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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

REPLY BRIEF OF ADVANZEON SOLUTIONS, INC.

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ARGUMENT

I. The Department incorrectly argues the contracts did not implicitly provide for tail period administrative fees

The Department ignores the Advanzeon/UHC and Advanzeon/UHCIC contracts' regulatory requirements, misstates Advanzeon's position regarding the relevance of October 2012's eligible member numbers, misreads Florida law governing contract interpretation, conjures up a nonexistent legal rule that a witness must be qualified as an expert before testifying about trade custom and usage, misunderstands the effect of England's testimony, and flips Advanzeon's occurrence policy analogy on its head, rendering it nonsensical and inapplicable to this case.[1]

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[1] Additionally, the answer brief accuses the initial brief's statement of the case of improperly including "legal argument, erroneous characterizations of the facts, and assertions of factual claims not supported by the record." Dep't Br. 2. Yet the Department does not specifically identify any such mischaracterizations of the record or improper legal argument. Perhaps that is because the Department's blanket accusations are mistaken, which is ironic because it is actually the Department's own statement of the case that contains the very kind of improper legal argument it falsely accuses Advanzeon of making. *See* Dep't Br. at 8 ("Nor did Advanzeon convincingly explain why the final accounting review … had any impact on its original claim."); *id.* ("It was reasonable to infer that Advanzeon should have known at the outset that it had made no attempt to bill or collect any 'tail' fees.").

Relatedly, the Department mischaracterizes Staubitz's testimony as demonstrating "Magellan picked up where Advanzeon left off," and "[t]he new contract with Magellan explained why Universal was no longer paying administrative fees to Advanzeon, [so] no further testimony on that issue was needed to make the point." Dep't Br. 9-10. Those statements are inaccurate for two reasons. First, Staubitz testified he was not "familiar at all with the contract between Magellan and Universal" (R. 4875) and admitted he knew neither what services the $1.9 million advance payment was for nor whether Magellan ever began providing network or administrative services (R. 6968-69). Second, the Magellan/UHC contract expressly stated the $1.9

A. The Department ignores the contracts' regulatory requirements (Dep't Arg. I.C)

The Department argues the contracts' 90-day period "is the time for notice of termination, *not* a tail period," and "[n]othing in the contracts reflects that any payment was agreed to beyond the monthly fees payable during the contract period and prior to termination." Dep't Br. 37. This argument misdirects the Court's attention to an undisputed and uncontroversial notice requirement (*see* R. 6989, 7019), while ignoring or shifting attention from the contracts' disputed regulatory requirements (*see* R. 6986-88, 7020-24). But it is the regulatory requirements that are the logical cornerstone for Advanzeon's tail period interpretation of the word "terminate."

Indeed, nowhere in its answer brief does the Department argue the contracts' "Regulatory Requirements" provisions, which included the "Claim Payment" sections (*see* R. 6986-88, 7020-24), did not apply to the word "terminate." Nor does it even acknowledge the existence of these contractual provisions or the state statute and federal regulations they incorporate. *See* Dep't Br. 11 ("Nothing in the contracts contemplated timeframes even as long as ninety days to process and pay claims.").

Instead, the Department chooses to turn a blind eye to these provisions.[2] But it cannot avoid their inescapable conclusion that, to give effect to the *entire* contracts,

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million payment's purpose was to "pre-fund an account (the 'Claims Account') from which" Magellan would pay its own provider claims. R. 7099.

[2] *See Dania Jai-Alai Palace, Inc.* v. *Sykes*, 450 So. 2d 1114, 1122 (Fla. 1984) (cautioning that declining to respond to arguments raised in a brief "could prove

the Court must interpret the word "terminate" to include a 90-day tail. *See, e.g.*, Advanzeon Br. 31-32 (explaining how the 90-day claim submission allowance would be rendered meaningless unless "termination" included a 90-day tail); *see also Am. Empl'rs' Ins. Co. v. Taylor*, 476 So. 2d 281, 283-84 (Fla. 1st DCA 1985) ("every provision in a contract should be given meaning and effect," and inconsistencies should be reconciled when possible).

In that regard, Advanzeon had explained, "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 [UHCIC or UHC] *within ninety (90) days of the discharge for inpatient services or the date of service for outpatient services*.'" Advanzeon Br. 6 (quoting R. 6987, 7021) (emphasis added); *accord* § 641.3155(2)(b), *Fla. Stat.* Nothing in the contracts' "Duration of the Agreement" sections (*see* R. 6989, 7019), on which the Department relies, 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. In other words, the Department is arguing the contracts required Advanzeon to clean provider claims for pre-termination behavioral health services that

hazardous" when the appellate court reviews the case's merits); *see also Gonzalez-Servin* v. *Ford Motor Co.*, 662 F.3d 931, 934 (7th Cir. 2011) (Posner, J.) ("The ostrich is a noble animal, but not a proper model for … appellate advoca[cy].").

were timely submitted after October 31, 2012 for free. That cannot be what the parties intended, nor is it what the contracts' plain language requires.[3]

As such, under the contracts' "Claim Payment" sections, which incorporated § 641.3155(2)(b), *Fla. Stat.*, because providers had 90 days to submit claims for treatments rendered prior to and up until October 31, 2012, Advanzeon had a continuing obligation to clean those tail period claims (*i.e.*, claims submitted after the October 31, 2012 termination but within the 90-day claim submission window). The natural corollary of Advanzeon's continuing obligation was that UHCIC and UHC likewise had a continuing obligation to pay a PMPM administrative fee for Advanzeon to clean any timely claims submitted during that tail period.

Thus, the Department's attempt to avoid the contracts' regulatory requirements and its reliance on the inapposite 90-day notice provision are misguided.

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[3] Advanzeon's providers rendered serious, urgent, non-elective, and often life-or-death mental health services. As such, even after the October 31, 2012 termination, Advanzeon had a moral and legal duty to ensure that no Universal member would be put in a position where he was denied access to emergency mental health services simply because Universal was switching to a new provider network. *See* R. 6893-95 (Heidt testifying that behavioral health claims processing includes a clinical care component, which could and has involved fielding calls where a person in extreme distress (*i.e.*, about to commit suicide by jumping off a bridge) is seeking mental health services), 6902-05 ("You never leave a person stranded out there.").

B. The Department misstates Advanzeon's position regarding October 2012's eligible member count (Dep't Statement of the case and facts)

The Department asserts that Advanzeon "concedes" that "once this type of contract terminates, there no longer remains any access to the provider network, so that there are no longer any 'eligible members' to support such a fiction." Dep't Br. 14 (citing Advanzeon Br. 14 and R. 6946-47). But this statement warps beyond recognition Advanzeon's position regarding the relevance of October 2012's eligible member numbers.

The Department's assertion implies that, because the contracts did not require Advanzeon to continue supplying its provider network after termination, there were no eligible members to generate provider claims that could have been submitted during the 90-day tail period. The portions of the initial brief and testimony the Department cites actually say the exact opposite. *See* Advanzeon Br. 14; R. 6946-47.

That is, Advanzeon's witnesses testified that although it no longer had to make its provider network available after termination, it remained responsible for cleaning any provider claims that may have come in during the 90-day tail. *See* Advanzeon Br. 14-15; R. 6946-47. In turn, because the members eligible to receive services immediately before termination were the only ones to whom any tail period claims could have pertained, the tail period PMPM fees naturally would have to be calculated based on those eligible member numbers. *See* Advanzeon Br. 25-26, 31-32,

34-37. As such, the Department's position that there could be no tail period because no members were eligible to receive services after October 31, 2012, is mistaken.

C. The Department misapprehends Florida contract law (Dep't Arg. I.A)

Relying on *Stapling Machines Co.* v. *Kirk*, 298 So. 2d 564 (Fla. 1st DCA 1974), *Indian Harbor Citrus, Inc.* v. *Poppell*, 658 So. 2d 605 (Fla. 4th DCA 1995), and *S. Crane Rentals* v. *City of Gainesville*, 429 So. 2d 771 (Fla. 1st DCA 1983), the Department argues extrinsic evidence of trade custom and usage cannot ever be used to explain the specific meaning of a contract term in a particular commercial context unless that term is otherwise ambiguous. *See, e.g.*, Dep't Br. 23-25. But none of those cases establish that proposition, nor is this an accurate statement of the law.

For example, *Stapling Machines* simply ruled custom and usage testimony "'will not be employed to *vary or contradict* that which the parties have set down and agreed to in no uncertain terms.'" 298 So. 2d at 565 (emphasis added) (citation omitted). But Advanzeon is not using trade custom and usage testimony to *vary* or *contradict* the plain language of the contracts; rather, it is using it, much like a specialized dictionary, to *explain*, as part of the contracts' surrounding circumstances, what the term "terminate" means. *See* Advanzeon Br. 22-27. And Florida courts specifically authorize the use of trade custom and usage testimony for that purpose, as do prominent authorities on contract law. *See* Advanzeon Br. 22-24 & nn. 11-13 (citing, *e.g.*, *Nat'l Merch. Co., Inc.* v. *United Serv. Auto. Ass'n*, 400 So. 2d 526, 531

(Fla. 1st DCA 1981), *In re Standard Jury Instructions—Contract and Business Cases*, 116 So. 3d 284, 316 (Fla. 2013), *Underwood* v. *Underwood*, 64 So. 2d 281, 288 (Fla. 1953), and E. ALLEN FARNSWORTH, CONTRACTS § 7.12 (3d ed. 1999)).

For similar reasons, the Fourth District's decision in *Indian Harbor Citrus* undermines the Department's position and actually bolsters Advanzeon's argument that trade custom and usage, while inadmissible to vary or contradict express contract terms, is admissible, as part of an examination of a contract's surrounding circumstances, to explain the meaning of those terms. *See Indian Harbor Citrus, Inc.*, 658 So. 2d at 606 ("'while custom or usage may be employed in explanation and qualification of terms of a contract that would otherwise be ambiguous, it cannot operate to contravene express instructions or to contradict an express contract to the contrary'" (citation omitted)).

Additionally, the grapefruit grower in *Indian Harbor Citrus* cited no authorities "interpret[ing] the phrase 'on or before' the date of performance as *requiring* the buyer to perform the contract earlier than the last date of performance," *id.* at 607, whereas Advanzeon extensively discussed the legal and insurance industries' widespread acceptance and recognition of the tail concept. *See* Advanzeon Br. 24-27 (citing *Gulf Ins. Co.* v. *Dolan, Fertig & Curtis*, 433 So. 2d 512, 514 (Fla. 1983), JOHN A. APPLEMAN, INSURANCE LAW AND PRACTICE § 7A 313 (Berdal ed. 1979), *First*

Prof'ls Ins. Co., Inc. v. *McKinney*, 973 So. 2d 510, 515 (Fla. 1st DCA 2007), and BLACK'S LAW DICTIONARY, *tail coverage* (10th ed. 2014)).

S. Crane Rentals is also distinguishable. There, this Court reversed because "the trial court erred in resorting to custom and usage to *create* a provision" on unilateral cancellation, "a point upon which the contract [wa]s *silent*." 429 So. 2d at 772 (emphases added). Here, however, Advanzeon's trade custom and usage testimony did not *create* a provision; rather, it *elucidated* the specific meaning of the contract term "terminate," a matter on which the contracts obviously were not silent.

Additionally, *S. Crane Rentals* explained that, because "[t]he laws which exist at the time and place of the making of a contract enter into and become a part of the contract made," Florida law about "cancellation rights [wa]s unambiguously annexed to the parties' contract." *Id.* at 773. As such, the reason it declined to interpret the contract according to crane rental industry custom and usage—which "allow[ed] for unilateral cancellation of contracts by crane lessees"—was that such an interpretation would contradict Florida law, which recognizes the doctrine of anticipatory repudiation (*i.e.*, "[w]here an obligor repudiates a duty before he has committed a breach by non-performance and before he has received all of the agreed exchange for it, his repudiation alone gives rise to a claim for damages for breach"). *Id.*

Here, unlike in *S. Crane Rentals*, Advanzeon's trade custom and usage testimony did not contradict the contracts or Florida law. To the contrary, it provided the

only logical way—and the only way consistent with the state and federal regulatory requirements that govern this industry—to reconcile the "Duration Of The Agreement" provisions, R. 6989, 7019, with the "Regulatory Requirements" sections, R. 6986-88, 7020-24. It is the regulatory requirements, of course, that expressly allowed the providers 90 days to submit their claims in accordance with Florida law. *See* § 641.3155(2)(b), *Fla. Stat.*[4] Because Advanzeon and the Universal entities obviously and necessarily made their contracts "in legal contemplation of [that] existing applicable law," the trial court should have accepted Advanzeon's trade custom and usage testimony to interpret the contracts to include a tail period. *S. Crane Rentals*, 429 So. 2d at 773.

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[4] The Department speculates that, had the contracts' included a tail period, "one would expect the fees required for that partial service, after the provider network was no longer accessible and provider services had stopped, to be negotiated as something much less than that which was paid when all such benefits were available." Dep't Br. 27 n.3. But that argument ignores the nature of the service Advanzeon provided. While it is true that part of the deal between Advanzeon and Universal involved Advanzeon allowing Universal to access its provider network (*see* R. 4824-25, 6892-96, 6951-54), the actual administrative service performed in exchange for the PMPM administrative fee was claims cleaning (*see* R. 4824-25, 6892-96, 6951-54). Because Advanzeon was obligated to continue cleaning claims during the tail period (*i.e.*, doing the administrative work), it would make no sense for it to accept a lower fee simply because it was no longer providing access to its provider network (*i.e.*, passively granting permission) after October 31, 2012. And in any case, the amounts Universal owed for provider fees (*i.e.*, reimbursements for payments Advanzeon had advanced to its providers) were always separate and distinct from those they owed for administrative fees. *See e.g.*, R. 4845-47, 4863, 4875.

D. A witness need not qualify as an expert to testify about trade custom and usage (Dep't Arg. I.B)

Citing *Red Carpet Corp. of Panama City Beach* v. *Calvert Fire Ins. Co.*, 393 So. 2d 1160 (Fla. 1st DCA 1981), the Department argues, "Florida law reflects that custom and usage should be offered through an expert." Dep't Br. 17; *see also* Dep't Br. 22, 28-30. But *Red Carpet* case does not stand for that proposition.

Rather, it simply held, in that particular case, "the jury would have been better informed as to the meaning of the [insurance] policy terms and the usual method of handling claims under such policies … and, therefore, better equipped to properly resolve the issues of fact" if the trial court had allowed expert testimony about trade custom and usage. *Id.* at 1161. That holding was premised on the principle that "testimony of qualified experts is helpful, if not necessary, in cases presenting questions of fact not within the ordinary experience of the jury," including "'obscure connotations of an insurance policy.'" *Id.* (quoting *Aetna Ins. Co. of Hartford, Conn.* v. *Loxahatchee Marina, Inc.*, 236 So. 2d 12 (Fla. 4th DCA 1970).[5]

[5] In *Montgomery* v. *Aetna Cas. & Sur. Co.*, the Eleventh Circuit held this Court's decision in *Red Carpet Corp.* and the Fourth District's decision in *Loxahatchee Marina, Inc.* (cited *supra*), which ruled "courts may admit expert testimony on the meaning of an insurance contract" "appear[ed] inconsistent with the Florida Supreme Court cases holding that interpretation of an insurance contract is a question of law to be decided by a judge." 898 F.2d 1537, 1541 n.9 (11th Cir. 1990) (citing *Jones* v. *Utica Mut. Ins. Co.*, 463 So.2d 1153, 1157 (Fla. 1985), *Smith* v. *State Farm Mut. Auto. Ins. Co.*, 231 So. 2d 193, 194 (Fla. 1970), and *Ellenwood* v. *S. United Life Ins. Co.*, 373 So. 2d 392, 394 (Fla. 1979)); *accord Ramjeawan* v. *Bank of Am. Corp.*, 2010 WL 1645097 (S.D. Fla. Apr. 21, 2010) (unpublished).

Advanzeon does not argue expert testimony is inappropriate 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). But here, the trial court, as fact finder, needed no expert assistance to calculate the tail period administrative fees, because that calculation involved nothing more than simple arithmetic. *See* Advanzeon Br. 35. Hence, even though Advanzeon's witnesses would have qualified as experts (*see* Advanzeon Br. 35 n.17), such qualification was unnecessary for them to testify about trade custom and usage.[6]

[6] Advanzeon challenges the following ruling regarding expert testimony: "Mr. Heidt testified that this 'carrying forward' of the member figures for the five-month tail is an industry standard, but Claimant provided neither an expert witness nor testimony from any other witness outside of Claimant's business to confirm that creating these figures on which to base their damages is an industry standard." R. 5553. Accordingly, the only expert testimony issue Advanzeon raised in its initial brief was whether Advanzeon needed to provide expert testimony to substantiate its *calculation methodology*, not its *tail-period interpretation* of the word "terminate." Hence, the Department's argument that Advanzeon's witnesses needed to qualify as experts to testify about industry custom and usage regarding the tail period (*see* Dep't Br. 29-33) is nonresponsive to the issue the initial brief raises. And because the answer brief does not rely on the "tipsy coachman" doctrine for its expert testimony argument, the Court should disregard it. *See Powell* v. *State*, 120 So. 3d 577, 591-93 (Fla. 1st DCA 2013) (refusing to consider tipsy coachman argument appellee raised for the first time at oral argument after briefing concluded); *accord Hamilton* v. *Southland Christian Sch., Inc.*, 680 F.3d 1316, 1319 (11th Cir. 2012) (appellee waived argument by failing to include it in answer brief) (citation omitted); *La Grasta* v. *First Union Sec., Inc.*, 358 F.3d 840, 847 n.4 (11th Cir. 2004) (same).

E. The Department misinterprets the effect of England's testimony (Dep't Arg. I.B)

The Department argues England's testimony that he had never seen tail period administrative fees charged in an ASO contract refuted Advanzeon's trade custom and usage testimony. *See* Dep't Br. 31-32. But it is mistaken because England's testimony pertained only to his personal observations as a claims supervisor, not to industry custom and usage, a matter on which his testimony expressly admitted he could not opine. *See* Advanzeon Br. 27-28 & n.14.

F. The Department distorts the occurrence policy analogy beyond recognition (Dep't Arg. I.C)

In arguing against the tail period interpretation, the Department flips Advanzeon's occurrence policy analogy on its head, rendering it nonsensical. Specifically, the Department argues, "A policyholder, in timely making a claim that arose during the policy period, but which was reported after the policy expired, would not have to continue to pay on the expired policy in order for that timely claim to be processed and honored." Dep't Br. 26 n.2, 39. But that argument gets the analogy backwards.

Advanzeon's analogy illogically places the healthcare provider in the position of the policyholder and Universal in the position of the insurance carrier. Advanzeon, on the other hand, would assume the same role it did under the UHCIC/Advanzeon and UHC/Advanzeon contracts—that of a claims processor who gets paid to clean timely claims. Ergo, if the policyholder (*i.e.*, healthcare provider) submitted

to the insurance carrier (Universal) a claim for a negligent act that occurred during the policy period (*i.e.*, a claim for healthcare services that were rendered prior to contract termination), not only would the insurance carrier (*i.e.*, Universal) have to pay that claim, but it would also have to pay the claims processor (*i.e.*, Advanzeon) to clean that timely submitted claim. That is how the UHCIC/Advanzeon and UHC/Advanzeon contracts operated. *See* Advanzeon Br. 24-27.

In making its no-extra-premiums argument, the Department has flipped the analogy by placing Universal in the position of the policyholder instead of in its rightful position as the insurance carrier. As a rhetorical ploy, this argument is clever enough. But ultimately, the Department's bizarre configuration makes no sense. Indeed, Universal was never in a position with respect to Advanzeon or its providers where it (*i.e.*, Universal) would, like a policyholder, be making claims for payment. To the contrary, the Universal entities were health insurance companies (specifically, HPOs) that would pay for the services Advanzeon's providers rendered their members. *See* R. 4821-28, 5353, 6892-93, 6902, 6904, 6907. Given this dynamic, placing the Universal insurance carrier entities in the position of a policyholder instead of an insurance carrier would defy all logic and common sense.

The Department further argues, "Because the monthly fees paid during the contract period covered the work to clean the claims coming out of each month, Advanzeon was already paid for the work by the time the contracts were terminated."

Dep't Br. 39. But the contracts do not specify whether the PMPM administrative fee was being paid (1) to clean the claims *coming out of* each month (*i.e.*, the Department's position) or (2) to clean the claims *being submitted* each month (*i.e.*, Advanzeon's position). *See* R. 6994 (Attachment B-1), 7001 (Attachment B-2), 7029 (Attachment B). Given this lack of textual guidance and Advanzeon's unrebutted trade custom and usage testimony, the Court should interpret the contracts to require payment of PMPM fees to cover the potential claims that could be *submitted* in a given month (which would require a tail period).[7]

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.

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[7] The parties have already staked out their positions about whether the trial court's determination that it could deny Advanzeon's administrative fees claim because Advanzeon had previously stated all administrative fees were paid was based on a judicial estoppel ruling or credibility determinations. *Compare* Advanzeon Br. 37-44, *with* Dep't Br. 20, 21, 35-37. Nothing further needs to be said about that issue.

Respectfully submitted,

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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.

August 23, 2019

/s/ Thomas Burns
Thomas A. Burns