UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

STEPHEN COHODES, Plaintiff, -against- **UNITED STATES OF AMERICA, CALLEN-LORDE COMMUNITY HEALTH CENTER, MEERA SHAH, M.D., JAMES BRAUN, D.O., WENDY STARK, and JANE DOE 1, JANE DOE 2, and JANE DOE 3 (CALLEN-LORDE NURSES OR ASSISTANTS),** Defendants.	**Civil Action No.: 1:17-cv-08307** **MEMORANDUM OF LAW IN SUPPORT OF MOTION TO SEAL**

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION TO SEAL

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PRELIMINARY STATEMENT

Plaintiff Stephen Cohodes suffered serious injuries as a result of the negligence and medical malpractice of government run hospital Callen-Lorde Community Health Center. As a result of such negligence, Plaintiff suffered severe injuries, pain, emotional distress and embarrassment. The nature of these injuries are of an extremely personal and private nature and Plaintiff, the victim of this misconduct, should not be punished further in addition to the suffering he has already undergone through the public airing of intimate and private medical information. As a result, Plaintiff hereby submits this Memorandum of Law in Support of his Motion to Seal the complaint, previously filed with redactions on October 27, 2017.

As a result of this aforementioned negligence, Plaintiff Stephen Cohodes has filed a redacted complaint against Defendants United States of America, Callen Lorde Community Health Center, Meera Shah, M.D., James Braun, D.O., Wendy Stark, and Jane Does 1-3 pursuant to the Federal Tort Claims Act (28 U.S.C. § 2671, *et. seq.*) and 28 U.S.C. §§ 1346(b)(1). In this complaint, Plaintiff puts forth allegations of negligence and medical malpractice in connection with the performance of a medical procedure. This procedure involved invasive testing on a very intimate and personal area of the Plaintiff's body. The negligent performance of this procedure resulted in long term detrimental effects on Plaintiff's health with personal and embarrassing ongoing repercussions in several private and personal physical areas. In support of these allegations, this complaint contains detailed information concerning Plaintiff's medical history, including other ongoing medical issues, the nature of the procedure performed, and its resulting physical and emotional effects. (See, Exhibit 1 – un-redacted complaint). In the interest of protecting this intimately private medical information, these components of the complaint were redacted. If such sensitive and highly personal facts were to be made public, not only would

Plaintiff suffer extreme embarrassment, but also his career and daily life could be negatively affected. Such information, in addition to privacy concerns, influences work and hiring decisions. Many companies are conducting Internet and legal searches on employees and potential employees. Moreover, the complaint contains medical information that has been shielded from family members, where such disclosure may have adverse effects. The personal and private nature of the injuries lend themselves to more sensational media coverage with such coverage already occurring, which is attached hereto as Exhibit 2. The Plaintiff, a victim of medical damages through no fault of his own, should be protected from additional suffering from sensational media, work related searches that could affect his career, and family related privacy concerns about private medical problems. Such private and confidential medical information, protected by HIPAA should be hidden from public view and thus, Plaintiff now moves to file this complaint under seal.

LEGAL ARGUMENT

Although there is a common law right of public access to judicial documents, that right is not absolute. *See Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 119 (2d Cir. 2006). Pursuant to Fed. R. Civ. P. 5.2(d), "the court may order that a filing be made under seal." The Second Circuit has articulated a three-step process for determining whether documents should be placed under seal. First, the court must determine whether the documents are judicial documents such that the presumption of access attaches. *See Lugosch*, 435 F.3d at 119. A "judicial document" is an "item . . . relevant to the performance of the judicial function and useful in the judicial process." *Id.* (*quoting United States v. Amodeo*, 71 F.3d 1044, 1048 (2d Cir. 1995)). Second, once the court determines that the item to be sealed is a judicial document, the court must then determine the weight of the presumption of access. *Id.* "[T]he weight to be given the

presumption of access must be governed by the role of the material at issue in the exercise of Article III judicial power and the resultant value of such information to those monitoring the federal courts [*i.e.*, the public]." *Id.* (quotation omitted). "Generally, the information will fall somewhere on a continuum from matters that directly affect an adjudication to matters that come within a court's purview solely to insure their irrelevance." *Id.* (quotation omitted). "Finally, after determining the weight of the presumption of access, the court must 'balance competing considerations against it.'" *Id.* at 120. (quotation omitted). "Such countervailing factors include . . . 'the privacy interests of those resisting disclosure.'" *Id.* (quotation omitted).

"[T]he 'mere filing of a paper or document with the court is insufficient to render that paper a judicial document subject to the right of public access'." *Stern v. Cosby*, 529 F.Supp. 2d 417, 420 (S.D.N.Y. 2007) (quoting *United States v. Amodeo*, 44 F.3d 141, 145 (2d Cir. 1995)). Here, simply because the complaint, by nature, must be filed with the court, this does not mean that its contents, no matter how personal, should be open to public view. Instead, even if the complaint is deemed a "judicial document," competing considerations outweigh any presumption of access and sealing should be permitted.

Plaintiff's countervailing interest in maintaining the confidentiality of his personal medical information favors the sealing of the complaint. This privacy interest outweighs any presumption of access. As set forth under HIPAA, the privacy of an individual's health information is of utmost importance and regulations exist to shield this material from public view. *Health Insurance Portability and Accountability Act of 1996*, Pub. L. No. 104-191, 110 Stat. 1936. The exposure of sensitive and protected health information could have far reaching consequences for Plaintiff ranging from extreme embarrassment to career implications. As such,

Plaintiff's right to keep such information private outweighs public disclosure through a complaint.

In "determining the weight to be accorded an assertion of a right of privacy, courts should first consider the degree to which the subject matter is traditionally considered private rather than public." *Doe v. Apfel*, 1999 U.S. Dist. LEXIS 4030, at *8 (E.D.N.Y. 1999) (quoting *United States v. Amodeo*, 71 F.3d 1044, 1051 [2d Cir. 1995]). Personal information of a medical nature is undoubtedly considered a private subject matter. Consequently, the Second Circuit has recognized this important privacy interest in medical information. *See Carter v. City of New York*, 2016 U.S. Dist. LEXIS 75783, at **14,15 (S.D.N.Y. 2016) (stating that medical information "is a sensitive subject matter that is traditionally considered private."); *Lytle v. JPMorgan Chase*, 810 F.Supp.2d 616, 629 (S.D.N.Y. 2011) ("[M]ost of the cases in which courts have concluded that the privacy interests of individuals were sufficient to overcome the presumption of access involve either illness or sensitive personal financial information."); *United States v. Sattar*, 471 F. Supp. 2d 380, 387 (S.D.N.Y. 2006) ("Furthermore, there is a recognized privacy interest in medical records, although that privacy right is neither fundamental nor absolute.") As such, Plaintiff's privacy interest in keeping his sensitive medical information from public view outweighs any interest in divulging such confidential information and the presumption of access has been overcome.

In *Doe v. Apfel*, the court permitted sealing and in making this determination looked to the fact that documents contained within the case's record contained "lengthy, detailed, and potentially embarrassing description of the illnesses" from which the plaintiff suffered. *Doe*, 1999 U.S. LEXIS 4030, at *9. The court found that such information was of no concern to the public and sealing of the record was deemed appropriate. *Id.* at **9-10. Here, the complaint

contains just that- "detailed and potentially embarrassing description" of Plaintiff's medical condition. There is no rational basis to support the disclosure of such facts. Plaintiff's medical condition, his reason for undergoing testing, and his test results, "are not a matter of public concern," and thus, they should remain under seal to avoid unnecessary harmful effects on Plaintiff's career, relationships, and daily life. *Id.* Although Plaintiff has chosen to bring this lawsuit, he should not be punished for seeking judicial recourse through the public airing of his private medical history. Plaintiff's private health information of an immensely personal nature is of no value to the public and thus should not be disclosed. *Amodeo,* 71 F.3d at 1048.

In recognition of the need to shield personal information from public view, New York courts have frequently permitted that submissions involving sensitive medical information be sealed. *See Doe v. United States,* 2017 U.S. Dist. LEXIS 83745, at *5 (S.D.N.Y. 2017) (finding that though plaintiff was not permitted to proceed anonymously, references to his medical information were permitted to be kept under seal). Unlike in *Doe v. United States,* Plaintiff is not seeking the drastic remedy of initiating an anonymous lawsuit. Instead, Plaintiff is pursuing a recognized course of action to rightfully shield his personal medical information from public view. The filing of the complaint under seal would allow defendants to view its contents in their entirety while protecting Plaintiff's confidential information and the judicial process would suffer no harm.

In satisfaction of the recognized competing interests, Plaintiff respectfully requests that that complaint be filed under seal.

CONCLUSION

For the foregoing reasons, Plaintiff requests that this court Order that Plaintiff's complaint be filed and maintained under seal.

Respectfully submitted,

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EXHIBIT 1

Un-redacted complaint filed with Court only

EXHIBIT 2

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Gov't Health Center Accused Of Biopsy Chemical Mix-Up

By **Darcy Reddan**

Law360, New York (October 30, 2017, 6:23 PM EDT) -- A patient at a government health center suffered third-degree burns after a physician used the wrong chemical during a biopsy-related procedure, a complaint filed Friday in New York federal court alleges.

Stephen Cohodes alleged that the mishap occurred at a New York City government-operated health facility, Callen-Lorde Community Health Center, during a procedure that he had undergone previously, though details about the exact nature of the procedure are redacted in the complaint. During the procedure, Dr. Meera Shah allegedly used trichloroacetic acid instead of acetic acid, or vinegar, resulting in third-degree burns and necrotic tissue.

Cohodes, who the complaint says had undergone the procedure five times, alleges that the staff should have recognized the severity of his reaction if they were as proficient in the procedure as they claimed. TCA is a chemical normally used to burn off genital warts, according to the complaint.

Cohodes brings the claims under the Federal Tort Claims Act for the tremendous pain he says he endured as well as a host of redacted claims. He is seeking an unspecified amount in damages.

In November 2016, Cohodes allegedly went to Callen-Lorde for an unspecified biopsy, which was performed by Shah with Dr. James Braun overseeing. According to the complaint, the procedure lasted 20 minutes instead of five, and it left Cohodes in extreme pain because the staff failed to notice that they were applying a much stronger chemical.

In addition to the claim that the staff should have noticed the mistake, Cohodes alleges that the staff was aware that they were using the wrong chemical. According to Cohodes, they improperly disposed of the chemical when they became aware, but did not notify him.

Cohodes says he called the health center the next day and was informed that he should return because the staff realized they had used TCA instead of vinegar.

Shah and Braun apologized following the checkup and offered to pay $400 for Cohodes to see an outside specialist and pay for future medical costs and prescriptions, according to the complaint.

In addition to the apology, Cohodes alleges that the Associate Director of Medicine of Callen Lorde Community Health Center informed him that they changed several chemical bottling procedures after the incident.

Aside from the alleged agony endured by Cohodes during the initial visit, he says that the application of TCA cooked his tissue samples, resulting in further treatment.

Counsel for Cohodes declined to comment on Monday.

Representatives for Callen-Lorde could not be reached for comment Monday.

Cohodes is represented by Andrew I. Hamelsky of White and Williams LLP.

Counsel information for the federal court was not available at the time of publication.

The case is Cohodes v. United States Of America et al, case number 2:17-cv-08307, in the U.S. District Court for the Southern District of New York.

--Editing by Alanna Weissman.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

STEPHEN COHODES,	
Plaintiff,	**Civil Action No.: 1:17-cv-08307**
-against-	**ORDER**
UNITED STATES OF AMERICA, CALLEN-LORDE COMMUNITY HEALTH CENTER, MEERA SHAH, M.D., JAMES BRAUN, D.O., WENDY STARK, and JANE DOE 1, JANE DOE 2, and JANE DOE 3 (CALLEN-LORDE NURSES OR ASSISTANTS),	
Defendants.	

ORDER

AND NOW, this _____ day of _____, 2017, upon consideration of the Motion to Seal of Plaintiff, Stephen Cohodes, is it hereby ORDERED that said Motion is GRANTED. The complaint shall be filed under seal and remain confidential and under seal until further order of this Court.

UNITED STATES DISTRICT COURT:

_____
J.