UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS, *et al.*,	)	
Plaintiffs,	)	
v.	)	
	)	Civ. No. 03-02006 (EGS/JMF)
RINGLING BROTHERS AND BARNUM & BAILEY CIRCUS, *et al.*,	)	
Defendants.	)	

PLAINTIFFS' REPLY TO DEFENDANTS' RESPONSE TO ORDER TO SHOW CAUSE

Introduction

At the hearing on September 16, 2005, concerning plaintiffs' motion to compel discovery responses and defendants' belated motion for a protective order for the medical records on the Asian elephants at issue in this case under the Endangered Species Act, this Court ordered defendants Ringling Brothers circus and Feld Entertainment ("Ringling Bros.") to show cause why they should not be held in contempt for failing to produce and identify all of the medical records that were requested by plaintiffs in their March 30, 2004 discovery requests. See Transcript of September 16, 2005 Hearing at 35-36 (Plf. Exh. A). The Court reduced that Order to writing on September 19, 2005. See Minute Order, September 19, 2005.

Specifically, the Court ordered defendants to show cause why they should not be held in contempt "for their failure to turn over the approximately 2,000 pages of veterinary records or to assert a privilege as to why they should not be turned over, in response to plaintiffs' initial

discovery request." Id. In response, defendants assert that the Court may not hold them in contempt because they did not violate a specific Court "order" to produce such records. See Defendant's Response to Order to Show Cause ("Show Cause Response") at 10-11. However, as demonstrated *infra*, Rules 26(g)(3), and 37(a) and (d) of the Federal Rules of Civil Procedure make clear that, at an absolute minimum, this Court may issue an order requiring defendants to pay plaintiffs' attorneys' fees and costs associated with plaintiffs' efforts to uncover the records and obtain a court order requiring defendants to produce the medical records. Indeed, as shown below, not only have defendants failed to justify their failure to produce or identify the requested records, but the justifications they have proffered are demonstrably untrue.

Before turning to plaintiffs' response, we wish to emphasize that it remains unclear whether defendants have yet produced all of the requested medical records. On September 28 and 29, 2005, pursuant to the Court's September 26, 2005 Order, the defendants delivered eight boxes of elephant medical records. Because plaintiffs have not yet had an opportunity to review all of those records, they are not yet in a position to say whether the defendants have finally complied with their discovery obligation to produce "all" of the medical records for the elephants. However, even a cursory review of the newly produced documents indicates that defendants still have not produced all such records. For example, while there are some hand-written notes in the records, they are few and far between. Rather, it appears that defendants have, again, provided plaintiffs with primarily typed medical "histories" for elephants that were compiled from original hand-written notes by the veterinarians and other Ringling Bros. employees, but, for the most part, the original notes have not been provided.

There are also many gaps in the records – e.g., for some animals, there are no records for

certain years at all. Indeed, in their recent Show Cause Response, defendants conspicuously mention that they had agreed "to produce non-privileged documents dated 1996 or later . . .." Show Cause Response, at 3 (emphasis added). However, because this Court made absolutely clear that defendants were to produce "all" medical records for the elephants, defendants must produce all such records, regardless of their form and regardless of the year they were compiled. See, e.g.,Transcript of September 16, 2005 Hearing, at 35 ("I'm going to order that all of these documents be produced"); id. at 36 ("And when I say all, I mean all, every last record") (emphasis added).

Once plaintiffs have had an opportunity to review the newly produced records, they will more fully advise the Court concerning defendants' compliance – or noncompliance – with the Court's September 26, 2005 Order.

PERTINENT BACKGROUND

Plaintiffs will not belabor the background that has led to the Court's Show Cause Order – all of which is detailed in Plaintiffs' January 25, 2005 Memorandum In Support Of Their Motion To Compel, at 25-30; Plaintiffs' March 4, 2005 Reply Memorandum In Support Of Their Motion To Compel, at 7-10; Plaintiffs' March 4, 2005 Opposition to Defendants' Motion for a Protective Order at 3-5; and was also discussed in detail at the September 16, 2005 Hearing. The bottom line is that, in response to plaintiffs' March 30, 2004 discovery request for "all" of the medical records for each elephant owned or leased by Ringling Bros. 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 Nos. 8 and 16 (Exh. A to Plfs. Motion to Compel), defendants produced only scant medical records, and, with respect to

Interrogatory No. 8, stated that, pursuant to Rule 33(d), all records containing the requested information had been produced. See Defendants' Objections and Responses To Plaintiffs' First Set Of Discovery (June 9, 2004) ("Def. Resp.") (Exh. B to Plfs. Motion to Compel), at 18, 30. Indeed, defendants did not claim a privilege for any such records, nor list any such records on a privilege log. Nor did defendants in any other way disclose that any records responsive to these requests had been withheld.

Subsequently, in light of the paucity of medical records that were provided, when plaintiffs insisted that defendants could not possibly have complied with the discovery request for all medical records, defendants' attorney represented, in writing, that defendants had in fact provided plaintiffs with the "complete" records in response to this request. See Letter from Joshua Wolson to Katherine A. Meyer (November 8, 2004), at 7 ("the records that defendants produced to you are complete, in that they contain all of the pages in defendants' files") (Plf. Exh. B).

It was only after plaintiffs informed defendants that they were filing a motion to compel that defendants admitted there were more "detailed" medical records for the elephants, see Letter from Kimberly Ockene to Joshua Wolson (Dec. 22, 2004), at 5 ("It is now clear that plaintiffs will be filing a motion to compel . . .") (Exh. H to Plfs. Motion to Compel); Letter from Joshua Wolson to Kimberly Ockene (January 4, 2005), at 3 (noting the existence of "more detailed medical records") (Exh. I to Plfs. Motion to Compel), and, it was only after plaintiffs filed their motion to compel, that defendants moved for a protective order with respect to such records. See Plfs. Motion to Compel (January 15, 2005); Def. Motion for a Protective Order (Feb. 15, 2005).

Moreover, conspicuously, none of the reasons proffered to the Court – both at the

September 16, 2005 Hearing, and now in defendants' Show Cause Response – were ever previously articulated by defendants to justify their failure to produce these records. Indeed, defendants did not mention any of these justifications in their opposition to the motion to compel, or in their discussions with plaintiffs' attorneys. Therefore, it is clear that these belated justifications have been concocted solely in response to the Court's expressed displeasure with the way the defendants have acted here.

Unfortunately, as a result of defendants' failure to produce the medical records that go to the core of plaintiffs' ESA claims, this case has been substantially delayed for many months. For example, without the medical records, plaintiffs have not been able to educate and secure the assistance of experts in this case, nor have they been able to take depositions of defendants' expert and lay witnesses concerning the treatment and care of the elephants. In addition, plaintiffs – non-profit public interest organizations and a former circus employee – have had to expend considerable resources pursuing the production of these critical records. Accordingly, sanctions should be imposed on defendants, which, at an absolute minimum, require defendants to pay plaintiffs' attorneys' fees and costs associated with this matter.

ARGUMENT

A. Defendants Have Failed To Justify Their Failure To Produce Or Identify The Medical Records Requested By Plaintiffs.

None of the reasons proffered by defendants justifies their failure to produce or identify the medical records requested in plaintiffs' discovery.

1. The Dr. Lindsay Excuse Has No Merit.

At the September 16, 2005 Hearing on this matter, defendants counsel identified only one

reason that defendants had failed to produce or identify all of the medical records – i.e., the assertion that, unbeknownst to any of the attorneys who helped prepare the discovery responses, the more "detailed" medical records were kept "off-site" at the home office of Ringling Bros.' veterinarian, William Lindsay. See Transcript at 44-45. However, as plaintiffs' counsel explained, this is no excuse at all since, until very recently, Dr. Lindsay was – and had been for many years - Ringling Bros.' chief, full-time veterinarian. Id. at 62-63. Indeed, for this very reason, long before defendants were required to produce the medical records for the animals, they had already listed Dr. Lindsay in their Initial Disclosures as someone likely to have discoverable information that defendants may use to support their defenses in this case. See Defendants' Initial Disclosures (January 30, 2004), at 2 (Plf. Exh. C). Therefore, since both defendants and their counsel have a duty to conduct a reasonable inquiry for all responsive records to discovery requests and certify that such responses are accurate, see Fed. R. Civ. P. 26(g)(2); Phinney v. Paulshock, 181 F.R.D. 185, 203 (D.N.H. 1998) ("Rule 26(g)(2) requires a certifying lawyer to make a reasonable effort to assure that the client has provided all the information and documents that are available to him that are responsive to the discovery demand"), they certainly had a duty to ask Dr. Lindsay whether he had any of the records that were covered by plaintiffs' request.

Indeed, even apart from defendants' inherent obligation under the Federal Rules to ascertain whether Dr. Lindsay had any responsive records, plaintiffs included a specific Instruction in their discovery requests that defendants must include in their response "any materials that they have a right to secure from any source . . .." Plaintiffs' Discovery Requests, Plaintiffs' Instruction No. 3 (emphasis added) (Exh. A to Plfs. Motion to Compel). Therefore, clearly defendants, and their lawyers, were on notice that they should secure from Dr. Lindsay –

and all other Ringling Bros. veterinarians and animal care providers – all records that are responsive to plaintiffs' discovery requests.

In fact, in defendants' latest attempt to justify their failure to produce the requested records, Ringling Bros.' in-house lawyer, Julie Strauss, admits that she "oversaw the search that [defendants] conducted to gather responsive documents," and that she has worked for Ringling Bros. for 17 years. See Strauss Decl. ¶¶ 3, 7. Ms. Strauss also states that, upon receipt of plaintiffs' discovery requests, she made phone calls "with a number of Feld employees to answer interrogatories and locate documents responsive to the requests." Id. ¶ 6 (emphasis added). Surely Ms. Strauss knew that Dr. Lindsay – defendants' principal veterinarian – was a logical source of many of the medical records sought by plaintiffs.

In fact, in defendants' recent filing, curiously, Ms. Strauss goes out of her way to emphasize that, three months before defendants even received plaintiffs' discovery requests, she had the foresight to put certain Ringling Bros. employees – **including Dr. Lindsay** – on notice that "discovery in this lawsuit would begin in early 2004 that would require [defendants] to produce to plaintiffs information regarding a wide variety of issues involving elephant care and treatment," and that she "specifically referenced the need to start gathering each elephant's medical records." Strauss Decl. ¶ 5 (emphasis added). Although defendants conspicuously failed to attach a copy of the email that Ms. Strauss sent to Dr. Lindsay and other Ringling Bros. employees on this matter, this admission alone demonstrates that Ms. Strauss knew all along that Dr. Lindsay was a logical repository of the records that plaintiffs predictably did request. Therefore, there simply is no credible basis to believe that it nevertheless did not occur to any of defendants' attorneys – or defendants themselves – to obtain all such responsive records from

their chief veterinarian, as well as the other veterinarians and animal care staff, when faced with an actual discovery request for "all" of the medical records.

2. The USDA Excuse Is Also Meritless.

In their Show Cause Response, defendants include a new reason for their failure to produce or identify the "detailed" medical records for the elephants which they have never asserted to plaintiffs, and which they failed to mention to the Court at the September 16, 2005 Hearing when the Court asked for an explanation. They now explain that the reason they did not realize that there were any other records that plaintiffs might want to obtain is that the few skeletal records they did produce – which, they assert, are those that are kept "on site" with the elephants – have always satisfied the United States Department of Agriculture when it has conducted investigations of Ringling Bros. under the Animal Welfare Act. See Show Cause Response at 5; Strauss Declaration ¶¶ 9, 14.

In support of this assertion, Ms. Strauss states that she "do[es] not recall any time that the USDA (or any other regulatory agency) has complained to [defendants] about the completeness of the records available on site." Strauss Decl. ¶ 9. Ms. Strauss also points to a specific investigation involving an elephant named Nicole, and insists that "[t]he USDA never suggested that the medical records that it received about Nicole were incomplete." Id. ¶ 14. Thus, defendants actually assert to this Court that, since the USDA always accepts the records produced on-site as the "complete" medical records of the elephants, defendants did not believe they had to look for, or produce, any other medical records that were responsive to plaintiffs' discovery requests. Show Cause Response at 5; Strauss Decl. ¶¶ 9, 14.

However, regardless of whatever successful deceptive practices defendants have used

with respect to the production of medical records for the USDA (and other regulatory bodies), this certainly does not excuse their failure to comply with the requirements of the Federal Rules of Civil Procedure here. Moreover, as demonstrated below – and in several documents obtained by plaintiffs under the Freedom of Information Act – Ms. Strauss' representations on this point are demonstrably false. On the contrary, USDA investigators have complained – in particular with reference to Nicole – that their investigations have been thwarted by Ringling Bros.' refusal to provide "complete" medical records on the elephants.

The Nicole investigation to which Ms. Strauss refers was initiated as a result of reports from several former Ringling Bros. employees, including plaintiff Tom Rider, that this elephant – one of the older matriarchal elephants in Ringling Bros.' entourage – was the recipient of particularly brutal beatings when she refused to perform as requested. On December 21, 1998, the USDA received a complaint from two former Ringling employees that Ringling handlers routinely beat the elephants with bullhooks, that these beatings cause the elephants much distress and pain, as evidenced by the animals' cries and other distressful verbal reactions which the employees frequently witnessed, and that "[b]eatings of Nicole are particularly frequent and brutal and entirely unprovoked." See Complaint Sent to USDA (December 21, 1998) (Plf. Exh. D), at Addendum p.2. In subsequent sworn testimony before the USDA, one of these former employees described in great detail an incident in which "Nicole was severely beaten" by two of Ringling's handlers "because she performed poorly" in a circus show. See Affidavit of Glen Ewell (January 20, 1999) (Plf. Exh. E), at 3. According to this individual, "[t]he beating continued until the handle of the bull hook shattered," and "one of the strikes . . . resulted in the metal hook penetrating the skin and causing an open wound from which blood began flowing."

Id.

Mr. Rider, who worked for Ringling for two and a half years, also specifically complained to the USDA about Ringling's routine beatings of elephants with bullhooks, and, in sworn testimony to the agency, also mentioned the cruel treatment of Nicole. See Affidavit of Tom Rider (July 20, 2000) (Plf. Exh. F), at 5. He further testified that, on June 21, 1999, Nicole "was taken off the train and trucked back to Florida, because of all the scars," because Ringling "didn't want the USDA to see all the [bull] hook marks on her leg, which had swollen," when the USDA inspected the circus as it traveled across the United States border into Canada. See id. In response to these complaints, the USDA began an investigation. And, although the USDA refuses to provide plaintiffs with many of the records generated during that and numerous other investigations it has conducted of Ringling Bros. over the years, which plaintiffs have both requested under FOIA and subpoenaed in this case – the few records the agency has disclosed show that Ms. Strauss' representations concerning this matter are patently false.[1]

For example, in response to the eye-witness accounts of the mistreatment of the elephants, the presence of tuberculosis in elephants, and the mistreatment of Nicole in particular, the USDA tried for years to obtain complete medical records on the elephants. However, as explained in a November 24, 2000 internal memorandum from the chief USDA investigator assigned to the case, "[t]he investigation has been very frustrating in that **Feld Entertainment has not been cooperative with allowing the USDA to review medical records on the elephants**, and that key witnesses will not cooperate due to court settlements with Feld

[1]The USDA's failure to respond to plaintiffs' subpoena is the subject of related pending litigation. See ASPCA v. USDA, Civ. No. 05-840 (D.D.C.) (EGS).

Entertainment that prevent them from discussing any circus issues with anyone." See Memorandum To Alan Christian from Diane Ward (November 24, 2000) (Plf. Exh. G) (emphasis added). In another memorandum written three months later, the USDA investigator again complained to her superior that Feld Entertainment was not allowing the agency "to review medical records" on the elephants. See Memorandum to Alan Christian from Diane Ward (March 26, 2001) (Plf. Exh. H).

In an August 27, 2001 Memorandum, another USDA investigator recorded that when the USDA sent an inspector to Ringling's "Center for Elephant Conservation" the records produced on Nicole "**did not look complete**." See Memorandum to Diane Ward from Charmain Zordan (August 27, 2001) (Plf. Exh. I) (emphasis added). Indeed, according to the USDA official, when Julie Strauss was contacted about this matter, and the agency requested copies of "all veterinary care records for Nicole for at least the past two years," Ms. Strauss and her co-counsel "refused to let [the USDA] copy the records on hand, and said it would take approximately two weeks for them to get back to [the USDA] on our request." Id. (emphasis added). According to the Memorandum, Ms. Strauss and her colleague also "would not allow [the USDA] to question any employees at the facility." Id.

In light of this evidence, there simply is no credibility whatsoever to Ms. Strauss' representations to this Court that the reason she did not realize she needed to look elsewhere for the "detailed" medical records for the elephants was that the USDA has always been satisfied with the completeness of the records that were produced on site. On the contrary, this history shows that defendants have a well-established pattern of hiding the complete medical records from the USDA, and then – as they have done here – using excuses to buy more time to prepare

the versions of the records they wish to provide.

3. The Computer Soft-Ware Excuse Is Also Baseless.

Nor is there any validity whatsoever to defendants' other new justification for overlooking thousands of medical records that were requested by plaintiffs – i.e., that there were problems with the new computer soft-ware program that defendants now use to record information about the elephants. See Show Cause Response at 9. Indeed, particularly because, according to defendants themselves, this system is relatively new, there would be no reasonable basis for assuming that all of the medical records requested by plaintiffs – which include records on elephants that Ringling Bros. acquired decades ago – somehow were entered into the new computerized system. See Strauss Decl. ¶ 12 (stating that the "relatively new centralized computer database" was "inaugurated" "at the time of the initial document search," which would have been after March 30, 2004).

Moreover, since plaintiffs' request covered "all" of the medical records, see Document Request No. 8, defendants are not allowed to provide plaintiffs with new computerized versions of previously hand-written or otherwise recorded information. Rather, they must provide plaintiffs with "all" of the records covered by plaintiffs' discovery requests, unless any such records are privileged. See also Strauss Decl. ¶ 12 (admitting that the new computerized version of the records is "[i]n addition" to the "hard copy records"); see also Hearing Tr. at 36 ("when I say all, I mean all, every last record"). Therefore, since defendants candidly admitted to this Court that none of these records are privileged, see Hearing Tr. at 35, there simply is no excuse for defendants' failure to provide all of the records in response to plaintiffs' initial discovery

request, regardless of whether defendants recently began using a computerized database.[2]

B. Defendants Should Be Sanctioned For Trying To Hide From Plaintiffs The Existence Of Thousands Of Pages Of Medical Records On The Elephants.

In light of what has occurred here, this Court should sanction defendants, and, at an absolute minimum, require them to pay plaintiffs' reasonable attorneys' fees and costs in pursuing the additional records that this Court has now ordered defendants to produce. Although defendants insist that they cannot be held in contempt at this juncture, since it has not yet been established that they violated any "order" of the Court, see Show Cause Response at 10-11, it is absolutely clear that this Court may order defendants to pay plaintiffs' reasonable attorneys' fees and costs, pursuant to Rules 26(g)(3), 37(a)(4)(A) and 37(d).

Rule 26(g)(2) requires that "[e]very discovery request, response, or objection made by a party represented by an attorney shall be signed by at least one attorney of record," and that signature "constitutes a certification that to the best of the signer's knowledge, information, and belief, formed after a reasonable inquiry, the request, response, or objection is . . . consistent with the rules [of discovery]." Fed. R. Civ. P. 26(g)(2). Rule 26(g)(3), in turn, authorizes the Court to impose sanctions – "which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including a reasonable attorney's fee" – for violating Rule 26(g)(2). Fed. R. Civ. P. 26(g)(3). Such sanctions may be imposed on the party, the certifying

[2]Indeed, as mentioned, *supra* at 3, it now appears that, in many instances, defendants have provided plaintiffs with the computerized version of the animals' medical histories, rather than the "hard copies" of the actual records, see Strauss Decl. ¶ 12. However, not only do such records not satisfy the plain language of plaintiffs' request – for "all" medical records – but, providing new, computerized versions of records affords defendants the opportunity to omit information from the original records or to add information that was not included in those records.

attorney, or both. Id.

Here, not only did defendants' counsel sign – and thereby certify – the responses to plaintiffs' discovery requests even though large quantities of documents directly responsive to plaintiffs' straightforward request for medical records had not been provided, see Def. Responses (Exh. B to Plfs. Motion to Compel), at 35, but defendants' counsel subsequently confirmed in writing that defendants had provided a "complete" response to plaintiffs' request for medical records. See Plf. Exh. B hereto. As discussed above, such a certification was unreasonable, given the fact that defendants now assert that they failed to ask their lead veterinarian whether he had any responsive medical records. Accordingly, plaintiffs are entitled to their reasonable attorneys' fees for pursuing the release of these critical records. See, e..g, Phinney v. Paulshock, 181 F.R.D. 185, 203-205 (D.N.H. 1998) (imposing sanctions pursuant to Rule 26(g)(3) on party who failed to disclose information requested in discovery, where certification under Rule 26(g)(2) was not reasonable under the circumstances).

In addition, Rule 37(a)(4)(A) provides that the Court "shall" order the defendants to pay plaintiffs the reasonable expenses incurred in making the motion to compel that has resulted in the Court's September 26, 2005 Order, after affording the defendants an opportunity to be heard on the matter . . .." Further, Rule 37(d) provides that the Court may make any order that is "just" with regard to a party's failure to comply with a discovery request under Rule 33, including requiring the party "to pay the reasonable expenses, including attorneys' 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." It is well established that a court has broad discretion to impose sanctions under Rule 37. See, e.g., National Hockey League v. Metropolitan

Hockey Club, Inc., 427 U.S. 639, 642-43 (1976).

Here, in response to plaintiffs' Interrogatory requesting information about each of the elephants ever owned or leased by defendants, including, but not limited to medical information, defendants's responded by (a) asserting all ten of their General Objections – which they no longer rely on with respect to the medical records; and (b) invoking their prerogative under Rule 33(d) to refer plaintiffs to the documents that defendants produced which would reflect the answers to the Interrogatory. See Defendants' Response To Interrogatory No. 8 (Exh. B to Plfs. Motion to Compel); see also Rule 33(d) ([w]here the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served . . . it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained . . ."). However, as the Court well knows, defendants did not produce the requested records, since it failed to disclose even the existence of "detailed" medical records, until plaintiffs threatened to move to compel.

Moreover, plaintiffs have recently discovered that, in clear violation of Rule 33(b), defendants also failed to provide any verification under oath with regard to their answer to Plaintiffs' Interrogatory No. 8. See Interrogatory Certifications Provided By Defendants (Plf. Exh. J) (certifying – but not under oath – the answers to only Interrogatory Nos. 6, 12, 13, 14, and 16). In other words, after leading plaintiffs to believe that all records containing information related to the elephants could be found in the documents that defendants originally produced – when, in fact, that was not true – defendants did not specifically certify that response to plaintiffs' interrogatory, as required by Rule 33(b).

Therefore, since the failure to certify answers to Interrogatories also constitutes an

egregious violation of the Rules of discovery, it is well within the Court's discretion to require defendants to pay plaintiffs their reasonable costs and attorneys' fees for the time spent on preparing and pursuing their motion to compel on this matter. See, e.g., Monroe v. Ridley, 135 F.R.D. 1, 5 (D.D.C. 1990) ("defendant's interrogatory responses cannot constitute 'answers' as they have not been signed and sworn in accordance with Fed. R. Civ. P. 33(a)"); Roth v. Bank of the Commonwealth, 1988 WL 43963, (W.D.N.Y.) ("[u]nsigned and unverified answers are not answers").

Accordingly, under Rules 26(g)(3), 37(a)(4) and 37(d), the Court may order defendants to pay plaintiffs' reasonable attorneys' fees and costs in connection with having to pursue this matter. Furthermore, it is well established that, to impose such sanctions, the Court need not establish that defendants' deficiencies were intentional – although plaintiffs believe that they were. Rather, negligence alone is a sufficient basis for imposing such sanctions. See, e.g., Long v. District of Columbia, 110 F.R.D. 1 (D.D.C. 1985) ("even simple negligence may justify the imposition of sanctions" under Rule 37(d)); Dellums v. Powell, [cite], 184 U.S. App. D.C. 339 (D.C. Cir. 1977) (willfulness only goes to type and magnitude of sanction imposed, not whether sanction may be imposed). Accordingly, it is not necessary that this Court find that defendants purposefully hid the existence of the "detailed" medical records from plaintiffs in order to require them to pay plaintiffs' reasonable attorneys' fees and costs.[3]

[3]A proposed order is submitted for this purpose.

Respectfully submitted,

/s/

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