IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

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

At its core, FEI's Opposition (the "Opposition") to the Nonprofit Organizations' Motion, simply assumes that every allegation in FEI's Amended Complaint regarding the wrongdoing of FFA, AWI and HSUS is true, and therefore fallaciously concludes that the Motion has no merit.[1] Ironically, while FEI claims the Motion contains "unfounded, *ad hominem* attacks on FEI", Opp. 3,[2] it is FEI who advances the baseless arguments that nonprofits are generally untrustworthy,[3] and that these particular Nonprofit Organizations are "sanctuaries for a crime" whose First Amendment rights—and the rights of their non-party donors—can and should be ignored. *See* Opp. 21-22. So far, FEI has proven none of its allegations. Reiterating that its allegations involve criminal conduct, *see* Opp. 14-16, does not ease FEI's burden of proof.

At bottom, the Opposition asks the Court to permit discovery of confidential donor

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[1] Capitalized terms are used herein consistent with their definitions in the Motion. Accordingly, "Nonprofit Organizations" refers to the original movants: FFA, AWI and HSUS. WAP separately responds to the Opposition *infra* at Section III.

[2] Of course, the Nonprofit Organizations' chronicle of FEI's past harassment of its perceived enemies is not an *ad hominem* attack, because FEI's past harassment is directly relevant to the likelihood of future harassment.

[3] *See, e.g.,* Opp. 4, n.5 (quoting Terry F. Lenzner, *Tis The Season for Nonprofit Scandals*, LAW360 (Dec. 4, 2013)). Mr. Lenzner's article, dealing with two instances of embezzlement by employees at nonprofit organizations completely unrelated to animal welfare or the Defendants here, says nothing about the likelihood that the Nonprofit Organizations would knowingly engage in fraud.

information FEI claims *it does not even need*, because FEI has not *recently* engaged in harassment of its perceived opponents. In doing so, FEI tries to sweep under the rug a history of harassment and an all too real likelihood that permitting the donor discovery FEI seeks will lead to new harassment. FEI's argument directly contradicts the balancing test established by *International Union v. National Right to Work Legal Defense & Education Foundation, Inc.*, 590 F.2d 1139, 1147 (D.C. Cir. 1978), and its progeny, and must be rejected.

ARGUMENT

I. FEI HAS NOT MET ITS BURDEN TO SHOW A SUBSTANTIAL NEED FOR THE DONOR INFORMATION

Under the First Amendment balancing test, FEI must show that the donor discovery at issue is *necessary* to its case. FEI does not even come close. The Opposition insists FEI does not need a second victim *and* confirms that FEI can identify donors without the constitutionally-fraught discovery it seeks. Even if FEI could somehow clear these hurdles, FEI has failed to substantiate any of the remaining elements of its RICO claim. FEI's failure to show necessity makes this case decidedly unlike the government-brought cases FEI cites in its Opposition, which all involved a compelling public policy purpose for disclosure. *See* Opp. 27-28 (citing *Citizens United v. FEC*, 558 U.S. 310, 370 (2010); *Buckley v. Valeo*, 424 U.S. 1, 71-72 (1976); *United States v. Judicial Watch Inc.*, 371 F.3d 824, 832-33 (D.C. Cir. 2004); *United States v. Comley*, 890 F.2d 539, 544 (1st Cir. 1989)).

FEI's protestations regarding the alleged criminality of the Nonprofit Organizations are too transparent to cover FEI's failure to show necessity. While it is undoubtedly true that the First Amendment does not protect *fraudulent* charitable solicitation, *see Illinois ex rel. Madigan v. Telemarketing Assocs., Inc.*, 538 U.S. 600, 612 (2003), it most certainly protects legitimate speech and association. Indeed, the fraudulent activity that the defendants unsuccessfully sought

to insulate from prosecution in *Madigan*—making false statements in charitable solicitations—is precisely what FEI has *so far failed* to show here.[4]

A. FEI Insists that a Second Victim is not Necessary to Prove its RICO Pattern

FEI previously maintained that it does not need any victim other than FEI itself to prove its RICO pattern allegations. Mot. 13. Rather than retreat from that position, FEI has doubled down, arguing that "controlling authority, [] makes clear that, in certain circumstances, a 'pattern of racketeering' can arise with only a single 'scheme' or single victim." Opp. 24. Yet, despite its insistence that it does not need donor victims, FEI complains that "Defendants have placed FEI between the proverbial 'rock and a hard place'" by arguing that FEI must allege more than one victim, but that the First Amendment blocks donor discovery. Opp. 1. But the Court, not the Nonprofit Organizations, decides what RICO requires. Until the Court rules that FEI cannot prove a RICO pattern without also proving donor fraud, FEI simply has no argument that trampling the First Amendment rights of the Nonprofit Organizations and their donors is necessary.

FEI's attempt to place this dilemma of its own making at the Nonprofit Organizations' feet is ill-conceived. *See* Opp. 24-25 ("If defendants want to avoid donor discovery, then they can stipulate that (1) FEI has, as a matter of law, pleaded a 'pattern' of racketeering, with only one scheme and one victim or (2) defendants made false and misleading solicitations regarding the ESA Action and/or Rider on which their donors relied in making donations that otherwise would have been made."). The Nonprofit Organizations have raised a legitimate First Amendment privilege. Because FEI seeks to pierce that privilege, it is FEI's burden to show that

[4] If anything, FEI's discussion of criminality shows how disconnected from reality FEI's "donor fraud" theory truly is. For example, the Opposition compares the Nonprofit Organizations' modest financial support for Tom Rider with *United States v. Aramony*, 88 F.3d 1369 (4th Cir. 1996) where the United Way's CEO used charitable donations to pay for his relationships with two mistresses and a condominium. *See* Opp. 15, n.11.

the discovery is necessary. It can wait for the Court to decide who is correct about the parameters for a RICO pattern, or it can abandon its current position and stipulate that its RICO pattern requires more than "only one scheme and one victim."[5]

B. FEI Identifies a Number of Alternative Sources for the Information it Seeks

FEI highlights that the discovery it seeks is unnecessary by identifying a number of alternative sources from which it can obtain donor information without breaching the First Amendment privilege. *See* Opp. 29-31. Most significantly, FEI states that the Nonprofit Organizations' donors include many other organizations that voluntarily disclose their financial support in annual tax filings. In Exhibit H to the Opposition, FEI identifies a large number of donations by such foundations, including 147 HSUS donations, 37 FFA donations, and 24 AWI donations. It does not appear that FEI has ever used these alternative *public* sources to determine whether any of the donors "gave money for purposes relevant to FEI's RICO claim" or whether they believe that the Nonprofit Organizations misled them in any way. Opp. 26.[6] Notwithstanding the widespread publicity of FEI's allegations—and the many donors allegedly known to FEI—FEI cannot identify a single donor who believes it has been defrauded by the Nonprofit Organizations. This is curious, given FEI's argument that if only they were aware of FEI's allegations, these "disenchanted donors" would file "a separate fraud action" against the Nonprofit Organizations. Opp. 29.

FEI has done nothing to substantiate its allegations of donor fraud. Instead, FEI rejoins

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[5] Neither eventuality would relieve FEI's burden to meet the First Amendment balancing test, including, at minimum, substantiating its remaining allegations.

[6] FEI's failure to exhaust alternative sources of donor information readily distinguishes this case from those that permitted any donor discovery. *See, e.g., Greyhound Lines, Inc. v. Int'l Amalgamated Trans. Union*, 1992 U.S. Dist. LEXIS 10095, at *7 (D.D.C. July 9, 1992) ("Greyhound . . . has been unable to learn the identification of FGS' contributors"). *Greyhound Lines* is also distinguishable because, by asserting that it can prove a single-victim RICO pattern and failing to substantiate its remaining RICO allegations, FEI cannot show that the donor discovery is "fundamental to [its] RICO claim." *See* Opp. 23.

that "only the organizations know which donors contributed funds based on solicitations referencing the ESA Action, FEI, its elephants and/or Rider." Opp. 25. But this is doubly wrong. First, for the most part, the Nonprofit Organizations will not be able to determine whether a particular donor was at all influenced by the ESA Action or Tom Rider.[7] Second, obviously the donors themselves know what prompted their generosity. That none of them, including those known to FEI, has come forward as "victims" is telling. Precisely because no donor would voluntarily support FEI's outlandish allegations, FEI seeks to force the Nonprofit Organizations to identify the most vulnerable group of donors for FEI to pick apart via deposition: individual donors who expressed some interest in the ESA Action or Tom Rider. *See* Opp. 25-26. However, the First Amendment protects both the donors and the Nonprofit Organizations from such attack. The Nonprofit Organizations do not need to put their supporters in FEI's crosshairs. This is, of course, true of the thousands of donors whose identities remain confidential,[8] but it is also true of the many public donors referenced in the Opposition.[9]

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[7] At present, the Nonprofit Organizations are aware of few donors who contributed based on solicitations referencing the ESA Action, FEI, its elephants, and/or Rider, principally those who contributed in conjunction with the July 2005 fundraiser. Discovery in this case is ongoing, and the parties have yet to even agree on e-discovery search terms. Accordingly, FEI's accusation that "*[t]he organizations have produced no log of responsive documents over which they are claiming First Amendment 'privilege*,'" Opp. 4, is knowingly premature.

Neither the ESA Action nor Tom Rider were significant features of the Nonprofit Organizations' fundraising efforts. Contrary to FEI's apparent impression, *see id.*, the ESA Action was an enormous money *drain* for the Nonprofit Organizations, not a source of funds.

[8] FEI's assertion that the Nonprofit Organizations disregard their privacy policies is false. While FEI points to the regrettable apparent disclosure of four HSUS supporters by one of HSUS' paid solicitors, *see* Opp. Ex. E at 20-28, that disclosure was a violation of the contract between the solicitor and HSUS, *id.* at 33. Similarly, the fact that HSUS engages in "arm's length" contracts with such solicitors, *see* Opp. 30, n.18, does not negate donor privacy. An arm's length vendor motivated to keep HSUS's business—and contractually obligated to protect confidential information—is very different from FEI, whose stated goal is the destruction of animal welfare organizations.

[9] Donors who have publicly revealed their support for the Nonprofit Organizations still have an expectation of privacy, and First Amendment protection, as to their support of the ESA Action or Tom Rider. *See Greyhound Lines*, 1992 U.S. Dist. LEXIS 10095, at *6-7 (cited in Opp. 32) (limiting the group whose First Amendment rights were not implicated to those organizations who had publicly supported the very strike at issue in the litigation, *not* the much larger group who had publicly supported the defendants).

C. FEI has not Shown a Substantial Likelihood of Prevailing on the Merits as to the Remaining Elements of its Donor Fraud Theory

FEI has done nothing more than allege that donors were defrauded. FEI's protests notwithstanding,[10] no ruling in either this case or the ESA Action found that the Nonprofit Organizations misled donors in any manner. *See* Opp. 17. As explained in the Motion, at minimum, FEI must show a substantial likelihood of prevailing on the remaining elements of its RICO case. *See* Mot. 22-24. To date, while FEI's claims have admittedly survived a motion to dismiss, FEI has done nothing to substantiate the far-fetched allegations that the Court had to accept as true at the pleading stage.

1. Requiring such a showing is consistent with applicable case law

As even FEI admits, a number of cases—including in this Circuit—have required "a plaintiff to show 'something more' than merely that its claim would survive a motion to dismiss," before obtaining information protected from discovery by the First Amendment. Opp. 34 (citing *Sinclair v. TubeSockTedD*, 596 F. Supp. 2d 128, 132 (D.D.C. 2009); *Dendrite Int'l v. Doe*, 775 A.2d 756 (N.J. Super. Ct. App. Div. 2001); *Doe v. Cahill*, 884 A.2d 451 (Del. 2005)).[11] FEI attempts to distinguish these cases on two grounds, that they involved defamation claims and that they involved discovery from third parties, neither of which is persuasive.

First, defamation claims are close analogues to the donor fraud alleged by FEI. In both cases, the information sought to be discovered—the identities of individuals—violates a First Amendment right to protected anonymous activity. Just like individuals who publish information on the internet, individuals who donate money to the Nonprofit Organizations may engage in

[10] FEI also spends three pages explaining that its allegations describe a criminal act on the part of the Nonprofit Organizations. *See* Opp. 14-16. The discussion is irrelevant: scandalous allegations are still *unproven* allegations.

[11] While "*Sinclair* . . . discussed, but did not adopt, the *Dendrite* test," Opp. 35 (quoting *Hard Drive Prod., Inc. v. Does*, 892 F. Supp. 2d 334, 339 n.2 (D.D.C. 2012)), it found that under either *Dendrite* or *Cahill* discovery would be blocked, because, among other things, "the Court question[ed] the sufficiency of Sinclair's claims." *Sinclair*, 596 F. Supp. 2d at 133.

First Amendment activity without opening themselves up to harassment. Unless, and until, the First Amendment activity is shown to be tainted by illegal conduct, the identities of the actors are not subject to discovery. Both this case and defamation cases contrast starkly with the cases on which FEI relies, which involve unauthorized downloading of copyrighted files. As FEI recognizes, these copyright cases involve minimal First Amendment protection, because downloading does not involve core First Amendment speech. *See* Opp. 35 ("The First Amendment interests implicated in defamation actions, where expressive communication is the key issue, is considerably greater than in file-sharing cases.") (quoting *Call of the Wild Movie, LLC v. Does*, 770 F. Supp. 2d 332, 350 n.7 (D.D.C. 2011)). But association with a like-minded nonprofit organization is precisely the kind of activity that—like expressive speech published online—the First Amendment holds sacred. *See, e.g., Krislov v. Rednour*, 226 F.3d 851, 860 (7th Cir. 2000).[12] Moreover, in the copyright cases FEI cites, the plaintiff had already substantiated its *prima facie* case of infringement by providing the court with the exact date and time at which a particular internet protocol address accessed the copyrighted file. *See, e.g., Hard Drive Prod.*, 892 F. Supp. 2d at 339-40. All that remained was to match the IP address to a named defendant. By comparison, FEI has nothing but unproven allegations in its Amended Complaint.

Second, whether discovery is sought from a defendant or a third party has no bearing on the First Amendment privilege. FEI cites no case for the proposition that the First Amendment protects litigants less than non-litigants. In addition, the discovery FEI seeks implicates not just the Nonprofit Organizations' First Amendment rights, but those of the donors themselves. FEI offers no explanation, nor could it, why the rights of donors would diminish because the

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[12] The fact that "fraudulent charitable solicitation [], like copyright infringement, is unprotected speech," *see* Opp. 35, is irrelevant. So is defamation. *See* Opp. 14 ("[l]ike other forms of public deception, fraudulent charitable solicitation is unprotected speech") (quoting *Madigan*, 538 U.S. at 612). The only relevant question is how worthy of First Amendment protection the underlying activity is if the allegations of illegal conduct are false.

Nonprofit Organizations happen to be defendants rather than recipients of subpoenas. In fact, First Amendment protections apply with full rigor even when the only rights at issue are those of current defendants in the litigation. *See, e.g., Sinclair*, 596 F. Supp. 2d at 134 (First Amendment barred subpoenas to websites to determine real names of three named defendants).

2. FEI has yet to make any showing in support of its allegations

Despite faulting the Nonprofit Organizations for "incorrectly presum[ing] . . . that *only* the 2005 fundraiser allegations meet the pleading threshold of Rule 9(b)," FEI's sole argument that it has supported its allegations about donor fraud by the Nonprofit Organizations involves the 2005 fundraiser. *See* Opp. 17-18. FEI incorrectly asserts that the Court's Findings of Fact in the ESA Action determined "that the fundraiser invitation misleadingly represented how contributions would be used." Opp. 17. The Court made no such finding; it merely found that:

> The [2005 fundraiser] purported to be a "benefit to rescue Asian elephants from abuse by Ringling Bros. Barnum & Bailey," the purpose of which was to "raise money so [the plaintiffs] c[ould] successfully wage this battle on behalf of the elephants." Proceeds from the fundraiser (more than $13,000.00) were provided by AWI to WAP, which in turn disbursed those funds to Mr. Rider.

FOF 39 (citations omitted). Setting aside the numerous reasons why the finding could not have any preclusive effect with regard to FEI's allegations in this case, nothing in Finding of Fact 39 is particularly helpful to FEI's argument. In fact, the finding suggests a true statement by the Nonprofit Organizations that the purpose of their fundraiser was to further their efforts on behalf of elephants against Feld.[13] Moreover, it would not have been possible for the Court to make any findings about the *factual accuracy* of what the 2005 fundraiser "purported to be" or its stated "purpose", because neither question was litigated in the ESA Action.

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[13] The fact that the ESA Action was ultimately dismissed on standing grounds does not impugn the Nonprofit Organizations' honest belief and best efforts to ensure that the "battle" against FEI would be "successfully waged."

D. The Court has not Permitted the Discovery the Motion Seeks to Quash

By mischaracterizing both the donor information that the Motion seeks to protect and the Court's May 9, 2013 Order, ECF No. 151 (the "May 9 Order"), FEI erroneously concludes that the court has already held that the donor information is discoverable. For example, FEI faults the Motion for omitting Topics 8, 22 and 23 of the May 9 Order. *See* Opp. 10. However, none of those topics even arguably encompasses information the Motion seeks to protect: identifying information regarding the Nonprofit Organizations' donors. The Motion does not seek to protect any actions taken by the Defendants themselves, or the information FEI would need to evaluate those actions. Thus, for example, Defendants will take reasonable steps to identify documents relating to their efforts, if any, to raise money to support the litigation or media efforts against Feld Entertainment.[14] They will also take reasonable steps to determine the amount of money actually raised by any such efforts. This information appears to fall within the topics found relevant by the May 9 Order and falls outside the First Amendment privilege at issue here.

In contrast, donor-identifying information has nothing to do with Topic 8, which found relevant "[h]ow *defendants* used the ESA action and Rider's claims and testimony for fundraising or publicity agendas," *See* May 9 Order at 2 (emphasis added); Topic 22, concerning complaints about fundraising activities; or Topic 23, concerning government investigations, *see id.* at 4. The Motion correctly focused on Topic 18, and explained that donor identification fell outside the scope of: "[i]nformation 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." *See id.*

Furthermore, the Court has yet to rule that anything is "discoverable." The Court has only

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[14] These will include all of their solicitations, whether or not they "are as pure as the driven snow." *See* Opp. 4.

ruled that certain discovery topics "are relevant," *see id.* at 1, and has made no ruling as to the applicability of the First Amendment privilege, or any other privilege, to the material subject to discovery in this case. Without doubt, both FEI and Defendants will argue in the coming months that certain material deemed relevant by the Court must be withheld on privilege grounds. Indeed, the discovery order in this case sets out the procedure for logging such privileged materials. *See* ECF No. 156 at 2-5.

II. THE THREAT OF HARASSMENT OF DONORS IS VERY REAL

To successfully assert the First Amendment privilege, "the litigant seeking protection need not prove to a certainty that its First Amendment rights will be chilled by disclosure," only "that there is some probability that disclosure will lead to reprisal or harassment." *Black Panther Party v. Smith*, 661 F.2d 1243, 1267-68 (D.C. Cir. 1981). 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." *Id.* at 1266. "If the former outweighs the latter, then the claim of privilege should be upheld." *Id.* Accordingly, the Nonprofit Organizations need not show that FEI engaged in harassment in the past. It suffices that a risk of future harassment exists, which the Opposition does not rebut. However, because the Nonprofit Organizations *can* show that FEI has previously engaged in harassment, and because FEI all but admits that it will harass donors by, at minimum, subjecting them to depositions in this case, the harassment side of the balance is heavy indeed.

For this reason, the Nonprofit Organizations' showing of probable harassment easily clears the standard of cases such as *Buckley v. Valeo* and *Citizens United*. As *Buckley* explained:

> The evidence offered need show *only a reasonable probability* that the compelled disclosure of a party's contributors' names will subject them to threats, harassment, or reprisals from either Government officials or private parties. The proof may include, for example, *specific evidence of past or present*

> *harassment* of members due to their associational ties, or of harassment directed against the organization itself. A pattern of threats or *specific manifestations of public hostility* may be sufficient. New parties that have no history upon which to draw may be able to offer evidence of *reprisals and threats directed against individuals or organizations holding similar views*.

424 U.S. at 74 (emphasis added). Similarly, *Citizens United* specifically expressed concern regarding the possibility that forced disclosure of donors could chill First Amendment activity; however, the Court found that concern inapplicable because "Citizens United has been disclosing its donors for years and has identified no instance of harassment or retaliation." 558 U.S. at 370 ("Some *amici* point to recent events in which donors to certain causes were blacklisted, threatened, or otherwise targeted for retaliation. . . . . The examples cited by *amici* are cause for concern.") Here, where the Nonprofit Organizations *do not* disclose their donors, where FEI does not currently know whether any of the public donors oppose FEI, and where FEI has a well-documented history of harassment, there is certainly "cause for concern."[15]

A. FEI has Actually Harassed Animal Welfare Activists in the Past

Rather than outright denying that specific acts of harassment occurred in the past—it cannot—FEI responds that the past acts of harassment are "stale" and have previously been dismissed by the Court. *See* Opp. 5-6 (stating that the Court denied two motions in the ESA Action that contained harassment allegations). However, this Court has never found that the harassment did not occur, a fact FEI does not contest. And FEI provides no rationale for why a pattern of harassment (and worse) that predates this litigation is not a good predictor of how FEI

[15] Similarly, while *United States v. Judicial Watch* found that "a general fear of the IRS is insufficient to establish that speech will be chilled," it agreed with the Tenth Circuit that the IRS would *not* be entitled to donor discovery if it intended to subject many of the donors to audits. 371 F.3d 824, 832-33 (D.C. Cir. 2004) (citing *United States v. Church of World Peace*, 775 F.2d 265, 266–67 (10th Cir. 1985)). Here, it is quite clear that FEI intends to subject every donor identified by the Nonprofit Organizations to deposition, and likely worse.

United States v. Comley, which the Opposition also cites, is inapplicable, because there the government was *not* seeking identifying information, but only the content of communications. 890 F.2d 539, 544 (1st Cir. 1989).

will behave if it obtains the discovery it seeks, and once this litigation concludes.

1. FEI engaged in a coordinated effort to harass animal welfare activists and infiltrate animal welfare organizations

FEI protests that the "Long Term Animal Task Force" document cited in the Motion "was never adopted," but ignores both the implications of FEI having created the document and the bevy of evidence cited in the Motion that FEI in fact engaged in a coordinated effort, spanning many years, to harass animal welfare activists and infiltrate animal welfare organizations. First, that FEI would invest the resources to develop an intricate 30-page plan, complete with diagrams is itself highly indicative of the animus FEI feels towards animal welfare organizations. Even absent the many instances of harassment documented in the Motion, the existence of such strong animus would suffice to create a significant risk of future harassment. Second—as confirmed by the very exhibits FEI cites in its Opposition to show the plan was never implemented—FEI never formally implemented the plan because *FEI was already engaged in these activities*. ESA Action ECF No. 146-9 at 3 ("Q: And Andy Ireland wrote a series of memoranda saying, 'This isn't necessary; we already have most of this in place.' Do you remember that? A: Yes.") (cited in Opp. 6).

Indeed, whether or not FEI ever formally implemented its plan, it is clear that FEI pursued many of the plan's directives. For example, Steven Kendall wrote that he was instructed to gather intelligence. *See* Mot. Ex. 10 at 50. FEI does not refute Steven Kendall's book, or his sworn testimony which confirms the performance of the activities contained in the non-implemented plan: (1) covert tape recorded conversations; (2) surveillance; (3) infiltration and/or the use of a confidence game to obtain information; (4) sharing intelligence with other investigators. *See id.* at 50-52; Mot. Ex. 14 at 1384-87. Likewise, FEI does not refute Joel Kaplan's sworn testimony that Richard Froemming's major assignment was to "destroy" People

for Ethical Treatment of Animals, Mot. Ex. 12 at 144, 154, or Kenneth Feld's own testimony that he was aware of an "intelligence gathering operation," *see* Mot. Ex. 15 at 2115:6-8 ("from what I've seen here, it looked like [Richard Froemming] did have people inside some of the [animal activist] organizations"). Nor does FEI address the fact that Mr. Feld hired Clair George, the former Deputy Director of Operations of the CIA, as a "consultant to Feld Entertainment and its affiliates," and tasked 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." *See* Mot. Ex. 13 at 3. Given these unrefuted statements regarding FEI's activities, one might wonder what was left to implement.

2. The PAWS Lawsuit involved FEI harassment

FEI's claim that "[t]he allegations concerning infiltration of PAWS already have been adjudicated, and failed to survive a motion to dismiss," Opp. 7, is partially misleading and partially false. The misleading part concerns the court's dismissal of PAWS' RICO claim, because PAWS failed to allege that the theft of its confidential business information by FEI resulted in a concrete loss of business or property. *See* Opp. Ex. B at 5. The court never found that the theft of confidential information alleged by PAWS did not in fact occur. FEI argues that PAWS never alleged that FEI *misused* the stolen information "to divert donations which otherwise would have been made to PAWS," and that "[t]his omission is glaring." Opp. 7. But the *truly* glaring omission is that FEI's Opposition *does not deny the theft*.

Additionally, FEI omits that the same order in the PAWS Litigation denied FEI's motion to dismiss PAWS' civil conspiracy claim, which alleged that FEI provided PAWS' stolen, confidential information to others, who in turn filed a lawsuit against PAWS for the sole and wrongful purpose of harming PAWS and driving it out of business. Opp. Ex. B at 7-9. PAWS alleged that FEI provided the Berosinis with the stolen confidential information in order to

discredit PAWS, and guaranteed that FEI would pay for any money damages incurred by the Berosinis in connection with their Nevada lawsuit. *Id.* at 7. "The Berosinis lawsuit was allegedly ultimately resolved in PAWS' favor, but caused PAWS to expend $168,000.00 in legal fees." *Id.* This allegation, which survived the Motion to Dismiss, bears a striking resemblance to the stated goals contained within the Long Term Animal Task Force plan and the Confidential Memo on PETA and PAWS created by FEI. *See* Mot. Ex. 8 at 3, 12-24, 28, 30; Mot. Ex. 9 at 10.

3. The Fairfax Case likely involved FEI harassment

Even the Fairfax Case, which the Motion only cites in a footnote to distinguish the verdict, *see* Mot. 18, n.7, likely involved FEI harassment. Again trying to direct attention away from its actual conduct, FEI points out that Mr. Feld, not FEI, was formally named as a defendant in the Fairfax case. Given that Mr. Feld is the owner and Chief Executive Officer of FEI, this is a red herring. So is the fact that Mr. Feld was found not liable to PETA for damages. The Motion properly pointed out that several individuals have testified under oath to past harassment by FEI or Mr. Feld. *See* Mot. 17-18. That is considerably more than the Nonprofit Organizations must show under the First Amendment balancing test.

4. The Pottker Litigation involved staggering FEI harassment

FEI's claim that FEI obtained *partial* summary judgment underscores that the court actually made uncontested findings of fact[16] sufficient to deny Feld's Motion for Summary Judgment on all of the counts brought by Jan Pottker herself. Opp. Ex. C at 19. Some of these facts seem lifted from a Robert Ludlum novel. The summary judgment opinion recounts that Mr. Feld hired Mr. George and another individual to concoct an intricate confidence scheme to divert Pottker from attempting any further publication about the Feld family or Ringling Bros. *Id.* at 1. Charles Smith, a former Vice President for Finance and Chief Financial Officer of FEI, told

[16] *See* Opp. Ex. C at 18-19.

Pottker that he believed her phone was tapped and that her house may have been broken into. *Id.* at 13. Smith also indicated that Feld had attempted to dupe her into not writing about the circus. *Id.* at 13-14.

B. FEI will Harass Donors if Allowed to take the Requested Discovery

Given the indisputable history of past harassment, the Nonprofit Organizations easily meet their burden to "show that there is *some probability* that disclosure will lead to reprisal or harassment." *Black Panther Party*, 661 F.2d at 1268 (emphasis added). FEI's response that it already knows about some of the Nonprofit Organizations' donors, and has not yet harassed them, *see* Opp. 31, is hardly reassuring. First, the majority of the donors known to FEI are sophisticated foundations better prepared to withstand FEI harassment than individual donors. Second, as FEI points out, it does not (for the most part) know whether these donors supported the Nonprofit Organizations' litigation efforts against FEI. *See* Opp. 25-26. It is waiting for the Nonprofit Organizations to paint targets on the donors of most interest to FEI before taking further action. Third, it is unsurprising that FEI would be circumspect vis-à-vis the Nonprofit Organizations' donors while it is seeking to discover additional donors and identify which donors are most worthy of its attention.

Once FEI is armed with the donor discovery it seeks there is certainly reason to fear that FEI will harass the Nonprofit Organizations and their supporters. FEI's militant attitude towards animal welfare organizations has not softened during the pendency of this litigation. *See, e.g.,* FEI, *ASPCA Pays $9.3 Million in Landmark Ringling Bros. and Barnum & Bailey Circus Settlement* (Dec. 28, 2012) (Kenneth Feld stating that "[a]nimal activists have been attacking our family, our company, and our employees for decades because they oppose animals in

circuses”);[17] Joe Roybal, *Ringling Bros. and Barnum & Bailey® Won’t Back Down To Animal Rights Extremists*, BEEF (June 20, 2013) (Stephen Payne, FEI Vice President of Corporate Communications, stating that “I don’t believe in turning the other cheek in a debate like this. You just get slapped twice.”).[18] This animus is pervasive, deep-seated, and often expressed in inflammatory and indeed inappropriate language. *See, e.g.*, John M. Simpson, *Strategies for Coping with “Animal Law” Claims* (Audio Recording), ANIMAL AGRICULTURE ALLIANCE STAKEHOLDER SUMMIT (Apr. 28-29, 2010) (quoting a law partner who equates the “mindset” of organizations like HSUS with “dealing with the Hitler Youth” and stating “I don’t think that’s an overstatement”).[19] Unless there is some reason to believe that FEI has acknowledged the illegality and impropriety of its past conduct and radically changed its corporate behavior and mindset—and the Opposition’s silence on this point speaks volumes—the past may reasonably be presumed to be prologue.

However, even setting aside the substantial risk of FEI’s future extrajudicial harassment of the Nonprofit Organizations’ donors, it is certain that FEI will harass donors within the confines of this case. FEI’s asserted purpose in pursuing discovery is to identify the Nonprofit Organizations’ donors and depose them, presumably to subject them to a parade of horribles regarding the Nonprofit Organizations’ alleged behavior in the ESA Action. Subjecting such donors, many of whom are private individuals who donated very small amounts of money, to such burdens will itself constitute harassment that punishes donors for exercising their First Amendment rights, and makes current and potential donors less likely to associate with the Nonprofit Organizations in the future.

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[17] *Available at:* http://www.ringlingbrostrialinfo.com/

[18] *Available at:* http://beefmagazine.com/cattle-industry-structure/ringling-bros-and-barnum-bailey-won-t-back-down-animal-rights-extremists

[19] *Available at* http://www.trufflemedia.com/home/conference/2010-animal-ag-alliance-stakeholders-summit

Nor does it "strain credulity" that FEI may seek to add donors as defendants.[20] *See* Opp. 29. FEI not only assumes the truth of its far-fetched allegations of conspiracy and fraud, but also that the donors will simply accept FEI's allegations without skepticism. As these donors are presumably predisposed to support animal welfare causes and to mistrust FEI, it is far more likely that they would offer testimony that they believe that FEI mistreats its elephants and other performing animals, they believe the Nonprofit Organizations are trustworthy organizations that undertook important work in trying to enjoin such mistreatment, and they stand by their donations.[21] If a donor's testimony contradicts FEI's narrative that she is a co-victim, FEI will likely consider her a willing participant in a RICO conspiracy or an aider and abettor of fraud. After all, FEI's pleadings do not allow room for the possibility that a willing donor could simply be an innocent bystander. *See, e.g.,* Opp. 29. Thus, the Nonprofit Organizations' fear that FEI would, at least implicitly, threaten donors with liability at deposition is well-founded. As is the fear that—if and when such threats prove insufficient—FEI would try to join one or two uncooperative donors as Defendants, *pour encourager les autres.*

C. FEI's Proposed Protective Order does not Protect Donors from Harassment

The proposed "global protective order" to which FEI points, Opp. 2, 12-14, is merely a *confidentiality* order, and therefore has no impact on this Motion. If all that was required to protect First Amendment rights was a confidentiality order limiting the purposes for which donor identities could be used, there would be no "*National Right to Work* balancing test." *See* Opp. 21. Moreover, the confidentiality protections of the global order sought by the parties would be illusory as to donor harassment. First, as explained above, some of the harassment by FEI will

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[20] FEI conspicuously does not put this concern to rest by categorically declaring—as it could—that it will not add donors to the case as Defendants.

[21] By comparison, FEI's suggestion that "what is more likely" is that "disenchanted donors" would file "a separate fraud action" against the Nonprofit Organizations rings hollow, given FEI's widespread publication of this case and the fact that hundreds of donors are already known to FEI. *See* Opp. 29.

consist of exactly the kind of activities that the global order would permit, such as FEI taking depositions of donors and joining donors as defendants in this case. Second, the fact that the Nonprofit Organizations provided donor information to FEI, an entity antagonistic to their donors, would chill protected First Amendment activity, with or without a confidentiality order. Third, a confidentiality order entered in this case offers ephemeral protection against future harassment by FEI, given the undisputed evidence that FEI's anti-animal welfare activities can continue for decades: it is unlikely that a harassed donor would even know of the confidentiality order, much less possess the legal sophistication and resources to enforce it.

In any case, a confidentiality order is not the mechanism to protect *privileged* materials. If a document or other information is privileged, it must be identified on a privilege log, not produced to the other party. FEI has itself made numerous objections to the Defendants' document requests based on the attorney-client and/or work product privileges. FEI presumably does not intend to produce those materials, satisfied that a global protective order is in place. Even FEI recognizes that privileged materials need not be produced and instead demands that these documents and information be identified on a privilege log. *See* Opp. 4.

III. FEI'S ALLEGATIONS CONCERNING WAP UNDERMINE, RATHER THAN SUPPORT, ITS OPPOSITION

Far from strengthening its Opposition, FEI's assertions concerning WAP only serve to reinforce the reasons why the Motion should be granted. To begin with, FEI does not deny, nor can it, that the Court in the ESA Action *specifically* recognized that WAP had a First Amendment right to protect the identities of third party contributors. *See* ECF Action No 178 at 8-9. While that holding does not preclude the Court from reaching a different result here, FEI proffers no compelling reason for the Court to do so.

Rather, the WAP materials submitted along with the Opposition reflect that WAP, in

response to the multiple subpoenas issued to it in the ESA Action, did what the Court instructed in that case and proceeded in precisely the manner that the Nonprofit Organizations contend is appropriate here—*i.e.*, it redacted the identities of individual donors who had no other relationship with the ESA Action, while providing FEI with substantive information concerning the communications between the donors and WAP. *See* Opp. Ex. D at 3-45.

A. The Materials FEI Cites in its Opposition Belie the Need for Donor Discovery

Moreover, the specific allegations and materials cited by FEI actually demonstrate the tenuous nature of both FEI's donor fraud theory and its purported need for the donor discovery at issue. For example, FEI first stresses its allegation that WAP solicited funds for Mr. Rider's advocacy from the ASPCA, FFA, AWI and HSUS. Opp. 18 (emphasis added) (quoting Am. Compl. ¶ 69). But that allegation not only underscores the anomalous nature of FEI's alleged "conspiracy"—in which the Defendant organizations who contributed to Mr. Rider's public advocacy are either co-conspirators or additional "victims" or both, depending on what best serves FEI's purposes at any given moment—but also undercuts FEI's purported need for the discovery of other confidential donor identities at this juncture. FEI can obviously take the depositions of organizational representatives of ASPCA (which is no longer a Defendant), FFA, HSUS, or AWI, to explore whether they were in fact defrauded by WAP (or anyone else) in providing funding for Mr. Rider's advocacy efforts, and hence whether FEI's co-victims theory makes any sense at all.

Similarly, FEI's purportedly "illustrative" example of a letter from an individual that FEI asserts was a WAP supporter only demonstrates the flimsiness of the entire donor fraud theory. Contrary to FEI's baseless assertion that Mr. Rider was "not traveling or engaging in a legitimate media campaign" of any kind, Opp. 20, the very document on which FEI relies demonstrates that the woman who wrote the letter met Mr. Rider *when Mr. Rider traveled to attend and speak at*

an elephant protection "rally at the [State] Capitol" in Harrisburg, Pennsylvania, to urge state legislators to protect circus elephants from mistreatment. Opp. Ex. D at 188-4 at 2 (emphasis added). Further, this letter demonstrates that the writer "had the opportunity of not just listening to [Mr. Rider's] talk," but that she also "convers[ed] with him at lunch," and formed *her own first-hand impression* of whether Mr. Rider was "motivated by the suffering and injustices that these animals endure." *Id.*

The notion that this letter—which shows that Mr. Rider *was* in fact traveling, that he *was* in fact personally advocating for the elephants, and that he *was* in fact meeting in person with like-minded individuals during his travels—could possibly form the basis for a mail or wire fraud allegation against WAP (or any of the Nonprofit Organizations) based on the self-evidently fallacious proposition that Mr. Rider was doing *none* of these things is ludicrous on its face. Equally farfetched is the notion that an individual who was appalled at the "injury and indignities being inflicted without mercy upon these innocent animals behind the scenes," *id.*, would regard herself as a *co-victim of FEI* who would be anxious for the opportunity to be deposed and/or file her own fraud case against organizations that share her views about elephant mistreatment and worked to halt the very treatment she abhors. If this is the best that FEI can offer—and, evidently, it is—it warrants not only granting the Motion but serious skepticism as to FEI's entire motivation in pursuing this litigation.[22]

B. FEI's Opposition is Inconsistent with the Court's Findings in the ESA Action and FEI's Own Past Allegations

Far from supporting FEI's intended trammeling of First Amendment rights, the more that FEI is compelled to explain its "donor fraud" theory, the more confounding and internally

[22] FEI's suggestion that this individual was somehow defrauded into making a *personal* assessment of Mr. Rider's credibility in 2003 because of the Court's subsequent "findings" regarding Mr. Rider's attachment to the elephants in 2009, *see* Opp. 20, is a chronological non sequitur which makes no legal or logical sense.

inconsistent that theory is revealed to be. Pressed to defend its donor fraud theory, FEI takes the position that Mr. Rider "was not traveling or engaging in a legitimate media campaign" at all with the funding he received. Opp. 20. This position is contrary to the very factual findings on which FEI purports to rely but selectively cites. *See* ESA Action ECF No. 599, FOF 48 ("Plaintiffs certainly established during the trial that Mr. Rider engages in media and educational outreach activity regarding FEI's Asian elephants, including speaking out about what he allegedly witnessed regarding elephant mistreatment, and publicizing his involvement in this litigation," and that this conferred a "benefit" on those supporting his efforts).

FEI's Amended Complaint concedes that Mr. Rider *did* "regularly observe the [FEI] elephants and videotape them" while they were touring the country, Am. Compl. ¶ 52; that he in fact did "appear as a witness testifying on behalf of legislative proposals . . . before the United States Congress and various state legislatures and bodies concerning FEI and/or captive Asian elephants," *id*. ¶ 17, including in Connecticut, Massachusetts, Nebraska, and the City of Chicago, *id*. ¶¶ 239-43; and that he even "continued to peddle his story and seek publicity" for his claims of circus elephant mistreatment in Europe *after* the ESA trial, *id*. ¶ 245.

In a more recent filing, FEI cited newspaper articles in which FEI's *own employees* responded to Mr. Rider's multiple interviews with media throughout the country, *see* ECF No. 181 at 4 n.3 (citing ECF No. 177 at Exs. C, E, H, L, N), and FEI's *own* internal e-mails documented that in fact "Tom Rider *has been touring the country*" criticizing FEI's elephant treatment practices. ECF No. 177 at Ex. R (FEI's own document explaining that Mr. Rider "spoke against the circus industry at the City Council meeting in Huntington Beach, CA" and at the UCLA law school). And in the ESA Action, FEI even went so far as to complain that Mr. Rider had so extensively "entered the spotlight *through his legislative and media appearances*"

that he had become a "public figure" regarding the elephant treatment issue and hence was entitled to less confidentiality for his personal information than would otherwise be the case. ESA Action ECF No. 46 at 11 (emphasis added); *see also* ECF No. 177, Ex. 8 at 3 n.1 (FEI exhibit referring to Federal Express labels subpoenaed in the ESA case demonstrating that Mr. Rider traveled to at least 47 different cities in 24 states while the ESA Action was being pursued); ESA Action ECF Nos. 152 & 152-4 (motion and letter from FEI's present counsel complaining that "Tom Rider has also made statements to the press" asserting the "inhumane treatment" of FEI's elephants, and should be compelled to cease doing so).

In short, far from demonstrating a compelling need for the forced disclosure of confidential donor information, FEI's donor fraud allegations against WAP and the Nonprofit Organizations, appear now to be based on the demonstrably false premise that Mr. Rider "did not travel" and never engaged in any "legitimate" media work at all. Opp. 20. At bare minimum, this counsels in favor of requiring FEI to first prove that *anything* that WAP or the Nonprofit Organizations actually said to a prospective donor could constitute actionable "fraud" *before* requiring these organizations to produce sensitive donor information protected by "core First Amendment rights," *see* ESA Action ECF No. 178 at 9, to a corporation with a frightening track record of resorting to any means it deems necessary to harass, punish, and intimidate its perceived adversaries.

CONCLUSION

For the foregoing reasons, the Nonprofit Organizations' Motion for Protective Order, and WAP's joinder thereto, should be granted in their entirety.

Date: January 3, 2014

Respectfully submitted,

/s Andrew Caridas

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY on this 3rd day of January, 2014, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send a notification of such filing to all counsel of record.

/s Andrew Caridas
Andrew Caridas