IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Miami Division

CASE NO.: 08-20424-CIV-UNGARO/SIMONTON

PREFERRED CARE PARTNERS HOLDING CORP., a Florida corporation, and PREFERRED CARE PARTNERS, INC., a Florida corporation,

Plaintiffs,

v.

HUMANA INC., a foreign corporation,

Defendant.
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**PLAINTIFFS' REPLY MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR SANCTIONS**

Plaintiffs, Preferred Care Partners Holding Corp. ("PCP Holding Corp.") and Preferred Care Partners, Inc. ("PCP") (collectively, "Plaintiffs"), by and through their undersigned attorneys and pursuant to S.D. Fla. L.R. 7.1 hereby file their Reply Memorandum of Law in Support of their Motion for Sanctions, D.E. # 153.[1]

Respectfully submitted,

LEGON, PONCE & FODIMAN, P.A.
Attorneys for Plaintiff
1111 Brickell Avenue, Suite 2150
Miami, Florida 33131
Telephone: (305) 444-9991
Facsimile: (305) 444-9937

BY: /s/ Todd R. Legon
TODD R. LEGON
Florida Bar No. 814415
S. DANIEL PONCE
Florida Bar No. 175437
ALICIA M. OTAZO-REYES
Florida Bar No. 0904376

[1] All exhibits referenced herein are found in an Appendix of Exhibits to Plaintiffs' Reply Memorandum of Law in Support of their Motion for Sanctions (hereafter, "Reply Appendix") being contemporaneously submitted for filing under seal.

## INTRODUCTION

Defendant Humana Inc. ("Humana") exhibits the height of arrogance in its Memorandum in Opposition to Plaintiffs' Motion for Sanctions [D.E. # 163] (hereafter, "Opposition") when it contends that (1) its destruction of relevant documents in the midst of this litigation and (2) its violation of the pretrial schedule governing this case by producing over 10,000 pages of documents (80% of which had never been produced before)[2] two months after the discovery deadline and one month before the case was to go to trial are "much ado about nothing." Opposition, at 1. In typical "blame the victim" fashion, Humana misleadingly contends that Plaintiffs' Motion for Sanctions is nothing more than an attempt to divert the Court's attention from the purported failure of their proof of the merits of their case. Id. In stark contradiction to this contention, however, Humana repeatedly concedes in its Opposition a key fact that compels, without the necessity for any further evidence, the granting of Plaintiffs' Motion for Partial Summary Judgment [D.E. # 104] and the injunctive relief sought therein. This key fact is, quite simply, that Humana employees breached the Confidentiality Agreement[3] between the parties by failing to destroy Plaintiffs' confidential information at the conclusion of the due diligence process conducted by Humana in considering its acquisition of Plaintiffs. Moreover, Humana's Opposition is otherwise rife with contradictory positions, misleading statements, factual inconsistencies and hollow excuses, all of which make up a fictitious "discovery tale," which Humana has submitted to the Court in a futile effort to avoid the sanctions it amply deserves, up to and including the striking of its answer and affirmative defenses and the entry of a default judgment of liability.[4]

Significantly, it is undisputed that on December 10, 2008 Humana engaged in a "print and purge" scheme whereby it instructed its employees to delete relevant documents from their computers. There is no legal or factual justification for such conduct notwithstanding Humana's claim, for the first time in this litigation, that the deleted documents were only "copies" and that it was under no obligation to maintain such "copies" because the "originals" have been kept in Humana's back-up system. Regardless, Humana's inability to produce anything other than a "manual snapshot" of one of the three documents that its employee, Charles Beckman, purged but did not print, flatly disproves this "discovery tale." Further, Humana's attempt to rewrite history in an effort to portray the "print and purge" scheme as "good faith" conduct is equally futile, and nothing short of preposterous. Indeed, the record evidence provides clear and undeniable proof that Humana implemented the "print and purge" scheme willfully and for the express purpose of derailing Plaintiffs' well-taken Motion for Partial

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[2] Opposition, at 4.
[3] Reply Appendix Exhibit 1.
[4] Humana's fictitious "discovery tale" may even be deemed to constitute a fraud on the court, thereby providing additional grounds for the imposition of the sanctions sought by Plaintiffs. See e.g., Ocon v. Equinamics Corp., No. 08-11226, 2009 WL 405370, at *1 (11th Cir. Feb. 19, 2009) ("A party commits a fraud on the court when the falsehood mires the 'judicial machinery' such that it 'cannot perform in the usual manner its impartial task of adjudging cases.'").

Summary Judgment.[5] Finally, Humana's "discovery tale" similarly fails to justify, both factually and legally, its inordinately late production of 10,000 pages of documents on January 16, 2009 and its even later production of an additional "culled" 300 pages of documents on March 4, 2009, just the week before last. Moreover, Humana's belittling of the importance of the sample of "smoking gun" documents found by Plaintiffs in the 10,000 page production wholly misconstrues the arguments set forth in Plaintiffs' Motion for Sanctions. Remarkably, this minimization effort is contradicted both by Humana's recent placing of its insurance carrier on notice of claims related to this litigation and the meritless arguments advanced in Humana's Motion to Disqualify undersigned counsel [D.E. # 162] filed the same day as the Opposition.[6] Thus, the "discovery tale" presented by Humana in its Opposition enhances, instead of defeats, Plaintiffs' Motion for Sanctions.[7]

## ARGUMENT

### *1. Plaintiffs' Motion for Partial Summary Judgment Should Be Granted "on the Merits."*

Humana repeatedly concedes in its Opposition that it breached the Confidentiality Agreement by failing to comply with its contractual duty to destroy the confidential information it obtained from Plaintiffs to decide whether to acquire them. Specifically, Humana states that "Humana's employees did not succeed in ridding themselves of due diligence materials—a point already conceded by Humana," Opposition, at 2; and acknowledges "Humana's admitted failure to completely destroy the

[5] Humana argues that Plaintiffs conceded in their Motion for Further Continuance of Trial and for Other Relief [D.E. # 148] (hereafter, "Motion for Continuance") that they had no evidence that Humana willfully or in bad faith withheld any responsive documents and that nothing has changed since. Opposition, at 1 (citing Motion for Continuance, at 2). What Plaintiffs actually stated in their Motion for Continuance, which was filed on January 21, 2009--a scant five days after receiving Humana's 10,000 page document production--was that, "Humana has undeniably failed to comply with its discovery obligations in this case. Whether this was intentional or negligent remains to be determined, but either way, Plaintiffs have been severely prejudiced." Motion for Continuance, at 2. On February 17, 2009, after having had an opportunity to review this massive production, Plaintiffs filed their Motion for Sanctions providing evidence of Humana's willful violation of its discovery obligations. Additionally, Humana's Opposition provides even further evidence of Humana's bad intent, as more fully discussed below. Hence, contrary to Humana's contention, the statement in the Motion for Continuance was not a concession and things certainly have changed since the filing of that motion.

[6] Humana's reliance on Lazar v. Mauney, 192 F.R.D. 324 (N.D. Ga. 2000) in support of its request that the Court strike portions of the Motion for Sanctions, Opposition, at 2 n.3, is misplaced because it is based on Humana's incorrect contention that Plaintiffs relied on privileged details from allegedly privileged documents in their Motion for Sanctions. On the contrary, Plaintiffs were extremely circumspect in their Motion for Sanctions in that they only submitted for the Court's consideration, under seal, the portions of documents for which Humana had claimed the privilege that clearly did not involve attorney-client communications. See Motion for Sanctions, at 4 n.9 (attorney communications redacted from documents bates labeled HUMANA SUPP 004000-004005); 12 n. 53 (HUMANA SUPP 007498 submitted showing only the date and recipient list on the email, with its contents redacted); 60 n. 13 (all portions of HUMANA SUPP 009980 redacted except for a statement regarding a Humana subsidiary's lack of wherewithal to acquire Plaintiffs, which, in any event, would not be privileged). Significantly, Humana has not objected to Plaintiffs' use of HUMANA SUPP 009980 in such a fashion, but has based its Motion to Disqualify undersigned counsel on Plaintiffs' similar treatment of the other two documents and their submission of two additional documents that Humana identified as privileged only **after** reviewing the Motion for Sanctions. Plaintiffs will address these disturbing issues more fully in their response in opposition to Humana's wholly meritless and disgraceful Motion to Disqualify. Suffice it to say for the moment that the case cited by Humana at page 2 of its Opposition as justifying denial of the Motion for Sanctions for use of privileged documents, Rico v. Mitsubishi Motors Corp., 171 P.3d 1092, 1100-01 (Cal. 2007), is wholly inapposite and factually distinguishable.

[7] Additionally, Humana's purported lack of knowledge and involvement in the egregious discovery violations that prompted the imposition of severe sanctions in Kelly v. Community Hospital of Palm Beach, Opposition, at 2 n.2, is wholly lacking in credibility given the findings contained in Judge Gill Freeman's Order and the imposition of the sanctions upon Humana itself. Reply Appendix Exhibit 2.

documents in its possession relating to the aborted transaction with Plaintiffs." Id. at 8. These admissions on the part of Humana compel the granting of Plaintiffs' Motion for Partial Summary Judgment and, as a logical corollary, denying Humana's Motion for Summary Judgment (wherein Humana seeks to prevail as to **all** of Plaintiffs' claims) either "on the merits" or as a sanction for Humana's discovery misconduct.

***2. Humana destroyed relevant documents.***

On December 10, 2008, as part of its "print and purge" scheme, Humana countermanded an earlier "litigation hold" instruction to the members of its due diligence team[8] and directed them **to delete** from their computers all documents related to the due diligence process.[9] Significantly, Humana's Opposition fails to cite any rule or case law whatsoever that authorizes such destruction of relevant documents in the midst of litigation. The reason is simple. There is none. Nevertheless, Humana now attempts to justify this unprecedented document destruction directive by claiming that the documents in the due diligence team members' computers were only "copies" and that the "original" documents have been maintained all along in the back-up for Humana's Lotus Notes email system. Opposition, at 8-9. However, there are multiple flaws in this chapter of Humana's "discovery tale."

As obviously recognized by Humana when it notified the due diligence team members of the "litigation hold," a party's obligation to identify and preserve relevant documents extends to "all sources of discoverable information." Zubulake v. UBS Warburg LLC, 229 F.R.D. 422, 432-33 (S.D.N.Y. 2004) (emphasis added). Indeed, the supplementation duty imposed by Fed. R. Civ. P. 26(e) "strongly suggests that parties also have a duty to make sure that discoverable information is not lost." Id. at 433 (emphasis added). Humana's initial document "preservation" instruction comported not only with these well-established discovery obligations but also with Humana's own "Principles of Business Ethics," which expressly prohibit Humana employees from destroying any documents related to a pending litigation.[10] Further, as acknowledged by Humana, the task of searching for and reconstructing the email files of its employees was both enormous and inherently inaccurate. Opposition, at 3-5. Indeed, as stated by the court in Hagemeyer N. Am., Inc. v. Gateway Data Sciences Corp., 222 F.R.D. 594, 600 (E.D. Wis. 2004), back-up systems sacrifice accessibility for storage capacity and a correlation exists between the inaccessibility of back-up systems and the cost of searching them. Thus, Humana's newly-found exclusive reliance on the Lotus Notes back-up system for compliance with its discovery obligations defies both legal precedent and practical considerations.

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[8] Humana due diligence team members Amy Boone and Charles Beckman both testified regarding the issuance of this initial "litigation hold" instruction. Plaintiffs' Motion for Sanctions, at 5.

[9] HUMANA SUPP 003455-003456, Reply Appendix Exhibit 3.

[10] See Humana's "Principles of Business Ethics," Reply Appendix Exhibit 4, at 26 ("Records should not be tampered with, removed, or destroyed prior to the specified date. If litigation, an audit, or a government investigation is pending, do not destroy any related records.").

Further, the back-up system upon which Humana now relies as the "be all source" for due diligence documents is limited to Lotus Notes emails and attachments.[11] Thus, to the extent that Humana employees deleted documents other than emails from their computers, Humana's Opposition makes no mention of any back-ups, or, in Humana terminology, "originals" for such documents. Additionally, Humana instructed due diligence team members not employed by Humana, such as Amanda Jester, of McDermott Will & Emery LLP, and the entire law firm of Greenebaum Doll & McDonald PLLC, to delete relevant documents from their computers.[12] Because Humana has no control over these extraneous computer systems, it cannot and does not claim to have "originals" or even back-ups for all of those deleted documents.

More significantly, Humana has only been able to produce a "manual snapshot"[13] of one of the three documents that were purged but not printed by Charles Beckman, notwithstanding its claim that all of them have been preserved in the Lotus Notes back-up system. Opposition, at 9 n.9. Humana's acknowledged inability to recover and produce this email in its original form and the special "manual" efforts it had to undertake to recover a "snapshot" of it, because it apparently could not be found through any of the other "searches," constitute an admission that its fabled back-up system is not an adequate substitute for the electronic documents that were destroyed in the "print and purge" scheme, particularly as to emails marked "do not forward or copy" such as the one admittedly purged by Beckman. Moreover, Humana's claim that another document purged by Beckman--an attachment to an email—had been "previously produced," id., is untrue. Indeed, a review of the referenced attachment's description makes it facially clear that the document that has been produced is a different version from the missing one.[14] In summary, the Lotus Notes back-up system is not the panacea that Humana portrays it to be and the purported availability of emails through that system does not in any way exonerate Humana's destruction of relevant documents in the midst of this litigation. If given the opportunity, Plaintiffs are confident that an independent search and analysis would yield further evidence of willful destruction or withheld documents.

***3. Humana's destruction of relevant documents was willful.***

Humana's lack of candor is even more evident when it argues in its Opposition that the

[11] Affidavit of Stephen Schoen, Opposition Exhibit C [D.E. # 163-4], at 2 (citing only to the availability of Humana's Lotus Notes back-up system for the proposition that Humana employees did not destroy any emails by deleting them).

[12] See Unsworn Declaration of Amanda Jester, Opposition Composite Exhibit E [D.E. # 163-6], at 45-46; Unsworn Declaration of Daniel E. Fisher, id. at 51-52.

[13] Reply Appendix Exhibit 5. Humana provided this "manual snapshot" on March 12, 2009, after performing a manual search based on "pinpoint information" preserved by Beckman before he purged the email, but only after Plaintiffs inquired regarding its availability due to Humana's cryptic reference to the purged document in its Opposition as "inconsequential." Opposition, at 9 n.9.

[14] The missing document, "Partagas Combined Admin Detail MR.xls," was a nearly "final" version, transmitted on October 10, 2007 at 2:21 p.m. HUMANA SUPP 007272, Reply Appendix Exhibit 6. The document that Humana claims to be the same as the missing one was a "work in progress" transmitted on that same day, but at 9:31 a.m. HUMANA 4125 through 4199, Reply Appendix Exhibit 7. Even more worrisome than the potential difference between the documents is Humana's attempt to mislead the Court by characterizing the two as being the same notwithstanding the distinction that is readily apparent from the transmitting emails.

December 10, 2008 "print and purge" scheme was a "good faith" effort to "mitigate" the grounds underlying Plaintiffs' Motion for Partial Summary Judgment by transferring the documents that its due diligence team members had previously failed to purge from their computers in late 2007 when the acquisition negotiations between the parties ended (as required by the Confidentiality Agreement) and consolidating them in the hands of Humana's in-house counsel, while collecting and preserving them for this litigation. Opposition, at 8. First, if this had been Humana's true intention, it stands to reason that it would have involved its information technology personnel in the project, afforded technical guidance to the team members, supervised their activities, and taken appropriate action to preserve the documents in electronic, as well as printed, form and to otherwise lock down or image the hard drives of each of its employees' computers. However, Humana did no such thing. Instead, it peremptorily directed the members of the due diligence team, many of whom are central to Plaintiffs' allegations of misconduct on the part of Humana, to make sure they had previously purged all due diligence materials from their computers, to print those that were not and then purge them from their computers, all without any supervision whatsoever.[15] Moreover, this characterization of the "print and purge" scheme is at odds with the affidavit of Attorney Andrew Berman (the acknowledged creator of the scheme) who attempts to distance it from Plaintiffs' Motion for Partial Summary Judgment by averring that the relief sought in that motion "never even crossed [his] mind" when he put the scheme in motion.[16] Notwithstanding counsel's after-the-fact disavowal, however, the urgency of the December 10, 2008 instruction, telling due diligence team members that their "immediate response is needed (TODAY)"[17] clearly ties the scheme to Humana's response to Plaintiffs' Motion for Partial Summary Judgment, which was due on December 12, 2008, only two days later. Thus, it is clear that the true motivation behind the "print and purge" scheme was to derail Plaintiff's Motion for Partial Summary Judgment, which is exactly what Humana attempted to do when it falsely argued that there was no evidence that any additional documents that should have been destroyed at the end of the due diligence period still remained in its possession; hence there was no reason to enjoin anything through summary judgment.[18] Accordingly, rather than a "good faith" effort to "transfer, "consolidate," "collect" and "preserve" the documents that it had failed to destroy when the due diligence process ended in late 2007, Humana's "print and purge" scheme amounted to nothing less than the willful and bad faith destruction of relevant documents in order to gain a misguided and ill-conceived tactical advantage over Plaintiffs.[19]

Even more suspect and contradictory of Humana's "good faith" theory is the submission of

[15] HUMANA SUPP 003455-003456, Reply Appendix Exhibit 3.
[16] Affidavit of Andrew S. Berman, Opposition Exhibit B [D.E. # 163-3] (hereafter, "Berman Aff.") ¶ 5.
[17] Reply Appendix Exhibit 3, at HUMANA SUPP 003456.
[18] Humana's Response in Opposition to Motion for Partial Summary Judgment [D.E. # 122], at 20.
[19] Significantly, Humana has provided no explanation of the gathering and production process it undertook with respect to responsive documents other than those related to the due diligence. Given the flaws that have been now been uncovered, it is not unlikely that Humana's other discovery responses were equally inadequate.

eleven (11) new Unsworn Declarations from due diligence team members[20] in response to Plaintiffs' observation in their Motion for Sanctions that the low "turn-out" of only seventeen (17) declarations submitted by Humana in opposition to Plaintiffs' Motion for Partial Summary Judgment, out of a total of ninety-four (94) queried team members, did not comport with the technical explanation provided by Humana for its failure to purge documents at the end of the due diligence process.[21] According to the architect of the "print and purge" scheme, these "straggler" declarations "trickled in" after December 22, 2008. Berman Aff. ¶ 6. Remarkably, however, six of the eleven new declarations are dated December 10 or 11, 2008,[22] the same date as the seventeen that were previously submitted, yet they were withheld.[23] More significantly, in his newly submitted declaration, which is dated December 11, 2008, Daniel E. Fisher on behalf of the Greenebaum Doll & McDonald law firm found it necessary to add the following paragraph to the boilerplate language appearing in the other declarations: "To my knowledge and belief, no electronic files pertaining to or received by us in connection with the proposed [trans]action were intentionally purged or destroyed after the commencement of th[is] Action until copied, disbursed and purged as described in Paragraph 6 below."[24] This prescient statement by Humana's due diligence counsel provides the most powerful evidence that Humana's "print and purge" scheme was both improper and willful, as Humana's **own** outside counsel tried to distance himself from the intentional destruction of documents that he was **directed** to perform. Hence, contrary to Humana's contention, the cases cited in Plaintiffs' Motion for Sanctions[25] fully support the imposition upon Humana of the ultimate sanction of striking its pleadings and entering a default judgment of liability against it for its willful destruction of relevant documents.

***4. Humana willfully delayed the production of "smoking gun" documents.***

In its Opposition, Humana does not even offer an apology to the Court for violating the pretrial schedule by producing over 10,000 pages of documents (80% of which had never been previously disclosed) two months after the November 17, 2008 discovery cut-off date. Instead, Humana contends that no sanctions whatsoever should be imposed upon it because its late production is

[20] Unsworn Declarations under Penalty of Perjury of Amy Brock, Elizabeth Shaw, Tracie Fahy, Rick Miller, Buddy Stewart, Mark Gleason, Maria Labarga, Daniel E. Fisher, Michael Seltzer, David Jarboe and Marshall Page, Opposition Composite Exhibit E, at 11-14, 29-38, 51-58.

[21] Motion for Sanctions, at 6 (given Humana's explanation that, unbeknownst to most Humana employees, deletion of an email from a Lotus Notes folder does not delete it from the Lotus Notes master file, it appeared that a much higher number of team members should have reported finding due diligence materials in their computers).

[22] Unsworn Declarations Under Penalty of Perjury of Buddy Stewart, Mark Gleason, Maria Labarga, Daniel E. Fisher (hereafter, "Fisher Decl."), Michael Seltzer and David Jarboe, Opposition Composite Exhibit E, at 33-38, 51-56.

[23] Unsworn Declarations under Penalty of Perjury of Amy Boone, Charles Beckman, Michael Russman, J. Gregory Price, William T. Stice, Bill Baldwin, Monica Grace Baldwin, Gregory B. Davis, Thomas A. Payne, Shannon Scott Thompson, Ed Henry, Debbie Galloway, Ralph M. Wilson, Amanda Jester, Tom Liston, Scott Ropp and Donna Scarborough, Opposition Composite Exhibit E, at 2-10, 15-28, 39-50, 61-62.

[24] Fisher Decl., Composite Exhibit E, at 52, ¶ 5.

[25] Plaintiffs' Motion for Sanctions, at 15 (citing Wm. T. Thompson Co. v. Gen. Nutrition Corp., 593 F. Supp. 1443, 1454 (C.D. Cal. 1984); Carlucci v. Piper Aircraft Corp., 102 F.R.D. 472, 485-86 (S.D. Fla. 1984); Computer Assocs. Int'l, Inc. v. Am. Fundware, Inc., 133 F.R.D. 166, 169 (D. Colo. 1990)).

"justified" and "not prejudicial" to Plaintiffs, hence "harmless." Opposition, at 6, 8.[26] Humana is wrong on all counts.

Humana first argues that its January 16, 2009 production of 10,000 pages of documents was an entirely proper and legitimate supplementation of its earlier production in compliance with Fed. R. Civ. P. 26(e). However, Rule 26(e)(1)(A) requires a party who has responded to a request for production to supplement its response:

> in a **timely** manner if the party learns that in some material respect the . . . response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing.

Fed. R. Civ. P. 26(e)(1)(A) (emphasis added). Throughout the discovery period, Humana repeatedly and falsely represented to Plaintiffs that all due diligence documents had been destroyed prior to the commencement of the litigation and that it had no such documents except for the results of its "reconstructed email correspondence and attachments."[27] In its Opposition, Humana claims that all along it "reasonably" relied on the work of its due diligence team liaison, Amy Boone, and the "destruction confirmation" emails she received from the members of the due diligence team. Opposition, at 3 (citing Berman Aff. ¶ 3). However, such blind reliance on the word of non-technical personnel is unreasonable given the now demonstrated ability of Humana's IT department to conduct a full search of Humana's computer systems. Significantly, Humana did not even bother to verify the accuracy of its reliance on Amy Boone's reports until the implementation of the "print and purge" scheme on December 10, 2008, almost a month after the discovery deadline. Thus, rather than complying with Rule 26(e)(1)(A), Humana violated it. Grider v. Keystone Health Plan Cent., Inc., No. Civ.A.2001-CV-05641, 2007 WL 2874408, at * 28 (E.D. Pa. Sept. 28, 2007) (concluding that "both the letter and spirit" of Rule 26(e)(1)(A), formerly Rule 26(e)(2), are violated by a party who responds to discovery requests by stating that it is not in possession of responsive documents when it has not looked and is not looking for the documents).[28]

Humana further attempts to excuse its inordinately late and voluminous production by

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[26] Humana also contends that no monetary sanction should be imposed because, in similar cases, courts have declined to impose such sanctions or imposed only nominal ones. Opposition, at 19-20. However, in both of the cases cited by Humana, the complaining party could ameliorate the prejudice visited upon it by conducting further discovery. See Omega Patents, LLC v. Fortin Auto Radio, Inc., No. 6:05-cv-1113-Orl-22DAB, 2006 WL 2038534, at * 5 (M.D. Fla. July 19, 2006) (directing the further deposition of the offending party's corporate representative); Tracy v. Fin. Ins. Mgmt. Corp., No. 1:04-CV-00619-TABDFH, 2005 WL 2100261, at * 3 (S.D. Ind. Aug. 22, 2005) (granting the complaining party the opportunity to depose additional witnesses). Here, Plaintiffs do not have such an option because discovery is closed.

[27] Humana's Initial Disclosures, Reply Appendix Exhibit 8, at 2. See also Humana's Response to First Request for Production, Reply Appendix Exhibit 9, at 1-2; Correspondence from A. Berman to T. Legon dated June 5, 2008, Reply Appendix Exhibit 10, at 1; Correspondence from A. Berman to T. Legon dated July 31, 2008, Reply Appendix Exhibit 11, at 1-2.

[28] Additionally, Humana's Rule 26(e) argument is inconsistent with the stance it took when it moved to strike Plaintiffs' Expert's Second Amended Expert Report, which Plaintiffs submitted on December 1, 2008, a mere two weeks after the discovery deadline. In its Reply Memorandum of Law in Further Support of its Motion to Strike Plaintiffs' Expert's Second Amended Expert Report [D.E. # 146], Humana adamantly argued that discovery supplementation pursuant to Rule 26(e) beyond the Court-imposed discovery deadline was prohibited. Id. at 5-6. Having taken such a stance, Humana should not be allowed to rely on Rule 26(e) to render its own late production timely. Alternatively, the Court should summarily deny Humana's Motion to Strike Plaintiffs' Expert's Second Amended Expert Report [D.E. # 108].

dubiously attributing the delay to "honest" mistakes resulting from the "vagaries" of searching electronic documents for production, coupled by the "unusual" requirement of the Confidentiality Agreement that all due diligence documents be destroyed at the end of that process. Opposition, at 7. However, Tom Liston, the Humana Senior Vice President who oversaw the due diligence process, testified without qualification that there was nothing unusual about a document destruction requirement as a part of any due diligence.[29] Therefore, Humana's claim of "unfamiliarity" with this requirement or unpreparedness to deal with the production issues in this litigation rings hollow to say the least.[30]

Further, Humana's "discovery tale" with respect to its even later production of documents on March 4, 2009, almost four months after the discovery deadline, defies belief. According to the affidavit of Humana's in-house counsel, Heidi Garwood, in May or June, 2008, while Humana was purportedly producing all of the documents obtained from its now admittedly incomplete and flawed first "reconstruction" of back up tapes, Humana secretly engaged in a second search of the back up system "over a broader timeframe" than the first one; and those results became available for review and production in early July, 2008 via an electronic "link" sent to Garwood in an email from Humana's IT department.[31] Incredibly, even though Garwood was intimately involved in multiple document productions, including five (5) in the month of July,[32] she now claims that, due to "other work demands" she did not immediately open the "link," "forgot" about it and "did not appreciate the significance" of the email because she "assumed" that previous searches had uncovered the documents that were responsive to Plaintiffs' discovery requests. Garwood Aff. ¶¶ 6-7. This is simply not believable. Moreover, when Garwood finally "remembered" the "missing link," after Plaintiffs' Motion for Partial Summary Judgment had been filed, Humana finally conducted a review of what amounted to an estimated 60,000 documents and, without explanation, has somehow now "culled" them down to a mere "12 emails with attachments, 14 emails with no attachments and 9 documents," which were just produced the week before last as responsive documents. Id. ¶ 8.[33]

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[29] Excerpt of Deposition of Tom Liston, taken on November 7, 2008, Appendix Exhibit 12, at 39: 10 – 40:25.

[30] Remarkably, Humana agreed to the document destruction provision of the Confidentiality Agreement with full knowledge that all emails and attachments generated during the due diligence process would be "preserved inviolate on its long term storage system." Opposition, at 4. This fact, had it been timely revealed, would have provided additional grounds for Plaintiffs to assert a claim for fraud in the inducement. See Plaintiffs' Motion for Sanctions, at 12-14.

[31] Affidavit of Heidi Garwood, Opposition Exhibit A (hereafter, "Garwood Aff.") ¶ 6.

[32] See Reply Appendix Composite Exhibit 13 (correspondence from A. Berman to T. Legon, with copies to H. Garwood, dated April 14, 2008 through November 11, 2008, transmitting Humana's discovery period document production).

[33] On March 12, 2009, in response to Plaintiffs' inquiry, Humana provided further details of the missing link "discovery tale," which raise even more disturbing questions regarding Humana's conduct in this litigation, given Humana's failure to produce all of the results of this second search or to advise Plaintiffs of the fashion in which it conducted a "culling" process that resulted in the production of a scant 36 documents (amounting to 300 pages) out of the 60,000 found in the search. While Plaintiffs reserve the right to supplement this submission and to seek further relief from the Court, at a minimum, Humana should be compelled to immediately turn over the hard drive containing the 60,000 documents that Humana found as result of the second search to an agreed upon or court designated independent forensic expert to verify the accuracy of Humana's claim that all other tens of thousands of documents are not responsive or were previously produced, all at Humana's expense.

Given the vast resources available to Humana[34] and the fact that it has two law firms representing it in this litigation, one of them being McDermott Will & Emery with over 1,100 lawyers,[35] the time lags in Humana's production of both the 10,000 pages of documents and the results of the May-July, 2008 search confirm that Humana willfully failed to produce the documents through "purposeful sluggishness." In re Seroquel Prods. Liab. Litig., 244 F.R.D. 650, 664-65 (M.D. Fla. 2007) (defendant was "purposely sluggish" in conducting e-discovery, thereby limiting the time for plaintiffs to review the information and follow-up on it).

Notwithstanding these inordinate document production delays, Humana incredibly contends in its Opposition that they are "harmless." Opposition, at 8.[36] To prove this point, Humana engages in formidable mental gymnastics in its attempt to minimize the prejudices visited upon Plaintiffs by the late production of "smoking gun" documents. Specifically, Humana goes to great lengths to establish that previously produced documents, specifically, HUMANA 2973-2974,[37] somehow reflected Humana's belatedly disclosed per member valuation analysis when it produced HUMANA SUPP 009294.[38] As set forth in Plaintiffs' Motion for Sanctions, however, the issue is not whether a valuation could be obtained from those earlier produced documents but that, when confronted with them, the two Humana employees in charge of the due diligence process categorically denied that Humana engaged in any such valuation analysis.[39] Humana's damages expert similarly denied the legitimacy of any such valuation analysis.[40] Yet, at the time of these depositions, Humana had in its possession a document that revealed that Humana had, in fact, conducted a valuation analysis of Plaintiffs' business on a per member basis. Due to Humana's concealment of this document, however, Plaintiffs and their damages expert witness have been forever denied the opportunity to utilize it in their damages calculations and otherwise in challenging the clearly contrived testimony of these witnesses.[41]

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[34] Humana's Press Kit, Reply Appendix Exhibit 14 (Humana ranks 110 on Fortune's list of largest U.S. companies, has 22,000 employees, is the nation's second largest provider of Medicare benefits, and had revenues of $21.4 billion and total assets of $10.1 billion in 2006).

[35] Reply Appendix Exhibit 15 (McDermott Will & Emery Firm Overview).

[36] Humana also disingenuously argues that Plaintiffs are not prejudiced by its production delays because the Court has continued the trial of this matter and, as a result, Plaintiffs have ample time to conduct additional discovery, with Humana sharing in the expenses as a "goodwill" gesture. Opposition, at 8. Humana conveniently omits from this argument the fact that the Order Re-Setting Pre-Trial Conference, Calendar Call and Trial Period [D.E. # 151] continuing the Pretrial Conference to April 10, 2009 and trial to the two-week period commencing April 27, 2009 expressly provides that all other dates and deadlines shall remain in full force and effect. Thus, contrary to Humana's sugar-coating suggestion, Plaintiffs are irreparably prejudiced by Humana's delayed production because discovery is closed.

[37] Reply Appendix Exhibit 16.

[38] See Exhibit 17 of Appendix of Exhibits to Plaintiffs' Motion for Sanctions (filed under seal).

[39] Excerpt of Deposition of Michael Russman, taken on November 6, 2008, Reply Appendix Exhibit 17, at 120:10 – 124: 24; Excerpt of Deposition of Charles Beckman, taken on November 6, 2008, Reply Appendix Exhibit 18, at 147: 3 – 149: 16.

[40] Excerpt of Deposition of Patrick Gannon, taken on November 13, 2008, Reply Appendix Exhibit 19, at 171: 13 – 182: 10.

[41] After Plaintiffs filed their Motion for Sanctions, Humana asserted the attorney-client privilege with respect to the document in question, HUMANA SUPP 009294. In their Request for *In Camera* Review and Finding of Waiver of Attorney Client Privilege by Defendant [D.E. # 158], Plaintiffs contend that Humana waived its claim of privilege with respect to all of the documents it produced. Moreover, if the valuation information contained in this document is just as easily obtainable from the non-privileged document bates labeled HUMANA 2974, Opposition, at 10, Plaintiffs fail to see how Humana can continue to claim that such information is privileged.

Another prime example of Humana's obfuscation is found in its attempts to minimize Humana's Ed Henry's concealment at his deposition of the fact that he had prepared a geographic analysis of Plaintiffs' membership in relation to Baptist Hospital by arguing that "the question of how many of Plaintiffs' members live near Baptist is different than that of how many of Plaintiffs' members utilized Baptist facilities and providers, which in turn is also different than the question of how would Plaintiffs' termination of their contract with Baptist impact their membership levels." Opposition, at 13. This Byzantine conundrum does nothing to ameliorate the simple facts that Henry concealed his involvement in the geographic analysis and that Humana concealed the document that would have precluded Henry from giving such misleading testimony related to an issue that Humana has made central to this case, namely, that Plaintiffs' loss of membership was attributable, in large part, to the termination of their relationship with Baptist Hospital.[42] Because discovery is now closed, Plaintiffs have no remedy, other than sanctions, for the prejudice visited upon them for this lack of candor on the part of both Henry and his employer.[43] In summary, Humana's willfully delayed production and the prejudices visited on Plaintiffs as a consequence provide additional grounds for striking Humana's pleading and entering a default judgment of liability against it, as argued in Plaintiffs' Motion for Sanctions.[44]

## CONCLUSION

In its Opposition, Humana contends that it has not sought an unfair advantage in this litigation but only a fair adjudication of Plaintiffs' claims on the merits; and that it has no desire to test the Court's authority. Opposition, at 17-18. In truth, Humana has done the exact opposite by depriving Plaintiffs of their right to timely discovery in defiance of this Honorable Court's Scheduling Order and the applicable rules; insisting that it is entitled to summary judgment as to all of Plaintiffs' claims, Opposition, at 9-10, notwithstanding the evidentiary handicap placed upon Plaintiffs by Humana's own discovery violations; and, in its latest and most dishonorable gambit, attempting to disqualify Plaintiffs' counsel in retribution for their vigorous and effective prosecution of the case. Given Humana's complete disregard for its discovery obligations and its appalling litigation tactics, Plaintiffs respectfully submit that it amply deserves the sanctions sought by Plaintiffs, up to and including the striking of its answer and affirmative defenses and the entry of a default judgment of liability. Accordingly, Plaintiffs respectfully request that this Honorable Court grant them the relief sought in their Motion for Sanctions and such other and further relief that the Court may deem proper and just.

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[42] See Humana's Amended Answer and Affirmative Defenses to Amended Complaint [D.E. # 105-2], at 12-13.

[43] Humana's attempts to minimize the other prejudices described in Plaintiffs' Motion for Sanctions are equally unavailing. Moreover, Humana's argument that, even if Plaintiffs had not been precluded from bringing a fraud in the inducement claim by its discovery violations, such a claim would be barred by the economic loss rule is particularly egregious. Opposition, at 15. In essence, Humana is presuming to predetermine the fate of a claim that never saw the light of day solely due to its own discovery misconduct.

[44] Plaintiffs' Motion for Sanctions, at 16-17 (citing Falcon Farms, Inc. v. R.D.P. Floral, Inc., No. 07-23077-CIV, 2008 WL 4500696, at *7 (S.D. Fla. Sept. 30, 2008); Inmuno Vital, Inc. v. Telemundo Group, Inc., 203 F.R.D. 561, 573 (S.D. Fla. 2001); BankAtlantic v. Blyth Eastman Paine Webber, Inc., 127 F.R.D. 224, 233 (S.D. Fla. 1989)).

**CERTIFICATE OF SERVICE**

I hereby certify that on March 16, 2009, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to Steven E. Siff, Esq., McDermott Will & Emery LLP, 201 South Biscayne Boulevard, Suite 2200, Miami, Florida 33131-4336; and Andrew S. Berman, Esq., Young, Berman, Karpf & Gonzalez P.A., 17071 West Dixie Highway, North Miami Beach, Florida 33160, Counsel for Defendant Humana Inc.

____/s/ Todd R. Legon_____