

C.A. NO. 14-3097

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

GREGORY S. MARKANTONE, DPM, PC., AND GREGORY S. MARKANTONE,
Appellants,

v.

PODIATRIC BILLING SPECIALISTS, LLC,
Appellee.

Appeal from Western District of Pennsylvania
2:14-cv-00215-LPL

APPEAL FROM ORDER DATED JUNE 9, 2014, DISMISSING PLAINTIFFS' COMPLAINT,
GRANTING DEFENDANT'S 12(B)(6) MOTION ON ALL COUNTS

APPENDIX VOLUME II (A14-A75)

Gregg R. Zegarelli, Esq.
PA I.D. #52717
mailroom.grz@zegarelli.com

Z E G A R E L L I
Technology & Entrepreneurial
Ventures Law Group, P.C.
2585 Washington Road, Suite 134
Summerfield Commons Office Park
Pittsburgh, PA 15241-2565
v.412.833.0600
f.412.833.0601

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/s/Gregg R. Zegarelli/
Gregg R. Zegarelli
PA I.D. #52717
mailroom.grz@zegarelli.com

Counsel for Appellants

Z E G A R E L L I
Technology & Entrepreneurial
Ventures Law Group, P.C.
2585 Washington Road, Suite 134
Summerfield Commons Office Park
Pittsburgh, PA 15241-2565
v.412.833.0600
f.412.833.0601

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U.S. District Court
Western District of Pennsylvania (Pittsburgh)
CIVIL DOCKET FOR CASE #: 2:14-cv-00215-LPL

MARKANTONE, DPM, PC. et al v. PODIATRIC BILLING SPECIALISTS, LLC
Assigned to: Magistrate Judge Lisa Pupo Lenihan
Case in other court: Third Circuit, 14-03097
Cause: 28:1338 Copyright Infringement

Date Filed: 02/13/2014
Date Terminated: 06/09/2014
Jury Demand: Plaintiff
Nature of Suit: 820 Copyright
Jurisdiction: Federal Question

Plaintiff**GREGORY S. MARKANTONE,
DPM, PC.**

represented by **Gregg R. Zegarelli**
Technology & Entrepreneurial Ventures
Law Group
2585 Washington Road, Suite 134
Summerfield Commons Office Park
Pittsburgh, PA 15241-2565
(412) 833-0600
Fax: (412) 833-0600
Email: mailroom.grz@zegarelli.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Plaintiff**GREGORY S. MARKANTONE**

represented by **Gregg R. Zegarelli**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

V.

Defendant**PODIATRIC BILLING
SPECIALISTS, LLC**

represented by **Christopher S. Channel**
Leech Tishman Fuscaldo & Lampl, LLC
525 William Penn Place
30th Floor
Pittsburgh, PA 15219
(412) 261-1600 ext 238
Fax: (412) 227-5551
Email: cchannel@leechtishman.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Jessica K. Ziemski
Leech Tishman Fuscaldo & Lampl, LLC

A14

525 William Penn Place, 28th Floor
Pittsburgh, PA 15219
412-261-1600
Fax: 412-227-5551
Email: jziemski@leechtishman.com
ATTORNEY TO BE NOTICED

Date Filed	#	Docket Text
02/13/2014	<u>1</u>	COMPLAINT against PODIATRIC BILLING SPECIALISTS, LLC. (Filing fee, including Administrative fee, \$400, receipt number 3091742), filed by GREGORY S. MARKANTONE, DPM, PC., GREGORY S. MARKANTONE. (Attachments: # <u>1</u> Exhibit 1, # <u>2</u> Exhibit 2, # <u>3</u> Exhibit 3, # <u>4</u> Exhibit 4, # <u>5</u> Exhibit 5, # <u>6</u> Civil Cover Sheet) (plh) (Entered: 02/14/2014)
02/13/2014		CLERK'S OFFICE QUALITY CONTROL MESSAGE re <u>1</u> Complaint. Attorney to submit AO 121 Report on the Filing or Determination of an Action or appeal Regarding a Copyright. Attorney advised to file the Notice within 7 days. The link to the report can be found under Other Forms at: http://www.uscourts.gov/FormsAndFees/Forms/CourtFormsByCategory.aspx (plh) (Entered: 02/14/2014)
02/14/2014	<u>2</u>	Disclosure Statement identifying none as corporate parent or other affiliate, by GREGORY S. MARKANTONE, GREGORY S. MARKANTONE, DPM, PC.. (Zegarelli, Gregg) (Entered: 02/14/2014)
03/19/2014	<u>3</u>	WAIVER OF SERVICE Returned Executed by GREGORY S. MARKANTONE, DPM, PC., GREGORY S. MARKANTONE. PODIATRIC BILLING SPECIALISTS, LLC waiver sent on 2/13/2014, answer due 4/14/2014. (Attachments: # <u>1</u> Exhibit Waiver of Service of Summons) (Zegarelli, Gregg) (Entered: 03/19/2014)
03/19/2014	<u>4</u>	NOTICE OF DEMAND FOR DATA BACKUP by GREGORY S. MARKANTONE, GREGORY S. MARKANTONE, DPM, PC. re <u>1</u> Complaint, (Zegarelli, Gregg) (Entered: 03/19/2014)
04/14/2014	<u>5</u>	MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM & <i>Lack of Jurisdiction</i> by PODIATRIC BILLING SPECIALISTS, LLC. (Attachments: # <u>1</u> Proposed Order) (Ziemski, Jessica) (Entered: 04/14/2014)
04/14/2014	<u>6</u>	BRIEF in Support re <u>5</u> Motion to Dismiss for Failure to State a Claim & <i>Lack of Jurisdiction</i> filed by PODIATRIC BILLING SPECIALISTS, LLC. (Ziemski, Jessica) (Entered: 04/14/2014)
05/05/2014	<u>7</u>	NOTICE <i>Response by Defendant to Plaintiff's Notice of Demand for Data Backup</i> by GREGORY S. MARKANTONE, GREGORY S. MARKANTONE, DPM, PC. re <u>4</u> Notice (Attachments: # <u>1</u> Exhibit) (Zegarelli, Gregg) Modified on 5/6/2014. (plh) This document removed from public view and redocketed at Doc. # <u>9</u> . (Entered: 05/05/2014)
05/05/2014	<u>8</u>	

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		BRIEF in Opposition re <u>5</u> Motion to Dismiss for Failure to State a Claim filed by GREGORY S. MARKANTONE, GREGORY S. MARKANTONE, DPM, PC.. (Zegarelli, Gregg) (Entered: 05/05/2014)
05/05/2014	<u>9</u>	RESPONSE to <u>4</u> Notice of Demand for Data Backup, filed by GREGORY S. MARKANTONE, GREGORY S. MARKANTONE, DPM, PC.. (Attachments: # <u>1</u> Exhibit) (plh) (Entered: 05/06/2014)
05/06/2014		CLERK'S OFFICE QUALITY CONTROL MESSAGE re <u>7</u> Notice. ERROR: Wrong event selected. CORRECTION: Re-docketed as Response. This message is for informational purposes only. (plh) (Entered: 05/06/2014)
05/06/2014	<u>10</u>	ORDER that should all parties wish to consent before a Magistrate Judge, they shall file a joint stipulation to that effect with the Clerk of Court no later than May 13, 2014. The Court notes that ALL parties must consent before the document is filed. IT IS FURTHER ORDERED that if any party DOES NOT wish to consent, the parties shall file a joint stipulation to that effect no later than May 13, 2014, requesting a District Judge be assigned and that the case be returned to that District Judge upon completion of pretrial matters. This stipulation SHOULD NOT indicate which parties wished to consent and which did not. Signed by Chief Magistrate Judge Lisa Pupo Lenihan on 05/06/2014. (jmb) (Entered: 05/06/2014)
05/13/2014	<u>11</u>	NOTICE of Appearance by Christopher S. Channel on behalf of PODIATRIC BILLING SPECIALISTS, LLC. (Channel, Christopher) (Entered: 05/13/2014)
05/13/2014	<u>12</u>	JOINT CONSENT to Trial/Jurisdiction by US Magistrate Judge by GREGORY S. MARKANTONE, GREGORY S. MARKANTONE, DPM, PC. (Zegarelli, Gregg) (Entered: 05/13/2014)
05/20/2014	<u>13</u>	REPLY BRIEF re <u>8</u> Brief in Opposition to re: <u>5</u> Motion to Dismiss filed by PODIATRIC BILLING SPECIALISTS, LLC. (Channel, Christopher) (Entered: 05/20/2014)
05/20/2014	<u>14</u>	MOTION to Impoundment of Subject-Matter and or Special Case Management Order by GREGORY S. MARKANTONE, GREGORY S. MARKANTONE, DPM, PC. (Attachments: # <u>1</u> Proposed Order) (Zegarelli, Gregg) Modified on 5/21/2014. (plh) (Entered: 05/20/2014)
06/03/2014	<u>15</u>	RESPONSE IN OPPOSITION to <u>14</u> Motion for Impoundment of Subject-Matter and/or Special Case Management Order, filed by PODIATRIC BILLING SPECIALISTS, LLC. (Channel, Christopher) (Entered: 06/03/2014)
06/04/2014	<u>16</u>	REPLY to Response to Motion re <u>14</u> Motion to Compel filed by GREGORY S. MARKANTONE, GREGORY S. MARKANTONE, DPM, PC.. (Zegarelli, Gregg) (Entered: 06/04/2014)
06/09/2014	<u>17</u>	MEMORANDUM OPINION GRANTING Defendants Motion to Dismiss (ECF No. <u>5</u>) and mootng Plaintiffs Notice of Demand for Data Backup (ECF No. <u>4</u>) and Motion to Compel Impoundment of Subject-Matter (ECF No. <u>14</u>). Signed by Chief Magistrate Judge Lisa Pupo Lenihan on 06/09/2014. (jmb) (Entered: 06/09/2014)
06/09/2014	<u>18</u>	ORDER that for the reasons stated in the Memorandum Opinion (ECF No. <u>17</u>) that the Motion to Dismiss (ECF No. <u>5</u>) is GRANTED. IT IS FURTHER

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		ORDERED that the Notice of Demand for Data Backup (ECF No. <u>4</u>) and Motion to Compel Impoundment of Subject-Matter (ECF No. <u>14</u>) are DENIED AS MOOT. IT IS FURTHER ORDERED that the Clerk of Court mark this case as CLOSED. Signed by Chief Magistrate Judge Lisa Pupo Lenihan on 06/09/2014. (jmb) (Entered: 06/09/2014)
06/10/2014	<u>19</u>	COPYRIGHT DOCUMENTS ISSUED - E-mailed copy of this letter, AO 121 Form, Docket Sheet and the Order of Dismissal/Judgment to the Copyright Office. (plh) (Main Document <u>19</u> replaced on 6/11/2014) (plh,) (Entered: 06/10/2014)
06/23/2014	<u>20</u>	NOTICE OF APPEAL as to <u>18</u> Order on Motion to Dismiss for Failure to State a Claim, Order on Motion to Compel, by GREGORY S. MARKANTONE, GREGORY S. MARKANTONE, DPM, PC. Filing fee \$505, receipt number 0315-3237806. The Clerk's Office hereby certifies the record and the docket sheet available through ECF to be the certified list in lieu of the record and/or the certified copy of the docket entries. The Transcript Purchase Order form will NOT be mailed to the parties. The form is available on the Court's internet site. (Zegarelli, Gregg) (Entered: 06/23/2014)

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

GREGORY S. MARKANTONE, DPM, PC.,
AND GREGORY S. MARKANTONE,

Plaintiffs,

v.

PODIATRIC BILLING SPECIALISTS, LLC

Defendants.

CIVIL ACTION NUMBER:

JURY TRIAL DEMANDED

COMPLAINT

THE PARTIES

1. Plaintiff corporation is a Pennsylvania corporation with a principal place of business located at 3863 Route 30, Latrobe, PA 15650, USA. Plaintiff individual practices at the same location.

2. Defendant is a Pennsylvania limited liability company with its registered office at 2505 Green Tech Drive, Suite A, State College PA 16803.

NATURE OF ACTION

3. Subject to the claims as set forth herein, this is an action generally for declaratory relief arising from copyright infringement, copy-right infringement, and various related state law claims.

JURISDICTION

4. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331, 1338(a) and (b), federal questions involving infringement of copyrights, joined with claims for unfair competition. Pendant jurisdiction over other claims arising from the same nucleus of operative facts lies in consideration of judicial economy, convenience, and fairness to litigants.

VENUE

5. The venue is proper in this District pursuant to 28 U.S.C. § 1391(b) and (c).

STATEMENT OF FACTS COMMON TO ALL COUNTS

6. Plaintiffs conduct a medical practice; that is, namely, a podiatry medical practice ("**Medical Practice**"). Plaintiffs have a significant investment in the office procedures, patient information, operational rules, and related data ("**Medical Data**").

7. The Medical Data contains protected HIPPA patient information.

8. Plaintiffs claim a copyright ownership interest in the Medical Data.

9. Defendant purports to be a professional podiatric billing specialist. Among other things, Plaintiff corporation and Defendant entered into the Agreement attached as Exhibit 1 (the "**Agreement**").

10. Plaintiffs have requested possession of the Medical Data including any content incorporated with it, as the Agreement expressly provides, and which is required to maintain the integrity of the Medical Data as contemplated by the Agreement.

11. In bad faith, and in violation of the required good faith and fair dealing, Defendant and its counsel refuse to acknowledge the provision drafted by Defendant, directly applicable to this scenario, to wit:

...(except that [Plaintiffs] will continue to have the right to use content that has been incorporated into patient care and billing records prior to the date of termination of this License...

12. Defendant has refused to place Plaintiffs into possession of the Medical Data, as such, indicating the patient data and information will be modified and extracted, in such a manner as to be unsure of the integrity of the Medical Data, and only upon payment of an extortive unreferenced payment of \$2,000. See Exhibits 2-5.

13. Defendant and its counsel obdurately repeat that certain content is copyrighted by Defendant, and refuses to acknowledge the exception expressly stated in the Agreement.

14. To wit, Defendant is acting in bad faith, withholding Plaintiffs' Medical Data in an extortive manner, while requiring thousands of dollars in fees to de-incorporate data that the Agreement expressly provides will remain incorporated. That is, Defendant has demanded that Plaintiffs pay Defendant thousands of dollars to do-incorporate certain content, when the Agreement indicates that the content will not be de-incorporated, and with the result not maintaining the integrity or form of the data, and with such act not guaranteeing the result. See Exhibit 3, ¶3. The conditions are in bad faith and extortive, because Defendant has power over Plaintiffs' Medical Data.

15. Plaintiffs claims a copyright in the Medical Data, which it cannot obtain without legal process, not having power over the res, which Defendant controls and knows it controls. Defendant claims a copyright over certain content, and had expressly placed Plaintiffs into the threat of claim and harm for copyright violation if Plaintiffs forces extraction of through any mechanism by obtaining a backup or otherwise. See, Exhibits 2-5.

16. Plaintiffs' Medical Data is important patient information, utilized for Plaintiffs' Medical Practice and any assertion of self-help places Plaintiffs and its patients in jeopardy of data loss, retaliation and personal injury from confusion or loss of patient medical data.

**FIRST CLAIM FOR RELIEF
DECLARATORY RELIEF**

17. By this reference, Plaintiffs hereby incorporate the previous averments as if restated herein.

18. Defendant has threatened legal action against Plaintiffs for copyright infringement if Plaintiffs use any form of self-help. Plaintiffs accordingly seek declaratory relief that Plaintiffs are entitled to the Medical Data incorporated with content claimed by Defendant.

WHEREFORE, Plaintiffs pray this Court declare that Plaintiffs are entitled to the Medical Data incorporated with content claimed by Defendant without violation of the Federal Copyright Act. Plaintiffs further pray, to the furthest extent permitted by law, for all compensatory, statutory, incidental and punitive damages, including, but not limited to cost of this action and attorneys fees, and any other damages and relief that justice requires.

**SECOND CLAIM FOR RELIEF
PERMANENT AND TEMPORARY
SPECIFIC PERFORMANCE/INJUNCTION**

19. By this reference, Plaintiffs hereby incorporate the previous averments as if restated herein.

20. Defendant has possession of Plaintiffs' Medical Data. Plaintiffs accordingly seek equitable relief that Plaintiffs Medical Data, incorporated with Defendant's content, if it be so incorporated, shall be immediately put into possession of Plaintiffs.

21. Money alone will not compensate Plaintiffs for injury to the Medical Practice, patients and Plaintiffs' reputation, and Plaintiffs are being irreparably harmed thereby.

WHEREFORE, Plaintiffs pray this Court temporarily and permanently enjoin or otherwise specifically require Defendant to place Plaintiffs into possession of the Medical Data. Plaintiffs further pray, to the furthest extent permitted by law, for all compensatory, statutory, incidental and punitive damages, including, but not limited to cost of this action and attorneys fees, and any other damages and relief that justice requires.

**THIRD CLAIM FOR RELIEF
BREACH OF CONTRACT**

22. By this reference, Plaintiffs hereby incorporate the previous averments as if restated herein.

23. Defendant has breached the Agreement, and has acted in bad faith and an extortive manner as previously averred.

24. Defendant has refused to return the Medical Data, even though the Agreement itself is legally frustrated by the fact that the software product relating to the Medical Data will no longer be supported by the manufacturer.

25. Moreover, Defendant has failed to deliver agreed services, which has caused significant complications and costs to Plaintiffs' Medical Practice, damaging Plaintiffs in an amount exceeding \$50,000.

WHEREFORE, Plaintiffs further pray, to the furthest extent permitted by law, for all compensatory, statutory, incidental and punitive damages, including, but not limited to cost of this action and attorneys fees, and any other damages and relief that justice requires.

**FOURTH CLAIM FOR RELIEF
TORTUOUS INTERFERENCE WITH CONTRACTUAL RELATIONS**

26. By this reference, Plaintiffs hereby incorporate the previous averments as if restated herein.

27. Defendant, by its legal counsel, has obdurately held Plaintiffs' data hostage, and demanded a payment of thousands of dollars without contractual or other reference, after good faith demand therefor by Plaintiffs.

28. Without the data, Plaintiffs are completely vulnerable in the Medical Practice and patient care. Plaintiffs cannot acquire the Medical Data without justified fear and threat of breach of contract, copyright infringement and/or retaliation.

29. Accordingly, as a hostage to Defendant, Plaintiffs' Medical Practice has been intentionally interfered with at additional cost, complexity and legal fees.

WHEREFORE, Plaintiffs further pray, to the furthest extent permitted by law, for all compensatory, statutory, incidental and punitive damages, including, but not limited to cost of this action and attorneys fees, and any other damages and relief that justice requires.

**FIFTH CLAIM FOR RELIEF
TORTUOUS INTERFERENCE WITH PROSPECTIVE BUSINESS ADVANTAGE**

30. By this reference, Plaintiffs hereby incorporate the previous averments as if restated herein.

31. Because Plaintiffs' Medical Data is held hostage by Defendant, Plaintiff cannot undertake commercial opportunities that Plaintiffs would otherwise take for commercial advantage.

WHEREFORE, Plaintiffs further pray, to the furthest extent permitted by law, for all compensatory, statutory, incidental and punitive damages, including, but not limited to cost of this action and attorneys fees, and any other damages and relief that justice requires.

**SIXTH CLAIM FOR RELIEF
COPYRIGHT INFRINGEMENT**

32. By this reference, Plaintiffs hereby incorporate the previous averments as if restated herein.

33. Defendant is using Plaintiffs Medical Data in a manner against the directive of Plaintiffs and, is therefore, infringing upon Plaintiffs' copyright interests, in violation of 17 USC.

34. Defendant has unclean hands in refusing to allow Plaintiffs to access the Medical Data for the purpose of asserting their legal rights.

WHEREFORE, Plaintiffs further pray, to the furthest extent permitted by law, for all compensatory, statutory, incidental and punitive damages, including, but not limited to cost of this action and attorneys fees, and any other damages and relief that justice requires.

Dated: February 13, 2014

/Gregg Zegarelli/
Gregg R. Zegarelli, Esq.
PA I.D. #52717

Z E G A R E L L I
Technology & Entrepreneurial
Ventures Law Group, P.C.
2585 Washington Road, Suite 134
Summerfield Commons Office Park
Pittsburgh, PA 15241-2565
412.559.5262



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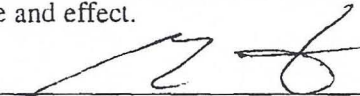
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Signature on behalf of: 

By: Gregory S. McKentzen Date: 2/22/12

Title: owner

Witness: Rebecca E. Jeagarden Date: 2/22/12

LAW OFFICE

ROBERT M. CRAVITZ

503 NORTH MARKET STREET, SELINSGROVE, PENNSYLVANIA 17870

December 4, 2013

TELEPHONE (570) 374-5070
FAX: (570) 374-4127
E-MAIL: clawoff@hotmail.com

Gregg Zegarelli, Esquire
Zegarelli Technology & Entrepreneurial
Ventures Law Group, P.C.
2585 Washington Road, Suite 134
Summerfield Commons Office Park
Pittsburgh, Pennsylvania 15241-2565

RE: Gregory S. Markantone, DPM, PC, &
The Podiatric Billing Specialists, LLC

Dear Attorney Zegarelli:

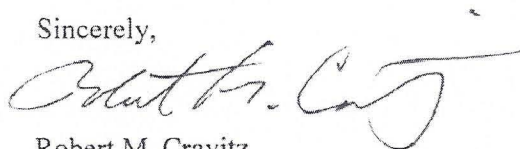
I apologize for not getting back to you sooner but with the holiday and other delays a response to your proposed settlement could not be formulated. My client has been attempting to work around the problems associated with transferring your client's database without the Podiatry Templates. Section 1 of the parties' Content Licensing Agreement states that "you do not have the right to use the Content in connection with any other software other than Allscripts' MyWay." Transfer of the Podiatry Templates with the database would be in violation of the parties' Agreement and would be a possible threat to my client's proprietary rights to those Templates.

To overcome these problems in order to accommodate your client's request for a "usable database", my client has repeatedly contacted Allscripts and Aprima. Both companies advised my client that there is no solution to transfer your database without the Podiatry Templates. Rather than accept this answer my client continues to explore other options to solve this problem.

Presently, a process may be possible to deactivate the Podiatry Templates but it will require writing a specific script. Your client's past notes will be in a read-only format and the patient demographics will transfer over. Your client will need to create all chief complaints, physical examinations, orders, services ordered, services performed, educational material and any section of the plan that will not transfer over. Your client would have a database similar to an original purchase of Aprima without any custom content. The fee for the deactivation of Podiatry Templates is \$2,000.00 per database. Although Aprima and my client think that the new script will work there can be no guarantees in that regard. If your client is interested in pursuing this solution please have him fill out and return the enclosed statement to my client directly together with his payment.

Hopefully, our clients can resolve their mutual concerns through continued cooperation and patience. If there are any questions or comments, please contact me.

Sincerely,



Robert M. Cravitz

cc. The Podiatric Billing Specialists, LLC
Enc. 1



A30

Gregory S. Markantone, PC
Gregory S. Markantone, DPM, President
3863 Route 30
Latrobe, PA 15650

I, _____, understand the data base upgrade to Aprima EHR from Allscripts MyWay and acknowledge the removal of Podiatry Templates© and the effect on the program. I agree to pay \$2,000 to The Podiatric Billing Specialists, LLC, in advance, for the programming service to deactivate the content.

Under the Content License Agreement you may not modify, translates, rent, lease, loan, or create derivative works based upon the Content or any part thereof. At no time may you reactivate the Podiatry Templates© for use, sharing, transfer, or selling.

Signature and Title

Date

Printed Name

Witness Name

Date

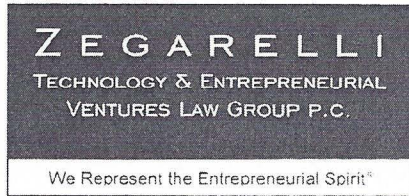
Internal Use Only:

Payment date: _____

Payment type: ACH Check (ck# _____) Credit Card (MC, Visa, AMEX)

Payment amount: _____

TPBS Initials



Writer's Direct Information
gregg.zegarelli@zegarelli.com
412.559.5262

December 12, 2013

VIA FACSIMILE: 570.374.4127

Robert Cravitz, Esq.
Cravitz Law Office
503 North Market Street
Selinsgrove, PA 17870, USA

Dear Bob:

This letter will serve to confirm our telephone conversation yesterday, which occurred in response to your written communication, dated December 4, 2013, which I received slowly by post on December 9, 2013:

1. Per our telephone conversation on November 20, 2013, I sent a document for your consideration on November 21, 2013. I have been emailing you and calling you for weeks trying personally to coordinate the transfer of my clients' patient care and billing records. Rather than any direct response, I received your letter by post.
2. Your letter fails to reference the exact clause that is actually at issue, to wit:

“...(except that [Drs. Markantone] will continue to have the right to use content that has been incorporated into patient care and billing records prior to the date of termination of this License...”
3. The problem being caused by your client is in trying to “de-incorporate” content from my clients' medical records. Your client is interfering with my clients' operations in doing so. This will serve as a demand for the immediate coordinated tender of my clients' medical records, without modification of the medical record data. If content is included with the data, so be it; that content is already licensed to my client as contemplated by the express exceptive language quoted in the document drafted by your client.
4. Please identify the provision of the agreement that contains your new claim for a “de-activation” fee of thousands of dollars. If you cannot supply that contractual language immediately, your request itself will be used as evidence of bad faith and interference.
5. The contract performance is frustrated in the basic bargain itself, as Allscripts has indicated that it has stopped or will stop support for the medical software; accordingly, apart from your client's performance breaches, my clients must change programs for their medical practices.



Z E G A R E L L I

December 12, 2013

Page 2

This letter is without waiver of rights. I regret the necessity of this letter, as I was trying to work cooperatively to manage, as a practical matter, what was already a bad situation by the performance breaches of your client. In that regard, please reference my June 12, 2013, letter requiring performance assurances.

At this point, we will require *actual physical receipt* of your stated position within five (5) calendar days from the date of this letter.

Very truly yours,

Z E G A R E L L I
Technology & Entrepreneurial
Ventures Law Group, P.C.

By: /Gregg Zegarelli/
Gregg R. Zegarelli

LAW OFFICE

ROBERT M. CRAVITZ

503 NORTH MARKET STREET, SELINSGROVE, PENNSYLVANIA 17870

December 16, 2013

TELEPHONE (570) 374-5070
FAX: (570) 374-4127
E-MAIL: clawoff@hotmail.com

Gregg Zegarelli, Esquire
Zegarelli Technology & Entrepreneurial
Ventures Law Group, P.C.
2585 Washington Road, Suite 134
Summerfield Commons Office Park
Pittsburgh, Pennsylvania 15241-2565

RE: Gregory S. Markantone, DPM, PC, &
The Podiatric Billing Specialists, LLC

Dear Attorney Zegarelli:

I spoke with my client concerning your letter dated December 12, 2013. My client does not agree with the representations made in your letter concerning its alleged performance breaches. Throughout the summer and early fall my client repeatedly tried to meet your client's demands. Finally, Allscripts stated that it is retiring the MyWay software and your client needed to obtain another electronic health records system.

According to the parties' Content License Agreement, "(t)he Content is licensed, not sold, to you by Licensor for use under the terms of this License and solely in connection with the use by your registered users of the Allscripts MyWay software in accordance with the Allscripts MyWay software license agreement. Licensor retains all right, title, and interest in the Content, including copyrights, patents, trademarks and other intellectual property rights therein. The Content is being licensed to you only upon condition that you accept all the terms of this License."

Section II. Termination of the same Agreement states that: "This License is effective only so long as the Allscripts MyWay software license remains in effect. Upon expiration or termination of your Allscripts MyWay software license, this license will automatically terminate.

My client will fully abide by the above-mentioned terms of the parties' Content License Agreement by providing your client with its patients' notes and records. All records will remain "as is" and there will be no transfer of the Content that is proprietary to my or my client as set forth in the License Agreement.

Please review this letter with your client and contact me with any questions or comments.

Sincerely



Robert M. Cravitz

cc: The Podiatric Billing Specialists, LLC

FAX Transmission & Regular Mail



A34

Z E G A R E L L I
TECHNOLOGY & ENTREPRENEURIAL
VENTURES LAW GROUP P.C.

We Represent the Entrepreneurial Spirit[®]

Writer's Direct Information
gregg.zegarelli@zegarelli.com
412.559.5262

December 17, 2013

VIA FACSIMILE: 570.374.4127

Robert Cravitz, Esq.
Cravitz Law Office
503 North Market Street
Selinsgrove, PA 17870, USA

Dear Bob:

Respectfully, your letter again fails to address, or now purposefully avoids addressing, the exact clause that is actually at issue, to wit:

“...except that [Drs. Markantone] will continue to have the right to use content that has been incorporated into patient care and billing records prior to the date of termination of this License...”

On or before the end of the business day tomorrow, please advise specifically of your position on the meaning and applicability of this referenced clause. Please be advised that your client's refusal to provide my clients' medical records data has, among other things, very serious implications for the company and its staff.

Very truly yours,

Z E G A R E L L I
Technology & Entrepreneurial
Ventures Law Group, P.C.

By: /Gregg Zegarelli/
Gregg R. Zegarelli



IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

GREGORY S. MARKANTONE, DPM, PC.,
AND GREGORY S. MARKANTONE,

Plaintiffs,

v.

PODIATRIC BILLING SPECIALISTS,
LLC

Defendant.

CIVIL ACTION NUMBER:

2:14-cv-00215-LPL

NOTICE OF DEMAND FOR DATA BACKUP

Defendant is hereby demanded to provide a full, complete and correct copy of all data used by Defendant in rendering services arising from the document attached as Exhibit 1 to Plaintiffs' Complaint. The backup should be as of the date of Defendant's (or its legal counsel's, if earlier) receipt of this Notice, be in native form and format, and be in such digital form as would allow another third-party service provider to re-establish medical practice operations in the ordinary course of business without conversions or other unnecessary acts or expenses. Said backup must be delivered to the undersigned, counsel for Plaintiffs, within five (5) calendar days from the aforesaid date of Defendant's (or its legal counsel's) receipt of this Notice, or be subject to claim of judicial sanction as the law may provide.

Dated: March 19, 2014

s/Gregg R. Zegarelli/
Gregg R. Zegarelli, Esq.
Pa. I.D. #52717

Z E G A R E L L I
Technology & Entrepreneurial
Ventures Law Group, P.C.

Administrative Office:
2585 Washington Road, Suite 134
Pittsburgh, PA 15241, USA
412.559.5262 mailroom.grz@zegarelli.com

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing will be served on this date, by regular or overnight mail, upon:

March 19, 2014

MS. ROBIN L. GARMAN
1333 S. ALLEN ST.
STATE COLLEGE, PA 16801

(courtesy copy to)

CHRISTOPHER S. CHANNEL, ESQ.¹
LEECH TISHMAN FUSCALDO & LAMPL
1800 FRICK BUILDING
PITTSBURGH, PA 15219-3423

Respectfully submitted,

/Gregg R. Zegarelli/

Gregg R. Zegarelli, Esq.
Pa. I.D. #52717

Z E G A R E L L I
Technology & Entrepreneurial
Ventures Law Group, P.C.

Administrative Office:
2585 Washington Road, Suite 134
Pittsburgh, PA 15241, USA
412.559.5262
mailroom.grz@zegarelli.com

¹ Attorney Channel has not yet appeared of record and is served documents of record as a courtesy.

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

GREGORY S. MARKANTONE, DPM.,	:	Civil Division
PC., and GREGORY S. MARKANTONE,	:	
	:	2:14-cv-00215-LPL
Plaintiffs,	:	
	:	
vs.	:	
	:	
PODIATRIC BILLING SPECIALISTS,	:	
LLC,	:	
	:	
Defendant.	:	
	:	

**MEMORANDUM IN SUPPORT OF DEFENDANT
PODIATRIC BILLING SPECIALISTS, LLC’S MOTION TO DISMISS**

Pursuant to Federal Rule of Civil Procedure 12(b)(6), Defendant The Podiatric Billing Specialists, LLC (incorrectly identified in the Complaint as Podiatric Billing Specialists, LLC), by and through its undersigned counsel, hereby submits this Memorandum of Law in Support of its Motion to Dismiss. For the reasons set forth below, Plaintiff’s claim for copyright infringement must be dismissed. Without the federal question jurisdiction, the remaining claims must be dismissed because the parties do not meet the requirements for diversity jurisdiction.

PRELIMINARY STATEMENT

Plaintiffs Gregory S. Markantone, DPM, PC., and Gregory S. Markantone (collectively referred to herein as “Plaintiffs”) filed a federal complaint against The Podiatric Billing Specialists, LLC (“Podiatric”) in an attempt to turn a minor contractual dispute into a “federal case” through the misuse of copyright claims. Podiatric has developed a system, which includes many carefully arranged and selected templates, that assists doctors of podiatric medicine in the collection and entry of patient data. Plaintiffs entered into a license to use the Allscripts My Way software, which includes podiatric templates. The paragraph of the Agreement (which was

attached to the Complaint as Exhibit 1) that grants the license states, “You do not have the right to use the Content in connection with any software other than Allscripts My Way You may not copy the Content or accompanying material (if any) to sell, give or distribute to others.” Agreement, ¶ 1.

The parties intend to conclude the contractual relationship and the Plaintiffs desire to utilize a new provider. Podiatric has every right to insist that Plaintiffs not share Podiatric’s copyright-registered works with any of Podiatric’s competitors during the data transfer process but is also willing to work with Plaintiffs in allowing Plaintiffs to use any data inputted by them. In trying to reach a mutually agreeable resolution, Podiatric suggested a settlement proposal that recognizes that there are costs associated with divorcing data from Podiatric’s copyright-registered works in the podiatric templates. Rather than participate in an amicable discussion, Plaintiffs filed this lawsuit, attaching Podiatric’s settlement proposal, though such information is clearly inadmissible pursuant to Federal Rule of Evidence 408.

Plaintiffs’ claims should be dismissed, because, as set forth below, the Plaintiffs have failed to set forth sufficient facts to survive a Fed. R. Civ. Pro. 12(b)(6) motion to dismiss on the copyright claim. Without the federal question jurisdiction of the copyright claim, the remaining claims should be dismissed because the parties are all Pennsylvania individuals or entities and diversity jurisdiction does not exist.

FACTUAL STATEMENT

Plaintiffs alleged that they conduct a podiatry medical practice. (Complt. ¶ 6). They allege that they have a significant investment in the Medical Data, which contains protected HIPAA patient information. (Complt. ¶¶ 6-7). Plaintiffs claim a copyright ownership interest in the Medical Data. (Complt. ¶ 8). Podiatric is a professional podiatric billing specialist.

(Complt. ¶ 9). Plaintiffs and Podiatric entered into an Agreement (the “Agreement”). (Complt, ¶ 9). Plaintiffs allege that they have requested possession of the Medical Data. (Complt. ¶ 10).

Plaintiffs have not pleaded that they registered or attempted to register the Medical Data with the United States Copyright Office. Plaintiffs have not alleged that Podiatric has copied, distributed, or created a derivative work based upon the Medical Data.

ARGUMENT

I. STANDARD OF REVIEW

When deciding a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure, the Court is “required to accept as true all allegations in the complaint and all reasonable inferences that can be drawn therefrom, and view them in the light most favorable to plaintiff.” Evancho v. Fisher, 423 F.3d 347, 350 (3d Cir. 2005). However, Plaintiffs must “set forth ‘sufficient factual matter, accepted as true, to state a claim of relief that is plausible on its face.’” Golod v. Bank of Am. Corp., 403 Fed. Appx. 699, 702 (3d Cir. 2010) (quoting Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009)). “‘Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice[.]’” Golod, 403 Fed. Appx. at 702 (quoting Iqbal, 129 S. Ct. at 1949); see also Evancho, 423 F.3d at 351 (“[A] court need not credit either ‘bald assertions’ or ‘legal conclusions’ in a complaint when deciding a motion to dismiss.”) (quoting In re Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1429-30 (3d Cir. 1997)). Accordingly, “[a] court must engage in a two-step analysis to ensure compliance with the Iqbal pleading standard: (1) a court must ignore legal conclusions and (2) consider only those allegations entitled to a presumption of truth to determine whether ‘they plausibly give rise to an entitlement to relief.’” Golod, 403 Fed. Appx. At 702 (quoting Iqbal, 129 S. Ct. at 195).

II. PLAINTIFFS' SIXTH CLAIM FOR RELIEF MUST BE DISMISSED BECAUSE THE PLAINTIFFS DO NOT ALLEGE A VALID COPYRIGHT INFRINGEMENT ACTION

The Plaintiffs fail, as a matter of law, to state a claim for copyright infringement. “In general, to establish a cause of action for a claim of copyright infringement, the plaintiff must allege: (1) ownership of a valid copyright; and (2) copying of constituent elements of the work that are original.” Impact Applications, Inc. v. CNS Vital Signs, 2013 U.S. Dist. LEXIS 158261, *11 (W.D. Pa. 2013) (citing Jackson v. Booker, 465 Fed. Appx. 163, 165 (3d Cir. 2012) (quoting Feist Publications, Inc. v. Rural Telephone Serv., Co., 499 U.S. 340, 361 (1991))). Plaintiffs’ claim for copyright infringement fails under both prongs. A claim for copyright infringement . . . requires that the Complaint set forth ““which specific original work is subject of the copyright claim, that plaintiff owns the copyright, that the work in question has been registered in compliance with the statute and by what acts and during what time defendant infringed upon the copyright.”” Teri Woods Publ., L.L.C. v. Williams, 2013 U.S. Dist. LEXIS 52745, *8 (E.D. Pa. 2013) (quoting Flynn v. Health Advocate, Inc., 2004 U.S. Dist. LEXIS 293 (E.D. Pa. 2004) (citations omitted)). Plaintiffs’ copyright claim fails, because they have not alleged that they registered the work, they have not alleged an infringement of the exclusive rights granted a copyright author, and the plaintiffs’ alleged work consists of facts – the selection and arrangement of which was dictated by Podiatric’s templates.

A. The Copyright Infringement Claim is Barred Because Plaintiffs Failed to Allege That They Registered Their Work

Plaintiffs have not set forth a prima facie case for copyright infringement, because they fail to allege that the work in question has been registered. Under 17 U.S.C.S. § 411(a), absent circumstances not applicable here, “no civil action for infringement of the copyright in any United States work shall be instituted until preregistration or registration of the copyright claim

has been made in accordance with this title.” It is “a mandatory precondition that a copyright must be registered with the Copyright Office before a copyright infringement claim is filed.” Sims v. Viacom, Inc., 2012 U.S. Dist. LEXIS 11485, *11 (W.D. Pa. 2012); See also Dawes-Lloyd v. Publish America, LLLP, 441 Fed. Appx. 956, 957 (3d Cir. 2011) (“An action for infringement of a copyright may not be brought until the copyright is registered.”). The Court in Sims held that “the registration requirement in 17 U.S.C. § 411(a) imposes a mandatory precondition to filing a copyright infringement lawsuit.” Sims, 2012 U.S. Dist. LEXIS at *16. Thus, the Sims Court granted defendant’s motion to dismiss and dismissed the plaintiff’s copyright infringement claim for failure to file a registration prior to instituting the lawsuit. In Dawes-Lloyd, the Third Circuit Court of Appeals held that because the plaintiff “did not hold a registered copyright, she could not state a prima facie case of copyright infringement, and that the District Court properly granted the appellee’s motion for summary judgment.” Dawes-Lloyd, 441 Fed. Appx. At 957.

While recognizing that the United States Supreme Court concluded in Reed Elsevier, Inc. v. Muchnick, 559 U.S. 154 (2010), that “§ 411(a)’s registration requirement is nonjurisdictional, notwithstanding its prior jurisdictional treatment,” the Third Circuit in Dawes-Lloyd, 441 Fed. Appx. at 957, held that, nevertheless, a copyright infringement claim cannot survive absent registration. The appropriate remedy is for the district court to dismiss the claim on substantive grounds rather than to base dismissal upon jurisdiction. See Id.

Plaintiffs have not alleged that the Medical Data is registered in accordance with 17 U.S.C.S. § 411(a). (See Compl.). Plaintiffs allege only that they “claim a copyright ownership interest in the Medical Data.” (Compl. ¶ 8). It follows that because Plaintiffs did not allege that they hold a registered copyright, they did not state a prima facie case of copyright infringement.

See Dawes-Lloyd, 441 Fed. Appx. at 957. The appropriate remedy, pursuant to Dawes-Lloyd, is to dismiss the claim. Accordingly, Plaintiffs' copyright infringement claim must be dismissed for failure to register their work prior to instituting this lawsuit.

B. The Plaintiffs Do Not Allege an Infringement of an Exclusive Right of a Copyright Owner

The Plaintiffs have failed to allege the actions of Podiatric violate any of the exclusive rights of a copyright owner pursuant to 17 U.S.C. § 106. Pursuant to Section 106, the copyright owner has the exclusive right to: (1) reproduce the copyrighted work in copies; (2) prepare derivative works; (3) distribute copies or phonorecords of the copyrighted work; (4) to perform the copyrighted work publicly; (5) to display certain types of copyrighted works publicly; and (6) for sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission. 17 U.S.C. § 106; See also Tegg Corp. v. Beckstrom Elec. Co., 650 F. Supp.2d 413, 421 n. 6 (W.D. Pa. 2008). Plaintiffs have not alleged that Podiatric has infringed upon any of the exclusive rights of a copyright owner. Plaintiffs have not alleged copying or distribution of the Medical Data. Rather, the Plaintiffs simply allege that "Defendant is using Plaintiffs Medical Data in a manner against the directive of Plaintiffs and, is therefore, infringing upon Plaintiffs' copyright interests, in violation of 17 USC." (Compl. ¶ 33). The Copyright Act does not grant an exclusive right to a copyright owner that creates an infringement based upon failure to follow "the directive" of the copyright owner. Because Plaintiffs have not alleged an infringement of an actual exclusive right under the Copyright Act, Plaintiffs' claim should be dismissed pursuant to Fed. R. Civ. Pro. 12(b)(6).

C. The Copyright Infringement Claim is Barred Because the Medical Data is Not Copyrightable

Facts are not copyrightable. Feist Publications, 499 U.S. at 344. “The most fundamental axiom of copyright law is that ‘no author may copyright his ideas or the facts he narrates.’” Id. at 344-45 (citing Harper & Row, Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 556 (1985)). A work must be original to the author to qualify for copyright protection. Feist Publications, 499 U.S. at 345 (citation omitted). The term “original,” as used in copyright, means “only that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity.” Id. (citing 1 M. Nimmer & D. Nimmer, Copyright §§ 2.01[A], [B] (1990)). The United States Supreme Court has explained that “originality requires independent creation plus a modicum of creativity[.]” Feist Publications, 499 U.S. at 346 (citing The Trade-Mark Cases, 100 U.S. 82, 94 (1879)).

“No one may claim originality as to facts. This is because facts do not owe their origin to an act of authorship. The distinction is one between creation and discovery: The first person to find and report a particular fact has not created the fact; he or she has merely discovered its existence.” Feist Publications, 499 U.S. at 347 (citation omitted).

The Medical Data that Plaintiffs claim a copyright interest in consists of “office procedures, patient information, operational rules, and related data.” (Compl. ¶ 6). Plaintiffs have not alleged that the information relating to patient visits owes its origin to the Plaintiffs, but rather this information may consist of facts that are not copyrightable, that existed before the Plaintiffs recorded them, and that would continue to exist if Plaintiffs never recorded them using Podiatric’s form. This information is raw data that is not entitled to copyright protection. In fact, Plaintiffs seem to concede the point by calling the information “Medical Data,” and “raw data does not satisfy the originality requirement.” Id. at 361; See also Harris v. Winfrey, 2011

U.S. Dist. LEXIS 28869, *7-8 (E.D. Pa. 2011). Generally, it is only the method or form for expressing the raw data that is copyrightable, not the data itself. See Triangle Publications, Inc. v. Sports Eye, Inc., 415 F. Supp. 682, 686 (E.D. Pa. 1976). Here, Podiatric controlled the method and form for expressing the data through its templates, while the doctor's office entered data as requested by the system. Accordingly, the Medical Data is not entitled to copyright protection, and Plaintiffs' copyright infringement claim should be dismissed.

D. This Court Lacks Subject Matter Jurisdiction Over the Remaining Claims

This Court does not have original jurisdiction over the remaining state law claims, and following the dismissal of Plaintiffs' federal copyright infringement claim, it would be appropriate to dismiss the remaining claims. "A district court may decline to exercise supplemental jurisdiction if the court has dismissed all claims over which it has original jurisdiction." Cindrich v. Fisher, 341 Fed. Appx. 780, 789 (3d Cir. 2009) (citing 28 U.S.C.S. § 1367). The Third Circuit Court of Appeals "observed that, in most cases, pendent state law claims should be dismissed without prejudice 'where the claim over which the district court has original jurisdiction is dismissed before trial.'" Id. (citing Borough of West Mifflin v. Lancaster, 45 F.3d 780, 788 (3d Cir. 1995)). The Third Circuit has stated that "if it appears that all federal claims are subject to dismissal, the court should not exercise jurisdiction over remaining claims unless 'extraordinary circumstances' exist." City of Pittsburgh Comm'n on Human Rels. v. Key Bank USA, 163 Fed. Appx. 163, 166 (citing Tully v. Mott Supermarkets, Inc., 540 F.2d 187, 195 (3d Cir. 1976)).

Plaintiffs allege that all parties reside or have their registered office in Pennsylvania. (Compl. ¶¶ 1-2). Therefore, this Court would not have diversity jurisdiction. "To satisfy the jurisdictional requirements of 28 U.S.C. § 1332(a)(1), the federal diversity statute, diversity must

be complete; that is, no plaintiff can be a citizen of the same state as any of the defendants.” Midlantic National Bank v. Hansen, 48 F.3d 693, 696 (3d Cir. 1995) (citations omitted). Thus, because the remaining claims are state law claims and there are no extraordinary circumstances warranting the jurisdiction of the district court and diversity jurisdiction does not exist, no independent basis for federal jurisdiction remains, and this Court should dismiss the remaining state law claims. See Ham v. Greer, 269 Fed. Appx. 149, 151 (3d Cir. 2008).

CONCLUSION

For the foregoing reasons, Defendant, The Podiatric Billing Specialists, LLC, respectfully request that this Court grant its Motion to Dismiss and dismiss the copyright infringement claim from Plaintiffs’ Complaint. Upon dismissal of the federal question presented by the copyright claim, this Court would lack jurisdiction over the pendent state law claims, because the parties are not diverse. Accordingly, Podiatric respectfully requests dismissal of the Complaint in its entirety.

Respectfully submitted,

/s/ Jessica K. Ziemski

Christopher S. Channel

PA ID No. 89218

cchannel@leechtishman.com

Jessica K. Ziemski

PA ID No. 309666

jziemski@leechtishman.com

LEECH TISHMAN FUSCALDO & LAMPL, LLC

525 William Penn Place, 28th Floor

Pittsburgh, PA 15219

(412) 261-1600

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

GREGORY S. MARKANTONE, DPM, PC.,
AND GREGORY S. MARKANTONE,

Plaintiffs,

v.

PODIATRIC BILLING SPECIALISTS,
LLC

Defendant.

CIVIL ACTION NUMBER:

2:14-cv-00215-LPL

DEFENDANT'S RESPONSE TO PLAINTIFF'S
NOTICE OF DEMAND FOR DATA BACKUP

Plaintiff hereby attaches Exhibit 1, reflecting Defendant's response to Plaintiff's Notice of Demand for Data Backup.

Dated: May 5, 2014

s/Gregg R. Zegarelli/
Gregg R. Zegarelli, Esq.
Pa. I.D. #52717

Z E G A R E L L I
Technology & Entrepreneurial
Ventures Law Group, P.C.

Administrative Office:
2585 Washington Road, Suite 134
Pittsburgh, PA 15241, USA
412.559.5262 mailroom.grz@zegarelli.com

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on the date below, the foregoing document was electronically filed with the Clerk of Court using the CM/ECF system, which will send notification of such filing to counsel of record:

May 5, 2014

Respectfully submitted,

/Gregg R. Zegarelli/

Gregg R. Zegarelli, Esq.
Pa. I.D. #52717

Z E G A R E L L I
Technology & Entrepreneurial
Ventures Law Group, P.C.

Administrative Office:
2585 Washington Road, Suite 134
Pittsburgh, PA 15241, USA
412.559.5262
mailroom.grz@zegarelli.com

LEECH TISHMAN
LEECH TISHMAN FUSCALDO & LAMPL

March 24, 2014

Jessica K. Ziemski
jziemski@leechtishman.com

Via E-mail (mailroom.grz@zegarelli.com) & First Class U.S. Mail

Gregg R. Zegarelli, Esq.
Zegarelli Technology & Entrepreneurial
Ventures Law Group, Inc.
2585 Washington Road, Suite 134
Pittsburgh, PA 15241

Re: *Gregory S. Markantone, DPM, P.C., et al. v. Podiatric Billing Specialists, LLC*
Case No. 2:14-cv-215

Dear Mr. Zegarelli:

I am Christopher S. Channel, Esq.'s associate. We are in receipt of your Notice of Demand for Data Backup filed with the Court in the above-captioned case on March 19, 2014. Because there is no Federal Rule of Civil Procedure, Local Rule, or other legal authority authorizing such a demand, we will not respond to your Notice of Demand for Data Backup.

Accordingly, we request that you immediately withdraw your demand.

Very truly yours,

LEECH TISHMAN FUSCALDO & LAMPL, LLC



Jessica K. Ziemski, Esq.
JZ

LEECH TISHMAN FUSCALDO & LAMPL, LLC

525 William Penn Place, 28th Floor Pittsburgh, Pennsylvania 15219 | T: 412.261.1600 F: 412.227.5551

LEECH TISHMAN.COM

A49

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

GREGORY S. MARKANTONE, DPM, PC.,
AND GREGORY S. MARKANTONE,

Plaintiffs,

v.

PODIATRIC BILLING SPECIALISTS,
LLC

Defendant.

CIVIL ACTION NUMBER:

2:14-cv-00215-LPL

PLAINTIFF'S BRIEF IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

Hypothetical: Picasso paints a picture. Picasso has a servant who Picasso pays a fair wage. Picasso's servant sees him paint the picture. That night, the servant takes the picture and runs away.

Picasso sues the servant in federal court for copyright infringement. The servant defends arguing that Picasso has not registered his copyright. To this Picasso says he cannot, because he does not possess the work to do so. Moreover, because the legal cognizance of the proprietary interest rests upon statutory copyright, the servant claims that Picasso is unable to claim the benefit of the statute because the federal court is without jurisdiction to hear the dispute.

Such as it is for the servant's argument, Defendant's argument is frivolous and untenable under any reasonable interpretation of the entire purpose of the Copyright Act. Every thief could defeat the Copyright Act by frustrating the claimed precondition to legal cognizance. Indeed, the United States Supreme Court clearly held that that this Court has jurisdiction with or without the copyright registration. Reed Elsevier v. Muchnick, 559 U.S. 154 (2010). Once jurisdiction is attached to this Court, this Court is then charged to make substantive determinations, and to grant such preliminary and permanent relief, as does justice.

This case regards Plaintiffs' patient medical data. Data that affects patient health and living condition. Respectfully, Defendant is obdurate.

Let us do unto others, such that this Court places itself into the position of the vulnerable plaintiff doctor so as to understand the gist of this action, and the continued incalcitrant and obdurate position of Defendant:

Plaintiff doctor hires Defendant as a professional technology service provider to advise on a patient care management system and to render data services, which is hosted remotely on Defendant's server. The system fails to work correctly, and, yet, the doctor honorably continues to pay the monthly fees. There are so many problems that the doctor needs to get further written assurances of performance, which are provided by Defendant, but these are not satisfied. The third-party manufacturer of the software package used with the hosted service then states that the product is discontinued and will no longer be supported, frustrating further services. Accordingly, apart from the continued breach of performance by Defendant, Plaintiff doctor simply seeks to move on to another vendor service provider.

"Please return my data so I can simply move on with a new supported product with a new vendor," says the plaintiff doctor. "No way," says the paid vendor, "either stay with us and our products, or you must pay us thousands to de-incorporate our data from your data, and then you will get the data not in a reasonably usable database operational form, but in a mix of non-operational .pdf files, some data, some empty databases, and without any guarantees of success of this de-incorporating process. Or, again, of course, you can just stay with us." "But," says the plaintiff doctor, "the agreement you drafted says:

'...except that [plaintiff] will continue to have the right to use content that has been incorporated into patient care and billing records prior to the date of termination of this License...'

See Exhibits to Complaint, particularly Exhibit 2, ¶3 (mash-up of data, no guarantees). Moreover, then says plaintiff doctor,

"Pursuant to our written agreement, please give me a backup of the data, so I can manage disaster control to protect my patient health records, as stated in the agreement you drafted, to wit:

'[Defendant is] authorized to make one copy of the Content solely for backup purposes.'

"No way," says the service provider, "you will not get backups of your medical data either."

See Complaint, Exhibit 1; see, Notice of Demand for Data Backup, Docket 4, and Defendant's Non-Response, Docket 7.

Defendant is acting in a extortive manner. Indeed, Defendant is holding Plaintiff's patient medical data hostage.

Upon review of the Complaint and Exhibits, particularly Exhibit 5 and Exhibit 4 to the Complaint, this Court will note Defendant's frustration simply getting any response from Defendant's counsel to the following statement:

'...except that [plaintiff] will continue to have the right to use content that has been incorporated into patient care and billing records prior to the date of termination of this License..'" (emphasis added)

In its brief, Page 2, Defendant indicates that "there are costs associated with divorcing the data"; but the concept of "de-incorporating" data is contrary to the express language of the Agreement and Defendant is now simply extorting unguaranteed mix-mashed processes and payments from the Plaintiffs by power over the data. See, Notice of Demand for Backup, and Response, Docket Nos. 4 and 7.

Even now to this very Court, in the writing of Defendant's motion, Defendant's counsel is still merely stating its general rule of Defendant's own copyright claim to certain subject-matter, consciously avoiding and refusing to provide any response or good faith reconciliation to the above exception clause, which is a crux of the dispute. See, Complaint Exhibit 1, ¶2. Exceptions to the general rule, particularly so-named ("except"), are crucially important. Defendant's current and prior counsel avoid the question because they cannot rationally reconcile the express exception within their obdurate, unprofessional and repugnant position.

Standard of Review.

The standard of review for a dismissal under F.R.C.P. 12(b)(6) is to accept all factual allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the complaint, the plaintiff may be entitled to relief. Pinker v. Roche Holdings Ltd., 292 F.3d 361, 374 n.7 (3d Cir. 2002); Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, at 1969 n.8, 167 L. Ed. 2d 929 (2007); World-com, Inc. v. Graphnet, Inc., 343 F.3d 651, 653 (3d Cir. 2003). Moreover, in the event a complaint fails to state a claim, unless amendment would be futile, the District Court must give a plaintiff the opportunity to amend the complaint. Shane v. Fauver, 213 F.3d 113, 116 (3d Cir. 2000).

Federal Rule of Civil Procedure 8(a)(2) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief." Phillips v. County of Allegheny, et. al., 515 F.3d 224, at 231 (3rd Cir. 2008). In considering a motion to dismiss, the issue is not whether the plaintiffs ultimately will prevail but whether they are entitled to offer

evidence to support their claims. Nami v. Fauver, 82 F.3d 63, 65 (3d Cir. 1996) (emphasis added).

A. This Court has Jurisdiction. This is a threshold determination. If this Court has jurisdiction, it may grant preliminary and permanent relief as justice requires; otherwise, no merits determination can be made.

Indeed, this Court clearly does have jurisdiction, as a matter of law, with or without a registration of the copyright. This issue was recently settled by the United States Supreme Court. Reed Elsevier v. Muchnick, 559 U.S. 154 (2010). Once jurisdiction is determined, everything else in the case is mechanical case management, and this Court then has the power to resolve this dispute through all mechanisms and powers available to it to help a vulnerable plaintiff who seeks redress.

1. The question of jurisdiction must not be confused with substantive determinations in other cases (which pre-suppose jurisdiction exists). Defendant mixes together and otherwise confuses two different legal concepts. If any court dismisses any case, other than for failure of jurisdiction (including for lack of registration), then a substantive determination was made on the merits with jurisdiction accepted by the Court.

Such as it is for Picasso in the above example, and in certain contexts as in Reed Elsevier, substantial justice requires that Plaintiff be afforded the opportunity to register the subject matter, and this Court has the power to create a context to permit the opportunity to do so. Otherwise, the entire gist of the Copyright Act is frustrated by the twisted logic error of holding hostage the thing that the culprit knows the victim needs as a precondition to make the case.¹ Accordingly, lack of registration cannot be the basis for failure of jurisdiction, nor can it be the basis of a dismissal if the context results in an absurd determination frustrating the Copyright Act.

2. Such as it is, in a second unusual case-by-case context, the subject of the dispute not only involves Plaintiff's unregistered copyright, but Defendant's claimed registered copyright. See, Complaint, Exhibit 1, ¶2. The "Content" is at issue in litigation, not only on the basis of Plaintiffs' claims, but also because the subject-matter revolves around Defendant's apparent defense. In Defendant's own motion to dismiss, Defendant argues by admission:

¹ All motion practice on the merits is not ripe when a jurisdictional challenge is pending; however, Plaintiffs intend to make a motion for preliminary relief in the form of impoundment for the purpose of registration, as well as for a constructive trust for a backup copy as required by the agreement, in due course.

[Defendant] has every right to insist that Plaintiffs not share Podiatric's copyright-registered works...

Defendant's Motion to Dismiss, P.2.² Defendant admits its defense is grounded in copyright, and Plaintiffs' claim for Count I, Declaratory Relief, relies upon determinations revolving around Defendant's claimed registered copyrights, thereby again satisfying jurisdiction.

This is the reason why jurisdiction remains notwithstanding statutory particularities. Accordingly, the subject of the dispute is clearly a matter of copyright determinations, registered or not, that makes jurisdiction in this Court exclusive for resolution in this Court. Plaintiffs are entitled to make a case on the merits, having this Court to provide a full and fair opportunity to do so.

B. Exclusive Right. Defendant clearly fails to provide any law cited on the precise point it places at issue and then flips the statutory logic. A copyright owner (with or without registration) has exclusive rights as a matter of law, similar to an owner of real estate (with or without recording of a deed). Like real estate, copyright infringement subsists in any trespass to the exclusive rights, which, by its nature, interferes with the rights. Guide to Computer Law, CCH, ¶1000; Sony Corp. v. Universal City Studios, 464 U.S. 417 (1984). Defendant cites no "magic words" legal requirement (particularly since any such requirement would confound suits by joint owners and create a myriad of legal anomalies). Any claim that is well-read as a trespass or any unauthorized use or access to the subject breaks the express or implied exclusive right, whether or not pleaded with magic words. The right to have exclusivity does not require that exclusivity must be pleaded. Exclusively deals in legal rights of a plaintiff, not in defenses of a defendant. Id. Defendant's assertion that a thief must copy, distribute or create a derivative work of copyrighted subject-matter is absurd. The fact that Defendant refuses to give Plaintiffs their medical data cannot be read any other way other than a trespass, which is an interference with Plaintiff's legally exclusive rights. This is pleaded throughout the Complaint, and its exhibits.

C. Not Copyrightable. For this fact-based assertion, Defendant requests dismissal as a matter of law arguing that medical data and databases (such as

² Plaintiffs are not competitors or "sharing" data. Plaintiffs are merely trying to move on to a new vendor software product and hosting service from a product no longer supported, using the subject-matter in a HIPPA confidential way for patients, in exercise of the express contractual language regarding copyright.

unknown future evidence might bear out that concept) are not copyrightable. It is a false legal assertion, again clearly contradicted by law. Indeed, "[c]opyright may ordinarily subsist in an automated data base either as an original compilation or as some other original work of authorship." Guide to Computer Law, CCH, ¶680; see also, Copyright Office Circular 65; Copyright Registration for Automated Databases; Nimmer on Copyright §2.04[C] ("'literary works' is broad enough to include computer data bases and programs"); Key Publications v. Chinatown Today, 945 F.2d 509 (2d Cir. 1991); cf. Feist Publications v. Rural Telephone, 499 U.S. 340 (1991). Apart from Defendant's incorrect legal assertion that databases are not copyrightable: First, the argument is not yet factually ripe in this case. Second, Defendant argues against itself, in that it claims a copyright to certain subject-matter, some of which is the same type is claimed by Plaintiff. Nevertheless, as a matter of law, databases and medical data are copyrightable in general, and are copyrightable based upon the facts of this specific case, which have yet to be adduced in the record, because, of course, Plaintiffs cannot get to their medical data.

D. Pendant Claims. These claims are argued on the basis of an improper request for a dismissal of the copyright claim, and the propriety of pendant jurisdiction will be determined by incidental ruling on jurisdiction.

Oral Argument. The undersigned would be glad to orally argue these points, if it should please this Court as necessary for a proper determination.

WHEREFORE, Plaintiffs request that this Court deny Defendant's motion to dismiss. Defendant's action in holding Plaintiffs' data hostage is extortive, obdurate, and just simply repugnant. Defendant's motion should be dismissed as groundless.

Dated: May 5, 2014

s/Gregg R. Zegarelli/

Gregg R. Zegarelli, Esq.
Pa. I.D. #52717

Z E G A R E L L I
Technology & Entrepreneurial
Ventures Law Group, P.C.

Administrative Office:
2585 Washington Road, Suite 134
Pittsburgh, PA 15241, USA
412.559.5262
mailroom.grz@zegarelli.com

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on the date below, the foregoing document was electronically filed with the Clerk of Court using the CM/ECF system, which will send notification of such filing to counsel of record.

May 5, 2014

Respectfully submitted,

/Gregg R. Zegarelli/

Gregg R. Zegarelli, Esq.
Pa. I.D. #52717

Z E G A R E L L I
Technology & Entrepreneurial
Ventures Law Group, P.C.

Administrative Office:
2585 Washington Road, Suite 134
Pittsburgh, PA 15241, USA
412.559.5262
mailroom.grz@zegarelli.com

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

GREGORY S. MARKANTONE, DPM.,	:	Civil Division
PC., and GREGORY S. MARKANTONE,	:	
	:	2:14-cv-00215-LPL
Plaintiffs,	:	
	:	
vs.	:	
	:	
PODIATRIC BILLING SPECIALISTS,	:	
LLC,	:	
	:	
Defendant.	:	

**REPLY BRIEF IN SUPPORT OF DEFENDANT
PODIATRIC BILLING SPECIALISTS, LLC’S MOTION TO DISMISS**

Plaintiffs’ Brief in Opposition to Defendant’s Motion to Dismiss (Doc. No. 8) confirms that Plaintiff has not registered its alleged copyright, and thus is unable to fulfill the mandatory precondition to filing a copyright infringement required by 17 U.S.C. §411(a).¹ Plaintiffs argue that this Court has jurisdiction to hear their copyright claim, but that argument is misplaced. (Doc. No. 8, at 1, 4-5). Defendant did not argue that this court lacks subject matter jurisdiction. Rather, Defendant argued that Plaintiff failed to state a claim because Plaintiff did not register its alleged copyright. Defendant recognized the holding in Reed Elsevier, Inc. v. Muchnick, 559 U.S. 154 (2010), that the registration requirement is “nonjurisdictional, notwithstanding its prior judicial treatment.” Memorandum in Support of Defendant’s Motion to Dismiss (Doc. No. 6, at 5). The Supreme Court’s holding did not render the language of 17 U.S.C. § 411(a) superfluous. The Third Circuit held in Dawes-Lloyd v. Publish America, LLP that “an action for infringement of a copyright may not be brought until the copyright is registered.” 441 Fed. Appx. 956, 957 (3d

¹ Plaintiff spends much of its brief name-calling, but calling the undersigned or Defendant names is no substitute for legal reasoning or reference to factual allegations in the Complaint that could defeat a motion to dismiss. See, e.g., Doc. No. 8 at 1 (“Respectfully, Defendant is obdurate.”).

Cir. 2011). The Dawes-Lloyd court affirmed summary judgment on the underlying copyright claim because the copyright was not registered. Likewise, the Honorable Terrence F. McVerry granted a motion to dismiss where the Plaintiff applied for registration of its copyright after filing the lawsuit. Sims v. Viacom, Inc., 2012 U.S. Dist. LEXIS 11485, *15 (W.D.Pa. 2012) (“[T]he registration requirement in 17 U.S.C. § 411(a) imposes a mandatory precondition to filing a copyright infringement lawsuit. Accordingly, Plaintiff’s copyright infringement claim must be dismissed for failure to file a registration prior to instituting this lawsuit.”). Plaintiffs do not allege that they registered a copyright. Plaintiffs instead make the subject matter jurisdiction argument then state, without any support, “lack of registration cannot be the basis for failure of jurisdiction, nor can it be the basis of a dismissal if the context results in an absurd determination frustrating the Copyright Act.” (Doc. No. 8, at 4.) Plaintiffs set forth an analogy that involves Picasso’s servant converting the physical embodiment of his work and thus frustrating registration. The argument fails, however, because, as explained in Peirson v. Clemens, Inc., Civ. A. No. 03-1145 JJF, 2005 U.S. Dist. LEXIS 4587 (D. Del. March 23, 2005), conversion of the physical embodiment of a copyright work is not preempted by the Copyright Act. Therefore, Plaintiffs’ analogy again simply sets forth a hypothetical state-law claim, and not a federal question. Because Plaintiffs have not pleaded that they have registered a copyright, their copyright claims must be dismissed. Further, Plaintiffs’ Complaint may not be resurrected based upon their belief of what Defendant’s defenses may be.

Plaintiffs also fail to refute Defendant’s argument that their copyright claims fails because they have not alleged a violation of any of the exclusive rights of a copyright owner. Plaintiffs argue that Defendant cites no “magic words” legal requirement and that “[A]ny claim that is well-read as a trespass or any unauthorized use or access to the subject breaks the express or implied exclusive right, whether or not pleaded with magic words.” (Doc. No. 8, at 5).

Defendants did cite the “magic words” – the words of the Copyright Act that convey and define the scope of the exclusive right. 17 U.S.C. § 106; (Doc. No. 6, at 6). The Act does not create a right to issue “directives.” To the extent that right ever exists, it exists as a result of the agreement of two parties – a contract or a license. Plaintiffs acknowledge as much by making contractual arguments throughout pages two and three of their Brief in Opposition. (Doc. No. 8, at 2-3). This case is simply a contractual dispute between Pennsylvania parties. Therefore, the copyright claim should be dismissed. Absent a federal question, the pendent state law claims should be dismissed.

CONCLUSION

For the foregoing reasons, Defendant, The Podiatric Billing Specialists, LLC, respectfully request that this Court grant its Motion to Dismiss and dismiss the copyright infringement claim from Plaintiffs’ Complaint. Upon dismissal of the federal question presented by the copyright claim, this Court would lack jurisdiction over the pendent state law claims, because the parties are not diverse. Accordingly, Podiatric respectfully requests dismissal of the Complaint in its entirety.

Respectfully submitted,

LEECH TISHMAN FUSCALDO & LAMPL, LLC

Date: May 20, 2014

/s/ Christopher S. Channel
Christopher S. Channel
PA ID No. 89218
cchannel@leechtishman.com
Jessica K. Ziemski
PA ID No. 309666
jziemski@leechtishman.com
525 William Penn Place, 28th Floor
Pittsburgh, PA 15219
(412) 261-1600
Counsel for Defendant

CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of May, 2014, I electronically filed the foregoing **Reply Brief in Support of Defendant The Podiatric Billing Specialists, LLC's Motion to Dismiss** with the Clerk of the Court using the CM/ECF system which sent electronic notification to the following:

Gregg R. Zegarelli, Esquire
mailroom.grz@zegarelli.com
Zegarelli Technology & Entrepreneurial
Ventures Law Group, Inc.
2585 Washington Road, Suite 134
Pittsburgh, PA 15241
Counsel for Plaintiffs

/s/ Christopher S. Channel

Christopher S. Channel

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

GREGORY S. MARKANTONE, DPM, PC.,
AND GREGORY S. MARKANTONE,

Plaintiffs,

CIVIL ACTION NUMBER:

v.

2:14-cv-00215-LPL

PODIATRIC BILLING SPECIALISTS,
LLC

Defendant.

PLAINTIFFS' MOTION FOR IMPOUNDMENT OF SUBJECT-MATTER
AND/OR SPECIAL CASE MANAGEMENT ORDER

1. The gist of this action is not complex. Plaintiff Gregory Markantone is a doctor who has created a significant amount of medical data, including case notes and opinions, using a software product sold and hosted remotely by Defendant. The Defendant refuses to release the data without payments and preconditions to recast the data out of its native form and format, without any guarantees of successfully maintaining the native integrity of the medical data. See, particularly, Complaint, Exhibit 2.

2. Plaintiffs have claimed a copyright in the subject-matter.

3. Defendant will not return Plaintiffs' medical data because Defendant claims certain subject-matter regarding which Defendant claims that it has a registered copyright.

4. Defendant creates a condition that it will not give Plaintiffs the subject-matter for any purpose, for the purpose of registering the copyright, or even for the agreed backup. See, Complaint, Exhibit 1, Dockets Nos. 4, 9.

5. Plaintiffs understood the gist of Defendant's motion to dismiss to be, in part, subject-matter jurisdiction arising from lack of a registration. In Plaintiffs' response to Defendant's motion to dismiss, Plaintiffs asserted that both Plaintiffs' claim and Defendant's registered copyright defense separately provide a basis for maintenance of this action with the pendant claims. Irrespectively, if Defendant now concedes the subject-matter jurisdiction of this Court without a registration by Plaintiff, then this Court,

with Defendant's conceded jurisdiction to do so, may formulate a case management order as is calculated by this Court to provide a full and fair opportunity for redress.

6. Defendant asserts the registration requirement is a pre-condition to maintaining an action, but, of course, Plaintiffs cannot, without judicial process, obtain from Defendant the thing required to obtain the registration.¹ Defendant's interpretation of the law frustrates the very purpose of the law, and is, respectfully, doubly repugnant, inequitable and in bad faith.

7. Plaintiffs' position is that this case can be maintained on the basis that Defendant has asserted a registered copyright as the very express foundation of Defendant's defense, and any act by Plaintiffs regarding the subject-matter has already been asserted to be a violation of Defendant's registered copyright. See, Plaintiffs' Brief in Opposition, P.4.

8. In Footnote 1 of Plaintiffs' Brief in Opposition, Plaintiffs asserted its intention to seek impoundment of the subject-matter for the purpose of registering the copyright.² Because Defendant has conceded this Court's jurisdiction, the motion would appear to be ripe for consideration.

9. Plaintiffs simply seek this Court to order the production of the database in its native form, which is customarily simply a SQL aggregated .bak file. Plaintiffs will hold the data in trust for use by Plaintiffs and its experts and for the sole purpose of filing an application for copyright registration.

10. There is no prejudice to Defendant is granting the request, and, if the request is not granted, there is prejudice to Plaintiffs.

11. To the extent that a special case management order is necessary or appropriate, Plaintiffs hereby make the request. Moreover, if a status conference, oral argument or evidentiary hearing is necessary or appropriate, Plaintiffs will be glad to address the context as may please this Court.

WHEREFORE, Plaintiffs request that this Court order Defendant to produce

1 Because Defendant is ostensibly silent on material issues regarding its position regarding the contract language reconciliation or the backup, from the context, it appears that Defendant's refusal to provide a backup is based upon the same registered copyright defense, thereby again, making the issue federally judiciable. See, Plaintiffs' Brief in Opposition, P.2; Dockets Nos. 4 and 9.
2 Plaintiffs note that, apart from an infringement action for which registration is a usual condition to proceed, the pendant claims and this action can continue with or without Plaintiffs' infringement case because the subject-matter, as expressly conceded by Defendant in its Motion, revolves around Defendant's own claim of a registered copyright which is entwined into all claims made in this case. Only an "action for infringement" requires the registration, not other entwined claims that are properly exclusively federally judiciable under the Act.

all data which is the subject of its professional services for Plaintiffs to be held and used by Plaintiffs for the purposes set forth herein.

Dated: May 20, 2014

s/Gregg R. Zegarelli/

Gregg R. Zegarelli, Esq.
Pa. I.D. #52717

Z E G A R E L L I
Technology & Entrepreneurial
Ventures Law Group, P.C.

Administrative Office:
2585 Washington Road, Suite 134
Pittsburgh, PA 15241, USA
412.559.5262

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on the date below, the foregoing document was electronically filed with the Clerk of Court using the CM/ECF system, which will send notification of such filing to counsel of record.

May 20, 2014

Respectfully submitted,

/Gregg R. Zegarelli/

Gregg R. Zegarelli, Esq.
Pa. I.D. #52717

Z E G A R E L L I
Technology & Entrepreneurial
Ventures Law Group, P.C.

Administrative Office:
2585 Washington Road, Suite 134
Pittsburgh, PA 15241, USA
412.559.5262

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

GREGORY S. MARKANTONE, DPM., PC., and GREGORY S. MARKANTONE,	:	Civil Division
	:	
Plaintiffs,	:	2:14-cv-00215-LPL
	:	
vs.	:	
	:	
PODIATRIC BILLING SPECIALISTS, LLC,	:	
	:	
Defendant.	:	

**DEFENDANT’S RESPONSE IN OPPOSITION
TO PLAINTIFFS’ MOTION FOR IMPOUNDMENT OF
SUBJECT-MATTER AND/OR SPECIAL CASE MANAGEMENT ORDER**

Defendant, The Podiatric Billing Specialists, LLC (incorrectly identified in this action as Podiatric Billing Specialists, LLC), by its undersigned counsel, files this Response to Plaintiffs’ Motion for Impoundment of Subject-Matter and/or Special Case Management Order (the “Motion”), stating as follows:

INTRODUCTION

The gist of this breach of contract action is that Plaintiffs want Podiatric Billing Specialists, LLC (“Podiatric”) to provide data in a specific manner pleasing to Plaintiffs that was not provided for in the contract between Plaintiffs and Podiatric. A review of the most recent Motion filed by Plaintiffs reveals that it is not accompanied by a brief, does not cite any authority for the relief requested, and is simply, in substance, a prohibited Sur-Reply to Podiatric’s Motion to Dismiss. Much like Plaintiffs’ filings captioned Notice of Demand for Data Backup (Doc. No. 4) and Defendant’s Response to Plaintiff’s Notice of Demand for Data Backup (Doc. No. 9), which simply consists of the undersigned’s correspondence, Plaintiffs have demonstrated a willingness to pollute the Court’s docket with impermissible filings without regard to the Federal

Rules of Civil Procedure, Local Rules, or the Court's practices. For that reason alone, the Motion should be stricken and the requested relief denied. Further, as set forth below, the Plaintiffs' Motion simply lacks merit and should be denied.

ARGUMENT

The Plaintiffs' Motion, again, puts the cart before the horse and requests this Court to require immediate production of the data in its native form, which is "customarily simply a SQL aggregated .bak file." Motion, ¶ 9. Plaintiffs provide no case law or statutory support for their request. If Plaintiffs are requesting impoundment pursuant to the Copyright Act, their claim again fails for the reasons set forth in Podiatric's Motion to Dismiss (Doc. No. 5) and Brief in Support (Doc. No. 6) and in Podiatric's Reply Brief (Doc. No. 13). Section 503 of the Copyright Act references the impounding and disposition of infringing articles. Section 503 states that

[a]t any time while an action under this title is pending, the court may order the impounding, on such terms as it may deem reasonable – (A) of all copies or phonorecords claimed to have been made or used in violation of the exclusive right of the copyright owner; (B) of all plates, molds, matrices, masters, tapes, film negatives, or other articles by means of which such copies or phonorecords may be reproduced; and (C) of records documenting the manufacture, sale, or receipt of things involved in any such violation, provided that any records seized under the subparagraph shall be taken into the custody of the court.

17 U.S.C. § 503(a)(1).

The impoundment of allegedly infringing materials "is a form of preliminary relief and the same standards apply with respect to issuance of an impoundment order as to the issuance of a preliminary injunction." Yamate USA Corp. v. Sugerman, 1991 U.S. Dist. LEXIS 20701, *42 (D.N.J. 1991) (citations omitted). To be entitled to a preliminary injunction, a plaintiff must demonstrate: "(1) a likelihood of success on the merits; (2) that it will suffer irreparable harm if the injunction is denied; (3) that granting preliminary relief will not result in even greater harm to

the nonmoving party; and (4) that the public interest favors such relief.” Steedley v. McBride, 530 Fed. Appx. 101, 103 (3d Cir. 2013). Plaintiffs have not analyzed the requirements for a preliminary injunction and certainly do not meet them. As Podiatric set forth in the Motion to Dismiss, Plaintiffs admit they cannot fulfill the mandatory prerequisite of registration. There is no allegation relating to a reasonable likelihood of success on the merits, irreparable harm, the balancing of equities or harm to Podiatric, or the public interest. Rather, Plaintiffs make jurisdictional arguments that are better suited for a reply brief to Podiatric’s Motion to Dismiss and do not provide support for the impoundment of the medical data. Thus, Plaintiffs fail to demonstrate likelihood of success on the merits.

Plaintiffs have set forth no argument regarding irreparable harm or that the relief will not result in even greater harm to Podiatric. The public interest would not be served by the relief requested because Plaintiffs allege that their plan is to make public their patients’ protected medical information. Compl., ¶ 6. Plaintiffs allege the purpose of the impoundment (which is not actually a request for impoundment at all, but rather a request that the court take a database from Podiatric and give it to Plaintiffs) is to “file an application for copyright registration.” Motion, ¶ 9. Accordingly, the Plaintiffs’ stated intentions are to take their patients’ Health Insurance Portability and Accountability Act (“HIPAA”) protected private medical information and file it with the United States Copyright Office, thereby rendering such private medical data a public document. Such an action is against public policy, Health Insurance Portability and Accountability Act of 1996 (HIPAA) Pub. L. No. 104-191, 110 Stat. 1936 (1996), and therefore the public interest would not be served by granting the relief requested by Plaintiffs.¹

¹ If the Court were to order that the Plaintiffs are to be provided the medical data for the purposes stated, to protect the public interest, Plaintiffs should be required to (1) notify their patients included in the medical data that they intend to make their patients’ information public; and (2) obtain the patients’ consent to do so.

Finally, “[t]he purpose of [Section 503] is to maintain the feasibility of the eventual destruction of items found at trial to violate the copyright laws by safeguarding them during the pendency of the action.” Societe Civile Succession Richard Guino v. International Foundation for Anticancer Drug Discovery, 460 F. Supp.2d 1105, 1109 (D. Ariz. 2006). Plaintiffs do not seek the impoundment of the medical data to maintain the feasibility of its eventual destruction. Further, the Plaintiffs do not request that the Court safeguard the data. Rather, Plaintiffs seek to have the Court simply take the medical data away from Podiatric and give it to the Plaintiffs. Plaintiffs have not alleged that Podiatric is copying their medical data, such that there is data in existence that could be remedied by the Court’s destruction upon a finding of copyright infringement.

Because Plaintiffs are not entitled to the requested relief, and have not even properly requested the relief sought, there is no reason that this Court should grant Plaintiffs’ request for a special case management order. Thus, their request for a special case management order should also be denied.

CONCLUSION

For the foregoing reasons, Defendant, The Podiatric Billing Specialists, LLC, respectfully requests that this Court deny Plaintiffs’ Motion for Impoundment of Subject-Matter and/or Special Case Management Order.

Respectfully submitted,

LEECH TISHMAN FUSCALDO & LAMPL, LLC

Date: June 3, 2014

/s/ Christopher S. Channel

Christopher S. Channel

PA ID No. 89218

cchannel@leechtishman.com

Jessica K. Ziemski

PA ID No. 309666

jziemski@leechtishman.com

525 William Penn Place, 28th Floor

Pittsburgh, PA 15219

(412) 261-1600

Counsel for Defendant

CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of June, 2014, I electronically filed the foregoing **Defendant's Response in Opposition to Plaintiffs' Motion for Impoundment of Subject-Matter and/or Special Case Management Order** with the Clerk of the Court using the CM/ECF system which sent electronic notification to the following:

Gregg R. Zegarelli, Esquire
mailroom.grz@zegarelli.com
Zegarelli Technology & Entrepreneurial
Ventures Law Group, Inc.
2585 Washington Road, Suite 134
Pittsburgh, PA 15241
Counsel for Plaintiffs

/s/ Christopher S. Channel _____

Christopher S. Channel

IN THE UNITED STATES DISTRICT COURT
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GREGORY S. MARKANTONE, DPM, PC.,
AND GREGORY S. MARKANTONE,

Plaintiffs,

v.

PODIATRIC BILLING SPECIALISTS,
LLC

Defendant.

CIVIL ACTION NUMBER:

2:14-cv-00215-LPL

PLAINTIFFS' REPLY TO DEFENANT'S RESPONSE IN OPPOSITION
TO PLAINTIFFS' MOTION FOR IMPOUNDMENT AND/OR SPECIAL CASE MANAGEMENT ORDER

1. Defendant unjustly concludes that, by Plaintiffs filing a Notice of Demand for Data Backup, it is such a dirty and nasty "pollution" in the record (which exists to document the dispute) because Defendant claims the filing to be impermissible, and yet Defendant cites no legal authority for that proposition (because none exists), nor did Defendant file a motion to strike. Defendant's tone itself demonstrates the hard and obdurate nature of Defendant.

2. To the contrary, Plaintiffs made the Notice of Demand for Data Backup [Doc. 4] of record in good faith (without errata by the Clerk's office) simply to make a record and to clarify the *true context* for review by this Court in resolving the dispute. And, while it is understandable that Defendant would not want more of a record of its repugnant refusal to provide Plaintiffs their patient medical data, the filing was made of record exactly for the reason it is relevant: to assist this Court with seeing the clear essence of this dispute, to wit: Defendant is holding Plaintiffs' patient medical data hostage. Respectfully, in order to meet the assertion as made, the pollution is Defendant's rhetoric.

3. As to the requirement for a brief, with some implied suggestion for a draconian ruling, Plaintiffs' request for a special scheduling order and/or status conference, oral argument or evidentiary hearing is something that can be managed with counsel, jurisdiction having been conceded by Defendants. As indicated in Footnote 1 of Plaintiffs' Brief in Opposition to the Motion to Dismiss, the purpose of filing the motion was simply to reduce the abstract nature of one element of the case posture: to wit, that, in the context of a motion to dismiss for failure to register a copyright, that a mechanical document was entered into the record requesting a procedure from this Court to obtain the subject-matter to do so.

4. Defendant side-steps by arguing a similar use of the term "impoundment" and the law of injunctions. The precise question belies injunctions. Indeed, Defendant has conceded all essential facts: Defendant is holding Plaintiffs' patient medical data and refuses to give it. At the same time, Defendant avers the legally frustrated argument that Plaintiffs must register the thing that Defendant withholds from Plaintiffs. The bad faith equity of the question is crystal clear. Defendant would have us lose our common sense.

5. Moreover and once again, with all the words, Defendant does not address the essence of Plaintiffs' request, but now obliquely argues around the question. That is, if we clearly ask, "Why and on what legal basis has Defendant continued to refuse to give Plaintiffs the patient medical data or a backup?" The answer, as made by Defendant expressly in the record as it now exists, is because Defendant claims a *federal* copyright in a certain part of the subject-matter. Accordingly, Defendant has argued its own demise.

6. If we should not be quagmired by rhetorical arguments, the facts of this case, reduced to their salient essence, and the relief sought, are quite clear: this venue is a proper forum to serve justice, whether: a) grounded by the concessions and admissions of Defendant's own stated defense, or b) grounded by Plaintiffs' claims, with a full and fair opportunity to support them by this Court's process of law, and in all fairness to Dr. Markantone to obtain his patient medical data to do exactly what Defendant itself clearly admits.

Dated: June 4, 2014

s/Gregg R. Zegarelli/
Gregg R. Zegarelli, Esq.
Pa. I.D. #52717

Z E G A R E L L I
Technology & Entrepreneurial
Ventures Law Group, P.C.

Administrative Office:
2585 Washington Road, Suite 134
Pittsburgh, PA 15241, USA
412.559.5262

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on the date below, the foregoing document was electronically filed with the Clerk of Court using the CM/ECF system, which will send notification of such filing to counsel of record.

June 4, 2014

Respectfully submitted,

/Gregg R. Zegarelli/

Gregg R. Zegarelli, Esq.
Pa. I.D. #52717

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