UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION IN LIMINE AND FOR ADDITIONAL SANCTIONS

Plaintiffs have filed a Motion in Limine and for Additional Sanctions Due to Defendant's Spoliation of Evidence (8/29/08) (Docket # 344) in which they accuse Feld Entertainment, Inc. ("FEI"), its expert Dr. Ted Friend, and FEI's counsel of "blatant and inexplicable spoliation." FEI will ignore the caustic rhetoric contained in the Motion and instead focus on the relevant facts and the law. First, the record, as well as plaintiffs' own legal authority, demonstrates that no spoliation occurred with regard to the studies Dr. Friend conducted for the USDA *prior to* becoming an expert for FEI in this case. The two events are separate and distinct. Moreover, Dr. Friend voluntarily produced his remaining research files to plaintiffs this summer, including the raw data sheets in which the video analysts recorded the elephants' behavior. Despite this, Dr. Friend and FEI have been wrongfully attacked as "spoliators."

Second, Plaintiffs ask that they be given a factual finding that the elephants "are not in good health, and that they suffer from diseases, including but not limited to tuberculosis" because six pages of documents related to animals *other than elephants* cannot be located by FEI's counsel. The request ignores reality, including the plethora of actual elephant medical

records produced in this case, and Plaintiffs can identify no prejudice to them. In any event, this document is already at issue before Judge Facciola, and counsel for FEI has already apologized to the Court for it. See FEI's Response to the Court's August 4, 2008 Order and Motion for Partial Reconsideration (8/13/08) (Docket # 332). Nonetheless, plaintiffs overreach and attempt to exploit the situation by seeking remedies that are entirely disconnected from, and bear no relation to, the misplaced six pages. Plaintiffs' Motion should be denied.

I. Dr. Friend's USDA Study Was Concluded Before He Became an Expert in this Case.

A. Dr. Friend Had No Duty to Preserve

Dr. Friend is a pre-eminent animal behaviorist who has devoted over thirty years to researching and studying animal welfare issues, including stress-related research. See Ex. 1, REDACTED FILED UNDER SEAL He is no stranger to the animal rights movement. In fact, he was honored by plaintiff API as their Humanitarian of the Year in 1986 for his studies on veal calves. (Ex. 2, Friend Decl. ¶ 1). He also happens to be one of two people (the other being Marthe Kiley-Worthington) who has conducted extensive research regarding the transportation and behavior of circus animals, including elephants. His research results have been published in peer-reviewed journals. His studies show that stereotypic behavior in circus elephants is not an indicator of poor welfare, and that transport of circus elephants is not harmful. REDACTED FILED UNDER SEAL As a result, plaintiffs are eagerly trying to exclude Dr. Friend's testimony at trial, and this motion is merely the latest avenue of attack.[1]

Dr. Friend began studying circus elephants in 1995.

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[1] In addition to filing this motion attacking Dr. Friend, plaintiffs also attempted to "supplement" the report of their expert Dr. Ros Clubb by offering additional opinions related to Dr. Friend's deposition testimony. FEI moved to strike the report as an improper attempt at rebuttal. See Motion to Strike Dr. Clubb's Supplemental Report (8/15/08) (Docket # 333).

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The USDA Study was not done for or paid for by any private party. See Ex. 2, Friend Decl. ¶ 2. Dr. Friend had no financial or other relationship with FEI during the elephant studies. Id. ¶ 4. There were two aspects of the USDA Study as it related to elephants: one aspect was to study environmental conditions and the other was to study elephant behavior during transport. Id. ¶ 2. The elephant behavior study used time-lapse video to record the activities of elephants during transport. Id.; REDACTED Videotaping of Ringling and other circuses' elephants for the USDA Study occurred in 2000, 2001, and 2002. Ex. 2, Friend Decl. ¶ 3; REDACTED FILED UNDER SEAL

At the start of the USDA Study, Dr. Friend asked

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Notwithstanding these agreements, no circus ever reviewed the USDA Study elephant footage. (Ex. 2, Friend Decl. ¶ 4). Specifically, neither Mr. Froemming nor anybody else at FEI reviewed the footage or requested copies of it, and Dr. Friend did not provide any copies of the footage to

[2] The Animal Care Division of the USDA Animal Plant Health Inspection Service ("APHIS") funded this research. The Animal Care Division is responsible for administering the Animal Welfare Act, and it inspects circuses. See Ex. 1, Friend Report at 2.

FEI. Id. The purpose of the agreement was to prevent re-sale of the tapes. The agreements were not signed for the purpose of destroying or hiding evidence, particularly because the USDA Study was unrelated to any litigation. Id.; REDACTED FILED UNDER SEAL

Ever mindful of his research budget, Dr. Friend's normal practice is to re-use videotapes once they had been analyzed for data. (Ex. 2, Friend Decl. ¶ 5). In addition to the USDA Study, REDACTED FILED UNDER SEAL

Once a tape had been analyzed and the data recorded, it was returned to the general pool for re-use by taping over it. Id. ¶ 6. The tapes in the video pool were not logged, and the elephant footage was eventually taped over for the tiger studies. Id. ¶¶ 6-7. By 2003, Dr. Friend's elephant study had been published, and he no longer had a need to retain any raw data related to that study. Space limitations at the University do not permit the keeping of all materials created during research. Id. ¶ 7. In fact, a major portion of the video pool was discarded in 2003 when they converted from VHS to digital filming. Id.¶ 9. *All of this occurred before Dr. Friend was retained as an expert by FEI in this case in May 2004.* Id. ¶ 8. Dr. Friend does not believe he discarded any elephant footage when the last of the VHS pool was dismantled in December 2007. Id. ¶¶ 9, 11.

Spoliation is the destruction of evidence, or the failure to preserve property for another's use as evidence. West v. Goodyear Tire & Rubber Co., 167 F.3d 776, 779 (2d Cir. 1999). First, however, there must be a duty to preserve. Silvestri v. General Motors Corp., 271 F.3d 583, 591 (4th Cir. 2001). The duty to preserve arises during litigation and can also arise prior to litigation when a party reasonably should know that the evidence may be relevant to anticipated litigation. Id. There is no evidence to suggest that Dr. Friend had any knowledge of litigation much less any duty to preserve the elephant footage from the USDA Study prior to becoming an expert in

this case in mid-2004. Accord REDACTED

Knowing this, Plaintiffs argue

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Plaintiffs claim that because 7 CFR § 3019.53(b) requires the retention of "financial records, supporting documents, statistical records, and all other records pertinent to an award" for three years, Dr. Friend was obligated to keep all of the raw data from his research for three years. (Motion at 4, 15). A closer look at Part 3019 reveals that it sets forth the requirements for the proper financial handling and accounting of grants, and § 3019.53 relates to financial records, not research data. See Ex. 5, 7 CFR 3019. "Research data" is a defined term in Part 3019 meaning: "recorded factual material commonly accepted in the scientific community as necessary to validate research findings[.] This 'recorded' material excludes physical objects (e.g., laboratory samples)." Id. § 3019.36. There is no reference to "research data" in § 3019.53, which is thus referring to financial information and not, as plaintiffs argue, research data. Section 3019.53 requires retention of financial recordkeeping related to funded research, and Texas A&M University has a system in place for that process. (Ex. 2, Friend Decl. ¶ 10). Dr. Friend, however, was not obligated to keep any of his research data for three years pursuant to 7 CFR § 3019.53. Id.

Furthermore, plaintiffs' own authority holds that a regulation can give rise to a duty to preserve only if plaintiffs are a member of the class of persons that the regulatory agency sought to protect in promulgating the rule. Byrnie v. Town of Cromwell, 243 F.3d 93, 109 (2d Cir. 2001); Dupee v. Klaff's, Inc., 462 F.Supp.2d 244, 249 (D. Conn. 2006). There is no indication that plaintiffs are in the class of persons sought to be protected by these financial record

regulations, which are entirely unrelated to plaintiffs' takings claim. As such, they cannot rely upon 7 CFR § 3019.53 (even if plaintiffs' interpretation of it were accepted *arguendo*) to impose a duty to preserve research data on Dr. Friend.

In short, Dr. Friend had no duty to preserve any of his research materials at the time when he re-used the tapes or probably even discarded some of them in 2003. Plaintiffs are correct that REDACTED FILED UNDER SEAL What Plaintiffs did not do at his deposition was ask Dr. Friend when these events occurred. Instead, they prefer to conclude incorrectly that he is "guilty of spoliation." Id. at 14. As demonstrated, this is not true. Dr. Friend has done nothing wrong, and he was not obligated to retain his research data.

B. Dr. Friend Did Not "Consider" the Videotapes for His Expert Report

Plaintiffs next argue that any materials generated during the USDA Study were subject to automatic disclosure pursuant to Fed.R.Civ.P. 26(a)(2)(B). (Motion at 15-17 nn.5-6). Rule 26(a) requires, *inter alia*, the disclosure of "the data or other information considered by the witness in forming" his opinions as part of the expert's report. See Fed.R.Civ.P. 26(a)(2)(B). Again, plaintiffs' own caselaw does not support their position. "Considered" is defined to mean "anything received, reviewed, read or authored by the expert, before or in connection with the forming of his opinion." Employees Committed for Justice v. Eastman Kodak Co., 2008 WL 2078096, *2 (W.D.N.Y. May 18, 2008); Trigon Insur. Co. v. U.S., 204 F.R.D. 277, 282-83 (E.D. Va. 2001) ("Any information *reviewed* by an expert will be subject to disclosure.") (emphasis added). ***This means that "[o]nly if [an expert] read and reviewed such archival documents in forming his current opinion are they 'considered'."*** Euclid Chem. Co. v. Vector Corrosion Tech., Inc., 2007 WL 1560277, *6 (N.D. Ohio May 29, 2007) (expert's testimony that he did not receive, read or review the same during relevant time period entitled to deference).

Dr. Friend did not review any elephant footage taken during the USDA Study to prepare his expert report in this case. His opinions set forth in his report are based upon his publications, not the underlying raw data created during his studies leading to those publications. (Ex. 2, Friend Decl. ¶ 8). This was properly and timely disclosed in his report. (Ex. 1, Friend Report at 4-5). In fact,

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Instead, students and employees assisted with the video review and analysis, and they documented their results. (Ex. 2, Friend Decl. ¶ 6).

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. The reviewers recorded their observations in data sheets. (Ex. 2, Friend Decl. ¶ 6). When asked to do so by plaintiffs this summer, Dr. Friend voluntarily produced the raw data that he still had. See Ex. 6, Joiner ltr (7/3/08); Ex. 2, Friend Decl. ¶ 6; see also Ex. 7 (examples of raw data).

Dr. Friend did not have to produce any of this material to plaintiffs when asked because he did not review it to prepare his expert report.[3] Rule 26(a) does not apply. Indeed, to say that any expert who has ever published an article or study must be prepared to produce all the underlying research materials from any publication cited to or be precluded from testifying would stand the law regarding expert testimony on its head.[4] Plaintiffs' experts repeatedly cite to

[3] These materials were made available because plaintiffs' counsel requested them, and FEI had no desire to delay the depositions by arguing about it.

[4] It is noteworthy that the Motion cites to over thirty cases. Not one of those cases deals with the situation at hand here, that is, an expert who conducts research and studies unrelated to litigation, the results of which are ultimately published in peer-reviewed journals. Plaintiffs authority instead relies upon cases dealing with actual evidence, such as burned boats, wrecked cars, or lost personnel files, that gave rise to the lawsuit but were destroyed or discarded somewhere along the way before trial. See, e.g., Silvestri v. General Motors Corp., 271 F.3d 583 (4th Cir. 2001) (wrecked car); State Farm Fire & Casualty Co. v. Broan Mnfg. Co., Inc., 523 F.Supp.2d 992 (D. Ariz.) (failure to preserve fire scene); Strong v. U-Haul Co. of Mass., 2006 WL 5164822 (S.D. Ohio) (lost tire and rims); Vodusek v.

their own materials throughout their reports, yet none of them "disclosed" or "produced" their research data to FEI. See, e.g.,

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Under the rationale presented in the Motion, plaintiffs' own experts have "violated Rule 26(a)," and "the Court's Sept. 3, 2004 order" thereby subjecting them to sanctions pursuant to Rule 37(b). (Motion at 15-17 nn.5&6). Rule 26(a) does not create such a requirement, and plaintiffs' reliance upon it is misplaced. See Rule 26 Advisory Committee Note 1993 (purpose of 26(a)(2)(B) was to prevent litigants from arguing "that materials ***furnished to their [testifying] experts*** to be used in forming their opinions – whether or not ultimately relied upon by the expert – are privileged or otherwise protected from disclosure") (emphasis added).

C. FEI Did Not Spoliate the Videotapes

Plaintiffs next claim that FEI "orchestrated the destruction of this evidence by entering into a written agreement with Dr. Friend requiring him to destroy any and all video footage documenting its elephants that he recorded." (Motion at 12). This too is incorrect. Nobody at FEI ever told Dr. Friend to tape over, discard or destroy any videotapes from the USDA Study. (Ex. 2, Friend Decl. ¶ 11).

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Bayliner Marine Corp., 71 F.3d 148 (4th Cir. 1995) (expert destroyed boat during testing); Webb v. D.C., 146 F.3d 964 (D.C. Cir. 1998) (personnel files lost). These cases and the others cited by plaintiffs are inapposite to the facts presented here.

Dr. Friend explained at deposition that REDACTED

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Plaintiffs claim that because this lawsuit was initially filed on July 11, 2000, FEI had a duty at that time to preserve the elephant footage from the USDA Study pursuant to this agreement. This is contrary to plaintiffs' prior positions taken in this case, as well as the law of this case. Plaintiffs have steadfastly argued that no discovery obligations arose in this case until written discovery commenced in 2004. See, e.g., Plaintiffs' Opposition to Motion to Compel Discovery from Rider at 8-9 (4/19/07) (Docket # 138) ("Prior to the time discovery requests were served in 2004, Mr. Rider did not routinely preserve every last scrap of paper that came into his possession – nor was he required to. . .) (Rider "simply had not kept his copies of these documents" prior to March 30, 2004). Rider was not sanctioned for this, and FEI was not even awarded any costs or fees for having to file the motion to compel. See Discovery Order at 4-5 (8/23/07) (Docket # 178). Moreover, the other plaintiffs have not abided by a July 2000 preservation date either. Mr. Markarian of the FFA testified that he did not begin saving e-mails

until 2005. (Ex. 8, Hearing Tr. at 14-15 (5/30/08)). Ms. Weisberg of the ASPCA testified that she has saved only those documents that *she deemed* relevant and put them in a folder. (Ex. 9, Hearing Tr. at 77 & 84 (2/26/08)). In light of this record, it would be unfair and unduly prejudicial to hold FEI to a July 2000 duty to preserve date when plaintiffs themselves who filed this suit did not adhere to any such duty at that time. Moreover, Mr. Froemming signed the agreement less than a month after plaintiffs filed their first suit, and there is no evidence in the record that demonstrates what, if anything, Mr. Froemming knew about the lawsuit at that time.

Much happened during the intervening period between the summer of 2000 and the re-filing of this lawsuit in the fall of 2003. In that interim, as explained above, Dr. Friend began and completed his USDA Study involving elephants and taped over the elephant footage consistent with his customary practice. This case was dismissed, appealed, remanded and re-filed as Civil Action 03-2006 on September 26, 2003. Mr. Froemming was unexpectedly diagnosed with terminal cancer in approximately November 2002, and he tragically passed away on July 2, 2003. It appears that when Mr. Froemming died, so did FEI's knowledge of this contract. Mr. Froemming's files have been searched repeatedly for various legal actions including this one since 2003, and the agreement with Texas A&M regarding the USDA Study elephant footage was never located. Moreover, FEI's legal department had no recollection of any such agreement or any record of it in its files. Ex. 10, Strauss Decl. ¶¶ 2-3.[5]

To ascertain what materials, if any, should have been produced requires an assessment of Plaintiffs' requests for production of documents. Trigon Insur. Co. v. U.S., 204 F.R.D. 277, 282 (E.D. Va. 2001) (cited by plaintiffs). Plaintiffs relegate this analysis to a footnote. See Motion at 13 n.4. When written discovery actually commenced in 2004, there were no document requests or interrogatories propounded to FEI that covered the USDA Study elephant footage.

[5] The copies attached to Dr. Friend's declaration came from Dr. Friend's files.

Contrary to Plaintiffs' claims, the footage was *not* responsive to Plaintiffs' document requests. See Motion at 13 n.4. Plaintiffs rely upon Interrogatory 14 and 17 to claim that they sought the elephant footage in discovery. Interrogatory 14 asked:

> ***Describe Ringling's practices and procedures*** for maintaining the elephants on the train when traveling from one venue to another, including but not limited to whether the animals are chained, how much space each elephant is provided, how the elephants are fed . . .

Pls' Ex. 12, Inter. #14 (emphasis added). Interrogatory number 17 sought in relevant part:

> 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.

Pls' Ex. 12, Inter. # 17 (emphasis added). Each interrogatory was accompanied by a document request to "produce all documents and records identified in response to [each interrogatory]." Id. at 14-15. The elephant footage taken for the USDA Study was neither a document regarding Ringling's practices and procedures, nor was it video that was made "by or for" Ringling. See Order at 3 (8/11/08) (plaintiffs' selective quoting of their discovery demands regarding practice and procedure on the train are "distressingly misleading"). Not surprisingly, FEI did not identify any of the USDA Study footage in its responses. See Ex. 11, FEI's Discovery Responses at 14, 17 (6/9/04). Because the videos were not responsive to any of Plaintiffs' interrogatories or document requests, there was no obligation to attempt to retrieve them from Dr. Friend or to advise plaintiffs that, as responsive documents, they had previously existed. Cf. Motion at n.4 (claiming FEI should have preserved the video footage or identified if it no longer existed).[6]

"A sanction for failure to preserve evidence is appropriate only when a party has consciously disregarded its obligation to do so." Sheperd v. ABC, Inc., 62 F.3d 1469, 1481

[6] Expert discovery in this case was conducted pursuant to a stipulation approved by the Court. No subpoenas were issued for experts. Ex. 12, Stipulation (9/2/04) (Docket # 22). Instead, the "parties will make all disclosures required by Federal Rule of Civil Procedure 26(a)(2)(B), as modified or limited by this Stipulation." As explained above, Rule 26 did not require the disclosure of the elephant footage either.

(D.C. Cir. 1995). There is no wrongdoing in destroying relevant documents in the absence of a duty to preserve. See Trigon Insur. Co. v. U.S., 204 F.R.D. 277, 286 (E.D. Va. 2001). FEI has not consciously disregarded its obligation (if there even was one) to preserve evidence. Mr. Froemming, the person from FEI who signed this agreement and discussed it with Dr. Friend, died nearly a year before written discovery issued in this case on March 30, 2004. FEI has no record of this agreement. Even if FEI could have somehow otherwise known of this agreement (exactly how that would have occurred under the circumstances is unclear), the footage was already gone – through no fault of Dr. Friend – by then. Moreover, to say that FEI should now be punished for failure to preserve footage that Dr. Friend as an expert had no obligation to produce under Rule 26(a)(2)(B) and that plaintiffs never asked for in written discovery goes too far. See Sheperd v. ABC, Inc., 2 F.3d 1469, 1481 (D.C. Cir. 1995) (sanctions not appropriate where record does not establish that documents existed at the time defendant became aware of their relevance to the litigation); Trigon Insur. Co. v. U.S., 204 F.R.D. 277, 286-87 (E.D. Va. 2001) (some degree of knowledge is required in order for duty to preserve to arise).

A finding of spoliation further requires actual prejudice to plaintiffs. "Spoliation is not remediable unless it is prejudicial." Ware v. Seabring Marine Indus., Inc., 2006 WL 980735, *3 (E.D. Ky. 2006) (refusing to preclude expert testimony where other evidence available) (cited by plaintiffs); see also Physicians Dialysis Ventures, Inc. v. Griffith, 2007 WL 3125197, *12-13 (D.N.J. Oct. 24, 2007) (no spoliation sanctions where documents were not destroyed with malice and the movant showed no resultant prejudice). There is absolutely no malice or bad faith involved here and no resulting prejudice to plaintiffs. Although plaintiffs claim "extreme prejudice," they do not articulate the substance of the alleged prejudice. (Motion at 2). In fact, a review of the relief requested by plaintiffs shows that they have not been prejudiced. First,

plaintiffs ask the Court to deem it established that the USDA Study elephant footage would have shown the elephants engaging in stereotypical behavior. (Motion at 20-21). Dr. Friend readily admits that the elephants were engaging in such behavior: this is reported in his published study. See

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Plaintiffs are attempting to exclude Dr. Friend's conclusions about that behavior, namely that the stereotypic behavior was not harmful.

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This is the ultimate issue in the case, and the presence or absence of the USDA Study elephant footage does not alter the parties' respective positions on this one iota. The request is inappropriate and does not relate in any manner to any "prejudice" resulting from plaintiffs inability to review the USDA Study footage.

Second, Plaintiffs ask for the established fact that the footage "would have shown that the elephants were cramped, crowded, chained, and kept in the dark during the entirety of each of the trips recorded by Dr. Friend." (Motion at 22). The request contradicts reality. In order to obtain relief of this nature, Plaintiffs bear the burden of showing that the "missing" evidence "would have been of the nature alleged by the party affected by its destruction." Dupee v. Klaff's, Inc., 462 F.Supp.2d 244, 249 (D. Conn. 2006). FEI does not contest that it tethers its elephants during transport – indeed, FEI's position is that it would be irresponsible and dangerous for the elephants not to chain them during transport. Dr. Friend's article reports that two of Ringling's elephants laid down during transport but they lost useable footage due to poor lighting at night. (Pls' Ex. 3 at 10). The Red Unit keeps the lights off *at night*, id., meaning that the cars are lit during the day, which is why Dr. Friend was able to conduct any taping in the

cars. See also Pls' Ex. 17 at 1-2 (describing rail cars with lights and windows in them). As for the space issues, plaintiffs were permitted by this Court to go inspect the rail cars, look inside while the elephants were in them, watch the unloading, and then enter and measure them. Plaintiffs were also permitted to photograph and videotape the inspection. REDACTED

REDACTED FILED UNDER SEAL This request basically asks the Court to find that Dr. Friend's published article is fraudulent, containing events that never occurred. There is no basis for this, and the Court should decline to do so.

Third, plaintiffs ask that the Court deem it established that the "elephants were forced to stand in excrement during the duration of the trips." Again, this bears no relationship to reality and thus would not have been shown on the videotapes (assuming that the floor of the cars was even recorded within the camera frame). Plaintiffs' own evidence shows that

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Dr. Friend reported to the USDA, based upon personal observations, that the "handlers would quickly remove feces and urine and pile it at the door." Sawdust was kept on the floor to lessen the spread of urine. (Pls' Ex. 4 at 41).

Finally, plaintiffs ask that the Court deem it established that the elephants were not taken off of the train during the trips Dr. Friend recorded. Given that at least some of the footage did not show the entire trip, see Pls' Ex. 3 at 9 (reflecting that only 40 minutes of video was made on one of the trips), plaintiffs' relief does not match what the tapes realistically could have shown. In any event, regardless of the elephant footage, neither FEI nor Dr. Friend contests that the

elephants remained on the train during the trips studied by Dr. Friend. Again, there is no prejudice that flows to the plaintiffs on this issue.

On this record and pursuant to the very caselaw cited by plaintiffs, there has been no spoliation, the materials at issue have never been subject to discovery, and plaintiffs have not been prejudiced: No relief is appropriate. Dr. Friend should be permitted to testify fully regarding his expert opinions, and the plaintiffs are free to cross-examine and disagree with him as they so desire.

II. There Has Been No Spoliation of Documents Regarding the Elephants' Health

Plaintiffs next attack FEI's counsel for its "cavalier approach regarding its failure to comply with the Court's discovery Orders." (Motion at 29). This too is false. FEI's counsel have approached discovery in this case at all times with diligence and great care. At issue is a 9-page fax labeled FEI 42474-78 that was produced in redacted form to plaintiffs.[7] Plaintiffs challenged the redactions by motion, and Judge Facciola undertook an *in camera* review. FEI produced unredacted documents to the Court on June 6, 2008. In its correspondence to the Court on that date, FEI's counsel advised the Court that it was submitting unredacted copies of FEI 42474, 42476 and 42478 for *in camera* review but could not find the originals reflected by FEI 42475 and 42477. See Ex. Joiner ltr (6/6/08). There was nothing inappropriate about addressing this letter to Judge Facciola's law clerk, which is what the parties had been instructed to do. See Order (9/10/07) ("All matters in the above captioned case should be addressed to the law clerk assigned to this action: Sara B. Podger."); cf. Motion at 29 (claiming it was inappropriate to send this letter "to the Judge's law clerk"). As Judge Facciola has previously stated: "On a daily basis in this Court, lawyers make representations to me and to each other about what they have

[7] These pages are attached as Exhibit 10 to the Motion. These documents were inadvertently produced out of order, and as previously explained to the Court, the proper order should be FEI 42474, 42478, 42477, 42476, and 42475. Ex. 13, Joiner ltr (6/6/08).

or have not done in responding to discovery. Those responses are sufficient." Order at 4 (5/29/08) (Docket # 300). FEI's counsel explained the circumstances regarding this document in the letter and offered to provide the Court with additional information.

Judge Facciola then issued his order on several motions on August 4, 2008. (Docket # 325). He ordered FEI to produce the redacted documents to the Court within seven days and to indicate the reason for the redaction. Id. at 4. FEI filed its response on August 13, 2008 explaining why the documents were redacted (because they related to other animals and not to elephants). FEI's counsel further advised the Court that they had re-searched their files for the redacted pages but could not find them, apologized to the Court, and explained that this was not the client's fault. See FEI's Response to Court's August 4, 2008 Order and Motion for Partial Reconsideration at 3 (8/13/08) (Docket # 332). The matter is pending before Judge Facciola, and FEI has already apologized for this. Id. It is truly regrettable that much time and energy has been expended over six pages of documents that *have absolutely no relevance to elephants or this case.* The misplacement of six irrelevant pages, however, is no excuse for plaintiffs to speculate wildly about them and to ignore the evidence in the case.

At this point in the proceedings, plaintiffs should know, for example, that brucellosis is not an elephant disease. See Ex. 14, Gaipo Decl. ¶ 5. Yet plaintiffs ask the Court to infer that "these specific records contain . . . information demonstrating that FEI elephants have tuberculosis and other diseases that are addressed by these certificates." (Motion at 8, 26). The documents at issue are vet certificates known as "interstates." They are standardized forms used for numerous animals, and thus, not all of the diseases "addressed by these certificates" apply to elephants. Id. ¶ 5. To urge the Court to make such a finding is inexplicable.

It is also equally reckless to tell the Court that the redacted six pages would "demonstrate FEI elephants have tuberculosis." (Motion at 26). FEI and its counsel would like to know the good faith basis for that statement. To the contrary, medical records and TB trunk wash results, all of which are in plaintiffs' possession, clearly disprove this statement. The fax at issue was sent from the Baltimore Arena to Mark Gaipo, the then General Manager of the Red Unit. (Ex. 14, Gaipo Decl. ¶¶ 1-2). It contained interstates for elephants traveling on the units. As FEI has previously explained, and plaintiffs now admit, these interstates are required to transport elephants. See Motion at 8; Ex. 15, Notice of Compliance with attached declaration of Dr. Wiedner and Strauss (10/11/06) (Docket # 98). No traveling elephant has been refused entry into or travel through any state at any time relevant to this case. See id. at Strauss Decl. ¶¶ 1-4. Moreover, no elephant on the Red Unit ever tested positive for tuberculosis during the 1995-2005 time period when Mr. Gaipo was the Red Unit General Manager. (Ex. 14, Gaipo Decl. ¶ 4). A positive TB test would require the removal of an elephant from a traveling unit. There was no such positive test or elephant removal from the Red Unit. Id. The "herculean efforts" by FEI have been to produce all manner of documents that plaintiffs have demanded in this case, including the medical records and the interstates.

Ironically, having forced FEI to the task of producing interstates, Plaintiffs now ask the Court to exclude that which they demanded be produced. FEI has produced thousands and thousands of pages of medical records, including TB trunk wash results. Plaintiffs have had these documents for years, knowing full well that they demonstrate that FEI's traveling elephants do ***not*** have TB. To ask the Court to conclude the opposite based on six missing pages regarding interstates for species other than elephants, namely horses, zebras, goats, alpacas, dogs, cats

and/or lions and tigers is improvident. See Ex. 14, Gaipo Decl. ¶ 3. Such a conclusion is not "entirely consistent with other evidence" in the case as Plaintiffs argue. (Motion at 26).

Finally, the strident claim that FEI and its counsel have "defied the Court's Order" four times is wrong. (Motion 9). Neither FEI nor its counsel have defied any court order in this case. As FEI has already explained to the Court two years ago, the interstates are not medical records, and it did not consider them responsive to plaintiffs' document requests. (Ex. 15, Notice of Compliance at 1-2; Dr. Wiedner Decl. ¶ 7, Strauss Decl. ¶ 2). When the Court ordered their production in its September 26, 2006 Order, FEI complied. Id. at Strauss Decl. ¶ 5. The fax at issue was produced pursuant to the September 26, 2006 Order. (Ex. 16, Joiner Decl. ¶ 2). The original of this document was provided by the client to FEI's counsel. (Ex. 14, Gaipo Decl. ¶ 2; Ex. 16, Joiner Decl. ¶ 2).

Counsel believe that the missing pages were interstates that did not contain elephant information. (Ex. 16, Joiner Decl. ¶ 4). This is consistent with the client's recollection as well. (Ex. 14, Gaipo Decl. ¶ 3). As such, where an entire page on an interstate was non-responsive (i.e., contained no elephant information), it was removed from the production as opposed to having only a portion of the page redacted, which is how interstate pages containing a mix of elephant and other animals were processed in that production. (Ex. 16, Joiner Decl. ¶ 3). The original was provided by FEI to counsel, and the original rather than a copy of this document was inadvertently processed by counsel for production. Id. ¶ 5. Even though the practice of FEI's counsel was to keep non-responsive pages, it cannot now locate these missing pages. Id. FEI 42475 and 42477 were inserted to show entire pages were removed from the nine-page fax prior to its production. Counsel inserts such slip sheets when necessary to show that certain pages of a document have been redacted from production. Id. ¶ 4. There has been no defiance of

Judge Facciola's orders. FEI's counsel apologize for this, but we obviously cannot provide Judge Facciola with what we cannot locate. This is due to no fault of the client. Id. ¶ 6. On the other hand, counsel have approached discovery and made redactions in good faith, and we simply do not believe that the missing interstates contained any information related to elephants. Id.

Having been put through the task of collecting and producing interstates, at Plaintiffs' insistence, Plaintiffs now ask that the Court exclude them at trial. Plaintiffs do not, however, identify any prejudice that they claim results from the missing six pages. Cf. Webb v. D.C., 146 F.3d 964, 971 (D.C. Cir. 1998) (resulting prejudice factor in determining whether and what nature of sanctions should be applied); Strong v. U-Haul of Mass., 2006 WL 5164822, *3 (S.D. Ohio 2006) (prejudice require a "reasonable possibility, based on concrete evidence, that access to the [missing material] would have produced evidence favorable" to plaintiffs). As explained above, there is no reasonable possibility that the missing pages would show the elephants are diseased or have TB. The request to exclude the evidence is disproportionate to the alleged transgression. It should be denied. See In re Wechsler, 121 F.Supp.2d 404, 415-16 (D. Del. 2000) (no unfavorable inference arises when the document in question has been lost or accidentally destroyed).

More importantly, plaintiffs' request that the Court deem it established that the elephants are in poor health and have tuberculosis because of the missing six pages is entirely unfounded. Plaintiffs have not met their burden to produce some evidence suggesting that any document relevant to substantiating their claims would have been included among the missing six pages. Byrnie, 243 F.3d at 108; Sandata Tech., Inc. v. Infocrossing, Inc., 2007 WL 4157163, *11-13 (S.D.N.Y. Nov. 16, 2007) (denying request for spoliation sanctions based upon speculation and

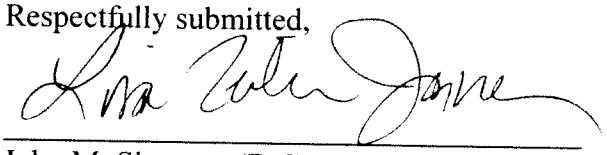
minimal value of documents). Where the desired inference is unsubstantiated and can be contradicted by other evidence, it is properly rejected. Dupee, 462 F.Supp.2d at 250. Here, the relief plaintiffs seek is contradicted by the medical records in the case. The Court should decline to draw an inference or deem any facts established due to the missing six pages.

CONCLUSION

Dr. Friend, FEI and FEI's counsel have not engaged in spoliation. There was no duty to preserve at the time the video footage was taped over. Plaintiffs did not request it in fact discovery, and it was not subject to disclosure in expert discovery. Under the circumstances, there is no basis to preclude Dr. Friend's testimony or deem facts established as Plaintiffs seek. As for the six missing pages, Plaintiffs again can point to no harm from this. They speculate as t what the documents would have shown, but there is no basis in reality for this. For the reasons set forth herein, the Court should deny the Motion.

Dated this 16th day of September, 2008.

Respectfully submitted,



John M. Simpson (D.C. Bar #256412)
Joseph T. Small, Jr. (D.C. Bar #926519)
Lisa Zeiler Joiner (D.C. Bar #465210)
Lance L. Shea (D.C. Bar #475951)
Michelle C. Pardo (D.C. Bar #456004)
Kara L. Petteway (D.C. Bar #975541)

FULBRIGHT & JAWORSKI L.L.P.
801 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Telephone: (202) 662-0200
Facsimile: (202) 662-4643

Counsel for Defendant Feld Entertainment, Inc.

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.	:	

ORDER

Upon consideration of Plaintiffs' Motion in Limine and for Additional Sanctions Due to Defendant's Spoliation of Evidence ("Motion") and Feld Entertainment, Inc.'s Response in Opposition thereto, it is this _____ day of September, 2008,

ORDERED that the Motion is **DENIED**.

_____
JUDGE EMMET G. SULLIVAN

CERTIFICATE OF SERVICE

I, Kara L. Petteway, do hereby certify that on September 16th, 2008 the foregoing **Response in Opposition to Plaintiffs' Motion in Limine and for Additional Sanctions Due to Defendant's Spoliation of Evidence** was served on the following in the manners stated below:

FILED PUBLICLY IN REDACTED/UNSEALED FORM VIA ECF on September 16, 2008 to:

All ECF-registered persons for this case, including plaintiffs' counsel

FILED WITH THE CLERK OF COURT UNDER SEAL IN UNREDACTED FORM on September 17, 2008:

Clerk's Office
U.S.D.C. for the District of Columbia
E. Barrett Prettyman Courthouse
333 Constitution Ave., N.W.
Washington, D.C. 20001

SERVED VIA HAND DELIVERY UNDER SEAL IN UNREDACTED FORM on September 17, 2008 and VIA E-MAIL on September 16, 2008:

Katherine Meyer, Esq.
Meyer Glitzenstein & Crystal
1601 Connecticut Ave., N.W., Ste. 700
Washington, D.C. 20009
Counsel for Plaintiffs

COURTESY COPY TO CHAMBERS OF HON. EMMET G. SULLIVAN UNDER SEAL IN UNREDACTED FORM on September 17, 2008:

Chambers
U.S.D.C. for the District of Columbia
E. Barrett Prettyman Courthouse
333 Constitution Ave., N.W.
Washington, D.C. 20001

/s/
Kara L. Petteway