

No. 23-16027

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**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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JESSE HERNANDEZ,  
Plaintiff - Appellee,

v.

COUNTY OF MONTEREY, et. al.,  
Defendants - Appellants,

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On Appeal from the United States District Court  
Northern California, San Jose Division, Case No. 5:13-cv-02354 BLF

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**EMERGENCY MOTION UNDER CIRCUIT RULE 27-3**

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**EMERGENCY MOTION FOR STAY OF THE DISTRICT  
COURT'S ORDERS RE MOTIONS TO SEAL**

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## NINTH CIRCUIT RULE 27-3 CERTIFICATE

Pursuant to Ninth Circuit Rule 27-3, I certify:

### **Relief Requested**

The relief Defendant-Appellant California Forensic Medical Group dba Wellpath (“Wellpath”) requests in the emergency motion that accompanies this certificate is a stay of the Orders to unseal briefing and documents filed in connection with Plaintiff-Appellee’s Enforcement Motion entered by district court on July 21, 2023 (“the July 21 Order”) (Dkt. 802) and Order Denying Defendants’ Motion for Stay of Sealing Order Pending Appeal and Extending Date for Plaintiffs to Re-file Neutral Monitor Reports until August 10, 2023 entered on July 28, 2023 (“the July 28 Order”) (Dkt. 819) (collectively “the Orders”).

### **Why Prompt Relief is Needed**

Relief is requested immediately to avoid irreparable harm to Wellpath. The Orders, if not stayed, would require Wellpath to unseal certain documents that maintain private, sensitive, and potentially identifying medical, psychiatric, behavioral health, and medical-related information of certain individuals. Further, the production of these neutral monitoring reports would serve only to increase media attention, fuel a general distrust among the parties, and ultimately serve in hindering Wellpath’s good faith efforts to comply with its reporting obligations. For once the bell has been rung, it cannot be unrung. The information maintained in the Neutral Monitor Reports cannot be erased from the public forum once submitted to the docket for review by all. Therefore, immediate relief is needed to stay the implementation of the Orders.

### **Wellpath’s Timely Efforts to Request a Stay**

The Orders were issued on July 21, 2023 (Dkt. 802) and July 28, 2023 (Dkt. 819), respectively. Wellpath filed a Notice of Appeal from an Order of the United

States District Court (Dkt. 805) and an Emergency Motion for Stay Pending Appeal and for Temporary Stay Pending Consideration of Motion (Dkt. 806) on July 21, 2023. The district court ruled on that request on July 28, 2023, denying Wellpath's motion for stay of the Sealing Order (July 21 Order) pending appeal. (Dkt. 819). In light of the Orders Wellpath brings this current request to the Court with all deliberate speed and urgency.

### **Notice**

Having been previously served with the request for stay filed with the district court, and with Wellpath's request filed with this Court, on the morning of August 4, 2023, Wellpath notified counsel for all parties by email of Wellpath's intention to file this motion. Plaintiffs and Intervenors stated they would oppose the motion. Defendants County of Monterey and Monterey County Sheriff's Office stated they would not oppose. Service will be effected by electronic service through the CM/ECF system. I notified the court clerk by email on August 4, 2023, that Wellpath was seeking a stay from the Orders pending appeal.

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## INTRODUCTION

Defendant Wellpath, Inc. (“Wellpath”) moves for a stay of two orders to unseal briefing and neutral monitor reports (the “Reports”) filed in connection with Plaintiff-Appellee’s Enforcement Motion. The first order, entered by district court on July 21, 2023 (“the July 21 Order”) (Dkt. 802), addresses three administrative motions to seal briefing and documents filed in connection with Plaintiffs’ Enforcement Motion (Dkt. 776). Specifically, Plaintiffs filed a motion to consider whether to seal in their entirety more than thirty neutral monitor reports, which were filed in support of their Motion to Enforce both the Settlement Agreement and the Implementation Plan developed by Defendant County of Monterey (the “County”) and Wellpath, which is set for hearing on August 24, 2023. (Dkt. 788). The second order at issue denied Wellpath’s Motion for Stay pending appeal was entered on July 28, 2023 (“the July 28 Order”) (Dkt. 819) (collectively “the Orders”). A stay of these Orders is necessary, not only to protect Wellpath’s rights on appeal, but to hold steadfast this society’s keen interest in preserving an individual’s right to hold private sensitive and potentially identifying medical and medical-related information from public access without a compelling interest. Once the bell has been rung, it cannot be unring; and once the information maintained in the Reports is filed on the public docket, it cannot be erased from the public memory.

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Relief is requested immediately to avoid irreparable harm to Wellpath. The Orders, if not stayed, would require Wellpath to unseal certain documents that maintain private, sensitive, and potentially identifying medical, psychiatric, behavioral health, and medical-related information of certain individuals. Further, the production of these neutral monitoring reports would serve only to increase media attention, fuel a general distrust among the parties, and ultimately serve in hindering Wellpath's good faith efforts to comply with its reporting obligations. Therefore, immediate relief is needed to stay the implementation of the Orders.

### **BACKGROUND**

This case has been under a Court supervised Settlement Agreement since August 18, 2015, and Court appointed monitors have been issuing Reports since their appointment in August 2016. (Dkt. Nos. 494, 563). These Reports have never been made a matter of public record and always remained confidential, giving the parties a reasonable expectation of confidentiality. Prior to their sealing motion (Dkt. 776), Plaintiffs never raised an issue related to these confidential reports nor attempted to make them a matter of public record. In fact, on July 17, 2017, Plaintiffs previously filed a Motion to Enforce the Settlement Agreement and no monitor reports were filed in support of that motion nor made a matter of public record. (Dkt. 599). Wellpath simply seeks to maintain the confidentiality of the neutral monitor reports that it has reasonably relied upon throughout this litigation.



In their sealing motion, Plaintiffs conditionally filed the Reports under seal, and conditionally redacted their Motion to Enforce to the extent it contained findings and quotations from the Reports. Plaintiffs, for the first time, asked that the Reports not be sealed in their entirety. Instead, Plaintiffs filed the motion to consider sealing the Reports because the Defendants have always reasonably relied upon the historical precedent that the Reports are confidential and should be sealed in their entirety.

On July 20, 2023, counsel for Intervenors Monterey County Weekly, First Amendment Coalition, Patricia and Jennifer Ramirez, and Yvette, Xavier, and Janel Pajas, filed a Noticed of Motion and Motion to Intervene for the Limited Purpose of Unsealing Court Records and Protecting Access to Public Proceedings (Dkt. 799) and a Motion to Unseal Court Records and Protect Access to Public Proceedings (Dkt. 800). The next day, the district court entered the July 21 Order ordering that the Plaintiffs file copies of the Reports with only very limited redactions on the public docket. Just hours later, because of the irreparable harm that would come from public access to the Reports, Wellpath filed a Notice of Appeal from the July 21 Order (Dkt. 805) and an Emergency Motion for Stay Pending Appeal and for Temporary Stay Pending Consideration of Motion (Dkt. 806).

Plaintiffs were allowed an opportunity to respond to Wellpath's Motion to Stay, and five days later, on July 26, 2023, attorneys for Plaintiffs filed Plaintiff's

Opposition to Defendant’s Motion for Stay (Dkt. 810). The district court allowed Wellpath only until noon on July 28, 2023, to reply to Plaintiffs’ response in opposition. Wellpath filed Defendant’s Reply to Plaintiff’s Opposition to Its Motion to Stay of Proceedings (Dkt. 817) supplying a Declaration of Paulette Torres Collazo in support of its Motion to Stay (Dkt. 817-1). The declaration detailed the irreparable harm Wellpath would suffer if the stay were not granted, all of which continues to be true if this Court does not grant the instant request for a stay. The district court summarily denied Wellpath’s Motion for Stay just hours after receiving Wellpath’s reply and declaration and entered the July 28 Order, necessitating this motion be brought to the Ninth Circuit. This Court has jurisdiction “because an order denying a motion to unseal or seal documents is appealable either as a final order under 28 U.S.C. § 1291 or as a collateral order.” *Oliner v. Kontrabecki*, 745 F.3d 1024, 1025 (9th Cir. 2014).

While a stay will not prejudice the Plaintiffs, the absence of a stay creates an immediate and irreparable harm to Wellpath if these documents are prematurely unsealed and filed on the public docket without this Court having the opportunity to consider the appeal before it. The unsealing of these documents effectively renders Wellpath’s appeal moot. If Wellpath is successful on its appeal, resealing the documents will do little to repair the harms that will have been caused in the interim.

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Therefore, Wellpath respectfully seeks a stay of the district court's order pending the resolution of this appeal.

## LEGAL ARGUMENT

### **I. The Orders Should Be Stayed in Order to Permit Wellpath a Meaningful Opportunity to Appeal**

This Court has the inherent authority to issue a stay pending appeal. F.R.A.P. 8(a)(2) provides that a motion for such relief may be made to the Court of Appeals if the moving party has first made a motion in the district court and the district court has denied that motion. The Supreme Court has outlined four factors to consider in issuing a stay pending appeal: (1) whether the applicant has made a strong showing of likelihood of success on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other interested parties; and (4) where the public interest lies. *Nken v. Holder*, supra, 556 U.S. at 434. “The first two factors . . . are the most critical.” *Id.* The Ninth Circuit employs a “sliding scale” approach to these factors, so that a stronger showing of one element may offset a weaker showing of another. *Leiva-Perez v. Holder*, 640 F.3d 962, 964-66 (9th Cir. 2011). To obtain a stay, Defendants “need not demonstrate that it is more likely than not that they will win on the merits” or that “ultimate success is probable.” *Id.* Rather, a “substantial case on the merits” or “serious legal questions” will suffice “so long as the other factors support the stay.” *Id.*

Wellpath readily satisfies the standard for a stay pending appeal. For the reasons discussed in more detail below, Wellpath will be greatly prejudiced if the Reports are unsealed during the pendency of the appeal—indeed if the Reports are unsealed, such unsealing would essentially render Wellpath’s appeal moot. Further, Wellpath is not seeking a stay of all proceedings. The stay will not disrupt judicial economy and efficiency, as there is no reason that the underlying proceedings cannot continue while the Reports remain sealed, just as they have been throughout the litigation. As such, these factors in the aggregate weigh in favor of a stay pending appeal.

**A. Wellpath has a strong likelihood of success on the merits.**

This appeal presents a case of first impression for this Court. This Court must consider whether the trial court abused its discretion in unsealing documents that were expected to remain confidential between the actual parties to the case, and that had remained under seal for years of pending litigation. Wellpath contends that the district court’s decision to summarily order the Reports unsealed, without providing the parties to the case a meaningful opportunity to respond to or otherwise oppose the motion, represents a clear abuse of discretion.

As discussed above, on July 20, 2023, the Intervenors filed their motion to intervene for the sole purpose of moving to unseal the confidential neutral monitor reports. As if prompted by the media’s desire to access confidential documents, the

district court ordered the reports unsealed the very next day. In the hours following entry of the July 21 Order, Wellpath rushed to file a Notice of Appeal and a Motion to Stay that Order pending appeal in an effort to prevent irreparable harm.

While Wellpath had mere hours on a Friday evening to move to stay the July 21 Order to ensure the Reports were not filed on the public docket, the district court then afforded Plaintiff five full days to brief their response to Wellpath's Motion to Stay. Once Plaintiffs filed their response brief, the district court then allowed Wellpath only two days to file a reply brief in support of its Motion to Stay. Wellpath filed its reply along with a declaration from Wellpath's Health Services Administrator, Paulette Collazo, detailing the irreparable harm that would ensue if the neutral monitor reports were unsealed. (Dkt. 817-1) The very same day, the district court denied Wellpath's Motion for a Stay, making a conclusory finding that the harms outlined in the declaration of Ms. Collazo were not "legitimate reasons to seal the reports or grant a stay." (Dkt. 802) The district court cited no authority for this position nor any reasons explaining its declaration that the very real harms to Wellpath were not "legitimate."

The intent of the Settlement Agreement approved and administered by the district court is to meaningfully improve the conditions at the jail, not to expose wrongdoing to the press. Furthermore, Wellpath and the neutral monitors had an expectation of confidentiality when the Reports were prepared. As discussed in

more detail below, this expectation is critical to healthcare providers in quality assurance and critical assessment inquiries like the ones the neutral monitors were conducting at the Monterey County Jail. The district court had previously ordered all neutral monitor reports to be filed under seal. Accordingly, the neutral monitors relied upon that prior order of the court when preparing their Reports, which encouraged candor and critical self-assessment. The district court then suddenly, at the request of third-parties, and without any input from the parties or the neutral monitors, abruptly ordered the unsealing of the neutral monitor reports, and drastically changed the landscape of the current litigation. This conduct amounts to an abuse of discretion, and Wellpath is likely to succeed on the merits.

**B. Wellpath will sustain irreparable harm if a stay is not granted.**

Unsealing the Reports will cause irreparable harm to Wellpath and its patients for a multitude of reasons. First, production of the reports will discourage Wellpath's employees from engaging in the quality review process. Both federal and California state law recognize that quality reviews should be privileged, so that healthcare providers can engage in transparent and critical review of care provided to patients, and thus improve the level of patient care going forward, without fear of liability or retaliation. 42 U.S.C. §11101; *Cal.Evid.Code* §1157(a). "Section 1157 represents a legislative choice between competing public concerns. It embraces the

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goal of medical staff candor at the cost of impairing plaintiffs’ access to evidence.” *Matchett v. Superior Ct.*, 40 Cal. App. 3d 623, 629 (Ct. App. 1974).

The Ninth Circuit has recognized that the need to protect medical privacy qualifies as a “compelling reason” for sealing records. *See, Kamakana v. City and County of Honolulu*, 447 F.3d 1172, 1178 (9th Cir. 2006); *Webb v. Smart Document Solutions, LLC*, 499 F.3d 1078, 1082 (9th Cir.2007). While the instant case does not deal with production of quality assurance reports in discovery, the principle is applicable. If healthcare providers cannot rely on the public policy that protects quality review reports, or in this case neutral monitoring reports, from public dissemination, they are discouraged from continuing to perform or meaningfully engage in the process, and thus potentially adversely affecting patient care. The goal of the neutral monitoring process in this case is to ensure compliance with the Implementation Plan, and ultimately improve care and outcomes for patients in Monterey County Jail. Producing the monitoring reports will have an opposite effect.

In addition, production of the reports will have real, immediate implications on Wellpath’s provision of medical care at Monterey County Jail. For example, production of these reports would create distrust between Wellpath’s staff and their patients. Patients may be discouraged from seeking medical or mental health care, or speaking openly and honestly with their medical providers, if they know that their

medical and psychiatric/mental health concerns are subject to disclosure and review by third parties. (Dkt. 817-1, Torres Dec. ¶3) Wellpath has also been tasked, via the Implementation Plan, with hiring and retaining competent medical staff to work at Monterey County Jail. The hiring process has already been negatively impacted by the media attention surrounding this litigation. (Dkt. 817-1, Torres Dec. ¶4) Production of the monitoring reports, and the resultant increase in media attention and public awareness of their confidential content, will only serve to make those hiring and compliance efforts more difficult. (Dkt. 817-1, *Id.*).

Overall, production of these reports would simply fuel distrust among the parties, harming the success of Wellpath's efforts to comply with the Implementation Plan, and negatively impacting the care and treatment provided to patients at Monterey County Jail. Balancing the need for the public's access to information, the sensitive health information, medical history, treatment records, and other Implementation Plan information outweighs and overcomes that need so that only a stay of the Orders can preserve Wellpath's rights pending appeal.

**C. Plaintiffs will not be substantially injured by a stay of the Orders.**

Although the likelihood of success on the merits and the irreparable harm in the absence of a stay are key inquiries, the Court should also consider "whether issuance of the stay will substantially injure the other parties interested in the proceeding." *See City & County of San Francisco v. United States Citizenship &*



*Immigration Servs.*, 944 F.3d 773, 789 (9th Cir. 2019); *see also Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2087 (2017). This factor weighs strongly in favor of a stay of the Orders.

The Plaintiffs cannot plausibly argue that they will be prejudiced by continuing to litigate the underlying proceedings while the Reports remain under seal. Plaintiffs have been litigating this action for years and have never claimed or alleged any harm as a result of the Reports being filed under seal. Only when members of the press requested unsealing was the district court prompted to unseal the Reports. Plaintiffs have a hearing on a motion to enforce scheduled for August 24, 2023 which Wellpath is not seeking to stay or otherwise delay. Wellpath is simply seeking to attend that hearing with the same expectation of confidentiality that it has had throughout the litigation, and asks that that hearing be conducted while the Reports remain under seal.

Any prejudice the Plaintiffs might arguably suffer pales in comparison to the harm that would inure to Wellpath if a stay were denied; the mandatory nature of the Orders drastically alters the status quo and directs Plaintiffs to do something that cannot be undone, even if Wellpath wins its appeal. *See Azurin v. Von Raab*, 792 F.2d 914, 915 (9th Cir. 1986) (granting stay pending appeal to preserve status quo and prevent dissipation of the assets). Even if the Orders were ultimately upheld,

the only impact on Plaintiffs and Intervenors if a stay were granted is a delay in unsealing the Reports, not a delay in the overall proceedings.

**D. The public interest lies with granting a stay.**

As discussed above, the public has an interest in encouraging candid and critical self-assessment by its medical providers for quality assurance and patient safety purposes. Indeed, this is exactly the reason why the state and federal statutory privileges cited above exist. If healthcare quality assurance assessments can simply become part of the public record upon the request of members of the media, it would entirely upend the trust between healthcare providers and their employers, and healthcare providers and their patients. Such a precedent would have a drastic and chilling effect on healthcare providers' ability to conduct candid compliance and patient safety reviews without fear of those assessments being disclosed to the press or otherwise used against them in court.

**CONCLUSION**

For the reasons above, Wellpath requests a stay of the Orders pending its appeal. Because the July 28 Order directs the Plaintiffs to file the Reports on the public docket by August 10, Wellpath respectfully requests that this Court issue an immediate stay pending the Court's ruling on this motion and the subsequent appeal.

By: /s/ Peter G. Bertling  
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**STATEMENT OF RELATED CASES**

Pursuant to Ninth Circuit Rule 28-2.6, Appellees are unaware of any related cases pending in this court.

By: /s/ Peter G. Bertling  
Peter G. Bertling  
Attorneys for Defendant-Appellant  
California Forensic Medical Group dba Wellpath

**CERTIFICATE OF SERVICE**

I, Peter G. Bertling, counsel for California Forensic Medical Group dba Wellpath, certify that, on August 4, 2023, a copy of the attached emergency motion was filed electronically through the appellate CM/ECF system with the Clerk of the Court. I further certify that all parties required to be served have been served.

By: /s/ Peter G. Bertling  
Peter G. Bertling  
Attorneys for Defendant-Appellant  
California Forensic Medical Group dba Wellpath

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing emergency motion complies with the type-volume limitation of Ninth Circuit Rules 27-1 and 32-3 because it contains 4,013 words. This emergency motion complies with the typeface and the type style requirements of Federal Rule of Appellate Procedure 27 because it has been prepared in a proportionally spaced typeface using 14-point font.

By: /s/ Peter G. Bertling  
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