

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

AMERICAN SOCIETY FOR THE	:	
PREVENTION OF CRUELTY TO	:	
ANIMALS, <u>et al.</u>	:	
	:	
Plaintiffs,	:	
	:	
v.	:	Case No. 03-2006 (EGS/JMF)
	:	
FELD ENTERTAINMENT, INC.,	:	
	:	
Defendant.	:	
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**DEFENDANT FELD ENTERTAINMENT, INC.’S (“FEI”) OPPOSITION TO
PLAINTIFFS’ MOTION FOR PARTIAL RECONSIDERATION OF
MAGISTRATE JUDGE FACCIOLA’S OCTOBER 10, 2008 ORDER**

Plaintiffs have now filed a conditional “motion for partial reconsideration” that the Court “could defer consideration of” until such time as FEI apparently moves for the admission of its “may call” trial exhibit 72. See Motion for Partial Reconsideration of Magistrate Facciola’s October 10, 2008 Order at 2 n.1 (10/23/08) (Docket # 383) (“Motion”). When appealing a magistrate judge’s order, the standard of review is “clearly erroneous” or “contrary to law.” Fed. R. Civ. P. 72(a) & LCvR 72.2(c). The Motion, however, addresses neither of these standards much less meets them. Instead, it is a continuation of plaintiffs’ latest filings of *ad hominem* attacks on FEI and its counsel that this Court has repeatedly warned counsel to stop doing. The Motion is meritless, inaccurate, and incomplete. It should be denied summarily by this Court, and Magistrate Judge Facciola’s October 10, 2008 Order (“Order”) should be affirmed forthwith.

Plaintiffs state repeatedly that “this Court twice ordered FEI to produce” the redacted pages, labeled as FEI 42475 and FEI 42477. (Motion at 1, 6). This is completely false. This Court has *never* ordered FEI to produce documents related to other animals such as horses,

zebras, goats, alpacas, dogs, cats, lions or tigers. Nor would it do so as such documents are entirely irrelevant to this case, and FEI's redactions related to same have been consistently upheld by Judge Facciola. See, e.g., 8/4/08 Order (Docket # 325) (upholding FEI's redaction of non-responsive information in documents subject to plaintiffs' Motion to Compel); Ex. 1, Gaipo Decl. ¶ 3. Moreover, Judge Facciola reviewed the partial redactions made on the *other pages* of this same fax (which were all related to other animals) and upheld all of them. See 8/4/08 Order. Given what Judge Facciola has seen for himself, what FEI has told this Court in Mr. Gaipo's declaration based on his personal knowledge (which plaintiffs cannot and do not refute) and what counsel for FEI has told this Court about the document, see Ex. 2, Joiner Decl. ¶ 4, there is nothing clearly erroneous about the Order.

PROCEDURAL HISTORY

The documents at issue, FEI 42475 and FEI 42477, were pages of a single facsimile containing certificates of veterinary inspection (also referred to as "interstates") which were produced to plaintiffs as entirely redacted pages. Interstates are transportation records not medical records. Ex. 3, Notice of Compliance at Wiedner Decl. ¶ 7 (10/11/06) (Docket # 98). This Court ordered FEI to produce interstates on September 26, 2006 (Docket # 94). FEI complied with that Order and produced the documents now at issue in response thereto in October 2006.

Over one year later, Plaintiffs filed a Motion to Compel certain redacted information, including FEI 42475 and FEI 42477, on February 15, 2008. (Docket # 266). Thereafter, Magistrate Judge Facciola ordered FEI to submit, *in camera*, the documents subject to that motion. See Minute Order (6/3/08). When submitting these documents *in camera*, FEI indicated in a cover letter to the Court that it engaged in a good faith search for, but could not locate, the

original documents underlying FEI 42475 and FEI 42477. See Ex. 3, Joiner letter to Podger. On August 4, 2008, Magistrate Judge Facciola issued an Order, *inter alia*, again requiring FEI to submit FEI 42475 and FEI 42477 (Docket # 325) for *in camera* review and to explain the reason for the redaction of those documents. FEI filed a response thereto on August 13, 2008 (Docket # 332); FEI reiterated that it could not locate the originals underlying these documents, explained counsel's error in relation thereto, and explained why it believed that the missing pages were non-responsive.

While the matter was pending before Magistrate Judge Facciola, plaintiffs filed their Motion in Limine and for Additional Sanctions on August 29, 2008 (Docket # 344) ("Motion *in Limine*"), which raised the documents FEI 42475 and FEI 42477 with this Court. FEI filed its Opposition thereto on September 16, 2008 (Docket # 356). FEI again explained in detail that these interstates did not relate to elephants, that the *other* evidence produced to plaintiffs (including the elephant medical records) established this, and that the relief plaintiffs were seeking had no basis in fact or reality. See Opp. to Motion *in Limine* at 15-20 & Exs. 13-17 thereto (declarations explaining interstates and health status of animals).

For example, plaintiffs' motion claimed that the missing documents would show that the elephants have, *inter alia*, brucellosis. (Motion *in Limine* at 8 & 26). The argument is inexplicable given the brucellosis is a hoofstock, not an elephant disease. See Opp. to Motion *in Limine* at 16. Plaintiffs also claimed that the documents "would demonstrate FEI elephants have tuberculosis." (Motion *in Limine* at 17). There is no good faith basis for the claim, and plaintiffs are fully aware that it is false: They have the Tb trunk washes, the medical records, and the interstates from this fax that do relate to elephants – which do not indicate Tb or any other disease. ***By definition, interstates are transport records for the elephants traveling on the***

units. They are permits to travel. If an elephant has Tb, it would not travel on the unit, and hence, there would not be an interstate for it. Mr. Gaipo explained this in his declaration. See Ex. 1, Gaipo Decl. ¶ 4. Yet plaintiffs persist in urging this Court to adopt a finding that is factually incorrect if not impossible. See Motion at 2 (claiming that the redacted pages “address whether elephants owned by defendants are infected with certain diseases, including tuberculosis or any other ‘infectious, contagious, and/or communicable disease’” (quoting Motion *in Limine* at 8)).

Tellingly, the Motion does not advise the Court that plaintiffs themselves have listed FEI’s interstates in their own Will Use Exhibits 1, 1A, 2 and 2A. If plaintiffs intend on using these very documents in their own case, FEI sees no legitimate point to this Motion. On October 10, 2008, Magistrate Judge Facciola ruled on FEI’s August 13, 2008 response and “sustain[e]d the claims made therein in their entirety,” including those made in relation to counsel’s inability to locate the originals of FEI 42475 and FEI 42477. See 10/10/08 Order at 1 n.1 (“Counsel cannot find the originals of these redacted documents.”). This Court denied Plaintiffs’ Motion *in Limine* and for sanctions without prejudice on November 4, 2008, subject to the present briefing. See 11/4/08 Order (Docket # 387). Plaintiffs object to Magistrate Judge Facciola’s October 10, 2008 Order and ask this Court to reverse it. For the reasons set forth above, and in accordance with the legal standards set forth below, Plaintiffs’ Motion is not well taken and should be denied.

ARGUMENT

Plaintiffs have not met the strict standard of review necessary to disturb Magistrate Judge Facciola’s October 10, 2008 Order. See Fed. R. Civ. P. 72(a) & LCvR 72.2(c) (order must be “clearly erroneous or contrary to law”). Indeed, courts from this district have consistently

“affirm[ed] the magistrate’s determination unless on the entire evidence the court is left with the definite and firm conviction that a mistake has been committed.” Beal v. District of Columbia, 545 F. Supp. 2d 8, 13 (D.D.C. 2008) (internal quotations and citations omitted); see also Boca Investerings P’ship v. United States, 31 F. Supp. 2d 9, 11 (D.D.C. 1998) (cited in Beal, supra) (“the magistrate judge’s decision is entitled to great deference”). Plaintiffs make no argument as to why the October 10, 2008 Order is clearly erroneous or contrary to law, which it is not, nor do they reference the governing standard of review.

Moreover, as FEI previously argued in its Opposition to Plaintiffs’ Motion *in Limine*, plaintiffs have not demonstrated that any document relevant to substantiating their claim that FEI’s elephants are being “taken” would have been included among the missing six pages of interstates. See Opp. to Motion *in Limine* at 19; see also Byrnie v. Town of Cromwell, 243 F.3d 93, 108 (2nd Cir. 2001) (“The burden falls on the prejudiced party to produce some evidence suggesting that a document or documents relevant to substantiating his claim would have been included among the destroyed files.”) (quotations and citations omitted). Plaintiffs have not met, nor do they even attempt to meet, this burden. Counsel for FEI has represented to the Court and plaintiffs that they do not believe the documents related to elephants. The interstates for this particular transport that pertained to elephants were among the other pages of the same facsimile produced to plaintiffs; therefore, there is no conceivable way that FEI’s inability to now produce the documents at issue regarding other animals has any bearing on plaintiffs’ case. See Opp. to Motion *in Limine* at 17-18; Ex. 2, Joiner Decl ¶¶ 4-5. Nor does the theory posited by plaintiffs make any sense: No elephant on the Red Unit tested positive for tuberculosis during the relevant time period. See Opp. to Motion *in Limine* at 17-18; Ex. 1, Gaipo Decl. ¶ 4.

Further, plaintiffs have not identified any prejudice resulting from the missing pages. See Opp. to Motion *in Limine* at 19; see also Webb v. District of Columbia, 146 F.3d 964, 971 (D.C. Cir. 1998) (prejudice is a factor in determining whether, and what type of, sanctions should be imposed). That there is no prejudice to plaintiffs is underscored by the fact that plaintiffs themselves have included the interstates as documents on their “will call” exhibit list. See, e.g., Pls. Will Call Exs. 1, 1A, 2 and 2A (containing interstates).

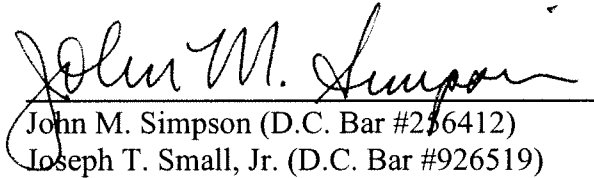
In sum, this is not a case where a party and its counsel purposefully withheld or destroyed documents. There has not been any spoliation. Cf. Monsanto Co. v. Bayer Bioscience, N.V., No. 00-01915, 2005 WL 598976, at *18-19 (E.D. Mo. Oct. 28, 2005) (cited by plaintiffs) (in response to motion to compel plaintiff represented to the Court that certain documents were irrelevant; plaintiff’s expert then relied on the very same category of documents). Nor is it a case where the documents at issue would have substantiated plaintiffs’ claim. Indeed, counsel has represented that the documents related to other animals not at issue in this case. See Ex. 2, Joiner Decl. ¶¶ 4-5. FEI’s counsel’s representations on this subject should be sufficient, as Magistrate Judge Facciola so held in the context of plaintiffs’ counsel’s representations to the Court and to FEI. Order (5/29/08) (Docket # 300), at 4 (“On a daily basis in this Court, lawyers make representations to me and to each other about what they have or have not done in responding to discovery. Those responses are sufficient.”). FEI’s counsel has repeatedly apologized to the Court and to plaintiffs regarding these documents.

CONCLUSION

Magistrate Judge Facciola's Order is not "clearly erroneous", nor is it "contrary to law." Plaintiffs themselves have not made any argument to the contrary. For these, and all of the other reasons stated above and in FEI's Opposition to Plaintiffs' Motion *in Limine*, plaintiffs' Motion for Reconsideration should be denied.

Dated this 6th day of November, 2008.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "John M. Simpson", is written over a horizontal line.

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