

COURT OF APPEALS  
DIVISION II

No. 38749-2-II

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STATE OF WASHINGTON  
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IN THE COURT OF APPEALS  
STATE OF WASHINGTON  
DIVISION II

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GROUP HEALTH COOPERATIVE, INC., a Washington corporation;  
and JITESH CHAWLA and "JANE DOE" CHAWLA, and GROUP  
HEALTH PERMANENTE, P.C., a Washington corporation,

Defendants/Petitioners,

v.

KARI CHAVEZ, individually and on behalf of all others similarly  
situated; PATTI FILAND, individually and on behalf of all others  
similarly situated; ALISA JACKSON, individually and on behalf of all  
others similarly situated,

Plaintiffs/Respondents.

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BRIEF OF RESPONDENT

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## TABLE OF CONTENTS

	<b>Page No.</b>
I. INTRODUCTION .....	1
II. STATEMENT OF THE ISSUE.....	4
III. STATEMENT OF THE CASE.....	4
A. Factual Background .....	4
B. Procedural Background.....	5
IV. ARGUMENT .....	8
A. Standard of Review .....	8
B. Civil Rule 26(b)(1) Authorizes the Trial Court to Permit Discovery of the Identities of Potential Class Members Prior to Class Certification.....	11
1. The Requested Discovery is Relevant.....	11
2. Defendant’s Allegations of Barratry are Unfounded .....	21
3. The Requested Discovery is Not Privileged.....	26
C. The Court’s Order Protects Patient Privacy Interests .....	27
1. Under the Trial Court’s Order, No Protected Healthcare Information Will Be Disclosed .....	28
2. The Letter the Court Authorized Reassures Patients That Their Healthcare Information Has Been Protected .....	33

D.	Plaintiffs' Interest in the Discovery Outweighs Class Members' Minimal Interest in Keeping Their Contact Information Private .....	34
E.	The Letter Can Be Revised to Provide Further Protections for Recipients of the Letter .....	39
V.	CONCLUSION.....	40

## TABLE OF AUTHORITIES

Page No.

### FEDERAL CASES

<i>Buycks-Roberson v. Citibank Fed. Sav. Bank</i> , 162 F.R.D. 338 (N.D. Ill. 1995).....	25
<i>Connell v. Wash. Hosp. Ctr.</i> , 50 F.R.D. 360 (D. D.C 1970).....	35
<i>Crabtree v. Hayden Stone Inc.</i> , 43 F.R.D. 281 (S.D.N.Y. 1967) .....	25
<i>Duke v. Univ. of Texas at El Paso</i> , 729 F.2d 994, 995 (5th Cir. 1984) .....	14
<i>Flanigan v. Am. Fin. Sys. of Ga.</i> , 72 F.R.D. 563 (M.D. Ga. 1976).....	25
<i>Gazelah v. Rome Gen. Prac., P.C.</i> , 502 S.E.2d 251, 253 (Ga. App. 1998).....	19
<i>Gulf Oil Co. v. Bernard</i> , 452 U.S. 89, 101, 1015 S Ct. 2193, 68 L. Ed.2d 693 (1981).....	12
<i>Hammond v. Lowe's Home Ctrs., Inc.</i> , 216 F.R.D. 666 (D. Kan. 2003).....	24
<i>Hatch v. Reliance Ins. Co.</i> , 758 F.2d 409 (9th Cir. 1985) .....	23, 24
<i>Hoffmann-La Roche, Inc. v. Sperling</i> , 493 U.S. 165, 110 S. Ct. 482, 107 L. Ed.2d 480 (1989).....	12
<i>In re Air Disaster Near Honolulu, Haw.</i> , 792 F. Supp. 1541 (N.D. Cal. 1990).....	24

<i>Kane v. Gage Merch. Servs., Inc.</i> , 138 F. Supp. 2d 212 (D. Mass. 2001) .....	24
<i>Martin v. LaFon Nursing Facility of the Holy Family, Inc.</i> , 244 F.R.D. 352 (E.D. La. 2007).....	<i>passim</i>
<i>Oppenheimer Fund, Inc. v. Sanders</i> , 437 U.S. 340, 98 S. Ct. 2380, 57 L. Ed.2d 253 (1978).....	<i>passim</i>
<i>Shannon v. Hess Oil Virgin Islands Corp.</i> , 96 F.R.D. 236 (D. V. I. 1982).....	14
<i>Shushan v. Univ. of Colo. at Boulder</i> , 132 F.R.D. 263 (D. Colo. 1990) .....	24
<i>Tucker v. Labor Leasing Inc.</i> , 155 F.R.D. 687 (M.D. Fla. 1994).....	24
<i>United States v. Moore</i> , 970 F.2d 48, 50 (5th Cir. 1992) .....	27

## STATE CASES

<i>Amalgamated Transit Union Local 587 v. State</i> , 142 Wn.2d 183, 11 P.3d 762 (2002).....	31
<i>Atari, Inc. v. Superior Court</i> , 212 Cal. Rptr. 773 (Ct. App. 1985).....	12
<i>Auto. Drivers &amp; Demonstrators Union Local No. 882 v. Dep't of Ret. Sys.</i> , 92 Wn.2d 415, 598 P.2d 379 (1979).....	29
<i>Barfield v. City of Seattle</i> , 100 Wn.2d 878, 676 P.2d 438 (1984).....	8
<i>City of Seattle v. Koh</i> , 26 Wn. App. 708, 614 P.2d 665 (1980).....	29

<i>Crab Addison, Inc. v. Superior Court</i> , 87 Cal. Rptr.3d 400 (2008) .....	10, 14, 18
<i>Darling v. Champion Home Builders Co.</i> , 96 Wn.2d 701, 638 P.2d 1249 (1982).....	21, 22
<i>Doe v. Group Health Coop. of Puget Sound, Inc.</i> , 85 Wn. App. 213, 932 P.2d 178 (1997).....	30, 33
<i>House v. Swedish American Hospital</i> , 564 N.E.2d 922 (Ill. App. 1991).....	19
<i>Howard Gunty Profit Sharing Plan v. Superior Court</i> , 105 Cal. Rptr. 2d 896 (Cal. Ct. App. 2001) .....	13
<i>In re Fort Worth Children’s Hospital</i> , 100 S.W.3d 582 (Tex. App. 2003) .....	19, 37
<i>In re P. P. Processing, Inc.</i> , 119 Wn.2d 452, 832 P.2d 1301 (1992) .....	31
<i>In re Search Warrant for 2045 Franklin, Denver Colorado</i> , 709 P.2d 597 (Colo. App. 1985) .....	27
<i>In re Tiene</i> , 115 A.2d 543 (N.J. 1955).....	36
<i>Lee v. Dynamex, Inc.</i> , 83 Cal.Rptr.3d 241 (2008) .....	<i>passim</i>
<i>Miller v. Savanna Maintenance Assoc.</i> , 979 So.2d 1235 (Fla. App. 2008).....	19, 37
<i>Prince v. Duke University</i> , 392 S.E.2d 388 (N.C. 1990).....	27
<i>Puerto v. Superior Court</i> , 158 Cal. App. 4th 1242 (2008) .....	14, 20, 22

<i>Doe v. Puget Sound Blood Ctr.</i> , 117 Wn.2d 772, 819 P.2d 370 (1992).....	<i>passim</i>
<i>Rhinehart v. Seattle Times Co.</i> , 98 Wn.2d 226, 654 P.2d 763 (1982).....	8
<i>Safeco Ins. Co. of Am. v. Superior Court</i> , 173 Cal. App. 4 <sup>th</sup> 814, 92 Cal. Rptr. 3d 814 (2009).....	22
<i>Shallenberger v. Hope Lutheran Church</i> , 449 N.E.2d 1152 (Ind. Ct. App. 1983).....	12
<i>Smith v. Behr Process, Inc.</i> , 113 Wn. App. 306, 54 P.3d 665 (2002).....	25
<i>Soter v. Cowles Publ'g Co.</i> , 131 Wn. App. 882, 130 P.3d 840 (2006).....	8
<i>State v. Leek</i> , 26 Wn. App. 651, 614 P.2d 209 (1908).....	29
<i>State ex rel. Carroll v. Junker</i> , 79 Wn.2d 12, 482 P.2d 775 (1971).....	8
<i>State v. Sullivan</i> , 143 Wn.2d 162, 19 P.3d 1012 (2001).....	31
<i>Weber v. Biddle</i> , 72 Wn.2d 22, 431 P.2d 705 (1967).....	9
<i>Wright v. Jeckle</i> , 121 Wn. App. 624, 90 P.3d 65 (2004).....	<i>passim</i>

## TREATISES

1A C. Sands, <i>Statutory Construction</i> § 27.02 (4th ed. 1972) .....	28
---	----

8 *Wigmore on Evidence*, §§ 2192–93 (3d ed. 1940).....36

**STATUTES**

45 CFR §164.....31  
RCW 5.60.060 .....26  
RCW 70.02.010 .....10, 28, 31  
RCW 70.02.020 .....10, 27, 31  
RCW 70.02.030 .....31  
RCW 70.02.050 .....31  
RCW 70.02.060 .....26, 31

**RULES**

CR 23 ..... *passim*  
CR 26 ..... *passim*

## I. INTRODUCTION

This class action lawsuit arises out of the negligent conduct of Group Health, Inc., Group Health Permanente, P.C. (collectively “Group Health”), and one of Group Health’s doctors, Jitesh Chawla. Group Health negligently hired Chawla, retained him, and failed to take reasonably adequate actions to correct Chawla’s pervasive and severe sexual misconduct even after Group Health was put on notice of Chawla’s unlawful actions. As a result, numerous women who were patients of Chawla’s at Group Health were placed at risk and injured.

During discovery, the trial court ordered Group Health to produce a list of the names and addresses of all females who were treated by Chawla at Group Health. In its decision, the court carefully weighed the interests of the Plaintiffs in the discovery against the interests of the potential class members in their protected “health care information.” After weighing these interests, the trial court permitted the requested discovery on the condition that the parties take steps to ensure that no “health care information” as defined by Washington’s Uniform Health Care Information Act and the federal Health Insurance Portability and Accounting Act (“HIPAA”) is disclosed. In particular, the trial court ordered the parties to use the procedure approved by the Court of Appeals in *Wright v. Jeckle*, 121 Wn. App. 624, 629, 90 P.3d 65 (2004), finding

that the procedure prevented confidential “health care information” from being disclosed. In that case, the trial court ordered the defendant to produce a list of the names and addresses of patient class members to a third party who did not know that the names on the list had received health care treatment so that the third party could send notice of the class action pursuant to CR 23(c). The issue on appeal here is whether the trial court properly exercised its discretion by ordering Group Health to produce a list of the names and addresses of former patients of Chawla at Group Health using the *Wright v. Jeckle* method for the purpose of allowing plaintiffs to conduct discovery pursuant to CR 26.

The trial court was well within its discretion when it ordered Group Health to produce information crucial to establish the elements of CR 23: the names, addresses, and phone numbers of the members of the proposed class. Because courts hold that such information is discoverable pre-class certification and because the trial court’s order provides protections for class members’ alleged privacy interests, Group Health’s motion should be denied.

In this appeal, Group Health has failed to meet its burden of demonstrating the trial court committed a manifest abuse of discretion by requiring Group Health to produce the requested discovery using the *Wright v. Jeckle* procedure. Group Health’s central argument, that permitting discovery of the identities of potential class members prior to

class certification is inappropriate, is meritless. In fact, courts around the country hold precertification discovery of potential class members' identities is appropriate where, as here, plaintiffs demonstrate the information is relevant to establish the elements of class certification and steps are taken to protect potential class members' privacy interests.

Group Health's other arguments are equally unavailing. First, no "health care information" as defined by either Washington's Uniform Health Care Information Act or by HIPAA will be released using the *Wright v. Jeckle* procedure. Second, Plaintiffs' interest in obtaining discovery that will allow them to vindicate the rights of the potential class members outweighs any interest the potential class members have in preserving the privacy of their names and addresses. This is especially true in this case where Group Health currently has unlimited and unilateral access to the information Plaintiffs seek. Third, if the Court determines that potential class members require further protection this can be achieved by remanding the issue to the trial court with instructions to revise the letter and envelope to be sent to the potential class members.

Washington has a proud history of protecting plaintiffs' right to access to the courts via the discovery rules. Even in close cases, and Plaintiffs respectfully submit this is not such a case, the State's jurisprudence requires that the parties have equal access to the information possessed by fact witnesses. The trial court adopted a procedure that

permits Plaintiffs to receive the discovery they need to move for class certification and protects the interests of the potential class members. For the reasons that follow, the trial court's decision should be affirmed.

## **II. STATEMENT OF THE ISSUE**

This Court should affirm the trial court's order denying Group Health's motion for protective order because the information is necessary to establish the requisite elements of CR 23; the information can be produced without violating state and federal statutes that protect health care information; and Plaintiffs' interest in the discovery outweighs the potential class members' interest in keeping their names and addresses private.

In the alternative, this Court should remand the issue to the trial court to revise the letter and envelope to be sent to the class to conform to the language set forth in Section IV.E of this brief.

## **III. STATEMENT OF THE CASE**

### **A. Factual Background**

In this proposed class action litigation, Plaintiffs Kari Chavez, Patti Filand, and Alisa Jackson allege that Defendant Jitesh Chawla engaged in a common course of sexual assault, sexual abuse, inappropriate touching, and victimization of female patients; and that Group Health acted negligently in hiring Chawla, retaining him, and failing to take reasonably adequate actions to correct Chawla's pervasive and severe sexually

inappropriate and assaultive behaviors even after they were put on notice that such disturbing conduct was occurring. CP 1–22.

Plaintiffs also allege that Group Health employees and patients repeatedly complained that Chawla was engaging in inappropriate conduct strikingly similar to the conduct Plaintiffs experienced, yet Group Health ignored these complaints. CP 16–18. At class certification, Plaintiffs must provide support for these allegations and thus demonstrate that their claims arise out of a common course of conduct engaged in by Chawla and Group Health toward female patients.

**B. Procedural Background**

Plaintiffs propounded discovery requests seeking a list of the names, addresses, and phone numbers of all former female patients of Jitesh Chawla at Group Health (the “Class List”). *See* CP 34. Before responding to the interrogatories and without conferring with Plaintiffs, Group Health moved for a protective order, asserting patient confidentiality. *See* CP 32–45.

On October 12, 2008, Plaintiffs’ counsel sent Group Health’s counsel an email proposing that the parties adopt the procedure used in *Wright v. Jeckle*, 121 Wn. App. 624, 629, 90 P.3d 65 (2004) to protect confidential information. CP 143, 149. Under Plaintiffs’ proposal, Group Health would send the Class List to Garden City Group — a well-regarded, independent third party, who would be responsible for keeping

the names and addresses confidential. *See id.* Plaintiffs also proposed that Group Health's counsel insert into an envelope a printed letter from Plaintiffs' counsel notifying Chawla's patients of the lawsuit and requesting they contact Plaintiffs' counsel if they have any information regarding the lawsuit's allegations. CP 143, 149–54. Group Health's counsel would then send the sealed envelopes to the Court-approved third party, who would address the envelopes using the list of names Group Health provided. CP 143, 149. In this way, those persons who have knowledge of the patients' identities would be segregated from those individuals who have knowledge of the subject matter of the lawsuit. Group Health would not agree to this compromise. Accordingly, Plaintiffs filed their response to Group Health's motion for protective order. *See* CP 126–41.

On October 24, 2008, Pierce County Superior Court Judge Thomas Felnagle heard oral argument on Group Health's motion for protective order. At the hearing, Judge Felnagle approved the discovery through the basic method Plaintiffs had proposed. However, the Court expressed concern about the language of the letter that Plaintiffs proposed be sent to class members and directed the parties to confer to come up with a revised letter that was (1) as calming as possible; (2) was not incendiary; and (3) reassured patients that their confidential information remains intact. RP 23:16 – 24:2 (Oct. 24, 2008).

On December 5, 2008, after the parties had conferred extensively regarding the letter's language, Judge Felnagle entered an order requiring Group Health to produce the Class List to Garden City Group along with sealed envelopes containing a revised letter to Dr. Chawla's patients ("Order Denying Protective Order"). CP 241–48. The revised letter, which Judge Felnagle approved, reassures patients that their confidential healthcare information has not been disclosed and informs them that they are not required to call Plaintiffs' counsel if they do not wish to do so. CP 246. Notably, at oral argument, Group Health's counsel stated her client had "very few" objections to the language of the letter, noting the letter "does say that the medical records have been and will continue to remain confidential." RP 15:9–12 (Dec. 5, 2008). In addition, Judge Felnagle found the discovery was necessary for purposes of establishing that typicality and commonality exist among the class members and Plaintiffs' mailing plan protected the privacy interests of potential class members. CP 241–43.

On December 15, 2008, Group Health filed a motion for reconsideration of the Order Denying Protective Order and/or for certification of the issues pursuant to RAP 2.3(b)(4), to which Plaintiffs were permitted a response. *See* CP 341–54. On January 9, 2009, Judge Felnagle issued an oral ruling, denying Group Health's motion for reconsideration of the Order Denying Protective Order and refused to

certify the issues for appellate review pursuant to RAP 2.3(b)(4). *See* RP 1–30 (Jan. 9, 2009). Judge Felnagle entered the Order Denying Reconsideration on January 12, 2009. CP 388–92.

#### IV. ARGUMENT

##### A. Standard of Review

The trial court possesses broad discretion to exercise control of litigation before it.” *Doe v. Puget Sound Blood Ctr.*, 117 Wn.2d 772, 777, 819 P.2d 370 (1992) (citing *Marine Power & Equip. Co. v. Dep’t of Transp.*, 107 Wn.2d 872, 875–76, 734 P.2d 480 (1978) (internal citations omitted)). Under CR 26(c), “the trial court exercises a broad discretion to manage the discovery process in a fashion that will implement the goal of full disclosure of relevant information and at the same time afford the participants protection against harmful side effects.” *See Rhinehart v. Seattle Times Co.*, 98 Wn.2d 226, 232, 654 P.2d 763 (1982); *Soter v. Cowles Publ’g Co.*, 131 Wn. App. 882, 891, 130 P.3d 840 (2006).

Further, discovery orders are reviewed for manifest abuse of discretion, which is the most deferential standard of review. *See Barfield v. City of Seattle*, 100 Wn.2d 878, 887, 676 P.2d 438 (1984) (holding a trial court does not abuse its discretion unless the record indicates “the discretion exercised is ‘manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons’”) (citations omitted); *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971) (citing *State ex*

*rel. Clark v. Hogan*, 49 Wn.2d 457, 303 P.2d 290 (1956)) (noting “[j]udicial discretion is a composite of many things, among which are conclusions drawn from objective criteria; it means a sound judgment exercised with regard to what is right under the circumstances and without doing so arbitrarily or capriciously”). “Exercise of that discretion will not be interfered with by an appellate court unless there has been an abuse of discretion which caused prejudice to a party or person.” *Weber v. Biddle*, 72 Wn.2d 22, 29, 431 P.2d 705 (1967).

Group Health mistakenly argues the trial court’s Order should be reviewed *de novo*, asserting the trial court relied on an improper legal rule. Defs.’ Br. at 13 (“the trial court employed post-certification guidelines set forth in CR 23 and interpreted in *Wright v. Jeckle*, 121 Wn. App. 624, 90 P.3d 65 (2004) to this pre-certification case involving a CR 26 discovery request for private health care information of non-parties”). An order permitting discovery of the identities of non-party fact witnesses is reviewed for abuse of discretion. *See Puget Sound Blood Ctr.*, 117 Wn.2d at 777–78 (reviewing trial court’s decision to permit discovery of the identity of a non-party blood donor who donated blood that the plaintiff alleged was contaminated with the AIDS virus for abuse of discretion). This general rule does not change simply because the non-party witnesses also are potential class members. *See Lee v. Dynamex*, 166 Cal. App. 4th 1325, 1336, 83 Cal. Rptr. 3d 241 (2008) (decision regarding discovery of

the identities of potential class members reviewed for abuse of discretion); *Crab Addison, Inc. v. Superior Court*, 169 Cal. App. 4th 958, 965, 87 Cal. Rptr.3d 400 (2008) (decision to permit discovery of the identities of potential class members where privacy interests at stake reviewed for abuse of discretion).

Further, even if the Court applies a *de novo* standard of review, the trial court did not rely on an improper legal rule. The issue in *Wright* was whether the class action notice procedure that the trial court had approved violated RCW 70.02.020. *See Wright*, 121 Wn. App. at 629 (“[t]he issue is whether the class action notice procedure ordered by the superior court violated the health care disclosure provisions of RCW 70.02.020”). The *Wright* court held that a list of patient names and addresses is not health care information where it is disclosed to a third party who has no knowledge that the individuals on the list are patients. *Id.* at 631 (concluding the defendant could comply with the notice procedure without disclosing health care information).

In this case, the trial court first established that it had broad discretion to permit the discovery requested by plaintiffs. RP 22–23. Then, it decided it would not permit the discovery unless the parties utilized the *Wright* procedure, thereby ensuring that no “health care information” as defined by RCW 70.02.010(6) was disclosed. Because

the trial court relied on *Wright* only to determine the parameters of “health care information,” the trial court did not apply an improper rule.

**B. Civil Rule 26(b)(1) Authorizes the Trial Court to Permit Discovery of the Identities of Potential Class Members Prior to Class Certification**

Plaintiffs are entitled to “discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action,” including “the identity and location of persons having knowledge of any discoverable matter.” CR 26(b)(1); *Puget Sound Blood Ctr*, 117 Wn.2d at 777. This broad right of discovery is necessary to ensure access to the party seeking the discovery. *Id.* Thus, the information Plaintiffs request is discoverable.

1. The Requested Discovery Is Relevant

As the United States Supreme Court has recognized, “discovery often has been used to illuminate issues upon which a [trial] court must pass in deciding whether a suit should proceed as a class action....” *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351, n.13, 98 S. Ct .2380, 57 L. Ed.2d 253 (1978). Where, as here, the information sought bears on issues of class certification, the names of potential class members are discoverable. *See id.* at 354, n.20 (stating that “communication with some members of the class could yield information bearing on” class action issues).

Precluding Plaintiffs from contacting members of the proposed Class will prevent them from properly investigating the allegations so they can move for class certification. Indeed, “[a] determination ‘whether the common questions are sufficiently persuasive to permit adjudication in a class action. . . cannot realistically be made until the parties have had a chance to conduct reasonable investigation.’” *Atari, Inc. v. Superior Court*, 212 Cal. Rptr. 773, 775 (Ct. App. 1985) (holding both sides have right to communicate with potential class members to complete discovery of class issues). The United States Supreme Court has also recognized that plaintiff’s counsel often need to conduct a thorough investigation into class allegations by contacting proposed class members. *Hoffmann-La Roche, Inc. v. Sperling*, 493 U.S. 165, 170-71, 110 S. Ct. 482, 107 L. Ed.2d 480 (1989) (holding a trial court “may authorize and facilitate notice” of a pending class action and order a defendant “to produce the names and addresses” of potential class members). A protective order should not make it “more difficult for. . . class representatives. . . to obtain information about the merits of the case from the persons they [seek] to represent.” *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 101, 1015 S. Ct. 2193, 68 L. Ed.2d 693 (1981) (holding that trial court exceeded its authority in restricting plaintiffs’ counsel from communicating with potential class members); *see also Shallenberger v. Hope Lutheran Church*, 449 N.E.2d 1152, 1154 (Ind. Ct. App. 1983) (same). To the contrary, Plaintiffs should

be “permitted precertification communication with potential class members for the purpose of investigation and preparation of [her] claims.” *Howard Gunty Profit Sharing Plan v. Superior Court*, 105 Cal. Rptr. 2d 896, 901 (Cal. Ct. App. 2001).

The names of the potential Class members are directly relevant to the subject matter of this case because Plaintiffs allege that Defendants engaged in a pervasive scheme of medical negligence and negligent supervision and bring this action on behalf of all female patients who, like themselves, were subjected to sexual touching or other sexual conduct or statements by Chawla while they were patients at Group Health. These potential Class members have knowledge directly pertaining to Defendants’ common course of negligence and negligent supervision, which will help establish (1) numerosity – the number of patients affected; (2) commonality – that the members of the class have been affected by Defendants’ conduct in the same or similar manner; (3) typicality – that the members of the proposed Class have been affected in the same or similar manner as the named Plaintiffs; and (4) predominance – that the common questions of law and fact are not outweighed by individualized issues, justifying class treatment of the claims. Plaintiffs are entitled to fully investigate their claims so they can adequately prepare their motion for class certification.

Without citing any authority, Group Health maintains the information is not relevant because “class actions proceed on the premise that the representative plaintiffs can establish the claims of the class without resort to testimony from absent class members.” Defs.’ Br. at 28 (“absent class members almost by definition do not have information that would be relevant to prosecution of class claims”). Numerous authorities, however, have rejected Group Health’s position. *See, e.g., Crab Addison, Inc. v. Superior Court*, 169 Cal. App. 4th 958, 966, 87 Cal. Rptr.3d 400 (Cal. Ct. App. 2008) (quoting *Puerto v. Superior Court*, 158 Cal. App. 4th 1242, 1250, 70 Cal. Rptr.3d 701 (Cal. Ct. App. 2008)) (permitting precertification discovery of a class list because “our discovery system is founded on the understanding that parties use discovery to obtain names and contact information for possible witnesses as the starting point for further investigations.”); *Shannon v. Hess Oil Virgin Islands Corp.*, 96 F.R.D. 236, 240–41 (D. V. I. 1982) (it is not appropriate for a court to limit discovery in a way that would preclude a potential class); *Duke v. Univ. of Texas at El Paso*, 729 F.2d 994, 995 (5th Cir. 1984) (reversing a trial court’s denial of class certification in a discrimination case on the grounds that the plaintiffs did not have adequate opportunity to discover the practices of university departments other than the department at which the named plaintiff worked); *Lee*, 166 Cal. App. 4th at 1338 (reversing trial court’s decision to deny class certification on the ground that the trial

court had denied class-wide discovery and thus denied plaintiffs the opportunity to prove their class claims).

Group Health wrongly relies on *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 98 S. Ct. 2380, 2391, 57 L. Ed. 2d 253 (1978), for the proposition that “outside the post-certification class notice context, the production of class members’ names normally is not within the scope of legitimate discovery.” See Defs.’ Br. at 28, 29 (citing *Oppenheimer*, 98 S. Ct. at 2388–89). This is neither *Oppenheimer*’s holding nor the law.

In *Oppenheimer*, the Supreme Court addressed the narrow issue of whether a defendant bears responsibility to pay to compile a list of names and addresses for purposes of sending post-certification notice pursuant to Fed. R. Civ. P. 23(c). *Oppenheimer Fund Inc.*, 437 U.S. at 342. The Supreme Court accepted review to resolve a split in the circuits on the issue. The Second Circuit had held that the federal discovery rules authorized the trial court to order defendants to assist in compiling a class list and to bear the expense involved in compiling and producing it. *Id.* The Supreme Court rejected the Second Circuit’s approach, and instead found that Rule 23(d), which permits courts to issue orders governing the conduct of class actions, empowers a trial court to direct defendants to assist in compiling such a list. *Id.* Because Rule 23(d) rather than the discovery rules authorize production of the list in the Rule 23(c) context, the trial court has the discretion to require plaintiffs to bear the burden to

pay to compile the list. *Id.* at 358 (“a district court exercising its discretion under Rule 23(d) should be considerably more ready to place the cost of the defendant’s performing an ordered task on the representative plaintiff, who derives the benefit, than under Rule 26(c)”). Indeed, the Supreme Court held that the test for determining who should pay to compile a list should be “whether the expense is substantial, rather than, as under Rule 26(c), whether it is ‘undue.’” *Id.* at 359.

In holding that Rule 23(d) rather than the discovery rules empowers a court to order defendants to produce a class list for purposes of sending notice, the Supreme Court noted that the plaintiffs had not sought the information to shed light on any of the substantive issues in the underlying case. *Id.* at 351 (noting that “the key phrase” in Rule 26(b)(1) is that discovery must be relevant to the subject matter involved in the pending action). Instead, the *Oppenheimer* plaintiffs had requested the information in order to satisfy Rule 23(c)’s procedural notice requirement. *See id.* at 352 (“Respondents’ attempt to obtain the class members’ names and addresses cannot be forced into the concept of ‘relevancy’ described above. The difficulty is that respondents do not seek this information for any bearing that it might have on issues in the case”). Thus, the discovery rules, which permit discovery only of information relevant to substantive issues, did not apply.

Nowhere in the opinion does the Supreme Court hold that outside the post-certification class notice context, the production of class members' names "is not within the scope of legitimate discovery." See Defs.' Br. at 29. Indeed, in its submissions to the trial court and in its brief here, Group Health egregiously misrepresents the Supreme Court's holding. To the contrary, the Supreme Court took care to expressly limit its holding to the post-certification notice context. The Supreme Court states:

We **do not hold** that class members' names and addresses never can be obtained under the discovery rules. There may be instances where this information could be relevant to issues that arise under Rule 23, see n. 13, *supra*, or where a party has reason to believe that communication with some members of the class could yield information bearing on these or other issues.

*Oppenheimer*, 437 U.S. at 354, n. 20 (emphasis added).<sup>1</sup>

Ignoring footnote 20, Group Health characterizes the Supreme Court's statements in footnote 13 as "dicta" and contends that the "key holding" upon which Group Health relies is more persuasive than the statements contained in footnote 13. Group Health misses the point. The statements contained in the *Oppenheimer* footnote emphasize the limits of the Supreme Court's holding. Through these footnotes, the Supreme

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<sup>1</sup> In footnote 13 the Supreme Court notes that discovery "often has been used to illuminate issues upon which a district court must pass in deciding whether a suit should proceed as a class action under Rule 23, such as numerosity, common questions, and adequacy of representation."

Court notes that pre-certification discovery of a class list is appropriate where, as here, the parties seek the discovery to illuminate issues relating to class certification. Thus, *Oppenheimer* does not stand for the proposition for which Group Health cites it.<sup>2</sup>

Moreover, numerous courts have held the discovery rules empower a court to require a class action defendant to produce a list of potential class member names and addresses where the information is relevant to determine the elements of class certification, thus undermining Group Health's claims to the contrary. See, e.g., *Martin v. LaFon Nursing Facility of the Holy Family, Inc.*, 244 F.R.D. 352, 359 (E.D. La. 2007) (permitting discovery of the identities of potential patient plaintiffs where information was relevant to determine the court's jurisdiction under the Class Action Fairness Act and protections were taken to guard the confidentiality of the information); *Crab Addison, Inc.*, 169 Cal. App. 4th at 974–75 (affirming trial court's decision to compel responses to interrogatories seeking contact information for potential class members); see also *Lee*, 166 Cal. App. 4th at 1337 (2008) (quoting *Pioneer Electronics (USA, Inc.) v. Superior Court*, 150 P.3d 198, 205-206 (Cal. 2007)) (“[c]ontact information regarding the identity of potential class

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<sup>2</sup> Like *Oppenheimer*, *In re Victor Tech. Sec. Litig.*, 792 F.2d 862, 865 (9th Cir. 1986) addressed who should bear the expense of post-certification class notice under Rule 23(c). It did not address, even in dicta, whether pre-certification discovery of a class list is appropriate. Thus, it does not apply here.

members is generally discoverable, so that the lead plaintiff may learn the names of other persons who might assist in prosecuting the case”).

These decisions accord with the general rule that the discovery rules permit discovery of the identities of non-party witnesses even when medical information is involved. *See Gazelah v. Rome Gen. Prac., P.C.*, 502 S.E.2d 251, 253 (Ga. App. 1998) (discovery rules permit disclosure of the names and addresses of nonparty witnesses receiving treatment from a clinic); *In re Fort Worth Children’s Hosp.*, 100 S.W.3d 582, 590 (Tex. App. 2003) (discovery rules authorize disclosure of list of nonparty witnesses who were administered vitamin at hospital); *House v. SwedishAm. Hosp.*, 564 N.E.2d 922, 927 (Ill. App. 1991) (plaintiff entitled to know identity of patient who allegedly attacked her so that she could contact and depose the patient); *Miller v. Savanna Maint. Assoc.*, 979 So.2d 1235, 1237 (Fla. App. 2008) (discovery rules permit disclosure of names and addresses of non-party witnesses where the information contained no damaging or sensitive information).

Indeed, courts permit plaintiffs to discover the identities of proposed class members because such a rule promotes fairness. For example, in this case, Group Health has unlimited access to the contact information of all proposed class members and is free to contact and interview them regarding their experiences and draft declarations in opposition to class certification. As Group Health points out in its brief,

Group Health already has sent its patients a letter informing them of Dr. Chawla's termination. *See* Defs.' Br. at 10 (citing CP 251, 320). Because Group Health has unilateral access to third-party witnesses—witnesses who could provide key testimony at class certification, Group Health has a huge advantage. *See Lee*, 83 Cal. Rptr.3d at 251 (stating “[f]rom the standpoint of fairness to the litigants in prosecuting or defending the forthcoming class action, [defendant] would possess a significant advantage if it could retain for its own exclusive use and benefit the contact information” of potential class members) (quoting *Pioneer Electronics (USA, Inc.) v. Superior Court*, 150 P.3d 198, 373 (Cal. 2007)); Permitting Group Health to contact class members without providing Plaintiffs the same opportunity is inequitable and violates the discovery rules' spirit of fairness. *See Puerto*, 158 Cal. App. 4th at 1256 (noting “[t]he trial court imposed no order preventing [defendant] from using the addresses and telephone numbers of these individuals in preparing its case, creating an inequitable situation in which one party has access to all, or nearly all potential witnesses but the other party is dependent on the willingness of those witnesses to participate in discovery”). Thus, the trial court did not abuse its discretion by entering an order that permitted Plaintiffs to reach out to potential class members who necessarily have knowledge relevant to class certification and to whom Group Health has unilateral access.

2. Defendants' Allegations of Barratry Are Unfounded

Group Health asserts that pre-certification discovery of a class list is generally not permitted because courts are concerned that plaintiffs may use the discovery to recruit new class members rather than establish the appropriateness of class certification. Defs.' Br. at 31. But Washington courts have rejected this rule. Indeed, the Washington State Supreme Court has specifically held that pre-certification communications with potential class members may not be restricted on the ground that the information may be misused unless the party opposing the discovery sets forth specific factual grounds for believing counsel will misuse the information. *Darling v. Champion Home Builders Co.*, 96 Wn.2d 701, 707, 638 P.2d 1249, 1252 (1982).

Here, Group Health seeks to limit Plaintiffs' communications with class members by denying them relevant discovery. Group Health, however, fails to set forth a single fact suggesting that Plaintiffs' counsel may use the information to "solicit" new clients. To the contrary, Plaintiffs have retained well-respected class action attorneys, who have prosecuted (and are prosecuting) numerous class actions in Washington state and throughout the country. *See* CP 142–46 at ¶¶ 11–13. Plaintiffs' counsel routinely seek and receive discovery of class member names and contact information so they can interview witnesses and establish the requirements of CR 23. *Id.* at ¶ 13. This case is no different. Plaintiffs

need the discovery of patient names and addresses to support their claims that Defendants engaged in a common course of medical negligence, sexual abuse, and negligent supervision that affected many of Dr. Chawla's former patients. This is not solicitation; it is relevant discovery of potential witnesses and their knowledge of the facts of the case. Thus, pursuant to *Darling*, the discovery is appropriate.

Moreover, in recent decisions, courts around the country have rejected the idea that pre-certification discovery of a class list is inappropriate due to concerns with barratry. Indeed, in a case decided this April in California, a California court of appeals permitted the plaintiffs to discover the identities of absent class members for the purpose of finding a new class representative. *See Safeco Ins. Co. of Am. v. Superior Court*, 173 Cal. App. 4<sup>th</sup> 814, 834, 92 Cal. Rptr. 3d 814 (2009) (noting that the potential for abuse was "nonexistent"). Likewise, in *Puerto*, the court found it "laudable" for plaintiffs' counsel to contact potential class members so long as counsel "observes ethical rules in interactions with prospective witnesses." 158 Cal. App. 4th at 1253. *See also LaFon Nursing*, 244 F.R.D. at 359 (holding identities of patient class members discoverable where the plaintiff seeks to contact patients to inform them that the action exists). In these cases, the court recognized that the potential class has a strong interest in the case proceeding as a class action and found that plaintiffs' counsel was entitled to the discovery it needed to

effectively prosecute the case as a class action. Likewise, in this case, the trial court has already found that Plaintiffs need the discovery for their motion for class certification. CP 243; RP 19:4–8 (Dec. 5, 2008). Thus, the discovery should be permitted.

The cases that Group Health cites to the contrary are inapposite. For example, in *Hatch v. Reliance Ins. Co.*, 758 F.2d 409, 416 (9th Cir. 1985), an interpleader action involving a dispute over a bond, the plaintiffs failed to demonstrate they needed the class list in order to investigate their motion for class certification, which was already before the court. By contrast, in this case, Plaintiffs have demonstrated they need the information to interview witnesses and investigate their class claims.

Further, in *Hatch*, the defendants had set forth substantial evidence that plaintiffs' counsel was abusing the class action process. Indeed, the district court found that plaintiffs did not meet Rule 23's adequacy requirement "because of the total incompetency of counsel." 758 F.2d at 415. Among other things, plaintiffs' counsel had requested discovery from the receiver, who was not a party to the action. *Id.* at 415–16. By contrast, in this case, Plaintiffs' counsel seek discovery that they routinely receive in other class actions. CP 142–46 at ¶ 14. Plaintiffs' counsel have never been found (or even accused) of abusing the process. Finally, Plaintiffs' counsel has proposed a legitimate, court-approved procedure

for obtaining the discovery that protects the privacy of potential class members. Thus, *Hatch* is simply not applicable here.

*Shushan v. Univ. of Colorado at Boulder*, 132 F.R.D. 263, 268 (D. Colo. 1990) is likewise inapposite. In *Shushan*, the court addressed the showing necessary to obtain conditional certification in a collective action brought pursuant to the ADEA. The *Shushan* court's decision to not allow the discovery is contrary to the overwhelming majority of authority which permits discovery of the identities of potential collective action members prior to conditionally certifying a collective action because such discovery "is necessary for the plaintiff to properly define the proposed class." See, e.g., *Hammond v. Lowe's Home Ctrs., Inc.*, 216 F.R.D. 666, 671 (D. Kan. 2003); see also *Tucker v. Labor Leasing Inc.*, 155 F.R.D. 687 (M.D. Fla. 1994); *Kane v. Gage Merch. Servs., Inc.*, 138 F. Supp. 2d 212 (D. Mass. 2001). Indeed, pre-notice discovery allows plaintiffs to make the required factual showing that they are "similarly situated" to absent class members. See *Hammond*, 216 F.R.D. at 671.

Group Health also improperly relies on *In re Air Disaster Near Honolulu, Haw.*, 792 F. Supp. 1541, 1551 (N.D. Cal. 1990). In *Air Disaster*, Plaintiffs sought a list of passengers who died in a plane crash for purposes of establishing the elements of class certification. The court denied the discovery, finding that individualized issues would predominate in any personal injury class action. See *Air Disaster*, 792 F.

Supp. at 1551. This is not the law in Washington State. In Washington, courts favor a “case-by-case application of class certification” and reject an approach that would render entire categories of cases “uncertifiable.” See *Smith v. Behr Process, Inc.*, 113 Wn. App. 306, 322, 54 P.3d 665 (2002) (citing *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1230–31 (9th Cir. 1996) (refusing to adopt an approach to class certification that would mean a products liability class action could never be certified). Indeed, the trial court in this case specifically rejected such an approach, denying Group Health’s motion to strike the class allegations on the ground that Plaintiffs had not had an opportunity to establish the elements of class certification because they had not yet received discovery of the class list.<sup>3</sup>

In short, the discovery rules permit plaintiffs to discover the identities of potential class members so long as plaintiffs demonstrate that the discovery is relevant. Here, Plaintiffs have done just that. Plaintiffs need the discovery to demonstrate that the members of the proposed class

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<sup>3</sup> The other cases that Group Health cites in its brief are likewise distinguishable because, unlike this case, the plaintiff either did not demonstrate that the information was relevant to their claims or the plaintiffs had failed to make even a minimal showing that the defendants’ wrongful behavior had impacted anyone beyond the named plaintiffs. See *Buycks-Roberson v. Citibank Fed. Sav. Bank*, 162 F.R.D. 338, 342 (N.D. Ill. 1995) (plaintiffs denied discovery of street addresses because they did not show the discovery was relevant); *Flanigan v. Am. Fin. Sys. of Ga.*, 72 F.R.D. 563 (M.D. Ga. 1976) (discovery not appropriate because there no evidence existed that controversy extended beyond the named plaintiffs); *Crabtree v. Hayden Stone Inc.*, 43 F.R.D. 281, 283 (S.D.N.Y. 1967) (same).

have been affected in the same or similar manner as the named Plaintiffs.

Thus, the trial court correctly authorized the discovery.

3. The Requested Discovery Is Not Privileged

Group Health asserts generally that when considering a discovery request, a court must determine whether a privilege applies. *See* Defs.' Br. at 15. But despite having multiple opportunities to brief and argue the issue, Group Health never raised the issue of privilege in the trial court proceedings or in its assignments of error. Therefore, the issue cannot be decided here. *See Puget Sound Blood Ctr.*, 117 Wn.2d at 779 (refusing to consider whether a common law privilege barred the requested discovery because the issue was not first presented to the trial court) (citations omitted).

In its brief, Group Health mentions in passing that the individuals who will receive the discovery letter from Plaintiffs are "innocent bystanders who have not waived the physician-patient privilege set forth in RCW 5.60.060(4)(b)." *See* Defs.' Br. at 20. The statute Group Health cites protects a physician from examination, without his patient's consent, in a civil action, "as to any information acquired in attending such patient, which was necessary to enable him or her to prescribe or act for the patient...." RCW 5.60.060(4)(b).

Even if Group Health had properly raised and preserved this issue for review, the language of RCW 5.60.060(4)(b) demonstrates the

privilege is not applicable here. The only information disclosed in this case is the patient's name and address, which is not privileged. *See, e.g., United States v. Moore*, 970 F.2d 48, 50 (5th Cir. 1992) (identity of patient or fact and time of his treatment does not fall within the scope of the physician-patient privilege); *Prince v. Duke Univ.*, 392 S.E.2d 388, 390 (N.C. 1990) (name, address, and telephone number of patient are not privileged); *In re Search Warrant for 2045 Franklin, Denver Colo.*, 709 P.2d 597, 601–02 (Colo. App. 1985) (as long as documents do not disclose both the ailment and the names of patients, no violation of confidence occurs). Further, a court-appointed third party will keep the information confidential and will have no knowledge that the individuals named on the list ever saw Chawla. Thus, any potential privilege is not violated. *See Wright v. Jeckle*, 121 Wn. App. at 628.

### **C. The Court's Order Protects Patient Privacy Interests**

As set forth above, the discovery rules generally permit pre-certification discovery of a class list so long as the party seeking discovery demonstrates that the discovery is necessary to establish the elements of class certification and the information is not privileged. However, Group Health maintains the discovery still should not be permitted because the interest of the proposed class members in their protected "health care information" outweighs Plaintiffs' interest in the discovery. Group Health also asserts that even if no "health care information" is actually disclosed,

the discovery should not be allowed because potential class members may “believe” that their protected information has been disclosed. For the following reasons, Group Health is wrong.

1. Under the Trial Court’s Order, No Protected Healthcare Information Will Be Disclosed

Group Health asserts that production of a list containing names, addresses, and phone numbers violates state and federal laws that protect health care information. Group Health maintains that RCW 70.02.020 prohibits disclosure of the information requested. Group Health’s assertions are meritless. The information Plaintiffs seek falls outside the scope of information protected from disclosure by state and federal statutes.

Washington’s Health Care Information Act plainly defines protected “health care information” as information that “identifies or can be readily be associated with” the identity of a patient **and** “directly relates to the patients’ health care.” RCW 70.02.010(6) (emphasis added). Likewise, the federal Health Information Privacy Act defines protected “health information” as:

[A]ny information, whether oral or recorded in any form or medium, that...(A) is created or received by a health care provider, health plan, public health authority, employer, life insurer, school or university, or health care clearinghouse; **and** (B) relates to the past, present, or future physical or mental health or condition of an individual, the provision of health care to an individual, or the past, present, or future payment for the provision of health care to an individual.

42 U.S.C. § 1171 (emphasis added).

Definitions are integral to the statutory scheme and of the highest value in determining legislative intent. *State v. Leek*, 26 Wn. App. 651, 614 P.2d 209 (1908). To ignore a definition section is to refuse to give legal effect to a part of the statutory law of the state. 1A C. Sands, *Statutory Construction* § 27.02, at 310 (4th ed. 1972). “When the legislative body provides a definition for a statutory term, it is that definition to which a person must conform his conduct.” *City of Seattle v. Koh*, 26 Wn. App. 708, 710–11, 614 P.2d 665 (1980) (quoting *Seattle v. Buchanan*, 90 Wn.2d 584, 584 P.2d 918 (1978)). A court “cannot read into a statute that which it may believe the legislature has omitted, be it an intentional or inadvertent omission.” *Auto. Drivers & Demonstrators Union Local No. 882 v. Dep’t of Ret. Sys.*, 92 Wn.2d 415, 421, 598 P.2d 379 (1979). Here, the Washington State legislature and Congress could have defined “health care information” as information that “identifies a patient or can be readily associated with the identity of a patient” **or** “directly relates to the patient’s health care, but did not. Instead, the legislature used a conjunction. Thus, the only information protected under the statute is that which identifies a patient **and** directly relates to the patient’s health care.

Here, Plaintiffs’ mailing plan discloses no protected information as defined by the statute because the party receiving the list — Garden City

Group — will not know that the listed individuals were patients at Group Health, let alone recipients of a particular type of treatment for a particular condition. *See Wright v. Jeckle*, 121 Wn. App. 624, 631–32, 90 P.3d 65 (2004) (holding that disclosure of a list of names to a third party “does not allow for any inference as to anything about the persons on the list other than they are receiving an envelope with something in it from the court”). This procedure effectively segregates those persons who have knowledge of the subject matter of the lawsuit from those persons who have knowledge of the patients’ names. *See Wright*, 121 Wn. App. at 628.

For this reason, the case cited by Group Health — *Doe v. Group Health Coop. of Puget Sound, Inc.*, 85 Wn. App. 213, 932 P.2d 178 (1997) — is distinguishable. In *Doe*, the court held that a patient’s name and consumer number was protected “health care information” because the recipients of the information were able to determine both the identity of the individual **and** the fact that he had received medical treatment. 85 Wn. App. at 217–18 (emphasis added). Here, the recipient, Garden City Group, will have no idea that the individuals listed visited Group Health, let alone that they received a particular type of treatment. Thus, no health care information is disclosed under the trial court’s order.

Group Health wrongly maintains Group Health must obtain patients’ consent before disclosing patients’ names since no enumerated statutory exemption applies. *See Defs.’ Br.* at 23–25. But the definition

of a term in the definitional section of a statute controls the construction of that term wherever it appears throughout the statute. *See State v. Sullivan*, 143 Wn.2d 162, 175, 19 P.3d 1012 (2001); *Amalgamated Transit Union Local 587 v. State*, 142 Wn.2d 183, 220, 11 P.3d 762 (2002); *In re P. P. Processing, Inc.*, 119 Wn.2d 452, 258, 832 P.2d 1301 (1992). Therefore, the definition of “health care information” contained in RCW 70.02.010(6) applies to the provisions of the statute relating to patient authorization and exemptions as well as RCW 70.02.020. *See* RCW 70.02.020 (prohibiting a health care provider from releasing a patient’s **health care information** without patient authorization); RCW 70.02.030 (providing that “a patient may authorize a health care provider or health care facility to disclose the patient’s **health care information**”); RCW 70.02.050 (listing instances where a health care provider or health care facility “may disclose **health care information** about a patient without the patient’s authorization”); RCW 70.02.060 (describing procedure for obtaining **health care information** in discovery); 45 CFR § 164 (providing that “[a] covered entity may use or disclose protected **health information** without the written consent or authorization of the individual...in the situations covered by this section) (emphasis added). Because no health care information will be disclosed using the *Wright* procedure, the authorization provisions and exemptions simply are not at issue here. *See Wright*, 121 Wn. App. at 631 (concluding that its decision

that no health care information would be disclosed “renders it unnecessary” to address whether the directory information exemption applies or whether authorization provisions were violated).

Further, because Plaintiffs do not know the identities of the potential class members, they could not obtain consent even if the statute required them to do so. For this reason alone, the discovery is appropriate. *See LaFon Nursing*, 244 F.R.D. at 359 (noting plaintiff “cannot comply” with the notice requirements of Louisiana’s healthcare information statute because the identity of the proposed patient class members was not known to either the plaintiff or the court).

The above statutory analysis demonstrates that the fact *Wright* involves post-certification notice rather than pre-certification discovery bears no relevance to the issue of whether health care information is disclosed under the Court’s order. For example, *Wright* does not hold that the identity of a patient is protected health care information where it is disclosed pursuant to the discovery rules, but is not health care information where it is disclosed for purposes of sending notice pursuant to CR 23(c). To the contrary, *Wright* stands for the proposition that disclosure of a list of patient names, addresses, and phone numbers does not invade privacy rights where the person to whom the disclosure is made does not know that the listed individuals were treated by a health care provider or at a health care facility and does not know the nature of the

action that is the subject of the mailing. *Wright*, 121 Wn. App. at 631 (concluding that “Dr. Jeckle may comply with the superior court’s notice procedure without disclosing his patients’ health care information”). Because the discovery rules authorize a trial court to order a defendant to produce a list of the identities of proposed class members, the trial court properly relied on *Wright* to craft a method of production that protects patients’ health care information.

2. The Letter the Court Authorized Reassures Patients That Their Healthcare Information Has Been Protected

Group Health further maintains that the discovery is improper because the patients receiving the letter may believe Group Health disclosed their names and addresses without their consent. *See* Defs.’ Br. at 22–23. Group Health is wrong for three reasons.

First, by limiting the definition of “health care information” to information that both identifies a patient and “directly relates to the patient’s health care” the legislature has determined that Group Health may disclose its patients’ names and addresses to a third party so long as the party receiving the information cannot infer that it is receiving a list of names and addresses of people who received health care treatment. *See Wright*, 121 Wn. App. at 631–32; *see also Doe v. Group Health*, 85 Wn. App. at 217–18. Thus, the patients’ subjective “belief” as to whether their “health care information” has been disclosed is irrelevant under the plain language of the statute.

Second, if Group Health is correct, then the same analysis would have applied in *Wright*. In *Wright*, patients receiving the court-approved notice also may have “believed” that Dr. Jeckle had disclosed their names and addresses without their consent. The court, however, authorized the notice.

Third, and perhaps most importantly, the trial court acknowledged Group Health’s concerns and approved the letter only after it had been revised to assure the recipients that their health care information had not been disclosed. RP 19:2–20:2 (Dec. 5, 2008). Indeed, during the presentation hearing, counsel for Group Health admitted her client had very few objections to the letter, suggesting only minor changes. RP 15:6–10 (stating “[w]e did it on the letter”). Thus, the trial court properly and carefully exercised its broad discretion to approve the discovery only after protections were in place to protect the recipients’ interests.

**D. Plaintiffs’ Interest in the Discovery Outweighs Class Members’ Minimal Interest in Keeping Their Contact Information Private**

Plaintiffs have a right of access to the courts. *Puget Sound Blood Ctr.*, 117 Wn.2d at 780. “Our constitution mandates that “[j]ustice in all cases shall be administered openly, and without unnecessary delay.” *Id.* (quoting Const. art. 1, § 10) (brackets in original). “That justice which is to be administered openly is not an abstract theory of constitutional law, but rather is the bedrock foundation upon which rest all the people’s rights and obligations.” *Id.*

The court rules recognize and implement the right of access. *Puget Sound Blood Ctr.*, 117 Wn.2d at 782. The discovery rules grant a broad right of discovery which is subject to the relatively narrow restrictions of CR 26(c). This broad right of discovery is necessary to ensure access to the party seeking the discovery. *Id.* “[T]he party seeking discovery therefore has a significant interest in receiving it.” *Id.* at 783.

In this case, Plaintiffs have a particularly strong interest in obtaining the discovery sought. Plaintiffs can only prove that the named Plaintiffs’ experiences were “typical” of other class members and that common issues predominate by interviewing them. Thus, the information is crucial to Plaintiffs’ motion for class certification. Plaintiffs also have a strong interest in contacting patients for the purpose of potentially vindicating their rights in a proposed class action lawsuit. *See LaFon Nursing*, 244 F.R.D. at 360.

Moreover, Group Health currently has unilateral access to these witnesses and can interview them at will. Thus, fairness dictates Plaintiffs be provided the same opportunity. *See Connell v. Wash. Hosp. Ctr.*, 50 F.R.D. 360, 360–61 (D. D.C 1970) (“[u]nless the hospital is compelled to provide patient names, it occupies a preferred position with respect to the lawsuit, for by informal means it can use its own records to locate witnesses favorable to its side of the controversy”).

Group Health, on the other hand, asserts no interest on behalf of its patients other than its patients' interests in their private health care information, which would not be impaired by the Court's decision. To the extent that Group Health asserts a more general right of privacy on behalf of its patients, it is black letter law that "[t]he duty of the witnesses to give testimony in matters vital to the public interest is paramount to any personal right of privacy." See *In re Tiene*, 115 A.2d 543 (N.J. 1955). Indeed, "we start with the primary assumption that there is a general duty to give what testimony one is capable of giving, and that any exemptions which may exist are distinctly exceptions, being so many derogations from a positive general rule." *Id.* (citing 8 Wigmore on Evidence, §§ 2192-93 (3d ed. 1940)).

But Group Health should not be permitted to use the health care information statutes as a sword to prevent plaintiffs from conducting the discovery they need to prosecute their claims. See *LaFon Nursing*, 244 F.R.D. at 359 (quoting *Moss v. State*, 925 So.2d 1185 (La. 2006) ("[o]bviously, the legislature intended the health care provider-patient privilege to be a shield and not a sword...."). Especially here, where Group Health has argued that Plaintiffs cannot meet the typicality and predominance requirements of CR 23, Plaintiffs must not be denied the discovery they need to refute those claims. See *id.* (patient-physician

privilege cannot be used offensively “to stymie the very discovery that plaintiff needs” to rebut defendant’s challenges).

Here, Plaintiffs do not seek the potential class members’ medical records, nor do they seek to require witnesses to speak with them about their experiences with Chawla at Group Health. Instead, Plaintiffs seek only to send a letter requesting that Chawla’s former patients contact Plaintiffs’ counsel. Thus, any intrusion into the witnesses’ privacy interests is minimal and is outweighed by Plaintiffs’ interest in the information. *See LaFon Nursing Facility*, 244 F.R.D. at 360 (the potential benefit that disclosure of absent class members’ names and addresses might provide to potential class members outweighs de minimis intrusion into the patients’ privacy); *In re Fort Worth Children’s Hosp.*, 100 S.W.3d 582, 590 (Tex. App. 2003) (patients’ right to privacy not violated where the trial court’s order required the defendant to produce non-party patient names and addresses to a third party who was charged with keeping the names and addresses confidential); *Miller v. Savanna Maint. Assoc.*, 979 So.2d 1235, 1237 (Fla. App. 2008) (plaintiff’s interest in discovering the names and addresses of third-party patient witnesses outweighs patients’ privacy interest in the information).

The fact that the press has covered the story is simply not relevant. The media often covers significant stories of wrong-doing that result in the

filing of class actions. This should not deprive Plaintiffs of their right to discovery under the civil rules.

Group Health's attempt to distinguish *Pioneer Electronics* also fails. Here, as in *Pioneer Electronics*, the Court properly considered the privacy interests of potential class members and entered an Order that protects these interests. Furthermore, California courts have not limited the *Pioneer Electronics* holding to individuals who have complained about a defendant's transgression. To the contrary, the courts have held it is reversible error to prevent plaintiffs from obtaining a complete list of potential class members. *See, e.g., Lee*, 166 Cal. App. 4th at 1338. Finally, the fact that the court in *Pioneer Electronics* ordered the sending of an "opt out" letter before permitting plaintiff's counsel to contact proposed class members does not distinguish it from this case. The purpose of the letter sent in *Pioneer Electronics* was to provide individuals who did not want to be contacted by plaintiff's counsel with an opportunity to "opt out." Here, the Court's Order provides potential class members with a similar opportunity. The letters' recipients are not required to contact Plaintiffs' counsel; indeed, the letter expressly states that the recipients may ignore it if they choose.

In short, the trial court here properly exercised its discretion. Plaintiffs' interest in interviewing potential class members so that they can potentially vindicate their rights outweighs class members' minimal

privacy interest in their names and addresses. Thus, the trial court's decision should be affirmed.

**E. The Letter Can Be Revised to Provide Further Protections for Recipients of the Letter**

Group Health maintains that the letter and the envelope approved by the trial court violate the standard set forth in *Wright*. In particular, Group Health asserts that the letter approved by this Court “would give the typical patient the impression that Group Health had provided her name and address to Chavez’s attorneys” because (1) “[n]othing informs her that the names and addresses were provided to Garden City Group, to be placed on sealed envelopes prepared by Group Health, without Garden City Group knowing the content of the envelopes;” and (2) “[n]othing informs her that her name and address have not been provided to Chavez’s attorneys.” Defs.’ Br. at 38 (citing Commissioner Schmidt’s Ruling Granting Discretionary Review at 5–6). Group Health also maintains the envelope is misleading because it “misleadingly states that the sender of the letter is the trial court rather than Garden City Group.” *Id.*

Group Health’s concerns are unfounded. The letter clearly informs the recipients that they are not required to talk to Plaintiffs’ counsel. CP 246. In addition, the letter reassures the patients that their confidential medical information has not been disclosed. *Id.* Likewise, the fact that the envelope contains the return address of the Superior Court is not

misleading since the Superior Court approved the mailing pursuant to CR 26(c).

If, however, this Court determines that Group Health is correct, these concerns can easily be addressed by remanding the case to the trial court to revise the letter and envelope. For example, the letter could be revised to include the following language:

We understand that you are a former patient of Dr. Chawla at Group Health. Please be assured that your medical records and private health care information have been and will continue to remain confidential. To protect your privacy, Group Health has not provided your name and address to us or to any of the other attorneys who represent the plaintiffs in this action. Instead, pursuant to a court order, Group Health provided your name and address along with a sealed envelope containing this letter to Garden City Group, an independent company specializing in the administration of class actions. Garden City Group did not open the sealed envelopes and thus does not know the contents of this letter. In addition, Garden City Group does not know the nature of the lawsuit, and does not know that you were ever a patient at Group Health. Garden City Group simply placed your name and address on the provided sealed envelope and mailed this letter. Garden City Group has agreed to keep your name and address strictly confidential.

CP 246 (new language underscored).

These revisions clarify that Plaintiffs' counsel did not receive the patient's name or contact information and explain in detail the steps taken to preserve the confidentiality of her health care information. Thus, Group Health's concerns are addressed.

As for the envelope, Group Health's concerns can be addressed by substituting Garden City Group's return address for the Court's return address. *Compare* CP 248. In addition, Plaintiffs propose that the block letters notifying patients that they have received an "Official Court Notice" be amended to state "Notice Regarding Lawsuit." *Id.* By making these simple, straightforward revisions, any concern that the envelope is "misleading" can be alleviated.

#### V. CONCLUSION

In sum, the trial court properly exercised its discretion by ordering Group Health to produce the names and addresses of its female patients who were treated by Chawla. Therefore, Plaintiffs respectfully request that the Court affirm the trial court's Order Denying Protective Order and its Order Denying Reconsideration. In the alternative, Plaintiffs respectfully request that the Court remand the issue to the trial court with instructions to revise the letter and envelope as set forth in Section IV.E, *supra*.

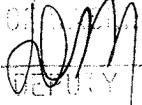
DATED this 12<sup>th</sup> day of August, 2009.

By



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Attorneys for Plaintiffs/Respondents

09 AUG 12 PM 3: 25

STATE OF WASHINGTON  
BY  DEPUTY

**CERTIFICATE OF SERVICE**

I, Thaddeus Martin, declare and say as follows:

I certify that on August 12, 2009, I caused a true and correct copy of this Statement of Arrangements to be served on the following via email:

**Ms. Rebecca Ringer**  
**FLOYD PLFEUGER & RINGER**  
**2505 Third Avenue, Suite 300**  
**Seattle, WA 98121**

**Richard Omata**  
**KARR TUTTLE CAMPBELL**  
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**Mr. John Versnel**  
**Ms. Nicole McGrath**  
**LAWRENCE & VERSNEL, PLLC**  
**3030 Two Union Square**  
**601 Union Street**  
**Seattle, Washington 98101**

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Executed this 12<sup>th</sup> day of August, 2009 at Seattle, Washington.

  
Thad Martin