IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO STAY PRODUCTION OF PRIVILEGED MATERIALS PENDING RESOLUTION OF RULE 72 OBJECTIONS

Defendants Animal Welfare Institute, The Fund for Animals, Inc., The Humane Society of the United States, and The Wildlife Advocacy Project (collectively, "Defendants"), by and through their undersigned counsel, respectfully move this Court to stay the production of privileged materials until the Rule 72 Objections to the Magistrate Judge's February 20, 2014 Order is ruled upon.

On December 2, 2013, Defendants' filed a Motion for a Protective Order to prevent Plaintiff Feld Entertainment, Inc. ("Feld") from obtaining, *inter alia*, the identities of Defendants' donors through discovery. As the primary basis for its Motion for a Protective Order, Defendants' argued that their donor names are privileged material under the First Amendment. [ECF No. 184].[1] On February 20, 2014, the Court issued an Order (the "Order") denying Defendants' Motion for a Protective Order and ordered Defendants to provide Feld

[1] Defendants' Motion for a Protective Order [ECF No. 184], the Reply in support thereof [ECF No. 193], and The Wildlife Advocacy Project's Joinder [ECF No. 185] are incorporated herein by reference.

"with the names of donors who received a solicitation and earmarked a donation to support the ESA lawsuit or Rider (or both)" and "those donors who attended a fund raiser and earmarked a donation in the same way." [ECF No. 202 at 8]. Pursuant to Federal Rule of Civil Procedure 72, Defendants filed Objections to the Court's Order. [ECF Nos. 214 & 215].[2] However, Defendants' Objections may not be heard prior to the production date of the privileged material, as the filing of Rule 72 Objections does not automatically stay an Order entered by the Magistrate Judge. *See, e.g., Powell v. American Federation of Teachers*, 883 F.Supp.2d 183, 185 (D.D.C. 2012); *James v. District of Columbia,* 191 F.Supp.2d 44, 46 n.1 (D.D.C. 2002).

Consequently, Defendants respectfully request the Court to stay the Order and the production of Defendants' privileged documents until Defendants' Rule 72 Objections have been ruled upon. A motion to stay requires proof that: (1) that there is "a substantial likelihood of success on the merits;" (2) the moving party will "suffer irreparable injury if the stay is denied;" (3) "that issuance of the stay will not cause substantial harm to other parties;" and (4) "that the public interest will be served by issuance of the stay." *Comm. On The Judiciary U.S. House of Representatives v. Miers*, 575 F.Supp.2d 201, 203 (D.D.C. 2008). As described further below, each of these elements is met here.

A. WHETHER THE FIRST AMENDMENT PRIVILEGE SHOULD BE BREACHED IS A SIGNIFICANT CONSTITUTIONAL QUESTION AND DEFENDANTS HAVE A SUBSTANTIAL LIKELIHOOD OF SUCCESS ON THE MERITS

First, there is a "substantial likelihood of success on the merits" of Defendants' Objections to the Court's Order. "The court is ***not required to find that ultimate success by the movant is a mathematical probability***, and indeed, as in this case, may grant a stay even though

[2] ECF Nos. 214 and 215 are incorporated herein by reference.

its own approach may be contrary to movant's view of the merits." *Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 844 (D.C. Cir. 1977) (emphasis added). Instead, however, "[a]n order maintaining the status quo is appropriate when a ***serious legal question is presented***." *Id.* at 844; *Miers*, 575 F. Supp. 2d at 203. As detailed in Defendants' Objections and in the original moving papers, there is a serious legal and constitutional question as to whether the First Amendment privilege applies to this case and whether the Court properly applied the required balancing test.

Indeed, the Supreme Court has long held that the First Amendment protects the freedom to associate and express views as a group, because "[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association." *NAACP v. Alabama*, 357 U.S. 449, 460 (1958). Incorporated into the freedoms of association and speech is the protection from "compelled disclosure of affiliation with groups engaged in advocacy." *Id.* at 462. These protections "extend[] not only to the organization itself, but also to its staff, members, contributors and others who affiliate with it." *Int'l Union v. Nat'l Right to Work Legal Def. and Educ. Found., Inc.*, 590 F.2d 1139, 1147 (D.C. Cir. 1978) (citations omitted). As a result, donor information is clearly protected under the First Amendment. *See, e.g., Bates v. Little Rock*, 361 U.S. 516, 523-24 (1960); *Int'l Action Ctr. v. United States*, 207 F.R.D. 1, 3 (D.D.C. 2002) (Courts "have ruled that the following information is protected by the First Amendment: membership and volunteer lists, ***contributor lists***, and past political activities of plaintiffs and of those persons with whom they have been affiliated" (emphasis added) (citations omitted); *Wyoming v. USDA*, 208 F.R.D. 449, 454 (D.D.C. 2002) (finding the First Amendment's broad scope encompasses "the freedom to protest policies to which one is opposed, and the freedom to organize, ***raise money***, and associate with other like-

minded persons so as to effectively convey the message of the protest") (emphasis added) (citations omitted); *see also Buckley v. Valeo*, 424 U.S. 1, 74 (1976) (organization's "associational ties" include "contributors' names").

Furthermore, the First Amendment prohibition against compelled disclosure remedies the serious concern that such disclosure would likely deter potential members or contributors from associating with particular groups out of fear of reprisal. *NACCP*, 357 U.S. at 462-63; *FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380, 388 (D.C. Cir. 1981) (compelled disclosure could result in "chilling the free exercise of political speech and association guarded by the first amendment"). "It is undoubtedly true that public disclosure of contributions to [particular groups] will deter some individuals who otherwise might contribute" and "[i]n some instances, disclosure may even expose contributors to harassment or retaliation." *Buckley*, 424 U.S. at 68. Courts have been especially likely to protect an organization from being forced to disclose its donors when "disclosure of its contributors' names 'will subject them to threats, harassment, or reprisals from either Government officials or private parties.'" *Citizens United v. FEC*, 558 U.S. 310, 367 (2010 (quoting *McConnell v. FEC*, 540 U.S. 93, 198 (2003)); *see also NAACP*, 357 U.S. at 462-63.

When the First Amendment privilege is implicated, courts must determine if the information can be sought through alternative means and whether the information goes to the heart of the lawsuit. *Int'l Action Ctr.*, 207 F.R.D. at 4. However, ***Feld has admitted that identities of the donors are not necessary to prove its RICO claim***. For example, during the October 31, 2012 motion hearing, Feld contended that it did not need a second victim (other than itself) to show a RICO pattern. *See*, [ECF No. 134] at 40:19-20 ("you can have a single victim and have a pattern of racketeering activity"); *id.* at 42:22-23 ("we don't need more than one

victim"); *id.* at 43:11-13 (The Court: "You don't believe as a matter of fact and law it's required [to have more than one victim?]" Mr. Simpson: "No."). The fact is that Feld has repeatedly argued that it does not need the identities of Defendants' donors to maintain its lawsuit. *See*, [ECF No. 188 at 24] ("controlling authority, [] makes clear that, in certain circumstances, a 'pattern of racketeering' can arise with only a single 'scheme' or single victim."). By definition information that is not needed to maintain the lawsuit cannot "go to the heart of the lawsuit," as is Feld's burden to show in order to pierce the First Amendment privilege. *Int'l Action Ctr.*, 207 F.R.D. at 4. Accordingly, Feld has facially failed to meet the substantial burden it must meet to pierce the First Amendment privilege of Plaintiffs ***and*** their donors who are not parties to this lawsuit.

Even should the party seeking disclosure meet this burden, disclosure will still not be compelled where the opposing party can "show that there is ***some probability*** that disclosure will lead to reprisal or harassment." *Black Panther Party*, 661 F.2d at 1267-68 (emphasis added); *see also id.* at 1267-68 (the "litigant seeking protection need not prove to a certainty that its First Amendment Rights will be chilled by disclosure."). As detailed in the original moving papers, Feld has a well-documented history of harassing animal welfare and animal rights organizations and their supporters. [ECF No. 184 at 15-21; ECF No. 193 at 10-17]. Indeed, Defendants presented evidence that Feld was secretly listening to activist conversations to ensure that all their activities would be videotaped so that activists could be identified, dissuaded from engaging in First Amendment activity, and reported to law enforcement and the FBI. [ECF No. 184. at 16]. Moreover, Feld engaged in "covert" operations to infiltrate and survey animal protection groups. In fact, Feld hired the former Deputy Director of Operations for the Central Intelligence Agency to consult about surveillance efforts of animal rights groups. *Id.* at 17. Feld has even

placed secret, paid operatives inside animal rights groups to steal confidential information including donation lists. *Id.* at 17-18. Feld's documented history of harassing and outright spying on animal rights organizations and donors is substantial and well beyond the some probability standard in which Courts should not require the disclosure of First Amendment privileged documents. *Black Panther Party*, 661 F.2d at 1267-68. Indeed, in the Order itself, the Court implicitly acknowledged the risk that Feld would intimidate or harass donors by issuing a protective order. [ECF No. 202 at 8]. However, the proper course of action when threat of harassment and intimidation exists is to maintain the integrity of the First Amendment privilege.

Ultimately, the First Amendment privilege at issue is a serious legal and constitutional question for which maintaining the status quo is appropriate until Objections are ruled upon. *Washington Metro. Area Transit Comm'n*, 559 F.2d at 844. Thus, the first prong for a stay exists as there is a "substantial likelihood of success on the merits."

B. DEFENDANTS AND NONPARTY DONORS WILL SUFFER IRREPARABLE HARM IF THE STAY IS NOT GRANTED

With respect to the second prong, if these privileged materials are permitted to be produced before the Court's ruling on Defendants' Rule 72 Objections, it will result in irreparable harm to Defendants and their non-party donors, who possess privileges under the First Amendment. *United States v. Philip Morris Inc.*, 314 F.3d 612, 621-22 (D.C. Cir. 2003) (finding "irreparable injury if a stay is denied" because "the general injury caused by the breach of the attorney-client privilege and the ***harm resulting from the disclosure of privileged documents*** to an adverse party ***is clear*** enough") (emphasis added), *abrogated on other grounds by Mohawk Industries, Inc. v. Carpenter*, 558 U.S. 100, 105 n.1, 130 S. Ct. 599, 604 n.1 (2009). If the proposed stay is not entered, Feld will obtain the names and identities of Defendants'

donors, despite the privileged status of this material. The sheer importance of the First Amendment privilege only serves to make the potential harm to Defendants and the donors more significant. *Black Panther Party v. Smith*, 661 F.2d 1243, 1267 (D.C. Cir. 1981) ("The need for First Amendment protection should be carefully scrutinized.").

Additionally, the irreparable harm caused by the production of these documents cannot be reversed if the Court ultimately sustains Defendants' Objections, even if the Court requires Feld to return and refrain from using these privileged materials. The protective order the Court entered in conjunction with the Order will not protect Defendants', or their donors', First Amendment privilege pending appellate review. Even if the documents are produced under a protective order, the privilege may be waived once Defendants' produce the materials. Once the privilege is waived, any appeal would become futile. The proper course of action for the First Amendment privilege, like any other privilege, is to log the information. Just releasing the names of the donors would have a chilling effect on association and free speech regardless of whether or not Feld adheres to the protective order. Consequently, the amount of prejudice Defendants and the nonparty donors will sustain from the production of privileged materials and a waiver of appellate rights and a Constitutional privilege, far outweighs the need for Feld to have these documents produced before an appellate review is complete.

C. FELD WILL NOT BE PREJUDICED BY A STAY

With respect to the third prong, Feld would experience no harm from the delay in production of Defendants' privileged donor list. As an initial matter, Feld has repeatedly argued that it does not need any victim other than Feld itself to prove its RICO pattern allegations. *See* [ECF No. 134 at 40:19-20] ("you can have a single victim and have a pattern of racketeering activity"); *id.* at 42:22-23 ("we don't need more than one victim"); *id.* at 43:11-13 (The Court:

"You don't believe as a matter of fact and law it's required [to have more than one victim?]" Mr. Simpson: "No."); [ECF No. 188 at 24] ("controlling authority, [] makes clear that, in certain circumstances, a 'pattern of racketeering' can arise with only a single 'scheme' or single victim."). As Feld believes it can maintain its case without the donor information, there is no prejudice to Feld by maintaining the status quo. In contrast, Defendants and non-party donors are facing the extinguishment of a Constitutional privilege.

In addition, there is no prejudice to Feld based upon delay. On March 3, 2014, Feld filed a Second Amended Complaint with approximately seventy (70) pages of new allegations to which Defendants must now respond. Moreover, this action is still in the early stages of discovery, as the parties are still cooperatively working to meet and confer about appropriate search terms. During the stay, Defendants can continue to work with Feld to select appropriate search terms for the donor information. To minimize delay, Defendants will collect and log the privileged material on a privilege log, which can be promptly turned over to Feld in the event that Defendants' appeals are unsuccessful. Furthermore, as mentioned earlier, Feld itself maintains that the identities of Defendants' donors are not necessary to prove its RICO claims. [ECF No. 188 at 24]. As such, Feld will experience no prejudice. Notwithstanding, the possibility of delay alone is insufficient to overcome the potential harm to a party resulting from revealing privileged materials to an adverse party. *Philip Morris Inc.*, 314 F.3d at 622 ("A mere assertion of delay does not constitute substantial harm."). As a result, the most equitable course of action is to stay the production of these privileged documents until the Court rules on Defendants' Rule 72 Objections.

D. PUBLIC INTEREST WILL BE SERVED BY MAINTAINING THE STATUS QUO UNTIL THE EXTENT OF THE FIRST AMENDMENT PRIVILEGE CAN BE DETERMINED

The public interest will be served by issuance of the stay. Not only does the Order threaten Defendants' constitutional rights, but it also threatens the First Amendment rights of Defendants' donors, who are members of the public at large. Furthermore, protection of association and the speech at issue in this case goes to the very heart of the American democracy. Since *NAACP v. Alabama*, the Court has declared it is "beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause to the Fourteenth Amendment, which embraces freedom of speech." *NAACP*, 357 U.S. at 460 (citations omitted). The Supreme Court has gone so far as to compare "[c]ompelled disclosure of membership in an organization engaged in advocacy of particular beliefs" with a "requirement that adherents of particular religious faiths or political parties wear identifying arm-bands." *Id.* (internal quotations omitted). With the gravity of its language, the Supreme Court shows the sheer importance that the First Amendment privilege plays in maintaining a strong and robust "free exchange of ideas" essential to the American constitutional democracy. *See Brown v. Hartlage*, 456 U.S. 45, 53, 102 S. Ct. 1523, 1527 (1982). Therefore, the protection of Defendants' donors' identities is surely in the public interest.

CONCLUSION

For the foregoing, and those set forth in the Motion for Protective Order, supporting Reply Memorandum and in the Objections, the Motion to Stay should be granted in its entirety.

Date: March 12, 2014

Respectfully submitted,
DEFENDANTS

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY on this 12th day of March, 2014, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send a notification of such filing to all counsel of record.

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