UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

DENNIS RUTHERFORD, et al., Plaintiffs, v. PALO VERDE HEALTH CARE DISTRICT, et al., Defendants.	Case No. ED CV 13-1247-JAK (SPx) **MEMORANDUM AND ORDER ON MOTION FOR RETURN OF DOCUMENTS AND REFERRED DISCOVERY ISSUES 1-4**

I.

INTRODUCTION

On January 30, 2014, defendants Palo Verde Health Care District ("PVHD") et al. filed a Motion for Return of Documents, to Disqualify Counsel and for Injunctive Relief (docket no. 76). Defendants seek the return of documents in plaintiffs' possession that defendants contend are protected by the attorney-client privilege and by the Health Insurance Portability and Accountability Act ("HIPAA"), and that belong to PVHD in any event. Defendants also seek the disqualification of plaintiffs' counsel. In this order the court addresses the

privilege and HIPAA issues and what should be done with the documents. The court addresses the disqualification issue in a companion Report and Recommendation.

These issues first came to the court's attention when defendants filed an Ex Parte Application to Stay Case and Seal First Amended Complaint on January 15, 2014. In a January 17, 2014 order, the court denied the stay request, but sealed the First Amended Complaint without making any findings as to the merits of the underlying dispute. In a separate order issued on January 22, 2014, the court referred the substantive discovery issues raised in the Ex Parte Application to the undersigned magistrate judge, posing to the parties and to the court the following five questions:

1) Whether the attorney-client privilege applies to the documents identified by defendants through the Application? Thus, are the materials privileged, and if so, has any privilege been waived as to some or all such documents?

2) Whether the healthcare records identified by defendants as ones that are subject to the limitations on disclosure imposed by HIPAA or corresponding federal regulations are subject to such limitations on disclosure?

3) If any of the documents identified by defendants is determined to be privileged or subject to restrictions on disclosure pursuant to HIPAA, what step(s), if any, should be taken with respect to the custody of any and all originals or copies of such documents, whether in paper and/or electronic form, presently in the custody or control of any or all of the plaintiffs and/or their counsel? Thus, who should maintain such documents, under what terms and conditions, and what steps, if any, should

be taken to implement any such order with respect to the custody of such documents?

4) With respect to any documents deemed subject to disclosure restrictions imposed by HIPAA, what notice, if any, should be provided to those whose medical records are subject to such a finding?

5) Based on the findings and rulings made with respect to Issues 1-4, what recommendations, if any, are made with respect to either the request for injunctive relief or the Motion to Disqualify plaintiffs' counsel?

The court addresses Issues 1-4 herein.

Following the January 22, 2014 order, which also set an initial briefing schedule, defendants filed their Motion for Return of Documents, to Disqualify Counsel and for Injunctive Relief on January 30, 2014, along with exhibits in support of their motion, and the Declarations of Maria C. Roberts and Myrna M. Davis. Plaintiffs filed their Opposition on February 6, 2014, accompanied by the declarations of Ljubisa Kostic, Ray Artiano, and Peter Klune, and relying in part on their earlier opposition to the Ex Parte Application and accompanying declaration of counsel. Plaintiffs also filed Objections to Declaration of Maria C. Roberts.

On February 11, 2014, defendants filed the Supplemental Declaration of Maria C. Roberts; Objections to, and Motion to Strike Evidence Submitted by Plaintiffs; and Response to Plaintiffs' Objections to the Declaration of Maria C. Roberts. Following a telephonic conference with the magistrate judge on February 14, 2014, on February 21, 2014 plaintiffs filed a Sur-Reply and another Declaration of Ljubisa Kostic. Defendants filed Objections to and a Motion to Strike the last Kostic Declaration on February 24, 2014.

The court held a hearing on the instant Motion on March 5, 2014. Following

the hearing, at the court's direction, both sides lodged disks containing the documents in dispute, on March 11 and 12, 2014. Defendants filed their Supplemental Memorandum on March 24, 2014, along with additional declarations and exhibits, including a Declaration of Ross A. Leo. Plaintiffs filed their Supplemental Brief and additional exhibits and declaration on April 2, 2014, and also filed Objections to and a Motion to Strike the Leo Declaration. Defendants responded to the Objections on April 7, 2014.

Having considered the parties' memoranda and other submissions and the arguments made at the hearing on this Motion, the court now grants in part and denies in part defendants' Motion for Return of Documents, as follows. In sum, the court finds that the attorney-client privilege has been waived as to some, but not all, of the documents in question, but that plaintiffs were permitted to disclose even the privileged documents to their own attorneys for use in this case, provided that plaintiffs and their attorneys maintain the documents' confidentiality. The court also finds, however, that the documents in question contain HIPAA-protected information that should not have been retained by any plaintiff after leaving PVHD, and that must be returned to defendants so such information may be redacted. Finally, the court finds that PVHD has properly proceeded as if there is a presumed HIPAA breach by taking steps to give the required notice to the individuals whose health care information was taken from PVHD.

II.

BACKGROUND

Plaintiffs are former executive employees of defendant Palo Verde Health Care District. PVHD operates Palo Verde Hospital in Blythe, California. Plaintiff Peter Klune was the Chief Executive Officer ("CEO") from 2009 until his contract was terminated in January 2013. Plaintiff Dennis Rutherford was the Chief Financial Officer ("CFO") from 2010 until his contract was not renewed in

February 2013, and also served as interim CEO for the last three weeks of his employment. Plaintiff Tara Barth was the Chief Nursing Officer ("CNO") from 2011 until her contract was not renewed in February 2013.

Plaintiffs filed lawsuits (which are now consolidated) in July 2013 alleging they were wrongfully terminated in response to their work in exposing or pursuing prosecution of an illegal kickback scheme at the hospital. Plaintiffs' claims include claims under the federal False Claims Act, for breach of their employment contracts, and for retaliatory termination and retaliation.

On December 23, 2013, plaintiffs served defendants with their disclosures under Rule 26 of the Federal Rules of Civil Procedure, including a disk containing 3,705 pages of documents. 1/30/14 Roberts Decl. (docket no. 76-2), ¶ 5. Defendants contend that disk contains documents protected by PVHD's attorney-client privilege, documents protected by the Health Insurance Portability and Accountability Act, and other confidential documents. Further, on January 7, 2014, plaintiffs filed a First Amended Complaint ("FAC") in which, according to defendants, plaintiffs specifically referenced privileged communications. Defendants applied ex parte to seal the FAC, and the court granted that application pending a determination of the issues in dispute that are considered herein.

The documents on the disk that defendants contend are privileged include emails and memoranda between PVHD legal counsel and plaintiff Klune with subject lines or titles stating "Attorney Client Privileged and Confidential." Ex. 7.[1] The documents on the disk that defendants contend are HIPAA-protected include hospital patient records disclosing patients' names, dates of birth and medical information concerning such matters as examination results. Ex. 16.

[1] All references to numbered exhibits herein are to exhibits lodged by defendants on January 30, 2014, or later, in support of their Motion for Return of Documents, to Disqualify Counsel and for Injunctive Relief.

At the heart of the privilege issue is a document referred to as the "Trask Memo," and its attachments. Plaintiffs' counsel Ljubisa Kostic first received a portion of the Trask Memo, which was prepared by attorney Grover Trask, on December 4, 2013, when it was given to him by plaintiff Peter Klune. 1/16/14 Kostic Decl. (docket no. 53-1), ¶ 15; 2/6/14 Kostic Decl. (docket no. 89-2), ¶ 5. Later that day Klune gave Kostic the entire USB drive containing the documents that became plaintiffs' Rule 26 disclosure. *Id*. Trask had been retained by PVHD as special counsel to investigate the reported unlawful activity at PVHD. 1/16/14 Kostic Decl., ¶ 9. The Trask Memo was written to the Chief Deputy District Attorney regarding violations at PVHD. *Id.* Plaintiff Klune and Trask met with officials at the Riverside District Attorney's Office on November 19, 2012 and provided the officials with the Trask Memo and its attachments. 2/6/14 Klune Decl. (docket no. 89-4), ¶ 7.

Plaintiff Klune states that he came into possession of the documents on the USB drive while he was CEO of PVHD, he continued to possess them even after he was terminated, and no one at PVHD ever asked him to return any documents. 2/6/14 Klune Decl. (docket no. 89-4), ¶¶ 8-9. Klune asserts that he did not review the documents after he was terminated, but he possessed them as a measure of self-protection in case he needed proof that he did not participate in or ignore the illegal conduct at PVHD. *Id.*, ¶ 9. He states the documents on the USB drive were compiled because they related to the unlawful conduct he and the other plaintiffs investigated, their internal reporting of the unlawful conduct to the Board, and to the self-reporting to the government. *Id.*, ¶ 10. He further states that any patient transfer logs on the USB drive are records of the "upcoding" related to the unlawful conduct, and any peer review documents are evidence of retaliatory sham peer reviews. *Id.*, ¶¶ 12-13.

When Kostic first opened the Trask Memo on his computer on the evening

of December 4, 2013, he saw that the header described it as privileged, but did not think the label fit since Mr. Trask was not writing to his client. 1/16/14 Kostic Decl., ¶ 16. After conducting some quick legal research, Kostic was convinced the Trask Memo and its exhibits were not privileged. *Id.* Kostic states he did not examine any of the other documents on the USB drive until December 23, 2013, the day Rule 26 disclosures were due. *Id.*, ¶ 17. Kostic states he did not have time to click through all the pages, so he only looked at the file names on the USB drive. *Id.* In a later declaration, Kostic states that to the extent he may have clicked through some of the other documents, he cannot recall their content. 2/6/14 Kostic Decl., ¶ 4.

After reviewing the disk, on December 27, 2013, defendants' counsel Maria Roberts contacted plaintiffs' counsel Kostic by letter and notified Kostic that the disk contained privileged information. Ex. 5. Roberts demanded the immediate return of all privileged documents and information, and also demanded that plaintiffs inform defendants how plaintiffs came to possess the information and to whom they had disclosed it. *Id.* Attorney Kostic responded on December 30, 2013, explaining plaintiffs' position that the documents are not privileged because they were prepared as part of an internal investigation with the aim of disclosing the findings to the government. Ex. 6. Kostic reiterated this position in another letter dated January 2, 2014 and asserted: "It follows that my inspection of the subject documents cannot possibly be a wrongful act." Ex. 8. Plaintiffs requested, among other things, that defendants specify the documents they claim are privileged and state whether any specific document was actually disclosed to a law enforcement or government agency and whether any specific document that was not directly disclosed pertained to the same subject matter. *Id.*

In a January 3, 2014 letter, plaintiffs addressed defendants' contention that documents in the Rule 26 disclosure contained individually identifiable health

information protected under HIPAA. Ex. 9. Attorney Kostic wrote: "I have informed you that I was the person who reviewed my clients' Rule 26 production and that I did not see any individually identifiable health information." *Id.* Plaintiffs requested that defendants specify by Bates number the documents they contend are subject to HIPAA's Privacy Rule and the attorney-client privilege. *Id.* Further correspondence and an in-person meeting did not resolve the disputes. *See* Exs. 11-15.

According to attorney Roberts, at the January 7, 2014 in-person meeting, attorney Kostic explained that he read all of the communications that defendants claim are privileged and demonstrated how he had reviewed the documents. 1/30/14 Roberts Decl., ¶ 18. Attorney Kostic disputes this account, stating that at that meeting he specifically told defense counsel he had never reviewed all the documents. 1/16/14 Kostic Decl., ¶ 5.

Apparently recognizing the dispute could not be resolved by the parties, in a January 9, 2014 letter attorney Kostic stated, inter alia, that he would no longer access the .pdf file containing the Rule 26 production, and that the file would remain sequestered until the court resolves the dispute. Ex. 12. Kostic stated that he and co-counsel Ray Artiano were the only persons who had access to the file, and that neither of them would access it further until the court resolves the dispute, "except as absolutely necessary to address the privilege and confidentiality issues with the court." *Id.* Attorney Artiano states that he was unable to access the USB drive, and therefore his review of the documents was limited to the Trask Memo and its attachments. 2/6/14 Artiano Decl. (docket no. 89-3), ¶ 2.

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III.

DISCUSSION[2]

A. Attorney-Client Privilege

The first questions the court considers here are whether the disputed documents in the Rule 26 disclosure are privileged and, if so, whether plaintiffs and their counsel were nonetheless permitted to access the documents. Application of the attorney-client privilege in a federal question case such as this is governed in the first instance by the federal common law of privilege. Fed. R. Evid. 501; *U.S. v. Zolin*, 491 U.S. 554, 562 (1989); *Agster v. Maricopa Cnty.*, 422 F.3d 839, 839 (9th Cir. 2005). But where federal law does not resolve the issue, a federal court may look to state law. *Jaffee v. Redmond*, 518 U.S. 1, 12-13 (1996); *Tennenbaum v. Deloitte & Touche*, 77 F.3d 337, 340 (9th Cir. 1996).

The attorney-client privilege protects confidential communications between a client and an attorney from disclosure:

> (1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by

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[2] As recounted in the Introduction, both sides filed a number of objections during the briefing of this matter, which the court has considered. Where the court has found the objections well-taken, it has not relied on the evidence objected to. For example, the court has not relied on statements made in declarations that lack foundation or fall outside the declarant's personal knowledge. Where there are objections based on relevance, the court has considered evidence to the extent the court finds it relevant, and not to the extent it does not.

Plaintiffs object most vehemently to the Declaration of Ross Leo. The court finds no violation under Fed. R. Civ. P. 26(a)(2) in defendants' submission of a declaration from a consultant on this matter. The court has not relied on the conclusions Mr. Leo drew as to the facts and law in dispute, but has looked at the statutes and regulations cited in his declaration to draw its own conclusions.

the legal adviser, (8) unless the protection be waived.

U.S. v. Graf, 610 F.3d 1148, 1156 (9th Cir. 2010) (citation omitted). The party asserting the attorney-client privilege bears the burden of establishing the existence of an attorney-client relationship and the privileged nature of the communication. *See id.* Because it impedes "'the full and free discovery of the truth,'" the attorney-client privilege "'applies only where necessary to achieve its purpose.'" *U.S. v. Talao*, 222 F.3d 1133, 1140 (9th Cir. 2000) (citations omitted).

Defendants have also asserted that some of the documents in question are protected by the attorney work product doctrine, which protects "documents and tangible things that are prepared in anticipation of litigation or for trial" so as to prevent "disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney." Fed. R. Civ. P. 26(b)(3). Although some of the documents at issue here appear to qualify for work product protection, for most of the documents the question is whether they are protected by the attorney-client privilege.

It is well established that the attorney-client privilege attaches to both individuals and corporations. *Upjohn Co. v. U.S.*, 449 U.S. 383, 390 (1981). The administration of the attorney-client privilege in the case of corporations presents "special problems." *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 348 (1985). "'As fictitious entities, corporations can seek and receive legal advice and communicate with counsel only through individuals empowered to act on behalf of the corporation.'" *Graf*, 610 F.3d at 1159 (quoting *Admiral Ins. Co. v. U.S. Dist. Court*, 881 F.2d 1486, 1492 (9th Cir. 1989)). In *Graf*, the Ninth Circuit adopted the Third Circuit's *Bevill* test for determining when a corporate officer may hold a personal attorney-client privilege, but also noted that "the Third Circuit made clear that 'any privilege that exists as to a corporate officer's role and functions within a corporation belongs to the corporation, not the officer.'" *Id.*

(quoting *In re Bevill, Bresler & Schulman Asset Mgmt. Corp.*, 805 F.2d 120, 124 (3d Cir. 1986)). Although PVHD is a public health care district, not a corporation, the same principles apply. *See Vela v. Superior Court*, 208 Cal. App. 3d 141, 149-50 (1989) (citing law concerning corporation's assertion of attorney-client privilege in finding a city was the holder of the privilege).

1. Privilege Determination

As noted in the background recitation above, in support of their motion defendants submitted a selection of heavily redacted documents from plaintiffs' Rule 26 disclosure that defendants contend are privileged. The documents give at least a prima facie indication of privilege, in that they are communications between the PVHD CEO and PVHD counsel, and have a header stating they are subject to the attorney-client privilege. But because the actual subjects of the communications were not shown, the documents did not provide the court with even as much information as is typically contained on a privilege log, and thus the court had little basis to determine whether the headers claiming privilege were accurate. The court therefore determined to conduct an in camera review of the documents in plaintiffs' Rule 26 disclosure to ascertain if the privilege headers were accurate, and also to assess whether the documents related to the subjects of the Trask Memo.

In response to the court's direction at the March 5, 2014 hearing on this matter, on March 11 and 12, 2014, counsel for both sides lodged copies of the disks containing plaintiffs' Rule 26 disclosures. The court compared portions of the disks and determined that, as best the court can tell, the information on the disks is substantially the same except that, as discussed at the hearing, the copy provided by plaintiffs contains almost no redactions, while the copy provided by defendants has personal identifiers redacted from the documents they contend are HIPAA-protected.

After reviewing the documents listed by defendants in their March 12, 2014 Notice of Lodgment as privileged, the court finds that defendants have satisfied their burden of establishing that most of the documents listed are protected by the attorney-client privilege or work product doctrine, with two exceptions. The court finds that the documents with Bates numbers 878-883 and 917-943 are not privileged, as they do not involve communications with a lawyer, are not seeking legal advice, and were not prepared in anticipation of litigation or trial.

Further, the court finds that the other documents involved communications with counsel on behalf of PVHD, and that therefore PVHD is the holder of the privilege. Plaintiffs have argued that while PVHD may hold the privilege (although perhaps, they argue, not alone), PVHD cannot assert the privilege against plaintiffs so as to withhold documents generated during plaintiffs' tenures at PVHD, citing *Gottlieb v. Wiles*, 143 F.R.D. 241, 247 (D. Colo. 1992). But this court agrees with other cases finding that *Gottlieb* erred in analogizing the relationship between a former director of a corporation and that corporation to the relationship between two parties who retained a single attorney then later become adverse, and thus "in failing to recognize that '[t]here is but one client, and that client is the corporation.'" *See Bushnell v. Vis Corp.*, 1996 WL 506914, at *8 (N.D. Cal. Aug. 29, 1996) (quoting *Milroy v. Hanson*, 875 F. Supp. 646, 649 (D. Neb. 1995); *see also Montgomery v. eTreppid Techs., LLC*, 548 F. Supp. 2d 1175, 1184-87 (D. Nev. 2008). "[W]hen control of a corporation passes to new management, the authority to assert and waive the corporation's attorney-client privilege passes as well." *Commodity Futures*, 471 U.S. at 349. Accordingly, PVHD is the holder of the privilege, not plaintiffs, and PVHD may assert the privilege, even where plaintiffs were previously party to the communications – provided, of course, that the privilege has not been waived.

2. Waiver

Plaintiffs contend that any applicable attorney-client privilege has been waived in this case due to disclosure of documents reflecting PVHD's internal investigation to government officials for prosecution. "[V]oluntarily disclosing privileged documents to third parties will generally destroy the privilege." *In re Pacific Pictures Corp.*, 679 F.3d 1121, 1126-27 (9th Cir. 2012); *accord In re Syncor ERISA Litig.*, 229 F.R.D. 636, 645 (C.D. Cal. 2005) ("Generally, the voluntary disclosure of a privileged attorney-client communication to a third party waives the privilege."). This is true even where the voluntary disclosure is made to the government, even in response to a subpoena. *Pacific Pictures*, 679 F.3d at 1127-30; *see Syncor*, 229 F.R.D. at 645 ("disclosure(s) of the documents to the Government waived whatever attorney-client privilege and work product protection these documents might have had").

As discussed above, on November 19, 2012, representatives from PVHD – including at least plaintiff Klune and outside counsel Trask – delivered the Trask Memo and its attachments to officials at the Riverside County District Attorney's Office. At times, including at the hearing on this Motion, defendants have seemed to concede that PVHD waived its privilege as to the Trask Memo. But in their Supplemental Memorandum following the hearing defendants make a last-ditch argument that this was not an authorized disclosure by PVHD, and therefore there was no waiver by PVHD. This argument is not convincing.

Defendants' only basis for their argument is a reference to the minutes of a PVHD board meeting held on November 14, 2012, five days before the Trask Memo was delivered to the District Attorney's Office, which minutes indicate that – at least during the open session – the board did not approve disclosure of the Trask Memo. *See* Ex. 20. This proves nothing. The Trask Memo was disclosed to government officials by PVHD's CEO and counsel, all of whom were clearly

authorized to act on behalf of PVHD. Further, the Trask Memo itself states that PVHD's board, on November 14, 2012, instructed its counsel to disclose the Trask Memo to the District Attorney. Although defendants submit a declaration from defendant Trina Sartin, the current President of PVHD's Board of Directors, saying that under the Brown Act the board could not take official action except at an open meeting, defendants cite no authority holding that official board approval is required before an entity's voluntary disclosure constitutes a waiver of the privilege. In short, the court finds PVHD's voluntary disclosure waived any assertion of privilege as to the Trask Memo and its attachments.

Plaintiffs argue that all of the documents on the USB drive are from PVHD's internal investigation into the wrongdoing, and therefore none are privileged because that investigation was disclosed to the government. Plaintiffs are correct that documents created with the intent to disclose them to the government are not privileged. *See Syncor*, 229 F.R.D. at 645 ("neither the attorney-client privilege nor the work product doctrine applies to . . . documents . . . prepared during the internal investigation of Syncor, since those documents were created with the intent to disclose them to the Government, if necessary"). The problem with plaintiffs' argument is that here it is not at all clear at what point PVHD contemplated reporting the findings of its internal investigation to the government. Many of the documents in question pre-date the Trask Memo by three years or more, and it appears highly unlikely that those older documents were drafted with government disclosure in mind. Further, some the of the documents on their face appear quite distinct from the matters reported in the Trask Memo.

There is no question, as noted above, that at some point PVHD did report at least some of its findings to the government. "[V]oluntary disclosure of the content of a privileged attorney communication constitutes waiver of the privilege as to all other such communications on the same subject." *Weil v. Investment/Indicators,*

Research & Mgmt., 647 F.2d 18, 24 (9th Cir. 1981); *accord Hernandez v. Tanninen*, 604 F.3d 1095, 1100 (9th Cir. 2010). The question here is how broadly to construe the "subject" of the Trask Memo. The Trask Memo concerns a number of alleged violations of law at PVHD; however, certainly PVHD did not waive its privilege with respect to all attorney-client communications concerning any potential legal violations at PVHD. Thus, reasonably, the waiver extends only to subjects of the violations reported in the Trask Memo and its attachments. *See Hernandez*, 604 F.3d at 1100-01 (disclosure of communications "with Ferguson about Tanninen" waived "attorney-client privilege only as to that matter," and thus court did not err in finding waiver of privilege as it "pertained to the conspiracy claim," but did err in finding blanket waiver as to entire case); *Weil*, 647 F.2d at 25 ("we find that the Fund waived its privilege only as to communications about the matter actually disclosed namely, the substance of Blue Sky counsel's advice regarding registration of Fund shares pursuant to the Blue Sky laws").

The subjects covered by the Trask Memo include the following alleged violations and problems at PVHD, and attach attorney-client communications about the same subjects: the hostile work environment created by Dr. Sahlolbei; Dr. Sahlolbei's retaliatory actions against physicians and nurses who report violations or do not comply with Dr. Sahlolbei's transportation demands, including use of peer review sessions; Dr. Barth's secret agreement to pay 25% of his hospital salary to Dr. Sahlolbei in violation of state and federal healthcare kickback laws; Dr. Sahlolbei's actions to force PVHD to approve Dr. Barth's employment agreements; the possible conflicts of interest defendants Sandra Hudson and Trina Sartin have in serving on the PVHD Board of Directors; Dr. Sahlolbei's actions to intimidate physicians to use Sartin's Desert Air Ambulance to transport patients to other hospitals, or to intervene in cases in which he is not involved to arrange transport, including demanding patient information in violation of HIPAA; and that

Dr. Sahlolbei's unnecessary use of Desert Air Ambulance and the hospital's former transportation policy violated the Emergency Transfer and Advanced Labor Transportation Act.

Given these subjects as to which PVHD waived any assertion of privilege, based on its in camera review, the court finds that any privilege that may have attached to the following documents has been waived, that is, those with Bates numbers: 121-183, 215, 447-449, 803, 847, 914-916, 1216-1218, 1517-1520, 1546, 1913, 2145-2146, 2371, 2560-2705, 2762-2764, 2823, 2854, 2857, 2860, 2948, 2959, 3273-3275, 3315-3319, and 3445-3447.

The court further finds, however, that among the documents listed by defendants in their Notice of Lodgment as privileged, PVHD has not waived its privilege as to the documents with the following Bates numbers: 313, 784, 785, 812-816, 822, 877, 979-980, 1183, 2025, 2042, 2460-2462, 2504-2505, 2843, 2886-2887, 2911-2912, 2955, 2968, 3008-3009, 3034, 3054-3056, 3218-3230, 3303-3304, 3444, and 3448-3449. Thus, these documents remain privileged.

3. Taking and Transfer of Documents

Having found that the documents on the USB drive that constituted plaintiffs' Rule 26 disclosure include documents that are protected by the attorney-client privilege, and that PVHD is the holder of that privilege, there remains the question of whether plaintiffs and their attorneys are nonetheless permitted to possess those documents because plaintiff Klune obtained them while he was employed at PVHD. Defendants maintain plaintiffs are not permitted to possess the documents for two reasons. First, defendants contend that Klune effectively stole the documents in violation of his confidentiality agreement when he failed to return them upon the termination of his employment, and therefore plaintiffs should not have had any of these documents irrespective of their privileged status. And second, because the USB drive contains privileged documents, defendants contend

they should immediately be returned to PVHD.

Plaintiffs signed confidentiality agreements in which they agreed not to disclose confidential information, including patient information, at any time, even after their employment with PVHD terminated. Ex. 2. But while these agreements may be pertinent to whether Klune committed a HIPAA violation (which is discussed in the next section), they do not address the issue of whether plaintiffs were required in general to return documents in their possession at the termination of their employment. The Sartin Declaration addresses the issue to some extent, stating she understood (from PVHD counsel) that upon his termination plaintiff Klune was instructed to return PVHD property in his possession, "including his keys and PVHD credit card." Sartin Decl., ¶ 6. But this declaration does not indicate whether Klune was at any time told to return all documents he had acquired in the course of his employment.

According to plaintiff Klune, he came to possess the documents on the USB drive while he was CEO at PVHD within the scope of his authority and duties, and he in fact authored many of the documents himself. 2/6/14 Klune Decl., ¶ 8. Klune declares that he simply retained possession of them – for his own protection – after his employment was terminated on January 22, 2013. *Id.*, ¶ 9. The problem with Klune's declaration is that it does not account for all of the documents produced in plaintiffs' Rule 26 disclosure. The court's in camera review of those documents revealed a small number of documents that post-date Klune's termination from PVHD by about two weeks and are communications to which plaintiff Rutherford was a party. The court does not doubt that Klune acquired the vast majority of documents on the USB drive during the course of his employment as he states, but he somehow acquired at least some of the documents later, perhaps from Rutherford. Thus, the acquisition of the documents was not quite as simple as Klune represented. Nonetheless, it appears that all the documents in question were

acquired by plaintiffs in the ordinary course of their employment, and were documents that, at least while they were employed, they were permitted to see and possess.

The question, then, is whether plaintiffs were permitted to retain and pass these documents on to their attorneys for potential use in this case. Defendants argue that what plaintiff Klune did here was to conduct improper "self-help" discovery. *See Pillsbury, Madison & Sutro v. Schechtman*, 55 Cal. App. 4th 1279, 1289 (1997). But although defendants cite a number of cases to support their position, they are largely distinguishable from the facts of this case.

Plaintiffs cite *Fox Searchlight Pictures, Inc. v. Paladino*, 89 Cal. App. 4th 294 (2001), to argue that they were permitted to give even privileged documents to their attorneys for use in litigating their wrongful termination case. In *Fox*, the plaintiff was an attorney in Fox's legal department who, after learning her contract would not be renewed, consulted a law firm regarding her legal options, and in the course of the consultations disclosed confidential and privileged information pertaining to Fox. *Id.* at 298. The court held that in-house counsel may disclose ostensibly confidential and privileged information to her own attorneys "to the extent [the information] may be relevant to the preparation and prosecution of her wrongful termination action against her former client-employer." *Id.* at 310. In so holding, the *Fox* court cited to *General Dynamics Corp. v. Superior Court*, 7 Cal. 4th 1164 (1994), in which the California Supreme Court concluded that in-house counsel are not inherently precluded from bringing a retaliatory discharge claim against a former employer, "*provided* it can be established without breaching the attorney-client privilege." *Id.* at 1169. The court in *Fox* reasoned that its holding did not conflict with the holding in *General Dynamics*, noting: "The attorneys for the in-house counsel are themselves bound by the rules of confidentiality and attorney-client privilege. Thus, disclosure to them is not a *public* disclosure." *Fox*,

89 Cal. App. 4th at 311.

There are other cases that are not as factually apposite to this case as *Fox Searchlight*, but that nonetheless stand for the principle that former employees suing their former employers are free to disclose privileged information learned in the course of their employment. *See Neal v. Health Net, Inc.*, 100 Cal. App. 4th 831, 843-44 (2002) (refusing to disqualify attorney from representing a plaintiff in an employment discrimination lawsuit where attorney subsequently was retained to represent a former legal secretary against same employer and new client may have disclosed confidential information to attorney, noting that "decisional authority has consistently concluded that a party cannot improperly disclose confidential information to one's own counsel in the prosecution of one's own lawsuit"); *Bell v. 20th Century Ins. Co.*, 212 Cal. App. 3d 194, 198 (1989) (where former employee with wrongful termination claim may have disclosed to her attorney privileged information from her former employer, court noted "[w]e fail to see how [plaintiff] could have improperly disclosed information to her own counsel in the prosecution of *her own lawsuit*"). Thus, there is substantial support for plaintiffs' position.

Most of the cases defendants cite involve very different circumstances from those in this case. In some of the cases, the documents at issue were ones that the parties who took them were never permitted to access or possess. *See Gomez v. Vernon*, 255 F.3d 1118, 1132 (9th Cir. 2001) (defense counsel implicitly encouraged employees of the defendant prison to search the plaintiff inmates' legal files and copy letters from their attorneys); *Furnish v. Merlo*, 1994 WL 574137, at *2 (D. Or. Aug. 29, 1994) (plaintiff, in the days before her employment terminated, unlocked an executive's desk and retrieved and copied documents from her personnel file, including a memo from corporate counsel discussing reasons for her termination); *Pillsbury*, 55 Cal. App. 4th at 1282 (employees with employment law claims against their former employer law firm improperly removed confidential

documents relating to their performance at firm, none of which documents were directed to the employees). By contrast, plaintiffs here were clearly permitted to access the documents at issue during their employment. Indeed, one or more plaintiffs is a party to most of the communications the court saw during its in camera review.

In other cases defendants cite, the parties who took the documents were not seeking to use them to pursue their own employment law claims, but rather were seeking to use them for some other purpose. *See In re IBP Confidential Bus. Documents Litig.*, 754 F.2d 787, 788 (8th Cir. 1985) (former employee took documents and then permitted third parties' attorneys to copy them to use in antitrust litigation against the former employer); *U.S. ex rel. Hartpence v. Kinetic Concepts, Inc.*, 2013 WL 2278122, at *1-2 (C.D. Cal. May 20, 2013) (former employees took documents from employer when left, then their attorneys used documents in qui tam action filed by employees against employer for False Claims Act violations). This is a significant distinction, as recognized in the recent decision in *Gotham City Online, LLC v. Art.com, Inc.*, 2014 WL 1025120 (N.D. Cal. Mar. 13, 2014). In that case, employees of Art.com operated Gotham City as a separate business. *Id.* at *1. Before their termination from Art.com, the employees gave their attorneys documents containing certain Art.com privileged communications. *Id.* at *2. The attorneys also represented Gotham City, and used those privileged communications to develop Gotham City's misappropriation of trade secrets claim and other business claims against Art.com. *Id.* at *3. In disqualifying counsel from representing Gotham City in only that case, the court recognized the holdings of *Fox Searchlight*, *Neal*, and *Bell* that "a party cannot improperly disclose confidential information to prosecute its lawsuit," and stated: "If the dispute before the Court was a wrongful termination claim by the [employees], the Court might well [] find these cases to be on point." *Id.* at *5.

The case that best supports defendants' position is *Conn v. Superior Court*, 196 Cal. App. 3d 774 (1987), but even this case is distinguishable. In it, the plaintiff in a wrongful termination action had taken over ten thousand pages of documents with him when he left his employment, which documents he claimed were his personal files. *Id.* at 777. The employer's attorneys first learned the plaintiff had the documents when he was deposed in a different case in which a third party was suing the employer. *Id.* at 778. Apparently most concerned about preventing the documents from being disclosed to third parties, the plaintiff and employer entered into an agreement in which the plaintiff was to return the privileged documents to the employer and simply agree to maintain the confidentiality of the other documents he took. *Id.* at 779. Plaintiff failed to fulfill that agreement, however, retaining the privileged documents on the ground that they were necessary to plaintiff's preparation of his wrongful termination case. *Id.* The Superior Court ultimately ordered the plaintiff to return "substantially all of the documents taken." *Id.* at 780. When plaintiff failed to do so, he and his attorney were held in contempt, with the court finding the documents to have been misappropriated documents that plaintiff "had no right to have in the first place." *Id.* at 785.

The *Conn* case cannot be wholly reconciled with *Fox Searchlight*. Nonetheless, the differences favor plaintiffs' position here. *Fox* involved a selective disclosure of confidential information pertinent to the plaintiff's case to her lawyer for use in her suit against her former employer, whereas *Conn* involved an employee's removal of the entirety of his personal files, many of which apparently had nothing to do with his wrongful termination claim but were of potential interest to third parties. The instant case is more like *Fox*. Plaintiff Klune did not remove all of his personal files from PVHD. Instead, he claims to have compiled the documents on the USB drive specifically because they concerned the

matters at issue in this case. 2/6/14 Klune Decl., ¶ 10. From the court's in camera review of a selection of these documents, it appears that the documents are ones that are relevant to this case.

Moreover, this court is persuaded by the reasoning in *Fox*. The documents on the USB drive largely relate to matters that are already within plaintiffs' personal knowledge. Surely they are permitted to share that knowledge with their own attorneys to the extent it relates to their claims in this case. There is no reasonable basis to distinguish between plaintiffs' orally relating matters they recall to their attorneys from their passing on to their attorneys documents concerning the same subjects when the documents are ones plaintiffs were permitted to access, and indeed authored in many instances.

Thus, the court finds plaintiffs were permitted to pass on to their attorneys the documents on the USB drive, even though many of them were privileged. This finding does not, however, reach the issue of whether plaintiffs were also permitted to pass on documents containing individually identifiable health information.

B. HIPAA

HIPAA, 42 U.S.C. 1320d et seq., "prohibits the wrongful [use or] disclosure of individually identifiable health information, defined as information that relates to the physical or mental health or condition of an individual, or the provision of health care to an individual, that identifies the individual." *Evans v. Tilton*, 2010 WL 3745648, at *1 (E.D. Cal. Sept. 16, 2010) (citing 42 U.S.C. § 1320d-6; 45 C.F.R. § 160.103). HIPAA requires that any "covered entity" under the Act obtain authorization before using or disclosing a patient's private health information. 45 C.F.R. §§ 160.103, 164.508. A "covered entity" under HIPAA is: (1) a health plan; (2) a health care clearinghouse; or (3) a health care provider who transmits any health information in electronic form in connection with certain transactions. 45 C.F.R. § 160.103.

1. Documents Subject to HIPAA and Confidentiality Agreement

There is no real dispute that plaintiffs' Rule 26 disclosure included documents containing individually identifiable health information, and the court's in camera review confirmed this. Indeed, the court found that all of the documents identified by defendants as HIPAA-protected – and a few others not listed – contained individually identifiable health information, except those with Bates numbers 3317-3318. *See* 45 C.F.R. § 160.103 (defining "individually identifiable health information"); 45 C.F.R. § 164.514(b) (describing information that should be redacted so health information is not individually identifiable, including names, birthdates, and medical record numbers). On the disk lodged by defendants, this information was redacted. On the disk lodged by plaintiffs – which the court understands to be a copy of the documents as disclosed by plaintiffs to defendants – some of this information was redacted, but much of it was not. Thus, plaintiffs' Rule 26 disclosure contained HIPAA-protected information.

Putting aside for the moment whether plaintiffs violated HIPAA by taking or transmitting these documents, there is no question that – intentionally or not – plaintiff Klune violated the confidentiality agreement he signed by taking the information with him when he left PVHD and then turning it over to his attorney. For example, in the agreement Klune stated his understanding that "all medical information/records regarding a patient is confidential," and agreed the information would "not be given to other individuals, unless proper authorization is obtained." Ex. 2. He further agreed that "all patient . . . information, financial and/or clinical, retrieved from any and all computer system(s) is strictly confidential. It should not be reproduced, transmitted, transcribed or removed from the premises in any form except as necessary as defined in my job description." *Id.* Klune's removal and retention of this information for his own protection was contrary to the agreement he signed.

Plaintiffs argue that, under *Fox Searchlight*, they were permitted to take this information and give it to their attorneys. But *Fox* does not help them with respect to this information. First, while the substance of the documents with the individual identifiers redacted appears relevant to this case, even plaintiffs have acknowledged that the individual identifiers – essentially, the HIPAA-protected information, and the information that calls the confidentiality agreement into play – are not relevant. As such, there was no reason for Klune to give this information to his attorneys, and no justification for his violation of the confidentiality agreement in this way. *See Fox Searchlight*, 89 Cal. App. 4th at 310. And second, *Fox* concerned confidential and privileged information, but not HIPAA-protected information, which is governed by its own separate rules, as discussed below.

2. HIPAA Breach

Plaintiffs argue that what they did here – namely, plaintiff Klune retained HIPAA-protected information, turned it over to his attorneys, and the attorneys disclosed it to defendants' attorneys – did not constitute a disclosure of HIPAA-protected information, and therefore there was no HIPAA breach. But while there was no public disclosure, HIPAA does not simply prohibit public disclosure of protected information. *See* 45 C.F.R. § 164.402 ("Breach means the acquisition, access, use, or disclosure of protected health information in a manner not permitted under subpart E of this part which compromises the security or privacy of the protected health information."); *see also Huping Zhou*, 678 F.3d 1110, 1112-13 (9th Cir. 2012) (former employee who accessed patient records in days after employment terminated violated HIPAA).

Plaintiffs argue that since PVHD disclosed HIPAA-protected information to the government, defendants cannot argue against plaintiffs' use of that same information. It is true that disclosure to the government is authorized, including for government oversight and law enforcement purposes. 45 C.F.R. §§ 164.512(d), (f).

And HIPAA allows use of protected health information that is "[i]ncident to a use or disclosure otherwise permitted or required." 45 C.F.R. § 164.502(a)(1)(iii). But plaintiffs are incorrect in their assertion that all of the HIPAA-protected information in their Rule 26 disclosure was also turned over to the government. The only HIPAA-protected information disclosed to the government was on the final two pages of attachments to the Trask Memo and consisted of one patient's name and medical record number. This limited disclosure to the government does not begin to approach the vast numbers of names and other HIPAA-protected information contained elsewhere in plaintiffs' Rule 26 disclosure. Plaintiffs' assertion that their use of all this information in their lawsuit is simply incidental to the disclosure to the government is unpersuasive.

Plaintiffs also assert, correctly, that HIPAA permits covered entities to use or disclose protected health information for "health care operations." *See* 45 C.F.R. §§ 164.502(a)(1)(ii), 164.506(c)(1). "Health care operations" include "conducting or arranging for medical review, legal services, and auditing functions, including fraud and abuse detection and compliance programs." 45 C.F.R. §§ 164.501. Thus, PVHD was permitted to use the protected information for its internal investigation, and plaintiff Klune would have been permitted to have the information for that purpose. But once plaintiffs left PVHD, they were no longer part of a health care provider or any other covered entity, and their use of the information for their own lawsuit is therefore not a permitted health care operation. *See* 45 C.F.R. § 160.103.

Similarly, plaintiffs contend that HIPAA permits the exchange of protected information during a lawsuit and for litigation purposes. The regulatory provision plaintiffs cite for this contention permits a covered entity to disclose protected health information in the course of a judicial proceeding if it is doing so in response to a court order or in response to a subpoena, discovery request, or other

lawful process, provided that other requirements are satisfied. 45 C.F.R. § 164.512(e)(1). But the problem again is that plaintiffs are not part of a covered entity. Indeed, they were not permitted to have this information in the first place once they left PVHD and ceased to work for a health care provider.

At the hearing on this matter, the court inquired of the parties whether they believed plaintiffs' disclosure could be authorized under HIPAA's whistleblower provision, which states that HIPAA is not violated when a member of a covered entity's workforce makes the disclosure to his or her attorney "for the purpose of determining the legal options of the workforce member" with respect to conduct by the covered entity "that is unlawful or otherwise violates professional or clinical standards." 45 C.F.R. § 164.502(j)(1). After considering the parties' supplemental briefing, the court concludes the provision does not apply here, because plaintiff Klune was no longer a member of PVHD's workforce at the time he disclosed the HIPAA-protected information to his attorneys. The Department of Health and Human Services ("HHS") "has stated that '[o]ur purpose in including this provision is to make clear that we are not erecting a new barrier to whistleblowing, and that covered entities may not use this rule as a mechanism for sanctioning workforce members or business associates for whistleblowing activity.'" *United States v. Boston Scientific Neuromodulation Corp.,* 2013 WL 2404816, at *8 (D.N.J. May 31, 2013) (quoting 45 Fed. Reg. 82,501, 82,636 (Dec. 28, 2000)). Since plaintiff Klune had been gone from PVHD for months at the time he disclosed the information to his attorneys, this purpose was not served by his disclosure.

In short, plaintiff Klune's removal of HIPAA-protected information from PVHD, retention of it for his own self-protection, and transmission of it to his attorneys was not authorized under HIPAA. Plaintiffs nonetheless argue that there has been no breach in any event because at the time Klune compiled the information he was permitted to have it, he never looked at it after he left PVHD,

and his attorneys did not review it before transmitting it to defendants' counsel. *See* 2/6/14 Klune Decl., ¶ 9; 1/16/14 Kostic Decl., ¶ 16 The court is not persuaded that this is the case.

First, there are indications that plaintiffs' counsel did review the documents, and did so with an eye to such information, although apparently not a very careful eye. *See* Ex. 13 (1/2/14 letter from Kostic stating "although I reviewed the documents in question I did not note any individually identifiable health information"); Ex. 9 (1/3/14 letter from Kostic stating "I was the person who reviewed my clients' Rule 26 production and . . . I did not see any individually identifiable health information"). And second, although there is no way to tell if plaintiffs' counsel in fact saw individually identifiable health information, and it is likely that even if they did they did not mentally retain any such information (*see* 2/6/14 Kostic Decl., ¶ 4), that does not alter the fact that such information was impermissibly disclosed to them. Similarly, even assuming Klune never looked at the information after he left PVHD, he still improperly retained the information.

Plaintiffs argue that the disclosure that occurred did not "compromise[] the security or privacy of the protected health information" so as to constitute a breach. *See* 45 C.F.R. § 164.402. The court notes that such disclosure is not a presumed breach if the covered entity demonstrates there is a low probability the protected information has been compromised, considering factors such as whether the protected information "was actually acquired or viewed." *See* 45 C.F.R. § 164.402(2). It is up to PVHD to make such a demonstration here, and it has not done so, but under the circumstances of this case it might be able to. Nonetheless, the court finds that because protected information was removed from PVHD and passed along to attorneys who were not authorized to access it, the security and privacy of the information were compromised, even if only slightly. Given that, and given the conservative approach PVHD has taken in which, up to now, it has

not elected to try to demonstrate that there is a low probability the information has been compromised, there has at a minimum been a presumed breach.

C. Remedies

For the reasons discussed above, the court has found plaintiff Klune's compilation of documents on the USB drive and transmission of those documents to his attorney was permissible with respect to the privileged documents on the drive, but not with respect to the HIPAA-protected documents on the drive. The question, then, is what remedies are appropriate. "HIPAA does not provide a private remedy for its violation." *Frye v. Ayers*, 2009 WL 1312924, at *3 (E.D. Cal. May 12, 2009); *see Webb v. Smart Document Solutions, LLC*, 499 F.3d 1078, 1081-82 (9th Cir. 2007). Nonetheless, in the context of this case and under the court's general authority to manage discovery (*see Crawford-El v. Britton*, 523 U.S. 574, 598-99 (1998)), some reasonable remedial measures are appropriate.

1. Custody of USB Drive

Because the USB drive contains HIPAA-protected information that should never have been in plaintiffs' possession, plaintiffs must return the drive and any copies of the drive or its contents to defendants. Further, plaintiffs must also deliver to defendants any notes, memoranda, summaries, or compilations they or their counsel may have made that contains any HIPAA-protected information. The copies and notes that must be deleted from any computer and delivered to defendants include all copies and notes in the possession or control of plaintiffs, plaintiffs' counsel, and anyone else who received this information from plaintiffs or their attorneys. Plaintiffs and their attorneys shall also verify under oath that they have delivered all such documents and information as provided herein, and have not retained any copies in any form or format. Further, those verifications shall identify all persons who have been given access to the HIPAA-protected information.

Given the apparent relevance of the documents on the USB drive, however, under Fed. R. Civ. P. 26 defendants must in turn disclose those documents to plaintiffs, after they have been redacted so they are no longer HIPAA-protected as provided in 45 C.F.R. § 164.514. The documents to be returned to plaintiffs after redaction of the HIPAA-protected information will include all the documents that were contained in plaintiffs' Rule 26 disclosure, including the privileged documents discussed above. As to those documents that are still privileged, although plaintiffs' counsel may see and review them, they are still obliged to maintain their confidentiality as provided in *Fox Searchlight*. As such, the parties should submit a stipulated protective order to address the treatment of those documents.

The balance of the injunctive relief requested by the parties is addressed in the accompanying Report and Recommendation.

2. Notice of HIPAA Violation

Notification in the event of a breach of protected information under HIPAA is governed by 42 U.S.C. § 17932. The statute obliges the covered entity that maintains the protected health information to give notice to the individuals whose information has been breached within 60 days after the covered entity discovers the breach. 42 U.S.C. §§ 17932(a), (d)(1), (e); 45 C.F.R. § 164.404. Where possible, such notice is to be made by first-class mail to the individuals. 42 U.S.C. § 17932(e)(1); 45 C.F.R. § 164.404(d). But where the breach involves the information of more than 500 persons, notice must be made to media outlets. 42 U.S.C. § 17932(e)(2); 45 C.F.R. § 164.406. Notice must also be given to the HHS Secretary. 42 U.S.C. § 17932(e)(3); 45 C.F.R. § 164.408.

Here, PVHD discovered the breach by December 30, 2013. *See* Ex. 13. Recognizing its notice obligations, PVHD began the notification process at least by January 30, 2014. *See* 1/30/14 Roberts Decl., ¶ 15. As discussed above, under the

circumstances here PVHD might be able to make the case that there is a low probability the protected information has been compromised, and thus there was no presumed breach and so notice would not be required. But PVHD has not chosen to try to demonstrate this, and indeed, it is a close question under the facts in the record here. Certainly there is nothing improper in PVHD taking the conservative course it has to presume a breach and give notice to the affected individuals, and this is an understandable course since HIPAA places the burden to give such notice on PVHD, and PVHD faces penalties for not giving notice when required.

Accordingly, there are no steps for this court to order any party to take with respect to notification. The only question left for this court to address with respect to notification is whether PVHD's public notification was improper in some way such that a correction or retraction is needed. That question is addressed in the accompanying Report and Recommendation.

IV.

CONCLUSION

Based on the foregoing, **IT IS ORDERED THAT**:

1. Defendants' Motion for Return of Documents (docket no. 76) is GRANTED IN PART AND DENIED IN PART as detailed above;

2. The original USB drive – which is currently in the custody of mediator Denise Asher, a neutral third party – shall be delivered to defendants within seven days;

3. Within seven days, plaintiffs shall deliver the following to defendants:

   a. Any and all copies of the USB drive and its contents currently in the possession, custody, or control of plaintiffs or their counsel;

   b. Any notes, memoranda, summaries, or compilations that plaintiffs or their counsel may have made that contain any HIPAA-protected information;

c. Verifications made under oath by each of the plaintiffs and their attorneys that they have delivered all such documents and information as provided herein, that they have not retained any copies of the same in any form or format, and that identify all persons who have been given access to the HIPAA-protected information on the USB drive;

4. Within fourteen days of the return of the USB drive to defendants, defendants shall deliver copies of all the documents on the USB drive to plaintiffs, but with all HIPAA-protected information redacted from the documents; and

5. As to those documents on the USB drive that are privileged, plaintiffs and their counsel shall maintain their confidentiality, and the parties shall meet and confer to reach a stipulated protective order to address the specific treatment of those documents.

DATED: April 17, 2014

SHERI PYM
United States Magistrate Judge