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

UNITED STATES OF AMERICA, ex rel. ANNE F. LANDERS,	)	
Plaintiff,	)	NO: 99-2097-D/V
v.	)	
BAPTIST MEMORIAL HEALTHCARE CORP., BAPTIST MEMORIAL HEALTH CARE SYSTEMS, INC., and BAPTIST MEMORIAL HOSPITAL MEMORIAL HOSPITAL, INC., d/b/a BAPTIST MEMORIAL MEDICAL CENTER, DOE CORPORATIONS 1-20,	)	
Defendants.	)	

ORDER ON DEFENDANTS' MOTION FOR SUPPLEMENTAL
DISCOVERY CONFERENCE AND FOR PROTECTIVE ORDER

This cause came to be heard on December 2, 2004, before the undersigned magistrate judge upon the defendants' motion, the response of the relator, statements of counsel for the respective parties, and the record in this cause, from all of which the Court finds and orders:

I. CLAIMS RELATING TO SURGERY PATIENTS

1. The defendants' request for a protective order regarding the obligation to respond to Requests for Production Nos. 3 and 6 in Plaintiff's First Set of Interrogatories and First Requests for Production of Documents and Things to Defendant, served on August 20, 2004, is granted in part and the defendants' shall provide the requested discovery to the relator in accordance with this order, and subsequent orders, of the Court.

2. Since the filing of the defendants' motion, the relator has filed, in the form of a spreadsheet attached as Exhibit A to Relator's Response to First Interrogatories and Production Requests to Plaintiff from Defendants, a schedule identifying approximately 1,787 surgery records that she believes reflect potential violations of government standards and therefore she alleges constitute potential false claims. The relator has advised the Court that her review of surgery records provided in discovery is not yet finished, and that when finished, the schedule of alleged potential false claims will likely increase.

3. The parties agree in principle to the selection of a protocol for statistical sampling of the universe of alleged false surgery claims so as to manage discovery related to such allegations.

4. The defendants shall submit their proposed protocol to the relator by December 16, 2004, and the relator shall submit her response to the defendants' proposed protocol by December 30, 2004.

5. The relator shall submit her schedule of allegedly false surgery claims by February 28, 2005, and such schedule of allegedly false surgery claims will constitute the universe from which the statistical sample will be drawn pursuant to the protocol ultimately selected or ordered by the Court.

6. The additional surgery records (page 2 of the surgery records and attachments, if any in the medical record) and billing records requested by the relator for surgery patients will be produced for the surgery cases in the statistical sample that will be selected by the procedure described above.

II. CLAIMS RELATED TO ICU PATIENTS

7. The defendants' request for a protective order regarding the obligation to respond to Requests for Production Nos. 14 and 15 in Plaintiff's First Set of Interrogatories and First Requests for Production of Documents and Things to Defendant, served on August 20, 2004, is granted in part and the defendants shall provide the requested discovery to the relator in accordance with this order, and subsequent orders, of the Court.

8. The defendants have advised the Court that they are attempting to locate and produce to the relator the payroll records that will identify the hospital personnel who worked in the various medical center ICU departments during the times pertinent to the relator's complaint. This process is ongoing and is expected to take approximately two (2) months.

9. The defendants have also advised the Court that they are attempting to locate computerized staffing records that should document the patient census and the staff assignment for the various medical center ICU departments pertinent to the relator's complaint.

10. Both parties agree that the information describe in paragraphs 8 and 9 above will be necessary for the relator to identify the claims related to ICU patients that she alleges to be false, and both parties agree that the production of the medical records and billing records for ICU patients should await the production by the Defendant of information necessary for the relator to identify potential claims and the relator's designation of the claims that she alleges to be false.

III. MINUTES OF VARIOUS HOSPITAL COMMITTEES

Defendant, Baptist Memorial Healthcare, also seeks a protective order in regard to the relator's request for all Surgical Services, Medical Executive and Infection Control Committee meeting notes and minutes for the period between 1994 through 2000. The court heard oral arguments on this point during the hearing held on December 2, 2004 and decided to take the issue under advisement.

Baptist contends that these meeting notes and minutes were prepared pursuant to the Tennessee Peer Review Statute, Tenn. Code Ann. § 63-6-219, and are therefore privileged information not

subject to discovery. Interestingly, Baptist cites to two cases which stand for the proposition that federal law does not support a peer review privilege. *Lemasters v. Christ Hospital*, 791 F. Supp. 188 (S.D. Ohio 1991); *Nilivar v. Mercy Health System-Western Ohio*, 210 F.R.D. 597 (S.D. Ohio 2002). Despite this acknowledgment, Baptist contends, in the alternative, that the rationale and the objective of the state law justify limiting the disclosure of information to at least that which is directly related to the relator's claim.

The relator, Anne Landers, asserts that the meeting notes and minutes are not protected by any privilege because state law has no application to this case given that the action was brought pursuant to the federal False Claims Act. Like Baptist, Landers cites *Nilivar v. Mercy Health System-Western Ohio* to illustrate that a physician peer review privilege does not exist within the federal common law.

In *Nilivar*, the plaintiff, a doctor, brought federal and state antitrust claims against the defendants, which were healthcare service providers. *Nilivar v. Mercy Health System-Western Ohio*, 210 F.R.D. 597, 599 (S.D. Ohio 2002). The doctor moved to compel discovery. *Id*. Defendants objected to the doctor's requests, claiming that the information the doctor sought was protected by a peer review privilege. *Id*. at 600. The court overruled the

objections holding that no such privilege was recognized by the federal court. *Id*. at 601. The court further held that the great weight of federal authority did not support the theory that a physician peer review privilege was recognized as a matter of federal common law. *Id*.

The court finds *Nilivar* to be persuasive and adopts the holding in *Nilivar*. Accordingly, Baptist's request for a protective order based on the peer review statute concerning plaintiff's request for all Surgical Services, Medical Executive and Infection Control Committee meeting notes and minutes for the period between 1994 and 2000 is denied. Nevertheless, because of the sensitive nature of these documents, Baptist need produce only those portions of the documents which directly relate to Lander's claim. All other sections not related to Lander's claim may be redacted by Baptist.

IT IS SO ORDERED this 16th day of December, 2004.

DIANE K. VESCOVO
UNITED STATES MAGISTRATE JUDGE