

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

SCHYLER GRODMAN,

Plaintiff,

v.

No. 5:23-CV-210-H

TEXAS TECH UNIVERSITY HEALTH
SCIENCES CENTER,

Defendant.

ORDER

Before the Court is the parties' joint motion for entry of an agreed confidentiality and protective order. Dkt. No. 38. The Court grants the motion and enters the following protective order. The Court removed paragraphs 21 through 27 of the parties' proposed order and added paragraphs 22 through 24 regarding confidential information and the Court's requirements for sealing motions.

1. The term "Producing Party" means the party or third party producing Confidential Information and the "Receiving Party" means the party, person or entity to whom production of Confidential Information is made.
2. The term "party" shall mean all named parties to any action in the above-captioned litigation, including any named party added or joined in this action.
3. The term "third party" shall mean any individual, corporation, other natural person or entity, or any state, federal, or local government agency, other than a named party.
4. The term "documents" as used herein is intended to be comprehensive and include any and all materials in the broadest sense contemplated by Rule 26(b) of the Federal Rules of Civil Procedure, and shall include all written, oral, recorded, or graphic

material, however produced or reproduced, including, but not limited to, all written or printed matter of any kind, computer data, all graphic or manual records or representations of any kind, and electronic or mechanical records or representations of any kind.

5. The term "information" as used herein is intended to be comprehensive and includes any and all information the Producing Party provides to the Receiving Party by any means, including testimony from any person obtained by deposition, deposition on written questions, at hearing, or otherwise.
6. The term "Confidential Information" means: any information of any type, kind, or character that is designated as "Confidential" by any of the supplying or receiving persons, whether it be a document, information contained in a document, information revealed during discovery, or otherwise.
7. The term "Confidential Health Information" means any document or information supplied in any form, including via testimony from any person, or any portion thereof, which identifies an individual or subscriber in any manner and that:
 - a. related to the past, present, or future case, services, or supplies relating to the 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, and;
 - b. either reveals the identity of the specific individual or could reasonably be used to reveal the identity of the specific individual.

Confidential Health Information specifically includes "protected health information" as such term is defined by the Standards for Privacy of Individually Identifiable

Health Information, 45 C.F.R. Parts 160 and 164, promulgated pursuant to the Health Insurance Portability and Accountability Act of 1996. See 45 C.F.R § 160.103

("protected health information" and "individually identifiable health information").

"Confidential Health Information" includes, but is not limited to, health care information in a personnel file, and a patient's dental and orthodontia information and related care information, medical bills, claims forms, charge sheets, medical records, medical charts, test results, notes, dictation, invoices, itemized billing statements, remittance advice forms, explanations of benefits, checks, notices, and requests. "Confidential Health Information" also includes all notes, summaries, compilations, extracts, abstracts, or oral communications that contain, are based on, or are derived from Confidential Health Information of a specific individual.

8. This Order shall govern the handling, disclosure, and disposition of all designated Confidential Information and Confidential Health Information in this case. To the extent documents and information have been marked and produced prior to the date of this Order bearing a confidentiality designation, such documents and information shall be afforded the same protections, treatment, and handling as the documents and information designated "Confidential Health Information" herein.
9. All Confidential Information and Confidential Health Information produced or exchanged in the course of this litigation may not be used or disclosed for any purpose other than for this litigation and in accordance with the terms of this Order.
10. Not later than ninety (90) days after final determination of this action, Confidential Health Information (including all hard copies) produced or exchanged, will be returned to the Producing Party or destroyed, and all electronic media containing Confidential

Health Information will be cleared, purged or destroyed consistent with NIST Special Publication 800-88, Guidelines for Media Sanitization, such that the Confidential Health Information can no longer be retrieved by the party to whom the information was produced. For purposes of this Protective Order, the "final determination of this action" shall be deemed to be the later of:

- a. full settlement of all claims;
- b. final judgment herein after the completion and exhaustion of all appeals, rehearings, remands, trials and reviews, if any, of this action; or
- c. the expiration of all time limits for the filing of or application for all appeals, rehearings, remands, trials or reviews of this action, including the time limits for the filing of any motions or applications for extension of time pursuant to applicable law.

11. Unless otherwise agreed by the party or third party producing Confidential Information, not later than ninety (90) days after the final determination of this action, each party shall return all Confidential Information in its possession, custody, or control, and all copies, derivations and summaries thereof, to the party who furnished it, or certify in writing that all such documents have been destroyed, provided, however, that each party may keep one copy of all documents produced herein and depositions taken herein containing Confidential Information (and not Confidential Health Information), subject to the provisions of this Protective Order regarding dissemination thereof.
12. Confidential Information and Confidential Health Information remains confidential even if the information is contained in documents revealed during depositions, or

identified within an interrogatory answer. However, Information shall not be regarded as Confidential Information if it is available or could be made available to the public, is in the public domain at the time of disclosure, or lawfully becomes part of the public domain. Confidential Information and materials already in the possession of, or that may come into the possession of, any branch or agency of the federal government, including but not limited to the United States Department of Justice and the Department of Health and Human Services, independent of this lawsuit, and that are, in that context, free of any privileged or confidential legal status, shall not be accorded any greater or additional protected confidential status by any confidentiality designation made in this lawsuit.

13. Should a document or record contain information that is protected under the terms and conditions of this Order as well as the terms and conditions of any other Protective Order entered in the above-captioned litigation, the terms and conditions of this Order shall govern in the event of any conflict between the orders unless the Court rules explicitly otherwise.
14. It is contemplated that the parties may seek information and documents that are either (a) trade secret, confidential, proprietary, or which are otherwise private or (b) documents and information subject to the provisions of the Privacy Act, 5 U.S.C. § 552a, to the provisions of 45 C.F.R. §§ 164.102-164.534, or to provisions of 42 U.S.C. § 1306, and there may be no waiver by the patient to produce the records to any entity outside of the requested or subpoenaed party, all of which is either Confidential Information or Confidential Health Information. In order to facilitate the production of Confidential Information or Confidential Health Information and to protect their

confidentiality, the Producing Parties are permitted to produce information to any Receiving Party in the litigation in their original, unredacted form. Upon production or receipt of the information, any party may designate the information as "Confidential" or "Confidential Health Information" as set forth herein.

15. Receiving Parties may use Confidential Information or Confidential Health Information only for purposes of the above-captioned litigation and may disclose them to non-parties to this litigation only as specified within this Protective Order and only if the non-party signs the form of acknowledgment attached to this Protective Order.

16. Confidential Information and Confidential Health Information produced or exchanged during this litigation must not be used by or disclosed to anyone other than the following Qualified Person(s):

- a. attorneys of record in this litigation, in-house and outside counsel for the named parties and for the Texas Health and Human Services Commission, outside counsel, and employees of such attorneys or named parties to whom it is necessary that the information be used or disclosed for purposes authorized under this Order and only for the purposes of preparing and presenting evidence in this litigation or any other state, federal or other governmental investigation or litigation;
- b. actual or potential consulting experts or independent technical experts engaged in this litigation who have executed a Certification attached as Exhibit A, and actual or potential testifying expert witnesses in this litigation who have executed a Certification attached as Exhibit A;

- c. the party or party representatives, in cases where the party is a legal entity, designated in writing by the party and disclosed to all parties and who have executed a Certification attached as Exhibit A;
- d. law enforcement personnel who have executed Exhibit A, including but not limited to:
 - i) attorneys general, deputy and assistant attorneys general, and/or any private counsel retained by such attorneys general or any other competent governmental authority, and their employees;
 - ii) the Attorney General for the United States of America, subordinate attorneys, and authorized employees employed by the United States Department of Justice; or
 - iii) licensed law enforcement agents and officers and their authorized subordinates and employees in the employment of a state, federal, or other competent government authority, including, but not limited to, Federal Bureau of Investigation special agents, Health and Human Services Office of Inspector General agents, and Medicaid Fraud Control Unit agents.
- e. any state, federal, or other competent governmental authority officials or employees of any state, federal, or other competent governmental authority who sign the Certification attached as Exhibit A and to whom it is necessary that the material be shown for purposes of this litigation;
- f. copy services, graphic support services, document imaging services, database/coding services, jury consultants, and other similar consultants, retained by counsel or by a party for purposes of this litigation;

- g. the Court and its authorized staff, court reporters, interpreters, translators and any special masters and/or mediators, arbitrators, or other similar persons, appointed by the Court;
 - h. any witness, provided that the witness does not retain any copy of the Confidential Information or Confidential Health Information;
 - i. any person who is shown from the face of the document as having been the author or prior recipient of the document; or
 - j. any other person authorized to use or disclose Confidential Information or Confidential Health Information by the Court after notice to all parties and an opportunity to be heard. Counsel for each party shall maintain a log of all Confidential Health Information used or disclosed by noting the general description of the information, the bates ranges, if any, or volume of the information disclosed, and to whom the information was disclosed. This log will be considered work product and not subject to discovery;
 - k. If this Court so elects, any other person designated as a Qualified Person by order of this Court, after notice to all parties and a hearing.
 - l. as soon as possible following execution, the State will provide copies of any Certification attached as Exhibit A that is executed by a Qualified Person described in (d) and (e) of this Paragraph. The provision of Confidential Information with Qualified Persons described in (a), (b), (c) and (d) of this Paragraph will not be disclosed except as provided in Paragraph 17.
17. No Confidential Information or Confidential Health Information may be intentionally disclosed to any person unless such person first is given a copy of this Protective Order

and advised that the information contained in the document is Confidential Information or Confidential Health Information and informed that an unauthorized disclosure of the information in the document may constitute a contempt of this Court. Each person (other than attorneys of record) to whom Confidential Information or Confidential Health Information is intentionally disclosed pursuant to this Protective Order shall execute a Certification in the form attached hereto as Exhibit A and shall agree to be bound by this Order prior to receiving any Confidential Information or Confidential Health Information. Each person executing Exhibit A shall also be informed that by executing Exhibit A, the person is agreeing to submit to the jurisdiction of the Court with respect to the enforcement of this Protective Order. At any request of the Court, all of these forms or some of them as designated shall be made available to the Court as may be required for the enforcement of this Protective Order. If the Court requests a Certification that has been executed by a consulting expert or other person or entity whose identity is not discoverable, the Certification shall be submitted to the Court *in camera* so as to prevent the disclosure of undiscoverable information. Copies of the executed Certifications shall be retained by counsel for the party or parties who disclosed the Confidential Information or Confidential Health Information to such persons. Copies of all Certifications executed pursuant to this Paragraph shall be disclosed to the party or third party who produced or supplied the Confidential Health Information:

- a. within thirty (30) days after the final resolution of this action (including resolution of all appellate proceedings;
- b. within thirty (30) days after the settlement of this action, or

- c. on good cause shown. Parties agree to retain the Certifications for a period of not less than five (5) years from the date of the conclusion of this case.
18. The parties should attempt to prevent the disclosure of Confidential Health Information in depositions by redacting or substituting any individually identifiable information such as the patient name, address, date of birth, age, phone number, fax number, and email address. Information containing Confidential Information or Confidential Health Information used or disclosed at a deposition taken in this litigation may be designated by any party as containing Confidential Information or Confidential Health Information by stating on the record at the deposition that all or part of the testimony contains Confidential Information, Confidential Health Information, or individually identifiable health information, and may be subject to the provisions of this Order.
19. If asked, persons attending depositions must leave the room before discussion of any Confidential Information or Confidential Health Information that the person is not entitled to review under this Order.
20. To the extent possible, the court reporter shall segregate into separate transcripts information designated as Confidential Information or Confidential Health Information with blank, consecutively numbered pages provided in a non-designated main transcript. The separate transcripts containing Confidential Information or Confidential Health Information shall have page numbers that correspond to the blank pages in the main transcript.
21. All deposition transcripts shall also be deemed to contain Confidential Information or Confidential Health Information for a period of thirty (30) days from the date the transcript is received by a party. Until expiration of the 30-day period, and unless

otherwise agreed to by the parties, the entire deposition will be treated as subject to protection against disclosure under this Order. During this period, any party or third party witness may designate information used or disclosed at such deposition as Confidential Information or Confidential Health Information by notifying all parties in writing of the specific pages and lines of the transcript which should be treated as such. Confidential Health Information so designated shall be underlined within the deposition transcript itself and those pages marked with the following legend: "CONFIDENTIAL HEALTH INFORMATION SUBJECT TO PROTECTIVE ORDER." Each party shall attach a copy of this written Order to the face of the hard copy or electronic transcript and each copy in any party's possession, custody or control. When such designation is made with respect to Confidential Health Information, the confidential portions and exhibits shall be filed in accordance with Paragraph 23 of this Order. The parties are mindful of their duty to limit such designation to information that they, in good faith, believe is legally protected. The terms and conditions of this Order shall apply to all such designated portions of any deposition transcript. Failure to designate any materials as Confidential Information or Confidential Health Information does not change the character of the information and shall not constitute a waiver of the assertion.

22. The Court generally discourages requests for filing motions and exhibits under seal. The parties may agree between themselves to designate documents "Confidential" during discovery. The typical standard there involves the parties assessing whether they want that material in the public domain. But filing that material with the Court under seal is a different matter. Court proceedings are, by and large,

public matters—and rightfully so given the First Amendment and that tax dollars fund the courts.¹

23. Here, the parties' agreement takes the form of this Protective Order. Federal Rule of Civil Procedure 26(c) permits the Court to issue a protective order "for good cause." To assist the parties in showing good cause here, the Court adds the following requirements that complement the sealing practices of the Fifth Circuit. A party seeking to file a specific document under seal must move for leave to do so and: (1) brief the legal authorities indicating the risks of disclosure outweigh the public's right to know, and (2) explain that no other viable alternative to sealing exists. Further, all facts recited in any such motion must be verified by the oath or declaration of a person or persons with personal knowledge.
24. If any party wishes to submit Confidential Information to the Court, the parties shall request to file the materials under seal, as appropriate and consistent with Fifth Circuit precedent. *See Binh Hoa Le v. Exeter Fin. Corp.*, 990 F.3d 410, 417–21 (5th Cir. 2021). The submission must be filed pursuant to Local Civil Rule 79.3 or in a sealed envelope bearing the caption of this action and a notice in the following form:

**CONFIDENTIAL INFORMATION or
CONFIDENTIAL ATTORNEYS EYES ONLY INFORMATION**

[caption]

This envelope, which is being filed under seal,
contains documents that are subject to a Protective

¹ *See Binh Hoa Le v. Exeter Fin. Corp.*, 990 F.3d 410, 417–21 (5th Cir. 2021); *United States v. Holy Land Found. for Relief & Dev.*, 624 F.3d 685, 690 (5th Cir. 2010) ("Public confidence [in our judicial system] cannot long be maintained where important judicial decisions are made behind closed doors and then announced in conclusive terms to the public, with the record supporting the court's decision sealed from public view." (alteration in original) (quoting *In re High Sulfur Content Gasoline Prods. Liab. Litig.*, 517 F.3d 220, 230 (5th Cir. 2008))); *SEC v. Van Waeyenberghe*, 990 F.2d 845, 849 (5th Cir. 1993) ("Public access [to judicial records] serves to promote trustworthiness of the judicial process, to curb judicial abuses, and to provide the public with a more complete understanding of the judicial system, including a better perception of its fairness." (alteration in original) (quoting *Littlejohn v. BIC Corp.*, 851 F.2d 673, 682 (3d Cir. 1988))); *see also Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1177 (6th Cir. 1983) (explaining that the First Amendment and the common law limit a court's discretion to seal records).

Order governing the use of confidential discovery material.

No Prejudice.

25. Failure to designate Confidential Information or Confidential Health Information as confidential does not change the character of the information as confidential.

Documents containing Confidential Information or Confidential Health Information previously produced may be retroactively designated as Confidential Information or Confidential Health Information and deemed so marked by notice in writing within ten (10) business days of the Producing Party becoming aware of such disclosure.

Documents unintentionally produced previously or in the future without the appropriate designation may be retroactively designated in the same manner and shall be treated as Confidential Information or Confidential Health Information from the date written notice of such designation is provided to the receiving party. As soon as reasonably possible, the Producing Party shall re-produce the documents with the proper designation affixed. Upon receipt of properly redesignated documents, the Receiving Party shall return all unmarked or incorrectly designated documents to the Producing Party within ten (10) business days, or in the alternative, destroy them. The Receiving Party shall also ensure that all persons to whom it provided copies of such documents as allowed by this Protective Order either return or destroy incorrectly-designated documents. The inadvertent or mistaken disclosure of information or documents subject to the attorney-client privilege, work product doctrine, or other protection shall be handled in accordance with FRCP 502, other applicable laws and rules, and/or by any other agreements between counsel.
26. Documents containing Confidential Information or Confidential Health Information to be inspected shall be treated as Confidential Information or Confidential Health

Information during inspection. Inspected documents containing Confidential Information or Confidential Health Information may be marked at the time of copying for the Receiving Parties. Documents to be inspected that have not yet been so designated or marked may be designated by letter until the appropriate legends can be applied.

27. All Confidential Health Information provided to a Receiving Party shall be maintained securely, with adequate safeguards, as required by HIPAA, in the offices of counsel of record. 45 C.F.R. Sections 164.530(c)(1), 164.308, 164.310, 164.312. Any documents containing Confidential Information or Confidential Health Information used by or disclosed to persons identified in Paragraph 16 shall be maintained securely with adequate safeguards to assure against dissemination or disclosure in violation of the provisions of this Protective Order, as defined above. Copies of documents or exhibits containing Confidential Information or Confidential Health Information may be made or prepared by independent copy services or printers for the purpose of this litigation only if the vendors agree to the terms and conditions of this Order.
28. Nothing herein shall prevent use or disclosure beyond the terms of this Order if the parties agree to a revised or amended Order for the Court's consideration, or if an individual who is the subject of the Confidential Health Information authorizes such use or disclosure consistent with HIPAA and Medicaid, or, if the Court, after notice to the affected parties, orders such use or disclosure. Nor shall anything herein prevent any counsel of record from utilizing Confidential Information or Confidential Health Information produced or exchanged in this litigation during the interview or examination of any testifying witness who is a) indicated on the document as being an

author or source, b) a recipient of, or c) an expert on the Confidential Information or Confidential Health Information, irrespective of whether any party produced such information.

29. A party shall not be obligated to challenge the propriety of the designation of information as Confidential Information or Confidential Health Information at the time the designation is made and failure to do so shall not preclude a subsequent challenge. In the event that any party to this litigation disagrees at any point in these proceedings with a confidentiality designation by another party, the disagreeing party may so state in a written objection to the designating party. The parties shall attempt to resolve such dispute in good faith on an informal basis. If the parties cannot resolve the dispute within fourteen (14) days of service of a written objection, or such other time as the parties may agree in writing, the designating party shall be required to move the Court for an order preserving the designated status of such information. Failure to file a motion with the Court by the fourteenth day following the written objection, or such other time as the parties may agree in writing, shall terminate any restrictions and nullify the designation. In the event the designating party timely files a motion to preserve the disputed confidentiality designations, the information, documents, or materials specified in such motion shall continue to be protected under this Order until the Court rules on the motion or the parties informally resolve the issue. The party that designated the information as containing "Confidential Information" or "Confidential Health Information" shall have the burden of demonstrating the propriety of its designation.

30. To the extent this Order restricts use or disclosure of Confidential Information or Confidential Health Information during this litigation, such Order shall continue to be binding after the conclusion of this case.
31. This Order shall not bar an attorney of record from rendering advice to his client with respect to this litigation or from conveying an evaluation of the Confidential Information or Confidential Health Information in general, without using or disclosing Confidential Information or Confidential Health Information produced or exchanged herein; provided, however, that in rendering such advice and otherwise communicating with the client, the attorney shall not disclose Confidential Information or Confidential Health Information produced by another party or third party herein if the use or disclosure would be contrary to the terms of this Order, unless the client is otherwise permitted by law to use or disclose the Confidential Information or Confidential Health Information. This provision shall not be used to circumvent any requirements of this Protective Order.
32. Should any party bound by this Order receive a subpoena, civil investigative demand, or other process from a third party seeking, requesting, or requiring disclosure of Confidential Information or Confidential Health Information in any form, such person shall give notice immediately to the producing party so that the producing party may seek appropriate relief, if any. Notice shall be made within ten (10) days of the request for production and shall be in writing. Notice to HHSC shall take the form of written notification to the Office of the Attorney General, Civil Medicaid Fraud Division. No person bound by this Order who receives a subpoena, civil investigative demand, other process from a third-party seeking, requesting, or requiring the

disclosure of Confidential Information or Confidential Health Information shall produce or disclose such documents or information unless and until (a) ordered by a court having competent jurisdiction, or (b) such production or disclosure is in accordance with the provisions herein and is expressly consented to by the Producing Party.

33. Notwithstanding any provision of this Order to the contrary, in accordance with any applicable Federal, State, or Local laws that afford heightened protection to certain categories of Confidential Health Information including, but not limited to, records or diagnosis or treatment for alcohol or substance abuse, certain sexually transmitted diseases such as HIV/AIDS, mental health, and research pertaining to genetic testing, the Producing Party may completely exclude from production any information afforded heightened protection by such Federal, State, or Local laws. To the extent the Producing Party excludes from production any such information or withholds documents from production on grounds enumerated in this paragraph, it shall provide prompt written notice to the Receiving Party unless such notification would serve to identify the person to whom the records or diagnoses or treatment pertains.
34. Nothing in this Order shall affect the rights of the parties or third parties to object to discovery on grounds other than those related to the protection of Confidential Information or Confidential Health Information, nor shall it preclude any party or third party from seeking further relief of protective orders from this Court as may be appropriate under the Federal Rules of Civil Procedure. Any person requiring further protection of Confidential Information or Confidential Health Information may petition this court for a separate order governing the disclosure of its information.

35. Nothing herein shall prevent disclosure beyond the terms of this Protective Order if each party designating the information as confidential, the producing party, and any other affected parties, consent to such disclosure, or if the Court, after notice to all affected parties and an opportunity to be heard, orders such disclosures. Nothing herein shall prevent any counsel of record from utilizing Confidential Information or Confidential Health Information in the examination or cross examination of a witness at a deposition, hearing, or trial in this litigation.
36. A party may seek the written permission of the producing party or order of the Court with respect to dissolution or modification of any part of this Order. The parties may, by stipulation, provide for exceptions and modifications to this Order, in compliance with applicable law.
37. To the extent the provisions of this Order or any prior Protective Orders entered in this action restrict the communication and use of the documents produced thereunder, such orders shall continue to be binding after the conclusion of this litigation, provided that: (a) there shall be no restriction on documents that are used as exhibits in Court unless such exhibits were ordered sealed by the Court, or temporarily sealed by the Court upon motion as referenced in Paragraph 25, and (b) a party may seek the written permission of the Producing Party or order of the Court with respect to dissolution or modification of such orders. Information that has become a matter of public record or are otherwise no longer confidential shall not continue to be subject to the terms of this Order after termination of this litigation

38. Any party may seek an order of this Court modifying this Protective Order, including a request for heightened protection for documents or information that are identified by a party as needing such protection.

So ordered on May 3, 2025.



JAMES WESLEY HENDRIX
UNITED STATES DISTRICT JUDGE