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**BY EMAIL TO [bkillough@rplfirm.com](mailto:bkillough@rplfirm.com)**

November 24, 2020

B. Craig Killough, Esquire  
Riley, Pope & Laney, LLC  
2838 Devine Street  
Columbia, South Carolina 29205

Dear Mr. Killough:

I am writing in response to your September 18, 2020 letter to Bruce Quinn, claiming that a document called the “Master Edit File,” and a set of payment codes called “Z-Codes,” which Quinn discussed in a blog post, are “owned by” your client, Palmetto GBA. You contended that the file is “the intellectual property of” that company, and that Quinn has no authority to “possess, use, copy or publish” that file. Your letter demands that Quinn delete the file from his computers; notify readers of his blog that “possession, use, copying or publication of the Master Edit File, or portions thereof,” is a violation of law, and provide you with names and contact information for anybody who downloaded the file or who received the file directly from Quinn.

I spent several days trying to reach you to try to ask you questions about your basis for making these rather extraordinary claims and demands. Unfortunately, you chose not to respond to these inquiries.

Looking only at your letter, I see no basis whatsoever for your claims. Consequently, although Quinn initially took steps to honor your client’s urgent requests to disable access to the material, he has now begun to take steps to reverse that process. Unless you respond with persuasive explanations for your claims of entitlement to block access, Quinn intends to continue down the path of restoring public access to those materials.

## **Background**

Your client Palmetto is a subsidiary of Blue Cross Blue Shield of South Carolina and functions, among other things, as a Medicare Administrative Contractor (“MAC”) for the federal Centers for Medicare and Medicaid Services (“CMS”). In that capacity, Palmetto developed a set of billing codes, called Z Codes, that all medical providers within its administrative area were required to use when seeking reimbursement for their services to recipients. This coding system has been controversial over the years.

Late last year, Bruce Quinn, a renowned expert on health reform, innovation, and Medicare

policy, used the Freedom of Information Act (“FOIA”) to obtain from CMS a copy of a spreadsheet containing lab test pricing and coding information prepared by Palmetto, which Palmetto calls a “Master Edit File” (“MEF”). In its capacity as a MAC, Palmetto is also subject to FOIA, and in September, Palmetto released the MEF to a financial analyst. The financial analyst posted a note to investors about one datapoint that he noticed in the file, and he also shared the document with Quinn. Quinn, in turn, published an article on his blog, Discoveries in Health Policy. He addressed the datapoint cited by the financial analyst, pointing out that it suggested that Palmetto was allowing significant overcharges for a molecular test called “GeneSight”; he also commented on other pricing anomalies reflected by the MEF. *MolDx Reprices Myriad Genesight Test at Lower Price of \$1568*, <http://www.discoveriesinhealthpolicy.com/2020/09/moldx-reprices-myriad-genesight-test-at.html>.

Quinn noted, for example, that during the past year alone, the MEF had increased by roughly 8,000 lines, “which probably has contributed to the accumulation of errors and a general unmanageability relative to the early vision of the Z code system when there were only a couple hundred codes.” Quinn cited two specific Z codes that had been mentioned by the financial analyst, and also posted the entire MEF online, linking to the document so that his readers could judge for themselves the validity of his criticisms.

### **Palmetto’s Claims and Demands**

Palmetto responded to this criticism by trying to shoot the messenger. A Palmetto official started calling and repeatedly texting Quinn, beginning at 5:50 AM, demanding that he remove the Master Edit File from the internet because it allegedly contains both “proprietary and private information.” Quinn honored that request on a provisional basis. You then followed up with your September 18 letter, contending that the Master Edit File, and the Z Codes in particular, are supposedly “protected by intellectual property laws” and that, consequently, Quinn lacks “authoriz[ation even] to possess the document,” not to speak of to publish or copy it. Consequently, you demanded that Quinn divest himself of the file and identify anybody who may have downloaded it from his cloud link or received it from him directly.

In addition, Palmetto has induced CMS to write to Quinn asking him to return the CMS the Master Edit File that it provided to him in December 2019 in response to his FOIA request. CMS told Quinn that the document contained unidentified proprietary information, and that, once Quinn returned the document, CMS would provide Quinn with a redacted document from which the proprietary information had been stripped out. I contacted CMS to ask for the detailed basis for its request, but CMS would not explain what the proprietary information is, and was unwilling to answer even the most basic questions about its request, or about the justifications Palmetto had provided for the withholdings. Moreover, I learned that it would not actually be CMS that would be redacting the file, but rather Palmetto itself, and CMS would simply be the messenger.

Similarly, I have been trying to reach you to ask for the basis for your intellectual property

claims. The very fact that neither you nor CMS has been willing to explain the basis for your claims causes me to doubt that your claim is sound.

### **Palmetto Has No Sound Intellectual Property Claims**

I see no basis for your asserting any actionable claim. Neither trademark nor copyright law would afford you the sort of relief you are demanding, and in any event my review of the federal copyright and trademark databases found no copyright or trademark registrations by Palmetto GBA. Indeed, a trademark in the term “Z-Code” was registered to a California company thirty years ago, but that mark was canceled in 2002.

The contention that Quinn cannot even possess the file implies that you have trade secret protection in mind, but there is no basis for claiming a trade secret here. Generally trade secrets are private information that gain their economic value by not being widely known to competitors, and they can be protected only so long as the owner of the supposed secret takes reasonable steps to protect them against disclosure. *Experian Info. Sols. v. Nationwide Mktg. Services*, 893 F.3d 1176, 1188 (9th Cir. 2018). But the great bulk of the data in the MEF—for example, the Z codes, the names of the procedures with which they are associated, and the reimbursement prices—are far too widely disseminated in the medical community to be deemed a trade secret. Every one of the thousands of medical providers within the several states for which Palmetto serves as the MAC needs to know the Z codes so they can submit appropriate billings. And patients are routinely provided with CMS remittance information that shows the price Palmetto MoDx paid for covered laboratory services.

Moreover, the owner of a trade secret loses protection unless it takes reasonable steps to protect the secrecy of its product. Yet in September 2020, Palmetto responded to a FOIA request from the financial advisory service Nephron by providing a complete copy of the MEF—it was that version of the MEF, not the version that Quinn had previously obtained from CMS under the FOIA, that Quinn posted to the cloud and linked from his blog post. In addition, earlier this year, Quinn notified Palmetto executives of mistakes in Z-code files dating back to at least early 2020—thus making clear that he had the MEF—and on many occasions since 2016, he has described in his speeches and blogs previous examples of Palmetto’s internal pricing errors, found in previous versions of the MEF. Palmetto has never tried to prevent him from having past versions of the document; it has effectively waived any trade secret claims.

In any event, I question whether trade secret protection would ever be appropriate for a document of this sort. After all, you do not use it in competition with other businesses, in that CMS gives Palmetto exclusive control over the Medicare reimbursement process in the states it serves as the MAC. And the MEF specifies the amounts of public funds that will be paid for the provision of various categories of medical services. Just as the codifications of law cannot be copyrighted, *Georgia v. Public.Resource.org*, 590 U.S. \_\_\_, 140 S. Ct. 1498 (2020), neither can such documents

B. Craig Killough  
November 24, 2020  
page 4

be shielded from public view by invoking trade secrets protection.

It is apparent, therefore, that Palmetto has no sound intellectual property claims, and that your efforts to deny Quinn access to the MEF that he obtained in a lawful manner is a response to his criticism. Any litigation that you might initiate to suppress his reliance on that document to support his criticism is bound to founder on Quinn's First Amendment right to criticize Palmetto. *See Bartnicki v. Vopper*, 532 U.S. 514 (2001). For all of these reasons, Quinn has now restored the Z code identifiers to his blog post. And, unless you promptly provide a persuasive argument to support your claim that intellectual property laws forbid him from making the Master Edit File available to the general public, he plans to place that document back into the cloud and will restore the link to the blog post. I look forward to hearing any arguments you choose to provide before he takes this step.

I will be writing separately to CMS to explain why Quinn is not willing to honor its request to "claw back" its FOIA disclosure of last year.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Paul Alan Levy", written over a light gray grid background.

Paul Alan Levy

cc: Hugh Gilmore