IN THE SUPREME COURT OF THE STATE OF NEVADA

Supreme Court Case No. 81680
District Court Case No. A-19-792978-B

UnitedHealth Group, Inc., United Healthcare Insurance Company, United HealthCare Services, Inc., UMR, Inc., Oxford Health Plans, Inc., Sierra Health and Life Insurance Company, Inc., Sierra Health-Care Options, Inc., Health Plan of Nevada, Inc.,
Petitioners

v.

The Eighth Judicial District Court, State of Nevada, Clark County, and the Honorable Nancy L. Allf, District Court Judge,
Respondent

and

Fremont Emergency Services (Mandavia), Ltd., Team Physicians of Nevada-Mandavia, P.C., Crum Stefanko and Jones, Ltd.,
Real Parties in Interest.

PETITIONERS' MOTION TO STAY THE UNDERLYING DISTRICT COURT CASE PENDING RESOLUTION OF ITS PETITION FOR WRIT OF PROHIBITION, OR, ALTERNATIVELY, MANDAMUS

D. LEE ROBERTS, JR., ESQ.
Nevada Bar No. 8877
COLBY L. BALKENBUSH, ESQ.
Nevada Bar No. 13066
BRITTANY M. LLEWELLYN, ESQ.
Nevada Bar No. 13527
WEINBERG, WHEELER, HUDGINS,
GUNN & DIAL, LLC
6385 South Rainbow Blvd., Suite 400
Las Vegas, Nevada 89118
(702) 938-3838
lroberts@wwhgd.com
cbalkenbush@wwhgd.com
bllewellyn@wwhgd.com
Attorneys for Petitioners

I. INTRODUCTION

The Clark County proceeding underlying Petitioners' ("United") writ petition should be stayed pending resolution of the writ to avoid undermining a primary goal of ERISA. United previously moved for such a stay in the district court and was denied. ERISA's core purpose is to ensure "nationally uniform plan administration" and to "provide a method for [parties] to resolve disputes over benefits inexpensively and expeditiously." As set forth in the writ, the Real Parties in Interest ("Plaintiffs") have brought a host of state law claims against United, all of which are preempted by ERISA. Plaintiffs have now used these preempted claims to secure orders from the district court requiring United to engage in commercially sensitive, expensive, and time consuming discovery—including production of administrative records for ***22,153*** claims, the lion's share of which Plaintiffs have not administratively exhausted as ERISA requires—all of which will be unavailable if this Court grants the writ and finds that ERISA preempts Plaintiffs' claims.

The writ seeks an order finding that all of Plaintiffs' state law claims are preempted and finding that the only claim Plaintiffs may attempt to assert is a federal statutory ERISA claim under 29 U.S.C. § 1132(a)(1)(B). Writ at p. 7. If this relief is granted, this case will be subject to the constraints of ERISA and

virtually all of the extraordinarily burdensome discovery currently taking place before the district court will be unavailable.

As alluded to above, Plaintiffs have asserted 22,153 claims for reimbursement and are seeking the administrative record or claims file for each individual claim. United submitted a detailed burden declaration explaining that it takes 2 hours to pull each administrative record and thus it would take a team of four people working full-time **over five years** to collect the administrative records for each claim. Nonetheless, the district court overruled United's undue burden objection and had ordered it to produce a minimum of 2,000 administrative records per month (i.e. 4,000 labor hours per month). This expansive discovery would not be available if the writ were granted because under ERISA a plaintiff may only assert claims for which it has exhausted its administrative remedies, something Plaintiffs have failed to do for over 90% of their 22,153 claims.

Similarly, the district court ordered United to produce discovery outside of the administrative record such as commercially sensitive market data, United's agreements with external out-of-network program vendors, and certain other document categories pertaining to United's out-of-network programs. This discovery would likewise be unavailable if the writ is granted as ERISA generally prohibits discovery outside of the administrative record.

II. PROCEDURAL HISTORY

The complicated procedural history of this matter is set forth in the writ petition. Pertinent to this Motion, United filed its writ petition on August 25, 2020. On August 26, 2020 United filed a motion to stay the litigation pending resolution of its writ petition with the district court. **Exhibit 1A-B** (motion and opposition). On September 23, 2020 the district court denied the motion to stay but stated "[i]f the Supreme Court requests briefing on the issue, I'd consider a brief stay for that purpose." **Exhibit 2** at 19:22–24 (Sept. 9, 2020 hearing transcript); **Exhibit 3** (Sept. 23, 2020 order). On September 21, 2020, this Court directed Plaintiffs to answer the writ petition. **Exhibit 4**. Therefore, pursuant to the district court's invitation, on September 23, 2020, United filed a renewed motion to stay with the district court. **Exhibit 5A-C** (motion, opposition and reply). However, on October 21, 2020 the district court denied the renewed motion to stay as well. **Exhibit 6** (order); **Exhibit 7** (Oct. 8, 2020 hearing transcript).

III. LEGAL ARGUMENT

A. Whether a stay pending resolution of a writ petition should be entered turns on the balancing of four factors.

Nevada Rule of Appellate Procedure 8 governs the issuance of a stay pending appeal or resolution of an original writ proceeding. *See Hansen v. Eighth Judicial Dist. Court ex rel. Cty. of Clark*, 116 Nev. 650, 657, 6 P.3d 982 986 (2000). The Rule applies equally to appeals and writ petitions. *Id.* The Rule

instructs that a party generally must first move for a stay in the district court before moving for a stay in the Supreme Court. *Id.* As discussed above, United moved for a stay twice at the district court level and those motions were denied. Under NRAP 8, courts should consider four factors in deciding whether to issue a stay: (1) whether the object of the writ petition would be defeated if the stay is denied, (2) whether the petitioner will suffer irreparable or serious injury if the stay is denied, (3) whether the real party in interest will suffer irreparable or serious injury if the stay is granted, and (4) whether petitioner is likely to prevail on the merits in the writ petition. *Id.* While this Court has "not ascribed particular weights to any of the stay factors in the civil context," it has "recognized that depending on the type of appeal, certain factors may be especially strong and counterbalance other weak factors." *State v. Robles-Nieves*, 129 Nev. 537, 542, 306 P.3d 399, 403 (2013). Further, this Court has recognized that "if one or two factors are especially strong, they may counterbalance other weak factors." *Mikohn Gaming Corp. v. McCrea*, 120 Nev. 248, 251, 89 P.3d 36, 38 (2004).

B. The first factor – the object of the writ being defeated if the stay is denied – weighs in favor of a stay.

In evaluating this first factor, this Court should identify the object of the writ petition and whether it will be defeated by the denial of the stay. *See Hansen*, 116 Nev. at 657-58, 6 P.3d at 986. Here, the object of United's writ is simple—a determination that ERISA preempts all of Plaintiffs' state law claims and that this

is, at bottom, a claims for benefits case subject to the ERISA regulatory framework. Not granting a stay would frustrate the core purposes of ERISA, which is to ensure "nationally uniform plan administration" (*Gobeille v. Liberty Mut. Ins. Co.*, 136 S. Ct. 936, 943 (2016)) and to "comprehensively regulate" employee benefit plans. *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 44 (1987). Indeed, "a primary goal of ERISA [is] 'to provide a method for [parties] to resolve disputes over benefits **inexpensively and expeditiously**.'" *Boyd v. Bert Bell/Pete Rozelle NFL Players Ret. Plan*, 410 F.3d 1173, 1178 (9th Cir. 2005).

In furtherance of this goal, discovery is limited in an ERISA claims for benefits case. Plaintiffs may only pursue the claims for which they have exhausted all available administrative remedies with the applicable health plan. *Bilyeu v. Morgan Stanley Long Term Disability Plan*, 683 F.3d 1083, 1088 (9th Cir. 2012) ("[a]s a general rule, an ERISA claimant must exhaust available administrative remedies before bringing a claim in federal court."); *Almont Ambulatory Surgery Ctr., LLC v. UnitedHealth Grp., Inc.*, 99 F. Supp. 3d 1110, 1178 (C.D. Cal. 2015) ("prior to bringing an ERISA claim in federal court, a plaintiff must exhaust administrative remedies under the relevant benefit plan."). Any available discovery is thus limited to those claims.

In general, discovery in an ERISA claims for benefits case is limited to the administrative record. *See e.g., Abatie v. Alta Health & Life Ins. Co.*, 458 F.3d

955, 970 (9th Cir. 2006) ("[I]n general, a [federal] district court may review only the administrative record when considering whether the plan administrator abused its discretion."); *Ehrensaft v. Dimension Works Inc. Long Term Disability Plan*, 120 F. Supp. 2d 1253, 1261-62 (D. Nev. 2000) (In an ERISA case, evidence should be limited to administrative record).

Without a stay, ERISA's core purpose of providing a way to "inexpensively and expeditiously" resolve claims against health plans for underpayment will be frustrated even if the writ is ultimately granted. First, the district court has ordered United to produce the administrative records for all 22,153 claims regardless of whether they have been administratively exhausted by Plaintiffs. **Exhibit 8** (September 28 order). Based on United's analysis of Plaintiffs' claim spreadsheet,[1] less than 2,000 of the 22,153 asserted claims have been administratively appealed. **Exhibit 9** (Declaration of Jane Stalinski). Petitioners have submitted evidence that it takes 2 hours to pull each administrative record and thus it would take a team of four people working full-time **over five years** to collect the administrative records for each claim. **Exhibit 10** (Way Declaration).[2]

[1] Due to a Stipulated Confidentiality and Protective Order entered by the Parties, Plaintiffs' claim spreadsheet (bates numbered FESM000344) may not be filed in open court. Further, the spreadsheet numbers over 200 pages. If the Court would like to review the spreadsheet to better understand the scope of this litigation, Defendants can submit a copy of the claim spreadsheet for *in-camera* review. Plaintiffs had previously asserted 15,210 claims for reimbursement (See Writ at pp. 2-3) but have now increased the number of claims to 22,153.

[2] Assuming 261 working days per year and 8 hour work days.

Despite this, the district court has overruled United's undue burden objections and ordered them to produce a minimum of 2,000 administrative records per month (i.e. 4,000 hours of labor per month on claims that Plaintiffs have largely failed to administratively exhaust such that they may pursue them under ERISA).

Second, the district court has also ordered extensive discovery *outside* of the administrative record that would also be generally unavailable if ERISA governs and the writ is granted. Among other things, United has been ordered to produce commercially sensitive market data, agreements with its external out-of-network program vendors, certain other document categories pertaining to United's out-of-network programs, and documents regarding "challenges" from other out-of-network medical providers to the reimbursement rates United allowed. **Exhibit 11** (Oct. 27 order).

All of this expensive and burdensome discovery would be unavailable if the writ is granted and this Court finds that ERISA governs Plaintiffs' claims. Yet, without a stay, United will have no choice but to continue producing all of the aforementioned documents at great expense before the writ is ever decided and ERISA's goal of ensuring an "inexpensive[] and expeditious[]" resolution of these disputes will have been frustrated. The first factor soundly weighs in favor of granting the stay requested herein.

C. The fourth factor weighs in favor of a stay because United's writ is likely to prevail on the merits.

"[W]hen moving for a stay pending an appeal or writ proceedings, a movant does not always have to show a probability of success on the merits, the movant must '**present a substantial case on the merits when a serious legal question is involved** and show that the balance of equities weighs heavily in favor of granting the stay.'" *Hansen*, 116 Nev. at 659, 6 P.3d at 987 (citing *Ruiz v. Estelle*, 650 F.2d 555, 565 (5th Cir. 1981)) (emphasis added). The issue of whether ERISA preempts state law has been previously considered to be of such importance that this Court has considered a writ petition challenging the denial of a motion to dismiss on the merits. *See W. Cab Co. v. Eighth Judicial Dist. Court of State in & for Cty. of Clark*, 133 Nev. 65, 68, 390 P.3d 662, 667 (2017) ("The instant petition seeks reversal of a denial of a motion to dismiss. Although we typically deny such petitions, considering this petition would serve judicial economy and clarify an important issue of law.") (addressing ERISA preemption of the Minimum Wage Amendment); *see also Tallman v. Eighth Jud. Dist. Ct.*, 131 Nev. 713, 725, 359 P.3d 113, 121 (2015) (addressing petition on the merits dealing with federal preemption under the Federal Arbitration Act and National Labor Relations Act).

This Court has never addressed the scope of ERISA preemption as applied to an out-of-network provider's claims against an insurer/plan administrator, but this Court has indicated potential interest in this issue by ordering Plaintiffs to

answer the writ petition. *See* **Exhibit 4** (Order Directing Answer). United will not reiterate here the extensive legal authority cited in its writ petition. However, United submits that a review of the writ petition, and the Reply that will be filed in support of the writ, will demonstrate that it has a strong likelihood of prevailing on the merits of the writ. Any state law claim that would require a plan administrator or insurer to deviate from the plan's payment terms for out-of-network providers is preempted by ERISA. *Gobeille v. Liberty Mut. Ins. Co*., 136 S. Ct. 936, 943 (2016) (holding that state laws that "govern a central matter of plan administration or interfere[] with nationally uniform plan administration" are preempted by ERISA). Since Plaintiffs' state law claims seek to force Defendants to pay a higher rate of reimbursement than is required by the plan terms, Plaintiffs claims are clearly preempted by ERISA. This factor thus weighs in favor of granting a stay.

D. The second and third factors – which consider the likelihood of irreparable harm – play less of a role here, but nevertheless weigh in favor of granting a stay.

Here, the parties have two choices: (1) stay discovery for a brief period of time until the writ petition is granted or denied, or (2) expend resources conducting discovery on all claims, even though the grant of United's writ would limit—considerably—the scope of available discovery and likely end this case outright. A brief stay is warranted under these circumstances.

Considering the first option, Plaintiffs will not be prejudiced if a stay is granted. Taking into account the time it generally takes for this Court to decide whether to grant or deny review of a writ petition, there would be only a relatively brief stay of discovery pending review of United's writ. At present, if the parties take the entirety of time offered by the Nevada Supreme Court to complete their briefing, the papers will be before the Court by November 30, 2020. At worst, in the context of this very complex dispute, Plaintiffs' case will be marginally delayed. This delay will not alter Plaintiffs' legal positions. Staying discovery would benefit all parties and the Court, and the potential costs saved by a short stay would outweigh any harm from the delay. Given that not issuing a stay will result in ERISA's core goal—comprehensively governing claims for benefits and resolving disputes over benefits "inexpensively and expeditiously"—being frustrated, good cause exists to issue the stay.

IV. CONCLUSION

Based on the foregoing, this motion to stay should be granted. All four applicable factors weigh in favor of staying the underlying Clark County proceeding pending resolution of United's writ petition.

Dated: November 20, 2020

/s/ Colby L. Balkenbush
D. Lee Roberts, Jr., Esq.
Colby L. Balkenbush, Esq.
Brittany M. Llewellyn, Esq.
Attorneys for Petitioners

VERIFICATION

1. I, the undersigned, declare as follows:

2. I am a lawyer duly admitted to practice before the courts of this State and I represent Petitioners in this proceeding.

3. I verify that I have read the foregoing Motion to stay the Underlying District Court Case Pending Resolution of Petition for Writ of Prohibition, or, Alternatively, of Mandamus and that the same is true to my own knowledge, except for those matters stated on information and belief, and as to those matters, I believe them to be true.

I declare under penalty of perjury under the laws of the State of Nevada that the foregoing is true and correct.

Dated: November 20, 2020

/s/ Colby L. Balkenbush

D. Lee Roberts, Jr., Esq.
Colby L. Balkenbush, Esq.
Brittany M. Llewellyn, Esq.
WEINBERG, WHEELER, HUDGINS,
GUNN & DIAL, LLC
6385 South Rainbow Blvd., Suite 400
Las Vegas, Nevada 89118
Attorneys for Petitioners

CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this Motion to stay the Underlying District Court Case Pending Resolution of Petition for Writ of Prohibition, or, Alternatively, of Mandamus 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 Motion complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires that every assertion in this Motion regarding matters in the record be supported by a reference to the record on appeal.

Dated: November 20, 2020

/s/ Colby L. Balkenbush

D. Lee Roberts, Jr., Esq.
Colby L. Balkenbush, Esq.
Brittany M. Llewellyn, Esq.
WEINBERG, WHEELER, HUDGINS,
GUNN & DIAL, LLC
6385 South Rainbow Blvd., Suite 400
Las Vegas, Nevada 89118
Attorneys for Petitioners

CERTIFICATE OF SERVICE

Pursuant to NRAP 25, I hereby certify that I am an employee of Weinberg, Wheeler, Hudgins, Gunn & Dial, LLC and that on November 20, 2020, I filed a Motion to stay the Underlying District Court Case Pending Resolution of Petition for Writ of Prohibition, or, Alternatively, of Mandamus with the Clerk of the Nevada Supreme Court and served a copy of the Writ to the addresses shown below (in the manner indicated below).

VIA EFLEX ELECTRONIC FILING SYSTEM:

Pat Lundvall, Esq.
Kristen T. Gallagher, Esq.
Amanda M. Perach, Esq.
McDonald Carano LLP
2300 W. Sahara Ave., Suite 1200
Las Vegas, Nevada 89102
plundvall@mcdonaldcarano.com
kgallagher@mcdonaldcarano.com
aperach@mcdonaldcarano.com

VIA U.S. MAIL:

The Honorable Judge Nancy L. Allf
Eighth Judicial District Court
Department No. 27
Regional Justice Center
200 Lewis Ave.,
Las Vegas, Nevada 89155

/s/ Cynthia S. Bowman

IN THE SUPREME COURT OF THE STATE OF NEVADA

Supreme Court Case No. 20-34655
District Court Case No. A-19-792978

UnitedHealth Group, Inc., United Healthcare Insurance Company, United Health Care Services, Inc., UMR, Inc., Oxford Health Plans, Inc., Sierra Health and Life Insurance Company, Inc., Sierra Health-Care Options, Inc., Health Plan of Nevada, Inc.,
Petitioners

v.

The Eighth Judicial District Court, State of Nevada, Clark County, and the Honorable Nancy L. Allf, District Court Judge,
Respondent

and

Fremont Emergency Services (Mandavia), Ltd., Team Physicians of Nevada-Mandavia, P.C., Crum Stefanko and Jones, Ltd.,
Real Parties in Interest.

APPENDIX IN SUPPORT OF PETITIONERS' MOTION TO STAY THE UNDERLYING DISTRICT COURT CASE PENDING RESOLUTION OF ITS PETITION FOR WRIT OF PROHIBITION, OR, ALTERNATIVELY, MANDAMUS - VOLUME I AND II

D. LEE ROBERTS, JR., ESQ.
Nevada Bar No. 8877
COLBY L. BALKENBUSH, ESQ.
Nevada Bar No. 13066
BRITTANY M. LLEWELLYN, ESQ.
Nevada Bar No. 13527
WEINBERG, WHEELER, HUDGINS,
GUNN & DIAL, LLC
6385 South Rainbow Blvd., Suite 400
Las Vegas, Nevada 89118
(702) 938-3838
lroberts@wwhgd.com
cbalkenbush@wwhgd.com
bllewellyn@wwhgd.com

Defendants UnitedHealthcare Insurance Company ("UHIC"), United HealthCare Services, Inc. ("UHS"), UMR, Inc. ("UMR"), Oxford Health Plans, Inc. ("Oxford"), Sierra Health and Life Insurance Co., Inc. ("SHL"), Sierra Health-Care Options, Inc. ("SHO"), and Health Plan of Nevada, Inc. ("HPN") (collectively, "Defendants"), by and through their attorneys of record, WEINBERG, WHEELER, HUDGINS, GUNN & DIAL, LLC, hereby submits this Appendix In Support Of Petitioners' Motion To Stay The Underlying District Court Case Pending Resolution Of Its Petition For Writ Of Prohibition, Or, Alternatively, Mandamus.

Exhibit	Description	Vol. No.	Page No.
1.	A: Defendants' Motion to Stay Proceedings Pending Resolution of Writ Petition on Order Shortening Time	1	00001-00058
	B. Plaintiffs' Opposition to Defendants' Motion to Stay Proceedings Pending Resolution of Writ Petition on Order Shortening Time	1	00059-00069
2.	Hearing Transcript 09/09/2020	1	00070-00135
3.	Order Denying Defendants' Motion to Stay Proceedings Pending Resolution of Writ Petition on Order Shortening Time 09/23/2020	1	00136-00146
4.	Order Directing Answer	1	00147-00149
5.	A. Defendants' Renewed Motion to Stay Proceedings Pending Resolution of Writ Petition on Order Shortening Time	1-2	00150-00217
	B. Plaintiffs' Opposition to Defendants' Renewed Motion to Stay Proceedings Pending Resolution of Writ Petition on Order Shortening Time	2	00218-00232
	C. Defendants' Reply in support of Renewed Motion to Stay Proceedings Pending Resolution of Writ Petition on Order Shortening Time	2	00233-00242
6.	Order Denying Defendants' Renewed Motion to Stay Proceedings Pending Resolution of Writ Petition on Order Shortening Time, 10/21/2020	2	00243-00253

7.	Hearing Transcript 10/08/2020	2	00254-00338
8.	Order Granting, in Part, Plaintiffs' Motion to Compel Defendants' Production of claims file for At-Issue Claims, or, In the Alternative, Motion in Limine, 09/28/2020	2	00339-00351
9.	Declaration of Jane Stalinski	2	00352-00354
10.	Declaration of Sandra Way	2	00355-00363
11.	Order Granting Plaintiffs' Motion to Compel Defendants' Defendants' List of Witnesses, Production of Documents and Answers to Interrogatories on Order Shortening Time, 10/27/2020	2	00364-00373