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SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF ORANGE

Coordination Proceeding
Special Title (CRC 3.550(b))

Children's Dental Group Cases

JUDICIAL COUNCIL COORDINATION

NO: JCCP 4917

Hon. Glenda Sanders, Judge

Underlying Case No. 30-2016-00894723-CU-MM-CJC

**SEPARATE STATEMENT IN SUPPORT
OF PLAINTIFF, ALEJADRINA AVILA'S
MOTION TO COMPEL DEPOSITION
TESTIMONY FROM DEFENDANT
DENTISTS REGARDING DENTI-CAL
BILLING FRAUD**

Master Complaint Filed: February 8, 2018

1st Bellwether Trial Date: January 13, 2020

Hearing Date: June 14, 2019

Hearing Time: 1:30 p.m.

Dept.: CX101

Pursuant to California Rule of Court 3.1345, Plaintiffs in the above-entitled Coordination Proceeding, by and through their undersigned Liaison Counsel, submit the following separate statement in support of their Motion to Compel Deposition Testimony From Defendant Dentists Regarding Denti-Cal Billing Fraud.

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1 **A. Question Presented At Deposition**

2 On March 18, 2019, defendant Lisa Nguyen, D.D.S. appeared for her duly noticed
3 deposition. At that time, she was asked by Plaintiffs' Co-Lead Trial Counsel the following line of
4 questioning:

5 Q Okay. Let's look at Exhibit 95-4. That's a patient named Giovanni Castillo.

6 Do you see that?

7 A Yes.

8 Q And that references Doctor Number 133. That's you, yes?

9 A Yes.

10 [Declaration of Carlos X. Colorado ("Colorado Decl.") at Exhibit F (Nguyen Deposition
11 Transcript), 21:6-12.]

12 **B. Response to Question At Deposition**

13 Following the introductory questions cited above, Counsel for Defendants interposed
14 various objections, including, most relevantly, the following:

15 MS. TAYLOR: Excuse me. I'm going to make an objection to questions on this patient,
16 Giovanni Castillo, since he's not a bellwether plaintiff and that it is beyond the
17 scope of this deposition.

[Ex. F at 21:13-16.]

18 MR. RAY: I have an objection on behalf of my client to questioning regarding other
19 patients, other plaintiffs, other charts in this case. It's beyond the scope of
20 the bellwether cases.

21 These aren't records that the plaintiffs would even have access to if these were
22 the only four cases being litigated. And so this is beyond the scope. And if
23 the judge needs to rule on this, that's fine.

24 I'm instructing my client not to answer any inquiries on patients other than
25 the bellwether patients, based on the discussion I have had with counsel off
26 the record.

27 And we'll send a meet and confer letter; we will request a discovery
28 conference. If that's unsuccessful, we will file the necessary motion.

[Id. at 22:1-15.]

C. Reasons for Compelling the Deposition Testimony Sought

There are several reasons why Counsel's instruction to Dr. Nguyen not to answer the questions was improper, and Defendants are entitled to an order compelling Dr. Nguyen and all defendants to answer questions regarding Denti-Cal billing practices for bellwether plaintiffs as well as for other patients treated at CDG. These reasons are stated more fully in the accompanying Motion to Compel Deposition Testimony From Defendant Dentists Regarding Denti-Cal Billing Fraud filed concurrently herewith and include the following.

1. Plaintiffs Are Entitled To Question Witnesses Regarding Fraud In Defendants' Billing Because Such Matters Are Relevant To This Action.

California discovery statutes provide that the deposition of a party to an action is a proper form of discovery. Code of Civil Procedure ("CCP") § 2025.010. "A party is entitled to take the testimony of her opponent before trial for the purpose of discovery." *Meyer v. Cooper* (Ct. App. 1965) 233 Cal. App. 2d 750, 754. Parties are entitled to broad discovery of any matter, not privileged, that is relevant to the subject matter of the pending action. CCP § 2017.010. As such, litigants have the right to take party depositions without prior court order or approval and, with certain exception, does not require any showing of good cause for taking of depositions. *See Kramer v. Superior Court* (Ct. App. 1965) 237 Cal. App. 2d 753, 755 (improper to deny plaintiffs' motion in libel case to compel answers by defendant relating to conversations and discussions had by defendant concerning plaintiff). The statutory right to take depositions may not be withheld or curtailed at the court's discretion. *See Carnation Co. v. Superior Court* (1950) 96 Cal.App.2d 138, 140-141 (defendant had the absolute right to take the deposition of the doctor who treated victims). To the contrary, a trial court has a clear duty to enforce the statutory right to a deposition and compel a witness to testify. *See Brown v. Superior Court* (1949) 34 Cal.2d 559, 561 ("[I]t is well settled that there is a clear duty on the trial court to enforce the statutory right to a deposition and compel a witness to testify.").

Because Plaintiffs allege fraudulent Denti-Cal billing as part of Defendants' improper profit scheme, inquiry into fraudulent Denti-Cal billing is highly relevant and should be allowed. Nothing speaks to its relevance in this action than the fact that *Defendants themselves have sought*

1 *to conduct broad-ranging discovery regarding Plaintiffs’ allegations of fraudulent billing*
2 *practices.* As Plaintiffs’ Co-Lead Trial Counsel explained during the Nguyen deposition, the
3 questions posed to Dr. Nguyen relate to “general CDG practices” [See Colorado Decl. at Ex. F
4 (Nguyen Depo. Tr.) at 24:14]. Such practices cut across the board and apply both to bellwether
5 plaintiffs and non-bellwethers. As such, asking about the non-bellwethers is fair game, because it
6 exposes the extent (or limitation) of the practices at issue. Indeed, Defendants’ own discovery on
7 this point has not been limited to bellwether plaintiffs: instead, Defendants have demanded that
8 Plaintiffs identify “*each and every fact* known to you upon which you base your allegation that
9 [Defendants] billed for services not received.” [See Colorado Decl. at Ex. B, Request No. 74
(emphasis added)].

10 Defendants object that asking about fraudulent billing practices outside the strict scope of
11 the experience of bellwether plaintiffs “is not in keeping with the orders” issued by the Court. [See
12 Colorado Decl. at Ex. F (Nguyen Depo. Tr.) at 23:17]. However, there is no order or instruction
13 from the Court that limits the scope of the depositions to support instructing a witness not to
14 respond to the lines of question at issue here. If anything, where the scope of depositions has been
15 specifically addressed, the Court has made it clear that both sides should work together to proceed
16 efficiently, and to allow common issues to be probed at the dentists’ deposition. For example, the
17 Court has ordered that “a lot of coordination needs to take place to ensure that the doctors’
18 depositions are taken in multiple cases, which is, again, why I don’t think the question of
19 consolidation should affect discovery.” [See Colorado Decl. at Ex. I (September 18, 2018 Hearing
20 Tr.) at 41:11-15.] Far from indicating that any limitations should be imposed, the Court made it
21 clear that common or ‘generic’ issues should be addressed efficiently. [*Id.* at 43:13-18 (a dentist
22 “shouldn’t have to ... answer those same generic questions 175 times”).]

23 Plaintiffs’ proposed questioning is consistent with their rights under the Code, as well as
24 the approach to discovery in this case that was endorsed by the Court. By asking doctors about
25 their treatment and billing practices—i.e., ‘generic’ issues—in one deposition, Plaintiffs are
26 heeding the Court’s admonition not to pose “those same generic questions 175 times.” [*Id.* at
27 43:16.] Plaintiff’s questions relating to non-bellwether patients is limited to Medi-Cal billing and
28 does not attempt to inquire into treatment plans or other issues particular to those patients.
Defendants’ approach, on the other hand, would limit questioning now to only the four bellwether

1 plaintiffs, and would require different depositions to be set for inquiring about other plaintiffs.
2 Proceeding this way, the extent of such billing would never be discovered. This would fly in the
3 face of reasonable application of the liberal discovery policies of the Code, of Plaintiffs' rights
4 thereunder, and of efficient application of this Court's directives.

5 **2. Defendants' Refusal To Allow Plaintiffs To Inquire About Billing**
6 **Fraud While They Propound Extensive Discovery On The Issue Is**
7 **Patently Unfair.**

8 It is important to bear in mind that the need for Plaintiffs to obtain the pattern and practice
9 evidence relating to Defendants' widespread billing practices¹ stems from Defendants' opposition
10 to trying the four bellwether cases together. Allowing Defendants to further cut-off and artificially
11 isolate each bellwether plaintiff from every other patient that was subjected to similar treatment
12 at CDG raises fairness issues, and prejudice to plaintiffs that goes well beyond the procedural
issue of proper instructions at a deposition.

13 Even taking into account only the procedural impropriety of Defendants' stance, it is quite
14 egregious for Defendants to propound 42 discovery requests relating to fraudulent billing issues
15 on Plaintiffs (six special interrogatory requests from six defendants, plus a request for production),
16 without any limitation as to whether such information is sought for bellwether plaintiffs or beyond
17 while, and then to turn around and seek to bar Plaintiffs from obtaining similar discovery from
18 Defendants. As noted above, the fact that Defendants have sought this discovery demonstrates
19 that it is relevant and necessary. However, if only Defendants are allowed to obtain it, while it is
20 denied to Plaintiffs, that would operate a patent unfairness in the discovery process and this Court
should act to prevent it.

21 Accordingly, it is critical to Plaintiffs to question witnesses regarding these matters without
22 unnecessary and baseless objections from Defendants.

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24 ///

25 _____
26 ¹ Exhibit 95, which Plaintiffs questioned Dr. Nguyen about, relates to eight patients: Ashley
27 Alvarado, Giovanni Castillo, Bahteli Feldblumb, Brianna Hernandez, Azucena Meza, Brandon
28 Morales, Luis Munoz, and Jocelyn Ruiz. But Plaintiffs have similar documentation relating to
upwards of 100 minor patients and some 15 CDG dentists. [See Colorado Decl. at ¶5.]

1 **3. Defendants’ Instruction To Dr. Nguyen Not To Answer Questions**
2 **Regarding Billing As To Non-Bellwether Plaintiffs Is Improper.**

3 Instructing Dr. Nguyen not to answer relevant questions on this issue based on scope
4 objections was highly improper. *See Stewart v. Colonial W. Agency, Inc.* (2001) 87 Cal. App. 4th
5 1006, 1015 (counsel may not instruct a witness not to answer a question unless it implicates
6 privileged matters where or circumstances are such that suspension is warranted; irrelevancy is
7 not enough). As the trial court in *Stewart* memorably put it, “The proper procedure is to adjourn
8 the deposition and move for [a] protective order. *You don’t assume the role of judge and instruct*
9 *the witness not to answer a question in a deposition. That is a huge no-no.*” 87 Cal. App. 4th at
10 1011 (emphasis added).

11 Here, Defendants took it upon themselves to instruct a deponent not to answer questions
12 on a subject on which they themselves sought wide-ranging discovery, without any court order
13 that permits them to unilaterally so instruct a witness, and took the position that they would not
14 allow any other witnesses to testify on the subject. However, Defendants have to date not sought
15 the Court’s guidance or intervention in asserting their position, simply resorting to self-help and
16 delay tactics to effectuate the obstruction.

17 Defendant’s conduct constitutes discovery abuse and should be sanctioned by an order
18 directing the Dentist Defendants to testify at their depositions regarding Denti-Cal billing for
19 nitrous oxide and by monetary sanctions as discussed in the motion.

20 Dated: May 7, 2019

HODES MILMAN, LLP

21
22 By: 
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