DISTRICT JUDGE BENJAMIN H. SETTLE
MAGISTRATE JUDGE J. RICHARD CREATURA

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

NATHAN ROBERT GONINAN, Plaintiff, v. WASHINGTON DEPARTMENT OF CORRECTIONS, et al., Defendant.	No. 3:17-cv-05714-BHS-JRC PLAINTIFF'S MOTION FOR PROTECTIVE ORDER AND FOR SANCTIONS AGAINST DEFENDANTS NOTED FOR HEARING ON AUGUST 24, 2018

I. INTRODUCTION AND RELIEF REQUESTED

Attorneys for Plaintiff Nonnie Marcella Lotusflower's (a.k.a. Nathan Robert Goninan) ("Ms. Lotusflower") have repeatedly advised Defendants[1] they should not directly engage with Ms. Lotusflower regarding any matter related to this litigation without first notifying them. . Yet recently, Defendants questioned Ms. Lotusflower under the guise of a "readiness assessment;" and not only failed to provide her attorneys with notice of the assessment, despite having agreed to do so; but asked wholly inappropriate questions that ultimately sought information protected by

[1] Nathaniel Burt, Ph.D., Karie Rainer, Ph.D., Eleanor Vernell, Wendi Wachsmuth, Daniel White and Department Of Corrections ("DOC") (collectively "Defendants").

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litigation privileges. Because Defendants refuse to confirm they will cease litigation contact with Ms. Lotusflower without first providing notice to her attorneys, and because they deliberately engaged in conduct intended to disrupt the litigation process and the attorney-client relationship, Ms. Lotusflower now seeks court-intervention to prevent Defendants from engaging in bad faith litigation conduct intended to intimidate and harass Plaintiff.

Specifically, Ms. Lotusflower requests the Court enter a protective order, prohibiting the Defendants from (1) contacting her regarding any litigation related matter without first providing her attorneys with notice; (2) engaging in conduct intended to harass and/or intimidate Ms. Lotusflower; and (3) engaging in conduct intended to disrupt the relationship between Ms. Lotusflower and her attorneys of record in this case. Ms. Lotusflower further requests that the Court enter sanctions against Defendants for their bad-faith litigation tactics intended to harass and intimidate Ms. Lotusflower from engaging in this litigation to enforce her rights under the U.S. Constitution.

II. FACTS

Prior to June 18, 2018, Ms. Lotusflower's attorney made clear to Defendants, through their attorneys, that any contact with Ms. Lotusflower for litigation purposes should only occur after providing notice to her attorneys. *See* Exhibits A - E to Declaration of Antoinette M. Davis ("Davis Declaration"). On or about June 18, 2018, DOC consultant Stephen B. Levine, M.D. ("Dr. Levine") evaluated Ms. Lotusflower "for readiness for, and appropriateness of, gender affirming surgery." *See* Exhibit F to Davis Declaration. Defendants provided Ms. Lotusflower and her counsel notice of this event. *See* Exhibit E to Davis Declaration. However, Defendants failed to notify Ms. Lotusflower and her attorneys of an additional scheduled evaluation, wherein Dr. Levine and Defendants asked Ms. Lotusflower a series of objectionable follow-up questions. *See* Exhibits F - I to Davis Declaration. Not only was the contact without notice troublesome, but the questions posed by Defendants to Ms. Lotusflower, in the absence of counsel, were wholly inappropriate. *Id.*

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More particularly, on June 27, 2018 – nine (9) days following the readiness assessment of which Ms. Lotusflower's attorneys were aware – at the request of DOC's consultant Dr. Levine, DOC Psychologist 4 Timothy Richel, Ph.D. asked Ms. Lotusflower questions that elicited information protected by the attorney-client and work product privileges; encouraged Ms. Lotusflower to call into question her attorney-client relationship with the ACLU of Washington; and discouraged Ms. Lotusflower from further engaging in the underlying litigation against Defendants. *See* Exhibit I to Davis Declaration. Among the questions posed were the following:

> 1. Motivation for the law suit [sic] to obtain surgery
>
> a. Do you realize that the ACLU has a motive beyond getting you surgery? If so, what is it? Why do you think you, in particular, were selected and not many others?
>
> b. Do you realize what this lawsuit means for you in terms of more evaluations, deposition by lawyers asking personal questions, trial, appeal of whatever verdict is reached, risk that a verdict will take a long time to be given and that surgery if granted may not occur for another several years.
>
> c. This process builds up your hope for surgery and asks you to be convincingly distressed—suffering from your genitals--asks you to exaggerate your distress, and yet it may fail to win in the court. What do you think this would do to your emotional life?

Id. Defendants' refusal to provide Ms. Lotusflower's counsel notice before the testing resulted in the obvious inability of Ms. Lotusflower's counsel to object to any of this testing being conducted. However, upon learning of Defendants' second purported evaluation to establish readiness, Ms. Lotusflower's attorney sent a letter dated June 29, 2018 to Defendants' attorney objecting to these questions and reiterating that Defendants should not have contact with Ms. Lotusflower regarding this lawsuit without providing notice to her attorneys. *See* Exhibit G to Davis Declaration:

> Dear Ms. Dibble:
>
> I understand the day before yesterday, Wednesday June 27, 2018, the Washington Department of Corrections had a follow up meeting with Ms. Lotusflower related to the assessment with Dr. Stephen Levine. The intended purpose of the meeting was to ask Ms. Lotusflower questions for information to be contained in Dr. Levine's report. We are highly concerned that DOC and Dr.

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> Levine asked Ms. Lotusflower improper questions. More specifically, Ms. Lotusflower was asked questions that directly elicited attorney-client communications and work product. Equally concerning, it seems there were questions posed that were intended to intimidate and discourage Ms. Lotusflower from further engaging in the underlying litigation, as well as to disrupt the attorney-client relationship. There may be irreparable harmful effects from this interrogation.
>
> The questions posed to Ms. Lotuslfower [sic] were contained in an email from Dr. Levine to a DOC employee.
>
> Please forward immediately a copy of the assessment follow up email between Dr. Levine and DOC. Also, consistent with the preservation of evidence letter dated February 2, 2018, take all steps to ensure the email and any other document or data, including that generate by, for, or to Dr. Levine, is preserve. We are investigating this matter.
>
> Next, we have asked repeatedly for notice related to Ms. Lotusflower's gender affirmation assessment. We were not provided notice of Wednesday's follow up. If you have not already done so, please advise your client of our expectation and their obligations in this regard. It is not our goal to slowdown any process, but as you and they are aware, Ms. Lotusflower is represented by counsel and direct contact with her about this case is not appropriate. Please confirm with us that this message has been communicated to the appropriate DOC representatives. Finally, we hope you agree with us that any and all details obtained by Ms. Lotusflower in response to the improper questions should not be used by DOC for any purpose, including in this legal proceeding.

Id.

On July 3, 2018, Defendants' attorney forwarded a copy of the offending questions that were contained in an email document dated June 25, 2018. *See* Exhibit I at DEFS 230 to Davis Declaration. Defendants also attached a June 27, 2018 Primary Encounter Report authored by DOC Psychologist 4 Richel. *Id*. Both documents refer to a June 22, 2018 MMPI-2 personality assessment conducted by Defendants four (4) days after the readiness assessment. *Id*. Defendants did not provide Ms. Lotusflower's attorneys any notice of this test, which, according to the report completed by Dr. Levine, was incorporated into the "readiness" opinion. *See* Exhibit F & I to Davis Declaration. None of the questions posed in the June 25, 2018 email have any readiness determination value. *See* Declaration of Randi Ettner ("Ettner Declaration") at ¶¶1-6. Similarly, the MMPI-2 serves no value in this regard. *Id*. at ¶7.

On July 17, 2018, the parties met and conferred regarding Defendants' litigation-related

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contact with Ms. Lotusflower, as well as the offending questions posed by Defendants. *See* Exhibit J to Davis Declaration; *see also* Davis Declaration at ¶14. Defendants' attorney indicated Defendants were aware of Ms. Lotusflower and her attorneys' demand of no litigation contact without notice; however, their attorney further stated "they don't tell me what is going on until after they meet with [Ms. Lotusflower]," and then indicated that there was nothing more she could do. *Id*. at ¶15. This response, or lack thereof, is insufficient for Ms. Lotusflower, who was left distressed and fears the conduct will persist. *Id*. at ¶16.

Defendants are sophisticated parties with substantial litigation experience. To date, DOC has been a party in at least 251 cases filed in federal district court in Washington ("WADC"). *See* Exhibit #K to Davis Declaration. In the past two years alone, DOC has been a party in 23 WADC cases, eight of which filed after Ms. Lotusflower commenced this lawsuit less than a year ago. *Id*. Defendants' above-described conduct is not a mistake.

III. EVIDENCE RELIED UPON

This motion relies upon the Declaration of Antoinette M. Davis, with Exhibits attached thereto, and the Declaration of Randi Ettner, along with the files and records of the Court.

IV. CERTIFICATION

Plaintiff has in good faith met and conferred with Defendants. *See* Exhibit J to Davis Declaration; Davis Declaration at ¶¶12, 14 & 15; *see also* Local Civ. R. 37(a).

V. ARGUMENT

A. THE COURT SHOULD ISSUE A PROTECTIVE ORDER PROHIBITING DEFENDANTS FROM ENGAGING IN LITIGATION-RELATED CONTACT WITH MS. LOTUSFLOWER AND FROM HARASSING HER TO END THE LITIGATION

"The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." Fed. R. Civ. P. 26(c). "Protective orders directed against non-parties or over material not obtained in discovery are issued pursuant to the 'inherent equitable powers of courts of law over their own process, to prevent abuses, oppression, and injustices.'" *Disability Rights New Jersey, Inc. v. Velez*, No. 10-

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03950(DRD), 2011 WL 2937355, at *4 (D. N.J. July 19, 2011), at *4 (quoting *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 785 (3d Cir. 1994) (internal citations omitted)). If faced with true evidence of intimidation, a court has the power to judicially intervene in the form of a protective order, preliminary injunction, or sanctions. *See id.* "While some forms of …intimidation … necessitate injunctive relief under Rule 65, protective orders are also an appropriate vehicle to prevent interference." *Id.*

A court order prohibiting Defendants from further intimidating and harassing Plaintiff is the only way to prevent the Defendants from causing further irreparable harm to Plaintiff. Defendants have "significant power" over Plaintiff, and there is no sign or assurances that Defendants will not further engage in the same harassing conduct moving forward. *See Velez*, 2011 WL 2937355, at *5 (discussing the similarities between the vulnerable position of psychiatric patients and inmates involved with litigation).

After Defendants asked Ms. Lotusflower the inflammatory questions, Plaintiff's counsel had a meet and confer with Defendants' counsel, Assistant Attorney General Candie Dibble, on July 17, 2018. The parties discussed Defendants' litigation-related contact with Ms. Lotusflower, as well as the offending questions posed by Defendants. It was during the parties' July 17, 2018 meet and confer that Plaintiff's counsel realized that Defendants will not retreat from their bad faith litigation tactics without a Court order. Thus, good cause exists for a protective order, especially where Defendants' attorney is not capable of obtaining her clients' cooperation in this regard, for whatever reason. According to Defendants' own counsel, Defendants are aware of Ms. Lotusflower's demand of no litigation-related contact without notice to her attorneys, but there is nothing she can do to assure the misbehavior will not persist.

Ms. Lotusflower therefore requests that this Court intervene to prevent further harm and injury to her during the course of this litigation. *See Velez*, 2011 WL 2937355, at *5 (discussing judicial intervention in the form of a "protective order, preliminary injunction, or sanctions" if the court finds evidence of "harassment or intimidation" on the part of the Defendants). Because

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Defendants' attorney has, in essence, admitted that she cannot guarantee that such conduct will not recur, Ms. Lotusflower respectfully requests that the Court enter a protective order prohibiting Defendants, and their agents, from (1) contacting her regarding any litigation related matter without first providing her attorneys with notice; (2) engaging in conduct intended to harass and/or intimidate Ms. Lotusflower; and (3) engaging in conduct intended to disrupt the relationship between Ms. Lotusflower and her attorneys of record in this case.

B. THE COURT SHOULD SANCTION DEFENDANTS FOR THEIR BAD FAITH LITIGATION CONDUCT

There are traditionally three sources of authority that enable the courts to sanction parties for improper conduct "(1) Federal Rule of Civil Procedure 11, which applies to signed writings filed with the court, (2) 28 U.S.C. § 1927, which is aimed at penalizing conduct that unreasonably and vexatiously multiplies the proceedings, and (3) the court's inherent power." *Fink v. Gomez*, 239 F.3d 989, 991 (9th Cir. 2001). This request seeks sanctions under the third of these authorities. "It has long been understood that '[c]ertain implied powers must necessarily result to our courts of justice from the nature of their institution,' . . ." *Chambers v. NASCO, Inc.* 501 U.S. 32, 43 (1991) (alteration in original) (quoting *United States v. Hudson*, 11 U.S. 32, 34 (1812)); *see also Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764 (1980) (citing *Hudson*). For this reason, "Courts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect, and decorum, in their presence, and submission to their lawful mandates." *Anderson v. Dunn*, 19 U.S. 204, 227 (1821); *see also Ex parte Robinson*, 86 U.S. 505, 512 (1874). These powers are "governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." *Link v. Wabash R. Co.*, 370 U.S. 626, 630–631 (1962).

It is well settled that federal courts have the inherent power to levy sanctions for "willful disobedience of a court order . . . or when the losing party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons . . . ." *Roadway Express Inc.*, 447 U.S. at 766 (internal

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quotation marks and citations omitted). Bad faith conduct during litigation includes willful actions, such as "recklessness when combined with an additional factor such as frivolousness, harassment, or an improper purpose." *Fink*, 239 F.3d at 994; *see also Roadway Express*, 447 U.S. at 766; *Hall v. Cole*, 412 U.S. 1, 15 (1973); *Browning Debenture Holders' Comm. v. DASA Corp*., 560 F.2d 1078, 1088 (2d Cir. 1977); *Physician's Surrogacy, Inc. v. German*, No. 17cv718-MMA (WVG), 2018 WL 1976187, at *5 (S.D. Cal. Apr. 19, 2018). Moreover, a finding of bad faith "does not require that the legal and factual bases for the action prove totally frivolous; where a litigant is substantially motivated by vindictiveness, obduracy or mala fides, the assertion of a colorable claim will not bar the assessment of attorneys' fees against him." *Lipsig v. National Student Mktg. Corp*., 663 F.2d 178, 182 (D.C.Cir.1980) (per curiam) (citation and quotation marks omitted) (sustaining "an award for general obstinacy unconnected with the merits of the case")); *see also Fink*, 299 F.3d at 992.

The inherent powers of the court serve to protect the court when its "dignity has been offended and whose process has been obstructed." *Toledo Scale Co. v. Computing Scale Co.*, 261 U.S. 399, 428 (1923). When a court is faced with bad faith conduct, "a court is duty bound to take action to redress it, and to try to deter future misconduct. To do nothing . . . creates a risk that courts will be viewed by unscrupulous litigants as an organ for committing fraud." *Lucas v. Jos. A. Bank Clothiers, Inc.*, 217 F.Supp.3d 1200, 1208 (S.D. Cal. 2016).

1. DOC's Bad Faith Conduct Warrants Sanctions.

"A comprehensive definition of 'bad faith' or conduct 'tantamount to bad faith' is not possible, but the type of conduct at issue 'includes a broad range of willful improper conduct.'" *Haeger v. Goodyear Tire & Rubber Co.*, 906 F. Supp. 2d 938, 974 (D. Ariz. 2012) (quoting *Fink*, 239 F.3d at 992) (reversed on other grounds). However, the Court can infer bad faith from a party's actions and the surrounding circumstances. *See Miller v. City of Los Angeles*, 661 F.3d 1024, 2019 (9th Cir. 2011). In establishing that sanctions are appropriate in this case, Ms.

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Lotusflower need only prove that "a party[2] acts for an *improper purpose*-even if the act consists of making a truthful statement or a non-frivolous argument or objection." *Fink,* 239 F.3d at 992 (emphasis in original). Here, the improper questioning of Ms. Lotusflower without notice to her attorneys was none more than an attempt by Defendants to disrupt the attorney-client privilege relationship between Ms. Lotusflower and the ACLU of Washington and to intimidate and harass Ms. Lotusflower from engaging in this litigation to enforce her rights under the U.S. Constitution.

Defendants not only questioned Ms. Lotusflower to elicit protected attorney-client and work product privileges regarding her"[m]otivation for the law suit [sic] to obtain surgery," but they attempted to disrupt her attorney-client relationship and dissuade her from further litigation by advising her that "the ACLU has a motive beyond getting you surgery." Without identifying any specific "motive" of the ACLU, Defendants sought to know from Ms. Lotusflower - a represented party - what motivation her attorneys had in representing her. Without addressing the particulars surrounding evidentiary issues with the posed question, the "motivations" of Ms. Lotusflower and the ACLU are clearly protected under litigation privileges. Further, Defendants' questioning implies that Ms. Lotusflower's attorneys are representing her for some sort of improper motive. Similarly, statements that seek to learn the reasoning why Ms. Lotusflower was selected when "not many others" were chosen, not only solicits privileged information, but also sows doubt into Ms. Lotusflower decision to seek court intervention and retain the ACLU as counsel. Defendants' loaded questions are entirely reckless, at best. *See United States v. Bauer*, 132 F.3d 504, 510 (9th Cir. 1997) (the attorney-client privilege is "perhaps[] the most sacred of all legally recognized privileges").

Defendants' questions also attempted to instill fear about the ligation process: "Do you realize what this lawsuit means for you in terms of evaluations, deposition by lawyers asking

[2] Having been hired by DOC to conduct the evaluation of Ms. Lotusflower, Dr. Levine's egregious conduct is attributable to the DOC. *See Haeger v. Goodyear Tire & Rubber Co.*, No. CV-05-02046-PHX-GMS, 2018 WL 1182551, at *3 (Mar. 7, 2018) ("Notwithstanding various exceptions, a principal is commonly liable for the conduct of its agents.").

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personal questions, trial, appeal of whatever verdict is reached, risk that a verdict will take a long time to be given and that surgery if granted may not occur for another several years." *See* Exhibit I to Davis Declaration. The questions, as posed, were intended to discourage and frighten Ms. Lotusflower into dropping the litigation to avoid partaking in the "long" and "personal" litigation process. Defendants also suggested that Ms. Lotusflower is being forced to "exaggerate" her feelings. As a result of this "convincingly distressed" and exaggerated behavior, Defendants warn Ms. Lotusflower that this behavior could have an impact on her emotional life: "[T]his process builds up your hope for surgery and asks you to be convincingly distressed–suffering from your genitals--asks you to exaggerate your distress, and yet it may fail to win in the court. What do you think this would do to your emotional life?" *Id*. None of these questions serve any redeemable purpose, including insight as to whether Ms. Lotusflower is ready for gender confirmation surgery. *See* Ettner Declaration. Indeed, the questions serve no other basis than to harass and intimidate Ms. Lotusflower, as well as to disrupt the litigation process.

Defendants' attempt to discourage Ms. Lotusflower from continuing with this litigation is not only improper due to the considerable amount of power, control, and authority Defendants exercise over inmates, in general, but also because Defendants use a necessary process to further harm an already suffering inmate. In addition to the unequal power position between Ms. Lotusflower and Defendants, Ms. Lotusflower, as an inmate, faces particular difficulty in expressing her desire to remain silent, question the legality of a line of questioning, ensuring her counsel is present during all question, and generally asserting her constitutional rights. As the Eastern District of Virginia observed, inmates are in a uniquely vulnerable position during litigation. *Adams v. NaphCare, Inc.*, No. 2:16-cv-229, 2016 WL 10492102, at *14 (E.D. Va. July 25, 2016) ("[I]nmates in a facility operated and strictly controlled by Defendant[] are in a vulnerable position. They are incarcerated in a facility that controls all aspects of their lives, and is operated by individuals who have been named as defendants in a case that has received widespread publicity."). Defendants' reckless behavior not only acted as a means to frustrate Ms.

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Lotusflower's attorney-client relationship, but also to intimidate her into dropping her lawsuit.

2. Ms. Lotusflower is Entitled to Attorneys' Fees

In addition to a protective order, Ms. Lotusflower seeks the fees incurred as a result of bringing this motion. There is "no question that a court may levy fee-based sanctions when a party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons, delaying or disrupting litigation, or has taken actions in the litigation for an improper purpose." *Fink*, 239 F.3d at 992 (quoting *Chambers*, 510 U.S. at 45-46 & n. 10).

In 2017, the Supreme Court held in *Goodyear Tire & Rubber Co. v. Haeger* that a court has the "inherent authority to sanction a litigant for bad-faith conduct by ordering it to pay the other side's legal fees. . . .incurred solely because of the misconduct–or put another way, to the fees that party would not have have incurred but for the bad faith." 137 S.Ct 1178, 1183-84 (2017). In establishing a but-for causation standard, the Supreme Court created a test that allows for an award of "the sum total of the fees that, except for the misbehavior, would not have accrued. *Id.* at 1187 (citing *Fox v. Vice*, 563 U.S. 826, 837-38 (2011)).

Because Defendants acted in bad faith by harassing Ms. Lotusflower and attempting to dissuade her from pursuing this litigation, Ms. Lotusflower is entitled to fees for bringing this Motion.

3. Defendants Should Strike Facts from the Post-Readiness Evaluation

Ms. Lotusflower seeks a sanction that would prevent Defendants, or their agents, from conducting any more evaluations in relation to this litigation. On two separate occasions, Defendants evaluated Ms. Lotusflower without consulting with her attorneys. Ms. Lotusflower and Defendants agreed to one evaluation. All evaluations subsequent to the initial evaluation were improper, not only because they were conducted without providing her attorneys with notice, but because they were intended to harass and intimidate Ms. Lotusflower from engaging in this litigation to enforce her constitutional rights. Further, the questions were intended to disrupt the relationship between Ms. Lotusflower and her attorneys on record in this case. Therefore,

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Defendants should be strictly limited to using only evaluation content obtained through permissible contact with Plaintiff, and the information obtained through evaluation activities following June 18, 2018 should be stricken.

4. The Court Should Admonish Defendants For Litigation Contact With Plaintiff Without Providing Notice And Bad Faith Litigation Conduct Intended To Harass And Intimidate

"Given the significant power the Defendants have over" Ms. Lotusflower, Plaintiff asks that this Court admonish Defendants for their litigation-related contact with Ms. Lotusflower without providing notice to her attorneys. *Adams*, 2016 WL 10492102, at * 16. In addition, Ms. Lotusflower requests that this Court admonish Defendants for their bad faith litigation-related conduct intended to harass and intimidate Ms. Lotusflower. "[L]itgation must be conducted honestly and fairly. Attempts at intimidation . . . will not be countenanced." *Id.* Further, Ms. Lotusflower asks that this court to remind Defendant to advise their staff that "retaliatory conduct [is] simply unacceptable." *Id.*

VI. CONCLUSION

Ms. Lotusflower respectfully request that the Court determine Defendants engaged in bad faith litigation tactics and grant Plaintiff's Motion for Protective Orderand for Sanctions Against Defendants. Plaintiff requests such relief be ordered as detailed in the Proposed Order submitted herewith. As reflected in the Proposed Order, Ms. Lotusflower request that the Court note that it is prepared, if compliance continues to be an issue, to impose further sanctions**.**

DATED this 2nd day of August, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on August 2nd, 2018, I electronically filed the foregoing *Motion* and the attached *Proposed Order* with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

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DATED: August 2nd, 2018

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