IN THE SUPREME COURT OF THE STATE OF NEVADA

UNITED SERVICES AUTOMOBILE ASSOCIATION, an Unincorporated Association,

Petitioner,

vs.

EIGHTH JUDICIAL DISTRICT COURT FOR THE STATE OF NEVADA IN AND FOR THE COUNTY OF CLARK; THE HONORABLE NADIA KRALL, DISTRICT COURT JUDGE,

Respondents,

and

JOHN ROBERTS

Real Party in Interest.

Supreme Court Case No.: 83355-COA

District Court Case: A-19-790757-C

Electronically Filed
Nov 10 2021 04:31 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

REAL PARTIES IN INTEREST JOHN ROBERTS' RESPONSE TO PETITIONER, UNITED SERVICES AUTOMOBILE ASSOCIATION'S PETITION FOR WRIT OF PROHIBITION OR MANDAMUS

Jordan P. Schnitzer, Esq.
Nevada Bar #10744
Jordan@TheSchnitzerLawFirm.com
THE SCHNITZER LAW FIRM
9205 West Russell Road, Suite 240
Las Vegas, Nevada 89148
Phone: (702) 960-4050
Attorney for Real Party in Interest

TABLE OF CONTENTS

SECTION **PAGE NO.**

TABLE OF AUTHORITIES iii

DISCLOSURE STATEMENT PURSUANT TO NRAP 26.1 vii

I. STATEMENT OF FACTS 1

II. SUMMARY OF THE ARGUMENT..1

III. LEGAL ARGUMENT..2

A. This Court Should Not Make Factual Determinations.......................................2

B. The Discovery Sought Is Relevant and the Discovery Commissioner Still Reduced the Scope of the Requests Due to Proportionality Considerations.............3

i. RPD 2, 15 and 16 Regarding Underwriting Were Limited By the Court........3

ii. Requests For Production 7 and 28 Regarding Claims Manuals Is Moot as USAA Has Produced Responsive Documents 5

iii. Requests for Production 9 Regarding Outsourced Work Documents Was Conceded During Oral Argument..7

iv. Request for Production 32 Regarding Vendor Payment Information Was Limited By the District Court 7

v. Requests For Production 36 Regarding Bonus Programs Was Limited By The Court Even After USAA Waived Its Arguments 11

vi. Requests For Production 39 Regarding Prior Depositions Was Limited By the Court 12

vii. The Interrogatories Were Limited By the Court 13

C. USAA Never Raised Specific Proportionality Challenges 15

IV. CONCLUSION 17

CERTIFICATE OF COMPLIANCE 18

CERTIFICATE OF SERVICE 20

TABLE OF AUTHORITIES

Cases

Amister v. River Cap. Int'l Group, LLC, No. 00 Civ. 9708 (DCDF), 2002 WL 2031614, at *1 (S.D.N.Y. Sept. 4, 2002)..9

Amister v. River Cap. Int'l Group, LLC, No. 00 Civ. 9708 (DCDF), 2002 WL 2031614, at *1 (S.D.N.Y. Sept.4, 2002)..9

Bryant v. Mattel, Inc., 2007 WL 5430886, *20 (C.D. Cal., June 27, 2007) (citing *United States v. Biackman*, 72 F.3d 1418, 1424 (9th Cir. 1995)............................8

Butler v. Rigsby, 1998 WL 164857, at *3–4 (E.D.La. Apr. 7, 1998)........................9

Butler v. Rigsby, 1998 WL 164857, at *4 (E.D. La. Apr. 7, 1998)...........................8

Duplantier v. Bisso Marine Co., Inc., 2011 WL 2600995, at *2–*3 (E.D. La. June 30, 2011)..11

Expeditors Int'l of Washington, Inc. v. Vastera, Inc., 2004 WL 406999, at *2 (N.D.Ill. Feb. 26, 2004)..11

Great Lakes Anesthesia, PLLC v. State Farm Mut. Auto. Ins. Co., 11-10658, 2011 WL 4507417, at *5 (E.D. Mich. Sept. 29, 2011)..10

Hawkins v. S. Plains Int'l Trucks, Inc., 139 F.R.D. 679, 682 (D. Colo. 1991) citing *Collins v. Wayne Corp*., 621 F.2d 777, 783 (5th Cir. 1980)..................................8

Hawkins v. S. Plains Int'l Trucks, Inc., 139 F.R.D. 679, 682 (D. Colo. 1991) citing *Collins v. Wayne Corp*., 621 F.2d 777, 783 (5th Cir.1980)....................................8

Hussey v. State Farm Lloyds Ins. Co., 216 F.R.D. 591, 594 (E.D.Tex.2003).........11

Int'l Game Tech. v. Ill. Nat'l Ins. Co., 2017 U.S. Dist. LEXIS 189753, at *6 (D. Nev. Nov. 16, 2017)..3

Inventio AG v. ThyssenKrupp Elevator Americas Corp., 662 F. Supp. 2d 375, 383 (D. Del. 2009) 13

Kelly v. Montgomery Lynch & Associates, Inc., 2007 U.S. Dist. LEXIS 93651, 2007 WL 4412572, *2 (N.D. Ohio 2007)..14

Ladd Furniture, Inc. v. Ernst & Young, No. 2:95CV00403, 1998 WL 1093901 (M.D. N.C. 1998)..10

Martinez v. James River Ins. Co., 219CV01646RFBNJK, 2020 WL 1975371, at *3 (D. Nev. Apr. 24, 2020)..6

McCall v. State Farm Mut. Auto. Ins. Co., 2017 U.S. Dist. LEXIS 117250, at *28 (D. Nev. July 26, 2017)..5

McCurdy v. Metro Life Ins. Co., 2007 U.S. Dist. LEXIS 25917, at *11-12 (E.D. Cal. Mar. 23, 2007)..6

Parkervision v. Qualcomm Inc., No. 3:11-CV-719-J-37-TEM, 2013 WL 3771226 (M.D. Fla. 2013) 11

People v. DeHoyos, 57 Cal. 4th 79, 123 (2013) 10

Phillips v. Clark Cty. Sch. Dist. 2012 U.S. Dist. LEXIS 5309, at *34-35 (D. Nev. Jan. 18, 2012)..4

Phillips v. Raymond Corp., 213 F.R.D. 521, 524 (N.D. Ill. 2003) 10, 11

Phillips, 2012 U.S. Dist. LEXIS 5309 at *34-35..4, 5

Renfrow v. Redwood Fire & Cas. Ins. Co., 288 F.R.D. 514, 521 (D. Nev. 2013) .….

………………………………………..……………………………3, 4, 6

Robinson v. G.G.C., Inc., 107 Nev. 135, 143, 808 P.2d 522, 527 (1991) 8

Schlatter v. Eighth Judicial Dist. Court, 93 Nev. 189, 192, 561 P.2d 1342, 1344 (1977) 15

Schlatter v. Eighth Judicial Dist. Court, 93 Nev. 189, 192, 561 P.2d 1342, 1344 (1977). 15

Spano v. Boeing Co., 2011 WL 3890268, at *1 (S.D.Ill. Sept. 2, 2011).................11

Spencer v. United States, 2003 WL 23484640, at *11–12 (D. Kan. Dec. 16, 2003) 8

State v. Wade, 105 Nev. 206, 209 n. 3, 772 P.2d 1291, 1293 n. 3 (1989)................5

Thomas v. Cate, 715 F. Supp. 2d 1012, 1033, 2010 U.S. Dist. LEXIS 21750, *47-48 (E.D. Cal. 2010) 14

Venetian Casino Resort, LLC v. Eighth Judicial Dist. Court in & for County of Clark 2, 17

Venetian Casino Resort, LLC v. Eighth Judicial Dist. Court in & for County of Clark, 136 Nev. 221, 226, 467 P.3d 1, n.9 (Nev. App. 2020).............................16

Venetian Casino Resort, LLC v. Eighth Judicial Dist. Court in & for County of Clark, 136 Nev. At 224-225 16

Washington, Inc. v. Vastera, No. 04-C-0321, 2004 WL 406999 at *2 (N.D. Ill. 2004) 10

Wood Expressions Fine Custom Cabinetry, Inc. v. Cincinnati Ins. Co., 2013 U.S. Dist. LEXIS 200176, at *9 (D. Ariz. Nov. 26, 2013)....................12

Zewdu v. Citigroup Long Term Disability Plan, 264 F.R.D. 622, 628 (N.D. Cal. 2010) 6

Zilisch v. State Farm Mut. Auto. Ins. Co., 196 Ariz. 234, 238 (2000) 12

<u>Other Authorities</u>

Unfair Claims Practices Act.................... 13, 14

DISCLOSURE STATEMENT PURSUANT TO NRAP 26.1

The undersigned counsel of record certifies that there are no persons or entities as described in NRAP 26.1(a) that must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal:

John Roberts– Real Party in Interest , is an individual.

Since the inception of the case, Appellant, has been solely represented by Jordan P. Schnitzer, Esq. of THE SCHNITZER LAW FIRM. There are no administrative agency actions in this case and no other attorneys are expected to appear on Appellant's behalf.

DATED this 10th day of November 2021.

THE SCHNITZER LAW FIRM

BY: /s/ Jordan P. Schnitzer, Esq.
JORDAN P. SCHNITZER, ESQ.
Nevada Bar No. 10744

Attorney for Real Party in Interest
John Roberts

I. STATEMENT OF FACTS

Real Party in Interest, John Roberts ("Roberts") generally agrees with Petitioner, United Services Automobile Association ("USAA")'s statement of facts but for a couple items. First, USAA neglected to inform the Court of the extent of Roberts's injuries, which include the need for multiple spine surgeries and a brain injury and $709,253.44 in medical expenses. Real Party in Interest's Appendix ("RPA") pp. 1-11 and pp. 12-27.

USAA also failed to address the oral argument that took place in front of the Discovery Commissioner. During oral argument, the Discovery Commissioner specifically referenced proportionality on eight separate occasions. RPA pp. 14, line 7 and 22; pp. 16, line 18; pp. 18, line 7 and 19; pp. 21, line 10, and pp. 23, line 4 and 7. Further, the Discovery Commissioner limited 16 of the requests at issue during the hearing and denied Plaintiff's requests as to 13 other items of discovery, evidencing the District Court's consideration of proportionality. Petitioner's Appendix ("PA") VOL II., pp. 275-279 and RPA pp. 28-58.

II. SUMMARY OF THE ARGUMENT

1. This Court is not in a position to make factual determinations relevant to the proportionality considerations and should decline to do so.

2. Case law supports the District Court's determination that the discovery at issue was relevant.
3. Although the discovery is relevant, the District Court properly considered proportionality as the majority of the items at issue were limited by the District Court and proportionality was referenced by the Discovery Commissioner on several occasions during the hearing.
4. Defendant failed to adequately develop and preserve any arguments concerning proportionality in the District Court.

III. <u>LEGAL ARGUMENT</u>

A. This Court Should Not Make Factual Determinations

USAA seeks to have this Court make factual determinations related to relevancy and proportionality. However, as the Court stated in *Venetian* "discovery decisions are "highly fact-intensive," and this court is not positioned to make factual determinations in the first instance, we decline to do so. *Venetian Casino Resort, LLC v. Eighth Judicial Dist. Court in & for County of Clark,* 136 Nev. 221, 226, 467 P.3d 1, 6 (Nev. App. 2020)(citations omitted). Therefore, to the extent the petition seeks to have this Court make factual determinations, it should decline to do so.

B. The Discovery Sought Is Relevant and the Discovery Commissioner Still Reduced the Scope of the Requests Due to Proportionality Considerations

Despite USAA's position, the Discovery Commissioner and the Court correctly determined the requests sought relevant information, yet still reduced the scope as a result of proportionality considerations.

i. <u>RPD 2, 15 and 16 Regarding Underwriting Were Limited By the Court</u>

In this case, the Discovery Commissioner clearly considered the appropriate proportionality factors as she reduced the scope of Request for Production Number 2 related to underwriting. RPA pp. 37 lines12-18 and PA VOL II., pp. 275-279.

"Underwriting information, as well as policy drafting history, is relevant and therefore discoverable in a breach of contract claim because it indicates what the coverage included and also whether the insurer failed to meet its obligation." *Int'l Game Tech. v. Ill. Nat'l Ins. Co.,* 2017 U.S. Dist. LEXIS 189753, at *6 (D. Nev. Nov. 16, 2017). As such, "[t]he relevancy of underwriting and policy drafting history information is not exclusive to cases that involve bad faith claims." *Id.* (citing *Renfrow v. Redwood Fire & Cas. Ins. Co.,* 288 F.R.D. 514, 521 (D. Nev. 2013). Producing the underwriting file is necessary even when certain matters may be in dispute as long as they relate to a party's claims. *See Renfrow*, 288 F.R.D. at 521

(rejecting the insurer's claim that producing the claim file is premature when the court had not decided whether the insured's claim was covered under the policy).

In *Phillips*, the United States District Court for the District of Nevada overruled the insurer's objections that the underwriting file was irrelevant due to the insured not asserting a bad faith claim. *Phillips v. Clark Cty. Sch. Dist.* 2012 U.S. Dist. LEXIS 5309, at *34-35 (D. Nev. Jan. 18, 2012). Similarly, in *Renfrow*, the United States District Court for the District of Nevada found that the insured was entitled to the underwriting files "as they are relevant to [the] claims of breach of contract and bad faith." *Renfrow v. Redwood Fire & Cas. Ins. Co*., 288 F.R.D. 514, 521 (D. Nev. 2013).

In this matter, Roberts asserted breach of contract, bad faith, and violations under the Unfair Claim Practices Act against the insurer. Just as the Court in *Phillips* and *Renfrow* found that the insurer's underwriting file was relevant when the insured asserted an action against its insurer as it related handling of the insured's claim, the underwriting file in this matter is relevant as it relates to USAA's handling of Roberts's claim. Ibid; *Phillips,* 2012 U.S. Dist. LEXIS 5309 at *34-35. Producing the underwriting file is even more pertinent in this matter because Roberts asserts both a breach of contract and bad faith claim, in addition to other causes of action, against USAA. Conversely, USAA never provided the Court with any case law to support its position that the underwriting information was not discoverable.

ii. Requests For Production 7 and 28 Regarding Claims Manuals Is Moot as USAA Has Produced Responsive Documents

USAA did not object before the Discovery Commissioner to producing the claims manual requested in RPD No. 7 and agreed to produce them with a requested protective order. PA VOL II pp. 255. This Court has noted that it "will not consider issues raised for the first time on appeal." *State v. Wade*, 105 Nev. 206, 209 n. 3, 772 P.2d 1291, 1293 n. 3 (1989). The Discovery Commissioner granted a protective order. PA VOL II., pp. 275-279 and RPA pp. 37, line 19-22. Therefore, USAA has waived any argument as to RPD No. 7.

The issue is also moot as USAA provided responses to RPD No. 7 and 28. RPA pp. 65, 66, 78 and 79.

Even if USAA has not waived the argument, and as it relates to RPD 28, "[d]ocuments relating to the handling of insurance claims…are relevant and discoverable." *Phillips*, 2012 U.S. Dist. LEXIS 5309, at *34-35. In fact, "[i]nformation regarding the job qualification and training of the claims employees who actually handled the Roberts's insurance claim is relevant and generally discoverable in a bad faith action." *McCall v. State Farm Mut. Auto. Ins. Co.*, 2017 U.S. Dist. LEXIS 117250, at *28 (D. Nev. July 26, 2017).

In *Phillips*, the District Court for the District of Nevada required the insurer to produce its employee training materials and claim manuals when the insured alleged breach of contract, violations under the Nevada Unfair Claim Practices Act, and the breach of covenant of good faith and fair dealing against the insurer. Id. Moreover, courts routinely provide that the insurer must produce its training and claims manuals that were in effect at the time that an insurer handled the insured's claim. *Renfrow*, 288 F.R.D. at 521; *Zewdu v. Citigroup Long Term Disability Plan*, 264 F.R.D. 622, 628 (N.D. Cal. 2010) (court allowing discovery of claims manuals the insurer used); *see* also *McCurdy v. Metro Life Ins. Co*., 2007 U.S. Dist. LEXIS 25917, at *11-12 (E.D. Cal. Mar. 23, 2007) (claim and procedural manuals were relevant as to "whether or not an administrator has complied with the procedural requirements dictated by a Plan").

More recently, even under the proportionality standard, federal courts agree "case law is well settled that claims manuals are generally relevant and discoverable both for bad faith and breach of contract insurance claims." *Martinez v. James River Ins. Co.*, 219, 2020 WL 1975371, at *3 (D. Nev. Apr. 24, 2020).

Here, Roberts's allegations are that the claim was handled improperly in various ways. Certainly, the claims manual would give insight into how the claim should have been handled. Roberts also has claims that USAA failed to implement

appropriate standards for handling claims. The claims manual is a pivotal piece to that claim.

iii. Requests for Production 9 Regarding Outsourced Work Documents Was Conceded During Oral Argument

Here, USAA's counsel made clear during the oral argument that USAA utilizes third-party vendors for evaluating the injury portion of claims. RPA pp. 46 line 16 - pp. 49, line 19. This company is called AIS. RPA pp. 91-94. Certainly, if USAA is outsourcing its claims handling obligations, Roberts should be entitled to see exactly what has been outsourced, how it is outsourced, how the third-party vendor is paid (and incentive) and what instructions are given to the vendor. Counsel for USAA even conceded this point during oral argument before the Discovery Commissioner. RPA pp. 46 line 16 - pp. 49, line 19.

iv. Request for Production 32 Regarding Vendor Payment Information Was Limited By the District Court

Again, the Discovery Commissioner clearly considered the appropriate factors because they limited the scope of RPD 32, even specifically addressing proportionality. PA VOL II., pp. 275-279 and RPA pp. 42, line 15-16 - pp. 45, line 1.

Reports and invoices by vendors and medical providers providing opinions regarding Roberts's injuries is relevant to showing that those vendors or medical

providers paid by USAA were biased and incentivized to create reports favorable to USAA's positions. As discussed above, USAA appears to have hired a Dr. Palermo to review the file. RPA pp. 90-93. The Nevada Supreme Court has explicitly held that the relationship between an expert and a party's attorney is relevant towards bias. *Robinson v. G.G.C., Inc*., 107 Nev. 135, 143, 808 P.2d 522, 527 (1991) ("relationships between witnesses and the parties or their counsel are admissible to show possible bias of a witness."). "[F]ee-payment arrangements are relevant to credibility and bias, and discoverable." *Bryant v. Mattel, Inc*., 2007 WL 5430886, *20 (C.D. Cal., June 27, 2007) (citing *United States v. Biackman*, 72 F.3d 1418, 1424 (9th Cir. 1995).

Courts around the country have found evidence of expert witness bias, including financial information, not only relevant, but discoverable. A party "does have the right to cross-examine an expert witness concerning fees earned in prior cases… [therefore, the expert] must produce information regarding [his] income." *Hawkins v. S. Plains Int'l Trucks, Inc*., 139 F.R.D. 679, 682 (D. Colo. 1991) citing *Collins v. Wayne Corp*., 621 F.2d 777, 783 (5th Cir. 1980). *See* also *Spencer v. United States*, 2003 WL 23484640, at *11–12 (D. Kan. Dec. 16, 2003) (finding that information regarding expert's annual income from litigation consulting is within the scope of permissible discovery); *Butler v. Rigsby*, 1998 WL 164857, at *4 (E.D. La. Apr. 7, 1998) (finding that magistrate judge's decision to allow discovery of expert

witness's net income and percentage of net income that is litigation-related was not clearly erroneous because this information is relevant to show bias); *Amister v. River Cap. Int'l Group, LLC,* No. 00 Civ. 9708 (DCDF), 2002 WL 2031614, at *1 (S.D.N.Y. Sept. 4, 2002) ("[O]ther courts have ordered [compensation] disclosure ... on the grounds that an expert's compensation is not protected by any privilege or work-product immunity, and that the extent of the expert's financial interest in the case may be relevant to bias."); *Butler v. Rigsby*, 1998 WL 164857, at *3–4 (E.D.La. Apr. 7, 1998) (stating that "courts have held that the amount of income derived from services related to testifying as an expert witness is relevant to show bias or financial interest" and citing cases).

An experts' bias related to the party or firm that hired him is equally fair game. For example, the Eastern District for the District of Michigan noted:

> Certainly, a continuing relationship between the witness and a party in which a witness receives payment for generating an opinion that may be favorable to the interests of the party seeking the opinion is a source of bias.
>
> In addition, expert witnesses in the business of furnishing litigation support, including medical-legal consultations, may have a motive to slant testimony to favor their customers and promote the continuation of their consultation business. Courts have recognized that expert witnesses who seek law firms, insurance companies, or the government as clients may have interests beyond the fact of individual cases in producing opinion evidence.

Great Lakes Anesthesia, PLLC v. State Farm Mut. Auto. Ins. Co., 11-10658, 2011 WL 4507417, at *5 (E.D. Mich. Sept. 29, 2011) (requiring four year financial and three year report disclosure).

The frequency of an expert's similar opinion is also relevant. "An expert's testimony in prior cases involving similar issues is a legitimate subject of cross-examination when it is relevant to the bias of the witness." *People v. DeHoyos*, 57 Cal. 4th 79, 123 (2013).

In fact, a number of courts have required production of an expert's prior reports. *Expeditors International of Washington, Inc. v. Vastera*, No. 04-C-0321, 2004 WL 406999 at *2 (N.D. Ill. 2004) (defendant entitled to examine potential inconsistencies between views expert intends to express in pending litigation with the testimony and opinions he has given and the theories and methodologies he had used in prior cases); *Phillips v. Raymond Corp*., 213 F.R.D. 521, 524 (N.D. Ill. 2003) (plaintiff entitled to inquire as to how often expert had testified for defendant in the past, his comparative record in testifying for plaintiffs and defendants and the expert's prior expressions of opinion about other forklifts and other injuries sustained by their operators); *Ladd Furniture, Inc. v. Ernst & Young, No*. 2:95CV00403, 1998 WL 1093901 (M.D. N.C. 1998) (court granted motion to compel response to request for information about expert's previous reports, including all reports expert had authored and transcripts of all deposition and trial testimony expert had given in

previous six years). *See* also *Parkervision v. Qualcomm Inc*., No. 3:11-CV-719-J-37-TEM, 2013 WL 3771226 (M.D. Fla. 2013)(prior expert reports, deposition transcripts and trial testimony transcripts fall within the ambit of Rule 26(b)(1) general fact discovery); *Spano v. Boeing Co*., 2011 WL 3890268, at *1 (S.D.Ill. Sept. 2, 2011); *Duplantier v. Bisso Marine Co., Inc*., 2011 WL 2600995, at *2–*3 (E.D. La. June 30, 2011); *Expeditors Int'l of Washington, Inc. v. Vastera, Inc*., 2004 WL 406999, at *2 (N.D.Ill. Feb. 26, 2004); *Phillips v. Raymond Corp*., 213 F.R.D. 521, 524 (N.D. Ill. 2003) ("bias is of course one of the quintessential bases for impeachment of a witness" and a plaintiff is "entitled" to inquire into an expert's "comparative record in testifying for plaintiffs or for defendants as such."); *Hussey v. State Farm Lloyds Ins. Co*., 216 F.R.D. 591, 594 (E.D.Tex.2003) (requiring production of prior expert reports because a fact-finder could draw inferences from prior reports).

v. <u>Requests For Production 36 Regarding Bonus Programs Was Limited By The Court Even After USAA Waived Its Arguments</u>

As the Discovery Commissioner noted, USAA actually provided the information, which the Discovery Commissioner took as a waiver of the objections but refused to provide the documents. The Discovery Commissioner then limited the

scope of the documents that needed to be produced. PA VOL II., pp. 275-279 and RPA pp. 11, line 19 – pp. 40, line 4.

"[I]nformation concerning [an insurer's] policies for evaluating and compensating claims adjusters and representatives may be relevant to the Plaintiff's bad faith claim." *Wood Expressions Fine Custom Cabinetry, Inc. v. Cincinnati Ins. Co.*, 2013 U.S. Dist. LEXIS 200176, at *9 (D. Ariz. Nov. 26, 2013). For example, in Zilisch, the Arizona Supreme Court upheld a bad faith verdict where "[t]he salaries and bonuses paid to claims representatives were influenced by how much the representatives paid out on claims." *Zilisch v. State Farm Mut. Auto. Ins. Co*., 196 Ariz. 234, 238 (2000). Similarly, here, USAA's bad faith conduct is likely the result of internal incentives to reduce claims payouts even in the 1st party context. USAA's most recent RPD responses acknowledges such documents exist but for some reason will not produce the actual documents. RPA pp. 83 and 84.

vi. Requests For Production 39 Regarding Prior Depositions Was Limited By the Court

Again, the Discovery Commissioner specifically referenced proportionality in limiting this request. PA VOL II., pp. 275-279 and RPA pp. 44, line 9-19. USAA's prior personnel testimony related to UM and UIM claims is relevant because such depositions typically deal with many topics relevant as discussed above. Specifically, such depositions usually deal with claims handling policies and

procedures, how evaluations are done, incentives given to employees, etc. As a result, such depositions would be discoverable. *Inventio AG v. ThyssenKrupp Elevator Americas Corp*., 662 F. Supp. 2d 375, 383 (D. Del. 2009)("… but based upon Gaussmann's supervisory role and his generalized knowledge on the subject matter at issue, his prior deposition testimony could lead to the discovery of admissible evidence."). USAA has not made any showing related to the burden of obtaining such documents.

vii. <u>The Interrogatories Were Limited By the Court</u>

The Discovery Commissioner limited the interrogatories as well. PA VOL II., pp. 275-279 and RPA pp. 50, line 20 – pp. 52, line 15. With regard to the interrogatories, Roberts argued the Interrogatories are properly limited as to time and scope, i.e., to the "past ten years" and as to Nevada claims as an allegation of a statutory violation of the Unfair Claims Practices Act – <u>a Nevada statute</u> – would inherently be a Nevada claim. Second, Roberts disagrees with the claim in the opposition that "[t]he existence of other contentions or legal proceedings will neither prove nor disprove the amount owed on this claim or the existence of any mishandling of this claim. Any such matter, with no nexus to the harm claimed to have been sustained by the Roberts herein with regard to his claim under the subject policy, is irrelevant and the Interrogatory is not reasonably calculated to lead to the discovery of admissible evidence." This is because USAA may have a pattern or

claims process that itself violates the Unfair Claims Practices Act. Arguendo, if USAA has acted in breach of the Act – as would be alleged by the lawsuits/information sought by this Interrogatory – in other past matters, yet failed to correct these improper practices, that certainly would be relevant to this action.

The mere fact that "this Request seeks information which is a matter of public record and can be independently obtained by Plaintiff without requiring Defendant to compile the information" does not absolve USAA of its requirements to respond to written discovery. "The fact that a responding party maintains records in different locations, utilizes a filing system that does not directly correspond to the subjects set forth in Plaintiffs' Interrogatory, or that responsive documents might be voluminous does not suffice to sustain a claim of undue burden." *Thomas v. Cate*, 715 F. Supp. 2d 1012, 1033, 2010 U.S. Dist. LEXIS 21750, *47-48 (E.D. Cal. 2010); *see also Simon v. ProNational Insurance Co.*, 2007 U.S. Dist. LEXIS 96318, 2007 WL 4893477, *2 (S.D. Fla. 2007) (in granting Plaintiff's Motion to Compel documents regarding similarly situated policy holders over a six (6) year period, held that Defendant's claim of undue burden was insufficient to preclude production; noted that a company cannot sustain a claim of undue burden by citing deficiencies in its own filing system); *Kelly v. Montgomery Lynch & Associates, Inc.*, 2007 U.S. Dist. LEXIS 93651, 2007 WL 4412572, *2 (N.D. Ohio 2007) (in granting Plaintiff's Motion to Compel, rejected Defendant's claim of undue burden, notwithstanding

Defendant's proffer that its "filing system is not maintained in a searchable way and the information sought would require 'manually searching through hundreds of thousands of records.' ").

Additionally, USAA indicates that information sought by this Interrogatory is "public record" so USAA can then use these public records as a starting point and then narrow down from all cases to cases involving a contention/claim for breach of the Unfair Claims Practices Act. Although information may be public record and accessible, USAA is in the best position to narrow the cases to the scope of those contending/claiming that USAA violated the Unfair Claims Practices Act. As is well settled in Nevada, discovery's boundaries are "broad" and extend beyond admissible evidence. *Schlatter v. Eighth Judicial Dist. Court*, 93 Nev. 189, 192, 561 P.2d 1342, 1344 (1977).

Despite Roberts's well taken position, the Discovery Commissioner still limited this request as well. PA VOL II., pp. 275-279 and RPA pp. 50, line 20 – pp. 52, line 15.

C. <u>USAA Never Raised Specific Proportionality Challenges</u>

In front of the Discovery Commissioner and even in its petition, USAA vaguely references the proportionality factors but made no specific arguments and presented no specific evidence regarding the burden or expense involved in producing the ordered items. The burden is not simply on the moving party to

address proportionality factors. *Venetian Casino Resort, LLC v. Eighth Judicial Dist. Court in & for County of Clark*, 136 Nev. 221, 226, 467 P.3d 1, n.9 (Nev. App. 2020).

USAA acknowledges that the issues at stake are important and that this is a high-dollar insurance policy at issue. USAA also does not make any argument that it is not in sole possession of the ordered documents nor that their resources are vast. RPA pp. 95. In fact, USAA's primary proportionality arguments are premised upon flawed relevancy arguments which are addressed above.

Regardless, the issue before this Court is simply whether or not the District Court appropriately considered proportionality. Given the transcript of the hearing, it is clear the Discovery Commissioner considered proportionality in the Report and Recommendations. This is contrary to the *Venetian* case where the Court noted the District Court only addressed relevancy and not proportionality. *Venetian*, 136 Nev. At 224-225. Therefore, the Petition should be denied.

//

//

//

//

//

//

IV. <u>CONCLUSION</u>

Based upon the foregoing, it is clear the District Court considered proportionality, contrary to what happened in *Venetian*. As a result, this Court's extraordinary intervention in discovery matters is not warranted.

DATED this 10th day of November 2021.

THE SCHNITZER LAW FIRM

BY: /s/ Jordan P. Schnitzer, Esq.
JORDAN P. SCHNITZER, ESQ.
Nevada Bar No. 10744

Attorney for Real Party in Interest
John Roberts

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 14 pt Times New Roman type style.

I further certify that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionally spaced, has a typeface of 14 points or more, and contains 4,733.

Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Civil Procedure, in particular NRAP 28 (e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any of the transcript or appendix where the matter relied on is to be found.

//

//

//

I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 10th day of November 2021.

THE SCHNITZER LAW FIRM

BY: /s/ Jordan P. Schnitzer, Esq.
JORDAN P. SCHNITZER, ESQ.
Nevada Bar No. 10744

Attorney for Real Party in Interest
John Roberts

CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on the 10th day of November 2021. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

Robert W. Freeman, Esq.
Nevada Bar No. 3062
Priscilla L. O'Briant, Esq.
Nevada Bar No. 10171
LEWIS BRISBOIS BISGAARD & SMITH LLP
6835 S. Rainbow Blvd., Suite 600
Las Vegas, NV 89118
Telephone: 702-893-3383
Facsimile: 702-893-3789
Attorneys for Petitioner

By: /s/ Melisa A. Gabhart
An Employee of
THE SCHNITZER LAW FIRM