

**United States District Court
District of South Carolina
–Florence Division–**

People for the Ethical Treatment of Animals, Inc.,
Matthew Howard; and Lexie Jordan,

Plaintiffs,

v.

Waccatee Zoological Farm; Kathleen Futrell (in her
individual capacity and as the personal
representative of the Estate of Archie Futrell); Jeff
Futrell; Dakota Futrell Stienecker; and Austin
Futrell,

Defendants.

Civil Action No. 4:22-cv-01337-JD

PLAINTIFFS' EMERGENCY MOTION FOR PRESERVATION OF ANIMALS

Plaintiffs People for the Ethical Treatment of Animals, Inc. ("PETA"), Matthew Howard, and Lexie Jordan, through counsel, move this Court under its inherent authority to manage its proceedings and preserve evidence to enter an order (1) clarifying that Defendants are barred from unilateral transfers of evidence, including animals; (2) requiring Defendants to disclose the present location of all animals that have been in their possession since the April 26, 2022 pendency of this litigation; (3) requiring Defendants to confirm whether they maintain ownership and control of all such animals; (4) requiring transferees, who Defendants must inform of this order, not to further transfer these animals without leave of the Court; (5) permitting immediate discovery including document requests and depositions of Defendants and any transferees regarding animal transfers, not to count against the ten deposition limit found in Fed. R. Civ. P. 30(a)(2)(A(i); and (6) issuing an order requiring Defendants to, after a reasonable discovery period, show cause why sanctions such as but not limited to default judgment should not issue for Defendants' contempt of their obligations to preserve relevant evidence.

INTRODUCTION

Without warning to this Court or to Plaintiffs, or cooperation with Plaintiffs’ multiple subsequent efforts to meet and confer, Defendants have taken it upon themselves to secretly transfer the central evidence in this litigation—animals kept at Waccatee Zoological Farm (“Waccatee”)—from their premises. According to Defendant’s counsel, Waccatee has closed, “discontinue[d]” further operations,” and sent its animals to Zootastic Park of Lake Norman (“Zootastic”), a roadside zoo based in North Carolina. This is particularly concerning because of Zootastic’s atrocious record of animal care—including, as determined by the United States Department of Agriculture (“USDA”), responsibility for gruesome animal deaths and injuries, animal escapes, animal attacks on both humans and other animals, inadequate veterinary care, and unsafe and unsanitary environments.

This is not the first time defendants in litigation concerning captive animals have engaged in similar conduct. Federal courts recognize that the captive animals at issue in Endangered Species Act and public nuisance litigation *are evidence*. See, e.g., *PETA v. Dade City’s Wild Things, Inc.*, No. 8:16-cv-2899-T-36AAS, 2020 WL 897988, at *10-*13 (M.D. Fla. Feb. 25, 2020). Parties to such litigation have a duty to preserve and avoid spoliation of those animals. In prior cases involving a party’s attempted unilateral transfer of captive animals at issue to third parties, such spoliation has been treated accordingly.

Defendants knew this. On July 22, 2022, Plaintiffs wrote to counsel for Defendants and reminded Defendants of their continuing obligation to preserve evidence, including but not limited to the animals at issue. Exhibit A. Over the past several days, Plaintiffs have learned that this reminder went unheeded. Defendants instead chose to engage in secret unilateral animal transfers, necessitating the instant motion practice. In order to ensure Defendants’ actions do not further

derail this litigation, this Court should, at a minimum, issue orders reiterating basic evidence preservation obligations and permitting Plaintiffs, and this Court, to determine the location and status of the animals at issue. Further relief may then be required, such as but not limited to default judgment.

BACKGROUND

On December 22, 2021, Plaintiffs fulfilled their obligation to notify Defendants of their intent to file suit regarding violations of the Endangered Species Act (“ESA”), 16 U.S.C. §§ 1531–44, and further notified Defendants of their intent to bring claims with respect to non-ESA animals at Waccatee. ECF No. 1-8. On April 26, 2022, Plaintiffs filed this lawsuit. ECF No. 1. The lawsuit alleges that Defendants’ practices with respect to the more than 460 animals at their facility violate the ESA and South Carolina public nuisance law. The complaint seeks appropriate declaratory and injunctive relief including the transfer of these animals to reputable facilities. *Id.*

Since then, Plaintiffs engaged Defendants in what they believed were good-faith efforts to settle this litigation. These efforts stalled suddenly in the summer of 2022 after Defendants adopted a policy of radio silence. Plaintiffs served Defendants on June 30, 2022. Defendant Kathleen Futrell, representing herself to be the sole owner and proprietor of Waccatee and the property on which it operates, filed her Answer on July 21, 2022.

Alarmed by Defendants’ sudden disengagement with settlement talks, Plaintiffs wrote to counsel for Defendants on July 22, 2022 to remind Defendants of their continuing obligations to preserve evidence. Ex. A. Plaintiffs explained, with representative citations, that precedent establishes that preservation obligations extend to the animals at issue. *Id.* Plaintiffs closed by offering to discuss evidence preservation issues further, and reiterated their readiness to continue settlement negotiations. *Id.* Plaintiffs received no response.

On September 7, 2022, Plaintiffs began receiving reports of Waccatee’s closure, and of animal disappearances. That same day, counsel for Plaintiffs contacted counsel for Defendants seeking an explanation. Exhibit B. Plaintiffs Lexie Jordan and Matthew Howard then drove by Waccatee on September 7 and September 8, 2022 to see for themselves what was reported on the internet. Plaintiffs confirmed, while remaining on public property, that numerous animals appeared to be missing and that animal transfers appeared to be occurring. Howard Decl., at ¶¶ 3-5; Jordan Decl., at ¶¶ 4-5.

Subsequent statements published on social media further corroborate these observations. On September 10, 2020, an individual representing himself as a supporter of Defendants with apparent knowledge of their intent stated that Waccatee is permanently closed. Jordan Decl., at ¶ 7. On September 11, 2022, an individual reported on social media that they observed bison being transported from the premises “stumbling and fighting to get away.” *Id.*, at ¶ 8.

Local media has also corroborated these reports. For example, a local news station reported on September 8, 2022 that Defendant Jeff Futrell told them Waccatee “closed for renovations,” but that he became “combative” when asked about the impact on the animals and refused to elaborate when asked about the animals’ habitats. K. Accettula, *Waccatee Zoo closed for renovations*, WBTW (Sept. 8, 2022), available at <https://www.wbtw.com/news/grand-strand/horry-county/waccatee-zoo-closed-for-renovations/>.

PETA further corroborated these reports by, starting on September 9, 2022, assigning a private investigator to make further observations of Waccatee from public vantage points. Peet Decl., at ¶¶ 2-3; Todd Decl., at ¶¶ 2-3. This investigator determined that some number of animals are being transported from Waccatee by individuals associated with Zootastic. Peet Decl., at ¶¶ 4-

5; Todd Decl., at ¶¶ 4-9. PETA also discovered that Waccatee appears to be inaccessible via its website and publicly listed phone number. Peet Decl., at ¶ 7.

Finally, counsel for Defendants wrote to PETA after the close of business on September 12, 2022. Exhibit C. He confirmed that Waccatee is now closed and has “discontinue[d] further operations.” *Id.* He further confirmed that Defendants “made arrangements to transfer its animals to the custody of the Zootastic Park[.]” *Id.*

ARGUMENT

The central issue in this case is the welfare and protection of the animals at Waccatee. ECF No. 1. As should be obvious, and as Plaintiffs took the initiative in explaining to Defendants, this requires the preservation of these animals. Ex. A. Defendants’ sudden, secretive transfers of animals—many to an out-of-state roadside zoo of equal disrepute—throws the status of both these animals and this litigation into doubt. In so doing, it appears to be an attempt to frustrate this Court’s ability to provide complete relief under the ESA and South Carolina public nuisance law. In order to ensure that these animals are preserved for trial, and that Plaintiffs are not unduly prejudiced, this Court should issue orders sufficient to preserve any remaining animals and permit Plaintiffs and this Court to determine the ongoing location and status of the animals at issue. This Court should also issue an order to show cause to determine, after a reasonable discovery period, whether further relief such as but not limited to default judgment is required to remedy Defendants’ apparent brazen undermining of this Court’s authority.

I. Evidence Preservation Obligations Have Clearly Attached

A party’s obligation to preserve evidence attaches when they know, or should know, that the evidence “was or could be relevant in litigation.” *QueTel Corp. v. Abbas*, 819 F. App’x 154, 156 (4th Cir. 2020). Plaintiffs notified Defendants of the likelihood of litigation with respect to all

animals at Waccatee on December 22, 2021. ECF No. 1-8, at 3. This lawsuit has been pending since April 26, 2022. ECF No. 1. This is sufficient to establish Defendants' affirmative obligations to preserve evidence. *QuelTel*, 819 Fed. App'x at 156 (affirming spoliation order with respect to destruction of computer containing key evidence that occurred after receipt of cease-and-desist letter notifying defendants of potential litigation).

II. Preservation Obligations Extend to the Animals at Issue

Defendants are not the first defendants in federal ESA and public nuisance litigation to attempt to undermine a court's authority via secretive, strategically timed animal transfers. As a result, there is ample federal precedent establishing that evidence preservation obligations extend to animals such as those at issue in this case.

In *Dade City's*, for example, the court affirmed that defendants' attempt to undermine a site inspection order by failing to preserve tigers "in their current state and location" and relocating them to another facility justified default judgment against defendants, dismissal of defendants' counterclaims, and monetary sanctions. 2020 WL 897988, at *10-*13. In so holding, the court rejected an argument that because animals are not "inanimate objects capable of being preserved in a static state," they are not subject to basic preservation obligations. *Id.* at *10. The court explained that, even though defendants cannot "prevent . . . the tigers' aging," what "the Court reasonably expected . . . was for Defendants to preserve what they knew they were required to preserve and what was in their control to preserve." *Id.* Similarly, in *PETA v. Wildlife in Need and Wildlife in Deed, Inc.*, ("WIN"), defendants argued that animals were not tangible evidence. No. 4:17-CV-00186-RLY, 2019 WL 3342087, at *3 (S.D. Ind. July 25, 2019). The court explained, however, that the purpose of evidence preservation obligations in this context was "to preserve the animals—themselves" because "this case is about the alleged harm suffered by the [animals]." *Id.*

Fourth Circuit precedent contains similar conclusions. The District of Maryland held in November 2021 that animals subject to public nuisance litigation could not be transferred, even in “the ordinary course of business.” *Collins v. Tri-State Zoological Park of W. Maryland, Inc.*, No. 1:20-CV-01225-PX, 2021 WL 5416533, at *5 (D. Md. Nov. 19, 2021). Instead, even normal course animal transfers would need to be “reasonably suspended to allow for the collection of evidence or, alternatively, at least coordinated with interested parties before taking place.” *Id.*

Relevant precedent is not limited to prior PETA litigation. For example, in *Animal Legal Defense Fund, Inc. (“ALDF”) v. Lucas*, a federal court found that a leopard’s being “in the possession and control of [defendant] at all relevant times, and as outlined in the Complaint . . . his condition, care and treatment while at [defendant’s facility] are unmistakably relevant” created sufficient preconditions for an award of spoliation sanctions. No. 2:19-40, 2021 WL 4035152, at *4 (W.D. Pa. Sep. 3, 2021). *See also* Order Prohibiting Spoliation and Preserving Evidence, *ALDF v. Special Memories Zoo, LLC*, No. 20-C-216 (E.D. Wisc. May 19, 2020), ECF No. 23.

Here, Plaintiffs’ Complaint describes, in exhaustive detail, the animals at issue and the extent to which their conditions, care, and treatment at Waccatee are violations of the ESA and public nuisance under South Carolina law. *See, e.g.*, ECF No. 1 at ¶¶ 51-216. Defendant Kathleen Futrell, in her Answer, admits allegations regarding the number of animals at issue, *see* ECF No. 8, at ¶ 51, and makes a number of representations about the conditions, care, and treatment of these animals at Waccatee. *See, e.g.*, ECF No. 8, at ¶¶ 70, 76, 82, 86, 88-89, 92-93, 95, 100, 109, 113, 116, 130, 143, 156, 159, 165, 168, 208, 212, 216, 230, 232-36. In case there was any ambiguity, however, Plaintiffs wrote to counsel for Defendants in July to put them further on notice. Ex. A. There is no question that Defendants, prior to engaging in secretive unilateral animal transfers, understood—or should have understood—their obligation to preserve these animals.

III. Defendants' Unilateral Transfers Violate Evidence Preservation Obligations and Prejudice Plaintiffs

In the above cases, the sudden and secretive nature of defendants' conduct, including in facilitating transfers, was critical to findings that they violated their evidence preservation obligations. In *Dade City's*, for example, the court found that defendant's obligations did not allow them to engage in "the rushed disposition of [these animals] over the course of a few days." 2020 WL 897988, at *10. The *WIN* decision, concerning (at that point) paper-only transfers of the animals, recognized that a requirement to "preserve" animals meant "Defendants or any party acting in concert with Defendants must not transfer, move, or relocate any [animal] before this litigation comes to an end." 2019 WL 3342087, at *2. Defendants' failures in *Collins* "to undertake such notification and coordination" necessary to allow for adequate documenting and inspection of the animals and their living conditions, and to allow for "coordinat[ion] with receiving facilities," "deprived Plaintiffs of . . . relevant evidence at least as to those animals." *Id.* And in *Lucas*, once again, the defendant's acting "without notice to [plaintiff]" while "armed with the knowledge that [the animal's] condition was at issue" was a critical factor. *Id.* at *6.

Here, Defendants did not notify or attempt to coordinate animal transfers with Plaintiffs. Counsel for Defendants has now confirmed the worst case scenario—that animals have been transferred in secret, many to a dilapidated out of state roadside zoo. Ex. C. *See also* Jordan Decl, at ¶¶ 4-8; Howard Decl, at ¶¶ 3-5; Peet Decl., at ¶¶ 2-6; Todd Decl., at ¶¶ 3-9.

Defendants' actions are likely to inflict irreparable harm on Plaintiffs and these animals. As explained above, and consistent with similar precedent, the central questions in this case involve these animals' living conditions in their current location—evidence which may now go undocumented. *Supra*, § II. As precedent cited above further reflects, plaintiffs in such cases expect to have the opportunity to inspect the animals at issue in their habitats. *See, e.g., Dade City's*, 2020

WL 897988 at 2-*3; *Collins*, 2021 WL 5416533 at *3-*4. Defendants' actions have already compromised this crucial process.

Plaintiffs also fear the irreparable harm Defendants' actions will inflict on these animals. During the chaos of Defendants' animal transfers, a number of animals appear to have escaped, with one being observed on a public road. Howard Decl., at ¶ 5; Jordan Decl., at ¶ 6. An observer described seeing bison "stumbling and fighting to get away." Jordan Decl., at ¶ 8. In the *Dade City's* case, three tigers died during transport. *PETA v. Dade City's Wild Things, Inc.*, No. 8:16-CV-2899-T-36AAS, 2019 WL 8495846, at *10 (M.D. Fla. July 30, 2019).

Defendants' conduct has also created urgent questions as to the quality of care these animals are receiving or will receive at transfer locations. The cases cited above include multiple instances in which animals were improperly transferred to a notorious facility in Oklahoma operated by two convicted felons, Joseph Maldonado-Passage (a/k/a "Joe Exotic") and Jeff Lowe. *Dade City's II*, 2019 WL 8495846, at *2-*7; *WIN*, 2019 WL 3342087, at *1-*4. In the *WIN* case, husbandry provided by Jeff Lowe to the improperly transferred animals was so deficient that it was later determined by a federal court to have killed a transferred lion shortly before her scheduled rescue, to have inflicted permanent serious injury on the surviving animals, and to have generally amounted to "appalling cruelty." *PETA v. Lowe*, No. CIV-21-0671-F, 2022 WL 576560 (W.D. Okla. Feb. 25, 2022).

Here, Defendants have confirmed many of these animals are now at Zootastic. Ex. C. This is cause for extreme concern. Even by the standards of unaccredited roadside zoos, Zootastic has shown a shocking failure to meet the minimum federal standards for the care of animals established by the Animal Welfare Act. Recent violations reported by the USDA include incidents in which the USDA deemed Zootastic responsible for:

- Gruesome animal deaths and injuries, such as from attacks by other animals, frostbite, self-mutilation, and flesh eating maggots;
- Animal escapes, including an incident in which a kinkajou was killed by a lion cub;
- Animal attacks on humans, including an incident in which a wildebeest charged and attacked an employee, causing major injuries requiring surgery;
- Inadequate veterinary care, including numerous reports of open wounds, scabbing, limping, swelling, ocular discharge, and hair loss going untreated; and
- Unsafe and unsanitary environments, including habitats in which animals have been exposed to live electrical cords, piles of old feces, and other dangerous debris.

See Peet Decl., at ¶ 6; Peet Exhibit C. Given this context, Plaintiffs fear that Defendant’s actions have caused, or are likely to cause, additional harms amounting to egregious violations of the ESA and public nuisance law.

In addition, Plaintiffs’ lawsuit seeks the permanent transfer of these animals to appropriate, reputable facilities. ECF No. 1, at 61. While, for reasons elaborated below, Plaintiffs do not believe that transfers anywhere within the United States would strip this Court of its authority to issue such a remedy in this case, a common thread running through similar precedent is defendants’ mistaken belief that such transfers can moot federal captive animal litigation. *See, e.g., WIN*, 2019 WL 3342087, at *2 n.2 (“[*WIN* defendants] also take the position that the transfer of title to the Big Cats moots the present controversy because Defendants no longer own the Big Cats. But they still are responsible for preserving them for this litigation, and there very much exists a dispute between PETA and Defendants.”); Minute Order, *Special Memories*, No. 1:20-cv-00216-WCG (E.D. Wis. Sep. 17, 2020), ECF No. 41 (denying motion to dismiss on mootness grounds following defendants’ transfer of animals at issue). These concerns are heightened here, given the USDA has

previously cited Zootastic for illegal animal sales, including of species at issue in this litigation. Peet Exhibit C. At the very least, Defendants’ conduct has increased the complication involved in eventual court-ordered animal transfers. As has occurred before, these unauthorized transfers—likely to parties with little heed of the ESA and other laws protecting animals—may ultimately require the joinder of an unknown number of additional defendants.

IV. This Court Can and Should Issue Orders to Mitigate the Damage Caused by Defendants’ Actions

This Court has inherent authority to issue orders sufficient to protect evidence, and mitigate the extent to which Defendants’ actions will cause evidence to be lost or destroyed. *See, e.g., Career Counseling, Inc. v. Amsterdam Printing & Litho, Inc.*, No. 3:15-CV-05061-JMC, 2016 WL 11725395, at *1 (D.S.C. May 13, 2016) (issuing preservation order).

An order further clarifying that Defendants and transferees, who Defendants should be required to inform of such an order, cannot transfer animals would do little more than reiterate already existing obligations. *See, e.g., WIN*, 2019 WL 3342087, at *3-*4 (recognizing that “[a] court order that binds a defendant may also bind a nonparty” when the nonparty has actual knowledge of the court’s order and is “acting in concert with the named party,” and requiring transferee to abide by animal preservation orders); *Pueblo of Laguna v. United States*, 60 Fed. Cl. 133, 138 (2004) (“In the court’s view, a document preservation order is no more an injunction than an order requiring a party to identify witnesses or to produce documents in discovery.”).

This Court can further mitigate the harm done by Defendants with a small number of additional limited orders. Such orders would require Defendants to disclose where all their animals are and who presently has control of them. It is also appropriate to permit Plaintiffs to conduct limited discovery regarding preservation and animals’ current status, without prejudicing Plaintiffs’ right to future merits discovery after the issuance of an appropriate scheduling order.

This would enable Plaintiffs to begin investigating the current degree of risk to the health, safety, and welfare of these animals, whether joinder of additional defendants is necessary, and what steps would be required to ensure appropriate final relief upon the resolution of this lawsuit.

Other federal courts have similarly mitigated the damage done by secretive animal transfers. In the *Dade City's* case, for example, the court found defendants' conduct to be so egregious that it justified default judgment and sanctions, with animals ending up at reputable sanctuaries. 2020 WL 897988, at *10-*15. In the final disposition of claims against WIN defendants, that court ruled that animals improperly transferred to Oklahoma would be subject to transfer along with those animals remaining at defendants' facility. WIN, No. 4:17-cv-00186-RLY (S.D. Ind. Sep. 15, 2020), ECF No.414 ("In light of the evidence discussed more thoroughly in the court's summary judgment order, the ESA authorizes the court to transfer all of the WIN Defendants' Big Cats, which the court determines to mean all Big Cats that have been within the ownership, possession, custody, or control of any of the WIN Defendants in Indiana, or any of their agents or any other people or entities under their direct or indirect control, during the pendency of this litigation, including the lion in the possession of Daniel Chambers, and the four lions in defendant Jeffrey L. Lowe's possession that were within the ownership, possession, custody, or control of the WIN Defendants."). In *Lucas*, which involved spoliation of animal remains that should have been subject to necropsy, the court granted plaintiff an adverse inference. *Lucas*, 2021 WL 4035152, at *4-*7. In sum, these cases support a conclusion that this Court may fashion remedies appropriate to the circumstances at hand.

This Court should also require Defendants to, after a reasonable discovery period, show cause why sanctions such as but not limited to default judgment should not issue for Defendants' contempt of their obligations to preserve relevant evidence. Defendants' actions, particularly in

light of their foreknowledge, raises obvious questions about their culpability. Plaintiffs and this Court should have the benefit of a full record in order to evaluate the necessity and appropriateness of sanctions.

CONCLUSION

For the foregoing reasons, PETA respectfully requests the Court enter an order (1) clarifying that Defendants are barred from unilateral transfers of evidence, including animals; (2) requiring Defendants to disclose the present location of all animals that have been in their possession since the April 26, 2022 pendency of this litigation; (3) requiring Defendants to confirm whether they maintain ownership and control of all such animals; (4) requiring transferees, who Defendants must inform of this order, not to further transfer animals without leave of the Court; (5) permitting immediate discovery including document requests and depositions of Defendants and any transferees regarding animal transfers, not to count against the ten deposition limit found in Fed. R. Civ. P. 30(a)(2)(A(i); and (6) issuing an order requiring Defendants to, after a reasonable discovery period, show cause why sanctions such as but not limited to default judgment should not issue for Defendants' contempt of their obligations to preserve relevant evidence

Dated: September 12, 2022

/s/ Stacie C. Knight
 Stacie C. Knight
 S.C. Bar No. 77968
 D.C. No. 10411
 WINSTON & STRAWN LLP
 300 South Tryon Street, 16th Floor
 Charlotte, NC 28202
 (704) 350-7700; (704) 350-7800 (fax)
 sknight@winston.com

Jonathan Brightbill*
 Kyllan Gilmore*
 Sharon Lin*
 WINSTON & STRAWN LLP
 1901 L Street NW
 Washington, DC 20036

(202) 282-5855; (202) 282-5100 (fax)

jbrightbill@winston.com

kgilmore@winston.com

slin@winston.com

Caitlin Hawks

Asher Smith

Aaron Frazier

PETA FOUNDATION

1536 16th Street NW

Washington, DC 20036

(202) 540-2179

CaitlinH@petaf.org

AsherS@petaf.org

AaronF@petaf.org

*Pro hac vice applications to be submitted

*Counsel for Plaintiffs PETA, Matthew Howard
and Lexie Jordan*