**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF MICHIGAN**
**SOUTHERN DIVISION**

**JOEL Q. HACK,** an individual, and
**WREN BEAULIEU-HACK,** an individual,

*Plaintiffs*,

Case No.: 2:18-cv-13330
Hon. Marianne O. Battani

v.

**THE CHARTER TOWNSHIP OF MILFORD**, a Michigan municipal corporation, **TOWNSHIP OF MILFORD BOARD**, a public body, **DONALD D. GREEN**, in his personal capacity and in his official capacity as Supervisor of Milford Township, and **TIMOTHY C. BRANDT**, in his personal capacity and in his official capacity as Building and Zoning Administrator of Milford Township,

*Defendants*.

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**PLAINTIFFS' REPLY TO DEFENDANTS' RESPONSE TO MOTION FOR ENTRY OF QUALIFIED PROTECTIVE ORDER**

Plaintiffs' proposed Qualified Protective Order ("QPO") permits Defendants the discovery they need into Plaintiffs' medical condition while balancing the stringent privacy rights codified in HIPAA.

Defendants do not contest that Plaintiffs' QPO permits Defendants to do the following:

- To obtain Plaintiffs' medical records (in conjunction with medical releases).
- To depose Plaintiffs' medical providers.

Defendants have one objection to Plaintiffs' proposed QPO: the QPO does not permit Defendants to conduct *ex parte* interviews of Plaintiffs' medical providers in circumvention of HIPAA.

Defendants fail to cite any Sixth Circuit or Supreme Court caselaw that authorizes, let alone requires, QPOs to allow *ex parte* interviews of medical providers. Indeed, Defendants' "most controlling authority" are three EDMI cases, all of which acknowledge that the pertinent HIPAA Regulation, C.F.R. § 164.512(e), does not even mention *ex parte* interviews:

- "The problem with 45 C.F.R. § 164.512(e) is that it does not expressly mention *ex parte* interviews." *Croskey v. BMW of N. Am.*, No. 02-73747, 2005 WL 4704767, at *4 (E.D. Mich. Nov. 10, 2005) (Hon. Nancy Edmunds).
- 45 C.F.R. § 164.512(e) "does explicitly mention *ex parte* interviews." *Palazzolo v. Mann*, 2009 U.S. Dist. LEXIS 22348, 2009 WL 728527, at *3 (E.D. Mich. Mar. 19, 2009) (Hon. Avern Cohn).
- CFR 164.512(e)(1) "does not specifically mention *ex parte* contact." *Congress v. Tillman*, No. 09-10419, 2009 WL 1738511, at *2 (E.D. Mich. June 16, 2009) (Hon. Steven D. Pepe).

Nowhere do these cases state that QPOs *require ex parte* meetings; surely 45 C.F.R. § 164.512(e) itself does not require it, as a quick read-through will confirm.

Indeed, in *Croskey*, the Hon. Edmunds disagreed with her own Magistrate, Hon. Paul J. Komives' ruling on the request for *ex parte* meetings.

Defendants' position, then, is far from settled, nor is it supported by the plain text of 45 C.F.R. § 164.512(e).

How then do we explain the above trinity of cases? In *Croskey*, Judge Edmunds did not cite any federal or state law to support her decision and instead seemed swayed by an *amicus curiae* brief that rather dramatically, and inaccurately, analogized the situation to "sending a boxer into the ring wearing a blindfold". *Croskey*, 2005 WL 4704767, at *3.

Plaintiffs respectfully suggest that Defendants are not going into a ring "blindfolded" when they are permitted to obtain and review the medical records in advance of a deposition. Medical records and depositions allow complete discovery.

But Judge Edmunds' policy decision also has a logical flaw. Judge Edmunds herself acknowledged that "a physician cannot be compelled to speak *ex parte* with defense counsel." *Croskey*, 2005 WL 4704767, at *4. Put differently, the medical provider can simply refuse to speak to defense counsel. Thus, a QPO that permits *ex parte* interviews does not in fact cure the *perceived* ill of being "blindfolded" without conducting *ex parte* interviews.

*Palazzolo* and *Tillman* are mere progeny of *Croskey*.

*Tillman* does not attempt any earnest analysis and relies on *Croskey*.

In *Palazzolo*, Judge Cohn relies on *Croskey* and, without explanation, gives deference to the Michigan Court of Appeals case of *Holman v. Rasak*. *Palazzolo*, 2009 WL 728527, at *3. *Holman* itself leans heavily on the Michigan Supreme Court case of *Domako*, which not only predates HIPAA's protections but is inconsistent with HIPAA's privacy rights. Indeed, Congress's enactment of HIPAA trumps *Domako* and the reasoning set forth in *Holman*, a fact acknowledged by Judge Edmunds but overlooked by Judge Cohn. *Croskey*, 2005 WL 4704767, at *3 ("…Michigan law is less stringent than HIPAA, and therefore preempted.")[1]

Plaintiffs' QPO permits the discovery that Defendants need regarding Plaintiffs' medical conditions: medical records and depositions. The Court should grant Plaintiffs' Motion and enter Plaintiffs' proposed QPO so the parties can avoid further delay and develop this case's facts.

Respectfully submitted,

/s/ R.J. Cronkhite
R.J. Cronkhite (P78374)

[1] Judge Edmunds acknowledged HIPAA preempted Michigan law but ventured that Michigan's policy "might fit neatly within the HIPAA framework." Plaintiffs respectfully suggest that gutting Plaintiffs' HIPAA privacy rights by permitting unnecessary *ex parte* meetings does not "fit neatly" within HIPAA's framework. In fact, Judge Edmunds' policy decision is completely at odds with HIPAA. Perhaps this is why Defendants could not cite binding, or even persuasive, law in support of their request for *ex parte* meetings.

*Attorneys for Plaintiffs*

Dated: March 8, 2019

**CERTIFICATE OF SERVICE**

I hereby certify that on **March 8, 2019**, I electronically filed the above document(s) with the Clerk of the Court using the ECF system, which will send notification of such filing to those who are currently on the list to receive e-mail notices for this case.

/s/ R.J. Cronkhite
*Attorney for Plaintiffs*