IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

UNITED STATES OF AMERICA *ex rel.* RIBIK, et al.,	)	
Plaintiffs,	)	
v.	)	Case No. 1:09cv13 (CMH/TCB)
HCR MANORCARE, INC., MANOR CARE INC., HCR MANORCARE SERVICES, LLC and HEARTLAND EMPLOYMENT SERVICES, LLC,	)	
Defendants.	)	

MOTION TO QUASH RULE 45 SUBPOENAS ON CENTERS FOR MEDICARE & MEDICAID SERVICES CONTRACTORS AND FOR A PROTECTIVE ORDER BARRING RULE 30(B)(6) DEPOSITIONS OF THE CENTERS FOR MEDICARE AND MEDICAID SERVICES CONTRACTORS

I. PRELIMINARY STATEMENT

Pursuant to Federal Rules of Civil Procedure 26 and 45, the United States of America moves this Court to quash the Rule 45 subpoenas served on four Centers for Medicaid & Medicaid Services ("CMS") contractors: Novitas Solutions, Inc. ("Novitas"), National Government Services, Inc. ("NGS"), CGS Administrators, LLC ("CGS"), and MAXIMUS Federal Services Inc. ("MAXIMUS") (collectively, "the CMS Contractors"), and for a protective order barring defendants HCR ManorCare Inc., ManorCare Inc., HCR ManorCare Services, LLC, and Heartland Employment Services, LLC (hereinafter "HCR ManorCare" or "Defendants") from taking 30(b)(6) depositions of the CMS Contractors.

The United States respectfully requests that the Court grant its motion for a protective order and to quash the Rule 45 subpoenas for the following reasons:

First, when CMS contractors work on behalf of CMS, they function as an extension of that agency. As a result, any 30(b)(6) deposition notice served on CMS contractors that relates to their work on behalf of CMS is equivalent to a 30(b)(6) notice to CMS itself. Here, HCR ManorCare served an extensive and detailed Rule 30(b)(6) Notice on CMS in October 2016. Since Rule 30(b)(6) prohibits service of a second notice on the same entity without leave of Court, and Defendants have not sought such leave, Defendants' attempt to obtain Rule 30(b)(6) testimony from the CMS Contractors is improper.

Second, the topics set forth in Defendants' notices to the CMS Contractors are clearly encompassed by the topics in Defendants' original notice to CMS. As Defendants have conceded during the meet and confer process, they issued the notices to the CMS Contractors because they wanted a particular type of witness (*i.e.* an employee of the CMS Contractors) to provide them with the information they had already requested from CMS. Since Defendants have no right to choose the witness – or even the type of witness – whom CMS designates to respond to a Rule 30(b)(6) notice, their improper attempt to dictate whom the Government designates to respond to a Rule 30(b)(6) notice provides another basis on which the Government's motion for protective order should be granted.

Finally, granting the current motion will *not* prevent Defendants from obtaining the information they are seeking. As Government counsel has made clear during the meet and confer process, the witnesses that CMS has designated to respond to Defendants' original Rule 30(b)(6) Notice to CMS will address the topics in that Notice, which clearly encompass the CMS Contractors' work on behalf of CMS, including the CMS Contractors' interpretation and application of CMS rules and regulations relating to the Medicare Part A Skilled Nursing Facility benefit.

For all of these reasons, the United States respectfully requests that the Court grant its Motion.

II. FACTUAL AND PROCEDURAL HISTORY

A. ManorCare Served a Rule 30(b)(6) Deposition Notice on CMS, and the United States Has Already Provided or Agreed to Provide Responsive Testimony

On October 20, 2016, HCR ManorCare served a Rule 30(b)(6) Deposition Notice on CMS. *See* Exhibit 1, Defendant's Notice of Videotaped Deposition of the Centers for Medicare and Medicaid Services Pursuant to Rule 30(b)(6). The United States lodged its objections and designated 30(b)(6) witnesses to testify on behalf of CMS, including its contractors. On December 20, 2016, HCR ManorCare took the 30(b)(6) deposition of one of CMS's designated witness, Ms. Jeanette Kranacs. Ms. Kranacs provided extensive testimony on CMS regulations, policies, standards, and other guidance related to the SNF rehabilitation therapy benefit under Medicare Part A. In addition, both prior to and during the deposition of Ms. Kranacs, the United States conveyed to defense counsel that a different CMS designee, Dr. Michael Handrigan, would provide 30(b)(6) testimony related to the interpretation and implementation of Medicare Part A skilled nursing facility regulations and guidance. *See* Exhibit 2, E-mail from David Wiseman, Senior Trial Counsel, U.S. Department of Justice to Eric Dubelier, Counsel for HCR ManorCare (Dec. 19, 2016). *See also* Exhibit 3, Transcript of Jeanette Kranacs, Corporate Designee and Individually, at 71-76 and 263-264 (Dec. 20, 2016).

B. ManorCare Served the CMS Contractors with Rule 45 Subpoenas Seeking 30(b)(6) Deposition Testimony About the CMS Contractors' Work on Behalf of CMS

After Ms. Kranacs' 30(b)(6) deposition and prior to scheduling Dr. Handrigan's 30(b)(6) deposition, HCR ManorCare propounded Rule 45 subpoenas for 30(b)(6) deposition testimony

on CMS contractors Novitas, NGS, CGS, and MAXIMUS.[1] These notices set out deposition topics related specifically to the CMS Contractors' work on behalf of CMS. For example, Topics 1 and 2 seek testimony related to "[a]ny and all interactions, directions or communications" between the CMS Contractors and HCR ManorCare or CMS "regarding coverage or reimbursement for SNF rehabilitation therapy and/or nursing services under Medicare Part A." *See* Exhibit 4, Attachment A, Rule 45 Subpoena to Novitas Solutions, Inc. (Jan. 17, 2017). Furthermore, Topic 3 seeks deposition testimony regarding the "[l]aws, regulations, guidance, standards, and policies" that the CMS Contractors "applied when reviewing HCR ManorCare's Medicare Part A claims for SNF rehabilitation therapy and/or nursing services and/or [the CMS Contractors] provided to HCR ManorCare in connection with [the CMS Contractors'] review of those claims." *Id.*

Many of the topics set forth in the Rule 45 subpoenas duplicate topics HCR ManorCare already set out in its original 30(b)(6) Notice to CMS. For example, Topic 6 in the original notice to CMS requests testimony on "[t]he substance of and processes by which CMS and *its contractors* review for purposes of reimbursement claims for rehabilitation therapy under the Medicare Part A benefit, including all phases of that process such as the standard of review, reconsideration, redetermination, and appeals…." (Emphasis added).

C. The Parties Have Met and Conferred on the Rule 45 Subpoenas to the CMS Contractors But Have Reached an Impasse.

Over the past few weeks, the parties have exchanged numerous e-mails regarding Defendants' subpoenas for 30(b)(6) testimony of the CMS Contractors. Government counsel has repeatedly explained to Defendants the United States' objections to the CMS Contractor

[1] HCR ManorCare originally served Rule 45 subpoenas for deposition testimony on CMS contractors Novitas, NGS, CGS, and MAXIMUS on December 23, 2016. HCR ManorCare served revised Rule 45 subpoenas for deposition testimony on these CMS contractors on January 17, 2017.

subpoenas and noted that Defendants can obtain the very information they seek through their original 30(b)(6) notice to CMS. *See* Exhibit 5, E-mail chain between David Wiseman, Senior Trial Counsel, U.S. Department of Justice, and Eric Dubelier, Counsel for HCR ManorCare. However, defense counsel has dismissed these objections and assurances and insisted on Defendants' right to specify that the information they seek come from witnesses designated by the contractors rather than witnesses designated by CMS. *Id.* As a result, the United States now moves this Court to quash the Rule 45 subpoenas and for a protective order barring Defendants from taking 30(b)(6) deposition testimony of the CMS Contractors.

III. LEGAL STANDARD

Pursuant to Federal Rule of Civil Procedure 45(d)(3), a court must quash a subpoena that "subjects a person to undue burden." Fed. R. Civ. P. 45(d)(3)(iv). Whether a subpoena subjects a witness to undue burden within the meaning of Rule 45(d)(3)(iv), "usually raises a question of the reasonableness of the subpoena" and requires the court to weigh "a subpoena's benefits and burdens [and] consider whether the information is necessary and whether it is available from any other source." *See Intelligent Verification Sys., LLC v. Microsoft Corp.*, No. 2:12CV525, 2014 WL 12544827, at *1 (E.D. Va. Jan. 9, 2014) (citing *Maxiena, Inc. v. Marks*, 289 F.R.D. 427, 439 (D. Md. 2012)).

In addition, a court may, at its discretion, issue a protective order limiting discovery. Fed. R. Civ. P. 26(c); *See Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 34 (1984). A party or any person from whom discovery is sought may move for a protective order in the court where the action is pending. Fed. R. Civ. P. 26(c)(1). Under Rule 26(c), a court "may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." Fed. R. Civ. P. 26(c). *Nicholas v. Wyndham*, 373 F.3d 537, 543 (4th Cir. 2004). Rule 26(c) "confers broad discretion on the trial court to decide when a protective order

is appropriate and what degree of protection is required." *Baron Fin. Corp. v. Natanzon*, 240 F.R.D. 200, 202 (D. Md. 2002) (quoting *Furlow v. United States*, 55 F. Supp. 2d 360, 366 (D. Md. 1999)).

> Rule 26(b)(2)(c) provides that a court must limit discovery if it concludes that:
>
> (i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;
>
> (ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or
>
> (iii) the proposed discovery is outside the scope permitted by Rule 26(b)(1).

Fed. R. Civ. P. 26(b)(2). The Advisory Committee has called attention to the limitations added in Rule 26(b)(2), emphasizing "the need for active judicial use of subdivision (b)(2) to control excessive discovery." Fed. R. Civ. P. 26(b)(1) advisory committee's note to 2000 amendment; *see also Crawford El v. Britton*, 118 S. Ct. 1584, 1597 (1998) ("Rule 26 vests the trial judge with broad discretion to tailor discovery narrowly."). These limitations permit the court to limit discovery if it would be unreasonably cumulative or duplicative or if the burden or expense outweighs the benefit in terms of resolving the merits of the dispute. *Id.*

IV. ARGUMENT

Rule 30(b)(6) allows a party to "name as the deponent a public or private corporation, a partnership, an association, a governmental agency, or other entity that must describe with reasonable particularity the matters for examination." Fed. R. Civ. P. 30(b)(6). Crucially, power is given to the organization subject to the Rule 30(b)(6) notice or subpoena to "designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf" and to "testify about information known or reasonably available to the organization."

Fed. R. Civ. P. 30(b)(6). Rule 30(b)(6) depositions are unique in that the "corporate designee 'speaks for the corporation' and gives binding answers for the corporation." *See NewMarket Corp. v. Innospec Inc.*, 3:10-CV-503, 2011 WL 1306008, at *5 (E.D. Va. Apr. 1, 2011); *see also In re Vitamins Antitrust Litigation*, 216 F.R.D. 168, 174 (D.D.C. 2003) (Rule 30(b)(6) depositions serve as "sworn corporate admission that is binding on the corporation."). To the extent that the CMS Contractors are performing work on behalf of CMS, they are an extension of CMS. By seeking testimony of a corporate representative from the CMS Contractors about their work performed purely on behalf of CMS, HCR ManorCare is ultimately seeking a "sworn corporate admission that is binding on" CMS. *In re Vitamins Antitrust Litigation*, 216 F.R.D. at 174.

A. CMS Contractors are Extensions of CMS Since They Work on Behalf of CMS to Carry Out CMS' Statutory Obligations

CMS contractors play a unique and significant role in administering the Medicare program as the primary components of CMS responsible for processing and paying Medicare claims. Medicare Administrative Contractors ("MACs"),[2] such as NGS, CGS, and Novitas, perform many functions on behalf of the Medicare program, including processing claims for Medicare payment and carrying out the first level of the Medicare claims appeals process. 42 U.S.C. §1395kk-1. Qualified Independent Contractors ("QICs), such as MAXIMUS, carry out the second level of the Medicare claims appeals process. 42 U.S.C. § 1395ff. While CMS contractors are individual business entities, in their role as contractors they work on behalf of

[2] MACS were formerly known as Part A Fiscal Intermediaries (FIs) or Part B carriers. *See* Centers for Medicare & Medicaid Services, *Medicare Administrative Contractors*, CMS.GOV (Feb. 5, 2016 12:34 PM), https://www.cms.gov/medicare/medicare-contracting/medicare-administrative-contractors/medicareadministrativecontractors.html.

CMS to carry out CMS' statutory obligations. In this role, Congress expressly conceived of CMS contractors as agents of the government, noting that:

> [i]n the performance of their contractual undertakings, the carriers and fiscal intermediaries...act on behalf of the Secretary, carrying on for him the governmental responsibilities imposed by the bill. The Secretary, however, would be the real party in interest in the administration of the program, and the Government would be expected to safeguard the interests of his contractual representatives with respect to their actions in the fulfillment of commitments under the contracts and agreements entered into by them with the Secretary.

S. Rep. No. 404, 89th Cong., 1st Sess., *reprinted in* 1965 U.S. Code Cong. & Admin. News 1943, 1992–1995. *See also* 42 C.F.R. § 421.5(b) ("[i]ntermediaries and carriers act on behalf of CMS in carrying out certain administrative responsibilities that the law imposes. Accordingly, their agreements and contracts contain clauses providing for indemnification with respect to actions taken on behalf of CMS and CMS is the real party of interest in any litigation involving administration of the [Medicare] program."). Consistent with this Congressional and statutory language, several federal courts have held that CMS contractors are agents of the United States. *See e.g.*, *Midland Psychiatric Assoc., Inc. v. United States*, 145 F.3d 1000, 1002–03 (8th Cir. 1998) (holding CMS contractors are government agents because they are "[u]nder contract with the Secretary of [HHS], [and] do the work of the Government on the Secretary's behalf."); *Bodmetric Health Servs., Inc. v. Aetna Life & Cas.*, 903 F.2d. 480, 487–88 (7th Cir. 1990) (holding that in their role as fiscal intermediaries, private organizations serve as federal officers or employees);); *Bushman v. Seiler*, 755 F.2d 653, 655 (8th Cir. 1985) ("It is well settled that Medicare intermediaries and carriers can be government agents….")(citation omitted).

Indeed, Defendants themselves have repeatedly recognized that CMS contractors are an extension of CMS by propounding discovery requests that define the "United States" and "CMS" to include Medicare contractors. For example, in HCR ManorCare's First Requests for

Production, Defendants defined "You" and "your" as "the Government of the United States of America, including its departments, agencies, employees, agents, *contractors*, servants, and/or representatives, including attorneys." *See* Exhibit 6, Definition 1 of HCR ManorCare Inc.'s First Request for Production of Documents to the United States of America (emphasis added). Furthermore, in other discovery requests, HCR ManorCare has defined "CMS" to mean "the Centers for Medicare & Medicaid Services, a part of the United States Department of Health and Human Services, its agents, servants, employees, *contractors*, and/or representatives, including attorneys." *See e.g.* Exhibit 7, Definition 15, Attachment A, Rule 45 Subpoena to MAXIMUS Federal Services Inc. (December 23, 2016). The United States has never contested the inclusion of CMS contractors within HCR ManorCare's definition of the United States or CMS. Indeed, the Government has expended a considerable amount of time and resources responding on behalf of CMS contractors to HCR ManorCare's discovery requests. For example, the United States has searched, collected, and reviewed documents from CMS contractors in response to HCR ManorCare's requests for production and has produced over 14,000 CMS contractor documents to date. This entire effort was based on the shared understanding between the United States and Defendants that CMS contractors were part of the United States and CMS.

Moreover, Defendants even served the Rule 45 subpoenas *to* the CMS Contractors *through* the U.S. Department of Justice, rather than to the CMS Contractors directly. *See* Exhibit 8, E-mail from Kate Seikaly, Counsel for HCR ManorCare to Jessica Weber, Trial Attorney, U.S. Department of Justice (Jan. 17, 2017). It is difficult to conceive of a more straightforward acknowledgement that the CMS Contractors are an extension of CMS and the United States.

B. HCR ManorCare's Rule 45 Subpoena on Each CMS Contractor is Equivalent to a Separate Rule 30(b)(6) Notice on CMS

Because the CMS Contractors are an extension of CMS, Defendants' subpoenas seeking 30(b)(6) testimony from the CMS Contractors are equivalent to notices seeking additional 30(b)(6) testimony from CMS. Given that, as noted above, Defendants served a Rule 30(b)(6) Notice directly on CMS in October 2016, they must obtain leave of this Court prior to serving any additional 30(b)(6) notices on CMS or its contractors. *See* Fed. R. Civ. P. 30(a)(2)(A)(ii); *Ameristar Jet Charter, Inc. v. Signal Composites, Inc.*, 244 F.3d 189, 192 (1st Cir. 2001)(lower court was not plainly wrong in quashing Rule 30(b)(6) subpoena in as much as it was "invalid" due to being issued without leave of court). *See also State Farm Mutual Auto. Ins. Co. v. New Horizont, Inc*., 254 F.R.D. 227, 235 (E.D. Penn. 2008)(holding Rule 30(a)(2)(A)(ii) is equally applicable to Rule 30(b)(6) corporate depositions). Here, Defendants are attempting to get 'multiple bites at the apple' to obtain binding testimony on CMS. As the Court noted in *State Farm Mutual Automobile Insurance Co. v. New Horizont, Inc*., 254 F.R.D. 227, 235 (E.D. Penn. 2008), a second Rule 30(b)(6) deposition is precisely the type of abuse of discovery that Rule 30(a)(2)(A)(ii) was designed to prohibit:

> the policy against permitting a second deposition of an already-deposed deponent is equally applicable to depositions of individuals and organizations. Taking serial depositions of a single corporation may be as costly and burdensome, if not more so, as serial depositions of an individual. In both cases, e ach new deposition requires the deponent to spend time preparing for the deposition, traveling to the deposition, and providing testimony. In addition, allowing for serial depositions, whether of an individual or an organization, provides the deposing party with an unfair strategic advantage, offering it multiple bites at the apple, each time with better information than the last.

Id. at 235. For this reason alone, the Court should enter a protective order against the requested 30(b)(6) testimony.

C. HCR ManorCare is Attempting an End-Run Around Rule 30(B)(6) by Attempting to Dictate whom the United States Designates as its 30(b)(6) Witness.

Federal Rule 30(b)(6) is clear that the choice of whom to designate as the witness to testify on behalf of a corporation lies *exclusively* with the corporation being deposed. Fed. R. Civ. P. 30(b)(6) ("The named organization must then designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf; and *it may set out the matters on which each person designated will testify*.) (Emphasis added). The United States has already designated Ms. Jeanette Kranacs and Dr. Michael Handrigan to provide 30(b)(6) testimony on behalf of CMS and its contractors. However, HCR ManorCare improperly insists that the United States' 30(b)(6) designations are unacceptable. As defense counsel stated explicitly in an e-mail, "we need someone from the MACs / FIs who can testify to [Topics] [#]5, #6 [of the original notice to CMS], and the practical application of the medical necessity requirement and documentation." *See* Exhibit 9, Email from Eric Dubelier, Counsel for HCR ManorCare to David Wiseman, Senior Trial Counsel, U.S. Department of Justice (Jan. 5, 2017). The United States has informed HCR ManorCare on numerous occasions that it has designated Dr. Handrigan to testify to Topics 5 and 6 of HCR ManorCare's 30(b)(6) Notice to CMS, including the CMS contractors' interpretation and implementation of Medicare Part A skilled nursing facility rehabilitation therapy laws, regulations, guidance, standards, and policies. However, HCR ManorCare continues to maintain that Dr. Handrigan is unacceptable as a 30(b)(6) witness on these Topics because Defendants "want testimony about the actual execution of the alleged CMS policies by the contractors with respect to HCR. For example, has the contractor ever denied a claim because the therapy notes did not contain a description of exactly what was done in group therapy?" *See* Exhibit 10, E-mail from Eric Dubelier, Counsel for HCR ManorCare to David Wiseman, Senior Trial Counsel, U.S. Department of Justice (Jan. 12, 2017). Even though Defendants have not taken Dr. Handrigan's deposition they nevertheless

assert –without any basis—that Dr. Handrigan is unacceptable as a 30(b)(6) witness on Topics 5 and 6 because he "cannot answer this question." *Id.*

Furthermore, HCR ManorCare maintains that Dr. Handrigan is not an acceptable 30(b)(6) witness because "[the United States'] previous CMS witnesses were unable to testify regarding the application of the medical necessity requirement to the real world, that is, in practice by the FIs and MACs." *Id*. This assertion is incorrect. The United States has not yet presented a witness to testify on the implementation and interpretation of CMS rules and regulations relating to the Part A SNF benefit. As the United States explicitly told HCR ManorCare prior to and during the deposition of Jeannette Kranacs, "[t]o the extent that your questions on Topic 1 concern the *implementation and interpretation* of those rules and regulations your questions could be answered in greater detail and with more depth of knowledge by Dr. Handrigan, the witness whom we have designated for topics 2, 3, 4, 5, 6, 17, and 23." *See* Exhibit 2. Again, HCR ManorCare has not yet deposed Dr. Handrigan. Consequently, HCR ManorCare's assertion that it is justified in seeking a 30(b)(6) witness from the CMS Contractors because prior witnesses were "unable" to address these issues has no merit.

HCR ManorCare improperly maintains that because Dr. Michael Handrigan was not employed by the CMS Contractors and may not have personal knowledge regarding the CMS Contractors' work on behalf of CMS, he cannot testify on the "real world application" of CMS rules and regulations relating to Medicare Part A skilled rehabilitation therapy by the CMS Contractors. However, pursuant to Rule 30(b)(6),

> if the persons designated by the corporation do not possess personal knowledge of the matters set out in the deposition notice, the corporation is obligated to prepare the designees so that they may give knowledgeable and binding answers for the corporation. Thus, the duty to present and prepare a Rule 30(b)(6) designee goes beyond matters personally known to that designee or to matters in which that designee was personally involved.

Humanscale Corp. v. CompX Intern., Inc., 3:09-CV-86, 2009 WL 5091648, at *2 (E.D. Va. Dec. 24, 2009). Consistent with its obligations under Rule 30(b)(6), the United States has spent a considerable amount of time and resources ensuring that Dr. Handrigan is thoroughly prepared to testify about the CMS Contractors' work on behalf of CMS, including their interpretation and implementation of Medicare Part A skilled rehabilitation therapy rules, guidance, and polices. In essence, HCR ManorCare is attempting an end-run around Rule 30(b)(6) by seeking witnesses employed by the CMS Contractors to provide testimony binding on CMS, the real party in interest—a request contrary to Rule 30(b)(6)'s instruction to "[t]he named organization [to] designate [a witness] to testify on its behalf." The Court should enter a protective order against the requested 30(b)(6) testimony on this basis alone.

D. HCR ManorCare has Already Obtained or Will Obtain 30(b)(6) Testimony from CMS Related to the CMS Contractors' Work on Behalf of CMS.

Allowing HCR ManorCare to take 30(b)(6) depositions of the CMS Contractors would subject the United States to duplicative, burdensome, and time-consuming 30(b)(6) depositions that would provide no additional facts or information that the United States has not already provided or agreed to provide to HCR ManorCare through its 30(b)(6) deposition of CMS. Courts have issued protective orders preventing depositions that would yield information already provided in prior depositions on the basis that they are "unreasonably cumulative, or duplicative." *See E.E.O.C. v Freeman*, RWT-09-2573, 2012 WL 2370122, at *2 (D. Md. June 21, 2012); *see also Nicholas v. Wyndham*, 373 F.3d 537, 543 (4th Cir. 2004) (court issued a protective order because the deposition sought yielded the same information already acquired through document productions and prior depositions and was cumulative, duplicative, unduly burdensome, and harassing) Here, HCR ManorCare had ample opportunity to obtain the information it seeks in its 30(b)(6) deposition topics to the CMS contractors from its 30(b)(6)

deposition of CMS. As a result, the United States' motion for a protective order should be granted. *See E.E.O.C. v Freeman*, RWT-09-2573, 2012 WL 2370122, at *2 (D. Md. June 21, 2012)(holding that a protective order preventing a deposition was appropriate because Plaintiff already had the opportunity to obtain information about deposition topics in a 30(b)(6) deposition of Defendant and personal depositions of Defendant's employees.)

The topics described in HCR ManorCare's Rule 45 subpoenas for 30(b)(6) deposition testimony of the CMS contractors are entirely duplicative and cumulative of the topics in HCR ManorCare's Rule 30(b)(6) Notice to CMS. As an initial matter, the Rule 45 subpoenas broadly describe that each "topic specifically includes laws, regulations, guidance, standards, and policies relating to reasonable and necessary services, skilled services, documentation, group therapy, co-treatment and modalities." *See* Exhibit 4. The United States designated and prepared Ms. Jeanette Kranacs to testify on the laws, regulations, guidance, and polices related to Medicare Part A skilled rehabilitation therapy. HCR ManorCare already took Ms. Kranac's 30(b)(6) deposition on these topics on December 20, 2016.

Furthermore, HCR ManorCare's subpoenas to the CMS Contractors for 30(b)(6) testimony seek information regarding work that the CMS Contractors performed on behalf of CMS related to the coverage or reimbursement of Medicare Part A skilled rehabilitation therapy services. *See e.g.*, Exhibit 4. These topics are entirely duplicative of many of the topics set out in HCR ManorCare's original 30(b)(6) Notice to CMS. For example, Topic No. 5 of the original 30(b)(6) Notice to CMS seeks testimony related to

> [t]he Medicare Assistance Contractors ("MACs"), Fiscal Intermediaries ("FIs"), Zone Program Integrity Contractors ("ZPICS") and other Medicare Contractors that reviewed Defendants' skilled rehabilitation therapy claims submissions under Medicare Part A from October 1, 2006 through May 31, 2012.

See Exhibit 1. Additionally, Topic 6 of HCR ManorCare's original 30(b)(6) Notice to CMS describes

> [t]he substance of and process by which CMS and *its contractors* review for purposes of reimbursement claims for rehabilitation therapy under the Medicare Part A benefit including all phases of that process such as the standard of review, reconsideration, redetermination, and appeals, as well as ZPIC and CERT, reviews, specific probe reviews of claims submitted by Defendants, and reviews of claims for patients identified in Appendix C to the United States' 5-27-2016 Discovery Requests.

Id. (Emphasis added). These extremely broad topics in the original notice to CMS clearly encompass the subject matter areas on which Defendants are now attempting to seek Rule 30(b)(6) testimony from the CMS contractors. As HCR ManorCare is well aware, the United States has designated Dr. Handrigan to testify on Topics 5 and 6 (among others) of the 30(b)(6) Notice to CMS, including the CMS Contractors' interpretation and implementation of Medicare Part A skilled nursing facility rehabilitation therapy laws, regulations, guidance, standards, and policies. HCR ManorCare has yet to schedule Dr. Handrigan's 30(b)(6) deposition. As such, HCR ManorCare has "ample opportunity to obtain the information" it seeks about the CMS contractors in is 30(b)(6) deposition of CMS.

In sum, this Court should quash Defendants' Rule 45 subpoenas and enter a protective order barring Defendants from taking Rule 30(b)(6) deposition of the CMS Contractors because (1) the Rule 45 subpoenas and accompanying deposition notices amount to a second -- and therefore improper – request for Rule 30(b)(6) testimony from CMS; 2) the notices to the contractors are cumulative and duplicative of defendants 30(b)(6) Notice to CMS; and (3) Defendants can obtain the information they are seeking about the CMS Contractors' work on behalf of CMS during the depositions of the witnesses that the United States has designated to respond to Defendants' original 30(b)(6) notice to CMS.

V. CONCLUSION

For all of the reasons stated above, the United States respectfully requests that its Motion for Protective Order and to Quash Defendants' Rule 45 Subpoenas to the CMS Contractors be granted.

Dated: January 27, 2017

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 27, 2017, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send a notification of such filing ("NEF") to the following:

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