IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

NATALIE M. GRIDER, M.D. and KUTZTOWN FAMILY MEDICINE, P.C.,	)	Civil Action No. 2001-CV-05641
Plaintiffs	)	
v.	)	
KEYSTONE HEALTH PLAN CENTRAL, INC., HIGHMARK, INC., JOHN S. BROUSE, CAPITAL BLUE CROSS, JAMES M. MEAD, and JOSEPH PFISTER,	)	
Defendants	)	
and	)	
STEVENS & LEE, P.C. DANIEL B. HUYETT JEFFREY D. BUKOWSKI HANGLEY, ARONCHICK, SEGAL & PUDLIN, and STRADLEY, RONON, STEVENS & YOUNG	)	
Respondents	)	

* * *

APPEARANCES:

KENNETH A. JACOBSEN, ESQUIRE
FRANCIS J. FARINA, ESQUIRE
JOSEPH A. O'KEEFE, ESQUIRE
On behalf of Plaintiffs

MICHAEL L. MARTINEZ, ESQUIRE
DANIEL T. CAMPBELL, ESQUIRE
MALCOLM J. GROSS, ESQUIRE
KIMBERLY G. KRUPKA, ESQUIRE
On behalf of Defendants Capital Blue Cross Keystone Health Plan Central, Inc., James M. Mead and Joseph Pfister

SANDRA A. GIRIFALCO, ESQUIRE
WILLIAM T. MANDIA, ESQUIRE
JEREMY D. FEINSTEIN, ESQUIRE
On behalf of Defendants
Highmark, Inc. and John S. Brouse

PATRICK J. O'CONNOR, ESQUIRE
THOMAS B. FIDDLER, ESQUIRE
MATTHEW J. SIEGEL, ESQUIRE
MALCOLM J. GROSS, ESQUIRE
On behalf of Defendant James M. Mead

BARBARA W. MATHER, ESQUIRE
CHRISTOPHER J. HUBER, ESQUIRE
On behalf of Respondents Hangley, Aronchick, Segal and Pudlin

LAWRENCE J. FOX, ESQUIRE
ELIZABETH Y. McCUSKEY, ESQUIRE
On behalf of Respondents Stevens & Lee, Daniel B. Huyett and Jeffrey D. Bukowski

MICHAEL D. O'MARA, ESQUIRE
On behalf of Respondent Stradley, Ronon, Stevens and Young

* * *

O P I N I O N

JAMES KNOLL GARDNER,
United States District Judge

This matter is before the court on two separate sanctions motions filed by plaintiffs. Plaintiffs' Motion for Sanctions and for Findings of Contempt Under Rules 11, 26(g) and 37 of the Federal Rules of Civil Procedure and Other Provisions

of Law was filed on March 22, 2006.[1] Plaintiff's Combined Motion and Memorandum for Sanctions and Findings of Contempt Under Rule 37 of the Federal Rules of Civil Procedure and Other Provisions of Law for Defendants' Flagrant Disobedience of This Court's April 26, 2004 Order Prohibiting the Redaction of Discovery Documents was filed December 19, 2006.[2]

A sanctions hearing was conducted by the undersigned on January 22, 23, 24, 25, 26 and February 6, 7, 8 and 9, 2007. Plaintiffs presented the testimony of ten witnesses and 161 exhibits. Defendants Highmark, Inc. and John S. Brouse presented two witnesses and 54 exhibits. Defendants Capital Blue Cross, Keystone Health Plan Central, Inc., James M. Mead and Joseph Pfister presented two witnesses and 20 exhibits. Respondents

---

[1] The Answer of Defendants Capital Blue Cross and James M. Mead to Plaintiffs' Motion for Sanctions and for Findings of Contempt Under Rules 11, 26(g) and 37 of the Federal Rules of Civil Procedure and Other Provisions of Law, was filed on April 10, 2006.

The Response in Opposition to Plaintiffs' Motion for Sanctions and for Findings of Contempt Under Rules 11, 26(g) and 37 of the Federal Rules of Civil Procedure and Other Provisions of Law was filed on behalf of defendants Highmark, Inc. and John S. Brouse on April 10, 2006.

Defendants Keystone Health Plan Central, Joseph Pfister and Their Counsels' Answer to Plaintiffs' Motion for Sanctions and for Findings of Contempt Under Rules 11, 26(g) and 37 of the Federal Rules of Civil Procedure and Other Provisions of Law was filed on April 10, 2006.

[2] The Response of Defendants Highmark Inc. and John S. Brouse in Opposition to Plaintiffs' Combined Motion and Memorandum for Sanctions and for Findings of Contempt Under Rule 37 of the Federal Rules of Civil Procedure and Other Provisions of Law for Defendants' Flagrant Disobedience of This Court's April 26, 2004 Order Prohibiting the Redaction of Discovery Documents was filed on January 2, 2007.

The Opposition of Capital and Keystone Defendants to Plaintiffs' Motion for Sanctions and for Findings of Contempt was filed on behalf of defendants Capital Blue Cross, James M. Mead, Keystone Health Plan Central, Inc. and Joseph Pfister on January 2, 2007.

Daniel B. Huyett, Esquire, Jeffrey D. Bukowski, Esquire and the law firm of Stevens & Lee, P.C. presented one witness and 43 exhibits. Respondent Stradley, Ronon, Stevens & Young presented no witnesses and six exhibits. Finally, respondent Hangley Aronchick, Segal & Pudlin presented one witness and 22 exhibits.

At the conclusion of the hearing, I took the matter under advisement. Thereafter, I reviewed the hearing testimony and exhibits and researched the matter. For the following reasons I now grant in part, and deny in part, plaintiffs' two sanctions motions.

SUMMARY OF DECISION

Specifically, I conclude that Defendants Keystone Health Plan Central, Inc., Capital Blue Cross, Highmark, Inc. and their respective counsel, including John S. Summers, Esquire, the law firm of Hangley Aronchick, Segal & Pudlin, Jeffrey D. Bukowski, Esquire and the law firm of Stevens & Lee, P.C., Sandra A. Girifalco, Esquire and the law firm of Stradley, Ronon, Stevens & Young all violated Rule 26(g)(2)(A) and (B) of the Federal Rules of Civil Procedure.

Defendants Keystone Health Plan Central, Inc., Capital Blue Cross, Highmark, Inc. all violated Rule 37(c)(1) of the Federal Rules of Civil Procedure.

Attorney Summers, the law firm of Hangley Aronchick, Segal & Pudlin, Attorneys Huyett and Bukowski, the law firm of

Stevens & Lee, Attorney Girifalco and the law firm of Stradley, Ronon, Stevens & Young all violated 28 U.S.C. § 1927 and Rule 83.6.1 of the Rules of Civil Procedure of the United States District Court for the Eastern District of Pennsylvania by unreasonably and vexatiously multiplying the proceedings in this case.

In all other respects, plaintiffs' two motions for sanctions are denied.

Based upon the violations set forth above, I impose the following sanctions upon each attorney and party sanctioned:

> (1) payment of plaintiffs' reasonable attorneys' fees for the filing of the within two sanctions motions, preparation for hearing and all in-court time during the hearing, together with any costs incurred for prosecution of these two motions;
>
> (2) payment to plaintiffs for all sums paid by plaintiffs as fees to Special Discovery Master Karolyn Vreeland Blume for her services in this case; and
>
> (3) payment of plaintiffs' reasonable attorneys' fees and costs incurred in preparing for, and participating in, all proceedings before Special Discovery Master Blume.

The parties and counsel sanctioned shall each pay the following percentages of the total fees and costs awarded to plaintiffs:

A. Keystone Health Plan Central, Inc. – 25%;

B. Capital Blue Cross - 25%;

C. John S. Summers, Esquire and the law firm of Hangley Aronchick, Segal & Pudlin, jointly and severally - 25%;

D. Highmark, Inc. - 10%;

E. Sandra A. Girifalco, Esquire and the law firm of Stradley, Ronon, Stevens & Young, jointly and severally - 10%; and

F. Daniel B. Huyett, Esquire, Jeffrey D. Bukowski, Esquire and the law firm of Stevens & Lee, P.C., jointly and severally - 5%.

Plaintiffs shall have until on or before October 30, 2006 to file a petition for attorneys fees and costs, together with their time records, including a detailed explanation of the hours expended, the dates of the services performed, the task completed, the hourly rate for each attorney performing work on this matter, and an itemized statement of costs and expenses incurred in connection with these sanctions motions.

JURISDICTION

Jurisdiction is based upon federal question jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1441(b). The court has supplemental jurisdiction over plaintiffs' pendent state law claims. See 28 U.S.C. § 1367. Venue is proper pursuant to 28 U.S.C. § 1391(b) because a substantial number of the events giving rise to plaintiffs' claims allegedly occurred in this judicial district.

PARTIES

Plaintiff Natalie M. Grider, M.D. is a family practitioner and President of plaintiff Kutztown Family Medicine, P.C. ("Kutztown"). Plaintiffs and their affiliates provide medical services to about 4,000 patients who are insured by defendant Keystone Health Plan Central, Inc. ("Keystone").

Keystone is a Health Maintenance Organization ("HMO") organized under the Pennsylvania Health Maintenance Organization Act.[3] Defendant Joseph Pfister is the former Chief Executive Officer of Keystone.

Defendant Highmark, Inc., ("Highmark") formerly known as Pennsylvania Blue Shield, is an insurance company which during the entire class period (January 1, 1996 through October 5, 2001) was a 50% owner of Keystone. Defendant John S. Brouse is the former Chief Executive Officer of Highmark.

Defendant Capital Blue Cross ("Capital") is an insurance company which during the entire class period was a 50% owner of Keystone. Defendant James M. Mead is the former Chief Executive Officer of Capital. In 2003 Capital purchased Highmark's ownership interest in Keystone. Keystone is now a wholly-owned subsidiary of Capital.

Respondents Daniel B. Huyett, Esquire, Jeffrey D. Bukowski, Esquire and the law firm of Stevens & Lee, P.C. are

[3] Act of December 29, 1972, P.L. 1701, No. 364, §§ 1-17, as amended, 40 P.S. §§ 1551-1567.

former counsel for defendants Capital and Mead. Attorney Huyett was lead counsel for Capital and Mead. Attorneys Huyett and Bukowski withdrew their appearances on October 3, 2006.[4]

Respondent law firm Hangley, Aronchick, Segal and Pudlin are the former counsel for defendants Keystone and Pfister. John S. Summers, Esquire was lead counsel for Keystone and Pfister. Attorney Summers and the rest of the attorneys at Hangley, Aronchick, Segal and Pudlin withdrew their appearances on July 3, 2006.[5]

Respondent law firm Stradley, Ronon, Stevens and Young has represented defendants Highmark, Inc and John S. Brouse throughout this litigation. Sandra A. Girifalco, Esquire was lead counsel for defendants Highmark and Brouse from the inception of this case until April 4, 2007.[6]

PROCEDURAL HISTORY

On October 5, 2001 plaintiffs filed their Complaint in the Court of Common Pleas of Philadelphia County. Defendants removed the action to this court on November 7, 2001.[7] By Order

---

[4] See Docket Entry 573.

[5] See Docket Entry 539.

[6] See Docket Entry 736. On April 4, 2007 Mary J. Hackett, Esquire became lead counsel for defendants Highmark and Brouse.

[7] This action was originally assigned to our colleague United States District Judge Anita B. Brody. The case was transferred from the docket of District Judge Brody to the docket of Senior District Judge Thomas N. O'Neill, Jr., on November 16, 2001 and from the docket of Senior Judge O'Neill to the undersigned on December 19, 2002.

and Opinion of the undersigned dated September 18, 2003, I granted in part and denied in part Defendants' Motion to Dismiss, which motion was filed January 23, 2002.

Specifically, I denied defendants' motion to dismiss based upon Pegram v. Herdrich,[8] the McCarran-Ferguson Act[9] and the state-action-immunity doctrine.[10] Defendants' motion to dismiss Count I of plaintiffs' Complaint alleging conspiracy to commit RICO violations was denied. Defendants' motion to dismiss Count II alleging aiding and abetting RICO violations was granted. Defendants' motion to dismiss Count III alleging illegal investment of racketeering proceeds under 18 U.S.C. § 1962(a) was granted without prejudice to file an amended complaint.

In addition, defendants' motion to dismiss Count IV was granted in part and denied in part relating to allegations of fraud, extortion, bribery and violations of the Travel Act[11] and Hobbs Act.[12] Defendants' motion to dismiss Count V alleging a violation of the Pennsylvania Quality Health Care Accountability and Protection Act was denied. Defendants' motion to dismiss Count VI alleging violation of a duty of good faith and fair

---

[8] 530 U.S. 211, 120 S.Ct. 2143, 147 L.Ed.2d 164 (2000).

[9] 15 U.S.C. § 1012.

[10] See Parker v. Brown, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943).

[11] 18 U.S.C. § 1952.

[12] 18 U.S.C. § 1951.

dealing was granted. In all other respects, Defendants' Motion to Dismiss was denied.[13]

On October 6, 2003 plaintiffs filed their Amended Complaint. On November 14, 2003 Defendants' Motion to Dismiss and/or Strike Certain Portions of the Amended Complaint was filed.

On December 30, 2003 a Status Conference was held by the undersigned pursuant to Federal Rule of Civil Procedure 16. At that conference the court attempted, albeit unsuccessfully, to attain consensus between counsel for the parties regarding an appropriate schedule for the completion of discovery, dispositive motions and trial. On January 14, 2004, a comprehensive Rule 16 Status Conference Order was entered by the undersigned memorializing the decisions made at the status conference held December 30, 2003.

From late 2003 until mid-2005, a plethora of motions were filed both with this court and with United States Magistrate Judge Arnold C. Rapoport. The January 2, 2003 Standing Order of the undersigned provides that all discovery disputes which cannot be amicably resolved shall be brought to the attention of

[13] In their Amended Complaint, plaintiffs changed the numbering of some of the counts which were also contained in the original Complaint. This was necessary to accommodate our dismissal of Counts II and VI from the original Complaint and plaintiffs' inclusion of a new count numbered V in the Amended Complaint.

Magistrate Judge Rapoport "by letter or other informal means".[14] Moreover, the Standing Order provides that: "Any party contending that the Order of the Magistrate Judge is clearly erroneous or contrary to law may file a Petition to Reconsider, together with a proposed Order, directed to the undersigned pursuant to 28 U.S.C. § 636(b)(1)(A)."

On April 26, 2004, partly in response to the filing of innumerable motions and the slow pace of discovery, I extended the deadlines set in our January 14, 2004 Rule 16 Status Conference Order. Moreover, on August 5, 2004, because of the inability of the parties to resolve any of their discovery disputes without court intervention, I placed this matter into civil suspense but required the parties to continue the discovery process.

From late 2004 into the summer of 2005 the parties continued their incessant motion practice and exhibited a complete inability to agree on even the most basic matters. In response to plaintiffs' request for appointment of a special master and over defendants' objection, I appointed Karolyn Vreeland Blume, Esquire,[15] as Special Discovery Master ("SDM") by

---

[14] I note that because of the number of disputes and animosity between the parties, Magistrate Judge Rapoport eventually required the parties to file formal motions rather than utilize his usual less formal dispute resolution procedures.

[15] Attorney Blume is known to the court as an attorney of over 30 years experience. She received a Bachelor of Arts degree with honors in

(Footnote 15 continued):

Order dated August 25, 2005, pursuant to the provisions of Rule 53 of the Federal Rules of Civil Procedure.

The next day, on August 26, 2005, I entered an Order granting in part, and denying in part, Defendants' Motion to Dismiss and/or Strike Certain Portions of the Amended Complaint. Specifically, I granted defendants' motion to dismiss all allegations of RICO violations in Counts I and II of the Amended Complaint based upon 18 U.S.C. § 1962(a).

Moreover, I granted defendants' motion to dismiss Count V (breach of contract) of plaintiffs' Amended Complaint against defendants Capital Blue Cross, Highmark Inc., John S. Brouse, James M. Mead and Joseph Pfister. (Count V remains against defendant Keystone only.) I further granted defendants' motion to dismiss plaintiffs' claim for punitive damages from Counts I,

---

(Continuation of footnote 15):

political science in 1974 from Skidmore College and a Juris Doctorate degree from Villanova University School of Law in 1977.

Attorney Blume spent the first 15 years of her career in a private, general law practice handling a broad spectrum of claims and issues for individual, business and non-profit organization clients. From 1992 through 2001 she served as Senior Law Clerk to United States Magistrate Judge Arnold C. Rapoport handling a wide variety of civil and criminal matters involving both state and federal law. Thereafter, from 2001 until 2004 Attorney Blume served as in-house counsel for PPL Corporation. Formerly she served as President of the Bar Association of Lehigh County. Attorney Blume is the founder and owner of Conflict Resolution Services located in Allentown, Pennsylvania. Currently, she provides mediation and arbitration services at all stages of conflict for businesses and other ventures.

Attorney Blume's knowledge and experience made her uniquely qualified to serve as Special Discovery Master in this matter considering the contentiousness exhibited by the parties in the discovery process.

III and V of plaintiffs' Amended Complaint and struck the request for punitive damages from the Amended Complaint.

Finally, I granted defendants motion to strike paragraphs 14(f), 53(f), 53(h), 124 (as it relates to allegations regarding 18 U.S.C. § 1962(b)) and paragraphs 2(j), (m), (o), (u), (v), (w) and (x) from the prayer for relief contained in Count III of plaintiffs' Amended Complaint. I denied defendants' motion to dismiss or strike in all other respects.

On September 12, 2005 all defendants answered plaintiffs' Amended Complaint and asserted affirmative defenses to plaintiffs' claims. Defendant Keystone also asserted a counterclaim for recoupment or set-off.

By Order dated and filed September 26, 2005 I set deadlines for class discovery,[16] expert reports, and expert depositions regarding class discovery; plaintiffs' deadline for filing an amended motion for class certification; defendants' deadline for a response to plaintiffs' motion for class certification; a hearing date for plaintiffs' motion for class

[16] I note that while February 1, 2006 was the deadline established by the court for the completion of class discovery in this matter, class discovery continued, with the constant participation and oversight of Special Discovery Master Blume. Documents offered and received into evidence at the class certification hearings included those produced on the evening of Friday, March 3, 2006 when defense counsel forwarded to plaintiffs' counsel computer disks containing thousands of pages of information regarding claims submissions.

The late production of discovery after the class discovery deadline is one of the many issues addressed in plaintiff's' motion for sanctions filed March 22, 2006.

certification; deadlines for trial expert reports and depositions; a dispositive motion deadline; a deadline for motions in limine; and a trial date.

On March 6-10, 2006 I conducted the class certification hearing in this matter. On March 10, 2006 the record was closed, closing arguments were heard by the court and the matter was taken under advisement.

By my Order and Opinion dated December 20, 2006 and filed December 21, 2006 I certified a class in this class action for the period from January 1, 1996 through and including October 5, 2001 on behalf of the following subclasses:

> All medical service providers in connection with medical services rendered to patients insured by defendant Keystone Health Plan Central, Inc. who during the period January 1, 1996 through October 5, 2001:
>
> > (1) submitted claims for reimbursement on a fee-for-service basis for covered services which claims were denied or reduced through the application of automated edits in the claims processing software used by defendants to process those claims; and/or
> >
> > (2) received less in capitation[17] payments than the provider was entitled through the use and application of automated systems to "shave" such payments in the manner alleged in plaintiffs' Amended Complaint filed October 6, 2003.

[17] A "capitation" is "an annual fee paid a doctor or medical group for each patient enrolled in a health plan." Webster's Third New International Dictionary 332 (1968).

In that Order, I also certified ten factual issues for class treatment, including a common failure to pay clean claims within the applicable statutory time period and common proof of a conspiracy to defraud in violation of RICO.[18] I also certified three legal issues for class treatment, including whether defendants committed mail or wire fraud, and whether they violated the Pennsylvania prompt payment statute.[19]

Finally, I certified eight common defenses for class treatment, including whether the class claims are barred by disclosures in defendants' standard forms, manuals and newsletters; by the applicable statute of limitations; or because of the absence of any material misrepresentations, misleading disclosures or omissions by defendants in their standard form contracts and consulting agreements.

In my class certification Order, I approved plaintiff Natalie M. Grider, M.D., both in her individual capacity and as President of plaintiff Kutztown Family Medicine, P.C., as the sole class representative. I also appointed plaintiffs' counsel, Kenneth A. Jacobsen, Esquire, Louis C. Bechtle, Esquire, Francis J. Farina, Esquire and Joseph A. O'Keefe, Esquire, each as class counsel.

---

[18] The Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968.

[19] Pennsylvania's Quality Health Care Accountability and Protection Act, Act of May 17, 1921, P.L. 682, No. 284, §§ 2101-2193, as amended, 40 P.S. §§ 991.2101 to 991.2193.

PLAINTIFFS' MARCH 22, 2006 SANCTIONS MOTION

Plaintiffs' Motion for Sanctions and for Findings of Contempt Under Rules 11, 26(g) and 37 of the Federal Rules of Civil Procedure and Other Provisions of Law was filed on March 22, 2006. In their March 22, 2006 sanctions motion, plaintiffs seek sanctions and a finding of contempt against the individual and corporate defendants, and their counsel in this case. Specifically, plaintiffs seek sanctions against all defendants and their counsel pursuant to Rules 11,[20] 26(g) and 37 of the Federal Rules of Civil Procedure.

In addition, plaintiffs seek sanctions against all defense counsel and their respective law firms pursuant to 28 U.S.C. § 1927[21] and Rule 83.6.1[22] of the Rules of Civil

---

[20] By my Order dated January 22, 2007 and filed February 28, 2007, I granted the objections of defendants and respondents to the Rule 11 portion of plaintiffs' motion for sanctions and struck all requests and claims based upon that Rule. The reasons for my decision are on the record of the proceedings held on January 22, 2007. Therefore, I need not address any of plaintiffs' allegations concerning Rule 11 sanctions in this Opinion.

[21] 28 U.S.C. § 1927 provides as follows:

> § 1927. Counsel's liability for excessive costs
>
> Any attorney or other person admitted to conduct cases in any court of the Untied states or any territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

[22] Local Rule 83.6.1 (b) and (c) provide:

> Rule 83.6.1 Expedition of Court Business

(Footnote 22 continued):

Procedure for the United States District Court for the Eastern District of Pennsylvania. Finally, plaintiffs seek sanctions under this court's inherent supervisory powers.[23]

Plaintiffs allege that defendants litigation tactics in this case have been a calculated effort to thwart discovery altogether, delay plaintiff's receipt of highly critical documents necessary for the class certification proceedings before the court and for ultimate trial on the merits and to undermine the administration of justice in this court.

Among the strategies plaintiffs allege that defendants and their counsel have intentionally and repeatedly utilized, include numerous measures to subvert and circumvent the discovery process in this case as follows:[24]

> 1. Delaying production of critical documents until after specific deadlines established by the court and Special Discovery Master Blume.

(Continuation of footnote 22):

> (b) No attorney shall, without just cause, fail to appear when that attorney's case is before the Court on a call, motion, pretrial or trial, or shall present to Court vexatious motions or vexatious opposition to motions or shall fail to prepare for presentation to the Court, or shall otherwise so multiply the proceedings in a case as to increase unreasonably and vexatiously the costs thereof.
>
> (c) Any attorney who fails to comply with section (a) or (b) may be disciplined as the Court shall deem just.

[23] See Chambers v. NASCO, Inc., 501 U.S. 32, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991).

[24] See Plaintiffs' Motion for Sanctions and for Findings of Contempt Under Rules 11, 26(g) and 37 of the Federal Rules of Civil Procedure and Other Provisions of Law, which motion was filed on March 22, 2006, at pages 2-4.

2. Denying the existence of documents, only to produce them after the expiration of discovery deadlines.

3. Failing to timely supplement discovery responses under Rule 26(e).

4. Hiding documents behind bogus claims of privilege.

5. Falsely describing documents on privilege logs.

6. Providing evasive and incomplete responsive responses to plaintiffs' discovery requests.

7. Misrepresenting to plaintiffs' counsel, the Special Discovery Master and the court the corporate defendants' interrelationships with each other, and based upon those allegedly false statements, refusing to even search for, let alone produce, documents responsive to plaintiffs' discovery requests.

8. Misrepresenting to plaintiffs' counsel and Special Discovery Master Blume that electronic data either did not exist at all or would take years to retrieve and produce, while at the same time providing similar information to their experts for use in preparation of expert reports to oppose class certification.

9. Flagrant and repeated violation of the court's November 4, 2005 Order that all privilege logs be produced no later than November 14, 2005 and that all underlying documents reflected on those logs be provided to Special Discovery Master Blume by that same date.

10. Permitting alleged perjured testimony to be offered at depositions of their clients and filing equally allegedly perjurious declarations with the court.

11. Allegedly fraudulently compiling and assembling disparate groups of documents together and passing them off as one integrated document

and a single "exhibit" in court filings and at depositions.

12. Repeated and flagrant violations of the Protective Order entered in this case, even after being admonished by Magistrate Judge Rapoport in an Order dated July 20, 2005 for such violations.

As a result of the combined actions and inactions alleged above, plaintiffs seek the following sanctions against defendants, their present counsel and their former counsel.[25]

A. Admonishment of all defense counsel of record, their respective firms and the individual and corporate defendants for the conduct.

B. Findings of Contempt as against all defense counsel of record and all corporate and individual defendants for their conduct.

C. Orders of sanction pursuant to Rules 26(g)(3), 37(a)(4)(A), 37(b)(2)(A), (B), (C) and (D), 37(c)(1) and 37(d) of the Federal Rules of Civil Procedure; 28 U.S.C. § 1927; Local Rule of Civil Procedure 83.6.1; and the inherent powers of the court, including, but not limited to:

(i) reimbursement of plaintiffs' attorneys' fees and expenses (including those paid by plaintiffs to the Special Discovery Master) incurred because of defendants' and respondents' conduct; and

(ii) such other and further relief the court deems just and proper to sufficiently sanction defendants, their current and former counsel to protect the integrity of the court and the administration of justice.

[25] See Plaintiffs' Motion for Sanctions and for Findings of Contempt Under Rules 11, 26(g) and 37 of the Federal Rules of Civil Procedure and Other Provisions of Law, which motion was filed on March 22, 2006, at pages 44-45.

Defendants and respondents deny all of plaintiffs' allegations of misconduct and further deny that any of them have acted in any inappropriate manner in this litigation.

PLAINTIFFS' DECEMBER 19, 2006 SANCTIONS MOTION

Plaintiff's Combined Motion and Memorandum for Sanctions and Findings of Contempt Under Rule 37 of the Federal Rules of Civil Procedure and Other Provisions of Law for Defendants' Flagrant Disobedience of This Court's April 26, 2004 Order Prohibiting the Redaction of Discovery Documents was filed on December 19, 2006.

In their December 19, 2006 sanctions motion, plaintiffs seek sanctions and a finding of contempt against the individual and corporate defendants, and their counsel in this case.[26] Specifically, plaintiffs seek sanctions against all defendants and their counsel pursuant to Rule 37 of the Federal Rules of Civil Procedure, pursuant to 28 U.S.C. § 1927 and Local Rule 83.6.1 this court's inherent supervisory powers.

In this regard, plaintiffs allege that defendants and their counsel have redacted documents on the basis of relevance.

[26] In footnote 1 of the December 19, 2006 sanctions motion, plaintiffs state: "Plaintiffs seek sanctions only against the law firms of defendants' counsel, not any individual attorney. However, the prayer for relief of the December 19, 2006 sanctions motion seeks admonishment of all defense counsel and the individual and corporate parties and findings of contempt against all defense counsel and all individual and corporate parties. I find that footnote 1 and the prayer for relief are inconsistent. Thus, in analyzing the conduct of defendants and their respective counsel on the issues involved in this motion for sanctions, I will rely on the prayer for relief in analyzing plaintiffs' allegations of misconduct.

More particularly, plaintiffs allege that by redacting documents on the basis of relevance, defendants and their counsel are in violation of the verbal directive made on the record on January 14, 2004 by United States Magistrate Judge Arnold C. Rapoport and in violation of my April 26, 2004 Order and Opinion.

Moreover, plaintiffs allege that defendants have refused to reference documents on privilege logs by a Bates number. Rather than put Bates numbers on privilege logs, plaintiffs allege that defendants refer to redacted or withheld documents by a reference number, the significance of which is known by only defendants and their counsel.

As a result of the combined actions and inactions alleged above, plaintiffs seek the following sanctions against defendants, their present counsel and their former counsel.

> A. Admonishment of all defense counsel of record, their respective firms and the individual and corporate defendants for the conduct.
>
> B. Findings of contempt against all defense counsel of record and all corporate and individual defendants for their conduct.
>
> C. That sanctions be imposed against all parties and their former and current counsel pursuant to Rules 26(g)(3), 37(a)(4)(A), 37(b)(2)(A), (B), (C) and (D), 37(c)(1) and 37(d) of the Federal Rules of Civil Procedure; 28 U.S.C. § 1927; Local Rule of Civil Procedure 83.6.1; and the inherent powers of the court, including, but not limited to:
>
> > (i) reimbursement of plaintiffs' attorneys' fees and expenses incurred from April 26, 2004 until December 19, 2006; and

(ii) deeming established for purposes of this action the facts alleged in paragraphs 6, 7, 56-63, 66-79, 80-85, 111-113 and 123-137 of plaintiffs' Amended Complaint filed October 6, 2003.

Defendants and respondents deny all of plaintiffs' allegations of misconduct in the December 19, 2006 sanctions motion. Furthermore, they deny that any of them have acted in any inappropriate manner in this litigation.

FINDINGS OF FACT

Based upon the testimony elicited at the sanctions hearing, the exhibits introduced, plaintiffs' two sanctions motions and responses, the pleadings and record papers, and my credibility determinations,[27] I make the following findings of fact.

1. On September 12, 2003 Plaintiffs' First Request for Production of Documents Related to Class Certification was served upon defendant Keystone, which document requests sought broad categories of documents relating to capitation (request #1), claims information relating to capitation (request #12) and reduced provider reimbursement under capitation. (Plaintiff's Exhibit 333, Tab 1).

2. Plaintiffs' First Request for Production of Documents sought a privilege log for any document withheld pursuant to a claim of privilege. (Plaintiff's Exhibit 333, Tab 1, page 4).

[27] Our Findings of Fact reflect our credibility determinations regarding the testimony and evidence presented at the sanctions hearing. Credibility determinations are within the sole province of the finder of fact, in this case the court. Fed.R.Civ.P. 52. See, e.g. Icicle Seafoods, Inc. v. Worthington, 475 U.S. 709, 715, 106 S.Ct. 1527, 1530, 89 L.Ed.2d 739, 745 (1986). Implicit in our findings is the conclusion that we found the testimony of witnesses credible in part, and have rejected portions of each of their testimony as more fully explained in our discussion.

3. On September 12, 2003 Plaintiffs' First Set of Interrogatories Related to Class Certification was served on defendant Keystone. On December 4, 2003 these Interrogatories were converted into document requests during a hearing before Magistrate Judge Rapoport. These Interrogatories sought information regarding capitation, provider reimbursement, complaints by providers about reimbursement and information concerning the elements that would be required to be proved for class certification. (Plaintiff's exhibit 333, Tab 2).

4. From October 2003 through December 2003, Keystone's in-house legal department and attorneys from respondent Hangley, Aronchick, Segal & Pudlin, including John S. Summers, Esquire, conducted a series of meetings regarding the defense of this case. (Notes of Testimony ("N.T.") of the hearing conducted before me on February 7, 2007 at pages 23-24, 34-43, 65-67 and 69-72).

5. Michael Wolfe, Esquire, corporate counsel for Capital since January 15, 2001, communicated on behalf of Capital and later both Capital and Keystone with outside counsel for Capital and Keystone on a regular basis. (Notes of Testimony of the hearing conducted before me on January 25, 2007 at page 18; Notes of Testimony of the hearing conducted before me on January 26, 2007 at page 73; Notes of Testimony of the hearing conducted before me on February 8, 2007 at pages 71-72).

6. Sometime between October 2003 and the end of December 2003, defendants and defense counsel entered into a joint-defense agreement, and Attorney Summers took the lead in defending this case on behalf of all defendants and their counsel. (Notes of Testimony of the hearing conducted before me on January 23, 2007 at pages 90-95).

7. During meetings held with Keystone employees, Attorney Summers instructed Keystone employees that they were not permitted to obtain claims processing data or reports from Synertech (Keystone's claims processor) that might be responsive to plaintiffs' discovery requests even though Keystone employees routinely requested reports and data from Synertech. Moreover, during this time, Attorney Summers requested Keystone employees to obtain data and reports to support defenses to the substantive claims and class certification issues. (Plaintiffs' Exhibits 129, 199, 218, 244 and 245; Hangley, Aronchick, Segal & Pudlin ("HASP") Exhibit 1; Capital Blue Cross ("CBC") Exhibits 25, 29 and 85); Special Discovery Master ("SDM") Report #4 (Docket Entry 454); Notes of Testimony of the hearing conducted before me on January 24, 2007 at pages 17-18, 61, 62-65, 66 and 74-78; Notes

of Testimony of the hearing conducted before me on February 9, 2007 at pages 28-35; N.T., February 7, 2007, at 23-24, 34-43, 65-67, 69-72, 140-150, 168).

8. Synertech was the processor of, and storage for, all of Keystone's claims data. Pursuant to the terms of the Administrative Services Agreement ("ASA") by and between Keystone and Synertech, the information processed and stored by Synertech was continuously owned by, and remained the property of, Keystone while in Synertech's possession. (CBC Exhibit 85).

9. Pursuant to the ASA, Keystone was entitled to obtain routine and regular reports from Synertech created from the data that Synertech stored. Keystone utilized Special Operation Requests in the ordinary course of business to obtain data reports from Synertech similar to the type sought by plaintiffs in their discovery requests. (CBC Exhibits 25, 29, and 85; Plaintiffs' Exhibits 129, 199, 218, 241, 244, 245 and 333, Tabs 1, 2, 8, and 9; HASP Exhibit 1; N.T., January 24, 2007, at 17-18, 61, 62-65, 66, 74-78; N.T., February 7, 2007, at 23-24, 34-43, 65-67, 69-72, 140-150, 168).

10. Defendants routinely denied not only the existence of the Synertech data, but also their ability to comply with plaintiffs' discovery requests. (SDM Report #8, Docket Entry 543).

11. On October 14, 2003 an unknown employee of Keystone created "Kutztown-030306" database on a Keystone computer. This database contained data which plaintiffs requested in their formal discovery requests years prior to February 2006. In response, Keystone repeatedly denied possession, custody, control, or the ability to generate the requested data, until Keystone produced it in February 2006, after the close of the class certification discovery period deadline, and very shortly before commencement of the class certification hearing. (Plaintiffs' Exhibit 240).

12. On October 17, 2003 all commercial claims, error code descriptions and Senior Blue claims tables were added to the Kutztown-030306 database. (Plaintiffs' Exhibit 240).

13. From October 2003 through November 2003, Keystone had the ability to generate data of the exact type which plaintiffs sought to be produced. This data could be requested from Synertech in the normal course of business by simply requesting the data. (Plaintiffs' Exhibits 129, 199, 218, 241, 244, 245 and 333; HASP Exhibit 1; CBC Exhibits 25, 29 and 85;

N.T., January 24, 2007, at pages 64-66; N.T., February 7, 2007, at 23-24, 34-43, 65-67, 69-72, 140-150, 168).

14. The Kutztown-030306 database created by Keystone on October 14, 2003 revealed that the information sought by plaintiffs was available to Keystone and in its possession and control throughout the discovery process. (Plaintiff's Exhibit 240).

15. On November 25, 2003 Keystone employee Ruth Jurkiewicz produced a computer disk from the Kutztown - 030306 database . This disk contained a spreadsheet known as "Grider to Legal". The spreadsheet contained detailed claims and encounter information regarding plaintiff Kutztown Family Medicine, P.C. for the class period and beyond. This is indicative of Keystone's ability, as early as Fall 2003, to produce and generate reports and claims data. (Plaintiffs' Exhibits 240 and 241).

16. On November 26, 2003 Capital and Highmark closed on a Stock Purchase Agreement whereby Capital acquired Highmark's 50% interest in Keystone. On that date, Capital became the sole owner of Keystone. Between January 1 and March 31, 2004 all Keystone employees became Capital employees. Capital then obtained actual possession, custody and control over all Keystone documents. (N.T., January 25, 2007, at 19-20.)

17. In January 2004 Keystone had the ability to generate claims data through its Comprehensive Analytical Health Reporting System ("CAHRS") in the routine course of business. (N.T., January 24, 2007, at 64-66; N.T., February 7, 2007, at 23-24, 34-43, 65-67, 69-72, 140-150, 168).

18. On January 14, 2004 Magistrate Judge Rapoport ruled that defendants were not the arbiters of relevance and directed defendants not to withhold discovery on that basis.

19. On January 25, 2004 after being unable to obtain claims data from defendants, plaintiffs served a subpoena on Synertech seeking materials and data stored for defendant Keystone. (Plaintiffs' Exhibit 102).

20. Soon after plaintiffs' subpoena was served on Synertech, Ed Loscher of Synertech was contacted by Keystone in-house counsel and was asked to gather Keystone related documents, a request that he honored by sending a complete set of materials to Hangley, Aronchick, Segal & Pudlin. (N.T., January 24, 2007, at 7-8).

21. On February 2, 2004 Plaintiffs' Second Request for Production of Documents Directed to All Defendants was served and requested all documents related to combination logic ("combo logic")(Request 25), automatic denials (Request 26), and all documents provided to any consultant or retained expert (Request 56). (Plaintiffs' Exhibit 333, Tab 8).

22. By my Order dated February 2, 2004, defendants were directed to provide privilege logs in the form outlined in the Order. (Docket Entry 61).

23. On February 6, 2004, after its attorney, Mark A. Lieberman, Esquire, had consulted with Keystone's counsel, John S. Summers, Esquire, Synertech objected to plaintiffs' subpoena, claiming that the materials sought were "trade secrets". (Plaintiffs' Exhibit 106; N.T., January 24, 2007, at 96-98 and 99-121).

24. On February 19, 2004 Keystone employee Ruth Jurkiewicz sent a memorandum to Brian Britt of Keystone attaching all Kutztown Family Medicine, P.C. claims that were rejected because of bundling, rejected because the procedure was deemed integral, rejected for capitation, and rejected by error code. (Plaintiffs' Exhibit 217).

25. On February 24, 2004 Ruth Jurkiewicz sent a second memorandum to Brian Britt. The memorandum listed many claims for medical services provided to patients by plaintiff Kutztown Family Medicine, P.C. which were rejected for payment by Keystone. Keystone's computer had been programmed to reject, as "integral", claims for more than one medical service performed for a patient by a doctor on the same day. The Keystone computer assigned an "error code" to such dual claims, signifying that the claim had been rejected. (Plaintiffs' Exhibit 217).

26. On March 1, 2004 Attorney Summers sent a letter to the court attaching a series of Declarations which affirmatively represented to the court that plaintiffs' allegations of bundling and downcoding lacked any factual basis, and that those claims were "without merit". (Plaintiffs' Exhibit 238; N.T., January 26, 2007, at 62-66).

27. After plaintiff served a subpoena requesting documents from Synertech, Keystone counsel John S. Summers contacted Synertech, after which on March 3, 2004 Synertech made its personnel available to Attorney Summers. (Plaintiffs' Exhibit 109; N.T., January 24, 2007, at 7-8, 18-21, 96-98 and 99-121).

28. On April 5, 2004, in response to plaintiffs' repeated demands for the underlying data and materials in support of the Declarations sent to the court on March 1, 2004, Attorney Summers sent a letter to plaintiffs' counsel declaring that the Declarations were "lay opinion" under Rule 701 of the Federal Rules of Evidence, and stating that he refused to produce the supporting material underlying the Declarations. (Plaintiffs' Exhibit 136).

29. By Order and Opinion of the undersigned dated April 26, 2004, defendants were directed to either produce materials responsive to plaintiffs' discovery requests or to place such materials on a privilege log as required by the Federal Rules of Civil Procedure and by the undersigned's February 2, 2004 Order. (Docket Entry 86).

30. On May 7, 2004 Attorney Summers changed his position concerning the materials and data in support of the Declarations which he sent to the court on March 1, 2004. Specifically, Attorney Summers changed the reason he gave for not disclosing the data and materials. Previously, he had contended that the data and materials constituted "lay opinion". On May 7th he asserted that the data and materials were protected from discovery under the "expert disclosure" provision of Federal Rule of Civil Procedure 26(a)(2) and Federal Rule of Evidence 702. (Plaintiffs' Exhibit 145).

31. On May 17, 2004 Plaintiffs' Third Request for Production of Documents Related to Class Certification Directed to Defendant Keystone Health Plan Central was served. (Plaintiffs' Exhibit 333, Tab 9).

32. Plaintiffs' Third Request for Production of Documents Related to Class Certification Directed to Defendant Keystone Health Plan Central formally requested all declarant materials (Request 1) and lists of combined and bundled codes (Requests 3 and 4). (Plaintiffs' Exhibit 333, Tab 9).

33. From May 4, 2004 until May 20, 2004, six databases with bundling and downcoding data were created by Keystone from claims data obtained from Synertech. (Plaintiffs' Exhibit 244).

34. On June 14, 2004 Attorney Summers spent an entire day at the offices of Synertech questioning witnesses who were scheduled for depositions noticed by plaintiffs to be conducted the next day. Attorney Summers asked numerous questions and reviewed documents with all of the witnesses in preparation for their upcoming depositions. Counsel for Synertech, Mark A.

Lieberman, Esquire, was present for these interviews. (N.T., January 24, 2007, at 99-121).

35. On June 21, 2004 the Response of Defendant Keystone Health Plan Central to Plaintiffs' Third Request for Production of Documents was served. In its response, Keystone interposed a new objection to plaintiffs' discovery requests. The objection stated "KHP Central further objects to production of a privilege log regarding documents prepared or created after KHP Central's current counsel were retained in October 2003." (Plaintiffs' Exhibit 333, Tab 17).

36. The Response of Defendant Keystone Health Plan Central to Plaintiffs' Third Request for Production of Documents also contained a new objection to Document Request No. 1 (a request for all the underlying materials and data supporting the Declarations by Keystone employees). This new objection stated that the declarant materials were protected by the attorney-client privilege and work product doctrine. Furthermore, defendant stated that "the documents relied upon and which form the basis of the declarations are attached to each employee's declaration." (Plaintiffs' Exhibit 333, Tab 17).

37. On June 27, 2004, after providing certain documents in discovery, Cheryl A. Krause, Esquire, an attorney at Hangley, Aronchick, Segal & Pudlin, sent plaintiffs' counsel a letter indicating that Keystone's recent production contained numerous inadvertently produced privileged documents, one of which was presumed by plaintiffs to be a memorandum authored by Keystone employee Robert Dufour. (Plaintiffs' Exhibit 154).

38. On July 14, 2004 Keystone forwarded plaintiffs' counsel an updated supplemental privilege log that did not reference the memorandum authored by Mr. Dufour. (Plaintiffs' Exhibit 157). On that same day, a completely redacted Dufour document was served on plaintiffs. The document was completely blank except for bearing Bates number KHP0066053. However, the document did not appear on a privilege log. (Plaintiffs' Exhibit 155).

39. On October 26, 2004, some Synertech witnesses were deposed by plaintiffs' counsel. During the deposition, counsel for Synertech sought a protective order from Magistrate Judge Rapoport. The requested protective order concerned questions posed to a Synertech witness about the preparation of Synertech witnesses by attorneys from Hangley, Aronchick, Segal & Pudlin. Judge Rapoport denied the protective order request. (Docket Entry 157).

40. Counsel for Synertech attempted to immediately appeal Judge Rapoport's denial of a protective order to the undersigned District Judge James Knoll Gardner, who was out of town. Counsel then sought intervention from the sitting Emergency Judge, United States District Judge Gene E.K. Pratter. Judge Pratter also denied a protective order. (Docket Entry 367).

41. On November 5, 2004 Synertech sought reconsideration of Magistrate Judge Rapoport's denial of a protective order. (Docket Entry 164). On November 24, 2004 Synertech filed an "amended" motion for reconsideration of Judge Rapoport's denial of a protective order. (Docket Entry 176).

42. On November 1, 2004 Capital's counsel denied possessing any documents relating to the "Health Connections" company referred to by Capital Chief Executive Officer Anita Smith at her deposition, which documents were the subject of a specific document request made by plaintiffs. (Plaintiffs Exhibits 71 and 333, Tab 10 (request 1)).

43. On November 5, 2004 plaintiffs' counsel, Francis J. Farina, Esquire, sent a letter to Attorney Krause of Hangley, Aronchick, Segal & Pudlin concerning withheld documents that were not listed on any privilege log, including the redacted Dufour document. (Plaintiffs' Exhibit 177).

44. On November 8, 2004 counsel for defendants Highmark and Brouse denied that Highmark audits Keystone operations or has any audit documents concerning Keystone. (Plaintiffs' Exhibit 29).

45. On November 19, 2004 Attorney Krause responded by letter to Attorney Farina's November 5, 2004 letter. Attorney Krause reiterated defendant Keystone's position that any documents obtained, generated or otherwise derived after the appearance of Hangley, Aronchick, Segal & Pudlin as defense counsel in this case will not be listed on a privilege log. (Plaintiffs' Exhibit 178).

46. On November 22, 2004 counsel for defendants Highmark and Brouse again deny that Highmark audits Keystone operations or has possession of any audit documents involving Keystone. (Plaintiffs' Exhibit 94, Responses 32 and 35).

47. On December 6, 2004 a Keystone electronic mail ("e-mail") was generated with "Summers Data Spreadsheet XLS" as an attachment. (Plaintiffs' Exhibit 200).

48. On January 14, 2005 counsel for the parties convene the last of a series of "meet and confer" discussions, for the purpose of reviewing outstanding discovery requests and objections. At this final meeting, counsel for all defendants refused to withdraw the "general objections" contained in all of their respective responses to plaintiffs' discovery requests. Moreover, counsel for Keystone again refused to list the declarant materials on a privilege log. (Plaintiffs' Exhibit 67)

49. On April 5, 2005, after plaintiffs sought depositions of certain representatives from defendant corporations for the purpose of establishing compliance with the requirement that defendants search for documents responsive to plaintiffs' discovery requests, defense counsel Daniel B. Huyett, denied plaintiffs' request to conduct such depositions. (Plaintiffs' Exhibit 317).

50. On April 15, 2005 plaintiffs filed a motion with Magistrate Judge Rapoport to strike defendants' general objections. Defendants all opposed plaintiffs' motion. (Docket Entries 238, 239 and 240).

51. By Order filed July 26, 2005, Magistrate Judge Rapoport granted plaintiffs' motion to strike defendants' general objections.

52. On August 9, 2005 defendants separately filed motions for reconsideration of Judge Rapoport's July 26, 2005 Order striking their respective general objections.

53. On August 25, 2005, pursuant to Rule 53 of the Federal Rules of Civil Procedure, the undersigned appointed Karolyn Vreeland Blume, Esquire as Special Discovery Master in this case. (Docket Entry 373; Plaintiffs' Exhibit 195).

54. The appointment of the SDM was necessitated by the obvious discovery problems involved in this case. Numerous motions were filed with Magistrate Judge Rapoport by both plaintiffs and defendants. Moreover, nearly every decision made by Judge Rapoport was appealed to the undersigned. (Docket Entry 373).

55. On October 20, 2005 SDM Blume conducted her initial meeting with the parties. (Plaintiffs' Exhibits 57 and 70).

56. On that same date, Synertech and Tingley withdrew their objections to subpoenas issued by plaintiffs in January 2004 and produced relevant documents that were listed as "Withheld Synertech Documents". (Plaintiffs' Exhibit 196).

57. At the first meeting of the SDM, Highmark's counsel Sandra A. Girifalco, Esquire, announced that she had "recently located" audit and other documents which counsel had repeatedly denied existed. (Plaintiffs' Exhibits 41, 41a. 41b, 41c, 38, 38a, 38b, 38c, 38d, 38e and 70).

58. At the October 20, 2005 meeting, counsel for Keystone also announced that Keystone had also "recently located" 24 boxes of material responsive to plaintiffs' discovery requests. (Plaintiffs' Exhibit 203).

59. In early November 2005, after learning that SDM Blume was prepared to issue a recommendation to the undersigned that all declarant material be produced, Keystone agreed to produce the materials, except those which it asserted were privileged, and agreed to place those privileged items on a log. (Docket Entry 441).

60. On November 1, 2005 Capital's counsel again denied possession of any Health Connections documents. (Plaintiffs' Exhibit 73).

61. By Order dated November 3, 2005, the undersigned directed all parties to produce a privilege log of all documents they claimed were privileged and to submit both the log and the documents to SDM Blume. (Docket Entry 437).

62. SDM Blume scheduled discovery meetings for November 3 and 4, 2005. Counsel were directed to produce specific lists of discovery requests for discussion at the meetings. On November 2, 2005 at 10:58 p.m., counsel for defendant Keystone e-mailed to plaintiffs' counsel and the Discovery Master 160 pages of copies of plaintiffs' discovery requests and Keystone's responses for the meeting the next morning. (Docket entry 441).

63. At the November 3, 2005 meeting, Capital's counsel Jeffrey D. Bukowski, Esquire announced the "discovery" of up to 60 boxes of recently located audit workpapers that counsel had previously denied existed, and which documents were represented to the SDM one week earlier as having been destroyed. (Plaintiffs' Exhibit 70).

64. SDM Blume requested counsel to narrow the scope of their discovery requests by prioritizing them. In response, plaintiffs provided SDM Blume and all defense counsel with a reduced list of "High Priority" categories of documents they needed produced for the class certification hearing. (Highmark Exhibit 15; Capital/Keystone Exhibit 29).

65. On November 15, 2005 SDM Blume held a discovery meeting with counsel. One of the discussion topics was Keystone's CAHRS operations and capabilities. (Plaintiffs' Exhibit 205).

66. The next day, November 16, 2005, Synertech produced 17,000 pages of documents previously withheld. (Plaintiffs' Exhibits 220-7, 220-10, 220-16 and 220-18).

67. On November 18, 2005 Keystone's counsel announced the "discovery" of a CAHRS manual, made on the eve of a Rule 30(b)(6) deposition of a CAHRS designated witness. (Plaintiffs' Exhibit 204).

68. On November 21, 2005 plaintiffs sent a letter to SDM Blume recapping their previous requests for systems materials (i.e. CAHRS) and sent an e-mail to Attorney Summers regarding the CAHRS system. (Plaintiffs' Exhibits 207 and 207).

69. Late in the evening after normal business hours the night prior to the Rule 30(b)(6) depositions of Keystone witnesses regarding the claims processing data system, counsel for Keystone forwarded hundreds of documents which previously had been requested by plaintiffs. (Plaintiffs' Exhibits 204, 205, 206, 207, 208, 209, 333, tabs 2, 8 and 9; SDM Report #2 (Docket Entry 441); N.T., January 25, 2007, at 157-158, 183-185, 239-243).

70. On November 22, 2005 Attorney Girifalco, counsel for Highmark, sent a letter to plaintiffs' counsel indicating that Highmark had not ever searched for responsive documents to any document request propounded by plaintiffs to which there was either a general or specific defense objection. (Plaintiffs' Exhibit 39).

71. On December 22, 2005 Keystone produced 50,937 documents including Synertech System Request Forms which had been previously withheld from plaintiffs. The existence of the documents was exposed in the boxes of documents labeled "Withheld Synertech Documents" produced by Synertech just prior to Keystone's production. (Plaintiffs' Exhibit 199).

72. On December 31, 2005 Highmark produced a privilege log listing documents withheld on the grounds of "discussion of matters unrelated to case", "unrelated to KHPC" and "unrelated to KHPC--not produced". (Plaintiffs' Exhibits 9 and 11).

73. On January 12, 2006 Highmark produced another privilege log listing some of the grounds of the claimed privilege as "discussion of matters unrelated to case", "unrelated to KHPC" and "unrelated to KHPC--not produced". (Plaintiffs' Exhibit 10).

74. On January 31, 2006, the last day of class discovery, Capital produced Health Connections documents after repeatedly denying that it had any such documents. (Plaintiffs' Exhibits 74 and 75).

75. Tens of thousands of documents were produced by defendants collectively on January 31, 2005, the day before the end of class discovery. (Plaintiffs' Exhibit 2).

76. On January 31, 2005 Highmark produced five computer disks of claims information (previously produced to defendants' joint-expert, Steven Wiggins) regarding plaintiff Kutztown Family Medicine, P.C. (Plaintiffs' Exhibit 22).

77. On February 3, 2006 Highmark produced 4,356 pages of documents, eight more computer disks containing discovery documents, and two more computer disks previously produced by Highmark to defendants' joint expert. (Plaintiffs' Exhibits 22 and 82).

78. The February 3, 2006 discovery production by Highmark included documents related to Cap Gemini Engagement, of which Highmark and its counsel previously had denied possession. Cap Gemini Engagement is a group of auditors hired by Highmark to evaluate its compliance with the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") (Plaintiffs' Exhibits 44, 47, 48, 82,94, 98, tab 24, and 213; SDM Report #3, (Docket Entry 442); N.T., January 23, 2007, at 54-70.

79. Highmark's February 3, 2006 discovery production included documents relating to the Pennsylvania Medical Society and Dennis Olmstead, whose deposition had been conducted one week earlier.

80. On February 8, 2006 Highmark produced 876 more pages of discovery and four more computer disks which it had previously provided to the joint defense expert. (Plaintiffs' Exhibits 22 and 83).

81. On February 15, 2006 Highmark served six more computer disks of claims submissions which were previously forwarded to the joint expert Steven Wiggins. (Plaintiffs' exhibit 23).

82. On February 21, 2006 defendant Keystone delivered to plaintiffs' counsel the "Grider to Legal" spreadsheet that had been created nearly three years earlier. (Plaintiffs' Exhibit 241).

83. On February 16, 2006 Keystone produced "HMO Fee Schedule Data Tables Added to KHP030375 Database", a data compilation of a type that defendant Keystone and its counsel had previously denied existed and denied could be created. (Plaintiffs' Exhibit 240).

84. On February 17, 2006 Highmark reported that it was doing "preliminary work" on "electronic claims that were sent to its clearinghouse." (Plaintiffs' Exhibit 20).

85. On February 18, 2006 Highmark produced to plaintiffs' counsel two more expert computer disks of claims information. (Plaintiffs' Exhibit 24).

86. On February 20, 2006 Keystone produced "KHP0295655", a computer disk of electronic data containing information regarding Keystone provider claims information. (Plaintiffs' Exhibit 244).

87. On February 21, 2006 four more joint expert computer disks containing claims information were produced to plaintiffs by Highmark. (Plaintiffs' Exhibit 25).

88. On February 25, 2006 Highmark produced an additional 326 pages of discovery documents to plaintiffs by. (Plaintiffs' Exhibit 84).

89. On March 1, 2006 defense counsel represented to SDM Blume and plaintiffs' counsel that there were no more computer disks of discovery materials and that everything had been produced for class discovery. (Docket Entries 485 and 494).

90. On March 2, 2006 Keystone produced another computer disk containing claims information. (Plaintiffs' Exhibit 240).

91. On March 3, 2006 another computer disk (KHP 0305375) containing Keystone claims information was produced to plaintiffs by Keystone. (Plaintiffs' Exhibit 240).

92. On March 6, 2006 the class certification hearings in this matter commenced before the undersigned.

93. There is no evidence in the record indicating that individual defendants James M. Mead, John S. Brouse or Joseph Pfister had any knowledge of, or participation in, the production of any discovery not directly addressed to each of them, individually.

CONCLUSIONS OF LAW

1. Defendants Keystone Health Plan Central, Inc., Capital Blue Cross, Highmark, Inc. and their respective counsel, including John S. Summers, Esquire and the law firm of Hangley Aronchick, Segal & Pudlin, Jeffrey D. Bukowski, Esquire and the law firm of Stevens & Lee, P.C., Sandra A. Girifalco, Esquire and the law firm of Stradley, Ronon, Stevens & Young all violated Rule 26(g)(2)(A) and (B) of the Federal Rules of Civil Procedure.

2. Defendants Keystone Health Plan Central, Inc., Capital Blue Cross, and Highmark, Inc. all violated Rule 37(c)(1) of the Federal Rules of Civil Procedure.

3. John S. Summers, Esquire and the law firm of Hangley Aronchick, Segal & Pudlin, Daniel B. Huyett, Esquire, Jeffrey D. Bukowski, Esquire and the law firm of Stevens & Lee, Sandra A. Girifalco, Esquire and the law firm of Stradley, Ronon, Stevens & Young all violated 28 U.S.C. § 1927 and Rule 83.6.1 of the Rules of Civil Procedure of the United States District Court for the Eastern District of Pennsylvania by unreasonably and vexatiously multiplying the proceedings in this case.

4. Plaintiffs failed to prove that any violations of court Orders by defendants and their counsel warrant the imposition of separate sanctions.

5. Plaintiffs failed to prove that sanctions are warranted against any party or lawyer pursuant to Rule 37(a)(4)(A) of the Federal Rules of Civil Procedure.

6. Plaintiffs failed to prove that sanctions are warranted against any party or lawyer pursuant to Rule 37(b)(2)(A),(B),(C) or (D) of the Federal Rules of Civil Procedure.

7. Plaintiffs failed to prove that any sanctions are warranted against individual defendants John S. Brouse, James M. Mead or Joseph Pfister.

8. The April 24, 2004 Order and Opinion of the undersigned did not bar defendants from redacting documents for any reason.

9. The November 3, 2005 Order of the undersigned did not require any party to include a Bates number on a privilege log.

10. The August 25, 2005 Order appointing Special Discovery Master Karolyn Vreeland Blume requires no action by the parties and is not a basis for imposition of sanctions.

DISCUSSION

Pursuant to Rule 26(b)(1) of the Federal Rules of Civil Procedure, the parties in this matter:

> may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable material....Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.

Fed.R.Civ.P. 26(b)(1).

Plaintiffs' two motions for sanctions raise serious allegations about the conduct of defense counsel and defendants themselves in the course of discovery in this matter. Plaintiffs assert that defendants and their counsel have engaged in a calculated course of conduct to disrupt, delay and frustrate plaintiffs' legitimate search for discoverable material.

To the contrary, defendants and their counsel deny all of plaintiffs' allegations and contend that they have participated in the discovery process in a proper, professional and ethical manner.

The course of discovery in this case is severely troubling to the court. This case is nearly six-years old, and discovery is not complete. At times the discovery process has completely broken down. It was necessary to appoint a Special Discovery Master to regulate and control discovery.

That process, while having limited effect, has also become entangled in the apparent efforts of defendants to delay this matter at all costs. For instance, one of the reasons why I appointed Special Discovery Master Blume was the incessant motion practice which threatened to paralyze the operations of Magistrate Judge Rapoport and myself. At that time both plaintiffs and defendants were filing numerous motions with Judge Rapoport, and the losing party would almost always seek

reconsideration by me under my Standing Order on discovery disputes.

After appointment of Special Discovery Master Blume, the parties spent a period of time productively dealing with discovery issues. Plaintiffs have accepted all the decisions of Special Discovery Master Blume. Defendants initially accepted many of her decisions, but reverted to a systematic routine of not only appealing to me most, if not all, of her substantive decisions, but also filing objections to the Master's monthly reports which detail the proceedings before her and her impressions of the status of this case. The docket reveals the amount of activity this case has generated by virtue of nearly 850 docket entries since this cases's inception on November 7, 2001.

As noted in earlier decisions, the level of animosity between counsel and the parties has been generally high and at times completely inappropriate even in hotly contested litigation.

As explained in detail below, I conclude that plaintiffs have proven some, but not all, of their allegations concerning the conduct of defendants and their counsel during the discovery process. Furthermore, I conclude that based upon the allegations contained in plaintiffs' Amended Complaint,

defendants are in possession of much of the information that will either prove or disprove plaintiffs' claims in this matter.

Defendants have denied throughout this litigation that they committed any of the acts alleged in the Amended Complaint. Specifically, defendants deny that they bundled or downcoded claims submitted by medical providers, conspired to violate RICO, committed the RICO predicate acts of mail or wire fraud or failed to pay the members of the class promptly. All of plaintiffs' factual and legal allegations will rise or fall based upon documents within the possession and control of defendants.

I find that defendants and their counsel have engaged in a course of conduct which makes it clear that they have not been forthcoming with the most important information in this case: the claims information and data generated in processing the request for payment for services rendered submitted by the doctors who make up this class. In addition, defendants and their counsel have not been timely forthcoming with information concerning audits of Keystone.

The discovery information requested by plaintiffs in these two areas is vital to establish the validity or invalidity of plaintiffs' claims. There are certainly other important areas of discovery, but the claims data is the most important.

If defendants have truly done nothing wrong in this matter, it will not disadvantage them if plaintiffs receive and

review all of the claims and audit information in defendants' possession. However, the test for discoverable material is not whether it will harm a party, but rather whether it is relevant to the claim or defense of any party (if not privileged) or whether the discovery appears reasonably calculated to lead to the discovery of admissible evidence. Fed.R.Civ.P. 26(b)(1). Certainly, the claims and audit information and data sought by plaintiffs satisfy this definition.

The corporate defendants have repeatedly denied that they have access to the requested information, and have misrepresented the nature of their roles in the claims submission process. Moreover, defense counsel have feigned misunderstanding of words, terms and phrases clearly understood by them and their clients.

Finally, regarding the credibility of Attorneys Girifalco and Summers, I found both to be evasive in their responses to many of the questions posed at the sanctions hearing by plaintiffs' counsel.[28] However, the demeanor and body language of both witnesses changed dramatically when questioned by their own counsel. Although, it is not unusual for a witnesses' demeanor to change when subject to adverse questioning, the degree to which these witnesses' demeanor

[28] Testimony of Sandra A. Girifalco, N.T., January 22, 2007, at 68-70, 73, 87-88 and 111; testimony of John S. Summers, N.T., January 22, 2007, at 152, 188-189, 207, 215-216, 217, 219, 222, 228, 233 and 238.

changed was so striking that it left me with the feeling that they both were hiding significant information and were not completely candid about their activities in this matter.

With all of these concepts in mind, I address plaintiffs' substantive allegations of misconduct.

Violations of Rule 26(g)

Rule 26(g) of the Federal Rules of Civil Procedure generally covers the signing of disclosures, discovery requests, responses and objections. Rule 26(g) provides:

> (g) Signing of Disclosures, Discovery Requests, Responses, and Objections.
>
> (1) Every disclosure made pursuant to subdivision (a)(1) or subdivision (a)(3) shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. An unrepresented party shall sign the disclosure and state the party's address. The signature of the attorney or party constitutes a certification that to the best of the signer's knowledge, information, and belief, formed after a reasonable inquiry, the disclosure is complete and correct as of the time it is made.
>
> (2) Every discovery request, response, or objection made by a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. An unrepresented party shall sign the request, response, or objection and state the party's address. The signature of the attorney or party constitutes a certification that to the best of the signer's knowledge, information, and belief, formed after a reasonable inquiry, the request, response, or objection is:

> (A) consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law;
>
> (B) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and
>
> (C) not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation. If a request, response, or objection is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the party making the request, response, or objection, and a party shall not be obligated to take any action with respect to it until it is signed.
>
> (3) If without substantial justification a certification is made in violation of the rule, the court, upon motion or upon its own initiative, shall impose upon the person who made the certification, the party on whose behalf the disclosure, request, response, or objection is made, or both, an appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including a reasonable attorney's fee.

Plaintiffs contend that in responses to their various discovery requests (interrogatories and requests for production of documents), defendants all included general objections that were not consistent with the Federal Rules of Civil Procedure, warranted by existing law, nor sought modification or reversal of existing law. In addition, plaintiffs contend that the general

objections were interposed for the improper purposes of harassment, to cause unnecessary delay and to needlessly increase the cost of this litigation.

Finally, plaintiffs contend that defendants did not make good faith efforts to locate documents requested by plaintiffs.

On the contrary, all defendants and respondents assert that plaintiffs fail to prove that the general objections were made without substantial justification or for any improper purpose. In addition, defendants and respondents contend that plaintiffs have also interposed general objections, however, not titled as "general objections", but rather titled as "Objections Applicable to Each Discovery Request". Thus, defendants and respondents argue that because plaintiff has also interposed general objections, defendants should not be sanctioned for engaging in the same conduct in which plaintiffs have engaged.

Finally, defendants assert that in some instances they initially did not locate documents responsive to plaintiff's discovery requests, but upon further search, documents were located; and those documents were produced under their continuing obligation to supplement discovery responses under Rule 26(e). For the following reasons, I disagree.

General Objections

The issue of general objections has been at the forefront of the discovery disputes between the parties since nearly the beginning of the discovery process. Plaintiffs attempted to discuss their discovery requests on numerous occasions by engaging in "meet and confer" sessions with defense counsel. However, defendants refused to withdraw their general objections.

On April 15, 2005 plaintiffs filed a motion with Magistrate Judge Rapoport to strike defendants' general objections. By Order dated July 26, 2005 Judge Rapoport granted plaintiffs' motion to strike defendants' general objections.

On August 9, 2005 defendants sought reconsideration by me of Judge Rapoport's July 26, 2005 Order. Without ruling on the substance of defendants' general objections, I referred them to Special Discovery Master Blume for disposition. Special Discovery Master Blume ultimately dismissed defendants' general objections with leave to assert specific objections to plaintiffs' outstanding discovery requests.

Upon review of the general objections contained in the various responses to plaintiffs' discovery requests, and based upon my credibility determinations of the testimony of Attorneys Summers, Girifalco, Huyett and Bukowski, I conclude that

defendants and their counsel interposed a number of legally deficient general objections for the improper purpose of delaying discovery in this case and to increase the costs to plaintiffs of bringing this case to trial.

Initially, I do not believe the testimony of Attorneys Summers, Girifalco, Huyett and Bukowski that they did nothing to frustrate discovery in this case. Rather, I conclude that there was a concerted effort to frustrate plaintiffs' attempts at obtaining relevant discovery.

Defense counsel all testified that they attempted to work with plaintiffs. However, this assertion is belied by an apparent lack of discovery that was produced for the nearly one year that this case was in civil suspense from August 5, 2004 until the first meeting with Special Discovery Master Blume on October 20, 2005. (As noted above, the Order placing this case in civil suspense clearly directed the parties to continue discovery while the case was in suspense.)

Then, during their initial meeting with Special Discovery Master Blume, counsel for Highmark and Keystone announced that they had just recently located responsive documents to long-sought-after discovery. Soon thereafter, Attorney Huyett announced that Capital had also just located up to 60 boxes of material.

I do not find credible defense counsel's assertions that they did not attempt to subvert discovery by the use of the general objections. Specifically, all the responses to plaintiffs' discovery requests include a general objection that certain documents are privileged. However, no defendant included a privilege log with their responses to discovery requests until directed to do so by the court. Failure to provide a privilege log with discovery responses directly violates Rule 26(b)(5)(A) of the Federal Rules of Civil Procedure and made the general objection based upon alleged privilege legally deficient.

In addition, beginning on June 21, 2004 defendant Keystone attempted to subvert my court Order of February 2, 2004, my Order and Opinion of April 26, 2004 and Rule 26(b)(5)(A) by including a new general objection which stated: "KHP Central further objects to the production of a privilege log regarding documents prepared or created after KHP Central's current counsel were retained in October 2003."

Other examples of improper general objections include Keystone General Objection Number 3 (Plaintiff's Exhibit 233, tab 17), Highmark General Objection Number 2 (Plaintiffs' Exhibit 98, Tab 20) and Capital General Objection Number 2 (Plaintiffs' Exhibit 99, Tab 26), to reference a few.

In addition, I find that the events involving the general objections speak loudly regarding the intent of defense

counsel and the parties. Defendants raised the general objections in every response to plaintiffs' discovery. Moreover, they steadfastly maintained that these general objections were all completely proper. Discovery ground to a halt because defendants refused to produce relevant documents based upon these inappropriate objections.

Judge Rapoport granted plaintiffs' motion to strike the general objections, and defendants appealed to me. I referred the issue of the general objections to Special Discovery Master Blume who also dismissed the general objections. Defendants did not appeal that decision.[29] It was not until SDM Blume was conducting nearly daily discovery oversight meetings in this matter that defendants finally gave this issue up by accepting SDM Blume's decision, nearly two years after the general objections were first interposed and after nearly one whole year of meaningless activity in discovery.

All discovery responses submitted in this matter were signed by Attorneys Summers, Girifalco and Bukowski. Thus, it is these three attorneys who face sanctions for violation of Rule 26(g). Based upon all the foregoing, I conclude that defendants utilized the general objections for the improper purpose of

[29] The Discovery Master's determination that the general objections be stricken is one of the few matters which defendants have not appealed to me.

causing unnecessary delay and increasing the costs of this litigation.

Finally, defendants and respondents contend that because plaintiffs were also including general objections in their discovery responses to defendants' discovery, defendants and respondents should not be sanctioned for that conduct. I disagree. Plaintiffs' conduct is not at issue in these sanctions motions. Thus, even if plaintiffs may have included improper general objections in their discovery responses(I make no finding that they did), it does not relieve defendants of their discovery violations.

Audit Documents Requested from Capital Blue Cross

As noted above, plaintiffs requested audit documents from defendant Capital. I conclude that Capital did not conduct a reasonable investigation regarding plaintiffs' request.

Specifically, I believe that portion of the testimony of Attorney Bukowski that he kept his client fully informed about plaintiffs' discovery requests. Defendants produced no evidence of any efforts made by anyone at Capital to find the audit documents which Capital's counsel repeatedly said did not exist. Moreover, when plaintiffs' counsel attempted to schedule Rule 30(b)(6) depositions of Capital employees, Attorney Huyett objected to plaintiffs' conducting those depositions.

In the absence of any evidence that Capital actually conducted a reasonable search for the audit documents and in light of Attorney Huyett's objection to plaintiff investigating this situation, I conclude that Capital was informed of plaintiffs' request (by Attorney Bukowski) and did not conduct a reasonable search for any audit documents until after the appointment of the Special Discovery Master. Thereafter, the tardy search revealed as many as 60 boxes of documents responsive to plaintiffs' discovery requests.

Audit Documents Requested from Highmark

Plaintiffs also requested audit documents from Highmark. In Highmark's written discovery responses dated March 3, 2004, November 8, 2004 and November 22, 2004, among others, Attorney Girifalco certified that a reasonable investigation was completed and that Highmark was not in possession of any audit documents.

However, in Attorney Girifalco's November 22, 2005 letter, she stated that Highmark had not even looked for any documents which were subject to an objection. Plaintiffs requested audit documents from Highmark in numerous discovery requests.[30] Each request was objected to by Highmark. Attorney Girifalco testified at the sanctions hearing that she kept

[30] Some examples include Plaintiffs' Exhibit 98, Tab 22, Request 10; Plaintiffs' Exhibit 98, Tab 38, Requests 4 and 6; Plaintiffs' Exhibit 94, Responses 32 and 35.

Highmark fully informed about plaintiffs' discovery requests. I find her credible on that point.

Based upon its counsel's assertion that Highmark did not even look for documents which I conclude it knew plaintiffs were seeking, Attorney Girifalco's certification pursuant to Rule 26(g)(2) was false and constitutes a violation warranting a sanction pursuant to Rule 26(g)(3).

Discovery of Claims Information

In numerous discovery responses defendant Keystone and its counsel, John S. Summers, Esquire, denied that they had any information concerning claims data, or the ability to obtain such data. I conclude that those representation were false. It is clear from the testimony and record that Keystone had the ability to generate reports of the kind requested by plaintiffs, either in-house through the CAHRS system or by requesting such information from Synertech under the Administrative Services Agreement (which establishes that Keystone is the owner of the information).

At the same time that Keystone was certifying that it was not in possession of any claims information, Attorney Summers directed Keystone employees such as Ruth Jurkiewicz to compile claims information to support declarations submitted to the court.

Rule 26(g) Conclusion

Accordingly, for all the foregoing reasons, I conclude that Defendants Keystone Health Plan Central, Inc., Capital Blue Cross, Highmark, Inc. and their respective counsel, including John S. Summers, Esquire and the law firm of Hangley Aronchick, Segal & Pudlin, Jeffrey D. Bukowski, Esquire and the law firm of Stevens & Lee, P.C., Sandra A. Girifalco, Esquire and the law firm of Stradley, Ronon, Stevens & Young all violated Rule 26(g)(2)(A) and (B) of the Federal Rules of Civil Procedure.

Rule 37 Sanctions

Plaintiffs seek sanctions against all defendants and respondents pursuant to Rule 37(a)(4)(A), 37(b)(2)(A),(B),(C) and (D), 37(c)(1) and 37(d) of the Federal Rules of Civil Procedure. The pertinent portions of Rule 37, Failure to Make Disclosures or Cooperate in Discovery; Sanctions, are reproduced in Appendix I, which is attached to this Opinion and incorporated here.

Rule 37(a)(4)(A) Sanctions

Plaintiffs moved for sanctions under Federal Rule of Civil Procedure 37(a)(4)(A). Under that subsection of the rule a party may be awarded counsel fees and reasonable expenses incurred in making a motion, if the motion is granted.

Rules 37(a)(2)(A)and (a)(2)(B) clarify that "the motion" referred to in Rule 37(a)(2)(A) is a motion to compel

discovery of the mandatory self-executing discovery disclosures required by Rule 26(a), answers to interrogatories propounded under Rule 33, or responses to a request for production of documents under Rule 34. Rule 37(a)(2)(A) provides in part, that "[i]f a party fails to make a disclosure required by Rule 26(a), any other party may move to compel disclosure and for appropriate sanctions."

I find it inappropriate to award plaintiffs Rule 37(a)(4)(A) sanctions because plaintiffs neither filed a motion to compel disclosure, nor was any such motion to compel granted. Thus, I deny plaintiffs' request for sanctions based upon Rule 37(a)(4)(A).

Rule 37(b)(2)(A) Sanctions

Federal Rule of Civil Procedure 37(b)(2)(A) provides that if a party fails to obey an order to provide or permit discovery, the court may make an order that any designated fact shall be taken to be established in accordance with the claim of the party obtaining the order.

Plaintiffs contend that the directives to produce discovery in this case, which directives plaintiffs contend were never challenged or otherwise opposed, constitute either orders of this court or "discovery orders". Defendants and respondents contend that there are no orders issued by this court that have

been violated. For the reasons expressed below, I agree with plaintiffs in part and with defendants and respondents in part.

The language of Fed.R.Civ.P. 37(b)(2) clearly requires two things as conditions precedent to engaging the gears of the rules's sanction machinery: (1) a court order must be in effect; and (2) the Order must then be violated before sanctions may be imposed. R.W. International Corp. V. Welch Foods, Inc., 937 F.2d 11, 15 (1st Cir. 1991). In this case, I conclude that plaintiffs fail to fulfill the first condition.

In my August 25, 2005 Order appointing Special Discovery Blume I conferred certain powers and duties upon her pursuant to Rule 53 of the Federal Rules of Civil Procedure. One of the powers conferred on SDM Blume was the power to "compel, take and record evidence when appropriate". In addition, my appointment Order provided: "in those instances where a ruling made by the Special Discovery Master is accepted by the parties...the Special Discovery Master shall confirm the same by letter to counsel and the court."

Thus, based upon the express provisions of the appointment Order, I conclude that in the event that the procedures outlined in the appointment Order were followed, a directive by the Special Discovery Master would operate as the equivalent of a court Order if not opposed by any party. Any

other interpretation of my appointment Order would strip SDM Blume of the power conferred upon her.

In this case, plaintiffs contend that SDM Blume issued an unopposed directive to defendants, which directive was referred to in her October 27, 2007 Report, that stated in pertinent part: "within fourteen days (14) days, defendants shall produce from themselves or third parties a list of codes that were bundled or downcoded, and deliver that data to plaintiffs."

In addition, plaintiffs rely on Special Discovery Master Recommendation VI filed with the court on February 13, 2006. In Recommendation VI, SDM Blume directed the following information to be provided by defendants.

> 1. List of all codes combined for each year of the class period;
>
> 2. List of all codes downcoded for each year of the class period;
>
> 3. List of all modifiers rejected or otherwise not recognized by defendants' processing system(s);
>
> 4. List of all claims denied as "integral" for each year of the class period for which the service performed did not appear on Keystone's I-10 Policy of integral procedure;
>
> 5. Copies of all electronic claim submissions made by plaintiff Kutztown Family Medicine, P.C. during the class period, especially those which appear on Capital Exhibit 3 used in the February 3, 2006 deposition of plaintiff Dr. Natalie M. Grider.

In addition, plaintiffs appear to rely on Special Discovery Master Recommendation VII which directed the same

information be produced, but withdrew the reasons that supported Recommendation VI. For the following reasons, I agree with defendants and respondents that Rule 37(b)(2)(a) sanctions are not appropriate.

Initially, I note that Special Discovery Master Recommendation VI was explicitly intended to be superceded by Recommendation VII. Thus, defendants could not have failed to comply with a recommendation that was effectively withdrawn.

Regarding Recommendation VII, there are currently pending objections to that Discovery Master recommendation which were filed by Highmark. Hence, because the Special Discovery Master's appointment Order requires de novo review by me of any recommendation in response to an objection, and because I have not yet ruled on Highmark's objection, defendants cannot be in violation of that directive.

Finally, with regard to the Discovery Master's unopposed directive to defendants to deliver to plaintiffs a list of codes that were bundled or downcoded, which directive was referenced in her October 27, 2007 Report, plaintiffs provided no evidence at the hearing, nor provided any exhibit establishing that the Special Discovery Master confirmed to me and counsel by letter that her unopposed ruling was accepted by the parties.

It is distressing that defendants failed to comply with a directive of the Special Discovery Master to which none of them

objected. However, the appointment Order is clear on the procedure to be followed, and in the absence of that procedure being followed, I am constrained to conclude that there was no order in place that is sanctionable under Rule 37(b)(2)(a).

Rule 37(c)(1) Sanctions

Plaintiffs seek sanctions pursuant to Rule 37(c) of the federal Rules of Civil Procedure. As noted above, Rule 37(c) provides:

> (c) Failure to Disclose; False or Misleading Disclosure; Refusal to Admit.
>
> (1) A party that without substantial justification fails to disclose information required by Rule 26(a) or 26(e)(1), or to amend a prior response to discovery as required by Rule 26(e)(2), is not, unless such failure is harmless, permitted to use as evidence at a trial, at a hearing, or on a motion any witness or information not so disclosed. In addition to or in lieu of this sanction, the court, on motion and after affording an opportunity to be heard, may impose other appropriate sanctions. In addition to requiring payment of reasonable expenses, including attorney's fees, caused by the failure, these sanctions may include any of the actions authorized under Rule 37(b)(2)(A), (B), and (C) and may include informing the jury of the failure to make the disclosure.

Fed.R.Civ.P. 37(c).

To assess whether Rule 37(c) is violated, I must examine the requirements of Rules 26(a) and 26(e)(1). Initially, I address Rule 26(a).

Violations of Rule 26(a)

Rule 26(a) involves the mandatory disclosures which parties must provide each other in federal civil cases. Subsection (a)(1)(B) is the section of Rule 26(a) pertinent to plaintiffs' request for sanctions. Because Rule 26 was amended in 2006, I must apply the version of the Rule that existed at the time of the alleged violation of the Rule. In 2004, Rule 26 (a)(1)(B) provided:

> (a) Required Disclosures; Methods to Discover Additional Matter.
>
> (1) Initial Disclosures. Except in categories of proceedings specified in Rule 26(a)(1)(E), or to the extent otherwise stipulated or directed by order, a party must, without awaiting a discovery request, provide to other parties:
>
> * * *
>
> (B) a copy of, or a description by category and location of, all documents, data compilations, and tangible things that are in the possession, custody, or control of the party and that the disclosing party may use to support its claims or defenses, unless solely for impeachment.

As stated in Finding of Fact 26, on March 1, 2004 Attorney Summers sent a letter to the court attaching a series of Declarations which affirmatively represented to the court that plaintiffs' allegations of bundling and downcoding lacked any factual basis, and that those claims were "without merit".

Thereafter, defendant Keystone, through its counsel, Attorney Summers, refused to produce the underlying documents and data compilations which supported the Declarations on a number of frequently changing bases. Initially, Attorney Summers withheld the underlying documents and data compilations because they allegedly constituted lay opinion. Next, Attorney Summers withheld the information on the basis that it was expert opinion and immune from discovery. Finally, Attorney Summers asserted that the underlying information was privileged material pursuant to either the attorney-client privilege or the attorney work product doctrine.

As noted by my colleague Senior United States District Judge J. William Ditter, Jr., "It is not good faith for a lawyer to frustrate discovery requests...with successive objections like a magician pulling another and another and then still another rabbit out of a hat." Massachusetts School of Law at Andover, Inc. v. American Bar Association, 914 F.Supp. 1172, 1177 (E.D.Pa. 1996).

Here, defendant Keystone and its counsel failed to provide information that is clearly required by Rule 26(a)(1)(B) to be produced automatically in discovery without a request for it. The underlying documents and the data compilation to support the Declarations were clearly utilized by defendant Keystone to support a defense of failure to state a claim upon which relief

can be granted. The Rule provides that a copy of the document must be provided if defendant may use it to support its defenses. In this case, Keystone was not in the situation where it might use the material. It actually sent Declarations to me which stated that plaintiffs could not prove their claims.

Furthermore, defendant Keystone withheld this information for over 18 months and forced plaintiffs to spend considerable time and effort to get the information produced. Therefore, I conclude that defendant Keystone and Attorney Summers should be sanctioned for this considerable discovery violation.

In addition, I conclude that a sanction is appropriate against defendant Keystone because its employees were actively involved in the compilation of the underlying materials and its in-house counsel knew of the materials and did nothing to make sure that they were disclosed in discovery as required by Rule 26.

Accordingly, for the foregoing reasons, I conclude that defendant Keystone's failure to disclose Rule 26(a) material, aided by its counsel, violated Rule 37(c)(1). Therefore, both Keystone and Attorney Summers are subject to sanctions.

Violations of Rule 26(e)(1)

Defendant Keystone's failure to produce the underlying material supporting its Declarations also violates Rule 26(e)(1). Federal Rule of Civil Procedure 26(e)(1) provides as follows:

> (e) Supplementation of Disclosures and Responses. A party who has made a disclosure under subdivision (a) or responded to a request for discovery with a disclosure or response is under a duty to supplement or correct the disclosure or response to include information thereafter acquired if ordered by the court or in the following circumstances:
>
> > (1) A party is under a duty to supplement at appropriate intervals its disclosures under subdivision (a) if the party learns that in some material respect the information disclosed is incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing. With respect to testimony of an expert from whom a report is required under subdivision (a)(2)(B) the duty extends both to information contained in the report and to information provided through a deposition of the expert, and any additions or other changes to this information shall be disclosed by the time the party's disclosures under Rule 26(a)(3) are due.

Defendant Keystone's initial disclosures pursuant to Rule 26(a) should have been sent to plaintiff sometime prior to my initial Rule 16 Conference in December 2003. Thus, by not providing the information underlying the Declarations until at least 18 months after the Declarations were sent to the court is

certainly not an "appropriate interval" after sending plaintiffs the Declarations but not the underlying documents.

Accordingly, I find defendant Keystone and Attorney Summers inaction in providing the underlying declarant materials sanctionable under Rule 37(c) for violation of Rule 26(e)(1).

Violations of Rule 26(e)(2)

Rule 26(e)(2) provides as follows:

> (2) A party is under a duty seasonably to amend a prior response to an interrogatory, request for production, or request for admission if the party learns that the response is in some material respect incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing.

Fed.R.Civ.P. 26(e)(2).

Plaintiffs contend that defendants have not "seasonably" amended their discovery responses because of the amount of discovery that was produced years after it was requested and the volume of discovery, previously requested, but not produced until at the end of or after the class discovery deadline.

Defendants and respondents contend that they all complied in a timely manner with their continuing duty to provide discovery when it became known to them, and that they have not

violated Rule 26 (e)(2). For the following reasons, I disagree with defendants and respondents.

Initially, I reiterate my earlier conclusion that neither Capital or Highmark conducted a reasonable search for audit documents until just after the appointment of Special Discovery Master Blume. I conclude that both the letter and spirit of Rule 26(e)(2) are violated by a party who responds to a discovery request by stating that it is not in possession of any responsive documents when that party has not looked, and is not looking, for the documents.

On November 22, 2005 Attorney Girifalco, counsel for Highmark, sent a letter to plaintiffs' counsel indicating that Highmark had not ever searched for responsive documents to any document request propounded by plaintiffs to which there was either a general or specific defense objection. See Finding of Fact 70. Plaintiffs requested appropriate discovery from Highmark as early as Fall 2003.

The November 22, 2005 letter indicates that the earliest that Highmark may have searched for the documents was after November 2005. The letter may explain why Highmark did not produce the documents on time, but it does not relieve Highmark from its violation of the duty to seasonably amend discovery responses. There were many documents which Highmark provided

after the February 1, 2006 class discovery deadline that were previously represented not to exist.

Defendant Keystone, through its counsel, announced at the first meeting held by Discovery Master Blume that it had just recently located documents responsive to plaintiffs' discovery requests. The production by Keystone included over 20 boxes of previously undisclosed material. Moreover, Keystone's production over the preceding year had been paltry compared to the over 20 boxes produced just after the first meeting with Special Discovery Master Blume.

The most egregious instance of late production involves Keystone's late production of claims data. Keystone claimed for years that it was unable to provide claims data. During the same time that Keystone and its counsel were feigning an inability to produce claims data (which it owned according to the ASA agreement with Synertech), Keystone was using claims data for its own self-serving purposes (i.e., the Declarations sent to the court on March 1, 2005).

Keystone had the ability to provide claims data through its CAHRS system and by making requests to Synertech (which it did regularly in the ordinary course of business). The reason that Keystone did not obtain the claims data sought by plaintiffs from Synertech was the directive from Attorney Summers to Keystone employees that no one was to obtain information in

response to plaintiffs' discovery requests from Synertech. Based upon the monthly Reports from Special Discovery Master Blume, to date, plaintiffs have still not received all the claims data that they are clearly entitled to under the discovery rules.

This case is about claims processing. To deny plaintiffs the data which Keystone owns is equivalent to denying plaintiffs their day in court. Without this data it will be more difficult for plaintiffs to prove their claims. I conclude that this is exactly what defendant Keystone hoped to accomplish by thwarting discovery in this case.

Additionally, I conclude that after Spring 2004 (the time when Keystone employees became Capital employees) Capital Blue Cross could have, and should have, taken a greater role in ensuring that its wholly-owned subsidiary Keystone was complying with its discovery obligations. Capital had its in-house counsel, Attorney Wolfe working with Keystone's outside counsel Attorney Summers and other attorneys at the firm of Hangley, Aronchick, Segal & Pudlin and with Capital's outside counsel, Attorneys Huyett and Bukowski. Thus, Capital was effectively involved in this case both on its own behalf and on behalf of Keystone.

Accordingly, based upon the foregoing, I conclude that all defendants, Keystone, Capital and Highmark, together with their respective counsel, Attorneys Summers, Huyett, Bukowski and

Girifalco are each subject to sanctions pursuant to Rule 37(c) based upon violations of their continuing duty to seasonably amend prior discovery responses.

Rule 37(d) Sanctions

Plaintiff seeks additional sanctions pursuant to Federal Rule of Civil Procedure 37(d) for defendants' failure to serve responses to interrogatories and requests for production of documents. Upon consideration of the sanctions already imposed herein against defendants and their counsel pursuant to Rule 37(c), I conclude that additional sanctions for essentially the same conduct would be cumulative and unnecessary.

Civil Contempt

Plaintiffs seek civil contempt citations against defendants and their counsel for willful violation of four of my Orders and one Judge Rapoport Order. Specifically, plaintiffs seek civil contempt regarding my Order and Opinion dated April 26, 2004; the August 25, 2005 appointment Order of Special Discovery Master Blume; the September 23, 2005 scheduling Order; and the November 4, 2005 Order directing all parties to provide privilege logs and documents regarding any document a party claimed was privileged.

To establish civil contempt the court must find that: (1) a valid order existed; (2) respondents knew of the order; and

(3) respondents disobeyed the order. Roe v. Operation Rescue, 919 F.2d 857, 871 (3d Cir. 1990). These "elements must be proven by clear and convincing evidence, and ambiguities must be resolved in favor of the party charged with contempt." John T. ex rel. Paul T. v. Delaware County Intermediate Unit, 318 F.3d 545, 552 (3d Cir. 2003).

In this case, I conclude that plaintiffs have failed to prove by clear and convincing evidence that defendants have violated any court Order for which relief could be granted.

Specifically, I conclude that the August 25, 2005 appointment Order of Special Discovery Master Blume puts no requirements on any party. Rather, the Order sets forth the reasons why appointment of a discovery master was appropriate, the powers she was given and the duties she was charged with performing.

Next, my Order and Opinion dated April 26, 2004 and Judge Rapoport's oral directive regarding relevancy do not state clearly that defendants may not withhold or redact discovery on the basis of relevance, which is essentially what plaintiffs state was "ordered". Lack of relevance is a legitimate basis for objecting to discovery. Rule 26(b)(1) states that "[p]arties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party".

While Judge Rapoport and I agreed that defendants are not the arbiters of relevance, they do have a right to object to discovery requests on the grounds that the requested discovery is not relevant to the claim or defense of any party. However, as noted in Rule 26(b)(1), relevant information need not be admissible at trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.

Judge Rapoport's directive concerning relevance was an oral statement made on the record in open court. It was not contained in a written court order. My discussion of relevance was contained in my written Opinion dated April 26, 2004, not in my Order attached to the Opinion. I believe that both Magistrate Judge Rapoport's verbal directive and my written one satisfy the first requirement of civil contempt, that a valid order existed, as articulated in Roe v. Operation Rescue, supra.

However, one could logically argue that a discussion in an Opinion is not "a valid Order" and that an oral statement in court is not "a valid Order". Because the elements of civil contempt must be proven by clear and convincing evidence, and because ambiguities must be resolved in favor of the party charged with contempt, John T. ex rel. Pault., supra, plaintiffs' motion for civil contempt based upon either my Order and Opinion dated April 26, 2004 or Judge Rapoport's oral directive regarding relevancy is denied.

Plaintiffs also seek a finding of civil contempt based upon my September 23, 2005 scheduling Order which established February 1, 2006 as the cut-off for class discovery. While it is clear that there was a court Order in effect, defendants Keystone and Highmark knew of my Order, and they violated my Order by serving voluminous discovery after the class discovery deadline, plaintiffs received this information in time to utilize it for the class hearing.

Plaintiffs have not identified any specific harm (other than less time to prepare for the class certification hearing) for violation of this Order. This is particularly so because plaintiffs prevailed at the class certification hearing. Moreover, plaintiffs received the discovery in plenty of time for the scheduled May 2008 trial of this case.

Accordingly, I deny plaintiff's motion for civil contempt based upon the September 23, 2005 scheduling Order.

Finally, plaintiffs seek to hold defendants in civil contempt for their violation of my November 4, 2005 Order directing all parties to provide privilege logs and documents regarding any document claimed by a party to be privileged. Plaintiffs raise two points regarding this Order.

Plaintiffs assert that defendants have violated this Order and my previous Orders directing all parties to provide privilege logs because defendants have not included Bates numbers

on the privilege logs. This argument fails because my Orders regarding production of privilege logs do not contain a requirement to include a Bates number in the information which I directed all parties to provide. Hence, plaintiffs' motion for civil contempt is denied regarding this aspect of the November 4, 2005 Order.

Next, plaintiffs contend that defendants should be held in contempt for violating the November 4, 2005 Order because they did not produce privilege logs and documents for all documents before the November 14, 2005 deadline contained in that Order. I decline to specifically address this motion because the issue of whether defendants' documents are privileged is currently pending before Special Discovery Master Blume.

Moreover, the specific issue of what to do with documents produced on privilege logs after the November 14, 2005 deadline is also before SDM Blume. By my Order dated August 16, 2007, at the specific request of Master Blume, I clarified how she should address allegedly privileged documents produced after the deadline to produce all privileged documents and a log.

In my August 16, 2007 Order I stated that:

> [The] Special Discovery Master may consider any claim of privilege waived as to any document produced with a privilege log after the November 14, 2005 deadline without prejudice to Defendants citing a valid outstanding objection that had been filed prior to the deadline, or providing an explanation for why the document was

> not produced or did not exist prior to the deadline through no fault of any party.

Thus, I conclude that it is more appropriate to permit the Special Discovery Master to decide the issue in the first instance. If she determines that there is no valid reason for not logging the documents and producing the documents to her, she is free to find that the privilege was waived. That would be a sufficient sanction for any late production. In the event that defendants satisfy her in either of the ways outlined in my August 16, 2007 Order, then a sanction is not warranted, and certainly not a finding of civil contempt.

Sanctions Pursuant to 28 U.S.C. § 1927 and Local Rule 83.6.1

Plaintiffs seek sanctions against defense counsel John S. Summers, Esquire, Sandra A. Girifalco, Esquire, Jeffrey D. Bukowski, Esquire and Daniel B. Huyett, Esquire for alleged violation of 28 U.S.C. § 1927 and Rule 83.6.1 of the Rules of Civil Procedure for the United States District Court for the Eastern District of Pennsylvania for alleged bad faith conduct in this case.

Defense counsel all deny that they have engaged in any bad faith conduct that would warrant sanctions under either section 1927 or Local Rule 83.6.1. For the following reasons, I disagree.

28 U.S.C. § 1927 provides as follows:

> § 1927. Counsel's liability for excessive costs
>
> > Any attorney or other person admitted to conduct cases in any court of the United States or any territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

Local Rule 83.6.1 (b) and (c) provide:

> Rule 83.6.1 Expediation of Court Business
>
> > (b) No attorney shall, without just cause, fail to appear when that attorney's case is before the Court on a call, motion, pretrial or trial, or shall present to Court vexatious motions or vexatious opposition to motions or shall fail to prepare for presentation to the Court, or shall otherwise so multiply the proceedings in a case as to increase unreasonably and vexatiously the costs thereof.
> >
> > (c) Any attorney who fails to comply with section (a) or (b) may be disciplined as the Court shall deem just.

As noted above, John S. Summers, Esquire engaged in a course of conduct which constituted bad faith in this matter. I found his testimony to be evasive. I have extensively outlined his conduct in this case above and incorporate it here.

I conclude that but for his actions, that the discovery process would have proceeded in a much more orderly and expeditious manner. Attorney Summers took the lead in defending

this case on behalf of all defendants. He was the one who took charge during meetings before Special Discovery Master Blume.

Attorney Summers insisted that Keystone lacked the ability to provide claims information when it clearly was able to do so. He interfered with third-party productions by interfering with plaintiffs' attempts to get data, documents and information from Synertech and Tingley (the company that wrote the claims processing software used by Synertech) regarding claims made by physicians and how the claims processing computer software operated.

Moreover, Attorney Summers interposed a baseless, frivolous objection in his discovery responses which subverted both the Federal Rules' requirement to provide a privilege log for allegedly privileged documents, and this court's clear Orders that documents alleged to be privileged must be entered on a privilege log. Specifically, Attorney Summers crafted and interposed a general objection to providing a privilege log for any document created after he and his firm began their representation of defendants Keystone and Pfister.

If not for the actions of Attorney Summers, there would have been no need to appoint a Special Discovery Master in this case. Thus, based upon the conduct outlined in the Findings of Fact and discussed herein, it is clear that Attorney Summers crossed the line from zealous advocacy to sanctionable conduct.

I conclude that he acted in bad faith in order to multiply these proceedings to the detriment of plaintiffs and their counsel.

Regarding the conduct of Attorney Girifalco, I also found her testimony to be evasive. I adopt all the findings and conclusions about her specific conduct discussed above in this Opinion. While her conduct was not as egregious as that of Attorney Summers, Attorney Girifalco did her fair share of impeding discovery in this case, which required plaintiffs to expend countless hours in attempting to obtain legitimate discovery. I conclude that she acted in bad faith in order to multiply these proceedings to the detriment of plaintiffs and their counsel.

While Attorneys Huyett and Bukowski, are the least culpable of the defense counsel in this case, they still helped to multiply these proceedings by their insistence on maintaining their general objections, their initial failure to provide the privilege logs required by the Rules, and by delaying this case and not actively moving discovery along during the period of civil suspense.

Both counsel denied doing any act to multiply the proceedings here. I did not find that testimony credible. Rather, I conclude that Attorneys Huyett and Bukowski acted in bad faith to multiply these proceedings to the detriment of plaintiffs and their counsel.

In addition, the numerous motions filed in this matter and the conduct of counsel in their arguments to the court provide significant evidence of their bad faith.[31] Specifically, defendants, through their counsel, sought reconsideration of nearly every discovery Order entered by Judge Rapoport, a jurist of over 25 years experience. While some of defendants' arguments were meritorious, I conclude others were advanced simply to make work for plaintiffs' counsel and to delay these proceedings.

Moreover, defendants have either appealed or disregarded almost every directive and recommendation issued by Special Discovery Master Blume in the two years since her appointment in this matter. Counsel have all feigned misunderstanding of terms such as "disengagement", "downcoding" and "bundling" in order to delay providing relevant discovery and have falsely represented their inability to produce information and documents.

In addition, there are numerous instances in the course of this litigation where defendants, through their counsel, took inconsistent positions on matters in this litigation to suit their tactical purposes at the moment. For example defense

[31] For concrete proof of the needless multiplication of litigation in this matter, we need look no further than the fact that as of September 28, 2007 there were 852 docket entries in this case. These two sanctions motions alone generated thirty-six docket entries, seven of which were filings by plaintiffs and twenty-nine of which were filings by defendants, their counsel, and former counsel. See Attachment I to the Order dated September 28, 2007 which accompanies this Opinion.

counsel argued to this court in their initial motion to dismiss, and in numerous responses to discovery requests, that this case had nothing to do with the managed care Multidistrict Litigation (MDL) proceedings before Chief Judge Federico A. Moreno in the United States District Court for the Southern District of Florida.

After I concluded in my September 2003 Order and Opinion denying the motion to dismiss that there were some similarities in the type of claims asserted in this case and in the MDL proceedings (RICO violations alleging mail and wire fraud as well as RICO conspiracy), defendants, in an effort to delay this action, requested to stay these proceedings to attempt to move this case to Florida. However, when a stay was denied by me, and the MDL panel denied defendants' request to transfer this case to Florida, defendants then all objected to plaintiffs' discovery requests seeking discovery about the Florida litigation as irrelevant to these proceedings.

Accordingly, for all the reasons stated above, I conclude that defense counsel all violated both 28 U.S.C. § 1927 and Local Rule 83.6.1.

Inherent Power to Sanction

Plaintiffs seeks sanctions under this court's inherent power to sanction. However, where the Rules of Civil Procedure or statutes are "up to the task" they should be used in place of

a court's inherent sanction power. Klein v. Stahl, 185 F.3d 98 (3d Cir. 1999). In this case, I conclude that the sanctions I have already imposed as discussed in this Opinion are sufficient and that nothing further will be accomplished by invoking this court's inherent authority to further sanction defendants or their counsel.

Individual Defendants

As noted in Finding of Fact 93, there is no evidence in the record indicating that individual defendants James M. Mead, John S. Brouse or Joseph Pfister had any knowledge of, or participation in, the production of any discovery not directly addressed to each of them, individually. Moreover, there is no evidence to support any sanction against any of the individual defendants.

CONCLUSION

For all the foregoing reasons, I conclude that Defendants Keystone Health Plan Central, Inc., Capital Blue Cross, Highmark, Inc. and their respective counsel, including John S. Summers, Esquire, the law firm of Hangley, Aronchick, Segal & Pudlin, Jeffrey D. Bukowski, Esquire, Daniel B. Huyett, Esquire, the law firm of Stevens & Lee, P.C.,Sandra A. Girifalco, Esquire and the law firm of Stradley, Ronon, Stevens & Young are

subject to the sanctions set forth in the Summary of Decision section of this Opinion.