IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA

FIRST DISTRICT

CASE NO.: 1D21-1503

TALLAHASSEE MEMORIAL HEALTHCARE, INC.,

Petitioner,

vs.

LENNOX WILES, a minor, by and through his parents and natural guardians, JADE WILES and JUSTIN WILES, and JADE WILES and JUSTIN WILES, individually,

Respondents.

_____/

NOTICE OF SUPPLEMENTAL AUTHORITY

Respondents, LENNOX WILES, a minor, by and through his parents and natural guardians, JADE WILES and JUSTIN WILES, and JADE WILES and JUSTIN WILES, individually, by and through undersigned counsel, hereby file this Notice of Supplemental Authority, *Estate of Hultman v. County of Ventura*, No. CV 21-06280-DSF (RAOx), 2022 WL 2101723 (C.D. Cal. May 16, 2022)(attached hereto).

The federal *Hultman* case construes and applies the federal Patient Safety Quality Improvement Act ("PSQIA") on two issues pertinent to this certiorari proceeding.

The *Hultman* case is directly relevant to two issues addressed in this Certiorari proceeding.

The analysis and conclusion in subsection V.B. of the *Hultman* order (*Id.* at *7-9) is pertinent to the issue addressed in section VI of the argument in the Response to the Petition for Writ of Certiorari (p.36) where it is argued that a document not created **solely** for submission to a PSO is not Patient Safety Work Product even if it is intended to be provided to the PSO.

Subsection V of the *Hultman* order (*Id.* at *5) is directly relevant to Section I.A. of the Response (p.21) that under these circumstances the hospital, not the Plaintiffs, has the burden of proof to demonstrate the existence of the privilege under the PSQIA.

WE HEREBY CERTIFY that a true copy of the foregoing was furnished to all counsel on the attached service list by email, on October 19, 2022.

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2022 WL 2101723
Only the Westlaw citation is currently available.
United States District Court, C.D. California.

ESTATE OF Scott HULTMAN et al.
v.
COUNTY OF VENTURA et al.

Case No.: CV 21-06280-DSF (RAOx)
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Filed 05/16/2022

Attorneys and Law Firms

Donnamarie Luengo, Deputy Clerk, Attorneys Present for Plaintiff(s): N/A

N/A, Court Reporter/Recorder, Attorneys Present for Defendant(s): N/A

Proceedings: (In Chambers) **MINUTE ORDER RE: PENDING DISCOVERY DISPUTE**

ROZELLA A. OLIVER, U.S. MAGISTRATE JUDGE

***1** Pending before the Court is a discovery dispute between Plaintiffs Estate of Scott Hultman, R.H., and Paula Hultman (collectively, "Plaintiffs") and Defendants Wellpath Management, Inc. and Wellpath Management L.L.C. (collectively, "Wellpath") regarding the discoverability of a Mortality and Morbidity Report and Review ("Report") and Psychological Autopsy of decedent Scott Hultman ("Decedent"). Plaintiffs and Wellpath (collectively, "the parties") dispute whether two parts of the Report and the Psychological Autopsy are privileged pursuant to the Federal Patient Safety and Quality Improvement Act ("PSQIA"), 42 U.S.C. § 299b-21 *et. seq.* The parties have completed their briefing. Dkt. Nos. 58-62, 72-74, 78, 81. The Court held a telephonic hearing on February 11, 2022. Dkt. No. 75. For the reasons set forth below, the Court GRANTS Plaintiffs' request to compel Parts I and III of the Report and the Psychological Autopsy.

I. Background

This case arises from the suicide of Decedent in November 2020 while Decedent was detained at the Ventura County Main Jail Pre-Trial Detention Facility. Compl. ¶ 1, Dkt. No. 2. Wellpath contracted with Ventura County to provide medical and mental health care to inmates in the Ventura County Jail. Answer ¶ 14, Dkt. No. 41.

On November 3, 2021, the parties emailed the Court with a request for an informal discovery conference ("IDC") for their dispute over the discoverability of Parts I and III of the Report. The Court asked the parties to submit the discovery requests and responses at issue. The parties provided Plaintiffs' discovery requests, Wellpath's responses, and Wellpath's privilege log. The Court requested the parties propose a letter briefing schedule and the Court adopted the parties' proposal. Dkt. No. 57. Plaintiffs filed their opening letter brief on November 18, 2021. Pls. Br., Dkt. No. 58. Wellpath filed its opposition letter brief on November 22, 2021. Wellpath Br., Dkt. No. 59. Plaintiffs filed their reply letter brief on November 23, 2021. Pls. Reply Br., Dkt. No. 60.

On November 29, 2021, after the Court had taken the dispute under submission, Wellpath filed a declaration from Mashekia Slack-Jones, a Wellpath employee. Slack-Jones Decl., Dkt. No. 61. On November 30, 2021, Plaintiffs filed an objection to the Slack-Jones Declaration. Pls. Obj., Dkt. No. 62. Plaintiffs requested the Court strike the declaration as untimely, and contended the declarant lacked personal knowledge. *Id.* Plaintiffs requested an opportunity to depose the declarant and respond if the Court was inclined to consider the declaration. *Id.*

On December 1, 2021, the Court issued an order directing the parties to meet and confer further and to propose a schedule for supplemental briefing, taking into consideration the timing of any related depositions. Dkt. No. 63.

On December 10, 2021, the parties filed a joint status report with a proposed schedule for supplemental briefing. Dkt. No. 64. The joint status report explained that while Ms. Slack-Jones was unavailable for deposition, Wellpath offered a substitute employee, Judd Bazzel, M.D., Patient Safety Officer and Medical Director for Care Management. *Id.* Additionally, the parties had scheduled the deposition of Ms. Leah James, R.N., the Health Services Administrator in Ventura, who was the person most knowledgeable on the content of Parts I and III of the Report. *Id.*

***2** On December 13, 2021, the parties emailed the Court with a request for an IDC regarding the Psychological Autopsy. Later on December 13, 2021, the Court adopted the parties' proposed briefing schedule for supplemental briefing

on the Report and also ordered the parties to include in their briefing their arguments on the applicability of the PSQIA privilege to the Psychological Autopsy. Dkt. No. 65.

Plaintiffs filed their supplemental opening brief on January 28, 2022. Pls. Suppl. Br., Dkt. No. 72. Wellpath filed its supplemental opposition brief on February 4, 2022. Wellpath Suppl. Br., Dkt. No. 73. Plaintiffs filed their supplemental reply brief on February 8, 2022. Pls. Suppl. Reply Br., Dkt. No. 74.

The Court held a telephonic hearing on February 11, 2022. Dkt. No. 75. Following the hearing, Plaintiffs filed a request for leave to submit as an exhibit a document referenced by the parties during the hearing as the "County's death review." Dkt. No. 76.

On February 15, 2022, the Court directed the parties to file further letter briefing on three specific questions. Dkt. No. 77. Wellpath filed its further supplemental letter brief on February 23, 2022. Wellpath 2nd Suppl. Br., Dkt. No. 78. Plaintiffs filed their further supplemental letter brief on March 1, 2022. Pls. 2nd Suppl. Br., Dkt. No. 81.

II. Discovery at Issue

In response to certain requests for production of documents, Wellpath produced Part II of the Report and withheld Parts I and III of the Report. *See* Pls. Suppl. Br., Exs. 3, 9. Part II of the Report is one page long and consists of an attendance sheet for a Mortality & Morbidity Review Meeting that took place on December 14, 2020. *See* Pls. Suppl. Br., Ex. 3. Wellpath listed the withheld parts of the Report on a privilege log. *See* Pls. Suppl. Br., Ex. 9. The privilege log provides that Part I of the Report is a "Patient Informational Report," and that Part III of the Report is a "Report & Recommendations Following Mortality or Morbidity Review." *See id.* Wellpath also withheld the Psychological Autopsy. *See* Pls. Suppl. Br., Ex. 11. Wellpath asserted a privilege under 42 U.S.C. § 299b-22 for the withheld parts of the Report and the Psychological Autopsy. *See* Pls. Suppl. Br., Exs. 9, 11.

III. The Patient Safety and Quality Improvement Act

Under the PSQIA, patient safety work product (PSWP) is privileged and not subject to discovery in connection with a federal civil proceeding against a provider. 42 U.S.C. § 299b-22(a)(2). PSWP is defined as:

> [A]ny data, reports, records, memoranda, analyses (such as root cause analyses), or written or oral statement--
>
> (i) which--
>
> (I) are assembled or developed by a provider for reporting to a patient safety organization and are reported to a patient safety organization; or
>
> (II) are developed by a patient safety organization for the conduct of patient safety activities;
>
> and which could result in improved patient safety, health care quality, or health care outcomes; or
>
> (ii) which identify or constitute the deliberations or analysis of, or identify the fact of reporting pursuant to, a patient safety evaluation system.

42 U.S.C. § 299b-21(7)(A).

A guidance published by the Department of Health and Human Services ("HHS") in 2016 summarizes the "three basic ways that certain information can become PSWP: (1) The information is prepared by a provider for reporting to a PSO [1] and it is reported to the PSO, (2) the information is developed by a PSO for the conduct of patient safety activities, or (3) the information identifies or constitutes the deliberations or analysis of, or identifies the fact or reporting pursuant to, a patient safety evaluation system (PSES)." Patient Safety and Quality Improvement Act of 2005—HHS Guidance Regarding Patient Safety Work Product and Providers' External Obligations, 81 FR 32655-01, 2016 WL 2958759, at *32656 (F.R. May 24, 2016). Providers generally create most of their PSWP through the first way, also referred to as the "reporting pathway." *See id.*

***3** PSWP "does not include information that is collected, maintained, or developed separately, or exists separately, from a patient safety evaluation system. Such separate information or a copy thereof reported to a patient safety organization shall not by reason of its reporting be considered patient safety work product." 42 U.S.C. § 299b-21(7)(B)(ii).

"The term 'patient safety evaluation system' means the collection, management, or analysis of information for reporting to or by a patient safety organization." 42 U.S.C. § 299b-21(6). "[I]nformation prepared for purposes other than reporting to a PSO is not PSWP under the reporting pathway." *See* HHS Guidance, 2016 WL 2958759, at *32656. "PSWP

cannot be used to fulfill external obligations," including "mandatory requirements placed upon providers by Federal and state health regulatory agencies." *Id.* The PSQIA "does not permit providers to use the privilege and confidentiality protections for PSWP to shield records required by external recordkeeping or reporting requirements." *Id.* at *32657. "The intent of the system established by the Patient Safety Act is to protect the additional information created through voluntary patient safety activities, not to protect records created through providers' mandatory information collection activities." *Id.* at *32655.

IV. The Parties' Arguments

A. Plaintiffs

Plaintiffs argue that the Report and Psychological Autopsy are not protected by the PSQIA because they are mandated under California law and by the National Commission on Correctional Healthcare (NCCHC) Accreditation. Pls. Suppl. Br. at 1.

Plaintiffs explain that Title 15, section 1046 of the California Code of Regulations mandates a death review ("Title 15 death review") on all inmate deaths. *Id.* Wellpath's contract with Ventura County and the Ventura County Sheriff's Office ("VCSO") gives the County and Sheriff the right to review the work being performed by Wellpath. Pl. Br. at 1-2. Plaintiffs contend that because Wellpath gathered the requested information to comply with state regulations and its contract with VCSO, this takes the Report outside the privilege of the PSQIA. *Id.* at 2. Additionally, Plaintiffs argue that even if the Report itself is not shared with the VCSO, if the improvement plans are shared verbally, this takes the Report outside of the PSQIA privilege. Pls. Suppl. Br. at 3. Plaintiffs assert that a Custody Homicide Investigation done by VCSO is not part of the Title 15 Review because it never determined the appropriateness of clinical care. Pls. 2nd Suppl. Br. at 4. The Homicide Investigation does not supplant the Title 15 Review that Wellpath is charged and mandated to perform. *Id.* at 4-5.

Plaintiffs also assert that the Report was prepared for a dual purpose because Wellpath/County of Ventura Detention Facility has sought NCCHC certification, which requires death reviews. Pls. Reply Br. at 1. This dual purpose removes the Report from the PSO privilege. *Id.* at 1-2. Plaintiffs contend that Wellpath has not met its burden to show that the Report is PSWP by virtue of a PSWP label and an email to a PSO. *Id.* at 2. Plaintiffs assert that the Ventura County Jail has now contracted with NCCHC to provide audits so that they may qualify for accreditation. Pls. Suppl. Br. at 6.

Plaintiffs also object to Dr. Bazzel's deposition testimony. *See* Pls. Suppl. Br. at 2-3. Plaintiffs argue that Dr. Bazzel is unfamiliar with how the Center for Patient Safety collates the data it collects and provides trends in healthcare back to their clients. *Id.* at 2. Plaintiffs also contend that Dr. Bazzel is not familiar with any contracts between the parties here and does not know any details concerning the California state regulations. *Id.* at 2-3.

***4** As to the Psychological Autopsy, Plaintiffs argue that it does not qualify as PSWP because it is not something that is submitted to the PSO. Pls. Suppl. Br. at 3-4.

B. Wellpath

Wellpath asserts that Parts I and III of the Report are protected under the PSQIA. Wellpath Br. at 2. Wellpath is a provider within the statutory definition and is a member of the Center for Patient Safety, a PSO. *Id.* at 3; Slack-Jones Decl. ¶ 2. Wellpath explains that the Report is not one document, but three separate and distinct documents. Wellpath Br. at 3; Slack-Jones Decl. ¶ 3. Part I is a synopsis of the facts and circumstances related to the inmate's death created solely for the purpose of preparation of Part III, and is not shared with anyone outside of Wellpath and the PSO. Wellpath Br. at 3; Slack-Jones Decl. ¶ 4. Although Part I was derived from non-PSWP information, which has been produced to Plaintiffs, Wellpath contends that this does not exclude it from PSQIA privilege. Wellpath Suppl. Br. at 3-4. Part II of the Report, which has been produced in this litigation, is shared with counties and is prepared for purposes of satisfying California Code of Regulations, Title 15, section 1046, among other reasons. Wellpath Br. at 3; Slack-Jones Decl. ¶ 4. Part III is related to Wellpath's internal self-critical analysis prepared for the sole purpose of submission to the PSO. Wellpath Br. at 3; Slack-Jones Decl. ¶ 5. Part III is not shared with anyone or any agency outside the PSO. Wellpath Br. at 3; Slack-Jones Decl. ¶ 5. Part III of the report was submitted to the PSO on January 29, 2021. Slack-Jones Decl. ¶ 5.

In response to Plaintiffs' argument that the Report was prepared to comply with Title 15, section 1046 of the California Code of Regulations, Wellpath contends that the Title 15 death review was a separate process from Wellpath's internal Mortality and Morbidity review. Wellpath Suppl. Br.

at 5. Wellpath followed its Policy and Procedure HCD-110-A-09 (the "Policy") in relation to Mr. Hultman's death. Wellpath 2nd Suppl. Br. at 1 & Ex. 1; *see also* Pls. Suppl. Br., Ex. 7. Pursuant to the Policy, a Clinical Mortality Review was held on December 14, 2020, and an Administrative Mortality Review was held on December 17, 2020. *Id.* at 1.

Wellpath contends that the Administrative Mortality Review, which included custody attendees along with Wellpath attendees, was one and the same as the Title 15 death review. Wellpath 2nd Suppl. Br. at 1-2; Wellpath Suppl. Br. at 5. The death review report resulting from the Administrative Mortality Review has been produced to Plaintiffs. Wellpath Suppl. Br. at 5 & Ex. 1; Wellpath Further Suppl. Br. at 3. On the other hand, the Clinical Mortality Review, also known as the Mortality & Morbidity Review, was attended only by the Wellpath Patient Safety Committee. Wellpath 2nd Suppl. Br. at 2. This internal review was undertaken for the PSO pursuant to the PSQIA on December 14, 2020, with attendees all within Wellpath's PSES. Wellpath Suppl. Br. at 5 & Ex. 2. The Report was separately authored on a different date and was not shared with Ventura County. *Id.* at 5.

As to Plaintiffs' other arguments, Wellpath asserts that whether the Center for Patient Safety collates data in a useful way is entirely irrelevant to the assertion of the PSQIA privilege here. Wellpath Suppl. Br. at 6. Wellpath contends that NCCHC accreditation is irrelevant because Ventura County Jail is not currently NCCHC accredited. *Id.* at 6. Moreover, the PSQIA provides that voluntary disclosure of PSWP by a provider to an accrediting body that accredits that provider is an exemption to the loss of the privilege which otherwise comes from sharing PSWP outside the PSES. *Id.* at 7.

***5** Finally, Wellpath asserts that the Psychological Autopsy is privileged PSWP even if it was not submitted to the PSO because it constitutes the deliberations and analysis of information within the PSES. *Id.* at 7-8. The Psychological Autopsy was completed by a qualified mental health professional per the guidelines of the Policy. Wellpath 2nd Suppl. Br. at 2.

V. Discussion

As the party claiming the privilege, Wellpath bears the burden of showing that the withheld portions of the Report and the Psychological Autopsy are protected PSWP under the PSQIA.[2] *See Tornay v. United States*, 840 F.2d 1424, 1426 (9th Cir. 1988) ("The party asserting an evidentiary privilege has the burden to demonstrate that the privilege applies to the information in question."); *Doe v. Pasadena Hosp. Ass'n, Ltd.*, No. 2:18-cv-08710-ODW-MAA, 2021 WL 4557221, at *18 (C.D. Cal. June 7, 2021) ("As the parties claiming the privilege, Defendants bear the burden of showing that the requested information falls within the PSQIA privilege.").

Courts carefully scrutinize the assertion of the PSQIA privilege and generally require factual assertions to be supported by evidence. In two cases cited by the parties, Wellpath and/or Correct Care Solutions (CCS), a predecessor of Wellpath, asserted that morbidity and mortality reports were privileged under the PSQIA.[3] *See Herriges v. Cnty. of Macomb*, Civil Action No.: 19-12193, 2020 WL 4726940 (E.D. Mich. Aug. 14, 2020); *Penman v. Correct Care Sols., LLC*, No. 5:18-cv-00058-TBR-LLK, 2020 WL 4253214 (W.D. Ky. July 24, 2020). The courts considered evidence submitted by Wellpath/CCS in finding that Wellpath/CCS did not sustain its burden to show that the privilege applied to the reports at issue. *See Herriges*, 2020 WL 4726940, at *7-8 (finding CCS employee's lack of personal knowledge regarding the process of reporting to a PSO rendered his testimony inadequate and CCS failed to produce evidence showing that Wellpath was a provider when it allegedly submitted the reports to the PSO); *Penman*, 2020 WL 4253214, at *4 (finding CCS did not provide necessary information to effectively evaluate whether a report was PSWP because CCS did not "state when the Report was created, the reason(s) why this specific Report was created, when it was provided to [the Kentucky Department of Corrections (KDOC)] and why it was provided to KDOC"). When courts find that the PSQIA privilege does apply, they base their findings on evidence offered by the party asserting the privilege. *See, e.g., Louzi v. Fort Bend Cnty.*, Civil Action No. 4:18-cv-04821, 2021 WL 1751066, at *1 (S.D. Tex. May 3, 2021) (finding report was protected under PSQIA because an affidavit of CCS employee and an email from a representative of the PSO facially established that the report was transmitted to the PSO); *Tinnal v. Norton Healthcare, Inc.*, Civil Action No. 3:11-cv-596-S, 2014 WL 12581760 (W.D. Ky. July 15, 2014) (finding documents were protected as PSWP based on an *in camera* review of the documents and the affidavit of an assistant general counsel for the provider).

A. The Deliberations and Analysis Pathway: Part I of the Report and the Psychological Autopsy

***6** Part I of the Report and the Psychological Autopsy could potentially be PSWP under only the deliberations and analysis pathway. Dr. Bazzel testified that the Psychological Autopsy is not provided to the PSO. Pls. Suppl. Br., Ex. 12, Bazzel Dep. Tr. 59:23-60:1. Although the Slack-Jones Declaration does not state whether Part I of the Report was provided to the PSO, *see* Slack Jones Decl. ¶ 5, Wellpath's counsel confirmed at the February 11, 2022 hearing that Part I was not reported to the PSO. Because Wellpath did not provide Part I and the Psychological Autopsy to a PSO, these documents are not PSWP under the reporting pathway. Thus, the documents are PSWP only if they "identify or constitute the deliberations or analysis of, or identify the fact of reporting pursuant to, a patient safety evaluation system." 42 U.S.C. § 299b-21(7)(A). Although the deliberations and analysis pathway contemplates PSQIA protection for some information even if it is not reported to a PSO, the HHS states in its 2016 guidance that "a provider should only place information in its PSES if it intends to report that information to the PSO." HHS Guidance, 2016 WL 2958759, at *32656.

Wellpath asserts that Part I of the Report and the Psychological Autopsy are protected as PSWP because they constitute the deliberations and analysis of information within the PSES. *See* Wellpath Suppl. Br. at 7. The Court looks to Wellpath's evidence to determine whether this assertion is sufficiently supported.

At his deposition, in response to a question about what part of Part I constitutes PSWP, Dr. Bazzel responded that "[a]nything that is used in the analysis and deliberation of data, whether it gets reported to the PSO or just lives in our PSES, is considered patient safety work-product." Pls. Suppl. Br., Ex. 12, Bazzel Dep. Tr. 37:11-17. Dr. Bazzel further responded that "[w]hile the sources of the information aren't PSWP, since the document was created and used in the formulation of materials that eventually got reported to the PSO, that is – the whole document is considered patient safety work-product." *Id.* 41:2-6. As to the Psychological Autopsy, Dr. Bazzel testified that it "is used in the absence of the data that generates the document that is eventually sent to the Center for Patient Safety. It resides within our PSES attached to the – attached to the – the event that was originally reported." *Id.* 59:14-18. He testified that it is not sent to the Center for Patient Safety, but is "considered patient safety work-product because it's used in the deliberation and analysis of the data that it eventually does get reported to the Center for Patient Safety." *Id.* 59:23-60:1.

Dr. Bazzel's testimony does not support that either Part I of the Report or the Psychological Autopsy are PSWP. Dr. Bazzel testified that both documents are "used in" deliberations and analysis, but Wellpath does not point to any evidence that these documents identify or constitute deliberations and analysis. Evidence that information is "used in" deliberations and analysis is not sufficient to establish PSWP protection under the deliberations and analysis pathway. *See Hyams v. CVS Health Corp.*, No. 18-cv-06271-PJH (LB), 2019 WL 6727536, at *2 (N.D. Cal. Dec. 11, 2019) (finding the plain language of the deliberations prong "does not extend the definition of PSWP to the underlying facts or documents that might have been the subject of deliberation and analysis"). Therefore, Dr. Bazzel's testimony does not establish that Part I of the Report or the Psychological Autopsy are PSWP. Rather, his testimony supports that both documents are not PSWP under the deliberations and analysis pathway.

A case cited by Wellpath, *Hacking v. United States*, No. 19-14449-CIV-CANNON/MAYNARD (S.D. Fla. Apr. 28, 2021), also supports that documents not reported to the PSO must reflect deliberations and analysis. In *Hacking*, the court conducted an *in camera* review of a document that was not submitted to a PSO, but found that it was privileged PSWP because it was a root cause analysis and reflected deliberations and analysis resulting from a PSES. *Id.* Here, there is no evidence that Part I of the Report or the Psychological Autopsy constitute a root cause analysis or reflect deliberations and analysis of a PSES.

***7** The descriptions of these documents in the Policy also support that they do not constitute deliberations and analysis of a PSES. Part I of the Report is titled a "Patient Information Report." *See* Pls. Suppl. Br., Ex. 7, at 9. The Psychological Autopsy is defined as "a written reconstruction of an individual's life." *See id.* at 2. Nothing about these descriptions suggests that these documents constitute the deliberations and analysis of a PSES.

At the hearing, Wellpath argued that the designation and treatment of these documents as PSWP is evidence that they are PSWP. Dr. Bazzel's testimony that there may be information that "lives in" Wellpath's PSES even though Wellpath has no intention of ever reporting this information to the PSO raises a serious concern that Wellpath is over-designating documents as PSWP. This concern is confirmed by Wellpath's labeling of Part II of the Report as "PSWP," despite its concession that it is not PSWP. *See* Wellpath Suppl. Br., Ex. 2. Wellpath has not represented that it took steps to

remove Part II from its PSES or that it has a process to do so, which raises an additional concern regarding Wellpath's collection and maintenance of documents within its purported PSES. *See* HHS Guidance, 2016 WL 2958749, at *32659 (describing the "drop out" provision for removal of PSWP from a PSES). Thus, Wellpath's designation of Part I of the Report and the Psychological Autopsy as PSWP is of limited value in the Court's determination of whether these documents are entitled to protection under the PSQIA.

In summary, the Court finds that Wellpath has not met its burden to show that Part I of the Report and the Psychological Autopsy are PSWP under the PSQIA.

B. The Reporting Pathway: Part III of the Report

The parties do not dispute that Wellpath is a provider under the PSQIA. Ms. Slack-Jones declares that Part III of the Report was prepared for the sole purpose of submission to a PSO, and it was submitted to the Center for Patient Safety on January 29, 2021. Slack-Jones Decl. ¶ 5.[4] The Court has confirmed that the Center for Patient Safety is a federally-listed PSO.[5] Therefore, it appears that Part III of the Report facially meets the requirements of PSWP under the reporting pathway.

***8** Plaintiffs argue that Part III of the Report should not be protected because it was prepared to comply with NCCHC standards and because the Center for Patient Safety is not providing information on areas of improvement. Pls. Reply Br. at 1; Pls. Suppl. Br. at 2. As for Plaintiffs' argument regarding NCCHC accreditation, there is an exception to the confidentiality and disclosure prohibitions for "[v]oluntary disclosure of patient safety work product by a provider to an accrediting body that accredits that provider." 42 U.S.C. § 299b-22(c)(2)(E). Thus, to the extent NCCHC requires disclosure of Part III of the Report for accreditation purposes, this would not waive the PSQIA privilege. The Court is also not persuaded by Plaintiffs' arguments regarding what the PSO does with the data submitted to it by Wellpath. *See* Pls. Suppl. Br. at 2. Plaintiffs do not dispute that the Center for Patient Safety is a federally-listed PSO and that Wellpath submitted Part III of the Report to the Center for Patient Safety. The Court is unaware of any authority requiring courts to examine whether a certified PSO is properly conducting PSO activities consistent with federal guidelines in determining whether documents in the possession of a provider are PSWP under the reporting pathway. Therefore, Plaintiffs' challenge regarding the Center for Patient Safety's use of Part III of the Report is not relevant in determining whether Part III of the Report is PSWP under the PSQIA.

The Court turns to the main issue in dispute for Part III of the Report: whether it was prepared for some purpose other than submission to a PSO. Plaintiffs argue that Part III was created to comply with California regulations or for sharing with VCSO. Pls. Suppl. Br. at 3. Wellpath contends that a Title 15 death review with VCSO representatives was conducted on December 17, 2020 to comply with California regulations, and that documents related to that review were produced to Plaintiffs. *See* Wellpath Suppl. Br. at 5; Wellpath 2nd. Suppl. Br. at 4-5. Wellpath maintains that Part III was part of the Clinical Mortality Review, a separate process, and is thus privileged PSWP. *See* Wellpath 2nd. Suppl. Br. at 3.

"[I]nformation prepared for purposes other than reporting to a PSO is not PSWP under the reporting pathway." *See* HHS Guidance, 2016 WL 2958759, at *32656. In *Penman*, the court found that CCS failed to meet its burden of establishing that a Mortality & Morbidity Report and Review was PSWP. 2020 WL 4253214, at *5. The court found that the report was not PSWP because CCS's declarant did not state whether the specific report at issue was assembled and developed for the sole purpose of reporting to a PSO, and because the report was produced by the Kentucky Department of Corrections ("KDOC"). *Id.* at *4. KDOC's possession of the report raised questions as to the purpose of the report and whether it was created, at least in part, for reporting to the KDOC. *Id.* The court noted that if it was created for reporting to the KDOC, later reporting to a PSO would not make it PSWP. *Id.* Consistent with the HHS Guidance and the *Penman* ruling, the Court finds that if Part III of the Report was created for use at the Administrative Mortality Review meeting, for compliance with Title 15, Section 1046 of the California Code of Regulations, or for sharing with VCSO, it is not PSWP because it was created for a purpose other than reporting to a PSO.

While Wellpath asserts that the Clinical Mortality Review and Administrative Mortality Review are two separate pathways, Wellpath's Policy shows that the two pathways are intertwined, at least with respect to Part III. Under section 6.2 of the Policy regarding the Clinical Mortality Review, the Responsible Health Authority/Health Services Administrator ("RHA/HSA") completes a draft of Part III, the Form 01c Report and Recommendations, at least three business days prior to the Administrative Mortality Review

Meeting. Pls. Suppl. Br., Ex. 7 at 4. Under Section 6.4 of the Policy regarding the Administrative Mortality Review, the RHA/HSA holds the Administrative Mortality Review meeting, reviewing the areas on Form 01c Reports and Recommendations and any other relevant factors to the specific event. *Id.* at 6. The Administrative Mortality Review includes a custody or client representative, *id.* at 8, and Wellpath represents that the December 17, 2020 Title 15 death review with VCSO is one and the same as the Administrative Mortality Review under the Policy, *see* Wellpath 2nd. Suppl. Br. at 2-3. At the end of the Administrative Mortality Review Process, local copies of Part III are destroyed. Pls. Suppl. Br., Ex. 7 at 7. Thus, under the Policy, Wellpath conducts the Clinical Mortality Review and creates Part III as preparation for the Administrative Mortality Review. Part III is then shared at the Administrative Mortality Review, which includes custody attendees.

***9** Dr. Bazzel's deposition testimony confirms that Part III is created, at least in part, for the Administrative Mortality Review/Title 15 death review, and not solely for submission to the PSO. Dr. Bazzel testified that a review that takes place between site leadership and the client within 30 days. Pls. Suppl. Br., Ex. 12, Bazzel Dep. Tr. 21:1-3. This appears to refer to the Administrative Mortality Review. Dr. Bazzel also testified about an internal Wellpath meeting prior to the client meeting for discussion of best practices and areas that might require improvement. *Id.* 21:4-9. This appears to refer to the Clinical Mortality Review. Dr. Bazzel further described the Clinical Mortality Review as when Wellpath starts "the root cause analysis process as well as ... the improvement planning process, so that when the site does have that multidisciplinary meeting with the client, they can go in and say 'We've reviewed this. This is what we found .... This is where we found that we could improve and this is how we're going to improve.' " *Id.* 21:9-16. Dr. Bazzel testified that Wellpath does not go through the root cause analysis with the County Sheriff's Department, but Wellpath does tell them the conclusions and the areas of improvement. *Id.* 28:25-29:14. In response to questioning on what findings of the mortality and morbidity review are shared with the sheriff's office, Dr. Bazzel testified that the improvements and plans are shared via "a verbal conversation that occurs during the 30-day review with the client," but no writings regarding the improvements or plan to accomplish the improvements are given to the client "[b]ecause that would be considered patient safety work-product."[6] *Id.* 52:12-18. Dr. Bazzel also testified that "[s]ome of the information contained" in the Report "would be discussed in the administrative review." Wellpath 2nd. Suppl. Br., Ex. 7, Bazzel Tr. 68:8-15. Thus, Dr. Bazzel's testimony confirms that the internal Clinical Mortality Review is conducted, at least in part, for reporting to the custody client at the Administrative Mortality Review. His testimony also confirms that the improvements and plans from the Clinical Mortality Review are verbally shared with the custody client. The Court infers that the findings and improvement plans described by Dr. Bazzel come from Part III of the Report as Wellpath describes Part III as "Report & Recommendations Following Mortality or Morbidity Review." Pls. Suppl. Br., Ex. 9, at 24.

Therefore, while Plaintiffs have not submitted evidence that VCSO possessed an actual copy of Part III, Plaintiffs have submitted objective evidence in the form of the Policy and Dr. Bazzel's testimony that Part III was prepared, in part, for reporting to VCSO at the Administrative Mortality Review. *Cf. Louzi*, 2021 WL 17511066, at *1 (finding PSQIA applies and distinguishing *Penman* because there was "no objective reason to believe that the report was disclosed to any party other than the PSO"). The burden is on Wellpath to establish application of the PSQIA privilege to Part III and the Court concludes that Wellpath has not met its burden.

VI. Conclusion

In conclusion, Wellpath has not met its burden to show that Parts I and III of the Report and the Psychological Autopsy are entitled to protection under the PSQIA. Wellpath did not assert any other privilege as to these documents and there is no dispute over their relevance. Accordingly, Wellpath shall produce Parts I and III of the Report and the Psychological Autopsy to Plaintiffs by **May 26, 2022**.

IT IS SO ORDERED.

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All Citations

Slip Copy, 2022 WL 2101723

Footnotes

1 Patient Safety Organization.

2 Because Wellpath only asserts privilege under the PSQIA, the Court need not address any of the other privileges referenced by Plaintiffs.

3 In one of those cases, the court explained that CCS joined with another company to form Wellpath in 2018. *Herriges v. Cnty. of Macomb*, Civil Action No.: 19-12193, 2020 WL 4726940, at *7 (E.D. Mich. Aug. 14, 2020),

4 Plaintiffs object to the Slack-Jones Declaration. *See* Dkt. Nos. 62, 81-3. Because Plaintiffs have now had the opportunity to depose two Wellpath employees regarding the statements in the Slack-Jones Declaration and to submit further briefing, the Court overrules Plaintiffs' objection that the declaration was untimely. Plaintiffs move to strike the declaration for the additional reasons that the statements within are unsupported and contradicted by the testimony of Dr. Bazzel, the individual Wellpath produced to replace Ms. Slack-Jones. Dkt. No. 81-3 at 2-3. Because Ms. Slack-Jones represents that she is the Vice President of Clinical Quality at Wellpath and that the facts set forth in her declaration are based on her personal knowledge, the Court overrules Plaintiffs' objections regarding admissibility of the declaration. Plaintiffs can and have pointed to purported inconsistencies between the statements within the declaration and Dr. Bazzel's testimony, which the Court will consider. However, the existence of inconsistent or contradictory evidence does not render the declaration inadmissible in its entirety.

5 PSOs must be certified and listed by the Secretary of HHS. 42 U.S.C. § 299b-24. The Secretary has delegated the function of certification to the Agency for Healthcare Research and Quality ("AHRQ"). 42 C.F.R. § 3.112. AHRQ maintains an online listing of certified PSOs, and the Center for Patient Safety is included on this list. *See* Listed PSOs, Agency for Healthcare Research and Quality, https://pso.ahrq.gov/pso/listed (last visited Feb. 9, 2022). The Court may take judicial notice of public records available on websites run by government agencies. *U.S., ex rel. Modglin v. DJO Global Inc.*, 114 F. Supp. 3d 993, 1008 (C.D. Cal. 2015); *see also* *Daniels-Hall v. National Educ. Ass'n*, 629 F.3d 992, 998-99 (9th Cir. 2010) (taking judicial notice of a list of vendors displayed publicly on the websites of two school districts).

6 Dr. Bazzel's testimony that the conclusions and improvement plans in Part III are shared verbally with VCSO appears to conflict with Ms. Slack-Jones' statement that Part III is not shared with anyone or any agency outside of the PSO. If Ms. Slack-Jones meant that a written copy of Part III was not shared with VCSO, this would be consistent with Dr. Bazzel's testimony. If Ms. Slack-Jones meant that no contents of Part III were shared with VCSO, the Court gives more weight to Dr. Bazzel's deposition testimony than Ms. Slack-Jones' declaration. Dr. Bazzel was offered as a witness with knowledge of this topic because Ms. Slack-Jones was unavailable. Therefore, to the extent there are conflicts, the Court will rely on Dr. Bazzel's deposition testimony rather than Ms. Slack-Jones' untested statement.