WAP voluntarily released to FEI some information that it had previously withheld on First Amendment grounds – after WAP concluded that release of that specific information would no longer interfere with its ongoing public education activities – does not preclude WAP from withholding the media contacts and strategies on which the organization is now relying. In this connection, it is also noteworthy that, with regard to any of WAP's media contacts who have already reported on Tom Rider and the elephant issue, WAP has previously provided FEI with copies of articles written by such contacts, and FEI is obviously capable of doing its own internet search for such materials at any time. See Wyoming, 208 F.R.D. at 455 (before compelling discovery of documents that implicate First Amendment interests, court must assess "whether the party seeking disclosure made reasonable attempts to obtain the information elsewhere"). Accordingly, what FEI is evidently seeking to discover are the identities of WAP's contacts in the media who have not yet produced print or broadcast stories, but may do so in the future. Whatever FEI's actual motivation in seeking such quintessential First Amendment materials, FEI has hardly demonstrated that it "needs the[m] for its defense in this lawsuit." FEI Mot. at 20.

is proper and warranted in the circumstances of the case," Katz v. Batavia Marine & Sporting Supplies, Inc., 984 F.2d 422, 424 (Fed. Cir. 1993), and "[c]ourts should balance the need for discovery against the burden imposed on the person ordered to produce documents." Wyoming, 208 F.R.D. at 452. Of particular pertinence here, "[]non-party status is one of the factors the court uses in weighing the burden of imposing discovery." Id. (emphasis added); see also 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"); Fed. R. Civ. P. 45(c)(3)(A)(iv) (authorizing courts to "quash" a subpoena that "subjects a person to undue burden").

When these principles are applied here, it is evident that the Court should not compel WAP to produce monthly financial reports, monthly bank statements, and monthly phone bills that duplicate what the organization has already supplied to FEI, i.e., comprehensive transaction detail charts that report on every financial transaction made by WAP concerning elephants, Ringling Bros. or Tom Rider, as well as every canceled check that pertains to these topics. To begin with, it is important to stress the stark contrast between FEI's position regarding the accessibility of its own financial information – which the Court sustained – and FEI's effort to obtain such information from a third party.

In response to plaintiffs' contention that financial information concerning the large profits that FEI is reaping from the use of the elephants in the circus bears on the credibility of FEI and its witnesses, Judge Facciola agreed with FEI that:

the fact that defendants' financial information may have some value regarding

> defendants' witnesses' credibility is of marginal utility and is too far out of proportion to the sensitivity of the financial information sought and the burden that would be placed on defendants in gathering and producing such documents. Moreover, defendants have freely admitted that they are engaged in a for-profit business – that should be sufficient for plaintiffs' asserted purposes.

2/23/06 Discovery Order at 9 (emphasis added).

Basic consistency suggests that the same reasoning should apply to the financial information that FEI is seeking from WAP. Indeed, if anything, FEI has a far weaker case for the financial documents at issue since, once again, FEI is seeking such information from a non-party that has already divulged extensive financial information on, among other things, the total amount of funding raised for Tom Rider's public education campaign; every disbursement made to Tom Rider by WAP for that activity; such trivia as where Mr. Rider has purchased his groceries and how much he has spent on auto repairs while following the circus; and the identity of all organizations and foundations that have supplied any funding. See FEI Exh. 4. In short, once again, especially since WAP has "freely admitted" that it is using contributions from the plaintiffs and some other organizations and individuals concerned with the well-being of the Ringling Bros. Elephants to fund Tom Rider's public education efforts, the (at most) "marginal utility" of the additional financial records is clearly outweighed by the "burden that would be placed [on WAP] in gathering and producing such documents. 2/23/06 Discovery Order at 9.

Indeed, since the "essential information" concerning WAP's arguably relevant activities is already available to FEI, Public Service Enterprise Group, Inc., 130 F.R.D. at 551, all that would result from WAP's being forced to produce monthly reports and statements would be that the organization would have to spend an enormous amount of time deleting sensitive internal information in these reports that has nothing to do with the subject matter of this lawsuit (such as

information pertaining to WAP's ongoing manatee advocacy work). Under comparable circumstances, courts have refused to compel such burdensome, make-work exercises, especially by non-parties to the underlying litigation. See, e.g., Linder v. Caldero-Portocarrero, 183 F.R.D. 314, 320 (D.D.C. 1998) ("The time and expense required for the agencies to respond to the requested expanded search, even taking into account the resources of the federal government[] also support the Court's conclusion that the request is unduly burdensome."); Green Construction Co. v. Kansas Power & Light Co, 732 F. Supp. 1550, 1554 (D. Kansas 1990) ("The court finds that the representation of Seabord about the large amount of labor time it would be required to spend to comply with the request shows that the request would place a great burden on Seaboard.").

When FEI's specific rationale for why WAP must go through this exercise is considered, it becomes even clearer that FEI is "us[ing] discovery to wage a war of attrition" against a small non-profit organization, rather than to pursue a legitimate effort to obtain necessary information for use in the litigation. Roberts v. Lyons, 131 F.R.D. 75, 77 (E.D. Pa. 1990). According to FEI, WAP's production of 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" is "wholly unacceptable" because 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." FEI Mot. at 20 (emphasis added).[15]

[15] The fact that the detailed chart was "initially heavily redacted" – and was subsequently disclosed in its entirety but for the identities of individual contributors – has nothing to do with the present discovery dispute, except to demonstrate, once again, that WAP has attempted in

Aside from the fact that FEI conveniently ignores the canceled checks and check stubs also produced by WAP, its argument is simply groundless. The detailed transaction chart does not "purport" to do anything. As WAP has repeatedly explained to FEI, preparation of this chart did not entail WAP's creation of a subjective "summary of the information it believes to be pertinent." FEI Mot. at 20 (emphasis added). To the contrary, the chart is a computer-generated compilation – using a standard software program – of the "classes" of all WAP accounts that pertain to Ringling Bros. or Tom Rider. See Declaration of Leslie Mink (WAP Exh. I); FEI Exh. 4. In other words, the document already produced does in fact reflect WAP's financial information as it is "'kept in the usual course of business,'" FEI Mot. at 20 (quoting Fed. R. Civ. P. 45(d)(1)), and hence the provision of monthly financial reports and statements -- which are based on exactly the same "classes" of data – while extraordinarily burdensome for WAP to produce because the majority of the internal financial information in them has nothing to do with Tom Rider or Ringling Bros. , would add nothing substantive to what FEI already knows. See Mink Decl.

Tellingly, as explained above, WAP, in a good faith effort to resolve this aspect of the dispute, offered to supply FEI with a sample monthly report (with extraneous information deleted) so that FEI could satisfy itself that the comprehensive report is merely a computer-generated recapitulation of what is in the monthly reports, and that producing the monthly reports would be extremely burdensome for a small non-profit organization. The only discernible reason why FEI did not take WAP up on that offer is that FEI was more interested in having an issue

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good faith to respond to FEI's new counsel's desire for more financial information than was sought by FEI's former counsel.

about which it could complain, rather than actually resolving the few remaining areas of dispute. In any event, since FEI's central premise – that the comprehensive transaction report represents some subjective selection of information by WAP – is completely erroneous, FEI's argument for inflicting a further burden on WAP necessarily collapses of its own weight.[16]

CONCLUSION

For the foregoing reasons, WAP respectfully requests that the Court deny the motion to compel.

Respectfully submitted,

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Dated: Sept. 21, 2006

[16] FEI harps on several minor discrepancies in the extensive financial information it has obtained from plaintiffs and WAP. See FEI Mot. at 21 & n. 11. However, the issue before the Court is not whether "every jot and tittle" of plaintiffs' or WAP's financial records, Public Service Enterprise Group, 130 F.R.D. at 552, comport with FEI's book keeping specifications. Rather, all that is at issue is whether WAP, a small non-profit organization that is not a party to this case, has reasonably responded to FEI's extremely invasive subpoena for organizational and financial details, including those that have no discernible bearing on this case. Plainly, WAP has done so.