

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

**AMERICAN SOCIETY FOR THE
PREVENTION OF CRUELTY TO
ANIMALS, et al.,**

Plaintiffs,

v.

FELD ENTERTAINMENT, INC.,

Defendant.

:
:
:
:
:
:
:
:
:
:
:
:
:
:

Case No. 03-2006 (EGS/JMF)

**MOTION TO COMPEL THE PRODUCTION OF DOCUMENTS
SUBPOENAED FROM THE HUMANE SOCIETY OF THE UNITED STATES**

Defendant Feld Entertainment, Inc. (“FEI”) hereby respectfully moves pursuant to Fed. R. Civ. P. 45(c)(2)(B) to compel the production of documents subpoenaed from the Humane Society of the United States (“HSUS”). The documents requested by FEI are not being withheld pursuant to a concrete objection; rather, they are being withheld without any explanation at all. FEI’s subpoena was served on June 15, 2007. HSUS (knowing that discovery is scheduled to close just three months from now) has ignored numerous deadlines and FEI’s numerous attempts to resolve any differences of opinion. The Court ruled on August 23, 2007 that all payment information related to Tom Rider was relevant and discoverable. Order (8/23/07) (Docket No. 178). Inexplicably, HSUS simply refuses to produce the requested documents and should be compelled by the Court to do so immediately.

Almost three years ago, HSUS merged with the Fund for Animals (“FFA”), an existing plaintiff in this litigation. Since that time, HSUS has managed this litigation on behalf of FFA, has advertised its participation in it, and has raised money purportedly to pay litigation expenses that ultimately was given to another plaintiff without whom this lawsuit would not exist.

HSUS's Vice President of Animal Protection Litigation, Jonathan Lovvorn, signed the complaint in this case, is listed as counsel of record on this case, and is served via ECF with all court filings. Since the merger, FFA has been operated by employees of HSUS. For example, HSUS operates FFA's legal and public relations departments and pays the salary of everyone who works on behalf of FFA (including the person who was presented as FFA's 30(b)(6) witness in this case). Indeed, HSUS's directors and officers are directors of FFA.

Nonetheless, FFA has refused to produce documents from the files of HSUS. FEI, therefore, was forced to issue a subpoena to HSUS commanding the production of documents related to this case and to determine whether HSUS should be formally made a party to this lawsuit. See Ex. 1, Subpoena. Three months later, FEI is still being stonewalled by HSUS, which has refused to produce even the most basic documents and information. FEI has conferred in good faith with HSUS, has modified its subpoena, has met in person and exchanged correspondence with HSUS, and has agreed to several time extensions. In response, FEI has been told that HSUS has "not approved" the production of materials commanded by the subpoena, many of which have already been deemed relevant by Judge Sullivan. HSUS has wasted enough time and resources on avoiding its obligations under the subpoena and should now be compelled to produce responsive materials immediately.

FACTUAL BACKGROUND

A. Purpose of the Subpoena

FFA, together with other plaintiffs, originally filed this lawsuit in 2000. Effective January 1, 2005, however, FFA merged and/or otherwise combined its operations with HSUS. Ex. 2, Press Release Announcing Merger. Since that time, HSUS has participated in this litigation by, for example, (a) presenting its own Executive Vice President for External Affairs as

FFA's 30(b)(6) witness, Ex. 3, FFA Deposition, (b) advertising this lawsuit as part of its current docket and assigning an "HSUS attorney" to be responsible for it, Ex. 4, HSUS Website, and (c) repeatedly issuing (sometimes weekly) press releases discussing this litigation (and documents produced by FEI in discovery), Ex. 5, HSUS Press Releases. HSUS, moreover, hired one of plaintiffs' attorneys (Jonathan Lovvorn) on December 1, 2004 as its Vice President of Animal Protection Litigation, Ex. 6, HSUS Press Release (12/1/04). By FFA's own admission, HSUS and FFA operate "one litigation section" and Mr. Lovvorn has been "managing this litigation" for FFA. Ex. 3, FFA Depo. at 29-30.¹ Indeed, even FFA's co-plaintiffs have treated HSUS essentially as a party to this litigation by, for example, claiming attorney-client privilege for communications between plaintiffs, HSUS, and plaintiffs' counsel. Ex. 7, Excerpt of AWI Deposition and Supplemental Interrogatory Response (confirming that HSUS representatives have participated in meetings with plaintiffs and counsel then claiming attorney-client privilege for such discussions).

FFA, together with the other organizational plaintiffs, have paid their co-plaintiff Tom Rider in excess of \$100,000 over the last six years (ever since Mr. Rider quit his job with a former plaintiff to remain in this litigation). See FEI's Mot. to Compel Documents Subpoenaed From the Wildlife Advocacy Project (9/7/06) (Docket No. 85) at 6-11. Judge Sullivan has already ruled that the payments to Mr. Rider are relevant in this action to evaluate his credibility, and the Court has ordered the existing plaintiffs to produce all documents related to such payments on September 24, 2007. See Order (8/23/07) (Docket No. 178).

HSUS has been right in the middle of the payments to Mr. Rider. Since FFA and HSUS combined their operations, HSUS has made numerous payments to Mr. Rider. Ex. 8, Documents

¹ FFA also testified that it no longer has any of its own employees, that HSUS pays all of the people who purport to work on behalf of FFA, and that HSUS operates a public relations department that serves both HSUS and FFA. Ex. 3, FFA Depo. at 33, 60-61.

of HSUS's Payments to Mr. Rider. Specifically, HSUS has given Mr. Rider (through the Wildlife Advocacy Project ("WAP"), a shell corporation operated and dominated by plaintiffs' counsel) at least \$9,500. HSUS, moreover, has hosted (together with the other organizational plaintiffs) a fundraiser focusing on this lawsuit and purporting to raise money to defray the cost of it. Ex. 9, Fundraiser Invitation.²

Notwithstanding HSUS's merger with FFA and its heavy involvement in the payments to Mr. Rider, FFA and plaintiffs' counsel have taken the position that they need not provide documents from the files of HSUS employees. Compare Ex. 11, Wolson letter to Ockene (1/24/06) with Ex. 12, Ockene letter to Wolson (2/13/06). This was re-confirmed by plaintiffs' counsel at the February 7, 2007 meet and confer held regarding the motions to compel against plaintiffs. FFA's position unjustifiably excludes from production responsive documents in the files of individuals who work for HSUS (even those who are paid by HSUS to work on FFA matters, such as Mr. Lovvorn).

FEI, therefore, had no choice but to issue a subpoena to HSUS for the documents. Specifically, FEI requested documents to determine whether HSUS should indeed be made a party to this lawsuit, documents relating to former FEI employees who are parties or witnesses in the litigation, and documents relating to HSUS's use of litigation documents in their media campaign against FEI. The documents subpoenaed from HSUS are responsive to the document requests served upon FFA and should not be hidden from FEI simply because they exist in the files of HSUS employees who did not previously work for FFA.

² The proceeds of that fundraiser, however, were subsequently given to Mr. Rider. Ex. 10, WAP Ledger.

B. HSUS's Deficient Response to FEI's Subpoena

HSUS originally asserted seven objections to FEI's subpoena, including an objection that has since been rejected by Judge Sullivan,³ an objection that contradicted an earlier ruling by Judge Facciola in this case,⁴ and three privilege objections that were already resolved by the plain face of the subpoena and its instructions.⁵ Ex. 13, Kindler letter to Gasper (6/29/07). None of HSUS's objections was supported by cited authority, including the shopworn objections that the subpoena was overbroad because it relied "upon the famous fishing formulation, 'refer, reflect, or relate to'" and that HSUS has a First Amendment right to conduct "media activities." Id. Nonetheless, FEI agreed to modify the time-frame covered by the subpoena and stated that it would modify the subpoena further and agree to protective orders in light of any authority that HSUS could provide in support of such requests. Ex. 14, Gasper letter to Kindler (7/9/07).

HSUS, however, never provided any such authority. Instead, HSUS's counsel sent a letter to FEI's counsel on Friday, July 13, 2007 (the last business day prior to HSUS's deadline to produce documents), indicating that they would like to schedule a meet and confer and would be in touch "early next week" to do so. Ex. 15, Dugan letter to Simpson (7/13/07). A full week later, on July 20, 2007, HSUS's counsel contacted FEI's counsel, requesting that the parties schedule the meet and confer an additional two weeks later. FEI's counsel agreed, and the parties met on August 2, 2007. Ex. 16, Gasper letter to Stowe (8/3/07).

³ See Order (8/23/07) (Docket No. 178) (ordering plaintiffs and non-party WAP to produce all documents relating to their payments to Mr. Rider).

⁴ See ASPCA v. Ringling Bros., 233 F.R.D. 209 (D.D.C. 2006) (requiring production of documents created after January 1, 1994); cf. Ex. 1, Subpoena (requiring production of documents since January 1, 1996).

⁵ See Ex. 1, Subpoena, Instruction No. 10 (instructing HSUS to provide a log of any documents withheld from production together with information necessary to evaluate HSUS's claim of privilege or other protection). See also GFL Advantage Fund, Ltd. v. Colkitt, 216 F.R.D. 189, 195 (D.D.C. 2003) ("When information subject to a subpoena is withheld on a claim that is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications or things not produced that is sufficient to enable the demanding party to contest the claim.").

During this meet and confer, FEI reiterated that it was willing to make concessions based on any appropriate objections, but that FEI could not do so until HSUS provided authority in support of its objections and/or a more detailed description of documents that it believed to be exempt from production. For example, HSUS alleged that some documents were “confidential and proprietary” yet never explained the type of documents it believed to be confidential or the authority upon which it made that determination. In lieu of discussing specific objections, HSUS reverted to its position that none of the documents requested by the subpoena was relevant to the existing ESA Action and that FEI was only seeking such documents in connection with its proposed RICO counterclaim. FEI, however, explained to HSUS that its payments to Mr. Rider are relevant to the ESA Action, whether or not FEI’s counterclaim was permitted to go forward in connection with this litigation. Ex. 16, Gasper letter to Stowe (8/3/07). Indeed, Judge Sullivan has upheld FEI’s position in this regard. See Orders (8/23/07) (Docket Nos. 175 and 178) (ruling that documents related to plaintiffs’ and others’ payments to Rider are relevant to the ESA Action independent of FEI’s potential RICO Action). FEI explained, moreover, that the documents commanded by the subpoena also are relevant to determine whether HSUS should be made a party to the litigation. Ex. 16, Gasper letter to Stowe (8/3/07). Counsel for HSUS also represented that HSUS never paid Rider. As shown below, however, this was false.

FEI agreed to accept an initial production from HSUS that included (a) documents sufficient to determine whether HSUS should be made a party to the litigation and (b) documents relating to HSUS’s payments to Mr. Rider. FEI explained that the first determination could be made if HSUS complied with Request Nos. 1 (documents sufficient to show the relationship between HSUS and FFA), 2 (documents relating to the litigation), and 9-19 (documents relating to HSUS’s recent press releases discussing documents produced by FEI in connection with the

litigation). FEI reiterated that if, as HSUS contends, it is not actively participating in this litigation, responding to these straightforward requests should not be burdensome.

The parties also discussed FEI's request that HSUS's initial production include documents relating to its payments to Mr. Rider. During that discussion, HSUS's counsel boldly proclaimed that no such payments have been made. Ex. 16, Gasper letter to Stowe (8/3/07). That, however, is not true. As FEI immediately informed HSUS's counsel, HSUS has made numerous payments to Mr. Rider. Specifically, Jonathan Lovvorn (plaintiffs' counsel and HSUS's Vice President of Animal Protection Litigation) sent the checks to the alter ego of his co-counsel and former law firm which, in turn, paid the money to Mr. Rider. Id. After this revelation, HSUS's counsel then argued it was not possible for HSUS to determine precisely which payments it made to third parties were ultimately given to Mr. Rider. That position is not tenable: It is difficult to believe that the individuals at HSUS who are responsible for making payments for this lawsuit and for Mr. Rider do not know the dates and payees of such checks. Nonetheless, FEI again tried to work with HSUS by agreeing to review a list of payments HSUS believed could possibly have been given to Mr. Rider and then to select the payments for which FEI believed documents should be produced.

Immediately after the meet and confer, FEI's counsel documented the parties' discussion in a letter dated August 3, 2007. Ex. 16, Gasper letter to Stowe (8/3/07). Specifically, FEI reiterated its position that the easiest way to determine whether HSUS should be made a party to this lawsuit is for HSUS to respond to Request Nos. 1, 2, and 9-19, but that FEI would consider any alternative proposal from HSUS, which was promised at the meet and confer and which FEI expected to receive by August 6, 2007. Id. FEI also requested that HSUS produce its list of payments that might have been for Mr. Rider the week of August 6, 2007 and the related

documentation the week of August 13, 2007. Id. In response, HSUS stated on August 8, 2007 that it would *not* be responding to Request Nos. 2 and 9-19, nor would it be producing documents related to its payments to Mr. Rider. Ex. 17, Stowe letter to Gasper (8/8/07). HSUS, moreover, indicated that its response to Request No. 1 would be limited to documents from the files of FFA and that it could determine which payments were made to or for Mr. Rider without FEI's assistance. Id. In addition, HSUS reverted to red herring complaints about the cost of electronic discovery and the difficulty of properly crafting search terms. Id.

By letter dated August 9, 2007, FEI sought to alleviate HSUS's unfounded concerns of any undue burden and explicitly stated that it did not expect HSUS to search every file that it owns. Ex. 18, Gasper letter to Stowe (8/9/07). Indeed, FEI proposed (and consented to) various search methodologies that would minimize any burden upon HSUS. Id. For example, *FEI agreed that HSUS's initial search for documents relating to the litigation could be limited to those that exist in the files of HSUS employees who have had responsibilities associated with the litigation or that were created by or for HSUS Officers or Directors.* Id. FEI, moreover, explicitly identified a few individuals at HSUS it believed to have responsibilities relating to the litigation. Id. Similarly, *FEI agreed that HSUS's initial search for documents relating to HSUS's payments to Mr. Rider could be limited to those that exist in the Accounting files, that exist in the files of any employees involved in such payments, or that were created by or for HSUS Officers or Directors.* Id. Finally, FEI expressed doubt that HSUS would be able to adequately demonstrate the relationship between HSUS and FFA without producing the merger agreement and by relying solely upon FFA documents, such as its charitable registrations. Id.

When the Court stayed discovery in its Order on August 10, 2007, FEI promptly informed HSUS and further explained that HSUS should not produce documents until the stay is

lifted. Ex. 19, Gasper letter to Stowe (8/13/07). Instead, FEI stated, the documents scheduled to be produced that week should be produced by HSUS within ten days of being informed that the stay was lifted. Id. Shortly thereafter, FEI informed HSUS that the stay had been lifted and requested that the documents previously discussed be produced on or before September 6, 2007. Ex. 20, Gasper letter to Stowe (8/27/07). FEI also informed HSUS that the Court ordered that discovery be completed by December 31, 2007 and that FEI was concerned about the unnecessary delays caused by HSUS's unfounded complaints of undue burden based on an elaborate and overbroad electronic discovery plan, which FEI never asked HSUS to conduct.

Notwithstanding FEI's various proposals to narrow the scope of its subpoena and granting HSUS numerous extensions, HSUS failed to produce *any* documents or information on September 6, 2007. Instead, counsel for HSUS informed FEI at approximately 6:00 pm that "The general counsel at HSUS misunderstood the deadline for getting documents to you and thought it was tomorrow. He is gone for the day and I can't get final approval to send you anything without his sign off." Ex. 21, E-mail Among Counsel. Notwithstanding the implicit promise to provide HSUS's entire initial production on September 7, 2007, FEI still had not received such documents as of the close of business. After inquiring when such documents would be provided, FEI was again informed by HSUS's counsel that "I still haven't gotten approval to send a full response but I couriered over what I could at 530. The courier is probably in transit. If I get approval to respond to the rest today I will." Ex. 21, E-mail Among Counsel.

Not only was HSUS's first production late, it was woefully insufficient. In lieu of providing what FEI requested, HSUS only produced scant documents, allegedly sufficient to show the relationship between HSUS and FFA. Not one of the documents produced, however, demonstrated in any way the relationship between HSUS and FFA. Thirty-three of the thirty-

seven pages were simply FFA's corporate registration statements. These documents show nothing other than that the FFA name is still being used to solicit money. They show nothing about how HSUS and FFA operate. Indeed, conspicuously absent from HSUS's purported response was the merger agreement explicitly requested by FEI. HSUS, moreover, did not even attempt to produce the two other categories of documents requested by FEI – those relating to the litigation and those relating to HSUS's payments to Rider. Instead, HSUS's counsel promised that the remainder of HSUS's initial production would be made "imminently." See Ex. 22, Stowe letter to Gasper (9/7/07) (with initial production).

On September 10, 2007, FEI asked when precisely it should expect to receive the rest of HSUS's initial production and was informed that it would receive "a list of payments to Tom Rider and WAP" either that evening or the next morning. Ex. 21, E-mail Among Counsel. It was now clear to FEI that HSUS had no intention of producing the requested documents. Nonetheless, FEI awaited HSUS's alleged list of payments to Mr. Rider, *which never came*. FEI, therefore, asked HSUS's counsel on September 12, 2007 when it should expect to receive the information that was now substantially overdue and was informed (yet again) "With ongoing apologies, I'm still waiting on approval from HSUS." Ex. 21, E-mail Among Counsel.

By letter dated September 13, 2007, FEI informed HSUS that its dilatory behavior would no longer be tolerated. Ex. 23, Gasper letter to Stowe (9/13/07). FEI informed HSUS that, in light of its outright refusal to produce two categories of documents requested by FEI and its blatant disregard for deadlines (either those established by FEI or even those suggested by HSUS itself), FEI could no longer agree to accept documents and information on a piecemeal basis and that HSUS should respond to Request Nos. 1-3 and 5-8 on or before September 20, 2007.⁶

⁶ Request Nos. 4 and 9-19 commanded the production of documents relating to HSUS's media strategy aimed at FEI and documents specifically relating to recent press releases that discussed in detail documents

To date, HSUS persists in its refusal to produce the substantially limited number of documents initially requested at the parties' meet and confer, let alone to produce the actual documents originally subpoenaed and now sought by FEI. Ex. 24, Stowe letter to Gasper (9/20/07). In lieu of producing "all documents relating to the litigation," HSUS has offered merely to provide a sworn declaration that the litigation was not mentioned in the "detailed minutes of its board meetings." Id. As is plainly evident, any such representation is meaningless. HSUS, moreover, continues to ignore and contradict Judge Sullivan's recent rulings in this case by refusing to produce any documents relating to its payments to or for Rider. Id.⁷

HSUS's conduct throughout has been outrageous. Simply ignoring subpoena powers because the recipient did "not approve" of the production is unheard of and nowhere under Fed. R. Civ. P. 45 is it permitted. To the contrary, HSUS's dilatory tactics and indefensible positions are quite clearly evidence of deliberate non-compliance with the subpoena and defiance of a Court order. See Fed. R. Civ. P. 45(a) advisory committee's note ("Although the subpoena is in a sense the command of the attorney who completes the form, defiance of a subpoena is nevertheless an act in defiance of a court order and exposes the defiant witness to contempt sanctions."). HSUS is seeking to obfuscate and avoid production until the clock runs out in December, just as the plaintiffs in this case have sought to do. FEI, accordingly, asks the Court

produced by FEI in discovery. FEI believed such documents to be relevant because plaintiffs have attempted to justify their payments to Mr. Rider as payments for his "media" activities. FEI believed, therefore, that documents relating to plaintiffs' media strategies would undermine or confirm the veracity of plaintiffs' defense to these improper payments. Nonetheless, Judge Sullivan recently ruled that documents relating to plaintiffs' media strategies are not relevant. See Order (8/23/07) (Docket No. 178). FEI, therefore, is no longer requesting that HSUS produce such documents.

⁷ HSUS's refusal to produce such documents is not excused merely because it has belatedly produced a list of payments from HSUS to WAP. Indeed, the Court recently compelled non-party WAP to produce documents relating to its payments to Rider notwithstanding that WAP previously produced a ledger similar to what HSUS has now provided. See Order (8/23/07) (Docket No. 178). Nonetheless, HSUS's representation that "no checks were issued to Tom Rider" is meaningless. FEI is entitled to documents relating to payments to *or for* Mr. Rider. Id. at 8 (WAP must produce documents "related to payments or donations *for or to* ... Tom Rider.") (emphasis added).

to expedite briefing, compel the production of documents, and award FEI its costs for having to move the Court.

ARGUMENT

A. **FEI Has Attempted to Confer in Good Faith**

Pursuant to LCvR 7(m), FEI hereby certifies that it attempted in good faith to confer with HSUS prior to filing this motion. FEI agreed to modify its subpoena in response to certain HSUS objections and agreed to make further modifications if HSUS provided authority in support of its other objections and/or provided a more detailed description of allegedly privileged or confidential documents. FEI, moreover, agreed to allow HSUS to make an initial production so that the parties could determine whether HSUS must comply with the subpoena in its entirety. HSUS has neither substantiated its objections nor attempted to make the initial production suggested by FEI. FEI has sought to reach agreement with HSUS on numerous issues and numerous occasions. As each deadline has passed, FEI has been told simply that HSUS has not “approved” its counsel’s disclosure of the requested documents and information. Even HSUS’s last ditch effort to avoid Court intervention is nothing more than a hollow promise to work with FEI while simultaneously refusing to produce documents related to a subject matter already deemed relevant by the Court. FEI has conferred in good faith with HSUS and has no recourse but to seek the Court’s assistance. See GFL Advantage Fund, Ltd. v. Colkitt, 216 F.R.D. 189, 194 (D.D.C. 2003) (“The Local Rule contemplates that counsel will speak to each other; it does not anticipate that counsel’s attempts to initiate a dialogue will be stonewalled. I find it unreasonable to insist that counsel wait for a response that never comes, like the two tramps who wait for Godot, before filing the motion.”).

B. HSUS Must Respond to Subpoena Request Nos. 1-3 and 5-8

Having given notice to HSUS, FEI may “move at any time to compel the production” of documents responsive to its subpoena. Fed. R. Civ. P. 45(c)(2)(B). For purposes of enforcing FEI’s subpoena, “the Court needs to balance, (1) the relevance of the information sought in the underlying case, (2) the requestor’s need for the information from the subpoenaed source, (3) the burden on the source to produce the information, and (4) the harm, if any, that disclosure of the requested information would have on the source.” Norex Petroleum Ltd. v. Chubb Ins. Co. of Canada, 2005 U.S. Dist. LEXIS 19127 at *3-4 (D.D.C. Mar. 9, 2005) (internal citations omitted), modified on recons., 384 F. Supp. 2d 45 (D.D.C. 2005). The documents requested by FEI are highly relevant (indeed, many of them already have been deemed relevant by Judge Sullivan) and cannot be obtained from other sources. Requiring HSUS to search and produce such documents, moreover, is neither burdensome nor harmful. HSUS’s objections of undue burden are premised entirely upon its misinformed opinion that its “entire computer system” must be searched. HSUS would rather make a mountain out of a molehill than spend a couple of hours to complete the production. There is no need to search HSUS’s entire computer system, and FEI has repeatedly so advised it.

1. The Documents Sought by FEI are Highly Relevant

For purposes of enforcing FEI’s subpoena, the relevancy standard is “exceedingly broad.” See Norex Petroleum Ltd. v. Chubb Ins. Co. of Canada, 2005 U.S. Dist. LEXIS 19127 at *3-4 (D.D.C. Mar. 9, 2005) (“Relevancy determinations made for information sought at the discovery phase of litigation is different from the standard used to assess reliability in the context of admissibility as evidence in the resulting trial. In determining relevance at this stage, the Court applies, ‘an exceedingly broad’ standard which will assess merely whether the information

sought is reasonably calculated to lead to the discovery of admissible evidence, not whether the information sought itself would be admissible.”) (internal citations omitted), modified on recons., 384 F. Supp. 2d 45 (D.D.C. 2005). As set forth above, the documents sought by the subpoena are relevant to this action for numerous reasons. First and foremost, they would answer the fundamental question of whether HSUS is a party to this litigation. This issue is crucial. FEI is entitled to know who it is actually litigating against. The issue, moreover, would affect the evidence that FEI could put on at trial should the matter go that far. If HSUS is substituted as a party, FEI, for example, would be allowed to rely upon prior statements by HSUS that might not otherwise be admissible. Moreover, FEI would be entitled to take discovery from HSUS as a party. If, on the other hand, HSUS is not a party to the litigation, FEI could be entitled to discover documents and information that have heretofore been withheld by plaintiffs based on assertions of privilege with respect to communications between them, counsel, and HSUS. See Ex. 7, Excerpt of AWI Deposition and Supplemental Interrogatory Response (claiming privilege for such communications). Plaintiffs do not get to have it both ways here. Either HSUS is a non-party and responds to the subpoena or HSUS is a party and stops bypassing discovery in the case. Moreover, the privilege claims must be sorted out to determine their (in)validity.

The documents commanded by the subpoena, moreover, bear heavily upon the credibility of Mr. Rider and other witnesses that plaintiffs intend to present at trial. Judge Sullivan has already ruled that documents related to plaintiffs’ and WAP’s payments to Mr. Rider are relevant to this lawsuit and has ordered that all such documents be produced. See Order (8/23/07) (Docket No. 178). There is no reason why HSUS should be treated any differently. Tellingly, throughout its stonewalling, HSUS has offered *nothing* to distinguish itself from that ruling.

Regardless of whether HSUS is formally made a party to this lawsuit, it clearly has an ongoing corporate relationship with FFA and its Vice President is currently plaintiffs' counsel. Payments made by Mr. Lovvorn and HSUS to any witness bear heavily upon the credibility of such witnesses at trial. Mr. Rider's credibility, in particular, is crucial to this litigation since the D.C. Circuit reinstated this lawsuit on the basis of his unsubstantiated allegation that FEI's alleged elephant abuse has caused him "aesthetic injury." ASPCA v. Ringling Bros., 317 F.3d 334, 337 (D.C. Cir. 2003) (denying FEI's motion to dismiss and holding that Mr. Rider has standing because "[g]iven the posture of the case, we must assume the truth of [his] claims"). This case is no longer at the pleading stage, and Mr. Rider's allegations are no longer free from questioning, nor are they presumed to be true.

2. FEI's Defense Requires HSUS's Production of the Requested Documents

FEI has no choice but to seek the requested documents from HSUS. Most of the documents commanded by the subpoena are internal HSUS documents (such as internal communications or notes of internal meetings) that cannot be obtained from other sources. See Ex. 14, Gasper letter to Kindler (7/9/07). FFA, moreover, has refused to produce documents from HSUS's files (even those files that pertain to FFA matters), thereby forcing FEI to issue the subpoena. The documents at issue reside in HSUS's files and, to date, FEI's efforts to obtain them (first from FFA, and now from HSUS) have been blocked.⁸

3. Producing the Requested Documents Would Not Unduly Burden HSUS

HSUS would not be burdened by complying with FEI's subpoena. "The burden of proving that a search for information would be unduly burdensome is on the party requesting

⁸ HSUS's objection that FEI could obtain the documents at issue from parties to the lawsuit is a classic runaround because the "other party" (namely FFA, the very entity with which HSUS has merged and the very entity whose employees are paid by HSUS) refused to produce them. HSUS has no excuse for non-production, regardless of what other parties may have and, as stated above, most of the documents commanded by the subpoena are internal HSUS documents that cannot be obtained from other sources in any event.

relief from the subpoena.” Linder v. Calero-Portcarrero, 183 F.R.D. 314, 319 (D.D.C. 1998). “Whether compliance with a requested search would be unduly burdensome depends on the volume of material requested, the ease of searching for the requested documents in the form presented, and whether compliance threatens the normal operations of the responding [party].” Id. at 320 (internal citations omitted).

To date, HSUS has not explained in detail the burden it would face if compelled to comply with the subpoena. See Coregis Ins. Co. v. Baratta & Fenerty, Ltd., 187 F.R.D. 528, 530 (E.D. Pa. 1999) (“The party asserting the objections must show *specifically* how each [request] is privileged or vague or overly broad.”) (emphasis added). Instead, HSUS has resorted to generic objections (all of which are overblown) concerning the alleged “burden” of “searching the entire computer system for additional documents.” Ex. 17, Stowe letter to Gasper (8/8/07). Any such burden, however, is not a result of FEI’s subpoena. FEI’s requests for documents are extremely narrow and, presumably, are limited to the files of only certain individuals at HSUS. FEI’s requests at issue in this motion can be distilled to documents (a) sufficient to show the relationship between HSUS and FFA, (b) relating to this litigation, (c) relating to HSUS’s fundraising efforts in connection with FEI or the litigation, (d) relating to Mr. Rider, (e) relating to any other FEI employee, (f) relating to the alter ego of plaintiffs’ counsel, or (g) relating to requests (by plaintiffs, their counsel, or the alter ego of their counsel) for payments concerning FEI or the litigation. There is no reason to assume that this is a vast amount of material and HSUS has made no effort to document such a claim in any event.

It is inherently incredible to think that HSUS does not know who was involved with the payments made (either directly or indirectly) to Rider. Somebody there made the payments. This should be a focused undertaking, particularly since HSUS’s counsel already proclaimed that

there were none and now has provided a list of them. HSUS knows who there is talking and communicating with Rider. Those persons' files can be checked. It is not FEI's job to have to repeatedly guess about where HSUS has its documents. HSUS knows this, and it is time for it to stop hiding the documents and just produce them.

HSUS must make a reasonable, good faith search for documents responsive to the subpoena. See In re Vitamin Antitrust Litig., 2001 U.S. Dist. LEXIS 11536, at *40 (D.D.C. Apr. 23, 2001) ("The Federal Rules of Civil Procedure oblige a party to make a *reasonable search* for, and to produce, all non-privileged documents in its possession, custody or control that are within the requests approved by the court.") (emphasis added). It need not, as HSUS insists upon doing, search the company's "entire computer system." See Ex. 17, Stowe letter to Gasper (8/8/07). Instead of searching the files of those HSUS employees who have been involved in this lawsuit, raising money for it, and/or making payments to Mr. Rider, HSUS insists that it must search its "entire computer system" and then complains that doing so would be burdensome. This is akin to saying that *all* of IBM's records must be searched in order to find the documents related to a particular equipment sale in Duluth. FEI does not expect, nor does it want, the results of such irrelevant make-work. Indeed, FEI has never demanded that HSUS search its entire computer systems and has taken the extraordinary additional step of suggesting how HSUS might define its search groups. Ex. 18, Gasper letter to Stowe (8/9/07). Complying with FEI's subpoena would not be burdensome to HSUS. A good faith search for responsive documents does not require that HSUS search its "entire computer system." FEI's requests are narrowly focused and should be enforced by this Court.

4. Disclosure of the Requested Documents Would Not Harm HSUS

Disclosure of these documents requested by FEI would not cause HSUS any harm. The only harm articulated thus far by HSUS is that compliance with the subpoena would require the disclosure of documents that are privileged or “confidential and proprietary.” These objections, however, do not justify HSUS’s blanket refusal to produce the remaining, non-privileged documents. Nonetheless, as is evident from the face of FEI’s subpoena, HSUS’s compliance with the subpoena would not compel the disclosure of such documents. Pursuant to Instruction No. 10, HSUS may, in fact, withhold documents pursuant to a claim of privilege or other protection provided that it produce, instead, information sufficient to support its claim of protection. Ex. 1, Subpoena at Instruction 10. Logging such claims is rudimentary, yet HSUS has not done so. Indeed, FEI has already agreed to enter a protective order governing HSUS’s alleged “confidential and proprietary information” and alleged “media and associational activities” upon receiving such information and authority in support of HSUS’s position.⁹ FEI has addressed any legitimate concern that HSUS could have.

CONCLUSION

FEI has been greeted with nothing but resistance, delay tactics, and bad faith in trying to obtain the documents subpoenaed from HSUS (that arguably should have been produced by FFA without the need for a subpoena). The conduct is a continuation of the pattern of behavior FEI has consistently encountered from plaintiffs. It is interfering with FEI’s taking of depositions

⁹ FEI attempted in good faith to resolve issues relating to HSUS’s privilege claims prior to seeking the Court’s assistance. HSUS, however, has refused to describe the documents it believes to be privileged or confidential. Until HSUS does so, FEI has no basis to determine the validity of HSUS’s claims and no reason to excuse HSUS’s refusal to produce such documents. See GFL Advantage Fund, Ltd. v. Colkitt, 216 F.R.D. 189, 195 (D.D.C. 2003) (Facciola, J.) (“Before a court turns to the question of privilege, the subpoenaed party must comply with the requirements of Fed. R. Civ. P. 45(d)(2) which provides: When information subject to a subpoena is withheld on a claim that is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications or things not produced that is sufficient to enable the demanding party to contest the claim.”).

and its defense of this case. Given the current discovery cut-off, FEI asks that briefing be expedited so that HSUS cannot profit from anymore delay. FEI further asks that its motion to compel be granted, that HSUS be ordered to produce documents immediately, and that FEI be awarded its costs and fees incurred for having to file this motion. A proposed form of order is also attached.

Dated this 21st day of September, 2007.

Respectfully submitted,

/s/

John M. Simpson (D.C. Bar #256412)
Joseph T. Small, Jr. (D.C. Bar #926519)
Lisa Zeiler Joiner (D.C. Bar #465210)
Michelle C. Pardo (D.C. Bar #456004)
George A. Gasper (D.C. Bar #488988)

FULBRIGHT & JAWORSKI L.L.P.
801 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Telephone: (202) 662-0200
Facsimile: (202) 662-4643

Counsel for Defendant Feld Entertainment, Inc.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **Motion to Compel the Production of Documents Subpoenaed from the Humane Society of the United States**, and all exhibits and attachments thereto, were served on HSUS on September 21, 2007 as follows:

Via first class mail, postage prepaid:

Matthew F. Stowe, Esq.
Attorney for Humane Society of the United States
Paul, Hastings, Janofsky & Walker LLP
875 15th Street, N.W.
Washington, DC 20005

Via ECF:

Jonathan Lovvorn, Esq.
Vice President of HSUS

I further certify that on this 21st day of September, 2007, the foregoing motion, and all exhibits and attachments thereto, were electronically filed with the Clerk of this Court using the CMF/ECF system, which will send notification of such filing to plaintiffs' counsel.

/s/
George A. Gasper