

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TENNESSEE  
WESTERN DIVISION**

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JOHN DOE, on behalf of himself and all others similarly situated,	)	
	)	
Plaintiff,	)	
	)	No. 2:17-cv-02793-TLP-cgc
v.	)	
	)	JURY DEMAND
BLUECROSS BLUESHIELD OF TENNESSEE, INC.,	)	
	)	CLASS ACTION COMPLAINT
Defendant.	)	
	)	

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**ORDER GRANTING PROTECTIVE ORDER**

The Court GRANTS the parties’ Joint Motion for a Protective Order. (ECF No. 62.) This Protective Order is issued to help minimize discovery disputes, protect the privacy of the parties’ sensitive information and records, and ensure that discovery proceeds efficiently in this case. Unless modified pursuant to the terms contained in this Order, this Order shall remain in effect throughout this litigation. As the parties have agreed that certain categories of documents and information should receive confidential treatment, and pursuant to Federal Rule of Civil Procedure 26(c), it is ORDERED:

**Scope.** This Order permits parties and non-parties to designate documents and information in this case as CONFIDENTIAL or Protected Health Information (the “Covered Information”) and disclose such Covered Information in accordance with the procedures set forth below. Covered Information designated as CONFIDENTIAL means information (regardless of how it is generated, stored, or maintained) or tangible things that qualify for protection under

Federal Rule of Civil Procedure 26(c), including but not limited to information the designating party believes in good faith to be protected under relevant provisions of applicable law regarding privacy information, non-public financial or business information, private or personal information that the designating party is prohibited from revealing or would not normally reveal to third parties except in confidence or has undertaken with others to maintain in confidence, pricing or rate information that is not already in the possession of the non-producing party and that is not publicly available; business information that, if made public, would give competitors an unfair business advantage or reveal trade secrets, or other similar types of confidential information protected from disclosure by statute or ruling.

**Protected Health Information (“PHI”).** The Health Insurance Portability and Accountability Act of 1996, as amended by the Health Information Technology for Economic and Clinical Health (collectively “HIPAA”) governs the use and disclosure of PHI by Covered Entities, as such terms are defined in HIPAA and its implementing regulations (hereinafter, the “HIPAA Privacy Rule”), including 45 C.F.R. § 160.103. For purposes of this Order, information designated as PHI will be treated separately under the terms of this Paragraph from information otherwise designated as Covered Information in this Order. A HIPAA Covered Entity may only disclose information specially designated as PHI in the course of a judicial proceeding if certain “satisfactory assurances” are received. *See* 45 C.F.R. § 164.512(e)(1)(iv). This Order hereby provides the requisite satisfactory assurances under HIPAA.

In accordance with the HIPAA Privacy Rule, this Order allows for the use and disclosure of PHI in the possession of parties and non-parties to this matter for the limited purpose of this litigation, including during discovery, at depositions, hearings, or other proceedings in this matter. In accordance with the HIPAA Privacy Rule, this Order specifically prohibits parties

and non-parties from using and/or disclosing PHI for any purpose other than the litigation. 45 C.F.R. § 164.512(e)(1)(v)(A). As to information regarding the identity of any Plaintiff, all information shall additionally be governed by the terms of the Non-Disclosure Agreement separately entered into between the parties, which shall supersede the terms of this Order. Also, in accordance with the HIPAA Privacy Rule, the PHI disclosed pursuant to this Order, including all copies made, shall be returned to the party or non-party who produced it, or shall be destroyed at the conclusion of this litigation. 45 C.F.R. § 164.512(e)(1)(v)(B). All parties and non-parties shall treat all PHI and all copies thereof as subject to this Order unless and until the Court orders otherwise or the parties mutually stipulate otherwise and shall enter into appropriate Business Associate Agreements prior to the disclosure of any PHI.

This Order constitutes a qualified protective order under 45 C.F.R. § 164.512(e)(1)(v)(A) and (B) of HIPAA's Privacy Rule.

This Order recognizes that it is not possible to identify and contact all individuals whose names or other PHI may be contained in such records and that redaction of all information that might be construed as PHI would be extremely difficult and would delay the proceedings. Therefore, this Order expressly authorizes the use and disclosure of PHI of non-party individuals to the extent such information is privileged or confidential under HIPAA and analogous state law, including but not limited to such information regarding mental health, alcohol/drug abuse, or HIV/AIDS, but only so long as it is protected from unauthorized disclosure in compliance with the above stated HIPAA regulations and analogous state law.

**Public Information Is Not Covered Information.** Documents that may qualify as Covered Information but that are otherwise available in the public domain are not Covered Information.

**Form and Timing of Designation.**

**Documents.** Documents containing Covered Information shall be so designated by placing or affixing the word(s) CONFIDENTIAL or PHI on each page of the document in a manner which will not interfere with the legibility of the document and which will permit complete removal of the CONFIDENTIAL or PHI designation. The parties should endeavor to affix CONFIDENTIAL or PHI designations prior to, or contemporaneously with, the production or disclosure of the documents. Later designations are not prohibited, with the understanding that the party claiming any information that is already on file with the Court that was not filed under seal should be so designated if, within two business days of such a filing, they request an order that such materials be designated as containing Covered Information and are to be filed under seal and treated in such a manner by all parties. Any such requests shall be submitted in accordance with Paragraphs 6 and 8 of this Order.

**Deposition or Other Proceeding.** In the case of depositions or other pre-trial testimony, designation of the portion of the transcript (including exhibits) which contains Covered Information shall be made (i) by a statement to such effect on the record during the proceeding in which the testimony is received, or (ii) by written notice served on counsel of record in this litigation within fourteen (14) business days after the receipt of the draft transcript of such proceeding by the designating party. However, before such fourteen (14) day period expires (or such earlier time as the parties may agree to or the Court may order), all testimony, exhibits and transcripts of depositions or other testimony shall be treated as Covered Information.

**Non-Written Materials.** Any non-written confidential material (*e.g.*, videotape, audio tape, computer disk, etc.) that contains Covered Information may be designated as such by labeling the outside of such non-written material designated as CONFIDENTIAL or PHI In the

event a receiving party generates any “hard copy” transcription or printout from any such designated non-written materials, the person who generates such “hard copy” transcription shall take reasonable steps to maintain the confidentiality of such materials.

**Protection of Confidential Material.**

**General Protections.** Documents designated CONFIDENTIAL or PHI under this Order shall not be used or disclosed by the parties or their counsel of record or any other persons identified below for any purposes whatsoever other than preparing for and conducting the litigation.

**Disclosure of Covered Information.** The parties, their counsel of record, and all of their respective officers, directors, employees and document services vendors shall not disclose or permit the disclosure of any documents or information designated CONFIDENTIAL or PHI under the terms of this Order to any other person or entity except as set forth in paragraphs (1)-(6) below, except as to categories (3) through (6) the name, address and Social Security Numbers of both the Plaintiff or any enrollee in any health plan, which shall be redacted from any such documents or information designated under the terms of this Order. PHI shall not be disclosed to any third party vendor prior to execution by that vendor of a Business Associate Agreement that complies with the requirements of HIPAA. Covered Information may be disclosed to the categories of persons described in paragraphs (3) and (4) only after the person to whom disclosure is to be made has executed an acknowledgment (in the form set forth at Attachment A hereto) that he or she has read and understands the terms of this Order and is bound by it, unless the document in question indicates that the person was a recipient of the document. Subject to these requirements, the following categories of persons may be allowed to review Covered Information:

Counsel. Counsel for the parties and employees of counsel who have responsibility for the action;

Parties. Individual parties and employees of a corporate party but only to the extent counsel determines in good faith that the employee's assistance is reasonably necessary to the conduct of the litigation in which the information is disclosed;

Investigators, expert witnesses retained by the parties or their counsel of record in connection with the litigation, and other agents of the parties acting in connection with the litigation;

Witnesses and their counsel in preparation for or during depositions, court-mandated conferences or hearings, or the trial of this case, although no copies of "CONFIDENTIAL" or "PHI" material shall be retained by such witnesses;

The Court and its personnel, including court reporters, videographers, and/or stenographers transcribing a deposition, conference, hearing, or trial;

Any other persons upon consent of the producing party or upon order of the Court.

**Copies.** All copies, duplicates, extracts, summaries or descriptions of documents designated as Confidential under this Order, or any portion of such a document, shall be affixed with the designation "CONFIDENTIAL" or PHI if the word does not already appear on the copy. They shall then be afforded the full protection of this Order.

**Filing of Confidential Materials.** If any party chooses to file any CONFIDENTIAL or PHI information, such CONFIDENTIAL or PHI Information shall be filed in the following manner, consistent with the standards set forth in *Shane Grp., Inc. v. Blue Cross Blue Shield of Michigan*, 825 F.3d 299 (6th Cir. 2016). Any party seeking to file CONFIDENTIAL information or PHI (including briefs that contain CONFIDENTIAL information or PHI) shall file such

document under seal using the procedure set forth in the Western District of Tennessee's User Manual for the ECF system, by filing the document as a "Sealed Motion" or "Sealed Document." Contemporaneously with that filing, the party shall file a separate motion for leave to keep the document under seal. If the filing party is seeking to file material it designated CONFIDENTIAL or PHI, then the filing party shall set forth the bases for maintaining the proposed sealed document under seal. If the filing party is seeking to file material designated CONFIDENTIAL or PHI by another party, then the filing party shall cite this provision of this Protective Order, and the party that designated the proposed sealed information as CONFIDENTIAL or PHI shall timely respond to the motion for leave to keep the document under seal with a brief that sets forth the bases for maintaining the document under seal. If the parties can reach an agreement in this regard, they may file a joint motion that sets forth the bases for maintaining the document under seal.

**Challenges to Designation as Covered Information.** Any CONFIDENTIAL or PHI designation is subject to challenge. The following procedures shall apply to any such challenge:

The burden of proving the necessity of a CONFIDENTIAL or PHI designation remains with the party or non-party asserting confidentiality.

A party or non-party who contends that documents designated CONFIDENTIAL or PHI are not entitled to confidential treatment shall give written notice to the party who affixed the designation of the specific basis for the challenge. The designating party or non-party shall have fourteen (14) days from service of the written notice (or such earlier time as the parties may agree to or the Court may order), to meet and confer in order to determine whether the dispute can be resolved without judicial intervention. If no resolution is reached, the party seeking to maintain the designation may move the Court for an order upholding the CONFIDENTIAL or

PHI designation, and any papers filed in support of or in opposition to this motion shall, to the extent necessary, be filed under seal to preserve the claimed confidentiality of the material.

Notwithstanding any challenge to the designation of documents as CONFIDENTIAL or PHI, all material previously designated CONFIDENTIAL or PHI shall continue to be treated as subject to the full protections of this Order until either (1) the party or non-party who claims that the documents are CONFIDENTIAL or PHI withdraws such designation in writing or (2) the Court rules that the documents should no longer be designated as Covered Information.

Challenges to the confidentiality of documents may be made at any time and are not waived by the failure to raise the challenge at the time of initial disclosure or designation.

In addition and subject to the provisions of this Paragraph relating to the process for challenging the designation of Covered Information, if it comes to the attention of a designating party that a document or information previously designated as CONFIDENTIAL or PHI does not contain such information, that party shall provide replacement documents removing such designations to the other parties.

**Failure to Designate.** Except as otherwise provided herein, a failure to designate a document as CONFIDENTIAL or PHI does not, standing alone, waive the right to so designate the document. If a party who originally designated information as Confidential Information makes use of such information in a pleading, motion, brief, memorandum or other document filed with the Court without following the provisions of this Paragraph, the confidentiality protection for that document or information that was originally designated as “Confidential” shall be deemed waived by the party, but the waiver extends to that information only. If a party designates a document as Confidential Information after it was initially produced, the receiving party, on notification of the designation, must make a reasonable effort to assure that the

document is treated in accordance with the provisions of this Order. No party shall be found to have violated this Order for failing to maintain the confidentiality of material during a time when that material has not been designated Confidential Information, even where the material is subsequently designated CONFIDENTIAL or PHI.

**Duty of Good Faith.** Each party or non-party that designates information or items for protection under this Order must act in good faith to limit any such designation to specific material that qualifies under the appropriate standards. If it comes to the attention of the designating party that information it has previously designated as CONFIDENTIAL or PHI does not qualify for such protection, that party will provide the other parties with versions of the documents or information that do not contain such a designation.

**Claw Back of Privileged & Protected Materials.** A producing party may assert privilege or protection over produced information at any time by notifying the receiving party(ies) in writing of the assertion of privilege or protection, except that:

Affirmative use of information by the producing party in the case waives privilege and protection with respect to it, and of other documents and information to the extent provided by Federal Rule of Evidence 502(a); and

Upon use in the case by another of information that was produced by a party, that producing party must promptly assert any claimed privilege and/or protection over it and request return or destruction thereof.

**Advance Notification of Potential Third Party Disclosures.** If any person receiving Covered Information covered by this Order: (a) is subpoenaed in another action or proceeding, (b) is served with a demand in another action or proceeding to which (s)he or it is a party or is otherwise involved; or (c) is served with any process by one not a party to this litigation, seeking

material designated as Covered Information by another party, the receiving party shall give written notice to the party that designated the material as Covered Information. The receiving party shall not produce any of the Covered Information for a period of at least ten (10) days, or within such lesser time period as ordered by a court, after providing the require notice to the designating party. If, within that period, the designating party gives notice to the receiving party that the designating part opposes production, the receiving party shall not thereafter produce such Covered Information until such time that the designating party has had the opportunity to obtain a protective order, but shall not be required to withhold production for longer than sixty (60) days. The designating party shall be solely responsible for asserting any objection to the requested production.

**Non-Waiver of Privilege.** Pursuant to Federal Rule of Evidence 502(d), the production of documents and information, whether intentional or inadvertent, shall not constitute a waiver, whether in this proceeding or any other federal or state proceeding whatsoever, of any privilege (including, without limitation, the attorney-client privilege and the work product protection) applicable to the produced materials or for any other privileged or protected materials containing the same or similar subject matter. This Order shall be interpreted to provide the maximum protection allowed by Federal Rule of Evidence 502(d).

**Treatment on Conclusion of Litigation.**

**Order Remains in Effect.** This Order will expire at the close of the litigation, including all appeals, for the above-referenced case.

**Return of CONFIDENTIAL or PHI Documents.** Within forty-five (45) days after the conclusion of the litigation, including the deadline to file any appeal or the conclusion of any appeal, upon written request by the producing party all documents treated as Covered Information under this Order shall be either destroyed or returned to the producing party or non-

party unless: (1) the document has been entered as evidence or filed in Court; or (2) the receiving party opts for destruction in lieu of return, and the receiving party provides a certification that all such copies have been destroyed. Notwithstanding the above requirements to return or destroy documents, counsel of record may retain attorney work product, and a copy of all documents filed with the Court. An attorney may use his or her work product in a subsequent litigation provided that such use does not disclose the Covered Information.

**Order Subject to Modification.** During the course of this litigation, the parties may agree or request that certain materials that constitute Covered Information receive greater or different protections from disclosure than provided for under the terms of this Order. This Order shall be subject to modification on the motion of any party, or by written stipulation approved by the Court, providing for such additional or different protections based on the particular circumstances and information at issue. The Order shall not, however, be modified until the parties have been given notice and an opportunity to be heard on the proposed modification.

**No Judicial Determination.** This Order is entered for the purpose of facilitating discovery and protecting confidentiality. Nothing herein shall be construed or presented as a judicial determination that any specific document or item of information designated as CONFIDENTIAL or PHI by counsel is subject to protection under Rule 26(c) of the Federal Rules of Civil Procedure or otherwise until such time as a document-specific ruling shall have been made.

**Persons Bound.** This Order shall take effect when entered and shall be binding upon: (1) counsel of record who signed below and their respective law firms; (2) their respective clients; and (3) non-parties.

**Relief from Order.** A party or non-party needing relief from the provisions of this Order

may, if agreement between or among the parties cannot be reached, seek appropriate relief from the Court upon due notice to all other parties based upon the timing and circumstances of such a request. This Order is without prejudice to all rights of parties and non-parties regarding objections as to discovery and admissibility as set forth in this Court's Local Rules and the Federal Rules of Civil Procedure.

**SO ORDERED**, this 23rd day of May, 2018.

s/ Thomas L. Parker  
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THOMAS L. PARKER  
UNITED STATES DISTRICT JUDGE