UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

**REPLY 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

Through the fog of defendants' vitriol, one fact remains absolutely clear: defendants have violated and continue to violate the Court's undeniably clear order of September 26, 2005. Indeed, while defendants' current counsel attempts to foist the blame for delay in the production of the medical records onto defendants' previous counsel, defendants freely admit that there are more than 1,200 medical records that are covered by plaintiff's March 2004 discovery requests that still have not been produced to plaintiffs, see Defendant Feld Entertainment Inc.'s Response in Opposition to Plaintiffs' Expedited Motion to Enforce The Court's September 26, 2005 Order ("Defs. Opp.") at 5 – none of which defendants' new counsel even mentioned in their letter to plaintiffs of May 12, 2006. Defendants also admit that certain veterinary inspection records have not

been produced because defendants believe that they do not qualify as either "medical records" or "veterinary records" that the Court ordered defendants to produce. See Defs. Opp. at 20-21; see also Order (September 26, 2005) ("September 2005 Order").

Remarkably, defendants also appear to admit that they have not produced numerous medical records that were created prior to 1994, even though plaintiffs' discovery request sought "all" such records for each elephant in defendants' custody since 1994, and even though the parties have always understood that this discovery request included the elephants' complete medical files, and this Court ordered defendants to produce "all" of the medical records, including "every last record." Transcript of September 16, 2005 Hearing at 36 (Plaintiffs' Exhibit ("Plfs. Exh.") 1); see also Plfs. Exh. 5 at 7 (letter from Covington & Burling stating that the medical records defendants produced were "complete, in that they contain all of the records in defendants' files"). Indeed, such complete medical files are relevant to defendants' past practices and the current conditions of the animals, since they reveal existing conditions as well as the medical baselines for the animals.

Thus, by their own admissions, it is absolutely clear that defendants are continuing to withhold records that this Court ordered produced by September 28, 2005. It is also clear that without plaintiffs' continued efforts to obtain the medical records they requested over two years ago – efforts that defendants complain "annoy and harass" them, Defs. Opp. at 14 n.7 – plaintiffs would have obtained very few of the records they are entitled to under Rule 26, including the various medical records that have been dribbling in since the Court's September 26 Order. Far from seeking to "derail[]" this litigation "into an unnecessary and costly detour about discovery, simply for the sake of

discovery," Defs. Opp. at 1, plaintiffs' only goal is to obtain the critical medical information about the elephants that they legitimately asked for a long time ago. Indeed, it is defendants – who have now had well over eight months since the Court's Order to search for and produce all of the responsive records – who are responsible for this continuing delay. Plaintiffs would have preferred to obtain all of the records they requested in June 2004 when defendants' discovery responses were due, but instead have had to go through multiple rounds of briefing and pain-staking correspondence with defendants' counsel to obtain the elephants' basic records.[1]

The gist of defendants' Opposition seems to be that plaintiffs and the Court should simply trust defendants to turn over the relevant records – which this Court had to order to be produced pursuant to a motion to compel. But defendants have certainly given plaintiffs no cause for trust. As the Court knows, defendants initially withheld thousands of pages of medical records without so informing plaintiffs at all, or listing a single such record on their privilege log. Thus, it has only been in response to plaintiffs continued perseverance, including their Motion to Compel – and the Court's subsequent Order that defendants divulge "all" such records – that plaintiffs have been able to obtain additional records, and have now learned that others exist that have not been turned over. In addition, as plaintiffs have previously demonstrated, defendants also have a history of withholding elephant medical records from authorities seeking to enforce the Animal Welfare Act. See Plaintiffs' Reply to Defendants' Response to Order to Show Cause at

[1] Contrary to defendants' statements, the reason plaintiffs are seeking the complete medical records on the elephants is not because the documents produced to date "do not support [plaintiffs'] abuse allegations." Defs. Opp. at 2. Indeed, quite the opposite is true, which plaintiffs will demonstrate to the Court at the appropriate time. However, plaintiffs are seeking the medical records because they go directly to the heart of both defendants' defenses and plaintiffs' claims in this case.

10-11 (Oct. 5, 2005) (D.D.C. Civ. No. 03-2006) (Docket #53) (citing internal USDA memorandum stating that medical records produced by Ringling Bros. "did not look complete").

Moreover, defendants can hardly fault plaintiffs for assuming there would actually be detailed medical records on each of the elephants, when defendants repeatedly assure the public and the news media that they provide their animals with "round-the-clock veterinary care," http://www.elephantcenter.com/pampered.aspx, that is "equivalent" to the care provided by a family doctor. See Plfs. Exh. 10. Furthermore, while defendants insist that, as to other categories of records that appear to be missing, they have in fact produced all such records, see e.g., Defs. Opp. at 16, defendants conspicuously have failed to produce a single declaration, under penalty of perjury, confirming that in fact all veterinary and medical records on the elephants have been produced. See Defs. Exh. E (Declaration of Dr. Ellen Weidner) (omitting any statement that all of the elephants' medical records have in fact been searched for and produced). Under these circumstances, and given defendants' admissions that there are over 1,200 medical records that they still have not produced, plaintiffs are amply justified in their continuing concerns.

## ARGUMENT

### A. Plaintiffs Complied With Their Obligations Under Local Rule 7.1(m).

Defendants spend a lot of energy accusing plaintiffs of shirking their obligation under L. Cv. R. 7.1(m). See Defs. Opp. at 7-8. That rule requires counsel, with regard to nondispositive motions, to "discuss the anticipated motion with opposing counsel . . . in a good-faith effort to determine whether there is any opposition to the relief sought and, if

there is opposition, to narrow the areas of disagreement." L. Cv. R. 7.1(m). The motion at issue here is one to enforce the Court's order to produce records that plaintiffs already had to move to compel after extensive efforts to have those records produced by defendants without court intervention. Nevertheless, in seeking defendants' position on the motion to enforce, plaintiffs scrupulously complied with their obligations under the local rules by writing an extraordinarily detailed letter to defendants' counsel, outlining each and every issue they planned to include in their motion, and providing defendants with the opportunity to respond with their position, which defendants did. Not surprisingly, defendants opposed the motion. See Plfs. Exh. 9 (plaintiffs' April 18, 2005 letter); Plfs. Exh. 2 (defendants' May 12, 2006 letter).

Plaintiffs did not "ignore[e]" or "disregard" defendants' responses. Defs. Opp. at 7, 8. On the contrary, plaintiffs carefully reviewed defendants' letter and explanations to determine which issues remained in dispute, and hence would be included in the motion to enforce. Indeed, as a result of defendants' responses, plaintiffs chose to drop several issues from this Motion, as defendants concede. See Defs. Opp. at 22 n. 12 (noting that plaintiffs dropped the issue of missing records for an elephant named "Nunya" after defendants explained the meaning of that term); id. at 30-31 (noting that plaintiffs "accepted [the] explanation" concerning the non-pathogenic nature of *Mycobacterium avian* complex in elephants).[2]

On numerous other issues, however, it was clear from defendants' letter that the parties maintained diametrically opposed views – with defendants unabashedly insisting

[2] Even though plaintiffs' removed these (and numerous other) issues from their Motion, defendants nevertheless insist on referencing these issues as alleged examples of plaintiffs' ignorance of elephant husbandry. See id. All that these examples demonstrate, however, is that Rule 7.1(m) served its purpose here – i.e., to narrow the issues in dispute.

that their production was not "incomplete." See Plfs. Exh. 2 at 1 (defendants' May 12 letter, asserting that "plaintiffs are incorrect in their assumption that defendant's production of veterinary records is 'incomplete,'" and that "[d]efendant has produced the veterinary records that were created and maintained"). Accordingly, plaintiffs proceeded with their Motion on those issues.

It is not true, as defendants self-servingly assert to this Court, that "FEI, through current counsel, represented that it wanted to resolve the discovery dispute without court intervention and that it would work with plaintiffs to do so." Defs. Opp. at 7; see also id. at 9 (accusing plaintiffs of "circumvent[ing] the good faith efforts of current counsel to solve any discovery dispute"). On the contrary, the vast majority of defendants' letter reiterated defendants' position that plaintiffs were wrong to believe that more medical records exist. See generally, Plfs. Exh. 2. Under those circumstances – where defendants insisted that there were no more responsive records, and plaintiffs insisted that there are (which defendants now admit) – there was little value in a prolonged negotiation between the parties, especially given that plaintiffs requested these records in March of 2004, and the Court had already unequivocally ordered defendants to produce them by no later than September 28, 2005.[3]

**B. Defendants Admit That Numerous Medical Records Are Still Outstanding.**

**1. Medical Records In Counsel's Possession**

Defendants steadfastly insisted in their May 12, 2006 letter to plaintiffs that they

[3] The only issue that defendants asked to confer about was the issue of veterinary electronic mail correspondence. See Plfs. Exh. 2 at 6. It is now clear that the only reason defendants sought a conference on this single issue was because they knew that hundreds of pages of responsive electronic material had not yet been produced, as they now admit. See Defs. Opp. at 5, 35 (admitting that among the un-produced material is "electronic mail that reference or relate to medical treatment of an elephant").

had produced all of the medical records that existed on the elephants, and accused plaintiffs of over-reaching and ignorance (as they still do) for seeking additional records. See Plfs. Exh. 2 at 1 ("plaintiffs are incorrect in their assumption that defendant's production of veterinary records is 'incomplete;'" "[d]efendant has produced the veterinary records that were created and maintained"); id. at 7 ("defendant has conducted an exhaustive search for any elephant veterinary record[s] and produced these to plaintiffs;" "[d]espite plaintiffs' unwarranted conclusions, defendant has kept more than adequate veterinary records . . . and has produced those in existence"). Now, faced with plaintiffs' motion to enforce the Court's September 26 Order, defendants suddenly admit that there are more than 1,200 pages of medical records that have not yet been produced, none of which defendants' have previously identified, and none of which defendants mentioned in their May 12 letter to plaintiffs when they asserted that "[d]efendant has produced the veterinary records that were created and maintained." Compare Plfs. Exh. 2 at 1, with Defs. Opp. at 5 (stating that approximately 1,200 medical records were turned over to prior counsel but never processed, and that an additional 46 pages were turned over to current counsel that have not been produced).[4]

Defendants conveniently blame their failure to produce the 1,200 records on defendants' prior counsel, Covington & Burling, and, without producing any sworn declarations on this point, self-servingly insist that "[t]he failure to process such documents . . . is by no means the fault of FEI. FEI complied with the 9/26/05 Order by

[4] Defendants use the term "records" rather than "pages" when providing the 1,200 records estimate, whereas they use the term "pages" when providing the 46 page estimate. See Defs. Opp. at 5. It is not clear whether their use of the term "records" in this context refers to entire documents, each of which could contain multiple pages. If that is the case, then presumably the 1,200 "records" could amount to many more than 1,200 pages that have not yet been produced.

providing the material to prior counsel." Defs. Opp. at 5; but see Carson v. Dep't of Justice, 631 F.2d 1008, 1015 n.30 (D.C. Cir. 1980) (noting that "[n]either this court nor the district court will ordinarily take cognizance of 'facts' supplied by way of [counsel's unsworn] assertion") (citations omitted).

First, however, although defendants conspicuously fail to specify exactly when they did in fact provide the records to prior counsel, it is unlikely that "FEI" provided these materials to their prior counsel in time to be produced to plaintiffs by the Court's September 28, 2005 deadline. See Defs. Opp. at 5 (noting that "FEI had provided [the records] to its prior counsel shortly after the 9/26/05 Order," without specifying when) (emphasis added). Second, it is completely unacceptable for defendants to blame their discovery violations on prior counsel, when it is defendants themselves who are responsible for ensuring compliance with Court orders. See Plfs. Exh. 1 at 34 (Transcript of September 16, 2005 Hearing) (Court noting that it is the client's obligation to comply with a discovery request). Indeed, defendants have full-time in-house counsel who are undoubtedly in regular contact with their outside counsel, and could have – and should have – followed up to ensure that the records had in fact been produced.

Moreover, it is patently unfair for plaintiffs to have to suffer the consequences and carry the risk for defendants' violations – whether those violations are the fault of defendants, their litigation counsel, or their in-house counsel. Regardless of who on defendants' team is responsible for the failure to turn over these records – which defendants concede are covered by plaintiffs' March 2004 discovery requests and this Court's September 2005 Order – plaintiffs should be compensated for having to repeatedly request the records and ultimately file this Motion before defendants ever

admitted – or discovered – that these records were still outstanding. Therefore, defendants should be ordered to produce all of these records immediately.[5]

Finally, the fact that it took this much time and effort on plaintiffs' part (including sending detailed correspondence and filing this Motion) for defendants to admit that these records still exist, suggests, once again, that defendants cannot be trusted to comply with the Court's Order on their own, without constant supervision, perseverance, and motions to this Court on plaintiffs' part. Accordingly, this extremely belated admission demonstrates even more forcefully the fairness and wisdom of plaintiffs' requested sanction (in addition to being compensated for their fees and costs) that each of defendants' veterinary staff and primary consulting veterinarians must produce sworn declarations attesting to the fact that, once and for all, the complete medical records for the elephants have been searched for, located, and produced.

**2. Defendants Admit They Have Withheld Medical Records That Were Created Prior to 1994.**

For the first time in this litigation, defendants now also admit that they did not search for or produce medical records if such records were created prior to 1994. See Defs. Opp. at 10-13. The implications of this revelation are shocking – it means that there may be thousands of additional highly relevant records that plaintiffs requested over two years ago that defendants have intentionally withheld from plaintiffs, without disclosing this extremely salient point to either plaintiffs or this Court.

[5] Two days ago, on Wednesday, July 19, 2006, plaintiffs received two boxes of records from defendants, and another two boxes of records at close of business on Friday, July 21, 2006, the day this Reply was due, without any notification from defendants that the boxes were on their way or any indication of what they contain. Plaintiffs have not yet had an opportunity to review these four boxes of records.

Defendants' contention that plaintiffs are "estopped" from seeking the elephants' medical records that were created prior to 1994 is completely disingenuous. Plaintiffs have always sought all of the medical records for the elephants, since the complete medical history of an animal is relevant to evaluating the animal's current condition. Accordingly, plaintiffs' Document Request No. 8 sought "all medical records that pertain to" each of the elephants identified in response to Interrogatory No. 8, which, in turn, required defendants to identify each elephant that defendants "owned or leased from 1994 to the present." FEI Exh. A at 8-9, 13 (emphasis added). In this series of requests, therefore, the 1994 limit that plaintiffs imposed applied only to which elephants were covered by the requests. However, once an elephant was covered, the request sought "all" of the medical records pertaining to that animal.

Indeed, until their recent Opposition (written by defendants' new counsel) the parties have consistently mutually understood that all of an elephant's medical records must be produced, without regard to when that record was created. For this reason, defendants have previously produced records generated prior to 1994. See, e.g., Plaintiffs' Supplemental Exhibit ("Plfs. Supp. Exh.") 1 (examples of material dated prior to 1994); see also December 22, 2004 Letter from Kimberly Ockene to Joshua Wolson (Plfs. Supp. Exh. 2) at 2 (noting that "plaintiffs have sought all such [medical] records for all elephants owned or leased by Ringling Brothers from 1994 to the present") (emphasis added).

In addition, at the September 16, 2005 hearing on this matter, plaintiffs' counsel consistently stated that plaintiffs wanted "all" of the medical and veterinary records on the animals, and defendants' counsel never once stated that defendants were only

required to produce such records that were created since 1994. See, e.g., Transcript of September 16, 2005 Hearing at 8, 15. On the contrary, defendants' counsel simply stated that the reason so few medical records had been produced is that records kept by Dr. William Lindsay – Ringling's chief veterinarian – were not produced because they were kept at his house. See id. at 33. Furthermore, when this Court ordered defendants to produce "all" such records, and emphasized that the Court meant "every last record," id. at 36-37, defendants' counsel again did not take exception to such an unequivocal judicial command by suggesting that defendants were not required to produce any such record that had been created prior to 1994. See id.[6]

In addition, contrary to defendants' assertion that plaintiffs request for "all" of the medical records, regardless of when they were created, "lacks any common sense," Defs. Opp. at 10, without the complete context of the animal's health and medical history, as noted, there is no baseline for assessing the animal's current condition, and the potential cause for that condition. Hence, this information is relevant to both plaintiffs' claims and defendants' defenses. Indeed, should plaintiffs assert that a particular animal's poor health is caused by the fact that she is kept chained on concrete for long periods of time, defendants should not be permitted to deny that assertion by pointing to records that have not been produced to plaintiffs that indicate that the elephant was born with the particular condition. Certainly, defendants' veterinarians maintain historical records for the

[6] Contrary to defendants' suggestion, Judge Facciola was not asked to, nor did he, deal with the issue of whether defendants were required to produce "all" of the elephants' medical records, regardless of when they were created, since, as explained above, that issue was never in dispute between the parties. Therefore, it is completely disingenuous of defendants to now insist that Judge Facciola's order granting plaintiffs' motion to compel other records that were created between 1994-96, somehow forecloses plaintiffs from obtaining all of the medical records – an issue that was decided by this Court, not Judge Facciola.

elephants, and it is not clear why it should be so burdensome for defendants to produce whatever records exist in an animal's file, regardless of the date the record was created.

In short, plaintiffs – and defendants until very recently – have always understood their request for medical records to encompass the complete record on a given animal, and are not "estopped" from seeking those records now. Accordingly, the Court should also order defendants to turn over all such withheld records immediately.

**3. Defendants Admit They Have Withheld Certificates of Veterinary Inspection.**

Defendants also admit that they have not searched for or provided plaintiffs with whatever "certificates of veterinary inspection" they maintain in their files, claiming that such records are not "medical records" that are subject to the Court's Order. See Defs. Opp. at 20-21. However, these certificates, as plaintiffs explained in their opening brief, typically certify that a veterinarian has inspected an animal and that the animal is free of disease and suitable for interstate travel, see Memorandum in Support of Plaintiffs' Expedited Motion to Enforce the Court's September 26, 205 Order ("Plfs. Br.") at 9-10, and clearly relate to the health or medical status of an animal. Indeed, defendants have already produced some of these certificates, plainly acknowledging that they are responsive to plaintiffs' requests. See, e.g., Plfs. Supp. Exh. 3 (providing examples of veterinary certificates).

Moreover, throughout the parties' meet and confer discussions in 2004 and 2005, plaintiffs made clear that they intended the term "medical records" to encompass all records related to the health or medical condition of an animal, which plainly would include these certificates. See, e.g., Plfs. Supp. Exh. 2 (December 22, 2004 Letter from Kimberly Ockene to Joshua Wolson), at 2 (stating that defendants' "search for additional

medical records should encompass all veterinary records or any records related to the health or physical condition of the elephants"). Defendants did not object to this understanding of the term "medical records." See Plfs. Exh. 6 (January 4, 2005 Letter from Joshua Wolson to Kimberly Ockene, responding to Ms. Ockene's December 22, 2004 letter), at 3 (indicating that defendants were "searching for the materials that [plaintiffs] have requested," without objecting to plaintiffs' clarification of the term "medical records"); cf. Pulsecard, Inc. v. Discover Card Serv., Inc., 168 F.R.D. 295, 310 (D. Kan. 1996) ("[r]espondents should exercise reason and common sense to attribute ordinary definitions to terms and phrases utilized in interrogatories").

Accordingly, the Court should also order the immediate production of any and all such "certificates of veterinary inspection" or comparable materials certifying the health or medical status of an elephant, as well as any other records – including additional e-mails or other correspondence – that concern the health or medical status of an animal, even if they are not encompassed by defendants' cramped definition of "medical records." See Defs. Opp. at 21.

**C. Additional Records Also Likely Exist.**

**1. More Detailed Records Are Likely To Exist.**

Defendants insist that there is no basis for plaintiffs' assumption that the elephants' medical records should contain more detail beyond the short-hand "medical histories" and lab reports that have been produced, and criticize plaintiffs for contending that any such detailed records still have not been produced. See Defs. Opp. at 13-17. Yet, as plaintiffs explained in their opening brief, defendants' own statements to the media, as well as USDA guidelines with which defendants insist they comply, suggest

that more detailed records should exist. See Plfs. Br. at 9, 17-18.

Thus, as plaintiffs have explained, it is defendants who are constantly asserting to the public and the press that they provide the highest standard of individualized care to their animals, along the lines of human medical care. See Plfs. Exh. 10 (defendants' head veterinarian explaining that defendants provide care to the elephants that would be the "equivalent of what would happen if you went into your doctor"); see also http://www.elephantcenter.com/pampered.aspx.[7] Therefore, plaintiffs reasonably assumed that, in order to achieve this high standard of veterinary care, one must also adhere to a high standard of veterinary record-keeping, including, for example, by making notes of routine exams.

Accordingly, the reason plaintiffs "expected" to find additional observational notes, exam notes, and narrative entries in the records is because that is what defendants have led plaintiffs (and the public) to believe would exist in their files. Defendants cannot have it both ways – i.e., publicly stating that they provide their animals with the highest standards of individualized medical attention (and treat them "as members of the family," Defs. Opp. at 16), while simultaneously criticizing plaintiffs for failing to understand that they tend to their animals and keep records in a more generalized manner, on the basis of "herd" management (presumably along the lines of how a herd of cattle is managed) – whereby they only record "abnormalities." See Plfs. Exh. 2 at 1 (noting that

[7] Defendants fault plaintiffs for relying on "random quotes from the media in a desperate attempt to establish that FEI's recordkeeping is somehow deficient." Defs. Opp. at 15. But plaintiffs are only relying on what defendants themselves, including Dr. Lindsay, their chief veterinarian, have stated to the public and the media. If plaintiffs are not permitted to rely on defendants' own statements, it is not clear what plaintiffs could rely on to demonstrate the inconsistencies between what records have been produced and what should actually exist in defendants' files.

"[d]efendant's veterinarians practice 'herd' veterinary medicine, which differs greatly from, for example, a neighborhood veterinarian who maintains a practice serving a pet population"); Defs. Opp. at 16 ("recordkeeping for herd medicine focuses on abnormalities"). It can only be one or the other, and, if it is the former, then additional records should exist. If it is the latter, and defendants have truly provided plaintiffs with all of the medical records – other than those it admits it has yet to produce – then defendants should have no trouble swearing to this fact under penalty of perjury. However, although defendants did submit a declaration in support of their Opposition, that declaration conspicuously fails to state that, in fact, defendants have provided plaintiffs with all of the medical records that exist for the elephants. See FEI Exh. E.

Moreover, contrary to defendants' statements, USDA guidelines and regulations do require Ringling Bros. to keep detailed records on the care and treatment of their elephants. Thus, while defendants contend that "no USDA regulation requires any form of medical records for animals exhibited in a circus," Defs. Opp. at 15, the USDA itself considers proper maintenance of detailed medical records to be a pre-requisite to providing animals with adequate veterinary care, which in turn is required by regulation. See 9 C.F.R. § 2.40 (requiring each animal exhibitor to establish and maintain programs of adequate veterinary care); USDA, Animal Care Resource Guide, Veterinary Care – Policy # 3 (Jan. 14, 2000) (Plfs. Supp. Exh. 4) (citing 9 C.F.R. § 2.40 as authority for the policy); id. at 3.4 (stating that "every facility is expected to have a system of health records sufficiently comprehensive to demonstrate the delivery of adequate health care," and that "for those facilities that employ one or more full-time veterinarians, it is expected there will be an established health records system . . . that meets and probably

exceeds, the minimum requirements set forth in this policy.") (emphasis added).

Indeed, the USDA guidelines specifically state that,

> [f]or all facilities, health records must be current, legible, and include, at a minimum, the following information:
> . . .
> - Dates, details, and results (if appropriate) of all medically-related observations, examinations, tests, and other such procedures.
> - Dates and other details of all treatments, including the name, dose, route, frequency, and duration of treatment with drugs or other medications . . .
> - Treatment plans should include a diagnosis and prognosis, when appropriate. They must also detail the type, frequency, and duration of any treatment and the criteria and/or schedule for re-evaluations by the attending veterinarian. In addition, it must include the attending veterinarian's recommendation concerning activity level or restrictions of the animal.

Id. (emphasis added).

Therefore, while the USDA may not cite the absence of adequate records as a "stand-alone violation," Defs. Opp. at 15, the agency can and in fact does cite the absence of proper records as a violation of the requirement for adequate veterinary care. Indeed, defendants themselves have been cited repeatedly by the USDA for such inadequate record-keeping. See Plfs. Supp. Exh. 5 (two instances of citing Ringling Bros. for inadequate veterinary care because record-keeping was sub-standard).

In addition, in contrast to what defendants are now telling this Court, see Defs. Opp. at 29, defendants' representatives have also stated to the press that Ringling Bros. "adheres to the American Zoo Association [AZA] and Elephant Handler's Association's published guidelines" for animal care. See Plfs. Supp. Exh. 6 at 2. However, as plaintiffs noted in their opening brief, Plfs. Br. at 18 n. 5, AZA guidelines require a "complete body daily exam" of each elephant and require the results of such exams to be recorded. See The American Zoo and Aquarium Association's Standards for Elephant Management

and Care (May 5, 2003) at 5 (Plfs. Supp. Exh. 7).[8]

Therefore, it is for all these completely justifiable reasons – and not "the uninformed hypotheses of plaintiffs' lawyers," Defs. Opp. at 13 – that plaintiffs expected to find far more detail and narrative in the records that they requested. However, as plaintiffs have noted, the records defendants have produced to date, more often than not, do not contain narrative entries for medical exams, treatment plans for sick or injured elephants, notations concerning the duration of treatment or specifics regarding the medications administered, or detailed follow-up notations concerning a treated elephant's progress. See Plfs. Br. at 17-20; see also Plfs. Exhs. 7, 20, 24.[9]

Plaintiffs continue to believe, therefore, that defendants' veterinarians, keepers, and veterinary staff must routinely record hand-written notes of exams and observations, or communicate concerning an elephant's condition by e-mail or other means aside from the abbreviated entries in the "medical histories." Any such notes and observations must be produced, regardless of whether they are ultimately entered into the "medical histories."

On the other hand, if defendants truly have produced every single medical note, observation, or record that exists on the elephants, then defendants' veterinarians and veterinary staff – or, at an absolute minimum the FEI official ultimately responsible for

[8] For this reason, the records from the Oregon Zoo are indeed relevant for purposes of comparison. See Plfs. Exh. 22.

[9] Although defendants state that plaintiffs are misrepresenting the contents of the records that have been produced, those records – several of which plaintiffs have attached to their Motion – speak for themselves, and show that there are typically no narrative entries to correlate with veterinary exams, and no detailed treatment plans or notations concerning the duration of treatment or follow-up for injured or ill elephants. See Plfs. Exhs. 7, 20, 24.

the accuracy of representations made to this Court – should have no trouble attesting to this fact, under penalty of perjury.

**2. Specific Animals' Records**

Aside from the general categories of missing records, plaintiffs also continue to believe that numerous records related to specific animals have not yet been produced, as discussed in plaintiffs' opening brief. See Plfs. Br. at 7-15.

For example, Seetna was in defendants' care for over four years, during which time she endured a complicated pregnancy and delivery, and ultimately was euthanized as a result of the complications. See Plfs. Br. at 11-12. Yet defendants have not produced any veterinary records for this animal, and contend that no further records exist. See Defs. Opp. at 22-23. However, although it is true that USDA guidelines do not require an entity to maintain records for more than one year past an animal's death or disposition, see Defs. Opp. at 23, given the fervor with which defendants tout their breeding, and research programs, the lack of historical records concerning parturition and breeding problems with their elephants is certainly surprising. See http://www.elephantcenter.com/comfortsafety.aspx ("The *Ringling Bros. Center for Elephant Conservation* is a 200-acre facility in Polk County, Florida, that serves as a superior environment for Asian elephant conservation, breeding, scientific study and retirement."). Defendants conspicuously do not state that they have in fact destroyed all of Seetna's records – only that they "could legally have" done so. Defs. Opp. at 23.[10]

[10] Defendants have misrepresented the USDA guideline that requires the maintenance of an animal's veterinary records for one year post-death or disposition. See FEI Exh. F at 14.2.3. Indeed, defendants boldly state that "FEI would have been completely within its rights to discard medical records that were more than one year old," Defs. Opp. at 33,

Again, if any additional records exist on Seetna, then defendants must produce them. If all such records have been produced, then defendants' should be able to attest to this fact under penalty of perjury.

Defendants also maintain that there are no additional records that exist for their young elephants, including baby elephants named Irvin, Aree, and Bertha, for whom very few records have been produced. See Defs. Opp. at 23-26.[11] However, as plaintiffs have explained, it is surprising that defendants claim to pay such close attention to every elephant in their care, including every endangered newborn elephant born at the CEC, yet do not keep daily observational notes or care records other than for major "abnormalities." Defs. Opp. at 16; but see http://www.ringling.com/animals/ (stating, among other things, that "[o]ur round-the-clock care never stops. Animals are an essential part of the circus tradition at Ringling Bros., so we're committed to the absolute highest standards of care for our animal performers"). If there are any additional staff observational notes, correspondence, or records of any kind concerning the health or medical condition of any of these animals, defendants must produce them immediately.[12]

Similarly, as plaintiffs explained, records appear to be missing for an elephant

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suggesting that the guideline applies to animals that are still living, rather than only to those who have died or been transferred.

[11] Indeed, prior to defendants' May 12, 2006 production in response to plaintiffs' April 28 letter, defendants had produced no records at all on Irvin.

[12] Defendants contend that, because defendants' veterinarians were all at Bertha's surgery, they did not have "time to generate written correspondence and e-mail" concerning Bertha's condition. Defs. Opp. at 26. However, the mere fact that they did not generate such correspondence while they were in surgery, does not mean they did not correspond about this critically ill endangered animal either before or after the surgery. A major medical event such as surgery on a newborn endangered species would presumably be of intense concern and generate much discussion among the defendants' veterinarians and non-veterinary executives. Plaintiffs still maintain, therefore, that such records are likely to exist, and that any and all such records must be produced.

named Gildah who died in August 2005. See Plfs. Br. at 21. Aside from one page of a "patient history" from 1999 that contains a single entry – defendants have produced little to no substantive veterinary records on Gildah for the years 1991-2004. However, because Gildah died less than a year ago, the USDA guideline permitting destruction of an animal's medical records one year after an animal's death or disposition does not apply, see FEI Exh. F at 14.2.3, and defendants should still have in their custody all of the medical records ever generated for this animal. There are almost certainly additional records on this animal, and all such records must be produced.[13]

**3. Other Categories of Records**

It is also clear that there are still additional categories of records that are missing from the materials produced to date, including records generated by consulting veterinarians, and radiographs of the elephants. See Plfs. Br. at 20-21.

Defendants state that a consulting veterinarian "will add to the elephant's veterinary records while on site or by subsequent communication." Defs. Opp. at 29. However, although some of the medical histories indicate exams by consulting veterinarians, plaintiffs have seen very few records reflecting "subsequent communication[s]" from non-staff veterinarians. To the extent that there are e-mail communications, letters, or other correspondence from any consulting veterinarian, defendants must produce all such records immediately.

Moreover, although defendants contend that it would be too costly to track down every "on-call" veterinarian to determine whether such individuals maintain files on

[13] Plaintiffs accept defendants' statements that there are no records for a "Shirly Ann," and no records for the stillborn calf born to Emma because, according to defendants' counsel, "medical records of a stillborn calf would not be created." Plfs. Exh. 2 at 6.

defendants' elephants, at a minimum defendants must ask their regular consulting veterinarians to search their files for responsive material. This would include (but not be limited to) the veterinarians listed on page 20 of plaintiffs' opening brief, whose names appear in the animals' records (i.e., Drs. Estes, Seamonson, Tell, and Hildebrandt). It appears that defendants have not yet done this, and the Court should order them to do so.

In addition, defendants still have not produced all of the radiographs in their custody or control concerning their elephants. For example, defendants have previously admitted to plaintiffs that there are a number of "x-rays of Feld's elephants which were taken solely for research purposes" and which are located at the University of Florida, but which defendants have refused to make available to plaintiffs for inspection because, according to defendants, they are not "medical records." See January 26, 2006 Letter from Joshua Wolson to Ethan Eddy (Plfs. Supp. Exh. 8) at 3. Plaintiffs have objected to this refusal to produce these records that relate directly to the medical condition of the elephants, but defendants have still not made these records available. See February 1, 2006 Letter from Ethan Eddy to Joshua Wolson (Plfs. Supp. Exh. 9) at 2. The Court should also order defendants to make these materials available to plaintiffs.

**D. Defendants' Conduct Is Sanctionable.**

As plaintiffs explained in their opening brief, defendants' conduct in this matter is clearly sanctionable under Fed. R. Civ. P. 37(b). See Plfs. Br. at 22-25. Although defendants repeatedly insist that "[t]here is no basis for finding that FEI violated the Court's 9/26/05 Order," Defs. Opp. at 38; see also Defs. Opp. at 7 (stating that "FEI has complied with the Court's 9/26/05 Order"), their own brief clearly belies that assertion. Indeed, as discussed above, defendants admit that there are still over 1,200 responsive

medical records that have not been produced, that they have not produced untold numbers of other medical records that were created prior to 1994, and that they have not produced veterinary inspection certificates that exist on the elephants.

In addition, defendants misleadingly suggest that only a small number of medical records have been produced since the Court's September 28 deadline. See Defs. Opp. at 4. However, in addition to the more than 1,200 records that defendants now admit are still outstanding, defendants' November 2005, December 2005, February 2006, and May 2006 productions also contained hundreds of medical records that should have been produced in September 2005 in response to this Court's unequivocal command.[14]

Thus – in contrast to defendants' statement that "the amount of medical records produced since the Court's 9/26/05 Order . . . is *de minimus,*" Defs. Opp. at 9 – in fact, since the Court's September 28 deadline defendants have continued to produce, in a piece-meal fashion, hundreds of pages of critically relevant medical records that should

[14] For example, the November 30, 2005 production contained numerous records that had been created before September 2005, including the necropsy (animal autopsy) reports for several elephants, records related to tuberculosis and foot care for elephants in defendants' custody, and the medical file for the young elephant named Riccardo who died in the summer of 2004 – none of which had been produced previously. The subsequent production on December 21, 2005 also contained over 200 pages of medical records that were created before September 2005 and had not previously been produced, including medical records for a baby elephant named Bertha who was born (and died) in the summer of 2005, laboratory reports from mid-2005, and other veterinary records from 2001, 2003, and 2004.

The February 10, 2006 production contained still more medical records that had not been produced and that were created prior to September 2005, including records related to tuberculosis, lab reports, additional records related to Riccardo's health, medical histories from 2000-2001, and radiograph interpretations. Defendants' latest production of May 12, 2006 in response to plaintiffs' April 28 letter contained still more medical records that had not yet been produced and that were created prior to the Court's September 2005 Order, including records related to elephants named Aree, Irvin, and Mala, among others.

have been produced months earlier. Moreover, many of these records might never have been produced at all had plaintiffs not continued to pursue them.

Plaintiffs certainly would have preferred not to have to use their public-interest clients' limited resources to file this Motion, which is why they have given defendants so much leeway since the Court's September Order to produce all of the responsive records. However, when it became clear that, even after seven months, defendants still had not complied with the Court's Order, plaintiffs deemed it necessary to seek Court intervention. Plaintiffs have shown enormous patience and cooperation with defendants – as evidenced by the fact that they have waited this long to seek the Court's assistance. However, because plaintiffs have already won their motion to compel these records that were long ago requested, they need the Court to ensure that the relief they obtained is actually carried out.

Indeed, while defendants accuse plaintiffs of annoying and harassing them for the medical records, it is clear that if plaintiffs had not "annoyed" defendants and continued to pursue this matter, plaintiffs might never have obtained hundreds of pages of clearly relevant records, including the 1,200 medical records defendants now admit have been withheld. At every step of the way, since the beginning of discovery in this case, plaintiffs have had to be unusually persistent and resourceful simply to obtain the most basic records from defendants. This is not how discovery is supposed to work, and it is most certainly not how plaintiffs would prefer to spend their limited time and resources. Moreover, contrary to defendants' assertions, their conduct is not "substantially justified" simply because defendants chose to switch counsel mid-stream. See, e.g., Defs. Opp. at

40.[15]

Furthermore, defendants are absolutely incorrect that plaintiffs have not been prejudiced by defendants' dilatory conduct. See Defs. Opp. at 39. As plaintiffs explained in their opening brief, see Plfs. Br. at 2-3, because plaintiffs have had to devote so much time to piecing together the medical records and deciphering what is missing – and then "annoying" defendants until they produce the missing records – they have been unable to engage in other discovery that they would like to take, and to get on with presenting their substantive case to the Court.[16] In addition, as plaintiffs also explained in their opening brief, Plfs. Br. at 2-3, 24-25, plaintiffs' experts who are reviewing the elephants' medical records are forced to re-review these files every time additional records come in, rather than being able to do one complete review with all of an animal's records.

[15] Defendants somehow believe that it is acceptable to ignore all of the violations of the Court's Order that occurred prior to Fulbright & Jaworski's entry of an appearance in this case, and suggest that because all prior violations were the fault of prior counsel, the violations are not sanctionable. See, e.g., Defs. Opp. at 9 ("What plaintiffs have not stated is that the amount of medical records produced since the Court's 9/26/05 Order by current counsel is *de minimus*.") (first emphasis in original, second emphasis added). The reason why plaintiffs did not specify the relative fault of each of defendants' counsel is that this simply is not relevant. Defendants themselves are responsible for complying with court orders, and must be held accountable, especially where plaintiffs have had to incur numerous costs associated with chasing after these critical records.

[16] To the extent that defendants have somehow been stymied in taking discovery in this case because of this discovery dispute, see Defs. Opp. at 8, they have only their own lack of diligence in complying with the Court's Order to blame.

Accordingly, for all of the foregoing reasons, and those stated in plaintiffs' opening brief, the Court should grant plaintiffs' Motion to Enforce the Court's September 26, 2005 Order, and enter plaintiffs' proposed order.[17]

Respectfully submitted,

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[17] Defendants' assertion that plaintiffs have not complied with their discovery obligations is inaccurate. See Defs. Opp. at 36. Plaintiffs produced thousands of pages of records to defendants in June 2004, and subsequently have supplemented that response on several occasions. Most recently, plaintiffs provided a supplemental production to defendants on July 11, 2006. Indeed, defendants have never moved to compel any responses from plaintiffs, nor have they needed to.