IN THE CIRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT,
IN AND FOR BROWARD COUNTY, FLORIDA

Complex Litigation Division
CASE NO. 06-08940 CACE (07)

SHERIDAN HEALTHCORP, INC., a
Florida corporation, individually and on
behalf of its affiliates and subsidiaries,

Plaintiff,

vs.

NEIGHBORHOOD HEALTH PARTNERSHIP,
INC., a Florida corporation,

Defendant.

______________________________/

ORDER ON PARTIAL SUMMARY JUDGMENT

THIS MATTER came before the court for hearings on February 17 and 26, 2009, upon the Motion for Entry of an Order Granting Partial Summary Judgment, filed by Sheridan Healthcorp, Inc., for itself and on behalf of its affiliates and subsidiaries (collectively, "Sheridan").[1] The court considered the motion, including the affidavits (and the attached exhibits) of Janet Gehring and Deana Tammara-Cohen, dated September 5, 2008. The court also considered the Opposition to Sheridan's Motion for Partial Summary Judgment filed on October 13, 2008, by Neighborhood Health Partnership, Inc. ("NHP"), including the affidavit and attached exhibits of Alan Glencsk, dated October 10, 2008; Sheridan's Reply to NHP's Opposition to Sheridan's Motion for Partial Summary Judgment, dated January 29, 2009; and NHP's Sur-Reply in Opposition to Sheridan's Motion for Partial Summary Judgment, dated February 13, 2009. The court also reviewed deposition

[1] The motion sought the entry of summary final judgment as to liability on Count II (breach of an implied-in-fact contract) and Count III (declaratory relief) of Sheridan's June 20, 2006 Complaint for Damages and for Declaratory Relief.

FROM : FAX NO. : Apr. 16 2009 02:11PM P1

transcripts of Lewis Gold, M.D. (Sheridan's President), Deana Tammara-Cohen (Sheridan's Vice President of Managed Care and Network Development), Janet Gehring (Sheridan's Vice President of Medical Reimbursement), Randee Lehrer (former Vice President, Network Management of NHP's parent, United Healthcare) and Alan Glenesk (Regional Vice President of NHP's parent, United Healthcare), including attached exhibits.[2] The court also reviewed the parties' post-hearing memoranda and, being otherwise fully advised in the premises,[3] does hereby - -

ORDER and **ADJUDGED** as follows:

Background Of The Dispute

This case essentially concerns a contractual dispute between Sheridan and NHP. Sheridan's employed and engaged physicians provide medical care in clinical specialties such as anesthesiology, as well as gynecology/OBGNY, infertility, general surgery, perinatology, gynecological oncology, pain management, neonatology, radiology and emergency care. In this case, Sheridan's physicians provided non-emergent medical care in the clinical specialty of anesthesiology in hospitals throughout Broward County. NHP is a Florida licensed Health Maintenance Organization ("HMO") which provides health care services for its members through prepaid health care plans. In return, NHP collects premiums from its members for the health care services. In this case, all of NHP's HMO members are commercial members, not Medicare members.

---

[2] These transcripts and exhibits were properly before the court. *See Ferguson v. V.S.L. Corp.*, 528 So.2d 32, 33 (Fla. 3d DCA 1988)(finding no violation of rule 1.510(c) where depositions relied on by trial judge in deciding a motion for summary judgment were not filed prior to the hearing, since depositions were taken pursuant to notice and were physically in existence "before the court," satisfying the timing provisions of the rule)(*citing Fernandez v. Cunningham*, 268 So.2d 166 (Fla. 3d DCA 1972)(refusal to consider deposition testimony obtained one day prior to hearing on motion for summary judgment was abuse of discretion)); *Elliott v. Dugger*, 542 So.2d 392, 394 (Fla. 1st DCA 1989)("[T]he court was authorized to consider the deposition filed the day of the hearing since it was taken pursuant to notice and was physically in existence 'before the court,' satisfying the provision of rule 1.510(c), Florida Rules of Civil procedure.").

[3] The court also reviewed and considered the (perhaps untimely) filed *amicus curiae memoranda* of the Florida Medical

Apr. 16 2009 02:12PM P2 FAX NO. : FROM :

Prior to March 1, 2006, the parties' contractual relationship was governed by a written Rate Agreement, dated December 23, 2004, with an effective date of January 1, 2005. Under the Rate Agreement, Sheridan, as a provider of medical care and related services, provided services to NHP's members.[4] The parties also entered into a First Amendment to Rate Agreement which extended its term through February 28, 2006. The Rate Agreement lapsed on February 28, 2006.[5]

Sheridan's Continuing Offer

On March 1, 2006 Sheridan made an express, written, and continuing offer to NHP to provide services to NHP's members, which offer clearly described where Sheridan provided such services, the types of services, and the charges for its services (the "Continuing Offer"). Sheridan also communicated the precise manner in which the Continuing Offer could be accepted, and NHP did, indeed, conduct itself in precisely that manner. NHP preauthorized its members to receive Sheridan's services and failed to take any action whatsoever to avoid or dissuade the acceptance of Sheridan's services by its members. Sheridan's Continuing Offer specified certain charges for its services, and therefore NHP had full knowledge of the charges.[6]

Association, the Florida Hospital Association, and the Florida Association of Health Plans, and as the responses to the documents.

[4] NHP is a Florida licensed Health Maintenance Organization ("HMO") which provides health care services for its members through prepaid health care plans. In return, NHP collects premiums from its members for the health care services. In this case, all of NHP's HMO members are commercial members, not Medicare members.

[5] On February 11, 2009, NHP filed its Notice of Intent to Rely On Summary Judgment Evidence in which it attached 42 separate exhibits. These exhibits merely establish that the parties continued to attempt to negotiate a new, long-term, written Rate Agreement subsequent to February 28, 2006. While the parties continued to negotiate statewide rates, these negotiations did not vitiate the parties' contract implied-in-fact and the applicable rate thereto. For example, Exhibit 4 to NHP's Notice of Intent (the same as Exhibit 1 to Ms. Gehring's Affidavit) clearly stated that while Sheridan had no existing Rate Agreement, "... [b]y choosing to send your members for services, Neighborhood Health has agreed to pay, and is obligated to pay our billed charges in full." No genuine issues of fact are created by these exhibits; instead, many of them reaffirm Sheridan's Continuing Offer and NHP's acceptance (*e.g.*, Exhibit 28 to NHP's Notice of Intent - - "As we continuously have stated, Sheridan is ready to consider a resumption of its contractual volume discount arrangements with United and NHP on mutually acceptable terms. Until that time comes, Sheridan will continue to provide excellent health care to NHP's members whenever NHP chooses to use Sheridan providers for its non-emergent care on the terms contained in the February 28 Continuing Offer.").

[6] *Cf National Union Fire Ins. Co. of Pittsburgh, Pennsylvania v. Texpak Group, N.V.*, 906 So.2d 300, 302 (Fla. 3d DCA

FROM : FAX NO. : Apr. 16 2009 02:13PM P3

On that date, (March 1, 2006) Sheridan's Vice President of Managed Care and Network Development, Deana Tammara-Cohen, sent the Continuing Offer to NHP's Director of Network Management, Vicki Miller. The Continuing Offer specified the only terms and conditions by which Sheridan, through its employed and engaged physicians,[7] would provide services to NHP's members. The Continuing Offer essentially provided that NHP could accept - - by its conduct, only[8] - - the physician services[9] provided by Sheridan at specified facilities (often times, the exclusive provider at that facility) (the "Locations") and at specified rates for the services (the "Billed Charges").[10]

<u>The Implied-In-Fact Contract</u>

Under Florida law, an implied-in-fact contract "is one form of an enforceable contract; it is based on a tacit promise, one that is inferred in whole or part from the parties' conduct, not solely from their words." *Eller Media Company n/k/a Clear Channel Outdoor, Inc. v. National Union Fire*

2005)("It was the best of contracts, it was the worst of contracts. . . ".)(Gersten, J., *concurring*).

[7] Sheridan's employed and engaged physicians provide medical care in clinical specialties including anesthesiology.

[8] As the "master of its offer," Sheridan had the right under its Continuing Offer to dictate the precise manner of NHP's acceptance. *Kendel v. Pontious*, 261 So.2d 167, 169 (Fla. 1972), *citing*, *Strong & Trowbridge Co. v. H. Baars & Co.*, 54 So. 92, 93-94 (Fla. 1910). *See also Salco Distributor, LLC v. Icode, Inc.*, 2006 WL 449156 (M.D. Fla.) ("A vendor, as <u>master of the offer</u>, may invite acceptance by conduct and may propose limitations on the kind of conduct that constitutes acceptance. A buyer may accept by performing the act the vendor proposes to treat as acceptance.")(*internal citation omitted*). Accordingly, Sheridan could, and did, provide that NHP could accept by its conduct, notwithstanding its purported rejection of the Continuing Offer by correspondence. *See also Bush v. Ayer*, 728 So.2d 799 (Fla. 4th DCA 1999) and *Muniz v. GCA Services Group, Inc.*, 2006 WL 2130735 (M.D. Fla.)("Where the offeror instructs the offeree on how to accept the offer, . . . only that method of acceptance creates a valid contract.")(*internal citation omitted*).

[9] The physician services referenced in Sheridan's Continuing Offer, and otherwise involved in this case, concern only non-emergent hospital-based medical services to NHP's members (the "Affected Health Services"). Accordingly, §641.513(5), *Fla. Stat.* does not apply here because it concerns only emergency services and care. The inapplicability of §641.513(5), *Fla. Stat.* NHP's argument that this court should engage in an analysis of whether Sheridan's rates constitute ". . . usual and customary provider charges" as discussed, *below*.

[10] Sheridan's Continuing Offer was modified, from time to time, in order to bring current its roster of physicians at each of the Locations, as well as the amount of the Billed Charges during the more than three (3) years since the Rate Agreement expired. The Billed Charges were, according to Sheridan, one hundred percent (100%) of its then applicable prices for each of the services provided. For its part, NHP responded to Sheridan's Continuing Offer on March 2, 2006 by stating, *inter alia*, that it intended only " to pay Sheridan the usual and customary rates" and that it did not consider the Continuing Offer to impose any contractual obligations on NHP or [its parent] United." NHP did not, at any time, make a counter-continuing offer to Sheridan; nor did NHP contend that Sheridan's Continuing Offer was unconscionable, illegal, vague, imprecise or lacking in any material term. Even had NHP made a counter-continuing offer to Sheridan, only NHP manages its members' care - - not Sheridan - - and NHP's preauthorizations, in any event, mooted the ability of Sheridan to accept a counter-offer.

FROM : FAX NO. : Apr. 16 2009 02:13PM P4

Insurance Company of Pittsburgh, PA., 2008 WL 4224292 (S. D. Fla.), *citing, Baycare Health Systems, Inc. v. Medical Savings Ins. Company*, 2008 WL 792061 *7 (M.D. Fla. March 28, 2008) (*quoting Commerce Partnership 8098 Ltd. Partnership v. Equity Contracting Co., Inc.*, 695 So.2d 383, 385 (Fla. 4th DCA 1997).[11] Courts have found an implied-in-fact contract in instances where services were performed under circumstances fairly raising a presumption that the parties understood and intended that an agreement was to be formed and consequent compensation was to be paid. *Commerce Partnership 8098, Ltd.*, 695 So.2d at 386-87. Here, the compensation to be paid was an express, material term of Sheridan's Continuing Offer throughout the period of NHP's acceptance.[12] Not only did NHP accept the price terms offered by Sheridan in the Continuing Offer through its conduct, but NHP also admitted that for non-emergent Affected Health Services, no statutory price limitation exists for Sheridan's services. *See* Deposition of Alan Glenesk, dated January 6, 2009, p. 259, line 11 to p. 260, line 7. As such, NHP was not free to arbitrarily reduce Sheridan's Billed Charges and this court need not separately analyze whether they are "usual and customary provider

[11] *See also, Waite Development, Inc. v. City of Milton*, 866 So.2d 153, 155 (Fla. 1st DCA 2004) (*citing* 17 *Am.Jur.2d* "Contracts" §3 (1964); 1 Arthur Linton Corbin, *Corbin on Contracts* §§1.18-1.20 (Joseph M. Perillo ed.1993).

[12] NHP further claims the absence of any facts supporting a meeting of the minds for NHP to reimburse Sheridan at the rates unilaterally set in its Continuing Offer. NHP contends a jury must determine a reasonable amount - - even if an implied-in-fact contract exists. In support of this argument, NHP relies upon *Eskra v. Provident Life & Accident Ins. Co.*, 125 F.3d 1406 (11th Cir. 1997), an October 19, 1990 Informational Bulletin from Florida's former Insurance Commissioner, and a July 20, 1994 letter from the Florida Department of Insurance's Bureau of Life and Health Solvency and Market Conduct Review concerning that October 19, 1990 bulletin the court finds the argument unpersuasive.

In *Eskra*, the Eleventh Circuit reasoned: "Where the existence of a contract is clear, but the term about how much an employee would receive is unspecified, a jury is empowered to award a reasonable amount of compensation. The impossibility of the calculation with 'absolute exactness' will not defeat recovery where a long track record of a business provides a solid foundation for reasonable projections." *Eskra*, 125 F.3d at 1413 (*internal citations omitted*). As the rates set forth in Sheridan's Continuing Offer are specified, clear and unequivocal - - unlike the situation in *Eskra* - - a jury need not embark upon a determination of reasonable compensation.

NHP's reliance upon Informational Bulletin 90-022 "Reimbursement of Non-Contracted Ancillary Providers" by former Florida Insurance Commissioner, Tom Gallagher (the "Bulletin 90-022") is similarly misplaced. The Bulletin was replaced by *Fla. Admin. Code* R. 69O-191.049(2) in 1992. *See Health Options, Inc. v. Palmetto Pathology Serv., P.A.*, 983 So.2d 608, 615 n.8 (Fla. 3d DCA 2008) ("This new rule [69O-191.049(2)] replaced the bulletin in 1992. HMOs were on notice that year that they, not their members or hospitals, should be paying for the disputed services."). On its face, *Fla. Admin. Code* R. 69O-191.049, which carries the force of law, does not provide that an HMO should pay a provider with whom it does not have contract "usual and customary" or "reasonable" charges. Here, though, the Court finds that this HMO, NHP, did have an implied-in-fact contract with Sheridan with rates of reimbursement well-defined.

FROM : FAX NO. : Apr. 16 2009 02:14PM P5

charges."[13]

Sheridan's Billed Charges

An analysis of Sheridan's Billed Charges is not required under the unique facts and circumstances of this case. NHP raised 22 Defenses when answering Plaintiff's Complaint on December 7, 2007. None of the Defenses raised alleged that Sheridan's Billed Charges are unconscionable or otherwise violated Florida's public policy. *See Aldridge v. Peak Property and Casualty Insurance Corporation*, 873 So.2d 499, 500-501 (Fla. 2d DCA 2004) (finding trial court was required to consider whether party was entitled to summary judgment on the claims actually pled). NHP did not, in any event, present any proof that Sheridan's Billed Charges were unconscionable or so unreasonable as to violate Florida's public policy. Even if such defenses had been raised, the evidence before the court is to the contrary. Mr. Glenesk testified that NHP's parent company, United Healthcare, pays Sheridan's Billed Charges for non-emergent Affected Health Services in the absence of a written, long-term Rate Agreement. *See* Deposition of Alan Glenesk, dated January 6, 2009, p. 153, line 8 to p. 158, line 3. Ms. Lehrer corroborated Mr. Glenesk. *See* Deposition of Randee Lehrer, dated December 29, 2008, p. 51, line 10 to p. 52, line 19; p. 68, line 17 to p. 69, line 14. Dr. Gold did the same; see *also* Deposition of Lewis Gold, M.D., dated February 11, 2009, p. 142, line 9 to p. 144, line 6.

While United Healthcare and NHP may operate separately, the court finds that United

---

[13] Notwithstanding, NHP argued at the February 26, 2009 hearing the case of *Cleveland Clinic Hospital vs. VISTA HealthPlan of Florida, Inc.* (Broward County Circuit Court; Case No. 05-05012) which involved §641.513(5), *Fla. Stat. Cleveland Clinic Hospital* does not apply to this action because it involved a provider-payer dispute concerning emergency services and care in the absence of a contract. Here, not only do the claims involve non-emergent services and care, but there exists an implied-in-fact contract in which Sheridan specified its rates as a material term thereof. Had Florida's Legislature determined to provide a similar framework for the analysis of an HMO's reimbursement to a provider in the context of non-emergent services, it would have done so. This court will not exceed its authority and legislate such a framework from the bench. *Shands Teaching Hospital & Clinics, Inc. v. Smith*, 480 So.2d 1366, 1370 (Fla. 1st DCA 1985). Applicable, too, is the maxim, *expressio unius est exclusio alterius,* which translates that "the expression of one thing is the exclusion of the other." *Shumrak v. Broken Sound Club, Inc.*, 898 So.2d 1018 (Fla. 4th DCA 2005), *Moonlit Waters Apartments, Inc. v. Cauley*, 666 So.2d 898, 900 (Fla. 1996). In other words, "when a law expressly describes a situation where something should apply, an inference must be drawn that what is not included by specific reference was intended to be omitted or excluded." *Coral Cadillac, Inc. v. Stephens*, 867 So.2d 556, 558-559 (Fla. 4th DCA 2004).

FROM : FAX NO. : Apr. 16 2009 02:15PM P6

Healthcare's determination to pay Sheridan's Billed Charges in the identical situation is persuasive[14] on the issue of whether the implied-in-fact price terms are reasonable.[15] At the February 26, 2009 hearing, NHP argued that it chooses not to pay Sheridan's Billed Charges because its members, unlike many of United Healthcare's members, are statutorily protected from Sheridan "balance-billing" NHP's members' in the amount of the underpayments.[16] NHP's argument only underscores the unreasonableness of its position, not the claimed unreasonableness of Sheridan's Billed Charges. Mr. Glenesk confirmed Sheridan's inability to balance-bill NHP's members for the difference between its Billed Charges and the amount paid by NHP. *See* Deposition of Alan Glenesk, dated January 6, 2009, p. 190, line 25 to p. 191, line 4. This was, again, corroborated by Ms. Lehrer. *See also* Deposition of Randee Lehrer, dated December 29, 2008, p. 159, lines 17-19, and by Dr. Gold. *See* Deposition of Lewis Gold, M.D., dated February 11, 2009, p. 138, lines 1-23. Under these circumstances, the court will not, indeed, cannot rewrite the parties' implied-in-fact contract in order to render Sheridan's Billed Charges more financially advantageous to NHP. *Yusem v. Butler*, 966 So.2d 405, 414 (Fla. 4th DCA 2007) *citing Beach Hotel Corp. v. Wieder*, 79 So.2d 659, 663 (Fla. 1955) (*en banc*) ("It is well settled that courts may not rewrite a contract or interfere with the freedom to contract or substitute their judgment for that of the parties thereto in order to relieve one

---

[14] It is noteworthy that the correspondence concerning rate negotiations from NHP to Sheridan before the lapsing of the Rate Agreement, and the correspondence from NHP to Sheridan concerning the Continuing Offer appeared only on United Healthcare's stationery. *See e.g.*, Exhibits 2, 3, 5, 7 and 9 to Mr. Glenesk's Affidavit, dated October 10, 2008. Further, each of NHP's letters was signed by a United Healthcare corporate representative (*i.e.*, Vicki Miller, its Director of Network Management or Randee Lehrer, its Vice President of Network Management). Moreover, all in-person negotiations concerning the possibility of a new Rate Agreement between the parties were attended by only United Healthcare's corporate representatives. Thus, while some corporate formalities may have been observed, many others were not such that indeed United Healthcare and NHP did not operate independently.

[15] It is not disputed that United Healthcare is able to internally compare a broad spectrum of provider charges because it receives all providers' full-billed charges for their services, including hospital-based services provided to United Healthcare's members. If Sheridan's Billed Charges are, in United Healthcare's view, unreasonable, then presumably it would not pay them in whole.

[16] *See* February 26, 2009 hearing transcript, p. 22, line 1 to p. 23, line 10 (Mr. Soto: "But NHP is not an insured business, the vast majority, almost all of their members, are members of an HMO, and under a health maintenance organization they cannot be balance-billed.").

FROM : FAX NO. : Apr. 16 2009 02:16PM P7

of the parties from the apparent hardship of an improvident bargain.").

Sheridan's Continuing Offer expressly provided that it would continue to be a contracted provider for non-emergent medical services for Affected Health Services at the locations and at the price of its Billed Charges ". . . despite any successive rejections or counteroffers." Sheridan's Continuing Offer also acknowledged that NHP could ". . . choose from time to time, in its discretion, to cause its . . . members not to utilize Sheridan's providers for non-emergent Affected Health Services through any means it chooses, and therefore, not to accept Sheridan's continuing contract offer described in this letter on certain occasions." In other words, Sheridan structured its Continuing Offer such that NHP could not reject by words, but would accept by deeds or conduct.[17] Sheridan contends that NHP accepted its Continuing Offer by (1) failing to manage their members' care and divert them to non-Sheridan Locations,[18] and (2) preauthorizing its members' non-emergent Affected Health Services at the Locations where it knew Sheridan's providers were present. This court agrees, as discussed below.

NHP's Acceptance of the Continuing Offer

Dr. Gold, President of Sheridan, testified (Deposition of Lewis Gold, M.D., dated February 11, 2009, p. 142, line 9 to p. 144, line 6) that ". . . the only way NHP could not agree to (*sic.*) us is not to send their patients. This is basically; we sent NHP and said you have choices here. Choice one, don't send your patients to us. Okay? Get your service somewhere else. Choice two if your patient does have service by a Sheridan physician, we are getting 100 percent of billed charges. That

[17] As master of its offer, Sheridan is entitled to keep open NHP's power of acceptance of its continuing offer despite any rejections or *counteroffers. See Restatement (Second) of Contracts* §38(1). In this regard, the court finds that each of the cases cited by NHP for the proposition that its express rejections terminate Sheridan's Continuing Offer are distinguishable. Absent in each and every case is an express offer which, by its terms, is continuing despite any rejections or counteroffers, and which requires acceptance (or rejection) by performance only.

[18] NHP did not, at any time, deny benefits or coverage to its members because it believed Sheridan's charges were "out-of-network [and] . . . exceed[ed] Usual, Customary and Reasonable Charges." *See* Exhibit 9 to Deposition of Randee Lehrer, dated December 29, 2008 at p. 37, Article VII, ¶41 (NHP's Member Handbook).

Apr. 16 2009 02:16PM P8 FAX NO. : FROM :

simple. So you have a choice, NHP." Similarly, Mrs. Tammara-Cohen testified that NHP knowingly elected to accept the terms of Sheridan's Continuing Offer (Deposition of Deana Tammara-Cohen, dated February 6, 2009, p. 165, line 15 to p. 166, line 15[19]; p. 170, lines 1-16[20]; p. 180, line 10 to p. 181, line 1[21] ; and p. 226, line 3 to p. 228, line 2[22]). For NHP's part, Ms. Lehrer testified (Deposition of Randee Lehrer, dated December 29, 2008, p. 147, lines 1-3; p. 147, line 25 to p. 148, line 4) that NHP was, at all times, obligated to manage its members' care as a "traditional gatekeeper model HMO" and that it had the right to redirect its members away from a provider, such as Sheridan, which was not part of NHP's network.[23] And, Mr. Glenesk testified that, indeed, NHP continued to preauthorize Sheridan's services (Deposition of Alan Glenesk, dated January 6, 2009, p. 188, line 19 to p. 189, line 3), and that NHP put no policy in place to manage its members' care so as to avoid acceptance of Sheridan's Continuing Offer (Deposition of Alan Glenesk, dated January 6, 2009, p. 235, line 12 to p. 236, line 2).[24]

---

[19] Mrs. Tammara-Cohen testified that NHP agreed to the price terms contained in Sheridan's Continuing Offer "[t]hrough their actions and through their continuing to authorize services where they knew we provided hospital-based services."

[20] Mrs. Tammara-Cohen further testified that "I believe we had an agreement, once they continued to use our services, knowing what they would be charged for those services."

[21] Mrs. Tammara-Cohen also testified that "NHP has continued to authorize services, knowing absolutely well what we charge and where we render those services, and continued to allow their patients to go there."

[22] Mrs. Tammara-Cohen consistently testified that "Again, in actions, NHP has continued to authorize our services, process the claims as though we were participating - - providers - - they are not penalizing the patients for our services as though they are going out of network. So in actual practicality, they are - - with the exception of not paying us the rate outlined in our continuing offer, acting as though we are participating providers. They have the complete authority to steer business, and they don't."

[23] Ms. Lehrer confirmed that NHP's parent, United Healthcare, was able to manage its members' care and redirect them away from HCA hospitals and other facilities in August 2006 - - six months after NHP's Rate Agreement with Sheridan lapsed. In that instance, NHP's parent, United Healthcare, advised its members and its participating surgeons that utilizing a non-participating HCA facility could result in the denial of all benefits. *See* Deposition of Randee Lehrer, dated December 29, 2008, p. 149, line 5 to p. 152, line 19; and attached exhibit 6. Here, Ms. Lehrer confirmed that NHP did nothing to divert its members from facilities where it knew Sheridan's physicians provided services. *See* Deposition of Randee Lehrer, dated December 29, 2008, p. 198, line 24 to p. 199, line 16. Notwithstanding, NHP continued to preauthorize its members to utilize Sheridan's services while not denying the coverage of its members. *See* Deposition of Randee Lehrer, dated December 29, 2008, p. 199, line 17 to p. 201, line 20.

[24] Notwithstanding that Mr. Glenesk signed his Affidavit on October 10, 2008, he testified that he did not see Sheridan's February 28, 2006 Continuing Offer until that time - - a period of more than 2½ years later. *See* Deposition of Alan Glenesk, dated January 6, 2009, p. 260, line 17 to p. 265, line 11.

FROM : FAX NO. : Apr. 16 2009 02:17PM P9

In addition to abdicating the management of its members' care which would have avoided acceptance of Sheridan's Continuing Offer, its preauthorizations of its members' elective, non-emergent care independently ratified the continuing acceptances of the Continuing Offer.[25] NHP's Physician Handbook provides that "[r]eimbursement for services that have not been pre-certified will be denied" and that all inpatient hospitalizations, surgeries and invasive procedures performed in an outpatient hospital or ambulatory facility must be pre-certified by NHP. *See* Exhibit 8 to Deposition of Randee Lehrer dated December 29, 2008, p. 44. In its companion Member Handbook, "hospital services" specifically include inpatient or outpatient anesthesia services, administration and supplies. *See* Exhibit 8 to Deposition of Randee Lehrer, dated December 29, 2008, p. 28, Article IV, §A(1)(c). Further, pre-certified "surgical services" specifically include anesthesia; and "anesthesia" is defined as "[a]dministration of anesthesia in connection with surgery . . . if in [NHP's] judgment, the nature of the procedure requires anesthesia." *See* Exhibit 9 to Deposition of Randee Lehrer, dated December 29, 2008, p. 31, Article V, §§B and D. Accordingly, NHP's preauthorization/pre-certification of non-emergent "hospital" and/or "surgical" services subsumes the authorization of "anesthesia" services.[26] In sum, when, and as, NHP preauthorizes non-emergent Affected Health Services, at the Locations where Sheridan disclosed its physicians were present, NHP accepted the Continuing Offer. This established the terms, conditions and charges of a contract implied-in-fact expressly stated in Sheridan's Continuing Offer.

---

[25] Paragraph 22 of Mr. Glenesk's Affidavit stated, in part, that "[p]reauthorization is not a promise by NHP to pay a specific amount for the provision of a particular service, but rather is solely a verification of coverage." However, NHP's Member Handbook states that "Pre-Certification/Prior Authorization decisions are decisions concerning <u>reimbursement</u> and do not replace or are they intended to influence the treatment decisions of the Member's Physician." *See* Exhibit 9 to Deposition of Randee Lehrer, dated December 29, 2008 at p. 22, Article 1, §BC. Asked to reconcile his Affidavit and NHP's Member Handbook, Mr. Glenesk testified "I can't say to that (*sic.*)." *See* Deposition of Alan Glenesk, dated January 6, 2009, p. 214, lines 1-4.

[26] Once preauthorized, Sheridan's employed and engaged physicians were not required to undertake an investigation in order to determine whether their services were being provided to an NHP member and/or to manage the member's care. Only NHP and not Sheridan, has the contractual right and responsibility to manage its members' care. *See* Deposition of Lewis Gold, M.D., dated February 11, 2009, p. 78, line 25 to p. 80, line 5; p. 127, line 24 to p. 132, line 7; and p. 145, line 18 to p. 146, line 12. *See* Deposition of Janet Gehring, dated February 4, 2009, p. 142, line 23 to p. 143, line 18.

FROM : FAX NO. : Apr. 16 2009 02:18PM P10

Conclusion

The court is satisfied there are no genuine issues of material fact as to Counts II and III of Sheridan's Complaint; nor are there any such issues of fact in respect of any of NHP's Affirmative Defenses.[27] *See Martin Petroleum Corporation v. Amerada Hess Corporation*, 769 So.2d 1105, 1108 (Fla. 4th DCA 2000)("Although it is true that, generally speaking, issues of negligence cannot be resolved on summary judgment, commercial litigation is another matter. Where a claim such as this one is filed, and after full discovery there is no evidence to support the allegations and there are thus no genuine issues of material fact, summary judgment should be granted. *A party should not be put to the expense of going through a trial, where the only possible result will be a directed verdict.*" (e.s.)).

NHP accepted the Continuing Offer by preauthorizing its members' non-emergent services at its participating facilities where it knew Sheridan's physicians provided services. It accepted Sheridan's services, but has failed to pay the disclosed-in-advance rates (*i.e.* the Billed Charges).[28] This, NHP cannot do. *Mazzoni Farms, Inc. v. E.I. DuPont De Nemours and Co.*, 761 So.2d 306, 313 (Fla. 2000) (". . . a party who 'accepts the proceeds and benefits of a contract' remains subject to 'the burdens the contract places upon him.' *Fineberg v. Kline*, 542 So.2d 1002, 1004 (Fla. 3d DCA 1988); *see also Head v. Lane*, 495 So.2d 821, 824 (Fla. 4th DCA 1986) (noting that a party who 'accepts the benefits' of a transaction is 'estopped' from 'repudiating the accompanying or resulting obligation').").

---

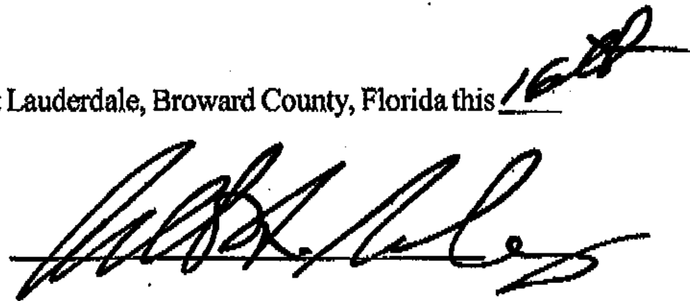
[27] Count I (for breach of the Rate Agreement) of Sheridan's Complaint remains pending and involves alleged underpayments and untimely payments by NHP. Discovery as to that claim, and corresponding defenses, does not prohibit the entry of partial summary final judgment on Counts II and III. *Estate of Herrera v. Berlo Industries, Inc.*, 840 So.2d 272 (Fla. 3d DCA 2003) ("Summary judgment may be granted, even though discovery has not been completed, when the future discovery will not create a disputed issue of material fact."), *citing, A&B Discount Lumber and Supply, Inc. v. Mitchell*, 799 So.2d 301 (Fla. 5th DCA 2001).

[28] The effect of NHP's acceptance of Sheridan's services while failing to pay its Billed Charges is to make NHP more competitive in the HMO marketplace at the expense of Sheridan's physicians. In other words, it is in a position to market its plans to its members and prospective members without services diminished by Sheridan's non-participation, but avails itself of unilaterally-set rates as if Sheridan was participating under a long-term, volume-discounted Rate Agreement

FROM : FAX NO. : Apr. 16 2009 02:18PM P11

Accordingly, partial summary final judgment as to Count II of Sheridan's Complaint is hereby entered in favor of Sheridan, and against NHP, establishing liability on the breach of implied-in-fact contract claim with regard to the non-emergent, post-February 28, 2006 services.[29] The court will conduct further proceedings regarding Sheridan's damages which shall be calculated in the amount of its Billed Charges, less any payments made by NHP, plus applicable pre-judgment interest.[30]

DONE and ORDERED, in Chambers, at Fort Lauderdale, Broward County, Florida this ____ day of April, 2009.



ROBERT A. ROSENBERG

Circuit Court Judge

Copies furnished:

Glenn J. Waldman, Esq.
Eileen L. Parsons, Esq.
Edward Soto, Esq.
Ardith Bronson, Esq.
Edward J. Pozzuoli, Esq.
Edward H. Zebersky, Esq.
Todd S. Payne, Esq.
Julie E. Nevins, Esq.

---

when it does not.

[29] The court also declares that, for purposes of Count III of the Complaint, Sheridan is entitled to payment from NHP of the Continuing Offer rates for medical services provided to NHP's members.

[30] The court will also entertain upon proper motions, Sheridan's claim for remuneration of its attorneys' fees and taxable costs pursuant to §641.28, *Fla. Stat.*

FROM : FAX NO. : Apr. 16 2009 02:19PM P12