UNITED STATES DISTRICT COURT FOR THE
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,

vs.

HUMANA INC., a foreign corporation,

Defendant.
_____/

DEFENDANT HUMANA INC.'S MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR SANCTIONS

Defendant Humana Inc. ("Humana" or "Defendant"), by its undersigned counsel, submits this Memorandum in Opposition to the Motion for Sanctions (D.E. #153) (the "Motion") filed by Plaintiffs Preferred Care Partners Holding Corp. ("Preferred Holdings") and Preferred Care Partners, Inc. ("PCP") (Preferred Holdings and PCP collectively, "Plaintiffs").[1]

PRELIMINARY STATEMENT

The instant Motion arises from fortuitous circumstances that Plaintiffs have seized upon to divert the Court's attention from the fact that their proof on the merits has utterly failed to materialize. While these circumstances have supplied Plaintiffs some undeserved traction that serves to obscure their lack of a case on the merits for any damages, Humana is confident that when this Court places this issue in the context of the core legal issues in this case, it will conclude that this is an unfortunate occurrence and in the end, much ado about nothing.

When they filed their Motion for Further Continuance of Trial and for Other Relief (D.E. #148) on January 21, 2009, Plaintiffs conceded that they had no evidence that Humana willfully or in bad faith withheld any responsive documents (p.2). Nothing has changed. In fact, the three

[1] Factual assertions herein are verified by the Affidavits of Heidi Garwood ("Garwood Aff."), Andrew S. Berman ("Berman Aff."), Stephen Schoen ("Schoen Aff."), and Kathleen Pellegrino ("Pellegrino Aff."), attached hereto as **Exhibits A-D** respectively.

primary premises relied upon by Plaintiffs in the Motion to attempt to show willfulness or bad faith are fundamentally flawed: (1) that Humana destroyed the "native" files of e-mails produced in its supplemental production; (2) that certain clearly privileged documents inadvertently produced by Humana contain "smoking gun" revelations; and (3) that Humana historically has engaged in a pattern of discovery abuses. *First*, Humana simply has not destroyed *any* responsive documents—even those documents deleted from its employees' individual computers. All such responsive documents have been preserved throughout the entire course of this litigation in original, "native" format on Humana's long term storage system. Schoen Aff. ¶¶ 3-5. *Second*, the supplemental production did not produce any "smoking gun" documents or even documents that resuscitate Plaintiffs' ailing claims. At most, the documents produced in the supplemental production merely provide cumulative evidence that Humana's employees did not succeed in ridding themselves of due diligence materials—a point already conceded by Humana. *Third*, the sole basis for Plaintiffs' conclusion that Humana is a discovery scofflaw is a case that involves a *former* Humana hospital that has not been handled by Humana for the last 16 years.[2] Sadly, Plaintiffs exacerbate their errors by embellishing their erroneous conclusions with details from inadvertently produced attorney-client privileged materials, which by itself justifies denial of the Motion.[3] *See Rico v. Mitsubishi Motors Corp.*, 171 P.3d 1092, 1100-01 (Cal. 2007).

As explained in detail below, Humana did the best it could in good faith to reconstruct a document universe that it was contractually required to destroy and reasonably believed it had destroyed. As soon as Humana discovered that it may have additional responsive documents that

[2] *Kelly v. Cmty. Hosp. of Palm Beach*, Case No. 93-654 CA 40, arises out of Humana's former hospital division, which was sold to an independent and publicly traded corporation named Galen Health Care, Inc. ("Galen") in 1993. Pellegrino Aff. ¶¶ 4-5. Galen is now an affiliate of Hospital Corporation of America ("HCA"), who, pursuant to an Assumption of Liabilities and Indemnification Agreement, has been defending the case for the past 16 years. *Id.* at ¶¶ 6-8. Although Humana is a named defendant, it has had no involvement in the case for that period of time and is not financially responsible for any damages or sanction award that may be issued. *Id.* It is fully indemnified by HCA who employs its own defense counsel who have no affiliation with and take no direction from Humana. *Id.* Thus, any reliance on that case to paint Humana in a dark light is misplaced.

[3] On March 6, 2009, Humana also filed a Motion to Disqualify counsel for Plaintiffs due to their improper utilization of inadvertently produced attorney-client privileged material, which among other things, requests that the Court strike the portions of the Motion that rely upon privileged documents. *See Lazar v. Mauney*, 192 F.R.D. 324 (N.D. Ga. 2000) (striking brief that incorporated inadvertently produced attorney-client privileged material).

had not been previously produced to Plaintiffs, Humana promptly gathered and reviewed these documents, sent them out for copying, and *voluntarily* produced them to Plaintiffs. At no time did Humana intend or desire to evade its legal obligations. Moreover, there is nothing in Humana's supplemental production that changes the parties' pending motions or the disputed issues in this case. Accordingly, because Humana acted in good faith and Plaintiffs have not been prejudiced by Humana's supplemental production of documents, the Court should deny the Motion in its entirety.

FACTUAL BACKGROUND

A. Humana's Original Production of Documents

As the Court knows, this case is unusual because Humana was required by the Confidentiality Agreement at issue in this case to destroy everything in connection with its possible acquisition of Plaintiffs. It believed that it had. Garwood Aff. ¶ 3. In fact, its point person on the destruction exercise, Amy Boone, received written confirmations from all on the due diligence team that they had each destroyed all paper and deleted all electronic material. *Id.* Those confirmations already have been provided to Plaintiffs and filed with the Court. *See, e.g.,* Appendix of Exhibits to Plaintiffs' Motion for Sanctions, Ex. 10 (HUMANA 0024-0147).

Accordingly, when Humana was sued in this case it assumed, incorrectly but reasonably, that its employees and the employees of its subsidiaries had no discoverable materials in their possession related to the possible acquisition of Plaintiffs by Humana. Berman Aff. ¶ 3. Given that all due diligence team members had confirmed destruction of all paper material and all electronic material on their individual computers, Humana devised a strategy to recapture and reconstruct any responsive electronic documents that had been deleted by individual users but were preserved on Humana's long term storage system—a process that began even before the first discovery request was propounded by Plaintiffs. Garwood Aff. ¶ 3; Berman Aff. ¶ 3. In consultation with its IT department, Humana determined that the only practicable means to produce relevant e-mails was by searching the long term storage system for the e-mail files of select employees with automated search terms. Garwood Aff. ¶¶ 4-5. Not every employee's e-mail file was recreated because, in good faith, Humana did not believe it to be necessary and it would have been a more enormous task than the one already undertaken, with no reward. *Id.*

On a rolling basis over many weeks Humana produced this material to Plaintiffs, which included contracts, marketing materials, e-mails and other documents. Each production was delivered with a cover letter indicating, among other things, whose e-mail files were being recreated and produced. *See, e.g.*, Appendix of Exhibits to Plaintiffs' Motion for Sanctions, Ex. 15. Plaintiffs never objected to the process nor did they ever request that e-mail files of other employees be searched for documents or additional steps be taken. In fact, Plaintiffs' counsel probably concluded, as did Humana's, that the process was monotonous because so much of the material recreated overlapped with and was duplicative of other material produced. Overall, Humana produced approximately 4,488 documents (12,315 pages total) and believed in good faith that it had taken all reasonably prudent steps to fulfill its discovery obligations and gather responsive documents.

B. Humana's Supplemental Production of Documents

In November 2008, a Humana employee, Charles Beckman, stumbled upon additional e-mails that he thought he had destroyed related to Humana's potential acquisition of Plaintiffs. Berman Aff. ¶ 4. Prompted solely by its ethical and procedural obligations, Humana immediately and expeditiously asked everyone on the due diligence team to recheck their computers and re-confirm that they had deleted everything. Specifically, Humana instructed the due diligence team members to print any additional e-mails located so Humana could produce them to Plaintiffs, but delete the e-mails on their individual computers so that the employees no longer would have access to them consistent with the Confidentiality Agreement. *Id.* ¶ 5. Humana did this knowing that all e-mails and attachments are preserved inviolate on its long term storage system. Schoen Aff. ¶¶ 3-5. From December 10-22, 2008, Humana received these additional documents from members of its due diligence team. Berman Aff. ¶¶ 6, 14. By December 26, 2008, counsel had completed its review of these documents, which were then sent out for copying and labeling and thereafter delivered to Plaintiffs by Federal Express on January 16, 2009. *Id.* ¶¶ 7-10, 14. Overall, this supplemental production included approximately 3,966 documents (10,120 pages total), 20% of which Humana later determined had already been produced to Plaintiffs in connection with its original production.

During this same time period, Humana also discovered an additional batch of electronic documents that had been gathered by its employees in the summer of 2008 but inadvertently never provided to its outside counsel. In May or June of 2008, in an abundance of caution and to

confirm that any and all responsive documents were recreated and produced in the original production, Humana instructed its IT Department to conduct another search of its long term storage system for responsive documents over a broader time frame. Garwood Aff. ¶ 6. In early July of 2008, the IT Department sent an e-mail containing a "link" to the results of this search that unfortunately was overlooked by Humana's in-house counsel. *Id.* ¶¶ 6-7. After thorough review of these documents, Humana has determined that only 9 documents, 12 e-mails with attachments, and 14 e-mails without attachments are responsive and appear not to have been previously produced to Plaintiffs. *Id.* ¶ 8. Humana produced these documents to Plaintiffs on March 4, 2009.

The reasons why there are some newly-produced documents are as follows. *First*, review of the materials previously thought to have been destroyed that were recently discovered on the hard drives of certain Humana employees yielded some responsive documents not containing any of the terms used in searching the long term storage system, and thus not captured in the previous search.[4] *Second*, some of the newly-discovered responsive documents thought to have been deleted came from the computers of personnel having marginal roles in the due diligence process, whose backup e-mail files had not originally been searched. *Third*, when Humana performed its original automated searches prior to discovery being served by Plaintiffs, it did not go back far enough in time to capture all potentially responsive material because, based upon Plaintiffs' allegations in the complaint, the key time period was September and October 2007. Garwood Aff. ¶¶ 4-6.

As soon as Humana discovered the existence of these documents, a supplemental production was promised to Plaintiffs' counsel, but it took time—particularly with all of the recent holidays—to collect these documents from various employees within Humana and its subsidiaries, to review them for privileged material, and to send them out for stamping and copying. Significantly, and contrary to Plaintiffs' characterizations in the Motion, none of these documents have any consequence to the disputed issues in this case.

[4] As explained in earlier submissions, many Humana employees did not realize that performing a delete function on the relevant folder in their computers did not delete the material altogether from their machines. *See, e.g.*, Humana's Response in Opposition to Motion for Partial Summary Judgment (D.E. #122), p.8, n.5. Additional steps were required, of which almost all were unaware. All were honest mistakes, and there is no evidence that any of the documents were used for nefarious purposes, particularly because the employees did not know the documents were still on their machines.

LEGAL STANDARD

Rule 16(f)(1)(C), Fed. R. Civ. P., permits the Court to impose sanctions that are "just," including those authorized by Rule 37(b)(2)(A)(ii)-(vii), if a party fails to obey a scheduling or other pretrial order.[5] "Rule 37(b)(2) contains two standards—one general and one specific—that limit a district court's discretion [to award sanctions]. First, any sanction must be 'just'; second, the sanction must be specifically related to the particular 'claim' which was at issue in the order to provide discovery." *Ins. Corp. of Ireland, Ltd. v. Compagnie Des Bauxites De Guinee*, 456 U.S. 694, 707 (1982). In order to be "just," "the court must fashion a sanction that is proportionate to the particular offense." *BankAtlantic v. Blythe Eastman Paine Webber, Inc.*, 127 F.R.D. 224, 235 (S.D. Fla. 1989); *see also Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422, 437 (S.D.N.Y. 2004) (stating that "a major consideration in choosing an appropriate sanction . . . is to restore Zubulake to the position that she would have been in had UBS faithfully discharged its discovery obligations"). As more generally described by this Court, sanctions for discovery violations are not appropriate if the violation "was either justified or harmless." *Rabello v. Bell Helicopter Textron, Inc.*, 200 F.R.D. 484, 489 (S.D. Fla. 2001); *see also Tower Ventures, Inc. v. City of Westfield*, 296 F.3d 43, 46 (1st Cir. 2002) (noting that "violation of a scheduling order may be excused if good cause exists").

ARGUMENT

A. SANCTIONS ARE NOT WARRANTED BECAUSE HUMANA HAS ACTED IN GOOD FAITH AND ITS SUPPLEMENTAL PRODUCTION OF DOCUMENTS IS JUSTIFIED

Sanctions are not warranted because Humana has acted in good faith and its supplemental production of documents is justified. *First*, Plaintiffs' unsupported assertion that Humana has destroyed documents relevant to this action is simply false. As discussed in detail below, the entire universe of relevant documents in Humana's possession has been preserved on a long term storage system (separate from individual computers) throughout the entire duration of this case.

[5] Rule 16(f)(2), Fed. R. Civ. P., requires the Court to award the reasonable expenses incurred because of any such noncompliance, "unless the noncompliance was substantially justified or other circumstances make an award of expenses unjust."

Schoen Aff. ¶¶ 3-5. *Second*, there is not a shred of evidence that Humana connived to withhold from its prior disclosures the documents contained in its supplemental productions.[6]

A more accurate synopsis of the gravamen of the instant Motion is that electronically stored information was discovered by Humana, and was disclosed to Plaintiffs, albeit after the November 17, 2008 discovery cut-off set by the Court in its Scheduling Order. Rule 26(e), Fed. R. Civ. P., expressly contemplates such a situation—where "a party . . . who has responded to [a] . . . request for production . . . learns that in some material respect the disclosure or response is incomplete or incorrect"—and imposes a duty on that party to "supplement or correct its disclosure or response in a timely manner." By voluntarily supplementing its document production in accordance with Rule 26(e) without Court intervention, Humana has fulfilled its discovery obligations, and is justified in disclosing these documents after the discovery cut-off.

If Humana had indeed schemed "in a desperate and improper attempt to defeat Plaintiffs' motion for partial summary judgment and avoid the nearly certain prospect of injunctive relief compelling it to engage a forensic expert to review its computer files" (Motion at 15), as Plaintiffs claim, it defies reason that it would, on its own initiative, disclose these documents and the circumstances of their collection at this stage in the litigation. Nor is this a case of "callous disregard" by Humana for its discovery obligations or this Court's orders. Quite to the contrary, Humana's good faith and earnestness are manifest in its efforts to promptly comply with its obligation to supplement upon discovering that its prior disclosure was incomplete.

Humana's failure to disclose the recently-produced documents at the time of its earlier production was the sort of honest mistake that any reasonable and responsible litigant could have made where, as here, the vagaries of the electronic search-and-production process[7] were compounded by the complexity of an unusual Confidentiality Agreement that required Humana to destroy the very documents whose production is now required. At the very worst, the conduct complained of here does not rise above ordinary negligence, which is an insufficient foundation

[6] At the time of filing their Motion for Further Continuance of Trial and for Other Relief on January 21, 2009, Plaintiffs conceded that they had no evidence of willfulness, and nothing factually has changed since then. *See* D.E. #148, p.2 ("Whether this was intentional or negligent remains to be determined.").

[7] *See* Fed. R. Civ. P. 37(e) and Fed. R. Evid. 502, new rules concerning electronically-stored information, which evince an over-arching understanding and recognition by the rule-makers of the extraordinary complexity that modern information systems have added to the traditional discovery process, and their intention to alleviate some of the harsh consequences falling upon litigants whose good faith discovery efforts have been frustrated by technical difficulties.

for the severe sanctions sought by Plaintiffs in the Motion. *See BankAtlantic v. Blythe Eastman Paine Webber, Inc.*, 12 F.3d 1045 (11th Cir. 1994) ("Violation of a discovery order caused by simple negligence, misunderstanding, or inability to comply will not justify a Rule 37 default judgment or dismissal."); *Malautea v. Suzuki Motor Co., Ltd.*, 987 F.2d 1536, 1542 (11th Cir. 1993), *cert. denied*, 510 U.S. 863 (1993).

B. SANCTIONS ARE NOT WARRANTED BECAUSE HUMANA'S SUPPLEMENTAL PRODUCTION OF DOCUMENTS IS NOT PREJUDICIAL TO PLAINTIFFS AND THUS IS HARMLESS

Sanctions also are not warranted because Humana's supplemental production of documents is not prejudicial to Plaintiffs and thus is harmless. *First*, the materiality of each document cited by Plaintiffs in their Motion is debunked below. *Second*, the Court has *sua sponte* continued the trial in this case until the two-week period commencing April 27, 2009.[8] *Third*, Humana has offered Plaintiffs any additional discovery that they believe they need, and as a gesture of goodwill, even offered to discuss sharing the expense of that discovery. Garwood Aff. ¶ 10. Thus, even if any of these documents were material, Plaintiffs have sufficient time before trial to conduct discovery and integrate any new information into their trial strategy.

1. No Documents Have Been Destroyed, Concealed or Withheld

Plaintiffs' assertions that Humana has destroyed, concealed or withheld documents relevant to this action is simply false. The "print and purge scheme" of which Plaintiffs complain was, in fact, Humana's good faith effort at (1) mitigating the very grounds on which Plaintiffs have sought partial summary judgment—Humana's admitted failure to completely destroy the documents in its possession relating to the aborted transaction with Plaintiffs—by transferring these documents from the possession of numerous employees dispersed in different parts of the company, and regions of the country, and consolidating them in the hands of Humana's in-house counsel, while also (2) collecting and preserving the documents for the instant litigation. The printing and deleting of this electronically-stored information did not result in the destruction of *any* responsive documents, the total universe of which has been produced to Plaintiffs in paper form (or its equivalent) and has been preserved in its original

[8] *See* Order Resetting Pretrial Conference, Calendar Call and Trial Period (D.E. #151).

"native" electronic format on Humana's long term storage system.[9] Schoen Aff. ¶¶ 3-5. Only *copies* of these documents have been deleted from the computers of the individual Humana employees—which is precisely what Plaintiffs have sought in this case.[10]

These circumstances stand in stark contrast to the cases relied upon by Plaintiffs, in which the sanctioned party's misconduct impaired their adversary's right to a fair adjudication of their claims on the merits by depriving them of relevant, material documents or information—either by destruction, or by repeated refusal to disclose. *See* case law cited in Section (C)(1) *infra*. Here, Plaintiffs have been provided with all relevant documents, and will have sufficient time before trial to review these documents, take discovery on them, and integrate them into their trial strategy. *See In re Seroquel Prods. Liab. Litig.*, 244 F.R.D. 650 (M.D. Fla. 2007) (deferring ruling on motion for sanctions pending a determination of prejudice). Moreover, as discussed *infra*, none of the documents produced after the discovery cut-off contain anything material that had not previously been disclosed. Accordingly, Plaintiffs have suffered no prejudice as a result of Humana's disclosure of these documents after the discovery cut-off.

2. <u>The Recently Produced Documents Are Not Material</u>

Notwithstanding Plaintiffs' extraordinary assertion that Humana's supplemental production contains "a large quantity of what can only be described as 'smoking gun' documents" (Motion at 7), none of the newly produced documents contain anything not previously disclosed that is material to the specific grounds on which the parties have moved for summary judgment, or to any other issue of fact in this case. Most relevantly for the purposes of the instant Motion, there is nothing in Humana's supplemental production, or in any line of questioning that Plaintiffs might otherwise have pursued with any deposed witness, that in any way changes the fact that Humana is entitled to judgment as a matter of law because Plaintiffs'

[9] This includes the 4,000 pages of documents and the two e-mails referenced in footnote 17 on page 5 of the Motion. Humana does not believe that the 4,000 pages of documents, which simply contain page after page of incomprehensible numbers, are even responsive, but in an abundance of caution, Humana sent them to Plaintiffs by Federal Express on February 25, 2009. In addition, the inconsequential content of the August 14, 2007 e-mail was transcribed on HUMANA SUPP 006741, and the October 10, 2007 e-mail and attachment previously were produced as HUMANA 2365 and HUMANA 4126-4201.

[10] Contrary to Plaintiffs' assertion, Humana <u>has</u> secured confirming declarations from each member of the due diligence team that discovered additional responsive documents on their individual computers, including Amy Brock and Michael Seltzer (attached hereto as **Composite Exhibit E**). Many of these declarations simply had not been received by Humana's in-house counsel at the time Humana filed its Response in Opposition to Plaintiffs' Motion for Partial Summary Judgment.

causation theory—that the disenrollment of Plaintiffs' members was the result of some action by Humana—lacks *any* factual support. *See* Humana's Motion for Summary Judgment (D.E. #92).

We address each of the purported revelations identified by Plaintiffs in turn.

a. Humana's Valuation Analysis

Plaintiffs first argue that "Humana concealed its own valuation analysis of Plaintiffs' membership." (Motion at 8-9). In support of this argument, Plaintiffs identify a recently produced e-mail (HUMANA SUPP 009294) in which Michael Russman states that Humana's $210M offer to purchase Plaintiffs amounts to $7,823 per member. Far from being a "smoking gun," this e-mail is completely immaterial.

First, HUMANA SUPP 009294 is not new; it is listed on Humana's Privilege Log served on June 13, 2008, as "CB 3-5." While it was inadvertently included in Humana's supplemental production of documents, Humana maintains that this document is privileged, that the privilege has not been waived, that Plaintiffs' use of the document is highly improper, and that the Court should disregard this document in determining the Motion.

Second, HUMANA SUPP 009294 does not contain a "valuation" of Plaintiffs, but rather simply expresses the $210M proposed purchase price in terms of price per member: $210M divided by 26,842 members equals $7,823.56. *See* Deposition of Patrick Gannon at 177:12-23 (testifying that this is not a true "valuation" but rather a "quick and dirty calculation used for purpose of negotiation").[11] As the proposed purchase price, membership and the ability to perform division were all available to Plaintiffs, Plaintiffs cannot, with a straight face, claim that this is some sort of revelation that in any way impacts the merits of this case.

Third, Humana had previously disclosed to Plaintiffs detailed documents containing Humana's per member valuation of Plaintiffs—documents which were provided to and analyzed by experts for both Plaintiffs and Humana. Specifically, HUMANA 2974[12] contains a detailed valuation analysis, including a per member EBITDA calculation ($1,003.26) and EBITDA multiples corresponding to a range of purchase prices (7.8 for a $210M purchase price). This document was delved into extensively at Mr. Russman's deposition, which specifically included

[11] The transcript of the deposition of Patrick F. Gannon, C.P.A., A.B.V, C.F.F., C.V.A. ("Gannon Dep."), is attached as Exhibit 1 to Humana's Sealed Appendix in Opposition to Motion for Sanctions ("Humana's Sanctions Appendix"), filed contemporaneously herewith under seal.

[12] Attached as Exhibit 2 to Humana's Sanctions Appendix.

a discussion of calculating per member value by multiplying the per member EBITDA by the EBITDA multiple.[13] Again, simple arithmetic provides Plaintiffs with the valuation which they accuse Humana of having improperly withheld—$1,003.26 multiplied by 7.8 equals $7,825.43, which roughly equals the $7,823 cited by Plaintiffs.

b. Humana's Purported "Leaking" of Confidential Acquisition Discussions

Plaintiffs cite to three recently-produced e-mails that evidence that third parties had somehow learned about the acquisition discussions between Humana and Plaintiffs, and that certain Humana employees were aware of this fact. (Motion at 9-10). These facts are neither new nor material, as Humana's employees have readily acknowledged that they knew of the external rumors that Humana and Plaintiffs were in negotiations.[14] In their Motion, Plaintiffs seek to spin these three e-mails as somehow evidencing their otherwise unsubstantiated claim that Humana "leaked" the fact that these acquisition discussions were taking place. These e-mails, however, provide no support for Plaintiffs' claim.

HUMANA SUPP 004235 contains a statement by Ed Henry that "I know word is already out on this, but I don't want anyone on our staff being the one fingered for leaking this." Far from a "scathing admission" (Motion at 10), this e-mail evidences nothing more than Mr. Henry's awareness that word of the acquisition discussions was "already out," and his desire that no one on his staff receive blame (deserved or otherwise) for a leak. If anything, this e-mail tends to show that Mr. Henry had no specific knowledge of any leaks by his staff, but instead sought to generally admonish the recipients to comply with their confidentiality obligations.

HUMANA SUPP 007872 is an unsolicited e-mail to Tom Liston from a third party stating "Local rumors are that Careplus is buying Preferred Care Partners." Plaintiffs simply cannot characterize this e-mail *to* a Humana employee as an "admission" *by* a Humana

[13] Deposition of Michael Russman ("Russman Dep.") at 120:5-123:21 (attached as Exhibit 3 to Humana's Sanctions Appendix); *see also* Deposition of Charles Beckman at 147:3-148:3, 214:4-215:1 (attached as Exhibit 4 to Humana's Sanctions Appendix); Gannon Dep. at 171:13-176:11.

[14] *See* Deposition of David Jarboe at 68:10-73:11 (attached as Exhibit 5 to Humana's Sanctions Appendix); Deposition of Michael Seltzer at 112:15-114:20 (attached as Exhibit 6 to Humana's Sanctions Appendix); Deposition of Santiago Freire at 17:2-18:15, 25:14-29:24, 32:7-35:1, 42:17-43:18, 66:16-67:14, 124:2-125:23, 134:5-140:10 (attached as Exhibit 7 to Humana's Sanctions Appendix); Deposition of Tomas Orozco at 44:13-55:14, 108:11-109:7, 113:2-13, 115:3-118:20, 120:7-124:24 (attached as Exhibit 8 to Humana's Sanctions Appendix).

employee. If anything, this e-mail is helpful to Humana as it tends to show that Humana was not the source of the rumor. If Humana had been the source of the e-mail author's information, it would be unlikely that the author would then ask Humana to confirm its own rumor.

HUMANA SUPP 001456-57 evidences the fact that Michael Seltzer advised Peter Buigas, a third party, of upcoming meetings with Plaintiffs. This e-mail, however, does not substantiate Plaintiffs' claim of "leaking" by Humana to outsiders, as Mr. Buigas was an insider to the negotiations—he was Humana's initial contact in 2006 with respect to an earlier proposed transaction between Humana and Plaintiffs and also in 2007 with respect to the proposed transaction underlying this case. In fact, Mr. Buigas was the person who initially brought Plaintiffs and Humana together, at Plaintiffs' election.[15] If anything, this document is helpful to Humana, as Mr. Seltzer's statement that he "still wants this one!" evidences Humana's seriousness about finalizing the purchase of Plaintiffs.

c. Humana's Purported Plan to Utilize Plaintiffs' Confidential Information

Plaintiffs claim that a newly-produced e-mail exchange between two Humana employees supports one of its "central claims"—that Humana was not serious about acquiring Plaintiffs but had instead "all along" planned "to use the due diligence process" to obtain confidential information from Plaintiffs that it could then use for competitive purposes. (Motion at 10). Again, this is nothing more than Plaintiffs' spin.[16] The e-mail, HUMANA SUPP 001737-38, instead simply reflects office chatter from non-decision makers regarding the precise considerations that would be expected on the part of Humana, in its evaluation of whether to acquire one of its competitors: Will Humana's goal of obtaining Plaintiffs' customers be better served through acquisition or "aggressive" competition? To buy or to continue competing?

[15] *See* e-mail correspondence between Mr. Buigas and representatives of Humana, attached as Composite Exhibit 9 to Humana's Sanctions Appendix.

[16] Among other things, the substantial scope of Humana's due diligence undermines Plaintiffs' thesis that Humana was not serious about acquiring Plaintiffs. *See also* Russman Dep. at 99:24-100:10 ("We offered two hundred and twenty million dollars in August 10 of '07 for a company that we determined had extremely aggressive accounting practices during our October 17th, 18th and 19th meetings in Miami, yes. And even after that diligence session, we were still willing to pay your client a substantial sum of money for their company, far in excess of what the value would be today and probably stretching the limits of what we should have paid, but we were trying to get a deal done because our management team wanted to get it done and we thought it was the right thing to do.").

There is nothing in the e-mail that suggests any plan to misuse the confidential information obtained from Plaintiffs in the due diligence process.[17] Moreover, the language regarding "captur[ing] membership through aggressive product pricing" is not even consistent with Plaintiffs' theory of the case, by which Humana allegedly obtained Plaintiffs' membership by raising the capitation rates paid to providers—not by lowering the product price paid by the members.

d. Humana's Performance of a "Provider Overlap Analysis"

Plaintiffs cite to a recently-produced geographic analysis of Plaintiffs' membership in relation to Baptist Hospital prepared by Ed Henry (HUMANA SUPP 00404-406) as evidence that Mr. Henry had testified untruthfully at his deposition in "disclaim[ing] knowledge of Humana having concluded any type of analysis to determine what impact Plaintiffs' termination of their provider contract with Baptist Hospital would have on their membership levels." (Motion at 11). Plaintiffs' conclusion is flawed, however, as 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.

e. Humana's Purported Improper Use of Plaintiffs' Provider List

Plaintiffs also claim that newly-produced documents (HUMANA SUPP 002739, 004569-4570, 007498-7501) reveal Humana's improper use of Plaintiffs' provider lists to identify "target" providers. (Motion at 11-12). *First*, there is nothing on the face of this document that permits that inference. Humana's alleged use of Plaintiffs' provider list is irrelevant, in any event, as the list was not a confidential document, but was instead publicly distributed (*e.g.*, via Plaintiffs' website) to identify to members and others the providers in Plaintiffs' network. *Second*, there already is extensive testimony in the record concerning Humana's entirely lawful practice of using non-confidential provider lists from all its competitors to locate providers with whom Humana subsidiaries may want to contract. *See* Deposition of Patricia Laughren at 30:4-

[17] *See* Russman Dep. at 99:24-100:17, 101:6-20, 102:10-15, 21-25, 103:1.

31:11, 32:22-33:24, 43:9-53:9, 57:2-20, 87:3-12.[18] *Third*, HUMANA SUPP 007498-7501 is not new; it is listed on Humana's January 15, 2009 Privilege Log as items 6 and 10. While it was inadvertently included in Humana's supplemental production of documents, Humana maintains that this document is privileged, that the privilege has not been waived, that Plaintiffs' use of this document is highly improper, and that the Court should disregard this document in determining the Motion.

f. Purported Fraudulent Inducement by Humana

Finally, Plaintiffs claim that newly-produced documents (HUMANA SUPP 10019-20, 009980, 005955-5956, 005969-5970) reveal that Plaintiffs could have brought a claim for fraudulent inducement with respect to the Confidentiality Agreement. (Motion at 12-13). This argument is frivolous for numerous reasons.

First, HUMANA SUPP 10019-20 is privileged. While it was inadvertently included in Humana's supplemental production of documents and via a clerical error not listed on a privilege log, Humana maintains that this document is privileged, that the privilege has not been waived, that Plaintiffs' use of this document is highly improper, and that the Court should disregard this document in determining the Motion.[19]

Second, Plaintiffs mischaracterize HUMANA SUPP 10019-20 as stating that there was a "slightly 'better than 50/50' chance of passing regulatory muster." This attorney-client communication related to the first potential acquisition of Plaintiffs in 2006, not the subsequent potential transaction underlying this case. In addition, the document itself makes clear that, while counsel believed there was a "better than 50/50 chance" the transaction would be approved, counsel were being cautious at that early stage because they did not yet have access to the sorts of information that might affect their analysis.

Third, HUMANA SUPP 009980, 005955-5956, 005969-5970, which reflect Humana's internal discussions as to the potential purchaser of Plaintiffs (Humana or one of its subsidiaries),

[18] Attached as Exhibit 10 to Humana's Sanctions Appendix.

[19] Plaintiffs argue that they were prejudiced by the fact that obviously privileged documents were not inadvertently produced *until after the cut off dates for discovery and for amending the pleadings.* They argue that if only Humana had inadvertently produced its privileged documents sooner, then plaintiffs could have—and despite Fed. R. Civ. P. 26(b)(5)(B) and the ethics rules, *would* have—used Humana's privileged documents in discovery and as the basis for an amended complaint. The bankruptcy of this argument is self evident. *See Rico v. Mitsubishi Motors Corp.*, 171 P.3d 1092, 1100-01 (Cal. 2007).

also cannot form the basis for a fraudulent inducement claim, because (i) the purchaser was immaterial to Plaintiffs, and in any event, was listed as "Humana Inc." in the initial draft documents, (ii) these discussions occurred after commencement of the parties' negotiations and therefore could not form the basis for inducement into the Confidentiality Agreement, and (iii) Humana ultimately made an offer above the amount originally discussed.

Fourth, Plaintiffs' baseless fraudulent inducement theory is further belied by the following facts: (i) Humana spent several months performing due diligence and ultimately offered $220M,[20] which it would not have done had it secretly harbored the belief that the transaction could not have been accomplished, and in the end, it was the Plaintiffs who called off the deal; (ii) all of the alleged representations cited by Plaintiffs (July 24, 2007 and August 10, 2007 letters) post-dated execution of the May 7, 2007 Confidentiality Agreement and therefore could not form the basis for inducement into the Confidentiality Agreement; and (iii) Plaintiffs amended their complaint prior to expiration of the discovery period.

Fifth, even if Plaintiffs had asserted a fraudulent inducement claim, it would be barred by the economic loss rule. *See* Order on Motion to Dismiss and Motion to Strike (D.E. #86), pp. 5-8; *see also Hotels of Key Largo v. Rhi Hotels*, 694 So. 2d 74, 78 (Fla. 3d DCA 1997) ("Misrepresentations relating to the breaching party's performance of a contract do not give rise to an independent cause of action in tort, because such misrepresentations are interwoven and indistinct from the heart of the contractual agreement. Therefore, we clarify that where the alleged fraudulent misrepresentation is inseparable from the essence of the parties' agreement, the economic loss rule applies and the parties are limited to pursuing their rights in contract.").

C. THE PARTICULAR SANCTIONS SOUGHT BY PLAINTIFFS ARE INAPPROPRIATE UNDER THESE CIRCUMSTANCES

1. Default Judgment as to Liability

Even assuming *arguendo* that Humana's supplemental production of documents constitutes an unjustified violation of the Scheduling Order, the sanction of default judgment would be totally disproportionate to the violation, and would thus be unjust. As explained in the very cases relied upon by Plaintiffs, considerations of justice and proportionality limit the imposition of the most severe sanction, default judgment, to only the most extreme abuses of the

[20] Russman Dep. at 99:24-100:17, 101:6-20, 102:10-15, 21-25, 103:1.

litigation process. *See Malautea*, 987 F.2d at 1542 ("[T]he severe sanction of a dismissal or default judgment is appropriate only as a *last resort*, when less drastic sanctions would not ensure compliance with the court's orders.") (emphasis added); *BankAtlantic*, 127 F.R.D. at 235 ("Default is a draconian measure that should be imposed only in exceptional cases.").

> A default judgment represents, in effect, an infringement upon a party's right to trial under the Seventh Amendment; it runs counter to a sound public policy of deciding cases on their merits; and finally it works against the goal of providing each party its fair day in court. . . . [A] default judgment should normally not be imposed to foreclose the merits of controversies as punishment for general misbehavior save in that *rare case* where the conduct represents such flagrant bad faith and callous disregard of the party's obligations under the Rules as to warrant the sanction.

Telectron, Inc. v. Overhead Door Corp., 116 F.R.D. 107, 129 (S.D. Fla. 1987) (internal quotation marks omitted) (emphasis added); *see also BankAtlantic*, 127 F.R.D. at 235 ("Even if the court finds that counsel's conduct was willful, default is not mandatory. The court should not be quick to forfeit a party's right to a full and fair trial on the merits.").

The nature of the conduct for which a default judgment sanction was imposed in the cases relied upon by Plaintiffs bears no resemblance to the circumstances of the instant case. The common thread running through each of these cases is bad intent—the sanctioned litigant had purposefully abused the discovery process, throwing sand in the eyes of their adversary, or had "callously" disregarded their obligations to the same effect. *See Nat'l Hockey League v. Metro. Hockey Club*, 427 U.S. 639, 640 (1976) (finding "callous disregard" and "flagrant bad faith" "[a]fter seventeen months where crucial interrogatories remained substantially unanswered despite numerous extensions granted at the eleventh hour and, in many instances, beyond the eleventh hour, and notwithstanding several admonitions by the Court"); *Malautea*, 987 F.2d at 1543 (affirming trial court's findings of willfulness and bad faith where defendants had refused to reveal discoverable information in violation of three successive orders, two of which had expressly threatened the sanction of default judgment); *Falcon Farms, Inc. v. R.D.P. Floral, Inc.*, No. 07-23077-CIV, 2008 WL 4500696 (S.D. Fla. Sep. 30, 2008) (finding "willful, bad faith misconduct" where defendant's corporate representative repeatedly refused to appear for deposition); *Inmuno Vital, Inc. v. Telemundo Group, Inc.*, 203 F.R.D. 561 (S.D. Fla. 2001) (finding willful failure to comply with multiple orders compelling production of documents by defendants who employed dilatory tactics including the false denial of the existence of

documents, followed by the refusal to produce the documents, necessitating five continuances); *Telectron*, 116 F.R.D. at 109-110 (finding willfulness and "flagrant dishonesty" where defendants' counsel ordered the destruction of documents "in a willful and intentional attempt to place documentation which he anticipated to be damaging to OHD's interests in this litigation forever beyond the reach of Telectron's counsel"); *Carlucci v. Piper Aircraft Corp.*, 102 F.R.D. 472, 486-89 (S.D. Fla. 1984) (finding "flagrant bad faith" and "callous disregard" where defendant "intentionally destroyed documents to prevent their production"); *Tower Ventures*, 296 F.3d at 47 (affirming trial court's dismissal where plaintiff failed to respond to show-cause order with any "legitimate reason" for "serial violations of the court's scheduling order"); *Computer Assocs. Int'l, Inc. v. Am. Fundware, Inc.*, 133 F.R.D. 166, 170 (D. Colo. 1990) (finding willfulness where defendant "intentionally destroyed evidence after the obligation to preserve it arose and after [it] had clear notice of that obligation"); *Wm. T. Thompson Co. v. Gen. Nutrition Corp.*, 593 F. Supp. 1443 (C.D. Cal. 1984) (finding bad faith in defendant's "failure to preserve critical documents after commencement of these actions . . . in response to a clear preservation order of the court: its erasure of computer tapes . . . its providing employees with instructions that amounted to approval for document destruction . . . its attempts to obstruct or delay the court's inquiry into the scope and import of GNC's destruction").

Here, none of the elements necessary for the ultimate sanction of default judgment are present: (1) that Humana acted willfully or in bad faith; (2) that Plaintiffs were prejudiced by Humana's conduct; and (3) that lesser sanctions would not serve the goals of punishment and deterrence.[21] *Telectron*, 116 F.R.D. at 131. As explained *supra*, Humana acted in good faith, and Plaintiffs have not been prejudiced by the supplemental production of documents. In addition, imposition of default judgment also is not necessary to punish and deter. Humana does not now, nor has it ever, engaged in the "gamesmanship" (Motion at 15) of which it is unfairly accused by Plaintiffs. Humana does not seek to obtain any unfair advantage in this litigation through misconduct or otherwise, but instead seeks only the fair adjudication of the claims asserted against it, by which it believes it is entitled to judgment *on the merits*. Moreover,

[21] This case bears no resemblance to the cases relied upon by Plaintiffs, all of which involve extraordinary misconduct by recalcitrant litigants. Significantly, in a number of the cases cited by the Plaintiffs, the court declined to impose a default judgment sanction for violations far more egregious than anything alleged by the Plaintiffs here.

Humana has no desire whatsoever to test the Court's authority, and is ever-mindful of the panoply of sanctions available to the Court to punish misconduct. Accordingly, this Court need not resort to the ultimate sanction to ensure Humana's compliance with the Court's orders.

2. Denying Humana's Motion to Exclude Testimony by Plaintiffs' Damages Expert

In addition, or in the alternative, to default judgment, Plaintiffs have asked the Court to sanction Humana by denying its Motion to Exclude the Expert Testimony of Alexander Fernandez (D.E. #94) ("Motion to Exclude"). Such a sanction would not be appropriate here, as "the sanction must be specifically related to the particular 'claim' which was at issue in the order to provide discovery." *Ins. Corp. of Ireland*, 456 U.S. at 707. As discussed *supra*, there is nothing in the supplemental production of documents at issue on this Motion that is material, either as a general matter, or specifically with respect to Plaintiffs' alleged damages. Imposing the sanction of denying Humana's Motion to Exclude would fail to comport not only with the requirement that the sanction relate to the claim at issue, but also that the sanction be just and proportionate. Humana respectfully submits that, notwithstanding whatever failings it may be culpable for here, it should prevail on its Motion to Exclude *on the merits*. To adjudicate the Motion to Exclude other than on the merits would be a windfall for Plaintiffs that would go well beyond restoring them to the whatever position they would have been in had all of Humana's disclosures been made prior to the discovery cut-off. Such would not be an appropriate, proportional sanction. *See Zubulake*, 229 F.R.D. at 437 (stating that "a major consideration in choosing an appropriate sanction . . . is to restore Zubulake to the position that she would have been in had UBS faithfully discharged its discovery obligations").

3. Exclusion of the Testimony of Humana's Damages Experts

Plaintiffs have also asked the Court to exclude the testimony of Humana's damages experts. (Motion at 18). The same reasons that weigh against sanctioning Humana by denying its Motion to Exclude also weigh against excluding Humana's experts: (1) there is nothing in Humana's supplemental production of documents that impacts the factual basis of its experts' opinions in any material way; and (2) excluding the opinions of Humana's experts would provide Plaintiffs with a windfall that would go far beyond restoring them to their rightful position.

Plaintiffs reliance on *Rabello*, 200 F.R.D at 489, in support of this request is also misplaced. In *Rabello*, the court imposed the very limited sanction of denying the sanctioned party the use of documents and witnesses disclosed after the discovery cut-off. Here, Plaintiffs seek the exclusion of expert testimony that was disclosed *prior* to the cut-off, and on which the supplemental disclosures have no material bearing.

4. Adverse Inference Instruction

An adverse inference instruction permits a jury to infer from the spoliation or withholding of evidence that the missing evidence would have been unfavorable to the party responsible for the evidence's unavailability. *See, e.g., Zubulake*, 229 F.R.D. 422 (stating that "the spoliation of evidence germane to proof of an issue at trial can support an inference that the evidence would have been unfavorable to the party responsible for its destruction"). As set forth *supra*, all relevant documents have been produced to Plaintiffs, and are thus available for presentation to the trier of fact. As there is no missing evidence here, there is no basis for an adverse inference instruction.

5. Monetary Sanction

Plaintiffs also seek the imposition of monetary sanction upon Humana. (Motion at 19). Humana respectfully submits that no sanction is warranted for its honest mistake, for which Humana has endeavored in good faith make appropriate supplements to its prior disclosures, and which have not resulted in any prejudice to Plaintiffs. Indeed, there are a number of factually-similar cases involving violations far less sympathetic than that committed by Humana here, for which courts have declined to impose sanction, or imposed only nominal monetary sanctions. *See, e.g., Omega Patents, LLC v. Fortin Auto Radio, Inc.*, No. 6:05-cv-1113-Orl-22DAB, 2006 U.S. Dist. LEXIS 49650 (M.D. Fla. July 19, 2006) (imposing sanction of $1500 and costs of an additional deposition where defendant had failed to timely produce 2,000 documents from its e-mail system without justification and had failed to present a corporate representative for deposition who was prepared to testify on noticed topics); *Tracy v. Fin. Ins. Mgmt. Corp.*, No. 1:04-cv-00619-TAB-DFH, 2005 U.S. Dist. LEXIS 38323 (S.D. Ind. Aug. 22, 2005) (imposing

sanction of costs for re-deposition of witnesses relating to tardy production of e-mails found to be not substantially justified).[22]

6. Other Requested Sanctions

Plaintiffs also request various other sanctions, without citing supporting case law or divulging any level of specificity, including granting Plaintiffs' Motion for Partial Summary Judgment, denying Humana's Motion for Summary Judgment, directing that certain matters claimed by Plaintiffs be taken as established, prohibiting Humana from supporting its defenses or introducing certain matters into evidence, and informing the jury of Humana's destruction of documents. (Motion at 1, 18-19). For all the reasons discussed *supra*, and because Plaintiffs have failed to provide any support or specificity for these requests, the Court should deny Plaintiffs' request to impose any of these types of sanctions.

CONCLUSION

WHEREFORE, for the foregoing reasons, Defendant Humana Inc. respectfully requests that the Court deny Plaintiffs Preferred Care Holding Corp. and Preferred Care Partners, Inc.'s Motion for Sanctions (D.E. #153), together with such other and further relief as the Court deems just and proper.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that, on **March 6, 2009**, we electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send notification of such filing to Todd R. Legon, Esq., S. Daniel Ponce, Esq. and Alicia M. Otazo-Reyes, Esq., LEGON, PONCE & FODIMAN, P.A., 1111 Brickell Avenue, Suite 2150, Miami, Florida 33131, *Counsel for Plaintiffs Preferred Care Partners Holding Corp. and Preferred Care Partners, Inc.*

[22] *Qualcomm Inc. v. Broadcom Corp.*, No. 05cv1958-B (BLM), 2008 WL 66932 (S.D. Cal. Jan. 7, 2008), relied upon by Plaintiffs in arguing for significant monetary sanctions, is distinguishable from the instant case. Qualcomm was caught concealing evidence from the Court, jury and opposing counsel. *Id.* at *4-5. Humana, on the other hand, has voluntarily supplemented its incomplete production without any intervention of the Court or urging of the Plaintiffs. Further, in *Qualcomm*, the previously concealed documents were not made known to the other side until during the trial. *Id.* By contrast, the supplemental disclosures here were made significantly in advance of trial.

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