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6 **UNITED STATES DISTRICT COURT**
7 **WESTERN DISTRICT OF WASHINGTON**
8 **AT SEATTLE**

9 LEA BLACK,

10 Plaintiff,

11 v.

12 PRIDE MOBILITY PRODUCTS
13 CORPORATION, a foreign corporation, *et*
al.,

14 Defendants.

NO. C15-2008-TSZ

ORDER RE-SETTING HEARING
ON SECOND MOTION TO
COMPEL AND DIRECTING
SECOND JOINT STATUS UPDATE
REGARDING DISCOVERY

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16 This matter comes before the Court *sua sponte*. The Court had initially set a hearing on
17 plaintiff's Second Motion to Compel and First Motion for Sanctions, Dkt. 182, against
18 defendant Pride Mobility Products Corporation ("Pride") for Friday, April 27, 2018. Due to an
19 unfortunate miscommunication regarding the hearing date, the Court hereby reschedules the
20 hearing on the motion for **Tuesday, May 15, 2018 at 10:00 a.m.** in Courtroom 12B at the U.S.
21 District Court, 700 Stewart Street, Seattle, Washington.

22 The Court appreciated the parties' April 6, 2018 joint status update, which revealed that
23 substantial progress had been made in narrowing the discovery issues in dispute. As several
24 weeks have passed since the parties' submission, it is the Court's expectation that further
25 production by Pride in the interim will have mooted additional issues. Indeed, Pride's response
26 to numerous discovery requests by plaintiff was that it did not object to the request, and had in

1 fact “engaged IT services to comprehensively search Pride’s internal systems to locate
2 additional responsive material,” which was ongoing. Due to the significant passage of time
3 (approximately two months between Judge Zilly’s initial referral of the motion and the new
4 May 15 hearing date), the Court expects that substantial progress has been made by Pride in
5 producing such responsive material, or else plaintiff’s request for sanctions may be granted.

6 In anticipation of the May 15 hearing, the parties are directed to confer and file a
7 second joint status update with the Court by no later than **Friday, May 4, 2018**, identifying the
8 discovery issues still in dispute. With respect to the parties’ primary disagreement concerning
9 plaintiff’s request that Pride produce unredacted product complaint files including the name,
10 address and phone number for complaining customers, the Court makes the following
11 observations to assist the parties in hopefully resolving their disagreement between themselves
12 and/or preparing their Second Joint Status Update.

13 Based upon the current record, the Court is not presently satisfied that Pride has made a
14 sufficient showing that it constitutes a “covered entity” under HIPAA. The Health Insurance
15 Portability and Accountability Act of 1996 (“HIPAA”) restricts health care entities from
16 disclosure of “protected health information.” Specifically, the Privacy Rule of HIPAA only
17 applies to “covered entities,” such as health plans, health care clearinghouses, and any health
18 care provider who transmits health information in electronic form in connection with
19 transactions. *See* 45 C.F.R. § 160.102(a)(3). Even if Pride does fall into the category of a
20 healthcare provider, which it likely does not, HIPAA does not shield Pride from responding
21 fully to plaintiff’s discovery requests. *See* 45 C.F.R. § 164.512(e)(1)(i).

22 Regulations authorized by the HIPAA, 42 U.S.C. § 1320 *et seq.*, prohibit *ex parte*
23 communications with health care providers regarding patients’ medical condition without their
24 consent, or importantly, a “qualified protective order.” *See* 45 CFR § 164.512. HIPAA’s
25 privacy provisions allow for disclosure of medical information in judicial proceedings;
26 however, the Act places certain requirements on both the medical professional providing the

1 information and the party seeking it. *See* 45 C.F.R. § 164.512(e) (2004). Specifically, the
2 regulations authorized by HIPAA permit disclosure of protected health information in judicial
3 proceedings in response to subpoenas or discovery requests if the party seeking the information
4 provides (1) satisfactory assurance that it has made reasonable efforts to secure a protective
5 order that both prohibits the parties from using or disclosing the protected health information
6 for any purpose other than the litigation, and (2) requires the return or destruction of the
7 protected health information at the end of the litigation or proceeding. 45 C.F.R. §
8 164.512(e)(1)(ii), (v).

9 To date, Pride has not explained why it believes it is a “covered entity” under HIPAA.
10 It is also not clear whether the incident files contain any personal *medical* information relating
11 to Pride customers, apart from a potential reference to a customer having received a
12 prescription for a Pride scooter rather than simply electing to purchase it without a doctor’s
13 medical recommendation. Even if Pride is a “covered entity” under HIPAA, however, Pride
14 must still produce the requested files in response to plaintiff’s discovery requests. *See e.g.*,
15 *Kolosnitsyn v. Crystal Mountain*, Case No. C08-5035-RBL, 2009 WL 1867343, *2 (W.D.
16 Wash. June 24, 2009) (granting plaintiff’s motion to compel Crystal Mountain to produce an
17 unredacted version of the Emergency Response Service injury report - including the injured
18 individual’s name and contact information – following an accident, because even if the EMS
19 injury report is privileged healthcare information under HIPAA, HIPAA does not shield
20 Crystal Mountain from its obligation to respond fully to discovery requests).¹ If the parties
21 have not resolved their HIPAA dispute by the May 15 hearing, the Court will further explore
22 the issue at that time.

23 ¹ If the current protective order entered in this case is insufficient to satisfy the HIPAA
24 regulations, the parties should confer and provide the Court with a proposed protective order
25 that prohibits disclosure of medical information contained in the files for any purpose other
26 than this litigation, and requires return or destruction of the files at the end of this lawsuit.
Pride would then promptly produce the unredacted files upon entry of the protective order by
the Court.

1 With respect to Pride's alternative assertion that an *in camera* review of the incident
2 files by the Court is necessary due to concerns regarding attorney-client privilege and/or the
3 work product doctrine, Pride should more thoroughly explain the factual and legal basis for its
4 assertion of the privilege. For example, if the Court directs Pride to unredact the names and
5 contact information for each complaining customer, and provide a privilege log to plaintiff
6 with respect to any assertions of attorney-client privilege or work product protection for
7 portions of the incident reports that reference internal legal advice, does that resolve the
8 parties' current dispute? The parties should more thoroughly address any remaining claims of
9 privilege in their second joint status update to enable to Court to issue a ruling during the
10 upcoming hearing.

11 The Clerk is directed to send a copy of this Order to counsel for plaintiff, counsel for
12 defendant Pride, and Judge Zilly.

13 DATED this 30th day of April, 2018.

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16 JAMES P. DONOHUE
17 United States Magistrate Judge
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