

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION**

UNITED STATES OF AMERICA
ex rel. **KARYN L. WALKER,**

Relator,

CASE NO.: 5:02-cv-131-WTH-GRJ

v.

R & F PROPERTIES OF LAKE COUNTY, INC.,

Defendant.

**RELATOR'S MOTION TO COMPEL DISCOVERY
AND MEMORANDUM OF LAW IN SUPPORT THEREOF**

Relator, Karyn L. Walker (“Walker”), by and through her undersigned counsel, moves the Court pursuant to Rule 37(a) of the Federal Rules of Civil Procedure, for an Order compelling the Defendant, R & F Properties of Lake County, Inc., f/k/a Leesburg Family Medicine (“LFM”), to provide more complete answers to interrogatories and to produce documents requested by Plaintiff in accordance with Rules 32, 33, and 34 of the Federal Rules of Civil Procedure.

1. This *Qui Tam* case alleging Medicare fraud by Defendants has been returned to this Court after a Mandate from the Eleventh Circuit Court of Appeals (Dkt. 126), which reversed an Order granting summary judgment and overruling objections to an Order of the Magistrate Judge as moot and vacated a discovery order of this Court (Dkt. 100.)
2. The Eleventh Circuit specifically directed that Walker be afforded “discovery of all information relevant to her claims, on behalf of the United States, that false claims for payment were made by LFM.” Thus, in accordance with that statement and general rules of discovery, Relator asks this Court to compel certain discovery requests.

3. Prior to, and following the Mandate, Relator had identified numerous discovery disputes and had been working with counsel for Defendant to resolve such disputes. Despite working together, many disputes remain unresolved, and Relator is asking this Court, pursuant to the Rules of Civil Procedure, to resolve such issues and order Defendant to answer certain discovery requests for the reasons set forth below in Relator's Memorandum of Law, fully incorporated in this Motion.

WHEREFORE, Relator asks that this Court issue an order compelling the discovery identified below and assess costs against Defendant pursuant to Rule 37.

MEMORANDUM OF LAW

I. Introduction

As this Court is aware, this case has a long, complex discovery history. Relator is here, once again, in order to compel certain discovery that has not yet been produced by Defendant and which is necessary in order to prosecute this case.

Ms. Walker filed her Complaint under the *qui tam* provision of the False Claims Act ("FCA"), alleging that the Defendant engaged in a pattern and practice of purposefully and knowingly presenting false and fraudulent claims to Medicare, in violation of 31 U.S.C. § 3729 *et. seq.*, alleging that by submitting certain fraudulent claims for reimbursement by the Medicare program, the Defendant was engaging in several different schemes, contrary to the Medicare regulations, that allowed Defendant to obtain a higher reimbursement rate for certain claims than to which it was legally entitled.

Defendant, a Medicare healthcare provider, routinely submitted claims to the United States for reimbursement of services provided to Medicare recipients by non-physician care providers as though the services had been provided by physicians (referred to as “incident to” billing), which allowed Defendant to obtain a higher reimbursement rate than had it submitted the claims as though the non-physician had provided the services. Although this practice is allowed under Medicare guidelines, it is only allowed if certain rules are followed.

Those rules provide that, in order to bill for services of a non-physician as though those services were provided by a physician, the services must be “incident to” the services of a physician, *i.e.*, the services must meet the following relevant requirements: 1) the services/supplies provided by the non-physician must be an integral, although incidental, part of the physician’s professional service, and 2) the services must be furnished under the physician’s direct supervision. The first criteria is met when the services are furnished during the course of treatment of an illness or injury where the physician himself performs an initial service and provides subsequent services of a frequency that reflects his/her active participation in and management of the course of the treatment. The second criteria is met when a physician is physically present in the office suite throughout the time that the services are being rendered.

Relator has alleged in this case that Defendant submitted claims for reimbursement that did not follow these rules in one or more of the following manners: 1) the claims were made for services provided when a physician was not in the building; 2) the claims were made for services provided to new patients; 3) the claims were made for services provided to existing patients who were seen for new complaints; and/or 4) the claims were made for services to existing patients for complaints for which a physician had treated the patient before, but either the non-physician had changed the treatment plan or it resulted in a new diagnosis.

Throughout discovery in this matter, Relator has sought fruitlessly to obtain numerous relevant documents and answers to interrogatories which are critical to this case and to Relator's ability to prove the violations of the False Claims Act. As described in detail below, as one example, one of the most critical types of documents that have been withheld by Defendant are the actual reimbursement request forms submitted to the United States for services provided by non-physicians, *i.e.*, the actual false claims. Further, Defendant has also failed to respond to numerous proper interrogatories without sustainable objection. Under the rules of discovery and the Eleventh Circuit's directives in this case that discovery should be liberally made available to Relator, Defendant should be compelled to produce discovery to the specific requests listed below.

II. Procedural Background

As this Court is aware, the procedural history of this case is also long and complex, as there have been several discovery disputes already brought to the attention of this Court and already decided by the Eleventh Circuit Court of Appeals. In this Court, after a Motion for Protective Order was filed by Defendant (Dkt. 67), within which some issues raised in the instant Motion were also at issue, Magistrate Judge Jones issued a recommendation (Dkt. 88), to which Relator timely objected and appealed to Judge Hodges. (Dkt. 95.) However, before any ruling was entered on the merits of the objections and appeal, this Court denied those objections and the appeal as moot upon granting Defendant's Motion for Summary Judgment, filed prior to the discovery deadline in this matter. (Dkt. 100.) Relator timely appealed that Order and the United States Court of Appeals for the Eleventh Circuit determined that summary judgment should not have been granted, and the order granting summary judgment and denying Relator's objections and appeal was reversed. (Dkt. 126.) Thereafter, Defendant filed a Petition for Writ of Certorari, and after the United States Supreme Court denied Defendant's Petition, this matter was returned to this Court for further proceedings.

The Mandate from the Eleventh Circuit clarified several important issues in this case, including finding that there is sufficient evidence, even without the benefit of all discovery, to allow this case to proceed to trial. The Court also agreed with Relator that discovery must be more liberally allowed to Relator and that the relevant time frame at issue in this case includes February 1997 through the date of the original Complaint. Further, in overturning the discovery order in this case, the Eleventh Circuit instructed that Relator was to be given access to all discovery that could even reasonably be related to the discovery of admissible evidence in this matter, a standard which the Court found had not been followed in previous orders of this Court.

Additionally, many of the issues raised in Relator's Objections to and Appeal from United States Magistrate Judge Jones' August 23, 2004 Order (hereinafter referred to as "Relator's Objections") (Dkt. 95), directly impact on several discovery disputes that are ongoing between the Parties. Since the discovery disputes became apparent, both before and after the issuance of the Mandate from the Eleventh Circuit, counsel for Relator has made numerous attempts to work out the various discovery disputes with counsel for Defendant. (See Composite Exhibit A.) However, the disputes have reached a point to which Defendant's counsel has indicated that court intervention will be necessary to resolve the remaining disputes.

At issue in this Motion are incomplete answers and inappropriate objections by Defendant to interrogatory answers from four separate sets of interrogatories, as well as incomplete responses and inappropriate objections by Defendant to Plaintiff's first set of Requests for Production.

As set out completely below, and because of the reasons set forth hereafter, Relator requests that this Court address all issues raised previously by her in Relator's Objections (Dkt. 95), and in accordance with many of the issues raised therein, enter an Order requiring Defendants to provide appropriate responses to the various discovery items as set forth more fully below. Further, in accordance with Federal Rule 37, Relator requests that this Court assess costs of filing this motion against Defendant.

LEGAL STANDARD

Liberality governs discovery under the Federal Rules. *Seattle Times Company v. Rhinehart*, 467 U.S. 20, 34, 104 S.Ct. 2199, 81 L.Ed. 2d. (1984). Thus, the Federal Rules strongly favor discovery whenever possible. *Farnsworth v. Proctor & Gamble Co.*, 758 F.2d 1545, 1547 (11th Cir. 1985). "A request of discovery should be allowed 'unless it is clear that the information sought can have no possible bearing on the claim or defense of any party.'" *Goodyear Tire & Rubber Co. v. Kirk's Tire & Auto Servicer of Haverstran, Inc.*, 211 F.R.D. 658 (D. Kan. 2003) (citations omitted); accord *Stewart v. Mitchell Transport, et. al.*, 2002 WL 15588210, *4 (D. Kan. 2002).

Discovery requests are treated liberally by the Courts. *Lyoach v. Anheuser-Busch Companies, Inc.*, 164 F.R.D. 62, 65 (E.D.M.O. 1995). "The necessity for liberal discovery to clarify the complex issues encountered in litigation must be given access to information that will assist the plaintiff..." *Id.* (quoting *Runyan v. Sybase, Inc.*, No. 93-0368, 1993 WL 377062, *4 (E.D.Pa. Sept. 16, 1993); accord *Serina v. Albertson's, Inc.*, 128 F.R.D. 290, 292 (M.D.Fla. Nov. 7, 1989). This is particularly true in this case where the Eleventh Circuit has specifically admonished, "...Walker should have been permitted discovery of **all** information relevant to her claims, on behalf of the United States, that false claims for payment were made by LFM." (*Emphasis added.*)

Further, the burden in a motion to compel is on the party being compelled, to clarify and explain specifically why its objections are proper considering the liberal and broad nature of the discovery rules. *See Zenith Electronics Corp. v. Exzec, Inc.*, 1998 WL 9181, *8 (N.D. Ill. 1998). “The mere fact that producing documents would be burdensome and expensive and would interfere with a party’s normal operations is not inherently a reason to refuse an otherwise legitimate discovery request.” *Baine v. General Motors Corp.*, 141 F.R.D. 328, 331 (M.D. Ala. 1991). This Court should be guided by these general principles in resolving the instant Motion to Compel.

DISCOVERY TO BE COMPELLED

I. GENERAL ISSUES

A. Temporal Scope of Discovery

One overriding issue relating to all discovery to date is the appropriate time frame for discovery in this matter. Prior to the Eleventh Circuit’s involvement, Magistrate Judge Jones’s August 23, 2004 Order set the temporal scope of discovery to include only the time frame during which Walker was employed by Defendant, February 1997 through May 1999. (Dkt. 89.) However, the Eleventh Circuit Court of Appeals specifically took up this issue and determined “the proper temporal range for discovery is February 1997 through the date of the original complaint [May 6, 2002].” (Dkt. 126, p. 12.)

Clearly, after the Eleventh Circuit’s Mandate was issued, and Defendant’s Petition for Writ of Certiorari on the Eleventh Circuit’s Opinion was denied, there can be no confusion as to the temporal scope of discovery going forward in this matter. However, in much of the discovery provided to date in this matter, the Defendant has refused to produce requested documents and other materials other than from February 1997 through 1999. After the Eleventh Circuit’s Mandate was issued, attempts were made to coordinate with counsel for Defendants to obtain updated discovery. (See Exhibit A.) However, in the last letter sent by Defendant’s counsel, it became

utterly clear that the Defendant was not going to update its discovery pursuant to the temporal mandate of the Eleventh Circuit.

Recently, in production made in response to a subpoena duces tecum for a deposition, certain updated documents were provided. However, Defendant still has not provided updated documents across the board. Thus, Relator has no choice but to ask this Court to compel compliance and order Defendants to provide updated discovery as it relates to all written discovery propounded in this case upon Defendants within ten (10) days of any order entered in response to this motion.

B. Discovery About Alleged Fraudulent “Incident To” Billing Other Than Simply When A Physician Was Not Present In the Suite For Services.

Another critical aspect of this case, about which discovery has been requested, but has routinely been not provided by Defendant, includes questions and documents pertaining to the theories of liability raised in this case for fraudulent billings to Medicare under “incident to” guidelines other than under the part of the guideline that requires a physician to be present in the office suite while the services are being rendered.

Walker has alleged that not only was Defendant illegally and fraudulently submitting false claims to Medicare when it submitted claims for services provided when a physician was not physically present, but she also alleged that Defendant illegally and fraudulently submitted false claims to Medicare when it submitted claims for services provided by a non-physician: 1) when the Medicare recipient had never before seen a physician; 2) when that Medicare recipient had never before seen a physician for the medical problem being presented; and 3) when the non-physician changed the treatment plan for the Medicare recipient from the treatment plan prescribed by a physician. Although submitting a claim for a Medicare recipient under any one of these three scenarios as though the physician had provided the services (under the “incident to” provisions of Medicare guidelines) would violate the laws and regulations relating to proper “incident to” billing,

and although Relator has raised these scenarios in this lawsuit, Defendant continually refuses to provide documents and information relating to these theories of liability.

Defendant has no basis upon which to withhold this discovery as it is the very crux of this lawsuit. For example, although the office manager for the Defendant testified that the only documents available that will determine whether a patient who was seen by a non-physician at LFM was seen for a new medical issue, is to look at the medical chart of that patient. (Exhibit B, pg. 115, ln. 3-10; pg. 133-134, ln. 23-25, 1-4.) Additionally, on August 11, 2007, at the deposition of Ms. Pamela Hill, a former billing/coding consultant for RCFA, a medical consulting company hired by Defendant in 1997-1998, Ms. Hill testified that, according to her expertise and years of experience, patient medical charts are critical in determining whether or not a practice is coding properly. Specifically, according to Ms. Hill, patient medical charts contain codes, including procedure codes and medical diagnosis codes assigned by the practice at the time of the patient's visit. Those provider-assigned codes are then used by Medicare and/or its intermediary in determining the amount of reimbursement a practice is entitled to for that particular patient's treatment.

However, despite this testimony and this Court's Confidentiality Order dated July 14, 2004 (Dkt. 86), Defendant refuses to produce the medical charts of patients who were seen by non-physicians during the relevant time frame. The medical charts are essential in assisting Relator in determining the number of patients on whose behalf Defendant submitted false claims by virtue of billing services of a non-practitioner as "incident to" the services of a physician, when those services could not appropriately, under Medicare guidelines, be billed in that manner.

Defendant should not be allowed to simply ignore the allegations in this case and get away with not producing relevant discoverable information and documents that are critical in proving the core allegations of this lawsuit. Because the documents requested are both relevant and necessary, and because Defendant has made no valid objection, all documents and responses relating to all alleged theories of Medicare fraud should be compelled.

C. Defendant Should Be Compelled to Produce the Actual False Claims at Issue.

Amazingly, throughout this litigation, which is a prosecution for submitting false claims for reimbursement for payment, Defendant has refused to produce the actual false claims themselves. In Plaintiff's first set of Requests to Produce, Relator specifically asked for these documents. Defendant objected to the request based upon relevant time period (which has now been clarified by the Eleventh Circuit's Mandate), and as being overly broad and burdensome. (Exhibit C.) Furthermore, in responding to a Request for Admission, Defendant admitted that it did, in fact, have in its possession, custody or control copies of these documents. (Exhibit D.)

In allowing Relator access to "discovery of all information relevant to her claims, on behalf of the United States, that false claims for payment were made by LFM," as directed by the Eleventh Circuit, it is clear that, at an absolute minimum, Relator must be given access to the false claims themselves. There is no possible valid objection to withholding these critical documents in this matter, and this Court should compel their production.

D. The Entire Set of Plaintiff's Fourth Set of Interrogatories Was Inappropriately Objected To By Defendant and This Court Should Compel Responses.

On July 1, 2004, Relator sent Defendants a fourth set of interrogatories containing three (3) interrogatories. (Exhibit E.) Instead of providing any sort of substantive response whatsoever to any of the interrogatories, Defendant simply objected.¹ (Exhibit F.) In each of the responses, Defendant stated that the interrogatory exceeded that temporal scope of discovery, and that taken together with other interrogatories propounded in this case, the interrogatories numerically exceeded 25 in number, in violation of Federal Rule 33. Both of these objections should be overruled, and Defendant should be ordered to answer these interrogatories.

¹ In compliance with Local Rule 3.04(a), the entirety of each of the interrogatories and responses in this set are set forth herein:

Interrogatory No. 1 from Plaintiff's Fourth Set of Interrogatories: Please state the actual number of patients seen on each day for each nurse practitioner or physician assist employed by LFM from 1994 to the present, and please also indicate the number of those patients on whose behalf LFM submitted a claim for reimbursement to Medicare. Please also indicate within these numbers, how many patients identified were seen by each nurse practitioner or physician assistant.

Response to Interrogatory 1: Objection. The time period covered by the interrogatory exceeds the temporal scope of discovery established in the Court's two prior orders. Docs. 47, 76. Moreover, Plaintiff's previous three sets of interrogatories, including all discrete sub-parts, have exceeded 25. Thus, this fourth set is objectionable as Plaintiff has failed to obtain leave to serve additional interrogatories as required by *Fed. R. Civ. P.* 33(a).

Interrogatory No. 2 from Plaintiff's Fourth Set of Interrogatories: Please state the actual number of new patients, i.e., patients that had not previously been provided services by anyone at LFM, that any nurse practitioner or physician assistant provided services for from 1994 – present broken down by month and non-physician care provider. For the numbers provided, please further indicate the number of patients for whom Medicare reimbursement claims were submitted by LFM organized by nurse practitioner or physician assistant.

Response to Interrogatory 2: Objection. The time period covered by the interrogatory exceeds the temporal scope of discovery established in the Court's two prior orders. Docs. 47, 76. Moreover, Plaintiff's previous three sets of interrogatories, including all discrete sub-parts, have exceeded 25. Thus, this fourth set is objectionable as Plaintiff has failed to obtain leave to serve additional interrogatories as required by *Fed. R. Civ. P.* 33(a).

Interrogatory No. 3 from Plaintiff's Fourth Set of Interrogatories: Please state the actual number of patients seen by a nurse practitioner or physician assistant employed by LFM by day and by service provider for who a new complaint was lodged, i.e., a medical complaint which had not been previously been presented to an LFM physician.

Response to Interrogatory 3: Objection. The time period covered by the interrogatory exceeds the temporal scope of discovery established in the Court's two prior orders. Docs. 47, 76. Moreover, Plaintiff's previous three sets of interrogatories, including all discrete sub-parts, have exceeded 25. Thus, this fourth set is objectionable as Plaintiff has failed to obtain leave to serve additional interrogatories as required by *Fed. R. Civ. P.* 33(a).

As it relates to Defendant's objection to these interrogatories on the basis of the temporal scope of discovery, soon after Defendant's objections were received, in an attempt at cooperation and moving this case forward, counsel for Relator asked that Defendant at least respond to the interrogatories with respect to the time period for which there was no relevant objection.

Defendant refused and simply relied upon its objections. Now that the proper time period for discovery has been decided by the Eleventh Circuit, Defendant's objection to these interrogatories as beyond the temporal scope must be overruled. Defendant should be compelled to respond to the interrogatories within the time frame mandated by the Eleventh Circuit. In the alternative, Relator asks that this Court allow her to re-issue these same interrogatories using the time frame that the Eleventh Circuit has approved.

As to the number of interrogatories in this matter, Defendant's position that Relator issued more than 25 interrogatories prior to or including the "Fourth Set," is simply unsupportable. Clearly, in this matter, Relator has issued four sets of interrogatories, including the one at issue in this Motion. In the first set of interrogatories (Exhibit G), there are three (3) interrogatories propounded. In the second set of interrogatories (Exhibit H), again there are three (3) questions propounded. In the third set of interrogatories (Exhibit I), there is one (1) interrogatory propounded. Last, as previously set out, in the fourth set of interrogatories (Exhibit E), there are again only three (3) questions propounded. Thus, the sum total of interrogatories which have been sent to Defendant under Federal Rule 33 is ten (10); clearly less than the twenty-five (25) contemplated by the Rule.

Further, there are no discrete sub-parts in any of the interrogatories propounded that could increase this number. In Plaintiff's third set of interrogatories, the question asks for Medicare provider numbers relating to a number of individuals who all worked for Defendant, and in the interrogatory itself, Relator set out each individual in a list. However, certainly the Federal Rules would not contemplate such an interrogatory to comprise more than one single interrogatory simply because the propounding party attempted to set out the request in a clear manner.² In each of the other sets of interrogatories, Defendant cannot, even in good faith, attempt to argue that there are any discrete sub-parts to any of the questions propounded. Each question is straight forward, asking for information on unmistakably one topic only.

Because Defendant's only objections to these interrogatories should be overruled, Plaintiff requests that this Court enter an Order directing Defendant to answer these interrogatories within ten (10) days of an order on this motion.

II. SPECIFIC DISCOVERY REQUESTS

1. Interrogatory No. 2 from Plaintiff's First Set of Interrogatories to Defendant.³

Defendant objects to this interrogatory only insofar as it allegedly violates the October 28, 2003, Order ("the Protective Order") of this Court. (Dkt. 47.) However, this interrogatory clearly requests only general, but important, background information that the Relator is entitled to – specifically asking the Defendant (who is accused of knowingly violating the "incident to" requirements) to describe what it understood were the "incident to" billing requirements.

Certainly, as this is the main issue in the case, it is relevant and should be responded to.

² Further, even if for some reason the interrogatory in the third set could possibly be read to impose an interrogatory with discrete sub-parts (which Relator believes is illogical to do), counting that interrogatory as seven (7) interrogatories will still not cause the total number of interrogatories in this matter to be in excess of twenty-five (25).

³ **Interrogatory:** Please describe in as much detail as possible LFM's practice of Medicare billing, relating to "incident to" billing.

Response: Objection. This interrogatory exceeds the permissible scope of discovery set forth in the Court's October 28, 2003 Order.

One of the main issues addressed in the Protective Order (this Court's October 28, 2003 Order) is the temporal scope of discovery, which again, has now been established as broader than Defendant originally insisted. However, even without the guidance from the Eleventh Circuit, because this interrogatory does not in any way impact the temporal scope of discovery, an objection based upon a position that it was too broad in scope should be overruled.

Another issue addressed in the Protective Order is the privacy concerns impacted by HIPAA. However, again, this interrogatory does not in any way impact such concerns. In short, there is nothing in the Protective Order that would in any way impact a response to this interrogatory. Further, Relator not only has previously agreed to abide by this Court's Confidentiality Order in protecting privacy rights under HIPAA, but Relator has also previously proposed to Defendant that she would agree to enter into another Confidentiality Agreement, which has been used and approved in other *qui tam* litigation in the State of Florida, and which would alleviate any lingering concerns. Thus, as there were no objections raised, and any confidentiality issues have been more than adequately addressed, Defendant should be compelled to respond fully.

2. Interrogatory No. 3 from Plaintiff's 1st Set of Interrogatories to Defendant.⁴

This interrogatory requests names of all non-physician care providers employed by the Defendant from 1995 through the date of the interrogatory. Again, Defendant objected stating only that the interrogatory violated the Protective Order in this case, presumably only as to the temporal scope of discovery. However, once again, in an attempt to resolve disputes rather than having to involve the Court, Relator asked that at least a response be given for the time period that was not in dispute, but counsel for Defendant refused to do so. Now that the temporal scope of discovery has

⁴ **Interrogatory:** Please list all names and addresses of CNA's, RN's and Nurse Practitioners employed by LFM from 1995 to the present time.

Response: Objection. This interrogatory exceeds the permissible scope of discovery set forth in the Court's October 28, 2003 Order.

been established, Defendant should be compelled to answer this interrogatory fully for the time frame established in this case.

3. Interrogatory No. 2 from Plaintiff's 2nd Set of Interrogatories to Defendant.⁵

Defendant's response to this interrogatory, again, fails to fully respond to the question asked with respect to what has now been established as the relevant time period in this matter. As there was no objection raised, Defendant should be compelled to respond fully to the interrogatory. Further, clearly a list of employees who worked at the facility while the illegal billing was taking place is relevant and could lead to the discovery of relevant and possibly important witnesses in this matter.

4. Document Requests Nos. 1 and 2 in Plaintiff's 1st Request for Production.⁶

This request for production simply asks for documents that might explain the managerial or organizational structure of the Defendant. Certainly, as the Defendant is a corporation, it is important to understand the structure of the company, as well as the names of the people who are responsible for decisions in the company, including decisions to submit the false claims.

⁵ **Interrogatory:** Please identify all persons who are and were employees of LFM during the relevant time period. This includes all individuals or entities who are or were independent contractors.

Response: Objection. LFM previously furnished Plaintiff's counsel with a list of all its employees in May 1999 when Plaintiff terminated her employment. The identity of individuals or entities who were LFM's independent contractors exceeds the scope of permissible discovery set forth in this Court's October 28, 2003 Order.

⁶ **Request #1:** All Articles of Incorporation, Bylaws, Operating Agreements and any and all other organizational documents of the Defendant.

Request #2: All documents that reflect the managerial/organizational structure and employee composition of the Defendant.

Response: The responses to the First Set of Requests for Production are not organized in a manner to determine what documents are responsive to each request. Thus, Relator refers to Exhibit J, which is the "Defendant's Supplemental Response to Plaintiff's First Request for Production of Documents," which is actually Defendant's first true response, and does not supplement any previous actual production.

Over the years, Relator is aware that the ownership and/or managerial structure has certainly changed as the name of the relevant entity has changed at least twice since this lawsuit was filed, although the partners/principals of the entity remain the same. In order to discover all persons who might have relevant information, it is certainly relevant to reveal the structure of the Defendant Corporation. The only documents produced by Defendants that could even arguably be responsive to this request is a copy of the Articles of Incorporation from 2003, a list of employees who worked for Defendant in May 1999, and job descriptions of some of the positions maintained by Defendants. Certainly, since the Defendant has changed names at least twice, there must be more relevant documents relating at least to the name change. Further, there must be documents which reflect the persons who control the entity, including, but not limited to, by-laws and any operating agreements. These documents should be compelled and produced to Relator.

6. Request No. 8 of Relator's First Set of Requests for Production.⁷

Although Defendant has produced some documents responsive to this request, it improperly limited the time frame to the scope of Walker's employment at LFM and has refused to update its production to the relevant time frame of this case as set forth by the Eleventh Circuit Court of Appeals. Such documents should be compelled as they are clearly relevant and discoverable as they may reveal what Defendant knew and understood the Medicare guidelines to be while improperly submitting claims for reimbursement – the very issues in this case. Further, despite Defendant's objection, the request clearly limits the documents sought to documents in Defendant's possession, custody or control. Defendant is not being asked to research this case, but to search its own documents and produce those that are responsive.

⁷ **Request #8:** All documents in your possession, custody or control which relate to all guidelines and regulations which LFM believes were the Medicare guidelines and regulations that regulated the conduct of LFM in its participation within the Medicare Program during the relevant time period.

Response: Objection. This request asks LFM to research Ms. Denk-Walker's case. The request is not limited to documents prepared by or for LFM and is improper. *See Chudasama v. Mazda Motor Corp.*, 123 F.3d 1353 (11th Cir. 1997)

7. Request No. 9 of Relator's First Set of Requests for Production and Request No. 3 of Relator's Third Set of Requests for Production.⁸

Defendant has refused to produce actual bills and claims submitted to Medicare and/or its intermediaries during the relevant time period and any documents that reveal whether the claims were paid by the government. These are the very false claims about which this case revolves, and are thus clearly relevant.⁹

Further, in response to Requests for Admission, Defendant has admitted that it “possesses records of the claims it submitted to Medicare.” (Exhibit D). Defendant states that it submitted these claims electronically. Thus, it should be simple for Defendant to simply produce those documents via disk to Relator.¹⁰ There is no justification for withholding these documents and Defendant should be compelled to produce all submissions for claims that were made “incident to” the care of a physician during the relevant time period.

⁸ **Request #9:** All documents in your possession, custody or control which relate to all Requests for Reimbursement submitted to Medicare and/or its intermediaries by LFM during the relevant time period, including corresponding records of payments and rejections of Requests for Reimbursement by Medicare and/or its intermediaries.

Response: Objection. See general objections above.

Request #3: Any and all records which show any and all details relating to the billing of LFM for Plaintiff's services and services of all other CNRAs, ARNPs, CNAs, registered nurses, licensed practical nurses, physicians, technicians, physicians assistants, “mid-level care providers,” and all administrative, clerical and other support personnel to Medicare under the name of a LFM physician.

Response: Objection. The scope of the request exceeds the permissible scope of discovery set forth in the Court's October 28, 2003, order granting LFM's motion for protective order. LFM is in the process of copying and deidentifying the documents responsive to this request that fall within the permissible scope of discovery.

⁹ These documents have also been specifically identified by Relator's two expert witnesses as critical documents that they each need in order to have a better, more complete understanding of the facts of the situation and in order to update and make more complete, each of their expert opinions.

¹⁰ Relator requests that these documents be produced in native file format in order to preserve the integrity of the claims as they were made.

8. Request No. 17 of Relator's First Set of Requests to Produce, and Request No. 2 of Relator's Third Set of Requests to Produce.¹¹

This request seeks medical records of patients of the Defendant who received services by a non-physician care provider and whose services were billed as “incident to” the services of a physician. This request was the subject of a previous hearing on a motion for a protective order, from which Magistrate Judge Jones wrote an Order that is the subject of still-pending objections and appeal to the United States District Court Judge.

As argued in those Objections, Relator must be given access to the medical records of certain patients of Defendant in order to prosecute her claims. The office administrator for Defendant admitted in her deposition that the only way to determine if a Medicare recipient, who was provided services by a non-physician, was seen for new problems or if that patient's treatment plan was changed, is to review the medical chart for that patient. (Exhibit B, pg. 115, ln. 3-10; pg. 133-134, ln. 23-25, 1-4.) Thus, the Defendant's own agent admitted that not only are the medical chart's relevant, but they are integral and crucial to being able to prove the allegations at issue in this lawsuit.

¹¹ **Request #17:** All documents in your possession, custody or control which relate to documents regarding LFM's Medicare patients' records only to the extent that such information will include patient names, last known addresses and telephone numbers, social security numbers, dates of birth, and dates of treatment, the diagnoses and the nature of the treatment provided to such Medicare patients and by whom at LFM, for all office visits, including the amount billed to Medicare for each visit, of the referenced patients during the relevant time period. The Plaintiff notes that it will enter into a reasonable Confidentiality Agreement pertaining to the requested patient information.

Response: Objection. See general objections above.

Request #2: Any and all documents which show and establish the identities of the patients who were seen by the Plaintiff, and all other CNRAs, ARNPs, CNAs, registered nurses, licensed practical nurses, physicians, technicians, physicians assistants, “mid-level care providers,” and all administrative, clerical and other support personnel and or any “mid-level care providers,” including billing information and insurance information. This request includes all “UB-92” forms for any patients seen by Plaintiff or other “mid-level care providers” during the relevant time period.

Response: Objection. The scope of the request exceeds the permissible scope of discovery set forth in the Court's October 28, 2003, order granting LFM's motion for protective order. LFM is in the process of copying and deidentifying the documents responsive to this request that fall within the permissible scope of discovery.

Further, both owners of LFM have testified that they relied upon recommendations of RCFA, their own consulting firm, in submitting their Medicare bills in the manner they did. Ms. Hill, a former billing/coding consultant for RCFA, testified that in order to determine whether the billing was done correctly in accordance with the guidelines on “incident to” billing, she needed to look at patient medical records.¹² Thus, as Defendant’s own consultant needed the patient records in order to determine whether LFM’s billing procedures were proper, it is more than disingenuous for Defendant to argue that these records are not necessary for Walker to make the same determination independently.

On July 14, 2004, Relator’s expert, Dr. James McClave provided certain preliminary opinions with regard to the estimated damages sustained by Plaintiff United States of America as a result of Defendant improperly billing Medicare under the three scenarios outlined above. Due to the paucity of discovery conducted and/or allowed at that time, Dr. McClave had to base his preliminary opinions upon verbal conversations with Relator’s counsel. (Exhibit K, pg. 3.) Dr. McClave stated he intended to revise his report and “update these calculations if and when new, relevant information, becomes available. I will also calculate the **actual** damages suffered by the government by the payment of these improper claims when data becomes available that will make that calculation possible.” (*Emphasis added.*) (Exhibit K, pg. 5) The only way to calculate *actual* damages sustained by Plaintiff under all the scenarios outlined by Relator is to cross-reference the billed charges against each Medicare patient’s medical chart to see whether any changes were made to the treatment plan or to see whether the patient was seen for a new condition.¹³

¹² This deposition took place on August 11, 2007, and the transcript has been ordered, but is not yet ready. When the transcript becomes available, Relator will file the relevant portions with this Court for reference.

¹³Christina Melnykovich, another expert retained by Relator, has also produced a report concluding Defendant knowingly and “improperly billed and collected payments for services provided to its patients by Karyn D. Walker [*sic*] and other non-physician practitioners in its employ.” (Exhibit L, p. 2.) Ms. Melnykovich went on to state, “It is my understanding that discovery is ongoing and may reveal other information relevant to my opinions, which might warrant modification or supplementation of my opinions.” *Id.* p. 5.

Again, in following the directives of the Eleventh Circuit to allow Walker access to discovery of all information relevant to her claims on behalf of the United States that false claims for payment were made by LFM, Defendant must be compelled to produce all medical charts for patients seen by non-physician care providers during the relevant time frame.

CONCLUSION

For the foregoing reasons, Relator respectfully requests that this Court enter an order compelling Defendant to answer the interrogatories at issue, and produce the documents identified, within ten days of such order. Further, Relator asks that this Court impose the costs of having to file this motion upon Defendant pursuant to Fed.R.Civ.P. 37.

3.01(g) CERTIFICATION

The undersigned counsel represents that she has engaged in numerous written and oral communications with counsel for Defendant in an attempt to resolve these issues. These attempts began prior to the Eleventh Circuit's Mandate in this case and have continued since then. In the most recent attempt to resolve these issues, counsel for Defendant has simply stated that, "With regard to your other objections, our position on those matters is well known and well briefed."

(Exhibit A.)

Dated this 16th day of August, 2007.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished electronically on this 16th day of August, 2007, to the following individuals via the CM/ECF system:

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