

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO**

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
v.)	Civ. No. 99 - 1435 (GAG/MEL)
)	
THE COMMONWEALTH OF PUERTO RICO,)	
<i>et al.</i> ,)	
)	
Defendants.)	
_____)	

**JOINT INFORMATIVE MOTION ON THE ACTIVITY OF THE
COMMONWEALTH’S MORTALITY REVIEW COMMITTEE AND THE
AVAILABILITY OF LOST COMMITTEE DOCUMENTS**

Late last month, the office of the Joint Compliance Coordinator (JCC) filed an informative motion asserting that: 1) all of the mortality and incident reports regarding the participants have been lost or unaccounted for; 2) the drafts, documents, and reports that had been or were being prepared by the Director of the Mortality Review Committee (MRC), Daisy Mercado, M.D., were not backed up digitally and no hard copies of these documents currently exists; and 3) no formal or final updated mortality reports have been produced to the JCC in the past two years. Informative Mot., Feb. 23, 2018, ECF No. 2199, at 1-2. The JCC motion characterized this as a “disturbing and deeply concerning situation” and called on the Commonwealth to “rebuild all of the lost information.” *Id.*

The next business day, the Court issued an order, directing the parties to immediately discuss this matter and to then file by today a restricted joint informative motion, outlining the respective positions of the parties. Order, Feb. 26, 2018, ECF No. 2201.

Pursuant to the Court’s order, on February 28, 2018, the parties, along with JCC Javier Aceves, M.D., and Deputy Monitor and Constitutional and Legal Advisor Alfredo Castellanos,

participated in a conference call to discuss the aforementioned situation with the MRC, along with several other pertinent matters. In further compliance with the Court's order, the parties hereby file a joint restricted informative motion on the MRC issues.

I. Commonwealth's Statement

Before addressing the legitimate concerns set out in the JCC's informative motion, the Commonwealth would like to provide important context to the situation and outline the affirmative actions that have been taken to address the concerns.

Since the entry of the Joint Compliance Action Plan (JCAP) in October of 2011, the Commonwealth has been working closely with the JCC to develop an adequate MRC and to produce proper mortality reports that meet JCAP requirements (Section III.5.N.), as well as the expectations of the Court, the JCC, and the United States. The nature of MRC reporting has been an ever-evolving process. From the entry of the JCAP in 2011 to late-2016, the Commonwealth provided preliminary reports on mortality to the JCC. In late-2016, after input from the JCC, the Commonwealth settled on a final model for future MRC reports that was approved by the JCC.

In order to further improve MRC reporting, the Commonwealth last year enlisted the Bureau of Forensic Sciences (BSF) to provide its expertise on the mortality review process. *See, e.g.,* Order, Aug. 4, 2017, ECF No. 2095. Then the new Commonwealth Legislature quickly enacted the Department of Public Safety Act, Act No. 20-2017, that required changes to the administration and oversight of the BFS. Because of the BSF's important role in the Commonwealth's mortality review process, on May 25, 2017, the Commonwealth Department of Health, and its new team at DSPDI, secured a collaborative agreement with the new BFS commissioner and the assigned pathologist, Dr. Edda Rodriguez, to continue BFS's joint effort

with the MRC to review and report on participant deaths. *See* Commonwealth's Memorandum on the New Structure of the Forensic Sciences Institute and the Effect on Compliance with the JCAP, ECF No. 2114.

The BFS/MRC collaborative efforts then slowed given the catastrophic and unprecedented impact of Hurricanes Irma and Maria, as the Commonwealth's priority necessarily shifted to ensuring the day-to-day health, safety, and welfare of the participants across the island; such efforts continue to demand priority attention to this day.

The Commonwealth acknowledges that the MRC did not issue a final MRC report for any of the 19 participants who died in 2017, and further generally acknowledges that there has been undue delay by the MRC director in completing final MRC reports on all participant deaths. The Commonwealth confirms the JCC report that the MRC director, indeed, lost all of the digital drafts of reports and documents that were stored on her computer or other storage media. It appears that the lost documents may be due in part to the impact of the two hurricanes. None of the MRC director's draft documents were shared with DSPDI or any other Commonwealth agency in compliance with the independent review process required by the JCAP and the JCC. The Commonwealth estimates that four draft MRC reports were lost. The MRC director is working to redo the lost work and to review the ongoing new work submitted to the MRC.

As a result of all this, in November 2017, the Commonwealth initiated efforts to identify and hire a new MRC director to undertake this important work. Approval of a contract with the candidate for MRC director position is currently under internal review at the Commonwealth's Department of Health and the Office of Management and Budget per local law and PROMESA provisions. The Department of Health expects this review and hiring process to be completed within 40 business days.

On the plus side, the Commonwealth asserts that, per JCAP requirements, all incident reports, including those associated with participant deaths, were transmitted via email and preserved in the electronic database maintained by Therap Services; these incident reports are currently available to the JCC. In addition, all of the relevant hard copy documents and preliminary reports made by the DSPDI Quality Unit have not been lost. In developing its final MRC report, the MRC is supposed to review documents and preliminary investigative reports from the DSPDI's Quality Unit. Prior to the hurricanes, there were at least four participant deaths that had been fully investigated by the Quality Unit at the DSPDI and presented to the MRC for a final report. In addition, prior to the hurricanes, there were seven participant deaths still under active investigation by the DSPDI Quality Unit. On February 28, 2018, the Commonwealth provided the JCC with nine preliminary reports from the DSPDI Quality Unit and on March 8, 2018, it will provide the JCC with information on 10 additional deceased participants from the Quality Unit.

The Commonwealth reiterates that the change in administrations, the devastating impact of the two hurricanes, and the structural changes with its partner at BFS place the current situation in its proper context and help explain any delays or omissions in MRC reporting. The Commonwealth also asserts that it had begun to take some corrective measures prior to the JCC's filing on this issue. Nonetheless, the Commonwealth recognizes the need to take action to avoid a similar situation in the future. To avoid risk of loss of digital documents in the future, DSPDI is in the process of implementing safeguard practices at the MRC and across DSPDI.

In light of the foregoing, the Commonwealth asks the Court to excuse MRD Director Mercado from appearing at the Public Hearings on March 12-13, 2018, and to grant the Commonwealth 40 days within which to inform the Court on the hiring of new MRC personnel.

II. United States' Position

The United States agrees with the JCC's conclusion that the loss of critical MRC documents is "disturbing and deeply concerning." We also agree that the death of any participant is a most serious event that merits careful review and analysis in order to gauge the system's ability to meet the health, safety, and welfare needs of our participants, especially those with complex conditions.

Through the JCAP, the Court prudently ordered the creation of the MRC to "identify and promptly make recommendations with regard to any preventable causes of illness and/or death so that other similarly situated participants will not suffer preventable illness or death." JCAP III.5.N. The MRC chairperson is to be independent of the DSPDI; the MRC is to meet regularly to address individual and systemic issues related to each death; the MRC is to conduct appropriate interviews with staff and others, review and discuss any necessary records and documents associated with the deceased individual and the care he/she received prior to death; and the MRC is to use a root-cause analysis to identify preventable causes of illness and death. *Id.* The MRC is to issue a report with written recommendations for remedial action, where warranted, and then the Commonwealth is to ensure that the recommendations are implemented to minimize or eliminate preventable illnesses and death for similarly situated participants who are still alive. *Id.*

The Court issued similar orders with regard to participant deaths in the past. *See, e.g.*, Community-Based Service Plan (CBSP), Sept. 2001 (requiring the Commonwealth to implement a system to assess, evaluate, investigate, and report on serious incidents and any deaths that implicate systemic quality assurance concerns). Of course, there are also the many Court-ordered provisions in the CBSP and other decrees mandating that the Commonwealth provide

the participants with adequate health care and other services to meet their individual needs and help ensure their health, safety, and welfare, which would minimize or eliminate preventable deaths. *See* CBSP at 6-7, 15-16.

We have been very patient over the years with regard to the Commonwealth's slow implementation of measures to comply with the MRC requirements of the JCAP. We trusted that the Commonwealth was engaging in diligent and good faith efforts to comply with existing Court orders, but that forbearance and trust seems to have been misplaced.

As far as we can tell, the MRC has never issued a final, independent MRC report that would comply with JCAP criteria. As referenced in the Commonwealth's statement above, it appears that there may have been some preliminary reports issued by the MRC in the early years of the JCAP, but it does not seem as if these were rigorous enough to satisfy the JCAP or the JCC. We are also not aware of any final MRC report being issued after the model reporting format was approved by the JCC. We are left with just the non-independent, internal reports of the DSPDI Quality Unit and some draft papers from the outgoing MRC director. This is most unacceptable.

Even with the transition to a new governor and the significant challenges wrought by Hurricane Maria, the Commonwealth should have done much more by now with regard to the proper review of participant deaths. We ask the Court to address mortality issues at the upcoming Public Hearing or at a separate hearing in the upcoming months. We think it would be most appropriate to require the active participation of MRC Director Mercado, so that she can explain why there has been so little reporting on individual participant deaths. Perhaps she can shed some light on obstacles to conducting investigations and issuing final MRC reports, so that we can collectively work to overcome such obstacles going forward. At the very least, she can

provide a first-hand account of how the MRC documents on her computer were lost, as well as any efforts taken or that could be taken to try to recover them.

In its most recent binder of materials, the Commonwealth lists the following number of participant deaths per year: 2011 – 14; 2012 – 15; 2013 – 17; 2014 – 20; 2015 – 14; 2016 – 14; and 2017 – 19; we have no data yet for 2018. We would ask the Court to require the Commonwealth to provide at least the following tracking information for all of these participant deaths since 2011:

- name of the deceased;
- date of death;
- date of any pre-MRC, internal investigation/report by DSPDI or predecessor agency;
- date of any preliminary MRC report;
- date of any draft MRC report; and
- date of any final MRC report.

Although it does not appear that there are any final reports, it would be good to have this confirmed and memorialized. For all of these documents, there should be a designation if any document, draft, or final report was created, but is now missing.

With the imposition of greater rigor and discipline on the MRC process, perhaps the Commonwealth will be able to develop and implement a proper system, envisioned and required by the JCAP, that will identify and then mitigate preventable causes of illness and death going forward. Our participants deserve no less than this.

The parties respectfully request that the Court take note of the foregoing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 6, 2018, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which sent notification of such filing to all counsel of record.

/s/ Richard J. Farano
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