IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,
ex rel. ROBERT C. BAKER,

Plaintiffs

v. Civ. No. 05-279 WJ/ACT

COMMUNITY HEALTH SYSTEMS, INC., *et al.*,

Defendants.

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION[1]

THIS MATTER comes before the Court on Defendants' Motion for Sanctions Against the United States of America [Doc. 373] ("Defendants' Motion"). This matter was referred to the undersigned by District Judge William Johnson on March 8, 2012 [Doc. 440] to hold hearings and to recommend an ultimate disposition.

1. The United States of America [hereinafter "Government" or "DOJ"] filed its Response in Opposition [Doc. 418] and Defendants' filed their Reply [Doc. 437]. On June 18, 2012 the Court held a hearing on Defendants' Motion. *See* Transcript [Doc. 510] (hereinafter "Tr."). The parties submitted their closing arguments in writing, *see* Defendants' Closing Argument [Doc. 522] and the United States' Closing Argument [Doc. 521]. Defendants thereafter moved to strike the Government's submissions or allow Defendants to submit a rebuttal [Doc. 529]. The Court entered its Order on July 18, 2011 declining to strike the Government's submissions; allowing Defendants

[1] Within 14 days after a party is served with a copy of the Magistrate Judge's Report and Recommendation that party may, pursuant to 28 U.S.C. § 636(b)(1), file written objections in the United States District Court to the Report and Recommendation. A party must file any objections within the 14-day period allowed if that party wants to have appellate review of the Report and Recommendation. If no objections are filed, no appellate review will be allowed.

to submit a rebuttal; and denying any further briefing on this matter [Doc. 530]. Defendants filed their rebuttal on July 27, 2012 [Doc. 535].

Background

2. This *qui tam* action was initially filed on April 29, 2005 by Relator Robert C. Baker [Doc. 1]. The Government, through the DOJ, filed its Notice of Intervention on February 20, 2009 [Doc. 31]. The facts of this case are fully set out in *United States of America, ex rel. Baker v. Community Health Systems, Inc.*, 709 F. Supp.2d 1084 (D.N.M. 2010) and other Memoranda Opinions and Orders entered in this case and will not be repeated here except as necessary. The primary issue in this case is whether Defendant hospitals made non-*bona fide* donations to their respective counties in order to receive federal dollars for care rendered to indigent patients.

3. In New Mexico, two sources of Medicaid funding to hospitals are the Sole Community Provider (SCP) fund and the Sole Community Provider Supplemental Payment (SCP Supplemental Payment) program. New Mexico's share of these programs to hospitals must be funded by county and local governments. The Government alleges that because Defendants knew their contributions to the SCP fund were ineligible for federal matching, they falsely characterized those payments as "unrestricted donations" in an effort to make them appear *bona fide*. A provider-related donation is *bona fide* only if it has no direct or indirect relationship to Medicaid payments to the health care provider. Plaintiffs allege that Defendants' donations had a direct or indirect relationship to the Medicaid payments they received under the SCP fund or SCP Supplemental Payments program and therefore were non-*bona fide* transactions.

4. Medicaid programs are administered by states in accordance with federal regulations, but they are jointly financed by the federal and state governments. The federal government pays its share of medical assistance expenditures to the State of New Mexico ("State") on a quarterly basis

according to statements of expenditures submitted by the State. A formula is used to calculate how much of the total reported expenditures the federal government will reimburse the State.

5. The expenditures are listed on a "Form 64," which details the State's actual recorded Medicaid expenditures, certifying that the expenditures are allowable under the Medicaid program and are based on actual expenditures and not estimates. The alleged false claims at issue in this case are "Form 64" claims submitted by the state to the Centers for Medicare and Medicaid Services (CMS), from "at least the Summer of 2000." Complaint in Intervention [Doc. 37], ¶ 5.

6. Defendants' Motion for Sanctions is premised on three main arguments: (1) the DOJ litigation hold was untimely; (2) the litigation hold was inadequate, causing the destruction of relevant evidence; and (3) due to the destruction of this relevant evidence, Defendants are prejudiced and are entitled to sanctions, including an adverse inference or dismissal.

7. The Government takes the position that the litigation hold was both timely and adequate, and argues that there has been no showing of bad faith, which is required for an adverse inference or dismissal, and there is no showing of prejudice, which is necessary to impose spoliation sanctions.

The Law on Litigation Holds and Spoliation Sanctions

8. While it is clear that the Federal Rules of Civil Procedure and the duty to preserve documents apply equally to private litigants and the government, "the issue of whether the government must preserve ESI ["electronically stored information"] during the time the Department of Justice considers intervention [in a False Claims Act case] . . . has yet to be resolved." 875 Practicing Law Institute/Lit. 299, 325 (February 1, 2012). Nevertheless, the general rule is that "[o]nce a party reasonably anticipates litigation, it must suspend its routine document

retention/destruction policy and put in place a 'litigation hold' to ensure the preservation of relevant documents." *Zubulake v. UBS Warbug LLC*, 220 F.R.D. 212, 218 (S.D.N.Y. 2003).

9. In The Sedona Conference Commentary on Legal Holds: The Trigger and The Process (Fall, 2010), the Conference notes that "[a] duty to preserve may arise or be 'triggered' before commencement of litigation. The duty 'arise[s] not only during litigation but also *extends to that period before the litigation when a party reasonably should know that the evidence may be relevant to anticipated litigation.*'" Sedona Conf. Jr. at 268 (quoting *Silvestri v. General Motors*, 271 F.3d 583, 591 (4th Cir. 2001)) (emphasis added).

10. "A party's discovery obligations do not end with the implementation of a 'litigation hold' -- to the contrary, that's only the beginning." *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422, 432 (S.D.N.Y. 2004). Counsel must become familiar with the client's document retention policies, which involves speaking with information technology personnel, and learning about backup procedures. *Id.* "It will also involve communicating with the 'key players' in the litigation, in order to understand how they stored information." *Id.* "In short, it is *not* sufficient to notify all employees of a litigation hold and expect that the party will then retain and produce all relevant information." *Id.* (emphasis by the court). "*Counsel must take affirmative steps to monitor compliance so that all sources of discoverable information are identified and searched. Counsel is under a continuing duty to ensure preservation.*" *Id.* (emphasis added).

11. "Federal courts possess inherent powers necessary 'to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.'" *Jordan F. Miller Corporation v. American Eagle Ins. Co.*, 139 F.3d 912, 1998 WL 68879, *3 (10th Cir. 1998) (unpublished opinion) (citing *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991)). This inherent power includes overseeing the discovery process and the preservation of evidence or information that may relate to a party's

claims or defenses. The prevention of spoliation of evidence or the award of sanctions if spoliation occurs is especially important in today's environment when so much information is being compiled and stored electronically. Indeed, "[a]side perhaps from perjury, no act serves to threaten the integrity of the judicial process more than the spoliation of evidence. . . . [W]hen critical documents go missing, judges and litigants alike descend into a world of *ad hocery* and half measures-and our civil justice system suffers." *United Medical Supply Co., Inc. v. United States*, 77 Fed. Cl. 257, 258 (Fed. Cl. 2007).

12. "Spoliation includes the intentional or negligent destruction or loss of tangible and relevant evidence which impairs a party's ability to prove or defend a claim. Sanctions for spoliation serve three distinct remedial purposes: punishment, accuracy, and compensation." *United States ex rel. Koch v. Koch Ind., Inc.*, 197 F.R.D. 488, 490 (N.D. Okla. 1999).

13. Although the foregoing courts and authorities discuss the duty to preserve evidence arising at the time litigation was "reasonably anticipated," the Court of Appeals for the Tenth Circuit has held that the duty arises when litigation is "imminent." "Spoliation sanctions are proper when '(1) a party has a duty to preserve evidence because it knew, or should have known, that litigation was imminent, and (2) the adverse party was prejudiced by the destruction of the evidence.'" *Turner v. Public Service Co. of Colo.*, 563 F.3d 1136, 1149 (10th Cir. 2009) (quoting *Burlington N. & Santa Fe Ry. Co. v. Grant*, 505 F.3d 1013, 1032 (10th Cir. 2007)).[2] "But if the aggrieved party seeks an

[2] In *Burlington Northern and Santa Fe Rwy. v. Grant*, 505 F.3d 1013 (10th Cir. 2007), the court stated that spoliation sanctions were appropriate when the offending party knew that litigation was "imminent." *Id*. at 1033. That language has been quoted in subsequent cases. *See*, *e.g.*, *Turner v. Public Service Co. of Colo.*, 563 F.3d 1136, 1149 (10th Cir. 2009). For this definition, *Burlington Northern* cited to *103 Investors I, L.P. v. Square D Co.*, 470 F.3d 985 (10th Cir. 2006). In *103 Investors*, litigation was imminent when the product was destroyed and the Court believes the Tenth Circuit's choice of the word "imminent" reflected that fact, rather than stating a different standard from the virtually universal standard of "reasonably foreseeable." As stated by the court in *Micron*

adverse inference to remedy the spoliation, it must also prove bad faith. 'Mere negligence in losing or destroying records is not enough because it does not support an inference of consciousness of a weak case.'" *Id*. (quoting *Aramburu v. Boeing Co.*, 112 F.3d 1398, 1407 (10th Cir. 1997)). While bad faith is required for an adverse inference, the Court may nonetheless impose lesser spoliation sanctions on the culpable party. *Id*. (citing *Henning v. Union Pac. R.R. Co.*, 530 F.3d 1206, 1220 (10th Cir. 2008)).

14. "Sanctions for spoliation may also be designed to promote accurate fact finding by the court or jury." *Koch Ind.*, 197 F.R.D. at 490. "When deciding whether to sanction a party for the spoliation of evidence, courts have considered a variety of factors, two of which generally carry the most weight: (1) the degree of culpability of the party who lost or destroyed the evidence; and (2) the degree of actual prejudice to the other party." *Patten v. Target Corp.*, 2009 WL 1279331, *3 (D. Colo. 2009) (unpublished opinion) (internal quotations & citations omitted).

> Trial judges should have the leeway to tailor sanctions to insure that spoliators do not benefit from their wrongdoing-a remedial purpose that is best adjusted according to the facts and evidentiary posture of each case. As other Circuits have recognized, it makes little sense to confine promotion of that remedial purpose to cases involving only outrageous culpability, where the party victimized by the spoliation is prejudiced irrespective of whether the spoliator acted with intent or gross negligence.

Reilly v. Natwest Markets Group Inc., 181 F.3d 253, 267, 268 (2nd Cir. 1999) (internal quotation marks & citations omitted).

Tech., Inc. v. Rambus, Inc., "*Burlington* merely noted that imminent litigation was sufficient, not that it was necessary for spoliation . . . ." 645 F.3d at 1320. Having reviewed all of the foregoing cases, the Court agrees with that analysis.

DISCUSSION

Timeliness of the litigation hold

15. "When litigation is 'reasonably foreseeable' is a flexible fact-specific standard that allows a district court to exercise the discretion necessary to confront the myriad factual situations inherent in the spoliation inquiry." *Micron Technology, Inc. v. Rambus, Inc.*, 645 F.3d 1311, 1320 (Fed. Cir. 2011).

16. On December 30, 2005, shortly after Baker filed his Complaint, the Government served notice on Defendants to issue a litigation hold to preserve evidence. *See* Court's Exhibit 3, Tab 3. On February 10, 2006, the DOJ requested that Defendants produce documents. *See* Court's Exhibit 3, Tab 4. On June 12, 2008, the DOJ reminded the New Mexico State Human Services Division (HSD) of its continuing duty to preserve potentially relevant documents, including suspending routine deletion measures. *See* Court's Exhibit 3, Tab 9. On the day of intervention, February 20, 2009, the Government sent a litigation hold packet to Gerald T. Roy, Assistant Inspector General for Investigations, Office of the Inspector General and to David Cade, Acting General Counsel, Department of Health & Human Services, both of whom are in Washington, D.C. *See* Court's Exhibit 1. The Government did not, however, issue a litigation hold notice to CMS and the Dallas Regional Office until March 16, 2009, some three weeks after the Government intervened in this proceeding. Tr. 179:17-20. A third litigation hold was sent in June to Dallas and the other regions that had not been included in the initial hold. Tr.182:17-24; Court's Exhibit 3, Tab 11.

17. The attorney ultimately in charge of the litigation hold issued to CMS, Dawn Popp ("Popp"), testified at the hearing that she became involved in the investigation of this case in late

2007 or early 2008. Tr. 167:1-11. Her predecessor, Troy Barsky, had been involved since 2005. Tr. 167:15-18.

18. At some point in 2007, the Government began negotiations with Defendants, outlining its theories of Defendants' alleged False Claim Act ("FCA") violations. These negotiations were ongoing until September 5, 2008, when counsel for Defendants sent the DOJ a 23-page letter declining the Government's offer to settle the case. Court's Exhibit 2. Counsel for Defendants sent another letter to the DOJ on January 9, 2009, forwarding some documents which Defendants wanted the Government to consider, and requesting that the Government provide documents that had been previously requested. Doc. 521, Exhibit U. The only other documents provided to the Court regarding communications between the Government and Defendants between September 5, 2008 and January 9, 2009 is the Tolling Agreement dated October 22, 2008, which was to expire on December 10, 2008. Doc. 521, Exhibit R.

19. The DOJ argued in its Response and at the hearing that it takes time to investigate claims and then investigate a potential defendant's theories and defenses. The DOJ must also obtain authority to intervene in a *qui tam* action and that process takes some additional amount of time. The Government stated at the hearing that the DOJ was seeking authority to intervene in late January or early February, 2009. Tr. 116:17-25; 117:1-11. There was no testimony as to when the DOJ made the final decision to request authority to intervene, but presumably it was after the Government received the September 5, 2008 letter from Defendants' counsel rejecting the Government's offer of settlement. Although counsel for the DOJ stated at the hearing that discussions were ongoing, there is nothing in the documents provided to the Court, or in the evidence presented at the hearing, to suggest that the Government responded to the Defendants' September 5, 2008 letter with a counteroffer for settlement. Likewise, the January 9, 2009 letter

from Defendants' counsel was not written in response to any communication or inquiry from the Government regarding settlement. More importantly, according to the Defendants, the Government's theories never changed throughout the negotiation period until the complaint was filed. Tr. 46:17-25.

20. Having read the parties' submissions and having heard the evidence at the hearing, as well as reading the parties' closing arguments and exhibits, the Court finds that the litigation hold was untimely. The Government stated at the hearing that it was DOJ policy to issue litigation holds when intervention was "reasonably foreseeable." Tr. 122:4-6. Under this policy, the Court believes intervention was reasonably foreseeable after receipt of Defendants' counsel's September 5, 2008 letter rejecting the Government's offer of settlement. Even if there were continuing discussions, as the Government argued at the hearing, that fact does not mean litigation was not reasonably foreseeable when the Defendants unequivocally rejected the Government's offer. As noted above, the Government offered no written response to Defendants' letters of September 5, 2008 or January 9, 2009 and, based on the documentation and testimony provided to the Court, made no attempt to alter its position regarding settlement prior to filing the Notice of Intervention on February 20, 2009. It is also telling to the Court that the final Tolling Agreement entered into by the parties was signed on October 15, 2008 and tolled the period only until December 10, 2008. Doc. 521, Exhibit R. Based on these facts, the Court rejects the Government's position that it did not and could not have reasonably anticipated litigation and therefore had no duty to issue a litigation hold until the very day it received permission from the DOJ to proceed with intervention and filed its Notice of Intervention on February 20, 2009.

21. Even if the Court gives the Government the benefit of the doubt and applies an imminent standard, the Court finds that the duty to initiate a litigation hold arose prior to February

20, 2009. "Imminent" means "near at hand; mediate rather than immediate." Black's Law Dictionary (6th ed. 1990). Counsel for the Government conceded at the hearing that the DOJ requested authority to intervene in late January or early February 2009 and at that point litigation was reasonably foreseeable. Tr. 117:4-5. The point is, neither "reasonably anticipated" nor "imminent" are the same as "simultaneous," which is in effect the position the Government took when it initiated the litigation hold simultaneously with the filing of the Notice of Intervention on February 20, 2009.

22. The Government had been investigating this case since 2005, had requested and received voluminous documents from Defendants, and had issued a litigation hold to Defendants on December 30, 2005. Court's Exhibit 3, Tab 3.[3] As further evidence that the Government was aware of the importance and necessity of preserving relevant documents, the DOJ sent a reminder to HSD of its duty to preserve documents on June 12, 2008. The effect and intent of these letters was to require the Defendants and the State preserve documents while the Government did not impose a similar obligation on itself.

23. The Court finds that the DOJ's concurrent filing of the Notice of Intervention and issuance of the litigation hold letters beginning on February 20, 2009 does not meet the legal requirements for a litigation hold under any definition. The Court finds that litigation was "reasonably foreseeable" and "imminent" when the DOJ received Defendants' letter of September 5, 2008, unequivocally rejecting the Government's offer of settlement. The duty arose at that time

[3] The Government argues that the December 30, 2005 letter was not really a litigation hold, but rather a warning that if Defendants destroyed or otherwise did not preserve documents, they could be subject to penalties, including fines and criminal sanctions. Regardless of how the Government wants to characterize this letter, it required the preservation of documents. *See* Court's Exhibit 3, Tab 3.

to preserve documents, identify key players and other individuals who were likely to have documents and ESI relevant to this litigation, and to request that CMS suspend its routine document retention/destruction policies. The litigation holds issued in February, March, and June, 2009 were therefore all untimely.

Adequacy of the litigation hold

24. Defendants argue the litigation hold was inadequate overall, but particularly with respect to two individuals whom Defendants contend were key players: James Frizzera ("Frizzera") and Robert Cowan ("Cowan").

25. Frizzera "became a Division Director in CMS's Central Office beginning in 2005 and served as Director of the CMS Financial Management Group from November 2006 to December, 2008." Defendants' Motion at 15 & cited Exhibits. "As Director, he had review oversight of CMS's approval of federal Medicaid payments to the State of New Mexico." *Id*. Frizzera was generally considered to be the most informed person about the donations and taxes that are the main elements of this case. Tr. 26:5-25; 27:1-3. He was communicating with the DOJ about "contemplated agency action" as early as March 26, 2005. Court's Exhibit 3, Tab 4. Defendants contend that Frizzera had a copy of the Relator's Complaint and was aware of the 2006 Financial Management Review ("FMR") prepared in Dallas by John Castro ("Castro Report" or "2006 FMR"). Tr. 31:5-7; 32:1-25. The Castro Report showed that at least four New Mexico hospitals were making the same donations Defendants were alleged to be making (and for which the Government now seeks millions of dollars in damages). Tr. 33:1-11. The Defendants call the 2006 FMR a "pivotal" report.

26. Cowan was the CMS New Mexico Financial Analyst from 2007 until his retirement in September 2010. Defendants Motion at 17 & cited Exhibits. He was "principally responsible for

reviewing the State's Form 64 claims and preparing the regional decision reports that, subject to supervisor and CMS Central Office approval, authorized the State's Medicaid awards." *Id*. "Beginning in late 2009, Mr. Cowan also led a financial management review of the New Mexico SCP program. As part of that review, Mr. Cowan spent months tracking the sources of the State's share of its Medicaid funding, analyzing the State's knowledge of provider donations and assessing the State's compliance (or lack thereof) with federal funding regulations." *Id*. at 18 & cited Exhibits.

27. Defendants argue that the loss of Frizzera's and Cowan's ESI severely hampers their ability to defend this lawsuit. Castro shared his findings with State officials in an exit interview and then wrote his report, but the Castro Report was not released. Tr. 33:24-25; 34:1-11. Defendants believe that Frizzera suppressed the Castro Report at the request of the DOJ. Tr.33:16-18. There is conflicting testimony on this issue. Bill Brooks testified that the DOJ had a copy of the Castro Report in 2006, but the DOJ denies this. Tr. 32:1-25. Some witnesses testified that the report was withheld because of the DOJ investigation. Tr. 33:20-25. Frizzera denies this allegation. *Id*. He testified that the 2006 FMR was not approved by CMS' central office in Baltimore because it was not in an acceptable form. Tr. 33:12-13.

28. The import of the 2006 FMR is that it showed improper donations from four hospitals. Why, Defendants ask, was that FMR not released to the State? Why was it never revised in the way Frizzera said it should be revised? The next report addressing these issues was not prepared until the 2009 FMR, which showed 13 hospitals allegedly making improper donations, the so-called Branch Report. Tr. 36:21-25; 37:1-15. Prior to the 2009 Branch Report, Cowan had prepared a Findings Attribute Report ("FAR"), which stated that the root cause of the donation

problem was the way the State, the counties, and the hospitals understood the regulations. Tr. 37:18-25; 38:1-18.

29. Defendants argue that these facts indicate that the Government knew very early on that improper donations were being made, that the State itself didn't understand the process, and that the 2006 FMR was suppressed in order to create additional damages. As evidence in support of this point, Defendants show that Cowan's FAR was not incorporated into the Branch Report. Tr. 40:9-17. The Branch Report lifted whole paragraphs from the unissued Castro Report, but the Branch Report identified 13 hospitals, not just the four identified in the Castro Report. Tr. 39:14-25; 40:1-8. The Branch Report found the same donation problems that had been occurring since 2006. The difference was that the Branch Report was shared with the State and the State has paid ten million dollars ($10,000,000) in settlement of the claims brought by the Government. Tr. 40:18-25; 41:1-10.

30. Based on the foregoing, the Defendants contend that the Government had full knowledge that some donations were not *bona fide*. To support this contention, Defendants' point to the documents that have been produced in this case which suggest that both Frizzera and Cowan were aware that the State and counties were not in compliance with federal regulations. The lost or destroyed ESI, Defendants' argue, would further support their defense of government knowledge.

31. To the contrary, the Government argues, what the Government knew can have no bearing on the primary issue in this case: Defendants' *scienter*. It is undisputed that neither Frizzera nor Cowan had any communications with the Defendants. Therefore, the Government argues, Defendants cannot rely on government knowledge because they did not know what the Government knew and what the Government knew had no bearing on Defendants' *scienter*. The Government

also argues that the lost ESI is irrelevant to the issues in this case because (1) Frizzera was not a key player and (2) Cowan's lost documents would not support the claims Defendants want to make.

32. Popp, an attorney with Health and Human Services ("HHS") in the Office of General Counsel ("OGC") was put in charge of the litigation hold. As noted above, the DOJ and Popp sent litigation hold letters to directors or other high level officials of various agencies ostensibly involved with the issues arising in the *Baker* litigation on February 20, 2009, March 16, 2009, and June 23, 2009. Court's Ex. 1.

33. Popp testified at the June 18, 2012 hearing that she had no discussions with agency personnel regarding document retention prior to the issuance of the February 20, 2009 litigation hold letter. Tr. 171:5-9. She also testified that the litigation hold procedure followed in the *Baker* litigation was the standard procedure she had used in prior FCA litigation as the liaison with the DOJ. Tr. 171:10-17. Although Popp had continuing involvement with the DOJ in 2008 and 2009, she did not participate in identifying the scope of documents to be preserved. Tr. 177:1-9. She was unaware of CMS' document retention policies. Tr. 171:18-21.

34. Popp's March 16, 2009 litigation hold letter was sent to the Director, Center for Medicaid and State Operations. Tr. 172:16-24. It required CMS personnel to preserve ESI, including back-up tapes and indices. Popp was *unaware* of who had responsibility for the preservation of these records and she did not contact the National Record Storage Center to make sure records were being retained. Tr. 184:13-25; 187:1-3. When asked who had responsibility to preserve backup tapes responsive to the litigation hold, Popp stated that it was "the substantive area of the agency who would have made a request to the Office of Information Services [OIS] to preserve particular backup tapes." Tr. 190:13-15.

35. Popp *assumed* that CMS would follow the written instructions she gave them about the litigation hold. Tr. 171:22-25; 172:1-2. Upon questioning by the Court, Popp stated that she had conversations with the Dallas regional office and the financial management group in the central (Baltimore) office and advised them to make sure that the litigation hold was distributed to all individuals who might have relevant information, but she *did not designate* such individuals herself and assumed her contacts would ensure that the proper parties would be instructed. Tr. 200:15-25; Tr. 201:1-16,

36. Popp testified that prior to the February 20, 2009 litigation hold letter, she worked closely with Frizzera, the former director of the financial management group in the Centers for Medicaid and State Operations in Baltimore. Tr. 169:11-16. Despite knowing he had retired in early December, 2008, Popp *did not alert his supervisor* or anyone else of the importance of preserving his ESI upon issuance of the February, 2009 litigation hold, *nor did she personally take any steps* to preserve his ESI. Tr.175:20-25; 176:5-8.

37. In a June 27, 2011 letter to counsel for the Defendants, counsel for the Government described CMS's document retention policy as follows:

> According to CMS's document retention policy, a former employee's email and network access is disabled immediately after a service request is submitted to delete the user's account. The email account is retained on HHS servers for 30 days after the request is approved. After the 30 day period, the account is deleted and retained on back up tapes for an additional 14 days. The service request also triggers the process to delete electronic files stored on the former employee's network home drive. This process can take 12 to 14 days to occur. Network home drive files are retained on back up tapes for 90 days after the account is deleted and access is disabled. Electronic files stored on a former employee's hard drive are deleted within 14 days of the employee's component submitting a service request to remove the workstation from the floor for re-imaging. Electronic files stored on the network share or global drives are typically retained for at least 7 years.

Court's Exhibit 4 [Doc. 374-5] at 2.

38. The letter goes on to describe how this policy was implemented as it related to Frizzera's e-mail and network access.

> In accordance with operation of the policy described above, Mr. Frizzera's email and network access was disabled on December 9, 2008 after a service request to deactivate his user account was submitted and approved. On or about January 9, 2009, Mr. Frizzera's email account was deleted from servers maintained by the HHS. The email account was retained on back up tapes for an additional 14 days. Electronic files on Mr. Frizzera's network home drive were deleted approximately 12 to 14 days after the service request to deactivate his user account was submitted and approved. The files were retained on back up tape for 90 days. Electronic files on Mr. Frizzera's hard drive were deleted approximately 12 to 14 days after the service request to deactivate his user account was submitted and approved. None of the files described above are still available on back up tapes or through disaster recovery.

Court's Exhibit 4 [Doc. 374-5] at 3.

39. At the June 18, 2012 hearing, Corey Stevenson ("Stevenson"), who is currently the Director of the Office of Information Services ("OIS"), confirmed the policy as described above and what was done specifically as it related to the retirement of Frizzera. Tr. 226-232. Stevenson was able to confirm that the service request to delete Frizzera's e-mail account was made on December 8, 2008. Stevenson also testified that prior to 2010, e-mails could be placed on the shared drive. Tr. 235:21-23. Finally, Stevenson testified that in the event of a litigation hold, if "the business component with the departing employee notifies OIS that basically I have 'X' who's privy to this litigation hold, we need to do X, Y, and Z to halt your . . . auto-deletion process. . . ", OIS will halt the process and preserve the departing employee's e-mail and other ESI. Tr. 237:12-15. [4] If OIS doesn't receive such a request from the manager of the business component, it will not take action even though it was copied on the litigation hold. Tr. 240:20-25; 241:1-3.

[4] Presumably a similar request could have been made by Popp or another attorney with the OGC or the DOJ.

40. According to Stevenson, ESI generated by Frizzera, which could include his e-mail, was placed on the shared drive and may still be available even though it was not located during the initial search done by Lockheed Martin.

> The Court: Do you know whether or not the folks at Lockheed Martin looked for anything on this shared drive?
>
> The Witness: No. What Lockheed is responsible for is just making sure the uptime and the availability of the drives. They do not pull -- they do not delete anything from the drives. They don't open the files on the drives. They really just make sure they're available for the employees.
>
> The Court: Okay. Well, who has access to this shared drive?
>
> The Witness: Like I said, there's folders basically routed based on organizations.
>
> The Court: But I mean, I could only get access to my folders, but is there an administrator who can get access to anybody's folders?
>
> The Witness: Yes. There's obviously -- as part of managing the network drives there's system administrator rights that Lockheed Martin would have.
>
> The Court: All right. So even though all these other things may have happened and the backup tape for 90 days may have been erased and so forth, there could still be something on the network shared or the global drive?
>
> The Witness: In theory, yes. Mr. Frizzera leaving would not have triggered anything to happen to anything on the shared drive.
>
> The Court: If I wanted to look on the shared drive to find out if there is anything that was generated by Mr. Frizzera, who would I go to and what would I do?
>
> The Witness: Basically, once you're at that point, that would be either the division director that was his employer could look because she would have -- he or she would have access to the drive, or if it came through the OGC that would initiate one of our investigations basically with Lockheed Martin. So we have a form that OGC would fill out basically as pertaining to what they're looking for and where, and basically Lockheed Martin would take those instructions, look on the site or the drive and pull back anything that's there.
>
> The Court: Do you know if that was done in this case?
>
> The Witness: I don't have knowledge of that because, again, that was prior to me --

The Court: All right.

The Witness: -- being here.

The Court: You don't know one way or the other?

The Witness: Correct.

Tr.232:4-21; 233:19-24; 234:5-24.

41. Based on the information from counsel for the Government in Court's Exhibit 4 and the testimony of Stevenson, it is clear that Frizzera's e-mail would have been available had the Government initiated a timely litigation hold. Frizzera's e-mail could have been sequestered and placed on a CD for preservation had the DOJ made a timely request.

42. The Court is unclear as to the nature and extent of the search for Frizzera's ESI on the shared drive conducted by CMS contractor, Lockheed Martin. Popp testified at the hearing that Lockheed Martin was not able to locate any of Frizzera's ESI in its initial search. According to Popp, no additional forensic searches were done. Tr. 193:14-18. Popp also testified that Lockheed Martin was not able to locate any of Cowan's ESI after she discovered his preserved documents had been "lost." Tr. 191:24-25; 192:1-12.

43. Contrary to the DOJ's argument that Frizzera was not a "key player," Popp testified that if Frizzera had been employed on February 20, 2009, his documents would have been within the scope of the litigation hold. Tr. 178:19-25; 179:-1. Nevertheless, Popp did not learn that Frizzera's documents had been destroyed until December, 2010 or January, 2011. Tr.: 192:13-18.

44. Cowan was still employed at CMS when the hold went into effect. He retired in September, 2010, but the first effort to identify and preserve his documents was not taken until sometime in December 2010. Tr. 191:15-23. His documents were initially preserved, but later

went "missing" and, according to the Government, his ESI cannot now be retrieved. Tr. 94:23-25; 95:1-10.[5]

45. Two other specific CMS employees were identified as being covered by the litigation hold: Linda Territo and Bobbie Sullivan. "Territo was the acting CMS funding specialist assigned to New Mexico between September 2008 and May 2010 and was responsible for recommending approval of HSD's Medicaid grant awards." Defendants' Reply [Doc. 437] at 14. "Sullivan served as the liaison between CMS Region VI and HSD concerning Medicaid issues between December 2008 and mid-2010." *Id.*

46. Popp learned in December, 2010 that Territo's documents had been destroyed upon her retirement while the litigation hold was in place. Tr. 194:6-12. Popp testified that she believed that Sullivan deleted some of her own ESI prior to leaving the agency and while the litigation hold was in place. Tr. 194:23-25; 195:1-25; 196:1-6.

47. No evidence was submitted to the Court as to which specific individuals were notified they were part of a litigation hold. Likewise, the Court has not been advised what directives, if any, were given to the key players, and similar *minimal* actions necessary for an adequate and effective litigation hold. Apparently, the Government and the DOJ believed that the

[5] Based on the testimony of Stevenson the Court suspects that the Cowan e-mails which were on the shared drive in a .pst folder were deleted when OIS changed the policy in 2010 to no longer allow e-mail to be saved on the shared drive. This could have easily been avoided had the Government downloaded Cowan's emails onto a disc when his e-mails were initially located on the shared drive. This is another example of the lackadaisical attitude with which the Government approached its ongoing duty to insure that the litigation hold was adequate and being properly monitored.

litigation hold information would "trickle down" to the appropriate personnel and that ESI and other relevant documentation would be preserved.[6]

48. The Government stated at the hearing that Frizzera and Cowan were not important witnesses for the Government and argued that because Defendants had sufficient facts and documentation to enable them to file a motion for summary judgment, the failure to preserve Frizzera's and Cowan's documents has not precluded the Defendants from presenting their defenses. Upon questioning by the Court, counsel for the Government begrudgingly acknowledged that the duty to preserve documents includes documents that might be of help to the Defendants. Tr.88:16-25; 89:1-15; 91:5-24; 122:7-25. As one court stated, "[t]he argument of an accused spoliator that it did not violate its duty to preserve evidence because it retained the "relevant" information and only deleted "irrelevant" information rings particularly hollow. The ultimate decision of what is relevant is not determined by a party's subjective assessment filtered through its own perception of self-interest." *Goodman v. Praxair Servs. Inc.*, 632 F.Supp.2d 494, 517 n.12 (D. Md. 2009).

49. The Court finds that the Government's litigation hold was inadequate. The Court does not know how crucial Sullivan and Territo are to Defendants' case, but it is clear that Frizzera and Cowan are important witnesses to the Defendants, and preservation and production of their ESI could be helpful in their efforts to prove a defense.

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[6] As one author notes, "[s]poliation is also a major issue for government agencies in FCA litigation. Documents in government agencies are critical to both liability and damages issues in FCA cases because the agency is the party defrauded. Government agencies are notoriously deficient in retaining documents, however. J. Boese, *Civil False Claims and Qui Tam Actions*, Vol. 2, § 507[I] at 5-196 (2012-1 Supp.).

Spoliation Sanctions

50. Virtually every fact -- and the inference to be drawn therefrom -- is disputed in this thrust and parry litigation. Defendants argue their central defense to the FCA is the government's knowledge. They claim that CMS was aware of allegedly improper donations from the State as early as 2006 and that documents, including ESI, relevant to this defense have been destroyed. According to the Government, its own knowledge is irrelevant and Defendants are incorrectly calling their defense a "government knowledge inference," when in fact it should be called a "full disclosure inference." The Government contends the burden is on Defendants to prove full disclosure on their part and that what the Government knew at any particular time frame is simply not relevant to the litigation.

51. In Judge Johnson's December 7, 2011 Memorandum Opinion and Order, regarding the Government's Motion to Strike Defendants' Affirmative Defenses, he ruled that the affirmative defense of "government knowledge inference" would not be stricken. "The Government's knowledge of an alleged 'false' claim contradicts a defendant's intent to knowingly submit a false claim. Since the crux of an FCA violation is intentionally deceiving the Government, no violation exists where the Government has not been deceived." MOO [Doc. 366] at 12. Accordingly, evidence which illuminates the Government's knowledge is crucial to Defendants' defense.

52. The two most important factors in determining spoliation sanctions are (1) culpability of the offending party; and (2) actual prejudice to the other party. *Patten*, 2009 WL 1279331, *3. The Court addresses each in turn.

Culpability

53. Culpability is the degree of fault to be assigned to the offending party. In situations involving the alleged failure to institute a timely and an adequate litigation hold, one end of the

spectrum is the willful destruction of documents. On the other end is mere negligence. This case falls in between those two extremes.

54. The Government argues that because there was continuing dialogue with the Defendants there was no duty to preserve documents or issue a litigation hold until the Notice of Intervention was actually filed. This position is contrary to law and would in effect do away with the duty to preserve documents and issue a litigation hold pre-litigation, let alone when litigation can be "reasonably anticipated" or is "imminent." The litigation hold notice that went to CMS and the Dallas Regional Office was not issued until March 16, 2009. A second letter was sent to all CMS regional offices on June 22, 2009. Tr. 179:17-25; Popp Declaration [Doc. 418] at ¶ 5 (a)-(b).

55. On the issue of the adequacy of the litigation hold, the Government argues that because Frizzera and Cowan are not key witnesses for the Government, and the Government did not intend to call them to prove its case, Frizzera's and Cowan's ESI are not relevant. The Government also argues that because counsel for Defendants was able to depose Frizzera and Cowan for five hours each, the Defendants have not been prejudiced. Finally, the Government argues as proof that the Defendants have not been prejudiced, Defendants were able to file a motion for summary judgment without relying on the ESI from Frizzera or Cowan. The problem with the Government's view is that it is entirely one-sided. Defendants are entitled to conduct discovery and present evidence regarding their theory of the case. The Defendants may want to call Frizzera and Cowan as witnesses and the Defendants have demonstrated that Frizzera's and Cowan's ESI may be relevant to what they view as the critical issue in this case. The fact that the Defendants were able to depose Frizzera and Cowan without the benefit of the ESI doesn't relieve the Government of the obligation to have instituted a timely and an adequate litigation hold. Similarly, just because the

Defendants were able to file a motion for summary judgment without relying on Frizzera's and Cowan's ESI doesn't make their ESI immaterial or irrelevant.

56. The bottom line is one party's unilateral and arbitrary determination of relevance cannot dictate the timing or the boundaries of the litigation hold. Even though the Government may not have been acting in bad faith or engaging in willful misconduct, its pre-litigation attempts to preserve ESI and other documents were woefully inadequate and go beyond mere negligence. Accordingly, the Court finds that the Government is culpable for its failure to timely initiate and adequately supervise the litigation hold in this case.

Prejudice

57. The Government's argument is that because the Defendants have independent evidence on a topic, despite spoliation, they cannot show prejudice. Tr. 96:9-13. The Government cites to *Turner v. Public Serv. Co.*, 563 F.3d 1136, 1150 (10th Cir. 2009) and *Burlington Northern & Santa Fe Rwy Co. v. Grant*, 505 F.3d 1013, 1032-33 (10th Cir. 2007) for this proposition. In those cases the court described the evidence that the party had and concluded that the evidence in hand was sufficient and therefore there was no prejudice.

58. For example, in *Burlington Northern*, the defendant argued he was unable to defend his nuisance case because the railroad had significantly altered the topography of the land in question. The Tenth Circuit disagreed:

> BNSF generated extensive documentation of the condition of the land before and during remediation, and the factual dispute regarding any change in elevation of the remediation site amounts to, at most, one and a quarter inches. In light of this, and absent meaningful evidence that Grant has been actually, rather than merely

> theoretically, prejudiced, we affirm the district court's denial of Grant's motion for spoliation sanctions.

505 F.3d at 1033.[7]

59. The Court finds the instant case is more like the situation in *Genova v. Banner Health*, 2012 WL 2340122 (D. Colo. 2012). In *Genova*, the emergency room physician on duty attempted to divert all ambulances to other hospitals because all of the in-patient and emergency room beds were full. He recommended that the hospital institute a "Code Purple," which was designed to address such a situation. *Id*. at *1. The CEO of the hospital and the physician got into an argument about this plan and the CEO refused to implement the Code Purple. The plaintiff physician claimed retaliation when his emergency room privileges were suspended. *Id*.

60. In discovery the plaintiff sought the Code Purple documents from the night in question. These documents contained data not available in other reports. *Id*. The court held a hearing and found that the documents were destroyed after litigation had been threatened and after a litigation hold had been implemented. *Id*. at *3. In reserving the adverse inference ruling until trial to determine whether bad faith was shown, the court noted that the destroyed documents "go to a 'critical issue.' Dr. Genova was in a position to have good grounds for believing that the records would support his version of the events of that evening." *Id*. at *3.

61. The foregoing cases demonstrate that prejudice is shown when the destroyed evidence goes to a critical issue and the evidence at hand is conflicting. Here we have differing

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[7] *Burlington Northern* is easily distinguished from the facts in the instant case because the change in topography was minimal and there was a significant amount of other evidence available to the party claiming prejudice. As the court noted in *Burlington Northern* there was no "meaningful evidence" that the defendant had been actually prejudiced as opposed to being theoretically prejudiced. In this case, however, there is evidence that the Defendants would be prejudiced if they were forced to go to trial without the lost or withheld ESI.

versions of the events that took place in 2006. For example, both Frizzera and Cowan have been deposed, but appear to have some deficiencies in their memory of the work they performed for CMS. Tr. 22:15-25;23:1-10. If Defendants had these witnesses' contemporaneous e-mails or other documents, those e-mails and documents could be used to refresh their recollection or for impeachment purposes. Additionally, testimony from other witnesses conflicts with Frizzera's recollections and Cowan cannot recall what he took from the unissued 2006 Castro Report to incorporate into the 2009 Branch Report. Tr. 38:7-25; 39:1-25; 40:1-25; 41:1-10. The Defendants have pieced together their theory, in part, by viewing entries on the Government's privilege log. Some of the Cowan and Frizzera e-mails that have survived are being withheld under claims of attorney-client privilege or work product immunity. Drafts of the Cowan report are being withheld under claims of deliberative process privilege. At the very minimum, given the current status of discovery, Defendants would be forced to go to trial on an incomplete record.

62. The crux of Defendants' argument is really a question: why did the Government allow improper donations to continue from 2006 to the present day? Tr. 60:14-18. Defendants argue that CMS knew of the improper donations by virtue of the Castro Report but elected not to do anything about it because of the DOJ investigation. Tr. 60:10-13. The Government's sole response to the spoliation claims has been that Government knowledge is not relevant and therefore the loss of Frizzera's and Cowan's documents is not relevant. Tr. 59:25;60:1-3; 21-25.

63. Defendants note that the Frizzera documents being withheld under a claim of deliberative process privilege include drafts and reviews of the 2006 Castro report and the subsequent Branch report. Tr. 65:24-25; 66:1-5. Defendants ask for production of these documents to remediate the loss of Frizzera's ESI. They argue the loss of Frizzera's contemporaneous e-mails and other documents hinder the Defendants' ability to find out why the Castro report was withheld

and the justification for not having it released to the State. Tr. 71:3-7. Defendants argue Frizzera is an adverse witness and his testimony constitutes "a post hoc evaluation." Tr. 71:7. "We've identified significant documents and activities about which we do not have a contemporaneous communication from two key witnesses . . . and those documents, such as the communications about the Branch report from Mr. Cowan and whatever the form of hand off was to Mr. Branch would be very important to understanding [exactly what happened]." Tr. 71:21-25; 72:1-4.

64. Defendants also contend that the Castro 2006 report was withheld due to the DOJ investigation and that the decision to withhold this report was discussed between Frizzera and the DOJ. Other witnesses have testified that the report was withheld due to the investigation. Tr. 130:21-25; 131:1-25; 132:125; 133:1-25. Defendants contend that had the report been released, the State would have advised the counties and the hospitals that there were questions about the donations being made and that the DOJ was investigating the payments. According to Defendants, the report was not released because the DOJ wanted to continue to build their case. Tr.:135:8-14. Both Frizzera and the DOJ deny these allegations.

65. As noted above, the Government is withholding documents and ESI which go to these issues based on work product immunity, deliberative process, and attorney client privilege. The work product doctrine is designed to protect counsel's legal opinions and strategies, but it does not protect facts. *Upjohn Co. v. United States*, 449 U.S. 383, 396 (1981). The deliberative process privilege "is designed to promote candid discussion within [a governmental] agency and improve its decisionmaking process, which advances the agency's ability to perform its functions." *Judicial Watch, Inc. v. United States Department of Justice*, 800 F.Supp.2d 202, 217 (D.D.C. 2011) (internal quotation marks & citations omitted). To qualify for the privilege, the document must be both predecisional and deliberative. *Id.* "The key question in determining whether the material is

deliberative in nature is whether disclosure of the information would discourage candid discussion within the agency." *Id*. at 218 (internal quotation marks & citation omitted). The attorney client privilege protects confidential communications between the client and counsel. *Upjohn*, 449 U.S. at 391.

66. The Government takes the position that documents or ESI generated by Frizzera and Cowan are not material or relevant. The Government contends Cowan was not a key player, and that reports or drafts prepared by Castro or Cowan were not withheld from the State due to the DOJ investigation. Yet the Government claims that such reports and drafts are immune from production due to the deliberative process privilege. The Government contends that Frizzera was not a key player, yet withholds documents which show he was involved in this case as early as 2005. Court's Exhibit 3, Tab 4.

67. The Court finds this is a case of the Government attempting to use the work product doctrine, the deliberative process privilege, and the attorney client privilege as both a sword and a shield. "A litigant cannot use the work product doctrine as both a sword and a shield by selectively using the privileged documents to prove a point but then invoking the privilege to prevent an opponent from challenging the assertion." *Frontier Refining, Inc. v. Gorman-Rupp Co., Inc.*, 136 F.3d 695, 704 (10th Cir. 1998). The same is true for the attorney client privilege. *Chevron Corp. v. Stratus Consulting, Inc.*, 2010 WL 3923092, *10 (D. Colo. 2010) (unpublished decision). Here, the Government argues that Cowan and Frizzera were not key players, that the 2006 FMR was not withheld at the request of Frizzera or the DOJ, or because of the DOJ's intervention, and that none of the withheld documents or ESI support Defendants' assertions. However, by refusing to produce documents that exist and destroying ESI that may be relevant to these issues, the Government has prevented Defendants from testing these assertions. Therefore, the Court finds that the immunity

and privileges the Government has asserted regarding these documents and ESI are overridden by the fairness doctrine. *See In re Grand Jury Proceedings*, 219 F.3d 175, 185, 191 (2d Cir. 2000). Whether fairness requires disclosure is decided on a case-by-case basis considering the specific context in which the privilege is asserted. *Id*. at 183. As noted by one court

> The crucial issue is not merely some connection to a judicial process but rather the type of unfairness to the adversary that results in litigation circumstances when a party uses an assertion of fact to influence the decisionmaker while denying its adversary access to privileged material potentially capable of rebutting the assertion.

In re Grand Jury Proceedings v. United States, 350 F.3d 299, 306 (2nd Cir. 2003).

The Court also finds that any claim of deliberative process privilege as to the 2006 or 2009 FMRs, assuming the privilege even applies, is overridden by the spoliation that has occurred in this case and the effect it has had on Defendants' ability to present their defense of Government knowledge.

68. Defendants cannot obtain this information from any other source and they have shown substantial need for this information. The evidence presented to the Court in the parties' submissions and at the hearing indicate that Frizzera was involved from the beginning of the investigation of this case in 2005. The evidence presented indicates that Cowan had substantial involvement with the funding issues at the heart of this case. The Defendants should not be required to rely on a witness's faulty memory of key events if there are documents that might refresh the witness's memory or otherwise lead to the discovery of admissible evidence.

69. As to the Government's argument that Frizzera's and Cowan's ESI were likely provided to Defendants by other means, the Court finds the following language particularly apt for this case:

> Be that as it may, there is no way of knowing with any degree of certainty as to how many of those documents were provided to the defendants *as a result of the government's mishandling of the documents*. The government's conduct created a situation where we cannot assess exactly what or how much information was lost and

> what or how much information was important to the defendants' case. It would defy logic at this point to give the government the benefit of the doubt on its word alone that it gave the defendants the functional equivalent of the information contained within those documents in some form or another. . . . The documents are lost. The fact is that there is no way of verifying [whether the documents support either party's claims or defenses], and this is caused directly by the government's conduct in handling these documents.

United States v. Holzmann, 2007 WL 781941, *1 (D.D.C. 2007) (unpublished opinion) (emphasis in original).

70. The Court finds that the Defendants have been prejudiced in their defense of the claims against them.

Sanctions

71. The failure to issue a timely litigation hold, the failure to identify key witnesses, the failure to take measures to suspend routine deletion of ESI, the failure to put in place an adequate litigation hold, the failure to ensure that proper procedures were being followed, and the failure to monitor the litigation hold all indicate that it is more probable than not that relevant evidence was destroyed. The Court is also troubled by the Government's arguments that Frizzera and Cowan were not key players, but then conceding at the hearing that those two men were not key players "for the Government." The Government's self-serving assessment of relevance not only inhibits the Defendants' ability to defend the claims against them, it also causes the Court to be concerned that a reliable result may not be obtained.

72. Although the Court cannot say at this point that the Government's actions amounted to bad faith or intentional misconduct, which could result in the type of sanctions requested by the Defendants, it is clear that the Government's actions, or failures to act, warrant the Court taking some action. "[A] district court has a great deal of discretion in exercising its inherent powers to fashion an appropriate sanction." *Id*. at *2 (citing *Chambers v. NASCO, Inc*., 501 U.S. 32, 44

(1991)). There is no point in requiring a party to preserve evidence and to instigate a timely and adequate litigation hold if there are no consequences unless the failure to do so was intentional, wilful, or in bad faith. As indicated earlier, spoliation of evidence threatens the integrity of the judicial process. Accordingly, "[s]anctions for spoliation may also be designed to promote accurate fact finding by the court or jury." *Koch Ind.,* 197 F.R.D. at 490.

RECOMMENDED DISPOSITION

The Court finds that the Government is culpable for its failure to issue a timely and an adequate litigation hold, and Defendants have shown prejudice by the destruction of relevant evidence that goes to the heart of their defenses. Accordingly, the Court makes the following recommendations for sanctions:

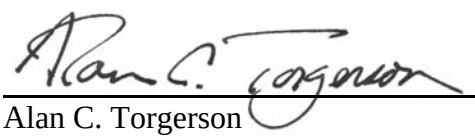
(A) The Government will produce all documents being withheld under a claim of ordinary work product or deliberative process privilege which discuss the withholding of the 2006 Castro Report and any drafts of the Branch Report;

(B) The Government will produce all e-mails from or to Frizzera and Cowan, or on which they were copied, regardless of whether they are being withheld under a claim of work product immunity, attorney client privilege, or deliberative process privilege. This production must include, but is not limited to, the documents identified in the Government's Privilege Log, Court's Exhibit 3, Tab 1 as documents 625 and 626;

(C) The Defendants are entitled to recover their reasonable attorney fees and costs associated with their Motion for Sanctions [Doc. 373], including fees for the briefing, appearances at the June 18, 2012 hearing, and the follow up briefing on closing arguments; and

(D) The Government must show cause in writing within twenty (20) calendar days of the entry of this Report and Recommendation why it should not be required to conduct an additional

forensic search of the shared drives in the CMS Central Office and Dallas Regional Office for the ESI of Frizzera and Cowan. Defendants may file a response within ten (10) calendar days of the Government's submission. No reply will be allowed. After the Court has reviewed the submissions, it will decide whether an additional forensic search of the shared drive will be done at the Government's expense.



Alan C. Torgerson
United States Magistrate Judge