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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Damian Hart, et al., **Plaintiffs,** **v.** **Maricopa County Sheriff's Office, Joe Arpaio, the duly Elected Sheriff of Maricopa County, et al.,** **Defendants.**	**Cause No. CIV-1977-00479-PHX-EHC** **DEFENDANTS' MARICOPA COUNTY BOARD OF SUPERVISOR'S OBJECTIONS TO 9/30/05 REPORT AND RECOMMENDATION AND MOTION FOR PROTECTIVE ORDER AND REQUEST TO SET HEARING/ORAL ARGUMENT ON MOTION TO TERMINATE** **(Assigned to the Honorable Earl H. Carroll)**

Defendants Maricopa County Board of Supervisors (the "County") and Maricopa County Sheriff's Office ("MCSO"), by and through undersigned counsel, respectfully submit their objections to the September 30, 2005 Order by the Honorable Morton Sitver (the "Order") (Doc. #1105). Should the Court Order that the County produce the documents objected to herein, it is requested that these documents should then be subject to a protective order confidentially restricting use of these documents only to the instant litigation after in camera review. This filing is supported by the accompanying Memorandum of Point and Authorities, the "Response of Maricopa County Board of Supervisor and the Maricopa County Sheriff's Office to Plaintiffs' Motion Pursuant to Fed.R.Civ.P. 37(A)(2)(B) to Compel Defendants to Produce Relevant Documents," (Doc. # 985) and the Declarations of Bill Williams (Doc. # 986) and Sharon Anthony (Doc. # 987), all of which

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are attached as exhibits hereto. In addition, the County and MCSO move for an oral argument hearing to be set on their Motion to Terminate the Amended Judgment (Doc. # 906) currently pending before the Court.

I. STANDARD OF REVIEW

On January 26, 2005, this Court referred a whole host of pending motions to the Honorable Morton Sitver. A complete list of the fifteen motions that were pending before Judge Sitver at the time the Order was filed is set forth on pages 1-2 of the Order. To date, Defendants' "Pre-hearing Memorandum and Renewed Motion for Order to Terminate the Amended Judgment" (Doc. # 906) has not been decided.

When a Magistrate Judge enters an Order in a pretrial matter not dispositive of a claim or defense of a party, that party may serve and file objections to that Order. Fed.R.Civ.P. 72(a); 28 U.S.C. § 636(b)(1). The District Judge to whom the case is assigned shall consider such objections and shall modify or set aside any portion of the Magistrate Judge's order found to be clearly erroneous or contrary to law. *Id.* For reasons set forth more fully below, paragraph 10 of the Magistrate Judge's September 30, 2005 Order, and its subparts, is believed to be clearly erroneous and contrary to law, and the County hereby objects to this Order.

II. ANALYSIS

Paragraph 10 of the September 30, 2005 Order requires Defendants to produce within 40 days the following documents: (1) morbidity/mortality and root cause analysis reports relating to suicides for 2001 through 2003 with identifying information redacted; (2) documents issued by the NCCHC to the County relating to the review and/or accreditation of jails by the NCCHC from January 1, 2000 to the present; (3) the independent evaluations of health care services required by paragraph 70 of the Amended Judgment from January 1, 2000 to present; (4) all inspection reports issued by any governmental agency as contained in Plaintiffs' request number 4 and relating to medical or mental health care, or environmental health and safety, for the years stated in the request; and (5) all minutes of any meetings of Correctional Health Services staff or contract health

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care providers from January 1, 2001 to present, subject to Defendants' filing of a motion for protective order.

As a general proposition, the Federal Rules of Civil Procedure expressly recognize limitations on discovery. Specifically, Fed.R.Civ.P. 26(b)(1) states: "Parties may obtain discovery regarding any matter, **not privileged**, that is relevant to the claim or defense of any party....all discovery is subject to the limitations imposed by Rule 26(b)(2)(i)....(emphasis supplied). Fed.R.Civ.P. 26(b)(2) states "...The frequency or extent of use of the discovery methods otherwise permitted under these rules and by any local rule shall be limited by the court if it determine that: (i) the discovery sought is unreasonably cumulative or duplicative or is obtainable from some other source that is more convenient, less burdensome or less expensive...."

The County and MCSO object to the production of the above-referenced documents for the following reasons:

- Lack of relevance/lack of discoverability/lack of authorization/lack of issue specification;
- Vagueness/overbreadth/burdensome;
- Patient confidentiality/privacy privileges and the quality assurance/quality management/quality improvement privileges (*See e.g.*, A.R.S. §§ 12-2292 *et seq.*; §§ 36-2401-2403; § 36-401 *et seq.*; § 36-445.01 *et seq.*); and
- The Amended Judgment (Doc. # 705) is stayed and the non-constitutional provisions are terminated by operation of law.
- The State of Arizona's Records Retention and Disposition Schedule, attached as Exhibit 4, defines the record retention policy for the County and MCSO. According to the policy, general correspondence must be kept for only 2 years, staff meeting minutes must be kept for only 2 years, quality information meetings must be kept for only 3 years, and quality management/utilization management reports must be kept only 2 years.

By this reference, the County and MCSO hereby incorporate their "Response of Maricopa County Board of Supervisor and the Maricopa County Sheriff's Office to Plaintiffs' Motion

Pursuant to Fed.R.Civ.P. 37(A)(2)(B) to Compel Defendants to Produce Relevant Documents," (Doc. # 985), attached as Exhibit 1, into this filing. With these general objections to the Order, the County will now address specific objections to the Order.

A. Morbidity/mortality and root cause analysis reports relating to suicides for 2001 through 2003 with identifying information redacted

The County objects to the production of morbidity/mortality and root cause analysis reports because they are protected by a self-critical analysis or peer review privilege. A.R.S. § 36-445 *et seq.*; A.R.S. § 36-2401, *et seq.*; *Bredice v. Doctors Hospital, Inc.*, 50 F.R.D. 249 (D.D.C. 1970) (recognizing self-critical analysis privilege in the context of hospital peer review), *aff'd without opin.*, 479 F.2d 920 (D.C. Cir. 1973). Accordingly, these reports are not discoverable and the Order is clearly erroneous and contrary to law. There is no current suit pending that would allow for the production of such records in any event. In any event, a stipulated judgment was entered into. The only issue properly before the Court now is the issue of termination of the matter. Whether there are current, ongoing violations of that judgment has no relevance to the records noted above.

The self-critical analysis or peer review privilege recognized in *Bredice* has been applied by numerous federal courts to preclude discovery of medical peer information. *See e.g.*, *Balk v. Dunlap*, 163 F.R.D. 360 (D. Kan. 1995) (finding minutes of OB/GYN meeting called to discuss the quality of patient care protected under Kansas medical peer review statutes); *Utterback v. Yoon*, 121 F.R.D. 297 (W.D. Ky. 1987) (finding Board of Investigation memorandum and Veterans Administration quality assurance records confidential and free from discovery in Federal Tort Claims Act medical malpractice claim against the United States. Indeed, a number of cases expressly recognize the protection from discovery of *mortality* reviews. *See e.g.*, *Weekoty v. United States*, 30 F.Supp.2d 1343 (D. N.M. 1998 (self-critical analysis privilege precluded discovery of morbidity and mortality review); *Spinks v. Children's Hosp. Nat'l Medical Center*, 124 F.R.D. 9 (D.D.C. 1989) (denying motion to compel production of morbidity and mortality conference and finding such materials subject to District of Columbia's statutory privilege).

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Undoubtedly, Plaintiffs will argue the recent *Agster v. Maricopa County*, 422 F.3d 836 (9th Cir. 2005) case for the proposition that there exists no such federal privilege of peer review mortality reviews conducted by County Correctional Health Services. However, we strongly assert the *Agster* ruling does not apply to the facts of the instant case.

In *Agster*, the parents and representative of the estate of Carol Agster brought an action against the County and the Maricopa County Sheriff's Office for the death of Agster while in the custody of the County in negligence and federal civil rights law. *Id.* at 837. Correctional Health Services was obligated to undertake a mortality review by standards promulgated by the National Commission on Correctional Health Care Standards for Health Services in Jails. *Id.* at 837-838. The mortality review prepared by Correctional Health Services was intended to be kept confidential and was never shared with anyone. *Id.* at 838. Plaintiffs sought discovery of the mortality review prior to trial, the district court ordered the production of the document, and the 9th Circuit Court of Appeals affirmed. *Id.*

Unlike the facts in *Agster*, however, in the instant case, the Court's Order is overly broad. In *Agster*, the Court permitted the discovery of the morbidity/mortality and root cause analysis report of the decedent to the decedent's parents and representatives. Here, Plaintiffs constitute a purported class[1] and have alleged various vague constitutional violations which have not ever been specified in detail. The Magistrate Judge has ordered Defendants to produce all morbidity/mortality and root cause analysis reports for Plaintiffs to paw over, but Plaintiffs have yet to demonstrate that there exists any current, ongoing, systemic constitutional violation in the *new jails* at the present. At the very least, the Order is premature, and constitutes a fishing expedition to further prolong this litigation. By his ruling, the Magistrate Judge has allowed Plaintiffs to conduct this fishing expedition at the expense of Defendants. However, maintaining confidentiality of these reports is essential to foster candid discussion in connection with the identification and analysis of the root causes of problems in the provision of healthcare so that effective improvements in the quality of

[1] It is entirely unclear, further, just who actually is within this "class" at this point, or whether the Plaintiffs' counsel is truly representing that purported class or is even in communication with any such class.

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care may be developed and implemented and should not be chilled. *See e.g.*, Declaration of Sharon Anthony (Doc. # 987), attached hereto as Exhibit 2. Such reports provide no support for Plaintiffs asserting that there are the current, ongoing, systemic abuses that they complain of. Plaintiffs merely appear to want to share these with other prospective litigants.

Moreover, most, if not all, of the factual information relied upon by Correctional Health Services for these reports has already been discovered by Plaintiffs from other sources, which makes the production of these reports unreasonably cumulative, duplicative and unduly burdensome in light of the peer review implications. Defendants previously provided data regarding suicides at the jails covering all Maricopa County Sheriff's Office inmate deaths by suicide 1997-2002 and year to date 2003. *See*, Declaration of Bill Williams Regarding Document Production ¶ 10 (Doc. # 986) (attached as Exhibit 3) (referencing Bates Nos. MC(OCT03)005394-005396). Defendants have also produced Maricopa County Sheriff's Office incident reports on suicides for 2001, 2002, and 2003. *See*, Declaration of Bill Williams Regarding Document Production ¶ 10 (Doc. # 986) (attached as Exhibit 3) (referencing Bates Nos. MC(MAR04)006285-006935).

The County further objects to this portion of the Order on the grounds of duplication, vagueness/overbreadth/and burdensomeness, and on the grounds of lack of relevance/lack of authorization/lack of issue specification/and lack of discoverability.

Finally, the Order requires Plaintiffs to file an omnibus motion to show "[t]he basis of Plaintiffs' claim that a **systemic** constitutional violation is currently ongoing...." (Order at 35) (emphasis in original). The production of 2-4 year old documents cannot lead to evidence showing current, ongoing, systemic constitutional violations. At the very least, Plaintiff's should first be requested to specify the violations they now complain of and to establish the need for, and relevance of these documents they now seek, and the Court should, at a minimum, order that Plaintiffs retain their confidentiality and limit the use of these documents to this case only.

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B. Documents issued by the NCCHC to the County relating to the review and/or accreditation of jails by the NCCHC from January 1, 2000 to the present

The County objects to the production of documents issued by the NCCHC because documents relating to NCCHC accreditation which documents have previously been provided to Plaintiffs' counsel on several occasions. *See*, Declaration of Bill Williams Regarding Document Production ¶ 14 (Doc. # 986); *see also*, Bates Nos. MC(OCT03)000061 – 000063; MC(OCT03)001586, and MC(OCT03)004917-005239; Statement and testimony of Dr. Gale Steinhauser and exhibits thereto; MC(MAY04)0006954. The County further notes that the NCCHC itself treats its evaluation documents as being privileged documents that are protected from disclosure.

The County further objects to this portion of the Order on grounds of vagueness/overbreadth/burdensomeness and on grounds of lack of relevance/lack of discoverability/lack of authorization/lack of issue specification. In addition, the County objects on the grounds of quality assurance/quality management/quality improvement privileges.

Finally, the Order requires Plaintiffs to file an omnibus motion to show "[t]he basis of Plaintiffs' claim that a **systemic** constitutional violation is currently ongoing...." (Order at 35) (emphasis in original). The production of documents, some of which are 5 years old, cannot lead to evidence showing current, ongoing, systemic constitutional violations. At the very least, Plaintiff's should first be requested to specify the violations they now complain of and to establish the need for, and relevance of these documents they now seek, and the Court should, at a minimum, order that Plaintiffs retain their confidentiality and limit the use of these documents to this case only.

C. The independent evaluations of health care services required by paragraph 70 of the Amended Judgment from January 1, 2000 to present

The County and MCSO object to the production of independent evaluations of health care services because all such documents have previously been provided to Plaintiffs' counsel on several occasions. Declaration of Bill Williams Regarding Document Production at ¶ 15 (Doc. # 986) (attached as exhibit 3); *see also*, Bates Nos. MC(OCT03)000061 – 000063; MC(OCT03)001586,

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and MC(OCT03)004917-005239; Statement and testimony of Dr. Gale Steinhauser and exhibits thereto; MC(MAY04)0006954. The County further objects because such independent evaluations are not required of the County by law. *See*, A.R.S. § 36-402(A12). In addition, the County objects on the grounds of quality assurance/quality management/quality improvement privileges. Finally, the County further objects because the Amended Judgment is stayed as a matter of law. 18 U.S.C. § 3626(e). Paragraph 70 became enforceable after the enactment of the PLRA. *See, Gilmore v. California*, 220 F.3d 987, 1006 (9th Cir. 2000).

Finally, the Order requires Plaintiffs to file an omnibus motion to show "[t]he basis of Plaintiffs' claim that a **systemic** constitutional violation is currently ongoing...." (Order at 35) (emphasis in original). The production of documents, some of which are 5 years old, cannot lead to evidence showing current, ongoing, systemic constitutional violations. At the very least, Plaintiff's should first be requested to specify the violations they now complain of and to establish the need for, and relevance of these documents they now seek, and the Court should, at a minimum, order that Plaintiffs retain their confidentiality and limit the use of these documents to this case only.

D. All inspection reports issued by any governmental agency as contained in Plaintiffs' request number 4 and relating to medical or mental health care, or environmental health and safety, for the years stated in the request

The County and MCSO object to the production of inspection reports issued by "any governmental agency" as contained in the Magistrate's Order because all such agency documents previously requested by Plaintiffs were provided to Plaintiffs' counsel on several occasions. *See*, Bates Nos. MC(OCT03)001587-001691), MC(OCT03000107-000115, MC(MAR04)006191-006284, statement and testimony of Bill Williams and Dr. Gale Steinhauser. The language as set forth in the Magistrate's Order, oversteps the previous requests by Plaintiffs. A vague request for any and all government reports is overreaching and overbroad. All reports specifically requested have been provided. The County and MCSO further object because such independent evaluations are not required of the County by law. *See*, A.R.S. § 36-402(A12). The County and MCSO further

object on grounds of vagueness and overbreadth and on grounds of lack of relevance/lack of authorization/lack of issue specification/lack of discoverability.

E. All minutes of any meetings of Correctional Health Services staff or contract health care providers from January 1, 2001 to present, subject to Defendants' filing of a motion for protective order

The County objects to the production of "[a]ll minutes of any meetings of Correctional Health Services staff or contract health care providers from January 1, 2001 to present" on the grounds that this portion of the Order is vague, overbroad, burdensome, and not likely to lead to relevant or discoverable information. Any search for "[a]ll minutes of any meetings" even if understood would be futile. The Court has not properly defined the parameters for such search or production. It is unreasonably burdensome to locate all documents from "meetings" because that would require searching the files of every employee for notes taken during a meeting if "minutes" is intended to so apply. The County further objects because Plaintiffs have yet to produce evidence of current, ongoing, systemic constitutional violations to justify such an intrusion. The County further objects on the grounds of the patient confidentiality/privacy privilege and the quality assurance/quality management/quality improvement privilege and on grounds that individual medical problems, injury, illness, death or claims are not matters of class-wide concern and are not discoverable in this case. *See e.g.*, A.R.S. § 12-2291 *et seq.*; A.R.S. § 36-509. The County further objects to the extent that documents were properly destroyed with permission from the state library because the records had no further administrative, legal, fiscal, research or historical value. A.R.S. § 41-1347.

If "minutes" is literally construed to formalized meeting minutes as defined by Roberts Rules of Order, it is believed that no such formal minutes may be available, but the County will attempt to comply if that is the definition to be applied.

Finally, the Order requires Plaintiffs to file an omnibus motion to show "[t]he basis of Plaintiffs' claim that a **systemic** constitutional violation is currently ongoing...." (Order at 35) (emphasis in original). The production of documents, some of which are 4 years old, cannot lead to

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evidence showing current, ongoing, systemic constitutional violations. At the very least, Plaintiff's should first be requested to specify the violations they now complain of and to establish the need for, and relevance of these documents they now seek, and the Court should, at a minimum, order that Plaintiffs retain their confidentiality and limit the use of these documents to this case only.

III. MOTION FOR PROTECTIVE ORDER

Should the Court order Defendants to produce any or all of the documents listed above, given the sensitivity of these documents, the Court should order that disclosure be limited only to Plaintiffs' counsel, clerical assistants and experts, and that the information may be used only in connection with the instant action. Pursuant to Fed.R.Civ.P. 26(c), a court may order that discovery may be had only on specified terms and conditions.

The County has a legitimate interest in protecting the information contained in the above-referenced documents, and the County would suffer a cognizable harm if this information were made available for purposes outside of this litigation. In the first place, Plaintiffs have never specified and defined the specific constitutional violations at issue which would necessitate the production of the above-referenced documents. Now, the Court is requiring Defendants to produce documents before Plaintiffs must file their omnibus motion, allowing Plaintiffs yet another opportunity to somehow craft something out of nothing. Putting aside this argument for a moment, assuming additional documents exist, there is no good reason to allow these documents to become publicly available. For reasons described above, many of these documents were created only because a privilege was thought to exist. If there were a chance that these documents were to be publicly disseminated, these documents likely would never have been created in the first place. Medical staff members are more willing to provide complete information about what actually happened, and not withhold important facts or details that might be self-critical or critical of others when their statements will not be subject to discovery or otherwise used in Court. *See*, Declaration of Sharon Anthony at ¶ 5, attached hereto as Exhibit 2. Confidential relationships and established principles of public policy would be unnecessarily compromised if these documents became

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available to others. Moreover, such public disclosure may compromise the very safety of the jails themselves and their operations.

Plaintiffs' attorneys have every incentive to work with other outside counsel and may seek discovery to be used for *other* cases against the County. To allow Plaintiffs' attorneys to disseminate discovery from this case for use in other cases would compromise the County without due process.

IV. CONCLUSION

For the foregoing reasons, the County respectfully objects to the Magistrate Judge's September 30, 2005 Order (Doc. # 1105) to produce the following documents:

- morbidity/mortality and root cause analysis reports relating to suicides for 2001 through 2003 with identifying information redacted;
- documents issued by the NCCHC to the County relating to the review and/or accreditation of jails by the NCCHC from January 1, 2000 to the present;
- all minutes of any meetings of Correctional Health Services staff or contract health care providers from January 1, 2001 to present, subject to Defendants' filing of a motion for protective order.

The County, joined by MCSO, object to the production of the following documents:

- the independent evaluations of health care services required by paragraph 70 of the Amended Judgment from January 1, 2000 to present
- all inspection reports issued by any governmental agency as contained in Plaintiffs' request number 4 and relating to medical or mental health care, or environmental health and safety, for the years stated in the request; and

Should the Court Order that the County and/or MCSO produce the documents referred to above, the production of any documents found should be limited as set forth herein and further defined after Plaintiffs show good cause for them and specify their claims further, and the documents, at a minimum, should be subject to an appropriate protective order restricting use of them solely to the needs defined in the instant litigation.

RESPECTFULLY SUBMITTED this 17th day of October, 2005.

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ELECTRONICALLY filed this 17th day of October, 2005, with:

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COPY mailed this 17th day of October, 2005 with:

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