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.	:	

DEFENDANT'S REPLY IN SUPPORT OF ITS
MOTION TO ENFORCE THE COURT'S DECEMBER 3, 2007 ORDER

In accordance with the directive of the Court during the telephone hearing held on February 7, 2008, defendant Feld Entertainment, Inc. ("FEI") submits this consolidated reply to address the arguments made in (i) the Humane Society of the United States' Response to Feld Entertainment, Inc.'s Motion to Enforce This Court's Order of December 3, 2007 (Feb. 5, 2007) (Docket No. 251) ("HSUS Opp."); and (ii) Plaintiffs' Response to Defendants' [sic] Motion to Enforce the Court's Order of December 3, 2007 Concerning the Humane Society of the United States (Feb. 7, 2007) (Docket No. 252) ("Pl. Resp.").

FEI moved to enforce against HSUS on the basis that HSUS has not produced all of the documents compelled by the Court's December 3, 2007 Order. Tellingly, when provided yet another opportunity in the face of FEI's motion, HSUS never declares that it has produced all such documents. Rather, HSUS (like plaintiffs) minces words. When critically considered, however, HSUS's misleading assertions not only fail to show that all Court-ordered documents have been produced, they affirmatively highlight HSUS's failure to comply with the Court's

Order. Moreover, the declarations submitted by Michael Markarian and Mary Kathryn Berge on behalf of HSUS are telling, including what it is that they fail to declare.

As described in detail below, HSUS's declarations actually establish the following:

- Instead of producing all of the documents subject to the Court's Order, HSUS tried "to find" the documents it believes are subject to the Order and are relevant to this case. Markarian Decl. ¶ 2.

- Instead of searching the files of all employees who might have Court-ordered documents, HSUS limited its search to employees (who remain unidentified) that work on elephant-related programs. Markarian Decl. ¶ 3. Importantly, HSUS makes no mention of searching the files of the specific employees identified in FEI's motion, such as Michael Markarian, Jonathan Lovvorn, or Roger Kindler. Nor does HSUS dispute the proposition that these people are the ones most likely to have been involved in the Rider payment issue and are the ones most likely to have responsive information.

- HSUS is withholding documents that "refer, reflect, or relate to Tom Rider", see Order at 2, by unilaterally calling them "media strategy" documents. Markarian Decl. ¶ 4.

- HSUS did not even bother to search for, let alone produce, documents in its possession, custody, or control that plaintiff FFA previously searched for. Markarian Decl. ¶ 4. It is no excuse for HSUS not to produce documents subject to the Court's December 3, 2007 Order simply because FFA determined such documents were not subject to the Court's August 23, 2007 Order. Indeed, FEI and the Court have reason to believe FFA has improperly withheld Court-ordered documents. Proceeding as HSUS does simply compounds and builds upon FFA's prior error and failure to produce.

- HSUS did not even bother to search its employees' files for Court-ordered documents pertaining to WAP. Order at 2. Instead, HSUS only searched its accounting records for such documents. Markarian Decl. ¶ 4. Neither FEI's subpoena nor the Order was limited to accounting records. HSUS has nonetheless unilaterally limited its production to such. Tellingly, HSUS does not state that it searched the files of the employees explicitly identified by FEI who have been in communication with WAP, such as Jonathan Lovvorn and Ethan Eddy.

As FEI previously has explained, the subpoena at issue was served upon HSUS after the entity it controls (FFA) refused to produce certain documents. FEI's motion argued that "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." Motion at 11. Importantly, HSUS does not refute this allegation. Nowhere does HSUS explain, for example, how its Executive Vice President, Michael Markarian, distinguishes between his HSUS files and his FFA files. HSUS cannot even muster a good-faith argument that certain documents in Mr. Markarian's files, for example, are not within HSUS's possession, custody, or control. Instead, HSUS seeks to avoid the directive in the Court's Order by electing not to search for any documents that it now claims FFA previously searched for. Accordingly, HSUS's representation that "no document was withheld on the basis that such document belongs to (FFA)" is meaningless. Markarian Decl. ¶ 11. HSUS is not "withholding" the documents on that basis because it never even bothered to search for and identify them in the first place.

HSUS's opposition and declarations do not refute, and in fact confirm, the allegations in FEI's motion. HSUS has willfully withheld documents subject to a Court Order by electing not to search ***all*** of the files maintained by ***all*** of the relevant people for ***all*** of the Court-ordered documents. Accordingly, HSUS should be ordered to produce all documents compelled by the Court's prior Order and to appear at the Court's hearing of February 26, 2008.

ARGUMENT

I. HSUS CONCEDES THAT NOT ALL COURT-ORDERED DOCUMENTS HAVE BEEN PRODUCED

HSUS must produce all of the documents that are subject to the Court's prior Order. HSUS cannot avoid its obligation to comply with an existing Court Order based on its self-serving belief that FEI has not demonstrated any prejudice. HSUS Opp. at 3. FEI has had to spend millions of dollars defending this lawsuit, which it considers meritless and anchored by a hired plaintiff to circumvent constitutional and prudential standing requirements to federal court

jurisdiction. It has had to spend tens of thousands of dollars to obtain documents from HSUS because HSUS stonewalled the subpoena, caused FEI to file a motion to compel against HSUS (that was granted), and still produced only sixteen payment-related pages in response to the Order because HSUS apparently did not think the rest of the material covered by the Order was "relevant." Moreover, Declarant Berge states that the HSUS accounting department searched for and identified payment records regarding Rider in August 2007, yet HSUS sat on these documents and did not produce them until December 13, 2007. See Ex. 2 at ¶¶ 4-6. The production was ***after*** counsel for HSUS denied any Rider payments in a face-to-face meet and confer meeting with counsel for FEI. All of this has prejudiced FEI and its defense of this case regardless of the blithe statements by HSUS to the contrary. In the current motion, FEI has more than ample basis to do what it has done: moved this Court to enforce the December 3, 2007 Order and compel HSUS to produce ***all*** of the documents without further gamesmanship and to compel HSUS's attendance at a hearing intended to uncover whether plaintiffs, in particular FFA, an entity that HSUS controls, violated a prior Court Order by withholding documents that are maintained in HSUS's offices by people paid by HSUS.[1]

A. HSUS Must Do More Than Try "to Find Relevant Documents" Compelled by the Court's Order

Tellingly, HSUS does not declare that it ***produced*** ***all*** documents compelled by the Court's Order; rather, HSUS declares that it tried "to ***find*** ***relevant*** documents" compelled by the Order. Markarian Decl. ¶ 2 (emphasis added). HSUS was not required just to look for

[1] For that reason, HSUS's citation to Banks v. Office of the Senate Sergeant-At-Arms, 241 F.R.D. 370, 372 (D.D.C. 2007), is inapt. There, the party requesting sanctions sought numerous and substantial sanctions that the Court considered to be equivalent to a default judgment. FEI's motion raises a serious issue – whether HSUS has violated a Court Order – but it is a serious issue of HSUS's own making. The Court certainly has discretion to compel HSUS to comply with existing Orders and to appear at a hearing later this month. HSUS's citation to this case, moreover, is inapposite because HSUS is not a party to this litigation. Indeed, HSUS and FFA have protested wildly that they are separate entities. If so, then this is not an issue of Rule 37 discovery sanctions. Rather, the sole issue presented is whether HSUS has violated the Court's Order. If so, by the plain language of Rule 45, HSUS is in contempt of Court.

documents; it was required to produce them. HSUS, moreover, had no authority to superimpose its own relevancy determinations into this process. Neither the subpoena nor the Order was limited to accounting records. Based on the declarations submitted, HSUS clearly limited its search for payment documents to accounting records. Again, it is the silence in the declarations that the Court needs to note: Nowhere in either declaration submitted does it state that HSUS has no documents (which was defined to include far more than mere accounting records and called for documents such as correspondence, memos, e-mails and notes) relating to any Rider payments. Again, HSUS appears to be taking plaintiffs' unavailing position on production, which is: after cherrypicking, we gave you some documents, so stop asking us for the rest. This is unacceptable and not what was ordered. Nor is this FEI's imagination run amok. FEI has provided this Court with concrete examples of the types of documents that have trickled out only after much teeth pulling by FEI from all of the various parties (whether plaintiffs or those inextricably intertwined with them). See, e.g., Motion at 6 and Exs. 2 & 3. The Order should have put this matter to rest once and for all and resulted in a full production by HSUS. It did not. Hence, that Order must be enforced and all documents compelled by the Court's Order must be produced regardless of whether HSUS believes the document to be "relevant."

B. HSUS Did Not Search the Files of All Relevant Employees

HSUS does not declare that it searched the files of all employees who are likely to have responsive documents; rather, HSUS declares that it searched the files of its employees who have worked on programs relating to elephants. Markarian Decl. ¶3.[2] Tellingly, HSUS does not declare that it searched the files of everyone specifically identified in FEI's motion as people likely to have responsive documents. Indeed, HSUS does not even identify whose files were

[2] Importantly, Mr. Markarian's declaration is conspicuously silent as to whether it searched the files of all employees who might have documents relating to WAP, the other plaintiffs, or MGC, for example. Id.

searched. HSUS, for example, never declares that it searched the files of Jonathan Lovvorn – the employee who is counsel in this case and was indisputedly involved in the payments to Rider because he mailed them to WAP. Motion at 6. HSUS, moreover, does not declare that it searched the files of its other attorneys identified by FEI as likely to have responsive documents (namely, Roger Kindler, who has provided updates to FFA's Board concerning this litigation and Ethan Eddy, who was an attorney involved in this case when he worked for plaintiffs' counsel and who has continued to receive e-mails from counsel concerning Rider and this lawsuit). Id. at 6, 9-10. HSUS also does not declare that it searched the files of its employees, officers, and directors who serve on FFA's board of directors and who have received documents discussing this litigation. Id. at 10. Finally, HSUS's declarant does not even confirm that ***his own files*** have been searched notwithstanding his substantial involvement in this case. Id. at 6, 9.[3]

This silence by HSUS to speak to the issue at hand – whether HSUS made a full search and production – is stunning. When provided with the opportunity to clear its name by stating that it produced all documents relating to Rider payments – not just the accounting records for the same – HSUS fails again to do so. Thus, while HSUS claims it "has consistently tried to avoid this litigation," HSUS Opp. at 4, it continues to play word games with the Order and the declarations provided. There is no proof that the search conducted or the resultant production complied with the scope of the Order.

[3] Tellingly, HSUS's opposition is completely silent as to the issue of whether it produced all documents discussing this litigation and created by a party to the lawsuit. FEI's motion presented detailed information concerning the documents it believes to exist that fall within this description and have not been produced by HSUS. Motion at 9-11. That a select handful of people involved with elephant programs searched their files for some documents that FFA did not previously search for does not mean that HSUS has produced all of the documents it was required to. Indeed, that likely is why HSUS's brief makes no representation remotely establishing that fact.

C. HSUS May Not Create Its Own Exceptions to the Court's Order

HSUS does not declare that the employees whose files were searched have no additional documents compelled by the Court's Order. Instead, HSUS declares that these employees have no documents that (a) are not solely related to media or legislative strategies, (b) were not already searched for and produced by FFA, and (c) reflect a party's discussion of this lawsuit or relate to Tom Rider. Markarian Decl. ¶4. This portion of HSUS's declaration is critical. It plainly demonstrates that HSUS has relied upon the same novel interpretations that FFA relied upon in withholding documents subject to Judge Sullivan's Order. It, moreover, plainly demonstrates that HSUS did not even bother to search its employees' files for certain documents compelled by the Court's Order. Specifically, HSUS did not review any employee's files (let alone the individuals, such as Jonathan Lovvorn, specifically identified by FEI) for any documents pertaining to WAP. Rather, HSUS now concedes that the only place it looked for such documents was in its accounting files. The Court's Order, however, permits no such thing.

1. HSUS Must Produce "All Documents That Refer, Reflect, or Relate to Tom Rider"

HSUS candidly acknowledges that it did not produce certain documents relating to Tom Rider because it believes such documents reflect HSUS's media strategy. HSUS Opp. at 3. HSUS, moreover, candidly acknowledges that it did not even attempt to search for documents that it believes relate solely to its or plaintiffs' media strategies. Markarian Decl. ¶4. The Court's Order, however, compels HSUS to produce "all documents that refer, reflect, or relate to Tom Rider." Order at 2. Although the Court ruled that HSUS's documents relating to media campaigns concerning a number of topics are irrelevant, it specifically ordered HSUS to produce all documents relating to Rider. Thus, the documents attached to FEI's motion and withheld by HSUS should have been produced by HSUS because they are subject to the Court's Order.

HSUS must produce all documents relating to Tom Rider. A purported "media document" that also relates to Tom Rider has to be produced or, at a minimum redacted to remove the supposed "media strategy." It cannot be withheld in its entirety as HSUS admits it has done here. There is nothing in the Court's order that permits such a withholding.

2. HSUS May Not Withhold Court-Ordered Documents in its Possession, Custody, or Control Simply Because FFA Previously Withheld Them

HSUS now admits that it did not search its employees' files for Court-ordered documents if FFA already searched those files. Markarian Decl. ¶4. As explained in FEI's motion, the subpoena to HSUS was necessitated in the first place because FFA and HSUS share employees, offices, and presumably, file drawers. When FFA refused to search certain files because they, allegedly, belonged to HSUS, FEI subpoenaed HSUS. HSUS, however, refused to produce responsive documents and, when ordered by the Court to do so, implied that FFA had them. Despite the explicit argument in FEI's motion that HSUS and FFA are, essentially, moving files from one drawer to another based upon which entity is being ordered to produce documents, HSUS does not even attempt to explain why the documents at issue are not in its possession, custody, or control. For example, HSUS cannot even argue in good-faith that documents in Mr. Markarian's files pertaining to FFA are not within the possession, custody, or control of HSUS. Indeed, even setting aside the fact that HSUS and FFA have essentially merged and are now pursuing a common agenda, HSUS pays Mr. Markarian's salary and provides the office space in which his allegedly "FFA" documents are stored.

Since these documents obviously are within HSUS's possession, custody, or control, HSUS declares instead that it does not have to search for or produce them because FFA allegedly already has. This is astounding. First, there is no exception in the Court's Order permitting HSUS to withhold documents on the basis that another party searched for or produced such

documents. Second, FFA's own compliance with the Court's Order of August 23, 2007, is in question, so HSUS's reliance upon FFA's work is insufficient, particularly, since FEI contends that FFA has not produced documents it is supposed to produce. Third, HSUS is subject to the separate Order of December 3, 2007. It is no excuse for HSUS not to produce Court-ordered documents just because FFA decided not to produce the documents in response to a separate Court Order. HSUS is simply perpetuating FFA's discovery misconduct.

3. HSUS Must Do More Than Search Its Accounting Files for Documents Pertaining to WAP

The Court ordered HSUS to produce "any documents that fall within Judge Sullivan's August 23, 2007 order that pertain to WAP." Order at 2. HSUS did not search any of its employees' files for such documents, limiting the search instead to HSUS's "accounting records." Markarian Decl. ¶¶ 5-6. The Court's Order was not limited to documents located in HSUS's accounting files; rather, HSUS was ordered to produce all such documents in its "possession, custody, or control." Order at 2. HSUS never declares that it has produced all of the Court-ordered documents or that it has even bothered to look in its employees' files for them. Rather, HSUS insists that the documents it has produced are all "that is required to initiate the payment of checks by the HSUS accounting department." HSUS Opp. at 4. While that may be true, it is beside the point because the Court Order covers more than that. HSUS must search for and produce all documents in its possession, custody, or control pertaining to WAP and falling within the Court's prior Order. HSUS must, for example, search the files of Jonathan Lovvorn (among others) for such documents. Mr. Lovvorn has sent the checks to WAP and apparently has had discussions with WAP about such payments.[4] It remains beyond credulity that Mr.

[4] For this reason, the declaration of Ms. Berge fails to demonstrate HSUS's compliance with the Court's Order. HSUS was not ordered to simply produce its "vendor files." See generally HSUS Opp. Ex. B. Rather, HSUS was ordered to produce all documents concerning payments to WAP.

Lovvorn has no e-mails or other documents concerning the payments. However, there is no basis to determine from HSUS's submission that it even bothered to check Mr. Lovvorn's files. HSUS's silence on this point is deafening, particularly since Mr. Lovvorn was one of the individuals specifically identified in FEI's motion as likely to have responsive documents. Motion at 10-11. HSUS's silence in the face of FEI's motion merely confirms the obvious point that it did not review Mr. Lovvorn's files.

II. FEI'S MOTION ACCURATELY PRESENTED THE FACTS AND ACCURATELY CHARACTERIZED THE COURT'S SCHEDULED HEARING

Even though FEI's motion is not directed at them, plaintiffs have elected to participate in the discussion. Pl. Resp. Instead of offering any insights into the matter before the Court, i.e., HSUS's compliance with the Court's Orders, plaintiffs attempt a side show by falsely accusing FEI of making "erroneous and unsubstantiated factual assertions." Id. at 2. Plaintiffs devote the rest of their filing to an attempt to explain away their own failure to comply with an entirely separate Court Order that was subject to an entirely separate motion to enforce.

As shown below, the claims about "false" allegations are easily disposed of. The rest of plaintiffs' argument is curious because all it does is provide further proof that they violated the Court's August 23, 2007 discovery order. Like HSUS, plaintiffs have foregone, yet again, another opportunity to moot the entire question of their compliance with the Court's Order. If it were true, it would be simple enough for plaintiffs to say that, yes, we have produced all ***"documents and information concerning payments to Tom Rider"*** and we have accounted for the documents and information in that category that have been ***"discarded, destroyed, or given to other persons or otherwise not produced"*** and we have explained the reasons why. Order at 7 (Aug. 23, 2007) (emphasis added). These are the operative terms of Judge Sullivan's Order. But plaintiffs refuse to state under oath or in any format that they have done what these terms say.

They did not do it in the declarations that Judge Sullivan ordered them to submit. They did not do it in their opposition to FEI's motion to enforce Judge Sullivan's order. They did not do it at the January 8, 2008 hearing. And they have not done it now. Instead, plaintiffs persist in using language that is deliberately designed to obscure the point that they have, in fact, withheld "documents and information concerning payments to Tom Rider." This is exactly the reason the Court scheduled "an evidentiary hearing [to be] held on the application by the Defendants to hold the Plaintiffs' in contempt." Transcript of Hearing at 1 (the Court) (Jan. 8, 2008) ("Hearing Tr."), as the following colloquy makes clear:

> MR. SIMPSON: . . . If it's true, if it's true that they produced every single piece of information that concerns payments to Tom Rider, then why didn't they say it? And if they'd said it under oath, we might not be here today. But they didn't say that. That's the problem.
>
> THE MAGISTRATE JUDGE: Well, that's – that's the point I'm trying to get at.
>
> MR. SIMPSON: Exactly. And that's why we think putting these people on the stand –
>
> THE MAGISTRATE JUDGE: And I can't make that determination until I hear from folks.
>
> MR. SIMPSON: That's why we think putting them on the stand will get to the bottom of this.

Id. at 21-22.

A. FEI's Motion Is Not Predicated Upon False Statements

FEI's motion contains no false statements. FEI never asserted that plaintiffs conceded that they "somehow failed to comply with Judge Sullivan's Order." See Pl. Resp. at 2. Rather, FEI said that "FFA's counsel 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." Motion at 7. This sentence contains two straightforward statements, both of which are true: (1) FFA's counsel acknowledged in open Court that plaintiffs were withholding communications about payments to Rider, and (2) there is a Court Order that FEI believes to compel the production of such communications. The second point is incontestable. As to the first, FFA's counsel went on at length in the January 8, 2008 hearing about how plaintiffs supposedly had "dr[awn] the line absolutely correctly" between "documents relating to media strategy" and "documents on funding of Mr. Rider." Hearing Tr. at 10. Obviously, the only point of defending this "line" was because documents concerning payments to Rider have in fact not been produced, apparently because plaintiffs and/or their counsel have "interpreted" the Order to permit them to withhold documents concerning payments to Rider that also have something to do with "media strategy." Otherwise, why did counsel not simply tell the Court that there are in fact no documents that concern payments to Rider that had been withheld? Thus, FEI's characterization of what plaintiffs' counsel confirmed at the hearing through his statements, as well as his omissions, was entirely accurate.

Indeed, the statement by plaintiffs' counsel that is quoted in their brief, Pl. Resp. at 3, is an apt illustration of how plaintiffs have minced words. Counsel emphatically states that plaintiffs "have produced every single document that we were required to produce by Judge Sullivan's order." Hearing Tr. at 16. This is not a statement of fact but a legal conclusion and simply begs the ultimate question before the Court. He then states that "[w]e have produced documents reflecting every single payment that we can possibly find involving Mr. Rider." Id. This statement is one of fact but does not prove compliance even if it is true. Plaintiffs were not ordered to produce a document about each payment; rather, they were ordered to produce all

documents about any payment. Moreover, documents that "reflect" the payments is a narrower category than documents that "concern" the payments – which is what the Court ordered. So even if plaintiffs have in fact produced every single document that reflects a payment to Rider, the Court's Order requires them to do more. Plaintiffs may not withhold a payment-related document simply because another (presumably less damaging) document reflecting that same payment was produced. Withholding any document that concerns the payments to Rider violates the Court's Order.

Plaintiffs discuss at length the communications about Rider and his payments that have been produced and the deposition questioning about that subject, implying that since FEI has received such a "vast" amount of information, plaintiffs are in compliance with the Court's Order. Pl. Resp. at 5. This argument is grossly misconceived. It makes no difference how "vast" the actual production has been if plaintiffs have withheld additional materials that they have been ordered to produce. What this position boils down to is the argument that FEI has "enough" information about Rider's payments. However, this is not the relevant standard, and, in particular, it was not the standard that the Court applied to FEI's production of the veterinary records. Plaintiffs' view of what is "vast" or "enough" is immaterial.

In this connection, there is no "internal inconsistency" in FEI's position as to the respective discovery defaults of plaintiffs and HSUS. Pl. Resp. at 6. As shown above, regardless of how plaintiffs choose to describe their own document production – "vast," "extensive," etc. – it has nothing to do with whether they have produced everything the Court's Order requires them to produce. And plaintiffs simply miss the point about HSUS's paltry document production. The limited amount of documents produced by HSUS – which HSUS would like the Court to believe is everything – is totally inconsistent with the Cassandra-like

cries of "burden" that HSUS's counsel made in the meet and confer, indicating very clearly the lack of good faith with which that process was conducted by HSUS. Since neither plaintiffs nor their counsel were present at the meet and confer, they are in no position to be commenting upon it.

B. FEI's Motion Does Not Mischaracterize the Court's Upcoming Hearing

Plaintiffs take umbrage with the fact that, in a motion and in two letters (which were not part of the public record until plaintiffs themselves filed them with the Court), FEI has referred to the February 26/March 6 hearing as a "contempt hearing," because, according to plaintiffs, "[t]he Court itself . . . has not characterized the hearing in this manner." Pl. Resp. at 6-7. However, this is exactly how the Court has characterized the hearing. On January 8, 2008, the Court opened the proceedings by stating that "We are assembled today, pursuant to my order of December 20th, 2007, to set a date for ***an evidentiary hearing*** held ***on the application by the Defendants to hold the Plaintiffs' in contempt.***" Hearing Tr. at 1 (emphasis added). Furthermore, whether or not the Magistrate Judge has the authority to adjudicate plaintiffs in contempt of court, it is undisputed that the Magistrate Judge may hold an evidentiary hearing to determine "'whether conduct has risen to the level at which he or she must certify the facts of the conduct to a district judge for adjudication'" of contempt. Pl. Resp. at 7 n.3 (quoting Athridge v. Aetna Cas. & Sur. Co., 184 F.R.D. 181, 198 (D.D.C.)).

Plaintiffs' memorandum on FEI's motion to enforce the Court Order pertaining to HSUS amounts to little more than their own motion to reconsider the Court's Order compelling the parties to appear at an evidentiary hearing concerning a separate motion to enforce filed by FEI. Try as they might to avoid answering questions under oath about their compliance (or lack thereof) with the Court's Order of August 23, 2007, plaintiffs cannot nullify the need for such a

hearing with additional declarations describing the manner in which they searched the documents. The primary issue arising out of the briefing related to that motion and the parties' status conference is whether plaintiffs withheld documents compelled by the Order. Plaintiffs' eleventh-hour offer to provide even more self-serving declarations about the search they conducted is pointless, and simply reveals their anxiety about having to take the stand at an evidentiary hearing. It is too late for declarations. Plaintiffs were supposed to submit proper declarations in response to the August 23, 2007 Order and have had ample opportunity at each stage of the proceedings since then to do so. Indeed, the information that plaintiffs suggest would be included in such declarations simply continues the word games. See Pl. Resp. at 7-8. The issue that has necessitated the hearing is whether plaintiffs produced all documents compelled by the Order or simply all documents they believe are compelled by the Order. There is a big difference between the two.[5]

Finally, plaintiffs cite nothing in support of their suggestion that, at the evidentiary hearing, plaintiffs present their evidence first. Pl. Resp. at 9. As the Court has recognized, FEI has the burden of proof. Hearing Tr. at 23. In federal court, the party with the burden of proof opens and closes. See, e.g., Athridge v. Aetna Cas. & Sur. Co., 474 F. Supp. 2d 102, 106-07 (D.D.C. 2007); United States v. Edelin, 134 F. Supp. 2d 59, 67 (D.D.C. 2001).

CONCLUSION

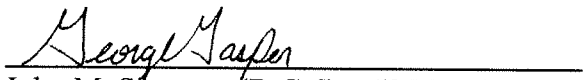
HSUS's opposition does nothing other than confirm the basic premise of FEI's motion. HSUS has not searched for, let alone produced, all of the documents commanded by the Court's

[5] Plaintiffs try mightily to downplay the consequences of their non-production decisions by re-casting the matter as a mere "legal disagreement between the parties." See Pls' Opp. at 3 n.1. By definition, everything in litigation is a legal disagreement between the parties. At this stage, however, the conduct at issue is a grave matter for the Court's consideration: whether plaintiffs violated the August 2007 discovery order and what the appropriate sanction for their conduct is.

December 3, 2007 Order. HSUS has (a) refused to search the files of all relevant employees, (b) refused to search any files other than accounting records for Court-Ordered documents pertaining to WAP, (c) refused to produce certain documents that refer, reflect, or relate to Tom Rider, and (d) refused to produce documents in its possession, custody, or control simply because FFA either produced such documents or decided not to produce such documents.[6] The Court, therefore, should Order HSUS to comply with the December 3, 2007 Order immediately and to appear at the evidentiary hearing scheduled for February 26, 2008.

Dated this 12th day of February, 2008.

Respectfully submitted,



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[6] Ironically, HSUS argues that its miniscule production corroborates their prior objection that FEI's subpoena was "unlikely to produce significant responsive documents." HSUS Opp. at 5. HSUS cannot unilaterally withhold documents responsive to the subpoena and commanded by the Court's Order and then point to its minimal production as proof that the subpoena does not command significant responsive documents. Only after HSUS complies with the Court's Order can anyone begin to determine whether significant responsive documents were commanded.