UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS, et al.,	:	
Plaintiffs,	:	
v.	:	**Case No. 1:03-CV-02006 (EGS/JMF)**
RINGLING BROS. AND BARNUM & BAILEY CIRCUS, et al.,	:	
Defendants.	:	

DEFENDANT FELD ENTERTAINMENT INC.'S RESPONSE IN OPPOSITION TO PLAINTIFFS' EXPEDITED MOTION TO ENFORCE THE COURT'S SEPTEMBER 26, 2005 ORDER

It has become increasingly clear to current counsel for FEI that this litigation has been derailed into an unnecessary and costly detour about discovery, simply for the sake of discovery. To date, defendant Feld Entertainment, Inc. ("FEI") has produced at least 15,000 pages of elephant medical records to plaintiffs, which reveal the meritless nature of this lawsuit. Most importantly, FEI categorically maintains that it is not hiding or withholding medical records from plaintiffs. Current counsel has no reason to doubt that. FEI has no need to hide anything in light of the extraordinary care it provides to its elephants. By now, plaintiffs must know this, and their decision to create another discovery diversion is telling: Plaintiffs' Expedited Motion to Enforce the Court's September 26, 2005 Order (6/9/06) ("Motion") demands that FEI be punished for not producing records that plaintiffs "expected to receive," that resemble those "usually kept in any human file," that are of a "quantity that [plaintiffs] would expect," and that coincide with what plaintiffs have read in the newspaper. Under the guise of a discovery dispute, plaintiffs attempt

to challenge the adequacy of FEI's recordkeeping, which has nothing to do with the substantive issues in this lawsuit or the Court's September 26, 2005 Order ("9/26/05 Order").

Plaintiffs would do well to remember what this case is supposedly about: declaratory and injunctive relief under the Endangered Species Act ("ESA"), 16 U.S.C. § 1531 *et. seq.* It is not a recordkeeping case. Indeed, the ESA says nothing about animal medical records. FEI has no obligation to maintain records in a manner that plaintiffs or their counsel unilaterally deem suitable. As shown below, FEI has fulfilled its discovery obligations.

INTRODUCTION AND BACKGROUND

The Court should not indulge plaintiffs' efforts to generate a non-existent discovery dispute between the parties. The Motion, as filed, misrepresents the documents produced to plaintiffs, ignores the answers provided earlier by FEI's current counsel, and falsely states that plaintiffs conferred in good faith as required by L.Cv.R. 7.1(m). Plaintiffs have represented to the Court that broad categories of elephant veterinary records have not been produced without any basis but their own inaccurate conjecture. Plaintiffs' strategy here is clear: plaintiffs now have medical records for FEI's elephants and, much to their surprise, such documents do not support their abuse allegations. Upon realizing the lack of evidence to support their case, plaintiffs are attacking FEI in whatever manner they can: by annoyance, requests for court sanctions, and expenditure of time and legal fees in lengthy discovery disputes. To do so, plaintiffs must retroactively re-write and expand their generic "medical record" document request to include virtually every other document that plaintiffs can now think of but *neglected to ask for* in document requests issued years ago. Plaintiffs' misrepresentations to the Court about what has been produced are easily demonstrated by plaintiffs' own exhibits. Any suggestion that FEI has shown "flagrant disregard" for the Court's 9/26/05 Order is false, and it misrepresents

how FEI has conducted itself and what has occurred in discovery since the 9/26/05 Order issued. Such reckless advocacy is inexcusable, particularly when lodged in the context of seeking sanctions.[1] Plaintiffs are trying to capitalize on the Court's prior ruling in their favor by concocting a dispute over "missing" records when nothing is "missing."

A. The Actual Requests

Plaintiffs' suit is one for injunctive relief, specifically, to end current practices that plaintiffs allege constitute a "taking" of FEI's elephants. In discovery, plaintiffs issued the following document request:

> With respect to each of the elephants identified in response to Interrogatory No. 8, produce all medical records that pertain to that animal.

Pl. First Set of Request for Admission, Interrogatories and Requests for Documents at Request No. 8, p.13. ("FEI Ex. A"). Interrogatory No. 8 asked, in pertinent part:

> *For each and every elephant that Ringling owned or leased from 1994 to the present,* provide detailed information about each such animal, including the name of the animal, the circumstances under which Ringling obtained possession of the animal, whether the animal was born in the wild or in captivity, the date of birth of the animal, and whether the animal has died.

Id., p. 8-9 (emphasis added). Despite the fact that plaintiffs seek to enjoin current practices, plaintiffs requested that FEI produce documents for the last twelve years:

> Unless indicated otherwise, the relevant time period for these requests shall be from January 1, 1994 through the present.

Id. at Instruction 11, p.4; *see also, e.g., id.* at Interrogatory No. 8, p.8-9. FEI objected to the production period and responded from January 1, 1996.

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[1] Plaintiffs now claim fees and costs incurred "in continuing to pursue the medical records" since the 9/26/05 Order. Plaintiffs' Memorandum In Support of Motion at 4 n.2. ("Brief"). Presumably, they intend to seek sanctions for the preparation of their April 28, 2006 letter and the Motion. Both are frivolous for failure to duly investigate the factual basis, or lack thereof, for them, and no such fees should be awarded.

These are plaintiffs' only document requests in this case for the medical records of FEI's Asian elephants. Plaintiffs' motion is a transparent attempt under the guise of "enforcing" the 9/26/05 Order to expand these requests to cover documents not previously sought.

B. The Motions That Followed

The Court is familiar with the Motion to Compel filed by plaintiffs and the Motion for Protective Order filed by FEI such that the entire procedural history will not be repeated here. After the September 16, 2005 oral arguments, the Court ordered FEI to turn over "all veterinary and medical records" in two days by September 28, 2005. *See* 9/26/05 Order at 1. It is this 9/26/05 Order on which plaintiffs purportedly base their latest Motion. The remaining matters, including the date range for production, were referred to Magistrate Judge Facciola for his resolution. *Id.* at 1-2; *see also* Memorandum Opinion (2/23/06) (Facciola, J.).

FEI, through its prior counsel, produced the bulk of the medical records on September 28, 2005 (*see* Correspondence of 9/28/05, producing 10,485 pages of medical records) ("FEI Ex. B") and September 29, 2005 (see Correspondence of 9/29/05, producing 4,236 pages of medical records) ("FEI Ex. C").[2] After this deadline, FEI supplemented its earlier productions with approximately 1,500 pages of additional records, which contained some medical records, but primarily consisted of non-medical records, such as USDA investigations, breeding, and assorted other documents. *See* Pl. Ex. 8 at 1.

[2] On September 28, 2005, Covington & Burling, FEI's former counsel, informed plaintiffs that the balance of the medical records were still being copied at a vendor, and would be provided the next day. FEI Ex. C. To current counsel's knowledge, plaintiffs did not object to this, and the remainder of the documents were produced on September 29, 2005 as promised.

FEI's new counsel, Fulbright & Jaworski LLP, entered an appearance on March 10, 2006. *See* Entry of Appearance (Mar. 10, 2006).[3] On April 28, 2006, Plaintiffs wrote to FEI's current counsel, alleging that broad categories of medical records still had not been produced in this case. Pl. Ex. 9. FEI, at the direction of its current counsel, immediately undertook a review of the productions to date to attempt to verify that the previous productions were complete. This review by current counsel is ongoing with respect to electronic material that FEI had provided to its prior counsel shortly after the 9/26/05 Order. Apparently, prior counsel had checked this material and thought that it already had been produced. Upon re-checking these materials, it now appears to current counsel that such material was not fully processed, and not all of it has been previously produced as prior counsel believed. FEI's current counsel will complete this review and prepare such documents, medical records or otherwise, for production shortly.[4] We estimate that there are approximately 1,200 medical records, roughly 400 of which are textual, and the remainder are photographs. The failure to process such documents, however, is by no means the fault of FEI. FEI complied with the 9/26/05 Order by providing the material to prior counsel.

At the direction of current counsel, FEI also undertook to again re-search its files for any elephant medical records. As a result of that process, FEI identified and turned over to current counsel 19 documents (86 pages) of medical records, which were produced on May 12, 2006. Since that production, FEI has since located an additional 7 documents (46 pages) of medical records, which it will produce promptly. Thus, the efforts to re-search FEI for all medical

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[3] FEI's prior counsel, Covington & Burling, subsequently withdrew as counsel on March 13, 2006.

[4] These records will be produced as soon as possible. However, many of these records include references to other animals that are not the subject of this lawsuit, and because plaintiffs would not agree to a protective order in this case, FEI must take great care to redact all references to non-responsive information to prevent misuse of the information in the public domain, which slows the processing time.

records pre-dating September 26, 2005 have yielded 26 documents (132 pages) not previously discovered. In light of the more than 15,000 pages of medical records already produced, this amount is minimal — ***less than 1% of the medical records*** (.8%) – and demonstrates two things: (1) FEI has executed repeated searches in a concerted effort to be exhaustive, and (2) FEI has been honest and forthright about turning over medical records. Despite their sanctimonious request for "sanctions," plaintiffs are receiving the documents requested and can show no prejudice whatsoever about the way in which this process has unfolded.

The Motion is misleading in that it would have this Court believe that FEI dumped another box of medical records on plaintiffs on May 12. *See* Brief at 10-11. This is false. At the same time it was re-searching its files for medical records, FEI also was supplementing its production with, *inter alia*, documents from the 1994-1995 range as Judge Facciola had ordered (which were not covered by the 9/26/05 Order) and with documents created after the date of the Court's 9/26/05. *See* 2/23/06 Order; Correspondence of 5/12/06 ("FEI Ex. D"). FEI's current counsel also assured plaintiffs that FEI would continue to supplement for all categories of documents. Pl. Ex. 2 at 7.

Also contemporaneous with its May 12, 2006 production, FEI addressed in detail plaintiffs' remaining suspicions that broad categories of medical records still had not been produced. *See* Pl. Ex. 2. It was obvious to FEI that plaintiffs had little, if any, knowledge about the manner in which veterinary medicine and recordkeeping are conducted for a herd of Asian elephants, and the May 12, 2006 letter was written only after consultation with a qualified veterinarian in order to dispel plaintiffs' misconceptions. *See* Declaration of Ellen Wiedner ¶2 (7/6/06) ("FEI Ex. E"); s*ee also* Pl. Ex. 2. In response to plaintiffs' inquiries regarding electronic correspondence, FEI's current counsel asked plaintiffs' counsel for a meet and confer to

determine what plaintiffs felt they were still owed and to resolve the matter. Pl. Ex. 2 at 6. Rather than resolving the matter through counsel, plaintiffs ignored this overture and filed their Motion. Plaintiffs now attempt to re-write their discovery request for medical records to include *all* e-mails. *See* Brief at 19 n.8. The document requests, however, will not support plaintiffs' revisionist history. *See infra* § VI(F).

Plaintiffs' tactic of constantly accusing FEI of withholding documents, threatening to seek the Court's intervention, and then ignoring the answers provided is counterproductive to the litigation. It is interfering with FEI's own ability to take discovery, and it is wasting the Court's and counsel's time. As demonstrated below, plaintiffs' overstated demands have become irrational, are contrary to the record, and defy reality. FEI has complied with the Court's 9/26/05 Order, and it is now time for the Court to order plaintiffs to cease and desist these tactics and proceed with the litigation at hand.

ARGUMENT

I. PLAINTIFFS ATTEMPT TO LEVERAGE THE PRIOR ORDER RATHER THAN CONFER IN GOOD FAITH

As a threshold matter, plaintiffs have not – as they certify – "conferred in good faith" with FEI on this issue, and falsely represented that that the parties "reached a stalemate." Brief at 2-3. When plaintiffs' counsel wrote FEI regarding their intent to file a motion, FEI, through current counsel, represented that it wanted to resolve the discovery dispute without court intervention and that it would work with plaintiffs to do so. Upon receiving plaintiffs' April 28, 2006 correspondence regarding what they believed to be outstanding medical records, Pl. Ex. 9, FEI, through current counsel, responded in painstaking detail to plaintiffs' questions about the status of the medical records production, and produced categories of documents by plaintiffs' unilaterally imposed deadline of May 12, 2006. Pl. Ex. 2; FEI Ex. D. Moreover, current counsel

proposed a meet and confer to discuss remaining issues with counsel. Pl. Ex. 2 at 6. Plaintiffs filed the instant motion without even responding to FEI's May 12, 2006 correspondence. No "stalemate" had occurred. Instead, plaintiffs unilaterally halted the good faith discussions about discovery disputes, effectively refusing to confer with counsel with whom they had never had prior interactions, and instead chose to disregard FEI's explanations that made plaintiffs' Motion unnecessary.

It is evident from this and prior briefings that plaintiffs clearly have an issue with how prior counsel handled discovery in this case. While that may be, FEI has obtained new counsel who have been working diligently to accommodate plaintiffs by supplementing documents, satisfying outstanding discovery disputes, fulfilling outstanding requests for radiograph and videotape copies, and scheduling deposition dates that plaintiffs' counsel repeatedly have changed. Pursuant to plaintiffs' request, counsel for FEI also has extended plaintiffs' videotape review hours from one day to five days per week, and accommodated every aspect of plaintiffs' schedule changes with respect to the same, so that discovery can progress at a quicker pace. In short, FEI, through its current counsel, has worked cooperatively with plaintiffs to resolve these outstanding disputes and has afforded all courtesies with respect to this process. Before plaintiffs circumvented this process and filed this Motion, the case was progressing and previously outstanding discovery disputes were systematically being resolved without the need for the Court's intervention. Indeed, FEI has a vested interest in resolving these matters: it would like to *take* its own discovery rather than devoting all of its resources to *responding* to plaintiffs' multitude of requests.

II. PLAINTIFFS' MOTION MISLEADS THE COURT

Plaintiffs' motion paints a picture of uncooperative, obstructionist behavior by FEI and its counsel. Such a characterization is not only unwarranted based on the record, but particularly offensive in light of the fact that plaintiffs circumvented the good faith efforts of current counsel to solve any discovery dispute by prematurely demanding court intervention. In doing so, plaintiffs have re-hashed disputes over documents that already have been produced,[5] misrepresented the type and content of the documents already produced, and attempted to lead the Court into believing that the bulk of medical records produced was after the date specified in the Court's 9/26/05 Order. What plaintiffs have not stated is that the amount of medical records produced since the Court's 9/26/05 Order by current counsel is *de minimus*: 19 documents (86 pages) produced on May 12, 2006, and 7 documents (46 pages) to be supplemented promptly. Far from flagrant disregard of the Court's 9/26/05 Order, FEI, at the direction of current counsel, has taken all steps to ensure that every last record has been discovered and produced, even going so far as to re-search documents gathered by prior counsel. In doing so, it has found a very small quantity of documents that were overlooked in the prior productions and produced those to plaintiffs. Any materials previously provided by FEI to prior counsel will likewise be searched and produced promptly. None of this is "obstructionist." An "obstructionist" party would produce nothing.

The Motion is based on the flawed premise that plaintiffs can use the Court's 9/26/05 Order to sweep each and every document that plaintiffs neglected to seek in discovery simply by labeling it a "medical record." Significantly, the issue of what, exactly, is a medical record, as

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[5] Plaintiffs re-visit matters raised previously in their Motion to Compel that are moot. *See* Brief at 6. The purpose for this reference to records for Riccardo, Luke, Roxy, Bunny and Lecheme, which have been produced, is unclear.

defined by those with knowledge in the veterinary profession, has never been addressed in this case. Plaintiffs have not attached a single declaration from a recognized veterinarian that would support their uninformed opinion as to what veterinary records should look like for a herd of Asian elephants. Nor have plaintiffs brought to the Court's attention, as they should have, the applicable U.S. Department of Agriculture ("USDA") requirements that show that FEI's system of recordkeeping for its animals is compliant. Instead, plaintiffs proceed in an intellectually and factually dishonest manner by stating unsupported argument as conclusion. *See, e.g.* Brief at 10 ("Although there might be some debate on the margins as to what specifically constitutes a 'medical record,' all records stemming from veterinary exams, such as the certificates of veterinary inspection, should certainly be included.").[6] Plaintiffs, despite having received all categories of documents that make up an elephant's "medical record," still insist that broad categories of records are missing from the production. Plaintiffs' *post hoc* analysis of what an elephant medical record should or should not be, is simply not controlling.

III. PLAINTIFFS ARE ESTOPPED FROM SEEKING DOCUMENTS PRIOR TO 1994

With respect to medical records, plaintiffs now take the outrageous position that their document requests are "not limited by any time frame," and that FEI is required to produce "all records, regardless of their date, for all elephants in their custody or care since 1994." Brief at 2 n.1. This lacks any common sense. It is also contrary to plaintiffs' own discovery requests, what they told the Court and moved to compel on, and what Judge Facciola ordered. Without moving for reconsideration of the February 23, 2006 Order, *see* L.Cv.R. 72.2(b) (requiring a party to

[6] Notably, not even plaintiffs' own misguided attempt to analogize the elephant records to human medical records will hold in this example. Veterinary inspections relate to transportation of animals across jurisdictional lines. This is no different than a D.C. Child Health Certificate, which any minor must have completed and signed by a doctor prior to entering a daycare facility or school in the District. The certificate must be completed and signed by the doctor, but the doctor does not retain a copy of the certificate to become part of the child's medical records.

move for reconsideration within ten (10) days of order), plaintiffs ask the Court to impose an unlimited timeframe for medical records *on the basis of the 9/26/05 Order*. The Court did not even address the time limit issue in the 9/26/05 Order but instead referred it to Judge Facciola. The February 23, 2006 Order does not lend itself to plaintiffs' latest overreaching. The Court need only consider what plaintiffs have previously stated to recognize the shenanigans occurring here: Plaintiffs' discovery requests stated the following: **"[u]nless indicated otherwise, the relevant time period for these requests shall be from January 1, 1994 through the present**." *See* FEI Ex. A at Instruction No. 11, p.4 (emphasis added). When FEI objected to that time period and agreed only to provide discovery back to January 1, 1996, plaintiffs moved to compel documents – but only for *an additional two years*. *See* Memorandum in Support of Plaintiffs' Motion to Compel (1/25/05). There, plaintiffs argued repeatedly in support of what they claimed was a "reasonable 10-year time frame":

> Defendants [sic] also objected to providing documents within the **reasonable 10-year time frame** that plaintiffs requested for many of their discovery requests – i.e., documents and information dating back to 1994 . . . Accordingly, plaintiffs must move to compel information withheld on this basis as well.

Id. at 9 (emphasis added); *see also id.* at 42 (asking that defendant be ordered to fully respond to plaintiffs' requests that sought documents and information from "**1994 to the present**.") (emphasis added).

Plaintiffs repeatedly reiterated the 1994 timeframe in their reply brief, by stating that it was based on their claims in the case:

> plaintiffs determined that a **time period of ten years (from service of discovery) would constitute a reasonable survey of defendants' documents and activities**.
>
> . . .
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> Moreover, any burden that results from defendants needing to conduct a "new search" for the additional two years covered by the plaintiffs' March 2004 discovery requests . . . is self imposed . . .**Accordingly, the Court should order**

> **defendants to comply with the reasonable time frame incorporated into plaintiffs' discovery requests**.

Reply in Support of Plaintiffs' Motion to Compel at 22-23 (3/24/05) (emphasis added).

The Court subsequently ruled that FEI is required to produce records from 1994 to the present. With respect to the date cut-off, Judge Facciola stated that "it seems reasonable for plaintiffs to have requested information **for a ten year period**." Feb. 23, 2006 Order at 10 (emphasis added). Indeed, the Court ordered FEI to "supplement their discovery responses with documents from 1994 and 1995." *Id.* Despite the plain language of this order, plaintiffs now argue that they are entitled to documents dating back to the birth of each elephant – which, if they even existed, would in some cases date back to the 1940s covering essentially sixty (60) years of documents. There is no good faith basis for plaintiffs to claim that they need temporally limitless discovery, particularly where they have sued for an injunction to end alleged current elephant practices. Having argued that January 1, 1994 forward is the relevant and reasonable period, and having obtained a ruling in their favor on this point, plaintiffs are judicially estopped from arguing for a different time frame. *New Hampshire v. Maine*, 532 U.S. 742, 749-51 (2001) (judicial estoppel "generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase.") (internal quotations omitted); *United States v. Quinn*, 403 F. Supp. 2d 57, 64-66 (D.D.C. 2005) (applying factors of judicial estoppel as recognized in *New Hampshire v. Maine*).

Plaintiffs did not ask for documents from an unlimited timeframe, did not move to compel documents from an unlimited timeframe, and the Court did not grant plaintiffs an unlimited timeframe for discovery. There is no discussion by the Court that medical records are not subject to the January 1, 1994 discovery cutoff imposed by the Court as plaintiffs represent. *See* Order at 9-10 (2/23/06). Nor can the February 23, 2006 Order be construed in any

conceivable way to support an unlimited timeframe for any documents. That plaintiffs would attempt to carve out some exception for veterinary records from 1994 to the present time frame is yet another example of plaintiffs' attempt to stretch the boundaries of the Court's 9/26/05 Order beyond all recognition. Plaintiffs falsely have represented to the Court that FEI "failed" to produce decades-old documents that were never sought or ordered, may or may not exist, and are completely irrelevant to this lawsuit. Plaintiffs misconduct is sanctionable, and the Court should deny their Motion altogether and award FEI its costs and fees for having to respond.

IV. HUMAN STANDARDS OF MEDICAL RECORDKEEPING DO NOT APPLY

In support of their argument that FEI's production of elephant veterinary records is incomplete, plaintiffs begin with the flawed assumption that medical records for a herd of Asian elephants should be similar to what is created or kept in a "human medical file." Brief at 7. This position rests on nothing but the uninformed hypotheses of plaintiffs' lawyers. What plaintiffs "expected" to receive and what actually exists are two different things. Plaintiffs' argument really is not that existing records have not been produced, but that something else, in plaintiffs' counsels' view, should have been generated. The Court ordered FEI to produce the records that exist – not to start creating records based on what plaintiffs "expect" to find. Plaintiffs have premised their entire argument on the misconception that these categories of documents are somehow "required" and, if they have not received them, the only explanation is that FEI is withholding them. In support of this hypothesis, plaintiffs have cited no authority, legal or veterinarian, for the proposition that veterinary records are supposed to have any resemblance to human medical records. FEI cannot state any more strongly: it is not withholding any category of veterinary record pertaining to elephants. Plaintiffs' insistence that such records are incomplete is not the standard by which FEI should be evaluated for purposes of this motion.

FEI cannot produce documents that either were never created or no longer exist in the ordinary course of business.

In its response to plaintiffs' April 28 letter, FEI explained, point by point, why such categories of veterinary records do not exist, why they are no longer in FEI's custody or control, or why what plaintiffs think should exist has no correlation to the actual practice of veterinary herd medicine.

> The practice of veterinary medicine and veterinary recordkeeping is not akin to the practice of human medicine and recordkeeping, nor does it closely parallel veterinary care that one might receive for a pet dog or cat. . . . [FEI's] veterinarians practice "herd" veterinary medicine, which differs greatly from, for example, a neighborhood veterinarian who maintains a practice serving a pet population.

Pl. Ex. 2 at 1-2.

Plaintiffs simply ignored these responses, instead insisting that such records must exist because such items could be in a human being's medical file. *See* Brief at 7; *see also id.* at 9 (scoffing at the above language as an "explanation" which plaintiffs did not know).[7] Tellingly, plaintiffs now burden the Court with a motion that has no affidavit or declaration from a veterinarian experienced in handling herd animals, specifically Asian elephants, that will support plaintiffs' Motion. Thus, plaintiffs provide nothing authoritative to rebut FEI's May 12, 2006 letter. Instead, plaintiffs submit that the Court should accept blindly their inaccurate rationale for why they believe these non-existent documents are being "withheld." This position is frivolous.

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[7] Plaintiffs assert that the explanation with respect to the difference between herd veterinary medicine and human medicine is disingenuous because it was not asserted by prior counsel. Brief at 9. However, this explanation came in response to plaintiffs' lengthy correspondence that made allegations about deficiencies in the records that have no relationship whatsoever to the practice of veterinary herd medicine. Prior to this April 28, 2006 correspondence, plaintiffs had not revealed their patent misunderstanding of the manner in which FEI's elephant records are kept. Plaintiffs now suggest that providing any explanation that could possibly resolve, rather than perpetuate, the medical records dispute is somehow improper. This further underscores plaintiffs' bad faith efforts to annoy and harass FEI, rather than to resolve the discovery dispute.

Significantly, plaintiffs fail to advise the Court that there are no requirements under the ESA for medical records for captive endangered species. And while the USDA sets minimum standards of care under the Animal Welfare Act ("AWA") for animals held by exhibitors, no USDA regulation requires any form of medical records for animals exhibited in a circus. *See* 9 C.F.R. Part 2, Subparts A-I 2006. In fact, USDA guidelines on "Health Records" indicate that "[h]ealth records are not specifically required by the AWA regulations, except for marine mammals." USDA Animal Care Resource Guide, Exhibitor Inspection Guide at 14.2.1 (rev. 11/04) ("FEI Ex. F"). Under USDA guidelines, "these records are not specifically required by the AWA regulations and standards, except for marine mammals. Therefore, a lack of any of these records or inadequacy of the health records may not be cited as a stand-alone violation, except for marine mammals." *Id.* (emphasis added). USDA guidelines further state that, with respect to the substance of the records, if health records are maintained, they need only be "sufficiently comprehensive to demonstrate the delivery of adequate veterinary care" and "consistent with professional standards." *Id.* Thus, even if this were a dispute about the adequacy of FEI's existing elephant records as produced – and it is not such a dispute – the relevant USDA standards show that FEI's records fully comply.[8]

Instead of authority, plaintiffs cite random quotes from the media in a desperate attempt to establish that FEI's recordkeeping is somehow deficient. Plaintiffs cite a DVD clip of FEI's veterinarian, Dr. Lindsay, ostensibly to "prove" that FEI maintains elephant veterinary records identical to human medical records. *See* Brief at 9; Pl. Ex. 10. This argument is ridiculous, and illustrates the lengths plaintiffs will go to in order to divert this case from the merits. The fact

[8] Of course, even if plaintiffs' case were a debate about FEI's compliance with USDA recordkeeping guidelines, there is no private cause of action under the AWA, *e.g., Int'l. Primate Protection League v. Inst. for Behavioral Res., Inc.*, 799 F.2d 934, 940 (4th Cir. 1986), *cert. denied*, 418 U.S. 1004 (1987), which further shows how far afield their discovery dispute has gone.

that FEI has always – and will continue – to take wonderful care of its animals, and in effect treat them as members of the family, obviously does not mean that the elephants are receiving human medical care, subject to human medical recordkeeping. The fact that FEI is justifiably proud of its elephant medical care has no correlation to the types of veterinary records it keeps, or is required to keep, by law. FEI is not withholding categories of exam notes, observations, test results, and medical histories. FEI already has turned over documents that fall into each of these categories, across the entire elephant herd (and for elephants that have long been deceased). FEI cannot produce what does not exist. Plaintiffs' tactic of isolating random media quotes is misleading and reeks of harassment. What plaintiffs are really arguing is that, in plaintiffs' view, FEI's veterinary records have insufficient detail. Whether or not the records have sufficient detail has nothing to do with whether or not they have been produced.

Furthermore, what plaintiffs characterize as a lack of medical information for the elephants is merely reflective of the general good health shared by the elephants. As FEI explained in its detailed correspondence to plaintiffs, recordkeeping for herd medicine focuses on abnormalities—not day-to-day good health of each individual animal in the herd. Pl. Ex. 2 at 3. Indeed, entries to an elephant's "Medical History," or "Animal Veterinary Report" that simply record the visit, are evidence that the animal was not experiencing any problems that required attention. FEI Ex. E ¶4. The level of detail for a given animal is a function of that animal's particular medical situation. *Id.* That one elephant had detailed entries and another did not says nothing about whether all the records for either animal were produced.

Plaintiffs repeatedly state that "one would expect" to find certain categories of medical records for FEI's herd of Asian elephants, but give no rationale or explanation why the expectation is legitimate. Plaintiffs "expectations," however, do not dictate FEI's discovery

obligations. Plaintiffs claim that they have retained experts to review the veterinary records to identify alleged gaps in the documents. Brief at 25. However, plaintiffs have failed to provide a single declaration, let alone from any recognized "expert" who has actual experience tending to a herd of Asian elephants that would provide any basis for their conclusions. Yet plaintiffs have summarily rejected FEI's representations about its elephant care and recordkeeping despite the fact that FEI has owned Asian elephants for 135 years, and its veterinary personnel are recognized nationally and internationally as experts in Asian elephant care. Plaintiffs' lack of proof is quite telling, and illustrates plaintiffs' patent misinformation now presented to this Court about what is contained in FEI's veterinary records.

V. PLAINTIFFS' INSISTENCE THAT MORE CATEGORIES OF DOCUMENTS EXIST IS UNWARRANTED

Despite the fact that FEI has produced at least 14,000 pages of medical records through its former counsel, and 132 pages of medical records through its new counsel, plaintiffs still contend that the document production is incomplete. Plaintiffs now represent to the Court that "Entire Categories of Standard Records Are Absent" from "most of the elephants' files." Brief at 17. The thrust of plaintiffs' argument is that they believe multiple "categories" of documents exist, but that FEI is intentionally withholding them. Plaintiffs' unsupported opinion is wrong.

A. Narratives Regarding Medical Treatment Have Not Been Excluded From the Production

Plaintiffs claim that FEI has produced only "skeletal, type-written medical 'histories' for each elephant, which appear to be typed excerpts from longer narrative records." Brief at 6; *see also* Pl. Ex. 7 (medical history for Nichole); Pl. Ex. 20 (medical history for Asha).[9] This is just

[9] Even though plaintiffs' own selection of exhibits does not support their arguments, it is clear that plaintiffs cherry-picked when selecting them for the Court. They avoided attaching more detailed records that show notes

one example in which plaintiffs are misrepresenting to the Court the types of information that have been produced to date. FEI has produced the medical histories free of any redactions. The documents themselves belie any missing category of narrative. These documents represent the chronological medical history for each elephant, in which the veterinarian documents routine visits and vaccinations, as well as medical conditions and treatment. Plaintiffs conclude, without any veterinary support, that such documents are "typed excerpts from longer narrative records" and suggest that other versions exist but are being withheld. Brief at 6. Plaintiffs' conclusion is wrong. FEI's elephant medical records, as evidenced by the documents themselves, contain various categories of medical information, including routine visits, vaccinations, elephant medical symptoms, veterinary observations, medications and other treatment, and follow-up plans, as necessary. A cursory review of these medical histories reveals that these records contain far more information than plaintiffs are representing to the Court.

For example, elephant Nichole's medical history, cited by plaintiffs as an example of a record containing no narrative information,[10] in fact contains her date of birth, origin, and identification information. Pl. Ex. 7. It also contains entries and narratives that document vaccinations, symptoms, diagnosis, laboratory and/or test results, examination notes, including re-examinations of prior conditions, observations, suspected illnesses/conditions and origins of same, treatment notes, medications, weight checks, and vital signs. *See id.* (Nichole's Medical

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regarding conditions and treatments. *See* Animal Veterinary Report; Medical History of Sarah (FEI 0003085-90) ("FEI Ex. G"); *see also infra* p.31 n.22.

[10] Plaintiffs often contradict themselves with respect to the characterization of the medical records produced to date. Indeed, plaintiffs admit that "(in some cases) many laboratory reports" have been produced. Brief at 17. The parties likely agree that lab reports or results are a part of the elephant's medical file. Plaintiffs may even agree that such reports contain diagnostic information about the elephant. However, despite the production of thousands of elephant lab results, plaintiffs dismiss the production of these records and characterize FEI's production as scant or otherwise incomplete.

History); *see also* Pl. Ex. 24 (Asia's Medical History record) (containing narratives regarding elephant's current and previous weights, observations about weight, diet and good health, documentation of blood tests, and follow-up regarding lack of abnormalities in blood tests).[11]

Plaintiffs also claim that Asha's medical history is incomplete because it does not have a great deal of narrative information. Brief at 17. In fact, Asha's medical history does include narrative notes, where applicable. *See* Pl. Ex. 20 (Asha's Medical History). What Asha's medical history demonstrates is that she is a healthy four-year-old. FEI Ex. E ¶5. Plaintiffs claim that Asha's record is deficient because, in plaintiffs' opinion, "a baby elephant is likely to be closely followed." Brief at 17. Again, this is plaintiffs' own speculation, and is not supported by any citation or qualified veterinarian. Nor is it clear why, even if an elephant is "closely followed," the medical record would be automatically voluminous. Plaintiffs' tactic of suggesting that an elephant, such as Asha, has a troubling medical condition that is not recorded in her medical history is disingenuous and aimed solely at misleading the Court into believing that FEI is purposefully withholding categories of medical records. This assertion is false. Plaintiffs do not rebut the explanation that visits of healthy animals, with no conditions or treatment to document, do not get recorded other than to state "examine on site" or "vet on site." FEI Ex. E ¶4. Plaintiffs' belief about what the documents should or should not contain therefore

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[11] Plaintiffs also take issue with various entries in Asia's medical record with respect to follow-up care for lameness, again stating that her medical history contains no "narrative concerning the progress of her condition." Brief at 19; Pl. Ex 24 at 5, 6. Yet a cursory review of the document proves plaintiffs wrong. The veterinarians made ongoing observations about Asia's "stiffness" (2/27/02) or "lameness" (6/1/04); (1/14/05), *see* Pl. Ex. 24 at 4, 5, and made multiple observations about her symptoms, medication, and treatment, which are all recorded in the record produced to plaintiffs and attached to their brief. The intermittent entries that do not discuss Asia's lameness indicate that Asia was not sufficiently symptomatic to note or otherwise warrant treatment at those times. FEI Ex. E ¶12. Plaintiffs' statement that there is no follow-up regarding Asia's lameness/stiffness issues misrepresents the document, which shows ongoing treatment and observations over time. Moreover, the fact that plaintiffs take issue with the fact that the Medical History document includes the primary source of narratives about Asia's condition is irrelevant. The inquiry should be whether FEI has produced all medical records for Asia, which it has.

has no basis and is not the standard by which FEI's requirement to produce documents is measured.

Plaintiffs' speculation that the narrative information contained in an elephant's medical history is some short-form version of some longer document similarly is incorrect. The type of information contained in this medical history is the information needed by FEI's veterinarians to administer care to an elephant herd. In any event, as FEI previously informed plaintiffs, if other narratives or notes were created for a particular elephant, such documents were produced. The allegation that FEI has elected to withhold broad categories of any document from an elephant's file is incorrect.

Plaintiffs also argue that the existence of certain types of documents for some elephants is evidence that the same type of document is being withheld for other elephants. Brief at 17 (citing to narratives in medical records of "Riccardo" and "Bertha"). FEI never has represented that its elephants have identical medical records or histories. In fact, one elephant's medical record, depending upon its health, may look very different from another's. FEI Ex. E ¶6. Riccardo had an unusual birth defect and Bertha had a non-repairable intestinal adhesion. *See* FEI 3064. It is self-evident why these elephants may have had records very different than those of the other healthy elephants.

B. Permit Or Inspection Documents are Not Medical Records

In addition to arbitrarily re-writing the date range for responsive medical records, plaintiffs' ever-expanding definition of a "medical record" now includes whatever they neglected to include in their original document requests. Now plaintiffs argue that inspection documents are also medical records, and that FEI should be "sanctioned" for not producing them. Brief at 9-10. As argued above, plaintiffs failed to define what, exactly, they meant by "medical

records." This intentional vagueness, however, cannot be misused by plaintiffs to sweep everything into the Court's 9/26/05 Order regarding the production of medical records. Significantly, the definition of a medical record, or the types of records that would fall into this category, was not argued by the parties at the motion to compel stage. Nor did the Court interpret or otherwise rule on what type of document would fall into this category. Erring on the side of over-inclusiveness, FEI produced categories of documents even though they arguably could fall outside the scope of a medical record. The "certificates of veterinary inspection," however, are not medical records. FEI does not maintain such an inspection certificate in an elephant's file, and it is not created to facilitate treatment of an elephant. FEI Ex. E ¶7. Rather, such a document is the result of an "inspection" type, permitting requirement, which varies from state-to-state, and is required to transport an animal through the state. Typically, such inspection certificates expire thirty (30) days after they are issued. *Id.*

Plaintiffs, themselves, admit that "there might be some debate on the margins of what specifically constitutes a 'medical record.'" Brief at 10. FEI would agree, particularly where the document requests never asked for inspection records, and the Court's 9/26/05 Order did not refer to them. To claim that the Court's 9/26/05 Order covered such documents is misrepresenting the record. This disagreement over the classification of this document, however, is not evidence of dilatory conduct, but rather evidences the fishing expedition plaintiffs are engaging in to obtain documents that they did not ask for in the first place.

V. FEI IS NOT WITHHOLDING DOCUMENTS RELATED TO SPECIFIC ELEPHANTS

FEI has produced veterinary records for its elephants. No amount of quoting from isolated media interviews or websites, or guidelines or regulations that do not apply to FEI or its animals, is going to change the fact that FEI's veterinary medical records, in reality, are different

than what plaintiffs imagine them to be. FEI's duty to produce responsive documents is not dictated by plaintiffs' unsupported opinions about veterinary recordkeeping. FEI can only produce what records are maintained and exist. Furthermore, the adequacy of FEI's medical records is not relevant to the motion to compel or this lawsuit.

Plaintiffs previously inquired about most of these elephants' records in their April 28, 2006 correspondence. *See generally* Pl. Ex. 9. FEI explained why certain records did not exist, or where plaintiffs were mistaken, in an effort to highlight that much of what plaintiffs believe is a "dispute" is easily resolved with a simple explanation. *See* Pl. Ex. 2. In some cases, the fishing expedition that plaintiffs are engaging in – and the waste of the Court's and FEI's resources in having to respond – is plainly obvious. Plaintiffs, however, chose not to accept most of FEI's straightforward explanations, and have asked for Court intervention, on all but the most frivolous of their issues, which they likely realized would undermine their current position.[12] FEI, therefore, addresses each again below for the Court.

A. Seetna's Records

Plaintiffs take issue with the quantity of medical records produced for an elephant named "Seetna." Seetna was an elephant owned by the Miami Metro Zoo who was taken in by FEI due to hurricane conditions in Miami. Pl. Ex. 11. She was euthanized on May 22, 1995 due to "impossible resolution of dystocia," which means generally severe difficulty in parturition (giving birth), a fact that plaintiffs neglect to mention. Instead, they suggest that she just "died" at aged 30, implying that this was from some problem with her veterinary care. Brief at 11-12.

[12] For example, plaintiffs demanded production of records for a "Nunya", whom plaintiffs assumed was an elephant for which FEI was withholding the production of medical records. Pl. Ex. 9 at 3 (referencing FELD 22405). A cursory glance of the "nunya" cite, suggests that "nunya" was likely nothing more than slang word filling in an obviously blank space on a chart. Plaintiffs, however, interpreted this blank information to refer to an undisclosed elephant, and demanded that FEI turn over medical records for "nunya."

Despite the fact that plaintiffs have received all records maintained for Seetna, and despite the fact that she died 18 months into the document production period (in 1996), plaintiffs continue to waste the Court's time arguing about the purported incompleteness of Seetna's file. Moreover, because the USDA guidelines state that records should be kept for one year, it is remarkable that there were *any* records on Seetna whatsoever. *See* FEI Ex. F at 14.2.3. Such records could legally have been destroyed years before this lawsuit was ever filed. Regardless of when Seetna came to FEI, or the details of her ownership, plaintiffs have been given every record FEI has on Seetna. Seetna died ten (10) years ago, and none of Seetna's records is relevant to plaintiffs' "taking" claim under the ESA.[13]

B. Irvin's Records

Plaintiffs admit that they received records for Irvin, who was born on June 1, 2005. Brief at 13. However, they still quibble with what was produced. Plaintiffs evidently cannot accept that a healthy elephant – less than a year old when plaintiffs sought follow up records – could only have 8 pages of medical records. Plaintiffs claim that in order for his medical record to be complete, Irvin must have had laboratory reports, for reasons plaintiffs do not state. *Id.* Again, plaintiffs claim that "one would expect" daily narratives and observational notes about Irvin, but do not provide any basis for this statement other than their own opinions on veterinary care for an elephant herd. Plaintiffs have what exists. None of the plaintiffs has ever bred an Asian elephant in captivity or cared for one, so what they "expect" to find regarding Irvin is irrelevant.

[13] Plaintiffs also state that FEI has not produced an "autopsy" report for Seetna. Brief at 13. Plaintiffs have received the elephant necropsy reports that exist. FEI has no necropsy report for Seetna.

C. Aree's Records

Plaintiffs make similar arguments with respect to the records produced for Aree, another baby elephant born on April 21, 2005, just over a month before Irvin. Plaintiffs admit that 15 pages of records have been produced for Aree; however, they deem them incomplete as they do not contain written interpretations of lab reports.[14] As stated in FEI's May 12, 2006 correspondence to plaintiffs, a lab report is a meaningful document to a veterinarian and, a veterinarian has no need for separate written analysis. FEI Ex. E ¶8; Pl. Ex. 2 at 3. Plaintiffs argue that a positive lab report requires some additional, independent written analysis from a veterinarian, but they do not identify what "positive" result for Aree they are talking about and cite nothing to support their "written analysis" theory. Brief at 13. FEI is unsure as to what sort of dramatic medical event they are trying to suggest is connected to this lab report. In any event, the fact that two elephants, Aree and Irvin, so similar in age and have a very similar quantity of medical records, shows that it is typical for a normal baby elephant to not have accumulated a significant amount of medical records. A lack of medical records reflects an animal's good health, *see* FEI Ex. E ¶¶4-6, a fact that plaintiffs obviously cannot accept.

D. Bertha's Records

Plaintiffs also complain that only a "handful of pages" were produced for Bertha. Brief at 13. Bertha lived for only 9 days. She was euthanized after surgery could not resolve her non-

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[14] Plaintiffs' accusations about FEI withholding categories of medical records are inherently contradictory. Plaintiffs claim that entire categories of records, for example, lab reports, are being withheld. Brief at 13. However, plaintiffs then admit receiving lab reports for Aree, which clearly contradicts the claim that FEI has produced no lab reports. *Id.* Curiously, in other sections of their brief plaintiffs admit that "many" laboratory reports have been produced. *Id.* at 17. This further illustrates that, where available, lab reports, and every other kind of medical record, have been produced. No elephant's file will be identical, and for plaintiffs to suggest otherwise is simply wrong.

repairable intestinal adhesion. Pl. Ex. 14 at FELD 0019825.[15] Among the documents that FEI produced for Bertha (attached by plaintiffs as Ex. 14) was the "Elephant First Occurrence" chart, which documents the times of all the baby elephant's "firsts" after her birth (FEI 1380); various laboratory reports (FEI 19826-19830; FELD 008073), with some containing written veterinary notes; veterinary notes of symptoms, ultrasound, and treatment, including medications administered (FELD 0019821-24); Surgical Procedure Report, which contains pre-operative diagnosis, pre-operative medication, anesthetic agents, and a description of the surgical procedure (FELD 0019825); an "Elephant Plan" for sedation, anesthesia and post-operative pain (FELD 0024240-41); surgical notes (FELD 0024239); and Bertha's necropsy report (FEI 3065), which describes Bertha's medical condition; and photos of Bertha's surgical procedure (FEI 1720). It is hard to understand why plaintiffs cannot accept that a nine-day-old elephant does not have a more lengthy medical file.[16]

Plaintiffs assert that Bertha's nine-day record is incomplete because it does not "[a]t an absolute minimum," contain "correspondence, memoranda or notes of meetings, or e-mail traffic between defendant's veterinarians and staff" concerning Bertha's death. Brief at 14 (emphasis in original). Given the fact that Dr. Lindsay, Dr. Wiedner and Dr. Isaza, together with at least four other medical and staff persons, were all attending the surgery of Bertha (which is clearly stated

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[15] Plaintiffs complain that the confidentiality designations made by prior counsel are overbroad. Brief at 6 n.3. That may be, but current counsel, who have been prioritizing document review and production in response to plaintiffs' various letters, have not yet had an opportunity to review those designations. Until such time, it appears that some of the medical records attached as Pl. Ex. 14 were designated as confidential, *see* FEI Exs. B & C, as were the records attached hereto as FEI Exs. G (Sarah elephant medical history) & H (Emma elephant records). Accordingly, FEI has filed Exhibits G and H under seal until it has time to determine the status of the designations. Exhibits G and H have been identified by Bates label and already produced to plaintiffs. FEI will serve plaintiffs with hard copies of these exhibits as well as file them under seal with the Clerk's office.

[16] Plaintiffs notified FEI that they believed this report appeared to "end abruptly." Pl. Ex. 9 at 4. Counsel for FEI subsequently determined that the document as produced, is complete, and informed plaintiffs of this fact in the May 12, 2006 correspondence. Pl. Ex. 2 at 3 n.3. Plaintiffs, however, have rejected this explanation and continue to insist that the document ends abruptly and is incomplete. What information plaintiffs believe to be missing is unclear. In any event, it is all that exists.

on the top of FELD 0024239), and devoting their collective experience and energy to saving this calf, it is absurd for plaintiffs to suggest that this team of veterinary professionals had time to generate written correspondence and e-mail while they were in a room, together, trying to save a life. This demonstrates plaintiffs' incredible insensitivity and misunderstanding of veterinary practices. Plaintiffs do not understand that veterinary care, not creating an e-mail, is and always will be the paramount concern of FEI veterinarians, in a medical emergency or otherwise. Plaintiffs do not bring these details about Bertha to the Court's attention because they would rather give the Court the false impression that there is some scheme by FEI to evade this Court's 9/26/05 Order. Nothing could be further from the truth, and this example clearly reveals plaintiffs' motives. Plaintiffs are, in bad faith, attempting to create a discovery conflict where none exists.

E. Barbara's and Karnaudi's Records

Plaintiffs protest that FEI has produced too few medical records for elephants Barbara and Karnaudi. Brief at 14. Karnaudi died on February 2, 1996, roughly two years into the discovery period. Given the fact that FEI's obligation to retain records would have expired years before this lawsuit, it is remarkable that FEI has ***any*** record on Karnaudi. In any event, FEI produced all existing records on Karnaudi. Barbara, not owned by FEI, came to FEI's Center for Elephant Conservation ("CEC") on July 4, 1995, and was returned to her owner just four (4) months later. *See* FEI 1184-85 (previously produced documents showing Barbara's history). Despite the fact that plaintiffs have the document that shows Barbara's short stay with FEI, plaintiffs nevertheless characterize the purported lack of records for Barbara as a glaring omission. As explained to plaintiffs previously, FEI typically does not retain medical records for elephants that are transferred back to original or new owners; the medical records, if created,

follow the elephant. Pl. Ex. 2 at 2. Notwithstanding this practice, any records retained by FEI for any elephants that are the subject of this lawsuit have been produced. If none for Barbara were produced, that means FEI had none.

F. Records of "Baby" Elephants

Plaintiffs rely on newspaper articles, ostensibly to "prove" that FEI is withholding documents on certain "baby" elephants. Brief at 15. Neither the Court, nor FEI, should have to indulge plaintiffs' speculation and inferential reasoning based on news accounts. For the elephants that died during the period of 1994 through the present, their records have been produced. That a reporter may have been speculating as to deaths or causes of death is irrelevant.[17] Kenny, Benjamin, Bertha and Riccardo passed away (although not all as "babies" as incorrectly represented by plaintiffs),[18] and records were produced for each elephant. Another elephant, Emma, had a calf die in utero. *See* Pl. Ex. 2 at 4.

In their April 28, 2006 letter, plaintiffs cited the very same news article to FEI, purportedly to "prove" that FEI is withholding records on unsuccessful births. Plaintiffs, citing USA Today as their source, claim that FEI was "expecting births of four new baby elephants," but that they only received records for three baby elephants (Irvin, Aree and Bertha). Brief at 16. In FEI's May 12, 2006 response, FEI informed plaintiffs that "the calf of Emma died in utero and was never delivered as a live birth. As such, defendant has no veterinary records for a calf that was never born alive." Pl. Ex. 2 at 4. Despite the fact that FEI clarified the purportedly

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[17] The USA Today article, as it turns out, was not accurate. None of FEI's baby elephants has ever died of herpes. In fact, FEI owns one of the few elephants who successfully recovered from elephant endotheliotropic herpesvirus (EEHV) or "herpes." FEI Ex. E ¶13.

[18] That plaintiffs do not know the basics about Asian elephants, including at what age an elephant is considered to be a baby, juvenile, or adult elephant, is further evidence that plaintiffs' unsupported opinions as to Asian elephant husbandry, veterinary medicine, and recordkeeping should be disregarded, and certainly not used as some misguided standard by which FEI should have to answer to in a discovery dispute.

"unaccounted for" calf, and explained that FEI did not keep a separate medical file on a stillborn calf, plaintiffs instead disregarded this statement, filed their Motion, and accused FEI of not producing documents regarding the stillborn calf. Plaintiffs have no good faith basis for doing so. Plaintiffs already have received documents regarding Emma's troublesome parturition, observational notes that the calf showed no viability, and treatment/observation notes in connection with Emma's expulsion of the calf. *See* FELD 0009105; 0009106, 0009111 ("FEI Ex. H").[19] This is yet another example of plaintiffs' attempt to misrepresent the documents produced to the Court and this behavior should not be tolerated.[20]

G. Shirley Ann

Plaintiffs also claim that FEI has not produced records for an elephant named "Shirley Ann."[21] Brief at 16. FEI's elephant herd includes an elephant named "Shirley" and an elephant named "Kelly Ann." Those records have been produced. There never has been a "Shirley Ann." As such, the single record noting this name likely reflects some name confusion. There are no medical records for a "Shirley Ann."

VI. PLAINTIFFS OPINIONS ABOUT "STANDARD" RECORDS ARE MISINFORMED

Plaintiffs seek to bolster their arguments regarding "missing" categories of documents by citing to irrelevant comparisons and unsupported theories about what should be contained in FEI's veterinary records. Plaintiffs arguments, however, are misplaced, and reflect their fundamental misunderstanding of caring for a herd of elephants in a circus.

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[19] Such previously produced documents also evidence that documents from consulting veterinarians, such as Dr. Schmitt, were produced. *See* FEI Ex. H.

[20] Plaintiffs gratuitous criticism of FEI's breeding program does not change the fact that the records are what they are, and not what plaintiffs claim they should be. Since 1992, FEI has had twenty (20) Asian elephants born at the CEC. *See* www.elephantcenter.com/bornat.aspx.

[21] FEI inadvertently omitted its explanation regarding the name discrepancy from its May 12, 2006 letter.

A. Comparisons To The Oregon Zoo

As FEI explained but plaintiffs chose to ignore, FEI is not a zoo and is not a member of, or regulated by, The American Zoo and Aquarium Association ("AZA"). Pl. Ex. 2 at 4. Caring for single or several elephants in a stationary zoo has little relation to caring for a herd of elephants in traveling shows. There is no USDA requirement that FEI must perform a "complete body daily exam" on each of its elephants. Brief at 18 n.5.

Plaintiffs now argue that their review of records obtained from the Oregon Zoo is evidence of the fact that FEI is withholding records. Brief at 18. It is unclear why plaintiffs believe that FEI, which operates a traveling circus, and any zoo, have the same number of animals, the same regulatory requirements, or the same animal care needs. The fact that the Oregon Zoo maintains records differently than FEI is wholly irrelevant to this analysis. Yet plaintiffs' dogged refusal to recognize the critical distinction is exactly the basis upon which plaintiffs are asking the Court to "sanction" FEI for not producing records. There is no factual or legal basis to support plaintiffs' untenable position.

B. Consulting Veterinarians

Plaintiffs claim that FEI has withheld medical records created by consulting veterinarians. Brief at 20. This is false. First, the fact that FEI has veterinarians on-call in every city does not mean that they all have examined elephants. Second, the elephant medical records that have been produced contain hundreds of entries from consulting veterinarians. When a consulting or on-call veterinarian treats an FEI elephant, the practice is that the veterinarian, if appropriate, will add to the elephant's veterinary record while on site or by subsequent communication. FEI Ex. E ¶9. To the extent a consulting veterinarian has treated an elephant and noted it in the elephant's medical record, these records have been produced to plaintiffs. FEI

is not, as plaintiffs suggest, withholding files of consulting veterinary records.[22] Therefore, the "sanction" that plaintiffs are seeking, *i.e.* that FEI must canvass the country to now contact every consulting and on-call veterinarian in every city that the circus has played since January 1, 1994, is totally unnecessary. It is overbroad, unduly burdensome, and plaintiffs do not explain why it is reasonably calculated to lead to the discovery of admissible evidence. There are hundreds of such on-call veterinarians during the relevant time period that may or may not still be alive, in business, or locatable. The inordinate expense required to track down such persons is not worth the potential benefit to doing so – recovering little or no responsive records that should be duplicative of anything in FEI's files. FEI is required to make good faith, reasonable efforts to produce documents in its possession, custody or control, which it has done.

C. Laboratory Reports

Although plaintiffs admit that FEI has produced thousands of pages of laboratory reports or results for its elephant herd, they still claim that laboratory reports, without corresponding written notes and analysis, are per se incomplete, and that FEI has withheld these from production. *Id.* at 20. This further illustrates plaintiffs' fundamental misunderstanding of veterinary medicine and recordkeeping.

Plaintiffs' letter of April 28, 2006 contains a stark example of their utter unfamiliarity with elephant veterinary records—which is one of the few but notable omissions from the "examples" they cite to the Court. In that correspondence, plaintiffs cited to lab reports indicating that various elephants showed findings of *Mycobacterium avian* complex in their blood. Pl. Ex. 9 at 5. Plaintiffs demanded records that showed how *Mycobacterium avian*

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[22] There is apparently some confusion about the difference between a consulting veterinarian and an on-call veterinarian. However, from the standpoint of recordkeeping, the practice of either of these veterinarians is the same. *See* FEI Ex. E ¶9.

complex was treated, suggesting that the absence of such was indicative of FEI's attempt to withhold records, or worse, evidence of poor veterinary care. *Id.* FEI responded, pointing out that *Mycobacterium avian* complex is non-pathogenic in elephants and therefore, no treatment was necessary. Pl. Ex. 2 at 5. Although plaintiffs did not include this example in their brief, this error further illustrates that plaintiffs are unqualified to be speculating about veterinary medicine or recordkeeping as applicable to Asian elephants. Why plaintiffs apparently accepted this explanation but ignored the others – when they have cited nothing for any of their medical assertions – is a mystery.

Plaintiffs also cite to a laboratory report for Benjamin that documents the results of his routine trunk wash. Brief at 20. Plaintiffs speculate that the listing of *Nocardia* on the lab report, without "corresponding interpretation or treatment plan," is evidence that FEI is withholding such documents. *Id.* *Nocardia* bacteria is found worldwide in soil. FEI Ex. E ¶10. Elephant trunk washes frequently contain normal organisms that do not indicate infection. *Id.* Plaintiffs' theory that this is another example of broad categories of "missing records" is simply unwarranted. Benjamin's medical file has been produced.

D. Surgical Procedures

FEI already has produced surgical records for its elephants, a fact that plaintiffs would be hard pressed to challenge, since they attached some as exhibits to their brief. *See* Pl. Ex. 14. Plaintiffs, however, found a reference in Sarah's medical records that notes a recommendation for surgery for a "fistula."[23] Plaintiffs questioned why surgical records were not produced for

[23] Interestingly, plaintiffs did not include Sarah's medical history as an exhibit to their brief. This is perhaps because Sarah's medical history completely undermines plaintiffs' argument that the medical history documents contain no narrative, observational, treatment, or follow-up notes. *See* FEI Ex. G (Medical History of Sarah; FEI 0003085-90). Indeed, Sarah's medical history (as she had an ongoing fistula condition) includes this and other detailed information, including notes by consulting veterinarians, where applicable.

Sarah. Pl. Ex. 9 at 7. In an attempt to resolve this issue, FEI responded that Sarah did not have surgery and, as such, no surgical document exists. Pl. Ex. 2 at 6; FEI Ex. E ¶11. Plaintiffs, again citing to no authority for their position, argue that such a non-occurrence should have resulted in follow-up documentation, and assume that such documents are being withheld. The fact that there is no entry in Sarah's medical record reflecting that surgery was not performed is what it is. Plaintiffs have no other "examples" of known medical conditions that were not reported as they attempt to lead the Court to believe. FEI is not withholding surgical treatment documents.

E. Alleged Gaps in Time

Plaintiffs have concluded that FEI's veterinary records contain "large gaps in time" for "many" elephants. Brief at 21. Notwithstanding plaintiffs' own speculation, FEI has searched for, and produced, the veterinary records for its elephants for the last twelve (12) years – from 1994 to the present. The examples of so-called "gaps" are, for the most part, plaintiffs' attempt to re-hash the date restriction (1994) in their document requests. Brief at 21 (requesting records pre-1994 for Zina and Calcutta I).[24] As addressed above, plaintiffs now cannot re-write the document requests to include all records from the beginning of time on each elephant. Plaintiffs have not requested, and the Court has not ordered, that FEI must produce documents that are decades old. For that reason, the fact that documents produced may not contain information pre-dating plaintiffs' 1994 date restriction is not a basis to sanction FEI.

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[24] Plaintiffs, again, misrepresent the documents produced to date. Plaintiffs state that "from 1991 to 2004 there are no records of any kind for Gildah other than raw laboratory reports." Brief at 21. Plaintiffs are incorrect. FEI 3287 is a Patient History that provides narrative veterinary comments from 1999. FEI produced the medical file for Gildah, an elephant who was located in Las Vegas as part of the Siegfried and Roy show, and is not withholding Gildah records as plaintiffs argue. The fact that Gildah's file contains less information than other elephants is no indication that documents are being withheld. Moreover, Gildah died in August of 2005. Gildah's records are irrelevant to plaintiffs' claims.

While FEI is under no duty to produce medical records for any elephant prior to 1994, it notes that it has produced medical histories that document treatment prior to 1994 for Calcutta I. *See* Pl. Ex. 27 (medical history of Calcutta I) (indicating medical treatment from 12/89, 12/90, 12/91, 2/10/92, 5/15/92, 1/10/94). Given the fact that plaintiffs have represented inaccurately the few examples of documents referenced in their brief, one can only imagine what the other tens of thousands of pages of FEI's production also contain that further negate plaintiffs' arguments. Plaintiffs' repeated misrepresentations to the Court should not be tolerated.

Second, despite the fact that FEI informed plaintiffs of the USDA's requirements regarding retention of health records, plaintiffs conveniently omitted these cites from their brief. *See* Ex. 9. In fact, USDA guidelines, which do not mandate that an exhibitor maintain medical records on its animals, state that if an exhibitor chooses to maintain medical records on its animals, they should be kept "for at least 1 year after the animal's disposition or death." FEI Ex. F at 14.2.3. This guideline is just that – a guideline, not a requirement. What this means is that long before this lawsuit was initiated, FEI would have been completely within its rights to discard medical records that were more than one year old. The fact that FEI has any records prior to the start of this lawsuit, or for elephants that died or were transferred years ago is remarkable, and certainly not required by any applicable regulation.

Finally, plaintiffs claim that FEI has produced a "limited number of radiographs." What plaintiffs are not telling the Court is that FEI already produced a significant amount of radiographs to plaintiffs. Indeed, plaintiffs requested copies for only a subset of these – totaling 408 pages of radiographs (copies produced on May 11, 2006). Despite plaintiffs' own characterization of this as a "limited number," FEI has produced what radiographs it has. Plaintiffs are correct that Benjamin (deceased in 1999) and Shirley had thoracic x-rays taken in

1998 to rule out tuberculosis (*See* Pl. Ex. 28, noting no infection); however, FEI already has indicated to plaintiffs in its May 12, 2006 letter that it "conducted a search for such records, and has not located any." Pl. Ex. 2 at 7. In other words, FEI does not have copies of these x-rays. FEI can only produce what documents exist.

F. Electronic mail communications

Plaintiffs allege that e-mail communications regarding medical treatment have not been produced. Brief at 19. This is yet another attempt by plaintiffs to sweep more categories of documents into their ever-expanding "medical record" category. FEI is not disputing that certain e-mail correspondence may be responsive to some of plaintiffs' document requests. However, just because a document is potentially responsive to some document request, does not make it a medical record. The Court's 9/26/05 Order, while requiring FEI to produce all medical records, does not sweep all categories of documents into this request, as plaintiffs now are arguing.

When plaintiffs suggested, in their April 28, 2006 correspondence to current counsel for FEI that all e-mail correspondence may not have been produced, current counsel for FEI offered to meet and confer with plaintiffs' counsel to determine what, exactly, plaintiffs meant by this request, as it was unclear from their document requests what e-mail correspondence they sought. Moreover, it was not entirely clear how every e-mail contemplated by plaintiffs could be deemed a "medical record," and thereby subject to the Court's 9/26/05 Order. Without even responding to FEI's request to meet and confer, plaintiffs filed this Motion and have now defined "medical records" to include "any e-mails that contain information concerning the health or medical status of any of defendants' Asian elephants." *See* Brief at 10 n.8. That is not, however, what their document request says: "With respect to each of the elephants identified in response to Interrogatory No. 8, produce all medical records that pertain to that animal." FEI Ex. A at

Document Request No. 8., p.13. Not every e-mail pertaining to the health or medical status of an elephant is a medical record. For those that are, FEI believed that it turned over these documents to its prior counsel. As explained above, current counsel are re-checking this material as it appears that prior counsel did not process it fully. The majority of electronic documents processed to date appear to include: (1) breeding records; (2) animal husbandry documents; (3) photographs of elephants; (4) documents that likely have already been produced; and (5) electronic mail that reference or relate to medical treatment of an elephant, or other document requests. To sanction FEI for something that it either turned over to prior counsel, or that plaintiffs never requested and, thus, was not ordered by this Court, would be completely unwarranted.

VIII. BOTH PARTIES HAVE A DUTY TO SUPPLEMENT THEIR PRODUCTIONS

Federal Rule of Civil Procedure 26(e)(2) requires any party to supplement its document production. Plaintiffs have intentionally misled the Court that FEI is conducting some sort of leisurely review of records to comply with the 9/26/05 Order. *See* Pl. Ex. 2. In FEI's correspondence, it represented "Defendant has met the obligation of the discovery requests and the Court's order. **If any additional medical record is located, defendant will further supplement its production in a timely manner."** *Id.* at 4 (emphasis added). Further, FEI stated that it "has conducted an exhaustive search of any elephant veterinary records and produced these to plaintiffs." *Id.* at 7. At no time did FEI represent that it is "still searching" for records, as plaintiffs misrepresent, and that it was simply referencing its ongoing duty to supplement. Plaintiffs' allegations are even more outrageous and unprofessional considering that they were aware that current counsel entered the case in March, 2006.

Plaintiffs argue, for the first time, that FEI should have sought an extension from the Court to produce records after the 9/26/05 Order. Brief at 23. Despite multiple correspondence and alleged good faith efforts to confer, plaintiffs have never raised this before, leading FEI to believe that its efforts to provide subsequent records were acceptable to plaintiffs. FEI's actions are hardly reflective of a party that did not take the Court's 9/26/05 Order seriously. It is difficult to see how ongoing efforts to produce every record required by a court order is evidence that FEI regarded the order as "precatory" as plaintiffs describe. Furthermore, while plaintiffs now object to supplemental productions after September 28, 2005, they never took issue with these production installments and gladly accepted the documents. When current counsel assumed responsibility for this matter, it responded promptly by plaintiffs' deadline, pointing out the flaws in the analysis, explaining the confusion over other allegedly missing records (which, plaintiffs accepted only in part), and producing additional records that current counsel, erring on the side of caution, felt might be responsive. It is unclear that given the urgency of the Court's 9/26/05 Order, and the history of the discovery to date, what else current counsel could have done but to proceed as it did and produce additional documents out of an abundance of caution.

What plaintiffs have not shared with the Court is that plaintiffs still have not produced all responsive documents owed to FEI. Despite multiple requests from prior and current counsel requesting that plaintiffs supplement their document production, plaintiffs seem content to delay and have yet to provide even a date certain as to when this will happen. *See* FEI Ex. D; Correspondence of 4/10/06 ("FEI Ex. I"). Plaintiffs obviously are operating under a double standard.

A. FEI's May 12, 2006 Supplemental Production

Upon entering the case, FEI, at the direction of current counsel, worked to address the ongoing discovery disputes in this case, with an eye toward resolving them. Given the Court's 9/26/05 Order, current counsel for FEI also resolved to undertake another search for all relevant medical records to ensure that all medical records from the relevant time period had, indeed, been produced. FEI aimed to fill in any "gaps" that plaintiffs had previously identified and, as plaintiffs admit, "other records were produced that filled in some of the time gaps in the elephants' records." Brief at 11. Plaintiffs now seek an explanation as to why the records are being supplemented. *Id.* It is curious how FEI can be faulted by plaintiffs for simultaneously over- and underproducing in response to their requests. *Cf.* Motion at 2 (seeking expert fees for having to review additional documents) *with* Brief at 2 (complaining that plaintiffs have received "very few records of any kind"). Plaintiffs' "heads I win, tails you lose" approach shows their preference for litigating about discovery rather than bringing it to a close.

FEI, through its prior counsel, had produced over 30,212 pages of documents in this case. Correspondence of 2/10/06 ("FEI Ex. J"). The documents were produced in hard copy format. Current counsel diligently had been reviewing these 30,000+ plus pages to determine what, if any, kind of medical record was omitted from this production. As the document requests require the production of every medical record for every elephant, dead or alive, for the last twelve (12) years, this has been no easy task. Nevertheless, counsel for FEI is trying to comply with the duty to supplement the prior production, and cannot speak to why particular records were not produced by prior counsel six months ago. What current counsel for FEI can represent, is that they understand their duty to produce all records covered by this Court's 9/26/05 Order and February 23, 2006 Order. Accordingly, FEI has made supplemental productions on May 12,

2006, May 23, 2006, May 31, 2006, June 2, 2006, June 13, 2006 and June 16, 2006. Many of these documents represent documents created after the Court's September 26, 2005 Order and can be generally referred to as "recently-created" documents. A small minority of the documents produced on these dates are elephant medical records (19 documents), some of which may contain duplicative information that had been produced in productions prior to September 28, 2005.[25] Plaintiffs also take issue with the fact that the supplemental production contained "a small handful of records" related to Irvin (born June 1, 2005), and "a handful of pages" related to Bertha (born July 30, 2005). Brief at 13. The fact that these were recently produced, however, should be no basis for an extrapolation that some other elephant's records are allegedly "incomplete."

IX. SANCTIONS ARE NOT WARRANTED

FEI's conduct does not warrant sanctions pursuant to Fed. R. Civ. P. 37(b). There is no basis for finding that FEI violated the Court's 9/26/05 Order. If it was FEI's intent to violate the Court's 9/26/05 Order, it would not have re-searched for medical records and decided to produce the 26 documents (132 pages) that it found as a result. The quantity is minimal in light of the total volume produced by FEI. Subsequent productions are the product of current counsel's efforts to make sure that prior counsel produced the universe of responsive documents. Any responsive documents not produced by prior counsel, such as e-mail, will be produced promptly.

"The central requirement of Rule 37 is that 'any sanction must be just.'" *Bonds v. District of Columbia*, 93 F.3d 801, 808 (D.C. Cir. 1996). "In determining whether to impose sanctions for failure to obey a court order compelling discovery, the court must consider the

[25] Plaintiffs previously were warned that in order to meet the May 12, 2006 deadline that they arbitrarily selected, duplicates could be contained in the production a that time. FEI Ex. D at 1. Some precision necessarily was lost for the sake of speed.

needs of the discovering party as well as the nature of the noncompliance; the trial court must consider how absence of evidence not produced would impair the other party's ability to establish its case and whether the noncomplying party's conduct would deprive the other party of a fair trial." *Lattimore v. Northwest Coop. Homes Ass'n*, 1992 U.S. Dist. LEXIS 7442, *9 (D.D.C. 1992) ("FEI Ex. K"). Any sanction awarded, moreover, "must be proportional to the wrongs done." *Banks v. Office of the Senate Sergeant-at-Arms*, 233 F.R.D. 1, 8 (D.D.C. 2005).

FEI's alleged non-compliance with the Court's 9/26/05 Order certainly was not intentional, nor was its document search and production conducted in bad faith. Within three days of the Court's 9/26/05 Order, FEI produced to plaintiffs over 14,000 pages of medical records. FEI provided additional documents to prior counsel, who then supplemented the production with an additional 1,500 pages in December 2005 and February 2006. FEI's current counsel, moreover, has undertaken a thorough review of FEI's documents in an effort to resolve this matter and put it behind them so that this litigation can progress.

Any non-compliance with the Court's 9/26/05 Order has been inadvertent. Plaintiffs, moreover, have not been prejudiced by any such alleged non-compliance. Discovery in this case remains ongoing, and no trial date is scheduled. Plaintiffs, having not yet deposed FEI personnel, have not been denied the opportunity to conduct those depositions without the documents at issue. Plaintiffs' right to establish their case and to present it at trial (if there is one) has not been impaired. Indeed, nowhere in plaintiffs' brief is there any suggestion, much less a statement, that any of the medical records that have been produced in any way show that FEI is "taking" Asian elephants in violation of the ESA. To the contrary, the records show that the elephants receive first-rate medical care. Because plaintiffs' right to establish their case has not been impaired and because FEI has not acted in bad faith, sanctions of any kind are not

warranted – particularly in light of plaintiffs' unwillingness to confer with FEI's new counsel. *See Monroe v. Ridley*, 135 F.R.D. 1, 6 (D.D.C. 1990) (quoting *Black Panther Party v. Smith*, 661 F.2d 1243, 1255 (D.C. Cir. 1981)) ("'When a court is deciding whether to impose sanctions on one party, the behavior of the other party deserves some consideration.'"). Indeed, plaintiffs themselves have not complied with FEI's repeated requests for supplemental document productions.

Plaintiffs' specific request for expenses particularly is inapplicable because such a sanction is not appropriate where the party's alleged failure to comply with a court order was "substantially justified" or where "other circumstances make an award of expenses unjust." Fed. R. Civ. P. 37(b)(2).[26] As detailed above, FEI's alleged failure to comply with the Court's 9/26/05 Order was substantially justified. It certainly was not flagrant or knowing as plaintiffs allege. FEI's arduous attempt to identify and produce the documents at issue was undertaken with the intent to comply with the Court's 9/26/05 Order, and it turned over the documents to prior counsel. Not only do FEI's efforts on this matter not warrant imposition of expenses, *see Fagan v. District of Columbia*, 136 F.R.D. 5, 8 (D.D.C. 1991) (denying request for attorney's fees under Rule 37(a)(4) where party's position was not "entirely unreasonable"), plaintiffs' unwillingness to confer with new counsel would make such an award for costs or fees unjust. Moreover, the flagrant misrepresentations contained in the Motion and accompanying Brief constitute the type of imprudent advocacy that should not be rewarded. The Motion is premised upon unsubstantiated accusation, inaccurate depictions of records already produced, and patently false statements regarding the February 23, 2006 Order. FEI should not be punished on such

[26] Plaintiffs assert that FEI should be required to pay the costs of the document review conducted by plaintiffs' expert. Such a review would be necessary for proper trial preparation regardless of the underlying discovery matter, and plaintiffs present no caselaw to support their cost-shifting position. The request should be denied.

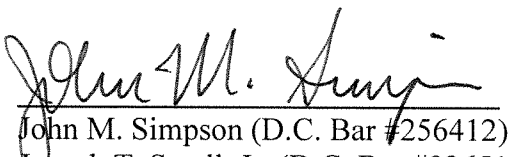
grounds stemming from plaintiffs' own misconceived notions about how FEI should keep its records – a matter which is not even before this Court. Any attorney's fee connected to this Motion could have been avoided by conferring in good faith with current counsel for FEI rather than ignoring them.

CONCLUSION

Accordingly, for the reasons stated herein, plaintiffs' motion should be denied.

Dated this 7th day of July, 2006.

Respectfully submitted,



John M. Simpson (D.C. Bar #256412)
Joseph T. Small, Jr. (D.C. Bar #926519)
Lisa Zeiler Joiner (D.C. Bar #465210)
Michelle C. Pardo (D.C. Bar #456004)

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.