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U.S. DISTRICT COURT
DISTRICT OF UTAH

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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

World Wide Association of Specialty
Programs, a Utah Corporation,

Plaintiff,

v.

PURE, Inc., PURE Foundation, Inc.
Sue Scheff, and Does I through 10,

Defendants.

**REPLY MEMORANDUM TO PLAINTIFF'S
: MEMORANDUM IN OPPOSITION TO
) MOTION TO QUASH SUBPOENAS
AND MEMORANDUM IN OPPOSITION TO
) PLAINTIFF'S CROSS MOTION TO
: ENFORCE SUBPOENAS AND REQUEST
) FOR ATTORNEYS FEES**

Case Number: 2:02-cv-00010PGC
Judge Paul G. Cassell

COMES NOW the Defendant, PURE, Inc. ("PURE"), by and through counsel and hereby respectfully submits its Reply Memorandum to Plaintiff's Memorandum in Opposition to Motion to Quash Subpoenas which Plaintiff served on programs to which the Defendant, PURE, refers and maintains a close business relationship. In as much as these subpoenas request the production of documents in which PURE has a personal right and also a privacy interest, PURE has standing to bring a Motion to Quash these

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Subpoenas and such a motion is proper because the scope of these subpoenas is over broad, the material requested is irrelevant and it invades the right and privacy of PURE.

1. **PURE HAS A PERSONAL RIGHT IN THE DOCUMENTS REQUESTED BY THE SUBPOENA DUCES TECUM AND THESE DOCUMENTS REQUEST CONFIDENTIAL COMMERCIAL INFORMATION. THEREFORE PURE HAS STANDING TO OBJECT TO THE SUBPOENAS.**

PURE clearly has standing to move to quash the Plaintiff's subpoenas to the non party witnesses in this case because the subpoenas command the production of documents in which PURE has a personal right to be protected and the documents requested are of a private and confidential nature. When a party has a personal right with respect to subpoenaed records, this right gives it standing to move to quash a subpoena directed to a third party. See Transcor Inc. v. Furney Charters, Inc. 212 F.R.D. 588, 591 (D.Kan. 2003)

The cases cited by the Plaintiff actually support PURE's assertion of standing to object to and to move to quash the subpoenas served on the non party witnesses. In Transcor the court found that a Defendant, Furney Charters, had a personal right with respect to its bank account records at a third party banks and that this right gave it standing to move to quash the subpoenas. Id. Broadcourt Cap Corp. v. Flagler Securities Inc. 149 F.R.D.. 626, 628 (D.Colo. 1993) makes it clear that the historical rule that only the served party could object to a subpoena has been modified and that "the court protects all persons

from undue burden imposed by the use of the subpoena power ... [and] there is little doubt that the court has the power and duty to examine all appropriate issues dealing with persons effected by the subpoena" In Broadcourt the court allowed a defendant and a third party to object to subpoenas served by the Plaintiff on another third party. In Windsor v. Martindale 175 F.R.D. 665, 668 (D.Colo. 1997) the court did not grant a defendant's motion to quash a subpoena served on third parties because the defendant failed to show any claim privilege or other legal basis for the denial. Despite the finding that the movants did not have standing in Windsor the court nevertheless did evaluate the relevancy the burden of the subpoenas noting that the court "has inherent power to protect anyone from oppressive use of process" Id at 670.

PURE has demonstrated that it has a personal right related to the information requested in the Subpoena Duces Tecum in as much as it commands the production of documents related to PURE's business transactions with third parties and correspondence between the third party and PURE, its employees or others who are associated with or have done work for PURE. Therefore it is clear that PURE has proper standing to move to quash the subpoenas served by the Plaintiff.

**II. THE PROGRAMS THAT WERE SERVED WITH
SUBPOENAS DUCES TECUM WERE JUSTIFIED IN
THEIR REFUSAL TO COMPLY WITH THE IMPROPER
SUBPOENAS.**

After being served with the Subpoena Duces Tecum several of the directors of those programs contacted the Defendant PURE and its attorneys to voice concerns regarding the Subpoenas Duces Tecum and the documents that were commanded to be produced. PURE and its attorneys informed the programs that PURE was in the process of preparing an objection to the subpoenas and a Motion to Quash. As indicated by the Certificate of Service on PURE's Motion to Quash the motion and memorandum in support were sent to the programs that were served with the subpoenas. Due to PURE's objection to the subpoenas and the Motion to Quash the programs were justified in failing to and refusing to comply with the subpoenas until further notice from the court on these issues. Rule 45(c)(2)(b) of the Federal Rules of Civil Procedure mandates that if a written objection is served then the party serving the subpoena shall not be entitled to inspect and copy the materials. Therefore it is not appropriate for the programs to produce any material until the court has an opportunity to rule on the motion.

III. PURE'S OBJECTION TO THE SUBPOENAS IS PROPER ACCORDING TO LAW AND THEREFORE WWASP'S REQUESTS FOR ATTORNEYS FEES IS INAPPROPRIATE.

PURE's Motion to Quash is appropriate according to case law and therefore the Motion to Quash should be granted and therefore there is no basis for the Plaintiff's requests for Attorneys Fees. Miera v. Dairyland Insurance Co. 143 F.3d 1337,1342 (10th Cir. 1998) makes it clear that sanctions are only appropriate when an attorney is "cavalier",

"bent on misleading the court", "intentionally acts without a plausible basis" or when "the entire course of the proceedings was unwarranted". The court also states that section 1927 is penal in nature and requires bad faith and that therefore the award should be made "only in instances evidencing serious and standard disregard for the orderly process of justice." Id. Because PURE made a proper objection to the Subpoenas and PURE's objections can be supported by law, the request for attorney fees is inappropriate and should be denied.

a. **PURE'S Objection To The Subpoenas Is Proper Because The Subpoenas Request An Overly Broad Production Of Irrelevant And Confidential Documents.**

The Subpoenas Duces Tecum served by the Plaintiff do not comply with the rules governing discovery. Although Rule 45 of the Federal Rules of Civil Procedure does not include relevance as an enumerated reason for quashing a subpoena "it is well settled, however that the scope of discovery under a subpoena is the same as the scope of discovery under Rule 26(b) and Rule 34" and that courts must examine the requests in a subpoena duces tecum to determine if that information is overly broad or seeking irrelevant information. Transcor, Inc. 212 F.R.D. at 591. In the Subpoena served by the Plaintiff, the Plaintiff requests information that is clearly overly broad and not relevant. The Plaintiff asserts that it needs the documents requested in numbers 1-4 to demonstrate that PURE sends "significantly more referrals to more programs which pay than to those that do not." (See Plaintiff's Memorandum in Opposition at 4) Sue Scheff has freely admitted that PURE

receives money for referrals she has made to programs. This information, however, has nothing to do with an issue of the lawsuit related to any claim or defense of the Plaintiff or Defendant. Whether PURE sends more referrals to programs that pay referral fees is not at issue in this case. The Plaintiff's argument that the documents requested in numbers 1 through 4 may demonstrate that PURE sends significantly more referrals to programs that pay than to those who do not is completely irrelevant and immaterial.

The documents requested in numbers 5 through 11 on the subpoena request confidential and private correspondence between the programs and PURE, Sue Scheff, individuals who have done work for PURE, and the other named Defendants. This request on the subpoena is vastly over broad inasmuch as it seeks the production of any and all such correspondence. The only correspondence that would be related to the Plaintiff's claims would be any correspondence discussing WWASP or its associated programs. Inasmuch as the Plaintiff's request for these documents seeks private and confidential correspondence not related to any issues in the lawsuit the requests are inappropriate and should be quashed. The Plaintiff also claims that these documents may demonstrate "financial connections between PURE and the programs" (See Plaintiff's Memorandum in Opposition at 4). This is also irrelevant. Sue Scheff has admitted that she receives financial reimbursement for referrals but whether she has any financial connections to the programs does not relate to any of the claims or defenses in this lawsuit and as such it is inappropriate information to request in the scope of discovery.

The Plaintiff has also requested copies of contracts entered into between parents of children and programs referred to by PURE. These contracts have nothing at all to do with the issues in the lawsuit at hand. Even if one of the contracts used by a program that PURE refers to was identical to the contract that Sue purportedly entered into with Carolina Springs Academy the similarity of the contract would have nothing to do whatsoever with the proof of fraud on the part of the Plaintiff and the inducement of that contract. PURE did not even exist at the time that Sue Scheff was defrauded and Sue Scheff did not start making referrals to other programs until after entering into the agreement with WWASP. WWASP's fraud must be judged and evaluated as of the time that Sue Scheff was involved in placing her daughter in a WWASP program. That she later became familiar with the contracts of other programs has no bearing on whether or not she was defrauded by WWASP.

The Plaintiff also seeks the advertising materials used by these other programs but has no need or justification in doing so. These materials are irrelevant to the issues in this case in that they have no bearing whatsoever on any of the claims and defenses presented. The fact that a program to which PURE refers may have advertising similar to a WWASP program has nothing to do with whether PURE or Sue Scheff published false or misleading information about WWASP. Instead this is an attempt by WWASP to exploit the power of the court in an attempt to obtain advertising and marketing materials of its competitors. The fact that a school to which PURE refers may have an overseas program

does not lead to the conclusion that Sue Scheff should be faulted for criticizing WWASP's overseas programs. Sue Scheff's and PURE's knowledge of the advertising materials of the programs to which it refers is not an issue in this case and therefore this request is inappropriate, irrelevant and should be quashed.

Finally, PURE acknowledges that the request that the programs produce information about licenses and accreditation may be relevant and therefore PURE withdraws any objections to items number 14 and 15 in the Subpoena Duces Tecum.

b. The Prior Protective Order Entered By This Court Does Not Give The Plaintiff Free Reign To Ignore The Standards Of Discovery And Seek Out Irrelevant And Confidential Information.

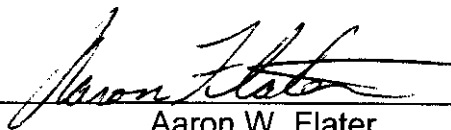
Due to the nature of PURE's business and its relationships with other programs to which it refers, PURE is justifiably concerned about protecting and insulating the businesses to which it refers from unnecessary harassment, annoyances and embarrassment related to this lawsuit. For that reason PURE sought a protective order from the court and a request that the Plaintiff be ordered not to contact any of those programs. This court held that WWASP should be able to contact those programs but that any information gathered would be subject to a protective order, that any discovery produced would be kept confidential. This decision and order of the court does not give WWASP free license to ignore time honored principals governing discovery simply because that information will be kept "confidential." Any discovery attempts by WWASP should still be governed by principals of relevance. PURE does not now object that the

programs were contacted by WWASP, PURE's objection rests on the type of information that was requested by WWASP when they contacted these programs. Much of the information that was requested relates directly to private and confidential documents which may have been exchanged between PURE and these programs and has no relevance to the issues in this lawsuit and therefore they are sought for improper purposes.

CONCLUSION

PURE is entitled to enforce its personal rights by objecting to the subpoenas served by the Plaintiff on non party witnesses and therefore PURE had standing to do so. Furthermore because PURE had a valid and legitimate objection to the subpoenas and filed it in a timely manner PURE was justified in instructing the programs that an objection and a Motion to Quash had been filed with the court and that the programs should not take any further action until the court had an opportunity to decide this issue. Finally, because PURE's actions were justified and are supported by law, WWASP's request for attorney's fees should be denied.

DATED this 27 day of June, 2003.

A handwritten signature in black ink, appearing to read "Aaron Flater", is written over a horizontal line.

Aaron W. Flater
Attorney for Defendant, PURE

CERTIFICATE OF MAILING

I hereby certify that on this 27 day of June, 2003, a true and correct copy of the foregoing **REPLY MEMORANDUM TO PLAINTIFF'S MEMORANDUM IN OPPOSITION TO MOTION TO QUASH SUBPOENAS AND MEMORANDUM IN OPPOSITION TO PLAINTIFF'S CROSS MOTION TO ENFORCE SUBPOENAS AND REQUEST FOR ATTORNEYS FEES**, was mailed postage prepaid, to the following:

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