SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

TRIAL/IAS PART 32
NASSAU COUNTY

HOLLY SAVARESE, Administratrix of the Estate of CHARLOTTE PEARL FORREST,

Plaintiff,

- against -

SAINT FRANCIS HOSPITAL, ROSLYN, NEW YORK, JIM HILEPO, M.D., "JANE DOE R.N.", NAME FICTITIOUS TRUE NAME PRESENTLY UNKNOWN TO PLAINTIFF,

Defendants.

Index No.: 605321/16
Motion Seq. Nos.: 01, 02
Motion Dates: 09/25/18
09/25/18

The following papers have been read on these motions:

	Papers Numbered
Notice of Motion (Seq. No. 01), Affirmations and Exhibits	1
Notice of Cross-Motion (Seq. No. 02), Affirmations and Exhibits	2
Affirmation in Reply to Motion (Seq. No. 01) and in Opposition to Cross-Motion (Seq. No. 02) and Exhibits	3
Affirmation in Reply to Cross-Motion	4

Upon the foregoing papers, it is ordered that the motions are decided as follows:

Plaintiff moves (Seq. No. 01), pursuant to CPLR § 3126, for an order striking defendant Saint Francis Hospital, Roslyn, New York's ("St. Francis") Verified Answer for failure to comply with plaintiff's discovery demands.

Defendant St. Francis opposes the motion and cross-moves (Seq. No. 02), pursuant to CPLR § 3126, for an order dismissing plaintiff's Complaint with prejudice for failing to comply

with Court Ordered discovery; or, in the alternative, cross-moves, pursuant to CPLR § 3126(3), for an order precluding plaintiff from presenting evidence or testifying at the time of trial in support of the allegations of malpractice or damages due to the failure to provide Court Ordered discovery; and/or moves for an order vacating plaintiff's demands for Quality Assurance material pursuant to Public Health Law § 2805-m. Plaintiff opposes the cross-motion.

Plaintiff commenced the instant medical malpractice action with the filing of a Summons and Complaint on or about July 14, 2016. *See* Plaintiff's Affirmation in Support of Motion (Seq. No. 01) Exhibit A. Issue was joined by defendant St. Francis on or about August 11, 2016. *See* Plaintiff's Affirmation in Support of Motion (Seq. No. 01) Exhibit B. Issue was joined by defendant Jim Hilepo, M.D. on or about August 23, 2016. *See* Plaintiff's Affirmation in Support of Motion (Seq. No. 01) Exhibit C. On February 21, 2017, the parties entered into a Preliminary Conference Order. *See* Plaintiff's Affirmation in Support of Motion (Seq. No. 01) Exhibit D. On June 27, 2017, the parties entered into a Compliance Conference Order that was So-Ordered by this Court. *See* Plaintiff's Affirmation in Support of Motion (Seq. No. 01) Exhibit E. On October 3, 2017, the action was discontinued against defendant Jim Hilepo, M.D. *See* Plaintiff's Affirmation in Support of Motion (Seq. No. 01) Exhibit F.

In support of plaintiff's motion (Seq. No. 01), her counsel submits, in pertinent part, that, "[p]laintiff's case against SAINT FRANCIS HOSPITAL concerns the care and treatment that Ms. Forrest received at their facility. It is plaintiff's contention that defendant, SAINT FRANCIS HOSPITAL, failed to properly institute measures to protect Ms. Forrest's skin from becoming damaged by pressure; failed to properly implement a care plan for preventing and healing pressure ulcers after they developed; and, failed to adequately care for and treat Ms. Forrest

during her admission. As such, plaintiff served Combined Discovery Demands, dated November 3, 2016, demanding: All documents, including, but not limited to, all of your policies, rules, regulations, procedures, protocols, guidelines, standards, training manuals, instructions, pamphlets and/or any other written material with regard to the diagnosis and treatment of the condition for which you operated and/or treated on the Plaintiff. This is to include any operative protocols.... Initially, defendant objected to the demand but also indicated that it was searching for material responsive to the demand.... Thereafter, defendant supplemented its response by providing a copy of its Pressure Ulcer Prevention Policy. Defendant did *not* provide any materials regarding SAINT FRANCIS HOSPITAL's procedures and/or protocols for wound care guidelines, would care assessment, wound care treatment and/or incontinence guideline - all health conditions that Ms. Forrest was supposed to be treated for while in the care of SAINT FRANCIS HOSPITAL.... Because defendant's responses were deficient, plaintiff served a Notice for Discovery and Inspection, dated October 13, 2017, which renewed prior demands for SAINT FRANCIS HOSPITAL's policies and procedures regarding the diagnosis and treatment of *all* conditions for which SAINT FRANCIS HOSPITAL treated Ms. Forrest.... More specifically, plaintiff detailed her demand for documents pertaining to policies and procedures in place at the time Ms. Forrest was admitted for wound care guidelines, wound care assessment, wound care treatment and/or any incontinence guidelines.... Further, plaintiff demanded hospital policy protocols, standard procedure, intervention protocols, and written rules concerning dressing selection, treatment guidelines, and documentation of wound guidelines.... Despite the relevancy of the demanded documents, defendant made general objections to providing these materials arguing that they were 'Quality Assurance material.'... Defendant limited its response to its

Pressure Ulcer Prevention Policy. Moreover, despite the fact that plaintiff's initial demands called for: *all documents, including, but not limited to, all policies, rules, regulations, procedures, protocols, guidelines, standards, training manuals, instructions, pamphlets and/or any other written material with regard to the diagnosis and treatment of the condition for which you operated and/or treated on the plaintiff-decedent. This is to include any operative protocols*, it failed to provide any documentation related to its policy, or any other treatment that Ms. Forest received at its facility, but not limited to, its checklists and EMR Best Practices. To date, defendant has failed to provide material responses to plaintiff's multiple demands as to the policies and procedures that were in place during Ms. Forrest's admittance to SAINT FRANCIS HOSPITAL, specifically those pertaining to wound care and incontinence treatment." *See* Plaintiff's Affirmation in Support of Motion (Seq. No. 01) Exhibits M-Q.

Counsel for plaintiff details the numerous demands made upon defendant St. Francis with which it is alleged that defendant St. Francis failed to comply. *See id.*

Counsel for plaintiff argues that, "[i]n the present action, each and every demand made by plaintiff is material and necessary to her ability to prove the negligence of defendant in its treatment and care of Ms. Forrest. Each category of discovery pertains to policies and procedures that Ms. Forrest's treating medical staff were allegedly implementing; training they underwent prior to treating her; and, their assignment in the hospital during the time period she was admitted. If not pertaining to her treatment, then plaintiff's demands pertain to defendant's Record Retention Policy, billing procedures for the treatment they allegedly provided Ms. Forrest, or insurance coverage maintained at the time of her stay at SAINT FRANCIS HOSPITAL. Those demands are clearly material and necessary to the care and treatment of Ms. Forrest. As alleged above, defendant caused Ms. Forrest to develop pressure ulcers as a result of

the failures of SAINT FRANCIS HOSPITAL's medical staff and personnel to properly institute measures to protect Ms. Forrest's skin from becoming damaged by pressure; and, failed to properly implement a care plan for preventing pressure ulcers and the healing of pressure ulcers after they developed. SAINT FRANCIS HOSPITAL employees, nurses, and doctors admitted to certain policies and procedures required by defendant to prevent against the type of injuries suffered by Ms. Forrest. Defendant's staff also testified as to training provided and utilized by them in preparing to treat a patient like Ms. Forrest who could suffer from pressure ulcers. SAINT FRANCIS HOSPITAL's staff have testified to orders given by doctors, notes taken by nurses, procedures performed to prevent against pressure ulcers, and tests conducted as to skin moisture. Yet, defendant has either refused or failed to provide plaintiff with material proof that its staff underwent training for injuries of this kind and actually conducted tests and procedures to prevent against Ms. Forrest's cause of death. When defendant has provided relevant information, it has failed to further supplement as promised or failed to provide a complete response as promised, citing no reason for doing so. Plaintiff's recent demands to depose defendant's Compliance Officer and Departmental Record Coordinator are relevant and necessary considering how many materials defendant failed to provide because they allegedly no longer exist." *See* Plaintiff's Affirmation in Support of Motion (Seq. No. 01) Exhibits H-K.

In opposition to the motion (Seq. No. 01) and in support of the cross-motion (Seq. No. 02), counsel for defendant St. Francis submits, in pertinent part, that, "[o]n or about May 23, 2017, your Affirmant's firm substituted as attorneys for St. Francis Hospital.... On June 27, 2017, plaintiff was directed to serve a copy of the conditional benefits letter from Medicare and authorizations, including insurance.... On August 28, 2017, St. Francis Hospital served responses to plaintiff's Combined Demands.... On September 29, 2017, St. Francis Hospital served a

Supplemental Response to plaintiff's Combined Demands.... On October 3, 2017, a telephone conference was held with Judge Sher regarding plaintiff's objections to St. Francis Hospital's responses. All of the issues regarding the plaintiff's initial demands and St. Francis Hospital's responses were addressed. As a result, on November 17, 2017, St. Francis Hospital served a response to plaintiff's Notice for Discovery & Inspection dated October 13, 2017.... On March 23, 2018, Catherine Pirolo RN, of which (*sic*) there is no evidence (*sic*) she treated the decedent, was produced for a deposition. RN Pirolo reserved her right to review the transcript. Plaintiff's counsel has conspicuously failed to serve the deposition transcript on RN Pirolo, depriving her of her right to make any necessary corrections. Of course, by failing to serve the deposition on RN Pirolo, her testimony is not admissible and cannot be used against St. Francis Hospital.

On June 18, 2018, plaintiff's counsel emailed copies of demands purportedly served on May 19, 2018 (which never arrived at our office).... On June 25, 2018, due to the impending Court Conference St. Francis Hospital served a response to the plaintiff's demand, only one week after it was improperly served.... On June 26, 2018, a conference was held before Judge Sher where, obviously due to the short notice by plaintiff, defendant was constrained to ask for more time to respond to discovery. These demands sought material not maintained by St. Francis Hospital, but by a third-party. St. Francis Hospital was directed to obtain and provide this material. On July 16, 2018, St. Francis Hospital served a response to the plaintiff's demands.... Then again, on August 8, 2018, St. Francis Hospital served a supplemental response to the plaintiff's demands.... On August 28, 2018, all parties appeared before the Court. Plaintiff claimed that the only outstanding item of discovery was excess insurance information. Defendant agreed to respond. The Court adjourned the case for one week, to the Tuesday after Labor Day (September 4, 2018). On August 31, 2018, after hours the Friday before Labor Day weekend, plaintiff's counsel emailed

new discovery demands and demands for items for which we previously responded.... Plaintiff's counsel renewed (*sic*) objection to our responses from over one year ago which had already been addressed during a telephone conference with the Court. On September 4, 2018 all parties appeared before the Court. Despite having less than 24 hours to respond to the demands, the Court directed that plaintiff make a discovery motion to be returnable September 25, 2018. On September 13, 2018, plaintiff short-served defendant with the instant motion to strike/compel and improperly made the motion returnable only twelve days later, despite demanding opposition at least seven days prior to the return date. On September 21, 2018, St. Francis Hospital responded to the plaintiff's demand dated August 30, 2018.... The Court will note that St. Francis Hospital had already responded to most of the plaintiff's demands. For the most part, plaintiff simply demanded items which the hospital has already provided (*sic*) Affidavit explaining (*sic*) they do not exist." *See* Defendant St. Francis' Affirmation in Opposition to Motion (Seq. No. 01) and in Support of Cross-Motion (Seq. No. 02) Exhibits D-N.

Counsel for defendant St. Francis contends that, "[o]n September 21, 2018, St. Francis Hospital responded to the plaintiff's demand dated August 30, 2018 within the time provided pursuant to the CPLR.... There is no outstanding discovery by St. Francis Hospital. Therefore, the instant motion by plaintiff should be denied as moot. In addition, given the history of defendant's timely responses throughout the entire case, there can be no finding of bad faith and therefore, no basis for the striking of St. Francis Hospital's Answer.... The history of this case demonstrates that St. Francis Hospital has timely responded to the plaintiff's demands since August of 2017, shortly after the file was transferred from another law firm. The huge amount of discovery provided evidences the defendant's attempts to comply with all appropriate demands. St. Francis Hospital even obtained and provided material from a third-party at the direction of the Court.

There is no evidence that the defendants (*sic*) have engaged in discovery in bad faith. In fact, the evidence demonstrates that St. Francis Hospital has gone above and beyond to respond to the plaintiff's demands despite their abusive and beyond the pale nature. All issues regarding the initial discovery demands were dealt with (*sic*) the Court and the parties over the phone on October 3, 2017. In June, plaintiff's counsel began springing new demands on the defendant just before Court conferences, knowing there would be insufficient time to respond, and then misrepresent (*sic*) to the Court that there was outstanding discovery.... The August 30, 2018 demands, claiming a deficiency in the St. Francis Hospital's responses made one year ago, are especially egregious.... Plaintiff's motion to strike the Answer of St. Francis Hospital must be denied since there is no willful, contumacious or bad faith on behalf of the defense. Plaintiff's motion to compel must be denied as moot, as St. Francis Hospital has responded to each of the plaintiff's demands in a timely fashion and provided all material in its possession which is responsive to those demands." *See* Defendant St. Francis' Affirmation in Opposition to Motion (Seq. No. 01) and in Support of Cross-Motion (Seq. No. 02) Exhibit N.

Counsel for defendant St. Francis further asserts that, "[p]laintiff seeks statements, documents and/or records of St. Francis Hospital's deficiencies in wound care and pressure ulcer prevention and treatment. This information, of course, is expressly made privileged by the NYS Public Health Law and exempt from disclosure. Therefore, these demands must be vacated as improper and a protective order issued to prevent plaintiff from continuing to request material objected to on the basis of privilege. The information sought by plaintiff is privileged and statutorily protected, *per se*. Public Health Law §2805-m clearly provides that no reports or records prepared pursuant to PHL §§2805-j, 2805-k, 2805-l (as the reports requested are) 'shall be subject to disclosure under ...article thirty-one of the civil practice law and rules.' [citation

omitted]. Moreover, Public Health Law §2805-j refers to the peer reviews performed by hospitals' quality assurance committees, while §2805-l requires hospitals to report adverse events occurring at the hospital. Thus, any documentation prepared in furtherance of the Public Health Law's provision for peer review/quality assurance committees and **reporting of adverse events fall squarely within the exemptions provided in Public Health Law §2805-m**. Public Health Law §2805-m(1) & (2) clearly states, inter alia, that the information required to be collected and maintained pursuant to Section 22805-l of the Public Health Law shall be kept confidential and is exempt from disclosure pursuant to Article 31 of the CPLR:...[citations omitted]. Any statements, documents and/or records of St. Francis Hospital's deficiencies in wound care and pressure ulcer prevention and treatment are maintained pursuant to the Public Health Law. Accordingly, plaintiff is not entitled to negative outcome reports and incident reports."

Counsel for St. Francis also submits that, "plaintiff acknowledges that St. Francis Hospital has provided most of the discovery being sought or explained in an Affidavit that it does not exist. For instance, plaintiff's own motion describes how, based on the inadmissible testimony of RN Pirolo, they would like 'Report Sheets,' In that same section, **plaintiff cites to the Affidavit advising that there are no 'Report Sheets' maintained by the hospital and all hand-off communications between nurses are destroyed because they are not part of the medical record**. Like in every hospital, some nurses use hand-written sheets of papers to take or give (*sic*) report. They contain information directly from the medical record and are used like cheat sheets for the nurses for a snapshot of each patient's history, condition, etc. Like in every hospital, there is a HIPAA bin. Hand-off communications are placed in these bins and destroyed. The information is maintained in electronic format, called SBAR at St. Francis Hospital, which was provided with an Affidavit. The Affidavit explained that this was the complete copy of the

SBAR communication. These communications are not intended to be part of the patient's medical record and are not maintained as such. Yet, despite admitting that St. Francis Hospital has provided a complete response to this demand, plaintiff again demands material they already know does not exist. Plaintiff's counsel claims that every piece of paper is a 'record' pursuant to the Records Retention Policy.... Not every piece of paper generated in connection with a patient is considered a Medical Record. For instance, an Affidavit was provided explaining that hand-off communications are not part of the medical record. No part of the decedent's Medical Record has been altered or destroyed. The plaintiff was provided the Record Retention Schedule for Medical Records. There is nothing else of relevance, to the extent the Record Retention Schedule for Medical Records is relevant at all, in the Record Retention Schedule to a medical malpractice action. The Record Retention Schedule contains the schedule for all types of documents including employment records, business records, etc. Plaintiff demanded the Record Retention Schedule for Medical Records, which was provided in whole. Plaintiff now moves for the annual and monthly indicator assignments. Again, this is a demand which was responded to with an Affidavit. Not only is this material privileged as part of the Quality Assurance function of St. Francis Hospital, an Affidavit was provided advising that this program did not go into effect until August 2104! It is unclear how plaintiff's counsel could argue this information is relevant to the care rendered to the decedent before she died in July 2014. The material sought by plaintiff is not reasonably calculated to lead to admissible evidence. There is no evidence that any part of the Medical Record was ever altered or destroyed. The decedent's treatment was thoroughly documented in the almost 3,000 pages of medical records. The plaintiff is insisting that items must exist, without having any evidence of same. St. Francis Hospital's record retention policy, billing procedures for treatments or insurance coverage had nothing to do with the development

of the decedent's sacral wound. There is no obligation for a hospital to maintain records of staff training, the presentations provided or the scores of the tests the nurses achieved. Nevertheless, St. Francis Hospital has provided everything that was maintained with respect to this material.... Plaintiff has offered nothing to support the position that the material is (*sic*) sought is material and necessary to this matter. As plaintiff has failed to meet her burden establishing that she is entitled to the requested discovery, or that the requested discovery is material and necessary, defendant is entitled to a protective order.... Plaintiff's demands are clearly burdensome and palpably improper. Accordingly, the prejudice to St. Francis Hospital must stop and it is respectfully requested that this Court strike plaintiff's demands for discovery and depositions."

Counsel for defendant St. Francis further asserts that, "[i]n the instant action, plaintiff was directed to provide the plaintiff's collateral source records by Order of Judge Sher dated June 27, 2017.... The records demonstrate that the decedent's collateral sources were HIP/VIP Medicare Home HMO and Empire Blue Cross/Blue Shield. Defendant demanded authorizations for these records on May 21, 2018.... Plaintiff served an authorization for Empire Blue Cross/Blue Shield, but failed to complete the dates of service, initial section 9(a) (which is required by almost all providers) or notarize the authorization (which is required specifically by Empire Blue Cross/Blue Shield). A letter was sent to plaintiff on July 5, 2018 requesting that these deficiencies be corrected.... Plaintiff did not provide a corrected authorization. On August 16, 2018, another letter was sent to plaintiff with a copy of the rejection letter from Empire Blue Cross/Blue Shield (which we attempted to process despite the deficiencies) detailing the necessary steps for providing defendant with an appropriate authorization.... Plaintiff continues to refuse to provide a valid authorization for Empire Blue Cross/Blue Shield.... On June 27, 2018, St. Francis Hospital served a demand for an authorization for a facility where the decedent was a

patient in conjunction with her hospital visits and surgeries in the Spring of 2012... Despite the plaintiff's brother and husband testifying about this facility, plaintiff's counsel claims to not be aware of the same.... Whether or not the plaintiff must provide these authorizations is not in dispute. Plaintiff was directed by Court Order on June 27, 2017 to provide defendant with the demanded authorizations. The plaintiff's provision of incomplete authorizations, despite defendant forwarding the explicit instructions on how to complete the authorizations, is evidence of the contumacious manner in which plaintiff has conducted discovery.... Plaintiff's counsel's refusal to provide the most basic of discovery items has prejudiced the defendant's ability to conduct its defense." *See* Defendant St. Francis' Affirmation in Opposition to Motion (Seq. No. 01) and in Support of Cross-Motion (Seq. No. 02) Exhibits E, O-T.

In further support of plaintiff's motion (Seq. No. 01) and in opposition to defendant St. Francis' cross-motion (Seq. No. 02), counsel for plaintiff submits, in pertinent part, "[i]n its cross-motion, defendant attempts to misguide the Court into believing that plaintiff had not addressed outstanding discovery at previous conferences and suddenly sprung these discovery demands on defendant at the eve of certification for trial. This is simply not true. As illustrated in plaintiff's underlying motion, discovery was far from complete at that juncture and plaintiff has made repeated efforts throughout the last year to obtain relevant discovery from defendant only to be met with defendant's unsupported objections or premises that a search was being conducted for materials that eventually went unanswered.... More significantly, at the time of the conference [October 3, 2017], the depositions of the parties and non-party witnesses had not been held. It is completely illogical to argue that all discovery issues were resolved on the October 3, 2017 telephone conference considering the parties were still entitled to post-deposition discovery demands under CPLR §3101 for full disclosure of all matters material and necessary to

prosecution of the action. Many of plaintiff's discovery demands, made after October 3, 2017, pertain to materials raised and/or referenced by witnesses who worked for SAINT FRANCIS HOSPITAL. The remainder sought to clarify previous demands that were objected to by defendant.... With each demand and response, it became abundantly clear that defendant would not fully comply with discovery demands, making the instant motion completely necessary.... Since the filing of the motion, defendant has further responded to plaintiff's discovery demands and either provided the requested material or further objected claiming privilege or that the documents were destroyed.... With regard to the materials not provided, defendant continues to hide behind alleged privilege or unsubstantiated claims that the materials were destroyed through hospital protocol in complete disregard for the Court's orders and CPLR §3101. To further complicate matters, defendant relies on the affirmation of counsel to make the case that materials are privileged, rather than putting forth proper testimony to explain hospital protocol in collecting the materials demanded or to testify as to why the materials were destroyed. Because defendant refused to provide proper support for their (*sic*) objections and the claimed destruction of relevant demanded materials, the Court must strike defendant's answer for its willful and contumacious conduct in failing to disclose material and necessary discovery to plaintiff. Additionally, the Court must deny defendant's motion for a protective order because defendant has not met its burden of proof establishing that the materials demanded are confidential under the Public Health Law." *See* Plaintiff's Affirmation in Further Support of Motion (Seq. No. 01) and in Opposition to Cross-Motion (Seq. No. 02) Exhibit Z.

Counsel for plaintiff asserts that, "[i]n defendant's most recent discovery response, the Hospital provides basic discovery that has been demanded by plaintiff for over two (2) years now (ie: a detailed billing record of plaintiff's treatment).... It also reiterated its claims that certain

discovery - call logs, nurses communications, orders for consultation to Dr. De'Noto and Dr. Light, nurse training materials and test results, assignment sheets for the K-2 Unit where Ms. Forrest was treated, and presentations regarding pressure ulcers and wound care - were no longer maintained by defendant. Of note, *defense counsel*, not a representative of the hospital familiar with their practices and procedures, attests that certain materials requested by plaintiff are no longer maintained and, it was standard practice of the hospital to destroy these materials. Specifically, defense counsel claims that the Report Sheets were destroyed and the SBAR communication tool utilized by Hospital staff is not maintained as part of plaintiff-decedent's medical record. Defendant provided cursory affidavits from hospital staff attesting to the fact that they searched and did not find the requisite materials, but none of these affidavits speak to the record retention policy.... Defense counsel is not qualified to attest to what documents are considered to be part of the medical record of plaintiff-decedent.... If the demanded records were destroyed, defendant should be required to put forth a knowledgeable witness to explain their record retention policy and why certain records of plaintiff-decedent's treatment were not maintained for review by the plaintiff in the present action. Plaintiff is entitled to any materials that reference the treatment and care provided to plaintiff-decedent during her stay at SAINT FRANCIS HOSPITAL, so defendant should be required to turn over the materials or present a witness to testify as to why they are no longer available."

Counsel for plaintiff adds that, "[i]n regards to the deposition testimony of Catherine Pirolo, a nurse at SAINT FRANCIS HOSPITAL, plaintiff acknowledges that, although a copy of Ms. Pirolo's testimony was annexed to the moving papers, a copy of the transcript was not previously furnished to defense counsel, due to law office error. However, plaintiff has since sent a copy of the transcript to defense counsel's office for Nurse Pirolo's review and execute in full

compliance with CPLR §3116(a).... Plaintiff does not intend to ignore CPLR 3116 and present Pirolo's testimony at the time of trial without her review and execution; rather, plaintiff relies upon the testimony in showing that defendant must disclose material and necessary information in regards to the training of the Hospital staff and treatment provided to plaintiff-decedent. Moreover, defendant and Nurse Pirolo will not be prejudiced in reviewing and executing the transcript considering the case has not yet been certified for trial and discovery remains outstanding. Therefore, the Court should disregard defendant's argument that discovery sought based upon Nurse Pirolo's deposition should be vacated by the Court."

Counsel for plaintiff also argues that, "[i]n defendant's latest discovery response, served after the filing of the underlying motion, defendant claims that two of plaintiff's discovery demands - records of deficiencies issued to hospital for pressure ulcer prevention and wound treatment, and data collected on the K-2 Unit where Ms. Forrest resided - are privileged as 'Quality Assurance' materials. Defendant relies on this contention in support of its opposition to the underlying motion and in support of its cross-motion for a protective order.... And, not (*sic*) that defendant cites to Public Health Law §2805-j and §2805-m to claim privilege, it fails to put forth sufficient evidence that the materials sought fall into the categories of confidentiality under the Public Health Law. New York courts have held that Public Health Law §2805-j and §2805-m do not provide a defendant hospital with a privilege over materials it claimed were 'generated in connection with a quality assurance review function' where the defendant hospital put forth conclusory statements in an affidavit of a hospital representative of such. [citations omitted]. The proper avenue for objecting on privilege is to supply an affidavit explaining, in detail, why the materials fell under Quality Assurance materials. Instead, defendant cites to the Affidavit of Elizabeth Grahn, a nursing education specialist for the Hospital, who simply attests that

defendants did not have data on plaintiff under the research study referred to as 'Moisture Associated Skin Damage Indicator.' This affidavit makes no reference to the deficiencies being privileged under the Public Health Law."

Counsel for plaintiff further contends that, "[i]n a veiled attempt to discredit plaintiff's due diligence in providing discovery, defendant argues plaintiff's case should be dismissed because defendant has been unable to produce two authorizations for medical records by the plaintiff. While defendant cites the letters it sent to plaintiff regarding its demand for an authorization to Empire Blue Cross/Blue Shield, it conveniently excluded correspondence from plaintiff's counsel that enclosed said authorization. As required by (*sic*) Compliance Conference Order, plaintiff provided an authorization for Empire Blue Cross/Blue Shield, and all other medical providers and collateral sources, on July 10, 2017.... Again, on July 16, 2018, plaintiff exchanged a fresh authorization for Empire Blue Cross/Blue Shield in response to defendant's July 5, 2018 letter.... Defendant's contention that the plaintiff **refused** to provide a valid authorization for Empire Blue Cross/Blue Shield is notably unsupported by any facts in evidence. Moreover, it conveniently ignores two instances where plaintiff previously provided defendant with an authorization. Nevertheless, plaintiff has provided a *third* authorizations for Empire Blue Cross/Blue Shield.... In regard to the authorization for HIP/VIP Medicare Home HMO, defendant admits that plaintiff provided an authorization for this medical provider *multiple* times throughout litigation. Further, plaintiff left dates of service blank in the authorization and gave consent for the entire medical file in response to defendant's demand that the authorizations be unrestricted. Defense counsel claims that their request for our permission to fill in the appropriate dates of service for the HIP/VIP Medicare Home HMO authorization has gone unanswered. In fact, upon receipt of a voicemail from the authorizations clerk at defense counsel's office, your

affirmant personally called defense counsel's office and advised of our consent to fill in the appropriate dates of service on the subject authorization. Therefore, this point is moot. Plaintiff rightfully objected to defendant's demand for an authorization for '[t]he facility where decedent was a patient in conjunction with her hospital visits and surgeries at North Shore Hospital in 2012.'... It is impossible for plaintiff to provide an authorization for a facility and/or medical provider that was not actually named in the demand. As such, plaintiff objected to the demand as vague, overbroad, not sufficiently particularized, not likely to lead to discoverable information, and unduly burdensome.... Plaintiff cannot be expected to do the work of defense counsel in searching for the name of certain facilities in which they seek to obtain medical records from. If defendant wants certain information from plaintiff, it must sufficiently particularize what exactly it is looking for in order for a proper response to be provided. Therefore, plaintiff appropriately objected to the demand but is willing to provide an authorization whenever defendant presents a demand that actually names a facility relevant to the underlying issues." *See* Plaintiff's Affirmation in Further Support of Motion (Seq. No. 01) and in Opposition to Cross-Motion (Seq. No. 02) Exhibits AA-CC.

New York has long favored "open and far-reaching pretrial discovery." *Kavanaugh v. Ogden Allied Maintenance Corp.*, 92 N.Y.2d 952, 683 N.Y.S.2d 156 (1998) *quoting DiMichel v. South Buffalo Ry. Co.*, 80 N.Y.2d 184, 590 N.Y.S.2d 1(1992) *cert. den. sub. nom. Poole v. Consolidated Rail Corp.*, 510 U.S. 816 (1993). CPLR § 3101(1) provides for "full disclosure of all matters material and necessary in the prosecution or defense of an action...." This provision has been liberally construed to require disclosure of any information or material reasonably related to the issues "which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason." *Allen v. Crowell-Collier Pub. Co.*,

21 N.Y.2d 403, 288 N.Y.S.2d 449 (1968). *See also Titleserv, Inc. v. Zenobio*, 210 A.D.2d 314, 619 N.Y.S.2d 769 (2d Dept. 1994). "The trial court is afforded broad discretion in supervising disclosure." *Those Certain Underwriters at Lloyds, London v. Occidental Gems, Inc.*, 11 N.Y.3d 843, 873 N.Y.S.2d 239 (2008). "If there is any possibility that the information is sought in good faith for possible use as evidence-in-chief or in rebuttal or for cross-examination, it should be considered evidence material . . . in the prosecution or defense." *Allen v. Crowell-Collier Pub. Co.*, *supra.*

Indeed, "the scope of permissible discovery is not entirely unlimited and the trial court is invested with broad discretion to supervise discovery and to determine what is 'material and necessary' as that phrase is used in CPLR 3101(a)." *Auerbach v. Klein*, 30 A.D.3d 451, 816 N.Y.S.2d 376 (2d Dept. 2006). *See also Ural v. Encompass Ins. Co. of Am.*, 97 A.D.3d 562, 948 N.Y.S.2d 621 (2d Dept. 2012). Ultimately, "'[i]t is incumbent on the party seeking disclosure to demonstrate that the method of discovery sought will result in the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information bearing on the claims.'" *Gomez v. State of New York*, 106 A.D.3d 870, 965 N.Y.S.2d 542 (2d Dept. 2013) *quoting Vyas v. Campbell*, 4 A.D.3d 417, 775 N.Y.S.2d 375 (2d Dept. 2004). However, the full disclosure authorized by CPLR § 3101(a) does not mean uncontrolled and unfettered disclosure. *See Farrell v. E.W. Howell Co., LLC*, 103 A.D.3d 772, 959 N.Y.S.2d 735 (2d Dept. 2013); *Romance v. Zavala*, 98 A.D.3d 726, 950 N.Y.S.2d 390 (2d Dept. 2012).

Furthermore, pursuant to CPLR § 3124, disclosure provisions are to be liberally construed. Ultimately, a trial court is afforded broad discretion in managing disclosure. *See* CPLR §§ 3124, 3101(a); *Kavanagh v. Ogden Allied Maintenance Corp.*, *supra.*

CPLR § 3126 provides the "[p]enalties for refusal to comply with order or to disclose." It reads, "[i]f any party, or a person who at the time a deposition is taken or an examination or inspection is made is an officer, director, member, employee or agent of a party or otherwise under a party's control, refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed pursuant to this article, the court may make such orders with regard to the failure or refusal as are just, among them: 1. An order that the issues to which the information is relevant shall be deemed resolved for purposes of the action in accordance with the claims of the party obtaining the order; or 2. an order prohibiting the disobedient party from supporting or opposing designated claims or defenses, from producing in evidence designated things or items of testimony, or from introducing any evidence of the physical, mental or blood condition sought to be determined, or from using certain witnesses; or 3. an order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or any part thereof, or rendering a judgment by default against the disobedient party."

The nature and degree of the sanction to be imposed on a motion pursuant to CPLR § 3126 is a matter reserved to the sound discretion of the trial court. *See Dokaj v. Ruxton Tower Ltd. Partnership*, 91 A.D.3d 812, 938 N.Y.S.2d 101 (2d Dept. 2012). The drastic remedy of striking a pleading for failure to comply with court ordered disclosure will be granted only where the conduct of the resisting party is shown to be willful and contumacious. *See Pirro Group, LLC v. One Point St., Inc.*, 71 A.D.3d 654, 896 N.Y.S.2d 152 (2d Dept. 2010). To invoke the drastic remedy of preclusion, the Court must determine that the party's failure to comply with a disclosure order was the result of willful, deliberate and contumacious conduct or its equivalent. *See Arpino v. F.J.F. & Sons Elec. Co., Inc.*, 102 A.D.3d 201, 959 N.Y.S.2d 74 (2d Dept. 2012);

Assael v. Metropolitan Tr. Auth., 4 A.D.3d 443, 772 N.Y.S.2d 364 (2d Dept. 2004). Willful and contumacious conduct can be inferred from repeated non-compliance with court orders, *inter alia*, directing depositions, coupled with either no excuses, or inadequate excuses; or a failure to comply with court ordered discovery over an extended period of time. *See Prappas v. Papadatos*, 38 A.D.3d 871, 833 N.Y.S.2d 156 (2d Dept. 2007).

Pursuant to CPLR § 3126 when a party refuses "to obey an order for disclosure or willfully fails to disclose information which the court finds ought to have been disclosed pursuant to this article, the court may make such orders with regard to the failure or refusal as are just..." CPLR § 3126(3) authorizes the court to strike pleadings or grant a default judgment against the disobedient party. The court may certainly impose sanctions or strike pleadings where a party fails to provide disclosure pursuant to an order. *See* SIEGEL, PRACTICE COMMENTARIES, 3126:5. It is only proper to strike a pleading, however, where it appears that the failure to obey the court's order is "deliberate and contumacious." *See Sindeband v. McCleod*, 226 A.D.2d 623, 641 N.Y.S.2d 127 (2d Dept. 1996); *Ortiz v. Weaver*, 188 A.D.2d 290, 590 N.Y.S.2d 474 (1st Dept. 1992). "[W]here a party disobeys a court order and by his conduct frustrates the disclosure scheme provided by the CPLR, dismissal of the [pleading] is within the broad discretion of the court." *See Eagle Insurance Company of America v. Behar,* 207 A.D.2d 326 (2d Dept. 1994).

Although, as mentioned, the Court has broad discretion in determining the appropriate sanction pursuant to CPLR § 3126, the "general rule is that a court should only impose a sanction commensurate with the particular disobedience it is designed to punish and go no further." *See Rossal-Daub v. Walter*, 58 A.D.3d 992, 871 N.Y.S.2d 751 (3d Dept. 2009) *citing Landrigen v. Landrigen*, 173 A.D.2d 1011, 569 N.Y.S.2d 843 (3d Dept. 1991)

The Court will first address plaintiff's motion (Seq. No. 01), pursuant to CPLR § 3126, for an order striking defendant Saint Francis' Verified Answer for failure to comply with plaintiff's discovery demands.

As to plaintiff's demand for statements, documents and/or records of defendant St. Francis' deficiencies in wound care and pressure ulcer prevention and treatment (*see* Plaintiff's Affirmation in Support of Motion (Seq. No. 01) Exhibit M ¶ 10), the Court finds that defendant St. Francis' complied with the demand as to pressure ulcer prevention and treatment in its September 29, 2017 Supplemental Response to Plaintiff's Combined Demand when it provided plaintiff with a copy of its Pressure Ulcer Prevention Policy. *See* Defendant St. Francis' Affirmation in Opposition to Motion (Seq. No. 01) and in Support of Cross-Motion (Seq. No. 02) Exhibit G ¶ 8 Exhibit A. With respect to the demand for defendant St. Francis' deficiencies in wound care, defendant St. Francis provided plaintiff with the Affidavit of Kathleen Engber, RN ("Nurse Engber"), the Director of Nursing Education and Clinical Resources at defendant St. Francis. *See* Defendant St. Francis' Affirmation in Opposition to Motion (Seq. No. 01) and in Support of Cross-Motion (Seq. No. 02) Exhibit N ¶ 1 Exhibit A. Nurse Engber asserts that, "I am fully familiar with St. Francis Hospital's policies and procedure manuals as they existed in 2014. There were no specific policies or procedures pertaining to 'Wound Care Guidelines', 'Wound Care Assessment', 'Wound Care treatment' or 'Incontinence Care' other than what may be included in the 'Pressure Ulcer Prevention' policy previously provided. I have had a search conducted for any in-service presentation materials regarding pressure ulcers or wound care from between July 2012 and July 2014. No materials have been found." *Id.*

As to plaintiff's request concerning defendant St. Francis' "liability insurance policies" (*see* Plaintiff's Affirmation in Support of Motion (Seq. No. 01) Exhibit M ¶ 11), in the June 27,

2017 So-Ordered Stipulation, counsel for defendant St. Francis agreed "to provide insurance coverage policy within 30 days." Based upon the representation of counsel for plaintiff, and upon counsel for defendant St. Francis' response to this demand, the Court finds counsel for defendant St. Francis has yet to fully comply with this demand and provide a copy of its primary insurance policy. *See* Defendant St. Francis' Affirmation in Opposition to Motion (Seq. No. 01) and in Support of Cross-Motion (Seq. No. 02) Exhibit F ¶ 11 and Exhibit N ¶ 2.

As to plaintiff's demand for detailed billing records for decedent (*see* Plaintiff's Affirmation in Support of Motion (Seq. No. 01) Exhibit M ¶ 20), the Court finds that defendant St. Francis' complied with this demand. *See* Defendant St. Francis' Affirmation in Opposition to Motion (Seq. No. 01) and in Support of Cross-Motion (Seq. No. 02) Exhibit G ¶ 20 Exhibit B and Exhibit N ¶ 4 Exhibit B.

As to plaintiff's demand for call logs made to physicians of defendant St. Francis relating to decedent's treatment (*see* Plaintiff's Affirmation in Support of Motion (Seq. No. 01) Exhibit M ¶ 21), the Court finds that defendant St. Francis' complied with this demand. Counsel for defendant St. Francis advised counsel for plaintiff that, "no call logs were maintained by the defendant independent of what may have been documented in the medical (*sic*) provided on August 28, 2017." *See* Defendant St. Francis' Affirmation in Opposition to Motion (Seq. No. 01) and in Support of Cross-Motion (Seq. No. 02) Exhibit N ¶ 5 and Exhibit F ¶ 12 Exhibit A.

As to plaintiff's demand for consultations for Dr. George De'Noto and Dr. Light, and Dr. De'Noto's notes, records and/or communications regarding decedent (*see* Plaintiff's Affirmation in Support of Motion (Seq. No. 01) Exhibit S ¶ 7), the Court finds that defendant St. Francis' complied with this demand. Counsel for defendant St. Francis advised counsel for plaintiff that, "no consult orders were maintained by the defendant independent of what may have

been documented in the medical (*sic*) provided on August 28, 2017." *See* Defendant St. Francis' Affirmation in Opposition to Motion (Seq. No. 01) and in Support of Cross-Motion (Seq. No. 02) Exhibit N ¶ 7 and Exhibit F ¶ 12 Exhibit A.

As to plaintiff's demand for "the contact information for the entity responsible for preparing and/or hosting and/or retaining the Health Stream/CLE/PowerPoint" and "copies of the quizzes taken by the staff who rendered treatment to plaintiff-decedent" (*see* Plaintiff's Affirmation in Support of Motion (Seq. No. 01) Exhibit L ¶ 8), the Court finds that defendant St. Francis' complied with this demand. Counsel for defendant St. Francis asserts that, "defendant responded to this demand on July 16, 2018, with an Affidavit explaining that the Health Streams module was not assigned by the defendant until after June 23, 2014, three weeks prior to the decedent's death. The Affidavit also explained that the quizzes were not maintained by the defendant. Health Streams was issued by the defendant. The staff are not required to take Continued Legal Education classes (CLE's (*sic*)). It is unclear what Power Point plaintiff is referring to, other than what was provided on July 16, 2018, which was created and maintained by NDNQI." *See* Defendant St. Francis' Affirmation in Opposition to Motion (Seq. No. 01) and in Support of Cross-Motion (Seq. No. 02) Exhibit N ¶ 8 and Exhibit K ¶ 1 Exhibit A.

As to plaintiff's demands with respect to the Nurse/Assistant Nurse/CAN/PCA Shift Reports, Monthly Reports and Annual and Monthly Indicator Assignments (*see* Plaintiff's Affirmation in Support of Motion (Seq. No. 01) Exhibits L ¶ 11, M and S), the Court finds that defendant St. Francis' complied with these demands. *See* Defendant St. Francis' Affirmation in Opposition to Motion (Seq. No. 01) and in Support of Cross-Motion (Seq. No. 02) Exhibit N ¶ 9 Exhibit C, Exhibit K ¶ 1 Exhibits A and B, Exhibit L ¶¶ 3, 5-7 Exhibits B and C.

With respect to plaintiff's demand to take depositions of defendant St. Francis' Compliance Officer and the Departmental Record Coordinator, the Court finds that this demand is overbroad and can be complied with by counsel for defendant St. Francis providing plaintiff with an affidavit of a representative from defendant St. Francis who can attest that the materials requested by plaintiff that were destroyed were not part of the decedent's medical record. *See* Plaintiff's Affirmation in Support of Motion (Seq. No. 01) Exhibit Q ¶ 3 Exhibit A.

Based upon the above, the Court finds that the record before it does not clearly establish a pattern of wilfulness or contumacious conduct necessary to justify dismissal of defendant Saint Francis' Verified Answer pursuant to CPLR § 3126. *See Warner v. Orange County Regional Medical Center*, 126 A.D.3d 887, 6 N.Y.S.3d 83 (2d Dept. 2015); *De Leo v. State-Whitehall Co.*, 126 A.D.3d 750, 5 N.Y.S.3d 277 (2d Dept. 2015); *Chong v. Chaparro*, 94 A.D.3d 800, 941 N.Y.S.2d 709 (2d Dept. 2012); *Hillside Equities, LLC v. UFH Apartments, Inc.*, 297 A.D.2d 704, 747 N.Y.S.2d 541 (2d Dept. 2002).

The drastic remedy of striking a pleading is warranted where the party's failure to comply with court-ordered discovery is willful and contumacious." *Commisso v. Orshan*, 85 A.D.3d 845, 925 N.Y.S.2d 612 (2d Dept. 2011). Here, there is nothing to support such a drastic remedy as defendant St. Francis did not repeatedly fail to respond to discovery demands. *See Dank v. Sears Holding Mgt. Corp.*, 69 A.D.3d 557, 892 N.Y.S.2d 510 (2d Dept. 2010).

Accordingly, plaintiff's motion (Seq. No. 01), pursuant to CPLR § 3126, for an order striking defendant Saint Francis' Verified Answer for failure to comply with plaintiff's discovery demands, is hereby **DENIED**. However, it is hereby

ORDERED that defendant St. Francis must provide a copy of its primary insurance policy to plaintiff within thirty (30) days of the date of this Decision and Order. And it is further

ORDERED that defendant St. Francis must provide plaintiff with an affidavit of a representative from defendant St. Francis who can attest that the materials requested by plaintiff that were destroyed were not part of the decedent's medical record.

The Court will now address defendant St. Francis' cross-motion (Seq. No. 02), pursuant to CPLR § 3126, for an order dismissing plaintiff's Complaint with prejudice for failing to comply with Court Ordered discovery; or, in the alternative, pursuant to CPLR § 3126(3), for an order precluding plaintiff from presenting evidence or testifying at the time of trial in support of the allegations of malpractice or damages due to the failure to provide Court Ordered discovery; and/or for an order vacating plaintiff's demands for Quality Assurance material pursuant to Public Health Law § 2805-m.

With respect to defendant St. Francis' demands for collateral source records (*see* Defendant St. Francis' Affirmation in Opposition to Motion (Seq. No. 01) and in Support of Cross-Motion (Seq. No. 02) Exhibit E and Exhibit O),"[i]t is well settled that a party must provide duly executed and acknowledged written authorizations for the release of pertinent medical records under the liberal discovery provisions of the CPLR when that party has waived the physician-patient privilege by affirmatively putting his or her physical or mental condition in issue." *Cynthia B. v. New Rochelle Hosp. Med. Ctr.*, 60 N.Y.2d 452, 470 N.Y.S.2d 122 (1983); *Lombardi v. Hall*, 5 A.D.3d 739, 774 N.Y.s.2d 560 (2d Dept. 2004); *Syron v. Paolelli*, 238 A.D.2d 710, 656 N.Y.S.2d 419 (3d Dept. 1997). However, the principle of "full disclosure" does not give a party the right to uncontrolled and unfettered disclosure. *See Farrell v. E.W. Howell Co., LLC*, 103 A.D.3d 772, 959 N.Y.S.2d 735 (2d Dept. 2013).

The Court finds that counsel for plaintiff has provided defendant St. Francis with authorizations for Empire Blue Cross/Blue Shield, albeit initially with alleged deficiencies. *See*

Plaintiff's Affirmation in Further Support of Motion (Seq. No. 01) and in Opposition to Cross-Motion (Seq. No. 02) Exhibits AA-CC. Counsel for plaintiff has also provided defendant St. Francis with an authorization as to HIP/VIP Medicare Home HMO and has given counsel for defendant St. Francis permission to fill in the appropriate dates of service on said authorization. *See* Defendant St. Francis' Affirmation in Opposition to Motion (Seq. No. 01) and in Support of Cross-Motion (Seq. No. 02) Exhibits Q and R.

With respect to defendant St. Francis' demand for an authorization for a facility where the decedent was a patient in conjunction with her hospital visits and surgeries in the Spring of 2012, based upon the arguments presented in the instant motion papers, the Court finds that plaintiff's brother and husband are in possession of the information necessary for counsel for defendant to provide an authorization request with respect to same. Therefore, counsel for plaintiff is to ascertain said information from her client and provide the name of the subject facility to counsel for defendant St. Francis in order to facilitate the preparation of a complete authorization.

As to counsel for defendant St. Francis' argument that counsel for plaintiff failed to provide defendant St. Francis with a copy of the deposition testimony of Catherine Pirolo, RN, the transcript of Catherine Pirolo, RN's testimony was provided to counsel for defendant St. Francis on or about October 1, 2018. *See* Plaintiff's Affirmation in Further Support of Motion (Seq. No. 01) and in Opposition to Cross-Motion (Seq. No. 02) Exhibit AA.

As the Court held above as to defendant St. Francis, the record before it does not clearly establish a pattern of wilfulness or contumacious conduct necessary to justify dismissal of plaintiff's Complaint pursuant to CPLR § 3126. *See Warner v. Orange County Regional Medical Center*, *supra*; *De Leo v. State-Whitehall Co.*, *supra*; *Chong v. Chaparro*, 94 A.D.3d 800, *supra*; *Hillside Equities, LLC v. UFH Apartments, Inc.*, *supra*. There is nothing to support such a drastic

remedy as plaintiff did not repeatedly fail to respond to discovery demands. *See Dank v. Sears Holding Mgt. Corp., supra.*

Accordingly, the branches of defendant St. Francis' cross-motion (Seq. No. 02), pursuant to CPLR § 3126, for an order dismissing plaintiff's Complaint with prejudice for failing to comply with Court Ordered discovery; or, in the alternative, pursuant to CPLR § 3126(3), for an order precluding plaintiff from presenting evidence or testifying at the time of trial in support of the allegations of malpractice or damages due to the failure to provide Court Ordered discovery, are hereby **DENIED**. However, it is hereby

ORDERED that counsel for plaintiff is to ascertain said information from her client with respect to the facility where the decedent was a patient in conjunction with her hospital visits and surgeries in the Spring of 2012, and provide the name of the subject facility to counsel for defendant St. Francis in order to facilitate the preparation of a complete authorization.

As to the branch of defendant St. Francis' cross-motion for an order vacating plaintiff's demands for Quality Assurance material pursuant to Public Health Law § 2805-m, CPLR § 3103(a) reads, "[t]he court may at any time on its own initiative, or on a motion of any party or of any person from whom discovery is sought, make a protective order denying, limiting, conditioning or regulating the use of any disclosure device. Such order shall be designed to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts."

New York State Education Law § 6527(3) states, in pertinent part, "[n]either the proceedings nor the records relating to performance of a medical or a quality assurance review function or participation in a medical or dental malpractice prevention program nor any report required by the department of public health pursuant to section twenty-eight hundred five-l of the

public health law described herein,..., shall be subject to disclosure under article thirty-one of the civil practice laws and rules except as hereinafter provided or as provided by any other provision of law."

The "quality assurance privilege" shields from disclosure certain records and reports generated by a hospital in performing either medical malpractice *or* quality assurance review (emphasis added)." *See Leardi v. Lutheran Medical Center*, 67 A.D. 3d 651, 888 N.Y.S.2d 168 (2d Dept. 2009). New York State Education Law § 6527(3) actually confers confidentiality on three categories of documents: records relating to the performance of medical review and quality assurance functions, records reflecting "participation in a medical and dental malpractice prevention program" and reports required by the New York State Department of Health... pursuant to Public Health Law § 2805-l. *See id.*; *Katherine F. v. State of New York*, 94 N.Y.2d 200, 702 N.Y.S.2d 231 (1999).

Defendant St. Francis has asserted that the "statements, documents and/or records of St. Francis Hospital's deficiencies in wound care and pressure ulcer treatment" ... are "expressly made privileged by the NYS Public Health Law and exempt from disclosure." However, the Court finds that defendant St. Francis has failed to set forth any admissible evidence, including, but not limited, to an affidavit from a director of Quality Management at defendant hospital, or someone in a similar capacity, who could attest to the fact that the reports at issue in plaintiff's discovery demand, and that are the subject of the instant cross-motion for a protective order, were created solely for the purpose of carrying out defendant St. Francis' statutorily mandated malpractice prevention/quality assurance program.

Therefore, the branch of defendant St. Francis' cross-motion (Seq. No. 02), for an order vacating plaintiff's demands for Quality Assurance material pursuant to Public Health Law § 2805-m, is hereby **DENIED**.

All parties shall appear for a Certification Conference in IAS Part 32, Nassau County Supreme Court,100 Supreme Court Drive, Mineola, New York, on January 29, 2019, at 9:30 a.m.

This constitutes the Decision and Order of this Court.

ENTER:

DENISE L. SHER, A.J.S.C.

Dated: Mineola, New York
December 18, 2018

ENTERED

DEC 19 2018

NASSAU COUNTY
COUNTY CLERK'S OFFICE