**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

**FELD ENTERTAINMENT, INC.,**

**Plaintiff,**

**v.** **Civil Action No. 07-1532 (EGS/JMF)**

**ANIMAL WELFARE INSTITUTE, *et al.*,**

**Defendants.**

**MEMORANDUM OPINION AND ORDER**

This case was referred to me for full case management. Currently pending and ready for resolution is The Fund for Animals, Animal Welfare Institute, and HSUS' Motion for a Protective Order [#184].

**INTRODUCTION**

Defendants[1] in this case, brought pursuant to the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1962(c) and 1964(c) (the "RICO action"),[2] were either plaintiffs or counsel for plaintiffs in a separate lawsuit that accused the Ringling Brothers and Barnum & Bailey Circus (referred to herein as "Feld") of abusing its world famous elephants, in violation of the Endangered Species Act, 16 U.S.C. § 1531, *et seq.* See Animal Welfare Institute, et al, v. Feld Entm't, Inc., Civil Action No. 03-2006 (EGS/JMF) ("the ESA action"). The plaintiffs in the ESA action premised their case on the testimony of the late Tom Rider, who testified that he observed the mistreatment of the elephants when he worked for the circus. Judge Sullivan, however, found

[1] Defendants are 1) the Animal Welfare Institute ("AWI"); 2) the Fund for Animals ("FFA"); 3) Tom Rider (deceased); 4) the Animal Protection Institute ("API"); 5) the Wildlife Advocacy Project ("WAP"); 6) the law firm of Meyer, Glitzenstein & Crystal ("MG&C"); 7) the members of MG&C; 8) the Humane Society of the United States ("HSUS"); 9) Jonathan R. Lovvorn and 10) Kimberely D. Ockene.

[2] All references to the United States Code or the Code of Federal Regulations are to the electronic versions that appear in Westlaw or Lexis.

that Rider was not credible and that he was essentially a paid plaintiff witness whose sole source of income throughout the litigation was provided by the animal advocacy organizations, which were his co-plaintiffs in the ESA action. Feld Entm't, Inc. v. ASPCA, 873 F. Supp. 2d 288, 299 (D.D.C. 2012). Judge Sullivan therefore concluded that Rider lacked standing and entered judgment for Feld, the defendant. ASPCA v. Feld Entm't, Inc., 677 F. Supp. 2d 55 (D.D.C. 2009), aff'd, 659 F.3d 13 (D.C. Cir. 2011).

**DISCUSSION**

I. Background

In its complaint in the RICO action, Feld claims that defendants misrepresented themselves when they sought public support for their earlier suit, the ESA action. First Amended Complaint of Feld Entertainment, Inc. [#25] ¶¶ 1-46. Specifically, Feld claims that a solicitation sent by the American Society for the Prevention of Cruelty to Animals ("ASPCA"),[3] AWI, and FFA/HSUS to potential contributors regarding a July 2005 fundraiser contained false and misleading statements about Rider. Id. ¶ 179. According to Feld, the solicitation was false because it alleged 1) that Feld mistreats its elephants; 2) that Rider left Feld's employment in order to speak out about the elephant abuse he had seen, when in fact he left Feld to work for another circus and only began speaking about the alleged abuse of the elephants when paid to do so; 3) that Rider witnessed elephant abuse on a daily basis when in fact his account of the alleged abuse changed over time, becoming more and more favorable to the defendants' claims in the ESA action; 4) that defendants were incapable financially of pursuing a case against Feld when in fact, at the end of 2005, the combined net assets of the participating organizations (ASPCA, AWI, and FFA/HSUS) was over $300 million; and 5) that the purpose of the fundraiser was to finance defendants' legal battle

[3] ASPCA is no longer a defendant in the RICO action.

against Feld when in fact the money was being raised to pay Rider for his services as a witness in the ESA action. Id. ¶ 180. Under a "donor fraud" theory, Feld theorizes that the very people who donated money to defendants to aid in their prosecution of the ESA action are, like Feld, victims in the RICO action because defendants' racketeering activity harmed them as well. Plaintiff Feld Entertainment, Inc.'s Opposition to the Organizational Defendants' Motion for a Protective Order [#188] at 20-27.

In order to prove its case, Feld therefore seeks to discover what defendants said about the ESA action when they solicited funds from their supporters. Specifically, Feld seeks all documents that refer or relate to the following: 1) requests for donations concerning the ESA action, Feld, Feld's elephants, Rider, and WAP; 2) campaigns that contemplated using the ESA action, Feld, or its elephants to raise funds or gain media attention; 3) the efficacy of any such campaigns; 4) contributions that were earmarked by the donor for use in connection with the ESA action or any other activity concerning Rider, Feld, or Feld's elephants; 5) donations that were earmarked by the donor a) for the ESA action, b) to support Rider, or c) for any activity concerning Feld or its elephants; 6) donations made as a result of the ESA action, Rider, Feld or Feld's elephants (if not already requested); 7) the identities of those persons who made the earmarked donations. [#184] at 13-14.

In response to Feld's requests for the names of some of its donors, the FFA, AWI, and HSUS ("the non-profit organizations") filed the instant motion for a protective order, arguing that if Feld gained "access to confidential donor information, both current and future donors would see their protected political conduct [under the First Amendment] chilled by the fear of financial burden and reprisal." [#184] at 9.

II. Analysis

A. The First Amendment does not Preclude the Discovery of the Donors' Names

1. Legal Standard

In its seminal decision in NAACP v. Ala. ex rel. Patterson, 357 U.S. 449 (1958), the Supreme Court stated that the "compelled disclosure of affiliation with groups engaged in advocacy may constitute [an] effective . . . restraint on freedom of association." Id. at 462. Since that decision, it has been the law of this Circuit that the party seeking disclosure must show 1) that the information sought "goes 'to the heart of the matter,'" and 2) that "every reasonable alternative source of information" has been exhausted. Black Panther Party v. Smith, 661 F.2d 1243, 1268 (D.C. Cir. 1981), dismissed as moot 458 U.S. 1118 (1982).[4] Accord Int'l Union, etc. v. Nat'l Right to Work Legal Def. & Educ. Found., Inc., 590 F.2d 1139, 1152 (D.C. Cir. 1978).

The parties understandably agree that this is the proper criterion. [#184] at 17; [#188] at 28. Nevertheless, the defendants, while conceding that Feld previously survived a motion to dismiss for failure to state a claim, argue that Feld must also show a substantial likelihood of prevailing on the merits on its allegations. [#184] at 30; Reply in Support of the Fund for Animals, Animal Welfare Institute, and HSUS' Motion for a Protective Order [#193] at 6. Defendants rely on several cases in support of their contention.

First, defendants cite McIntyre v. Ohio Elections Com'n, 514 US. 334, 347 (1995) and Bates v. Little Rock, 361 U.S. 516, 524 (1960). [#184] at 31. In McIntyre, at the page cite, the Supreme Court stated: "When a law burdens core political speech, we apply 'exacting scrutiny,' and we uphold the restriction only if it is narrowly tailored to serve an overriding state interest."

4 "Even though the Black Panther decision was later vacated as moot, Smith v. Black Panther Party, 458 U.S. 1118 (1982), there is no suggestion in later case law in this Circuit that its reasoning or analysis has been rejected or abandoned by our Court of Appeals." Int'l Action Ctr. v. United States, 207 F.R.D. 1, 3 n.6 (D.D.C. 2002).

Bates, at the page cited, stands for the proposition that "[w]here there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling." In neither case did the Supreme Court speak to the burden (if any) to be imposed upon a civil litigant who seeks the names of donors to a political or social cause.

Second, defendants cite to two state law cases and one federal court case in which parties sought to pierce the anonymity of Internet speakers. [#84] at 31. The state court decisions are, of course, not binding on this court. The federal court case, while authored by a judge of this Court and therefore persuasive, never reached the issue of whether it was appropriate to disclose the identities of anonymous Internet speakers. In that case, Judge Bates concluded that because it was clear that 1) the court lacked subject matter jurisdiction; 2) the court lacked personal jurisdiction; and 3) the complaint failed to state a claim upon which relief could be granted, "[t]he Court *need not* resolve . . . the precise standard appropriate for determining whether disclosure of anonymous Internet speakers [was] warranted." Sinclair v. TubeSockTedD, 596 F. Supp. 2d 128, 132-34 (D.D.C. 2009) (emphasis added). Ultimately, none of the cases cited by defendants, including those referenced in footnote 11, dealt with the discovery of anonymous donors to a political or social cause. On the other hand, the D.C. Circuit's decisions in Black Panther and Right to Work speak to that precise issue and are binding precedent.

Moreover, nothing in the Federal Rules of Civil Procedure could possibly be interpreted to require that a litigant, whose complaint has survived a motion to dismiss for failure to state a claim, make an additional showing to secure discovery. Without controlling authority directing me to do so, I am reluctant to engage in the tautological exercise of requiring a plaintiff to prove its case prior to getting evidence to prove its case.

Furthermore, defendants forget that Judge Sullivan has already issued judicial findings in the ESA action that are significant aspects of Feld's RICO action. In his December 30, 2009 opinion, Judge Sullivan made the following findings: 1) Rider was not credible when he claimed that he left Feld's employment because he could not bear to witness further mistreatment of the elephants;[5] 2) Defendants' (ASPCA, AWI and HSUS) July 2005 fundraiser "purported to be a 'benefit to rescue Asian elephants from abuse by Ringling Bros. Barnum & Bailey . . . [to] raise money . . . [to] successfully wage . . . battle on behalf of the elephants," but the funds collected were ultimately disbursed to Rider;[6] 3) the "lawsuit could not have been maintained without Mr. Rider's participation as a plaintiff, and the payments to him are linked directly to the litigation itself";[7] 4) "the primary purpose of the funds paid to Mr. Rider was to secure and maintain his participation in [the] lawsuit and were not legitimate reimbursements for bona fide media expenses";[8] and 5) Rider's advocacy efforts on behalf of the elephants began only after the commencement of his financial relationship with the defendant organizations.[9] Thus, if plaintiff's claims in the RICO action are to be subjected to an evidentiary test for sufficiency before discovery of the names of the donors can be had (a proposition I reject), plaintiff's allegations regarding the misrepresentations and fatal omissions in the 2005 solicitation would pass that test.

The true criteria for assessing the discoverability of the donors' names is, therefore, determining 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.

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[5] ASPCA, 677 F. Supp. 2d at 70.
[6] Id. at 77.
[7] Id. at 89.
[8] Id.
[9] Id. at 74.

2. The Donors' Names Go to the Heart of Feld's Case

The names of the donors do go to the heart of Feld's case. Without interviewing them and learning what they did in response to the solicitation Feld cannot establish reliance upon those statements, an element of their fraud case. Additionally, there may be donors who did not receive the solicitation but attended the fund raiser. Without learning who they were and then interviewing them, it is impossible for Feld to learn what they were told by the defendants and whether they relied upon it in making their contributions. Thus, these interviews and what they may yield go to the heart of Feld's case for without them Feld cannot hope to make out a case of fraud.

3. There are No Less Intrusive Means of Securing the Information

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.

B. Defendants' Motion for a Protective Order will be Denied

Faithfulness to the principles articulated in NAACP, Black Panther, and Right to Work requires that the intrusion into the donors' privacy and anonymity be no greater than necessary. See Black Panther, 661 F.2d at 1268. In this case, there are at least two categories of donors: 1) those individuals who received a solicitation to support the ESA lawsuit and Rider's work, and who earmarked a subsequent donation for those purposes; and 2) those individuals who did not receive a solicitation, but attended a fund raiser, heard what was said there about the ESA lawsuit and Rider, and earmarked a subsequent donation in the same way.[10]

[10] Finally, there may be other individuals who neither received a solicitation nor attended a fundraiser but nevertheless earmarked a contribution to support the ESA lawsuit and Rider because they heard of them in some other way. It is unlikely, however, that this category of individuals could have been defrauded by defendants in the manner Feld claims.

Accordingly, defendants will have to provide Feld with the names of 1) those donors who received a solicitation and earmarked a donation to support the ESA lawsuit or Rider (or both); and 2) those donors who attended a fund raiser and earmarked a donation in the same way. Donors who neither received a solicitation nor attended a fund raiser cannot possibly have been defrauded and therefore the disclosure of their identities is unnecessary.

Finally, to eliminate any risk whatsoever of Feld intimidating or harassing the donors, I am simultaneously issuing a protective order (Feld's proposed protective order), which provides as follows:

> Any material designated as Confidential shall be used solely for the preparation and trial of the Lawsuit, any appeal(s) in the Lawsuit, settlement discussions and negotiations in connection with the Lawsuit, any form of alternative dispute resolution of the Lawsuit, or in response to a government subpoena or request for information, and for no other purpose whatsoever. Any party seeking to use any Confidential Material for any other purpose must seek permission from the Court by motion.

[#201] at ¶ 7.

**CONCLUSION**

It is therefore, hereby,

**ORDERED** that The Fund for Animals, Animal Welfare Institute, and HSUS' Motion for a Protective Order [#184] is **DENIED.**

**SO ORDERED.**

Digitally signed by John M. Facciola
DN: c=US, email=john_m._facciola@dcd.uscourts.gov, o=United States District Court for the District of Columbia, cn=John M. Facciola
Date: 2014.02.20 14:54:33 -05'00'

**JOHN M. FACCIOLA**
**UNITED STATES MAGISTRATE JUDGE**