

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA, and THE STATE OF WISCONSIN,
ex rel. DR. TOBY TYLER WATSON,

Plaintiffs,

v.

Case No. 11-CV-236-JPS

JENNIFER KING VASSEL,

Defendant.

**OPPOSITION TO MOTION OF DEFENDANT JENNIFER
KING VASSEL FOR ENTRY OF A HIPAA QUALIFIED
PROTECTIVE ORDER AUTHORIZING DISCOVERY OF
NON-RELEVANT RECORDS OF N.B.**

Relator, Dr. Toby Tyler Watson, opposes the Motion Of Defendant Jennifer King Vassel (Dr. King) For Entry of a HIPAA Qualified Protective Order to discover medical records of N.B., from other providers, Document No. 118, on the grounds that the information is not relevant and not likely to lead to relevant information.

Dr. King cites *U.S. ex rel. Camillo v. Ancilla Systems, Inc.*, 233 F.R.D. 520, 522 (S. D. Ill. 2005) (citing *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978)) for the proposition that "The Supreme Court has interpreted relevance broadly to include any matter that bears on, or that reasonably could lead to other matters that could bear on, any issue that is or may be in the case." However, in *Oppenheimer*, the Supreme Court also held:

At the same time, "discovery, like all matters of procedure, has ultimate and necessary boundaries." Discovery of matter not "reasonably calculated to lead to the discovery of admissible evidence" is not within the scope of Rule 26(b)(1). Thus, it is proper to deny discovery of matter that is relevant only to claims or defenses that have been stricken, or to events that occurred before an applicable limitations period, unless the information sought is otherwise relevant to issues in the case.

(437 U.S. at 351-352, citations and footnotes omitted). The Supreme Court then held that discovery of class members' names was not permissible under this relevancy standard. *Camillo* does not mention this explication of the boundaries of Fed. R. Civ. P. 26(b)(1). Discovery of N.B.'s treatment by other providers is not permissible under this relevancy standard, as it is not relevant to, nor will it lead to admissible evidence on whether Dr. King caused false claims by writing prescriptions that are not for a medically accepted indication as defined under 42 U.S.C. § 1396r-8(k)(6), §1396r-8(g)(1)(B)(i),.

Without more, Dr. King asserts these records would be relevant to determining Dr. King's knowledge that she caused false claims, but this is not the case. The question is not whether other providers may have also caused false claims, but instead whether Dr. King (i) had actual knowledge the claims were false, (ii) was deliberately indifferent to the fact the claims were false, or (3) recklessly disregarded the fact that the claims were false. 31 U.S.C.A. § 3729(b)(1)(B); *U.S. v. King Vassel*, 728 F.3d 707, 712 (7th Cir. 2013). N.B.'s records in the hands of other providers has no bearing on, nor will they lead to any admissible records with respect to, the state of Dr. King's knowledge.

Dr. King also argues that these records may help establish that state Medicaid programs can reimburse prescriptions that are not for a medically accepted indication as defined under 42 U.S.C. § 1396r-8(k)(6), §1396r-8(g)(1)(B)(i).¹ The *Relator* does not dispute that Wisconsin has been reimbursing prescriptions that are not for a medically accepted indication when a doctor such as the defendant here ignores Congress' coverage restriction to medically accepted

¹ Dr. King actually uses the term "off-label," ignoring that *Relator* has never asserted no off-label prescriptions may lawfully be reimbursed; just that they must have support in one of the compendia incorporated by reference in 42 U.S.C. §1396r-8(g)(1)(B)(i) to be lawfully reimbursed.

indications. Whether such prescriptions may be legally reimbursed is a legal question, not a factual one.

For the foregoing reasons, the *Relator* respectfully suggests the Motion Of Defendant Jennifer King Vassel For Entry Of A HIPAA Qualified Protective Order to discover medical records of N.B., from other providers, Document No. 118, should be **DENIED**.

Dated this 30th day of October, 2013.

LAW PROJECT FOR PSYCHIATRIC
RIGHTS, INC.

s/ James B. Gottstein
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