STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND
FAMILY DIVISION

LORI MATHESON,
f/k/a LORI ANN SCHMITT,
Plaintiff,

vs.

MICHAEL SCHMITT,
Defendant.

Hon. Karen D. McDonald
Case No. 2015-831539-DM

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PLAINTIFF'S ANSWER TO DEFENDANT'S MOTION TO (1) SEAL THE DEPOSITION OF DR. STANLEY PLOTKIN, (2) QUASH A SUBPOENA DUCES TECUM SERVED ON DR. PLOTKIN, AND (3) PROHIBIT THE DEPOSITION OF DR. TERESA HOLTROP

NOW COMES the above captioned Plaintiff, by and through her attorneys, and as for her answer to Defendant's motion to seal Dr. Plotkin's deposition, quash Plaintiff's subpoena duces tecum served on Dr. Plotkin, and prohibit the deposition of Dr. Teresa Holtrop (the "Motion"):

1. Plaintiff neither admits nor denies the allegations contained in paragraph One of the Motion and leaves Defendant to his proofs.

2. Plaintiff neither admits nor denies the allegations in paragraph Two of the Motion and leaves Defendant to his proofs.

3. Admits Plaintiff served Dr. Plotkin with a subpoena duces tecum on January 15, 2018 and that Defendant, for the first time, indicated on January 16, 2018 he no longer intends to call

Dr. Plotkin as an expert witness at trial but denies the balance of paragraph Three of the Motion.

4. Plaintiff admits that the subpoena has not been withdrawn, but denies the balance of the allegations in paragraph Four of the Motion.

5. Plaintiff denies paragraph Five of the Motion for the reason that same are untrue.

6. Plaintiff admits a deposition of Dr. Plotkin was taken on January 11, 2018 but denies the balance of the allegations in paragraph Six of the Motion for the reason that same are untrue.

7. Plaintiff admits that the deposition covered a number of topics relevant to vaccine safety but denies the balance of the allegations in paragraph Seven of the Motion.

8. Plaintiff neither admits nor denies that Defendant has beliefs but otherwise denies the allegations contained in paragraph Eight of the Motion.

9. Plaintiff admits that she seeks to depose Dr. Teresa Holtrop but denies the balance of the allegations in paragraph Nine of the Motion for the reason that same are untrue.

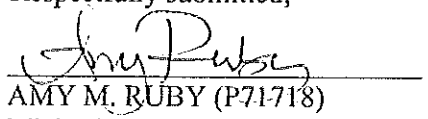
10. Plaintiff denies the allegations in paragraph Ten of the Motion.

11. Plaintiff denies the allegations in paragraph Eleven of the Motion.

12. Plaintiff neither admits nor denies that Defendant has feelings but otherwise denies the balance of the allegations in paragraph Twelve of the Motion.

WHEREFORE, Plaintiff respectfully requests this Honorable Court deny all relief requested by Defendant based on the appended brief in support of this opposition and the appended affidavit of Plaintiff in support of this opposition and the exhibits appended thereto.

Respectfully submitted;



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Attorney for Plaintiff

Dated: February 12, 2018

BRIEF IN OPPOSITION

I. DEFENDANT'S MOTION TO SEAL SHOULD BE DENIED

Defendant requests that the Court "Seal Dr. Plotkin's January 11, 2018 deposition, limiting its use to the above captioned case." (Ex. 1 at 3.)[1] Prior to this motion, Defendant was comfortable publicizing Dr. Plotkin's deposition when he believed it would benefit him in the eyes of the public. Prior to the deposition, Defendant bragged about Dr. Plotkin's role in this case on Facebook and even moved this Court to permit Dr. Plotkin to testify in public during the hearing via video conference because his testimony was going to be central to Defendant's case. Defendant's counsel then conducted a discussion live on Facebook *during Dr. Plotkin's deposition* wherein she described what was being said and made belittling and, at best, misleading comments about Plaintiff's questions.

Just as Defendant publicly disclosed and discussed Dr. Plotkin's deposition, days after the deposition Plaintiff sent a copy of it to two sources who distributed it widely to the media. It is only now, weeks after the deposition, that Defendant moves to "seal" the transcript because Defendant has decided that the deposition testimony may cast his position in a negative light. When Defendant identified Dr. Plotkin as his expert, and then publicized his role in this case, Defendant made his testimony a matter of public interest. Plaintiff's decision to distribute information about the deposition reflected Defendant's prior publicity. Defendant cannot now ask the Court to un-ring the public interest bell because he does not like Dr. Plotkin's testimony.

A. CHRONOLOGY OF EVENTS RELATED TO DR. PLOTKIN'S DEPOSITION

1. The Publicity Prior to the Deposition

On or about November 27, 2017, Defendant sent Plaintiff Dr. Plotkin's 56-page curriculum vitae. (Ex. 2; Aff. ¶ 2.) Dr. Plotkin is an internationally known expert in vaccinology. (Ex. 2.)

[1] "Ex. __" refers to the exhibits attached to the Affidavit of Lori Matheson, dated February 12, 2018 ("Aff."). "Dep." refers to the transcript of the deposition of Dr. Stanley Plotkin, dated January 11, 2018.

As a result, on November 28, 2017, Defendant announced on Facebook that "I JUST found out that I can get the nation's leading expert on vaccines to testify." (Ex. 3.)

This matter has garnered significant public attention. Indeed, cameras and reporters from media outlets, including Fox, NBC and ABC, have been permitted in the courtroom during every substantive hearing. (Aff. ¶ 4.) Outside the court room, numerus media outlets have covered this case, including but not limited to: USA Today; the Detroit Free Press; the Detroit News; the Miami Herald; and the Pensacola News Journal. (*Id.*) Plaintiff is also aware of the extensive posting by Defendant and his attorneys online about this case. (Exs. 4, 5, 6, and 7.)

Dr. Plotkin testified that he became an expert in this case at the request of a national public advocacy group, Voices for Vaccines, working to influence public opinion in favor of vaccines. (Dep. 14:20-15:22; 47:7-47:21; 54:3-54:19; Ex. 8.) It is precisely because this case received national media attention that Voices for Vaccines asked Dr. Plotkin to be an expert witness. (*Id.*) Dr. Plotkin admitted during his deposition that he never spoke with Defendant, didn't even know the Defendant's, Plaintiff's, or their child's name, nor did he know Faith's age, medical history, vaccination history, or whether she had a contraindication to any vaccine. (Dep. 14:15-15:25; 20:2-20:20; 26:13-27:24.) Instead, he agreed to be an expert due to the media attention.

To ensure media exposure, Defendant planned to have Dr. Plotkin testify in open court before the media cameras. (Ex. 9; Dep. 400:12-400:23.) Indeed, Defendant made a motion, dated January 10, 2018, to permit Dr. Plotkin, a Pennsylvania resident, to testify via video conference. (Ex. 9.) Defendant pleaded that "[w]ithout Dr. Plotkin's testimony, Father has no expert to refute the experts Mother is bringing," and that his testimony would "provide . . . a full and accurate picture of the medical and scientific community by offering the testimony of one of the leading vaccine researchers in the country." (Ex. 9 at 3-4.)

Given that Defendant retained a world-renowned out-of-state expert in vaccinology, Plaintiff wanted to likewise retain an attorney with significant experience in complex expert issues as well as some vaccine litigation experience to effectively depose Dr. Plotkin. (Aff. ¶ 9.)

2. Defendant's Counsel Posted a Running Description of the Deposition on Facebook While it was Taking Place

The deposition took place on January 11, 2018 in Pennsylvania. Defendant's counsel, Ms. Nieusma, appeared remotely via telephone. While listening remotely, Ms. Nieusma live posted on Facebook real-time descriptions of parts of the deposition that she believed were helpful to her client. (Ex. 4.) Ms. Nieusma provided updates throughout the deposition and paraphrased and quoted portions of the questions and testimony. (*Id.*) However, Ms. Nieusma's descriptions and quotes often mischaracterized the testimony or questions. (*Infra* § C(2).)

In one of her posts, Ms. Niesma stated: "For those of you concerned, the client is fine with my sharing this information." (Ex. 4 at 3.) Her posts were, and are still, available for anyone to read and repost. (Ex. 4.) Ms. Nieusma's posts establish that far from wanting to seal the contents of the deposition, while it was taking place, Defendant explicitly wanted to publicize it.

Ms. Nieusma's posts started on January 11, 2018 at 12:20 p.m. when Ms. Nieusma wrote:

> Today in adventures in lawyering: 3 hours into a deposition on vaccines. The first two hours were spent establishing that my expert has gotten paid by vaccine companies, a fact he freely admits.
>
> Highlights of the third hour have included opposing counsel asking about 'the similarities in DNA between humans and other mammals, like chickens'.
>
> Also, the CDC, NIH, WHO, and the AMA are all in a vast conspiracy to vaccinate children and make money.
>
> Stay tuned for hours 4-8.

(Ex. 4 at 1.) Shortly after, she added: "Oh, and we aren't getting paid, so my boss is super thrilled about this day long deposition[,]" stating that how she got involved in the case is "a long story that

mostly involves me being an idiot." (*Id.*)

Later that day, Ms. Nieusma posted "Hour 4-we've moved to aluminum in vaccines" and followed up with "We've moved to aluminum in the brain," to which another reader replied, "Have you explored tinfoil hats as a possible source?" (Ex. 4 at 2.) Thereafter, Ms. Nieusma, using her married name Laura Welch, engages in the following exchange with other readers on Facebook:

> **Laura Welch.** Hour 5-we've made it to vaccines cause autism.
> **Emily Gillingham.** Please, enthrall us with their arguments that being neurotypical is more important than not dying of polio.
> **Suzanne Stevens Adam.** Newsflash: vaccines don't cause autism...
> **Laura Welch.** Also, even if they do, measles, polio, tetanus, etc. are so much worse.

(*Id.*) Ms. Nieusma also posted "Hour 8 – vaccines cause AIDS" to which responses such as "Bahahaha" and "Just throw a book at them...literally" were posted. (Ex. 4 at 3.)

Later, in response to a post from another woman that read "I can't deal with more than a 5 minute discussion with an anti-vaccer. Hope you're enjoying a nice glass of wine now", Ms. Nieusma made clear that her personal agenda is for all "kids to be vaccinated." *Id.*

In all, the post thread included 38 written posts made by Ms. Nieusma and those following her, and those posts received an additional 65 reactions (*e.g.*, likes) from others following the conversation. (Ex. 4.) It is unclear how many additional people, either during or after the deposition, read these posts without commenting.

3. Events Following the Deposition

Prior to this motion, neither party requested a protective order or in any way identified as confidential any of the materials that have been exchanged. Likewise, at no time prior to or during the deposition, did Defendant ever state that any portion of the deposition should be marked confidential or sealed. To the contrary, as shown, the media has played a major role in this litigation and Defendant did what he could to make the public aware of Dr. Plotkin's testimony.

As such, when Plaintiff received a copy of Dr. Plotkin's deposition on January 14, 2018, there were no restrictions on its use by either party. That day, Plaintiff shared the video of Dr. Plotkin's deposition with a non-profit media outlet and a non-profit scientific research institute. (Aff. ¶ 10.) Plaintiff also shared a copy of the deposition transcript on January 16, 2018. (*Id.*) Plaintiff understands that these sources have in turn provided copies of the video and transcript to over a dozen other individuals and media outlets. (*Id.*) However, Plaintiff is not aware of specifically who received copies after she sent them out on January 14, 2018. (*Id.*)

The Court had instructed the parties to identify their trial experts by January 15, 2018. On January 16, 2018, Defendant informed Plaintiff by email at around 2:00 p.m. that Dr. Plotkin would not testify, and later that day stated he would call a different expert to testify regarding vaccinology. This was the first time Defendant informed Plaintiff that Dr. Plotkin would not be testifying.

Defendant then waited nearly a week, until January 22, 2018, to inform Plaintiff that he intended to seek an order sealing the deposition. (Aff. ¶ 11.) This was the first indication from Defendant that he wished to restrict Plaintiff's use of the deposition. (*Id.*)

B. DEFENDANT'S REQUEST TO SEAL IS MOOT BECAUSE INFORMATION REGARDING THE DEPOSITION IS ALREADY PUBLIC

Before Defendant made this motion, he knew it was already moot. Shortly after informing Plaintiff that Defendant intended to make a motion to seal the deposition, Defendant's counsel acknowledged that the motion was "not really an emergency, the cat [was] out of the bag" because copies of the deposition video and transcript were already public. (Aff. ¶ 11.)

Once information becomes public, "[t]he genie is out of the bottle," and no court has "the means to put the genie back." *Gambale v Deutsche Bank AG*, 377 F.3d 133, 144 (CA 2, 2004) (holding that once the amount in a confidential settlement agreement was made public, the court was powerless to make the information private again). While we did not locate a Michigan state court opinion, courts around the country have acknowledged that motions "seeking to restrain 'further

dissemination of publicly disclosed information' are moot." *Constand v Cosby*, 833 F.3d 405, 410 (CA 3, 2016) (quoting 13C Fed. Prac. & Proc. Juris. § 3533.3.1 (3d ed.) (collecting cases)).

For example, in *Costand*, the district court ordered that a confidential settlement agreement be unsealed, and within minutes a reporter downloaded the agreement and then published an article about it. *Id.* at 408. Even though the defendant moved for a stay of the district court's order within 20 minutes of its issuance, the Third Circuit ruled that issue was moot, reasoning that "[p]ublic disclosure cannot be undone because, . . . '[w]e simply do not have the power, even were we of the mind to use it . . . , to make what has thus become public private again.'" *Id.* at 410 (quoting *Gambale*, 377 F.3d at 144); *see also In re Copley Press, Inc.*, 518 F.3d 1022, 1025 (CA 9, 2008) ("Secrecy is a one-way street: Once information is published, it cannot be made secret again."); *In re Orthopedic Bone Screw Products Liab. Litig.*, 94 F.3d 110, 111 (CA 3, 1996) (finding a motion to stay public disclosure of information was moot because the information had already been submitted publicly to the FDA); *C & C Products, Inc. v Messick,* 700 F.2d 635, 636 (CA 11, 1983) (holding the issue of secrecy is moot once third parties control copies of the document).

Here, Defendant had already posted on Facebook about the deposition when Plaintiff received the video and transcript, and there were no confidentiality restrictions on her. The media was and is an active player in this litigation and Defendant had not given Plaintiff any indication that he wanted to keep the deposition private. Therefore, Plaintiff had every right to publicize the deposition. Once the deposition video and transcript became public, that rendered moot any subsequent motion to seal it. Defendant had many opportunities to act to maintain the confidentiality of the deposition. He could have requested a protective order before the deposition, or his counsel could have asked Plaintiff, during or immediately after the deposition, to keep it confidential while Defendant made the instant motion. Instead, Defendant chose to publicize the deposition, and he must now live with the consequences of that decision.

C. DEFENDANT'S REQUEST TO SEAL OTHERWISE LACKS MERIT

Even if Defendant's sealing motion was not moot, he fails to satisfy his burden to establish good cause to seal the deposition.

1. Standard for Protective Order

MCR 2.302(C) allows the Court "on reasonable notice and for good cause shown" to "issue any order that justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." "The party seeking protection," here Defendant, "bears the burden of demonstrating good cause for the order[.]" *Island Lake Arbors Condo. Ass'n v Meisner & Associates, PC*, 301 Mich App 384, 402; 837 NW2d 439 (2013).

The moving party cannot meet its burden by asserting generalized and unsupported concerns, rather, to establish good cause, the moving party must state specific reasons that justify issuance of the order. *See Szpak v Inyang*, 290 Mich App 711, 715-716; 803 NW2d 904 (2010) (holding that a "generalized" concern that the witness may be intimidated absent the protective order was insufficient, because the proponent of the order had not identified "any specific danger of 'annoyance, embarrassment, oppression, or undue burden or expense.'" (quoting MCR 2.302(C)). Similarly, federal courts have held that to show good cause to seal a discovery document, the moving party must show that "'disclosure will work a clearly defined and serious injury to the party seeking closure. The injury must be shown with specificity. Broad allegations of harm, unsubstantiated by specific examples or articulated reasoning do not support a good cause showing.'" *U.S. v Stone*, No. 10-20123, 2012 US Dist LEXIS 5785 (ED Mich, Jan. 18, 2012) (*quoting Pansy v Borough of Stroudsburg*, 23 F3d 772 (CA 3, 1994)).[2]

[2] When evaluating the MCR, Michigan courts often turn to federal law as a guide. *Alberto v Toyota Motor*, 289 Mich App 328, 336-337; 796 N.W.2d 490 (2010) ("Michigan's rules of discovery largely track the federal discovery rules.").

2. Defendant's Arguments to Seal Are Frivolous and/or Misleading

In requesting the protective order, Defendant makes three arguments in favor of sealing, however, none of these arguments has any merit.

First, Defendant asserts that the deposition took "approximately 10 hours and covered topics that far exceed the scope of the above captioned case[.]"[3] (Ex. 1 at 4.) Defendant provides only three examples of areas of inquiry that supposedly exceeded the action's scope: (1) "military vaccine schedules;" (2) "the oral polio vaccine;" and (3) Dr. Plotkin's "finances." (*Id.*)

Defendant's first example can be easily dismissed because Plaintiff never asked Dr. Plotkin a single question regarding "military vaccine schedules[.]" In fact, the term "military" was never even used during the deposition.

As for questions regarding "oral polio vaccine," these were clearly relevant to show Dr. Plotkin and the medical community's questionable actions during vaccine development. In his motion requesting that Dr. Plotkin testify remotely, Defendant stated that "Dr. Plotkin was personally involved in the development of many of the vaccines that are commonly administered today[.]" (Ex. 9 ¶ 5.) Thus, prior to the deposition, Defendant told the Court that Dr. Plotkin's past role in developing vaccines was relevant to this action. (*Id.*)

Dr. Plotkin admitted that he tested experimental oral polio vaccines on (i) "orphans," (ii) the "mentally handicapped," (iii) "babies of mothers in prison," and (iv) "individuals under colonial rule." (Dep. 346:24-350:19; Ex. 10, 11, 12 and 13.) Dr. Plotkin confirmed during his deposition that he previously defended some of these practices by writing that:

> How could polio vaccine have been developed without experiments in children? The question is whether we are to have experiments performed on fully functioning adults, and on children who are

[3] During the "approximately 10 hours" deposition, Defendant's counsel made a *total* of five substantive objections, none of which were to relevance or scope, nor otherwise even intimate that the deposition was too far afield. (Dep. 51:16-19, 167:25-168:13, 248:12-13, 249:17, 250:7-13.) Defendant's lack of concern during the deposition imputes his motive in bringing this Motion and the veracity of his claim the deposition "far exceeded the scope" of this action.

> potential contributors to society, or are to perform initial studies in children and adults who are human in form but not in social potency. It may be objected that this question implies a Nazi philosophy, but I do not think it is difficult to distinguish nonfunctioning persons from members of ... other groups.

(Dep. 349:20-350:8; Ex. 14.) It is not hard to see why Dr. Plotkin's actions in testing on people he described as "children and adults who are human in form but not in social potency" contributed to Plaintiff's moral and ethical problems with compulsory vaccinations, making this testimony clearly relevant.[4] That said, it is also not hard to see why such testimony is less than flattering for Defendant's position, and why he would now ask this Court to ensure that testimony regarding unethical practices in vaccine development be sealed. Nevertheless, Defendant's desire to hide bad testimony is not good cause for issuing a protective order.

As for Dr. Plokin's finances, Defendant cites no specific examples of improper discussions on this topic. (Ex. 1.) Dr. Plotkin was asked about his financial ties to pharmaceutical companies producing the vaccines he recommended Faith receive. As an expert, Dr. Plotkin's financial ties to these companies was relevant. To the extent Defendant is arguing the deposition reveals private financial information, that is misleading. Dr. Plotkin testified that he has for years received payments from vaccine makers, a fact that Defendant's counsel announced to the world on Facebook. (Ex. 4 at 1.) Dr. Plotkin, however, could not recall the amount of almost any of these payments, but those amounts are far from private. Indeed, detailed information about payments Dr. Plotkin receives from pharmaceutical companies is publicly available at https://openpaymentsdata.cms.gov/. For example, this website provides that between 2013 and 2016 Dr. Plotkin received payments from pharmaceutical companies totaling over $613,000. (Aff.

[4] The discussion regarding oral polio vaccine was also relevant to showing that vaccines can inadvertently contain animal viruses, because Dr. Plotkin admitted that the oral polio vaccine inadvertently contained a monkey virus, SV40, which infected millions of Americans. (Dep. 331:21-334:4.)

¶ 13; Ex. 15.) Plaintiff believes that all of the information about Dr. Plotkin's finances is publicly available, and sealing the deposition would do nothing to protect Dr. Plotkin's privacy in that area.

Second, Defendant claims that "Plaintiff or her out-of-state counsel"[5] will somehow use the deposition transcript "in order to further their personal agenda." (Ex. 1 at 4.) This unsubstantiated assertion does not meet the specificity required by Michigan law for showing good cause. *Szpak,* 803 N.W.2d at 907 (rejecting generalized unsubstantiated concerns).

Instead, Defendant's argument actually shows why "justice requires" the Court to *deny* the protective order. MRC 2.302(C). Prior to making this motion, Defendant had no qualms about using Dr. Plotkin's involvement in this case to further his "personal agenda." Many of Ms. Nieusma's comments on Facebook were clearly attempts to further Defendant's agenda and to make Plaintiff's position in this litigation look unhinged and not worthy of respect. Likewise, Dr. Plotkin testified that he became involved in this case at the request of Voices for Vaccines, an outside organization with a clear agenda. (Dep. 15:5-12.) Thus, Defendant was comfortable allowing Dr. Plotkin's testimony to advance everyone else's agenda, but now he asks that Plaintiff not be allowed to use the testimony for her agenda. Such a restriction would be unjust.

Plaintiff must be also allowed to publicly defend her positions from Defendant's unwarranted and false public attacks regarding the deposition testimony. For example, in one of her Facebook posts during the deposition, Ms. Nieusma stated "we've made it to vaccines cause autism." (Ex. 4 at 2.) But this statement falsely reflects what transpired during the deposition. Indeed, counsel for Plaintiff expressly stated that "I'm not trying to legitimize the view that vaccines cause autism." (Dep. 252:22-254:6.) The issue of vaccines and autism arose as part of a

[5] It is curious that Defendant twice stated that Plaintiff's counsel, Mr. Siri, is not from Michigan. Mr. Siri's home state is irrelevant to this motion, especially where Defendant retained Dr. Plotkin who resides in Pennsylvania. Instead, it appears Defendant is attempting to create prejudice against Plaintiff because she retained an out-of-state counsel, but Plaintiff is confident the Court will not discriminate based on the residence of the lawyers in this action.

nuanced discussion of vaccine safety research wherein autism was simply an example. (Dep. 216:15-219:2; 230:13-255:25.) In fact, Dr. Plotkin agreed that there was insufficient evidence to determine whether, or not, certain vaccines cause autism. Specifically, Dr. Plotkin testified:

> Q: Dr. Plotkin, in 2011, the [Institute of Medicine] ... issued its, another report on vaccine safety. And this time it looked at 158 of the most commonly claimed serious injuries after vaccination, right?
> A: Yes.
>
> ***
>
> Q: ... Can you please read the causality conclusion in the IOM report with regard to whether DTaP or Tdap can cause autism.
> A: The evidence is inadequate to accept or reject a causal relationship between diptheria toxoid-, tetanus toxoid-, or the acellular pertussis-containing vaccine [and] autism.
>
> ***
>
> Q: Okay. . . . they [Institute of Medicine] also didn't find any evidence that DTaP/Tdap do not cause autism. Now, that doesn't mean that DTaP/Tdap do cause autism, correct?
> A: Correct. . . .
> Q. That's right. All it means is that they [IOM] couldn't find a study that shows, that supported that it does not cause autism, right?
> A: Yes.
>
> ***
>
> Q: ... If you don't know whether DTaP or Tdap cause autism, shouldn't you wait until you do know, until you have the science to support it to then say that vaccines do not cause autism?
> A: Do I wait? No, I do not wait because I have to take into account the health of the child.
> Q: And so for that reason, you're okay with telling the parent that DTaP/Tdap does not cause autism even though the science isn't there yet to support that claim?
> A: Absolutely.

(Dep. 230:13-230:17; 242:21-243:13; 254:7-254:17; 255:15-255:25.) Ms. Nieusma's false claim that Plaintiff's counsel indicated "vaccines cause autism" was plainly attempting to discredit, in the eyes of the public, Plaintiff's legitimate concerns about the lack of vaccine safety testing.

Ms. Nieusma also stated, "we've moved to aluminum in vaccines" and "aluminum in the brain" which elicited comical responses about foil hats. (Ex. 4 at 2.) However, again these comments present only a small and slanted take on the deposition testimony. Dr. Plotkin was asked about the science supporting the safety of aluminum in vaccines. Among other things, Dr.

Plotkin was asked about letters written by scientists in British Columbia -- scientists that Dr. Plotkin stated "published good science." (Dep. 291:13-293:5.) In those letters the scientists stated:

> In children there is growing evidence that aluminum adjuvants may disrupt developmental processes in the central nervous system. . . . Despite the foregoing, the safety of aluminum adjuvants in vaccines has not been properly studied in humans, even though pursuant to the recommended vaccine schedule published by the Centers for Disease Control, a baby may be injected with up to 3,675 micrograms of aluminum adjuvants by six months of age.

(Dep. 305:25-307:13.) This testimony shows that Plaintiff's concerns regarding the safety of aluminum in vaccines are not as unhinged as Ms. Nieusma and her friends seemed to think, and Plaintiff should not be precluded from refuting same publicly.

As another example, Ms. Nieusma posted "Hour 8 - vaccines cause AIDS." (Ex. 4 at 3.) Again, this, at best, mischaracterizes the testimony. Plaintiff's counsel never once implied vaccines cause AIDS. (Dep. 365:19-369:22.) Rather, Dr. Plotkin was asked questions concerning a paper he wrote refuting the idea that AIDS originated from certain vaccine trials, and about certain supporting documents Dr. Plotkin had promised to make public, but that appeared not to be available. (*Id.*)

As shown, many of Ms. Nieusma's comments were misleading at best, and at worst defamatory, because they make false assertions about Plaintiff's position to cast her in the worst light possible. If the deposition is sealed, Ms. Nieusma's Facebook comments may be the only thing the public hears about the deposition, and Plaintiff will have no means to refute those statements in the eyes of the public. Such a result would be unjust because (i) it would prevent Plaintiff from defending against Defendant's false public assertions regarding the content of the deposition, and (ii) it would favor Defendant's ability to advance his agenda in public while disadvantaging Plaintiff's ability to do the same.

Furthermore, restricting the use of the deposition because it might advance one party's agenda is a content-based restriction, and thus, violates the First Amendment. The "principal

inquiry in determining content neutrality is whether the government has adopted a regulation of speech without reference to the content of the regulated speech[,]" courts "thus look to the government's purpose as the threshold consideration." *Madsen v Women's Health Ctr., Inc.*, 512 U.S. 753, 763 (1994) (internal quotations omitted). If an injunction is content based, it is subject to strict scrutiny. *See St. John's Church in Wilderness v Scott*, 296 P3d 273, 282; 2012 COA 72 (Colo App, 2012) (applying strict scrutiny of an injunction prohibiting use of certain protest signs); *Options v Lawson*, 287 NJ Super 209; 670 A2d 1081, 1086 (App Div, 1996) ("Heightened scrutiny by a reviewing court is necessary when an injunction is not content-neutral."). Here, defendant's arguments show that the purpose for the injunction is not content neutral and defendant's arguments in favor of the protective order cannot pass strict scrutiny. *See VI 4D, LLLP v Crucians in Focus, Inc.*, 2012 VI LEXIS 65 (VI, Dec. 28, 2012) (holding that restricting the parties from publishing certain documents that would support one side's position was a content-based injunction).

Third, Defendant claims that the deposition contains "information about Dr. Plotkin's travel schedule, finances and the distribution of labor in his marriage" that should not be released to the public. Putting aside that these topics constitute a small fraction of the deposition, none of this information rises to the level of establishing good cause for a protective order.

As for Dr. Plotkin's travel schedule, he listed the countries he visited in 2017 to "[a]ttend meetings, scientific meetings" and the additional trips he planned in 2018 to teach in France, attend meetings in Washington D.C., and conferences in Germany and India. (Dep. 20:21-25:24.) None of this is confidential. However, all of this refutes Defendant's prior assertion that Dr. Plotkin, as an 85-year old man, was "unable to travel to Michigan to testify in this hearing" and that forcing him to attend would be "incredibly burdensome for a man of his age." (Ex. 9 at p. 4.)

As for Dr. Plotkin's finances, as discussed *supra*, his testimony did not reveal anything that was not reasonably accessible from public sources.

As for "the distribution of labor" in his marriage, the only testimony Dr. Plotkin provided about his marriage regarded the fact that "my wife does the accounting." (Dep. 43:11.) There is nothing confidential about that, at least not sufficient to justify a protective order.

In sum, Defendant has not provided any valid grounds to find good cause to seal any portion of the deposition. Hence, not only is the sealing motion moot, sealing is otherwise inappropriate, a violation of the First Amendment, and futile because it is already public.

II. DEFENDANT'S MOTION TO QUASH SHOULD BE DENIED

Defendant also moves to quash the subpoena to Dr. Plotkin (the "Subpoena") pursuant to MCR 2.305(A)(4) and 2.305(B)(1), (2) based on his conclusory assertion that it is "unreasonable and oppressive." (Ex. 1 at 4.) Defendant fails to explain this assertion and it is simply wrong.

A. The Requests Are Relevant and Reasonable

The requests are relevant to the subject matter of this action and otherwise reasonable, and therefore responses are required under MCR 2.302(B)(1) and MCR 2.310(B)(2). Most of the requests seek documents supporting Dr. Plotkin's vaccine safety claims and hence are relevant to the central claims in this action, and it is hard to see why Defendant would want to suppress such information. *See, e.g., Park Forest of Blackman v Smith,* 112 Mich App 421, 429; 316 N.W.2d 442 (1982) (reversing an order quashing subpoena because "[b]y quashing the subpoena, the trial court prevented the defendant from obtaining relevant evidence on the issue of just cause.")

The first request in the Subpoena seeks:

> All Communications Concerning this Lawsuit, including but not limited to Communications with Karen Ernst. This request excludes Communications that were solely with Defendant's counsel.

(Ex. 16 ¶ 1.) Dr. Plotkin stated that the only communications he had about this lawsuit were emails with Karen Ernst of Voices for Vaccines, and Dr. Paul Offit of the Children's Hospital of Philadelphia. (Dep. 14:15-17:13.) As for his emails with Ms. Ernst, he stated that "[i]f I can find

it, I'll be glad to send it to you." (*Id.*) As for his emails with Dr. Offit regarding this action, Dr. Plotkin stated those emails discussed vaccine safety. (*Id.*) Producing these two email exchanges is relevant to this dispute and, by Dr. Plotkin's admission, not unreasonable or oppressive.

The second request in the Subpoena asks for:

> Documentation reflecting the duration of the safety review period and placebo control used for each clinical trial reflected in the Package Insert for each vaccine on the CDC's Childhood Vaccine Schedule to the extent not already reflected in the Package Insert.

(Ex. 16 ¶ 2.) Federal law requires the clinical trial experience for each vaccine to be described in its package insert. (21 CFR 201.57(c)(7).) Nonetheless, Dr. Plotkin testified that safety review periods for certain vaccines may be longer than stated on the inserts and that a placebo may have been used despite the insert reflecting otherwise. (Dep. 148:25-202:21). This additional safety information, if it exists, is directly relevant to Plaintiff's claims that vaccines have not been adequately safety tested.

The third request in the Subpoena seeks:

> Documentation of clinical trial(s) reflecting the safety profile of the cumulative exposure of the vaccines recommended during the first two years of life in the CDC's Childhood Vaccine Schedule, including the safety profile for children with a family history of autoimmunity.

(Ex. 16 ¶ 3.) Dr. Plotkin repeatedly explained that a randomized clinical trial is necessary to determine whether a vaccine causes a claimed adverse reaction. (Dep. 155:7-155:22; 156:24-157:5; 162:7-162:11; 177:2-177:6.) Plaintiff is merely asking that he produce a clinical trial showing the safety profile of requiring a two-year-old child, such as Faith, to receive all recommended vaccines. It is difficult to conceive of a more relevant request.

The fourth request in the Subpoena asks for:

> Documentation countering the peer reviewed literature reflecting that aluminum adjuvants used in vaccines are taken up by macrophages, transported to brain tissue, and cause immune activation and the release of IL-6 in the brain.

(Ex. 16 ¶ 4.) Dr. Plotkin stated that researchers at the University of British Columbia are doing "good science" in identifying what would render a child susceptible to a vaccine injury, with an emphasis on aluminum adjuvant used in vaccines. (Dep. 291:13-292:16.) This group among others have developed a body of peer reviewed science, published in part in journals Dr. Plotkin is an editor, that supports that aluminum adjuvant in vaccines may pose a safety risk. (Dep. 291:13-308:9.) This is relevant to the safety of injecting Faith with aluminum adjuvanted vaccines. Asking Dr. Plotkin for citations to the science requested above is neither burdensome or oppressive.

The fifth request in the Subpoena demands:

> Documentation reflecting the safety profile for each Vaccine Ingredient for each vaccine on the CDC's Childhood Vaccine Schedule, including but not limited to monkey kidney cells, calf serum, guinea pig cell cultures, pig gelatin, lactose, yeast, egg protein, human diploid cells, human diploid lung fibroblasts, human albumin, human DNA, human proteins, PCV-1, and PCV-2.

(Ex. 16 ¶ 5.) The citations supporting the safety of vaccine ingredients should be readily available to the nation's leading vaccine expert and editor of the primary medical textbook on vaccines. (Ex. 9.) Since Defendant seeks to inject Faith with these ingredients, their safety is relevant.

The sixth request in the Subpoena seeks:

> All letters cited in your article "Postscript relating to new allegations made by Edward Hooper at The Royal Society Discussion Meeting on 11 September 2000" and all papers and documents in your personal files and elsewhere upon which you based your article entitled "Untruths and Consequences: the false hypothesis linking CHAT type 1 polio vaccination to the origin of human immunodeficiency virus" which are not publicly accessible at the library of the College of Physicians of Philadelphia.

(Ex. 16 ¶ 6.) Dr. Plotkin stated he deposited almost all documents responsive to this request with the Historical Medical Library of the College of Physicians of Philadelphia with a small balance remaining in his personal files. (Dep. 366:15-370:13.) Dr. Plotkin stated that if the library restricted access to the documents he would authorize their release. (Dep. 369:2-369:8.) The

library's catalog states the documents provided by Dr. Plotkin are "fully restricted until the donor is deceased." (Ex. 17.) Dr. Plotkin need do nothing more than fulfill his promise to authorize access to the library documents. As for the small balance of documents in his personal file, Dr. Plotkin stated he has no issue sharing copies with Plaintiff. (Dep. 370:5-370:14.) Hence, there is nothing unreasonable or oppressive in these requests and these documents are relevant to, *inter alia*, the ethical and consent issues Plaintiff has raised regarding vaccinating Faith.

The seventh and eight requests in the Subpoena relate to Dr. Plotkin's financial conflicts with the companies whose products he opined Faith's pediatrician should purchase and administer to Faith. While relevant to this dispute, as long as Dr. Plotkin does not intend to appear at trial, Plaintiff will not demand responses to the seventh and eighth document requests.

B. Defendant's Arguments to Quash the Subpoena Are Without Merit

Despite the plain relevance of the requests in the Subpoena, Defendant's only argument is that Dr. Plotkin "is no longer in the case and is outside the jurisdiction of this Court." (Ex. 1 at 4.) As for Defendant's claim that Dr. Plotkin is "no longer in the case," which we understand to mean he does not intend to testify at trial, it is irrelevant. Defendant already designated him as an expert and Plaintiff has deposed him as an expert for Defendant. The documents requested remain relevant irrespective of whether Defendant intends to call Dr. Plotkin during trial.

As for Defendant's claim that Dr. Plotkin "is outside the jurisdiction of this Court," Defendant is simply wrong. By agreeing to serve as an expert witness, and agreeing to be deposed in this action, Dr. Plotkin submitted to this court's jurisdiction. He cannot now revoke that submission to avoid providing evidence that he testified about.

III. DEFENDANT SHOULD BE PERMITTED TO DEPOSE DR. TERESA HOLTROP

On December 1, 2017, Plaintiff requested deposition dates for both Dr. Plotkin and Dr. Teresa Holtrop. (Aff. ¶ 3, fn.1.) Because Defendant identified Dr. Plotkin as his primary expert,

Plaintiff chose to prioritize his deposition. (Dep. at 1.) Discovery closed on January 15, 2018. One day later, Defendant informed Plaintiff he would not present Dr. Plotkin at trial and that only Dr. Holtrop would appear as an expert. Given this new development, Plaintiff renewed her request for dates for Dr. Holtrop's deposition. When Defendant refused to provide dates, Plaintiff noticed Dr. Holtrop's deposition for February 6, 2018, but was advised she would not attend without a court order. Plaintiff has since re-noticed Dr. Holtrop's deposition for February 20, 2018.

"[T]he purpose of discovery is to simplify and clarify issues. . . . Thus, the rules should be construed in an effort to facilitate trial preparation and to further the ends of justice." *Reed Dairy Farm v Consumers Power Co.*, 277 Mich App 614, 616; 576 NW2d 709 (1998). As such, the discovery process "should promote the discovery of the true facts and circumstances of a controversy, rather than aid in their concealment." *Domako v Rowe*, 438 Mich 347, 360; 475 NW2d 30 (1991). Trial courts, therefore, have discretion to allow parties to conduct discovery, even after the discovery cutoff date. *Carr v Starr Indem & Liab Co*, unpublished per curiam opinion of the Court of Appeals, issued September 18, 2014 (Docket No. 316359), p2 (holding court did not abuse discretion by allowing discovery after the cut-off).

Plaintiff respectfully submits that the need to depose Dr. Holtrop before trial is now acute. Plaintiff only learned after the close of discovery that she will be Defendant's only expert. Being deprived of the ability to depose Dr. Holtrop prior to trial will prejudice Plaintiff's defense. The interests of judicial efficiency, fairness, and justice all favor permitting the deposition to proceed. Permitting this deposition also will not unduly prejudice Defendant. And to the extent that Defendant claims that any discovery after the cut off will work a prejudice, much of the reason for that prejudice rests on the fact that he changed his expert designations after the discovery cut off.

WHEREFORE, Plaintiff respectfully requests this Honorable Court deny all relief requested by Defendant based on the appended brief in support of this opposition and the appended affidavit of Plaintiff in support of this opposition and the exhibits appended thereto.

Respectfully submitted;

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