

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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

**PLAINTIFFS’ REPLY IN SUPPORT OF THEIR MOTION FOR PARTIAL  
RECONSIDERATION OF MAGISTRATE FACCIOLA’S OCTOBER 10, 2008 ORDER  
REGARDING DOCUMENTS THAT FEI’S COUNSEL CANNOT FIND**

Although FEI asserts that plaintiffs have launched an “ad hominem” attack against it simply by filing a very limited objection to Magistrate Facciola’s ruling that imposed no sanction for FEI counsel’s failure to produce documents that were subject to several Court orders, see FEI’s Opp. (Docket Entry (“DE”) 388) at 1, this simply is not true. On the contrary, plaintiffs have shown remarkable restraint in not challenging FEI counsel’s representation that it cannot find the documents at issue. Moreover, although plaintiffs originally sought a ruling that would have drawn negative inferences and established certain facts about the missing documents, see Plaintiffs’ Motion In Limine (DE 344), plaintiffs are now simply asking that, in light of FEI’s inability to produce the information at issue, it not be allowed to rely on similar information in support of its defense in this case.

While defendant now asserts in some places in its Opposition that the six missing pages of documents concerned only information about “other animals,” and hence clearly was not responsive to plaintiffs’ discovery requests, see e.g., FEI Opp. (DE 388) at 3, 5, defendant has no basis for making such a definitive representation, since it concedes that it no longer has a copy of the documents at issue. Indeed, the sworn declaration submitted by FEI’s counsel on this point more candidly states only that she “believe[s]” that the missing information concerned other animals, see Declaration of Lisa Joiner, Exhibit 2 to FEI’s Opposition, at ¶ 6, but offers no conclusive evidence that the missing records are not relevant. The additional declaration submitted by FEI employee Mark Gaipo states that he “believes” that the missing pages “contained a batch of vet certificates.” See Def. Exhibit 1 ¶ 3. Hence, Mr. Gaipo is not even certain that the documents at issue were in fact vet certificates, or “interstates” as FEI now definitively asserts is the case, see FEI Opp. at 2. Therefore, there simply is no basis for knowing whether the six missing pages of information that FEI has not been able to produce contained only non-responsive information.

The bottom line is that this Court twice ordered FEI to produce these documents, that Magistrate Facciola also ordered FEI to produce the unredacted versions of these documents in camera, that FEI’s counsel had the documents in question as recently as March 7, 2008 when it filed its Opposition to plaintiffs’ Motion to Compel that information and asserted that the six pages contained “non-responsive” information, see FEI’s Opp. to Pls.’ Mot. to Compel Redacted Information (Filed under Seal) (March, 7, 2008) at 14-15 (DE 274), and that FEI’s counsel admits that they somehow lost the documents that were the subject of these Orders. See Pls.’ Motion at 2-5 (DE 383). Contrary to FEI’s representation, Opp. at 4-6, plaintiffs are not

asserting that it was clearly erroneous or contrary to law for Magistrate Facciola to accept FEI's counsel's representation that she "misplaced" the documents. Indeed, it is not necessary to show that defendant acted in bad faith in failing to produce the documents that were subject to these court orders. See e.g., Sendi v. Prudential Bache, 100 F.R.D. 21 (D.D.C. 1983) (finding of negligence by defendant was sufficient to warrant imposition of appropriate sanction for misplacement of materials required to be produced in discovery).

Plaintiffs contend that under the circumstances present here, irrespective of the reasons why the documents have not been produced, and because FEI itself concedes that there simply is no way of knowing for sure what information was contained in these missing documents, there should be some consequence for what, at an absolute minimum, is FEI's gross negligence in failing to preserve and produce documents that were the subject of several court orders. As one court has observed, "[t]he Court expects that any trial attorney appearing as counsel of record . . . who receives a request for production of documents in a case such as this will formulate a plan of action which will ensure full and fair compliance with the request." Bratka v. Anheuser-Busch Co., Inc., 164 F.R.D. 448, 461 (S.D. Ohio 1995) (internal citations omitted). As that Court further observed, "deterrence is an important consideration" in selecting the appropriate sanction for violation of a discovery order, since "[p]arties cannot be permitted to jeopardize the integrity of the discovery process by engaging in halfhearted and ineffective efforts to identify and produce relevant documents." Id. at 463.

Accordingly, while plaintiffs are no longer seeking a ruling that this Court draw negative inferences and designate certain established facts about the missing documents – although such sanctions would clearly be appropriate here – plaintiffs do believe that this Court should exercise

what the Supreme Court has recognized is “wide discretion” in fashioning some appropriate relief for defendant’s actions in failing to abide by several pretrial production orders to produce these six pages, even in situations where there is no showing of bad faith. See Societe Internationale v. Rogers, 357 U.S. 197, 213 (1958) (trial court has “wide discretion to proceed in whatever manner it deems most effective” where a party demonstrates that it is unable to comply with pretrial production order). Plaintiffs believe that the appropriate remedy under the circumstances is at least to preclude defendant from relying on the approximate 208 health certificates that it has designated as possible Exhibits in defense of plaintiffs’ claims. See Def.’s May Call Exhibit 72. That specific remedy simply was not before Judge Facciola when he decided to accept FEI counsel’s explanation for the six missing pages and take no further action, but is properly before this Court which has jurisdiction over all evidentiary matters.<sup>1</sup>

#### CONCLUSION

For all of the foregoing reasons as well as those set forth in plaintiffs’ motion, plaintiffs respectfully request that the Court grant their motion for partial reconsideration and preclude FEI from relying on the health certificates that they have included in their May Call Exhibit 72.

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<sup>1</sup>Contrary to defendant’s suggestion, FEI Opp. at 4, the mere fact that plaintiffs have also designated some of these same records as Exhibits that they will be relying on in support of their claims does not negate the appropriateness of the requested sanction. See Fed. R. Evid. 105 (evidence may be admissible as to one party but not the other). Moreover, at present plaintiffs seek to introduce only 43 of the same 280 health certificates that are included in defendant’s may call Exhibit 72. Compare Plaintiffs’ Will Call Exhibit 1A with Defendant’s May Call Exhibit 72.

Respectfully submitted,

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