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January 18, 2019

**By ECF**

Hon. Cathy L. Waldor  
U.S. District Court for the District of New Jersey  
Martin Luther King Building & U.S. Courthouse  
50 Walnut Street  
Newark, NJ 07101

**Re: Conforti v. St. Joseph's Healthcare System, Inc., et al., No. 2:17-cv-00050 (D.N.J.)**

Dear Judge Waldor:

Counsel for Plaintiff Jionni Conforti (“Mr. Conforti” or “Plaintiff”) and Defendants St. Joseph’s Healthcare System, Inc. (“SJHS”), St. Joseph’s Hospital and Medical Center d/b/a St. Joseph’s Regional Medical Center (“SJRMC”), and Father Martin D. Rooney (collectively, “Defendants”) jointly write to request the Court’s assistance in resolving two immediate disputes pertaining to the following topics:

1. On January 8, 2019, Defendants served Mr. Conforti with notices of subpoenas to six of Mr. Conforti’s medical providers. In those subpoenas, Defendants seek: (a) the production of Mr. Conforti’s medical records from July 1, 2018 to the present; and (b) to take the depositions of each of those six medical providers, with the six depositions noticed to take place on January 22-28, 2019. Mr. Conforti seeks leave to file a motion to quash these subpoenas.
2. Defendants object to Mr. Conforti’s prior designations of certain medical records as “Attorneys’ Eyes Only” (“AEO”) pursuant to the Discovery Confidentiality Order (Dkt. 21) (the “DCO”) or, alternatively, have sought Mr. Conforti’s consent to use the AEO-designated records and/or information derived therefrom at the depositions of Mr. Conforti himself Mr. Conforti’s medical providers, as well as to share those AEO-designated records with Defendants’ consulting psychiatrist who has executed the Agreement to Be Bound by Discovery Confidentiality Order. Mr. Conforti does not consent to either request. Pursuant to ¶ 8(b) of the DCO, Mr. Conforti respectfully presents this dispute to the Court.

The parties met and conferred on these issues on January 11, 2019, but were unable to resolve the instant disputes. The parties therefore jointly request that the Court schedule a telephonic

conference at its earliest convenience to discuss resolution of these disputes.

**I. DEPOSITIONS OF AND DOCUMENTS FROM MR. CONFORTI'S MEDICAL PROVIDERS**

On January 8, 2019, Defendants notified Mr. Conforti that they would be issuing subpoenas to six of Mr. Conforti's medical providers, four have of which been served to date. In particular, Defendants noticed depositions for:

- (1) Dr. Joseph Vitale, one of Mr. Conforti's primary healthcare providers, on January 22, 2019 (served on January 8) -- Dr. Vitale is not available on the noticed date;
- (2) Mary Vitale, another of Mr. Conforti's primary healthcare providers who works with Dr. Vitale, on January 22, 2019 (served on January 8) -- Ms. Vitale is not available on the noticed date;
- (3) Ms. Rissy Batista, Mr. Conforti's first therapist, on January 23, 2019 (not served);
- (4) Dr. Charles Haddad, the surgeon who performed a hysterectomy on Mr. Conforti after Defendants refused to do so, on January 24, 2019 (served on January 8) -- Dr. Haddad is not available on the noticed date;
- (5) Dr. Vincent Fitzgerald, Mr. Conforti's second therapist, on January 25, 2019 (served on January 9); and
- (6) Dr. Ian Tang, the doctor who provided transition-related medical care to Mr. Conforti, on January 28, 2019 (not served).

In addition, each of these subpoenas seeks the following documents, to supplement the documents previously provided by Plaintiff's counsel from these providers:

All documents relating to your treatment of Jionni Conforti, f/k/a Krystal Conforth, during the period of July 1, 2018 to the present, per the attached authorization, including all clinical records, medical records, psychiatric records, psychotherapy records, patient histories, office/therapy notes, diagnoses, treatment records, surgical records, progress notes, test results, referrals, prescriptions, and records sent to you by other health care providers about Jionni Conforti, f/k/a Krystal Conforth.

***A. Mr. Conforti's Position***

As the Court is aware, Mr. Conforti alleges two claims: (1) discrimination on the basis of sex in violation of 42 U.S.C. § 18116; and (2) discrimination because of sex and gender identity in violation of N.J. Stat. Ann. §§ 10:5-1, *et seq.* See Dkt. 1 ("Compl.") ¶¶ 82-101. These claims are premised on Defendants' denial to Mr. Conforti of his ability and opportunity to schedule a medically necessary hysterectomy because of his sex, nonconformity with sex stereotypes,

gender identity and expression, and transgender status. Mr. Conforti alleges that the discriminatory treatment took place in June 2015. *Id.* ¶¶ 67-70.

Defendants' attempt to depose six of Mr. Conforti's medical providers—and with only two weeks' notice—are improper under Fed. R. Civ. P 26(b)(1) because such repeated and invasive questioning is irrelevant, harassing, and highly disproportional in light of the claims, defenses, and facts at issue in this case.

*First*, Mr. Conforti asserts two discrete claims of discrimination under federal and state law—and *not* any independent tort for emotional distress—seeking only garden variety emotional distress damages as one form of requested relief.<sup>1</sup> Mr. Conforti never disclosed any intention to call his medical providers as witnesses in this case, and Defendants have never claimed that they refused to perform a hysterectomy on Mr. Conforti for any reason related to the testimony of medical providers that are unaffiliated with Defendants or its decision to deny Mr. Conforti medical care. Mr. Conforti can provide case authority in support of his position, should the Court allow for further briefing, as Mr. Conforti requests.

*Second*, Mr. Conforti has already produced approximately 500 pages of medical records to Defendants ranging from January 1, 2011, to August 28, 2018, *i.e.* from four and a half years before the denial occurred in June 2015 to a year and a half after Mr. Conforti filed his Complaint. Defendants have articulated no valid reason for why seven and a half years' worth of medical records from six medical providers is insufficient to satisfy their discovery needs, or why they require additional medical records from October 2018 to January 2019 (as well as testimony from six medical providers) to defend against a garden variety damages request. In stark contrast, Defendants' requests would impose significant burden and expenses on Mr. Conforti while pervasively infringing on his rights to privacy and confidential medical care. Such documents offer no probative value for Defendants beyond what the produced medical records already provide.

*Third*, Defendants have no legal basis, under either federal or New Jersey law, to leverage a standard claim for garden variety emotional distress damages as a result of a discrete instance of discriminatory treatment into an invasive fishing expedition of numerous medical personnel to discuss highly sensitive, confidential, and irrelevant medical topics or personal traumas that Defendants must concede have nothing to do with the discriminatory treatment Mr. Conforti suffered at the hands of Defendants in June 2015. Defendants have not identified how any testimony from each of Mr. Conforti's medical providers would be relevant, proportional, or justified in light of (a) the narrow claims and issues in this case, (b) the records already produced, and (c) the highly sensitive nature of the information sought. Such depositions, if anything, would serve to chill and stigmatize individuals' legitimate claims of discriminatory treatment by effectively allowing that any claim of discrimination would open the door into an

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<sup>1</sup> See Compl., Prayer for Relief (C), at 25 (seeking an award of “compensatory damages in an amount to be established at trial for his emotional distress and suffering, embarrassment, humiliation, emotional pain and anguish, violation of his dignity, and loss of enjoyment of life”).

inspection of their entire medical or psychiatric history—a truly disquieting proposition, particularly for transgender people.

*Fourth*, as a pragmatic matter, Defendants have not shown any individualized need for each of these six depositions—there is no indication as to how these third parties have any information that could bear on Mr. Conforti’s claims of discrimination or Defendants’ defenses. That Defendants have not taken a single deposition and noticed all six subpoenas on the eve of the close of discovery further demonstrates that these are being used as fishing techniques—a particularly unsettling development given the highly sensitive nature of seeking to depose a party’s therapists and doctors who are entrusted with the most personal information imaginable.

Accordingly, Mr. Conforti seeks to file a motion to quash the six subpoenas in their entirety.

## ***B. Defendants’ Position***

### **1. Plaintiff Put His Mental Condition In Issue.**

Defendants do not understand Mr. Conforti’s objections to the depositions of his medical providers given that Mr. Conforti has squarely placed his mental condition and treatment history in issue, both before and then continuing after his request for a sterilization procedure at a Catholic hospital was denied. First, he alleges that the hysterectomy that he asked Defendants to perform in 2015 was a “medically necessary” treatment for his gender dysphoria, a diagnosable mental condition according to the DSM-V issued by the American Psychiatric Association. Complaint at ¶¶2, 30-31. Mr. Conforti contends that he has “long struggled with depression and anxiety rooted in the need to align himself with his true sex” and that he has “received hormone therapy under the direction and supervision of his primary care physician as well as other medical treatment.” *Id.* at ¶3.

Second, Mr. Conforti admits that after he offered no other medical reason for the requested hysterectomy and he was informed that his requested procedure could not be performed by Defendants to treat gender dysphoria – as Defendants were obligated to do by the “Ethical and Religious Directives for Catholic Health Care Services” promulgated by the United States Conference of Catholic Bishops – he became “deeply depressed” and it caused him “great anxiety.” *Id.* at ¶9. Mr. Conforti further asserts that he has “suffered emotional distress, humiliation, embarrassment, and a loss of dignity” as a result of Defendants’ actions. *Id.* at ¶10; *see also Id.* at ¶¶90, 101. Indeed, the *only compensatory damages sought by Plaintiff in his prayer for relief are for claimed emotional harm*. However, while attempting to recover monetary damages from Defendants for alleged emotional distress, Mr. Conforti concedes in his Complaint that he has “long struggled with depression and anxiety.” *Id.* at ¶3.

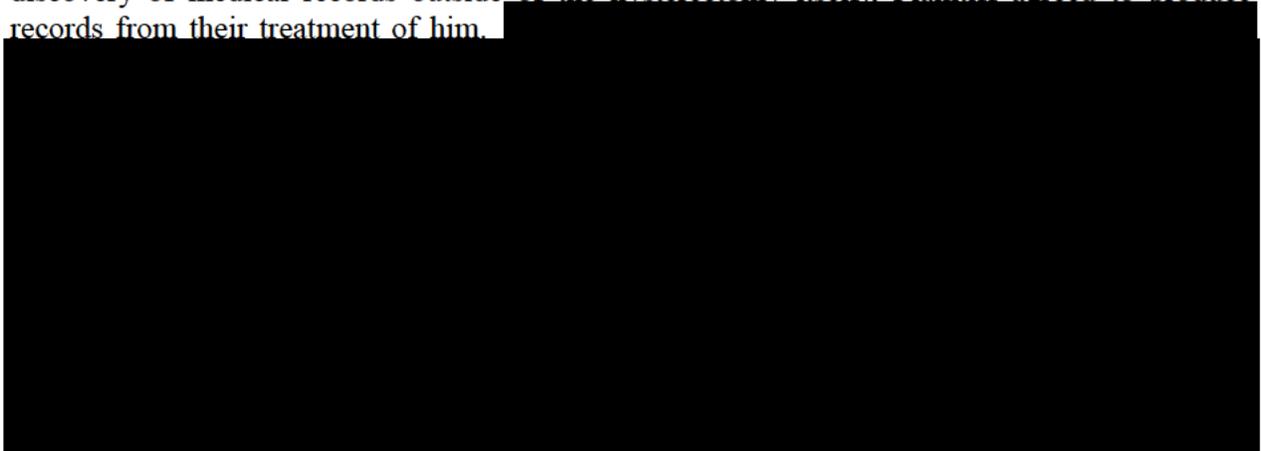
Beyond the allegations of the Complaint, the fact that Plaintiff has placed his mental condition in controversy is reinforced by his written discovery responses. For example, in response to Defendants’ Interrogatory No. 4, Plaintiff states that his alleged monetary damages include “compensation for his emotional distress and suffering, embarrassment, humiliation,

emotional pain and anguish, violation of dignity, and loss of enjoyment of life as a result of Defendants' conduct in amount to be proven at trial." As shown below, each of the medical providers who have been noticed for depositions provided treatment to Mr. Conforti in relation to one or all of these issues.

## **2. Plaintiff's Treatment by Dr. Tang and Rissy Batista**

When Plaintiff contacted Dr. Brian Day in May 2015 about his request to have a hysterectomy performed at St. Joseph's Hospital and Medical Center, he provided two notes from medical providers. One was from Dr. Ian Tang, a primary care physician then of Apicha Community Health Center, and another from Rissy Batista, a therapist then of Rissy's Lighthouse Therapeutic Services. Dr. Tang's letter stated that Mr. Conforti had been diagnosed with "Gender Identity Disorder" and that he was "seeking a hysterectomy to aid with his female to male transition." As stated in his Complaint, Plaintiff took "steps, at Dr. Tang's direction, to align himself with his true sex" starting in June 2014. Complaint at ¶55. Ms. Batista's letter stated that she had diagnosed Mr. Conforti with gender dysphoria and that a "full hysterectomy has been discussed at length and it's currently recommended to complete full transition from female to male."

Dr. Tang and Ms. Batista were identified in Plaintiff's Initial Disclosures as having knowledge of his gender dysphoria diagnosis and, in addition, they were identified by Plaintiff in response to interrogatories as being among several of Mr. Conforti's healthcare providers. As detailed above (and after much back and forth caused by Plaintiff's initial efforts to block any discovery of medical records outside of the hysterectomy itself), Plaintiff agreed to produce records from their treatment of him.



Defendants are clearly entitled to depose Dr. Tang and Ms. Batista when they can be located.<sup>2</sup> Their treatment of Mr. Conforti is relevant to his claim that a hysterectomy was a

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<sup>2</sup> Defendants' process server has informed Defendants' counsel that the attempts to serve Dr. Tang at the address provided by Plaintiff's counsel in discovery were unsuccessful. In addition, service has not been perfected on Ms. Batista at the location provided by Plaintiff in discovery. During the meet and confer conference on January 11, Plaintiff's counsel informed Defendants that they were aware that both Dr. Tang and Ms. Batista had relocated and changed practices, but

“medically necessary” treatment for his gender dysphoria, his claim that he experienced emotional distress/harm that was purportedly caused by Defendants, and whether the hysterectomy performed in 2015 proved to be successful in treating Plaintiff’s gender dysphoria.

**3. Plaintiff’s Treatment by Dr. Haddad**

Dr. Charles Haddad is an OB/GYN who performed a hysterectomy on Plaintiff on September 23, 2015 at Hackensack UMC Mountainside Hospital in Montclair, New Jersey. The purpose of Dr. Haddad’s deposition is clear – Defendants are entitled to probe, among other things, the reasons Dr. Haddad agreed to perform the hysterectomy, any other treatment that Dr. Haddad provided to Mr. Conforti, and any discussions Dr. Haddad had with Mr. Conforti that relate to his emotional distress claim and/or the impact of the hysterectomy on Plaintiff’s gender dysphoria.

**4. Plaintiff’s Treatment by Dr. Vitale and Ms. Vitale.**

Dr. Joseph Vitale, a primary care physician, and Mary Vitale, an Advanced Practice Nurse – both affiliated with the West Paterson Family Medical practice – have treated Mr. Conforti regularly beginning in early 2014 (before Mr. Conforti asked Defendants to perform a hysterectomy) and continuing through the end of 2018.

[REDACTED]

Dr. and Ms. Vitale’s treatment of Mr. Conforti is clearly relevant to his claims, and they should appear for their depositions.

**5. Plaintiff’s Treatment by Mr. Fitzgerald.**

Vincent Fitzgerald of Nutley Family Service was identified by Mr. Conforti in his interrogatory responses as a therapist who treated him in relation to his alleged emotional harm. Most of the records provided by Plaintiff from his treatment with Mr. Fitzgerald are handwritten and difficult to follow.

[REDACTED]

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to date no new addresses have been provided. Accordingly, the depositions of Tang and Batista cannot go forward on the dates identified in the subpoenas.

Because Mr. Fitzgerald's treatment of Plaintiff relates directly to Plaintiff's alleged emotional harm and a variety of potential causes of same, Defendants should be allowed to take his deposition.

## **6. Conclusion**

Taken together, Plaintiff's pleadings, discovery responses, and medical records raise a large number of questions about his emotional distress claim and the gender dysphoria diagnosis that formed the basis for Mr. Conforti's request for a hysterectomy. The health care providers whom Defendants seek to depose all possess highly relevant information concerning those topics. This discovery is not disproportionate to the needs of this case. The fact that Plaintiff has been treated by a number of medical and mental health providers is not of Defendants' making. In claiming in conclusory fashion that these depositions would somehow be burdensome for Plaintiff, Mr. Conforti fails to mention that he has already deposed six individuals currently or formerly associated with St. Joseph's – staffing each deposition with 3 or 4 attorneys from Quinn Emanuel and LAMBDA Legal – and still seeks two more such depositions.

The fact that Mr. Conforti has tagged his emotional distress claim as “garden variety” is misleading. As the Mr. Conforti's allegations and the medical records show, his medical/mental health history is extensive and complex, and according to him, closely intertwined with his gender dysphoria. Thus, Mr. Conforti's alleged emotional distress is the antithesis of “garden variety,” a term that does not appear among the remedies under either the Affordable Care Act or the New Jersey Law Against Discrimination.

Nor does it matter that Mr. Conforti has not alleged a separate tort for emotional harm. His mental condition is directly in issue by virtue of his claim that Defendants should have performed a hysterectomy on him as a “medically necessary” treatment for his gender dysphoria. He also alleged that Defendants caused him emotional harm, the sole component of his alleged compensatory damages, thereby again placing his medical condition in issue.

Although Plaintiff's counsel claims that the sole motivation in moving to quash these depositions (and, as discussed below, in applying AEO designations to Mr. Conforti's medical records) is to protect his privacy, in reality Plaintiff's counsel is attempting to tie Defendants' arms behind their backs so that Plaintiff – who is not a medical professional – can freely introduce evidence at trial about his alleged emotional condition while Defendants will not have the ability to refute his claims by medical evidence and expert testimony. Moreover, Plaintiff's counsel appears inclined to seek disclosure of all of the questions that Defendant intends to ask his medical providers in advance of the depositions, which is patently unfair and inappropriate.

Accordingly, Defendants submit that Plaintiff should be denied leave to move to quash the depositions of Plaintiff's medical providers.

## **II. MR. CONFORTI'S "ATTORNEYS' EYES ONLY" DESIGNATIONS FOR CERTAIN MEDICAL RECORDS**

Pursuant to an agreement reached by the parties during a meet and confer on April 10, 2018, Mr. Conforti produced approximately 500 total pages of medical records and related correspondence to Defendants on July 20, 2018, and October 17, 2018. The vast majority of records were designated as "Confidential" by Mr. Conforti pursuant to ¶ 1 of the DCO. A subset of medical records were marked as "Attorneys Eyes Only," a higher level of protection which, pursuant to ¶ 2 of the DCO, applies to "any information, document, or thing, or portion of any document or thing, that contains or discloses highly sensitive business or personal information, the disclosure of which is highly likely to cause significant harm to an individual or to the business or competitive position of the designating party." The designations that Defendants challenge are: Tang 006, 035, 038, 044, 050, 058, 061, 066, 068, and 071; Fitzgerald014, 016, 059, and 061; and Batista039, 045, 054, and 072. In addition, on one medical record (Fitzgerald016 and 061), Mr. Conforti redacted certain information.

On January 9, 2019, Defendants emailed Mr. Conforti's counsel to request that Mr. Conforti vacate all AEO designations on his medical records or, in the alternative, consent to the use of all medical records at each of the depositions of Mr. Conforti's medical providers and by all of Defendants' (undisclosed) experts/consultants. The parties held a meet-and-confer on January 11, 2019, but were unable to reach a final agreement.

### ***1. Mr. Conforti's Position***

The few AEO designations given to a small portion of Mr. Conforti's overall medical records are warranted, as ¶ 2 of the DCO explicitly permits an AEO designation for any document "that contains or discloses highly sensitive ... personal information, the disclosure of which is highly likely to cause significant harm to an individual." Such is the case with the records here, which contain references to highly confidential discussions between Mr. Conforti and his medical providers on a range of irrelevant topics, including [REDACTED] that would cause significant harm to Mr. Conforti if disclosed by Defendants.

During the parties' January 11, 2019 meet-and-confer, Mr. Conforti expressed that he was willing to agree, subject to his general objections to the six proposed depositions, that medical records marked AEO could be used at a deposition only if they were prepared by that particular deponent. Defendants did not agree to this proposal. It is thus apparent that Defendants' purpose in raising this dispute is to disclose Mr. Conforti's most sensitive and confidential medical information from one medical provider's records to other health care providers who could not have considered such records when previously treating and/or diagnosing Mr. Conforti. Disclosing highly personal information that Mr. Conforti never chose to share, merely because he brought unrelated discrimination claims against Defendants, serve only to disproportionately harm Mr. Conforti and his essential rights without offering any valid corresponding benefit. The burden and prejudice is further compounded by the scope of

Defendants' request to de-designate *all* medical records marked AEO, without exception, to use in any of the six proposed depositions.

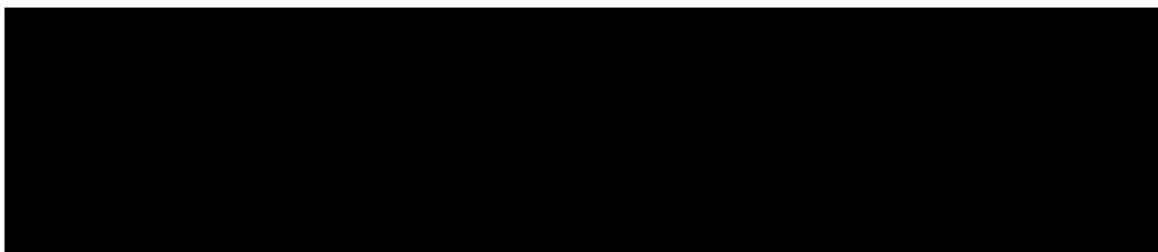
In addition, as to the one page of Mr. Conforti's records (Fitzgerald016 and 061) with one line of information redacted, the redacted information is unrelated to the case, involves a particularly sensitive note from decades ago, and is so sensitive and personal that it cannot be disclosed. Such information is outdated, irrelevant, highly inflammatory, prejudicial, and disproportional, and is well beyond the applicable time scope and subject matters for medical records that Mr. Conforti agreed to produce (subject to his relevance objections). To the extent that the Court entertains any doubts, Mr. Conforti is willing to disclose that information solely to the Court for its own *in camera* review, which will confirm that it should remain redacted.

Mr. Conforti, like the vast majority of civil litigants, brings only a standard, garden variety mental distress damages request as one form of relief he seeks as compensation for Defendants' acts of discrimination. As numerous courts in New Jersey have recognized in similar contexts—and for which Mr. Conforti can provide case authority should the Court allow for further briefing, as Mr. Conforti requests—Mr. Conforti did not automatically waive all expectations of privacy and open the door into any invasive inquiry into his most confidential and sensitive medical records by doing so. Defendants' request to engage in invasive and irrelevant questioning of numerous medical providers regarding Mr. Conforti's most sensitive information should be denied.

## ***2. Defendants' Position***

Defendants' concerns about the AEO designations of Plaintiff's medical records are threefold: (1) Defendants should be permitted to question Mr. Conforti about the records and, as discussed above, question his medical providers about their treatment of him; (2) Defendants should be allowed to use the documents at the depositions of Mr. Conforti's other medical providers, even if the records do not relate to their treatment of him, so that they can be made aware of his complete medical history; and (3) Defendants should be able to show the records to consulting and testifying experts so that Defendants can adequately prepare for the depositions of Plaintiff's medical providers, the medical examination of Plaintiff (which has not been noticed and to which Plaintiff intends to object), and trial, and so that one or more experts may provide an opinion regarding: (i) the "medical necessity" of Plaintiff's request for a hysterectomy to treat gender dysphoria; and (ii) the cause of Plaintiff's alleged emotional distress.

The AEO designations are not as limited as Plaintiff's counsel suggests. Instead, Plaintiff has systematically attempted to limit Defendants' ability to probe the most critical and potentially harmful stressors in Mr. Conforti's life – [REDACTED] – even though these stressors are clearly relevant to Plaintiff's claim that Defendants, and Defendants alone, caused him severe emotional harm. For example, [REDACTED]



All of the information set forth above relates to stressors in Plaintiff's life that predated the events that form the basis of his lawsuit against Defendants and likely contributed to or caused outright his alleged emotional distress. Similar pertinent information abounds in the other documents designated as AEO by Plaintiff's Counsel.

Defendants maintain that a "Confidential" designation of Plaintiff's records under the Discovery Confidentiality Order is sufficient for the protection sought by Plaintiff. Under the Discovery Confidentiality Order, the use of the medical records will be limited to the purposes set forth above. Each of Plaintiff's doctors and any testifying or consulting experts engaged by Defendants will be bound by the Discovery Confidentiality Order and prohibited from disclosing or discussing the information contained in the records with any third parties. Defendants' counsel will not make any of Mr. Conforti's records public and will file any such records with the Court under seal, as done with the instant application.

Defendants note that Plaintiff has had free rein to take discovery of virtually unlimited sensitive medical information and documentation from Defendants. All of the documents produced by Defendants to date have been marked "Confidential" by Defendants, so Defendants have not intentionally sought to use to the Discovery Confidentiality Order to restrict Plaintiff's usage of those documents.

Lastly, as discussed above, Plaintiff's counsel, through the improper use of the AEO designations, appears to be seeking to seek disclosure of all of the questions that Defendants intend to ask his medical providers in advance of the depositions, which is patently unfair and inappropriate.

For these reasons, Defendants respectfully submit that the Court enter an Order that the AEO designations be stricken from Plaintiff's medical records, that the records be marked "Confidential" subject to the protections of the Discovery Confidentiality Order, and that Defendants may use the records for the purposes outlined above. In addition, Defendants respectfully request that the Court accept Plaintiff's counsel's invitation and review the documents redacted by Plaintiff (Fitzgerald016 and 061) *in camera* to determine whether the information is relevant to Plaintiff's claims and discoverable.

Respectfully submitted,

DATED: January 18, 2019

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