UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

REPLY IN SUPPORT OF MOTION TO COMPEL DOCUMENTS SUBPOENAED FROM THE WILDLIFE ADVOCACY PROJECT

The subpoena at issue here contained five simple requests for documents from the Wildlife Advocacy Project ("WAP"), written in plain English, and commanding production of materials related to the funding of Mr. Rider while a plaintiff in this lawsuit. It should come as no surprise that FEI would want to discover materials that demonstrate how much and by whom plaintiff Rider was paid since the inception of this lawsuit: Whether or not Mr. Rider is acting as a professional plaintiff in this case goes to the "heart of it." Yet WAP, a 501(c)(3) who must open its books to the public anyway, has responded as if it were being asked to divulge warehouses of financial documents that must never be exposed to the light of day. This is nonsense. Apparently, both WAP and plaintiffs welcome public education and scrutiny in this case just so long as it remains one-sided and restricted to Feld Entertainment, Inc. See Response at 21. A fair trial, however, dictates otherwise.[1]

[1] WAP disclaims any notion of a jury trial by stating plaintiffs seek only "injunctive relief and not damages." WAP is apparently unaware that plaintiffs also have sued for forfeiture – a remedy which, even if available, would give FEI the right to a jury.

The Response is remarkable not for what it says, but for what it *fails* to say. Nowhere does WAP come forward to tell this Court that it has fulfilled its obligations under the subpoena but for any allegedly privileged documents. See generally WAP Opposition to Motion to Compel (9/21/06) ("Response"). Instead, WAP states vaguely that "the only substantive information regarding the funding ... that remains at issue involves the identities of individuals." Id. at 21. WAP is not the final arbiter of what is or is not substantive – the Court is. Nowhere does WAP come forward to show why or how it is not the alter ego of the law firm of Meyer, Glitzenstein & Crystal ("MGC"). Instead, WAP drops a conclusory footnote to dispute its alter ego status. See id. at 9 n.3. Nowhere does WAP come forward to explain why plaintiffs' counsel were involved with coordinating and making payments to Rider. Cf. id. at 8-10 (describing MGC's role in case without ever addressing financial payments by MGC) with Motion at 4, Exs. 7 & 14 thereto (WAP letters written by Meyer and Glitzenstein forwarding WAP payments to Rider); id. at 10, Exs. 28 & 29 (check and check requests to MGC for "reimbursement for money given to Tom Rider"). Nowhere does WAP come forward to explain *why* it is unreasonable or unduly burdensome to turn over its materials related to payments to Rider. See Response at 29-31 (omitting again any approximation of the volume of responsive materials left at issue and providing no affidavits or declarations as to the time or effort needed to produce the documents already identified in its chart). Nowhere does WAP come forward to explain the financial inconsistencies between its subpoena response and its own documents and the sworn discovery responses of Rider and the ASPCA. Instead, WAP says the Court should just forget about such discrepancies. See Response at 33 n.16; cf. Motion at 15 & n.10.

It is time for these games to end.[2] WAP knows precisely which financial documents are sought, and knows precisely where they are located. When pressed by FEI's counsel, WAP repeatedly withheld certain documents while it simultaneously attempted to provide just enough other documents or information to avoid a motion to compel. To this day, WAP still has not made a full production. The Court should hold WAP accountable for its maneuvering to hide the documents, and order WAP to produce them immediately.

I. WAP'S PROCEDURAL HISTORY IS INCORRECT

It is **absolutely false** that FEI's new counsel "retracted much of the subpoena narrowing and understanding that had previously been reached between WAP and FEI." Response at 18 (emphasis in original). FEI's new counsel sent WAP a letter dated June 13, 2006, setting forth the ways in which it believed WAP had not complied with the subpoena, *as modified by FEI's former counsel*, and advising WAP that its continued failure to comply would necessitate a motion to compel. FEI Ex. 33. WAP disingenuously recites one-half of a sentence in that letter: "all of our prior concessions to reach resolution of this without the need for court intervention are withdrawn," Response at 18, while omitting the first half: "If we are put to the time and expense to litigate this by motion to compel, ..." FEI Ex. 33.

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[2] For an example of WAP's bad-faith, the Court need look no further than the issue of WAP's allegedly confidential financial information. First, in August 2005, Eric Glitzenstein summarily proclaimed that WAP would not disclose its financial information absent a protective order. FEI Ex. 42. When FEI sought additional details, Glitzenstein would not elaborate until conferring with WAP's outside counsel, but promised that either he or WAP's counsel would be in touch to "clarify what information WAP seeks to protect." FEI Ex. 31. Then, five weeks later, *without contacting FEI's counsel*, WAP unilaterally redacted such information from its original, paltry production. FEI Ex. 32. In response, FEI requested from WAP's outside counsel a proposed protective order, WAP Ex. D., which WAP finally provided weeks later, FEI Ex. 15. FEI's new counsel agreed that it would consent to WAP's proposed protective order, as modified by FEI's proposed revisions. FEI Ex. 33. Then, and only then, did WAP finally produce the documents, abandoning its request for a protective order: "WAP is no longer requiring that such information or documents be subject to a protective order." FEI Ex. 35. On this issue alone, FEI's counsel was forced to participate in at least two telephone calls and submit at least four letters in response to WAP's obstructionist efforts. *To this day, WAP has not articulated any legal basis or legal precedent upon which it based its repeated (though ultimately withdrawn) demands for a protective order.*

Despite new counsel's efforts to resolve this matter, WAP continued to play hide and seek. For example, WAP coyly responded to the *unilateral offer of FEI's new counsel* that the parties could include within the scope of a proposed protective order all information that WAP believed to be protected by the First Amendment. FEI Ex. 34. WAP's opposition brief would have the Court believe that it was willing to produce this information. Response at 4. In practice, however, WAP continued to obfuscate by summarily stating that the proposed order was not appropriate for this information. Instead of providing proposed changes that would meet its demands, WAP stated that it "*might* be willing to agree to disclose such information subject to an appropriately crafted protective order." FEI Ex. 35 (emphasis added). Nearly one year after the subpoena was served, WAP knew and ought to have disclosed whether or not it would "disclose such information subject to an appropriately crafted protective order." Instead, WAP responded with an ambiguous gesture upon which FEI could not rely to reach an actual resolution but upon which WAP could attempt to argue in its opposition that it was willing to reach a compromise. WAP had a duty, but chose not, to respond in good-faith to FEI's subpoena. FEI did not have a duty to endure the time and expense of participating in WAP's games, especially given the fact that WAP's principals and founders were actively accelerating their taking of discovery in this case.

II. WAP MISINTERPRETS THE RULES OF PROCEDURE

Each of WAP's procedural arguments is without merit. First, FEI should not have filed its motion as a separate, miscellaneous action. None of the undersigned, who have a combined experience of more than sixty years of litigating in D.C., have ever had to file a miscellaneous action to enforce a subpoena that was issued out of an existing case filed here. Miscellaneous actions to enforce subpoenas are for cases that originate elsewhere but require a subpoena to be

issued out of this federal court because the witness is located here. See, e.g., Chen v. Ming Dow Ho, 368 F. Supp. 2d 97 (D.D.C. 2005) (ruling on motion to compel filed as a miscellaneous action in this court and relating to litigation pending in another jurisdiction); FEI Ex. 41, Norex Petroleum Ltd. v. Chubb Ins. Co. of Canada, 2005 U.S. Dist. LEXIS 19127 (D.D.C. March 9, 2005) (same). It is oxymoronic for WAP, who pleads limited resources elsewhere in its response when it suits other needs, to claim that a separate lawsuit must be filed for every subpoena issued out of this case in which there is a dispute and then must be related back to this case after filing. Such a proliferation of litigation serves no purpose, as even WAP admits. See Response at 2 n.1. Rule 45 – the rule dedicated to and governing *subpoenas* – requires no such thing. See Fed.R.Civ.P. 45(c)(2)(B) (party can "move at any time for an order to compel").

WAP's cited authority does not support its position. First, LCvR 40.3 does not even apply here. Rule 45 subpoenas are not included in the definition of the term "miscellaneous cases." See LCvR 40.3 (identifying only "actions to enforce *administrative* subpoenas" as "miscellaneous cases" subject to random assignment); see also Wyoming v. U.S. Dep't of Agriculture, 208 F.R.D. 449, 452 n.2 (D.D.C. 2002) (ruling on motion to compel related to litigation pending in another jurisdiction and addressing *where* the action should have been filed, not *how* it should have been filed: "The plaintiff properly filed this miscellaneous action in this court since Federal Rule of Civil Procedure 45 allows parties to serve subpoenas at any place within 100 miles of a non-party's place of business. [The subpoenaed parties] all have offices in Washington, D.C.") (internal citations omitted).

Second, all parties received the requisite notice. FEI repeatedly provided WAP with notice that its continued obstruction would result in a motion to compel. See FEI Ex. 33; FEI Ex. 34. WAP, of course, does not have standing to complain that plaintiffs did not receive

adequate notice. Factually, it could not do so anyway: Eric Glitzenstein, plaintiffs' own counsel, initially responded (on behalf of WAP) to the subpoena. FEI, notwithstanding the fact that WAP - the alter ego of plaintiffs' counsel - received unambiguous notice of the motion in advance, formally provided notice to plaintiffs by serving upon their counsel a copy of the motion as required. Unlike other jurisdictions, this court does not require a party to provide others with formal notice that it will apply to the court for relief on a certain date.

Finally, FEI fulfilled its obligations pursuant to LCvR 7(m). It conferred for months in good faith with WAP and explained those efforts in painstaking detail to the Court. See Motion at 13-17. It sent at least six letters to WAP and participated in at least three telephone conversations to resolve the outstanding issues. FEI's letters dated June 13, 2006 and June 19, 2006 clearly put WAP on notice that FEI would file a motion to compel if the parties were unable to reach agreement on the outstanding issues by the end of June. FEI apologizes that it did not include a specific footnote for the Court stating that it had conferred with WAP and that WAP opposed the motion, but FEI thought that this was clear from the elaborate detail and exhibits provided in its motion. Id. FEI fulfilled its obligations to confer in good faith, and its efforts are not diminished simply because it would not accede to WAP's repeated efforts to stall by trickling out documents only after numerous exchanges correspondence occur. Clearly, the Court's assistance is required to resolve the impasse.[3]

[3] It is ironic, indeed, that WAP, having accused FEI of violating procedural rules, failed to attach a proposed order as required by LCvR 7(c). Under WAP's reasoning, the Court should proceed as though the procedurally defective opposition was never filed and should immediately grant FEI's motion to compel.

III. WAP MISCHARACTERIZES THE FACTS

Although WAP would like the Court to believe that it has far exceeded its obligations, the records does not support such assertions.[4] Contrary to WAP's assertion, it has not been "extraordinarily forthcoming,"[5] nor has it produced a "plethora of materials." Response at 1, 7. As explained above, for example, WAP did not produce its allegedly confidential financial information until FEI spent an inordinate amount of time participating in telephone calls, submitting letters, and revising a proposed protective order that WAP then abandoned. Similarly, only after FEI's current counsel conducted an exhaustive review of WAP's original production and engaged in lengthy negotiations, did WAP produce documents and information previously withheld.[6] Ironically, FEI then learned that the 272 pages previously withheld was more than the 266 pages originally produced. Nonetheless, WAP's total production of 538 pages (85 of which were news articles that WAP retrieved after receiving the subpoena) - *essentially one redweld* - certainly is not a "plethora of materials."

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[4] To be abundantly clear, FEI's new counsel did not retract the positions of prior counsel. Supra note 1. WAP's out-of-context use of half-a-sentence is disingenuous and can only be understood as an attempt to mislead the Court. Similarly, FEI's prior counsel never agreed that WAP need not produce the names of individual donors. Cf. Response at 15. To the contrary, prior counsel specifically requested a log of donations made by *all* donors so that FEI could evaluate whether further conversations were necessary. Perhaps if WAP did not, again, take a quote out of context, this would have been clear to the Court. WAP Ex. B (WAP's cherry-picked quote preceded by "I explained to you our position that the names of donors are discoverable, regardless of whether they are parties to this litigation. In particular, I explained that ..."). Ironically, consistent with WAP's affection for playing games, the log requested by FEI's prior counsel was never provided.

[5] It is unclear why WAP chose (let alone was knowledgeable enough given its alleged "third-party" status) to assert that Rider has been "extraordinarily forthcoming" as well. Response at 11 n.4. When asked for documents identifying funds or items he has received from any animal advocacy organization, such as WAP, the ASPCA, etc., Rider ridiculously asserted a Fourth Amendment right to privacy and a First Amendment right to freedom of association. FEI Ex. 6. Rider is engaging in the same games that WAP insists on playing.

[6] WAP states that "FEI's change in counsel is what in fact resulted in a lengthy delay in resolving the remaining issues." Response at 11 (emphasis in original). This makes no sense. FEI received further responsive documents only *after* FEI's new counsel pressed WAP for them. The documents were responsive as soon as the subpoena was served – nearly eight months before FEI's current counsel entered the case – and should have thus been produced at that time. Is WAP truly suggesting that had FEI's current counsel never entered the case and never pressed them to comply with the subpoena that it never would have produced the responsive documents at all?

WAP similarly mischaracterizes the underlying facts by asserting that the documents sought by FEI will have "at most, a marginal relationship to this case" and that FEI's motion is intended merely to disparage plaintiffs. Response at 1, 6. WAP essentially argues that FEI has not sufficiently articulated how the documents are relevant to this case while simultaneously arguing that FEI presented the Court with too much information. Cf. Response at 25 with id. at 6. WAP cannot have it both ways. As explained in FEI's motion, the documents sought will have a *substantial* impact on this case. Tom Rider's allegations of injury are the reason this case was reinstated by the Court of Appeals and his allegations of abuse are the primary source of the other plaintiffs' complaints. Motion at 1. His credibility is, therefore, essential to the continuation and resolution of this lawsuit. The injunction that plaintiffs seek, moreover, requires them to come forward with clean hands. Motion at 11-13. Plaintiffs attempt to gloss over this, see Response at 25, yet, the participation in this lawsuit by a plaintiff who has received at least $100,000[7] from his co-plaintiffs and/or their counsel's alter ego raises serious questions about the purpose of his involvement in the lawsuit and, among other things, the cleanliness of all of plaintiffs' hands. FEI recognizes the seriousness of this issue, and so should the Court. Instead of recklessly providing the Court with presumptions of impropriety, FEI appropriately set forth and documented the underlying facts. It is because these issues present serious questions and because they demonstrate the purpose of the subpoena, that FEI described them in detail. And, as is painstakingly clear from FEI's motion, the documents sought by the subpoena – including those still at issue – are highly relevant to this case.

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[7] Indeed, WAP steers clear of this fact in its brief and tries to justify the contributions by claiming that Rider has had to stay in Super 8 motels and has not gotten wealthy. See Response at 11 n.4. That argument misses the point entirely: The issue here is that WAP and the co-plaintiffs are paying for Mr. Rider's living expenses regardless of *how* Mr. Rider lives. WAP then tries to reduce the number by averaging the $68,000 paid by WAP alone, which it claims is "less than $14,000 per year for [Rider's] public education work." Id. at 19 n.10. Even using WAP's reduced number, Rider is still being provided annually on average thousands of dollars beyond minimum wage. In addition, FEI has received no documents that would indicate that Mr. Rider has paid any taxes on these "contributions."

WAP's opposition also mischaracterizes legal precedent to support its summary conclusions. First, WAP implies that the D.C. Circuit substantiated Rider's claims or his role as an effective spokesman. Response at 10. The court was merely reciting Rider's allegations from the pleadings. Similarly, WAP states baldly that it is not an alter ego of Meyer Glitzenstein & Crystal ("MGC") and that such an alter ego analysis is irrelevant. First, it is astounding that the only proffered difference between the two organizations is that one has completed its work with the manatees while the other one continues such work. Response at 9 n.3. Conspicuously absent from the Response are denials that the organizations fail to maintain corporate formalities, use the same office and equipment, share many of the same human resources, and commingle funds.[8] Also absent are denials that MGC's partners actively manage WAP and have pledged "substantial contributions," or that MGC has diverted to WAP funds that were billed and collected as attorney's fees. That the only difference WAP could muster between it and MGC is that MGC doesn't work on the manatees anymore is telling. The conclusion that WAP is an alter ego of MGC is relevant for several reasons. WAP cannot pretend that it is an arm's length third party worthy of special protection. See Response at 29. FEI, moreover, has a right to know the extent to which WAP's conduct is attributable to MGC. See Motion at 12 (reciting D.C. Rule of Prof. Conduct 1.8(d)).

IV. WAP'S ARGUMENTS MISS THE MARK

A. WAP Has Not Refuted That the Subpoena - Absent Its Specific Objections to Providing Donor Names, Media Strategy and Duplicative Financial Information - Is Enforceable As Issued

As clearly explained in FEI's motion to compel and in its letter to WAP dated June 13, 2006, because FEI has been put to the time and expense of litigating this subpoena, it is now

[8] Coincidentally, the WAP website was last checked on the date of this filing and is no longer functional. It states only that: "This domain name expired on 09/23/2006 and is pending renewal or deletion." See http://www.wildlifeadvocacy.org/.

seeking to enforce the subpoena as issued. Motion at 17-20 (arguing subpoena is enforceable *as issued*); Motion at 24 ("For the foregoing reasons, defendant respectfully requests that WAP be compelled to comply with the subpoena in its entirety."). Nowhere in its opposition, however, does WAP substantiate whether or how the subpoena, as issued, was not enforceable. While it makes passing references in the "facts" section that the subpoena was facially overbroad, WAP cites no case law. Nor does WAP elaborate on its position in the "argument" section. There, WAP only argues that it should not be compelled to produce three specific categories of documents or information: the identity of individual donors, portions of its media strategy, and certain financial materials. Because WAP has not argued to the Court that FEI's subpoena was not enforceable as issued, the Court, regardless of how it rules on the three categories about which WAP actually argues, should compel WAP to comply with the remainder of the subpoena. See M.K. v. Tenet, 99 F. Supp. 2d 12, 27-28 (D.D.C. 2000) (treating as conceded a motion's un-contested argument); LCvR 7.1(b).

B. The Identity of Individuals Funding Rider's Efforts is Critical to This Case

The details of the Tom Rider funding scheme touch directly upon Rider's standing (and, hence, the standing of the rest of the Organization Plaintiffs) and FEI's defense of unclean hands. WAP claims that FEI does not need to review the underlying documentation in un-redacted form because plaintiffs have already acknowledged that they provide grants to Rider, and thus, FEI should be satisfied without having any details of how the payments worked. This is akin to saying that one should be contented with an unassembled bicycle and stop asking for the assembly instructions. Unlike the party in the case relied on by WAP, FEI does not know information that is crucial to its defense. Boody v. Township of Cherry Hill, 997 F. Supp. 562, 573 (D.N.J. 1997) (affirming, under a "clearly erroneous" standard, denial of request for details where such details – the "actual value of the alleged fraud" – were not relevant to the underlying

proceeding). For example, FEI does not know how much money is being provided to Rider, whether it is in the form of cash payments or barter (such as charging expenses to others' credit cards), or whether it has anything to do with his "public education efforts." All of these details are relevant because they go directly to bias, credibility and motive.

To evade producing the actual documents requested by the subpoena, WAP's counsel represents that the "small number of individual contributors whose identities have been deleted in fact are not plaintiffs' counsel or employees of the Organizational Plaintiffs." Conspicuously absent from WAP's opposition is a representation that neither plaintiffs' counsel (either individually or as a law firm) or employees of the Organizational Plaintiffs have made donations to WAP for Rider. Until WAP produces all requested documents, FEI will never know whether such documents reflect contributions by people involved in this litigation or otherwise affiliated with them.[9]

WAP's representation is, in fact, meaningless. Indeed, the names WAP has redacted from the documents it actually has produced, are generally on letters either to or from WAP. One would not expect that Mr. Glitzenstein wrote a letter to himself thanking himself for contributing to himself. Nor would one expect that Ms. Meyer wrote a letter to herself enclosing a contribution for her own organization that operates out of her law firm's office. It is particularly concerning for WAP to continue hiding the source of its funds when FEI already knows that WAP has spent more money on Rider than its own accounting ledger reflects in donations (at least in terms of the donations that it has disclosed). Motion at 15. The issue here is not necessarily whose names appear on these letters, it is whether or not documents

[9] WAP also takes the position that it need not produce documents beyond the date of the subpoena. Response at 5 n.2. The Court can clearly order them to produce documents through any date it sees fit. Having taken this position, however, WAP is foreclosed from complaining about the issuance of any subsequent subpoenas to update the production.

commanded by the subpoena have been withheld, in whole or in part, because WAP is trying to hide information.

FEI needs to see all documents – in their entirety - commanded by the subpoena to determine whether or not they will impact any subsequent motions. WAP's offer for the Court to review such documents in-camera would require the Court to do independent research to determine whether or not the individuals identified have an affiliation with plaintiffs or their counsel. WAP, itself, acknowledges that such an affiliation may not be clear. Response at 22 n.12. FEI, for example, already knows that the ASPCA has promised to run WAP's funding request for Rider by some of its "high donors." FEI Ex. 3. The Court should not have to determine whether random names have an affiliation with plaintiffs or their counsel. Only after FEI conducts the necessary research and presents it in any subsequent motions in this case, does the Court need to evaluate whether it is relevant to Rider's credibility.

Of course, FEI's need for obtaining the redacted information need only be considered *after* WAP demonstrates a sufficient harm that would flow from disclosure. Motion at 22 (citing New York State NOW v. Terry, 886 F.2d 1339, 1355 (2d Cir. 1989), cert. denied, 495 U.S. 947 (1990)). WAP has not, and cannot, demonstrate such harm. WAP relies solely upon unfounded allegations that have been levied against FEI by animal activists like plaintiffs. Response at 23-24. Indeed, WAP even resorted to threatening FEI with raising this with the Court in order to dissuade FEI from filing a motion to compel. FEI Ex. 35. FEI will not be intimidated. If WAP and the plaintiffs would like to convert this case into litigating other causes of action, FEI would suggest the Court start by considering the most recent failure by the consortium of animal rights activists to attack FEI. A jury, after hearing the "evidence" regarding the same kind of

allegations WAP is now baselessly making, rejected them in total. See Verdict Form and Final Order in PETA v. Feld, attached hereto as FEI Ex. 46.[10]

The case law here is clear. WAP must articulate a harm that is likely to flow from disclosure of information it claims to be protected by the First Amendment. Motion at 22-23 (citing Shelton v. United States, 404 F.2d 1292, 1299 (D.C. Cir. 1968); United States v. Duke Energy Corp., 232 F.R.D. 1, 3 (D.D.C. 2005)). That, they have failed to do. Even if their unfounded and unsubstantiated allegations are accepted as such a basis, it is clear that the information with respect to certain individuals would be crucial to FEI's defense and that WAP cannot be trusted to make selective disclosures and/or representations. For that reason, FEI respectfully requests that the Court order WAP to produce such information.[11]

C. The First Amendment Does Not Protect WAP's "Media Strategy"

Fourteen months after the subpoena was issued, WAP still has not articulated legal precedent for an alleged "media strategy" privilege. The only support to which it cites is the precedent addressing membership lists. Response at 27. Under the First Amendment balancing test in this Circuit, the burden is on WAP to first articulate a harm that would flow from disclosure. Motion at 22 (citing New York State NOW v. Terry, 886 F.2d 1339, 1355 (2d Cir. 1989), cert. denied, 495 U.S. 947 (1990)). Not only has WAP not cited any precedent supporting

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[10] FEI denies that it would harass, spy on, or otherwise attack WAP's individual donors. Nonetheless, it is illogical that such a risk could flow from WAP's disclosure that people like Katherine Meyer, Eric Glitzenstein, high-ranking officials within plaintiffs' organizations, etc. – whose identities are already public knowledge - have given money to Rider. Their opposition to the circus is already well-known.

[11] FEI notes the irony of WAP now claiming that it "is willing – as it has previously advised FEI – to attempt to negotiate an appropriate protective order." As discussed above, it was FEI who initially offered that compromise. Even then, WAP's representation here is a little more affirmative than its previous representation that it "*might* be willing" to disclose such information pursuant to a protective order. FEI Ex. 35. Nonetheless, WAP again leaves itself wiggle room in that it's willing to "attempt to negotiate." These games must stop. To that end, FEI will consent to a protective order requiring that this information be used only for purposes of this litigation. It will not, however, consent to a protective order that substantiates or acknowledges in any way WAP's outrageous and unfounded allegations by prohibiting FEI from reviewing any materials. Counsel for FEI must be able to confer fully with its client for purposes of rendering legal advice in this case, just as plaintiffs' counsel have demanded when negotiating other protective orders in this case.

the notion that "media strategy" is somehow entitled to First Amendment protection, it has not articulated how disclosure of such strategy in this case would harm WAP. Motion at 22-23 (citing Shelton v. United States, 404 F.2d 1292, 1299 (D.C. Cir. 1968); United States v. Duke Energy Corp., 232 F.R.D. 1, 3 (D.D.C. 2005)). Like the allegedly confidential financial information, WAP has asserted a privilege devoid of any legal precedent or factual predicate.

WAP argues that FEI should not have access to WAP's media strategy because plaintiffs were denied access to FEI's public relations documents. Apparently, at this late stage, WAP is morphing its First Amendment argument into one of relevancy. Nonetheless, these instances are not analogous. Unlike plaintiffs, whose interaction with the media is purposefully and deliberately related to this litigation, FEI does not publicly comment on this litigation. Plaintiffs, on the other hand, issue a press release at every stop advertising their filing of this lawsuit. As WAP's own exhibits make clear, plaintiffs advertise this lawsuit as part and parcel of their campaign against FEI. WAP Ex. B. As WAP's document production makes clear, Katherine Meyer is involved in WAP's media efforts. FEI Ex. 3, 19, 20. To the extent that WAP claims it (on behalf of plaintiffs and others) is paying Rider for his advocacy efforts, how WAP is using Rider with respect to its advertisements of this case is relevant to this case. Clearly, Katherine Meyer feels that WAP is more likely to receive donations from people if Rider is part of this lawsuit. FEI Ex. 19 (trumpeting Rider's participation in this lawsuit in grant proposal sent to prospective donor).

WAP's incendiary allegations that FEI is seeking this information to ascertain the identity of WAP's contacts in the media is insincere and unfounded. As explained in FEI's motion, only after FEI pressed WAP to substantiate its claims of privilege over "media strategy" did WAP finally produce a document (FEI Ex. 3) that it previously withheld. This e-mail does not contain

the identity of any media contacts. Its date of November 2003 and its discussion of media pieces that had already aired, moreover, completely undermine WAP's assertion that it originally withheld, but has since produced, documents relating to media activities that would no longer be interfered with. This document was presumably withheld because it is an e-mail from plaintiffs' counsel (in WAP's files) to other plaintiffs noting that counsel is "personally very impressed with [Rider's] ... total commitment to this lawsuit" and asking plaintiffs to help raise more funds for Rider. WAP does not provide any plausible explanation as to why it has now produced some documents related to its media strategy but not others. One cannot self-select which "privileged" documents will be produced while simultaneously withholding others on grounds of privilege.

In sum, WAP has not articulated an interest in its "media strategy" worthy of First Amendment protection. WAP has failed to proffer legal or factual support for a position that it has asserted for more than a year. Nonetheless, such information is crucial to this proceeding and FEI's need for such information would outweigh any alleged interest.

D. WAP Has Not Substantiated Its Allegations That Producing the Financial Documents Withheld Thus Far Would be Burdensome and Duplicative

WAP claims that it is a "small" organization that generates, but is incapable of producing, "mountains" of documents. Setting aside the logic, or lack thereof, of WAP's position, its unsubstantiated assertion is insufficient. WAP bears the burden of articulating precisely why the documents at issue here would present an undue burden. Motion at 19 (citing Coregis Ins. Co. v. Baratta & Fenerty, Ltd., 187 F.R.D. 528, 530 (E.D. Pa. 1999)). Ironically, even the cases cited by WAP involve parties who articulated in detail the burdens they would face. In one case, the court specifically noted that the parties from whom documents were requested had "described the precise nature of [their] burden[s]" in a number of ways. Linder v. Caldero-Portocarrero, 183

F.R.D. 314, 320 (D.D.C. 1998) (internal quotations omitted). In the other case cited by WAP, the party from whom documents were requested articulated for the court the number of (nearly 62,400) insurance claims that would need to be reviewed and why a physical review of each claim would be necessary. Green Construction Co. v. Kansas Power & Light Co., 732 F. Supp. 1550, 1554 (D. Kansas 1990). WAP has made no such particular representation. Compounding the irony here, WAP's unsubstantiated and conclusory assertions apparently would not have been acceptable to plaintiffs themselves. See Plaintiffs' Motion to Compel filed May 6, 2004 (arguing that there is no burden if the finite materials are easily located, that a self-inflicted burden – i.e., having to redact information so a party can produce less than what has been subpoenaed – is not sufficient, and citing In re The Exxon Valdez, 142 F.R.D. 380, 383 (D.D.C. 1992), to argue that "claims of undue expense are less credible when subpoenaed third party has a financial relationship with the defendant").

Again, having failed to meet its burden with respect to a position it has asserted for more than a year, WAP attempts to evade the subpoena by arguing that FEI is taking a position that is inconsistent with an earlier one. Again, however, FEI's request for protection is substantially different than WAP's request. FEI sought to protect its financial information because it has no bearing on this case. FEI, unlike WAP, was not founded and is not managed by outside counsel in this case. FEI, unlike WAP, did not provide at least $68,000 to a party in this litigation – let alone, a party without whom this litigation would not exist. Even the language recited in WAP's opposition demonstrates that Judge Facciola viewed this issue as a balancing test, stating that the value of such information was "of marginal utility and too far out of proportion to the sensitivity of financial information." Response at 29-30.

Here, it cannot be argued that WAP's financial information concerning Rider is "of marginal utility." But WAP does not address the issues of whether payments to Mr. Rider are improper legally or whether they could impact his standing. WAP's assertion that the underlying documents would merely duplicate information contained in its six-page chart is of no value.[12] The chart itself is internally inconsistent as FEI has proven. Motion at 21. It is inconsistent, moreover, with sworn representations made by plaintiffs in the underlying litigation. Id. Contrary to WAP's assertion, these are *not* minor discrepancies. Response at 33 n.16. The fact that a plaintiff (ASPCA) may or may not have been billed for legal expenses that were diverted, through WAP, to another plaintiff is not trivial. Motion at 21. Rather, it is evidence of the type of conduct that WAP is trying to hide. Such conduct and WAP's efforts to hide it are the very reason that FEI was forced to file this motion to compel.

Tellingly, WAP focuses its argument here on the database that generates its "monthly reports." Neither WAP's opposition brief nor the declaration of Ms. Mink make reference to WAP's financial statements or cell phone bills, both of which heretofore have explicitly been withheld as duplicative and burdensome. See FEI Ex. 35. Similarly, FEI notes that Ms. Mink's declaration only addresses whether WAP's bank statements would provide FEI with "additional information regarding WAP's financial transactions concerning" these issues. It does not declare that the statements would not provide FEI with additional information about the source of such funds. Bank statements, in fact, often identify the sources of funds and the payees of expenditures.

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[12] WAP inaccurately proclaims that the "central premise" of FEI's argument is that "the comprehensive transaction report represents some subjective selection of information by WAP." Response at 33. In fact, the "central premise" of FEI's argument is that WAP, on the basis of its unsubstantiated claim that this report represents all of the information requested, is withholding responsive documents. Motion at 20 ("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.") It is telling that, instead of substantiating its claims of burden and duplication, WAP attempts to divert the Court's attention by mis-representing FEI's "central premise."

Throughout this entire ordeal, WAP has made insincere assertions requiring FEI to jump through hoops to get information to which it is legally entitled. This is a serious issue, and WAP ought to be responding appropriately. FEI has a right to know where the money for Rider is coming from – specifically, whether it is coming from sources involved in this litigation or otherwise affiliated with them. Indeed, since the filing of this motion, plaintiffs have inexplicably noticed the deposition of their own Tom Rider for "preservation" purposes, yet their counsel says he is not ill. WAP's own production raises serious questions about whether or not all donations and sources of funds have been disclosed. At this point, only WAP's full compliance would provide FEI with any reasonable sense that it has all of the necessary documents and information commanded by the subpoena. If those documents no longer exist, WAP should be required to explain why under oath. See FEI Ex. 9 (Instruction 6 of the Subpoena).

For the reasons herein and in its Motion, FEI respectfully requests that WAP be compelled to comply immediately with the subpoena in its entirety. The documents requested cast doubt upon the merits of this lawsuit and could obviate the need for further proceedings. WAP should not be permitted to further delay this discovery.

Dated this 3rd day of October, 2006.

Respectfully submitted,

/s/

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **Reply in Support of Motion to Compel Documents Subpoenaed from the Wildlife Advocacy Project** and its exhibit, were mailed, first class mail, postage prepaid, on this 3rd day of October, 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 3rd day of October, 2006, the foregoing motion and its exhibit 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