COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPERIOR COURT
DEPARTMENT OF THE
TRIAL COURT

STEWARD HEALTH CARE SYSTEM, LLC,	)	
v.	)	SUCV2014-2665-A
BOSTON GLOBE MEDIA PARTNERS, LLC and JOHN DOE,	)	
Defendants.	)	

OPPOSITION OF BOSTON GLOBE MEDIA PARTNERS, LLC TO PLAINTIFF'S EMERGENCY MOTION FOR DECLARATORY/INJUNCTIVE RELIEF

Boston Globe Media Partners LLC, publisher of *The Boston Globe* newspaper (the "Globe") respectfully submits this opposition to the emergency motion of plaintiff Steward Health Care System, LLC ("Steward") for declaratory/injunctive relief.

FACTUAL SUMMARY

This action arises out of a newspaper article that has not yet been published by the Globe. Plaintiff's papers state that the article is being written by an "award-winning reporter" who, along with her editor, "have indicated [the Globe's] goal of a commitment to fairness and trustworthy reporting." Plaintiff's Ex Parte Emergency Motion for Short Order of Notice at 2 n.1.

Plaintiff also acknowledges that the reporter has stated that the article will "focus on the texture of one's family's experience" in the mental health system and "is not an investigation or a comprehensive analysis of the mental health care system in any way." Complaint, ¶ 12. A Globe editor similarly advised Steward that the planned article "is a lengthy narrative whose principal focus is on a family attempting to cope with a mentally ill son. As such, it follows their lives as they traverse a broad sweep of experiences and includes [patient name redacted] difficult

behavior and his interactions with many entities, including police and the court system." Complaint, Exhibit 3.

In addition to family and other interviews, the Globe received medical records from the patient. The patient has not agreed to a request (conveyed by the Globe) to give Steward a release to allow it to discuss the patient's treatment.

After the patient refused to provide a release to Steward, the Globe editor wrote Steward that "[i]t is my judgment that in reporting and writing this story [the reporter] has been scrupulously fair in her depiction of all [patient name redacted] interactions, including those that involve Norwood [Hospital, a Steward facility]. Obviously, we are interested in hearing any additional information you are able to provide." *Id.*

It is undisputed that the article has not been published and that Steward has not seen any drafts of the article.

ARGUMENT

In determining whether to grant a preliminary injunction, the court "initially evaluates in combination the moving party's claim of injury and chance of success on the merits." *Packaging Indus. Group, Inc. v. Cheney*, 380 Mass. 609, 617 (1980). "What matters as to each party is not the raw amount of irreparable harm the party might conceivably suffer, but rather the risk of such harm in light of the party's chance of success on the merits." *Id.* "Only where the balance between these risks cuts in favor of the moving party may a preliminary injunction properly issue." *Id.*

As shown below, Steward's motion for injunctive relief against the Globe should be denied because (1) it has no likelihood of success on the merits of its claim against the Globe; (2) it will not suffer irreparable harm if the relief it seeks against the Globe is denied; and (3) the balance of potential harms favors the denial of injunctive relief.

A. Count II of the Complaint Fails to State a Claim against the Globe.

Steward has no likelihood of success on Count II of its complaint, the only claim against the Globe. Count II is styled as a claim for a declaratory judgment. G.L. c. 231A, § 1 provides

in relevant part that a court may, "on appropriate proceedings make binding declarations of right, duty, status and other legal relations sought thereby, either before or after a breach or violation thereof has occurred in any case in which an **actual controversy has arisen** and is specifically set forth in the pleadings...." *Id.* (emphasis added).[1]

There is no "actual controversy" between the Globe and Steward, as required to bring a declaratory judgment action under c. 231A. Steward's submission demonstrates that, at Steward's request, the Globe asked John Doe if he would give Steward permission to discuss his treatment, and that the Globe did so.[2] The patient's refusal does not create any "actual controversy" between the Globe and Steward.

The record also demonstrates that the Globe has not yet published any article about this matter. Steward's speculation that the Globe will, in the future, publish an article Steward finds objectionable also does not amount to an "actual controversy" between Steward and the Globe and therefore provides no basis for declaratory judgment relief. *See generally District Attorney for Hampden Dist. v. Grucci*, 384 Mass. 525, 527 (1981) ("The assertion of possibilities does not present a dispute between the parties, and an actual controversy is essential to the granting of declaratory relief.").

The relief actually requested in Count II, moreover, is not for declaratory relief but for injunctive relief. *See* Complaint, ¶ 43 ("Steward seeks an Order requiring the Globe to identify and to deliver to the Court and to Steward those portions of Doe's medical record that Doe has either permitted the Globe to review or authorized it to publish...."). But nothing in c. 231A

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[1] Examples of actual controversies appropriate for declaratory judgment relief include "determinations of right, duty, status or other legal relations under deeds, wills or written contracts or other writings constituting a contract or contracts or under the common law, or a charter, statute, municipal ordinance or by-law, or administrative regulation...." G.L. c. 231A, § 2.

[2] The record does not indicate whether Steward asked John Doe for a release before filing suit.

entitles a declaratory judgment plaintiff to automatic injunctive relief. *See generally Payton v. Wells Fargo Bank, N.A.*, 2013 WL 782601 at *6 (D. Mass.) ("Injunctive relief is not a stand-alone cause of action under Massachusetts or federal law.").

Steward's requests for injunctive relief are premised on the erroneous assumption that the Health Insurance Portability and Accountability Act ("HIPAA") permits a health care provider to obtain an order authorizing the disclosure of patient information for the purpose of preventing what it perceives as a future threat of reputational harm. None of the cases cited by Steward stand for that proposition. *Bertram v. Sizelove*, 2012 WL 273083, *3-4 (E.D. Cal. 2012) (recognizing only that HIPAA does not prohibit discovery in litigation of medical records that are "directly relevant to the action" because the plaintiff has "waived his right to privacy by initiating this lawsuit and placing his medical records at issue"); *Vanderbilt v. Town of Chilmark*, 174 F.R.D. 225, 228-230 (D. Mass. 1997) (denying defendant's motion to compel discovery of patient-psychotherapist communications where the plaintiff-patient neither explicitly waived the common law privilege nor used privileged material to support a claim or defense in the litigation); *Holman v. Rasak*, 761 N.W.2d 391, 394-395 (Mich. App. 2008) (recognizing that under HIPAA, even the filling of a lawsuit "does not waive the confidentiality of health information" and that HIPAA allows a physician to disclose confidential health information only under limited conditions—in that case, in an ex parte oral interview where a qualified protective order was in place). Accordingly, Steward also has no derivative right to injunctive relief against the Globe in aid of such a claim.[3]

Even if HIPAA granted Steward disclosure rights against John Doe, however, Steward does not cite any provision of the statute or regulations that grant health care providers rights

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[3] Steward cites no case supporting its argument that the provision in 45 C.F.R. § 164.506)c)(1) permitting providers to disclose patient records for "health care operations" applies to cases involving concerns about publicity, as opposed to administrative matters such as processing insurance claims.

against third parties such as the Globe to compel the disclosure of information concerning patients.[4]

Even assuming, moreover, that there was an actual controversy between Steward and the Globe, an order compelling the press to turn over information that was legally obtained in the absence of a viable claim for defamation or some other recognized form of relief -- indeed, before an article even is published -- would violate fundamental rights under the First Amendment and Article 16 of the Declaration of Rights. *See generally In the Matter of Walter F. Roche*, 381 Mass. 624, 632 (1980) ("Some protection for ... information gathering must exist if the First Amendment is to serve adequately its central purpose of facilitating intelligent decisions by a self-governing people."); *Sinnott v. Boston Retirement Board*, 402 Mass. 581, 586, *cert. denied*, 488 U.S. 980 (1988) (refusing to compel discovery of reporter given questionable nature of underlying claim).

B. Steward Will Not Suffer Irreparable Harm in the Absence of an Injunction

Steward's complaint is almost entirely based on its assumptions and speculations about what will be contained in an article that the Globe has not yet published. As the Globe previously has informed Steward, it believes that those concerns are entirely unwarranted. *See, e.g.*, Complaint at Exhibits 2 and 3. To the extent Steward fears that it may in the future be defamed by a Globe publication, that is a claim compensable in money damages. *See generally Krebiozen Research Foundation v. Beacon Press*, 334 Mass. 86, 95-96 (1956), *cert. denied*, 352 U.S. 848 (1956) (money damages is alternative to injunctive relief in defamation cases).

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[4] In addition, as the exhibits to the Complaint establish, the Globe has informed Steward in detail about the complaints raised by John Doe about his care. Whether and how the Globe intends to write about those complaints, Steward has no need to obtain the Globe's internal records to ascertain what those complaints were.

C. The Balance of Harms Favors the Denial of Injunctive Relief

Steward also argues that, absent injunctive relief, mental health patients will be deterred from seeking treatment at Steward facilities. The basis for this assertion is Steward's speculation about the contents of an article that it has not read and which has not yet been published. The claim also ignores that, as Steward admits, the Globe has stated its "goal of a commitment to fairness and trustworthy reporting" on this matter. *See* Steward's Ex Parte Emergency Motion for Short Order of Notice at 2 n.1. On this record, the issuance of injunctive relief is far more likely to deter patients from seeking treatment by establishing the precedent that health care providers who believe patients have voiced complaints about their care have the right to disclose the patients' medical records without their consent.

CONCLUSION

For the foregoing reasons, defendant Boston Globe Media Partners, LLC requests that the court deny plaintiff's emergency motion for declaratory/injunctive relief.

Respectfully submitted,

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By its attorneys,

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Dated: August 21, 2014

CERTIFICATE OF SERVICE

I, Jonathan M. Albano, hereby certify that on August 21, 2014, I served a copy of the foregoing document by email and by first-class mail, postage pre-paid, upon counsel of record.

Jonathan M. Albano