

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN SOCIETY FOR THE)	
PREVENTION OF CRUELTY TO)	
ANIMALS, <u>et al.</u> ,)	
)	Civ. No. 03-2006 (EGS/JMF)
Plaintiffs,)	
)	
v.)	
)	
RINGLING BROS. AND BARNUM)	
& BAILEY CIRCUS, <u>et al.</u> ,)	
)	
Defendants.)	

**PLAINTIFFS' MOTION REQUESTING ATTORNEYS'
FEES AND COSTS RELATED TO PLAINTIFFS' MOTION TO
ENFORCE THE COURT'S SEPTEMBER 26, 2005 ORDER**

Pursuant to this Court's September 26, 2006 Order, and Rule 37(b)(2) of the Federal Rules of Civil Procedure, plaintiffs hereby request that they be awarded their reasonable attorneys' fees and costs incurred in connection with their Motion to Enforce the Court's September 26, 2005 Order ("Motion to Enforce") related to the elephants' medical records. Plaintiffs request \$16,104.05 in fees and \$4,271.48 in costs, for a total reimbursement from defendants in the amount of \$20,375.53. In support of this Motion, plaintiffs state as follows, and also attach the Declaration of Kimberly D. Ockene.

Plaintiffs also request that the amount requested here be added to the amount of fees and costs that plaintiffs sought, at the Court's direction, in connection with their January 25, 2005 Motion to Compel discovery, which resulted in this Court's September 26, 2005 Order commanding defendants to produce the elephants' medical records. On

February 23, 2006, the Court directed plaintiffs to submit their motion for fees and costs related to their Motion to Compel the medical records. See Order (Feb. 23, 2006) (Docket #60). On April 3, 2006, plaintiffs submitted their request for \$26,000.00 in fees and costs in connection with that matter (Docket ##64, 66). That motion is fully briefed.

BACKGROUND

On September 26, 2005, in response to plaintiffs' Motion to Compel discovery from defendants, this Court ordered the defendants to turn over, by no later than September 28, 2005, "all" of the veterinary and medical records pertaining to the Asian elephants in their custody. Order (Sept. 26, 2005). However, because defendants did not comply with this Order by producing all of the medical records, on June 9, 2006, after an attempt to confer with defendants with respect to the missing records, plaintiffs were forced to file a motion to enforce the Court's September 26, 2005 Order. On September 26, 2006, the Court granted plaintiffs' Motion to Enforce, and, once again, ordered defendants to turn over all of the elephants' medical records. The Court also invited plaintiffs to submit their request for fees and costs associated with their Motion to Enforce. See Order (Sept. 26, 2006).

As a result of plaintiffs' Motion to Enforce and the Court's Order granting that motion, defendants have produced thousands of pages of additional medical records, most of which should have been produced in June 2004 through discovery, and all of which should have been produced by no later than September 28, 2005 in response to the Court's unequivocal Order. Indeed, all of the records that the Court has now had to order defendants to produce – twice – should have been produced without any need for litigation at all in the normal course of discovery. And yet, as plaintiffs explained in their

briefs on the Motion to Enforce, it is absolutely clear that, without plaintiffs' Motion to Compel, and later their Motion to Enforce, defendants would likely never have turned over many of these important records. Because defendants did not comply with their discovery obligations, plaintiffs were required to litigate – and relitigate – the production of the medical records, and incur numerous fees and costs associated with that litigation.

ARGUMENT

Pursuant to Federal Rule of Civil Procedure 37(b)(2), the Court “shall require the party failing to obey” a court discovery order “to pay the reasonable expenses, including attorney’s fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.” Fed. R. Civ. P. 37(b)(2) (emphasis added). In other words, once a court finds that a party has failed to comply with an order compelling discovery – as this Court has done here in granting plaintiffs’ Motion to Enforce the Court’s September 26, 2005 Order – it must order the delinquent party to pay the other party’s resulting expenses and fees unless the delinquent party can demonstrate that its actions were substantially justified.

Here, as plaintiffs explained in their briefs on the Motion to Enforce, it is abundantly clear that defendants cannot demonstrate any such substantial justification. On the contrary, defendants have dug in their heels at each turn, repeatedly insisting that they had “produced the veterinary records that were created and maintained,” May 12, 2006 Letter from Michelle Pardo to Kimberly Ockene at 1 (attached as Exhibit 2 to Plaintiffs’ Expedited Motion to Enforce the Court’s September 26, 2005 Order) – even though they later admitted to having withheld at least 1,200 medical records, see Defendant Feld Entertainment Inc.’s Response in Opposition to Plaintiffs’ Expedited

Motion to Enforce The Court's September 26, 2005 Order ("Def's. Opp.") at 5.

Defendants therefore forced plaintiffs to go through the exercise of filing their Motion to Enforce to obtain the delinquent records. See also Defs. Opp. at 7 (insisting that "FEI has complied with the Court's 9/26/05 Order" despite their simultaneous admission that at least 1,200 records still had not been produced).

Indeed, despite defendants' protestations that they had fully complied with the Court's September 2005 Order, shortly before plaintiffs filed their Reply in support of their Motion to Enforce, on July 19th and 21st, 2006, defendants suddenly produced several boxes of documents containing thousands of pages of medical records that should have been produced, at the latest, by September 28, 2005 in response to the Court's Order. Yet another full box of medical records was produced to plaintiffs on October 11, 2006, in response to the Court's Order granting plaintiffs' motion to enforce. See also Reply in Support of Plaintiffs' Expedited Motion to Enforce the Court's September 26, 2005 Order at 22 n. 14 (discussing numerous medical records that defendants produced long after the Court's September 28, 2005 deadline). This extremely belated production of medical records is entirely inexcusable, particularly in light of this Court's previous admonition to defendants – in September 2005 –that defendants were to produce "every last [medical] record" immediately. See Transcript of September 16, 2005 Hearing at 35 ("I'm going to order that all of these documents be produced"); id. at 36 ("And when I say all, I mean all, every last record").

Under these circumstances, the Court should not hesitate to award plaintiffs the reasonable fees and costs they incurred in chasing after these important records. See, e.g., McDowell v. Gov't of Dist. of Columbia, 233 F.R.D. 192, 204 (D.D.C. 2006)

(awarding fees and costs under Fed. R. Civ. P. 37(b)(2) where party failed to comply with discovery orders); Caldwell v. Ctr. for Corr. Health and Policy Studies, Inc. 228 F.R.D. 40, 44-45 (D.D.C. 2005) (awarding fees to party aggrieved by other party's failure to comply with discovery orders).

Plaintiffs should not have had to resort to these lengths simply to obtain these basic, clearly relevant, records, which were requested in discovery in March 2004, ordered produced by the Court in September 2005, and only finally produced in July and October of 2006 in response to plaintiffs' Motion to Enforce. By engaging in such blatant obfuscation, and forcing plaintiffs to file repeated motions simply to obtain these basic discovery materials, defendants continue to unduly delay a resolution of this case on the merits.

PLAINTIFFS' FEES AND COSTS

Plaintiffs request that the Court order defendants to reimburse them in the amount of \$20,375.53, which represents \$16,104.05 in fees and \$4,271.48 in costs. Considering the amount of effort plaintiffs have had to expend to obtain the medical records from defendants, these amounts are entirely reasonable. As explained in the accompanying declaration of Kimberly D. Ockene, these amounts are fully justified by the contemporaneous time and expense records maintained by plaintiffs' law firm and by the hourly rates used by the Department of Justice – commonly referred to as the “Laffey Matrix.” Although plaintiffs have not attached those records to the Declaration due to the fact that doing so would reveal counsel's work product and attorney-client communications, plaintiffs would readily comply with a Court request to review the records *in camera* should the Court desire to do so.

As noted, plaintiffs also currently have an outstanding request for fees and costs associated with the motion to compel that this Court granted on September 26, 2005, in which they have requested reimbursement in the amount of \$26,000 in fees and costs. Therefore, plaintiffs request that the Court grant both motions and order defendants to reimburse plaintiffs in the total amount of \$46,375.53. Plaintiffs have attached a proposed order for that purpose.

CONCLUSION

For the foregoing reasons, plaintiffs respectfully request that the Court grant plaintiffs' motion for attorneys' fees and costs.

Respectfully submitted,

/s/ Kimberly D. Ockene

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