

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN SOCIETY FOR THE)	
PREVENTION OF CRUELTY TO)	
ANIMALS, <i>et al.</i>)	
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 ENFORCE THIS COURT'S ORDER OF
DECEMBER 3, 2007

INTRODUCTION

The Humane Society of the United States ("HSUS"), 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 Enforce this Court's Order of December 3, 2007 (the "Motion"). The HSUS has fulfilled its obligation to produce the documents compelled by that order, which encompasses: (1) documents sufficient to show the relationship between the HSUS and the FFA, (2) all documents that "were created by any other party to this litigation in which that party discusses this litigation or any aspect of it" (3) all 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," (4) 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 finally all documents “that fall within Judge Sullivan’s August 23, 2007, order that pertain to WAP[.]” *See* Order of Dec. 3, 2007, at 1-2 (Docket Number 231) (“the Order”). HSUS has searched for all responsive documents and all such documents in the “possession, custody, or control”¹ of the HSUS have been produced. *See* Declarations of Michael Markarian (attached as Ex. 1) and Mary Berge (attached as Ex. 2), which describe the HSUS’s search procedures in detail.

The HSUS has complied with this Court’s order and has tried in good faith to convince Feld Entertainment of this fact. There is no reason to grant Feld Entertainment’s latest enforcement motion, and drag the HSUS into litigation it has consistently tried to avoid by requiring it to attend a sanctions hearing directed at parties to the litigation.

ARGUMENT

District courts are entrusted with great responsibility and discretion with respect to determining whether discovery violations have occurred, and what sanctions, if any, to impose in response to such violations. *See Banks v. Office of the Senate Sergeant-at-Arms*, 241 F.R.D. 370, 372 (D.D.C. 2007). “However, a court’s discretion is not without limits. As this Circuit has emphasized, any sanctions awarded must be proportional to the underlying offense. When considering severe sanctions, a district court considers the resulting prejudice to the sanctioned party, prejudice to the judicial system, and the need to deter future similar misconduct.” *Id.* (citing *Bonds v. District of Columbia*, 93 F.3d 801, 808 (D.C. Cir. 1996)).

¹ HSUS uses this precise terminology, originally adopted by Feld Entertainment, as a slight variation in this wording resulted in a false accusation that HSUS is attempting to use word games to withhold relevant documents. *See* Feld Entertainment, Inc., Motion to Enforce this Court’s order of December 3, 2007, at 2 & Exhibits 1 & 2. As it has explained before, the HSUS is not playing such word games.

Here, Feld Entertainment, while asserting that there “must” be more documents, has not proffered any meaningful evidence that the HSUS has withheld documents or otherwise conspired with the FFA to engage in discovery abuses. In addition, because it has not seriously attempted to show that the HSUS committed any discovery violations, *a fortiori* Feld Entertainment has made absolutely no showing that it has suffered any prejudice to the preparation of its defense as a result of these unsupported allegations. Consequently, its attempt to bring the HSUS into a sanctions hearing involving the litigation parties is improper and premature, and should be denied.

1. The HSUS has not withheld responsive documents by claiming they are in the “possession, custody or control” of the FFA.

The strongest putative evidence that Feld Entertainment presents in support of its spurious allegations that the HSUS and the FFA are engaging in “shell” and “semantic” games are three emails produced by parties to the litigation, sent from an office manager at the law firm of Meyer Glitzenstein (MGC) to several recipients, including Jonathon Lovvorn, an HSUS-employed attorney, who represents the FFA. *See* Motion at Ex. 3. The HSUS has not withheld these emails on the grounds that they are not in HSUS possession, custody, or control. These innocuous emails, which do little more than point out the fact that Tom Rider will be appearing on television at particular times, relate solely to media strategies and are excluded from the Court’s order by virtue of the Court’s declining to enforce the specific Request For Production (RFP) Feld Entertainment sought to enforce relating to media strategies. As Michael Markarian explains in his declaration, the HSUS has examined potential sources of responsive documents. These emails, as communications relating to media strategy, were simply outside the scope of the search the HSUS conducted.

The HSUS is unaware of any assertion by the FFA that it could not produce documents during the course of discovery because they were controlled by the HSUS. The HSUS is not

withholding any documents on the grounds that they are in the possession, custody, or control of the FFA. Again, Mr. Markarian has provided a declaration explaining the precise manner in which the files of pertinent HSUS employees (some of whose records had not previously been searched in connection with this litigation) have been searched. Documents are not being concealed between the two organizations or otherwise being withheld by one organization using the other as a shield. The HSUS has consistently tried to avoid this litigation, and continues to do so, on the grounds that the FFA remains a fully capable corporate co-plaintiff, but it has never attempted to do so by playing word games with discovery orders from this Court.

2. The HSUS has produced all extant responsive documentation regarding payments from the HSUS to the WAP.

With respect to the HSUS's accounting files and check requests relating to payments to the WAP, Feld Entertainment asserts that the HSUS should be subject to sanctions because it is "beyond credulity to believe that HSUS has no other documents concerning Rider or payments to him." As the HSUS has consistently explained (and as Feld Entertainment has consistently ignored), the HSUS *has made no payments to Tom Rider*, and it is therefore unsurprising that there are no documents concerning Rider or payments to him. The HSUS has, however, made several payments to the WAP over the years. With respect to these payments, as the HSUS has previously explained, its accounting department was merely processing check requests for the FFA, which were to be sent to the WAP. It does not "strain credulity" to believe that all that is required to initiate the payment of checks by the HSUS accounting department to the WAP are the requisite check request forms and

their accompanying cover letters. Indeed, this is consistent with HSUS standard corporate practice.²

See Berge Declaration, Ex. 1 at 1-2.

Finally, Feld Entertainment asserts that the HSUS must be withholding documents because it earlier asserted that various searches required by the subpoena would be burdensome, yet produced a relatively small number of documents in response to this Court's Order of December 3, 2007. There is absolutely nothing inconsistent about these two facts. First, the Requests for Production enforced by the Court's order are far less expansive in scope than those in the original subpoena, the vast majority of which this Court properly declined to compel. Second, when it made these statements, the HSUS was arguing that this Court should decline to enforce Feld Entertainment's original motion to compel not only because it was burdensome, but also because it was unlikely to produce significant responsive documents. After spending tens of thousands of dollars to comply with Feld Entertainment's Rule 45(b) subpoena, few responsive documents have been located, which leads the HSUS to question whether this exercise is necessary in order to shed additional light on Tom Rider's credibility or any other issue relevant to the underlying litigation.

CONCLUSION

For the foregoing reasons, the HSUS respectfully requests that FEI's Motion to Enforce this Court's Order of December 3, 2007, be denied, and that the HSUS be awarded the attorneys fees and costs it incurred in defending against this motion.

² The HSUS has concluded that the accounting "vendor" file containing documentation pertaining to the HSUS's June 2005 payment of \$3000 to the WAP has been lost. Vendor files are occasionally lost, despite the HSUS's best efforts to comply with its own file retention policies. *See* Exhibit 2 at ¶10.

Respectfully submitted,

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Civil Action No. 07-1523

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 ENFORCE THIS COURT'S ORDER OF DECEMBER 3, 2007, was served by via ECF upon all parties to this proceeding.

/s/ Christopher F. Dugan
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