

Much like plaintiffs, HSUS has refused to obey the Court's Order and played word-games instead. FEI has reason to believe that rather than producing the documents ordered, HSUS has proffered carefully-crafted (yet wholly misleading) assurances that it has produced all documents it thinks it has been ordered to produce so that it can further evade the actual reach of the subpoena as enforced by Court Order. Astoundingly, HSUS now implies that the documents sought by FEI belong to FFA, an entity controlled by HSUS. Yet, when FEI previously asked FFA for these documents, it was told HSUS had them. Judge Sullivan has ordered FFA to produce all documents concerning payments to Tom Rider and now Judge Facciola has ordered HSUS to do the same. Yet, in the face of these two Court Orders, both FFA and HSUS pretend they cannot produce the documents because the other one has them. The finger-pointing and endless shell game is patently offensive, and the deliberate concealment of documents must stop.

Therefore, FEI hereby moves to: (i) enforce the Court's Order against HSUS; (ii) issue an order directing HSUS to appear at the contempt hearing scheduled for February 26, 2008 and March 6, 2008; (iii) subject HSUS to all sanctions the Court deems fit and proper; and (iv) award FEI its costs and fees associated with this motion and the upcoming hearing related to same.

FACTUAL BACKGROUND

FFA has retained no employees of its own since merging with HSUS in 2005. Instead, all of FFA's employees are paid by HSUS and many, if not all, have overlapping HSUS responsibilities. See FEI's Motion to Compel the Production of Documents Subpoenaed From HSUS (9/21/07) (Docket No. 192) ("Motion") at 2-3. For the last three years, FFA has hidden crucial documents from FEI by refusing to produce files that it claims belong to HSUS (e.g., the files of HSUS employees who admittedly perform work on behalf of FFA). In lieu of burdening

the Court with this baseless issue of “control”, FEI subpoenaed HSUS for the documents that FFA refused to produce. Thus, regardless of which entity FFA and HSUS believed to control the documents, one or the other would have to produce them as both were now covered by the document requests to FFA and the subpoena to HSUS.

Nonetheless, despite the issuance of a subpoena that resolved FFA’s objection, both FFA and HSUS have persisted in their refusal to produce damaging documents. FEI, therefore, having already moved to compel FFA’s compliance with discovery requests, was forced to file another motion to compel HSUS’s compliance with the subpoena. Both of these motions have since been granted in large part. On August 23, 2007, the Court ordered FFA to produce “all responsive documents and information concerning payments to Tom Rider” and a sworn declaration, identifying any such documents no longer in its possession and stating what became of such materials. Order (8/23/07) (Docket No. 178) at 6-7. On December 3, 2007, moreover, the Court ordered HSUS to produce, among other things:

“all documents in its possession, control or custody that were created by any other party to this litigation in which that party discusses this litigation or any aspect of it”;

“documents that pertain to Tom Rider’s ‘funding for his public education and litigation efforts’ provided the funding came from ‘a party, any attorney for any of the parties, or any officer or employee of the plaintiff organizations or WAP’ or that pertain to payments made to Rider by any such person”;

“all documents that ‘refer, reflect or relate’ to Tom Rider, including all communications with or to him, and documents that pertain to payments made to him”; and

“any documents that fall within Judge Sullivan’s August 23, 2007, order that pertain to WAP [EGS Order at 8] that are in HSUS’s possession, custody or control.”

Order at 1-2.

Notwithstanding the Court's explicit Order to produce a wide array of documents (including all documents relating to Tom Rider) and HSUS's prior representations that producing such documents would be burdensome, see, e.g., HSUS's Opp. to FEI's Mot. to Compel (10/5/07) (Docket No. 202) at 18, 19 (complaining that FEI's requests would require "expansive" and "immense volumes of unnecessary" discovery), HSUS has now produced a mere *sixteen pages* relating to Rider or payments to him. Like FFA and the other plaintiffs, HSUS is playing word-games with the Court's Orders and acting as though "all documents [concerning] Rider" does not really mean "all documents [concerning] Rider." HSUS, moreover, has justified its shockingly insufficient production by claiming that it only paid Rider on FFA's behalf; thus, according to HSUS now, it makes sense that HSUS has few payment-related documents. See Ex. 1, Stowe letter to Gasper (12/17/07). Astoundingly, after years of FFA implying that it does not control the documents concerning payments to Rider because such payments were made by HSUS, HSUS now insists in the face of a Court Order that it too does not control those very documents because it merely made the payments on FFA's behalf. All of this brazen maneuvering by FFA and HSUS begs the question: How can it be that the documents that belong to FFA and/or HSUS are not in the possession, custody or control of either FFA and/or HSUS? For years, FEI has been harassed mercilessly by plaintiffs in this case about discovery. Why should FFA or HSUS now be permitted to avoid their discovery obligations?

FEI now has been forced to obtain one Order compelling FFA to produce the documents at issue and another Order compelling HSUS to do the same. Yet, neither entity has produced the documents. Instead, both FFA and HSUS insist that the documents are not within their possession, custody, or control, and each still implies that FEI must obtain the documents from

the other one. This shell game, which has lasted more than three years, is appalling. HSUS and FFA are not two independent entities; HSUS controls and operates FFA. One or the other has the documents that FEI has sought for almost four years and yet they both refuse to produce them. FEI already has obtained two Orders on this subject and already has moved to hold FFA in contempt. Now, FEI has no choice but to inform the Court of HSUS's behavior and to request that the Court's Order dated December 3, 2007 be enforced and that HSUS also be ordered to appear at the Court's hearing concerning FFA's and the other plaintiffs' failure to comply with existing discovery Orders. See Fed. R. Civ. P. 45(e) (failure to comply with a subpoena constitutes contempt); Food Lion, Inc. v. United Food & Commercial Workers Int'l Union, 103 F.3d 1007, 1016 (D.C. Cir. 1997) (party that disobeys an Order compelling compliance with a subpoena is in contempt of Court).²

ARGUMENT

A. HSUS Must Produce All Documents That Refer, Reflect, or Relate to Tom Rider and/or Payments to Him

HSUS has been ordered to produce all documents relating to Rider and/or his funding. Yet, in the face of such an explicit Order, HSUS has produced a mere sixteen pages concerning either Rider or the numerous payments (of at least \$11,500) that HSUS made to him. Prior to the Court's Order, HSUS insisted that FEI was only entitled to know the dates and amounts of its payments to Rider. HSUS's Opp. to FEI's Mot. to Compel (10/5/07) (Docket No. 202) at 16-17. The Court, however, disagreed and ordered HSUS to produce "all documents" related to Rider or his funding. Yet, even now, HSUS refuses to do so. Indeed, the documents that HSUS

² Pursuant to LCvR 7(m), FEI hereby certifies that it attempted in good faith to confer with HSUS prior to filing this motion. The parties exchanged written correspondence about the issues presented herein, see Ex. 2, Gasper letter to Stowe (12/14/07) and Ex. 1, Stowe letter to Gasper (12/17/07), and undersigned counsel left voicemail messages for HSUS counsel on December 17, 2007 and January 24, 2008. Counsel for HSUS confirmed (in response to an e-mail from undersigned counsel) on January 24, 2008 that HSUS opposes the relief sought by FEI.

reluctantly produced include nothing but copies of checks, check requests, and cover letters to WAP. In essence, HSUS produced not what the Court ordered, but only what it previously argued FEI was entitled to – documents sufficient to show its payments to Rider – and nothing else. Shockingly, HSUS has not even bothered to produce any documents relating to a \$3,000 payment it made for Rider in May 2005. See Ex. 24 to FEI's Motion (Stowe letter to Gasper (9/20/07) (confirming such a payment was made)).

Like plaintiffs (including FFA), HSUS has simply refused to produce any communications concerning Tom Rider or the payments to him. Indeed, FEI previously obtained from WAP copies of three such documents that HSUS has failed to produce. Ex. 3, E-mails Among Plaintiffs, Counsel, WAP, and HSUS Concerning Tom Rider. These few e-mails are merely examples of the types of documents that FEI reasonably believes to exist and that HSUS has withheld in the face of the Court's order. The fact that WAP was willing to produce these innocuous e-mails with HSUS employees does not excuse HSUS's refusal to produce them or its refusal to produce any and all other e-mails commanded by the Court's Order.

The e-mails that FEI obtained from other sources involved Ethan Eddy and Jonathan Lovvorn – two HSUS employees who have communicated with plaintiffs and WAP about Rider. All of those individuals' communications pertaining to Rider must be produced. FEI, moreover, understands that Michael Markarian (FFA's President and HSUS's Executive Vice President) has been one of the individuals responsible for coordinating with plaintiffs and counsel concerning FFA's/HSUS's payments to Rider. It is no excuse for HSUS not to produce Court-ordered documents simply because Mr. Markarian is FFA's President. He also is an employee of HSUS. Furthermore, Mr. Markarian sends and receives e-mails using an HSUS e-mail address.

HSUS has possession, custody, or control over Mr. Markarian's e-mails and his communications concerning payments to Rider must be produced.³

The record in this case amply supports the assertion that HSUS is in violation of the Court's Order. Not only is it beyond credulity to believe that HSUS has no other documents concerning Rider or payments to him (e.g., no documents about a \$3,000 payment and no communications about any of the payments), FFA's counsel has acknowledged in open court that it and the other plaintiffs have brazenly withheld (in the face of a separate Court Order) communications about payments to Rider. Importantly, FFA has never denied that it has had communications concerning payments to Rider. Any such communications that reside in HSUS's files (either e-mail or paper) must be produced pursuant to the Court's December 3, 2007 Order. Moreover, the sixteen pages produced is inconsistent with HSUS's own prior representations that complying with FEI's subpoena would require "expansive" and "immense" discovery. HSUS's Opp. to FEI's Mot. to Compel (10/5/07) (Docket No. 202) at 18, 19. Were those representations simply the false and empty posturing of high-priced lawyers, or were those claims of "burden" to be taken at face value? To be clear, the Court granted FEI's motion in large part and ordered HSUS to produce the vast majority of documents sought by FEI's subpoena – namely, documents concerning Rider and payments to him. HSUS's subsequent production of a mere sixteen pages on that subject does not square with the representations they made to FEI and this Court in fighting FEI's subpoena. That is, HSUS raised a big fuss about

³ FEI is, of course, mindful of the Court's ruling that plaintiffs' alleged "media strategy" is irrelevant to this litigation. FEI does not expect FFA or HSUS to produce such documents. However, they must produce "all documents" concerning their payments to Rider. They cannot hide payment documents, which have been deemed relevant, by unilaterally calling them "media" documents, which has become plaintiffs' mantra in this case. For example, the documents produced by WAP and attached hereto do not reflect any "media strategy" and, thus, should have been produced by HSUS.

how hard it was going to be to comply, and now HSUS expects everyone to believe that only sixteen pages were ever involved.

In lieu of complying with the Court's Order in its entirety, HSUS appears to be hiding behind two novel interpretations of that Order. *First*, HSUS appears to take the position that documents concerning payments are within the control of FFA, not HSUS, despite the fact that all of FFA's employees are paid by HSUS, that they have overlapping HSUS responsibilities, that they work in HSUS's offices, and that they appear to use HSUS e-mail addresses for FFA-related business. Setting aside the insincerity of HSUS's argument, the documents at issue were requested from FFA almost four years ago and the Court has ordered FFA to produce them. If HSUS truly does not have control of documents in FFA's files, then it ought to instruct its employees who operate FFA to produce such documents in compliance with the Court's Order pertaining to FFA. Regardless of who produces the documents, two Court Orders compel either HSUS or FFA to produce them. Yet neither entity has done so.

Second, HSUS appears to adopt FFA's novel interpretation of a prior Court Order. Specifically, the Court's Order concerning HSUS compelled the production of all documents relating to WAP that fell within the Court's prior Order concerning FFA and the other plaintiffs. Compare Order at 2 (compelling the production of documents pertaining to WAP that fall within the Court's August 23, 2007 Order) with Order (8/23/07) (Docket No. 178) at 8-9 (ordering WAP to produce *all documents* concerning payments except for monthly financial reports, bank statements or phone bills). Like plaintiffs, however, HSUS has proffered carefully-crafted statements that it does not have any other documents relating to WAP and "covered by [the Court's prior] Order." Ex. 4, Stowe letter to Gasper (12/13/07). Tellingly, HSUS never states that it has produced "all" documents relating to WAP and payments to Tom Rider. Indeed, in

light of the representations made by FFA's counsel at the January 8, 2008 status conference (that plaintiffs do not believe the Court's prior Order compelling the production of "all" responsive payment documents actually compels the production of "all" responsive payment documents), HSUS's recent representation that it has produced all documents "covered by" the Court's prior Order is meaningless.

Simply put, "all" means "all" and HSUS should not be permitted to hide documents behind its and FFA's semantics. Nor should HSUS and FFA be permitted to hide documents behind meaningless distinctions such as whether Mr. Markarian and Mr. Lovvorn were acting on behalf of the entity who made the payments to Rider or the entity on whose behalf the payments were made. **Both entities have been ordered to produce all documents in their possession, custody, or control concerning payments.** HSUS, therefore, should be ordered to appear at the hearing concerning plaintiffs' contempt of Court so that FEI and the Court can adequately evaluate what documents have been withheld and which entity has control over them. Only then will FFA's and HSUS's refusal to comply with Court Orders be fully understood.

B. HSUS Must Produce Documents Discussing This Litigation or Any Aspect of It

HSUS also has been ordered to produce "all documents in its possession, control, or custody that were created by any other party to this litigation in which that party discusses this litigation or any aspect of it." Order at 1. Yet, HSUS has not produced any such documents in response to the Court's Order and it is beyond credulity that they do not exist. HSUS employs at least three people who have been actively involved in this litigation, including Jonathan Lovvorn (counsel of record for plaintiffs), Michael Markarian (the President of FFA and Executive Vice President of HSUS, who has provided testimony, sworn interrogatory answers, and declarations in this case), and Ethan Eddy (HSUS's attorney for this case and previously an MGC attorney

involved in this case). See FEI's Motion to Compel the Production of Documents Subpoenaed From HSUS (9/21/07) (Docket No. 192) at 2-3. Indeed, according to documents produced by WAP, at least two of these individuals have been part of e-mail communications among plaintiffs and their counsel. See, e.g., Ex. 3, E-mails Produced by WAP.

It is beyond credulity that three HSUS employees with such heavy involvement in this litigation do not have any documents in which a party to this lawsuit discusses any aspect of it. It is, moreover, beyond credulity that none of HSUS's other Officers and Directors have any such documents. Indeed, HSUS previously produced the minutes of one FFA Board Meeting, in which Roger Kindler (HSUS's General Counsel & Vice President) provided a "discussion and analysis of developments in [this] litigation." Ex. 22 to FEI's Motion, FFA Board Minutes.⁴ It makes absolutely no sense to believe that neither Mr. Kindler nor anybody else at HSUS has any other documents in which FFA or any other plaintiff discusses this litigation. Moreover, FFA's Board meetings include at least four other individuals who are Officers and Directors of HSUS (including Mr. Markarian). To the extent FFA's Board Minutes or materials were circulated to these individuals using their HSUS e-mail address, they are within the possession, custody, or control of HSUS and must be produced if they discuss this litigation.⁵

The HSUS employees discussed above must have documents in their files in which plaintiffs (whether FFA or others) discuss this litigation. Again, however, HSUS appears to be playing word-games with the Court's Order. Having been ordered to produce any documents in which FFA discusses this litigation, HSUS appears to take the position that documents created

⁴ Astoundingly, HSUS redacted this "discussion" on the basis of attorney-client privilege. Either Mr. Kindler (HSUS's General Counsel) is not FFA's attorney and the "discussion" should not have been redacted or Mr. Kindler is FFA's attorney (which further undermines any distinction HSUS attempts to draw between itself and FFA) and all other documents in which Mr. Kindler discusses this lawsuit must be produced.

⁵ In fact, FEI believes these minutes are created and maintained by Sheryl Dempsey, the former Secretary of FFA, whom FEI believes is now employed by HSUS and uses HSUS's computers to create and save such documents for FFA.

by Mr. Markarian (for example) are documents created by “HSUS”, not “FFA.” Such semantics, however, flatly contradict HSUS’s position outlined above that documents in these individuals’ files concerning payments to Rider were created and are maintained by “FFA,” not “HSUS.” Thus, according to HSUS, it cannot produce payment documents in Mr. Markarian’s files (for example) because those belong to FFA, while it need not produce litigation documents in his files because those were created by HSUS. The circularity of HSUS’s arguments is simply bad faith and is part and parcel of plaintiffs’ and HSUS’s coordinated and ongoing efforts to conceal evidence harmful to their case and their credibility for almost four years. FFA and HSUS should no longer be permitted to hide documents subject to a Court Order by moving them from one filing cabinet to another based on which party is responding to FEI or appearing before the Court on any given day.

CONCLUSION

FFA and HSUS have conspired to withhold relevant and damaging documents concerning this litigation and their payments to or for Tom Rider. FFA’s counsel has acknowledged in open court that it is withholding certain documents concerning payments to Rider notwithstanding the Court’s Order that all responsive documents concerning payments be produced. FFA, moreover, has refused to search the files of HSUS personnel who operate FFA and have been responsible for making payments to Rider. Now, in the face of a second Court Order, HSUS insists that it need not produce documents from the files of those very same personnel because the payments were made on FFA’s behalf. Regardless of who “controls” the documents at issue, either HSUS or FFA must produce them. The Court, therefore, should Order HSUS to comply with the December 3, 2007 Order immediately and to appear at the hearing concerning FFA’s and others’ failure to provide Court-ordered material. Only if HSUS appears

can FEI and the Court fully determine which documents have been withheld and why. A proposed form of order is also attached.

Dated this 25th day of January, 2008.

Respectfully submitted,



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