16-0752

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IN THE CIRCUIT COURT OF RALEIGH COUNTY, WEST VIRGINIA

EARL DOUGLAS JOHNSON,

Plaintiff,

v. CIVIL ACTION NO. 15-C-143-K

RALEIGH GENERAL HOSPITAL, L.L.C.;
DONALD KENNETH GLASER, M.D.;
LIFEPOINT HEALTH, INC.;
LIFEPOINT HOSPITALS, INC.; and
LIFEPOINT WV HOLDINGS, INC.,

Defendants.

ORDER

On May 31, 2016, appeared the parties, by counsel, for a hearing on "Plaintiff's Motion to Compel Defendants to Produce March 29, 2012 letter authored by Dr. Sodums." Plaintiff requests that the Court compel Defendant Raleigh General Hospital, L.L.C. to produce a letter authored by Dr. Marcis Sodums to Raleigh General Hospital's CEO, Allen Peters, dated March 29, 2012. Having reviewed the briefs submitted by the parties and heard the argument of counsel, the Court concludes as follows:

At deposition, Dr. Sodums testified he did not prepare the March 29, 2012 letter to Allen Peters as part of a peer review investigation. *See* Sodums deposition at 34. In this case, Dr. Sodums testified that he prepared the subject letter because he was concerned about Dr. Glaser's patients' safety and was concerned about being implicated in the alleged fraudulent activity involving Dr.

Glaser. *See* Sodums deposition at 34-35. Dr. Sodums testified that he was not a member of the medical executive committee, the board of trustees, or a peer review committee at Raleigh General Hospital. *See* Sodums deposition at 31-32.

Based on the discovery taken to date, the Court **FINDS** that Dr. Sodums' March 29, 2012 letter to Allen Peters was not part of the peer review process. The Court further **FINDS** that merely because the letter was used during the peer review proceeding does not mean the letter is subject to the peer review privilege. *State ex rel. Wheeling Hosp., Inc. v. Wilson*, 782 S.E.2d 622, 634 (W. Va. 2016). Therefore, the Court **FINDS** that the March 29, 2012 letter authored by Dr. Sodums to Allen Peters is not subject to peer review protection and should be disclosed, and Plaintiff's Motion to Compel the March 29, 2012 letter authored by Dr. Sodums is hereby **GRANTED.** Defendant Raleigh General Hospital, L.L.C. is **ORDERED** to produce the letter to Plaintiff within fourteen (14) days.

Defendant Raleigh General Hospital, L.L.C.'s objection to this order is noted and preserved.

The Clerk is directed to forward an attested copy of the Order to all counsel of record.

ENTER this **ORDER** this the 5th day of July, 2016.

JUDGE

The foregoing is a true copy of an order entered in this office on the 5th day of July, 2016.
PAUL H. FLANAGAN, Circuit Clerk of Raleigh Co., WV
By Amy Cusack Deputy

IN THE CIRCUIT COURT OF RALEIGH COUNTY, WEST VIRGINIA

EARL DOUGLAS JOHNSON,

Plaintiff,

v.

CIVIL ACTION NO. 15-C-143-K
Judge Kirkpatrick

RALEIGH GENERAL HOSPITAL, LLC;
DONALD KENNETH GLASER, M.D.;
LIFEPOINT HEALTH, INC.;
LIFEPOINT HOSPITALS, INC.; and
LIFEPOINT WV HOLDINGS, INC.,

Defendants.

DEFENDANT, RALEIGH GENERAL HOSPITAL, LLC'S
MOTION FOR PROTECTIVE ORDER

COMES NOW, Defendant, Raleigh General Hospital, LLC ("RGH" and/or "this Defendant"), by counsel, pursuant to Rule 26(c) of the *West Virginia Rules of Civil Procedure*, and hereby moves this Court to enter a Protective Order ordering that RGH is not required to disclose any peer review, attorney/client, or work product privileged information, including financial documents regarding other cardiac procedures unrelated to the stent procedures at issue. Moreover, RGH moves this Court to prohibit Plaintiff from noticing any witness to be deposed prior to the Court issuing its ruling on this Motion. In further support of this Motion, RGH states as follows:

I. FACTUAL BACKGROUND

On or about April 9, 2015, Plaintiff filed his Amended Complaint in the Circuit Court of Raleigh County, West Virginia. Then, on April 24, 2015, Plaintiff filed his First Set of Discovery to Defendant Raleigh General Hospital, LLC. Subsequently, this

Defendant requested extensions for responding to Plaintiff's First Set of Discovery. Plaintiff was agreeable and provided extensions.[1]

On September 9, 2015, Plaintiff filed a Notice of Videotaped Deposition *Duces Tecum* of Representative(s) of Raleigh General Hospital, LLC. In this Notice, Plaintiff requests that a RGH representative be made available to testify on nineteen (19) different topics and produce documents responsive to twenty-one (21) requests for production. *See* Notice of Videotaped Deposition Duces Tecum of Representative(s) of Raleigh General Hospital, LLC, attached as Exhibit A. Also on September 9, 2015, Plaintiff requested that eleven (11) specific individuals be made available for deposition and also requested to depose "the individual(s) who prepared, revised and/or approved" a press release issued on or about February 4, 2015. Plaintiff's counsel provided dates in November 2015 for the depositions. Plaintiff's counsel listed these potential dates for depositions without first discussing the proposed dates with counsel for any of the Defendants to ensure there were no pre-existing scheduling conflicts. *See* September 9, 2015 Correspondence, attached as Exhibit B.

The documents listed in Plaintiff's Notice of Videotaped Deposition *Duces Tecum* are almost identical to those requested in Plaintiff's First Set of Discovery, and in both sets of written discovery, Plaintiff seeks to require RGH to produce documents that are not discoverable based on either privilege or irrelevancy. Specifically, Plaintiff's written discovery requests to RGH included requests for information and documents concerning all cardiac procedures, even though cardiac stent procedures are the only

[1] On June 30, 2015, this Court entered an Agreed Order Granting Joint Motion to Consolidate, which consolidated, for purposes of discovery, the following cases: *Earl Douglas Johnson v. Raleigh General Hospital, et al.*, *Michael Hester v. Raleigh General Hospital, at al.*, and *Shawn Poore v. Raleigh General Hospital, et al.* The Court also ordered that "any future similarly situated suit shall be consolidated with these cases, and pursuant to Rule 42(b) of the West Virginia Rules of Civil Procedure, assigned to Judge H.L. Kirkpatrick."[1]

type of cardiac procedure at issue in this case. Plaintiff's written discovery also included requests for information and documents protected by the attorney-client privilege, work product doctrine, and West Virginia Peer Review Statute, W. Va. Code § 30-3C-1, et seq.

In a good faith effort to confer with Plaintiff's counsel before seeking Court intervention, by letter dated November 17, 2015, RGH's counsel informed Plaintiff of its objection to Plaintiff's broad requests for documents, including financial documents related to all cardiac procedures. RGH suggested that the scope be narrowed to only cardiac stent procedures — the type of cardiac procedures at issue in this case. Furthermore, RGH objected to disclosing documents and information protected by the West Virginia Peer Review Privilege, the attorney/client privilege, and the work product doctrine. Additionally, RGH informed Plaintiff that it was working to obtain deposition dates for current employees that Plaintiff requested to depose. RGH suggested that depositions be postponed until at least January 2016 and Plaintiff has agreed.

On November 19, 2015, counsel for RGH and counsel for Plaintiff[2] engaged in a teleconference in an attempt to reach an agreement regarding Plaintiff's Notice of Videotaped Deposition *Duces Tecum*. During the teleconference, it was determined that the parties are in disagreement as to the discoverability of various information, including, but not limited to, the following:

a. The relevancy of information, including financial documents, related to all cardiac procedures;

[2] The following counsel appeared telephonically on behalf of RGH: B. Todd Thompson, Brandon M. Howell, Lon S. Hays, Don R. Sensabaugh, Jr., Amy Rothman Malone, and Shereen S. Compton. The following counsel appeared telephonically on behalf of the various Plaintiffs in this consolidated matter: Ben Salango, Robert V. Berthold, Jr., and Arden J. Curry, II.

b. The privileged nature of documents regarding any disciplinary actions taken against Dr. Glaser, which were generated during a peer review process;

c. The privileged nature of documents regarding any complaints against Dr. Glaser, which were generated during a peer review process; and

d. The privileged nature of documents regarding Dr. Glaser, which were disclosed to federal and/or state governmental authorities.

On November 20, 2015, RGH filed its Responses to Plaintiff's First Set of Discovery.[3] RGH objected to the production of information related to all cardiac procedures, as this information is irrelevant and not likely to lead to the discovery of admissible evidence. Moreover, RGH appropriately objected to the production of information that is privileged and protected from disclosure and provided Plaintiff with a detailed Privilege Log, attached as Exhibit C.[4]

Because Plaintiff's Notice of Videotaped Deposition *Duces Tecum* seeks to require RGH to produce witnesses to testify regarding documents that are not discoverable based on either privilege or irrelevancy, RGH now moves this Court to narrow the scope of discovery by entering an Order to prohibit Plaintiff from requesting and obtaining any privileged documents or information and any financial documents or information unrelated to cardiac stent procedures. This Defendant also moves this Court to prohibit Plaintiff from noticing any witness to be deposed prior to January 2016 and prior to the Court issuing its ruling on the instant motion.

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[3] On November 25, 2015, at Plaintiff's request, a meet and confer telephone conference was held to discuss Plaintiff's objections to RGH's discovery responses.

[4] On November 23, 2015, RGH provided this Privilege Log to Plaintiff as a supplement to the Privilege Log originally provided with its Responses to Plaintiff's First Set of Discovery. RGH's Privilege Log contains the following categories of documents: RGH Credentialing/Privilege File relative to Donald K. Glaser, M.D.; RGH Interventional Cardiology Program Consultation Material; RGH Board and Committee Meeting Materials; RGH Complaint/Grievance Material relative to Donald K. Glaser, M.D.; RGH Quality/Performance Improvement Material relative to Donald K. Glaser; RGH Administrative Office Material relative to Quality and Peer Review of Services Provided by Donald K. Glaser, M.D.; and Correspondence with the U.S. Department of Justice/Attorney General's Office.

II. LEGAL AUTHORITY AND ARGUMENT

This Court's authority to narrow the scope of discovery is set forth in *West Virginia Rule of Civil Procedure* 26(c), which provides the following:

> Upon motion by a party or by the person from whom discovery is sought, including a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action, and for good cause shown, the court in which the action is pending . . . may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) That the discovery not be had; (2) That the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) That the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) That certain matters not be inquired into or that the scope of the discovery be limited to certain matters; (5) That discovery be conducted with no one present except persons designated by the court; (6) That a deposition after being sealed be opened only by order of the court; (7) That a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (8) That the parties simultaneously file specified documents or information enclosed in sealed envelopes to be open as directed by the court.

W. Va. R. Civ. P. 26(c).

RGH requests that the Court enter a Protective Order pursuant to Rule 26(c) in order to limit the scope of discovery and find that discovery of privileged and irrelevant information may not be had.

A. THE COURT SHOULD FIND THAT RGH IS NOT REQUIRED TO DISCLOSE ANY PEER REVIEW, ATTORNEY/CLIENT, OR WORK PRODUCT PRIVILEGED INFORMATION.

Throughout the course of written discovery, Plaintiff has asked RGH to produce various documents that are privileged and protected from disclosure under the West Virginia Peer Review Statute. In response, RGH provided Plaintiff with a Privilege Log containing seven (7) categories of documents and explaining that these documents are

privileged by the Peer Review Statute, the attorney/client privilege, the work product doctrine, and/or the Health Insurance Portability and Accountability Act ("HIPAA").

A majority of the documents are protected by the Peer Review Statute, which specifically provides that "[t]he proceedings and records of a review organization shall be confidential and privileged and shall not be subject to subpoena or discovery proceedings . . . ." W. Va. Code § 30-3C-3; *see also* Syl. Pt. 2, *Young v. Saldanha*, 431 S.E.2d 669 (W. Va. 1993) (finding that the enactment of the Peer Review Statute "evinces a public policy encouraging health care professionals to monitor the competency and professional conduct of their peers in order to safeguard and improve the quality of patient care."). The West Virginia Legislature has specified that "'peer review' means the procedure for evaluation by health care professionals, including practice analysis, inpatient hospital and extended care facility utilization review, medical audit, ambulatory care review, claims review, and patient safety review." W. Va. Code § 30-3C-1. Moreover, the term "review organization"—the entity that performs the peer review activity—is defined as follows:

> any committee or organization engaging in peer review, including a hospital utilization review committee, a hospital tissue committee, a medical audit committee, a health insurance review committee, a health maintenance organization review committee, hospital, medical, dental and health service corporation review committee, a hospital plan corporation review committee, a professional health service plan review committee or organization, a dental review committee, a physicians' advisory committee, a podiatry advisory committee, a nursing advisory committee, any committee or organization established pursuant to a medical assistance program, the joint commission on accreditation of health care organizations or similar accrediting body or any entity established by such accrediting body or to fulfill the requirements of such accrediting body, any entity established pursuant to state or federal law for peer review purposes, and any committee established by one or more state or local professional societies or institutes, to gather and review information relating to the care and treatment of patients for the purposes of: (i) Evaluating and improving the quality of health care rendered; (ii) reducing

> morbidity or mortality; or (iii) establishing and enforcing guidelines designed to keep within reasonable bounds the cost of health care. It shall also mean any hospital board committee or organization reviewing the professional qualifications or activities of its medical staff or applicants for admission thereto, and any professional standards review organizations established or required under state or federal statutes or regulations.

W. Va. Code § 30-3C-1.

The Supreme Court of Appeals of West Virginia has found that the party asserting the peer review privilege during the course of discovery has the burden of establishing the existence of the applicable peer review organization. *State ex rel. HCR ManorCare, LLC v. Stucky*, 776 S.E.2d 271, 280 (W. Va. 2015). The Court has also found that a hospital's by-laws should be examined to determine whether certain hospital committees are review organizations. *State ex rel. Shroades v. Henry*, 421 S.E.2d 264, 269-70 (W. Va. 1992); *see also Stucky*, 776 S.E.2d at 281. If a situation arises where "the by-laws do not clearly indicate that peer review is a function of the committee, the party asserting the privilege has the burden of presenting additional information." *Shroades*, 421 S.E.2d at 270.

Here, RGH's by-laws and policies establish the existence of internal review organizations and the applicability of the peer review privilege. Because many of the documents requested by Plaintiff were generated during internal and external peer review processes, RGH appropriately objected to their production and provided Plaintiff with a Privilege Log detailing seven categories of documents (labeled A through G) that are protected from disclosure.

1. RGH *Privilege Log* Item A is entitled to peer review protection.

Item A on RGH's Privilege Log is Donald K. Glaser, M.D.'s ("Dr. Glaser") Credentialing/Privileging File, which is protected under the Peer Review Statute, West

Virginia case law, and RGH's policies. According to the Supreme Court of Appeals of West Virginia, "[a] hospital committee that is responsible for considering applications for admission to its staff and for issuing staff privileges or credentials in accordance therewith is a 'review organization' . . . [and] may . . . avail itself of the health care peer review privilege." Syl. Pt. 5, *State ex rel. Charles Town Gen. Hosp. v. Sander*, 556 S.E.2d 85 (W. Va. 2001) (internal citations omitted).

RGH's Medical Staff By-Laws establish the hospital's Credentials Committee, which has the duty of maintaining each physician's credentialing file. The Medical Staff By-Laws provide the following:

> [The] Credentials Committee shall consist of members who shall be active staff members in good standing. The voting members shall include the Chairman appointed by the Medical Executive Committee, Vice-Chairperson or designee of each of the Medical Staff Departments, subspecialty representative from anesthesia and radiology and the Vice President of the Medical Staff. In addition to the CEO, COO and CMO the ex-officio members without vote shall include the Risk Manager and Credentialing Specialist. . . . **The Credentials Committee shall review all applications for appointment, reappointment, and the granting, renewal or revision of clinical privileges and make recommendations as to whether the applicants meet the Medical Staff's criteria for membership and/or clinical privileges.**

RGH Medical Staff By-laws § 13.4(b) (emphasis added).[5] Moreover, in May 2000, RGH implemented an Access to Credential/Performance Improvement Files Policy.[6] The policy is applicable to

> all files and records maintained by the Hospital on behalf of its Medical Staff, including, but not limited to, the credentials and peer review files of individual practitioners, . . . and the records of all medical staff credentialing . . . activities conducted under the authority of the Hospital.

[5] A complete copy of RGH's Medical Staff By-laws is attached as Exhibit D.
[6] A complete copy of the Access to Credential/Performance Improvement Files Policy is attached as Exhibit E.

The policy provides that "all Medical Staff files and all discussions and/or deliberations relating to credentialing" shall be kept confidential to "the fullest extent possible permitted by law."

As evident from these policies, RGH has established a Credentials Committee, which is an internal organization that engages in peer review activities as defined by W. Va. Code § 30-3C-1. Because the Credentials Committee and its associated documents fall under the definitions for "peer review," all of the documents generated and kept by the committee are entitled to peer review protection pursuant to W. Va. Code § 30-3C-3. Therefore, this Court should find that RGH is not required to produce Dr. Glaser's Credentialing/Privileging File and is not required to produce a witness to testify about the Credentialing/Privileging File.

2. RGH *Privilege Log* Item B is entitled to protection pursuant to the Peer Review Statute, attorney-client privilege, and work product doctrine.

Item B on RGH's Privilege Log relates to interventional cardiology program consultation materials. This category includes documents that were generated during peer review investigations, undertaken by independent review organizations, to evaluate the quality of health care services provided by Dr. Glaser at RGH. These documents are comprised of reports, memoranda, and correspondence.

The interventional cardiology consultation materials are clearly privileged based on the Peer Review Statute and RGH's by-laws and policies. *See* W. Va. Code § 30-3C-3 ("[t]he proceedings and records of a review organization shall be confidential and privileged and shall not be subject to subpoena or discovery proceedings . . . ."); *see also Young v. Saldanha*, 431 S.E.2d 669, 673 (W. Va. 1993) (citing *Daily Gazette Co. v. West Virginia Bd. of Medicine*, 352 S.E.2d 66, 71 (W. Va. 1986)) ("West Virginia's peer

review statutes, like those enacted throughout this country, were put in force 'with the ultimate purpose of improving the quality of medical care provided in . . . this State.'"). RGH's Medical Staff By-laws specifically protect these documents from disclosure:

> **Information with respect to any practitioner . . .** submitted, **collected** or prepared by any representatives of the hospital . . . **for purposes related to the achievement of quality care** or contribution to clinical research **shall, to the fullest extent permitted by the law, be confidential and shall not be disseminated** beyond those who need to know nor used in any way as provided herein. **Such confidentiality also shall apply to information of the like kind provided by third parties.**

RGH Medical Staff By-laws § 15.4(a) (emphasis added). Because the consultation materials were generated during the peer review process and RGH's Medical Staff By-laws indicate a clear intent to maintain confidentiality, RGH should not be required to produce these documents.

In addition, the interventional cardiology consultation materials are also protected by the attorney-client privilege and work product doctrine. RGH worked with its counsel to coordinate and communicate with external peer review organizations, in order to generate independent, unbiased peer review data and conclusions. Thus, any communication, whether written or verbal, between RGH's counsel and the peer review organizations and any attorney notes or memoranda regarding the peer review investigations are protected by the work product doctrine. Moreover, any communication between RGH and its counsel is clearly protected by the attorney-client privilege.

According to Rule 26(b)(1) of the *West Virginia Rules of Civil Procedure*: "Parties may obtain discovery regarding any matter, **not privileged**, which is relevant to the subject matter involved in the pending action . . . ." Moreover, under West Virginia law,

> "[i]n order to assert an attorney-client privilege, three main elements must be present: (1) both parties must contemplate that the attorney-client relationship does or will exist; (2) the advice must be sought by the client from the attorney in his capacity as a legal advisor; (3) the communication between the attorney and client must be intended to be confidential."

Syl. Pt. 7, *State ex rel. Med. Assur. of W. Va., Inc. v. Recht*, 583 S.E.2d 80 (W. Va. 2003) (internal quotation marks and citation omitted); *see also id.* at 88 (citing 1 Franklin D. Cleckley, *Handbook on Evidence for West Virginia Lawyers*, § 5-4(E)(2)(b), p. 5-107 (4th ed. 2000)) ("Communications are protected whether they are made verbally or in writing, including electronic mail messages and facsimile transmissions."). Here, pursuant to the attorney-client privilege, Plaintiff is not entitled to any document regarding communications between RGH and its counsel addressing or referring to peer review investigations.

Moreover, any communications, whether written or verbal, between RGH's counsel and the peer review organizations and any attorney notes or memoranda regarding the peer review investigations are protected by the work product doctrine. According to *West Virginia Rule of Civil Procedure* 26(b)(3) work product is defined as "documents and tangible things . . . prepared in anticipation of litigation or for trial." *See also* Syl. Pt. 7, *State ex rel. United Hosp. v. Bedell*, 484 S.E.2d 199 (W. Va. 1997) ("To determine whether a document was prepared in anticipation of litigation and, is therefore, protected from disclosure under the work product doctrine, the primary motivating purpose behind the creation of the document must have been to assist in pending or probable future litigation.").

RGH worked with its counsel to procure independent peer review of certain procedures performed at RGH by Dr. Glaser. RGH's counsel, on behalf of RGH, took proactive steps to evaluate the care that Dr. Glaser was providing to hospital patients

and to evaluate the potential for litigation. Therefore, any correspondence between RGH's counsel and the external peer review organizations and any documents created by RGH's counsel regarding the peer review investigations fall under the sphere of work product. *See, e.g., Head v. Inova Health Care Servs.*, 55 Va. Cir. 43, 45 (Va. 2001) (finding that correspondence and memoranda between counsel and an external peer review organization were protected from disclosure by the work product doctrine).

Because the interventional cardiology program consultation materials are protected from disclosure by the Peer Review Statute, the attorney-client privilege, and the work product doctrine,[7] this Court should find that RGH is not required to disclose these documents or produce a witness to testify regarding these documents.

3. RGH *Privilege Log* Item C is entitled to peer review protection.

Item C on RGH's Privilege Log relates to RGH Board and Committee Meeting Materials from the Board of Trustees, Medical Executive Committee, Peer Review/Quality Improvement Committee, and Credentials Committee. According to the Board of Trustees By-laws, "[t]he primary purpose of the Board of Trustees is to oversee the quality of care at the Hospital and the peer review activities of the medical staff, therefore the meeting minutes of the Board of Trustees shall be maintained in a secure, confidential manner, without public release or distribution." *See Board of Trustee By-law* § 3.11.1.[8] Moreover, the Board of Trustees By-laws provide that the meetings of any Board committee, which include the Medical Executive Committee, Facility Ethics and Compliance Committee, Institutional Review Board, and Quality

[7] RGH notes that the only "non-privileged" documents included in Item B are patient medical records, which are protected from disclosure by HIPAA.
[8] A complete copy of RGH's Board of Trustee By-laws is attached as Exhibit F.

Improvement Committee, "shall be conducted in private, and the minutes and other records of such meetings shall be maintained in a confidential manner." *Id.* § 3.12.1.

Moreover, the Access to Credential/Performance Improvement Files Policy applies to "the records and minutes of all Medical Staff Committees and Departments." Thus, pursuant to the policy, these records and minutes shall be confidential "to the fullest extent possible permitted by law." The policy provides the following procedure for the maintenance of records and minutes:

> 1. Minutes and related documents and reports of Medical Staff Committees and Departments shall be maintained in an orderly and accessible fashion in the Medical Staff Office, under the custody of Risk Management Director, Credentialing Specialist and Quality/Medical Staff Office Assistant.
>
> 2. [sic]
>
> 3. Minutes and reports of Committees or Departments shall be maintained in an especially confidential manner when they pertain to credentialing, performance improvement, or peer review matters.
>
> 4. Minutes and related documentation will be distributed to the Committee or Department members, however minutes/documentation will be retrieved prior to members leaving the meeting.
>
> When documents are distributed in the course of a Committee or Department meeting, all copies are retrieved at the conclusion of the meeting. They shall be marked confidential. Do not remove from room.

Access to Credential/Performance Improvement Files at 3.

RGH has clearly defined the Board of Trustees, Medical Executive Committee, Peer Review/Quality Improvement Committee, and Credentials Committees as review organization. Moreover, RGH's by-laws and policies set forth the privileged nature of the records and minutes of these committees due to their role in the peer review process. Because these committees are peer review organizations that participate in peer review activities, this Court should find that RGH is not required to produce records and

meeting minutes of these committees and is not required to produce a witness to testify about these documents.

4. RGH *Privilege Log* Item D is entitled to peer review protection.

Item D relates to complaint and grievance material associated with Dr. Glaser. RGH implemented a Handling of Patient Complaints Policy[9], which took effect in August 1990. This policy governs the confidentiality of complaints made against physicians. Specifically, according to the policy, "the Board of Trustees delegates the responsibility for reviewing and resolving patient complaints and grievances to the Service Excellence Steering Committee" (SESC). Moreover, "[a]ll Patient Complaint/Grievance Reports and related relevant information shall be recorded and filed in a retrievable manner" and **"[a]ll discussions, reports and files generated during the investigation of customer concerns shall be protected as 'Confidential Internal Review' Information."** *Handing of Patient Complaints Policy* ¶ 10 (emphasis added). Additionally, "[c]omplaints concerning physician will be forwarded to the Quality department for follow-up as directed" and "[e]ach physician complaint is tracked and trended by the Quality Department and reported to the QI/Peer Review Committee." *Id.* ¶ 12.

The complaint and grievance materials maintained by RGH relating to Dr. Glaser include confidential internal review report files and logs generated during the investigation of complaints. These materials are not available from original sources. Instead, when complaints are made to RGH staff member, a record is generated by a RGH staff member for the benefit of the SESC, as contemplated by the Handling of Patient Complaints Policy. Because these documents were created for purposes of peer

[9] A complete copy of the Handling of Patient Complaints Policy is attached as Exhibit G.

review and as a means of recording complaints, these documents are confidential internal peer review information. Therefore, complaint and grievance material relative to Dr. Glaser should be protected from discovery pursuant to the Peer Review Statute, W. Va. Code § 30-3-1, et seq., and RGH's policies and procedures. Moreover, RGH should not be required to produce a witness to testify about these complaint and grievance materials.

5. RGH *Privilege Log* Items E and F are entitled to peer review protection.

Items E and F on RGH's Privilege Log relate to quality/performance improvement materials. These categories include documents that were generated by review organizations to assist and facilitate with the evaluation and analysis of the quality of health care services provided by Dr. Glaser at RGH. These documents are clearly privileged based on the Peer Review State and RGH's by-laws and policies. *See* W. Va. Code § 30-3C-3 ("[t]he proceedings and records of a review organization shall be confidential and privileged and shall not be subject to subpoena or discovery proceedings . . . .").

RGH's Medical Staff By-laws establish a "Quality Improvement/Peer Review Committee," which has the authority to engage in peer review activities:

> The Quality Improvement/Peer Review Committee shall consist of the Chiefs of the Clinical Department of the Medical Staff or an individual designated by the Chief of the Clinical Department. **This Committee shall direct the overall performance improvement program of the Hospital and monitor the services provided by all departments to assure the effective utilization of resources. It shall adopt specific programs and procedures to review, evaluate, and monitor the quality and appropriateness of patient care within the Hospital. The Committee shall review complaints of patients or staff regarding medical care.** Additionally the Quality Improvement/Peer Review Committee shall ensure that when findings of the quality assessment process (either aggregate data or single events) are relevant to an individual's performance, the Committee shall conduct peer review and an ongoing

> evaluation of the individual's competency and make recommendations accordingly. . . . A copy of the minutes will be retained as a permanent record of this Committee.

RGH Medical Staff By-laws § 13.4(c) (emphasis added). Moreover, RGH's Medical Staff By-laws specifically protect documents generated for quality improvement and peer review purposes:

> **Information with respect to any practitioner . . . submitted, collected or prepared** by any representatives of the hospital including its Board of Medicine Staff, **for purposes related to the achievement of quality care or contribution to clinical research shall, to the fullest extent permitted by the law, be confidential and shall not be disseminated** . . . .

RGH Medical Staff By-laws § 15.4(a) (emphasis added).

The Access to Credential/Performance Improvement Files Policy is also applicable to these documents. ("This policy shall apply to all files and records maintained by the Hospital on behalf of its Medical Staff, including, but not limited to, . . . peer review files of individual practitioners . . . and the records of all medical staff credentialing, performance improvement, and peer review matters that take place in the course of Medical Staff committee and Department meetings"). Thus, pursuant to the policy, these documents must be kept confidential to "the fullest extent possible permitted by law." The policy goes on to provide the following list of documents that may be included in a physicians' Performance Improvement File:

1. Any clinical summary statistics.
2. Any evaluations or reports from proctors or monitors.
3. Compliant reports concerning the physician.
4. Confidential reports of peer review.
5. Any periodic review and appraisal forms completed by the appropriate department chairperson, including those completed at the time of application for appointment or reappointment.

6. Utilization activities/Pro Denials.

7. Correspondence between the hospital and the physician concerning his or her practice in the hospital.

Access to Credential/Performance Improvement Files at 2-7.

Items E and F on RGH's Privilege Log include documents that were generated internally and externally during the peer review and quality improvement process. These documents are comprised of reports, summaries, memoranda, correspondence, and patient medical records. The only documents in these files available from an "original source," as defined by W. Va. Code § 30-3-1, are patient medical records, which are confidential and protected from disclosure by HIPAA. All other documents in these files were generated during the peer review/quality improvement process and were utilized exclusively by peer review organizations.

Based on RGH's by-laws and policies, it has established a Quality Improvement/Peer Review Committee, which oversees peer review activities conducted within the hospital and externally. Because RGH has a committee in place to oversee peer review and the documents at issues were generated during the peer review process, this Court should find that RGH is not required to produce the documents listed under Items E and F on RGH's Privilege Log and it is not required to produce a witness to testify about these documents.

6. RGH *Privilege Log* Item G is entitled to peer review protection

Item G on RGH's Privilege Log relates to documents provided to the United States Department of Justice ("DOJ") in regard to Dr. Glaser's quality improvement and peer review evaluations. The documents included in this category total approximately 70,000 pages and contain peer review and privileged information. This Court should find

that RGH is not required to respond to Plaintiff's request for RGH's production to the DOJ or any other federal and/or state governmental authorities.

Before this civil action was filed, certain documents regarding Dr. Glaser were produced to the United States Attorney's office. These documents should be protected from disclosure because 1) they are considered trade secrets and/or confidential commercial or financial information within the meaning of 5 U.S.C. § 552(b)(4); (2) they were produced with the understanding that confidentiality would be maintained; and (3) all statements were made in compromise negotiations subject to Federal Rule of Evidence 408 and/or West Virginia Rule of Evidence 408. The production to the United States Attorney's Office, which was made in response to an investigation, did not modify or waive these privileges, nor did it make the documents produced admissible in a civil action. Furthermore, individual patient records were produced to the United States Attorney's Office and production of these records, without a release, would violate HIPAA, codified at 45 C.F.R. §164.502, *et. seq.* In addition, the majority of the documents provided to the United States Attorney's office are peer review records generated by internal and external review organizations and protected from disclosure under the West Virginia Peer Review Statute, W. Va. Code § 30-3C-1, et seq.

The production to the DOJ consisted of both privileged and non-privileged information. However, because this production was made during a federal investigation, with RGH, in good faith, believing that confidentiality would be maintained, it is inappropriate for Plaintiff to request *all* of the documents produced to the DOJ. If Plaintiff requests specific documents that are non-privileged and available from an original source (i.e., not generated solely for the DOJ's review), RGH will produce these documents as contemplated by the *West Virginia Rules of Civil Procedure*. Therefore,

due to the privileged and confidential nature of the transaction between RGH and the DOJ, RGH should not be required to respond to Plaintiff's request for documents produced to federal and/or state governmental authorities.[10]

B. THE COURT SHOULD FIND THAT RGH IS NOT REQUIRED TO DISCLOSE ANY INFORMATION REGARDING CARDIAC PROCEDURES OTHER THAN CARDIAC STENT PROCEDURES.

In addition to prohibiting Plaintiff from requesting any privileged information, this Court should order that RGH is not required to disclose any information, including financial documents, related to all cardiac procedures – other than stent procedures – as this information is irrelevant and is not reasonably calculated to lead to the discovery of admissible evidence. The only cardiac procedures at issue in this case are stent procedures. Plaintiff has failed to put forth sufficient evidence to show that information regarding other types of cardiac procedures is relevant in this case or likely to lead to the discovery of admissible evidence.

Moreover, requiring RGH to produce information on all cardiac procedures would be unduly burdensome and unnecessarily complicate discovery in this case. Currently, there are appropriately seven-five (75) individuals similarly situated to the plaintiff in this case, Earl Douglas Johnson. Discovery is likely to be cumbersome in these cases due to the amount of plaintiffs. It will be detrimental to the parties in these cases, and this Court, if the discovery process is further weighed down by the unnecessary production of irrelevant documents. Therefore, in the interest of judicial economy and to prevent the unnecessary discovery of irrelevant information, RGH requests that this Court find that Plaintiff is entitled to information relating to only cardiac stent procedures.

[10] RGH reserves the right to file supplemental briefing with regard to the documents contained in RGH Privilege Log Item G.

III. CONCLUSION

RGH understands that completing depositions in a timely manner is of importance. However, because Plaintiff has requested that deponents be prepared to testify about information and documents that RGH believes are privileged, inadmissible, and irrelevant, Court intervention is necessary to determine the scope of discovery in this case before depositions begin. RGH certifies that it has made a good faith effort to resolve this dispute without Court intervention, as required by the provisions of Rule 26(c) of the *West Virginia Rules of Civil Procedure.*

WHEREFORE, for the reasons set forth above and pursuant to Rule 26(c) of the West Virginia Rules of Civil Procedure, RGH moves the Court for a Protective Order prohibiting Plaintiff from requesting and obtaining any privileged documents or information and any financial documents or information unrelated to stent cardiac procedures, prohibiting Plaintiff from noticing any witness to be deposed prior to January 2016 and prior to the Court issuing its ruling on the instant motion, and for any further relief that this Court deems appropriate.

RALEIGH GENERAL HOSPITAL, LLC,

By counsel.

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IN THE CIRCUIT COURT OF RALEIGH COUNTY, WEST VIRGINIA

EARL DOUGLAS JOHNSON,

Plaintiff,

v.

CIVIL ACTION NO. 15-C-143-K
Judge Kirkpatrick

RALEIGH GENERAL HOSPITAL, LLC;
DONALD KENNETH GLASER, M.D.;
LIFEPOINT HEALTH, INC.;
LIFEPOINT HOSPITALS, INC.; and
LIFEPOINT WV HOLDINGS, INC.,

Defendants.

CERTIFICATE OF SERVICE

I, the undersigned counsel for Defendant Raleigh General Hospital, LLC, do hereby certify that a true and exact copy of ***"DEFENDANT, RALEIGH GENERAL HOSPITAL, LLC'S MOTION FOR PROTECTIVE ORDER"*** has been served via first class U.S. Mail, postage prepaid, on this the 11th day of December, 2015, on the following counsel of record:

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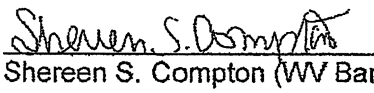

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