UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

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

Defendant Feld Entertainment, Inc. ("FEI") submits this opposition to Plaintiffs' Motion Requesting Attorneys' Fees and Costs Related to Plaintiffs' Motion to Enforce the Court's September 26, 2005 Order (11/2/06) ("Plaintiffs' Motion" or "Pls. Motion"). Plaintiffs' Motion marks the second time that they have requested attorneys' fees for elephant medical records produced after the Court's September 26, 2005 Order. Plaintiffs would have the Court believe that their recent efforts to obtain additional medical records – and the legal fees and expenses incurred in conjunction with such efforts – turned up mountains of documents that FEI had been withholding. Plaintiffs apparently view the Court's invitation to seek attorneys' fees as a license to misrepresent the facts to the Court. Plaintiffs' conduct, however, should not go unnoticed, or worse, be rewarded.

It is clear from this Motion that plaintiffs will go to any lengths to harass and annoy FEI, even at the expense of misrepresenting facts to the Court to effectuate this goal. In response to

plaintiffs' first motion for attorneys' fees, FEI already explained to the Court the deficiencies in its initial production and responded in good faith to plaintiffs' additional requests for searches. FEI obtained new counsel, and continued to produce, out of an abundance of caution, all documents that were related to any of plaintiffs' discovery requests. Def. Opposition to Pls. Motion for Attorneys' Fees (4/17/06). To date, FEI has produced 30,212 pages of documents through prior counsel and 42,871 pages of documents through current counsel. Notice of Compliance (10/11/06) ¶ 2. Because of plaintiffs desire to perpetuate a discovery dispute where none exists, FEI already has been forced to devote significant time and expense to obtaining declarations from 29 employees,[1] all to establish that the representations FEI made back in May 2006 about its documents are entirely supportable and correct. See Notice of Compliance at 1. In this respect, FEI already has "paid" to indulge plaintiffs' ill-conceived demand for additional records. The outcome of plaintiffs' continued fishing expedition, however, completely justifies FEI's May 12, 2006 position regarding its medical records. Far from being rewarded for their conduct in perpetuating unnecessary litigation, plaintiffs should be held accountable for this colossal waste of the Court's and FEI's time and resources.

BACKGROUND

This is plaintiffs' second request for attorneys' fees and expenses for the same category of records: elephant veterinary records. On September 26, 2005, the Court ordered FEI to produce "all veterinary and medical records" by September 28, 2005. See September 26, 2006 Order at 1. FEI, through prior counsel, produced the bulk of the medical records on September 28, 2005 , see Def. Opp. to Pls. Motion to Enforce, Exs. B & C (7/7/06) ("Def. Opposition") (producing 10,485 pages and 4,236 pages of medical records). After this deadline, FEI

[1] FEI shortly will be filing two additional declarations from employees who were on vacation at the time the Notice of Compliance was filed.

supplemented its earlier productions with approximately 1,500 pages of additional records, some of which were medical records, but primarily consisted of non-medical records. Id. at 4. FEI's new counsel made an appearance in this case on March 10, 2006. See Entry of Appearance (Mar. 10, 2006). Plaintiffs filed a motion for attorneys' fees in conjunction with their motion to compel, which remains pending before the Court. See Pls. Motion for Attorneys' Fees (4/3/06).

On April 28, 2006, plaintiffs informed FEI that it still believed that large categories of elephant medical records had not been produced. See Ex. 9 to Pls. Motion to Enforce (6/9/06) ("Motion to Enforce"). On May 12, 2006, counsel for FEI responded to plaintiffs in detail, explaining why certain records—and indeed certain elephants—did not exist, why they no longer had certain records, and correcting misimpressions plaintiffs had about record-keeping requirements and the (non)existence of entire categories of records. See May 12, 2006 Correspondence from M. Pardo to K. Ockene (attached hereto as Ex. A). FEI's counsel also recommended that counsel for the parties meet to discuss the production of electronic records (such as email communications). Id. at 6. Plaintiffs never responded to this invitation and instead filed a Motion to Enforce just 28 days later. Plaintiffs' Motion to Enforce rejected FEI's explanations about the existence of the records and argued without basis that the records must exist and that FEI was withholding them. See generally Pls. Motion to Enforce. While plaintiffs apparently were preparing their Motion to Enforce, new counsel determined that, unbeknownst to FEI, prior counsel had not fully processed electronic documents that FEI had turned over to counsel and that such documents were being prepared for production by FEI's new counsel. Def. Opposition at 5. As it stated it would, FEI produced responsive documents on July 19 and 21, and August 3 and 18, 2006.

On September 26, 2006, the Court granted plaintiffs' Motion to Enforce and ordered FEI to: (1) produce specified records; and (2)

> provide to plaintiffs sworn declarations from all veterinarians, veterinary technical ("vet tech") staff, and other animal care staff, employed by defendants or who consult with defendants regularly concerning their elephants, as well as other employees of defendants who have responsibility for recording or maintaining information about the health or medical status of any elephants, stating that (a) they have searched for all records covered by this Order, and (b) they have each produced all such records to plaintiffs in accordance with this Order.

September 26, 2006 Order. The Court specifically ordered an additional 11 named consultants and employees (former and current) to provide declarations. In accordance with this Order, FEI provided 29 sworn declarations to plaintiffs, see Notice of Compliance at 1, retrieved x-rays from third parties that were made available to plaintiffs for inspection, and produced approximately 1,875 pages. As explained in detail below, approximately 1,625 of these were created after the Court's September 26, 2005 Order and another approximately 107 were not required to be produced until the Court's September 26, 2006 Order. The remaining approximately 150 pages contained lab results previously produced in part. Notice of Compliance ¶¶ 1-3. Plaintiffs now seek attorneys' fees and costs in conjunction with filing their Motion to Enforce.

ARGUMENT

I. PLAINTIFFS MISREPRESENT THE DOCUMENTS PRODUCED

Plaintiffs' motion hinges on the concept that they did not receive documents prior to the September 26, 2005 Order and that they had to expend attorneys' fees and costs to effectuate this result. However, plaintiffs have resorted to misrepresentation as a means to their end: to disparage FEI in Court and to make FEI "pay." Plaintiffs' Motion boldly misrepresents the facts and mischaracterizes FEI's conduct during litigation, and perpetuates a discovery dispute that

has come to a close. Plaintiffs' tactics, however, are a violation of Rule 11 and require denial of their Motion.

A. FEI's October 11, 2006 Document Production

Plaintiffs blatantly misrepresent, yet again, the contents of FEI's document productions. See Pls. Motion at 4. Plaintiffs state that on October 11, 2006 "[ye]t another full box of medical records was produced." Id. Plaintiffs further argue that "***[t]his extremely belated production of medical records is entirely inexcusable,*** particularly in light of this Court's previous admonitions to defendants . . ." Id. (emphasis added). Whether plaintiffs are convinced that misrepresentations to this Court will go unnoticed and further bolster their attorneys' fees arguments, or simply did not bother to review the contents of the October 11, 2006 document production before representing to the Court what it contained, is unclear. What is clear is that defendant should not be repeatedly castigated for alleged deficiencies when it is, in fact, in compliance with the Court's Order and fulfilling its duties to supplement productions in a timely manner.[2]

The box of documents provided to plaintiffs on October 11, 2006 contained 1,875 pages. Approximately 1,625 of these, on their face, were created after the Court's Order of September 26, 2005. It is disingenuous and plainly wrong for plaintiffs to claim that these documents were "belatedly" produced. In addition, approximately 107 pages of the 1,875 produced on October 11, 2006 are Certificates of Veterinary Inspection, or "interstates" that were created prior to the Court's September 26, 2005 Order, but were not produced because FEI does not believe them to

[2] This is more than plaintiffs can demonstrate, who are unable to meet their own purported standards. For example, Mr. Rider has not supplemented his production. Indeed, the Wildlife Advocacy Project ("WAP"), which is controlled by plaintiffs' attorneys, Meyer, Glitzenstein, & Crystal, failed to produce documents subject to a subpoena and FEI had to move to compel. WAP, however, recently produced documents that should have been produced 14 months ago without explanation. Once again, plaintiffs, and plaintiffs' attorneys' alter-ego organization do not conduct themselves as if the rules equally apply.

be medical records. See Declaration of Wiedner, Ex. E to Def. Opposition; Notice of Compliance at 1. FEI, accordingly, was not required to produce the interstates until the Court's Order of September 2006. Thus, it also is disingenuous and plainly wrong for plaintiffs to claim that these documents were "belatedly" produced.

The fact that plaintiffs are now arguing that FEI should be ordered to pay attorneys' fees for failing to produce records that were ***not even in existence prior to the Court's September 26, 2005 Order*** is outrageous. It is further evidence of the lengths plaintiffs will go to waste the Court's time and resources and harass FEI for documents that it properly produced. How plaintiffs can characterize the October 11, 2006 documents as "extremely belated" and "entirely inexcusable," or why this is a basis "to award plaintiffs the reasonable fees and costs they incurred in chasing after these important records" defies logic. Far from the "blatant obfuscation" of which plaintiffs accuse FEI, Pls. Motion at 5, the October 11, 2006 production merely illustrates that FEI has diligently supplemented its medical records productions up to, and including, the date of the Court's September 26, 2006 Order.[3]

Plaintiffs' misrepresentations to the Court should automatically result in a denial of their Motion. Indeed, plaintiffs' behavior is expressly prohibited by Rule 11:

> By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances –

---

[3] As previously represented to the Court in its Notice of Compliance, FEI stated that it was producing some medical records. Notice of Compliance ¶ 1. FEI retrieved from offsite additional elephant radiographs for thirteen (13) elephants and made these available to plaintiffs for inspection. Id. Additionally, while FEI never had a copy of Benjamin and Shirley elephants' thoracic x-rays, it contacted Rood & Riddle Equine Hospital in Lexington, KY (site of the x-rays) and obtained the x-rays on loan, which have been made available to plaintiffs for inspection. Plaintiffs have yet to examine these purportedly critical x-rays. Finally, FEI has produced lab results, FEI 42479-42625, parts of which duplicate prior productions. Notice Of Compliance ¶ 1. While these are elephant medical records, the amount of records (approximately 150 pages or 8% of the box), is de minimus.

> (1) is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; . . .
>
> (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery;

Fed. R. Civ. P. 11(b); See Perkinson v. Gilbert/Robinson, Inc., 821 F.2d 686, 691 n.4 (D.C. Cir. 1987) (finding counsel's deceptive characterization of the obstruction of service of a subpoena to be appropriately sanctionable under Rule 11). The documents themselves, as well as the Notice of Compliance filed with this Court, properly represent what FEI produced in this litigation, and are further evidence of FEI's good faith efforts. Plaintiffs' violations of Rule 11 – whether or not they result separately in Rule 11 sanctions – are appropriately considered by the Court in exercising its discretion whether to award attorneys' fees. Accordingly, plaintiffs mischaracterization of the October 11, 2006 document production should not be tolerated and, at a minimum, should result in a denial of their instant Motion.

B. FEI's July 19, 2006 and July 21, 2006 Document Productions

As a basis for their attorneys' fees claim, plaintiffs also cite to document productions that FEI "suddenly" produced on July 19 and July 21, 2006. Pls. Motion. at 4. It is unclear why plaintiffs believe this production to be "sudden," given the fact that counsel for FEI had informed plaintiffs on July 7, 2006, that it had identified electronic documents that were not previously processed by former counsel and were working to produce those to plaintiffs. See Def. Opposition at 5. Prior to this date, counsel for FEI had informed plaintiffs on May 12, 2006 that it was undertaking a review of electronic documents to determine if all responsive documents had been produced. Ex. A at 6. At this point, new counsel for FEI had been involved in this case for less than 60 days and discovery deficiencies in prior productions could not even be ascertained until new counsel had a chance to review more than 30,000 documents that already

had been produced by prior counsel on FEI's behalf. Notwithstanding these circumstances, plaintiffs decided to ignore new counsel's offer to meet and confer regarding the production of electronic documents, where scope, mechanics, and a timeline for production could have been negotiated without the need for litigation. Instead, plaintiffs filed their Motion the next month improperly characterizing a "stalemate" between the parties. Pls. Motion to Enforce at 2-3. In short, plaintiffs had no need to "chase" records at this point. FEI and its new counsel were cooperating fully and attempting to explain how records are kept regarding FEI's Asian elephants, the latter being a point which neither plaintiffs nor their counsel understand or wish to hear.

By the time FEI's obligation to respond to the Motion to Enforce was due, new counsel for FEI was well underway in processing the additional documents for production, and noted that in its Brief. Def. Opposition at 5 & n.4 (stating that "these records will be produced as soon as possible").[4] On July 19, 2006 and July 21, 2006, FEI produced responsive documents. What plaintiffs have not told the Court, however, is that the majority of the July productions were not medical records, but rather were other non-medical records such as daily reports, animal inventories, breeding program documents, company electronic mail and photographs. FEI 10370- FEI 22448. Indeed, more than ninety percent of the 12,000 pages produced in July 2006 were either created ***after*** the September 26, 2005 Order or ***were not medical records***.

Plaintiffs would have the Court believe that FEI produced tens of thousands of pages of documents after the Court's September 26, 2005 Order. This simply is not the case. Instead, as the record reflects, most of the documents produced in these productions were not medical

[4] Because the records contained a significant amount of non-responsive information, and plaintiffs would not agree to a protective order to cover FEI's records in this case, FEI's counsel had to take great care to redact all references to non-responsive information to prevent misuse of the information in the public domain. This exercise slowed the processing time. Nevertheless, redacted documents were produced on July 19 and 21, 2006.

records, were previously produced in part, and/or post-date the Court's September 26, 2005 Order. Plaintiffs' failure to represent this properly to the Court should result in the denial of their Motion. FEI has produced, through prior and current counsel, in excess of 73,000 pages of documents. It has fulfilled it obligations and was prepared to do so without the need for litigation of this matter. That plaintiffs sought judicial intervention to compel FEI to produce documents it already had to given to plaintiffs is incomprehensible. See Notice of Compliance at 2-3 ("the documents related to numbers 1-5, 7, 9-10, 12-14 of the Order have been produced already.").

II. AN AWARD OF ATTORNEYS FEES IS NOT APPROPRIATE

Aside from plaintiffs' misrepresentations to the Court, the facts and circumstances make any award to plaintiffs completely unjustified. Federal Rule of Civil Procedure 37(b)(2) vests the Court with discretion to award "reasonable expenses" caused by the failure to obey a court order "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).

A. FEI's Conduct Was Substantially Justified

Opposition to a motion to compel is substantially justified if there is a "genuine dispute" or "if reasonable people could differ" as to the appropriateness of the contested discovery action. Pierce v. Underwood, 487 U.S. 552, 565 (1988) (internal quotations and citations omitted); Peterson v. Hantman, 227 F.R.D. 13, 16 (D.D.C. 2005) ("A party's actions are substantially justified if the issue presented is one that could engender a responsible difference of opinion among conscientious, diligent[,] but reasonable advocates.") (internal quotation omitted; alteration in original); see also 8A WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 2288 (2d ed. 1994) ("Making a motion, or opposing a motion, is 'substantially justified' if the motion raised an issue about which reasonable people could genuinely differ on whether a party

was bound to comply with a discovery rule."). The purpose underlying sanctions is to "deter the abuse implicit in carrying or forcing a discovery dispute to court when no genuine dispute exists," and to "deter a party from pressing to a court hearing frivolous . . . objections to discovery." Fed. R. Civ. P. 37 Advisory Committee's note (1970 Amendment to subsection (a)(4)). In addition, the District of Columbia Circuit has emphasized that any sanction awarded must be "proportional" to the underlying offense. Bonds v. District of Columbia, 93 F.3d 801, 808 (D.C. Cir. 1996) ("the choice of sanction under Rule 37, whether mild or severe, is always guided by the concept of proportionality; between offense and sanction") (internal quotations omitted).

Contrary to plaintiffs' assertions that FEI has "dug in their heals [sic] at every turn," Pls. Motion at 3, the record reflects the opposite. What plaintiffs fail to highlight for the Court is that current counsel for FEI did take plaintiffs' requests for further documents seriously and did re-examine the prior document production to determine whether any category of document was omitted. Indeed, in its May 12, 2006 letter, rather than merely representing to plaintiffs that it did not have such records, FEI provided detailed explanations as to why categories of documents did not exist. See Ex. A. For example, FEI explained the theory behind "herd" veterinary medicine and why medical treatment of a herd differs from a neighborhood veterinarian dealing with a pet population, id. at 1-2, 3; it explained medical recordkeeping requirements that do not require records to be retained for a significant period of time in the normal course of business, id. at 4-5; FEI explained that it no longer owned or leased particular animals and thereby no longer retained the records, id. at 2-3; and, most importantly, FEI explained that some of the elephants for which plaintiffs demanded records simply did not exist. Id. at 3 (indicating that there never

was an elephant named "Nunya").[5] See also Def. Opposition at 28 (indicating that there never was an elephant named "Shirley Ann"). Had plaintiffs considered FEI's good faith efforts to resolve this dispute, or even responded to its offer to meet and confer now that new counsel was involved in the case, plaintiffs' Motion to Enforce and the instant Motion for Attorneys' Fees would never have been necessary. FEI's conduct was entirely justifiable, and designed to resolve, rather than create, additional discovery disputes.

Plaintiffs' characterization of FEI's behavior during this phase of discovery is misplaced. Plaintiffs state that FEI admits to having "withheld at least 1,200 medical records," Pls. Motion at 3; however, this statement is belied by the record itself. See Def. Opposition at 5 (explaining that FEI turned over records to prior counsel who did not appear to have fully processed electronic material and that FEI's current counsel had undertaken this review and production; no representation made that anything was being "withheld"). Plaintiffs' repeated misrepresentation of the record is tiresome and should not be tolerated. Aside from its properly-lodged objections, FEI has not taken any position that it was "withholding" documents from plaintiffs. Quite the opposite—since retaining new counsel, FEI has produced voluminous documents to plaintiffs up to and including medical records from September 26, 2006. While the prior document productions admittedly were not perfect, new counsel has produced over 42,000 pages of documents to date which arguably are responsive to plaintiffs' exceedingly broad document

[5] Realizing the ridiculousness of pressing for documents for an elephant named "Nunya" (that, as FEI explained, likely was a slang word used to indicate a blank part of a chart or "none") plaintiffs dropped their demand for all medical records regarding elephant "Nunya." Ex. A at 3. Plaintiffs also dropped their demand for records regarding "Myrtle" when FEI explained that "Myrtle" was a nickname for elephant "Aree." Id. at 2. This further shows that FEI was acting reasonably and its position was substantially justified. See Doe v. District of Columbia, 230 F.R.D. 47, 56 (D.D.C. 2005) (where court credited some of defendant's arguments and plaintiffs conceded several points as to the limitation of the scope of discovery, the defendant's position was substantially justified).

requests.[6] There is absolutely no showing of bad faith on the part of FEI that would warrant an imposition of sanctions. See In re Multi-Piece Rim Products Liability Litigation, 653 F.2d 671, 680 (D.C. Cir. 1981) (court can consider a party's good faith as a sign that his motion or opposition was not devoid of justification); Sigma-Tau Industrie Framaceutiche Riunite, S.P.A. v. Lonza, Ltd., 106 F. Supp. 2d 8, 13 (D.D.C. 2000) (same). Plaintiffs are in no position to be complaining about FEI's document production and the time has come to foreclose them from further arguing year-old discovery disputes as though they are ongoing.

Further, FEI's position on the 2006 records is substantially justified. Plaintiffs argue that all the documents produced after the Court's September 26, 2005 Order are evidence of "withheld" documents and FEI's failure to produce them is sanctionable. Pls. Motion at 4-5. Plaintiffs make this argument knowing full well that the vast majority of the documents of which they complain ***did not exist prior to the Court's September 26, 2005 Order***. Plaintiffs' argument that documents not in existence prior to the Court's Order should have been produced by September 28, 2005 is completely nonsensical. See Int'l Brotherhood of Electrical Workers Local Union No. 1249 v. Taylor Elec. Contractors, Inc., 1992 U.S. Dist. LEXIS 2400, at *7-8 (N.D.N.Y. Mar. 3, 1992) ("In the court's opinion, ***there can be no better justification for failing to produce documents than not possessing them***. Therefore, the court finds that defendant's opposition to the motion to compel production of documents was 'substantially justified,' and plaintiffs' motion for costs and attorney's fees is hereby denied.") (emphasis added). As such, plaintiffs' argument that records created after the September 28, 2006 deadline should have been

[6] Plaintiffs are hard-pressed to argue that FEI's retention of new counsel has had anything but a positive effect on discovery. FEI's prior counsel produced 30,212 pages of documents. Since new counsel entered the case in March of 2006, FEI has produced an additional 42,871 pages of documents to plaintiffs (including Bates labeled videotapes). In comparison, all five plaintiffs in this case collectively have produced only 20,493 pages and have failed to fully supplement their productions or correct their deficiencies to date. In any event, plaintiffs have no deadline for which to depose witnesses and no trial date has been set. There is absolutely no prejudice that can be argued from receiving these documents within the last few months, particularly when plaintiffs have made no effort to inspect them.

produced prior to September 28, 2006 should be summarily denied, and plaintiffs should be admonished for misrepresenting to the Court the nature of a document production that is the basis of their Motion.

Here, FEI was substantially justified in producing the documents to plaintiffs for several reasons. First, a large majority of the documents produced after September 28, 2005 were documents that were not even created until 2006. Second, with respect to documents created in 1994 and 1995, FEI had objected to their production and it was not until February 23, 2006 that Judge Facciola had ordered their production. Third, many of the documents at issue are not considered by FEI, or its practicing veterinarian, to be medical records, and thus were not within the scope of the September 26, 2005 Order. See Declaration of Wiedner, Ex. E to Def. Opposition (stating that certificates of veterinary inspection or "interstates" are transportation documents and not medical records); Notice of Compliance at 1. FEI previously had objected and taken the position that plaintiffs' over-arching "medical records" document request did not include every document at FEI.[7] When specifically ordered by the Court to produce veterinary inspection certificates, see September 26, 2006 Order, FEI complied with that Order on time. Surely, plaintiffs cannot be serious in their argument that documents created in 2006 should have been produced before September 28, 2005. Moreover, as discovery progressed, plaintiffs' ever-expanding definition of "medical records" became clear. FEI objected to a broad classification of nearly every company record as being a medical record, and, unlike plaintiffs, FEI supported its objections with veterinary opinion. See Def. Opposition, Ex. E (Dr. Wiedner declaration); Notice of Compliance at 1. Clearly, such a debate is one that could engender, at minimum, a "reasonable difference of opinion among conscientious, diligent but reasonable advocates."

[7] Plaintiffs' document request for medical records was unduly broad. After written discovery closed, plaintiffs likely determined that the only way to obtain documents that they did not ask for would be to lump them into the broad category of "medical records." FEI objected to this course of conduct. Def. Opposition at 2.

Peterson, 227 F.R.D. at 16 (quoting Athridge v. Aetna Cas. & Sur. Co., 184 F.R.D. 200, 205 (D.D.C. 1998). Moreover, when ordered to produce them over objection, FEI did so promptly. Therefore, substantial justification exists for the production of the pre-and-post September 26, 1995 documents and, accordingly, plaintiffs' Motion should be denied.

Perhaps the clearest example of "substantial justification" is that the outcome of plaintiffs' Motion to Enforce confirmed what FEI had stated all along—without the need for additional litigation—that it was not withholding broad categories of medical records and that it had conducted a diligent search and produced all such documents to plaintiffs. What the 29 declarations and subsequent productions confirmed is exactly the position that FEI had taken – and plaintiffs had summarily dismissed—all along. Plaintiffs repeatedly pushed for the production of records for elephants that did not exist or that FEI has not owned or leased for years, and for documents that FEI never created, or had any regulatory requirement to keep. See generally Ex A; Notice of Compliance. At most, plaintiffs received a nominal amount of documents, approximately 150 pages, that had previously been produced, in part, and radiographs that FEI never had possession of, but had to go out and retrieve copies of, which plaintiffs could have done themselves in the first instance. There is no stronger evidence that FEI was substantially justified in the position it took with plaintiffs back in May of 2006, without any need for Court intervention.

B. The Circumstances Would Make An Award of Expenses Unjust

Even if the Court determines that FEI was not substantially justified, plaintiffs agree that pursuant to Fed. R. Civ. P. 37(b)(2), an award of attorneys' fees and expenses may be inappropriate where "other circumstances make an awarded of expenses unjust." Pls. Motion at 3. An award of attorneys fees and expenses to plaintiffs for their second request for attorneys'

fees would be patently unjust under the circumstances. First, despite providing a lengthy explanation to plaintiffs on May 12, 2006 as to why certain categories of medical records – and indeed certain elephants – did not exist, plaintiffs refused to accept these non-controversial explanations and filed their Motion to Enforce. In doing so, plaintiffs requested, and the Court so ordered, FEI to submit declarations with respect to the elephant medical records. September 26, 2006 Order. FEI was put through the time and expense of obtaining 29 declarations from its employees, which effectively told plaintiffs exactly what it had before—such elephants and medical records do not exist or already had been produced. See generally, Notice of Compliance. Plaintiffs entire Motion to Enforce, therefore, was a burdensome exercise that cost FEI time and money, and which was effectively a waste of time—for FEI, for plaintiffs, and for the Court. Ordering FEI to pay attorneys fees—when it then had to spend significant resources proving to plaintiffs what FEI previously had asserted—would be unjust. All this exercise shows is that FEI is not engaging in "hide-the-ball" tactics alleged by plaintiffs and that plaintiffs will stop at nothing to discredit FEI's reputation with the Court. To continually clutter the docket with filings over a non-issue is completely at odds with any professed desire to get to the "resolution of the case on the merits."

Moreover, plaintiffs' ability to proceed with its case has not been prejudiced by FEI's actions. Both parties have engaged in supplementing their document productions and, indeed, it is plaintiffs that have yet to cure their document production deficiencies to date. See supra note 1. The discovery period remains open for depositions and expert discovery and a trial date has not been set. Furthermore, the medical records had no bearing on plaintiffs' ability to respond to FEI's Motion for Summary Judgment, which is fully briefed and pending before the Court, without a single medical record submitted by plaintiffs in support of their position. As such, the

circumstances clearly do not support an imposition of attorneys' fees and expenses against FEI. Plaintiffs' Motion should be denied.

III. Plaintiffs Fees and Expenses Are Unsupported

A. Plaintiffs Have Failed to Itemize Their Fees and Expenses

Plaintiffs claim that they are entitled to $16,104.05 in attorneys' fees associated with pursuing their Motion to Enforce. Pls. Motion at 5. It is puzzling why, having briefed a motion to compel medical records (and an accompanying attorneys' fee motion) previously, plaintiffs' fees and expenses in pursuing the instant Motion are as high as they claim. However, without any specificity, FEI cannot analyze and prove fully the accuracy of this figure.

Even if plaintiffs' Motion to Enforce was not a waste of the parties' and the Court's time and resources, Plaintiffs' Motion does not contain the necessary detail that is required of such a motion. Without itemization of these fees (and the accompanying costs, discussed infra), neither the Court nor FEI can adequately assess whether these fees are reasonable, particularly in light of the fact that plaintiffs already have made the same arguments in prior motions. See Pls. Motion to Compel (1/25/2005); Pls. Motion to Enforce (6/9/2006); See also National Assoc. of Concerned Veterans v. Sec'y of Def., 675 F.2d 1319, 1327 (D.C. Cir. 1982). (explaining that "[c]asual after-the-fact estimates of time expended on a case are insufficient to support an award of attorneys' fees"). Accordingly, plaintiffs should be required to produce an itemized fee statement or bill of costs so that FEI has a reasonable basis upon which to assess this request. See Kister v. District of Columbia, 229 F.R.D. 326, 331 (D.D.C. 2005) ("Once the reasonableness of the hours claimed becomes an issue, the applicant should voluntarily make his time charges available for inspection by the District Court ***or opposing counsel upon request.***") (quoting Concerned Veterans, 675 F.2d at 1327) (emphasis added). Plaintiffs' blanket response that all billing records are "privileged" does not excuse them from providing this information.

B. Plaintiffs' Request for Expenses Are Related to the Litigation In General and As Such Are Not Recoverable

In addition to not being able to analyze and object with any particularity to plaintiffs alleged fees and expenses, FEI should not bear the burden of plaintiffs' attorneys' fees or expenses that are otherwise necessary to the litigation. Plaintiffs have argued that they are entitled to $4,271.48 in "costs" associated with their Motion to Enforce the Court's September 26, 2005 Order. Pls. Motion at 1, Ex A ¶ 5 (Decl. of Ockene). Plaintiffs, however, submit only this "global" cost and leave the Court and FEI to guess as to what portion of these "costs" is apportioned to legal research, and what portion is related to document review.[8] Plaintiffs argue that a compensable expense is time spent by a paralegal to "go through medical records . . . and integrate them in an orderly fashion (i.e., by elephant) into the previously produced records, so plaintiffs could determine what records still had not been produced . . ."). Pls. Motion, Ex. A ¶ 5.

Plaintiffs appear to be arguing that but for the Motion to Enforce, plaintiffs never would have had to review FEI's document productions, organize or analyze the documents in the normal course of litigation. This is ridiculous. Any litigant who receives documents in a case will be required to review the documents and incur expenses thereto as a normal part of litigation. Counsel for FEI is tasked with the very same exercise when plaintiffs produce documents in this litigation. Notably, plaintiffs' documents were not received by FEI at one time, have been supplemented over time, and still are not complete to date.

Courts consistently have held that the attorneys' fees and expenses awarded pursuant to Fed. R. Civ. P. 37(b) must be related to the motion to compel. See e.g., Stillman v. Edmund

[8] Plaintiffs presumably are not arguing that the Westlaw bill is "privileged." Given the fact that plaintiffs cite only a handful of cases in their Motion to Enforce, including a case they previously cited in prior pleadings, Westlaw charges should be insignificant. FEI reserves its right to object to the claimed costs or expenses when plaintiffs satisfy their burden of itemizing such expenses.

Scientific Co., 522 F.2d 798, 801 (4th Cir. 1975) (citing Brunswick Corp. v. Chrysler Corp., 291 F. Supp. 118, 122 (E.D. Wis. 1968) (holding that "recovery under Rule 37(a) is limited to the costs incurred in obtaining an order compelling the plaintiff to answer interrogatories"). Plaintiffs simply cannot recover for paralegal, attorney or other professional's time spent in reviewing documents produced by the opposing party. Such expenses are typical tasks incurred with discovery in general and are necessary to prosecute or defend a case, apart from any motion to compel. See In re Hunter Outdoor Prods., Inc., 21 B.R. 188, 193 (Bankr. D. Mass. July 12, 1982) ("Rule 37(a)(4) provides for an award only as to those fees incurred in opposing the motion to compel discovery, and ***not as to all fees incurred with discovery in general.***") (emphasis added). Because plaintiffs would have had to undertake this task even in the absence of any motion, such expenses are not compensable under Rule 37. Moreover, FEI should not be made to bear the expense of sorting and reviewing the fruits of plaintiffs' exceedingly broad document requests and demands for an inordinate number of documents. Plaintiffs chose to request an inordinate amount of documents from an unlimited period of time that have nothing to do with this litigation. They cannot now shift their cost of managing these records by arguing that it is unique to their Motion to Enforce.

Even if this expense could be isolated for the attorneys' fee analysis, which it cannot, it is puzzling why plaintiffs cannot provide the hourly rate that they paid this paralegal or the exact amount of time spent on this task. See Pls. Motion, Ex. A ¶ 5 (Decl. of Ockene) (stating that the cost of paralegal time is "approximately $15-$20/hour"). Such approximations are not acceptable. Plaintiffs fail to provide any hourly total for the paralegal's work. Surely, plaintiffs are not alleging that the exact figure is privileged information, or that they do not have records that specifically account for their paralegal time. Rather, plaintiffs lack of specificity suggests

that something about their total "costs" is not supportable by any documentation, or else it would have been included just like their attorneys' fees breakdown.

CONCLUSION

The outcome of plaintiffs' continued fishing expedition completely justifies FEI's May 12, 2006 response and illustrates plaintiffs' improper motive to perpetuate discovery disputes and disparage FEI to the Court. The result of plaintiffs' race to the courthouse with its Motion to Enforce and Motion for Attorneys' fees, less than two months after new counsel for FEI entered the case and made progress with respect to discovery, resulted not in the windfall that plaintiffs expected, but a confirmation that FEI had been representing the nature of their documents truthfully to plaintiffs all along. As such, plaintiffs decision to incur $20,373.53 in alleged attorneys' fees and expenses – all to confirm what FEI had represented prior to the Motion to Enforce in June, 2006 – was a needless expense for which FEI should not bear the burden. Most importantly, plaintiffs should not be permitted to benefit from their blatant misrepresentations to the Court regarding FEI's document productions. This behavior is sanctionable in and of itself and is yet another basis why the Court should deny their Motion for Attorneys' Fees.

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

Dated this 16th day of November, 2006.

Respectfully submitted,

/s/

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)
George A. Gasper (D.C. Bar #488988)

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.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

ORDER

Upon consideration of Plaintiffs' Motion Requesting Attorneys' Fees and Costs Relating to Plaintiffs' Motion to Enforce The Court's September 26, 2005 Order ("Motion") and Feld Entertainment, Inc.'s Response in Opposition thereto, it is this _____ day of _____, 2006.

ORDERED that the Motion is DENIED.

IT IS SO ORDERED.

_____
United States District Judge