IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS, *et al*. Plaintiffs,	)	
v.	)	Civil Action No. 03-2006 (EGS/JMF)
FELD ENTERTAINMENT, INC., Defendants	)	

THE HUMANE SOCIETY OF THE UNITED STATES' RESPONSE TO FELD ENTERTAINMENT, INC.'S MOTION TO COMPEL THE PRODUCTION OF DOCUMENTS SUBPOENAED FROM THE HUMANE SOCIETY FROM THE UNITED STATES

INTRODUCTION

The Humane Society of the United States ("HSUS"), as a non-party to the litigation between the American Society for the Prevention of Cruelty to Animals ("ASPCA"), *et al*., and Defendant Feld Entertainment, Inc. ("FEI"), respectfully requests that this Court deny FEI's motion to compel production of documents subpoenaed from the Humane Society of the United States, and requests that a protective order be entered protecting it from the unreasonable discovery demands of the Defendant in that litigation. Of the entirety of the subject matter of the June 15, 2007, subpoena that FEI seeks to enforce (RFPs #1-3 and 5-8), only two possible issues remain relevant – whether HSUS is a separate entity from the Fund For Animals ("FFA"), a party to the litigation involving FEI, and whether HSUS made any payments to Tom Rider, another party to the litigation involving FEI. HSUS has already voluntarily produced documents which, taken together with affidavits that HSUS has offered, are sufficient to prove both points. Moreover, HSUS has been forced to expend almost $20,000 (exclusive of legal fees), and numerous work-hours of its employees, to comply with FEI's subpoena and subsequent requests.

At this point, FEI's ongoing effort to seek additional information from the files of HSUS is not reasonably calculated to lead to admissible evidence as required by F.R.C.P. 26(b)(1), and appears to serve no proper litigation purpose. Rather, this subpoena appears to be directed at HSUS primarily because many individuals at the FFA became HSUS employees following the 2005 corporate combination between the FFA and HSUS, a fact which, from FEI's point of view, entitles FEI to continue to conduct discovery – beyond that permitted by the federal rules – against the FFA under the guise of seeking the information from those individuals in their roles as HSUS personnel. FEI has had, and continues to have, fair opportunity to conduct discovery against the FFA, and permitting additional discovery against the FFA through the backdoor method of requests for production against HSUS unfairly burdens both HSUS and the FFA.

As Judge Sullivan reminded the parties litigating before him in an order dated August 23, 2007, "the purpose of this litigation is to determine whether or not defendant's treatment of elephants constitutes a 'taking' under the Endangered Species Act." Slip Op. at 12 (Docket Number 178). In contrast, the subpoena served on HSUS on June 15, 2007, contains 19 separate requests for production, not a single one of which relates to FEI's treatment of its elephants or any defense FEI raised in its answer. *Compare* Motion to Compel the Production of Documents Subpoenaed from the Humane Society of the United States ("MTC"), 9/21/07 (Docket No. 192), Ex. 1 (Subpoena) *with* Answer filed by Feld Entertainment, Inc. (Docket No. 4).

In the opinion of HSUS, FEI, faced by serious allegations of mistreatment of captive elephants, has been attempting to adopt the tried and true Beltway defense of claiming that the allegations against it are the result of some sort of ill-defined conspiracy. In furtherance of this tactic, FEI attempted, without success, to amend its answer to include a RICO claim against the Plaintiffs in the lawsuit against it. In addition, it sought wide ranging discovery into "all

communications between plaintiffs, WAP, animal rights advocates, and animal rights organizations generally," their finances, the ties between the organizations, and their "media and legislative contacts and strategies." *See* Order Granting in Part and Denying in Part Defendant's Motion to Compel Documents (Docket Number 178) ("Slip Op.") at 9. The Rule 45 subpoena served on HSUS was part and parcel of this overall strategy, seeking expansive information regarding the communications between HSUS and the Plaintiffs (RFP 7), HSUS's finances (RFPs #3, 8), the ties between HSUS and other animal protection groups (RFPs #1, 7), and HSUS's media strategies (RFPs #2, 4, 9-19).

In a brace of orders dated August 23, 2007, Judge Sullivan roundly rejected FEI's new litigation tactic. In addition to denying FEI permission to amend its answer to assert the RICO counterclaim, see Order Denying Defendant's Motion for Leave to Amend Answers (Docket #175), the Court denied the portion of FEI's motion to compel production against the Wildlife Advocacy Project ("WAP"), explaining that "defendant's subpoena is over broad and over burdensome in its requests and seeks a lot of information that is irrelevant to the "taking" claim in this lawsuit, the credibility of Tom Rider, or any claimed defenses." Slip Op. at 8. The Court specifically rejected the Defendant's requests for "communications between plaintiffs . . . and animal rights organizations," "media and legislative strategies," and "additional financial records," all on the grounds "the information is irrelevant to the claims and defenses in this litigation." Slip Op. at 9. Given that nothing in the subpoena FEI served on HSUS has ever related to any of the claims or defenses actually pled in the ASPCA/FEI litigation, a different party might have chosen to withdraw the entire subpoena in response to this ruling. Instead, FEI initially responded by agreeing to a more limited voluntary production, see MTC Ex. 19 (letter from Mr. Gasper to Mr. Stowe dated 8/27/07), then withdrew that limitation, see MTC Ex. 23

(letter from Mr. Gasper to Mr. Stowe dated 9/13/07), and finally filed this motion to compel when it was dissatisfied with the pace and content of HSUS' voluntary production.

During the parties meet-and-confer on August 2, 2007, HSUS was informed that FEI did not understand the relationship between HSUS and the FFA (an organizational plaintiff in the ASPCA litigation against FEI) following the 2005 corporate combination between the two entities, and was concerned that HSUS might have "merged" with the FFA to the degree that HSUS was the real party in interest in the lawsuit against FEI and should be made party to the litigation. Recognizing this concern was one that, if correct, would be relevant to the ASPCA/FEI litigation, HSUS assured FEI that this was not the case, and agreed to produce documents sufficient to show that the FFA had survived the corporate combination as a separate and distinct entity. It has done so. *See* MTC Ex. 22 (letter from Mr. Stowe to Mr. Gasper 9/7/07); MTC Ex. 24 (letter from Mr. Stowe to Mr. Gasper dated 9/20/07).

In addition, HSUS was informed at the meet-and-confer that FEI believed that HSUS may have given money to Tom Rider, either directly or through the WAP or other intermediaries. Recognizing that Tom Rider's credibility as a witness was an issue of relevance to the ASPCA/FEI litigation, HSUS agreed to voluntarily search its files to determine if it had made any payments to Tom Rider or the WAP. It has done so, explained that it made no payments to Tom Rider, disclosed those made to the WAP, and offered affidavits to this effect to FEI. *See* MTC Ex. 24 (letter from Mr. Stowe to Mr. Gasper dated 9/20/07). HSUS also conducted additional searches in an attempt to disprove the various unfounded allegations made by FEI. *See id.*

Notwithstanding HSUS' good faith efforts to convince FEI (1) that HSUS remains separate from the FFA and is not a party to the litigation, and (2) that it has made no payments to

Tom Rider, FEI chose to file a motion to compel with almost three months remaining in discovery. FEI's motion – which contains unique levels of vitriol and hyperbole in *lieu* of meaningful legal arguments establishing the relevance of the evidence it seeks – should be denied, and HSUS should be granted a protective order of appropriate scope as well as the fees and costs associated with defending this motion as provided for by F.R.C.P. 37 (a)(4).

FACTUAL BACKGROUND

As Judge Sullivan has implicitly recognized by rejecting FEI's motion to amend its answer and to seek extensive discovery against the WAP, FEI is not the target of some conspiracy. It is true that, like many organizations sharing an interest in ensuring a common goal (in this case, the humane treatment of animals), animal protection organizations generally stay in touch with each other on matters of importance to their membership (which may sometimes overlap), and discuss amongst each other issues of mutual concern. The Humane Society and the Fund for Animals were not strangers to each other even before their corporate combination, and after the HSUS's acquisition of certain FFA assets the organizations still retain a shared interest in protecting animals from unpleasant and exploitative conditions of captivity. Indeed, it was this shared interest in protecting animals that brought HSUS and the FFA closer together and led to their corporate combination, which was designed to exploit synergies created by shared payroll, media, and accounting resources. FEI has insistently referred to this corporate combination as a "merger,"[1] see MTC, *passim*, notwithstanding the materials HSUS has produced – including FFA's certificate of good standing from its state of incorporation (New York), numerous separate state charitable registration statements of the FFA, the FFA's form

1 FEI relies upon some non-technical, if not poor phrasing in a press release issued by lay staff in the HSUS press office at the time of the corporate combination, which has subsequently been retracted.

990, and minutes from the FFA's separate board meeting[2] – that conclusively demonstrate that the FFA still survives as a viable entity. No matter how many times FEI repeats its claim that HSUS and the FFA merged in its motion to compel, it remains untrue.[3]

FEI's motion to compel contains additional inaccuracies, only the most important of which are addressed here. First, FEI asserts that HSUS has not given reasons why it has not produced the documents requested by FEI. *See* MTC at 1 ("[Documents requested by FEI] are being withheld without any explanation at all."). To the contrary, HSUS has repeatedly and clearly explained its objections at the beginning, middle, and end of the process, and those objections have remained unchanged throughout.

Of primary concern here, Mr. Kindler, General Counsel to HSUS, explained in a letter to counsel for FEI on June 29, 2007, that relevance was HSUS' first objection to each of the RFPs, as the relevance of all 19 of the subpoena's RFPs hinged on a decision from the Court granting FEI's motion to amend its answer to assert a RICO counterclaim. *See* MTC Ex. 13 (letter from Mr. Kindler to Mr. Gasper, 6/29/07). Relevance arguments took up a significant amount of the time that the parties spent discussing voluntary production at the August 2, 2007, meet-and-confer, where newly-retained counsel for HSUS again reiterated that none of the RFPs were relevant to the existing Endangered Species Act ("ESA") claims and defenses, absent FEI being afforded the opportunity to amend. Finally, counsel for HSUS explained yet again in a letter

2 Counsel for HSUS made clear to FEI at the August 2, 2007 meet-and-confer that it would request these documents from the FFA as a courtesy (HSUS desired at the time to speed the process along and spare itself a burdensome third party discovery dispute). One of the acute reasons behind the collaborative process breaking down was FEI's subsequent attempts to incorrectly attribute "testimonial" aspects to this production by claiming that HSUS produced these documents from its own files, thus indicating that the FFA and HSUS were one entity. *See* MTC Ex. 23 (letter from Mr. Gasper to Mr. Stowe dated 9/13/07).

3 In a "merger" of two corporations, one survives and one is extinguished. *See* 20 Am. Jur. Proof of Facts 2d 609, I §1. In a "consolidation," both corporations are subsumed into a third, new corporation. HSUS and FFA typically use the more neutral term "corporate combination" to describe the 2005 transaction, which resulted in neither a "merger" nor a "consolidation."

delivered the day before FEI filed this motion that the only issues covered by the subpoena that retained any relevance to the current litigation were (1) the credibility of Tom Rider, and (2) whether the FFA remained a separate, viable organization following the 2005 corporate combination involving HSUS. *See* MTC Ex. 24, at 2 (letter from Mr. Stowe to Mr. Gasper dated 9/20/07). FEI itself acknowledged HSUS' relevance objection to its entire subpoena in a letter immediately following the meet-and-confer, in the course of trying to argue around the objection. *See* MTC Ex. 16 (letter from Mr. Gasper to Mr. Stowe dated 8/3/07) ("You state that HSUS objects to the subpoena in its entirety on the basis that it is not relevant to the issues currently plead in the underlying litigation.").

Moreover, HSUS has raised at least three additional objections to these RFPs in both the aforementioned letters and at the meet-and-confer: (1) the fact that the documents sought were available elsewhere, (2) that searching for the documents would impose an undue burden on HSUS, especially since HSUS is a non-party, and (3) that some documents sought by the subpoena, especially those pertaining to the litigation (and specifically sought by RFP #2), were plainly covered by the attorney-client privilege. As a consequence, FEI's repeated assertions that it does not understand why HSUS has not fully complied with RFPs 1-3 and 5-8 simply ring hollow.

Second, FEI asserts throughout its motion that HSUS has made payments to Rider. *See, e.g.*, MTC at 6. This claim is false, and FEI has been informed repeatedly that it is false.[4] HSUS has offered FEI sworn affidavits to the effect that it has never made any payments to Tom Rider

4 In the course of preparing this response, counsel for HSUS discovered that FEI has repeated its erroneous statement that HSUS made payments to Rider in at least one other filing in the ASPCA/FEI litigation. *See* NOTICE *of Supplemental Points and Authorities in Opposition* by FELD ENTERTAINMENT, INC. re 181 MOTION for Leave to File *A Supplemental Complaint Adding Three Former Ringling Brothers Employees As Additional Plaintiffs* (Docket number 198), at 11 (". . . FFA has produced documents showing that *payments made to Rider by the Humane Society of the United States* . . . were coded as litigation expenses . . .") (emphasis added). The claim that HSUS has made payments to Mr. Rider is untrue, no matter how many times, and where, FEI repeats it.

– which HSUS confirmed by performing a search of payee records and check request forms in HSUS' accounting department as part of its voluntary compliance with the subpoena. A careful reading of FEI's motion shows that FEI understands this very well; what FEI means when it says that HSUS has made payments to Rider is that a different organization, the WAP, has made payments to Rider. *See* MTC at 7. FEI seeks to attribute the payments the WAP made to Tom Rider to HSUS. Yet FEI has made absolutely no showing that HSUS and WAP are the same entity or serve as alter egos, functionally or otherwise (nor would it be possible for FEI to do so). Absent such a showing, which FEI has not even attempted to undertake, its repeated assertions that HSUS has made payments to Tom Rider are a chronic misstatement of the facts.[5]

Third, FEI asserts in its motion that HSUS has "participated in [the ASPCA/FEI] litigation." *See* MTC at 2. It has not. FEI alleges in support of its claim that HSUS provided the FFA's 30(b)(6) witness, and hired Jonathan Lovvorn, a former partner in the law firm representing the plaintiffs, as its Vice President of Animal Protection Litigation, which since HSUS is not a party in the instant case, is beside the point.[6] *See* MTC at 3. FFA's 30(b)(6) witness was Michael Markarian, FFA's president since 2002 and executive vice president since 1999, who in 2005 also became an HSUS executive vice president. He appeared at the deposition in his capacity as FFA president; HSUS did not "provide" him, as FEI contends. Such a circumstance is no more than a byproduct of the overlapping leadership and membership

5 In a last-ditch attempt to work cooperatively with FEI, HSUS disclosed all payments it has made to the WAP since January 2000, and even offered search its records for payments to other organizations that FEI could reasonably hypothesize might have made payments to Mr. Rider, if FEI would produce a list of such organizations – all in advance of receiving any proof of relevance from FEI. *See* MTC Ex. 24 (letter from Mr. Stowe to Mr. Gasper dated 9/20/07).

6 Although Mr. Lovvorn (along with the firm of Meyer & Glitzenstein, in which he was formerly a partner) represents the FFA in the ASPCA/FEI lawsuit, as he has done since the case was filed, he does not represent the HSUS in this Rule 45 matter. As part of his HSUS duties, Mr. Lovvorn represents a lot of non-HSUS animal protection groups in a number of cases.

of the two organizations resulting from the corporate combination, and does not indicate HSUS' participation in the FFA's litigation any more than having overlapping boards of directors would drag one corporation into litigation involving another.

FEI also notes that HSUS has issued press releases discussing the ASPCA/FEI litigation. *See* MTC at 3. Of course it has – HSUS, as an animal protection organization, is and will always be concerned with the way FEI treats its captive elephants. Informing its membership and the public about recent efforts by other similar organizations to ensure these elephants are treated humanely cannot be deemed to be "participat[ing]" in the litigation, and any decision to the contrary would raise grave First Amendment concerns. Finally, FEI urges that HSUS has somehow participated in the ASPCA/FEI lawsuit by virtue of various litigation positions taken by the FFA in that litigation. But it cannot be the case that a party to litigation can bestow party status on an unwilling nonparty to the litigation simply by virtue of the legal positions the party takes in that litigation. Notwithstanding the fact that they share some assets, officers, and membership, HSUS and the FFA remain separate legal and decision-making entities (as documents already produced to FEI prove), and the FFA does not have the authority to commit the HSUS to any litigation. Discovery disputes between FEI and the FFA in the ASPCA/FEI litigation should be sorted out between those parties, without the involvement of unwilling third parties.

Finally, FEI's statement of the facts makes much mention of alleged "dilatory" conduct on the part of HSUS, and claims that various productions were "late." *See* MTC at 5-12. Each of the "deadlines" for HSUS' voluntary production mentioned in this section was set unilaterally by FEI, without any input from HSUS regarding how long, realistically, it might take to locate and compile the information, review any potential production for privilege issues or the need for

redaction, and obtain approval from HSUS' general counsel to produce the information voluntarily.[7] Under such circumstances, FEI should hardly be permitted to complain that the unilaterally and artificially-imposed deadlines it sought to impose were "missed." Nonetheless, counsel for HSUS worked diligently to prepare the voluntary submissions in time to meet FEI's demands. HSUS' counsel's polite apologies by e-mail to counsel for FEI when HSUS could not deliver voluntary information as fast as FEI demanded were just that, and were not, as counsel for FEI claims (see MTC at 10), intended as implicit consent to FEI's chosen deadlines, or as "suggest[ions]" that a slightly later deadline was acceptable to HSUS.

Throughout what was supposed to be a collaborative negotiating process, HSUS participated in good faith, voluntarily producing or offering to produce documents and affidavits sufficient to demonstrate (1) that it made no payments to Tom Rider, and (2) that both it and the FFA remain separate corporate entities – the only issues from the subpoena that retain relevance following the Judge Sullivan's denial of FEI's motion to amend its answer and his August 23, 2007 discovery orders. Accordingly, for the reasons discussed below, FEI's motion should be denied, and HSUS should be granted a protective order to protect it from additional abusive discovery.

ARGUMENT

I. FEI Seeks Discovery in RFPs 1-3 and 5-8 of its Subpoena that Is Not Relevant to the Issues Involved in the ASPCA/FEI Litigation, and is Not Reasonably Calculated to Lead to Admissible Evidence.

F.R.C.P. 26(b) (1) provides the general limits on the scope of discovery, and allows a court for good cause to permit "discovery of any matter relevant to the subject matter involved in the action." Relevant information need not be admissible at trial, of course, but must "appear[]

7 The first and last time FEI and HSUS discussed timelines for voluntary production collaboratively was at the August 2, 2007, meet and confer meeting.

reasonably calculated to lead to the discovery of admissible evidence." *Id*. Regardless of how liberally construed or "exceedingly broad" is this standard, see MTC at 13-14, FEI simply has not and cannot establish the relevance of the documents it seeks. Nothing in the June 15, 2007, subpoena served on HSUS relates in any way to the Endangered Species Act claim brought by the ASPCA *et al.* against FEI, or to any defense that FEI raised in its answer. Nor are any of the RFPs that FEI seeks to compel from HSUS "reasonably calculated" to lead to any such evidence. Judge Sullivan has already instructed FEI and the parties litigating before him that "the remainder of discovery and briefing in this litigation should relate to the claims and defense in this lawsuit," an instruction that FEI has simply ignored by continuing to press its subpoena and by filing this motion to compel. *See* Slip Op. at 12. This instruction notwithstanding, in an attempt to reach compromise during the August 2, 2007 meet-and-confer between the parties and thereafter,[8] HSUS agreed that FEI's allegations should be met with information sufficient to show that the FFA remained a viable entity following the 2005 corporate combination between it and HSUS, and that HSUS had not made any payments to Tom Rider. HSUS has done so, and consequently FEI is seeking to enforce portions of a subpoena that do not have any arguable relevance to the issues arising from the ASPCA/FEI litigation.

A. ***FEI's Narrow Assertions of Relevance with Respect to the RFPs 1-3 and 5-8 Hinge Entirely on Unsubstantiated Allegations that Assume Facts that Are Not in Evidence, Have Been Disproven by Documents that Are Publicly Available or Already Voluntarily Produced by HSUS, and Have Been Implicitly Rejected By Judge Sullivan in his Order Denying FEI's Motion to Amend Its Answer to Assert a RICO Counterclaim Against the ASPCA/FEI Plaintiffs.***

FEI's first argument regarding why the documents it seeks to discover are relevant is that "they would answer the fundamental question of whether HSUS is a party to this litigation." MTC at 14. HSUS is not a party to the ASPCA/FEI litigation. HSUS has not filed a complaint

8 *See* MTC Ex. 24, at 2 (letter from Mr. Stowe to Mr. Gasper dated 9/20/07).

against FEI, and has not filed or signed any pleadings in the litigation (with the exception of this motion, which HSUS has filed as a non-party). Consequently, in order to establish the relevance of further discovery designed to ultimately attribute a lawsuit brought in name by the FFA to HSUS, FEI is required by F.R.C.P. 26(b)(1) to make some showing that the additional discovery is "reasonably calculated" to lead to admissible evidence that would allow it to satisfy the test for "piercing the corporate veil" between the two organizations (and for satisfying the test of F.R.C.P. 25 for establishing that HSUS, not the FFA, is the real party in interest in the litigation). FEI's unsupported assertions of unity between the organizations notwithstanding, FEI has not attempted in any way to demonstrate that the respective corporate structures of HSUS and the FFA are a sham – nor could it, as information already in its possession suffices to defeat any such claim.

"The law in the District of Columbia is that 'the acts and obligations of the corporate entity will not be recognized as those of a [another entity] until the party seeking to disregard the corporate entity has proved by affirmative evidence that there is (1) unity of ownership and interest and (2) use of the corporate form to perpetrate fraud or wrong.'" *Smith* v. *Washington Sheraton Corp.* ("*Washington Sheraton*"), 135 F.3d at 779, 786 (DC Cir. 1998) (*quoting Vuitch* v. *Furr*, 482 A.2d 811, 815 (D.C. 1984)). A similar test applies under the laws of State of New York, the State of Incorporation of the FFA. *See Morris* v. *New York State Dep't of Taxation and Finance*, 623 N.E.2d 1157, 1160-61 (NY 1993) (piercing the corporate veil requires showing that (1) another entity dominated the corporation and effectively dictated its action, and (2) such domination was used to perpetuate a fraud or wrong that injured the plaintiff). FEI cannot show unity of ownership and interest between HSUS and the FFA, as information already in its possession shows this not to be the case, and as a consequence any attempt to show that the

discovery it seeks is reasonably calculated to allow it to discover evidence that will ultimately allow it to attribute acts of the FFA to HSUS must fail.[9] *Cf*, *Washington Sheraton*, 135 F.3d at 786 (affirming grant of summary judgment where opposing party presented no meaningful evidence that corporate veil should be pierced).

FEI already possesses documents sufficient to demonstrate that (1) HSUS and the FFA have separate corporate structures, (2) the corporate formalities between the two organizations have been observed, and (3) there is no unity of interest between the organizations. Throughout the collaborative discovery process, HSUS acknowledged that if FEI were correct in its seemingly unshakable yet entirely inaccurate belief that the FFA and HSUS had "merged" in 2005 – such that the FFA no longer remained a viable separate entity from HSUS – then determining which party was the real party in interest in the litigation against FEI would be a proper subject for discovery. As a consequence, HSUS, via public sources and requests to the FFA, obtained and voluntarily produced a separate certificate of good standing for the FFA from the State of New York, separate charitable registration statements, a separate form 990 "Return of Organization Exempt from Income tax," and even the minutes from one of the FFA's separate board meetings.[10] *See* MTC Ex. 22; 24. Collectively, these documents demonstrate that the corporate formalities between the FFA and HSUS have been observed, and FEI should no longer be allowed to pursue its subpoena against HSUS under the pretext of needing to assure itself that it is the FFA, and not HSUS, that is the proper plaintiff in the ASPCA/FEI litigation, especially in view of the fact that the lawsuit, with FFA as co-plaintiff, was ongoing for several years prior

9 Moreover, although FEI alleges fraud and conspiracy at every opportunity, and has done so again here, FEI has no evidence that any fraud has been committed upon it *by virtue of HSUS dominating the actions of the FFA*, as required by the second prong of the *Washington Sheraton*/*Morris* test.

10 Presumably, FEI could have obtained these documents directly from the FFA during the regular course of discovery in the ASPCA/FEI litigation. Counsel for HSUS is unaware of why FEI did not do so.

to the 2005 combination of FFA and HSUS. FEI's ongoing attempts to seek additional discovery of this issue are simply not "reasonably calculated to lead to admissible evidence" as required by F.R.C.P. 26(b)(1).

In addition to the numerous documents supporting the corporate separateness of HSUS and the FFA that HSUS has obtained from the FFA and given to FEI in the course of negotiations surrounding the subpoena, other FFA corporation information and documents available to FEI – including the form 990, the FFA website, and the deposition of Michael Markarian – demonstrate that not only have the formalities of corporate separateness been maintained since 2005, but that the FFA has maintained its own income streams, its own program identity, and its own assets, including real property located in three states. As the Supreme Court has recognized, having overlapping boards and officers, as is the case with HSUS and FFA, does not defeat separate corporate identity:

> Directors and officers holding positions with a parent and its subsidiary can and do "change hats" to represent the two corporations separately, despite their common ownership . . . courts generally presume "that directors are wearing their subsidiary hats and not their parent hats when acting for the subsidiary."

United States v. *Bestfoods*, 524 U.S. 51, 69 (1998) (*quoting Lusk* v. *Foxmeyer Health Corp*., 129 F.3d 773, 779 (5th Cir. 1997)). Consequently, in the face of the information already in FEI's possession, FEI simply cannot show that RFP's 1-3 and 5-8 are reasonably calculated to led to admissible relevant evidence that would support an attempt to pierce the corporate separateness of FFA from HSUS.

Despite HSUS' ongoing relevance objections, and notwithstanding the fact that FEI's motion to compel contains an argument heading entitled "the Documents Sought by FEI are Highly Relevant," see MTC at 13-15, FEI's Motion to Compel seems to skip over the issue of relevance entirely, and to ignore completely the discovery FEI has already conducted and the

documents HSUS has already produced.[11] In its putative section addressing relevance, FEI complains that it deserves to know who is litigating against it, but ignores the fact that HSUS has produced documents to show that the FFA remains separate from HSUS and is therefore the FFA (regardless of any overlapping directorship) is plainly the party litigating against it. Thereafter, FEI's argument largely consists of various complaints about the litigation positions taken by the FFA and other parties in the ASPCA/FEI litigation. *See* MTC at 14 ("*Plaintiffs* do not get to have it both ways here.") (emphasis added). These are issues that FEI should take up with the FFA and other Plaintiffs directly in the ASPCA/FFA litigation. They do not involve HSUS and cannot serve as a valid basis for third party discovery against it.

FEI's remaining argument for why the RFPs it seeks to compel are relevant is that payments to Tom Rider bear on his credibility as a witness. HSUS fully understands that Judge Sullivan ruled in the ASPCA/FEI litigation that FEI was entitled to "information concerning the payments made to Tom Rider and the role of *the organizational plaintiffs and WAP* in those payments." Slip Op at 8 (emphasis added). FEI seeks to use this ruling as the basis for compelling expansive discovery against HSUS, urging that "[t]ellingly, throughout its stonewalling, HSUS has offered ***nothing*** to distinguish itself from that ruling." MTC at 14 (emphasis in original). One difference that should have been immediately evident to FEI: HSUS is not a party to the ASPCA/FEI litigation, and parties are generally permitted less expansive discovery against nonparties than against their party opponents. *See, e.g.*, *Wyoming* v. *U.S. Dep't. of Agriculture*, 208 F.R.D. 449 (D.D.C. 2002) ("Non-party status is one of the factors the court uses in weighing the burden of imposing discovery."). Leaving this issue to one side,

11 FEI's motion instead focuses extensively on HSUS' arguments that production would be an undue burden. While compliance with the portions of FEI's subpoena at issue here certainly would constitute an undue burden on HSUS, that issue took a secondary role once Judge Sullivan properly denied FEI's motion to amend its complaint on August 23, 2007 (Docket number 175).

however, HSUS has repeatedly explained to FEI that it has made no payments to Tom Rider, and has offered FEI an affidavit to that effect. *See* MTC Ex. 24, at 2 (letter from Mr. Stowe to Mr. Gasper dated 9/20/07).

Given that HSUS has made no payments to Tom Rider, the relevance of its payments to WAP and/or any other organization that may have given money to Rider is tenuous at best. The proper issue is the credibility of *Tom Rider*. If an entity, such as the WAP, has allegedly given money to Tom Rider, and that money was given to the WAP by a party opponent such as the FFA, then the source of the WAP's payment could have relevance to a factfinder's inquiry into Tom Rider's credibility. However, if that money did not come from a party opponent, the source of the money that the entity ultimately gave to Tom Rider is marginally relevant at best. The relevant issue is whether Tom Rider's testimony has been influenced by money received directly or indirectly from a party opponent. Given that the ultimate factfinder will be made aware that some of the WAP's money was donated by a party opponent, would that same factfinder find it important that another portion of this money came from HSUS, as opposed to some other third party entity? No, he or she would not. Indeed, Judge Sullivan implicitly recognized this fact in the course of denying in part FEI's motion to Compel Discovery against Plaintiff Tom Rider, where he explained "[h]owever, the Court finds that the source of any . . . funding [to Rider for public education and litigation efforts] is irrelevant unless it is a party, any attorney for any of the parties, or any officer or employee of the plaintiff organizations or the WAP." Slip Op. at 4. HSUS is none of those listed sources.

Yet notwithstanding the tenuous nature of any claim of relevance of HSUS' payments to the WAP, HSUS has never pressed this point. Instead, HSUS voluntarily provided FEI with a list of all payments made to the WAP, and offered to provide lists of payments to other entities if

FEI can reasonably claim that those parties may have thereafter given the money to Rider. *See id*. FEI has never given HSUS such a list. Because HSUS has (1) made no payments to Tom Rider (notwithstanding FEI's repeated, emphatic, and erroneous assertions to the contrary), (2) produced a list of the payments made to the WAP, and (3) offered to produce lists of payments to other organizations that are reasonably believed to have given money to Rider, there is simply nothing remaining for HSUS to produce that would be relevant to the issue of Rider's credibility in the ASPCA/FEI litigation.

B. ***With Respect to Both of FEI's Narrow Assertions of Relevance, All Discovery, Including the Voluntary Production, Is Already Duplicative With Discovery FEI Has or Should Have Conducted with Parties to the Litigation and the WAP***

The discovery that FEI seeks is duplicative of discovery FEI has already conducted or could have conducted against other parties in the ASPCA/FEI litigation. As can be seen from correspondence between counsel for FEI and counsel for HSUS, one of the primary areas in which FEI sought discovery against HSUS was the aforementioned issue of payments made to the WAP. *See* MTC Ex. 21-24. The parties spent considerable time discussing this issue at the August 2, 2007, meet-and-confer. Yet after all this expenditure of time and energy, *FEI attached not only a list but a copy of the actual check stubs, and letters accompanying them, from HSUS to the WAP as Exhibit 8 of its motion to compel*. HSUS can only assume that FEI obtained this information during discovery from a party to the litigation, or perhaps from the WAP itself, but regardless, HSUS cannot help but question why FEI would issue a subpoena, and then move to compel that subpoena, in no small part over a dispute to obtain documents that were apparently in its possession the entire time. Such conduct strikes HSUS as sanctionable.

But regardless, the problem of duplicative and unnecessary third party discovery transcends the narrow issue of HSUS's donations to the WAP, and suffuses virtually the entirety of RFPs 1-3 and 5-8. Documents detailing the operation of the FFA, and its relationship to

HSUS, could have been obtained by issuing RFPs to the FFA, a party opponent, instead of burdening a nonparty for the same materials. Likewise, any payments made to Tom Rider from the WAP or the Plaintiffs, to the extent relevant to Tom Rider's credibility, could have been (and apparently to some degree has been) discovered by FEI through RFPs directed at the WAP, the other ASPCA/FEI litigation Plaintiffs, or Tom Rider himself. There appears to be no proper purpose underlying FEI's decision to direct a subpoena at HSUS to obtain this information when it is (or was) just as easily (or more easily) attainable from FEI's proper party opponents. Understood in this light, FEI's ongoing claim that it is entitled to expansive discovery against a nonparty on the basis that this discovery will somehow shed additional light on the issue of the parties' payments to Rider is simply a red herring.

II. *The RFPs FEI Seeks to Enforce Are Significantly Overbroad When Compared with FEI's Purported Grounds of Relevance.*

Even if FEI's putative assertions of relevance retained any force following HSUS's voluntary disclosure, FEI seeks to enforce RFPs whose scope far exceeds the two narrow justifications of relevance it offers. FEI argues that the RFPs are relevant with respect to (1) "[f]irst and foremost . . . the fundamental question of whether HSUS is a party to this litigation," and (2) "the credibility of Mr. Rider and other witnesses that plaintiffs intend to present at trial." MTC at 14. Yet RFP #2 of the June 15, 2007 subpoena, for example, seeks all documents that refer, reflect, or relate to the ASPCA/FFA litigation, including "public statements, including press releases," and "internal communications the refer to or mention the litigation." MTC Ex 1, at 6. In addition to seeking some material that is almost certainly protected by the attorney-client privilege (as discussed below), and in addition to encompassing material implicitly excluded from FEI's discovery against the parties in Judge Sullivan's August 23, 2007 ruling, see Slip Op. at 9 (finding FEI's request for discovery of communications between plaintiffs and animal rights

organizations "overbroad . . . and irrelevant to the claims and defenses in this litigation"), none of that material would have any real bearing on Tom Rider's credibility or HSUS's relationship with the FFA. Likewise, RFPs #3 and #8 seek all documents relating to HSUS' fundraising activities relating to the ASPCA/FEI litigation, elephants, the WAP, *etc*., including communications between HSUS and the Plaintiffs and other animal rights organizations. *See* MTC Ex. 1, at 7, 10. This request will obviously encompass material that has absolutely nothing to do with HSUS' relationship with the FFA, or any payments made by any plaintiff or the WAP to Tom Rider. RFP #6 seeks all materials related to communications with specified former employees of FEI. *See* MTC Ex. 1, at 9-10. As best HSUS can tell, this request has absolutely nothing to do with the FFA or payments to Tom Rider. Only RFPs #1, 5, and 7 even indirectly relate to FEI's allegations regarding whether or not HSUS is the proper party in interest with respect to the ASPCA/FEI litigation, or to Tom Rider's credibility. RFP#1 is overbroad because it seeks documents explaining the relationship between the FFA and HSUS beyond those necessary to establish that the FFA is a viable separate organization. *See* MTC Ex. 1, at 6. RFP #5 is overbroad because it seeks all documents that refer, reflect, or relate to Tom Rider, regardless of whether or not those documents relate to payments Tom Rider. *See* MTC Ex. 1, at 8. Finally, RFP #7 is overbroad because it seeks all documents that refer, reflect, or relate to the WAP, regardless of whether or not those documents relate to payments to the WAP. *See* MTC Ex. 1, at 9-10. When carefully compared against the two narrow grounds of relevance FEI advances to support them, the RFPs FEI seeks to enforce are so broad in scope that, rather than being reasonably calculated to lead to the discovery of admissible evidence as required by F.R.C.P. Rule 26, they appear reasonably calculated to burden HSUS with immense volumes of unnecessary discovery.

III. ***The RFPs seek materials that are protected by attorney-client privilege***

Several of the RFPs, RFP#2 in particular, seek material that is protected by attorney-client privilege. One of FEI's stated purposes in seeking to enforce the RFP's 1-3 and 5-8 against HSUS is to determine whether HSUS should be added as a party in the lawsuit against it. *See* MTC at 14. As a consequence, a significant amount of material covered by RFP #2, which requests all documents that refer, reflect, or relate to the ASPCA/FEI litigation, may have been prepared in conjunction with FEI's issuance of the Rule 45 subpoena or in anticipation of the possibility, however remote, that HSUS would find itself dragged into litigation against FEI. In the event that the court should see fit to grant FEI's motion to compel, in whole or in part, HSUS respectfully requests the opportunity to prepare a privilege log of the documents so compelled, so that the validity of HSUS' claim of attorney-client privilege may be fairly assessed.

CONCLUSION

For the foregoing reasons, HSUS respectfully requests that FEI's Motion to Compel the Production of Documents Subpoenaed from the Humane Society of the United States be denied, that a Protective Order be entered pursuant to F.R.C.P. 37(a)(4)(B), and that HSUS be awarded the attorneys fees and costs it incurred in defending this motion pursuant to F.R.C.P. 37(a)(4)(A).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing THE HUMANE SOCIETY OF THE UNITED STATES' RESPONSE TO FELD ENTERTAINMENT, INC.'S MOTION TO COMPEL THE PRODUCTION OF DOCUMENTS SUBPOENAED FROM THE HUMANE SOCIETY FROM THE UNITED STATES was served by via electronic mail upon all parties to this proceeding.

/s/Christopher F. Dugan

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