

**Olmann v Willoughby Rehabilitation & Health Care  
LLC**

2020 NY Slip Op 33567(U)

October 21, 2020

Supreme Court, Kings County

Docket Number: 514289/15

Judge: Bernard J. Graham

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At an IAS Term, Part 36 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 21st day of October, 2020.

PRESENT:

HON. BERNARD J. GRAHAM,

Justice.

-----X  
JOSEPH OLMANN, AS THE ADMINISTRATOR OF THE ESTATE OF MARIE C. OLMANN AND JOSEPH OLMANN, INDIVIDUALLY,

Index No. 514289/15

Mot. Seq. Nos. 7, 8

Plaintiff,

-against-

WILLOUGHBY REHABILITATION AND HEALTH CARE LLC AND SPRING CREEK REHABILITATION & NURSING CARE CENTER,

Defendants.

-----X

The following e-filed papers read herein:

NYSCEF Docket Nos.:

Notice of Motion/Order to Show Cause/  
Petition/Cross Motion and  
Affidavits (Affirmations) Annexed \_\_\_\_\_ 222-232, 248-254

Opposing Affidavits (Affirmations) \_\_\_\_\_ 237-246, 259

Reply Affidavits (Affirmations) \_\_\_\_\_ 256-258

Other Documents \_\_\_\_\_ 247, 255, 260-262<sup>1</sup>, 268<sup>2</sup>  
270-272, 273, 278-283<sup>3</sup>

<sup>1</sup> Memoranda of Law are referenced in the absence of opposing or reply affidavit(s) or affirmation(s).

<sup>2</sup> Certified transcript of January 9, 2020 hearing with regard to the motions.

<sup>3</sup> Parties' letters to the court, with exhibits, submitted in response to the Second Department's August 26, 2020 decision and order impacting the motions herein.

Upon the foregoing papers, in motion sequence (mot. seq.) seven, defendant Willoughby Rehabilitation and Health Center LLC d/b/a Spring Creek Rehabilitation & Nursing Care Center, s/h/a Willoughby Rehabilitation and Health Care Center LLC and Spring Creek Rehabilitation & Nursing Care Center (Spring Creek or defendant), moves for an order, pursuant to CPLR 2201, staying enforcement of the court's June 27, 2019 (the 2019 Order) order to the extent that it requires defendant to disclose certain Minimum Data Sets (MDS) pending the hearing and determination of plaintiff's consolidated appeals.

In mot. seq. eight, plaintiff Joseph Olmann, as the administrator of the Estate of Marie C. Olmann and Joseph Olmann, individually (plaintiff), cross-moves for orders: (1) pursuant to CPLR 3214, compelling defendant to produce unredacted staffing records in electronic form in accordance with the 2019 Order; (2) pursuant to CPLR 3103, mandating that the producing party bears its own costs of production; and (3) pursuant to CPLR 3103, entering a HIPAA-qualifying protective order governing the exchange of confidential and protected health information.

### **Background**

Plaintiff commenced this action on November 23, 2015 against Spring Creek, a nursing home, alleging that it provided inadequate care to decedent Marie Olmann, causing her to sustain personal injuries. Plaintiff also seeks class certification, contending that facility-wide deficiencies in care, particularly as to inadequate staffing levels, violated Public Health Law § 2801-d.

### **The 2016, 2017 and 2019 Orders**

By motion filed on March 9, 2016, plaintiff sought a qualified protective order, pursuant to CPLR 3103 (a) and 45 CFR 164.512 (e) (1) (ii), to protect the personal health information (PHI) of the nursing home residents that may appear in requested discovery. In its May 11, 2016 order (Gloria M. Dabiri, J.) (the 2016 Order), the court denied plaintiff's request as overly broad and premature, as no class had been certified.

Plaintiff first sought class certification by motion filed on May 2, 2016. By motion filed on June 9, 2016, plaintiff also moved to compel responses to its first request for production of documents dated January 19, 2016. In its June 20, 2017 order (Gloria M. Dabiri, J.) (the 2017 Order), the court denied class certification, with prejudice, as to plaintiff's common law negligence claim because plaintiff failed to meet the CPLR 901 requirements of commonality and superiority. In particular, the court held there was insufficient support in the record for plaintiff's conclusion that a question common to all proposed class members is whether Spring Creek's staffing was inadequate and whether the lack of staffing harmed the resident class members. With respect to its Public Health Law § 2801-d claim, the court denied class certification with leave to renew, and allowed plaintiff limited, precertification discovery as to that claim. To that end, the court directed defendant to provide responses to Requests # 16 (all docs revealing health and safety concerns raised by residents during resident counsel meetings), # 23 (daily and monthly acuity reports during the relevant time period), # 24 (all acuity trend reports during the relevant time period), and # 44 (all documents relating to complaints from residents and other persons concerning the quality of resident care provided at the facility and living conditions at the facility during the relevant time period).

Plaintiff appealed the court's 2016 and 2017 Orders. Defendant filed a notice of

appeal from the 2017 Order, but subsequently withdrew its appeal.

By order to show cause signed on November 22, 2017, plaintiff subsequently moved to compel responses to Requests # 16, 23, 24 and 44, as well as to plaintiff's second request for production of documents, including production of documents showing facility staffing levels. In that motion, plaintiff contended that defendant should be required to produce MDS, which are calculated for residents at the facility and reported to government regulator agencies. In response, defendant argued that disclosure of MDS fell outside of the parameters of the acuity reports requested in Requests #23 and #24. In the 2019 Order, the court held: "Given that Spring Creek does not produce acuity reports, production of MDS records for Spring Creek residents is material and necessary to determine whether a question common to all proposed class members is whether Spring Creek's staffing was inadequate given the demand of its residents" (2019 Order at 9). The court held that plaintiff should be given an opportunity to review the MDS data as it may, possibly, reflect on the level of care provided at Spring Creek. The court directed defendant to produce the MDS data for Spring Creek residents from November of 2012 to November of 2015 in response to Requests #23 and #24 seeking acuity data, and held that plaintiff's request for such production in electronic or native format was reasonable. The court further held that information regarding staffing levels will sharpen the issue of whether plaintiff satisfies the commonality requirement for class certification pursuant to CPLR 901. In that regard, the court ordered that defendant produce documents reflecting the persons who worked at the facility from November of 2012 to November of 2015 by providing their roles, work schedules and assignments. The documents ordered included,

but were not limited to, staffing schedules or assignments sheets. Defendant filed a notice of appeal from the 2019 Order, but subsequently withdrew that appeal as well.

On October 19, 2019, defendant filed the instant motion to stay production of the MDS pending resolution of the appeal. On January 2, 2020, plaintiff filed the instant cross motion for the entry of a qualified protective order, to compel discovery, and for defendants to pay for the cost of production of the staffing level documents. On January 9, 2020, the court heard argument with respect to the pending motions. Additional oral argument was held on July 22, 2020, and the motions were submitted.

### **The August 26, 2020 Second Department Decision and Order**

On August 26, 2020, the Second Department decided plaintiff's appeal of the 2016 and 2017 Orders (*see Olmann v Willoughby Rehabilitation and Health Care Center, LLC*, 186 AD3d 837 [2d Dept 2020] (the 2020 Order). The court affirmed that portion of the 2016 Order denying plaintiff's motion for a qualified protective order to allow for disclosure of confidential information of other Spring Creek residents, holding that Judge Dabiri providently exercised her discretion in denying same (*id.* at 839). The court also modified the 2017 Order by granting plaintiff's motion to compel additional discovery related to the decedent's care at Spring Creek (Demands # 30, 32, 33, 34, 36, 36, 51) (*id.* at 839-840). The court otherwise affirmed the 2017 Order insofar as appealed (*id.* at 838). In that respect, the court held that Judge Dabiri providently exercised her discretion in denying the motion for class certification, noting that "[h]ere, common questions of law or fact do not predominate over questions involving members of the proposed class as to causation" (*id.* at 839). The court further held that plaintiff "failed to establish that a class action is superior to other available methods for the fair and efficient adjudication of

the controversy” (*id.*).

### Parties’ Contentions

#### **Defendant’s Motion to Stay Enforcement of the 2019 Order**

Defendant moves for a stay of enforcement of the 2019 Order pending the hearing and determination of plaintiff’s consolidated appeals, contending that it has provided responses in compliance with the order, but has not provided the MDS. In support of its failure to comply, Spring Creek argues that the MDS is not a tool used to measure staffing, but is merely part of the clinical assessment of residents. The information in the MDS is allegedly provided to Medicare and Medicaid for reimbursement funding. Defendant asserts that the MDS contains protected resident-specific identifiable health care information that is protected from disclosure by HIPAA. According to defendant, plaintiff’s demand for access to hundreds of thousands of pages of HIPAA-protected medical information concerning thousands of individual residents demonstrates plaintiff’s cavalier attitude towards privacy rights and the bounds of discovery, and also plaintiff’s misunderstanding of the nature and purpose of MDS. Spring Creek contends that the discovery requests are overly broad and unduly burdensome.

In support of its motion, defendant submits the affidavit of Tatiana Poulard, Spring Creek’s Director of Nursing, who purportedly has personal knowledge of its administrative practices, operations, and document storage and retention policies pertaining to Spring Creek. Poulard states that Spring Creek does not store MDS records. Rather, MDS is purportedly stored by SigmaCare, a vendor that provides electronic medical record services. According to Poulard, SigmaCare advised that only individuals

with access to SigmaCare accounts may log in to view the MDS files, and that the files are unable to be transferred to or opened in alternative formats, such as PDF. This is to ensure the integrity of HIPAA-protected resident personally identifiable health care information contained in each MDS assessment. Poulard has been advised that the requested MDS records from November 2012 through November 2015 yielded approximately 7,000 individual MDS assessments, which are a minimum of 30 pages each and typically at least 50 pages. Poulard states that physical production of the requested MDS would range from 210,000 pages at minimum to 350,000 pages, all of which must be reviewed by attorneys to ensure its HIPAA compliance and that all PHI has been redacted.

Defendant contends that the protections afforded to MDS under federal law exist to ensure the integrity of the HIPAA-protected information in the assessments. Spring Creek asserts that, nevertheless, it has provided the decedent's MDS for the applicable three-year period, which totals 246 pages, every page of which allegedly contains PHI.

Defendant states that MDS records are submitted to the government through SigmaCare. Spring Creek submitted a request to SigmaCare to obtain the MDS records, but due to HIPAA issues and data theft concerns, Spring Creek advised that (1) only individuals with access to a SigmaCare account may login to view the MDS files, and (2) the files are unable to be transferred to or opened in alternative formats, such as PDF.

In opposition, plaintiff contends that the outcome of the appeal has no impact on defendant's obligation to produce the MDS assessments pursuant to the 2019 Order. In that regard, plaintiff asserts that the 2019 Order reaffirmed the 2017 Order's holding that discovery of Spring Creek's acuity levels as material and necessary for precertification

discovery as to whether a question common to all proposed class members is whether Spring Creek's staffing was inadequate given the demand of its residents. Plaintiff also notes that defendant did not perfect an appeal of the 2019 Order directing defendant to produce the MDS assessments, and notes that plaintiff appealed the denial of discovery, not the grant of discovery of the acuity discovery for the purpose of pre-certification.

Plaintiff argues that defendant merely seeks to delay litigation of this action, as production of the MDS assessments is neither burdensome nor costly. To that end, plaintiff asserts that the MDS assessments can be produced in electronic, machine-readable format. According to plaintiff, when produced in such a format, they do not require a page-by-page review for PHI in order to comply with the 2019 Order. Plaintiff contends that physical paper production of the information would run afoul of the 2019 Order, since the court directed discovery in machine-readable electronic form where available. Plaintiff relies on defendant's assertion that it transmits the MDS information to the DOH in electronic, machine-readable format for its assertion that it can be produced in this format to plaintiff. Plaintiff submits that it has never requested the information in PDF format, as hinted at by defendants.

In support of its contention that the MDS assessments can be produced in machine-readable language, plaintiff submits the affidavit of Charlene Harrington, RN, PhD, FAAN (Harrington), a professor emeritus of sociology and nursing and alleged expert in the analysis of CMS data. Harrington allegedly performed numerous analyses of data sets comprised of the MDS assessments of nursing homes for the purpose of determining the level of staffing necessary to adequately care for the home's residents. Harrington states that a facility should be able to export the MDS assessments of its

residents in raw, machine-readable format such as Extensible Markup Language (XML) or Comma Separated Value (CSV) format. She asserts that such machine-readable files are simple TXT documents that allow for processing and analysis of information contained therein by referring to a data dictionary that explains where and in what order particular information can be found in the file. She further states that 42 CFR 483.20 (f) requires that nursing homes encode and transmit their MDS assessments according to prescribed data formats and layouts so they are machine-readable. In her experience, electronic medical record vendors are readily capable of doing this. Harrington also believes that nursing homes that use such vendors are themselves able to use the vendor-provided software to download MDS assessments into machine-readable format. In Harrington's purported expert opinion, raw MDS assessments taken by nursing homes of their residents pursuant to 42 CFR 483.20 prove that the data can be used to calculate, on an aggregate basis, the staffing needs of a facility, as well as to develop, review, and revise the resident's comprehensive plan of care.

Plaintiff further contends that SigmaCare, defendant's electronic medical records vendor, has confirmed that defendant does, in fact, have the ability to download its residents' MDS records into machine-readable electronic format. To that end, plaintiff submits an affirmation from John D. Sardesai-Grant (Grant), an associate with the law firm representing plaintiff. Grant allegedly spoke with a SigmaCare analyst regarding the capabilities of SigmaCare's software provided to nursing homes for managing MDS assessments, who told that: (1) a nursing home that uses its software can easily download the MDS assessments in electronic format as a machine-readable file, (2) a nursing home uses an electronic portal provided by SigmaCare to enter information required by the

MDS assessments into its database, and (3) a nursing home uses SigmaCare software to store encoded MDS assessments for later submission to databases maintained by relevant regulatory authorities, and that a facility can easily download the MDS assessments to itself in the same Extensive Markup Language (XML) filed format in which the regulatory authorities currently require an MDS assessment to be loaded. The SigmaCare analyst also allegedly confirmed that MDS assessments can be downloaded in TXT or CSV format, and confirmed that a TXT file in CSV format is a machine-readable file that is electronically maintained and electronically exported, and also could be anonymized mechanically (globally using a repeatable program) by replacing personal identification with a randomized number.

Plaintiff contends that because the MDS assessments can be produced in electronic, machine-readable files, defendant need not manually review each assessment for redaction. Instead, the MDS assessment database can be programmed to replace any field that identifies a resident, such as name or social security number, with an anonymous numerical identifier, thereby preventing any unwarranted disclosure of HIPAA protected information. Plaintiff submits that, as previously argued in support of the motion to compel, anonymized MDS information is regularly used by many researchers. In that regard, Harrington also states that the MDS assessments can be anonymized to preserve residents' privacy while still providing raw medical information necessary for the analysis of data for purposes of the litigation. Harrington avers that this process is not time-consuming or burdensome, but can be performed on a global basis with a simple find and replace.

Plaintiff contends, moreover, that the 2019 Order did not contemplate redaction of

all PHI specific to each resident, but rather directed production of MDS because “plaintiff should be given the opportunity to review MDS data as it may, possibly, reflect on the level of care provided at Spring Creek.” Plaintiff argues that, as noted by Harrington, in order for the MDS assessments to provide useful information regarding the facility’s residents needs, the assessments must contain information necessary for assigning a resident into the relevant Resource Utilization Group, which will indicate the level of staffing needed by that resident (i.e., the resident’s acuity). Redaction of all PHI, rather than merely the identity markers as directed by the court, would allegedly frustrate the purpose for which the court ordered MDS production.

Finally, plaintiff notes that defendant withdrew its appeal of the 2016, 2017 and 2019 Orders denying class certification with leave to renew as to the Public Health Law claim and wherein MDS was ordered for pre-certification discovery, and therefore, cannot argue that there is a pending questions as to whether defendant must produce the MDS.

In reply, defendant contends that it complied with the 2019 Order by providing plaintiff with an invoice for the cost of production of redacted staffing records, but that plaintiff refuses to pay for the records and contests the redaction of staff names. Defendant asserts that, as was argued in front of the court, the MDS is not a tool to measure staffing, but is merely a part of the clinical assessment of residents that is then sent to Medicare and Medicaid for reimbursement purposes. As previously argued before the court, defendant now reargues that the MDS contains protected resident-specific identifiable PHI that is protected from disclosure pursuant to HIPAA. Defendant asserts that the court did not appreciate the gravity of ordering production of the MDS, and

restates that its production would be unduly burdensome. It contends that the order should be held in abeyance because plaintiff continues to misstate to the court the “unprecedented violation of federal law that will occur by the disclosure of the MDS.”

In addition, defendant disputes Harrington’s contention that the MDS is used to determine nursing home staffing levels. Defendant argues it previously raised this issue with the court, but that the court misapprehended or misunderstood what the federal government actually says about MDS. To that end, defendant asserts that the Center for Medicare and Medicaid Services (CMS) is the federal agency that provides reimbursement to, and oversees and monitors long-term care facilities like Spring Creek. Defendant contends that CMS conclusively determined the purpose of MDS and published this in the Federal Register, codified in CFR 483. According to defendant, surveys, which are conducted in accordance with the Guide to Surveyors, a/k/a “The State Operation Manual” (SOM), are conducted by CMS employees who perform nursing home inspections pursuant to federal law. Defendant contends that the November 22, 2017 SOM does not provide any directives to surveyors that the MDS is to be reviewed to determine the adequacy of staffing levels. Rather, the MDS is alleged to be used to determine reimbursement levels.

Defendant also argues that the federal government has set up barriers to prevent production of MDS. Federal law allegedly places strict limits on disclosure, with only a minimum amount of personal data is to be collected to achieve the purpose of MDS reimbursement, policy and research functions. Defendant asserts that disclosure of the clinical record is only permissible when required by transfer to another health institution, state or federal law, and/or the resident. Otherwise, providers cannot release MDS data

on an individual level format or in the aggregate. Defendant contends that the disclosure pursuant to law exception does not change the fact that the MDS is protected from this type of disclosure sought here. Defendant alleges that under federal law, the facility must make reasonable efforts to limit uses and disclosures “to the minimum necessary to accomplish the intended purpose” of the legal proceeding (*see* 45 CFR 164.502 [b]; 165.514 [d]).

Defendant also submits that there are also technical burdens to de-identifying PHI and requires a qualified expert to address technical, physical, computational and data implications at stake. Defendant also claims that Harrington, plaintiff’s purported expert, is not qualified, as she is not an expert on MDS or technology, and has no familiarity with SigmaCare of the federal regulations governing MDS protections. Defendant also contends that Grant’s affirmation regarding his call with SigmaCare is improper because it is impermissible hearsay and because he may have violated the advocate-witness rule and ought to be disqualified as counsel.

Defendant argues that redaction of three years worth of MDS data in “raw data TXT format” with a simple search and replace, as plaintiff argues, is impossible. Moreover, it contends that CMS prohibits disclosure of MDS in the manner and form argued by plaintiff. Even if search and replace were possible, plaintiff does not acknowledge the burden and cost to defendant of hiring an IT professional familiar with XML and CSV formats, or the type of expert that HIPAA requires under the statute. Defendant argues that pursuant to CPLR 3103 (a), the court has discretionary authority to issue an order limiting discovery when it is unreasonably expensive, such as here, where

producing three years worth of records would be financially burdensome for defendant. Defendant avers that plaintiff should bear the high cost of production of electronically stored information.

Defendant further states that underscoring the lack of merit of this lawsuit is the fact that in January 2019, the NYS Legislature declined to enact a law that would create actual staffing ratios in long-term care facilities, and that currently, New York State does not legislate staffing ratios.

**Plaintiff's Cross Motion for a Qualified Protective Order, To Compel Production of Unredacted Staffing Records, and for Cost Shifting**

Plaintiff seeks an order, pursuant to CPLR 3214, compelling defendant to produce unredacted staffing records, in electronic form, in accordance with the 2019 Order. Plaintiff contends that defendant did not abide by the 2019 Order in that it has needlessly redacted responsive documents, opted for physical over electronic production, demanding payments of production costs, and filing a meritless motion to stay production pending appeal. Plaintiff informs that defendant intends to produce hard copies of redacted "staffing sheets," which plaintiff claims are inadequate. Plaintiff argues defendant must be compelled to produce both hard copy and electronic staffing/payroll records, free of redactions. Plaintiff notes that the 2019 Order mandates production in electronic format where available.

Plaintiff notes that the court ordered defendant to produce "[a]ll documents reflecting the persons who worked at the Facility, the times they worked (e.g., the staff and hours), their role (e.g., LNP or CAN), and their assignments (e.g., if assigned to a particular floor), including, but not limited to, staffing schedules or assignment sheets."

According to plaintiff, defendant will produce 1,400 pages at 75 cents per page, for a total of \$1,050, representing three years-worth of document, with all the names redacted to protect identities, once it receives an invoice for production. Plaintiff contends that nothing in the June 2019 Order, the CPLR, or the Uniform Rules of Courts, provides a basis for defendant's redactions.

In addition, plaintiff argues that defendant should bear the costs of production. In that regard, plaintiff contends that in a class action litigation, costs should be borne by the producing party, particularly where discovery involves electronically-stored information, such as staffing or MDS records. Plaintiff further asserts that entry of a HIPAA-qualified protective order is warranted because discovery may involve PHI.

Defendant opposes the entry of a qualified protective order, arguing that Judge Dabiri previously rejected the same motion in 2016 as premature and overbroad. Defendants contend that the 2019 Order did not permit plaintiff access to any PHI other than the MDS, and that the court allowed defendant to redact confidential information from the MDS. Defendant also notes that Judge Dabiri did not give plaintiff leave to renew the motion, and plaintiff cannot now relitigate the issue.

With respect to the cost issue, defendant contends that plaintiff should bear the production cost of their requested documents, a position that is allegedly supported by Second Department case law. Moreover, with respect to payroll records, defendant argues that plaintiff's demand for same does not appear anywhere in the Court's prior order and plaintiff's prior demand for payroll records was denied by Judge Dabiri in 2016.

#### **Parties' Submissions in Response to the 2020 Order**

Defendant contends that by its 2020 Order, the Second Department has limited disclosure solely to decedent and has conclusively denied plaintiff access to any records of Spring Creek's residence. In response, plaintiff argues that the only impact of the 2020 Order is that defendant must now respond to seven additional document requests that were previously denied. Plaintiff asserts that the Second Department did not overrule Judge Dabiri's determination that pre-certification discovery is warranted, that facility residents' acuity data must be produced, or that class certification would not be considered in the future upon renewal motion.

In addition, plaintiff contends that the 2020 order does not impact the 2019 Order's directive that defendant must provide staffing records, and argues that the defendant must produce these records for the entire facility in unredacted form. Plaintiff asserts that after the 2020 Order was issued, defendant submitted a "Response to Appellate Division Order" to plaintiff regarding the additional discovery ordered, stating, among other things, that the 2020 Order limits production of staffing records solely to decedent. Plaintiff further notes that defendant withdrew its appeal of the 2019 order, and therefore, has no grounds to object to production of unredacted staffing records for the entire facility for pre-certification discovery, as was previously directed.

#### **Discussion**

The portion of defendant's motion (mot. seq. seven) seeking a stay of enforcement of the 2019 Order pending resolution of the appeal is denied as moot, as the Second Department has recently issued the 2020 Order.

However, in light of the Appellate Division's holding that Judge Dabiri

“providently exercised [her] discretion in denying [plaintiff’s] motion for class certification” on the grounds that “common questions of law or fact do not predominate over questions involving members of the proposed class as to causation” and because plaintiff “failed to establish that a class action is superior to other available methods for the fair and efficient adjudication of the controversy” (*Olmann*, 186 AD3d at 839), the court must now reconsider its decision with respect to production of the MDS. The plain language of the 2020 Order apparently forecloses class certification in this matter. Moreover, the Second Department’s ruling that Judge Dabiri should have compelled Spring Creek to provide additional discovery specifically “related to the decedent’s care, the staffing of nurses and nursing assistants who provided care to the decedent, and complaints or investigations of alleged substandard care or abuse involving the decedent” (*id.* at 840) – i.e., documents concerning decedent’s meals, bed changing records, movement and change of position records – provides further support for the conclusion that the Second Department intended to limit this case solely to claims related to the plaintiff.

Since the Second Department has held that class certification would not be proper here, there is no longer a basis for discovery of both the MDS records and the staffing records for the entire facility, both of which were only ordered as pre-certification discovery in contemplation of a class action. Accordingly, defendant’s motion (mot. seq. seven) is granted to the extent that the court reconsiders its 2019 Order in light of the 2020 Order and holds that defendant need not produce the MDS records of the Spring Creek population, in any form, to plaintiff.

Likewise, the court reconsiders its holding with respect to production of staffing

records. That portion of plaintiff's cross motion (mot. seq. eight) seeking unredacted staffing records for the entire facility on the basis that it is essential pre-certification discovery is denied. Defendant is to provide staffing records and other relevant responses to plaintiff's demand for "all records regarding the work schedules and assignments of all personnel, including nurses and nursing assistants, who provided care and treatment to Plaintiff during the relevant time period," sought in Demand # 30. With respect to plaintiff's motion for cost shifting, the court directs that plaintiff bear the cost of this production.

Courts have broad discretion to set the terms and conditions of discovery (*see Castagnazzi v Schlecker*, 159 AD2d 533, 533 [2d Dept 1990]; *see also Matter of U. S. Pioneer Elecs. Corp. (Nikko Elec. Corp. of Am.)*, 47 NY2d 914, 916 [1979]; *Duracell Intren., Inc. v American Employers' Ins. Co.*, 187 AD2d 278 [1st Dept 1992]). Costs associated with discovery, as with all disclosure provisions of CPLR Article 31, must be viewed in light of the court's broad discretion under CPLR 3103 (a) to regulate the use of any disclosure device (*see Ozen v Yilmaz*, 181 AD2d 666, 667 [2d Dept 1992]).

There is authority in the Second Department for the proposition that the party requesting discovery should bear the cost of production (*see Rubin v Alamo Rent-A-Car*, 190 AD2d 661, 663 [2d Dept 1993] [finding that lower court erred in directing plaintiffs to bear costs of redaction and reproduction of documents in response to defendants' requests]). "[E]ach party should shoulder the initial burden of financing his own suit, and based upon such a principle, it is the party seeking discovery of documents who should pay the cost of their [reproduction]" (*id.*; *see also Rosado v Mercedes-Benz of N. Am.*, 103 AD3d 395 [2d Dept 1984]). Moreover, the amount of documents to be produced has

now been limited, and it would not be inequitable for plaintiff to shoulder the cost of this production.

Finally, plaintiff's motion for a qualified protective order is denied. "HIPAA regulations specifically call for the issuance of a 'qualified protective order' to '[p]rohibit [ ] the parties from using or disclosing the protected health information for any purpose other than the litigation or proceeding for which such information was requested" (*Matter of Kayla S. (Eddie S.)*, 46 Misc3d 747, 751-752, [Fam Ct Bronx County 2014], quoting 45 CFR 164.512 [e] [1] [v] [A]). However, as the Second Department has held that a class action is not the appropriate vehicle here, and the court has therefore ruled that MDS for all facility residents is not to be produced, there is no need for a qualified protective order to protect the PHI of Spring Creek's residents. Moreover, a similar application was previously denied by Judge Dabiri.

### **Conclusion**

Accordingly, it is

**ORDERED** that portion of defendant's motion (mot. seq. seven) for a stay pending appeal is denied as moot. That portion of defendant's motion which seeks reconsideration of the court's 2019 Order directing production of MDS or acuity data for Spring Creek residents is granted to the extent that the court reconsiders its order and defendant need not produce the MDS to plaintiff; and it is further

**ORDERED** that plaintiff's motion (mot. seq. eight) to compel production of unredacted, facility-wide staffing records, for a qualified protective order, and for cost shifting is denied; and it is further

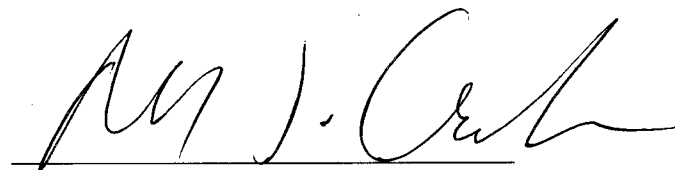
**ORDERED** that defendant is to provide documents responsive to plaintiff's

Demand # 30 for “all records regarding the work schedules and assignments of all personnel, including nurses and nursing assistants, who provided care and treatment to Plaintiff during the relevant time period,” only with respect to plaintiff.

The court has reviewed the parties’ remaining contentions and finds them to be without merit. All relief not expressly granted herein is denied.

This constitutes the decision and order of the court.

ENTER:



J.S.C. HON. BERNARD J. GRAHAM

KINGS COUNTY CLERK  
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