

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.

Defendant.

Civ. No. 03-2006 (EGS/JMF)

**PLAINTIFFS' MOTION FOR PARTIAL
RECONSIDERATION OF MAGISTRATE
FACCIOLA'S OCTOBER 10, 2008 ORDER REGARDING
DOCUMENTS "MISPLACED" BY FEI'S COUNSEL**

Pursuant to Federal Rule of Civil Procedure 72(a) and Local Rule 72.2, plaintiffs respectfully object to, and seek partial reconsideration of, that portion of Magistrate Facciola's October 10, 2008 Order concerning defendant's counsel's contention that they "cannot find" certain documents that this Court twice ordered defendant Feld Entertainment, Inc. ("FEI") to produce, and that FEI also failed to submit for an in camera inspection that was ordered by Magistrate Facciola. See Order (DE 369) at note 1 (sustaining defendant's supplemental explanation that "[c]ounsel cannot find the originals" of redacted documents FEI 42475 and 42477). As discussed below, irrespective of why FEI's counsel cannot locate the documents at issue, elementary fairness dictates that FEI should not be permitted to base its case on a skewed sample of health certificates where neither the Court nor plaintiffs have been able to review some

of those documents that were collected by FEI's counsel but were somehow subsequently misplaced.¹

Background

As explained in Plaintiffs' August 29, 2008 Motion In Limine And For Additional Sanctions Due To Defendant's Spoliation Of Evidence ("Spoliation Motion In Limine"), see DE 344 at 8-10, the information at issue concerns a total of six pages that were removed from a nine-page document containing "veterinary inspection certificates" that address whether elephants owned by defendant are infected with certain diseases, including tuberculosis or any other "infectious, contagious, and/or communicable disease." See id.; see also Exs. 9 and 10 to Pls.' Spoliation Mot. In Limine (Exhibit 10 reflects that two pages were withheld from FEI 42475 and four pages were withheld from FEI 42477).

These inspection certificates are required to be executed by FEI in order to transport the elephants in interstate commerce. See Pls.' Spoliation Mot. In Limine at 8-10. Defendant has listed more than 150 similar documents as Exhibits it "may" rely on in defense of plaintiffs' claims in this case. See Def.'s Pre-Trial Statement at 25 & App. I (DE 342). These documents bear on plaintiffs' claims in this case that defendant "takes" the endangered Asian elephants in its care in violation of section 9 of the Endangered Species Act, 16 U.S.C. § 1538(a), particularly because FEI routinely keeps these elephants chained on two or more legs for many hours each day and often for days at a time when the elephants are kept on chains in rail cars as they travel

¹ As discussed further below, FEI has indicated that it "may" seek to rely on some or all the health certificates that have been produced. Accordingly, since the remedy plaintiffs seek will only apply in the event that FEI does seek to rely on these documents, the Court could defer consideration of this motion until that time.

throughout the country each year. Plaintiffs allege that this treatment “takes” the elephants because it both “harms” and “harasses” them. See id. § 1532(19) (definition of “take”).

As plaintiffs’ expert witnesses have explained in their Expert Reports and will further testify at trial, the medical records for the elephants show that over the years many of FEI’s elephants have tested positive for tuberculosis – a disease that is not found in elephants in the wild and is linked to a stressful lifestyle and suppressed immune system. See, e.g., Susan K. Mikota, Stress, Disease and Tuberculosis in Elephants, in An Elephant in the Room: the Science and Well Being of Elephants in Captivity 74, 80 (D.L. Forthman, et al. eds., in press) (“It is widely accepted that stress influences both susceptibility to TB and its severity once infection is established The numerous stressors experienced by captive elephants have been described adequately above and in other chapters of this book. Recall that TB is a human disease and that elephants in captivity are exposed to a disease they would not normally encounter living in their natural habitat in the wild.” (citations omitted)) (Ex. A); see also FEI Expert Witness Dennis Schmitt Dep. 209-210, Aug. 29, 2008) (Ex. B) (admitting that Dr. Mikota is “one of the few” experts on tuberculosis in elephants, and that it “it is possible” that stress influences an elephant’s susceptibility to tuberculosis). Accordingly, records indicating whether elephants have tuberculosis or other diseases are relevant to plaintiffs’ claims in this case.

As plaintiffs further explained in their Spoliation Motion In Limine, this Court twice ordered FEI to produce the inspection certificates – first in September 2005 in response to plaintiffs’ motion to compel disclosure of the medical and veterinary records for the elephants, see Order of Sept. 26, 2005 (DE 50), and then again on September 26, 2006, when plaintiffs moved to enforce the previous order because FEI had still not provided all such records, see DE 94.

With respect to the latter Order, this Court stressed that “within ten (10) days of this Order, defendants shall deliver to the office of plaintiffs’ attorneys **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 that were in defendant’s custody or control from 1994 to the present, regardless of when such records were created,” and that this specifically included **“all veterinary inspection and health certificates for the elephants.”** Order (DE 94) at 1-2 (emphases added).

When, in response to that Order, FEI ultimately produced these records to plaintiffs in October 2006, it had redacted six pages from the health certificates at issue, plaintiffs moved to compel those redacted pages. In response to that motion, Magistrate Facciola ordered that FEI produce the missing pages to him in camera. However, although defense counsel had possession of the entire document on March 7, 2008 when it made the representation in its opposition to plaintiffs’ motion to compel before Judge Facciola that these particular pages were “non-responsive,” see DE 274, instead of producing the missing pages to Judge Facciola as ordered, FEI’s counsel sent a letter to his law clerk stating that “Defense counsel had the originals reflected by pages 42475 and 42477, but is unable to locate them at this time.” See Letter to Judge Facciola’s Law Clerk (June 6, 2008) (Ex. 11 to Pls.’ Spoliation Mot. In Limine). When Judge Facciola then issued a second Order requiring FEI to produce the missing pages in camera, see Order of Aug. 4, 2008 (DE 325), FEI’s counsel again represented that they could not locate the documents and that, in any event, FEI believes that the missing pages contained non-responsive

information. See Def.'s Resp. to the Court's Aug. 4, 2008 Order & Mot. for Partial Consideration (DE 332) at 3.²

On October 10, 2008, Judge Facciola issued an Order concerning several matters then pending before him. See Order (DE 369). That Order stated that, with respect to the pages that had been redacted from the documents this Court ordered FEI to produce, and which counsel had asserted had been lost sometime since March 7, 2008, that he "sustains the claims" made by defendant's counsel with respect to these documents – i.e., that the documents cannot be produced because "Counsel cannot find the originals of these redacted documents." See id. at 1.

Basis For Objection

Regardless of the *reasons* why these materials cannot be provided to the Court or plaintiffs, it is indisputable that those documents have in fact not been produced as required by both this Court's earlier rulings and Judge Facciola's previous orders requiring that they be produced for in camera review. Accordingly, plaintiffs respectfully submit that, at bare minimum, the Court should preclude FEI from relying on the other health certificates that FEI has identified as possible Exhibits that it may seek to employ in its defense to plaintiffs' claims.

As plaintiffs point out in their Spoliation Motion In Limine, at 25-26, such a remedy is expressly authorized by Rule 37(b). See 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). Moreover, under the circumstances, it would highly prejudicial to plaintiffs to allow

² In opposition to plaintiffs' Motion In Limine on this matter, defendant's counsel submitted a declaration to the Court addressing this issue, along with a declaration from an FEI employee in support of defendant's position that is unlikely that the missing pages contained any responsive information.

FEI to rely on the health certificates that it has chosen to rely on, when it has failed to produce *all* of the health certificates that this Court twice ordered it to produce in response to plaintiffs' motion to compel these records. As one court has explained, a party should not be allowed "to cherry-pick the documents relating to [an issue] that it chooses to produce during discovery." Monsanto Co. v. Bayer Bioscience N.V., No. 4:00CV01915 ERW, 2005 WL 5989796, at *19 (E.D. Mo. Oct. 28, 2005). Therefore, because FEI was unable to produce the documents that plaintiffs requested – and that this Court twice ordered it to produce in response to plaintiffs' motion to compel – the defendant should "not be permitted to rely on any of the evidence related to that [issue]." Id.

CONCLUSION

For the foregoing reasons, in this limited respect, plaintiffs' respectfully object to and seek reconsideration of Magistrate Facciola's October 10, 2008 Order sustaining FEI's explanation for its non-production of the inspection records at issue.

Respectfully submitted,

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