UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

PLAINTIFFS' MOTION IN LIMINE AND FOR ADDITIONAL SANCTIONS DUE TO DEFENDANT'S SPOLIATION OF EVIDENCE AND SUPPORTING MEMORANDUM

INTRODUCTION

Pursuant to Federal Rule of Civil Procedure 37 and the Court's inherent authority to impose sanctions for spoliation, plaintiffs hereby move for an order sanctioning defendant Feld Entertainment, Inc. ("FEI") for destroying and losing vital evidence in this case, by granting this motion in limine to (a) exclude or limit the scope of the testimony REDACTED [redacted] (b) prohibit defendant from relying on any veterinary health certificates in defense of plaintiffs' claims, and (c) designate certain facts concerning the missing evidence as established.

First, after this lawsuit was filed, and REDACTED [redacted]

This spoliated evidence goes to the heart of plaintiffs' claim that the confining and chaining of the elephants on the railroad cars "takes" them in violation of section 9 of the Endangered

Species Act ("ESA"), 16 U.S.C. § 1538 (see Compl. ¶¶ 24, 101 (DE 1)), and was responsive to a number of plaintiffs' long-standing discovery requests. In addition, REDACTED

To sanction the destruction of this important evidence, and to at least partially redress the severe prejudice plaintiffs have suffered as a result, plaintiffs respectfully request that the Court REDACTED, and that it also take certain designated facts as established. Specifically, and as explained in more detail below, plaintiffs request that the Court designate the following facts – all of which are consistent with other evidence plaintiffs will introduce at the trial – as established:

R

C

Second, although in four separate Orders FEI has been directed to produce six pages of veterinary health certificates in this case, FEI recently informed the Court that it is "now unable to locate them." FEI's Resp. to the Court's Aug. 4, 2008 Order ("FEI's Aug. 4, 2008 Filing") at 3 (DE 332) (Aug. 13, 2008) (emphasis added). In light of this blatant and inexplicable spoliation

of specific medical records, plaintiffs respectfully request that the Court preclude defendant from relying on any health certificates during the trial, and designate as established fact that these six spoliated pages contain evidence consistent with the other overwhelming evidence plaintiffs will present at trial demonstrating that FEI's elephants are not in good health, and that they suffer from tuberculosis and other diseases.

BACKGROUND

A. The Spoliation Of REDACTED

On July 11, 2000, plaintiffs filed suit against defendant, claiming that, inter alia, "its chaining and confinement of elephants for many hours each day violate[s] the 'taking' prohibitions" of the ESA, 16 U.S.C. § 1538(a)(1)(B). Compl. ¶ 101. The Complaint further alleged "emotional and aesthetic harm" arising from "seeing [defendant's elephants] engage in 'stereotypic' behaviors as a result of their mistreatment." Compl. ¶ 24; see also id. ¶ 26 (noting that a plaintiff "has seen the elephants engage in stressful 'stereotypic' behavior, as a result of defendants' mistreatment of them" and will "continue to suffer emotional and aesthetic harm by seeing the elephants mistreated, and seeing them engage in 'stereotypic' behaviors as a result of their mistreatment"). Stereotypic behavior is an abnormal behavior that is characterized by repetitive weaving or swaying back and forth for no apparent reason, and is considered by scientific experts to be a strong indication that the animal is experiencing poor welfare. See, e.g. REDACTED

REDACTED

REDACTED

Dr. Friend's study involved gathering data about the behavior of circus elephants during transport, including Ringling Brothers' elephants, by videotaping them, and then forming conclusions based on observations of the videotapes. See USDA APHIS Animal Care, "Transportation and Management of Circus Animals: Transportation of Circus Elephants, Final Report" 20 ("USDA Report") (Ex. 4) (FELD 2229) (the purpose of collecting the video footage data was to "allow[] the researchers to determine whether the animals were performing abnormal behaviors"). As part of the study, Dr. Friend took video footage of elephants during five Ringling Bros. trips by mounting video camera in the railcars used to transport the elephants. See J.L. Williams and T.H. Friend, "Behavior of Circus Elephants During Transport," 14 Journal

of the Elephant Managers Association 3, 9 (Table 1) ("JEMA Article") (Ex. 5). These trips took place between June 2000 and 2002. See JEMA Article at 8.[1] Over sixty hours of footage of five elephants in Ringling Bros. trains was recorded and analyzed for this study – over thirty-five hours of footage of Blue-unit elephants, as well as more than twenty-seven hours of Red-unit elephants. See JEMA Article 9, Table 1 (Ex. 4); see also REDACTED Each set of video observations of Ringling elephants lasted from 40 minutes to 26.3 hours, with an average length of 9.1 hours. JEMA Article 8, 9 (Ex. 4); see also REDACTED

According to Dr. Friend himself, the video tape documented that the elephants engaged in "[t]he stereotypic behavior of weaving, considered an abnormal behavior." USDA Report 60 (FELD 2300) (Ex. 4); see also id. at 62 ("During this study, weaving was observed in both short and long trips during direct and video observations."); accord JEMA Article 8 (Ex. 4) ("Bouts of . . . weaving . . . were recorded."). Indeed, according to Dr. Friend's article, some of the videotaped elephants "commenced weaving shortly after entering the . . . rail car." JEMA Article 10 (Ex. 4).

Dr. Friend's study of Ringling Bros.'s elephants was, of course, conducted with defendant's knowledge and authorization, since FEI had to provide Dr. Friend access to the

REDACTED

[2] All of the data pertaining to elephants on railcars discussed in Dr. Friend's JEMA Article pertain to Ringling Bros. elephants. Although Dr. Friend also gathered video data pertaining to elephants from other circuses, none of these circuses use train cars to transport their elephants. See JEMA Article at 8 (Ex. 4).

railcars REDACTED [redacted] See Final USDA Report at 20 (FELD 2229) (the purpose of collecting the video footage data was to "allow[] the researchers to determine whether the animals were performing abnormal behaviors"). The study was begun shortly after plaintiffs filed their original lawsuit in this matter, and continued for at least three years, when Dr. Friend published his results. See USDA Report Figure 5 (FELD 2240) (indicating that taping of FEI's elephants began on Aug. 6, 2000); Complaint in Performing Animal Welfare Society, et al. v. Ringling Bros., et al, Civ. No. 00-1641 (July 11, 2000) (EGS) (D.D.C.); JEMA Article (2003) (Ex. 4).

Nonetheless, REDACTED [redacted]

REDACTED [redacted]

REDACTED [redacted]

Thus, REDACTED

REDACTED

B. Defendant's Spoliation of Veterinary Inspection Certificates Documenting the Health Status of Its Animals.

In light of FEI's failure to produce the veterinary and medical records that plaintiffs had requested in their 2004 Document Requests, in September 2005, this Court granted plaintiffs' motion to compel FEI to "turn over all" of these records. Order of Sept. 26, 2005 (DE 50). When FEI continued to defy that Order, the Court granted plaintiffs' expedited motion to enforce the original Order. Order of Sept. 26, 2006 (DE 94).

Among the documents that defendant did not produce at all until the motion to compel was granted was a nine-page document containing "veterinary inspection certificates" – i.e., certifications regarding the health status of FEI's animals. These certifications address whether the animals have been infected with tuberculosis, brucellosis, or any other "infectious, contagious, and/or communicable disease," see, e.g., Ex. 9 (FEI 2676), and are required to be executed in order to transport the elephants in interstate commerce. See, e.g., 23 Neb. Admin. Code Ch. 2, § 004 (2008) (All animals brought into the state . . . shall be accompanied by a complete and legible Certificate of Veterinary Examination").

When FEI finally produced this document in October, 2006, it had redacted six pages of these Certificates, in their entirety, from the middle of several other pages of certificates that were produced. See Ex. 10 (FEI 42475, reflecting 2 pages, and FEI 42477, reflecting an additional 4 withheld pages). Accordingly, plaintiffs subsequently filed a motion to compel the release of the withheld pages, as part of a larger motion for the release of various information that had been redacted by FEI. See Pls.' Mot. to Compel Redacted Information (Feb. 15, 2008). In response to that motion, FEI claimed that these six pages contained "non-responsive" information, and that this was the reason this information had not been produced. See FEI's

Opp'n to Mot. to Compel Redacted Information 11, 14-15 (Mar. 7, 2008); see also id. at 14-15 (claiming these documents cover "Other Animals (various); elephant portions produced").

In order to resolve the motion to compel, Judge Facciola ordered FEI to produce these pages (and others) for an in camera inspection. See Minute Order of June 3, 2008. However, FEI did not comply with that Order either. Instead, in a letter to Judge Facciola's law clerk FEI's counsel simply stated that although "Defense counsel had the originals reflected by pages 42475 and 42477" – indeed, FEI must have reviewed them as recently as March 2008 in order to represent that they were "non-responsive," and certainly had them in October, 2006, when it decided to withhold them in the first instance – she "is unable to locate them at this time." See Letter of June 6, 2008 (Ex. 11) (emphasis added). The letter contained no explanation as to how long the six pages had been missing, what efforts had been made to locate them, or what additional efforts would be made – if any – to come into compliance with Judge Facciola's Order.

Subsequently, Judge Facciola issued a second Order for FEI to produce these six pages to the Court, along with an explanation as to why the information was being withheld. See Order of August 4, 2008, at 4 (DE 325). However, defendant once again defied the Court's Order, and, instead of producing the records, submitted a "Response To The Court's Order" that simply referred to its earlier letter, reiterating that while "counsel at one time had the original documents reflected by FEI 42475 and FEI 42477," she "is now unable to locate them." FEI's Aug. 4, 2008 Filing at 3 (DE 332); see also id. ("[c]ounsel believes that this facsimile contained a batch of certificates of veterinary inspection for the unit, and that the redacted pages did not relate to elephants," and "[t]his is consistent . . . with the client's recollection regarding this particular

document"). Although this "Response" to Judge Facciola's second Order stated that defense counsel has "re-searched our files for this document in an effort to provide it to the Court and to prove that it is irrelevant," id. (emphasis added), defendant and its counsel still did not explain how or when the copy of these six pages in the offices of Fulbright and Jaworski were lost, or the particular efforts that have been made to find either those copies, or the originals that are presumably still in the possession of FEI. Nor did counsel submit a declaration concerning these matters.[3]

Nonetheless, despite having lost six pages of these health certificates, in FEI's recently filed Rule 26(a) Pretrial Disclosures defendant has identified a long list of other veterinary health certificates that it states it may rely on at trial. See DE 318 at 9, 24-25 (July 18, 2008) (listing specific certificates).

ARGUMENT

I. The Destruction Of REDACTED

A. [redacted]

1. REDACTED

REDACTED

[redacted], it is guilty of spoliation. See West v. Goodyear Tire & Rubber Co., 167 F.3d 776, 779 (2d Cir. 1999) ("Spoliation is the destruction or

[3] Plaintiffs assume that FEI did not provide defense counsel with the originals of the documents produced in this case. Indeed, it would have been standard practice for Fulbright and Jaworski itself to have made at least one copy of the produced documents before bates labeling them.

significant alteration of evidence, or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation."); Silvestri v. Gen. Motors Corp., 271 F.3d 583, 590 (4th Cir. 2001) ("Spoliation refers to the destruction or material alteration of evidence or to the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation." (citations omitted)).

A duty to preserve evidence arises whenever one knows or should know that the material is potentially relevant to pending or potential litigation. State Farm Fire & Cas. Co. v. Broan Mfg. Co., Inc., 523 F. Supp. 2d 992, 996 (D. Ariz. 2007). Here, this lawsuit was filed before RE [redacted] CT [redacted]. Moreover, defendant reasonably should have known that documentation of its chaining of elephants during transportation, and of its elephants engaged in stereotypic behavior during such transport, were relevant to plaintiffs' action, given that plaintiffs' Complaint expressly stated that FEI was unlawfully "taking" the endangered Asian elephant "by routinely . . . chaining [elephants] for long periods of time," Compl. ¶ 1 (emphasis added), and that this "chaining and confinement of elephants for many hours each day violate[s] the 'taking' prohibitions of section 9 of the ESA." Id. ¶ 101 (emphasis added). Plaintiffs' Complaint further stated that one of the plaintiffs "has seen the elephants engage in stressful 'stereotypic' behavior, as a result of defendants' mistreatment of them." Id. ¶ 26 (emphases added).

Because plaintiffs' Complaint put defendant on notice that REDACTED [redacted] – indeed, plaintiffs later requested precisely this kind of information in their discovery requests, see supra at 12, n.4 – defendant was under a clear

duty to retain this REDA . See DL v. Dist. of Columbia, – F. Supp. 2d –, No. 05-1437, 2008 WL 2555101, at *8 (D.D.C. June 27, 2008) ("'While a litigant is under no duty to keep or retain every document in its possession once a complaint is filed, it is under a duty to preserve what it knows, or reasonably should know, is relevant in the action, is reasonably calculated to lead to the discovery of admissible evidence, is reasonably likely to be requested during discovery, and/or is the subject of a pending discovery request.'" (quoting Arista Records, Inc. v. Sakfield Holding Co. S.L., 314 F. Supp. 2d 27, 34 n.3 (D.D.C. 2004)) (emphasis added)).

Nonetheless, despite being aware of the relevance of REDACTED

[redacted]

. See Strong v. U-Haul Co., No. 1:03-cv-00383, 2006 WL 5164822, at *3-5 (S.D. Ohio Dec. 28, 2006) ("Spoliation . . . occurred" where it was "undisputed that" evidence disappeared while it was " in defendants' custody and control"); Jordan F. Miller Corp. v. Mid-Continent Aircraft Serv., Inc., No. 97-5089, 1998 WL 68879, at *5 (10th Cir. Feb. 20, 1998) ("[C]ourts have sanctioned a party

for failing to preserve evidence even when the evidence was not in the party's actual possession at the time the spoliation occurred."); id. at *2-3 (holding that trial court had properly sanctioned plaintiffs by dismissing claims where a third party had destroyed evidence and explaining that despite plaintiffs contention "that they had no hand in the loss or destruction of the evidence," sanctions can be "imposed even when the destruction or loss of evidence was neither intentional nor in bad faith").[4]

2. REDACTED REDACTED

REDACTED . As discussed above, REDAC

extremely relevant to this litigation. Moreover, it is clear that the REDACTED

Thus, the only issue with regard to REDACTED is whether he had a duty to

[4] Defendant's spoliation also violates Rules 34(b) and 26(e) because REDACTED responsive to several of Plaintiffs' Interrogatories and Document Requests. See Ex. 12 (Mar. 30, 2004 Requests). For example, Interrogatory No. 14 instructed FEI to "[i]dentify all records that reflect" defendant's "practices and procedures for maintaining the elephants on the train . . . including but not limited to whether the animals are chained, how much space each elephant is provided, how the elephants are fed," etc. Ex. 12 at 10 (emphasis added); see also Int. No. 17 (instructing defendant to "identify all video, audio, or other recordings that have been made by or for Ringling in the last ten years that involve, concern, or record elephants or individuals who work with elephants") (emphasis added); see also id. at 14 (directing defendant to produce all documents identified in response to the interrogatories); id. at 2 (instructing FEI to include all materials "that they have a right to secure from any other source").

Moreover, w REDACTED at a minimum defendant was obligated to at least have identified REDACT pursuant to plaintiffs' discovery instructions. See id. ("If any Documents have been lost, mutilated, erased, deleted, or destroyed, so state and identify such Document, the time and circumstances under which the loss, mutilation, erasure, deletion, or destruction occurred, and state to which request(s) the Document would have been responsive").

preserve evidence. As discussed below, REDACTED

The duty to preserve evidence can arise from statute or regulation. See Byrnie v. Town of Cromwell, 243 F.3d 93, 109 (2d Cir. 2001) (holding that federal regulations imposing two year record retention gave rise to a duty for purposes of spoliation analysis); accord Sarmiento v. Montclair State Univ., 513 F. Supp. 2d 72, 94 (D.N.J. 2007); Dupee v. Klaff's, Inc., 462 F. Supp. 2d 244, 249 (D. Conn. 2006); see also Gorelick, J., et al., Destruction of Evidence (1994 and Supp. 2005) ("There is no good reason to destroy documents during the period when the statutes or regulations require" their maintenance.)). Here, REDACTED

Dr. Friend's study REDACTED

7 C.F.R § 3019.53(b) (requiring record retention "until all litigation, claims, or audit findings involving the records have been resolved and final action taken").

Dr. Friend also assumed a duty to maintain evidence in his capacity as an expert for defendant. See Vodusek v. Bayliner Marine Corp., 71 F.3d 148, 156-57 (4th Cir. 1995) (district court properly instructed jury that "'it is the duty of a party, a party's counsel and any expert witness, not to take action that will cause the destruction or loss of relevant evidence where that will hinder the other side from making its own examination and investigation of all potentially relevant evidence'" (emphasis added)); Lifetime Products, Inc. v. Correll, Inc. 323 F. Supp. 2d 1129, 1150 (D. Utah 2004) (counsel is responsible for informing experts of the duty to maintain records); see also Steven Lubet, Expert Witnesses: Ethics and Professionalism, 12 Geo. J. Legal Ethics 465, 481 (1999) ("[A]n expert should never destroy any item, document, object, photograph, or record for the purpose of concealing it from discovery or obstructing another party's access to evidence."). Indeed, REDACTED [redacted]. See also Dec. 5, 2003 Stipulated Pre-Trial Schedule (Ex. 13) (providing for the expert reports in this case to be exchanged in November 2004).

Thus, because REDACTED [redacted][5]

[5] REDACTED [redacted] – also violates Rule 26(a), which governs the disclosure of expert testimony and requires that a proffered expert provide a written report that discloses "the data or other information considered by the witness in forming" all opinions he will express. The word "considered" is broadly defined and "the courts have embraced an objective test that defines 'considered' as anything received, reviewed, read, or authored by the expert, before or in connection with the forming of his opinion, if the subject matter relates to the facts or opinions expressed." Employees Committed for Justice v. Eastman Kodak Co., – F.R.D. –, No. 04-CV-6098, 2008 WL 2078096, at *2 (W.D.N.Y. May 15, 2008) (citation omitted) (emphasis omitted); see also Euclid Chem.

B. Appropriate Remedies For The Spoliation Of REDACTED

1. The Court Should REDACTED

In light of REDACTED and the resulting unfair prejudice to plaintiffs, plaintiffs request that, pursuant to Rule 37 and the Court's inherent authority, the Court REDACTED. See, e.g., Mems v. City of St. Paul, 327 F.3d 771 (8th Cir. 2003) (expert testimony was properly excluded under Rule 37 for failure to disclose expert's notes from meetings); Unigard Sec. In. Co. v. Lakewood Eng'g & Mf'g Corp., 982 F.2d 363, 368 (9th Cir. 1992) ("[A] district court's inherent powers [include] . . . the power . . . to exclude testimony of witnesses whose use at trial . . . would unfairly prejudice an opposing party.'" (citation omitted)); Ware v. Seabring Marine Indus., No. Civ.A. 04-418-JBC, 2006 WL 980735, at *3 (E.D. Ky. Mar. 6, 2006) ("Expert testimony based on inspection of inadvertently lost or destroyed evidence should be excluded where the other party is unable to rebut the testimony because of the loss." (citation omitted)); BTO Logging, Inc. v. Deere & Co., 174 F.R.D. 690, 692-93 (D. Ore. 1997) (Courts' "inherent powers include the power to exclude

---

Co. v. Vector Corrosion Techs., Inc., No. 1:05 CV 80, 2007 WL 1560277, at *3-4 (N.D. Ohio May 29, 2007); Western Resources, Inc. v. Union Pacific R.R. Co., No. 00-2043-CM, 2002 WL 181494, at *9 (D. Kan. Jan. 31, 2002); Reed v. Binder, 165 F.R.D. 424, 428 & n.6 (D.N.J. 1996) ("'[t]he data and information considered by the expert' . . . means 'what' the expert saw, heard, considered, read, thought about or relied upon in reaching the conclusions and opinions to be expressed"); Trigon Ins. Co. v. United States, 204 F.R.D. 277, 282 (E.D. Va. 2001) ("'Considered,' which simply means 'to reflect on' or 'to think of: come to view, judge or classify,' clearly invokes a broader spectrum of thought than the phrase 'relied upon,' which requires dependence on the information." (citation omitted)). By its terms, Rule 26(a)(2) mandates that a proffered expert disclose any data underlying her report. See, e.g., Olson v. Montana Rail Link, Inc., 227 F.R.D. 550, 551 (D. Mont. 2005). REDACTED and where an expert has "considered" such data in the course of preparing a report, that data must be disclosed. Id. at 551-553.

the testimony of witnesses which would unfairly prejudice an opposing party. Using these inherent powers, courts have imposed sanctions for the destruction of spoliation of evidence.").[6]

Because of REDACTED plaintiffs have been denied any opportunity to review and present REDACTED – evidence that goes to the very heart of plaintiffs' claims. See, e.g., Compl. ¶¶ 1, 24, 26, 101. Accordingly, plaintiffs are undeniably prejudiced. See, e.g., Jordan F. Miller Corp., 1998 WL 68879, at *5 (district court properly determined that prejudice to defendant arising from plaintiff's destruction of evidence warranted sanctions where plaintiff "and his agents had an opportunity to inspect" the evidence and defendant "had no such opportunity"); Dillon v. Nissan Motors Co., Ltd., 986 F.2d 263, 267-68 (8th Cir. 1993) (district court properly found defendant was prejudiced where "'evidence which may have prov[en] helpful to the defense had been destroyed'" (citation omitted)).[7]

---

[6] Spoliation can be sanctioned by a district court "either pursuant to Rule 37(b)(2) of the Federal Rules of Civil Procedure, which authorizes a court to assess a sanction for violation of a discovery order, or pursuant to the court's inherent power to 'protect [its] integrity and prevent abuses of the judicial process.'" Webb v. District of Columbia, 146 F.3d 964, 971 (D.C. Cir. 1998) (citation omitted). Rule 37(b)(2) addresses spoliation that occurs in violation of a court "order to provide or permit discovery" while the Court's inherent authority authorizes it to impose sanctions for spoliation "[e]ven without a discovery order." West, 167 F.3d at 779 (citing Chambers v. NASCO, Inc., 501 U.S. 32, 43-45 (1991)) (additional citations omitted)). Because defendant's failure to disclose the video footage at issue violates the Court's order that the parties provide proper expert disclosures, see Minute Order of Sept. 3, 2004, the Court can sanction defendant pursuant to either Rule 37 or its inherent authority. Regardless of whether the Court proceeds under Rule 37 or its inherent authority, the analysis is essentially the same. See Barsoum v. NYC Hous. Auth., 202 F.R.D. 396, 399 (S.D.N.Y. 2001).

[7] See also Unigard, 982 F.2d at 368-69 (district court properly found that "allowing [plaintiff] to introduce the testimony of its experts would unfairly prejudice [plaintiff]" where "'plaintiff's destruction of key evidence'" precluded defendant from "an opportunity to inspect

This prejudice, in turn, warrants exclusion of REDACTED, especially given REDACTED See, e.g., id., 986 F.2d at 266-67 (where before case was filed plaintiffs and their expert "destroyed crucial evidence" that they "knew or should have known . . . was . . . important . . . evidence which should have been preserved," "but did not do so in bad faith" and defendant was "prejudiced by the inability to inspect" the evidence, district court properly precluded the expert from testifying and excluded any evidence derived from his inspection); Lifetime Prods., Inc., 323 F. Supp. 2d at 1152 (affirming decision of magistrate judge striking and excluding from consideration declaration and opinions of expert where expert had destroyed documents); Unigard, 982 F.2d at 368 (district court properly excluded expert testimony as a sanction for destruction of evidence); see also Reed, 165 F.R.D. at 430 n.10 ("'If an expert is unable or unwilling to make the disclosures [required by Rule 26] he should be excluded as a possibility for retention as an expert witness in the case. . . . A party may not

---

[the destroyed] evidence" and from gaining expert testimony related to the destroyed evidence); State Farm Fire & Cas. Co., 523 F. Supp. 2d at 997 (finding prejudice where destruction of evidence "deprived [adversary's experts] of the ability to determine whether the evidence would have supported their theory of the case"); In re Wechsler, 121 F. Supp. 2d 404, 416 (D. Del. 2000) ("[W]hen considering the degree of prejudice suffered by the party that did not destroy the evidence, the court should take into account whether that party had a meaningful opportunity to examine the evidence in question before it was destroyed. . . . [W]hen one side is completely deprived of the opportunity to inspect the evidence because it was destroyed after the other side had a chance to examine it, then sanctions for spoliation are generally appropriate." (citations omitted)); BTO Logging, 174 F.R.D. at 694 ("It is prejudicial to . . . require [a party] to base its [case] on evidence chosen and retained by [its adversary's] expert."); Seabring Marine Indus., Inc. , 2006 WL 980735, at *3 (where "[t]he best way for the plaintiff to prove the [alleged] defect [was] by . . . testimony from an expert who examined the [evidence]' and defendant's destruction of evidence "precluded plaintiff from pursuing this avenue of proof," plaintiff was prejudicial to plaintiff's claim (citation omitted)).

simply retain an expert and then make whatever disclosure the expert is willing or able to make notwithstanding the known requirements of Rule 26" (other citations omitted)).

Even if the Court is not prepared to REDACTED plaintiffs request that, at an absolute minimum, the Court REDACTED As noted above, REDACTED). Because the data underlying this study – REDACTED Accordingly, REDACTED been extremely probative of this very issue. See, e.g., Olson, 227 F.R.D. at 552-53 (where data underlying defendant's expert's report was untimely disclosed the court would prohibit the expert "from relying in any way upon data or conclusions specifically not included and spelled out in his" original expert report; any opinion held by the expert that was not properly disclosed would be stricken as would be "any opinion or evidence based on undisclosed data or testing"); BTO Logging, 174 F.R.D. at 692-94 (where plaintiff's disposal of evidence had precluded defendant's expert from examining that evidence, "any testimony by

[plaintiff's] experts . . . which [was] based on their examinations of the" disposed evidence would be excluded).

2. The Court Should Also Sanction FEI's REDACTED

In addition to excluding or limiting REDACTED, plaintiffs respectfully request that, in view of the highly probative nature of this evidence to plaintiffs' principal claims in this case, the Court sanction REDACTED. See Black v. Sheraton Corp. of Am., 371 F. Supp. 97, 102 (D.D.C. 1974) (deeming facts as established as sanction for discovery violation); Johnson v. Secretary, Dep't of Health & Human Servs., 587 F. Supp. 1117, 1121 (D.D.C. 1984) (making findings of established facts based on allegations from plaintiff's complaint); see also Strong, 2006 WL 5164822, at *3 ("the practical importance of the loss of the evidence" is significant when determining spoliation sanctions).[8]

Specifically, plaintiffs request that the Court direct that the following facts be taken as established:

REDACTED

[8] Despite the willfulness of FEI's spoliation, plaintiffs do not seek "the most severe Rule 37(b)(2) sanctions – dismissal, default judgment, and striking pleadings in whole or in part . . . ." Card Tech. Corp. v. Datacard Inc., 249 F.R.D. 567, 571 (D. Minn. 2008) (citing Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 705 (1982) (additional citations omitted); see also id. ("The judicial admission of certain facts as established . . . is not necessarily a severe sanction." (citation omitted)); Evanson v. Union Oil Co., 85 F.R.D. 274, 278 (D. Minn. 1979) (although the court could in its discretion sanction defendant in other ways for discovery violations it was "reluctant to go this far" and would instead only sanction the defendant "by having certain facts . . . deemed to be true . . ..").

REDACTED

Plaintiffs' expert, Dr. Benjamin Hart, a Distinguished Professor Emeritus at the University of California in Davis who holds both a PhD and a DVM and is a certified Applied Animal Behaviorist by the Animal Behavior Society, acknowledges REDACTED Dr. Hart concludes that RE CT

Another expert of plaintiffs, Dr. Ros Clubb, who received her Ph.D in animal behavior from Oxford University in the United Kingdom and whose research has focused on the relationship between animals' natural behaviors in the wild and their abnormal behaviors in captivity, explains that REDACTED

Dr. Clubb concludes that REDACTED

Second, the Court should deem as established fact that REDACTED . Again, this is entirely consistent with other evidence in this case. See, e.g., USDA Interoffice Memorandum from

[9] Plaintiffs' expert, Dr. Phil Ensley has worked as a veterinarian in zoo and wild animal medicine for over thirty years, including as an associate veterinarian with the Zoological Society of San Diego, where he worked with elephants, for twenty-nine years. REDACTED . Dr. Ensley reviewed all of the elephant medical records that this Court ordered defendant to produce to plaintiffs and also participated in both Court-ordered inspections of defendant's elephants. Id. at 5, 132, 236-46; Order of Sept. 26, 2005 (DE 50); Order of Sept. 26, 2006 (DE 94); Order of Aug. 23, 2007 (DE 178). He concluded that REDACTED see also Dep. of Frank E. Hagan 101:8 (Nov. 9, 2004) (Ex. 16) (noting that when he has seen elephants in defendant's stock cars "usually they're bopping their heads back and forth").

Charles M. Currer to Dr. Robert Willems (July 16, 1999) (PL 02081-83) (Ex. 17) (inspection of one of defendant's elephant cars revealed that defendant's elephants "are chained both front and hind by the legs next to the wall of the train car" and that "there is very little space between the wall and the elephants body, as well as very little space between the two elephants"); REDA

; Ringling Bros. and Barnum & Bailey Circus Blue Unit Elephant Stabling Positions (Train Travel) (FEI 2346) (Ex. 18) (documenting that defendant transports six to seven elephants per railcar); Decl. of Robert Tom, Jr. ¶ 18 (Oct. 10, 2006) (API 6238) (Ex. 19) ("While on the boxcars, the animals do not have enough room to turn around or lay down.").

Third, the Court should deem as established the fact that REDACTED

. This is also consistent with evidence that has been produced in this case. See, e.g., Tom Decl. ¶ 17 (Oct. 10, 2006) (API 6238) (Ex. 19) ("On a 3 or 4 day train run, they stop only once to let the elephants and horses off of the train for about 2 hours to clean the boxcars. During these infrequent stops, we fill up to a dumpster-and-a-half with waste that accumulates in the four animal cars.") (emphasis added); Decl. of Archele Faye Hundley ¶ 39 (Sept. 29, 2006) (API 6248) (Ex. 20) ("It

was a 3-day train ride when we traveled by train from Worcester, Mass., to Tulsa, Okla. The elephants and horses were only let out once for exercise during the trip. There was such an accumulation of elephant feces that it took two dump trucks to remove all the waste from their boxcars.") (emphasis added); REDACTED

Finally, the Court should deem as established the fact that REDACTED This is also consistent with other evidence that will be presented at trial. See, e.g., Hagan Dep. 103:12 (Nov. 9, 2004) (Ex. 16); id. 104:4-23 (stating that during the entire 500+ mile trip from Phoenix, AZ to Fresno, CA elephants were not taken off the train); REDACTED (citing compilation of FEI Transportation Orders).

* * *

In sum, REDACTED [redacted] – all of which is extremely relevant evidence in this case. Therefore, to sanction defendant's spoliation, and to at least partially redress the resultant prejudice to plaintiffs, the Court should take these facts as established. See Black, 371 F. Supp. at 102; Johnson, 587 F. Supp. at 1121.

II. Defendant's Spoliation of Documents Concerning The Health of the Elephants.

As noted, supra at 7-9, defendant also failed to produce six pages of veterinary certificates despite four separate Court Orders to do so – i.e., Judge Sullivan's Orders on plaintiffs' motions to compel and to enforce, and Judge Facciola's in camera review and production Orders – on the grounds that its counsel purportedly lost the documents. In view of this additional spoliation, plaintiffs respectfully request that the Court provide the following additional sanctions: (a) an Order precluding defendant from relying on the other health certificates that FEI has identified as potential trial exhibits, see DE 318 at 9 and 24-25, and (b) issue a factual finding that the spoliated records would reveal evidence that is consistent with the overwhelming additional information plaintiffs will admit into evidence demonstrating that FEI's Asian elephants are not in good health.

In its recently filed Rule 26(a) disclosures, FEI listed more than 150 health certificates that it "may" rely on at trail in defense of plaintiffs' claims. Def. R. 26(a) Pre-Trial Disclosures at 24-25 (DE 318). Prohibiting FEI from relying on these certificates is expressly authorized by

Rule 37. Fed. R. Civ. P. 37(b)(2)(A)(ii) (authorizing the Court to enter an Order "prohibiting the disobedient party from . . . introducing designated matters into evidence") (emphasis added). This sanction is particularly appropriate here in light of the possibility – indeed, likelihood – that the missing health certificates contradict those that FEI has produced. Indeed, it would plainly be highly prejudicial to plaintiffs to permit FEI to rely on health certificates it has chosen to produce in this case, while at the same time allowing it to fail to produce similar certificates after four Orders to do so. In short, in light of FEI's clear spoliation of six pages of health certificates, it should not be permitted to rely on any such documents in this case.

The Court should also infer that these specific records actually contain information that would support plaintiffs' claims here, including information demonstrating that FEI elephants have tuberculosis and other diseases that are addressed by these certificates. See Ex. 9. Courts have often imposed this kind of sanction where a party has failed to comply with discovery orders. See, e.g., Washington Gas Light Co. v. Biancaniello, 183 F.2d 982, 986 (D.C. Cir. 1950) (fact that defendant failed to produce evidence "permits the inference that had it been introduced at trial it would have been unfavorable to [defendant's] case"); Black, 371 F. Supp. at 102 (inferring that records not produced contain facts consistent with plaintiffs' theory); In re Napster, Inc. Copyright Litigation, 462 F. Supp. 2d 1060 (N.D. Cal. 2006); Donato v. Fitzgibbons, 172 F.R.D. 75, 84 (S.D.N.Y. 1997) (allowing adverse inference based on destruction of evidence). Moreover, such a conclusion is entirely consistent with other evidence showing these animals suffering these very conditions. See, e.g., FEI Press Release, "Ringling Bros. and Barnum & Bailey Center for Elephant Conservation Announces Second Test Positive For Tuberculosis In Male Elephant") (Sept. 5, 2005) (Ex. 22).

As with the videotapes, the court need not conclude that FEI acted in bad faith in order to provide these remedies. See, e.g., Trull v. Volkswagen of Am., Inc., 187 F.3d 88, 95 (1st Cir. 1999) ("Bad faith is not essential. If [ ]evidence is mishandled through carelessness, and the other side is prejudiced . . . the district court is entitled to consider imposing sanctions, including exclusion of the evidence."); see also BTO Logging, Inc., 174 F.R.D. at 692-94 (sanctioning plaintiff for destruction of evidence despite lack of evidence of bad faith where plaintiff failed to preserve evidence, thereby precluding adversary from examining that evidence); Unigard Security Ins. Co., 982 F.2d at 369 (trial court properly sanctioned plaintiff for destruction of evidence despite lack of bad faith where the "destruction of evidence . . . precluded [defendant] from any opportunity to inspect th[at] evidence").

At the same time, however, determining whether the misconduct is sanctionable turns in significant part on whether the defendant – and its counsel – were on notice that the Court expected every effort to be made to preserve relevant evidence. See Donato, 172 F.R.D. at 80 (explaining that the court's earlier discovery Order was "intended to send a clear message to counsel and to defendant Orangetown of the importance of complying carefully with their obligations in this case."). Here, given the Court's repeated admonitions – beginning as early as 2005 – that FEI must produce every record that in any way relates to the health of the elephants, defendant has unquestionably been on notice that it must preserve all such records. See, e.g., Transcript of September 16, 2005 Hearing at 35 ("I'm going to order that all of these [medical] documents be produced"); id. at 36 ("And when I say all, I mean all, every last record") (emphasis added). Indeed, the Court's September 26, 2006 Order granting plaintiffs' motion to enforce the compelled production of the medical records ordered defendant to produce "all

records that in any way pertain to the medical condition or health status of, and all veterinary records for, any and all Asian elephants" in defendant's custody. Order (Sept. 26, 2006) (DE 94) at 1-2 (emphasis added). Even more specifically with regard to the records at issue now, the Court in particular ordered defendant to produce "all veterinary inspection and health certificates for the elephants." Id. at 2 (emphasis added).

Accordingly, there certainly can be no doubt that FEI has been on notice that the Court expected these records to be produced and preserved, and defendant's failure to do so should be sanctioned appropriately. See also Cine Forty-Second Theater v. Allied Artists Pictures, 602 F.2d 1062, 1068 (2d Cir. 1979) ("[W]here counsel should have understood his duty to the court the full range of sanctions may be marshalled. Indeed, in this day of burgeoning, costly and protracted litigation courts should not shrink from imposing harsh sanctions where, as in this case, they are clearly warranted") (emphasis added).

In this regard, it is also critical to emphasize that even if the Court were to give any consideration to FEI's "defense" of its failure to comply with these Orders, that explanation makes no sense.[10] First and foremost, FEI's counsel's unsubstantiated guess that the lost records were withheld because they "did not relate to elephants," FEI's Aug. 4, 2008 Filing at 3, is not credible because these pages were withheld in their entirety. Given FEI's emphatic position that it need not even identify, let alone produce, records with no elephant information in them, if they did not contain at least some information relating to FEI's elephants these pages would not have

[10] The fact that defendants' explanations for the failure to produce these records have been both incomplete and contained in unsworn statements seriously discounts their reliability. See Carson v. Dep't of Justice, 631 F.2d 1008, 1015, n.30 (D.C. Cir. 1980) (courts do not "ordinarily take cognizance of 'facts'" asserted by counsel in briefs).

been identified as responsive to plaintiffs' document requests at all. Certainly, FEI has not Bates labeled and withheld as non-responsive other medical records for its horses, tigers and other animals; instead, it simply has not identified such documents in this case. Thus, the fact that FEI identified these pages certainly indicates that at least some portion(s) of them contain elephant information.[11]

The sanctions plaintiffs seek here are also particularly appropriate in light of defendant and its counsel's cavalier approach regarding its failure to comply with the Court's discovery Orders. Thus, rather than seeking any relief from its contempt of several Orders to produce these records, defendant first raised this issue in a letter to the Judge's law clerk, and then only raised it again in response to a fourth production order, in a "Response to the Court's Order" – which, again, did not ask that FEI be relieved of its discovery obligations or offer any means to remedy defendant's flagrant violation of the Court's Orders. Instead, counsel simply apologized and asked that the Court "recognize that counsel's inability to produce these pages for in camera review is due to no fault of the client." FEI's Aug. 4, 2008 Filing at 3.

Second, even putting aside the likelihood that these records were in fact "non-responsive," defendant and its counsel have not even tried to explain how it was that these records were lost and what efforts were made to find them, let alone submitted a sworn declaration concerning these matters. Certainly, simply saying that counsel has "re-searched our

[11] FEI's explanation is also contradicted by the fact that it has produced other health certificates which do contain information on other animals, where those records also contain information about elephants. See, e.g. Ex. 9 (FEI 2676). Thus, since some of the pages in the overall document at issue here – e.g., FEI 42476 and 42478 (Ex. 10) – contain information about elephants, there is no reason FEI would have withheld the other pages simply because they included information on other animals.

files for this document" cannot be sufficient. Id. At bare minimum, a meaningful search would have included seeking the original of these documents from FEI itself, and detailing why they could not be located. In short, the sparse information provided lends no assurance that these records cannot in fact be obtained, as defendant claims – which makes the sanctions plaintiffs are requesting even more appropriate. See Biancaniello, 183 F.2d at 986 (defendants "failure to produce the best evidence in explanation of why" the evidence was not produced "creates a strong circumstance unfavorable to appellant").

Indeed, since the Court has long-recognized the vital importance of the medical records to plaintiffs' claims in this case, and in light FEI's herculean efforts to avoid providing these records to plaintiffs, it is entirely appropriate that as a sanction for FEI's failure to produce these records the Court grant plaintiffs' motion. Accordingly, the Court should (a) preclude FEI from relying on other health certificates in this case, and (b) deem as established fact that the missing health certificates contain information consistent with other evidence plaintiffs will be introducing demonstrating that the elephants – who travel in chains in cramped rail cars day after day, year after year, and who are routinely hit with bull hooks – are not in good health. See Shepherd v. Am. Broadcasting Co., Inc., 62 F.3d 1469, 1478 (D.C. Cir. 1995) (explaining that "a district court may impose issue-related sanctions whenever a preponderance of the evidence establishes that a party's misconduct has tainted the evidentiary resolution of the issue"). Indeed, plaintiffs' expert witness Dr. Philip Ensley, who again has reviewed all of the elephants' medical records (and also participated in the Court-ordered inspection of the elephants) concluded that the evidence demonstrates REDACTED

REDACTED The Court should therefore deem as established facts that the missing health certificates would contain information consistent with these findings.

CONCLUSION

For the foregoing reasons, plaintiff's motion should be granted. A proposed Order is attached.

Respectfully submitted,

/s/ Delcianna J. Winders
Delcianna J. Winders
(D.C. Bar No. 488056)
Howard M. Crystal
(D.C. Bar No. 446189)
Katherine A. Meyer
(D.C. Bar No. 244301)
Tanya M. Sanerib
(D.C. Bar. No. 473506)

Meyer Glitzenstein & Crystal
1601 Connecticut Avenue, N.W.
Suite 700
Washington, D.C. 20009
(202) 588-5206

Counsel for Plaintiffs

Dated: August 29, 2008