

**IN THE STATE COURT OF [REDACTED] COUNTY
STATE OF GEORGIA**

[REDACTED],

Plaintiff,

v.

[REDACTED]

Defendants.

Civil Action No.: [REDACTED]

**PLAINTIFFS' BRIEF REGARDING
PLAINTIFFS' SECOND MOTION TO COMPEL,
PLAINTIFFS' MOTION TO DETERMINE SUFFICIENCY OF RESPONSES,
AND DEFENDANTS' MOTION FOR A PROTECTIVE ORDER**

INTRODUCTION

This is Plaintiffs' *second* motion to compel. In the first, filed on May 16, 2016, Plaintiffs noted that discovery requests had been served in February and that "Defendants have refused to provide substantive responses to **any of it.**" Ps' 1st MTC at 1. Plaintiffs asked the Court to Order Defendants to "engage in normal discovery under the Civil Practice Act." *Id.* at 13. On August 19, 2016, the Court held that "[a]s to the wrongful death claims, Plaintiff's motion to compel discovery is GRANTED. The parties shall proceed with discovery on the wrongful death claims." 1st 08/19/16 Order at 2.¹

Despite the Court's Order, two and a half months later, **Defendants have still failed to produce substantive evidence.** The only document that Defendants have produced since the

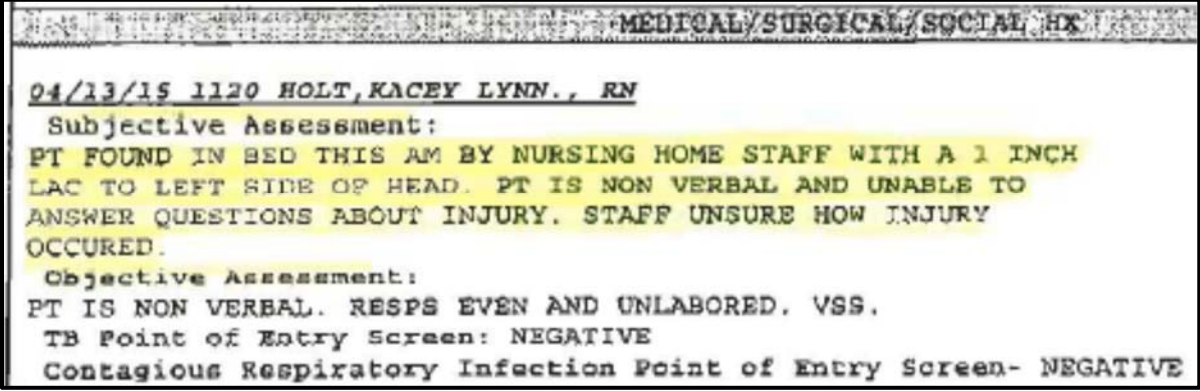
¹ The Court entered two Orders on this date, one at 9:16am and one at 1:28pm. Plaintiffs refers to them as the 1st and 2nd Orders of that day.

filing of the Complaint is a publicly available printout from the Secretary of State's webpage. The only substantive evidence Defendants *ever* produced were the medical records of [REDACTED], which Plaintiffs obtained before filing the case and to which Plaintiffs had an absolute legal right. Production of those medical records, as required by law, did not authorize Defendants to disregard their discovery obligations during the pendency of this case. Plaintiffs must again move to compel, and again ask the Court to direct Defendants to do what normal litigants do without prodding—engage in real discovery.

Discovery is going to be very important in this case. There is much to 'discover.' As Plaintiffs wrote in the undersigned's email to the Court of November 1, 2016,² the *first* set of facts to be discovered surround the neglect and death of [REDACTED]. [REDACTED] was in the care of [REDACTED] for several years, during which time she was unable to get out of her bed without assistance. While at [REDACTED], [REDACTED] developed multiple pressure sores, including a Stage III/IV sore; had ingrown toenails fester into bacterial infections; and sustained small lacerations that went days without having the bandage changed. (Much of this evidence comes from [REDACTED]'s own records, which Plaintiffs obtained before filing suit, and should be undisputed.) Plaintiffs view this as evidence of neglect caused by understaffing. Understaffing was a pattern at [REDACTED]—as noted in Plaintiffs' 11/01/16 email, Medicare gave [REDACTED] a “**much below average**” rating, and the lowest-possible one star out of five, on both its “**overall rating**” and its “**staffing**” rating. Understaffing must be a focus of discovery.

² Plaintiff's understanding from the Court's instructions is that this brief should serve as a *supplement* to that email, and for that reason Plaintiffs incorporate the email by reference. *See* Pls.' 11/01/16 Email to the Court (Ex. A).

Neglect is not the whole story, however. On the morning of April 13, 2015, [REDACTED] was found in her bed with a gash in her head and blood in her hair. Obviously [REDACTED], who could not get out of bed without assistance, could not have inflicted these injuries herself. Someone caused them. [REDACTED] has not been forthcoming about how [REDACTED] sustained this injury. *See* Defs.' Resp. to Interrogatory 22 (obfuscating).³ When, later that morning, [REDACTED] was removed to a hospital and diagnosed with a subdural hematoma, Defendants told the hospital that *they did not know* how the injury occurred. *See* Eastside Med. Ctr. Records (Ex. B) (excerpt below).



MEDICAL/SURGICAL/SOCIAL HX

04/13/15 1120 HOLT, KACEY LYNN., RN

Subjective Assessment:
PT FOUND IN BED THIS AM BY NURSING HOME STAFF WITH A 1 INCH LAC TO LEFT SIDE OF HEAD. PT IS NON VERBAL AND UNABLE TO ANSWER QUESTIONS ABOUT INJURY. STAFF UNSURE HOW INJURY OCCURED.

Objective Assessment:
PT IS NON VERBAL. RESPS EVEN AND UNLABORED. VSS.
TB Point of Entry Screen: NEGATIVE
Contagious Respiratory Infection Point of Entry Screen- NEGATIVE

The Department of Health and Human Services (“HHS”) investigated. When HHS interviewed witnesses, nobody confessed—but HHS dug up an important clue. When interviewed, the Director of Nursing admitted that earlier that day, one of [REDACTED]’s nurses had transferred [REDACTED] using a Hoyer lift (a mechanical lift that requires two staff people to operate safely) with only one person. That violates the standard of care. *See* 05/07/15 HHS Stmt. of Deficiencies (Ex. C) (excerpt below). Plaintiffs suspect that the nurse dropped [REDACTED], causing her subdural hematoma.

³ On 11/01/16, Plaintiffs filed Defendants’ discovery responses with the Clerk pursuant to a notice of filing.

During a 04/22/2015, 3:00 p.m. interview, the DON acknowledged that on 04/13/2015, CNA HH admitted to transferring Resident #8 using a mechanical lift without assistance, and that Resident #8 required two-persons for transfer.

The *second* focus of discovery must be on [REDACTED]’s corporate ownership scheme. (The undersigned wishes that this type of discovery was unnecessary, but this case presents no alternative.) As noted in Plaintiffs’ 11/01/16 email, Defendants’ principals—[REDACTED] and [REDACTED]—created a dizzying array of shell companies to run the ten or so nursing homes that they controlled. To give the Court a flavor for the complexity, [REDACTED] was an officer for *twenty-seven* entities registered with the Secretary of State, served as a registered agent for *one hundred and ten* such entities, and was involved with *fifteen* that had names beginning with “[REDACTED].” *See* Pls.’ 11/01/16 email.

The Court has authorized Plaintiffs to conduct discovery as to “whether Defendant [REDACTED] is the proper party and more specifically, whether Defendant [REDACTED], owned and operated [REDACTED].” 2nd 08/19/16 Order. Even without the benefit of meaningful discovery, the evidence shows that Defendant [REDACTED] “*owned*” [REDACTED]. Defendants themselves represented to Medicare that Defendant [REDACTED] was the “**100%**” owner of [REDACTED]. *See* Medicare Ownership Information (copied below) (Ex. D)⁴. It also appears that Defendant [REDACTED] “*operated*” [REDACTED] either directly or through its subsidiaries, including Defendant [REDACTED]. *See* [REDACTED] (Ex. E); 01/10/12 Lease Guaranty (Defendant [REDACTED] representing that it is Defendant [REDACTED]’s “sole limited partner and ultimate parent” and guaranteeing certain debts of Defendant [REDACTED]) (Ex. F); 03/31/2015 AdCare Form 10-K (stating that “affiliates of

⁴ Available at <https://www.medicare.gov/nursinghomecompare/ownership-info.html#ID=115771>.

[REDACTED] Health Services” will sublease Georgia nursing homes) (Ex. G);⁵ 08/02/2007 Press Release (“[REDACTED] is comprised of eleven Long Term Care and Senior Living centers based in the Southeast U.S. . . .) (Ex. H). In sum, even before Defendants produced meaningful discovery, there is already evidence that Defendant [REDACTED] both *owned* (directly) and *operated* (directly or indirectly, as an alter ego or joint venture) [REDACTED]. Defendants have tried to block discovery as to all of this.



[REMAINDER REDACTED]

Instead of providing straightforward responses to Plaintiffs’ discovery requests, Defendants asserted boilerplate objections to substantially everything. Of course parties have a right to assert *meritorious* objections. The problem here, however, is that Defendants have asserted *meritless* objections, then purported to respond “subject to” them. The assertion of meritless objections creates two problems. First, where Defendants object and produce no evidence or information, that is an obvious problem because it deprives Plaintiffs of evidence. Second, where Defendants purport to respond “subject to” a meritless objection but do not reveal what evidence or information Defendants are withholding pursuant to that objection, neither Plaintiffs nor the Court can tell what is being withheld. Because nobody can tell whether evidence or information has been withheld, such a response makes *finality* impossible. Because it is impossible to tell what is being withheld, neither Plaintiff nor the Court can assess whether

⁵ Because the filing is 349 pages long, Plaintiffs have attached only the first page and the two relevant pages, 241 and 242.

the evidence should be produced. Certainly Defendants are not entitled to make unilateral, unreviewable decisions about what is discoverable and what is not.

Where an objection appeared *meritorious*, Plaintiffs have worked with Defendants to modify the objected-to request. For instance, as to Requests for Production 27-30, Defendants objected to the timeframe of the requests—and because that objection seemed meritorious, Plaintiffs modified the timeframe to adopt Defendants’ proposal. But most of Defendants’ objections are, in Plaintiffs’ view, *meritless*. **Defendants have refused to withdraw a single one.** See Defs.’ 10/26/16 Letter (asserting that “each objection asserted in response to Plaintiffs’ discovery requests is valid and appropriate.”).⁶

That leaves one option: Plaintiffs must ask the Court to rule.

STRUCTURE OF THIS BRIEF

The remainder of this brief is structured as follows:

1. Discovery Requests to which Plaintiffs Seek Complete Responses
 - a. Requests for Production (“RPDs”) and Interrogatories (“ROGs”)
 - i. Corporate Structure
 - ii. Business Records
 - iii. Witnesses & Previous Incidents
 - iv. Staffing
 - v. Policies & Procedures
 - vi. Internal Documents

⁶ Plaintiffs filed this letter with the Clerk on 11/01/16 pursuant to a Notice of Filing.

- vii. Medical History
 - viii. Injuries
 - ix. Insurance
 - x. Miscellaneous
 - b. Requests for Admission (“RFAs”)
- 2. Other Issues with Defendants’ Responses
 - a. Bates Numbering
 - b. Privilege Log
 - c. “General Objections”
- 3. Response to Defendants’ Motion for a Protective Order
- 4. Conclusion

I. Discovery Requests as to which Plaintiffs Seek Complete Responses

Here, Plaintiffs have identified the most important discovery requests as to which Defendants have provided unsatisfactory answers. Plaintiffs ask that the Court direct Defendants to respond fully and completely to each of the below requests. Defendants may withhold evidence or information on the basis of a valid claim of privilege, but if they do, Defendants should list the withheld evidence or information on a privilege log.

Plaintiffs served a substantively identical set of discovery requests on each of the three defendants. The relevant formal pleadings (i.e., Defendants’ formal responses to Plaintiffs requests for production, interrogatories, and requests for admission) have been filed with the Clerk pursuant to a Notice of Filing on November 1, 2016.

A. Requests for Production (“RPDs”) and Interrogatories (“ROGs”)

1. Corporate Structure

As described above, Plaintiffs must conduct discovery on Defendant’s corporate structure to determine who did what and the extent to which one entity controlled another. The relevance of these requests is straightforward and Plaintiffs have tried to write the requests in a straightforward way. Defendants’ responses have been, in Plaintiffs’ view, insufficient. One example is RPD 9:

9.

Please provide all documents that set forth, describe, or establish what people or entities are entitled to receive profits from the operation of [REDACTED] from February 1, 2011 until the present.

RESPONSE: Please refer to Objection Nos. 1, 2, 4, 5, 7 and 10 above.

This instruction is clearly relevant. Plaintiffs would like to obtain the evidence *before* conducting depositions of corporate personnel.

In this category, Plaintiffs ask the Court to compel full and complete responses to:

- RPDs: 6, 7, 9, 10
- ROGs: 1, 2, 3, 6

As noted above, the Court authorized Plaintiffs to conduct discovery as to “whether Defendant [REDACTED] is the proper party and more specifically, whether Defendant [REDACTED], owned and operated [REDACTED].” 2nd 08/19/16 Order. Because discovery

into Defendant [REDACTED] is limited in this way, this category—Corporate Structure—is the *only* category of RPDs and ROGs as to which Plaintiffs ask the Court to direct Defendant [REDACTED] to respond.

2. Business Records & Government Investigations

Entities involved with nursing homes are required to maintain certain documents, some of which are relevant to this case. For instance, Defendants had to submit “cost reports” that showed what care residents like [REDACTED] needed, and what care Defendants were supposed to provide.

Further, when a nursing home gets investigated—as was [REDACTED]—other records are generated. For instance, when the Department of Health and Human Services investigates, the Department often creates a “Statement of Deficiencies” and requires the nursing home to create a “Plan of Correction.” Obviously, documents like those are relevant here.

In this category, Plaintiffs ask the Court to compel full and complete responses to:

- RPDs: 12, 13, 14, 15, 26, 33
- ROGs: 28, 29

3. Witnesses and Previous Incidents

Asking after witnesses is a standard practice in every case, and Plaintiffs have followed that practice here. It is especially important in this case—where Defendants, who were supposed to serve as [REDACTED]’s caretakers, know the names of the individual caretakers and witnesses much better than Plaintiffs do.

Plaintiffs also seek witnesses to other instances of neglect and understaffing at [REDACTED]. Plaintiffs know that there were systemic problems—in part because of Medicare’s low, one-star-out-of-five ratings of [REDACTED], and in part because of news reports describing other times when [REDACTED] mistreated its residents. Plaintiffs are entitled to learn what happened and who the witnesses are.

In this category, Plaintiffs ask the Court to compel full and complete responses to:

- RPDs: 16, 22, 23, 24, 25
- ROGs: 6, 8, 9, 12, 32, 33

4. Staffing

Staffing was a problem at [REDACTED]. Even without meaningful discovery responses, the known facts about (1) the apparent neglect of [REDACTED]; (2) the apparent unavailability of another person to operate the Hoyer lift on the morning of April 13, 2015; (3) the complaints of other residents that have surfaced in the press; and (4) Medicare’s low “staffing” rating suggest a staffing problem. Staffing must be a focus of discovery.

In this category, Plaintiffs ask the Court to compel full and complete responses to:

- RPDs: 27, 28, 29, 30,⁷ 34
- ROGs: none

5. Policies & Procedures

Policies and procedures are regularly sought in cases with corporate defendants. They

⁷ As to RPDs 27-30, Defendants objected and requested a modified timeline of “January 2014 through the decedent’s discharge from [REDACTED].” Plaintiffs agreed. Defendants still have not produced the evidence.

are relevant here—for instance, Plaintiffs need to know what Defendants’ policies were as to staffing, wound care, health assessments, and Hoyer lift transfers. Defendants possess responsive documents—for instance, Defendants have admitted to having a “Policies and Procedure Manual” for [REDACTED]. Defendants should produce them.

In this category, Plaintiffs ask the Court to compel full and complete responses to:

- RPDs: 31, 32
- ROGs: none

6. *Internal Evidence*

If Defendants possess internal documents—such as meeting minutes, memoranda, emails, records of complaints, or something else—related to [REDACTED], then those documents are discoverable. Plaintiffs have requested them, but Defendants have not produced them.

In this category, Plaintiffs ask the Court to compel full and complete responses to:

- RPDs: 35, 42, 43, 45
- ROGs: 18, 27

7. *Medical History*

Plaintiffs are entitled to discover the evidence surrounding [REDACTED]’s care and treatment. One important piece of evidence will be *color copies* of [REDACTED]’s medical records (*see* RPD 36). Color copies are important because nurses often use different colors to denote the work of different shifts or to signify other details about the care provided. It is also an unfortunate fact that sometimes, nursing home staffs go back and “retroactively” insert records

of care that did not actually occur. *If* that occurred here, color copies of the records will help to reveal it.

Plaintiffs also seek other records, such as nursing assessments and physician orders. These are not burdensome requests. If the color copies that Defendants produce in response to RPD 36 contain the information requested elsewhere—for instance, if the records requested by RPD 36 contain the “nursing assessments” requested in RPD 38—then Defendants can respond by simply noting the Bates range where the responsive documents have already been produced.

In this category, Plaintiffs ask the Court to compel full and complete responses to:

- RPDs: 36, 38, 39, 40, 41, 44
- ROGs: 19, 25

8. *Injuries*

It is beyond dispute that [REDACTED] sustained several injuries while in [REDACTED]’s care—pressure sores, an infected toenail, a cut hand, a subdural hematoma, and facial bruising. Defendants have denied responsibility for any of it, which of course they have the right to do. But Defendants should explain how the injuries occurred. This they have refused to do.

In this category, Plaintiffs ask the Court to compel full and complete responses to:

- RPDs: none
- ROGs: 15, 16, 21, 22, 24, 26

9. *Insurance*

Defendants should provide insurance information so that the jury can be qualified.

In this category, Plaintiffs ask the Court to compel full and complete responses to:

- RPDs: 52
- ROGs: 31

10. Miscellaneous

Plaintiffs ask the Court to compel full and complete responses to the following.

- RPD 47: This request seeks “photographs, drawings, video recordings, or other graphic depictions of [REDACTED].”
- RPD 53: This request seeks Defendants’ advertising and marketing materials. If [REDACTED] promised a level of service that it did not deliver, that is relevant.
- RPD 56: This request seeks a privilege log, which is addressed in greater detail below.

B. Requests for Admission (“RFAs”)

RFAs can simplify a case—to the benefit of both the parties and the Court. If a request is admitted, then the parties usually need not argue or conduct discovery about that subject anymore. If a request is denied, then at least an area of disagreement has been identified. As the Court of Appeals has written, RFAs “are designed with a view toward establishing uncontested facts that go to the merits of the case.” *Moses v. Jordan*, 310 Ga. App. 637, 647 (2011), *rev’d on other grounds by* 291 Ga. 39. For that reason, RFAs are permissible **even if they call for a legal conclusion**, as long as that legal conclusion is relevant to the case. As the Supreme Court held, “requests for admission under OCGA § 9–11–36(a) are not objectionable

even if they require opinions or conclusions of law, as long as the legal conclusions relate to the facts of the case.” *G.H. Bass & Co. v. Fulton Cty. Bd. of Tax Assessors*, 268 Ga. 327, 329 (1997) (emphasis added). For that reason, RFAs may validly ask for the application of law to fact—e.g., whether a given legal requirement applied to [REDACTED] or whether Defendants complied with the law as it applied to [REDACTED].

Here, Plaintiff served 127 RFAs in hopes of simplifying this complex case. Had Defendants provided direct, proper answers (i.e., “admitted” or “denied”) then this case might be simpler already. 127 RFAs is not too many—in *Moses v. Jordan*, the Court of Appeals held that **398** RFAs⁸ were not too many. 310 Ga. App. at 647-48. Here, the RFAs that Plaintiffs served were reasonably calculated to identify disputed issues and, hopefully, limit the issues as to which Plaintiffs must introduce evidence at trial.

Defendants have objected to substantially every RFA, then purported to respond “subject to” that objection. As noted above, responding “subject to” an objection would be fine if the objection was *meritorious*, but it is not permissible where the objection is *meritless*. Responses made “subject to” a meritless objection create two problems. First, it is unclear what the response actually means (is the RFA really denied, or only partially?). Second, the RFA would be confusing to the jury if introduced at trial. Despite Plaintiffs’ request for simple, direct responses, Defendants have refused to withdraw any of their objections. Therefore, Plaintiffs must ask the Court to rule on those objections.

Defendants’ obfuscation is sometimes strange. For instance, in response to RFA 15, Defendant [REDACTED] claimed not to know whether it was under investigation for Medicare

⁸ Plaintiffs arrive at this number by adding the figures provided in *Moses* in the paragraph on page 644 beginning with “[t]he record shows.”

fraud (Plaintiffs believe that it is):

15.

You are currently under investigation for Medicare fraud.

RESPONSE: Please refer to Objection Nos. 1, 2, 5, 6, 7, 10 and 11 above. Subject to these objections, and without waiving the same, this Defendant is without sufficient knowledge or information to either admit or deny this Request at this time. This Defendant has made a reasonable inquiry and the information known or readily obtainable is insufficient to enable this Defendant to either admit or deny the truthfulness of this Request.

As to the RFAs, Plaintiffs ask the Court to “determine the sufficiency of the answers or objections,” as O.C.G.A. § 9-111-36(a)(3) authorizes. Specifically, Plaintiffs respectfully ask that the Court direct Defendants [REDACTED] and [REDACTED]⁹ to either “admit” or “deny” the below-specified RFAs.

RFAs: 1-3, 13-16, 20, 22, 25-33, 35-38, 42-44, 49, 50, 52, 53, 65, 68, 70-72, 74, 75, 77, 78, 81, 82, 84-107, 110-127

II. Other Issues with Defendants’ Responses

A. Bates Numbering

Plaintiffs have repeatedly asked Defendants to Bates-number the documents that Defendants eventually produced. Defendants have refused both verbally and in writing.

Bates numbering is inexpensive. It is easy. It is also important because it allows the

⁹ Following the Court’s Orders of August 19, 2016, Plaintiffs do not ask the Court to compel Defendant [REDACTED] to answer these RFAs.

parties and Court to keep track of what was produced and when. Otherwise, if a dispute arises as to whether a document is produced, it is very difficult for the Court or parties to know whether the document has in fact been produced, and when, and in response to what. **Bates numbering is a great way to prevent disputes** about what has been produced, and what has not. Plaintiffs struggle to think of a good reason for Defendants to refuse to Bates number documents.

Plaintiffs respectfully request that the Court to order both parties to Bates-number the documents. Alternatively, Plaintiffs can take the documents that Defendants produced, Bates-number them *for* Defendants then produce them back to Defendants along with an RFA asking Defendants to acknowledge that the documents have been properly Bates-numbered. But it would be much simpler if Defendants would simply Bates-number them from the start.

B. Privilege Log

Parties may withhold documents on claims of privilege, and Plaintiffs anticipate that Defendants will do so. However, if they do, then Defendants bear the burden of showing that the privilege applies. Importantly, those claims of privilege must be *supported* because “an unsupported claim of privilege does not meet the proponent's burden of showing the privilege applies.” *General Motors v. Conkle*, 226 Ga. App. 34, 47 (1997). Defendants should provide such support by describing, on a privilege log, “the nature of the documents, communications, or tangible things not produced or disclosed and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess such claim.” USCR 5.5(1)(b).

Plaintiffs recognize that there are some documents that are so obviously privileged that it does not make sense to ask Defendants to put them on a privilege log. For instance, an email between the CEO of Defendant [REDACTED] to [REDACTED], Esq. would be obviously privileged, and need not be logged. For that reason, as Plaintiffs wrote to Defendants on October 12, 2016, “Plaintiffs agree that in response to any discovery request, Defendants may withhold, without listing on a privilege log, (1) documents created by Defendant’s *outside* counsel (i.e., your law firm), and (2) communications between Defendants and Defendant’s *outside* counsel (i.e., your law firm) that postdate the filing of this lawsuit.” Pls.’ 10/12/16 Email.¹⁰

Further, Plaintiffs have not requested witness statements created by Defendants’ outside legal counsel because those are privileged. *See* RPD 16 (requesting witness statements but expressly *excluding* “statements, descriptions, or accounts taken by outside counsel”). Obviously, since Plaintiffs have not requested such statements, they need not appear on any privilege log.

As to other withheld documents, however, Defendants must support claims of privilege with a privilege log as USCR 5.5(1)(b) and *Conkle* require. Defendants have recognized as much—they produced a document entitled “privilege log.” (Ex. I). But that document fails utterly to meet USCR 5.5(1)(b)’s requirement to set forth enough information to “enable other parties to assess such claim.” The substantive **entirety** of Defendants’ “privilege log” is copied below:

¹⁰ This email was filed with the Clerk pursuant to a Notice of Filing on November 1, 2016.

NO.	DOCUMENT DESCRIPTION	DISCOVERY REQUEST	REASONS WHY DOCUMENTS ARE NOT DISCOVERABLE
1.	Witness Statements Obtained by ██████ in ██████ in Anticipation of Litigation	Nos. 16, 26, 54, 55 and 56 of Plaintiffs' First Request for Production of Documents to Defendant ██████, L.P. and No. 16 of Plaintiffs' First Interrogatories to Defendant ██████, L.P.	Attorney Work Product and Prepared in Anticipation of Litigation

That is insufficient. It does not even identify what individual pieces of evidence are being withheld. Plaintiffs respectfully request that the Court direct Defendants to provide a privilege log that, with regard to each allegedly privileged document or communication, lists (1) the date, (2) the author, (3) all recipients (including cc's, and identifying which persons are lawyers by placing "Esq." next to the person's name), (4) the subject matter, and (5) a burden-carrying explanation of why the communication is privileged.

C. "General Objections"

Defendants have made so-called "general objections" that purport to apply to each and every response to a discovery request. That is improper. Such objections make it impossible to know whether *any* discovery response is complete, or whether Defendants are withholding documents or evidence pursuant to a "general objection." In other words, "general objections" make *finality* impossible. "The questions must at the very least be considered on an individual basis and answered accordingly." *Tennesco, Inc. v. Berger*, 144 Ga. App. 45, 48 (1977). "[A] general objection such as a mere statement that interrogatories are irrelevant and immaterial is

not sufficient.” *Bullard v. Ewing*, 158 Ga. App. 287, 290 (1981). Despite the parties’ meeting-and-conferring, Defendants have refused to withdraw their “general objections.”

Plaintiffs ask that the Court overrule Defendants’ general objections.

III. Response to Defendants’ Motion for a Protective Order

A. Legal Standard

[P]rotective orders should not be entered when the effect is to frustrate and prevent legitimate discovery. *Such are intended to be protective—not prohibitive*—and, until such time as the court is satisfied by *substantial evidence that bad faith or harassment motivates the discoverer’s action*, the court should not intervene to limit or prohibit the scope of pre-trial discovery.

Moses, 310 Ga. App. at 647, *rev’d on other grounds by* 291 Ga. 39 (emphasis in original). The party seeking a protective order bears the burden of showing “good cause” why a protective order should be entered. O.C.G.A. § 9-11-26(c); *Fulton County Bd. of Assessors v. Saks Fifth Ave., Inc.*, 248 Ga. App. 836, 842 (2001). “Good cause for the issuance of a protective order . . . must be clearly demonstrated. [cit.] Such cause necessarily is not established by stereotyped or conclusional statements, bereft of facts.” *Young v. Jones*, 149 Ga. App. 819, 824 (1979).

B. Timeliness

If a litigant really needs a protective order, the litigant must seek it on a timely basis—not use the alleged need for a protective order as an excuse to delay the production of evidence. Here, Defendants withheld substantially all evidence and information in discovery, and then announced for the first time *on the day that discovery responses were due* that one reason

Defendants would not produce anything was that they wanted a protective order. It is obviously improper for Defendants to wait until discovery is due to announce that they desire a protective order. As Judge Wayne Purdom has written in his treatise, “the timing of the motion for a protective order is important. *The motion must be filed before the due date for the discovery or the date that the deposition is to be taken, and not afterwards.*” Judge Wayne M. Purdom, Ga. Civil Discovery § 4:8 (emphasis added). Here, Defendants did not *mention* a protective order until the day responses were due, and did not *move* for one until Plaintiffs had completed the meet-and-confer process required by Rule 6.4. That is untimely. Defendant’s motion should be denied on that basis—it was, and is, a dilatory tactic.

C. Lack of Merit

Defendants cannot show that “bad faith or harassment motivates the discoverer’s action” or that “good cause” exists for a protective order. *See Moses*, 310 Ga. App. at 647; § 9-11-26(c). The records contain **no evidence** that Plaintiffs acted to “harass” Defendants, that anything Plaintiffs seek constitutes a “trade secret,” or that producing the requested materials will put Defendants at a competitive disadvantage. A “trade secret” is information that “is not commonly known,” that “[d]erives economic value, actual or potential, from not being generally known,” and that “[i]s the subject of efforts that are reasonable under the circumstances to maintain its secrecy.” O.C.G.A. § 10-1-761(4); *see Purdom*, Ga. Civil Discovery § 5:4 (applying Trade Secrets Act to scope of civil discovery). Defendants have produced no evidence to meet that burden.

Moreover, many of the documents that Defendants say are “confidential business / proprietary information” clearly are not. For example, Defendants assert that [REDACTED]’s “marketing brochures” are confidential. Defs.’ Br. at 3. That is false—*by their very nature, marketing materials are designed for public distribution*. They are not “trade secrets.” Instead of being “the subject of efforts . . . to maintain [their] secrecy,” marketing brochures are distributed to others in hopes of earning business. *See* § 10-1-761(4) (quoted language). Defendants are invited to tell the Court whether recipients of the marketing brochures were required to sign the “Exhibit A—Agreement Concerning Information Covered by Confidentiality Stipulation” that appears on page 12 of Defendant’s proposed protective order. Nor may Defendants assert a “trade secret” right to withhold [REDACTED]’s own “*wound log for the decedent*” or “*incident reports for the decedent*.” *See* Defs.’ Br. at 3 (emphasis added). If anyone has a privacy right in that evidence, it is [REDACTED]’s family. That Defendants have attempted to appropriate [REDACTED]’s privacy rights, and to use them against her, is ironic. It is also troubling. There is no evidence that those items—or any other item listed in Defendants’ brief—constitutes a trade secret.

Plaintiffs respectfully request that the Court deny Defendants’ motion for a protective order.

D. Defendants’ Proposed Protective Order

Plaintiffs do not believe that a protective order should be entered. But if the Court is inclined to enter one, Plaintiffs ask that it *not* be the one that Defendant’s proposed. That

proposal is unreasonable for the three main reasons explained below, in addition to some minor issues not raised here.

The undersigned has, in the past, agreed to reasonable protective orders that were requested on a timely basis. If the Court decides to enter a protective order here, Plaintiffs ask that the Court first allow Plaintiffs to draft a counter-proposal.

1. Anti-Sharing Provision

Defendants' proposed protective order is unduly restrictive because it would prohibit sharing with other lawyers and similarly-situated plaintiffs. *See* ¶ 14. Plaintiffs discussed this issue with Defendants in the parties' telephone conference, but Defendants declined to compromise. The point of a protective order based on trade secrets—where one is appropriate—is to keep true trade secrets out of the hands of a defendants' competitors, who could conceivably use the information to their own commercial advantage. It is doubtful that any other nursing home would want to copy [REDACTED]'s business practices. It is certain, that neither Plaintiffs nor their counsel have any interest in sharing [REDACTED]'s business practices with [REDACTED]'s competitors.

Plaintiffs would like the ability, however, to share the evidence produced in the case with other lawyers and with similarly-situated plaintiffs (i.e., others who have personal injury or wrongful death cases against the nursing homes controlled by [REDACTED] and [REDACTED]). That is for two reasons. First, sharing allows Plaintiffs' counsel to compare notes and collaborate with other lawyers in order to do the best job possible in handling this case. Second, it will allow other similarly-situated plaintiffs to know what documents may be obtained

in discovery. *See Grange Mut. Ins. Co. v. Trude*, 151 S.W.3d 803, 814 (Ky. 2004) (“That discovery might be useful in other litigation or other proceedings is actually a good thing because it furthers one of the driving forces behind the Civil Rules by allowing the cost of repeating the discovery process to be avoided and thereby encouraging the efficient administration of justice.”).

It is this second point—colabortaion with similarly-situated plaintiffs—that really motivates Defendants’ attempt to prevent sharing. If sharing is allowed, then Defendants cannot ‘stonewall’ in discovery. For instance, if Plaintiff A has obtained documents from Defendants in discovery, and then similarly-situated Plaintiff B files suit the next year, *and* if Plaintiff A can talk openly with Plaintiff B, then Defendants cannot effectively withhold relevant evidence from Plaintiff B. If Defendants *do* withhold evidence from Plaintiff B, Defendants can get caught—because Plaintiff A can tell Plaintiff B what has been withheld. *See Miller v. Gen. Motors Corp.*, 192 F.R.D. 230, 231 (E.D. Tenn. 2000) (“since General Motors will not know during the pendency of this litigation the attorneys who might be recipients of shared information, this will encourage General Motors to be careful with regard to completeness and uniformity of its production of discovery in all similar cases.”). That is why corporate defendants seek protective orders—they do not want Plaintiff A and Plaintiff B talking.

Sharing has many benefits. As the Seventh Circuit wrote:

“(a)s a general proposition, pre-trial discovery must take place in the (sic) public unless compelling reasons exist for denying the public access to the proceedings.” . . . This presumption should operate with all the more force when litigants seek to use discovery in aid of collateral litigation on similar issues, for in addition to the abstract virtues of sunlight as a disinfectant, access in such cases materially eases the tasks of courts and litigants and speeds up what may otherwise be a lengthy process.

Wilk v. American Medical Association, 635 F.2d 1295, 1299 (7th Cir. 1981). *See also Baker v. Liggett Group, Inc.*, 132 F.R.D. 123, 125-26 (D. Mass. 1990) (“[T]o routinely require every plaintiff . . . to go through a comparable, prolonged and expensive discovery process would be inappropriate. . . . the sharing of information obtained in discovery with litigants in comparable cases is consistent with Fed. R. Civ. P. 1 which provides that the Rules are to ‘be construed to secure the just, speedy, and inexpensive determination of every action.’”); *Ward v. Ford Motor Co.*, 93 F.R.D. 579, 580 (D. Colo. 1982) (allowing sharing of documents to reduce “effort and expense inflicted on all parties...by repetitive and unnecessary discovery. In this era of ever expanding litigation expense, any means of minimizing discovery costs improves the accessibility and economy of justice...Each plaintiff should not have to undertake to discovery anew the basic evidence that other plaintiffs have uncovered. To so require would be tantamount to holding that each litigant who wishes to ride a taxi to court must undertake the expense of inventing the wheel. **Efficient administration of justice requires that courts encourage, not hamstring, information exchanges**”) (emphasis added); *Garcia v. Peeples*, 734 S.W.2d 343, 347-48 (Tex. 1987) (“In addition to making discovery more truthful, shared discovery makes the system itself more efficient.”).

2. *Clawback Provision*

Defendants’ proposal is also unduly restrictive because it contains a “clawback” provision—that is, it purports to require Plaintiffs to return all documents at the end of the litigation and destroy all copies. *See* ¶ 26. The problem with a such a provision is that it makes a sharing provision useless. If a Court enters a protective order with a clawback provision, then

as soon as the litigation is over, Plaintiffs must return or destroy all evidence. *After that, Plaintiff have nothing left to share.* Upon receipt of the evidence after the case, Defendants can destroy the documents. Then the evidence is not available for the next similarly-situated Plaintiff. Perhaps that is why the Civil Practice Act makes no mention of evidentiary “clawback.” Plaintiffs discussed this issue with Defendants in the parties’ telephone conference, but Defendants declined to compromise.

Defendants sometimes defend their practice of destroying documents based on a “document retention” policy. If a party wishes to destroy its own documents, that may be its right. But the undersigned does not mind storing them. That way, the documents will continue to exist and may be used by similarly-situated plaintiffs.

Plaintiffs therefore oppose any clawback provision.

3. Burden on Court Process

Defendants’ proposed protective order would impose an undue burden on the Court’s processes. First, it would impose restrictions on the flow of trial or hearings by requiring the parties to give “advance notice” of the use of any document that the opposing party had designated as “confidential.” *See* ¶ 21. Because it is often impossible to predict what issues will arise when—particularly in the context of cross-examination—that restriction simply is not workable. It imposes an undue burden on the parties and the Court.

Second, as currently written, Defendants’ proposal would prevent the parties from using the Court’s e-file system because every brief that quoted or attached (or to use the word of Defendants’ proposal, “contained”) allegedly confidential information would have to be “filed in

a sealed envelope or other appropriate sealed container . . .” See ¶ 22. That language, as written, would require the filing of paper copies.

E. Courts Regularly Permit Sharing

Leading commentators, after collecting and analyzing the case law, have favored sharing provisions. As Professor Dustin Benham has written, “sharing makes courts more efficient, more transparent, and more effective at finding the truth.” Dustin Benham, “Proportionality, Pretrial Confidentiality, and Discovery Sharing,” 71 Wash. & Lee L. Rev. 2181, 2251 (2014).¹¹

Georgia courts regularly permit sharing. See *Walden v. Chrysler*, Civil Action No. 12CV472, Superior Court of Decatur County, Georgia (2013); *Hatfield v. Ford*, Civil Action No. 77639, State Court of Bibb County, Georgia (2011); *Williams v. Honda Motor Co.*, Civil Action No.2010CV04232B, State Court of Clayton County, Georgia (2011); *Milton v. Honda Motor Co.*, Civil Action No. 4:03-CV-140-2 (2004), Middle District Court of Georgia, Columbus Division (2004); *Gibson v. Ford Motor Co.*, Civil Action No. ST-00-CV-0111(2000), State Court of Clarke County, Georgia (2000) (collectively, Ex. J).¹²

Trial courts on a national basis regularly permit sharing. For federal decisions, see *Idar v. Cooper Tire & Rubber Co.*, No. C-10-217, 2011 WL 688871 (S.D. Tex. Feb. 17, 2011); *Pia v. Supernova Media, Inc.*, 275 F.R.D. 559, 561-62 (D. Utah 2011); *JAB Distributors, LLC v. London Luxury, LLC*, No. 09-CV-5831, 2010 WL 4008193 (N.D. Ill. Oct. 13, 2010); *Brownlow v. Gen. Motors Corp.*, No. 3:05CV-414-R, 2007 WL 2712925 (W.D. Ky. Sept. 13, 2007). For state courts, see *Hampton v. DaimlerChrysler Corp.*, Case No. 05-CVS-1127, Superior Court of

¹¹ Plaintiffs will happily provide a copy of the article at the Court’s request.

¹² Many of these Orders were entered by consent.

Iredell County, North Carolina (2005); *Cooper v. General Motors Corp.*, Civil Action No.: 251-96-1253CIV, Circuit Court of Hinds County, Mississippi (1998); *Neal v. DaimlerChrysler Corp.*, Case No.: 03-CA-8085, Circuit Court of the Ninth Judicial Circuit in and for Orange County, Florida; *Stansell v. Ford Motor Co.*, C/A No.: 01-CP-25-122, Court of Common Pleas of Hampton County, South Carolina (2001); and *Flax v. DaimlerChrysler Corp.*, Civil Action No. 02C-1288, Circuit Court for Davidson County, Tennessee (2002) (collectively, Ex. K).¹³

IV. Conclusion

Plaintiff respectfully requests that the Court enter an Order that:

1. directs Defendants to respond fully and completely to the specific discovery requests identified herein;
2. directs both parties to Bates-number all documents produced;
3. insofar as Defendants withhold evidence or information on the basis of privilege, directs Defendants to produce a privilege log as described herein;
4. overrules Defendants' "general objections;" and
5. denies Defendants' motion for a protective order.

This 8th day of November, 2016.

Respectfully submitted,

¹³ Many of these Orders were entered by consent.

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