No. 1D18-3087

IN THE FIRST DISTRICT COURT OF APPEAL
FOR THE STATE OF FLORIDA

ADVANZEON SOLUTIONS, INC. f/k/a
COMPREHENSIVE BEHAVIORAL CARE, INC.,

Appellant,

v.

STATE OF FLORIDA *ex. rel.* FLORIDA DEPARTMENT OF FINANCIAL SERVICES, as the receiver of Universal Health Care Insurance Company, Inc., a Florida corporation, and Universal Health Care, Inc., a Florida corporation,

Appellee.

On Appeal from the Circuit Court of the Second Judicial Circuit in and for Leon County, Florida
L.T. Nos. 13-CA-358 & 13-CA-375 (consolidated), Hon. Terry P. Lewis

INITIAL BRIEF OF ADVANZEON SOLUTIONS, INC.

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STATEMENT OF THE CASE AND FACTS

Nature of the case

This is a receivership appeal. In business for 45 years, Appellant, Advanzeon Solutions, Inc.,[1] is a publicly traded managed behavioral health organization ("MBHO"). *See* R. 4821-28, 5353, 6933-34. It entered into contracts with Universal Health Care Insurance Company, Inc. ("UHCIC") and Universal Health Care, Inc. ("UHC"), which required them to pay to Advanzeon provider fees and administrative fees. *See* R. 5551-56, 6994, 7001, 7029. When UHC and UHCIC went into receivership, there was a shortfall between the amount UHCIC and UHC owed Advanzeon and the amount they had paid. *See* R. 5551-56. Advanzeon's claims sought to recover that deficit. *See* R. 5551-56, 6593-871, 6879, 7126-51.

As receiver, Appellee, the Florida Department of Financial Services ("the Department"), stipulated to many of the figures involved in calculating the total value of Advanzeon's claims. R. 5551-52, 5555, 6878-83. The Department further agreed Advanzeon should recover $32,139.86 for provider fees and $237,610.24 for administrative fees earned during the contracts' effective dates through their October 31, 2012 termination. R. 5555, 6882-83. But the Department contested an $820,167 sum for administrative services Advanzeon had provided during the five-month period following the contracts' termination. *See* R. 5552-53, 6882-83.

[1] Advanzeon was formerly known as Comprehensive Behavioral Care, Inc. ("CompCare"). *See* R. 4737, 4810-11, 4821-22.

Advanzeon argued the contracts, read in light of industry trade custom and usage, as explained by the testimony of its President and CEO, included a "tail" period that required it and the Universal entities to continue fulfilling their contract obligations for 90 days after the contracts terminated. *See* R. 5552-53, 6900-04, 6915, 6934-36. It further argued the specific circumstances surrounding the termination of these contracts required the tail to extend an additional two months (*i.e.*, five months total). *See* R. 5552-53, 6926-28, 6936-40, 6958-60.

In contrast, no Department witness testified whether trade custom in the managed behavioral health industry involved continuing contract obligations for 90 days after termination or claimed such contract terms usually are not interpreted in light of this industry custom. *See* R. 6961-76.

Without explaining how Advanzeon was supposed to continue working for free during the tail and extended tail periods to ensure providers continued to receive payments for services rendered or considering whether it was required to adopt Advanzeon's unrebutted testimony, the trial court disagreed with Advanzeon. *See* R. 5552-54. It granted a stipulated amount for provider fees ($32,139.86) and a stipulated amount for pre-termination administrative fees ($237,610.24), but denied unpaid tail and extended tail administrative fees ($820,167). R. 5555-56.

The sole issue on appeal is whether the trial court erred and abused discretion in ruling Advanzeon was not entitled to tail and extended tail administrative fees.

Course of the proceedings

In February 2013, the Department initiated delinquency proceedings against UHCIC and UHC. R. 54-313. After the cases, but not the estates, were consolidated (*see* R. 317, 5551-52, 5558), the trial court declared UHCIC and UHC insolvent, appointed the Department as receiver, and authorized it to liquidate those Universal entities (R. 599-622, 5573-97).

Advanzeon submitted a claim in each receivership. *See* R. 5551-52, 6879. The Department disputed the amounts claimed. *See* R. 4744, 4763-64. Advanzeon objected to the Department's classification and denial of its claims (R. 6593-609, 7126-42; *see also* R. 5551-52), and the Department responded (R. 4702-29). After a two-day hearing on December 11, 2017 and April 4, 2018 (R. 4804-90, 6874-979), the trial court partially denied Advanzeon's claims. R. 5551-56. Advanzeon sought rehearing (R. 5471-95), which the Department opposed (R. 5496-523) and was denied without a hearing (R. 5527). This timely appeal followed. R. 5547-57.

Disposition in the lower tribunal

A. Advanzeon's business model

Advanzeon maintains a network of healthcare providers and contracts with health plan organizations ("HPOs") to provide their "members" (*i.e.*, insureds) with behavioral health services. *See* R. 4821-28, 5353, 6892-93, 6902, 6904, 6907. To do this, Advanzeon commonly enters into administrative services only ("ASO") contracts with these HPOs. *See* R. 4823-25, 6892-96, 6934, 6952-54.

Under ASO contracts, Advanzeon performs two main functions. *See* R. 4824-25, 6892-96, 6950-51. First, it grants an HPO's members access to its provider network (*i.e.*, it authorizes its network providers to treat the HPO's members). *See* R. 4824-25, 6892-96, 6951-54. Second, it "cleans" (*i.e.*, vets) the claims (*i.e.*, invoices) its network providers submit for payment by the HPO. *See* R. 4824-25, 6892-96, 6951-54.

To clean a claim, Advanzeon determines whether its provider's behavioral health services were covered under an HPO's medical plan, medically necessary, and appropriately billed. R. 4824-26, 6892-95. If Advanzeon approves the claim, it sends the claim to the HPO. *See* R. 4825, 6892-94. The HPO can then directly pay the provider for the billed services. *See* R. 4825, 6892-95, 6953-54. In practice, however, this rarely happens. *See* R. 4825, 6894-95. Instead, the HPO usually sends provider payments to Advanzeon, which forwards them to its providers. *See* R. 4825, 6894-95, 6951-54. Because state and federal law requires Advanzeon to ensure its providers are timely paid,[2] Advanzeon often has to initially advance provider fees and later seek reimbursement from the HPO. *See* R. 4825, 6893-95, 6937-40, 6951-54.

For cleaning the claims, Advanzeon charges HPOs a per member/per month ("PMPM") administrative fee, which is calculated by multiplying the number of HPO members who were eligible to receive behavioral health services in a given

[2] *See, e.g.*, § 641.3155, *Fla. Stat.*; 42 C.F.R. §§ 422.520, 447.45, 447.46.

month by the contractually established rate. *See* R. 4824-26, 6892-93, 6904-05, 6908-11. As such, under an ASO contract, the value of the services Advanzeon's providers render to an HPO's members does not affect the amount the HPO owes Advanzeon each month *for administrative fees*. *See* R. 4824-26, 6892-93, 6904-05, 6908-11, 6914-20. Rather, the amount of administrative fees due Advanzeon depends solely on eligible member numbers and the contractually established PMPM rate. *See* R. 4824-26, 6892-93, 6904-05, 6908-11, 6914-20.

Hence, each month, HPOs end up owing Advanzeon for (1) provider reimbursements and (2) administrative fees. R. 6894-95, 6916-18.

B. The Universal contracts

UHCIC and UHC were HPOs. *See* R. 4702, 6984, 7012. Advanzeon entered into an ASO contract with each of them. *See* R. 6984-7010, 7012-45.[3]

1. Duration

Each contract contained a provision governing termination. *See* R. 6989 ("Section 7: Duration Of The Agreement"), 7019 ("Section 15: Duration Of The Agreement"). "In accordance with CFR 422.505," both contracts allowed either party to terminate the "Agreement without cause by giving the other party written notice of termination … at least ninety (90) days prior to the effective" termination date. R. 6989, 7019.

[3] Advanzeon entered into the Universal contracts when it was still CompCare. *See* R. 6984, 7012.

2. Regulatory requirements

Each contract contained a section incorporating by reference various regulatory requirements. R. 6986-88 ("Section 6: Regulatory Requirements"), 7020-24 ("Section 18: Regulatory Requirements"). Within these sections, each contract contained a provision entitled "Claim Payment." R. 6987, 7021.

The "Claim Payment" section of each contract required all provider "claims for payment, whether electronic or non-electronic [to] be mailed or electronically transferred to the Health Plan *within ninety (90) days of the discharge for inpatient services or the date of service for outpatient services.*" R. 6987, 7021 (emphasis added). In other words, the providers and Advanzeon were allowed 90 days from the date behavioral health services were rendered to submit a clean claim to UHC or UHCIC. *See* R. 6987, 7021.[4]

The "Claim Payment" provisions also required UHC and UHCIC to either pay or deny a clean claim within 20 days after receiving the claim if it was submitted electronically and within 30 days if it was submitted non-electronically. R. 6987, 7021. Additionally, UHC and UHCIC guaranteed it would pay 95% of all properly formatted clean claims within 30 days. R. 6987, 7021.

As such, the contracts contemplated situations where an Advanzeon provider would render services to a UHC or UHCIC member on a certain date, submit its

[4] For this requirement, the Advanzeon/UHC contract cited § 641.3155, *Fla. Stat.*, and 42 C.F.R. § 422.520(b), § 447.45(d)(2), (3), (5), and (6), and § 447.46. R. 7021. The Advanzeon/UHCIC contract cited only 42 C.F.R. § 422.520(b). R. 6987.

claim (*i.e.*, invoice) 90 days later, and receive payment from UHC or UHCIC up to 30 days after submitting the claim. *See* R. 6987, 7021.

3. ASO fees

Each contract set forth the applicable PMPM administrative fee rates. R. 6994 ("Attachment B-1"), 7001 (Attachment B-2), 7029 ("Attachment B").

C. The termination letter

Advanzeon was notified its UHC and UHCIC contracts would terminate on October 31, 2012. R. 4711, 7011.

D. Advanzeon's claims and objections

Advanzeon filed a claim in each of the receiverships. *See* R. 4810-11, 6593-94, 7126-27, 6691-846. Initially (*i.e.*, before the December 11 and April 4 hearings), the Department denied those claims outright, determining Advanzeon was entitled to $0. *See* R. 4810-11, 6602-04, 6879, 7135-37. Advanzeon filed written objections to that determination in each of the receiverships. *See* R. 6593-609, 7126-42. The objections were supported by affidavits from its CEO, Clark Marcus. *See* R. 6610-871, 7143-51. The objections and affidavits stated Advanzeon's claim was for provider fees, not administrative fees. *See* R. 5552, 6593, 6598-99, 6601, 7131-32, 7147.

E. The December 11, 2017 objections hearing

After Advanzeon filed its objections but before the December 11 hearing, its trial counsel informed the Department's trial counsel that its claims calculations accounted for outstanding tail and extended tail administrative fees. R. 4771-77.

At the hearing, the Department characterized that assertion as stating a new claim and contended Advanzeon should be prohibited from arguing entitlement to tail and extended tail administrative fees, because the written objections stated all administrative fees were paid. *See* R. 4808, 4813-16.[5]

In response, Advanzeon clarified that its tail and extended tail fee calculation did not raise a new claim; rather, it was part and parcel of its provider fee claims. R. 4808, 4816-17, 4820-22, 4829-31; *see also* R. 4883-88. It explained calculating its provider fee claims involved more than simply subtracting the amount UHCIC and UHC had paid it from the amount it had paid its providers. R. 4808, 4816-17, 4820-22, 4829-31; *see also* R. 4883-88. Instead, because Advanzeon had applied a large portion of the Universal money it received toward outstanding administrative fees (including unpaid tail and extended tail fees), its provider fee calculation was naturally dependent upon the amount it had credited toward administrative fees. *See* R. 4816-17, 4829-31; *see also* R. 4883-88. Accordingly, any dispute about Advanzeon's entitlement to tail and extended tail administrative fees necessarily affected its provider fee claim and was not part of some new claim.

In other words, Advanzeon had taken its administrative fees "off the top" (of the amount the Universal entities paid) before calculating the outstanding provider fees it would claim in the receiverships. R. 4817, 4820, 4827, 4830, 4884-85. Indeed,

[5] The Department had made the same argument in its motion to strike Advanzeon's "new claims." R. 4748-49.

that was the reason why its written claims and objections stated all administrative fees had been paid (*i.e.*, the administrative fees had been paid because Advanzeon applied incoming Universal monies toward administrative fees first and applied only the surplus toward provider reimbursements). *See* R. 4883-88.

To support its position that the trial court should not consider Advanzeon's administrative fees in resolving the claims (R. 4817), the Department presented the testimony of Fred Staubitz, one of its senior forensic accountants (R. 4833-89):[6]

Staubitz had never analyzed the Advanzeon contracts or the subject matter of Advanzeon's claims until after UHCIC and UHC were ordered into receivership. *See* R. 4834-35. He testified the net amount due Advanzeon for both claims was approximately $32,000. *See* R. 4837; *see also* R. 6882-83 (Department's counsel stipulating the Universal entities owed Advanzeon $32,139.86 for provider fees). This sum did not include the $237,610.24 in outstanding administrative fees the Department would, at the April 4 hearing, admit UHCIC and UHC owed Advanzeon. *See* R. 6882-83.

Staubitz stated both UHCIC and UHC paid administrative fees and provider fees from separate bank accounts. *See* R. 4845-47. They each maintained a claims

[6] After the December 11 hearing, the parties stipulated to the amount of provider fees UHCIC and UHC owed, and the Department agreed Advanzeon's claims properly included outstanding administrative fees. *See* R. 6882-83. The dispute then became whether UHCIC and UHC owed Advanzeon for administrative fees incurred during the five months following the contracts' termination. *See* R. 6899-6901.

account, an operating account, and a depository account. R. 4845-46.[7] He initially claimed this account structure allowed him to deduce how much UHCIC and UHC had paid in administrative fees and how much they had paid in provider fees. R. 4863, 4875.

But neither Universal's checks nor its wire transfer records bore any signs indicating the purpose of each payment. R. 4862-63, 4868. For that reason, Staubitz admitted he could not be sure which payments were for administrative fees and which ones were for provider fees. R. 4863. And despite knowing the applicable member numbers and PMPM rates, he never calculated or determined the amount of administrative fees the Universal entities owed Advanzeon under the ASO contracts. R. 4865-67. In other words, he never analyzed whether UHCIC and UHC had paid all the administrative fees they owed Advanzeon. *See* R. 4865-67.

Staubitz further testified neither UHCIC nor UHC paid any administrative fees in 2013. R. 4861. He speculated this was because the Universal entities contracted with Magellan, another MBHO, to take over for Advanzeon when the ASO contracts terminated in October 2012. *See* R. 4874-75. Yet he admitted he was not "familiar at all with the contract between Magellan and Universal." R. 4875.

And although Staubitz was the person at the Department who supposedly knew the most about the transactions between Advanzeon and the Universal entities

[7] Through Staubitz, the Department moved into evidence a report he authored that showed his conclusions regarding which Universal payments were for provider fees and which ones were for administrative fees. R. 4858, 7107-25.

(R. 4846-47), he did not know whether Advanzeon provided administrative services in January, February, or March 2013 (R. 4861).

F. The April 4, 2018 objections hearing

The trial court continued the objections hearing to April 4, 2018. *See* R. 6878.

1. The stipulations

After the December 11 hearing, the parties narrowed the scope of the dispute. *See* R. 6879-83. They agreed UHCIC and UHC owed Advanzeon a combined total of $32,139.86 for provider fees. R. 6882-83. They also agreed UHCIC and UHC owed Advanzeon a combined total of $237,610.24 for administrative fees earned during the ASO contracts' effective dates through their October 31, 2012 termination. R. 6882-83. They, however, continued to disagree about the $820,167 in administrative fees Advanzeon contended the Universal entities owed for the five months following the contracts' termination. *See* R. 6882, 6885-89, 6981-83.

Advanzeon argued the contracts, read in light of industry custom and trade usage, required it to continue providing administrative services for at least 90 days after the contracts terminated. *See infra* Disposition F.4. It explained this period is known in the managed behavioral health industry as the "tail." *See infra* Disposition F.4. It further argued the specific circumstances surrounding the contracts' termination required performance to continue for an additional two months. *See infra* Disposition F.5. It referred to this period as the "extended tail." *See infra* Disposition

F.5. Ultimately, Advanzeon claimed UHCIC and UHC owed $820,167 for administrative services rendered during the tail and extended tail. R. 6926, 6981-83.

But the Department argued the contracts did not include a tail or extended tail, so UHCIC and UHC owed nothing for administrative services performed after the contracts' termination. R. 6882-83.

In sum, the Department valued Advanzeon's total claim at $269,750.10 ($32,139.86 provider fees + $237,610.24 pre-termination ASO fees). R. 6882-83. Advanzeon valued its claim at $1,089,917.10 ($32,139.86 provider fees + $237,610.24 pre-termination ASO fees + $820,167 tail and extended tail ASO fees). *See infra* Disposition F.4, 5; R. 6882-83, 6885-89, 6926, 6981-83.

2. The witnesses

Three witnesses testified for Advanzeon: Mark Heidt, Advanzeon's president (*see* R. 6890-931); Clark Marcus, Advanzeon's CEO (*see* R. 6932-55); and Arnold Finestone, chairman of its auditing committee (*see* R. 6955-61). All three were Advanzeon board members and had decades of experience running healthcare companies or working in the healthcare industry. *See* R. 6891, 6933, 6956-58. Marcus and Finestone had personally overseen the administration of the Advanzeon/UHCIC and Advanzeon/UHC contracts. *See* R. 6936-37, 6959-60.

Staubitz and William England, a claims supervisor for the Department, testified as the Department's rebuttal witnesses. *See* R. 6961-76. Neither Staubitz nor England worked for or were otherwise associated with Advanzeon or the Universal

entities before the ASO contracts' termination. *See* R. 4834-35, 6970. They based their opinions about the contracts' requirements solely on liquidation-related forensic accounting. *See* R. 6965-71.

3. The administrative-fees-first testimony

Heidt testified Advanzeon always applies the first monies to come in from an HPO toward outstanding administrative fees (*i.e.*, Advanzeon always pays itself before paying its providers). R. 6895-96. He explained this practice allows Advanzeon to gauge an HPO's financial health, maintain a sufficient operating budget, and protect itself in the event that an HPO becomes insolvent. R. 6895-97. Specifically, he testified that, when payments came in from UHCIC and UHC, Advanzeon would first allocate those sums to administrative fees and then, if any money was left over, it would apply that surplus to provider reimbursements. *See* R. 6895-97, 6917-18.

Marcus and Finestone likewise testified Advanzeon would record incoming monies as paid administrative fees before applying any surplus to provider fees. R. 6939-40, 6960. No Department witness testified to the contrary.

4. The tail period testimony

Heidt and Marcus explained a 90-day tail customarily applies to ASO contracts for managed behavioral health services. R. 6900-04, 6915, 6934-36. In that regard, they testified the parties' responsibilities under an ASO contract do not immediately stop on the contract's termination date. R. 6901-04, 6915, 6934-36. Rather, because federal law, state law, and standard ASO contracts allow providers 90

days from the date of service to submit their claims (*see* R. 6987, 7021), the claims cleaning and payment process necessarily must continue for 90 days after contract termination (*see* R. 6901-04, 6915, 6934-36).

Heidt and Marcus explained this practice allows for providers to continue rendering services up until the date of termination, submit their claims within 90 days (even if the submission occurs after termination), and be paid for those claims. R. 6901-04, 6915, 6934-36. They further testified ASO contracts inherently incorporate this "industry wide" tail concept, and the Advanzeon/UHC and Advanzeon/UHCIC contracts required the parties' obligations to continue during the 90-day tail that followed the contracts' October 31, 2012 termination. R. 6901-04, 6915, 6934-36.[8]

Additionally, Marcus explained that, when an ASO contract terminates, the outgoing MBHO (*e.g.*, Advanzeon) has to "turn [its] patients over to an incoming" MBHO (*e.g.*, Magellan). R. 6936. The industry term for this transition is "warm handoff." *See* R. 6936. Normally, once an ASO contract terminates, the outgoing MBHO continues to clean its provider claims during the tail period, but the incoming MBHO takes over the provider network function (*i.e.*, the members who were being treated by the outgoing MBHO's providers are transferred to the incoming MBHO's providers). *See* R. 6936-38. All three Advanzeon witnesses testified Magellan, the company that was supposed to take over for Advanzeon, was not ready to begin

[8] Through Heidt's testimony (R. 6906-09), Advanzeon introduced Claimant's Exhibit 1 (6981-83), which was a spreadsheet that showed how Advanzeon had calculated the monthly administrative fees the Universal entities owed.

performing network or administrative services when the Advanzeon/UHC and Advanzeon/UHCIC contracts terminated on October 31, 2012. *See* R. 6926-28, 6936-40, 6958-60.

In contrast, although Staubitz had testified at the December 11 hearing that he was not familiar with the Magellan/Universal contracts (*see* R. 4875), he asserted at the April 4 hearing that, in November 2012, Magellan picked up where Advanzeon had left off (R. 6965-66). He presumed Magellan was ready to begin contract performance because (1) the Magellan/UHCIC and Magellan/UHC contracts became effective on November 1, 2012, (2) those contracts required a $1.9 million payment from the Universal entities to Magellan, and (3) UHC had made that payment. *See* R. 6963-66; *see also* R. 7069-99.

Staubitz, however, admitted he had no personal knowledge whether the members who were being treated by Advanzeon's providers were transferred to Magellan's providers. R. 6968. He also admitted the $1.9 million was an advanced payment (*i.e.*, a deposit), he did not know what services the payment was for, and he did not know whether Magellan ever began providing network or administrative services. R. 6968-69. Additionally, he never stated the Magellan contracts would have required Magellan to clean claims submitted by Advanzeon's providers during the 90-day tail. *See* R. 6961-68. Nor did he explain how this type of inter-MBHO melding of administrative responsibilities would have been feasible or consistent with Advanzeon's and Magellan's respective contract obligations. *See* R. 6961-68. In

other words, even if the warm handoff had occurred (*i.e.*, Magellan had started to administer its *own* provider network and clean its *own* provider claims), Magellan still would not have been able to clean tail period claims submitted by *Advanzeon's* providers (the network for which it never shared with Magellan). *See* R. 6935-38.

Lastly, although UHCIC and UHC's parent company had at least 1,102 full-time employees in 2012 (*see* R. 719, 721-22), the Department did not call any of those employees—or any Magellan employees—to contradict Advanzeon's trade custom and usage testimony that ASO contract obligations normally continue for 90-days after termination (*see* R. 6961-68). Instead, it relied exclusively on Staubitz, whose testimony said nothing about trade custom and usage in the managed behavioral health industry (*see* R. 6961-68), and England, who testified he could not speak to the industry standard for how and when contractual ASO fees are paid (R. 6974).[9]

5. The extended tail period testimony

All three Advanzeon witnesses testified an extended tail was necessary in this case because Magellan still was not ready to begin performing network or administrative services after the 90-day tail expired.[10] *See* R. 6926-28, 6936-40, 6958-60.

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[9] Indeed, England did nothing more than profess his own ignorance when he testified that, over the course of his career, he personally had never seen post-contract administrative fees claimed in a receivership. *See* R. 6974.

[10] Heidt testified the extended tail covered the two-month period following the 90-day tail (*i.e.*, the tail and extended tail combined spanned five months). R. 6927. Marcus, however, testified the extended tail lasted at least through February 2013, but he was not sure whether it covered March 2013 (*i.e.*, the fifth month after contract termination). R. 6936. For the purposes of this appeal, Advanzeon maintains the extended tail period lasted two months.

Marcus also explained that, in addition to not being ready to take over the claims cleaning function, Magellan was not even ready to begin administering its provider network on November 1, 2012 (*i.e.*, the date the Magellan/Universal contracts became effective). *See* R. 6935-38. Accordingly, he testified Advanzeon continued to allow UHCIC and UHC members to access its provider network throughout the tail and into the extended tail. *See* R. 6935-38.

6. The calculation testimony

Advanzeon's spreadsheet calculated the monthly ASO fees due for November 2012 through March 2013 (*i.e.*, the tail and extended tail) based on October 2012's eligible member numbers. R. 6918-20, 6981-83. As such, the ASO fees for each month included in the tail and extended tail did not vary. R. 6918-20, 6938-39; 6981-83. Heidt and Marcus testified it was standard industry practice and Advanzeon's practice to calculate monthly tail period ASO fees based on the number of eligible members an HPO had during the last month before termination. *See* R. 6918-20, 6938-39, 6946-47.

Marcus explained using that number was appropriate because any claims being processed during the tail would have related to provider services rendered in the month preceding termination. R. 6938, 6946-47 ("the only [eligible member] number that can possibly exist in a tail" is for "the last period of time during the term of the contract," and "[y]ou cannot have an up and down fluctuation because"

Advanzeon is only responsible for cleaning claims for behavioral health services provided before contract termination).

But because England's review of Advanzeon's receivership claim revealed no invoices for healthcare services rendered after October 31, 2012, he testified it would not be appropriate to calculate the tail period ASO fees using October 2012's eligible member numbers. *See* R. 6975-76.

G. The order on Advanzeon's objections

The trial court granted the stipulated amount for provider fees ($32,139.86) and the stipulated amount for pre-termination administrative fees ($237,610.24) but denied unpaid tail and extended tail administrative fees ($820,167). R. 5551-56.

It denied the unpaid tail and extended tail for two reasons. R. 5552. First, characterizing Advanzeon's written objections and Marcus's affidavits as stating "all administrative fees were paid," the trial court ruled Advanzeon could not, absent agreement from the Department, claim entitlement to unpaid administrative fees. R. 5552. Second, it ruled neither the "law, [nor] the contract between the parties, [n]or logic and common sense" supported Advanzeon's tail and extended tail arguments. R. 5552. In that regard, the trial court found the "assertion that Magellan … was not ready to" replace Advanzeon "on November 1, 2012, was unsupported by" documentary or testimonial evidence from Magellan. R. 5554. Noting Staubitz testified the Universal entities had made a $1.9 million payment to Magellan, the trial court

concluded, "It would make no sense to pay two companies for the same service." R. 5554.

The trial court also rejected Advanzeon's methodology for determining the monthly administrative fees due for November 2012 through March 2013 (*i.e.*, the tail and extended tail periods) as speculative and unreliable. R. 5552-53. It reasoned that, although Heidt had testified "'carrying forward'" eligible member numbers throughout the tail period was "an industry standard," Advanzeon "provided neither an expert witness nor testimony from" witnesses outside its business to confirm that methodology was indeed an industry standard. R. 5553. It further reasoned Advanzeon "failed to substantiate or provide any documentation" showing that (1) "UHC and/or UHCIC's membership" had been consistently at the "peak" October 2012 numbers during the tail and extended tail periods, (2) Advanzeon had submitted provider claims to UHC or UHCIC following the October 31, 2012 termination, or (3) Advanzeon had invoiced UHC or UHCIC for administrative services provided during the tail and extended tail. R. 5553.

SUMMARY OF ARGUMENT

The trial court erred in partially denying Advanzeon's claim. First, it misinterpreted the Advanzeon/UHCIC and Advanzeon/UHC contracts to not include a tail or extended tail. This involved failing to interpret the contracts in light of unrebutted trade custom and usage testimony, requiring Advanzeon to present expert testimony, misinterpreting the Magellan contracts, misunderstanding the failed "warm-

handoff" testimony, and requiring tail and extended tail invoices to corroborate Advanzeon's calculation testimony. Second, it misapplied the judicial estoppel doctrine to bar Advanzeon from arguing UHCIC and UHC owed unpaid administrative fees beyond the $237,610.24 to which the Department stipulated. These legal errors caused the trial court to abuse its discretion in denying Advanzeon $820,167 for administrative fees earned during the contracts' tail and extended tail.

ARGUMENT

I. Issue: Did the trial court err and abuse its discretion when it denied Advanzeon unpaid tail and extended tail administrative fees?

The trial court erred and abused its discretion when it overruled Advanzeon's objections and partially denied its unpaid tail and extended tail claims.

Standard of review

"Delinquency proceedings under chapter 631 are actions in equity," so a trial court's rulings on a claimant's objections are reviewed for an abuse of discretion. *Bender* v. *Fla. Dep't of Fin. Servs.*, 17 So. 3d 770, 772 (Fla. 1st DCA 2009) (citing § 631.021(1), *Fla. Stat.*). Under this standard, an appellate court owes no deference to a trial court's legal rulings. *Van* v. *Schmidt*, 122 So. 3d 243, 258 (Fla. 2013) (legal rulings in an order reviewed for an abuse of discretion "are not entitled to deference," because "a reviewing court can determine the legal issue just as well as the trial court"); *United States* v. *Browne*, 505 F.3d 1229, 1267 n.29 (11th Cir. 2007) (a trial "'court by definition abuses its discretion when it makes an error of law'" (quoting *Koon* v. *United States*, 518 U.S. 81, 100 (1996))).

Contract interpretation is a matter of law reviewed de novo. *Imagine Ins. Co., Ltd.* v. *Fla. Dep't of Fin. Servs.*, 999 So. 2d 693, 696 (Fla. 1st DCA 2008).

Judicial estoppel rulings are reviewed under a mixed standard. *Anfriany* v. *Deutsche Bank Nat'l Trust Co.*, 232 So. 3d 425, 427 (Fla. 4th DCA 2017). Legal rulings are reviewed de novo. *Id.* Fact-based conclusions are reviewed for an abuse of discretion. *Id.*

Merits

A. The trial court misinterpreted the contracts to not include a tail or extended tail

The trial court misinterpreted the Advanzeon/UHC and Advanzeon/UHCIC contracts to not require payment of tail and extended tail administrative fees. In so ruling, it erred by not considering unrebutted trade custom and usage testimony, requiring Advanzeon to provide an expert to substantiate its industry custom testimony, misinterpreting the Magellan contracts, misunderstanding the testimony about Magellan's failure to take over for Advanzeon, and requiring tail and extended tail invoices to corroborate Advanzeon's calculation testimony.

1. The contracts included a tail

The trial court misinterpreted the Advanzeon/UHC and Advanzeon/UHCIC contracts to not include a tail.

a. The trial court should have interpreted the word "terminate" in light of trade custom and usage

The trial court erred when it rejected Advanzeon's trade custom and usage testimony, which had explained the meaning of the word "terminate" in the Advanzeon/UHCIC and Advanzeon/UHC contracts. R. 6989, 7019.

"Contract interpretation begins with a review of" an agreement's plain language. *Taylor* v. *Taylor*, 1 So. 3d 348, 350 (Fla. 1st DCA 2009). As part of that review, courts must consider the contract's subject matter and surrounding circumstances.[11] For that reason, commercial contracts, which involve industry-specific terminology, subject matter, and circumstances, "should be interpreted in light of [industry] custom or trade usage." *Nat'l Merch. Co., Inc.* v. *United Serv. Auto. Ass'n*, 400 So. 2d 526, 531 (Fla. 1st DCA 1981); *Fred S. Conrad Const. Co.* v. *Exch. Bank of St. Augustine*, 178 So. 2d 217, 221 (Fla. 1st DCA 1965) (same); *In re Standard*

[11] *See Underwood* v. *Underwood*, 64 So. 2d 281, 288 (Fla. 1953) (when interpreting a contract, "it is the duty of the court, as near as may be, to place itself in the situation of the parties, and from a consideration of the *surrounding circumstances*, the occasion, and apparent object of the parties to determine the meaning and intent of the language employed" (emphasis altered) (quoting *St. Lucie County Bank & Trust Co.* v. *Aylin*, 114 So. 438, 441 (Fla. 1927))); *Golf Scoring Sys. Unlimited, Inc.* v. *Remedio*, 877 So. 2d 827, 829 (Fla. 4th DCA 2004) (words in a contract "'should be given their natural meaning or the meaning most commonly understood in relation to the subject matter and *circumstances*" (citation omitted) (emphasis added)); *Gold Coast Media, Inc.* v. *Meltzer*, 751 So. 2d 645, 646 (Fla. 3d DCA 1999) ("[i]t is fundamental that courts should apply the most commonly understood meaning with regard to the subject matter and *circumstances* of the contract" (emphasis added)); *Gamble* v. *Mills*, 483 So. 2d 826, 829 (Fla. 4th DCA 1986) ("words in a contract should be given their natural meaning" with regard to the "subject matter and *circumstances*" of the contract (emphasis added)).

Jury Instructions—Contract and Business Cases, 116 So. 3d 284, 316 (Fla. 2013) (same).[12]

Litigants often incorrectly argue that, absent ambiguous language, the parol evidence rule bars consideration of trade custom and usage. *See* E. ALLEN FARNSWORTH, CONTRACTS § 7.12 (3d ed. 1999) ("[a]t times it is misleadingly suggested that a plain meaning rule excludes more than evidence of prior negotiations during the first stage [of contract interpretation]"). In truth, however, extrinsic trade custom and usage "evidence may be admitted to explain" contract terms "even if the contract is unambiguous." *In re Standard Jury Instructions—Contract and Business Cases*, 116 So. 3d at 316 (citing *NCP Lake Power, Inc.* v. *Florida Power Corp.*, 781 So. 2d 531, 536 (Fla. 5th DCA 2001)); *accord Advent Oil & Operating Inc.* v. *S & E Enters. LLC*, 48 So. 3d 70, 72 (Fla. 1st DCA 2010).

Importantly, trade custom and usage testimony "is not an exception to the parol evidence rule because it does not vary or contradict the written instrument." *In re Standard Jury Instructions—Contract and Business Cases*, 116 So. 3d at 316 (citing *Se. Banks Trust Co., N.A.* v. *Higginbotham Chevrolet-Oldsmobile, Inc.*, 445 So. 2d 347, 348-49 (Fla. 5th DCA 1984)).[13] Rather, it "merely places the fact finder

[12] Indeed, the famous case of *Frigaliment Importing Co.* v. *B.N.S. Int'l Sales Corp.*, 190 F. Supp. 116, 117 (S.D.N.Y. 1960) (Friendly, J.), shows that even common words such as "chicken" can take on an industry-specific meaning when used in a commercial contract.

[13] The rationale for the distinction between evidence of *surrounding circumstances* and evidence of *prior negotiations* is that true extrinsic evidence or parol evidence relating to the parties' prior negotiations addresses what was a party's

in the position of the parties when the contract was made." *Id.* As such, trade custom and usage essentially serves as a supplemental dictionary to define terms according to the contract's commercial context. *See GEICO* v. *Macedo*, 228 So. 3d 1111, 1113 (Fla. 2017) ("'courts may look to legal and non-legal dictionary definitions to determine'" the meaning of contract terms (citation omitted)).

Trade custom and usage is particularly important here because the parties interpreted the term "terminate" (R. 6989, 7019) differently. The Department viewed termination as requiring all contract obligations to cease immediately. *See* R. 6882-88. Advanzeon agreed termination required *provider* services to immediately stop on the termination's effective date (*i.e.*, October 31, 2012). *See* R. 6900-04, 6934-36. But its trade custom and usage testimony explained that, in ASO contracts, termination includes a 90-day tail during which the MBHO (*e.g.*, Advanzeon) continues to clean incoming provider claims for *pre-termination* services that were submitted *post-termination*. *See* R. 6900-04, 6934-36.

This tail concept is not without precedent in the law or the insurance industry. For example, occurrence-based professional-liability policies cover an insured's negligence if it "occurs within the policy period, regardless of" when the claim is submitted to the insurance carrier. *Gulf Ins. Co.* v. *Dolan, Fertig & Curtis*, 433 So. 2d 512, 514 (Fla. 1983) (citing JOHN A. APPLEMAN, INSURANCE LAW AND

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subjective intent or understanding of the agreement, whereas evidence regarding the surrounding circumstances addresses what the contract language *objectively means.* E. ALLEN FARNSWORTH, CONTRACTS §§ 7.2, 7.12 (3d ed. 1999) (emphasis added).

PRACTICE § 7A 313 (Berdal ed. 1979)). Under an occurrence policy, if the negligent act or omission occurs during the policy period, the insured can validly file a claim *after* the policy has expired. As such, "[t]he occurrence insurer … is faced with a 'tail' that extends beyond the policy period itself." *Id.* at 515.

Advanzeon's trade custom and usage testimony reveals a direct analogy between ASO contracts and occurrence policies. In an ASO contract, the relevant occurrence is the rendition of behavioral health services by a network provider. In an occurrence policy, the relevant occurrence is the insured's negligent act. In both types of contracts, the relevant occurrence must occur during the life of the contract: *i.e.*, the behavioral health services must be provided before termination (ASO contract), and the negligence must occur during the policy period (occurrence policy).

Additionally, in both types of agreements, the tail allows claims based on these occurrences to be asserted after the contract or policy has terminated. The only difference is that in an ASO contract, the tail period is limited by the 90-day provider claim submission deadline, whereas occurrence policies contain no such limitation. Accordingly, if the ASO contracts had been occurrence policies, and the providers' pre-termination services had been negligent acts, the Universal entities would be liable for those claims even if they were submitted during the tail. Likewise, because the contracts here obligated Advanzeon to clean valid provider claims (R. 6989, 7019) including those submitted after the October 31, 2012 termination, the Universal entities were obligated to pay for those administrative services.

Occurrence-based professional liability policies are different from "claims-made policies." *Gulf Ins. Co.*, 433 So. 2d at 514. Claims-made policies cover an insured's negligence if it "'is discovered and brought to the attention of the insurer within the policy term.'" *Id.* (citation omitted). Hence, the coverage-triggering event in a claims-made policy is "notice [of a claim] to the carrier within the policy period," not a negligent act during the policy period. *Id.* So unlike occurrence policies, standard issue claims-made policies do not include a tail period "extension of coverage." *Id.* at 515.

Nevertheless, insureds can generally purchase "tail coverage" endorsements for claims-made policies. *See First Prof'ls Ins. Co., Inc.* v. *McKinney*, 973 So. 2d 510, 515 (Fla. 1st DCA 2007). And this practice is so common that even Black's Law Dictionary has an entry for the term "tail coverage." *See* BLACK'S LAW DICTIONARY, *tail coverage* (10th ed. 2014) ("[a]n extension of a claims-made professional-liability policy to protect against claims and lawsuits filed after the end of the policy period but based on negligent acts that occurred during the policy period"). This widespread legal recognition of the tail concept further supports Advanzeon's interpretation of the contracts.

In sum, Advanzeon's trade custom and usage testimony about the 90-day tail shed light on what it meant for the contracts to "terminate." Accordingly, the trial court should have considered trade custom and usage as part of the contract's

surrounding circumstances, especially since the tail concept is widely accepted in the insurance industry and recognized in the law.

b. The trial court should have accepted Advanzeon's tail period testimony

"A court must accept evidence which … is neither impeached, discredited, controverted, contradictory within itself, or physically impossible." *State* v. *Fernandez*, 526 So. 2d 192, 193 (Fla. 3d DCA 1988). Under that standard, the trial court should have accepted Advanzeon's tail-period trade custom and usage testimony.

No Department witness testified whether trade custom in the managed behavioral health industry involves continuing ASO contract obligations for 90 days after termination. *See* R. 6961-76. Also, they never claimed ASO contract terms usually are not interpreted in light of this industry custom. *See* R. 6961-76.

Specifically, England testified he could not speak to industry custom regarding how and when contractual ASO fees are normally paid. R. 6974. His testimony regarding the customary tail period relied on the fact that, over the course of his career as a claims supervisor for the Department, he had never *personally* seen post-termination administrative fees claimed in a receivership. *See* R. 6974. That testimony says nothing about whether ASO contracts customarily include a tail. *See* R. 6974. Thus, England's testimony did not contravene, discredit, or impeach Heidt's or Marcus's trade custom and usage testimony about the 90-day tail.[14]

[14] Indeed, England's testimony that over the course of his career, he personally had never seen post-contract administrative fees claimed in a receivership (*see* R.

Staubitz's testimony relative to the tail concept said nothing about industry custom in the managed behavioral health field and relied exclusively on his interpretation of the Magellan contracts and post-liquidation forensic accounting. *See* R. 6963-69. He testified the Advanzeon/UHCIC and Advanzeon/UHC contracts could not have included a tail period, because the Magellan contracts became effective on November 1, 2012 and required a $1.9 million advanced payment. *See* R. 6963-66. Yet Staubitz admitted he did not know the purpose of the payment and whether the warm handoff had actually occurred (*i.e.*, whether Magellan had actually begun providing network and administrative services on November 1, 2012). R. 6968-69. In fact, Advanzeon's witnesses testified Magellan had never begun providing network or administrative services. R. 6926-28, 6936-40, 6958-60. Accordingly, Staubitz's testimony neither contravened Advanzeon's trade custom and usage testimony nor shed light on whether the circumstances surrounding Magellan's intervention required Advanzeon to provide tail period administrative services.

Also, Advanzeon's trade custom and usage testimony was not internally contradictory or physically impossible. Instead, it offered the only logical explanation for how Advanzeon could get paid for cleaning claims for pre-termination healthcare services that were submitted post-termination. *See infra* Argument I.A.1.c. Indeed, neither Staubitz nor England testified about trade custom or usage or otherwise

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6974) said nothing about industry custom in the managed behavioral health field. *Cf.* WILLIAM SHAKESPEARE, HAMLET act 1, sc. 5 ("There are more things in heaven and earth, Horatio, than are dreamt of in your philosophy.").

attempted to justify the catch-22 that would occur if tail period obligations were ignored (*i.e.*, the MBHO remains obligated by federal law, state law, and the contract to clean post-termination claims for pre-termination services, but the HPO somehow became exempt from paying for those services simply because the claims were submitted after termination).

Thus, the trial court should have accepted Advanzeon's unrebutted trade custom and usage testimony and interpreted the contracts in light of that testimony.

c. The tail concept made a harmonious reading of the contracts possible

The trial court also erred when it rejected Advanzeon's trade custom and usage testimony, because the contracts' various provisions could not be reconciled absent that tail-period explanation.

"[E]very provision in a contract should be given meaning and effect," and inconsistencies should be reconciled when possible. *Am. Empl'rs' Ins. Co.* v. *Taylor*, 476 So. 2d 281, 283-84 (Fla. 1st DCA 1985) (citing *Excelsior Ins. Co.* v. *Ponoma Park Bar & Package Store*, 369 So. 2d 938, 941 (Fla. 1979)); *Auto-Owners Ins. Co.* v. *Anderson*, 756 So. 2d 29, 34 (Fla. 2000) (same). In other words, courts must construe "contract[s] harmoniously in order to give effect to all portions thereof." *City of Homestead* v. *Johnson*, 760 So. 2d 80, 84 (Fla. 2000).

Interpreting the word "terminate" requires construction of three provisions in the ASO contracts between Advanzeon and the Universal entities: (1) the "Duration Of The Agreement" section (R. 6989, 7019); (2) the "Regulatory Requirements"

section (R. 6986-89, 7020-24); and (3) the attachments pertaining to ASO fees (R. 6994, 7001, 7029).

The "Duration Of The Agreement" section of each contract serves as the interpretive starting point because it contains the term "terminate." *See* R. 6989, 7019. Under that section, either party could "terminate" the contract "without cause" so long as the terminating party provided "written notice … at least ninety (90) days" before the termination's effective date. R. 6989, 7019. Nothing in that section relieved Advanzeon of its obligation to continue administering its provider network (*i.e.*, authorizing its providers to treat UHCIC and UHC members) up until the termination's effective date. R. 6989, 7019.

The "Claim Payment" provision of the "Regulatory Requirements" section required providers to submit their claims within 90 days after providing behavioral health services to UHC and UHCIC members. R. 6987, 7021. That section also required UHC and UHCIC to pay timely claims within 30 days. R. 6987, 7021. Nothing in the contracts relieved the Universal entities of their obligation to pay timely *post-termination* provider claims.

In support of these terms, the contracts cited several regulatory requirements. *See supra* note 2. Among them was § 641.3155, *Fla. Stat.*, which mirrors the contracts' 90-day claim submission requirement, *id.* § 641.3155(2)(b), and likewise imposes a timely payment obligation, *id.* § 641.3155(3)(b), (4)(b). Neither § 641.3155, *Fla. Stat.*, nor the federal regulations cited in the contracts, *see supra* note 2, state

HPOs are relieved from any obligation to pay *post-termination* claims for *pre-termination* services.

Additionally, the attachments relating to ASO fees required the Universal entities to pay Advanzeon PMPM administrative fees for Advanzeon's claims-cleaning services. R. 6994, 7001, 7029. Those attachments are silent as to post-termination administrative fees.

It is impossible to give all these contract provisions effect without interpreting "termination" to include a 90-day tail. For example, if an Advanzeon provider rendered treatment to a UHC member on October 30, 2012 (*i.e.*, one day before "termination"), that provider would have 90 days (*i.e.*, until January 28, 2013) to submit a claim. *See* R. 6987, 7021. If the provider were to submit its claim for payment on December 1, 2012 (*i.e.*, within 90 days), Advanzeon would be required to clean that claim and the Universal entities would be required to pay it. *See* R. 6987, 7021. The trial court's interpretation of "terminate," which required all contract obligations to cease on the termination's effective date, would have relieved the Universal entities' of their obligations to (1) pay the provider for the October 30 services, and (2) pay Advanzeon for cleaning the December 1 claim. Therefore, the trial court's interpretation of "terminate" completely disregarded the contracts' "Claim Payment" section and fee-related attachments.

The bottom line is this: Advanzeon had to continue making its providers available to treat UHCIC and UHC members up until the contracts' October 31, 2012

termination, the providers had 90 days to submit their claims, Advanzeon had to clean those claims, and the Universal entities had to pay those claims. Contrary to the trial court's ruling, it actually defies "logic and common sense" (*see* R. 5552) to construe the contracts in a manner that denies Advanzeon entitlement to administrative fees relating to timely (*i.e.*, within 90 days) post-termination provider claims.

If the trial court had given "every provision" of the Advanzeon/UHCIC and Advanzeon/UHC contracts "meaning and effect," it could not have denied Advanzeon tail period administrative fees simply because the submission and cleaning process occurred after the termination's effective date. *Am. Empl'rs' Ins. Co.*, 476 So. 2d at 284. The contracts expressly authorized the 90-day claim-submission window required by law. *See* R. 6987, 7021. Thus, to interpret the contracts "harmoniously," the trial court needed to accept Advanzeon's tail period testimony. *City of Homestead*, 760 So. 2d at 84. It erred when it declined to do so.

2. The contracts included an extended tail

The trial court also erred in rejecting Advanzeon's testimony that the circumstances surrounding the "warm handoff" necessitated a two-month extended tail.

The Department's testimony about the Magellan contracts becoming effective on November 1, 2012 and requiring a $1.9 million payment did not "impeach[], discredit[], [or] controvert[]" Advanzeon's testimony that Magellan was not ready to begin performing network or provider services even after the 90-day tail. *Fernandez*, 526 So. 2d at 193. As explained above, the Department's testimony was based on

speculative after-the-fact forensic examination, so it could not have displaced Advanzeon's testimony, which was based on personal experience administering the Advanzeon/UHCIC and Advanzeon/UHC contracts. *See supra* Argument I.A.1.ii.

Moreover, the trial court's observation that "[i]t would make no sense to pay two companies for the same service" shows it misunderstood the Magellan/UHC contract. R. 5554. That contract reveals the purpose of the $1.9 million payment was to "pre-fund an account (the 'Claims Account') from which" Magellan would pay *its own provider claims*. R. 7099.[15] As such, it was forward-looking, not backward-looking, and that $1.9 million thus had nothing to do with the *administrative fees* Magellan would potentially earn during the contract term. In that regard, the record is devoid of any evidence showing Magellan actually began providing network and administrative service on November 1, 2013 or at any time thereafter.

Therefore, the $1.9 million transfer the Department's witnesses testified about could not have shown Magellan was providing administrative services during November 2012 through March 2013. Nor does it support the trial court's assertion that paying Advanzeon's tail and extended tail administrative fees would require the Universal entities to pay for the same administrative services twice. Accordingly, nothing in the Magellan contracts contravened the notion that the Advanzeon/UHCIC and Advanzeon/UHC contracts contained a 90-day tail that had to be extended an

[15] Indeed, the Department's own witness admitted the $1.9 million payment was an advance payment for *future* provider claims. R. 6968-69.

additional two months due to the circumstances surrounding the unconsummated warm handoff between Advanzeon and Magellan.[16]

3. Advanzeon's administrative fees calculation was reliable

The trial court erred in ruling Advanzeon's methodology for calculating tail and extended tail administrative fees was unreliable. *See* R. 5553.

Advanzeon calculated the tail and extended tail administrative fees using the termination month's (*i.e.* October 2012) eligible member numbers. R. 6918-20, 6938-47, 6981-83. That industry-standard methodology was appropriate because, as Marcus explained, any claims being processed during the tail would have related to provider services rendered in the month preceding termination. R. 6938, 6946-47. It thus follows that October 2012's eligible member number was the only figure relevant to the tail period PMPM calculation. *See* R. 6938, 6946-47.

The trial court rejected this explanation because Advanzeon (1) did not provide expert testimony supporting its calculation methodology, (2) did not present evidence that its providers had submitted claims during the tail or extended tail, and (3) did not submit invoices for tail and extended period administrative fees. R. 5553. But none of these reasons rendered Advanzeon's calculation testimony unreliable.

[16] To be clear, any issues regarding whether Magellan actually began performing network or administrative services during or after November 2012 could only affect Advanzeon's extended tail arguments, not its tail period arguments. In that regard, even if Magellan had started administering its network and cleaning its provider claims in November 2012, Advanzeon still would have needed to be paid to clean its own provider claims that were submitted during the 90-day tail.

First, there is no legal requirement that an expert must substantiate a party's industry custom testimony. Expert testimony is appropriate when "scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or in determining a fact in issue." § 90.702, *Fla. Stat.*, *held unconstitutional in part by DeLisle* v. *Crane Co.*, 258 So. 3d 1219 (Fla. 2018). "There is no more certain test for determining when experts may be used than the common-sense inquiry whether the untrained layman would be qualified to determine intelligently and to the best possible degree the particular issue without enlightenment from those having a specialized understanding of the subject involved in the dispute." Mason Ladd, *Expert Testimony*, 5 VAND. L. REV. 414, 418 (1952).

Here, however, the trial court, as factfinder, needed no expert assistance to understand Advanzeon's calculation methodology. *See* R. 5553. That methodology involved simple arithmetic and could easily be understood by a layperson—indeed, by a first grader—because it involved nothing more than multiplying the monthly eligible member number by the contractually established PMPM rate. *See* R. 6892-93, 6904-05, 6908, 6917-18. Hence, the trial court erred in requiring Advanzeon to substantiate with an expert its industry custom testimony about the calculation of tail-period administrative fees.[17]

[17] Although a witness need not need qualify as an expert to testify about trade custom and usage, the extensive "knowledge, skill, experience, training, and education" of all three Advanzeon witnesses (*i.e.*, Heidt, Marcus, and Finestone) easily would have qualified them as experts. *See* § 90.702, *Fla. Stat.* Indeed, they each held advanced degrees (Heidt and Marcus have law degrees, whereas Finestone has a

Second, whether or not Advanzeon submitted evidence of provider claims during the tail or extended tail had no effect on whether Advanzeon was owed administrative fees for its services during that period. Recall, Advanzeon's administrative fees are calculated on a PMPM basis. *See* R. 4824-26, 6994, 7001, 7029, 6892-93, 6904-05, 6908, 6917-18. The number of claims Advanzeon actually cleans per month therefore has no effect on the monthly administrative fees calculation.[18] *See* R. 4824-26, 6994, 7001, 7029, 6892-93, 6904-05, 6908, 6917-18. Accordingly, Advanzeon was entitled to tail and extended tail administrative fees regardless whether it cleaned any claims during those five months.

Third, whether or not Advanzeon submitted invoices for tail and extended tail administrative fees was irrelevant to its entitlement to those fees. Advanzeon's entitlement to administrative fees derived from the Advanzeon/UHC and Advanzeon/UHCIC contracts, not some demand for payment it had made on the Universal entities. *See supra* Argument I.A.1. And in any case, Advanzeon did not need to submit tail and extended tail invoices for the Universal entities to know how much

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Ph.D) and had decades of experience in the healthcare industry. *See* R. 6891, 6932-34, 6955-58.

[18] The Advanzeon/UHCIC and Advanzeon/UHC contracts expressly set forth the applicable PMPM rate (*see* R. 6994, 7001, 7029), so Advanzeon's administrative fees claim did not rely on a quantum meruit argument. *See Daake* v. *Decks N Such Marine, Inc.*, 201 So. 3d 179, 180-81 (Fla. 1st DCA 2016) ("Quantum meruit is a 'legal doctrine which, in the absence of an express agreement, imposes legal liability on a contract that the law implies from facts where one receives goods or services ... where ... a reasonable person receiving such benefit would ordinarily expect to pay for it.'" (citation omitted)).

they owed. As Marcus explained, the tail period administrative fees were a sum certain that could be determined, through simple arithmetic, by reference to the pertinent eligible member number and contractual PMPM rate—two pieces of information readily available to UHCIC and UHC.

For these reasons, the trial court erred in ruling Advanzeon's calculation testimony was unreliable. In summary, it was reasonable for Advanzeon to calculate the tail period administrative fees based on October 2012's eligible member numbers. Indeed, contrary to the trial court's reference to October 2012's eligible member numbers as "peak numbers" (*see* R. 5553), the evidence actually showed there were more eligible members in August 2012 than in October 2012 (*see* R. 6982). And in any case, the difference in eligible members during the three months preceding the termination of the Advanzeon/UHC and Advanzeon/UHCIC contracts was negligible and certainly could not support the trial court's reactionary determination that Advanzeon was entitled to $0 for its tail and extended tail administrative fees.

B. The trial court erred when it misapplied an unstated version of the judicial estoppel doctrine to deny Advanzeon tail and extended tail administrative fees

Because the written objections and their exhibits stated "all administrative fees were paid," the trial court ruled Advanzeon was not entitled to receive administrative fees beyond those the Department agreed to pay. R. 5552. It appears to have reached this conclusion by applying an unstated version of the judicial estoppel

doctrine. But that doctrine could not have precluded Advanzeon's tail and extended tail arguments.

"[T]he equitable doctrine of judicial estoppel … prevents litigants from taking totally inconsistent positions in separate judicial proceedings to the prejudice of the adverse party." *Fleming* v. *Swisher Int'l, Inc./Broadspire Kemper Ins. Grp.*, 120 So. 3d 160, 161 (Fla. 1st DCA 2013). Essentially, it prohibits "parties from 'making a mockery of justice by inconsistent pleadings' and 'playing fast and loose with the courts.'" *Blumberg* v. *USAA Cas. Ins. Co.*, 790 So. 2d 1061, 1066 (Fla. 2001) (citations omitted).

Judicial estoppel applies only if "'the position assumed in the former'" proceeding was "'successfully maintained.'" *Id.* (citation omitted). Furthermore, "'[i]n proceedings terminating in a judgment, the positions must be clearly'" or inherently inconsistent and must involve the "'same questions.'" *Id.* (citation omitted); *see also Fleming*, 120 So. 3d at 162.

"A party has successfully maintained a claim or position if, in the prior proceeding, the court 'adopt[ed] the claim or position either as a preliminary matter or as part of a final disposition.'" *Fleming*, 120 So. 3d at 162 (citation omitted). Indeed, the U.S. Supreme Court has held: "Absent success in a prior proceeding, a party's later inconsistent position introduces no 'risk of inconsistent court determinations' … and thus poses little threat to judicial integrity." *New Hampshire* v. *Maine*, 532

U.S. 742, 750-51 (2001) (citation omitted); *Brown & Brown, Inc.* v. *Sch. Bd. of Hamilton County.*, 97 So. 3d 918, 920-21 (Fla. 5th DCA 2012).

There are four reasons why the doctrine of judicial estoppel could not have precluded Advanzeon's tail and extended tail arguments. First, Advanzeon made all its representations about administrative fees in the *same* proceeding. Second, it never successfully maintained the position that all administrative fees were paid. Third, that position was not clearly or inherently inconsistent with its post-termination administrative fees arguments. Fourth, the objections and their exhibits involved questions different from the contract interpretation issue the parties litigated at the April 4 hearing.

1. There were no separate proceedings

Here, there was no "prior proceeding" in which Advanzeon had taken a purportedly inconsistent position concerning administrative fees. *Fleming*, 120 So. 3d at 162. The consolidated receivership proceeding below was the only "'judicial proceeding[],'" *id.* at 161 (citation omitted), where Advanzeon filed objections and affidavits stating all administrative fees were paid (*see* R. 317, 5551-56). Those objections were then litigated in one hearing, which was held over two days (*i.e.*, December 11, 2017 and April 4, 2018) and culminated in the order partially denying Advanzeon's claims. *See* R. 5551-56. As such, Advanzeon's supposedly inconsistent positions were taken in the same proceeding. Therefore, even if the representations in Advanzeon's objections and Marcus's affidavits were inconsistent with its

arguments at the April 4 hearing, there still would have been no change in position under the judicial estoppel doctrine.

2. Advanzeon never successfully maintained the position that all administrative fees were paid

Before entering judgment on Advanzeon's claims and objections (R. 5551-56), the trial court never adopted "'as a preliminary matter or as part of a final disposition'" Advanzeon's statement that all administrative fees were paid. *Fleming*, 120 So. 3d at 162 (citation omitted). As such, the judicial estoppel doctrine could not have barred Advanzeon from arguing it was entitled to tail and extended tail administrative fees.

Because the trial court made findings about Advanzeon's objections for the first time in its order denying them (*see* R. 5551-56), it could not have adopted any position regarding Advanzeon's claims before then. Advanzeon's position that all administrative fees were paid thus could not have been "successfully maintained" before the court ruled on the objections. *Fleming*, 120 So. 3d at 162. Accordingly, the judicial estoppel doctrine could not have foreclosed Advanzeon's tail and extended tail arguments at the April 4 hearing, which occurred *before* the trial court ruled on Advanzeon's objections.

Furthermore, the trial court's order on Advanzeon's objections shows it actually adopted "'as part of a final disposition'" the position that all administrative fees were *not* paid. *Id.* (citation omitted). Indeed, by ruling Advanzeon was entitled to recover from the receiverships a total of $237,610.24 for unpaid administrative fees,

the trial court implicitly recognized Advanzeon had provided UHCIC and UHC administrative services for which it had not been paid. *See* R. 5555-56. Therefore, the trial court erred when it ruled Advanzeon's statement that all administrative fees were paid barred the argument that UHCIC and UHC owed $820,167 for tail and extended tail administrative fees.

3. Advanzeon did not take inconsistent positions

Advanzeon's statement that all administrative fees were paid was not inconsistent with its argument that, under the ASO contracts, UHCIC and UHC owed post-termination administrative fees.

Advanzeon always applied the first monies to come in from an HPO toward outstanding administrative fees. *See* R. 4820-22, 4829-30, 6895-97, 6917-18, 6939-40, 6960. UHCIC and UHC payments were no exception. *See* R. 4820-22, 4829-30, 6895-97, 6917-18, 6939-40, 6960. Neither Department witness testified to the contrary. *See* R. 4833-79, 6961-76.

Hence, when Advanzeon submitted its claim and filed its objections, it had already credited Universal funds toward the $820,167 post-termination administrative fees it believed was owed. *See* R. 4820-22, 4829-30, 6895-97, 6917-18, 6939-40, 6960. That is why its claims and objections stated all administrative fees were paid. *See* R. 4820-22, 4829-30, 6895-97, 6917-18, 6939-40, 6960.

And that statement remained accurate even when the Department challenged Advanzeon's entitlement to post-termination administrative fees.[19] *See* R. 4820-22, 4829-30, 6895-97, 6917-18, 6939-40, 6960. That entitlement issue pertained only to whether Advanzeon had correctly calculated the outstanding administrative fee amount to include the tail and extended tail. It did not bear on Advanzeon's position that all administrative fees were paid. According to Advanzeon's calculation methodology (*i.e.*, including tail and extended tail administrative fees) and accounting practices (*i.e.*, taking administrative fees off the top), all administrative fees were indeed paid. That Advanzeon later had to litigate its contractual entitlement to tail and extended tail fees did not change its position.

Therefore, Advanzeon's tail and extended tail arguments were not inherently or clearly inconsistent with the statement that all administrative fees were paid, so the doctrine of judicial estoppel did not apply. *Fleming*, 120 So. 3d at 162; *Blumburg*, 790 So. 2d at 1066.[20]

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[19] Initially, it was unclear from the Department's denial that it would have disputed Advanzeon entitlement to those fees. *See* R. 6879-83. So when Advanzeon objected, it was operating under the presumption that the Department agreed it had properly credited UHC and UHCIC payments toward outstanding tail and extended tail administrative fees.

[20] "'The term 'judicial estoppel' is sometimes used to indicate estoppel arising from sworn statements made in the course of judicial proceedings.'" *Ramsey* v. *Jonassen*, 737 So. 2d 1114, 1115 (Fla. 2d DCA 1999) (citation omitted). This type of judicial estoppel is more accurately called "'estoppel by oath.'" *Id.* at (citation omitted). Like the objections, Marcus's sworn affidavit stated all administrative fees were paid. *See* R. 5552. As explained above, however, that statement was not inconsistent with its post-termination administrative fees claim, so it could not have triggered the judicial estoppel doctrine.

Moreover, to properly conclude Advanzeon had taken inconsistent positions, the trial court would have had to find incredible Advanzeon's witnesses' unrebutted explanation for why the objections and exhibits stated all administrative fees were paid. It never made such credibility determinations. *See* R. 5551-56. Accordingly, if the Court does not reverse the portion of the trial court's order denying Advanzeon's claim, it must, at minimum, remand for the trial court to make the required credibility determinations. *Cf. Dillow* v. *State*, 884 So. 2d 508, 510 (Fla. 2d DCA 2004) (reversing because trial court failed to make crucial witness credibility determinations).[21]

4. The objections and affidavits involved questions different from the contract dispute

The contract interpretation issue the parties litigated at the April 4 hearing was different from the questions the objections and affidavits addressed.

When Advanzeon filed its claims in the receiverships, it had no reason to presume the Department would contest its entitlement to post-termination administrative fees. It had already applied Universal monies toward all outstanding administrative fees, including tail and extended tail fees, so, from its perspective, UHCIC

[21] Even if the trial court had found the witnesses' administrative-fees-first testimony incredible, that determination alone would not have allowed it to infer UHCIC and UHC did not owe tail and extended tail administrative fees. *See M.P.W.* v. *State*, 702 So. 2d 591, 592 (Fla. 2d DCA 1997) (while the trial court, as fact finder, "may find that a witness is not credible, such a finding does not permit the [court] to interpret" his testimony contrary to what he actually testified); *Republic Nat'l Bank of Miami, N.A.* v. *Roca*, 534 So. 2d 736, 738 (Fla. 3d DCA 1988) ("A trial court cannot arbitrarily reject unrebutted testimony.").

and UHC only owed provider fees. *See* R. 4820-22, 4829-30, 6895-97, 6917-18, 6939-40, 6960. Accordingly, when Advanzeon filed its objections and Marcus's affidavit, the issues regarding its claims pertained to the provider fee shortfall, not administrative fees. *See* R. 4820-22, 4829-30, 6895-97, 6917-18, 6939-40, 6960.

That changed when the Department realized Advanzeon had founded its claims on the premise that UHCIC and UHC owed $820,167 in post-termination administrative fees. *See* R. 6879-83. When that premise surfaced, the Department posited Advanzeon was not entitled to post-termination administrative fees. *See* R. 6879-83. Thereafter, the parties' dispute morphed into a disagreement about whether the contracts obligated UHCIC and UHC to pay tail and extended tail administrative fees. *See* R. 6879-83.

As such, the parties' dispute at the time Advanzeon filed its objections and Marcus's affidavit did not involve the "'same questions'" as those underlying the contract interpretation issue litigated at the April 4 hearing. *Blumburg*, 790 So. 2d at 1066 (citation omitted). Accordingly, the statement that all administrative fees were paid could not have estopped Advanzeon from arguing UHC and UHCIC owed tail and extended tail administrative fees.[22]

[22] Additionally, the law-of-the-case doctrine, another judicial estoppel principle, could not have foreclosed Advanzeon's post-termination administrative fees position. *See Fla. Dep't of Trans.* v. *Juliano*, 801 So. 2d 101, 105 (Fla. 2001). It "requires that questions of law actually decided on appeal must govern the case in the same court and the trial court, through all subsequent stages of the proceedings." *Id.* This is the first and only appeal concerning Advanzeon's claims and objections, so

CONCLUSION

The Court should affirm the awards of $237,610.24 for administrative fees and $32,139.86 for provider fees (which were not cross-appealed) but reverse the denial of the tail and extended tail claims and remand with instructions to enter judgment in Advanzeon's favor for an additional $820,167.[23]

Respectfully submitted,

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it would have been improper for the trial court to apply the law-of-the-case doctrine to reject Advanzeon's tail and extended tail arguments.

[23] Advanzeon does not challenge the denial of its $106,707.15 claim relating to payments it had inadvertently credited toward funds received from a Texas affiliate of UHC and UHCIC. *See* R. 5554.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February 7, 2019, I electronically served the following via eDCA and email:

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief was prepared in Times New Roman, 14-point font, in compliance with Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

February 7, 2019

/s/ Thomas Burns
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