UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

PLAINTIFF FELD ENTERTAINMENT, INC.'S OPPOSITION TO THE ORGANIZATIONAL DEFENDANTS' MOTION FOR A PROTECTIVE ORDER

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INTRODUCTION

The Fund for Animals ("FFA"), Animal Welfare Institute ("AWI") and the Humane Society of the United States' ("HSUS") Motion for a Protective Order (ECF 184) ("Motion")[1] is an improper attempt to use the First Amendment to quash all discovery concerning the fraud the organizations perpetrated against their own donors and shut down litigation of plaintiff Feld Entertainment, Inc.'s ("FEI's") RICO claim. Defendants have placed FEI between the proverbial "rock and a hard place." They claim that FEI must allege more than one scheme and victim to state a RICO "pattern," but then argue that the First Amendment blocks any and all discovery as to the second scheme and additional victims alleged in the First Amended Complaint ("FAC") (ECF 25): the donors who were defrauded by defendants' false and misleading solicitations concerning the ESA Action and/or the lead plaintiff (Rider) that Judge Sullivan found that they "hired." No. 03-2006, ECF 620 at 3. FEI's discovery requests directly track the topics ***which the Court already has held are relevant and discoverable in this case.*** *See* ECF 151. The Motion should be denied. FEI's proposed protective order (which is not even mentioned in the Motion) and which more than adequately addresses any legitimate "associational" concerns that defendants have, should be entered. Defendants' First Amendment objections should be overruled and defendants should be ordered to proceed with document production forthwith and to produce, within thirty (30) days, responsive documents, if any, that defendants already have located and are withholding on First Amendment grounds.

Just because the defendants are "non-profit" "advocacy" organizations purportedly acting in what they view as the "public interest" does not mean the Constitution shields their illegal conduct. The First Amendment does not *per se* block discovery or litigation of a claim merely

[1] Defendant Wildlife Advocacy Project ("WAP") joined the Motion. ECF 185. Counsel for Born Free United with Animal Protection Institute ("Born Free") has stated that Born Free will join the Motion but has yet to do so.

because it is embarrassing or inconvenient for defendants, or because the defendants in this racketeering case happen to be "non-profit" organizations. The First Amendment does not protect fraudulent charitable solicitation (a point which the Motion entirely ignores) and, as both Judge Sullivan and defendants' counsel have recognized, the Supreme Court has never held that "the First Amendment trumps [a] RICO claim."[2] The organizations cite no authority holding that discovery concerning fraudulent conduct, that directly goes to a crucial element of a RICO claim of public import,[3] should be denied, in its entirety, due to generalized, unsubstantiated allegations of "harassment" and "reprisal." Nor do the organizations cite any cases holding that a viable RICO claim must be dismissed because the discovery necessary to prove it is protected by an absolute Constitutional "privilege." There is none. The First Amendment does not provide the organizations cover from their fraud, ***because that fraud was perpetrated against their donors***.[4]

Indeed, assuming that the First Amendment applies here at all – in the face of allegations of fraudulent and illegal conduct – the remedy is one that already has been requested ***by FEI***: the entry of a protective order limiting the use and disclosure of donor information. *See* ECF

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[2] ECF 134 (10-31-12 Hearing Tr.), at 36 ("THE COURT: You mentioned in your pleadings the concern articulated by Justices Kennedy and Souter in concurring opinions about the caution that courts should exercise in dealing with RICO claims not overlooking constitutional considerations, [the] First Amendment. ***They didn't say that the First Amendment trumps [a] RICO claim. They didn't say – and they couldn't have said that***. … ***It doesn't mean that a RICO case can't be prosecuted that has – that presents legitimate First Amendment constitutional issues*** because this indeed is the case, right? … MR. BRAGA: Right, Your Honor is exactly right. ***It doesn't mean the First Amendment trumps RICO***.") (emphases added).

[3] ECF 134 (10-31-12 Hearing Tr.), at 30 ("THE COURT: ***The public has an interest in this case.*** The public has been following this case intently over the years.") (emphasis added).

[4] The organizations' hypothetical scenario concerning an imaginary suit against the National Rifle Association ("NRA") by a "liberal political action committee" (Mot. at 2 n.1), misses the mark entirely. This case has nothing to do with which side of the political aisle the parties associate with. ***It has to do with fraud and other illegal conduct, which is actionable under the RICO statute.*** Fraud is fraud, regardless of who commits it. The hypothetical does not contend that the NRA filed a fraudulent lawsuit against the "liberal political action committee" that was anchored by a hired plaintiff and witness; advertised the lawsuit as legitimate and used it to raise money; and then funneled at least some of that money to the for-hire plaintiff through a sham 501(c)(3) organization, labeled as "grants" for a fake "media" campaign. *Cf.* **FOF 1, 39, 49-53, 59**. Had the NRA done any of this, it would get no First Amendment "pass" because the plaintiff holds different political views or because the NRA is a 501(c)(3).

164. Such an order would allow FEI to proceed with discovery crucial to its RICO claim and protect the privacy of non-parties from whom discovery may subsequently be sought. ***The Motion fails to even acknowledge that FEI already has moved for such an order, or that defendants did not oppose the entry of one.*** Indeed, instead of accurately citing the record or controlling legal authority, the Motion relies on generalized, formulaic allegations of harassment and reprisal, resorts to unfounded, *ad hominem* attacks on FEI and advocates for the application of a heightened standard for discovery that has never been applied by any court in this district.

The Motion dismisses the FAC's "pattern" allegations as "novel" and "fanciful," but it ignores that Judge Sullivan has held – ***three*** times – that the FAC alleges a "pattern" of racketeering in compliance with the pleading standards of *Twombly*, *Iqbal* and Rule 9(b). ECF 90 at 29-34 (denying motion to dismiss) & ECF 129 at 3-4 (denying motion for reconsideration) & 6-7 (denying motion for certification). At each procedural stage, defendants raised the sufficiency of FEI's donor fraud allegations. The Court rejected all three of defendants' challenges, and expressly held that "[t]he FAC alleges victims and injuries in addition to FEI and its lawsuit related costs: ***the donors who were allegedly defrauded and lost money as a result***." ECF 90 at 32-33 (emphasis added). Defendants raised the discoverability of donor information yet ***again*** – for a ***fourth*** time – in their joint discovery plan. ECF 118 at 2 ("The alleged 'pattern of racketeering' that allowed FEI's RICO claim to survive a motion to dismiss raises serious First Amendment issues … ."). But, notwithstanding defendants' argument, this Court held that donor information is relevant and discoverable. *See* ECF 151. Defendants' attempt to block litigation of FEI's donor fraud theory has been considered and rejected by both Judges Sullivan and Facciola, numerous times and in various procedural contexts. The time for the discovery has come.

This Motion is less about the First Amendment than it is about the reputational damage – and resultant drop in donations and income stream[5] – that the organizations may face when donors, who learn how their tax-deductible donations were actually used, testify that they never would have given money to fund a fraudulent lawsuit propped up by a paid witness. Tellingly, ***nowhere in the Motion or the accompanying declarations do the organizations come forward to say that they did not use the ESA Action to raise money***.[6] Nor do the organizations come forward to say that their solicitations using the ESA Action did not make false and/or misleading statements about the case or how contributions would be used. If the organizations' solicitations are as pure as the driven snow, then why don't they say so (or produce them)? Likewise, nowhere does the Motion affirmatively state whether the organizations have searched for the materials requested, or whether they even exist. ***The organizations have produced no log of responsive documents over which they are claiming First Amendment "privilege."*** But it is evident that the documents (and the donors) exist. Irrespective of the organizations' attempt the dodge the issue, the Court already has found that the organizations used the ESA Action to raise money, and that at least one of their solicitations misrepresented the use of the donated monies. **FOF 39**. Defendants cannot escape the preclusive effect of the Court's findings. The donors are not "hypothetical" and the donor fraud allegations are not "fanciful."

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[5] The organizations' allegations of "irreparable harm" due to potential loss of donations are speculative and self-serving. *See* Opp. Ex. A, Terry F. Lenzner, *Tis The Season for Nonprofit Scandals*, LAW360 (Dec. 4, 2013) ("Generally, nonprofits fear exposure because they don't want to discourage donors, and they value their reputations more than good governance.") (discussing United Way and Progressive Policy Institute scandals).

[6] As further discussed *infra*, FEI's document requests do not seek the identity of each and every donor to the defendant organizations. The requests are specifically tailored to the issues to be litigated in this case – ***solicitations and donations concerning the ESA Action, FEI, FEI's elephants and/or Rider***. *See, e.g.*, Mot. Ex. 1 (FEI Document Requests to FFA) (Request Nos. 24-31). There are at least two (2) potential levels of donor fraud: (i) donors who gave money based on false/misleading statements about the case, Rider, etc.; and (ii) donors who gave money without knowing that the donee was involved in a racketeering enterprise. Fraud arises in either scenario if the donation decision would have been different if the false statement or omission had not occurred. FEI's current requests focus on the former scenario.

In sum, the Court already has decided both that the FAC pleads a pattern of racketeering and that donor information is discoverable, and the Motion establishes no reason why donor discovery should not go forward. The organizations' effort to paint FEI as a repeat "bad actor" – a theory which was unsuccessfully (and relentlessly) pursued in the ESA Action – is utterly unpersuasive, and, more importantly, legally deficient. Selected quotations from hearsay magazine and television opinion pieces are insufficient to establish "harassment" warranting First Amendment protection, under the standards set forth by the Supreme Court and the Circuit. The declarations' generalized allegations of harm, conjecture about what may or may not happen in the future, and boilerplate language which merely parrots the legal standard fare no better. The Motion should be denied, and discovery should proceed.

FACTUAL BACKGROUND

I. FEI HAS NEVER HARASSED ANY NON-PROFIT ORGANIZATION OR DONOR

The Motion cites to no court judgment or other form of objective evidence finding that FEI has ever harassed, intimidated or retaliated against any non-profit organization or donor.[7] Instead, the Motion cites to ***opinion*** pieces which are ***more than ten (10) years old***. Mot. Ex. 5, (Salon article dated ***08-20-01***) & Mot. Ex. 6 (60 Minutes segment dated ***05-04-03***). None of the "harassment" allegations, which likewise are stale and are all over a decade old, have merit. These very same allegations were made by defendants during litigation of the ESA Action, in Rider's motion for a protective order over his "confidential" financial information (*i.e.*, the illegal witness payments) (No. 03-2006, ECF 141-1 at 11-12) and the ESA Action plaintiffs' Rule 11 Motion (No. 03-2006, ECF 163 at 40-42). Both motions were denied. FEI's

[7] It is ironic that parties who have been adjudged responsible for more than thirteen (13) years of vexatious litigation (No. 03-2006, ECF 620), some of whom have been separately sanctioned (*id.*), would make allegations of "harassment." If anyone was "harassed" it was FEI, by having to spend $25+ million to defend a case with a fraudulent jurisdictional predicate.

oppositions to those motions (No. 03-2006, ECF 146 at 16-18 & ECF 165 at 74-75 & 78-79), as well as a sanctions motion that it subsequently filed (No. 03-2006, ECF 171 at 10-20), laid out, in significant detail, the factual inaccuracies about the issues the organizations now raise (again). Repeating the same allegations over and over again does not make them true. Indeed, there is no Rule 11 basis for defendants' continued reliance on these shop-worn allegations, which they know, through prior filings, are false and/or utterly lacking in factual foundation. Nevertheless, FEI will address them, again, in turn.

A. The Long Term Animal Task Force Was Never Implemented

Defendants have recycled a document they obtained previously in discovery as justification for the unprecedented relief which they now seek. The Motion extensively cites the "Long Term Animal Task Force" (Mot. at 16 & Mot. Ex. 8), but that document was never adopted, and no actions regarding PETA or any other group were ever taken by the "Task Force" or FEI. This ground was already covered in the ESA Action. No. 03-2006, ECF 146-9 at 3 ("Q: Now, the long-term animal welfare plan, you say that was never implemented, right? A: I believe that's correct."). That document was drafted in the early 1990s –***more than fifteen (15) years ago*** – by a person who is now deceased. It does not describe any "strategy" that ever was in effect, let alone any strategy that is currently in place. ***FEI explained this at least four (4) times in the ESA Action***. No. 03-2006, ECF 146 (Rider Protective Order Opp.), at 16; ECF 158 (Reply in Support of Motion to Enforce 09-26-05 Order), at 10 n.5; ECF 165 (Rule 11 Opp.), at 78-79; & ECF 171 (§ 1927 Sanctions Motion), at 10 & 20. As FEI stated more than six (6) years ago in briefing in the ESA Action, "no plan exists today – which [the ESA Action] plaintiffs know from their own discovery." No. 03-2006, ECF 165 at 78. The record concerning this

document is un-refuted, and defendants offer nothing new. It is not a legitimate basis to cut off donor discovery in this case.[8]

B. The PAWS Lawsuit Was Dismissed

The allegations concerning infiltration of PAWS (Mot. at 17-18) already have been adjudicated, and failed to survive a motion to dismiss. The allegations were never proven, and were made ***more than thirteen (13) years ago***. Specifically, in 2000, PAWS brought a RICO lawsuit against FEI, alleging that FEI obtained, *inter alia*, its "confidential business information," including copies of "documents pertaining to its donors" and "PAWS' membership list." Opp. Ex. B (PAWS Order) (11-21-00), at Opinion Pg. 3 (citing PAWS complaint). While PAWS alleged that FEI obtained donor information, it did not allege that FEI misused that information. As noted in the district court's opinion, PAWS conceded that it did "not allege ***'that defendants have actually used the information they stole from PAWS to divert donations which otherwise would have been made to PAWS***.'" *Id.* at Opinion Pg. 4. Indeed, the Motion cites no testimony, and attaches no declaration from any PAWS donor indicating that they were harassed or intimated by FEI. That is because no such harassment or intimidation occurred. This omission is glaring.

C. FEI Was Never a Party to the Fairfax Case

FEI was never a party to the lawsuit involving PETA in Fairfax Country, Virginia. *Cf.* Mot. at 18 n.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 … .") (emphasis added). Kenneth Feld was a defendant in that lawsuit, ***but the company (FEI) was not***. The

[8] Other than the instant case, FEI has never instituted any litigation against any animal rights organizations or donors. The organizations cite a document from ***1991*** (Mot. Ex. 9), which is dated more than ***fifteen (15) years*** before FEI first filed this case. At the time that document was drafted, there was no way to anticipate that FEI would be the victim of a fraudulent lawsuit that was in court solely on the false accusations of a hired witness.

organizations know this, because, as acknowledged in their Motion, the verdict form was filed as an exhibit in the ESA Action – at least ***three (3) separate times***. No. 03-2006, ECF 95-1 (Reply in Support of Mot. to Compel WAP, Ex. 46); ECF 146-10 (Rider Protective Order Opp., Ex. 10) & ECF 169-23 (Rule 11 Opp., Ex. 102). Regardless, the jury ***rejected*** PETA's claims and entered a verdict ***in favor of Mr. Feld***. *See id.* PETA's petition for appeal was denied. See No. 03-2006, ECF 146-10 at 6. The allegations of infiltration, spying, and removal of confidential information (Mot. at 17), were all directly disputed by Mr. Feld's trial testimony. No. 03-2006, ECF 169-22 (Rule 11 Opp., Ex. 101), at Trial Tr. 2355-56, 2368-69 & 2397-98. The challenged actions were lawful in the eyes of a Virginia jury, and the jury's judgment was affirmed by the Supreme Court of Virginia. The Fairfax case thus has absolutely no relevance to FEI's request for donor discovery.

D. The Court Entered Partial Summary Judgment for FEI in the Pottker Litigation

The *Pottker* litigation is likewise irrelevant here. That case, like the Long Term Animal Task Force, PAWS lawsuit, and PETA lawsuit, is ancient history. *Pottker* concerned alleged events – some of which occurred more than ***twenty-five (25) years ago*** – involving the actions of individuals who are now deceased. *See* Opp. Ex. C (*Pottker* Summary Judgment Opinion & Orders), at Opinion Pg. 1-14 (describing events which occurred in 1988 and throughout the early 1990s). The Motion attaches only five (5) pages of the Judge Hedge's comprehensive forty-five (45) page opinion (*compare* Mot. Ex. 7 (Excerpts from *Pottker* Summary Judgment Opinion) *with* Opp. Ex. C (*Pottker* Summary Judgment Opinion & Orders)), and completely ignores that summary judgment was granted, ***in favor of FEI***, as to plaintiff Fishel's invasion of privacy claim. *See* Opp. Ex. C (*Pottker* Summary Judgment Opinion & Orders). Specifically, Judge Hedge found that "the allegations of breaking and entering and wiretapping the home cannot

survive summary judgment," because they "relied entirely on second and third-hand statements and speculation." *Id.* at Opinion Pg. 26. Moreover, the opinion established that were questions of material fact – for a jury to decide – concerning Ms. Pottker's allegations against the company. *See id*. Ms. Pottker's allegations were never proven, and there were no judicial findings entered against FEI. In sum, none of the "evidence" cited in the Motion is even current, and none of it has a been found to be true by any court or jury. It certainly is not a basis to completely cut off FEI's request for donor discovery.

II. THE MOTION DISTORTS THE RECORD OF THIS CASE

A. The Court Already Has Held that Donor Information is Discoverable

The Court already has decided that donor information, including the donors' identities, is discoverable. Pursuant to Court Order (ECF 94), the parties filed discovery plans setting forth proposed topics for discovery. Both FEI and defendants raised the issue of donor discovery in their filings. *See* ECF 117 at 5 (FEI's discovery plan discussing the "fraud on Defendants' other donors") & ECF 118 at 2 (defendants' discovery plan discussing "First Amendment issues"). Indeed, ***defendants specifically argued that an inquiry into "the identities of contributors … "necessarily infringes core First Amendment rights of the nonprofit organizations and their supporters … ."*** ECF 118 at 2. Notwithstanding defendants' argument, the Court's May 9, 2013 Order (ECF 151) held that, *inter alia*, the following topics are relevant and within the scope of discovery in this case:

> **8. How defendants used the ESA action and Rider's claims and testimony for fundraising or publicity agendas.**
>
> 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 same.
>
> **22. Complaints about 1) defendants' fundraising activities on behalf of elephants, 2) campaigns, 3) tactics, or 4) publicity made by federal, state, or local agencies, and any statement made by any one of which defendants were aware that accused defendants of making false statements during their fundraising activities.**
>
> **23. With respect to contributions made to defendants to aid in their work on behalf of elephants, instances in which each defendant has been investigated by governmental authorities (federal, state, local) concerning 1) fundraising, 2) donations, 3) donor fraud, or 4) tax compliance.**

ECF 151 at 2-4 (emphases added).

Nowhere did the Court hold that donor discovery is irrelevant or *per se* not discoverable, as the Motion implies. To the contrary, the Court's Order makes plain that donor discovery concerning the ESA Action, Rider's claims and testimony, FEI and its Asian elephants is relevant. Indeed, the Court, in large part, adopted FEI's proposed language concerning donor discovery – a point which the Motion does not acknowledge. There is no "donor discovery" topic that FEI proposed in its discovery plan which the Court eliminated from its scope order. All of FEI's proposed donor topics were adopted, albeit with some minor modifications. *Cf.* ECF 117 at 6-10 (FEI's discovery plan) (Discovery Topic Nos. 8, 22, 28 & 29) *with* ECF 151 at 1-7 (Discovery Topic Nos. 8, 18, 22 & 23). The Motion selectively cites the Court's Order by referencing only one (1) of the four (4) discovery categories encompassing defendants' fundraising and/or donor information, and misleadingly implies that the Court's Order somehow limited donor discovery. *Cf.* Mot. at 4-5 (citing only Topic No. 18). It didn't.

Not only does the Motion selectively cite the Order, it flatly (and incorrectly) assumes – without any analysis or discussion – that the information sought by FEI's document requests is ***not*** encompassed by the topics set forth by the scope Order. Mot. at 5-6. For example, the

Motion does not explain how FFA Request No. 24 ("[a]ll documents that refer, reflect, or relate to any solicitation of or request for donations, contributions, payments or financial support of any kind … ***concerning the ESA action, FEI or FEI's elephants, Tom Rider, and/or WAP, by defendants***") (emphasis added) or FFA Request No. 27 ("[a]ll documents that refer, reflect or relate to donations … the were designated 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 form of activity concerning ***Tom Rider, FEI or FEI's elephants***") (emphases added) are not encompassed by Discovery Topic No. 8 ("How defendants used the ***ESA action and Rider's claims and testimony*** for fundraising or publicity agendas … .") (emphasis added) or Discovery Topic No. 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 ... .") (emphasis added). As previously stated, FEI is not embarking on a "scavenger hunt" to find each and every donor who gave money to the defendant organizations during the relevant time period, for any purpose whatsoever. FEI's requests are limited to those donors who were defrauded by defendants' solicitations ***referencing the ESA Action, FEI, FEI's elephants and/or Rider***. FEI's document requests were deliberately drafted to track the language of the Court's Order.

Moreover, just because the "magic words" the organizations now focus on – "donor lists, donor names, or other donor-identifying information" – are not specifically enumerated in the May 9, 2013 Order does not mean that this information is not discoverable. None of the discovery topics FEI proposed or the topics that the Court adopted expressly addressed donor identity. But donor identity obviously was within the scope of what FEI requested and what the Court ultimately ordered. For example, "[h]ow defendants used the ESA Action and Rider's

claims and testimony for fundraising" (ECF 151, Discovery Topic No. 8) obviously encompasses who made the donations that were so induced. The clear takeaway is that the Court already considered and rejected defendants' First Amendment arguments, and determined that donor information – including "donor lists, donor names, and other donor-identifying information" – is relevant and discoverable.[9]

B. FEI Already Has Moved for a Global Protective Order That Would, Among Other Things, Restrict the Use and Disclosure of Donor Information

FEI already has moved for the entry of a global protective order in this case, at the direction of the Court. *See* ECF 164. This issue has been briefed and currently is pending. The Motion makes no reference to this pending briefing, which is troubling given that FEI moved for such an order to, *inter alia*, address the exact issue raised now: the use and disclosure of donor information. *See id.* at 14-15 ("The Court's order makes clear that discovery will involve inquiry into ***sensitive and confidential information***, not only from all of the parties to the case, but also from third parties. For example, the scope of discovery includes, *inter alia*: … ***information concerning the RICO defendants' donors*** … The entry of such an order will … protect the confidential material of all of the parties and third parties who may be subpoenaed for documents and testimony.") (emphases added) & 21 ("The material to be discovered in this case – confidential financial data, tax returns, ***donor lists*** and 'media strategy,' among other things – is sensitive.") (emphasis added). FEI's proposed protective order contemplates that any party ***or*** third party producing documents or information may designate that information as confidential (ECF 164-1 ¶ 3); material designated as confidential shall be used solely for the preparation and

[9] In response to FEI's document requests, the organizations uniformly asserted "boilerplate" objections asserting the First Amendment "privilege" of the organizations and their donors. *See, e.g.*, Mot. Ex. 1, FEI Document Requests to FFA (Request Nos. 24-29). None of the organizations represented in their responses and objections to FEI's document requests whether the documents sought by FEI's requests actually exist. Nor do any of the organizations' declarations state whether the documents exist. No privilege log has been produced either. Thus, FEI, and the Court, are left to consider the discoverability of this information in the abstract.

trial of this case (*id.* ¶ 7); and any violation of the order by any party may be sanctionable as a contempt of court (*id.* ¶ 18).

Defendants did not oppose the entry of FEI's order, but requested that the Court "refine" how the term "confidential information" was defined. *See* ECF 168 at 2 & 9-11 . Ironically, defendants' proposed definition specifically included "donor information." *Id.* at 11 ("[I]nformation produced in discovery may be labeled 'confidential' by a party or third party responding to a discovery request … because the document contains sensitive commercial information; personal financial information; ***donor information***; or comparably sensitive private information.") (emphasis added). Indeed, even though defendant Born Free represented that it would join the instant Motion, in its initial disclosures, it specifically contemplated producing donor information ***pursuant to the entry of a protective order.*** ECF 57 at 2 ("Some of these documents are also protected by various individuals' privacy rights. Once the parties have stipulated to an appropriate confidentiality agreement and the Court has entered an appropriate order or orders addressing these privacy and confidentiality issues, and this Defendant has received appropriate and non-objectionable requests form plaintiffs, this Defendant will produce to plaintiffs … those relevant, non-privileged documents identified to date … ."). Thus, even defendants have acknowledged that donor information will be produced in this case, and the way to address any privacy concerns that may arise is through the entry of an appropriate protective order – not to quash discovery entirely.[10]

[10] Moreover, FEI has a history of abiding by the protective orders entered in the ESA Action – a precedent which indicates its reliability in respecting court orders regarding the confidentiality of information and which defendants cannot deny. Defendants, by contrast, repeatedly disseminated discovery material in the ESA Action and claimed that it was their "right" to do so. *See* ECF 164 (Mem. in Support of Entry of Protective Order) at 5-8 & 10-13 (cataloguing the ESA Action plaintiffs' use of documents and videotapes produced by FEI in the media, including on the internet and on television programs, and distribution of them to non-parties such as PETA). Indeed, Born Free attempted to purchase billboard space for an advertisement that included a picture of an elephant and a quote (lifted out of context) from documents produced in the ESA Action. *See id.* at 11-12.

The Motion makes no argument as to why the entry of FEI's proposed protective order, and the progression of donor discovery pursuant to its terms, will not the remedy the privacy concerns the organizations now raise. Nothing has changed since the protective order briefing or defendants' initial disclosures – defendants merely seek to quash discovery because they do not want to do it.

ARGUMENT

I. THE FIRST AMENDMENT DOES NOT SHIELD FRAUD COMMITTED BY ANYONE, INCLUDING FRAUD COMMITTED BY "NON-PROFITS" AND/OR CHARITIES

A. Fraudulent Charitable Solicitation is Criminal

The First Amendment does not shield fraud, no matter who committed it or what their "cause" may be. There is no special treatment under the law for "non-profit" "advocacy" organizations who commit fraud. The Supreme Court has unequivocally held that ***"[l]ike other forms of public deception, fraudulent charitable solicitation is unprotected speech."*** *Illinois ex rel. Madigan v. Telemarketing Assocs., Inc.*, 538 U.S. 600, 612 (2003) (emphasis added). If anything, non-profit organizations that accept money from the public and benefit from tax exemptions should be held to a higher, not a lower, standard of trust and lawfulness than an individual or a for-profit organization. "[W]hen fundraisers make false or misleading representations designed to deceive donors about how their donations will be used," those statements are actionable as fraud. *Id.* at 624. In *Madigan*, the State of Illinois alleged that telemarketers represented that a significant amount of each dollar donated would be used for specific charitable purposes for Vietnam Veterans when, in reality, the telemarketers turned over only 15 cents (or less) of each dollar to the veterans' charity for which they were raising money. *Id.* at 607-09. "[M]isleading potential donors into believing that a substantial portion of their

contributions would fund specific programs or services, knowing full well that was not the case" was not protected by the First Amendment and was actionable as civil fraud. *Id.* at 622.

Fraudulent charitable solicitation is not only actionable as civil fraud, it is ***criminal***. In *United States v. Lyons*, 472 F.3d 1055 (9th Cir. 2007), the Ninth Circuit, following *Madigan*, affirmed criminal convictions for, *inter alia*, ***mail fraud*** and ***money laundering*** where the defendants made "specific misrepresentations and omissions … regarding the use of donated funds." *Id.* at 1066. *See also id.* at 1059 ("Donors were told their contributions went to specific charitable activities when, in reality, almost no money did.") & 1066 ("Neither *Madigan* nor the First Amendment insulates defendants from criminal prosecution for fraudulent misrepresentations about their charitable endeavors.").[11]

The Motion does not cite to *Madigan*, nor does it even acknowledge that fraudulent charitable solicitation – which is exactly what the FAC alleges, *see infra* –is not protected by the First Amendment. Indeed, the organizations' failure to cite *Madigan* is curious given that it was extensively discussed in the parties' certification/reconsideration briefing on this ***same issue*** (*i.e.*, FEI's ability to take donor discovery). ECF 105-1 at 20 n.15 (defendants' motion, discussing *Madigan*); ECF 114 at 12-14 (FEI's opposition, same) & ECF 123 at 16 (defendants' reply, same). Previously, defendants (feebly) argued that *Madigan* was inapplicable here because (1) FEI is a private party, not a State Attorney General and (2) the FAC did not allege that defendants' misrepresented how the donation money would be used. *See* ECF 123 at 16. Both

[11] In *United States v. Aramony*, 88 F.3d 1369 (4th Cir. 1996), the Fourth Circuit affirmed the criminal conviction of the chief executive officer of the United Way of America ("UWA"), Aramony, for, *inter alia*, ***mail and wire fraud***, where the defendant used money donated to UWA for personal gain. Among other things, UWA money was used to pay a "monthly salary" to Aramony's mistress even though she did, at most, only a day or two of work. *Id.* at 1374. *Cf.* **FOF 50** ("Despite the irregular and sporadic nature of the media work, the payments and other financial support have come to Mr. Rider from WAP and the organizational plaintiffs or their counsel without interruption."). Further, even though specific funds donated to UWA were earmarked "to support the expansion of the nation's voluntary sector," Ararmony used that money to buy a condominium for himself and another mistress. 88 F.3d at 1374-75.

arguments fail. There is no language in *Madigan* limiting its application to state enforcement actions. And, in any event, in this civil RICO action, FEI is acting as a private attorney general representing the public interest. *Rotella v. Wood*, 528 U.S. 549, 557-58 (2000) ("The object of civil RICO is thus not merely to compensate victims but to turn them into prosecutors, 'private attorneys general,' dedicated to eliminating racketeering activity."); *Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 151 (1987) (private RICO actions "bring to bear the pressure of 'private attorneys general' on a serious national problem for which public prosecutorial resources are deemed as inadequate"); *cf. ASPCA v. Ringling Bros.*, 244 F.R.D. 49, 53 (D.D.C. 2007) (Sullivan, J.) ("Under both the ESA and antitrust laws, private citizens function as 'private attorneys general' representing the public interest."). And, as set forth in detail below, the FAC alleges with specificity that the organizations defrauded donors into making contributions under the auspices of the lawsuit and/or Rider's fake "media" campaign, when at least some of the monies raised actually went to pay for Rider's participation and testimony in the case. **FOF 1, 49-53, 59**.

B. The FAC Makes Detailed Allegations of Fraudulent Charitable Solicitation

The FAC alleges fraudulent charitable solicitation directly akin to *Madigan and Lyons*. FAC ¶¶ 11, 25-26, 69, 77, 126-129, 179-183. Like defendants' unsuccessful motion for certification/reconsideration, the Motion completely ignores a number of the FAC's donor fraud allegations, and pretends that the FAC makes only one "fanciful" and "bald" allegation concerning the defrauding of "hypothetical" victims – the 2005 joint fundraiser. Mot. at 4, 10 & 13. *Cf.* ECF 105-1 at 5. The Motion also incorrectly presumes that the Court held that ***only*** the 2005 fundraiser allegations meet the pleading threshold of Rule 9(b). The Court's motion to dismiss opinion made no such finding. *Cf.* Mot. at 11 ("The only donor-related allegations in the FAC that even arguably satisfy Rule 9(b) relate to a single fundraiser in July 2005."). In reality,

and as already explained at length in FEI's opposition to the certification/reconsideration motion (*see* ECF 114 at 5-11), the FAC alleges multiple instances of donor fraud, and these allegations are anything but "fanciful" because they are directly based on documents and testimony produced in the ESA Action. Despite defendants' attempt at obfuscation, the donor fraud actually happened. Indeed, as further discussed below, ***the Court already has made preclusive findings on the donor fraud issue, which are binding on all defendants.***

1. The 2005 Joint Fundraiser Donors Were Defrauded

The joint fundraiser is one instance of alleged donor fraud. The FAC alleges that the organizations jointly held a fundraiser, ***and misrepresented how the proceeds of the fundraiser would be used***: "[T]he invitation misleadingly implies that any funds raised would help ASPCA, AWI and FFA/HSUS 'wage' their legal 'battle' against FEI, when in fact, the funds were being raised to provide Rider with a livelihood for his services as a plaintiff and witness in the ESA Action." FAC ¶ 180 (quoting DX 62). That the fundraiser donors were misled as to how their donation money would be used is far from "[r]ank conjecture." Mot. at 13. Indeed, this issue already has been litigated and decided. The Court, citing the fundraiser invitation (DX 62), AWI's testimony about the invitation, and the WAP deposit ledger (DX 50), expressly found that the fundraiser monies were raised on the basis of rescuing FEI's elephants from "abuse" but they actually went to pay for Rider's participation and testimony in the ESA Action: "The event 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**. Defendants are precluded from re-litigating FOF 39, which conclusively establishes that the fundraiser invitation misleadingly represented how contributions would be used. Defendants'

argument that FEI has "made no showing that any of the Nonprofit Organizations made any 'misrepresentations' to such hypothetical victims," Mot. at 13, is yet another attempt to re-litigate issues already decided in the ESA Action.

It could well be that some of defendants' donors would be unconcerned that their donations were used to pay a hired plaintiff who was lying to the Court about his purported "aesthetic injury." However, given that many of defendants' donors are charities or foundations who themselves have obligations of stewardship as to the monies entrusted to them, it is unlikely that this will be the majority view. In any event, it is a matter to be explored in discovery.

2. WAP's Donors Were Defrauded

The donor fraud allegations extend well beyond the 2005 joint fundraiser. The FAC specifically alleges that WAP's donors were defrauded into believing that their contributions were supporting a legitimate media campaign, when the money actually purchased Rider's participation and testimony in the case. Specifically, the FAC alleges that "MGC and/or Meyer encouraged and advised ASPCA, FFA/HSUS and AWI to donate funds ***and to solicit donations for the Rider funding through WAP*** … ." FAC ¶ 69 (emphasis added). *Cf.* **FOF 38** ("… Ms. Meyer, specifically sent an email to the representatives of the organizational plaintiffs, including Mr. Markarian, requesting funds to support Mr. Rider's advocacy efforts regarding the elephants and the lawsuit, and expressly suggesting that the funds for Mr. Rider could be contributed to WAP so that they would be tax deductible. DX 65."). Further, the FAC alleges that upon information and belief, "WAP and/or Meyer" utilized a fraudulent "'grant proposal' … to solicit funds" for Rider from an unidentified individual, which was one of a multitude of acts by Ms. Meyer as an agent of all the organizational defendants, acting within the scope of her authority. FAC ¶¶ 46 & 128. Among other things, the FAC alleges that this proposal falsely represented how the funding provided to WAP would be used: the FAC alleges that the proposal ***"falsely***

stated that (1) the proposal was for money to help fund an ongoing grass roots media campaign … (6) the '$10,000 sought would 'fund this public education effort for 2004;' and (7) the money was to be spent on 'out-of-pocket costs' for Rider," none of which was true and all of which was "shown to be false at the trial of the ESA Action." *Id.* ¶ 127. Nor is it speculation that a donor parted company with her money based upon these false statements. Rider admitted publicly in January 2004 to being funded by an unidentified California woman. ECF 177-21 (MGC Summary Judgment Mot. Ex. U) (1-11-04 article), at 3 ("Rider said he doesn't belong to any group … . He said he doesn't receive money at this time from animal groups, ***but does receive money from a private individual in California***.") (emphasis added).

FEI's allegations that WAP's donors were defrauded are not "fanciful." WAP's own documents show that the donors exist and they were misled as to how their donations were being used. The donors are not "hypothetical," as WAP well knows. As discussed in the organizations' own Motion, in the ESA Action, WAP successfully argued that the identities of its donors (who they now claim are "hypothetical") were not relevant and should have been redacted. No. 03-2006, ECF 178. Indeed, the WAP deposit ledger shows that it received "contributions" and "donations" from a number of individuals, and that money went to Rider. No. 03-2006, ECF 457-11 (DX 50) (identities redacted). Further, additional documents show not only that the donors existed, but they also were defrauded. WAP sent "thank you" notes to its donors indicating that their contributions were being used to "help Tom continue his efforts to be a voice for the elephants" and support WAP's "efforts to educate the public about what goes on behind the scenes at the Ringling Brothers' circus." No. 03-2006, ECF 86-16 (WAP Mot. to Compel, Ex. 21). *See also* ECF 86-15 (WAP Mot. to Compel, Ex. 20) (representing to individual donor that grant money was "to support Tom Rider's efforts to shed the light of public

scrutiny on Ringling Bros.' treatment of endangered Asian elephants" and that WAP was "seeking additional funds for these efforts," *i.e.*, Rider's "assisting grass roots groups around the country with their efforts to educate the public about what goes on behind the scenes at the circus"). None of the "thank you" notes indicate that the money was Rider's sole source of income **(FOF 21)** or that he was not traveling or engaging in a legitimate media campaign **(FOF 49-50)**. It is hardly "rank conjecture" (*cf.* Mot. at 13) for the FAC to allege that WAP's donors were defrauded when Judge Sullivan already has found that Rider had a "'motive to falsify' his testimony so that he would continue to be paid," No. 03-2006, ECF 620 at 3, and that the "primary purpose" of WAP's payments "was to secure Mr. Rider's initial and continuing participation as a plaintiff" in the ESA Action – and not legitimate "media" work. **FOF 53**.

One specific example is illustrative. Exhibit D hereto is a compendium of correspondence between an individual donor (whose identity was ***disclosed*** in one of the ESA Action plaintiffs' publicly available trial exhibits, *see* No. 03-2006, ECF 415-1 (PWC 94A), at 196) and WAP. The donor's initial letter to WAP, enclosing a contribution, makes the following statements, all of which are contrary to the Court's findings that Rider was a plaintiff hired by his co-plaintiffs and counsel, who did not travel or engage in meaningful media work **(FOF 1, 49-53, 59)**: (1) Rider "dedicat[ed]" "the rest of his life to informing the public about the horrid and cruel treatment of animals used in the circuses." (2) Rider is "now devoted to speaking up for the elephants whenever and wherever he can, and indeed, travels extensively to do so." (3) Rider is a "simple man with no pretensions, no ulterior designs, without greed, and with such utter humility … ." (4) Rider "asks for nothing. He just gets out there and does this work because he believes in it. He is one man, taking on the circus … . ***Alone. Without Pay***." Opp. Ex. D at 1 (11-24-03 letter) (F 01949) (emphasis added). This donor then proceeded, on the

strength of these false impressions about Rider, to make "monthly" donations to WAP over the next six (6) years, "towards [its] humane work of public education re: the truth about what goes on behind the scenes at the Ringling Brothers' circus." *See* Opp. Ex. D. This same donor received the "thank you" letters described above, indicating that her money was being donated to "help Tom continue his effort to be a voice for elephants" and "educate the public about what goes on behind the scenes at the Ringling Brothers' circus." *Id*. Thus, it is not "fanciful" for FEI to allege that this donor was defrauded and fell for the false image of Rider pleaded in the FAC: "defendants created the romantic, but totally untrue image of Rider as the heroic champion of elephant welfare who quit his FEI job because of 'aesthetic injury' and who was now speaking out for the elephants at great personal inconvenience and sacrifice to himself." FAC ¶ 4.

II. THE *NATIONAL RIGHT TO WORK* BALANCING TEST WEIGHS IN FAVOR OF ALLOWING FEI TO PROCEED WITH DONOR DISCOVERY

The First Amendment protects the freedom to associate, including membership and contribution lists, *NAACP v. Alabama*, 357 U.S. 449, 260 (1958), but it does not shield fraud or unlawful activity. *Madigan*, *supra*; *United States v. Bell*, 217 F.R.D. 335, 343 (D. Md. 2003). Nor does the First Amendment completely bar a private attorney general from bringing a civil RICO claim to protect the public interest. Indeed, "the First Amendment does not make a social club a sanctuary for crime." *In re Buscaglia*, 518 F.2d 77, 79 (2d Cir. 1975) (quoted in *Bell*, *supra*). The organizations cannot use the First Amendment to thwart claims about the fraud they perpetrated, ***because the victims of that fraud were their own donors***. The Motion blindly presumes that the concept of "association" applies here at all – where it is alleged that the organizations misrepresented the very reason(s) the donors were purportedly "associating" with them. Were the donors actually "associating" with the organizations who defrauded them, when they allegedly gave money (*i.e.*, were "associating") for one purpose (to support a legitimate

lawsuit and/or a real "media" campaign), but the organizations were spending it on another (bribing Rider)? It is more than plausible that at least some of the donors were defrauded, did not intend to "associate" with a fraudulent lawsuit and an illegal witness payment scheme, and as a result will not "associate" with (*i.e.*, donate to) the organizations again in the future. That is what the organizations fear, and what they are trying to hide from. But the First Amendment does not provide them with cover.

Moreover, even where First Amendment protection applies, it is not an absolute bar to civil discovery. Courts in this Circuit apply a balancing test, and weigh (1) whether the information sought goes to the "heart of the lawsuit" and (2) whether the party seeking the discovery sought the information through alternative sources and has made reasonable attempts to obtain the information elsewhere. *Wyoming v. United States Dep't of Agric.*, 208 F.R.D. 440, 455 (D.D.C. 2002) (citing *Int'l Union v. Nat'l Right to Work Legal Defense and Ed. Found., Inc.*, 590 F.2d 1139, 1152 (D.C. Cir. 1978). *See also Black Panther Party v. Smith*, 661 F.2d 123, 1266-69 (D.C. Cir. 1981).

There are instances in which constitutionally protected information is discoverable. *National Right to Work*, 590 F.2d at 1153 ("At some point, the additional burden on a litigant in seeking out alternative sources of discovery may justify compelling disclosure of essential information from one asserting a constitutional privilege."). *See also United States v. Duke Energy Corp.*, 232 F.R.D. 1, 3 (D.D.C. 2005) (Friedman, J.) (rejecting First Amendment objections to third-party subpoena where, *inter alia*, information sought went to the "heart of the lawsuit"). Indeed, a court in this district, applying the *National Right to Work* balancing test, has ordered the identification of a non-profit organization's donors – the same information FEI is seeking – in the context of a civil RICO case – the same type of claim FEI is bringing.

Greyhound Lines, Inc. v. Int'l Amalgamated Transit Union, 1992 U.S. Dist. LEXIS 10095 (D.D.C. July 9, 1992) (Green, J.). In *Greyhound Lines*, a case which FEI specifically cited in is certification/reconsideration opposition (ECF 114 at 14-16), Judge Green recognized that the non-profit organization had a "substantial claim of constitutional privilege," but held that the discovery was warranted because (1) the evidence was fundamental to the plaintiff's RICO claim and (2) the plaintiff attempted to seek it from other sources, but was blocked by the assertion of Fifth Amendment privileges. The Motion neither cites *Greyhound Lines* nor attempts to distinguish it.

A. The Court Ordered the Production of Certain Donor Information in the ESA Action

Judge Sullivan's ruling in the ESA Action concerning the identity of WAP's donors does not control here. There, the Court, applying *Wyoming*, *supra*, ***ordered the production of certain donor information, to the extent it was relevant to the issues to be litigated in the ESA Action***. The Court ordered the production of the identities of WAP's donors, if those donors were parties to the litigation, attorneys for any of the parties, or employees or officers of any of the plaintiff organizations or WAP. No. 03-2006, ECF 178 at 8-9. But, the Court held that "any further information about individual or organizational donors would be irrelevant and would tread on core First Amendment rights." *Id.* That was because the information about additional donors was not relevant to the issues to be litigated in that case – plaintiffs' "taking" claim, Rider's credibility or FEI's defenses *Id.* at 8. Thus, Judge Sullivan did not bar all donor discovery; instead, donor discovery was limited based on the evidence necessary to prove (and discredit) the ESA "taking" claim.

B. Donor Material Should Be Produced In This Case

In this case, assuming the First Amendment even applies, the issues are different than those at stake in the ESA Action and the balancing test likewise yields a different result. As a threshold matter, in the ESA Action, WAP was a third-party; here, the discovery is sought from ***parties***. *Wyoming*, 208 F.R.D. at 452 ("non-party status is one of the factors the court uses in weighing the burden of imposing discovery."). ***Party discovery***, *i.e.*, the document requests to FFA and the other organizations, not third-party discovery, is at issue. *Cf.* Mot. at 24 ("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.").

Moreover, in this case, the donors' identities are critical to FEI's RICO claim, *i.e.*, its donor fraud theory. Defendants cannot have it both ways: ***defendants*** have argued (incorrectly) that FEI needs to prove additional schemes and victims to state a RICO claim, but at the same time they claim that any discovery on these issues is off limits and barred by the First Amendment. Defendants' theory is contrary to controlling authority, which makes clear that, in certain circumstances,[12] a "pattern of racketeering" can arise with only a single "scheme" or single victim.[13] ***FEI can plead a RICO claim even if the donors were not defrauded.*** But, if defendants are going to continue to insist that FEI must prove additional schemes and victims, it must allow FEI to take discovery on them. 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

[12] There is no rigid formula for pleading a RICO case. The D.C. Circuit has held that whether a plaintiff has pleaded a "pattern of racketeering" is a "case-by-case," "fact-specific" determination. *Western Assocs. v. Market Square Assocs.*, 235 F.3d 629, 634 & 637 (D.C. Cir. 2001).

[13] *H.J., Inc.,v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 240 (1989) ("[I]t is implausible to suppose that Congress thought continuity might be shown only by proof of multiple schemes."); *Western Assocs.*, 235 F.3d at 634 ("It is true that … a single scheme may suffice for purposes of RICO[.]"). *See also Elemary v. Philipp Holzmann A.G.*, 533 F. Supp. 2d 116, 142-43 (D.D.C. 2008) (single victim, single scheme pattern of racketeering stated RICO cause of action).

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. Otherwise, discovery must proceed. The choice is theirs.[14]

Further, there is no alternative source for the information FEI seeks: ***only the organizations know which donors contributed funds based on solicitations referencing the ESA Action, FEI, its elephants and/or Rider***.[15] As is further discussed below, the identities of certain of the organizations' donors are already in the public domain through the donors' (or some of the defendants') tax or regulatory filings. *See, e.g.*, Opp. Ex. F (Born Free filings with Oklahoma Secretary of State). With regard to these donors, the organizations concede that the First Amendment concerns are "lessened." Mot. at 14. But, FEI cannot be left to guess which donors received solicitations that are relevant to FEI's RICO claim, and gave money as a result. FEI should not be forced waste its resources hunting and pecking on the internet to locate donors, *see infra*, and then to burn through its deposition count and ask each and every donor (there are hundreds of them) who has publicly disclosed a contribution to the defendant organizations whether they donated money ***on the basis of the ESA Action, FEI, FEI's elephants and/or Rider, or on the basis of some other cause***. Is it FEI's burden to depose a

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[14] *Cf. Tree of Life Christian Sch. v. City of Upper Arlington*, 2012 U.S. Dist. LEXIS 32205, at *11-12 (S.D. Ohio Mar. 12, 2012) (cited by organizations) (denying request for donor discovery where, *inter alia*, the Court was not convinced that the donor's identity was "highly relevant" to the case"); *Heartland Surgical Specialty Hosp., LLC v. Midwest Div., Inc.*, 2007 U.S. Dist. LEXIS 19475, at *23 (D. Kan. Mar. 16, 2007) (cited by organizations) (denying motion to compel ***third-party discovery***, ***pursuant to subpoena***, where the "information sought [was] only minimally relevant to the claims made" in the lawsuit).

[15] The Motion's argument that FEI already has received "significant donation information as to donors who were parties to [the ESA Action," Mot. at 14, is wrong. In support of this statement, the Motion cites to FEI's counsel's discussion of a fundraising letter sent by Katherine Meyer to AWI. The FAC specifically alleges that the document was fraudulent, and generated post-hoc to make AWI's "grant" to WAP appear legitimate. ***This document is an alleged act of mail and wire fraud, not an alternative source of information about donor fraud.*** *See* FAC ¶ 127 ("In a letter dated December 11, 2003, Meyer, acting on behalf of WAP, transmitted a 'grant proposal' to Liss of AWI to fund Rider. Upon information and belief, AWI had already made the decision to provide continuous funding for Rider through WAP, and this 'grant proposal' was written to give cover to that funding decision."). Further, as counsel stated, the FAC alleges that the same document, or a similar version of it, was sent to ***donors other than AWI, including an unidentified woman***. *Id.* ¶ 128. It is the identities of these donors that FEI's document requests seek.

third party to find out if they gave money for Hurricane Katrina relief or the ESA Action or neither? That essentially is the shell game that the organizations propose. Mot. at 14 ("FEI could also attempt to review public resources regarding FEI's critics and opponents … ."). That position is contrary to the Court's scope Order, which did not include discovery as to all of the organizations' donors – but only those who gave money for purposes relevant to FEI's RICO claim. Only the organizations can identify which donors fall into this category, and there is no alternative source for it.

C. The Organizations' Unsubstantiated, Hollow Allegations of Harassment Are Legally Deficient

The organizations' generalized allegations concerning retaliation and harassment do not trigger First Amendment protection. As discussed *supra*, the Motion's diatribe about purported misconduct by FEI centers on allegations the are both stale and unfounded. The declarations do not add anything. They do not identify a single incident of harassment, either of the groups or their donors, by FEI. The declarations come forward with ***no evidence*** that could serve as a basis to limit discovery in this case. Instead, the declarations rely on hearsay and speculate about what impact donor discovery may have on contributions to the organizations at some future point in time. *E.g.*, Mot. Ex. 2 (Liss Decl.), ¶ 12 ("FEI's past harassment and retaliation against animal welfare organizations and their supporters is ***well-known in the animal welfare community*** and a significant cause for concern among FEI's adversaries. … I have strong reason to believe that if FEI is given access to the identities of AWI's donors, FEI will use this information to attempt to restrict AWI's funding.") (emphasis added); Mot. Ex. 3 (Handy Decl.), ¶¶ 8 & 9 ("***I do not believe*** that HSUS's donors would approve of HSUS sharing their personal information with a company such as FEI. … ***I believe*** that if HSUS is compelled to produce confidential donor information to FEI, then our current donors would be ***less likely*** to continue

their financial support out of concern that HSUS cannot adequate protect their private information. I also ***believe*** that there would be fewer new donors … .") (emphases added); Mot. Ex. 4 (Markarian Decl.), ¶ 11 (""I ***believe*** that ***current donors could be less likely to continue their financial support*** out of concern that The Fund for Animals cannot adequately protect their private information and interests. I also ***believe*** that ***there could be fewer new donors***, based on the fear that their financial support could lead to harassment. I am especially concerned here, ***because of my understanding—based on what I have read in the news media reports and based on the long history of litigation with FEI***—that FEI has a hostile attitude toward animal protection organizations and those who have challenged FEI's treatment of animals.") (emphases added).

Courts have held that general allegations of fear, such as the ones proffered in the Liss, Handy and Markarian declarations (Mot. Exs. 2-4), do not warrant Constitutional protection. *See Citizens United v. Fed. Elec. Comm'n,* 558 U.S. 310, 370 (2010) (cited by organizations) (upholding application of disclosure requirements in Bipartisan Campaign Reform Act where "Citizens United [] has offered ***no evidence*** that its members may face similar threats or reprisals. To the contrary, ***Citizens United has been disclosing its donors for years and has identified no instance of harassment or retaliation***.") (emphases added); *Buckley v. Valeo*, 424 U.S. 1, 71-72 (1976) (cited by organizations) ("But no appellant in this case has tendered ***record evidence*** of the sort proffered in *NAACP v. Alabama*. Instead, appellants primarily rely on 'the clearly articulated fears of individuals, well experienced in the political process.' ***At best they offer the testimony of several minor-party officials that one or two persons refused to make contributions because of the possibility of disclosure***.") (emphases added); *United States v. Judicial Watch*, 371 F.3d 824, 832-33 (D.C. Cir. 2004) ("***[A] general fear of the IRS is***

insufficient to establish that speech will be chilled. … Judicial Watch has not produced sufficient evidence to support its allegation that enforcement of the summons will chill its members' speech.") (emphasis added); *United States v. Comley*, 890 F.2d 539, 544 (1st Cir. 1989) ("These general allegations of harassment fall short of the solid, uncontroverted evidence of actual harassment that has existed in those cases where the Supreme Court has found violations of the right to freedom of association.").

Courts have applied First Amendment protection in cases where there was uncontroverted evidence of actual instances of harassment, or where an individual has come forward to say that disclosure would change his or her conduct. No such evidence exists here. *Cf. Alabama,* 357 U.S. at 462 (cited by organizations) ("Petitioner has made an ***uncontroverted showing*** that on past occasions revelation of the identity of its rank-and-file members has exposed these members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of physical hostility.") (emphasis added); *Brown v. Socialist Workers '74 Campaign Comm.,* 459 U.S. 87, 99 (1982) (cited by organizations) ("Appellees introduced ***proof of specific*** incidents of private and governmental hostility toward the SWP and its members within the four years preceding the trial. These incidents … included threatening phone calls and hate mail, the burning of SWP literature, the destruction of SWP members' property, police harassment of a party candidate, and the firing of shots at an SWP office.") (emphasis added); *Perry v. Schwarzenger,* 591 F.3d 1147, 1163-64 (9th Cir. 2009) (cited by organizations) (relying on declaration of individual who would be impacted by disclosure, stating the following: "I can unequivocally state that if the personal, non-public communications I have had regarding this ballot initiative … are ordered to be disclosed through discovery in this matter, it will ***drastically alter how I communicate in the future*** … .") (emphasis added).

Nowhere do the organizations come forward with evidence analogous to *NAACP, Brown* or *Perry*. Indeed, conspicuously absent from the filing is any statement by any ***donor*** that they have been harassed by FEI, fear such harassment or will stop "associating" with the organizations if discovery is ordered. *Cf. Buckley*, 424 U.S. at 74 ("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."). Supreme Court and Circuit authority dictates that this lack of proof undermines the First Amendment claim.

The Motion's argument that donor discovery should be thwarted because FEI may add some of donors as defendants lacks merit, and does not amount to the standard for "harassment" set forth in *Alabama* and *Brown*, *supra*. Defendants raised this same argument in their unsuccessful certification/reconsideration motion. ECF 105-1, at 12 n.8. As FEI previously argued, it strains credulity to argue that a victim of defendants' donor fraud, who, for example, was misled regarding how her donations were being used, could somehow become a defendant in this case. Regardless, that discovery could theoretically result in additional parties being added to this case (or, what is more likely, result in a separate fraud action by disenchanted donors) is not a basis to stop it. *Cf. Imperial Enterprises, Inc. v. Does*, 2011 U.S. Dist. LEXIS 155874, at *9 (D.D.C. 2011) (Walton, J.) ("disclosure of the parties' identities furthers the public interest in knowing the facts surrounding judicial proceedings") (quotation omitted). Indeed, the public interest would be thwarted by the outcome that defendants seek through quashing donor discovery, *i.e.*, by either suppressing evidence of the extent of the fraud or by withholding such evidence from other victims.

D. Some of the Donors' Identities Are Already Known

Further undermining the organizations' First Amendment argument is that donor identity is not the "secret" that the Motion tries to portray. Indeed, public filings with state authorities

that disclose the identities of certain of the organizations' donors. Opp. Ex. E (paid solicitor registration filed with Massachusetts Attorney General, submitting examples of pledge cards/correspondence, where the apparent names and addresses of actual HSUS donors are disclosed)[16]; Opp. Ex. F (Born Free's filing of 2010, 2011 and 2012 tax forms with Oklahoma Secretary of State, publicly disclosing the names and addresses of dozens of donors making contributions to Born Free of more than $5,000.00).[17] Former defendant ASPCA publicly lists hundreds of its own individual and corporate donors in its annual reports which are available to the public on ASPCA's website. *See* ECF 114-13 (Certification/Reconsideration Opp. Ex. 11) (ASPCA Annual Report, 2011) at 35-64. Certain of the organizations may have "privacy" policies (neither WAP nor Born Free has come forward to say that those groups have such policies), but apparently they do not comply with them.[18]

Moreover, some donors, who are charities or foundations, have disclosed their donations to the defendant organizations in their own tax filings, which are publicly available from these donors themselves or through organizations that collect and make available free of charge the IRS Forms 990 and 990-PF that public charities and foundations are required to file with the IRS and make publicly available. Opp. Ex. H (chart listing donors to defendant organizations who

[16] Available at Massachusetts Attorney General website http://www.charities.ago.state.ma.us/charities/index.asp). While HSUS touts the confidentiality of its donor list, that policy is not indicated anywhere on the pledge cards contained in Opp. Ex. E. Thus, it is questionable whether donors who used those pledge cards actually gave funds to HSUS with any expectation that the contribution would be kept secret.

[17] Available at Oklahoma Secretary of State website (https://www.sos.ok.gov/corp/charityInquiryFind.aspx).

[18] HSUS's public filings with the New York Attorney General's office usually include all of their fundraising solicitor and donor advisor contracts. Opp. Ex. G (HSUS 2011 filing) (available at New York Attorney General website) (http://www.charitiesnys.com/RegistrySearch/show_details.jsp?id={AC9D62F0-3EFA-4C43-A30E-1EC6CC882C41}). Those documents make clear that HSUS's donors' information is shared with their contractors. The information is not handled as if it were a state secret. Instead, the contractors are required to take "reasonable," "commercially reasonable" or "adequate" measures to keep the information confidential, may not disseminate to a third party without HSUS consent unless required to do so by law, and can only use the information for purposes of performing the contract. *See, e.g., id.* at Part I, .pdf pp. 37, 55, 98, 117, 227 & Part II at pdf. 4, 31, 40 & 63. These contractual restrictions on the use of donor information – by parties who have merely an arm's length commercial contractual relationship with HSUS – are virtually identical to the ones contained in FEI's proposed protective order, which additionally is buttressed by the contempt powers of this Court. *See* ECF 164.

disclosed their contributions in their own tax filings). All of the Forms 990 and 990-PF referred to in Ex. H to this Opposition are publicly available through free sources such as GuideStar (www.guidestar.org); ProPublica (www.propublica.org); and the National Center for Charitable Statistics (http://nccs.urban.org/). This chart was constructed through time-consuming extrapolation and guessing about which charity or foundation included on a public list of donors (such as ASPCA's annual reports) may also have contributed money to one or more of the defendant organizations. It only represents a fraction of the potentially publicly known charity and foundation donors of defendants. However, none of the defendant organizations has to guess or extrapolate; each has readily available to it a list of those of its contributors who are either charities or foundations subject to the requirements of filing IRS Forms 990 or 990-PF. Thus, even as to the ascertainment of publicly known donor identity, the information is not equally available. To the contrary, it is more readily and directly available from the defendant organizations themselves than it is to FEI by hunting and pecking on the internet.

Furthermore, if any donor was going to be a target of "harassment," it would be these contributors, because all of these donors' identities are known or available to FEI. Indeed, many of these donors have contributed hundreds of thousands and, in some cases millions, of dollars to the defendant organizations going back, in some cases, to 2000. Opp. Ex. H. ***But there are no allegations, much less any evidence, that FEI has "harassed" any of them.*** Nor is there any evidence that any of these donors would stop donating if their association with HSUS, et al., were not a "secret." To the contrary, the implication is that these donors affirmatively seek to broadcast their association with defendants by disclosing it in their publicly available tax forms. What might cause these donors to stop donating is the revelation that they gave money to support a fraudulent case, but that is a consequence of the defendants' own making.

The same is true with the alleged PAWS donors, discussed *supra,* as well as the handful of WAP donors who are known to FEI through discovery in the ESA Action. *See* Ex. D (Compendium of WAP Donor Correspondence) & ECF 114 at 8 (FEI Certification/Reconsideration Opp., noting that WAP's ledger of payments (DX 50) (No. 03-2006, ECF 457-11) disclosed that the Glaser Family Foundation, African Elephant Trust and PETA donated funds for Rider and/or the ESA Action). According to defendants' own allegations, FEI has known about these donors' identities for ***years***. But none of them has submitted a statement under oath indicating that they have been "harassed." Indeed, the facts here are analogous to *Citizens United*, where the First Amendment claims were rejected for these very reasons. *Citizens United,* 538 U.S. at 370 (cited by organizations) ("Citizens United has been disclosing its donors for years and has identified no instance of harassment or retaliation.").

Moreover, the donors whose identities are publicly known cannot plausibly have a reasonable expectation of privacy. Indeed, as previously stated, the Motion concedes that the First Amendment "chilling" concerns are "lessened" with respect to donors whose identities are publicly known. Mot. at 14. Indeed, in *Greyhound Lines*, the court specifically held that any potential chilling effect "would not extend to information regarding contributions made by … organizations [] already known to be associated" with the labor strike at issue. 1992 U.S. Dist. LEXIS 10095, at *6-7.

III. THE ANONYMOUS INTERNET SPEAKER CASES HAVE NO RELEVANCE HERE

The organizations apparently acknowledge that the discoverability of the donors' identities is governed by the *National Right to Work* balancing test, discussed *supra*. *See also Black Panther Party,* 661 F.2d at 1266 (applying balancing test to discovery request for membership list; citing *National Right to Work*). Indeed, that is the standard Judge Sullivan

previously applied when considering the discoverability of WAP's donors in the ESA Action – a decision which the organizations themselves rely on. *See* No. 03-2006, ECF 178 at 9 (citing *Wyoming, supra*). It also is the standard that has been applied by other courts in this district when determining whether donor information is discoverable. *See, e.g., Int'l Action Ctr. v. United States*, 207 F.R.D. 1 (D.D.C. 2002) (Kessler, J.) (cited by organizations); *Greyhound Lines, supra*.

But, the Motion goes on to cite cases concerning anonymous internet speakers and claims that FEI should be required to make some type of "heightened showing" before it can discover the donors' identities. Mot. at 22-24. Essentially, the organizations are trying to resurrect their abandoned "SLAPP" defense (*see* Minute Order, 04-23-13), by requiring FEI to demonstrate that is racketeering allegations are meritorious, ***before*** it has had a chance to take any discovery. The FAC already has survived ***three*** attempts by defendants to dismiss it. What ***else*** must FEI do or show to proceed with discovery on its claim, that survived a motion to dismiss, a motion for reconsideration and motion for certification? The approach advocated by the Motion is contrary to the Federal Rules of Civil Procedure, and controlling caselaw (*i.e.*, *National Right to Work*).

Indeed, the anonymous internet speaker cases cited by the organizations have no relevance to this civil RICO claim, which already has survived a motion to dismiss. *See* Mot. at 23 (citing *Dendrite Int'l v. Doe*, 775 A.2d 756 (N.J. Super. Ct. App. Div. 2001) and *Doe v. Cahill*, 884 A.2d 451 (Del. 2005)). In *Dendrite*, the plaintiff brought claims for, *inter alia*, defamation against numerous fictitiously-named John Doe defendants, who were posters on a Yahoo! Message board. 775 A.2d at 759-63. The plaintiff sought expedited discovery from a third-party, an internet service provider (ISP), for the purpose of ascertaining the true identity of the John Doe defendants. *Id.* A similar fact pattern was at issue in *Cahill*, where the plaintiff

brought a defamation claim against an unknown defendant, arising out of statements posted on an internet blog, and sought to compel an ISP to disclose the Doe defendant's identity. 884 A.2d at 454-55. The plaintiffs in *Dendrite* and *Cahill* sought the discovery from ***third-parties***, ***before any motions practice had taken place***. Both *Dendrite* and *Cahill* adopted the application of a balancing test that requires a plaintiff to show "something more" than merely that its claim would survive a motion to dismiss, in order for the third-party discovery to proceed. *See Sinclair v. TubeSockTedD*, 596 F. Supp. 2d 128, 132 (D.D.C. 2009) (Bates, J.) (discussing *Dendrite* and *Cahill*).

As a threshold matter, *Dendrite* and *Cahill* are inapposite here because they were ***defamation*** cases.[19] The Motion cites no case applying *Dendrite* or *Cahill* to a civil RICO claim or a case involving donor fraud, and even the court which decided *Dendrite* has questioned its applicability in other contexts. *See Too Much Media, LLC v. Hale*, 993 A.2d 845, 862 (N.J. Super. Ct. App. Div. 2010) ("[W]e limited our decision to [in *Dendrite*] to 'standards to be applied by courts in evaluating applications for discovery of the identity of anonymous users of Internet Service Provider (ISP) message boards.' … ***The protections of*** **Dendrite** ***have never been extended beyond ISPs.***") (emphasis added), *aff'd in part and modified in part*, 206 N.J. 209 (N.J. 2011).[20] The Ninth Circuit has specifically disavowed a rigid application of any

[19] Most of the cases cited in footnote 11 of the Motion likewise involved anonymous internet speakers and allegations of defamation. *See Best Western Int'l v. Doe*, 2006 U.S. Dist. LEXIS 56014 (D. Ariz. July 25, 2006) (request for expedited discovery to third-parties in suit concerning anonymous messages that, *inter alia*, allegedly ***defamed*** the plaintiff); *Highfields Capital Mgmt., L.P. v. Doe*, 385 F. Supp. 2d 969 (N.D. Cal. 2004) (motion to quash subpoena in suit for, *inter alia*, ***defamation***); *In re Baxter*, 2001 U.S. Dist. LEXIS 26001 (W.D. La. Dec. 20, 2001) (Fed. R. Civ. P. 27 application for discovery in the context of allegedly ***"false and defamatory materials"***); *Krinsky v. Doe 6*, 72 Cal. Rpt. 3d 231 (Cal. Ct. App. 2008) (third-party subpoena in lawsuit arising out of allegedly ***"defamatory remarks"***). *Cf. Mobilisa, Inc. v. Does*, 170 P.3d 712, 719 (Ariz. Ct. App. 2007) (subpoena request case involving property-based claim where unknown speaker engaged in ***expressive speech protected by the First Amendment***).

[20] Indeed, the same court recently limited the application of *Dendrite*, ***even in the context of a subpoena to an ISP***. *See Warren Hospital v. Does*, 63 A.3d 246, 250-51 (N.J. Super. Ct. App. Div. 2013) (***rejecting "a strict or overly-formulaic application of the*** **Dendrite** ***test"*** where the plaintiffs demonstrated (1) the speakers' unlawful or impermissible mode of communication and (2) that the allegedly defamatory statements would survive a motion to

heightened standard to discovery concerning the identities of anonymous speakers. *See Anonymous Online Speakers v. United States*, 661 F.3d 1168, 1177 (9th Cir. 2011) (refusing to apply *Cahill* in case that did not involve "expressly political speech" and holding that ***"[t]he specific circumstances surrounding the speech serve to give context to the balancing exercise"***) (emphasis added). The Motion cites no case from this district where the standards adopted by *Dendrite* and *Cahill* were actually adopted. *Sinclair, supra*, cited in the Motion, "discussed, but did not adopt, the *Dendrite* test," as Judge Bates specifically noted in a subsequent case. *Hard Drive Prod., Inc. v. Does*, 892 F. Supp. 2d 334, 339 n.2 (D.D.C. 2012).

Courts in this district have refused to apply *Dendrite* and *Cahill* in copyright infringement cases, where the plaintiffs sought to learn the identities of file-sharers. *See, e.g., Hard Drive Prod.*, 892 F. Supp. 2d at 339 ("[L]ike courts in this and other jurisdictions, the Court declines to apply the *Dendrite* test … ."); *Call of the Wild Movie, LLC v. Does*, 770 F. Supp. 2d 332, 351 n.7 (D.D.C. 2011) (Howell, J.) ("The *Dendrite* case was applied in a defamation case; the case that discusses the *Dendrite* test in this district was also a defamation action."). In part, those courts distinguished *Dendrite* on the basis that "the First Amendment's protection is not absolute and does not extend to copyright infringement." *Hard Drive Prod.*, 892 F. Supp. 2d at 338. *See also Call of the Wild*, 770 F. Supp. 2d at 351 n. 7 ("The First Amendment interests implicated in defamation actions, where expressive communication is the key issue, is considerably greater than in file-sharing cases."). The Motion makes no argument why caselaw developed by a New Jersey state court as to defamation claims should be applicable in the context of a federal racketeering case based, in part, on fraudulent charitable solicitation, which, like copyright infringement, is unprotected speech. *See Madigan, supra.*

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dismiss, and permitting plaintiff to pursue discovery into the identities of John Does One and Two) (emphasis added).

Moreover, in both *Hard Drive Productions* and *Call of the Wild*, ***the courts granted the plaintiff's request for discovery of the identities of the unknown defendants*** through third-party subpoenas to ISPs. The courts in those cases applied a balancing test which is less "rigorous" than those adopted by *Dendrite* and *Cahill*. *See Call of the Wild*, 770 Supp. 2d at 351 n.7 (comparing test set forth in *Sony Music Entm't, Inc. v. Doe*, 326 F. Supp. 2d 446 (S.D.N.Y. 2004) with *Dendrite* test). In *Hard Drive Productions*, Judge Bates denied the defendant's request to reconsider Magistrate Judge Facciola's order allowing discovery to go forward, holding that (1) the plaintiff made a "concrete showing of a prima facie claim of copyright infringement"; (2) ***there were restrictions on the use and disclosure of the defendants' identities***, (3) subpoenaing the ISPs was the only way for plaintiff to obtain the defendants' identities; (4) without the identifying information, the plaintiff could not name or serve process on the defendants, and thus "c[ould not] advance its claims of copyright infringement"; and (5) ***the defendants had little expectation of privacy in their subscriber information***. 892 F. Supp. 2d at 339-40. The court in *Call of the Wild* engaged in the same analysis and reached substantially the same conclusion.[21] 770 F. Supp. 2d at 351-54.

Even if some type of "heightened showing" akin to the tests set forth in *Dendrite*, *Cahill* or *Sony Music Entertainment* – which are all above and beyond the standard set forth in *National Right to Work* – is employed here, the FAC would more than meet that threshold. FEI's claim already has survived three (3) attempts at dismissal and it is supported by preclusive findings made by Judge Sullivan (**FOF 39**); the discovery is sought from ***defendants***, not third parties;

[21] *See also Imperial Enterprises, Inc.*, 2011 U.S. Dist. LEXIS 155874, at *9-14 (in copyright infringement case, rejecting privacy and First Amendment arguments of putative defendants and denying motion to quash discovery concerning their personal identifying information) (noting that "the undersigned authorized the disclosure of the putative defendants' personal identifying information 'solely for the purpose of protecting the plaintiff's rights as set forth in the Complaint'").

FEI already has proposed restrictions on the use and disclosure of the donor information[22]; FEI can only obtain the information it needs to pursue its RICO claim from defendants; and at least some of the donors cannot have a reasonable expectation of privacy, because their donations are publicly disclosed in their tax filings and/or were made known through discovery in the ESA Action (and indeed are part of the public record of that case, as part of one of the ESA Action plaintiffs' own exhibits). *See supra*. There is no reason for discovery to be stopped in this case. While creative, the organizations' analogy to the anonymous internet speakers cases is inapt.

CONCLUSION

The donor discovery sought by FEI is relevant and discoverable. The organizations cannot hide behind the Constitution merely because they are "non-profits" that advocate on behalf of an ideological "cause." ***The First Amendment does not shield fraud committed by anyone, nor does it trump the litigation of a viable RICO claim.*** The organizations should not be permitted to benefit from their own fraud. Accordingly, the Motion should be denied; FEI's proposed protective order should be entered; and, defendants should be ordered to produce, within thirty (30) days, responsive documents, if any, that defendants already have located and are withholding on First Amendment grounds.

[22] In *Anonymous Online Speakers*, where Ninth Circuit denied the anonymous speakers' petition for mandamus and thus permitted discovery concerning their identities to go forward, the panel specifically noted that a protective order was in place. 661 F.3d at 1177-78 ("***[W]e note that the parties have a protective order in place that provides different levels of disclosure for different categories of documents to various recipients***, such as disclosure for 'Attorneys' Eyes Only.' … A protective order is just one of the tools available to the district court to oversee discovery of sensitive matters that implicate First Amendment rights.") (emphasis added). The court relied on its prior decision in *Perry*, cited *supra*, where the panel held that ***"a protective order can ameliorate the harms of disclosure."*** *Id.* at 178 (discussing *Perry*) (emphasis added).

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Respectfully submitted,

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