IN THE STATE COURT OF HALL COUNTY
STATE OF GEORGIA

| | | |
|---|---|---|
| JENNIFER A. BOSTEDT, | ) | |
| | ) | |
| Plaintiff, | ) | CIVIL ACTION FILE |
| | ) | |
| v. | ) | NO. 2014SV68N |
| | ) | |
| HARLEY M. BROWN, | ) | |
| | ) | |
| Defendant. | ) | |

**DEFENDANT HARLEY M. BROWN'S RESPONSE IN OPPOSITION TO NONPARTY ML HEALTHCARE SERVICES, LLC'S MOTION TO QUASH AND FOR PROTECTIVE ORDER**

COMES NOW Harley M. Brown ("Defendant") and files this Response in Opposition to Non-Party ML Healthcare Services, LLC's ("MLH") Motion to Quash and for Protective Order, showing this Honorable Court as follows:

## I. STATEMENT OF FACTS

### A. Defendant's Requests to MLH

On October 17, 2014, Defendant served a Subpoena Duces Tecum to MLH, a non-party in this lawsuit, requesting specific documents identified the request. [*See* MLH's Resp. Brief, Exhibit 2 thereto] A copy of the 5.2 Certificate of Service confirming service of Defendant's Subpoena is attached hereto. [*See* Exhibit A]

The Subpoena, which was signed by the Clerk of this Court, requested that, in lieu of appearance at a deposition, MLH was required to produce the requested documentation to Defendant's counsel's office **on or before October 31, 2014 at 10:00 a.m.**, which was exactly two weeks from the day the Subpoena was served. [Exhibit A (emphasis in original)]

After receiving no objection, response, or communication whatsoever from MLH or its attorneys by the deadline, Defendant served MLH with a Notice of 30(b)(6) Deposition and

Notice to Produce on November 11, 2014. [*See* 5.2 Certificate of Service, Exhibit B hereto][1]

On November 17, 2014, MLH drafted a Motion to Quash and for Protective Order, requesting that this Court Quash Defendant's Subpoena and Notice of 30(b)(6) Deposition and Notice to Produce. MLH's Motion to Quash was filed with the Court the following day, on November 18, 2014, **32 days after** Defendant served Subpoena.

The day after MLH filed its Motion to Quash, on November 19, 2014, defense counsel sent MLH a letter stating the following:

> As of the date of this letter, we have not received any of the subpoenaed documents or any written notification explaining your failure to produce the requested documents. While neither the Civil Practice Act nor the Superior Court Rules require us to send a "good faith" letter before filing a Motion to Compel, this letter will constitute our second request and our good faith effort in obtaining the documents sought in our October 17, 2014 subpoena.

[Exhibit C hereto] This letter also notified MLH that Defendant was withdrawing its 30(b)(6) Deposition Notice. [*Id.*] Defendant received MLH's Motion the following day, November 20th, objecting to both the Subpoena Duces Tecum and 30(b)(6) Deposition Notice. Thus, for purposes of MLH's current motion, their request to quash Defendant's 30(b)(6) Deposition Notice should be denied as moot as Defendant has withdrawn that notice. However, MLH's Motion to Quash Defendant's Subpoena Duces Tecum should also be DENIED for the reasons discussed below.

Preliminarily, MLH does not provide any explanation in its motion demonstrating any excusable neglect in failing to respond to Defendant's October 17th Subpoena by the requested October 31st deadline. Indeed, MLH has not challenged the timing, sufficiency or procedure regarding the Subpoena Defendant has served. The crux of MLH's motion is two-fold: 1.) the requested information is barred by the collateral source rule; and 2.) the information sought

[1] Defendant's Deposition Notice and Notice to Produce sought the exact same documents as the Subpoena Duces Tecum.

constitutes a trade secret. Both of these arguments fail.

**B. The Nature of ML Healthcare's Business**

Before these two arguments are addressed, Defendant believes it will help to familiarize the Court with MLH's business practices, and as such, the purpose behind Defendant subpoenaing certain documents from them. As set forth in their Motion to Quash, MLH is not a healthcare provider, making the use of the word "healthcare" in their name somewhat of a misnomer. [MLH Resp. Brief, p. 2 ¶ 1] Rather, MLH operates under the guise that it provides "access to medical services to those injured plaintiffs who are unable to afford [medical] services as a result of being uninsured or financially incapable" [*Id.* at ¶ 2], when in fact, MLH's business is no different than simply betting on litigation.

While Defendant is of course limited in its ability to provide much of a cogent explanation of MLH's involvement in this particular case because MLH has objected to Defendant's Subpoena in its entirety, Defendant's counsel has obtained a substantial amount of information on MLH's business practices in other lawsuits. Sworn deposition testimony of MLH's Chief Executive Officer, Brian Craver, as well as deposition testimony of a physician who is referred patients by MLH in an unrelated personal injury case, shed some light on MLH's business practice. [*See* Deposition 30(b)(6) Deposition Transcript of Brian Craver, Exhibit D hereto; *see also* Excerpts from the Deposition of Richard Hunter, M.D., Exhibit E hereto].

In looking at this sworn testimony, the core of MLH's business model is that it finances an injured person's medical treatment in exchange for a right to recover proceeds from a future settlement or judgment. In effect, therefore, attorneys refer clients to MLH as a way to build damages in a personal injury lawsuit.

MLH's involvement in litigation typically begins when a plaintiff's attorney, not the

plaintiff herself, contacts MLH. Generally the plaintiff's attorney completes some kind of intake form or attorney suit evaluation. A similar intake form was completed by Plaintiff's counsel in this case. [*See* Atlanta Medical Management Questionnaire; Exhibit F hereto] Some of the requested information Plaintiff's attorney filled out in this questionnaire includes the type of accident involved; a characterization of liability as being either good, bad or comparative negligence; a confirmation of insurance "coverage to compensate [the] client for their alleged damages;" and the available limits of insurance coverage from the alleged at-fault party's insurer. [*Id.*]

While Exhibit F was completed for a seemingly different company, Defendant assumes a similar form was completed for MLH.[2] Armed with this information about a plaintiff's attorney's assessment of liability and available insurance coverage, MLH then decides whether it will finance the plaintiff's medical treatment. Of course, MLH has no interaction with the plaintiff, but instead relies solely upon her attorney's representations.

After investing in the lawsuit, MLH receives frequent updates from the plaintiff's attorneys. [Craver Depo. at pp. 50-55]. MLH then refers the plaintiff to physicians who are within a preferred network established by MLH. After looking at sworn testimony from one of these treators who is referred cases by MLH, it is no wonder that MLH prefers to select the provider who treats a plaintiff. For example, Dr. Richard Hunter, who uses MLH as a referral source, has testified in another case that, in the past three years he has received between two to four referrals **per week** from ML Healthcare. [Hunter Depo., pp. 33-34] In total, Dr. Hunter has treated between 300-600 patients who were referred to him by MLH. [*Id.* at 34-35] Shockingly,

[2] Defendant believes there may be some relationship between Atlanta Medical Management and MLH as the records custodian of Atlanta Medical Management scratched through a Certification of Authentication of Records that was sent to MLH and wrote in Atlanta Medical Management. [Exhibit G hereto] Defendant assumes MLH must have sent the Subpoena that was directed to MLH to Atlanta Medical Management. The relationship between MLH and Atlanta Medical Management is also an item included in Defendant's Subpoena to MLH. [¶ 14]

out of those hundreds of patients, Dr. Hunter **has not once determined that <u>any</u> of 300-600 patients had an injury that he believed was not proximately caused by an accident that gave rise to the lawsuit MLH invested in**. [*Id.* at 34-35] Dr. Hunter further understands that a patient referred to his practice "needs to be related to an accident." [*Id.* at 18] In fact, before MLH even approves a patient's procedure, "it's presupposed" that Dr. Hunter will relate that procedure to the accident involved in the underlying litigation because if it is not related to the accident, MLH will not pay for it. [*Id.* at 21-22] Defendant has a good faith basis to believe that Plaintiff's treators in this case have a similar arrangement with MLH. Indeed, communications between MLH and Plaintiff's medical providers are most likely documented in MLH's electronic notes [Craver Dep. at pp. 35-36], which Defendant has requested in its subpoena.

Furthermore, Defendant believes MLH also inflates medical invoices for treatment rendered to plaintiffs because of their financial stake in the claim. MLH's "profit" derives from the margin between the suggested cost of treatment – generally using a medical database and Current Procedural Terminology ("CPT") codes – and the actual payment the fund company made to the provider, which is based on MLH's pre-negotiated rates with the provider. Invariably, MLH's negotiated rates with providers are significantly less than the suggested cost set by the CPT code. For example, according to payment logs that MLH **<u>was ordered to produce by a federal judge</u>** in the case where MLH's CEO testified [Exhibit D], it was determined that MLH stands to gain a one-hundred seventy percent (117%) rate of return on its investment in that litigation. Documents related to MLH's pre-negotiated rates for the providers who treated Plaintiff in this lawsuit are also requested in Defendant's Subpoena.

Based on the foregoing, Defendant intends to challenge the reasonableness of the medical expenses in this case, which most certainly makes the documents sought discoverable (and

admissible). The actual amount MLH has paid Plaintiff's treating physicians is entirely relevant. Expert testimony regarding the reasonableness of Plaintiff's medical expenses may also be necessary, but without the requested information, determining the reasonableness of the charges is next to impossible.

In short, MLH's Motion to Quash should be DENIED for the following reasons:

1. The documents requested are directly relevant to this lawsuit. First, the documents are related to the bias, prejudice and credibility of the medical providers who Defendant believes will attempt to link the medical treatment authorized by MLH to the incident giving rise to this lawsuit. The financial interest of the medical providers in providing that anticipated testimony is also relevant. Second, Defendant believes the medical bills are inflated to provide MLH with a profit margin on its payments. Defendant would like to obtain the true and accurate amounts paid so that Defendant has the ability examine the reasonableness of such inflated bills, further demonstrating the relevancy of the requested documents. Third, communications between Plaintiff's attorneys and MLH are not privileged and should be produced, especially since most of Plaintiff's medical providers have been chosen either by her attorneys and/or MLH;
2. The subpoena was proper and was served in accordance with the Civil Practice Act. MLH's Motion to Quash Defendant's Subpoena Duces Tecum was served on October 17, 2014, requesting a response no later than October 31, 2014 at 10:00 a.m. MLH has not challenged the timing provided in the Subpoena, but instead filed its Motion to Quash on November 18th, two weeks after the requested deadline. MLH's Motion to Quash should also be denied because it is untimely. *See* O.C.G.A. § 9-11-45 (a)(2);
3. MLH is not an insurance company or a medical provider. It does not "insure" people

before an accident or before medical treatment. Rather, MLH becomes involved "after the fact" to fund litigation by paying a portion of an individual's medical services and in exchange for receiving a financial interest in the litigation; thus incentivizing MLH and their preferred providers to charge greatly inflated medical services to maximize their profits;

4. Through the "funding" of (or "betting" on) the instant litigation, MLH's interest in and connection to this litigation is relevant and discoverable. In particular, the nature and extent of MLH's interest in this litigation is relevant to bias, credibility, impeachment, and to causation of damages;
5. The collateral source rule, in and of itself, does not provide MLH with a basis to prevent the *discovery* of the requested documentation. The collateral source rule is more appropriately used to prohibit the introduction of such evidence *at trial*. However, MLH is not an insurer or medical provider subject to the "collateral source rule." Rather, MLH is a quasi-venture capitalist company that bets on litigation, and receives a return on their investment through litigation. If anything, MLH is a real party in interest because they have received an assignment of Plaintiff's claim to medical expenses;
6. MLH's reliance on a "trade secret" objection is not a proper basis for failing to respond to Defendant's subpoena. There is no valid trade secret privilege against the discovery of business information Defendant has requested; and
7. The documents requested in Defendant's Subpoena are properly limited in terms of time, scope, and breadth, are not unduly burdensome, and seek information that is relevant and material as to the defense to Plaintiff's damages in this personal injury case.

## II. ARGUMENT AND CITATION OF AUTHORITY

### A. MLH Motion to Quash is Untimely

MLH has waived its ability to file a Motion to Quash. O.C.G.A. § 9-11-45(a)(2) provides in pertinent part:

> (2) The person to whom the subpoena is directed may, **within ten days after the service thereof or on or before the time specified in the subpoena for compliance, if such time is less than ten days after service**, serve upon the attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials.

*Id.* (emphasis added) Defendant served her Subpoena Duces Tecum on October 17, 2014, requesting a response by October 31, 2014. In accordance with the above statute, MLH's objection was due on Monday, October 27, 2014, yet MLH did not file its Motion until November 18, 2014. No reason has been given for MLH's delay, and as such, this Court need not even consider the substantive arguments they have raised to deny their motion.

Even if the Court were to consider the objections raised in MLH's Motion to Quash, those arguments fail for the following reasons.

### B. Standard of Review

The Georgia Court of Appeals recently recognized that "protective orders should not be awarded when the effect is to frustrate and prevent legitimate discovery." *Galbreath v. Braley*, 318 Ga. App. 111, 113 (2012), cert. denied (Apr. 15, 2013)(citation omitted) In fact, Georgia courts repeatedly hold that "protective orders are intended to be protective—not prohibitive—and, until such time as the court is satisfied by substantial evidence that bad faith or harassment motivates the discoveror's action, the court should not intervene to limit or prohibit the scope of pretrial discovery." *Id.* (citing *McKesson HBOC, Inc. v. Adler*, 254 Ga. App. 500 (2002))

There is absolutely no evidence, much less "substantial evidence," that Defendant is motivated by "bad faith or harassment" in serving this Subpoena to MLH. To the contrary, for

the numerous reasons discussed above, Defendant's Subpoena was reasonably calculated to lead to the discovery of admissible evidence. In fact, Defendant has attached hereto numerous orders in both Georgia state court and federal court where MLH has been ordered to produce the same documents Defendant has sought in her Subpoena Duces Tecum. [*See* Exhibit H hereto]

**C. The Requested Documents Are Not Collateral Source**

MLH's first substantive argument is that Defendant has sought the production of documents that fall under the collateral source rule, and therefore, are not discoverable [MLH Resp. ¶ 4] As demonstrated in the attached orders, both state and federal courts have rejected precisely this same argument.

None of the cases cited by MLH support its misguided argument that it is a "collateral source." Under Georgia law, a collateral source is a third party that has voluntarily provided a benefit through a bargained-for agreement, such as insurance or a gratuity. *See Olariu* v. *Marrero*, 248 Ga. App. 824, 826 (2001) (emphasis added). The collateral source rule generally prevents inclusion of evidence that a plaintiff received "gratuitous medical care, continued salary or wage payments, proceeds from insurance policies, or welfare and pension benefits. . .." *Bennett* v, *Haley*, 132 Ga. App, 512, 523 (1974) (quoting 22 Am. Jur. 2d *Damages* § 206) (internal quotations omitted).

The stated goal of this rule is to prevent a tortfeasor from unjustly benefiting from a reduction in the plaintiffs damages "whether [from] insurance companies or beneficent boss or helpful relatives." *Id.* at 522. For that reason, courts do not allow a defendant to introduce evidence to reduce damages based solely on the fact that the plaintiff received a benefit from one of these sources. *Amalgamated Transit Union Local J324 v, Roberts*, 263 Ga. 405,408 (1993).

MLH does not fall within any of the categories Georgia courts have recognized as a

collateral source, such as insurance coverage, services furnished without charge, compensation for time not actually worked, Social Security or pension benefits, workers' compensation benefits or Medicaid/Medicare benefits. *See Cincinnati* v. *Hilley*, 121 Ga. App. 196,201 (1970); *Bennett* v. *Haley*, 132 Ga. App. 512, 525 (1974); *Denton* v. *Conway Express, Inc.*, 261 Ga. 41,42-43 (1991); *Georgia Power Co.* v. *Flagan*, 261 Ga. 41,43 (1991); *Warren* v, *Ballard*, 266 Ga. 408,409-10 (1996); *Worthy* v. *Kendall*, 222 Ga. App. 324, 325-26 (1996).

MLH is not a collateral source because, unlike all other recognized collateral sources in this state, MLH does not provide any benefit to Plaintiff. Unlike an insurance company—which receives premiums from its insureds, thereby providing a contractual right to the insured to file a claim with the insurance company to cover medical expenses— MLH does not receive premium payments from plaintiffs. Instead, MLH has the discretion to decide whether or not it will invest in a case, at which point, MLH funds future treatment (that is recommended by MLH's preferred providers) **on the condition** that the plaintiffs will reimburse MLH not only for any amounts that it paid to the providers, but for an amount that could far exceed what MLH paid. Indeed, MLH's reimbursement has priority over a plaintiff's ability to collect from his/her own settlement or judgment, which theoretically means MLH has the ability to reduce that value to zero. Quite simply, MLH does not bestow a benefit to plaintiffs, and if anything, they burden them. In fact, MLH has been known to go after plaintiffs to recover the money that was invested in a lawsuit where the plaintiffs did not prevail:

> Q. With respect to the statement, "Regardless of the outcome of the lawsuit," has ML Healthcare ever filed suit against the plaintiff in an unsuccessful lawsuit?
>
> **A. Yes.**

[Brian Craver Depo., p. 71].

The "collateral source" cases MLH has cited in its Motion concern categories of third parties that Defendant agrees are collateral sources. However, MLH does not fall within any of these recognized collateral source categories. The first category of decisions MLH cites in ¶ 4(b) concern the admissibility of evidence related to a party's insurance coverage. MLH is not an insurer by any stretch of the imagination. The second category identified in ¶ 4(c) addresses whether hospitals setting rates with insurance companies, pursuant to a specific statute, O.C.G.A. § 33-30-21, are admissible. By its own admission, MLH is "not itself a healthcare provider." [MLH Resp. Br., p. 2] Thus, none of the cases MLH cites to support their collateral source theory prohibit the discoverability or admissibility of these documents at trial.

The reality of MLH's arrangement is they are a real party in interest because they have been assigned from Plaintiff a priority right to recover money paid in this lawsuit, and as such, both MLH and their "preferred providers" have a vested interest to casually relate Plaintiff's alleged injuries to this accident and to inflate the cost of that treatment to maximize their recovery. At a minimum, these documents go to the weight a jury gives this evidence and not its admissibility. Defendant should be able to show the jury the amounts that MLH actually paid to Plaintiff's medical providers (the proper measure of her damages) and the profit that MLH stands to gain if the jury were to award damages in the amount of the providers' invoices. The collateral source rule has no application in this context, and as such, the Court should deny MLH's motion and order the production of the requested documents.

**D. The Requested Documents Do Not Constitute a Trade Secret**

MLH's argument that the documents Defendant has requested are protected trade secrets similarly fails. Under Georgia law, when asserting a privilege, a respondent cannot rely on a blanket claim that documents within the discovery request include privileged materials, but must

instead individually review the documents, file a privilege log describing them, and file affidavits or other materials to support factual claims about the privileged nature of what was withheld. *See Georgia Cash America, Inc. v. Strong*, 286 Ga. App. 405, 412–13, 649 S.E.2d 548, 554–5 (2007). To date, MLH has not provided the Court or Defendant with a privilege log demonstrating why the requested documents are protected. MLH has failed to make any showing at all as to how the information sought by Defendant constitutes non-discoverable trade secrets in this case, other than through conclusory and general allegations. Stated another way, MLH claims these documents are trade secrets simply because they say so. For instance, MLH has failed to show how agreements with medical providers constitute "trade secrets." MLH has also failed to show how it "protects" any alleged "trade secrets" in its agreements with medical providers from third party competitors. *American Std, Inc. V. Pfizer, Inc*., 828 F.2d 734 (1987).

Even if MLH made such a showing to the Court, which they have failed to do, an appropriate protective order limiting the dissemination of the requested information would be the proper remedy. Further, MLH has not shown by any competent evidence how it would be harmed by producing the requested information to Defendant in this case. Indeed, harm to MLH is highly unlikely because none of the parties to the instant litigation are competitors of MLH. *See United States v. United Fruit Co*., 410 F.2d 553, 556 (5th Cir. 1969). Again, any alleged harm from public disclosure could be remedied with an appropriate protective order, should MLH prove "good cause" for an order.

Finally, Defendant has shown repeatedly shown in this brief that the discovery sought from MLH is relevant to defenses of causation of damages, as well as to bias, credibility, and impeachment evidence. *See* O.C.G.A. §§ 24-6-620; 24-6-622 ("The state of a witness's feelings towards the parties and the witness's relationship to the parties **may always** be proved for the

consideration of the jury.") *McGee v. Jones*, 232 Ga. App. 1, 499 S.E.2d 398 (1998); *Waits v. Hardy*, 214 Ga. 41, 44 (1958) (noting that arguing to a jury "that the plaintiff in a personal injury suit did not go to a doctor until his lawyer sent him does not charge the lawyer with wrongful conduct"); *S. Bell Tel. & Tel. Co. v. Franklin*, 196 Ga. App. 474 (1990)

The information sought by Defendant is necessary to prepare her case for trial, which includes proving her defenses and rebutting opinions as to causation, particularly when Defendant has a good faith basis to believe that Plaintiff's treating physicians have a financial interest in causally relating this accident to her alleged injuries because MLH provides referral source and revenue stream to these providers. Defendant's need for the information and the relevancy of the information clearly exceed MLH's purported need to maintain confidentiality of the requested documents.

WHEREFORE, Defendant respectfully requests that this Court DENY MLH's Motion to Quash and for Protective Order and also requests that the Court enter an Order directing MLH to produce the requested documents sought in Defendant's Subpoena Duces Tecum. Defendant further requests that the discovery period be re-opened and extended for the reasons set forth in Defendant's Motion and Reply to Extend the Discovery Period. Plaintiff's basis for opposing a discovery extension is undoubtedly to prohibit Defendant from examining the issues sought in her Subpoena, documents which are clearly discoverable, yet Defendant did not know existed until discovery was on the verge of expiring, notwithstanding Defendant having requested this information from Plaintiff through written discovery. Neither Plaintiff nor MLH should be allowed to withhold discoverable information until the eve of trial in the hopes that these important issues go unnoticed. Defendant served this Subpoena during the discovery period, and MLH objected the last day of discovery. The Court is permitted to re-open and extend discovery

under these circumstances pursuant to Unif. Sup. Ct. R. 5.1.

Respectfully submitted, this 16th day of December, 2014.

**DREW ECKL & FARNHAM, LLP**

_____

Barbara A. Marschalk
***Georgia Bar. No. 324498***
Matthew T. Jones
***Georgia Bar No. 938189***

880 West Peachtree Street (30309)
Post Office Box 7600
Atlanta, Georgia 30357-0600
Telephone: (404) 885-1400
Facsimile: (404) 876-0992
Email: bmarschalk@deflaw.com
Email: mjones@deflaw.com
***Attorneys for Defendant***
**5542401/1**
**00353-088237**

IN THE STATE COURT OF HALL COUNTY
STATE OF GEORGIA

| | | |
|---|---|---|
| JENNIFER A. BOSTEDT, | ) | |
| | ) | |
| Plaintiff, | ) | CIVIL ACTION FILE |
| | ) | |
| v. | ) | NO. 2014SV68N |
| | ) | |
| HARLEY M. BROWN, | ) | |
| | ) | |
| Defendant. | ) | |

**CERTIFICATE OF SERVICE**

This is to certify that I have this day served a copy of the *DEFENDANT HARLEY M. BROWN'S RESPONSE IN OPPOSITION TO NONPARTY ML HEALTHCARE SERVICES, LLC'S MOTION TO QUASH AND FOR PROTECTIVE ORDER* upon opposing counsel by depositing true copies of same in the United States Mail with adequate postage affixed thereon and properly addressed to:

Roger W. Orlando, Esq.
Dana Dayagi, Esq.
The Orlando Firm, P.C.
Decatur Court; Suite 400
315 W. Ponce de Leon Avenue
Decatur, Georgia 30030

Richard L. Robbins, Esq.
Rachel F. Gage, Esq.
Robbins, Ross, Allow, Belinfante, Littlefield, LLC
999 Peachtree Street, NE
Suite 1120
Atlanta, Georgia 30309

This 16th day of December, 2014.

Barbara A. Marschalk
***Georgia Bar. No. 324498***

**DREW, ECKL & FARNHAM, LLP**
880 West Peachtree Street (30309)
Post Office Box 7600
Atlanta, Georgia 30357
Telephone: 404-885-1400
Email: bmarschalk@deflaw.com
***Attorneys for Defendant***
5502802/1
00353-0882