**SUPERIOR COURT OF CALIFORNIA,**
**COUNTY OF SAN DIEGO**
**CENTRAL**

**MINUTE ORDER**

DATE: 11/06/2017 TIME: 02:29:00 PM DEPT: C-73

JUDICIAL OFFICER PRESIDING: Joel R. Wohlfeil
CLERK: Juanita Cerda
REPORTER/ERM: Not Reported
BAILIFF/COURT ATTENDANT:

CASE NO: **37-2014-00022411-CU-MT-CTL** CASE INIT.DATE: 07/08/2014
CASE TITLE: **D'Angelo Santana vs Rady Children's Hospital-San Diego [E-File]**
CASE CATEGORY: Civil - Unlimited CASE TYPE: Mass Tort

**APPEARANCES**

The Court, having taken the above-entitled matter under submission on 10/27/17 and having fully considered the arguments of all parties, both written and oral, as well as the evidence presented, now rules as follows:

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After entertaining the arguments of counsel and taking the matter under submission, the Court now rules as follows:

The Motion (ROA # 400) of Plaintiffs D'Angelo Santana, a minor by and through her guardian ad litem, Tashinda Santana, Sasha Sami Shamon, and Alexandria N. Vanden Heuvel ("Plaintiffs"), pursuant to section 382 of the Code of Civil Procedure and Rule 3.764 of the Rules of Court, for an order certifying Plaintiffs' claims alleged against Defendant Rady Children's Hospital - San Diego ("Defendant" or "Rady") in Plaintiffs' First Cause of Action ("COA") under California's Confidential Medical Information Act, Civil Code 56 et seq., ("CMIA") in Plaintiffs' Consolidated Amended Class Action Complaint and Injunctive Relief, filed January 28, 2015, on behalf of a class of similarly situated persons defined as follows: "All patients of Defendant Rady Children's Hospital - San Diego who were admitted in-patient to one of Defendant's hospital, satellite or urgent care locations between July 1, 2012 and June 30, 2013" ("Class"), is GRANTED.

As set forth below, this order is conditioned on the filing of an amended pleading.

Plaintiffs prosecuting this Motion will be the class representatives. They have claims which are typical of the class, and can adequately represent the class. Further, it is undisputed that class counsel is adequate.

The parties are instructed to meet and confer regarding the content of the class notice, and the manner of class notice. The Court defers any ruling on these issues until a later hearing.

Plaintiffs must demonstrate the existence of an ascertainable and sufficiently numerous class, a well-defined community of interest, and substantial benefits from certification that render proceeding as a class superior to the alternatives. Brinker Restaurant Corp. v. Superior Court (2012) 53 Cal. 4th 1004, 1021. The certification question is essentially a procedural one that does not ask whether an action is legally or factually meritorious. Id. at 1023. On the other hand, issues affecting the merits of a case may be enmeshed with class action requirements. Id. The Court must examine Plaintiffs' theory of recovery, assess the nature of the legal and factual disputes likely to be presented, and decide whether individual or common issues predominate. Id. at 1025.

**A. Whether Common Issues Predominate?**

The community of interest requirement embodies three factors: (1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class. Code Civ. Proc. 382; Linder v. Thrifty Oil Co. (2000) 23 Cal. 4th 429, 435-436. The requisite community of interest exists only where the issues which may be jointly tried, when compared with those requiring separate adjudication, are sufficiently numerous and substantial to make a class action advantageous. Hamwi v. Citinational-Buckeye Inv. Co. (1977) 72 Cal. App. 3d 462, 471. If a class action will splinter into individual trials, common questions do not predominate and litigation of the action in the class format is inappropriate. Id. Predominance is a comparative concept, and the necessity for class members to individually establish eligibility and damages does not mean individual fact questions predominate. Sav-On Drug Stores, Inc. v. Superior Court (2004) 34 Cal. 4th 319, 334.

"Any provider of health care ... who negligently creates, maintains, preserves, stores, abandons, destroys, or disposes of medical information shall be subject to the remedies and penalties provided under subdivisions (b) and (c) of Section 56.36." Civ. Code 56.101. "... [A]n individual may bring an action against a person or entity who has negligently released confidential information or records concerning him or her in violation of [the Confidentiality of Medical Information Act] for "nominal damages of one thousand dollars" and the amount of any actual damages. Civ. Code 56.36(b). The individual does not have to show that he suffered or was threatened with actual damages in order to recover the $1,000. Eisenhower Medical Center v. Superior Court (2014) 226 Cal. App. 4th 430, 434.

"Medical information" is defined as "any individually identifiable information, in electronic or physical form, in possession of or derived from a provider of health care ... regarding a patient's medical history, mental or physical condition, or treatment. Civ. Code 56.05(j). "Individually identifiable" means that the medical information includes "any element of personal identifying information sufficient to allow identification of the individual, such as the patient's name, address, electronic mail address, telephone number, or social security number, or other information that, alone or in combination with other publicly available information, reveals the individual's identity." Id. On the other hand, unless there is a specific written request by the patient to the contrary, the CMIA does not prevent a hospital, "upon an inquiry concerning a specific patient, from releasing at its discretion any of the following information: the patient's name, address, age, and sex; a general description of the reason for treatment (whether an injury, a burn, poisoning, or some unrelated condition); the general nature of the injury, burn, poisoning, or other condition; the general condition of the patient; and any information that is not medical information as defined in Section 56.05." Civ. Code 56.16 (emphasis added); see also Garrett v. Young (2003) 109 Cal. App. 4th 1393, 1407-1408 (release of "innocuous information" envisioned by section 56.16 exception represents a pragmatic solution to the problem faced by health care providers surrounded by concerned friends and family of a patient or members of the media when the patient is a

public figure).

Plaintiffs must plead and prove that the subject medical information was actually viewed by an unauthorized person. Sutter Health v. Superior Court (2014) 227 Cal. App. 4th 1546, 1550 and 1555. "... [W]ithout an actual confidentiality breach, a health care provider has not violated section 56.101 and therefore does not invoke the remedy provided in section 56.36." Id. at 1555. "No breach of confidentiality takes place until an unauthorized person views the medical information. It is the medical information, not the physical record (whether in electronic, paper, or other form), that is the focus of the Confidentiality Act. While there is certainly a connection between the information and its physical form, possession of the physical form without actually viewing the information does not offend the basic public policy advanced by the Confidentiality Act." Id. at 1557.

**Confidential Information / Actually Viewed.** Defendant argues that a determination about what medical information was released and whether such information was confidential will require individual inquiry. However, the allegations and presently available evidence establish that the information disclosed as to all potential class members was the same (e.g., name, primary diagnoses, admit/discharge dates, medical record number, and other insurance billing and claims information). Whether the information contained within the subject "Exercise.xlsx" file (an Excel spreadsheet) is individually identifiable, in the possession of and derived from a health care provider, and pertains to medical history, condition and treatment is a common issue. Section 56.16 and the Garrett v. Young case are not applicable because this action does not involve an inquiry concerning a specific patient, and the subject Excel spreadsheet appears to contain information beyond the scope of that specified within section 56.16. The type of information contained within the spreadsheet is common as to all of the class member patients.

Whether this information constitutes confidential medical information subject to protection by the CMIA is a common issue. See Eisenhower Medical Center v. Superior Court (2014) 226 Cal. App. 4th 430 (name, medical record number, age, date of birth, and last four digits of Social Security number is not information encompassed within the CMIA; the CMIA pertains to substantive information regarding a patient's medical condition or history). Finally, whether this information was "actually viewed" is also a common issue. As alleged, one or more of the four job applicants scrolled through the entire spreadsheet.

**Voluntary Disclosure.** Defendant argues that whether each class member intended the information contained within the Exercise.xlsx file to remain confidential is a question regarding an individual inquiry. Defendant cites deposition testimony which evidences that three named Plaintiffs voluntarily shared confidential medical information with friends, family members and certain other private and governmental entities. Further, Defendant's employees submit declarations stating that it is common practice for Rady patients, or their guardians, to authorize disclosure of their medical information to third parties for a variety of reasons. However, Defendant presents no authority for the proposition that select, authorized disclosures negate the overall confidentiality of the medical information. The Court does not presuppose that a patient's decision to confide a medical condition to a friend, or an authorized disclosure to a social services agency necessarily entails giving up a statutory right to confidentiality with respect to other, unauthorized disclosures to strangers. This is not an individual issue because there is no evidence presented that some putative class members did, or would have, authorized disclosure to the four job applicants [redacted]. In addition, "[a]ny waiver by a patient of the provisions of [the CMIA] ... shall be deemed contrary to public policy and shall be unenforceable." Civ. Code 56.37.

Defendant also presents evidence (via the Declaration of Christina Galbo) suggesting that some patients (via parental consent) have chosen to disclose details of their medical condition, diagnosis, treatment and / or prognosis with the public. This has occurred via the "Rady Children's Hospital Foundation" website ("Patient Stories"), Defendant's Facebook page, third party Facebook pages, etc. However, this evidence does not negate the predominance of common issues for two reasons. First, there is no authority cited for the proposition that such a generalized disclosure constitutes a waiver of the CMIA's protection against more specific and particularized disclosures of medical information. As discussed above, a voluntary waiver is unenforceable.

Second, the very nature of these testimonials suggest that they are an isolated occurrence that does not represent the vast majority of potential class members. See Sotelo v. MediaNews Group, Inc. (2012) 207 Cal. App. 4th 639, 659–660 (the Court may not deny class certification by focusing on the divergent experiences of a select minority of class members, and ignoring the overwhelming similarities among the majority). Even assuming 200 patients posted similar Internet testimonials, this represents just 1.4 percent of the overall class. The overwhelming majority of class members did not voluntarily disclose the particulars of their medical conditions to the world, via the Internet. These testimonials do not defeat class certification.

**Individualized Claims for Actual Damages.** The first cause of action within the "Consolidated Amended Class Complaint" seeks both nominal damages in the amount of $1,000 and "actual damages suffered, if any." See ¶ 34. Plaintiffs argue in reply: "Plaintiffs' trial plan is not to calculate actual damages on a 'class wide basis'; instead, Plaintiffs seek only the nominal or statutory damages of $1,000 under the CMIA on a 'class wide basis,' since a nominal damage award is identical to each Class member and can be easily calculated on a class wide basis." Reply at p. 8, lines 12-15. However, Plaintiffs cannot simply disavow the right for members of the class to recover actual damages in light of the allegation within the operative pleading. In fact, there is unrefuted evidence that some named Plaintiffs seek actual damages as compensation for the cost of obtaining identity theft protection and for their emotional distress.

There lacks a sufficient community of interest within a class where each member would be required to individually litigate numerous and substantial questions to determine his or her right to recover following the class judgment determining issues common before the class. Reyes v. San Diego County Bd. of Supervisors (1987) 196 Cal. App. 3d 1263, 1278. However, the necessity for class members to individually establish eligibility and damages does not necessarily mean individual fact questions predominate. Id. A class action is not inappropriate simply because each member of the class may at some point be required to make an individual showing as to his or her eligibility for recovery or as to the amount of his or her damages. Id. The Court can devise remedial procedures which channel the individual determinations that need to be made through existing administrative forums. Id. Arguably, a common procedure could be devised to determine whether individual class members are entitled to compensation for the purchase of identity theft protection. On the other hand, individual claims for emotional distress damages would devolve into a series of mini-trials that threaten to swamp the common liability issues.

In order to address this concern, the Court requires that Plaintiffs file a "Consolidated Second Amended Class Complaint" within thirty (30) days of the date of this order. The amended pleading must specify that the class claim does not encompass actual damages. Any claim for actual damages may only be recovered as part of an individual claim by one or more representative Plaintiffs. Further, the class notice must explain that class members are giving up their right to pursue a claim for actual damages, and must opt out of this action in order to pursue such a claim, subject to any applicable statute of

limitations.

**Defendant's Affirmative Defense.** In the event Defendant satisfies the multiple requirements set forth within section 56.36(e)(2), it will be entitled to an affirmative defense preventing an award for nominal damages, although actual damages could still be awarded. Civ. Code, 56.36(e). Whether this affirmative defense applies is wholly dependent on Defendant's course of conduct, a common issue that does not defeat class certification.

**B. Adequate Representation**

The party seeking class certification has the burden of proving the adequacy of its representation. Richmond v. Dart Industries, Inc. (1981) 29 Cal. 3d 462, 470. However, when the party opposing certification presents evidence that indicates widespread antagonism to the class suit, the adequacy of representation is called into question. Id. A putative representative cannot adequately protect the class if his interests are antagonistic to or in conflict with the objectives of those he purports to represent. Id. But only a conflict that goes to the very subject matter of the litigation will defeat a party's claim of representative status. Id. Moreover, if the Court can divide the class into subclasses or otherwise separate those issues that merit class action treatment so as to remove any antagonism, then the action need not be dismissed. Id. at 470-471. When the vast majority of a class perceives its interest as diametrically opposed to that of the named representatives, the Court cannot equitably grant named Plaintiffs the right to pursue the litigation on behalf of the entire class. Id. If the vast majority of the class do not oppose the suit, the minority may have its views presented either as a subclass or as interveners. Id. Named Plaintiffs inadequately represent the putative class where they fail to raise claims reasonably expected to be raised by members of the class and thus pursue a course which, even should the litigation be resolved in favor of the class, would deprive class members of many elements of damage. City of San Jose v. Superior Court (1974) 12 Cal. 3d 447, 464.

**Failure to Prosecute Claims for Actual Damages of Putative Class Members.** Defendant argues that Plaintiffs cannot disavow the ability to recover actual damages, and still maintain the ability to adequately represent all putative class members. At least some members of the class will have claims for actual damages that would be "waived" via this action. However, as discussed above, this will be addressed by amending the pleading and including an opt-out procedure within the class notice.

**Putative Class Members Who Were Treated in the Neonatology Service Line.** As discussed above, Plaintiffs must plead and prove that the subject medical information was actually viewed by an unauthorized person. Defendant contends that the evidence will demonstrate that information viewed by an "unauthorized person," if any, was limited to data related to "patients treated in the neonatology service line." This results from the manner in which the "Exercise" spreadsheet was constructed necessitating an "affirmative act of changing the filter and field settings in certain specific ways." Opposition at p. 23, lines 3-8. Defendant contends named Plaintiffs were not treated by the neonatology service line such that their confidential information was not actually viewed. However, this evidentiary issue does not mandate denial of class certification at this stage of the proceedings. Rather, the Court envisions a process, such as trial bifurcation, where the issue of what medical information was actually viewed can be addressed as a preliminary matter. If Defendant's rendition of events prevails, then decertification will be ordered unless a named Plaintiff treated by the neonatology service line can be substituted in as class representative for the more limited class of neonatology patients.

**C. Superiority of Class Action Treatment**

By establishing a technique whereby the claims of many individuals can be resolved at the same time, the class suit both eliminates the possibility of repetitious litigation and provides small claimants with a method of obtaining redress. Linder v. Thrifty Oil Co. (2000) 23 Cal. 4th 429, 435. Generally, a class suit is appropriate when numerous parties suffer injury of insufficient size to warrant individual action and when denial of class relief would result in unjust advantage to the wrongdoer. Id. But because group action also has the potential to create injustice, the Court is required to carefully weigh respective benefits and burdens and to allow maintenance of the class action only where substantial benefits accrue both to litigants and the Court. Id.

**Privacy and confidentiality issues**. Court proceedings are generally open to the public. Thus, the privacy and confidentiality issues raised by Defendant would need to be addressed whether within the context of individual actions, or a class action. The use of procedural mechanisms, such as a protective order, will permit the Court and parties to effectively and appropriately utilize confidential medical information. See, e.g. U.S. ex rel. Stewart v. Louisiana Clinic (E.D. La., Dec. 12, 2002, No. CIV.A. 99-1767) 2002 WL 31819130, at *3 (HIPPA standards generally permit a health care provider to disclose nonparty patient records during a lawsuit, subject to an appropriate protective order, without giving notice to the nonparty patients).

**Manageability.** Although predominance of common issues is often a major factor in a certification analysis, it is not the only consideration. Duran v. U.S. Bank Nat. Assn. (2014) 59 Cal. 4th 1, 28. In certifying a class action, the Court must also conclude that litigation of individual issues, including those arising from affirmative defenses, can be managed fairly and efficiently. Id. at 28-29. As discussed above, this Court believes that procedures can be devised that would permit for efficient management of individual issues (e.g., the actual damage opt-out)

**Appointment of Guardian Ad Litems for Class Members.** The Court envisions a process whereby guardians would be appointed when, and if, individual class members are permitted to make a claim for a portion of any recovery, via settlement or after a trial on the merits. Defendant fails to submit authority demonstrating that the Court appointed guardian is necessary at an earlier time (i.e., upon receipt of the class notice). Defendant also fails to submit authority suggesting that the necessity of such an appointment negates the ability to certify a class. If this were the case, then minor children could never join in a class action lawsuit, which is not the status of current law. See Hypolite v. Carleson (1975) 52 Cal. App. 3d 566 (class action comprised of minor children Plaintiffs premised on the wrongful denial benefits in the form of aid to families with dependent children).

**Whether Class Treatment is Authorized by Section 56.36.** As set forth above, section 56.36(b) states that "an individual" may bring an action for the negligent release of medical information "concerning him or her." Defendant argues that this statutory language prohibits, as a matter of law, aggregation of these individual claims into a class action. Defendant cites no case authority supporting this interpretation of the statutory language. This argument lacks merit: "We do not find in § 205(g) the necessary clear expression of congressional intent to exempt actions brought under that statute from the operation of the Federal Rules of Civil Procedure. The fact that the statute speaks in terms of an action brought by "any individual" or that it contemplates case-by-case adjudication does not indicate that the usual Rule providing for class actions is not controlling, where under that Rule certification of a class action otherwise is permissible. Indeed, a wide variety of federal jurisdictional provisions speak in terms of individual plaintiffs, but class relief has never been thought to be unavailable under them." Califano v. Yamasaki (1979) 442 U.S. 682, 700. The Court agrees that an unequivocal statement from the Legislature would be necessary to limit class treatment, and that statutes authorizing an "individual" or "person" to bring an action are routinely interpreted as permitting for class treatment.

**Potential Scale of Aggregate Award.** Whether a multimillion-dollar award aggregating the nominal damages of thousands of patients is generally permissible (e.g., would pass constitutional muster) is a common issue that will be determined by the Court when and if the need arises. The Court notes that class action claims often aggregate many small claims into very large awards.

Plaintiffs' evidentiary objections (ROA # 440) are OVERRULED.

Plaintiffs' objections (ROA # 444) are SUSTAINED to the Declaration of Bryan Leifer and the Declaration of Jon Kardassakis, and OVERRULED to the Declaration of Dustin Kerkstra, the Declaration of Martha Oliver, the Declaration of Jacqueline Small and the Declaration of Christina Galbo.

IT IS SO ORDERED.

Judge Joel R. Wohlfeil