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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

PEBBLE LIMITED PARTNERSHIP, Plaintiff, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*, Defendants.	Case No. 3:14-cv-00171-HRH **MEMORANDUM IN SUPPORT OF TIM TROLL'S MOTION TO QUASH NON-PARTY SUBPOENA** **ORAL ARGUMENT REQUESTED PURSUANT TO LOCAL RULE 7.2** **Fed. R. Civ. P. 45(d)(3); Fed. R. Civ. P 26(b)(2)(C)**

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INTRODUCTION

The Federal Advisory Committee Act ("FACA"), 5 U.S.C. App. II, §§ 1–16, "does not apply to every entity whose views may be sought or considered by an agency—vast numbers of private organizations express their views to regulators" every day. *Town of Marshfield v. Fed. Aviation Admin.*, 552 F.3d 1, 5–6 (1st Cir. 2008). Forcing the disclosure of the internal communications and documents of dozens of individuals and entities engaged in public interest advocacy, through communications with each other and with the government, does nothing to establish or disprove that the U.S. Environmental Protection Agency ("EPA") violated FACA. Yet, Pebble Limited Partnership ("PLP") is fishing for precisely this sort of information from more than 60 non-parties to this litigation. *See* Ex. 1 (PLP Notices of Taking Oral Depositions and Serving Subpoenas *Duces Tecum*). At best, this type of discovery is designed to gather information that can be used to gain an unfair advantage over PLP's adversaries in the political arena in the ongoing policy debate over the Pebble Mine. At worst, its aim is to intimidate and bankrupt opponents of the proposed Pebble Mine project. The Federal Rules of Civil Procedure and the First Amendment protect non-parties from this type of invasive and inappropriate discovery.

Tim Troll is a non-party to this litigation. As part of his former employment with The Nature Conservancy ("TNC"), Mr. Troll worked with many other individuals, Native groups, and non-governmental organizations to advocate against the Pebble Mine. In this litigation, PLP has alleged misconduct on the part of EPA pursuant to a federal statute that governs the actions of the federal government. The communications, documents, and emails from a private citizen like Tim Troll cannot speak to whether EPA violated FACA. The production of these documents is wholly irrelevant to PLP's FACA claim and will impinge Mr. Troll's First Amendment rights. PLP's subpoena to Mr. Troll is an abuse of discovery and should be quashed.

BACKGROUND

I. RELEVANT FACTUAL BACKGROUND

PLP has alleged that EPA violated FACA by "establishing" and "utilizing" certain groups for collective advice. Second Am. Compl. ¶ 1-2, Doc. 133. Tim Troll's only connection to this case is that PLP has alleged that he, along with several other individuals and non-profit organizations, was a member of the de facto Anti-Mine Coalition advisory committee. *Id*. at ¶ 31. Mr. Troll's connection to the Pebble Mine is helping to facilitate independent scientific research and distributing information about the potential impacts of the mine on the water and fish resources of Bristol Bay supported by that research. *See* Decl. of Tim Troll in Supp. of Mot. to Quash Non-Party Subpoena ("Troll Decl.") at ¶ 11. Mr. Troll has, in his employment with TNC and The Bristol Bay Heritage Land Trust (the "Land Trust"), advanced the position that the results of scientific research raise serious unanswered questions about the serious environmental risks of the Pebble project. *See id.* at ¶¶ 12, 14.

A. The Efforts to Stop the Proposed Pebble Mine.

For more than a decade, the Pebble Mine has been the focus of controversy and widespread opposition. If built, the Pebble Mine would be one of the world's largest metallic sulfide mines.[1] Bristol Bay is home to the largest sockeye salmon fishery in the world.[2] It supports a 1.5 billion dollar fishing industry.[3] Since the Pebble deposit sits at the headwaters of

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[1] *See* STUART LEAVIT & DAVID CHAMBERS, CTR. FOR SCI. & PUB. PARTICIPATION, COMPARISON OF THE PEBBLE MINE WITH OTHER ALASKA LARGE HARDROCK MINES 1 (2012), *available at* http://ofmpub.epa.gov/eims/eimscomm.getfile?p_download_id=513582.

[2] *See* U.S. ENVTL. PROT. AGENCY, PROPOSED DETERMINATION OF THE U.S. ENVIRONMENTAL PROTECTION AGENCY REGION 10 PURSUANT TO SECTION 404(C) OF THE CLEAN WATER ACT: PEBBLE DEPOSIT AREA, SOUTHWEST ALASKA, at 3-20 n.26 (2014) [hereinafter PROPOSED DETERMINATION], *available at* http://www2.epa.gov/sites/production/files/2014-07/documents/pebble_pd_071714_final.pdf.

[3] *See* GUNNAR KNAPP ET AL., INST. OF SOC. & ECON. RESEARCH, THE ECONOMIC IMPORTANCE OF THE BRISTOL BAY SALMON INDUSTRY 2 (2013), *available at* http://www.iser.uaa.alaska.edu/Publications/2013_04-

two key salmon-supporting watersheds in Bristol Bay, local communities have found themselves at the epicenter of a severe resource conflict.

In response to this threat, numerous Alaska Native Tribes, tribal organizations, commercial and sport fishermen, conservation organizations, hunting and fishing organizations and others have initiated campaigns and other advocacy efforts against the proposed Pebble Mine.[4] These entities have developed individual strategies to stop the Pebble Mine and they have communicated freely with like-minded adversaries of the mine to strengthen their efforts. Their wide-ranging efforts have included divestment campaigns, consumer and industry boycotts, ballot initiatives, and administrative actions, all with the principal goal of stopping the Pebble Mine.

Given this shared interest, many of these efforts have involved communications between a diverse group of entities aligning themselves against the proposed Mine.[5] For example, in

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TheEconomicImportanceOfTheBristolBaySalmonIndustry.pdf.

[4] *See, e.g.*, Our Bristol Bay, The Protection Effort, http://www.ourbristolbay.com/the-bristol-bay-protection-effort.html (last visited Sept. 22, 2015) (listing hundreds of entities including tribes, villages, students, civic groups, commercial fishing groups, chefs, churches, conservation organizations, hunting and fishing groups, retailers, outfitters and publications all opposed to the Pebble Mine); *see also* Nunamta Aulukestai, http://www.nunamta.org/ (last visited Sept. 22, 2015) (Nunamta Aulukestai's Pebble campaign); Trout Unlimited, Save Bristol Bay, http://www.savebristolbay.org/ (last visited Sept. 22, 2015) (Trout Unlimited' s Save Bristol Bay campaign); Stop Pebble Mine, http://www.stoppebblemine.org/ (last visited Sept. 22, 2015) (the Stop Pebble Mine campaign); Renewable Res. Coal., Bristol Bay Pebble Mine, http://www.renewableresourcescoalition.org/pebble-mine (last visited Sept. 22, 2015) (Renewable Resources Coalition's campaign); Bristol Bay United, http://www.bristolbayunited.com/ (last visited Sept. 22, 2015) (Bristol Bay United's campaign); Natural Res. Def. Council, Stop the Pebble Mine, http://www.savebiogems.org/stop-pebble-mine/ (last visited Sept. 22, 2015) (Natural Resource Defense Council's campaign).

[5] *See, e.g.*, Yereth Rosen, *REFILE-Anglo Departure Not the End of Alaska's Pebble Mine, Locals Say*, REUTERS, Sept. 17, 2013, http://www.reuters.com/article/2013/09/18/mining-alaska-pebble-idUSL2N0HD1KW20130918 (last visited Sept. 22, 2015) ("Pebble has inspired some unlikely alliances - sport and commercial fishermen, Native tribes and corporations, political conservatives and environmentalists - all finding common ground against the

2008, Earthworks launched a campaign to boycott gold from the Pebble Mine Project.[6] This was part of a "No Dirty Gold" campaign launched by Earthworks and Oxfam America in 2004.[7] Other groups like Renewable Resources Coalition, Bristol Bay Alliance, and Nunamta Aulukestai ("Nunamta") joined this campaign to get jewelers to take a pledge to not source gold from the Pebble Mine.[8] Over 100 jewelers joined the No Dirty Gold pledge.[9] Several of the organizations involved in this effort have been subpoenaed by PLP, including Tiffany & Co.—one of the larger jewelers to sign the pledge. *See* Ex. 1 at 12-14, 19.

As another example, in 2011, a coalition of groups signed an editorial published in The Guardian.[10] Self-described as "unusual bedfellows," Native leaders, Bristol Bay fishing groups, royal jewelers, conservationists, and sportsmen declared, "[w]e are proud to stand together in our opposition to the proposed Pebble Mine."[11] The group hoped to bring their collective influence to bear on Anglo American's shareholders—the investor that owned 50 percent of the Pebble project. In 2011 and 2012, a coalition of groups, many of whom have been subpoenaed by PLP,[12]

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development.").

[6] *See* Tilde Herrera, *Jeweler Opposition to Bristol Bay Gold Grows*, GREENBIZ, Feb. 14, 2011, http://www.greenbiz.com/blog/2011/02/14/jeweler-opposition-bristol-bay-gold-grows (last visited Sept. 22, 2015).

[7] *Id.*

[8] *See* Our Bristol Bay, The Bristol Bay Protection Pledge, http://www.ourbristolbay.com/the-pledge.html (last visited Sept. 22, 2015).

[9] Earthworks, No Dirty Gold, The Gold Star List: Retailers Who Support the Golden Rules, http://nodirtygold.earthworksaction.org/retailers/the_gold_star_list#.VgB3HBG6dpi (last visited Sept. 22, 2015).

[10] *Coalition to Save Bristol Bay, Alaska*, THE GUARDIAN, Apr. 20, 2011, http://www.theguardian.com/business/2011/apr/21/coalition-to-save-bristol-bay (last visited Sept. 22, 2015).

[11] *Id.*

[12] The groups that ran the advertisements and who have also been subpoenaed include the Natural Resources Defense Council, the National Parks Conservation Association, Nunumta Aulukestai, Bristol Bay Regional Seafood Development Association, Alaska Independent Fishermen's Marketing Association, Earthworks, Renewable Resources Coalition, the National Wildlife Federation, and Trustees for Alaska.

took out full page ads in the Financial Times, targeting Anglo American and Rio Tinto. *See* Exs. 10–12. This effort was successful. Anglo American pulled out of the Pebble venture in 2013[13] and Rio Tinto divested its shares in the Pebble Mine in 2014.[14] Many of the individuals and groups involved in this divestment campaign, including Natural Resources Defense Council, the National Parks Conservation Association, Nunumta, Bob Waldrop, Bristol Bay Regional Seafood Development Association, Alaska Independent Fishermen's Marketing Association, Earthworks, Renewable Resources Coalition, the National Wildlife Federation, and Trustees for Alaska are now accused of participating in the alleged FACA committees and/or are on the list of subpoenaed third parties. *See* Ex. 1 at 10, 19; Second Am. Compl. ¶ 31, Doc. 133.

In 2009, Nunamta and several individuals initiated a lawsuit challenging the way in which the State of Alaska Department of Natural Resources ("DNR") permitted exploration activity at the Pebble project, namely without prior public notice or an assessment of potential environmental impacts.[15] This litigation involved a 10-day trial, multiple experts and witnesses, numerous appeals, and contentious discovery.[16] On May 29, 2015, the Alaska Supreme Court ruled in favor of Nunamta holding that state permits issued to Pebble for exploration activity required public notice and comment pursuant to the Alaska Constitution.[17] Nunamta and

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[13] *See* Juliet Eilperin, *Major Backer of Pebble Mine Project Pulls Financial Support*, WASH. POST, Sept. 16, 2013, http://www.washingtonpost.com/news/post-politics/wp/2013/09/16/major-backer-of-pebble-mine-project-pulls-financial-support/ (last visited Sept. 22, 2015).
[14] *See* Juliet Eilperin, *In another blow to Pebble Mine, Rio Tinto pulls out*, WASH. POST, April 7, 2014, http://www.washingtonpost.com/news/post-politics/wp/2014/04/07/in-another-blow-to-pebble-mine-rio-tinto-pulls-out/ (last visited Sept. 24, 2015).
[15] *See Nunamta Aulukestai v. State of Alaska, Dep't of Natural Res.* (*Nunamta I*), 351 P.3d 1041, 1045 (Alaska 2015).
[16] *Id*. at 1045–50; *see also Alaska Conservation Found. v. Pebble Ltd. P'ship*, 350 P.3d 273 (Alaska 2015).
[17] *Nunamta I*, 351 P.3d at 1064.

Trustees for Alaska—Nunamta's attorneys in the state case—are both targets of PLP's third party discovery. *See* Ex. 1 at 13, 19; Ex. 2 (Trustees for Alaska Subpoena).

In 2010, in yet another effort to stop the Pebble Mine, "six federally recognized Bristol Bay tribal governments requested that EPA initiate a process under Section 404(c) of the [Clean Water Act, 33 U.S.C. § 1344(c),] to protect waters, wetlands, fish, wildlife, fisheries, subsistence, and public uses in the Nushagak and Kvichak River watersheds and Bristol Bay from metallic sulfide mining, including a potential Pebble mine."[18] The six tribal governments were subsequently joined by three additional Bristol Bay tribal governments.[19] Stakeholders, including additional Bristol Bay tribes, the Bristol Bay Native Association, the Bristol Bay Native Corporation, stakeholder groups dependent on the fishery, and elected officials from Alaska and other states all subsequently expressed support for protecting Bristol Bay.[20] As noted in an article,

> [i]n 2010, an unlikely alliance of commercial fishermen, native tribes, and concerned citizens decided that their next best hope for stopping the Pebble Mine was to get the federal government to intervene. Even "Redneck Republicans," as one Alaskan called himself, were concerned that the mine's promise wasn't enough to risk ruining the salmon fishery. The alliance petitioned the U.S. Environmental Protection Agency to conduct a preliminary investigation of the potential ecological impact of a hypothetical large-scale mining operation in Bristol Bay.[21]

In February 2011, in response to these petitions, EPA commenced a scientific assessment in Bristol Bay that produced the Bristol Bay Watershed Assessment, and ultimately resulted in the proposed 404(c) determination.[22] There were several opportunities along the way for the public

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[18] PROPOSED DETERMINATION, *supra* note 2, at 2-4.
[19] *Id.*
[20] *Id.* at 2-5.
[21] Svati Kirsten Narula, *Is Alaska's Pebble Mine the Next Keystone XL?*, THE ATLANTIC, Mar. 14, 2014, http://www.theatlantic.com/politics/archive/2014/03/is-alaskas-pebble-mine-the-next-keystone-xl/284251/ (last visited Sept. 22, 2015).
[22] Press Release, U.S. Envtl. Prot. Agency, EPA Plans Scientific Assessment of Bristol Bay

to provide EPA with comments and over 1 million comments were submitted.[23] Indeed, many of the alleged members of the Anti-Mine Coalition—who are now being subjected to unduly burdensome subpoenas—submitted individual comments to EPA during the appropriate notice and comment periods.[24]

Surveys in the State and the region consistently demonstrate overwhelming opposition to the Pebble Mine.[25] In fact, two ballot measures—one local and one state-wide—have been passed by voters in an attempt to increase scrutiny of the process to allow permitting.[26] The efforts identified above are a few illustrative examples of the diverse coalition of groups and individuals coalescing around the common goal of stopping the Pebble Mine through a variety of different advocacy efforts.

Watershed (Feb. 7, 2011), http://yosemite.epa.gov/opa/admpress.nsf/0/8c1e5dd5d170ad99852578300067d3b3 (last visited Sept. 22, 2015); *see also* PROPOSED DETERMINATION, *supra* note 2, at 2-5 to 2-14.

[23] PROPOSED DETERMINATION, *supra* note 2, at 2-6 tbl. 2-1; *see also id.* at 2-9 (documenting number of comments).

[24] *See, e.g.*, Letter from Tim Troll, Executive Dir., Bristol Bay Heritage Land Trust, to the Office of Envtl. Info., U.S. Envtl. Prot. Agency, *available at* http://www.regulations.gov/#!documentDetail;D=EPA-R10-OW-2014-0505-2974; E-mail from Bob Waldrop to U.S. Envtl. Prot. Agency (Sept. 19, 2014), *available at* http://www.regulations.gov/#!documentDetail;D=EPA-R10-OW-2014-0505-2843; Letter from Robert Heyano, President, Bristol Bay Reg'l Seafood Dev. Ass'n, to U.S. Envtl. Prot. Agency (Sept. 17, 2014), *available at* http://www.regulations.gov/#!documentDetail;D=EPA-R10-OW-2014-0505-1899; Letter from Randall H. Hagenstein, Alaska Dir., The Nature Conservancy, to U.S. Envtl. Prot. Agency (Sept. 16, 2014), *available at* http://www.regulations.gov/#!documentDetail;D=EPA-R10-OW-2014-0505-2913.

[25] *See, e.g.*, Press Release, Bristol Bay United, Poll Finds 62% of Alaskans Oppose Development of the Pebble Mine (June 12, 2014), http://www.bristolbayunited.com/press/press-release-poll-finds-62-of-alaskans-oppose-development-of-the-pebble-mine/ (last visited Sept. 22, 2015); Alex DeMarban, *Poll: 81 Percent of Bristol Bay Shareholders Oppose Pebble*, ALASKA DISPATCH NEWS, Nov. 22, 2011, http://www.adn.com/article/poll-81-percent-bristol-bay-shareholders-oppose-pebble (last visited Sept. 22, 2015).

[26] *See* Sean Doogan, *Minimum Wage, Anti-Pebble Measures Pass Easily*, ALASKA DISPATCH NEWS, Nov. 4, 2014, http://www.adn.com/article/20141104/minimum-wage-anti-pebble-measures-pass-easily (last visited Sept. 22, 2015); Daysha Eaton, *'Save Our Salmon' Initiative Passes in Alaska* (Alaska Pub. Radio Network broadcast Oct. 18, 2011), http://www.npr.org/templates/story/story.php?storyId=141488951 (last visited Sept. 22, 2015).

Many of the individuals and organizations targeted for third party discovery by PLP in this litigation have expressed their opposition to the Pebble Mine and support for action to protect Bristol Bay. PLP has labeled many of these groups and individuals as members of the alleged Anti-Mine Coalition FACA based purely on their First Amendment protected advocacy efforts. Under PLP's theory, public education about the impacts of the proposed Pebble Mine and efforts to build opposition are the criteria for membership in the alleged *de facto* FACA committees and for receiving a subpoena in this case.

B. PLP's Aggressive Discovery Tactics

Last year, PLP assured the court that "facts going to the 'established or utilized' requirements under FACA . . . *are in Defendants' exclusive possession*." *See* PLP Reply in Support of Mtn. for Expedited Discovery, Doc. 64 at 2 (emphasis added). However, since discovery in this case began, PLP has noticed at least 64 non-party subpoenas for documents and 12 non-party subpoenas for deposition testimony. *See* Ex. 1. The subpoenaed non-parties include, among others, Tiffany & Co., Orvis, Patagonia, The Gordon and Betty Moore Foundation, the Pew Charitable Trusts, the American Fisheries Society, Cook Inletkeeper ("CIK"), Alaska Center for the Environment ("ACE"), Wild Salmon Center, and Rio Tinto. *Id*. at 12-14. Counsel for Tim Troll—Trustees for Alaska— is also representing CIK, ACE, and Earthworks all of whom received subpoenas substantively similar to Mr. Troll's subpoena. *See* Ex. 3 (CIK, ACE, and Earthworks Subpoenas); Decl. of Michelle Sinnott in Supp. of Mot. to Quash Non-Party Subpoena ("Sinnott Decl.") at ¶ 2.[27] Trustees for Alaska—a non-profit law firm—was served with a subpoena on August 26, 2015. *See* Ex. 2 (Trustees Subpoena). Several of the subpoenaed third-parties have filed motions to quash because of the inappropriate nature of PLP's subpoenas. *See* Alaska Conservation Foundation and Sam Snyder Mtn. to Quash, Doc.

[27] PLP has since withdrawn Earthworks' subpoena. Sinnott Decl. at ¶ 8.

160 at 2; Ex. 9 (*Shoren Brown v. Pebble Limited Partnership*, Civ. No. MC15-00131RSL, Motion to Quash 3, ECF No. 1 (W.D. Wash., Sept. 8, 2015)).

With over 60 subpoenas to non-parties to this litigation—many of whom have publicly expressed opposition to the Pebble Mine—the extent of PLP's third-party discovery is alarming. Moreover, because PLP has also sought extensive discovery from EPA the necessity of such broad non-party discovery is questionable. On July 15, 2015 PLP served on EPA "101 document requests, many of which have numerous subparts, and which are accompanied by voluminous exhibits." *See* EPA Opposition to Plaintiff's Motion Under Fed. R. Civ. P. 26(b)(2)(A), Doc. 144 at 4. According to EPA, these requests seek "documents about communications between EPA and each and every of the 128 individuals or organizations listed on [one of] plaintiff's exhibits." *Id*. at 4 n.1. EPA criticized PLP for seeking "every document under the sun related to Bristol Bay" instead of "narrowly tailor[ing] its document requests to the limited question of whether EPA 'established or utilized' the alleged advisory committees." *Id*. at 4. In addition, PLP has noticed the deposition for 11 EPA employees and officials. *See* Ex. 1 at 4-6, 10-11.

C. Tim Troll's Subpoena

Tim Troll's involvement with the Pebble Mine was in his capacity as an employee for TNC and the Land Trust. *See* Troll Decl. at ¶ 15. Mr. Troll, among the several others that have been subpoenaed, was involved in the grassroots efforts against the Pebble Mine. *Id.* at ¶¶ 9-14. As a result of his opposition to the Pebble Mine, Mr. Troll was served with a subpoena for the production of documents and deposition testimony. The subpoena contains the following eight extremely broad document requests:

(1) "All Documents relating to the Pebble Mine Project or hardrock mining in Alaska.
(2) All Documents relating to the Clean Water Act in connection with the Pebble Mine Project or hard rock mining issues in Alaska, including all Documents relating to Section 404(c).

(3) All Documents relating to the Bristol Bay Watershed Assessment.
(4) All Documents relating to the Bristol Bay Assessment Team.
(5) All Documents relating to the Intergovernmental Technical Team.
(6) All Documents relating to the May 2010 petition from Native Alaskan Tribes to EPA.
(7) All Documents relating to any meeting with any person, including EPA, other federal and state agencies, or other person regarding the topics in Requests 1-6.
(8) All Communications with any person, including EPA, other federal and state agencies, or other Person, regarding the topes in Requests 1-6."

See Ex. 4 at 8 (Aug. 6, 2015 Tim Troll Subpoena). The subpoena covers a span of eleven years, from January 1, 2004 to December 19, 2014. *See id*. at 5 at Instruction No. 6. The subpoena commands Mr. Troll to sit for a deposition on September 29, 2015, but it does not identify what topics are to be covered at this deposition. *See id.* at 1.

Mr. Troll served timely written objections to this subpoena on August 19, 2015. *See* Ex. 5 (Letter from Michelle Sinnott to Jared Butcher and Linda Bailey re: Tim Troll Written Objections, Aug. 19, 2015). Counsel for Mr. Troll conferred telephonically with counsel for PLP regarding Mr. Troll's objections on August 31, 2015 and September 8, 2015. *See* Sinnott Decl. at ¶¶ 5-6. PLP's counsel attempted to narrow the subpoena down to two requests, but in doing so still sought the same broad categories of information, including all of Mr. Troll's communications with a list of 30 plus individuals and entities regarding seven broad topics. *See* Ex. 6 (Letter from Errol Patterson to Michelle Sinnott re: Tim Troll Subpoena, Aug. 31, 2015).[28] However, this attempt to narrow the subpoena ignored Mr. Troll's overarching objections about his lack of control over potentially responsive documents and the inappropriate nature of the

[28] The second request in Mr. Patterson's letter requests "[a]ll Documents Relating to Meetings or Communications with any of the Persons identified in the attached Appendix A concerning" several different topics including, "EPA actions regarding the [Bristol Bay Watershed Assessment]." *See* Ex. 6 at 1. Mr. Troll's work for TNC and the Land Trust focused on research within the Bristol Bay region and was connected to the proposed Pebble Mine. *See* Troll Decl. at ¶¶ 10-11. As a result, all of Mr. Troll's communications with the 30 plus individuals and entities listed in Appendix A are arguable covered by this "narrowed" request.

subpoena. *See* Ex. 5 at ¶ 1-4, 8. PLP's counsel agreed to postpone Mr. Troll's deposition for thirty days to allow sufficient time for Court resolution of the dispute. *See* Sinnott Decl. at ¶ 6.

II. STATUTORY FRAMEWORK

Discovery must be "relevant to *any party's claim or defense*." Fed. R. Civ. P. 26(b)(1) (emphasis added). PLP alleges that (1) EPA *utilized* two de-facto FACA committees (the Anti-Mine Coalition and the Anti-Mine Scientist group) and (2) EPA *established and utilized* two additional de-facto FACA committees (the Anti-Mine Assessment Team and the Intergovernmental Technical Team Subgroup).[29] Thus, PLP's discovery request must be "relevant" to demonstrating that EPA "utilized" or "established" the alleged FACA committees in question.

In the Order on the Motion to Dismiss, this Court held that an advisory committee is "established" "only if it is actually formed by the agency" and it is "utilized" if it is "under the actual management or control of the agency." Order on Motion to Dismiss, Doc. 128 at 11 (citing *Byrd v. U.S. Envtl. Prot. Agency*, 174 F.3d 239, 245 (D.C. Cir. 1999); *Town of Marshfield*, 552 F.3d at 6). In addition, the Court held that the committee must be established or utilized "for *the purpose* of obtaining advice or recommendations for the federal government." Order on Motion to Dismiss, Doc. 128 at 11-12 (emphasis added) (citing *Sofamor Danek Group, Inc. v. Gaus*, 61 F.3d 929, 936 (D.C. Cir. 1995)).

"Recognizing the Pandora's Box that could erupt if FACA were construed broadly," *Natural Res. Def. Council v. Envtl. Prot. Agency*, 806 F. Supp. 275, 277 (D.D.C. 1992), the

[29] Second Am. Complaint, Doc. 133 at ¶¶ 156-215 (Count 1, Anti-Mine Coalition; Court 2, Anti-Mine Scientist; Count 3, Anti-Mine Assessment Team and the Intergovernmental Technical Team); Order on Motion to Dismiss, Doc. 128 at 18 ("Those portions of plaintiff's FACA-based claims in Counts One and Two which are based on allegations that defendants 'establish' the Anti-Mine Coalition and the Anti-Mine Scientists are dismissed with prejudice. Plaintiff's Count Four is also dismissed with prejudice.").

Supreme Court in *Public Citizen v. U.S. Department of Justice* adopted a restrictive view of the statute so that FACA would not extend to just "any group of two or more persons" from which an "agency seeks advice." 491 U.S. 440, 452 (1989). As a result, "participation by an agency or even an agency's 'significant influence' over a committee's deliberations does not qualify as management and control such that the committee is utilized by the agency under FACA." *Byrd*, 174 F.3d at 246 (quoting *Wash. Legal Found. v. U.S. Sentencing Comm'n*, 17 F.3d 1446, 1451 (D.C. Cir. 1994)). In addition, an "entity formed privately" that receives "no federal funds and [is] not amenable to the strict management by agency officials . . . cannot easily be said to have been utilized by a department or agency." *Aluminum Co. of Am. v. Nat'l Marine Fisheries Serv.*, 92 F.3d 902, 905 (9th Cir. 1996) (alteration in original) (quoting *Pub. Citizen*, 491 U.S. at 457–58) (internal quotation marks omitted). The mere "fact that a federal agency obtains information or advice from a committee, formally or informally, does not automatically classify the committee as a federal advisory committee subject to FACA regulations, nor does it indicate that the agency 'utilizes' the committee." *Wash. Toxics Coal. v. U.S. Envtl. Prot. Agency*, 357 F. Supp. 2d 1266, 1273 (W.D. Wash. 2004) (quoting *Pub. Citizen*, 491 U.S. at 453).

Because actual establishment or strict management and control by the agency is required to demonstrate the existence of a FACA committee, the type and extent of discovery "must be limited." *See, e.g.*, *Int'l Brominated Solvents Ass'n v. Am. Conference of Governmental Indus. Hygienists, Inc.*, No. 5:04 CV 394 (DF), 2005 WL 1220850, at *5 (M.D. Ga. May 20, 2005). In *Citizens for Responsibility and Ethics in Washington v. Leavitt* (*Citizens for Responsibility*), the District of Columbia District Court held that because "[t]he sole question at issue [in a FACA case] is whether [the agency] solicited the collective advice of expert[s] . . . . The identities of the meeting attendees and their organizational attachments, their method of selection, the specific

advice they provided, and how [the agency] used or will use this advice is irrelevant." 577 F. Supp. 2d 427, 434 (D.D.C. 2008).

The Supreme Court in *Cheney v. U.S. District Court for the District of Columbia* noted that discovery requests in a FACA case are inappropriate when "[t]hey provide respondents all the disclosure to which they would be entitled in the event they prevail on the merits [of their FACA claim], and much more." 542 U.S. 367, 388 (2004). Indeed, courts have recognized that to require disclosure of "the details of [] meetings in response to plaintiff's requests for discovery would effectively provide plaintiff with the very relief it seeks on the merits." *See, e.g.*, *Citizens for Responsibility & Ethics in Wash. v. Leavitt*, No. CIV.A.08-0576 ESH, 2008 WL 4356935, at *6 (D.D.C. Sept. 22, 2008). Thus, PLP is only entitled to the specific advice provided (if any), how the agency used that advice, and details of meetings information *if* it succeeds on the merits of its claims. *See Animal Legal Def. Fund, Inc. v. Shalala*, 104 F.3d 424, 430–31 (D.C. Cir. 1997) (allowing discovery to determine what documents plaintiffs were entitled to "access under FACA" after establishing a FACA committee existed); *see also Citizens for Responsibility*, 577 F. Supp. 2d at 434.

ARGUMENT

Federal Rule of Civil Procedure 45(d)(3)(A) requires the Court to quash or modify a subpoena if (1) it "requires disclosure of privileged or other protected matter, if no exception or waiver applies" or (2) it "subjects a person to undue burden."

The subpoena served on Tim Troll is inappropriate and must be quashed pursuant to Federal Rule of Civil Procedure 45(d)(3)(A) because (1) the subpoena seeks irrelevant information, (2) all the evidence necessary to establish that EPA violated FACA—i.e., that EPA established directly or maintained such strict management and control as to utilize an illegal FACA committee—can be obtained from the federal defendants, and (3) enforcing the subpoena

would infringe on Mr. Troll's First Amendment rights. In addition, the subpoena should be quashed because it demands production of documents over which Mr. Troll, in his individual capacity, does not have control.

It is improper for PLP to drag Mr. Troll, along with countless other non-parties, into this case with burdensome discovery requests. At most, the discovery will only lead to unnecessary, cumulative, and duplicative information. Moreover, instead of advancing the claims in this litigation, discovery will penalize and chill the exercise of fundamental First Amendment rights held by Mr. Troll and other non-parties.

I. THE SUBPOENA SHOULD BE QUASHED BECAUSE ANY RELEVANT DISCOVERY IN THIS CASE SHOULD BE OBTAINED FROM EPA, NOT THIRD-PARTIES

A. The Subpoena Seeks Irrelevant Information That is Outside the Scope of Discovery.

The scope of documents and testimony that can be sought from non-parties is the same scope of discovery generally allowed under Federal Rule of Civil Procedure 26—it must be "relevant to any party's claim or defense." In the only case that addresses the relevancy of non-party discovery in a FACA case, *Wyoming v. U.S. Department of Agriculture* (*Wyoming II*), 208 F.R.D. 449 (D.D.C. 2002), the court quashed several subpoenas against non-parties because the information sought was irrelevant due to the unique nature of a FACA claim.[30] It is an "inherently undue burden" to compel the production of irrelevant information. *See Jimenez v.*

[30] The Wyoming District Court did allow discovery against the intervenors in the underlying litigation. *Wyoming v. U.S. Dep't of Agric.*, 239 F. Supp. 2d 1219, 1244–45 (D. Wyo. 2002), *vacated*, 414 F.3d 1207 (10th Cir. 2005). However, this decision has been expressly vacated. *Wyoming v. U.S. Dep't of Agric.*, 414 F.3d 1207, 1213 n.7 (10th Cir. 2005) ("Although the possibility that these rulings will have any preclusive effect in future litigation is slight, because the entire case is moot and the WOC has specifically requested vacatur, this court deems it appropriate to grant WOC's request to vacate these rulings of the district court."). In addition, non-parties are entitled to greater protection from discovery abuse than are intervenors. *See, e.g.*, *Dart Indus. Co. v. Westwood Chem. Co.*, 649 F.2d 646, 649 (9th Cir. 1980) ("While discovery is a valuable right and should not be unnecessarily restricted, the 'necessary' restriction may be broader when a nonparty is the target of discovery." (citation omitted)). Mr. Troll has not intervened in this case.

City of Chicago, 733 F. Supp. 2d 1268, 1273 (W.D. Wash. 2010). A subpoena must be quashed or modified if it "subjects a person to an undue burden." Fed. R. Civ. P. 45(d)(3)(A)(iv). The subpoena to Mr. Troll imposes an undue burden because it is irrelevant, unreasonably cumulative, and should not be allowed.

The litigation underlying *Wyoming II* had multiple claims, including that the U.S. Department of Agriculture ("USDA") established and utilized a *de facto* FACA committee when creating the Roadless Regulations. 208 F.R.D. at 451–52. Wyoming issued non-party subpoenas to (1) United States Public Interest Research Group, (2) Heritage Forest Campaign, and (3) Earthjustice Legal Defense Fund. *Id.* at 451. Wyoming moved to compel, alleging that the non-party witnesses "provided critical research, data, legal memoranda, advice, and recommendations to the USDA regarding the development of the Roadless Regulations." *Id*. at 452.

In denying the motion to compel, the court explained that "[t]he threshold issue before the court is whether the information Wyoming seeks is *relevant* to its claim that the defendants violated the terms of the FACA." *Id*. at 453 (emphasis added). The Court held that the documents requested from the third parties were "irrelevant," explaining that:

> [T]he government alone can establish an advisory committee under 5 U.S.C. App. 2 § 3 and . . . "utilized" [is defined] so narrowly as to admit only those groups into the FACA statutory scheme that are under strict management or control of the government agency. Thus, the non-party witnesses correctly point out that the requested documents fall outside the scope of discovery needed for Wyoming to prove its claim that the *government* violated the FACA.

Id. at 454–55 (citations omitted). As a result, the court found that the discovery sought was "obtainable from another source that is more convenient, less burdensome, and less expensive." *Id*. at 454. In other words, any relevant discovery was available from the government *party* and it was unduly burdensome to request irrelevant or duplicative information from *non-party* witnesses. *See id*.

Mr. Troll's subpoena should be quashed because it seeks, in part, information that is remarkably similar to the type of documents the court in *Wyoming II* determined to be irrelevant to a FACA claim. In *Wyoming II*, the subpoenas sought "a broad range of documents" including, for example, "all documents the non-party witnesses possess involving the Roadless Regulations," and "all documents the non-party witnesses sent or received about the Roadless Regulations to or from any member of the USDA, the Forest Service, the Council on Environmental Quality," and other outside non-profits. *Id.* at 452. Here, PLP's subpoena seeks, for example, "[a]ll Documents relating to the Pebble Mine Project" and "[a]ll Documents relating to any Meeting with any Person, including the EPA . . . regarding" the Pebble Mine Project, the Bristol Bay Watershed Assessment, and several other equally broad topics. *See* Ex. 4 at 8. PLP's attempt to narrow the request still sought all communications on seven broad topics with more than 30 individuals and non-governmental entities. *See* Ex. 6 at 1 and 5 (Appendix A). As a result, the Court should similarly quash the subpoena against Mr. Troll because it seeks irrelevant information.

Moreover, PLP's FACA allegations depend entirely on the nature and extent of *EPA's control* over the alleged FACA committees, and thus any relevant discovery in this case should be in the hands of EPA. This Court summarized PLP's basic allegations that EPA established or utilized *de facto* FACA committees as follows: "EPA set the agendas for the meetings," "EPA personal chaired numerous meetings," "EPA personnel . . . routinely initiated and requested follow-up meetings," "EPA solicited the views of the Coalition members and actively organized with them," EPA received "group advice and recommendations through white papers, memos, and presentations," and "EPA personal also co-drafted certain memos with" alleged committee members. Order on Motion to Dismiss, Doc. 128 at 12-14. The focus of PLP's allegations is on

EPA action. Each of these allegations can be proved or disproved solely by reference to information in the custody of EPA. If PLP is unable to find support for the existence of any of the alleged FACA committees in EPA's files, then no amount of fishing in Tim Troll's files is going to remedy that deficiency.

Even if PLP could somehow establish EPA management and control by trolling through documents and information in the hands of a public citizen, there is no conceivable reason for PLP to seek information about Mr. Troll's communications, activities, and meetings with other public citizens and non-governmental groups. Neither Mr. Troll's subpoena nor the subsequent letter purporting to narrow the subpoena limits the requests to communications with EPA. *See* Ex. 4 at 8 (e.g."[a]ll Documents relating to the Pebble Mine Project or hard rock mining issues in Alaska"); Ex. 6 at 1 (e.g. "[a]ll Documents Relating to Meetings or Communications with any of the Person identified in the attached Appendix A," which includes over 30 individuals and non-governmental entities). This type of information has absolutely no relevance in this case and should not be allowed.

B. Any Relevant Documents in Mr. Troll's Possession Are Duplicative of Discovery That Can Be Obtained from EPA.

If Mr. Troll had any documents relevant to PLP's FACA claims, those documents would be duplicative of information that is obtainable from EPA—a party to this litigation. The Court "must limit the frequency or extent of discovery" if it "is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive." Fed. R. Civ. Pro. 26(b)(2)(C); *see also Wyoming II*, 208 F.R.D. at 452.[31] A court should "prohibit a party from obtaining discovery from a non-party if that same

[31] Federal Rule of Civil Procedure 26(b)(2)(C) allows the court to "on its own" limit the frequency or extent of discovery. Given the sheer scope of non-party discovery that PLP is attempting in this case, a broader order that limits the extent of third-party discovery may be

information is available from another party to the litigation." *Amini Innovation Corp. v. McFerran Home Furnishings, Inc.*, 300 F.R.D. 406, 410 (C.D. Cal. 2014) (quoting *Rocky Mountain Med. Mgmt., LLC v. LHP Hosp. Group*, No. 4:13-cv-00064-EJL, 2013 WL 6446704, at *4 (D. Idaho Dec. 9, 2013)). If plaintiffs have not demonstrated that "they attempted to obtain documents from the defendant in an action prior to seeking the documents from a non-party, a subpoena duces tecum places an undue burden on a non-party. *Soto v. Castlerock Farming & Transp., Inc.*, 282 F.R.D. 492, 505 (E.D. Cal. 2012). Mr. Troll's subpoena should be quashed because any potentially responsive *relevant* information is available from EPA.

There is no indication that PLP will be precluded from seeking the relevant discovery from EPA that it needs to litigate this case. In fact, as this Court knows, PLP has already sought a significant number of documents from EPA under the Freedom of Information Act ("FOIA"). 5 U.S.C. § 552; *see Pebble Ltd. P'ship v. Envtl. Prot. Agency*, Civ. No. 3:14-cv-00199-HRH (D. Alaska). In addition, PLP has noticed depositions for 11 current EPA officials and at least 2 former EPA employees. *See* Ex. 1 at 4-6, 10-11; Order on Motion for Subpoena, Doc. 155 (order granting PLP request to subpoena former EPA employee Phil North). The Court recently noted that a former EPA employee Phil North "may be the only person within EPA capable of shedding meaningful light upon whether or not unauthorized advisory committees were create or utilized." Order on Motion for Subpoena, Doc. 155 at 2. PLP has also served EPA with "101 document requests." *See* EPA Opposition to Plaintiff's Motion Under Fed. R. Civ. P. 26(b)(2)(A), Doc. 144 at 4. Given the extent of PLP's current outstanding discovery against EPA, it is extremely unlikely that Mr. Troll can provide anything new and relevant. As a non-

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necessary and prudent. *See* Ex. 1.

party to this litigation, Mr. Troll should not be forced to expend the time and resources to produce cumulative evidence.

II. THE SUBPOENA MUST BE QUASHED BECAUSE IT INFRINGES ON MR. TROLL'S FIRST AMENDMENT RIGHTS.

The irrelevant nature and broad scope of the documents requested by Mr. Troll's subpoena highlights the unspoken and impermissible goal of non-party discovery in this litigation: harassment of those opposed to the Pebble Mine. Mr. Troll was, and continues to be, involved in public advocacy efforts fighting against the Pebble Mine. *See* Troll Decl. at ¶¶ 9-14. As part of these efforts, Mr. Troll conducted First Amendment-protected activities, such as associating with other groups to develop positions on the controversial mine and planning and implementing different ways to advocate that position to others, including the federal government. *Id*. at ¶¶ 16-20. The information sought by PLP's subpoena goes to the heart of Mr. Troll's participation in this effort to stop the Pebble Mine.

The unfettered "freedom to associate with others for the common advancement of political beliefs and ideas lies at the heart of the First Amendment." *Perry v. Schwarzenegger*, 591 F.3d 1147, 1152 (9th Cir. 2009). The Supreme Court has recognized time and time again that:

> An individual's freedom to speak, to worship, and *to petition the government* for the redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed.

Roberts v. U.S. Jaycees, 468 U.S. 609, 622 (1984) (emphasis added); *see also Nat'l Ass'n for the Advancement of Colored People v. Alabama*, 357 U.S. 449, 460 (1958) ("Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association."). Thus, when "discovery would have the practical effect of discouraging the exercise of First Amendment associational rights, the party seeking such discovery must

demonstrate a need for the information sufficient to outweigh the impact on those rights." *Perry*, 591 F.3d at 1152.[32] In *Wyoming II*, the court quashed non-party subpoenas in a FACA case, in part, because of First Amendment concerns. 208 F.R.D. at 454–55 (explaining 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 a group wants to keep confidential").

To establish a First Amendment privilege, the non-party must demonstrate that "enforcement of the discovery requests will result in (1) harassment, membership withdrawal, or discouragement of new members, or (2) other consequences which objectively suggest an impact on, or 'chilling' of, the members' associational rights." *Id*. at 1160. The burden then shifts to the requesting party to demonstrate, among other things, that "the information sought is highly relevant to the claims or defenses in the litigation," the request is "carefully tailored to avoid unnecessary interference with protected activities," and the information is "otherwise unavailable." *Id*. at 1161.

A. Compliance with the Subpoena Will Have a Chilling Effect on Mr. Troll and Others Involved in the Advocacy Efforts Against the Pebble Mine.

In *Perry v. Schwarzenegger*, the Ninth Circuit had "little difficulty concluding that disclosure of internal campaign communications *can* have [a chilling effect] on the exercise of protected activities" and thus, the Court prevented discovery into those matters. *Id*. at 1162 (emphasis in original). The Court explained that "[i]n addition to discouraging individuals from joining campaigns, the threat that internal campaign communications will be disclosed in civil litigation can discourage organizations from joining the public debate over an initiative." *Id.* at 1162 n.8. An important aspect of "the right to associate with others to advance one's shared

[32] A First Amendment privilege objection applies to discovery orders "even if all of the litigants are private entities." *Perry*, 591 F.3d at 1160 n.5.

political beliefs is the right to exchange ideas and formulate strategy and messages, and *to do so in private*." *Id.* at 1162–63 (emphasis added).

PLP's complaint takes legitimate First Amendment protected activity and labels it a FACA committee. *See supra* Background Sec. I.A. This sets a very dangerous precedent. Indeed, courts have warned that FACA "does not apply to every entity whose views may be sought or considered by an agency—vast numbers of private organizations express their views to regulators" every day. *Town of Marshfield*, 552 F.3d at 5–6. If a public citizen or a non-profit organization was subject to a subpoena in a FACA case for every instance in which they advocated a particular position to the federal government, the number of individuals and groups willing to petition the government for redress on important issues would certainly diminish.

Mr. Troll's work relating to the Pebble project was in the context of his participation as part of the larger effort to stop the Pebble Mine. *See* Troll Decl. at ¶¶ 9–14. Mr. Troll is an advocate. His ability to do his job depends on his ability to freely communicate, associate, and organize with others on controversial issues, like the Pebble Mine. *Id.* at ¶¶ 16–19. Indeed, a diverse group of individuals and organizations have coalesced around the common goal of stopping the Pebble Mine. *See supra* Background Sec. I.A. Up until this point these groups have communicated freely amongst themselves in order to strengthen both their individual and coordinated advocacy efforts. *Id.* If Mr. Troll was forced to hand over his internal communications with his colleagues to the organization that his advocacy efforts targeted, he would not continue to communicate with others as freely and openly. *See* Troll Decl. at ¶¶ 17–20. Rather, Mr. Troll would have to constantly consider whether his potential communications might be disclosed in discovery. *Id*. For example, one important aspect of Mr. Troll's advocacy work involved communicating with scientists. *Id*. at ¶ 20. He engaged several scientists "to

pursue lines of inquiry to help determine the risks associated with the development of the Pebble Mine." Mr. Troll would have "serious doubts" about undertaking such advocacy efforts in the future if he knew that such efforts would be subject to discovery. *Id*. Other individuals and organizations that also advocated against the Pebble Mine have expressed similar First Amendment concerns if compliance with PLP's subpoenas is forced. *See e.g*, Exhibit C to ACF and Sam Snyder Joint Mot. to Quash Pls. Subpoenas, Doc. 160-3 at ¶ 14 ("The organization will be less willing to engage in free and open communications internally and with its grant recipients and conservation partners knowing that these communications may be disclosed to the very entities whose actions are being opposed."); Ex. 7 at ¶ 18 (Shoren Brown Decl. in Supp. of Mot. to Quash) ("If I am forced to produce my non-public communications regarding my expression of views on matters of public policy and causes that are important to me, it will negatively impact how I participate and communicate in such activities in the future and make me think twice about getting involved at all."). As a result, Mr. Troll's First Amendment rights, as well as others who he worked with, will be curtailed if he is forced to comply with the subpoena.

B. PLP Cannot Demonstrate A Compelling Need For This Information.

PLP "must show that the information sought is highly relevant to the claims or defenses in the litigation," which is "a more demanding standard of relevance than that under Federal Rule of Civil Procedure 26(b)(1)." *Perry*, 591 F.3d at 1161. As described above, PLP cannot even demonstrate that the requested documents are relevant under the basic discovery standard let alone demonstrate that the subpoena requests "highly relevant" information. *See supra* Argument Sec.I. For that reason, PLP cannot overcome the First Amendment privilege and the subpoena should be quashed on that basis.

III. THE SUBPOENA MUST BE QUASHED BECAUSE MR. TROLL DOES NOT HAVE CONTROL OVER THE REQUESTED DOCUMENTS.

Any relevant and non-privileged documents that are potentially responsive to Mr. Troll's subpoena are work-related documents that he does not have the legal authority to release. Rather, all of the potentially responsive documents belong to his former employer, TNC or his current employer, the Land Trust. Because Mr. Troll was subpoenaed in his individual capacity these documents are not his to release.

"Control is defined as the legal right to obtain documents upon demand." *United States v. Int'l Union of Petroleum & Indus. Workers, AFL–CIO*, 870 F.2d 1450, 1452 (9th Cir. 1989). "[R]ecords in the possession of a former employer are further removed from the control of a former employee." *Bryant v. Armstrong*, 285 F.R.D. 596, 607 (S.D. Cal. 2012); *see also Lowe v. District of Columbia*, 250 F.R.D. 36, 38 (D.D.C. 2008) ("Former employees of government agencies do not have "possession, custody, or control" of documents held by their former employers."). In addition, a current employee subpoenaed in his individual capacity cannot produce his employer's documents in response to a subpoena. *See, e.g., Learning Connections, Inc. v. Kaufman, Englett & Lynd, PLLC*, 280 F.R.D. 639, 639–40 (M.D. Fla. 2012) (granting a protective order for subpoena issued to a current employee in an individual capacity because the records sought belonged to her employer); *Ghawanmeh v. Islamic Saudi Acad.*, 274 F.R.D. 329, 332 (D.D.C. 2011) ("Plaintiff's effort to have these employees enter their employer's office and remove the employer's records, thereby engaging in an act of theft, is an attempted abuse of the Court's processes.").

Mr. Troll did not do any Pebble related advocacy in his personal capacity. *See* Troll Decl. at ¶ 15. Mr. Troll was employed at TNC from February 2004 to March 31, 2012 and has been the full-time executive director of the Land Trust since April 1, 2012. *Id.* at ¶¶ 2–3. All of Mr.

Troll's efforts in relation to the Pebble Mine were in the capacity of his employment with either TNC or the Land Trust. *Id*. at ¶¶ 9–15. Thus, any documents responsive to the subpoena are work-related documents that belong to either TNC or the Land Trust. Because these documents are not Mr. Troll's documents he risks potentially losing his current employment or even legal liability if he produces them to PLP. *See, e.g.*, *O'Day v. McDonnell Douglas Helicopter Co.*, 79 F.3d 756, 762 (9th Cir. 1996) (determining that employee's unauthorized taking of employer's documents—even if gathered to preserve evidence for a discrimination suit—justified employee's discharge); *Harry Winston, Inc. v. Kerr*, 189 F.R.D. 73, 75 (S.D.N.Y. 1999) (involving a situation where an employer sued an employee for misappropriation, among other things, for releasing documents and other information); *State v. Saavedra*, 117 A.3d 1169, 1173 (N.J. 2015) (employee charged with theft for taking hundreds of documents from employer).

PLP understands that Mr. Troll's efforts to expose the environmental risks of the Pebble Mine were within his employment at TNC. In fact, the Complaint identifies Mr. Troll as an alleged member of the Anti-Mine FACA committee in his capacity as an employee with TNC. *See* Second Amended Complaint, Doc. 133 at ¶ 31 (listing alleged members of the Anti-Mine Coalition as "The Nature Conservancy and at least one of its members, Tim Troll"). PLP originally tried to serve Mr. Troll at TNC and directed the subpoena to Mr. Troll as an employee of TNC. *See* Ex. 10 (First Subpoena issued to Tim Troll). Moreover, during the meet and confer process PLP's counsel identified several examples of communications in an attempt to highlight why Mr. Troll was subpoenaed. *See* Ex. 6 at 2. Most of these examples identify Mr. Troll as "TNC's Tim Troll" and "TNC's Troll." *Id*. The appropriate avenue for PLP to seek to obtain documents related to Mr. Troll's work with TNC is from TNC. Indeed, PLP has already issued a subpoena to TNC. *See* Ex. 1 at 6.

CONCLUSION

"Although [t]he purpose of discovery is to provide a mechanism for making relevant information available to the litigants, the spirit of the rules is violated when advocates attempt to use discovery tools as tactical weapons rather than to expose the facts and illuminate the issues." *Lewis v. Donley*, No. 3:06-CV-00053-JWS, 2009 WL 2176123, at *2 (D. Alaska July 22, 2009) (quoting Fed. R. Civ. P. 26, advisory committee notes to 1983 amendments) (internal quotation marks omitted). The extensive non-party discovery sought by PLP is unnecessary for litigation of an alleged FACA violation. Mr. Troll's subpoena is just one example of countless public citizens and non-governmental organizations being subjected to PLP's tactical use of discovery. The legal question in this case is whether EPA established or utilized several alleged FACA committees. The documents and testimony PLP seeks from Mr. Troll are not relevant to this question. For this reason, and for the others explained above, the Court should quash this subpoena.

Respectfully submitted this 24th day of September, 2015.

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CERTIFICATE OF SERVICE

I certify that on September 24, 2015, I caused a copy of **TIM TROLL'S MOTION TO QUASH NON-PARTY SUBPOENA and MEMORADUM IN SUPPORT OF TIM TROLL'S MOTION** to be electronically filed with the Clerk of the Court for the U.S. District Court of Alaska using the CM/ECF system, which will send electronic notification of such filings to the attorneys of record in this case, all of whom are registered with the CM/ECF system.

/s/ Michelle Sinnott
Michelle Sinnott