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8 **SUPERIOR COURT OF CALIFORNIA**
9 **COUNTY OF SAN FRANCISCO**
10 **UNLIMITED JURISDICTION**

11 **OMONDI NYONG'O**

12 **Plaintiff,**

13 v.

14 **SUTTER HEALTH, PALO ALTO**
15 **MEDICAL FOUNDATION, and PALO**
ALTO FOUNDATION MEDICAL GROUP,

16 **Defendants.**

Case No. CGC-21-592714

**DECLARATION OF DANIEL M.
HUTCHINSON IN SUPPORT OF
MOTION TO ENFORCE PROTECTIVE
ORDER**

Hearing Date: April 18, 2022
Time: 9:00 AM
Dept.: 302

17
18 I, Daniel M. Hutchinson, hereby declare as follows:

19 1. I am a partner in the law firm of Lieff, Cabraser, Heimann & Bernstein, LLP
20 (“LCHB”), counsel of record for Plaintiff in this matter. I am admitted to practice before this Court
21 and am a member in good standing of the bar of the State of California; the United States District
22 Court for the Central, Northern, and Southern Districts of California; the United States District
23 Court for the Northern District of Illinois; the United States District Court for the Eastern District
24 of Wisconsin; and the U.S. Courts of Appeals for the First, Second, Third, Fourth, Seventh, Ninth,
25 and Eleventh Circuits. I make these statements based on personal knowledge and would so testify
26 if called as a witness at trial.
27
28

1 2. On October 22, 2021, Defendant Palo Alto Foundation Medical Group (“PAFMG”)
2 served 153 document requests, 31 special interrogatories, and 17 form interrogatories, and a
3 deposition notice.

4 3. PAFMG filed an *ex parte* Case Management Statement *without* meeting or
5 conferring with Plaintiff in any respect, in which it falsely stated to the Court: “The party or parties
6 have met and conferred with all parties on all subjects required by rule 3.724 of the California Rules
7 of Court.” My co-counsel immediately reached out to PAFMG to identify the misrepresentation
8 and offered it an opportunity to cure its error by conducting the meet and confer it had told the
9 Court it already completed. Although PAFMG was aware it had made this false statement to the
10 Court, it never corrected it.

11 4. On November 2, 2021, the parties held their rule 3.724 conference.

12 5. At that conference, I stressed the importance of agreeing to a case protective order
13 so that production could proceed efficiently and expeditiously.

14 6. On November 16, 2021, PAFMG circulated a draft protective order.

15 7. On December 1, 2021, Plaintiff proposed a substantially revised draft, which added
16 a new Section 4 addressing “HIPAA-Protected Information” to ensure that work records could be
17 produced with care, and stated: “Accordingly, upon entry of this Order, all Parties shall be entitled
18 to produce and/or disclose to all Parties in this Litigation any and all Disclosure or Discovery
19 Material, including any and all “CONFIDENTIAL” Information and/or HIPPA-Protected
20 Information, regardless of the origin of that Disclosure or Discovery Material. For example,
21 Plaintiff shall be entitled to access and produce Disclosure or Discovery Material in his possession,
22 custody, and/or control from Defendants Sutter Health, PAFMG, and/or PAMF.” A true and
23 correct copy of Plaintiff’s proposal is attached hereto as **Exhibit A**.

24 8. I thereafter followed up by email on December 7, 2021.

25 9. The next day, I spoke with PAFMG’s counsel Mick Rubio by telephone regarding
26 this language. I further explained that the purpose of this language was to allow Plaintiff to access
27 and produce the documents that PAFMG requested—e.g., work emails and other relevant
28 documents accessible through his work computer—without fear of retaliation from Defendants. I

1 explained that Plaintiff was simply unable to produce documents unless or until all parties agree to
2 the protective order with this language ensuring that Defendants would not use Plaintiff's document
3 production in this case as a pretext to engage in further adverse action against him.

4 10. PAFMG's counsel agreed to that concept and represented that only Defendants
5 PAFMG and PAMF maintained Plaintiff's work emails, not Sutter Health.

6 11. Accordingly, on December 8, 2021, PAFMG sent a revised draft, which stated:
7 "Accordingly, upon entry of this Order, all Parties shall be entitled to produce and/or disclose to all
8 Parties in this Litigation any and all Disclosure or Discovery Material, including any and all
9 "CONFIDENTIAL" Information and/or HIPPA-Protected Information, regardless of the origin of
10 that Disclosure or Discovery Material. For example, Plaintiff shall be entitled to access and
11 produce Disclosure or Discovery Material in his possession, custody, and/or control which may
12 originate from accounts otherwise maintained or owned by Defendants PAMF and/or PAFMG,
13 which Plaintiff has allowable access to." A true and correct copy of PAFMG's proposal is attached
14 hereto as **Exhibit B**.

15 12. Throughout this time, I followed up repeatedly with Defendants PAMF and Sutter
16 Health regarding the protective order, including on December 1, 7, 8, 9, 13, and 14. I noted that
17 PAMF's and Sutter Health's delay "prejudiced both Plaintiff and PAFMG by delaying discovery."
18 A true and correct copy of my email correspondence with PAMF is attached hereto as **Exhibit C**.

19 13. On December 7, 2021, PAMF and Sutter Health promised that they would "provide
20 any further edits shortly." (*See Exhibit C.*)

21 14. On December 10, 2021, PAMF and Sutter Health stated: "I will let you know as
22 soon I have further edits, or approval if there are no further edits." (*See Exhibit C.*)

23 15. On December 14, 2021, PAMF and Sutter Health stated "we are working to get a
24 response by the end of this week." (*See Exhibit C.*)

25 16. For its part, PAFMG stated: "We are fine giving [PAMF and Sutter Health]
26 additional time and don't feel prejudiced by any delay." (*See Exhibit C.*)

27 17. With no response from PAMF and Sutter Health forthcoming, Plaintiff and PAFMG
28 executed the protective order and moved the Court for its approval.

1 18. On December 23, 2021, the Court clerk rejected the protective order because PAMF
2 and Sutter Health had not signed it.

3 19. Following a mutual extension for all discovery, on December 14, 2021, Plaintiff's
4 counsel responded to each of PAFMG's discovery requests.

5 20. Despite the broad and far-reaching nature of PAFMG's requests, Plaintiff indicated
6 that he would produce responsive, non-privileged documents. Accordingly, Plaintiff stated in
7 response to 132 of the 153 requests that "Plaintiff will produce any responsive, non-privileged
8 documents in Plaintiff's possession, custody, or control." For 20 of the 21 remaining requests,
9 Plaintiff stated that he was unable to produce documents only because he "has no responsive, non-
10 privileged documents in Plaintiff's possession, custody, or control."

11 21. On December 29, 2021, PAFMG sent Plaintiff a letter demanding that Plaintiff
12 "produce all responsive documents," including all documents from all medical providers that
13 treated Plaintiff. A true and correct copy of my PAFMG's letter is attached hereto as **Exhibit D**.

14 22. Because Sutter and PAMF still had not provided comments to, much less signed,
15 the protective order, Plaintiff was stymied from moving forward. Plaintiff responded by letter. A
16 true and correct copy of Plaintiff's letter is attached hereto as **Exhibit E**.

17 23. Finally, on January 6, 2022, PAMF and Sutter Health provided feedback on the
18 protective order.

19 24. While Plaintiff did not believe that any further changes were warranted, his counsel
20 met and conferred in good faith until all parties signed a final Stipulated Protective Order with
21 minor changes on January 26, 2022.

22 25. With that Stipulated Protective Order finally in place, Plaintiff affirmed to PAFMG
23 that he could begin a rolling production. A true and correct copy of Plaintiff's email is attached
24 hereto as **Exhibit F**.

25 26. On January 27, 2022, the Court signed the Protective Order.

26 27. On Wednesday, February 2, 2022, I sent Defendants a letter responding to their ex
27 parte communication to Plaintiff without including his counsel. I explained that Defendants'
28 communication was improper because: (1) the Protective Order expressly permits Plaintiff to

1 produce “any and all Disclosure or Discovery Material, including any and all ‘CONFIDENTIAL’
2 Information and/or HIPAA-Protected Information, regardless of the origin of that Disclosure or
3 Discovery Material”; (2) Defendants’ communication seeks *ex parte* information from a Plaintiff
4 represented by counsel; and (3) Defendants’ communication was the latest in a series of
5 discriminatory, retaliatory, and abusive conduct against Plaintiff for engaging in protected activity.
6 A true and correct copy of Plaintiff’s letter is attached hereto as **Exhibit G**.

7 28. On February 3, 2022, PAMF’s and Sutter Health’s counsel stated that “it looks like
8 an automated email” and agreed to look into it. A true and correct copy of PAMF’s and Sutter
9 Health’s counsel email is attached hereto as **Exhibit H**.

10 29. The parties then met and conferred two weeks later, on February 15, 2022. In the
11 conference, PAMF’s and Sutter Health’s counsel asserted for the first time that Plaintiff is not
12 permitted to access or produce his work emails in response to PAFMG’s discovery requests.
13 Defendant PAFMG joined that position and also contended for the first time that Plaintiff could not
14 access his emails. Defendants, however, could not articulate any law or policy supporting their
15 position. In an attempt to avoid motion practice, I asked Defendants to state their position in
16 writing, including any law or policy that Defendants believed supported their position.

17 30. On February 24, 2022, PAFMG elaborated on its new position, claiming for the first
18 time that Plaintiff “cannot, for example, access his own medical records.” A true and correct copy
19 of PAMF’s and Sutter Health’s counsel email is attached hereto as **Exhibit I**.

20 31. On February 25, 2022, I responded by setting forth—again and in detail—the above-
21 mentioned procedural history to explain how PAFMG’s new position directly contradicted its prior
22 statements and agreements, including the fact that PAFMG served discovery requests and a series
23 of meet and confer letters asking Plaintiff to produce the same work records it now claimed that
24 Plaintiff could not even access. A true and correct copy of Plaintiff’s email is attached hereto as
25 **Exhibit J**.

26 32. Throughout this process, PAFMG has suggested that Dr. Nyong’o could produce
27 responsive documents that he collected from “other” sources, such as any emails from his personal
28 email account. This request ignores the fact that Defendants did not raise their objection until *after*

1 Dr. Nyong'o's responsive documents were collected and placed together in a single location on his
2 counsel's document review platform to be reviewed and produced. I explained that "the presence
3 of all documents from Plaintiff together in a single location on Plaintiff's counsel's document
4 review platform means that Plaintiff's counsel would have to access all the documents to determine
5 which documents fall into which categories, which Defendants have wrongly claimed would be
6 improper." Therefore, the only way for Plaintiff to produce the documents would be for him to go
7 through the exact same work again of identifying and sending the documents through a secure
8 online portal to his counsel.

9 33. On March 1, 2022, PAMF and Sutter Health provided a short email attaching four
10 documents. Without citing any specific provision, PAMF and Sutter Health maintained that under
11 these policies Plaintiff cannot access or produce in this litigation *any* "data maintained by Sutter
12 Health." Attached hereto is **Exhibit K** a true and correct copy of that email, along with **Exhibit L**
13 (Workforce Confidentiality and Privacy Policy); **Exhibit M** (PAMF Confidentiality Agreement);
14 **Exhibit N** (Sutter Health Use of Internet, Email, Instant Message, and Texting Policy; and **Exhibit**
15 **O** (Sutter Health Safeguarding Protected Health Information Policy).

16 34. PAFMG stated that PAMF's and Sutter Health's "email addresses our position."
17 Attached hereto is **Exhibit P** a true and correct copy of PAFMG's email.

18 35. The parties met and conferred again on March 9, 2022. Defendants did not withdraw
19 their objections to Plaintiff producing documents. Attached hereto is **Exhibit Q** a true and correct
20 copy of the parties' subsequent emails.

21 36. Plaintiff therefore files the accompanying Motion to Enforce Protective Order.

22 I declare under penalty of perjury that the foregoing is true and correct and that it was
23 executed in Oakland, California, on March 21, 2022.

24
25 /s/ Daniel M. Hutchinson
Daniel M. Hutchinson

EXHIBIT A

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PALO ALTO FOUNDATION MEDICAL GROUP

7
8 SUPERIOR COURT OF CALIFORNIA
9 COUNTY OF SAN FRANCISCO

10
11 OMONDI NYONG'O,) CASE NO. CGC-21-592714
12)
Plaintiff,)
13 vs.) STIPULATED PROTECTIVE ORDER
14)
SUTTER HEALTH, PALO ALTO)
15 MEDICAL FOUNDATION, and PALO)
ALTO FOUNDATION MEDICAL GROUP,)
16 Defendants.) Amended Complaint Filed: October 13, 2021
Complaint Filed: June 22, 2021

17
18 1. PURPOSES AND LIMITATIONS

19 Disclosure and discovery activity in this employment action may involve production of
20 confidential, proprietary, health, and/or private information for which special protection from
21 public disclosure and from use for any purpose other than prosecuting this litigation may be
22 warranted. Accordingly, the parties hereby stipulate to and petition the court to enter the
23 following Stipulated Protective Order. The parties acknowledge that this Order does not confer
24 blanket protections on all disclosures or responses to discovery and that the protection it affords
25 from public disclosure and use extends only to the limited information or items that are entitled
26 to confidential treatment under the applicable legal principles. The parties further acknowledge,
27 as set forth in Section 13.3, below, that this Stipulated Protective Order does not entitle them to
28 file confidential information under seal; California Rule of Court Rules 2.550 and 2.551 set forth

1 the procedures that must be followed and the standards that will be applied when a party seeks
2 permission from the court to file material under seal.

3 2. DEFINITIONS

4 2.1 Challenging Party: a Party or Non-Party that challenges the designation of
5 information or items under this Order.

6 2.2 “CONFIDENTIAL” Information or Items: any information (regardless of how it
7 is generated, stored or maintained) or tangible things which are in the possession of a
8 Designating Party that constitutes technical and competitively-sensitive information protected by
9 law, and/or personal financial, health, or contact information protected by California's right to
10 privacy.

11 2.3 Counsel (without qualifier): Outside Counsel of Record and House Counsel (as
12 well as their support staff).

13 2.4 Designating Party: a Party or Non-Party that designates information or items
14 produced as “CONFIDENTIAL.”

15 2.5 Disclosure or Discovery Material: all items or information, regardless of the
16 medium or manner in which it is generated, stored, or maintained (including, among other things,
17 testimony, transcripts, and tangible things), that are produced or generated in disclosures or
18 responses to discovery in this matter.

19 2.6 Expert: a person with specialized knowledge or experience in a matter pertinent
20 to the litigation who has been retained by a Party or its counsel to serve as an expert witness or as
21 a consultant in this action.

22 2.7 House Counsel: attorneys who are employees of a party to this action. House
23 Counsel does not include Outside Counsel of Record or any other outside counsel.

24 2.8 Non-Party: any natural person, partnership, corporation, association, or other
25 legal entity not named as a Party to this action.

26 2.9 Outside Counsel of Record: attorneys who are not employees of a party to this
27 action but are retained to represent or advise a party to this action and have appeared in this
28 action on behalf of that party or are affiliated with a law firm which has appeared on behalf of

1 that party.

2 2.10 Party: Plaintiff Omondi Nyong'o, Defendant Sutter Health, Defendant PAFMG,
3 and Defendant PAMF.

4 2.11 Producing Party: a Party or Non-Party that produces Disclosure or Discovery
5 Material in this action.

6 2.12 Professional Vendors: persons or entities that provide litigation support services
7 (e.g., photocopying, videotaping, translating, preparing exhibits or demonstrations, and
8 organizing, storing, or retrieving data in any form or medium) and their employees and
9 subcontractors.

10 2.13 Protected Material: any Disclosure or Discovery Material that is designated, in
11 good faith, as "CONFIDENTIAL" and/or "Confidential Protected Health Information".

12 2.14 Receiving Party: a Party that receives Disclosure or Discovery Material from a
13 Producing Party.

14 3. SCOPE

15 The protections conferred by this Stipulation and Order cover not only Protected Material
16 (as defined above), but also (1) any information copied from Protected Material; (2) all copies of
17 Protected Material; and (3) any testimony, conversations, or presentations by Parties or their
18 Counsel that reveal Protected Material.

19 However, the protections conferred by this Stipulation and Order do not cover the
20 following information: (a) any information that is in the public domain at the time of disclosure
21 to a Receiving Party or becomes part of the public domain after its disclosure to a Receiving
22 Party as a result of publication not involving a violation of this Order, including becoming part
23 of the public record through trial or otherwise; and (b) any information known to the Receiving
24 Party prior to the disclosure, obtained from the Receiving Party prior to the disclosure, and/or
25 obtained by the Receiving Party after the disclosure from a source who obtained the information
26 lawfully and under no obligation of confidentiality to the Designating Party. Accordingly, upon
27 entry of this Order, all Parties shall be entitled to produce and/or disclose to all Parties in this
28 Litigation any and all Disclosure or Discovery Material, including any and all

1 “CONFIDENTIAL” Information and/or HIPAA-Protected Information, regardless of the origin
2 of that Disclosure or Discovery Material. For example, Plaintiff shall be entitled to access and
3 produce Disclosure or Discovery Material in his possession, custody, and/or control from
4 Defendants Sutter Health, PAFMG, and/or PAMF. Defendant Sutter Health, PAFMG, and/or
5 PAMF shall likewise be entitled to access and produce Disclosure or Discovery Material in their
6 possession, custody, and/or control from Plaintiff.

7 Any use of Protected Material at trial shall be governed by a separate agreement or order.

8 **4. HIPAA-Protected Information**

9 4.1 General. Discovery in this Litigation may involve production of “Protected Health
10 Information” as that term is defined and set forth in 45 C.F.R. § 160.103, for which special
11 protection from public disclosure and from any purpose other than prosecuting this Action is
12 warranted.

13 4.2 “Protected Health Information” shall encompass information within the scope and
14 definition set forth in 45 C.F.R. § 160.103 that is provided to the Parties by a covered entity as
15 defined by 45 C.F.R. § 160.103 (“Covered Entities”) or by a business associate of a Covered
16 Entity as defined by 45 C.F.R. § 160.103 (“Business Associate”) in the course of the Litigation,
17 as well as information covered by the privacy laws of any individual states, as applicable.

18 4.3 Any Party who produces Protected Health Information in this Litigation shall
19 designate such discovery material “Confidential Protected Health Information” in accordance
20 with the provisions of this Protective Order.

21 4.4 Unless otherwise agreed between counsel for the Parties, the designation of
22 discovery material as “Confidential Protected Health Information” shall be made at the following
23 times: (a) for documents or things at the time of the production of the documents or things; (b)
24 for declarations, correspondence, expert witness reports, written discovery responses, court
25 filings, pleadings, and other documents, at the time of the service or filing, whichever occurs
26 first; (c) for testimony, at the time such testimony is given by a statement designating the
27 testimony as “Confidential Protected Health Information” made on the record or within thirty
28 (30) days after receipt of the transcript of the deposition. The designation of discovery material

1 as “Confidential Protected Health Information” shall be made in the following manner: (a) on
2 documents, by placing the notation “Confidential Protected Health Information” or similar
3 legend on each page of such document; (b) for tangible things, by placing the notation
4 “Confidential Protected Health Information” on the object or container thereof or if
5 impracticable, as otherwise agreed by the parties; (c) for declarations, correspondence, expert
6 witness reports, written discovery responses, court filings, pleadings, and any other documents
7 containing Protected Health Information, by placing the notation “Confidential Protected Health
8 Information” both on the face of such document and on any particular designated pages of such
9 document; and (d) for testimony, by orally designating such testimony as being “Confidential
10 Protected Health Information” at the time the testimony is given or by designating the portions of
11 the transcript in a letter to be served on the court reporter and opposing counsel within thirty (30)
12 calendar days after receipt of the certified transcript of the deposition.

13 4.5 Pursuant to 45 C.F.R. § 164.512(e)(1), all Covered Entities and their Business
14 Associates (as defined in 45 C.F.R. § 160.103), or entities in receipt of information from such
15 entities, are hereby authorized to disclose Protected Health Information pertaining to the Action
16 to those persons and for such purposes as designated in herein. Further, all Parties that are
17 entities subject to state privacy law requirements, or entities in receipt of information from such
18 entities, are hereby authorized to disclose Protected Health Information pertaining to this Action
19 to those persons and for such purposes as designated in herein. The Court has determined that
20 disclosure of such Protected Health Information is necessary for the conduct of proceedings
21 before it and that failure to make the disclosure would be contrary to public interest or to the
22 detriment of one or more parties to the proceedings.

23 4.6 The Parties shall not use or disclose Protected Health Information for any purpose
24 other than the Litigation, including any appeals. The Parties may, inter alia, disclose Protected
25 Health Information to (a) counsel for the Parties and employees of counsel who have
26 responsibility for the Litigation; (b) the Court and its personnel; (c) Court reporters; (d) experts
27 and consultants; and (e) other entities or persons involved in the Litigation.

28

1 4.7 Within sixty days after dismissal or entry of final judgment not subject to further
2 appeal, the Parties, their counsel, and any person or entity in possession of Protected Health
3 Information received pursuant to this Order shall destroy or return to the Covered Entity or
4 Business Associate such Protected Health Information.

5 4.8 Nothing in this Order authorizes the parties to obtain Protected Health
6 Information through means other than formal discovery requests, subpoenas, depositions,
7 pursuant to a patient authorization, or any other lawful process.

8 5. DURATION

9 Even after final disposition of this litigation, the confidentiality obligations imposed by
10 this Order shall remain in effect until a Designating Party agrees otherwise in writing or a court
11 order otherwise directs. Final disposition shall be deemed to be the later of (1) dismissal of all
12 claims and defenses in this action, with or without prejudice; and (2) final judgment herein after
13 the completion and exhaustion of all appeals, rehearings, remands, trials, or reviews of this
14 action, including the time limits for filing any motions or applications for extension of time
15 pursuant to applicable law.

16 6. DESIGNATING PROTECTED MATERIAL

17 6.1 Exercise of Restraint and Care in Designating Material for Protection. Each Party
18 or Non-Party that designates information or items for protection under this Order must take care
19 to limit any such designation to specific material that qualifies under the appropriate standards.
20 The Designating Party must designate for protection only those parts of material, documents,
21 items, or oral or written communications that qualify – so that other portions of the material,
22 documents, items, or communications for which protection is not warranted are not swept
23 unjustifiably within the ambit of this Order.

24 Mass, indiscriminate, or routinized designations are prohibited. Designations that are
25 shown to be clearly unjustified or that have been made for an improper purpose (e.g., to
26 unnecessarily encumber or retard the case development process or to impose unnecessary
27 expenses and burdens on other parties) may expose the Designating Party to sanctions.

28

1 If it comes to a Designating Party’s attention that information or items that it designated
2 for protection do not qualify for protection, that Designating Party must promptly notify all other
3 Parties that it is withdrawing the mistaken designation.

4 6.2 Manner and Timing of Designations. Except as otherwise provided in this Order
5 (see, e.g., second paragraph of section 6.2(a) below), or as otherwise stipulated or ordered,
6 Disclosure or Discovery Material that qualifies for protection under this Order must be clearly so
7 designated before the material is disclosed or produced.

8 Designation in conformity with this Order requires:

9 (a) for information in documentary form (e.g., paper or electronic documents, but
10 excluding transcripts of depositions or other pretrial or trial proceedings), that the Producing
11 Party affix the legend “CONFIDENTIAL” or “Confidential Protected Health Information” to
12 each page that contains protected material. If only a portion or portions of the material on a page
13 qualifies for protection, the Producing Party also must clearly identify the protected portion(s)
14 (e.g., by making appropriate markings in the margins).

15 (b) for testimony given in deposition or in other pretrial or trial proceedings, that the
16 Designating Party identify on the record, before the close of the deposition, hearing, or other
17 proceeding, all protected testimony.

18 (c) for information produced in some form other than documentary and for any other
19 tangible items, that the Producing Party affix in a prominent place on the exterior of the
20 container or containers in which the information or item is stored the legend
21 “CONFIDENTIAL.” If only a portion or portions of the information or item warrant protection,
22 the Producing Party, to the extent practicable, shall identify the protected portion(s).

23 6.3 Inadvertent Failures to Designate. If timely corrected, an inadvertent failure to
24 designate qualified information or items does not, standing alone, waive the Designating Party’s
25 right to secure protection under this Order for such material. Upon timely correction of a
26 designation, the Receiving Party must make reasonable efforts to assure that the material is
27 treated in accordance with the provisions of this Order.

28 7. CHALLENGING CONFIDENTIALITY DESIGNATIONS

1 7.1 Timing of Challenges. Any Party or Non-Party may challenge a designation of
2 confidentiality at any time. Unless a prompt challenge to a Designating Party’s confidentiality
3 designation is necessary to avoid foreseeable, substantial unfairness, unnecessary economic
4 burdens, or a significant disruption or delay of the litigation, a Party does not waive its right to
5 challenge a confidentiality designation by electing not to mount a challenge promptly after the
6 original designation is disclosed.

7 7.2 Meet and Confer. The Challenging Party shall initiate the dispute resolution
8 process by providing written notice of each designation it is challenging and describing the basis
9 for each challenge. To avoid ambiguity as to whether a challenge has been made, the written
10 notice must recite that the challenge to confidentiality is being made in accordance with this
11 specific paragraph of the Protective Order. The parties shall attempt to resolve each challenge in
12 good faith and must begin the process by conferring directly (in voice to voice dialogue; other
13 forms of communication are not sufficient) within 14 days of the date of service of notice. In
14 conferring, the Challenging Party must explain the basis for its belief that the confidentiality
15 designation was not proper and must give the Designating Party an opportunity to review the
16 designated material, to reconsider the circumstances, and, if no change in designation is offered,
17 to explain the basis for the chosen designation. A Challenging Party may proceed to the next
18 stage of the challenge process only if it has engaged in this meet and confer process first or
19 establishes that the Designating Party is unwilling to participate in the meet and confer process in
20 a timely manner.

21 7.3 Judicial Intervention. If the Parties cannot resolve a challenge without court
22 intervention, the Designating Party shall file and serve a motion to retain confidentiality within
23 21 days of the initial notice of challenge or within 14 days of the parties agreeing that the meet
24 and confer process will not resolve their dispute, whichever is earlier. The Parties, however,
25 may stipulate in writing to extending these deadlines. Each such motion must be accompanied by
26 a competent declaration affirming that the movant has complied with the meet and confer
27 requirements imposed in the preceding paragraph. Failure by the Designating Party to make such
28 a motion including the required declaration within 21 days (or 14 days, if applicable), or outside

1 of the time stipulated to in writing by the Parties shall automatically waive the confidentiality
2 designation for each challenged designation. In addition, the Challenging Party may file a motion
3 challenging a confidentiality designation at any time if there is good cause for doing so,
4 including a challenge to the designation of a deposition transcript or any portions thereof. Any
5 motion brought pursuant to this provision must be accompanied by a competent declaration
6 affirming that the movant has complied with the meet and confer requirements imposed by the
7 preceding paragraph.

8 The burden of persuasion in any such challenge proceeding shall be on the Designating
9 Party. Frivolous challenges, and those made for an improper purpose (e.g., to harass or impose
10 unnecessary expenses and burdens on other parties) may expose the Challenging Party to
11 sanctions. Unless the Designating Party has waived the confidentiality designation by failing to
12 file a motion to retain confidentiality as described above, all parties shall continue to afford the
13 material in question the level of protection to which it is entitled under the Producing Party's
14 designation until the court rules on the challenge.

15 8. ACCESS TO AND USE OF PROTECTED MATERIAL

16 8.1 Basic Principles. A Receiving Party may use Protected Material that is disclosed
17 or produced by another Party or by a Non-Party in connection with this case only for
18 prosecuting, defending, or attempting to settle this litigation. Such Protected Material may be
19 disclosed only to the categories of persons and under the conditions described in this Order.
20 When the litigation has been terminated, a Receiving Party must comply with the provisions of
21 section 14 below (FINAL DISPOSITION).

22 Protected Material must be stored and maintained by a Receiving Party at a location and
23 in a secure manner that ensures that access is limited to the persons authorized under this Order.

24 8.2 Disclosure of "CONFIDENTIAL" Information or Items. Unless otherwise
25 ordered by the court or permitted in writing by the Designating Party, a Receiving Party may
26 disclose any information or item designated "CONFIDENTIAL" only to:

27 (a) the Receiving Party's Outside Counsel of Record in this action, as well as
28 employees of said Outside Counsel of Record to whom it is reasonably necessary to disclose the

1 information for this litigation;

2 (b) the officers, directors, and other control group employees (including House
3 Counsel) of the Receiving Party to whom disclosure is reasonably necessary for this litigation;

4 (c) Experts (as defined in this Order) of the Receiving Party to whom disclosure is
5 reasonably necessary for this litigation and who have signed the “Acknowledgment and
6 Agreement to Be Bound” (Exhibit A);

7 (d) the court and its personnel;

8 (e) court reporters and their staff, professional jury or trial consultants, mock jurors,
9 and Professional Vendors to whom disclosure is reasonably necessary for this litigation;

10 (f) during their depositions, witnesses in the action to whom disclosure is reasonably
11 necessary. Pages of transcribed deposition testimony or exhibits to depositions that reveal
12 Protected Material must be separately bound by the court reporter and may not be disclosed to
13 anyone except as permitted under this Stipulated Protective Order.

14 (g) the author or recipient of a document containing the information or a custodian or
15 other person who otherwise possessed or knew the information.

16 9. PROTECTED MATERIAL SUBPOENAED OR ORDERED PRODUCED IN OTHER
17 LITIGATION

18 If a Party is served with a subpoena or a court order issued in other litigation that compels
19 disclosure of any information or items designated in this action as “CONFIDENTIAL,” that
20 Party must:

21 (a) promptly notify in writing the Designating Party. Such notification shall include a
22 copy of the subpoena or court order;

23 (b) promptly notify in writing the party who caused the subpoena or order to issue in
24 the other litigation that some or all of the material covered by the subpoena or order is subject to
25 this Protective Order. Such notification shall include a copy of this Stipulated Protective Order;
26 and

27 (c) cooperate with respect to all reasonable procedures sought to be pursued by the
28 Designating Party whose Protected Material may be affected.

1 If the Designating Party timely seeks a protective order, the Party served with the
2 subpoena or court order shall not produce any information designated in this action as
3 “CONFIDENTIAL” before a determination by the court from which the subpoena or order
4 issued, unless the Party has obtained the Designating Party’s permission. The Designating Party
5 shall bear the burden and expense of seeking protection in that court of its confidential material –
6 and nothing in these provisions should be construed as authorizing or encouraging a Receiving
7 Party in this action to disobey a lawful directive from another court.

8 10. A NON-PARTY’S PROTECTED MATERIAL SOUGHT TO BE PRODUCED IN THIS
9 LITIGATION

10 (a) The terms of this Order are applicable to information produced by a Non-Party in
11 this action and designated as “CONFIDENTIAL.” Such information produced by Non-Parties in
12 connection with this litigation is protected by the remedies and relief provided by this Order.
13 Nothing in these provisions should be construed as prohibiting a Non-Party from seeking
14 additional protections.

15 (b) In the event that a Party is required, by a valid discovery request, to produce a
16 Non-Party’s confidential information in its possession, and the Party is subject to an agreement
17 with the Non-Party not to produce the Non-Party’s confidential information, then the Party shall:

18 (1) promptly notify in writing the Requesting Party and the Non-Party that some
19 or all of the information requested is subject to a confidentiality agreement with a Non-Party;

20 (2) promptly provide the Non-Party with a copy of the Stipulated Protective
21 Order in this litigation, the relevant discovery request(s), and a reasonably specific description of
22 the information requested; and

23 (3) make the information requested available for inspection by the Non-Party.

24 (c) If the Non-Party fails to object or seek a protective order from this court within
25 14 days of receiving the notice and accompanying information, the Receiving Party may produce
26 the Non-Party’s confidential information responsive to the discovery request. If the Non-Party
27 timely seeks a protective order, the Receiving Party shall not produce any information in its
28 possession or control that is subject to the confidentiality agreement with the Non-Party before a

1 determination by the court. Absent a court order to the contrary, the Non-Party shall bear the
2 burden and expense of seeking protection in this court of its Protected Material.

3 11. UNAUTHORIZED DISCLOSURE OF PROTECTED MATERIAL

4 If a Receiving Party learns that, by inadvertence or otherwise, it has disclosed Protected
5 Material to any person or in any circumstance not authorized under this Stipulated Protective
6 Order, the Receiving Party must immediately (a) notify in writing the Designating Party of the
7 unauthorized disclosures, (b) use its best efforts to retrieve all unauthorized copies of the
8 Protected Material, (c) inform the person or persons to whom unauthorized disclosures were
9 made of all the terms of this Order, and (d) request such person or persons to execute the
10 “Acknowledgment and Agreement to Be Bound” that is attached hereto as Exhibit A.

11 12. INADVERTENT PRODUCTION OF PRIVILEGED OR OTHERWISE PROTECTED
12 MATERIAL

13 When a Producing Party gives notice to Receiving Parties that certain inadvertently
14 produced material is subject to a claim of privilege or other protection, such inadvertent
15 production by any of the undersigned Parties or Non-Parties to the Proceedings of any
16 Document, Testimony or Information during discovery in this Proceeding without a
17 “CONFIDENTIAL” designation, shall be without prejudice to any claim that such item is
18 “CONFIDENTIAL” and such Party or Non-Party shall not be held to have waived any rights by
19 such inadvertent production. In the event that any Document, Testimony or Information that is
20 subject to a “CONFIDENTIAL” designation is inadvertently produced without such designation,
21 the Party or Non-Party that inadvertently produced the document shall give written notice of
22 such inadvertent production within twenty (20) days of discovery of the inadvertent production,
23 together with a further copy of the subject Document, Testimony or Information designated as
24 “CONFIDENTIAL” (the “Inadvertent Production Notice”). Upon receipt of such Inadvertent
25 Production Notice, the Party that received the inadvertently produced Document, Testimony or
26 Information shall promptly destroy the inadvertently produced Document, Testimony or
27 Information and all copies thereof, or, at the expense of the producing Party, return such together
28 with all copies of such Document, Testimony or Information to counsel for the producing Party

1 and shall retain only the “CONFIDENTIAL” designated Materials. Should the receiving Party
2 choose to destroy such inadvertently produced Document, Testimony or Information, the
3 receiving Party shall notify the producing Party in writing of such destruction within ten (10)
4 days of receipt of written notice of the inadvertent production. This provision is not intended to
5 apply to any inadvertent production of any Information protected by attorney-client or work
6 product privileges. In the event that this provision conflicts with any applicable law regarding
7 waiver of confidentiality through the inadvertent production of Documents, Testimony or
8 Information, such law shall govern. This provision is not intended to modify whatever procedure
9 may be established in an e-discovery order that provides for production without prior privilege
10 review. Insofar as the parties reach an agreement on the effect of disclosure of a communication
11 or information covered by the attorney-client privilege or work product protection, the parties
12 may incorporate their agreement in the stipulated protective order submitted to the court.

13 13. MISCELLANEOUS

14 13.1 Right to Further Relief. Nothing in this Order abridges the right of any person to
15 seek its modification by the court in the future.

16 13.2 Right to Assert Other Objections. By stipulating to the entry of this Protective
17 Order no Party waives any right it otherwise would have to object to disclosing or producing any
18 information or item on any ground not addressed in this Stipulated Protective Order. Similarly,
19 no Party waives any right to object on any ground to use in evidence of any of the material
20 covered by this Protective Order.

21 13.3 Filing Protected Material. Without written permission from the Designating Party
22 or a court order secured after appropriate notice to all interested persons, a Party may not file in
23 the public record in this action any Protected Material. Where any Protected Material is included
24 in any motion or other proceeding governed by California Rules of Court, Rules 2.550 and
25 2.551, the party shall follow those rules. With respect to discovery motions or other proceedings
26 not governed by California Rules of Court, Rules 2.550 and 2.551, the following shall apply: If
27 Protected Material is submitted to or otherwise disclosed to the Court in connection with
28 discovery motions and proceedings, the same shall be separately filed under seal with the clerk

1 of the Court in an envelope marked: “CONFIDENTIAL – FILED UNDER SEAL PURSUANT
2 TO PROTECTIVE ORDER AND WITHOUT ANY FURTHER SEALING ORDER
3 REQUIRED.”

4 14. FINAL DISPOSITION

5 Within 60 days after the final disposition of this action, as defined in paragraph 4, each
6 Receiving Party must return all Protected Material to the Producing Party or destroy such
7 material. As used in this subdivision, “all Protected Material” includes all copies, abstracts,
8 compilations, summaries, and any other format reproducing or capturing any of the Protected
9 Material. Whether the Protected Material is returned or destroyed, the Receiving Party must
10 submit a written certification to the Producing Party (and, if not the same person or entity, to the
11 Designating Party) by the 60 day deadline that (1) identifies (by category, where appropriate) all
12 the Protected Material that was returned or destroyed and (2) affirms that the Receiving Party has
13 not retained any copies, abstracts, compilations, summaries or any other format reproducing or
14 capturing any of the Protected Material. Notwithstanding this provision, Counsel are entitled to
15 retain an archival copy of all pleadings, motion papers, trial, deposition, and hearing transcripts,
16 legal memoranda, correspondence, deposition and trial exhibits, expert reports, attorney work
17 product, and consultant and expert work product, even if such materials contain Protected
18 Material. Any such archival copies that contain or constitute Protected Material remain subject to
19 this Protective Order as set forth in Section 5 (DURATION).

20 **IT IS SO STIPULATED, THROUGH COUNSEL OF RECORD.**

21 Dated: LIEFF CABRASER HEIMANN & BERNSTEIN, LLP

22
23
24 By: _____
25 KELLY M. DERMODY
26 DANIEL M. HUTCHINSON
27 JALLÉ H. DAFA
28 NIGAR SHAIKH
Attorneys for Plaintiff

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Dated: FOX ROTHSCHILD LLP

By: _____
ALEXANDER HERNAEZ
DANIEL V. KITZES
Attorneys for Defendants
SUTTER HEALTH AND PALO ALTO MEDICAL
FOUNDATION

Dated: GORDON REES SCULLY MANSUKHANI, LLP

By: _____
MARCIE ISOM FITZSIMMONS
R. MICK RUBIO
Attorneys for Defendant
PALO ALTO FOUNDATION MEDICAL GROUP

PURSUANT TO STIPULATION, IT IS SO ORDERED.

DATED: _____ Judge of the Superior Court

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EXHIBIT A

ACKNOWLEDGMENT AND AGREEMENT TO BE BOUND

I, _____ [print or type full name], of _____ [print or type full address], declare under penalty of perjury that I have read in its entirety and understand the Stipulated Protective Order that was issued by the California Superior Court, County of San Francisco on [date] in the case of *Omondi Nyong'o v. Sutter Health, Palo Alto Medical Foundation, et al*, Case No. CGC-21-592714. I agree to comply with and to be bound by all the terms of this Stipulated Protective Order. I solemnly promise that I will not disclose in any manner any information or item that is subject to this Stipulated Protective Order to any person or entity except in strict compliance with the provisions of this Order.

I further agree to submit to the jurisdiction of the California Superior Court, County of San Francisco for the purpose of enforcing the terms of this Stipulated Protective Order, even if such enforcement proceedings occur after termination of this action.

Date: _____

City and State where sworn and signed: _____

Printed name: _____

Signature: _____

1 **PROOF OF SERVICE**

2 Nyong’o v. Sutter Health, et al.
3 San Francisco Superior Court, Case No. CGC-21-592714

4 I am a resident of the State of California, over the age of eighteen years, and not a party
5 to the within action. My business address is: Gordon Rees Scully Mansukhani, LLP 275 Battery
6 Street, Suite 2000, San Francisco, CA 94111. On the date below, I served the within documents:

- 7 **Via E-Mail:** by transmitting via electronic mail the document(s) listed above to the
8 email address(es) set forth below. During the Coronavirus (Covid-19) pandemic, this
9 office will be working remotely, not able to send physical mail as usual, and is therefore
10 using only electronic mail.
- 11 **Via FedEx:** By placing a true copy thereof enclosed in a sealed envelope, at a station
12 designated for collection and processing of envelopes and packages for overnight
13 delivery by FedEx as part of the ordinary business practices of Gordon Rees Scully
14 Mansukhani, LLP described below, addressed as follows:
- 15 **Via U.S. Mail:** By placing the document(s) listed above in a sealed envelope with
16 postage thereon fully prepaid, in United States mail in the State of California at San
17 Francisco, addressed as set forth below.

18 **Attorneys for Plaintiff**

19 Kelly M. Dermody	Tel: (415) 956-1000
20 Daniel M. Hutchinson	Email: kdermody@lchb.com
21 Jallé H. Dafa	Email: dhutchinson@lchb.com
22 Nigar Shaikh	Email: jdafa@lchb.com
Lieff Cabraser Heimann & Bernstein, LLP	Email: nshaikh@lchb.com
275 Battery St, 29th Floor	
San Francisco, CA 94111	

23 **Attorneys for Sutter Health and**
24 **Palo Alto Medical Foundation:**

25 Alexander Hernaez	Tel: 415 364-5566
26 Daniel V. Kitzes	Email: Ahernaez@foxrothschild.com
27 Fox Rothschild LLP	Email: Dkitzes@foxrothschild.com
28 345 California St., Suite 2200	
San Francisco, CA 94104	

29 I am readily familiar with the firm’s practice of collection and processing correspondence
30 for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same
31 day with postage thereon fully prepaid in the ordinary course of business. I am aware that on
32 motion of the party served, service is presumed invalid if postal cancellation date or postage
33 meter date is more than one day after the date of deposit for mailing in affidavit.

34 I declare under penalty of perjury under the laws of the State of California that the above
35 is true and correct. Executed on _____, 2021 at San Francisco, California.

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Yehimi Olvera

EXHIBIT B

1 MARCIE ISOM FITZSIMMONS (SBN: 226906)
R. MICK RUBIO (SBN: 285588)
2 GORDON REES SCULLY MANSUKHANI, LLP
275 Battery Street, Suite 2000
3 San Francisco, CA 94111
Telephone: (415) 986-5900
4 Facsimile: (415) 986-8054
Misom@grsm.com
5 Mrubio@grsm.com

6 Attorneys for Defendant
PALO ALTO FOUNDATION MEDICAL GROUP

7
8 SUPERIOR COURT OF CALIFORNIA
9 COUNTY OF SAN FRANCISCO

11 OMONDI NYONG'O,) CASE NO. CGC-21-592714
12)
13 Plaintiff,)
14 vs.) STIPULATED PROTECTIVE ORDER
15)
16 SUTTER HEALTH, PALO ALTO)
MEDICAL FOUNDATION, and PALO)
ALTO FOUNDATION MEDICAL GROUP,)
17 Defendants.) Amended Complaint Filed: October 13, 2021
Complaint Filed: June 22, 2021

18
19 1. PURPOSES AND LIMITATIONS

20 Disclosure and discovery activity in this [employment](#) action ~~are likely to may~~ involve
21 production of confidential, proprietary, [health](#), and/or private information for which special
22 protection from public disclosure and from use for any purpose other than prosecuting this
23 litigation may be warranted. Accordingly, the parties hereby stipulate to and petition the court to
24 enter the following Stipulated Protective Order. The parties acknowledge that this Order does not
25 confer blanket protections on all disclosures or responses to discovery and that the protection it
26 affords from public disclosure and use extends only to the limited information or items that are
27 entitled to confidential treatment under the applicable legal principles. The parties further
28 acknowledge, as set forth in Section [42-313.3](#), below, that this Stipulated Protective Order does

-1-

STIPULATED PROTECTIVE ORDER FOR STANDARD LITIGATION

1 not entitle them to file confidential information under seal; California Rule of Court Rules 2.550
2 and 2.551 set forth the procedures that must be followed and the standards that will be applied
3 when a party seeks permission from the court to file material under seal.

4 **2. DEFINITIONS**

5 2.1 **Challenging Party:** a Party or Non-Party that challenges the designation of
6 information or items under this Order.

7 2.2 **“CONFIDENTIAL” Information or Items:** any information (regardless of how it
8 is generated, stored or maintained) or tangible things which are in the possession of a
9 Designating Party ~~who believes in good faith that such information is entitled to confidential~~
10 ~~treatment under applicable law that constitutes technical and competitively-sensitive information~~
11 ~~protected by law, and/or personal financial, health, or contact information protected by~~
12 ~~California's right to privacy.~~

13 2.3 **Counsel (without qualifier):** Outside Counsel of Record and House Counsel (as
14 well as their support staff).

15 2.4 **Designating Party:** a Party or Non-Party that designates information or items ~~that~~
16 ~~it produces in disclosures or in responses to discovery produced~~ as “CONFIDENTIAL.”

17 2.5 **Disclosure or Discovery Material:** all items or information, regardless of the
18 medium or manner in which it is generated, stored, or maintained (including, among other things,
19 testimony, transcripts, and tangible things), that are produced or generated in disclosures or
20 responses to discovery in this matter.

21 2.6 **Expert:** a person with specialized knowledge or experience in a matter pertinent
22 to the litigation who has been retained by a Party or its counsel to serve as an expert witness or as
23 a consultant in this action.

24 2.7 **House Counsel:** attorneys who are employees of a party to this action. House
25 Counsel does not include Outside Counsel of Record or any other outside counsel.

26 2.8 **Non-Party:** any natural person, partnership, corporation, association, or other
27 legal entity not named as a Party to this action.

28 2.9 **Outside Counsel of Record:** attorneys who are not employees of a party to this

1 action but are retained to represent or advise a party to this action and have appeared in this
2 action on behalf of that party or are affiliated with a law firm which has appeared on behalf of
3 that party.

4 ~~2.10 Party: any party to this action, including all of its officers, directors, employees,~~
5 ~~consultants, retained experts, and Outside Counsel of Record (and their support staffs).~~

6 ~~2.10 Party: any party to this action, including Plaintiff Omondi Nyong'o;~~ Defendant
7 ~~Sutter Health and its officers, directors, employees, and agents;~~ Defendant ~~PAFMGPalo Alto~~
8 ~~Foundation Medical Group and its officers, directors, employees, and agents;~~ and Defendant
9 ~~PAMF and its officers, directors, employees, and agents.~~

10 2.11 Producing Party: a Party or Non-Party that produces Disclosure or Discovery
11 Material in this action.

12 2.12 Professional Vendors: persons or entities that provide litigation support services
13 (e.g., photocopying, videotaping, translating, preparing exhibits or demonstrations, and
14 organizing, storing, or retrieving data in any form or medium) and their employees and
15 subcontractors.

16 2.13 Protected Material: any Disclosure or Discovery Material that is designated ~~, in~~
17 ~~good faith,~~ as "CONFIDENTIAL" and/or "Confidential Protected Health Information".

18 2.14 Receiving Party: a Party that receives Disclosure or Discovery Material from a
19 Producing Party.

20 3. SCOPE

21 The protections conferred by this Stipulation and Order cover not only Protected Material
22 (as defined above), but also (1) any information copied ~~or extracted~~ from Protected Material; (2)
23 all copies ~~excerpts, summaries, or compilations~~ of Protected Material; and (3) any testimony,
24 conversations, or presentations by Parties or their Counsel that ~~might~~ reveal Protected Material.

25 However, the protections conferred by this Stipulation and Order do not cover the
26 following information: (a) any information that is in the public domain at the time of disclosure
27 to a Receiving Party or becomes part of the public domain after its disclosure to a Receiving
28 Party as a result of publication not involving a violation of this Order, including becoming part

Commented [MR1]: I'm not agreeable to deleting "extracted"

Commented [MR2]: I'm not agreeable to this deletion either.

1 of the public record through trial or otherwise; and (b) any information known to the Receiving
2 Party prior to the disclosure, obtained from the Receiving Party prior to the disclosure, and/or
3 obtained by the Receiving Party after the disclosure from a source who obtained the information
4 lawfully and under no obligation of confidentiality to the Designating Party. Accordingly, upon
5 entry of this Order, all Parties shall be entitled to produce and/or disclose to all Parties in this
6 Litigation any and all Disclosure or Discovery Material, including any and all
7 “CONFIDENTIAL” Information and/or HIPPA-Protected Information, regardless of the origin
8 of that Disclosure or Discovery Material. For example, Plaintiff shall be entitled to ~~access and~~
9 produce Disclosure or Discovery Material in his possession, custody, and/or control which may
10 originate from accounts otherwise maintained or owned by Defendants PAMF and/or PAFMG,
11 which Plaintiff has allowable access to. ~~from Defendants Sutter Health, PAFMG, and/or PAMF,~~
12 Defendant Sutter Health, PAFMG, and/or PAMF shall likewise be entitled to ~~access and~~ produce
13 Disclosure or Discovery Material in their possession, custody, and/or control ~~from which may~~
14 originate from accounts otherwise maintained or accessible by Plaintiff.

Commented [MR3]: Please see my proposed language/edits.

15 Any use of Protected Material at trial shall be governed by a separate agreement or order.

16 4. HIPAA-Protected Information

17 4.1 General. Discovery in this Litigation may involve production of “Protected Health
18 Information” as that term is defined and set forth in 45 C.F.R. § 160.103, for which special
19 protection from public disclosure and from any purpose other than prosecuting this ~~Action is~~
20 warranted.

Commented [MR4]: This will need to be defined.

21 4.2 “Protected Health Information” shall encompass information within the scope and
22 definition set forth in 45 C.F.R. § 160.103 that is provided to the Parties by a covered entity as
23 defined by 45 C.F.R. § 160.103 (“Covered Entities”) or by a business associate of a Covered Entity
24 as defined by 45 C.F.R. § 160.103 (“Business Associate”) in the course of the Litigation, as well
25 as information covered by the privacy laws of any individual states, as applicable.

26 4.3 Any Party who produces Protected Health Information in this Litigation shall
27 designate such discovery material “Confidential Protected Health Information” in accordance with
28 the provisions of this Protective Order.

1 4.4 Unless otherwise agreed between counsel for the Parties, the designation of
2 discovery material as “Confidential Protected Health Information” shall be made at the following
3 times: (a) for documents or things at the time of the production of the documents or things; (b) for
4 declarations, correspondence, expert witness reports, written discovery responses, court filings,
5 pleadings, and other documents, at the time of the service or filing, whichever occurs first; (c) for
6 testimony, at the time such testimony is given by a statement designating the testimony as
7 “Confidential Protected Health Information” made on the record or within thirty (30) days after
8 receipt of the transcript of the deposition. The designation of discovery material as “Confidential
9 Protected Health Information” shall be made in the following manner: (a) for documents, by
10 placing the notation “Confidential Protected Health Information” or similar legend on each page
11 of such document; (b) for tangible things, by placing the notation “Confidential Protected Health
12 Information” on the object or container thereof or if impracticable, as otherwise agreed by the
13 parties; (c) for declarations, correspondence, expert witness reports, written discovery responses,
14 court filings, pleadings, and any other documents containing Protected Health Information, by
15 placing the notation “Confidential Protected Health Information” both on the face of such
16 document and on any particular designated pages of such document; and (d) for testimony, by
17 orally designating such testimony as being “Confidential Protected Health Information” at the time
18 the testimony is given or by designating the portions of the transcript in a letter to be served on the
19 court reporter and opposing counsel within thirty (30) calendar days after receipt of the certified
20 transcript of the deposition.

21 4.5 Pursuant to 45 C.F.R. § 164.512(e)(1), all Covered Entities and their Business
22 Associates (as defined in 45 C.F.R. § 160.103), or entities in receipt of information from such
23 entities, are hereby authorized to disclose Protected Health Information pertaining to the Action to
24 those persons and for such purposes as designated in herein. Further, all Parties that are entities
25 subject to state privacy law requirements, or entities in receipt of information from such entities,
26 are hereby authorized to disclose Protected Health Information pertaining to this Action to those
27 persons and for such purposes as designated in herein. The Court has determined that disclosure
28 of such Protected Health Information is necessary for the conduct of proceedings before it and that

Commented [MR5]: Can you please advise on this? I'm unclear which "persons"? this provision refers to.

Commented [MR6]: Same comment as above.

1 ~~failure to make the disclosure would be contrary to public interest or to the detriment of one or~~
2 ~~more parties to the proceedings;~~

Commented [MR7]: I don't believe this language is necessary.

3 4.6 The Parties shall not use or disclose Protected Health Information for any purpose
4 other than the ~~Litigation~~, including any appeals. The Parties may, inter alia, disclose Protected
5 Health Information to (a) counsel for the Parties and employees of counsel who have responsibility
6 for the ~~Litigation~~; (b) the Court and its personnel; (c) Court reporters; (d) experts and consultants;
7 and (e) other entities or persons involved in the ~~Litigation~~.

Commented [MR8]: We'll need to make consistent – "Action" vs. "Litigation".

8 4.7 Within sixty days after dismissal or entry of final judgment not subject to further
9 appeal, the Parties, their counsel, and any person or entity in possession of Protected Health
10 Information received pursuant to this Order shall destroy or return to the Covered Entity or
11 Business Associate such Protected Health Information.

12 4.8 Nothing in this Order authorizes the parties to obtain Protected Health
13 Information through means other than formal discovery requests, subpoenas, depositions, pursuant
14 to a patient authorization, or any other lawful process.

15 45. DURATION

16 Even after final disposition of this litigation, the confidentiality obligations imposed by
17 this Order shall remain in effect until a Designating Party agrees otherwise in writing or a court
18 order otherwise directs. Final disposition shall be deemed to be the later of (1) dismissal of all
19 claims and defenses in this action, with or without prejudice; and (2) final judgment herein after
20 the completion and exhaustion of all appeals, rehearings, remands, trials, or reviews of this
21 action, including the time limits for filing any motions or applications for extension of time
22 pursuant to applicable law.

23 56. DESIGNATING PROTECTED MATERIAL

24 ~~5.16.1~~ Exercise of Restraint and Care in Designating Material for Protection. Each Party
25 or Non-Party that designates information or items for protection under this Order must take care
26 to limit any such designation to specific material that qualifies under the appropriate standards.
27 The Designating Party must designate for protection only those parts of material, documents,
28 items, or oral or written communications that qualify – so that other portions of the material,

1 documents, items, or communications for which protection is not warranted are not swept
2 unjustifiably within the ambit of this Order.

3 Mass, indiscriminate, or routinized designations are prohibited. Designations that are
4 shown to be clearly unjustified or that have been made for an improper purpose (e.g., to
5 unnecessarily encumber or retard the case development process or to impose unnecessary
6 expenses and burdens on other parties) may expose the Designating Party to sanctions.

7 If it comes to a Designating Party's attention that information or items that it designated
8 for protection do not qualify for protection, that Designating Party must promptly notify all other
9 Parties that it is withdrawing the mistaken designation.

10 5-26.2 Manner and Timing of Designations. Except as otherwise provided in this Order
11 (see, e.g., second paragraph of section ~~5-2~~6.2(a) below), or as otherwise stipulated or ordered,
12 Disclosure or Discovery Material that qualifies for protection under this Order must be clearly so
13 designated before the material is disclosed or produced.

14 Designation in conformity with this Order requires:

15 (a) for information in documentary form (e.g., paper or electronic documents, but
16 excluding transcripts of depositions or other pretrial or trial proceedings), that the Producing
17 Party affix the legend "CONFIDENTIAL" or "Confidential Protected Health Information" to
18 each page that contains protected material. If only a portion or portions of the material on a page
19 qualifies for protection, the Producing Party also must clearly identify the protected portion(s)
20 (e.g., by making appropriate markings in the margins).

21 ~~A Party or Non-Party that makes original documents or materials available for inspection need
22 not designate them for protection until after the inspecting Party has indicated which material it
23 would like copied and produced. During the inspection and before the designation, all of the
24 material made available for inspection shall be deemed "CONFIDENTIAL." After the inspecting
25 Party has identified the documents it wants copied and produced, the Producing Party must
26 determine which documents, or portions thereof, qualify for protection under this Order. Then,
27 before producing the specified documents, the Producing Party must affix the
28 "CONFIDENTIAL" legend to each page that contains Protected Material. If only a portion or~~

1 ~~portions of the material on a page qualifies for protection, the Producing Party also must clearly~~
2 ~~identify the protected portion(s) (e.g., by making appropriate markings in the margins).~~

3 (b) for testimony given in deposition or in other pretrial or trial proceedings, that the
4 Designating Party identify on the record, before the close of the deposition, hearing, or other
5 proceeding, all protected testimony.

6 (c) for information produced in some form other than documentary and for any other
7 tangible items, that the Producing Party affix in a prominent place on the exterior of the
8 container or containers in which the information or item is stored the legend
9 “CONFIDENTIAL.” If only a portion or portions of the information or item warrant protection,
10 the Producing Party, to the extent practicable, shall identify the protected portion(s).

11 ~~5-36.3~~ Inadvertent Failures to Designate. If timely corrected, an inadvertent failure to
12 designate qualified information or items does not, standing alone, waive the Designating Party’s
13 right to secure protection under this Order for such material. Upon timely correction of a
14 designation, the Receiving Party must make reasonable efforts to assure that the material is
15 treated in accordance with the provisions of this Order.

16 ~~67.~~ CHALLENGING CONFIDENTIALITY DESIGNATIONS

17 ~~6-17.1~~ Timing of Challenges. Any Party or Non-Party may challenge a designation of
18 confidentiality at any time. Unless a prompt challenge to a Designating Party’s confidentiality
19 designation is necessary to avoid foreseeable, substantial unfairness, unnecessary economic
20 burdens, or a significant disruption or delay of the litigation, a Party does not waive its right to
21 challenge a confidentiality designation by electing not to mount a challenge promptly after the
22 original designation is disclosed.

23 ~~6-27.2~~ Meet and Confer. The Challenging Party shall initiate the dispute resolution
24 process by providing written notice of each designation it is challenging and describing the basis
25 for each challenge. To avoid ambiguity as to whether a challenge has been made, the written
26 notice must recite that the challenge to confidentiality is being made in accordance with this
27 specific paragraph of the Protective Order. The parties shall attempt to resolve each challenge in
28 good faith and must begin the process by conferring directly (in voice to voice dialogue; other

1 forms of communication are not sufficient) within 14 days of the date of service of notice. In
2 conferring, the Challenging Party must explain the basis for its belief that the confidentiality
3 designation was not proper and must give the Designating Party an opportunity to review the
4 designated material, to reconsider the circumstances, and, if no change in designation is offered,
5 to explain the basis for the chosen designation. A Challenging Party may proceed to the next
6 stage of the challenge process only if it has engaged in this meet and confer process first or
7 establishes that the Designating Party is unwilling to participate in the meet and confer process in
8 a timely manner.

9 6-37.3 Judicial Intervention. If the Parties cannot resolve a challenge without court
10 intervention, the Designating Party shall file and serve a motion to retain confidentiality within
11 21 days of the initial notice of challenge or within 14 days of the parties agreeing that the meet
12 and confer process will not resolve their dispute, whichever is earlier. The Parties, however,
13 may stipulate in writing to extending these deadlines. Each such motion must be accompanied by
14 a competent declaration affirming that the movant has complied with the meet and confer
15 requirements imposed in the preceding paragraph. Failure by the Designating Party to make such
16 a motion including the required declaration within 21 days (or 14 days, if applicable), or outside
17 of the time stipulated to in writing by the Parties shall automatically waive the confidentiality
18 designation for each challenged designation. In addition, the Challenging Party may file a motion
19 challenging a confidentiality designation at any time if there is good cause for doing so,
20 including a challenge to the designation of a deposition transcript or any portions thereof. Any
21 motion brought pursuant to this provision must be accompanied by a competent declaration
22 affirming that the movant has complied with the meet and confer requirements imposed by the
23 preceding paragraph.

24 The burden of persuasion in any such challenge proceeding shall be on the Designating
25 Party. Frivolous challenges, and those made for an improper purpose (e.g., to harass or impose
26 unnecessary expenses and burdens on other parties) may expose the Challenging Party to
27 sanctions. Unless the Designating Party has waived the confidentiality designation by failing to
28 file a motion to retain confidentiality as described above, all parties shall continue to afford the

1 material in question the level of protection to which it is entitled under the Producing Party's
2 designation until the court rules on the challenge.

3 78. ACCESS TO AND USE OF PROTECTED MATERIAL

4 7-18.1 Basic Principles. A Receiving Party may use Protected Material that is disclosed
5 or produced by another Party or by a Non-Party in connection with this case only for
6 prosecuting, defending, or attempting to settle this litigation. Such Protected Material may be
7 disclosed only to the categories of persons and under the conditions described in this Order.
8 When the litigation has been terminated, a Receiving Party must comply with the provisions of
9 section ~~13-14~~ below (FINAL DISPOSITION).

10 Protected Material must be stored and maintained by a Receiving Party at a location and
11 in a secure manner that ensures that access is limited to the persons authorized under this Order.

12 7-28.2 Disclosure of "CONFIDENTIAL" Information or Items. Unless otherwise
13 ordered by the court or permitted in writing by the Designating Party, a Receiving Party may
14 disclose any information or item designated "CONFIDENTIAL" and/or "Confidential Protected
15 Health Information" only to:

16 (a) the Receiving Party's Outside Counsel of Record in this action, as well as
17 employees of said Outside Counsel of Record to whom it is reasonably necessary to disclose the
18 information for this litigation ~~and who have signed the "Acknowledgment and Agreement to Be~~
19 ~~Bound" that is attached hereto as Exhibit A;~~

20 (b) the officers, directors, and other control group employees (including House
21 Counsel) of the Receiving Party to whom disclosure is reasonably necessary for this litigation
22 ~~and who have signed the "Acknowledgment and Agreement to Be Bound" (Exhibit A);~~

23 (c) Experts (as defined in this Order) of the Receiving Party to whom disclosure is
24 reasonably necessary for this litigation and who have signed the "Acknowledgment and
25 Agreement to Be Bound" (Exhibit A);

26 (d) the court and its personnel;

27 (e) court reporters and their staff, professional jury or trial consultants, mock jurors,
28 and Professional Vendors to whom disclosure is reasonably necessary for this litigation ~~and who~~

1 ~~have signed the “Acknowledgment and Agreement to Be Bound” (Exhibit A);~~

2 (f) during their depositions, witnesses in the action to whom disclosure is reasonably
3 necessary ~~and who have signed the “Acknowledgment and Agreement to Be Bound” (Exhibit~~
4 ~~A), unless otherwise agreed by the Designating Party or ordered by the court.~~ Pages of
5 transcribed deposition testimony or exhibits to depositions that reveal Protected Material must be
6 separately bound by the court reporter and may not be disclosed to anyone except as permitted
7 under this Stipulated Protective Order.

8 (g) the author or recipient of a document containing the information or a custodian or
9 other person who otherwise possessed or knew the information.

10 89. PROTECTED MATERIAL SUBPOENAED OR ORDERED PRODUCED IN OTHER
11 LITIGATION

12 If a Party is served with a subpoena or a court order issued in other litigation that compels
13 disclosure of any information or items designated in this action as “CONFIDENTIAL,” that
14 Party must:

15 (a) promptly notify in writing the Designating Party. Such notification shall include a
16 copy of the subpoena or court order;

17 (b) promptly notify in writing the party who caused the subpoena or order to issue in
18 the other litigation that some or all of the material covered by the subpoena or order is subject to
19 this Protective Order. Such notification shall include a copy of this Stipulated Protective Order;
20 and

21 (c) cooperate with respect to all reasonable procedures sought to be pursued by the
22 Designating Party whose Protected Material may be affected.

23 If the Designating Party timely seeks a protective order, the Party served with the
24 subpoena or court order shall not produce any information designated in this action as
25 “CONFIDENTIAL” before a determination by the court from which the subpoena or order
26 issued, unless the Party has obtained the Designating Party’s permission. The Designating Party
27 shall bear the burden and expense of seeking protection in that court of its confidential material –
28 and nothing in these provisions should be construed as authorizing or encouraging a Receiving

1 Party in this action to disobey a lawful directive from another court.

2 910. A NON-PARTY'S PROTECTED MATERIAL SOUGHT TO BE PRODUCED IN THIS
3 LITIGATION

4 (a) The terms of this Order are applicable to information produced by a Non-Party in
5 this action and designated as "CONFIDENTIAL." Such information produced by Non-Parties in
6 connection with this litigation is protected by the remedies and relief provided by this Order.
7 Nothing in these provisions should be construed as prohibiting a Non-Party from seeking
8 additional protections.

9 (b) In the event that a Party is required, by a valid discovery request, to produce a
10 Non-Party's confidential information in its possession, and the Party is subject to an agreement
11 with the Non-Party not to produce the Non-Party's confidential information, then the Party shall:

12 (1) promptly notify in writing the Requesting Party and the Non-Party that some
13 or all of the information requested is subject to a confidentiality agreement with a Non-Party;

14 (2) promptly provide the Non-Party with a copy of the Stipulated Protective
15 Order in this litigation, the relevant discovery request(s), and a reasonably specific description of
16 the information requested; and

17 (3) make the information requested available for inspection by the Non-Party.

18 (c) If the Non-Party fails to object or seek a protective order from this court within
19 14 days of receiving the notice and accompanying information, the Receiving Party may produce
20 the Non-Party's confidential information responsive to the discovery request. If the Non-Party
21 timely seeks a protective order, the Receiving Party shall not produce any information in its
22 possession or control that is subject to the confidentiality agreement with the Non-Party before a
23 determination by the court. Absent a court order to the contrary, the Non-Party shall bear the
24 burden and expense of seeking protection in this court of its Protected Material.

25 4011. UNAUTHORIZED DISCLOSURE OF PROTECTED MATERIAL

26 If a Receiving Party learns that, by inadvertence or otherwise, it has disclosed Protected
27 Material to any person or in any circumstance not authorized under this Stipulated Protective
28 Order, the Receiving Party must immediately (a) notify in writing the Designating Party of the

1 unauthorized disclosures, (b) use its best efforts to retrieve all unauthorized copies of the
2 Protected Material, (c) inform the person or persons to whom unauthorized disclosures were
3 made of all the terms of this Order, and (d) request such person or persons to execute the
4 “Acknowledgment and Agreement to Be Bound” that is attached hereto as Exhibit A.

5 ~~12.~~ INADVERTENT PRODUCTION OF PRIVILEGED OR OTHERWISE PROTECTED
6 MATERIAL

7 When a Producing Party gives notice to Receiving Parties that certain inadvertently
8 produced material is subject to a claim of privilege or other protection, such inadvertent
9 production by any of the undersigned Parties or Non-Parties to the Proceedings of any
10 Document, Testimony or Information during discovery in this Proceeding without a
11 “CONFIDENTIAL” designation, shall be without prejudice to any claim that such item is
12 “CONFIDENTIAL” and such Party or Non-Party shall not be held to have waived any rights by
13 such inadvertent production. In the event that any Document, Testimony or Information that is
14 subject to a “CONFIDENTIAL” designation is inadvertently produced without such designation,
15 the Party or Non-Party that inadvertently produced the document shall give written notice of
16 such inadvertent production within twenty (20) days of discovery of the inadvertent production,
17 together with a further copy of the subject Document, Testimony or Information designated as
18 “CONFIDENTIAL” (the “Inadvertent Production Notice”). Upon receipt of such Inadvertent
19 Production Notice, the Party that received the inadvertently produced Document, Testimony or
20 Information shall promptly destroy the inadvertently produced Document, Testimony or
21 Information and all copies thereof, or, at the expense of the producing Party, return such together
22 with all copies of such Document, Testimony or Information to counsel for the producing Party
23 and shall retain only the “CONFIDENTIAL” designated Materials. Should the receiving Party
24 choose to destroy such inadvertently produced Document, Testimony or Information, the
25 receiving Party shall notify the producing Party in writing of such destruction within ten (10)
26 days of receipt of written notice of the inadvertent production. This provision is not intended to
27 apply to any inadvertent production of any Information protected by attorney-client or work
28 product privileges. In the event that this provision conflicts with any applicable law regarding

1 waiver of confidentiality through the inadvertent production of Documents, Testimony or
2 Information, such law shall govern. This provision is not intended to modify whatever procedure
3 may be established in an e-discovery order that provides for production without prior privilege
4 review. Insofar as the parties reach an agreement on the effect of disclosure of a communication
5 or information covered by the attorney-client privilege or work product protection, the parties
6 may incorporate their agreement in the stipulated protective order submitted to the court.

7 12.13. MISCELLANEOUS

8 12.13.1 Right to Further Relief. Nothing in this Order abridges the right of any
9 person to seek its modification by the court in the future.

10 12.13.2 Right to Assert Other Objections. By stipulating to the entry of this
11 Protective Order no Party waives any right it otherwise would have to object to disclosing or
12 producing any information or item on any ground not addressed in this Stipulated Protective
13 Order. Similarly, no Party waives any right to object on any ground to use in evidence of any of
14 the material covered by this Protective Order.

15 12.13.3 Filing Protected Material. Without written permission from the
16 Designating Party or a court order secured after appropriate notice to all interested persons, a
17 Party may not file in the public record in this action any Protected Material. Where any
18 Protected Material is included in any motion or other proceeding governed by California Rules
19 of Court, Rules 2.550 and 2.551, the party shall follow those rules. With respect to discovery
20 motions or other proceedings not governed by California Rules of Court, Rules 2.550 and 2.551,
21 the following shall apply: If Protected Material is submitted to or otherwise disclosed to the
22 Court in connection with discovery motions and proceedings, the same shall be separately filed
23 under seal with the clerk of the Court in an envelope marked: "CONFIDENTIAL – FILED
24 UNDER SEAL PURSUANT TO PROTECTIVE ORDER AND WITHOUT ANY FURTHER
25 SEALING ORDER REQUIRED."

26 13. FINAL DISPOSITION

27 Within 60 days after the final disposition of this action, as defined in paragraph 4, each
28 Receiving Party must return all Protected Material to the Producing Party or destroy such

1 material. As used in this subdivision, "all Protected Material" includes all copies, abstracts,
2 compilations, summaries, and any other format reproducing or capturing any of the Protected
3 Material. Whether the Protected Material is returned or destroyed, the Receiving Party must
4 submit a written certification to the Producing Party (and, if not the same person or entity, to the
5 Designating Party) by the 60 day deadline that (1) identifies (by category, where appropriate) all
6 the Protected Material that was returned or destroyed and (2) affirms that the Receiving Party has
7 not retained any copies, abstracts, compilations, summaries or any other format reproducing or
8 capturing any of the Protected Material. Notwithstanding this provision, Counsel are entitled to
9 retain an archival copy of all pleadings, motion papers, trial, deposition, and hearing transcripts,
10 legal memoranda, correspondence, deposition and trial exhibits, expert reports, attorney work
11 product, and consultant and expert work product, even if such materials contain Protected
12 Material. Any such archival copies that contain or constitute Protected Material remain subject to
13 this Protective Order as set forth in Section 4-5 (DURATION).

14 **IT IS SO STIPULATED, THROUGH COUNSEL OF RECORD.**

15 Dated: LIEFF CABRASER HEIMANN & BERNSTEIN, LLP

16
17 By: _____
18 KELLY M. DERMODY
19 DANIEL M. HUTCHINSON
20 JALLÉ H. DAFA
21 NIGAR SHAIKH
22 Attorneys for Plaintiff

23 Dated: FOX ROTHSCHILD LLP

24 By: _____
25 ALEXANDER HERNAEZ
26 DANIEL V. KITZES
27 Attorneys for Defendants
28 SUTTER HEALTH AND PALO ALTO MEDICAL
FOUNDATION

Dated: GORDON REES SCULLY MANSUKHANI, LLP

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By: _____
MARCIE ISOM FITZSIMMONS
R. MICK RUBIO
Attorneys for Defendant
PALO ALTO FOUNDATION MEDICAL GROUP

PURSUANT TO STIPULATION, IT IS SO ORDERED.

DATED: _____
Judge of the Superior Court

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EXHIBIT A

ACKNOWLEDGMENT AND AGREEMENT TO BE BOUND

I, _____ [print or type full name], of _____ [print or type full address], declare under penalty of perjury that I have read in its entirety and understand the Stipulated Protective Order that was issued by the California Superior Court, County of San Francisco on [date] in the case of *Omondi Nyong'o v. Sutter Health, Palo Alto Medical Foundation, et al*, Case No. CGC-21-592714. I agree to comply with and to be bound by all the terms of this Stipulated Protective Order ~~and I understand and acknowledge that failure to so comply could expose me to sanctions and punishment in the nature of contempt.~~ I solemnly promise that I will not disclose in any manner any information or item that is subject to this Stipulated Protective Order to any person or entity except in strict compliance with the provisions of this Order. I further agree to submit to the jurisdiction of the California Superior Court, County of San Francisco for the purpose of enforcing the terms of this Stipulated Protective Order, even if such enforcement proceedings occur after termination of this action.

I hereby appoint _____ [print or type full name] of _____ [print or type full address and telephone number] as my California agent for service of process in connection with this action or any proceedings related to enforcement of this Stipulated Protective Order.

Date: _____
City and State where sworn and signed: _____
Printed name: _____
Signature: _____

Commented [MR9]: At this juncture, we're not agreeable to striking this language.

1 **PROOF OF SERVICE**

2 Nyong'o v. Sutter Health, et al.
3 San Francisco Superior Court, Case No. CGC-21-592714

4 I am a resident of the State of California, over the age of eighteen years, and not a party
5 to the within action. My business address is: Gordon Rees Scully Mansukhani, LLP 275 Battery
6 Street, Suite 2000, San Francisco, CA 94111. On the date below, I served the within documents:

- 7 **Via E-Mail:** by transmitting via electronic mail the document(s) listed above to the
8 email address(es) set forth below. During the Coronavirus (Covid-19) pandemic, this
9 office will be working remotely, not able to send physical mail as usual, and is therefore
10 using only electronic mail.
- 11 **Via FedEx:** By placing a true copy thereof enclosed in a sealed envelope, at a station
12 designated for collection and processing of envelopes and packages for overnight
13 delivery by FedEx as part of the ordinary business practices of Gordon Rees Scully
14 Mansukhani, LLP described below, addressed as follows:
- 15 **Via U.S. Mail:** By placing the document(s) listed above in a sealed envelope with
16 postage thereon fully prepaid, in United States mail in the State of California at San
17 Francisco, addressed as set forth below.

18 **Attorneys for Plaintiff**

19 Kelly M. Dermody Tel: (415) 956-1000
20 Daniel M. Hutchinson Email: kdermody@lchb.com
21 Jallé H. Dafa Email: dhutchinson@lchb.com
22 Nigar Shaikh Email: jdafa@lchb.com
23 Lief Cabraser Heimann & Bernstein, LLP Email: nshaikh@lchb.com
24 275 Battery St, 29th Floor
25 San Francisco, CA 94111

26 **Attorneys for Sutter Health and
27 Palo Alto Medical Foundation:**

28 Alexander Hernaez Tel: 415 364-5566
Daniel V. Kitzes Email: Ahernaez@foxrothschild.com
Fox Rothschild LLP Email: Dkitzes@foxrothschild.com
345 California St., Suite 2200
San Francisco, CA 94104

29 I am readily familiar with the firm's practice of collection and processing correspondence
30 for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same
31 day with postage thereon fully prepaid in the ordinary course of business. I am aware that on
32 motion of the party served, service is presumed invalid if postal cancellation date or postage
33 meter date is more than one day after the date of deposit for mailing in affidavit.

34 I declare under penalty of perjury under the laws of the State of California that the above
35 is true and correct. Executed on _____, 2021 at San Francisco, California.

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Yehimi Olvera

EXHIBIT C

From: [Hutchinson, Daniel M.](#)
To: [Marcie Fitzsimmons](#)
Cc: [Kitzes, Daniel V.](#); [Mick Rubio](#); [Hernaез, Alexander](#); [Dermody, Kelly M.](#); [Shaikh, Nigar A.](#); [White, Frank J.](#)
Subject: Re: [EXTERNAL] RE: Nyong"o - Draft Protective Order
Date: Tuesday, December 14, 2021 7:22:06 PM

Regardless of how PAFMG feels, the fact is that Plaintiff and PAFMG have not been able to exchange any documents because of Sutter Health's and PAMF's month-long delay. Plaintiff and PAFMG have an agreement. We will move forward with that agreement.

Best regards,
Daniel

> On Dec 14, 2021, at 5:12 PM, Marcie Fitzsimmons <misom@grsm.com> wrote:

>

> We are fine giving you additional time and don't feel prejudiced by any delay.

>

> Sent from my iPhone

>

>> On Dec 14, 2021, at 5:10 PM, Kitzes, Daniel V. <dkitzes@foxrothschild.com> wrote:

>>

>> Daniel,

>>

>> After PAFMG circulated the initial draft of the protective order, your office took two weeks to provide comments, including the addition of significant new terms pertaining to HIPAA-protected information. It has been approximately two weeks following those comments, and we are working to confirm that the edits are acceptable for us and our client. Given the comparable timing, there is no prejudice to your client or PAFMG. In any event, we are working to get a response by the end of this week.

>>

>> Daniel Kitzes

>> Associate

>> Fox Rothschild LLP

>> Constellation Place

>> 10250 Constellation Boulevard, Suite 900

>> Los Angeles, CA 90067

>> (424) 249-1749 - direct

>> dkitzes@foxrothschild.com

>>

>> -----Original Message-----

>> From: Hutchinson, Daniel M. <dhutchinson@lchb.com>

>> Sent: December 14, 2021 5:02 PM

>> To: Kitzes, Daniel V. <dkitzes@foxrothschild.com>

>> Cc: Marcie Fitzsimmons <misom@grsm.com>; Mick Rubio <mrubio@grsm.com>; Hernaез, Alexander <AHernaез@foxrothschild.com>; Dermody, Kelly M. <kdermody@lchb.com>; Shaikh, Nigar A. <nshaikh@lchb.com>; White, Frank J. <fwhite@lchb.com>

>> Subject: [EXT] Re: [EXTERNAL] RE: Nyong'o - Draft Protective Order

>>

>> Daniel:

>>

>> As stated, we will move forward without Sutter Health and PAMF. Your delay has prejudiced both Plaintiff and PAFMG by delaying discovery. We cannot wait any longer for you.

>>

>> Best regards,

>> Daniel

>>

>> On Dec 13, 2021, at 9:18 PM, Hutchinson, Daniel M.
<dhutchinson@lchb.com<<mailto:dhutchinson@lchb.com>>> wrote:
>>
>> Daniel:
>>
>> That's simply not good enough. We cannot accept an open-ended timeline. Entry of a protective order has
already delayed unduly because of Sutter Health's and PAMF's failure to participate over the past month. Again, if
Sutter Health and PAMF do not participate, we will move forward without your input.
>>
>> Best regards,
>> Daniel
>>
>> On Dec 13, 2021, at 9:11 PM, Kitzes, Daniel V.
<dkitzes@foxrothschild.com<<mailto:dkitzes@foxrothschild.com>>> wrote:
>>
>>
>>
>> Daniel,
>>
>> As I mentioned on Friday, I am working on it, and I will get any proposed edits to you as soon I have them.
Thanks.
>>
>> Daniel Kitzes
>> Associate
>> Fox Rothschild LLP
>> Constellation Place
>> 10250 Constellation Boulevard, Suite 900 Los Angeles, CA 90067
>> (424) 249-1749 - direct
>> dkitzes@foxrothschild.com<<mailto:%20dkitzes@foxrothschild.com>>
>>
>> From: Hutchinson, Daniel M. <dhutchinson@lchb.com<<mailto:dhutchinson@lchb.com>>>
>> Sent: December 13, 2021 8:55 PM
>> To: Kitzes, Daniel V. <dkitzes@foxrothschild.com<<mailto:dkitzes@foxrothschild.com>>>; 'Marcie Fitzsimmons'
<misom@grsm.com<<mailto:misom@grsm.com>>>; 'Mick Rubio'
<mrubio@grsm.com<<mailto:mrubio@grsm.com>>>; Hernaez, Alexander
<AHernaez@foxrothschild.com<<mailto:AHernaez@foxrothschild.com>>>
>> Cc: Dermody, Kelly M. <kdermody@lchb.com<<mailto:kdermody@lchb.com>>>; Shaikh, Nigar A.
<nshaikh@lchb.com<<mailto:nshaikh@lchb.com>>>; White, Frank J.
<fwhite@lchb.com<<mailto:fwhite@lchb.com>>>
>> Subject: [EXT] RE: [EXTERNAL] RE: Nyong'o - Draft Protective Order
>>
>> Daniel:
>> Another day has passed without any substantive response regarding the protective order from Sutter Health and
PAMF. This delay is not acceptable. PAFMG proposed a draft protective order almost a month ago on November
16. If Sutter Health and PAMF do not respond, we will have no choice but to finalize the protective order without
their input.
>>
>> <image001.gif>
>>
>> Daniel M. Hutchinson
>> dhutchinson@lchb.com<<mailto:dhutchinson@lchb.com>>
>> t 415.956.1000
>> f 415.956.1008
>> Pronouns: he/him/his
>> Loeff Cabraser Heimann & Bernstein, LLP
>> 275 Battery Street, 29th Floor
>> San Francisco, CA 94111-3339

>> [https://urldefense.com/v3/_http://www.lieffcabraser.com_!!Nz4wtPUZ-ZE!MAFUyIkz0-wtfx4s76mZM-lbUsJUopryecmQECh5qx-L7-eoSh3hMguqHcs\\$](https://urldefense.com/v3/_http://www.lieffcabraser.com_!!Nz4wtPUZ-ZE!MAFUyIkz0-wtfx4s76mZM-lbUsJUopryecmQECh5qx-L7-eoSh3hMguqHcs$)
<[https://urldefense.com/v3/_https://www.lieffcabraser.com_!!Nz4wtPUZ-ZE!MAFUyIkz0-wtfx4s76mZM-lbUsJUopryecmQECh5qx-L7-eoSh3hNFyL5Ak\\$](https://urldefense.com/v3/_https://www.lieffcabraser.com_!!Nz4wtPUZ-ZE!MAFUyIkz0-wtfx4s76mZM-lbUsJUopryecmQECh5qx-L7-eoSh3hNFyL5Ak$)>

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>> From: Kitzes, Daniel V. <dkitzes@foxrothschild.com<<mailto:dkitzes@foxrothschild.com>>>
>> Sent: Friday, December 10, 2021 10:17 AM
>> To: Hutchinson, Daniel M. <dhutchinson@lchb.com<<mailto:dhutchinson@lchb.com>>>; 'Marcie Fitzsimmons' <misom@grsm.com<<mailto:misom@grsm.com>>>; 'Mick Rubio' <mrubio@grsm.com<<mailto:mrubio@grsm.com>>>; Hernaez, Alexander <AHernaez@foxrothschild.com<<mailto:AHernaez@foxrothschild.com>>>
>> Cc: Dermody, Kelly M. <kdermody@lchb.com<<mailto:kdermody@lchb.com>>>; Shaikh, Nigar A. <nshaikh@lchb.com<<mailto:nshaikh@lchb.com>>>; White, Frank J. <fwhite@lchb.com<<mailto:fwhite@lchb.com>>>
>> Subject: RE: [EXTERNAL] RE: Nyong'o - Draft Protective Order

>>
>>

>> Daniel,

>>

>> We have some minor proposed edits to the ESI protocol. Please see attached.

>>

>> Regarding the protective order, I am waiting on comments with respect to the HIPAA/PHI provisions. I will let you know as soon I have further edits, or approval if there are no further edits.

>>

>> Daniel Kitzes
>> Associate
>> Fox Rothschild LLP
>> Constellation Place
>> 10250 Constellation Boulevard, Suite 900 Los Angeles, CA 90067
>> (424) 249-1749 - direct
>> dkitzes@foxrothschild.com<<mailto:%20dkitzes@foxrothschild.com>>

>>

>> From: Hutchinson, Daniel M. <dhutchinson@lchb.com<<mailto:dhutchinson@lchb.com>>>
>> Sent: December 9, 2021 5:29 PM
>> To: Kitzes, Daniel V. <dkitzes@foxrothschild.com<<mailto:dkitzes@foxrothschild.com>>>; 'Marcie Fitzsimmons' <misom@grsm.com<<mailto:misom@grsm.com>>>; 'Mick Rubio' <mrubio@grsm.com<<mailto:mrubio@grsm.com>>>; Hernaez, Alexander <AHernaez@foxrothschild.com<<mailto:AHernaez@foxrothschild.com>>>
>> Cc: Dermody, Kelly M. <kdermody@lchb.com<<mailto:kdermody@lchb.com>>>; Shaikh, Nigar A. <nshaikh@lchb.com<<mailto:nshaikh@lchb.com>>>; White, Frank J. <fwhite@lchb.com<<mailto:fwhite@lchb.com>>>
>> Subject: [EXT] RE: [EXTERNAL] RE: Nyong'o - Draft Protective Order

>>

>> Good afternoon Daniel.

>>

>> We have not heard from Sutter Health or PAMF regarding the protective order or ESI production protocol. On Tuesday, you promised a response "shortly." Please respond as soon as possible and by no later than the close of business tomorrow.

>>

>> Best regards,

>> Daniel

>>

>> From: Hutchinson, Daniel M.
>> Sent: Wednesday, December 8, 2021 2:26 PM
>> To: 'Kitzes, Daniel V.' <dkitzes@foxrothschild.com<<mailto:dkitzes@foxrothschild.com>>>; 'Marcie Fitzsimmons' <misom@grsm.com<<mailto:misom@grsm.com>>>; 'Mick Rubio'

<mrubio@grsm.com<<mailto:mrubio@grsm.com>>>; Hernaez, Alexander
<AHernaez@foxrothschild.com<<mailto:AHernaez@foxrothschild.com>>>
>> Cc: Dermody, Kelly M. <kdermody@lchb.com<<mailto:kdermody@lchb.com>>>; Shaikh, Nigar A.
<nshaikh@lchb.com<<mailto:nshaikh@lchb.com>>>; White, Frank J.
<fwhite@lchb.com<<mailto:fwhite@lchb.com>>>
>> Subject: RE: [EXTERNAL] RE: Nyong'o - Draft Protective Order
>>
>> Good afternoon Daniel.
>>
>> Plaintiff has made a few minor changes to address PAFMG's comments, where noted (see attached). Please
confirm whether this version is acceptable to Sutter Health and PAMF, or provide any additional feedback.
>>
>> Best regards,
>>
>> <image001.gif>
>>
>> Daniel M. Hutchinson
>> dhutchinson@lchb.com<<mailto:dhutchinson@lchb.com>>
>> t 415.956.1000
>> f 415.956.1008
>> Pronouns: he/him/his
>> Loeff Cabraser Heimann & Bernstein, LLP
>> 275 Battery Street, 29th Floor
>> San Francisco, CA 94111-3339
>> [https://urldefense.com/v3/_http://www.lieffcabraser.com_!!Nz4wtPUZ-ZE!MAFUyIkz0-wtfx4s76mZM-lbUsJUopryecmQECh5qx-L7-eoSh3hMguqHcs\\$](https://urldefense.com/v3/_http://www.lieffcabraser.com_!!Nz4wtPUZ-ZE!MAFUyIkz0-wtfx4s76mZM-lbUsJUopryecmQECh5qx-L7-eoSh3hMguqHcs$)
<[https://urldefense.com/v3/_https://www.lieffcabraser.com_!!Nz4wtPUZ-ZE!MAFUyIkz0-wtfx4s76mZM-lbUsJUopryecmQECh5qx-L7-eoSh3hNFyL5Ak\\$](https://urldefense.com/v3/_https://www.lieffcabraser.com_!!Nz4wtPUZ-ZE!MAFUyIkz0-wtfx4s76mZM-lbUsJUopryecmQECh5qx-L7-eoSh3hNFyL5Ak$)>
>>
>>
>> From: Kitzes, Daniel V. <dkitzes@foxrothschild.com<<mailto:dkitzes@foxrothschild.com>>>
>> Sent: Tuesday, December 7, 2021 2:44 PM
>> To: Hutchinson, Daniel M. <dhutchinson@lchb.com<<mailto:dhutchinson@lchb.com>>>; 'Marcie Fitzsimmons'
<misom@grsm.com<<mailto:misom@grsm.com>>>; 'Mick Rubio'
<mrubio@grsm.com<<mailto:mrubio@grsm.com>>>; Hernaez, Alexander
<AHernaez@foxrothschild.com<<mailto:AHernaez@foxrothschild.com>>>
>> Cc: Dermody, Kelly M. <kdermody@lchb.com<<mailto:kdermody@lchb.com>>>; Shaikh, Nigar A.
<nshaikh@lchb.com<<mailto:nshaikh@lchb.com>>>; White, Frank J.
<fwhite@lchb.com<<mailto:fwhite@lchb.com>>>
>> Subject: RE: [EXTERNAL] RE: Nyong'o - Draft Protective Order
>>
>>
>> We are still reviewing the ESI protocol with our team, and I am hopeful we'll have an answer on that shortly.
We are also reviewing your proposed edits to the protective order and will provide any further edits shortly.
>>
>> Daniel Kitzes
>> Associate
>> Fox Rothschild LLP
>> Constellation Place
>> 10250 Constellation Boulevard, Suite 900 Los Angeles, CA 90067
>> (424) 249-1749 - direct
>> dkitzes@foxrothschild.com<<mailto:%20dkitzes@foxrothschild.com>>
>>
>> From: Hutchinson, Daniel M. <dhutchinson@lchb.com<<mailto:dhutchinson@lchb.com>>>
>> Sent: December 7, 2021 12:23 PM
>> To: 'Marcie Fitzsimmons' <misom@grsm.com<<mailto:misom@grsm.com>>>; 'Mick Rubio'
<mrubio@grsm.com<<mailto:mrubio@grsm.com>>>; Hernaez, Alexander

<AHernaez@foxrothschild.com<<mailto:AHernaez@foxrothschild.com>>>; Kitzes, Daniel V.
<dkitzes@foxrothschild.com<<mailto:dkitzes@foxrothschild.com>>>
>> Cc: Dermody, Kelly M. <kdermody@lchb.com<<mailto:kdermody@lchb.com>>>; Shaikh, Nigar A.
<nshaikh@lchb.com<<mailto:nshaikh@lchb.com>>>; White, Frank J.
<fwhite@lchb.com<<mailto:fwhite@lchb.com>>>
>> Subject: [EXT] FW: [EXTERNAL] RE: Nyong'o - Draft Protective Order
>>
>> Good afternoon counsel.
>>
>> We have not yet heard back from you regarding the protective order or production protocol. Please either confirm that you agree or update us on your position.
>>
>> Best regards,
>> Daniel
>>
>> <image001.gif>
>>
>> Daniel M. Hutchinson
>> dhutchinson@lchb.com<<mailto:dhutchinson@lchb.com>>
>> t 415.956.1000
>> f 415.956.1008
>> Pronouns: he/him/his
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>> San Francisco, CA 94111-3339
>> [https://urldefense.com/v3/_http://www.lieffcabraser.com_!!Nz4wtPUZ-ZE!MAFUyIkz0-wtfx4s76mZM-lbUsJUopryecmQECh5qx-L7-eoSh3hMguqHcs\\$](https://urldefense.com/v3/_http://www.lieffcabraser.com_!!Nz4wtPUZ-ZE!MAFUyIkz0-wtfx4s76mZM-lbUsJUopryecmQECh5qx-L7-eoSh3hMguqHcs$)
<[https://urldefense.com/v3/_https://www.lieffcabraser.com_!!Nz4wtPUZ-ZE!MAFUyIkz0-wtfx4s76mZM-lbUsJUopryecmQECh5qx-L7-eoSh3hNFyL5Ak\\$](https://urldefense.com/v3/_https://www.lieffcabraser.com_!!Nz4wtPUZ-ZE!MAFUyIkz0-wtfx4s76mZM-lbUsJUopryecmQECh5qx-L7-eoSh3hNFyL5Ak$)>
>>
>>
>> From: Hutchinson, Daniel M.
>> Sent: Wednesday, December 1, 2021 6:04 PM
>> To: 'Mick Rubio' <mrubio@grsm.com<<mailto:mrubio@grsm.com>>>; Dermody, Kelly M.
<kdermody@lchb.com<<mailto:kdermody@lchb.com>>>; Shaikh, Nigar A.
<nshaikh@lchb.com<<mailto:nshaikh@lchb.com>>>
>> Cc: Marcie Fitzsimmons <misom@grsm.com<<mailto:misom@grsm.com>>>; 'Kitzes, Daniel V.'
<dkitzes@foxrothschild.com<<mailto:dkitzes@foxrothschild.com>>>; 'Hernaez, Alexander'
<AHernaez@foxrothschild.com<<mailto:AHernaez@foxrothschild.com>>>
>> Subject: RE: [EXTERNAL] RE: Nyong'o - Draft Protective Order
>>
>> Good afternoon Mick.
>>
>> Plaintiff's proposed additions to Defendants' proposal are attached. Please let us know whether Defendants agree.
>>
>> I've also attached a proposed ESI production protocol, as we discussed during the parties' CMC meet and confer.
>>
>> We are available to discuss these matters further at your convenience.
>>
>> Best regards,
>>
>> <image001.gif>
>>
>> Daniel M. Hutchinson
>> dhutchinson@lchb.com<<mailto:dhutchinson@lchb.com>>
>> t 415.956.1000
>> f 415.956.1008

>> Pronouns: he/him/his
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>> San Francisco, CA 94111-3339
>> [https://urldefense.com/v3/_http://www.lieffcabraser.com_!!Nz4wtPUZ-ZE!MAFUyIkz0-wtfx4s76mZM-lbUsJUopryecmQECh5qx-L7-eoSh3hMguqHcs\\$](https://urldefense.com/v3/_http://www.lieffcabraser.com_!!Nz4wtPUZ-ZE!MAFUyIkz0-wtfx4s76mZM-lbUsJUopryecmQECh5qx-L7-eoSh3hMguqHcs$)
<[https://urldefense.com/v3/_https://www.lieffcabraser.com_!!Nz4wtPUZ-ZE!MAFUyIkz0-wtfx4s76mZM-lbUsJUopryecmQECh5qx-L7-eoSh3hNFyL5Ak\\$](https://urldefense.com/v3/_https://www.lieffcabraser.com_!!Nz4wtPUZ-ZE!MAFUyIkz0-wtfx4s76mZM-lbUsJUopryecmQECh5qx-L7-eoSh3hNFyL5Ak$)>
>>
>>
>> From: Mick Rubio <mrubio@grsm.com<<mailto:mrubio@grsm.com>>>
>> Sent: Tuesday, November 30, 2021 3:40 PM
>> To: Hutchinson, Daniel M. <dhutchinson@lchb.com<<mailto:dhutchinson@lchb.com>>>; Dermody, Kelly M. <kdermody@lchb.com<<mailto:kdermody@lchb.com>>>; Shaikh, Nigar A. <nshaikh@lchb.com<<mailto:nshaikh@lchb.com>>>
>> Cc: Marcie Fitzsimmons <misom@grsm.com<<mailto:misom@grsm.com>>>; 'Kitzes, Daniel V.' <dkitzes@foxrothschild.com<<mailto:dkitzes@foxrothschild.com>>>; 'Hernaesz, Alexander' <AHernaesz@foxrothschild.com<<mailto:AHernaesz@foxrothschild.com>>>
>> Subject: [EXTERNAL] RE: Nyong'o - Draft Protective Order
>>
>> Also - one additional follow up. Daniel Hutchinson, kindly advise if you have any redlines/comments on this. Thanks.
>>
>> -Mick
>>
>> From: Mick Rubio
>> Sent: Tuesday, November 16, 2021 10:51 AM
>> To: Hutchinson, Daniel M. <dhutchinson@lchb.com<<mailto:dhutchinson@lchb.com>>>; Dermody, Kelly M. <kdermody@lchb.com<<mailto:kdermody@lchb.com>>>; Shaikh, Nigar A. <nshaikh@lchb.com<<mailto:nshaikh@lchb.com>>>
>> Cc: Marcie Fitzsimmons <misom@grsm.com<<mailto:misom@grsm.com>>>; Kitzes, Daniel V. <dkitzes@foxrothschild.com<<mailto:dkitzes@foxrothschild.com>>>; Hernaesz, Alexander <AHernaesz@foxrothschild.com<<mailto:AHernaesz@foxrothschild.com>>>
>> Subject: Nyong'o - Draft Protective Order
>>
>> Counsel:
>>
>> Per our previous emails, please find our proposed draft protective order. Kindly redline any proposed edits.
>>
>> Thanks,
>> Mick
>>
>>
>>
>> _____
>> R. Mick Rubio | Senior Counsel
>>
>> GORDON REES SCULLY MANSUKHANI
>> YOUR 50 STATE PARTNER®
>>
>> 275 Battery Street, Suite 2000
>> San Francisco, CA 94111
>> P: 415-986-5900 | F: 415-986-8054 | mrubio@grsm.com<<mailto:mrubio@grsm.com>>
>>
>> <http://www.grsm.com><<https://www.grsm.com>>
>> vCard<<https://www.grsm.com/Utilities/vCard.ashx?NodeGuid=6fe9515a-323a-4563-af6a-685406bc7a62>>
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>>

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>>

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>>

>>

>>

EXHIBIT D

MARCIE ISOM FITZSIMMONS
MISOM@GRSM.COM

R. MICK RUBIO
MRUBIO@GRSM.COM

GORDON&REES
SCULLY MANSUKHANI
YOUR 50 STATE PARTNER™

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SAN FRANCISCO, CA 94111
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FAX: (415) 986-8054
WWW.GRSM.COM

December 29, 2021

VIA E-MAIL

Kelly M. Dermody
Daniel M. Hutchinson
Jallé H. Dafa
Nigar Shaikh
Lieff Cabraser Heimann & Bernstein, LLP
275 Battery Street, 29th Floor
San Francisco, CA 94111
kdermody@lchb.com
dhutchinson@lchb.com
jdafa@lchb.com
nshaikh@lchb.com

Re: Nyong'o v. Sutter Health, et al.
San Francisco Superior Court, Case No. CGC-21-592714
Meet and Confer Re: Plaintiff's Responses to Discovery

Counsel:

We write to meet and confer regarding Plaintiff's deficient responses to Palo Alto Foundation Medical Group's ("PAFMG's") first set of: Employment Form Interrogatories, Special Interrogatories, and Request for Production of Documents.

Please provide supplemental, **verified** responses consistent with this correspondence no later than January 14, 2022, such that we can avoid taking these issues up with the Court.

Verifications

As a threshold matter, none of Plaintiff's responses to the discovery are verified. An unverified response is the equivalent of a non-response. (*Appleton v. Superior Court* (1988) 206 Cal.App.3d 632, 636.)

Employment Form Interrogatories

Form Interrogatory No. 208.1

Plaintiff has failed to appropriately respond to each of the subparts indicated in this form interrogatory. Plaintiff is required to provide straightforward responses, and respond to each interrogatory, and its subparts accordingly. Given this, an amendment to this interrogatory is required.

Form Interrogatory No. 210.1-210.3

These interrogatories seek information about Plaintiff's amount of income, benefits, or earning capacity he has lost to date; as well as whether or not Plaintiff will lose future income, benefits, or earning capacity. Plaintiff evasively responds that the "total amount of income, benefits, or earning capacity Plaintiff has lost to date will be determined at trial." This is improper. Plaintiff has a duty to provide responses that are as complete and straightforward as the information reasonably available to the responding party permits. If it cannot be answered completely, it must be answered to the extent possible. (Code of Civil Procedure § 2030.220(a)).

Here, Plaintiff is required to, at the very least, provide an estimate or information about what his purported damages may be. Simply indicating that such damages will "be determined at trial" is wholly evasive and improper, and grounds for sanctions. (*See Scheiding v. Dinwiddie Const. Co.* (1999) 69 Cal.App.4th 64, 76; *see also* Code of Civil Procedure § 2030.010(f).)

Plaintiff also has a duty to obtain information regarding damages. (*See* Code of Civil Procedure § 2030.220(c); *Regency Health Services, Inc. v. Superior Court (Settles)* (1998) 64 Cal.App.4th 1496, 1504).

Given this, Plaintiff must provide a supplemental response to these interrogatories.

Form Interrogatory No. 212.3

Plaintiff's response to this interrogatory is incomplete. This interrogatory specifically asks Plaintiff to state: (a) a description of the injury; (b) whether the complaint is subsiding, remaining the same, or becoming worse; and (c) the frequency and duration. Here, Plaintiff identifies various injuries including emotional stress; loss of sleep; loss of appetite; premature greying of head hair; arthritis of left neck; muscular contraction of left neck and left shoulder. Plaintiff has not identified the duration of these various purported injuries, instead only indicating the frequency. Please identify when these physical injuries manifested, and the duration of these injuries.

Form Interrogatory No. 212.4

Plaintiff has not provided all pertinent information for the following providers:

- Abigail Zimmerman
- Gerg Ohanessian and "Marianne"

Consistent with Plaintiff's duties to appropriately obtain full information, please provide us with full and complete information of these providers, including Abigail Zimmerman's business address, and "Marianne's" full name.

Form Interrogatory No. 212.7, 213.1, 213.2

Plaintiff has provided no estimate as to any future/additional cost of treatment. Again, Plaintiff is required to provide this information and has a duty to make a reasonable and good faith effort to obtain this information “by inquiry to other natural persons or organizations....” (Code of Civil procedure § 2030.220(c).)

Plaintiff apparently has information from these providers that he will require future treatment, and can certainly make equal inquiry to those persons or organizations as to the estimated time for duration/treatment, as well as cost. Given this, Plaintiff should provide supplemental responses to this interrogatory.

The same is true with regard to Form Interrogatory No. 213.1. Plaintiff provides no information, responsive to the interrogatory subparts as to the nature of purported “punitive and liquidated damages.” In addition to the nature of these damages, Plaintiff must provide the dates they occurred; the amount; and the identity of the person(s) who have knowledge of the amount(s) of damage(s). Plaintiff has made no such good faith effort, and instead has evasively stated that the “amount of damages....will be determined at trial.” This is improper, and Plaintiff must provide a supplemental response.

Plaintiff’s response to Form Interrogatory 213.2 is also improper, as Plaintiff fails to identify any documents that support his claim for punitive and liquidated damages, and instead “notes that Defendant has possession, custody, or control over certain documents....” This response is evasive. If Plaintiff has documentation supporting the existence of damages, Plaintiff must identify it. Otherwise, if no such document exist, Plaintiff must so state. Given this, a supplement to this interrogatory is required.

Special Interrogatories

With regard to each special interrogatory (i.e., Special Interrogatory Nos. 1 through 31), Plaintiff has failed to properly “identify” the persons indicated throughout his responses. As indicated in each of the interrogatories, Plaintiff is required to state all last known contact information for those person(s). Please provide supplemental responses where appropriate.

Request for Production of Documents

As a threshold matter, Plaintiff has yet to produce any documents. Now that Plaintiff and PAFMG have signed the protective order, please produce all responsive documents by January 14.

Plaintiff’s responses are defective. Plaintiff’s responses to Request Nos. 1–4, 9-22, 26-27, 30-46, 49-59, 61-63, 66-69, 71-86, 89-123, 125-128, 130-134, 136-140, 144-153 indicate that “Plaintiff will produce any responsive, non-privileged documents in Plaintiff’s possession, custody, or control.” Under the Code of Civil Procedure, Plaintiff is required to state either, his agreement to comply, or some inability to comply. (Code of Civil Procedure § 2031.210(a)). Ostensibly, Request Nos. 1–4, 9-22, 26-27, 30-46, 49-59, 61-63, 66-69, 71-86, 89-123, 125-128, 130-134, 136-140, 144-153, is an “agreement to comply.” Given this, Plaintiff is required to state whether such a production will be allowed in whole or in part. (Code of Civil Procedure § 2031.220.) Plaintiff has not made any such indication, and therefore a supplement is required for these responses.

Furthermore, as to Plaintiff's responses to Request Nos. 5-8, 23-25, 28-29, 47-48, 60, 64-65, 70, 124, 129, 143, these responses appear to indicate an inability to comply. Plaintiff states "Plaintiff has no responsive, non-privileged documents in Plaintiff's possession, custody, or control." This response is also not code compliant. If Plaintiff is unable to comply, Plaintiff must indicate that a diligent search and reasonable inquiry has been made, and the reason for Plaintiff's inability to comply. (Code of Civil Procedure § 2031.230.)

Given the above, each of Plaintiff's responses must be supplemented accordingly.

Request Nos. 135 and 141

Plaintiff improperly limits the scope of the document requests. Request No. 135 seeks all documents regarding any medical providers Plaintiff has treated with since January 1, 2017 through the present. PAFMG is entitled to investigate the nature of any physical injuries alleged by Plaintiff as a result of Defendants' supposed conduct, and the extent to which Plaintiff is experiencing pre-existing injuries unrelated to Defendants.

As to Request No. 141, Plaintiff similarly limits the request regarding communications posted by or received by Plaintiff on social media websites related to his employment with Plaintiff, and provides a caveat that he will only produce documents "As they relate to allegations in his Complaint." That is improper. Plaintiff brings an action concerning his overall employment with Defendants, and therefore, any and all communications posted or received by Plaintiff related to his employment with Defendants on social media are discoverable. Plaintiff cannot pick and choose which documents he would like to produce.

For these reasons, Plaintiff must provide produce the documents requested in Nos. 135 and 141.

Conclusion

Please provide us with verifications, supplemental responses, and all responsive documents by January 14, 2022, such that we can avoid having to file a motion.

We remain happy to discuss this with you further.

GORDON REES SCULLY MANSUKHANI, LLP



Marcie Isom Fitzsimmons

R. Mick Rubio

EXHIBIT E

January 14, 2022

VIA EMAIL

misom@grsm.com

Marcie Isom Fitzsimmons
Gordon Rees Scully Mansukhani, LLP
275 Battery Street, Suite 2000
San Francisco, CA 94111

RE: *Nyong'o v. Sutter Health et al.*, Case No. CGC-21-5914

Dear Counsel:

I write in response to Defendant Palo Alto Foundation Medical Group's ("PAFMG") letter of December 29, 2021. In that letter, PAFMG claimed that Dr. Nyong'o's responses to PAFMG's discovery requests were "deficient." PAFMG requested a further response by January 14, 2022. Dr. Nyong'o responds as follows:

Background

PAFMG's letter fails to acknowledge the massive scope of its discovery requests. PAFMG served 153 document requests, 31 special interrogatories, and 17 form interrogatories.

Despite this massive amount of requests, Dr. Nyong'o responded in good faith. He provided substantive responses to each and every interrogatory. His special interrogatory responses total 23 pages. His form interrogatory responses total 16 pages. Each response provides a wealth of information.

Dr. Nyong'o's responses to PAFMG's 153 document requests were likewise fulsome and complete. He provided substantive written responses to each of the 153 requests. Where he had no responsive documents, he so stated. *See, e.g.*, Responses to RFP Nos. 5-8, 22-25, 28-29, 47-48, 60, 64-65, 70, 124, 129, 142-143. For the remaining requests, he affirmed that he will produce any responsive, non-privileged documents in his possession, custody, or control. *See, e.g.*, Responses to RFP Nos. 1-4, 9-21, 26-27, 30-46, 49-59, 61-63, 66-69, 71-86, 89-123, 125-128, 130-134, 136-140, 144-153. Indeed, for some requests where PAFMG requested documents that did not exist, Dr. Nyong'o nonetheless affirmed that he would produce related documents. *See Responses to RFP Nos. 87-88.*

In light of Dr. Nyong'o's cooperation and massive efforts to date to comply with PAFMG's discovery requests, there is simply no basis for PAFMG to claim that Dr. Nyong'o's responses are "deficient." Rather, as explained below, any inability of Dr. Nyong'o to provide further information or documents is, for the most part, a direct result of Defendants Sutter Health's and PAMF's ongoing refusal to agree to an appropriate protective order.

Dr. Nyong'o's Loss of Income and Damages

Most of PAFMG's letter deals with discovery requests regarding Dr. Nyong'o's loss of income, benefits, and earning capacity, and other compensatory, punitive, and/or liquidated damages caused by Defendants' conduct. See Responses to Form Interrogatory Nos. 210.1, 210.2, 210.3, 212.3, 212.7, 213.1, 213.2.

As an initial matter, PAFMG is not "in the dark" about this matter. PAFMG participated in the pre-litigation mediation on January 8, 2021. As part of that mediation, Dr. Nyong'o informed PAFMG of the damages he suffered as of that date. While the mediation privilege applies to that information—and Dr. Nyong'o preserves, and does not waive, all rights, privileges, and protections—the fact is that PAFMG and its counsel are already well-aware of the damages suffered by Dr. Nyong'o.

Moreover, PAFMG already has in its possession, custody, and control most, if not all, information relevant to Dr. Nyong'o's loss of income, benefits, earning capacity. Defendants obviously know the amount of lost compensation suffered by Dr. Nyong'o because Defendants are the ones who reduced his compensation. PAFMG's insistence that Dr. Nyong'o repeat this information to PAFMG, which PAFMG already knows, is not a good-faith discovery request. Rather, it is an abuse of the discovery process that merely requires Dr. Nyong'o and his counsel to perform more work simply for the sake of performing more work.

Even though PAFMG is well-aware of this information, Dr. Nyong'o nonetheless provided a wealth of damages-related information in his discovery responses and affirmed that he will provide a precise calculation of his final damages at trial. See, e.g., Responses to Form Interrogatory Nos. 210.2, 210.3, & 213.1. In the alternative, Dr. Nyong'o is willing to supplement his responses within thirty (30) days after the parties complete their document production, which Dr. Nyong'o discusses below.

Dr. Nyong'o's Document Production

During the parties' initial Rule 3.724 conference on November 2, 2021, Plaintiff's counsel alerted Defendants of the need to agree to an appropriate protective order so that all parties could produce documents as soon as practicable.

Although Plaintiff's counsel offered to circulate a draft for consideration, PAFMG ultimately proposed its own draft on November 16, 2021. Dr. Nyong'o provided his proposed additions on December 1, 2021.

In particular, Dr. Nyong'o added provisions guaranteeing that he could search for and produce documents without fear that Defendants would argue he violated HIPAA and/or accessed "company" documents without permission.

In subsequent calls with PAFMG's counsel Mick Rubio, including on December 8, 2021, I explained that Dr. Nyong'o could not produce documents until *all Defendants* agreed to those provisions. I explained that Dr. Nyong'o could not take the risk of producing documents unless or until Defendants confirmed with certainty that he would not face additional retaliation or reprisals simply for producing relevant documents. I repeated that message again to counsel for all parties, telephonically and in writing, on January 5, 2022.

Yet, despite that clear message and Plaintiff's counsel's repeated follow-up, Defendants Sutter Health and PAMF still have not agreed to those provisions. As you know, Dr. Nyong'o sought Court approval of the proposed protective order, but the Court declined to do so absent Sutter Health's and PAMF's agreement. As we have repeatedly informed you, Dr. Nyong'o has every intention of producing documents, but simply cannot do so until this issue is resolved. Indeed, Sutter Health's and PAMF's ongoing silence, without explanation, only heightens Dr. Nyong'o's concern that Defendants will use his document production in this case as a pretext to engage in further adverse action against him.

Dr. Nyong'o will revisit this issue once Sutter Health and PAMF agree to the protective order and/or the Court enters a protective order binding on Sutter Health and PAMF.

Other Items

Verification: Plaintiff's counsel inadvertently neglected to include Dr. Nyong'o's written verification of his interrogatory responses. Since PAFMG has requested amended responses, which Dr. Nyong'o has agreed to provide at a later date, we will include a verification with those amended responses, as you requested.

Subparts for Form Interrogatory No. 208.1: Dr. Nyong'o has responded in full to this interrogatory, including all subparts. PAFMG already has the Charge of Discrimination and amendments filed with the Department of Fair Employment and Housing, which Dr. Nyong'o referenced in his answer, and which also contain the responsive information. Forcing Dr. Nyong'o to re-write this information into subparts—when PAFMG already has it—is an abusive make-work request with which Dr. Nyong'o will not comply.

Contact Information: Dr. Nyong'o responded to PAFMG's interrogatories by identifying dozens of individuals, including many addresses and telephone numbers. See Responses to Special Interrogatory Nos. 1-31; Responses to Special Interrogatory No. 212.4. Not satisfied, PAFMG has requested the last known contact information for everyone. This further make-work request is improper and abusive. Indeed, the majority of remaining persons listed are Defendants' own employees, executives, and/or representatives. Dr. Nyong'o made clear his objection that any each interrogatory's request for all "contact information" seeks "information

that is within the possession, custody, or control of Defendant and/or its counsel, and/or that is publicly available.” PAFMG’s request for their contact information is therefore another unnecessary make-work request.

RFP Responses: PAFMG’s asserts certain that Dr. Nyong’o’s written statements are “defective”, “not code compliant”, and require a “supplement.” This is nonsense. Dr. Nyong’o repeatedly states that “Plaintiff will produce any responsive, non-privileged documents in Plaintiff’s possession, custody, or control.” This answer is clear and precise; Dr. Nyong’o will perform an appropriate search for responsive documents and produce them. Similarly, there is no ambiguity with Dr. Nyong’o’s response that “Plaintiff has no responsive, non-privileged documents in Plaintiff’s possession, custody, or control.” That response means exactly what it says. After an appropriate search, Dr. Nyong’o has not identified any responsive documents.

Irrelevant Documents: For Request Nos. 135 and 141, Dr. Nyong’o made clear that he will limit his search to relevant documents. He will not produce any documents regarding medical treatment *not* caused by Defendants’ conduct. Nor will he produce social media posts *not* related to the allegations in the Complaint. PAFMG’s continued pursuit of irrelevant documents regarding Dr. Nyong’o’s medical treatment and personal conduct on social media is inappropriate, abusive, and improper.

Very truly yours,



Daniel M. Hutchinson

EXHIBIT F

From: [Hutchinson, Daniel M.](#)
To: "[Marcie Fitzsimmons](#)"
Cc: [Dermody, Kelly M.](#); [Dafa, Jallé H.](#); [Shaikh, Nigar A.](#); [White, Frank J.](#); [Mick Rubio](#)
Subject: RE: [EXTERNAL] Nyong'o v. Sutter - Further Meet and Confer re_ Plaintiff's Reply to Our MC
Date: Wednesday, January 26, 2022 12:30:38 PM
Attachments: [Re EXTERNAL RE Nyong'o - Draft Protective Order.msg](#)
[image001.gif](#)

Marcie:

Sutter Health and PAMF unfortunately have not agreed to abide by the terms of the protective order pending its entry by the Court. As you know, Plaintiff's counsel have certainly asked them—many times. Those efforts frankly were hindered by your statement last month to Sutter Health and PAMF that “[w]e are fine giving you additional time and don’t feel prejudiced by any delay” (see attached). If all Defendants confirm, we are not opposed to doing a rolling production.

Best regards,



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Pronouns: he/him/his
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From: Marcie Fitzsimmons <misom@grsm.com>
Sent: Wednesday, January 26, 2022 10:07 AM
To: Hutchinson, Daniel M. <dhutchinson@lchb.com>
Cc: Dermody, Kelly M. <kdermody@lchb.com>; Dafa, Jallé H. <jdafa@lchb.com>; Shaikh, Nigar A. <nshaikh@lchb.com>; White, Frank J. <fwhite@lchb.com>; Mick Rubio <mrubio@grsm.com>
Subject: RE: [EXTERNAL] Nyong'o v. Sutter - Further Meet and Confer re_ Plaintiff's Reply to Our MC

Daniel,

I am concerned about the delay in plaintiff's production if plaintiff intends to wait until the court signs the protective order to begin to search for responsive documents. As you know, it can often take weeks (if not longer) for the court to sign those protective orders. Also, many of the documents requested have nothing to do with the terms of the protective order. Is it not sufficient that all of the parties agree to abide by the protective order? We cannot prepare for your client's deposition on February 11 until we receive plaintiff's production.

Marcie

From: Hutchinson, Daniel M. <dhutchinson@lchb.com>
Sent: Wednesday, January 26, 2022 10:02 AM
To: Marcie Fitzsimmons <misom@grsm.com>
Cc: Dermody, Kelly M. <kdermody@lchb.com>; Dafa, Jallé H. <jdafa@lchb.com>; Shaikh, Nigar A. <nshaikh@lchb.com>; White, Frank J. <fwhite@lchb.com>; Mick Rubio <mrubio@grsm.com>
Subject: RE: [EXTERNAL] Nyong'o v. Sutter - Further Meet and Confer re_ Plaintiff's Reply to Our MC

Good morning Marcie:

Plaintiff's counsel expect to provide Dr. Nyong'o's verification sometime this week.

As you know, it has been Plaintiff's counsel's position that Dr. Nyong'o could not begin the process of searching for and producing responsive documents until all defendants confirmed that he would not face retaliation for doing so. In light of Defendants' confirmation just this morning, Plaintiff's counsel can file a protective order today (again). Once the Court enters that order (or Sutter Health and PAMF agree to abide by the terms of that order pending its entry), we will consult with Dr. Nyong'o about a timeline for production. At this time, however, we cannot estimate the time required to produce responsive documents without knowing the anticipated volume or content of responsive documents. We note that the language Sutter Health and PAMF insisted upon regarding anonymization of information may also require some additional time to process and anonymize documents.

Plaintiff's counsel do not believe any additional time is necessary for any motion to compel by PAFMG. As set forth in his meet and confer correspondence, Dr. Nyong'o has been forthright in his discovery responses. There is therefore no need for PAFMG to file any motion to compel. However, we are willing to provide this additional

time to PAFMG's counsel as a professional courtesy so long as PAFMG provides a reciprocal amount of time to Dr. Nyong'o.

Best regards,



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From: Marcie Fitzsimmons <misom@grsm.com>
Sent: Wednesday, January 26, 2022 8:23 AM
To: Hutchinson, Daniel M. <dhutchinson@lchb.com>
Cc: Dermody, Kelly M. <kdermody@lchb.com>; Dafa, Jallé H. <jdafa@lchb.com>; Shaikh, Nigar A. <nshaikh@lchb.com>; White, Frank J. <fwhite@lchb.com>; Mick Rubio <mrubio@grsm.com>
Subject: RE: [EXTERNAL] Nyongo v. Sutter - Further Meet and Confer re_ Plaintiff's Reply to Our MC

Hi Daniel. I wanted to follow up on my email below. Can you please get back to us today with answers to the following:

- (1) When is plaintiff going to serve verifications to discovery?
- (2) How soon after the protective order is finalized and filed can we expect to receive plaintiff's production?
- (3) Are you amendable to providing us with a two week extension on filing a motion to compel?

Thank you,
Marcie

From: Marcie Fitzsimmons
Sent: Tuesday, January 25, 2022 9:47 AM
To: 'Hutchinson, Daniel M.' <dhutchinson@lchb.com>
Cc: Dermody, Kelly M. <kdermody@lchb.com>; Dafa, Jallé H. <jdafa@lchb.com>; Shaikh, Nigar A. <nshaikh@lchb.com>; White, Frank J. <fwhite@lchb.com>; Mick Rubio <mrubio@grsm.com>
Subject: RE: [EXTERNAL] Nyongo v. Sutter - Further Meet and Confer re_ Plaintiff's Reply to Our MC

Daniel,

Although we disagree that not having the protective order in place is a valid excuse for failing to produce any responsive documents, it appears that PAMF/Sutter and plaintiff are close to reaching an agreement on the language of the protective order. How soon after that is finalized and filed can we expect to receive plaintiff's production? As you know, we are scheduled to depose your client on February 11. We need plaintiff's production (and verification) with ample to time to prepare for his deposition. We would like to continue to meet and confer about plaintiff's responses, but it appears that will be most productive once plaintiff produces documents. Are you amendable to providing us with a two week extension on filing a motion to compel?

Thank you,
Marcie

MARCIE ISOM FITZSIMMONS | Partner

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From: Hutchinson, Daniel M. <dhutchinson@lchb.com>
Sent: Monday, January 24, 2022 5:29 PM
To: Jamie Olvera <volvera@grsm.com>; Marcie Fitzsimmons <misom@grsm.com>; Mick Rubio <mrubio@grsm.com>
Cc: Dermody, Kelly M. <kdermody@lchb.com>; Dafa, Jallé H. <jdafa@lchb.com>; Shaikh, Nigar A. <nshaikh@lchb.com>; White, Frank J. <fwhite@lchb.com>
Subject: RE: [EXTERNAL] Nyongo v. Sutter - Further Meet and Confer re_ Plaintiff's Reply to Our MC

Good afternoon counsel.

Please see the attached correspondence.

Best regards,



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From: Jamie Olvera <volvera@grsm.com>
Sent: Wednesday, January 19, 2022 3:45 PM
To: Dermody, Kelly M. <kdermody@lchb.com>; Hutchinson, Daniel M. <dhutchinson@lchb.com>; Dafa, Jallé H. <jdafa@lchb.com>; Shaikh, Nigar A. <nshaikh@lchb.com>; White, Frank J. <fwhite@lchb.com>
Cc: Marcie Fitzsimmons <misom@grsm.com>; Mick Rubio <mrubio@grsm.com>; 'Hernaез, Alexander' <AHernaез@foxrothschild.com>; 'Kitzes, Daniel V.' <dkitzes@foxrothschild.com>; mvanlandingham@foxrothschild.com
Subject: [EXTERNAL] Nyongo v. Sutter - Further Meet and Confer re_ Plaintiff's Reply to Our MC

Counsel,

Attached is a letter from Mr. Rubio for your review and files.

YEHIMI (JAMIE) OLVERA | Legal Secretary (she/her/hers)
GORDON REES SCULLY MANSUKHANI, LLP
275 Battery Street, Suite 2000
San Francisco, CA 94111
Direct: 415-875-3372 | Main: 415-986-5900 | Fax: 415-986-8054
Yolvera@grsm.com / Jolvera@grsm.com

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EXHIBIT G

February 2, 2022

VIA EMAIL

Marcie Isom Fitzsimmons
Gordon Rees Scully Mansukhani, LLP
275 Battery Street, Suite 2000
San Francisco, CA 94111
misom@grsm.com

Alexander Hernaez
Fox Rothschild LLP
345 California Street, Suite 2200
San Francisco, CA 94104-2670
AHernaez@foxrothschild.com

RE: *Nyong'o v. Sutter Health et al.*, Case No. CGC-21-5914

Dear Counsel:

We write to address a violation of the Stipulated Protective Order. As you know, starting at the November 3, 2021 rule 3.724 conference and continuing thereafter, Plaintiff's counsel have insisted that Plaintiff cannot begin document production until all Defendants confirmed he would not face retaliation for doing so. To that end, the parties agreed to include the following provision in the Protective Order:

[A]ll Parties shall be entitled to produce and/or disclose to all Parties in this litigation any and all Disclosure or Discovery Material, including any and all "CONFIDENTIAL" Information and/or HIPAA-Protected Information, regardless of the origin of that Disclosure or Discovery Material. For example, Plaintiff shall be entitled to produce Disclosure or Discovery Material in his possession, custody, and/or control which may originate from accounts otherwise maintained or owned by Defendants PAMF and/or PAFMG, which Plaintiff has allowable access to.

Protective Order ¶ 3.

On January 26, 2022, all parties agreed to abide by the Protective Order. On January 27, 2022, the Court signed and entered that order.

Plaintiff thereafter promptly began the process of collecting documents responsive to PAFMG's document requests.

This morning, however, Plaintiff received the attached email from Sutter Health, which cc's PAFMG CEO Kurt VandeVort, M.D. This communication comes directly from a Sutter Health representative in its "Office of the General Counsel." The email claims that Plaintiff has violated Sutter Health policy, demands that he destroy documents collected for this litigation, and asks him for a written explanation and attestation regarding his document review and collection for this litigation.

This communication was improper for many reasons. First, it contradicts the Protective Order, which expressly permits Plaintiff to produce "any and all Disclosure or Discovery Material, including any and all 'CONFIDENTIAL' Information and/or HIPAA-Protected Information, regardless of the origin of that Disclosure or Discovery Material." Plaintiff insisted on this language so that he would not face any adverse actions simply for producing relevant documents. Yet, only a few days after the Protective Order was entered, Sutter Health has claimed that he violated Sutter Health Policy, demanded that he answer a series of questions, and reported his required document collection efforts directly to PAFMG's CEO.

Second, this communication improperly seeks *ex parte* information from a Plaintiff represented by counsel. PAFMG's request for the reasons he collected and sent these documents necessarily seeks privileged information, including attorney-client privileged communications and attorney work-product. Because this communication comes directly from a Sutter Health representative in its Office of the General Counsel, Sutter Health should be well aware of these issues.

Third, this adverse action against Plaintiff is the latest in a series of discriminatory, retaliatory, and abusive conduct against him. A plaintiff in an employment discrimination should not face adverse actions for engaging in protected activity. Sutter Health's accusations that Plaintiff violated company policy, its demands that he submit to a series of questions, and its reporting of his document collection efforts directly to PAFMG's CEO—all for engaging in a protective activity—is not well taken.


We insist that Defendants withdraw this email demand, and instruct its representatives not to make any further demands on Plaintiff. Please confirm in writing once you have done so.

We further object to Defendants' monitoring and review of Plaintiff's email communications, and also note that we will be forced to seek Court intervention if Defendants fail to retain or delete records in this case, including Plaintiff's email communications.

We remain available to meet and confer on any aspect of this issue.

February 2, 2022
Page 3

Very truly yours,


Daniel M. Hutchinson

2364517.1

GZJ KDV'J ''

From: [Hernaез, Alexander](#)
To: [Hutchinson, Daniel M.](#); "[Marcie Fitzsimmons](#)"; [Mick Rubio](#); [VanLandingham, Mitchell R.](#)
Cc: [Dermody, Kelly M.](#); [Dafa, Jallé H.](#); [Shaikh, Nigar A.](#); [White, Frank J.](#)
Subject: [EXTERNAL] RE: Nyong"o v. Sutter Health, et al.
Date: Thursday, February 3, 2022 11:22:18 AM
Attachments: [image001.gif](#)

I will look into this from my end. I should be able to respond by this evening or tomorrow morning. For what it's worth, it looks like an automated email. I also assume that whatever was being accessed he had "allowable access to"?

Alex

From: Hutchinson, Daniel M. <dhutchinson@lchb.com>
Sent: February 2, 2022 12:26 PM
To: 'Marcie Fitzsimmons' <misom@grsm.com>; Mick Rubio <mrubio@grsm.com>; Hernaез, Alexander <AHernaез@foxrothschild.com>; VanLandingham, Mitchell R. <MVanLandingham@foxrothschild.com>
Cc: Dermody, Kelly M. <kdermody@lchb.com>; Dafa, Jallé H. <jdafa@lchb.com>; Shaikh, Nigar A. <nshaikh@lchb.com>; White, Frank J. <fwhite@lchb.com>
Subject: [EXT] Nyong'o v. Sutter Health, et al.

Good afternoon counsel.

Please see the attached correspondence, which requests a prompt response.

Best regards,



Daniel M. Hutchinson
dhutchinson@lchb.com
t 415.956.1000
f 415.956.1008
Pronouns: he/him/his
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EXHIBIT I

From: [Marcie Fitzsimmons](#)
To: [Hutchinson, Daniel M.](#)
Cc: [Mick Rubio](#); [Keenley, Elizabeth](#); "[ahernaез@foxrothschild.com](#)"; "[dkitzes@foxrothschild.com](#)"; [Dermody, Kelly M.](#); [Dafa, Jallé H.](#); [Shaikh, Nigar A.](#); [White, Frank J.](#)
Subject: RE: [EXTERNAL] Nyong'o v. Sutter Health, et al.
Date: Thursday, February 24, 2022 3:04:25 PM
Attachments: [image001.gif](#)

Daniel,

As we discussed during our last phone call, the protective order is not a discovery order that gives your client free reign to violate Sutter, PAMF, or PAFMG's policies or the law. Neither Mick nor any other defense counsel on this case has stated otherwise. Alex agreed to provide you with the applicable policies in that respect and my understanding is that he will do so shortly. If you recall, this concern came about because your client received an auto-generated email indicating that he may have accessed information that he was not permitted to access via Sutter's systems. We don't know that he actually did so, but he did something to trigger the automatic notice system and we just want to make sure he (and you) are familiar with the policies in place related to accessing information, primarily concerning patient information that is HIPAA protected. He cannot, for example, access his own medical records or that of others (including his patients) for purposes of this lawsuit, but I understand from our prior conversation that you represented he has not done that. There is no reason why documents that your client has outside of the Sutter system that are responsive to our discovery requests should not be produced immediately. Your client's failure to produce even those documents at this point is causing unnecessary delays in the litigation, particularly given that we have your client's deposition on calendar and you have noticed the depositions of 17 witnesses.

As for your client's deposition, we served a timely deposition notice for your client's deposition on a date(s) that you represented both you and your client are available. We plan to proceed with the deposition on March 11 and will wait to see what the court does with respect to ordering the second day of his deposition. If we don't have your client's documents in time for his deposition on March 11, we will reserve our right to keep the deposition open such that we can question him on those outstanding documents.

Marcie

From: Hutchinson, Daniel M. <dhutchinson@lchb.com>
Sent: Tuesday, February 22, 2022 2:04 PM
To: Marcie Fitzsimmons <misom@grsm.com>
Cc: Mick Rubio <mrubio@grsm.com>; Keenley, Elizabeth <keenley@lchb.com>; 'ahernaез@foxrothschild.com' <ahernaез@foxrothschild.com>; 'dkitzes@foxrothschild.com' <dkitzes@foxrothschild.com>; Dermody, Kelly M. <kdermody@lchb.com>; Dafa, Jallé H. <jdafa@lchb.com>; Shaikh, Nigar A. <nshaikh@lchb.com>; White, Frank J. <fwhite@lchb.com>
Subject: RE: [EXTERNAL] Nyong'o v. Sutter Health, et al.

Good afternoon Marcie.

The parties met and conferred on this matter extensively on Tuesday, February 15. As you know, starting at the CRC 3.724 meet and confer, Plaintiff has consistently taken the position that he cannot search for and produce documents in response to Defendants' document requests unless or until Defendants confirm that he will not face any adverse actions from Defendants for doing so. I personally discussed this topic at length on several occasions with your colleague Mick Rubio. In those conversations, Mick and I expressly discussed that Plaintiff could search and produce emails and other documents accessible on his work computer and/or company devices. Those conversations concluded with agreed-upon language in the Protective Order stating:

[A]ll Parties shall be entitled to produce and/or disclose to all Parties in this litigation any and all Disclosure or Discovery Material, including any and all "CONFIDENTIAL" Information and/or HIPAA-Protected Information, regardless of the origin of that Disclosure or Discovery Material. For example, Plaintiff shall be entitled to produce Disclosure or Discovery Material in his possession, custody, and/or control which may originate from accounts otherwise maintained or owned by Defendants PAMF and/or PAFMG, which Plaintiff has allowable access to.

Protective Order ¶ 3. On January 26, 2022, all parties agreed to abide by the Protective Order. On January 27, 2022, the Court signed and entered that order. Plaintiff thereafter promptly began the process of collecting documents responsive to PAFMG's document requests. To be clear, Plaintiff accessed only relevant documents that he is permitted to access.

Yet, Defendants almost-immediately took adverse action against Plaintiff for doing what the Protective Order expressly permitted him to do. On February 2, 2022, a Sutter Health representative from its "Office of the General Counsel" emailed Plaintiff directly and cc'd PAFMG CEO Kurt VandeVort, M.D. Defendants' email claimed that Plaintiff has violated Sutter Health policy, demanded that he destroy documents collected for this litigation, and asked him for a written explanation and attestation regarding his document review and collection for this litigation. Plaintiff and his counsel immediately halted his document production and insisted that Defendants withdraw this email demand so that discovery could commence. Yet Defendants never withdrew their demand. Instead, during our call on February 15, all Defendants maintained that some unspecified rules and/or law precluded Plaintiff from accessing and/or producing documents.

As I explained, this change in Defendants' position is not well taken. It comes 3-1/2 months after Plaintiff first took steps to avoid precisely this type of unfounded claim that Plaintiff did anything improper. It follows a long line of abusive and retaliatory conduct toward Plaintiff. And frankly, it makes no sense. To the extent that Defendants believe any of these documents contain confidential information, the Protective Order specifically addresses that possibility and permits parties to designate as confidential any documents that merit such protection. Defendants could not explain why discovery could not simply proceed under the terms to the agreed-upon Protective Order.

I therefore insisted that Defendants put in writing any rules or laws they believed precluded Plaintiff from accessing and producing relevant documents, and that Defendants specify precisely which documents they maintain are at issue. I explained that, without such specificity, Plaintiff's counsel cannot process any documents for production. Sutter Health's and PAMF's counsel promised to provide Defendants' position in writing, but has not yet done so.

In your email yesterday, you suggest that there may be "a number of documents unrelated to that issue." That may be so, but Plaintiff's counsel cannot locate any such documents until Defendants clarify what they believe "that issue" is. Your position also ignores that all documents from Plaintiff remain together in a single location on Plaintiff's counsel's document review platform. Accessing the documents to determine which documents fall into which categories would require Plaintiff's counsel to access all of the documents, which Defendants have wrongly claimed would be improper.

In sum, no matter how baseless we believe Defendants' allegations are, they are serious allegations. We will not put our client or ourselves at risk by accessing any documents unless or until Defendants' withdraw their email and resolve this issue.

As you know, the parties also discussed at length Plaintiff's deposition and did not agree to proceed with any deposition on March 11. Plaintiff's counsel offered to inquire about Plaintiff's availability for a two-day deposition on consecutive days. Defendants declined that offer and instead filed its motion to compel. Plaintiff's counsel remain available to meet and confer on an appropriate schedule for Plaintiff's deposition.



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From: Marcie Fitzsimmons <misom@grsm.com>
Sent: Monday, February 21, 2022 10:47 AM
To: Hutchinson, Daniel M. <dhutchinson@lchb.com>
Cc: Mick Rubio <mrubio@grsm.com>; Keenley, Elizabeth <keenley@lchb.com>; 'ahernaез@foxrothschild.com' <ahernaез@foxrothschild.com>; 'dkitzes@foxrothschild.com' <dkitzes@foxrothschild.com>; Dermody, Kelly M. <kdermody@lchb.com>; Dafa, Jallé H. <jdafa@lchb.com>; Shaikh, Nigar A. <nshaikh@lchb.com>; White, Frank J. <fwhite@lchb.com>
Subject: RE: [EXTERNAL] Nyong'o v. Sutter Health, et al.

Daniel,

We have yet to receive plaintiff's document production or verification for our requests for production of documents. While I understand that plaintiff is taking the position that he is not going to produce documents until he is clear on what he can/can't access related to his current Sutter emails, there are a number of documents unrelated to that issue that could and should be produced, including text messages, emails to/from his personal email address, notes, social media posts, documents from his personal computer, documents related to his damages, etc. We need plaintiff's document production in order to prepare for his deposition and in advance of any other depositions in this case. Please provide us with at the very least the documents unrelated to his work email by the close of business on Friday, along with his signed verification and a date certain on which you will produce the remainder of the documents. We need his production by no later than March 4 in order to have ample time to prepare for his March 11 deposition.

Thank you,
Marcie

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Thank you.

GZJ KDK'L'

From: [Hutchinson, Daniel M.](#)
To: ["Marcie Fitzsimmons"](#)
Cc: [Mick Rubio](#); [Keenley, Elizabeth](#); ["ahernaез@foxrothschild.com"](#); ["dkitzes@foxrothschild.com"](#); [Dermodу, Kelly M.](#); [Dafa, Jallé H.](#); [Shaikh, Nigar A.](#); [White, Frank J.](#)
Subject: RE: [EXTERNAL] Nyong'o v. Sutter Health, et al.
Date: Friday, February 25, 2022 5:37:39 PM

Good afternoon Marcie.

I write to address PAFMG's email of yesterday.

First, PAFMG's references to Plaintiff doing anything to "violate Sutter, PAMF, or PAFMG's policies or the law" is not well-taken. Again, the parties negotiated a Protective Order for the express purpose of allowing Plaintiff to access and produce relevant documents that "originate from accounts otherwise maintained or owned by Defendants." I was very clear with Defendants that the purpose of this provision was to avoid any unfounded accusations and retaliation against Plaintiff for accessing relevant documents. In response to my direct questions, Defendants did not raise any "policies" or "law" that would prevent Plaintiff from accessing relevant documents. In fact, it was Plaintiff's counsel who added Section 4 to the Protective Order regarding the production of documents containing "HIPAA Protected Information."

Defendants' recent position directly contradicts their prior position and agreements. PAFMG now states that Plaintiff "cannot, for example, access his own medical records." But PAFMG's discovery requests expressly sought Plaintiff's medical records. Plaintiff's responses clearly indicated that he would collect relevant medical records from his healthcare providers, including Defendants. PAFMG did not object. To the contrary, PAFMG demanded that Plaintiff also access *irrelevant* medical records. PAFMG then subpoenaed medical records without even providing a copy of the Protective Order to the subpoena recipients. This is just one example from PAFMG's 153 document requests.

Second, PAFMG's assertion that Plaintiff is "causing unnecessary delays in the litigation" is false and not well-taken. Plaintiff promptly began collecting responsive documents within *days* after the Court entered the Protective Order. PAFMG again asserts that some documents should be produced "immediately" without any explanation about how that can be done when (a) Defendants have not articulated any law or policy that defines which documents they believe Plaintiff cannot access, and (b) even if they had, the presence of all documents from Plaintiff together in a single location on Plaintiff's counsel's document review platform means that Plaintiff's counsel would have to access *all the documents* to determine which documents fall into which categories, which Defendants have wrongly claimed would be improper.

In short, Defendants have tied the hands of Plaintiff and his counsel, and now complain about the inevitable consequences of tying our hands.

Finally, there is no deposition on calendar for March 11. During our meet and confer on February 15, 2022, the parties discussed at length Plaintiff's deposition and did not agree to proceed with a one-day deposition on March 11. A one-day deposition that remained "open" would be abusive and inefficient. And, PAFMG has consistently stated that it will not proceed with a deposition of any length until Plaintiff produces all his documents, which obviously has not yet occurred for the reasons we discussed.

Plaintiff's counsel offered to inquire about Plaintiff's availability for a two-day deposition on consecutive days. Defendants agreed that proceeding on consecutive days was reasonable. Defendants' motion to compel further reflects their agreement and states "Defendants' counsel agreed that it would schedule Plaintiff's deposition for two-consecutive days if that were logistically feasible to coordinate." As I mentioned again in my last email, Plaintiff's counsel remain available to meet and confer on an appropriate schedule for Plaintiff's deposition. If Defendants are unable or unwilling to meet and confer about alternate dates for Plaintiff's deposition at this time, I suggest that we take up the issue again after the Court hearing on March 14.

**Lieff
Cabraser
Heimann &
Bernstein**
Attorneys at Law

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f 415.956.1008
Pronouns: he/him/his
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275 Battery Street, 29th Floor
San Francisco, CA 94111-3339
www.lieffcabraser.com

From: Marcie Fitzsimmons <misom@grsm.com>
Sent: Thursday, February 24, 2022 1:04 PM
To: Hutchinson, Daniel M. <dhutchinson@lchb.com>
Cc: Mick Rubio <mrubio@grsm.com>; Keenley, Elizabeth <keenley@lchb.com>; 'ahernaез@foxrothschild.com' <ahernaез@foxrothschild.com>; 'dkitzes@foxrothschild.com' <dkitzes@foxrothschild.com>; Dermody, Kelly M. <kdermody@lchb.com>; Dafa, Jallé H. <jdafa@lchb.com>; Shaikh, Nigar A. <nshaikh@lchb.com>; White, Frank J. <fwhite@lchb.com>
Subject: RE: [EXTERNAL] Nyong'o v. Sutter Health, et al.

Daniel,

As we discussed during our last phone call, the protective order is not a discovery order that gives your client free reign to violate Sutter, PAMF, or PAFMG's policies or the law. Neither Mick nor any other defense counsel on this case has stated otherwise. Alex agreed to provide you with the applicable policies in that respect and my understanding is that he will do so shortly. If you recall, this concern came about because your client received an auto-generated email indicating that he may have accessed information that he was not permitted to access via Sutter's systems. We don't know that he actually did so, but he did something to trigger the automatic notice system and we just want to make sure he (and you) are familiar with the policies in place related to accessing information, primarily concerning patient information that is HIPAA protected. He cannot, for example, access his own medical records or that of others (including his patients) for purposes of this lawsuit, but I understand from our prior conversation that you represented he has not done that. There is no reason why documents that your client has outside of the Sutter system that are responsive to our discovery requests should not be produced immediately. Your client's failure to produce even those documents at this point is causing unnecessary delays in the litigation, particularly given that we have your client's deposition on calendar and you have noticed the depositions of 17 witnesses.

As for your client's deposition, we served a timely deposition notice for your client's deposition on a date(s) that you represented both you and your client are available. We plan to proceed with the deposition on March 11 and will wait to see what the court does with respect

to ordering the second day of his deposition. If we don't have your client's documents in time for his deposition on March 11, we will reserve our right to keep the deposition open such that we can question him on those outstanding documents.

Marcie

From: Hutchinson, Daniel M. <dhutchinson@lchb.com>
Sent: Tuesday, February 22, 2022 2:04 PM
To: Marcie Fitzsimmons <misom@grsm.com>
Cc: Mick Rubio <mrubio@grsm.com>; Keenley, Elizabeth <keenley@lchb.com>; 'ahernaesz@foxrothschild.com' <ahernaesz@foxrothschild.com>; 'dkitzes@foxrothschild.com' <dkitzes@foxrothschild.com>; Dermody, Kelly M. <kdermody@lchb.com>; Dafa, Jallé H. <jdafa@lchb.com>; Shaikh, Nigar A. <nshaikh@lchb.com>; White, Frank J. <fwhite@lchb.com>
Subject: RE: [EXTERNAL] Nyong'o v. Sutter Health, et al.

Good afternoon Marcie.

The parties met and conferred on this matter extensively on Tuesday, February 15. As you know, starting at the CRC 3.724 meet and confer, Plaintiff has consistently taken the position that he cannot search for and produce documents in response to Defendants' document requests unless or until Defendants confirm that he will not face any adverse actions from Defendants for doing so. I personally discussed this topic at length on several occasions with your colleague Mick Rubio. In those conversations, Mick and I expressly discussed that Plaintiff could search and produce emails and other documents accessible on his work computer and/or company devices. Those conversations concluded with agreed-upon language in the Protective Order stating:

[A]ll Parties shall be entitled to produce and/or disclose to all Parties in this litigation any and all Disclosure or Discovery Material, including any and all "CONFIDENTIAL" Information and/or HIPAA-Protected Information, regardless of the origin of that Disclosure or Discovery Material. For example, Plaintiff shall be entitled to produce Disclosure or Discovery Material in his possession, custody, and/or control which may originate from accounts otherwise maintained or owned by Defendants PAMF and/or PAFMG, which Plaintiff has allowable access to.

Protective Order ¶ 3. On January 26, 2022, all parties agreed to abide by the Protective Order. On January 27, 2022, the Court signed and entered that order. Plaintiff thereafter promptly began the process of collecting documents responsive to PAFMG's document requests. To be clear, Plaintiff accessed only relevant documents that he is permitted to access.

Yet, Defendants almost-immediately took adverse action against Plaintiff for doing what the

Protective Order expressly permitted him to do. On February 2, 2022, a Sutter Health representative from its "Office of the General Counsel" emailed Plaintiff directly and cc'd PAFMG CEO Kurt VandeVort, M.D. Defendants' email claimed that Plaintiff has violated Sutter Health policy, demanded that he destroy documents collected for this litigation, and asked him for a written explanation and attestation regarding his document review and collection for this litigation. Plaintiff and his counsel immediately halted his document production and insisted that Defendants withdraw this email demand so that discovery could commence. Yet Defendants never withdrew their demand. Instead, during our call on February 15, all Defendants maintained that some unspecified rules and/or law precluded Plaintiff from accessing and/or producing documents.

As I explained, this change in Defendants' position is not well taken. It comes 3-1/2 months after Plaintiff first took steps to avoid precisely this type of unfounded claim that Plaintiff did anything improper. It follows a long line of abusive and retaliatory conduct toward Plaintiff. And frankly, it makes no sense. To the extent that Defendants believe any of these documents contain confidential information, the Protective Order specifically addresses that possibility and permits parties to designate as confidential any documents that merit such protection. Defendants could not explain why discovery could not simply proceed under the terms to the agreed-upon Protective Order.

I therefore insisted that Defendants put in writing any rules or laws they believed precluded Plaintiff from accessing and producing relevant documents, and that Defendants specify precisely which documents they maintain are at issue. I explained that, without such specificity, Plaintiff's counsel cannot process any documents for production. Sutter Health's and PAMF's counsel promised to provide Defendants' position in writing, but has not yet done so.

In your email yesterday, you suggest that there may be "a number of documents unrelated to that issue." That may be so, but Plaintiff's counsel cannot locate any such documents until Defendants clarify what they believe "that issue" is. Your position also ignores that all documents from Plaintiff remain together in a single location on Plaintiff's counsel's document review platform. Accessing the documents to determine which documents fall into which categories would require Plaintiff's counsel to access all of the documents, which Defendants have wrongly claimed would be improper.

In sum, no matter how baseless we believe Defendants' allegations are, they are serious allegations. We will not put our client or ourselves at risk by accessing any documents unless or until Defendants' withdraw their email and resolve this issue.

As you know, the parties also discussed at length Plaintiff's deposition and did not agree to proceed with any deposition on March 11. Plaintiff's counsel offered to inquire about Plaintiff's availability for a two-day deposition on consecutive days. Defendants declined that offer and instead filed its motion to compel. Plaintiff's counsel remain available to meet and confer on an appropriate schedule for Plaintiff's deposition.

From: Marcie Fitzsimmons <misom@grsm.com>
Sent: Monday, February 21, 2022 10:47 AM
To: Hutchinson, Daniel M. <dhutchinson@lchb.com>
Cc: Mick Rubio <mrubio@grsm.com>; Keenley, Elizabeth <keenley@lchb.com>; 'ahernaез@foxrothschild.com' <ahernaез@foxrothschild.com>; 'dkitzes@foxrothschild.com' <dkitzes@foxrothschild.com>; Dermody, Kelly M. <kdermody@lchb.com>; Dafa, Jallé H. <jdafa@lchb.com>; Shaikh, Nigar A. <nshaikh@lchb.com>; White, Frank J. <fwhite@lchb.com>
Subject: RE: [EXTERNAL] Nyong'o v. Sutter Health, et al.

Daniel,

We have yet to receive plaintiff's document production or verification for our requests for production of documents. While I understand that plaintiff is taking the position that he is not going to produce documents until he is clear on what he can/can't access related to his current Sutter emails, there are a number of documents unrelated to that issue that could and should be produced, including text messages, emails to/from his personal email address, notes, social media posts, documents from his personal computer, documents related to his damages, etc. We need plaintiff's document production in order to prepare for his deposition and in advance of any other depositions in this case. Please provide us with at the very least the documents unrelated to his work email by the close of business on Friday, along with his signed verification and a date certain on which you will produce the remainder of the documents. We need his production by no later than March 4 in order to have ample time to prepare for his March 11 deposition.

Thank you,
Marcie

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GZJ KDK'K

From: [Hernaiz, Alexander](#)
To: [Hutchinson, Daniel M.](#); "Marcie Fitzsimmons"
Cc: [Mick Rubio](#); [Keenley, Elizabeth](#); [Dermody, Kelly M.](#); [Dafa, Jallé H.](#); [Shaikh, Nigar A.](#); [White, Frank J.](#)
Subject: RE: [EXTERNAL] Nyong'o v. Sutter Health, et al.
Date: Tuesday, March 1, 2022 6:01:42 PM
Attachments: [image001.gif](#)
[Confidentiality Agreement \(ePR\) - 97900922 - OMONDI NYONG"O-C-C.pdf](#)
[Safeguarding Protected Health Information Policy-C-C-C.pdf](#)
[Use of Internet- Email- Instant Messaging- and Texting Policy-C-C-C.pdf](#)
[Workforce Confidentiality and Privacy Policy-C-C-C.pdf](#)

Counsel:

Attached are the 3 primary policies governing the use and allowable access of Confidential Data and/or PHI by a physician employed by PAFMG. Also attached is an agreement signed by Plaintiff regarding Confidentiality. All physicians employed by PAFMG must follow the same set of policies re allowable access. Your client does not have any special allowable access to data because he is a litigant. In other words, Plaintiff's direct access to data maintained by Sutter Health is only in his capacity as a physician employed by PAFMG. Nor does Plaintiff own any of the data maintained by Sutter Health. If your client believes that such data is discoverable, then he must propound appropriate discovery. Your client—as a litigant—may not exercise self-help to access data outside of the identified policies. All attempts by any PAFMG physician to access data outside of stated requirements must be investigated pursuant to policy. Therefore, regarding the email your client received, Sutter Health asks that your client—as a physician employed by PAMFG-- respond to the questions contained therein regarding his data access. Alternatively, your client may be contacted by a Sutter Health representative so that it may understand the data access.

If Plaintiff wants his own medical records, there is an established procedure for those to be requested. (Of course, none of the Defendants have access to Plaintiff's medical records absent consent or subpoena even if a Defendant is custodian of those records.)

Regarding depositions, the dispute is simple—you have refused to produce your client for deposition unless Defendants agree to a time limit *in advance*.

We believe this position is without authority and inappropriate. We remain willing to schedule Plaintiff's deposition for 2 consecutive days and to meet and confer if additional time is needed (something we believe will not be necessary but cannot guarantee in advance). We will take the March 11 date off calendar only because you have stated a refusal to produce your client on that date. At this point, we will await a ruling from the court related to your client's deposition, as we are unwilling to incur further delays over this issue. We also expect prompt production of plaintiff's documents.

Alex

From: Hutchinson, Daniel M. <dhutchinson@lchb.com>

Sent: February 22, 2022 2:04 PM

To: 'Marcie Fitzsimmons' <misom@grsm.com>

Cc: Mick Rubio <mrubio@grsm.com>; Keenley, Elizabeth <keenley@lchb.com>; Hernaez, Alexander <AHernaez@foxrothschild.com>; Kitzes, Daniel V. <dkitzes@foxrothschild.com>; Dermody, Kelly M. <kdermody@lchb.com>; Dafa, Jallé H. <jdafa@lchb.com>; Shaikh, Nigar A. <nshaikh@lchb.com>; White, Frank J. <fwhite@lchb.com>

Subject: [EXT] RE: [EXTERNAL] Nyong'o v. Sutter Health, et al.

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t 415.956.1000
f 415.956.1008
Pronouns: he/him/his
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275 Battery Street, 29th Floor
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From: Marcie Fitzsimmons <misom@grsm.com>
Sent: Monday, February 21, 2022 10:47 AM
To: Hutchinson, Daniel M. <dhutchinson@lchb.com>
Cc: Mick Rubio <mrubio@grsm.com>; Keenley, Elizabeth <keenley@lchb.com>; 'ahernaез@foxrothschild.com' <ahernaез@foxrothschild.com>; 'dkitzes@foxrothschild.com' <dkitzes@foxrothschild.com>; Dermody, Kelly M. <kdermody@lchb.com>; Dafa, Jallé H. <jdafa@lchb.com>; Shaikh, Nigar A. <nshaikh@lchb.com>; White, Frank J. <fwhite@lchb.com>
Subject: RE: [EXTERNAL] Nyong'о v. Sutter Health, et al.

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Thank you,
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GZJ KDKV'L''



Origination:	5/1/1998
Effective:	2/2/2022
Final Approved:	2/2/2022
Last Revised:	2/2/2022
Next Review:	2/2/2023
Owner:	Jacki Monson: SH VP, Chief Privacy & Informa
Policy Area:	Privacy & Information Security
References:	CIA Reporting, Confidentiality, Privacy
Applicability:	Sutter Health System

Workforce Confidentiality and Privacy Policy

PURPOSE

The purpose of this policy is to establish requirements for an annual acknowledgement by Workforce members on their responsibilities for complying with Sutter privacy and information security policies and to establish a requirement for sanctions of Workforce members that fail to comply with these policies.

POLICY

It is policy to require Workforce members to acknowledge their responsibilities for complying with Sutter privacy and information security policies on an annual basis.

SCOPE

This policy applies to Sutter Health and any legal entity for which Sutter Health or its affiliate is the sole member or directly or indirectly controls greater than 50% of the voting power (herein referred to as Sutter) and all Workforce members of Sutter.

DEFINITIONS

Access is the ability or means necessary to store data in, to retrieve data from, to read, write, modify or communicate with, or to otherwise use any information services (IS) resource.

Confidential Data is defined in the [Data Classification Policy](#).

Disclosure is the release, transfer, giving access to, or divulging of PHI outside of the entity that maintains the information.

Personally Identifiable Information (PII) is any information about a patient/member maintained by an organization that can be used to distinguish or trace a patient's/member's identity, such as name, social security number, date and place of birth, mother's maiden name, or biometric records.

Protected Health Information (PHI) is individually identifiable health information, including demographic information collected from a patient/member, if in a context that indicates provisions of, or payment for, health care services, in any form, created or received by a health care provider, health plan, employer, or health care clearinghouse; and relates to the past, present, and future physical or mental health or condition of a patient/member in their status as a patient/member; the provision of health care to a patient/member; or the past,

present, or future payment for the provision of health care to a patient/member; and that identifies the patient/member; or with respect to which there is a reasonable basis to believe the information can be used to identify the patient/member, with a few limited exceptions.

Sanction is a disciplinary penalty or measure taken by Sutter against a Workforce member.

Use is sharing, viewing, manipulating, utilizing, employing, applying, examining or analyzing PHI within a covered entity.

Workforce, pursuant to the Health Insurance Portability and Accountability Act (HIPAA), means the employees, practitioners, volunteers, trainees and other persons whose conduct, in the performance of work for the covered entity is under the direct control of such entity, whether or not paid by the covered entity.

PROCEDURE

A. Workforce Confidentiality and Privacy Acknowledgment

1. All Workforce members shall be required to read and sign an acknowledgment (see **Attachment A: Workforce Confidentiality Acknowledgement**) confirming they have read and understand this policy at the time they begin performing work or services for Sutter, at any time they transition to a different Sutter facility, and on an annual basis.
2. These acknowledgments shall be maintained by Sutter for a minimum of six (6) years.

B. Confidentiality Policy

1. Ownership of Information and Property
 - a. All Confidential Data that Workforce members may have Access to by virtue of their work for or employment by Sutter belongs to and is the property of Sutter. Sutter retains the right to retake, recover, or reclaim any Sutter property including property containing PHI.
 - b. All information obtained by Workforce members from or on behalf of Sutter remains the property of Sutter unless otherwise specified in writing by Sutter.
 - c. All equipment issued by Sutter is the property of Sutter.
2. Safeguarding Confidential Data, see [Safeguarding Protected Health Information Policy](#).
 - a. Workforce members, including mobile and remote Workforce members, must maintain the same confidentiality standards for their home workstations that they maintain within a Sutter facility and are obligated to protect and safeguard Confidential Data, regardless of format (e.g., paper, voice, electronic), by following Sutter Privacy and Information Security policies, including this policy. Workforce members:
 - i. Must make reasonable efforts to avoid being overheard and reasonably limit Confidential Data discussed or displayed in the proximity of any individual who does not have the right or need to know;
 - ii. Must take precautions that reasonably limit computer screens from being inappropriately visible to others;
 - iii. Must secure paper documents so that an unauthorized person cannot view or Access them by locking them in a secure location when leaving the information unattended;
 - iv. Must log off before leaving computers unattended;
 - v. Must shred or otherwise destroy Confidential Data that is no longer needed;

- vi. Must have authorization to print from non-Sutter work locations (e.g., home) and only to the extent necessary for a valid business purpose. Authorization for printing from non-Sutter work locations may only be granted upon submission of a service desk ticket and will not be reviewed without approval from the Workforce member's supervisor.
 3. Access, Use, and Disclosure. See [Use and Disclosure of Protected Health Information for Treatment, Payment, and Health Care Operations Policy](#).
 - a. Workforce members may not Access, Use or Disclose any Confidential Data unless authorized to do so by Sutter and required to do so as part of their official duties. Such Use or Disclosure must be restricted to what is required for essential business purpose(s).
 - b. Workforce members may only Access, Use, or Disclose Sutter files, systems, programs or Confidential Data (whether electronic or otherwise) necessary to perform their job functions. Unauthorized review, Access, duplication, dissemination, removal, damage or alteration of such files, systems, programs or Confidential Data is prohibited.
 - c. Confidential Data may only be sent to third parties (e.g., persons, vendors, organizations, etc.) authorized by Sutter to receive or view the information. Before sending Confidential Data to a third party, Workforce members must confirm with a privacy or information security officer the third party is authorized to receive it.
 4. Incident Reporting
 - a. All Workforce members shall contact their supervisor/manager/director or a privacy or information security officer if they believe that information confidentiality or security may be compromised, in any way, either through the possible Disclosure of sign-on information or the direct unauthorized Access, Use or Disclosure of Confidential Data, either intentional or accidental. Workforce members can also report concerns via the Confidential Message Line (1-800-500-1□50) or by filling out an [online form](#). For additional information refer to the [Handling Privacy and Information Security Complaints and Incidents Policy](#).
 5. Return of Property
 - a. Upon termination of work for, or employment with, Sutter, or upon earlier request of Sutter, Workforce members must return to Sutter all Confidential Data and property belonging to Sutter, including, but not limited to, all documents, electronic storage devices, cell phones, flash, thumb or USB drives, desktop computers, laptops, discs, CDs or other property.
- C. Compliance with Privacy and Information Security and Equipment Use Policies
1. Sutter has additional privacy policies that apply to PHI and information security policies that apply to all Confidential Data (e.g., workstation security, remote Access, Internet and email usage, passwords, malicious software, instant messaging) and Workforce members are obligated to follow those policies as well as this policy.
- D. No Expectation or Right of Privacy
1. Sutter reserves the right, at all times, and without prior notice, to inspect and search any and all Sutter property for the purpose of determining whether this policy or any other Sutter policy has been violated. This includes making the determination that such inspection and investigation is necessary for purposes of promoting safety in the workplace or compliance with state, federal and/or local laws or regulations. These inspections may be conducted during or after business hours and in the presence or absence of the Workforce member.
 2. Workforce members have no expectation or right of privacy in any material, document, email, data,

text-message, instant message or other information stored, Accessed, viewed, transmitted or sent either by:

- a. Using any Sutter property, such as Sutter owned computers, phones, smartphones, laptops or other tools; or
 - b. Via any Sutter provided network, voice-mail account, email account or system. Sutter owns all such information. Workforce members' use of Sutter property, including all Sutter email accounts, is not private.
3. Sutter retains the right to search, inspect, investigate, monitor, and review any information stored, Accessed, viewed, transmitted or sent using any Sutter property at any time, without regard to whether the information is password protected. This includes Workforce members' personal information (including web postings, blogs, social media sites or personal email accounts) to the extent such information is stored, Accessed, viewed, transmitted or sent using any Sutter property.
 4. For purposes of inspecting, investigating, or searching Workforce members' computerized files or transmissions, voicemail, or email accounts and systems, Sutter may override any applicable passwords or codes.

E. Sanctions for Failing to Safeguard Confidential Data

1. Sutter has developed privacy and information security policies related to Confidential Data, including PHI, a [Code of Conduct](#), training materials and department specific procedures to verify Workforce members are aware of their obligations to maintain the security and confidentiality of Confidential Data.
2. Any Workforce member who violates privacy or security policies may be subject to Sanctions by Sutter. Sanctions of Workforce members shall be consistent with Sutter policies for discipline and may include termination.
3. Sanctions of physician members of the Sutter organized health care arrangement shall be consistent with medical staff bylaws, professional service agreements and Sutter policies.
4. Sanctions of physicians who are not a member of a Sutter medical staff or associated with a medical foundation may consist of written communications, documented education/training, increased auditing and monitoring of system Access and/or immediate termination of Access to Confidential Data, including PHI. If Access is terminated, reinstatement at a later date shall be determined on a case-by-case basis.
5. Sutter shall document Sanctions involving privacy and information security violations and maintain such documentation for a minimum of six (6) years. For privacy and information security Sanctions of all Workforce members at Sutter, Sutter's chief technology risk, privacy and information security officer is responsible for confirming the maintenance and storage of such documentation in a manner reasonably calculated to provide orderly and reliable preservation. Additionally, for Sanctions of any Workforce member of Sutter, the HR department is responsible for maintaining and storing a copy of such documentation pursuant to its standard policies for retention of personnel files. Additionally, if the Sanction is issued against a physician, a copy of such documentation may be placed in a physician credentialing/physician relationship file, if appropriate.
6. Under no circumstances shall a Sanction be applied against a person in any of the following situations, provided the person has not made a Disclosure of Confidential Data, including PHI, that would otherwise be prohibited under HIPAA:
 - a. When a person reports a suspicion of a privacy or security incident to Sutter;

- b. When a person has filed a privacy complaint with Sutter or with the Department of Health and Human Service (DHHS);
- c. When a person testifies, assists, or participates in an DHHS investigation or compliance review; and
- d. When a person reasonably opposes a Sutter practice on the good faith belief that the practice conflicts with law or regulation.
- e. For additional information, consult the [Reporting Compliance Concerns and Non-Retaliation Policy](#).

F. Failure to Comply

- 1. Any unlawful, unauthorized, or attempted Access, Use or Disclosure of Confidential Data in violation of law may be reportable to the effected individuals and/or government agencies. Workforce members may be held personally liable by state, federal and/or local regulatory agencies.
- 2. Except as provided herein, any violation of this policy may be subject to immediate Sanctions by Sutter.
- 3. In addition to Sutter issuing Sanctions to a Workforce member for any violation of this policy, Sutter may also pursue any available legal remedies.

G. Limitations

- 1. Nothing in this policy or the associated acknowledgment limits the ability to file a charge or complaint with the Equal Employment Opportunity Commission, the National Labor Relations Board, the Occupational Safety and Health Administration, the Department of Fair Employment and Housing or any other federal, state, or local government agency or commission (government agencies), provided there is no unlawful Use or Disclosure of Confidential Data, including PHI, in filing such a charge or complaint. Nothing in this policy limits the ability to communicate with any government agencies or otherwise participate in any investigation or proceeding that may be conducted by any government agency, including providing documents or other information, without notice to Sutter, provided there is no unlawful Use or Disclosure of Confidential Data, including PHI, in any such communications or participation. This policy does not limit the right to receive an award for information provided to any government agencies.
- 2. This policy is not intended to, and does not, interfere with any protected rights under applicable laws, including the right to engage in concerted activity or other rights protected by Section 7 of the National Labor Relations Act, provided that there is no unlawful Use or Disclosure of Confidential Data, including PHI, in the course of such activity.

REFERENCES

[Code of Conduct](#)

Confidentiality of Medical Information Act: Cal. Civil Code § 56 et seq.

[Data Classification Policy](#)

[Handling Privacy and Information Security Complaints and Incidents Policy](#)

HIPAA 45 CFR Parts 160, 162 and 164 et seq.

National Labor Relations Act, Section 7

[Passwords and Authentication Policy](#)

[Remote Access Policy](#)

[Remote and Mobile Worker Policy](#)

[Reporting Compliance Concerns and Non-Retaliation Policy](#)

[Safeguarding Protected Health Information Policy](#)

[Social Media Policy](#)

[Use and Disclosure of Protected Health Information for Treatment, Payment, and Health Care Operations Policy](#)

[Use of Internet, Email, Instant Messaging, and Texting Policy](#)

[Workstation and End Point Device Security Policy](#)

ATTACHMENT

Attachment A: Workforce Confidentiality Acknowledgement

All revision dates:

2/2/2022, 3/30/2021, 6/7/2018, 2/23/2018, 7/18/2017, 5/2/2016, 7/20/2015, 4/27/2015, 3/18/2013, 6/1/2010

Attachments

[Attachment A: Workforce Confidentiality Acknowledgement](#)

Approval Signatures

Step Description	Approver	Date
Policy Owner Verify Policy Communicated	Jacki Monson: SH VP, Chief Privacy & Informa	2/2/2022
System Policy & Procedure Committee	Joyce Sklark: Compliance Officer, Eastern Di	2/2/2022
SPPC Pre-review	Joyce Sklark: Compliance Officer, Eastern Di	1/14/2022
Privacy & Information Security Committee	Patricia Dickerson: Dir Awareness, Training & Prog	11/1□/2021
Policy Owner	Jacki Monson: SH VP, Chief Privacy & Informa	11/1□/2021

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Palo Alto Medical Foundation

Palo Alto Medical Clinic

Confidentiality Agreement

I understand that I may have access to information that is confidential and may not be disclosed except as permitted or required by law and by PAMF and PAMC policies and procedures. This information includes, but is not limited to, protected health information, personnel information and business operations information. I understand that I am committed to protect and safeguard from disclosure all confidential information regardless of the type of media on which it is stored (e.g. paper, micro-fiche, voice tape, computer systems). I agree that I will not disclose any confidential information from any record or information system to any unauthorized person.

I understand that:

- I am obligated to hold confidential information in the strictest confidence and not to disclose the information to any person or in any manner that is inconsistent with applicable law or the policies and procedures of PAMC/PAMF.
- I acknowledge that I may not use or disclose any confidential records of a friend, relative, staff member, volunteer or any other person, unless I am authorized to do so and am required to do so as part of my official duties. Such use and disclosure must be restricted to that required for essential business purpose(s).
- I will not discuss or allow confidential information of any type to be displayed or overheard in the proximity of any individual who does not have the right or need to know. This includes conversations in public places or private spaces where they may be easily overheard, allowing computer screens to be inappropriately visible, and leaving printed material where it may be openly viewed.
- In order to access certain information, a unique User ID, Security Code, Password or Access Device may be established that identifies me to PAMF Information Systems. My authentication codes and devices are for my use only when accessing facilities, systems and information appropriate to my work (although my supervisor or other authorized personnel may have access to such codes). To use anyone else's authentication code or device in order to access any PAMF system is considered a violation of PAMF confidentiality and security standards.
- All information obtained from PAMF systems remains the property of PAMF regardless of physical location or method of storage, unless otherwise specified by PAMF in writing.

If I believe that information confidentiality or security may be compromised in any way, either through the possible disclosure of sign-on information or the direct unauthorized access of information, either intentional or accidental, I shall contact immediately the PAMC Administrative Director or the PAMF Privacy officer.

- User accounts or access to electronic information may be disabled without prior notice by the Chief Data Security Officer, Chief Information Officer or their designee when, in their opinion, they hold a reasonable belief that a user's account may be compromised or is being used for inappropriate access to information.
- I understand that my privileges are subject to periodic review, revision, and if appropriate, renewal. I understand that all access to PAMF systems is subject to monitoring and review as deemed appropriate by PAMF.
- If at any time I feel that the confidentiality of my password(s), sign-on(s) or identification device(s) has been compromised, I will notify the PAMF Help Desk immediately so that my old code(s)/device(s) can be cancelled and new ones issued.
- My confidentiality obligation continues indefinitely.
- This Agreement does not supercede any other rules or expectations regarding the use or disclosure of confidential information that may be contained in other PAMC/PAMF documents. Such documents include, but are not limited to, job descriptions, policies, employee handbooks and department procedures.

I understand that any access, attempted access, or disclosure of information in violation of law or PAMC/PAMF policies will be considered a breach of confidentiality. I understand that if I breach such confidentiality, I may be subject to immediate disciplinary action, up to and including termination.

My signature below acknowledges that I agree to abide by the terms of this agreement.

Printed Name: OMRONI NYONGO Date: 7/9/08

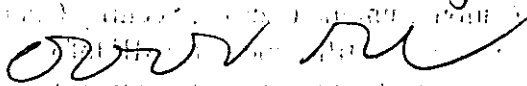
Signature: 

EXHIBIT N



Origination:	5/1/2003
Effective:	10/3/2016
Final Approved:	10/3/2016
Last Revised:	10/3/2016
Next Review:	10/3/2017
Owner:	<i>Jacki Monson: SH VP, Chief Privacy & Informa</i>
Policy Area:	<i>Privacy & Information Security</i>
References:	<i>CIA Reporting, Information Security, Privacy</i>
Applicability:	<i>Sutter Health System</i>

Use of Internet, Email, Instant Messaging, and Texting Policy

PURPOSE

To protect Sutter Health (SH) Information Services (IS) Resources from improper alteration or destruction of Data and to establish appropriate use and access to the Internet, email, instant messaging and text messaging; to ensure the IS Resources serve as useful resources and communication tools that support SH's daily operations; to protect the Confidentiality, Integrity, and Availability of the IS Resources and Confidential Data; and to comply with HIPAA and industry best practices, as appropriate.

POLICY

A Workforce member must use IS Resources in a manner that protects the Confidentiality, Integrity, and Availability of IS Resources and Confidential Data, minimizes business interruptions, and ensures the lawful use of such systems.

SCOPE

This policy applies to Sutter Health, its Affiliated Entities and Operating Corporations (as those terms are defined in the Sutter Health Bylaws), all Workforce members of Sutter Health, and its Affiliated Entities and Operating Corporations, and all other entities or organizations, and all Workforce members of such entities or organizations, in which Sutter Health and/or an Affiliated Entity or Operating Corporation has a direct or indirect voting control or equity interest of greater than 50% (herein collectively referred to as "Sutter Health" or "SH").

DEFINITIONS

Access: Means the ability or means necessary to store Data in, to retrieve Data from, to read, write, modify or communicate with, or to make use of any resource of a system or to obtain the use of an IS Resource

Availability: Data or information is accessible and usable upon demand by an authorized person. Availability is usually expressed in terms of how often a system is unavailable or how much downtime can be tolerated before business operations are negatively impacted.

Confidential Data: Data that is intended strictly for use within, by or on behalf of Sutter Health, as required by law or as required or permitted by SH policies, including any Data created, received, maintained, or

transmitted by or on behalf of Sutter Health that identifies a patient or health plan member, consistent with the definition of Protected Health Information. Unauthorized use or disclosure of Confidential Data could seriously adversely impact the organization, our patients and members, employees, and business partners. For examples of Confidential Data refer to Sutter Health Data Retention, Storage and Destruction Policy.

Confidentiality: Means Data or information is not made available or disclosed to unauthorized persons or processes.

Data: Any information that is created, inputted, stored, processed, received, transmitted, or reported or used by or on behalf of Sutter Health, in any storage medium, including but not limited to hard copy information, electronic information, databases, emails, text messages, films, web files, mobile device data, images, illustrations, audio clips, video, sound, and graphics.

Electronic Protected Health Information (EPHI): Means any individually identifiable health information, including demographic information if in a context that indicates provision of, or payment for, health care services, in an electronic format that is collected from an individual and that:

- A. Is created or received by a health care provider, health plan, employer, or health care clearinghouse;
- B. Relates to the past, present, or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present or future payment for the provision of health care to an individual;
- C. That identifies the individual, or with respect to which there is a reasonable basis to believe the information can be used to identify the individual; and
- D. Does not include education records covered by Federal law or employment records held by a Covered Entity in its role as an employer.

Email: Electronic mail. Communications composed and transmitted on a computer system or network.

End Point Devices: The principal point of contact when accessing electronic information within Sutter Health. The reference to End Point Devices includes fully functional desktop PCs, diskless terminals, laptops, and other portable computing devices such as notebooks, Mobile Devices, point of sale terminals (POS), etc.

Information Services (IS) Resources: A set of processes, computing systems, communication services, electronic storage, application and system software, End Point Devices, Mobile Devices and other technology related components (architecture) that enable and sustain the business operation of SH clinical, administrative, and financial functions, and that are owned or managed by SH.

Instant Messaging: A system for exchanging typed electronic messages instantly via the Internet or a cellular network, using a shared software application on a personal computer (such as a laptop or desktop). Instant Messaging is a form of transitory Data and is used exclusively for the informal communication of information. Transitory Data does not set policy, establish guidelines or procedures, or certify a transaction, or become a record of receipt.

Integrity: The condition of the Data or information has not been altered or destroyed in an unauthorized manner.

Internet: An interconnected system of networks that connects computers around the world via the TCP/IP protocol, allowing the exchange of information.

Mobile Device: Any handheld or portable advanced computing device, including running an operating system optimized or designed for mobile computing, such as a tablet, smart phone or watch, etc. This term includes

both Sutter Health Mobile Devices and personal Mobile Devices. Any device running a full desktop version operating system is not included in this definition.

Protected Health Information (PHI): Means any individually identifiable health information, including demographic information if in a context that indicates provision of, or payment for, health care services, that is collected from an individual and that:

- A. Is created or received by a health care provider, health plan, employer, or health care clearinghouse;
- B. Relates to the past, present, or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present or future payment for the provision of health care to an individual;
- C. Identifies the individual, or with respect to which there is a reasonable basis to believe the information can be used to identify the individual; and
- D. Does not include education records covered by Federal law or employment records held by a Covered Entity in its role as an employer.

Secure Text Messaging: Refers to Sutter Health's approved technology (also known as Sutter Secure Messaging) used for secure mobile texting (e.g., SMS or MMS messages) via Mobile Device or web-based console.

Workforce: Employees, practitioners, volunteers, trainees, and other persons whose conduct, in the performance of work for SH is under the direct control of SH, whether or not paid by the SH.

Working Time: That time when a Workforce member is at work and should be working. "Working time" does not include break time, unpaid meal periods, or time before and after work.

PROCEDURE

General Provisions

- A. Workforce members shall not use IS Resources to access the Internet, Email, Instant Messaging, Secure Text Messaging and/or unsecured text messaging systems in a manner that disrupts SH business operations or the business operations of any other organization, violates or circumvents SH policies, including but not limited to SH privacy and information security policies and procedures, violates local, state, or federal law or introduces malicious software into IS Resources.
- B. Workforce members shall not use Instant Messaging for communicating messages that contain PHI or would constitute official business records of Sutter Health.
- C. Confidential Data shall not be sent over the Internet or other public networks in an unencrypted state.
- D. Access to Email, Instant Messaging, Secure Text Messaging and/or unsecured text messaging systems through IS Resources is provided to support SH business purposes. Incidental personal use of Email, Instant Messaging, Secure Text Messaging, or Mobile Devices during Working Time is permissible but must be kept to a minimum, must not interfere with work, and must not violate any other SH policy.
- E. Workforce members shall not use IS Resources to send communications, comments or images that would violate SH's policies concerning Anti-Discrimination, Harassment and Retaliation, Social Media, or Conflict of Interest.
- F. Workforce members may not use SH IS Resources for the following activities:
 - 1. Conduct or manage a non-SH business enterprise;

2. Send communications to other Workforce members, patients, or others associated with SH that engage in political campaign activity on behalf of or in opposition to any candidate for elected public office; or
 3. Send communications to other Workforce members, patients, or others associated with SH that engage in charitable fundraising activities or advertise the sale of any products or services, unless it is for a pre-approved purpose. Pre-approval must be obtained from Human Resources. Generally the pre-approved purpose will be in support of our mission and various health-related charitable not-for-profit programs. Fundraising events for which pre-approval may be granted can be in support of internal events or external community events (e.g., fundraising for March of Dimes). Any fundraising communications to patients or plan members or promotion of a third party product or service to patients or plan members or where PHI is used in any way, must be consistent with Use and Disclosure of Protected Health Information for Fundraising (Policy Stat ID: 2367769).
- G. SH may, at its discretion, prevent Workforce members from connecting SH IS Resources with certain websites or services that may provide offensive or disruptive content. Workforce members who discover they have connected with a website that contains sexually explicit, racist, or other potentially offensive material must immediately disconnect from that site. The ability to connect with a specific website does not in itself imply that Workforce members are permitted to visit that site.
- H. Workforce members must not use SH Email accounts to auto-forward email to an external destination. Workforce members are prohibited from altering or obscuring message headers or assuming another individual's identity without the individual's express permission.
- I. In addition to any other activities prohibited by SH information security policies, Workforce members are prohibited from: intentionally interfering with the proper functioning of any IS Resource or connection, including attempting to overload a system so that it cannot respond to legitimate traffic or to slow responses to legitimate traffic (e.g., Denial of Service); monitoring or crawling that disrupts or impairs an IS Resource or connection; operating unapproved network services, such as proxy servers; or using any means, automated or manual, to circumvent restrictions, such as access or storage restrictions.
- J. Workforce members with SH Email must not forward or send email with Confidential Data to personal or other non-SH email accounts unless specifically approved by the Privacy and Information Security Compliance Steering Committee. A Data Loss Prevention (DLP) exception request form may be obtained on the MySutter DLP portal site.
- K. Personal or other non-SH email accounts may not be used to transmit Confidential Data unless specifically approved by the SH Privacy and Information Security Compliance Steering Committee. A DLP exception request form may be obtained on the MySutter DLP portal site or by contacting your Information Security Officer.
- L. For information concerning posting messages or creating websites that refer to Sutter Health, please refer to the Social Media Policy.
- M. EPHI may be sent by Secure Text Messaging in accordance with the following guidelines:
1. All Workforce members must use the Sutter Health approved secured text messaging solution.
 2. No texting of orders for patients is allowed per Joint Commission and CMS direction.
 3. Any text messaging of EPHI must be permitted under SH's privacy policies, and must be limited to the minimum amount necessary for the purpose, as applicable.
- N. Workforce members have no right to privacy in any use of SH IS Resources, even when they are used for personal reasons. SH retains the right to view any information stored within its IS Resources even after

termination of employment. This includes Email, Instant Messages and Secure Text Messages, Internet activity and search history, and any information stored in both public and private folders on SH IS Resources, including network computers and the disk drives of workstations and SH owned or managed End Point Devices.

- O. SH retains the right to review any information originating from its IS Resources that may have been inappropriately transferred to a network or standalone computer system not directly owned by SH.
- P. SH may report any activity that SH suspects violates any law, regulation, or this policy to appropriate law enforcement officials, regulators, or other appropriate third parties, and cooperate with any investigation and prosecution of illegal or fraudulent conduct. This may include disclosing communications, documents, Internet activity or search history, network logs, or other information that SH deems appropriate.
- Q. In the event of a data request, legal hold or investigation related to Secure Text Messages or Confidential Data transmitted by, or stored, created, or received on, Mobile Devices, including personal devices and Sutter owned devices or other End Point Devices, that device may be subject to collection and analysis of stored Data.
- R. Prior to management reviewing or monitoring an individual's use of IS Resources, a Human Resources and/or Privacy representative should be contacted to ensure compliance with proper procedures. Legal advice must be obtained before reviewing or monitoring an individual's use of personal devices.

REFERENCE

- Minimum Necessary Protected Health Information Policy
- Anti-Discrimination, Harassment and Retaliation Policy
- Social Media Policy
- Conflict of Interest Policy

HIPAA:

- 164.312(a)(2)(iv) Encryption and Decryption
- §164.308(a)(1)(ii)(D) - Information system activity review

ATTACHMENTS

None

All revision dates:

10/3/2016, 7/1/2012

Attachments

No Attachments

Approval Signatures

Step Description	Approver	Date
Policy Owner Verify Policy Communicated	Jacki Monson: SH VP, CPISO	10/3/2016

Step Description	Approver	Date
System Policy & Procedure Committee	Joyce Sklark: Policy & Procedure Mgmt Mgr	9/29/2016
Executive Compliance Committee	Joyce Sklark: Policy & Procedure Mgmt Mgr	8/10/2016
Privacy & Information Security Committee	Rachel Powell: Snr Reg Privacy Analyst Lead	8/8/2016
Policy Owner	Jacki Monson: SH VP, CPISO	8/8/2016

COPY

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Origination: 7/20/2015
Effective: 8/6/2021
Final Approved: 8/6/2021
Last Revised: 8/6/2021
Next Review: 8/6/2022
Owner: Jacki Monson: SH VP, Chief Privacy & Informa
Policy Area: Privacy & Information Security
References: CIA Reporting
Applicability: Sutter Health System

Safeguarding Protected Health Information Policy

PURPOSE

The purpose of this policy is to provide guidance to Workforce members on ways to safeguard and dispose of Protected Health Information (PHI) in accordance with applicable state and federal laws and regulations.

POLICY

It is policy to take reasonable and appropriate steps to safeguard and dispose of PHI in accordance with applicable state and federal laws and regulations.

SCOPE

This policy applies to Sutter Health and any legal entity for which Sutter Health or its affiliate is the sole member or directly or indirectly controls at least 51% of the voting power (herein referred to as "Sutter") and all Workforce members of Sutter.

DEFINITIONS

Access is the ability or means necessary to store data in, to retrieve data from, to read, write, modify or communicate with, or to otherwise use any information services resource.

Disclosure is the release, transfer, giving access to, or divulging of PHI outside of the entity that maintains the information.

Electronic Media means:

1. Electronic storage material on which Data is or may be recorded electronically, including memory devices in computers (hard drives) and any removable/transportable digital memory medium, such as CD-ROM, DVD, floppy disks, magnetic tape or disk, optical disk, or digital memory cards and flash drives; or
2. Transmission media used to exchange information already in electronic storage media. Transmission media include the internet (wide-open), intranet, extranet (using internet technology to link a business with information accessible only to collaborating parties), leased lines, dial-up lines, private networks, and the physical movement of removable/transportable electronic storage media. Certain transmissions, including of paper, via facsimile, and of voice, via telephone, are not considered to be transmissions via Electronic Media, if the information being exchanged did not exist in electronic form immediately before the transmission.

Electronic Protected Health Information (EPHI) is PHI in electronic form.

Encryption is to convert data into a form called cipher-text that cannot be easily understood by unauthorized people.

Minimum Necessary is the reasonable efforts to only access, Use, Disclose, or request the minimum amount of PHI necessary for the purpose of the access, Use, Disclosure, or request.

Mobile Worker is an eligible Sutter employee who is permitted by Sutter to voluntarily elect to work at a remote location on a pre-determined regular basis and/or utilize hoteling space at Sutter locations designated by Sutter.

Patient/Member is any person who has received services at a Sutter facility without regard to date of service, is a member of a health plan or otherwise is the subject of the PHI.

Personally Identifiable Information (PII) is any information about a Patient/Member maintained by an organization that can be used to distinguish or trace a Patient's/Member's identity, such as name, social security number, date and place of birth, mother's maiden name, or biometric records.

Protected Health Information (PHI) is individually identifiable health information, including demographic information collected from a Patient/Member, if in a context that indicates provisions of, or payment for, health care services, in any form, created or received by a health care provider, health plan, employer, or health care clearinghouse; and relates to the past, present, and future physical or mental health or condition of a Patient/Member in their status as a Patient/Member; the provision of health care to a Patient/Member; or the past, present, or future payment for the provision of health care to a Patient/Member; and that identifies the Patient/Member; or with respect to which there is a reasonable basis to believe the information can be used to identify the Patient/Member, with a few limited exceptions.

Remote Worker is an eligible Sutter employee in a position who is designated and required to work exclusively at a remote location when free Sutter hoteling space is not available.

Use is sharing, viewing, manipulating, utilizing, employing, applying, examining or analyzing PHI within a covered entity.

Workforce is, pursuant to the Health Insurance Portability and Accountability Act (HIPAA), employees, practitioners, volunteers, trainees and other persons whose conduct, in the performance of work for the covered entity is under the direct control of such entity, whether or not paid by the covered entity.

Workstations are the principal point of contact when accessing electronic information within Sutter. The reference to Workstation includes desktop computers, diskless terminals, laptops, and other portable devices such as notebooks, PDAs, and smart phones.

PROCEDURE

The following guidelines are to be followed to help safeguard PHI:

- A. **Retention of PHI:** All PHI, including Electronic Media containing EPHI shall be retained for periods of time consistent with the [Data Retention, Storage, and Disposition Policy](#).
- B. **Routine Clean Sweep:** Except in a medical or life-threatening emergency, Workforce members must perform a routine clean sweep of their work area and remove or secure PHI prior to leaving the work area unattended.
 1. Performing a Routine Clean Sweep.

- a. Perform a visual check of the area and remove or secure any PHI. Any unattended documents containing PHI should not be left out on desks or countertops. After business hours, or when the Workforce member leaves their work area, PHI must be secured in an appropriate location (e.g., locked cabinet).
 - b. Remove and secure all forms of removable Electronic Media, including CDs, DVDs, and USB drives, containing EPHI.
 - c. When temporarily leaving a Patient/Member unattended, Workforce member must lock their Workstation. Additional security requirements for PHI can be found in the [Workstation and End Point Device Security Policy](#).
2. Any Workforce member who identifies unattended or improperly secured PHI should immediately report the incident to their local privacy and/or information security officer. If a Workforce member identifies unattended or unsecured PHI, they should not leave the PHI unattended/unsecured.
- C. **Disposal of PHI:** All PHI, including Electronic Media containing EPHI, must be disposed of in secured, designated containers.
1. Sutter will have in place appropriate safeguards to prevent intentional or unintentional Use or Disclosure of PHI intended for disposal. Appropriate safeguards include:
 - a. Confidential locked disposal bins in all open work areas that create, receive, maintain, or transmit PHI
 - i. Confidential disposal bins in all secured offices containing PHI.
 - ii. Confidential removal and destruction of PHI on a routine basis.
 2. Disposal of PHI.
 - a. Sutter will dispose of all printed PHI, including labels, in designated confidential bins.
 - b. Labels adhered to items such as IV tubing and bags will have all PHI removed or redacted prior to disposal.
 - c. Workforce members must dispose of PHI in designated, locked containers (e.g., Shred-It bins). All PHI no longer needed must be kept in a secure manner (e.g., locked in a cabinet) until the Workforce member is able to place it in a designated, locked container for destruction.
 - d. PHI must be disposed of, or destroyed, so that it cannot be recovered.
 - e. Disposal of PHI requires adherence to the [Data Retention, Storage, and Disposition Policy](#). Contact the health information management (HIM) manager for consultation on retention and destruction procedures.
 3. Disposal of Electronic Media. For disposal of Electronic Media such as magnetic disks, optical discs and flash drives containing EPHI, Workforce members must refer to the [Data Retention, Storage, and Disposition Policy](#). If Workforce members have further questions, they can contact the privacy and/or information security officer. Electronic Media with EPHI must never be placed in the trash.
- D. **Transporting:** Laptop computers, Electronic Media and PHI (e.g., paper PHI, films with PHI, etc.) must be transported and stored in a secure manner. Do not leave unsecured laptops, Electronic Media or PHI unattended. Workforce members must take reasonable steps to prevent unauthorized access to and/or Disclosure of laptop computers, Electronic Media, and PHI. For example, while carrying paper PHI Workforce members should put it in a folder, place the PHI face down on a cart being used, or place the documents in a sealed, clearly addressed envelope.

- E. **Handing Off PHI:** Workforce members should always double-check each page of paperwork containing PHI before handing it to a Patient/Member to ensure the paperwork contains the correct Patient/Member information. Avoid multitasking when working with documents containing PHI to help prevent picking up and/or transferring the wrong paperwork.
- F. **Workspace/Public Areas:** Workforce members should avoid discussing PHI in public areas, including but not limited to hallways, elevators, restrooms, and cafeterias. When discussing PHI, Workforce members must be particularly aware of the sensitive nature of the information and take reasonable precautions to protect the PHI. It is the responsibility of every Workforce member to take reasonable steps to safeguard against incidental Disclosures of PHI.
- G. **Off-Site/Remote Work:** When Workforce members work off-site, in addition to Remote and Mobile Workers, they should maintain the same privacy and information security safeguards adhered to while in the office, where applicable. Workforce members must take precaution to prevent unauthorized access to paper PHI or ePHI while working remotely on Sutter issued devices by securing paper PHI and devices (e.g., put laptop and paper PHI in a drawer when not in use, avoid discussing PHI in open areas, etc.) Sutter has additional policies on working remotely which must be followed in addition to this policy. See the [Remote and Mobile Worker Policy](#).
- H. **Printers and Fax Machines:** Printers and fax machines must be located in secure areas where only authorized members of the Workforce can have access to documents being printed and faxed. Workforce members should make efforts to quickly retrieve printed documents containing PHI if using a shared printer to help prevent another Workforce member from picking up the wrong documents. When receiving PHI by fax or printing PHI to a printer, Workforce members should take reasonable steps to minimize the possibility that the documents are viewed or received by an unauthorized recipient. Home printers may only be used to print PHI if authorized, only to the extent necessary for a valid business purpose and shall be secured when not in use.
- I. **Faxing PHI:** Sending PHI via fax is permitted provided that the standard Sutter cover sheet containing confidentiality language is used and the fax number of the authorized recipient is verified prior to transmission. For guidance, see the [Electronic and Fax Transmittal of Protected Health Information Policy](#).
- J. **Copying PHI:** When PHI is copied, only the Minimum Necessary information may be copied. This may require that part of a page be masked. Workforce members must take precautions to retrieve all copied pages and originals from the copy machine.
- K. **Bulletin boards and Whiteboards:** Bulletin boards and whiteboards, including in digital format (e.g., smart board), used to display PHI for business purposes should be placed in areas not generally accessible by or readily visible to the public. These boards may not contain any documents with PHI of a Patient/Member unless the Patient/Member has authorized the display or the Use of PHI on the board. Other safeguards should be applied to reasonably limit incidental Disclosures to the general public.
- L. **Portable Workstation/Electronic Media:**
1. Portable Workstations (e.g., laptop computers), Electronic Media and mobile devices (e.g., a Sutter-issued mobile phone) are vulnerable to theft and the loss of all data stored on them. The loss or theft of these devices places the information they contain at risk of Disclosure or compromise..
 2. Workforce members must take precautions when using these devices in public places (e.g., airports, restaurants, conferences, public transportation) to avoid unauthorized persons from observing PHI on the device. For guidance on how to order privacy screens contact a privacy and/or information security officer.

- M. **Securing Portable Workstations:** When left unattended, portable Workstations (such as laptop computers) must be physically secured (e.g., locked room/cabinet, cable lock for laptops, etc.).
- N. **Removing PHI:** PHI that resides on Workstations will be removed/wiped from the device by the designated support personnel using Sutter Privacy and Information Security approved methods for data destruction prior to relocation, reassignment, and removal from service. Users must access and Use only the resources that have been specifically assigned or made available for their access or Use.
- O. **Passwords:** Passwords must not be shared or accessible to family members or others. For additional guidance on passwords see the [Passwords and Authentication Policy](#).
- P. **Saving EPHI:** EPHI must not be saved on local hard drives (e.g., c:drive) or other Electronic Media except when necessary to perform Sutter job duties. All locally saved PHI must be Encrypted and removed from the local hard drive once the work is completed. Workforce members are not permitted to access PHI, on public Workstations such as in hotels and libraries.
- Q. **Data Transmission/E-mail:**
1. Workforce members with a Sutter e-mail account must not e-mail PHI to their own (or another Workforce member's) personal e-mail address (e.g., Gmail, Yahoo! Mail, Outlook.com). This includes cc'ing a personal e-mail account on an e-mail sent with your Sutter e-mail account.
 2. Sutter wireless network communications used to transmit EPHI must be Encrypted.
 3. For additional guidance on data transmission see the [Electronic and Fax Transmittal of Protected Health Information Policy](#).
- R. **Removable Media:** Portable media, such as USB drives, CDs and backup tapes containing EPHI, or other sensitive information, must be Encrypted.
- S. **Recovery of Misdirected PHI:** If PHI needs to be recovered, the Workforce member's local privacy and/ or information security officer must be notified immediately and will be responsible for coordinating the retrieval of the PHI from the recipient in a secure manner (e.g., U.S. mail, bonded courier service, etc.).
- T. **Compliance with Privacy and Information Security, Data Governance and Equipment Use Policies:** Sutter has additional privacy and information security policies addressing PHI. Workforce members must be familiar with and follow these policies. If Workforce members have questions about these policies, they should contact a privacy and/or information security officer.

REFERENCE

HIPAA 45 CFR Parts 160, 162, and 164 et seq

[Data Retention, Storage and Disposition Policy](#)

[Electronic and Fax Transmittal of Protected Health Information Policy](#)

[Passwords and Authentication Policy](#)

[Remote and Mobile Worker Policy](#)

[Use of Internet, Email, Instant Messaging, and Texting Policy](#)

[Workstation and End Point Device Security Policy](#)

ATTACHMENTS

None

All revision dates:

8/6/2021, 3/6/2020, 7/20/2015

Attachments

No Attachments

Approval Signatures

Step Description	Approver	Date
Policy Owner Verify Policy Communicated	Jacki Monson: SH VP, Chief Privacy & Informa [SK]	8/6/2021
System Policy & Procedure Committee	Joyce Sklark: Compliance Officer, Eastern Di	7/28/2021
SPPC Pre-review	Joyce Sklark: Compliance Officer, Eastern Di	7/15/2021
Privacy & Information Security Committee	Patricia Dickerson: Dir Awareness, Training & Prog	5/18/2021
Policy Owner	Jacki Monson: SH VP, Chief Privacy & Informa	5/18/2021

COPY

EXHIBIT P

From: [Marcie Fitzsimmons](#)
To: [Hutchinson, Daniel M.](#)
Cc: [Mick Rubio](#); [Keenley, Elizabeth](#); "[ahernaез@foxrothschild.com](#)"; "[dkitzes@foxrothschild.com](#)"; [Dermodу, Kelly M.](#); [Dafa, Jallé H.](#); [Shaikh, Nigar A.](#); [White, Frank J.](#)
Subject: RE: [EXTERNAL] Nyong'o v. Sutter Health, et al.
Date: Tuesday, March 1, 2022 7:10:27 PM
Attachments: [image001.gif](#)

Just to close the loop on this, I believe that Alex's email addresses our position. There is simply no valid excuse for the delayed production or delay in producing your client for deposition. We will also get back to you about the deponents that you have noticed, but we will not be producing anyone for deposition until we have taken your client's deposition.

Marcie

From: Hutchinson, Daniel M. <dhutchinson@lchb.com>
Sent: Friday, February 25, 2022 3:38 PM
To: Marcie Fitzsimmons <misom@grsm.com>
Cc: Mick Rubio <mrubio@grsm.com>; Keenley, Elizabeth <keenley@lchb.com>; 'ahernaез@foxrothschild.com' <ahernaез@foxrothschild.com>; 'dkitzes@foxrothschild.com' <dkitzes@foxrothschild.com>; Dermody, Kelly M. <kdermodу@lchb.com>; Dafa, Jallé H. <jdafa@lchb.com>; Shaikh, Nigar A. <nshaikh@lchb.com>; White, Frank J. <fwhite@lchb.com>
Subject: RE: [EXTERNAL] Nyong'o v. Sutter Health, et al.

Good afternoon Marcie.

I write to address PAFMG's email of yesterday.

First, PAFMG's references to Plaintiff doing anything to "violate Sutter, PAMF, or PAFMG's policies or the law" is not well-taken. Again, the parties negotiated a Protective Order for the express purpose of allowing Plaintiff to access and produce relevant documents that "originate from accounts otherwise maintained or owned by Defendants." I was very clear with Defendants that the purpose of this provision was to avoid any unfounded accusations and retaliation against Plaintiff for accessing relevant documents. In response to my direct questions, Defendants did not raise any "policies" or "law" that would prevent Plaintiff from accessing relevant documents. In fact, it was Plaintiff's counsel who added Section 4 to the Protective Order regarding the production of documents containing "HIPAA Protected Information."

Defendants' recent position directly contradicts their prior position and agreements. PAFMG now states that Plaintiff "cannot, for example, access his own medical records." But PAFMG's discovery requests expressly sought Plaintiff's medical records. Plaintiff's responses clearly indicated that he would collect relevant medical records from his healthcare providers, including Defendants. PAFMG did not object. To the contrary, PAFMG demanded that Plaintiff also access *irrelevant* medical records. PAFMG then subpoenaed medical records without even providing a copy of the Protective Order to the subpoena recipients. This is just one example from PAFMG's 153 document requests.

Second, PAFMG's assertion that Plaintiff is "causing unnecessary delays in the litigation" is false and not well-taken. Plaintiff promptly began collecting responsive documents within *days* after the Court entered the Protective Order. PAFMG again asserts that some documents should be produced "immediately" without any explanation about how that can be done when (a) Defendants have not articulated any law or policy that defines which documents they believe Plaintiff cannot access, and (b) even if they had, the presence of all documents from Plaintiff together in a single location on Plaintiff's counsel's document review platform means that Plaintiff's counsel would have to access *all the documents* to determine which documents fall into which categories, which Defendants have wrongly claimed would be improper.

In short, Defendants have tied the hands of Plaintiff and his counsel, and now complain about the inevitable consequences of tying our hands.

Finally, there is no deposition on calendar for March 11. During our meet and confer on February 15, 2022, the parties discussed at length Plaintiff's deposition and did not agree to proceed with a one-day deposition on March 11. A one-day deposition that remained "open" would be abusive and inefficient. And, PAFMG has consistently stated that it will not proceed with a deposition of any length until Plaintiff produces all his documents, which obviously has not yet occurred for the reasons we discussed.

Plaintiff's counsel offered to inquire about Plaintiff's availability for a two-day deposition on consecutive days. Defendants agreed that proceeding on consecutive days was reasonable. Defendants' motion to compel further reflects their agreement and states "Defendants' counsel agreed that it would schedule Plaintiff's deposition for two-consecutive days if that were logistically feasible to coordinate." As I mentioned again in my last email, Plaintiff's counsel remain available to meet and confer on an appropriate schedule for Plaintiff's deposition. If Defendants are unable or unwilling to meet and confer about alternate dates for Plaintiff's deposition at this time, I suggest that we take up the issue again after the Court hearing on March 14.



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From: Marcie Fitzsimmons <misom@grsm.com>
Sent: Thursday, February 24, 2022 1:04 PM
To: Hutchinson, Daniel M. <dhutchinson@lchb.com>
Cc: Mick Rubio <mrubio@grsm.com>; Keenley, Elizabeth <ekenley@lchb.com>; 'ahernaез@foxrothschild.com' <ahernaез@foxrothschild.com>; 'dkitzes@foxrothschild.com' <dkitzes@foxrothschild.com>; Dermody, Kelly M. <kdermody@lchb.com>; Dafa, Jallé H. <jdafa@lchb.com>; Shaikh, Nigar A. <nshaikh@lchb.com>; White, Frank J. <fwhite@lchb.com>
Subject: RE: [EXTERNAL] Nyong'o v. Sutter Health, et al.

Daniel,

As we discussed during our last phone call, the protective order is not a discovery order that gives your client free reign to violate Sutter, PAMF, or PAFMG's policies or the law. Neither Mick nor any other defense counsel on this case has stated otherwise. Alex agreed to provide you with the applicable policies in that respect and my understanding is that he will do so shortly. If you recall, this concern came about because your client received an auto-generated email indicating that he may have accessed information that he was not permitted to access via Sutter's systems. We don't know that he actually did so, but he did something to trigger the automatic notice system and we just want to make sure he (and you) are familiar with the policies in place related to accessing information, primarily concerning patient information that is HIPAA protected. He cannot, for example, access his own medical records or that of others (including his patients) for purposes of this lawsuit, but I understand from our prior conversation that you represented he has not done that. There is no reason why documents that your client has outside of the Sutter system that are responsive to our discovery requests should not be produced immediately. Your client's failure to produce even those documents at this point is causing unnecessary delays in the litigation, particularly given that we have your client's deposition on calendar and you have noticed the depositions of 17 witnesses.

As for your client's deposition, we served a timely deposition notice for your client's deposition on a date(s) that you represented both you and your client are available. We plan to proceed with the deposition on March 11 and will wait to see what the court does with respect to ordering the second day of his deposition. If we don't have your client's documents in time for his deposition on March 11, we will reserve our right to keep the deposition open such that we can question him on those outstanding documents.

Marcie

From: Hutchinson, Daniel M. <dhutchinson@lchb.com>
Sent: Tuesday, February 22, 2022 2:04 PM
To: Marcie Fitzsimmons <misom@grsm.com>
Cc: Mick Rubio <mrubio@grsm.com>; Keenley, Elizabeth <keenley@lchb.com>; 'ahernaез@foxrothschild.com' <ahernaез@foxrothschild.com>; 'dkitzes@foxrothschild.com' <dkitzes@foxrothschild.com>; Dermody, Kelly M. <kdermody@lchb.com>; Dafa, Jallé H. <jdafa@lchb.com>; Shaikh, Nigar A. <nshaikh@lchb.com>; White, Frank J. <fwhite@lchb.com>
Subject: RE: [EXTERNAL] Nyong'o v. Sutter Health, et al.

Good afternoon Marcie.

The parties met and conferred on this matter extensively on Tuesday, February 15. As you know, starting at the CRC 3.724 meet and confer, Plaintiff has consistently

taken the position that he cannot search for and produce documents in response to Defendants' document requests unless or until Defendants confirm that he will not face any adverse actions from Defendants for doing so. I personally discussed this topic at length on several occasions with your colleague Mick Rubio. In those conversations, Mick and I expressly discussed that Plaintiff could search and produce emails and other documents accessible on his work computer and/or company devices. Those conversations concluded with agreed-upon language in the Protective Order stating:

[A]ll Parties shall be entitled to produce and/or disclose to all Parties in this litigation any and all Disclosure or Discovery Material, including any and all "CONFIDENTIAL" Information and/or HIPAA-Protected Information, regardless of the origin of that Disclosure or Discovery Material. For example, Plaintiff shall be entitled to produce Disclosure or Discovery Material in his possession, custody, and/or control which may originate from accounts otherwise maintained or owned by Defendants PAMF and/or PAFMG, which Plaintiff has allowable access to.

Protective Order ¶ 3. On January 26, 2022, all parties agreed to abide by the Protective Order. On January 27, 2022, the Court signed and entered that order. Plaintiff thereafter promptly began the process of collecting documents responsive to PAFMG's document requests. To be clear, Plaintiff accessed only relevant documents that he is permitted to access.

Yet, Defendants almost-immediately took adverse action against Plaintiff for doing what the Protective Order expressly permitted him to do. On February 2, 2022, a Sutter Health representative from its "Office of the General Counsel" emailed Plaintiff directly and cc'd PAFMG CEO Kurt VandeVort, M.D. Defendants' email claimed that Plaintiff has violated Sutter Health policy, demanded that he destroy documents collected for this litigation, and asked him for a written explanation and attestation regarding his document review and collection for this litigation. Plaintiff and his counsel immediately halted his document production and insisted that Defendants withdraw this email demand so that discovery could commence. Yet Defendants never withdrew their demand. Instead, during our call on February 15, all Defendants maintained that some unspecified rules and/or law precluded Plaintiff from accessing and/or producing documents.

As I explained, this change in Defendants' position is not well taken. It comes 3-1/2 months after Plaintiff first took steps to avoid precisely this type of unfounded claim that Plaintiff did anything improper. It follows a long line of abusive and retaliatory conduct toward Plaintiff. And frankly, it makes no sense. To the extent that Defendants believe any of these documents contain confidential information, the Protective Order specifically addresses that possibility and permits parties to designate as confidential any documents that merit such protection. Defendants could not explain why discovery could not simply proceed under the terms to the agreed-upon Protective Order.

I therefore insisted that Defendants put in writing any rules or laws they believed precluded Plaintiff from accessing and producing relevant documents, and that Defendants specify precisely which documents they maintain are at issue. I explained that, without such specificity, Plaintiff's counsel cannot process any documents for production. Sutter Health's and PAMF's counsel promised to provide Defendants' position in writing, but has not yet done so.

In your email yesterday, you suggest that there may be "a number of documents unrelated to that issue." That may be so, but Plaintiff's counsel cannot locate any such documents until Defendants clarify what they believe "that issue" is. Your position also ignores that all documents from Plaintiff remain together in a single location on Plaintiff's counsel's document review platform. Accessing the documents to determine which documents fall into which categories would require Plaintiff's counsel to access all of the documents, which Defendants have wrongly claimed would be improper.

In sum, no matter how baseless we believe Defendants' allegations are, they are serious allegations. We will not put our client or ourselves at risk by accessing any documents unless or until Defendants' withdraw their email and resolve this issue.

As you know, the parties also discussed at length Plaintiff's deposition and did not agree to proceed with any deposition on March 11. Plaintiff's counsel offered to inquire about Plaintiff's availability for a two-day deposition on consecutive days. Defendants declined that offer and instead filed its motion to compel. Plaintiff's counsel remain available to meet and confer on an appropriate schedule for Plaintiff's deposition.



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Pronouns: he/him/his

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From: Marcie Fitzsimmons <misom@grsm.com>

Sent: Monday, February 21, 2022 10:47 AM

To: Hutchinson, Daniel M. <dhutchinson@lchb.com>

Cc: Mick Rubio <mrubio@grsm.com>; Keenley, Elizabeth <keenley@lchb.com>;

'ahernaesz@foxrothschild.com' <ahernaesz@foxrothschild.com>;

'dkitzes@foxrothschild.com' <dkitzes@foxrothschild.com>; Dermody, Kelly M.

<kdermody@lchb.com>; Dafa, Jallé H. <jdafa@lchb.com>; Shaikh, Nigar A.

<nshaikh@lchb.com>; White, Frank J. <fwhite@lchb.com>

Subject: RE: [EXTERNAL] Nyong'o v. Sutter Health, et al.

Daniel,

We have yet to receive plaintiff's document production or verification for our requests for production of documents. While I understand that plaintiff is taking the position that he is not going to produce documents until he is clear on what he can/can't access related to his current Sutter emails, there are a number of documents unrelated to that issue that could and should be produced, including text messages, emails to/from his personal email address, notes, social media posts, documents from his personal computer, documents related to his damages, etc. We need plaintiff's document production in order to prepare for his deposition and in advance of any other depositions in this case. Please provide us with at the very least the documents unrelated to his work email by the close of business on Friday, along with his signed verification and a date certain on which you will produce the remainder of the documents. We need his production by no later than March 4 in order to have ample time to prepare for his March 11 deposition.

Thank you,
Marcie

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GZJ KDV'S '''

From: [Marcie Fitzsimmons](#)
To: [Hutchinson, Daniel M.](#)
Cc: [Dermody, Kelly M.](#); [Dafa, Jallé H.](#); [Shaikh, Nigar A.](#); [White, Frank J.](#); [Mick Rubio](#); [Hendel, William](#); [Hernaез, Alexander](#)
Subject: RE: [EXTERNAL] Nyong'o v. Sutter Health et al.
Date: Thursday, March 10, 2022 3:33:56 PM

Thank you Daniel. We strongly disagree with your interpretation of what has transpired and your explanation for plaintiff's failure to produce documents in this case.

We do, however, hope that regardless of the motion that is filed that this issue gets resolved such that we can move this case forward.

-----Original Message-----

From: Hutchinson, Daniel M. <dhutchinson@lchb.com>
Sent: Thursday, March 10, 2022 1:28 PM
To: Marcie Fitzsimmons <misom@grsm.com>
Cc: Dermody, Kelly M. <kdermody@lchb.com>; Dafa, Jallé H. <jdafa@lchb.com>; Shaikh, Nigar A. <nshaikh@lchb.com>; White, Frank J. <fwhite@lchb.com>; Mick Rubio <mrubio@grsm.com>; Hendel, William <whendel@foxrothschild.com>; Hernaез, Alexander <AHernaез@foxrothschild.com>
Subject: RE: [EXTERNAL] Nyong'o v. Sutter Health et al.

Good afternoon counsel.

As we have discussed, any motion to compel from PAFMG would be baseless, as the only thing standing in the way of Plaintiff producing documents is Defendants' objection to Plaintiff or his counsel accessing or producing documents that PAFMG specifically requested. As you know, Defendants belatedly raised this objection for the first time after responsive documents were already co-mingled on Plaintiff's counsel's document review platform. There is therefore no way to determine which documents fall into any particular category without accessing all of the documents, which Defendants have wrongly claimed would be improper. The responsibility for the delays and burden this issue has caused for Plaintiff and his counsel rests solely with Defendants.

Regarding PAFMG's request for an extension, Plaintiff agrees that PAFMG may have until March 28 to file any motion to compel.

Best regards,
Daniel

-----Original Message-----

From: Marcie Fitzsimmons <misom@grsm.com>
Sent: Thursday, March 10, 2022 12:53 PM
To: Hutchinson, Daniel M. <dhutchinson@lchb.com>
Cc: Dermody, Kelly M. <kdermody@lchb.com>; Dafa, Jallé H. <jdafa@lchb.com>; Shaikh, Nigar A. <nshaikh@lchb.com>; White, Frank J. <fwhite@lchb.com>; Mick Rubio <mrubio@grsm.com>; Hendel, William <whendel@foxrothschild.com>; Hernaез, Alexander <AHernaез@foxrothschild.com>
Subject: [EXTERNAL] Nyong'o v. Sutter Health et al.

Counsel:

Per our meet and confer discussion this afternoon, Defendant intends to move to compel plaintiff's production of documents, given that we have yet to receive any responsive documents from plaintiff. I understand based on our call today and our prior meet and confer correspondence, plaintiff's position and concerns about producing documents retrieved from Defendants' servers. As previously indicated, however, notwithstanding that I believe that issue has been addressed by PAMF/Sutter's counsel already, there are documents not on that server that should have been searched for and produced at this point (including for example: texts, personal emails, social media accounts, notes, etc). As we all recognize, this is causing a number of delays in the matter.

You indicated during our call today that you may elect to move to enforce the protective order to try to get some direction from the court on this issue, which may obviate the need for us to file our motion to compel. I informed you that I would

like to take a look at your motion to make that evaluation myself. However, we anticipate that plaintiff could make an argument that our motion to compel deadline is Monday, March 14. While we believe the date for any such motion does not begin until the discovery is verified, we would nonetheless like to avoid any timeliness arguments and would like to avoid having to file our motion if plaintiff's motion makes it unnecessary for us to do so. We also discussed the fact that getting rulings on some of the pending motions could be helpful. As a result, we request that plaintiff grant us until one week after plaintiff files the motion to enforce the protective order or until March 28 (whichever is later) to file a motion to compel.

Please confirm this extension by the close of business today.

Thank you,
Marcie

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