IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT
IN AND FOR MIAMI-DADE COUNTY, FLORIDA

Case No. 2017-011905 CA 01

VIDA MEDICAL CENTERS
OF MIAMI, CORP.,

Plaintiff,

v.

SIMPLY HEALTHCARE
PLANS, INC.,

Defendant.

Plaintiff's Response to Defendant's
Motion to Dismiss and Strike the Complaint

LEGAL MEMORANDUM IN SUPPORT

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Table of Contents

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SIMPLY HEALTHCARE PLANS, INC.,

Defendant

_____/

PLAINTIFF VIDA MEDICAL CENTERS OF MIAMI CORP.'S RESPONSE TO DEFENDANT'S MOTION TO DISMISS THE COMPLAINT AND TO STRIKE THE COMPLAINT AND DISMISS THE CASE WITH PREJUDICE

Plaintiff Vida Medical Centers of Miami Corp. ("Vida") moves this Court to deny in its entirety Defendant Simply Health Care Plans, Inc.'s ("Simply") motion to dismiss the Complaint for failure to state a claim, and to strike the Complaint for fraud upon the Court and dismiss the case with prejudice. Plaintiff's Response is accompanied by this legal memorandum in support.

Introduction

The Plaintiff, Vida, filed a Complaint ("Complaint" or "Compl.") for breach of contract, violation of the Florida Unfair and Deceptive Practices Act ("FDUTPA"), and tortious interference with a business relationship against Simply on May 17, 2017. Defendant filed a Motion to Dismiss and Strike the Complaint pursuant to Florida Rule of Civil Procedure 1.140(b)(6) and 1.140(f) for failure to state a cause of action and for deliberately defrauding the Court. Vida respectfully requests that this Court deny Defendant's Motion in its entirety, as the Complaint sufficiently meets the pleading standards for the aforementioned claims. Moreover,

Defendant has not demonstrated by clear and convincing evidence that the Plaintiff has intentionally misled the Court. Thus, its Motion to Strike the Complaint should also be denied.

Summary of the Facts

Vida Medical Center is a Healthcare Management Services Organization that provides medical services to patients in South Florida. Simply Healthcare is a Health Maintenance Organization ("HMO"). On or about August 15, 2015, Vida and Simply entered into a valid participating provider agreement ("the Agreement"), making Vida's physicians "in-network" medical care providers for Simply Healthcare members. *See* Compl. Ex. A.

A. Termination of the Agreement

The initial term of the Agreement was for twelve months, expiring on August 1, 2016. Compl. Ex. A § 9.1. Pursuant to an automatic renewal provision, the Agreement was extended for an additional year, until August 2017. *Id.* Throughout the parties' relationship, Simply never levied any complaints against Vida regarding the provision of its services to patients nor non-compliance with the Agreement terms. Indeed, the parties had a cordial relationship and Simply was pleased with Vida's performance. Compl. ¶ 15, n. 2. However, about five months later, on January 12, 2017, Simply notified Vida that it was terminating the Agreement due to Vida's alleged breach of Section 9.2(i) of the Agreement. (*See* Compl. Ex. B, ¶ 2, "Notice of Termination"). The Notice states, in relevant part:

> (x) [Vida] is in breach of representations and warranties in the Agreement as they relate to compliance with federal and state laws and regulations, compliance with the Plan's policies and procedure and the Plan's Handbook.
> (xi) [Vida] is in repeated and continuous breach under the Agreement as it relates to Section 9.2(i)(x).

(Compl. Ex. B).

Termination was to be effective on March 1, 2017. The Notice did not specify how or when Vida violated any laws, the Agreement, Simply's Policies and Procedures or the Plan's Handbook. Until receiving the Notice, Vida believed it was in full compliance with its contractual obligations. In an effort to understand the succinct statements Simply made in the Notice, Vida promptly requested the Plan's Policies and Procedures and the Plan's Handbook. Despite multiple requests, Simply never provided the Plan's Policies and Procedures.[1]

Simply later informed Vida by telephone that Vida allegedly violated 42 U.S.C. §§ 1320a-7, 1320a-7a, and 1320a-7b (the federal "Anti-Kickback Statute"), which makes it illegal to give remuneration to Medicare and Medicaid beneficiaries in exchange for business referrals. On several occasions prior to the Notice, Vida gave already-enrolled patients free tote bags with basic hygiene essentials, such as toothpaste and bath tissue. *See* Compl. Ex. B, p. 2 ¶ 2. Simply was not only well aware of this practice, but also promoted it. In fact, the tote bags, which bore Simply's logo, were ordered by Abel Pages, a Simply sales representative. Mr. Pages coordinated all deliveries of the bags. Simply never asked Vida to desist nor ever implied that Vida (or Simply itself for that matter) may be violating federal law[2]. *See* Compl. ¶ 15. Nevertheless, months later, Simply insisted that the bags were the basis for termination. Compl. Ex. B, p. 2 ¶ 2.

Following the Notice, Vida conducted an extensive review of (1) pertinent laws and regulations regarding the Anti-Kickback statute; (2) multiple advisory opinions from the Office of the Inspector General ("OIG") from the federal Department of Health and Human Services;

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[1] As of the date of this filing, Simply still has not provided the Policies and Procedures to Vida.

[2] It is important to note that Vida's position in this matter is that, at no point in time, not during the contract, before, or after, did it violate the Anti-Kickback Statute. However, Simply's alleged justification to terminate the contract would be essentially an admission that Simply itself violated the law, as Simply coordinated, promoted and helped with the distribution of the hygiene essentials bag.

(3) the Medicaid Managed Care Manual published by the Centers for Medicare and Medicaid Services; and (4) the Compliance Program for Individual and Small Group Physician Practices published by the OIG. Vida's review categorically reflected that it did not violate the Anti-Kickback Statute or any other law, and that Simply's allegations for terminating the contract were unfounded. Consequently, in a letter dated February 7, 2017 Vida appealed Simply's decision to terminate (Compl., Ex. C, "Appeal Letter"). Simply nonetheless upheld its original decision, offering no further explanation nor proof that Vida had violated the Agreement in any way. *See* Compl. Ex. D.

B. Phone Calls to Vida's Patients

About forty-five days before the effective date of termination, Simply began contacting Vida's patients to induce them to switch to other medical centers associated with, managed, or controlled by Simply. Compl. ¶¶ 33-36. Simply gave them false and misleading information, making the patients believe they had no choice but to leave Vida. *Id.* At least seventy-six Vida patients said that Simply and medical centers associated with Simply persistently told them, among other things:

- That Dr. Lorites, the Medical Director and primary physician at Vida, had abandoned the Simply Health Care plan;
- That Dr. Lorites had left the clinic without notice;
- That all Vida patients were being automatically reassigned to a new doctor;
- That Vida's operational licenses had been revoked;
- That Vida was going out of business;
- That patients are bound by law to agree to the change of provider and that they cannot change their HMO plan.

Compl. ¶¶ 34-35.

None of these statements were true. Simply continued calling Vida's patients several times a week, prompting many of them to ask Vida to make Simply stop calling them. Compl. ¶¶ 35-36. Neither the patients nor Vida had ever given their names and phone numbers to these competing medical centers. *See id.* This information could only have been disclosed by Simply. Furthermore, the patients had not yet received formal notice from Simply that Vida would no longer be an in-network provider, nor had Simply explained what their rights were in this situation. Compl. Ex. C, p. 5 ¶ 3. These phone calls caused a mass exodus of Vida's patients before the Agreement's effective termination, nearly leaving Vida insolvent. *Id.* Moreover, through Simply's misleading and false statements many of Vida's patients were effectively denied their right to remain with their doctor through another HMO plan or by paying out of pocket. Vida subsequently brought this action against Simply.

Procedural History

On May 17, 2017 Vida filed a Complaint asserting three different claims for relief:

- Simply breached the Agreement and the warranty of good faith and fair dealing implied therein (Count I);
- Simply violated the Florida Deceptive and Unfair Trade Practices Act ("FDUTPA") (Count II); and
- Simply tortiously interfered with Vida's business relationship with its patients (Count III).

Simply filed its Motion to Dismiss and Strike the Complaint on June 26, 2017. Today, Vida files this Response to Defendant's Motion.

Standard of Review

"[Florida Rule of Civil Procedure] 1.140(b) tests whether the plaintiff has stated a cause of action, not whether the plaintiff will prevail at trial." *Lonestar Alternative Solution, Inc. v. Leview-Boymelgreen Soleil Developers, LLC*, 10 So. 3d 1169, 1171 (Fla. 3d DCA 2009)

(internal citations omitted). "[A breach of contract] action cannot be dismissed 'unless it clearly appears as a matter of law that the contract cannot support the action alleged.'" *Lonestar*, 10 So. 3d at 1172 (internal citations omitted). "To rule on a motion to dismiss, a court's gaze is limited to the four corners of the complaint, including attachments incorporated in it, and all well pleaded allegations are taken as true." *U.S. Project Mgmt., Inc. v. Parc Royale E. Dev., Inc.*, 861 So. 2d 74, 76 (Fla. 4th DCA 2003). Furthermore, when deciding a motion to dismiss, the trial court may not consider affirmative defenses. *Susan Fixel, Inc. v. Rosenthal & Rosenthal*, 842 So. 2d 204, 206 (Fla. 3d DCA 2003).

Summary of the Arguments

The Court should deny Simply's Motion to Dismiss for failure to state a claim, as only a complaint that does not allege sufficient facts to support it may be dismissed. *Lonestar*, 10 So. 3d 1172. The Complaint states specific facts showing that Simply lacked a proper cause to terminate the Agreement but did so regardless, breaching express contractual provisions and acting in bad faith. Moreover, the sole inquiry on a motion to dismiss is whether the plaintiff has properly met the pleading standard; the trial court may not consider affirmative defenses. *Susan Fixel Inc.*, 842 So. 2d at 206. Simply's alleged justifications for terminating the Agreement thus have no bearing on a motion to dismiss. Finally, Simply's Motion to Strike Count I of the Complaint for willful fraud should also be denied for failure to substantiate its allegations of intentional wrongdoing with clear and convincing evidence. *Cox v. Burke*, 706 So. 2d 43, 46 (Fla. 5th DCA 1989).

Simply's actions leading to termination of the Agreement – namely, misleading patients with false information and Simply's vague, unsubstantiated reasons for termination – fall squarely within the purview of FDUTPA. Compl. ¶¶ 17-45; Ex. C. Lastly, although Simply had a financial interest in Vida's business relationship with its patients, Vida's claim for tortious

interference should not be dismissed because Simply used improper means to safeguard its interest, thereby unlawfully interfering with Vida's own business relationships. Thus, Simply's Motion should be denied in its entirety.

Arguments

I. Simply Made Unsubstantiated Accusations Against Vida and Deceptively Induced Vida's Patients to Switch Providers, Thus Breaching Specific Provisions of the Agreement and the Covenant of Good Faith and Fair Dealing Implied Therein.

The Court cannot consider affirmative defenses in a motion to dismiss, rendering Simply's justifications for terminating the Agreement wholly irrelevant. *Susan Fixel*, 842 So. 2d at 206. Regardless, Vida's practice of giving its patients gifts of nominal value did not violate the federal Anti-Kickback Statute, and thus Simply lacked genuine cause to terminate the Agreement. Compl. ¶ 21; Ex. C, pp. 2-4. Simply pursued termination nonetheless, breaching Sections 4.2, 9.1, 9.2, 9.7, 10.2, and 10.3 of the Agreement. Compl., Counts I-III; Ex. A. Simply also acted in bad faith, using a serious, unsubstantiated accusation as an excuse to cancel Vida's contract and siphon its patients to centers associated with it.

A. Simply Lacked Genuine Cause to Terminate the Agreement.

i. Even if Simply's alleged justification for breaching the Agreement is true—which it is not—it is irrelevant at this stage.

Simply's Motion to Dismiss relies overwhelmingly on the argument that its termination of the Agreement was justified because of Vida's alleged "illegal acts." This justification is an affirmative defense and has no bearing on a motion to dismiss. *Susan Fixel, Inc.*, 842 So. 2d at 206 ("Consideration of potential affirmative defenses . . . is wholly irrelevant and immaterial to deciding such a motion."). The Court should thus not consider Simply's defense when deciding the Motion. Indeed, affirmative defenses are not grounds for a motion to dismiss, even if the availability of a defense to bar the claim appears on the face of the complaint. *Fletcher v.*

Williams, 153 So. 2d 759 (Fla. 1st DCA 1963). *See also Hough v. Menses*, 95 So. 2d 410, 412 (Fla. 1957) (stating affirmative defenses should be raised in an answer, not a motion to dismiss, because the plaintiff should not have the burden of anticipating and overcoming a defense in an initial pleading).

ii. Even if Simply's defense was relevant at this stage, the Court should still deny Simply's Motion, as Vida complied with all federal laws and regulations.

The Anti-Kickback Statute prohibits remuneration, in cash or in kind, to any person to induce or reward the referral of federal health care program business. 42 U.S.C. § 1320a-7b(b). The Statute defines "remuneration" as "transfers of items or services for free or for other than fair market value." 42 U.S.C. § 1320a-7a(i)(6)(B). Remuneration does not include, however, "any permissible practice described . . . in regulations issued by the Secretary [of Health and Human Services]." *Id.*

The OIG issued regulations stating that items of nominal value are not prohibited by the Anti-Kickback Statute, and has interpreted "nominal value" to mean "no more than $10 per item, or $50 in the aggregate per patient on an annual basis" (the "$10/$50 Rule") 65 Fed. Reg. 24,400, 24,410-11 (Apr. 26, 2000).[3] The free hygiene items Vida gave to its patients fall squarely within this statutory exception. On February 7, 2017 Vida communicated this to Simply in its Appeal Letter. Compl. Ex. C, pp. 3-4.

Regardless, Simply insisted that it has "irrefutable evidence that [Vida] violated the Statute" and Section 9.2 of the Agreement. Compl. Ex. C, p. 2 ¶ 2. Simply has never proffered this evidence despite numerous requests. *Id.* Simply's counsel improperly relies on Vida's Appeal Letter as an admission – and therefore proof – of Vida's wrongdoing[4], when in fact the

[3] The OIG recently adjusted these limits to $15 per item or $75 in the aggregate per patient on an annual basis. This new rule became effective January 6, 2017. 65 Fed. Reg. 88,368, 88,394 (Dec. 7, 2016).
[4] Defendant's Motion to Dismiss, p. 9 ¶ 2.

letter states the contrary. Compl., Ex. C. Vida did indeed give its patients free hygiene essentials (in coordination with Simply, as stated earlier), but the letter explains in great detail why these gifts are not prohibited by the Anti-Kickback Statute. *Id.* at 2-4. Moreover, Vida only provided hygiene essentials to existing patients. Vida could not have induced the business of patients it already had.

In its final letter Simply merely replied that "[b]ased upon [their] review, the original decision ha[d] been upheld." Compl. Ex. D. Once again, it failed to provide any evidence that the value of Vida's gifts to its patients was in excess of the $10/$50 Rule, and it offered no further explanation for the basis of its decision. *Id.* While the Agreement permits Simply to terminate the contract for cause, Simply's lack of transparency indicates that the ostensible cause does not in fact exist. Simply has thus breached Sections 9.1 and 9.2 of the Agreement.

iii. Simply's baseless allegations and deceptive behavior were acts of bad faith.

Simply breached the covenant of good faith and fair dealing implied in the aforementioned contractual provisions when it arbitrarily accused Vida of violating the Anti-Kickback Statute as an excuse to cancel the Agreement. It is well settled that Florida law recognizes an implied warranty of good faith and fair dealing in every contract. *Ins. Concepts & Design, Inc. v. Healthplan Servs.*, 785 So. 2d 1232, 1234 (Fla. 4th DCA 2001). The implied covenant exists to protect the contracting parties' reasonable expectations. *Cox v. CSX International*, 732 So. 2d 1092, 1097 (1st DCA 1999) (quoting *Scheck v. Burger King Corp.*, 798 F. Supp. 692, 693, n.5 (S.D. Fla. 1992)).

While no independent claim exists for breach of this warranty, a cause of action for the same can be maintained as long as (a) there has been a breach of an express term of the underlying contract, or (b) it is not in derogation of the express terms of the underlying contract.

See Burger King Corp. v. Weaver, 169 F. 3d 1310, 1317-18 (11th Cir. 1999). Where the express terms of a contract grant one party a degree of discretion in performance such that it can deprive the other party of a substantial proportion of the agreement's value, the decision-making party is nevertheless bound by the duty to act in good faith. *Cox v. CSX*, 732 So. 2d at 1097-98.

Section 9.2(i) does not state that Simply must provide Vida proof of cause for termination, but it is inherently reasonable that Vida would expect Simply to demonstrate how Vida breached the contract. This is especially true in light of Simply's severe allegations. Notably, Simply could have terminated the Agreement without cause.[5] Compl. Ex. A, § 9.4. Instead, Simply claims that Vida committed a serious violation of federal law that could result in substantial civil and criminal penalties.[6] Making such bold, unsubstantiated accusations without any proof evinces not only Simply's bad faith in its dealings with Vida, but also that it lacks such proof because none exists. Vida always complied with all laws.

Moreover, allowing Simply to terminate a contract citing a violation of law without providing any evidence gives Simply the ability to terminate the contract for virtually any reason. Simply could have told Vida that it violated any provision whatsoever and all it would need to do to cancel the contract is allege wrongdoing in a laconic termination letter.

iv. *Simply's reliance on* Dunkin' Donuts v. Martinez *and* Dunkin' Donuts v. Chetminal *is inappropriate, inaccurate, and misleading; these cases are non-binding franchise cases inapplicable to this matter, or, at a minimum, clearly distinguishable.*

Simply improperly relies on two cases to support its argument that it was entitled to terminate the Agreement in light of Vida's "illegal acts." Def's Mot. to Dismiss at 12.

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[5] Termination without cause would have required 90 days' notice. It seems Simply was too unwilling to wait to exercise this termination option, as it rushed to transfer Vida's patients (to the point of harassment) to other centers managed, operated, or controlled by Simply.

[6] Penalties include a fine of up to $25,000 and imprisonment for up to five years for a single violation. *See* 42 U.S.C. § 1320a-7b(b).

In *Dunkin' Donuts v. Martinez*, the Court held that Dunkin' Donuts validly terminated a franchise agreement because it believed its franchisee was violating federal tax and employment laws, thus breaching the contractual provision to "obey all laws." No. 01-013589, 2003 U.S. Dist. Lexis 2694, *4-6 (S.D. Fla. Feb. 21, 2003). However, contrary to Simply's assertion (Def's Mot. at 12), Dunkin' Donuts' decision was based on much more than an anonymous tip. Rather, it corroborated the tip with internal and third-party investigations, as well as employment and tax records obtained from the franchisee and third-party institutions. *Id.*

Similarly, in *Dunkin' Donuts v. Chetminal Inc.*, Dunkin' Donuts validly terminated a franchise upon learning that the franchisee was arrested for selling cigarettes to minors. No. 97-6413-CIV-Marcus, *2 (S.D. Fla. Nov. 26, 1997). Although the franchisee was merely charged, the Court found there was sufficient evidence that he actually sold the cigarettes, namely, credible testimony from the arresting officer and a minor who claimed to have bought cigarettes from the franchisee on at least two occasions. *Id.* at 3.

Unlike the franchisors in *Martinez* and *Chetminal*, Simply has never substantiated its accusations of illegal activity with even a modicum of proof. Nevertheless, it claims to have "irrefutable evidence." Compl. ¶¶ 17-23; Ex. C, p. 2 ¶ 2.

The only evidence Simply has ostensibly proffered is Vida's Appeal Letter, which it cites out of context to its own words as an admission – and therefore "proof" – of Vida's wrongdoing:

> The [Appeal Letter]) from Vida's lawyers to Simply Healthcare . . . states that Simply Healthcare gave specific notice in telephone conversations that its reason for the termination was that Simply Healthcare had "irrefutable evidence that [Vida] is in violation of the Anti-Kickback Statute." The truthfulness of this fact is not in dispute and must be taken as true.

Def.'s Mot. to Dismiss at 9, citing Compl., Ex. C at 2.[7]

[7] Ironically, Simply's lawyers — who filed a Motion to Dismiss with baseless allegations of fraud — now intend to mislead this court as to a statement (or attachment) in the Complaint. To pretend that its own statement quoted in the Complaint regarding what it does not have (evidence) is now a fact that "must be taken as true" is disingenuous.

In fact, Vida reiterates in the Appeal Letter that Simply could not prove any wrongdoing:

> You have stated in phone conversations that you have irrefutable evidence that [Vida] is in violation of the Anti-Kickback Statute. We have not seen that evidence.
>
> We have requested in telephone conversations for you to provide us with the evidence you have of the alleged violations but you have refused to provide such evidence. We have also requested that you point at what statute, opinion, or decision makes you confidence [*sic*] that we are in violation of the law but you have also refused to point at such material.

Compl. Ex. C at 2; *Id.*, n. 2.

Simply's final letter also contains nothing more than a cursory statement upholding its decision. Compl. Ex. D. In spite of multiple requests, Simply still has not shed any light on the situation. Compl. Ex. C at 2, n. 3. This withholding of its "proof" is unreasonable and flies in the face of the reasoning in the cases Simply relies on to support its position. Unlike the franchisor in *Martinez,* for example, Simply has not corroborated its assertions with third-party investigation, nor produced records supporting its allegations. In fact, if it had done so, Simply would have discovered that Vida's actions were not only legal, but also were sponsored by its own agents.

B. Simply Breached Sections 9.7 *Post-Term Obligations* and 10.3 *Confidentiality* of the Agreement.

Simply had an indisputable contractual obligation to safeguard Vida's confidential information. Compl. Ex. A §§ 9.7, 10.3. However, it breached this duty and the implied covenant of good faith and fair dealing implied therein when it disseminated information to Vida's competitors regarding the parties' contractual relationship and Vida's patients' personal information. Compl. ¶¶ 38-40. Despite Simply's contrary assertion (Def.'s Mot. to Dismiss, at 5-

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Undersigned counsel will not waste pages arguing the obvious—the allegations to be taken as true in a Complaint are the Complainant's.

7[8]), Section 9.7, *Post-Termination Obligations* explicitly binds both parties.[9] Additionally, Section 10.3, *Confidentiality* unequivocally states that "the provisions of this Section 10.3 shall survive the termination or expiration of this Agreement." Compl., Ex. A.[10] When read in conjunction with Section 9.7, it is clear that Simply's duty of confidentiality survived termination of the Agreement.

"Confidential information" is ". . . any and all information disclosed by either party to the other in relation to [the] Agreement, [or] related to a party's business, including but not limited to, Member rosters, notes, . . . customer lists . . . [and] agreements." Compl. Ex. A, § 10.3. The disclosure involved Vida's patients' data and matters relating to the parties' relationship. Compl., ¶ 39; Ex. C at 5, ¶ 3.

Simply claims that it "properly notified [Vida's] patients of the termination and assisted their transition to other in-network providers." Def's Mot. to Dismiss at 21. Vida acknowledges that Simply has a duty to *notify* its members about changes to its provider network. Under federal disclosure requirements, HMOs must

> make a good faith effort to provide written notice of a termination of a contracted provider at least 30 calendar days before the termination effective date to all enrollees who are patients seen on a regular basis by the provider whose contract is terminating, irrespective of whether the termination was for cause or without cause. When a contract termination involves a primary care professional, all enrollees who are patients of that primary care professional must be notified.

42 C.F.R. § 422.111(e).

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[8] Simply's allegation that Vida willfully and fraudulently altered the text of §§ 9.7, 10.2 is addressed in Section II below.

[9] (i) [T]ermination shall not relieve either party from completing its responsibilities which accrued prior to termination and each party shall complete, as soon as possible, all such responsibilities; and (ii) any provisions of this Agreement which are stated to remain in effect and survive after termination shall remain in effect.

[10] *See also* Ex. A, § 10.15 ("The parties each acknowledge and agree . . . that Sections . . . 9.7 [Post-Termination Obligations], 10.2 [Non-Solicitation], [and] 10.3 [Confidentiality] . . . shall survive the termination or expiration of this Agreement, irrespective of the cause giving rise thereto.")

What Simply actually did, however, is far from a "good faith effort" to disclose as required by law. In stark contrast, Simply and other Simply-associated medical centers contacted patients and lied to them so they would change providers. Compl. ¶¶ 33-40. Simply told Vida's patients that their doctor had quit without notice, that they had to see a new doctor, that Vida had gone out of business, and that Vida lost its state operational licenses. Compl. ¶ 34. To pretend to equate the notice required by law with Simply's blatantly false statements is wholly disingenuous.

Furthermore, some patients learned of the contract cancellation (as early as sixty days before the effective termination) from Vida's competitors rather than from Simply itself. Compl., Ex. C at 5, ¶ 3. Vida had not discussed any matters in relation to the Agreement – which are protected under the Confidentiality clause – with third parties. *Id.* Vida also certainly did not disclose its patients' data to competing third parties, nor would it have any reason to. Simply is the only other party that could have provided this sensitive information to Vida's competitors, in violation of Sections 9.7 and 10.3 of the Agreement. Compl. ¶¶ 38-40.

Leaking sensitive business information to Vida's competitors and poaching patients is also entirely inconsistent with the covenant of good faith. The "duty to notify" does not require deception nor facilitation of unfair competition.

C. Breach of Sections 10.2 *Non-Solicitation* and 4.2 *Member Acceptance/Transfer* of the Agreement.

When Simply harassed Vida's patients to make them switch to other Simply-associated medical providers, Simply breached the Non-Solicitation and Member Transfer clauses. Moreover, Simply's actions evince not only a clear intent to harm Vida's business, but also a

complete disregard for patients' right to choose their own doctor.[11] The law states that even where one party can exercise a degree of discretion sufficient to deprive the other party of the benefit of the bargain, that party must still abide by the duty of good faith. *See Cox v. CSX*, 732 So. 2d at 1097-98.

In *Cox v. CSX*, the defendant-appellee argued that it was entitled to summary judgment on plaintiff's breach of contract claim because the agreement gave it sole discretion in assigning jobs to the plaintiff-appellant. 742 So. 2d at 1094. Despite the express discretionary provision, the court reversed, holding that the defendant's practice of withholding lucrative jobs in an arbitrary, unreasonable manner was still subject to the implied duty of good faith and fair dealing. *Id.* at 1097. Similarly, in *Scheck v. Burger King Corp.*, the court held that despite an express denial of an exclusive territory, the franchisee was nonetheless entitled to "expect that [the franchisor would] not act to destroy the right of the franchisee to enjoy the fruits of the contract." 798 F. Supp. 692, 694 (S.D. Fla. 1992).

While the non-solicitation clause applies only to Vida, (Compl. Ex. A § 10.2.), like the Plaintiff in *Cox*, Vida had a reasonable expectation that Simply would not take actions that were materially adverse to its interests and the relationship it had with its patients. Moreover, nowhere in the Agreement does it say that Simply had a right to take Vida's current patients, especially not through misrepresentations. *See* Compl. Ex. A § 4.2.

Under 42 C.F.R. § 422.111(e), Simply only had a duty to notify patients of the termination of its contract with Vida. Patients were always free to remain with their doctor and Simply did not have to coerce them into going to its affiliated centers. The *Member Transfer*

[11] Vida acknowledges that Medicare Advantage patients must choose "in-network" doctors in their plan. However, nothing prevents a patient from becoming a member of another HMO so as to preserve his relationship with his doctor or to pay the doctor out of pocket. In fact, some patients contacted Medicare to do just this — keep their doctor and be reassigned to other HMOs.

provision of the Agreement states that Simply and Vida had to assist each other in transferring patients. Compl. Ex. A § 4.2. The *Member Transfer* provision required cooperation, not intimidation, harassment, or even coercion of patients. Vida had a reasonable, good-faith expectation that Simply would cooperate in the transfer of those who actually wanted to be transferred. The evidence shows that the overwhelming majority of Vida's patients wanted to remain with their doctor.

In *Cox v. CSX* the defendant-appellee's "arbitrary and unreasonable" exercise of discretion in assigning jobs was indicative of bad faith. Simply's actions in this case are far more egregious. Simply went beyond withholding clients from Vida; it directly interfered with Vida's right to "enjoy the fruits of the contract" *and* destroyed patients' relationship with their doctor. Simply and other medical centers associated with it routinely harassed patients and told them lies, making them believe they were obligated to sever their relationship with Dr. Lorites. Compl., ¶¶ 33-35.

Simply's dishonesty offends all notions of good faith and fair dealing. Nothing in the Agreement gave it the right to lie to Vida's patients, neither before nor after termination.

II. Simply's Motion to Strike Should be Denied Because its Allegation that Vida has Committed Fraud on the Court is Meritless

A. Standard for Dismissal Based on Fraud on the Court

A party moving for dismissal for fraud faces a high burden. Dismissal is appropriate only where "it can be demonstrated, *clearly and convincingly, that a party has sentiently set in motion some unconscionable scheme calculated to interfere with the judicial system's ability to impartially adjudicate a matter* by improperly influencing the trier of fact or unfairly hampering the presentation of the opposing party's claims or defense." *Cox v. Burke*, 706 So. 2d 43, 46 (Fla. 5th DCA 1998) (emphasis added).

The courts have the right and obligation to dismiss fraudulent claims. *Savino v. Florida Drive In Theatre Mgmt., Inc.*, 697 So. 2d 1011, 1012 (Fla. 4th DCA 1997). However, because "dismissal sounds the 'death knell of the lawsuit,' courts must reserve such strong medicine for instances where the defaulting party's misconduct is correspondingly egregious." *Aoude*, 892 F.2d at 1118 (internal citation omitted). "The clear and convincing evidence necessary to succeed on a motion to dismiss for fraud on the court must demonstrate that the plaintiff 'committed knowing deception intended to prevent the defense from discovery essential to defending the claim.'" *Cherubino v. Fenstersheib & Fox, P.A.*, 925 So. 2d 1066, 1069 (Fla. 4th DCA 2006) (internal citation omitted).

In *Cox v. Burke*, the court properly dismissed the plaintiff's suit for legal malpractice against her former attorneys, who had refused to continue representing her in an underlying personal injury claim. 706 So. 2d at 44. The court held that the plaintiff forfeited her right to trial, given overwhelming evidence of her extreme misrepresentations and omissions during discovery about her previous injuries, her marital status, and even her identity, all of which were material to her personal injury claim.

In contrast, in *Rios v. Moore*, another personal injury case, the court found that although the plaintiff did not accurately describe her injuries, her actions did not rise to the *Cox* plaintiff's level of fraudulent, intentional conduct. 902 So. 2d 181, 183. (Fla. 3d DCA 2005). The plaintiff voluntarily disclosed her prior injuries in a deposition and any inconsistencies in her testimony could have been addressed via cross-examination and impeachment. *Id.* Similarly, the defendant's motion to strike was denied in *Cherubino*, as the court was unconvinced that the plaintiff knowingly attempted to deceive opposing counsel. 925 So. 2d at 1069.

B. Simply's Counsel Has Not – and Cannot – Prove by Clear and Convincing Evidence that Vida's Attorney Intentionally Tried to Defraud the Court.

i. *Vida's counsel's use of brackets is not a misrepresentation, neither intentional nor unintentional.*

Simply claims that Vida deliberately altered the text of Sections 9.7 *Post-Termination Obligations* and 10.2 *Non-Solicitation* so as to mislead the Court about the parties' obligations. Def's Mot. to Dismiss at 5-7. Simply alleges this fraud on the Court because Vida's counsel inserted in the Complaint relevant text from certain provisions of the contract, adding the words "Vida" or "Simply" within brackets.

Citation rules vary. Generally, brackets are used in a quote to insert material by someone other than the original writer,[12] or to clarify an original quote.[13] It is difficult to imagine a scenario where Vida's counsel wanted to mislead the Court by "altering" a text while simultaneously signaling to the Court, with brackets, that additional material had been inserted and did not belong in the original text. Moreover, it is even more difficult to imagine that Vida's counsel committed this "fraud" and at the same time attached the full text of the contract to the Complaint.

ii. *Vida's counsel's use of brackets is an attempt to reflect well established law.*

It is well established law that the covenant of good faith and fair dealing is implied in all provisions of a contract, even – and especially – when one party has a considerably higher degree of discretion to act than the other party. *See Cox v. CSX*, 732 So. 2d at 1097-98.

Vida's counsel's use of brackets is just an attempt to reflect what is overwhelmingly the law in Florida: that Simply was bound by the duty of good faith and fair dealing. Just as Simply had a duty of good faith under the Confidentiality and Post-termination clauses, Simply was also

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[12] *See* http://www.apastyle.org/learn/faqs/use-brackets.aspx
[13] *See* http://data.grammarbook.com/blog/brackets/changing-a-quote-using-brackets/

obligated to act in good faith under the Non-solicitation clause because Vida also had a business relationship with its patients upon which its enjoyment of the fruits of the Agreement depended.

Further, it is absurd to accuse Vida's counsel of "sentiently setting in motion" a scheme to defraud the court when counsel willingly included the Agreement for the Court's review. Simply's counsel at best has a case against Attorney Ayala for improper citation in paragraph 32 of the Complaint.

iii. *Assuming, arguendo, that Simply's fraud allegation has some merit, it fails to demonstrate by clear and convincing evidence that Vida's counsel committed fraud on the Court.*

Simply has not proven by clear and convincing evidence that Vida altered the text of Sections 9.7 and 10.2 of the Agreement so as to intentionally mislead the court. First, the obligation to safeguard confidential information pursuant to Section 9.7 unequivocally applied to both parties. As for 10.2, even though there is no express language forbidding Simply from soliciting Vida's patients, Vida had a reasonable expectation that Simply would not sabotage Vida's business relationship with its patients. Paragraphs 32-37 of the Complaint are not an attempt to defraud the Court. Rather, they illustrate how Simply breached the covenant of good faith and fair dealing implied in specific provisions of the Agreement.

Simply has not and cannot prove that Vida deliberately attempted to deceive the Court or otherwise engaged in behavior that is even remotely as egregious as the plaintiff's in *Cox v. Burke*. Vida has consistently alleged the same facts in its Complaint and all the attached exhibits.

III. The Facts Showing Simply's Dishonesty Support a Cause of Action for Unfair and Deceptive Trade Practices.

Vida's Complaint shows how Simply intentionally misled Vida's patients and gave its confidential information to competitors, causing the patients to switch providers as early as forty-five days before the effective termination of the Agreement. Compl. ¶¶ 52-66. To establish a

prima facie case under FDUTPA, a plaintiff must properly plead (1) a deceptive or unfair trade practice; (2) causation; and (3) actual damages. *Kia Motors Am. Corp. v. Butler*, 985 So. 2d 1133, 1140 (Fla. 3d DCA 2008). The facts in Vida's Complaint state with particularity how (1) Simply and other medical centers associated with it told numerous lies to Vida's patients (including that they were obligated to switch doctors) ; (2) that patients *actually* switched doctors because of this; and (3) as a result, Vida sustained losses so substantial that it was nearly left insolvent.

Simply's actions, discussed *supra*, are a violation of FDUTPA, which prohibits "[u]nfair methods of competition, unconscionable acts or practices, and unfair or deceptive practices in the conduct of any trade or practice." Fl. Stat., § 501.204(1). The Florida legislature intended for the statute to be "construed liberally" to protect consumers and businesses alike. Fla. Stat § 501.202. Thus, in considering whether the actions of a defendant are unfair or deceptive, courts have regarded the concept as "extremely broad." *Day v. Le-Jo Enterprises, Inc.*, 521 So. 2d 175, 178 (3rd DCA 1988). Generally, any practice that is likely to mislead consumers is deceptive. *See Rebman v. Follett Higher Educ. Group, Inc.*, 575 F. Supp. 2d 1272 , 1279 (M.D. Fla. 2008).

Vida does not, as Simply claims, assert that Simply's breach of the Agreement is itself an unfair or deceptive act. Rather, Vida correctly claims that the actions *underlying* Simply's breach of contract – namely, telling patients disparaging lies about Vida and colluding with Vida's competitors – constitute unfair and deceptive practices. *See* Compl. ¶¶ 33-34, 57-60. Vida alleges these facts with particularity and they must be taken as true. *See, e.g., Medimport S.R.L. v. Cabreja*, 929 F. Supp. 2d 1302, 1319 (S.D. Fla. 2013) (finding that plaintiff met FDUTPA pleading requirements because it described when and how defendant acted to plaintiff's detriment). Additionally, Vida does not dispute that Simply was obligated by law to inform its

beneficiaries that Vida would no longer be an in-network provider. However, Simply's duty did not give it the right to also disseminate false information nor to give Vida's confidential information to its competitors.

Starting approximately forty-five days before terminating the Agreement, Simply told Vida's patients the following:

- That Vida closed its business without notice;
- That its operational licenses had been revoked by regulatory authorities;
- That their doctor had left Vida without notice;
- That Vida was insolvent and closing its clinics;
- That patients were bound by law to agree to a change in providers, and that they could not leave Simply's health plan.

Compl. ¶¶ 33-34, 52-66.

Not only were these statements false, but they also directly attacked the integrity of Vida and its physicians in an effort to induce patients to switch providers. Vida lost many patients before the termination of the Agreement because patients believed Simply's lies. Simply also facilitated unfair competition by giving patients' names and phone numbers to Vida's competitors, who then directly contacted patients to also induce them to switch providers. Compl. ¶ 39; Ex. C at 5.[14] Vida describes these actions, in detail, multiple times in the Complaint. The Court should therefore deny Simply's Motion.

[14] Further, even before Simply sent Vida the Notice of Termination, Simply altered Vida's contact information on patients' online portals. The portal still showed Vida's name and logo, but the phone number was different. If a patient had access to this portal, a patient would get the impression that it was calling Vida when it was in fact calling another medical center.

IV. Simply, Through Improper Methods, Interfered in Vida's Relationship with its Patients Under the Guise of Giving the Patients "Notice."

Simply's argument that it was acting under a supervisory interest, and thus was not a stranger to Vida's business relationship with its clients, is an affirmative defense and should not be considered in a motion to dismiss Vida's claim for tortious interference with a business relationship. *Susan Fixel*, 842 So. 2d at 206. Irrelevance notwithstanding, Simply's Motion should be denied because it forfeited its privilege to intervene when it misled Vida's patients into switching providers.

To establish a *prima facie* tortious interference claim, the plaintiff must show (1) the existence of a business relationship; (2) knowledge of the relationship on the part of the defendant; (3) an intentional and unjustified interference with the relationship by the defendant; and (4) damage to the plaintiff as a result of the breach of the relationship. *Palm Beach Cty. Health Care Dist. v. Prod. Medical Educ., Inc.*, 13 So. 3d 1090, 1094 (Fla. 4th DCA 2009).

"Under Florida law, a defendant is not a stranger to a business relationship, and thus cannot be held liable for tortious interference, when it has a supervisory interest in how the relationship is conducted or a potential financial interest in how a contract is performed." *Palm Beach Cty.*, 13 So. 3d 1094. However, even when the privilege to interfere exists, that privilege is not absolute.

The intervenor has the "obligation to employ means that are not improper." *Making Ends Meet, Inc. v. Cusick*, 719 So. 2d 926, 928 (Fla. 3rd DCA 1998); *see also Ethyl Corp. v. Balter*, 386 So. 2d 1220, 1225-26 (Fla. 3rd DCA 1980) (stating that activities taken to safeguard one's own financial interest in a business relationship are only non-actionable so long as improper methods are not used); Fla. Std. Jury Instr. (Civil) MI 7.2 (stating that "one who uses physical violence, *misrepresentations*, illegal conduct, threats of illegal conduct, *or other improper*

conduct has no privilege to use those methods, and his interference using such methods is improper") (emphasis added).

In *Gunder's Auto Center v. State Farm Mutual Automobile Insurance Company*, an auto repair shop sued an auto insurer for removing it from its "preferred provider" list. 422 F. Appx. 819, 822-23 (11th Cir. 2011). Simply's counsel claims that the court affirmed dismissal of the plaintiff's tortious interference claim in *Gunder* because the insurer had a financial interest in the business relationship between the repair shop and the insureds. Def.'s Mot. to Dismiss at 20. However, the court actually affirmed the dismissal of the claim not because the auto insurer's interest conferred an absolute privilege to interfere, but because the plaintiff failed to allege in its amended claim that the insurer used improper means. *Id.*

Unlike the plaintiff in *Gunder*, Vida both satisfies the elements of the *prima facie* claim and explicitly states the improper means Simply used to interfere with Vida's patient-physician relationship. Compl. ¶ 67-73. Simply contacted patients before and after the Notice of Termination and misrepresented facts, causing patients to leave Vida because they believed they had no choice when, in fact, they did. *Id.* It gave patients' contact information directly to Vida's competitors. *Id.* Simply's deliberate sabotage was in no way justified by Vida's "illegal acts," as Vida always complied with all laws. Rather, Simply fabricated an excuse to hand-deliver Vida's patients to other medical centers it controlled and preferred. Simply's actions directly harmed Vida. The resulting loss of the majority of patients nearly forced Vida to cease its operations. Accordingly, Simply's Motion to dismiss Count III of the Complaint should be denied.

Conclusion

For the aforementioned reasons, Vida respectfully requests that the Court deny the Defendant's motion to dismiss and strike Counts I, II, and III of the Complaint, and such other and further relief that this Court deems just and equitable.

Respectfully submitted,

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Certificate of Service

I hereby certify that on September 28, 2017, a true and correct copy of the foregoing was served on David Massey, Esq., James L. VanLandingham, Esq., and Craig Smith, Esq., Hogan Lovells, US LLP, 600 Brickell Avenue, Suite 2700, Miami, FL 33131, via e-service notification through the Florida Courts E-Filing Portal.

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