UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

REPLY IN SUPPORT OF DEFENDANT'S MOTION TO COMPEL THE PRODUCTION OF DOCUMENTS SUBPOENAED FROM THE HUMANE SOCIETY OF THE UNITED STATES

INTRODUCTION

HSUS is not a typical "non-party", nor is it immune to the Court's prior rulings in this case. HSUS's continued refusal to produce documents ***already deemed relevant by Judge Sullivan*** is astounding. HSUS attempts to defend its obfuscation with arguments that have all been previously rejected by the Court. Faced with a Court order compelling a non-party (WAP) to produce documents relating to all payments to or for Tom Rider notwithstanding that WAP previously produced a list of ***all*** such payments, HSUS takes the position that it need not produce the very same type of documents because it is a non-party (so is WAP) and because it has provided a list of ***certain*** such payments (so did WAP). Instead of accepting the Court's prior ruling for what it is (an explicit indication that the documents sought by FEI's motion are relevant and should have been produced months ago), HSUS misconstrues the order several times and ignores it entirely several others. HSUS cannot distinguish its documents from those

already compelled by the Court's prior ruling and HSUS should be ordered to produce all such documents immediately.

HSUS has blatantly stalled FEI's efforts to obtain discoverable information. HSUS is not a typical "non-party," nor has it proceeded in good-faith. HSUS combined its operations with those of FFA (a named-plaintiff) more than two years ago; it pays the salary of FFA's employees; it shares office space with FFA; it received more than 75% of FFA's assets shortly after the combination; it pays a substantial percentage of FFA's legal fees; its own in-house counsel serves as plaintiffs' counsel in this case; it has assigned another in-house counsel to be responsible for the litigation; it identifies this case on its online docket of current cases; and it has issued press releases detailing documents produced by FEI in the course of discovery. HSUS is not immune from discovery in this case no matter how many times it calls itself a non-party.

Contrary to HSUS's allegation, FEI's subpoena was not issued simply because "individuals at the FFA became HSUS employees following the 2005 corporate combination between the FFA and HSUS." Opp. at 2. Simply put, it was issued because FFA (an entity operated by people paid by HSUS) told FEI that it could not have documents from the files of HSUS employees who did not work for FFA before January 1, 2005 even if those employees now work on FFA matters. FEI, for example, was denied relevant documents from the files of the HSUS employee who (according to FFA's own deposition testimony) is "managing this litigation" for FFA. Ex. 3, FFA Depo. at 30. According to HSUS, moreover, FFA is not producing documents from the files of FFA employees that relate to those employees' work on behalf of HSUS. Opp. at 2. It is beyond credulity that FFA does not have possession, custody, or control of documents in its offices (sometimes in its employees' own files) simply because an

employee did not work with FFA prior to January 1, 2005 or because the documents relate to the entity that controls and operates FFA.

The documents requested by FEI's subpoena are relevant to this litigation. When FEI requested them from FFA, it was told FFA would not produce them. At that point, FEI could have burdened the Court with another motion to compel or it could have, as it chose to do, issue a subpoena to HSUS for the same documents. Either FFA or HSUS has the documents requested by FEI and already deemed relevant by the Court. Indeed, FFA has been ordered to produce ***all*** documents in its possession, custody, and control regarding ***all*** payments to Rider (whether made by FFA, HSUS, or others). HSUS cannot avoid producing the documents at issue based on complaints that FEI should have asked FFA for them. FEI has done that, to no avail. HSUS's position is ludicrous: that documents already deemed relevant by the Court are actually irrelevant and that documents previously requested from FFA should have been requested from FFA.

HSUS's circular arguments and continued defiance of the Court's prior order further support FEI's request for costs incurred in bringing this motion and for withstanding HSUS's frivolous objections. HSUS has not responded to FEI's subpoena in good-faith. The Court cannot ignore that HSUS attempted to hold FEI at bay with objections it has since abandoned because they could not be defended in court. See Ex. 13, Kindler letter to Gasper (6/29/07) (raising four objections abandoned in HSUS's opposition brief, including overbroad in time, confidential and proprietary, First Amendment, and inaccessibility of recovering electronic information). Nor can the Court ignore that HSUS complained for months that FEI's subpoena was unduly burdensome but now totally fails to even attempt to substantiate this objection. Nor does HSUS defend its improper refusal to produce basic information by the reasonable deadlines

to which the parties agreed.[1] HSUS never once explains why it was unable to provide FEI with a list of payments it made to Rider or WAP for more than six weeks after the parties' meet and confer and more than three months after receiving a subpoena requesting not just the list but all relevant documents. Finally, the Court cannot ignore that most, if not all, of the objections actually relied upon by HSUS in opposition to FEI's motion have already been explicitly rejected by the Court in its prior rulings. HSUS's offer to provide certain information about payments to Rider neither provides FEI with all of the information deemed relevant by Judge Sullivan, nor provides FEI with the underlying documents (also as required by Judge Sullivan). HSUS should be held accountable for its outright refusal to produce documents already deemed relevant by the Court as well as its continual assertions of objections that previously have been overruled by the Court.

ARGUMENT

A. The Documents Requested by FEI Are Relevant to Its Defense

Echoing one of plaintiffs' favorite themes, HSUS complains that FEI's subpoena should not be enforced because it allegedly does not relate to plaintiffs' allegations of animal abuse. Opp. at 2 (subpoena does not "relate[] to FEI's treatment of its elephants"). FEI certainly looks forward to disproving (whether at trial or otherwise) plaintiffs' offensive and baseless allegations that FEI harms the very elephants that its employees have dedicated their lives to care for and to nurture. No matter how baseless the allegations at issue in this lawsuit, however, FEI need not

[1] HSUS is wrong that the deadlines for production were unilaterally established by FEI. See, e.g., Ex. 21, E-mail Among Counsel (in which HSUS promised to submit certain information by a certain time before ignoring its own schedule entirely). Similarly disingenuous is HSUS's argument that it has been unduly burdened by FEI's subpoena because it has been "forced to expend almost $20,000." See Opp. at 1. As best FEI can tell, the money referenced by HSUS was spent preserving documents requested by the subpoena. All such documents, however, should already have been subject to a document preservation order. If HSUS reasonably anticipated the possibility of joining this litigation for purposes of the attorney-client privilege, see Opp. at 20, it should have been preserving all documents relevant to the litigation in any event. FEI's subpoena is not the cause of HSUS's belated expenditure on document preservation.

stand idly by while plaintiffs and HSUS pay for the services of a paid plaintiff. FEI, like any defendant, has a right to insist that the plaintiffs who accuse it of wrongdoing (again, no matter how frivolous and baseless such allegations may be) actually have Article III standing. Plaintiffs do not get a free pass to hire the services of a party and a key witness merely because they believe (albeit wrongfully) their position to be morally superior.

Contrary to HSUS's argument, discovery in this case is not limited to plaintiffs' allegations. Nor is it limited to the defenses asserted in FEI's Answer. See Opp. at 2 (subpoena does not "relate[] to FEI's treatment of its elephants or any defense FEI raised in its Answer"); id. at 11 ("[n]othing in the ... subpoena served on HSUS relates in any way to the [ESA] claim ... or to any defense that FEI raised in its Answer"). Notwithstanding the irony of HSUS's position,[2] Judge Sullivan has ruled that discovery shall proceed relating to "the claims and defense in this lawsuit." Order (8/23/07) (Docket No. 178) (hereinafter "Order") at 12 (cited in Opp. at 11). Try as it might to distort Judge Sullivan's prior order, HSUS is simply wrong that FEI may only discover documents relating to the defenses asserted in its Answer. FEI may pursue discovery with respect to any applicable defense – in its Answer or otherwise. For example, the documents requested by FEI's subpoena bear heavily upon plaintiffs' standing in this case and the credibility of their lead witness – neither of which is an affirmative defense. Judge Sullivan already has ruled that many of the documents withheld thus far by HSUS are relevant to this lawsuit and discoverable by FEI. HSUS's position conflicts with the Court's prior rulings.

[2] Plaintiffs intentionally hid evidence relating to their payments to Rider until long after FEI's Answer was due. To the extent such information is not included in FEI's Answer, it is only because of the drastic measures that plaintiffs took to conceal such information.

B. HSUS Must Produce a *Complete* Response to Request No. 1

HSUS does not dispute that FEI is entitled to documents in order to determine whether HSUS should be made a party to this litigation in light of its merger/combination with FFA; rather, HSUS insists that FEI already has enough information to make that determination. HSUS's argument, however, relies upon the wrong legal standard. Its repeated assertions that FFA remains a legally-recognized entity and that FEI cannot "pierce the corporate veil" are irrelevant.

In order to determine whether HSUS should be added as a party, FEI need not "pierce the corporate veil" as HSUS suggests.[3] Rule 25(c) grants the Court discretion to substitute or join a party whenever "any transfer of interest" has occurred; the Rule is not limited to "mergers." It is irrelevant, therefore, whether FEI can "pierce the corporate veil" or whether FFA remains a legally distinct entity. See Opp. at 11-14. The operative test under Rule 25 is whether HSUS is a transferee of interest in FFA. Luxliner P.L. Export Co. v. RDI/Luxliner, Inc., 13 F.3d 69, 73 (3d Cir. 1999). Importantly, that test grants the Court discretion to substitute or join HSUS as a party if its transaction with FFA "amounted to a *de facto* merger or consolidation." Id.[4] HSUS's proclamation that FFA remains a legally distinct entity does nothing to prove or disprove whether a *de facto* merger has occurred. HSUS must produce the basic documents requested (such as the transaction agreement, for example) so that FEI and, if ultimately necessary, the

[3] FEI is not seeking to hold a shareholder of HSUS liable for the company's conduct or liabilities. There is no reason, therefore, for the Court to conduct an analysis of the three factors identified by HSUS. Nonetheless, even if there were, FEI should not have to take HSUS's word for it that there is no "unity of interest" among HSUS and FFA. Regardless of what the appropriate test is, it remains unclear why HSUS refuses to produce the limited documents requested by FEI (documents "sufficient to show" the relationship between HSUS and FFA) so that FEI and the Court can conduct their own analyses without having to rely upon HSUS's unsupported allegations of fact.

[4] Whether HSUS is a transferee of interest in FFA is a question of state law. Although Luxliner applied New Jersey law, the same test applies in New York and Washington, DC (the jurisdictions in which FFA and HSUS are incorporated, respectively). See Allen Morris Commercial Real Estate Servs. Co. v. Numismatic Collectors, Inc., 1993 U.S. Dist. LEXIS 7052, Civil No. 90-0264 (S.D.N.Y. May 27, 1993); Reese Bros., Inc. v. United States Postal Serv., 477 F. Supp. 2d 31, 40-41 (D.D.C. 2007) (citing Bingham v. Goldberg, 637 A.2d 81, 89-90 (D.C. 1994)). HSUS, therefore, may be added to this lawsuit if its "combination" with FFA constituted a *de facto* merger.

Court may determine whether a *de facto* merger has occurred and whether HSUS should be added to this lawsuit. In Luxliner, the Third Circuit held that an evidentiary hearing was required for the Court to make that determination. Id. In this case, HSUS must at least produce the documents requested so that FEI and the Court may have access to all of the pertinent facts, not just those that HSUS has unilaterally deemed relevant. Id. at 73 ("To determine whether an entity is a transferee of interest so as to trigger this discretion, however, a district court's mission is one of applying law to ***facts***.") (emphasis added).

Nothing in Rule 25 or elsewhere permits HSUS to withhold documents based on its unilateral and unsupported assertions that a merger has not occurred and that corporate formalities still exist. To be clear, FEI is not seeking to substitute or join HSUS at this time. It only seeks to discover basic documents (such as the actual agreement) to determine precisely who is bringing this lawsuit. As detailed in FEI's motion, this determination will play a crucial role in determining what additional evidence FEI may discover and present at trial. Mot. at 14.

FEI's request was for documents "sufficient to show" the relationship between HSUS and FFA. The documents that HSUS has produced are not "sufficient" to show the relationship. None of the documents even refers to the transaction between the two entities (whatever it was), and HSUS itself cannot even state in its opposition what its current relationship to FFA is. Instead, HSUS describes the relationship with vague terms like "synergies." Opp. at 5. All of this beating around the bush could easily have been avoided by simply producing whatever documents exists (e.g., agreement) that states what the transaction between FFA and HSUS was. Surely there was such a document, and it has not been destroyed. That HSUS continues to hide the ball on this suggests that it does have something to hide, namely, that HSUS's relationship

with FFA is close enough to deem HSUS the real party in interest in this litigation. Therefore, the Court should compel a complete response to Request No. 1.

C. HSUS Must Produce *All* Documents Relating to Its Payments to *or for* Rider

Judge Sullivan already has granted three separate motions to compel on the issue that plaintiffs and WAP (a non-party) must produce all documents concerning payments or donations to or for Rider from any animal advocate or animal advocacy organization. See Order at 3 (Rider must produce "all responsive documents and information concerning his income and payments from other animal advocates and animal advocacy organizations"); id. at 6 (the organizational plaintiffs must produce "all responsive documents and information concerning payments to Tom Rider, ***regardless of whether such payments were made directly to him or indirectly through other means*** ..."); id. at 8 (WAP must produce all "non-privileged documents and information ... related to payments or ***donations for or to*** and expenses of Tom Rider ...") (emphasis added). Not only has HSUS boldly refused to produce documents already deemed relevant by the Court, it attempts to defend its conduct with arguments that are squarely rejected by the Court's prior ruling. Even if HSUS's alleged "facts" are accepted as true, HSUS cannot distinguish itself from the Court's prior ruling on the basis that (a) it is an alleged non-party (so is WAP), (b) its payments to Rider are not from a "party opponent" (neither are those already deemed relevant by the Court), and (c) it offered to provide a list of ***certain*** payments it has made for Rider (so did WAP – in fact, WAP provided a list of ***all*** such payments).

HSUS complains that FEI could get the documents from a party to the lawsuit and that FEI's requests are overbroad. These objections, however, ignore the reality of this case, which is (a) FEI tried to get these documents from plaintiffs but FFA (which is operated and funded by HSUS) refused to produce them and (b) plaintiffs (including FFA/HSUS) have sought to conceal

documents by improperly construing FEI's document requests as narrowly as possible. As explained below, HSUS's arguments either already have been rejected by the Court or have no merit in any event.

1. The Court Already Has Ruled That a Non-Party Must Produce All of Its Documents Concerning Payments and Donations to or for Rider

HSUS cannot distinguish itself from the Court's prior ruling on the basis that it allegedly is not a party to this litigation. See Opp. at 15 ("One difference that should have been immediately evident to FEI: HSUS is not a party to the ASPCA/FEI litigation."). Notwithstanding the insincerity of that argument,[5] Judge Sullivan already has ruled that a non-party (WAP) must produce all of its documents concerning payments or donations to or for Rider. Order at 8. HSUS has stated no basis for different treatment.

2. The Court Already Has Ruled That *All* Payments to Rider Are Relevant Regardless of Their Source

According to HSUS, "the relevant issue is whether Tom Rider's testimony has been influenced by money received directly or indirectly from ***a party opponent***" and HSUS's own payments to Rider are only "marginally relevant." Opp. at 16 (emphasis added). However, the Court already has ruled that ***all*** payments to Rider from ***any animal advocate or animal advocacy organization*** are relevant to evaluating his credibility. See Order at 3 (compelling Rider to produce all documents and information concerning such payments); id. at 6, 8 (compelling the organizational plaintiffs and WAP to produce the same, regardless of the source of such payments). Thus, it is not limited to "party opponent" payments. Indeed, the Court

[5] HSUS is not a typical "non-party." Cf. Opp. at 15 ("parties are generally permitted less expansive discovery against nonparties"). HSUS operates, funds, and manages FFA's operations. Indeed, it pays the salary of each FFA employee and pays a substantial percentage of FFA's legal fees. HSUS also employs the attorney responsible for handling this litigation on behalf of FFA. HSUS, moreover, has made payments for Rider on FFA's behalf in connection with this case. It is not unreasonable to request from HSUS documents relating to litigation that it manages and funds on behalf of an entity that it controls and operates, particularly when FFA has taken the position that it will not produce HSUS documents.

already has compelled WAP and FFA to produce their documents concerning HSUS's payments – the very same payments that HSUS now audaciously proclaims to be irrelevant.

Judge Sullivan held that FEI is entitled to discover all documents concerning ***all*** payments to or for Rider by any animal advocate or animal advocacy organization (such as HSUS). The Court also permitted plaintiffs and WAP to redact the ***identity*** of donors who are not plaintiffs or counsel in this case, but this did not "implicitly recognize" that payments from such donors are irrelevant. Cf. Opp. at 16. In fact, the Court ordered that all documents relating to such payments be ***produced***.[6]

Nonetheless, even if discovery were limited to payments made by plaintiffs or their counsel, HSUS's payments for Rider would be discoverable since they qualify as both. HSUS's payments for Rider have been identified internally as FFA expenses. HSUS's payments for Rider are made on behalf of FFA and, therefore, are just as relevant as those made by FFA itself.[7] HSUS's payments, moreover, have been sent by plaintiffs' counsel. Payments mailed by Jonathan Lovvorn on HSUS letterhead are just as relevant as those mailed by Eric Glitzenstein on WAP letterhead.

The Court's prior ruling is clear: All payments to or for Rider from animal advocacy organizations (such as HSUS) are relevant and the related documents must be produced.

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[6] HSUS also conveniently ignores that the purpose of redacting the identity of certain donors is to prevent the disclosure of an unknown donor's identity, which could potentially infringe (according to plaintiffs) on the donor's freedom of association. Any such concern has no relevance here because FEI knows that HSUS has made payments for Rider. HSUS's association with plaintiffs, Rider, and WAP is no secret.

[7] Pursuant to the Court's prior ruling, FFA has produced a handful of documents from the files of people who worked for FFA prior to January 1, 2005 relating to HSUS's payments for Rider (thereby conceding the relevance of such payments and acknowledging that such documents must be produced). If left unchecked, HSUS's argument would mean that documents about its payments in the files of certain FFA employees (who are paid by HSUS and have related HSUS obligations) are relevant to this litigation but that the documents from the files of other HSUS employees, including those who now work on FFA's litigation matters such as this case (e.g., Jonathan Lovvorn and Ethan Eddy), are irrelevant to this lawsuit. FEI should not be denied documents already compelled by a Court order simply because they reside in the files of an individual who did not work for FFA before HSUS began to fund its existence and to pay Rider on its behalf.

Nonetheless, even if the Court were to reverse its prior ruling and hold that only payments from plaintiffs and their counsel are relevant to evaluating Rider's credibility, HSUS's payments would still be discoverable because they are precisely that.

3. The Court Already Has Ruled That A List of Payments to Rider Is Not a Sufficient Response to FEI's Document Requests

HSUS cannot avoid producing ***documents*** concerning its payments to or for Rider on the basis that it already provided to FEI a ***list*** of its payments to WAP. See Opp. at 16-17. As discussed below, HSUS's list of payments is incomplete. Nonetheless, even if HSUS disclosed the date and amount of all payments already deemed relevant by the Court, it still must produce the corresponding ***documents***. Indeed, WAP recently was compelled to produce all "non-privileged ***documents*** and information ... related to payments or donations for or to and expenses of Tom Rider ..." notwithstanding that it previously provided FEI with a mere ***list*** of such payments and donations. Order at 8 (emphasis added).[8] HSUS cannot avoid the clear implication of the Court's prior ruling no matter how many times it misconstrues it. FEI is not only entitled to "information" concerning payments to Rider; it is entitled to all "***documents and*** information" concerning such payments. Compare Opp. at 15 ("HSUS fully understands that Judge Sullivan ruled ... that FEI was entitled to '***information*** concerning the payments to Tom Rider ...'") with Order at 3 (Rider must produce "all responsive ***documents and information*** concerning his income and payments ..."); id. at 6 (the organizational plaintiffs must produce "all responsive ***documents and information*** concerning payments to Tom Rider, ..."); id. at 8

[8] The Court's ruling that WAP may withhold "monthly financial reports, bank statements, or phone bills" is not applicable here. Order at 9. Unlike HSUS, WAP specifically identified certain categories of documents that would allegedly be burdensome to produce and allegedly would not provide FEI with any additional meaningful information. HSUS seeks to withhold ***all*** documents related to its payments, not just certain categories of allegedly mundane and duplicative documents such as "monthly financial reports, bank statements, or phone bills."

(WAP must produce all "non-privileged ***documents and information*** ... related to payments ...") (emphases added).[9]

HSUS's offer to provide certain information in lieu of the actual documents requested is insufficient and such an approach already has been rejected by the Court. Nonetheless, the Court cannot ignore that the ***information*** provided thus far by HSUS is useless and intentionally vague. HSUS's affirmation that it has made no payments "to Rider" is meaningless. See Opp. at 4, 7, 10, 11, 16, 17. It is beyond credulity that HSUS did not know that its payments to the alter ego of its Vice President's former law firm would not be funneled to Rider, particularly since the alter ego's payments to Rider in 2005 exceeded 100% of its entire revenue. Nonetheless, Judge Sullivan has ruled that all payments to ***or for*** Rider must be disclosed and that the related documents must be produced. See Order at 6 (the organizational plaintiffs must produce "all responsive documents and information concerning payments to Tom Rider, regardless of whether such payments were made ***directly to him or indirectly through other means*** ..."); id. at 8 (WAP must produce all "non-privileged documents and information ... related to payments or donations ***for or to*** and expenses of Tom Rider ...") (emphases added). Regardless of HSUS's semantics, all documents related to its payments ***for Rider*** have already been deemed relevant.

It also is irrelevant that HSUS has offered to provide limited information about payments it has made to other organizations identified by FEI. Opp. at 17. It is HSUS's responsibility to identify the payments it has made to or for Rider. See Ex. 16, Gasper letter to Stowe (8/3/05) (stating more than two months ago that HSUS's accounting department and the individuals

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[9] Indeed, documents recently produced by FFA confirm the wisdom of the Court's prior ruling. FEI has long maintained that documents relating to the payments to Rider will present a more accurate and reliable basis to assess the purpose and effect of such payments – two crucial areas of inquiry in evaluating Rider's credibility in light of such payments. For example, FFA recently produced documents identifying payments to Rider as a "litigation" expense. See Ex. 26 to FEI's Notice of Supplemental Points (10/2/07) (Docket No. 198). Such documents further underscore why it is vital for FEI and the Court to have access to all documents concerning payments to Rider. HSUS's alleged list of payments sheds very limited light, if any, on the purpose or effect of such payments.

involved in this litigation (e.g. Jonathan Lovvorn) ought to quickly be able to identify any and all such payments). It is not FEI's responsibility to guess which entities or individuals might have been used by HSUS to funnel money to Rider. Indeed, FEI recently learned that plaintiff AWI paid Rider $500 by issuing a $600 check to one of its employees who wired the money to Rider, paid the wire transfer fee, and placed the rest back into AWI's petty cash fund. See AWI's Latest Response to Inter. No. 21 (attached as Ex. 10 to FEI's Notice of Supplemental Points (10/2/07) (Docket No. 198)). Such a payment underscores the frivolity of HSUS's argument. Under HSUS's approach, FEI never would have discovered this payment unless it happened to correctly guess the name of the employee through whom the payment was funneled. FEI should not be denied relevant documents or information simply because it cannot blindly guess with one hundred percent accuracy which individuals or entities might have been used by HSUS to funnel money to Rider. This, of course, is the result that HSUS seeks.

4. The Requested Documents Are Not Available From Parties to the Litigation

The documents requested by FEI are neither in its possession nor available elsewhere. HSUS's argument that FEI could have requested these documents from its "proper party opponents," see Opp. at 18, ignores the fact that FEI did that but was told FFA does not have control over HSUS's documents. Moreover, the other plaintiffs have engaged in wide-spread spoliation.[10] FEI thus had no choice but to subpoena HSUS.

FEI's subpoena requests all documents concerning payments or donations to or for Rider. That includes internal documents such as meeting notes, intra-company e-mails, and accounting

[10] HSUS defines FEI's "proper party opponents" to include "WAP, the other ASPCA/FEI litigation Plaintiffs, or Tom Rider himself." Opp. at 18. It is unclear why HSUS continues to refer to WAP as a "party opponent" of FEI. WAP is not a party to this lawsuit but has been compelled to produce all of its documents concerning all of its payments or donations to or for Rider. No matter how many times HSUS calls itself a non-party and WAP a "party opponent" of FEI, it cannot escape the indisputable fact that Judge Sullivan already has compelled a non-party to produce the very documents requested by FEI's subpoena.

records – none of which would be available from anyone other than HSUS or FFA. See Mot. at 15 n.8. Despite a Court order compelling FFA to produce all of its documents concerning payments to Rider (regardless of whether the check was issued by FFA or HSUS), FFA continues to insist that the files of certain people (e.g., Jonathan Lovvorn and Ethan Eddy) who are paid by HSUS to manage this litigation on behalf of FFA need not be searched for such documents. HSUS's argument that FEI could obtain the documents at issue from FFA is disingenuous at best.[11] FEI asked FFA for these documents, but has been told by FFA (an entity controlled by HSUS and operated by people paid by HSUS) that it cannot have them. Now that FEI has been forced to subpoena HSUS for the records that FFA refuses to produce, HSUS cannot avoid production by arguing FEI should get them from FFA. HSUS/FFA's circular argument should not be permitted to stand.

FFA is the only plaintiff with access to HSUS's internal documents, yet FFA has refused to produce them. FEI, therefore, cannot obtain ***all*** of the documents requested by its subpoena from its "proper party opponents." It is irrelevant, therefore, that FEI obtained from WAP some correspondence with HSUS. See Opp. at 17. HSUS's refusal to produce ***all*** responsive documents is not excused simply because FEI has obtained ***some*** documents that HSUS previously shared with an entity that FEI happened to subpoena earlier. Compare Opp. at 17 (calling FEI's request for ***all*** documents sanctionable since FEI already had ***some*** documents) with Order at 3, 6, 8 (compelling Rider, the organizational plaintiffs, and WAP to produce all non-duplicative documents concerning payments notwithstanding that FEI had some documents

[11] FEI could not have requested from FFA documents relating to its combination/merger with HSUS on January 1, 2005 since the deadline for issuing document requests in this case was in 2004. FEI did, however, issue document requests to FFA concerning payments to Rider and has been refused access to the documents at issue in this motion.

on that issue already).[12] The documents requested by FEI's subpoena cannot be obtained elsewhere.

5. FEI's Requests Are Relevant and Not Overbroad

HSUS simply has refused to produce the documents requested by FEI notwithstanding a prior Court order holding that all such documents are relevant and rejecting all of HSUS's arguments addressed above. HSUS's defiance of that order is astounding and is not excused by its allegations that FEI's subpoena is overbroad. A simple request-by-request look at the documents at issue in this motion demonstrates that everything FEI seeks has been deemed relevant by Judge Sullivan and that FEI's requests are as narrowly tailored as possible. To the extent that HSUS believes FEI's requests to be explicit or duplicative, it is only because plaintiffs (including HSUS's cohort FFA) have demonstrated a willingness to construe FEI's requests as narrowly as possible to avoid producing documents they would like to pretend do not exist. See, e.g., FFA's Latest Response to Inter. No. 21 (attached as Ex. 8 to FEI's Notice of Supplemental Points (10/2/07) (Docket No. 198)) (acknowledging that the Court recently compelled FFA to produce documents and information previously withheld because FFA narrowly construed FEI's requests).

Request No. 2 seeks all documents relating to the litigation. It is plainly evident that documents relating to this litigation (particularly those in the files of an entity that has combined with a named-plaintiff and that pays the salary of numerous people who work on this litigation) are relevant to this case. HSUS's objection that this request calls for privileged material gets it

[12] Nonetheless, even if FEI could theoretically obtain ***all*** of HSUS's relevant documents from its "proper party opponents," the Court cannot ignore the fact that multiple plaintiffs have acknowledged their widespread destruction of documents that have been deemed relevant by Judge Sullivan, including documents concerning payments to Rider. See Rider Decl. ¶¶ 3, 5; ASPCA Decl. ¶¶ 2(a), 2(c) (attached as Exs. 14 & 18 to FEI's Notice of Supplemental Points (10/2/07) (Docket No. 198)).

nowhere. Compare Opp. at 18 with Ex. 1, Subpoena at Instruction No. 10 (explicitly permitting HSUS to log all such allegedly privileged documents in lieu of actually producing them).[13] HSUS, moreover, cannot escape this request by misconstruing (yet again) the Court's prior ruling. Although the Court held that plaintiffs need not produce all communications with other animal advocates, it specifically compelled them to produce documents and information concerning communications with animal advocates regarding this litigation. Compare Opp. at 18-19 with Order at 3. FEI's request for documents related to this litigation is relevant and narrowly tailored.

Similarly, Request Nos. 3 and 8 seek documents relating to donations and fundraising intended for Rider – documents that already have been deemed relevant by Judge Sullivan. Order at 8. Indeed, Request No. 8 seeks documents relating to plaintiffs, their counsel's or WAP's requests for donations to Rider.[14] This is narrowly focused upon the type of documents already deemed relevant by Judge Sullivan. Notwithstanding HSUS's insistence that such documents have nothing to do with payments to Rider, see Opp. at 19, the Court has specifically concluded that they do and that they must be produced.

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[13] HSUS alleges that certain documents are privileged because they were prepared in anticipation of being "dragged into this lawsuit against FEI." Opp. at 20. It is ironic indeed that HSUS spends the first nineteen pages of its brief arguing that FEI is unreasonably seeking discovery against an "unwilling third-party" then spends the twentieth page arguing that its documents are privileged because it reasonably anticipated that it could ultimately become a party.

[14] The only reason FEI's requests seek documents "concerning the Litigation, the presentation of elephants in circuses, Tom Rider, Defendant, and WAP" is to ensure that HSUS does not avoid production by euphemistically labeling its payments for Rider as payments for something else. FEI has no interest in compelling the production of documents concerning payments from HSUS to AWI that are wholly unrelated to FEI or Rider. Yet, given the gamesmanship already employed by FFA/HSUS, FEI had no choice but to be explicit as possible in its requests to ensure that it is not denied documents simply because it did not guess the label that HSUS chose to put on its Rider payments. FEI is not interested, nor do the Federal Rules of Civil Procedure require it, to play HSUS's shell game. FEI just wants the documents it needs, and that the Court has already found to be relevant and ordered all others to produce.

Request No. 5 seeks documents relating to Rider. While HSUS complains that such a request ***could*** be overbroad because it ***could*** encompass documents not relating to payments, HSUS tellingly never states that it has any such documents. FEI's request is as explicit as possible to confront the reality that plaintiffs (including FFA) have previously construed FEI's document requests as narrowly as possible. Absent proof that HSUS actually has documents relating to Rider that do not involve payments to him or his involvement in this litigation (two categories of documents that already have been deemed relevant by the Court), there is no reason to conclude that FEI's request for all documents relating to Rider is burdensome or overbroad. Similarly, HSUS's complaint that Request No. 7 (all documents relating to WAP) ***could*** be overbroad because it ***could*** encompass documents relating to issues other than payments also rings hollow. Again, HSUS does not actually allege that it has such documents, only that FEI's subpoena could be construed to encompass such documents.[15] All documents related to WAP that relate to payments or to this litigation have already been deemed relevant.

Finally, Request No. 6 seeks documents relating to former employees of FEI. HSUS complains that this request has nothing to do with payments to Rider, yet ignores the fact that all of the individuals identified by FEI have been, will be, or might be witnesses in this case. Just as plaintiffs' / HSUS's payments to Rider are relevant to his credibility, payments to other witnesses are relevant to their credibility. Tellingly, HSUS does not state that it has no such documents. Instead, HSUS asks the Court to believe that any such documents would be irrelevant and overbroad.

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[15] Indeed, it appears that the vast majority, if not all, of WAP's financial efforts are directed to Rider. As discussed above, for example, more than 100% of the donations WAP received in 2005 were given to Rider. It is highly unlikely, therefore, that HSUS's documents relating to WAP refer to anything other than WAP's payments to Rider.

CONCLUSION

Accordingly, for the reasons stated herein and in defendant's motion, defendant's motion should be granted. HSUS should be compelled to immediately produce all documents responsive to Request Nos. 1-3 and 5-8 and to pay FEI's costs and fees for having to file the motion. The Court already has ruled that the documents requested by FEI are relevant and that the objections raised by HSUS are without merit.

Dated this 18th day of October, 2007.

Respectfully submitted,

/s/

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **Reply in Support of Defendant's Motion to Compel the Production of Documents Subpoenaed from the Humane Society of the United States** was served on HSUS on October 18, 2007 as follows:

Via first class mail, postage prepaid:

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I further certify that on this 18th day of October, 2007, the foregoing brief was 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