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STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH,

Petitioner,

v.

DOAH Case No. 11-5891PL

DOH Case No. 2011-10006

CHRISTINA B. PAYLAN, M.D.,

Respondent.

**PETITIONER'S RESPONSE TO MOTION TO STRIKE PETITIONER'S RESPONSE
TO RESPONDENT'S NOTICE OF OBJECTION, MOTION FOR PROTECTIVE
ORDER, AND MOTION TO QUASH NOTICE OF TAKING DEPOSITION IN LIEU
OF LIVE TESTIMONY AND REQUEST FOR PROTECTIVE ORDER TO PREVENT
UNLAWFUL DISCLOSURE OF CONFIDENTIAL MEDICAL INFORMATION**

Petitioner responds to Respondent's Motion and states:

1. On February 2, 2012, Petitioner issued a Notice of Taking Dr. Soler-Baillo's Deposition In Lieu of Live Testimony. Petitioner's deposition of Dr. Soler-Baillo was noticed for February 14, 2012. The notice indicated the deposition would be taken in-person in Miami, Florida.

2. On February 13, 2012, at 8:56 a.m.,¹ Respondent filed a motion to quash Petitioner's notice of taking Dr. Soler-Baillo's deposition on the basis that Petitioner's subpoena to Dr. Soler-Baillo requested that he produce Respondent's patient records at his deposition without providing Dr. Soler-Baillo with a patient release that authorized him to do so.

¹ Undersigned counsel was in Tampa, Florida on this day defending a deposition in this matter. Respondent's counsel appeared at the same deposition via videoconference from Tallahassee.

3. In the interest of moving forward with the deposition, at 10:31 a.m. that day, Petitioner filed an amended notice of taking Dr. Soler-Baillo's deposition. The amended notice did not include a subpoena for Respondent's patient records.

4. At 11:38 a.m. that same day, Respondent filed motion to quash Petitioner's amended notice of taking Dr. Soler-Baillo's deposition on the basis that Petitioner would question Dr. Soler-Baillo regarding his physician/patient relationship with Respondent.

5. On February 14, 2012, a telephonic hearing was held on Respondent's motion. At the time, Petitioner had not had an opportunity to respond to Respondent's motion. In the interest of moving forward with the deposition, undersigned counsel offered during the telephonic hearing to not question Dr. Soler-Baillo about Respondent specifically. The Administrative Law Judge correctly noted that any conversation with Dr. Soler-Baillo concerning this case would likely involve some disclosure of patient-sensitive information. Undersigned counsel then argued that Respondent had waived any privilege she had to patient-confidentiality with respect to Dr. Soler-Baillo by virtue of statements she made to Tampa Police officers on June 9, 2011. The Administrative Law Judge then determined an evidentiary hearing would be required to determine whether a waiver had occurred.

6. On February 17, 2012 – just four days after Respondent's Motion was filed – Petitioner filed its written response to Respondent's Motion. In its response, Petitioner argued Respondent had waived any privilege she had to patient-confidentiality with respect to Dr. Soler-Baillo by virtue of statements she made to

Tampa Police officers on June 9, 2011, and by signing a release authorizing Dr. Soler-Baillo to speak with Petitioner's agent, the Florida Recovery Center. A copy of Petitioner's response is attached hereto as Exhibit A.

7. In her Motion, Respondent argues that Petitioner's Response should be stricken because it includes arguments not made by undersigned counsel during the telephonic hearing held on February 14, 2012.

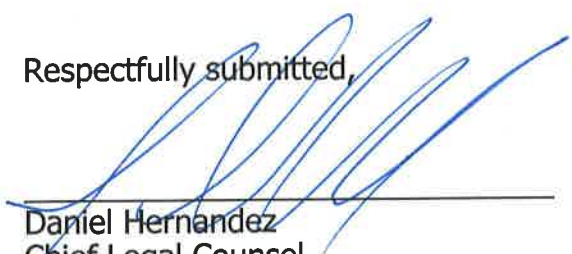
8. Respondent's Motion should be denied because Petitioner's response was filed just four days after Respondent's Motion. Accordingly, Petitioner's response fully complied with Rule 28-106.204, Florida Administrative Code.

9. In her Motion, Respondent further notes that Petitioner "chose" to attach confidential medical records and information concerning Respondent to its response.

10. In actuality, Petitioner inadvertently attached an un-redacted copy of Respondent's evaluation at the Florida Recovery Center to its response. When Respondent alerted Petitioner to this fact, Petitioner immediately contacted the DOAH clerk and had the un-redacted report removed from the DOAH website.

WHEREFORE, Petitioner respectfully requests that Respondent's Motion be denied.

Respectfully submitted,



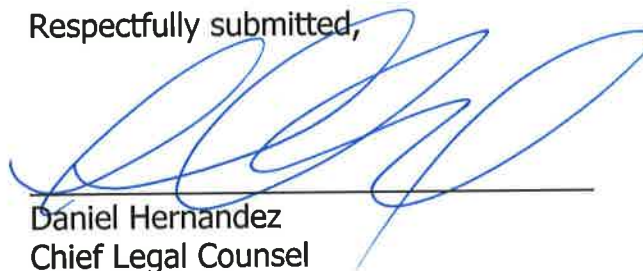
Daniel Hernandez
Chief Legal Counsel
Florida Bar #176834

Grace Kim
Assistant General Counsel
Florida Bar #31096
DOH Prosecution Services Unit
4052 Bald Cypress Way, Bin C-65
Tallahassee, FL 32399-3265
(850) 245-4640 telephone
(850) 245-4662 fax

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Notice of Filing has been furnished via email to Julie Gallagher, Esquire, Attorney for Respondent, Akerman Senterfitt, 106 East College Avenue, Suite 1200, Tallahassee, Florida 32301, (julie.gallagher@akerman.com), and Martin R. Dix, Esquire, Attorney for Respondent, Akerman Senterfitt, 106 East College Avenue, Suite 1200, Tallahassee, Florida 32301 (martin.dix@akerman.com) on this 21st day of February, 2012.

Respectfully submitted,



Daniel Hernandez
Chief Legal Counsel
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STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

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DOAH Case No. 11-5891PL
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CHRISTINA B. PAYLAN, M.D.,

Respondent.

**PETITIONER'S RESPONSE TO RESPONDENT'S NOTICE OF OBJECTION,
MOTION FOR PROTECTIVE ORDER, AND MOTION TO QUASH NOTICE OF
TAKING DEPOSITION IN LIEU OF LIVE TESTIMONY**

Petitioner responds to Respondent's notice of objection, motion for protective order, and motion to quash notice of taking deposition in lieu of live testimony and states:

1. On May 23, 2011, Respondent underwent a surgical procedure by Dr. Jose Soler-Baillo in Miami. A copy of a letter from Dr. Soler-Baillo confirming that Respondent underwent the surgery is attached hereto as Exhibit A.
2. On June 9, 2011, the Tampa Police Department ("TPD") executed a search warrant at Respondent's residence.
3. At the time TPD executed its search warrant, Respondent was present at her residence and was interviewed by TPD officers.
4. During the course of the interview, Respondent advised TPD officers that the last time she received Demerol was in connection with her surgery on May 23, 2011, in Miami, Florida.

5. In October 2011, Petitioner compelled Respondent to undergo an evaluation at the Florida Recovery Center ("FRC").

6. During the course of her evaluation at the FRC, Respondent executed a release authorizing FRC staff to speak with Dr. Soler-Baillo concerning the surgery he performed on her on May 23, 2011.

7. At the time she executed the release, Respondent understood that any information obtained by FRC from Dr. Soler-Baillo would be forwarded to Petitioner.

8. In October 2011, as part of their evaluation of Respondent, FRC evaluators spoke directly with Dr. Soler-Baillo regarding the surgery he performed on Respondent on May 23, 2011, and concerning his communications with Respondent in the weeks that followed the surgery.

9. One of the FRC evaluators, Scott Teitelbaum, M.D., recounted the communications between FRC and Dr. Soler-Baillo in his report to Petitioner (*see* page 3 of report) and identified Dr. Soler-Baillo as a source of collateral information (*see* page 1 of report) considered during the evaluation. A copy of the evaluator's report to Petitioner is attached hereto as Exhibit B.

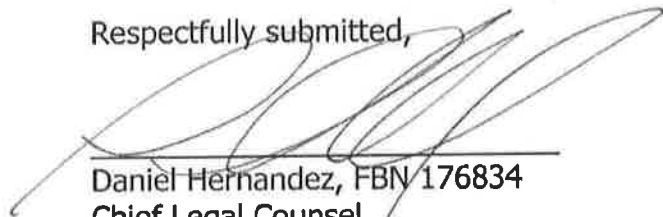
10. Dr. Soler-Baillo advised FRC evaluators that, contrary to Respondent's earlier report to TPD officers, he had not prescribed Demerol to Respondent in connection with her May 23, 2011, surgery. *See* Exhibit B at page 3.

11. Based on Respondent's voluntary release of her patient information to TPD officers, FRC evaluators and Petitioner, Respondent has waived any objection she may have to the Petitioner deposing Dr. Soler-Baillo. *See* Section 90.507, Florida Statutes ("A

person who has a privilege against the disclosure of a confidential matter or communication waives the privilege if the person . . . voluntarily discloses or makes the communication when he or she does not have a reasonable expectation of privacy, or consents to disclosure of, any significant part of the matter or communication.). *See also Lifemark Hospitals of Florida v. Izquierdo*, 899 So.2d 478, 480 (Fla. 3rd DCA 2005)(by agreeing to the production of her patient records, plaintiff was deemed to have waived any objection that may have existed to the deposition of her treating psychiatrist on the basis of psychotherapist-patient "or other privilege"); *Koch v. Cox*, 489 F.3d 384, 391 (C.A. D.C. 2007)(patient could not revoke his release of medical records to the extent holder of records had disclosed confidential information in reliance upon the waiver).

WHEREFORE, Petitioner respectfully requests that Respondent's Motion be denied and that Petitioner be permitted to depose Dr. Soler-Baillo immediately.

Respectfully submitted,

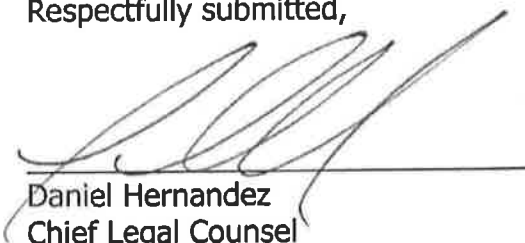


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petitioner's Response to Respondent's Notice of Objection, Motion for Protective Order, and Motion to Quash Notice of Taking Deposition in Lieu of Live Testimony has been furnished via U.S. mail and email to Julie Gallagher, Esquire, Attorney for Respondent, Akerman Senterfitt, 106 East College Avenue, Suite 1200, Tallahassee, Florida 32301, (julie.gallagher@akerman.com), and Martin Dix, Esquire, Attorney for Respondent, Akerman Senterfitt, 106 East College Avenue, Suite 1200, Tallahassee, Florida 32301, (martin.dix@akerman.com), on this 17th day of February, 2012.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read 'Daniel Hernandez', is written over a horizontal line.

Daniel Hernandez
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