UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No.: 09-60351-SEITZ / O'SULLIVAN

MANAGED CARE SOLUTIONS, INC.,

Plaintiff,

vs.

ESSENT HEALTHCARE, INC.,

Defendant.

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PLAINTIFF'S MOTION FOR SANCTIONS, INCLUDING THE ENTRY OF A DEFAULT JUDGMENT AND AN AWARD OF ATTORNEY'S FEES, AND REQUEST FOR HEARING

Plaintiff, Managed Care Solutions, Inc. ("MCS"), by and through undersigned counsel, and pursuant to Federal Rules of Civil Procedure 37, and the Court's inherent power to oversee discovery and prevent spoliation and litigation abuses, respectfully requests that this Court issue an order (1) finding that the Essent has spoliated evidence in this case and that sanctions are warranted and (2) issuing appropriate sanctions, including the entry of a default judgment in MCS's favor against Defendant, Essent Healthcare, Inc. ("ESSENT"), and to order Defendant to pay MCS its attorney's fees and costs it has incurred in this action. MCS also requests a hearing on its motion, and states:

INTRODUCTION

This motion is necessitated by Defendant's egregious and admitted destruction, omission and concealment of documentary records that would have been directly probative of Plaintiff's claims.

It is undisputed that: (1) ESSENT deleted emails relative to MCS's claims in this case, (2) that ESSENT failed to place a litigation "hold" on documents related to this case, until well after the case was filed in March 2009, (3) ESSENT did not produce any documents that pre-dated December 2008, and (4) ESSENT failed to produce other directly relevant, responsive evidence until after the close of fact discovery.

These responsive documents, including emails, reports and other information are highly relevant to the issue of whether Defendant engaged other third party vendors and/or agencies to service ESSENT's third party payor accounts receivables, in violation of the Exclusivity Provision of the subject Professional Service Agreement (hereinafter "PSA" annexed hereto without attachments as Exhibit "A"), as well as the total number of accounts transferred to these agencies (which relates to the damages suffered for Defendant's breach of said provision). *Id.* Finally, the absence of these emails, any and all related reports and the circumstances surrounding their destruction[1] can only be the result of bad faith on the part of the Defendant.

As a long line of case law indicates, this Court has the inherent power to protect its integrity by imposing the "ultimate sanctions", including the striking of Defendant's pleadings and the entry of a default judgment in Plaintiff's favor due to the Defendant's conduct in this case. The Court also has the inherent power to protect MCS by awarding the attorney's fees expended and/or incurred by MCS in dealing with Defendant's vexatious, unconscionable and dilatory conduct. Under the facts of this case and as demanded by both principles of equity and the relevant case law in this jurisdiction, no lesser sanctions would suffice.

FACTUAL BACKGROUND

From the outset of this litigation, Defendant has consistently undermined the judicial process by purposefully thwarting Plaintiff, MCS, and this Court's ability to adjudicate the key issues in the instant matter. [2] As more fully discussed *infra*, Defendant lied under oath, failed to produce numerous smoking-gun documents and admittedly destroyed and purged electronic correspondence and other documents related to and responsive to MCS's claims. Separate from

[1] The Court shall note that to date, ESSENT has not produced its internal reports and notes in compliance with multiple discovery Court orders, either because ESSENT claimsnever existed (which was contradicted by some of its own discovery, testimonies and third party vendors) or because they do not keep the material, indicating that the information is always available on their computer systems. However and although under their constant control until now, ESSENT refused to reprint or reissue those reports, demonstrating its abusive litigation and discovery conduct.

[2] As early as the July 9, 2009 hearing on Defendant's Motion to Dismiss, Defendant's concealment of relevant contracts and other evidence began to take center stage; to wit: when confronted by MCS's representations that ESSENT had assigned/transferred its third party claims to other collection vendors in violation of, inter alia, the exclusivity provision of the PSA, Defendant's counsel unequivocally denied not only the nature of such other vendors, but also of their very existence. *See* Exhibit "B".

ESSENT not having placed a "litigation hold" on responsive documents and having deleted e-mails, ESSENT produced in excess of thirteen thousand (13,000) bates numbered documents after the close of fact discovery in this case.

On September 19, 2009, Plaintiff propounded its first request for documents. On October 21, 2009, ESSENT served its responses and objections, **yet did not produce one document**. However, in its verified responses, ESSENT's corporate representative, Steven Wylie ("WYLIE"), Senior Vice President of Operations Finance, declared under oath that *"no other company provided denial management services and/or the type of services that MCS provided to ESSENT from January 1, 2005 through June 30, 2009." See* Exhibit "C", Defendant's Responses to Plaintiff's Request for Documents.

Thereafter, on December 10, 2009, Plaintiff moved to compel Defendant to produce responsive documents, including, without limitation, any and all contracts with third party accounts receivable vendors and/or agencies, and any and all written correspondence, collection reports, etc. between ESSENT and those agencies. *See* Exhibit "C". However, to purposefully avoid having to produce or reveal said material, Defendant's counsel artfully promoted its self-serving interpretation of the PSA's definition of the term "Denial". As noted by the Court the term "Denial" in the PSA was clear and unambiguous to include all unpaid claims, in whole or in part, without further restriction. *See* Exhibit "D", Tr. of December 10, 2009 hearing. Further, Defendant's counsel attempted to mislead the Court, averring that MCS was not contracted to service accounts receivable pertaining to **non-contracted** third party payors. Specifically, Defendant's counsel stated that "*we [the Defendant] distinguish that in terms of the types of services being provided, since MCS, as pled in the complaint and as set forth in the exhibit solely was providing denial management services. The other entity, Your Honor, which goes by the initials NHPN [National Healthcare Payors Network], as we have referred to, negotiated up front contracts for out of network providers. It was not providing denial management services*." (Emphasis added). *See* Exhibit "D".

Defendant's disingenuous statements were proffered for the sole purpose of *concealing all the contracts* ESSENT executed or effectuated with other collection agencies unbeknownst to MCS and in breach of the underlying PSA, including, but not limited to, the two (2) illustrative contracts MCS knew existed at the time, namely the contract between ESSENT and National Healthcare Payors Network (NHPN) and the contract between ESSENT and Preferred Medical

Marketing Corporation (PMMC).[3] At the conclusion of the December 10, 2009, hearing, Magistrate Judge O'Sullivan ordered Defendant to disclose the identity of, and provide ALL contracts for, each and every **accounts receivable and/or collection vendors** engaged by Defendant for the relevant forty (40) month period, February 20, 2006 through and including June 30, 2009. *See* Exhibit "D"*; see also* Exhibit "E" discovery order.

On January 8, 2010, in its Response to Plaintiff's Motion for Partial Summary Judgment, ESSENT attached to WYLIE's declaration, **under seal** an **additional nine (9) contracts with third party accounts receivable vendors**[4]. *See* [D.E. 63]; *see also* Exhibit "G". (Emphasis added). Contrary to WYLIE's declarations that these vendors did not perform similar services as MCS[5], the express contractual language of the agreements clearly demonstrates the opposite. *See* Composite Exhibit "F", contracts with said vendors.

Not only did ESSENT file these contracts under seal, ESSENT also failed to produce any of the requested and court ordered discovery material (email correspondence, collection status reports, invoices, payments etc.) concerning those vendors. However, the attached contracts, in pertinent part, obligate the third party vendor to submit monthly collection reports and invoices to ESSENT, depicting any and all unpaid claims assigned to it from third party insurance payors as

[3] The two (2) contracts between ESSENT and PMMC and NHPN, respectively, were fully executed merely days after ESSENT contracted with MCS. *See* Composite Exhibit "F".

[4] The other (9) vendors disclosed included ParrishShaw, National Patient Account Services **("NPAS")**, Cardon HealthCare, Medical Claims and Collection Inc. ("MCCI"), Edward Sloan & Associates, SARMA Collections, PV Kent & Associates, Collection Service Center, and Marcum Associates**.**

It should also be noted that Essent did not produce the **Essent-NPAS** agreement **until May 12, 2010**, well over a month after the fact discovery cut-off date of April 1, 2010. A review of that particular agreement clearly demonstrates that NPAS was engaged by Essent to service its accounts receivable claims unpaid, in whole or in part, by third party insurance payors.

[5] Steven Wylie, on behalf of Essent, declared that the scope of services pertaining to those other vendors were restricted "to underpayments, performed fair debt collection activities, engaged in retrospective reviews of ESSENT's revenues, and performed other functions related to other parts of the hospital revenue cycle." *See* Exhibit "G" at page 4.

well as any payments recovered. Therefore, there is no doubt that these documents were not only responsive but also existed and/or still exist.[6]

Ironically, three months later, on March 25, 2010, near the eve of the discovery cut-off, during its corporate deposition, ESSENT admitted that NHPN as well as other vendors provided similar services as exclusively contracted to be performed by MCS under the PSA and that "third-party payers" as defined in the PSA encompassed the "non-contracted third-party payers" subset as defined in the ESSENT/NHPN contract.[7] *See* Exhibit "H", Deposition Tr. of Steven Wylie at 480-481.

Further, during ESSENT's corporate deposition, other designated 30(b)(6) representatives acknowledged the similarities of services provided by most of the eleven (11) disclosed vendors, including, but not limited to Cardon Healthcare, ParrishShaw, MCCI, with those services ESSENT contracted MCS to perform, thus admitting that the other contracts, in large part, encompassed third party payor related collection work, and not self-pay or other marketing services, Essent has so purported.

When MCS again compelled ESSENT to comply with Magistrate Judge O' Sullivan's prior discovery rulings, Defendant informed Plaintiff that relevant correspondence, notes, email correspondence and their attachments, including accounts receivable and collection reports responsive to MCS requests for documents, had been either purged or destroyed[8] (See Exhibit

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[6] The duty to preserve extended not only to documents in its possession, but also documents in its "control." *In re NTL Sec. Litig.*, 244 F.R.D. 179, 195 (S.D.N.Y. 2007) (party must preserve documents if it has "the right, authority, or practical ability to obtain [them] from a non-party; Fed. R. Civ. P. 34(a)(1) (party must preserve evidence within its "control").

[7] "*Q. By reading that section now, has your position changed whether or not ESSENT contracted NHPN on an exclusive basis to perform the services outlined?*
A. They were contracted for the exclusive -- under an exclusive right to bill the qualified accounts.
Q. And to follow up, research, re-file, and ***appeal bills or claims denied*** *or rejected by plan?*
A. ***Yes****."* (Emphasis added).

See Exhibit "H".

[8] ESSENT produced an email exchange between two ESSENT corporate officers Larry Reaves ("REAVES") and WYLIE between June 4 and June 5, 2009, wherein REAVES expresses that all

"I"), and further verified by ESSENT's 30(b)(6) representative, Steve Wylie, who admittedly testified to the destruction of material evidence:

> *Q. Were there documents, to your knowledge, that have been destroyed or purged . . . From 2006 to the present . . . have there been any documents . . . Destroyed? Purged?*
> *A. Yes. I would say yes.*
> *Q. You said earlier that some of the e-mails would have attachments?*
> *A. Yeah. Some e-mails have attachments.*
> *Q. Those attachments did -- where they have patient information -- whether they were Excel spreadsheets, denial, underpayment reports, MEDITECH reports; anything like that?*
> *A. They could have; yes.*
> . . .
> *Q. Excel spreadsheets such as MEDITECH reports, such as underpayment reports, denial reports that had patient information. Were those documents if they were attached to an e-mail, the e-mail was destroyed, would those documents be destroyed?*
> . . .
> *THE WITNESS: Yes. If they were attached to an e-mail, and they were in the deleted box or outside of that, yes, they would have been deleted; they would have been purged.*

See Composite Exhibit "H", Tr. of Steve Wylie, at 199-202; *see also* Exhibit "J", Tr. of Larry Reaves, at 58-59.

WYLIE also testified that ESSENT did not place a "litigation hold" on documents until well after receiving notice from MCS in January 2008, that Plaintiff intended to pursue legal action, well after receiving demand letters from the undersigned counsel in January 2009, and well after suit commenced on March 6, 2009 as follows:

> *Q. And at no point receiving the **January 2008** letter did you take any -- or my **January 2009** letter, did you take any proper steps to stop the destruction of any documents you had?*
> *A. No. Not at that point in time.*
> . . .
> *Q. I can represent [the underlying lawsuit was filed] March of 2009. Why was this e-mail sent on **June 4, 2009**, rather than March 2009 . . . ?*
> *A. Because that's the first time I was -- thought of it and was reminded, you need to send a document preservation letter.*

See Composite Exhibit "H", Deposition Tr. of Steve Wylie, at 192-194. (Emphasis added).

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documents pertaining to MCS have been purged but for some limited papers and electronic ones. Exhibit "I".

Defendant was aware or should have been aware of the commencement of legal action as early as January 2008, when MCS's CEO, Kara Atchison sent Steve Wylie an email demanding payment for unpaid invoices and expressing its intent to file suit in the alternative, or at the very latest in January 2009, upon receipt of MCS's final demand letter sent by the undersigned counsel. *See* Composite Exhibit "K"; see *also* Exhibit "G". Yet, *after* Defendant had notice of the claims between the parties, Defendant destroyed company emails. Such destruction, after clear notice of the general suit, clearly evidences Defendant's continued bad faith conduct and a culpable state of mind.

Simply put, Defendant failed to preserve its electronic records and probative evidence pertaining to this litigation. Additionally, said destruction of such patient health information is a violation of both state and federal laws and regulations, including potential Health Insurance Portability and Accountability Act ("HIPAA") violations (and in violation of ESSENT's own document retention policy).[9]

Further, it is abundantly clear that ESSENT destroyed (and/or has concealed) documents, namely, weekly, monthly, quarterly and/or yearly collection and/or accounts receivable reports provided by other collection accounts receivable agencies to ESSENT and also submitted internally by ESSENT's own billing departments from its five (5) hospitals.

Contrary to WYLIE's testimony that he was never provided with any written collection reports from third party vendors (externally) nor had he received any reports from Essent's own billing departments (internally) at any time from 2006 through 2009 (he does state that he would receive the reports telephonically, but never in paper or electronic form), Michael Miller, ESSENT's other 30(b)(6) representative(s) and Director of Patient Business Services for Paris Regional Medical Facility, testified that every month he prepared and sent collection reports to his

[9] Federal law covering all Defendant's hospital facilities relevant to this Motion, include but are not limited to the following: 42 CFR §482.24 covers facilities performing Medicare and Medicaid services and subsection (b)(1) provides that "[m]edical records must be retained in their original or legally reproduced form for a period of at least five years." Such regulation, dealing with payment for services, includes the type of information at issue here. Moreover, the Health Insurance Portability and Accountability Act ("HIPAA") imposes additional regulation on covered entities with respect to data retention. *See* 64 Fed. Reg. 59994. HIPAA requires certain information and records, including the type at issue here, to be maintained of six (6) years.

It is abundantly clear that the Defendant failed to keep (or concealed) potentially hundreds or thousands of records (including PHI) since February 20, 2006.

superior and to ESSENT's management and saved these reports on his network drive in a Microsoft Excel format and affirming that he could reprint all of them in about one hour. *See* Exhibit "L", Deposition Tr. of Michael Miller.

Since ESSENT did not produce any responsive documents which pre-dated December 2008, MCS subpoenaed documents from non-parties, including those disclosed third party vendors/agencies, discussed *supra.* [10] This third party production only bolstered ESSENT's abusive discovery tactics.

For example, one of ESSENT's vendors, ParrishShaw produced documents which demonstrated that nearly **eighteen thousand (17,998)** accounts were transferred to them by ESSENT during the relevant period of the PSA, (February 2006 through June 2009) while ESSENT's only produced documents evidencing **seven thousand (7,000)** accounts. Contrary to ESSENT's 30(b)(6) respective testimony, ParrishShaw's representative confirmed that it provided ESSENT periodic monthly collection reports, including, but not limited to, a set of aggregate reports recapitulating all collection transactions sent to ESSENT on May 25, 2009, clearly evidencing that these collection reports not only existed and that ESSENT has either destroyed or concealed them from Plaintiff in the instant case. *See* Exhibit "M".

Further, another vendor, Preferred Medical Marketing Corporation, ("PMMC"), produced in excess of one thousand (1,000) responsive documents, including email correspondence, invoices, payments, collection reports, while ESSENT had produced only the Essent-PMMC contract.

Similarly, while ordered to produce copies of checks and invoices issued to these vendors/agencies, documents which were responsive to Plaintiff's Request for Production No. 21, (*See* Exhibit "C"), Essent, instead, produced misleading AP vendor summary reports summarizing the checks and invoices made available to MCS under the respective Court orders and MCS production request. For example, on or about March 19, 2010, ESSENT produced a fifteen (15) page AP Vendor summary report bates stamped ***ESSENT0101788 to ESSENT0101802***, depicting **$463,672.25** in payments over sixty five (65) checks to those

[10] The duty to preserve extended not only to documents in its possession, but also documents in its "control." *In re NTL Sec. Litig.*, 244 F.R.D. 179, 195 (S.D.N.Y. 2007) (party must preserve documents if it has "the right, authority, or practical ability to obtain [them] from a non-party; Fed. R. Civ. P. 34(a)(1) (party must preserve evidence within its "control").

enumerated eleven (11) vendors, discussed *supra*, for each and all of its Essent's hospital facilities from 2006 through 2009. *See* Exhibit "N".

Therefore, on March 23, 2010, after the undersigned counsel addressed ESSENT's facially deficient production during the deposition of ESSENT's CEO, Michael Browder, ESSENT suddenly produced successive versions of AP vendor reports, which reflected a dramatically increasing number of checks and payments thereto bearing the same letterhead of March 23, 2010.

Then, on March 24, 2010, ESSENT produced another AP Vendor summary report, bate stamped ***ESSENT0102538 to ESSENT0102607***, which now was eighty six (86) pages long, substantially larger than the reports produced on March 19, 2010 and representing **$2,301,160.15** in payments issued over three hundred and sixty five (365) checks.

Finally, on March 30, 2010, ESSENT provided Magistrate O'Sullivan its latest version of the AP Vendor report, representing now in excess of hundred and fifty (150) pages and **$2,960,425.92** of mostly omitted payments over close to a thousand (1,000) checks, falsely representing to the Court that this report was the same report previously provided to MCS in discovery on March 19, 2010. *See* Composite Exhibit "O".

As such, ESSENT purposefully attempted to conceal the majority of the invoices and payments pertaining to the first eleven (11) vendors, discussed *supra*. Upon notice of MCS's subpoena *duces tecum* issued to Regions Bank and facing the potential of contradictory discovery, ESSENT produced close to a thousand checks and invoices, while prior to the close of discovery, Essent initially only produced sixty five (65) of them.

Once confronted with the conflicting documents produced by certain non-parties, ESSENT ironically produced a substantial number of documents, albeit after April 1, 2010, the fact discovery cut-off date, through and including May 12, 2010.

This undisclosed material was not only responsive to MCS's initial discovery requests, but also ordered to be produced pursuant to multiple discovery Court's orders dated December 10, 2009, January 15, 2010, March 9, 2010. *See*, Exhibit "E"; *see also* Composite Exhibit "Q".

Following receipt of ESSENT's belated production, MCS unearthed another sixteen (16) accounts receivable vendors/agencies, which Essent did not disclose prior to the discovery cut-

off.[11] Further, Essent's belated production also demonstrates that ESSENT has not produced all of its ERA/835's (Electronic Remittance Advice) in compliance with previous discovery orders.

Knowledge of these additional vendors came at an exorbitant cost to MCS who invested hundreds of hours to uncover and prove Essent's abusive discovery tactics and ultimate concealment of said vendors. Even when compelled to produce said documents, Essent and its attorney's abusively and willfully denied the mere existence of these additional vendors. *See* Exhibit "R". As such, MCS posits that Defendant's recent disclosure shall in no way be considered truthful or complete.

However, it is now beyond dispute that ESSENT's discovery-period document production was woefully incomplete, given its post-discovery deadline production of an additional 13,000 bates labeled documents, a significant number of which had never been produced prior to April 1, 2010 Thus, ESSENT has irreversibly tainted the discovery process by withholding critical documents and information not only from Plaintiff but from this Court.

ESSENT's bad faith intent to withhold, purge, and conceal responsive key documents has severely prejudiced MCS's ability to prove its case and moreover to properly define its damages.[12]

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[11] On April 29, 2010, ESSENT admitted to the Court the existence of **another five (5) previously undisclosed AR vendors**: ***HealthCare Collection Services, Health Source Consultants, Gragil, Attorneys HealthCare Recovery and Rycan***. *See* Exhibit "P". Further, on May 12, 2010, once again, ESSENT admitted to the Court the existence of **an additional six (6) new undisclosed vendors**, albeit ESSENT denied their same existence until the day of the hearing (*See* Exhibit "Q") consisting of ***All States Medicaid, Wellington Group, Healthcare Partners Billing, MedSphere, Per-Se a/k/a McKesson and Medical Bureau of Economic to which in their production of May 2010 they added Audit Billing Center Inc.*** *See* Exhibit "P", copies of contracts with said additional vendors.

While finally during the May 13 through 21, 2010 depositions ordered by the Court, ESSENT's representatives acknowledged the existence of **another four (4) undisclosed vendors**, namely ***HBCC, Claim Assist, National Healthcare Review and SSI***.

[12] MCS is still investigating this issue, as it is MCS's belief that ESSENT has not produced all Electronic Remittance Advices (ERA or HIPAA 835) but rather a small fraction of ERA's representing less than thirty percent (30%) of the total claims unpaid, in whole or in part, during that period.

ARGUMENT

I. THIS COURT HAS THE INHERENT POWER TO STRIKE DEFENDANTS' ANSWER, ENTER A DEFAULT JUDGMENT AND AWARD ATTORNEY'S FEES

The United States Supreme Court has held that in addition to the sanctions provisions in the Federal Rules of Civil Procedure and federal statutes, federal courts possess the inherent power to sanction parties and attorneys who conduct litigation in bad faith or who perpetrate fraud on the court. *See Chambers v. NASCO, Inc.*, 501 U.S. 32, 43-51 (1991) (involving a suit for specific enforcement of a contract for the purchase of a television station and subsequent bad faith acts of the station owner). The Supreme Court has cautioned that a "court must, of course, exercise caution in invoking its inherent power, and it must comply with the mandates of due process, both in determining that the requisite bad faith exists and in assessing fees." *Id*. at 50.

However, "if in the informed discretion of the court, neither the statute nor the Rules are up to the task, the court may safely rely on its inherent power." *Id*. The imposition of sanctions pursuant to a court's inherent authority serves the dual purpose of "vindicating judicial authority without resort to the more drastic sanctions available for contempt of court and making the prevailing party whole for expenses caused by his opponent's obstinacy." *Id*. (internal edits omitted) (citing *Hutto v. Finney*, 437 U.S. 678, 689 (1978)). The Supreme Court has held that sanctions such as dismissal and attorney's fees are within a court's inherent power when a party's conduct evidences bad faith and an attempt to perpetrate a fraud on the court. *See id*. at 40-46; 51 (affirming an award of $996,644.65 in attorney's fees).

The Eleventh Circuit has explained that "[t]he key to unlocking a court's inherent power is a finding of bad faith." *Allapattah Servs., Inc. v. Exxon Corp.*, 372 F. Supp. 2d 1344, 1373 (S.D. Fla. 2005) (striking defendant's affirmative defenses pursuant to the court's inherent powers) (citing *Byrne v. Nezhat*, 261 F.3d 1075, 1106 (11th Cir. 2001) (sanctioning attorney who filed a frivolous lawsuit in bad faith for the purpose of extorting a settlement). One court in the Southern District of Florida has explained: "Bad faith exists when the court finds that a fraud has been practiced upon it, or 'that the very temple of justice has been defiled,' or where a party or attorney knowingly or recklessly raises a frivolous argument, delays or disrupts the litigation, or hampers the enforcement of a court order." *Allapattah*, 372 F. Supp. 2d at 1373 (citing *Chambers*, 501 U.S. at 46; *Malautea v. Suzuki Motor Co. Ltd.*, 987 F.2d 1536, 1545-46 (11th Cir. 1993) (affirming

district court's award of default judgment for violation of discovery orders award of attorney's fees and costs, and additional fines under the court's inherent powers).

"Spoliation" is defined as the intentional destruction, mutilation, alteration, or concealment of evidence. *St. Cyr v. Flying J. Inc.*, No. 3:06-cv-13-33TEM, 2007 WL 1716365, at 3 (M.D. Fla. June 12, 2007); *Optowave Co. v. Nikitin*, No. 6:05- v-1083-Orl-22DAB, 2006 WL 3231422, at 7 (M.D. Fla. Nov. 7, 2006). Generally spoliation is established when the party seeking sanctions proves that (1) the missing evidence existed at one time; (2) the alleged spoliator had a duty to preserve the evidence; and (3) the evidence was crucial to the movant being able to prove its prima facie case or defense. *St. Cyr*, 2007 WL 1716365, at 3. (internal citations omitted.)

II. THE DEFENDANT HAD A DUTY TO RETAIN THE DOCUMENTS

Federal law imposes on Defendant a duty to retain information and documents that are relevant to ***pending or potential*** litigation. *See, e.g., Silhan v. Allstate Ins. Co.,* 236 F. Supp. 2d 1303, 1313 (N.D. Fla. 2002) (recognizing a "duty to preserve [evidence in] anticipation of litigation"); *In re Seroquel Prods. Liab. Litig., No. 6:06-md-1769-Orl-22DAB*, 2007 U.S. Dist. LEXIS 61287, at 44 (M.D. Fla. Aug. 21, 2007) (sanctioning party for failing to meet its *"responsibility at the outset of the litigation"* to implement effective litigation hold to ensure *"(1) that all relevant information (or at least all sources of relevant information) is discovered, (2) that relevant information is retained on a continuing basis; and (3) that relevant non-privileged material is produced to the opposing party"*) (quoting *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422, 432 (S.D. N.Y. 2004)); *Telectron, Inc. v. Overhead Door Corp.*, 116 F.R.D. 107, 126-27 (S.D. Fla. 1987)("Sanctions may be imposed against a litigant who is on notice that documents and information in its possession are relevant to litigation, or potential litigation, or are reasonably calculated to lead to the discovery of admissible evidence, and destroys such documents and information."). *Brown v. Finlay Enterprises*, 2006 U.S. Dist. Ct. Motions 910696 (N.D. Fla. Nov. 19, 2007).

In the instant case, Defendant was on notice of litigation well prior to the instant lawsuit being filed on March 6, 2009. ESSENT has admitted to: 1) receiving multiple letters prior to the filing of the suit threatening litigation from both MCS's C.E.O., Ms. Atchison, as early as January 2008, and 2) a final demand letter from the undersigned counsel in January 2009.

However, ESSENT did not place a "litigation hold" on documents until June 4, 2009 (and even then, the retention email was only sent to a select few employees).*See* Exhibit "G", Tr. of WYLIE of March 24, 2010.

On June 5, 2009, one day later, Defendant's corporate representative, Larry Reaves, responded that "nearly all documents related to MCS have been purged". *See* Exhibit "I". Here, the Defendant admits to destroying nearly all relevant electronic documents, including attachments, pertaining to ESSENT, its five hospital facilities, and other competitor accounts receivable vendors/agencies.

Plaintiff anticipates that, in its response, Defendant will argue that "[a]s a part of an ongoing business practice, ESSENT, and its employees, Steven Wylie, regularly purged their emails pursuant to its corporate retention policy. Ironically, though, ESSENT did not even comply with its own retention policy, which in pertinent part, states: "Records that cannot be destroyed include records of matters **involving anticipated or ongoing litigation**, or records with a permanent retention."[13] (Emphasis added).

However, it should be noted that courts have repeatedly rejected claims that a party should not be subject to spoliation sanctions because it destroyed documents pursuant to a document retention/destruction policy. *See, e.g., Stevenson v. Union Pacific R.R. Co.,* 354 F.3d 739, 750 (8th Cir. 2004); *In re Prudential In. Co. of Am. Sales Practices, Litig.,* 169 F.R.D. 598, 615 (D.N.J. 1997) ("w]hen senior management fails to establish and distribute a comprehensive document retention policy, it cannot shield itself from responsibility because of [its underlying employees] actions"). *United Med. Supply Co. v. United States*, 77 Fed. Cl. 257, 274 (Fed.Cl. 2007).

In this case, it is abundantly clear Defendant did not take any steps to preserve any of the electronic evidence at issue; instead, the Defendant allowed (and continues to allow) the data to be purged from the system after thirty days (if the user deleted the email) or automatically would

[13] Records that cannot be destroyed include records of matters **involving anticipated or ongoing litigation**, or records with a permanent retention. In the event of a lawsuit or government investigation, document destruction (including emails) shall be suspended until the lawsuit or investigation has concluded. Failure to retain documents in the face of litigation may subject the Company to monetary sanctions and/or obstruction of justice charges. Once the litigation/investigation has concluded, the records may be destroyed in accordance with this Document Retention Policy. (Emphasis added).

be deleted once it was thirteen (13) months old.[14] Further, there is no reasonable business routine demanding that data be destroyed after said period of time, especially in light of developments in the technology field (including the ability to inexpensively maintain documents at an off-site server); and industry standards state the exact contrary. The sophistication of the Defendant (they are a large hospital system); and, the requirements that they maintain and protect all patient health information ("PHI"), comply with HIPPA requirements, etc.; that would simply serve no rational business purpose (other than to cover up any wrongdoing). However, even assuming the regular course of business was to destroy this data every thirteen (13) months, intervention to stop the destruction of data that could have easily been accomplished was not.

The duty to preserve the evidence obviously existed pursuant not only to the Defendant's VERY OWN RECORD RETENTION POLICY, but also, if the documents contained PHI or records supporting billing information, it had a duty to preserve said information pursuant to both Federal and State laws for many years longer than from 2006 through the present.

III. THE EVIDENCE IS CRUCIAL TO PLAINTIFF'S CASE AND DAMAGE CALCULATIONS

The evidence is indeed crucial as it goes towards the proof of the material breaches[15] of the PSA as well as to the calculation of Plaintiff's damages[16] and, perhaps more importantly, it sheds

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[14] ***DEFINITIONS***

A record is recorded information, regardless of medium or characteristic that can be retrieved at any time. It includes all original documents, papers, letters, x-rays, cards, books, maps, photographs, blueprints, sound or video recordings, microfilm, magnetic tape, electronic media, and other information recording media, regardless of physical form or characteristic, that are generated and/or received in connection with transacting Company business.

> • Company business records include, but are not limited to, letterhead correspondence, legal opinions, real estate documents, directives and policies, official meeting minutes, personnel records, benefit programs, purchasing requisitions and invoices, **accounts payable and receivable documents, tax documents, billing & reimbursement documents, completed and signed forms, contracts, insurance documents, general ledgers, audit reports, and financial reports.** (Emphasis added).

[15] ESSENT's concealment of the other vendors servicing its accounts receivables for unpaid third party payor insurance claims from the very inception of the PSA evince ESSENT's bad faith intent throughout the relationship.

[16] Based on data consolidation of reports filed in 2006, 2007, 2008 and 2009 with CMS, different local authorities as well as based on information and documents provided to MCS within

light on the volume of accounts that were sent to other collection agencies in violation of the underlying exclusivity agreement or PSA (and it would provide us with the names and contracts between all collection agencies and ESSENT during the relevant timeframe which have, to date, been concealed or only produced if necessary to a response to a motion – and certainly said documents have not provided when the Court orders ESSENT to produce the same).

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the course of the relationship, and sporadically obtained in discovery, ESSENT invoiced an in excess of eight hundred and forty million dollars ($840,000.000) a year during the contracted period and received an average of three hundred and twenty million dollars ($320,000,000) a year in net revenue or during the three years of the PSA ESSENT invoiced about two billion five hundred million dollars ($2,500,000,000) million and collected about nine hundred and thirty eight million dollars ($938,000,000). For that same period, ESSENT invoiced about one billion one hundred and eighty four million dollars ($1,184,000,000) to third party payors. Based on information provided to MCS by ESSENT specifically for Paris Regional Medical Center (one of the two facilities fully implemented), ESSENT denial rate of such claims was approximately fourteen point four percent (14.4%) - within the industry standard range and with a 51.3% contractual adjustment rate. Over the scope of the PSA, MCS should have received from ESSENT about eighty three million dollars ($83,000,000) in net denied claim.

Based on MCS's historical recovery rate of ninety percent (90%) of the net denied claims transferred by ESSENT during the uncontested sixteen (16) months, MCS would have collected about seventy four million and seven hundred thousand dollars ($74,700,000) for ESSENT and would have been entitled to about eighteen million and four hundred thousand dollars ($18,400,000) in fees. Computing MCS's project profitability of about sixty percent (60%), MCS loss of profits on the ESSENT PSA should have been about ten million and nine hundred thousand dollars ($10,900,000) assuming the negotiated contingency rates or about four million and eight hundred thousand dollars ($4,800,000) in profits accounting only the active period of sixteen months of the PSA.

MCS recent discovery of its expected concealment by ESSENT of a substantial number of competitive vendors hired in breach of the PSA as well as of a substantial portion of its ERAs (also called HIPAA 835 Electronic Remittance Advice) to be worked by those same vendors, in lieu of MCS as set in the PSA raises serious issues as to ESSENT's continuous bad faith all along the relationship and spoliation not only during the course of this lawsuit, but more importantly during the implementation of the PSA.

Upon such finding, MCS believes that ESSENT's denial rate would have been in the thirty percent (30%) range which would result in substantially higher damages representing about twenty two million eight hundred and sixty thousand dollars ($22,860,000) on the full scope of the PSA or alternatively about ten million and ninety thousand dollars ($10,090,000 accounting only the active period of sixteen months of the PSA. *See* MCS Supplemental Discovery on Damages attached hereto as Exhibit "S".

Again, the number of accounts transferred to other collection agencies may never be known to anyone but ESSENT and/or its attorneys, as the destruction and concealment of this crucial evidence serves to cut-off or, at the very least, obstructs any meaningful discovery in this case.

IV. BAD FAITH MUST BE PRESUMED FROM DEFENDANT'S CONDUCT

With regard to bad faith, it can be shown by direct evidence and/or by circumstantial evidence where certain factors converge. More specifically, where no direct evidence of bad intent exists, in this Circuit, bad faith may be found on circumstantial evidence where all of the following hallmarks are present: (1) evidence once existed that could fairly be supposed to have been material to the proof or defense of a claim at issue in the case; (2) the spoliating party engaged in an affirmative act causing the evidence to be lost; (3) the spoliating party did so while it knew or should have known of its duty to preserve the evidence; and (4) the affirmative act causing the loss cannot be credibly explained as not involving bad faith by the reason proffered by the spoliator. *Calixto* at 44-45.

In the instant case, it can be affirmatively shown vis-à-vis circumstantial evidence that each of the "hallmarks" as delineated by the *Calixto* Court are present here: 1) the materiality of the evidence is obvious in light of the fact that it goes to the crux of the complaint (breach of the exclusivity provision) and proof that it once existed has been demonstrated since other collection agencies have provided some documents that should have been provided by ESSENT (but have not been provided since the documents have been destroyed, concealed or omitted) and from Defendant's own admissions that it destroyed evidence; 2) the Defendant undoubtedly engaged in an affirmative act causing the evidence to be lost when its own 30(b)(6) representative admitted to destroying evidence (*See* Exhibit "H", Deposition Tr. of WYLIE at 199-202; *see also* Exhibit "J", Deposition Tr. of Larry Reaves, March 26, 2010); 3) the Defendant here in fact knowingly admitted to its own duty to preserve the evidence pursuant to its corporate Records Retention Policy but failed to do so; and 4) Defendant's affirmative act in destroying the documents cannot be credibly explained by any reason whatsoever, but for the bad faith of the Defendant in destroying relevant documents in an effort to conceal its own clear violations of the underlying PSA and, moreover, Defendant breached its own Records Retention Policy, federal HIPPA regulations, which create a presumption that the evidence was unfavorable to ESSENT. *See*

Latimore v. Citibank F.S.B., 151 F.3d 712, 716 (7th Cir. Ill. 1998)(holding *"[t]he violation of a record-retention regulation creates a presumption that the missing record contained evidence adverse to the violator."*); *see also Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1418-19 (10th Cir. 1987); *Favors v. Fisher*, 13 F.3d 1235, 1239 (8th Cir. 1994).

Even though bad faith is present here, Courts have held that a finding of bad faith is not required to issue spoliation sanctions. *United Medical Supply Co., Inc. v. U.S.*, 77 Fed. Cl. 257, 268 (Fed. Cl., 2007) (*"Guided by logic and considerable and growing precedent, the court concludes that an injured party need not demonstrate bad faith in order for the court to impose, under its inherent authority, spoliation sanctions."*).

In the instant case, however, the fact that Defendant here: 1) concealed evidence; 2) lied under oath; and, 3) destroyed responsive documents and, including e-mail documents and corresponding attachments, amount to more than negligence, or excusable neglect but rather a willful and abusive disregard for the discovery process and the instant litigation. Since the documents are now destroyed, the Court must make a finding of severe sanctions as a result. *See Turner v. Hudson Transit Lines, Inc*., 142 F.R.D. 68, 74-78 (S.D.N.Y.1991) (finding, *"it makes little difference to the party victimized by the destruction of evidence whether that act was done willfully or negligently."*). Indeed, a finding of bad faith only impacts the severity of the sanctions (e.g. whether a dismissal or default judgment should be entered) and not whether a sanction should be issued. *See e.g. Flury v. Daimler Chrysler Corp.* 427 F.3d 939, 944 (11th Cir.2005); *see also Aldrich v. Roche Biomedical Laboratories*, 737 So.2d 1124, 1125 (Fla. 5th DCA 1999) (the appropriate sanction when a party fails to preserve evidence in its custody depends on the willfulness or bad faith of the party responsible), rev. denied, 751 So.2d 1250 (Fla.2000). As noted by the court in *St. Cyr v. Flying J Inc.*, 2007 WL 1716365, (M.D. Fla., 2007), the willfulness or bad faith of the party responsible for the loss is a factor to be considered when determining the seriousness of the sanctions. Other factors include the degree of prejudice sustained by the opposing party and what is required to cure the prejudice. *Id.*

Here, bad faith is present. The Defendant's actions in proffering perjurious testimony, concealing documents, and destroying documents and/or information can only be seen as bad faith, especially in light of the fact that the attorneys for the Defendant have been involved in the brazen attempts to conceal these many other collection agencies from both the Plaintiff and the Court in an effort to mitigate their liability in the underlying case. See Exhibit "R".

V. DEFENDANT'S BAD FAITH ACTS WARRANT THE ULTIMATE SANCTIONS

Defendant lied under oath, destroyed or purged supportive and historical correspondence and buried or concealed key documents. Much like the sanctioned parties in the cases cited above, Defendant attempted to enhance its case through perjurious testimony and the burying of key documents. Defendant's scheme was calculated to serve two purposes: to improperly influence and defraud this Court regarding the key issues in the case - whether Defendants breached the Exclusivity Provision by contracting other third party vendors and/or agencies to service ESSENT's accounts receivables and to deprive MCS from determining the total amount of its damages.

Only after facing multiple Court orders and contradictory nonparty documents did Defendant concede to breaching the Exclusive Clause of the PSA. Prior to that, Defendant did everything they could to conceal from MCS the truth. Toward that end, WYLIE lied repeatedly under oath beginning with ESSENT's verified responses served on October 21, 2009, discussed *supra*, in his declaration filed with this Court on January 8, 2010, and during his deposition, testifying that Defendant never engaged any other third party vendor.

However, the documents produced by non-parties - consisting of emails to and from ESSENT as well as reports and contracts - not only proved that WYLIE lied under oath, said documents also proved that Defendant did not act in good faith in the instant matter and consistently withheld, concealed and destroyed responsive key documents from MCS and this Court.

In addition to spoliation, there can be no question but that ESSENT failed to comply with its discovery obligations given that ESSENT failed to produce directly relevant, responsive evidence until well after the close of fact discovery. As discussed above, after the fact discovery cut-off date of April 1, 2010, ESSENT produced in excess of thirteen thousand (13,000) documents that go to the heart of MCS's claims.

"The effect of losing potentially relevant e-mails is obvious, but the effect of late production cannot be underestimated either." *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422, 436 (S.D.N.Y. 2004) (emphasis added).[17]

CONCLUSION

"Those who lie, evade and fail to tell the whole truth obviously enjoy an advantage over honest litigants." Chemtall, 992 F. Supp. at 1409. Taken alone, Defendants' failure to produce key documents warrants sanctions under the inherent powers doctrine. Taken together with WYLIE's perjurious testimony regarding the pivotal issue in this case, Defendants' bad faith actions warrant the "ultimate" sanctions.

The Defendant's failure to comply with the discovery process, multiple compel orders from this court until weeks and months after the discovery cutoff set by this Court has severely prejudiced Plaintiff as both critical discovery deadlines have expired and as the trial is set for September 27, 2010.

The purpose of the discovery process has been thwarted by Defendant's wanton actions, perjurious statements, concealment, omission and destruction of evidence, depriving Plaintiff the ability to prove its claims and evaluating its damages, Defendant's breaches as well as to evaluate and eventually oppose ESSENT expert opinion among others.

Thus, for the foregoing reasons, Plaintiff, MANAGED CARE SOLUTIONS, respectfully requests that this Court enter a Default Judgment in MCS's favor against Defendant, ESSENT, and award MCS its contractual attorney's fees and costs it has incurred in this case, or impose any other sanction it deems proper.

In the event the Court finds that entry of default judgment is not warranted, Plaintiff asks in the alternative that the Court impose an adverse inference as follows:

That, for purposes of summary judgment and trial, the finder of fact be instructed to draw an adverse inference directing that the destroyed evidence would have supported Plaintiff's claim that Defendant materially breached the exclusivity clause of the parties PSA, among other provisions. *See, Optowave Co. v. Nikitin*, No. 6:05-cv-1083-Orl-22DAB, 2006 U.S. Dist. LEXIS

[17] It is important to note that while *Zubulake* was decided in the Southern District of New York, it is consistently cited by this Court in dealing with the issues of spoliation and sanctions. *See, e.g., St. Cyr*, 2007 WL 1716365, at 4; *Optowave*, 2006 WL 3231422, at 11-12.

81345, at 38-39 (M.D. Fla. Nov. 7, 2006) (an appropriate sanction for spoliation was "an adverse inference instruction to the jury directing that the destroyed evidence would have supported the Plaintiff's case"); *In re Mobro Marine, Inc*., No. 3:02-cv-471-J-20-TEM, 2004 U.S. Dist. LEXIS 27561, at 26 (M.D. Fla. December 20, 2004) (spoliation of evidence warranted adverse inference against defendant with respect to question whether the destroyed evidence would have demonstrated defendant's negligence); *Four Seasons Hotels & Resorts B.V. v. Consorcio Barr*, S.A., 267 F. Supp. 2d 1268, 1324 (S.D. Fla. 2003) (concluding that defendant violated computer protection statute in part because of an adverse inference imposed by court against defendant in response to defendant's spoliation of evidence).

Finally, in addition to the sanctions requested above, Plaintiff asks that the Court award Plaintiff all costs incurred as a result of Defendant's spoliation of evidence, including all reasonable attorney's fees incurred in filing this Motion and all reasonable costs she has and will incur in seeking to obtain the requested evidence from alternative sources. *See Telectron*, 116 F.R.D. at 135 (requiring party that destroyed documents in violation of Rule 37 to pay "all reasonable attorneys' fees and costs incurred by [party] in ferreting out the nature, extent and source of the destruction which occurred").

REQUEST FOR HEARING

Pursuant to S.D. Fla. L.R. 7.1.B, MCS requests a hearing. Due process requires that the party against whom sanctions are sought "must be given an opportunity to respond, orally or in writing, to the invocation of such sanctions and to justify his actions." *In re Mroz*, 65 F.3d 1567, 1575-76 (11th Cir. 1995).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing was filed using with the Court CM/ECF system and served to all persons listed on the attached service list by using the CM/ECF system and on this _10th_ day of June, 2010.

Respectfully Submitted,

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