

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

**AMERICAN SOCIETY FOR THE  
PREVENTION OF CRUELTY TO  
ANIMALS, et al.,**

**Plaintiffs,**

**v.**

**RINGLING BROS. AND BARNUM &  
BAILEY CIRCUS, et al.,**

**Defendants.**

**Case No. 03-2006 (EGS/JMF)**

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**DEFENDANT FELD ENTERTAINMENT INC.'S OPPOSITION TO  
PLAINTIFFS' MOTION FOR ATTORNEY'S FEES AND COSTS**

**INTRODUCTION**

On February 23, 2006, the Court ordered plaintiffs to submit “any motion requesting attorney’s fees and costs related to their Motion to Compel Discovery of Veterinary Records (Doc. No. 27)” (“Motion to Compel”) by April 3, 2006. Plaintiffs subsequently filed a motion requesting attorney’s fees and costs totaling \$26,318.03. Plaintiffs’ motion, however, inappropriately requests reimbursement for fees and expenses related to motions other than the Motion to Compel, misstates hourly rates included in the “Laffey Index,” and fails to itemize fees and costs associated with the Motion to Compel. Plaintiffs’ motion therefore should be denied.

**FACTS**

Defendant has explained in prior pleadings that it in no way attempted to conceal the existence of responsive documents, and the deficiencies in its initial production were the result of administrative challenges unique to the traveling circus units, traveling veterinarians, and a

problematic medical records software system. As explained more fully in its Response to Order to Show Cause (9/21/05), which is incorporated herein by reference, Defendant acknowledged the deficiencies in the initial production and responded in good faith to plaintiffs' request for additional searches. Additionally, defendant has retained new counsel who is working diligently to ensure that all relevant records are produced to plaintiffs.<sup>1</sup>

### ARGUMENT

#### **I. The Court Should Not Award Attorney's Fees and Costs as Defendant's Conduct Was Substantially Justified and an Imposition of Fees and Costs Would Be Unjust**

Pursuant to Rule 37(a)(4), plaintiffs seek an award of attorney's fees and costs totaling \$26,318.03. It is well established that the Court has broad discretion to determine whether and what type of sanctions to impose. Fed. R. Civ. P. 37; *Kister v. District of Columbia*, 229 F.R.D. 326 (D.D.C. 2005); *see also In re Multi-Piece Rim Prod. Liab. Litig.*, 653 F.2d 671 (D.C. Cir. 1981). For motions granted in part and denied in part, Rule 37(a)(4)(C) controls. It provides, in pertinent part, "[i]f the motion is granted in part and denied in part, the court may . . . apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner." Fed. R. Civ. P. 37(a)(4)(C) (emphasis added); *Cobell v. Norton*, 226 F.R.D. 67, 91 (D.D.C. 2005); *Alexander v. FBI*, 192 F.R.D. 25, 31 (D.D.C. 2000) (applying Rule 37(a)(4)(C) to a motion to compel granted in part, denied in part). It also is within the Court's discretion to award no fees and costs at all. *Lohrenz v Donnelly*, 187 F.R.D. 1, 10 (D.D.C. 1999) (where motion to compel was granted in part and denied in part court refused to award sanctions to

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<sup>1</sup> In a footnote, plaintiffs contend, without additional explanation, that defendant still has not produced all of the veterinary records as ordered by this Court on September 26, 2005. Pl. Motion Requesting Attorney's Fees and Costs at 2, n.1. Defendant's newly retained counsel is in the process of reviewing the document productions to ensure that all relevant medical records have been produced.

either side); *Alexander v. FBI*, 186 F.R.D. 200, 207 (D.D.C. 1999) (parties' discovery disagreements were justifiable; no fees awarded).

Here, although the Court granted plaintiffs' motion with respect to the veterinary medical records, plaintiffs were not successful on other issues raised in their Motion to Compel. Indeed, the remainder of the Motion to Compel was referred to Magistrate Judge Facciola. September 26, 2005 Order (Sullivan, J.). Defendant's Motion for a Protective Order also was granted in part at that time. *Id.* Subsequently, Judge Facciola ruled in favor of defendant on several contested discovery issues remaining in the Motion to Compel. February 23, 2006 Order (Facciola, M.J.) (granting in part and denying in part Plaintiffs' Motion to Compel). For example, the Court held that defendant was neither obligated to log, nor required to produce, documents that clearly were the product of outside counsel's work product regarding Tom Rider. Defendant did not, as plaintiffs attempted to argue, waive any work product by failing to reveal voluntarily its defense strategies and preparation in this case to plaintiffs. *See id.* at 4-6. Similarly, the financial information regarding profitability was deemed too tangential to this litigation, and defendant was protected from such irrelevant discovery. *See id.* at 8-9. Defendant's success in defending such issues raised in the Motion to Compel is evidence that it was substantially justified in making those legal arguments. *Cobell*, 226 F.R.D. at 91-92. This, coupled with the challenges and circumstances surrounding the production of the veterinary medical records at issue, renders the imposition of fees and costs unwarranted and unjust.

Even if the Court determines that plaintiffs are entitled to those fees and costs related to their efforts to obtain the veterinary medical records, plaintiffs have not provided a basis upon which such fees or costs could be determined. Plaintiffs state that the attorney's fees spent in connection with the veterinary records issue totals \$4,109.10, roughly one-fifth of the total time

spent on the Motion to Compel (67.32 hours). Declaration of Katherine A. Meyer at 2 (April 3, 2006) (“Meyer Decl.”). Without itemization of these fees (and the accompanying costs, discussed *infra*), neither the Court nor defendant can adequately assess whether these fees are reasonable. See *Concerned Veterans v. Sec’y of Def*, 675 F.2d 1319, 1327 (D.C. Cir. 1982) (fee application must contain sufficiently detailed information about hours logged and work done). Accordingly, plaintiffs should be required to produce an itemized fee statement or bill of costs so that defendant can be afforded a reasonable opportunity to analyze such fees and object if they are unreasonable. *Kister*, 229 F.R.D. at 331 (“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). As stated in *Kister*, “[t]he fee application should therefore indicate whether nonproductive time or time expended on unsuccessful claims was excluded, **and, if time was excluded, the nature of the work and the number of hours involved should be stated.**” *Kister*, 229 F.R.D. at 331 (quoting *Concerned Veterans*, 675 F.2d at 1327-28) (emphasis added).

#### A. Calculation of Hourly Rate

Plaintiffs argue that the hourly rates used by the Department of Justice in the Laffey Matrix represent the prevailing market rates for attorneys at varying levels of experience, as well as law clerks and paralegals. Pl. Motion for Attorney’s Fees at 2. While defendant objects to the award of any costs or fees, it does not object to the use of the Laffey Matrix to determine the appropriate hourly rates, with one exception: plaintiffs have misstated the hourly rate for law clerks as \$150 per hour. Meyer Decl. at 2-3. The Laffey Matrix provides for a **\$115 rate per hour** for law clerks and paralegals. United States Attorney’s Office Laffey Matrix 2003-2006 (attached hereto as Exhibit A). Accordingly, an award by the Court, if any, should reflect a \$35

reduction per hour for compensable law clerk time, in accordance with the hourly rate listed in the Laffey Matrix.<sup>2</sup>

**B. Plaintiffs Have Failed to Itemize Their Costs**

Plaintiffs also request that the Court order defendant to reimburse them for “approximately \$1,412.53 out-of-pocket costs in connection with this matter”. Meyer Decl. at 3. Plaintiffs have not segregated their costs pertaining to each of the three motions, nor have they broken them down into identifiable categories. This “global” cost estimate makes it impossible for defendant to review and contest non-compensable costs from this combined total. Moreover, plaintiffs’ vague description of cost “including Westlaw charges, couriers, copying and phone bills”, Meyer Decl. at 3, does not allow defendant to assess their reasonableness. Accordingly, plaintiffs should be required to produce an itemized fee statement or bill of costs so that defendant can be afforded a reasonable opportunity to object to such costs.

**II. Fees and Costs Related to Plaintiffs’ Response to Defendant’s Motion for a Protective Order Should Not Be Compensable**

Plaintiffs seek \$11,919.85 in fees related to their opposition to Defendant’s Motion for a Protective Order. Meyer Decl. at 2-3. This request, however, is outside the scope of the Court’s Order, and is unwarranted for several reasons.

First, the Court’s Order of February 23, 2006 states that “plaintiffs shall file any motion requesting attorney’s fees and costs **related to their Motion to Compel Discovery of Veterinary Records (Doc. No. 27)**”. See February 23, 2006 Order (Sullivan, J.) (emphasis added). By its own language, the Order does not invite plaintiffs to seek recovery of attorney’s

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<sup>2</sup> As stated previously, any calculation of compensable fees and costs would be premature at this time. Without having the benefit of reviewing an itemization of plaintiffs’ attorney’s fees and costs, defendant cannot determine whether the fees are reasonable, inflated, or apportioned.

fees or costs in connection with plaintiffs' opposition to Defendant's Motion for a Protective Order.

Second, although Plaintiffs' Motion to Compel and Defendant's Motion for Protective Order may address like subject matter, *i.e.* veterinary medical records, each motion was distinct, was separately briefed, dealt with separate issues, and had different dispositions. Specifically, the Motion to Compel addressed plaintiffs' ability to obtain the veterinary medical records in discovery, while Defendant's Motion for a Protective Order focused on obtaining confidential designations for a sub-set of the veterinary records produced in discovery. As such, the motions, and the subsequent work done by plaintiffs to brief each, are "truly fractionable" from each other for the purpose of analyzing a request for attorney's fees and expenses. *See Kister*, 229 F.R.D. at 333-34.

Third, and most important, even if the Court's Order invited plaintiffs to file a motion to recoup fees and expenses related to their opposition to the protective order, which it does not, such an imposition of fees is unwarranted. Even in the absence of the Court's Order, if plaintiffs were to proceed solely under Rule 37(a)(4)(C), defendant was substantially justified in seeking a protective order requiring confidentiality of the veterinary medical records, and therefore, should not be held liable for fees and costs. *See Mitchell v. Nat'l Railroad Passenger Corp.*, 217 F.R.D. 53, 55 (D.D.C. 2003) (substantial justification can eliminate the imposition of fees and expenses under Rule 37(a)(4)(C)). The Court itself contemplated that defendant might need to seek a protective order during this litigation. In November 2003, the Court held that defendant could seek protection for the confidentiality of "particular specified information that is to be produced in discovery, upon a showing of 'good cause' . . ." *See Order of November 25, 2003 at 2.* In February of 2005, Defendant requested a protective order allowing for confidentiality

designations on various categories of records, including veterinary medical records that were the foundation of employee research papers and articles. Def. Motion for Protective Order at 2. Defendant had good cause to support its motion for a protective order, specifically that dissemination of certain medical records could prevent defendant's employees from publishing scientific articles and research. Def. Reply Mem. at 4. Furthermore, although the Court granted the motion in part and denied it in part, it recognized that defendant's concern about public dissemination of the elephant medical records was warranted, when it stated the following:

Plaintiffs are admonished, however, that the purpose of discovery is to produce and seek evidence for use *in litigation* and the Court will not take lightly any abuse of the discovery process for purposes of publicity or to argue the merits of plaintiffs' claims in the media, as opposed to the Court.

September 26, 2005 Order (Sullivan, J.) (emphasis in original).

Because the Court granted the motion in part, allowing for a protective order with respect to veterinary medical records that formed the basis of scientific research, and admonished plaintiffs against the inappropriate use of documents outside of this litigation, defendant was substantially justified in seeking the protective order. *See In Re Multi-Piece Rim Prod. Liab. Litig.*, 653 F.3d at 680 (evaluation of degree of justification of party's motion is within the sound discretion of the court; court denied request for expenses as motion was not devoid of justification).

Importantly, as noted by defendant in the prior protective order briefings, the protective order neither prevents plaintiffs from receiving these records, nor from using them to pursue their claims in this litigation. Despite having access to and use of defendant's medical records in this litigation, plaintiffs, for whatever reason, nevertheless chose to spend over \$11,000 to oppose defendant's motion, ostensibly to ensure that they also could disseminate these records to the public, other animal rights groups, or whomever else they desired. Such is not the proper

purpose of discovery in the judicial system, and it is not an expense that defendant should have to bear.

Considering these circumstances, and in light of the good cause supporting the request for a protective order to maintain the confidentiality of veterinary medical records, it therefore would be unjust to award plaintiffs fees and costs for time spent opposing defendant's motion for a protective order. Accordingly, the Court should deny the \$11,919.85 sought by plaintiffs for opposing the motion for a protective order.

**III. Fees and Expenses Related to Plaintiffs' Reply to Defendant's Response to Motion to Show Cause Should Not Be Compensable**

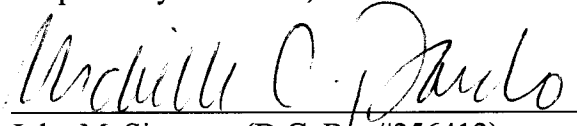
Plaintiffs also seek fees and expenses in the amount of \$8,877.55 for the time spent responding to defendant's response to the Order to Show Cause. Meyer Decl. at 3. This is puzzling given that the Court has not ruled on the Order. In any event, defendant contends that it has complied with the Order and demonstrated that it should be discharged. It is awaiting the Court's ruling on the matter. Accordingly, plaintiffs' request for fees and costs associated with the show cause order should be denied.

**CONCLUSION**

For the reasons stated above, defendant respectfully requests that the Court deny plaintiffs' motion for attorney's fees and costs, because defendant was substantially justified in its position and an award would be unjust. In the alternative, defendant requests that the court exclude from any compensable total the fees and costs related to motions other than the Motion to Compel Veterinary Records. Finally, defendant requests that the Court apply the hourly rates listed in the Laffey Matrix for attorneys and law clerks, rather than the amounts represented in plaintiffs' briefing, and order plaintiffs to provide an itemized statement of all fees and costs.



Respectfully submitted,

A handwritten signature in cursive script, reading "Michelle C. Pardo", written in black ink over a horizontal line.

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