UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,
and THE STATE OF WISCONSIN,
ex rel. DR. TOBY TYLER WATSON,

Plaintiffs,

v. Case No. 11-CV-236

JENNIFER KING VASSEL,

Defendant.

DEFENDANT JENNIFER KING VASSEL'S BRIEF IN OPPOSITION TO PLAINTIFF'S SECOND MOTION FOR ENTRY OF AN HIPAA QUALIFIED PROTECTIVE ORDER

Despite attempting to parse his request for medical records, the plaintiff's second motion is the same as the first: a fishing expedition without a basis in law or fact. The motion must be denied. Defendant Jennifer King Vassel (Dr. King), by her attorneys, Gutglass, Erickson, Bonville & Larson, S.C., respectfully submit the following brief in opposition to the plaintiff's second motion for entry of an HIPAA qualified protective order.

ARGUMENT

I. THE PLAINTIFF REQUESTS THIS COURT APPROVE A BOUNDLESS FISHING EXPEDITION.

As in the first motion, the plaintiff is again requesting nearly limitless access to the medical records of Dr. King's minor patients, without demonstrating any relationship to him or N.B., the minor that is the subject of this case. The case at bar involves medications

prescribed for N.B.; nowhere in his brief does the plaintiff state that the medical records collected would relate to this case. 45 C.F.R. 164.512(e)(1)(v) prohibits the plaintiff "from using or disclosing the protected health information *for any purpose other than the litigation or proceeding for which such information was requested* [. . . .]" (emphasis added.) The plaintiff, in fact, specifically states that the records obtained would *not* be used for this case: "It is true that Dr. Watson is seeking to identify off-label prescriptions ***besides N.B.*** [. . . .]" *Plaintiff's brief,* p. 3 (Document 105, p. 3).

While the plaintiff contends in his brief that he agrees to the redaction of patient names (but this language is absent from his proposed order), he still requests that patients' confidential Medicaid identification numbers be provided, yet does not state what he plans to do with those numbers. "[E]ven if the individual or entity accessing the prescription PHI [personal health information] of 'Patient X' does not know that the information belongs to or is associated with Patient X, Patient X knows that the information belongs to her and knows that someone out there might be viewing that information without her consent." Christopher R. Smith, "Somebody's Watching Me: Protecting Patient Privacy in Prescription Health Information," 36 Vermont Law Review 4, p. 936. The plaintiff wants access to Medicaid identification numbers (which are often related to a person's Social Security number) and prescription medication information which, even if the patient's name is redacted, may contain other personal information such as the patient's medical condition, date of birth, pharmacy location (so the general area where the patient lives may be known), the address of the patient, and the name of the medication.

The plaintiff wants to hide behind a court order in to obtain medical records of minor patients to comb through their records without the knowledge of them or their parents, without identifying a purpose for this disclosure (although an educated guess would be to prosecute other false claims act claims against Dr. King). The Court's decision denying the plaintiff's first motion remains relevant here:

> In the very least, Dr. Watson has failed to provide this Court with any indication of how he would use the records he seeks. He requests entry of an extremely broad order that would enable him to receive a vast amount of documents, and yet he has failed to provide the Court with any limiting principle or purpose for the requested documents other than their potential relevance. The Court will not provide Dr. Watson unfettered access to patient-identifying information without first knowing the intended use of that information.

(Document 39, p.2).

While he purports to limit his request to only those records related to Wisconsin Medicaid programs, the plaintiff's request is disingenuous. The plaintiff's request still covers all of the Medicaid programs in the state, as the State administers the Medicaid program[1] (of note, he is not requesting records for private pay patients, but only for patients' claims paid with federal or state money, in order to assert false claims act claims).

"[D]iscovery is not to be used as a fishing expedition." ***E.E.O.C. v. Harvey L. Walner & Associates,*** 91 F.3d 963, 971 (7th Cir.1996). The plaintiff's requested order has no relation

[1]"In the case of prescription drugs, pharmacies pay pharmaceutical companies for drugs and then submit claims to the state Medicaid agency for reimbursement." ***Watson v. King-Vassel***, ___ F.3d ___, 2013 WL 4532140, *6 (7th Cir. 2013).

to the case at bar. The Court should deny this motion.

II. THE REQUESTED ORDER IS EXCESSIVELY BROAD, UNDULY BURDENSOME, AND DIFFERS FROM THE ARGUMENTS PRESENTED IN THE PLAINTIFF'S BRIEF.

While the plaintiff purports in his brief that he is not requesting the names of the patients be disclosed, his proposed order does not state this. The proposed order requests that state Medicaid programs comb through all of their records, since March 3, 2005, determine what patients received prescription medication from Dr. King, whether the particular medication was prescribed off-label, and whether the prescription has any basis in the compendia. The plaintiff also requests "demographic information" relating to the "past, present or future physical or mental condition of an individual," the "provision of care to an individual," or "the payment for care provided to an individual, which **identifies the individual or which reasonably could be expected to identify the individual**." *Plaintiff's proposed order*, p. 2 (Document 104-1, p. 2) (emphasis added). Thus, despite the representations in his brief, the plaintiff's order does not request redaction of the patients' names, and in fact mandates that they be disclosed. The order is excessively broad, requiring disclosure of not only prescription medications, but also the physical and mental health condition of a patient, what care was provided to that patient, and the billing invoices for payment of the care provided to the patient*, all without the knowledge of the patient and the patient's parents.*

Other areas of the order are also extremely expansive. The plaintiff requests that he be permitted to disclose patient information to juror venire members, meaning that a patient's

identifying information could be disclosed to members of the public, even if they are not selected to be a member of the jury. ***Id.***, p. 2. Moreover, it is unknown what is the purpose of paragraph seven of the order, and there is no explanation of it in the plaintiff's brief. ***Id.***, p. 3. If the plaintiff is attempting to unnecessarily restrict the litigation process, for that reason alone this request should be struck. Paragraph seven appears to broaden the plaintiff's request to include *other information*, which could encompass the entire discovery process of this case. This paragraph is unnecessary and has no basis in fact or law.

One other point about the proposed order. The proposed order assumes that Medicaid reimbursement is determined solely by reference to the compendia. This misstates the law. The statutes provide that the compendia are not the sole basis for determining whether off-label use of prescription medication can be reimbursed by a state Medicaid program. Wisconsin and all other states utilize drug use review boards to create a formulary to determine reimbursement. 42 U.S.C. § 1396r-8(d). The drug use review board reviews prescription medications to determine whether they are appropriate, medically necessary, and not likely to result in adverse medical results, using a number of sources including the compendia, but also other medical information that reflects medical practices such as medical literature. 42 U.S.C. § 1396r-8(g).

Further, the plaintiff seeks patient health care records covering an excessively broad period of time. The requested disclosure of protected health information "since March 3, 2005" spans a period of *over eight years*. The plaintiff presents no evidence that such records would lead to the discovery of admissible evidence. Fed. R. Civ. P. 26(b)(1). To the

contrary, Dr. King has averred that she *never* submitted any charges to any state or federal governmental entity (Dr. King's Memorandum of Law, Docket No. 29, p. 8), therefore precluding the possibility that any such records would contain relevant information.

III. THE FOUNDATION FOR THIS MOTION IS WITHOUT A BASIS IN LAW.

The plaintiff also requests that the order be issued pursuant to Fed. R. Civ. P. 26(c). Federal Rule of Civil Procedure 26(c) pertains to protective orders, where a party usually attempts to *prohibit* certain discovery from occurring. In the instant case, however, the plaintiff is attempting to obtain patient prescription medication records, and other demographic information, for a fishing expedition. As the legal foundation for this motion is flawed, the motion should be denied.

CONCLUSION

Based on the foregoing arguments, defendant Jennifer King Vassel respectfully requests that the Court deny the plaintiff's motion.

Dated at Milwaukee, Wisconsin this 19th day of September, 2013.

GUTGLASS, ERICKSON,
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