IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FELD ENTERTAINMENT, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	**Civ. No. 1:07-cv-1532 (EGS/JMF)**
ANIMAL WELFARE INSTITUTE, *et al.*,	)	
	)	
Defendants.	)	
	)	

THE FUND FOR ANIMALS, ANIMAL WELFARE INSTITUTE, AND HSUS' MOTION FOR A PROTECTIVE ORDER

Pursuant to Federal Rule of Civil Procedure 26(c)(1), The Fund for Animals, Inc., the Animal Welfare Institute, and The Humane Society of the United States (collectively, the "Nonprofit Organizations"), move the Court for a protective order preventing the disclosure of any identifying information regarding any person, other than a party to this litigation, who has made a donation to any of the Nonprofit Organizations. Alternatively, the Nonprofit Organizations ask the Court to hold all such discovery in abeyance until Plaintiff Feld Entertainment, Inc., can establish a legitimate need for such discovery, by, *inter alia*, showing a substantial likelihood to prevail on the remaining elements of its RICO case.

A Memorandum of Points and Authorities and exhibits thereto in support of this Motion, and a Proposed Order are submitted herewith.

Pursuant to Local Civil Rule 7(m), undersigned counsel states that counsel for the Nonprofit Organizations consulted with counsel for Plaintiff regarding the relief requested herein on November 21 and 22, 2013, at which times counsel for Plaintiff informed counsel for the Nonprofit Organizations that Plaintiff opposes this Motion.

Date: December 2, 2013

Respectfully submitted,

/s Andrew Caridas

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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THE FUND FOR ANIMALS, ANIMAL WELFARE INSTITUTE, AND HSUS' MOTION FOR A PROTECTIVE ORDER

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Pursuant to Federal Rule of Civil Procedure 26(c)(1), The Fund for Animals, Inc. ("FFA"), the Animal Welfare Institute ("AWI"), and The Humane Society of the United States ("HSUS") (collectively, the "Nonprofit Organizations"), submit this Memorandum of Points and Authorities in support of their Motion for a Protective Order preventing the disclosure of non-party donor identifying information.

I. INTRODUCTION

Plaintiff Feld Entertainment, Inc. ("FEI") has brought this RICO action solely to recover attorneys' fees that it allegedly incurred in defending *Animal Welfare Institute v. Feld Entertainment, Inc.*, Case No. 03-2006 (EGS/JMF) (the "ESA Action"), even as FEI seeks these same fees in the ESA Action. To support the "pattern" of racketeering activity it must establish, FEI now pursues a "donor fraud" theory alleging that the Nonprofit Organizations misled their own donors as to the treatment of elephants in the Ringling Brothers Circus and the role of Tom Rider in the ESA Action and related media campaign. Accordingly, FEI's Second Request for Production of Documents to each of the Nonprofit Organizations explicitly seeks documents reflecting the identities of the organization's private non-party donors, information protected by the First Amendment rights of the Nonprofit Organizations and their donors to free speech and association.

Should FEI gain access to confidential donor information, both current and future donors would see their protected political conduct chilled by the fear of financial burden and reprisal. This fear would be particularly well founded in light of FEI's history of harassment and retaliation against individuals and organizations that seek to remedy animal mistreatment. The chilling effect on the donors on whom the Nonprofit Organizations depend for their continued existence would also irreparably harm the Nonprofit Organizations, along with other animal welfare and animal rights organizations that depend on the same donors for support. FEI's

"donor fraud" argument is unprecedented: a Court ruling that an adversary of a nonprofit advocacy organization may obtain that organization's donor information merely by *alleging* that the organization misled its donors would set a disastrous precedent that would alter the legal landscape for all nonprofit and advocacy organizations.[1]

FEI has yet to demonstrate any legitimate interest in the donor information it seeks. Even if it could make such a showing (which it cannot), the possibility of donor harassment far outweighs any legitimate interest FEI may claim. There is no reason to believe that FEI will exercise restraint with regard to individuals who made donations to the Nonprofit Organizations in the hopes of curtailing FEI's animal mistreatment. Indeed, FEI's past conduct raises grave—and well-founded—concerns that FEI will not. For these reasons, the Nonprofit Organizations seek a protective order that cabins FEI's discovery within constitutional bounds.

II. BACKGROUND

A. FEI's Unsuccessful Efforts to Obtain Donor Information in the ESA Action

In the ESA Action, FEI contended that it was entitled to broad discovery concerning the identities of private non-party donors who supported animal welfare and animal rights organizations. The Court rejected FEI's position, explaining that such discovery would "tread on core First Amendment rights" of speech and association. ESA Action ECF 178 at 8. For example, in rejecting FEI's contention that it was entitled to learn the identities of all donors to the Wildlife Advocacy Project ("WAP"), the Court drew a sharp distinction between potential contributors who had some direct relationship to the ESA Action and those who had no such relationship, holding that:

[1] As an example, one could imagine a suit by a liberal political action committee against the National Rifle Association, alleging it lied to members and donors regarding the efficacy of guns in preventing violent crime, and seeking a list of those members and donors.

> In producing such information, WAP may redact the names and identifying information of individual donors or organizations who are not parties to this litigation, attorneys for any of the parties or employees or officers of any of the plaintiff organizations or WAP. WAP shall also provide a sworn declaration or affidavit indicating that any donors are not plaintiffs' counsel, employees or officers of the organizational plaintiffs or employees or officers of WAP, to the extent that is true. The Court finds that any further information about individual or organizational donors would be irrelevant and would tread on core First Amendment rights. *See Wyoming v. U.S. Dep't of Agriculture*, 208 F.R.D. 449, 454 (D.D.C. 2002).

Id. at 8-9. Likewise, with respect to the organizational plaintiffs in the ESA Action, the Court held that the plaintiffs were obligated to provide "responsive documents and information concerning payments to Tom Rider . . . except that *plaintiffs may redact the names of individual donors or organizations* unless they are parties to this litigation, attorneys for any of the parties, or employees or officers of any of the plaintiff organizations or WAP." *Id.* at 6-7 (emphasis added).

B. The Court's July 9, 2012 Order

On July 9, 2012, the Court issued its order on the motion to dismiss in this case, holding that FEI's allegations, as a whole and if true, might establish a RICO pattern. *See generally*, ECF 90 ("July 2012 Order") at 30-32. The Court recognized that "if a plaintiff alleges only 'a single scheme, a single injury and few victims, it is 'virtually impossible for plaintiffs to state a RICO claim.'" *Id.* at 30 (quoting *Western Assocs.* (quoting *Edmondson*, 48 F.3d at 1265)). Questioning whether FEI cleared this hurdle, the Court stated:

> [T]he Court agrees with defendants that the ESA Action is, overwhelmingly, the basis for this lawsuit. However, at this stage of the proceedings, the Court accepts all facts alleged in the FAC as true and thus cannot ignore the other allegations in the Amended Complaint: specifically, the allegedly unlawful fundraising activity.

Id. at 32.

The Court observed that the First Amended Complaint ("FAC") alleged, in passing, the possibility that third party donors to the Nonprofit Organizations were victimized in the same manner as FEI: "Specifically, FEI alleged that the defendants held a fundraiser in 2005 and committed mail and wire fraud by soliciting funds based on 'materially false and/or misleading statements about Rider, the ESA Action, and FEI.'" *Id.* at 32 (citing FAC ¶ 179). Based on this reading of the Complaint, and—as it must on a motion to dismiss—assuming FEI could actually support its allegations that false statements were made to donors at a 2005 fundraiser, the Court held that those allegations *could* be part of a pattern of racketeering activity.

Notably, at the hearing on Defendants' motion for reconsideration, the Court expressly recognized the validity of Defendants' First Amendment concerns should FEI seek discovery of donor information. *See* Oct. 31, 2012 Motion Hearing Tr. (ECF 134) at 32:4-6 (the Court is "mindful of the long line of cases . . . about donor lists and First Amendment"); *id.* at 33:18-20 ("The First Amendment means a heck of a lot, and we are going to defend that, but that's – that's a big concern here . . . ."); *id.* at 36:14-15 (this case "presents legitimate First Amendment constitutional issues"). The Court reasoned, however, that it did not "need to focus on . . . what's discoverable down the line" in determining whether the case should be dismissed or certified for interlocutory review, *id.* at 31:24-25, explaining that the important "constitutional issues" posed by FEI's pattern claim would be addressed in the context of specific discovery requests. ECF 129 at 6.

C. The Court's May 9, 2013 Order and the Instant Document Requests

On May 9, 2013, the Court ordered that the scope of relevant discovery in this case includes, *inter alia*:

> 18. Information about 1) fundraising donations, 2) marketing, 3) advertising plans, 4) programs, or 5) campaigns that refer to or contemplate using the ESA

> action, FEI, or its elephants to raise funds or to gain media attention or publicity, including proposed plans, strategies, campaigns, or programs that were not implemented and what funds were spent on 1) reports or communications on the efficacy of campaigns or appeals, 2) contracts with fundraising counsel, 3) solicitors, 4) telemarketers, and 5) filings with federal and state authorities regarding the same.

ECF 151 at ¶ 18.[2] This Order does not provide that FEI is entitled to donor lists, donor names, or other donor-identifying information.

Nevertheless, FEI thereafter served document requests that broadly seek the identity of non-party donors and other constitutionally protected information. In particular, FEI requests:

> 24. All documents that refer, reflect, or relate to any solicitation of or request for donations, contributions, payments or financial support of any kind, regardless of label or characterization, concerning the ESA action, FEI or FEI's elephants, Tom Rider, and/or WAP, by defendants.
>
> 25. All documents that refer to fundraising donations, marketing, advertising plans, programs, strategies, and campaigns that contemplated or contemplate using the ESA Action, FEI or FEI's elephants to raise funds or donations or to gain media attention or publicity, including but not limited to proposed plans, strategies, campaigns or programs that were not implemented, and what such funds or donations were spent on.
>
> 26. With respect to any fundraising donations, marketing, advertising plans, programs or campaigns that contemplate using the ESA Action, FEI or FEI's elephants to raise funds or donations or to gain media attention of publicity, all documents that refer, reflect or relate to reports or communications as to the efficacy of any such campaign or appeal, contracts with fundraising counsel or advisors, solicitors, telemarketers and filings with federal and state authorities regarding the same.
>
> 27. All documents that refer, reflect or relate to donations (whether financial or in kind) that were designed or otherwise earmarked by the donor for use in connection with the ESA action or that were designated or otherwise earmarked by the donor to support work or any other form of activity concerning Tom Rider, FEI or FEI's elephants.
>
> 28. All documents not otherwise covered by Request No. 27, that refer, reflect or relate to donations (whether financial or in kind) that were made as a result of the ESA Action, Tom Rider, FEI or FEI's elephants.

[2] Of the 46 areas of allegedly relevant discovery outlined by the Court, only paragraph 18 arguably touches upon information relating to donors. *Id.*

> 29. All documents sufficient to identify each and every person or entity who made any of the donations described in Request Nos. 27 and 28.
>
> . . . .
>
> 31. All documents that refer, reflect, or relate to the "2005 Benefit For the Asian Elephants" or any other fund-raising activities and/or benefits referring or relating to the ESA Action, FEI's elephants, Tom Rider, FEI, and/or WAP. This request includes, but is not limited to any documents that refer, reflect or relate to any: (a) meeting of your Board of Directors or any committee, subcommittee, working group, or other sub-unit thereof where there was any discussion of any such fund-raisers and/or benefits; (b) public statements, including press releases, that you, your agents, or anyone acting at your behest have made that refer to or mentions any such fund-raisers and/or benefits; (c) internal communications with defendants or any other Animal Activist/Group that refer to or mention any such fund-raisers and/or benefits; and (e) communications with any of your members, volunteers, donors and/or employees that refer to or mention any such fund-raisers and/or benefits.

E.g. Ex. 1, Second Req. for Prod. of Docs. to Def. the Fund for Animals, at 10-12.[3] Since these requests call for confidential identifying information regarding non-party donors, and therefore squarely confront the issue the Court foreshadowed at the October 31, 2012 motion hearing, the Nonprofit Organizations have objected on First Amendment grounds and seek the protective order detailed herein.

III. ARGUMENT

A. The First Amendment Protects Against Compelled Disclosure of Non-Party Donors

The Supreme Court has long held that the First Amendment protects the freedom to associate and express views as a group, because "[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association." *NAACP v. Alabama*, 357 U.S. 449, 460 (1958). These protections "extend[] not only to the organization itself, but also to its staff, members, contributors and others who affiliate with it."

[3] FEI submitted identical document requests to the other Nonprofit Organizations.

Int'l Union v. Nat'l Right to Work Legal Def. and Educ. Found., Inc., 590 F.2d 1139, 1147 (D.C. Cir. 1978) (citations omitted). Since *NAACP v. Alabama*, the Court has declared it "beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech." *NAACP*, 357 U.S. at 460 (citations omitted). Incorporated into the freedoms of association and speech is the protection from "compelled disclosure of affiliation with groups engaged in advocacy." *Id.* at 462. The Supreme Court has gone so far as to compare "[c]ompelled disclosure of membership in an organization engaged in advocacy of particular beliefs" with a "requirement that adherents of particular religious faiths or political parties wear identifying arm-bands." *Id.* (internal quotations omitted).

Subsequent cases have confirmed that donor information falls squarely within the First Amendment protection from compelled disclosure. *See, e.g.*, *Bates v. Little Rock*, 361 U.S. 516, 523-24 (1960); *Int'l Action Ctr. v. United States*, 207 F.R.D. 1, 3 (D.D.C. 2002) (courts "have ruled that the following information is protected by the First Amendment: membership and volunteer lists, *contributor lists*, and past political activities of plaintiffs and of those persons with whom they have been affiliated") (emphasis added) (citations omitted); *Wyoming v. USDA*, 208 F.R.D. 449, 454 (D.D.C. 2002) (the First Amendment's broad scope encompasses "the freedom to protest policies to which one is opposed, and the freedom to organize, *raise money*, and associate with other like-minded persons so as to effectively convey the message of the protest") (emphasis added) (citations omitted); *Buckley v. Valeo*, 424 U.S. 1, 74 (1976) (organization's "associational ties" include "contributors' names").

The First Amendment prohibition against compelled disclosure remedies the concern that such disclosure would likely deter potential members or contributors from associating with

particular groups out of fear of reprisal. *NAACP*, 357 U.S. at 462-63; *FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380, 388 (D.C. Cir. 1981) (compelled disclosure could result in "chilling the free exercise of political speech and association guarded by the first amendment"). "It is undoubtedly true that public disclosure of contributions to [particular groups] will deter some individuals who otherwise might contribute" and "[i]n some instances, disclosure may even expose contributors to harassment or retaliation." *Buckley*, 424 U.S. at 68. Courts have been especially likely to protect an organization from being forced to disclose its donors when "disclosure of its contributors' names 'will subject them to threats, harassment, or reprisals from either Government officials or private parties.'" *Citizens United v. FEC*, 558 U.S. 310, 367 (2010) (quoting *McConnell v. FEC*, 540 U.S. 93, 198 (2003)); *see also NAACP*, 357 U.S. at 462-63.

The D.C. Circuit has also held that the First Amendment privilege applies with equal force in the context of civil discovery mechanisms. *Int'l Union*, 590 F.2d at 1147; *Black Panther Party v. Smith*, 661 F.2d 1243, 1264 (D.C. Cir. 1981).[4] Indeed, "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." *Wyoming*, 208 F.R.D. at 454 (citation omitted). Accordingly, the First Amendment protects organizations from compelled disclosure of members or contributors in discovery and allows "the association itself [to] assert the right of its members and contributors to withhold their connection with the association." *Int'l Union*, 590 F.2d at 1152 (citation omitted).

[4] *Black Panther Party* was later invalidated on mootness grounds. However, this Court has found that "[e]ven though the *Black Panther* decision was later vacated as moot, there is no suggestion in later case law in this Circuit that its reasoning or analysis has been rejected or abandoned by our Court of Appeals. Indeed, it has been cited subsequently by the Circuit in a unanimous *per curiam* opinion in *Steffan v. Cheney*, 920 F.2d 74 (1990), as well as in many other cases from outside this Circuit." *Int'l Action Ctr.*, 207 F.R.D. at 3 n.6 (internal citations omitted). Therefore, the reasoning and analysis in *Black Panther* is plainly applicable to the present case.

When the First Amendment privilege is implicated, the Court must first determine whether the party seeking disclosure can meet two requirements: (1) can "the information sought be discovered through alternative sources and has the party seeking disclosure made reasonable attempts to obtain the information elsewhere"; and (2) "does the information sought go to the heart of the lawsuit." *Id.* (citation omitted); *Int'l Action Ctr.*, 207 F.R.D. at 4 ("Defendants . . . failed to meet the standard established in this Circuit for compelling disclosure of information protected by the First Amendment."); *Wyoming*, 208 F.R.D. at 455 (same).

Even should the party seeking disclosure meet this burden, disclosure will still not be compelled where the opposing party can "show that there is *some probability* that disclosure will lead to reprisal or harassment." *Black Panther Party*, 661 F.2d at 1267-68 (emphasis added); *see also id.* at 1267-68 ("the litigant seeking protection need not prove to a certainty that its First Amendment rights will be chilled by disclosure"); *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 655 (2000) ("An association must merely engage in expressive activity that *could* be impaired in order to be entitled to protection.") (emphasis added); *United States v. Duke Energy Corp.*, 232 F.R.D. 1, 3 (D.D.C. 2005). If "some probability" of harassment exists, the Court must engage in a "balancing inquiry" in which one party's "First Amendment claim should be measured against the [other party's] need for the information sought." *Black Panther Party*, 661 F.2d at 1266. "If the former outweighs the latter, then the claim of privilege should be upheld." *Id.* The balancing inquiry "requires a detailed and painstaking analysis," and "[t]he argument in favor of upholding the claim of privilege will ordinarily grow stronger as the danger to rights of expression and association increases." *Id.* at 1267.

B. FEI is Not Entitled to Obtain Non-Party Donor Information Based on the Court's Prior Rulings

FEI's document requests in this case include overly broad and otherwise objectionable requests seeking the identities of the Nonprofit Organizations' private non-party donors. These requests fall well outside the Court's prior Orders regarding the proper scope of discovery and seek information and documents that are protected from disclosure under the First Amendment.

1. The document requests go beyond the scope of the Court's prior Orders in this case

This Court's May 9, 2013 Order set forth the permissible bounds of relevant discovery in this case. As to the Nonprofit Organizations' fundraising, the Order found the following areas of discovery relevant: "1) fundraising donations, 2) marketing, 3) advertising plans, 4) programs, or 5) campaigns that refer to or contemplate using the ESA action, FEI, or its elephants [as well as] 1) reports or communications on the efficacy of campaigns or appeals, 2) contracts with fundraising counsel, 3) solicitors, 4) telemarketers, and 5) filings with federal and state authorities," *See* ECF 151 at ¶ 18. Notably absent from this list are the donor lists, donor names, or other identifying information regarding non-party donors that FEI now seeks. FEI has no other basis for obtaining the requested information.

Moreover, FEI's requests also stray far beyond the FAC allegations that the Court's July 9, 2012 Order concluded *might* constitute an actionable RICO pattern. In that opinion, the Court rejected FEI's purported bases for having a viable RICO "pattern" based on (a) legislative and administrative advocacy (for which there is no alleged injury), (b) press conferences, news statement and website postings (which are protected by the First Amendment), and (c) purported injuries to other institutions (as to which no specific injury was alleged). ECF 90 at 19-21, 31-32. However, the Court did not dismiss FEI's claims, finding sufficient at the pleading stage, a novel and fanciful RICO pattern under which certain unspecified donors of the Nonprofit

Organizations may be co-victims with FEI, notwithstanding that these donors exercised free speech by giving money to oppose FEI. The only donor-related allegations in the FAC that even arguably satisfy Rule 9(b) relate to a single fundraiser in July 2005. *See* FAC ¶¶ 179-84. The Court recognized as much: "Specifically, FEI alleg[ed] that the defendants held a fundraiser in 2005 and committed mail and wire fraud by soliciting funds based on 'materially false and/or misleading statements about Rider, the ESA Action, and FEI.'" ECF 90 at 32 (citing FAC ¶ 179).

It is these narrow allegations regarding the July 2005 fundraiser, far-fetched as they may be, which the Court had to accept as true at the pleading stage, and which provide the only conceivable relevance for *any* discovery into the Nonprofit Organizations' donors.[5] FEI instead seeks broad discovery going well beyond that isolated fundraiser.

2. The document requests are inconsistent with the Court's First Amendment ruling in the ESA Action

This is not the first time that FEI has sought to encroach on the First Amendment rights of nonprofit organizations and their donors. In the ESA Action, the Court's August 23, 2007 Order addressed, in part, FEI's request, via subpoena, for broad categories of documents revealing the identities of non-party donors. *See* ESA Action ECF 95 at 7, n.4. In accordance with First Amendment precedent, the Court rejected this request and limited discovery to donations by parties to the ESA Action, finding that granting the requested donor information "would tread on core First Amendment rights." ESA Action ECF 178 at 8. While a prior ruling in the ESA Case is not binding on the Court, the First Amendment considerations motivating that

[5] Of course, as discussed below, this case is no longer merely at the pleading stage. In evaluating FEI's entitlement to certain discovery—especially over First Amendment objections that the Court has already recognized as a "big concern" in this case, ECF 134 at 33—the Court need no longer simply accept FEI's allegations as true. To come even close to showing an overriding need for the donor information it seeks, FEI must substantiate its allegations.

decision have not changed. FEI once again improperly seeks documents that would disclose the identities of non-party donors. The Court should once again decline FEI's request.

C. FEI Cannot Meet its Burden Under the First Amendment to Obtain Discovery of Private Non-Party Donors

Consistent with Supreme Court, Circuit Court, and this Court's First Amendment jurisprudence, the identities of the Nonprofit Organizations' non-party donors are plainly entitled to First Amendment protection. Accordingly, FEI must prove that the information it seeks "go[es] to the heart of the lawsuit" and that it has "made reasonable attempts to obtain the information elsewhere." *Int'l Union*, 590 F.2d at 1152 (citations omitted). Moreover, because there is a very real "probability that disclosure will lead to reprisal or harassment," *Black Panther Party*, 661 F.2d at 1268 (citations omitted), FEI must show that its need for the donor information outweighs the First Amendment rights of the donors and the Nonprofit Organizations they support. FEI cannot meet its initial burden, much less succeed under the ultimate balancing test.

1. FEI has not shown a sufficient interest in discovering private non-party donor information

FEI cannot sufficiently demonstrate its lawful interest in discovering non-party donor information. "The interest in disclosure will be relatively weak unless the information goes to 'the heart of the matter,' that is, unless it is crucial to the party's case." *Id.* at 1267 (citations omitted). "Mere speculation that information might be useful will not suffice." *Id.* As this Court previously observed, the "heart" of FEI's case is the ESA Action. *See*, *e.g.*, July 9, 2012 Order ECF 90 at 32 ("The Court agrees with defendants that the ESA Action is, overwhelmingly, the basis for this lawsuit."). In the hopes of bolstering a tenuous *and unprecedented* RICO pattern, FEI now wishes to undertake a donor scavenger hunt based on the speculation that somewhere

out there is a donor who—despite the clear opposition to FEI demonstrated by his or her contribution to the Nonprofit Organizations' efforts to end FEI's elephant treatment practices—was in fact misled by the Nonprofit Organizations and thus "victimized" in the same fashion as FEI.

To date, FEI has not only failed to substantiate that any such supposed victims actually exist, but has made no showing that any of the Nonprofit Organizations made any "misrepresentations" to such hypothetical victims. Rank conjecture and bald allegations contained in five paragraphs of a one-hundred-page complaint are not sufficient to justify infringing on these organizations and their donors' core First Amendment rights. *See Black Panther Party*, 661 F.2d at 1268 ("Mere speculation that information might be useful will not suffice.").

Moreover, at the October 31, 2012 motion hearing, FEI contended that it did not need a second victim (other than itself) to show a RICO pattern. *See* ECF 134 at 40:19-20 ("you can have a single victim and have a pattern of racketeering activity"); *id*. at 42:22-23 ("we don't need more than one victim"); *id.* at 43:11-13 (The Court: "Do you need donor fraud allegations to survive?" Mr. Simpson: "I don't think so . . . ."); *id.* at 45:5-7 (The Court: "You don't believe as a matter of fact and law it's required [to have more than one victim?]" Mr. Simpson: "No."). While Defendants disagree with FEI's single-victim pattern theory, FEI cannot claim an "overriding need" to discover the Nonprofit Organizations' donor information while simultaneously protesting that it does not need a second victim. It is premature to provide FEI with any donor information before the Court definitively forecloses FEI's single-victim theory.

2. FEI has not sought the information from less intrusive alternative sources

FEI also cannot prove that it has sought the information through alternative sources. "Even when the information sought is crucial to a litigant's case, disclosure should be compelled only after the litigant has shown that he has exhausted every reasonable alternative source of information." *Black Panther Party*, 661 F.2d at 1268 (citations omitted). This case is similar to *Wyoming v. USDA*, in which this Court found that the compelling party had "not shown that it has made reasonable attempts to obtain the information elsewhere." 208 F.R.D. at 455. Indeed, it appears that FEI's only other attempt at discovering the identities of the Nonprofit Organizations' donors consisted of the similar discovery requests rejected by the Court in the ESA Action. ESA Action ECF 178 at 8.

One alternate source for relevant donor information is the discovery FEI already obtained in the ESA Action. FEI concedes that it has already received significant donation information as to donors who were parties to that litigation. *See, e.g.*, ECF 134 at 53 (FEI's counsel's reference to fundraising letter sent from Katherine Meyer to AWI). FEI could also attempt to review public resources regarding FEI's critics and opponents, given that to the extent that a donor has voluntarily surrendered his or her anonymity as a result of open and notorious political activity beyond membership in, or support for, one of the Nonprofit Organizations, the First Amendment concerns would be lessened.[6]

In short, there are less intrusive and constitutionally fraught methods by which FEI could attempt to find other "victims" to sustain its RICO pattern that now sits on life support. Despite its burden under the First Amendment to exhaust such alternative methods, as far as the

6 Given the extensive nationwide publicity that the ESA Action has received, had Defendants' alleged fraud really harmed "plenty of other victims"—as FEI has represented to the Court, ECF 134 at 45:3-4—then surely at least *one* of these "victims" would have come forward in the six years since FEI first publicly accused the Nonprofit Organizations of fraud.

Nonprofit Organizations are aware, FEI has attempted none. Before the Court even considers permitting donor discovery, FEI must meet its burden and detail what it has done to pursue its tenuous donor victim theory.

D. The Overwhelming Threat of FEI Harassment and Retaliation Outweighs any Legitimate FEI Interest in the Donors' Identities

Because the Nonprofit Organizations can readily demonstrate "some probability" of reprisal or harassment if donor identities are disclosed to FEI, such disclosure would be foreclosed by the First Amendment even if FEI could meet its burdens to show that the information goes to the heart of this case and that it has exhausted all reasonable efforts to obtain this information from other sources. *Black Panther Party*, 661 F.2d at 1268; *Boy Scouts of Am.*, 530 U.S. at 655; *Duke Energy Corp.*, 232 F.R.D. at 3. Disclosure of confidential donor information would chill the exercise of protected free speech and association by deterring current and potential contributors from associating with the Nonprofit Organizations based on their legitimate fear that doing so will subject them to harassment and reprisal from FEI. *See, e.g.*, *NAACP*, 357 U.S. at 462-63. Such a chilling of their supporters would in turn irreparably harm the Nonprofit Organizations, along with other animal welfare and animal rights organizations that depend on the same pool of current and prospective donors.

1. FEI has a well-documented history of harassing animal welfare and animal rights organizations and their supporters

Here, the threat of reprisal and harassment is particularly pronounced based on FEI's documented history of implementing schemes to spy on, infiltrate, obtain information using false pretenses, and otherwise harass and retaliate against organizations and individuals it perceives as antagonistic. *See, e.g.*, Ex. 5, Jeff Stein, *The Greatest Vendetta on Earth*, Salon (Aug. 20, 2001); *see also* Ex. 6, 60 Minutes Segment (DVD) (May 4, 2003); Ex. 7, Mem. Op. 4, *Pottker v. Feld*,

No. 1999 CA 8068 B ("It appears undisputed that Kenneth Feld was extremely upset by [an article written about him], developed an intense dislike for plaintiff, and wanted to keep her from publishing about the circus or his family again."). FEI has frequently targeted animal welfare and animal rights supporters and organizations, including some of the plaintiffs in the ESA Action.

During the 1990s, FEI developed a "Long Term Animal Plan Task Force" to combat the perceived threat that animal "activists are increasing their activities to effectuate their ultimate goal of banning the exhibition of animals in entertainment." Ex. 8, FEI Long Term Animal Plan Task Force, at 1. FEI's counteroffensive involved a well-documented plan to spy on and harass animal activists through an "Animal Issues Department" responsible for carrying out an "aggressive approach to media and public relations," including operations to "expose and discredit animal activist entities." *Id.* at 3, 12-24, 28. FEI's methods included secretly listening to activist conversations, *id.* at 16, ensuring that "[a]ll activities of animal activists will be videotaped" for "several" purposes (including: (1) turning the tapes "over to local law enforcement and, if appropriate, to the FBI," (2) using the tapes "to physically identify activists" and to "profile local animal activists," and (3) "*dissuad[ing] activist activity* if they know their actions are being memorialized," *id.* at 8, 12, 15 (emphasis added)), and sharing "intelligence about animal activists" with "friendly" industries. *Id*. at 13.

Additionally, FEI sought to deplete the financial resources of these organizations. Starting approximately in 1990, FEI worked to "[f]ormulate a plan to discredit the IRS Section 501(c)(3) status of PETA, PAWS, etc. and [] to have PETA de-listed from the Combined Federal Campaign and the United Way." *Id.* at 13. FEI's plan also involved attacking animal protection groups with "lawsuits" and accusing the groups with "money irregularities," with the expectation that "[b]y keeping up the pressure" on those fronts, the groups "*[w]ill spend more of their*

resources in defending their actions," and consequently "will have a hard time keeping demonstrators on the front line." Ex. 9, Confidential Mem. on PETA and PAWS, at 10 (emphasis added).

FEI also launched a massive "covert" operation focused on the infiltration and surveillance of various animal protection groups. Ex. 10, Steven Kendall, *A Tiger Among the Jungle*, at 50 ("I was instructed to gather as much information on the various groups as possible."); Ex. 11, *News Report on Circus Spies* (DVD). In furtherance of this operation, FEI employees, including its former Vice President, Richard Froemming, employed both legal and illegal means. *See* Ex. 12, Joel Kaplan Dep., at 154 ("The major assignment, when [Richard Froeming] first came into the company, was to try to destroy People for Ethical Treatment of Animals. . . ."") (emphasis added); *id.* at 144 ("Well, illegal assignments, I participated in a couple of those."). FEI's espionage initiative was sufficiently developed to warrant retaining Clair George, the former Deputy Director of Operations of the CIA, as a "consultant to Feld Entertainment and its affiliates," and tasking him "to review reports from Richard Froemming and his organizations, based on their surveillance of and efforts to counter the activities of various animal rights groups." Ex. 13, Excerpt of Clair George Aff., at 3.

FEI's covert operations included placing several undercover operatives inside of animal rights organizations, including PAWS (the original lead plaintiff in the ESA Action) and the Elephant Alliance. Ex. 14, Excerpt of Steven Kendall Test., at 1384-85; *see also* Ex. 15, Excerpt of Kenneth Feld Test. in *PETA v. Feld*, at 2115 ("from what I've seen here, it looked like [Richard Froemming] did have people inside some of the [animal activist] organizations"). One objective of FEI's several plants within the unsuspecting animal rights organizations was to steal confidential information from these organizations, including donor lists. One operative, Julie

Lewis, stayed in the house of Florence Lambert, the President of Elephant Alliance, and proceeded to pass information regarding Ms. Lambert to FEI, including Ms. Lambert's plans and projects for the Elephant Alliance. Ex. 16, Florence Lambert Test., at 1083, 1086, 1099; Ex. 9 at 11. Most importantly, Ms. Lewis provided FEI with the Elephant Alliance's confidential donor information. *See* Ex. 16 at 1113 (referencing an FEI confidential memorandum that listed the exact amount of donations received by the Elephant Alliance during one month); Ex. 17, Excerpt from Patricia Derby Dep., at 1297-98 (finding "membership lists" and "documents showing contributions [from] various donors and donor cards" among the documents Julie Lewis is believed to have stolen). Reports from within FEI confirm that it successfully sought to obtain the confidential donor information of animal welfare and animal rights organizations. *See* Ex. 10 at 51 ("As my contacts became more involved with PETA and PAWS as well as other groups such as the Elephant Alliance, I was able to obtain copies of donations, contact lists and other crucial information."); *id.* at 182 ("information that was obtained over the years [included] donation records").[7]

2. Compelling donor discovery would subject donors to harassment and irreparably harm the Nonprofit Organizations

The history of harassment and retaliation by FEI, including its prior successful attempts to improperly obtain donor lists, demonstrates the need to protect the Nonprofit Organizations and their non-party donors. FEI is not an organization that *might* harass or retaliate against dissenters for the first time, but one that has done so in the past. Moreover, this lawsuit, and the particular donor discovery FEI now seeks, are further proof that FEI still seeks to intrude upon, harass and retaliate against its opponents.

[7] FEI previously cited a Fairfax County Verdict Form where a jury found that FEI was not liable to PETA for common law conspiracy or abuse of process to rebut evidence of FEI's harassment of animal welfare and animal rights organizations. ESA Action ECF 95-1, Exhibit 46. However, FEI has never denied that FEI conducted such unauthorized surveillance. ESA Action ECF 95 at 12-13.

At a minimum, FEI would use the donor information to subject numerous well-intentioned individuals to the burdens of litigation and to the threat that FEI may just as readily label them as the Nonprofit Organizations' co-conspirators, potentially liable for tens of millions of dollars in damages, rather than FEI's co-victims. If a donor states that she would have contributed to the Nonprofit Organizations despite the Court's credibility findings about Mr. Rider, then, consistent with FEI's RICO theory in this case, such individuals must be co-conspirators. *See, e.g.*, FEI Opp. to Defs.' Mot. for Reconsideration or Interlocutory Certification, ECF 114 at 10 (asserting that HSUS is "at least one fraud victim in addition to FEI" if HSUS was misled by FFA as to the legality of payments to Mr. Rider). FEI's "with us or against us" approach to RICO leaves little room for safe exercise of First Amendment rights. Subjecting individuals to the stress of depositions, the cost of retaining counsel, and the risk of crushing RICO liability, for their simple act of contributing to a nonprofit organization, is incompatible with the First Amendment's protection of free speech and association. Furthermore, FEI's history with regard to animal welfare and animal rights supporters raises real concerns that the harassment to which donors could be subjected would not stop at being embroiled in this litigation.

Such harassment, both immediate and threatened, interferes with the donors' ability to "pursue their collective effort to foster beliefs" by "induc[ing them] to withdraw from the [organization] and dissuad[ing] others from joining it." *NAACP*, 357 U.S. at 463; *see also Perry v. Schwarzenegger*, 591 F.3d 1147, 1160 (9th Cir. 2009) ("Courts typically consider whether disclosure will result in "membership withdrawal, or discouragement of new members, or . . . other consequences which objectively suggest an impact on . . . the members' associational rights.") (internal quotation marks omitted). It would also infringe on the donors' rights to keep

their donations confidential when they exercise their First Amendment rights. *See, e.g.*, *Wyoming*, 208 F.R.D. at 454 (threats 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.") (citations omitted). *Cf. Tree of Life Christian Sch. v. City of Upper Arlington*, 2012 WL 831918, at *3 (S.D. Ohio Mar. 12, 2012) ("courts have suggested that violations of a member's desired anonymity may infringe on associational rights."); *Heartland Surgical Specialty Hosp., LLC v. Midwest Div., Inc.*, 2007 WL 852521, at *4 (D. Kan. Mar. 16, 2007) (same).

Moreover, compelled disclosure would result in irreparable harm to the Nonprofit Organizations themselves: there is a risk that donors would no longer trust the organizations to protect their identities and would instead associate financial support for the organizations with the significant burdens imposed by FEI discovery and even future extra-judicial harassment by FEI. *See, e.g.*, Ex. 2, Declaration of Cathy Liss, at ¶¶ 11-13; Ex. 3, Declaration of Geoffrey Handy, at ¶ 9; Ex. 4, Declaration of Michael Markarian, at ¶ 11.[8] The Nonprofit Organizations are all 501(c)(3) organizations, dependent upon the financial support of donors to exist, to sustain their operations, and to run their programs and campaigns in support of their stated purposes of reducing the suffering and abuse of animals. *See, e.g.*, Ex. 2 at ¶ 4; Ex. 3 at ¶ 4; Ex. 4 at ¶¶ 3, 6. Recognizing that their donors' information is vital to their continued existence, these organizations vigorously protect the confidentiality of that information. *See, e.g.*, Ex. 2 at ¶¶ 6-10; Ex. 3 at ¶¶ 5-7; Ex. 4 at ¶¶ 7-9. For example, AWI does not share its donor list with any other

[8] *See also Council on Am-Islamic Relations v. Gaubatz*, 667 F. Supp. 2d 67, 77 (D.D.C. 2009) ("'[The] public disclosure of the confidential, personal information of . . . contributors to the organization negatively impacts the organization's ability to attract . . . contributors as these individuals are less willing to participate if there is a risk that their private information will be publicly disclosed . . . . Disclosure of a non-profit corporation's confidential donor list, like disclosure of a for-profit corporation's customer list, 'might well lead to a loss of trust and goodwill' if donors "begin to feel that their personal information is not safe with plaintiff.'") (citation omitted)).

party, *see* Ex. 2 at ¶ 7, and FFA and HSUS will only share information with thoroughly-vetted, like-minded organizations, generally after pre-approving any communication that such organizations would send to the donors, *see* Ex. 3 at ¶ 5, Ex. 4 at ¶¶ 8-9.[9] Because the release of donor names would have such a chilling effect on support by current and future donors and members, courts routinely hold that organizations are constitutionally protected from compelled disclosure of their donors' identities. *See, e.g.*, *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87, 95 (1982); *Int'l Union*, 590 F.2d at 1147; *Black Panther Party*, 661 F.2d at 1265; *FEC v. Larouche Campaign*, 817 F.2d 233, 234-35 (2d Cir. 1987); *F.E.C. v. Hall-Tyner Elec. Campaign Comm.*, 678 F.2d 416, 420 (2d Cir. 1982); *Eilers v. Palmer*, 575 F. Supp. 1259, 1261 (D. Minn. 1984).

E. The Relief Sought is Reasonable and Narrowly Tailored to Protect the First Amendment Interests at Stake

The Nonprofit Organizations seek the entry of a protective order that (i) limits FEI to discovery of relevant material in light of the Court's prior orders in this case, and (ii) cabins such discovery in recognition of the First Amendment rights of the Nonprofit Organizations and their non-party donors. At the motion to dismiss stage, the Court permitted the case to proceed after taking as true the very limited allegations about donors who attended a single fundraiser in 2005 who could arguably be considered FEI's "co-victims." At this more advanced stage, however, when First Amendment rights are at stake, such naked and highly speculative allegations cannot suffice.

[9] Donors even opt out of this very limited—and carefully controlled—sharing. *See* Ex. 3 at ¶¶ 5, 7 (explaining that members and donors who enroll via the HSUS website can e-mail HSUS requesting that their information not be shared, and members and donors who enroll via other means receive an annual notice that they can fill out and return to prevent their information from being shared); Ex. 4 at ¶ 8 (same with regard to FFA).

Even outside of the First Amendment context, the Court has substantial powers to limit discovery to protect parties and non-parties from harassment and also to protect their privacy interests. *See generally In re Sealed Case (Med. Records)*, 381 F.3d 1205, 1215 (D.C. Cir. 2004) ("As a whole, 'Rule 26 vests the trial judge with broad discretion to tailor discovery narrowly.' . . . 'Although [Rule 26(c)] contains no specific reference to privacy or to other rights or interests that may be implicated, such matters are implicit in the broad purpose and language of the Rule.'") (quoting *Crawford-El v. Britton*, 523 U.S. 574, 598 (1998) and *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 35 n. 21 (1984)). Indeed, courts have "long 'recognized that interests in privacy may call for a measure of extra protection,' even where the information sought is not privileged." *Id.*

FEI cannot carry its First Amendment burdens to establish that it needs to discover confidential donor information from the Nonprofit Organizations. Moreover, even if it could do so, the threat of donor harassment here significantly outweighs any legitimate interest FEI might show. Thus, FEI should not be permitted to discover the identities of the Nonprofit Organizations' non-party donors.

At a minimum, no such discovery should occur unless, and until, FEI can demonstrate an overwhelming interest in learning the identities of the donors by showing a substantial likelihood to prevail on the remaining elements of its RICO case. Such a showing would include both (i) FEI's allegations regarding the Nonprofit Organizations' fraud against FEI and (ii) FEI's allegations that the Nonprofit Organizations made misrepresentations to their donors. Specifically, FEI must prove that the Nonprofit Organizations knowingly paid Tom Rider to provide false testimony, thereby harming FEI, and that the Nonprofit Organizations knowingly made false or misleading statements to their donors on which such donors may have relied.

Requiring FEI to make this heightened showing as a threshold matter would be consistent with the level of exacting constitutional scrutiny and the resulting safeguards courts have routinely imposed when compelled disclosure threatens First Amendment privacy rights. *See, e.g., McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995); *Bates*, 361 U.S. at 524. Specifically instructive are the recent cases where plaintiffs seek to discover the identity of anonymous Internet speakers. *See generally Sinclair v. TubeSockTedd*, 596 F. Supp. 2d 128, 131-34 (D.D.C. 2009) (discussing balancing tests used in *Dendrite Int'l v. Doe*, 775 A.2d 756, 760-61 (N.J. Super. Ct. App. Div. 2001) and *Doe v. Cahill*, 884 A.2d 451, 460 (Del. 2005)). Using both *Dendrite*'s five-part balancing test[10] and *Cahill's* slightly lower standard, courts have routinely required that plaintiffs first prove, with sufficient evidence, all of the elements of their claims that can be supported without the constitutionally-problematic discovery. *Cahill*, 884 A.2d at 460; *Dendrite*, 775 A.2d at 760.[11]

Such judicial safeguards would shield the Nonprofit Organizations and their donors from a wholly unnecessary breach of their First Amendment speech and association rights while imposing no prejudice to FEI's legitimate interests. If FEI can prove it has meritorious claims against the Nonprofit Organizations—including its allegations regarding "misrepresentations" to donors—the Court will be able to evaluate FEI's "need" for donor information based on a more complete record, taking into consideration more than just the sparse and counterintuitive

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[10] In *Dendrite*, the Court required: (1) that the plaintiff undertake to notify the anonymous posters that they are the subject of a subpoena seeking their identity; (2) that the plaintiff specify the exact statement alleged to constitute actionable speech; (3) that the court review the complaint and other information to determine whether a viable claim against the anonymous defendants is presented; (4) that the plaintiff produce sufficient evidence to support, prima facie, each element of its cause of action; and (5) that the court then balance the First Amendment right of anonymous speech against the strength of the plaintiff's prima facie claim and the need for disclosure of the anonymous defendant's identity. 775 A.2d at 760.

[11] Multiple courts use these tests or variations thereof when considering anonymous speech. *See Sinclair v. TubeSockTedd*, 596 F. Supp. 2d at 131-34 (collecting cases, including *Highfields Capital Mgmt. v. Doe*, 385 F. Supp. 2d 969, 974-76 (N.D. Cal. 2005); *In re Baxter*, 2001 WL 34806203, at *12 (W.D. La. Dec. 20, 2001); *Mobilisa, Inc. v. Doe*, 170 P.3d 712 (Ariz. Ct. App. 2007); *Best Western Int'l, Inc. v. Doe*, 2006 WL 2091695, at *4-5 (D. Ariz. July 25, 2006); *Krinsky v. Doe 6*, 72 Cal. Rptr. 3d 231, 245-46 (Cal. Ct. App. 2008)).

allegations contained in the FAC. Protecting donor information at this point in the litigation is a natural extension of the Court's decision to stage discovery and take party discovery first. *See* May 9, 2013 Order, ECF 167, at 1.

IV. CONCLUSION

For the foregoing reasons, the Nonprofit Organizations respectfully request that their Motion for Protective Order be granted in its entirety. Accordingly, the Nonprofit Organizations request that FEI not be permitted to discover the identities of the Nonprofit Organizations' non-party donors. At a minimum, the Court should enter an Order protecting the non-party donors' identities until FEI makes a substantial showing of likelihood to prevail on the merits as to all the elements of its RICO claims that are not dependent upon the donor information it seeks.

Date: December 2, 2013

Respectfully submitted,

/s Andrew Caridas

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FELD ENTERTAINMENT, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	**Civ. No. 1:07-cv-1532 (EGS/JMF)**
ANIMAL WELFARE INSTITUTE*, et al.*,	)	
	)	
Defendants.	)	
	)	

PROPOSED ORDER

Having considered the Motion for a Protective Order (the "Motion") submitted by The Fund for Animals, Inc., the Animal Welfare Institute, and The Humane Society of the United States (collectively, the "Nonprofit Organizations") and the related submissions of all parties, and for good cause shown, it is hereby:

ORDERED that the Nonprofit Organizations' Motion is GRANTED; and further

ORDERED that, unless otherwise ordered by this Court, Plaintiff Feld Entertainment, Inc., shall take no discovery that would reveal the identities of the donors or supporters of the Nonprofit Organizations, other than donors or supporters who were a party to this case as of December 2, 2013.

Date: _____

_____
Hon. John M. Facciola
UNITED STATES MAGISTRATE JUDGE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY on this 2nd day of December, 2013, I electronically filed the foregoing, and all paper exhibits thereto, with the Clerk of Court using the CM/ECF system, which will send a notification of such filing to all counsel of record. I further certify that I filed, by hand delivery to the Clerk of Court, two copies of a CD containing video exhibits, and served, via First Class mail, a copy of the CD containing video exhibits on all counsel of record.

/s Andrew Caridas
Andrew Caridas