SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN FRANCISCO

KRISTEN NICODEMUS, Plaintiff, vs. SAINT FRANCIS MEMORIAL HOSPITAL, ET AL. Defendants.	Case No. CGC – 13-531076 ORDER ON (1) DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, SUMMARY ADJUDICATION; (2) PLAINTIFF'S MOTION FOR SUMMARY ADJUDICATION

In this certified class action, Plaintiff Kristen Nicodemus alleges that Defendants (St. Francis Memorial Hospital and CiOX Health, LLC.) overcharged her for copies of her medical records in violation of Evidence Code § 1158. Plaintiff alleged two causes of action, one under § 1158; and the other under B&P § 17200 *et seq.* (UCL) predicated on the § 1158 violation.[1] Five of defendants' affirmative defenses are at issue now: (1) "Not the Real Party in Interest[;]" (2) "Voluntary Payment Doctrine[;]" (3) Waiver; (4) Agency; and (5) Estoppel.

Three motions were argued August 23, 2018. Defendants seek summary judgment and in the alternative, summary adjudication of plaintiff's claims. Plaintiff seeks summary adjudication of the five listed affirmative defenses.

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[1] Plaintiff argues that her complaint fairly includes theories under the "unfair" and "fraudulent" prongs of the UCL. It does not. Complaint ¶¶ 49-51.

Requests for Judicial Notice and Evidentiary Objections

Defendants have an unopposed request for judicial notice of two other complaints filed by plaintiff's attorneys. The request is granted. RJN, Exs. 14, 18; E.C. § 452(d).

Defendants object to the reply declaration of Leland Belew. This evidence and thus the objection are immaterial to the motion. In any event, the objection is sustained. It is improper reply evidence. *San Diego Watercrafts, Inc. v. Wells Fargo Bank, N.A.*, 102 Cal.App.4th 308, 316 (2002).

Exhibit R: Plaintiff's state that this document clarifies the dates on which defendants transferred documents among themselves. Plaintiff's Response to Objections, 2. If the precise dates were material, the evidence should have been included in the moving papers. But the evidence is not material and the request is denied. *Duran v. Obesity Research Inst., LLC*, 1 Cal. App. 5th 635, 653 (2016) (deny notice when evidence is immaterial).

Exhibits S-T: Defendants contend they were unaware plaintiff believed the costs were in dispute as a basis for their affirmative defense. Plaintiff's Response to Objections, 2. This was not a new opposition argument. In any event, the new evidence is immaterial to defendants' knowledge of plaintiff's dispute – it relates to other individuals. The request is denied.

Exhibit U: Defendants' operative pleadings should be considered regardless of whether they are attached as an exhibit to a declaration. The request is granted.

Exhibits V-X: Plaintiff offers evidence of the scope of a deponent's authority to testify on CiOX's behalf in response to Defendants' argument that the deponent lacked authority to testify. Plaintiff's Response to Objections, 2-3. This evidence should have been included with the moving papers. In any event the evidence is immaterial and so the request is denied.

Defendants' Motions

1. Whether Plaintiff's Request is Subject to Evidence Code § 1158

a. The Statute

Evidence Code § 1158 limits the amount health care providers may charge for copying patient records and providing them to attorneys retained by patients. *Thornburg v. Superior Court*, 138 Cal.App.4th 43, 46 (2006) (*Thornburg I*). The agents or contractors of entities expressly covered by the first paragraph of § 1158 may be held liable, but only if "(1) they have assumed the duty of responding to section 1158 requests *and* (2) they are acting for their own advantage and benefit as well as the interests of entities expressly covered by the statute." *Id.* at 53. Section 1158 is enforceable through a private right of action. *Thornburg v. El Centro Regional Medical Center*, 143 Cal.App.4th 198, 206 (2006) (*Thornburg II*).

b. Factual Background

On August 1, 2012, plaintiff's attorneys sent a records request in which they requested that St. Francis send "all records" to her attorneys' address and provided an authorization form. *See* Belew Decl., Ex. F; *see also* Emery Decl., Ex. 2.[2] Plaintiff has admitted in her discovery responses in this litigation that she requested "copies" of her patient records on or about July 31, 2012. Emery Decl., Ex. 4 at 2, Ex. 6 at 2. There was no reference to § 1158.

By letter dated August 8, 2012, St. Francis informed plaintiff's attorneys of formal defects with the form. Belew Decl., Ex. G. The letter attached a copy of St. Francis' authorization form for use by Plaintiff's attorneys. *Id.*

[2] Defendants submitted some documents with redacted material whited out whereas Plaintiff has submitted documents with redacted material blacked out. As plaintiff notes, white-out redactions makes it impossible to ascertain where redacted material appeared because the pages are white. Accordingly, the citations here are to plaintiff's versions of the documents, where the sides have submitted competing versions. There do not appear to be substantive differences in the documents.

On August 16, 2012, plaintiff's attorneys sent a second records request in which they requested St. Francis send "all records" to her attorneys' address and provided a completed copy of St. Francis' authorization form. *Id.* at Ex. H. Plaintiff admitted she requested "copies" of her patient records on August 16, 2012. Emery Decl., Ex. 4 at 2, Ex. 6 at 2. There was no reference to § 1158.

On August 29, 2012, Plaintiff's attorneys sent a follow up letter to St. Francis, Belew Decl., Ex. J, stating the attorneys had not received response to the August 16, 2012 request, which was enclosed. The letter asked St. Francis to "advise at your earliest convenience when the records will be made available. Also, please advise whether we may send our own copy service to copy the records." *Id.*

On or about August 30, 2012, HealthPort,[3] sent an invoice dated August 28, 2012, and a document entitled "California Agent Fee Information" to Plaintiff's attorneys. Belew Decl., Ex. I. The invoice stated, among other things, that payment "implies that you agreed to employ HealthPort as your professional photocopy representative for the purposes of this request" and referred the reader to the Agent Fee Information for details. The Agent Fee Information sheet quoted an excerpt from § 1158 and stated that the section was inapplicable. The sheet implied that this was because HealthPort was being hired as the patient's representative/agent for the purposes of making copies. The sheet also explained how the patient could obtain records from HealthPort, but did not provide alternative means of obtaining the records without relying on HealthPort's services and paying HealthPort's full fee. *Id.*

Plaintiff's attorneys sent HealthPort a check dated September 5, 2012, in the full amount of the invoiced costs with an entry in the "MEMO" section that read: "under protest in violation of CA EVID CODE 1158[.]" Emery Decl., Ex. 12. Within a week, HealthPort mailed

[3] During the relevant time period, CiOX was known as HealthPort Technologies, LLC.

plaintiff's medical records with an invoice reflecting that the requested costs had been paid in full. *Id.*, Ex. 14; Belew Decl., Ex. R.

On September 19, 2012, St. Francis personnel contacted plaintiff's attorneys by telephone to advise them that plaintiff's records were ready for copying. Plaintiff's Separate Statement, UMF 27. On September 24, 2012, plaintiff's attorneys called Saint Francis to explain that plaintiff's records had already been received. *Id.*, UMF 27.

c. The Meaning of the Statute

Defendants assume § 1158 does not give attorneys the right to demand that medical providers copy and send patient records to them. Plaintiff does not contest this. Opposition, 4:6-8. Next, defendants assert that plaintiff's attorneys made a request for St. Francis to copy and send patient records to them. Motion, 16. Notwithstanding their admissions in response to discovery, plaintiff disputes this fact by arguing that their letter by its terms requested only "records," which is reasonably read to mean original records. Opposition, 5:1-7. Defendants reason that because the request was for a service not required under § 1158, that section is inapplicable.

Both side appear to agree that a medical provider *may* fulfill its obligations under § 1158 by mailing copies of patient records to attorneys. Opposition, 4-6; Reply, 1:15-17. And plaintiff notes that St. Francis routinely responds to § 1158 requests by copying and mailing records to the requesting attorney through CiOX. Opposition, 4.

The operative request was sent by plaintiff's attorneys on August 16, 2012. Belew Decl., Ex. H. The attorneys asked St. Francis to send "all records" pertaining to Plaintiff's treatment to their address. The attached "authorization" authorized St. Francis to disclose "ALL RECORDS" to Plaintiff's attorneys at their law firm's address. Neither party has identified any case law

addressing whether this sort of records request triggers § 1158. Neither *Thornburg I* nor *Thornburg II* decides this question.

I conclude the operative request is within the scope of § 1158. Section 1158 is implicated "[w]henever, prior to filing of any action or the appearance of a defendant in the action, an attorney at law or his or her representative presents a written authorization therefor signed by an adult patient," "or a copy thereof" to a subject entity, the entity "shall make all of the patient's records under his, hers or its custody or control available for inspection and copying by the attorney at law or his, or her, representative, promptly upon the presentation of the written authorization." § 1158; § 1158(b) (2018) ("Before the filing of any action or the appearance of a defendant in an action, if an attorney at law or his or her representative presents a written authorization therefor signed by an adult patient, ... or a copy thereof, to a medical provider, the medical provider shall promptly make all of the patient's records under the medical provider's custody or control available for inspection and copying by the attorney at law or his or her representative.")

The statute does not specify any special words that must be included in a written authorization to trigger the statutory protections. Rather, the language "a written authorization therefor" means a written authorization to "make all of the patient's records under" the responding entity's "custody or control available for inspection and copying by the attorney at law or his, or her, representative." § 1158 (2012); § 1158(b) (2018).

The written authorization here did just that. Specifically, the authorization authorized St. Francis to make all of plaintiff's records available to plaintiff's attorneys and specified a location for St. Francis to do so – the attorneys' office. Belew Decl., Ex. H. Defendants' argument, undisputed here, that defendants had no obligation to make the records available *at the attorneys'*

office is irrelevant in the face of defendants' concession that they were permitted to comply with the statute by copying and sending medical records to attorneys. Reply, 1.

Defendants in effect argue that when the request is for copies made by the provider, it is not a request for "inspection and copying by the attorney" and so doesn't qualify under §1158. But this cramped reading of the statute is belied by the fact that the statute contemplates copying costs incurred by the provider.[4] And defendants' position implies that a medical records request that contains all of the elements required by § 1158 is invalid when attorneys request that the records be made available for inspection and copying in a manner that is permitted, but not required, by the statute. That result is contrary to the language and purpose of the statute.

2. Agency

Defendants argue that payment created an agency relationship, rendering § 1158 inapplicable. If an agency relationship was created, defendants contend that plaintiff has no claim because the statute imposes no limitation on the amount plaintiff's *own* photocopying service may charge plaintiff. Motion, 19; § 1158 (2012).

Agency depends on an agreement that one acts on another's behalf and subject to his control, and consent by the other to so act. *van't Rood v. County of Santa Clara*, 113 Cal.App.4th 549, 571 (2003). Agency may also be created by ratification. *Id.* at 571.

Defendants cite three pieces of evidence: HealthPort's invoice, the agency sheet that accompanied the invoice, and plaintiff's attorneys' payment of the full amount requested in the invoice. Motion, 17-19; Emery Decl., Exs. 10, 12; Belew Decl., Ex. I. This is insufficient to carry defendants' initial burden of showing the existence of an agency relationship. There is no

[4] "All reasonable costs incurred by any person or entity enumerated above in making patient records available pursuant to this section may be charged against the person whose written authorization required the availability of the records." *Id.* "Reasonable cost" includes, inter alia, "ten cents ($0.10) per page for standard reproduction of documents of a size 8 ½ by 14 inches or less" and "twenty cents ($0.20) per page for copying of documents from microfilm[.]"

evidence that plaintiff's attorneys could exercise control over HealthPort. Rather, HealthPort's information packet stated that it had already "processed" the "request for information" and was "awaiting payment" before specifying the ways in which plaintiff's attorneys could pay HealthPort to obtain copies of the information. Emery Decl., Ex. 10; Belew Decl., Ex. I. The invoice stated the amount due to obtain copies of the records. Emery Decl., Ex. 10; Belew Decl., Ex. I. This evidence is inconsistent with the inference that plaintiff's attorneys and HealthPort reached an agreement by which HealthPort would act on the attorney's behalf and subject to the attorney's control in securing copies of plaintiff's medical records. The documents do not show, as a matter of law, an express or implied agency agreement.

Defendants' evidence also does not show ratification. The documents can be construed as a request for plaintiff's attorneys to ratify unauthorized copying performed by HealthPort, retroactively making HealthPort their agent with respect to that copying. Emery Decl., Ex. 10 (both documents stated that Plaintiff's attorneys were agreeing to employ HealthPort as their professional photocopy representative or agent by paying the invoice to receive the records); Belew Decl., Ex. I (same). But there is no evidence that HealthPort purported to act as plaintiff's attorneys' agent when it copied the medical records.

Defendants' Separate Statement and other evidence instead support the inference that HealthPort did not hold itself out as plaintiff's agent when it copied her medical records. St. Francis took the initial step of providing the records to HealthPort as St. Francis' "Business Associate" under a contractual arrangement for HealthPort to provide services to St. Francis. Defendants' Separate Statement, UMF 10; Emery Decl., Exs. 7-8.[5]

[5] Defendants provided only a portion of the contract, which omits the definitions of certain defined terms, HealthPort was only to provide "Services" in connection with Attorney Requests under § 1158 after disclosing the attorney requestors right to use their own copy service and securing the attorneys' consent to using HealthPort as a representative. Emery Decl., Ex. 16. The contract also contained language disclaiming the existence of any agency

3. Waiver

Defendants argue that the payment for, and retention of, the records waived any right to insist on the records being provided in a different way. Plaintiff says the payment was procured by fraud, duress, or mistake of fact; that § 1158 cannot be waived; and the documents that allegedly give rise to the waiver are unenforceable exculpatory contracts.

Waiver is the intentional relinquishment of a known right after knowledge of the facts. A statutory benefit may be waived if "(1) the statute does not prohibit waiver, (2) the statute's public purpose is incidental to its primary purpose, and (3) the waiver does not seriously undermine any public purpose the statute was designed to serve." *Lanigan v. City of Los Angeles*, 199 Cal.App.4th 1020, 1030 (2011).

A waiver may be shown by an actual intention to relinquish a right or conduct so inconsistent with the intent to enforce the right in question as to induce a reasonable belief that it has been relinquished. *Outboard Marine Corp. v. Superior Court*, 52 Cal.App.3d 30, 41 (1975). The burden is on the party claiming a waiver of a right to prove it by clear and convincing evidence that does not leave the matter to speculation. *Florence W. Med. Clinic v. Bonta*, 77 Cal.App.4th 493, 504 (2000). Waiver is ordinarily a question of fact, but waiver based on conduct manifestly inconsistent with the intention to enforce a known right may be determines as a matter of law where the underlying facts are undisputed or the evidence is susceptible of only one reasonable conclusion. *Oakland Raiders v. Oakland-Alameda County Coliseum, Inc.*, 144 Cal.App.4th 1175, 1191 (2006).

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relationship between HealthPort and the medical facilities. *Id.* Even if HealthPort could have held itself out as Plaintiff's agent by complying with the terms of the contract, the present record indicates that HealthPort did not comply with those terms because it failed to advise her attorneys of their option to secure the medical records without using HealthPort. *See id.* at Ex. 10. More fundamentally, this does nothing to dispel the notion, supported by the balance of the record, that HealthPort took all action necessary to respond to the records request except actually sending the records before responding to the records request by requesting payment, all pursuant to its pre-existing relationship with St. Francis.

Defendants have not produced evidence that plaintiffs' attorneys intended to relinquish rights under § 1158 or that plaintiffs' attorneys engaged in conduct so inconsistent with the intent to enforce the right in question as to induce a reasonable belief that such rights had been relinquished.

Defendants' evidence consists of HealthPort's invoice, the agency sheet that accompanied the invoice, plaintiff's attorneys' payment of the full amount requested in the invoice, the subsequent notification that the records were ready for plaintiff's attorneys to send in their own copy service, and plaintiff's attorneys' election to pursue litigation against HealthPort for an overcharge rather than to send in their own copy service to create new copies of the records and to seek a full refund from HealthPort. Motion, 20 (summarizing evidence).

This evidence does support the inference that plaintiffs' attorneys were *aware* of rights under § 1158. For example, these attorneys noted their objection to the fees in the "MEMO" section of the check used to pay HealthPort's invoice. Emery Decl., Ex. 12. But the same fact precludes the determination that plaintiff or her attorneys intended to *relinquish* the right.

4. Voluntary Payment Doctrine

Defendants argue that the payment was made voluntarily with knowledge of the "pertinent" facts and cannot be recovered. Motion, 21. Defendants do not specify which facts they believe are pertinent to the application of the voluntary payment doctrine.

"Payments made voluntarily, with knowledge of the facts, cannot be recovered." *Steinman v. Malamed*, 185 Cal.App.4th 1550, 1557 (2010). The fact that payment is made "under protest" is not alone enough to make a payment involuntary. *Id.* at 1558. "Payments of illegal claims enforced by duress, coercion, or compulsion, when the payor has no other adequate remedy to avoid it, will be deemed to have been made involuntarily and may be recovered, but

the payment must have been enforced by coercion and there must have been no other adequate means available to prevent the loss." *Id.* (quoting *Western Gulf Oil Co. v. Title Ins. & Trust Co.*, 92 Cal.App.2d 257, 264 (1949). A payment is made under duress where a reasonably prudent person finds that in order to preserve his property or protect his business interests it is necessary to make a payment of money that he does not owe. *Id.* In addition, the party insisting on payment must act wrongfully, such as with the knowledge that the claim asserted is false. *Id.* at 1559. The question of duress is a factual question. *Young v. Hoagland*, 212 Cal. 426, 431-32 (1931); *CrossTalk Prods., Inc. v. Jacobson*, 65 Cal.App.4th 631, 645 (1998).

Defendants' voluntary payment argument seems to be based on the same facts as their waiver argument. Motion, 21. As noted, plaintiff's attorneys' notation on the check evidences the fact that they believed that defendants were violating § 1158 at the time. Emery Decl., Ex. 12. Under *Steinman*, the inclusion of a notation on the check stating that payment was under protest is insufficient to make the payment involuntary. *Steinman*, 185 Cal.App.4th at 1558. Thus defendants satisfy their initial burden on summary adjudication. Emery Decl., Exs. 10, 12.[6]

Turning to plaintiff's burden, I note that defendants' evidence shows that more than one month after her initial request and more than two weeks after her second request, plaintiff had not been given any indication that she had any means of accessing her medical records other than by acceding to HealthPort's demands. Emery Decl., Exs. 2, 5, 10-12, 17 at 117:12-23. Further, plaintiff was not advised that she could use her own copy service until after she made payment. *Id.*, Exs. 10, 12, 17 at 117:12-23.

It is also however true that plaintiff has no evidence that she required prompt access to her medical records. Rather she points to her attorneys' obligation to promptly investigate her

[6] Plaintiff (through her attorneys) was aware of the costs HealthPort was charging to provide copies of the records and that HealthPort was asserting that those costs fell outside of § 1158 at the time payment was tendered. This satisfies defendants' initial burden of producing evidence that plaintiff had "knowledge of the facts."

claims. Opposition, 13. But even in the absence of exigent case-specific circumstances, § 1158 itself is predicated on a policy that patients are entitled to prompt access to medical records. *Thornburg II*, 143 Cal.App.4th at 205.

A reasonable fact finder could conclude that plaintiff acceded to HealthPort's terms under duress. Making inferences in plaintiff's favor, HealthPort's agency sheet represented that the only means of securing her medical records was through HealthPort. Emery Decl., Ex. 10. Plaintiff was presented with a choice: tender payment under dispute in an effort to secure her records quickly, or withhold payment while disputing the charge and incur further interminable delay. A reasonable person might well choose the first course. Thus plaintiff has met her burden, and I must deny the motion.

5. Estoppel

Defendants argue plaintiff is estopped from asserting a violation of § 1158 because she tendered payment to HealthPort to induce it to send records knowing she would then file a class action lawsuit against HealthPort. Motion, 21-23; *see also* Reply, 9 (arguing that plaintiff is estopped from prosecuting this case because her attorneys behaved disingenuously).

> The doctrine of equitable estoppel is founded on notions of equity and fair dealing and provides that a person may not deny the existence of a state of facts if that person has intentionally led others to believe a particular circumstance to be true and to rely upon such belief to their detriment.

City of Oakland v. Oakland Police and Fire Retirement System, 224 Cal.App.4th 210, 239 (2014). There are four elements: (1) the party to be estopped must be apprised of the facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended; (3) the other party must be ignorant of the true state of facts; and (4) he must rely upon the conduct to his injury. *Id.*

With respect to the first element, defendants just state that plaintiff was apprised of the facts, without stating which facts those are. Motion, 22. With respect to the second element, defendants argue that plaintiff's attorneys induced HealthPort to send them the medical records by paying the full amount of the invoice. *Id.* With respect to the third element, defendants argue that they were not aware of the true facts – i.e., that plaintiff's attorneys would sue. *Id.* With respect to the fourth element, defendants argue that they are being forced to defend a class action because they relied on plaintiff's attorneys' payment of the full invoice to mail the medical records. *Id.*

The central fact cited by defendants is that plaintiffs' attorneys paid the invoice in full, shown by the check on which Plaintiff's attorneys wrote "under protest – in violation of CA EVID CODE 1158." Emery Decl., Ex. 12. Obviously plaintiff's attorneys believed that defendants were violating § 1158. Undoubtedly cognizant of this inference, defendants offer deposition testimony to the effect that defendants never look at the checks. In effect, the motion is based on the notion that defendants could ignore the notation on the check. Defendants offer no case law in support of this approach. Nor do they offer facts demonstrating that it would be untenable for them to review checks for indications that payment was rendered under protest. Plaintiff made her disagreement with the fees she was being charged clear on the face of the very instrument with which she made payment.[7] She is not estopped from pursuing that claim now.

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[7] Defendants offer no evidence to support their speculation that plaintiff intended to induce defendants to provide the records and open itself to class action liability. The present record is susceptible to the reasonable inference that plaintiff just intended to induce defendants to provide a refund of the alleged overcharge.

Plaintiff's Motion

1. Real Party in Interest

"Every action must be prosecuted in the name of the real party in interest...." C.C.P. § 367. Defendants' "real party in interest" defense is premised on the notion that plaintiff has no rights under the statute. Opposition, 18-20.[8]

The statute addresses a medical provider's duty to respond to written authorization's presented by an "attorney at law or his or her representative." Section 1158(b). It contemplates attorneys requesting records. Section 1158(e)(1).

Prior to January 1, 2016, entities subject to § 1158 were authorized to charge all reasonable costs incurred in making patient records available against the person whose written authorization required the availability of the records – i.e., the patient. Section 1158 (2012); Senate Floor Analysis of AB 1337 at p. 2 (Aug. 13, 2015) ("This bill...[p]ermits reasonable costs incurred under this bill to be charged against the attorney who requested the records, not the person who authorized the request"). Under the prior version of the statute, the Court of Appeal ruled that the statute "gives patients a private right of action to enforce its provisions, including its costs limitations." *Thornburg II*, 143 Cal.App.4th at 206. Because plaintiff's claim arose under the version of the statute before the *Thornburg II* Court,[9] that decision controls, and plaintiff is the real party in interest.

Summary adjudication is granted.

[8] This defense is pled only against plaintiff, not any other members of the certified class. CiOX Third Amended Answer ¶ 2; St. Francis Third Amended Answer ¶ 2.

[9] Defendants argue that *Thornburg II* did not decide that the private right of action belongs to patients, as opposed to attorneys, because no party to the litigation argued that the right of action belonged to the attorneys. Opposition, 19 n.5. While that specific argument was not addressed in the opinion, the Court of Appeal expressly held that patients have a private right of action to enforce the statute.

2. Voluntary Payment Doctrine

This affirmative defense is pled only against plaintiff, not the class. CiOX Third Amended Answer ¶ 3-7; St. Francis Third Amended Answer ¶¶ 3-7.

Plaintiff argues that the voluntary payment doctrine cannot apply because plaintiff's attorneys made payment under protest. But this is insufficient to make payment involuntary. *Steinman*, 185 Cal.App.4th at 1558.

Plaintiff argues that the voluntary payment doctrine cannot apply because the payment was made as a result of fraud, duress, or mistake of fact. As to the assertion that plaintiff lacked knowledge of the facts (because HealthPort omitted information about its relationship with St. Francis and any alternative means of securing access to Plaintiff's medical records), the evidence does not indicate that plaintiff "lacked knowledge of the facts" because, in fact, the check tendered by plaintiff's attorneys shows, on its face, that plaintiff believed defendants were violating § 1158. Plaintiff has not carried her initial burden on that issue.

As to the assertion that plaintiff was induced by fraud, mistake of fact, or duress, the argument is in essence that a person in the position of plaintiff or her attorneys would, as a matter of law, have tendered payment when presented with the undisputed factual backdrop. As noted above, plaintiff's attorneys had two options: they could have made payment under dispute in an effort to gain access to her records as quickly as possible, or withhold payment and dispute the charge. Just as a reasonable fact finder could determine that only the former course was viable in light of the undisputed facts and the ongoing statutory violation, a reasonable fact finder could determine that the latter course was also tenable.

The motion is denied.

3. Waiver

Waiver is pled against plaintiff and perhaps also against the class. CiOX Third Amended Answer ¶¶ 8-9; St. Francis Third Amended Answer ¶¶ 8-9. Plaintiff relies on C.C. § 1668 (contracts void if exculpating of fraud, willful injury, or violation of law) and C.C. § 3513 (cannot waive law established for a public reason). *See e.g., Iskanian v. CLS Transportation Los Angeles, LLC*, 59 Cal.4th 348, 382-83 (2014).

Section 1158 does not expressly prohibit waiver. "The overall purpose" of § 1158 "is to provide patients with an expeditious means of obtaining and reviewing medical records before initiating litigation against medical providers." *Thornburg II*, 143 Cal.App.4th at 205. To that end, § 1158 "states a clear public policy of permitting a patient, before filing an action, to inspect and copy any medical records concerning the patient. The legislative purpose behind this enactment is not stated, but its apparent goal is to permit a patient to evaluate the treatment he or she received before determining whether to bring an action against the medical provider." *Thornburg I*, 138 Cal.App.4th at 50.

In *Thornburg I*, the Court of Appeal noted the policy "of the cost limitations set forth" in the statute. *Id.* at 51. See also *id.* at 53 (Court noted the section's "manifest purpose of limiting the cost of copying").

The first element of the § 3513 test is satisfied because § 1158 does not expressly prohibit waiver. *See DeBerard Properties, Ltd. v. Lim*, 20 Cal.4th 659, 668-69 (1999). The second element of the test is met because the primary benefit of § 1158 is private. *See id.* (private versus public benefits).

The third element is not satisfied. A waiver here would seriously compromise two public purposes that § 1158 was intended to serve. Specifically, it would interfere with the public

policy purposes of providing access to medical records quickly and at low cost if a patient or her attorney, when faced with an overcharge, waives the statutory protection by paying the overcharge to secure access to the records.[10] While it is not clear that the same scenario applied to the full class, plaintiff's conduct here did not waive the protections of § 1158.

Next, § 1668 precludes a finding that plaintiff waived her rights under § 1158. Defendants' argument is in essence that § 1668 cannot apply because plaintiff never had any rights that she could have waived in the first place. Opposition, 14-15. But of course the waiver defense *pre-supposes* plaintiff had the pertinent right.

Given these discussions, there is no need to consider plaintiff's other arguments.

Neither party has considered what do with respect to this defense to the class where plaintiff has carried her burden only as to herself, not as to the rest of the class. It appears that the defense has not been *entirely* disposed of, and so the motion cannot be granted.[11]

4. Agency

Agency is pled against both plaintiff and the class. CiOX Third Amended Answer ¶¶ 10-11; St. Francis Third Amended Answer ¶¶ 10-11.

Plaintiff argues that defendants are liable under *Thornburg I* if HealthPort assumed the duty of responding to § 1158 requests and acted for their own advantage and benefit as well as

[10] The material undisputed facts are: (1) On April 16, 2012, Plaintiff's attorneys sent a medical records request to St. Francis. *See* Defendants' Opposition to Separate Statement ¶¶ 17, 34; Belew Decl., Ex. H. (2) Plaintiff's received a response from HealthPort on September 4, 2012. *See* Defendants' Opposition to Separate Statement ¶ 39; Belew Decl., Ex. I. (3) HealthPort's response disclosed only two methods of securing access to the records, both of which required Plaintiff to pay HealthPort's invoice. Belew Decl., Ex. I. Although the response quoted from Evidence Code § 1158, it did not indicate any other means of securing access to medical records. On these facts, assuming the protections of the statute apply, defendants had already violated the timing requirements of § 1158 by delaying their response to plaintiff's request and were demanding a payment that violated the cost limitations in the statute. Finding that plaintiff waived the protections of the statute by tendering a payment in an effort to mitigate the ongoing statutory violation would seriously undermine the statute's public purpose of providing prompt access to medical records at a reasonable cost.

[11] At argument plaintiff's counsel suggested that an exhibit buried in a footnote would be sufficient evidence that the circumstances for the class were the same as for the plaintiff. Because the issues are not squarely presented by the papers, I decline to so rule now, but the parties may be able to reach an agreement on this defense as it applies to the class if plaintiff's counsel is right.

St. Francis' interests. Motion, 15. Plaintiff produced evidence that HealthPort undertook a duty to respond to § 1158 requests for St. Francis. Belew Decl., Ex. O. There is evidence that the arrangement benefits both defendants. Belew Decl., Ex. D at 50:18-51:14.

Thornburg I does set forth two predicates that must be satisfied to extend liability to a third party, *Thornburg I*, 138 Cal.App.4th at 53, but it does not state that liability will necessarily follow whenever those predicates are present. *See id.* (using the word "may," rather than must). *Thornburg I* does not preclude any arrangement where a copy service responds to requests on behalf of a medical provider and offer its services, assuming that copy service is not given exclusive access. *Compare Thornburg I*, 138 Cal.App.4th at 53-54 (records made "exclusively" available to Bactes).

The motion is denied.

5. Estoppel

Plaintiff argues that defendants cannot establish the third and fourth elements of the estoppel defense. Motion, 17-19. On the third element, plaintiff argues that the factual record belies the allegation that defendants were unaware that plaintiff did not intend to be bound by the agency sheet. Motion, 18. On the fourth element, plaintiff argues that (1) Defendants did not rely on plaintiff's behavior because defendants disregarded plaintiff's attempts to goad defendants into compliance with § 1158; and (2) Defendants were not injured by this lawsuit because this lawsuit is appropriate.

Plainly, plaintiff's attorneys wrote "under protest – in violation of CA EVID CODE 1158" on the check by which they paid HealthPort. Defendants' Response to Separate Statement ¶ 66; Belew Decl., Ex. K. There is also no dispute that defendants did not review the check. Defendants' Response to Separate Statement ¶ 68. This is the only evidence cited in the relevant

section of the separate statement that could have put defendants on notice that plaintiff believed that the agency agreement was unenforceable. *See id.* at ¶¶ 65-68.

Plaintiff has not carried her initial burden of producing evidence that defendants knew she believed the arrangement violated § 1158. And plaintiff has not carried her initial burden on the fourth element of the affirmative defense (reasonable reliance). On this record, and making inferences in favor of the party defending against the motion for summary adjudication, one may conclude that it was reasonable for defendants not to review the face of the check for notes.

Plaintiff also seems to argue that the costs of defending a lawsuit is not an injury. There is no support for this position.

Plaintiff's argument that an estoppel here implies estoppel in all attempts to enforce § 1158 is unpersuasive. The defense for example would not apply where a defendant does not impose the terms and conditions in this case or where an attorney objects to the same terms.

Finally I reject plaintiff's cursory public policy arguments. There is no useful supporting citation of authority.

Conclusion

Plaintiff's motion regarding real party is interest is granted. The balance of the motions are denied.

Dated: August 24, 2018

Curtis E.A. Karnow
Judge of The Superior Court

CERTIFICATE OF ELECTRONIC SERVICE
(CCP 1010.6(6) & CRC 2.260(g))

I, DANIAL LEMIRE, a Deputy Clerk of the Superior Court of the County of San Francisco, certify that I am not a party to the within action.

On AUG 24 2018, I electronically served THE ATTACHED DOCUMENT via File & ServeXpress on the recipients designated on the Transaction Receipt located on the File & ServeXpress website.

Dated: AUG 24 2018

T. Michael Yuen, Clerk

By: _____
DANIAL LEMIRE, Deputy Clerk