

Hernandez et al. v. County of Monterey et al., No. CV 13 2354 PSG
Plaintiffs' Letter Brief Regarding CFMG's Document Production

Plaintiffs move to compel Defendant California Forensic Medical Group, Inc. ("CFMG") to produce documents in response to two sets of discovery requests served on June 20, 2014. *See* Decl. of Sarah P. Alexander in Supp. of Pls.' Position ("Alexander Decl."), filed herewith, ¶ 2 & Ex. A. After nearly five months of meeting and conferring, unmet promises, and inappropriate assertions of privileges, CFMG has thus far only produced an extraordinarily small amount of discovery and still refuses to produce most documents responsive to Plaintiffs' requests. *Id.* ¶¶ 6-30 & Exs. D-R. With respect to each discovery dispute discussed below, CFMG has not met its obligation to respond to the best of its ability and has not asserted any objections justifying non-disclosure. Plaintiffs respectfully ask this Court to issue an order compelling prompt production. *See* Proposed Order, filed herewith.

E-Discovery: With respect to all of Plaintiffs' Requests, *CFMG has categorically refused to produce any electronically stored information or documents.* Alexander Decl. ¶ 30. Plaintiffs proposed an e-discovery plan on August 8, 2014, to which CFMG did not object for over a month. *Id.* ¶¶ 12-18, 22 & Exs. G-L. Ultimately, CFMG belatedly claimed that electronic production would be too burdensome because CFMG was purportedly obligated, under federal and state law, to redact information related to any non-Plaintiff's medical treatment. *Id.* ¶ 24. As previously briefed, Plaintiffs are entitled to the production of this information without redaction. *See* Dkt. Nos. 348, 370. No HIPAA, federal, or state law privileges require the redaction of any health care information of putative Class and Subclass members. *See Hutton v. City of Martinez*, 219 F.R.D. 164, 166 (N.D. Cal. 2003) (Any constitutionally protected interest in avoiding disclosure of medical information "is conditional and a limited impairment of the right may be allowed if properly justified."); *Rosales v. City of Bakersfield*, No. 05-0237, 2006 WL 988605, at *4 (E.D. Cal. Apr. 13, 2006) (HIPAA does not create federal privileges); *Delaney v. Tilton*, No. 07-1219, 2008 WL 4298179, at *3 (E.D. Cal. Sept. 18, 2008) (in federal civil rights action, state privacy laws are not applicable). Accordingly, CFMG's assertions regarding the burden posed by production of electronically-stored information are without merit. This is especially true because the parties are bound by a HIPAA-qualified protective order that precludes the use of such information for purposes other than in this litigation. *See* Dkt. No. 305; *see also* Dkt. No. 354, at 2 (CFMG admission that protective order is "HIPAA-compliant"). CFMG should be directed to immediately begin production of all electronically stored documents responsive to Plaintiffs' discovery requests, as narrowed by the search terms and custodians set forth in Plaintiffs' August 8, 2014 e-discovery plan.

Documents Related to In-Custody Deaths: Plaintiffs' Requests 31-37 seek all documents related to in-custody deaths at the Jail since 2010. Alexander Decl., Ex. A, at 13-16. CFMG refuses to produce any responsive documents, objecting that Plaintiffs' Requests seek "private third-party information in violation of HIPAA and the State and Federal Constitutions"; are "potentially violative of California Evidence Code § 1157 et seq."; and are "not reasonably calculated to lead to the discovery of admissible evidence and ... irrelevant." *Id.* All of CFMG's reasons for withholding discovery are meritless. As is discussed above, HIPAA creates no privilege, and state law privileges are not applicable in this federal action. And Plaintiffs' need for this relevant information far outweighs any privacy intrusion. Death reviews are the "mechanism for medical delivery systems to identify and correct problems" and should show "whether there has been a gross deviation from the adequate provision of care and whether the death was preventable." *Plata v. Schwarzenegger*, No. 01-1351, 2005 WL 2932253, at *7 (N.D. Cal. Oct. 3, 2005). Requests for documents related to inmate deaths, and any responses to or investigations of those deaths, are "reasonably calculated to lead to the discovery of admissible evidence" regarding the life-threatening risks faced by every Jail prisoner. Fed. R. Civ. P. 26(b)(1); *see* Second Am. Compl., Dkt. No. 41, ¶ 1. Such documents are commonly produced in prison conditions cases. *See Gray v. County of Riverside*, No. 13-00444, 2014 WL 5304915, at

*20 (C.D. Cal. Sept. 2, 2014) (discussing plaintiffs' expert review of "death" and "autopsy reports" before class certification).

Contract Negotiations and Contract Modification Documents: Plaintiffs' Requests 1-4 and 45-46 seek documents related to the contracts between CFMG and the County and the negotiations of these contracts. Alexander Decl., Ex. A, at 2-3, 18-19. Plaintiffs agreed to narrow these Requests to responsive documents from 2004 to the present. CFMG has produced some, but not all, responsive documents. *Id.* ¶¶ 14, 23 & Ex. A, at 2-3. As one example, CFMG has failed to produce recent amendments to the current contract, despite using the new increase in staffing as evidence in opposition to Plaintiffs' Motions for Preliminary Injunction and for Class Certification. *See* Dkt. Nos. 169, 329. CFMG did not object to Plaintiffs' requests for contracts between the County and CFMG. Alexander Decl., Ex. A, at 2. Additionally, CFMG claims that no documents related to contract negotiations exist. *Id.* at 3. It is implausible that CFMG and the County recently renegotiated their contract without creating any communications or documents. Furthermore, CFMG has already produced some documents related to contract negotiations, including the County's Request for Proposals #10303 from 2011. CFMG should be ordered to deliver a full, responsive production.

Reviews of Staffing: Plaintiffs' Request 9 seeks all documents related to "the analysis, study or adequacy of staffing." Alexander Decl., Ex. A, at 5. Because inadequate staff at the Jail limits prisoners' access to constitutionally adequate health care, such documents are highly relevant. *See, e.g., Coleman v. Brown*, 938 F. Supp. 2d 955, 984 (E.D. Cal. 2013) ("chronic understaffing ... in mental health staff positions" is "evidence of an ongoing Eighth Amendment violation"). Ms. Husted, CFMG's COO, testified that CFMG determined staffing levels were inadequate in the spring of 2014 and was analyzing workflow to determine proper staffing levels. Alexander Decl., Ex. C, at 60:18-61:17, 214:6-23. Yet, CFMG has refused to produce any documents related to this or other staffing evaluations. *See id.*, Ex. A, at 5-6.

Documents Related to Neutral Expert Reports: Plaintiffs' Requests 14-27 seek all documents related to the four, joint, neutral expert reports, including CFMG internal communications and communications with County employees related to the experts' evaluations. Alexander Decl., Ex. A, at 7-12. CFMG implausibly represented that it had no communications with SZS Consulting Group (disability accommodations) or Michael Hackett (security). *Id.* at 8. CFMG objected on third-party privacy grounds to producing documents related to the reports of Drs. Michael Puisis (medical) and Richard Hayward (mental health). *Id.* at 9-12. As discussed above, CFMG's weak and unsubstantiated privacy arguments regarding HIPAA and state and federal privacy rights are insufficient to outweigh Plaintiffs' need for this information. *See Hutton*, 219 F.R.D. at 166. The documents requested by Plaintiffs are directly relevant to whether CFMG is deliberately indifferent to prisoners' health and safety needs.

Quality Assurance Documents (Other than Minutes): This Court held a discovery hearing on October 29, 2014, regarding CFMG's production of redacted quality assurance minutes and complete failure to produce quality assurance reports and other documents. The day before the hearing, CFMG produced some quality assurance reports and other documents. Alexander Decl. ¶ 26. This production was problematic in at least two respects. First, CFMG improperly redacted information related to dental care. Contrary to CFMG's assertion at the hearing, dental care is at issue in this case and redaction of information regarding dental care is improper. *See* Dkt. No. 370, at 1-2. CFMG should be ordered to produce the documents without redactions regarding dental care. Second, the production of quality assurance reports and other documents is incomplete. Plaintiffs requested "all quality assurance reports relating to the Jail from January 1, 2010 to the present." Alexander Decl., Ex. A, at 12. Ms. Husted testified that Lola Bayer, the Director of Nursing, is responsible for "[q]uality assurance audits." *Id.*, Ex. C, at 169:7-170:3. Yet Ms. Bayer's name does not appear in the documents produced by CFMG on October 28, 2014. *See id.*, Ex. H. CFMG should be ordered to produce all quality assurance

reports and other documents that have not yet been produced.

Documents Related to CFMG Revenue and Expenses: Plaintiffs' Requests 38-44 seek documents related to how CFMG's financial incentives and motivations affect the provision of medical and mental health care to prisoners. *See* Alexander Decl., Ex. A, at 16-19. CFMG has refused to provide any documents on privacy grounds. *Id.* The Constitution forbids prison health providers from making medical decisions on the basis of cost. *See Peralta v. Dillard*, 744 F.3d 1076, 1084 (9th Cir. 2014) (in injunctive relief cases, "[i]f the state provided insufficient resources to accord inmates adequate medical care, it could be compelled to correct those conditions"). Evidence of CFMG's revenues and expenses in providing services to prisoners in the Jail speaks to whether CFMG and the County fulfill their constitutional obligation to provide adequate medical care—regardless of cost. Plaintiffs' need for this information outweighs any privacy interest CFMG may have in its financial documents, especially given the protective order in place. Other courts have found similar documents to be discoverable. *See, e.g., Chevron Corp. v. Donziger*, 296 F.R.D. 168, 200 (S.D.N.Y. 2013) (granting motion to compel, *inter alia*, extensive financial records to establish personal jurisdiction); *Int'l Bhd. of Teamsters, Airline Div. v. Frontier Airlines, Inc.*, No. 11-02007, 2012 WL 1429524, at *7 (D. Colo. Apr. 24, 2012) (financial information relevant to parties' investigation of corporate structure for injunctive relief); *Access 4 All, Inc. v. W & D Davis Inv. Co., Ltd.*, No. 06-504, 2007 WL 614091, at *4 (S.D. Ohio Feb. 21, 2007) (compelling production of financial records in ADA case).

Documents Related to CFMG's Recordkeeping Systems: Plaintiffs' Requests 48-54 seek documents related to any medical records systems (including electronic medical records), medical tracking systems, and scheduling systems utilized or tested by CFMG at the Jail. During the August 6, 2014 telephone call, CFMG agreed to produce documents responsive to these requests. This agreement, including Plaintiffs' agreement to narrow the scope of some requests as to time, was memorialized in Plaintiffs' September 9, 2014 letter to CFMG, to which CFMG never objected. *See* Alexander Decl., Ex. M, at 6-7. No documents have been produced in response to these requests related to CFMG's current recordkeeping systems.

Appropriateness of Sanctions: "Parties...have a duty to act competently, diligently, and ethically with respect to discharging discovery obligations," and "[a] party does not meet its discovery obligations by sticking its head in the sand and refusing to look for documents." *Robinson v. Arkansas City*, No. 10-1431, 2012 WL 603576, at *4 (D. Kan. Feb. 24, 2012) (internal quotations and citations omitted). As described in the Alexander Declaration, CFMG has repeatedly thwarted Plaintiffs' discovery efforts, refused to produce responsive documents, promised to produce documents and then failed to do so without explanation, refused to talk to Plaintiffs' counsel on the telephone, and done everything in its power to obstruct discovery. Plaintiffs respectfully request the award of attorneys' fees pursuant to Federal Rule of Civil Procedure 37(a)(5)(A) for the hours Plaintiffs' counsel has been forced to devote to obtaining this discovery. *See* Alexander Decl. ¶¶ 31, 32. Plaintiffs attempted in good faith to obtain the discovery without court action, CFMG's failure to produce the discovery discussed above is not "substantially justified," and no circumstances exist that would make an award of fees "unjust." Fed. R. Civ. P. 37(a)(5)(A)(ii) & (iii).

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Respectfully submitted,

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