

Plaintiffs did not have to file a motion to compel to obtain the medical records. It is undisputed that, during the meet-and-confer process, defendant undertook additional searches, found more records, and offered to produce them to plaintiffs under a protective order. Plaintiffs could have had the documents promptly by agreeing to a temporary protective order pending the Court's resolution of the dispute over the scope of a permanent protective order. But they did not follow this course. Thus, the discovery dispute before the Court was not whether defendant would produce the records, but rather the scope of any protective order relating to those records. In these circumstances, the motion to compel was unnecessary and costs of the motion to compel cannot be awarded under FRCP 37(a)(4)(A). Nor should plaintiffs be awarded costs related to the protective order dispute under FRCP 26(c), because defendant's position was "substantially justified," as shown by the Court's granting of the protective order in part and its admonition that plaintiffs should not misuse records produced in discovery.²

The remainder of this reply also responds to plaintiffs' *ad hominem* attack on defendant, which we are reluctant to leave unanswered even though there is no legal basis for a contempt citation or award of costs on the motion to compel.

**There Is No Basis For Imposing Discovery Sanctions
Or Awarding Plaintiffs Attorneys' Fees.**

There is no basis for imposing discovery sanctions here because it is undisputed that defendant offered to produce the medical records, subject to a protective order, before plaintiffs filed their motion to compel. After defendant made its initial document production, plaintiffs waited more than four months — until October 19, 2004 — to initiate meet and confer discussions. After an exchange of letters and an in-person

² Order of September 26, 2005, at 2.

meeting, defendant agreed on December 3 to search for additional records. In that search, defendant found additional records and asked plaintiffs to consent to a protective order for ensuring the confidentiality of the documents. Plaintiffs could have had the documents then by agreeing to a provisional protective order pending the Court's ruling on the scope of a permanent order. When plaintiffs refused to agree to any protective order, the parties submitted their dispute to the Court and, upon resolution of the issue by the Court, defendant produced the documents.

In short, defendant met and conferred with the plaintiffs, searched for additional documents, and identified such documents in less time than it took plaintiffs to initiate meet and confer discussions in the first place. Delay thereafter resulted from the protective order issue, not defendant's objections to producing the documents.

The deficiencies in defendant's initial document search provide no basis for the imposition of discovery sanctions. Plaintiffs invoke FRCP 37(a)(4)(A) as a ground for receiving an award of their expenses and attorneys' fees associated with their motion to compel. But it is undisputed that the motion to compel was unnecessary: defendant offered to produce the medical records *before* the filing of any motion to compel, subject only to a protective order. Thus, it is inappropriate to award costs and fees associated with the motion to compel under FRCP 37(a)(4)(A), which expressly requires that a party must first "mak[e] a good faith effort to obtain the disclosure or discovery without court action." The rule worked here, obviating the need for the parties to seek a ruling from the Court on the discoverability of these documents.

The dispute the parties brought to the Court involved the protective order question. Accordingly, the relevant rule is FRCP 26(c), which expressly governs "the

award of expenses in relation to the motion [for protective order].” Under this rule, the Court would take into account whether defendant’s request for a protective order “was substantially justified or . . . other circumstances make an award of expenses unjust” under the standards of FRCP 37(a)(4). Here, the Court granted defendant’s motion for a protective order “in part” and admonished plaintiffs to restrict their use of discovery information for the purposes of this lawsuit and not “for purposes of publicity or to argue the merits of plaintiffs’ claims to the media....” (Order of September 26, 2005, at 2.) Defendant respectfully submits that the request for protective order was “substantially justified” and it would be unjust to impose expenses on defendant for requesting a protective order.

Plaintiffs also cite FRCP 26(g)(3), which provides for an award of expenses and fees where “without substantial justification a certification is made in violation of the rule.” Plaintiffs try to invoke the certification rule based on a meet-and-confer letter dated November 8, 2004, in which counsel for defendant stated his understanding that the medical records production was “complete, in that they contain all the pages in defendant’s files.” (Pl. Mem. at 14.) Plaintiffs do not mention that, at the meet-and-confer meeting held a week later, counsel for the parties discussed the issue and counsel for defendant specifically agreed to conduct an additional search for medical records. (*See* Letter of December 3, 2004 at 2.) When additional medical records were found, defendant promptly offered to produce them subject to protective order.

We know of no precedent — and plaintiffs cite none — in which expenses and fees were awarded for an initial oversight in document production that was promptly corrected through the meet-and-confer process. FRCP 26(g) was never meant to apply to

good-faith communications between counsel during the meet-and-confer process, which are not a formal “discovery request, response or objection” embraced by FRCP 26(g).³ Other provisions of FRCP 26(g) also reflect that it was not meant to apply to the meet-and-confer process, and plaintiffs do not argue otherwise.⁴ Indeed, the meet-and-confer process is intended to enable the parties to discuss outstanding discovery issues and to resolve issues without the need for a motion. *See Avent v. Solfaro*, 210 F.R.D. 91, 95 (S.D.N.Y. 2002) (meet-and-confer process “embodies a policy of encouraging voluntary resolution of pretrial disputes, in the interest of judicial and client economy and effective processing of cases”). It is, in sum, entirely unfair to treat counsel’s meet-and-confer letter as a formal “certification,” where the meet-and-confer process quickly resulted in a further search and an offer to produce the omitted medical records. It is important that the meet-and-confer procedure not be treated as another phase of the adversary process, which would chill the informal, good-faith resolution of discovery issues contemplated by the rule.

Moreover, even if there had been a “certification” by defendant’s counsel within the meaning of FRCP 26(g), there would be no basis here for imposing expenses and fees under that rule. There must be a showing of deliberate or knowing misrepresentation by counsel: where “counsel had no knowledge that the discovery response was inadequate,

³ In *Phinney v. Paulshock*, 181 F.R.D. 185, 204 (D.N.H. 1998), a letter from counsel was deemed a formal “certification” where the letter “responded to plaintiffs’ original interrogatory requests ... and to plaintiffs’ specific follow-up request.” Here, by contrast, counsel’s letter was not a formal discovery response, but part of the meet-and-confer process.

⁴ The certification provisions of FRCP 26(g)(2) have no application to the meet-and-confer letter — under those provisions, counsel certifies that its discovery responses are “consistent with these rules and warranted by existing law or a good faith argument,” “not interposed for any improper purpose,” “not unreasonably or unduly burdensome or expensive.”

there is no ground for a sanction under Rule 26(g), which applies only to knowing violations of the rules.” *Maynard v. Nygren*, 332 F.3d 462, 470 (7th Cir. 2003).

Plaintiffs also cite FRCP 37(d) as a basis for discovery sanctions. Rule 37(d), however, applies to a party’s failure to “serve a written response to a request for inspection submitted under Rule 34” Defendant, of course, did serve a written response to plaintiffs’ discovery requests, making the rule inapplicable.⁵

In sum, the meet-and-confer process worked in this case. Plaintiffs had no need to file a motion to compel production of medical records because the meet-and-confer process prompted an additional search and offer to provide the records subject to protective order. To award expenses and fees in these circumstances is inconsistent with FRCP 37(a)(4), which does not authorize expenses and fees for motions to compel unless the meet-and-confer process failed.⁶

Plaintiffs’ Ad Hominem Attacks On Defendant’s Initial Document Production Are Irrelevant And Gratuitous.

In response to the Court’s order to show cause, defendant submitted the declaration of Julie Alexa Strauss explaining why defendant’s initial production of

⁵ Plaintiffs now also challenge defendant’s interrogatory responses and verifications. Those concerns, however, have never been the subject of a meet-and-confer discussion between the parties, making any effort to raise them now improper. *See* FRCP 37(d) (“Any motion specifying a failure [under this Rule] shall include a certification that the movant has in good faith conferred or attempted to confer with the party failing to answer or respond in an effort to obtain such answer or response without court action.”).

⁶ Plaintiffs’ cases are not to the contrary. In *Long v. Dist. of Columbia*, 110 F.R.D. 1, 3 (D.D.C. 1985), the defendant first disclosed new information in support of a summary judgment motion. In *Dellums v. Powell*, 556 F.2d 231, 236-37 (D.C. Cir. 1977), the court ordered sanctions reinstated against a plaintiff who had willfully failed to respond to discovery requests by precluding him from acting as a class representative, while refusing to impose similar sanctions on two other plaintiffs whose failure to respond had not been willful. *See id.*

medical records overlooked documents that were then identified in searches undertaken after consultations with plaintiffs' counsel in the meet-and-confer process. Plaintiffs open their response by complaining that Ms. Strauss' explanations "were [n]ever previously articulated by defendants" and were not presented in defendant's "opposition to the motion to compel." (Pl. Mem. at 5.) Plaintiffs' argument is a really cheap shot: defendant had no reason to present these explanations in opposition to plaintiffs' motion to compel *because defendant did not oppose the production of medical records*. As already discussed, defendant undertook an additional search during the meet-and-confer process, acknowledged that it had located additional medical records, and offered to produce them under a protective order. There was never an occasion for defendant to explain why some medical records had initially been overlooked.

Plaintiffs then attack Ms. Strauss' explanations why responsive documents were initially overlooked. For the reasons already explained, these attacks are irrelevant to the issues before the Court. *Ad hominem* attacks cannot compensate for the lack of any merit in plaintiffs' legal position under FRCP 26(g) and 37. Defendant acknowledges that its further searches for documents requested during the meet-and-confer process identified additional documents; plaintiffs are beating the proverbial dead horse in insisting that the initial production should have included those documents.

Plaintiffs argue that, during the initial round of production, defendant should have obtained all medical records in the custody of William Lindsay, defendant's former chief veterinarian. (Pl. Mem. at 5-8) Defendant has already conceded that these documents were overlooked. Ms. Strauss' declaration explains — and plaintiffs acknowledge — that defendant specifically instructed Lindsay to gather all elephant medical records in his

control. (Pl. Mem. at 7.) Defendant identified Lindsay in its initial disclosures as knowledgeable about the issues in dispute — hardly an effort at concealment. Plaintiffs do not acknowledge Ms. Strauss’ explanation that Lindsay, who left defendant’s employment, had copies of documents that were not — as she had mistakenly believed — also maintained with the animals in the company’s veterinary records. (Strauss Dec ¶¶ 18-20.) It is simply not correct, as plaintiffs assert, that defendant failed to “ask Dr. Lindsay whether he had any of the records that were covered by plaintiffs’ request.” (Pl. Mem. at 6.)

Ms. Strauss also explained that software problems also contributed to gaps in defendant’s initial document production. Defendant is not suggesting, as plaintiffs characterize the matter (*see* Pl. Mem. at 12), that it intended to produce computer records in lieu of hard copies. Indeed, defendant’s search focused on hard-copy documents maintained at all of the sites where elephants are located. (Strauss Dec. at ¶¶ 8, 12.) At the time of the search, defendant believed that it would obtain from its computer system up-to-date, company-wide medical records about each of the animals would be maintained both centrally and at the same locations as the animals themselves. The system has worked poorly, however, resulting in gaps in records, which accounts for some of the deficiencies in the initial production.

Ms. Strauss’ belief in the completeness of medical records maintained on-site with the animals was reinforced by her dealings with the USDA and state and local regulatory agencies. (*See* Strauss Dec. at ¶ 9.) Plaintiffs attack Ms. Strauss’ declaration by citing internal USDA documents from an investigation in which USDA cleared defendant of any wrongdoing. (Pl. Mem. at 9-11.) Plaintiffs suggest that Ms. Strauss

should have known that the medical records maintained on-site with the animals were not complete because internal USDA memoranda written by USDA employees questioned their completeness.⁷ USDA's internal memoranda did not result in the agency complaining to Feld that the medical records were incomplete or inadequate, and such internal memoranda cannot call into question Ms. Strauss' statement that she did not recall any such complaint.⁸ (*Id.*)

CONCLUSION

Defendant has produced thousands of pages of medical records (and animal observation reports) in this case. Initial production was complicated by the fact that the records are maintained at multiple sites, consisting of observations and reports compiled by several traveling veterinarians, and software problems unexpectedly prevented defendant from implementing a system under which medical records would automatically be updated upon entry of reports into the system. Defendant made a supplemental production to plaintiffs last month and is systematically re-canvassing its files at all locations and undertaking special efforts to make sure that other medical records have not been overlooked. If any are discovered, they will be promptly produced to plaintiffs.

⁷ Plaintiffs also charge that defendant denied USDA access to witnesses in the course of at least one USDA investigation. The facts will show that defendant routinely makes its employees available to speak with USDA staff during investigations, while reserving the right in some cases to request that USDA follow formal procedures or proceed through counsel. This allegation is any event irrelevant to defendant's production of medical records in this case.

⁸ After Ms. Strauss's declaration was submitted to the Court on September 21, a USDA inspector recently questioned the sufficiency of information in the medical records of an elephant named Gunther at the CEC facility in Florida. (A copy of the USDA's inspection report dated October 7, 2005, is attached hereto.) Defendant is in the process of responding to the inspector's report and copies of all related documents will be provided to plaintiffs in supplemental productions to the extent they are called for by plaintiffs' requests and are not privileged.

For the reasons stated, the Court should find that there is no basis to cite defendant for contempt of Court or otherwise to sanction defendant.

Respectfully Submitted,

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October 19, 2005