

United States District Court
For the Northern District of California

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E-Filed 02/04/2010

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

RICHARD B. FOX,

No. C 04-0874 RS

Plaintiff,

ORDER RE LETTER BRIEFS

v.

GOOD SAMARITAN L.P., et al,

Defendants.

With prior approval of the Court, the parties have submitted letter briefs regarding certain ongoing discovery disputes between them. Specifically, defendants seek a protective order precluding a number of depositions from being taken, and plaintiff moves to compel the further production of documents arising out of the materials defendants produced in response to the Court's December 30, 2009 order. The Court finds these matters suitable for disposition without oral argument, pursuant to Civil Local Rule 7-1(b).

1. Redactions

Plaintiff complains that defendants have heavily redacted the patient records and peer review materials they were ordered to produce regarding the two non-pediatric patients. A substantial portion of plaintiff's briefing is devoted to arguing the relevance of those two patients' cases to this

1 action, presumably in response to defendants' continued assertions during the meet-and-confer
2 process that such matters have little bearing on the issues in this litigation. The Court's December
3 30, 2009 order reflected a conclusion that the patient records and peer review materials were
4 relevant, for discovery purposes at least, to the extent they contained any direct or indirect
5 references to plaintiff, "whether specifically by name or otherwise," but that any other information
6 in those files was not subject to production.

7 In response, defendants have produced documents, including some where all substantive
8 content has been redacted.¹ Plaintiff now insists that defendants provide a "redaction log." The
9 Court's prior ruling, however, in effect has limited plaintiff's discovery request such that only
10 materials referring to plaintiff are to be deemed responsive. A party need not log documents it may
11 possess that are not responsive to a request.

12 That said, plaintiff's concern that defendants may have taken an overly narrow view of what
13 materials may *indirectly* refer to him is understandable. To allay such concern, defendants have
14 offered to submit the complete unredacted materials for *in camera* review. With some reluctance,
15 the Court concludes that such a review is appropriate in the interests of resolving this issue in a
16 manner that balances the competing interests and assures plaintiff has a fair opportunity to uncover
17 any evidence that may support his claims. Within 5 days of the date of this order, defendants shall
18 submit the materials to the Clerk's office in the San Jose courthouse for delivery to chambers. The
19 materials should be marked or identified in some appropriate manner that permits the Court readily
20 to distinguish between the material that has been produced to plaintiff and that which has been
21 redacted or completely withheld.²

22 2. Designation level

23 The December 30, 2009 order directed defendants to produce physician privileging files on
24 an "attorney's-eyes only" basis, but did not specify a level of protection for the patient records and

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26 ¹ It is unclear whether this represents overly aggressive redaction or merely an effort by defendants
27 to provide a complete record of the contents of the files from which material has been produced.

28 ² Defendants must also honor the offer they have made to remove certain specific redactions.

1 peer review materials related to the two non-pediatric patients.³ Although the peer review material
2 in particular implicates confidentiality concerns similar to those presented by the privileging files, in
3 light of the other limitations on defendants' obligation to produce (i.e., only those materials referring
4 to plaintiff) and under all the circumstances, these materials shall be re-designated as only
5 "confidential" under the protective order.

6
7 3. Destroyed medical records

8 Defendants assert that medical records relating to one of the non-pediatric patients have been
9 destroyed "in accordance with California state law." Without adopting plaintiff's implication that
10 this gives rise to a suspicion of possible wrongful destruction of evidence, defendants are hereby
11 directed to provide plaintiff with additional information as to precisely when and why the records
12 were destroyed.

13
14 4. Redacted financial information

15 Although the parties have already resolved their disputes regarding the redaction of financial
16 information in some documents produced by defendants, the record is not clear as to whether
17 defendants continue to withhold the information in the six documents identified in Exhibit G to
18 plaintiff's letter brief. As plaintiff notes, however, if defendants choose to stand on those
19 redactions, he may seek to preclude defendants from relying on such information at trial.

20
21 5. Depositions

22 Defendants seek a protective order precluding plaintiff from deposing Dr. Bassam Saffouri,
23 who participated in a November 13, 1992 meeting of the Executive Committee of the Division of
24 Gastroenterology that reviewed the circumstances of the colonoscopy procedure performed on
25 plaintiff's wife. The minutes of that meeting reflect what appear to have been somewhat heated

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27 ³ Defendants originally produced records regarding the pediatric patients on an attorney's-eyes
28 only basis, but have agreed to remove that designation as to those documents.

1 exchanges between plaintiff and Dr. Saffouri. Plaintiff alleges that shortly after that meeting he was
2 advised, “watch your back.” Plaintiffs’ theory is that defendants participated in a conspiracy to
3 retaliate against him for raising questions as to the adequacy of patient care. Under these
4 circumstances, the evidence plaintiff seeks to elicit through Dr. Saffouri’s deposition is relevant, at
5 least for purposes of discovery, and no protective order will issue.

6 Defendants also seek a protective order precluding plaintiff from deposing four corporate
7 officers of HCA.⁴ Plaintiff impliedly acknowledges that the depositions of these individuals may
8 not be necessary upon completion of numerous other depositions which the parties agree will go
9 forward. Accordingly, defendants’ request for a protective order as to these four potential
10 deponents will be denied, without prejudice. Should plaintiff subsequently conclude he still wishes
11 to pursue these depositions, defendant may renew its request for a protective order with respect to
12 any or all of them via a letter brief not to exceed five pages. Within three days thereafter, plaintiff
13 may file a responsive brief also not to exceed five pages. Any such responsive brief should include
14 a succinct description of the relevant information plaintiff believes each potential deponent is likely
15 to hold, and the length of time plaintiff proposes for each such deposition.

16
17 IT IS SO ORDERED.

18 Dated: 02/04/2010



RICHARD SEEBORG
UNITED STATES DISTRICT JUDGE

27 _____
28 ⁴ Plaintiff has dropped his request to depose a fifth officer, Dr. Thomas Frist, Jr.