

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

UNITED STATES OF AMERICA ex rel.
DONALD GALE,

Relator,

v.

OMNICARE, INC.,

Defendant.

Case No. 1:10-CV-0127

Judge James S. Gwin

Magistrate Judge McHargh

**OMNICARE, INC.'S RESPONSE
TO RELATOR'S MOTION FOR SANCTIONS**

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In the short period allowed for discovery in this case, Omnicare, Inc. (“Omnicare”) accomplished the nearly insurmountable tasks of collecting and reviewing millions of pages of documents and producing almost half a million pages of responsive documents. Omnicare diligently located and collected documents, employed a reputable document vendor, utilized over 23,212 hours of contract attorneys’ and Jones Day associates’ time to complete the production by the discovery cut-off. Complaining that Omnicare produced too many documents at the back end of the discovery period, Relator seeks the most extreme sanction of a default judgment, in the absence of any evidence that Omnicare acted in bad faith and even though Omnicare has not violated a court order. In fact, the percentage of documents produced later in the discovery period is simply a reflection of and directly attributable to the significant expansion of the scope of discovery midway through the case. The case expanded from thirty-one skilled nursing facilities (“SNFs”) in Northern Ohio to hundreds nationwide, from ten custodians to over forty and to an additional fifteen months ending in April 2011.

The facts show that Omnicare worked diligently to collect, review, and produce documents responsive to the expanded discovery. They also show that Omnicare made substantial efforts to focus its production by engaging a vendor to remove exact duplicate documents, by working to produce the documents in the native formats requested by Relator’s counsel, and by engaging a review tool that would automatically review and produce the most relevant documents in the pipeline first. Omnicare did not hide any document, or withhold or delay any production. Omnicare did not engage in any inappropriate, let alone sanctionable, conduct, and Relator has not made the case for any sanction, let alone a default judgment.

If there is any gamesmanship here, it is not on Omnicare’s part.

I. OMNICARE WORKED DILIGENTLY TO PRODUCE ALL RESPONSIVE DOCUMENTS WITHIN THE ORDERED DISCOVERY PERIOD.

Relator has misrepresented, exaggerated, or omitted many facts. A real and complete chronology of discovery reveals an attentive, diligent process in the face of burdensome discovery on a compressed schedule. The timing of Omnicare's productions resulted not from any sanctionable conduct but from the sheer volume of information requested by Relator, the time involved in conducting discovery in a case of this nature, and the expansion of discovery at the end of May 2013 and the ensuing weeks of negotiations between the parties regarding how to conduct the nationwide discovery – negotiations that the Magistrate Judge's order contemplated.

A. Omnicare's Document Collection, Review, and Production Protocols Generally.

The review and production process used here is standard for large, document discovery, especially when heavily oriented toward electronic data.

Omnicare first had to extract potentially relevant documents from its multiple servers and certain custodians' computers, all of which takes time. Omnicare then sent the retrieved data to its discovery data vendor, Renew Data, for processing, de-duplication, and loading into a document review program called Relativity. To expedite the review of the voluminous number of emails retrieved in discovery, Omnicare employed a review acceleration tool called Vestigate, which is administered by a division of Renew Data called Analytics. Vestigate expedites document review by searching the universe of data loaded into the Relativity system and selecting potentially responsive documents using a set of predictive queries based on relevant language in the documents. To calibrate or "train" the tool, attorneys analyze a statistically-significant sample of the reviewable documents, and code key language to create the set of predictive queries.

The discovery data vendor, Renew, then batched documents for the attorneys' review. The documents were batched based on the Vestigate's analytic results. Neither Omnicare nor its lawyers selected the order for production of particular documents or delayed the production of, or buried, any documents.

To concentrate the review team's efforts on finding and producing responsive documents, the attorneys held aside emails and other documents identified during the review as potentially privileged so they could be scrutinized later. Omnicare produced a first privilege log (165 entries on 31 pages) to Relator on June 28, 2013. As a result of an August 28 "meet and confer" agreement between the parties (8/28/2013 email from S. Sozio to R. Morgan to , attached as Ex. A), many of the documents for which Omnicare claimed an attorney-client privilege were subsequently produced to Relator and the corresponding privilege log entries were removed.

B. The Original February-May Production from Ten Custodians, Limited to Thirty-One Ohio SNFs and January 2004 Through January 2010.

On January 8, 2013, this Court set September 30 as the close of discovery. (Dkt. 50 (01/08/13).) After an initial ESI conference on January 18,¹ Relator's counsel sent a letter on January 22 proposing search terms and acknowledging that Omnicare was searching ten custodians. (1/22/13 letter from R. Brooks to T. Tabacchi, attached as Ex. B). A chronology of discovery correspondence is attached to Declaration of Kristin S.M. Morrison. (attached as Ex. C.) The negotiations on the search terms continued into February. (2/1/13 email from C. Geisler to R. Brooks, attached as Ex. D.) Relator agreed to the initial ten custodians and knew that Omnicare was producing documents from these ten custodians relating to the thirty-one Ohio SNFs listed in the complaint and from the time period of January 19, 2004, through January 19,

¹ Unless otherwise specified, all referenced dates are from 2013.

2010 (the complaint's filing date). Indeed these parameters were disclosed to the Relator before the first status conference in January and discussed at the conference.

Renew loaded into the review system more than two million de-duplicated files from the ten custodians. On February 11, 2013, a team of contract attorneys and a Jones Day associate began the weeks-long process of training the review acceleration tool to identify potentially responsive documents in the universe of reviewable files. The next week, Omnicare added additional contract attorneys to the review team to expedite the review and subsequent productions of responsive documents.

Between February 19 and March 8, Omnicare made four productions of documents, and produce additional documents in the following weeks. (Ex. C.) Productions for the ten custodians continued to May 31st. During that time, Omnicare also retrieved and sent to Renew Data: (i) additional electronic files collected from the hard drives of Jeff Carty, Bert Brady and Rolf Schrader; (ii) email data for two departmental email accounts, Pricing.Department@omnicare.com and National.Pricing@omnicare.com; and (iii) network shared-drive files for the Pricing Department and Michael Mautz.

C. The July-October Production From Thirty-Seven Additional Custodians, for Many Entities Across the Nation and Fifteen Additional Months Through April 2011.

On May 9, Relator filed a motion to compel nationwide discovery. On May 23, Magistrate Judge McHargh opened up discovery well beyond the thirty-one Ohio SNFs listed in the complaint. After a meet and confer conference around that time, Omnicare agreed to extend the relevant timeframe for discovery for an additional fifteen months (until April 8, 2011, the date of the government's declination). These expansions in scope and timeframe drastically increased the production burdens. Until that time, documents about other geographic areas or SNFs and documents on any topic after January 19, 2010, had been considered non-responsive.

Omnicare responded promptly. Within days of the ruling, it identified seven states in which 70-80% of its per diem contracts had been serviced during the expanded relevant time. Omnicare also identified approximately thirty additional custodians who were most likely to possess relevant information. On May 31, 2013, Omnicare wrote to Relator offering to produce responsive email data for those custodians and conveying Omnicare's willingness to work with Relator's counsel on appropriate search phrases. Relator did not propose its search terms (9 pages of over 100 terms) until June 24. (6/24/13 Email from S. Vann, attached as Ex. E.) In the end of June and early July, the parties met and conferred to negotiate the bounds of Omnicare's additional discovery burdens. (*See* Ex. C.)

Then, with the agreement on scope, starting in July Omnicare expanded its collection of documents to thirty-seven new custodians, for nationwide discovery beyond the thirty-one Ohio SNFs and for an additional fifteen months. Omnicare had to locate, retrieve, and send the data to Renew, which had to upload them and start the review process. In addition to the thirty-seven new custodians, Omnicare also had to re-review the files of Jeff Carty, Bert Brady, Rolf Schrader, and Michael Mautz, as well as the Pricing Department and National Pricing files for emails responsive to the new discovery parameters. While waiting for the files from the additional custodians, a team of contract attorneys began the process of re-training the review acceleration tool for the enlarged scope, based on email data already loaded in the system.

As part of the new, nationwide discovery effort, Omnicare and its team collected, processed, de-duplicated, loaded, and ultimately searched via the review acceleration tool

approximately 1.3 terabytes of data, which is the equivalent of approximately 110 million pages of plain text documents. That process took approximately five weeks to complete.²

The document collection's size was not the only impediment. During one week of August, technical issues impeded Omnicare's efforts to review documents for production. Documents were loading on the reviewers' computer screens very slowly and causing their computers to "freeze up." The problems persisted for about four days until Renew Data was able to reconfigure system processes and increase bandwidth. Precious time to review documents was lost.

Omnicare's document review team did everything humanly possible to conduct a thorough review, to expedite the process and make a complete production. For example, the Omnicare team batched documents for review as they were loaded, but also re-searched earlier loaded documents based on new queries derived from later-loaded custodian's files to ensure that the production was complete and that responsive were captured. Omnicare maintained efforts to expedite the review and productions.

Around mid-August, after all the nationwide custodian data had been loaded and the final acceleration tool queries had been created and allowed to run against the universe of data, it was apparent that additional attorneys would be needed to meet the fast-approaching discovery

² The timeline of data loads for the 37 additional custodians is as follows: (1) Bill Oakley, Brian Sedlock, Dan Lohmeier, Doug Pepper, Greg Licht, Jeff Cremean, James Jankowski, Mike Arnold, Micahel Azarro, Matt Ulizio, Mike Wood, Chuck Agonis (available 7/14/2013); (2) Jim Cialdini, Mike Meyer, Pat Downing, Chris Palutis, Mike Inman, Sam Enloe, Steve Baker, Tom Ludeke (available 7/18/2013); (3) Brian McGinnis, Bob Meyer, Jeff Garrett, Matt Ulizio, Phil Swart, Tom Schleigh (available 7/25/2013); (4) Steve Rappa, Tom Gady, William Tucker, Dennis Sunberg, Dave West, Jennifer Yowler, Kraig Ortwein, Steve Gates (available 7/31/2013); (5) John Gould, Scott Shellabarger, John Clarke (available 8/2/2013).

deadline. Thus, on August 16th, the core review team was expanded from 20 to 32 contract attorneys, each working up to fifty hours per week.

After the core team increased to thirty-two attorneys, the number of responsive documents awaiting review by the second-level QC Jones Day team grew substantially. Starting on August 22, additional Jones Day associates were added to that team; by September 9th the team consisted of fourteen Jones Day associates.

Omnicare's 32-attorney core review team worked 5,122 hours in August and 4,483 hours in September to complete the review of documents identified by the intelligent review tool. Jones Day associates logged over a thousand hours in August and September readying the documents for production. The added efficiencies of increasing the team size allowed Omnicare's document productions in August and September to become successively larger, culminating with its final production on September 30th. The production statistics evidence those efficiencies obtained by adding staffing and resources to the effort, not Relator's bald accusation of "flagrant gamesmanship":

Aug-16:	2,108 documents produced
Sep-16:	11,662 documents produced
Sep-20:	13,087 documents produced
Sep-30:	24,689 documents produced

With the goal of providing Relator's counsel as many responsive documents as quickly as possible, documents identified by the review team as containing potentially privileged content were held aside for further review.

The privilege review team assessed each document and, in many instances, concluded that the documents did not contain privileged content. The remainder, however, were determined to reflect legal advice of counsel or legal advice to be sought from counsel. Those

documents were either redacted or withheld, as appropriate. A corresponding privilege log was created and the redacted documents were produced as soon as possible, on October 2, 2013.

Despite this enormous task, Omnicare produced its documents by the close of discovery – less than three months from when the parameters for the expanded discovery were set.

II. RELATOR’S PARTICULAR COMPLAINTS DO NOT SUPPORT HIS REQUEST FOR SANCTIONS.

A. The Production of Documents Toward the End of Discovery Was the Inevitable Result of a Significant Expansion of Production Obligations a Few Months Before the Discovery Deadline.

Nationwide discovery was not ordered until May 23. Even then, it was not until mid-July that agreement was reached regarding from which custodians to collect documents and what search terms to use. Omnicare then needed to retrieve and send those custodians’ documents to the Renew for processing and review. The vendor had delays due to technical issues. All this left Omnicare’s attorneys with about eight weeks to review and produce documents from the additional 37 custodians for the nationwide discovery. Omnicare, its document vendor, the contract attorneys, and Jones Day all worked diligently to produce the responsive, non-privileged documents by the close of discovery. Omnicare absolutely denies holding any documents for a “document dump.”

Relator’s complaint about documents from the original ten custodians produced toward the end of the discovery period is unfounded. For example, Exhibit 4 to Relator’s motion is an email chain started by Omnicare Financial Analyst Mike Mautz and references parts of “score cards.” Because the “score cards” had been created at the direction of attorneys at Reed Smith, Omnicare initially asserted privilege over them. On August 28, Omnicare agreed with Relator to produce the scorecards and related emails. That is why some Mautz documents containing “score card” information were produced late in the production.

Exhibit 6, dated April 8, 2010, did not become responsive until after the parties agreed to extend the relevant discovery period from beyond the original the original date of January 19, 2010. Similarly, Exhibit 8 was originally not responsive because it did not relate to any of the thirty-one Ohio SNFs. It became responsive only when the geographic coverage and the list of custodians expanded. Accordingly, those documents were part of the review process that did not begin until July.

B. Omnicare Produced Additional Privilege Logs and Redacted Documents at the End of Discovery Because It Was Attempting To Produce Non-Privileged Documents As Fast As Possible.

Omnicare put documents that had initially been designated as possibly privileged into a separate batch for a later review. As Exhibit C shows, Omnicare produced privilege logs throughout discovery. After the parties set the scope of the expanded, nationwide discovery, however, Omnicare faced a very tight production deadline. Attempting to produce responsive documents as quickly as possible in the final months leading to that deadline, Omnicare turned later to the batch of documents initially marked as potentially privileged. The timing resulted from Omnicare's efforts to produce non-privileged, responsive documents by the discovery deadline, not some strategy to prejudice Relator, as he claims with no support.

Relator's complaint about the production of redacted documents is similarly addressed. After reviewing the batch of documents marked initially privileged, Omnicare was able to produce some of the documents in redacted form. There was no sanctionable conduct.

C. The Geode Group

Relator's argument with respect to the Geode Group ("Geode") discovery appears to be that Omnicare has engaged in misconduct because it produced "*nine distinct copies, from six different custodians*" of a "comprehensive, four-page strategy document" but that document was

not included in the Geode files produced. (Mot. at 6, 9 (emphasis in original).)³ The absurdity of Relator's suggestion that Omnicare must be "hiding" "damning evidence" because it has not produce yet a tenth copy of a particular document aside, Relator has wrongly assumed that the Geode Group files returned to Omnicare contained the document in the first place. The presumed tenth copy was not withheld from production by Omnicare or its counsel.⁴

Relator's broader accusations relating to Geode are also riddled with inaccuracies. Omnicare did not: hire Geode "to assist it in . . . circumventing the Anti-Kickback statute"; fire Geode Group for cause or direct Geode Group to suddenly stop work and destroy documents.⁵ Indeed, Omnicare was contractually required to provide significant notice of non-renewal to Geode. (Ex. A to Stamps Decl.) Omnicare and the Geode Group entered an Independent Contractor Agreement in July 2010, whereby Geode provided customer communication and business development advice to Omnicare. (Declaration of Jeff Stamps ("Stamps Decl.") ¶ 3-4 (attaching Agreement as Exhibit A); *see also* Declaration of Robert Folmar ("Folmar Decl.") ¶ 2.) The overwhelming majority of services provided by Geode involved customers with fee for service contracts. (Stamps Decl. ¶ 3). The Agreement was for two years, and expired in July

³ That Relator complains that the document was not contained in Geode's files suggests that Relator appreciates that the document was prepared by Geode and not, as Relator represents earlier in his motion, "authored by" Omnicare's Jeff Stamps. (Motion at 6).

⁴ *See* Folmar Decl. ¶ 4 (the files returned by Geode on the CD(s) were "deep dive" files and the CD(s) contained no additional documents.) A copy of the CD containing Geode files provided to counsel for purposes of the litigation has been provided to Relator's counsel. In addition, Omnicare's counsel advised Relator's counsel yesterday of the facts relating to the return of Geode Group files, that the original CD(s) no longer exist, and that, should Relator have additional questions about the issue, Omnicare would make Mr. Folmar available for interview or deposition at Relator's request. Omnicare notes that it has produced over one hundred "deep dive" spreadsheets, as well as other Geode documents, to Relator as part of its production of email data and that Geode spreadsheets were produced as early as February, 2013.

⁵ Relator's representations to the Court are purportedly based on a letter to Relator's counsel from Geode in response to Relator's subpoena. *See* Ex. 12 to Motion.

2012. (Stamps Decl. ¶ 4, Ex. A). Omnicare decided not to renew the Geode contract for an additional term because it no longer wished to incur the cost and no longer had a need for an outside consultant on these issues. (Stamps Decl. ¶ 6); *see also* Declaration of Carolyn Hutchison⁶ (“Hutchison Decl.”) ¶ 3-4.)⁷ Accordingly, Omnicare notified Geode in September 2011 that it would not renew the Agreement in July 2012. (Stamps Decl. ¶ 6, attaching letter as Exhibit B.) The Geode Group was not fired mid-engagement, and the ten month transition to the contract end can hardly be characterized as a direction to “immediately stop work.”

The Agreement with Geode contains standard language found in most vendor or consulting agreements that calls for the return or destruction of confidential information at the conclusion of the engagement. *See* Exhibit A to Stamps Decl. At the conclusion of the contract, Omnicare worked with Geode on the transition of files back to Omnicare. (Hutchison Decl. ¶ 4.) While Relator cites Geode’s letter as support for its representation that Omnicare directed Geode to destroy records, the letter reflects that Omnicare requested that Geode return “all records” to Omnicare. (Ex. 12 to Mot.) To the extent Geode destroyed any remaining records (and Geode clearly did not destroy all records because it produced documents to Relator in response to his subpoena), the Geode letter reflects that any destruction was done on its own initiative. (*Id.* *See also* (Hutchison Decl. ¶ 5.) (“I did not instruct the Geode Group to destroy documents. I am not aware of anyone at Omnicare instructing the Geode Group to destroy documents.”).)

D. Mathis File

⁶ Ms. Hutchison was unable to sign her declaration because of a family hospital emergency. Omnicare will provide a signed version of the document as soon as practical.

⁷ This Court has requested that Omnicare provide to the Court the invoices from Geode. There are 453 invoices, many of which are multiple pages. Because filing that volume of exhibits on ECF is not practical, Omnicare is filing an invoice that is illustrative of the others and will deliver the full set of invoices to the Court on Tuesday (after Monday’s court holiday) . (*See* 10/15/2010 invoice from Geode, attached as Ex. F.)

Relator complains that Omnicare did not produce a file that Mr. Mathis discussed in his deposition. Again, there is no foul play here. Omnicare explained this situation to Relator's counsel in a letter dated October 7, 2013 (attached as Ex. G). Omnicare incorporates that explanation here.⁸ Omnicare also located at off-site storage, and restored, the hard drive from Mr. Mathis's computer while he was employed at Omnicare. An electronic "per diem" file was located on that hard drive, and like the "per diem" file found in paper files, has been produced to Relator, although those documents do not relate to the allegations in this litigation.

III. THESE FACTS DO NOT EVEN COME CLOSE TO WARRANTING THE EXTREME SANCTION OF A DEFAULT JUDGMENT.

Relator moves for sanctions pursuant to Rule 37(b)(2)(a) (Mot. at 13, n.22), but ignores the rule's plain language.⁹ Rule 37(b)(2)(a), entitled "Sanctions in the District Where the Action is Pending, *For Not Obeying a Discovery Order*," permits a court to make "just orders" with regard to a party's failure "*to obey an order to provide or permit discovery. . . .*" Fed. R. Civ. P. 37(b)(2) (emphasis added). Relator glosses over the key fact that Omnicare did not violate a court order, instead complaining about Omnicare's actions within the bounds of the discovery order and that the close of discovery was so close to trial. Relator does not cite a single case in which there was any question that the sanctioned party had violated the Court's discovery order. Instead, he cites a litany of cases where a party had committed clear cut and egregious violations of the actual court orders or the rules of discovery.

⁸ Omnicare also offers to make Mr. Mathis's executive assistant, Kathryn Kampmann, available for an interview or deposition.

⁹ Per the Court's request, Omnicare has focused this brief on the facts and provides this short discussion of the law. Omnicare would welcome the opportunity to present a supplemental brief on the law.

The three opinions that Relator cites as supporting his position that entry of default judgment is appropriate here are entirely inapposite. In each case, the sanctioned party committed true, egregious, and largely uncontested violations of a court's discovery order (or orders).¹⁰ Unlike the moving parties in *Laukus*, *Stooksbury*, and *JetBlue*, Relator cannot allege gross – or any – violations of the Court's discovery orders. Nor did Omnicare lie to Relator or the Court about its discovery process and the volume and timing of its productions. Indeed, Omnicare has been forthcoming with Relator and the Court during discovery, and has on multiple occasions filed papers indicating the volume and types of documents it was likely to produce. (*See, e.g.*, Dkt. 69.) In addition, Omnicare has been in constant communication with Relator about the timing of its productions. (See Ex. C.)

Ignoring that Omnicare did not violate a court order, Relator skips directly to *Bank One of Cleveland, N.A. v. Abbe*, 916 F.2d 1067 (6th Cir. 1990), which enumerates four factors required to impose the “sanction of last resort,” *i.e.*, dismissal or default pursuant to Rule 37: (1) whether the party acted willfully in failing to comply with the discovery orders; (2) whether the moving party was prejudiced thereby; (3) whether the party was fairly warned of the possibility of a default judgment; and (4) whether less drastic sanctions would be unavailing. *Id.* at 1074.

¹⁰ *But see Marie, et al. v. American Red Cross, et al.* 2013 WL 1183328, at *2-3 (S.D. Ohio, March 20, 2013) (finding sanctions inappropriate where the court had not ordered the specific discovery about which the moving party complained but rather had simply set deadlines for discovery, so no party could have violated those orders by failing to produce certain categories of documents; “plaintiff was unable to seek sanctions against defendants pursuant to Rule 37(b)(2) because the rule only provides a remedy to a party in circumstances when the opposing party fails to comply with a court order to provide discovery. Thus, since the Court had not issued an order to redress a discovery violation committed by the defendants, the plaintiff's counsel could not seek any relief under this rule.”).

Even if the *Bank One* factors could apply here – which they do not because Omnicare did not violate any order – they would not be met.¹¹

First, Omnicare executed a reasonable plan to get relevant documents into Relator’s hands as quickly as possible. Omnicare and its team of lawyers worked diligently to address the expanded scope of discovery and the fast discovery close. The relevant inquiry is not whether Omnicare had the best plan or results, but whether Omnicare acted willfully in failing to comply with an order. Relator can prove no part of that. Against Omnicare’s explanation of its efforts to produce documents swiftly, Relator has shown no willful plan to withhold documents until the last minute.

Second, there is no prejudice here. Relator claims, “Had these documents been timely produced, summary judgment would have been pled differently, different witnesses would have been selected for deposition, different questions would have been asked and relator’s trial strategy would have markedly changed.” (Relator’s Mot. at 5.) But Relator rests on that bald assertion, without supplying specific examples of how its actions would have changed and why they would have been material. Relator’s complaint about the motion for summary judgment has no merit. The documents that Relator references were non-responsive until well after the deadline for the summary judgment motion. While motions for summary judgment were due on May 28, the Magistrate Judge did not order discovery beyond the thirty-one Ohio facilities until May 23, and Relator did not provide suggested search terms until late June. Additionally,

¹¹ In a footnote to his Motion, Relator asks for alternative sanctions, including an assumption of admissibility of all of the documents that Omnicare has produced. (Mot. at n.14.) Omnicare opposes that request. As Omnicare notes throughout this brief, its productions of documents were not late or in violation of any Court Order. Additionally, as Omnicare discusses more fully in Section II, *infra*, Relator has not made any showing that these documents were produced in bad faith. Rather, they were produced in a timely fashion and as soon as Omnicare was able to do so.

Relator has not shown that the documents support its claim of kickbacks or that the documents would have materially affected his motion for summary judgment. They do not resolve – certainly not in Relator’s favor – the factual issue “whether Omnicare’s below-market pricing was offered with the intention of inducing referrals or whether it was the product of ‘sloppy accounting and management.’” (Relator’s Mot. for Sanctions at 7 (quoting Doc. No. 104 at 19).)

Third, Relator alleges that Omnicare was warned of these potential sanctions by the Court’s order dated October 1, 2013. (Dkt. 131 (10/01/13).) But that Order came too late to serve as a warning and dealt solely with Omnicare’s obligation to retrieve information from backup tapes.

Finally, Relator states that lesser sanctions would be unavailing because “any lesser sanction will leave Relator and this Court to wonder what evidence Omnicare possesses that is still being withheld.” (Mot. at 16.) That Relator baldly accuses Omnicare of withholding relevant documents, without any support to justify such an accusation, cannot be sufficient to hold Omnicare liable for Relator’s claims in their entirety. In addition, although Omnicare will be prepared for the October 21 trial date, it would not object to a request by Relator for a continuance.

CONCLUSION

For the foregoing reasons, Omnicare requests that the Court deny Relator’s motion for sanctions.

Dated: October 12, 2013

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 12, 2013, the foregoing Omnicare, Inc.'s Response to Relator's Motion for Sanctions and all attachments thereto, was filed electronically through the Court's electronic filing system. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

Additionally, I hereby certify that on October 12, 2013, a copy of the Omnicare, Inc.'s Omnicare, Inc.'s Response to Relator's Motion for Sanctions and all attachments thereto, was served on the following by electronic mail:

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History: This message has been forwarded.

Rick,

Our production team tells me that they can produce on Friday a significant tranche of the quarterly analysis documents that are subject to our compromise agreement. There are several that have a reference to counsel's advice or a privilege marking on the documents that we will be redacting. In order to redact these documents we will need to alter the originals to delete the privileged information and markings and so indicate the redaction. Otherwise, to redact in the traditional way would require the creation of a tiff image which will be much more difficult for you to work with.

The withheld documents that we need to redact can't be produced on Friday, but the bulk of those currently on the privilege log can be produced.

Will you produce Relator's information subject to our agreement on Friday if we make the production outlined above?

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January 22, 2013

VIA E-MAIL

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Chicago, Illinois 60601-1692

Re: *United States of America ex rel. Donald Gale v. Omnicare, Inc.*
No. 1:10-cv-0127-(N.D. Ohio)

Dear Tina:

As we discussed on our January 18, 2013 call, please find attached Relator's list of proposed search terms to run, as a first step in an iterative process, against the emails and other files of custodians to be selected by the parties on tomorrow's call. While we have agreed to provide search terms as an appropriate first step in formulating a general ESI protocol, we reiterate our request that Omnicare provide Relator with *all* non-privileged .pst files for the 10 specific custodians we identified on the January 18 call,¹ among possible other custodians later to be identified, so that the parties may satisfy the discovery deadlines the Court has set in this case.

Omnicare, of course, is most knowledgeable about its own documents, and is in the best position to identify terms of art that are used internally for its own policies, procedures, and products. As such, we expect that Omnicare will readily be able to propose additional search terms, as well as refinements to those Relator has proposed, so that we may collectively arrive at

¹ This non-exhaustive list of 10 custodians consists of the nine individuals identified in the "ESI Discovery Conference" document provided to Relator at the time of the call, with the addition of a tenth chosen from among the witnesses listed in Relator's Initial Disclosures, Burt Brady.

Tina M. Tabacchi, Esq.

January 22, 2013

Page 2

an optimal set of terms that will generate documents responsive to our requests with greatest efficiency.

To ensure that Relator's list of search terms generates results that may be adequately evaluated for accuracy and further refinement, please provide a report showing the unique hits – i.e., document hits vs. term hits. To the extent the documents identified are responsive, please advise whether they have been excluded from other term's searches. Additionally, in running the proposed search terms, to the extent terms are not listed with "!" so as to capture all endings of the term, we request that stemming be left active.

With the caveat that the parties have not yet determined whether a relevance review by way of an iterative search term approach will be ultimately be workable in this case in view of the discovery deadlines set by the Court, it remains of paramount importance that the parties' search methodology satisfies accepted e-discovery standards in federal litigation practice. Accordingly, Relator requests that Omnicare engage in a quality control ("QC") process to ensure accuracy in its retrieval of responsive documents and validation of search results. To assist in this process, and after considering similar protocols in other litigations, Relator proposes the following:

1. Omnicare will conduct a quality control search of the documents that were not included or "dropped out" when it applied Relator's proposed search terms to the database of documents originally collected (the "QC Documents").
2. In order to ascertain the quality of the search terms, Omnicare will conduct a random review of 5% of the QC Documents (the "QC Subset").
3. If the percentage of the QC Subset deemed responsive (without regard to privilege or redactions) is greater than or equal to 20%, then Omnicare will review for responsiveness all of the QC Documents. If more than 10% are deemed to be responsive, the parties will meet and confer regarding additional search terms likely to retrieve responsive documents and/or identify specific custodians or data repositories that will be reviewed 100% unfiltered as likely sources of responsive material.

Following resolution of any issues between the parties concerning the search methodology engaged in, Relator is willing to work with Omnicare to refine further the key words and/or other search criteria, as appropriate.

Tina M. Tabacchi, Esq.

January 22, 2013

Page 3

We look forward to discussing these matters with you on the call tomorrow morning.

Sincerely,

A handwritten signature in blue ink, appearing to read "Ross B. Brooks", is centered on the page.

Ross B. Brooks

RBB:

Attachment

cc: Steven G. Sozio, Esq.
John R. Scudder, Esq.
Frederick M. Morgan, Jr., Esq.
Jennifer M. Verkamp, Esq.
Virginia A. Davidson, Esq.
Eric S. Zell, Esq.
Rolando G. Marquez, Esq.
Allison J. Marocco

RELATOR'S PROPOSED SEARCH TERMS

<p>["nursing home" or (nursing w/2 home)] OR ["skilled nursing facility" or "SNF"] OR [("long term care" or LTC) w/3 (facility or facilities)) or LTCF] OR each of the "Nursing Homes"* listed below</p>	<p>paired with:</p>	<p>w/20 prompt pay w/20 per diem w/20 collect! w/20 cost! w/20 discount! w/20 free w/20 pric! w/20 reduc! w/20 exclusiv! w/20 receivable! w/20 swap! w/20 terms w/20 exchange! w/20 ("Medicare Part A" or "Part A") w/20 "usual & customary" or "usual and customary" or "U&C" w/20 (low w/3 ball!)</p>
<p>("long term care" or LTC) w/3 (pharmacy or pharmacies) OR LTCP</p>	<p>paired with:</p>	<p>w/20 prompt pay w/20 per diem w/20 collect! w/20 cost! w/20 discount! w/20 free w/20 pric! w/20 reduc! w/20 exclusiv! w/20 receivable! w/20 swap! w/20 terms w/20 exchange! w/20 ("Medicare Part A" or "Part A") w/20 "usual & customary" or "usual and customary" or "U&C" w/20 (low w/3 ball!)</p>
<p>"Medicare Part A" OR "Part A"</p>	<p>paired with:</p>	<p>w/20 prompt pay w/20 per diem w/20 adjust! w/20 audit! w/20 collect! w/20 cost! w/20 discount! w/20 disput! w/20 free w/20 pric! w/20 reduc! w/20 exclusiv! w/20 cover! w/20 (compare or comparison) w/20 days w/20 (excluded or exclusion)</p>
<p>contract w/20 of Part A or SNF below w/20 (cost or price) discount w/10 allowable "Fair market value" or FMV Tru! w/3 up</p>		

RELATOR'S PROPOSED SEARCH TERMS

("long term care" or LTC) w/3 (department or division or group)
"per diem"
price! or pricing
(price! or pricing) w/20 (procedure or manual or policy)
(price! or pricing) w/20 report!
dispensing w/10 fees
pharmacy w/3 service w/3 agreement
pharmacy w/3 consult! w/3 agreement
compliance w/20 train!
compliance w/20 audit!
compliance w/20 report!
"MTS On Demand Training"
pharmac! w/3 train!
("Medicare Part D" or "Part D") w/20 cover!
("Medicare Part D" or "Part D") w/20 (compare or comparison)
("Medicare Part D" or "Part D") w/20 days
("Medicare Part D" or "Part D") w/20 (excluded or exclusion)
Medicaid w/20 cover!
Medicaid w/20 (compare or comparison)
Medicaid w/20 days
Medicaid w/20 (excluded or exclusion)
"managed care" w/20 cover!
"managed care" w/20 (compare or comparison)
"managed care" w/20 days
"managed care" w/20 (excluded or exclusion)
"prospective payment system" or PPS
"Anti-Kickback Statute" or AKS
("Anti-Kickback Statute" or AKS) w/20 "safe harbor"
inducement

*** Non-Exhaustive List of Nursing Homes**

Aurora Manor
Autumn Hills Care Center
Bath Manor Special Care Center
Broadview Multi-Care Center
Camelot Arms Care Center
Canton Health Care Center
Cedarwood Plaza
Century Oak Care Center
Country Court Nursing Center
Essex Healthcare of Tallmadge
Essex of Salem I
Essex of Salem II
Essex of Salem III
Franklin Plaza Extended Care
Good Samaritan Nursing Home
Hennis Care Centre-Bolivar
Hennis Care Centre-Dover
Lexington Court Care Center
Menorah Park Center for Senior Living
Meridian Arms Living Center

RELATOR'S PROPOSED SEARCH TERMS

Montefiore
Mount St. Joseph
Orchard Villa
Parkside Villa
Pleasant Lake Villa
Ridgewood Healthcare Center
The Pines of Canton
Westlake Health Care Center
Wickliffe Country Place
Willowbrook
Willowood Care Center of Brunswick
Woodside Village Care Center

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

UNITED STATES OF AMERICA ex rel.
DONALD GALE,

Relator,

v.

OMNICARE, INC.,

Defendant.

Case No. 1:10-CV-0127

Judge James S. Gwin

Magistrate Judge McHargh

DECLARATION OF KRISTIN S.M. MORRISON

I, Kristin, S.M. Morrison, declare as follows:

1. I am over the age of 18 and know of no physical or mental reason that would prohibit me from giving this declaration, which is made on my personal knowledge.
2. I am an attorney with the law firm of Jones Day in the firm's Cleveland, Ohio office. I am a member in good standing of the Bar of the State of Ohio, and I am licensed to practice before this Court. I and my law firm represent Omnicare, Inc. in this matter.
3. I submit this Declaration in further support of Defendant Omnicare, Inc.'s Response to Relator's Motion for Sanction.
4. The dates and descriptions listed in the Chronology of Discovery Correspondence below are an accurate summary of the correspondence and communications related to discovery between the parties to this action and relevant Court Orders, in chronological order, between January 8, 2013 and October 2, 2013.

CHRONOLOGY OF DISCOVERY CORRESPONDENCE

Date	Description
01/18/2013	Initial ESI Conference between parties.
01/22/2013	Letter from R. Brooks to T. Tabacchi regarding using search terms for document searches. Acknowledges “specific 10 custodians” identified during ESI conference.
01/30/2013	Email from C. Geisler to R. Brooks, R. Marquez and S. Vann attaching Omnicare’s revised discovery conference submission.
02/01/2013	Email from C. Geisler to R. Brooks, R. Marquez and S. Vann attaching revisions to Relator’s proposed search terms.
02/09/2013 – 02/19/2013	Parties on-going negotiation of confidentiality agreement.
02/11/2013	Omnicare serves responses to first set of discovery requests (includes objections to time period and geographic scope).
02/13/2013	Email from R. Brooks to C. Geisler, R. Marquez and S. Vann agreeing to use Omnicare’s search terms on the 10 custodians.
02/14/2013	Email from C. Geisler to R. Brooks confirming 10 agreed custodians and search terms.
02/19/2013	Letter from J. Scudder to E. Zell enclosing Omnicare’s first production of documents.
02/25/2013	Letter from J. Scudder to E. Zell enclosing Omnicare’s second production of documents.
03/01/2013	Letter from J. Scudder to M. Jones enclosing Omnicare’s third production of documents.
03/07/2013	Email from R. Brooks to S. Sozio requesting confirmation that Omnicare has not agreed to provide any discovery beyond the 31 Complaint SNFs.
03/07/2013	Email from S. Sozio to R. Brooks indicating that Omnicare has produced discovery beyond the 31 Complaint SNFs and offering to discuss the following day.
03/07/2013	Letter from C. Geisler to R. Brooks describing Omnicare’s quality control process used in the document review.

Date	Description
03/08/2013	Letter from J. Scudder to M. Jones enclosing Omnicare's fourth production of documents.
03/08/2013	Email from R. Marquez to C. Geisler requesting identification of Omnicare's additional search terms used.
03/14/2013	Letter from F. Morgan to S. Sozio, T. Tabacchi, J. Scudder and C. Geisler regarding discovery deficiencies including Omnicare's objection to producing documents beyond 01/19/2010.
03/18/2013	Email from C. Geisler to R. Marquez and F. Morgan regarding delay in response to counsel's questions regarding Omnicare's quality control process.
03/21/2013	Parties conduct meet and confer conference.
03/22/2013	Letter from C. Geisler to R. Brooks regarding quality control process for ESI review.
03/22/2013	Letter from F. Morgan to S. Sozio, J. Scudder, T. Tabacchi, and C. Geisler regarding produced documents from Mike Mautz's files but not located in his custodial files.
03/25/2013	Letter from J. Scudder to M. Jones enclosing Omnicare's fifth production of documents.
03/28/2013	Letter from C. Geisler to F. Morgan explaining de-duplication process.
03/28/2013	Letter from R. Brooks to S. Sozio, J. Scudder, T. Tabacchi and C. Geisler summarizing parties meet and confer conference
03/29/2013	Letter from F. Morgan to S. Sozio regarding geographic scope of discovery
04/04/2013	Letter from S. Sozio to R. Brooks and F. Morgan regarding response to meet and confer summary and stating Omnicare's position. Omnicare agrees to extend discovery cut-off to April 8, 2011.
04/09/2013	Letter from J. Scudder to M. Jones enclosing Omnicare's sixth production of documents.
04/18/2013	Letter from C. Geisler to R. Brooks and F. Morgan regarding Omnicare's review process and specific search strings used in initial document review
04/22/2013	Letter from J. Scudder to M. Jones enclosing Omnicare's seventh production of documents.

Date	Description
04/23/2013	Letter from F. Morgan to S. Sozio, J. Scudder, T. Tabacchi and C. Geisler attaching Relator's Notice of 30(b)(6) deposition.
04/29/2013	Letter from R. Brooks to S. Sozio responding to 4/4/13 letter. Relator accepts April 8, 2011 discovery cut off date.
05/01/2013	Parties conduct a meet and confer conference.
05/08/2013	Omnicare serves objections and responses to 30(b)(6) notice.
05/08/2013	Letter from C. Geisler to M. Jones enclosing Omnicare's eighth production of documents.
05/09/2013	Relator files motion to compel seeking nationwide discovery, documents produced to the government in the <i>Silver</i> action, claims data and personnel files for all employees/former employees on Relator's 26(a) disclosures.
05/13/2013	Letter from F. Morgan to S. Sozio, T. Tabacchi and C. Geisler regarding meet and confer conference. Requests number of search hits from Omnicare's initial production, documents relating to investigations, update on status of the Mathis production related to Relator's alertline notification and solicits compromise on nationwide discovery. Relator offers to limit nationwide discovery to remaining 10 regions and remaining SNFs with per diem arrangements.
05/13/2013	Email from J. Huigens to F. Morgan attaching Omnicare's ninth production of documents.
05/23/2013	Magistrate Judge orders nationwide discovery but acknowledges the burden involved and suggests representative sampling after the total number of per diem arrangements is established. (ECF No. 74.)
05/29/2013	Letter from F. Morgan to S. Sozio, P. Rao, T. Tabacchi and C. Geisler requesting identification of per diem facilities, live access to Omnicare's dispensing systems, and suggesting search of Omnicare's email system.
05/31/2013	Letter from S. Sozio to F. Morgan in response to 5/29/2013 letter identifying per diem arrangements in seven states accounting for 70% to 80% of Omnicare's per diem arrangements.
05/31/2013	Letter from J. Huigens to M. Jones enclosing Omnicare's tenth production of documents.
06/10/2013	Letter from F. Morgan to S. Sozio regarding discovery issues including identification of additional custodians and proposing production of documents from 14 states.

Date	Description
06/17/2013	Letter from C. Geisler to F. Morgan stating that Omnicare will produce claims data (Relay Health Data), nationwide per diem contracts and purchasing data during the next week.
06/19/2013 9:18 a.m.	Email from F. Morgan to S. Sozio and C. Geisler requesting a meet and confer regarding Omnicare's selected sampling states.
06/19/2013 3:10 p.m.	Email from F. Morgan to S. Sozio and C. Geisler regarding Omnicare's privilege log.
06/19/2013	Letters from J. Huigens to M. Jones enclosing Omnicare's eleventh and twelfth production of documents.
06/20/2013	Email from F. Morgan to C. Geisler regarding production of claims data.
06/21/2013	Letter from J. Huigens to M. Jones enclosing Omnicare's thirteenth production of documents.
06/24/2013	Email from S. Vann to S. Sozio, T. Tabacchi, P. Rao and C. Geisler regarding Relator's proposed search terms.
06/24/2013	Parties conduct meet and confer conference.
06/26/2013	Letter from J. Huigens to M. Jones enclosing Omnicare's fourteenth production of documents.
06/28/2013	Omnicare serves its privilege log.
07/10/2013	Omnicare serves its amended privilege log and redacted documents.
07/10/2013	Letter from J. Huigens to M. Jones enclosing Omnicare's fifteenth production of documents.
07/11/2013	Email from C. Geisler to S. Vann identifying 37 nationwide custodians, their location and position.
07/12/2013	Letter from S. Vann to S. Sozio, P. Rao, T. Tabacchi and C. Geisler listing various discovery disputes including analysis of the selected states. Letter was provided to the Court.
07/15/2013	Letter from S. Sozio to S. Vann in response to 7/12/2013 letter. Copy sent to the Court.

Date	Description
07/16/2013	Letter from S. Vann to S. Sozio in response to 7/15/2013 letter. Copy sent to the Court. Letter requests discovery from 14 states and email searches across Omnicare's data servers.
07/16/2013	Letter from S. Sozio to S. Vann in response to 7/16/2013 letter. Copy sent to the Court. Proposes that parties would benefit from a meet and confer on these issues.
07/23/2013	Letter from J. Huigens to M. Jones enclosing Omnicare's sixteenth production of documents.
07/25/2013	Email from F. Morgan to S. Sozio regarding discovery issues.
07/26/2013	Email from C. Geisler to F. Morgan in response to 07/25/2013 email.
07/26/2013	Email from C. Geisler to F. Morgan regarding Omnicare's analysis of SNFs locations.
07/30/2013	Emails from C. Geisler to F. Morgan regarding email searches.
08/12/2013	Letter from D. Miller to S. Sozio, T. Tabacchi and C. Geisler regarding Omnicare's privilege log.
08/14/2013	Letter from S. Vann to S. Sozio regarding discovery issues including requesting 5 additional custodians.
08/16/2013	Letter from J. Huigens to M. Jones enclosing Omnicare's seventeenth production of documents.
08/19/2013	Letter from S. Sozio to S. Vann responding to 08/14/2013 letter and declining request to add additional custodians.
08/28/2013	Email from S. Sozio to R. Morgan confirming compromise on privilege documents and production of documents on 8/30/2013.
08/29/2013	Email string between S. Vann and C. Geisler regarding discovery issues including requesting 2 additional custodians.
08/30/2013	Letter from J. Huigens to A. Ashcraft enclosing Omnicare's eighteenth production of documents.
09/06/2013	Letter from J. Huigens to M. Jones enclosing Omnicare's nineteenth production of documents.

Date	Description
09/11/2013	Letter from D. Miller to S. Sozio regarding pre-2007 documents and requesting 7 additional custodians.
09/12/2013	Letter from S. Sozio to D. Miller in response to 09/11/2013 letter declining request to add additional custodians.
09/16/2013	Parties conduct meet and confer conference.
09/16/2013	Letter from D. Miller to S. Sozio "confirming" understanding in meet and confer.
09/16/2013	Letter from J. Huigens to M. Jones enclosing Omnicare's twentieth production of documents.
09/17/2013	Letter from S. Sozio to D. Miller responding to 09/16/2013 letter and declining request to add 7 new custodians.
09/20/2013	Letter from J. Huigens to M. Jones enclosing Omnicare's twenty-first production of documents.
09/23/2013	Email string between D. Miller and C. Geisler regarding collection of documents from nationwide custodians paper files and share drive files.
09/24/2013	Letter from J. Huigens to M. Jones enclosing Omnicare's twenty-second production of documents.
09/25/2013	Letter from D. Miller to the Court regarding discovery dispute.
09/30/2013	Letter from J. Huigens to M. Jones enclosing Omnicare's twenty-third production of documents.
10/01/2013	Order granting in part and denying in part Relator's discovery requests. (ECF No. 131.)
10/02/2013	Letter from J. Huigens to M. Jones enclosing Omnicare's twenty-fourth production of documents.

5. Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct, based upon my knowledge, information, and belief.

Executed on October 12, 2013


Kristin S.M. Morrison



Subject: U.S. ex rel. Gale v. Omnicare
From: Carol Geisler
Extension: 54174
To: Ross Brooks, Roland Marquez, sara.vann
Cc: Tina M. Tabacchi

02/01/2013 05:55 PM

Dear Ross,

Following up on our discussions earlier this week, I have attached our revisions to Relator's proposed search terms. As we discussed, we consolidated certain categories and eliminated some of the duplication. We are providing this list for discussion purposes only and are happy to continue the dialogue with you on this process. As we have mentioned, these proposed terms are offered while reserving our right to modify or limit them once we determine the amount of data they return.

Have a good weekend,

Carol



Proposed Search Terms.pdf



Carol P. Geisler

77 W. Wacker Drive • Chicago, IL 60601
DIRECT 312.269.4174 • **FAX** 312.782.8585
CGEISLER@JONESDAY.COM

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OMNICARE'S RESPONSE TO PROPOSED SEARCH TERMS

FOR DISCUSSION PURPOSES ONLY - OMNICARE'S 2/01/13 RESPONSE TO RELATOR'S PROPOSED ESI SEARCH TERMS
 OMNICARE RESERVES THE RIGHT TO REVISIT ANY OF THESE TERMS WITH RELATOR BASED ON ESI SEARCH HITS
 THE BELOW TERMS WOULD BE USED TO SEARCH ESI FOR POTENTIALLY RESPONSIVE DOCUMENTS

["nursing home" or (nursing w/2 home)] OR ["skilled nursing facility" or "SNF"] OR [{"long term care" or LTC} w/3 (facility or facilities)] or LTCF] OR [{"long term care" or LTC} w/3 (pharmacy or pharmacies)]	paired with:	w/20 prompt pay w/20 exclusiv! w/20 swap! w/20 (low w/3 ball!) w/20 ((price! or pricing) w/5 report!) w/20 (Tru! w/3 up) w/20 ("Fair market value" or FMV)
"Medicare Part A" OR "Part A"	paired with:	w/20 cost! w/20 exclusiv!
below w/5 (cost or price) "per diem" (price! or pricing) w/10 (procedure or manual or policy) compliance w/10 train! compliance w/10 audit! "MTS On Demand Training" "Anti-Kickback Statute" or AKS ("Anti-Kickback Statute" or AKS) w/20 "safe harbor" inducement		

COMPLAINT SNF NAMES:

Aurora Manor
Autumn Hills Care Center
Bath Manor Special Care Center
Broadview Multi-Care Center
Camelot Arms Care Center
Canton Health Care Center
Cedarwood Plaza
Century Oak Care Center
Country Court Nursing Center
Essex Healthcare of Tallmadge
Essex of Salem I
Essex of Salem II
Essex of Salem III
Franklin Plaza Extended Care
Hennis Care Centre-Bolivar
Hennis Care Centre-Dover
Lexington Court Care Center
Menorah Park Center for Senior Living
Meridian Arms Living Center
Montefiore
Mount St. Joseph
Orchard Villa
Parkside Villa
Pleasant Lake Villa
Ridgewood Healthcare Center
The Pines of Canton

OMNICARE'S RESPONSE TO PROPOSED SEARCH TERMS

Westlake Health Care Center
Wickliffe Country Place
Willowbrook
Willowood Care Center of Brunswick
Woodside Village Care Center

From: Sara Vann [Sara.Vann@morganverkamp.com]
Sent: 06/24/2013 03:46 PM GMT
To: Carol Geisler; Tina Tabacchi; Stephen Sozio; P. Nikhil Rao
Cc: Rick Morgan <rick.morgan@morganverkamp.com>; "Ross Brooks (RBrooks@sanfordheisler.com)" <RBrooks@sanfordheisler.com>; "Roland Marquez (rmarquez@sanfordheisler.com)" <rmarquez@sanfordheisler.com>; Jennifer Verkamp <jennifer.verkamp@morganverkamp.com>; "Davidson, Virginia (vdaavidson@calfee.com)" <vdaavidson@calfee.com>; "Zell, Eric (EZell@Calfee.com)" <EZell@Calfee.com>
Subject: Proposed Search Terms

Counsel,

Please find attached Relator's Proposed Search terms, as discussed in our morning conference. Best regards,

Sara

Sara Vann

Morgan Verkamp LLC
700 Walnut Street, Suite 400
Cincinnati, Ohio 45202
Tollfree 1.877.621.6127
Tel. 1.513.651.4400 Ext. 127#
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U.S. ex rel. Gale v. Omnicare, Inc.

Relator's Proposed Search Terms, 6/24/13

I. Terms By Themselves:

Per diem

perdiem

Induc!

Low ball

Lowball

fair market value

fmv

Kickback!

Kick back!

Kick! back

Incent!

Risk shar!

True up!

Trued up!

Trueup!

True-up!

Trued-up!

Cost shar!

Anti-Kickback Statute

AKS

Anti-Kickback

Safe harbor
Safeharbor
Safeharbour
remuneration
Rate adjust!
Rate chang!
Swap!
Exclusive
Exclusivity
Prompt pay!
Promptpaydiscount
Promptpay
Fraud!
Abuse!
PPS target
Corporate Pricing Committee

II. Paired Terms

<p>[Nursing home or (nursing w/2 home)] OR</p> <p>[skilled nursing or SNF] OR</p> <p>[LTC or long term care) w/3 (facility or facilities)] OR</p> <p>[(long term care or LTC) w/3 (pharmacy or pharmacies)]</p>	<p>w/20</p>	<p>Audit!</p> <p>inquir!</p> <p>investigat!</p> <p>review!</p> <p>Business</p> <p>Rank</p> <p>Sales</p> <p>Retention</p> <p>Retain!</p> <p>Loss!</p> <p>Lose!</p> <p>losing</p> <p>Lost!</p>
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		<p>Shortfall! Under bid below negative Cost! COG! Cost w/2 goods Deadnet Dead net Rebate Discount! Profit! Margin! Gross GM Net Revenue! utilize! Volume Return (get or obtain or keep or send or gain) w/5 (business) Value ROI Income Amount Opportunit! Increase! Decrease! Target! Giv! away Gave away Strategy! Candidate</p> <p>Exclude! Exclusion! Carve out! Carve! out Carveout! Invoice! U&C! UC! Usual or custom! Usual and custom! PD PPS</p>
--	--	---

		<p>PPD PPDs Pric! Pricing Worksheet! Approv! Bid! Charg! Rate! Fee! Per patient! Free Reduc! Exception Offer Inclusive</p> <p>Compet! Polic! Practice! Guid! Instruct! Proced! Complia! OIG Exchang! Influ!</p> <p>Contract! Agreement! Addend! Propos! Solicit! Develop! Negotiate! Arrange!</p>
<p>Part A</p>	<p>w/20</p>	<p>Analysis Option! Capitat! Paid Bill! Skilled beds</p> <p>Loss! Lose! losing Lost! Shortfall!</p>

		<p>Under bid below less cut reduce negative Cost! COG! Cost w/2 goods Deadnet Dead net rebate Discount! Profit! Margin! Gross GM Net Revenue! utilize! Volume Return (get or obtain or keep or send or gain) w/5 (business) Value ROI Income Amount Opportunit! Increase! Decrease! offer Target! Givl away Gave away Strategy! candidate benchmark bench mark</p> <p>Exclude! Exclusion! Carve out! Carve! out Carveout! Invoice! U&C!</p>
--	--	---

		<p>UC! Usual or custom! Usual and custom! PD PPS PPD PPDs Pric! Pricing Worksheet Approv! Bid! Charg! Rate! Fee! Per patient! Free Reduc! Exception Inclusive</p> <p>Audit! Compet! Polic! Practice! Guid! Instruct! Proced! Complia! OIG Exchang! Infl!</p> <p>Contract! Agreement! Addend! Propos! Solicit! Develop! Negotiate! Arrange!</p>
Part A	w/5	<p>Below Lower low under less reduce</p>

		cut undercut benchmark bench mark approv!
Rate	w/5	adjust! chang! low! decreas! Alter! Amend! Option! benchmark bench mark approv!
Compli!	w/20	Train! Audit! Report! Refer! Advi! Guid! Practice! Polic! Procedur! Issue! Question! Complain! Review! Investing! Inquir! Suspect! Suspicious Pric! Manual!
[Each SNF identified as having a per diem]	w/20	Audit! inquir! investigat! review! Business Rank Sales Retention Retain! Loss Lose! losing Lost!

		<p> Shortfall! negative under bid below cut reduce Cost! COG! Cost w/2 goods Deadnet Dead net rebate Discount! Profit! Margin! Gross GM Net Revenue! utilize! Volume Return (get or obtain or keep or send or gain) w/5 (business) Value ROI Income Amount Opportunit! Increase! Decrease! Referr! Offer Target! Giv! away Gave away Strategy! Candidate benchmark bench mark Exclude! Exclusion! Carve out! Carve! out Carveout! Invoice! </p>
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		<p>U&C! UC! Usual or custom! Usual and custom! PD PPS PPD PPDs Pric! Pricing Worksheet Approv! Bid! Charg! Rate! Fee! Per patient! Free Reduc! Exception Inclusive</p> <p>Audit! Compet! Polic! Practice! Guid! Instruct! Proced! Complia! OIG Exchang! Influ!</p> <p>Contract! Agreement! Addend! Propos! Solicit! Develop! Negotiate! Arrange!</p>
<p>Absolute OR PharMerica OR One Rx OR ChemRx OR NuScript OR New Day OR Walgreen OR Competit!</p>	<p>w/20</p>	<p>Pric! Bid! Solicit! Refer! Offer! Match! Terminat!</p>

		Guarant! Pressure inclusive
Pric!	w/5	Committee Approv!
Actuar!	w/20	Cost Risk Valu! Forecast!

74,443.77

The Geode Group LLC
 5324 Canyon Ridge Drive
 Liberty Township, OH 45011
 www.thegeodegroup.com

Invoice

Vendor # 47282

Invoice #: 101510OCR
Invoice Date: 10/15/2010
Due Date: 10/15/2010
Project:
P.O. Number:

Bill To:
 Omnicare, Inc.
 Jeff Stamps
 Senior Vice President
 9482 Meridian Way
 West Chester, OH 45069

326	326965	76690	16,290.04
531	531965	76690	8,700.00
660	660965	76690	8,700.00
3201	3201965	76690	8,700.00
150	150965	76690	10,665.77
348	348965	76690	8,700.00
12	12965	76690	8,700.00
453	453965	76690	3,987.96

Date	Description	Amount
10/15/2010	Weekly Contract Rate for HPRS Growth and Retention Process fee for 7 regions (Great Lakes, Mid-Atlantic, Northeast, South Central, Southeast, NY and Southwest).	60,900.00
10/11/2010	Golden, CO-Front Line Service - Pharmacy tour video taping and editing with additional 5 copies	1,500.00
10/11/2010	Golden, CO-Front Line Service - Information Access Committee Meeting	1,000.00
10/13/2010	Indianapolis, IN-Billing Supervisor HPRS Process Training and DISC - Delivery	7,500.00
10/13/2010	Car rental and Fuel for HPRS & DISC Training-Tim Morrison	90.04
10/9/2010	Cheshire, CT - Front Line Service Training 10/4-10/10-Julie Morrison and Lori Priselac	
10/9/2010	Lodging for 6 nights in Cheshire, CT-Radisson Inn and Marriott	1,223.74
10/9/2010	Meals for 7 days when traveling on behalf of client-Julie Morrison, Lori Priselac	240.32
10/9/2010	Rental Car and fuel for travel -National Car Rental and Citgo	329.41
10/9/2010	Parking fees at Cincinnati airport (68.00) and reimbursement for mileage (101 miles @ .385=38.85)- J. Morrison	106.85
10/9/2010	Mileage reimbursement to and from airport (170 miles @.385=65.45)-L. Priselac	65.45
10/12/2010	Golden, CO Front Line Service Training 10/10-10/12-Julie Morrison, Lori Priselac, and Micah Simms	
10/12/2010	Lodging for 2 nights in Denver, CO Courtyard-Julie Morrison and Micah Simms	602.36
10/12/2010	Lodging for 2 nights in Golden, CO Marriott-Lori Priselac	311.94
10/12/2010	Meals for 3 days when traveling on behalf of client -Julie Morrison, Lori Priselac and Micah Simms	212.10
10/12/2010	Rental Car and fuel for travel for 3 days-Enterprise Car Rental and Circle K	216.07
10/12/2010	Parking fees at Cincinnati airport (39.00) and reimbursement for mileage (101 miles @ .385=38.85)- J. Morrison	77.85
10/10/2010	Baggage Fees-Delta and transportation to airport Enterprise-L. Priselac	67.64

Posted 10/19/10
 By: jratay

Total	\$74,443.77
Payments/Credits	\$0.00
Balance Due	\$74,443.77

Federal Tax ID No. 33-1070877

Note: All invoices are due upon receipt. A late payment charge of one percent (1%) per month may be assessed all invoiced amounts (or any balance thereof).

OK To Pay
[Signature]
 Signature
 10-15-10
 Date

All Items Received
[Signature]
 Signature
 10-15-10
 Date

JONES DAY

NORTH POINT • 901 LAKESIDE AVENUE • CLEVELAND, OHIO 44114.1190

TELEPHONE: +1.216.586.3939 • FACSIMILE: +1.216.579.0212

DIRECT NUMBER: (216) 586-7201
SGSOZIO@JONESDAY.COM

I

JP000790/CLI-2148584
259309-600002

October 7, 2013

VIA E-MAIL

Fredrick Morgan
Morgan Verkamp, LLC
700 Walnut Street, Suite 400
Cincinnati, OH 45202

Re: United States ex rel. Donald Gale v. Omnicare, Inc.
Case No. 1:10-CV-0127 (N.D. Ohio)

Dear Rick:

This letter provides information regarding the handling of Mr. Mathis' files following his separation from Omnicare as required under the Court's Order (ECF No. 138 at 4). Specifically, Omnicare provides below the identity of persons who had contact with his files.

Kathryn Kampmann was Mr. Mathis' executive assistant from September 2009 until March 2011. She was responsible during that time period for maintaining Mr. Mathis' files at his direction. When Mr. Mathis left Omnicare in March 2011, she collected and placed all hard copy documents located in Mr. Mathis' office into boxes. Any other existing files remained in filing cabinets. The boxes and files remained on-site at Omnicare's Covington headquarters. In June 2012, Omnicare moved its corporate headquarters from Covington, Kentucky to Cincinnati, Ohio. The boxes and filing cabinets containing Mr. Mathis' documents were also moved from Covington to Cincinnati and were stored in a closet near Ms. Kampmann's work station. In Spring 2013, Omnicare's in house counsel asked Ms. Kampmann to review the files under her control for documents related to "per diems." Ms. Kampmann located a file labeled "per diem/hospice" that was determined to be non responsive.

Following the Mathis deposition, the Mathis files were reviewed by Ms Kampmann to locate any file bearing a "per diem" label. Documents responsive the Court's Order (EFC No. 138) were also recently removed from the Mathis files by Joseph Huigens (Jones Day attorney) and are now in possession of Jones Day. The other Mathis files remain at Omnicare. Omnicare is not aware of any other person having had access to Mr. Mathis' files other than shipping personnel when the boxes were moved during the corporate relocation.

The paper "per diem/hospice" file that is being produced in response to the Court's order was found among Mr. Mathis's hard copy files that were held by Omnicare. A search for an electronic "per diem" file was also conducted. We were unable to find any electronic file folder

Richard Morgan
October 7, 2013
Page 2

JONES DAY

that was labeled as "per diem" or used a similar designation in the file name description. The electronic files that were searched have restricted access and permission to access such files must be approved by Omnicare Information Systems. With respect to shared drives, access is, generally speaking, limited to members of the department using that shared drive. Omnicare also recently located Mr. Mathis' hard drive in an offsite storage facility. The hard drive will be restored and reviewed. We will advise you once that process is completed.

Finally, we will send under separate cover Omnicare's privilege log for documents that were withheld or redacted from the "per diem/hospice" file folder and its privilege log for documents that were withheld or redacted relating to the Corporate Compliance Committee Meeting minutes, notes and agenda.

Very truly yours,

Handwritten signature of Stephen G. Sozio in blue ink.

Stephen G. Sozio

cc: Honorable James S. Gwin (via facsimile)
All counsel of Record

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA *ex rel.*
DONALD GALE,

Relator,

v.

OMNICARE, INC.,

Defendant.

Case No. 1:10-CV-0127

Judge James S. Gwin

Magistrate Judge McHargh

DECLARATION OF ROBERT FOLMAR

I, Robert Folmar, declare the following:

1. I am presently the Director of Account Operations for Omnicare, Inc. ("Omnicare"). Previously, I was part of the Retention Department, where I started in September, 2011. I have been employed by Omnicare since August, 2008. I am over the age of eighteen and am under no legal disability that would prevent me from testifying in regard to the matters contained within this Declaration. I have personal knowledge of the facts and matters set forth in this Declaration.

2. As part of my responsibilities with Omnicare, I worked with the Geode Group, an organization hired by Omnicare to consult on processes for improving internal and external Omnicare communications and developing strategies for working more effectively with customers. As part of this consulting process, the Geode Group created excel spreadsheets called "deep dives." When I was brought into the Retention Department, I learned that the long term

plan was to not renew the Geode Group contract which was to expire on July 1, 2012, but to perform that function internally at Omnicare.

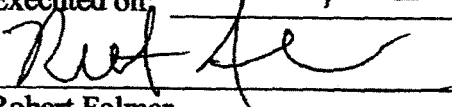
3. In connection with the transition of this work back to Omnicare, I worked with the Geode Group to transfer Omnicare's confidential customer information in the "deep dive" documents back to Omnicare.

4. During the course of the transition, I received from the Geode Group what I believe was one CD (it is possible that there may have been more than one CD, I do not specifically recall), containing several hundred spreadsheets with the "deep dive" information ("Geode Group CD"). The Geode Group CD contained no information or files other than "deep dive" files. I was responsible for loading all the files from the Geode Group CD onto a newly created SharePoint site for my team. SharePoint is a Microsoft software application platform that permits a team to share and manage as a group their working documents. At the time that I loaded the files from the Geode Group CD, there was no other information on the SharePoint site.

5. At the time that I received the Geode Group CD, I had no knowledge that the files on the Geode Group CD may have had any relevance to any litigation. After I loaded all the files from the Geode Group CD to the SharePoint site, I placed the Geode Group CD in a designated confidential material bin for disposal consistent with my practice for handling media that contains confidential information. Once the files were loaded onto the secure SharePoint site I had no business purpose for retaining the Geode Group CD.

6. The first time I learned that the Geode Group files may have any relevance to litigation was when Omnicare's counsel contacted me about the Geode Group CD in September, 2013. At Omnicare's counsel's request, I downloaded all of the "deep dive" files on the SharePoint site as of September 13, 2013 to a CD and provided that to counsel for purposes of the litigation.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: 10/12/13

Robert Folmar

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

UNITED STATES OF AMERICA ex rel.
DONALD GALE,

Relator,

v.

OMNICARE, INC.,

Defendant.

Case No. 1:10-CV-0127

Judge James S. Gwin

Magistrate Judge McHargh

DECLARATION OF CAROLYN HUTCHISON

I, Carolyn Hutchison, declare the following:

1. I have been employed by Omnicare, Inc. (“Omnicare”) for 23 years. I have been the Vice President of Account Management since January 2011. My organization is responsible for customer service and contract management.

2. I am over the age of eighteen and am under no legal disability that would prevent me from testifying in regard to the matters contained within this Declaration. I have personal knowledge of the facts and matters set forth in this Declaration.

3. In January 2011, when I assumed the role of Vice President of Account Management, it was Omnicare’s plan to build an internal organization that would focus on customer retention so that we would no longer need to pay a consultant like the Geode Group.

4. In the Summer of 2011, Omnicare determined that it had sufficiently grown its own account management organization such that it was not necessary to continue to incur the cost of renewing the contract with the Geode Group. The Geode Group was informed of

Omnicare's decision in the Fall of 2011. I and my organization continued to work with the Geode Group until July 2012.

5. Sometime during the April- June, 2012 timeframe, I discussed with the Geode Group their transition back to Omnicare of Omnicare's customer information and documents. I was not involved with the actual transfer of any information or documents from the Geode Group to Omnicare. I did not instruct the Geode Group to destroy documents. I am not aware of anyone at Omnicare instructing the Geode Group to destroy documents.

I declare under penalty of perjury that the foregoing is true and correct:

Executed on: _____

Carolyn Hutchinson

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

UNITED STATES OF AMERICA ex rel. DONALD GALE, Relator, v. OMNICARE, INC., Defendant.	Case No. 1:10-CV-0127 Judge James S. Gwin Magistrate Judge McHargh
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DECLARATION OF JEFFREY M. STAMPS

I, Jeffrey Stamps, declare the following:

I was employed by Omnicare, Inc. from 1990 until I retired in November, 2012. When I retired from Omnicare I was the Executive Vice President and President of Omnicare's Long-Term Care Division.

I am over the age of eighteen and am under no legal disability that would prevent me from testifying in regard to the matters contained within this Declaration. I have personal knowledge of the facts and matters set forth in this Declaration.

The Geode Group was a sales and marketing consulting company initially retained by Omnicare sometime in or before 2009 to work with our pharmacy personnel on customer communication and business development. The overwhelming majority of the consulting services provided by the Geode Group supported Omnicare's efforts to retain and expand business with skilled nursing facilities with which Omnicare had fee-for-service contracts.

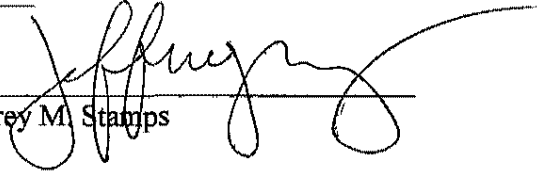
In July 2010, Omnicare and the Geode Group negotiated an Independent Contractor Agreement (copy attached as Exhibit A). The Agreement had an initial term of twenty-four months, and provided for automatic renewal for successive terms of eighteen months. *See* Agreement at Section 4. However, the Agreement provided that either party could elect not to renew the Agreement by notifying the counter-party, in writing no later than one hundred twenty days prior to the expiration of the current term, that the Agreement would not be renewed. *Id.*

I am not aware of any written contract between Omnicare and the Geode Group that preceded the July 2010 Agreement.

By late 2011, Omnicare had developed its sales and marketing resources to a point where, in the judgment of Omnicare's management, the Company could provide adequate support for its regional personnel without the need for outside consultants. The Geode Group Agreement provided for payment of substantial fees, and Omnicare decided to eliminate that expense beginning in mid-2012. To that end, I notified the Geode Group in writing, as contemplated by Section 4 of the Agreement, of Omnicare's election not to renew the Agreement at the expiration of its initial two-year term. *See* September 29, 2011 Stamps Letter to the Geode Group (copy attached as Exhibit B). The Geode Group continued, however, to render consulting services to Omnicare until the end of the contract term in June 2012.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: October 11, 2013



Jeffrey M. Stamps

DC01/3245271.4

EXHIBIT A

INDEPENDENT CONTRACTOR AGREEMENT

This Independent Contractor Agreement ("Agreement") is entered into and is effective on July 7, 2010 (the "Effective Date") between The Geode Group, an Ohio limited liability company, located at 5324 Canyon Ridge, Liberty Township, Ohio, 45011 ("Contractor") and Omnicare, Inc., a Delaware corporation, located at 100 E. Rivercenter Boulevard, Covington Kentucky 41011 ("Company") and is entered into and effective as of the date this Agreement is executed.

1. APPOINTMENT AND SERVICES TO BE PROVIDED

Company hereby appoints Contractor, and Contractor hereby accepts appointment, as an independent contractor to provide certain consulting services, described below, and related services (collectively "Obligations"), within the background, experience, and competence of Contractor. Contractor's Obligations are limited to the following services:

- Providing Company's employees with coaching for Company's growth and retention opportunities in Omnicare's traditional pharmacy services division in each of the Company's Regional Service Regions (RSA) as currently defined in the United States of America where Company does business
- Providing pipeline analysis for both growth and retention opportunities in Omnicare's traditional pharmacy services division in the regions set out below including deep dives, strategies, call plans, and strategic and tactical retention guidance and related tools
- Providing preparation for and participation on weekly RVP Calls
- Providing Company with access to and facilitation of Contractor's High Probability Resource Retention ("HPRR") and High Probability Resource Selling ("HPRS") processes, related tools and terminology during the term of this Agreement or any renewals thereof
- Providing per diem and contract management coaching, facilitation and deep dives for a jointly appointed Retention Contract task force working for the Company's Executive VP of Operations

The Obligations are strictly limited to coaching, HRPS facilitation, assessments and analysis for growth and retention opportunities in Company's traditional pharmacy services division and shall not include coaching or analysis for other divisions or sub-divisions within Company. Other items excluded from services but available outside the scope of work as provided in Section 3 are:

- Involvement in the growth and/or retention processes on National Accounts and/or with Key Account Managers is available separately.

- Assessments and HPRS process training is available separately.

An authorized Contractor representative must approve any services requested by Company for Contractor to perform.

2. PERFORMANCE OF OBLIGATIONS

The manner in which the Obligations are to be performed and the specific hours to be worked by Contractor shall be mutually agreed to by Contractor and Company. Contractor, however, reserves the exclusive right to replace any individual or resource with individuals or resources Contractor deems to have comparable or superior capabilities, provided that, in Contractor's judgment, such replacement will not compromise the performance of Contractor's Obligations. Contractor shall work as many hours as are reasonably necessary to fulfill Contractor's Obligations under this Agreement.

Contractor shall:

- a) Collaborate with Company's Executive VP of Operations and/or VP of Sales when requested to do so;
- b) Design and present all training and assessments required for Company to effectively execute HPRS process to Company for approval under separate agreement;
- c) Be responsible for any staffing necessary to perform Contractor's Obligations; and
- d) Not appoint any other consultant, representative, agent or independent contractor to perform any of Contractor's Obligations without Company's prior written consent.

Contractor hereby covenants that in performing its obligations under this Agreement, it will comply in all material respects with all applicable statutes, regulations, rules, orders, ordinances and other laws of any governmental entity to which this Agreement and the parties' obligations under this Agreement, are subject with respect to healthcare regulatory matters (including, without limitation, the Federal Anti-Kickback Statute (42 U.S.C. §1320a-7b(b)).

Company agrees that its engagement of Contractor is limited to the services identified in this Agreement. In the event Company wishes to engage Contractor to provide services outside the scope of this Agreement, authorized representatives of both Company and Contractor shall execute a scope of work in substantially the same form as this agreement. In the event Company and Contractor execute a scope of work for extraneous services as provided herein, Company agrees to pay Contractor for such services as provided in Section 3.

Company agrees to cooperate with Contractor and provide assistance to Contractor as is reasonably necessary to assist Contractor to perform the Obligations. Company shall also provide Contractor with access to Company's facilities, employees and computer systems to the extent necessary for Contractor to perform its Obligations and Company will direct that Company's personnel cooperate with Contractor's in the delivery of its Obligations. Company



acknowledges that its failure to provide timely assistance or access to Contractor may delay delivery of Contractor's Obligations. Contractor shall not be responsible for delays caused by such failures.

3. COMPENSATION AND BILLING

As full compensation for Contractor's performance of the Obligations under this Agreement, Company shall pay Contractor a weekly fee of eight thousand seven hundred and no/100 dollars (\$8,700.00 USD) for each of the regions subject to this Agreement and detailed as currently defined by State and listed in this section below (the "Weekly Fee Per Region"), payable in fifty-two (52) equal weekly installments each year of the contract. Company shall pay Contractor's travel and travel related expenses when submitted. Company shall pay each such installment and expenses to Contractor on or before 5pm (EST) on the last business day of each week during the term of this Agreement and any renewal thereof.

Regions Included as of the Effective Date:

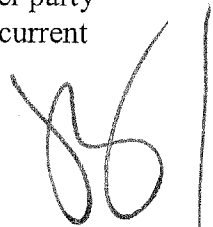
- New England (NJ, CT, RI, MA, NH, ME, VT, NH)
- Mid Atlantic (VA, MD, eastern PA)
- Southeast (FL, GA, MS, SC, NC, AL)
- Great Lakes (MI, Northern OH)
- New York (New York State)
- South Central (Indiana RSA, Southern OH, TN, IN, Western PA, WV, KY)
- Southwest (TX, NM, AZ)

National Accounts, Midwest and Southern (IL, WI, MO, KS, OK, AK, LA), Pacific (CA, UT, NV) and Great Plains (WA, OR, ID, MT, WY, CO, ND, SD, NE, MN, IA) are not initially included but can be added with mutual agreement.

In the event Contractor provides services to Company outside the scope of work as provided in Sections 1 and 2, Company shall pay for such services at the rate of \$275.00 per hour unless otherwise agreed to by both parties in writing.

4. TERM

The initial term of this Agreement shall begin on the Effective Date and shall continue for twenty-four (24) consecutive months (the "Initial Term"). The Agreement shall automatically renew at the end of the Initial Term for successive terms of eighteen (18) months each; provided, however, that either party may elect not to renew this Agreement by providing the other party with written notice at least one hundred twenty (120) days prior to the end of the then current



term. Should either party not wish to renew this Agreement and provide the other party with proper written notice as provided in this section, this Agreement shall expire on the last day of the then current term.

If Company terminates this Agreement without cause prior to the last day of the then-current term, Company shall pay to Contractor the Weekly Fee Per Region for the period from the date of termination to the last day of the then-current term.

5. RELATIONSHIP OF PARTIES

Contractor is an independent contractor of the Company. Nothing in this Agreement shall be construed as (i) creating an association, partnership, joint venture, agency relationship or employer-employee relationship; (ii) a guarantee of future employment or engagement; or (iii) a limitation upon the Company's right to terminate this Agreement. All persons employed by Contractor in connection with performance of the Obligations shall be Contractor's employees or independent contractors.


Contractor shall be responsible for all of Contractor's federal and state taxes, withholding, social security, insurance, and other benefits. Contractor shall also be responsible for its employees and independent contractors, including, without limitation, paying all compensation, withholding taxes, providing worker's compensation insurance, and making all other required payments in connection with such employees or independent contractors.

Neither Contractor, its employees, independent contractors nor agents shall directly or indirectly represent themselves to be an employee or agent of Company or create any obligation on behalf of Company without Company's prior written consent.

6. PROTECTION OF CONFIDENTIAL INFORMATION AND INVENTIONS

Each party may disclose information to the other concerning its proprietary know-how, trade secrets, customer lists, business plans, business and accounting data, patents, copyrights, agreements and other confidential information ("Confidential Information"). Confidential Information shall include Company's or Contractor's processes, tools, terminology, forms and data. All such Confidential Information shall remain the sole property of the party disclosing the same, and the receiving party shall have no interest in, or right with respect thereto, except as set forth herein. Each party agrees that the receiving party, its employees, and its independent contractors may use the disclosing party's Confidential Information to the extent necessary to complete the Obligations. Except as expressly provided in this Agreement, each party agrees to keep the other party's Confidential Information strictly confidential, and agrees not to disclose the other party's Confidential Information to any third party.

The obligations contained in foregoing paragraph do not apply to (i) information that is or hereafter becomes generally known and available to the public through no fault of the receiving party; and (ii) information that has been disclosed to the receiving party by a third party who is not under obligation to maintain such information in confidence.



If Confidential Information is required to be produced by law, court order, or governmental authority, the party required to produce the Confidential Information must immediately notify the other party of that obligation. The party will not produce or disclose Confidential Information in response to that obligation until the other party has (i) requested protection from the court or other legal or governmental authority issuing the process and the request has been denied; (ii) has consented in writing to the production or disclosure of the Confidential Information in response to the process; or (iii) taken no action to protect its interest in the Confidential Information within thirty (30) business days after receipt of notice from the party of the obligation to produce or disclose.

Each party agrees that the Confidential Information disclosed is special, unique and extraordinary. The improper use or disclosure of Confidential Information by one party will cause irreparable injury and damage to the other. Each party agrees that the other party shall be entitled to seek injunctive and equitable relief to prevent improper use or disclosure of Confidential Information. The aggrieved party shall also be free to pursue any other remedies available to it for such improper use or disclosure, or threatened improper use or disclosure, including the recovery of damages. The remedies provided for in this paragraph shall be cumulative and in addition to, and not in lieu of, any other remedy now or hereafter existing, whether such remedies are sought in a proceeding at law or in equity.

Upon termination of this Agreement and written request, a party shall promptly return to the other party, or destroy upon request of the other party, all Confidential Information of the other party in its possession.

7. OWNERSHIP OF INTELLECTUAL PROPERTY

Contractor shall retain ownership of all intellectual property of Contractor used to perform its Obligations including, but not limited its ideas, skills, tools, techniques, processes, software, models and other consulting tools ("Contractor Knowledge"). All materials, ideas, processes, techniques developed by Contractor in order to perform its Obligations, whether developed solely by Contractor or with Company's employees or consultants, shall be considered "Contractor Knowledge" and shall remain the exclusive property of Contractor.

8. LIMITATION OF LIABILITY

Contractor's Obligations, services and products are provided "as is." Except as expressly provided in this Agreement, Contractor does not warrant or guarantee any products, services, revenue, bed growth or retention results provided in connection with performance of the Obligations.

CONTRACTOR DISCLAIMS ALL WARRANTIES, EXPRESS, IMPLIED, OR STATUTORY, TO COMPANY AS TO ANY MATTER WHATSOEVER, INCLUDING ALL IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE AND NON-INFRINGEMENT OF THIRD PARTY RIGHTS. NO ORAL OR WRITTEN INFORMATION OR ADVICE GIVEN BY CONTRACTOR, ITS EMPLOYEES,

INDEPENDENT CONTRACTORS OR AGENTS SHALL CREATE A WARRANTY OR IN ANY WAY INCREASE THE SCOPE OF CONTRACTOR'S OBLIGATIONS.

EXCEPT AS PROVIDED IN SECTION 10, NEITHER PARTY SHALL BE LIABLE TO THE OTHER PARTY OR TO ANY OTHER THIRD PARTY FOR ANY CONSEQUENTIAL, INDIRECT, SPECIAL, INCIDENTAL, RELIANCE, OR EXEMPLARY DAMAGES ARISING OUT OF OR RELATING TO THIS AGREEMENT OR THE OBLIGATIONS, WHETHER FORESEEABLE OR UNFORESEEABLE, AND WHETHER BASED ON BREACH OF ANY EXPRESS OR IMPLIED WARRANTY, BREACH OF CONTRACT, MISREPRESENTATION, NEGLIGENCE, STRICT LIABILITY IN TORT, OR OTHER CAUSE OF ACTION (INCLUDING, BUT NOT LIMITED TO, DAMAGES FOR LOSS OF DATA, GOODWILL, PROFITS, INVESTMENTS, USE OF MONEY, OR USE OF FACILITIES; INTERRUPTION IN USE OR AVAILABILITY OF DATA; STOPPAGE OF OTHER WORK OR IMPAIRMENT OF OTHER ASSETS; OR LABOR CLAIMS), EVEN IF SUCH PARTY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES.

9. INDEMNITY

Each party (the "indemnifying party") agrees to indemnify, defend, and hold the other party" and its successors, officers, directors, agents, employees and independent contractors (the "other party harmless from any and all actions, causes of action, claims, demands, cost, liabilities, expenses and damages (including attorneys' fees, expert witness fees and costs of defense) arising out of, or in connection with: (i) a breach of this Agreement by the indemnifying party; (ii) gross negligence of the indemnifying party, its independent contractors, agents or employees; or (iii) any alleged or actual violations by the indemnifying party or its independent contractors, employees or agents of any governmental laws, regulations or rules. The indemnifying party shall assume the responsibility for and the expense of investigation, defense and/or settlement of such claims.

10. NON COMPETE/NON SOLICITATION

During the term of this Agreement and for a period of one (1) year following the expiration or termination of this Agreement, Contractor agrees that it will not (i) solicit business from any person or entity that competes with Company in the long term care industry in the United States of America (a "Company Competitor"); (ii) enter into any agreement or other arrangement with a Company Competitor, or (iii) solicit or hire any employee of Company without the Company's written consent; provided, however, that this Section 10 shall not survive the termination of this Agreement by Contractor in accordance with Section 12 for an uncured material breach of Company.

11. REPRESENTATIONS AND WARRANTIES OF PARTIES

Each party represents that it is free to enter into this Agreement, and warrants that the execution and delivery of this Agreement and the performance of the Obligations herein contemplated will not conflict with or violate any provision of any agreement to which it may be a party, or violate any applicable law, rule, regulation, order or decree of any government or governmental instrumentality or court.

12. DEFAULT AND TERMINATION

Company and Contractor each shall have the right to terminate this Agreement upon written notice to the other party in the following events:

- A. The other party defaults in the delivery of any of its undertakings or obligations under this Agreement, including failure to make payment or failure to perform the Obligations, and such default is not cured within thirty (30) days after written notification by the injured party.
- B. An insolvency or other proceeding for the relief of creditors or any petition under the Bankruptcy Code is filed by or against the other party, and is not discharged within ninety (90) days.

If (i) Contractor terminates this Agreement due to (A) a default by Company in the performance of its undertakings or obligations under this Agreement (and Company fails to cure its default within thirty (30) days after written notification by Contractor) or (B) the filing by Company of an insolvency petition, assignment for the benefit of creditors, or other proceeding for the relief of creditors, or any petition under the Bankruptcy Code, and such action not discharged within ninety (90) days of its filing; or (ii) if Company terminates this Agreement other than as permitted in Section 4 or this Section 12, then Company shall pay to Contractor the Weekly Fee Per Region for the period from the date of termination to the last day of the then-current term. Such payment shall be made within thirty (30) days of the date of termination.

If Company fails to pay any amount due under this Agreement in accordance with the terms hereof (subject to a 15-day grace period), Contractor may impose a late fee equal to 1 percent (1%) per month.

13. FORCE MAJEURE

Contractor shall not be held responsible for any delays or failures in performance of its Obligations due to events to which it cannot reasonably control. These may include, but are not limited to, Company's failure for any reason to provide adequate personnel and/or effort to execute Contractor's HPRS process and/or coaching or instruction, strikes, riots, epidemics, wars, fire, governmental regulations, communication line failure, power failure, or acts of God.

14. SURVIVAL

The following Sections shall survive expiration or termination of this Agreement: 3, 5, 6, 7, 8, 9, 10, 11, 12, 18 and 19.

15. ENTIRE AGREEMENT

This Agreement contains the entire agreement between Contractor and Company, and supersedes any and all prior agreements, written or oral, between the parties hereto. No provision of this

Agreement can be hereafter waived, amended, modified or supplemented in any respect, except by a subsequent written agreement executed by each of the parties.

16. ASSIGNMENT

The parties hereby recognize this Agreement is personal in nature and shall not be assignable by either party, without the other party's prior written consent.

17. NOTICES

Any notice or other communication under this Agreement shall be in writing and shall be effective upon hand-delivery or upon proof of receipt when mailed by U. S. Certified Mail, return receipt requested, to the parties at the address set forth in the preamble of this Agreement.

18. CHOICE OF LAW; DISPUTE RESOLUTION

This Agreement shall be governed by and construed in accordance with substantive and procedural laws of the State of Ohio, without reference to choice of laws. Each party voluntarily submits to the personal jurisdiction of the court of the United States District Court for the Southern District of Ohio and the courts of Butler County, Ohio, and each party agrees to submit to the exclusive jurisdiction of such courts. Each party further agrees that service of process by U. S. Certified Mail to such party's address for notices set forth in this Agreement shall be effective service of process with respect to any disputes arising out of this Agreement.

19. ATTORNEY'S FEES

Should suit be brought to enforce or interpret any part of this Agreement, the prevailing party shall be entitled to recover its reasonable attorneys' fees and costs, including expert witness fees and fees on any appeal.

20. SEVERABILITY

In the event that any provision or portion of this Agreement shall be determined to be invalid or unenforceable for any reason, in whole or in part, the remaining provisions of this Agreement shall be unaffected and shall remain in full force and effect to the fullest extent permitted by law.

21. CAPTIONS AND TITLES

Captions and titles have been used in this Agreement only for convenience, and in no way define, limit, or describe the meaning of this Agreement or any part thereof.

A handwritten signature in black ink, consisting of a stylized, cursive name followed by a vertical line.

22. WAIVER

Waiver of a breach of any provision of this Agreement shall not operate or be construed as a waiver of any subsequent breach.

IN WITNESS WHEREOF the undersigned have executed this Agreement as of the day and year first written above.

For The Geode Group, LLC:

Signature: _____
Printed _____
Name: _____
Title: _____
Date: _____

For Omnicare, Inc.:

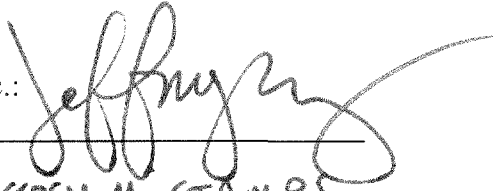
Signature:  _____
Printed _____
Name: JEFFREY M. STAMPS
Title: SVP : Intern COO
Date: 7/7/10

EXHIBIT B



Omnicare

100 E. RiverCenter Blvd.
1600 RiverCenter II
Covington, KY 41011
TEL 859.392.3338
FAX 859.392.3360

Jeffrey M. Stamps, R.Ph., FASCP
Executive Vice President and President, Long Term Care Operations

jeff.stamps@omnicare.com

September 29, 2011

Mr. Tim Morrison
President
The Geode Group, LLC
5324 Canyon Ridge
Liberty Township, Ohio 45011

Re: Independent Contractor Agreement dated July 7, 2010

Dear Tim,

As you know Omnicare entered into an Independent Contractor Agreement on or about July 7, 2010 for the provision of various services. The term of this agreement was for twenty-four (24) months ("Initial Term"). Further the contract states "The Agreement shall automatically renew at the end of the Initial Term for successive terms of eighteen (18) months; provided, however, that either party may elect not to renew this Agreement by providing the other party with written notice at least 120 days prior to the end of the then current term."

We have discussed a transition plan which will conclude in June of 2012. You continue to work collaboratively with my team to develop this plan, and we look forward to working through this transition period and accomplishing the goals we set for ourselves.

Please accept this letter as Omnicare's written notification that we are not going to renew the current agreement. As we get into the first quarter of next year we can assess Omnicare's ongoing needs related to the services of The Geode Group.

I thank you in advance for your continued support of our transition plan and your understanding of Omnicare's need to transition these programs internally after four years of working on them with The Geode Group.

Please call me if you have any questions.

Sincerely,

Jeffrey M. Stamps

Cc: Carolyn Hutchison
Beth Kinerk
Mindy Ferris
Division Presidents

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2013 WL 1183328

Only the Westlaw citation is currently available.

United States District Court,
S.D. Ohio,
Eastern Division.

Sister Michael MARIE, et al., Plaintiffs,

v.

AMERICAN RED CROSS, et al., Defendants.

No. 2:11-cv-474. | March 20, 2013.

Attorneys and Law Firms

Thomas Irven Blackburn, Buckley King & Bluso,
Columbus, OH, for Plaintiffs.

Allison L. Feldstein, Andrew T. Quesnelle, Mariah L. Klinefelter, Wendy West Feinstein, Eckert Seamans Cherin & Mellott, LLC, Pittsburgh, PA, Jeffrey Alan Stankunas, Julia Rae Baxter, Mark David Landes, Isaac, Brant, Ledman & Teetor, LLP, Columbus, OH, for Defendants.

Opinion

OPINION AND ORDER

NORAH McCANN KING, United States Magistrate Judge.

*1 This matter is before the Court on the *Motion of Plaintiffs for Sanctions and/or Extension of the Discovery Cut-Off Period and the Dispositive Motion Date* (“*Plaintiffs’ Motion for an Extension or Sanctions*”), Doc. No. 89, on the response of defendants American Red Cross and Mary McCord, Doc. No. 96, and on plaintiffs’ reply, Doc. No. 109. Also before the Court is the February 19, 2013 *Motion of Plaintiffs for Extension of Time to Respond to Motions for Summary Judgment and for Extension of Discovery Cut-Off Period* (“*Plaintiffs’ Rule 16(b) and 56(d) Motion*”), Doc. No. 97, the response of defendants Ross County Emergency Agency and David Bethel, Doc. No. 100, and plaintiffs’ reply, Doc. No. 104. *Plaintiffs’ Rule 16(b) and 56(d) Motion* was filed on February 19, 2013. Defendants American Red Cross and Mary McCord (collectively the “ARC defendants”) also filed a response to that motion, but not until on March 19, 2013. *See* Doc. No. 106. The ARC defendants’ response will not be considered by the Court because it was not

filed within the time permitted by the local rules of this Court. *See* S.D. Ohio Civ. R. 7.2 (“Any memorandum in opposition shall be served within twenty-one (21) days from the date of service set forth in the certificate of service attached to the Motion.”).

For the reasons that follow, plaintiffs’ motions are **DENIED**.

I. Background

Plaintiffs Sister Michael Marie and Sister Mary Cabrini originally asserted claims against Ross County Emergency Management Agency and David Bethel (collectively the “RCEMA defendants”) and the ARC defendants under 42 U.S.C. § 1983, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, and Ohio Revised Code §§ 4112.02, 4112.99, alleging discrimination, harassment and retaliation based on plaintiffs’ religion. Following the original preliminary pretrial conference, the Court, in consultation with counsel, established a discovery completion date of August 30, 2012 and a dispositive motions filing date of September 30, 2012. *Preliminary Pretrial Order*, Doc. No. 26. The Court also advised the parties “that the discovery completion date requires that discovery requests be made sufficiently in advance to permit timely response by that date.” *Id.*

On August 23, 2012, plaintiffs filed a motion to extend the discovery and dispositive motions deadlines. *Motion of Plaintiffs to Amend Discovery Deadline*, Doc. No. 55. On September 19, 2012, the Court concluded that plaintiffs had failed to show good cause for the requested extension but nevertheless granted the motion in part and extended the discovery completion and dispositive motions deadlines to October 30, 2012 and November 29, 2012, respectively. *Order*, Doc. No. 60. However, the Court limited discovery conducted after August 30, 2012 to that requested by the parties by August 30, 2012. *Id.* The Court also advised the parties that there would be no further extension of the discovery completion deadline. *Id.*

*2 Notwithstanding that warning, the ARC defendants thereafter filed a consent motion to extend the date by which depositions must be completed. *Consent Motion to Extend Time to Complete Depositions*, Doc. No. 64. The Court granted that motion, extending the discovery and dispositive motions deadlines to December 14, 2012 and January 13, 2013, respectively. *Order*, Doc. No. 69. The Court again advised the parties that there would be no further extension of the discovery completion deadline or

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of the summary judgment deadline. *Id.* The Court also denied plaintiffs' motion to compel, Doc. No. 65, and amended motion to compel, Doc. No. 66, as moot because plaintiffs had agreed to withdraw the motions should the *Consent Motion to Extend Time to Complete Depositions* be granted. *See Order*, Doc. No. 69.

The parties jointly filed yet another motion to extend the discovery and dispositive motions deadlines on December 14, 2012. *Joint Motion to Extend Time to Complete Discovery and File Dispositive Motions*, Doc. No. 73. The Court denied that motion on December 17, 2012, reasoning that the parties had failed to establish good cause to modify the scheduling order. *Order*, Doc. No. 74.

On January 14, 2013, the RCEMA defendants filed a motion for summary judgment, Doc. No. 85, the ARC defendants filed a motion for summary judgment, Doc. No. 87, and plaintiffs filed *Plaintiffs' Motion for an Extension or Sanctions*. On February 19, 2013, plaintiffs filed *Plaintiffs' Rule 16(b) and 56(d) Motion*. Plaintiffs' motions seek (1) sanctions under Rule 37(b)(2)(A) in connection with the ARC defendants' alleged failure to comply with the Court's discovery orders, (2) an extension of the discovery completion and dispositive motions deadlines pursuant to Rule 16(b), and (3) an extension of the discovery completion deadline and of the date by which plaintiffs must respond to defendants' motions for summary judgment pursuant to Rule 56(d).¹

II. Discussion

A. Rule 37(b)(2)(A)

Plaintiffs seek sanctions in the form of attorneys' fees and costs and a grant of default judgment against the ARC defendants under Fed.R.Civ.P. 37(b)(2)(A) in connection with defendants' alleged failure to comply with the Court's discovery orders. *Plaintiffs' Motion for an Extension or Sanctions*, pp. 13–16. Rule 37(b) of the Federal Rules of Civil Procedure authorizes the imposition of sanctions in connection with a party's "fail[ure] to obey an order to provide or permit discovery." Fed.R.Civ.P. 37(b)(2)(A). A court may issue such orders as are just, including, *inter alia*, orders "rendering a default judgment against the disobedient party" or "treating as contempt of court the failure to obey any order except an order to submit to a physical or mental examination." Fed.R.Civ.P. 37(b)(2)(A) (vi), (vii).

Plaintiffs argue that the ARC defendants failed to comply with the Court's orders "require[ing] that the ARC Defendants provide the identified ARC employees for depositions and require[ing] that the ARC Defendants

fully respond to the written discovery requests of Plaintiffs." *Id.* at p. 13. Plaintiffs have not, however, referred to an order of this Court that specifically required such discovery. The Court's discovery orders, Doc. Nos. 60, 69, 74, simply extended the discovery completion date and limited the scope of discovery permitted after August 30, 2012. The Court did not order any party to conduct particular discovery. Rule 37(b) sanctions are therefore not warranted. *See Sokos v. Hilton Hotels Corp.*, 283 F.Supp.2d 42, 55 (D.D.C.2003) ("First, it was readily apparent that the plaintiff was unable to seek sanctions against the defendants pursuant to Rule 37(b)(2) because the rule only provides a remedy to a party in circumstances when the opposing party fails to comply with a court order to provide discovery. Thus, since the Court had not issued an order to redress a discovery violation committed by the defendants, the plaintiff's counsel could not seek any relief under this rule.").

B. Rule 16(b)

*3 Plaintiffs' motions also seek an extension of the discovery and dispositive motions deadlines—by an indeterminate period—"to enable Plaintiffs to conduct discovery, including discovery beyond the limited discovery which was initially ordered by the Court." *Plaintiffs' Rule 16(b) and 56(d) Motion*, p. 16. *See also Plaintiffs' Motion for an Extension or Sanctions*, p. 16. Specifically, plaintiffs seek to depose four identified individuals, to depose otherwise unidentified "additional parties," and to secure documents that had been requested of the ARC defendants but which had allegedly never been produced. *Plaintiffs' Rule 16(b) and 56(d) Motion*, p. 16. Plaintiffs argue that defendants will not be prejudiced by an extension of the discovery completion and dispositive motions deadlines, that the ARC defendants failed to fully respond to discovery requests and to produce employees for depositions, and that the Court's limitation on discovery penalizes plaintiffs.

Rule 16(b) of the Federal Rules of Civil Procedure requires that the Court, in each civil action not exempt from the operation of the rule, enter a scheduling order that limits the time to, *inter alia*, complete discovery and file motions. Fed.R.Civ.P. 16(b) (1), (b)(3)(A). The rule further provides that "[a] schedule may be modified only for good cause and with the judge's consent." Fed.R.Civ.P. 16(b)(4). *See also* S.D. Ohio Civ. R. 16.2 ("[T]he Magistrate Judge is empowered to ... modify scheduling orders upon a showing of good cause."). " 'The primary measure of Rule 16's 'good cause' standard is the moving party's diligence in attempting to meet the case management order's requirements.' " *Inge v. Rock Fin. Corp.*, 281 F.3d 613, 625 (6th Cir.2002)

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(quoting *Bradford v. DANA Corp.*, 249 F.3d 807, 809 (8th Cir.2001)). “A district court should also consider possible prejudice to the party opposing the modification.” *Andretti v. Borla Performance Indus., Inc.*, 426 F.3d 824, 830 (6th Cir.2005) (citing *Inge*, 281 F.3d at 625). The focus is, however, “primarily upon the diligence of the movant; the absence of prejudice to the opposing party is not equivalent to a showing of good cause.” *Ortiz v. Karnes*, 2:06-cv-562, 2010 WL 2991501, at *1 (S.D. Ohio July 26, 2010) (citing *Tschantz v. McCann*, 160 F.R.D. 568, 571 (N.D. Ind. 1995)). Whether to grant leave under Rule 16(b) falls within the district court’s discretion. *Leary v. Daeschner*, 349 F.3d 888, 909 (6th Cir.2003).

The Court notes, initially, that the motions presently before the Court are the parties’ fourth and fifth requests for an extension to the discovery deadline. *See* Doc. Nos. 55, 64, 73, 89, 97. The present motions set forth the progression of plaintiffs’ discovery efforts and the Court’s discovery orders from plaintiffs’ initial August 9, 2012 discovery request through the filing of the present motions. *See Plaintiffs’ Motion for an Extension or Sanctions*, pp. 1–16; *Plaintiffs’ Rule 16(b) and 56(d) Motion*, pp. 1–16. Plaintiffs essentially reargue the previous motions to extend the discovery deadline by providing a supplemented recitation of the facts previously presented to the Court. Plaintiffs also argue that the Court’s September 19 and December 17, 2012 orders are unfair.²

*4 The Court’s September 19, 2012 order extended the discovery and dispositive motions deadlines and limited discovery conducted after August 30, 2012 to the written discovery and depositions requested by the parties on or before August 30, 2012. *Order*, Doc. No. 60. Plaintiffs argue that the September 2012 order unfairly limited plaintiffs’ ability “to obtain discovery in regard to their claims against the RCEMA Defendants” by limiting discovery of the RCEMA defendants to a single deposition. *Plaintiffs’ Rule 16(b) and 56(d) Motion*, pp. 14–15. Plaintiffs further argue that the September 2012 order “make [s] it impossible for Plaintiff[s] to adequately oppose Defendants’ Motion for Summary Judgment.” *Id.* at p. 14. *See also id.* at p. 5 (“The Court’s order limited and hampered Plaintiffs’ ability to prepare their case and to obtain discovery at a time when a motion to dismiss was pending”). Plaintiffs now seek to extend the discovery completion deadline and to permit discovery beyond what had been requested on or before August 30, 2012. *Id.* at p. 16.

The Court’s September 2012 order limited discovery because plaintiffs had failed to show good cause for the requested modification of the scheduling order. *See Order*,

Doc. No. 60, pp. 2–3. Despite being advised in the *Preliminary Pretrial Order*, Doc. No. 26, “that the discovery completion date requires that discovery requests be made sufficiently in advance to permit timely response by that date,” *id.* at p. 2, plaintiffs waited until August 9, 2012, *i.e.*, three weeks before the discovery deadline, to seek discovery from the RCEMA defendants. *Order*, Doc. No. 60, p. 2; *Plaintiffs’ Rule 16(b) and 56(d) Motion*, p. 4. The Court noted plaintiffs’ failure in this regard and limited discovery accordingly. *See Order*, Doc. No. 60, pp. 2–3. Plaintiffs have not persuaded the Court that the September 2012 order was erroneous or that the facts now establish good cause to further modify the pretrial schedule. Any limitation in the parties’ ability to seek discovery is a direct result of their own failures to diligently pursue discovery during the initial discovery period.

The Court’s December 17, 2012 order denied the parties’ joint motion to extend the discovery completion and dispositive motions filing deadlines, Doc. No. 73. *Order*, Doc. No. 74. Plaintiffs argue that the December 2012 order “penalizes Plaintiffs (who have fully cooperated in this discovery process) ... [and] enabl[es] the ARC Defendants to prevent Plaintiffs from obtaining discovery needed to prove their claims.” *Plaintiffs’ Rule 16(b) and 56(d) Motion*, p. 15. The order also “make[s] it impossible for Plaintiff[s] to adequately oppose Defendants’ Motions for Summary Judgment” and “[e]ffectively ... determines this case in favor of the Defendants.” *Id.* at pp. 14–15. *See also Plaintiffs’ Motion for an Extension or Sanctions*, p. 15.

*5 The Court denied the parties’ joint motion to extend the discovery completion and dispositive motions filing deadlines because the parties had failed to show good cause for the requested extension. *See Order*, Doc. No. 74, p. 2. Notably, the parties had been advised on two prior occasions that there would be no further extension of the discovery completion deadline. *See Order*, Doc. No. 60; *Order*, Doc. No. 69. Plaintiffs have not persuaded the Court that the December 2012 order was erroneous or that plaintiffs have now shown good cause to modify the pretrial schedule.

Under all these circumstances, the Court concludes that plaintiffs have failed to establish good cause for yet another extension of the discovery completion and dispositive motions filing dates. *See Fed.R.Civ.P.* 16.

C. Rule 56(d)

Plaintiffs’ Rule 16(b) and 56(d) Motion also seeks an extension, for an indeterminate period, to respond to defendants’ motions for summary judgment and to

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conduct discovery.

Rule 56(d) of the Federal Rules of Civil Procedure establishes the proper procedure to be followed when a party concludes that additional discovery is necessary to respond to a motion for summary judgment:

When Facts Are Unavailable to the Nonmovant. If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:

- (1) defer considering the motion or deny it;
- (2) allow time to obtain affidavits or declarations or to take discovery; or
- (3) issue any other appropriate order.

Fed.R.Civ.P. 56(d). The affidavit or declaration required by the rule must “indicate to the district court [the party’s] need for discovery, what material facts [the party] hopes to uncover, and why [the party] has not previously discovered the information.” *Cacevic v. City of Hazel Park*, 226 F.3d 483, 488 (6th Cir.2000) (citing *Radich v. Goode*, 866 F.2d 1391, 1393–94 (3d Cir.1989)). Rule 56(d) will not serve to shield parties who were dilatory in conducting the necessary discovery. *Mallory v. Noble Corr. Inst.*, 45 F. App’x 463, 469 (6th Cir.2002) (citing *Schaffer v. A.O. Smith Harvestore Prods., Inc.*, 74 F.3d 722, 732 (6th Cir.1996)). A motion under Rule 56(d) may be properly denied where the requesting party “ ‘makes only general and conclusory statements [in its affidavit] regarding the need for more discovery and does not show how an extension of time would have allowed information related to the truth or falsity of the [information sought] to be discovered.’ ” *Ball v. Union Carbide Corp.*, 385 F.3d 713, 720 (6th Cir.2004) (quoting *Ironside v. Simi Valley Hosp.*, 188 F.3d 350, 354 (6th Cir.1999)), or where the affidavit “lacks ‘any details’ or ‘specificity.’ ” *Id.* (quoting *Emmons v. McLaughlin*, 874 F.2d 351, 357 (6th Cir.1989)). The importance of complying with Rule 56(d) cannot be over-emphasized. *See Cacevic*, 226 F.3d at 488. Finally, whether or not to grant a request for additional discovery falls within the trial court’s discretion. *Egerer v. Woodland Realty, Inc.*, 556 F.3d 415, 426 (6th Cir.2009).

*6 In the case presently before the Court, plaintiffs have submitted the *Certification and Declaration* of Attorney Thomas I. Blackburn in support of their Rule 56(d) motion. *See Plaintiffs’ Rule 16(b) and 56(d) Motion*, p. 17. Attorney Blackburn certifies that he “repeatedly ... communicated with” counsel for the ARC defendants “in an attempt to schedule the depositions of Michael Carroll, Teals J. Brewer, Bill Malfara and Bill Maltz.” *Id.*

However, Brewer’s deposition was cancelled by the ARC defendants, the ARC defendants did not provide a date on which to depose Bill Malfara, and did not provide last known addresses for Michael Carroll and Bill Maltz until the last day of the discovery completion period. *Id.* Attorney Blackburn also avers that Mary McCord and David Gore possess “written and electronic documents which, while requested, were not produced by the ARC Defendants.” *Id.* According to Attorney Blackburn, counsel for the ARC defendants “stated that he would look into whether such testified-to-documents actually existed,” but that he “never got back” to Attorney Blackburn. *Id.* Finally, Attorney Blackburn “declares that the depositions of those witnesses identified above, as well as depositions of additional parties and the receipt of requested, but not produced documents, are needed for Plaintiffs to adequately respond to Defendants’ Motions for Summary Judgment.” *Id.*

Attorney Blackburn’s *Certification and Declaration* is insufficient to support a Rule 56(d) motion. First, Attorney Blackburn’s certification fails to comply with the requirements of 28 U.S.C. § 1746. Under 28 U.S.C. § 1746, unsworn declarations have the same force and effect as a sworn affidavit only if “subscribed by [the declarant], as true under penalty of perjury, and dated, in substantially the following form: ... ‘I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date). (Signature).’ ” *Id.* Attorney Blackburn’s certification is not dated and it does not declare under penalty of perjury that the statements contained in the certification are true and correct. *Plaintiffs’ Rule 16(b) and 56(d) Motion*, p. 17. This failure violates the strict requirements of Section 1746 and the Court therefore need not consider this defective declaration. *See, e.g., Bonds v. Cox*, 20 F.3d 697, 702 (6th Cir.1994) (excluding from consideration affidavits that were subscribed under penalty of perjury, but were undated). Having failed to offer a proper declaration, plaintiffs have not complied with Rule 56(d).

Even considering the substance of Attorney Blackburn’s certification, plaintiffs’ request for additional time to conduct discovery is nevertheless without merit. Plaintiffs seek to depose four identified individuals, to depose unidentified “additional parties,” and to secure documents that were requested from the ARC defendants but which have allegedly not been produced. *Plaintiffs’ Rule 16(b) and 56(d) Motion*, p. 17. The certification does not, however, specify what documents are needed and it fails to identify the “additional parties” sought to be deposed. The certification also fails to explain why any of the requested discovery is necessary to enable plaintiffs to respond to the motions for summary judgment or how plaintiffs expect those materials to help in opposing

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summary judgment.³ The certification also fails to set forth any reason whatsoever why plaintiffs need additional time to respond to the RCEMA defendants' motion for summary judgment. Attorney Blackburn's certification simply lacks the specificity required by Rule 56(d). See *Summers v. Leis*, 368 F.3d 881, 887 (6th Cir.2004) ("Bare allegations or vague assertions of the need for discovery are not enough.... In order to fulfill the requirements of Fed.R.Civ.P. 56[d], [the movant] must state with 'some precision the materials he hopes to obtain with further discovery, and exactly how he expects those materials would help him in opposing summary judgment.' ") (quoting *Simmons Oil Corp. v. Tesoro Petroleum Corp.*, 86 F.3d 1138, 1144 (Fed.Cir.1996)).

*7 Even considering the substance of *Plaintiffs' Rule 16(b) and 56(d) Motion*, plaintiffs' request for additional time to conduct discovery is without merit. Plaintiffs' motion makes the same arguments for an extension of time to complete discovery under Rule 56(d) as it does under Rule 16(b). Compare *id.* with *Reply of Plaintiffs to Defendants Ross County Emergency Agency and David Bethel's Memorandum Contra Motion of Plaintiffs for Extension of Time to Respond to Motions for Summary Judgment and for Extension of Discovery Cut-off Period*, Doc. No. 104, p. 4 ("This argument is puzzling to Plaintiffs as Plaintiffs' Motion contains 16 pages setting forth Plaintiffs' arguments of why they have good cause for seeking an extension of discovery in this case"). As the record makes clear, plaintiffs have not been diligent in

pursuing discovery and, although plaintiffs criticize the Court's discovery orders, see *Plaintiffs' Rule 16(b) and 56(d) Motion*, p. 14 ("[T]he Court's initial order limiting the discovery Plaintiffs could conduct and the Court's order denying an extension of the last discovery cut-off date also make it impossible for Plaintiff[s] to adequately oppose Defendants' Motion for Summary Judgment."), p. 15 ("[T]he Court Order of September 19, 2012 (Doc. # 60) limited the ability of Plaintiffs to obtain discovery in regard to their claims against the RCEMA Defendants. Effectively, the Court Order of December 17, 2012, determines this case in favor of the Defendants and makes it impossible for Plaintiffs to adequately respond to Defendants' Motions for Summary Judgment."), plaintiffs did not file objections to those orders. See Fed.R.Civ.P. 72(a).

Under the circumstances, plaintiffs have failed to carry their burden under Rule 56(d) to show an inability to present facts essential to justify their opposition to defendants' motions for summary judgment.

WHEREFORE, based on the foregoing, *Plaintiffs' Motion for an Extension or Sanctions*, Doc. No. 89, is **DENIED**. *Plaintiffs' Rule 16(b) and 56(d) Motion*, Doc. No. 97, is **DENIED**.

Footnotes

- 1 On that same date, plaintiffs in fact filed responses to the motions for summary judgment. Doc. Nos. 98, 99.
- 2 Plaintiffs did not file objections to the September 19 or December 17, 2012 orders. See Fed.R.Civ.P. 72(a).
- 3 Plaintiffs have in fact responded to defendants' motions for summary judgment. The responses, which do not comply with the "Limitation Upon Length of Memoranda" requirements of S.D. Ohio Rule 7.2, specifically state that the "[e]vidence in this case is sufficient to establish" a genuine issue of material fact. *Plaintiffs' Memorandum Contra to Defendants, Ross County Emergency Management Agency's and David Bethel's Motion for Summary Judgment*, Doc. No. 99, p. 3. See also *id.* at pp. 13, 17-19; *Plaintiffs' Memorandum Contra to Defendants, American Red Cross' and Mary McCord's Motion for Summary Judgment*, Doc. No. 98, pp. 10, 16-18.