

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)
	:	JUDGE: Emmet G. Sullivan
RINGLING BROS. AND BARNUM &	:	
BAILEY CIRCUS, et al.,	:	
	:	
Defendants.	:	
_____	:	

DEFENDANT’S RESPONSE TO ORDER TO SHOW CAUSE

Defendant submits this Memorandum and the accompanying Declaration of Julie Alexa Strauss in response to the Court’s Order to Show Cause why defendant should not be held in contempt.

INTRODUCTION

We understand the Court’s concern about plaintiff’s allegations. Plaintiffs have alleged that defendant intentionally concealed some of its elephant medical records at the time of its initial document production, and that defendant only acknowledged the existence of unproduced medical records during the meet-and-confer process. Plaintiffs theorize that defendant was trying to hide damaging documents and that the existence of these documents was only uncovered by the vigilance of plaintiffs’ counsel in pressing for additional searches of defendant’s files.

It is true that defendant’s initial production of medical records was incomplete, and that the shortcomings of the initial production were discovered in response to the requests of plaintiffs’ counsel during the meet-and-confer process. There

is no truth to the inference that defendant intentionally tried to conceal the existence of responsive documents. Ms. Strauss's accompanying declaration explains why some responsive medical records were not identified before the initial production. The problems resulted from omissions and miscommunication within defendant's organization consisting of multiple locations, traveling veterinarians without fixed company offices, three circus units that are constantly on the move, and a problematic medical records software system.

Defendant respectfully submits that, on the facts and the law, there is no basis for a contempt citation. At the same time, defendant recognizes that its initial production of documents was deficient, and that it discovered and acknowledged the inadequacy when it responded in good faith to plaintiffs' requests for additional searches during the meet-and-confer process.

BACKGROUND

In December 2003, before the parties began discovery or exchanged initial disclosures in this case, defendant's in-house counsel, Julie Strauss, recognized that elephants' medical records were likely to be documents that would be required in discovery. At that time, Ms. Strauss sent an e-mail to William Lindsay, DVM – then defendant's Director of Veterinary Medicine at the time – John Kirtland – then defendant's Executive Director for Animal Stewardship – Tracy Mahoney – then the Executive Assistant to Feld's Vice President of Circus Operations – Jim Andacht – Feld's Vice President of Circus Operations – as well as a staff member in Feld's legal department, noting that discovery would likely begin soon and would require document production and disclosure of information regarding a wide variety of issues involving

elephant care and treatment, covering both specific matters and general practices.

(Strauss Decl. at ¶ 5.¹) The e-mail specifically referenced the need to gather each elephant's medical records. (*Id.*)

On March 30, 2004, plaintiffs served defendant with their discovery requests, including interrogatories, document requests, and a request for admission. Ms. Strauss began working with attorneys from Covington & Burling to prepare responses to plaintiffs' requests. (*Id.* at ¶ 6.) As part of that effort, Ms. Strauss personally spoke with a number of Feld employees to answer interrogatories and locate documents responsive to the requests. (*Id.*) Ms. Strauss opted for telephone conversations rather than other forms of communication because Feld's organization consists of multiple locations and traveling units, so that written and e-mail communications are often unreliable. (*Id.* at ¶ 15.) At the culmination of that effort, Feld provided plaintiffs with more than 3,600 pages of documents, as well as interrogatory responses and a response to the request for admission. (*Id.* at ¶ 6.) It has since provided more than 2,500 additional pages, supplemental interrogatory responses, and offered to produce additional documents under a protective order. (*Id.*)

One of the document requests in plaintiffs' discovery requests sought all medical records that related to each elephant that Feld identified as one that it owned or leased. (*Id.* at ¶ 7.) Another sought all documents about each elephant's birth, death, breeding, and other information. (*Id.*) Feld asserted partial objections to these requests, but it agreed to produce non-privileged documents dated 1996 or later that it located after a reasonable search. (*Id.*)

¹ A copy of the Declaration of Julie Alexa Strauss ("Strauss Decl."), defendant's Vice President and Corporate Counsel, is attached at tab A.

To gather the documents in question, Ms. Strauss asked for copies of the medical records for all elephants from each of the three traveling units of Ringling Bros. and Barnum & Bailey Circus – the Blue, Red, and Gold units – as well as from Feld’s two facilities housing elephants – the Ringling Bros. Center for Elephant Conservation (“CEC”) and the Williston retirement facility. (*Id.* at ¶¶ 8, 15.) Ms. Strauss believes that she spoke with the general managers or veterinary technicians on each touring unit, two employees at the CEC, and an employee at the Williston facility, among others, while preparing Feld’s discovery responses, and she is confident that she would have discussed the need to gather medical records for every elephant at each location in conversations with those individuals. (*Id.* at ¶ 15.) The records that Ms. Strauss received in response to these inquiries formed the bulk of the 700-plus pages of medical records that Feld produced in response to plaintiffs’ requests. (*Id.* at ¶ 17.) At no time did any of the members of the animal care staff (or any other Feld employee) tell Ms. Strauss that the medical records maintained at each site were incomplete, or that anyone maintained additional medical records about elephants. (*Id.* at ¶ 16.)

The decision to seek records from these sources was based on Ms. Strauss’s understanding of Feld’s policies based on (a) practical uses for the medical records and (b) the relevance of the records to regulatory agencies and her experience making documents available to the USDA and other regulatory agencies that wanted access to the documents. First, Feld’s policy is that medical records are kept on site with the animals to facilitate provision of medical care. Feld has employed more than one staff veterinarian, each of whom travels on a constant basis, so the same veterinarian does not always treat an animal. (*Id.* at ¶ 10.) Staff veterinarians do not have fixed offices at

Feld facilities. (*Id.*) In each city where Ringling Bros. and Barnum & Bailey Circus performs, Feld also employs local, on-call veterinarians in case of emergencies. (*Id.*) In addition, other Feld animal care staff may also administer medical care to an animal or otherwise need access to the animal's medical records. (*Id.* at ¶ 11.) Because so many different people may need access to an animal's medical records, Feld's official policy is to keep the records with the animals.

Second, USDA inspectors, as well as state and local inspectors in many jurisdictions, can and do conduct unannounced inspections of each of Feld's facilities, and often seek medical records for animals on site. (*Id.* at ¶ 9.) For example, in 2001 USDA investigators asked to see medical records for an elephant named Nicole. (*Id.* at ¶ 14.) The relevant records were at the CEC, where Nicole was living at the time, and the records were made available to the USDA at the CEC. (*Id.*) To Ms. Strauss's knowledge, neither the USDA nor any local regulatory agency has complained to defendant about the on-site medical records made available to them for any inspection or investigation. (*Id.* at ¶ 9.)

Medical records are maintained at the units, the CEC, and the Williston facility for the elephants housed at each location. (*Id.* at ¶ 8.) Feld has also been using a computerized system for medical records called "DVMax." (*Id.* at ¶ 12.) When a veterinarian or other animal care personnel made an entry to an animal's record in DVMax, the updated record would be sent to the CEC for incorporation into the central DVMax system. (*Id.* at ¶ 13.) The CEC would update the DVMax entries, and it would then send the updated version back to the units. (*Id.*) The units would then have a complete, updated set of medical records which they could then print out or add to their

own electronic records. (*Id.*) Ms. Strauss understood that all relevant employees on the units and at the CEC were using DVMax to update medical records. (*Id.* at ¶ 16.)

In June 2004, defendant made its first production of documents to plaintiffs. This production included all of the elephant medical records it had gathered, totaling more than 700 pages. More than four months later, on October 19, 2004, plaintiffs sent a letter that for the first time questioned the scope of defendant's production of medical records.²

In early November, Ms. Strauss was out of Washington participating in a USDA investigation of the death of an elephant named Riccardo at the CEC. As part of that investigation, Ms. Strauss, Jeannie Perron of Covington & Burling, William Lindsay, and Gary Jacobsen met with the USDA at the CEC. (Strauss Decl. at ¶ 18.) Shortly before that meeting, Ms. Strauss and Dr. Perron received a set of handwritten, day-to-day observations about Riccardo made by animal care staff at the CEC, as opposed to veterinarians. (*Id.*) Ms. Strauss had not seen those documents before, nor does she recall having been aware that the documents existed. (*Id.*) At the time, Ms. Strauss was focused on the Riccardo investigation, and she did not realize that the existence of the document might suggest that Feld's document production in this case might be incomplete. (*Id.*)

Shortly thereafter, Mr. Wolson relayed to Ms. Strauss concerns voiced by plaintiffs about defendant's discovery responses. (*Id.* at ¶ 19.) Mr. Wolson specifically asked about records for Riccardo, at which point Ms. Strauss realized that the Riccardo documents might be responsive in this case. (*Id.*) She provided the records to Mr.

² Tab B at 6.

Wolson and began discussing with him the possibility of obtaining a protective order for them. (*Id.*) At some point, definitely after defendant's document production and likely after the Riccardo investigation, Ms. Strauss learned that Dr. Lindsay had documents relating to Feld's elephants in his possession at his home office in Toronto, Canada. (*Id.* at ¶ 20.) Ms. Strauss has also learned since the initial document production that some Feld employees may have been failing to enter medical information into DVMax as a result of software compatibility and other technical concerns. (*Id.*)

Following up on a meet-and-confer meeting of November 15 and his subsequent discussions with Ms. Strauss, Mr. Wolson wrote to plaintiffs stating that defendant was searching for additional responsive documents.³ Mr. Wolson then wrote to plaintiffs requesting agreement that "before providing any additional or more detailed medical records, we ask plaintiffs to consent to the production of such materials under a protective order."⁴ Defendant asked for that protective order in order to expedite the production of material to plaintiffs while accommodating defendant's concerns about research interests in some of the medical records and the possibility of unfair public attacks on the veterinarians' professional reputations. (Strauss Decl. at ¶ 23.) When plaintiffs declined to agree to a protective order, Feld filed a motion seeking an order protecting the medical records.

Ms. Strauss states that at no time during the discovery process has Feld sought to conceal information or to avoid producing information to plaintiffs that is responsive to plaintiffs' document requests. (*Id.* at ¶ 24.) Feld has not asserted that its medical records are privileged, nor has it denied the existence of additional documents.

³ Tab C at 2.

⁴ Tab D at 3.

As plaintiffs have acknowledged in their motion to compel (at 29), defendant had “admit[ted] that they have more responsive medical records” before plaintiffs filed their motion to compel.

ANALYSIS

The record before the Court provides neither a factual nor a legal basis to hold defendant in contempt of Court. Ms. Strauss’s declaration and the attached correspondence between counsel make clear that defendant was not intentionally hiding information in preparing its discovery responses. And there is no legal foundation on which to hold defendant in contempt, because defendant has not violated a discovery order issued by the Court.

I. Defendant Did Not Intentionally Conceal Documents.

No one at Feld sought to conceal any responsive information from plaintiffs in the discovery process. In directing the gathering of documents, Ms. Strauss attempted to retrieve the documents plaintiffs requested from the places they were supposed to be located, and where she and others had found similar documents in the past. Under the circumstances, the expectation that the elephants’ medical records would be kept with the traveling units, updated through DVMax, was understandable. Indeed, she had no reason to think that defendant’s staff veterinarians would have any medical records in addition to the ones on site with the animals because the veterinarians do not have offices at Feld, they travel much of the year, and they treat animals at numerous sites around the country. (Strauss Decl. at ¶ 10, 16.) These practical considerations were an important part of Feld’s centralized medical record policy.

The record is also clear that some medical records were not identified during defendant's initial document search as a result of misunderstandings within the organization. In particular, some members of defendant's animal care staff interpreted "medical records" as covering only those materials that were created by a veterinarian and/or that dealt directly with medical issues. (*Id.* at ¶ 22.) Thus, handwritten observation notes and similar documents were not gathered for production. Though not an unreasonable interpretation, defendant did not intend to use this narrower interpretation of "medical records" in discovery, and it included those documents in the offer to supplement. (*Id.*) However, the miscommunication was not revealed to any of defendant's in-house or outside counsel until well after the discovery responses were served.

Moreover, problems with Feld's DVMax computer medical records database led to the oversight of some documents during the course of the initial document search. DVMax was intended to serve as a central database that all animal caregivers could update and which would ensure that all units had fully updated medical records. (*Id.* at ¶ 12.) However, it later came to light that entries in DVMax may have been incomplete, either because of employee oversight or because of technical problems that prevented employees from updating the system. (*Id.* at ¶ 20.) As a result, some Feld employees, including veterinarians, were keeping separate files of notes about the care given to the elephants. (*Id.*) Ms. Strauss was unaware of these additional and/or supplemental documents at the time of the initial document search. (*Id.* at ¶¶ 4, 8, 20.)

The oversights in defendant's search likely relate to the fact that defendant's medical recordkeeping was not as organized as it should be. Dr. Wiedner,

defendant's current Director of Veterinary Care, has concluded that the recordkeeping must be improved. (*Id.* at ¶ 21.) Having taken over responsibilities from Dr. Lindsay, Dr. Wiedner, along with others at Feld, is now engaged in systemizing the management of medical records. (*Id.*)

The discovery process worked here in the way the Federal Rules of Civil Procedure contemplate. Although defendant overlooked responsive medical records in its initial document search, it engaged in good-faith discovery discussions with plaintiffs in an effort to avoid burdening the Court with unnecessary discovery motions, and it acknowledged the oversight before plaintiffs filed their motion to compel. While regrettable – and defendant does regret its oversight – the inadvertent failure to identify all medical records before June 2004 does not warrant an order of contempt of court.

II. A Contempt Citation Is Not Legally Justified.

Defendant has not violated any order of this Court. A civil contempt citation would be appropriate “only if the putative contemnor has violated an order that is clear and unambiguous, and the violation must be proved by clear and convincing evidence.” *Armstrong v. Executive Office of the President, Office of Admin.*, 1 F.3d 1274, 1289 (D.C. Cir. 1993) (*per curiam*) (internal quotes and citations omitted); *see also Lee v. Dept. of Justice*, 413 F.3d 53, 63 (D.C. Cir. 2005). Similarly, a discovery sanction under Federal Rule of Civil Procedure 34(b) would be appropriate only for disobedience of an Order issued by the Court. *See Banks v. Office of the Senate Sergeant-At-Arms and Doorkeeper*, Civ. A. Nos. 03-56, 03-686, 03-2080, 2005 WL 1074329, at *1 (D.D.C. May 4, 2005) (Facciola, M.J.) (court may sanction a party that fails to comply with a “discovery order”).

Defendant failed in the first instance to respond fully to plaintiffs' document requests. While that oversight should not have occurred, it did not involve any failure to comply with an order of the Court instructing that medical records be produced. Nor is there any dispute before the Court about the discoverability of the medical records that defendant has identified; once defendant's request for a protective order is resolved – and we expect to reach agreement with the plaintiffs on this issue this week – defendant will produce the additional medical records to plaintiffs. Because defendant has not violated an order of the Court, a contempt citation is not appropriate here. *See id.*; *see also Armstrong*, 1 F.3d at 1289 (reversing contempt citation “because the appellants were never directly ordered to promulgate new regulations”).

CONCLUSION

Defendant regrets its oversights during its initial search for documents in this case. For the reasons stated herein, defendant's conduct does not justify a contempt citation.

Respectfully Submitted,

COVINGTON & BURLING

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