

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA, <u>ex rel.</u>	)	
ROBERT C. BAKER,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	CIV 05-279 WJ/ACT
COMMUNITY HEALTH SYSTEMS, INC.,	)	
et al.,	)	
	)	
Defendants.	)	
	)	

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UNITED STATES' RESPONSE IN OPPOSITION TO  
DEFENDANTS' MOTION FOR SANCTIONS [DOCS. 373, 374]

I. Introduction

Unable to defend their case on the record now fully developed, Defendants claim [Docs. 373, 374] that documents they have never seen are exculpatory and ask this Court to sanction the United States for not producing them. The Court should reject this argument. The Department of Justice (DOJ) takes its responsibility to adhere to the rules of discovery and the Court seriously, and contrary to Defendants' allegations, has in place long standing retention policies and directives to ensure that relevant materials are preserved. DOJ and the Centers for Medicare & Medicaid Services (CMS) followed those policies here and took timely and reasonable steps to preserve documents. The government has acted in good faith throughout discovery in order to meet its preservation obligation.

Even armed with an erroneous account of the government's efforts, Defendants fail to make a *prima facie* case for sanctions. The gravamen of Defendants' motion is that

James Frizzera's and Robert Cowan's electronic documents would have revealed that CMS and DOJ knew about the provider donations at issue in this False Claims Act (FCA) case, and the State's failure to report them on its Form 64 claims. This Court recently ruled, however, that government knowledge alone does not automatically preclude a finding of *scienter*. Any purported government knowledge of the Defendants' practices is relevant only insofar as government knowledge and approval was communicated to the Defendants and actually affected their *scienter*. Documents that Defendants have never seen, whether or not they even existed, cannot have affected their *scienter* before they made the donations and are therefore irrelevant. Defendants also cannot demonstrate prejudice, a condition precedent for spoliation sanctions. Defendants' motion should therefore be denied.

## **II. Statement of Facts**

On March 14, 2005, Robert Baker filed the underlying *qui tam* complaint. DOJ then initiated a nearly four year investigation to discern whether the allegations in Mr. Baker's complaint had merit. In October 2007, DOJ wrote to Defendants requesting that they respond to Mr. Baker's allegations and evidence uncovered to date in the investigation. Over the course of sixteen months, the parties discussed the allegations and attempted to negotiate a resolution. Those efforts failed in early 2009. On February 20, 2009, DOJ issued a written litigation hold and preservation instructions to CMS and concurrently filed its notice of election to intervene in the underlying *qui tam* action. Almost four months later, the United States filed its first complaint against Defendants. DOJ and CMS took immediate steps to preserve documents once litigation was reasonably anticipated. Popp Decl. Ex. 1, ¶¶ 3-5. CMS Agency Counsel instructed appropriate CMS

employees in all regions to preserve materials related to this matter and coordinated the collection and review of over 500,000 pages of materials. *See id ¶ 5.* DOJ monitored the agency's efforts throughout the litigation, regularly communicating with agency counsel regarding the preservation and collection efforts. *Id. ¶ 6.* DOJ also coordinated the production of these materials to Defendants.

Both James Frizzera and Robert Cowan are former CMS employees. Mr. Frizzera retired in December 2008. Ex. 2, at 224. On December 9, 2008 and before the United States reasonably anticipated litigation, CMS deleted electronic documents in Mr. Frizzera's individual files in accordance with the good faith, routine operation of CMS' document retention policy for former employees.<sup>1</sup> The electronic files on Mr. Frizzera's home network drive, however, may still have been available in late February 2009 on backup tape(s) when the United States elected to intervene in the underlying *qui tam*. Mr. Frizzera's hard copy documents were preserved.<sup>2</sup> Mr. Cowan retired on September 30, 2010. Ex. 3, at 14. Mr. Cowan's individual hard copy files were preserved. Ferguson Decl. Ex. 4, ¶ 4. The Financial Management Branch Manager in the CMS Dallas Regional office, Dorothy Ferguson, located a folder of Robert Cowan's saved e-mails after he retired

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<sup>1</sup> 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. Stevenson Decl. Ex. 7, ¶ 7. On or about January 9, 2009, his email account was likely deleted from servers maintained by the Department of Health and Human Services and was likely retained on backup tape for an additional 14 days. *Id. ¶¶ 4, 7.* Electronic files on his hard drive were deleted approximately 12 to 14 days after the service request to deactivate his user account was submitted and approved. *Id. ¶¶ 5, 7.* Electronic files on his network home drive were likely deleted approximately 12 to 14 days after the service request to deactivate his user account was submitted and approved, and they were likely retained on backup tape for 90 days. *Id. ¶¶ 3, 7.*

<sup>2</sup> See *infra* n.13; see also Ex. 2, at 56-58.

on a CMS network drive. *Id.* ¶ 5. Several months later, however, CMS was unable to locate this folder and Mr. Cowan's individual electronic documents. *Id.* ¶¶ 5-6.

Despite this, the United States has produced ample documentation from both custodians. The United States has produced over 9700 total pages of documents from Mr. Frizzera and over 1800 pages of documents from Mr. Cowan.<sup>3</sup> Mr. Frizzera himself also provided over 2000 pages of documents to Defendants. Ex. 2, at 19-20. Moreover, documents these custodians saved to the official agency files were preserved and have been produced. Defendants also deposed both Mr. Frizzera and Mr. Cowan and introduced hundreds of pages of exhibits at each deposition.

### **III. Defendants Have Not Established the Relevance of the Allegedly Spoliated Evidence**

The first step in determining whether to impose sanctions for the destruction or loss of evidence is to decide whether the missing information would be relevant. *Asher Assocs. LLC, v. Baker Hughes Oilfield Ops.*, No. 07-cv-01379, 2009 WL 1328483, at \*5 (D. Colo. May 12, 2009); *see also Vigil v. Whirlpool Corp.*, No. 00-1435, 2001 WL 36102292, at \*1 (D.N.M. Nov. 16, 2011) (“The hallmark of a spoliation claim is that the destroyed evidence must be relevant to the issue for which the party seeks the sanction.”). Relevant evidence for the purposes of the spoliation inquiry is evidence that is helpful to proving a party’s claims or defenses. *Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Secs.*, 685 F. Supp. 2d 456, 467 (S.D.N.Y. 2010) (stating that the proper question is whether the material is relevant, not whether it is responsive to a request). The movant

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<sup>3</sup> See *infra* nn.9, 11.

must produce evidence “that documents containing relevant information actually existed and were destroyed.” *Kincaid v. Wells Fargo Secs. LLC*, No. 10-CV-808, 2012 WL 162349, at \*2 (N.D. Okla. Jan. 19, 2012); *Benton v. Dlorah, Inc.*, No. 06-CV-2488, 2007 WL 3231431, at \*3 (D. Kan. 2007). As demonstrated below, Defendants have failed to meet their burden.

#### **A. The Allegedly Spoliated Documents Are Not Relevant to This Case**

This litigation concerns the improper provider donations Defendants made to New Mexico counties. The United States’ complaint asserts that Defendants made payments to New Mexico counties for the purpose of receiving back Medicaid payments in the amount of their payments plus triple those amounts from resulting federal contributions, and thereby knowingly caused the State of New Mexico to present false claims to the United States in violation of the FCA.

Defendants make no genuine effort to establish the relevance of the allegedly spoliated evidence, nor have they demonstrated how such evidence would be helpful to the specific defenses they have raised. Instead, they rely on assertions that “both CMS and DOJ ... were well aware of these donations, and ... of the State’s failure to properly report them on its Form 64 claims.” Mem. P. & A. Supp. Defs.’ Mot. for Sanctions, Doc. No. 374, at 20-21 (“Defs.’ Mem.”). Defendants’ claims are presumably meant to bolster their assertion of the government knowledge inference.<sup>4</sup> But courts have held that individual government employees’ opinions about regulations and their application are not relevant in determining their meaning. See, e.g., *United States v. Lachman*, 397 F.3d 42, 54 (1st Cir.

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<sup>4</sup> Defendants fail to identify how this information would otherwise be relevant.

2004). Indeed, this Court has stated that government knowledge of Defendants' conduct is relevant only if it was known to Defendants.

**B. The Court Has Ruled That Government Knowledge Is Relevant Only Insofar as It Affected Defendants' *Scienter***

The Court's December 7, 2011 opinion, striking Defendants' various equitable defenses, defines the bounds of the limited government knowledge inference that Defendants may assert in this action. Mem. Op. Order Grant'g in Part Pls.' Mot. to Strike Affirmative Defenses, Doc. No. 366 (Dec. 7, 2011). This Court held that "while Defendants may raise the 'Government knowledge' defense, Plaintiffs correctly define the contours of the 'defense.... Government knowledge of a false claim can create an inference that the defendant did not act with the requisite scienter.'" *Id.* at 12 (citing *United States ex rel. Burlbau v. Orenduff*, 548 F.3d 931, 952-53 (10th Cir. 2008)). The Tenth Circuit has explained that "[t]he proper focus of the scienter inquiry ... must always rest on the defendant's 'knowledge' of whether the claim is false, a knowledge which may certainly exist even when a government agency misinterprets its own regulations." 548 F.3d at 952-53 (citing *United States v. Southland Mgmt. Corp.*, 326 F.3d 669, 682 n.8-9 (5th Cir. 2003)). Other courts have noted that "[i]n principle, it would seem that the government's knowledge of a false claim would not be an effective defense if the person making the false statement did not know that the government knew it was false ...." *Southland*, 326 F.3d at 682 n.9. It is the knowledge of the *defendants*, not government officials, that is relevant to the FCA's *scienter* element.

**C. Documents That Defendants Have Never Seen Cannot Have Affected Their Scienter**

Documents in two former CMS employees' individual files that Defendants have never seen, regardless of whether they existed or were preserved, are irrelevant to the determination of whether Defendants "knowingly" caused the submission of false claims. The only evidence that can have any relevance to Defendants' *scienter* is that which comes from their *own* files. Even assuming Mr. Frizzera and Mr. Cowan possessed electronic documents regarding the conduct in this case, such documents are utterly irrelevant unless Defendants can establish that they themselves were aware of or privy to those documents prior to the submission of the claims at issue. Defendants do not even allege such awareness, and their efforts to discover these documents further demonstrates they were not aware of them.<sup>5</sup>

Moreover, the "government knowledge inference" requires a showing that the defendant was "forthcoming" and "open with the government" about the allegedly false information; it is not available where the defendant "neglected to disclose all the pertinent information." *Burlbaw*, 548 F.3d at 952-53; *United States ex rel. A+ Homecare, Inc. v. Medshares Mgmt. Group Inc.*, 400 F.3d 428, 455 n.21 (6th Cir. 2005) (holding that defendant's "argument that liability is precluded by the Government's knowledge is unpersuasive," in part because defendant "neglected to disclose all the pertinent information" in filing the claim); *see also United States ex rel. Jordan v. Northrop Grumman*

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<sup>5</sup> The structure of Medicaid administration makes it even more unlikely that Mr. Frizzera or Mr. Cowan had any contact with Defendants, given that the state, not CMS, administers the program and communicates with providers.

Corp., No. CV 95-2985, 2002 U.S. Dist. LEXIS 26674, at \*61-70 (C.D. Cal. Aug. 5, 2002) (requiring a showing that the Government “received full disclosure of the specific facts underlying the particular claim prior to submission of that claim” and that defendant “freely suppl[ied] all information … regarding the facts underlying the Government’s claim under the FCA”). Markedly absent from Defendants’ Memorandum is any assertion that these two custodians advised Defendants about the conduct at issue in this case or provided government approval, implicit or explicit, of that conduct before Defendants made donations. There is no evidence that Defendants apprised these two custodians of the conduct at issue and certainly no evidence that they sanctioned it. In fact, other than communications involving this case, Defendants had *no* communications with federal officials concerning their donations to New Mexico counties. Ex. 8, at 120-23. Defendants’ motion is an attempt to distract attention from their own *scienter*.

#### **IV. Defendants Have Not Demonstrated Prejudice**

Sanctions for spoliation of evidence require a showing that (1) a party had 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 Serv. Co.*, 563 F.3d 1136, 1150 (10th Cir. 2009). The moving party must present “meaningful evidence” that they have been “actually, rather than theoretically, prejudiced.” *Id.; Burlington Northern and Santa Fe Railway Co. v. Grant*, 505 F.3d 1013, 1032-33 (10th Cir. 2007). Without proving the evidence is relevant, a party cannot show that they were prejudiced by its unavailability. *Henning v. Union Pac. R.R. Co.*, 530 F.3d 1206, 1220 (10th Cir. 2008); *see also Pension Comm.*, 685 F. Supp. 2d at 467 (“The innocent party must also

show that the evidence would have been helpful in proving its claims or defenses—i.e. that the innocent party is prejudiced without that evidence.”).

As discussed above, Defendants lack any factual basis to assert that missing documents would support a government knowledge inference. This Court’s previous ruling makes clear that such documents would not be “unquestionably relevant” to such an inference. Moreover, the United States produced in full the official agency files related to the conduct at issue in this case. Only the official agency files are relevant in determining whether the government knowledge inference is applicable. *Lachman*, 387 F.3d at 54. The unavailability of two former employees’ individual files does not prejudice Defendants in making their assertion of government knowledge.

Defendants then speculate that “it is highly likely that Mr. Frizzera and Mr. Cowan’s electronic documents also would have contained additional, unknowable relevant evidence.” Defs’ Mem., Doc. No. 374, at 21-22. Courts, however, repeatedly refuse to find that speculation about lost documents can demonstrate prejudice sufficient to warrant sanctions. *Burlington*, 505 F.3d at 1032-33; *Asher*, 2009 WL 1328483, at \*10 (concluding that “the court cannot impose sanctions on speculation alone”); *Vigil*, 2001 WL 36102292, at \*1 (“Mere speculation about what those materials may or may not have shown is insufficient to justify an inference instruction or to limit ... testimony.”). Defendants’ unfounded allegations that “unknowable, relevant evidence” has “likely” been destroyed do not support a finding of prejudice. This is particularly true where, as here, the documents would be relevant only to the extent they shed light on Defendants’ *scienter*. Defendants have offered no evidence that they disclosed their conduct to Mr. Frizzera or Mr. Cowan or

that either of them communicated their views to Defendants. Instead they speculate that exculpatory documents are now missing.

**V. The Government Took Timely and Reasonable Steps to Preserve Documents**

Defendants fail to provide a full and accurate account of the government's efforts to preserve documents in this case. In fact, the government issued a timely litigation hold, preserved and collected documents in accordance with its duty, and produced hundreds of thousands of pages of documents to Defendants in discovery.

**A. DOJ Issued a Timely Litigation Hold**

A duty to preserve evidence attaches when litigation is pending or reasonably foreseeable. *West v. Goodyear Tire & Rubber Co.*, 167 F.3d 776, 779 (2nd Cir. 1999); *Silvestri v. General Motors Corp.*, 271 F.3d 583, 591 (4th Cir. 2001). This requires more than a mere possibility of future litigation. *Cache La Poudre Feeds, LLC v. Land O'Lakes, Inc.*, 244 F.R.D. 614, 623 (D. Colo. 2007). The court's decision must be guided by the facts of each case. *Id.* Defendants assert that the government's litigation hold came too late. Yet none of the events Defendants have identified made litigation reasonably foreseeable during the government's investigation.

**1. The Filing of the Underlying *Qui Tam* Did Not Trigger the United States' Obligation to Preserve Documents**

Defendants first argue that the government's obligation to preserve evidence arose at the time the *qui tam* was filed under seal and served on DOJ in 2005. Using the filing date of the *qui tam* to trigger a preservation obligation is not supported by the case law nor called for under the facts of this case.

After years of investigation and attempts to resolve this matter without litigation, DOJ ultimately filed its complaint in June 2009. Implementing a litigation hold when the *qui tam* was filed would have created a needless and costly burden on the affected agency. From 2005 to 2011, approximately 2000 *qui tam* matters were filed involving fraud against HHS. Civil Div., U.S. Dep’t of Justice, *Fraud Statistics Overview* (2011), available at [http://www.justice.gov/civil/docs\\_forms/C-FRAUDS\\_FCA\\_Statistics.pdf](http://www.justice.gov/civil/docs_forms/C-FRAUDS_FCA_Statistics.pdf). Approximately another 1200 *qui tam* matters were filed during this period alleging fraud against other government agencies, such as the Department of Transportation and the Department of Defense. *Id.* Over the last twenty years, the United States has intervened in approximately 22 percent of the matters that were filed during that period. In many of the intervened matters, intervention was contemporaneous with dismissal of the *qui tam* action in order to complete settlement with the defendant and litigation did not commence. In those matters where the government declined intervention, the relators did not proceed with litigation in an overwhelming number of matters, choosing to dismiss the matter voluntarily or to settle before litigation occurred. Thus the filing of a *qui tam* matter does not necessarily result in litigation against the named defendants. In fact, only a small percentage of the filed *qui tam* matters result in litigation.

Courts have recognized that the duty to preserve evidence does not extend to the point where it becomes an unreasonable burden. *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 216-17 (S.D.N.Y. 2003) (“Must a corporation, upon the threat of litigation, preserve every shred of paper, every e-mail or electronic document, and every back-up tape? The answer is clearly, ‘no’. Such a rule would cripple large corporations, like [defendant],

that are almost always involved in litigation.”). Courts have specifically rejected arguments that the start of a government investigation triggers an obligation to preserve. *FTC v. Lights of Am. Inc.*, No. SACV 10-1333, (C.D. Cal. Jan. 20, 2012) (holding that the FTC was not obligated to impose a litigation hold at the beginning of the full-phase investigation or the issuance of a civil investigative demand); *In re Delta/Airtran Baggage Fee Antitrust Litig.*, No. 1:09-md-2089, 2011 WL 915322, at \*6 (N.D. Ga. Feb. 22, 2011) (“Plaintiffs ask this Court to hold that, as a matter of law, when a business is served with a CID, an irrebuttable presumption arises that civil litigation by one or more parties against the business is reasonably foreseeable. No court has so held, and this Court is unwilling to be the first.”). The possibility of *qui tam* matters being filed by relators is ever present for the United States. Issuing a litigation hold upon the filing of every *qui tam* and the start of every government investigation would cripple the United States with an unnecessary, costly, and impracticable burden that would extend throughout all agencies of the federal government.

## 2. Assertion of Work Product Privilege Does Not Establish that the United States Reasonably Anticipated Litigation

Defendants next argue that DOJ’s Third Privilege Log demonstrates that the United States reasonably anticipated litigation in March or April of 2005, the date of two e-mails withheld pursuant to the attorney work product privilege. To the contrary, this does not demonstrate as a factual matter that the United States reasonably anticipated litigation at the time the e-mails were created. See *Salvatore v. Pingel*, No. 08-cv-00312, 2009 WL 943713, at \*7 (D. Colo. Apr. 6, 2009) (rejecting the argument that an assertion of work product privilege triggered a duty to preserve documents). The privilege log Defendants point to was created long after the documents were created, the litigation hold

was issued, and litigation began. The *ex post* assignment of privilege to these documents does not alter the fact that the United States did not reasonably anticipate litigation until early 2009 when it was clear that intervention in the underlying *qui tam* was appropriate.

Conflating the standards for work product privilege and the duty to preserve documents is not appropriate in the context of government investigations. The government routinely investigates potential civil violations of the law, and in doing so will likely consider litigation strategy even in instances where actual litigation is a remote possibility. A rule that links work product creation with document preservation would require government agencies to impose burdensome and costly litigation holds at the outset of every investigation, contrary to the holdings in *Lights of America* and *In re Delta/Airtran*. As the statistics above demonstrate, this result is unwarranted given the low probability that a government investigation will blossom into litigation.

### **3. DOJ's Settlement Correspondence Does Not Establish that the Government Reasonably Anticipated Litigation**

Defendants contend that the United States' settlement correspondence triggered the government's preservation obligation. This argument is not supported by applicable case law or the facts of this case. Whether settlement correspondence triggers a party's preservation obligation is based on the content of the correspondence and circumstances in which it is sent. *Asher*, 2009 WL 1328483, at \*7-8; *Land O'Lakes*, 244 F.R.D. at 622-23. Generally, a letter that includes explicit and unequivocal language "threaten[ing] litigation" will trigger the recipient's duty to preserve. *Asher*, 2009 WL 1328483, at \*8. Correspondence that raises the possibility of a non-litigious resolution, however, does not trigger a preservation obligation. *Land O'Lakes*, 244 F.R.D. at 623.

In *Land O'Lakes*, the court held that plaintiff's settlement correspondence did not trigger the defendants' preservation obligation where counsel sent letters to the putative defendant over a two-year negotiation in which the attorney reiterated her client's desire to explore a negotiated resolution of the dispute. *Id.* The court focused on the letters' demurred tone and the lengthy passage of time between the letters and filing, both of which undermined a conclusion that the correspondence triggered a duty to preserve evidence. *Id.* In *Asher*, the same court held that a demand letter that adopted an emphatic tone, characterized negotiations as "failed," and threatened litigation did give rise to preservation obligation on the part of the recipient. 2009 WL 1328483, at \*8.

The United States did not "threaten litigation" in its settlement correspondence.<sup>6</sup> As in *Land O'Lakes*, the language of the government's correspondence and the context in which it was sent demonstrate that the United States did not reasonably foresee litigation until early 2009. The United States made clear in correspondence in October 2007 that although it felt that intervention "was warranted" in this matter, it invited a response from Defendants regarding the allegations before any final decision was made regarding intervention.<sup>7</sup> DOJ's January 2008 correspondence set forth a settlement proposal in an effort to arrive at a non-litigation resolution. Settlement discussion continued between the

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<sup>6</sup> DOJ has no objection to providing the parties' settlement correspondence to the Court *in camera*, provided that it includes *all* of the parties' settlement correspondence. This correspondence clearly shows that the parties explored settlement and did not reasonably anticipate litigation until early 2009.

<sup>7</sup> DOJ routinely sends correspondence to defendants in an investigation to invite discussion regarding the allegations and potential non-litigation resolutions. A rule that sending such correspondence triggers a preservation obligation could chill valuable settlement discussions and perversely incentivize parties to forego efforts to resolve matters amicably, further burdening the courts' already burgeoning dockets.

parties into early 2009. Not until settlement discussions ultimately failed in early 2009 did litigation become reasonably foreseeable. And at that time, the United States intervened in this *qui tam*, and DOJ issued a timely litigation hold to CMS.<sup>8</sup>

Thus, the United States did not have an obligation to preserve documents until after Mr. Frizzera retired. Federal Rule of Civil Procedure 37(e) instructs that “absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good faith operation of an electronic information system.” Fed R. Civ. P. 37(e) (2006). Similarly, courts refuse to issue sanctions for good faith, routine deletion or loss under their inherent power to sanction. *Lights of America*, at \*9. When DOJ issued the litigation hold, only Mr. Frizzera’s home network drive files may have been available on backup tape(s). See Stevenson Decl. Ex. 7, ¶¶ 3, 7. Mr. Cowan retired in September 2010. CMS preserved his hard copy files and e-mails but was later unable to locate his e-mails or home drive electronic documents. Ferguson Decl. Ex. 4, ¶¶ 5-6. The loss of Mr. Frizzera’s home network drive files and Mr. Cowan’s electronic files, however, does not justify sanctions for the reasons discussed in this memorandum.

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<sup>8</sup> Defendants also assert that the United States did not ensure that the State of New Mexico, Human Services Department (HSD) preserved documents, in violation of its duty to preserve evidence. Defendants do not explain, however, how the United States can be held responsible for preserving evidence in the possession, custody and control of a separate sovereign. For purposes of Fed. R. Civ. P. 34, documents are in a party’s possession, custody, or control only if that party has actual possession or has a legal right to obtain the documents upon demand. *Land O’Lakes*, 244 F.R.D. at 627 (citing *Klesch & Co. Ltd. v. Liberty Media Corp.*, 217 F.R.D. 517, 520 (D. Colo. 2003)); see also *Pension Comm.*, 685 F. Supp. 2d at 467 (noting that as a part of the relevance inquiry the moving party must show that the non-movant had control of the evidence).

**B. The Government Took Reasonable Steps to Preserve Documents**

There is no support for Defendants' argument that the government's discovery efforts were so flawed as to support a finding of gross or ordinary negligence. Along with the written litigation hold letter, DOJ provided detailed instructions and guidance to CMS and its counsel regarding both preservation and collection of documents. *Popp Decl.* Ex. 1, ¶ 3. These instructions contradict Defendants' claims that the government "failed to exercise the oversight required of counsel" or otherwise placed total reliance on unsupervised fact witnesses. Indeed, CMS issued preservation instructions to designated officials at various CMS offices for distribution to potential custodians. *Id.* ¶¶ 4-5. CMS forwarded the instructions to all regional offices and coordinated the collection efforts. *Id.* Ms. Popp had numerous conversations with Ms. Dorothy Ferguson in the CMS Dallas office regarding the agency's efforts, contrary to Defendants' claim that Ms. Ferguson was unsupervised. *Id.* ¶ 7. CMS also ensured that these offices certified compliance with the litigation hold and regularly consulted with DOJ regarding the agency's preservation efforts. *Id.* ¶¶ 5-6.

The effectiveness of both CMS' general retention policies and its particular preservation instructions are apparent given the substantial volume of material (hard copy and electronic) produced by the government during this litigation. The result has been the production of over 500,000 pages of material. Defendants' claim that the government "failed to take any steps to identify and specifically preserve" relevant files is belied by the record. Defendants have extensively used documents produced by the United States at deposition. During the discovery phase of this case, Defendants interrogated 12

individuals employed, or formerly employed, by the federal government, during which they marked and used in excess of 208 exhibits.

## **VI. Defendants Are Not Entitled to Relief**

Sanctions are also inappropriate because the United States has acted in good faith throughout discovery and the purposes of sanctions do not support their use in this case. Before issuing sanctions for spoliation, a court should consider what sanction, if any, is appropriate given the non-moving party's culpability, the prejudice to the moving party, and the purposes to be served by exercising the court's power. *Asher*, 2009 WL 1328483, at \*5. A court should also select the least onerous sanction that serves the remedial purposes of sanctions. *United States ex rel. Koch v. Koch Indus., Inc.*, 197 F.R.D. 463, 483 (N.D. Okla. 1998). A terminating sanction is appropriate only in extreme cases involving serious misconduct. *Ehrenhaus v. Reynolds*, 965 F.2d 916, 920 (10th Cir. 1992) (holding, in a non-spoliation case, that courts should weigh five factors before issuing extreme sanctions, including (1) prejudice, (2) interference with the judicial process, (3) culpability of the non-movant, (4) whether the court warned the party in advance that a dispositive sanction was likely for non-compliance, and (5) the efficacy of lesser sanctions). The moving party must show sufficient evidence of intentional destruction or bad faith before a litigant is entitled to an adverse inference instruction. *Aramburu v. Boeing Co.*, 112 F.3d 1398, 1407 (10th Cir. 1997) ("Mere negligence in losing or destroying records is not enough because it does not support an inference of consciousness of a weak case."); *Turner*, 563 F.3d at 1149; *Zolo Tech. v. Roadway Express, Inc.*, No. CIVA05CV-0049, 2006 WL 898132, at \*2-3 (D. Colo. April 4, 2006).

**A. The United States Has Acted in Good Faith Throughout Discovery**

As discussed above, the United States took reasonable and timely steps to preserve evidence. The record also demonstrates that the United States has acted in good faith to comply with the Federal Rules of Civil Procedure and its duty to this Court. Indeed, Defendants have failed to adduce any evidence of willful destruction justifying dismissal of claims or evidence of bad faith justifying an adverse inference instruction. *Aramburu*, 112 F.3d at 1413. Defendants cannot point to such evidence because it does not exist. DOJ and CMS produced all responsive, non-privileged documents available for both custodians and were candid with Defendants regarding efforts to comply with their document requests. Defs' Mem., Doc. No. 374, Ex. 5, 7.

Any suggestion of bad faith is further undermined by other records the United States produced for both custodians responsive to Defendants' requests. See *Turner*, 563 F.3d at 1150; *Aramburu*, 112 F.3d at 1413. In response to Defendants' document requests, the United States produced over 9700 total pages of documents from Mr. Frizzera, including over 2000 total documents over 1000 of which are e-mails.<sup>9</sup> Throughout his tenure as Director, Mr. Frizzera had a practice of copying and forwarding substantive e-mails to his deputy Kristen Fan. Frizzera Decl. Ex. 5, ¶ 4; see also Ex. 2, at 245-46; Ex. 6, at 51. The United States produced Ms. Fan's files, which substantiate this practice. Defendants also fail to note that Mr. Frizzera himself provided over 2000 pages of

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<sup>9</sup> These documents were produced throughout the following U.S. productions: 7, 11, 17-18, 25-28, 30-32, 35, 39, 41-43, 46-47, 50. The e-mail total represents e-mails where Mr. Frizzera was the sender or recipient, as well as any e-mails on which he was copied.

documents to Defendants in response to their third party subpoenas.<sup>10</sup> Ex. 2, at 19-20.

The United States also produced over 1800 pages of documents from Mr. Cowan, including nearly 200 total documents 134 of which are e-mails.<sup>11</sup> Defendants also had ample opportunity to question both witnesses in their depositions with regard to their knowledge about the improper provider donations at issue. *Turner*, 563 F.3d at 1150 (concluding that a finding of bad faith was undermined where the witness whose documents were lost was available for extensive questioning at deposition). In fact, Defendants introduced almost 500 pages in exhibits at Mr. Frizzera's deposition and over 300 pages in exhibits at Mr. Cowan's deposition.

Attempting to manufacture evidence of bad faith, Defendants claim the "destruction of Mr. Frizzera's and Mr. Cowan's ESI appears to contravene CMS's own internal records retention schedules." This argument fails for two reasons. Defendants incorrectly assume that all of these files were "federal records" subject to the CMS Records Schedule.<sup>12</sup> Moreover, Defendants cite to only part of the records schedule, ignoring other provisions that conflict with their strained argument. CMS employees operate under record retention policies that direct them to preserve hard copies of any electronic document, including e-mails, that would constitute a federal record. Ctrs. for Medicare &

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<sup>10</sup> FRIZ001-000001-FRIZ001-001085; DEFS-FRIZZERA-000001-DEFS-FRIZZERA-001084.

<sup>11</sup> These documents were produced throughout the following U.S. productions: 11, 13, 18-19, 25, 27, 30, 39, 41-43, 46-47, 50. The e-mail total represents e-mails that Mr. Cowan is the sender or recipient, as well as any e-mails on which he was copied.

<sup>12</sup> A federal record is a document evidencing a United States agency's functions, policies, or operations. 44 U.S.C. § 3301 (2006). Only government documents that meet that statutory definition are federal records. There is no sound reason to assume that all of the documents at issue were federal records.

Medicaid Servs., *Records Schedule* (2011), available at <http://www.cms.gov/CMSRecordsSchedule/downloads/RecordsSchedule.pdf>; Nat'l Archives and Records Admin., *General Records Schedule 20: Electronic Documents* (2010), available at <http://www.archives.gov/records-mgmt/grs/grs20.html>. Indeed, Mr. Frizzera testified at his deposition that he printed copies of electronic documents regularly and saved them in his files. Ex. 2, at 56-58; see also Frizzera Decl. Ex. 5, ¶ 5. The government produced over 1100 hard copy documents from Mr. Frizzera's files.<sup>13</sup> Similarly, Mr. Cowan testified that he saved hard copy documents throughout his employment with CMS, including printed e-mails. Ex. 3, at 185-86, 188. The government produced over 50 hard copy documents from his files.<sup>14</sup>

The case Defendants cite to support their request for sanctions involved an egregious example of willful destruction and suspect circumstances not present here. Finding ample evidence of bad faith, the *Phillips* court entered default judgment against the defendant, who failed to issue a litigation hold until the court ordered it to do so, after concluding that the defendant employees wiped their hard drives on the eve of production, attempted to cover up their deletions, and made false representations to the court regarding their activities. *Phillips N. Am. Corp. v. BC Tech.*, 773 F. Supp. 2d 1149, 1209 (D. Utah 2011). The United States' conduct in this litigation does not approach in any manner the duplicitous conduct present in *Phillips*. Indeed, the record shows that the

---

<sup>13</sup> US0174817-US0177202 (U.S. production #26); US0255369-US0255763 (U.S. production #28); US0273541-US0278231 (U.S. production #31); US0278232-US0279487 (U.S. production #32).

<sup>14</sup> US0138035-US0139678 (U.S. production #19).

United States issued a timely litigation hold, issued instructions to personnel regarding the litigation hold and their responsibilities, preserved documents according to that litigation hold, and collected and produced over 500,000 pages of documents. The record, therefore, belies Defendants' claims that the United States acted with a culpable state of mind supporting dismissal of claims or an adverse inference instruction.

**B. Defendants Cannot Obtain Monetary Sanctions**

Defendants' request for fees and costs runs afoul of sovereign immunity, which precludes an award of costs or fees against a government agency absent a statute expressly waiving this immunity. *In re Graham*, 981 F.2d 1135, 1139 (10th Cir. 1992); *Alexander v. FBI*, 541 F. Supp. 2d. 274, 300-01 (D.D.C. 2008). Defendants cite no such statute. See also Fed. R. Civ. P. 37(f) advisory committee's note.

Moreover, there is no basis for Defendants to claim they have been forced to incur significant fees and costs to recreate these custodians' files in an attempt "to uncover the extent of CMS' and DOJ's knowledge." Defs' Mem., Doc. No. 374, at 22. Defendants' efforts amount to nothing more than what they already would have done in discovery to prove their defense. In fact, the United States, not Defendants, has borne the entire cost of the exhaustive efforts to produce all available, non-privileged documents for both custodians. Granting Defendants' request for fees and costs would improperly compel the United States to subsidize the Defendants' ordinary litigation expenses.

**C. Defendants' Request for All Privileged Material for These Custodians Is an Improper Attempt to Circumvent Discovery**

Defendants also seek an order compelling the United States to produce all privileged documents created or sent by Mr. Frizzera and Mr. Cowan. Not only is this

request an attempt to circumvent the discovery process, it is not tailored to address the alleged spoliation. *Koch*, 197 F.R.D. at 483 (holding that the selected sanction “should be a function of and correspond to” the willfulness of the act and prejudice). By styling this request as a remedy for spoliation, Defendants attempt to circumvent discovery, which closed over two months ago. The record demonstrates that the United States acted in good faith and produced all responsive, relevant, and non-privileged materials for these two custodians. There is no basis for sanctions, much less a sanction ordering the production of privileged material, which Defendants have not properly challenged. Defendants had ample time to raise such a challenge in discovery and chose not to. The Court should not create a backdoor for them.

#### **D. There Is No Prejudice or Wrongful Conduct to Redress in This Case**

Finally, sanctions would be contrary to the remedial purposes they are meant to address because the United States acted in good faith throughout discovery. “Spoliation sanctions serve a remedial function by leveling the playing field or restoring the prejudice party to the position it would have been in without spoliation.” *Asher*, 2009 WL 128483, at \*10; *see also Koch*, 197 F.R.D. at 483 (noting that sanctions serve several remedial purposes including, deterrence, accuracy, and compensation). There is no wrongful conduct to deter or redress here because the United States acted reasonably and in good faith. The parties already enjoy a level playing field. Defendants’ files would contain any relevant documents that demonstrate government approval was communicated to them by Mr. Frizzera or Mr. Cowan. Defendants seek relief that, if granted, would inappropriately tilt the playing field in their favor.

VII. Conclusion

There is no legal or factual basis for the sanctions sought by Defendants, and the United States respectfully requests their motion be denied.

Respectfully submitted

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Assistant Attorney General  
Civil Division  
KENNETH J. GONZALES  
United States Attorney, District of New Mexico  
/s/ \_\_\_\_\_  
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Washington D.C. 20044

Attorneys for Plaintiff United States of America

I HEREBY CERTIFY that on February 13, 2012, I filed the foregoing electronically through the CM/ECF system, which caused counsel of record to be served by electronic means, as more fully reflected on the Notice of Electronic Filing.

/s/ \_\_\_\_\_  
HOWARD R. THOMAS  
Assistant United States Attorney

# Exhibit 1

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA, ex rel. )  
ROBERT C. BAKER, )  
Plaintiff, )  
v. )  
COMMUNITY HEALTH SYSTEMS, INC., )  
et al., )  
Defendants. )

---

NO. CIV 05-279 WJ/WDS

**DECLARATION OF DAWN POPP**

I, Dawn Popp, do hereby declare as follows:

1. I am an attorney in the CMS Division of the Office of General Counsel (OGC) in the U.S. Department of Health and Human Services (HHS). Except as specifically stated, I have personal knowledge of the matters stated herein.
2. This declaration is in support of the United States' Response in Opposition to Defendants' Motion for Sanctions Against the United States of America in the above-captioned case.
3. On or about February 20, 2009, my office received correspondence from the U.S. Department of Justice (DOJ) advising of DOJ's intent to intervene in the above-captioned case and requesting that HHS implement a litigation hold to preserve potentially relevant documents, including electronically stored information (ESI). This correspondence included a 4-page letter with detailed instructions, a 10-page guide, and 26 pages of attachments.

4. After receiving this litigation hold request, I worked with the Centers for Medicare and Medicaid Services (CMS), Office of Strategic Operations and Regulatory Affairs, Strategic Operations Group, Division of Correspondence Management, to develop instructions regarding compliance with the litigation hold for distribution within CMS.

5. CMS took the following steps, consistent with routine procedures regarding document preservation for litigation:

- a. On or about March 17, 2009, the litigation hold request, instructions regarding compliance with the litigation hold, and a certification form regarding such compliance were distributed to designated points-of-contact within the CMS Office of Information Services, the CMS Center for Medicaid and State Operations, and the CMS Regional Office in Dallas, Texas, with a direction to distribute the instructions to the appropriate staff within each of those offices. Recipients were informed that they should contact me with any questions regarding the litigation hold.
- b. On or about June 22, 2009, the litigation hold request, instructions, and certification form were distributed to designated points-of-contact for all of the CMS Regional Offices that had not previously received them, with a direction to distribute the instructions to the appropriate staff within each of those offices. Recipients were informed that they should contact me with any questions regarding the litigation hold.
- c. The certification form that was distributed along with the litigation hold

request and instructions required a representative of each applicable CMS Center, Office, and Region to declare under penalty of perjury that they had caused all appropriate personnel and departments within the Center, Office, or Region to become aware of the existence of the litigation hold, which would remain in effect until expressly advised by OGC that it has been lifted.

- d. On March 26, 2009, a representative of the CMS Office of Information Services responded that each of its programmatic support areas had reviewed the materials regarding the litigation hold and determined that they would not have any relevant documents.
- e. Signed certifications were received from representatives of the Center for Medicaid and State Operations and the CMS Regional Offices as follows:
  - i. CMS Region VI (Dallas): March 19, 2009.
  - ii. Center for Medicaid and State Operations: April 14, 2009.
  - iii. Consortium Administrator on behalf of all CMS Regional Offices: July 2, 2009.

6. Throughout and subsequent to this period of time, I was in contact with DOJ regarding CMS' obligation to preserve documents and its efforts to do so.
7. Throughout and subsequent to this period of time, I was also in contact with the CMS components that were most likely to have documents relevant to the issues in this case, the Financial Management Group (FMG) within CMS' Center for Medicaid and State Operations and the CMS Regional Office in Dallas, Texas regarding the obligation to preserve relevant

documents and those offices' efforts to do so. This contact included communications with Kristin Fan, then the acting Director of FMG, and Dorothy Ferguson, the Financial Management Branch Manager in the Division of Medicaid & Children's Health in the Dallas Regional Office.

8. I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.



Dawn Popp

Executed this 10<sup>th</sup> day of February, 2012

# Exhibit 2

Capital Reporting Company  
Frizzera, James C. 09-21-2011

1

UNITED STATES DISTRICT COURT  
DISTRICT OF NEW MEXICO

-----:  
UNITED STATES OF AMERICA, ex rel. :  
ROBERT C. BAKER, :  
: Plaintiff, :  
: vs. : No.  
COMMUNITY HEALTH SYSTEMS, INC., : CIV 05-279  
et al., : WJ/WDS  
: Defendants. :  
-----:

Washington, D.C.

Wednesday, September 21, 2011

Videotaped Deposition of:

JAMES C. FRIZZERA

called for oral examination by counsel for the  
Defendants, pursuant to notice, at Skadden, Arps,  
Slate, Meagher & Flom, L.L.P., 1440 New York Avenue,  
Northwest, Washington, D.C., before Shari R.  
Broussard, RPR, CSR, of Capital Reporting Company, a  
Notary Public in and for the District of Columbia,  
beginning at 10:02 a.m., when were present on behalf  
of the respective parties:

Capital Reporting Company  
Frizzera, James C. 09-21-2011

19

1 in-house counsel about my deposition today.

2 Q Did you have conversations with Mr. Clark or 10:17:21

3 Ms. Hunt about your deposition?

4 A Not about the -- the purpose of today's 10:17:25

5 deposition. Only about the issue of document  
6 requests.

7 Q Other than discussions with legal counsel, 10:17:43  
8 as you've described, have you had conversations with  
9 anyone else about your attendance in the deposition  
10 here today?

11 A No, other than to let people know that I 10:17:54  
12 wasn't available today because I would likely be  
13 deposed all day.

14 Q Did you discuss your anticipated deposition 10:18:03  
15 with Kristin Fan?

16 A I may have mentioned to Kristin Fan at some 10:18:09  
17 point that I was going to be deposed, but that was it.

18 Q When you left the employ of CMS, did you 10:18:29  
19 take any materials with you at the time you departed?

20 A The only material that I took were those -- 10:18:40  
21 sort of the same buckets of material I provided to you  
22 in discovery: Regulatory issuances that -- some of

Capital Reporting Company  
Frizzera, James C. 09-21-2011

1 which I had, you know, had in my possession because I  
2 worked at home on the weekends, Departmental Appeals  
3 Board decisions, and the GAO reports, public  
4 documents.

20

5 Q And those are the materials you provided to 10:19:13  
6 us in the binder a few weeks ago?

7 A That's correct. 10:19:17

8 Q As group director, the position I think you 10:19:40  
9 said you held when you last were employed by CMS,  
10 could you describe what your responsibilities and  
11 areas of duty were?

12 A Well, it was the overall financial 10:19:52  
13 management of Medicaid, and that included all of the  
14 institutional and noninstitutional Medicaid  
15 reimbursement, it included the financial operations,  
16 the claiming and expenditure reporting from states,  
17 all of Medicaid financing policy, and then sort of a  
18 connection or coordination with each of the ten  
19 regions in, you know, overseeing all of those items  
20 that I just listed to you.

21 Q Just so we understand the terms that you're 10:20:51  
22 employing, when -- when you say overall financial

Capital Reporting Company  
Frizzera, James C. 09-21-2011

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1 your office?

2 A At the time I left there -- there were 11:16:39  
3 documents that were hard-copy documents within file  
4 cabinets in my office that was an accumulation of  
5 files in large part related to my life as a health  
6 insurance specialist there and over the years  
7 accumulating files as more of the technician if you  
8 will.

9 As I started -- as -- as I became a division 11:17:02  
10 director and ultimately a group director, the --  
11 the -- the number of files I retained necessarily  
12 reduced because those files were stored at -- that --  
13 well, even the informal files were worked on by people  
14 who were subordinate to me and -- and the official  
15 files were, you know, either in that particular  
16 division or often in the regional offices.

17 Q When you say the official files, what is the 11:17:39  
18 distinction that you're drawing?

19 A Well, if I had worked on, in my capacity as 11:17:43  
20 a -- as a technician in earlier days, if I had worked  
21 on a particular reimbursement plan amendment, I may  
22 have maintained a file on that for, you know, any

Capital Reporting Company  
Frizzera, James C. 09-21-2011

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1 number of reasons relative to my review of that and  
2 that carried with me throughout my career into my file  
3 cabinets as they moved while the official file, if you  
4 will, the actual approval of that and the stamped  
5 approved pages resided in our regional office.

6 Q In the regional office? 11:18:29

7 A In some instances it was in both. Baltimore 11:18:30  
8 had copies of it, but the delegated authority for the  
9 noninstitutional plans are all regional. This  
10 institutional stuff is -- is centralized. And there's  
11 a list -- there's a delegation of authorities that I'm  
12 not overly familiar with but that the agency has that  
13 would stipulate where each of those authorities  
14 exists.

15 Q Now, did -- did you keep among your 11:19:02  
16 hard-copy files any materials that you had printed out  
17 from your e-mail or e-mail attachments?

18 A Oh, I'm sure I did. 11:19:12

19 Q Did you have a separate file for New Mexico 11:19:15  
20 matters?

21 A Most of my files were state specific. 11:19:22

22 Whether I had any particular New Mexico files or not I

Capital Reporting Company  
Frizzera, James C. 09-21-2011

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1 don't recall, but they all remained in those file  
2 cabinets that I referred to.

3 Q So when you left, those state files were  
4 there?

5 A I left everything there, correct. 11:19:39

6 Q Tell me how you maintained your e-mail files 11:19:43  
7 and communications on a -- on a regular basis.

8 A Well, largely I tried to survive the daily 11:19:54  
9 e-mail there. I don't recall that I had any  
10 particular rigid foldering process of those. Most of  
11 the e-mail in whatever came to me I would try and  
12 address and then move it out of the system. So...

13 Q What does that mean, "move it out of the 11:20:16  
14 system"?

15 A Just get rid of it. I mean if you asked me 11:20:19  
16 a question and I answered it, I hit the delete key.

17 Q Did you have any folders that you retained 11:20:26  
18 where you had a chain of communications, discussions  
19 on a particular topic?

20 A Electronically? 11:20:36

21 Q Yes, sir. 11:20:37

22 A I don't recall. I may have, but I don't 11:20:37

Capital Reporting Company  
Frizzera, James C. 09-21-2011

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1 \$50 million? You weren't aware of that?

2 A No, I was not aware of that.

04:33:58

3 Q And you weren't -- I think you previously 04:33:59

4 testified you weren't aware that the financial

5 management review that was conducted by the regional

6 office and approved for issuance to the state by the

7 central office had identified nine hospitals making

8 donations of cash to their respective counties. You

9 weren't aware of that?

10 A No, I was not aware of that. When was the

04:34:19

11 timing of that?

12 Q It was federal fiscal year 2009 for a review 04:34:20

13 that was performed in that -- for that period.

14 A Okay. So that would have been October 1 of 04:34:26

15 '08 through September 30th of 2009. I left in

16 December of 2008. Did that action all occur between

17 October 1 of 2008 and December 5th of 2008?

18 Q Well, you tell me. You were there.

04:34:40

19 A I wasn't aware of it. So you're asking me 04:34:42

20 whether I was aware and I'm just asking whether or not

21 any of that occurred while I was still there or if

22 that was all subsequent to me leaving.

Capital Reporting Company  
Frizzera, James C. 09-21-2011

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1 someone who assumed your responsibilities when you  
2 leave the office?

3 A No, there was no such memo. 05:13:05

4 Q What did you do to leave your professional 05:13:09  
5 obligations to CMS in good order for the person that  
6 was going to come in and assume your role?

7 A I had given the agency 45 days notice of my 05:13:20  
8 departure and during that time my deputy, who I worked  
9 closely with all the time, I continued to keep her in  
10 the loop, which she often was anyway, but continued to  
11 work that out with her so that once I left she would  
12 be able to serve in an acting position without any  
13 problems.

14 Q And who was that deputy? 05:13:52

15 A Kristin Fan. 05:13:54

16 Q Did you in the closing of your office 05:14:00  
17 matters forward to Kristin or others any kind of discs  
18 or electronic communications of any type reflecting  
19 your records?

20 A No. During that 45 days I, you know, 05:14:19  
21 continued to maintain the same behavior I always did  
22 where I copied people, but I didn't have any

Capital Reporting Company  
Frizzera, James C. 09-21-2011

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1 particular files that then I moved over to someone  
2 else.

3 Q Was there anything you did at all to 05:14:37  
4 preserve any electronic media that had been  
5 accumulated during the course of your, you know, 20  
6 years with the agency?

7 A No. I'm old school, so I had copies which 05:14:48  
8 were in those files, and for the last several years,  
9 you know, I didn't control any of the formal files.

10 So...

11 Q Did anybody from the agency come and, you 05:15:02  
12 know, take a download of your computer or anything?

13 A Not that I'm aware of. 05:15:07

14 Q Do you know what the document retention 05:15:09  
15 policy is at CMS? Do you know what period of time  
16 records are retained?

17 A I do not. 05:15:20

18 Q And I think you previously testified that at 05:15:21  
19 the time of your departure and prior no one had ever  
20 told you you needed to preserve records that would  
21 relate to or might relate to this litigation?

22 A Correct. 05:15:33

# Exhibit 3

Capital Reporting Company  
Cowan, Robert A. 08-31-2011

1

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA, )  
EX REL. ROBERT C. BAKER, )  
PLAINTIFF, )  
vs. ) NO. CIV 05-279 WJ/WDS  
COMMUNITY HEALTH SYSTEMS, )  
INC.; ROSWELL HOSPITAL )  
CORPORATION D/B/A EASTERN )  
NEW MEXICO MEDICAL )  
CENTER; DEMING HOSPITAL )  
CORPORATION D/B/A MIMBRES )  
MEMORIAL HOSPITAL AND )  
NURSING HOME; AND SAN )  
MIGUEL HOSPITAL )  
CORPORATION D/B/A ALTA )  
VISTA REGIONAL MEDICAL )  
CENTER,  
DEFENDANTS. )

\*\*\*\*\*

ORAL VIDEOTAPED REALTIME DEPOSITION OF

ROBERT A COWAN

AUGUST 31, 2011

VOLUME 1 of 1

\*\*\*\*\*

Capital Reporting Company  
Cowan, Robert A. 08-31-2011

		14
1	Did you speak with anyone about your	09:05
2	deposition, apart from counsel?	09:05
3	A Other than my wife, no.	09:05
4	Q You didn't speak with anyone that's currently	09:05
5	employed by CMS, apart from counsel?	09:05
6	A No.	09:05
7	Q Have you discussed with anyone from CMS their	09:05
8	depositions in this case?	09:05
9	A No.	09:05
10	Q You indicated that you're retired. Is that	09:05
11	right?	09:05
12	A That's right.	09:05
13	Q How long have you been retired?	09:05
14	A I retired effective September 30th, 2010.	09:05
15	Q Apart from your communications with legal	09:05
16	counsel in preparation for your deposition today, have	09:05
17	you had any communications with CMS representatives	09:06
18	following your departure from CMS?	09:06
19	A There were a couple of attorneys that came	09:06
20	down to our ranch and talked to us. And prior to	09:06
21	that, I probably informed someone at our office	09:06
22	through e-mail, probably Dorothy Ferguson, that they	09:06

Capital Reporting Company  
Cowan, Robert A. 08-31-2011

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1 they could pertain to Medicaid issues or articles or 15:01  
2 something that certain programs or something that, you 15:01  
3 know, I wasn't interested, but... 15:01  
4 Q Okay. Do you recall -- 15:01  
5 A I assure you, any e-mails that related to a 15:01  
6 review, we wouldn't delete. They would be on there. 15:01  
7 Q And you would save those to your personal 15:02  
8 retention folders? 15:02  
9 A There was an archive file you can move them 15:02  
10 to, if I remember. 15:02

11 Q So did you print out all the e-mails from the 15:02  
12 reviews, as well as save them to archive? 15:02

13 A Yes, there should be a paper copy of an 15:02  
14 e-mail in the file. 15:02

15 Q For every e-mail that you saved to the 15:02  
16 archive, as well? 15:02

17 A Yes. 15:02

18 Q Are you sure about that? 15:02

19 A Well, I mean, you know, that was the standard 15:02  
20 procedure, if I had an e-mail that pertained to a 15:02  
21 review, it should go in the review file. 15:02

22 Q Did every communication you had within CMS 15:02

Capital Reporting Company  
Cowan, Robert A. 08-31-2011

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1 regarding a state Medicaid program become -- concern a 15:02  
2 review? 15:02

3 A I'm sorry. I don't understand the question. 15:02

4 If it pertained to the review and it was an e-mail 15:02  
5 from within CMS, yes, I'd put it in the file. 15:02

6 Q Okay. What if it was an e-mail that didn't 15:02  
7 pertain to any specific review? 15:03

8 A Well, then I had lots of folders, that if it 15:03  
9 was just on a particular Medicaid topic, then if I 15:03  
10 thought it had information that I might need or refer 15:03  
11 to, then I'll put it in a particular subject file. 15:03

12 Q Okay. 15:03

13 A They were my own personal subject files that 15:03  
14 I used, but... 15:03

15 Q And those were within your -- within your 15:03  
16 e-mail. Do you know which e-mail system CMS used 15:03  
17 while you were the financial analyst assigned to the 15:03  
18 State of New Mexico? 15:03

19 A I'm not real knowledgeable about that. What 15:03  
20 did we use? I can't remember the name of it. 15:03

21 Q And was it within this e-mail system that you 15:03  
22 set up your retention folders? 15:03

Capital Reporting Company  
Cowan, Robert A. 08-31-2011

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1 Q Do you recall receiving a retention -- 15:05

2 document retention instruction concerning the State of 15:05

3 New Mexico? 15:05

4 A I don't recall getting one. I could have. 15:05

5 We wouldn't -- we wouldn't -- we would retain 15:05

6 documents that pertained to a review that was open 15:06

7 and -- 15:06

8 Q What about documents or e-mails that may not 15:06

9 pertain specifically to a review? 15:06

10 A Well, like I say, if I thought they contained 15:06

11 some information that might be helpful, I'd file it to 15:06

12 a subject file or -- 15:06

13 Q Those would be within your personal e-mail 15:06

14 retention folders? 15:06

15 A Yes. I had a lot of -- two drawers of files 15:06

16 on different Medicaid subjects, areas. And anything 15:06

17 that -- referenced materials that related to those, 15:06

18 I'd often file and just -- 15:06

19 Q When you left CMS, do you know what happened 15:06

20 to those? 15:06

21 A I left them in my drawers. 15:06

22 Q Did you have a lot of retention folders set 15:06

# Exhibit 4

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW MEXICO**

UNITED STATES OF AMERICA, ex rel.  
ROBERT C. BAKER,  
Plaintiff,  
v.  
COMMUNITY HEALTH SYSTEMS, INC.,  
et al.,  
Defendants.

NO. CIV 05-279 WJ/WDS

## **DECLARATION OF DOROTHY FERGUSON**

I, Dorothy Ferguson, do hereby declare as follows:

1. I am currently the Financial Management Branch Manager in the Division of Medicaid & Children's Health, in the Dallas Regional Office of the Centers for Medicare & Medicaid Services (CMS), U.S. Department of Health and Human Services (HHS). Except as specifically stated, I have personal knowledge of the matters stated herein.

2. This declaration is in support of the United States' Response in Opposition to Defendants' Motion for Sanctions Against the United States of America in the above-captioned case.

3. Upon information and belief, Robert Cowan was employed by CMS from approximately 1989 to September 30, 2010, when he retired from government service. I was his supervisor from September 1, 2008 until he retired.

4. I sent Mr. Cowan a copy of a litigation hold for the above-captioned case and

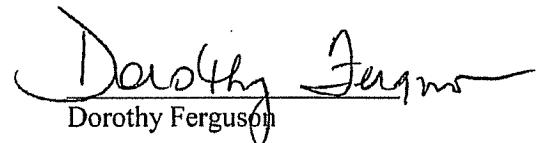
detailed instructions from the CMS Office of Strategic Operations and Regulatory Affairs (OSORA) and the United States Department of Justice (DOJ) regarding preservation of relevant documents. As required by the litigation hold, efforts were made to preserve Mr. Cowan's documents that were relevant to this case prior to his departure. Prior to his retirement, Mr. Cowan indicated to me that his practice was to print out hard copies of most of his emails rather than saving them electronically. I instructed Mr. Cowan to provide his relevant hard copy files to Jeoffrey Branch. These files were among those that we provided to the HHS Office of General Counsel (OGC) for production in this case.

5. In or around December, 2010, while working with attorneys in OGC to respond to document requests in the above-captioned case, I searched for, and located, a folder on our Division's share drive titled "Robert Cowan" containing Mr. Cowan's emails saved as .pst files. The folder was password-protected and I was unable to open it at the time. I shared this information with the attorneys I was working with. I understand, based on information and belief, that in or around February 2011, the OGC attorneys asked the IT department to search the "Robert Cowan" folder, along with all other folders on the share drive and various other locations, for relevant electronic documents using search terms.

6. In or around early 2011, I noticed that the "Robert Cowan" folder was no longer visible to me on the share drive. I searched for, but was unable to locate, the folder. In early May, 2011, attorneys from OGC asked me again about the "Robert Cowan" folder. I related that the "Robert Cowan" folder no longer appeared to be on the share drive. I understand based on information and belief that the OGC attorneys then followed up with the IT department to determine if the "Robert Cowan" folder had been searched as requested, and to discover what

had happened to the folder. It is my understanding that the IT department was unable to locate the folder and it could not be determined what had happened to it.

7. I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.



Dorothy Ferguson

Executed this 10 day of February, 2012

# Exhibit 5

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA, ex rel. )  
ROBERT C. BAKER, )  
Plaintiff, )  
v. )  
COMMUNITY HEALTH SYSTEMS, INC., )  
et al., )  
Defendants. )  
\_\_\_\_\_  
NO. CIV 05-279 WJ/WDS

**DECLARATION OF JAMES FRIZZERA**

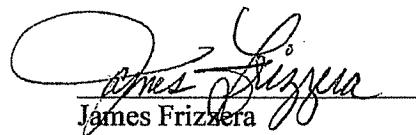
I, James Frizzera, do hereby declare as follows:

1. I was employed by the Centers for Medicare & Medicaid Services (CMS), U.S. Department of Health and Human Services (HHS) between November 1988 and December 2008, when I left CMS. Prior to my departure, my most recent position was as Director of the Financial Management Group within the Center for Medicaid and State Operations (CMSO). Except as specifically stated, I have personal knowledge of the matters stated herein.
2. This declaration is in support of the United States' Response in Opposition to Defendants' Motion for Sanctions Against the United States of America in the above-captioned case.
3. I understand based on information and belief that Kristin Fan has been employed by the CMS from July, 1994 to the present. I was her supervisor from January 2005 until I left CMS.
4. During the time I was Ms. Fan's supervisor, and in her capacity as my Deputy, it

was our mutual common practice to copy one another on, and/or forward to each other, all substantive work related e-mails to ensure we were both aware of all activity occurring in the office in case one of us was out of the office or unavailable for any reason. As such, it is very likely that the vast majority, if not all, of the e-mails that I sent or received between January 2005 and December, 2008 that might be relevant to the above-captioned case, would have been sent or received by Ms. Fan as well.

5. In addition, during my tenure at CMS, I routinely printed hard copies of substantive emails for inclusion in my personal subject-matter files and the official agency files. It is my understanding based on information and belief, that all such printed emails relevant to the issues in the above-captioned case have either been produced to the defendants or included on a privilege log.

6. I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.



James Frizzera

Executed this 10<sup>th</sup> day of FEBRUARY, 2012

# Exhibit 6

Capital Reporting Company  
Fan, Kristin A. 08-02-2011

1

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

- - - - - - - - - - - - - - - x

UNITED STATES OF AMERICA, ex : No.:

rel., ROBERT C. BAKER, : CIV 05-279 WJ/WDS

Plaintiffs, :

vs. :

COMMUNITY HEALTH SYSTEMS, :

INC., et al., :

Defendants. : Pages 1-284

- - - - - - - - - - - - - - - x

Baltimore, MD

Tuesday, August 2, 2011

Videotaped Deposition of:

KRISTIN A. FAN,

called for oral examination by counsel for  
Defendants, pursuant to notice, at CMS Office  
Building, 7008 Security Boulevard, Baltimore, MD,  
before Sherry L. Brooks, CLR, of Capital Reporting  
Company, a Notary Public in and for the State of  
Maryland, beginning at 9:13 a.m., when were present  
on behalf of the respective parties:

Capital Reporting Company  
Fan, Kristin A. 08-02-2011

51

1 agency's practice is when a senior employee like Mr.  
2 Frizzera leaves employ of the government?  
3 A. I don't know.

4 Q. Do you know whether or not Mr. Frizzera  
5 routinely used E-mails to communicate with people in  
6 the agency and outside?

7 A. He did.

8 Q. When he left, you didn't get any of his  
9 E-mail communications within the agency or to those  
10 outside the agency?

11 A. Well, he routinely would CC me when he was  
12 here on a lot of his communications, so I probably,  
13 you know, had those within my own files.

14 Q. So if you had a CC from Mr. Frizzera in  
15 your files, even after he left, you would have  
16 preserved it?

17 A. Yes.

18 Q. And have you produced those E-mails as  
19 well to counsel for the government with response to  
20 our request?

21 A. Yes.

22 Q. Are you aware that Mr. Frizzera's E-mails

# Exhibit 7

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW MEXICO

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

Plaintiff, )

v. )

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

Defendants. )

NO. CIV 05-279 WJ/WDS

**DECLARATION OF COREY STEVENSON**

I, Corey Stevenson, do hereby declare as follows:

1. I am currently the Director of the Enterprise Data Center Group in the Office of Information Services of the Centers for Medicare & Medicaid Services (CMS), U.S. Department of Health and Human Services (HHS). In this capacity, I am familiar with the policies and procedures that CMS follows with regard to emails and electronically stored documents when an employee leaves the agency. Except as specifically stated, I have personal knowledge of the matters stated herein.

2. This declaration is in support of the United States' Response in Opposition to Defendants' Motion for Sanctions Against the United States of America in the above-captioned case.

3. When an employee leaves CMS for any reason, the Computer Access Administrator (CAA) submits a delete userid request within the Enterprise User Administration

(EUA) Workflow system, which immediately disables the individual's computer and network access. This request also generates a notification to the first approver (usually, the employee's manager). When the request is approved by the first approver, or after twelve days, whichever comes first, the user is disconnected from all current access and all of the user's account ids and the user's Home directory are deleted. The Home drive data is retained on backup tape for 90 days and then deleted.

4. The request submitted in the EUA Workflow system also generates a notification to the email application maintainers, who remove the user from all distribution lists and address books, as well as renaming the user's email address and preventing anyone from sending emails to the user. Thirty days after this occurs, the user's email account is deleted from the server. Data within the email account is retained on backup tape for two weeks and then deleted.

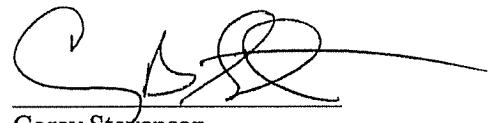
5. With regard to the former employee's government laptop or PC, after an employee has left the agency, a service request is submitted to remove the computer from the employee's workstation. The computer is removed from the employee's workstation within 14 days after submission of the service request. It is then re-imaged (deleting all data on the hard drive) and placed in inventory for redeployment.

6. When an employee leaves the agency, any files or data saved by that employee on the network share or global drives remain on those drives, where they are typically retained for at least seven years.

7. Upon information and belief, the process described above was followed with respect to Jim Frizzera's email account, network access, and government computer following his departure from the agency in December, 2008. Specifically, a delete user request was submitted

and approved on December 9, 2008, triggering the disabling of Mr. Frizzera's email and network access and the subsequent deletion of his account id and Home directory. The availability of back-ups of his emails and data from his Home directory would have been as described above.

8. I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.



Corey Stevenson

Executed this 1<sup>st</sup> day of February, 2012

# Exhibit 8

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA, )  
ex rel., ROBERT C. BAKER, )  
                              )  
                               )  
Plaintiffs,                )  
                              )  
vs.                         ) CASE NO.  
                              ) CIV 05-279 WJ/WDS  
COMMUNITY HEALTH SYSTEMS, INC., )  
ROSWELL HOSPITAL CORPORATION )  
d/b/a EASTERN NEW MEXICO MEDICAL )  
CENTER; DEMING HOSPITAL )  
CORPORATION d/b/a MIMBRES )  
MEMORIAL HOSPITAL AND NURSING )  
HOME; and SAN MIGUEL HOSPITAL )  
CORPORATION d/b/a ALTA VISTA )  
REGIONAL MEDICAL CENTER,     )  
                              )  
Defendants.                )  
                              )

VIDEOTAPED DEPOSITION OF  
30(b)6 Designee of Community Health Systems  
Professional Services Corporation  
NATHAN SUMMAR  
Taken on Behalf of the United States of America  
October 26, 2011  
Commencing at 8:59 a.m.

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Reported by: Jerri L. Porter, RPR, CRR  
Tennessee LCR No. 335  
Expires: 6/30/2012

1 MR. BUCK: We'll take it under  
2 advisement.

3 BY MR. McAULIFFE:

4 Q What communications were there between the  
5 hospitals and any United States government or  
6 federal official concerning contemplated or actual  
7 donations made by the hospitals to a New Mexico  
8 county?

9 MR. BUCK: Objection.

10 THE WITNESS: Could you repeat that  
11 question?

12 BY MR. McAULIFFE:

13 Q Yeah. What communications occurred between  
14 the hospitals and the United States -- and any  
15 United States government or federal official  
16 concerning contemplated or actual donations made by  
17 the hospitals to the New Mexico counties?

18 MR. BUCK: Objection.

19 THE WITNESS: I'm not aware of any  
20 communication between hospital employees and federal  
21 officials outside of any communications that involve  
22 this case.

23 BY MR. McAULIFFE:

24 Q Well, what communications between the  
25 hospitals and the federal government occurred

1 involving this case?

2 MR. BUCK: Objection.

3 THE WITNESS: Well, in the sense that  
4 the federal government has conducted or participated  
5 in the case and personally deposed individuals that  
6 were employed by the hospital, certainly there's  
7 been some contact there.

8 BY MR. McAULIFFE:

9 Q And other than that, you're not aware of any  
10 instances where there's been communications between  
11 the hospitals and the federal government regarding  
12 the donations?

13 MR. BUCK: Objection.

14 THE WITNESS: Nothing is coming to  
15 mind.

16 BY MR. McAULIFFE:

17 Q And what communications were there between  
18 PSC and any United States government or federal  
19 official concerning contemplated or actual donations  
20 made by the hospitals to the New Mexico counties?

21 MR. BUCK: Objection.

22 THE WITNESS: Could you repeat the  
23 question? I'm sorry.

24 BY MR. McAULIFFE:

25 Q Sure. What communications have there been

1 between PSC and any United States government or  
2 federal official concerning contemplated or actual  
3 donations made by the hospitals to New Mexico  
4 counties?

5 MR. BUCK: Objection.

6 THE WITNESS: Other than specific  
7 communications that would have been a part of this  
8 case, essentially depositions of PSC individuals,  
9 I'm not aware of any communications between federal  
10 officials and PSC employees.

11 BY MR. McAULIFFE:

12 Q So, it's true, is it not, that in deciding  
13 to approve the donations at issue in this case, PSC  
14 did not rely upon any communications with any  
15 federal government official?

16 MR. BUCK: Objection.

17 BY MR. McAULIFFE:

18 Q Correct?

19 MR. BUCK: Objection.

20 THE WITNESS: Well, I do believe that  
21 PSC relied on the fact that the federal government  
22 was fully aware that the hospitals were making  
23 unrestricted donations to the county and continued  
24 to fund the hospitals as a part of the sole  
25 community program. I think through those actions

1 the federal government was certainly aware.

2 I don't believe that there were any  
3 specific person-to-person communications that would  
4 have been relied upon, to my knowledge.

5 BY MR. McAULIFFE:

6 Q And your knowledge is PSC's knowledge,  
7 correct?

8 MR. BUCK: Objection.

9 THE WITNESS: Yes. And it's based on  
10 my review of various documents in connection with  
11 this case, as well as interviews with PSC  
12 individuals associated with this case and reading  
13 their depositions.

14 I think it's possible that those  
15 communications may have occurred, but where people  
16 that I discussed didn't recall certain questions, I  
17 can't speak in those situations.

18 But based on my review and taking --  
19 undertaking those actions, I'm not aware of any  
20 discussions with a federal official that would have  
21 been relied on, only the actions of the federal  
22 government.

23 BY MR. McAULIFFE:

24 Q I'm going to refer you to the last two  
25 documents in your binder, which you had included