UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 09-60351-CIV-SEITZ/O'SULLIVAN

MANAGED CARE SOLUTIONS, INC.,

Plaintiff,

v.

ESSENT HEALTHCARE, INC.,

Defendant.
_____/

DEFENDANT'S RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION FOR SANCTIONS

Defendant Essent Healthcare, Inc. ("Essent") respectfully submits this *Response* in opposition to the *Motion for Sanctions* [DE #152] filed by Plaintiff Managed Care Solutions, Inc. ("MCS" or "Plaintiff"). Plaintiff's motion is replete with colorful language alleging misconduct on the part of Essent and its counsel. [*See* Ex. 1 hereto.] Minus the pejoratives, however, MCS's allegations are shown to be one thing only: misleading assertions raised in a last-ditch attempt to divert the Court's attention from the merits of Defendant's dispositive motion filed May 17, 2010 [DE #142] – a motion that shows Defendant is entitled to summary judgment.

This is a breach of contract case. MCS performed services under the contract at issue at only one of Essent's hospitals – Paris Regional Medical Center in Paris, Texas – and did so for approximately eleven months – May 2006 to March 2007. The Magistrate Judge, however, in his discretion allowed MCS to seek discovery related to four additional hospitals in Pennsylvania, Connecticut and Massachusetts where MCS never worked and for a period of forty months – February 2006 to June 2009. Consequently, because of the way MCS took advantage of this broad scope, the discovery burden on Essent has been far greater than the scope of the issues on the merits, and Essent readily acknowledges that responding to discovery has not been free of error. Nevertheless, neither Essent nor its counsel have committed any bad faith spoliation of evidence, and MCS's motion is without merit.

In its Motion, Plaintiff seeks sanctions on the basis that Essent has allegedly spoliated evidence. To meet this burden, Plaintiff must show: (1) the existence of a potential civil action; (2) a legal or contractual duty to preserve evidence that is relevant to the potential civil action; (3) destruction of that evidence; (4) significant impairment of the ability to prove the lawsuit; (5) a causal relationship between the evidence destruction and the inability to prove the lawsuit; and (6) damages. *Green Leaf Nursery v. E.I. DuPont De Nemours and Co.,* 341 F.3d 1292, 1308 (11th Cir. 2003). Sanctions for spoliation are appropriate "only when the absence of that evidence is predicated on bad faith.... 'Mere negligence' in losing or destroying the records is not enough for an adverse inference, as 'it does not sustain an inference of consciousness of a weak case.'" *Bashir v. Amtrak,* 119 F.3d 929, 931 (11th Cir. 1997) (quoting *Vick v. Tex. Employment Comm'n,* 514 F.2d 734, 737 (5th Cir. 1975)). Plaintiff cannot meet its burden here, for reasons set forth below.

FACTS AND PROCEDURAL HISTORY

As shown in Essent's *Motion for Summary Judgment* [DE #142], supporting memorandum of law [DE #145], and reply brief [DE #160], none of the materials described in Plaintiff's *Motion for Sanctions* are relevant to the merits of this case. As Essent has briefed in its previously filed motion, memorandum, and reply, the merits of this case relate exclusively to two issues: (1) whether Essent owes MCS any amount for an "associated software license fee paid to a third party," and (2) whether Essent failed to assign to MCS all Paris Regional Medical Center accounts to which MCS was contractually entitled between February 20, 2006, and March 29, 2007. The materials referenced in MCS's motion, however, pertain to time periods after March 29, 2007, to facilities other than Paris Regional Medical Center, and to vendors that do not perform services that could possibly have violated the agreement at issue. Because such materials are irrelevant, MCS cannot show it was harmed in prosecuting this lawsuit; because no bad faith conduct occurred, MCS cannot possibly show the existence of bad faith. In light of this, MCS cannot meet its burden under *Green Leaf Nursery* and *Bashir*.

MCS's continuing insistence that this case is about 40 months of lost profits from five hospitals, rather than the two issues set forth above, is unfounded in fact and undocumented by cognizable evidence, for reasons shown in Defendant's *Motion for Summary Judgment* and supporting materials filed May 17, 2010 [DE ##142-49], Defendant's reply brief and supporting materials [DE ##160, 162-67 (in particular, Exhibits 1 – 3 to DE #162], Defendant's motion to exclude evidence of lost profits and supporting materials [DE ##158-159], and the Court's Order granting Essent's motion to strike MCS's expert disclosures [DE #138]. MCS has repeatedly made unfounded and improper assertions such as: "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." [*Motion for Sanctions*, DE #152, 2.] Some of these assertions were, in substance, raised by Plaintiff in a previous motion for sanctions [DE #87, 3-5, 14-15] with similar inflammatory rhetoric [*id.*, 19-21 ("Given the gravity and nature of the efforts taken by the Defendant and counsel for the Defendant to perpetrate a fraud upon this Court and their brazen efforts to do so, sanctions in the form of. . . a judgment entered as to liability as to breach of the exclusivity provision of the PSA. . . are not only warranted, but absolutely necessary as well.") (asking the Court to impose professional sanctions upon counsel for their "systemic deception and/or fraud" upon the Court

and MCS)].[1] [*See* letter from R. Ingham to R. Harrod, C. Owen, and J. Woodruff dated Dec. 21, 2009, DE #87-6 (raising issues regarding NHPN and PMMC) (contending Essent counsel made "A BLATANT MISREPRESENTATION OF THE FACTS TO THE COURT. . . IN AN EFFORT TO CONCEAL DISCOVERY, PERPETUATE (sic) A CONSPIRACY AND/OR A FRAUD UPON THE COURT").] That motion was denied by the Court by Order dated April 27, 2010 [DE #134]. The remaining issues have largely been vetted at the seven discovery hearings conducted by the Magistrate Judge in the past seven months – on December 10, 2009 [*see* DE ## 45, 46, 48, 53]; January 14, 2010 [*see* DE ##52, 75, 76, 99]; February 26, 2010 [*see* DE ##93, 94, 106]; March 4, 2010 [*see* DE #104, 108, 109, 110, 117]; March 30 [*see* DE #112, 113, 114, 118, 129]; April 29, 2010 [*see* DE #123, 137, 139]; and May 12, 2010 [*see* DE #140, 141, 150], and the Magistrate has either provided relief or ruled the issues non-meritorious. [*See* **Exhibit 3** hereto (Orders from the discovery conferences, DE ## 48, 76, 110, 129).]

At the December 10 hearing, the Magistrate ordered broad discovery encompassing 40 months, five hospitals, and Essent's corporate headquarters. Essent has complied with the Magistrate's Orders and all proper discovery requests, and it has provided the proper documents and witnesses, largely at its expense. MCS's continuing quest for sanctions, rather than on the merits reflects one thing only: MCS has failed to meet its burden to avoid Essent's Motion for Summary Judgment – which is now ripe for review. In an eleventh hour attempt to keep alive a case that should be dismissed, MCS now brings this *Motion for Sanctions*, which is misleading at best and, in places, wholly without factual or legal support.

1. Plaintiff's Specific Allegations.

October 21, 2009, Document Production. Plaintiff states that Essent "did not produce one document" on October 21, 2009 [*Motion*, DE #152, 3.][2] Plaintiff fails to acknowledge, however, that the parties were engaged in protracted and ongoing discussions at that date about MCS's document requests and that Essent told Plaintiff at the time it was in the process of preparing a complex and extensive production which it would roll out beginning as soon as the

[1] Filed herewith as **Exhibit 2** hereto are the Notices of Hearing MCS filed for each of its discovery-related Motions.

[2] Filed herewith as **Exhibit 4** hereto are Essent's Responses to Plaintiff's First Set of Requests for Production of Documents.

available technology would permit.[3] Indeed, Essent began this production on November 11, 2009, at which time it produced more than 14,000 pages of documents. [Letter dated Nov. 11, 2009, from S. McBride to R. Ingham, filed herewith at **Exhibit 6**.][4] By December 8, Essent had produced more than 33,000 pages [Letter dated Dec. 8, 2009, from S. McBride to R. Ingham, filed herewith at **Exhibit 6**]; by January 12, 2010, Essent had produced more than 53,000 pages [Letter dated January 12, 2010, from J. Woodruff to R. Ingham, filed herewith at **Exhibit 6**]; and by February 8, 2010, Essent had produced more than 100,000 pages [Letter dated February 8, 2010, from F. Fenelon to R. Ingham, filed herewith at **Exhibit 6**]. As the speed and size of this rolling production demonstrate, the fact that no documents were produced on the exact date of October 21 does not suggest that Essent was engaged in dilatory or bad faith conduct or that Essent somehow failed to comply with the rules. Further, MCS did not take its first deposition in this case until March 22, 2010, and discovery did not close until April 1, 2010. There is no basis for MCS to suggest that it was prejudiced in any way by Essent's beginning production in November rather than October 2009.

Statements Denying the Existence of Competing Vendors. Plaintiff continues to insist that such vendors as NHPN and PMMC performed denial management services for Essent in violation of the Professional Services Agreement ("PSA"). [*Motion for Sanctions*, 3.] That is contrary to extensive and uncontroverted record evidence. [*See, e.g.*, DE ##54-73, esp. Decl. of David Cranford, DE #64-1; with regard to NHPN in particular, *see* Decl. of NHPN's Victoria Conboy and related exhibits, DE #67 and 61; Cranford Expert Report, DE #143-2.] Plaintiff had the opportunity to challenge this evidence in its expert disclosures and failed to do so. [*See Order*, filed May 3, 2010 (*granting Defendant's Motion to Strike Plaintiff's Expert Disclosures*), DE #138. *See generally Def.'s Mot. to Strike Pl.'s Expert Disclosure*, DE #115; *Pl.'s Response in Opp. to Def.'s Mot. to Strike*, DE #121; *Def.'s Reply*, DE #130.] 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 despite eight months of scorched-earth discovery practices enacted under the broad parameters of the discovery orders, which

[3] *See, e.g.*, letters dated August 4, 14, 25, 2009, and September 8, 2009, regarding the on-going dispute concerning MCS's responses to discovery from Essent. Copies produced herewith as **Exhibit 5.**

[4] Filed herewith as **Exhibit 6** is a collective exhibit with correspondence from Essent to MCS detailing its document production.

permitted Plaintiff to inquire freely about five hospitals over a 40-month period despite its having provided services to only one hospital over a 15-month period.

Production of the Essent-NPAS Agreement. Plaintiff complains 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." [*Motion for Sanctions*, 4.] That is true on its face but completely misleading when divorced from its context. Plaintiff was made aware of the NPAS-Essent agreement at least as early as January 8, 2010, when Essent filed its *Response in Opposition to Plaintiff's Motion for Partial Summary Judgment* [DE #54.] In support thereof, Essent filed the Declaration of Steve Wylie, who stated that Essent used NPAS "to provide services related to parts of the revenue cycle **other than** "denial management" [DE #63-1, ¶ 13]. Further, Essent advised MCS by letter dated January 13, 2010, that NPAS objected to Essent's providing NPAS's confidential business information to MCS, even in light of the protective order. [Letter from C. Owen to R. Ingham, Jan. 13, 2010, filed herewith at **Exhibit 7**.][5] NPAS counsel appeared to argue its objections at the discovery hearing on January 14, 2010, though its objections were not heard at the time. [DE #75.] MCS was thus aware it would need to seek any NPAS documents **from NPAS** if it indeed required them. [*Id.*] Essent reiterated NPAS's position to MCS by letters dated February 4 and 19, 2010. [Letters from F. Fenelon to R. Ingham, dated Feb. 4 and 19, 2010, filed herewith at **Exhibit 7**.] After telling Essent that it would work with NPAS's counsel to resolve NPAS's objections, MCS apparently declined to pursue obtaining these documents from NPAS. In an attempt to put this issue to an end, in the face of MCS's failure to obtain the information from NPAS or resolve NPAS's objections and MCS's continuing complaints about not having the information, Essent produced the relevant NPAS agreement at a time when MCS would be able to depose Essent's witnesses about it, since such testimony would make clear there was no breach of the PSA based on any conduct between Essent and NPAS. [Email from C. Owen to R. Ingham and J. Warrick, dated May 17, 2010, filed herewith at **Exhibit 7**.] In fact, Steve Wylie testified that prior to June 30, 2009, NPAS only provided services for self-pay collection accounts [S. Wylie Dep., 150: 20-23, filed herewith as **Exhibit 18**]. Both the Court and MCS have agreed that self-pay collection services are not relevant to this lawsuit. [Tr. April 29, 2010, pp. 19, 26-27, filed herewith as **Exhibit 9**.]

[5] Filed herewith as **Exhibit 7** is a collective exhibit with correspondence regarding the NPAS documents and dispute.

Nonetheless, MCS continues to complain – again, over an issue that has been proven irrelevant by extensive record evidence after MCS has engaged in protracted and sweeping discovery regarding its meritless and unsubstantiated claims. [*See* letter from J. Woodruff to R. Ingham dated June 7, 2010, filed herewith at **Exhibit 7**.]

Production by ParrishShaw. MCS now claims that ParrishShaw "produced documents which demonstrated that nearly eighteen thousand (17,995) accounts were transferred to them by ESSENT during the relevant period of the PSA (February 2006 through June 2009).. . ." (*Motion for Sanctions*, 8.) MCS failed to attach documents evidencing the asserted proposition to its *Motion for Sanctions* and has never produced any documents to Essent received from ParrishShaw despite Essent's discovery request for these documents [*see* Essent's Request for Production of Documents, No. 7, filed herewith as **Exhibit 8**] and the Court's order [*see* Tr. April 29, 2010, 76:9 – 77:12, filed herewith as **Exhibit 9**] that MCS produce any documents received from a third party. Julie Shaw, as authorized by ParrishShaw, however, has stated under penalty of perjury that she never provided any documents to MCS. [Decl. of Julie Shaw, DE #165-2 at ¶ 8.] Ms. Shaw further attested that the work performed pursuant to the Essent-ParrishShaw Letters of Agreement "is insurance follow-up work; it is not 'denial management' work." [*Id.* at ¶ 7.] In light of these substantive and evidentiary failures, MCS may not rely on its assertions regarding ParrishShaw in support of the instant motion.

Production by PMMC. MCS claims that PMMC produced many documents in response to a subpoena duces tecum consisting of email correspondence and other documents, while Essent only produced the contract between it and PMMC. (*Motion for Sanctions*, 8.) However, MCS's claims are untrue. On or before March 1, 2010, Essent produced all responsive documents in its possession relating to PMMC, including email correspondence, reports, and contracts. *See* collective **Exhibit 10** filed herewith (confidential information redacted). It is unsurprising that PMMC may have documents not contained in Essent's files, and no adverse inference may properly be drawn from that.

Production of Checks, Invoices, and Accounts Payable Vendor Summary Reports. Essent fully complied with the Court's order and produced all remaining responsive documents and information to Request No. 21 for the previously identified eleven vendors on March 19, 2010. Essent made the checks and invoices for these third party vendors available to MCS for inspection [*see* e-mail from F. Fenelon to R. Ingham and J. Warrick, March 8, 2010 filed

herewith as **Exhibit 11**], which the Court deemed sufficient and in compliance with Fed. R. Civ. P. 33(d) and 34(b)(2)(E). [*See* Tr. March 30, 2010 hearing, 32, 35, filed herewith as **Exhibit 12**.] Essent later provided copies of the actual checks and invoices at MCS's expense, as per the Court's direction. Once six additional accounts receivable vendors were discovered by counsel for Essent, which was the subject of the Court's hearing nearly a month later on April 29, 2010, checks and invoices relating to those vendors were produced to MCS on May 5 and 6, 2010 in compliance with the Court's Order.

Although Essent had previously complied with its obligation to produce the relevant checks and invoices for inspection, Essent also provided MCS with summaries in the form of accounts payable vendor summary reports ("AP Vendor Reports") showing the amounts of all of the invoices and payments made by Essent and its hospitals to the previously identified eleven accounts receivable vendors during the relevant time period. These AP Vendor Reports were prepared by Essent at its counsel's request and not as a response to an interrogatory or Rule 34 request. These AP Vendor Reports were an unsuccessful effort to provide information to MCS in a more cost-effective way for MCS. Contrary to MCS's assertion, the AP Vendor Reports were all produced on March 19, 2010 via Waller Lansden Dortch & Davis, LLP's FTP site and were again provided by Essent's counsel on March 23, 2010, before the close of discovery. [*See* DE #152-15.] These are the very same reports that Essent's counsel provided to Magistrate Judge O'Sullivan on March 30, 2010. [*See* DE #152-15; Tr. March 30, 2010, 27 -33.] MCS cites only portions of the AP Vendor Reports [ESSENT0101788 - ESSENT0101802 and ESSENT0102538 to ESSENT0102607] and alleges that these portions were produced at different times, which is incorrect. There is only one set of AP Vendor Reports, and Essent produced the complete set of AP Vendor Reports to MCS on March 19, 2010.

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

As set forth more fully in its *Motion for Summary Judgment* and supporting *Memorandum of Law* [DE #142 and 145], Essent properly terminated the parties' Professional Services Agreement ("PSA") by letter dated September 29, 2006, pursuant to § 9.2 of the PSA.[6] Then, Essent received from MCS an invoice dated May 18, 2007, for "Software License Fees – Term. Paragraph 9.2." The amount of this invoice was $125,000. [Decl. of S. Wylie, DE #63-1,

[6] All of the correspondence discussed here was exhibited to the Declaration of Steve Wylie filed January 8, 2010 [DE #63-1].

¶ 34. *See* Ex. 5 to Wylie Decl.] Essent was shocked at the high amount of this invoice, and Steve Wylie and Kara Atchison had multiple communications about this invoice [Decl. of S. Wylie, DE # 63-1, ¶¶ 36 – 39], ending on approximately June 5, 2007. Essent heard nothing further from MCS about the license fees until January 2008, when Kara Atchison renewed MCS's request for payment of $125,000 which, with tax, resulted in an amount Essent billed of $135,312.50. [*See* Ex. K to MCS's Motion, produced without exhibits.] In response, Essent asked MCS to provide invoices and proof of the fact that MCS had actually made the payment for which it was then seeking reimbursement, together with its contract with the software vendor, an explanation of the vendor's allocation of the licenses, and related information. [Decl. of S. Wylie, DE # 63-1, ¶¶ 46-49.] For almost a year, Essent heard nothing in response. Finally, on January 13, 2009, Essent received correspondence from counsel for MCS mentioning alleged violations of the PSA, but "specifically addressing" only the "failure to remit payment to MCS for third party software fees."

In 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 MCS had purportedly paid to a third party vendor (and which MCS still refused to document). [*See* Report of D. Michael Costello, DE #143-1.] 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.

Notwithstanding this, MCS filed its lawsuit on March 6, 2009, alleging breach of contract, breach of implied covenant of good faith and fair dealing, and seeking an accounting. [*Compl.*, DE #1, Counts I, II, and III.] At no time in any of the protracted communications concerning the $135,312.50 in software license fees did MCS ever mention that it believed Essent had engaged in any other conduct that was a source of concern to MCS.

3. Essent's Document Retention Policy and Procedure.

Steve Wylie, Essent's Senior Vice President for Operations, Finance, testified about Essent's document retention policy, which was Exhibit 107 to his deposition. He testified that, under Essent's policy and practice, emails that are deleted by a user are permanently and **automatically** deleted from the system thirty days later. [S. Wylie Dep., 173:25—174:17, DE #153-1]. Additionally, all electronic mailbox items are **automatically** deleted thirteen months after receipt. [*Id.*] Essent's policy further establishes procedures for a litigation "hold" to be

placed on materials after a lawsuit is filed. After being served with this lawsuit, Essent issued a litigation hold via email on June 4, 2009, pursuant to its document retention policy. There is no suggestion (much less evidence) by MCS that the passage of time between the filing of the *Complaint* on March 6, 2009 and the formal notice of the litigation hold on June 4, 2009 caused the destruction of any critical evidence. All emails in existence on or before February 6, 2008 (*i.e.*, 13 months before the filing of the *Complaint*) would have been automatically deleted prior to the filing of the *Complaint*. Given that the parties' relationship ended March 29, 2007, any emails relating to that relationship would have been automatically deleted by April 29, 2008 (*i.e.*, 13 months after March 29, 2007). Thus, issuing the litigation hold in June 2009 had no effect on the relevant documents because they had been automatically purged long before Essent had any notice of potential litigation.

4. Essent's Document Production.

Essent timely served written Responses and Objections to Plaintiff's First Request for Production of Documents on October 21, 2009, in compliance with Rule 34(b)(2)(A) of the Federal Rules of Civil Procedure. Essent's Responses and Objections indicated for which categories of documents "inspection and related activities [would] be permitted as requested" and to which requests Essent maintained an objection as permitted under Federal Rule 34(b)(2)(B) and Local Rule 26.1. Rather than producing documents only by making them available for inspection and copying, Essent delivered to MCS all non-objectionable responsive documents on a rolling basis beginning on November 11, 2009, and continued to deliver documents in this manner per the Court's Order. [DE #48].[7] Essent has delivered over **115,000** pages in this case, has produced innumerable more documents pursuant to Federal Rule 34(b)(2), and has taken extensive additional measures to provide MCS with the documents and information it requested, including creating reports to provide such information, although it had no obligation to do so.[8]

Contrary to MCS's specific and unfounded assertions otherwise, **Essent produced many documents dated prior to December of 2008**. The automatic e-mail deletion policy did not

[7] The Court clarified in its Order of December 10, 2009, that the relevant discovery period for this lawsuit is February 20, 2006, through June 30, 2009 rather than through June 30, 2007, which resulted in Essent's having to produce additional documents on a rolling basis.

[8] MCS makes a general assertion that Essent has not produced "its internal reports and notes in compliance with multiple discovery Court orders" with no citation to the record whatsoever. MCS's statement is not correct. Essent timely produced all internal reports and notes in its possession.

have any effect on hard copy documents or documents maintained on Essent's network drives. Therefore, contracts, electronic remittance files (also known as "835s"), and many other documents were produced for the entire 40-month period of February 20, 2006 through June 30, 2009. The only documents not produced for the entire period were emails and attachments to emails, which had been deleted as a matter of course pursuant to Essent's document retention policy before the lawsuit was ever filed.

Essent did *send* some documents to MCS after the close of fact discovery in this case; **however, most of these documents had already been produced prior to the discovery cut-off** via Waller Lansden Dortch & Davis, LLP's FTP site on March 19, 2010, per the Court's Order, with a courtesy copy forwarded to MCS on a disc on April 15, 2010.[9]

5. Discovery Relating to Third Party Vendors.

Essent has gone to great lengths on multiple occasions to explain its relationships with its third-party vendors to MCS and to the Court. [Tr. July 9, 2009, 14-15, DE #152-2; Decl. of S. Wylie, DE #63-1, 13, 14, 15 ("[Third party vendors] provided services related to parts of the revenue cycle other than "denial management. . . . Essent has not used any outside provider of denial management services since it terminated its contract with MCS."); Def.'s Responses to Pl.'s Request for Production, DE #152-3; Report of David A. Cranford, DE #143-2, 4-7.; *see generally*, Tr. December 10, 2009, DE #152-4.] Essent's management and employees have testified under oath at length about these relationships. Essent also provided affidavits from several of these vendors stating that the services provided are not denial management services and are not services encompassed within Essent's PSA with MCS.[10] Essent's expert, David

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[9] Admittedly, Essent produced some documents for the first time after April 1, 2010; however, MCS was not prejudiced by the delayed production of any of these documents. The documents, produced in response to the Court's Order of April 29, 2010, contained documents relating to six third party AR vendors. As a result of the late production, MCS was given the opportunity to reopen the depositions of Larry Reaves, Steve Wylie and Kenneth Miller at Essent's expense, and to take additional depositions from Michael Miller, Michael Maher, and Peter Morrow at MCS's expense regarding these entities and all documents produced after March 22, 2010. [Transcript of May 12, 2010 hearing, p. 40, attached hereto as **Exhibit 13**.]. MCS availed itself of this opportunity, and these depositions took place on May 13, 18, 19, and 29, 2010. Thus, MCS has no basis to suggest it was prejudiced in any way by receiving additional information that it had requested.

[10] *See, e.g.*, DE #67-1, ¶ 15 ("NHPN addresses claims before they are filed with health insurers where the patients' health insurer is not on the list of those insurers who have a managed care contract with the hospital"; and "MCS contract does not address either the process or claims that NHPN was handling on behalf of Essent between February 20, 2006, through February 20, 2009."); DE #69-1, ¶ 6 (Edward Sloan & Associates is a "self-pay collection agency" and "[w]ith regard to ESA's healthcare clients, including Essent, ESA's services relate to collecting debts from patients who have failed to pay medical bills."); DE #70-1, ¶ 8 and DE #165-1, ¶¶ 5, 7 (ParrishShaw provided services to Essent Healthcare, Sharon Hospital, and Southwestern Regional Medical Center

Cranford, gave a declaration and provided an expert report addressing services provided by third party vendors. Mr. Cranford opined that none of the services performed by these entities constitute "denial management" and they are entirely different than those services performed for Essent by MCS pursuant to the PSA. [*See* DE #64-1, ¶¶ 21–46.] This testimony is unanswered and uncontradicted by anything in the record despite MCS having the opportunity to pursue discovery directly from these third-parties if it so chose to do. ***As stated by counsel for Essent, no other company provided Essent with denial management services such as MCS provided to Essent, from February 20, 2006, through June 30, 2009.***

ARGUMENT

MCS moves for sanctions against Essent, including default judgment or an adverse inference, based on Essent's alleged discovery abuses. The alleged "discovery abuses" amount to the following: (1) Essent's deletion of emails pursuant to its established document retention policy prior to the filing of this lawsuit – during a time when the parties were in a dispute ***about a bill for $135,312.50 in software license fees*** and it was inconceivable to Essent, based on its knowledge of its own conduct (that it had not breached the PSA), that MCS had any complaint about anything, other than the alleged software license fees (which even now, more than three years after the termination of the contract, remain undocumented); (2) Essent's implementation of a litigation hold in June 2009, pursuant to its document retention policy, before any written discovery was received from MCS; and (3) the production of some third-party vendor documents after the discovery cut-off but prior to MCS's depositions of the applicable witnesses. None of these actions by Essent amount to spoliation of evidence; none created any prejudice for MCS; none were committed with the required element of "bad faith," and, with respect to the documents first produced after April 1, 2010, MCS has been granted comprehensive curative relief by the Magistrate Judge. For these reasons, MCS's Motion should be denied.

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pursuant to Letters of Agreements attached to the declaration, which did not include denial management work); DE # 68-1, ¶¶ 5-7, 9 (Medical Claims and Collections, Inc. "is engaged in the business of collecting debts from patients who have failed to pay medical bills – not from insurance companies or third-party payors"; "MCCI has never negotiated with any insurance company or other third-party payor on behalf of Essent" and has never provided "denial management services" to Essent.).

A. Essent has preserved the evidence relevant to the anticipated litigation.

The facts of record cannot establish the first two elements of MCS's spoliation claim—*i.e.,* the existence of a potential civil action and a legal duty to preserve evidence which is relevant to the potential civil action. First, despite MCS's assertions to the contrary, it is not the law in the Eleventh Circuit that "anticipated" litigation creates a duty to preserve evidence. *See, e.g., Silhan v. Allstate Ins. Co*., 236 F. Supp. 2d 1303, 1313 (N.D. Fla. 2002) (denying a motion for sanctions for spoliation of evidence and holding that no common law duty to preserve evidence (absent some sort of notice) exists in Florida law). Indeed, recently the Middle District of Florida questioned whether *the filing of a lawsuit* in and of itself would create a duty to preserve evidence in *Floeter v. City of Orlando*, No. 6:05-cv-400-Orl-22KRS, 2007 WL 486633 at *6, n.6 (M.D. Fla. Feb. 9, 2007), by stating "[w]hether merely filing litigation raises a duty to preserve evidence is an open question under federal law in this circuit."[11]

The Court need not decide this issue, however, because of the particular facts here. The cases suggesting that there is a pre-litigation duty to preserve evidence very clearly limit that duty to the evidence that "a party reasonably should know . . . may be relevant to anticipated litigation." *See Hagopian v. Publix Supermarkets, Inc.*, 788 So. 2d 1088 (Fla. 4th DCA 2001) (holding that an adverse party's duty to preserve evidence is created when that party recognizes that an adverse suit is imminent). More specifically, "a party is not guilty of spoliation when it destroys documents as part of its regular business practices and is unaware of their potential relevance to litigation. *Wilson v. Wal-Mart Stores, Inc.*, No. 5:07-cv-394-Oc-10GRJ, 2008 WL 4642596, at *3 (M.D. Fla., Oct. 17, 2008). The instant dispute arose over the software license fee allegedly owed by Essent under the PSA. The lawsuit filed by MCS encompassed allegations never discussed by the parties prior to the filing and many that remained unarticulated until the fall of 2009 or spring of 2010. Furthermore, the nature and extent of these new allegations were not specified in the *Complaint* (or the *Amended Complaint*), in any way that put Essent on notice of the extraordinarily sweeping nature of the allegations. Only 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.

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[11] In this case, MCS filed its *Complaint* on March 6, 2009, and propounded discovery September 19, 2009.

In many instances, of course, claims asserted in litigation are very different from those originally asserted by the parties. For example, in *Calixto v. Watson Bowman Acme Corp.*, No. 07-60077-CIV, 2009 WL 3823390 (S.D. Fla. Nov. 16, 2009), the plaintiff sought to compel back-up tape information claiming that the defendant failed to preserve the original evidence after notice of a pending lawsuit. The plaintiff had sent a letter to the defendant on March 1, 2004, requesting royalty payments on a patent and notifying the defendant that the sale of products related to the patent in Asia would violate the agreement between the parties. *Id.* at *16. The plaintiff later sued for tortious interference with contract and claimed the March 1, 2004, letter should have put the defendant on notice to preserve all emails relating to the tortious interference claim. *Id.* at *17. The *Calixto* defendant asserted that electronic information allegedly related to the tortious interference claim was deleted in the regular course of business and that it had no notice of a tortious interference action based on a letter seeking royalty payments and stating restrictions on a patent. The Court agreed with the defendant, found no bad faith, and awarded no sanctions for the claimed "spoliation" of electronic evidence. *Calixto*, 2009 WL 3823390 at *17.

Essent experienced a course of events very similar to those in *Calixto*. Specifically:

- In September 2006 Essent terminated the PSA, aware that it potentially owed a "software license fee" as part of the termination.
- Eight months later, in May 2007, Essent received an invoice purportedly for a software license fee it reasonably believed was exorbitant, and which it disputed.
- Seven months after correspondence about the invoice, in January 2008, MCS first began to claim that the failure to pay the software license fee was a breach of the contract, but MCS consistently made settlement demands encompassing only the alleged software license fee.
- A year after that, on January 13, 2009, Essent received a letter "specifically addressing" the "failure to remit payment to MCS for third party software fees" again demanding payment of an increased fee, and threatening to file suit for "breach of contract, including, . . . loss of profits, attorney's fees and costs."
- Finally, on March 6, 2009, the lawsuit was filed seeking unspecified damages for breach of contract and breach of covenant of fair dealing and for the very first time claiming Essent had failed to transfer appropriate accounts to MCS.

In its *Motion*, MCS alleges that Essent intentionally destroyed evidence. [*Motion for Sanctions,* 16.] There is no evidence of intentional destruction and MCS points to none. At most, Essent allowed emails to be deleted in the ordinary course of business pursuant to its routine document destruction policy. Some of these emails may have related to third party vendors employed by Essent for various payment services. Those documents were not reasonably encompassed in the dispute between the parties as it existed in May 2007 – or indeed until fall 2009 at the earliest.

The most that Essent can "reasonably" be expected to have retained as of June 2009, and all that was required under the law, is information related to the dispute about the software license fee. Indeed, Essent would have had no reason to retain even that, since it repeatedly informed MCS it would reimburse MCS for associated software license fees once MCS showed proof it had in fact paid these fees to a third party. Even today, MCS has failed to document such payments (and Essent contends MCS will never be able to, because MCS has failed to show it paid associated license fees to a third party). In January 2008, Steve Wylie, Essent's Senior Vice President for Operations, Finance, believed that MCS was seeking reimbursement for payments other than fees it had actually paid to a third party for software licenses associated with the Essent project. Mr. Wylie insisted that MCS document what fees it had paid, the purpose of those fees, and their association with the Essent contract. Mr. Wylie expected that documentation would show the actual amount to which MCS was entitled was substantially lower than the $125,000 that had been invoiced. Essent was prepared to meet its legitimate and documented obligations under the PSA. There was no reason to believe otherwise, as far as Mr. Wylie knew, because at that time Mr. Wylie believed MCS had paid some software license fees to some third party in association with Essent. Thus, there was no reason to believe litigation would ensue.[12]

MCS's original correspondence, indeed all correspondence until the actual lawsuit, referred to and "specifically addressed" only the software license fee dispute. All correspondence made demands and settlement offers relating to the particular dispute about the $125,000 invoice. Since Essent possessed no information about the bona fides of MCS's

[12] This is why Mr. Wylie testified that, even in January 2008, he "did not believe" the parties would "be in litigation." [See Dep. of S. Wylie, 188:16-189:6, DE #153-1] Interestingly, on April 8, 2009, MCS testified that it had no ongoing disputes over "coding or what accounts constitute denials under the contract[.]" [K. Atchison Dep., April 8, 2008, 50:15 – 51:25, *MCS v. Baptist Health System, Inc.,* filed herewith as **Exhibit 19** (under seal).]

reimbursement demand, apart from the disputed invoice, it had no records to maintain on this topic.[13] It certainly had no reason to retain records about anything else when its automatic retention policy required their destruction. In light of the facts and circumstances here, it was reasonable for Essent to continue its regular electronic information deletion until June 2009.

B. The alleged "destroyed" evidence is not crucial to any of MCS's claims.

A required element of a spoliation claim is that a causal relationship exists between the destroyed evidence and the plaintiff's case. *Green Leaf Nursery v. E.I. DuPont De Nemours and Co.,* 341 F.3d 1292, 1308 (11th Cir. 2003). Indeed, courts routinely refuse to award any sanctions if the missing evidence is anything less than critical or crucial to the opposing party's case. *See, e.g.*, *Floeter v. City of Orlando*, No. 6:05-cv-400-Orl-22KRS, 2007 WL 486633 (M.D. Fla. Feb. 9, 2007), *5 n.6 (refusing to award sanctions where the deleted emails were relevant but not crucial); *In re Electric Machinery Enters., Inc*., 416 B.R. 801, 875 (Bankr. M.D. Fla. 2009) (refusing to impose sanctions and an adverse inference under Florida law because the documents which were intentionally destroyed prior to litigation were not "crucial" nor "truly critical" to plaintiff's case); *Wilson v. Wal-Mart Stores, Inc*., No. 5:07-cv-394-Oc-10GRJ, 2008 WL 4642596, at *3 (M.D. Fla., Oct. 17, 2008) (refusing to award sanctions and an adverse inference in part because the destroyed document was "not critical to Plaintiff's ability to prove her case because there is other evidence potentially available to Plaintiff to prove her claim").

It is not even enough to assert that the evidence might have aided in establishing claims; rather, the documents must be crucial. *In re Electric Machinery Enters., Inc*., 416 B.R. at 875 ("While the disposed documents may have further undermined HCC's defenses or supported EME's claims, none of the destroyed documents were truly critical to EME's case"); *Cf. Optowave Co., Ltd. v. Nikitin*, No. 6:05-cv-1083-Orl-22DAB, 2006 WL 3231422, at *11 (M.D. Fla. Nov. 7, 2006) (allowing an adverse inference as a discovery sanction due to defendant's intentional destruction of emails relating to the contract at issue because the missing evidence is "directly relevant to construction of the terms of the Contract").

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[13] As set forth in detail in Essent's *Motion for Summary Judgment*, MCS and its vendor BCA Corporation, ("BCAC") to which the software fee was allegedly due, have contradictory explanations for what, exactly, makes up the $125,000 fee (plus tax). MCS testified that the fee was "one full year of the license fee for one facility with a 50 percent discount" [MCS Dep., 171:5-19, 186:1-10, DE #144-1, 51, 62]; while BCAC testified that the fee had nothing to do with quantifying an "associated software license fee paid to a third party." [BCAC Dep. 101:23-102:4; *and see* 107:24-109:4, DE #144-3, 33-37.] If MCS and its vendor did not agree on the explanation for the $125,000, certainly no electronic correspondence or documents that Essent had would have shed light on this issue.

MCS baldly asserts in its *Motion* that the allegedly destroyed evidence is "crucial" to its claims for material breach of the PSA as well as establishing its damages. MCS never demonstrates or substantiates this conclusory assertion with any reference to facts or evidence, however, and it is difficult to understand from its motion to what evidence MCS is referring apart from emails that were routinely deleted in conformity with Essent's document retention policy. The documents produced after the discovery deadline are neither "destroyed" nor "concealed" because they were in fact produced, albeit late. Any inconvenience to MCS for the untimely production, however, was remedied when MCS was allowed time to depose six witnesses (three for the second time) about these late-produced documents.

Further, MCS has not used any of the late-produced third-party-vendor information in its damages calculations. MCS submitted with its *Motion* an "Exhibit S," which had never before been served on Essent, was not signed, yet was captioned "Plaintiff's Supplemental Disclosures." [DE #152-19.] This purported "Supplement" is a 15-page document with 56 pages of exhibits purporting to establish MCS's alleged lost profits.[14] This document includes, for the first time, a discussion of MCS's claimed damages. None of the 56 pages of exhibits references any of the documents produced by Essent in April and May 2010.

Since the only dispute of which Essent had notice prior to the filing of the lawsuit related solely to the alleged failure to pay software license fees, the only documents Essent could possibly have had any obligation to retain were documents relating (1) to whether MCS paid any software licensing fees to a third-party associated with the Essent PSA and, (2) if so, the amount MCS paid. Those documents are primarily if not wholly within MCS's possession. Indeed when MCS invoiced Essent for $125,000.00, Essent asked MCS to provide documentation demonstrating that the invoice was a bona fide request for reimbursement. For more than a year, MCS failed to produce any documentation whatsoever supporting its invoice. It was not until after the lawsuit was filed and the Court ordered MCS immediately to produce those documents [Tr. July 9, 2009, 15-16, DE #152-2] that MCS first came forward with any of the checks that purport to document these alleged license fees.[15]

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[14] This document is improper for numerous reasons, including that it is untimely, has no certificate of service and was never served on Essent until its inclusion in the Motion for Sanctions, filed on Thursday, June 10, 2010. These arguments will be addressed in a separate filing. *See* the Third Declaration of D. Michael Costello addressing the substance of "Exhibit S."

[15] These checks, in fact, do not provide documentation that MCS paid software license fees to BCAC associated with the Essent contract. [*See* Report of D. Michael Costello, DE #143-1, 5-6].

C. MCS's bald statements do not establish that Essent acted in bad faith, and no sanctions are appropriate.

In a claim for spoliation of evidence, sanctions are only appropriate when bad faith is established. *Bashir v. Amtrak,* 119 F.3d 929, 931 (11th Cir.1997); *Mann v. Taser Int'l, Inc.*, 588 F.3d 1291, 1310 (11th Cir. 2009); *In re Mroz,* 65 F.3d 1567, 1575 (11th Cir.1995) ("A finding of bad faith, however, is required to impose sanctions based upon the court's inherent powers."). MCS argues that this requirement does not apply here, because of cases allegedly creating a presumption of bad faith in certain instances. The cases, however, are in different courts and circuits. The law for this Circuit is clear and does not support MCS's position.

Moreover, bad faith cannot be established by mere conclusory allegations that a party acted with bad faith. *See Atlantic Sea Co., S.A. v. Anais Worldwide Shipping, Inc.*, No. 08-23079-CIV, 2010 WL 2346665, *2 (S.D. Fla. June 9, 2010) (refusing to award sanctions for spoliation because the only evidence of bad faith were the plaintiff's conclusory statements). In this Circuit, only the most willful of behavior has been held to establish bad faith. *Cf., e.g., Flury v. Daimler Chrysler Corp.,* 427 F.3d 939, 944 (11th Cir. 2005) (imposing the sanction of dismissal of plaintiff's produce liability action because of the destruction of the subject vehicle under plaintiff's control after plaintiff and plaintiff's expert had inspected the vehicle, but prior to allowing defendant to inspect, despite defendant's request to do so); *Telectron, Inc. v. Overhead Door Corp*., 116 F.R.D. 107, 137 (S.D. Fla. 1987) (granting default judgment to plaintiff as a discovery sanction when defendant's secretary and legal counsel ordered employees to destroy relevant documents on the same day he received the complaint and request for production of documents); and *Preferred Care Partners Holding Corp. v. Humana, Inc.*, No. 08-20424-CIV, 2009 WL 982460, *16 (S.D. Fla., April 09, 2009) (finding no bad faith and refusing to grant default or summary judgment after the close of discovery when defendant discovered hundreds of thousands of emails relating to confidentiality agreement at issue in the lawsuit and instead awarding sanctions and re-opening discovery).

Moreover, the sanctions sought by MCS—default judgment or an adverse inference—are of the most severe kind. Even if MCS could establish bad faith, which it cannot, such severe sanctions are not appropriate here. Default judgment should only be imposed if less drastic sanctions cannot properly redress the wrongdoing. *See Hashemi v. Campaigner Publications, Inc.,* 737 F.2d 1538 (11th Cir.1984); *Aztec Steel Co. v. Florida Steel Corp.,* 691 F.2d 480, 481-82

(11th Cir.1982). Though a Court has power to impose sanctions, that power is not unbridled. *Telectron, Inc. v. Overhead Door Corp.,* 116 F.R.D. 107, 129 (S.D. Fla. 1987).

MCS's Motion describes in conclusory fashion "purges" of documents and "destruction" of evidence and "violations" of Essent's own document retention policy. Each of these statements mischaracterizes the facts. In reality, during the almost-two-year negotiation concerning the software license fee, Essent continued to automatically delete its emails consistent with and pursuant to its existing policy. When the lawsuit was filed, it implemented a litigation hold on June 4, 2009, prior to any discovery's being propounded and almost three years after the termination of the relationship between MCS and Essent. By June 4, 2009, all of the electronic correspondence prior to May 4, 2008 had been deleted in the routine course. MCS last provided services under the PSA in March 2007 – fourteen months earlier than the litigation hold was put in place. All emails from March 2007 and earlier would have been automatically purged in or before April 2008 – long before Essent would have had any reason whatsoever to believe litigation with MCS would ensue regarding ***anything*** – much less claims seeking millions of dollars in alleged lost profits involving allegations regarding almost every vendor relationship Essent has in the health care revenue cycle for five hospitals over a three-year period – none of which pertains to a $135,312.50 software license dispute.

MCS's argument that Essent did not comply with is own retention policy is false.[16] First, the deletion of the emails occurred *pursuant to* the document retention policy. Second, a litigation hold was instituted after the lawsuit was filed, *pursuant to* the document retention policy. Essent complied with the policy. [S. Wylie Dep. 204:20-205:3, DE #153-1]. MCS's argument is confusing at best, since no specific instance of Essent's ignoring its policy is cited.

It is worth noting that Essent is, in actuality, a collection of five rural hospitals. Each hospital runs on a separate computer system with separate servers, and it is not now, nor was it ever, possible to simply "flip a switch" to change the document deletion process. MCS's allegation that it would have been inexpensive to retain completely irrelevant electronic information for over two years prior to the lawsuit is wholly unsupported and false. To the

[16] MCS appears to argue that the mere deletion of an email with medical information attached or included in the email violates Federal and State laws regarding retention of health and medical records, even if the identical patient medical information is securely stored elsewhere. That argument is unsupported in the law. Moreover, MCS has never sought in discovery or otherwise raised an issue as to patient medical records which were allegedly not available. The various states in which Essent has hospitals have different and idiosyncratic requirements for the preservation of patient medical records. Essent's document retention policy requires each of its hospitals to comply with state law. [*See generally* S. Wylie Dep. (Vol. II), 444: 10 - 447:11, DE #153-2.]

contrary, the retention of electronic information is done by copying of the material and retention of physical tapes for which storage space is a significant issue.

Contrary to MCS's assertion, on December 10, 2009, the Magistrate Judge decided that services related to rectifying "underpayments" are relevant to the dispute for discovery purposes and recognized that the terms of the PSA, including the scope of the activities comprising "denial management services" is subject to interpretation by the trial court. [DE #152-4, 18, 22]. Therefore, there has been no concealment of documents or false statement by Essent. A substantive dispute exists between the parties over the relevancy of documents relating to third party vendors. The Magistrate Judge resolved this dispute for purposes of discovery, and Essent has fully complied with every Court order on this subject.

Specifically, the Court ordered on December 10, 2009, that Essent provide MCS with the PMMC and NHPN contracts and the names of other vendors working on collections or accounts receivable for the five Essent facilities during the dates of February 20, 2006, through June 30, 2009. Essent complied on December 18, 2009 [*see* Letter from Sarah McBride to Robert Ingham, dated December 18, 2009, filed contemporaneously herewith at **Exhibit 6**, and Essent's Supplemental Responses to Requests for Production of Documents, dated January 13, 2010, filed contemporaneously herewith as **Exhibit 14**], and filed representative contracts with other third party vendors, as exhibits to its Response to MCS's Motion for Partial Summary Judgment and provided them to MCS, even though Essent was not required to produce the contracts for these vendors. MCS implies that filing these contracts under seal was inappropriate. However, copies of the documents filed under seal were served on Counsel on January 8, 2010, the very same day the documents were filed. Further, the Court ordered that contracts with third party vendors remain under seal and stated that "[i]t does not appear that the precise financial arrangements with non-parties to this dispute are relevant to this case." [DE #128].

Essent also produced all emails relating to third party vendors prior to March 1, 2010. On March 4, 2010, the Magistrate Judge ordered for the first time that contracts and other documents were to be produced for all revenue vendors other than self-pay collection agencies. [Tr. March 4, 2010 hearing, 26, attached hereto as **Exhibit 15**.] Essent produced responsive documents and information to Request No. 21 on March 19, 2010. Essent made the checks and invoices for all third party vendors available to MCS for inspection and copying, which inspection the Court deemed sufficient [Tr. March 30, 2010 hearing, 32, 35, attached hereto as

Exhibit 12]. MCS declined to inspect when offered by Essent. Essent later provided copies of the actual checks and invoices at MCS's expense, as the Court allowed. Clearly, there was no attempt by Essent to conceal checks and invoices, and MCS's statements to the contrary are completely false. The Magistrate Judge has already held that Essent produced the checks and invoices, in accordance with the Federal Rules of Civil Procedure, well in advance of the discovery cutoff.[17] When Essent's counsel discovered that they had erroneously failed to identify six additional vendors, Essent's counsel acted promptly to advise the Magistrate Judge of their error and took prompt corrective action.[18] On May 12, 2010, the Magistrate Judge held a hearing regarding this event and denied Plaintiff's repeated request for sanctions. Instead, the Magistrate Judge entered an order permitting MCS to take additional depositions and divided the expense of these additional depositions evenly between Essent and MCS.

MCS cannot establish any bad faith on the part of Essent, a required element for a spoliation claim. No sanctions should be awarded, and MCS's Motion should be denied.

CONCLUSION

Apparently spurred on by its complete inability to muster any evidence on the merits of its case, MCS's *Motion for Sanctions* seeks to revive a host of stale complaints regarding the discovery process – none of which will ultimately have any relevance and most of which have already been addressed by the Court. MCS cannot establish that Essent's alleged "discovery abuses" are in fact abuses of the discovery process, and they certainly do not rise to the level of "spoliation." Essent has not violation any duty to preserve evidence; MCS cannot establish that any of the alleged "destroyed" evidence was critical to its case; and MCS has not been prejudiced by the routine deletion of emails that occurred prior to the implementation of the litigation hold. MCS cannot establish that Essent acted with bad faith because Essent did not act in bad faith. Certain documents were produced later than they ought to have been, but this was not intentional, and the Magistrate Judge has already given MCS a complete remedy for the late production. As such, MCS cannot establish its claim for spoliation of evidence, or for sanctions under Rule 37 of the Federal Rules of Civil Procedure. Thus, Essent respectfully requests that the Motion be denied.

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[17] MCS contends that notice of a subpoena duces tecum issued to Regions Bank resulted in Essent's producing checks and invoices. This is inaccurate. MCS did not give Essent notice of the subpoena duces tecum.

[18] This corrective action included producing an additional 703 documents to MCS from counsel's Nashville, Tennessee offices during the time that all of Middle Tennessee was suffering the effects of a natural disaster. [*See* May 5, 2010, News Article from *The Tennessean*, filed herewith as **Exhibit 16**.]

Dated: June 28, 2010.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 28, 2010, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record identified on the attached Service List via transmission of Notices of Electronic Filing generated by CM/ECF.

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