UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

DEFENDANT WILDLIFE ADVOCACY PROJECT'S OBJECTIONS TO THE FEBRUARY 20, 2014 MEMORANDUM OPINION AND ORDER REQUIRING THE DISCLOSURE OF DONOR IDENTIIES OF THE NON-PROFIT ORGANIZATION DEFENDANTS

Pursuant to Federal Rule of Civil Procedure 72(a), Defendant Wildlife Advocacy Project ("WAP") hereby objects to the February 20, 2014 Memorandum Opinion and Order, which denied a motion for a protective order filed by Defendants The Fund for Animals, Animal Welfare Institute, and Humane Society of the United States ("Nonprofit Defendants") seeking to prevent disclosure to Feld Entertainment Inc. ("FEI") of the identities of members and other supporters of the Nonprofit Defendants. WAP filed a response in support of the Nonprofit Defendants' motion, which explained that "WAP's First Amendment right to protect the identities of donors and contributors who were unrelated to the ESA Action was specifically recognized and upheld in the ESA Action." ECF No. 185 (citing ESA Action ECF No. 178 at 8-9); *see* ESA Action ECF No. 178 at 8-9 (holding that compelled disclosure of WAP supporters who were unrelated to the ESA Action would violate "core First Amendment rights" of speech and association).[1]

[1] WAP was not a party in the ESA Action and, indeed, the Court refused to allow WAP to participate in briefing when FEI first raised its RICO allegations in the ESA Action. *See* ESA Action ECF No. 176 at 11-12 (striking WAP's response to FEI's motion to add a RICO counterclaim because "WAP is not a party to this case"). However, WAP did response to multiple third party subpoenas in the ESA Action and, in that context, the Court recognized the "core First Amendment rights" to protect donors who were otherwise unrelated to the ESA Action. ESA Action ECF No. 178 at 8-9.

The Magistrate Judge's February 20, 2014 Memorandum Opinion and Order requires the disclosure of donor identities, and raises a vitally important First Amendment issue that should be addressed by this Court -- and, potentially, the Court of Appeals -- before this unprecedented RICO action proceeds further. In particular, Judge Facciola has now squarely held that FEI "cannot hope to make out a case of [donor] fraud" -- which under this Court's prior rulings is integral to FEI's alleged RICO "pattern" -- without extracting from the organizational Defendants the identities of their *own* supporters and contributors. ECF No. 202 at 7. This ruling creates a serious tension between RICO and First Amendment rights and therefore necessitates this Court's reassessment of whether RICO should be applied and interpreted in a manner that entails such incursions on the constitutional rights of nonprofit organizations and their supporters. *See Nat'l Org. for Women, Inc. v. Scheidler*, 510 U.S. 249, 263 (1994) (Souter, J., concurring) ("[L]egitimate free-speech claims may be raised and addressed in individual RICO cases as they arise.").[2]

BACKGROUND

In allowing FEI's RICO claim to proceed past the motion to dismiss stage, "the Court rejected most" of FEI's arguments concerning its alleged RICO "pattern" -- a necessary element of any RICO claim. ECF No. 129 at 3. However, the Court found that FEI's allegations of "donor fraud" in connection with a 2005 fundraiser were sufficiently specific to allow the RICO claim to proceed. *Id*. In particular, "[t]he Court found that the donor fraud allegations in connection with the 2005 fundraiser met both the requirements of *Iqbal* and *Towmbly* and the heightened pleading requirements for fraud under Rule 9(b)." *Id*.[3]

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[2] These First Amendment concerns are reinforced by the "Second Amended Complaint" FEI filed several days ago, which modifies FEI's allegations by greatly expanding the scope of the nonprofit organization-donor communications that FEI now seeks to bring within the scope of its RICO claims. *See* ECF No. 213.

[3] One of the central "donor fraud allegations" advanced by FEI -- and hence on which the Court had to rely in allowing the donor fraud theory to proceed -- has *subsequently been jettisoned by FEI*. As explained by Judge Facciola in the discovery order at issue, according to the Complaint reviewed by the Court at the motion to dismiss stage (FEI's First Amended Complaint), the "solicitation [to the 2005 fundraiser] was false because (among other reasons) it stated 1) *that Feld mistreats its elephants.*" ECF No. 202 at 2 (emphasis added). This allegation was in fact crucial to FEI's donor fraud theory because the central feature of the fundraiser invitation on which FEI relied was the contention that FEI abuses and mistreats the elephants. *See* ECF No. 105-2 (copy of invitation to fundraiser referring to the "abuse of circus elephants who are beaten and chained for most of their lives," FEI's "mistreatment

Relying heavily on the grave First Amendment implications of a "pattern" predicated on the proposition that the organizations' own supporters are somehow co-victims along with the very same corporate entity whose animal treatment practices they abhor, Defendants moved for reconsideration or, in the alternative, interlocutory certification for appellate review. At an October 31, 2012 hearing on that motion, the Court made clear that it recognized that FEI's novel RICO pattern "presents legitimate First Amendment issues," particularly given the potential that FEI would seek to support it by demanding donor lists from the organizations. 10/31/12 Motion Hearing Tr. (ECF No. 134) at 36:14-15. The Court stressed that it is "mindful of the long line of cases . . . about donor lists and [the] First Amendment," *id*. at 32:4-6, and that "[t]he First Amendment means a heck of a lot, and we are going to defend that . . . ." *Id*. at 33:18-20. However, the Court reasoned that the Court did not "need to focus on . . .what's discoverable down the line" in determining whether the case should proceed past the pleading stage, *id*. at 31:24-25, and that the "fact that constitutional issues ***may arise*** during the [discovery] process" was not a sufficient "basis for certification" or reconsideration at that juncture. ECF No. 129 at 6 (emphasis added); *id*. (explaining that the mere possibility of difficult constitutional issues in discovery did not establish a "substantial ground for difference of opinion," as is necessary for certification).

The "legitimate First Amendment issues" that the Court anticipated "*may* arise" have now in fact arisen. FEI has served all of the Defendant nonprofit organizations with discovery demanding not only all solicitations of funding relating in any manner to the ESA Action or to "FEI or FEI's elephants," but "[a]ll document sufficient to identify each and every person who made any donations" in order to "support work or any other form of activity concerning Tom Rider, FEI or FEI's elephants." ECF No. 184 at Ex. 1 (Requests 27, 28, 29). The Nonprofit Defendants moved for a protective order, arguing that compelling them to provide the identities of their supporters to FEI -- an entity whose elephant treatment

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of Asian elephants," and the "numerous eyewitness accounts and other evidence of the mistreatment of the elephants, including the deaths of several baby elephants"). However, in its just-filed Second Amended Complaint FEI has *deleted* the allegation that the fundraising invitation was fraudulent in alleging that FEI abuses and mistreats the elephants. *See* ECF No. 205-2 at ¶ 220 (removing the allegation that "the invitation's various claims that FEI mistreats its elephants are untrue"). This is not only tantamount to a concession that FEI is unable and unwilling to defend itself against claims of abuse and mistreatment, but it will necessitate the Court's reconsideration of the plausibility of the entire donor fraud theory that the Court previously found to pass muster at the pleading stage.

practices the organizations' supporters object to -- would violate both the organizations' and their supporters' First Amendment rights of association and speech. ECF No. 184.

The Nonprofit Defendants set forth the many precedents -- including this Court's ruling concerning WAP in the ESA Action -- recognizing that compelled disclosure of membership and donor identities infringes on core constitutional rights, and hence that civil litigants must overcome an extremely high bar to obtain such information. *Id*. at 6-9. They further argued that FEI could not do so, especially in view of FEI's long, documented history of retaliating, and even engaging in dirty tricks, against its perceived adversaries. *Id*. at 15-21. The Nonprofit Defendants explained that at the very least donors who are otherwise unconnected to the ESA Action could be subjected to depositions and the need to retain counsel merely for supporting an animal protection cause in which they believed. *Id*. At worst, the defendant organizations explained, the donors could be exposed to more severe harassment, including being joined in the litigation as co-defendants if they do not answer FEI's questions as FEI would prefer – e.g., if they say that they would have supported the organizations' efforts notwithstanding FEI's allegations of fraud. *Id*.

Judge Facciola rejected these arguments and held that the Nonprofit 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 fundraiser and earmarked a donation the same way." ECF No. 202 at 8. In issuing this ruling, Judge Facciola recognized that the donor information does indeed warrant constitutional protection under the Supreme Court's ruling in *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958) and other precedents. *See* ECF No. 202 at 4 ("In its seminal decision in [*NAACP*], the Supreme Court stated that the '***compelled disclosure of affiliation with groups engaged in advocacy may constitute [an] effective . . . restraint on freedom of association***.'") (quoting *NAACP*, 357 U.S. at 462) (emphasis added).

Nonetheless, Judge Facciola held that, in view of the RICO pattern on which FEI is relying -- and which this Court held was the only alleged pattern on which FEI *could* base its RICO claims under Circuit precedent -- the "names of the donors do go to the heart of Feld's case" because "[w]ithout

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." ECF No. 202 at 7. In addition, Judge Facciola stated that he could "see no alternative means for Feld to be able to conduct these crucial interviews other than by securing the donors' names." *Id*.

Judge Facciola did not discuss the abundant evidence of past FEI harassment and intimidation marshaled by the Nonprofit Defendants. But, implicitly acknowledging that there *was* indeed a "risk" of "Feld intimidating or harassing donors," Judge Facciola stated that to "eliminate any risk whatsoever" he was "simultaneously issuing a protective order (Feld's proposed order)" which simply provides that "'any materials 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 . . . .'" ECF No. 202 (quoting ECF No. 201 at ¶ 7). This language, however, would not prevent donors and supporters from being subjected to intimidating interviews or time-consuming and expensive depositions -- again, merely because they sought to support an animal protection cause -- or even being joined as co-defendants if they do not cooperate to FEI's satisfaction or answer its questions in the manner that FEI prefers.

ARGUMENT

Although the Court has properly recognized that the sole RICO pattern FEI is now pursuing "presents legitimate First Amendment constitutional issues," ECF No. 134 at 36:13-17; *see also id at* 33:18-20 ("[t]he First Amendment means a heck of a lot, and we are going to defend that, but that's a big concern here"), the Court deferred addressing those concerns until discovery was under way. But now that FEI has left no doubt about its intention to use this case to pry into constitutionally protected communications between FEI's ideological opponents and their supporters, and Judge Facciola has held that such information is crucial to the novel "donor victim" theory on which FEI's RICO claim now

depends, the time is ripe for the Court to squarely consider whether RICO can or should be applied in a manner that *will* inevitably impinge on the core First Amendment rights of the nonprofit Defendants as well as their supporters, who have expressed no interest in joining FEI as co-plaintiffs in this case but will nonetheless be exposed to legal peril and financial injury merely for supporting a cause in which they believed.

As the Court has previously recognized, a concurring opinion in *National Organization for Women, Inc. v. Scheidler*, 510 U.S. 249, 263 (1994) ("*NOW*"), offers "guidance" that is directly pertinent to the case at hand, in which a requested application of RICO would infringe on constitutional rights and hence result in a direct conflict between RICO's application and the First Amendment. ECF No. 134 at 36:3-12; *see also id.* at 32:4-8 (explaining that the Court is "mindful of the long line of cases starting with the *NAACP I* and *II* [cases] and donor lists and First Amendment, and this . . . *this is the conflict between RICO and – to a certain extent, RICO and First Amendment privileges*"). *Id*. (emphasis added).

In *NOW*, in considering a RICO claim alleging that abortion opponents allegedly engaged in violence and extortion as well as other means to shut down abortion clinics, the Court held that there was no "economic motive requirement" in RICO, i.e., the defendants did not need to be motivated by economic gain in order for RICO to be applied to their conduct. 510 U.S. at 262. In their concurring opinion, Justices Souter and Kennedy "stress[ed] that the Court's opinion does ***not bar First Amendment challenges to RICO's application in particular cases,***" *id*. at 263 (emphasis added), and "caution[ed] courts applying RICO to bear in mind the First Amendment interests that could be at stake." *Id*. at 265. In explaining why an economic-motive requirement is unnecessary to safeguard First Amendment rights in appropriate cases, the concurrence explained that an

> economic-motive requirement would protect too much with respect to First Amendment interests, since it would keep RICO from reaching ideological entities whose members commit acts of violence we need not fear chilling. An economic-motive requirement might also prove to be underprotective in that entities engaging in vigorous but fully protected expression might fail the proposed economic-motive test (for even protest movements need money) and so be left exposed to harassing RICO suits.

Id. at 264. The concurrence further reasoned that an "economic-motive requirement is, finally, unnecessary because "***legitimate free-speech claims may be raised and addressed in individual RICO cases as they arise***" and "nothing in the Court's opinion precludes a RICO defendant from raising the First Amendment in its defense in a particular case." *Id*. (emphasis added) (citing, among other cases, *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 917 (1982) and *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958)).[4]

In light of how the discovery process has unfolded, this case squarely implicates the kinds of First Amendment concerns that Justice Souter and Kennedy's concurrence stressed should be addressed in determining whether a particular application of RICO should be barred on constitutional grounds. Now that (1) FEI has made abundantly clear that it has no intention of pursuing its RICO case without making every effort to dragoon the nonprofit organizations' *own* supporters and members into this litigation as purported "co-victims" of an entity with which they vehemently disagree, and (2) Judge Facciola has found that divulging the identities of such individuals and exposing them to FEI's questioning (or worse) is in fact essential to FEI's RICO pattern, the Court should now hold that this is one of the "particular cases" in which RICO's "application" should be rejected on constitutional grounds. *NOW*, 510 U.S. at 263. At the very least, the Court should entertain new briefing and argument on that issue, given the Court's past recognition of a potential conflict between the application of RICO here and "legitimate" First Amendment concerns – a conflict which is no longer hypothetical but is now concrete and urgent.[5]

Alternatively, in light of Judge Facciola's discovery order, the Court should revisit certifying the pattern issue to the Court of Appeals. Again, at the hearing on Defendants' motion for reconsideration or certification, the Court stated that it was "mindful of" and "sensitive to" the serious First Amendment

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[4] On remand, the Seventh Circuit and district court applied the analysis in the concurring opinion in determining whether there were First Amendment restrictions on the RICO case at issue there, *see Nat'l Org. for Women, Inc. v. Scheidler*, 25 F.3d 1053 (7th Cir. 1994); *Nat'l Org. for Women, Inc. v. Scheidler*, 897 F. Supp. 1047, 1083-1090 (N.D. Ill. 1995), and eliminated those elements of the RICO claim that "implicat[ed] validly exercised First Amendment activities." 897 F. Supp. at 1087 n.28.

[5] Indeed, the urgency is reinforced by FEI's latest Amended Complaint, which adds a host of additional constitutionally protected activities to the alleged RICO pattern and that will be addressed in WAP's response to the Second Amended Complaint.

concerns, but suggested that they could not factor into a certification analysis before the discovery specifically being sought put those issues in a concrete context. ECF No. 134 at 31:20-25. The Court explained that:

> Discovery is the big issue in the case. I mean, it's -- and forgive me, it's the elephant in the courtroom, you know. It is. It seriously is. And the Court's very sensitive to – to what's being alleged about what's discoverable. ***And I don't really think I need to focus on that, what's discoverable down the line to drive the Court's decision about whether or not it should reach certification, but I mean, it's something the Court's mindful of***.

Id. (emphasis added).

Although the Court expressed doubts that the Court of Appeals would wade into hypothetical discovery disputes, *id*., the issue is no longer hypothetical. At this juncture, the matter as to which there is indeed a "substantial ground for difference of opinion," ECF No. 129 at 6 (quoting 28 U.S.C. § 1292(b)), especially in view of the *NOW* concurrence, is whether the First Amendment bars pursuit of a RICO pattern that FEI maintains (and Judge Facciola has now ruled) is ***dependent*** on invading the relationship between nonprofit organizations and their donors and members, and on exposing otherwise uninvolved donors and members to, at minimum, "interviews" by FEI's attorneys and, at worst, expensive and time-consuming depositions and trial testimony and the prospect of being joined as co-defendants (none of which would be foreclosed by the protective order approved by Judge Facciola).

Particularly given FEI's long and well-documented history of retaliatory action against perceived adversaries, this case now risks the severe "chilling" effect on associational and free speech rights that the *NOW* concurrence warned federal courts to be watchful for in individual RICO cases. 510 U.S. at 264; *see also NAACP*, 357 U.S. at 466 ("We hold that the immunity from state scrutiny of membership lists which the Association claims on behalf of its members is here so related to the right of the members to pursue their lawful private interests privately and to associate freely with others in so doing as to come within the protection of the Fourteenth Amendment."); *id*. at 463 ("It is not sufficient to answer, as the State does here, that whatever repressive effect compulsory disclosure of names of petitioner's members may have upon participation by Alabama citizens in petitioner's activities follows not from state action but from private community pressures. The crucial factor is the interplay of governmental and private

action, for it is only after the initial exertion of state power represented by the production order that private action takes hold."). Consequently, the standards for certification before this massive, constitutionally fraught case proceeds further are now clearly satisfied. *See, e.g., Carey v. Hume*, 492 F.2d 631, 632 (D.C. Cir. 1974) ("The troublesome legal issue of the compelled disclosure by a journalist of his sources of information gave rise to this interlocutory appeal (28 U.S.C. § 1292(b)"); *Howard v. Office of the Chief Admin. Officer of the U.S. House of Representatives*, 840 F. Supp. 2d 52, 55 (D.D.C. 2012) (certifying for appellate review whether certain termination claims "trench on territory protected by the Speech or Debate Clause" because it was "one as to which a substantial ground for difference of opinion exists").

Finally, the Court has previously observed that there are "strong policy arguments regarding the danger associated with using RICO against non-profit advocacy organizations," but that, while "[t]his Court is highly sensitive to these arguments," they are "outside of the judiciary's role in a divided government." ECF No. 129 at 7. To be clear, WAP is *not* advancing such a policy argument here. Rather, we are relying on the well-established *legal* principle that where the application of a "statute would raise serious constitutional problems" – as is the case here – "the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. and Constr. Trades Council*, 485 U.S. 568, 575 (1988) (citation omitted). This principle effectuates, rather than undermines, the "judiciary's role in a divided government," ECF No. 129 at 7, because, as the Supreme Court has explained in refusing to construe a statute as impinging on First Amendment rights:

> This approach not only reflects the prudential concern that constitutional issues not be needlessly confronted, but also recognizes that Congress, like this Court, is bound by and swears an oath to uphold the Constitution. The courts will therefore not lightly assume that Congress intended to infringe constitutionally protected liberties or usurp power constitutionally forbidden it.

Id.; *see also Ass'n of Private Sector Colls. and Univs. v. Duncan*, 681 F.3d 427, 454 (D.C. Cir. 2012) ("[A] law 'must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score.'") (citation omitted); *Thompson v. Washington*,

497 F.2d 626, 633 (D.C. Cir. 1973) ("The statutory interpretation advanced in the present case is based in material degree on the strength of the plaintiffs' constitutional contentions, leading us to perform 'our duty in the interpretation of federal statutes to reach a conclusion which will avoid serious doubt of their constitutionality.'") (citation omitted).

Here, especially given the amorphous nature of RICO's "pattern" requirement, *see, e.g.*, *H.J. Inc., v. Nw. Bell Tel. Co.*, 492 U.S. 229, 238 (1989) ("The text of RICO conspicuously fails anywhere to identify, however, forms of relationship or external principles to be used in determining whether racketeering activity falls into a pattern for purposes of the Act."); *id.* at 251 (Scalia, J., concurring) (criticizing the "vagueness" of RICO's pattern requirement), the statute can and should be construed to avoid its application to a "unique" if not "unprecedented" situation, ECF No. 129 at 1, 2, raising grave First Amendment problems – i.e., one in which the purported "pattern" is now dependent on advocacy organizations being forced to divulge to their "bitter adversar[y]," *id*. at 2, the identities of their own supporters and members so that FEI can then deploy them (against their will) to harm the very organizations with whom they chose to associate.

CONCLUSION

By sustaining FEI's position that the RICO pattern at issue cannot be pursued without FEI obtaining the identities of the nonprofit organizations' own supporters and members, the order under review has made plain the constitutional infirmity in the application of RICO to FEI's alleged pattern. Consequently, the time is ripe for the Court to address whether a purported pattern fraught with intractable First Amendment problems should proceed or, alternatively, to reassess whether this threshold issue should now be certified to the Court of Appeal in light of the *NOW* concurrence and other authorities counseling against the invocation of RICO in a situation like this one.[6]

[6] While it is irrelevant to the legal analysis, a conclusion that RICO should not be construed to apply in a situation like this one would hardly leave FEI without a remedy since FEI is pursuing the very same "damages" – i.e., its attorney's fees in the ESA Action – through a fee application in that action.

Respectfully submitted,

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Date: March 6, 2014

CERTIFICATE OF SERVICE

I hereby certify that, on this 6th day of March, 2014, I have caused the foregoing document to be served on all counsel of record through filing on the Court's electronic records system.

/s/Stephen L. Braga
Stephen L. Braga