UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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

Plaintiffs,

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

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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DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION FOR ENTRY OF QUALIFIED PROTECTIVE ORDER AND INCORPORATED BRIEF IN SUPPORT

NOW COME the Defendants, **THE CHARTER TOWNSHIP OF MILFORD, TOWNSHIP OF MILFORD BOARD, DONALD D. GREEN** and **TIMOTHY C. BRANDT,** by and through their attorneys, **O'CONNOR, DeGRAZIA, TAMM & O'CONNOR, P.C.,** pursuant to FED. R. CIV. P. 26(C) in Response to Plaintiffs' Motion for Entry of Qualified Protective Order, state as follows:

1. Defendants neither admit nor deny the allegation alleged in Paragraph 1 as the Complaint speaks for itself. Defendants further state that Plaintiffs' claims are without merit for the reason stated in Defendants' Motion for Summary Judgment (ECF #16).

2. Defendants admit that Plaintiffs' Complaint includes a request for compensation for the alleged mental distress and suffering experienced by Plaintiff Joel Hack. Defendants further state that they have requested Plaintiffs provided authorizations for the release of medical records and a draft Qualified Protective Order which complies with the requirements of 45 C.F.R. § 164.512(e)(1) to allow defense counsel to conduct *ex parte* meetings with treating physicians. To date, Plaintiffs have failed to provide signed authorizations and instead filed the present Motion.

3. Defendants admit that they have served Plaintiffs with written discovery and authorizations for the release of medical records. Defendants further

state that Plaintiffs have failed to provide signed authorizations and instead filed the present Motion.

4. Defendants admit that Plaintiffs have not provided releases for medical records requested by Defendants. By putting Plaintiffs' medical history and care at issue in this case, Defendants are entitled to the discovery of medical records without the entry of Plaintiffs' proposed Qualified Protective Order. See 45 C.F.R. § 164.508(a)(1). Defendants further state that defense counsel has explained the process by which medical records are produced and that the Qualified Protective Order proposed by the Defendants is only to permit *ex parte* communications with treating physicians to allow defense counsel the same right to meet with treaters as Plaintiffs.

5. The allegations alleged in Paragraph 5 are denied as untrue. A Qualified Protective Order is not necessary for the release of medical records or to conduct depositions of Plaintiffs' treating physicians. Defendants have a right to the discovery of Plaintiffs' medical conditions and medical treatment for which they seek compensation from the Defendants. Plaintiffs' proposed Qualified Protective Order is taken from a commercial transaction qualified protective order and would place unnecessary restrictions on defense counsel which are not on Plaintiffs' counsel.

6. The allegations contained in Paragraph 6 are denied as untrue. Plaintiff has placed his medical condition at issue in this case with the claims made against the Defendants. Defendants are entitled to the discovery of the information and to use the information as necessary to defend against Plaintiffs' claims.

7. Defendants admit that Defendants' proposed Qualified Protective Order permits *ex parte* communications with Plaintiff's medical providers. Defendants' proposed Qualified Protective Order contains standard language approved by the United States District Court for the Eastern District of Michigan and Michigan state courts and complies with the requirements of 45 C.F.R. § 164.512(e)(1).

8. The allegations alleged in Paragraph 8 are denied as untrue. Defendants' proposed Qualified Protective Order permitting *ex parte* communications is consistent with Michigan and federal law in the Eastern District of Michigan.

9. Defendants admit to requesting a Qualified Protective Order permitting *ex parte* communications. Defendants deny that *ex parte* meetings will result to "trial by ambush." To the contrary, permitting Plaintiffs' counsel the right to meet with treating physicians while denying defense counsel the same right would result in manifest injustice and trial by ambush. Furthermore, Plaintiffs' counsel has the right to conduct meetings with treating physicians and/or conduct

depositions to discover any communications between defense counsel and the treating physicians.

10. The allegations alleged in Paragraph 10 are denied as untrue. Plaintiffs' proposed Qualified Protective Order is drafted for the purpose of commercial litigation and trade secrets, not the release of medical records.

11. No contest.

WHEREFORE, Defendants respectfully request this Honorable Court deny Plaintiffs' Motion and enter Defendants' Qualified Protective Order attached as Exhibit A.

Respectfully submitted,

By:/s/ Richard V. Stokan, Jr.

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Dated: March 1, 2019

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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

Plaintiffs,

Hon. Marianne O. Battani
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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,

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BRIEF IN SUPPORT OF DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION FOR ENTRY OF QUALIFIED PROTECTIVE ORDER AND INCORPORATED BRIEF IN SUPPORT

ISSUES PRESENTED

I. Whether the Plaintiffs are entitled to entry of a Qualified Protective Order exceeding the requirements of 45 C.F.R. § 164.512(e)(1) and prohibiting Defense counsel from conducting *ex parte* meetings with treating physicians.

Plaintiffs' answer "yes"

Defendants answer "no".

This Court should answer "no".

II. Whether the Defendants are entitled to entry of a Qualified Protective Order consistent with the requirements of 45 C.F.R. § 164.512(e)(1) allowing Defense counsel to conduct *ex parte* meetings with treating physicians.

Plaintiffs' answer "no"

Defendants answer "yes".

This Court should answer "yes".

MOST CONTROLLING AUTHORITY

The controlling or most appropriate authority for the relief sought, in addition to FED. R. CIV. P. 26 and 45 C.F.R. § 164.512(e)(1) is: *Croskey v. BMW of N. Am.*, No. 02-73747, 2005 WL 4704767, at *1 (E.D. Mich. Nov. 10, 2005) (Attached as Ex. T); *Palazzolo v. Mann*, 2009 U.S. Dist. LEXIS 22348, 2009 WL 728527 (E.D.Mich. Mar. 19, 2009) (Attached as Ex. U); *Congress v. Tillman*, No. 09–10419, 2009 WL 1738511, at *1 (E.D.Mich. June 16, 2009) (Attached as Ex V).

Introduction

This case arises out of allegations that the Township of Milford, along with its agents, unlawfully imposed preconditions upon Plaintiffs in their construction of a residential driveway. Plaintiff alleges that Defendants' actions constitute an unlawful taking and a violation of due process. Defendants deny the allegations and maintain that their actions were appropriate and lawful.

Factual Background

Plaintiffs Joel Hack and Wren Beaulieu-Hack (collectively, "Plaintiffs") purchased a vacant 3.15-acre parcel of land located at 2610 Pearson Road in Milford Township for $75,000.00. (Complaint, ECF No. 1, Pg ID 20). The property is zoned R-1-R, Rural Residential and Plaintiffs' builder submitted an application for a building permit to install a 2,116-foot premanufactured home on a new basement with a garage. (Complaint, ECF No. 1, Pg ID 21). The application did not require, nor did Plaintiffs depict, that any grading or use of fill material would be used during construction. A permit was issued on November 13, 2017. (Complaint, ECF No. 1, Pg ID 21). The permit, issued to Plaintiffs and their contractor EBI Incorporated, specifically noted that it was for only the work described and "does not grant permission for additional or related work which requires separate permits". (Complaint, ECF No. 1, Pg ID 42).

In February 2018, the Township received a complaint from Plaintiffs' neighbor David Mamo, regarding concerns of flooding on his property caused by construction activities on Plaintiffs' property. Mr. Mamo's concerns were that Plaintiffs' builder had changed the elevation of the property diverting water onto his property. In an email to Township Supervisor Donald Green dated February 27, 2018, Mr. Mamo included photographs of his flooded property and indicated that he built his property "30 years ago and [flooding] has never been a problem in the past." **(Exhibit B; Exhibit C)**. On March 26, 2018, Mr. Mamo again wrote to the Township regarding the effects Plaintiffs construction had on his property. Mr. Mamo noted in pertinent part:

> ***I am still concerned about our problem with water damage from the construction of the new house to the west of our house.***
>
> I was told by a lawyer and Tim Brant that I could not do anything until the damage was done. As we discussed, the damage was done and I am concerned that the new homeowner is being told by his builder and excavator that they can handle this problem.
>
> ***In the past, water stayed on his property but with their new construction, they have raised the grade elevation so that now water backs up and negatively impacts my property. I think a meeting with all involved and professionals would go a long way to solving this problem.*** **(Exhibit D)**.

Mr. Mamo expressed his concerns to Plaintiffs in an email dated May 4, 2018 and indicated that he would be willing to meet with Plaintiffs in order to resolve the issue:

> ***I feel that you still have a major issue with water management and that the reasons that diverted water to our property still exist. I think you should be also concerned about you [sic] septic field which may have been compromised by the water elevations.***
>
> I have made notes for you to review with your builder, excavator, and civil engineer that I think are important. I have also included pictures for you to review that [sic] back to last year and if you need more for reference, please let me know. You can see that the picture with my barn was a major concern of ours and has not ever done that since 1988.
>
> ***I would be happy to meet or talk to anybody any time and I do not have to bring any council.*** **(Exhibit E)**.

Plaintiffs responded to Mr. Mamo's email on May 5, 2018 but refused to address his concerns or cease construction. Plaintiff Wren Beaulieu-Hack wrote in part:

> Please know that we have taken great pains to hire the correct people to excavate our land. ***When all is complete perhaps, we can discuss then. In the meantime, our lawyer, builder and civil engineer all request that you allow us to complete the work without further communication.*** **(*Id.*)**.

In June 2018, the Township received notice that Plaintiffs were bringing fill material on site in order to construct the driveway. **(Exhibit F)**. The portion of the property between Plaintiffs' house and Pearson Road is in a low-lying area. According to Plaintiffs' Complaint, the area where the driveway is proposed to be located is covered by water approximately 90% of the year. **(Complaint, ECF No. 1, Pg. ID 25)**. During heavy rains, the water can be several feet deep. (*Id.*). On June 13, 2018, Township Building Administrator Timothy Brandt issued a cease and desist letter to Plaintiffs' builder EBI Incorporated indicating that a

permit was required to place any additional fill on the property. **(Exhibit G)**. Along with Mr. Brandt's letter, he enclosed a standard Township form for an application for permit to dredge and/or fill. The requirement for a permit is established by Section 32-583 of the Township's Zoning Ordinance. **(Exhibit H)**.

In order to obtain a permit, Plaintiffs were required to submit an application along with plans showing the proposed area where fill was to be placed, the existing and proposed final elevations, location of existing drainage course and the boundaries of wetlands.

A topographical/grading survey was submitted by Plaintiffs' engineering consultant, Boss Engineering, on August 14, 2018, more than two months after Plaintiffs were notified of the need for a permit. The Township's planning consultant, Hubbell, Roth & Clark ("HRC"), reviewed the proposed grading plan and issued a letter on August 24, 2018, and indicated that it did not object to the grading plan. **(Exhibit I)**. In its letter, HRC noted that it assumed the existing contours on the plan are from the pre-development of the property and accurately reflected the pre-development conditions. (*Id*.). Notably, HRC was unaware that grading had been performed on site to accommodate the location of Plaintiffs' home.

During the Township Board meeting on September 19, 2018, the fill permit was discussed. Mr. Mamo, the neighboring property owner who resides at 2488

Pearson Road, made a presentation regarding how the addition of fill dirt affected his property and noted that there was seasonal ponding on Plaintiffs' land. Mr. Mamo presented evidence to the Township Board of flooding on his property since Plaintiffs' construction activity. **(Exhibit J)**. During the meeting, Township attorney, Jennifer Elowsky, indicated it would be appropriate for the Township Board to direct the issues raised by Mr. Mamo to the Township's engineer and building official. **(*Id.*)**. As a result, a motion was made to postpone a decision on the fill and grade permit until the Township Board received more information from the Township's engineer.[1]

Pursuant to the motion by the Township Board, on October 8, 2018, Michael P. Darga of HRC, reissued a letter regarding the re-review of the fill and grade plans submitted on behalf of Plaintiffs. **(Exhibit K)**. In the review letter, it was noted that the grading plans submitted with Plaintiffs' initial application appeared to have presented different pre-development conditions than what was originally present. **(*Id.*)**. As a result, Mr. Darga recommended the fill and grade permit be conditioned on the following:

[1] Although a final decision had not yet been reached by the Township in September 2018, Plaintiffs were already threatening a lawsuit in an attempt to force action. An email dated September 25, 2018 from Township Attorney Jennifer Elowsky indicates that she spoke with Plaintiffs' Attorney, R.J. Cronkhite, who "repeatedly threatened suing the Township in an attempt to force action in favor of his client." **(Exhibit L)**.

1. The applicant must submit to the Township a drainage area map showing the entire tributary area to 2610 Pearson Road, determine the retention volume created a 10-year storm, and calculate the pre-construction area of the low spot that contained this volume. This information can be used to determine if additional retention volume needs to be provided with the proposed grading plan and if additional topographic information needs to be shown on adjacent properties.

2. The applicant must improve the proposed swales, according to Township standards, to divert water from behind the home to the low area. It appears that the current site grading may be impeding the flow of water from the east and not allowing it to make it to the low area.

3. The plans should include calculations to verify that any proposed culvert is properly sized to facilitate drainage to the low point west of the driveway. **(Exhibit K)**.

The application for the fill permit was to be considered at the Township Board's October 17, 2018 meeting. In the morning of October 17, 2018, ***prior to*** the Township Board's meeting, Plaintiffs filed this lawsuit in the Oakland County Circuit Court. In their 122-paragraph Complaint, Plaintiffs alleged that the Township's decision to request HRC to revisit its review of the fill permit was the result of a relationship between Township Supervisor Don Green and Plaintiffs' neighbor. **(Complaint, ECF No. 1, Pg. ID 22).** It is incorrectly claimed that a fill and grading permit is not required by ordinance and that the Township already approved the driveway when it issued the building permit.

The Township Board held a public hearing regarding Plaintiffs' application for a grade and fill permit on the evening of October 17, 2018 – ***after*** Plaintiffs'

lawsuit was filed. Plaintiffs were present at the meeting and represented by Counsel. The Township Board voted to approve the permit subject to the three conditions recommended by the Township's engineering consultant. **(Exhibit K; Exhibit M)**.

Throughout the pendency of this lawsuit and prior, Defendants have sought to accommodate Plaintiffs in their effort to construct a driveway including issuing a temporary occupancy permit. As a result, the Plaintiffs were able to occupy their home prior to the filing of the present lawsuit.

The case was subsequently removed to federal court while efforts were made to reach a resolution without the need for further litigation. Meetings were held with Counsel and the Township Engineer. Despite being advised that the pre-conditions for obtaining fill and grade permit required minimal labor and expenses, Plaintiffs rejected efforts to resolve the dispute instead electing to engage in an aggressive litigation strategy. **(Exhibit N)**. For example, almost immediately after filing the Complaint, Plaintiffs' Attorney contacted the Township's planning consultant, Michael P. Dargara of HRC, in an effort to schedule his deposition without consulting with Defense counsel regarding availability. **(Exhibit O)**. As a result, Defendants were forced to file a motion for protective order (ECF No. 11) which was granted by this Court. (ECF No. 18). When it became obvious that early resolution efforts would fail the parties proceeded with the litigation.

Plaintiffs' counsel was advised during preparations of the Joint Report of the Parties' Rule 26(F) Conference (ECF No. 15) that Defendants intended to seek a qualified protective order to permit ex-parte meetings with treating physicians. **(Exhibit P).** Plaintiffs' counsel rejected Defendants' request and insisted on a model protective order routinely utilized in commercial litigation for protection of trade secrets. **(Exhibits P, Q).** Plaintiffs' counsel, however, agreed to execute releases for Mr. Hack's medical records "upon properly issued discovery requests." **(Exhibit Q).** In response, discovery requests were served on Plaintiffs on December 5, 2018.

In response to discovery requests Plaintiffs' counsel refused to provide signed authorizations claiming that the Defendants requested "sensitive, confidential information" and demanding that Defendants agree to a protective order which placed an unreasonable burden on the Defendants. **(Exhibit R).** In response an effort was made to clarify Defendants' discovery requests and the application of the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"). **(Exhibit S).** Once again a standard qualified protective order was provided. (Id).

On or about January 4, 2019, Plaintiffs' counsel provided responses to Defendants' discovery requests without signed authorizations for the release of medical records. The present motion was filed on February 15, 2019.

Standard of Review

FED. R. CIV. P. 26(b)(1) provides:

> Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.

Although the scope of discovery is traditionally broad, Rule 26 requires a "threshold showing that the requested information is reasonably calculated to lead to the discovery of admissible evidence" in order to avoid the "proverbial fishing expedition, in hope that there *might* be something of relevance." *Tompkins v. Detroit Metro. Airport*, 278 F.R.D. 387, 388 (E.D. Mich. 2012). "[D]istrict courts have discretion to limit the scope of discovery where the information sought is overly broad or would prove unduly burdensome to produce." *Surles ex rel. Johnson v. Greyhound Lines, Inc.*, 474 F.3d 288, 305 (6th Cir. 2007); See also *Scales v. J.C. Bradford & Co.*, 925 F.2d 901 (6th Cir. 1991) ("Th[e] desire to allow broad discovery is not without limits and the trial court is given wide discretion in balancing the needs and rights of both plaintiff and defendant."). Accordingly, "Courts may limit discovery requests for information that is outside the scope allowed by Rule 26, or is cumulative or easily obtained elsewhere." *Knight Capital Partners Corp. v. Henkel Ag & Co., KGaA*, 290

F. Supp. 3d 681, 685 (E.D. Mich. 2017) citing FED. R. CIV. P. 26(b)(2)(C). In addition, "a district court may grant a protective order preventing the production of discovery to protect a party or entity from 'annoyance, embarrassment, oppression, or undue burden or expense." *Id.* [quotation omitted].

FED. R. CIV. P. 26(c)(1) provides for protective orders in the context of discovery. In pertinent part, the rule provides:

> A party or any person from whom discovery is sought may move for a protective order in the court where the action is pending -- or as an alternative on matters relating to a deposition, in the court for the district where the deposition will be taken. The motion must include a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action. The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:
>
> (A) forbidding the disclosure or discovery;
>
> (B) specifying terms, including time and place or the allocation of expenses, for the disclosure or discovery;
>
> (C) prescribing a discovery method other than the one selected by the party seeking discovery;
>
> (D) forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters;
>
> (E) designating the persons who may be present while the discovery is conducted;
>
> (F) requiring that a deposition be sealed and opened only on court order;

(G) requiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way; and

(H) requiring that the parties simultaneously file specified documents or information in sealed envelopes, to be opened as the court directs.

"To sustain a protective order under Rule 26(c), the moving party must show 'good cause' for protection from one (or more) harms identified in Rule 26(c)(1)(A) with a particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements." *In re Ohio Execution Protocol Litig.*, 845 F.3d 231, 236 (6th Cir. 2016), *cert. denied sub nom. Fears v. Kasich*, 138 S. Ct. 191, 199 L. Ed. 2d 128 (2017). [quotations omitted]. "Good cause exists if specific prejudice or harm will result from the absence of a protective order." *Id*.

Law & Argument

PLAINTIFFS ARE NOT ENTITLED TO A QUALIFIED PROTECTIVE ORDER RESTRICTING ACCESS TO MEDICAL RECORDS CONTRARY TO THE REQUIREMENTS OF 45 C.F.R. § 164.512(e)(1)

Pursuant to the general rules of discovery, a party may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter in the pending action. Fed.R.Civ. 26(b). However, Plaintiffs have refused to provide signed Health Insurance Portability and Accountability Act ("HIPAA"), 42 USC 1320d et seq., authorizations for the release of Plaintiffs' medical records from treating physicians. Instead, Plaintiffs' counsel insists on a burdensome qualified protective order which

contains restrictions which are neither necessary nor required to protect the Plaintiffs' privacy.

The Health Insurance Portability and Accountability Act of 1996 ("HIPAA") governs physician patient privilege and specifically includes an exception that allows for the disclosure of covered information for purposes of judicial and administrative proceedings. See 45 C.F.R. § 164.512(e)(1). Under this section a physician may disclose protected health information in one of three ways: "obtaining a court order," "sending a subpoena or discovery request where plaintiff has been given notice of the request," or "sending a subpoena or discovery request where reasonable effort has been made to obtain a qualified protective order." *Croskey v. BMW of N. Am.*, No. 02-73747, 2005 WL 4704767, at *1 (E.D. Mich. Nov. 10, 2005) **(Exhibit T);** see also 45 C.F.R. § 164.512(e)(1). Thus, a qualified protective order is not required to obtain medical records.

Defense counsel routinely obtains medical records without the entry of a qualified protective order. The additional restriction of obtaining a qualified protected order is only necessary in the absence of signed authorizations for the release of medical records. See 45 C.F.R. § 164.508(a)(1). Pursuant to 45 C.F.R. § 164.508(a)(1) a medical provider may release medical information upon receipt of a signed authorization which complies with statutory requirements in absence of a qualified protective order.

In this case, Plaintiffs have presented no justification for requiring a qualified protective order pertaining to the release of medical records. Additionally, Plaintiffs' motion contains no good cause for placing an additional burden on the defense as required by Plaintiffs' proposed qualified protective order. Defendants are not seeking medical records through a subpoena, court order or discovery request. Instead, Defendants are requesting signed authorizations for the release of medical records. Therefore, because Plaintiffs have presented no good cause to burden the Defendants with unnecessary requirements to obtain medical records, Plaintiffs' request for a qualified protective order should be denied.

To the extent that a qualified protective order is required, Plaintiffs' proposed qualified protective order exceeds the requirements of 45 C.F.R. § 164.512(e)(1) and should not be entered for the reasons set forth below.

DEFENDANTS ARE ENTITLED TO A QUALIFIED PROTECTIVE ORDER TO ALLOW EX-PARTE MEETINGS WITH TREATING PHYSICIANS

In addition to obtaining medical records, Defense counsel would like to informally hold *ex parte* meetings/discussions with Plaintiffs' treating physicians. Federal courts, and specifically the U.S. District Court for the Eastern District of Michigan have recognized that 45 C.F.R. § 164.512(e)(1) authorizes the release of medical information which includes permitting *ex-parte* meetings. See *Palazzolo v. Mann*, 2009 U.S. Dist. LEXIS 22348, 2009 WL 728527 (E.D.Mich. Mar. 19, 2009)

(Exhibit U); see also 45 C.F.R. §160.103 (HIPPA applies to both oral and written information); *Congress v. Tillman*, No. 09–10419, 2009 WL 1738511, at *1 (E.D.Mich. June 16, 2009) (holding that defendants may conduct an *ex-parte* oral interview with plaintiff's treating physician where a qualified protective order, consistent with 45 C.F.R. § 164.512(e)(1), is in place) **(Exhibit V).**

Placing restrictions on Defendants' *ex parte* meetings has also specifically been rejected by federal courts. In *Croskey v. BMW of N. Am.*, No. 02-73747, 2005 WL 4704767, at *1 (E.D. Mich. Nov. 10, 2005) **(Exhibit T)**, Judge Nancy Edmunds reversed a magistrate judge's ruling which placed restrictions on a defendant's *ex parte* access to the plaintiff's treating physicians finding that the magistrate erred in finding "that a 'qualified protective order' under HIPAA requires specific notice to a plaintiff's counsel of a proposed *ex parte* meeting, and plaintiff's consent." (*Id.*).

As acknowledged by Judge Edmunds in *Croskey*, under 45 C.F.R. § 164.512(e)(1)(ii)(B) a protective order must meet the requirements of Section 164.512(e)(1)(v), and contain language that:

> (A) Prohibits the parties from using or disclosing the protected health information for any purpose other than the litigation or proceeding for which such information was requested; and
>
> (B) Requires the return to the covered entity or destruction of the protected health information (including all copies made) at the end of the litigation or proceeding. [*Croskey*, *supra* at 2].

No additional restrictions are required. However, the magistrate in *Croskey* while permitting *ex parte* meetings, required the defendants to give notice to plaintiff's counsel of any *ex parte* meeting and further required that plaintiff consent to the meeting. (Id). Judge Edmunds found that these requirements exceeded the criteria of 45 C.F.R. § 164.512(e)(1) but would also impede the defendant's access to evidence holding as follows:

> For these reasons, 45 C.F.R. § 164.512(e)(1)(ii)(B), as defined by Section 164.512(e)(1)(v), does not require specific notice to Plaintiff's counsel before Defendant conducts an ex parte interview with Plaintiff's treating physician. Nor does it require Plaintiff to consent to such an interview. [*Croskey, supra* at 4].

In so ruling, Judge Edmunds relied, in part, on *Bayne v. Provost*, 359 F.Supp.2d 234 (N.D.N.Y.2005), where the court addressed a request for a qualified protective order to permit *ex parte* meetings, as follows:

> Defendants are granted a Qualified Protective Order and Authorization to interview [Plaintiff's nurse] about the relevant events in this litigation and [Plaintiff's] medical history and condition. The Defendants shall draft for this Court to execute a Qualified Protective Order and Authorization that incorporates ... [the following terms]: (1) the Defendants are prohibited from using or disclosing the protected health information for any purpose other than this litigation; (2) the Defendants are required to either return or destroy the protected information at the end of the litigation; (3) the document shall be captioned Qualified Protective Order and Authorization and shall be used exclusively for the interview of [Plaintiff's nurse]; and (4) there shall be a recitation on the document's face in bold letters that the purpose of the disclosure is not at the request of the patient, however, he has been put on notice of this order, and that the purpose of the information is to assist the Defendants in defense of a lawsuit brought by the Plaintiff....

> [I]f the Defendants comply with all of these requirements and eventually choose to call [Plaintiff's nurse] as a witness, they shall not be precluded from conducting subsequent private discussions with [that party] in preparation for trial testimony and the contents of such further discussions need not be disclosed....
>
> [T]he Defendants shall advise [Plaintiff's nurse] that this Qualified Protective Order and Authorization does not compel her to participate in an interview against her wishes nor to occur outside the presence of her attorney if she wishes to have one present.
> [Id. at 243].

As cited above, federal courts have routinely issued protective orders allowing *ex parte* meetings as long as measures are put in place to ensure that HIPAA's goals are achieved. *Congress, supra* at 2 (holding that "defendants may conduct an *ex parte* oral interview with [plaintiff's] physician if a qualified protective order, consistent with 45 C.F.R. § 164.512(e)(1), is first put in place.") (quoting *Holman v. Rasak*, 281 Mich.App. 507, 513, 761 N.W.2d 391, 395 (2008)); *Palazzolo, supra* at 1 ("The issue presented is whether a protective order, consistent with HIPPA [sic], may contain a provision that allows for defendants' counsel to conduct *ex parte* interviews with plaintiff's treating physicians. The answer is yes."); See also *Szpak v Inyang*, 290 Mich App 711 (2010) (holding that it was an abuse of discretion to place any conditions on defense counsel's *ex parte* meetings with Plaintiff's treating physicians, such as requiring notice of the meeting to plaintiff's counsel or providing plaintiff's counsel with an opportunity to attend the meeting).

HIPAA regulations permit adversaries in litigation to have access to a plaintiff's relevant medical records which are at issue in the case. "Having access to the medical witnesses who may testify at trial serves the same goal of allowing equal access to the evidence, which is essential to the success of the adversary process. *See Dennis v. United States*, 384 U.S. 855, 873, 86 S.Ct. 1840, 16 L.Ed.2d 973 (1966) (observing that "[i]n our adversary system ..., it is rarely justifiable for [one side] to have exclusive access to a storehouse of relevant fact"); *see also McCormick v. Brzezinski*, No. 08–10075, 2008 WL 4965343, at *3 (E.D.Mich. Nov. 18, 2008) ("[G]iven that Plaintiff has put her medical condition at issue in this litigation, Defendants are entitled to discovery regarding Plaintiff's medical condition in order to properly defend this matter."). *Thomas v. 1156729 Ontario Inc.*, 979 F. Supp. 2d 780, 784 (E.D. Mich. 2013).[2] Only where a plaintiff shows a specific reason for restricting access, "such as sensitive medical history irrelevant to the lawsuit, a court may restrict ex parte interviews and disclosure of medical records." *Pratt v. Petelin*, 09–2252–CM–GLR, 2010 WL 446474, at *7 (D.Kan. Feb. 4, 2010). In this case, no showing has been made by the Plaintiffs.

Plaintiffs' counsel was requested to provide a specific reason for restricting access to the Plaintiffs' medical information. No justification was provided to the

[2] The Michigan Supreme Court has also recognized that *ex parte* meetings with treating physicians allow a party to properly prepare for trial. *Holman v Rasak*, 486 Mich 429; 785 NW2d 98 (2010).

Defendants or the Court through Plaintiffs' motion for a over complicated qualified protective order which exceeds the requirements of 45 C.F.R. § 164.512(e)(1) and places an unreasonable burden on the Defendants. It is clear from the language in 45 C.F.R. § 164.512(e)(1) that a qualified protective order need only prohibit a defendant from disclosing a plaintiff's protected information beyond the purposes of this litigation, and second, that the defendant must return or destroy the protected information after the litigation has concluded. *Croskey, supra* at 2. The qualified protective order proposed by the Defendants satisfies the requirements of 45 C.F.R. § 164.512(e)(1) and should be entered.

WHEREFORE, Defendants respectfully request this Honorable Court deny Plaintiffs' Motion and enter Defendants' Qualified Protective Order attached as Exhibit A.

Respectfully submitted,

By:/s/Richard V. Stokan, Jr.

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Dated: March 1, 2019

CERTIFICATE OF SERVICE

I hereby certify that on March 1, 2019, I electronically filed the foregoing paper(s) with the Clerk of the Court using the ECF efile system which will send notification of such filing to all counsel of record and I hereby certify that I have mailed by United States Postal Service the Paper(s) to the following non-efile participants: None.

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