

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN SOCIETY FOR THE)
PREVENTION OF CRUELTY TO)
ANIMALS, *et al.*)
Plaintiffs,)
v.)
FELD ENTERTAINMENT, INC.,)
Defendants)
_____)

Civil Action No. 03-2006 (EGS/JMF)

**HUMANE SOCIETY OF THE UNITED STATES' RESPONSE TO
FELD ENTERTAINMENT, INC.'S MEMORANDUM IN SUPPORT OF
ITS PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Feld Entertainment, Inc. ("FEI") has failed to carry its burden of demonstrating, by clear and convincing evidence, that the Humane Society of the United States ("HSUS") failed to comply with the Judge Facciola's December 3, 2007 Order (Dkt# 231). To the contrary, as detailed below and in HSUS' accompanying Response To Defendant's Proposed Findings Of Fact And Conclusions Of Law and previous Response To FEI's Motion To Enforce This Court's Order Of December 3, 2007 (Dkt# 251), the evidence is clear that HSUS undertook exhaustive efforts involving numerous searches and spending tens of thousands of dollars in staff time and other resources to comply with Judge Facciola's December 3, 2007 Order as informed by Judge Sullivan's August 23, 2007 Order (Dkt# 178) (together "Orders"). Tellingly, FEI admits that it has not met its burden by seeking contempt findings with respect to each plaintiff *but not HSUS* – a non-party subpoena respondent with respect to this lawsuit. Defendant's Proposed Findings Of Fact And Conclusions Of Law (Dkt# 307) at 41-44.

I. HSUS Complied With Judge Facciola's December 3, 2007 Order As Informed By Judge Sullivan's August 23, 2007 Order.

The unrebutted evidence adduced at the hearing on February 26, March 6, and May 30, 2008 demonstrates that HSUS complied with the Orders. The evidence included live and written testimony of Michael Markarian, HSUS' Executive Vice President for External Affairs. Hearing Tr. (3/6/2008) at 5.

Mr. Markarian testified that:

- Mr. Markarian was aware of FEI's June 15, 2007 subpoena to HSUS and was involved in searching for responsive documents. Hearing Tr. (3/6/2008) at 79.
- In searching for documents responsive to the June 15, 2007 subpoena, HSUS identified several staff members who had previously searched their files because they were searched during the Fund for Animals' ("FFA") responses, and they were re-searched, rechecked. Hearing Tr. (3/6/2008) at 79 and 88-92.
- In searching for responsive documents, HSUS also identified a broader group of HSUS' employees who had not worked on FFA programs, but that may have had some contact with Mr. Rider or may have worked on circus-related or captive-elephant-related issues, and, therefore, "cast the net widely and search[ed] files and talk[ed] to staff members who may have had some interaction with Mr. Rider." Hearing Tr. (3/6/2008) at 79 and 88-92.
- "[HSUS] asked the staff members who [HSUS] felt were remotely likely to have had any contact with Mr. Rider or with this litigation or even with elephant related issues, and they did not have any documents that were responsive to this request." Hearing Tr. (3/6/2008) at 91.

- Mr. Markarian read both Orders and HSUS received advice of counsel regarding the meaning of the phrase "media and legislative strategy" as used in the Orders. Hearing Tr. (3/6/2008) at 62 and 86-87.
- Mr. Markarian was responsible for HSUS' search for documents and familiar with what HSUS did to comply with the Orders. Hearing Tr. (3/6/2008) at 63 and 82-84, FEI Ex. 45 (Declarations of Michael Markarian and Mary Kathryn Berge, both dated February 5, 2008).
- HSUS has produced all responsive documents in its or its employees' files that pertain to the payments HSUS has made to the Wildlife Advocacy Project ("WAP"). Hearing Tr. (3/6/2008) at 64-65.
- HSUS has produced all responsive documents in its or its employees' files that refer, reflect, or relate to Tom Rider. Hearing Tr. (3/6/2008) at 64 and 78-80.
- HSUS produced all responsive documents in its or its employees' files that discuss this litigation. Hearing Tr. (3/6/2008) at 65.
- "To the best of [Mr. Markarian's] knowledge . . . , The HSUS is not in possession of any relevant, non-privileged documents regarding the subject matter of this lawsuit between plaintiffs, Rider, WAP, and plaintiffs' counsel, or regarding payments to Tom Rider, that have not already been produced by The HSUS or the Fund for Animals." FEI Ex. 45 (Declaration of Michael Markarian at ¶ 12.)
- HSUS searched electronic files, e-mail files, and paper files, including those of HSUS employees, Jonathan Lovvorn and Ethan Eddy – both of whom are

- attorneys whose work representing FFA was reimbursed by FFA. Hearing Tr. (3/6/2008) at 65-57 and 71-72.
- Mr. Markarian did not recall finding any electronic documents related to payments to Tom Rider. Hearing Tr. (3/6/2008) at 72.
 - Mr. Markarian did not understand that any documents concerning payments to Tom Rider were not produced on the basis that such documents are "media strategy" documents. Hearing Tr. (3/6/2008) at 77.
 - In conducting the searches described in Mr. Markarian's and Ms. Berge's declarations (Hearing Tr. (3/6/2008) at 82-83 and FEI Ex. 45), HSUS created a search process that HSUS determined would be most likely to produce relevant documents. Hearing Tr. (3/6/2008) at 84.
 - Mr. Markarian's declaration accurately reflects his understanding about the efforts to find documentation as to a \$3,000 payment to WAP in July 2005 and that "[a]t great expense . . . [HSUS] made exhaustive efforts to try to find [such] documents." Hearing Tr. (5/30/2008) at 66-67.
 - HSUS conducted "numerous searches . . . [and] searched several departments and the files of several employees multiple times, both print documents and electronic files, and [HSUS is] confident that [HSUS] produced everything in our possession that relates to any payments to Tom Rider." Hearing Tr. (5/30/2008) at 67-68.
 - In response to Judge Sullivan's August 2007 order, HSUS "spent tens of thousands of dollars in staff time and other resources to comply" and the searches were "exhaustive." Hearing Tr. (5/30/2008) at 68.

- Such efforts by HSUS "absolutely diverted [HSUS'] attention from [HSUS] programmatic mission to protect animals." Hearing Tr. (5/30/2008) at 68.
- HSUS carried out exhaustive searches, in "good faith," with respect to both Judge Sullivan's and Judge Facciola's orders, including with respect to emails. Hearing Tr. (5/30/2008) at 67-69 and 73-75.

In addition to the foregoing live testimony and Mr. Markarian's and Ms. Berge's declarations, FEI Ex. 45, the Court itself questioned HSUS employee and attorney for the plaintiffs Mr. Lovvorn extensively regarding compliance with the Orders. Hearing Tr. (5/30/2007) at 144-150. FEI does not dispute Mr. Lovvorn's statements to the Court regarding compliance with the Orders. As the Court previously noted, lawyers' representations about what they have or have not done in responding to discovery are sufficient evidence of compliance. Memorandum Order (Dkt# 300) at 4.

Based upon this record, the Court should find that HSUS acted in good faith and achieved compliance or substantial compliance with the Orders and not that HSUS failed to comply. This record demonstrates that HSUS applied far more effort than is generally expected of a non-party discovery respondent – especially where the documents sought by FEI were available from parties and were, by FEI's own admission, "innocuous[.]" Defendant's Motion To Enforce The Court's December 3, 2007 Order (Dkt# 247) at 6 and *Wyoming v. U.S. Dept. of Agriculture*, 208 F.R.D. 449, 452-53 (D.D.C. 2002) (nonparty status, as well as relevance and need, are factors weighed in considering the burden in responding to a discovery request).

II. FEI's Unfounded Suspicion That HSUS Withheld Documents FEI Obtained From Others During Discovery Is Not Clear And Convincing Evidence Of Non-Compliance.

That HSUS produced fewer responsive documents than FEI hoped or expected HSUS to have in its possession, custody, or control hardly demonstrates that HSUS failed to comply with the Orders. FEI's evidence falls far short of what this Court has characterized as a "high" standard: clear and convincing proof that the nonparty accused of contempt violated a clear and unambiguous order. *Athridge v. Aetna Cas. and Sur. Co.*, 184 F.R.D. 181, 198 (D.D.C. 1998).

In this case, FEI points to two emails to HSUS employee and attorney for the plaintiffs Jonathan Lovvorn (*i.e.*, FEI Exs. 69 and 72) obtained from others during discovery and complains that HSUS also should have produced them pursuant to the December 3, 2007 Order. Defendant's Proposed Findings Of Fact And Conclusions Of Law (Dkt# 307) at Finding Of Fact No. 125 and Hearing Tr. (5/30/2008) at 46-49. With respect to FEI Ex. 69, which is dated January 26, 2006, Mr. Markarian testified that: "We did not have a copy of this document or else we would have produced it." Hearing Tr. (5/30/08) at 48. With respect to FEI Ex. 72, which is dated June 21, 2006, Mr. Markarian testified that: "A one-sentence e-mail that mentions that Tom is appearing on NPR today at 9:45a.m. Pacific time is not something that I would view as something that needs to be saved." Hearing Tr. (5/30/08) at 48-49. Even FEI admits that both of these pre-2007 emails are "innocuous[.]" Defendant's Motion To Enforce The Court's December 3, 2007 Order (Dkt# 247) at 6. The evidence is consistent with Mr. Lovvorn's never having received such emails or that, if received, such emails were not saved or were deleted prior to June 15, 2007 – the date that FEI served a document subpoena upon HSUS.¹

¹ HSUS is informed that certain emails to Mr. Lovvorn that pertain solely to media appearances of Tom Rider were provided by FFA to Judge Facciola for *in camera* inspection on June 10, 2008.

FEI also points to an email to Mr. Markarian dated November 5, 2003 (*i.e.*, FEI Ex. 51) and insinuates that that HSUS should have produced it pursuant to December 3, 2007 Order. Hearing Tr. (5/30/2008) at 12-14. With respect to FEI Ex. 51, Mr. Markarian testified that: "I do know that this particular e-mail did not turn up in a search of Fund For Animals or HSUS electronics files. . . [and that] I was not aware of this particular e-mail. It was not intentionally destroyed. I routinely do not save every single e-mail I receive. I delete e-mails from time to time. I don't save every piece of communication that comes across my desk, so the fact that these e-mails were not in my possession does not mean that they were intentionally discarded or that I remembered them being discarded." Hearing Tr. (5/30/2008) at 14-17.

FEI further points to a cover letter on HSUS letterhead dated May 24, 2005 (*i.e.*, FEI Ex. 65) and insinuates that that HSUS should have produced it pursuant to the December 3, 2007 Order. Hearing Tr. (5/30/2008) at 42. With respect to FEI Ex. 65, Mr. Markarian testified that: "It was not produced in [HSUS'] searches. [HSUS] did not have a copy of it." Hearing Tr. (5/30/2008) at 42.

At bottom, FEI's complaint with respect to HSUS is that FEI expected HSUS to have retained more documentation responsive to its 2007 subpoena and the subsequent Orders than HSUS actually had to produce. As this Court has consistently concluded, "a party's complaint that there must be more than they received is insufficient in itself to require any further inquiry[.]" Memorandum Order (Dkt #300) at 3, let alone require a finding of contempt.

III. FEI's Failure To Seek A Finding Of Contempt With Respect To HSUS Renders Moot FEI's Pending Motion To Compel Further Production From And To Award Costs, Expenses, And Attorneys Fees Against HSUS.

FEI's failure to seek a conclusion of law with respect to the December 3, 2007 Order or HSUS' compliance with that Order renders moot FEI's pending motion. Defendant's Proposed Findings Of Fact And Conclusions Of Law (Dkt# 307) at 41-44. Without a finding that HSUS

failed to comply with the December 3, 2007 Order, neither an order requiring further production efforts nor an order awarding costs, expenses, or attorney's fees resulting from non-compliance are justified. Although the Court has broad discretion in resolving discovery disputes, to order such relief absent a finding of non-compliance would be an abuse of discretion.

Even if, despite the evidence of HSUS' substantial efforts to comply, the Court found some non-compliance, the unrebutted evidence of HSUS' good faith with respect to its compliance efforts weighs strongly against awarding any costs, expenses, and attorneys' fees to FEI. FEI's Memorandum In Support Of Its Proposed Findings Of Fact And Conclusions Of Law (Dkt# 307-2) at 9 (admitting that "good faith" is a factor that may be considered for mitigation of damages). Such an award against HSUS would not be proportionate to any underlying offense. Moreover, FEI provided no evidence that its costs, expenses, and attorney's fees in pursuing its 3-day hearing primarily focused on the parties' alleged violation of the August 23, 2007 Order were increased as a result of FEI's successful effort to force non-party HSUS to participate. As the Court noted at the hearing, FEI's counsel was rudderless in his approach toward FEI's claim that HSUS violated its December 3, 2007 Order. Hearing Tr. (5/30/2008) at 59-60 (the Court asking FEI counsel what Mr. Markarian's pre-2007 testimony had to do with whether HSUS had violated an order issued in 2007).

IV. Conclusion.

For all of the foregoing reasons and the reasons set forth in HSUS' accompanying Response To Defendant's Proposed Findings Of Fact And Conclusions Of Law and previous Response To FEI's Motion To Enforce This Court's Order Of December 3, 2007 (Dkt# 251), FEI's motion should be denied with respect to HSUS.

Dated: July 11, 2008

Respectfully submitted,

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