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.

_____/

PLAINTIFF'S REPLY IN SUPPORT OF ITS MOTION FOR SANCTIONS

Plaintiff, Managed Care Solutions, Inc. ("MCS"), by and through undersigned counsel, replies to Defendant's Response in Opposition to Plaintiff's Motion for Sanctions, Including the Entry of a Default Judgment and an Award of Attorney's Fees [D.E. 174] (hereinafter referred to as "Response"), and states:

INTRODUCTION

Defendant's Response is riddled with disingenuous, conclusory and self-serving statements. In its Response, Essent improperly contends that there are only two issues to be resolved by this Court (1) payment of "associated software license fees" and (2) Essent's failure to assign to MCS all Paris Regional Accounts during February 20, 2006 through March 29, 2007. *See* Response at p.2. Contrary, MCS's amended complaint seeks damages against Essent's for its multiple and material breaches of the parties Professional Service Agreement ("PSA"). [D.E. 28,¶¶ 11(a)-(f), 15(a)-(g), 28(a)-(c)]. More importantly, Essent admits that it even prior to improperly terminating the parties' PSA pursuant to Section 9.2, "Essent did not provide MCS with 'all accounts receivable for its five (5) hospital facilities." [D.E. 34,¶17].

Additionally, in its Response, Defendant knowingly misrepresents to this Honorable Court that "[i]n January 2009, and in the succeeding months, ***the only dispute*** between the parties, as far as Essent was aware, involved the amount of software license fees . . . [that] Essent had no reason to believe that MCS had any other complaint, including a complaint that Essent had violated the PSA by using "competing vendors" or withholding accounts . . ..". *See* Defendant's Response at p.8. However, on February 11, 2009, prior to suit being filed, Defendant was clearly on notice of MCS's specific claims for Defendant's multiple breaches of contract, which included Essent's breach of the exclusivity clause. *See* Exhibit "A"; *See also* [D.E. 152, Ex. 11]. As such, counsel for the Defendant continues to mislead the Court regarding key facts and information. Quite frankly, the undersigned is baffled that fellow officers of the Court have the

impudence to continually conduct themselves in this type of litigation conduct (and to sign and file a document with the Court which clearly is riddled with blatantly false representations).

While there has been seven (7) discovery hearings to date, Defendant still refuses to comply with these Orders[1] and boldly attempts in its Response to minimize the legal effect or obligations that the Orders have on the Defendant. In fact, as early as December 10, 2010, this Court ordered the Defendant to provide discovery related to each and every accounts receivable vendor to the Plaintiff. *See* [D.E. 45, 110]. Again, it is undisputed that the Defendant failed to produce 831,121 pages of responsive discovery previously omitted until well after the discovery cut-off date in this case.[2] *See, e.g.,* Exhibits "A", "B" and "C". Moreover, Defendant states in footnote 9 of its Response that it produced much of these documents in response solely to the Court's order of April 29, 2010. However, both the December 10, 2009 and March 9, 2010 orders compel Essent to produce all accounts receivable/collections vendors providing those services to Essent during the relevant forty (40) month period. *See* [D.E. 45, 110]. Further, Mr. Steven Wylie has lied under oath on more than one occasion; specifically, his multiple declarations and verified responses to interrogatories regarding the names of other vendors working accounts receivable for Essent were designed to intentionally mislead both the undersigned and this Court regarding the existence of at least sixteen additional vendors and which he admitted failed to disclose to the Plaintiff. *See* Exhibit "D". Moreover, clear evidence of Mr. Wylie's efforts to commit fraud upon this is never more evident than when he states in his verified Responses to Interrogatories to see documents produced March 19, 2010 when he signed said Response, under oath, on March 11, 2010. In this Reply, Plaintiff herein addresses Defendant's Specific Allegations in its Response, in turn, as follows:

October 21, 2009, Document Production. Defendant admits it did not produce a single document on October 21, 2010. Defendant has still not, as of the date of this filing, provided Plaintiff with its initial disclosures. Defendant argues it was involved in "protracted and ongoing discussions at that date about MCS's document request" and that it produced documents on a rolling basis "beginning as soon as the

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[1] Plaintiff has noticed another informal discovery conference on July 13, 2010, requesting once again that Magistrate Judge O'Sullivan enforce the Court's prior orders. See [D.E. 177].

[2] Even though Defendant continually argues in its Response that any documents provided after the discovery were irrelevant and that Plaintiff has not suffered any prejudice, it is clear from a review of the admissions contained within the transcripts of the depositions of Defendant's 30(b)6) representatives that numerous accounts receivable vendors were providing the same services as the Plaintiff and that contracts, reports, emails and other discoverable information related to these vendors was not provided until after the discovery cut-off date – it is clear that evidence of competing vendors is not only relevant, but concealing the existence of the same has been highly prejudicial to the Plaintiff in this case and grounds for this Court to grant Plaintiff's Motion for Sanctions, Including Default and Attorney's Fees. *See, e.g.,* Deposition Transcript of Steven Wylie of May 25, 2010, pp. 39-50, attached hereto as Exhibit "B".

available technology would permit". However, this statement is simply untrue. *See* Composite Exhibit "E"; see also Exhibit "F". Further, while Defendant argues that it produced numerous pages of documents on November 11, 2009 and January 12, 2010, many if not all were unreadable, useable, and encrypted. *See* Exhibit "G".

Statements Denying the Existence of Competing Vendors. Defendant argues "the instant Motion is an improper attempt to raise irrelevant complaints in order to compensate for a lack of substantive merit of the case and for Plaintiff's failure to prove otherwise", regarding other vendors performing services that were to be exclusively provided by MCS. However, Defendant's corporate representatives testified otherwise. *See* Exhibit "B"; *See also* Exhibit "C" and Exhibit "H". [3] Defendant's arguments that Essent had never engaged these other vendors in violation of the PSA, and that the same "is contrary to extensive and uncontroverted record evidence" is wholly rebutted by a review of the relevant corporate representatives deposition transcripts. *See* Moreover, had the testimony during the depositions of Essent's corporate representatives been consistent with that of the recent testimony provided in May of 2010, MCS would have had the opportunity to depose Essent's experts regarding the same (however, since the testimony was otherwise, until just recently, MCS was severely prejudiced in many ways, including its inability to question Defendant's experts regarding the same).

Further, and perhaps most importantly, Michael Miller testified that at all material times ("Since day one"), Essent's in house billing department collected on underpaid, unpaid and/or denied claims by third party payors, in clear breach of the parties PSA Section 7 and 8. *See* Exhibit "I". This is in express breach of the underlying PSA and evidences bad faith on the part of the Defendant as it failed to disclose this glaring breach to Plaintiff at any time prior to the May 18, 2010 deposition and failed to provide one scintilla of documentary evidence relating to the same (no internal reports, emails, etc.) when Mr. Miller admitted that there is an entire in-house division employing anywhere between 14-17 staff members responsible for appealing unpaid claims to insurance companies on behalf of Essent during the entirety of the relevant period of time!

Production of the Essent-NPAS Agreement. Despite Court Orders on December 10, 2009 and March 9, 2010, compelling Essent to produce any and all documents responsive to any and all third party

[3] While AHC is only one example, a review of the relevant deposition transcripts of Michael Miller, Steven Wylie, Larry Reaves and Michael Maher indicate that Essent had engaged other accounts receivable vendors, including ParrishShaw, NPAS, Healthcare Consultants, Gragil & Associates, Inc., Healthcare Partners Billing, Inc., to name a few, during the relevant period of time. Again, it is undisputed that the vast majority, if not all, of the discovery related to these agencies was not provided until after the discovery deadline.

accounts receivable vendors, Defendant urges this Court that it was Plaintiff's obligation to obtain the Essent/NPAS agreement. Rule 34(a) of the Federal Rules of Civil Procedure requires the production of requested documents "which are in the possession, custody or control of the party upon whom the request is served." Legal ownership or actual physical possession is not required; documents are considered to be under a party's "control" when that party has the right, authority or ability to obtain those documents upon demand. *See, e.g.,* Searock v. Stripling, 736 F.2d 650, 653 (11th Cir. 1984). Essent was obligated to either produce, object or move for a protective order regarding this contract, but it failed to do so and finally produced this relevant contract in May 12, 2010, nearly six (6) weeks after the discovery cut-off.

Production by ParrishShaw. Again, Defendant is playing a game of semantics as to what services were to be performed by MCS on its behalf. It is clear that "denials", as defined in the underlying PSA would necessarily include underpayments (all claims "denied in whole or in part") and not simply "denial management" as it's known in the medical community. In fact, had Essent wanted MCS to only perform "denial management services" it could have easily said so during the formation of the contract. Since it did not, and the contract is clear on its face, Defendant was obligated to provide all accounts during the relevant timeframe to MCS for any denied claim, including those which were only partially paid. While ParrishShaw may not be in the business of "denial management", that argument assumes that the PSA was only for those services – when it in fact was not. In fact, "denial management" is defined in the PSA as the services listed in the same, which is a comprehensive list (and includes "denied" claims, as defined in the PSA), in 3.1.1 through 3.1.14. Moreover, the multiple Court orders and discovery requests were not limited to only those companies providing "denial management" and Defendant was and is under a duty to provide all documents for each facility for the relevant timeframe as to each and every accounts receivable and/or collection agency it employed or contracted with – the failure to do so when it knew of the existence of said duty is by definition spoliation.

Production by PMMC. Defendant alleges that it produced "all responsive documents in its possession relating to PMMC" on or before March 1, 2010. First, Defendant made representations earlier in this litigation that it need not produce any documents relating to PMMC because they were involved in "marketing" for Essent. *See* [D.E. 53]. However, MCS convinced Magistrate Judge O'Sullivan that the undersigned had information that led Plaintiff to believe otherwise and that PMMC documentation must be provided. Magistrate Judge O'Sullivan agreed with the Plaintiff and ordered the production of the underlying contract (and all other responsive discovery relating thereto). Suffice it to say that PMMC was not involved with marketing whatsoever. Instead, the contract revealed, *inter alia,* that Phase One would include "gathering data and underpayment identification" and Phase Two was titled "collecting on underpaid

accounts". *See* Essent-PMMC Contract for Accounts Receivable/Collection Services filed previously. This was precisely what MCS was engaged to do exclusively.

Production of Check, Invoices, and Accounts Payable Vendor Summary Reports. Defendant alleges that it "fully complied with the Court's order and produced all remaining responsive documents . . . for the previously identified eleven vendors on March 19, 2010", which, interestingly, was only days before the discovery cut-off. For the sake of brevity, Plaintiff fully incorporates its discussion in its Motion for Sanctions as to this issue.

The Scope of any Potential Civil Action: $135,312.50 in "Associated Software License Fees Paid to a Third Party."

Essent argues that it properly terminated the PSA "by letter dated September 29, 2006, pursuant to sec. 9.2 of the PSA". However, its alleged "termination" was not proper as it was required to, *inter alia*, provide a lump sum payment of $50,000 (it is undisputed that Essent did not do so) and pay associated software license fees (which Essent still has not made a payment of even $1 towards, to this very day). As such, any "termination" was improper and in violation of the PSA itself. Consequently, Essent is liable for all damages including lost profits and, of course, pre-"termination" breaches, including, but not limited to: breach of the exclusivity provision, breach of the termination clause, etc. Essent argues that the only dispute between the parties revolved around the software licensing fees. This is simply incorrect. *See supra.* Moreover, Defendant argues that the maximum MCS can claim due and owing is $135,312.50 since MCS had made an offer to resolve the underlying issue of the software licensing fees at a reduced rate, by compromise, and only in the spirit of a swift and amicable settlement. However, said confidential settlement communication is inadmissible pursuant to Rule 408 of the Federal Rules of Evidence (as it was a confidential settlement communication) and therefore cannot be considered for the purposes of either this motion or Defendant's Motion for Summary Judgment (or in this case or any other legal proceeding).

Essent's Document Retention Policy and Procedure. Defendant alleges that there is no evidence to support Plaintiff's argument that the passage of time from the filing of the complaint, March 6, 2009, until a litigation hold was "placed" or requested by Essent to a select few of its employees on June 4, 2009 that any prejudice was suffered or that any critical evidence was destroyed. In fact, while it is difficult to prove that documents that have already been destroyed were critical to the underlying case when it is impossible to determine what exactly has been destroyed (since it is impossible to know the content of documents that are no longer in existence), the underlying Motion cited to persuasive case law on this issue. *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). Moreover, the underlying motion cited to a plethora of case law which held that a litigation hold must be placed as soon as litigation is anticipated; here, litigation was anticipated as early as January 2008, when Ms. Atchison sent a demand letter to Steven Wylie threatening litigation if he failed to pay the amounts demanded. *See* [D.E. 152, Ex. 11].

Additionally, Essent's 30(b)(6) representative, Larry Reaves and Steven Wylie testified that they provided documents (including documents that were not provided until after the discovery cut-off). *See* Exhibits "C" and "D". Moreover, Michael Miller, Director of Patient Financial Services at Paris Regional Hospital, testified during deposition that he was not even asked by anyone at Essent to search for and produce emails between himself and any accounts receivable vendor until 2010. *See* Exhibit "I". Additionally, during said deposition, Mr. Miller states that he was asked for the first time to find emails and other relevant documentation related to AHC, Healthsource Consultants, Medsphere and McKesson just "two or three weeks" prior to said deposition. *See,* Exhibit "I". As such, Mr. Miller testimony confirmed MCS's suspicions – Essent was either purposefully concealing documents for the purpose of avoiding compliance with valid discovery requests and multiple Court orders compelling the same, or Defendant was, at best, negligent in its "attempts" to comply with the same. *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.").

Essent's Document Production. Defendant attempts to argue that it continually produced responsive documents and did so prior to the discovery cut-off and in compliance with all Court orders. Plaintiff respectfully disagrees. Defendant produced from March 19, 2010 through the discovery cut-off of April 1, 2010 about 276,056 pages of responsive documents to both Plaintiff's September 21, 2009 discovery requests and discovery Orders issued by Magistrate Judge O'Sullivan and by doing so, it caused great prejudice to the Plaintiff, and specifically it effectively hindered Plaintiff's ability to conduct proper and/or meaningful discovery in this case.

Since the discovery cutoff date of April 1, 2010, and further developing the need for spoliation sanctions due to the concealment of a substantial amount of discovery, including undisclosed competing vendors, and only under further Court orders compelling said production, Defendant has produced about 831,121 new pages of responsive discovery previously omitted and/or concealed in direct contravention of the Court's prior orders and rulings as duly noted by Magistrate Judge O'Sullivan in the last hearings. Specifically, Essent has produced since April 1, 2010 13,479 new bate stamped documents, about 700 documents bearing duplicated bate stamps (*although distinctively different documents*) and a plethora of documents bearing no bate stamp whatsoever, all totaling in excess of 14,500 documents representing

about 831,121pages (and about 62% of the total discovery produced to date) although directly responsive to the initial September 2009 Plaintiff's Request for Production and subsequent orders from Magistrate Judge O'Sullivan. "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). Although Defendant has admittedly produced further responsive documents since after the discovery cut-off, there remain substantial differences between the parties relative to Defendant's obligations and the Plaintiff has been forced to set yet another discovery hearing in front of Judge O'Sullivan, which is currently scheduled for July 13, 2010.[4]

Discovery Relating to Third Party Vendors. Defendant reiterates its protracted argument that "no other company provided Essent with denial management service such as MCS provided to Essent" for the relevant timeframe. This is at odds with the record evidence properly before this Court, including testimony elicited from Essent's corporate representatives. *See* Statements Denying the Existence of Competing Vendors, discussed *supra.* Additionally, Essent's 30(b)(6) representatives, Larry Reaves and Steven Wylie testified that they provided documents (including documents that were not provided until after the discovery cut-off) to its attorneys prior to when its attorneys actually produced them to the Plaintiff. *See* Exhibits "B", "C" and "I". Moreover, Michael Miller, Director of Patient Financial Services at Paris Regional Hospital, testified during deposition that he was not even asked by anyone at Essent to search for and produce emails between himself and any accounts receivable vendor until 2010. *See,* Exhibit "I". Additionally, during Mr. Millers May 18, 2010 deposition, he states that he was asked for the first time to find emails and other relevant documentation related to AHC, Healthsource Consultants, Medsphere and McKesson just "two or three weeks" prior to said deposition. *See,* Exhibit "I". As such, Mr. Miller testimony confirmed MCS's suspicions – Essent was either purposefully concealing documents for the purpose of avoiding compliance with valid discovery requests and multiple Court orders compelling the same, or Defendant was, at best, negligent in its "attempts" to comply with the same (as it failed to even ask a director of financial services for its emails until 2010, and for documentation related to specific accounts receivable vendors until just weeks

[4] Plaintiff now has evidence in their possession of additional concealed 835's. Magistrate Judge O'Sullivan had warned Essent of the same on multiple occasions during oral arguments and though confronted with arguments from Plaintiff that it knew many 835's were missing and/or concealed, Defendant continually maintained its position, stating on the record in open Court on more than one occasion, that all responsive 835's have been produce. Magistrate Judge O'Sullivan had sternly warned that if they were concealing 835's, they would be subjected to harsh sanctions from him and quite possibly have their pleadings stricken and/or default entered against them (speculating as to how Judge Seitz would react to said information). See Hearing Transcripts of March 30, 2010 and April 29, 2010; see also [D.E. 178, Ex. A].

before his May 12, 2010 deposition, knowing that its own document retention policy would cause many of his email communications to be purged). *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.") *see also, 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).

A. DEFENDANT FAILED TO PRESERVE EVIDENCE IT WAS LEGALLY REQUIRED TO PRESERVE

Defendant's contention that "it is not the law in the Eleventh Circuit that "anticipated" litigation litigation creates a duty to preserve evidence" is simply not true. The Eleventh Circuit in *Flury v. Daimler Chrysler Corp.,* 427 F.3d 939 (11th Cir. Ga. 2005) cited the definition of spoliation as a matter of federal law as "The term "spoliation" refers to the failure to preserve evidence that is necessary to contemplated or pending litigation." *Id.* at 944 fn. 9. *Approved by Frede v. J.C. Penney Corp.*, 2007 U.S. Dist. LEXIS 56593 (M.D. Fla. Aug. 3, 2007) (adopting said definition of spoliation).

To the extent that Defendant claims a substantive difference between the terms "anticipated" and "contemplated," such argument could only be viewed as farcical.

Defendant is moreover off point in its citation to several cases analyzing the issue of spoliation from a state-law perspective. *See* Response at 12 (*citing* Silhan v. Allstate Ins. Co., 236 F. Supp. 2 1303, 1313 (N.D. Fla. 2002) (no duty to preserve exists in Florida law)). The Eleventh Circuit has weighed in on the issue in *Flury* and held that in the Eleventh Circuit, the issue of spoliation in diversity cases is governed by Federal law and not that of the states.[5] *See also Martinez v. Brink's, Inc.,* 171 Fed. Appx. 263, 269 (11th Cir. 2006) (acknowledging that federal law, not state law, governs the imposition of sanctions, such as an adverse inference instruction).

The respondent to a motion for sanctions based on spoliation in the case of St. Cyr v. Flying J Inc., 2007 U.S. Dist. LEXIS 42502 (M.D. Fla. June 12, 2007), made the identical contention as Defendant; that "they were not under a "duty to preserve evidence just in anticipation of possible litigation," relying on Florida

[5] "We agree with the first view, that federal law governs the imposition of spoliation sanctions. Furthermore, in accordance with the fourth and fifth circuits, we conclude that federal law applies because spoliation sanctions constitute an evidentiary matter. This view is consistent with the law of our circuit regarding the rules of evidence, where we have held that, "in diversity cases, the Federal Rules of Evidence govern the admissibility of evidence in the federal courts." Thus, we conclude that federal law governs the imposition of sanctions for failure to preserve evidence in a diversity suit." Id. at 944 (internal citations omitted).

law. The court gave the appropriately little credence to the argument, stating "Notwithstanding this contention, federal law, which controls, makes clear that a litigant "'is under a duty to preserve what it knows, or reasonably should know, is relevant [to litigation or potential litigation] . . . .'" Thus, the duty to preserve evidence may arise prior to commencement of litigation. Indeed, the Court finds that the St. Cyrs contemplated litigation and that it was reasonably foreseeable that the van would be relevant to the litigation. Thus, the St. Cyrs were under a duty to preserve the van." *Id.* at 8-9.

Defendant moves on from that evidently untenable position to state that notwithstanding same, it was in compliance with preservation requirements as it came to known that such evidence "may be relevant to anticipated litigation." *See* Response at 12 (*citing Hagopian v. Publix Supermarkets, Inc.*, 788 So. 2d 1088 (Fla. 4th DCA 2001).[6]

Whether a far statement of the law or not, Defendant's application of the facts of this cause to such law is sorely misleading. Defendant claims that prior to the "fall of 2009 or spring of 2010" the only dispute discussed between the Parties was with respect to MCS' claim for software fees, and that "the nature and extend of the[] new allegations were not specified in the *Complaint* (or the *Amended Complaint*")…and finally that "[o]nly after MCS served written discovery, made oral representations to the Court over the course of a number of months, and provided deposition testimony was Essent on notice of the true nature and scope of MCS's allegations." *See* Response at 12.

Contrary to such bald misrepresentations is the fact that at the absolute latest Defendant was fully aware of MCS' claim of breach of exclusivity as of February 11, 2009. By written correspondence to the undersigned of same date, Defendant made the following statement: "with respect to the "exclusivity provision" at section 8, contrary to MCS's assertions, Essent has never assigned "denied claims" to any party other than MCS; thus, there is no credible possibility that MCS will prove breach of this provision…"[7] *See* Exhibit "A."

That statement definitively shows that the latest possible point in time at which Defendant knew its dealings with the other AR vendors, including contracts, assignments and payment details and related documents were directly at issue and contemplated as a litigation matter.

In light of the above, Defendant's statements that "the most that Essent can "reasonably" be expected to have retained as of June 2009…is information related to the dispute about the software license

[6] Defendant, however, fails to allege that the *Hagopian* court applied the same standards as the Federal ones which govern the instant inquiry.

[7] Of course, in the hindsight of today, that statement is indeed laughable considering the discovery of some twenty additional vendors, at least some of which were providing identical services as MCS.

fee" and that "all correspondence until the actual lawsuit referred to and "specifically addressed" only the software license fee dispute" simply need no further response. *See* Response at 14-15.

B. THE DESTROYED EVIDENCE IS CRUCIAL TO MCS' DAMAGE CLAIMS

In response to MCS' claims in that the admittedly destroyed evidence is necessary for the proper and accurate calculations of the extent of MCS' damages, Defendant responds with the flip assertion that "[t]he documents produced after the discovery deadline are neither "destroyed" nor concealed" because they were in fact produced, albeit late." Response at 16. Essentially Defendant therein argues that, 'well, we didn't produce all this stuff until multiple court orders and the uncovering of other evidence forced us to, but now you have it.' But it is still not complete and as of today, there is yet another discovery hearing pending to address the issue.

Defendant further goes on to refute MCS' claim by arguing that "MCS has not used any of the late-produced third-party-vendor information in its damage calculations..." and that MCS' Supplemental Disclosures [D.E. 152-19] fails to utilize such 'late-produced third-party-vendor information.' Response at 16 Defendant is clearly misapprehending the nature of the Supplement, which, under the Rules, need only be as complete as the information on hand.[8]

In this case, the Supplement sets forth what MCS contends is the proper calculation to be applied in determining its lost profits damages. The Supplement, rather than using only that limited financial and third-party-vendor information it had on hand as of June 10, 2010, which would have required much speculation and assumption to bring such limited information into a serviceable estimate of the *total damages*. Instead of relying on that limited actual data from Defendant, MCS provided a more accurate analysis based on Defendant's financial data available publically. This method more properly fulfilled the purpose of the Rule 26 Disclosure by providing a more accurate calculation of the total estimated damages.

Alternatively, had full and complete production been received from Defendant, MCS would have been able to produce its Supplement with the actual figures and data gleaned from such discovery.

Regardless, the cruciality of the evidence is with regard to its necessity to prove liability and damages at trial and not in a Rule 26 Disclosure.

Whether such full and complete discovery will eventually be had is unknown to MCS. What is known, however, is that in either case, concealment and/or destruction has occurred at the hands of Defendant and spoliation sanctions are now appropriate, in one measure or another.

[8] For more detailed analysis on this issue see MCS' Response in Opposition to Defendant's Motion in Limine to Exclude Evidence of Lost Profits [D.E. 178].

C. DEFENDANT ACTED IN BAD FAITH IN SPOILING THE ESSENTIAL EVIDENCE

With regard to bad faith, it can be shown by direct evidence or by circumstantial evidence where certain factors converge. *Calixto v. Watson Bowman Acme Corp*., 2009 U.S. Dist. LEXIS 111659, 44-45 (S.D. Fla. Nov. 16, 2009) (enumerating the 'hallmarks' of a finding of bad faith).

Contrary to Defendant's allegation that MCS presented mere 'bald' statements, MCS in fact cited to those circumstantial factors which would warrant a finding of bad faith.

Defendant's 'note' regarding the alleged difficulty in implementing its retention policy is moreover off base[9] as it is "no defense to suggest, as the defendant[s] attempt[], that particular employees were not on notice. To hold otherwise would permit an agency, corporate officer, or legal department to shield itself from discovery obligations by keeping its employees ignorant. The obligation to retain discoverable materials is an affirmative one; it requires that the agency or corporate officers having notice of discovery obligations communicate those obligations to employees in possession of discoverable materials. *Swofford v. Eslinger*, 671 F. Supp. 2d 1274 (M.D. Fla. 2009).

Finally, Defendant generally attempts to hide behind its retention policy by claiming that it complied with it. Motion at 18. However such assertion is refuted on its face by Exhibit "A" evidencing actual, admitted knowledge of the claims of MCS as of Feburary 11, 2009. The violation of a record-retention regulation creates a presumption that the missing record contained evidence adverse to the violator. *Latimore v. Citibank F.S.B*., 151 F.3d 712, 716 (7th Cir. Ill. 1998) (*citing 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).

[9] Response at 18 (Defendant cannot "flip a switch" to change its document deletion process).

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 _8th_ day of July, 2010.

Respectfully Submitted,

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