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INSURANCE COMPANY

BEFORE THE INSURANCE COMMISSIONER

OF THE STATE OF CALIFORNIA

In the Matter of PACIFICARE LIFE AND HEALTH INSURANCE COMPANY, Respondent.	File No. UPA 2007-0004 OAH No. 2009061395 **PACIFICARE'S MOTION FOR WITNESS TESTIMONY AND FURTHER DISCOVERY AS A RESULT OF CDI'S DESTRUCTION OF AND FAILURE TO PRESERVE EVIDENCE** Judge: Hon. Ruth S. Astle

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I. Introduction

This motion seeks discovery remedies for the California Department of Insurance's ("CDI") destruction of and failure to preserve evidence highly relevant to PacifiCare Life and Health Insurance Company's ("PacifiCare's") defense of this enforcement action.

Among the documents destroyed by CDI are records suggesting that this state agency colluded with the California Medical Association ("CMA") to artificially inflate the number of complaints against PacifiCare and was influenced by the CMA to expand the scope of CDI's market conduct examination and this enforcement action.[1] The handful of destroyed documents that PacifiCare has been able to recover from CMA to date reflect, among other things, that:

- CDI changed its existing rules to enable CMA and its members to file regulatory complaints against PacifiCare without first requiring them to exhaust PacifiCare's internal appeal process. Exh. 5412 (Tab A).
- Ms. Rosen urged CMA's Aileen Wetzel to recruit CMA members to file complaints since "*the more numbers racked up, the better*." Ex. 5413; emphasis added (Tab B).
- Based on the "influence" of the CMA, Ms. Rosen caused the market conduct division to "expand their scope to cover other parts of the insurance code – and other conduct, heretofore not previously examined." Ex. 5414 (Tab C).
- Ms. Rosen accepted a "wish list" from CMA. Ex. 5415 (Tab D).
- Ms. Rosen expressed regret that "more money in the CA state treasury doesn't really help your doctors, does it?" Ex. 5415.

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[1] CMA is a physician advocacy group that often clashes with healthcare payers, like PacifiCare, over issues ranging from reimbursement rates to provider billing practices to medical cost management. Suffice it to say that CMA is a highly interested party in payer-provider disputes. CMA's influence over the market conduct exam appears to explain in large part CDI's unprecedented decision to move forward against PacifiCare. As demonstrated by the evidence adduced to date, CDI has treated PacifiCare differently from all of the other health insurers examined by CDI, even though such other examinations and subsequent enforcement proceedings have involved much more serious allegations of misconduct.

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CDI admitted for the first time by letter dated November 8, 2010 ("November 8 Letter") that these and other relevant documents were destroyed when Ms. Rosen's desktop computer hard drive was "wiped clean" in "late 2008" – well after the Order to Show Cause ("OSC") was served in this matter. (November 8, 2010 Letter from Bryce Gee, Tab E.) This revelation stands in direct contrast to CDI's representations to the ALJ on April 23, 2010 – in connection with PacifiCare's motion to compel CDI's communications with CMA – in which CDI's counsel unequivocally represented that all responsive documents had been produced based on a "sweep" of files conducted in response to the motion. CDI's counsel also confirmed that Ms. Rosen was the one likely to have such communications in her possession.

> [W]e've done -- we did a sweep of everybody's files once before. We went back to Ms. Rosen's and found a couple documents. *And she, you know, she is the most likely person to have documents. She's the one who was communicating with them largely.* And we've asked her if other people would have documents relevant to the, you know, that's -- and she is the person.

Tr: 6488:18-25 (emphasis supplied) (Tab F).

Ms. Rosen was present in the courtroom during this colloquy but remained silent, despite knowing of CDI's obligation to preserve relevant documents and that her desktop computer had been replaced in late 2008. As a result of her silence and the ensuing seven-month delay, PacifiCare may have lost the ability to recover deleted electronic records. Just as troubling as her silence is the fact that Ms. Rosen and CDI allowed her computer to be replaced and her electronic data to be destroyed during the pendency of this litigation. Concerns about Ms. Rosen's document preservation, however, are not limited to electronic records. For example, PacifiCare has also learned that CMA delivered a "large packet of documentation" to Ms. Rosen related to United and PacifiCare – none of which has been produced by CDI (or CMA for that matter).

The spoliation of relevant evidence does not end with Ms. Rosen. Rather, Ms. Rosen's conduct reflects a larger pattern of document destruction by CDI senior staff and executives involved in the PacifiCare investigation. For example, on November 2, 2010, Joel Laucher, Chief of CDI's Market Conduct Division, acknowledged that he likely deleted emails related to PacifiCare's market conduct examination and destroyed hard copy documents, ignoring written

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procedure manuals that authorized the deletion of only "insignificant" emails and encouraged archiving of emails and the use of shared drives. Nicoleta Smith, PacifiCare's primary contact at CDI, admitted to destroying hard copy documents and deleting electronic data relating to PacifiCare.

Accordingly, as a matter of due process and this Court's inherent authority to enforce CDI's discovery obligations in the face of substantial spoliation of evidence, PacifiCare is entitled to testimony and discovery, outlined in more detail below, to determine the scope of, to attempt to recover, and to reconstruct, this lost or destroyed data.

In fact, to the extent additional discovery confirms that the underlying market conduct examination of PacifiCare was tainted by CMA's undue influence in CDI's putative investigation, this entire action may well be subject to dismissal. CDI premised both its expansive market conduct exam and this unprecedented enforcement action on provider "complaints" which we now know were inflated based on CDI's undisclosed one-time exception to its complaint-filing procedures and its joint venture with CMA to "rack up" as many complaints as possible against PacifiCare. *See, e.g., People ex rel. Clancy v. Superior Court*, 39 Cal. 3d 740, 746-47 (1985) ("Not only is a government lawyer's neutrality essential to a fair outcome for the litigants in the case in which he is involved, it is essential to the proper function of the judicial process as a whole."). Simply put, if the CDI and CMA had not engaged in their joint complaint solicitation campaign, there may well have been no market conduct exam at all against PacifiCare (much less an exam of this magnitude) and, had there been no market conduct exam against PacifiCare (or one more normal in scope), this enforcement action would never have been brought. CDI's failure even to attempt to "develop a full and fair record" here, *id.* at 746, coupled with its misrepresentations about document preservation and the so-called provider "complaints" that were used to justify a scorched earth market conduct exam, *see Pickering v. State Bar of California,* 24 Cal.2d 141, 144 (1944) (discussing government attorney's duty of candor), appear even at this stage to provide grounds for dismissal of this action. *See, e.g., Boulas v. Superior Court*, 188 Cal. App. 3d 422, 429 (1986) (dismissing case based on conduct of government lawyers that violated defendant's due process rights). However, PacifiCare will

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1 await the outcome of further investigation, as set forth below, before it applies to the Court for
2 the remedies warranted by CDI's conduct.

3 **II. Statement of Facts**

4 **A. Document Destruction**

5 1. Andrea Rosen

6 Ms. Rosen is Staff Counsel in CDI's Health Enforcement Bureau, as identified in the
7 OSC. In 2009, PacifiCare requested "all communications related to PLHIC or United by CDI
8 officials, including Steve Poizner and Andrea Rosen, *with the California Medical Association or*
9 *representatives of a UC hospital or provider group*." (Italics added.) In response, CDI attorney
10 Bryce Gee stated that "CDI *has produced all responsive and non-privileged documents* relating
11 to the Order to Show Cause ... that exist and are in its possession. Ms. Rosen will re-review her
12 files to confirm that all CMA and UC documents have been produced." (4/19/10 Bryce Gee
13 correspondence (italics added); Tab G.)

14 At an April 23, 2010 hearing, Mr. Gee represented to the ALJ that the further review of
15 Ms. Rosen's files had taken place and "found a couple documents." 6489:18-25, 6490:4-7
16 (Tab F). Ms. Rosen was present in the courtroom and no mention was made of the deletion of
17 her hard drive. At that hearing, the ALJ indicated that PacifiCare should serve a subpoena for
18 documents on CMA, which PacifiCare then did.

19 That subpoena resulted in the production by CMA of several emails with Ms. Rosen that
20 had not been produced by CDI in response to PacifiCare's discovery request, despite the fact
21 that they are undeniably responsive, not privileged, and, indeed, damning. When these
22 documents were introduced into evidence, the ALJ asked CDI to look again at Ms. Rosen's files
23 to determine whether it could locate the documents produced by CMA. Tr. 13204:20-13205:17
24 (Tab H).

25 In response to the ALJ's request, CDI submitted the November 8 Letter (Tab E), which
26 revealed the following:

27 • Upon reviewing Ms. Rosen's desktop and laptop computers, it was discovered
28 that "some" of Ms. Rosen's emails had been saved on her local hard drive rather

than on a shared network drive.

- In "late 2008" Ms. Rosen's desktop computer was replaced.
- The replaced computer's hard drive was "wiped clean" and "any data on her c: drive, where Outlook would have been archiving, would have been lost."

As it currently stands, counsel for CDI said it will search for Ms. Rosen's former computer hard drive, but no other steps are being taken to recover these lost documents.

2. Nicoleta Smith

Nicoleta Smith was the primary contact at CDI for PacifiCare from approximately fall of 2006 to summer of 2007. Tr. 290:14-17 (Tab I). In this role, Ms. Smith received numerous written letters, emails, and other documents relating to PacifiCare. Tr. 290:18-291:6 (Tab I). In fact, CDI asserts that the complaints received by Ms. Smith's department – which, as we now know, CDI solicited and facilitated – led to the decision to undertake a targeted market conduct examination of PacifiCare. Tr. 4731:13-4732:1, Tr. 4732:21-23 (Tab J).

CDI, however, produced only 40 documents from Ms. Smith. Tr. 293:23-294:1-4, 290:14-17 (Tab I). This limited production was due to the fact that Ms. Smith began systematically destroying documents related to the investigation of PacifiCare in December 2007. Tr. 291:19-292:6 (Tab I). Specifically, Ms. Smith testified that she began deleting documents related to PacifiCare from her computer in December 2007, destroyed hard copies of documents related to PacifiCare as late as July 2008, and all along failed to record what documents she destroyed. Tr. 293:1-11 (Tab I). In doing so, she disregarded express instructions from Chief of the Claims Services Bureau, Dave Stolls, on April 27, 2007, to retain information relating to PacifiCare (Exhibit 5368 (Tab K)).

Although Ms. Smith testified that she discussed the deletion of her files with her supervisor Patrick Campbell, Mr. Campbell testified that he never had any such conversation. To the contrary, Mr. Campbell testified that Ms. Smith understood the importance of retaining PacifiCare related documents. Tr. 5889:24-5890:2; 5890:18-5891:3 (Tab L).

3. Joel Laucher

From approximately 2002 to 2009, Joel Laucher was Chief of CDI's Market Conduct

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Division. Tr. 12993:22-25, 12994:12-14 (Tab M). In this role, Mr. Laucher managed two bureaus that conducted market conduct examinations of insurers, including PacifiCare. Tr. 12994:3-11 (Tab M).

Despite his senior position and role during the 2007 Market Conduct Examination of PacifiCare, CDI produced only 22 documents for which Mr. Laucher was the custodian of record. Tr. 13106:4-6 (Tab M).

On November 2, 2010, Mr. Laucher testified that he likely deleted emails related to the PacifiCare Market Conduct Examination. Tr. 13106:2-3 (Tab M). Mr. Laucher deleted such emails "sporadically as they seemed no longer necessary." Tr. 13114:25-13115:16, 13114:11-12, 13170:8-11 (Tab M). In doing so, he failed to notify anyone about his deletions or avail himself of CDI's storage and backup options, including email archives and shared drives. *Id.* Mr. Laucher also testified that he destroyed hard copy documents, including those that he authored and those referenced in documents produced by CDI. Tr. 13118:19-13119:4, 13119:17-19, 13125:11-14, 13130:4-15 (Tab M).

B. <u>The CMA Document Production</u>

Pursuant to a subpoena duces tecum, CMA has produced several items of correspondence between itself and Ms. Rosen (while withholding many others) which appear to reflect a previously undisclosed plan to inflate the number of complaints against PacifiCare.[2] The limited documents that PacifiCare has received (Exhibits 5412-5415), however, reveal troubling facts concerning Ms. Rosen's dealings with the CMA, as summarized in the five bulletpoints on page 1 of this Motion.

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[2] CMA has expressly withheld additional correspondence and other documents which likely contain further evidence of communications between Ms. Rosen and the CMA. At a minimum, CMA indicates that it has withheld (i) communications with CDI *after* January 2008, (ii) communications *prior to 2008 that purportedly relate to United*, as opposed to PacifiCare (despite making no such distinctions in correspondence with CDI), (iii) documents related to complaints of its members after June 2007, (iv) internal documents (such as memos, notes, emails, *etc.*) regarding its communications with CDI or PacifiCare or United generally, and, (v) a "large pack of documentation" sent to Ms. Rosen in February 2007 and referenced in an email that CMA produced.

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III. Legal Analysis

A. This Court Has the Authority to Compel A Party's Compliance with its Discovery Obligations and to Remedy CDI's Destruction of Evidence By Ordering Further Discovery.

The Administrative Procedure Act ("APA") allows a party seeking discovery to bring a motion to compel pursuant to Government Code Section 11507.7. The APA also gives this Court broad authority to "exercise *all* powers relating to the conduct of the hearing," Govt. Code § 11512(b) (emphasis added), which includes the power to remedy failures to produce discovery.

Courts have long recognized their inherent power to remedy a party's discovery abuses, including the alteration and spoliation of evidence. *See Stephen Slesinger, Inc. v. Walt Disney Co.*, 155 Cal. App. 4th 736, 758 (2007); *see also W. Steel & Ship Repair, Inc. v. RMI, Inc.*, 176 Cal. App. 3d 1108, 1116 (1986) (describing a court's "inherent power ... to control litigation before it, to prevent abuse of its process, and to create a remedy for a wrong even in the absence of specific statutory remedies"). Likewise, agency tribunals have relied on their "inherent powers analogous to those of courts with respect to the exercise of [their] judicial duties." *Victor v. S. Cal. Gas Company*, 1988 Cal. P.U.C. Lexis 198, at *6–7 (1988). As part of this Court's broad authority to "exercise all powers relating to the conduct of the hearing," Gov't Code § 11512(b), the Court may compel discovery consistent with PacifiCare's right to due process and fundamental fairness in these proceedings. *See Mohilef v. Janovici*, 51 Cal. App. 4th 267, 302 (1996) (observing that the Due Process Clause "ensures that an administrative proceeding be conducted fairly").

The APA requires this Court to see that PacifiCare is given "the opportunity to present evidence and rebut evidence." Gov't Code § 11425.10(a)(1). Likewise, "the Due Process Clause prohibits a State from punishing an individual without first providing that individual with 'an opportunity to present every available defense.'" *Philip Morris USA v. Williams*, 549 U.S. 346, 353 (2007); *see also Bell v. Farmers Ins. Exch.*, 115 Cal. App. 4th 715, 757 (2004) ("We agree that the trial management plan would raise due process issues if it served to restrict [a

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defendant's] right to present evidence against the claims.").

Here, CDI's spoliation of evidence, and its failure to timely disclose the spoliation, has restricted – indeed, obstructed – PacifiCare's right to discovery and to present relevant evidence in its defense. "A party may be disadvantaged as much by the destruction of evidence as by the invasion or destruction of a unique relationship with its expert witness. . . . Faced with this sort of abuse of the litigation process, the trial court may act to prevent the taking of an unfair advantage and to preserve the integrity of the judicial system." *See Peat, Marwick, Mitchell & Co. v. Superior Court*, 200 Cal. App. 3d 272, 289 (1988) (acknowledging a court's "inherent authority" to exclude evidence as a remedy for abuse of the litigation process).

B. The ALJ Should Remedy CDI's Spoliation Of Evidence By Compelling Testimony of Certain CDI Witnesses And Ordering Additional Discovery.

PacifiCare respectfully requests that the ALJ order CDI to produce the following witnesses to testify at trial in order to either locate copies of the lost data or to reconstruct their content:

(1) A "person most knowledgeable" concerning the technical information regarding Ms. Rosen's computer software and hardware as relayed in Mr. Gee's November 8, 2010 Letter;

(2) A "person most knowledgeable" or a custodian of records who can testify concerning the maintenance, handling, and current whereabouts of any and all computers assigned to Ms. Rosen between 2006 and the present.

(3) Ms. Rosen to reconstruct the content of the lost documents, as well as all other areas of unprivileged relevant testimony of which she has knowledge.

PacifiCare further requests that the ALJ order CDI to submit any computer hard drive used by Ms. Rosen, Ms. Smith, and Mr. Laucher from 2006 to present (including any home computers) to a third party with expertise in retrieving electronic data.

Finally, PacifiCare requests that the ALJ order production of any documents in CDI's possession, custody, or control that pertain to or relate in any way to communications between CDI and (i) the CMA, (ii) representatives of any University of California hospital, or (iii) other

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provider group, which relate to PLHIC or United, including calendar entries (electronic or otherwise), phone logs, time entries, meeting requests, or notes.

The basis for each request is set forth below.

1. Examination Of Ms. Rosen and CDI "Persons Most Knowledgeable"

The destroyed documents are relevant to, among other things, whether CDI's conduct justifies dismissal of some or all of the claims in this action, whether evidence should be excluded, and the scope and amount of potential penalties in these proceedings – if any. Recently disclosed CMA-CDI communications show that CDI partnered with an interested party, the CMA, to solicit complaints against PacifiCare to "rack[] up" the numbers and excused CMA members from the standard process for filing a complaint with CDI which required first raising the issue with PacifiCare. This not only inflated the number of putative complaints, but prevented PacifiCare from remedying any legitimate concerns before they resulted in complaints to CDI. This patent lack of neutrality on the part of CDI taints this entire proceeding. *See People v. Superior Court*, 19 Cal.3d 255, 267 (1977) (a government attorney "is the representative of the public in whom is lodged a discretion which is not to be controlled . . . by an interested individual"); *County of Santa Clara v. Superior Court*, 50 Cal. 4th 35, 57 (2010) ("A fair prosecution and outcome in a proceeding brought in the name of the public is a mater of vital concern for both defendants and for the public, whose interests are represented by the government and to whom a duty is owed to ensure that the judicial process remains fair and untainted by an improper motivation on the part of attorneys representing the government.").

At a minimum, PacifiCare is entitled to examine those individuals with information about whether lost electronic data can be recovered and to examine witnesses regarding the subjects covered by the destroyed documents. *See* Gov't. Code § 11450.10(a) ("Subpoenas and subpoenas duces tecum may be issued for attendance at a hearing and for production of documents at any reasonable time and place or at a hearing"); *see also Astle et al.*, California Administrative Hearing Practice § 7.115 at p. 417 (CEB 2009) (agency members and personnel may be subpoenaed and called as witnesses by either party). Although CDI's failure to implement an effective legal hold and its inexplicable delay in disclosing the destruction of

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documents has likely resulted in incurable prejudice to PacifiCare – timely disclosure may have allowed PacifiCare to obtain this critical evidence from other sources and to develop and present additional defenses – it is possible that some relevant electronic evidence may still be restored.

Accordingly, first, PacifiCare should be authorized to examine CDI's custodian of records or its internal technology expert regarding the specifics of how the destruction here occurred (with respect to Ms. Rosen's computers), the existence and whereabouts of backup data, document storage and destruction protocols, and the maintenance and handling of computer hardware.

Second, in light of CDI's destruction of these highly relevant written communications with the CMA and other providers, PacifiCare is entitled to question Ms. Rosen regarding: (a) her communications with CMA and other providers and/or provider organizations, (b) her internal communications regarding CMA and other providers and/or provider organizations, including the degree to which such groups influenced the claims that CDI brought and the penalties it seeks, and (c) document retention and destruction.

Any communications between Ms. Rosen and third parties are clearly not privileged. And communications internal to CDI regarding CMA and other providers/provider groups are not privileged either because Ms. Rosen was not acting as an attorney with respect to these communications. *See San Francisco Unified Sch. Dist. v. Superior Court*, 55 Cal. 2d 451, 456 (1961); *Doe 2 v. Superior Court*, 132 Cal. App. 1504, 1522 (2005).

2. Electronic Discovery

PacifiCare requests that the ALJ also authorize a third-party expert to perform a forensic examination of the computer hard drives used by Ms. Rosen, Ms. Smith, and Mr. Laucher from 2006 to the present (including any home computers used for business purposes) in an attempt to retrieve the lost electronic data.

California and federal courts have ordered the production of computers, including home computers, so that a party can perform a forensic examination to retrieve stored information. *See, e.g., TBG Ins. Services Corp. v. Superior Court*, 96 Cal. App. 4th 443, 455 (2002) (ordering production of a home computer in a wrongful termination case for misuse of employer's

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computer where the employer provided the plaintiff employee with two computers, one at the office and one at home); *Hardin v. Belmont Textile Machinery Co.*, 2007 U.S. Dist. LEXIS 57937 (D.N.C. 2007) (compelling production of home computer for forensic examination). The California Electronic Discovery Act ("EDA") expressly allows parties to seek discovery of electronically stored information from a source that is not "reasonably accessible," such as on backup tapes, and in so doing, the court may set conditions for the production, including the allocation of the expense. Civ. Proc. Code § 2031.060(e).

In short, unless each of the computers used by Ms. Rosen, Mr. Laucher and Ms. Smith are produced for forensic examination, or CDI's backup tapes are translated, PacifiCare may not be able to obtain the information relating to the degree to which CDI has coordinated with CMA or other provider groups in order to inflate the number of alleged violations for purposes of the market conduct examination and this enforcement action. *Cf. Electronic Funds Solutions v. Murphy*, 134 Cal. App. 4th 1161, 1184 (2005) (affirming the issuance of terminating sanctions against a defendant who deleted emails from computer after the trial court had issued an order compelling discovery of the computer's hard drive).

3. Production Of Additional Documentary Evidence

Finally, PacifiCare seeks discovery of internal CDI communications – including those with Commissioner Poizner, calendar entries, phone logs, time entries, and notes – relating to the CMA's and other provider groups' communications regarding the subject matter of this action. As discussed above in section III.B.1, the extent of interest groups' influence over CDI, CDI's practice of bypassing established provider complaint procedures, the legitimacy of "complaints" drummed up by CDI, CDI's motivation in pursuing this enforcement action, and the extent to and circumstances under which relevant documents were destroyed are all highly relevant.

To the extent that CDI attempts to hide behind the attorney-work product doctrine, it is clear that the doctrine does not apply to any interaction Ms. Rosen had with the CMA or other providers/provider groups concerning PacifiCare or United because that doctrine is inapplicable when an attorney is not acting as a "legal advisor[]," but instead is simply documenting "factual

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matters" related to the attorney's performance of non-lawyer tasks. *2,022 Ranch L.L.C. v. Superior Court*, 113 Cal. App. 4th 1377, 1401 (2003); *Watt Industries, Inc. v. Superior Court*, 115 Cal. App. 3d 802, 805 (1981)(work-product doctrine does not protect "notes" memorialized while lawyers were acting "as business agents, nonattorneys or clients acting for themselves").

Further, even if the ALJ were to find that the doctrine applies, it is a qualified privilege that can be overcome by a showing of prejudice. The "absolute" protection under the work product doctrine only covers an attorney's "core" work-product – *i.e.*, writings "reflecting an attorney's impressions, conclusions, opinions, or legal research of theories." *Izazaga v. Superior Court*, 54 Cal. 3d 356, 381-382 & fn. 19 (1991); *see also* Civ. Proc. Code § 2018(c). Other "general" forms of work product are subject only to a qualified privilege, and must be produced when denying discovery would unfairly prejudice the other side or result in an injustice. *See* Civ. Proc. Code § 2018(b); *State Farm Fire & Cas. Co. v. Superior Court*, 54 Cal. App. 4th 625, 649-650 (1997).

As discussed above, these communications are highly relevant and denial of this request will severely limit, if not preclude, PacifiCare from presenting key defenses. Furthermore, "[p]rejudice is inherent" when a plaintiff fails to comply with discovery, because "[a]n important aspect of legitimate discovery from a defendant's point of view is the ascertainment, in advance of trial, of the specific components of plaintiff's case so that preparations can be made to meet them." *Liberty Mut. Fire Ins. Co. v. LcL Administrators, Inc.*, 163 Cal. App. 4th 1093, 1103, 1105 (2008) (responding party's "assertion that it did not have any information to support its claims because none of the relevant documents was in its possession [was] insincere, if not downright deceptive"). *See also Do It Urself Moving & Storage, Inc. v. Brown, Leifer, Slatkin & Berns*, 7 Cal. App. 4th 27, 37 (1992)(party seeking evidence sanctions "did not have a burden of showing that [it was] prejudiced by [the other party's] dilatory conduct," but was "only required to demonstrate [a] willful failure to comply with discovery").

Given CDI's knowing destruction of relevant documents, denial of discovery on these issues will result in an injustice.

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LOS ANGELES, CALIFORNIA 90017-5704
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IV. Conclusion

Justice Douglas once warned: "[t]he function of the prosecutor . . . is not to tack as many skins of victims as possible to the wall" – or, in this case, to "rack up" complaints against a regulated company in order to justify a targeted market conduct exam. *Donnelly v. DeChristoforo*, 416 U.S. 637, 648-649 (1974). In order for PacifiCare to defend itself against the allegations of the OSC, it is crucial that it learn the extent of the collusion between CDI's counsel and third parties to create the appearance that a large number of complaints had been filed through CDI's process against PacifiCare. This joint development of the record with a highly motivated special interest group, coupled with CDI's destruction of and failure to preserve evidence during the pendency of its own enforcement action, further compounds the need for this discovery. Indeed, the discovery could be critical to the resolution of this entire proceeding.

For the foregoing reasons, PacifiCare respectfully requests an order for the testimony and discovery identified above.

Dated: November 17, 2010

SNR DENTON US LLP

By Steven A. Velkei

STEVEN A. VELKEI

Attorneys for Respondent
PACIFICARE LIFE AND HEALTH
INSURANCE COMPANY

27358141

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PROOF OF SERVICE

I, Deborah Waterford, hereby declare: I am employed in the City and County of San Francisco, California in the office of a member of the bar of this court at whose direction the following service was made. I am over the age of eighteen years and not a party to the within action. My business address is SNR Denton US LLP, 525 Market Street, 26th Floor, San Francisco, California 94105. On November 17, 2010, I served:

PACIFICARE'S MOTION FOR WITNESS TESTIMONY AND FURTHER DISCOVERY AS A RESULT OF CDI'S DESTRUCTION OF AND FAILURE TO PRESERVE EVIDENCE

on the interested parties in this action by placing a true copy thereof, on the above date, enclosed in a sealed envelope, addressed as follows:

Michael J. Strumwasser Bryce Gee LaKeitha Oliver Strumwasser & Woocher LLP 10940 Wilshire Boulevard Suite 2000 Los Angeles, CA 90024 mstrumwasser@strumwooch.com bgee@strumwooch.com loliver@strumwooch.com	Andrea Rosen California Department of Insurance Legal Division Health Enforcement Bureau 300 Capitol Mall, 17th Floor Sacramento, CA 95814 rosena@insurance.ca.gov

☒ **(By Mail)**: I am personally and readily familiar with the business practice of SNR Denton US LLP for collection and processing of correspondence for mailing with the United States Postal Service, pursuant to which mail placed for collection at designated stations in the ordinary course of business is deposited the same day, proper postage prepaid, with the United States Postal Service.

☐ **(By Facsimile)**: I caused a true copy of the foregoing document to be served by facsimile transmission to each interested party at the respective facsimile numbers listed. A transmission report was properly issued by the sending facsimile machine for each interested party.

☐ **(By Federal Express)**: As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for Federal Express delivery. Under that practice, it would be picked up by a Federal Express representative on that same business day at San Francisco, California, in the ordinary course of business.

☒ **(By Electronic Mail)**: I transmitted the above documents by electronic mail to the interested parties via the e-mail addresses listed above for each party.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

EXECUTED on November 17, 2010, at Oakland, California.

Deborah Waterford

SNR DENTON US LLP
601 SOUTH FIGUEROA STREET, SUITE 2500
LOS ANGELES, CALIFORNIA 90017-5704
(213) 623-9300

TAB A

Aileen Wetzel

·m:	Rosen, Andrea [RosenA@insurance.ca.gov]
it:	Wednesday, February 28, 2007 12:28 PM
To:	Aileen Wetzel
Cc:	Jodi Black; Catherine Hanson
Subject:	RE: CMA PacifiCare-UHC Analysis

Aileen,

I think we've finally gotten to the point where Tony agrees that these don't need to come in as individual complaints using the SB 367 format. I am sending down a copy of what you provided to me today with a cover memo.

They are working with Pacificare and I think he will incorporate these complaints into their work. Let me see what I can do working directly with him.

Thanks

Andrea Rosen
Staff Counsel
Health Enforcement Bureau
California Department of Insurance
(916) 492-3508 phone
(916) 324-1883 fax
rosena@insurance.ca.gov

-----Original Message-----
From: Aileen Wetzel [mailto:awetzel@cmanet.org]
Sent: Wednesday, February 28, 2007 9:56 AM
To: Rosen, Andrea
Cc: Jodi Black; Catherine Hanson
Subject: RE: CMA PacifiCare-UHC Analysis

Hi Andrea,

We believe that the documentation submitted to the Department by CMA clearly demonstrates a pattern of PC/UHC's failure to load physician contracts in a timely manner, as well as their repeated failure to load contracted fee schedules correctly into their systems. This documentation demonstrates a lack of administrative capacity and at the very least exposes incompetency at PacifiCare/United Healthcare that that are adversely affecting physicians and patients. Physicians are not getting paid, claims are not being processed correctly, and patients are not being given correct information as to whether or not a physician is in or out of network. CMA has received hundreds of complaints from physicians regarding this insurer. We included in our documentation copies of several letters physicians have received from PC/UHC where they clearly acknowledge that they have failed to load contracts correctly. CMA would like the Department to intervene to require the insurer to correct these problems.

Can you clarify what submitting these complaints to the formal Provider Complaint process would accomplish? Would this be a formality in order for the Department to begin an investigation? Will we need to fill out an individual complaint form for each physician, or is our documentation sufficient? I would be more than happy to work with you and Tony to make sure you have the information you need.

Thank you so much,
Aileen

Aileen E. Wetzel
Associate Director - Center for Economic Services
California Medical Association
1201 J Street, STE 200
Sacramento, CA 95814
916-551-2037
916-551-2027 (fax)
awetzel@cmanet.org

From: Rosen, Andrea [mailto:RosenA@insurance.ca.gov]
Sent: Monday, February 26, 2007 4:57 PM
To: Aileen Wetzel
Subject: RE: CMA PacifiCare-UHC Analysis

Spoke with Tony- don't bother with the names of the insureds for each of these doctors. Did you want their complaints to go through the formal Provider Complaint process?

Andrea Rosen
Staff Counsel
Health Enforcement Bureau
California Department of Insurance
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rosena@insurance.ca.gov

—Original Message—
From: Aileen Wetzel [mailto:awetzel@cmanet.org]
Sent: Monday, February 26, 2007 1:10 PM
To: Rosen, Andrea
Subject: CMA PacifiCare-UHC Analysis

Hi Andrea,

Attached is a copy of the CMA analysis of the PacifiCare/United Healthcare physician contract. You'll see comments under the section titled "Regulatory Issues" that apply to products regulated by DMHC as well as by DOI. Please let me know if you have any questions.

Thanks!

Aileen

Aileen E. Wetzel
Associate Director - Center for Economic Services
California Medical Association
1201 J Street, STE 200
Sacramento, CA 95814
916-551-2037
916-551-2027 (fax)
awetzel@cmanet.org

TAB B

Aileen Wetzel

From: Aileen Wetzel
Sent: Thursday, April 26, 2007 1:34 PM
To: 'Rosen, Andrea'
Subject: RE: returning your message
Attachments: ElenaMcFann03_29_07.pdf; response from UHC fullyinsured 041807.pdf

Hi Andrea,

Thank you for your response. I look forward to learning more! We have loads of additional documentation and would be happy to forward it to you if you think it would be helpful. I am aware of several physicians that will probably be willing to testify.

As a side note, our physicians have not found the complaint process at the DOI helpful with regards to United Health Care. The complaints are returned with the request that the physician provide proof that the claim(s) involve fully-insured enrollees. As outlined in my letter to Elena McFann at PC/UHC (attached), United does not identify on the patient's card or on the EOB if the patient is self-insured. This requires that the physician call for each and every patient to determine if the patient is fully insured before being able to submit a complaint to DOI.

Thanks again and good luck on your legal opinion.

Regards,

Aileen

Aileen E. Wetzel
Associate Director - Center for Economic Services
California Medical Association
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Sacramento, CA 95814
916-551-2037
916-551-2027 (fax)
awetzel@cmanet.org

From: Rosen, Andrea [mailto:RosenA@insurance.ca.gov]
Sent: Thursday, April 26, 2007 1:14 PM
To: Aileen Wetzel
Subject: returning your message

Hi Aileen,

I'm deep into working on a legal opinion right now on another matter; but wanted to drop you a quick note.

We are looking into our options to move on the United/Pacificare infractions.. and are not quite ready for a public statement on how we will proceed. We are working jointly with DMHC which is a good thing.

We did meet with UC last week as you probably know and we are waiting for a written memorialization of their complaints against this insurer.

I am confident that you all at CMA will be pleased with the direction we are heading; and YES, we will need your testimony, support etc as we move more publicly to dig deeper into their issues.

Take care now, and feel free to continue to have your members use the RFA/ complaint process operated by CDI and the IHC's as well. the more numbers racked up, the better.

Andrea Rosen

Staff Counsel

Health Enforcement Bureau

California Department of Insurance

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rosena@insurance.ca.gov

TAB C

Long Do

om:	Rosen, Andrea [RosenA@insurance.ca.gov]
nt:	Monday, June 18, 2007 1:03 PM
To:	Catherine Hanson
Subject:	RE: United/ RICO suit
Attachments:	Rosen, Andrea.vcf

Hi Catherine- we haven't spoken recently. I understand that you are moving to AMA but not til July . If you are still working (though I understand that this would be a good time to take a long vacation), can you give me call? I'm curious what you think of this win by United.

We are conducting a market conduct exam of Pacificare/ United right now- and partly as a result of your teachings and influence, I have gotten the CDI to expand their scope to cover other parts of the insurance code.. and other conduct, heretofore not previously examined.

I'm wondering if this settlement would affect our exam in any way. I don't think it would, but would value your opinion.

Thanks- my direct line is 4923508.

National Underwriter: UnitedHealth Wins Battle In Managed Care Suit
BY ALLISON BELL
NU Online News Service, June 18, 2007, 10:25 a.m. EDT

A managed care company has taken a step toward beating back a class-action lawsuit.

judge panel of the 11th U.S. Circuit Court of Appeals has issued a 2-sentence opinion upholding a lower-court ruling in favor of UnitedHealth Group Inc., Minnetonka, Minn., and against the plaintiffs, a class representing doctors who had treated UnitedHealth managed care plan patients.

The courts consolidated the UnitedHealth case with a wave of other managed care suits in Miami under U.S. District Court Judge Federico Moreno. Lawyers for the plaintiffs in the cases accused UnitedHealth and the other managed care companies of conspiring to hold down doctors' compensation.

The other major defendants in the litigation have negotiated settlements. The settlements call for the companies to pay tens of millions of dollars into settlement funds and to change the way they work with doctors.

But Moreno dismissed all claims in the case against UnitedHealth in June 2006, and the new 11th Circuit ruling has upheld that decision.

"The judgment of the district court is affirmed for the reasons set out in the district court's order granting summary judgment," the court writes in the brief opinion explaining its ruling.

The 11th Circuit does not conduct the same analysis of how the "plus factors" provision of antitrust law applies to Racketeering Influenced and Corrupt Organization cases, but, "even if that requirement is not applicable, the district court's judgment is still due to be affirmed under the facts and circumstances of this case," the court writes.

The 11th Circuit appellate court has jurisdiction over Alabama, Florida and Georgia.

At press time, the defendants were not immediately available to comment, and it was not clear whether the plaintiffs would appeal the 11th Circuit ruling.

If the ruling stands, and UnitedHealth does not negotiate the kind of settlement agreement its competitors have negotiated, the company will not be subject to the kinds of settlement agreement provisions that will regulate many

competitors' dealings with physicians. Typical managed care litigation settlement agreement provisions require that competitors publish detailed contract and pricing information on their physician Web sites.

/e are pleased that this decision puts the Shane vs. Humana class action claims behind us," Thomas Strickland, nitedHealth's chief legal officer, says in a statement about the 11th Circuit ruling. "This ruling affirms the Southern District Court of Florida's finding in support of our position that there was no evidence of improper conduct by UnitedHealth Group."

The company "looks forward to continuing to work collegially with physicians and their professional organizations to improve the quality of care delivery and to simplify health care administration," Strickland says.

Andrea Rosen

Staff Counsel

Health Enforcement Bureau

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CONFIDENTIALITY NOTICE: This communication may contain confidential and/or legally privileged information. It is solely for the use of the intended recipients. Unauthorized interception, review, use or disclosure is prohibited and may violate applicable laws including the Electronic Communications Privacy Act. If you are not the intended recipient, please contact the sender and destroy all copies of the communication.

---Original Message---
From: Catherine Hanson [mailto:chanson@cmanet.org]
Sent: Saturday, March 31, 2007 12:00 PM
To: Rosen, Andrea
Subject: RE: silent PPO law (CIC 10178.3) and CIC 790.03 Unfair Practices, Prohibited acts

Hi Andrea. I certainly agree with you that there are sections that the Insurance Commissioner can only enforce against insurers for specified insurance lines, as well as the fact that after Moradi only the Insurance Commissioner has jurisdiction to enforce 790.03 claims (or at least most of those claims). But there are many provisions that I believe apply to UnitedHealth regardless of whether it is an insured product. I have to go give a speech on managed care contracting now but I will get you something more specific tomorrow.

You really should talk with the Nebraska DOI about their United enforcement actions. The lead attorney there appears to be Martin Swanson, 402-471-2201. You can pull down the complaint I referred to off their website. Thanks, Catherine

From: Rosen, Andrea [mailto:RosenA@insurance.ca.gov]
Sent: Friday, March 30, 2007 5:30 PM
To: Catherine Hanson
Subject: silent PPO law (CIC 10178.3) and CIC 790.03 Unfair Practices, Prohibited acts

Catherine

Do you believe that these above sections of the Insurance Code could be applied to provider networks (silent PPO) or claims 790.03 paid under the benefits of a self- insured plan where NO insurance policy whatsoever (e.g. no reinsurance even) was in place? 790.03 cannot be stated as a private cause of action anymore (moradi)

I found Graves v. Blue Cross and have been reading through your CPLH and it's still not very clear to me.

Many of the insurance codes such as 10123.13 start with language like" Every insurer issuing group or individual policies of health insurance ... shall reimburse claims.. for those expenses .. no later than 30 working days after receipt.."

hard to argue that it does not apply to claims being paid pursuant to an insurance policy, don't you think?

inotherwords, understandably, many of the CIC sections reference the authority of the code section back to the underlying insurance contract(policy) since that's the basis for the benefit, the bargain, etc... makes it hard to argue that WITHOUT that insurance policy, the code section requirements apply to self- funded health plans (for example clearly the state mandates for specific types of coverage apply to insurance policies only and not to self-funded plans which have the erisa preemption)

bear with me- I'm still trying to sort this out. I've read alot on erisa preemption this week and it's a wild area.

Andrea Rosen

Staff Counsel

Health Enforcement Bureau

California Department of Insurance

(916) 492-3508 phone

(916) 324-1883 fax

rosena@insurance.ca.gov

TAB D

Jodi Black

From:	Aileen Wetzel
Sent:	Friday, October 19, 2007 9:04 AM
To:	Rosen, Andrea
Cc:	Deborah Winegard GMAIL; Jodi Black
Subject:	RE: United Healthcare

Hi Andrea,
Thank you for your email. We'll re-work our "wish list."

I apologize if there was misunderstanding over the "back on the table" reference. I can assure you this was nothing more than thanking you for allowing CMA to summarize the key concerns with regards to United Healthcare. We are very aware, and grateful, that the Department is continuing to investigate these issues.

Have a great weekend!
Aileen

—Original Message—
From: Rosen, Andrea [mailto:RosenA@insurance.ca.gov]
Sent: Thu 10/18/2007 6:30 PM
To: Aileen Wetzel
Cc: Deborah Winegard GMAIL; Jodi Black
Subject: RE: United Healthcare

Aileen,

Thank you for your list, though I was hoping for a list of things they should be undertaking rather than a list of problems. The hard part here is not necessarily identifying the problems, but what kinds of things to specifically ask/ convince them to do to fix them. Of course, we will move to assess penalties as our evidence justifies , but more money in the CA state treasury doesn't really help your doctors, does it? Personally, I want a company that works better for consumers and providers. Period.

Also- I am confused and somewhat taken aback at your statement " opportunity to put these issues back on the table" as I have assured you since your first request and since we announced that we opened a joint formal investigation that these issues, as well as others, have been continuously under investigation, inquiry etc and very much " on the table". Any inference that these issues have not been actively on the table since they were raised is erroneous.

Also- I have no idea what " confidentiality agreement" you are referring to below. Please send me a sample.

Thanks for your list and letting me clarify our work to date as the law allows.

Talk to you soon.

Andrea Rosen
Staff Counsel, Health Enforcement Bureau
(916) 492-3508 ph
(916) 324-1883 fax

From: Aileen Wetzel [mailto:awetzel@cmanet.org]
Sent: Thursday, October 18, 2007 3:10 PM
To: Rosen, Andrea; Link, David

Cc: Deborah Winegard GMAIL; Jodi Black
Subject: United Healthcare

Hi Andrea and David,

Thank you again for taking time out of your busy schedules to meet with Deborah and me last week. CMA is pleased that the Department of Insurance is moving forth with a full investigation of the issues we have brought to your attention regarding United Healthcare/PacifiCare. Key areas of concern include the following:

- Failure to load contracts in a timely manner
- Failure to process contract terminations in a timely manner
- Failure to load contract rates correctly
- Incorrectly identifying physicians as participating providers in provider directories
- Incorrectly processing claims as out-of-network
- Lack of administrative capacity to handle physician inquiries
- Failure to provide prior notification to physicians prior to implementing fee schedule changes
- Failure to fully disclose fee schedules (i.e. providing physician with conversion factors but not with the RVU)
- Failure to identify/disclose the status of the insured on insurance cards and/or on the EOB
- Inappropriately discounting physician claims through First Health, TRPN, or Multiplan when the physician is not contracted with these entities
- Contract provisions that are inconsistent with California law and/or regulations (see CMA's analysis of the UHC/PacifiCare contract)
- Lab protocol that proposes to penalize physicians when a United patient receives services from a non-contracted lab
- Imaging Notification Policy - United states "notification" is not the same as "prior authorization" and that payment is not guaranteed
- Imaging Certification Policy
- United's Premium Designation - rates physicians based on "quality" and "efficiency"
- Unilateral amendments to contracts (i.e. recent Medicare Advantage notification)
- Confidentiality Agreement – CMA believes to be unlawful
- Inappropriately reassigning PPO patients

Our expectation is that DOI investigate and validate that United Healthcare has violated various unfair payment and contracting practices and that they have not complied with the Undertakings agreed to as part of the United/PacifiCare merger. CMA respectfully requests that the Department take enforcement action against United Healthcare, including the assessment of fees and penalties.

Thank you for the opportunity to put our issues back on the table. If you have any questions or require additional information, please don't hesitate to let me know.

Aileen

Aileen E. Wetzel
Associate Director - Center for Economic Services
California Medical Association
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TAB E

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LOS ANGELES, CALIFORNIA 90024

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FREDRIC D. WOOCHER
MICHAEL J. STRUMWASSER
GREGORY G. LUKE †‡
BRYCE A. GEE
BEVERLY GROSSMAN PALMER
JONATHAN D. KROP
BYRON F. KAHR

†Also admitted to practice in New York
‡Also admitted to practice in Massachusetts

November 8, 2010

Honorable Ruth S. Astle
Office of Administrative Hearings
1515 Clay Street, Suite 206
Oakland, California 94612-1436

Re: *In the Matter of PacifiCare Life and Health Insurance Company*, File No. UPA 2007-00004, Case No. 2009061395

Dear Judge Astle:

I am writing to report on document issues that came up at last week's hearing.

CMA Correspondence with CDI

First, at the November 3 hearing, Mr. Laucher was questioned on four documents reflecting communications between CMA and CDI (marked Exhibits 5412-5414), which had not previously been produced by CDI. As CDI had represented, it had believed that all such responsive and nonprivileged documents that exist and are in CDI's possession had been produced.

Your Honor requested that CDI, now that it had something specific to look for, search again for these documents. On November 4, I went to Sacramento and personally observed Ms. Rosen and two IT personnel at CDI extensively search Ms. Rosen's desktop and laptop computers for any relevant documents not previously produced, looking specifically for the recently identified CMA correspondence.

We manually reviewed all email folders and sub-folders, as well as all electronic files on Ms. Rosen's local drives of her two computers and her shared network drive. We further ran electronic searches of all her local and shared drives. We were unable to find any of the CMA correspondence that CMA recently produced in response to PacifiCare's subpoena.

In the course of our search of Ms. Rosen's computers, we learned from the IT personnel that the default set-up of Ms. Rosen's email-archiving function caused some emails to be archived in a folder on her computer's local drive, rather than on the shared network drive. As a result, we discovered a small number of archived emails that may not have previously been produced. These emails are now being processed.

However, in late 2008 Ms. Rosen's desktop computer was replaced pursuant to routine CDI hardware-replacement cycles. The IT staff advises that the replaced computer was, in the ordinary course, wiped clean and given to the Department of General Services for recycling. Consequently any data on her c: drive, where Outlook would have been archiving, would have been lost. Nevertheless, we have asked the IT department to identify for us all previous computers that Ms. Rosen may have used to determine whether any of Ms. Rosen's data may still exist on those computers, notwithstanding the standard practice of formatting and deleting all files on old computers. We will update Your Honor and PacifiCare counsel on the status of this effort.

CMA Correspondence with PacifiCare

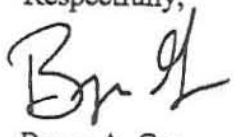
In the course of cataloging the documents the CMA produced in response to PacifiCare's subpoena, we reviewed 103 documents reflecting communications between the CMA and PacifiCare employees. Of these 103, there were at least 79 documents that PacifiCare never produced to CDI.

Attached is a list of the CMA-produced documents that are missing from PacifiCare's production. We request that PacifiCare undertake a search for the whereabouts of these documents.

Emails Referenced in Exhibits 5373 and 5400

Your Honor also inquired regarding the e-mails referenced in Exhibits 5373 (See RT 13125) and 5410. We checked for the 7/19/07 e-mail (see Exh. 5373, CDI00006118) and 7/23/07 and 7/25/07 e-mails from Mr. Laucher (see Exh. 5410, CDI00249868). Each of the three documents was withheld from production on claim of attorney-client privilege, and each was logged as such on the privilege log served on Respondent on November 3, 2009. No timely objection to their being withheld was received from Respondent.

Respectfully,



Bryce A. Gee

cc: Ronald Kent
Steven Velkei
Thomas McDonald

Documents Missing from PacifiCare's Production

CMA Production (Bates Numbers)	PacifiCare Production
CMA00280-81	No Document
CMA00285-87	No Document
CMA00288-89	No Document
CMA00290-91	No Document
CMA00299-301	No Document
CMA00302-04	No Document
CMA00305-06	No Document
CMA00307	No Document
CMA00308-11	No Document
CMA00312-13	No Document
CMA00314-15	No Document
CMA00316	No Document
CMA00317-18	No Document
CMA00323-24	No Document
CMA00331	No Document
CMA00345-46	No Document
CMA00347	No Document
CMA00348	No Document
CMA00349	No Document
CMA00350	No Document
CMA00351	No Document
CMA00352	No Document
CMA00355	No Document
CMA00356	No Document
CMA00357	No Document
CMA00358	No Document
CMA00359	No Document
CMA00360	No Document
CMA00361	No Document
CMA00362	No Document
CMA00363	No Document
CMA00365	No Document
CMA00367	No Document
CMA00369	No Document
CMA00370	No Document
CMA00371	No Document
CMA00372	No Document
CMA00373	No Document
CMA00375	No Document
CMA00377	No Document
CMA00378	No Document
CMA00380	No Document
CMA00381	No Document
CMA00382	No Document
CMA00383	No Document

CMA Production (Bates Numbers)	PacifiCare Production
CMA00384	No Document
CMA00385	No Document
CMA00386	No Document
CMA00387-88	No Document
CMA00389	No Document
CMA00390	No Document
CMA00391-92	No Document
CMA00393	No Document
CMA00396	No Document
CMA00398	No Document
CMA00399	No Document
CMA00400	No Document
CMA00401	No Document
CMA00402	No Document
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CMA00409	No Document
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CMA00418	No Document
CMA00419	No Document
CMA00420	No Document
CMA00421	No Document
CMA00422	No Document
CMA00423	No Document
CMA00424	No Document
CMA00425	No Document

TAB F

1 BEFORE THE INSURANCE COMMISSIONER

2 OF THE STATE OF CALIFORNIA

3 OAKLAND, CALIFORNIA DEPARTMENT A, RUTH ASTLE, JUDGE

4 -oOo-

5 IN THE MATTER OF) UPA 2007-00004

6 PACIFICARE LIFE AND HEALTH INSURANCE) OAH 2009061395

7 COMPANY,) FRIDAY 04/23/10

8 RESPONDENT.) VOLUME 50

9 _____) TELEPHONE CONFERENCE

10 REPORTER'S TRANSCRIPT OF PROCEEDINGS

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23 REPORTED BY: STARR A. WILSON, CSR NO. 2462

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1 And as I explained to PacifiCare, we expect them to be
2 produced early next week. Um, our guys have a rush on it so
3 --
4 **THE COURT:** All right. Well, I want those
5 produced. See, communications of outside people directly
6 and the things that they gave you is not privileged.
7 **MR. VELKEI:** And, your Honor, on that the
8 Department has only -- has only agreed to produce
9 communications with Ms. Rosen and no other Department
10 officials with respect to, and I think it should be,
11 PacifiCare or United. They simply said we'll only give you
12 stuff that involves Ms. Rosen. We're entitled to all of it.
13 I mean if I went off the street and made a Public Records
14 Act request, all of this information I would be entitled to.
15 So to suggest that they can narrow it just to Ms. Rosen.
16 **THE COURT:** Are you -- is that what you're
17 suggesting, Mr. Gee?
18 **MR. GEE:** No. We haven't narrowed it to Ms.
19 Rosen. I mean we've done -- we did a sweep of everybody's
20 files once before. We went back to Ms. Rosen's and found a
21 couple documents. And she, you know, she is the most likely
22 person to have documents. She's the one who was
23 communicating with them largely. And we've asked her if
24 other people would have documents relevant to the, you know,
25 that's -- and she is the person.

1 **THE COURT:** And one of them is coming back. Mr.
2 Rossi, is that the one? I can't remember. Martin. Rossi.
3 Rossi is coming back?
4 **MR. GEE:** Mr. Rossi is coming back.
5 **THE COURT:** So we can ask him. If it turns out --
6 **MR. GEE:** Yeah.
7 **THE COURT:** If it turns out there's other
8 material, then we'll have to revisit this.
9 **MR. VELKEI:** Just to be clear, so we're on the
10 record, the Department in their letter said Ms. Rosen will
11 re-review her files to confirm all documents. And it's
12 limited only to Ms. Rosen. We asked for Mr. Poisner. We
13 asked for other Department officials. I mean let's be clear
14 that the California Medical Association was, you know, right
15 behind these provider investigations, were making statements
16 about both PacifiCare and United that prompted action by the
17 Department. You know, whatever communications related to
18 either company during the relevant time period by involving
19 Mr. Poisner, Mr. Link, any of the Department officials needs
20 to be --
21 **THE COURT:** Well, let's have Mr. Rossi and see
22 what there is.
23 **MR. VELKEI:** Well, Mr. Rossi is from UCLA. He is
24 not going to know whether Mr. Poisner receives
25 communications from the CMA or met with the CMA --

1 **THE COURT:** Oh, CMA.

2 **MR. VELKEI:** -- and discuss issues. Or, you know,

3 Pugerelli.

4 **MR. GEE:** He reviewed -- we reviewed their files.

5 **THE COURT:** All right.

6 **MR. GEE:** And what I said in the letter was we --

7 we re-reviewed Ms. Rosen's files.

8 **THE COURT:** All right.

9 All right, um, if you give me specific names of

10 specific people that you think they should re-review, I'll

11 look at it and see whether they should or not. I'm really,

12 um, you know, I think they're entitled to some of this stuff

13 if it exists. I wasn't real, you know, I don't know how to

14 say this exactly, I wasn't real impressed by some of the

15 testimony about what people remember and didn't remember.

16 So, you know, I don't know where it leads us.

17 **MR. VELKEI:** Well, and that's what we're trying to

18 do, your Honor. We're just trying to do our diligence. I

19 mean the California Medical Association has its own agenda.

20 And the fact that they were meeting.

21 **THE COURT:** Well, you have enough to argue about

22 that already.

23 **MR. VELKEI:** Well, but I just think there's so

24 much more. I mean, for example, your Honor, let me give you

25 one example. We have been trying to solve this problem of

TAB G

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April 19, 2010

BY E-MAIL AND U.S. MAIL

Ronald D. Kent
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Re: *In the Matter of PacifiCare Life and Health Insurance Company*, File No. UPA 2007-00004, Case No. 2009061395

Dear Counsel:

Below are the Department's responses to the requests set forth in your April 6, 2010, letter:

(1) **All documents withheld on the grounds of the attorney-client or work product privileges because of Andrea Rosen's involvement before service of the accusation on January 28, 2008.**

These documents constitute privileged attorney-client communications and work product.

(2) **All communications related to PLHIC or United by CDI officials, including Steve Poizner and Andrea Rosen, with the California Medical Association or representatives of a UC hospital or provider group.**

CDI has produced all responsive and non-privileged documents relating to the Order to Show Cause ("OSC") that exist and are in its possession. Ms. Rosen will re-review her files to confirm that all CMA and UC documents have been produced.

(3) All emails involving Joel Laucher or other members of CDI management with respect to the scope, timing or other aspects of the market conduct examination, including, but not limited to, the July 24, 2007 and July 25, 2007 emails referenced in Exhibit 5173.

CDI has confirmed with Mr. Laucher that it has produced from his files all responsive and non-privileged documents relating to the OSC.

(4) All documents reflecting conclusions from the electronic analyses referenced in Exhibit 547.

These documents are not relevant to this proceeding. In ruling on PLHIC's motion to compel discovery, the ALJ previously upheld CDI's limitation of documents to be produced to those that relate to the OSC. (See Order Granting in Part and Denying in Part Respondent PacifiCare Life and Health Insurance Company's Motion to Compel Discovery, filed Oct. 19, 2009 ("Order Re: PLHIC Motion to Compel").)

Moreover, as PLHIC must know, market conduct examinations are confidential, unless the Commissioner has deemed them to be public, in which case they are already publicly available. The electronic analyses themselves contain claim data that, as PLHIC has repeatedly noted, are confidential. PLHIC cannot expect CDI to produce such confidential information of PLHIC competitors.

(5) All data reflected in CDI's database related to any complaints filed against PLHIC from 2003 to the present.

CDI has produced all responsive and non-privileged data relating to the OSC that exist and are in its possession.

(6) Data on complaints filed against the "other healthcare companies" to which PacifiCare was compared from 2005 to 2008, contained in the database referred to by Janelle Roy.

PLHIC is mistaken. Ms. Roy specifically testified that PLHIC was not compared to other healthcare companies. (5603:11-15.) Rather, as Ms. Roy testified, PLHIC was compared to the previous complaint history of PLHIC. (5603:16-20.)

Data on complaints filed against other healthcare companies are not relevant to this proceeding. As discussed above, the ALJ previously upheld CDI's limitation of documents to be produced to those that relate to the OSC. (See Order Re: PLHIC Motion to Compel.)

Moreover, as PLHIC must know, complaints against other healthcare companies are confidential. Even were they relevant to this proceeding, CDI could not produce them to PLHIC any more than CDI could share with other insurers complaints against PLHIC.

TAB H

1 BEFORE THE INSURANCE COMMISSIONER

2 OF THE STATE OF CALIFORNIA

3 OAKLAND, CALIFORNIA DEPARTMENT B, RUTH ASTLE, JUDGE

4 --o0o--

5 IN THE MATTER OF) UPA 2007-00004

6 PACIFICARE LINE AND HEALTH INSURANCE) OAH 2009061395

7 COMPANY,) WEDS. 11/3/10

8 RESPONDENT.) VOLUME 110

9 _____) PGS 13157-13264

10 REPORTER'S TRANSCRIPT OF PROCEEDINGS

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22 REPORTED BY: DEBORAH FUQUA, CSR #12948

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1 if we can set a hearing at the break, and I'll
2 communicate that to the CMA.
3 THE COURT: It's a motion to enforce the subpoena?
4 MR. VELKEI: Yes.
5 THE COURT: All right. So before we get into
6 that, does the Department not have these documents?
7 MR. STRUMWASSER: I don't -- I'm not sure of that.
8 But I know we never got them from the respondent.
9 We may or may not have gotten some documents
10 from CMA; I don't know -- because I was aware of the
11 subpoena.
12 THE COURT: But my question, Mr. Strumwasser, do
13 you not have copies of these things from the
14 Department?
15 MR. STRUMWASSER: I've never seen these. I
16 personally have never seen them. I don't know whether
17 they were searched for. I don't know whether they were
18 found. I don't know whether they were logged. That's
19 a process that other folks do and I am a beneficiary.
20 THE COURT: Can you check into that?
21 MR. STRUMWASSER: Sure.
22 MR. VELKEI: Your Honor, if I could, just to
23 remind the Court, Mr. Gee actually -- and we've gotten
24 his transcript -- was unequivocal, "we've gone, we've
25 gone again, we've searched."

1 THE COURT: I know.
2 But now that you have something specific to
3 look for --
4 MR. GEE: Exactly.
5 THE COURT: Can you do that again?
6 MR. GEE: Sure.
7 MR. VELKEI: I mean, our view, your Honor --
8 obviously it's going to disagree with the Department --
9 is it was either withheld or destroyed. Either way, I
10 have the correspondence with Mr. Gee, and I can quote
11 him. And I'm happy to.
12 THE COURT: I'm not asking in order to cause, you
13 know, some kind of consternation. I'm asking because,
14 if we had them, we could short-circuit this and we
15 could just do it. So if you see them.
16 MR. GEE: We'll look for them your Honor.
17 THE COURT: All right.
18 MR. VELKEI: Q. And finally just to -- have you
19 seen this laundry list of things the CMA wanted from
20 both PacifiCare and United?
21 A. No.
22 Q. Finally, you would agree with me that the CMA
23 makes the request in the second to last paragraph that
24 the Department move forward with an enforcement action
25 and assess fees and penalties?

1 share drive?
2 MR. STRUMWASSER: With respect to this exam?
3 MR. VELKEI: Q. With respect to this exam.
4 A. Not that I recall.
5 Q. How about, did you archive any of the older
6 e-mail messages that you had related to the exam?
7 A. Not that I recall.
8 Q. So fair to say you didn't have to delete the
9 e-mails; you could have archived them or put them on a
10 share drive, correct?
11 A. Yes.
12 Q. Now, back to your comments, sir, about -- I'm
13 struck by the notion that there were 200 exams going on
14 at the time and sort of hard for you to keep track of
15 all of them, and you mentioned some issues with wild
16 fires. Was that something that was percolating at the
17 time?
18 A. Wild fire exams were, I believe, in 2008.
19 Q. There were also issues related to rescission
20 of consumer insurance policies, correct?
21 A. Yes.
22 Q. Do you think that the allegations reflected in
23 this exam were as serious as those related to the wild
24 fires and rescission cases?
25 MR. STRUMWASSER: Vague. By "serious" does he

TAB I

1 BEFORE THE INSURANCE COMMISSIONER

2 OF THE STATE OF CALIFORNIA

3 OAKLAND, CALIFORNIA DEPARTMENT B, RUTH ASTLE, JUDGE

4 -oOo-

5 IN THE MATTER OF) UPA 2007-00004

6 PACIFICARE LIFE AND HEALTH INSURANCE) OAH 2009061395

7 COMPANY,) TUESDAY 12/8/09

8 RESPONDENT.) TRIAL DAY TWO

9 _____) VOLUME 2-B

10 REPORTER'S TRANSCRIPT OF PROCEEDINGS

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25

1 MR. STRUMWASSER: Is it possible?
2 THE COURT: Yes.
3 MR. STRUMWASSER: Is this one of those like
4 Worshock tests to see what you think?
5 THE COURT: Anything is possible.
6 BY MR. VELKEI:
7 Q. Anything is possible. Well, why don't we try a
8 different way, Ms. Smith. What was that understanding of
9 yours based upon?
10 A. The presentations that PacifiCare had made.
11 Q. Anything else?
12 A. No.
13 Q. Okay. I want to switch gears a little bit and
14 ask you about, fair to say that you were the point person in
15 dealing with PacifiCare beginning sometime in the fall of
16 '06 and at least continuing through the summer of '07?
17 A. Yes.
18 Q. And we've testified about a lot of paper changing
19 hands, companies sending you a variety of written responses,
20 e-mails, Excel spread sheets; correct?
21 A. Yes.
22 Q. And there are a number of letters that you sent
23 over that same period of time; correct?
24 A. I believe so, yes.
25 Q. And there were a number of e-mails that you sent

1 and received in connection with this whole area of period of
2 time that we've been talking about?
3 A. That is correct.
4 Q. So we're presumably we're talking about hundreds
5 of documents over this period of time; correct?
6 A. Many documents, I think. I can't number them but.
7 Q. Roughly?
8 A. I don't have a number. I never counted them.
9 Many. We met every other week. We had documents exchange.
10 Q. Did you destroy any documents in connection with
11 this period of time from the fall of' 06 through the summer
12 of '07?
13 MR. STRUMWASSER: Objection. Over broad.
14 THE COURT: Any documents relating to PacifiCare?
15 MR. VELKEI: Relating to PacifiCare. Excuse me,
16 your Honor.
17 THE COURT: Okay.
18 BY MR. VELKEI:
19 Q. Did you destroy any documents related to
20 PacifiCare in the investigation that you undertook over this
21 period of the time fall of '06 to the summer of '07
22 A. Yes, I did.
23 Q. And when did you first begin destroying documents?
24 A. August of 2007 I no longer worked on the
25 project and I think, going by memory, sometime perhaps in

1 December or January. Um, --

2 THE COURT: What year?

3 THE WITNESS: Of 2007.

4 Q (By Mr. Velkei) January of '08?

5 A. 2007, the December or January, December 2007 or

6 January of '08. And the following the investigation of

7 the field claims bureau, there were further requests for the

8 claims services bureau to review outstanding issues of

9 PacifiCare. But I don't know those deadlines because that

10 assignment was not made to me.

11 In July of 2008, I was asked to move offices.

12 And I also we have a computer system where e-mails

13 exceed your limit and my e-mails exceed my limit from time

14 to time. When I am no longer involved in a project for a

15 lengthy period of time, and I'm not told that I need to keep

16 certain things, just for housekeeping, I need to get rid of

17 them. So I had to clean up my e-mails for reasons of

18 exceeding my e-mail box. In fact, right now I checked my

19 e-mail and I'm again at the limit and I have to dig them

20 out, which ones I'm going to delete. Besides that, the

21 actual documents that I kept a file on were kept in my

22 office but I moved offices and that was in July of

23 2008. There were certain things that I determined not to be

24 of value. It wasn't anything that anybody asked me to keep

25 so those documents were not kept.

1 Q. So just so I'm clear, you destroyed some documents
2 in December of '07 and January of '08?
3 A. You know, it, I'm giving you a rough. I don't
4 know exactly. There were documents deleted off of the
5 computer system. There were documents, we changed
6 computers. My e-mail runs out of space whenever I'm
7 prompted I would have destroyed those documents.
8 Q. So you think it would be sometime in December of
9 '07?
10 A. I'm thinking at that time frame.
11 Q. At that time frame, ma'am?
12 A. Yeah.
13 Q. Yes?
14 A. I'm not -- I'm not certain.
15 Q. And then it's also your testimony that you recall
16 purging or destroying some of the documents in July related
17 to PacifiCare in July of '08 when you changed offices?
18 A. Yes. The actual documents, because of the amount
19 of work that had to take place in the boxes.
20 Q. Do you happen to have a list or index of the
21 documents were destroyed over that period of time?
22 A. No, I'm sorry, I did not keep.
23 Q. So I guess it wouldn't surprise you to learn that
24 only forty documents were produced by the Department on your
25 behalf?

1 A. It would not surprise me. I was asked I
2 don't know, within the past year to produce documents. It
3 was a long time after I had destroyed documents and I
4 produced what I could.
5 Q. I'm going to switch gears to the
6 complaint process we touched on it. I don't want to spend
7 too much time but I'm trying to, first of all, understand
8 how you fit into the hierarchy of the Department. So
9 commissioner is here, right?
10 A. Yes.
11 Q. And then there's -- how many levels are you
12 separated from the actual Commissioner Poisner, if you can
13 answer that question?
14 A. Okay.
15 MR. STRUMWASSER: The actual commissioner Poisner
16 as opposed body doubles or --
17 THE WITNESS: Um, three.
18 BY MR. VELKEI:
19 Q. Great.
20 A. And then the commissioner will be the fourth.
21 Q. Okay. So you report, you reported, well, you
22 reported to Mr. Stoles?
23 A. There is a bureau chief that is a supervisor I
24 report to. The bureau chief reports to, in our branch, to a
25 division chief. The division chief reporting to a deputy

TAB J

1 BEFORE THE INSURANCE COMMISSIONER

2 OF THE STATE OF CALIFORNIA

3 OAKLAND, CALIFORNIA, DEPARTMENT B, RUTH ASTLE, JUDGE

4 -oOo-

5 IN THE MATTER OF) UPA 2007-00004

6 PACIFICARE LIFE AND HEALTH INSURANCE) OAH 2009061395

7 COMPANY,) March 1, 2010

8 RESPONDENT.)

9 _____) Volume 35

10

11 REPORTER'S TRANSCRIPT OF PROCEEDINGS

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1 501. Take a moment to look that over, if you would.
2 **THE WITNESS:** Okay, I have read it.
3 **BY MR. VELKEI:**
4 Q. Do you recognize this document?
5 A. It looks familiar to me mainly because of my name
6 and so on. I remember it vaguely because of the 4,400
7 policyholders.
8 Q. This was significant enough to get your attention?
9 A. You mean as the far as the document you put in
10 front of me?
11 Q. Yes, sir.
12 A. It reminds me of having seen it before.
13 Q. The number of claim holders and the amount at
14 issue, four and a half million dollars, was that significant
15 enough for you to consider whether a market conduct
16 examination would be appropriate?
17 A. No. This is just part of the information that I
18 transferred that was given to me by apparently Ms. Smith or
19 someone else. I am not sure. I am not sure that this
20 completely includes all the information that I had at my
21 disposal or any conversations that may have occurred outside
22 the scope of this email transmission.
23 Q. In this email you are communicating with your
24 supervisor about whether or not the Department should
25 consider a market conduct exam, correct?

1 A. That's accurate.
2 Q. And your concern is that based on the four and a
3 half million number and the number of policy holders, you
4 may not be able to identify the problem based on a claim
5 file review, correct?
6 A. Well, there is a lot in that question. Could you
7 restate the question one more time, please.
8 Q. The subject matter of your email is whether or not
9 something less than a market conduct exam would be able to
10 get to this issue of whether four and a half million dollars
11 was owed policyholders; correct?
12 A. I am relating to what she stated to me. I don't
13 see that evaluation.
14 Q. "Joel, we may not be able to identify such a
15 situation in a claim file review." What did you mean by
16 that, Mr. Dixon?
17 A. I think this has to do with the Certificate of
18 Creditable Coverage. In other words, we are not able to
19 identify whether or not people have been turned away from
20 having their coverage continued.
21 Q. So if you want to get to the bottom of this issue,
22 you are actually discussing a potential exam set-up?
23 A. That's accurate.
24 Q. So the consideration is to get to the answer to
25 this question by doing a market conduct exam?

TAB K

From: Stolls, David
Sent: Friday, April 27, 2007 10:32 AM
To: Smith, Nicoleta
Cc: Masters,Robert; Brunelle, Steven; Love, Barbara; Cignarale, Anthony; Girion, Woody
Subject: RE: CCR Training for PLHIC Claims Staff
Thanks, Nicoleta, for the additional information.

As important at this information is, it is dwarfed when compared to the overall problems you and our staff have identified.

I suspect you and our staff will be receiving all kinds of updates in the course of investrigating the individual complaint files or in the course of general correpondence from the company. I don't want to piecemeal information to Legal so let's wait until an attorney is formally assigned to the matter and then we can set up proper communication channels.

For now I would certainly keep a "folder" on additional information, notes, findings and at the appropriate time we will update Legal via the "chain of command". Perhaps at some point the "chain of command" could be "waived" on routine information and communication to Legal but, for now, please hang on to this kind of information and have available when communication channels are soon extablished.

Thanks..

Dave Stolls, CPCU
Chief, Claims Services Bureau
(213) 346-6571
stollsd@insurance.ca.gov

-----Original Message-----
From: Smith, Nicoleta
Sent: Friday, April 27, 2007 10:17 AM
To: Stolls, David
Cc: Masters,Robert; Brunelle, Steven; Love, Barbara
Subject: FW: CCR Training for PLHIC Claims Staff

Hi, Dave.

Please see the list attached which gives us more people than the original list provided to us just a few weeks ago. In addition, please see that this list contains the location of the claims personnel. Redacted

Redacted

Redacted Thanks.

Nicoleta

-----Original Message-----
From: Henggeler, Laura D [mailto:Laura.Henggeler@phs.com]
Sent: Friday, April 27, 2007 9:51 AM
To: Henggeler, Laura D; Smith, Nicoleta
Subject: RE: CCR Training for PLHIC Claims Staff

Hi Nicoleta:

As you requested, I have attached is the PLHIC claims staff training listing with staff locations (city and

TAB L

1

2 BEFORE THE INSURANCE COMMISSIONER

3 OF THE STATE OF CALIFORNIA

4 OAKLAND, CALIFORNIA DEPARTMENT A, RUTH ASTLE, JUDGE

5 -oOo-

6 IN THE MATTER OF) UPA 2007-00004

7 PACIFICARE LIFE AND HEALTH INSURANCE) OAH 2009061395

8 COMPANY,) THURSDAY 03/18/10

9 RESPONDENT.) TRIAL DAY 44

10 _____) VOLUME 44

11 REPORTER'S TRANSCRIPT OF PROCEEDINGS

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1 Q. Now, is, when you got this document retention
2 instruction regarding PacifiCare, did you make any kind of
3 response or note of some sort confirming that you had
4 received and understood that instruction?
5 A. I don't recall.
6 Q. Is it typical CDI practice and procedure that when
7 a document retention instruction goes out, that part of that
8 communication is some mechanism for a recipient to
9 acknowledge having received and -- having received that
10 communication?
11 A. I'm not aware of any -- anything like that.
12 Q. Did you take any steps to insure that your direct
13 and indirect reports in the CSB had received the PacifiCare
14 document retention instruction?
15 A. Other than telling them?
16 Q. Did you ask that they all e-mail you or somehow
17 confirm that they actually had received it and understood
18 it?
19 A. I don't recall that.
20 Q. Okay. Is that something you would typically do
21 when a document retention instruction goes out from your
22 superiors?
23 A. No.
24 Q. Have you, at some point, had a discussion with
25 Nicoleta Smith regarding retaining, her retaining documents

1 related to PacifiCare?
2 A. Yes.
3 Q. When did you have that discussion, sir? Let me --
4 let me withdraw that. Did you have that discussion sometime
5 in or about July of 2008?
6 A. I don't recall.
7 Q. Did you have that discussion about retaining
8 documents, PacifiCare documents with Nicoleta Smith about
9 the same time Ms. Smith was about to change offices?
10 A. I don't recall.
11 Q. How many discussions have you had with Nicoleta
12 Smith about her need to retain PacifiCare-related documents?
13 A. I would say several.
14 Q. Several?
15 **THE COURT:** Is that a yes?
16 **THE WITNESS:** Yes.
17 BY MR. KENT:
18 Q. Can you give me your best estimate as to how many
19 times you've talked to Nicoleta Smith about the need for her
20 to keep her PacifiCare documents, not to destroy them?
21 A. How many times?
22 Q. Uh-huh.
23 A. By several, I mean somewhere between, you know,
24 five and ten times, I would say, that the issue may have
25 come up.

1 Q. Five to ten times? Is that your estimate? Is
2 that correct?
3 A. Yeah.
4 Q. And let's see if we can put a time frame on that.
5 When was -- do you recall the first time, and I know it
6 won't be specific down to the date, but, generally speaking,
7 when was the first time you talked to Nicoleta Smith about
8 the importance for her to retain all her PacifiCare
9 documents?
10 **MS. ROSEN:** I'm going to object. It
11 mischaracterizes his testimony. He didn't say anything
12 about all of her documents, the importance of. He just
13 testified they had a conversation about documents.
14 **THE COURT:** Okay. Do you want to rephrase?
15 **MR. KENT:** No. I think he's -- I think he's
16 answered several questions about acknowledging the
17 importance of them.
18 **THE COURT:** When is the first time you had the
19 discussion as you can recall, the best you can recall?
20 **THE WITNESS:** I really don't remember when the
21 first time was. I -- I recall numerous conversations about
22 it. You know, as we were, you know, getting documents, you
23 know, boxed and put away, and stored and make -- to make
24 sure that they're all in one place, you know, as part of.
25 That's a routine thing in our project. We box them up and

TAB M

1 BEFORE THE INSURANCE COMMISSIONER

2 OF THE STATE OF CALIFORNIA

3 OAKLAND, CALIFORNIA DEPARTMENT B, RUTH ASTLE, JUDGE

4 --o0o--

5 IN THE MATTER OF) UPA 2007-00004

6 PACIFICARE LINE AND HEALTH INSURANCE) OAH 2009061395

7 COMPANY,) TUES. 11/2/10

8 RESPONDENT.) VOLUME 109

9 _____) PGS 12983-13156

10 REPORTER'S TRANSCRIPT OF PROCEEDINGS

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1 Q. So are your responsibilities strictly limited
2 to property casualty insurers?
3 A. Yes.
4 Q. Is it involved with just approving rates that
5 the insurance companies are applying for, rate
6 increases, things of that sort?
7 A. Rates and rate-related changes, forms changes,
8 rule changes.
9 Q. Since you assumed your position as deputy
10 commissioner rate regulation branch, do you continue to
11 have any responsibilities or involvement in the market
12 conduct area?
13 A. Just some lingering input on certain issues at
14 times.
15 Q. Would lingering input include input on the
16 PacifiCare matter?
17 A. No.
18 MR. STRUMWASSER: Other than this testimony?
19 MR. VELKEI: That's correct.
20 THE COURT: He said no.
21 THE WITNESS: No.
22 MR. VELKEI: Q. Prior to that time, Mr. Laucher,
23 you were the chief of the market conduct division; is
24 that correct?
25 A. Yes.

1 Q. Can you explain what the responsibilities are
2 for chief of the market conduct division?
3 A. Yes. We had two bureaus that conduct market
4 conduct examinations that review either the
5 underwriting files or the claims files of licensed
6 insurance companies that do business in California.
7 And we had a market analysis unit that pulled up
8 information mostly from National Association of
9 Insurance Commissioner databases about companies that
10 we were intending to examine. So I managed that
11 process.
12 Q. Would it be fair to say that you were in
13 charge of all market conduct exams from 2002 to
14 November 2009?
15 A. Yes, at that level. Yes.
16 Q. Did your responsibility end once the market
17 conduct exam was completed? So let's take a particular
18 market conduct exam. You were responsible for
19 overseeing the actual exam process, correct?
20 A. Yes.
21 Q. Once an exam was completed, were you involved
22 in subsequent efforts or steps after the exam was
23 completed?
24 A. In certain situations, yes.
25 Q. Did you provide, during your time as chief of

1 your files related to this particular examination?
2 A. I think the -- I likely would have deleted
3 e-mail related to this examination.
4 Q. The records on the document production show
5 that a total of only 22 documents were produced in
6 which you were the custodian of record.
7 A. Okay.
8 Q. I'm assuming, sir, but I'm going to ask you,
9 there were probably a lot more documents than 22 that
10 related to this particular engagement, correct?
11 MR. STRUMWASSER: By "engagement," you mean this
12 exam?
13 MR. VELKEI: Yes.
14 THE WITNESS: Not necessarily.
15 MR. VELKEI: Okay.
16 Q. Did you destroy documents or not, sir, related
17 to PacifiCare and the examination?
18 THE COURT: He said he deleted e-mails.
19 MR. STRUMWASSER: Vague as to time.
20 THE COURT: He said he deleted e-mails.
21 MR. VELKEI: Q. Why don't we go to a new
22 document, then, sir. Let me show you what's been
23 previously marked as Exhibit 5171.
24 A. Okay.
25 Q. Do you recognize this document?

1 e-mails in connection with your oversight of the
2 examination, right?
3 A. Yes.
4 Q. And that you destroyed many of those e-mails,
5 correct?
6 A. I would have destroyed many e-mail, yes.
7 Q. How many -- I mean, did the destruction occur
8 at one point? Did it occur over a period of time? So
9 focusing specifically on the PacifiCare exam, when were
10 these e-mails deleted?
11 A. They would be deleted as -- sporadically as
12 they seemed no longer necessary to me.
13 Q. Seemed necessary to you?
14 A. Correct.
15 Q. You understand that there are document
16 retention policies of the Department of Insurance,
17 correct?
18 A. We have a work paper guideline in our own
19 procedures manual.
20 Q. So the procedures manual that we've been
21 talking about, there is some provision for that?
22 A. Yes.
23 Q. So we'll talk about that in a second.
24 Understanding sort of the interest of many folks, the
25 fact that this was a high profile exam, did you discuss

1 this decision to delete e-mails with anybody prior to
2 doing it?
3 A. No.
4 Q. Did you check to see whether somebody retains
5 at least one copy of the documents that you were
6 destroying?
7 A. Well, if I sent an instruction to the examiner
8 on something that they were to do, I would expect that
9 might end up in the work papers.
10 Q. You would expect it might end up in the work
11 papers?
12 A. Right.
13 Q. You really -- did you check to make sure that
14 the e-mails you sent were in fact in the work papers
15 before you destroyed them?
16 A. No.
17 Q. Did you make any kind of determination whether
18 you thought that the particular e-mails you were
19 destroying had some significant bearing on the exam?
20 A. If I sent an instruction about something to do
21 and that something occurred, I might be likely to
22 destroy that e-mail, or I would be likely to destroy
23 that e-mail if it's just a procedural step, for
24 example.
25 Q. But you destroyed e-mails knowing full well

1 2008?
2 A. After we'd already issued our enforcement
3 action?
4 Q. After the OSC in January 2008; is that
5 correct?
6 A. It's my testimony I don't recall after that.
7 Q. Do you keep a date book by any chance? Is
8 there a record of meetings that you participated in?
9 A. I keep a calendar.
10 Q. Do you have one for 2007 and 2008 that you
11 retained?
12 A. I don't know.
13 Q. Would you check?
14 A. Sure.
15 Q. Just in terms of documents, did you typically
16 receive documents via e-mail, or would you also receive
17 them interoffice and meetings, things of that sort?
18 A. All ways.
19 Q. Did you also destroy documents in addition to
20 e-mails? So we'll put aside e-mails. Let's focus on
21 hardcopy documents, the ones that are before you. Do
22 you recall destroying any hardcopy documents related to
23 the PacifiCare examination?
24 A. Yeah, it would be possible that something
25 the -- for example, that the company might have given

1 me that our examiners also had.
2 I see I retained this. But it would have been
3 possible I wouldn't have retained this. I could have
4 seen I could have gotten rid of this. I didn't see it
5 as -- our other people involved in the exam got this
6 same thing.
7 Q. But you didn't get rid of that document
8 though.
9 A. Yeah, I didn't. I'm saying it would have been
10 a document I might have destroyed.
11 Q. I guess my point is, Mr. Laucher, it appears
12 that you did save some documents before the examination
13 process even began. And thank you for pointing out the
14 presentation that the company gave in March 2007, you
15 retained that.
16 A. Yes.
17 Q. But is it your testimony that there are other
18 documents that you did destroy?
19 A. I think that's possible.
20 Q. How did you decide what you destroyed and what
21 you didn't?
22 A. Things that looked relevant to keep, I kept.
23 Q. You made that determination on your own?
24 A. Yes.
25 Q. You didn't consult anybody at any point?

1 clear what that means, whether it's many attempts to
2 get one or many attempts to draw one up.
3 Q. Do you recall being approached about helping
4 to weigh in on what the scope of the exam should be?
5 A. Yes.
6 Q. Now, it says, "The bureau chief has instructed
7 that a list of issues be submitted to the division
8 chief so that he can establish the exam priorities per
9 e-mail dated 7/19/07." Do you see that?
10 A. Yes.
11 Q. I looked for that e-mail, Mr. Laucher, and I
12 couldn't find it. Is that one of the e-mails that
13 possibly could have been destroyed?
14 A. Yes.
15 Q. It's your testimony that you don't think
16 that's significant or relevant to the examination, what
17 the scope would be?
18 MR. STRUMWASSER: Argumentative.
19 THE COURT: Sustained.
20 MR. VELKEI: Q. Do you recall destroying that
21 e-mail?
22 A. Do I recall the story of it?
23 Q. Destroying it.
24 A. Oh, destroying that e-mail? No.
25 Q. Do you recall the e-mail?

1 pages appear to be some form of the scope document
2 before it was edited or changed by you, correct?
3 A. It's some version of the document, yes.
4 Q. Now, I'd like to turn, if we can, to the first
5 page of 5410 and what's listed as the exam priorities.
6 And it says "per Joel e-mail" dated July 25th, 2007. I
7 couldn't find this e-mail either, Mr. Laucher. Is it
8 possible that you also destroyed this document?
9 A. Yes.
10 Q. Going down the scope of the examination, sort
11 of down below that, says, as of July 24th, 2007,
12 "reference Joel e-mail" dated July 23rd, 2007. I also
13 couldn't find the July 23rd, 2007 e-mail. Is it
14 possible that you deleted this document as well?
15 A. Yes.
16 Q. And that basically was setting forth the scope
17 of the examination, correct?
18 A. Yes.
19 Q. Do you recall what additional detail was in
20 that e-mail?
21 A. No.
22 Q. Do you recall who you sent the e-mail to?
23 It's July 23rd.
24 A. No.
25 Q. Same questions for going back up to "Exam