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.	)	
	)	

NONPROFIT ORGANIZATIONS' OBJECTION
TO THE FEBRUARY 3, 2014 MEMORANDUM OPINION AND ORDER
ON THEIR MOTION FOR PROTECTIVE ORDER

In accordance with Rule 72(a), The Fund for Animals, Animal Welfare Institute, and the Humane Society of the United States (collectively, the "Nonprofit Organizations") respectfully submit this Objection to the February 20, 2014 Memorandum Opinion and Order (the "Order"), which was filed as ECF 202 in Civil Action No. 07-1532 (D.D.C.) (EGS/JMF). In support of their Objection, the Nonprofit Organizations incorporate their Motion for Protective Order (ECF 184) (the "Motion") and supporting Reply Memorandum (ECF 193) and further state as follows:

INTRODUCTION

To support the "pattern" of racketeering activity it must establish in this RICO action, Plaintiff Feld Entertainment, Inc. ("Feld") pursues a tenuous "donor fraud" theory alleging that the Nonprofit Organizations misled their own donors regarding the advocacy of Tom Rider. Feld seeks to use this donor fraud theory as the basis for invasive discovery into the identities of the Nonprofit Organizations' private non-party donors, counter to the First Amendment speech and association rights of both the Nonprofit Organizations and the donors themselves. To protect against this intrusion, the Motion sought to bar donor discovery unless, and until, Feld can show that it actually *needs* the donor information to establish a pattern of racketeering and that its

interest in the information—*i.e.* need for the information, inability to obtain the information elsewhere, and likelihood of proving the remaining elements of its RICO case—outweigh the significant risk of donor harassment and irreparable harm to the Nonprofit Organizations.

The Order denying the motion was contrary to law in (i) finding that "[t]he names of the donors go to the heart of Feld's case" even though Feld adamantly insists that it can make out a RICO pattern without a second scheme or victim, (ii) failing to consider the threat of donor harassment and harm to the Nonprofit Organizations if donor discovery is compelled, and (iii) failing to balance such harassment and irreparable harm against Feld's interest in donor discovery.

STANDARD OF REVIEW

Pursuant to Federal Civil Rule 72(a) and Local Civil Rule 72.2(c), the Court must "modify or set aside any part of [Judge Facciola's] order that is clearly erroneous or is contrary to law."

> The "clearly erroneous" standard applies to factual findings and discretionary decisions. Under that deferential standard, a magistrate judge's factual findings or discretionary decisions must be affirmed unless, although there is evidence to support them, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. The "contrary to law" standard, by contrast, permits *de novo* review of a magistrate judge's legal conclusions.

Am. Ctr. for Civil Justice v. Ambush, 794 F. Supp. 2d 123, 129 (D.D.C. 2011) (quotations and internal citations omitted).

ARGUMENT

The First Amendment's guarantees of free speech and association protect individuals from "compelled disclosure of [their] affiliation with groups engaged in advocacy," which the Supreme Court has compared to a "requirement that adherents of particular religious faiths or

political parties wear identifying arm-bands." *NAACP v. Alabama*, 357 U.S. 449, 462 (1958) (internal quotations omitted). Donor information falls squarely within this First Amendment protection. *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). The First Amendment privilege against donor discovery applies with equal force in the context of civil litigation. *Int'l Union v. Nat'l Right to Work Legal Def. and Educ. Found., Inc.*, 590 F.2d 1139, 1147 (D.C. Cir. 1978); *Black Panther Party v. Smith*, 661 F.2d 1243, 1264 (D.C. Cir. 1981). 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 v. U.S. Dep't of Agriculture*, 208 F.R.D. 449, 454 (D.D.C. 2002) (citation omitted). The First Amendment protects both the organization and its constituents, 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).

While the Order correctly identifies *International Union* and *Black Panther Party* as the relevant precedent in this Circuit, *see* ECF 202 at 4, it commits legal error by failing to require that Feld show an actual need for the information it seeks, in accordance with *International Union*, failing to consider the risk of donor harassment and harm to the Nonprofit Organizations, as *Black Panther Party* requires, and failing to apply the *Black Panther Party* balancing test.

I. THE ORDER IS CONTRARY TO LAW BECAUSE FELD DENIES THAT IT NEEDS THE DONOR INFORMATION TO PROVE A RICO PATTERN

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." *Int'l Union*, 590 F.2d at 1152 (citation omitted). Accordingly, Feld must first show that donor discovery is *necessary* to its case. *See Black Panther Party*, 661 F.2d at 1268 ("Mere speculation that information might be useful will not suffice.").

The Order summarily concludes that "[t]he names of the donors do go to the heart of Feld's case" because "without … them … Feld cannot establish reliance," and without reliance "Feld cannot hope to make out a case of [donor] fraud." ECF 202 at 7. But the central allegations of Feld's case are not about donor fraud, but about fraud against Feld. Feld is not a donor, and alleges no harm from the alleged donor fraud other than the harm caused by the alleged RICO conspiracy. Accordingly, the donor fraud theory is only necessary to Feld's case if Feld must show additional victims (besides itself) to establish a RICO pattern. While the Nonprofit Organizations believe that Feld must indeed find additional "victims" to properly allege a RICO pattern, Feld has consistently denied this proposition, including in the opposition to this very Motion. *See* ECF 188 at 24 (arguing that "controlling authority, [] makes clear that, in certain circumstances, a 'pattern of racketeering' can arise with only a single 'scheme' or single victim").

As a matter of law, the donor information that Feld seeks cannot "go to the heart of Feld's case" when Feld insists it does not need the information. Unless the Court rules (or Feld stipulates) that its RICO pattern requires more than one scheme and one victim, the donor information is not necessary to Feld's case, and it remains "[m]ere speculation that the [donor] information might be useful." *See Black Panther Party*, 661 F.2d at 1268. Accordingly, allowing donor discovery to go forward at this time is contrary to law.

II. THE ORDER IS CONTRARY TO LAW BECAUSE IT FAILS TO CONSIDER THE RISK OF DONOR HARASSMENT AND IRREPARABLE HARM TO THE NONPROFIT ORGANIZATIONS

If the party seeking disclosure can meet its threshold burden to show that the discovery is necessary, the Court must determine whether there is "*some probability* that disclosure will lead to reprisal or harassment." *Id.* at 1267-68 (emphasis added). "[T]he litigant seeking protection need not prove to a certainty that its First Amendment rights will be chilled by disclosure," *id.* at 1267-68, "[a]n association must merely engage in expressive activity that could be impaired in order to be entitled to protection." *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 655 (2000) (emphasis added); *see also United States v. Duke Energy Corp*., 232 F.R.D. 1, 3 (D.D.C. 2005). Courts are especially likely to uphold the privilege when disclosing the identities of donors "'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 Nonprofit Organizations readily demonstrated "some probability" of harassment if donor identities are disclosed to Feld. "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…. 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*." *Buckley v. Valeo*, 424 U.S. 1, 74 (1976) (emphasis added). The Motion was replete with evidence of past harassment by Feld against animal welfare activists and organizations and other perceived enemies of Feld. *See* ECF 184 at 15-18. Notably, past espionage efforts appear to have been specifically targeted at obtaining donor lists. *See id.* at 18. Moreover, the Motion discussed the *certainty* that donors would be harassed in this litigation, when private individuals with no connection to this case beyond having made a small donation

are subjected to the hardship of being questioned in a deposition, the need to retain counsel, and the fear of being joined as defendants in a RICO lawsuit if Feld is unhappy with their answers. *See id.* at 19. The certainty that donors will become embroiled in this pitched litigation as a result of their protected speech is a compelling reason to uphold the privilege. *See United States v. Judicial Watch*, 371 F.3d 824, 832-33 (D.C. Cir. 2004) (while "a general fear of the IRS is insufficient to establish that speech will be chilled," the IRS would *not* be entitled to donor discovery if it intended to subject many of the donors to audits) (citing *United States v. Church of World Peace*, 775 F.2d 265, 266–67 (10th Cir. 1985)).

The Motion also explained, with supporting declarations, that the donor harassment would irreparably harm the Nonprofit Organizations by damaging their relationship to the donors whose contributions are the Nonprofit Organizations' lifeblood. *See* ECF 184 at 20-21. "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." *Perry v. Schwarzenegger*, 591 F.3d 1147, 1160 (9th Cir. 2009) (internal quotation marks omitted); *see also NAACP*, 357 U.S. at 463 (harassment 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"); *Buckley*, 424 U.S. at 68 ("[i]t is undoubtedly true that public disclosure of contributions to [particular groups] will deter some individuals who otherwise might contribute"); *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"). If disclosure is compelled, certain donors will no longer trust the Nonprofit Organizations to protect their identities, and will instead associate financial support for the Nonprofit

Organizations with the significant burdens imposed by Feld discovery and the risk of additional future harassment.

The Order is contrary to law because it failed to take any account of the grave risk of donor harassment and irreparable harm to the Nonprofit Organizations. It is completely silent regarding Feld's history of harassment, the likelihood of future extra-judicial harassment, the harassment intrinsic in subjecting individual donors to the rigors of this litigation for engaging in protected speech, or the impact of donor harassment on the Nonprofit Organizations that depend on these donors.[1]

III. THE ORDER IS CONTRARY TO LAW BECAUSE IT FAILS TO BALANCE THESE RISKS AGAINST FELD'S "NEED" FOR THE INFORMATION

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.

The Order is contrary to law because it performed no balancing between Feld's supposed "need" for the donor information and the grave risk of donor harassment and concomitant irreparable harm to the Nonprofit Organizations. The Order makes no mention of a balancing

[1] In fact, the Order mentions harassment only once, claiming that the protective order entered by the Court—pursuant to which discovery marked "Confidential" must be used solely in connection with this lawsuit—will "eliminate any risk whatsoever of Feld intimidating or harassing donors." ECF 202 at 8. But confidentiality orders do not adequately protect privileged matter. Privileged materials are logged and withheld, not designated as confidential and produced. Moreover, even if a confidentiality designation could adequately protect donors from extra-judicial harassment—and it cannot—it would do nothing to prevent the harassment stemming from individual donors being subjected to deposition, litigation expense, and litigation risk. In any case, simply dismissing any risk of donor harassment by citing to a confidentiality order is completely incompatible with the "detailed and painstaking analysis" required by *Black Panther Party*. *See* 661 F.2d at 1266.

test, and performs no balancing of interests. Instead, it erroneously concludes that the only "true criteria for assessing the discoverability of the donors' names is … 1) whether knowing donors' names goes to the heart of Feld's case; and 2) whether there are less intrusive means to secure the information." ECF 202 at 6. This is only one half of the Court's duty under *Black Panther Party*: without "measure[ing Feld's need] against" the risk of harassment and irreparable harm, the Court cannot adequately safeguard the core First Amendment rights at issue. *See* 661 F.2d at 1266.

The failure to balance meant that the Order applied a fundamentally incorrect legal standard in considering the Motion, resulting in several subordinate conclusions that are themselves clearly erroneous or contrary to law. First, the Order flatly rejected the proposition that Feld should be required to show a substantial likelihood to prevail on the merits with regard to the remaining elements of their case before obtaining donor discovery. *See* ECF 202 at 5-6. Requiring such a heightened showing is a reasonable method to accomplish the *Black Panther Party* balancing of interests, and has been explicitly endorsed by a court in this circuit, *see 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)),[2] and a number out-of-circuit federal courts. *See, e.g.*, *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); *Best Western Int'l, Inc. v. Doe*, 2006 WL 2091695, at *4-5 (D. Ariz. July 25, 2006). Applying the heightened showing requirement

[2] While the Order correctly points out that *TubeSockTedD* did "*not* resolve the precise standard appropriate for determining whether disclosure was warranted," ECF 202 at 5 (quoting 596 F. Supp. 2d at 132-134), the *TubeSockTedD* court was nevertheless choosing between two standards—*Dendrite International* and *Cahill*—that both require the party seeking discovery to make a heightened showing of likelihood of success on the merits. That the court did not resolve the *precise* showing that a party seeking discovery must make does not negate its clear endorsement for *some* heightened showing.

endorsed by *TubeSockTedD* would help satisfy the *Black Panther Party* balancing test by ensuring Feld can only pierce the First Amendment privilege when its interest in the protected information is sufficiently concrete, as opposed to "mere speculation." *See Black Panther Party*, 661 F.2d at 1268.

Second, to the extent the Order concluded, as an alternate basis for denying the Motion, *see* ECF 202 at 6, that Feld's claims could satisfy an "evidentiary test for sufficiency" based on the Court's December 30, 2009 opinion in the ESA Action—to which the Humane Society was not even a party—this is another error attributable to the failure to balance. The Order does not set out what standard such a hypothetical "evidentiary test" would use, or explain how the Court's opinion in the ESA Action would help Feld pass this test. Moreover, as the Nonprofit Organizations pointed out in their reply in support of the Motion, *see* ECF 193 at 8, the Court never found that the Nonprofit Organizations knowingly made any material misstatements or omissions in their fundraising efforts. Had the Order employed the correct balancing test, it would undoubtedly have also given closer scrutiny to Feld's allegations.

Finally, the Order simply concludes, with no analysis, that "Defendants have not identified and I see no alternative means for Feld to be able to conduct these crucial interviews other than by securing the donors' names." ECF 202 at 7. But the Nonprofit Organizations, and indeed even Feld, *did* point to alternate avenues that Feld could, but did not, pursue. For example, the Motion pointed to the wide publicity the ESA Action has received—to say nothing of this RICO case seeking tens of millions of dollars—which would certainly have put the donors who were supposedly defrauded by the Nonprofit Organizations on notice of Feld's claims. *See* ECF 184 at 14 n.6. That no such donor "victims" have come forward simply disproves Feld's donor fraud allegations. The Motion also explained that there exist donors who

have made their support for the Nonprofit Organizations public, and to whom Feld already has access. *Id.* at 14. Feld confirmed as much in Exhibit H to its opposition to the Motion, wherein Feld identifies, *inter alia*, 147 Humane Society donations, 37 Fund for Animals donations, and 24 Animal Welfare Institute donations. *See* ECF 188-9; *see also* ECF 193 at 4-5 (discussing same). The Order does not consider either of these alternative sources.

Nor does the Order provide any analysis of why no other alternative means exist for Feld to obtain the information it seeks in a less intrusive and constitutionally-fraught manner. Even setting aside the numerous other deficiencies in Feld's quest for the Nonprofit Organizations' donors, proper concern for the First Amendment privilege requires the Court to take reasonable steps to protect donors. Such steps could include notifying potentially relevant donors of Feld's allegations and providing them an opportunity to come forward voluntarily, or at least an opportunity to object to disclosure, and an "attorneys' eyes only" provision for discovery related to donor information. A summary conclusion that "no alternative means" exist is incompatible with *Black Panther Party.*

CONCLUSION

For the foregoing reasons, the Court should sustain the Nonprofit Organizations' objection in its entirety.

Date: March 6, 2014

Respectfully submitted,

/s Andrew Caridas

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY on this 6th day of March, 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
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