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 TO DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR ATTORNEYS' FEES AND COSTS

In response to plaintiffs' motion for attorneys' fees and costs, defendants insist that the $26,319.03 requested as a sanction for defendants' failure either to produce or even identify the medical records for the endangered elephants at issue in this case is both unwarranted and unreasonable, and hence should not be imposed by this Court. However, except for defendants' correction of the Laffey rate that should have been applied to the law clerks' time, which reduces plaintiffs' total request by $305 to approximately $26,000 (rounded down), as demonstrated below, none of the reasons given by defendants has any merit.

1. Defendants contend that the imposition of a sanction is unwarranted because defendants' failure to produce or even divulge the existence of voluminous medical records for the animals in response to plaintiffs' March 2004 discovery requests was "the result of administrative challenges unique to the traveling circus units, traveling veterinarians, and a problematic medical records software system." Defendants' Opposition at 1-2. However, this

statement not only fails to contain any citations to the record of this case, but is also at odds with previous arguments made by defendants to defend their blatant failure to abide by the applicable discovery rules.

Thus, while defendants now apparently assert – with no proof whatsoever – that their failure to produce or identify the medical records was due to the fact that they use "traveling veterinarians," Opposition at 1, defendants previously insisted to the Court that the reason they had failed to produce these records was because they were being "stored" at the home of their chief veterinarian, Dr. William Lindsay. See, e.g., Transcript of September 16, 2005 Hearing, at 44 ("in this case, records that were off-site and stored in one of the veterinarian's homes were overlooked") (emphasis added); see also id. at 33 (identifying Dr. Lindsay as the veterinarian who maintained veterinary records at his home).

Furthermore, all of the various – and shifting – reasons given by defendants for failing to produce or identify the medical records have already been proven to be completely unavailing, particularly in light of defendants' counsel's unambiguous – but erroneous – representation that defendants had provided the "complete" medical records to plaintiffs. See Plaintiffs' Reply to Defendants' Response To Order To Show Cause (October 5, 2005) ("Pl. Show Cause Mem."); id. at 4 (quoting defendants' counsel's letter to plaintiffs' counsel, representing that "the records that defendants produced to you are complete, in that they contain all of the pages in defendants' files"). Since plaintiffs have already thoroughly briefed these matters in connection with the defendants' response to the Court's Order to Show Cause why defendants should not be held in contempt of Court for failing to produce these records, and, in response, the Court instructed plaintiffs to file their motion for monetary sanctions, plaintiffs have not repeated all of those arguments again, but instead have incorporated them by reference. See Plaintiffs' Motion

Requesting Fees and Costs at 1.[1]

2. Defendants' contention that the request for fees and costs is unwarranted because plaintiffs did not prevail on all aspects of their motion to compel, Defendants' Opposition at 3, makes no sense. The sworn declaration of plaintiffs' lead counsel makes it absolutely clear that the plaintiffs are only seeking the imposition of a monetary sanction for time spent on compelling the production of the medical records, and are not seeking any fees for time spent on any of the other categories of records that were the subject of plaintiffs' motion to compel. See Declaration of Katherine A. Meyer ¶ 4 ("since that motion covered several issues, in addition to the medical records, plaintiffs are only seeking reimbursement for approximately one-fifth of the time spent on the motion to compel, which includes the time spent on the factual background and legal arguments for that part of the brief, including the motion and memorandum, the reply memorandum, and the oral argument") (emphasis added).

3. Except for the fact that plaintiffs inadvertently applied the wrong Laffey rate for law clerk services, defendants do not contest the rates that plaintiffs seek for their attorneys' time. Nor do defendants actually contest the reasonableness of plaintiffs' request for approximately $26,000 – which probably pales in comparison to what the defendants were charged by their attorneys for work on this same matter. Nevertheless, defendants insist that this Court cannot make such an award because plaintiffs have not submitted "an itemized fee statement or bill of costs." Opposition at 4. However, this is simply an incorrect statement of

[1]Defendants conspicuously argue that the Court should not impose sanctions for defendants' misconduct because "[a]dditionally, defendant has now retained new counsel who is working diligently to ensure that all relevant records are produced to plaintiffs," Opposition at 2, clearly implying that defendants' previous counsel is to blame for the discovery violations that occurred here. However, unless defendants are going to reveal to the Court the actual reasons why they suddenly changed counsel in this case, they certainly should not be permitted to use their abrupt change in counsel as a basis for escaping sanctions for their own misconduct.

both the law and the facts.

An application for fees and costs "must be sufficiently detailed to permit the District Court to make an independent determination whether or not the hours claimed are justified." Nat'l Ass'n of Concerned Vets. v. Sec. of Defense, 675 F.2d 1319, 1327 (D.C. Cir. 1982). In addition, "the better practice is to prepare detailed summaries based on contemporaneous time records indicating the work performed by each attorney for whom fees are sought." Id.

That is precisely what plaintiffs did here. They submitted a sworn declaration from their lead attorney which (1) states that she has reviewed the "firm's contemporaneous time and expense records," (2) explains precisely how many hours were spent on the motion to compel, (3) further explains that, in view of the fact that the motion covered several issues, plaintiffs only seek reimbursement for one-fifth of that time which covers the portion of time spent on the medical records issue, and (4) states with precision, how many such hours of time were spent by each of the named attorneys' who worked on this matter and by the law clerks. See Meyer Declaration ¶ 4. Plaintiffs' counsel also itemized the out-of-pocket costs incurred in connection with this matter. Id. ¶ 8. Therefore, based on this sworn declaration, and this Court's own experience as to the time normally spent on such matters, surely the Court has ample basis for determining that the amount of fees and costs requested here is eminently "reasonable."

Nevertheless, should the Court wish to review plaintiffs' actual billing records, plaintiffs are more than willing to produce them for the Court in camera. See Concerned Veterans, supra, 675 F.2d at 1327 ("[i]n any event, once the reasonableness of the hours claimed is an issue, the applicant should voluntarily make his time charges available for inspection by the District Court

or opposing counsel on request") (emphasis added).[2]

4. Defendants also contest plaintiffs' request for fees and costs for time spent on the related opposition to the defendants' motion for a protective order and for time spent on plaintiffs' response to the defendants show cause submission. Defendants' Opposition at 5-8. However, this Court's February 23, 2006 Order invited plaintiffs to file a request for fees and costs "related to" their motion to compel the medical records.

As the proceedings in this case amply demonstrate, and as plaintiffs' lead counsel explained in her declaration, the time spent by plaintiffs on opposing defendants' motion for a protective order for the medical records was "inextricably related" to the motion to compel on this issue. See Meyer Declaration ¶ 2. Thus, in their opposition to plaintiffs' motion to compel the medical records, defendants' asserted – as a defense to the motion – their motion for a protective order, which they filed on the same day as their opposition to the motion to compel, see Defendants' Opposition to Motion to Compel, at 25-28, and also relied on the same Declaration that they submitted in support of the motion for the protective order. See id. at 26; Declaration of Bruce Read. Moreover, it was in their motion for a protective order that defendants – for the first time – admitted that, in response to plaintiffs' discovery request for "all" of the medical records for each of the elephants, defendants only produced "a limited number of their elephants' veterinary records," and that defendants "are in possession of additional veterinary records that are responsive to plaintiffs' document requests." Defendants' Motion For A Protective Order at 1 (emphasis added).

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[2]Because plaintiffs' billing records reveal both work product and attorney-client communications, they are not willing to make them available to defendants at this juncture.

Not surprisingly, plaintiffs then relied on those representations to bolster their motion to compel, and to oppose defendants' request for a protective order – on the ground that "in light of the way that defendants have proceeded with respect to these clearly relevant materials, they certainly should not be rewarded with a broad protective order that allows them to keep all of these highly relevant records secret . . .." Plaintiffs' Surreply In Opposition To Motion For Protective Order at 4; see also Plaintiffs' Reply to Opposition to Motion to Compel at 9 (cross-referencing arguments made in opposition to defendants' motion for a protective order).

Indeed, although defendants insist that they were "substantially justified" in seeking a broad protective order for all of the medical records that they failed to identify, Defendants' Opp. at 7, this Court disagreed – relying heavily on the fact that defendants had failed to produce or identify these records in response to plaintiffs' discovery requests. Thus, the Court ruled that:

> [a]lthough properly requested by plaintiffs, defendants failed to turn over all veterinary records, failed to properly object to the production of the records, and failed to adequately assert any privilege that would justify non-production of the records. Defendants have therefore waived their right to object to the discovery of the veterinary records.

Order (September 26, 2005) (emphasis added) (citation omitted). Accordingly, the Court denied the protective order sought by defendants, and instead approved the much more limited protective order proposed by plaintiffs. Id. Therefore, time spent opposing defendants' protective order for the medical records was clearly "related to" plaintiffs' motion to compel the production of those records. Order (February 23, 2006).

Likewise, the time spent responding to the defendants' Show Cause submission is also "related to" the motion to compel, since it explained in great detail precisely why the Court should not excuse defendants' failure to either produce, or at an absolute minimum identify the existence of, the missing medical records, including evidence that defendants had also failed – or

refused – to disclose elephant medical records to USDA inspectors attempting to enforce the requirements of the Animal Welfare Act. See Pl. Show Cause Mem. Id. at 8-11.

Moreover, "'under Rule 37, the district court has broad discretion to impose sanctions for discovery violations,' and to determine what sanctions to impose." Kister v. District of Columbia, 229 F.R.D. 326, (D.D.C. 2005) (emphasis added), quoting, Bonds v. District of Columbia, 93 F.3d 801, 807 (D.C. Cir. 1996). In addition, "when assessing the reasonableness of the sanction imposed, a district court should consider that the purpose underlying Rule 37(a)(4)(C) is 'not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent.'" Id.

Therefore, in light of the extreme relevance of the animals' medical records to the core issues in this case, the defendants' clear efforts to impede plaintiffs' ability to obtain those records – and thereby substantially delay this case – requiring defendants to pay plaintiffs $26,000 in fees and costs for all of the work they had to undertake to obtain access to those records is clearly reasonable. See also Pl. Show Cause Mem. at 8-11 (defendants have likewise refused to produce the elephants' medical records for the United States Department of Agriculture under the Animal Welfare Act). Indeed, substantially reducing plaintiffs' fee request as requested by defendants would simply not have the kind of deterrent effect that is intended by Rule 37, particularly since defendants make millions of dollars from the circus each year,[3] and have shown a propensity for impeding discovery in other cases for which they have also been

[3] According to the 2004 federal tax return for Feld Entertainment, Inc. & Subsidiaries, which includes the Ringling Bros. circus, "total income" for 2004 was $ 203,461,295. This document, attached as Exhibit A, was introduced as an Exhibit in People for the Ethical Treatment of Animals, Inc. v. Kenneth Feld, et al., No. 2004-220181 (Cir.Ct. Fairfax County, Va.).

sanctioned. See, e.g., People for the Ethical Treatment of Animals, Inc. v. Kenneth Feld, et al., No. 2004-220181 (Cir.Ct. Fairfax County, Va.), Transcript (December 8, 2005) (attached as Exhibit B) at 100 (observing that "[d]iscovery in this case has been like pulling teeth . . . defendant's resisting discovery by all available means" and imposing sanctions).

CONCLUSION

For the following reasons, as well as those set forth in plaintiffs' opening memorandum, defendants should be required to pay plaintiffs $ 26,000 as a reasonable sanction for failing to produce or identify the existence of the elephants' medical records that were requested by plaintiffs over two years ago. A revised proposed Order is submitted for this purpose.

Respectfully submitted,

/s/

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