UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

PLAINTIFFS' REPLY IN SUPPORT OF MOTION REQUESTING ATTORNEYS' FEES AND COSTS RELATING TO PLAINTIFFS' MOTION TO ENFORCE

In response to Plaintiffs' straightforward request for attorneys' fees and costs associated with their Motion to Enforce – which this Court invited Plaintiffs to submit – Defendants offer three major defenses. First, they seek to blame their prior counsel – Covington & Burling – for the failure to produce records that this Court had to order Defendants to produce. Second, they claim – erroneously, as explained below – that most of the records produced were "newly" generated, and hence were not produced as a result of Plaintiffs' Motion to Enforce the Court's previous Order to produce the medical records of the elephants at issue in this case. And third, they rehash their argument that Plaintiffs failed to meet and confer before filing their Motion to Enforce – an argument that the Court already rejected in granting that motion. However, since neither these, nor Defendants' subsidiary arguments, have any merit, Plaintiffs' Motion requesting fees should be granted.

1. *Defendants cannot avoid their Court-Ordered obligations by blaming their prior attorneys*. To the contrary, as the Supreme Court has explained, a party may not contend that "his counsel's unexcused conduct imposes an unjust penalty on the client." Link v. Wabash R.R.Co., 370 U.S. 626, 633-34 (1962); see also, e.g., Hussain v. Nicholson, 435 F.3d 359, 364 (D.C. Cir. 2006) ("a party who voluntarily chooses his attorney cannot . . . avoid the consequences of the acts or omissions of this freely selected agent") (other citations omitted).

Therefore, Defendants cannot avoid paying Plaintiffs' attorneys' fees and costs on the grounds that "discovery deficiencies in prior productions could not even be ascertained until new counsel had a chance to review" prior productions. Defendants' Opposition to Plaintiffs' Motion Requesting Attorneys' Fees and Costs ("Def. Opp.") (Nov. 16, 2006) at 7-8; see also id. at 11 (claiming that "FEI turned over records to prior counsel who did not appear to have fully processed electronic materials and that FEI's current counsel had undertaken this review and production"). To the contrary, having voluntarily chosen its counsel, Defendants cannot "avoid the consequences of the acts or omissions of this freely selected agent." Nicholson, 435 F.3d at 364 (emphasis added); see also Green v. Blazer Diamond Products Inc., No. 92-1385, 1994 U.S. Dist. LEXIS 21346, at *20 (D.D.C. Dec. 8, 1994) ("'Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent'"), quoting Wabash, 370 U.S. at 634.

2. *In response to the Motion to Enforce, Defendants produced thousands of additional records that pre-dated the Motion.* Thus, while Defendants have also produced more recent documents, there is no basis for Defendants' suggestion that the Motion to Enforce did not result in the disclosure of many additional pages that should have already been produced to

Plaintiffs as a result of this Court's September 26, 2005 Order granting Plaintiffs' Motion to Compel these records, and demanding that they all be produced by September 28, 2005. See Def. Opp. at 13 ("a large majority of the documents produced after September 28, 2005 were documents that were not even created until 2006"). Indeed, Defendants' seven separate document productions thus far since Plaintiffs' Motion to Enforce was filed – on June 13, 2006; June 19, 2006; July 19, 2006; July 21, 2006, August 3, 2006, August 18, 2006, and October 11, 2006 – have contained thousands of additional pages that should have been previously produced, as they are all dated prior to September 28, 2005.[1]

Moreover, the sheer quantity of the additional records is not nearly as important as the relevance of the records to Plaintiffs' claims and Defendants' defenses. Were it otherwise, a Defendant could be excused for failing to produce a critical "smoking gun" document in response to a discovery request on the grounds that it produced thousands of other records after the Court granted the opponents' motion to compel such records.

Thus, for example, one of the documents not produced until July 2006 – 10 months after the Court's September 2005 Order – was dated January 2005 and describes a fairly recent

---

[1] Defendants' effort to shift the focus to the records produced after the Court's September 26, 2006 Order is unavailing. Def. Opp. at 4-5, 14 (claiming that "plaintiffs received a nominal amount of documents, approximately 150 pages"). The relevant date for these purposes is the date the Motion to Enforce was filed (June 9, 2006), not the date of the Court's Order granting that motion. See Fed. R. Civ. P. 37(a)(4)(A) ("[i]f the motion is granted or if the disclosure or requested discovery is provided after the motion was filed, the Court shall, after affording an opportunity to be heard, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay the moving party the reasonable expenses incurred in making the motion, including attorney's fees") (emphasis added); see, e.g., Hopper v. Financial Management Systems, Inc., No. 96-456, 1996 WL 653833, *2 (D.D.C. Nov. 1, 1996) ("[t]he appropriate inquiry for the magistrate judge was whether the documents had been produced before the plaintiff had filed his motion, not whether they had been produced before the Court's order was entered") (emphasis added).

incident of elephant abuse that resulted in elephant "blood in small pools and dripped along the length of the rubber and all the way inside the barn." FEI 15026 (Attachment ("Att.") A). Another document – this one dating from 2001 – discusses "a lot of severe, likely not completely treatable foot problems at Williston, that originated in the years that the elephants were on the road . . . ." FEI 21230 (Att. B) ("I noticed some small lacerations behind the forelegs and ears in some elephants. I went specifically looking for these with just Pete present with Dutchess, Jenny, and Judy, and found several bloody spots and one small abscess"); see also FEI 19522 (Att. C) (July 2004 document discussing Defendants' Veterinarian's concerns about finding "all species water buckets to be in an unacceptable condition – e.g. feces or food in water, water level too low, and/or poor water quality"). Again, absent Plaintiffs' Motion to Enforce, there is no reason to expect that these – or similar records dated prior to the Court's September 2005 Order and relevant to how these endangered animals are treated by Defendants, but not produced until after the Motion to Enforce was filed – would ever have been disclosed.

Finally, it bears emphasizing that it is still not yet clear whether all of the medical records in Defendants' and their agents custody or control – particularly older records – have been produced. Thus, as part of their Motion to Enforce, Plaintiffs requested that the Court order Defendants to produce all the medical records – regardless of the date of such records – for the elephants in their custody or care since 1994. Plaintiffs' Motion to Enforce Memorandum ("Mot. Enforce Mem.") at 2, n.1. Plaintiffs also requested that the Court order Defendants to explain whether they had destroyed any elephant medical records. Id. at 24. Although Defendants argued that Plaintiffs' document request did not cover those older records, see Def. Opp. at 10-13, the Court ruled for Plaintiffs on this point. See Order of Sept. 26, 2006 at 2, 4. Thus, the

Court ordered that Defendants must (a) produce all remaining elephant medical records for elephants in defendants' custody or control from 1994 to the present, "regardless of when such records were created," and (b) "also provide to plaintiffs a sworn declaration, subject to the penalty of perjury, from an official of defendants with personal knowledge concerning this matter, stating whether any records subject to this Order once existed, but no longer exist; and, if so, detailing what happened to such records." Id. (emphasis added).

Rather than comply with this requirement, Defendants submitted a declaration from a veterinarian who stopped working for Defendants almost ten years ago. See Def. Notice of Compliance, Declaration of Richard Houck (attached as Att. D for the Court's convenience). However, this declaration does not comport with the Court's Order since it is not from a current "official of defendants," and, in any event, fails to address whether Defendants have in fact destroyed any records other than those of Dr. Houck. Id. ¶¶ 3-7 (discussing maintenance of his own records, and the failure of a computer on which records were stored). Thus, Dr. Houck makes no representations regarding elephant medical records generated by other personnel prior to 1997, see, e.g., FEI 21490 (Att. E) (example of a 1993 medical record from a veterinary hospital) or, for that matter, any medical records created after 1997 (when Dr. Houck ceased working for Defendants) that may once have existed, but were subsequently destroyed. Id.

Moreover, Dr. Houck's assertion that "there were no medical records on any animal" when he began working for Defendants in 1984 is simply not true. See, e.g., FEI 4985 (Att. F) (1980 Health Certificate for 6 elephants). Accordingly, until such time as Defendants actually come into compliance with the Court's September 26, 2006 Order, it remains unclear whether

there are any additional medical records that have not been produced, whether any such medical records were destroyed, and, if so, by whom and under what circumstances.

3. *Plaintiffs met their obligation to meet and confer before filing the Motion to Enforce*. Defendants' suggestion that Plaintiffs were required to provide Defendants with additional time to come into compliance with the Court's Order simply because Defendants chose to hire new counsel is erroneous. See supra at 2. However, even putting that aside, the fact remains that Plaintiffs' counsel did directly confer with Defendants' new counsel before filing the Motion to Enforce. See Mot. Enforce Mem., Exhibits 2 and 9 (exchange of letters prior to Motion to Enforce).

Thus, Plaintiffs sent Defendants a detailed letter outlining additional materials that must be provided, and, with the exception of electronic records, Defendants once again asserted that all the records had already been produced. Id. Moreover, as for the electronic records, it was not until Defendants were forced to respond to Plaintiffs' Motion to Enforce that Defendants, for the first time, admitted that they had yet to produce hundreds of pages of electronic records. See Defendants' Opposition to Motion to Enforce at 5, 35 (July 7, 2006) (admitting that 1,200 records had not yet been produced). However, as noted, supra at 2, blaming Covington & Burling is simply not a valid defense to Plaintiffs' request for the fees and costs associated with having to litigate the Motion to Enforce, for the same reasons that it was not a valid defense to the Motion itself. See, e.g., Calvin Green, 1994 U.S. Dist. LEXIS 21346, at *21 (noting that if a party who violates discovery requirements "wishes to remedy the inadequacies of its counsel, the client's remedy is against the attorney in a suit for malpractice") (other citations omitted).

4. *None of Defendants other arguments have any merit*. First, while Defendants may "not believe" that the Certificates of Veterinary Inspection are "medical records," Def. Opp. at 5-6, the Court "believe[d]" otherwise, which is why the Court ordered that these records be produced. Thus, contrary to Defendants' suggestion, Plaintiffs are plainly entitled to recover for this aspect of their Motion to Enforce.

Second, while Plaintiffs acknowledge that, in addition to the records that should have been, but were not, previously produced, Defendants have also produced recently generated records, see Def. Opp. at 5 (discussing recently generated records), Plaintiffs did not move to compel or seek enforcement with respect to these records – which, as Defendants point out, could not have been produced before they were generated. However, the existence of additional, newly generated records that Defendants are producing to Plaintiffs on an ongoing basis is entirely irrelevant to Defendants' failure to comply with the Court's command that previously generated but as-yet-unproduced pages be provided to Plaintiffs. Again, as discussed, thousands of such pages were produced after Plaintiffs filed their Motion to Enforce. See supra at 3.

Third, Defendants' contention that its continued defiance of the Court's Orders has caused "absolutely no prejudice" to Plaintiffs is both erroneous and irrelevant here. Def. Opp. at 12, n.6. Plaintiffs have been severely prejudiced by the delay in obtaining these highly relevant documents, which in turn has delayed the ultimate resolution of this case – Defendants' apparent strategy in every move it makes in this case. See Mot. Enforce Mem. at 24. In any event, the Federal Rules provide that fees "shall" be awarded for a successful motion to compel, unless Defendants' conduct is "substantially justified" – a showing that certainly has not been met here. Fed. R. Civ. P. 37(a)(4)(A).

Finally, Defendants' complaints about the specific fee recovery Plaintiffs seek are way off the mark, for all the reasons that Plaintiffs detailed in their Reply in support of their earlier Motion for Attorneys' Fees and Costs (April 24, 2006), and will not be repeated here. As to itemization, Plaintiffs have previously explained that the time summaries Plaintiffs' counsel have submitted in sworn declarations accompanying the fee requests are entirely appropriate. Id. at 4 (citing Nat'l Ass'n of Concerned Vets v. Secretary of Defense, 675 F.2d 1319, 1327 (D.C. Cir. 1982)).[2]

As for the time and costs incurred, Defendants only complaint relates to the time spent by a paralegal to compare newly produced records with those previously provided. Def. Opp. at 18. However, while Defendants claim that this time would have been necessary regardless of when the documents were produced, Def. Opp. at 17, this plainly is not the case. To the contrary, each time Defendants have produced additional records, Plaintiffs have been forced to yet again review the documents previously produced to (a) insure that the medical history on each of the elephants is complete, (b) ascertain the relationship between the old and new records and eliminate duplicates, and (c) determine which documents may remain missing. Plaintiffs would not have had to spend this additional time had all the documents been produced at the same time as was required by Plaintiffs' original discovery requests and this Court's September 26, 2005 Order compelling production of "all" medical records by September 28, 2006.

---

[2] Although Plaintiffs do not believe it necessary, as with their motion seeking fees for the original Motion to Compel, Plaintiffs' counsel are certainly prepared to submit their billing records for in camera inspection should the Court wish to review them before resolving the Motion. See Reply to Defendants' Opposition to Motion for Attorneys' Fees and Costs at 4-5 (Apr. 24, 2006).

CONCLUSION

For all of the foregoing reasons, Plaintiffs' Motion for Attorneys' Fees and Costs should be granted.

Respectfully submitted,

/s/

Howard M. Crystal
(D.C. Bar No. 446189)
Katherine A. Meyer
(D.C. Bar No. 244301)
Kimberly D. Ockene
(D.C. Bar No. 461191)
Tanya M. Sanerib
(D.C. Bar No. 473506)

Meyer Glitzenstein & Crystal
1601 Connecticut Ave., N.W.
Suite 700
Washington, D.C. 20009
(202) 588-5206

November 27, 2006