SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN DIEGO - NORTH COUNTY REGIONAL CENTER

Plaintiff, v. Defendants.	**CASE NO.:** Assigned For All Purposes To: **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTIONS TO STAY DEPOSITION OF PERSONS MOST KNOWLEDGEABLE FOR *FACILITY*, TO QUASH DEPOSITION SUBPOENA, FOR PROTECTIVE ORDER, AND FOR MONETARY SANCTIONS** **Date: September 26, 2014** **Time: 1:30 p.m.** **Dept:** **IMAGED FILE**

Plaintiff hereby submits her memorandum of points and authorities on her motions to stay the deposition of the Person Most Knowledgeable for *Facility*, to quash the deposition subpoena and notice of taking deposition, for protective order, and for monetary sanctions as follows:

I. INTRODUCTION

This is the fourth Motion to Quash that Plaintiff has been forced to file in this case due to Defendants' persistent efforts to transform this simple 2-car personal injury action into a

referendum on medical billing practices. The present motion involves Defendants' untimely deposition subpoena to *Facility*, whose bills for physical therapy services to Plaintiff total $2,675.00.

Defendants wish to delve into *Facility's* business practices by questioning a witness from that small physical therapy company about its general policies, procedures and guidelines regarding the assignment of accounts receivable. These areas of inquiry are far outside the boundaries of issues relevant to this case.

Plaintiff therefore requests that the deposition of the PMK for *Facility* be stayed pending the hearing on this motion, and that the subpoena and notice be quashed, that a protective order be issued protecting Plaintiff and *Facility* from this deposition, and that monetary sanctions be imposed against Defendants' counsel.

II. FACTUAL BACKGROUND

Plaintiff suffered injuries to her neck and back when her vehicle was rear-ended by Defendant's vehicle on April 10, 2011. Following a 2-level cervical disc replacement surgery, Plaintiff went to 10 physical therapy sessions at *Facility*. (¶2, *Attorney* Dec.) The total charges were $2,675. (¶2, *Attorney* Dec)

Plaintiff did not have full coverage health insurance at the time of the collision. *Facility* agreed to provide healthcare services to Plaintiff on a lien signed by Plaintiff and her attorney. (¶3, *Attorney* Dec., Exh. L) Pursuant to this lien, Plaintiff acknowledged that she was financially responsible for full payment of *Facility*'s charges. (Exh. L)

Defendants have now issued a Deposition Subpoena and Notice of Deposition to the Person Most Knowledgeable at that *Facility* regarding the following issues:

1) The sale, assignment, purchase, or accounts receivable financing at a discount of service invoices, billings or medical-legal liens;

2) Authority to sell, assign or transfer medical-legal liens;

3) Process by which medical-legal liens are sold, assigned or transferred;

4) The contracted rates for the sale assignment and transfer of the medical legal liens; and

5) Pre-admittance factoring of the plaintiff/patient's lien based accounts.

The subpoena to *Facility* was not issued in a timely manner. In addition, the areas of inquiry designated by Defendants are far outside the scope of any issue which is relevant to the subject matter of this action. Thus, Plaintiff requests that the subpoena be quashed.

In addition, Plaintiff requests that a Protective Order be issued to prevent this deposition from being taken at all. This is yet another attempt by Defendants' counsel to delve into the business practices of Plaintiff's healthcare providers and medical finance companies, none of whom are parties to this action.

Last, Plaintiff seeks an order imposing monetary sanctions against Defendants' counsel for their persistent efforts to obtain information or materials that are well outside the scope of permissible discovery.

III. LEGAL ARGUMENT

A. The Court Should Enter an Order Staying the Deposition of the PMK and Quashing the Deposition Subpoena and Notice of Deposition

Plaintiff brings this motion pursuant to Code of Civil Procedure Section 2025.410, which reads in part:

> (a) Any party served with a deposition notice that does not comply with Article 2 (commencing with Section 2025.210) waives any error or irregularity unless that party promptly serves a written objection specifying that error or irregularity at least three calendar days prior to the date for which the deposition is scheduled, on the party seeking to take the deposition and any other attorney or party on whom the deposition notice was served. . . . (c) In addition to serving this written objection, a party may also move for an order staying the taking of the deposition and quashing the deposition notice. This motion shall be accompanied by a meet and confer declaration under Section 2015.040. The taking of the deposition is stayed pending the determination of this motion.

On May 30, Plaintiff's counsel spoke with Defendants' counsel concerning several issues, including a possible trial continuance. The parties agreed to stipulate to continue the trial, but agreed that the discovery cut-off for percipient discovery would remain with the August 1, 2014 trial date. This agreement was confirmed on May 30, 2014 in correspondence from Defendants' attorney, in which she stated, "So long as the deposition subpoenas are timely served [prior to the

original cut-off date], we agreed that the depositions may be scheduled after the discovery cut off date." (¶ 4, *Attorney* Dec, Exh. I)

The Stipulation and Order to Continue Trial and Trial Related Dates was filed and signed by the *Judge* on June 6, 2014. The Order provides, in pertinent part, that the "percipient discovery deadline is to remain with the trial date of August 1, 2014, except that depositions timely noticed may be taken after the discovery deadline if needed to accommodate counsel and/or witnesses." (¶ 5, *Attorney* Dec, Exh. J) Thus, the deadline for percipient discovery was July 2, 2014. (¶ 6, *Attorney* Dec, Exh. K)

On June 16, 2014, Defendant served a Notice of Deposition and Subpoena for the *Facility* PMK to appear for deposition on July 2, 2014. (¶ 7, *Attorney* Dec, Exh. A).

On June 23, 2014, a meet and confer letter and a written objection was personally served on Defendants' counsel, asking that they agree to withdraw the Deposition Subpoena. (¶ 8, *Attorney* Dec, Exh. B). On June 24, 2014, a second meet and confer letter and written objection was served on Defendants' counsel on the grounds that the subpoena was untimely. Defendants' counsel was again asked to withdraw the Deposition Subpoena. (¶ 9, *Attorney* Dec, Exh. C) On that same date, Defendants' attorney wrote a letter to Plaintiff's counsel in which she stated "we will withdraw the subject subpoena." (¶ 10, *Attorney* Dec, Exh. D)

Despite Defendants' agreement to withdraw the subpoena, on June 25, 2014, Defendants served a new Notice and Subpoena for the deposition of the *Facility* PMK, this time scheduling the deposition for July 17, 2014, a date beyond the discovery cut-off date. (¶ 11, *Attorney* Dec, Exh. E)

On June 30, 2014, Plaintiff sent a meet and confer letter and objection to the new Notice and Subpoena, requesting that they agree to withdraw the Notice and Subpoena. (¶ 12, *Attorney* Dec, Exh. F)

Instead of withdrawing the Notice and Subpoena, on July 9, 2014, Defendants served Plaintiff by mail with a Notice of "Continuance" of the Deposition, moving the deposition forward 3 days to July 14, 2014. In addition, Defendants faxed a letter to Plaintiff's counsel on

the late afternoon of July 10, 2014 to confirm that the deposition of the *Facility* PMK would go forward on July 14, 2014. (¶ 13, *Attorney* Dec, Exh. G & H)

Accordingly, Plaintiff has no choice but to immediately seek this Court's assistance in preventing Defendants' counsel from taking this deposition.

1. The Notice and Subpoena are Untimely

Code of Civil Procedure Section 2025.270(c) provides, in pertinent part, "if, as defined in Section 1985.3 or 1985.6, the party giving notice of the deposition is a subpoenaing party, and the deponent is a witness commanded by a deposition subpoena to produce personal records of a consumer or employment records of an employee, the deposition shall be scheduled for a date at least 20 days after issuance of that subpoena." Section 1985.3 and 1985.6 define "subpoenaing party" as a person "causing a subpoena duces tecum to be issued or served in connection with any civil action."

There is no question that Defendants constitute a "subpoenaing party" under Sections 1985.3 and 1985.6, as they issued a subpoena duces tecum to *Facility*. It is also unquestionable that the subpoena commands *Facility* to produce "personal records of a consumer." Section 1985.3 defines "personal records," in pertinent part, as "the original, any copy of books, documents, other writings, or electronically stored information pertaining to a consumer and which are maintained by any 'witness' which is a . . . physical therapist." "Consumer" means "any individual . . . which has . . . used the services of the witness." The subpoena to *Facility* demands that the witness bring numerous documents pertaining to Plaintiff to the deposition.

Thus, according to Section 2025.270(c), the deposition was required to be 20 days after the date the subpoena was issued. Because the subpoena was issued on June 16, 2014, the earliest date on which the deposition of the *Facility* could be held was July 6, 2014, or 4 days AFTER the discovery cut-off date of July 2. Realizing that the notice was untimely, Defendants initially agreed to withdraw the Notice.

Yet Defendants now have decided to totally disregard their Stipulation and the Order of this Court and attempt to move forward with this untimely deposition. The Subpoena must be quashed.

2. The Majority of the Areas of Testimony Designated by Defendants Are Not Reasonably Calculated to Lead to the Discovery of Information Which is Relevant to the Issues Involved in this Case

In their June 24, 2014 correspondence, Defendants contend that this deposition is "reasonably calculated to lead to the discovery of admissible evidence as it pertains to the reasonable value of the medical treatment Plaintiff has incurred," and to "validate how these medical providers arrived at their charges to determine whether they are in fact reasonable."

Contrary to this assertion, the majority of the areas of testimony which Defendants designated for the *Facility* PMK deposition do not relate in any way to the "reasonable value of the medical treatment Plaintiff has incurred."

- The sale, assignment, purchase, or accounts receivable financing at a discount of service invoices, billings or medical-legal liens. This area of testimony seeks information relating to *Facility*'s general policies, procedures, and guidelines. *Facility* is not a party to this action. Such policies, procedures and guidelines have no conceivable relevance to whether the charges billed to Plaintiff are reasonable.
- Authority to sell, assign or transfer medical-legal liens. This area of testimony seeks information relating to *Facility*'s general policies, procedures, and guidelines. *Facility* is not a party to this action. Such policies, procedures and guidelines have no conceivable relevance to whether the charges billed to Plaintiff are reasonable.
- Process by which medical-legal liens are sold, assigned or transferred. This area of testimony seeks information relating to *Facility*'s general policies, procedures, and guidelines. *Facility* is not a party to this action. Such policies, procedures and guidelines have no conceivable relevance to whether the charges billed to Plaintiff are reasonable.
- The contracted rates for the sale assignment and transfer of the medical legal liens. This area of testimony seeks information relating to *Facility*'s general policies, procedures, and guidelines. *Facility* is not a party to this action. Such policies, procedures and guidelines have no conceivable relevance to whether the charges billed to Plaintiff are reasonable.

Thus, the Subpoena/Notice of Deposition issued to the Person Most Knowledgeable at *Facility* should be quashed.

3. **The Factoring of Plaintiff's Lien Is Not Relevant to the Issues in this Case**

The only conceivably relevant area of inquiry identified by Defendants is "pre-admittance factoring of the plaintiff/patient's lien based accounts," as this area of inquiry is the only designated area which actually relates to Plaintiff.

However, even this area of inquiry is irrelevant to the issues in this case. In *Howell v. Hamilton Meats & Provisions, Inc.* (2011) 52 Cal.4th 541 and *Corenbaum v. Lampkin* (2013) 215 Cal.App.4th 1308, the courts held that where a provider has, by prior agreement with the plaintiff's private health insurer, accepted less than a billed amount as full payment, evidence of the full amount is not relevant. Simply put, these decisions hold that negotiated rate differentials do not represent an economic loss for the plaintiff, and thus are not recoverable or otherwise admissible. Instead "any reasonable charges for treatment the injured person has paid or, having incurred, still owes the medical provider are recoverable as economic damages." *Howell*, 52 Cal.4th at 551. The *Howell* court recognized that its decision would mean that a tortfeasor who injures a member of a managed care organization would pay less in compensation for medical expenses than a tortfeasor who injured an individual who was uninsured or who received medical care on a lien, stating "fortuity is a fact in life and litigation." (*Id*. at 566.)

In the present case, Plaintiff's private health insurance did not pay for her medical bills. Thus, pursuant to *Howell* and *Corenbaum*, Plaintiff is entitled to recover as economic damages the reasonable charges for treatment that she has paid or still owes her medical providers even if those medical providers have sold the accounts at a discount.

In *Katiuzhinsky v. Perry* (2007) 152 Cal.App.4th 1288, the court held that even in cases where a lien has been assigned or factored, the plaintiff is entitled to the full amount of that bill. In *Katiuzhinsky*, the defendants argued that the discounted rate paid to the financial services company "represents a more accurate reflection of the reasonable value of the services than the amount billed." *Id*. at 1297. The Court of Appeal disagreed, stating "The fact that a hospital or doctor, for administrative or economic convenience, decides to sell a debt to a third party at a

discount does not reduce the value of the services provided in the first place. . . . Plaintiffs should have been permitted to present evidence of the amounts charged to and incurred by them, and to argue to the jury that these amounts represented the reasonable value of the medical services provided." *Id*. at 1298.

Facility's business decision to sell its accounts receivable to another company at a loss rather than wait years for full payment of that debt has no bearing on any of the issues of this case. Under her agreement with *Facility*, Plaintiff is required to pay the full amount of its charges.

4. Defendants' Counsel Should Not be Allowed to Turn This Personal Injury Action Into a Tool for Gathering Evidence Unrelated to this Action

Defendants have a medical billing expert to opine on the reasonableness and necessity of Plaintiff's medical expenses. Therefore, their exhaustive attack on medical providers and their billing companies is highly suspect.

Defendants have set multiple depositions of the persons most knowledgeable on the "policies and procedures" for admission and billing of the providers and billing companies that accept and purchase medical liens. Suspiciously, the deposition notices do not appear to focus on Plaintiff. Rather, Defendants seek to gain general information about the facilities' and billing companies' policies and procedures. They also have asked for the medical providers' confidential financial affairs.

It is clear that Defendants are misusing the discovery process in this case for "an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." (Code of Civil Procedure §128.7(b)(1)) In addition, they are "persisting, over objection and without substantial justification, in an attempt to obtain materials that are outside the scope of permissible discovery." (Code of Civil Procedure §2023.010(a)) They also are "employing a discovery method in a manner or to an extent that causes unwarranted annoyance, embarrassment, or oppression, or undue burden and expense." (Code of Civil Procedure §2023.010(c))

Plaintiff would like to give Defendants' attorneys the benefit of the doubt. However, if they are using this case for the improper purpose of gathering data for a vendetta against lien providers and institutions, Plaintiff requests that this Court take appropriate action against the law firm.

B. <u>The Court Should Enter a Protective Order Preventing Defendants from Making Inquiry into Irrelevant Issues</u>

Plaintiff brings her motion for protective order pursuant to Code of Civil Procedure Section 2025.420, which reads in part:

> (a) Before, during, or after a deposition, any party, any deponent, or any other affected natural person or organization may promptly move for a protective order. The motion shall be accompanied by a meet and confer declaration under Section 2015.040.
> (b) The court, for good cause shown, may make any order that justice requires to protect any party, deponent, or other natural person or organization from unwarranted annoyance, embarrassment, or oppression, or undue burden and expense. This protective order may include, but is not limited to, one or more of the following directions:
> (1) That the deposition not be taken at all.

For the reasons set forth above, Plaintiff requests that the Court enter an order preventing Defendants from taking the deposition of the *Facility* PMK in this matter. Defendants have no legitimate grounds to go forward with this deposition.

C. <u>The Court Should Order Monetary Sanctions Against Defendants' Counsel</u>

Sanctions are authorized under both Code of Civil Procedure Sections 2025.410 and 2025.420, which read, in part:

> §2025.410(d): The court shall impose a monetary sanction under Chapter 7 (commencing with Section 2023.010) against any party, person, or attorney who unsuccessfully makes or opposes a motion to quash a deposition notice, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust.

> §2025.420(h): The court shall impose a monetary sanction under Chapter 7 (commencing with Section 2023.010) against any party, person, or attorney who unsuccessfully makes or opposes a motion for a protective order, unless it finds that

> the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust.
>
> Code of Civil Procedure §2023.030 reads, in part:
>
> To the extent authorized by the chapter governing any particular discovery method or any other provision of this title, the court, after notice to any affected party, person, or attorney, and after opportunity for hearing, may impose the following sanctions against anyone engaging in conduct that is a misuse of the discovery process.
> (a) The court may impose a monetary sanction ordering that one engaging in the misuse of the discovery process, or any attorney advising that conduct, or both pay the reasonable expenses, including attorney's fees, incurred by anyone as a result of that conduct.

Code of Civil Procedure §2023.010(a) defines "misuse of the discovery process" as "persisting, over objection and without substantial justification, in an attempt to obtain information or materials that are outside the scope of permissible discovery." In addition, §2023.010(i) provides that "failing to confer in person, by telephone, or by letter with an opposing party or attorney in a reasonable and good faith attempt to resolve informally any dispute concerning discovery" constitutes misuse of discovery.

As discussed above, and as discussed in Plaintiff's prior Motions to Quash, Defendants are engaged in a discovery campaign in this case which is well outside the scope of permissible discovery. Objections have been asserted by Plaintiff and by the outside witnesses as to privacy, trade secret privileges, confidentiality, and other privileges, as well as relevance. Despite the multiple objections, Defendants persist in this meritless discovery crusade.

In addition, Defendants have failed and refused to respond to multiple attempts by Plaintiff's counsel to meet and confer concerning the deposition of the *Facility* PMK.

Plaintiff therefore requests that the Court issue an order imposing sanctions in the amount of $4,660 against Defendants' counsel. (¶14-16, *Attorney Dec*)

IV. CONCLUSION

Based on the foregoing, Plaintiff respectfully requests that the Court issue the following orders:

1) Staying the taking of the deposition of the PMK for *Facility* and quashing the Deposition Subpoena and Deposition Notice to the *Facility* PMK;

2) Preventing Defendants from taking the deposition of the *Facility* PMK in this matter at all;

3) Awarding sanctions in the amount of $4,660 against Defendants' counsel.

Dated: July 11, 2014 LAW OFFICES OF *ATTORNEY*

By: _____
Attorney for Plaintiff