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**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY**

JIONNI CONFORTI,

Plaintiff,

v.

ST. JOSEPH’S HEALTHCARE SYSTEM,
INC.; ST. JOSEPH’S HOSPITAL AND
MEDICAL CENTER D/B/A ST. JOSEPH’S
REGIONAL MEDICAL CENTER; and
FATHER MARTIN D. ROONEY,

Defendants.

Honorable Claire C. Cecchi, U.S.D.J.
Honorable Cathy L. Waldor, U.S.M.J.

Case No. 2:17-cv-00050 (CCC/CLW)

**NOTICE OF CONSOLIDATED MOTION
TO FILE UNDER SEAL**

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PLEASE TAKE NOTICE that on September 8, 2020, at 9:00 a.m., or as soon thereafter
as counsel may be heard, Defendants St. Joseph’s Health, Inc., St. Joseph’s University Medical

Center, Inc., and Father Martin D. Rooney (collectively, “Defendants”), shall move this Court pursuant to L. Civ. R. 5.3, for entry of an order granting this consolidated motion to seal (i) designated portions of Defendants’ Moving Brief [D.E. 130] and Exhibits 2 through 9 attached to the Declaration of Christopher S. Mayer, Esq., submitted in support of Defendants’ Motion Appealing The Honorable Cathy L. Waldor’s January 22, 2020 and March 30, 2020 Opinions and Orders Denying [D.E. 129], and (iii) permitting Defendants to publicly file the proposed redacted versions of their Moving Brief submitted in conjunction with this consolidated motion.

PLEASE TAKE FURTHER NOTICE that Defendants will rely on the Declaration of Thomas S. Doherty, Esq. submitted in support of this consolidated.

PLEASE TAKE FURTHER NOTICE that a proposed form of Order accompanies this Notice of Motion.

Respectfully submitted,

McCARTER & ENGLISH, LLP
Attorneys for Defendants St. Joseph’s Health,
Inc., St. Joseph’s University Medical Center,
Inc., and Father Martin D. Rooney

By: s/Thomas S. Doherty
Thomas S. Doherty

Dated: July 30, 2020

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Honorable Claire C. Cecchi, U.S.D.J.
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Case No. 2:17-cv-00050 (CCC/CLW)

**CONSOLIDATED MOTION TO FILE
UNDER SEAL**

Pursuant to L. Civ. R. 5.3, Defendants St. Joseph's Health, Inc., St. Joseph's University Medical Center, Inc., and Father Martin D. Rooney (collectively, "Defendants"), by and through their counsel McCarter & English, LLP, respectfully move this Court for an order permitting Defendants to file under seal (i) designated portions of Defendants' Moving Brief [D.E. 130] and (ii) Exhibits 2 through 9 attached to the Declaration of Christopher S. Mayer, Esq. ("Mayer Declaration"), submitted in support of Defendants' Motion Appealing The Honorable Cathy L. Waldor's January 22, 2020 and March 30, 2020 Opinions and Orders Denying Defendants' Motion to Compel a Mental Examination of Plaintiff [D.E. 129], and (iii) permitting Defendants to file the proposed redacted version of their Moving Brief submitted in support of this Motion.

The materials that are the subject of this motion to seal have been designated by Plaintiff Jionni Conforti (“Plaintiff”) as either “Confidential” or “Attorneys’ Eyes Only” pursuant to the Discovery Confidentiality Order entered by this Court on July 19, 2017 [D.E. No. 21]. These materials attached to the Mayer Declaration and submitted in support of Defendants’ Appeal include documents reproduced as: (i) Exhibit 2 (relevant portions of the transcript of Plaintiff’s deposition, conducted on January 29, 2019); (ii) Exhibit 3 (relevant portions of the transcript of Dr. Ian Tang’s deposition, conducted on September 20, 2019); (iii) Exhibit 4 (relevant portions of the transcript of Ms. Rissy Batista’s deposition, conducted on September 18, 2019); (iv) Exhibit 5 (relevant portions of Plaintiff’s medical records from Dr. Ian Tang); (v) Exhibit 6 (relevant portions of medical records from Dr. Joseph Vitale); (vi) Exhibit 7 (relevant portions of health care records from Ms. Rissy Batista); (vii) Exhibit 8 (relevant portions of health care records from Vincent Fitzgerald, LCSW); and (viii) Exhibit 9 (relevant portions of Plaintiff’s Answers to Defendants’ First Set of Interrogatories). The Discovery Confidentiality Order directs that in the event any information or documents designated as “Confidential” or “Attorneys’ Eyes Only” is filed with the Court, the filing party is obligated to petition that the confidentially-designated material be sealed in accordance with Local Civil Rule 5.3. [D.E. 21, at ¶ 1(d), 9]. In order to comply with the Discovery Confidentiality Order and in keeping with Plaintiff’s designations thereunder, Defendants ask that this Court seal the materials set forth above.

Pursuant to L. Civ. R. 5.3(c)(2)(i), the undersigned counsel has conferred with counsel for Plaintiff. The parties have agreed to all proposed redactions to (i) designated portions of Defendants’ Moving Brief, attached hereto as Exhibit 1, and (ii) Exhibits 2 through 9 attached to

the Mayer Declaration. Defendants seek leave to file this consolidated motion to file under seal, pursuant to Local Civil Rule 5.3(c), after the completed briefing of Defendants' Appeal.

WHEREFORE, Defendants respectfully request that the Court grant this Motion and enter an order (i) permitting the filing under seal of designated portions of Defendants' Moving Brief [D.E. 130], and (ii) permitting the filing under seal of Exhibits 2 through 9 of the Mayer Declaration [D.E. 129, 130], and (iii) permitting the filing of the proposed redacted version of Defendants' Moving Brief (Exhibit 1).

Respectfully submitted,

McCARTER & ENGLISH, LLP
Attorneys for Defendants St. Joseph's Health,
Inc., St. Joseph's University Medical Center,
Inc., and Father Martin D. Rooney

By: /s/Thomas F. Doherty
Thomas F. Doherty

Dated: July 30, 2020

Examination of Plaintiff [D.E. 129, 130], and (iii) to publicly file the proposed redacted version of Defendants' Moving Brief, pursuant to L. Civ. R. 5.3.¹

3. This Motion is being made pursuant to the terms of the Discovery Confidentiality Order entered by this Court on July 19, 2017 [D.E. 21], which directs that in the event any information or documents designated as "confidential" are filed with the Court, the filing party is obligated to petition that the confidentially-designated material be sealed in accordance with Local Civil Rule 5.3. [D.E. 21, at ¶ 1(d), 9].

4. The materials that are the subject of this Motion have been designated by Plaintiff as either "Confidential" or "Attorneys' Eyes Only" pursuant to the Discovery Confidentiality Order. These materials have been submitted with the Mayer Declaration in support of Defendants' Appeal and reproduced as: (i) Exhibit 2 (relevant portions of the transcript of Plaintiff's deposition, conducted on January 29, 2019); (ii) Exhibit 3 (relevant portions of the transcript of Dr. Ian Tang's deposition, conducted on September 20, 2019); (iii) Exhibit 4 (relevant portions of the transcript of Ms. Rissy Batista's deposition, conducted on September 18, 2019); (iv) Exhibit 5 (relevant portions of Plaintiff's medical records from Dr. Ian Tang); (v) Exhibit 6 (relevant portions of medical records from Dr. Joseph Vitale); (vi) Exhibit 7 (relevant portions of health care records from Ms. Rissy Batista); (vii) Exhibit 8 (relevant portions of health care records from Vincent Fitzgerald, LCSW); and (viii) Exhibit 9 (relevant portions of Plaintiff's Answers to Defendants' First Set of Interrogatories). The designated portions of Defendants' Moving Brief contain information derived from the foregoing materials.

¹ Defendants filed their entire Moving Brief under seal [D.E. 129]. However, in accordance with L. Civ. R. 5.3(c)(2)(i), Defendants have narrowed the portions of that brief that they seek to file under seal.

5. In support of this Motion and in accordance with L. Civ. R. 5.3(c)(3), counsel for Defendants has prepared a redacted version of Defendants' Moving Brief (attached as Exhibit 1), and an index identifying the redacted information Defendants seek to seal and describing with particularity: (a) the nature of the material; (b) the legitimate private or public interest which warrants the relief sought; (c) the clearly defined and serious injury that would result if the relief sought is not granted; (d) why a less restrictive alternative to the relief sought is not available; (e) any prior order sealing the same materials in the pending action; and (f) the identity of any party or nonparty known to be objecting to the sealing request. The index is attached as Exhibit 2.

6. Based on Plaintiff's submissions to this Court, Plaintiff deems information derived from his medical records "confidential" because the materials contain, reference, and/or reflect what Plaintiff considers to be highly sensitive personal and medical and/or health care information, which Plaintiff designated as "Confidential" or "Attorneys' Eyes Only" pursuant to the parties' Discovery Confidentiality Order. Plaintiff maintains that if these materials were to become available to the public, he would likely suffer significant harm, including the dissemination of what he deems to be his highly confidential medical and personal information that he wishes to keep private.

7. Given the nature of the arguments made by Defendants in their Appeal, there is no less restrictive alternative available to Defendants than to rely upon the confidentially-designated documents while simultaneously following the terms of the Discovery Confidentiality Order in seeking to seal these documents.

8. Furthermore, Defendants' request is narrowly tailored and limited to the materials deemed "Confidential" or "Attorneys' Eyes Only" by Plaintiff, and the unredacted portions sufficiently disclose the nature of the parties' discovery dispute to the public.

9. This Court has previously sealed the same or similar materials, including, but not limited to, materials derived from Plaintiff's deposition testimony, discovery responses, and treatment with his treating physicians and health care providers, which were also designated as either "Confidential" or "Attorneys' Eyes Only" by Plaintiff pursuant to the parties' Discovery Confidentiality Order.

10. On April 3, 2019, Plaintiff filed a consolidated motion to file under seal information and documents relating to Plaintiff's treatment with his treating physicians and health care providers identified in Defendants' Appeal, which the Court granted on May 19, 2019 [D.E. 77, 82].

11. Similarly, on August 26, 2019, Defendants filed a consolidated motion to file under seal similar information and documents derived from Plaintiff's deposition testimony, discovery responses, and treatment with his treating physicians and health care providers [D.E. No. 106], which the Court granted on August 28, 2019 [D.E. 107].

12. Counsel for Plaintiff consents to the instant request. The undersigned is not aware of any other party or nonparty opposing this motion.

13. Defendants seek leave to file this consolidated motion to file under seal, pursuant to Local Civil Rule 5.3(c), on this date, July 30, 2020, after the completed briefing of Defendants' Appeal.

14. On July 6, 2020, Plaintiff filed his Opposition Brief to Defendants' Appeal [D.E. 133].

15. On July 13, 2020, Defendants filed their Reply Brief in further support of their Appeal [D.E. 134].

16. Defendants respectfully request to file this Consolidated Motion to Seal slightly beyond the 14-day period in L. Civ. R. 5.3(c)(2)(ii)(a) – i.e., on July 30, 2020 instead of July 27, 2020 – because additional time was needed to secure Plaintiff’s consent to the proposed redactions in Defendants’ moving brief.

17. Accordingly, Defendants respectfully request that the Court grant their Consolidated Motion to File Under Seal.

I declare under penalty of perjury that the foregoing is true and correct.

s/Thomas F. Doherty
Thomas F. Doherty

Dated: July 30, 2020

EXHIBIT 1

**UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY**

JIONNI CONFORTI,

Plaintiff,

v.

ST. JOSEPH'S HEALTHCARE SYSTEM,
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FATHER MARTIN D. ROONEY,

Defendants.

Honorable Claire C. Cecchi, U.S.D.J.
Honorable Cathy L. Waldor, U.S.M.J.

Case No. 2:17-cv-00050 (CCC/CLW)

**BRIEF IN SUPPORT OF DEFENDANTS' APPEAL FROM MAGISTRATE JUDGE'S
JANUARY 22, 2020 AND MARCH 30, ORDERS**

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On the Brief,
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Thomas F. Doherty

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PRELIMINARY STATEMENT

Defendants St. Joseph’s University Medical Center, Inc. St. Joseph’s Health, Inc. (collectively, “SJUMC”) and Father Martin Rooney appeal from Magistrate Judge Waldor’s Opinions and Orders dated January 22, 2020 and March 30, 2020¹ that erroneously denied their motion pursuant to Fed. R. Civ. P. 35(a) to compel Plaintiff Jionni Conforti (“Plaintiff” or “Conforti”) to undergo a mental examination by a licensed psychiatrist. This Court’s intervention is warranted because the Magistrate’s Orders are clearly erroneous and contrary to law in finding that Plaintiff has not put his mental condition “in controversy” and that “good cause” did not exist to warrant an examination. Contrary to the Magistrate’s ruling, Conforti’s mental condition is at the very core of this case on the issues of both liability and damages.

Plaintiff, a transgender individual with a documented history of depression and anxiety, alleges that a Catholic hospital and a Catholic priest should be held liable for emotional distress damages for declining in June 2015 to perform a hysterectomy that would have removed a healthy organ in furtherance of Plaintiff’s gender transition from female to male. Based on the Ethical and Religious Directives for Catholic Health Care Services promulgated by the United States Conference of Catholic Bishops (the “ERDs”) that all Catholic hospitals in the United States are bound to follow, Defendants determined that SJUMC could not perform the sterilization procedure that Plaintiff claims was medically necessary solely due to an alleged mental health diagnosis of gender dysphoria.

In this litigation, Conforti contends that Defendants’ decision to deny the procedure was somehow discriminatorily based on his sex in violation of federal and New Jersey law and that he experienced emotional harm and trauma as a result. Conforti thereby placed his gender

¹The original deadline to file this appeal was April 15, 2020, which was extended by an additional 45 days until Saturday, May 30, 2020, pursuant to the Court’s Standing Order related to filing and discovery deadlines during the COVID-19 pandemic.

dysphoria condition and his emotional condition – which is inextricably linked to his gender dysphoria – directly in issue. Accordingly, Defendants moved pursuant to Rule 35(a) to have Plaintiff undergo a mental examination. The Magistrate denied that motion and Defendants’ subsequent motion for reconsideration, thus prompting this appeal.

As demonstrated below, the Magistrate’s finding that Plaintiff’s mental condition is not in controversy and that his emotional distress claim is merely “garden variety” is not only erroneous, but it also conflicts with the Magistrate’s prior finding that Conforti’s claim was not garden variety. It was clear error for the Magistrate to hold, without citation to any legal authority, that the standard for “garden variety” emotional distress for purposes of a Rule 35 motion is different than the standard the court had recently applied in finding the distress was not garden variety for purposes of permitting Defendants to depose certain health care providers.

The Magistrate further also erred in concluding that Plaintiff’s mental condition is not in controversy because it cannot be disputed that the entire basis of Plaintiff’s lawsuit arises out of his gender dysphoria – a mental health condition. In fact, Plaintiff concedes that his gender dysphoria caused depression and anxiety and necessitated hormone therapy, surgical procedures, and continuing medical and psychological treatment as he transitioned from his birth sex of female to a transgender man. Similarly, Conforti’s mental condition is the sole grounds for his claimed damages. In particular, Plaintiff alleges in his Complaint that he became “deeply depressed,” suffered “great anxiety,” and continues to experience anxiety as a result of Defendants’ purported discriminatory conduct of denying him “medically necessary” surgery.

The Magistrate further erred by finding that good cause does not exist under Rule 35 to permit a defense-engaged psychiatrist to examine Plaintiff. Mr. Conforti’s medical history demonstrates complex emotional and psychological issues. Defendants have a right to determine through independent examination whether Plaintiff’s preexisting gender dysphoria, anxiety

disorder, depression, hormone therapy and other stress factors contributed to or caused the very harm he alleges was caused by Defendants, and whether the requested procedure was in fact medically necessary. In this regard, the Magistrate also erred in questioning the qualifications of the licensed psychiatrist engaged by Defendants, Donald Raymond Reeves, Jr., M.D., to evaluate Plaintiff. Defendants met their burden under Rule 35 and it was improper for the Court to suggest that Dr. Reeves is unqualified to conduct an examination without allowing Defendants to even address that issue in briefing.

Accordingly, Defendants respectfully submit that Judge Waldor's January 22, 2020 and March 30, 2020 Order should be reversed.

STATEMENT OF FACTS AND PROPOSED EXAMINATION

I. Dr. Tang and Batista Diagnose Plaintiff With Gender Dysphoria.

Plaintiff claims to have first been diagnosed in June 2014 with gender identity disorder, now referred to as gender dysphoria. *See* Mayer Decl., Exh. 1, Plaintiff's Complaint ("Compl.") at ¶ 55; *see also* Exh. 2, Plaintiff's Depo. ("Pl.'s Dep.") at 33:11-13. At that point, Plaintiff began the process of transitioning from his birth sex of female to a transgender man, first through hormone therapy and then through more invasive surgery such as a double mastectomy and the totally hysterectomy at issue in this case. *Id.* at 36:3-6, 48:20-49:20, 50:8-16, 51:14-16.

A medical doctor, Dr. Ian Tang, [REDACTED]

[REDACTED] *See* Mayer Decl., Exh. 3, Dr. Tang's Depo. at 52:6-23, 53:10-55:14, 218:4-9. [REDACTED]

[REDACTED] *Id.* at 95:18-97:5, 217:22-218:3, 218:10-219:3. [REDACTED]

[REDACTED] *Id.* at

86:19-87:3, 195:17-24. [REDACTED]

[REDACTED] *Id.* at 185:7-186:19, 187:12-21, 232:20-233-13.

[REDACTED] *d.* at 220:5-14, 230:5-24.

Thereafter, in or around March 2015, [REDACTED]

[REDACTED] Batista did not purport to be an expert in the area of gender dysphoria and often referred her transgender patients to other medical professionals with greater experience treating transgender individuals. *See* Mayer Decl., Exh. 4, Depo. of Rissy Batista (“Batista Dep.”) at 23:24-24:9. Conforti was one of Batista’s first transgender patients. *See id.* at 115:5-116:14.

[REDACTED] *Id.* at 25:4-22, 34:21-37:13, 111:3-113:5. [REDACTED]

[REDACTED] *Id.* at 48:6-21. [REDACTED]

[REDACTED] *Id.* at 48:23-49:13, 127:16-25, 128:21-129:7. Batista admitted at her deposition that it “was not up to [her] to determine” whether a total hysterectomy was “medically necessary” and, like Dr. Tang, explicitly omitted the phrase “medically necessary” from her letter to Plaintiff’s insurance carrier recommending that he undergo surgery due to gender dysphoria. *Id.* at 74:22-75:7, 76:22-25.

II. Plaintiff Seeks To Undergo A Total Hysterectomy To Treat His Gender Dysphoria.

In or around April or May 2015, Conforti began exploring the possibility of undergoing a total hysterectomy to remove all female body parts to deal with his alleged gender dysphoria.

Mayer Decl., Exh. 2, at 59:10-15, 64:12-24. [REDACTED]

[REDACTED]
[REDACTED] *Id.* at 99:14-101:24.

In or around May 2015, Conforti contacted Dr. Brian Day, an obstetrician-gynecologist with privileges at SJUMC, at Dr. Day's private practice to ascertain whether he could perform the hysterectomy and whether the surgery would be covered by insurance. *See* Mayer Decl., Exh. 1, ¶ 59, Exh 2, Pl's Dep. at 84:7-85:24. On or about June 8, 2015, Conforti visited Dr. Day's office to advise that his insurance would cover the procedure. *Id.* at Exh 2, 103:15-18.

Thereafter, Conforti emailed SJUMC to inquire whether he could undergo a total hysterectomy at the hospital "to remove all female parts based on the medical necessity for ... Gender Reassignment Surgery." *Id.* at 132:18-21; *see also* Mayer Decl., Exh. 1, Compl. ¶ 8. At no time did Plaintiff inform Dr. Day or SJUMC that he sought the hysterectomy for any reason other than gender dysphoria (i.e., Conforti never contended that the surgery was necessary to treat any diseased tissue or organ). *See* Mayer Decl., Exh. 2, Pl.'s Dep. at 134:1-14.

On or about June 16, 2015, Father Martin D. Rooney, a Catholic priest and the Director of Mission Services at SJUMC, informed Conforti that, "as a Catholic hospital [SJUMC] would not be able to allow [Plaintiff's] surgeon to schedule this surgery here at [SJUMC]." *Id.* at 140:17-20.

Thereafter, another physician, Dr. Charles Haddad, successfully performed the total hysterectomy on Conforti at nearby Hackensack UMC Mountainside Hospital in September of

2015, only a few weeks after the time Plaintiff wished to have the surgery done at SJUMC. *Id.* at 153:2-24, 154:11-19.

Plaintiff alleges that he has suffered “emotional distress, humiliation, embarrassment, and a loss of dignity” and became “deeply depressed” as a result of Defendants’ denial of his request to undergo a total hysterectomy. *See* Mayer Decl., Exh. 1, Compl. at ¶¶ 9, 10, 72, 73. Plaintiff further alleges that Defendants caused him “great anxiety, as he not only had to once again search for a surgeon whom he could trust to perform this highly sensitive surgical procedure, but he also became, and remains, anxious about visiting” SJUMC’s Paterson or Wayne locations. *Id.* at ¶ 9. Thus, in addition to injunctive relief (which is moot since he has already undergone a hysterectomy), Plaintiff’s Complaint seeks compensatory damages for his emotional distress and suffering, emotional pain and anguish, humiliation, degradation, embarrassment, violation of his dignity, and loss of enjoyment of life. *See, e.g., id.* at ¶ 90.

III. Plaintiff’s Treatment For Anxiety, Depression, And Other Stressors In His Life.

Plaintiff testified at his deposition that Defendants’ conduct still causes him to suffer “emotional distress,” “hurt,” “shame,” and “depression.” *See* Mayer Decl. Exh. 2, Pl.’s Dep. at ¶¶ 162:4-163:2. Yet, he admits having both “long-term” depression and anxiety before his interaction with Defendants. *See id.* at 194:18-22; *see id.* at Exh. 1, Compl. at ¶ 3.

Plaintiff’s medical records evidence a history of complex emotional and psychological issues. [REDACTED]

[REDACTED] *See* Mayer Decl., Exh. 5, at TANG00063-72. [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED] See Mayer Decl., Exh. 6, VITALE00001, 30-32, 47-48, 51-54, 80-84, 111-115; see *id.* at Ex. 2, at Pl.'s Dep. at ¶¶ 248:14-249:10.

Furthermore, contrary to his medical records, [REDACTED]

[REDACTED] See Mayer Decl., Ex. 2, Pl.'s Dep. at ¶¶ 196:14-197:22. [REDACTED]

[REDACTED] *Id.* at ¶¶ 189:16-190:10, 191:15-192:25, 193:18-21, 231:1-232:17, 234:11-20; see also Mayer Decl., Exh. 7, BATISTA0005-6, 26-27, 63-65, 71-72.

Plaintiff's medical history after June 2015 depicts ongoing mental and psychiatric issues that cannot be definitively attributed to Defendants' conduct. See Mayer Decl., Ex. 2, Pl.'s Dep. at 248:11-249:21. [REDACTED]

[REDACTED] *Id.* at Ex. 7, BATISTA00032-35. [REDACTED]

[REDACTED] *Id.* at BATISTA00061-62. [REDACTED]

[REDACTED] See Mayer Decl., Exh. 8, FITZGERALD00012-20.

IV. The Proposed Examination of Conforti And Qualifications Of Dr. Reeves.

Defendants have engaged Dr. Reeves to submit an expert report in this matter. In support of their motion to compel, and after consultation with Dr. Reeves, Defendants detailed the scope, duration, and location of the examination, in accordance with Rule 35. See *id.* at Exh. 10, at p. 8-9. Defendants explained that as a predicate to his report, Dr. Reeves would assess during his

examination, without limitation, the following topics: Plaintiff's alleged emotional distress, depression and anxiety that purportedly were caused by Defendants, other potential causes of Plaintiff's alleged distress/ depression/anxiety and the treatment Plaintiff has undergone (including medications) for same; and Plaintiff's claimed gender dysphoria and the impact on the dysphoria symptoms of the hysterectomy that Plaintiff underwent at a different hospital. *Id.*

RELEVANT PROCEDURAL HISTORY

I. Plaintiff's Claims.

On January 5, 2017, Plaintiff commenced this action against Defendants alleging (1) sex discrimination in violation of Section 1557 of the Patient Protection and Affordable Care Act(Count One), and (2) gender identity discrimination in violation of the New Jersey Law Against Discrimination (Count Two). Mayer Decl., Exh. 1.

II. Motion Practice Regarding Plaintiff's Mental And Psychological History.

On February 15, 2019, Plaintiff moved to quash subpoenas served by Defendants on his treating physicians, including Dr. Tang and Ms. Batista, claiming that he merely alleged "garden variety" emotional distress, which was insufficient to waive the patient-psychotherapist privilege under *Jackson v. Chubb Corp.*, 193 F.R.D. 216 (D.N.J. 2000) (Dkt. 69). Defense counsel informed Judge Waldor at the motion hearing on June 20, 2019, as they had from the very outset of the case, that Defendants may seek an independent medical examination of Plaintiff considering his extensive preexisting psychological history and the nature of his claims. Defense counsel expressed concern about prematurely filing the Rule 35 motion to compel before the Court had permitted Defendants to depose any of Plaintiff's medical providers, but the Magistrate ordered Defendants to file the motion on July 22, 2019. *Id.* at 20:12-21:1, 73:12-74:17. Thus, on July 22, 2019, Defendants filed the motion to compel the mental examination of

Plaintiff pursuant to Fed. R. Civ. P. 35(a) and 37 (Dkt. 96, 97). The parties fully briefed the motion by August 13, 2019.

Two days after briefing was closed on the Rule 35 motion, the Magistrate denied Plaintiff's motion to quash Defendants' subpoenas on certain health care providers. *See* Mayer Decl., Exh. 12 (Dkt. 104). In so ruling, the Court found that Conforti's emotional condition is not general or garden variety:

Conforti references his mental health issues throughout the Complaint.

* * *

Under the *Jackson* balancing test, quashing Batista's deposition would work an undue prejudice on Defendants. At the discovery stage, Defendants are entitled to pursue relevant inquiries into these complex emotional and psychological factors, which cannot be neatly reduced to "garden variety" distress at this stage. Moreover, as the Complaint spells out, Conforti suffered from depression and anxiety long before Defendants denied him the hysterectomy in June 2015. Without Batista's testimony, Defendants would be hamstrung in exploring other contributing factors to Conforti's emotional distress and defending themselves against Conforti's allegation that Defendants' discrimination was the driving cause of Plaintiff's emotional damages, whether "garden variety" or otherwise.

Id. at pp. 7-8 (emphasis added).

Accordingly, Judge Waldor permitted Defendants to conduct the depositions of Dr. Tang and Ms. Batista, the health care providers that diagnosed Plaintiff with gender dysphoria and recommended that he undergo a total hysterectomy at SJUMC. *Id.*

III. The Court Denied Defendants' Motion To Compel The Mental Examination Of Plaintiff Pursuant To Rule 35(a).

After the parties had briefed the motion to compel, Defendants took the depositions of Ms. Batista and Dr. Tang on September and September 20, 2019, respectively. The deposition testimony revealed, for the first time in this case, that their diagnosis of Plaintiff's gender dysphoria was based almost entirely on Plaintiff's belief that he has gender dysphoria.

On December 3, 2019, the parties attended a hearing before Judge Waldor to discuss, among other things, Defendants' Rule 35 motion. On the record, Defense counsel stated that

Defendants should be allowed to pursue through expert testimony whether the total hysterectomy was in fact medically necessary given the manner in which Dr. Tang and Batista diagnosed Plaintiff. *See* Mayer Decl., Exh. 13, December 3, 2019 Hearing Transcript at 10:1-11:10.

On January 22, 2020, the Court denied Defendants' motion to compel pursuant to Fed. R. Civ. P. 35(a) finding, among other things, that Defendants had not satisfied the "in controversy and good cause requirements of Rule 35. *See* Mayer Decl., Exh. 14 (Dkt. 116). Judge Waldor further questioned, *sua sponte*, Dr. Reeves' qualifications to evaluate Plaintiff, stating that "Defendants have not produced any declarations or certifications regarding either Dr. Reeves's qualifications for the diagnosis and treatment of gender dysphoria or his ability to reevaluate Dr. Tang and Ms. Batista's diagnostic techniques and the WPATH treatment protocol by conducting a psychiatric examination of Plaintiff at this stage." *Id.* at p. 8.

On February 5, Defendants timely requested that Judge Waldor reconsider her decision to deny the motion to compel. In support, Defendants submitted a Declaration from Dr. Reeves detailing his expertise in psychiatry, repeating his proposed examination, and reiterating his opinion that the examination is necessary. *See id.* at Exh. 15, Reeves Decl. at ¶¶ 3-8.

On March 30, Judge Waldor denied Defendants' motion and affirmed the Court's prior decision to deny Defendants' motion to compel Plaintiff to undergo a mental examination. *See* Mayer Decl., Exh. 16 (Dkt. 128). Judge Waldor acknowledged that although her "discussions of Plaintiff's emotional distress damages [were] internally inconsistent to some degree," Plaintiff had not placed his mental condition "in controversy" within the meaning of Rule 35. *Id.* at p. 2. Judge Waldor reiterated that "Plaintiff's history of depression and anxiety, no matter how extensive or complicated, cannot on its own sustain Defendants' burden under Rule 35." *Id.* Additionally, Judge Waldor ruled that the deposition testimony of Dr. Tang and Batista did not

constitute “new evidence” and that the “perceived shortcomings” in that testimony did not demonstrate good cause under Rule 35. *Id.* at p. 3.

Lastly, with respect to the qualifications of Dr. Reeves, Judge Waldor ruled that although Rule 35 does not “obligate a moving party to present a sworn statement attesting to the qualifications of an expert or the intended examination,” Defendants, like other Rule 35 movants, should “have attempted to meet the good cause standard by submitting materials from their proposed expert[] about the necessity of a mental examination.” *Id.* at p. 3.

IV. Plaintiff Recently Served Expert Reports On Issues Material To This Appeal.

On March 20, 2020, Plaintiff produced three expert reports from Dr. Debra Stulberg, MD, MAPP, Loren S. Schechter, MD, and Dr. Randi C. Ettner, Ph.D that shed further light on the positions that Plaintiff intends to take respecting his gender dysphoria, the purported medical necessity for his requested total hysterectomy, and his alleged emotional distress at trial. *See* Mayer Decl., Exh. 17, Dr. Ettner’s Report at ¶ 2; *see also* Mayer Decl., Exh. 18, Dr. Schechter’s Expert Report at ¶ 3.

Dr. Ettner stated that “[g]ender dysphoria is characterized by incongruence between one’s experienced/expressed gender and assigned sex at birth, and clinically significant distress or impairment of functioning that results.” *See, e.g.,* Mayer Decl., Exh. 17, at ¶ 23. According to Dr. Ettner, the supposed benefits of a total hysterectomy for an individual with gender dysphoria include both physical and mental health benefits, such as removing an increased cancer risk of female cancers and reducing the need for treatment for mental health issues associated with the disorder, whereas denying surgery can lead to “the development of psychiatric disorders” and a heightened risk for depression, anxiety, and suicidality in adulthood. *Id.* at ¶¶ 42, 46, 49, 67.

Dr. Schechter stated that gender dysphoria is a “serious medical condition” that “can lead to debilitating anxiety and depression, as well as serious incidents of self-harm, including self-

mutilation, suicide attempts, and suicide.” Mayer Decl., Exh. 18, at ¶ 23. Dr. Schechter opined that “effective” and “medically necessary” treatments of gender dysphoria include gender confirmation surgery, which can “alleviate” gender dysphoria. *Id.* at ¶¶ 24, 29. Like Dr. Ettner, Dr. Schechter cited benefits of gender confirmation surgery such as decreasing the risk of developing gynecologic cancers. *Id.* at ¶¶ 38, 40. He similarly opined that the denial of necessary medical care is “likely to perpetuate gender dysphoria and create or exacerbate other medical issues, such as depression and anxiety, leading to an increased possibility of self-harm, negative health outcomes, and even suicide.” *Id.* at ¶¶ 43, 44. According to Dr. Schechter, the denial of a total hysterectomy to Plaintiff, “assuming such hysterectomy was deemed to be medically necessary by [his] health care providers,” was inconsistent with the standards of care, which confirm that surgery is “medically necessary to help people alleviate the often serious and life-threatening symptoms of gender dysphoria.” *Id.* at ¶ 45 (emphasis added).

STANDARD OF REVIEW

Defendants file this appeal pursuant to L. Civ. R. 72.1(c)(1)(A). A ruling on discovery matters is non-dispositive. *In re Merck & Co.*, 2012 WL 12904796, at *1 (D.N.J. Dec. 12, 2012). On appeal, a district court judge examines whether the magistrate judge’s decision is “clearly erroneous or contrary to law.” *Control Screening, LLC v. Integrated Trade Sys.*, 2011 U.S. Dist. LEXIS 85202, 15-16 (D.N.J. Aug. 3, 2011) (quoting L. Civ. R. 72.1(c)(1)(A)). “A finding is clearly erroneous only ‘when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.’” *Lo Bosco v. Kure Eng’g Ltd.*, 891 F.Supp. 1035, 1037 (D.N.J. 1995) (quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948)). A finding “is contrary to law if the magistrate judge has misinterpreted or misapplied applicable law.” *In re Merck & Co.*, 2012 WL 12904796, at *1. On non-dispositive motions, findings of fact are reviewed for

“clear error” and legal conclusions are reviewed de novo. *Doe v. Hartford Life & Accident Ins. Co.*, 237 F.R.D. 545, 548 (D.N.J. 2006).

ARGUMENT

JUDGE WALDOR ERRED BY DENYING DEFENDANTS’ MOTION TO COMPEL

A mental examination under Rule 35 of the Federal Rule of Civil Procedure is appropriate when the “mental or physical condition” of a party “is in controversy,” the court may order the party “to submit to a physical or mental examination by a suitably licensed or certified examiner” upon a showing of “good cause.” Fed. R. Civ. P. 35(a). In applying Rule 35, courts must start with the “basic premise ‘that the deposition-discovery rules are to be accorded *a broad and liberal treatment* ... to effectuate their purpose that ‘civil trials in the federal courts no longer need be carried on in the dark.’” *Schlagenhauf v. Holder*, 379 U.S. 104, 115 (1964) (emphasis added).

For the reasons set forth below, Judge Waldor erred in finding that Plaintiff’s mental condition was not in controversy and that Defendants had not shown good cause for the examination. Accordingly, Judge Waldor’s January 22, 2020 and March 31 2020 Orders should be reversed and Plaintiff should be compelled to appear for an examination with Dr. Reeves.

A. The Court Erred In Finding That Plaintiff Had Not Placed His Mental Condition “In Controversy.”

On Plaintiff’s motion to quash certain depositions of Plaintiff’s medical providers and on Defendants’ motion to compel the Rule 35 examination, Judge Waldor reached inconsistent rulings regarding Plaintiff’s emotional condition, yet considered the same allegations in the Complaint, statements he made at his deposition, and the extensive history of depression and anxiety documented in Plaintiff’s medical records. In denying Defendants’ motion for reconsideration, Judge Waldor acknowledged that her prior discussions of Plaintiff’s emotional

distress damages are “internally inconsistent to some degree;” however, she concluded that such inconsistencies were insufficient to reconsider her ruling on the motion to compel. *See* Mayer Decl., Exh. 16, Dkt. 128 at p. 2.

Defendants submit that these inconsistencies cannot be reconciled and compel reversal of Judge Waldor’s decision. In fact, in denying Plaintiff’s motion to quash in part, Judge Waldor acknowledged that the Complaint spelled out how Conforti suffered from depression and anxiety “long before” and after Defendants denied him the hysterectomy in June 2015. *See id.* at Exh. 12, Dkt. 104 at pp. 7-8. Thus, Judge Waldor ruled that Defendants were entitled to pursue relevant inquiries into the “complex emotional and psychological factors,” which “[could not] be neatly reduced to ‘garden variety distress’ at [the discovery] stage.” *Id.*

However, on Defendants’ motion to compel, Judge Waldor reached the opposite conclusion that Plaintiff had not placed his mental condition “in controversy” within the meaning of Rule 35 based on assurance from Plaintiff that he seeks damages for “standard” emotional distress and did not intend to introduce evidence that Defendants’ conduct “caused or exacerbated any clinical conditions.” Mayer Decl, Exh. 14, Dkt. 116 at pp. 3-4 (emphasis added). Judge Waldor found that “Plaintiff’s characterization of his damages claim is consistent with the language in the Complaint, which contains standard language concerning the emotional distress damages typically sought in discrimination cases” and that he described his alleged mental distress in “general terms” such as “emotional distress,” “hurt,” and “of course some depression.” *Id.* (emphasis added).

Plaintiff’s characterization of his emotional distress as “standard” emotional distress is belied by the admissions in the Complaint and Judge Waldor’s own ruling. *See* Mayer Decl., Exh. 1, Compl. at ¶¶ 9, 10, 72, 73; *see id.* at Exh. 12, Dkt. 104 at pp. 7-8. Plaintiff’s allegations of depression and anxiety attributed to Defendants’ conduct are not the same as the mild

embarrassment, humiliation, and upset that courts in this district have generally considered “garden variety.” See *Montana v. Cty. of Cape May Bd. of Freeholders*, 2013 WL 5724486, *3, *6 (D.N.J. Oct. 18, 2013) (distinguishing between generalized allegations of emotional distress and emotional distress of a more severe nature and noting that “testimony of depression, flashbacks of sexual abuse, severe and permanent psychological damage, or suicidal thoughts” rises to a level “beyond ‘garden variety’ allegations of emotional distress.”); accord *Flores-Febus v. MVM, Inc.*, 299 F.R.D. 338, 340 (D.P.R. 2014) (permitting examination in employment discrimination case where plaintiff alleged “a plethora of specific mental injuries,” including depression, insomnia, and anxiety). Applying this reasoning here, the alleged psychiatric injuries of depression and anxiety apparent from the face of the Complaint rise beyond “garden variety” emotional distress. *Schlagenhauf*, 379 U.S. at 119 (1964) (holding that the pleadings alone are sufficient to meet the Rule 35 requirements such as where “a plaintiff in a negligence action who asserts mental or physical injury ...”).

Even if, *arguendo*, the pleadings alone are insufficient, which is not the case here, a plaintiff still places his mental condition in controversy if, in addition to a claim of emotional distress, the plaintiff satisfies “one or more” of the following disjunctive factors:

- 1) a cause of action for intentional or negligent infliction of emotional distress; 2) an allegation of a specific mental or psychiatric injury or disorder; 3) a claim of unusually severe emotional distress; 4) plaintiff’s offer of expert testimony to support a claim of emotional distress; and/or 5) plaintiff’s concession that his or her mental condition is ‘in controversy’ within the meaning of Rule 35(a).

Kuminka v. Atl. Cty., 551 F. App’x 27, 29-30 (3d Cir. 2014) (affirming district court’s decision to compel medical examination where plaintiff “alleged a claim for damages for emotional distress and explicitly included a cause of action for intentional infliction of emotional distress in her complaint.”) (internal citations omitted). Allegations of an “ongoing” mental illness

similarly support a finding that the plaintiff has placed his mental injury “in controversy.” *See Dibrito v. Harrisburg Area Cmty. Coll.*, 2010 WL 936236, at *1 n.1 and 2 (M.D. Pa. Mar. 12, 2010) (citing *Bowen v. Parking Auth.*, 214 F.R.D. 188, 195 (D.N.J. 2003)).

Here, as established herein, the Complaint clearly alleges specific mental and psychiatric injuries or disorders attributed to Defendants’ conduct. Additionally, Plaintiff cannot avoid his admissions in his own verified statements in his discovery responses that Defendants’ alleged conduct necessitated him to seek out psychological care. *See Dahdal v. Thorn Americas, Inc.*, 1998 WL 37532, at *2 (D. Kan. Jan. 28, 1998) (finding that plaintiff placed her mental condition “in controversy” where in response to interrogatories she identified a physicians with whom she psychiatric treatment); *Cauley v. Ingram Micro, Inc.*, 216 F.R.D. 241, 244 (W.D.N.Y. 2003) (noting that hospitalization and treatment by physician places plaintiff’s claim beyond a bare allegation of emotional stress typically associated with discrimination case); *see also Denny v. Wingspan Portfolio Advisors, LLC*, 2013 WL 2434572, *1-2 (N.D. Tex. June 5, 2013) (recognizing that a plaintiff “affirmatively places her mental condition ‘in controversy’ when she alleges a permanent or ongoing mental disorder or emotional distress or claims that she has required psychiatric or psychological care as a consequence of discriminatory treatment.”). ■

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■
■ See Mayer Decl., Exh. 9, Rog. No. 5; *see id.* at Exh. 7, BATISTA26-34 ■, BATISTA61 ■
■; *see id.* at Exh. 8, FITZGERALD18 ■.

Furthermore, contrary to Judge Waldor’s ruling on the motion to compel, the Complaint and medical evidence demonstrate the ongoing nature of Plaintiff’s mental and psychological injuries and disorders. *See id.* at Exh. 12 Dkt. 104, at pp. 7-8 (finding that Plaintiff suffered anxiety and depression long before June 2015 and that his alleged depression continued after St.

Joseph's did not permit him to receive the hysterectomy). Plaintiff alleges in his Complaint that he remains "anxious" about visiting SJUMC's Paterson and Wayne locations due to Defendants' alleged wrongful conduct. *See* Mayer Decl., Exh. 1, Compl. at ¶ 10. Defendants' alleged wrongful conduct occurred in June 2015, yet Plaintiff testified at his deposition over *three years* later that he still felt emotionally "hurt" and "upset" by Defendants' conduct. *See* Mayer Decl., Exh. 2, at Pl.'s Dep. at 162:4-163:2. Plaintiff admittedly sought psychological treatment with Ms. Batista, Mr. Fitzgerald, and Dr. Vitale in that interim time period. Not to mention Plaintiff's own experts will likely testify about the ongoing effects of denying him surgery, including the exacerbation of his gender dysphoria disorder and other medical issues, such as depression and anxiety. *See, e.g.,* Mayer Decl., Exh. 18, at ¶ 44. The evidence offered in support of Conforti's equitable and monetary damages for suffering caused by Defendants' alleged discriminatory conduct exposes Plaintiff to a Rule 35 examination. *See Guzman v. News Corp.*, 2012 WL 2148166, at *1 (S.D.N.Y. June 13, 2012) ("...[I]f a plaintiff asserts that a defendant's actions caused a mental injury or ongoing mental illness, that plaintiff puts her mental condition clearly in controversy....") (citing *Schlagenhauf*, 379 U.S. at 119).

Accordingly, Judge Waldor erred in denying Defendants' motion to compel and motion for reconsideration and Defendants should be permitted to have Dr. Reeves conduct an examination of the Plaintiff, pursuant to Fed. R. Civ. P. 35.

B. The Court Erred In Requiring Defendants To Satisfy A Higher Legal Standard Than Required For Rule 35.

In addition to overlooking key evidence in the record, Judge Waldor required Defendants to satisfy a higher legal standard under Rule 35 without a clear basis in law. In an attempt to reconcile the inconsistent rulings concerning garden variety emotional distress, Judge Waldor stated, without any further explanation or elaboration, that the Court "previously found that

Defendants were entitled to explore the extent and causes of Plaintiff's emotional distress by deposing three of its medical providers. . . . The same logic does not extend to Rule 35 examinations, which are subject to a separate and more exacting standard than other forms of discovery. Plaintiff's history of depression and anxiety, no matter how extensive or complicated, cannot on its own sustain Defendants' burden under Rule 35." *See* Mayer Decl., Exh. 14, Dkt. 116, at p. 4. Judge Waldor did not cite to any authority in support of this heightened standard.

However, the "more exacting standard" of the "in controversy" requirement under Rule 35 is not substantively different from the standard articulated by *Jackson v. Chubb Corp.*, 193 F.R.D. 216 (D.N.J. 2000). The district court in *Jackson* grounded its logic in the "in controversy" requirement of Rule 35(a), concluding that a plaintiff may waive the privilege by alleging more complex distress, including "any specific psychiatric injury or disorder, or unusually severe distress." *Id* at 225 n. 8; *see also* *Stevenson v. Stanley Bostitch, Inc.*, 201 F.R.D. 551, 557 (N.D. Ga. 2001) (relying upon *Jackson* and similar cases and holding that "determining whether the plaintiff has placed her mental condition at issue so as to waive the privilege is analogous to, and should be generally consistent with, the analysis conducted when a Rule 35(a) examination is requested."). Thus, Judge Waldor's ruling that the prior finding that Plaintiff's emotional condition is not garden variety should not now control for purposes of a Rule 35 examination is contrary to the law.

Accordingly, Judge Waldor erred in denying Defendants' motion to compel and motion for reconsideration and Defendants should be permitted to have Dr. Reeves conduct an examination of the Plaintiff, pursuant to Fed. R. Civ. P. 35.

C. Judge Waldor’s Failed To Consider That Plaintiff’s Diagnosis Of Gender Dysphoria Is Central To This Issues of Liability And Damages.

Judge Waldor’s rulings on the motion to compel and motion for reconsideration also overlooked the fact that Plaintiff’s diagnosis of gender dysphoria goes to the heart of his claims, including liability and damages as well as standing to bring this lawsuit. Plaintiff’s claims are entirely predicated upon an ongoing mental or psychological disorder. *See Gavin v. Hilton Worldwide, Inc.*, 291 F.R.D. 161, 164-65 (N.D. Cal. 2013) (permitting Rule 35 examination because the plaintiff’s discrimination claims were premised upon on mental disability and she alleged that Hilton discriminated against her because of her mental disability and that she suffered ongoing severe emotional distress as a result). Gender dysphoria prompted Plaintiff to take steps to align himself with his true sex, i.e., to transition in a manner consistent with his gender identity, by undergoing medically necessary treatments such as hormone therapy, a mastectomy, and a total hysterectomy. *See* Mayer Decl. at Exh. 1, Pl.’s Compl. at ¶¶ 55, 56, 60 (alleging, in relevant part, that “[o]n May 13, 2015, Jionni emailed Dr. Day’s office explaining his desire to obtain a hysterectomy and his need for seeking it—i.e., as treatment for his gender dysphoria.”); *see id.* at Exh. 2, Pl’s Dep. at 134:1-4 (testifying that gender identity disorder was reason for why the total hysterectomy was medically necessary); *see id.* at. 139:18-141:2.

It is undisputed that Plaintiff’s inability to receive this alleged medically necessary surgery at SJUMC forms the basis of his claims. *See id.* at Exh. 1, Compl. at ¶ 70 (“Father Rooney prevented Jionni’s medically necessary hysterectomy from being performed at SJRMC’s hospitals because of Jionni’s sex, nonconformity with sex stereotypes, gender identity, and transgender status.”). In denying the motion to compel, Judge Waldor ignored the admissions in the Complaint and deposition testimony demonstrating that SJUMC’s liability is inseparable from Plaintiff’s underlying mental or psychological disorder. *See id.* at Exh. 14, Dkt. 116 at p. 5

(finding that liability instead “turns on whether Defendants denied Plaintiff treatment for impermissible discriminatory reasons - namely, because the Ethical and Religious Directives prevented Defendants from performing a hysterectomy for gender reassignment purposes.”).

Additionally, Judge Waldor failed to appreciate that Defendants requested a mental examination of Plaintiff because substantial evidence indicates that his alleged injuries and damages stem from a prolonged mental or psychological disorder acknowledged in the pleadings and medical evidence. *See Womack v. Stevens Transp., Inc.*, 205 F.R.D. 445, 447 (E.D. Pa. 2001) (finding “in controversy” requirement satisfied where the medical evidence indicated that the cause of plaintiff’s alleged injuries may be, in part, due to plaintiff’s preexisting psychological problems). By his own admissions, gender dysphoria admittedly caused him long-term struggles with depression and anxiety rooted in the need to align himself with his true sex. *See id.* at Exh. 1, ¶ 3 (alleging that Plaintiff “had long struggled with depression and anxiety rooted in the need to align himself with his true sex[.]”). Plaintiff elaborated on these long-term struggles at his deposition. *See id.* at Exh. 2, Pl.’s Dep. at ¶¶ 194:18-195:3. According to Plaintiff, “[i]f not properly treated, gender dysphoria may result in psychological distress, anxiety, depression, and even self-harm or suicidal ideation.” *See id.* at Exh. 1, at ¶ 34.

The expert reports of Plaintiff’s experts further evidence the relevancy of Plaintiff’s ongoing gender dysphoria regarding the issue of causation.² Both experts acknowledge that individuals with gender dysphoria often suffer from other mental health issues, such as anxiety and depression, and that these conditions may continue to worsen if not properly treated. *See* Mayer Decl., Exh. 17, ¶¶ 50, 54, 72; *see id.* at Exh. 18, ¶ 23. Both experts also opine on the benefits of gender confirmation surgery, yet acknowledge that surgery may not eliminate gender

²Although a district court will generally not consider new evidence on appeal, the expert reports produced in discovery highlight the inconsistencies in Plaintiff’s legal position; namely, that he will not seek to offer expert

dysphoria and other mental health conditions. *See* Mayer Decl., Exh. 17, at ¶¶ 46, 49; *see id.* at Exh. 18, at ¶ 35. The foregoing therefore indicates that Plaintiff’s alleged anxiety, depression and distress could be attributable to his underlying condition of gender dysphoria even after obtaining the surgery he wanted. Plaintiff suffers from a mental or psychiatric injury or disorder that is not clearly divisible and it is appropriate for Dr. Reeves to explore the nebulous dividing line between Plaintiff’s alleged emotional distress before and after June 2015. Accordingly, this appeal should be granted and Defendants should be permitted to have Dr. Reeves conduct an examination of the Plaintiff, pursuant to Fed. R. Civ. P. 35.

D. Judge Waldor Erred In Rejecting Defendants’ Argument On Standing And Did Not Sufficiently Consider The Deposition Testimony Of Dr. Tang And Batista.

Judge Waldor improperly dismissed the threshold issue of medical necessity, which is an issue of standing, as a “novel argument” inadequately addressed in Defendants’ answer or motion papers. *See* Dkt. 116 at p. 5. Judge Waldor faulted Defendants for belatedly raising this issue even though well-settled case law provides that the burden of establishing standing rests solely on Plaintiff. *See* Fed. R. Civ. P. 8(c)(1) (not enumerating standing as an affirmative defense); *see also De Lage Landen Financial Services, Inc. v. M.D.M. Leasing Corp.*, 2007 WL 4355037, *3 (N.D.Ill. 2007) (“Because a plaintiff must plead and ultimately prove standing, lack of standing ‘is not an affirmative defense under federal law.’”) (quoting *Native Am. Arts, Inc. v. The Waldron Corp.*, 253 F.Supp.2d 1041, 1045 (N.D.Ill. 2003)); *accord Berg v. Obama*, 586 F.3d 234, 238 (3d Cir. 2009) (holding that the plaintiff must establish standing).

As established herein, discovery on the threshold issue of medical necessity is evolving and has been conducted in a manner that forced Defendants to prematurely file their motion to compel. *See* Mayer Decl., Exh. 11, June 20, 2019 Hearing Transcript at 20:12-21:1, 73:12-

testimony in support of his claimed damages, yet the expert reports produced are rife with references to the

74:17. After conducting the depositions of Dr. Tang and Batista, which occurred after briefing on the motion to compel, it became clear that both Dr. Tang and Batista hastily accepted Plaintiff's self-diagnosis of gender dysphoria during their initial consultation with him. *See* Mayer Decl., Exh. 4, Batista Dep. at 48:6-21; *see also* Mayer Decl., Exh. 13, Tang Dep. at 218:4-9. Defendants subsequently presented this newly discovered evidence to the Magistrate Judge at oral argument on December 3, 2019 and in support of their motion for reconsideration. In denying the motion for reconsideration, the Magistrate Judge noted "perceived shortcomings" in Dr. Tang's and Ms. Batista's testimony, but concluded that such shortcomings were insufficient to warrant a Rule 35 mental examination. *See id.* at Exh. 16, Dkt. 128 at p. 3.

Yet, these acknowledged "shortcomings" are highly relevant to whether Plaintiff can sustain his claims against Defendants. Based on the opinions of his own experts, Plaintiff cannot sustain his claims unless his treating physicians (i.e., Dr Tang and Batista) deemed the hysterectomy "medically necessary," which did not occur here. *See* Mayer Decl., Exh. 18, at ¶ 45 ("concluding that the denial of a medically necessary hysterectomy to Plaintiff, "assuming such hysterectomy was deemed to be medically necessary by [his] health care providers," was inconsistent with the standards of care...[.]"). Plaintiff's experts did not attest to the efficacy of Dr. Tang's or Ms. Batista's diagnosis. As such, Dr. Reeves must be permitted to evaluate Plaintiff's claim that the surgery was medically necessary.

Accordingly, this appeal should be granted and Defendants should be permitted to have Dr. Reeves conduct an examination of the Plaintiff, pursuant to Fed. R. Civ. P. 35.

purported mental and psychological injuries resulting from the denial of surgery.

E. Plaintiff Cannot Evade The “In Controversy” Requirement By Declining To Offer An Expert On The Precise Issue Of Emotional Distress.

In denying the motion to compel, Judge Waldor also based her decision upon Plaintiff’s representations that he does not plan to offer expert testimony to support his emotional distress damages, and that he will not introduce evidence that Defendant’s conduct caused or exacerbated any clinical conditions. *See* Mayer Decl. at Exh. 14, Dkt. 116 at p. 3, 4. Courts have repeatedly found that a plaintiff’s decision to forego expert testimony on the issue of emotional distress does not preclude a court from compelling a mental examination where the nature of the claims and diagnosed psychiatric conditions establishes that a plaintiff has put his mental condition directly in controversy. *See Montana*, 2013 WL 5724486, at *6; *see also Thiessen v. GE Capital Corp.*, 178 F.R.D. 568, 571 (D. Kan. 1998) (concluding that “the court is not convinced that plaintiff’s decision to refrain from presenting any expert or medical testimony with respect to plaintiff’s emotional distress claim somehow precludes defendants from requesting an examination pursuant to Rule 35.”); *Dandal v. Thorn Americas, Inc.*, 1998 U.S. Dist. LEXIS 832, at *6 (D. Kan. Jan. 28, 1992) (concluding that plaintiff may not trump the requested Rule 35 exam simply by proposing not to offer at trial her own experts or treating psychologist)

Here, there is nothing to prevent Plaintiff from testifying before the jury about the seriousness of his ongoing mental or psychological injuries and emotional distress, even if he declined to retain a medical expert on the precise issue of emotional distress. Even without expert testimony, Plaintiff can tell the factfinder about his gender dysphoria, depression, anxiety, and distress. Defendants are simply not required to accept Plaintiff’s contention that his mental or psychiatric injury comes from the June 2015 incident as opposed to some other underlying cause, which can only be assessed by a qualified expert on the matter. *See Dahdal*, 1998 WL 37532, at *2; *see also Gray v. State of Florida*, 2007 WL 2225815, at *2 (M.D. Fla. July 31,

2007) (compelling Rule 35 exam where plaintiff allegedly suffered from anxiety and depression prior to and as a result of discrimination and retaliation and finding that “Plaintiff’s emotional damages will be an issue in the case during trial and Plaintiff will no doubt testify, either through her own testimony or through that of an expert, regarding her claims of emotional distress and the extent of her damages related to such distress.”).

Notwithstanding his own testimony, it is undisputed that Plaintiff intends to rely upon the testimony of his own health care providers and his experts. The expert testimony in particular will focus on the severity of Plaintiff’s gender dysphoria and the emotional and psychological effects of not receiving the surgery. *See, e.g.,* Mayer Decl., Exh. 18, at ¶¶ 24, 25, 29 (discussing medical necessity of surgery for individuals with severe gender dysphoria); *see id.* at Mayer Decl., Exh. 18, at ¶¶ 64, 67, 70 (denial of surgery can lead to “the development of psychiatric disorders” and a heightened risk “for post-traumatic stress disorder, depression, life dissatisfaction, anxiety, and suicidality in adulthood”). Thus, Plaintiff will likely ask a jury to draw an inference that not only was his surgery medically necessary and improperly denied, but that the denial of this surgery either caused or exacerbated his ongoing mental or psychiatric injuries and distress.

Given that Plaintiff intends to not only rely upon the diagnoses of Dr. Tang and Ms. Batista, as well as recently produced expert reports, Dr. Reeves must be granted the opportunity to explore whether Plaintiff did in fact suffer from severe gender dysphoria, to evaluate his claim that the total hysterectomy was medically necessary, and to assess the cause and extent of his claimed emotional distress damages.

Accordingly, this appeal should be granted and Defendants should be permitted to have Dr. Reeves conduct an examination of the Plaintiff, pursuant to Fed. R. Civ. P. 35

F. The Magistrate Judge Erred In Finding That Defendants Did Not Establish Good Cause Exists To Compel The Mental Examination Of Plaintiff.

Judge Waldor also erred in finding that Defendants failed to establish “good cause” for the requested examination. *See* Mayer Decl., Exh. 14, Dkt. No. 116 at p. 6-7. “Good cause requires a showing that the examination could adduce specific facts relevant to the cause of action and is necessary to the defendant’s case.” *Womack*, 205 F.R.D. at 447; *see also King v. Mansfield Univ. of Pennsylvania*, 1:11-CV-1112, 2014 WL 563323, at *2 (M.D. Pa. Feb. 11, 2014) (compelling medical examination where plaintiff placed his medical condition at issue based on averments in amended complaint and good cause existed where examination could adduce facts relevant to the cause of action and necessary to defendant’s defense).

Here, good cause exists for an independent mental examination of Conforti because the examination will likely adduce facts highly relevant to the defense of his discrimination and emotional distress claims. It is undisputed that Plaintiff was diagnosed with gender dysphoria, anxiety, and depression before Defendants allegedly discriminated against him. *See* Mayer Decl., Exh. 12, Dkt No. 104 at p. 8; *see id.* at Exh. 1, Compl. at ¶ 29 (affirmatively stating that a person suffering from gender dysphoria must have “clinically significant distress”); *see id.* at Ex. 2, Pl.’s Dep. at 194:18-20 [REDACTED]; *see id.* at Ex. 5, TANG00063-72. According to Conforti, gender dysphoria caused him depression and anxiety and necessitated hormone therapy, surgical procedures, and continuing medical and psychological treatment. *See id.* at Exh. 1 at ¶ 3 (alleging that “[a]s part of his treatment for gender dysphoria, [Plaintiff] has received hormone therapy under the direction and supervision of his primary care physician as well as other medical treatment.”). Yet, he also attributes his more recent anxiety and depression to Defendants’ conduct. *See id.* at Exh. 1, ¶ 10 (Defendants’ conduct caused him to become “deeply depressed” and to suffer “great anxiety.”);

see id. at ¶ 73 (“Jionni was also depressed that after his long search to find a surgeon who could perform the surgery.... Jionni also felt anxiety at having to search for a new surgeon whom he could trust to perform this highly sensitive surgical procedure.”).³

As established herein, the allegations in the Complaint, written discovery responses, and medical evidence shows that Plaintiff claims an ongoing specific mental or psychiatric injury, which alone establishes “good cause” under Fed. R. Civ. P. 35. *See Bonner v. Normandy Park*, 2008 WL 624942, at *3 (W.D. Wash. Feb. 12, 2008) (compelling IME where plaintiff asserted claim of emotional distress and his deposition testimony and complaint alleged that distress was ongoing); *see also Flores-Febus v. MVM, Inc.*, 299 F.R.D. 338, 341 (D.P.R. 2014) (“Factors relevant to a finding of good cause include...whether plaintiff is claiming ongoing emotional distress.”) (internal citations and quotation marks omitted); *Guzman*, 2012 WL 2148166, at *1 (finding good cause exists where plaintiff asserts that “a defendant’s actions caused a mental injury or ongoing mental illness...[.]”) (citing *Schlagenhauf*, 379 U.S. at 119)).

Notwithstanding the foregoing, the cause and extent of Plaintiff’s anxiety, depression, and other psychiatric or emotional harm clearly warrants examination by Dr. Reeves so that he can gather additional information and assess these and other issues explained in Plaintiff’s medical and psychological records, as discussed above. *Womack*, 205 F.R.D. at 447. [REDACTED]

[REDACTED] *See Mayer Decl., Exh. 2, Pl.’s Dep. at 189:16-190:10; see*

³Although Plaintiff’s counsel contends that his emotional distress is “standard” or “garden variety,” Plaintiff seeks to be free to testify about the depression, anxiety, and distress that Defendants’ justified denial of his hysterectomy supposedly caused him as well as the purported harm caused by the “delay” in scheduling the hysterectomy. See Complaint at ¶ 34 (“If not properly treated, gender dysphoria may result in psychological distress, anxiety, depression, and even self-harm or suicidal ideation.”). Yet, he admittedly lacks the acumen to discuss at length the scientific foundation for his disorders or injuries and if they stem from Defendants’ conduct or another event. See Mayer Decl., Exh. 2, at Pl.’s Dep. at 259:4-6. Similarly, Plaintiff also seeks to be free to testify that about the medical necessity of the hysterectomy whether predicated upon his personal concerns about underlying medical conditions, such as cancer, or his gender dysphoria. Yet, his expert affirmatively states that the treating physician

id. at Exh. 7, BATISTA00065. Defendants have a right to determine whether Plaintiff's preexisting psychiatric disorders and other factors contributed to or caused the harm he alleges was caused by Defendants. *See Bonner*, 2008 WL 624942, at *3 (compelling Rule 35 exam so defendants can evaluate plaintiff's mental state to challenge the emotional distress claim, "to preserve defendant's right to a fair [trial]," and "to preserve the equal footing of the parties.").

Judge Waldor incorrectly ruled that Defendants had less intrusive means available to them to explore the foregoing issues. *See id.* at Exh. 14, Dkt. No. 116 at p. 6-7. The deposition of Plaintiff did not allow Defendants to discover information about Plaintiff's extensive history of complex emotional and psychological issues, which he is unqualified to testify to. *See E.E.O.C. v. Maha Prabhu, Inc.*, 2008 WL 2559417, at *2 (W.D.N.C. June 23, 2008) ("Where the average lay person would have difficulty evaluating the nature, extent, and cause of the claimant's injuries, there is good cause for an independent medical evaluation."). The medical records also fail to afford Defendants a less intrusive means because they lack substantive detail as to the cause and extent of his alleged injuries. *See Mayer Decl.*, Exh. 7, at BATISTA32-35

[REDACTED]

[REDACTED]

[REDACTED]. Moreover, as discussed in more detail above, the deposition testimony of Dr. Tang and Batista and the production of expert reports of Dr. Schechter and Dr. Ettner clearly compel an independent evaluation by Dr. Reeves to assess whether Plaintiff suffered from severe gender dysphoria necessitating surgery.

must assess medical necessity of the gender confirmation surgery and the severity of the gender dysphoria. *See id.* at Exh. 16, ¶ 45.

It is hard to image a case that is less “garden variety” than the present matter, where Plaintiff’s mental health is key to why the hysterectomy was sought at a Catholic hospital and is the sole basis for the monetary damages sought. Even the expert reports discussed above show that the “garden variety” label is inapposite here since the DSM-V observes that the critical element of gender dysphoria is the presence of “clinically significant distress” associated with the condition. *See, e.g.*, Mayer Decl., Exh 17, at ¶ 24 (explaining DSM-5 diagnostic criteria for gender dysphoria in adults). Plaintiff seeks damages to be determined at trial, *see id.* at Exh. 1, ¶ 90, and Defendants are therefore entitled to explore the extent of these damages which are alleged to be ongoing and severe in nature. *See Diunugala v. Dep’t of Conservation*, 2018 WL 6137595, *2 (C.D. Cal. Jan. 31, 2018) (finding good cause where plaintiff allegedly suffered “emotional pain, humiliation, mental anguish, loss of enjoyment of life, and emotional distress” and damages “in an amount according to proof.”). Accordingly, this appeal should be granted and Defendants should be permitted to have Dr. Reeves conduct an examination of the Plaintiff, pursuant to Fed. R. Civ. P. 35.

G. The Magistrate Judge Erred By Questioning, Sua Sponte, Dr. Reeves’s Qualifications To Evaluate a Diagnosis of Gender Dysphoria.

In their motion for reconsideration, Defendants argued that Judge Waldor unfairly questioned Dr. Reeves’s qualifications to evaluate Plaintiff because Plaintiff did not mount any challenge to the qualifications of Dr. Reeves in his opposition brief and because the Court question the doctor’s expertise during oral argument or provide Defendants the opportunity to be heard on the issue.

In rejecting this argument and apparently concluding that Dr. Reeves is not qualified to conduct a mental examination of Plaintiff, Judge Waldor conceded that “Rule 35 does not ‘obligate a moving party to present a sworn statement attesting to the qualifications of an expert

or the intended examination.” Dkt. 128, at p. 3. As such, Defendants complied fully with the procedural requirements of Rule 35 by submitting, based on what Dr. Reeves told them, a proposed Order with their motion to compel setting forth “the time, place, manner, conditions, and scope of the examination, as well as the person or persons who will perform it.”

Even though unnecessary, in response to Judge Waldor’s questioning of Dr. Reeves’ qualifications, Defendants submitted a declaration of Dr. Reeves in support of their motion for reconsideration. The declaration submitted by Dr. Reeves sufficiently sets forth his qualifications as an expert at this stage in discovery. *See* Mayer Decl, Exh. 14, Dkt. 128 at p. 4. Like Plaintiff’s experts, Dr. Reeves’ declaration sets forth his expertise in psychiatry, *see id.* at Exh. 15, Reeves Decl. at ¶¶3-5, and appends his detailed curriculum vitae on his educational and professional experiences. Dr. Reeves’ declaration also outlines the parameters for proposed examination and reiterates his opinion on why the examination is necessary. *See id.* at ¶¶ 6-8.

Where, as here, a party proffers a suitably licensed medical professional to perform the examination, courts have found that it has no further burden to meet with respect to the professional’s qualifications. *See Jefferys v. LRP Publications, Inc.*, 184 F.R.D. 262, 263 (E.D. Pa. 1999) (finding that where a moving party selects “a physician or psychologist, there is no doubt he could conduct [a Rule 35] examination.”). Challenges to Dr. Reeves’ qualifications are more appropriately addressed pre-trial, by in limine motion, after the completion of expert discovery. *See McMillan v. Valley Rubber & Gasket Co.*, 2017 WL 3383120, at *16 (E.D. Cal. Aug. 7, 2017) (compelling Rule 35 examination, but stating that “[n]othing in [the court’s] order [should] be construed as barring Plaintiff from filing a motion in limine relating to [the expert]’s proposed testimony at the appropriate time in accordance with the schedule provided in connection with the final pretrial conference.”).

The portions of *McLaughlin v. Atl. City*, 2007 WL 1108527 (D.N.J. Apr. 10, 2007) the Magistrate Judge relied upon in denying the motion for reconsideration do not hold that the “in controversy” and “good cause” requirements must be established through a letter, affidavit, or declaration of an expert. *See* Mayer Decl, Exh. 16, Dkt. 128 at p. 3. Rather, the *McLaughlin* court stated that these requirements simply necessitate “an affirmative showing by the movant that each condition as to which the examination is sought is really and genuinely in controversy and that good cause exists for ordering each particular examination.” *See* *McLaughlin*, 2007 WL 1108527, at *2. Unlike the plaintiff in *McLaughlin*, Defendants have not solely relied upon the conclusory statements of Dr. Reeves to compel the mental examination. *See id.* at *3 (stating that the court was “not requiring plaintiff to prove his case on the merits in order to order a Rule 35 mental examination...[h]owever, plaintiff must produce more than conclusory statements by a psychiatric expert to support its burden of proof.”). Rather, Defendants affirmatively established the need for the examination through the pleadings, discovery responses, and medical evidence.

Accordingly, Magistrate Judge erred in denying Defendants’ motion to compel and Defendants should be permitted to have Dr. Reeves conduct an examination of the Plaintiff.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that this Court reverse Magistrate Judge Waldor’s Orders denying Defendants’ request for Plaintiff to appear for a mental examination.

Respectfully submitted,

McCARTER & ENGLISH, LLP
Attorneys for Defendants

By: /s/ Christopher S. Mayer
Christopher S. Mayer
Thomas F. Doherty

Dated: June 1, 2020

EXHIBIT 2

Conforti v. St. Joseph's Healthcare System, Inc., et al., Case No. 2:17-cv-00050 (CCC/CLW)
Rule 5.3(c)(3) Index in Support of Defendants' Consolidated Motion To Seal

Material	Basis for Sealing	Clearly Defined and Serious Injury that Would Result if the Relief is Not Granted	Why a Less Restrictive Alternative to the Relief Sought is Not Available	Any Prior Order Sealing The Same Materials In The Pending Action	Party in Opposition to Sealing, if any, and Basis
Designated Portions of Defendants' Brief in Support of Motion Appealing The Honorable Cathy L. Waldor's January 22, 2020 and March 30, 2020 Opinions and Orders Denying Defendants' Motion to Compel a Mental Examination of Plaintiff (the "Appeal") [D.E. 129, 130]	Defendants' Brief submitted in support of their Appeal contains information derived from Plaintiff's deposition testimony, written discovery responses, and medical / health care records, which Plaintiff designated as "Confidential" or for "Attorneys' Eyes Only" pursuant to the Discovery Confidentiality Order (the "Protective Order") [D.E. 21].	Plaintiff has designated his deposition testimony, written discovery responses, and medical / health care records "Confidential" or for "Attorneys' Eyes Only" because he maintains that they contain, reference, and/or reflect private and confidential medical information [D.E. 21 at ¶ 1(a)-(d)].	Given the nature of the arguments made by Defendants in support of their Appeal, there is no less restrictive alternative available to Defendants than to rely upon the confidentially-designated documents while simultaneously following the terms of the Discovery Confidentiality Order [D.E. 21 at ¶ 1(d), 9].	On August 26, 2019, Defendants filed a consolidated motion to file under seal similar information and documents derived from Plaintiff's deposition testimony, discovery responses, and treatment with his treating physicians and health care providers [D.E. No. 106], which the Court granted on August 28, 2019 [D.E. 107].	Counsel for Plaintiff does not object to the instant request. Defendants are not aware of any other party or nonparty opposing this motion.
Exh. 2 to Mayer Declaration (Relevant Portions of Plaintiff's Deposition conducted on January 29, 2019)	Plaintiff designated portions of his deposition testimony as "Confidential" or for "Attorneys' Eyes Only" pursuant to the Protective Order entered by this Court on July 19, 2017 [D.E. No. 21].	Plaintiff has designated portions of his deposition testimony as "Confidential" or for "Attorneys' Eyes Only." Plaintiff maintains that the designated portions of his deposition testimony contain, reference, and/or reflect highly sensitive personal and medical information [D.E. No. 21 at ¶ 1(a)-(d)].	Given the nature of the arguments made by Defendants in support of their Appeal, there is no less restrictive alternative available to Defendants than to rely upon the confidentially-designated documents while simultaneously following the terms of the Discovery Confidentiality Order [D.E. No. 21 at ¶ 1(d), 9].	On August 26, 2019, Defendants filed a consolidated motion to file under seal relevant portions of Plaintiff's deposition testimony [D.E. No. 106], which the Court granted on August 28, 2019 [D.E. 107].	Counsel for Plaintiff does not object to the instant request. Defendants are not aware of any other party or nonparty opposing this motion.

Conforti v. St. Joseph’s Healthcare System, Inc., et al., Case No. 2:17-cv-00050 (CCC/CLW)
Rule 5.3(c)(3) Index in Support of Defendants’ Consolidated Motion To Seal

<p>Exh. 3 to Mayer Declaration (Relevant portions of the transcript of Dr. Ian Tang’s deposition conducted on September 20, 2019)</p>	<p>Plaintiff designated portions of Dr. Tang’s deposition testimony as “Confidential” or for “Attorneys’ Eyes Only” pursuant to the Protective Order [D.E. No. 21].</p>	<p>Plaintiff designated portions of Dr. Tang’s deposition testimony as “Confidential” or for “Attorneys’ Eyes Only.” Plaintiff maintains that the designated portions of Dr. Ian Tang’s deposition testimony contain, reference, and/or reflect highly sensitive personal and medical information [D.E. No. 21 at ¶ 1(a)-(d)].</p>	<p>Given the nature of the arguments made by Defendants in support of their Appeal, there is no less restrictive alternative available to Defendants than to rely upon the confidentially-designated documents while simultaneously following the terms of the Protective Order [D.E. No. 21 at ¶ 1(d), 9].</p>	<p>On August 26, 2019, Defendants filed a consolidated motion to file under seal medical records and deposition testimony relating to Plaintiff’s medical treatment with Dr. Tang [D.E. No. 106], which the Court granted on August 28, 2019 [D.E. 107].</p>	<p>Counsel for Plaintiff does not object to the instant request. Defendants are not aware of any other party or nonparty opposing this motion.</p>
<p>Exh. 4 to Mayer Declaration (Relevant portions of the transcript of Rissy Batista’s deposition conducted on September 18, 2019)</p>	<p>Plaintiff designated portions of Rissy Batista’s deposition testimony as “Confidential” or for “Attorneys’ Eyes Only” pursuant to the Protective Order entered by this Court on July 19, 2017 [D.E. No. 21].</p>	<p>Plaintiff designated portions of Rissy Batista’s deposition testimony as “Confidential” or for “Attorneys’ Eyes Only.” Plaintiff maintains that the designated portions of Rissy Batista’s deposition testimony contain, reference, and/or reflect highly sensitive personal and medical information [D.E. No. 21 at ¶ 1(a)-(d)].</p>	<p>Given the nature of the arguments made by Defendants in support of their Appeal, there is no less restrictive alternative available to Defendants than to rely upon the confidentially-designated documents while simultaneously following the terms of the Protective Order [D.E. No. 21 at ¶ 1(d), 9].</p>	<p>On August 26, 2019, Defendants filed a consolidated motion to file under seal similar information and documents derived from health care records and deposition testimony relating to Plaintiff’s treatment with Ms. Batista [D.E. No. 106], which the Court granted on August 28, 2019 [D.E. 107].</p>	<p>Counsel for Plaintiff does not object to the instant request. Defendants are not aware of any other party or nonparty opposing this motion.</p>

Conforti v. St. Joseph’s Healthcare System, Inc., et al., Case No. 2:17-cv-00050 (CCC/CLW)
Rule 5.3(c)(3) Index in Support of Defendants’ Consolidated Motion To Seal

<p>Exhibit 5 to Mayer Declaration (Relevant Portions of Plaintiff’s Medical Records from Dr. Ian Tang)</p>	<p>Plaintiff identified these medical records as “Confidential” or for “Attorneys’ Eyes Only” pursuant to the Discovery Confidentiality Order [D.E. 21].</p>	<p>Plaintiff has designated his medical records “Confidential” or for “Attorneys’ Eyes Only” because he maintains that they contain private and confidential medical information [D.E. No. 21 at ¶ 1(a)-(d)].</p>	<p>Given the nature of the arguments made by Defendants in support of their Appeal, there is no less restrictive alternative available to Defendants than to rely upon the confidentially-designated documents while simultaneously following the terms of the Discovery Confidentiality Order [D.E. No. 21 at ¶ 1(d), 9].</p>	<p>On August 26, 2019, Defendants filed a consolidated motion to file under seal similar information and documents derived from medical records and deposition testimony relating to Plaintiff’s treatment with Dr. Tang [D.E. No. 106], which the Court granted on August 28, 2019 [D.E. 107].</p>	<p>Counsel for Plaintiff does not object to the instant request. Defendants are not aware of any other party or nonparty opposing this motion.</p>
<p>Exhibit 6 to Mayer Declaration (Relevant Portions of Medical Records from Dr. Joseph Vitale and Nurse Mary Vitale)</p>	<p>Plaintiff designated these medical records as “Confidential” or for “Attorneys’ Eyes Only” pursuant to the Discovery Confidentiality Order [D.E. 21].</p>	<p>Plaintiff has designated his medical records “Confidential” or for “Attorneys’ Eyes Only” because he maintains that they contain, reference, and/or reflect highly sensitive private and confidential medical information [D.E. 21 at ¶ 1(a)-(d)].</p>	<p>Given the nature of the arguments made by Defendants in support of their Appeal, there is no less restrictive alternative available to Defendants than to rely upon the confidentially-designated documents while simultaneously following the terms of the Discovery Confidentiality Order [D.E. No. 21 at ¶ 1(d), 9].</p>	<p>On August 26, 2019, Defendants filed a consolidated motion to file under seal similar information and documents derived from medical records and deposition testimony relating to Plaintiff’s treatment with Dr. Vitale and Nurse Mary Vitale [D.E. No. 106], which the Court granted on August 28, 2019 [D.E. 107].</p>	<p>Counsel for Plaintiff does not object to the instant request. Defendants are not aware of any other party or nonparty opposing this motion.</p>

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Rule 5.3(c)(3) Index in Support of Defendants’ Consolidated Motion To Seal

<p>Exhibit 7 to Mayer Declaration (Relevant Portions of Health Care Records from Ms. Rissy Batista)</p>	<p>Plaintiff designated these health care records as “Confidential” or for “Attorneys’ Eyes Only” pursuant to the Discovery Confidentiality Order [D.E. 21].</p>	<p>Plaintiff has designated his health care records “Confidential” or for “Attorneys’ Eyes Only” because he maintains that they contain private and confidential medical information [D.E. No. 21 at ¶ 1(a)-(d)].</p>	<p>Given the nature of the arguments made by Defendants in support of their Appeal, there is no less restrictive alternative available to Defendants than to rely upon the confidentially-designated documents while simultaneously following the terms of the Discovery Confidentiality Order [D.E. No. 21 at ¶ 1(d), 9].</p>	<p>On August 26, 2019, Defendants filed a consolidated motion to file under seal similar information and documents derived from health care records and deposition testimony relating to Plaintiff’s treatment with Ms. Batista [D.E. No. 106], which the Court granted on August 28, 2019 [D.E. 107].</p>	<p>Counsel for Plaintiff does not object to the instant request. Defendants are not aware of any other party or nonparty opposing this motion.</p>
<p>Exhibit 8 to Mayer Declaration (Relevant Portions of Health Care Records from Vincent Fitzgerald, LCSW)</p>	<p>Plaintiff designated these health care records as “Confidential” or for “Attorneys’ Eyes Only” pursuant to the Discovery Confidentiality Order [D.E. 21].</p>	<p>Plaintiff has designated his health care records “Confidential” or for “Attorneys’ Eyes Only” because he maintains that they contain private and confidential medical information [D.E. No. 21 at ¶ 1(a)-(d)].</p>	<p>Given the nature of the arguments made by Defendants in support of their Appeal, there is no less restrictive alternative available to Defendants than to rely upon the confidentially-designated documents while simultaneously following the terms of the Discovery Confidentiality Order [D.E. No. 21 at ¶ 1(d), 9].</p>	<p>On August 26, 2019, Defendants filed a consolidated motion to file under seal similar information and documents derived from health care records and deposition testimony relating to Plaintiff’s treatment with Mr. Fitzgerald [D.E. No. 106], which the Court granted on August 28, 2019 [D.E. 107].</p>	<p>Counsel for Plaintiff does not object to the instant request. Defendants are not aware of any other party or nonparty opposing this motion.</p>

Conforti v. St. Joseph’s Healthcare System, Inc., et al., Case No. 2:17-cv-00050 (CCC/CLW)
Rule 5.3(c)(3) Index in Support of Defendants’ Consolidated Motion To Seal

<p>Exhibit 9 to Mayer Declaration (Relevant Portions of Plaintiff’s Answers to Defendants’ First Set of Interrogatories)</p>	<p>Plaintiff designated his Answers to Defendants’ First Set of Interrogatories as “Confidential” or for “Attorneys’ Eyes Only” pursuant to the Discovery Confidentiality Order [D.E. 21].</p>	<p>Plaintiff has designated his Answers to Defendants’ First Set of Interrogatories as “Confidential” or for “Attorneys’ Eyes Only” because he maintains that his discovery responses contain, reference, and/or reflect highly sensitive personal and medical information [D.E. 21 at ¶ 1(a)-(d)].</p>	<p>Given the nature of the arguments made by Defendants in support of their Appeal, there is no less restrictive alternative available to Defendants than to rely upon the confidentially-designated documents while simultaneously following the terms of the Discovery Confidentiality Order [D.E. No. 21 at ¶ 1(d), 9].</p>	<p>On August 26, 2019, Defendants filed a consolidated motion to file under seal relevant portions of Plaintiff’s interrogatory answers [D.E. No. 106], which the Court granted on August 28, 2019 [D.E. 107].</p>	<p>Counsel for Plaintiff does not object to the instant request. Defendants are not aware of any other party or nonparty opposing this motion.</p>
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**UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY**

JIONNI CONFORTI,

Plaintiff,

v.

ST. JOSEPH'S HEALTHCARE SYSTEM,
INC.; ST. JOSEPH'S HOSPITAL AND
MEDICAL CENTER D/B/A ST. JOSEPH'S
REGIONAL MEDICAL CENTER; and
FATHER MARTIN D. ROONEY,

Defendants.

Honorable Claire C. Cecchi, U.S.D.J.
Honorable Cathy L. Waldor, U.S.M.J.

Case No. 2:17-cv-00050 (CCC/CLW)

**[PROPOSED] ORDER GRANTING
DEFENDANTS' CONSOLIDATED
MOTION TO SEAL**

THIS MATTER having been opened to the Court by McCarter & English, LLP, counsel for Defendants St. Joseph's Health, Inc., St. Joseph's University Medical Center, Inc., and Father Martin D. Rooney (collectively, "Defendants"), and with consent of counsel for Plaintiff Jionni Conforti ("Plaintiff"), and the Court having considered submissions in support of Defendants' Consolidated Motion to Seal pursuant to L. Civ. R. 5.3:

FINDINGS OF FACT

1. On June 1, 2020, Defendants filed a Brief in support of their Motion Appealing The Honorable Cathy L. Waldor's January 22, 2020 and March 30, 2020 Opinions and Orders Denying Defendants' Motion to Compel a Mental Examination of Plaintiff [D.E. 129, 130].

2. Defendants' Moving Brief and supporting materials attached to the Declaration of Christopher S. Mayer, Esq. ("Mayer Declaration") were filed under temporary seal. The supporting materials submitted with the Mayer Declaration have been designated by Plaintiff as either "Confidential" or "Attorneys' Eyes Only" pursuant to the parties' Discovery

Confidentiality Order, entered by this Court on July 19, 2017 [D.E. 21]. Those materials include as follows: (i) Exhibit 2 (relevant portions of the transcript of Plaintiff's deposition, conducted on January 29, 2019); (ii) Exhibit 3 (relevant portions of the transcript of Dr. Ian Tang's deposition, conducted on September 20, 2019); (iii) Exhibit 4 (relevant portions of the transcript of Ms. Rissy Batista's deposition, conducted on September 18, 2019); (iv) Exhibit 5 (relevant portions of Plaintiff's medical records from Dr. Ian Tang); (v) Exhibit 6 (relevant portions of medical records from Dr. Joseph Vitale); (vi) Exhibit 7 (relevant portions of health care records from Ms. Rissy Batista); (vii) Exhibit 8 (relevant portions of health care records from Vincent Fitzgerald, LCSW); and (viii) Exhibit 9 (relevant portions of Plaintiff's Answers to Defendants' First Set of Interrogatories).

3. In support of this Motion to Seal, counsel for Defendants prepared a redacted version of Defendants' Moving Brief (attached hereto as Exhibit 1) in accordance with L. Civ. R. 5.3(c)(2)(i).

4. The narrowly tailored portions of Defendants' Moving Brief that Defendants seek to file under seal contain information derived from the supporting materials attached as Exhibits 2 through 9 of the Mayer Declaration.

5. Furthermore, in support of this Motion to Seal and in accordance with Local Civil Rule 5.3, Defendants submit an index in the form prescribed by Appendix U to the Local Civil Rules.

6. The foregoing materials are identified on the Index with reference to the supporting declaration to justify their confidential nature.

7. Defendants were required to submit the foregoing materials to the Court to effectively advocate their position while simultaneously following the terms of the parties' Discovery Confidentiality Order [D.E. 21].

8. This Court has previously sealed the same or similar materials, including, but not limited to, materials derived from Plaintiff's deposition testimony, discovery responses, and treatment with his treating physicians and health care providers, which were also designated as either "Confidential" or "Attorneys' Eyes Only" pursuant to the parties' Discovery Confidentiality Order [D.E. 21].

9. On May 19, 2019, the Court granted the Plaintiff's consolidated motion to file under seal information and documents relating to his treatment with certain medical and/or health care providers identified in Defendants' Appeal [D.E. 77, 82].

10. On August 28, 2019, the Court granted Defendants' consolidated motion to file under seal similar information and documents derived from Plaintiff's deposition testimony, discovery responses, and medical treatment with his treating physicians [D.E. 106, 107].

CONCLUSIONS OF LAW REGARDING MOTION TO SEAL

Following review of the papers submitted in support of the Motion to Seal, and for good cause shown, the Court hereby concludes:

11. A party seeking to seal information must demonstrate "good cause," which turns on an examination of the factors set forth in Local Civil Rule 5.3(c)(3). Telebrands Corp. v. Newmetro Design, LLC, 2016 U.S. Dist. LEXIS 191179, at *3 (D.N.J. July 18, 2016) (quoting Pansy v. Borough of Stroudsburg, 23 F.3d 772, 786 (3d Cir. 1994)).

12. Local Civil Rule 5.3(c) governs Motions to Seal and requires a single, consolidated motion on behalf of all parties that includes an index and supporting declaration(s)

describing with particularity: (a) the nature of the materials or proceedings at issue; (b) the legitimate private or public interest which warrant the relief sought; (c) the clearly defined and serious injury that would result if the relief sought is not granted; (d) why a less restrictive alternative to the relief sought is not available; (e) any prior order sealing the same materials in the pending action; and (f) the identity of any party or nonparty known to be objecting to the sealing request. See L. Civ. R. 5.3(c)(3).

13. Plaintiff designated the foregoing materials and the information derived therefrom as “Confidential” or for “Attorneys’ Eyes Only” under the Discovery Confidentiality Order because Plaintiff maintains that the materials contain, reference, and/or reflect highly sensitive personal and medical information. [D.E. 21 at ¶ 1(a)-(d)].

14. Given the nature of the arguments made by Defendants in support of their Appeal, there is no less restrictive alternative available to Defendants than to rely upon the confidentially-designated documents while simultaneously following the terms of the Discovery Confidentiality Order [Id. at ¶¶ 1(d), 9].

15. The omission of the materials from the submissions made on Defendants’ Appeal would significantly limit the parties’ ability to advocate for their positions.

16. Defendants’ request to seal is narrowly tailored and limited to the materials deemed “Confidential” or “Attorneys’ Eyes Only” by Plaintiff, and the unredacted portions of Defendants’ Appeal sufficiently disclose the nature of the parties’ discovery dispute to the public while adhering to the parties’ Discovery Confidentiality Order.

17. The foregoing materials and information derived therefrom are presently designated as “Confidential” or for “Attorneys’ Eyes Only” and unavailable to public access.

18. As set forth in Paragraphs 9 and 10 above, the Court has previously sealed the same or similar materials, including, but not limited to, materials derived from Plaintiff's deposition testimony, discovery responses, and treatment with his treating physicians and health care providers, which were also designated as either "Confidential" or "Attorneys' Eyes Only" pursuant to the parties' Discovery Confidentiality Order [D.E. 21].

19. Counsel for Plaintiff consents to the instant request and the Court is not aware of any other party or nonparty opposing this motion.

20. The Court concludes that Defendants have demonstrated that their application meets the requirements of Local Civil Rule 5.3.

IT IS on this ____ day of _____, 2020,

ORDERED that Defendants' Consolidated Motion to Seal is GRANTED; and it is further ORDERED that designated portions of Defendants' Moving Brief and Exhibits 2 through 9 attached to the Mayer Declaration submitted in support of Defendants' Motion Appealing The Honorable Cathy L. Waldor's January 22, 2020 and March 30, 2020 Opinions and Orders Denying Defendants' Motion to Compel a Mental Examination of Plaintiff [D.E. 129, 130], shall be filed under seal pursuant to L. Civ. R. 5.3. This Order is without prejudice to the parties' rights to seek further confidentiality protections during the course of this litigation; and it is further

ORDERED that the proposed redacted versions of Defendants' Moving Brief shall be publicly filed.

HON. CLAIRE C. CECCHI, U.S.D.J.