

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

AMERICAN SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS, <u>et al.</u> ,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	
RINGLING BROS. AND BARNUM & BAILEY CIRCUS, <u>et al.</u> ,	)	
	)	
Defendants.	)	
	)	

Civ. No. 03-2006 (EGS/JMF)

**PLAINTIFFS’ EXPEDITED MOTION TO ENFORCE THE COURT’S  
SEPTEMBER 26, 2005 ORDER AND FOR SANCTIONS PURSUANT  
TO FEDERAL RULE OF CIVIL PROCEDURE 37(b)(2)**

Pursuant to Federal Rule of Civil Procedure 37(b)(2), plaintiffs move for an Order enforcing this Court’s September 26, 2005 Order, which unequivocally commanded the defendants in this case to turn over “all” of the elephants’ veterinary and medical records “by no later than **September 28, 2005.**” Order (Sept. 26, 2005) (emphasis in original). As explained in the attached Memorandum, defendants did not comply with this Order by turning over all of the medical records by September 28, and now, more than six months later, defendants still have not produced all such records. Instead, since the Court issued its Order, defendants have, on a piecemeal basis, pursuant to their own schedule, produced some of the responsive records. However, it is clear that many such records still have not been produced.

Accordingly, pursuant to Federal Rule of Civil Procedure 37(b)(2), plaintiffs request that the Court find that defendants have violated the Court's September 26, 2005 Order, and that the Court impose sanctions on defendants. At a minimum, the Court should order defendants immediately to comply in full with the September 26 Order by turning over every single veterinary or medical record as the Court required, and order defendants to pay plaintiffs' attorneys' fees, costs, and expert witness fees expended in continuing to pursue these records. Such costs would include the additional time plaintiffs' experts have spent in repeatedly reviewing the elephants' medical files each time additional records (created prior to September 2005 but produced after September 28, 2005) have been produced and incorporated into those files.

In addition, the Court should order defendants to prepare and produce to plaintiffs sworn declarations from each of defendants' staff, consulting veterinarians, veterinary technicians, trainers, and other individuals who have any responsibility for recording or maintaining information about the health or medical status of the elephants, attesting to the fact that all medical and veterinary records have in fact been produced. A proposed order outlining these remedies is attached to this motion.

In support of this motion, plaintiffs submit the accompanying Memorandum in Support of Plaintiffs' Expedited Motion to Enforce The Court's September 26, 2005 Order and for Sanctions Pursuant to Fed. R. Civ. P. 37(b)(2), Exhibits 1-28, and a proposed order.

Pursuant to Local Rule 7.1(m), counsel for plaintiffs also hereby certify that they have conferred with counsel for defendants in good faith, in an effort to secure the release of the requested information without court action. However, because defendants insist

that they are in compliance with the Court's September 26, 2005 Order, the parties have reached a stalemate on this issue.

Respectfully submitted,

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June 9, 2006

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**MEMORANDUM IN SUPPORT OF PLAINTIFFS’  
EXPEDITED MOTION TO ENFORCE THE COURT’S  
SEPTEMBER 26, 2005 ORDER AND FOR SANCTIONS PURSUANT  
TO FEDERAL RULE OF CIVIL PROCEDURE 37(b)(2)**

**INTRODUCTION**

This is a case challenging Ringling Brothers and Barnum & Bailey Circus’ (“Ringling Bros.”) unlawful treatment of Asian elephants under the Endangered Species Act, 16 U.S.C. § 1538. On September 26, 2005, this Court granted plaintiffs’ motion to compel the production of “all” of the medical records concerning the endangered Asian elephants in defendants’ custody or control, and ordered that “defendants shall turn over all [such] records by no later than **September 28, 2005.**” Order (Sept. 26, 2005) (emphasis in original); see also Transcript of September 16, 2005 Hearing at 35 (“I’m going to order that all of these documents be produced”) (Exhibit 1) (emphasis added); id. at 36 (“And when I say all, I mean all, every last record”) (emphasis added). Despite this unequivocal Order, it is clear that defendants still have not turned over all of the

elephants' medical records.

Indeed, despite defendants' transmittal to plaintiffs of approximately 12,000 additional pages of medical records on September 28 and 29, 2005, and additional boxes of medical records on November 30, 2005, December 21, 2005, February 10, 2006, and May 12, 2006 – many of which should have been produced to plaintiffs in June 2004 in response to plaintiffs' March 2004 discovery requests, and certainly by September 28, 2005 in response to the Court's Order – defendants still have not produced key records, such as reports from veterinary consultations, substantive observations and notes of examining veterinarians, daily observational notes and treatment plans for wounded or ill elephants, and other categories of records that will be discussed below. Moreover, for many of defendants' elephants, including one baby elephant who died in August 2005 at only eight days old, plaintiffs have received very few records of any kind. Therefore, defendants have clearly violated this Court's September 26, 2005 Order.<sup>1</sup>

Defendants' dilatory and obstructive conduct is causing considerable delay to this litigation. Although plaintiffs are proceeding with the case on other fronts, it has been difficult for plaintiffs to fully assess their case, prepare for depositions, or prepare expert reports without the complete medical records on the elephants that they long ago requested. In addition, this obstructive behavior has caused plaintiffs to expend

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<sup>1</sup> Plaintiffs originally requested records for all elephants that have been in defendants' custody or care since 1994, but defendants refused to produce records for any elephant that has not been in their care since 1996. This dispute was recently resolved by Magistrate Judge Facciola, who ruled in plaintiffs' favor. See Memorandum Opinion at 9-10 (Feb. 23, 2006) (JMF). Therefore, defendants are required to produce all medical and veterinary records for any elephant that was in defendants' custody or care since 1994. Once an animal is covered by the request, however, the records pertaining to that elephant are not limited by any time frame. Hence, defendants must produce all records, regardless of their date, for all elephants in their custody or care since 1994.

considerable resources in pursuing these critical records, including additional costs associated with plaintiffs' experts having to repeatedly review the elephants' files when additional records are produced (records that should have been produced in September 2005). While defendants have slowly been turning over additional medical records in a piecemeal fashion in response to plaintiffs' letters and litigation threats, it has been a struggle every step of the way. Moreover, even though it is defendants' obligation to produce responsive records, plaintiffs have had to piece together the records to determine what is missing, so that they can attempt to extract the missing records from defendants.

Indeed, as recently as May 12, 2006 – more than six months after the Court issued its unequivocal Order to produce “all” medical records by September 28, 2005 – defendants produced still more records that existed prior to September 28, and indicated that they are still searching for additional records and will produce them in a “timely manner.” See May 12, 2006 Letter from Michelle Pardo to Kimberly Ockene, at 7 (“Defs. May 12 Letter”) (Exhibit 2) (“If any additional medical records are located, defendant will further supplement its production in a timely manner.”). In plaintiffs' view, while defendants certainly have an obligation to “supplement” their production with all recent medical records on an ongoing timely basis, any medical records that existed prior to September 28, 2005, but were not – and still have not been – produced by that date are necessarily not being produced in a “timely manner.”

Plaintiffs accordingly request that the Court find, pursuant to Federal Rule of Civil Procedure 37(b)(2), that defendants have violated the Court's September 26, 2005 Order. As discussed below, at an absolute minimum, the Court should order defendants immediately to comply in full with the September 26 Order by turning over every single

veterinary or medical record as the Court required, and require defendants to pay plaintiffs' attorneys' fees and costs expended in continuing to pursue these records. In addition, the Court should order defendants to prepare and produce to plaintiffs a sworn declaration from each of defendants' staff and regular consulting veterinarians, veterinary technicians, trainers, and other individuals who have any responsibility for recording or maintaining information about the health or medical status of the elephants, attesting, under penalty of perjury, to the fact that they have each (1) searched for all records for each elephant in defendants' custody or control since 1994, and (2) produced such records to plaintiffs. A proposed order to this effect is attached to this motion, including a list of individuals who, among others, should be required to submit affidavits.<sup>2</sup>

#### **PERTINENT BACKGROUND**

**A. This Court's Unequivocal Order And Defendants' Failure To Meet The September 28, 2005 Deadline**

The background that led to the Court's September 26, 2005 Order is detailed in Plaintiffs' Memorandum In Support Of Their Motion To Compel (January 25, 2005) (Docket # 27), at 25-30; Plaintiffs' Reply Memorandum In Support Of Their Motion To Compel (March 4, 2005) (Docket # 33), at 7-10; Plaintiffs' Opposition to Defendants' Motion for a Protective Order (March 4, 2005) (Docket # 34), at 3-5; and was also

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<sup>2</sup> Pursuant to this Court's Order of February 23, 2006 inviting plaintiffs to file a motion for attorneys' fees related to plaintiffs' Motion to Compel the production of the medical records, see Order (Feb. 23, 2006) (Docket # 60), plaintiffs have already filed their motion for attorneys' fees with respect to the Motion to Compel on April 3, 2006. See Plaintiffs' Motion for Attorneys' Fees and Costs Related to Plaintiffs' Motion to Compel Medical Records of Elephants (April 3, 2006) (Docket # 64). That motion is briefed and currently pending before the Court. Accordingly, the fees plaintiffs are requesting pursuant to the present Motion include only those fees and costs incurred in continuing to pursue the medical records since the Court issued its September 26, 2005 Order.

discussed in detail at the September 16, 2005 Hearing. See Transcript (Exhibit 1). In short, plaintiffs' March 30, 2004 discovery requests sought "all" of the medical records for each elephant ever owned or leased by Ringling Brothers since 1994, as well as all other records that would contain information about the birth, death, disposition, and condition of such elephants. See Plaintiffs' Interrogatory No. 8, Document Requests No. 8 and 16 (Exhibit 3). In response, defendants stated that such records had been produced. See Defendants' Objections and Responses To Plaintiffs' First Set Of Discovery (June 9, 2004), Response No. 8 (Exhibit 4). Yet the number of medical records produced was extremely minimal, even though defendants did not claim a privilege for any such records, list any such records on a privilege log, nor in any other way disclose that any responsive medical records had been withheld.

Indeed, even when plaintiffs subsequently questioned whether defendants had complied with plaintiffs' discovery requests, defendants' attorney represented that defendants had provided plaintiffs with the "complete" medical records. See November 8, 2004 Letter from Joshua Wolson to Katherine A. Meyer at 7 (Exhibit 5) ("the records that defendants produced to you are complete, in that they contain all of the pages in defendants' files") (emphasis added).

Subsequently, after plaintiffs informed defendants that they were filing a motion to compel, defendants admitted that they had not produced all of the requested medical records, and that there were "more detailed medical records" for the elephants, but they refused to produce such records unless plaintiffs would consent to a blanket protective order prohibiting the public disclosure of any of those records. See January 4, 2005 Letter from Joshua Wolson to Kimberly Ockene at 3 (Exhibit 6). Plaintiffs then filed



their Motion to Compel, in response to which defendants filed a motion for a protective order with respect to all of the outstanding medical records. See Docket ## 27, 30.

As explained in Plaintiffs' Memorandum In Support Of Their Motion To Compel (January 25, 2005) (Docket #27), at 26-28, prior to the Court's Order of September 26, 2005, defendants had produced essentially only skeletal, type-written medical "histories" for each elephant, which appear to be typed excerpts from longer narrative records. The "histories" typically summarize in short-hand form the general status of an elephant on a given day, or that a veterinarian was "on-site" on a particular day, but, for the most part, provide little substantive information concerning an elephant's medical condition. See, e.g., Medical History for Nichole (Exhibit 7). For certain elephants, no medical records at all were produced. See Plaintiffs' Memorandum In Support Of Their Motion To Compel (Docket # 27), at 27-28.

Following the Court's hearing on September 16, 2005 on the motion to compel and defendants' motion for a protective order, the Court issued its September 26, 2005 Order, granting Plaintiffs' Motion to Compel the medical records, denying defendants' Motion for a Protective Order, and entering plaintiffs' more limited proposed protective order. See Order (Sept. 26, 2005).<sup>3</sup>

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<sup>3</sup> The Court entered plaintiffs' narrow protective order, see Docket #49, which allows defendants to designate specific information as "confidential" only if defendants can attest to some "identifiable commercial interest" in the records, "because that particular information forms the basis of a specific research paper that defendants intend to publish in the near future, and because the premature disclosure of such information would substantially diminish the commercial value of that publication." See Protective Order, ¶ 5 (emphasis added). Since then, defendants have designated well over 18,000 pages of records in full as confidential. However, as plaintiffs explained to defendants in a very detailed letter sent in January 2006, none of these designations meet the requirements of the Protective Order. Accordingly, although plaintiffs are still awaiting defendants'

After the Court issued its Order, defendants produced approximately 12,000 pages of veterinary records on September 28 and 29, 2005. According to defendants, these thousands of pages had not been identified in their initial response to plaintiffs' discovery requests due to certain "oversights." See Defendants' Response to Order to Show Cause (Docket # 46), at 9. The majority of these records were laboratory reports, including thousands of pages of tuberculosis test results, as well as numerous documents that were duplicative of records that had already been produced to plaintiffs. The new boxes of documents contained little of the evaluative, observational, diagnostic, substantive veterinary information for each elephant that plaintiffs expected to receive – i.e., the sort of narrative notations and descriptions that are usually kept in any veterinary or human medical file. In some cases, certain types of records – including more detailed narrative veterinary observations – were produced for some elephants, but not for many others. And there were significant time gaps in many of the elephants' records.

Additional medical records continued to trickle in during the months following the Court's Order. Thus, defendants subsequently produced additional medical records on November 30, 2005, December 21, 2005, and February 10, 2006 – many of which should have been produced by (at the latest) September 28, 2005 in response to the Court's Order, rendering defendants automatically in violation of the Court's Order. Indeed, in a letter dated December 16, 2005 – two and a half months after the September 28 deadline the Court set for the production of "all" of the medical records – defendants' counsel stated that defendants were still searching for such records. See December 16, 2005 Letter from Joshua Wolson to Kimberly Ockene at 1 (Exhibit 8) ("Defendant has at

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response to their letter, it is likely that the parties will seek judicial intervention on this matter.

all times been diligently searching for all responsive documents, including any documents that could qualify as medical records covered by Judge Sullivan's Order dated September 26, 2005. Defendant is continuing to do so and will continue to produce responsive documents if and when they are located.") (emphasis added). Yet defendants never sought an extension of the Court's Order, nor explained why it was not possible to locate all medical records by the Court's deadline. Apparently, defendants believe the Court's direct order to produce "all [veterinary and medical] records by no later than **September 28, 2005.**" Order (Sept. 26, 2005) (emphasis in original), was merely precatory, and that they may produce whatever records they wish, subject to their own timeframe.

**B. Defendants Continuing Failure To Produce "All" Of The Elephants' Medical Records**

In addition to blatantly violating the Court's unequivocal deadline for production of these highly relevant records, the belatedly produced medical records still do not contain many of the categories of records that plaintiffs believe exist.

On April 28, 2006, having thoroughly reviewed all of the records that defendants produced on September 28, December 21, and February 10, and it being clear that responsive medical records were still absent from these productions, plaintiffs sent a comprehensive letter to defendants detailing the records that that were absent and indicating that, accordingly, they intended to file a motion to enforce this Court's Order. See April 28, 2006 Letter from Kimberly Ockene to Lisa Joiner ("Plfs. April 28 Letter") (Exhibit 9). By letter dated May 12, 2006, defendants stated that the reason the records appeared incomplete was because defendants engage in the practice of "herd medicine," rather than the sort of individualized medical attention such as what one would expect

their own pets to receive or that one would expect a human to receive from a doctor. See Defs. May 12 Letter (Exhibit 2), at 1-2 (“Any assumption that veterinary records will resemble or be maintained like human medical records is misplaced. Defendant’s veterinarians practice ‘herd’ veterinary medicine, which differs greatly from, for example, a neighborhood veterinarian who maintains a practice serving a pet population.”).

However, this new “explanation” for the lack of records, which defendants have never before stated to plaintiffs during the past two years of battling over these records, is in stark contrast to the statements made repeatedly in the media by defendants’ own veterinarians. Indeed, defendants have expressly stated in public relations videos and other materials that the Ringling Bros. elephants do receive the same sort of care that a person would expect to receive from his or her own family doctor. See, e.g., DVD clip of Dr. William Lindsay, Head Veterinarian (explaining that “We try to do the equivalent of what would happen if you went into your doctor . . .”) (submitted by hand as Exhibit 10); see also <http://www.elephantcenter.com/pampered.aspx> (stating that the Ringling Bros. elephants receive “round-the-clock veterinary attention”).

If defendants are indeed providing their elephants with the kind of intensive veterinary care that they tout in the public arena, then one would expect the records they maintain to evidence this fact, including through routine documentation of exam notes and results, veterinary observations, and other entries discussed below.

Defendants also asserted in their letter to plaintiffs that certain records concerning the health of the elephants are not even responsive to plaintiffs’ request for medical records and hence will not be produced, including health certificates for the elephants,

which many states require before an animal may be transported into the state. See Plfs. April 28 Letter, at 7. These health certificates, also known as “certificates of veterinary inspection,” typically require a veterinarian to physically examine the animal and determine whether the animal is free of certain diseases prior to transporting the animal into a State. See, e.g., Ohio Admin. Code § 901:1-17-12 (2006); Ariz. Admin Code R3-2-602, R3-2-606 (2005). Defendants contend, however, that these certificates are “not prepared in connection with any aspect of rendering medical treatment to an elephant and, as such, [are] not responsive” to plaintiffs’ discovery request for all medical records on the elephants. See Defs. May 12 Letter at 6. This assertion illustrates the lengths to which defendants will go to avoid producing records to plaintiffs, and to avoid complying with this Court’s Order that they produce “all” of the medical records. See also Transcript of Sept. 16, 2005 Hearing at 36 (Exhibit 1) (“And when I say all, I mean all, every last record.”). Although there might be some debate on the margins as to what specifically constitutes a “medical record,” all records stemming from veterinary exams, such as the certificates of veterinary inspection, should certainly be included.

In response to plaintiffs’ April 28 letter, defendants also produced an additional box of documents on May 12, 2006 that contained still more of the medical records that should have been produced by September 28, 2005 pursuant to this Court’s Order. These included additional records of a baby elephant named Bertha who died as an infant in August 2005, and some records of other elephants for whom, until May 12, 2006, defendants had produced no records at all. See, e.g., Plaintiffs’ April 28, 2006 Letter at 2 (notifying defendants that plaintiffs had received no records for a baby elephant named Irvin); Defendants’ May 12, 2006 Letter at 2 (noting that defendants were now producing

records for Irvin “in our May 12, 2006” production). Other records were produced that filled in some of the time gaps in the elephants’ records. However, plaintiffs strongly believe that still more medical records are missing, and plaintiffs are tired of struggling to obtain them. Moreover, defendants have never explained why the records are being produced in bits and pieces, and it is not at all clear why it should be so difficult to locate all of the responsive records, as the Court ordered more than six months ago. Plaintiffs are therefore asking for the Court’s immediate intervention in this matter.

Discussed below are examples of records that defendants have not yet produced. This is not intended to be an exhaustive list. Unfortunately, because defendants are the only ones in control of the records, plaintiffs have no way of ascertaining for sure what records are missing. It is in any event clear that defendants have not searched for and produced “all” of the medical records, as the Court ordered them to do by September 28, 2005.

### **ARGUMENT**

#### **A. Defendants Are In Violation Of The Court’s September 26, 2006 Order Because They Have Failed To Produce All Of The Medical Records Concerning The Asian Elephants In Their Custody Or Control.**

##### **1. Defendants Have Produced Very Few Medical Records For Many Of Their Elephants.**

For many of the elephants, defendants have produced only a paucity of veterinary records, and hardly the quantity of records that one would expect to find in a veterinary file for any animal that receives “round-the-clock veterinary attention,” as Ringling Bros. contends its elephants receive. See <http://www.elephantcenter.com/pampered.aspx>.

For example, plaintiffs have received only a few records for a female elephant named Seetna, who died in mid-1996 at the age of 30 in defendants’ custody. In fact,

plaintiffs received no veterinary records at all for Seetna – only a few non-veterinary records such as USDA forms and contractual documents with the Miami Metro Zoo (from where defendants obtained Seetna). Plaintiffs informed defendants of the absence of any medical records for Seetna in plaintiffs’ April 28 letter. See Plfs. April 28 Letter, at 3. In response, defendants stated that they “did not own Seetna,” and that “Seetna was a Miami Metro Zoo elephant who came to stay with defendant after a hurricane,” Defs. May 12 Letter, at 2, suggesting that Seetna was only in defendants’ custody and care for a short, temporary stay, and hence that they would not have many records for her.

However, a review of the few records defendants did produce indicates that Seetna was permanently donated to defendants by the Miami Metro Zoo in 1995, and had actually been in defendants’ custody and care since 1992 under a breeding loan. See Exhibit 11 (noting that Seetna “was one of two Asian elephants transferred to the Ringling Bros.’ facility from the Miami Zoo in August of 1992”); Exhibit 12 (noting that Seetna was in Ringling Bros.’ “possession under a breeding loan entered into in 1992”) Exhibit 13 (noting that on June 1, 1995 Seetna was “donated on permanent loan from Metro Miami Zoo to RBBB”). Therefore, common sense would suggest that defendants would have maintained a medical file for an elephant that was in their care for at least four years, and that her earlier medical records would have been transferred from the Miami Metro Zoo as well. Indeed, Seetna was pregnant while in defendants’ care and apparently experienced a complicated pregnancy and delivery, resulting in a stillborn calf and Seetna’s ultimate death. See Exhibit 11. Yet defendants have produced no medical records concerning these complications or the stillbirth. In addition, one of the documents defendants produced specifically indicates that an autopsy was to be

performed on Seetna, see id., but defendants have failed to produce any autopsy report for this animal.

Another example of an apparently incomplete file is that of the baby elephant named Irvin. Prior to May 12, 2006, plaintiffs had received no veterinary records at all for Irvin, who was born in June, 2005, see <http://www.ringling.com/cec/jul2005birth.aspx>. After plaintiffs complained about this in their April 28 letter, defendants produced a small handful of records for Irvin in their May 12 production – a total of eight pages. However, the records contain no laboratory reports, and little of the narrative or daily observational notes that one would expect for a newborn member of an endangered species.

Similarly, defendants have produced only about fifteen pages pertaining to a baby elephant named Aree, who was born in April 2005. The majority of those pages are laboratory reports without any annotation or interpretation, and there is very little narrative information in the records.<sup>4</sup>

Defendants have also produced only a handful of pages pertaining to the baby elephant named Bertha, who was born on July 30, 2005, and who died on August 9, 2005, after undergoing surgery at the defendants' "Center for Elephant Conservation" ("CEC"). See Exhibit 14 (records produced for Bertha). It seems unlikely that this is the

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<sup>4</sup> Defendants stated in their May 12 letter that it is not unusual for laboratory reports to be unaccompanied by any narrative or follow-up because "[i]f a lab report indicates that a particular elephant's lab test is positive or negative, a veterinarian has no need for separate written analysis. The record states all the information that the defendant's veterinarians . . . need[] to know." Defendants' May 12 Letter, at 3. However, certainly if a lab report comes back positive, the animal's record should contain follow-up notes, treatment plans, or some other documentation concerning how to deal with the positive result. As discussed more below, some of the elephants' records contain no such follow-up documentation, and, if such records exist in the custody of any of defendants' veterinarians or other staff, they must be produced.



entirety of the records in defendants' custody for this elephant, who had serious health problems that resulted in surgery at the CEC and the ultimate death of the baby elephant. Indeed, although defendants contend that the "surgical report" they belatedly produced (in December 2005) for Bertha is complete, see Defs. May 12 Letter, at 3 n. 3, that document appears to end abruptly, and contains no notation concerning surgery resolution, or even that the elephant died, suggesting that one or more pages may be missing. See FELD 24239 (contained in Exhibit 14). In addition, the records contain virtually no post-operative analysis or notes concerning the procedure or what went wrong, which is odd in light of defendants' public contention that they run the leading facility for the study and reproduction of Asian elephants. See <http://www.ringling.com/animals/conservation/conservation.aspx> (noting that defendants "Center for Elephant Conservation" is "dedicated to the conservation, breeding, scientific study, and retirement of the Asian elephant"). At an absolute minimum, there should be correspondence, memoranda or notes of meetings, or e-mail traffic between defendants' veterinarians and staff concerning this traumatic death of an endangered species.

In addition, there are several elephants for whom defendants have produced very few pages, including an elephant named Barbara and another elephant named Karnaudi. Defendants' May 12 letter did not comment on Barbara's status, yet any and all records concerning this animal must be produced. In addition, while defendants' letter stated that "all records for Karnaudi have been produced," Defs. May 12 Letter, at 2, plaintiffs have received only a few pages concerning Karnaudi (most of which are not even veterinary records), who was apparently acquired by defendants in 1963 and died in 1996. See Exhibit 15. There should be a thick veterinary file for an elephant in defendants' care for

more than thirty years, and defendants must produce all documents in their custody or control related to this animal.

**2. Defendants Have Produced No Medical Records For Certain Elephants.**

For some elephants, it appears that defendants have produced no medical records at all. For example, according to newspaper articles, six baby elephants died at defendants' "Center for Elephant Conservation" ("CEC") prior to 2002. See John Tidwell, *Making Room for Elephants*, *Zoogoer*, Mar/Apr. 2002, at 7 (Exhibit 16) ("The CEC alone has 26 elephants, with four pregnant cows and 11 successful births. But they have also had setbacks. Six of their 11 calves have died young, one from herpes.") (emphasis added). However, defendants have produced veterinary records for only two baby elephants that died at the CEC before 2002, neither of whom was diagnosed to have died from herpes. The first is Benjamin, who died in 1999 at the age of four, and the second is Kenny, another baby elephant who died in 1998 at the age of three and a half. Plaintiffs have not been provided with veterinary records for any other babies that died prior to 2002. Although plaintiffs raised this point in their April 28 letter to defendants, defendants' only response was that this newspaper report was "inaccurate," without further explanation. See Plfs. April 28 Letter, at 2; Defs. May 12 Letter, at 3. Plaintiffs are entitled to obtain any existing records concerning all baby elephants, in addition to Benjamin and Kenny, who died prior to 2002.

In addition, it appears that defendants may not have disclosed records that reveal unsuccessful pregnancies. Thus, a December 2003 USA Today article indicated that Ringling Bros. was expecting births of four new baby elephants in the 18 months following the article's publication. See Joe Eaton, *Under the Big Top: Asian Elephant*

*Conservation; Animal Activists Say It's Just an Act*, USA Today, Dec. 15, 2003 (Exhibit 17) (“[The CEC] expects four more arrivals in the next 18 months.”). However, as of the time they sent their April 28 letter, plaintiffs had received records for only three such births (Irvin, born in June 2005, Aree, born in April 2005, and Bertha who was born July 30, 2005 and died August 9, 2005).

In their May 12 response to plaintiffs’ letter, defendants indicated that there are no records for the fourth baby elephant because “the calf of Emma died in utero and was never delivered as a live birth. As such, defendant has no veterinary records for a calf that was never born alive.” Defs. May 12 Letter, at 4. Defendants also stated that they typically do not create records concerning stillborn calves. Id. at 6. However, Emma’s “medical history” does not contain a statement that Emma’s calf died in utero, see Exhibit 18, and it is not clear how defendants are able to keep statistics or research concerning what they tout as the “most successful Asian elephant breeding program in the Western Hemisphere,” see <http://www.elephantcenter.com/bornat.aspx>, without maintaining records of unsuccessful births and pregnancies. In any event, if there are additional records concerning the demise of Emma’s calf, or of any other stillbirths or pregnancy complications – whether in the form of e-mail, notes, memoranda, or otherwise – plaintiffs are entitled to obtain them.

Defendants also have not produced any veterinary records for an elephant named Shirley Ann, who is referenced in a single veterinary rounds summary. See Exhibit 19. Defendants did not respond to this point in their May 12 letter.

### **3. Entire Categories of Standard Records Are Absent From Most of the Elephants' Files.**

There are also more general categories of records that appear to be absent from the elephants' medical files. Indeed, as noted, with the exception of some narrative entries in very recent years, most of the elephants' files contain little to no narrative observational, diagnostic, evaluative, or handwritten notes, of the kind that would be expected if defendants' elephants are, as defendants contend to the public, receiving the same type of thorough medical care that humans receive from their physicians. See Exhibit 10. Rather, except for some very recent records, the files routinely contain only the short-hand "medical history" of the elephant, see, e.g., Medical Histories of Asha (Exhibit 20), and Nichole (Exhibit 7), along with some (in some cases many) laboratory reports. Clearly, key annotative records are missing from these files. For example, Asha's file contains essentially no narrative information at all, even though a baby elephant is likely to be closely followed. Moreover, because several of the files that plaintiffs have received do contain some hand-written narrative information beyond what is contained in the medical histories, see, e.g., Riccardo's records (Exhibit 21), Bertha's file (Exhibit 14), it is likely that many of the other elephants' records contain additional narrative and hand-written notations as well, although they have not been produced to plaintiffs.

For example, for each instance in the "medical histories" where there is a notation of "examine on site" or "vet on site," see, e.g., Medical History of Asha (Exhibit 20), there should be corresponding veterinary notes, observations, or other data entries in an animal's file concerning the results of the exam. See also, e.g., Animal Care Resource Guide, Veterinary Care – Policy # 3, USDA, Jan. 14, 2000, at 3.4 (stating that medical

records should contain “dates, details, and results . . . of all medically-related observations, examinations, tests, and other such procedures”). Yet, routinely, no such corresponding records or information have been produced to plaintiffs.<sup>5</sup>

Indeed, a review of elephant medical records from other institutions that maintain elephants in captivity provides a stark contrast to the records plaintiffs have received from defendants. For example, records for an Asian elephant maintained at the Oregon Zoo provide examination notes when a veterinarian examines the elephant, descriptions of problems and possible diagnoses, notes regarding decisions to take blood or do laboratory work, and generally the sort of observational notes and narrative one would also expect to see in a human medical chart. See Exhibit 22.<sup>6</sup> This is in sharp contrast to the medical histories provided by defendants, which contain little narrative. See (Medical Histories of Nichole, Asha (Exhibits 7, 20). Regardless of whether the Ringling Bros.’ veterinarians enter their exam notes or other notes concerning the elephants into the electronic “medical histories,” all such notes must nevertheless be produced to plaintiffs.

Additional categories of records that plaintiffs have not received include:

- Veterinary inspection certificates for each elephant who is on the road, certifying that, to the best of the veterinarian’s knowledge, each elephant was free of infectious or contagious disease at the time of interstate shipment. See, e.g., Ohio Admin. Code § 901:1-17-12 (2006); Ariz Admin. Code R3-2-602, R3-2-606 (2002); 2 Va. Admin. Code § 5-140-20(B) (1998). As noted above, defendants stated in their May 12 letter that they deem these veterinary inspection certificates to be non-responsive to plaintiffs’ discovery request. These records, however, which deal directly with the health and well-being of the elephants, are plainly

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<sup>5</sup> See also, e.g., The American Zoo and Aquarium Association’s Standards for Elephant Management and Care (May 5, 2003) (noting that proper elephant care calls for a “complete body daily exam,” and that the results of such daily exams “should be recorded” in each elephant’s chart) (emphasis added).

<sup>6</sup> These records were disclosed pursuant to the Oregon State open records laws.

encompassed within the meaning of “medical records,” and, more importantly within the broad scope of this Court’s September 26, 2005 Order.<sup>7</sup>

- Electronic mail communications to and from Ringling Bros. veterinarians that contain information concerning the elephants’ health or medical condition. Although it is clear that defendants and their veterinarians regularly use e-mail to communicate, see, e.g., Exhibit 23, plaintiffs have received only a handful of e-mail records concerning the elephants. However, pursuant to defendants’ discovery obligations and this Court’s September 26, 2005 Order, each of defendants’ veterinarians (on-staff and consulting), veterinary technicians, and animal care-givers must thoroughly search his or her electronic mail archives and produce any and all communications containing elephant medical information.<sup>8</sup>
- Treatment plans, daily treatment notes, observation notes, and follow-up notes for each illness or ailment indicated on the “medical histories.” There are examples throughout the records that have been produced of injury or ailments, without corresponding records containing substantive diagnostic or evaluative information concerning the injury, or subsequent treatment or follow-up. For example, an elephant named Asia was reportedly lame in early 2005, see Exhibit 24, at FELD 8774, and her medical history reveals that treatment was recommended, but there are no further follow-up concerning her lameness, nor any narrative concerning the progress of her condition. Additional examples of lameness or injury are noted throughout the elephants’ medical histories, without any corresponding follow-up or treatment plans in the materials plaintiffs received. See, e.g., Exhibit 20 (Asha’s medical history) (notation that the animal had ventral edema, without any subsequent entries concerning the

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<sup>7</sup> Moreover, based on defendants’ assertion that these veterinary inspection certificates are not encompassed within the Court’s Order, plaintiffs are concerned that defendants may be withholding additional categories of records that also bear directly on the animals’ health status.

<sup>8</sup> Defendants’ stated in their May 12 letter that they would like to meet with plaintiffs “to discuss with more particularity the categories of e-mail that plaintiffs request.” Defs. May 12 Letter, at 6. However, plaintiffs do not believe such a meeting should be necessary, especially at this extremely late date. The “categories” of e-mail that plaintiffs request are simple: any e-mails that contain information concerning the health or medical status of any of defendants’ Asian elephants. Moreover, if defendants had questions as to what information plaintiffs were seeking, the time to ask would have been two years ago, when the parties initially exchanged discovery responses. At the absolute latest, defendants should have made this inquiry in September 2005, when this Court ordered them to turn over “every last” veterinary or medical record. See Transcript of September 16, 2005 Hearing, at 36.

resolution of the matter). The lack of such records in the materials suggests that the complete veterinary records have not been produced, and that such treatment or follow-up observations are located elsewhere in defendants' files.<sup>9</sup>

- Reports or any other records prepared by any consulting veterinarian related to the observation, diagnosis, or treatment of defendants' elephants. Ringling Bros. has stated that it has veterinarians on-call in every city to which the circus travels, yet defendants have produced little to no records generated by such consulting veterinarians. Examples of veterinarians who are referenced in the records as having examined defendants' elephants include: Drs. Estes, Seamonson, Dr. Tell, and Dr. Hildebrandt. Yet plaintiffs have received no reports, clinical exam data, clinical assessments, or other records prepared by these, or other, consulting veterinarians.<sup>10</sup>
- For each positive result from a laboratory test, the corresponding notes, reports, chart entries, follow-up or treatment plan, or other records concerning the bloodwork or other diagnostic tests. For example, bloodwork for the young elephant Benjamin isolated a bacterial infection called *Nocardia*, yet the records contain no corresponding interpretation or treatment plan, nor any notation or record entries concerning the significance of these results. See Exhibit 25. The absence of such information in the records defendants have provided suggests that the complete records have not been produced.
- Records relating to surgical procedures or recommendations for surgery. Surgery is indicated in various medical histories, but no accompanying surgical report or follow-up documentation has been produced. For example, Sarah's medical history indicates a recommendation for surgery to correct a "fistula" (an internal abnormality) on that elephant, yet her records contain no follow-up concerning such a procedure or why it was not undertaken. Defendants' May 12 letter states that "defendant's veterinarians determined that surgery on Sarah's fistula was not an appropriate course of action and, as such, the surgery was never

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<sup>9</sup> See USDA, Animal Care Resource Guide, Veterinary Care – Policy # 3, at 3.4 (Jan. 14, 2000) (stating that medical records should contain "dates and other details of all treatments, including the name, dose, route, frequency, and duration of any treatment and the criteria and/or schedule for re-evaluation(s) by the attending veterinarian").

<sup>10</sup> Defendants' May 12 Letter states that all records of such consulting veterinarians have been produced, see Defs. May 12 Letter, at 5, but defendants have not provided any evidence that all of these consulting veterinarians have in fact been asked to search their records for any responsive materials. Defendants must undertake such inquiries and produce any and all responsive records.

performed.” Defs. May 12 Letter, at 6. However, there is no indication in the animal’s actual medical records concerning the resolution of this matter, and hence plaintiffs wonder how defendants’ counsel were able to ascertain such information.

Until defendants produce all such records, and any others concerning the medical condition of any of their elephants, defendants continue to be in violation of the Court’s Order.

**4. There Are Large Gaps In Time For The Medical Records For Many Elephants.**

There are also significant time gaps in the medical records. For example, defendants have produced a limited number of radiographs, but very few for the period prior to 2000 and none for the period after 2002.

In addition, there are large time gaps for many of the elephants’ records. Indeed, many of the bare-bones “medical histories” – which, as noted, are the only records other than laboratory reports that plaintiffs have received for a large number of the elephants – begin well after defendants acquired the particular elephant. See, e.g., Medical History of Zina (acquired 1972, medical history begins in 1994) (Exhibit 26). Some records contain only one entry for a given year, and plaintiffs have been provided no additional records for that year for those elephants. See, e.g., Medical History for Calcutta I (Exhibit 27) (no entries between 1992 and 1994). The records plaintiffs received concerning the elephant named Gildah – an elephant who lived in isolation at the Mirage Hotel in Las Vegas until she died in August 2005 – do not even contain a “medical history.” In fact, from 1991 to 2004 there are no records of any kind for Gildah other than raw laboratory reports. Plaintiffs simply cannot obtain a complete picture of defendants’ treatment of



their animals if they are only provided with snippets of each animal's medical file.<sup>11</sup>

**B. THE COURT SHOULD ORDER DEFENDANTS TO COMPLY IMMEDIATELY WITH THE SEPTEMBER 26, 2005 ORDER AND SHOULD IMPOSE SANCTIONS ON DEFENDANTS PURSUANT TO FED. R. CIV. P. 37(b).**

Federal Rule of Civil Procedure 37(b) provides that “[i]f a party . . . fails to obey an order to provide or permit discovery . . . the court in which the action is pending may make such orders in regard to the failure as are just.” Fed. R. Civ. P. 37(b). The Court has broad authority to fashion an appropriate order under the particular circumstances of a case, including the extreme sanctions of dismissing a case or entering a default judgment where a party has flagrantly violated discovery orders. See, e.g., Alexander v. FBI, 186 F.R.D. 78, 88 (D.D.C. 1998) (“District courts enjoy substantial discretion in deciding whether and how to impose sanctions under Rule 37”) (quoting Chudasma v. Mazda Motor Corp., 123 F.3d 1353, 1366 (11th Cir. 1997)). See also National Hockey League v. Metro Hockey Club, 427 U.S. 639, 643 (1976) (noting that “the most severe in the spectrum of sanctions . . . must be available to the district court in appropriate cases, 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”); G-K Properties v. Redevel. Agency of San Jose, 577 F.2d 645, 647-48 (9th Cir. 1978) (noting that when a party acts in “flagrant disregard” of court orders enforcing

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<sup>11</sup> Plaintiffs are also aware of a few specific veterinary records that defendants have not produced, including thoracic x-rays of Benjamin and Shirley, see Exhibit 28 (noting thoracic x-rays for infant elephants Benjamin and Shirley taken to determine presence of tuberculosis, dated June 14, 1998), and any other thoracic x-rays taken to rule-out or diagnose tuberculosis. Defendants stated in their May 12 letter that they have “not located” these x-rays. Defs. May 12 Letter, at 7. This response is unacceptable, however, in light of this Court’s Order, and considering that defendants’ own records indicate that these x-rays exist.

the rules of discovery, “it is within the discretion of the trial court to dismiss the action or to render judgment by default against the party responsible for noncompliance”); Dellums v. Powell, 566 F.2d 231, 235 (D.C. Cir. 1977) (noting that “however innocent a failure to provide discovery may be, it is fundamental that a party that does not provide discovery cannot profit from its own failure”).<sup>12</sup>

Here, defendants initially produced only a minimal amount of medical records for the elephants, and subsequently produced more records only after plaintiffs moved to compel this discovery and after the Court ordered defendants to produce the records. Even now, many months after the Court’s unmistakably clear Order – and a full two years after the materials first should have been produced in discovery – it is clear that defendants still have not searched for or produced the entirety of the medical records.

Indeed, as recently as May 12, 2006, defendants stated that they are still searching for records created prior to the Court’s September 26, 2005 Order, and will produce additional records “in a timely manner.” Defs. May 12 Letter, at 7. Yet, the time for the production of all of the elephants’ medical records has long since come and gone. Moreover, defendants have never sought an extension of the court-ordered deadline for producing these critical records. Instead they have simply delivered records in a piecemeal fashion, and only when plaintiffs can figure out (and complain about) what is missing. Such behavior is unacceptable. See Food Lion, Inc. v. United Food and

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<sup>12</sup> Under the circumstances, the Court could also clearly hold defendants in contempt of court for failing to comply with the Court’s September 26, 2005 Order. See, e.g., Food Lion, Inc. v. United Food and Commercial Workers Int’l Union, 103 F.3d 1007, 1016-17 (D.C. Cir. 1997). However, at this juncture, particularly given the delay that has already ensued, plaintiffs are more interested in actually obtaining the records they originally requested in March of 2004 than in spending time and resources in a contempt proceeding.

Commercial Workers Int'l Union, 103 F.3d 1007, 1016-17 (D.C. Cir. 1997) (noting the findings of the district court that “[t]he Kamber Group is clearly in contempt. It never sought an extension of time for complying with the court’s order; it just moves along blithely at its own pace . . .”).

In light of this record, plaintiffs believe that, at a minimum, the following sanctions are appropriate. First, the Court should order defendants – once again – to immediately produce all of the above-listed records and any other records that concern the health or medical status of the elephants.

Second, the Court should order defendants to provide plaintiffs with sworn declarations from all staff and regular consulting veterinarians, veterinary technicians, trainers, and other individuals who have any responsibility for recording or maintaining information about the health or medical status of the elephants, attesting, under penalty of perjury, to the fact that they have each (1) searched for all records for each elephant in defendants’ custody or control since 1994, and (2) produced such records to plaintiffs. A non-exhaustive list of at least some of these individuals is included in the proposed order attached to this motion.

Third, the Court should order defendants to provide a sworn declaration from an official of defendants with personal knowledge concerning this matter, stating whether any records subject to the Court’s September 26, 2005 Order at one time existed, but no longer exist and, if so, detailing what became of such records.

Finally, the Court should order defendants to pay plaintiffs’ costs and attorneys’ fees associated with pursuing the medical records since September 28, 2005, including the filing of this Motion. See Fed. R. Civ. P. 37(b)(2) (“In lieu of any of the foregoing

orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.”).

These costs would include costs incurred by plaintiffs' experts who have been required to review each elephants' medical records repeatedly when additional records for the elephants are produced (records that should have been produced in September 2005).

There is certainly no basis here for finding that defendants' flagrant violation of the Court's Order is in any way justified. On the contrary, the record demonstrates that defendants are knowingly violating the Court's Order by producing documents of their own choosing, and at their own pace. Under such circumstances, and given the considerable delay defendants' behavior has caused to the litigation, an order requiring defendants to pay plaintiffs' reasonable expenses associated with pursuing these records is eminently reasonable.

A proposed order is attached that outlines these sanctions.

Respectfully submitted,

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June 9, 2006