SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. JOHN J. KELLEY** **PART** **56M**

Justice

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SEAN B. BANKER and DANIELLE M. RADEL,

Plaintiffs,

- v -

ELLEN J. SCHERL, M.D., FABRIZIO A. MICHELASSI, M.D., NEW YORK-PRESBYTERIAN/WEILL CORNELL MEDICAL CENTER, NEW YORK-PRESBYTERIAN HOSPITAL, and THE JILL ROBERTS CENTER FOR INFLAMMATORY BOWEL DISEASE,

Defendants.

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INDEX NO. 800004/2022

MOTION DATE 09/05/2025

MOTION SEQ. NO. 004

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 16, 17, 18, 19, 20, 21, 22, 23, 24, 26, 27, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55

were read on this motion to/for MISCELLANEOUS.

In this action to recover damages for medical malpractice based on alleged departures from good and accepted medical practice, in particular, the defendants' alleged failure properly to diagnose and treat the medical conditions experienced by the plaintiff Sean B. Banker, and their alleged failure properly to generate and maintain medical and billing records, the defendants move, in effect, pursuant to CPLR 2221(a) to modify this court's June 16, 2025 status conference order so as to vacate the directive therein that they produce metadata and audit trails referable to Banker's treatment with them, and pursuant to CPLR 3103(a) for a protective order excusing them from the production of that metadata and those audit trails. The plaintiffs oppose the motion. The motion is denied.

On March 21, 2025, the plaintiffs served a demand on the defendants directing them to produce metadata and an audit trail in connection with the electronically stored information that

constituted some or all of the medical records that they had generated in connection with their treatment of Banker. In a response dated April 25, 2025, the defendants

> "object[ed] to this demand on the grounds that it is vague, overbroad, palpably improper, unduly burdensome, not reasonably calculated to lead to discoverable evidence and demands materials that are privileged and/or confidential. Defendants further object[ed] to the production of audit trails and metadata and other demanded material in that plaintiffs have failed to demonstrate how these items are relevant to the allegations of negligence that underlie this medical malpractice action or that these demanded items will provide or is reasonably likely to lead to information bearing on the claims of this matter."

In a June 8, 2025 reply to the defendants' objections, the plaintiffs wrote that

> "the relevance of this data is clear. There are widespread omissions and inconsistencies within the medical record provided; including missing physician-to-patient consults and/or communications which occurred but are not represented, phantom entries of occurrences which did not, post-dated changes to records occurring after their 'final' timestamp markings, reporting of events in the timeline prior to their occurrence, extensive under inclusion of records and communications pertaining to the acknowledgement and attempted reconciliation of medical error and false reporting, among many other discrepancies and omissions. Additionally, acknowledgement of 'changes' still being made in the medical record was stated by a former member of your legal team in the presence of the Court Clerk during our last conference on February 24th, 2025 - which was what initially prompted the topic of Metadata considerations as first raised by the Clerk. Especially in light of the fact that the records provided to us following this statement were assembled nearly 2 years prior and stamped as being aggregated all the way back on May 4, 2023."

After the court's staff met with the parties on June 16, 2025 for an in-person status conference to discuss, among other things, the issue of metadata and audit trails, the court, in a status conference order dated June 16, 2025, directed that the "Defendants shall provide plaintiff with audit trail and metadata regarding medical records within 60 days," that is, by August 12, 2025. Rather than producing the metadata, the defendants made this instant motion on August 15, 2025.

Generally, an audit trail or other metadata referable to electronic medical and hospital charts and records is not material, relevant, or necessary to the prosecution or defense of a medical malpractice action, unless the plaintiff shows, "beyond mere conjecture, that there is relevant information to be gleaned from metadata and audit trails which cannot be obtained from

other sources, including the medical records and deposition testimony" (*Punter v New York City Health and Hosps. Corp.*, 2019 NY Slip Op 31065[U], 2019 NY Misc LEXIS 1906, *16 [Sup Ct., N.Y County, Apr. 12, 2019] [Silver, J.], *affd* 191 AD3d 563 [1st Dept 2021]; *see Dennehy v Harlem Hosp. Cent.,* 2018 NY Slip Op 32496[U], 2018 NY Misc LEXIS 4370, *13 [Sup Ct, N.Y. County, Oct. 2, 2018]; *Czyz v Scherl,* 2017 NY Slip Op 31465[U], 2017 NY Misc LEXIS 2651, *8 [Sup Ct, N.Y. County, Jul. 10, 2017] [Shulman, J.]; *see generally Aguilar v Immigration & Customs Enforcement Div. of U.S. Dept. of Homeland Sec*., 255 FRD 350, 354 [SD NY 2008]). Contrary to the defendants' contentions, however, the court concludes that the plaintiffs did indeed make a showing, beyond mere conjecture, that the audit trail and metadata will yield relevant information (*see Vargas v Lee*, 170 AD3d 1073 [2d Dept 2019] [on renewal, plaintiff sustained the threshold burden of demonstrating that the portion of the audit trail at issue was reasonably likely to yield relevant evidence]). In *Vargas*, the Court explained that

> "an audit trail generally shows the sequence of events related to the use of a patient's electronic medical records; i.e., who accessed the records, when and where the records were accessed, and changes made to the records (*see Gilbert v Highland Hosp.*, 52 Misc 3d 555, 557 [Sup Ct, Monroe County 2016]; *see also Matter of Irwin v Onondaga County Resource Recovery Agency*, 72 AD3d 314, 320 [2010]). Hospitals are required to maintain audit trails under federal and state law (*see* 45 CFR 164.312[b]; 10 NYCRR 405.10[c][4][v]). As argued by the plaintiff[ ], the requested audit trail was relevant to the allegations of negligence that underlie this medical malpractice action in that the audit trail would provide, or was reasonably likely to lead to, information bearing directly on the . . . care that was provided to [her decedent]"

(*id*. at 1076-1077; *see London v Mount Sinai Hosp*., 2023 NY Slip Op 32542[U], *6-7, 2023 NY Misc LEXIS 3718, *10-11 [Sup Ct, N.Y. County, Jul. 24, 2023] [Kelley, J.]). In the instant action, the plaintiffs specifically have pointed to gaps in the records that have been produced, numerous inconsistencies in the records as to dates of examinations, testing, and treatment, examples of what they claim to be missing, altered, or later-supplemented records, and an instance in which a diagnostic film allegedly taken of Banker, a man, reported that the subject of the scan was a woman. Hence, the production of metadata and audit trails will assist the

parties in sorting out whether there were indeed errors or gaps in Banker's medical records, and whether those records were altered or supplemented (*see Wright v Stephens,* 239 AD3d 1271, 1274 [4th Dept 2025]). To the extent that the defendants contend that the records that they submitted in support of their motion contradict the plaintiffs' contentions, the court concludes that they are not dispositive of the numerous examples that the plaintiffs have cited. The production thus is relevant both to the prosecution and defense of the action, and, therefore, there is no basis for modifying this court's June 16, 2025 status conference order.

CPLR 3103(a) allows the court, on its own motion or on motion of any party, to make a protective order denying, limiting, conditioning, or regulating the use of any disclosure device. Inasmuch as the court is denying that branch of the defendants' motion that seeks to vacate so much of the status conference order as directed the production of the very items for which the defendants seek a protective order, that branch of the defendants' motion seeking a protective order must be denied.

Accordingly, it is,

ORDERED that the defendants' motion is denied; and it is further,

ORDERED that, on the court's own motion, on or before January 15, 2026, the defendants shall provide the plaintiffs with an accessible version of the metadata and audit trails referable to the electronically stored medical records that they generated in connection with their consultations with, and examinations, testing, and treatment of, the plaintiff Sean B. Banker.

This constitutes the Decision and Order of the court.

12/15/2025
DATE

JOHN J. KELLEY, J.S.C.

CHECK ONE:		**CASE DISPOSED**		[X]	**NON-FINAL DISPOSITION**		
		GRANTED	[X] **DENIED**		**GRANTED IN PART**		**OTHER**
APPLICATION:		**SETTLE ORDER**			**SUBMIT ORDER**		
CHECK IF APPROPRIATE:		**INCLUDES TRANSFER/REASSIGN**			**FIDUCIARY APPOINTMENT**		**REFERENCE**