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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

FIRSTSOURCE SOLUTIONS USA, LLC,  
Plaintiff,  
v.  
TULARE REGIONAL MEDICAL  
CENTER,  
Defendant.

No. 1:15-cv-01136-DAD-EPG

ORDER DENYING MOTION TO DEFER  
CONSIDERATION OF THE MOTION FOR  
SUMMARY JUDGMENT AND GRANTING  
MOTION FOR SUMMARY JUDGMENT

(Doc. Nos. 40, 57, 61)

TULARE REGIONAL MEDICAL  
CENTER,  
Counter-claimant,  
v.  
FIRSTSOURCE SOLUTIONS USA, LLC,  
Counter-defendant.

This matter concerns a breach of contract dispute concerning the provision of various fee collection services performed by plaintiff and counter-defendant Firstsource (hereinafter “plaintiff”) on behalf of defendant and counter-claimant Tulare Regional Medical Center (hereinafter “defendant”). Now before the court are two motions filed by plaintiff: a motion for summary judgment filed on October 18, 2016 and a motion for terminating sanctions filed on December 9, 2016. (Doc. Nos. 40, 57.) Additionally, in opposition to plaintiff’s motion for

1 summary judgment, defendant has filed a request under Federal Rule of Civil Procedure 56(d) to  
2 defer consideration of summary judgment and allow it additional time to disclose records it has  
3 not yet provided to plaintiff. (Doc. No. 61.) The court held a hearing on these motions on  
4 January 19, 2017, at which plaintiff’s counsel Emily Feinstein and defendant’s counsel Teresa  
5 Chow appeared.<sup>1</sup> For the reasons that follow, defendant’s request to defer consideration of the  
6 summary judgment motion will be denied, plaintiff’s motion for summary judgment itself will be  
7 granted, and plaintiff’s motion for terminating sanctions will be denied as moot.

## 8 **BACKGROUND**

### 9 **A. Factual Background**

10 This matter concerns a dispute over billing-related services provided by plaintiff to  
11 defendant. Virtually all of the salient facts related to this case are undisputed. The parties entered  
12 a valid contract on November 18, 2010 wherein plaintiff agreed to perform “revenue cycle  
13 services, patient access services, and patient financial services”—essentially billing and other  
14 business services—for defendant. (Doc. No. 62 at 4–6.) Plaintiff was to receive a contingency  
15 fee of 3.75 percent of the total fee payments it collected for defendant. (*Id.* at 6.) The contract  
16 provided that defendant would pay invoices on a monthly basis, and would be liable for a service  
17 charge of 1.5 percent per month for any invoices unpaid after more than thirty days. (*Id.* at 9.)

18 Defendant terminated the agreement by letter on September 11, 2014, to be effective May  
19 31, 2015. (*Id.* at 11.) Plaintiff continued to perform services for defendant between September  
20 11, 2014 and May 31, 2015. (*Id.* at 12.) Nevertheless, defendant failed to pay plaintiff for  
21 services rendered during this period. (*Id.* at 14–15.) Plaintiff has invoiced defendant for  
22 \$724,385.08, which defendant has refused to pay. (*Id.* at 16–23.) Plaintiff began assessing late  
23 fees on unpaid invoices in January 2015. (*Id.* at 25.)

### 24 **B. Procedural Background**

25 Plaintiff filed this suit on July 21, 2015, alleging one claim for breach of contract in its  
26 complaint. (Doc. No. 1.) Defendant answered the complaint on October 13, 2015, and alleged  
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28 <sup>1</sup> All counsel appeared telephonically at the hearing on the pending motions.

1 one counterclaim for breach of contract, claiming plaintiff failed to collect between \$6.5 and \$7  
2 million worth of bills for defendant. (Doc. No. 6.) Fact discovery was initially set to close in this  
3 case on June 24, 2016. (Doc. No. 25 at 2.) The court extended this deadline to September 22,  
4 2016 upon the stipulation of the parties. (Doc. No. 32 at 3.) Defendant then sought and obtained,  
5 *ex parte*, a continuance of all deadlines in the case, including those related to discovery, on  
6 September 20, 2016. (See Doc. No. 35.) This application was granted by the court on October  
7 21, 2016, and amended by order on November 1, 2016. (Doc. Nos. 45, 46.) Plaintiff, meanwhile,  
8 moved for summary judgment on October 18, 2016, arguing that defendant admitted it had been  
9 invoiced for the amounts in question and had not paid those invoices, and had provided no  
10 admissible evidence on which to base its claim that plaintiff had breached the parties' contract.  
11 (Doc. No. 41.) Plaintiff then moved for terminating sanctions related to defendant's affirmative  
12 defenses and counterclaim on December 9, 2016, asserting that despite the court's granting of the  
13 *ex parte* continuance it had sought, defendant had still not disclosed the required documents or  
14 participated in discovery in good faith. (Doc. No. 57-1.)

15 Defendant opposed plaintiff's summary judgment motion on January 4, 2017. (Doc. No.  
16 61.) In doing so, defendant requested additional time under Rule 56(d) to produce documents it  
17 failed to produce during discovery in order to allow the case to be decided on the merits. (*Id.* at  
18 15–17.) Defendant also opposed plaintiff's motion for the imposition of terminating sanctions on  
19 January 10, 2017. (Doc. No. 71.) Thereafter, this entire action was automatically stayed pursuant  
20 to defendant's bankruptcy filing on October 11, 2017. (Doc. No. 84.) The parties submitted a  
21 stipulation, approved by the bankruptcy court, on June 5, 2018, lifting the stay. (Doc. No. 91.)

## 22 LEGAL STANDARD

23 Summary judgment is appropriate when the moving party “shows that there is no genuine  
24 dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R.  
25 Civ. P. 56(a).

26 In summary judgment practice, the moving party “initially bears the burden of proving the  
27 absence of a genuine issue of material fact.” *In re Oracle Corp. Sec. Litig.*, 627 F.3d 376, 387  
28 (9th Cir. 2010) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)). The moving party

1 may accomplish this by “citing to particular parts of materials in the record, including  
2 depositions, documents, electronically stored information, affidavits or declarations, stipulations  
3 (including those made for purposes of the motion only), admissions, interrogatory answers, or  
4 other materials” or by showing that such materials “do not establish the absence or presence of a  
5 genuine dispute, or that the adverse party cannot produce admissible evidence to support the  
6 fact.” Fed. R. Civ. P. 56(c)(1)(A), (B). When the non-moving party bears the burden of proof at  
7 trial, “the moving party need only prove that there is an absence of evidence to support the  
8 nonmoving party’s case.” *Oracle Corp.*, 627 F.3d at 387 (citing *Celotex*, 477 U.S. at 325.). *See*  
9 *also* Fed. R. Civ. P. 56(c)(1)(B). Indeed, summary judgment should be entered, after adequate  
10 time for discovery and upon motion, against a party who fails to make a showing sufficient to  
11 establish the existence of an element essential to that party’s case, and on which that party will  
12 bear the burden of proof at trial. *See Celotex*, 477 U.S. at 322. “[A] complete failure of proof  
13 concerning an essential element of the nonmoving party’s case necessarily renders all other facts  
14 immaterial.” *Id.* In such a circumstance, summary judgment should be granted, “so long as  
15 whatever is before the district court demonstrates that the standard for entry of summary  
16 judgment . . . is satisfied.” *Id.* at 323.

17         If the moving party meets its initial responsibility, the burden then shifts to the opposing  
18 party to establish that a genuine issue as to any material fact actually does exist. *See Matsushita*  
19 *Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). In attempting to establish the  
20 existence of this factual dispute, the opposing party may not rely upon the allegations or denials  
21 of its pleadings but is required to tender evidence of specific facts in the form of affidavits, and/or  
22 admissible discovery material, in support of its contention that the dispute exists. *See* Fed. R.  
23 Civ. P. 56(c)(1); *Matsushita*, 475 U.S. at 586 n.11; *Orr v. Bank of Am., NT & SA*, 285 F.3d 764,  
24 773 (9th Cir. 2002) (“A trial court can only consider admissible evidence in ruling on a motion  
25 for summary judgment.”). The opposing party must demonstrate that the fact in contention is  
26 material, i.e., a fact that might affect the outcome of the suit under the governing law, *see*  
27 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *T.W. Elec. Serv., Inc. v. Pac. Elec.*  
28 *Contractors Ass’n*, 809 F.2d 626, 630 (9th Cir. 1987), and that the dispute is genuine, i.e., the

1 evidence is such that a reasonable jury could return a verdict for the nonmoving party. *See Wool*  
2 *v. Tandem Computs., Inc.*, 818 F.2d 1433, 1436 (9th Cir. 1987).

3 In the endeavor to establish the existence of a factual dispute, the opposing party need not  
4 establish a material issue of fact conclusively in its favor. It is sufficient that “the claimed factual  
5 dispute be shown to require a jury or judge to resolve the parties’ differing versions of the truth at  
6 trial.” *T.W. Elec. Serv.*, 809 F.2d at 631. Thus, the “purpose of summary judgment is to ‘pierce  
7 the pleadings and to assess the proof in order to see whether there is a genuine need for trial.’”  
8 *Matsushita*, 475 U.S. at 587 (citations omitted).

9 “In evaluating the evidence to determine whether there is a genuine issue of fact,” the  
10 court draws “all reasonable inferences supported by the evidence in favor of the non-moving  
11 party.” *Walls v. Central Contra Costa Cty. Transit Auth.*, 653 F.3d 963, 966 (9th Cir. 2011). It is  
12 the opposing party’s obligation to produce a factual predicate from which the inference may be  
13 drawn. *See Richards v. Nielsen Freight Lines*, 602 F. Supp. 1224, 1244–45 (E.D. Cal. 1985),  
14 *aff’d*, 810 F.2d 898, 902 (9th Cir. 1987). Finally, to demonstrate a genuine issue, the opposing  
15 party “must do more than simply show that there is some metaphysical doubt as to the material  
16 facts . . . . Where the record taken as a whole could not lead a rational trier of fact to find for the  
17 nonmoving party, there is no ‘genuine issue for trial.’” *Matsushita*, 475 U.S. at 587 (citation  
18 omitted).

## 19 ANALYSIS

### 20 A. Rule 56(d) Request

21 Defendant requests the court defer ruling on plaintiff’s summary judgment motion under  
22 Rule 56(d) and to reopen discovery in this action. (Doc. No. 61 at 15–17.) Under Rule 56(d), the  
23 court must deny or continue a motion for summary judgment if an opposing party can show that  
24 “for specified reasons, it cannot present facts essential to justify its opposition.” Fed. R. Civ. P.  
25 56(d). Indeed, Rule 56(d) “require[es], rather than merely permit[s], discovery where the  
26 nonmoving party has not had the opportunity to discover information that is essential to its  
27 opposition.” *Metabolife Int’l Inc. v. Wornick*, 264 F.3d 832, 849 (9th Cir. 2001); *see also Roberts*  
28 *v. McAfee, Inc.*, 660 F.3d 1156, 1169 (9th Cir. 2011) (noting the rule requires discovery only

1 where the nonmoving party has not had this opportunity). The opposing party “must identify by  
2 affidavit the specific facts that further discovery would reveal and explain why these facts would  
3 preclude summary judgment.” *Tatum v. City & Cty. of San Francisco*, 441 F.3d 1090, 1100 (9th  
4 Cir. 2006); *see also Swoger v. Rare Coin Wholesalers*, 803 F.3d 1045, 1048 (9th Cir. 2015). In  
5 order to be entitled to relief under Rule 56(d), defendant here “must show (1) that [it] ha[s] set  
6 forth in affidavit form the specific facts that [it] hope[s] to elicit from further discovery, (2) that  
7 the facts sought exist, and (3) that these sought-after facts are ‘essential’ to resist the summary  
8 judgment motion.” *State of California v. Campbell*, 138 F.3d 772, 779 (9th Cir. 1998). *See also*  
9 *Swoger*, 803 F.3d at 1048; *Blough v. Holland Realty, Inc.*, 574 F.3d 1084, 1091 n.5 (9th Cir.  
10 2009) (noting that to obtain a continuance under 56(d) a party must make a timely application,  
11 specifically identifying the relevant information and some basis for the belief that the information  
12 sought actually exists); *Nidds v. Schindler Elevator Corp.*, 113 F.3d 912, 921 (9th Cir. 1996)  
13 (“The burden is on the party seeking additional discovery to proffer sufficient facts to show that  
14 the evidence sought exists.”)

15 In addition, the movant must also establish that they have been diligent in pursuing the  
16 discovery they now assert is necessary. *Pfingston v. Ronan Eng’g Co.*, 284 F.3d 999, 1005 (9th  
17 Cir. 2002) (“The failure to conduct discovery diligently is grounds for the denial of a Rule 56[d]  
18 motion.”); *Nidds v. Schindler Elevator Corp.*, 113 F.3d 912, 921 (9th Cir. 1996). “District courts  
19 have wide latitude in controlling discovery, and decisions not to permit further discovery in  
20 response to motions made pursuant to Federal Rule of Civil Procedure 56[d] are reviewed for  
21 abuse of discretion.” *United States v. Johnson Controls, Inc.*, 457 F.3d 1009, 1023 (9th Cir.  
22 2006) (citing *United States v. Kitsap Physicians Serv.*, 314 F.3d 995, 1000 (9th Cir. 2002)). *See*  
23 *also Swoger v. Rare Coins Wholesalers*, 803 F.3d 1045, 1047 (9th Cir. 2015).

24 The court is unpersuaded that discovery should be re-opened in this case. Rather, it  
25 appears clear that defendant crafted the bind in which it now finds itself. Put simply, defendant  
26 has not been diligent here. What defendant seeks is yet further time in which to disclose records  
27 within its own possession to plaintiff so that it can both oppose plaintiff’s motion for summary

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1 judgment and pursue its own counterclaim.<sup>2</sup> (Doc. No. 61 at 16–17.) Defendant does not seek  
2 further information or documentation from plaintiffs. The documents defendant now wishes to  
3 belatedly disclose are, apparently, the billing records for nearly 400,000 patient accounts that  
4 form the underlying basis both for its defense to plaintiff’s claim and for its counterclaim that  
5 plaintiff caused it more than \$6.5 million in damages. (*Id.*; Doc. No. 6 at 6–8.)

6         These records were arguably part of the initial disclosures defendant was required to  
7 provide in this action, because they were documents or electronically stored information “the  
8 disclosing party has in its possession, custody, or control and may use to support its claims or  
9 defenses.” Fed. R. Civ. P. 26(a)(1)(A)(ii). Defendant’s counterclaim clearly would have been  
10 based in large part on these records, which apparently depict patient accounts on which plaintiff  
11 allegedly failed to adequately collect. These records were in defendant’s possession. Initial  
12 disclosures in this case were purportedly completed by the parties prior to February 11, 2016.  
13 (*See* Doc. No. 25 at 2.) Thus, defendant’s tardiness did not begin at the close of discovery on  
14 November 6, 2016, but some nine months earlier, and continued throughout the entire pendency  
15 of this case. Indeed, plaintiff also requested these records early on, and defendant replied to this  
16 discovery request on June 3, 2016 with a production of only 32 pages worth of documents, none  
17 of which apparently included the disputed patient records. (Doc. Nos. 58-2, 58-3.) Defendant  
18 now submits an affidavit from its controller indicating it only *began* the process of seeking to  
19 disclose this information on August 18, 2016, six months after it probably should have begun this  
20 process, two months after it originally responded to plaintiff’s discovery request, and only one  
21 month before the discovery deadline in place under the court’s scheduling order at that time. (*See*  
22 Doc. No. 64 at ¶¶ 20–25.)

23         No satisfactory explanation has been presented concerning this lack of diligence on  
24 defendant’s part. Defendant’s controller, Delbert Bryant, merely explains in his affidavit that the  
25 hospital’s accounting department resources were over-burdened during the course of this  
26 litigation due to the implementation of a bond initiative and an impending audit. (Doc. No. 64 at

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27 <sup>2</sup> Defendant presumably recognizes that, having failed to disclose these records, it may not use  
28 them in future proceedings in this case. *See* Fed. R. Civ. P. 37(c)(1).

1 ¶¶ 18–19.) Because of this, it hired two outside consultants, the first of whom it contacted on  
2 August 18, 2016. (*Id.* at ¶¶ 20, 22.) The analysis was purportedly finished “[s]hortly before” the  
3 extended November 6, 2016 discovery cut off, and was produced on that date to plaintiff. (*Id.* at  
4 ¶¶ 27–28.) However, Bryant reviewed the second consultant’s work and “determined it was  
5 incomplete,” following which defendant began a review of the same. (*Id.* at ¶¶ 29–30.) Indeed,  
6 emails between attorneys for the parties indicate that the “incomplete” documents produced were  
7 not to be relied upon going forward. (Doc. No. 71-3.) Defendant asserts elsewhere that the  
8 people in control of the hospital only took over operations in 2014 and therefore lacked  
9 familiarity with defendant’s billing records, thereby delaying record production. (Doc. No. 71 at  
10 5.)

11 While the court understands large document productions can be taxing on an organization,  
12 defendant knew from the very beginning of this case that it intended to both defend against  
13 plaintiff’s claim and bring its own counterclaim on the basis of plaintiff’s alleged failure to  
14 perform adequately under the parties’ contract. The parties proposed the original discovery  
15 schedule on November 12, 2015, which brought fact discovery to an end on June 24, 2016, and  
16 either were aware or should have been aware of their institutional capacities when they proposed  
17 this schedule. (*See* Doc. No. 12 at 5.) Further, defendant knew how to request extensions of time  
18 to complete discovery, if necessary, having done so once by stipulation and once *via ex parte*  
19 application. (Doc. Nos. 31, 35.) Defendant’s failure to retain the necessary consultants until  
20 months after discovery had opened and indeed only shortly before the already-extended discovery  
21 deadline was to expire is no one’s fault but its own. Moreover, the fact that the current  
22 management of the hospital took control of operations in 2014 does not excuse defendant’s  
23 failures to comply with discovery deadlines in this action some two years later. Again, the court  
24 understands that management shifts in large institutions may cause some tasks to fall to the side.  
25 This, however, is presumably one of the reasons why defendant hired outside counsel to litigate  
26 this matter. The failure to produce this discovery material in a timely manner or seek reasonable  
27 extensions prior to the close of discovery falls squarely on defendant’s shoulders. Defendant’s

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1 lack of diligence should not and will not cause the resolution of this case to be delayed any  
2 longer.

3 **B. Summary Judgment**

4 Having declined to re-open discovery under Rule 56(d), the court now turns to plaintiff's  
5 motion for summary judgment. Plaintiff moves for summary judgment arguing that it is entitled  
6 to judgment in its favor as a matter of law on its breach of contract claim, any affirmative  
7 defenses defendant sought to bring, and on defendant's counterclaim, since defendant admits to  
8 the breach of the contract and has come forward with no admissible evidence of plaintiff's  
9 purported wrongdoing. (Doc. No. 40.) Additionally, plaintiff seeks to be awarded attorneys' fees  
10 and costs pursuant to its contract. (*Id.*) Defendant contends that genuine disputes of material fact  
11 remain concerning plaintiff's performance under the contract, particularly as to whether plaintiff  
12 adequately performed under the contract as exemplified through four patient accounts it has  
13 identified. (Doc. No. 61 at 19–22.)

14 1. Evidence to be Considered

15 At the outset, plaintiff protests that the documentary evidence of the four disputed patient  
16 accounts presented by defendant in opposition to plaintiff's motion for summary judgment,  
17 attached to declarant Alan Germany's affidavit as Exhibits A through F and found on the court's  
18 docket at Document Numbers 40-1 through 40-6, was not disclosed to plaintiff prior to the close  
19 of discovery. (Doc. No. 68 at 8–9.) The evidence is therefore "automatically barred" under Rule  
20 37, accordingly to plaintiff. (*Id.*) Though not specifically presented as such, the court interprets  
21 this objection as a motion for evidentiary sanctions under Rule 37(c). When a party fails to  
22 disclose information during discovery, "the party is not allowed to use that information . . . to  
23 supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially  
24 justified or is harmless." Fed. R. Civ. P. 37(c)(1). "Rule 37(c)(1) sanctions have been described  
25 'as a self-executing, automatic sanction to provide a strong inducement for disclosure of  
26 material.'" *Bonzani v. Shinseki*, No. 2:11-cv-0007-EFB, 2014 WL 66529, at \*3 (E.D. Cal. Jan. 8,  
27 2014) (quoting *Yeti by Molly, Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101, 1106 (9th Cir.

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1 2001)); *see also Goodman v. Staples The Office Superstore, LLC*, 644 F.3d 817, 827 (9th Cir.  
2 2011).

3 It is apparently undisputed that defendant failed to disclose the patient account records on  
4 which it now bases its opposition to the summary judgment motion during discovery. As noted,  
5 non-expert discovery in this action closed on November 6, 2016. (Doc. No. 46 at 3.)  
6 Defendant’s counsel declares she produced these documents to plaintiff on January 8, 2017, two  
7 months after the close of discovery. (Doc. No. 71-2 at ¶ 13.) Therefore, these records, and the  
8 statements of the declarants based on them, are admissible only if defendant’s failure to disclose  
9 them was “substantially justified or is harmless.” Fed. R. Civ. P. 37(c)(1). However, this  
10 evidence is also the sole evidence before the court supporting defendant’s opposition, its  
11 affirmative defenses, and its counterclaim. Therefore, the court’s refusal to consider this  
12 evidence is tantamount to a dismissal of defendant’s counterclaim and its affirmative defenses.

13 “The party facing sanctions bears the burden of proving that its failure to disclose the  
14 required information was substantially justified or is harmless.” *R&R Sails, Inc. v. Ins. Co. of*  
15 *Pa.*, 673 F.3d 1240, 1246 (9th Cir. 2012). Nevertheless, evidence preclusion may be a “harsh  
16 sanction,” particularly where it will amount to dismissal of a claim. *Id.* at 1247. In such  
17 circumstances, not only must a district court find a failure to disclose is not substantially justified  
18 or harmless, it is also “required to consider whether the claimed noncompliance involved  
19 willfulness, fault, or bad faith,” as well as whether there are lesser available sanctions. *Id.* at  
20 1247–48 (brackets and internal quotations omitted); *Henry v. Gill Indus., Inc.*, 983 F.2d 943, 946  
21 (9th Cir. 1993) (holding that, in order to justify dismissal under Rule 37, “the losing party’s non-  
22 compliance must be due to willfulness, fault, or bad faith”); *Wyle v. R.J. Reynolds Indus., Inc.*,  
23 709 F.2d 585, 589 (9th Cir. 1983) (terminating sanctions “authorized only where the failure to  
24 comply is due to willfulness, bad faith, or fault of the party”).<sup>3</sup>

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26  
27 <sup>3</sup> Nevertheless, decisions on the appropriateness of sanctions are given “particularly wide  
28 latitude.” *Yeti by Molly, Ltd.*, 259 F.3d at 1106; *see also Ollier v. Sweetwater Union High Sch.*  
*Dist.*, 768 F.3d 843, 859 (9th Cir. 2014).

1 Defendant asserts the volume of records delayed their production, as did the fact that those  
2 in control of the hospital only took over operations in 2014 and therefore lacked familiarity with  
3 defendant's billing records. (Doc. No. 71 at 5.) The court is again unconvinced by this  
4 explanation. As previously stated, defendant knew from the outset of the case that an analysis of  
5 the patient billing records would be crucial both to its anticipated defense to plaintiff's claim and  
6 in support of its own counterclaim. The fact the current administrators began in their positions in  
7 2014 is no justification either, as it shows they had at least two years between then and the close  
8 of discovery in this case to gain some understanding of the hospital's billing records. Moreover,  
9 the hospital management was represented by counsel in this case, who could advise them of what  
10 records had to be produced in order to meet their discovery obligations. Defendant jointly  
11 proposed the original deadline for discovery, and subsequently secured two extensions of that  
12 deadline, once by stipulation and once by *ex parte* application. (See Doc. Nos. 12, 32, 46.)  
13 Nevertheless, defendant still failed either to timely produce the discovery it now seeks to rely  
14 upon or to make additional timely requests to extend the discovery deadlines.

15 Nor can it be said that defendant's failure to disclose harmless here. Defendant asserts its  
16 failure to disclose "has not permanently denied [plaintiff] the ability to obtain and utilize relevant  
17 evidence. Nor has it prevented [plaintiff] from filing a dispositive motion." (Doc. No. 71 at 15–  
18 16.) However, the *permanent* denial of plaintiff's ability to obtain the new evidence is not the  
19 sole measure of harm. Indeed, if discovery is re-opened in this action, plaintiff's summary  
20 judgment motion will effectively have been prevented and both its time and the court's time will  
21 have been wasted. More importantly, defendant's failure to produce discovery has unreasonably  
22 delayed resolution of plaintiff's claim, pursuant to which it sought payment for admittedly unpaid  
23 invoices for work it performed a mounting number of years ago. See *In re Phenylpropanolamine*  
24 *(PPA) Prods. Liab. Litig.*, 460 F.3d 1217, 1236 (9th Cir. 2006) ("Prejudice from unreasonable  
25 delay is presumed."). In order to accommodate this failure, the court would be compelled to re-  
26 open discovery and re-schedule proceedings on dispositive law and motion. See *Jackson v.*  
27 *United Artists Theatre Circuit, Inc.*, 278 F.R.D. 586, 595 (D. Nev. 2011) (delayed disclosure was  
28 less harmful because it did "not require that discovery be reopened"); *Flanagan v. Benicia*

1 *Unified Sch. Dist.*, No. CIV S-07-0333 LKK GGH, 2007 WL 2601413, at \*2 (E.D. Cal. Sept. 6,  
2 2007) (finding evidentiary sanctions not warranted because discovery cutoff had not yet passed);  
3 *see also Payne v. Exxon Corp.*, 121 F.3d 503, 508 (9th Cir. 1997) (finding prejudice where  
4 plaintiffs failed to disclose documents until after discovery, “therefore depriv[ing defendants] of  
5 any meaningful opportunity to follow up on that information, or to incorporate it into their  
6 litigation strategy”).

7 Plaintiff argues defendant has not acted with good faith in the discovery phase of this  
8 litigation, because it sought and received two extensions of the court’s discovery deadline and  
9 still never produced the required documents. (Doc. No. 57-1 at 10–11, 15–16.) “[D]isobedient  
10 conduct not shown to be outside the control of the litigant’ is all that is required to demonstrate  
11 willfulness, bad faith, or fault.” *Henry*, 983 F.2d at 948 (quoting *Fjelstad v. Am. Honda Motor*  
12 *Co., Inc.*, 762 F.2d 1334, 1341 (9th Cir. 1985)); *see also Jorgensen v. Cassidy*, 320 F.3d 906,  
13 912 (9th Cir. 2003); *Hobson v. Buncich*, No. 2:10-CV-429-TLS-PRC, 2013 WL 208934, at \*6  
14 (N.D. Ind. Jan. 16, 2013) (noting fault has been defined as “objective unreasonableness”). The  
15 only time defendant expressly claims to have acted in good faith in relation to this discovery was  
16 when it made belated disclosures to plaintiff in order to file its opposition to plaintiff’s summary  
17 judgment motion. (Doc. No. 71 at 11) (identifying “additional productions” made “in good faith”  
18 during early January 2017). As far as the court is concerned, these were not “good faith”  
19 productions, but rather a very belated production of documents that should have been disclosed to  
20 plaintiff many months earlier.

21 Given the above, the court concludes defendant has acted in bad faith here. Defendant  
22 both failed to produce obviously necessary documents in discovery and failed to seek extensions  
23 of time in which to do so. This occurred despite defendant knowing the billing records would be  
24 relevant to plaintiff’s claim and its counterclaim since the very beginning of the case. Further,  
25 defendant has acted with conscious regard—or disregard—of the discovery and other deadlines in  
26 this case throughout its pendency. For instance, in a joint status report filed on November 16,  
27 2016, defendant indicated it made no effort to disclose additional records between the time it filed  
28 its *ex parte* application for an extension of time and when the court granted it. (*See* Doc. No. 51

1 at 5) (“TRMC could not reasonably move forward with the analyses until it knew that the Court  
2 would grant its *Ex Parte* Application (“Application”) to continue the trial and other case  
3 deadlines.”). Clearly defendant was aware of and acted consciously in relation to the deadlines in  
4 this case, and chose not to proceed with disclosures it was required to make when it was not in its  
5 own interest to do so. This is not a case of mistake, inadvertence, or even negligence. The failure  
6 to disclose here was both willful and in bad faith.

7 With this in mind, the court turns to whether there are lesser sanctions than the barring of  
8 defendant’s evidence available to remedy the predicament this litigation is now in. Unfortunately  
9 there are none. For example, considering the facts to be established in the light the plaintiff  
10 presents or prohibiting defendant from disputing plaintiff’s evidence are essentially the same  
11 sanction as simply refusing to consider defendant’s evidence. Fed. R. Civ. P. 37(b)(2)(A)(i)–(ii).  
12 Imposition of monetary sanctions is likely ineffective here as well since, if plaintiff prevails, it is  
13 entitled to attorneys’ fees pursuant to the parties’ contract. (*See* Doc. No. 1-1 at 2) (“In the event  
14 of any default of the payment provision herein, [defendant] agrees to pay, in addition to any  
15 defaulted amount, all actual legal costs, including but not limited to, attorney fees, collection  
16 costs and court costs [plaintiff] has incurred to collect the overdue amount.”). Defendant also  
17 offered to “consider” voluntarily reimbursing plaintiff for the attorneys’ fees it spent bringing  
18 both the motion for sanctions and motion for summary judgment. (*See* Doc. No. 71 at 9.)  
19 However, such a modest imposition of sanctions would fail to incentivize diligence. Finally, any  
20 continuance or further delay of the resolution of this action would not be a sanction at all, as it is  
21 precisely the relief that defendant seeks.

22 In sum, defendant has failed to comply with its discovery obligations. It has not been  
23 diligent in producing the documents it was required to produce, and has not provided a persuasive  
24 justification for its lack of diligence. This bad faith failure to produce documents harmed  
25 plaintiff. Lesser evidentiary sanctions than barring consideration of this late-disclosed evidence  
26 would be ineffective here, and are therefore unwarranted. The court will not consider the  
27 documentary evidence of the four patient accounts supplied by defendant in considering whether  
28 summary judgment in favor of plaintiff is warranted here.



1 motion. Fed. R. Civ. P. 37(c)(1). Moreover, defendant has admitted each of the other elements  
2 of plaintiff's claim. This is sufficient to entitle plaintiff to summary judgment in its favor.<sup>4</sup>

3 However, for the reasons discussed below, even if defendant's evidence were admissible,  
4 the granting of summary judgment in favor of plaintiff would still be appropriate. "When a  
5 party's failure to perform a contractual obligation constitutes a material breach of the contract, the  
6 other party may be discharged from its duty to perform under the contract." *Brown v. Grimes*,  
7 192 Cal. App. 4th 265, 277 (2011); *see also Plotnik v. Meihaus*, 208 Cal. App. 4th 1590, 1602–03  
8 (2012). The question of whether a breach is "material" is normally a determination for the  
9 factfinder. *Schellinger Bros. v. Cotter*, 2 Cal. App. 5th 984, 1002 (2016); *Brown*, 192 Cal. App.  
10 4th at 277; *Superior Motels, Inc. v. Rinn Motor Hotels, Inc.*, 195 Cal. App. 3d 1032, 1051–52  
11 (1987). However, materiality of a breach becomes a matter of law when there is only one  
12 reasonable conclusion to be reached from the facts presented. *See, e.g., Target Corp. v. Wolters*  
13 *Kluwer Health, Inc.*, No. CV 15-6350-AB (FFMx), 2015 WL 12646483, at \*7 (C.D. Cal. Dec. 16,  
14 2015); *LocusPoint Networks, LLC v. D.T.V. LLC*, No. 14-cv-01278-JSC, 2015 WL 5043261, at  
15 \*11 (N.D. Cal. Aug. 26, 2015); *Frank Lloyd Wright Found. v. Kroeter*, 697 F. Supp. 2d 1118,  
16 1134 (D. Ariz. 2010).

17 California courts have noted that the breaching party's mental state and the timing of the  
18 breach may be factors to consider in determining whether a breach is material. *Schellinger Bros.*,  
19 2 Cal. App. 5th at 1002; *Whitney Inv. Co. v. Westview Dev. Co.*, 273 Cal. App. 2d 594, 602  
20 (1969). The following other factors are potentially relevant to this inquiry as well:

- 21 (1) The extent to which the injured party will obtain the substantial  
22 benefit which he could have reasonably anticipated; (2) the extent  
23 to which the injured party may be adequately compensated in  
24 damages for lack of complete performance; (3) the extent to which  
25 the party failing to perform has already partly performed or made  
26 preparations for performance; (4) the greater or less hardship on the  
party failing to perform in terminating the contract; (5) the wilful,  
negligent, or innocent behavior of the party failing to perform; and  
(6) the greater or less uncertainty that the party failing to perform  
will perform the remainder of the contract.

27 <sup>4</sup> Since the court concludes that summary judgment is warranted as to plaintiff's breach of  
28 contract claim, defendant's counterclaim, and defendant's affirmative defenses, plaintiff's  
separate motion for terminating sanctions (Doc. No. 57) will be denied as moot.

1 *Sackett v. Spindler*, 248 Cal. App. 2d 220, 229 (1967). As the Ninth Circuit has commented, a  
2 breach will justify rescission or non-performance by the non-breaching party “only when it is ‘of  
3 so material and substantial a nature that [it] affect[s] the very essence of the contract and serve[s]  
4 to defeat the object of the parties. . . . [The breach must constitute] a total failure in the  
5 performance of the contract.’” *Rano v. Sipa Press, Inc.*, 987 F.2d 580, 586 (9th Cir. 1993)  
6 (quoting *Affiliated Hosp. Prods., Inc. v. Merdel Game Mfg. Co.*, 513 F.2d 1183, 1186 (2d Cir.  
7 1975)) (alterations in original).

8 Even were the evidence presented by defendant in opposition to plaintiff’s motion to be  
9 considered, summary judgment would be warranted on plaintiff’s breach of contract claim.  
10 Defendant’s controller Delbert Bryant declares defendant generated a log of all patient accounts,  
11 calculated the average payment received for a service within a given period of time, and then  
12 determined whether there was a “variance,” i.e. an underpayment, between the average amount  
13 and the amount actually collected. (Doc. No. 64 at ¶¶ 31–34.) According to Bryant, defendant  
14 has been underpaid on the accounts relevant to this dispute by approximately \$58.5 million. (*Id.*  
15 at ¶¶ 35–36.) However, defendant has presented virtually no evidence, admissible or otherwise,  
16 that any of these alleged underpayments are the fault of plaintiff. As plaintiff rightly points out, it  
17 contracted to provide certain billing and revenue cycle services, not to serve as a guarantor for the  
18 debts of defendant’s patients. (*See, e.g.*, Doc. No. 1-1 at 9) (contract noting plaintiff “shall use its  
19 *commercially reasonable efforts* to bring accounts to final resolution”) (emphasis added). At  
20 most, defendant identifies four underpaid accounts it believes were due to some breach by  
21 plaintiff,<sup>5</sup> which at most indicate it suffered approximately \$11,000 in losses. (*See* Doc. No. 63

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22 <sup>5</sup> The court by no means is convinced these records actually show the underpayments were  
23 caused by some action of plaintiff’s. Defendant’s chief operating officer and chief financial  
24 officer Alan Germany declares he identified three actions plaintiff was “required to take, but  
25 failed to do so,” including “checking patient eligibility prior to or during patient’s stay in the  
26 hospital,” “ensuring claims are accurate and complete prior to submission to the payor,” and  
27 “pursuing collection to conclusion.” (Doc. No. 63 at ¶ 12.) Germany does not explain how he  
28 decided plaintiff was required to take these actions, as this language does not appear in the  
parties’ contract. (*See, e.g.* Doc. No. 1-1 at 9–10) (noting plaintiff would “identify potential payer  
problems prior to service . . . and make every attempt to resolve the situation prior to service” and  
use “commercially reasonable efforts to bring accounts to final resolution”). Nevertheless, the  
court will presume this is what these records show for purposes of this discussion.

1 at ¶¶ 11–21, 25; Doc. No. 63-6 at 1.)

2 No reasonable factfinder could conclude \$11,000 worth of underpayments constitutes a  
3 material breach of this contract. While it is unclear how much money plaintiff collected for  
4 defendant over the course of the entire contract, plaintiff did collect more than \$17.5 million of  
5 payments for defendant between October 2014 and May 2015 alone.<sup>6</sup> (Doc. No. 62 at 17.)  
6 Underpayments of \$11,000 would represent less than one-tenth of one percent of the value of the  
7 revenues collected by plaintiff for defendant during just the final seven months of the contract.  
8 There is no evidence before the court on summary judgment that any breach by plaintiff was  
9 willful, malicious, or even negligent in nature. *Schellinger Bros.*, 2 Cal. App. 5th at 1002. The  
10 parties mutually performed under the contract for almost four years (*see* Doc. No. 62 at 4, 11–12),  
11 suggesting there was no ongoing concern about plaintiff’s performance. *Whitney Inv. Co.*, 273  
12 Cal. App. 2d at 602 (“[A] slight breach at the outset may justify termination whereas a like breach  
13 later in performance may be deemed insubstantial.”). Defendant obtained the substantial benefit  
14 of the bargain, receiving at least \$17.5 million in revenues with, at most, an \$11,000  
15 underpayment. *See Sackett*, 249 Cal. App. 2d at 229. Plaintiff continued to render services under  
16 the contract through the termination date set by defendant, despite not receiving timely payments  
17 on its invoices. (Doc. No. 62 at ¶¶ 30, 37–39.) Thus, even were defendant’s evidence to be  
18 considered, plaintiff would still be entitled to summary judgment because any purported breach  
19 for which defendant has supplied evidence is not material. *Rano*, 987 F.2d at 586.

20 For all of these reasons, summary judgment in plaintiff’s favor is warranted on its breach  
21 of contract claim, and plaintiff will be awarded the undisputed amount of \$724,385.08 invoiced  
22 and not paid. (*See* Doc. No. 62 at 15–16.) Plaintiff also seeks an award of interest, costs, and  
23 attorneys’ fees. (Doc. No. 41 at 20.) Within thirty (30) days following service of this order,  
24 plaintiff is directed to file a notice of motion and motion, noticing that motion for hearing on the  
25 court’s calendar setting out its request for interest, costs, and attorneys’ fees.

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27 <sup>6</sup> Assuming the collection rate stayed relatively consistent with these values, plaintiff could easily  
28 have collected more than \$120 million for defendant over the course of the contract.

1 **CONCLUSION**

2 Given all of the foregoing:

- 3 1. Defendant’s request under Rule 56(d) to reopen discovery (Doc. No. 61) is denied;
- 4 2. Plaintiff’s objections to the documentary evidence attached to Alan Germany’s affidavit  
5 (Doc. Nos. 40-1–40-6) are well-founded, and that evidence is deemed inadmissible on  
6 summary judgment pursuant to Rule 37;
- 7 3. Plaintiff’s motion for summary judgment (Doc. No. 61) is granted as to its breach of  
8 contract claim, defendant’s affirmative defenses, and defendant’s counterclaim;
- 9 4. Judgment is entered in favor of plaintiff and against defendant in the amount of  
10 \$724,385.08;
- 11 5. Plaintiff may file a motion within thirty (30) days of the entry of final judgment seeking  
12 prejudgment interest, attorneys’ fees, and costs pursuant to Federal Rule of Civil  
13 Procedure 54 and Local Rule 293;
- 14 6. Plaintiff’s motion for terminating sanctions (Doc. No. 57) is denied as moot; and
- 15 7. The Clerk of the Court is directed to enter judgment.

16 IT IS SO ORDERED.

17 Dated: June 12, 2018

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 19 \_\_\_\_\_  
 20 UNITED STATES DISTRICT JUDGE