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**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF IDAHO**

ADREE EDMO (a/k/a MASON EDMO),

Plaintiff,

v.

IDAHO DEPARTMENT OF CORRECTION;  
HENRY ATENCIO, in his official capacity;  
JEFF ZMUDA, in his official capacity;  
HOWARD KEITH YORDY, in his official  
and individual capacities; CORIZON, INC.;  
SCOTT ELIASON; MURRAY YOUNG;  
RICHARD CRAIG; RONA SIEGERT;  
CATHERINE WHINNERY; and DOES 1-15;

Defendants.

Case No.: 1:17-cv-00151-BLW

**REPLY BRIEF IN SUPPORT OF  
PLAINTIFF'S MOTION TO STRIKE  
DECLARATION OF KRINA L. STEWART  
AND FOR PROTECTIVE ORDER**

Complaint Filed:	April 6, 2017
Discovery Cut-Off:	None Set
Motion Cut-Off:	None Set
Trial Date:	None Set

## INTRODUCTION

Plaintiff filed her Motion to Strike and for Protective Order out of the specific concern that, by filing a declaration from Ms. Edmo's current medical provider containing protected and sensitive information obtained directly from Ms. Edmo during a clinical appointment, Defendants are improperly converting Ms. Edmo's ongoing medical appointments into *ex parte* discovery contacts, thereby chilling her communications with her providers and affecting her ability to obtain ongoing medical care. This issue arises out of the particular context in which Plaintiff is a prisoner in the custody of Defendants and has no ability to obtain medical treatment from a third party. To address this concern, Plaintiff made a proposal that would balance the interests of Defendants in defending this case with Ms. Edmo's interests in protecting her private information not relevant to the issues in this litigation. Given that Defendants have complete control of Plaintiff's access to medical treatment and her medical providers, such balancing is essential.

Defendants' Opposition fails to respond to this underlying concern or propose an alternative solution that would address the balancing of interests required. Indeed, Defendants deny that they disclosed protected information in the Stewart Declaration or in their July 11, 2018 state court motion for an order permitting disclosure of Ms. Edmo's Presentence Investigation Reports ("PSI Reports"), and confirm their intention to continue to use Ms. Edmo's protected information in a similar manner. However, HIPAA requires that Defendants "make reasonable efforts to limit [uses and disclosures of protected health information] to the minimum necessary" to defend this lawsuit. *See* 45 C.F.R. § 164.502(b). Under these circumstances, judicial safeguards are necessary to protect Ms. Edmo's interests.

In the absence of a protective order balancing the parties' interests and access, Ms. Edmo's communications with her treating clinicians will necessarily be chilled, to the detriment of her ongoing medical care, and Ms. Edmo will have no ability to object to the disclosure of protected information that is not relevant or necessary to the litigation prior to its release to the public. Accordingly, Ms. Edmo requests the Court issue an order: (1) striking the Declaration of

Krina L. Stewart (Dkt. No. 68-2), for the purpose of sealing it or removing it from the public docket; (2) prohibiting Defendants from using Plaintiff's protected medical information in the present litigation unless produced or obtained through formal discovery procedures as required under the Federal Rules of Civil Procedure and HIPAA, 45 CFR § 164.512(e)(1); and (3) requiring Defendants to timely serve Plaintiff's counsel in the instant case with any documents or subpoenas filed or served, regardless of forum, relating to discovery or other proceedings in the instant litigation.

## **ARGUMENT**

Defendants failed to respond to Ms. Edmo's underlying concern that Defendants' unfettered conversion of her ongoing medical treatment into *ex parte* discovery opportunities chills her ability to obtain medical care. Moreover, Defendants misstate the law regarding a plaintiff's privacy rights in protected information irrelevant to the litigation. Accordingly, this Court should exercise its discretionary authority under Federal Rule of Civil Procedure 26(c) to regulate or limit discovery in the interests of the parties. *Tahoe Ins. Co. v. Morrison-Knudsen Co.*, 84 F.R.D. 362, 363-64 (D. Idaho Nov. 15, 1979).

### **I. A Protective Order is Necessary to Balance Defendants' Discovery Needs and Ms. Edmo's Medical and Privacy Interests**

#### **A. Even where a medical provider is a party to litigation, HIPAA restricts the release of protected medical information "to the minimum necessary to accomplish the intended purpose"**

Defendants argue that because Ms. Edmo's pleadings "contain various, specific references to her mental health treatment at IDOC, all of which was obtained outside the formal discovery procedures and filed publicly with this Court," she has waived any objections to Defendants doing the same. However, the law is clear that a plaintiff does not waive her rights to privacy as to all information provided during the course of medical treatment by putting her health at issue in litigation. *Fritsch v. City of Chula Vista*, 187 F.R.D. 614, 633 (S.D. Cal. July 14, 1999); *Piehl v. Saheta*, 2013 U.S. Dist. LEXIS 79401, at \*5 (D. Md. June 5, 2013) ("In

enacting HIPAA, Congress recognized a societal interest in maximizing the protections afforded in the confidential physician-patient relationship, even where a patient's medical history is at issue in a court case."); *Roosevelt Hotel, Ltd. Partnership v. Sweeney*, 394 N.W.2d 353, 357 (Iowa 1986). Information that is irrelevant to the issues raised in the litigation should be protected from disclosure. *Britt v. Superior Ct.*, 20 Cal. 3d 844, 849 (1978) (concluding that waiver of physician-patient and psychotherapist-patient privileges extends only to information relating to the medical conditions in question).

Defendants assert that because IDOC is a party to this litigation, HIPAA "contemplates and allows for IDOC to disclose and use protected health information as part of its legal services in defending this lawsuit." Opp. at 11. HIPAA, however, places limits on the use of protected medical information even by parties to litigation. Specifically, HIPAA requires that a "covered entity," including IDOC here, "must make reasonable efforts to limit protected health information to the minimum necessary to accomplish the intended purpose of the use, disclosure, or request." *See* 45 C.F.R. § 164.502(b).

Ms. Edmo did not automatically waive all rights to medical privacy, and Defendants do not have carte blanche to disclose any information they obtain by virtue of their position as Ms. Edmo's exclusive care provider. A balance must still be achieved between Defendants' ability to use health information relevant to defending this case, and the strong federal policy in favor of protecting patient privacy.

**B. Court intervention is especially necessary because Defendants have complete control over Ms. Edmo's ongoing medical treatment**

Because Ms. Edmo is a prisoner in the custody of IDOC, Defendants have complete control over her ongoing access to medical treatment and direct access to and control over Ms. Edmo's medical providers. This creates a dynamic in which Ms. Edmo must continue to rely for treatment on medical clinicians whose interests are opposed to hers in ongoing litigation. Rather than attempt to mitigate the conflict this creates for medical providers whose primary obligation is to provide medical treatment in the best interest of Ms. Edmo, Defendants have affirmatively

instructed their medical providers that any information obtained during their medical treatment of Ms. Edmo may be used against her in litigation, and filed a declaration from Ms. Edmo's current clinician disclosing information that is not relevant to the instant litigation and puts Ms. Edmo at risk of punitive discipline. In the absence of discovery protections afforded to Ms. Edmo, under these conditions she will necessarily be chilled from disclosing information to her mental health clinicians due to the fear that any information she discloses may be used against her in litigation or expose her to punitive consequences, even where that information has no relevance to resolving the issues raised in her lawsuit.

Other courts have recognized the conflict inherent in this dynamic in the context of discovery.<sup>1</sup> Both *Boone v. Heyns*, 2017 U.S. Dist. LEXIS 146089 (E.D. Mich. Sept. 11, 2017), and *Strayhorne v. Caruso*, Civ. Case No. 11-15216, 2014 WL 916814 at \*4 (E.D. Mich. March 10, 2014), involve prisoner lawsuits against prison medical providers. In both of these cases the court denied a request from Corizon for a HIPAA disclosure order allowing it to speak *ex parte* with the plaintiff's medical providers. While Defendants argue in their Opposition that these cases relate only to communications with the plaintiff's *outside* medical providers, this distinction is not made explicit in the opinions themselves. Regardless, the underlying concerns

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<sup>1</sup> The conflict between protecting a treater-patient relationship and need for a clinical evaluator to provide information to a court or potentially adverse entity is also routinely recognized and addressed in the context of other types of proceedings. For example, court-ordered competency evaluations for non-adjudicated criminal defendants are typically performed by non-treating clinicians so that there will be no conflict of interest between providing the information from the evaluation to the court and protecting the treater-patient relationship. Similarly, as part of their disciplinary procedures for prisoners with mental illness, many prison systems recognize that requesting a prisoner-patient's current treater to provide input about the degree to which a patient's mental illness contributed to the violation alleged poses a conflict for the treater and patient, and so require that a non-treating clinician evaluate the patient in a non-confidential contact for the purposes of the disciplinary process and provide information from that contact to the disciplinary officer.

of the *Boone* and *Strayhorne* courts remain the same where the medical providers are exclusively provided by Defendants—namely, that “one cannot expect a medical provider to know what protected information is relevant to the plaintiff’s claims and what information is not relevant[,] thus creating the risk that confidential information will be shared even where defense counsel has not intended to elicit such information.” *Strayhorne*, 2014 WL 916814 at at \*11-12.

Indeed, these concerns have already come to pass in the current litigation. Ms. Edmo’s treating clinician filed a declaration with the Court that contained information about Ms. Edmo’s relationship status and related communications the clinician learned about from Ms. Edmo during the course of a clinical appointment. This information is irrelevant to the issues in the instant lawsuit, but has the potential to lead to punitive consequences for Ms. Edmo. Plaintiff not only seeks to strike this Declaration, but also to prevent the future disclosure of sensitive information.

Defendants take the position that they may continue eliciting information from Ms. Edmo’s clinicians for purposes of litigation and none of Ms. Edmo’s medical information is protected, given her filing of the instant suit. Defendants’ position makes it exceedingly likely that they will continue to violate HIPAA by failing to minimize the disclosure of protected information to that necessary to defend Ms. Edmo’s claims.

### **C. Formal discovery procedures will balance the parties’ interests**

Defendants assert in their Opposition that they “cannot practically be expected to serve formal discovery requests or subpoenas upon themselves.” Opp. at 14. However, formal discovery procedures are not limited to discovery requests or subpoenas; Defendants could proceed here by designating Ms. Edmo’s treating physicians as non-retained experts if they intend to elicit testimony from her treating physicians, allowing Ms. Edmo to be alerted as to the nature of her treating physician’s testimony, and make any necessary objections. This procedure “strikes an appropriate balance between the parties’ ability to obtain all relevant information and the patient’s right to have irrelevant medical information remain confidential.” *Piehl v. Saheta*, 2013 U.S. Dist. LEXIS 79401, at \*7 (D. Md. June 5, 2013). Instead of doing this, Defendant

IDOC attempted to make an end-run around such protections by notifying Ms. Edmo that all treatment contacts are essentially converted to their own *ex parte* discovery opportunities, and asserting its prerogative to file declarations directly from her treating clinicians divulging whatever protected information they see fit.

Moreover, while Defendants object to Plaintiff's proposal as unworkable, they fail to present an alternative procedure through which Ms. Edmo's privacy rights will be protected. Defendants assert only that Ms. Edmo may depose any IDOC treatment providers during the discovery period, and may "object to the relevancy of any declaration filed by treatment providers or any testimony presented on the record." Opp. at 16-17. Neither of these procedures allows Ms. Edmo to protect her protected information from public disclosure until after the damage has been done.

Here, where Ms. Edmo's treating clinicians are—by nature of Ms. Edmo's incarcerated status—employees either of IDOC or Corizon Defendants, a balancing must take place to protect disclosure of information irrelevant to the issues in litigation and to protect Ms. Edmo's right to medical privacy and allow her some assurances that participating fully in ongoing treatment will not undermine her ability to seek justice through the courts. Formal discovery procedures appropriately provides this balancing.

## **II. Defendants' Improper Disclosure of Plaintiff's Protected Information in Related State Court Filing**

Defendants' motion in state court for authorization to disclose Ms. Edmo's PSI Reports to third parties in relation to the instant federal litigation was problematic in two ways. First, although IDOC's motion itself specifies that it is directly related to the instant federal case, IDOC did not serve a copy of its motion on Plaintiff's counsel in this case. Second, the content of IDOC's state court motion demonstrates the same lack of discretion and judgment that Defendants' filing of the Declaration of Krina Stewart showed: Defendants publicly filed descriptions of Plaintiff's sensitive and protected information to which they have access only as a result of having custody and control of Plaintiff.

In their Opposition, Defendants respond to the first point by explaining that they gave Plaintiff notice of their intention to request the PSI Reports. Opp. at 18. However, notification of the intent to request the records does not respond to the concern raised here, that by failing to serve Plaintiff's current counsel with the motion at the time it was actually filed in state court, Plaintiff was deprived of the opportunity to appear and make formal objections—for example, to the disclosure of her protected information in Defendant's motion—that could be considered by the state court. The records were sought for use in the present litigation, and thus Defendants should have served the motion on Plaintiff's present counsel.

Defendants respond to the second point by asserting that the information found in their Motion to Disclose regarding the PSI Reports “can be found separately in unsealed, non-PSI documents, including the Plaintiff's expert declarations.” Opp. at 18. Even were it the case that some information contained in the PSI reports can be found in other sources, Defendant's argument misses the point: Defendants described the content of Plaintiff's sealed PSI reports in a public filing. If such information were relevant and available from other non-protected sources, Defendant could cite to those. However, Defendant elected to specifically describe content in sealed reports in their public filing, disregarding Plaintiff's privacy interests specifically protected under Idaho law. Defendants further argue that they described what information the PSI Reports “did not” contain rather than the information the Reports do contain. This is in the first place inaccurate, and in the second place, an argument of semantics not substance.

Defendants' suggestion that a Protective Order will “protect the confidentiality of PSI Reports,” is inapposite, as it does not respond to the concerns raised by Plaintiff in her Motion to Strike and for Protective Order. Plaintiff seeks relief here from Defendants' actions in failing to serve counsel with a motion seeking documents for use in the present litigation, to ensure that such failures do not occur in the future.

### **CONCLUSION**

For the foregoing reasons, Plaintiff requests the Court issue an order (1) striking the Declaration of Krina L. Stewart (Dkt. No. 68-2), for the purpose of sealing it or removing it from



**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 8th day of August, 2018, I filed the foregoing electronically through the CM/ECF system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

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