|  |  |  |
| --- | --- | --- |
| COURT\_NAME COURT\_VENUE |  | **Index No:  IndexOrAAA\_Number** |
|  |  |  |
| |  |  |  | | --- | --- | --- | | **PROVIDER\_NAME**  A/A/O **INJUREDPARTY\_NAME**, | | | |  | | PLAINTIFF, | |  | -AGAINST- |  | | **INSURANCECOMPANY\_NAME**, | | | |  | | DEFENDANT | |  | **NOTICE OF CROSS MOTION AND**  **AFFIRMATION IN OPPOSITION**  **Return Date:\_\_\_\_/\_\_\_\_/\_\_\_\_**  **Not on Trial Calendar** |

|  |  |  |
| --- | --- | --- |
| **PLEASE TAKE NOTICE,** that upon the annexed affirmation of Alek Beynenson, Esq., dated NOWDT; upon the annexed Exhibits; and upon all of the prior pleadings and proceedings herein, the undersigned will move this Court at Special Term, Part 40, of the COURT\_NAME, COURT\_VENUE located at COURT\_ADDRESS, on \_\_\_\_\_/\_\_\_\_\_/\_\_\_\_\_ at 2:00 PM. Room 507 or as soon thereafter as counsel can be heard for an Order denying defendant’s motion and granting plaintiff’s cross motion compelling defendant to respond to plaintiff’s outstanding interrogatories and requests for discovery or be precluded from offering their unsupported evidence of medical necessity defense at trial and for such other and further relief the court deems just and proper.  **PLEASE TAKE FURTHER NOTICE,** that you are required to be served upon the undersigned your answering papers no later than seven (7) days before the return date of this application. If service of opposing papers is made by mail, it must be mailed twelve (12) days prior to the return date of this application pursuant to CPLR Section 2103. | | |
| DATED: | Franklin Square, New York NOWDT | |
|  | | \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ By: Alek Beynenson, Esq. THE BEYNENSON LAW FIRM,PC  Attorneys for Plaintiff(s)  475 Franklin Avenue  Franklin Square, NY 11010  Tel: 516-858-4411  Fax: 516-216-5405  Our Case Id:**Case\_Id** |
| To: DEFENDANT\_NAME Attorneys for Defendant DEFENDANT\_ADDRESS, DEFENDANT\_CITY, DEFENDANT\_STATE, DEFENDANT\_ZIP **YOUR FILE**#: ATTORNEY\_FILENUMBER | | |

|  |  |  |
| --- | --- | --- |
| COURT\_NAME COURT\_VENUE |  | **Index No:  IndexOrAAA\_Number** |
|  |  |  |
| |  |  |  | | --- | --- | --- | | **PROVIDER\_NAME**  A/A/O **INJUREDPARTY\_NAME**, | | | |  | | PLAINTIFF, | |  | -AGAINST- |  | | **INSURANCECOMPANY\_NAME**, | | | |  | | DEFENDANT | |  | **AFFIRMATION IN OPPOSITION AND IN SUPPORT OF CROSS MOTION** |

|  |  |
| --- | --- |
| Alek Beynenson, an attorney duly admitted to practice law before the Courts of the State of New York, hereby affirms the following to be true under the penalties of perjury:   1. I am a member of The Beynenson Law Firm P.C., attorneys of record for Plaintiff, and as such am fully, familiar with the facts and circumstances surrounding this action from the records and files maintained therein. 2. This affirmation is submitted in opposition to Defendant's motion to dismiss Plaintiff’s complaint based on alleged lack of medical necessity, and in support of Plaintiff’s Cross Motion to compel Defendant to comply with Plaintiff’s discovery demands.   **Plaintiff Rebutted Defendant’s**  **Lack of Medical Necessity Defense**   1. In the instant case, defendant has attempted to demonstrate through the peer review of Dr. Stauber that the services or supplies which the plaintiff afforded to its assignor were not medically necessary. In opposition, the plaintiff, based upon the annexed affidavit of Dr. Roberts, asserts that the services at issue were performed within generally accepted guidelines, and therefore, were medically necessary (See **EXHIBIT A** the affidavit annexed hereto and made a part hereof). A triable issue of fact exists as to the medical necessity of the rendered services/supplies. 2. It is also noteworthy that Dr. Stauber’s peer review report lists a number of medical records which purportedly provided the factual basis for the peer doctor’s opinion contesting the medical necessity of the services/supplies.   **Defendant is Withholding Demanded Relevant Evidence**   1. Interrogatory 11(b) of the Plaintiff’s Demand for Verified Written Interrogatories (**Exhibit B**) demands that Defendant produce “true and accurate copies of all documents forwarded to the reviewer concerning the peer review or IME.” These documents purportedly provide the factual basis for the peer doctor’s opinion contesting medical necessity of services rendered or supplies provided by the Plaintiff. 2. The list of reviewed documents in the peer review shows that the peer doctor reviewed several documents that were created by non-parties to this action and these documents are not independently available to the plaintiff and were not included in defendant’s discovery responses. Documents from Dr. Stauber report include:    * Verifications of Treatments by Attending Physician or Other Provider or Health Services, dated 12/18/09 - 2/7/10 as submitted by Professional Health Imaging, P.C.    * Report of MRI of the Cervical Spine, conducted on 12/18/09 as submitted by Professional Health Imaging, P.C.    * MRI Referrals, undated, as submitted by Professional Health Imaging, P.C.    * Report of MRI of the Lumbar Spine, conducted on 2/7/10 as submitted by Professional Health Imaging, P.C.    * Report of MRI of the Thoracic Spine, conducted on 1/17/10 as submitted by Professional Health Imaging, P.C.    * Verification of Treatment by Attending Physician or Other Provider of Health Services, dated 12/10/09 as submitted by SK Prime Medical Supply, Inc.    * DME Referral, dated 12/7/09 as submitted by Stephen Roberts, MD of Harvard Medical P.C.    * Delivery Receipt, undated as submitted by SK Prime Medical Supply, Inc.    * Various No-Fault Bills and Invoices, various dates and providers    * Reports of Spinal ROM Exams, conducted on 12/9/09 as submitted by Harvard Medical, P.C.    * Report on Initial Evaluation, conducted on 12/7/09 as submitted by Stephen Roberts, M.D. of Harvard Medical, P.C.    * Massage Therapy Notes, dated 1/8/10-2/19/10 as submitted by Liberty Chiro, P.C.    * Chiropractic Progress Notes, dated 12/7/09-2/16/10 as submitted by Liberty Chiro P.C.    * Report of Initial Exam, conducted on 12/4/09 as submitted by Liberty Chiro, P.C.    * Physical Therapy Notes, dated 12/14/09-3/9/10 as submitted by Harvard Medical, P.C.    * Progress Notes, dated 12/16/09-2/25/10 as submitted by GBI Acupuncture, P.C.    * Reports of Physical Performance Tests, conducted on 12/29/09 and 3/4/10 as submitted by Harvard Medical, P.C.    * Application for No-Fault Benefits Form, dated 12/14/09    * Report of Initial Exam, conducted on 12/7/09 as submitted by GBI Acupuncture, P.C.    * Police Accident Report, dated 12/4/09 3. These underlying medical records would allow plaintiff to “submit the medical records to its own medical expert in order to obtain a rebuttal affidavit on the issue of medical necessity.” East 75th St. Diagnostic Imaging v Clarendon Natl. Ins. Co., 2011 NY Slip Op 21315 (Dist Ct Nassau Co., Ciaffa, J., 2011). The court continued:   “Although a defendant need not necessarily submit those records in order to make a prima facie showing on a lack of medical necessity defense, see Active Imaging, P.C. v. Progressive Northeastern Ins. Co., 2010 NY Slip Op 51842 (App Term, 2d Dept), the opponent can certainly make use of such records in challenging whether the peer doctor's opinion has a sufficient "factual basis and medical rationale." See Novacare Med. Ins. Co. v. Travelers Prop. Cas. Ins. Co., 2011 NY Slip Op 50500 (Dist Ct Nassau Co., Ciaffa, J.). Before the opponent can do so, however, it must first obtain the records. If the records are not records belonging to the provider suing for payment, the records typically are obtainable through discovery. Insurers can and should provide them routinely, upon request.” Id.   1. In East 75th St. Diagnostic Imaging, the plaintiff MRI provider whose services were denied based on lack of medical necessity was seeking non-party treating provider records which the peer review doctor reviewed. Id. The Court denied defendant’s summary judgment motion to dismiss and granted plaintiff’s cross motion compelling the defendant to comply with plaintiff’s discovery request. The Court noted that by failing to make available to plaintiff all of the records reviewed by the peer doctor, as requested in plaintiff’s discovery demands, the defendant’s did not meet its burden to sustain a motion to dismiss based due to lack of medical necessity based on the peer review report of defendant’s medical expert. The burden did not shift to the plaintiff to oppose the defendant expert’s opinion with plaintiff’s expert opinion. Id. See also Muscatello v. City of New York, 215 AD2d 463 (2d Dept. 1995); Gray v. South Nassau Communities Hosp., 245 AD2d 337 (2d Dept. 1997) (Second Department decisions holding that defendant doctor’s medical expert failure to address essential factual issues in his moving affidavit contesting claim of medical malpractice, and basing his opinion upon “disputed or apparently incorrect facts” calls for denial of defendant’s motion “despite the insufficiency of the evididence proferred by the plaintiffs in opposition.”) The same analysis was applied in the no-fault context. See Novacare Med. Ins. Co. v. Travelers Prop. Cas. Ins. Co., 2011 NY Slip Op 50500 (Dist Ct Nassau Co., Ciaffa, J., 2011). 2. In the instant case, in order to obtain a rebuttal affidavit on the issue of medical necessity, the records would need to be submitted to plaintiff’s medical expert. Without the records, plaintiff is unable to determine “whether the statements made by the [peer/IME doctor] are belied by the underlying medical records.” East 75th St. Diagnostic Imaging. The records might lead to relevant evidence that is necessary in order to interpose a meaningful and complete opposition. For example, “if a peer review report ignores or misrepresents documented facts in the medical records, the opponent can and should be able to point out such shortcomings.” Novacare Med. Ins. Co.. 3. Although defendant’s service of motion may give rise to an automatic stay of disclosure under CPLR 3214(b), “same statute allows the Court to *order otherwise*." “CPLR 3212(f) likewise authorizes court-ordered disclosure where it appears from opposing papers that *facts essential to justify opposition may exist but cannot then be stated*." (internal quotations omitted). East 75th St. Diagnostic Imaging. This is such a case.   **WHEREFORE,** plaintiff respectfully requests this Honorable Court issue an order denying defendant’s motion and to grant plaintiff’s cross motion compelling defendant to respond to plaintiff’s outstanding interrogatories and requests for discovery or be precluded from offering their unsupported evidence of medical necessity defense at trial and for any other relief Honorable Court deems just and proper. | |
|  | |

|  |  |
| --- | --- |
| DATED: | Franklin Square, New York NOWDT |

|  |  |
| --- | --- |
|  | \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ **Alek Beynenson, Esq.**  THE BEYNENSON LAW FIRM, PC.  Attorneys for Plaintiff(s)  475 FRANKLIN AVENUE  FRANKLIN SQUARE, NY 11010  Tel: 516-858-4411  Fax: 516-216-5405  Our Case Id:Case\_Id |

|  |  |
| --- | --- |
| TO: **DEFENDANT\_NAME** Attorney for Defendant(s)  **DEFENDANT\_ADDRESS**  **DEFENDANT\_CITY, DEFENDANT\_STATE DEFENDANT\_ZIP**  **Tel: DEFENDANT\_PHONE**  **YOUR FILE # ATTORNEY\_FILENUMBER** |  |

|  |  |
| --- | --- |
| COURT\_VENUE  COURT\_NAME | **Index No.: IndexOrAAA\_Number** |
| ----------------------------------------------------------X |  |
| |  |  |  | | --- | --- | --- | | **PROVIDER\_NAME**  A/A/O **INJUREDPARTY\_NAME** | | | |  | | PLAINTIFF, | |  | -AGAINST- |  | | **INSURANCECOMPANY\_NAME** | | | |  | | DEFENDANT | |  |  |  | | **CERTIFICATION** |
| ----------------------------------------------------------X |  |

|  |
| --- |
| I, Alek Beynenson, pursuant to Section 130-1 of the Rules of the Chief Administrator (22 NYCRR), certify that to the best of my knowledge, information and belief, formed after an inquiry reasonable under the circumstances the foregoing Notice of Affirmation in Opposition and the contentions therein are not frivolous within the meaning of' 130-1.1. |

|  |  |  |
| --- | --- | --- |
| DATED: | Franklin Square, New York NOWDT | |
|  | | \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ By: Alek Beynenson, Esq. THE BEYNENSON LAW FIRM, PC  Attorneys for Plaintiff(s)  475 Franklin Avenue  Franklin Square, NY11010  Tel: 516-858-4411; Fax: 516-216-5405  **Our Case Id: Case\_Id** |

|  |  |
| --- | --- |
| COURT\_VENUE  COURT\_NAME | **Index No.: IndexOrAAA\_Number** |
| ----------------------------------------------------------X |  |
| |  |  |  | | --- | --- | --- | | **PROVIDER\_NAME**  A/A/O **INJUREDPARTY\_NAME** | | | |  | | PLAINTIFF, | |  | -AGAINST- |  | | **INSURANCECOMPANY\_NAME** | | | |  | | DEFENDANT | |  |  |  | | **AFFIDAVIT** |
| ----------------------------------------------------------X |  |

|  |  |
| --- | --- |
| STATE OF NEW YORK  COUNTY OF | ) ss. |

I, Stephen Roberts, M.D., hereby swear the following to be true under the penalty of perjury:

1. I am a physician duly licensed to practice in the State of New York
2. I am a Board Certified Orthopedic Surgeon and the treating physician of the patient herein.
3. I personally reviewed the peer review report of Stuart Stauber, M.D., who determined that the MRI testing performed on December 18, 2009, January 17, 2010 and February 7, 2010 were not medically necessary.
4. In forming his opinion of the medical necessity of the MRIs, Dr. Stauber did not review the follow-up evaluations of the patient which I performed on 12/15/2010 and 1/14/2011. These records document the progression of the patient’s condition and form important data points for determination of necessity of diagnostic imaging. These records were in possession of the defendant. See Exhibit A of Defendant’s Affirmation in Opposition dated November 14, 2011.
5. Notwithstanding Dr.Stauber’s opinion to the contrary, it is my opinion that based upon the symptoms presented by the patient when I treated him, the MRIs of the cervical, thoracic, and lumbar spine were medically necessary.
6. As an initial matter, Barrett Raughlyn (“patient”), 24 year-old male, was in a car accident on December 4, 2009. The consequences of missing a spine injury in an otherwise healthy 24 year old cannot be overstated.
7. The patient presented to my clinic with a grossly abnormal physical exam and very concerning symptoms. Any competent physician, irrespective of specialty training, would recognize neck and back pain after motor vehicle collision that is associated with neurologic deficits as being highly suspicious for a cervical spine injury. The most insidious neck injury involves injury to the cervical spine ligaments.
8. Plain xrays and CT scan cannot evaluate ligament injury. Plain x-ray and CT scan only evaluate fluid and bone (by means of an electron “shadow”). MRI is the definitive test to evaluate soft tissue (such as ligaments -–these CANNOT be seen on CT scan or plain x-ray). An inference on ligament instability or injury can be made by resultant changes in bone structure but that cannot be viewed directly on plain x-ray. At this point, MRI is clearly indicated as discussed below; and if that MRI shows evidence of injury would prompt immediate referral and evaluation by a neurosurgeon. This conclusion is in stark contrast to the assessment made by Dr. Stauber.
9. Several points made by Stauber seem inconsistent with the opinion he provides. Patient’s symptoms and objective physical exam findings strongly argue in support of imaging (MRI) of his cervical, thoracic and lumbar spine and findings based upon these studies could dramatically alter the treatment plan as outlined below.
10. My evaluation strongly suggest a cervical spine injury and demand evaluation with imaging as per the current standards of care delineated by the EAST trauma organization

“The EAST Trauma organization establishes the current standard of care for evaluation of the injured persons and care delivered at trauma centers . The guidelines it publishes are found at www.east.org. The following guidelines http://www.east.org/tpg/cspine2009.pdf define the current state of the art for evaluation of cervical spine after injury. These guidelines state “All other patients in whom CS injury is suspected must have radiographic evaluation.“ MRI is a defined part of this algorithm when there is a neurologic deficit attributable to a cervical spine injury.”

1. The seminal study upon which the EAST cervical spine guidelines are based upon is the NEXUS study published in the New England Journal of Medicine.

“In 2000, the New England Journal of Medicine (NEJM) published the landmark National Emergency X-Radiography Utilization Study (NEXUS). NEXUS was a prospective observational study conducted at over 21 trauma centers across the United States to validate five criteria for a low probability of CS injury. This decision instrument required patients to have 1) no midline cervical tenderness, 2) no focal neurologic deficit, 3) normal alertness, 4) no intoxication, and 5) no painful distracting injury.” (See PMID: 10891516)”

1. The above NEXUS study clearly indicates that if these 5 criteria are not fulfilled by clinical exam – as they were not fulfilled on this patient’s post-injury evaluation – imaging is indicated. Whether or not a cervical spine CT scan or plain xrays of the c-spine were done in the interval between the motor vehicle collision and the clinc evaluation; MRI would still be indicated based upon the EAST guidelines.
2. In regards to the necessity of the cervical spine MRI, Dr. Stauber also cites to a paper “Diagnosis and Management of Low Back Pain” and notes that the article “pertain[s] to the lower back, but applicable to the cervical spine.”
3. However, Dr. Stauber does not explain *how* this article is “applicable to the cervical spine. Is this statement regarding 1) screening evaluation of the neck and back, 2) evaluation after injury of the neck or back, or 3) evaluation of non-injured complaints such as infection, tumor, etc. as cited in Stauber’s reference article? This statement is quite ambiguous. Clearly, as can be seen from a review of the EAST guidelines on injury, evaluation of the injured back and neck are quite different. To say they are equally “applicable” is quite inaccurate, unless a very specific process is specified such as spinal abscess (infection). For example, there are many disease processes which are unique to the lumbar spine and for which MRI is indicated for but not for cervical spine, such as the cauda equina syndrome.
4. To infer that no treatment could have been rendered or treatment plan altered based upon the results of the MRI to evaluate a cervical spinal injury in this particular patient is clearly uninformed.
5. With regards to the thoracic spine MRI, Dr. Stauber’s reference quotes are so generic and broad as to be useless with regard to this patient. Dr. Stauber cites to the same article titled “Diagnosis and Management of Acute Low Back Pain” but does not substantiate whether this article pertains to thoracic spine as opposed to lumbar, and fails to explain how the purported standards for performance of the thoracic MRIs were or were not met in this particular case.
6. The MRI of the lumbar spine was performed about two months after the date of accident and after treatment started for this patient.
7. Dr. Stauber cites to one an article for the proposition that “imaging should be reserved for patient who have signs and symptoms of radiculopathy and who do not have a response to conservative treatment over a period of four to six weeks.” In this case, the patient fits these criteria having undergone two months of treatment.
8. Dr. Stauber also cites at length to a study dealing with age-related low back pain.
9. Finally Dr. Stauber makes a conclusory statement that “none of the above clinical scenarios were present in this case.” However, there is no indication how he arrives at this conclusion in this case of a 24 year old patient who has been treating for two months.
10. The MRI testing was necessary to properly diagnose and treat the patient’s symptoms of a possible spinal injury. Mr. Raughlyn presented with neck, thorax and back pain. The testing was recommended to confirm or rule out spinal injury or radiculopathy and the MRI result was used to tailor a more precise treatment plan including reevaluation of the appropriate physical therapy modalities and ruling out (or establishing as the case may be) the potential need for epidural injections and/or surgical intervention. The clinical picture was not clear and testing was required.
11. Therefore, I disagree with the opinion of Dr. Stauber and the services performed were within the generally accepted standard care. Accordingly, the services at issue should be deemed medically necessary.

BY\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Sworn to before me this \_\_\_\_\_ Day of \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, 2012

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_  
Notary Public, State of New York

|  |  |  |
| --- | --- | --- |
| COURT\_NAME COURT\_VENUE |  | **Index No:  IndexOrAAA\_Number** |
|  |  |  |
| |  |  |  | | --- | --- | --- | | **PROVIDER\_NAME**  A/A/O **INJUREDPARTY\_NAME**, | | | |  | | PLAINTIFF, | |  | -AGAINST- |  | | **INSURANCECOMPANY\_NAME**, | | | |  | | DEFENDANT | |  | **AFFIDAVIT OF SERVICE** |

|  |  |
| --- | --- |
| STATE OF NEW YORK COUNTY OF NASSAU | ) ) ss. |

I, Alla Levy, being sworn, deposes and says:

I am not a party to the action, am over eighteen (18) years of age and reside in the State of New York.

On /2012, I served the within Notice Of Cross Motion and Affirmation in Opposition via First Class Mail, by depositing a true copy thereof enclosed in a post-paid wrapper, in an official depository under the exclusive care and custody of the United States Postal Service within New York State, addressed to the following:

|  |  |
| --- | --- |
|  | TO: **DEFENDANT\_NAME** Attorney for Defendant(s)  **DEFENDANT\_ADDRESS**  **DEFENDANT\_CITY, DEFENDANT\_STATE DEFENDANT\_ZIP**  **Tel: DEFENDANT\_PHONE Fax: DEFENDANT\_FAX**  **YOUR FILE # ATTORNEY\_FILENUMBER** |

                                                                              \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_  
                                                                               Alla Levy

 Sworn to before me on 0 /2012

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Alek Beynenson

Notary Public State of New York

No.02BE6235084

Qualified in Kings County

Commission Expires Jan. 31, 2015

|  |  |
| --- | --- |
| COURT\_VENUE COURT\_NAME | **Index No.: IndexOrAAA\_Number** |
| ------------------------------------------------------------------------X |  |
| |  |  |  | | --- | --- | --- | | **PROVIDER\_NAME**  A/A/O **INJUREDPARTY\_NAME** | | | |  | | PLAINTIFF (S), | |  | -AGAINST- |  | | **INSURANCECOMPANY\_NAME**, | | | |  | | DEFENDANT(S), | | |  | | --- | |  | |  | |
| ------------------------------------------------------------------------X |  |

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

**NOTICE OF CROSS MOTION AND AFFIRMATION IN OPPOSITION**

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

The Beynenson Law Firm, PC  
Attorneys for Plaintiffs  
475 Franklin Avenue.  
Franklin Square, NY 11010  
Tel: 516-858-4411

Fax: 516-216-5405

Our File # Case\_ID