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January 27, 2021

The Honorable Kenneth M. Karas
The Hon. Charles L. Brieant Jr. Federal Building
and United States Courthouse
300 Quarropas Street
White Plains, NY 10601-4150

MEMO ENDORSEMENT

Re: United States ex rel. Cutler v. Cigna Corp. et al., No. 17 Civ. 7515 (KMK),
Cigna's Request For Access To The Original Complaint

Dear Judge Karas:

On behalf of the Defendants, and per the Court's instructions, Dkt. 82, we offer the following response to the correspondence from Relator Robert A. Cutler ("Cutler") dated January 20, 2021 ("Letter"), Dkt. 81.

I. Cigna respectfully submits that there is no material dispute regarding the need to unseal the Original Complaint as to the Defendants so that Cigna may use the complaint in preparing its defense. In an email to counsel, Cutler wrote, "I will not oppose" Cigna's request to unseal. *See* Exhibit A. Similarly, Cutler states in his filing that he "does not object in principle to unsealing the Original Complaint." Letter at 1.

The only point for further discussion is whether the complaint's exhibits should be posted on the public docket. We do not see this as a significant issue. Cigna respectfully recommends that the Court either (1) lift the seal as to the Defendants and leave the exhibits under seal as to the public, or (2) lift the seal as to the Defendants and direct the parties to meet and confer to create appropriately redacted versions of the exhibits for the public docket. Either option would allow Cigna to use the exhibits in its defense, while appropriately limiting disclosure of the protected health information ("PHI"). Neither option would prejudice Cutler in any way.

II. Even though Relator does not oppose Cigna's request, Cutler does appear interested in attempting to prevent Cigna from using his prior pleading by suggesting that Cigna's request implicates the Health Insurance Portability and Accountability Act ("HIPAA"). Cutler's discussion of HIPAA is, however, both inaccurate and a distraction. Cigna's current request implicates HIPAA only to the extent the exhibits become public, in which case redactions would fully address that issue.

III. Separately, we address a few unfortunate errors in Cutler's filing in order to ensure accuracy. First, Cutler claims that there is "cause for concern" because Cigna allegedly did not

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inform him that his exhibits contain PHI. *See* Letter at 1. This is incorrect. Cutler prepared the exhibits in question and is aware of their contents. More importantly, we addressed HIPAA in our interactions with Relator. When we asked for Cutler’s consent to unseal the complaint on December 15, 2020, we asked that he agree to unseal his “original complaint, subject to appropriate HIPAA redactions.” Exhibit A. Subsequently, on January 12, 2021, we provided Cutler with a draft of our letter to the Court. *See id.* Hearing no objection from Cutler, we filed our letter the next day without alteration. *Compare id.* (attachment), with Dkt. 75.

Second, Cutler asserts, without citation, that the burden is on Cigna to “provide additional information” regarding “[its] intended use” before the Original Complaint can be unsealed. *See* Letter at 2. The Second Circuit “easily” held that complaints are “judicial document[s] subject to a presumption of access.” *Bernstein v. Bernstein Litowitz Berger & Grossmann LLP*, 814 F.3d 132, 139 (2d Cir. 2016).¹ Since Mr. Cutler has not stated opposition and, in any event, offers no basis to counter that “presumption of access,” the Original Complaint, which as a functional matter is already public and widely available, should be unsealed as to Defendants. *See Lugosch v. Pyramid Co. of Onondaga*, 435 F. 3d 110, 126 (2d Cir. 2006) (describing the “burden on the party seeking to prevent disclosure”).²

Finally, Cutler asserts, again without citation, that the Original Complaint “has no ‘use’” and “will have no bearing on the case.” Letter at 1. Under *Bernstein*, *Lugosch*, and similar cases, the potential uses for the complaint are not relevant to whether it should be unsealed as to Defendants. Nevertheless, it is settled that “[t]he amendment of a pleading does not make it any the less an admission of the party.” *Andrews v. Metro N. Commuter R.R.*, 882 F.2d 705, 707 (2d Cir. 1989). Indeed, Cutler admits that his amendment included “a significant number of revisions to [his] factual allegations.” Letter at 1. Cigna has a due process right to evaluate those changes for itself. *See, e.g., United States v. McKeon*, 738 F.2d 26, 31 (2d Cir. 1984) (“A party . . . cannot advance one version of the facts in its pleadings, conclude that its interests would be better served by a different version, and amend its pleadings to incorporate that version, safe in the belief that the trier of fact will never learn of the change in stories.”). More broadly, Cutler’s Original Complaint is likely, in our view, to be relevant to a host of issues in this litigation. *See, e.g., U.S. ex rel. Schweizer v. Oce, N.V.*, 577 F. Supp. 2d 169, 172-73 (D.D.C. 2008) (prior pleading relevant to issues of public disclosure and original source); *U.S. ex rel. Health Outcomes Techs. v. Hallmark Health Sys., Inc.*, 349 F. Supp. 2d 170, 174 (D. Mass. 2004) (prior pleading relevant to “defenses such as exhaustion of the limitations period”); *see also* Fed. R. Civ. P. 15(c)(1) (describing the “relation back” test for amended pleadings).

¹ *See also Haider v. Geller & Co. LLC*, 457 F. Supp. 3d 424, 427 (S.D.N.Y. 2020) (“It is plain that a complaint is a judicial document to which the presumption of access attaches.”); *U.S. v. UCB, Inc.*, No. 14-cv-2218 (TPG), 2017 WL 838198, at *2 (S.D.N.Y. Mar. 3, 2017) (original and amended complaints both judicial documents).

² *See also U.S. ex rel. Love v. Teach for America, Inc.*, No. 17-cv-2062 (KBF), 2018 WL 1156103, at *1 (S.D.N.Y. Feb. 21, 2018) (relator must show “extraordinary circumstance or compelling need” to keep the complaint under seal).

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The Court orders that the seal be lifted for the original Complaint as to the Defendants only and otherwise leaves the exhibits under seal for the public. Any future briefing filed related to this Motion should redact any contents that remain unseal. Unredacted copies of such briefing must be emailed directly to Chambers.

White Plains, NY
January 28, 2021

SO ORDERED


KENNETH M. KARAS U.S.D.J.

Respectfully submitted,

/s/ Eamon P. Joyce

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