SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ROBERT DAVID KALISH** **PART** **IAS MOTION 29EFM**

Justice

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MARGARET FORD, Deceased, by and through, LILIAN FORD GRIMES, as Administratrix of the Estate of MARGARET FORD,

Plaintiffs,

- v -

THE MARY MANNING WALSH NURSING HOME COMPANY, INC., CATHOLIC HEALTH CARE SYSTEM, CATHOLIC HEALTH CARE SYSTEM D/B/A MARY MANNING WALSH NURSING HOME, MARY MANNING WALSH NURSING HOME

Defendants.

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INDEX NO. 150419/2017

MOTION DATE 05/15/2019

MOTION SEQ. NO. 002

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 002) 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 55, 56, 57, 58, 59, 61, 62, 63, 64, 65, 66, 67

were read on this motion to/for PROTECTIVE ORDER.

Motion by Defendants Mary Manning Walsh Nursing Home Co., Inc. and the Catholic Healthcare System d/b/a Mary Manning Walsh Nursing Home (collectively, "Defendants") for a protective order, pursuant to CPLR 3103, vacating this Court's oral orders from the bench of March 4, 2019, directing Defendant to produce the documents from its privilege log of September 10, 2018 within thirty (30) days is granted in part and denied in part; and cross-motion by Plaintiffs Margaret Ford and Lilian Ford Grimes (collectively, "Plaintiffs"), pursuant to CPLR 3126, to strike Defendants' answer for failing to comply with this Court's March 4, 2019 oral directives is granted in part and denied in part.

BACKGROUND

In the instant case, it is alleged that Plaintiff Margaret Ford ("Margaret") developed pressure sores due to the negligence of Defendants, while she was a resident at the Mary Manning Walsh Nursing Home facility ("MMW") from July 25, 2014 through August 5, 2014 and from August 7, 2014 through November 10, 2014. Plaintiff subsequently died on January 14, 2015. This action is brought on Margaret's behalf by her administratix Plaintiff Lilian Ford Grimes ("Lillian"). Plaintiffs' counsel has previously stated that, in sum and substance, Defendants were negligent by failing to maintain an appropriate level of staffing at the facility.

The main issue on the instant motion concerns whether certain documents submitted for in camera review are protected from disclosure pursuant to the quality assurance ("QA") privilege, as recognized by federal and state statutes.

This discovery dispute was first brought to the Court's attention around the late summer of 2018, and on August 20, 2018, this Court ordered Defendants to produce a privilege log by

September 10, 2018 regarding any documents it claimed were privileged. Defendants timely submitted this privilege log to the Court, and thereafter to Plaintiffs at the Court's direction. Pursuant to the Court's direction, Defendants also submitted the underlying documents to the Court because, as the Court explained to the parties, it intended to review the documents in camera and issue a ruling from the bench determining which, if any, materials were protected from disclosure. At the request of the parties, the Court delayed said review for several months as the parties unsuccessfully attempted to mediate a settlement. The Court then directed the parties to appear on March 4, 2019 for said in camera review.

At the conference on March 4, 2019 ("the March 4 Conference"), the Court explained that it intended to go over each item in the privilege log, the parties could make their arguments, and the Court would make a ruling as to each exhibit in the privilege log. The Court then reviewed each exhibit and ruled that the QA privilege did not apply to any of the exhibits. In particular, the Court noted that Defendants had the burden of establishing that the QA privilege applied, and that Defendants had not submitted an affidavit from someone with knowledge establishing how the documents were created and for what purpose. Accordingly, the Court directed Defendants' counsel to turn over the documents submitted within thirty (30) days.

On or about April 4, 2019, it was brought to the Court's attention that Defendants had not turned over any documents to Plaintiffs in compliance with this Court's March 4 directives, and Defendants had not moved this Court to reconsider its order or appealed the March 4 orders. At the Court's direction, the parties appeared before the Court on April 9, and the Court questioned Defendants' counsel as to why it had not complied with its March 4, 2019 orders. Defendants counsel – a different attorney but from the same firm as the attorney who appeared on March 4, 2019 – stated that it had not complied because it only recently received a copy of the minutes and intended to move the Court to reconsider its order. This attorney stated that the attorney who appeared on March 4 "did not communicate" the nature of the Court's March 4 directives. The Court stated that it had given Defendants thirty (30) days to comply, and that, in the Court's view, the time to challenge its directives had expired. However, the Court provided Defendants an additional five (5) days to turn over the records.

Notwithstanding the Court's statements on the record, Defendants moved by order to show cause for a protective order, pursuant to CPLR 3103, that in sum and substance seeks to vacate the Court's March 4 directives.

Plaintiffs oppose the instant motion and have cross-moved for an order striking Defendants' answer, pursuant to CPLR 3126, for their failure to comply with the Court's March 4 directives.

The parties appeared before the Court on May 15, 2019 to argue the instant motion and cross-motion. During said argument, the Court stated on the record that it would grant Defendant's motion in part, and vacate its order with regard to Exhibit A, and then stated that it would deny the motion with regard to Exhibit B. Said argument, however, was interrupted by questions the Court received from the jury room during deliberations in a contemporaneous trial. As counsel were unable to return for argument that afternoon or the next day, at the request of

the parties, the Court took the remainder of the motion and the cross-motion on written submission.

The Court will review Defendants' motion with regard to each of the five exhibits submitted for in camera review; and will then consider Plaintiffs' cross-motion for sanctions.[1]

DISCUSSION

I. Defendants' Motion

A. Procedural Matters

As a preliminary matter, this Court notes that because the Court's March 4 Order was not made in response to a motion on notice, it was not appealable as of right. Accordingly, the appropriate procedure to challenge an "ex parte" or "sua sponte" order of an IAS court is to move to vacate the order, pursuant to the CPLR 5015 and 5701 (a) (3), "and then[, if denied,] appeal from the denial of that motion so that a suitable record may be made and counsel afforded the opportunity to be heard on the issues." (*Bd. of Educ. of City School Dist. of City of New York v Grullon*, 117 AD3d 572, 573 [1st Dept 2014].) Such a motion must be made within a "reasonable time" which "naturally depends upon the particular reason assigned for relief." (CPLR 5015 [Legislative Studies and Reports].)

To be clear, however, this Court's decision to sign the instant order to show cause and consider the current challenge to its March 4 Order is by no means an endorsement of Defendants' counsel's misguided belief that the March 4 Order was "no order. (See Reply Affirm in Supp. at 2.) The Court's oral directives from the bench on March 4 were an enforceable order and Defendants were required to comply with these directives or timely move to vacate the Court's directives.

B. Relevant Law Regarding Defendants' Assertion of the Quality Assurance Privilege

The quality assurance ("QA") privilege is grounded in several federal and state statutes, namely, Education Law § 6527 (3), Public Health Law § 2805-m and 42 USCA § 1395i-3 (b) (1) (B).

With regard to the state statutes, Education Law § 6527 (3) and Public Health Law § 2805-m protect records and testimony from disclosure relating to records that are generated pursuant to Public Health Law §§ 2805-j, 2805-k and 2805-l and regulations promulgated thereunder.

Public Health Law § 2805-j governs a hospital's "[m]edical, dental and podiatric malpractice prevention program."

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[1] In addition, the issues concerning Defendants' assertion of the QA privilege on the motion and Plaintiffs' cross-motion to strike the answer, the parties seek judicial intervention on a myriad of other issues. The Court will briefly address these requests at the end of the section in a section titled "Other Issues."

Public Health Law § 2805-k governs the procedure relating to "[i]nvestigations prior to granting or renewing privileges."

Public Health Law § 2805-l governs the procedures relating to "[a]dverse event reporting," which includes required reporting relating to "patients' deaths or impairments of bodily functions in circumstances other than those related to the natural course of illness, disease or proper treatment in accordance with generally accepted medical standards." (Id.)

> "Public Health Law § 2805–m and Education Law § 6527(3) both protect from disclosure documents created by or at the behest of a quality assurance committee for quality assurance purposes. It is the burden of the entity seeking to invoke the privilege to establish that the documents sought were prepared in accordance with the relevant statutes. The party asserting the privilege is required at a minimum, to show that it has a review procedure and that the information for which the exemption is claimed was obtained or maintained in accordance with that review procedure. Records that are duplicated or used by a quality assurance committee are not necessarily privileged."

(*Robertson v Brookdale Hosp. Med. Ctr., 153 AD3d 743, 744* [2d Dept 2017].)

The ultimate question is whether the documents claimed privileged were "generated by or at the behest of a quality assurance committee for quality assurance purposes." (*In re Subpoena Duces Tecum to Jane Doe, Esq.*, 99 NY2d 434, 441 [2003]; *see also Clement v Kateri Residence*, 60 AD3d 527, 527 [1st Dept 2009]; *Sanchez v Residence*, 79 AD3d 492 [1st Dept 2010].) "The purpose of the privilege is to enhance the objectivity of the review process and to assure that medical review or quality assurance committees may frankly and objectively analyze the quality of health services rendered by hospitals and thereby improve the quality of medical care." (*Pasek v Catholic Health Sys., Inc.*, 159 AD3d 1553, 1554 [4th Dept 2018].) "The privilege protects evaluations of individual physicians, not hospital-wide plans to improve quality and prevent malpractice." (*Aldridge v Brodman*, 49 AD3d 1192, 1193 [4th Dept 2008]; *see also Klingner v Mashioff*, 50 AD3d 746, 747-48 [2d Dept 2008] [finding no quality assurance privilege for "minutes of a departmental mortality and morbidity meeting convened approximately two weeks after the death of the plaintiff's decedent, contained, among other things, statements by several of the individual defendants herein regarding the subject matter of this action"].)

Similarly, under 42 USCA § 1395i-3 (b) (1) (B), where a "nursing facility must maintain a quality assessment and assurance committee, consisting of the director of nursing services, a physician designated by the facility, and at least 3 other members of the facility's staff, which (i) meets at least quarterly to identify issues with respect to which quality assessment and assurance activities are necessary and (ii) develops and implements appropriate plans of action to correct identified quality deficiencies," disclosure of that committee's records cannot be compelled by a state.

In analyzing 42 USCA § 1395i-3 (b) (1) (B), the Court of Appeals held:

> "We read the language 'records of such committee' … as encompassing within its parameters any reports generated by or at the behest of a quality assurance committee for quality assurance purposes. Of course, where the committee simply duplicates existing records from clinical files, no privilege will attach. However, compilations, studies or comparisons of clinical data derived from multiple records, created by or at the request of committee personnel for committee use, are 'records of such committee' and are entitled to protection from disclosure pursuant to federal law."

(*In re Subpoena Duces Tecum to Jane Doe, Esq.*, 99 NY2d 434, 441 [2003].)

The Court will now review each exhibit in turn and determine whether to vacate the relevant portion of its March 4 Order and grant Defendants protective relief.

1. **Ex. A: Quality Management Committee Meeting Minutes, dated November 12, 2014**

   a. **Demand, Response and Nature of Document**

In Plaintiffs' Demand No. 10, Plaintiffs seek:

> **"Copies of all documentation of and from Defendant's Quality Assessment and Assurance Committee regarding Plaintiff."**

(Affirm in Supp. Ex. D [Plaintiff's Demand] at ¶ 10.) In their initial response, Defendants asserted the QA privilege pursuant to Education Law § 6527 (3) and 42 USCA § 1395i-3 (b) (1) (B), but never stated whether there were any documents responsive to such demand.

For in camera submission as responsive to Plaintiff's Demand No. 10, Defendants produced a document titled "Quality Management Committee Meeting Minutes," dated November 12, 2014, asserting in their privilege log that said document is privileged pursuant to Education Law § 6527 (3) and Public Health Law §§ 2805-j, 2805-l and 2805-j, and 42 USCA § 1395i-3 (b) (1) (B).

This document appears to be minutes of Quality Management Committee at Mary Manning Walsh Nursing Home ("MMW") wherein a myriad of topics relating to the quality of resident care and resident life are discussed, and wherein recommendations and follow-up plans are made for related issues. The beginning of the report notes that this is a "Confidential Report to the Quality Management Committee" and the last sentence reads: "This item is confidential and protected as Quality Assurance (QA) material under the NYS Education Law 6527 and NYS Public Health Law."

   b. **March 4, 2019 Ruling**

When this exhibit was initially reviewed in camera and argued by the parties, this Court ruled that these minutes were not protected by the QA privilege. The Court then found that the minutes appeared to involve information "routinely prepared and maintained pursuant to 10 NYCRR 415.15(a)(3)(i)" and discussed "a generalized approach for planning for a variety of

issues" with peer-review only mentioned in passing. The Court further noted that Defendants failed to submit an affidavit from someone with knowledge explaining how the documents were created and for what purpose the documents were generated.

c. Arguments on Instant Motion

On this motion, Defendants argue that the subject minutes are, by their nature, protected from disclosure by the QA privilege. In addition, and now for the first time, Defendants submit an affidavit from Michael Monahan who is an Administrator at MMW and "a member of the Quality Assurance Committee for Mary Manning Walsh since September 2013." (Affirm in Supp, Ex. K [Monahan Aff.] ¶¶ 2-3.) Stating that he understands that Plaintiffs' counsel is requesting copies all documentation from the Quality Management Committee regarding Margaret, Mr. Monahan states: "There is no such documentation created by the QA committee specific to Ms. Ford, and even if there was documentation from the QA committee that included Ms. Ford, it would be protected and privileged under the law." (Id. ¶¶ 7-8.)

Plaintiffs argue that the Court correctly found that the subject minutes "do not appear to have been prepared at the behest of the quality assurance committee but appeared to be 'of the type routinely prepared and maintained pursuant to 10 N.Y.C.R.R. 415 (a) (3) (i)." Plaintiffs' further argue that "Mr. Monahan does not dispute the Court's description of the minutes."

d. Analysis and Ruling

Although this Court did order the production of these minutes/documents—when they were initially provided for in camera review as being responsive to Plaintiffs' Demand No. 10—the Court, being provided with the affidavit of Mr. Monahan for the first time on this motion, has now determined that these materials are not actually responsive to Plaintiffs' demand since they—according to Mr. Monahan—make no mention of Margaret.

To reiterate, when a nursing home asserts that a document is protected from disclosure pursuant to the QA privilege, the question for the Court is whether the document at issue was "generated by or at the behest of a quality assurance committee for quality assurance purposes." (*In re Subpoena Duces Tecum to Jane Doe, Esq.*, 99 NY2d 434, 441 [2003].) The minutes of a QA committee will generally be prima facie protected because they could not exist but for the committee meeting and making of a record of what transpired.[2]

Here, given that there is apparently nothing responsive in the minutes—no discussion of Margaret—and because the minutes were created by and at the behest of the QA committee for QA purposes, the Court finds that said minutes are non-responsive and protected from disclosure pursuant to the QA privilege.

Accordingly, the Court hereby vacates the relevant portion of its prior March 4, 2019 order directing Defendant to turn over copies to Plaintiffs of the November 12, 2014 Minutes of

[2] That is not to say that QA meeting minutes will always be protected. For example, a successful challenge to the assertion of the QA privilege could occur where the minutes reveal that the committee did not meet for quality assurance purposes.

the Quality Assurance Committee (Ex. A to Priv Log). Defendant need not produce these minutes to Plaintiff.[3]

2. Ex. B: 2014 Daily Census Reports

a. Demand, Response and Nature of Documents

In Demand No. 11(a), Plaintiffs sought:

> **"Copies of daily census records consisting of a summary report of the daily resident census with cumulative figures for the time period of July 24, 2014 through November 10, 2014."**

(Affirm in Supp., Ex. D [Demand].) Defendants initially responded that such documents were not material and necessary and that the demand improperly sought materials that were privileged pursuant to 42 USC § 1395i-3(b)(I)(B)(ii), Education Law § 6527(3) and Public Health Law § 2803-d(6)(e). (Affirm in Supp., Ex. E [Response].)

Defendants thereafter produced documents titled "2014 Daily Census Reports" as Exhibit B to this Court for in camera review and asserted in their privilege log that said documents were privileged pursuant to the above state and federal statutes. In response to Defendants' privilege log assertions, Plaintiffs argued that these documents were relevant to the merits of the case:

> "[D]aily census records are relevant to the level of staffing. Nursing homes are mandated to report census information to DOH/CMS in order to provide a basis to understand the relative number of nursing staff providing direct care (broken down by 'topic/type') to all of the residents during each shift and, extrapolating, allows inference as to the number of nursing hours available to residents."

(Affirm. in Supp., Ex. H [Pl. Response to Priv Log] at 2.)

b. March 4, 2019 Ruling

When this exhibit was initially reviewed in camera and argued by the parties, this Court ruled that the document was not protected from disclosure by the QA privilege and ordered that it be turned over, explaining its basis as follows:

> "The document that was submitted to the Court, there is no indication that was submitted, how this document was generated or any relation it has to the function of the defendant's quality assurance committee.
>
> The documents, in sum and substance, appear to be

[3] The Court notes that, having ruled on this branch of Defendants' motion on the record at the oral argument along with the documents attached to Exhibit B, the respective portions of this decision are meant to supplement those oral rulings.

> computer records of admissions and discharges. While such a document could potentially be utilized by the quality assurance committee, there is no evidence suggesting that it was created by or at the behest of the quality assurance committee. As I stated previously, there is no affidavit that was submitted by the defendant that might indicate that.
>
> Defendant also, in their application, makes reference to Public Health Law Section 2803-D6E, which holds that reports related to abuses of persons receiving care or services in residential health care facilities are protected from [and] exempt from disclosure.
>
> Specifically, the relevant portion of that statute says, except as hereinafter provided, any report, record of the investigation of such report and all other information related to such report shall be confidential and shall be exempt from disclosure under Article 6 of the Public Officers Law.
>
> Exhibit B is simply a record of admissions and discharges. There is nothing indicating that it is a record relating to an investigation of abuse.
>
> Accordingly, Exhibit B, the 2014 daily census report is not protected from disclosure by any of the claimed privileges and must be produced to the plaintiff.
>
> All the names obviously are to be redacted out. Defendant, clearly, if there is any name of any individual [patient it is to be redacted]."

(March 4 Tr. at 7:17-9:06.)

c. Arguments on Instant Motion

In support of applying the QA privilege to the subject daily census records, Defendant submits the affidavit of Mr. Monahan which states:

> "I understand that plaintiff is also requesting daily census records and a summary report of the records. Any summary report prepared by the QA Committee would be part of the statutory reporting requirements for nursing facilities and therefore would not discoverable to a specific lawsuit. Moreover, as much as the census of the facility falls into patient care and quality of care, it is my opinion that it is covered under the statutory protections."

(Monahan Aff. ¶ 8.)

In opposition, Plaintiffs argue that this Court previously found "there was no indication how such document was generated or how same relates to the function of the defendants' quality assurance function." (Affirm in Opp. at 9.) Plaintiffs further add that Mr. Monahan's claim that such documents are privileged because they are "part of the statutory reporting requirement", such argument is not valid," given the Court of Appeals holding in *In re Subpoena Duces Tecum to Jane Doe, Esq.*, (99 NY2d 434, 441 [2003].)

d. Instant Analysis and Ruling

Mr. Monahan only states that "[a]ny summary report prepared by the QA Committee ***would*** … not [be] discoverable to a specific lawsuit." He does not affirmatively state that the subject materials ***were*** in fact prepared by or at the behest of the Quality Assurance committee for a quality assurance purpose. In fact, it is unclear whether Mr. Monahan even reviewed the particular documents submitted as Exhibit B. Accordingly, Mr. Monahan's affidavit fails to establish the subject records here were generated by or at the behest of the QA committee for QA purposes. (*See Estate of Savage v Kredentser*, 150 AD3d 1452, 1454 [3d Dept 2017]; *Slayton v Kolli*, 111 AD3d 1314, 1315 [4th Dept 2013]; *Visalli v Cohen*, 31 Misc 3d 1221(A) [Sup Ct, Nassau County 2011].)

Moreover, Mr. Monahan's view that these records are protected from disclosure simply because they relate to "patient care and quality of care" is mistaken. (*See In re Subpoena Duces Tecum to Jane Doe, Esq.*, 99 NY2d 434, 441 [2003].)

Thus, Defendants have failed to meet their burden of establishing that these census records and summary reports (submitted as Exhibit B) are protected from disclosure by the QA Privilege.

However, pursuant to a colloquy on the record between counsel for both parties, Defendants need only produce these census records and summary reports for the period of July 24, 2014 through November 10, 2014, as demanded by Plaintiffs, and need not submit any dates beyond the aforesaid that may have been submitted for in camera review.

Accordingly, the Court will not vacate or modify the portion of its March 4 order directing Defendant MMW to turn over copies of the daily census records (as submitted as Exhibit B) for the time period of July 24, 2014 through November 10, 2014. Defendant must turn these documents over within ten (10) days with any patient names redacted.

3. Ex. C: Quality Management Committee Policy and Procedures

a. Demand, Response, and Nature of Document

In Plaintiffs' Demand No. 32, Plaintiffs seek:

"A copy of the Quality Assessment and Assurance Programs/Plans established and prepared in accordance with 10 N.Y.C.R.R. § 415.27 relating to the types of

conditions and occurrences alleged in the Complaint during the Plaintiffs residency at the subject facility."

(Affirm. in Supp., Ex. E [D's Responses to Demand].) In their response to this demand Defendant referred Plaintiff to its response to Demand No. 10, presumably claiming the document to be protected by the QA privilege pursuant to pursuant to Education Law § 6527 (3) and 42 USCA § 1395i-3 (b) (1) (B).

Thereafter, Defendants submitted a document titled "Quality Management Policy and Procedure," with a last revised date of May 3, 2015, and which lists four appended documents as attachments. Plaintiffs responded to the privilege log stating that they were not seeking "any document related to the quality assessment and assurance committee performance or review function," but rather "copies of the policies, procedures, and/or plans established as required under 10 N.Y.C.R.R. §415.27(c)(3)(v)." (Pl. Response to Priv Log at 5-6.) In addition, Plaintiffs argued that "a response to this demand is especially relevant and necessary as defendant has yet to disclose that the facility had any policies and procedures related to the types of conditions and occurrences alleged in the Complaint (i.e. pressure sores), other than a 'turn and position' policy." (Id.)

b. March 4, 2019 Ruling

When this exhibit was initially reviewed in camera and argued by the parties, this Court ruled that the document was not protected from disclosure by the QA privilege and ordered that it be turned over, explaining its basis as follows:

> "The document that I just described is a document that sets forth the policy of the defendant to have a comprehensive systematic quality management program designed to involve all members of the organization.
>
> The document further states that the governing board and executive director are responsible for a comprehensive quality management program supported by the quality management committee.
>
> As such this document appears to be a mission statement and a policy manual for the defendant's mission of quality management and performance improvement. There is also no indication anywhere in the document that it is meant to be kept confidential.
>
> As such, there is no indication that this document was prepared by or at the behest of the quality assurance committee, it was meant to be confidential or that keeping it confidential will enhance the objectivity of the review process and to assure that medical review or quality

assurance committees may frankly and objectively analyze the quality of health services rendered by hospitals and thereby improve the quality of medical care.

You can see a case called Pasek, P-A-S-E-K, versus Catholic Health Systems at 159 Appellate Division 3rd, Page 1553.

Accordingly, Exhibit C, titled quality management committee policy and procedures is not protected from disclosure by the QA privilege and the defendant must produce it to the plaintiff."

(March 4 Tr. at 9:12-11:01.)

c. Arguments on Instant Motion

In his affidavit, Mr. Monahan states:

"I understand that plaintiff is seeking documents prepared by the facility concerning QA programs/plans prepared in accordance with 10 NYCRR 415.27. Such documents related to QA programs would only be prepared by the QA Committee and thus would not be discoverable."

(Monahan Aff. ¶ 9.)

Plaintiff argues that the Court correctly determined that such document would not be protected from discovery by the QA privilege since there is no indication that said document was created by or at the behest of the QA committee and that said document was meant to be kept confidential.

d. Instant Analysis and Ruling

Again, Mr. Monahan's affidavit falls short of stating that the subject document submitted for in camera review was ***actually*** created by or at the behest of the QA Committee. Similar to his statements regarding Exhibit B, Mr. Monahan talks about the documents annexed as Exhibit C in the abstract and it is unclear whether he in fact reviewed these documents before signing his affidavit.

Moreover, the very text of the document begins: "It is the policy of Mary Manning Walsh to have a comprehensive systematic Quality Management Program designed to involve all members of the organization." Later on, in a section titled "Responsibilities" it is stated: "Authority: The Governing Board and Executive Director are ultimately responsible for a comprehensive Quality Management Program and are supported by the following." The Quality Management Committee is one of the committees listed as "supporting."

In addition, the two names listed on the first page – Michael Monahan and Vivian Paternak – are the Administrator and the Director of Quality Management. While both Monahan and Pasternak are on the QA Committee, there is no indication that the committee directed this document to be created.

Moreover, even assuming arguendo that the document was created by or at the behest of the QA Committee, pursuant to 10 NYCRR 415.27, the subject document appears to be in the nature of a mission statement that "[q]uality assurance shall be the responsibility of all staff, at every level, at all times" (10 NYCRR 415.27 [a]) paired with generalized protocols to help staff respond to issues of the residents quality of care and quality of life. Again, assuming arguendo that the subject document was created by the QA committee, it might also be viewed as MMW's attempt to provide "a written plan for the quality assessment and assurance program which describes the program's objectives, organization, responsibilities of all participants, scope of the program and procedures for overseeing the effectiveness of monitoring, assessing and problem-solving activities." (10 NYCRR 415.27 [c] [2].)

While Courts have held that "Quality Assessment and Assurance Committee reports prepared in accordance with 10 NYCRR 415.27(c)(6) … are statutorily immune from disclosure," (*Simmons v N. Manhattan Nursing Home, Inc.*, 52 AD3d 351, 352 [1st Dept 2008]), Defendants cite to no cases for the proposition that materials relating to subsections (a), (c) (2), or (c) (3) (v) are immune from disclosure and the Court is not aware of any such controlling authority.

Further, there is no indication that this document was meant to be kept confidential, and Mr. Monahan is silent as to whether the document was in fact kept confidential.[4] As Defendants themselves point out (Affim in Supp. at 11), the rationale behind the QA privilege is that protecting confidentiality promotes the candid exchange of information necessary for QA committees to review and improve upon the delivery of care. (*See e.g. Brathwaite v State*, 208 AD2d 231, 235 [1st Dept 1995] [cited in Affirm in Supp.at 11.) Given that there is no indication that the document has been kept confidential, the rationale for upholding the privilege does not exist here.

As such this Court finds that there is no indication that this document was prepared by or at the behest of the QA Committee, was meant to be confidential, or that keeping it confidential will "enhance the objectivity of the review process and to assure that medical review or quality assurance committees may frankly and objectively analyze the quality of health services rendered by [Defendants] and thereby improve the quality of [] care." (*Pasek v Catholic Health Sys., Inc.*, 159 AD3d 1553, 1554 [4th Dept 2018]; *see also Clement v Kateri Residence*, 60 AD3d 527, 528 [1st Dept 2009] [holding that "staff medical policies, and system-wide operational materials such as contracts, licenses, and by-laws, are material and necessary"].)

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[4] The Court notes that the documents submitted for in camera review ***on this motion*** all have the watermark – "CONFIDENTIAL!" – written across them. However, that watermark does not appear on the documents that were submitted to the Court ***for its in camera review on March 4, 2019***. Presumably, this watermark was added by Defendants' counsel as a precautionary measure.

Further, in this demand, Plaintiffs are not seeking any reports created in response to Margaret's pressure sores, but rather Plaintiffs seek information concerning whether MMW had any "policies and procedures" in place relating to pressure sores. Defendant has apparently submitted the subject document as being responsive to Plaintiff's demand.

Accordingly, the document titled Quality Management Committee Policy and Procedures, submitted for in camera review as Ex. C, is not protected from disclosure by the QA privilege, and Defendants are directed to produce said document to Plaintiffs within ten (10) days.

4. **Exs. D-E, 2013 and 2014 Annual State Survey Documents**

In Demand No. 33, Plaintiffs seek:

"Copies of all reports prepared pursuant to 10 N.Y.C.R.R. § 412.1 for a period of five (5) years preceding the time frames specified in the Complaint."

Defendants have submitted Annual State Survey Documents submitted to the New York State Department of Health for 2013 and 2014. In their privilege log, Defendants do not claim that these documents are immune from disclosure but rather argue that they are publicly available to Plaintiffs via a Freedom of Information Law ("FOIL") request. Prior to this Court's March 4 Order, Plaintiffs responded to Defendants that they had FOILed these documents but had not received a response.

At the March 4 Conference, the Court stated as follows:

> "The defendant in the papers does not actually claim that these documents are protected from disclosure, but simply states that they are available through a foil request.
>
> Since the document has -- since the documents have already been prepared for this Court for in-camera review, the defendant should produce them and submit them to the plaintiff.
>
> Accordingly, the defendant is ordered to produce the documents, D and E, to the plaintiff."

(March 4 Tr. at 1:05-12.)

On the instant motion, Mr. Monahan states:

> "I understand that plaintiff seeks copies of reports prepared by Mary Manning Walsh pursuant to 10 NYCRR 412.1 for five years. Any reports generated under this code would be generated as part of the QA mandatory process and therefore protected from

disclosure in a lawsuit. Even the DOH does not disclose such reports prepared by facilities. That said, it is my understanding that the State findings generated by the DOH from such reports and inspections are discoverable through the State."

At the oral argument on the instant motion, Plaintiffs' counsel confirmed that, after several months, it still had not received a response to its FOIL request.[5] There is simply no reason to further delay this case as Plaintiffs wait for a response for their FOIL request when Defendants have these documents and can easily provide them to Plaintiffs.

Accordingly, Defendant shall produce its Annual State Survey Documents submitted to the New York State Department of Health for 2013 and 2014 within ten (10) days to Plaintiffs.

II. Plaintiffs' Cross-Motion and Other Issues

Plaintiffs' cross-move, pursuant to CPLR 3216, to strike Defendants' answer for their failure to comply with this Court's March 4 Order. In addition, in the event that the Court does not strike Defendants' answer, Plaintiffs seek an order from this Court directing Defendants to provide the date of birth for Defendants former employee Yvonne Ormsby, as Plaintiff is of the belief that Defendant has provided an address for a similarly named individual with a different address.

Defendant separately complains that "it has become very confusing who is representing plaintiff in this case," and asks for a direction from this Court as to who the formal attorney of record is for plaintiff.

The Court will address the cross motion and these other requests in turn.

A. Cross-Motion to Strike the Answer

"The nature and degree of the penalty to be imposed pursuant to CPLR 3126 lies within the sound discretion of the Supreme Court." (*Schiller v Sunharbor Acquisition I, LLC*, 152 AD3d 812, 813 [2d Dept 2017].) "The striking of a pleading may be appropriate where there is a clear showing that the failure to comply with discovery demands or court-ordered discovery is willful and contumacious." (*Brandenburg v County of Rockland Sewer Dist. #1*, 127 AD3d 680, 681 [2d Dept 2015].) The courts however are encouraged to provide litigants with reasonable latitude before imposing the "ultimate sanction" of striking a pleading. (*See CDR Creances S.A.S. v Cohen*, 62 AD3d 576, 577 [1st Dept 2009].) Moreover, there is a strong preference in this state that, wherever possible, actions be decided on their merits and a discovery sanction lesser than striking a pleading be imposed. (*See Ayala v Lincoln Med. & Mental Health Ctr.*, 92 AD3d 542 [1st Dept 2012].)

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[5] The Court notes that Monahan appears to claim that these publicly available documents are protected from disclosure by the QA privilege. The Court rejects this argument outright.

The Court also notes that, notwithstanding Plaintiffs' initial demand for reports "for a period of five (5) years preceding the time frames specified in the Complaint[,]" Plaintiffs now appear to be seeking reports "for a period of two years preceding Plaintiffs admission." (Pl. Response to Priv Log at 6.)

Nonetheless, the bar and bench has been repeatedly admonished by the Court of Appeals and the Appellate Division that discovery non-compliance has an insidious effect on the legal system and should not be tolerated:

> "As this Court has repeatedly emphasized, our court system is dependent on all parties engaged in litigation abiding by the rules of proper practice. The failure to comply with deadlines not only impairs the efficient functioning of the courts and the adjudication of claims, but it places jurists unnecessarily in the position of having to order enforcement remedies to respond to the delinquent conduct of members of the bar, often to the detriment of the litigants they represent. Chronic noncompliance with deadlines breeds disrespect for the dictates of the Civil Practice Law and Rules and a culture in which cases can linger for years without resolution. Furthermore, those lawyers who engage their best efforts to comply with practice rules are also effectively penalized because they must somehow explain to their clients why they cannot secure timely responses from recalcitrant adversaries, which leads to the erosion of their attorney-client relationships as well."

(*Gibbs v St. Barnabas Hosp.*, 16 NY3d 74, 81 [2010] [internal citations omitted].) To this end, as Chief Judge Kaye explained, CPLR 3126 was designed to give the Supreme Court the tools to combat discovery abuse:

> If the credibility of court orders and the integrity of our judicial system are to be maintained, a litigant cannot ignore court orders with impunity. Indeed, the Legislature, recognizing the need for courts to be able to command compliance with their disclosure directives, has specifically provided that a 'court may make such orders ... as are just,' including dismissal of an action.

(*Kihl v Pfeffer*, 94 NY2d 118, 123 [1999], quoting CPLR 3126.)

Undeniably, Defendants failed to comply with this Court's March 4 directives, and the explanation for the non-compliance was a series of law office failures on the part of Defendants' counsel, including counsel's misguided belief that a court's oral directive is not a valid and binding order unless reduced to a written instrument.

Notwithstanding the aforesaid, this Court believes that the most productive step is to move forward and to encourage a more cooperative atmosphere with the understanding that the Court's indulgence here will not be taken for granted. As such this Court will not strike Defendants' answer.

B. Other Issues

With regards to Plaintiffs' request regarding Defendants' former employee Yvonne Ormsby, Defendants shall supply the date of birth of said employee, as Plaintiffs' counsel has demonstrated that this information if material and necessary for locating said former employee.

All other relief requested but not specifically addressed in this motion has been considered by this Court and is otherwise denied. The parties should therefore meet and confer in good faith on any other discovery disputes that have arisen since the submission of the instant motion.

CONCLUSION

Accordingly, it is hereby

ORDERED that the motion by Defendants Mary Manning Walsh Nursing Home Co., Inc. and the Catholic Healthcare System d/b/a Mary Manning Walsh Nursing Home ("Defendants") for a protective order, pursuant to CPLR 3103, vacating this Court's oral orders from the bench of March 4, 2019, directing Defendant to produce the documents from its privilege log of September 10, 2018 within thirty (30) days is granted to the extent that this Court's order directing disclosure of the item submitted for in camera review as Exhibit A is vacated and the motion is otherwise denied; and it is further

ORDERED that the cross-motion by Plaintiffs Margaret Ford and Lilian Ford Grimes (collectively, "Plaintiffs"), pursuant to CPLR 3126, to strike Defendants' answer for failing to comply with this Court's March 4, 2019 oral directives is granted to the extent that Defendants are directed to provide the date of birth for their former employee Yvonne Ormsby within ten (10) days and cross-motion is otherwise denied; and it is further

ORDERED that Defendants shall produce the documents submitted for in camera inspection as Exhibits B-E within ten (10) days of the Court's filing of this order as outlined in the instant decision and the minutes of the May 15, 2019 oral argument ("the Oral Argument Transcript"); and it is further

ORDERED that Defendants shall purchase a copy of the Oral Argument Transcript forthwith and serve a copy of the Oral Argument Transcript together a copy of this order with notice of entry.

The foregoing together with Oral Argument Transcript constitutes the decision and order of this Court.

5/302019
DATE

ROBERT DAVID KALISH, J.S.C.
HON. ROBERT D. KALISH
J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE