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By Appointment Only

Honorable Loretta A. Preska
Judge, Southern District of New York
Daniel Patrick Moynihan U.S. Courthouse
500 Pearl Street
Courtroom 12A
New York, New York 10007

VIA ECF

RE: Medina v. DOCCS, 15-cv-1955 (LAP)

April 12, 2017

Dear Judge Preska:

I represent Plaintiff in the above-captioned matter. I am in receipt of Defendants' motion for disclosure of Plaintiff's mental health records. While suggesting denial of disclosure would be "fundamentally unfair," Defendants' counsel offers no precedent for the stripping of a privilege protected by the *Federal Rules of Evidence.* Defendants' counsel inappropriately suggests it is merely Plaintiff's "privacy interest" at issue. *Fed. R. Evid*. 501 treats confidential communications between a licensed psychotherapist – including a licensed social worker engaged in psychotherapy – and his or her communications with a patient in the course of diagnosis or treatment, as protected from disclosure. The psychotherapist privilege was first enunciated in *Jaffee v. Redmond*, 518 U.S. 1 (1996). As the *Jaffee* court stated:

> The psychotherapist privilege serves the public interest by facilitating the provision of appropriate treatment for individuals suffering the effects of a mental or emotional problem. The mental health of our citizenry, no less than its physical health, is a public good of transcendent importance. In contrast to the significant public and private interests supporting recognition of the privilege, the likely evidentiary benefit that would result from the denial of the privilege is modest. If the privilege were rejected, confidential conversations between psychotherapists and

> their patients would surely be chilled, particularly when it is obvious that the circumstances that give rise to the need for treatment will probably result in litigation. Without a privilege, much of the desirable evidence to which litigants such as petitioner seek access--for example, admissions against interest by a party--is unlikely to come into being. This unspoken "evidence" will therefore serve no greater truth-seeking function than if it had been spoken and privileged.

Jaffee v. Redmond, 518 U.S. 1, 11-12 (1996).

Indeed, the psychotherapist privilege established under *Fed. R. Evid*. 501 is not even subject to a balancing test. The *Jaffee Court* held:

> We reject the balancing component of the privilege implemented by [the Appellate] court and a small number of States. Making the promise of confidentiality contingent upon a trial judge's later evaluation of the relative importance of the patient's interest in privacy and the evidentiary need for disclosure would eviscerate the effectiveness of the privilege. As we explained in *Upjohn,* if the purpose of the privilege is to be served, the participants in the confidential conversation "must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all."

Ibid. at 17-18(citing *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981)).

Though Plaintiff is made to guess, Defendants seem to suggest that Plaintiff has forfeited his privilege by asserting that after threatening to harm himself DOCCS placed him on 1:1 suicide watch in the infirmary and left on the overhead lights. Alternatively, maybe Defendants suggest that by submitting a letter Plaintiff wrote to Ms. Konesky, an OMH Clinician, he waived his psychotherapist privilege. (Dkt. No. 164, Ex. 4.) Neither of these two actions is a forfeiture of the privilege. Mr. Medina appealed to a mental health professional because he wanted to stay in the mental health ward to receive services. Consistent with the Supreme Court's holding in *Jaffee*, the *Sims* court stated:

> that although a plaintiff waives his psychotherapist-patient privilege if he "does the sort of things that would waive the attorney-client privilege, such as basing his claim upon the psychotherapist's communications with him" or "selectively disclos[ing] part of a privileged communication in order to gain an advantage in litigation," or "suing the therapist for malpractice", he "<u>does not put his mental state in issue merely by acknowledging he suffers from depression for which he is not seeking recompense</u>."

Sims v. Blot, 534 F. 3d 117, 133-34 (2d Cir. 2008) (citing *Koch v. Cox*, 376 U.S. App. D.C. 376 (D.C. Cir. 2007)(emphasis in original). As in *Sims*, where the Plaintiff testified regarding communications with mental

health professionals and the "circumstances of his placement in PSU," here, Plaintiff's letter to Ms. Konesky regarding his removal from the Tri-ICP unit to the SHU did not forfeit his privilege. Mr. Medina was not using the letter as a sword and a shield, rather he was complaining about an unnecessary move (because Defendants would not throw some paper over a window) that affected his access to mental health services.

In the *Sims* case, with which this Court is familiar, the Second Circuit further established a balancing test for granting disclosure in the face of alleged forfeiture or waiver: "[w]hether fairness requires disclosure . . . is best decided on a case by case basis, and depends primarily on the specific context in which the privilege is asserted." *Sims v. Blot*, 534 F. 3d 117, 132 (2d Cir. 2008)(citing *John Doe Co. v. United States*, 350 F. 3d 299, 302 (2d Cir. 2003)). Based on Defendants' Proposed Form of Order, it seems Plaintiff must assert his privilege for the entire litigation. (Dkt. No. 176, Ex. 1 at 2)(seeking an order that "defendants may use information concerning plaintiff Anthony Medina's mental health in connection with their defense of this case.") Plaintiff has not requested any relief for psychological and emotional damages, nor has he used his mental health status to support his claims. However, even if he did, "garden variety emotional damages" are certainly on the table without forfeiting his psychotherapist privilege. Defendants' argument that "unless [Plaintiff] affirmatively waives any claims for damages relating to mental or emotional distress, has necessarily also put his mental health in issue in the underlying claims for damages as well" is just wrong. (Dkt. No. 176, FN 1.) The *Sims* court held exactly the opposite:

> Finally, we reject respondents' contentions that "anybody" who requests damages for "pain and suffering has waived the psychiatric privilege" "because the psychiatric records might conceivably disprove the experiencing of the pain and suffering," that any claim of "even . . . 'garden variety' injury waives the psychotherapist-patient privilege," and that a plaintiff's mental health is placed in issue whenever the plaintiff's claim for "unspecified damages" may "include[] some sort of mental injury." ***In reality respondents simply seek to have the privilege breached whenever there is a possibility that the psychiatric records may be useful in testing the plaintiff's credibility or may have some other probative value*** . . . if this principle were not the rule, then in virtually ever case a forfeiture might be found, as in virtually every case the party opposing the privilege could argue that the psychological record might reveal evidence that the party asserting the privilege is testifying falsely.

Sims, 534 F. 3d at 141-142 (internal references to the record omitted)(emphasis added).

The record to date in this case makes clear Plaintiff has threatened to harm himself or tried to kill himself in the past. Though Plaintiff's counsel has not been able to speak to him that may have also happened on February 28, 2017. The motion for civil contempt is not about whether or not Plaintiff was rightfully placed on suicide watch (of course he was); the contemptuous act the motion addresses is: 1) the refusal to tint the window outside Plaintiff's cell and the insistence on moving him instead, and 2) the refusal to dim or turn off the lights once he was on suicide watch in the infirmary.[1] Neither of these decisions on the part of DOCCS' personnel touches on Plaintiff's mental health conditions. DOCCS is perfectly able to submit evidence that it was necessary to leave the lights on while Plaintiff was on 1:1 suicide watch without discussing his medical condition. However, the greater question is why this necessity was not raised before the Order for mandatory injunctions was issued?

Defendants had *AMPLE* opportunity to negotiate the terms of a stipulation addressing Mr. Medina's exposure to light. Counsel for the parties discussed in minute detail provisions for security issues, mental health issues, we even argued about the length of a tether from Mr. Medina's waist chain to his handcuffs in a disciplinary hearing so that he could remain cuffed and use his CCTV device - all exceptions and carve-outs were on the table. Countless lawyer hours were spent drafting a stipulation that would serve all needs, and yet, Defendants refused to sign. On June 16, 2016 the Court granted Defendants yet one more week to sign the Stipulation. (Dkt. No. 122.) Again, they refused. Now it seems they want to renegotiate the Order, or at least belatedly craft exceptions to its application.

For the reasons stated above, Plaintiff opposes any issuance of a disclosure order for his mental health records.

[1] Cuffing him at the March 20, 2017 disciplinary hearing is another instance.

Very truly yours,

/s/ Amy Jane Agnew

Amy Jane Agnew, Esq.
Counsel for Plaintiff

cc: Bruce Turkel, AAG (VIA ECF)
Daniel Schulze, AAG (VIA ECF)