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 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.

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

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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.

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EXHIBIT 1-A

EXHIBIT 1-A

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WEINBERG WHEELER HUDGINS GUNN & DIAL

DISTRICT COURT

CLARK COUNTY, NEVADA

FREMONT EMERGENCY SERVICES (MANDAVIA), LTD., a Nevada professional corporation; TEAM PHYSICIANS OF NEVADA-MANDAVIA, P.C., a Nevada professional corporation; CRUM, STEFANKO AND JONES, LTD. dba RUBY CREST EMERGENCY MEDICINE, a Nevada professional corporation, Plaintiffs, vs. UNITEDHEALTH GROUP, INC., UNITED HEALTHCARE INSURANCE COMPANY, a Connecticut corporation; UNITED HEALTH CARE SERVICES INC. dba UNITEDHEALTHCARE, a Minnesota corporation; UMR, INC. dba UNITED MEDICAL RESOURCES, a Delaware corporation; OXFORD HEALTH PLANS, INC., a Delaware corporation; SIERRA HEALTH AND LIFE INSURANCE COMPANY, INC., a Nevada corporation; SIERRA HEALTH-CARE OPTIONS, INC., a Nevada corporation; HEALTH PLAN OF NEVADA, INC., a Nevada corporation; DOES 1-10; ROE ENTITIES 11-20, Defendants.	Case No.: A-19-792978-B Dept. No.: 27 **HEARING REQUESTED** **DEFENDANTS' MOTION TO STAY PROCEEDINGS PENDING RESOLUTION OF WRIT PETITION ON ORDER SHORTENING TIME**

Defendants UnitedHealth Group, Inc.; UnitedHealthcare Insurance Company; United

Case Number: A-19-792978-B

HealthCare Services, Inc.; UMR, Inc.; Oxford Health Plans LLC (incorrectly named as "Oxford Health Plans, Inc."); Sierra Health and Life Insurance Company, Inc.; Sierra Health-Care Options, Inc. and Health Plan of Nevada, Inc. (collectively, "United" or "Defendants"), moves to stay this case pending resolution of its Petition for a Writ of Prohibition, or, Alternatively, Mandamus to the Supreme Court of Nevada. As explained in the following Memorandum of Points and Authorities, the exhibits attached thereto, the pleadings and papers on file herein, and any argument presented at the time of hearing on this matter, the stay should be entered.

Dated this 25th day of August, 2020.

/s/ Colby L. Balkenbush

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ORDER SHORTENING TIME

On application of the declaration of counsel for Defendants and good cause appearing,

IT IS HEREBY ORDERED that DEFENDANTS' MOTION TO STAY PROCEEDINGS PENDING RESOLUTION OF WRIT PETITION ON ORDER SHORTENING TIME shall be heard on the 9th day of September, 2020 at 10:30 a.m./~~p.m.~~ in Department XXVII of the above entitled Court.

Dated this 26th day of August, 2020

Nancy L Allf

DISTRICT COURT JUDGE

DATED:

5F8 A63 868C E8A2
Nancy Allf
District Court Judge

Submitted by:

WEINBERG, WHEELER, HUDGINS,
GUNN & DIAL, LLC

/s/ Colby L. Balkenbush

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DECLARATION OF COLBY L. BALKENBUSH, ESQ. IN SUPPORT OF APPLICATION FOR ORDER SHORTENING TIME

1. I am over the age of 18, have personal knowledge of the matters set forth herein and, unless otherwise stated, am competent to testify to the same if called upon to do so. I am an attorney at Weinberg, Wheeler, Hudgins, Gunn & Dial, LLC, counsel for Defendants in the above-captioned matter.

2. On August 25, 2020, Defendants filed a Petition for Writ of Prohibition, or alternatively, Mandamus, with the Nevada Supreme Court concerning this Court's denial of its motion to dismiss.

3. If the Nevada Supreme Court grants the relief requested by United—a finding that Plaintiffs' claims are subject to dismissal either under Nevada Rule of Civil Procedure 12(b)(5) or on ERISA preemption grounds—in whole or in part, the scope of discovery in this matter would be significantly altered.

4. Specifically, if Plaintiffs' claims are found to be preempted, and Plaintiffs re-plead them as ERISA claims for benefits, they would be entitled only to the strictly limited discovery of the administrative record that applies to such claims.

5. Because discovery is ongoing, time-intensive, and costly, and because the pending writ petition may curtail or eliminate entirely the need for the discovery currently pending and forthcoming in this action, there is good cause to hear this motion as soon as this Court deems practicable, and on shortened time, pursuant to EDCR 2.26.

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

DATED: August 25th, 2020

/s/ Colby L. Balkenbush
Colby L. Balkenbush Esq.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The TeamHealth Nevada Plaintiffs are for-profit, private equity-backed out-of-network medical providers affiliated with one of the largest national physician management companies in the United States. The TeamHealth Nevada Providers are separate entities from the Nevada hospitals within which they work and with whom they contract. The out-of-network providers have no contracts with United, and charge patients far more than the reasonable value of their services. Along those lines, a recent class action by patients alleges that TeamHealth charges nearly three times the median rate for in-network physicians at participating hospitals, and their billed charges are significantly higher, at more than four times the median rate.[1] Defendants administer health plans whose members have allegedly received medical treatment from Plaintiffs. Plaintiffs allege that the health plans have underpaid them for medical services, and seek to compel the Defendants to pay Plaintiffs at extraordinarily inflated rates without any regard to the explicit terms of the plans. Defendants contend that their only obligation to Plaintiffs is to pay them at the out-of-network rates set forth in each patient's applicable health plan since Plaintiffs otherwise lack a contract, oral promise, or statute setting forth any particular rate of reimbursement for the services at issue.

On August 25, 2020, United filed a writ petition in the Supreme Court of Nevada concerning this Court's denial of its motion to dismiss. *See* Defendants' Petition for Writ of Prohibition, or alternatively, Mandamus, **Exhibit 1**. During the period of time in which the Nevada Supreme Court is considering United's writ petition, United respectfully requests that this Court stay this case. As explained below, a stay should be granted because all of the factors for determining whether to enter a stay pending resolution of a writ petition weigh in favor of

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[1] The class action lawsuit, brought by patients of TeamHealth, asserts federal racketeering claims that bring TeamHealth's rates under serious scrutiny. *See Fraser v. Team Health Holdings, Inc.*, Case 3:20-cv-04600-LB, Doc. 1 (N.D. Ca. Filed July 10, 2020). In particular, the complaint alleges that TeamHealth "inflate[s] the rates it charges patient-consumers far above those that it knows it is legally entitled to collect," and then "pursues patients ruthlessly" including "through a medical debt collector that is a TeamHealth subsidiary" and by suing "patients who would qualify for free care and reduced rates under hospitals' 'charity care' programs." *Id.* ¶¶ 6, 7, 10.

entering such a stay in this case. First, if the stay is not entered, the object of the writ petition—obtaining a finding that Plaintiffs' claims are subject to dismissal either under Nevada Rule of Civil Procedure 12(b)(5) or on ERISA preemption grounds, and thereby either eliminating or limiting the need for discovery significantly—risks being defeated. Second, the writ petition has a strong likelihood of success. Third, the stay does not pose any risk of irreparable harm to Plaintiffs, but there may be irreparable harm to Defendants if a stay is not granted. Finally, This Court has the inherent ability to control its docket for judicial economy and efficiency, both for itself and for the parties.

II. STATEMENT OF PERTINENT FACTS

As this Court is aware, this case presents a convoluted procedural history. Plaintiff Fremont Emergency Services filed this action in state court on April 15, 2019, alleging claims for Breach of Implied-in-Fact Contract, Tortious Breach of the Implied Covenant of Good Faith and Fair Dealing, Alternative Claim for Unjust Enrichment, Violation of NRS 686A.020 and 686A.310, Violations of Nevada Prompt Pay Statutes & Regulations, Consumer Fraud & Deceptive Trade Practices Acts, and Declaratory Judgment. United thereafter removed to federal court on May 14, 2019 on the basis that all of Plaintiff's claims are completely preempted by the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001, *et. seq.*, and therefore raise federal questions under 28 U.S.C. § 1331.

Plaintiff filed a motion to remand the action on May 24, 2019. Thereafter, on June 5, 2019, Plaintiff filed a motion to stay the proceedings pending the resolution of the motion to remand, arguing that "the Court has the inherent ability to control its docket for judicial economy and efficiency, both for itself and the parties." *See* Plaintiff's Motion to Stay, **Exhibit 2**, at 7:19–20. The Honorable Cam Ferenbach denied Plaintiff's Motion to Stay in federal court, noting that he was "not convinced that Plaintiff will be successful in having the case remanded to state court." *See* Order Denying Plaintiff's Motion to Stay, **Exhibit 3**, at 7:3.

While Plaintiff's Motion to Remand was pending, Plaintiff filed a First Amended Complaint, incorporating additional Plaintiffs (now parties to this action) and thirty (30) additional pages of allegations, in support of a new claim for relief alleging a violation of NRS

207.350 *et seq.*, the Nevada civil RICO statute. Shortly after filing their First Amended Complaint, the action was remanded to state court. It nevertheless remains Defendants' position that Plaintiffs' sole remedy for the alleged underpayment of claims is to bring a statutory ERISA claim against Defendants under ERISA § 502(a)(1)(B).

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. *See id.* (citing NRAP 8(a)).

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.* (citing NRAP 8(c)). While the Nevada Supreme 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, the 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).

Courts commonly enter such stays where, as here, (i) engaging in discovery prior to resolution of a dispositive motion or appeal would be wasteful of court and party resources, and (ii) the opposing party will not be prejudiced by a stay. *See Tradebay, LLC v. eBay, Inc.*, 278 F.R.D. 597, 601 (D. Nev. 2011) (a stay of discovery furthers the goal of efficiency for the court and the litigants where a plaintiff will be unable to state a claim for relief); *Barnes v. Cty. of*

Monroe, 2013 WL 5298574, at *1 (W.D.N.Y. Sept. 19, 2013) (staying discovery in part because "[i]n light of the pending dispositive motions, the need for further discovery is not inevitable"); *Buffalo Emergency Assocs., LLP v. Unitedhealth Grp., Inc.*, No. 19-CV-1148S, 2020 WL 3259252, at *1 (W.D.N.Y. June 16, 2020) (staying all discovery in a virtually identical case brought by Plaintiffs' affiliates during the pendency of United's motion to dismiss).[2] "A stay may also be granted in order to avoid inconsistent results . . . or avoid needless waste of judicial resources." *PersonalWeb Techs., LLC v. Apple Inc.*, 69 F. Supp. 3d 1022, 1027 (N.D. Cal. 2014).

B. A stay entered pending resolution of United's writ petition should be entered because each of the four factors weigh in favor of such a stay.

A stay of this case pending resolution of United's writ petition is warranted. As explained below, each of the factors weighs heavily in favor of such a stay.

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

In evaluating this first factor, the 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 Petition for Writ of Mandamus or, alternatively, Prohibition, is to determine whether Plaintiffs' claims are subject to conflict and/or complete preemption under ERISA. The Petition challenges each of Plaintiffs' claims and provides multiple, meritorious bases for finding that Plaintiffs' claims are subject to both complete and conflict preemption under ERISA, and subject to dismissal for failure to state a claim. If the Nevada Supreme Court grants the relief requested by United—a finding that Plaintiffs' claims are subject to dismissal either under Nevada Rule of Civil Procedure 12(b)(5) or on ERISA preemption grounds—in whole or in part, there may be no need for discovery at all. Even if the Complaint is not dismissed in its entirety, the Court's ruling may significantly reduce or alter the scope of discovery. *See Weisman v. Mediq, Inc.*, 1995 WL 273678, at *2 (E.D. Pa. May 3, 1995) ("By imposing a stay while ruling on the motion, when discovery proceeds the parties will have full

[2] Attached hereto as **Exhibit 4**.

knowledge as to which claims are viable and, correspondingly, as to what discovery need occur."). If, for example, the Nevada Supreme Court finds Plaintiffs' claims preempted, and Plaintiffs re-plead them as ERISA claims for benefits, they would be entitled only to the strictly limited discovery that applies to such claims. *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, the object of the writ petition itself would be defeated. Discovery is just now beginning and, if permitted to proceed on all of Plaintiffs' claims, is likely to be extraordinarily expensive. As it currently stands, Plaintiffs are asserting 15,210 claims for additional reimbursement for medical services.[3] In a burden declaration attached to their responses to Plaintiffs' requests for production, Defendants demonstrated that it would take, on average, 2 hours just to pull the administrative record for a single claim.[4] With 15,210 claims at issue, this means that it would take 30,420 hours just to pull the administrative records for each claim.[5] Based on the foregoing, it would take a team of four people working full-time on nothing other than gathering documents for this case over 3 years to pull the applicable administrative records.[6]

In addition to these administrative records, Plaintiffs are seeking to prove their RICO claim by requesting the production of internal and external communications from United with no defined search terms, no named custodians, and no clear parameters, which would likely result in the return of a substantial amount of emails.[7]

As far as United's own discovery, to investigate the merits of Plaintiffs' state law claims United is seeking, for example, all of the clinical records for each claim at issue, inclusive of documents on costs incurred for each treatment, and agreements with hospitals and providers for

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[3] **Exhibit 5**, Dec. of Sandra Way at 2:10-12.
[4] *Id.* at 6:3-11.
[5] *Id.*
[6] *Id.*
[7] In response to these requests, United has moved for a Protective Order, and for the entry of an email protocol to govern these searches of electronic communications.

services provided. Additionally, Plaintiffs' RICO claim, which comprises approximately thirty (30) pages of their forty-seven (47) page First Amended Complaint, will require significant probing of Plaintiffs' allegations of racketeering.

Absent a stay, significant time and expense will be incurred by all parties on potentially needless discovery with amorphous boundaries. If the Nevada Supreme Court agrees either that Plaintiffs have failed to state a claim, or that their claims are ERISA-preempted, the need for discovery would be either ended completely or curtailed significantly. As noted above, if, for example, the Nevada Supreme Court finds Plaintiffs' claims preempted, and Plaintiffs re-plead them as ERISA claims for benefits, the only discovery that is permitted in ERISA "claims for benefits" cases is (1) identification of the at-issue plans, members, and claims; (2) any assignment forms that Plaintiffs allege they received from relevant plan participants that are relevant to the at-issue claims, and (3) the controlling administrative records, which would include the governing plan documents. *Ehrensaft*, 120 F. Supp. 2d at 1261–62 (In an ERISA case, evidence should be limited to administrative record). Discovery outside of these materials is not "relevant to any party's claim or defense and proportional to the needs," Fed. R. Civ. P. 26(b), of an ERISA "claims for benefits" case. Moreover, Plaintiffs must have fully exhausted any claims they wish to pursue. *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, a plaintiff must exhaust administrative remedies under the relevant benefit plan.) The scope of discovery would thus be markedly broader if permitted to include all of Plaintiffs' claims for relief.

The first factor soundly weighs in favor of granting the stay requested herein.

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

The issue of whether ERISA preempts state law has been previously considered to be of such importance that the Nevada Supreme Court will consider 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). The Nevada Supreme 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 issue is currently being litigated around the country.[8]

United's writ petition, which takes up this issue, is meritorious and likely to prevail. Here, the health plans implicated by Plaintiffs' claims contain payment terms which specify the amount of reimbursement owed to out-of-network providers like Plaintiffs when those providers treat a plan member. Allowing Plaintiffs' state law claims to proceed would directly undermine the congressional intent behind ERISA—creating a uniform national administrative scheme that guides the processing of claims and disbursement of benefits for employee health plans. By bringing state law claims that seek to force the health plans to pay out-of-network providers at a higher rate than their plan terms require, the weight of authority provides that Plaintiffs are seeking a remedy that directly conflicts with ERISA's requirements. The Ninth Circuit, as well as Nevada federal courts, have repeatedly found that plaintiffs cannot plead around ERISA preemption by asserting an implied-in-fact contract claim, which is precisely what Plaintiffs have sought to do here. *See Aetna Life Ins. Co. v. Bayona*, 223 F.3d 1030, 1034 (9th Cir. 2000) ("We have held that ERISA preempts common law theories of breach of contract implied in fact, promissory estoppel, estoppel by conduct, fraud and deceit and breach of contract.") (internal citation omitted); *Parlanti v. MGM Mirage*, 2006 WL 8442532, at *6 (D. Nev. Feb. 15, 2006)

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[8] The present lawsuit appears to be part of a coordinated strategy by TeamHealth-affiliated providers to file virtually identical cases in various jurisdictions around the country. *See e.g., Emergency Care Services of Pennsylvania, P.C. et al. v. UnitedHealth Group, Inc., et al.*, No. 19-01195, ECF No. 1 (M.D.P.A. filed July 11, 2019); *Emergency Group of Arizona Prof'l Corp. v. United Healthcare Inc.*, No. 19-04687, ECF No. 18 (D. Az. filed Aug. 9, 2019) (dismissed voluntarily by the provider-plaintiffs without prejudice); *Buffalo Emergency Associates, LLP, et al. v. UnitedHealth Group, Inc., et al.*, No. 19-01148, ECF No. 1 (W.D.N.Y. filed Aug. 26, 2019) (same); *Florida Emergency Physicians et al. v. United Healthcare of Florida, Inc.*, No. 20-60757, ECF No. 27 (S.D.Fl. filed Mar. 3 2020).

(same).

Further, although this Court disagreed with Defendants' position, federal courts, including the Ninth Circuit, have agreed that once a medical provider accepts an assignment of benefits from a plan member and asserts a claim for reimbursement to the insurer, that provider stands in the shoes of the plan member and its state law claims are just as susceptible to preemption under ERISA as a plan member's state law claims.[9] In fact, the Ninth Circuit has repeatedly stated that ERISA's preemption clause is "one of the broadest preemption clauses ever enacted by Congress." *Evans v. Safeco Life Ins. Co.*, 916 F.2d 1437, 1439 (9th Cir. 1990). The Nevada Supreme Court has never addressed this issue.

In addition, it remains Defendants' position that Plaintiffs have also failed to state claims under NRCP 12(b)(5). In particular, Plaintiffs have failed to state a claim for:

- implied-in-fact contract (*Smith v. Recrion Corp.*, 91 Nev. 666, 669, 541 P.2d 663, 665 (1975) ("[p]ast consideration is the legal equivalent to no consideration" and that services cannot be subject to an implied-in-fact contract unless the contract was created "before" the services were provided."));
- tortious breach of the implied covenant of good faith and fair dealing (*Aluevich v. Harrah's*, 99 Nev. 215, 216, 660 P.2d 986, 986 (1983) (holding that claim for tortious breach of the implied covenant of good faith and fair dealing does not extend to commercial leases between two sophisticated parties));
- unjust enrichment (*Peacock Med. Lab, LLC v. UnitedHealth Grp., Inc.*, 2015 WL 2198470, at *5 (S.D. Fla. May 11, 2015) ("a healthcare provider who provides services to an insured does not benefit the insurer."));
- violation of NRS 686A.020 and 686A.310 (*Gunny v. Allstate Ins. Co.*, 108 Nev. 344, 346, 830 P.2d 1335, 1336 (1992) (plaintiffs have no private right of action as a third-party claimant under Nevada Unfair Insurance Practices Act));
- violations of Nevada's Consumer Fraud and Deceptive Trade Practices Acts (*Rebel Oil Co. v. Atl. Richfield Co.*, 828 F. Supp. 794, 797 (D. Nev. 1991) (business competitors are not "victims" within the meaning of NRS 41.600 and thus lack standing to sue under the Act)); and
- violation of the Nevada civil RICO statute (*see, e.g., Allum v. Valley Bank of*

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[9] *See e.g., Melamed v. Blue Cross of California,* 557 F. App'x 659, 661 (9th Cir. 2014) ("Here, [out-of-network provider's] breach of implied contract claim is completely preempted because through that claim, [the out-of-network provider] seeks reimbursement for benefits that exist 'only because of [the insurer's] administration of ERISA-regulated benefit plans.'") (internal citation omitted); *In Re Managed Care Litig.*, 298 F. Supp. 2d 1259, 1292 (S.D. Fla. 2003) (out-of-network providers' implied-in-fact contract claim was preempted).

Nevada, 109 Nev. 280, 286, 849 P.2d 297, 301 (1993) (affirming the district court's granting of a motion to dismiss a Nevada RICO claim because the plaintiff had failed to plead proximate cause, as Plaintiffs have done here); *Zavala v. Wal Mart Stores Inc.*, 691 F.3d 527, 540–41 (3d Cir. 2012) (affirming dismissal of RICO claim predicated on involuntary servitude and noting that "[m]odern day examples of involuntary servitude have been limited to labor camps, isolated religious sects, or forced confinement.")).

For these reasons, United's writ petition is meritorious, and is likely to prevail. This factor thus weighs in favor of granting a stay.

3. 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 Defendants' writ petition would upend the entire scope of permitted discovery and likely end this case outright. A brief stay of discovery is warranted under the circumstances here.

Considering the first option, Plaintiffs will not be prejudiced if a stay of all discovery is granted. Given the time it generally takes for the Nevada Supreme Court to decide whether to grant or deny review of a writ petition, there would likely be only a relatively brief stay of discovery pending review of Defendants' writ petition. 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.

Further, incurring unnecessary legal expenses, as detailed in § III.B.1, above, can constitute irreparable harm in the context of a stay pending appeal of an interlocutory order. *Hunt v. Check Recovery Systems, Inc.*, 2008 WL 2468473 at *3-4 (N.D. Cal. June 17, 2008); *Rajagopalan v. Noteworld, LLC*, 2012 WL 2115482 at *2-3 (W.D. Wash. June 11, 2012). Given the high potential for wasted resources and unnecessary expense associated with continuing discovery, these factors weigh in favor of a stay.

III.

RELIEF REQUESTED

Each factor in the test outlined by the Nevada Supreme Court in *Hansen* favors a stay. Based on the foregoing, this case, United respectfully requests that this matter be stayed pending resolution of United's writ petition.

Dated this 25th day of August, 2020.

/s/ Colby L. Balkenbush

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Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of August, 2020, a true and correct copy of the foregoing **DEFENDANTS' MOTION TO STAY PROCEEDINGS PENDING RESOLUTION OF WRIT PETITION ON ORDER SHORTENING TIME** was electronically filed and served on counsel through the Court's electronic service system pursuant to Administrative Order 14-2 and N.E.F.C.R. 9, via the electronic mail addresses noted below, unless service by another method is stated or noted:

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EXHIBIT 1

August 25, 2020 Writ Petition to Nevada Supreme Court. Exhibit omitted for brevitity

EXHIBIT 1

EXHIBIT 2

EXHIBIT 2

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Attorneys for Plaintiff Fremont Emergency Services (Mandavia), Ltd.

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

FREMONT EMERGENCY SERVICES (MANDAVIA), LTD., a Nevada professional corporation, Plaintiff, vs. UNITED HEALTHCARE INSURANCE COMPANY, a Connecticut corporation; UNITED HEALTH CARE SERVICES INC., dba UNITEDHEALTHCARE, a Minnesota corporation; UMR, INC., dba UNITED MEDICAL RESOURCES, a Delaware corporation; OXFORD HEALTH PLANS, INC., a Delaware corporation; SIERRA HEALTH AND LIFE INSURANCE COMPANY, INC., a Nevada corporation; SIERRA HEALTH-CARE OPTIONS, INC., a Nevada corporation; HEALTH PLAN OF NEVADA, INC., a Nevada corporation; DOES 1-10; ROE ENTITIES 11-20, Defendants.	Case No.: 2:19-cv-00832-JAD-VCF **MOTION TO STAY PROCEEDINGS PENDING RESOLUTION OF MOTION TO REMAND** **Request for Order Shortening Time Pursuant to LR IA 6-1(d)**

Plaintiff Fremont Emergency Services (Mandavia), Ltd. ("Fremont") respectfully requests that this Court to stay these proceedings until it has had an opportunity to determine whether it has subject matter jurisdiction. As explained in Fremont's motion to remand this action to the Eighth Judicial District Court for Clark County, Nevada, Fremont sets forth the reasons why Defendants' removal based on ERISA preemption was improper and therefore why this Court does not have subject matter jurisdiction. ECF No. 5. Until this Court determines if subject

matter jurisdiction exists, it is within the Court's discretion to stay all other matters. Accordingly, pursuant to LR IA 6-1(d), Fremont requests the Court consider this Motion to Stay on order shortening time. A statement of good cause supporting Fremont's request for order shortening time is contained in the Declaration of Kristen Gallagher submitted herewith. Exhibit 1, Gallagher Declaration at ¶¶ 3-5. Specifically, Fremont respectfully requests that the Court set an expedited briefing schedule on the Motion to Remand and stay all other proceedings until it has had an opportunity to adjudicate the Motion to Remand. Fremont's response to Defendants' motion to dismiss is June 18, 2019.

This Motion is based upon the record in this matter, the points and authorities that follow, the pleadings and papers on file in this action, and any argument of counsel entertained by the Court.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION AND PROCEDURAL POSTURE.

Plaintiff Fremont Emergency Services (Mandavia), Ltd. ("Fremont") asserted claims against defendants United HealthCare Insurance Company ("UHCIC"), United HealthCare Services, Inc. dba UnitedHealthcare ("UHC Services"), UMR, Inc. dba United Medical Resources ("UMR"), Oxford Health Plans, Inc. ("Oxford" and with UHCIC, UHC Services and UMR, the "UH Parties"), Sierra Health and Life Insurance Company, Inc. ("Sierra"), Sierra Health-Care Options, Inc. ("Sierra Options") and Health Plan of Nevada, Inc. ("HPN" and, collectively with the UH Parties, "United HealthCare") based entirely on United HealthCare's statutory and common law duties. ECF No. 1-1, Complaint. Nothing in Fremont's Complaint concerns United HealthCare's obligations under any employee benefit plan that it provides to its members. *Id.* Prior to United Health Care's removal to this Court, counsel for Fremont explained to United Healthcare's counsel that no obligation under any employee benefit plan was at issue under the Complaint.

Nevertheless, United HealthCare removed this action on the basis of federal question jurisdiction, specifically asserting that Fremont's claims are completely preempted by Section 502(a) (29 U.S.C. § 1132(a))) of the Employee Retirement Income Security Act of 1974, as

amended ("ERISA") claiming the subject claims relate to an employee benefit plan. (ECF No. 1). Thereafter, United HealthCare filed a motion to dismiss invoking pursuant to Fed. R. Civ. P. 12(b)(6), arguing that Fremont's statutory and common law claims are completely preempted by ERISA and subject to dismissal. ECF No. 4.

Fremont filed a Motion to Remand disputing ERISA preemption exists because this action involves disputes concerning the ***rate of payment*** rather than the ***right to payment***. ECF No. 5. As set forth in the Motion to Remand, disputes about the rate of payment are not governed by ERISA and are not subject to complete preemption under *Aetna Health, Inc. v. Davila*, 542 U.S. 200 (2004) and its progeny. Pertinent to this Motion and the Motion to Remand, United HealthCare paid all of the claims at issue in the litigation, making the question of coverage under the respective plans a nonissue. The ***only*** issue here is the amount of payment that was tendered to Fremont and whether that rate of payment is adequate under Nevada statutes and common law. As is detailed below, Ninth Circuit precedent dictates that disputes concerning the ***rate of payment*** rather than the ***right to payment*** are not governed by ERISA and are not subject to complete preemption under *Davila* and its progeny. Because the Court does not have subject matter jurisdiction over this dispute, Fremont moved for remand. *Id.* Given the existence of a threshold issue of concerning subject matter jurisdiction, Fremont respectfully requests that the Court stay all proceedings, including the briefing schedule on United HealthCare's motion to dismiss, until the Court has had an opportunity to adjudicate the Motion to Remand.

II. STATEMENT OF RELEVANT FACTS.

Fremont is a professional practice group of emergency medicine physicians and healthcare providers that provides emergency medicine services to patients presenting to the emergency departments at eight hospitals and other facilities in Clark County, Nevada staffed by Fremont. *See* Notice of Removal, Ex. 1 (ECF No. 1-1) (hereinafter "Compl.") at ¶ 14. Fremont and the hospitals whose emergency departments it staffs are obligated by both federal and Nevada law to examine any individual visiting the emergency department and to provide stabilizing treatment to any such individual with an emergency medical condition, regardless of the individual's insurance coverage or ability to pay. *Id.* at ¶ 15; *see also* Emergency Medical Treatment and Active Labor

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Act (EMTALA), 42 U.S.C. § 1395dd; NRS 439B.410. Fremont fulfills this obligation for the hospitals which its staffs. ECF No. 1-1, Compl. at ¶ 15. In this role, Fremont's physicians provide emergency medicine services to all patients, regardless of insurance coverage or ability to pay, including to patients with insurance coverage issued, administered and/or underwritten by United HealthCare. *Id.*

United HealthCare is responsible for administering and/or paying for certain emergency medical services provided by Fremont which are at issue in the litigation. *Id.* at ¶¶ 3-9. United HealthCare provides, either directly or through arrangements with providers such as hospitals and Fremont, healthcare benefits to its members. *Id.* at ¶ 16. There is no written agreement between United HealthCare and Fremont for the healthcare claims at issue in this litigation; Fremont is therefore designated as "non-participating" or "out-of-network" for all of the claims at issue in this litigation. *Id.* at ¶ 17. Notwithstanding the lack of a written agreement, an implied-in-fact agreement exists between the parties. *Id.*

Despite not participating in United HealthCare's "provider network" for the period in dispute, Fremont has continued to provide emergency medicine treatment, as required by law, to patients covered by United HealthCare's plans (the "Members") who seek care at the emergency departments where they provide coverage. *Id.* at ¶ 22. In emergency situations, patients are likely to go to the nearest hospital for care, particularly if they are transported by ambulance. *Id.* at ¶ 23. Patients facing an emergency situation are unlikely to have the luxury of determining which hospitals and physicians are in-network under their health plan. *Id.* United HealthCare is obligated to reimburse Fremont at the usual and customary rate for emergency services Fremont provided to its Patients, or alternatively for the reasonable value of the services provided. *Id.*

From July 1, 2017 through the present, Fremont has provided emergency medicine services to United HealthCare's members; however, commencing July 1, 2017, the UH Parties arbitrarily began drastically reducing the rates at which they paid Fremont for emergency services for some claims, but not others. *Id.* at ¶¶ 19-20. The UH Parties paid some of the claims for emergency services rendered by Fremont at far below the usual and customary rates, yet paid other substantially identical claims submitted by Fremont at higher rates. *Id.* at ¶ 20.

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Relevant to this Motion, for each of the healthcare claims at issue in this litigation, United HealthCare has already determined that each claim is payable; however, it paid the claim at an artificially reduced rate. *Id.* at ¶ 27. Thus, the claims at issue involve no questions of whether the claim should be covered under a health plan or whether it is payable; rather, the questions at issue in this case involve only a determination of whether United HealthCare paid the claim at the required usual and customary rate or, alternatively, for the reasonable value of services rendered.

On April 15, 2019, Fremont filed its Complaint against United HealthCare for breach of implied in fact contract, tortious breach of the implied covenant of good faith and fair dealing, alternative claim for unjust enrichment, violation of NRS 686A.020 and 686A.310, violations of Nevada Prompt Pay statutes and regulations, Consumer Fraud & Deceptive Trade Practices Acts and for declaratory judgment. *See* Complaint, Notice of Removal (ECF No. 1) at Exhibit 1. On May 14, 2019, United HealthCare filed its Notice of Removal with this Court, contending that the state law claims asserted are completely preempted by ERISA because the subject claims relate to an employee benefit plan. (ECF No. 1). As detailed herein, the claims arise not from an employee benefit plan, but United HealthCare's statutory and common law duty to pay for its Members' emergency services at usual and customary rates or, alternatively, for the reasonable value of services rendered. Binding precedent in the Ninth Circuit makes clear that cases, such as this, which concern the rate of payment only, do not relate to employee benefit plans, are not preempted by ERISA and, therefore, do no give rise to federal question jurisdiction. *Marin Gen. Hosp. v. Modesto & Empire Traction Co.*, 581 F.3d 941, 985 (9th Cir. 2009); *see also California Spine & Neurosurgery Inst.*, 2019 WL 1974901, at *3 ("Under Ninth Circuit law, ERISA does not preempt claims by a third party [medical provider] who sues an ERISA plan not as an assignee of a purported ERISA beneficiary, but as an independent entity claiming damages.") (citing *Catholic Healthcare West-Bay Area v. Seafarers Health & Benefits Plan*, 321 Fed. App'x 563, 564 (9th Cir. 2008)). Although United HealthCare has made and lost these same arguments before

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another federal court, it again pursued its frivolous[1] removal and motion to dismiss for, what appears to be, no other purpose than to delay and unnecessarily expand these proceedings.

II. ARGUMENT.

A. The Court Should Stay the Proceedings Until it Determines Whether Subject Matter Jurisdiction Exists.

"[A] federal district court is obligated to ensure it has jurisdiction over an action, and once it determines it lacks jurisdiction, it has no further power to act." *Deleo v. Rudin*, 328 F. Supp. 2d 1106, 1115 (D. Nev. 2004) (citing *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94 (1998) ("Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause."). Even though not raised by the parties, lack of jurisdiction may be considered by the court, at any stage of the proceedings. *Libhart v. Santa Monica Dairy Co.*, 592 F.2d 1062, 1064 (9th Cir. 1979).

It follows that "[a] motion to remand should be determined before deciding a motion to dismiss" because a federal court that lacks subject matter jurisdiction cannot rule on other pending motions. *In re Bear River Drainage District*, 267 F.2d 849, 851 (10th Cir. 1959) (declining to consider pending motion to dismiss upon remand); *Illinois v. Sadder-Bey*, No. 17-CV-4999, 2017 WL 2987159, at *4 (N.D. Ill. July 13, 2017) (a federal court lacking subject matter jurisdiction over a removed case must remand it to the state court from whence it came, and cannot rule on other pending motions) (citing *Nichols v. Se. Health Plan of Alabama, Inc.*, CIV.A. 93-0481-P-C, 1993 WL 726249 (S.D. Ala. 1993)); *Macro v. Indep. Health Ass'n, Inc.*, 180 F. Supp. 2d 427, 431 (W.D.N.Y. 2001) ("[I]f removal [based on ERISA preemption] was inappropriate, the court must

[1] The frivolous nature of United HealthCare's removal of this action is explained in the Motion to Remand (ECF No. 5 at 5 n.1). By way of example, prior to removal, Fremont made it clear that ERISA does not apply by highlighting, "the claims at issue concern a dispute over the amount paid, not whether the claim was payable because defendants already determined the subject claims were payable. As a result, there is no basis to remove the action to federal court under federal question jurisdiction." *Id.* Further, other federal district courts have rejected UHCIC's ERISA preemption arguments.

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remand for lack of subject matter jurisdiction, notwithstanding the pendency of the other motions.").

In *Harden v. Field Memorial Community Hosp.*, 516 F. Supp. 2d 600 (S.D. Miss. 2007), aff'd, 265 Fed. Appx. 405 (5th Cir. 2008), the district court refused to adjudicate a motion to dismiss before deciding the issue of subject matter jurisdiction raised in a motion to remand. Similarly, in *Hammer v. Amazon.com*, 392 F. Supp. 2d 423 (E.D.N.Y. 2005), the court first determined whether it had subject-matter jurisdiction before ruling on a Rule 12(b)(6) motion. *See also Akhlaghi v. Berry*, 294 F. Supp. 2d 1238 (D. Kan. 2003); *Hearns Concrete Const. Co. v. City of Ypsilanti*, 241 F. Supp. 2d 803 (E.D. Mich. 2003); *Ren-Dan Farms, Inc. v. Monsanto Co.*, 952 F. Supp. 370 (W.D. La. 1997) (courts must determine subject-matter jurisdiction before personal jurisdiction or venue); *Nichols v. Southeast Health Plan of Alabama, Inc.*, 859 F. Supp. 553 (S.D. Ala. 1993) (federal court lacking subject-matter jurisdiction over a removed case cannot rule on other pending motions) (citing § 3739.1 Remand Subject-Matter Jurisdiction Grounds, 14C Fed. Prac. & Proc. Juris. § 3739.1 (rev. 4th ed.)); *Univ. of S. Alabama v. Am. Tobacco Co.*, 168 F.3d 405, 411 (11th Cir. 1999) ("federal court must remand for lack of subject matter jurisdiction notwithstanding the presence of other motions pending before the court.").

Here, Fremont challenged United HealthCare's removal based on ERISA preemption grounds. A determination of whether the Court has subject matter jurisdiction must be decided before United HealthCare's motion to dismiss. Because the Court has the inherent ability to control its docket for judicial economy and efficiency, both for itself and the parties, and because the Court is required to first determine whether it has subject matter jurisdiction over the case, Fremont requests a stay of the proceedings, including the remaining briefing schedule on United HealthCare's motion to dismiss, until the Court can make that determination. To allow otherwise would require completion of the briefing schedule on United HealthCare's Rule 12(b)(6) dispositive motion that seeks dismissal of Fremont's entire Complaint based on complete and conflict ERISA preemption. Motion to Dismiss (ECF No. 4) at 3:2-7.

...

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As set forth in full in Fremont's Motion to Remand, "removal on ERISA grounds is only appropriate if ERISA completely preempts a state law claim."[2] *California Spine & Neurosurgery Inst. v. Boston Sci. Corp.*, No. 18-CV-07610-LHK, 2019 WL 1974901, at *3 (N.D. Cal. May 3, 2019) (citing *Marin Gen. Hosp. v. Modesto & Empire Traction Co.*, 581 F.3d 941, 944-45 (9th Cir. 2009)). In determining whether a claim for payment falls within the purview of ERISA's civil enforcement provision, the Ninth Circuit distinguishes between claims that implicate the *right* of payment, which are preempted by ERISA, and claims that implicate the *rate* of payment, which are not preempted. *Blue Cross of California v. Anesthesia Care Assocs. Med. Grp., Inc.*, 187 F.3d 1045, 1051 (9th Cir. 1999) (noting that ERISA did not preempt the state law claims because "[t]he dispute here is not over the right to payment, which might be said to depend on the patients' assignments to the Providers, but the amount, or level, of payment, which depends on the terms of the provider agreements."); *Windisch v. Hometown Health Plan, Inc.*, No. 3:08-cv-00664-RJC-RAM, 2010 WL 786518, at *5 (D. Nev. Mar. 5, 2010) ("Plaintiff has affirmatively taken the position that he is only challenging Defendants' adjudication and payment of claims that have already been determined to be covered...ERISA does not preempt Plaintiff's claims because they do not require the Court to interpret ERISA plans."). Federal courts in other states likewise have determined that ERISA does not completely preempt claims based on statutory or other common law rate-payment obligations. *E.g., Coast Plaza Doctors Hosp. v. Ark. Blue Cross & Blue Shield*, No. CV 10-6927 DDP (JEMx), 2011 WL 3756052, at *4 (C.D. Cal. Aug. 25, 2011); *Med. & Chirurgical Faculty of Md. v. Aetna U.S. Healthcare, Inc.*, 221 F. Supp. 2d 618, 619 & n.1 (D. Md. 2002); *Emergency Servs. of Zephyrhills, P.A. v. Coventry Health Care of Fla., Inc.*, -- F. Supp. 3d ----, Case No. 16-25193, 2017 WL 6548019, at *5 (S.D. Fla. Apr. 5, 2017) (remanding out-of-network provider's claims for underpayment, breach of implied in fact contract and unjust enrichment where plaintiff alleged violation of Florida rate payment statute); *Lone Star*

[2] Ordinarily, federal preemption is merely a defense to the merits of a claim and does not provide federal question jurisdiction or a basis to remove an action to federal court. *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987). Complete preemption, if it exists, is a "narrow exception" to the well-pleaded complaint rule that "converts" state-law claims into federal law ones, and thereby allows removal to federal court. *Aetna Health, Inc. v. Davila*, 542 U.S. 200, 209 (2004).

OB/GYN Assocs., 579 F.3d at 530 ("A claim that implicates the rate of payment as set out in the Provider Agreement, rather than the right to payment under the terms of the benefit plan, does not run afoul of *Davila* and is not preempted by ERISA."). The case law is clear on this issue, and United HealthCare is well-informed of the outcome given it has tried to remove on the same grounds, but the arguments rejected.[3]

United HealthCare also argues that conflict preemption provides for an alternate basis for dismissal. Notably, however, ERISA conflict preemption does not provide a basis for removal and would require Fremont to address arguments that presupposes the Court has subject matter jurisdiction.[4] A defense of conflict preemption under ERISA § 514(a) does not provide a basis for federal question jurisdiction under either § 1331(a) or § 1441(a). The Supreme Court has explained that:

> federal law becomes relevant only by way of a defense to an obligation created entirely by state law, and then only if [the Hospital] has made out a valid claim for relief under state law. The well-pleaded complaint rule was framed to deal with precisely this situation.
>
> ... [S]ince 1887 it has been settled law that a case may not be removed to federal court on the basis of a federal defense including the defense of preemption....

Marin Gen. Hosp. v. Modesto & Empire Traction Co., 581 F.3d 941, 949 (9th Cir. 2009) (citing *Franchise Tax Bd. of Cal. v. Constr. Laborers Vacation Trust for S. Cal.*, 463 U.S. 1, 13 14, 103 (1983)); *see also Met. Life Ins. Co. v. Taylor*, 481 U.S. 58, 64 (1987) ("ERISA preemption [under § 514], without more, does not convert a state claim into an action arising under federal law.").

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[3] *See e.g. Gulf-To-Bay Anesthesiology Associates, LLC v. UnitedHealthcare of Florida, Inc.*, No. 8:18-cv-00233-EAK-AAS, 2018 WL 3640405, at *3 (M.D. Fla. July 20, 2018) ("The Court finds unavailing UHIC's attempt to recast through an ERISA lens [plaintiff's] entitlement to full payment."); *Low-T Physicians Service, P.L.L.C. v. United HealthCare of Texas, Inc., et al.*, No. 4:18-cv-00938-A, 2019 WL 935800, at *2 (N.D. Tex. Feb. 26, 2019) ("the question here is not as to the right to ERISA benefits under a particular plan but on the amount of payment due under certain provider agreements. Such claims are not preempted by ERISA.").

[4] But "if the doctrine of complete preemption does not apply, even if the defendant has a defense of 'conflict preemption' within the meaning of [§ 514(a)] because the plaintiff's claims 'relate to' an ERISA plan, the district court[is] without subject matter jurisdiction." *Marin Gen. Hosp. v. Modesto & Empire Traction Co.*, 581 F.3d 941, 945 (9th Cir. 2009).

While United HealthCare would be free to assert a defense of conflict preemption in state court under § 514(a), it cannot rely on that defense to establish federal question jurisdiction. As a result, it is more efficient for the Court to rule on the issue of subject matter jurisdiction first. Further, In the event the Court remands the action, the Court and parties have not unnecessarily expended time and resources to briefing issues that the Court cannot consider. Conversely, in the event the Court denies the Motion to Remand, the stay would be lifted and Fremont would respond to the United HealthCare's motion to dismiss.. Fremont respectfully requests that the Court first determine whether United HealthCare properly removed the case before United HealthCare can proceed with such arguments.

B. Legal Standard for Exercise of Inherent Power to Stay Proceedings.

A district court has the inherent power to stay its proceedings. *Landis v. North American Co.*, 299 U.S. 248, 254 (1936); *see also Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1109 (9th Cir. 2005). This power to stay is "incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Id.*; *see also Gold v. Johns Manville Sales Corp.*, 723 F.2d 1068, 1077 (3d Cir.1983) (holding that the power to stay proceedings comes from the power of every court to manage the cases on its docket and to ensure a fair and efficient adjudication of the matter at hand). This is best accomplished by the "exercise of judgment, which must weigh competing interests and maintain an even balance." *Landis*, 299 U.S. at 254-55. In determining whether to stay a case, courts must weigh "competing interests which will be affected by the granting or refusal to grant a stay[.]" *Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1110 (9th Cir. 2005) (citing *CMAX, Inc. v. Hall*, 300 F.2d 265, 268 (9th Cir. 1962)). The movant bears the burden of establishing the need to stay the case. *Clinton v. Jones*, 520 U.S. 681, 708 (1997).

Motions to stay are often considered in the context of other pending proceedings and, in those cases, the competing interests courts consider (known as the *Landis* factors) include: "(1) the possible damage which may result from the granting of a stay; (2) the hardship or inequity which a party may suffer in being required to go forward; and (3) and the orderly course of justice measured in terms of the simplifying or complicating of issues, proof, and questions of law which

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could be expected to result from a stay." *Thomas v. Smith-Palluck Associates Corp.*, No. 2:17-cv-02001-MMD-CWH, 2019 WL 1586750, at *1 (D. Nev. Apr. 12, 2019); *Singer v. Las Vegas Athletic Clubs*, No. 2:17-cv-01115-GMN-VCF, 2019 WL 1338384, at *5 (D. Nev. Mar. 25, 2019) (citing *CMAX*, 300 F.2d at 268). If there is a "fair possibility" that a stay could impact the non-moving party, then the moving party has to demonstrate a clear case of hardship or inequity if granting that stay would prejudice the non-moving party. *Id.* at 255. These factors weigh in favor of a targeted stay until the Court determines if it has subject matter jurisdiction.

As to the first factor, there will be no damage to United HealthCare if the Court first determines Fremont's Motion to Remand. Once that determination has been made, if the case is remanded then United HealthCare can proceed with its defenses there. Importantly, the main basis for its motion to dismiss – ERISA complete preemption – will not exist if the Court remands the action. Second, if Fremont is required to go forward with responding to the motion to dismiss, Fremont it presupposes that the Court has jurisdiction under ERISA Section 502(a). This is the proverbial putting the cart before horse. The Court is required to determine subject matter jurisdiction first, not assuming there is, as United HealthCare would prefer. Third, deciding the Motion to Remand puts the threshold issue of subject matter jurisdiction before the Court first. This promotes the orderly course of justice because a stay will allow the Court the opportunity to adjudicate the Motion to Remand before deciding whether Fremont's claims should be dismissed due to ERISA complete or conflict preemption. Each of these *Landis* factors weighs in favor of a stay.

III. CONCLUSION.

Fremont respectfully requests that the Court stay the litigation until it has had an opportunity to adjudicate Fremont's Motion to Remand.[5] If the remand motion is granted, the Court will have determined it lacks subject matter jurisdiction over the matter and will remand the

...

[5] Fremont has inquired with United HealthCare about a stay of proceedings. United HealthCare's counsel declined to consider a stay pending resolution of Fremont's Motion to Remand or a discovery stay. Ex. 1 at ¶ 6.

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matter to the Eighth Judicial District Court, Clark County, Nevada, and the Court will not need to employ judicial resources in connection with the Rule 12(b)(6) motion.

DATED this 5th day of June, 2019.

McDONALD CARANO LLP

By: /s/ *Kristen T. Gallagher*

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of McDonald Carano LLP, and that on this 5th day of June, 2019, I caused a true and correct copy of the foregoing **MOTION TO STAY PROCEEDINGS PENDING RESOLUTION OF MOTION TO REMAND** to be served via the U.S. District Court's Notice of Electronic Filing system ("NEF") in the above-captioned case, upon the following:

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An employee of McDonald Carano LLP

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INDEX OF EXHIBITS

Description	Exhibit No.
Declaration of Kristen T. Gallagher, Esq.	1

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EXHIBIT 1

DECLARATION OF KRISTEN T. GALLAGHER, ESQ.

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Attorneys for Plaintiff Fremont Emergency Services (Mandavia), Ltd.

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

FREMONT EMERGENCY SERVICES (MANDAVIA), LTD., a Nevada professional corporation, Plaintiff, vs. UNITED HEALTHCARE INSURANCE COMPANY, a Connecticut corporation; UNITED HEALTH CARE SERVICES INC., dba UNITEDHEALTHCARE, a Minnesota corporation; UMR, INC., dba UNITED MEDICAL RESOURCES, a Delaware corporation; OXFORD HEALTH PLANS, INC., a Delaware corporation; SIERRA HEALTH AND LIFE INSURANCE COMPANY, INC., a Nevada corporation; SIERRA HEALTH-CARE OPTIONS, INC., a Nevada corporation; HEALTH PLAN OF NEVADA, INC., a Nevada corporation; DOES 1-10; ROE ENTITIES 11-20, Defendants.	Case No.: 2:19-cv-00832-JAD-VCF **DECLARATION OF KRISTEN T. GALLAGHER, ESQ. IN SUPPORT OF MOTION TO STAY PROCEEDINGS PENDING RESOLUTION OF MOTION TO REMAND** **Request for Order Shortening Time Pursuant to LR IA 6-1(d)**

I, KRISTEN T. GALLAGHER, declare as follows:

1. I am an attorney licensed to practice law in the State of Nevada and am a partner in the law firm of McDonald Carano LLP, counsel for Fremont.

2. This declaration is submitted in support of Fremont Emergency Services (Mandavia), Ltd.'s Motion to Stay Proceedings Pending Resolution of Motion to Remand on

order shortening time ("Motion to Stay") and is made of my own personal knowledge, unless otherwise indicated. I am over 18 years of age, and I am competent to testify as to same.

3. Fremont respectfully submits that good cause exists for the Court to consider its Motion to Stay pending resolution of Fremont's Motion to Remand (ECF No. 5) on shortened time because the threshold issue of subject matter jurisdiction is at issue.

4. As explained in Fremont's Motion to Remand this action to the Eighth Judicial District Court for Clark County, Nevada, Fremont sets forth the reasons why Defendants' removal based on ERISA preemption was improper and therefore why this Court does not have subject matter jurisdiction. Until this Court determines if subject matter jurisdiction exists, it is within the Court's discretion to stay all other matters, including the briefing and adjudication of Defendants' motion to dismiss (ECF No. 4) as that motion presupposes that the Court has subject matter jurisdiction. However, if the Court does not have subject matter jurisdiction over this action, the remaining briefing on the motion to dismiss and the Court's use of judicial resources in connection with that motion will be unnecessary.

5. Accordingly, Fremont respectfully requests that the Court set an expedited briefing schedule on the Motion to Remand and stay all other proceedings until it has had an opportunity to adjudicate the Motion to Remand.

6. Prior to filing the Motion to Stay Proceedings, I inquired with Defendants' counsel whether Defendants would agree to stay proceedings to allow the Motion to Remand to be adjudicated. After conferring with his client, Mr. Balkenbush indicated that Defendants declined to stay the proceedings or to stay discovery.

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

Executed: June 5, 2019. */s/ Kristen T. Gallagher*

Kristen T. Gallagher

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EXHIBIT 3

EXHIBIT 3

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

***

FREMONT EMERGENCY SERVICES (MANDAVIA), LTD., Plaintiff, vs. UNITED HEALTHCARE INSURANCE COMPANY, *et al.*, Defendants.	2:19-cv-00832-JAD-VCF **ORDER** MOTION TO STAY [ECF No. 14]

Before the Court is Plaintiff Fremont Emergency Services' Motion to Stay Proceedings Pending Resolution of Motion to Remand. (ECF No. 14). For the reasons discussed below, Plaintiff's motion is denied.

BACKGROUND

As alleged in the operative complaint, Plaintiff is "is a professional emergency medicine services group practice that staffs [] emergency departments...throughout Clark County, Nevada." (ECF No. 1-1 at 2). Defendants are entities, including several named "United Healthcare," related to paying for and administering healthcare. (*Id.* at 2-3). Plaintiff's "physicians provide emergency medicine services to all patients, regardless of insurance coverage or ability to pay, including to patients with insurance coverage issued, administered and/or underwritten by United HealthCare." (*Id* at 4). "There is no written agreement between United HealthCare and [Plaintiff] for the healthcare claims at issue in this litigation... Notwithstanding the lack of a written agreement" Plaintiff alleges that "an implied-in-fact agreement exists between the parties." (*Id.* at 5). "Beginning on July 1, 2017, [Defendants] arbitrarily began

drastically reducing the rates at which they paid [Plaintiff] for emergency services for some claims, but not others." (*Id.*). Plaintiff alleges that,

> 38. Through the parties' conduct and respective undertaking of obligations concerning emergency medicine services provided by Fremont to the UH Parties' Patients, the parties implicitly agreed, and Fremont had a reasonable expectation and understanding, that the UH Parties would reimburse Fremont for non-participating claims at rates in accordance with the standards acceptable under Nevada law and in accordance with rates the UH Parties pay for other substantially identical claims also submitted by Fremont.
>
> 39. Under Nevada common law, including the doctrine of quantum meruit, the UH Parties, by undertaking responsibility for payment to Fremont for the services rendered to United HealthCare Patients, impliedly agreed to reimburse Plaintiffs at rates, at a minimum, equivalent to the reasonable value of the professional emergency medical services provided by Fremont.
>
> 40. The UH Parties, by undertaking responsibility for payment to Fremont for the services rendered to the UH Parties' Patients, impliedly agreed to reimburse Fremont at rates, at a minimum, equivalent to the usual and customary rate or alternatively for the reasonable value of the professional emergency medical services provided by Fremont.

(*Id.* at 8). Plaintiff brings claims against Defendants for breach of implied-in-fact contract, tortious breach of the implied covenant of good faith and fair dealing, unjust enrichment, violation of NRS 686A.020 and 686A.310, violation of Nevada prompt pay statutes and regulations, consumer fraud and deceptive trade practices, and declaratory judgment. (*Id.* at 8-17).

Plaintiff filed its complaint in Nevada state court. (ECF No. 1-1). Defendants removed the case to this Court. (ECF No. 1). Defendants argue that Plaintiff's claims are preempted ERISA due to "the fact that numerous employee welfare benefit plans are implicated." (*Id.* at 3). Plaintiff has filed a motion to remand the case to state court, which is currently pending before Judge Dorsey. (ECF No. 5).

Plaintiff has also filed a motion to stay. (ECF No. 14). Initially, Plaintiff asked that the motion to remand be decided on an expedited basis and that all other proceedings be stayed until the Court ruled on

the motion to remand. (*Id.* at 2). Judge Dorsey denied the motion to expedite briefing and referred the remained of the motion to me. (ECF No. 17). As an initial matter, I am now construing the motion to stay as a motion to stay discovery. The motion to stay discusses staying a pending motion to dismiss. (ECF No. 14). The motion to dismiss (ECF No. 4) is also before Judge Dorsey. I make no recommendation regarding what order Judge Dorsey will use to address the motion to dismiss and motion to remand.[1] The only remaining issue in the case is a potential stay of discovery.

In its motion to stay, Plaintiff argues that "this action involves disputes concerning the rate of payment rather than the right to payment" and "disputes about the rate of payment are not governed by ERISA and are not subject to complete preemption." (ECF No. 14 at 3). "[T]he claims arise not from an employee benefit plan, but [Defendants'] statutory and common law duty to pay for its Members' emergency services at usual and customary rates or, alternatively, for the reasonable value of services rendered." (*Id.* at 5). "Given the existence of a threshold issue of concerning subject matter jurisdiction, [Plaintiff] respectfully requests that the Court stay all proceedings...until the Court has had an opportunity to adjudicate the Motion to Remand." (*Id.* at 3).

In response, Defendants argue that "the granting of a motion to remand does not obviate the need for discovery." (ECF No. 20 at 4). Defendants asserts discovery is needed into the types of medial claims that were denied or underpaid. (*Id.* at 7-8). Finally, Defendant argues that the motion to remand will likely not be granted because "the only legal duties owed by Defendants (if any) flow from the rights [Plaintiff] has as the assignee of Defendants' plan members. Since those rights are directly based on and related to employee benefit plans governed by ERISA, [Plaintiff's] claims are completely preempted." *Id.* at 11).

In its reply, Plaintiff asserts that, "if discovery proceeds, [Plaintiff] will be at a disadvantage because it will not have the benefit of [Defendants'] answer and affirmative defenses and will be unduly

[1] In addition, the only briefing left to be completed on the motion to dismiss is by Defendants, who are not moving to stay the case.

hampered in prosecuting this action." (ECF No. 24 at 5). Plaintiff argues that a motion to remand is dispositive, no discovery is needed to resolve the jurisdictional issue, and the motion to remand will be granted. (*Id.* at 6-12).

ANALYSIS

The Rules do not provide for automatic or blanket stays of discovery when a potentially dispositive motion is pending. *Ministerio Roca Solida v. U.S. Dep't of Fish & Wildlife*, 288 F.R.D. 500, 502 (D. Nev. 2013). Whether to grant a stay is within the discretion of the court. *Munoz-Santana v. U.S. I.N.S.*, 742 F.2d 561, 562 (9th Cir. 1984). "[A] party seeking a stay of discovery carries the heavy burden of making a strong showing why discovery should be denied." *Ministerio Roca Solida*, 288 F.R.D. at 503.

Courts in the District of Nevada apply a two-part test when evaluating whether a discovery stay should be imposed. *See TradeBay, LLC v. Ebay, Inc.*, 278 F.R.D. 597, 600 (D. Nev. 2011). First, the pending motion must be potentially dispositive of the entire case or at least the issue on which discovery is sought. *Id.* Second, the court must determine whether the pending motion to dismiss can be decided without additional discovery. *Id.* When applying this test, the court must take a "preliminary peek" at the merits of the pending dispositive motion to assess whether a stay is warranted. *Id.*

There has been some differing opinions in this Court regarding whether a motion to remand is a dispositive motion in the context of a motion to stay. *See Anoruo v. Valley Health Sys., LLC*, No. 2:18-cv-00105-MMD-NJK, 2018 WL 1785866, at *3 (D. Nev. Apr. 13, 2018) ("a motion to remand is not sufficient grounds to grant a stay of discovery... discovery will proceed regardless of the outcome of the District Court's remand decision"); *Grammer v. Colorado Hosp. Ass'n Shared Servs., Inc.*, No. 2:14-cv-1701-RFB-VCF, 2015 WL 268780, at *2 (D. Nev. Jan. 21, 2015) (granting a temporary discovery stay pending a ruling on a motion to remand regarding diversity jurisdiction). I will not deny this motion to stay purely on the basis that it relates to a pending motion to remand. However, the fact that the case will

continue even if the motion to remand is granted is a factor that weighs in favor of denying the motion to stay discovery.

Without prejudging the outcome of the motion to remand, I am not convinced that the motion can be granted without further discovery. The main issue in Defendants' removal of the case and Plaintiff's motion to remand the case to state court is preemption under ERISA. Plaintiff asserts that its rate of payment claims "arise not from an employee benefit plan," which would be preempted by ERISA and grant this Court jurisdiction over at least some of the claims, "but [Defendants'] statutory and common law duty to pay for its Members' emergency services at usual and customary rates or, alternatively, for the reasonable value of services rendered." (ECF No. 14 at 5). However, the caselaw on this issue and the facts of this case in particular are not settled.

Courts have held that when "rate of payment" claims are brought "under quasi-contractual theories of liability," the claims are not preempted by ERISA. *REVA, Inc. v. HealthKeepers, Inc.*, No. 17-24158-CIV, 2018 WL 3323817, at *4 (S.D. Fla. July 6, 2018). However, these cases state that the amount of payment must be connected to a duty outside of an ERISA plan, such as a contract or a state statute. *See Marin Gen. Hosp. v. Modesto & Empire Traction Co.*, 581 F.3d 941, 948 (9th Cir. 2009) ("the asserted obligation to make the additional payment stems from the alleged oral contract"); *Port Med. Wellness Inc. v. Connecticut Gen. Life Ins. Co.*, No. CV-13-03604 BRO PLAX, 2013 WL 5315701, at *6 (C.D. Cal. Sept. 18, 2013) (rate of pay claims are "typically construed as independent contractual obligations"); *Hialeah Anesthesia Specialists, LLC v. Coventry Health Care of Fla., Inc.*, 258 F. Supp. 3d 1323, 1328 (S.D. Fla. 2017) (discussing implied-in-law right to payment). When a defendant's duty "to reimburse for emergency services... was necessarily dependent on the fact that plaintiff was a participant in an ERISA-governed plan," courts have held that the claims are preempted under ERISA. *In re WellPoint, Inc. Out-of-Network UCR Rates Litig.*, 903 F. Supp. 2d 880, 929–30 (C.D. Cal. 2012); *see also Torrent & Ramos, M.D., P.A. v. Neighborhood Health Partnerships, Inc.*, No. 04-20858-CIV, 2004 WL 7320735, at

*4 (S.D. Fla. July 1, 2004) (holding the case was "a suit for benefits under an ERISA plan where a provider rendered certain emergency services to an ERISA provider...and failed to receive the payment it expected" and Plaintiff's "attempt to recast its claim as one of implied contract does not change this reality") (internal quotations omitted).

In this case, Plaintiff asserts Defendants "impliedly agreed to reimburse [Plaintiff] at rates, at a minimum, equivalent to the usual and customary rate or alternatively for the reasonable value of the professional emergency medical services provided" "[t]hrough the parties' conduct" and "[u]nder Nevada common law." (ECF No. 1-1 at 8). Plaintiff does not cite any specific common law principle or Nevada statute[2] obligating Defendants to pay a certain amount to Plaintiff for the services rendered. Plaintiff's complaint is also vague regarding what conduct resulted in any implied-in-fact contract—Plaintiff merely alleges that (1) it regularly provides services to Defendants' health plan members, (2) Defendants "were aware that [Plaintiff] was entitled to and expected to be paid at rates in accordance with the standards established under Nevada law," and (3) "by undertaking responsibility for payment to [Plaintiff]" Defendants "impliedly agreed to reimburse [Plaintiff] at rates, at a minimum, equivalent to the usual and customary rate or alternatively for the reasonable value of the professional emergency medical services provided by [Plaintiff]." (ECF No. 1-1 at 5, 8). Further discovery will likely be needed to resolve Plaintiff's implied contract assertion, as it relates to the conduct of the parties and their expectations. In addition, there is caselaw suggesting that if interpreting an implied-in-fact contract requires interpretation of an ERISA plan's terms,[3] claims based on the contract are preempted. *Sharp Mem'l Hosp. v. Regence*

[2] The statutes cited in the complaint, such as NRS 686A.310, deal with the timing of payments rather than the obligation to pay.

[3] One of the allegations in the complaint is that Defendants "generally pay lower reimbursement rates for services provided to members of their fully insured plans and authorize payment at higher reimbursement rates for services provided to members of self-insured plans or those plans under which they provide administrator services only." (ECF No. 1-1 at 5-6).

BlueCross BlueShield of Utah, No. 16-CV-2493-JM-RN), 2018 WL 3993359, at *8 (S.D. Cal. Aug. 21, 2018).

I am not convinced that Plaintiff will be successful in having the case remanded to state court. Should Judge Dorsey find that any of Plaintiff's seven claims are preempted by ERISA, the Court will then have grounds to exert supplemental jurisdiction over the remaining claims. Allowing the parties to engage in discovery at this time will assist in the progress of the case, even if it is subsequently remanded. I am not persuaded that Plaintiff will be prejudiced at engaging in discovery before Defendants have filed an answer. Plaintiff knows the allegations in its complaint and can direct its discovery towards those allegations. On the other hand, Defendants will struggle defending this case without further information from Plaintiff regarding its allegations.

Accordingly, and for good cause shown,

IT IS HEREBY ORDERED that Plaintiff's Motion to Stay Proceedings Pending Resolution of Motion to Remand (ECF No. 14) is DENIED.

IT IS FURTHER ORDERED that the parties engage in a Rule 26(f) conference no later than July 12, 2019 and submit a proposed discovery plan and scheduling order no later than July 26, 2019. These deadlines will be stayed should a party object to this order.

DATED this 27th day of June, 2019.

CAM FERENBACH
UNITED STATES MAGISTRATE JUDGE

EXHIBIT 4

EXHIBIT 4

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

BUFFALO EMERGENCY ASSOCIATES, LLP,
EXIGENCE MEDICAL OF BINGHAMTON, PLLC,
EXIGENCE MEDICAL OF JAMESTOWN, PLLC,
and EMERGENCY CARE SERVICES OF N.Y., PC,

v.

DECISION AND ORDER
19-CV-1148S

UNITEDHEALTH GROUP, INC.
UNITEDHEALTHCARE OF NEW YORK, INC.,
UNITEDHEALTHCARE INSURANCE CO. OF N.Y.,
UNITEDHEALTHCARE, INC.,
UNITEDHEALTHCARE SERVICES, INC.,
JOHN DOES 1-10, and
ROE ENTITIES 11-20,

Defendant.

This matter involves the plaintiff physicians' claims that the defendant insurance entities are illegally underpaying them for medical services provided to their insureds. Defendants have moved to dismiss Plaintiffs' complaint. (Docket No. 10.) Presently before this Court are Plaintiffs' motion for a scheduling conference and scheduling order and Defendants' motion for stay of discovery. (Docket Nos. 34, 40.) For the reasons stated below, this Court finds good cause to grant Defendants' motion and to stay discovery pending resolution of Defendants' motion to dismiss.

The standard governing stays of discovery has been succinctly stated in this district as follows:

> A district court has discretion to stay discovery pursuant to Rule 26 (c) of the Federal Rules of Civil Procedure, upon a showing of good cause. Mirra v. Jordan, No. 15-CV-4100

> (AT)(KNF), 2016 WL 889559, at *2 (S.D.N.Y. Mar. 1, 2016) (citing Hong Leong Finance Limited v. Pinnacle Performance Limited, 297 F.R.D. 69, 72 (S.D.N.Y. 2013)). "In determining whether good cause exists for a stay of discovery, three factors are considered: (1) the strength of the dispositive motion; (2) the breadth of the discovery sought; and (3) the prejudice a stay would have on the non-moving party." Lithgow v. Edelman, 247 F.R.D. 61, 62 (D. Conn. 2007). "'The party seeking a stay of discovery bears the burden of showing good cause. The pendency of a dispositive motion is not, in itself, an automatic ground for a stay.'" Mirra, 2016 WL 889559, at *2 (quoting Morien v. Munich Reinsurance America, Inc., 270 F.R.D. 65, 66-67 (D. Conn. 2010)).

Reyes-Herrera v. Flaitz, 6:19-CV-6257-MAT, 2020 WL 871264, at *8 (W.D.N.Y. Feb. 20, 2020).

Having considered the parties' arguments, and having weighed the considerations set forth above, this Court finds that Defendants have demonstrated good cause for a stay of discovery pending resolution of the pending dispositive motion. Defendants have filed a comprehensive motion to dismiss that, at the very least, may shape the number and nature of the claims going forward in a manner that could significantly impact the breadth of discovery. Thus, to proceed to discovery now, in what appears to be a complex, document-rich case, could lead to unnecessary expenditures of time and resources. See Barnes v. County of Monroe, No. 10-CV-6164, 2013 WL 5298574, at *2 (W.D.N.Y. Sept. 19, 2013) (staying discovery in part because "[i]n light of the pending dispositive motions, the need for further discovery is not inevitable"). So too, Plaintiffs are not unfairly prejudiced by a stay under these circumstances, particularly because money damages, not equitable relief, is at stake. Consequently, consistent with the long custom in this court of staying discovery pending resolution of motions to dismiss,

Defendants' motion is granted, and Plaintiff's motion is denied.

IT HEREBY IS ORDERED, that Defendants' Motion to Stay Discovery Pending Resolution of the Motion to Dismiss (Docket No. 40) is GRANTED.

FURTHER, that Plaintiff's Motion for a Scheduling Conference and Scheduling Order (Docket No. 34) is DENIED.

FURTHER, that discovery in this action is STAYED pending resolution of Defendants' Motion to Dismiss.

SO ORDERED.

Dated: June 16, 2020
Buffalo, New York

s/William M. Skretny
WILLIAM M. SKRETNY
United States District Judge

EXHIBIT 5

EXHIBIT 5

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Sierra Health-Care Options, Inc., and
Health Plan of Nevada, Inc.

WEINBERG WHEELER HUDGINS GUNN & DIAL

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

FREMONT EMERGENCY SERVICES (MANDAVIA), LTD., a Nevada professional corporation; TEAM PHYSICIANS OF NEVADA-MANDAVIA, P.C., a Nevada professional corporation; CRUM, STEFANKO AND JONES, LTD. dba RUBY CREST EMERGENCY MEDICINE, a Nevada professional corporation

Plaintiff,

vs.

UNITEDHEALTH GROUP, INC., a Delaware corporation; UNITED HEALTHCARE INSURANCE COMPANY, a Connecticut corporation; UNITED HEALTH CARE SERVICES INC. dba UNITEDHEALTHCARE, a Minnesota corporation; UMR, INC. dba UNITED MEDICAL RESOURCES, a Delaware corporation; OXFORD HEALTH PLANS, INC., a Delaware corporation; SIERRA HEALTH AND LIFE INSURANCE COMPANY, INC., a Nevada

Case No.: 2:19-cv-00832-JCM-VCF

DECLARATION OF SANDRA WAY IN SUPPORT OF DEFENDANTS' OBJECTIONS TO FREMONT'S REQUESTS FOR PRODUCTION, INTERROGATORIES AND REQUESTS FOR ADMISSIONS

corporation; SIERRA HEALTH-CARE OPTIONS, INC., a Nevada corporation; HEALTH PLAN OF NEVADA, INC., a Nevada corporation; DOES 1-10; ROE ENTITIES 11-20,

Defendants.

I, Sandra Way, declare under penalty of perjury that the foregoing is true and correct:

1. I am employed as the Claim & Appeal Regulatory Adherence Business Manager for United Healthcare Employer & Individual. I have worked for United for 10 years. My job responsibilities include providing oversight of regulatory related functions for E&I Claim & Appeal Operations.

2. I understand that, according to Fremont, there are approximately 15,210 claims at issue in this litigation which are identified in a spreadsheet produced by Fremont that is bates numbered FESM000011.

3. For each of the claims at issue, I understand that Fremont has submitted written discovery requests to Defendants, including requests for production, interrogatories and requests for admissions. While each request often asks for a slightly different piece of information related to the claims, taken together, the requests ask for any and all information related to the claims at issue, including all documents and communications related to the claims.

4. Many of Fremont's requests essentially ask for information that collectively constitutes what is often called the "administrative record" for each claim.

5. To produce the administrative record for each claim, United must locate and produce the following categories of documents from their records for each individual claim, to the extent that any such documents exist:

a. Member Explanations of Benefits ("EOBs");

b. Provider EOBs and/or Provider Remittance Advices ("PRAs");

c. Appeals documents;

d. Any other documents comprising the administrative records, such as correspondence or clinical records submitted by Plaintiffs;

e. The plan documents in effect at the time of service.

6. These documents are not stored together and are spread across at least four separate systems within United.

7. The documents from categories *a*; and *b*, are stored on a United electronic storage platform known as EDSS. "EDSS" stands for Enterprise Data Storage System. The documents from category *d* may be stored in another United electronic storage platform known as IDRS. "IDRS" stands for Image Document Retrieval System. When using EDSS or IDRS, documents must be individually searched for and pulled. The process for doing so looks like this:

First, a United employee must access EDSS or IDRS from their computer.

Second, the employee must select the type of document that they wish to pull from a drop down menu: claim form, letter, EOB, etc.

Third, the employee must run a query for that document for each individual claim at issue, based on some combination of claim identifying information (e.g., the claim number, member ID number, dates of services, social security number, provider tax identification number, etc.).

Fourth, the employee must download the documents returned by their query.

Fifth, the employee must open and review the downloaded documents to confirm that they pertain to one of the at-issue claims.

Sixth, if the documents do pertain to an at-issue claim, the employee must migrate those documents to a United shared drive specific to this litigation, from which the documents will be transferred to United's outside counsel for this matter.

8. Documents from category *c* are located on a United electronic escalation tracking platform known as ETS. "ETS" stands for Escalation Tracking System. Pulling documents from ETS, which is done on an individual claim-by-claim basis, substantially mirrors the process for pulling documents from EDSS and IDRS.

9. My team has previously pulled documents from categories *a*, *b*, *c*, and *d* in connection with other provider-initiated litigation. Based on the documents that we pulled previously, we have developed estimates of the average time that it takes to pull each category of document:

a. Member Explanations of Benefits ("EOBs"): *45 minutes.*[1]

b. Provider EOBs and/or Provider Remittance Advice ("PRAs"): *20 minutes.*

c. Appeals documents: *30 minutes.*

d. Other documents comprising the administrative records: *15 minutes.*

10. I understand that Plaintiffs in this case have questioned the above time estimates, based on their very different experience accessing PRAs, claiming that it only takes Plaintiffs two minutes to pull a PRA from the UHC Portal for providers. These are completely different enterprises, and it is to be expected that it would take substantially less time for a provider to access their own, pre-sorted records through the UHC Portal, than it would for United to (1) search for and locate the records of health plan members based on varying pieces of data, (2) verify that the located records are the correct ones, and further contain no extraneous material, in accordance with United's rigorous standards for ensuring that HIPAA-protected information is not improperly disclosed, and (3) process that information for external production in accordance with United's prescribed process for court-ordered discovery production. My estimates are based on substantial experience locating, verifying, and processing records for many hundreds of discovery productions. I stand by them, and stand ready as necessary to provide supporting testimony under oath.

11. By way of example, as stated above, it takes 45 minutes on average to locate, verify, and process a member EOB. Allow me to explain.

a. United stores EOBs as images that are stored in EDSS and marked with "Film Locator Numbers" or "FLNs".

b. To locate the correct EOB for a given claim, we must first determine the correct FLN by running queries in the system based on the data given to us by the provider. This process can take substantial time, because United-administered plans have tens of millions of members, each of whom is likely to see multiple

[1] Searching member EOBs is more time consuming than searching provider EOBs/PRAs due to the volume of United members and member records.

providers on multiple dates of service, and even a single date of service can result in the generation of numerous EOBs. Moreover, if we are required to rely on member name and date of service information to identify the correct records, United typically has numerous members with the same or similar names that need to be sorted through to determine a match. In addition, this process is further complicated by the fact that the data given to us by providers in litigation frequently contains nicknames or misspellings of names—and sometimes transposed digits and other inaccuracies—that does not match our systems data and significantly complicates the process.

c. Once we use the claim data that is furnished to us by the provider to identify what we believe to be the correct FLN, we must then enter that FLN into EDSS to pull up and download the EOB in question.

d. Once the targeted EOB has completed downloading, our rigorous HIPAA protection protocol requires us to review the entire downloaded document to ensure (1) that it is the correct EOB that matches the claim at issue in the litigation and (2) that there are no extraneous pages included that might result in the inadvertent but unauthorized disclosure of HIPAA-protected information. Some EOB records are simple, but others may contain several pages, and the process of confirming a match and confirming that no extraneous information is included takes substantial time.

e. Once the EOB has been verified, we must take the additional step of processing and uploading it to the specific share drive that has been established for the particular instance of litigation.

12. For each individual EOB, the above-described process may take more or less than 45 minutes, but across a large volume of records, my experience confirms that 45 minutes is the average. As set forth in paragraph 9 above, EOBs take the longest time to locate, verify, and process because of the massive volume of member records and the difficulties that are typically encountered using member data to locate the requested records. Similar processes govern the

location, verification, and processing of the other records identified in Paragraph 9, however, and the completion of those processes typically takes meaningful time.

13. Thus, I estimate that it will take, on average, about ***2 hours*** to pull a full set of the *a*, *b*, *c*, and *d* category documents for a single claim, which would need to be done for each of the 15,210 claims at issue claim (for a total of approximately ***30,420 hours***). Based on the forgoing time estimates, it would take a team of four people working full-time on nothing other than gathering documents for this case over ***3 years*** to pull the documents related to categories *a*, *b*, *c*, and *d*. This does not account for other factors that could complicate the collection process, such as any at-issue claims that have not been successfully "mapped" to a unique United claim number,[2] or archived documents that may have to be located and pulled from other sources or platforms.

14. If a provider includes an accurate Claim Number and Member Number in their claim data, the average time listed above for identifying EOBs can be substantially shortened. That is because accurate Claim Number and Member Number information avoids the need to search through multiple duplicative member names and multiple and frequently overlapping dates of service to identify the specific claim at issue. I estimate that having accurate Claim Number and Member Number information would reduce the time it typically takes to locate, verify, and process an EOB from 45 minutes to 30 minutes, and the time that it would take to pull all of the documents described in Paragraph 9 from 2 hours to 1.5 hours. Based on my review of Fremont's list of claims (FESM000011), Fremont appears to have provided some, but not all of the claim numbers and member numbers for the claims it is seeking information on. I have not yet been able to verify the accuracy of these numbers.

15. My group does not handle documents from category *e* and I do not have personal knowledge of the processes utilized to locate and pull plan documents. Nonetheless I have been informed of the relevant processes by colleagues whose job functions do include locating and

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[2] Lack of a valid United claim number can make searching for many of the document categories described much more time consuming and complicated. In some instances, it can also make it impossible to identify and collect the right documents.

pulling these documents. I understand that plan documents for *current* United clients can be accessed through a United database. First, the team must access the appropriate database, locate, and pull all of the relevant documents for each plan implicated by the at-issue claims. Once pulled, a United employee must then open each document, confirm that the document relates to the plan covering the at-issue claim, label the file, and migrate the document to the appropriate shared drive location related to this litigation. The colleagues who have informed me have previously pulled plan documents in connection with other provider-initiated litigation where only 500 claims were at issue. Based on the documents that they pulled previously and the 15,210 claims at issue here, it is estimated that it will take approximately *6,996 hours* to collect the relevant plan documents. Because plan documents will be handled by a team that is separate from my team handling the claim and appeal document collection, this time estimate will run concurrently to the time estimate for pulling documents pertain only to pulling documents related to categories *a*, *b*, c, and *d*.

16. The above time estimates for plan documents pertain only to pulling documents related to *current* United clients. Documents related to former clients may be far more difficult and time consuming to access. I understand that archived plan documents may be located in off-site storage. In other instances, I understand that these archived documents may be stored in legacy systems that use outdated file formats that are not readable on today's computers; in these instances the documents would need to be converted to PDFs before a United employee can even verify whether the document is relevant to this litigation. We do not currently know how many of the at-issue claims will require accessing archived documents.

17. The above statements regarding the estimated amount of time to locate and produce documents that are responsive to certain of Fremont's written discovery requests apply to documents in the possession of the United Health Defendants (United HealthGroup, Inc., United Healthcare Insurance Company, and United Health Care Services, Inc.), the Sierra Defendants (Sierra Health and Life Insurance Company, Inc., Sierra Health-Care Options, Inc., and Health Plan of Nevada, Inc.) and Defendant UMR, Inc. In regard to the United Health Defendants, I have personal knowledge of the processes utilized to locate and pull claim

documents except in regard to category *e*, as previously discussed in paragraph 15 of this Declaration. In regard to the Sierra Defendants and UMR, Inc., I do not have personal knowledge of the processes utilized to locate and pull claim documents. Nonetheless I have been informed of the relevant processes for the Sierra Defendants and UMR, Inc. by colleagues whose job functions do include locating and pulling these documents. I understand that the process utilized by the Sierra Defendants and UMR, Inc. to locate and pull the documents described in paragraph 5 of this Declaration is substantially similar to the process utilized by the United Health Defendants. I further understand that, just as with the documents that are in the possession of the United Health Defendants, it takes the Sierra Defendants and UMR, Inc. approximately 2 hours of time to locate and pull the administrative record for a claim.

18. I declare under penalty of perjury that the foregoing is true and correct.

Executed on January 29th, 2020 in Moline, Illinois

SANDRA WAY
Business Manager
Claim & Appeal Regulatory Adherence
United Healthcare

CSERV

DISTRICT COURT
CLARK COUNTY, NEVADA

Fremont Emergency Services (Mandavia) Ltd, Plaintiff(s) vs. United Healthcare Insurance Company, Defendant(s)	CASE NO: A-19-792978-B DEPT. NO. Department 27

AUTOMATED CERTIFICATE OF SERVICE

This automated certificate of service was generated by the Eighth Judicial District Court. The foregoing Motion was served via the court's electronic eFile system to all recipients registered for e-Service on the above entitled case as listed below:

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EXHIBIT 1-B

EXHIBIT 1-B

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DISTRICT COURT

CLARK COUNTY, NEVADA

FREMONT EMERGENCY SERVICES (MANDAVIA), LTD., a Nevada professional corporation; TEAM PHYSICIANS OF NEVADA-MANDAVIA, P.C., a Nevada professional corporation; CRUM, STEFANKO AND JONES, LTD. dba RUBY CREST EMERGENCY MEDICINE, a Nevada professional corporation, Plaintiffs, vs. UNITEDHEALTH GROUP, INC., a Delaware corporation; UNITED HEALTHCARE INSURANCE COMPANY, a Connecticut corporation; UNITED HEALTH CARE SERVICES INC., dba UNITEDHEALTHCARE, a Minnesota corporation; UMR, INC., dba UNITED MEDICAL RESOURCES, a Delaware corporation; OXFORD HEALTH PLANS, INC., a Delaware corporation; SIERRA HEALTH AND LIFE INSURANCE COMPANY, INC., a Nevada corporation; SIERRA HEALTH-CARE OPTIONS, INC., a Nevada corporation; HEALTH PLAN OF NEVADA, INC., a Nevada corporation; DOES 1-10; ROE ENTITIES 11-20, Defendants.	Case No.: A-19-792978-B Dept. No.: 27 **PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO STAY PROCEEDINGS PENDING RESOLUTION OF WRIT PETITION ON ORDER SHORTENING TIME** Hearing Date: September 9, 2020 Hearing Time: 10:30 a.m.

Plaintiffs Fremont Emergency Services (Mandavia), Ltd. ("Fremont"); Team Physicians of Nevada-Mandavia, P.C. ("Team Physicians"); Crum, Stefanko and Jones, Ltd. dba Ruby Crest

Emergency Medicine ("Ruby Crest" and collectively the "Health Care Providers") oppose the Motion to Stay Proceedings Pending Resolution of Writ Petition ("Petition") on Order Shortening Time (the "Motion") filed by UnitedHealth Group, UnitedHealthcare Insurance Company; United HealthCare Services, Inc.; UMR, Inc.; Oxford Health Plans, Inc.; Sierra Health and Life Insurance Co., Inc.; Sierra Health-Care Options, Inc.; and Health Plan of Nevada, Inc. (collectively, "United"). This Opposition is based upon the record in this matter, the points and authorities that follow, the pleadings and papers on file in this action, and any argument of counsel entertained by the Court.

POINTS AND AUTHORITIES

I. INTRODUCTION AND BACKGROUND RELEVANT TO THE MOTION

The Nevada Supreme Court uniformly denies stay requests where the request arises from the denial of a motion to dismiss and when the only claimed prejudice to a party requesting a stay is the saving of either time or money, both of which form the basis for United's Motion. And, in fact, none of the factors utilized by the Nevada Supreme Court in determining whether to issue a stay favor United.[1] Because United cannot meet its burden under Rule 8(c) of the Nevada Rules of Appellate Procedure and the applicable legal authority to obtain a stay, the Motion should be denied.

II. LEGAL ARGUMENT

A. Applicable Legal Standard.

While United correctly cites NRAP 8(c) and the four-part test that this Court must consider in evaluating a request for a stay (Motion at 7:8-17), United glosses over the fact that the Nevada Supreme Court "generally will not consider writ petitions challenging orders denying motions to dismiss." *Dignity Health v. Eighth Judicial Dist. Court in & for County of Clark*, 465 P.3d 1182 (Nev. 2020) (unpublished) ("we are not persuaded that an appeal from an adverse

[1] (1) whether the object of the appeal or writ petition will be defeated if the stay or injunction is denied; (2) whether appellant/petitioner will suffer irreparable or serious injury if the stay or injunction is denied; (3) whether respondent/real party in interest will suffer irreparable or serious injury if the stay or injunction is granted; and (4) whether appellant/petitioner is likely to prevail on the merits in the appeal or writ petition. NRAP 8(c).

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final judgment would be an inadequate legal remedy."). Exceptions to the general rule – where no disputed factual issues exist and clear statutory or rule-based authority obligates dismissal – do not exist here. *Nevada State Bd. of Nursing v. Eighth Judicial Dist. Court in & for County of Clark*, 459 P.3d 236 (Nev. 2020) (citing *Smith v. Eighth Judicial Dist. Court*, 113 Nev. 1343, 1345, 950 P.2d 280, 281 (1997)).

Also weighing against a stay, writ relief is not appropriate where a "plain, speedy, and adequate remedy" at law exists. *Pan v. Eighth Judicial Dist. Court*, 120 Nev. 222, 228, 88 P.3d 840, 844 (2004) (observing that the party seeking writ relief bears the burden of showing such relief is warranted); *Smith v. Eighth Judicial Dist. Court*, 107 Nev. 674, 677, 818 P.2d 849, 851-852 (1991) (recognizing that writ relief is an extraordinary remedy and that this court has sole discretion in determining whether to entertain a writ petition). No less important, the Court must consider whether "the underlying proceedings could be unnecessarily delayed by a stay." (*id.* at 658; 6 P.3d at 987) and it is United's burden to demonstrate that extraordinary intervention is warranted." *Pan*, 120 Nev. at 228, 88 P.3d at 844.

In advocating for a stay, United curiously relies on cases with no connection to the NRAP 8(c) factors, instead pointing to several federal district court decisions that each employ a different legal standard, under different circumstances, that do not bind this Court. Motion at 7:24-8:7. *Tradebay*, *Barnes* and *Buffalo Emergency Assoc.* all concern stays of discovery pending resolution of dispositive motions, while *PersonalWeb* involves a patent infringement case and a stay pending resolution of proceedings before the United States Patent and Trademark Office ("USPTO"). *Tradebay, LLC v. eBay, Inc.*, 278 F.R.D. 597, 600 (D. Nev. 2011) ("The Federal Rules of Procedure do not provide for automatic or blanket stays of discovery when a potentially dispositive motion is pending."); *Barnes v. County of Monroe*, No. 10-CV-6164, 2013 WL 5298574, at *1 (W.D.N.Y. Sept. 19, 2013) (under the court's inherent power to control its docket, the federal district court granted a stay of discovery involving a pro se incarcerated

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plaintiff asserting claims under 42 U.S.C. § 1983);[2] *Buffalo Emergency Associates, LLP v. UnitedHealth Group, Inc.*, No. 19-CV-1148S, 2020 WL 3259252, at *1 (W.D.N.Y. June 16, 2020) (relying on FRCP 26(a) to stay discovery pending resolution of a motion to dismiss); *PersonalWeb Techs., LLC v. Apple Inc.*, 69 F. Supp. 3d 1022, 1025 (N.D. Cal. 2014) (evaluating stay factors applicable to patent infringement cases pending review or reexamination of the patents).[3] None of these cases inform adjudication of the instant Motion and the Court should disregard them.

B. The NRAP 8(c) Factors Weigh Against a Stay.

1. The Object of United's Writ Will Not Be Defeated if a Stay is Denied.

United describes the "object" of its Petition as "whether Plaintiffs' claims are subject to conflict and/or complete preemption under ERISA." Motion at 8:16-18. But there is no scenario where United's complete preemption argument will result in dismissal of the First Amended Complaint ("FAC") because it is a jurisdictional doctrine and cannot be used to obtain dismissal of a state law claim on a Rule 12(b)(5) motion to dismiss. *See, e.g., Owayawa v. Am. United Life Ins. Co.*, CV 17-5018-JLV, 2018 WL 1175106, at *3 (D.S.D. Mar. 5, 2018) ("[A]lthough complete preemption...can be used to invoke federal question jurisdiction, Defendants cannot use [the doctrine] as a ground for dismissing Plaintiffs' claims under Federal Rule of Civil Procedure 12(b)(6).").

Next, even United concedes that there is a scenario where the Health Care Providers' pleading may not be dismissed in its entirety. Motion at 8:23-9:6. In that case, partial relief does not provide entitlement to a stay. *Sledge v. Eighth Judicial Dist. Court of State, ex rel. County*

[2] The federal court also noted that there were fifty-five named defendants, the merits of the pending dispositive motions were favorable to defendants and plaintiff did not oppose the stay motion which, the court ruled, resulted in plaintiff's failure to establish prejudice if a stay were imposed. *Barnes*, 2013 WL 5298574 at *1.

[3] The factors required under whether to stay a patent infringement case pending review or reexamination of the patents: "(1) whether discovery is complete and whether a trial date has been set; (2) whether a stay will simplify the issues in question and trial of the case; and (3) whether a stay would unduly prejudice or present a clear tactical disadvantage to the nonmoving party." *Id.* at 1025. *PersonalWeb Techs., LLC*, 69 F. Supp. at 1025.

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of Clark, 131 Nev. 1347, at *1 (2015) (unpublished) ("determining that intervention is not appropriate if it would not dispose of the entire controversy, since the avoidance of a needless trial is not possible"). And even if United's Petition is granted in full (which is unlikely), such a determination will not obviate the need for discovery – a concession United is resigned to make. Motion at 9:2-5 ("If, for example, the Nevada Supreme Court finds Plaintiffs' claims preempted, and Plaintiffs re-plead them as ERISA claims for benefits, they would be entitled only to the strictly limited discovery that applies to such claims."). As such, the "object" of the Petition is not really dismissal of the FAC, but merely its attempt to narrow the scope of discovery. It is unlikely the Nevada Supreme Court will deem this appropriate for writ relief.

Finally, United relies on a case that granted a stay of discovery pending adjudication of a motion to dismiss. *Weisman v. Mediq, Inc.*, CIV. A. 95-1831, 1995 WL 273678, at *2 (E.D. Pa. May 3, 1995) (relying on FRCP 26, the federal district court granted a stay of discovery while a motion to dismiss awaited adjudication). The Court should disregard this authority as inapplicable.

Ultimately, this Court should not grant a stay simply so United does not have to engage in discovery. *See Mikohn Gaming Corp.*, 120 Nev. at 253, 89 P.3d at 39; *see also Hansen*, 116 Nev. at 658, 6 P.3d at 986-987. At any time, United may file a dispositive motion demonstrating that there is no dispute of material facts that each of the Health Care Providers' claims are conflict preempted or do not state a claim for relief, thereby eliminating any extraordinary basis for writ relief. United also has a speedy and adequate remedy available to it as it can "appeal from [any] final judgment" that the Health Care Providers may obtain against United. *Smith*, 113 Nev. at 1344, 950 P.2d at 281 ("we will not exercise our discretion to consider writ petitions that challenge orders of the district court denying motions to dismiss or motions for summary judgment."). Accordingly, even if United must conduct discovery in connection with claims it asserts are preempted or should have been dismissed pursuant to NRCP 12(b)(5), United may move for summary judgment and/or appeal any judgment that may be obtained against it. Thus, United has an adequate remedy it may pursue, and the "object" of its Petition will not be defeated.

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2. United Will Not Suffer Irreparable Harm if the Court Denies the Motion.

United admits that the irreparable harm factor "plays less of a role" (Motion at 13:8) – meaning the factor does not tip in its favor. The only irreparable harm United directs the Court's attention to is the purported "irreparable harm" related to "the high potential for wasted resources and unnecessary expenses associated with continuing discovery...." *Id.* at 13:25-27. But, the *Hansen* court made it clear: litigation expenses such as "lengthy and time-consuming discovery, trial preparation, and trial...**while potentially substantial**, are neither irreparable nor serious." *Hansen*, 116 Nev. at 658, 6 P.3d at 986-987 (emphasis added). Accordingly, even "substantial" litigation costs are not sufficient to rise to the level of "irreparable harm." *Id.* Because United's only "irreparable harm" alleged concerns litigation costs, United has failed to prove any prejudice or harm.

United points to cases from other jurisdictions in effort to defeat Nevada's long-standing precedent that litigation costs do not constitute irreparable harm. *Id.* at 13:22-27 (citing *Hunt v. Check Recovery Sys., Inc.*, No. C 05 4993 SBA, 2008 WL 2468473, at *5 (N.D. Cal. June 17, 2008); *Rajagopalan v. Noteworld, LLC*, No. C11-5574 BHS, 2012 WL 2115482, at *1 (W.D. Wash. June 11, 2012)). Neither case involves a Nevada state court interlocutory appeal of a motion to dismiss. The Court can disregard the inapplicable legal authority in light of *Hansen's* decree. 116 Nev. at 658, 6 P.3d at 986-987.

3. The Health Care Providers Will Suffer Significant and Irreparable Harm By a Stay.

United argues that "at worst, in the context of this very complex dispute, Plaintiffs' case will be marginally delayed." Motion at 13:18-19. The Health Care Providers have already detailed to the Court the impact of United's delay tactics that have had the effect of cumulative delay of this case as well as United's full payment for the Health Care Providers' emergency medicine services provided long ago. *See, e.g.*, Plaintiffs' March 30, 2020 Status Report at 5:2-18; Plaintiffs' Motion to Compel Defendants' Meet and Confer Participation and Related Action on Order Shortening Time at 7:11-20; Motion to Compel Defendants' Production of Claims File for At-Issue Claims, or in the Alternative, Motion in Limine on Order Shortening Time at 7:13-8:6,

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9:6-12:15. The *Hansen* court noted that, should "the underlying proceedings [] be unnecessarily delayed by a stay," then that could constitute irreparable or serious injury. *Id.* at 658, 6 P.3d at 987. Any stay of the Health Providers' claims against United will delay the entire litigation.

The Nevada Supreme Court is a busy appellate court. As of now, it is not known whether the Health Care Providers will be directed to answer the Petition. This determination may take several months and, if briefing does commence, the resolution of United's Petition will likely take more than a year. United owes the Health Care Providers approximately $20.9 million, which, in some instances, has remained unpaid for years. The Health Care Providers will suffer prejudice if a stay is imposed with a December 31, 2020 deadline for fact discovery fast approaching. Indeed, granting an indefinite stay at this point in the case would necessitate that both fact and expert discovery be continued to some indefinite time in the future – the sort of delay that United desires. Granting an indefinite continuation in the discovery deadlines and, resultingly, a jury trial in this matter will result in unnecessary and undue prejudice to the Health Care Providers.

4. United Is Not Likely To Prevail On The Merits Of The Writ Petition.

Here, the Court was correct in its adjudication of United's motion to dismiss and the stay must be denied as United is not likely to prevail on the merits of its Petition for the same reasons its motion to dismiss was unsuccessful. United suggests that the Nevada Supreme Court may take a particular interest in the issue of whether ERISA preempts state law (Motion at 10:24-26), but the mere existence of that argument does not bestow automatic merit to United's Petition. United continues to refer and rely on cases that are not analogous, do not stand for the proposition that United purports, or have been rejected by subsequent court decisions. Motion at 11:8-12:1. For example, United continues to point to *Evans v. Safeco Life Ins. Co.*, 916 F.2d 1437, 1439 (9th Cir. 1990) for the proposition that "ERISA's preemption clause is one of the broadest preemption clauses ever enacted by Congress." Motion at 12:6-8. But United's reliance is so wholly misplaced it is hard to imagine the Nevada Supreme Court will decide differently that this Court:

> 34. ***In the face of this controlling law, United relies on outdated and a now-rejected overbroad interpretations of Section 514(a)***. *See Evans v. Safeco Life Ins. Co.*, 916 F.2d 1437, 1439 (9th Cir. 1990). United argues

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> that the "relates to" language in the preemption provision of Section 514 (a) is one of the "broadest preemption clauses ever enacted by Congress." However, the Court does not find merit in United's argument and therefore rejects the argument.

June 24 Order Denying United's Motion to Dismiss ("June 24 Order") at ¶ 34 (emphasis added); *see also* ¶¶ 15, 27, 35, 68, 118, 128 (rejecting United's reliance on inapplicable legal authority). Further, United again points to two cases that are factually dissimilar because they are direct actions by a plan member: *Aetna Life Ins. Co. v. Bayona*, 223 F.3d 1030, 1034 (9th Cir. 2000) (employee plan member's counterclaims directly against plan administrator conflict preempted) and *Parlanti v. MGM Mirage*, No. 2:05-CV-1259-ECR-RJJ, 2006 WL 8442532, at *1 (D. Nev. Feb. 15, 2006) (plaintiff directly sued former employer over supplemental executive retirement plan). It is difficult to conceive that the Nevada Supreme Court will decide differently than this Court:

> 35. The Court also finds that United relies on legal authority that is inapplicable to a conflict preemption analysis because it addresses complete preemption under Section 502(a) of ERISA. The cases cited by United involved claims expressly seeking ERISA benefits and/or brought directly by plan members rather than third-party medical providers. *See e.g. Aetna Life Ins. Co. v. Bayona*, 223 F.3d 1030, 1034 (9th Cir. 2000), as amended on denial of reh'g and reh'g en banc (Nov. 3, 2000) (employee plan member's counterclaims directly against plan administrator conflict preempted); *Blau v. Del Monte Corp.*, 748 F.2d 1348 (9th Cir. 1984) (nonunion salaried employees brought suit against employer for benefits under employee welfare plan); *Parlanti v. MGM Mirage*, No. 2:05-CV-1259-ECR-RJJ, 2006 WL 8442532, at *1 (D. Nev. Feb. 15, 2006) (plaintiff directly sued former employer over supplemental executive retirement plan).

June 24 Order at ¶ 36. As a result, the Health Care Providers respectfully suggest that the Nevada Supreme Court is likely to uphold this Court's June 24 Order in connection with United's ERISA preemption argument.[4] Further, United's Petition challenging denial under NRCP 12(b)(5) should not garner any attention from the Nevada Supreme Court in light of the applicable legal

[4] Additionally, the Court can deny a request for stay "if the appeal appears frivolous or if the appellant apparently filed the stay motion purely for dilatory purposes...." *Mikohn Gaming Corp. v. McCrea*, 120 Nev. 248, 253, 89 P.3d 36, 40 (2004). Both factors exist here. United consistently relies on outdated or legally distinguishable cases and United even delayed filing the Petition in order to build in further delay.

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standard governing motions to dismiss and the Court's specific findings that the FAC's allegations, if true, state actionable claims for relief.

All in all, the factors weigh heavily against granting United's Motion such that this factor should further solidify the Court's determination that United has failed to establish justification for a stay. *See Mikohn Gaming Corp.*, 120 Nev. at 251, 89 P.3d at 38 ("[I]f one or two factors are especially strong, they may counterbalance other weak factors."). United failed to set forth a valid "object" of its Petition and, moreover, failed to prove that it will suffer any prejudice or harm. Further, United failed to take into consideration the prejudice the Health Care Providers will suffer if the Court grants its Motion. Specifically, United has an adequate remedy at law to address the Health Care Providers' claims, has only alleged that it will suffer prejudice and harm by having to expend its time and money in discovery, and has ignored the ramifications a stay will have on the Health Care Providers.

III. CONCLUSION

Based on the foregoing, the Health Care Providers respectfully requests that the Court deny United's Motion in its entirety.

DATED this 8th day of September, 2020.

McDONALD CARANO LLP

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 8th day of September, 2020, I caused a true and correct copy of the foregoing **PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO STAY PROCEEDINGS PENDING RESOLUTION OF WRIT PETITION ON ORDER SHORTENING TIME** to be served via this Court's Electronic Filing system in the above-captioned case, upon the following:

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EXHIBIT 2

EXHIBIT 2

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DISTRICT COURT

CLARK COUNTY, NEVADA

FREMONT EMERGENCY SERVICES (MANDAVIA) LTD., Plaintiff(s), vs. UNITED HEALTHCARE INSURANCE COMPANY, Defendant(s).	CASE NO: A-19-792978-B DEPT. XXVII

BEFORE THE HONORABLE NANCY ALLF, DISTRICT COURT JUDGE

WEDNESDAY, SEPTEMBER 9, 2020

RECORDER'S TRANSCRIPT OF PROCEEDINGS
RE: PENDING MOTIONS

APPEARANCES (VIA VIDEO CONFERENCE):

For the Plaintiff(s): PATRICIA K. LUNDVALL, ESQ.
AMANDA PERACH, ESQ.

For the Defendant(s): D. LEE ROBERTS JR., ESQ.
COLBY L. BALKENBUSH, ESQ.

RECORDED BY: BRYNN WHITE, COURT RECORDER

LAS VEGAS, NEVADA; WEDNESDAY, SEPTEMBER 9, 2020

[Proceedings convened at 10:44 a.m.]

THE COURT: I am sure you will need at least an hour. The Motion to Stay will determine the other two motions. I see that there number of pro hac vice. Are you guys available and willing to come back at 1:30.

MS. LUNDVALL: Yes, Your Honor. On behalf of Fremont, the plaintiffs in this action, we are willing to come back at 1:30.

MR. ROBERTS: Yes, Your Honor. On behalf of the defendants, Lee Roberts, we are willing to come back at 1:30.

THE COURT: I thank you for your professional courtesy. My biggest fear is being a judge is that people don't get their chance to be heard. So thank you very much for being willing to be flexible.

[Recess taken from 10:45 a.m. until 1:29 p.m.]

THE COURT: -- 1:29, but I'm going to assume that Fremont versus United is ready to go. Is the representative for the plaintiff here to -- who can tell me that you're ready.

MS. LUNDVALL: Yes, Your Honor. Pat Lundvall for McDonald Carano, along with Amanda Perach, here on behalf of the plaintiff. And we are ready to go (indiscernible) -- I just want to let you know that Ms. Gallagher, Kristen Gallagher, expresses her regrets for not being able to attend today's hearing.

THE COURT: Thank you.

Is there a representative for the defendant who can tell me

you're ready to go? Mr. Roberts? Okay.

MR. BALKENBUSH: Colby Balkenbush, Your Honor, for the defendants. I believe Mr. Roberts should be on as well. Let me check on that. He's on. He's on.

THE COURT: Mr. Roberts, you're there?

I don't see him, Mr. Balkenbush.

MR. BALKENBUSH: And I apologize. Let me send him an email real quick. He was just emailing me a second ago so he should be on.

THE COURT: All right. Well, let's wait just a moment until he can join us.

MS. LUNDVALL: We hope the Court got some lunch.

THE COURT: It's been a long day. I had a cookie; does that count?

MS. LUNDVALL: Well, it depends upon in who's world we're talking.

THE COURT: Perhaps, Brynn, you can let us know when Mr. -- oh, I see Mr. Roberts is on the phone.

Mr. Roberts --

MR. ROBERTS: Hi, Your Honor.

THE COURT: Are you there?

MR. ROBERTS: I am. Can you hear me?

THE COURT: I can. Good enough. I didn't want to start without you --

MR. ROBERTS: I appreciate that.

THE COURT: Okay. So the first motion is your Motion for Stay, and we'll take that first because it'll affect how we proceed. Motion for Stay, please.

MR. ROBERTS: Thank you, Your Honor. Lee Roberts for the defendants with regard to the Motion for Stay.

The brief that we have submitted to the Court does go through the factors that the Court should consider in determining whether to grant a stay. Under Rule 8, the Court needs to consider whether the object of the writ petition would be defeated if the stay was denied; number two, whether the petitioner will suffer irreparable or serious injury if the stay is denied; three, (indiscernible) party of interest will suffer irreparable or serious injury if the stay is granted; and, finally, whether the petitioner is likely to prevail on the merits in the writ petition.

And, although, the Nevada Supreme Court is not prescribed any particular weight, which must be given to any of these stay factors, it has recognized that certain factors may be especially strong and counterbalance other weak factors. So it's more a totality of the circumstances based on all four of those factors.

I don't have to deal long with the likelihood of prevailing on the writ petition. Obviously, since the -- this Court has made a decision and we're seeking writ on that decision, the Court has already determined that we're not likely to prevail. But I think that there's still a question of how strong that factor is in the Court's mind under the petition that we've alleged. In other words, was this a slam

dunk or was this a close question which the Court could see leaving room for a good faith disagreement in the possibility that the Court might grant the writ?

And just on these very same issues, we have a very similar dispute that was pending before the District Court of Nevada, the federal court in this case, which resulted in remand. But, essentially, examining the exact same issues and claims, the Court in Arizona found it was appropriate to dismiss. And there is contrary authority that's been cited in both the briefs.

So I think that in looking at this factor, the Court should understand that it is a close question and that despite this Court's findings, there is a reasonable chance that the Nevada Supreme Court might agree with us and grant the writ.

So the question then turns to the other factors. And rather than repeat what's already in our brief, I'd like to sort of focus -- since we did -- the opposition brief was just filed yesterday, and we did not get a chance to file a reply. I thought I would go through some of the case law this morning and try to focus on the arguments that the Court has not yet heard and our reply to the points and authorities raised in the opposition.

The first case I'd like to discuss is *Dignity Health v. 8th Judicial District Court*, which is 465 P.3d 1182. That was cited for the proposition that the Nevada Supreme Court generally will not consider repetitions challenging orders denying Motions to Dismiss.

First of all, this is an unpublished case; so it's -- only can be

looked to by the Court for it's persuasive authority, if any. And there isn't much information about the underlying case at issue, but we do know the Court was not persuaded that extraordinary and discretionary relief was warranted under the facts of that case.

We know it was a standard medical malpractice case and there were likely no novel issues of law. And while an appeal may be an adequate legal remedy in the legal malpractice case, we don't believe that's true in the matter at hand because we are so early in the litigation, and one of the motions on calendar for today, if the Court denies the stay, is going to be the extremely burdensome and time-consuming discovery which has been served upon the defendants and a Motion to Compel has been filed. And although we haven't filed a Motion to Compel, we do point out in that other briefing that we have sought information regarding all of these claims, and we've sought the clinical record. And the same objection has been made to our discovery, that it's unduly burdensome for them to have to actually produce the clinical records in support of each and every one of the over 22,000 claims which are currently in dispute in this litigation.

Therefore, while the Nevada Supreme Court might generally reject writ petitions -- and we agree with that point that are challenging a Motion to Dismiss -- we think that ERISA questions had previously been considered to be of such important (sic) that the Nevada Supreme Court will consider a writ petition challenging a denial of a Motion to Dismiss on the merits on the grounds of ERISA.

And we would cite the Court to *W. Cab Company v. The Eighth Judicial District* 390 P.3d 662, page 667, for that point addressing ERISA preemption of minimum wage amendment and noting that the instant petition seeks reversal of the denial of a Motion to Dismiss, quote, Although we typically deny such petitions, considering this petition would serve judicial economy and clarify an important issue of the law.

Therefore, while we understand the general rule, generally about motions to dismiss, in this case we think that ERISA and the fact that this is an important issue of law and it does involve federal preemption, is a petition that the Court would be more likely to accept than the general writ petitions about a typical Motion to Dismiss.

The next case that I would like to address is *Nevada State Board of Nursing v. The Eighth Judicial District Court* 459 P.3d 236. That's a 2020 decision. Once again, it's unpublished and, therefore, not binding precedent. This decision can be distinguished because that case did not involve the exception I just discussed, where the Court has an opportunity to clarify an important question of the law.

In addition, the point that they have made with *Pan v. Eighth Judicial District,* a 2004 case, 88 P.3d 840, which is that a writ relief is not appropriate where a plain, speedy, and adequate remedy at law exists. And we acknowledge there is a lot of language and a lot of decisions saying that the fact that a party has to incur attorney's fees and costs in conducting discovery doesn't mean that a direct appeal is not an adequate and speedy remedy.

However, in *International Game Tech v. Second Judicial District Court,* a Washoe case, 179 P.3d 556 and 559, the Court found that writ relief was appropriate there, and an appeal is not an adequate and speedy remedy given the early stages of litigation and the policies of judicial administration.

So you can't just say discovery is never an inadequate remedy. The -- because you have to incur those discovery costs. You have to look at how early in the litigation you are, whether that discovery cost would be completely avoided if the writ was granted, and how early are we in the litigation, and how much has already been done. And even though this case has been pending for quite a while, Your Honor, it has started out in federal court, and it came here, and (indiscernible) on motion practice and very little discovery has been done, and it is still at an early stage where this Court can prevent a waste of legal resources and a waste of judicial (indiscernible) in continuing to administer this case, all of which costs would be saved if our writ was granted and the Court found that ERISA preemption is appropriate here.

We've noted, and I think it's worth considering, that the shoe is on the other foot a little bit. And when we were up in federal court, it was the plaintiffs who moved for a stay of discovery on the grounds that the case was likely to be remanded, and the Court should not waste judicial resources by proceeding with the federal case until the Court decided on the Motion to Remand. We think that some of those same factors play in here that they pointed out to the Court

there, and that over all, this is not a common case where a party seeks a frivolous writ after the denial of a Motion to Dismiss.

ERISA preemption is an area which the Nevada Supreme Court has shown an interest in. This case deals with a point not previously addressed by the Nevada Supreme Court, particular the right of payment versus right of payment exception. And, in fact, we believe that the Court may be motivated -- regardless of whether they side with us or not -- they may be motivated to accept the petition in order to clarify this important point of law under ERISA.

Unless the Court has any further questions, I will end my argument there.

THE COURT: Thank you.

The opposition, please.

MS. LUNDVALL: Thank you, Your Honor. Pat Lundvall from McDonald Carano here on behalf then of the plaintiff.

To begin, I'm glad that the Court has a reputation for reviewing the written papers in making decisions on these motions before, in addition to listening to the oral presentations on the motions, since the oral presentation that was just made by Mr. Roberts does differ, and differs in a significant piece from the written motion that they have brought to the Court. Let me address that to begin with because it does focus upon the totality of the circumstances which I'm glad that Mr. Roberts has led with.

When you look at the totality of the circumstance and you look at their concessions that they made in their motion, United asked

for a stay of all discovery even though it concedes that even if it is 100 percent successful on the writ petition, that there will be claims that remain. It concedes that there are ERISA claims that will remain and that --

THE COURT: Excuse my interruption. Someone is typing in the background, and if you'll just mute yourself, because it interferes with my ability to listen. Thank you.

Please proceed.

MR. ROBERTS: Your Honor, I apologize, and I'm muted.

THE COURT: Okay. All right, Ms. Lundvall.

MS. LUNDVALL: Thank you, Your Honor.

One of the things I wanted to point out up front is that United is asking for a stay of all discovery, even though it acknowledges if it were 100 percent successful on this writ petition before the Nevada Supreme Court, that there would be claims that remain even after that writ petition. And they concede that there are ERISA claims that would remain as a result of the writ petition and that there would be discovery that would be necessary on those writ -- on those ERISA claims. And at the very minimum, the administrative record then would have to be disclosed, and there'd have to be discovery on those issues.

And when you scour their papers and when you scour the case law -- and I do do a lot of appellate work, and so I'm fairly familiar with this -- they can offer -- and I can't find a single Nevada case that has stayed the proceedings below that when, in fact, that

what is at issue in a writ is a review on a partial Motion to Dismiss.

And so, in fact, if you take a look that there's even Nevada authority to the contrary that holds that when, in fact, that you're seeking a partial review of a Motion to Dismiss, it's inappropriate for writ review. And if it's inappropriate for writ review, then surely it's inappropriate for a stay of proceedings during that writ review.

The second point that I'd like to make -- and that is that, once again, looking at totality of the circumstances that United is asking for a stay of all discovery even though -- even if it were 100 percent successful on the writ, the only benefit it obtains from a stay is narrowing the scope of discovery. So in other words, all they're trying to do on a writ is to narrow the scope of discovery. And what they're trying to do is to save some time or save some money by asking for a stay, even assuming 100 percent success on the writ, which is what we disagree upon.

They offer no Nevada Supreme Court authority, once again, on that proposition. And, in fact, they run exact contrary to the holdings in *Hansen* and the exact contrary to the holdings in *Micon*, the two principle Nevada Supreme Court cases that say clearly and unequivocally that saving time or money is not irreparable or substantial harm that should be evaluated in determining whether or not that a stay should issue.

If you look particularly at the *Hansen* case, in *Hansen* it was an issue as to whether or not that there was personal jurisdiction over a defendant. And the district court below had found that there was

jurisdiction over that defendant, and there was a writ review that was sought then by the defendant before the Nevada Supreme Court. And he had asked for a stay, and his principle argument was there's no reason I should go through the entirety of this case and go through discovery and potentially go through a trial when, in fact, that the Nevada Supreme Court is reviewing this on a writ. And the Nevada Supreme Court denied his request for a stay, stating that, in fact, that cost savings or time savings or trying to save effort in not having to litigate a portion or all of the case, was not a factor to be taken into account then in determining to grant a stay.

The other thing that United is asking -- and when you couple their two arguments together in particular, I think it's important to keep in mind that they acknowledge that there will be ERISA claims that will continue, even if they're 100 percent successful, that there'll have to be discovery on those ERISA claims, and that the administrative record on those ERISA claims will have to be gathered and disclosed as part of discovery. And they take the position, even though we disagree with it, but they take the position that it's going to take up to four years to gather that administrative record and to turn that over as part of discovery.

So when you couple their two arguments together and suggest that, in fact, that we should just stop all discovery and stop all proceedings below while we determine whether or not that the Nevada Supreme Court is, number one, even going to grant review, let alone to make a decision on writ review on this -- what we're

looking at is a delay of upwards between seven to nine years before, potentially, we can get to trial from when we first filed this case. And there is a number of different cases from our Nevada Supreme Court that states that when there is going to be an undue delay that will result by grant of a stay, then that means that the stay should not be granted below.

In general, when I take a look at these factors in totality, it underscores the fact that the law abhors an absurd position. And when you evaluate the four factors that are supposed to be required to be looked at, then when, in fact, you can see why it is that in this circumstance that a stay should not be granted, as has been requested then by United.

The first factor, if I can underscore, and that is that the Court should review -- is whether or not that the object of United's writ will be defeated if the stay is denied. And they contend or they argue that the object of their writ review is to determine whether or not that either complete preemption or conflict preemption should apply to preempt then some of these claims and to transmute them into ERISA claims.

Well, first and foremost, complete preemption is a jurisdictional tool, and they have no opportunity by which then to go back to federal court and to seek that jurisdictional tool or to use that jurisdictional tool so as to get federal court jurisdiction. So that ship has already sailed, and that can't be the object then of a writ petition.

The only thing that's left is conflict preemption, and the

Court gave them the opportunity for review after factual discovery then in bringing motions for summary judgment at the conclusion then of that discovery. So they have the opportunity to review below and then an opportunity then on appeal to preserve then any of the issues for which that they seek conflict of preemption. So boil it down to its bare essence, a denial of the stay then does not defeat the object of their writ review.

Number two, the Court is supposed to evaluate whether or not that United will suffer irreparable harm if the stay is not granted. The only harm that United offers to the Court -- and I underscore this -- the only harm that they offer to the Court is found at page 13 of their brief, lines 25 to 27, when they speak to the fact of -- and I quote here: The high potential for wasted resources and unnecessary expenses associated with continuing discovery. So in other words, what they're saying is that it's go to go cost us time or money to litigate this case, and we want to save time and money. Both the *Micon* case as well as *Hansen* say saving time and money is not irreparable, it's not even substantial harm under those two cases. So that factor doesn't favor them.

Number three, the Court is supposed to evaluate then whether or not the plaintiffs, the healthcare providers, if they will suffer or potentially suffer significant or irreparable harm by the grant of the stay. And this is one where I think that you need to take this case and look at it in context. United is the largest healthcare provider across the nation and the largest healthcare provider here in

the state of Nevada. In other words, United's policyholders are the largest group of policyholders that seek medical services on an emergency basis from the plaintiffs. Pursuant to law, both federal law and state law, we are obligated to provide medical services without any opportunity to review or any opportunity to discern if we're going to get paid for the provision of those services.

So in other words, where I'm going with this is that the largest group of individuals, patients, policyholders that walk through the door of emergency rooms that my clients provide services for are United policyholders, and that is the largest group then that for which that United is only paying pennies on the dollar on the invoices and the bill charges that we send them for payment. And they're doing this in an effort to try to coerce and to exert and to try to, in essence, push us into a written agreement for which that pays us below cost of the provision of the services that we provide.

So the longer that this case proceeds, like any other business, the greater the likelihood of our provision then of providing the services for which that we're not getting paid, you end up with a company then that is writing more red ink than it does black ink and that runs the risk then of substantially harming then the healthcare providers and pushing them out of business. United knows this. And as with any injunctive type of relief, when you're threatening the very livelihood and the very existence of an entity, that is the pure definition then of the definition of irreparable harm.

So the longer that United can push us and the longer that

they can make the provision of these -- this litigation go on, the greater likelihood then that we don't have a viable opportunity or a viable way by which to move forward. They already owe us $20 million and that's counting on a daily basis and that's accumulating then on a daily basis. And so that factor is a significant factor for which that mitigates against the grant of the stay.

The last point that the Court is to analyze then in determining whether or not that a stay should be granted is whether or not that United is likely to prevail in the merits of their writ, a petition that they filed before the Nevada Supreme Court.

When they described the contents of that petition then to you, one of the things that was interesting to me is that they relied upon the same two cases that this Court has already rejected. They relied upon the same cases for which that this Court had found. For example, the *Evans v. Safeco* case -- that it was a Ninth Circuit case for which that -- subsequent Ninth Circuit decisions, subsequent U.S. Supreme Court decisions had indicated that the test and the review then that had originally been offered by *Evans v. Safeco* was not the appropriate test. One by one by one, if you look at the cases that they cited on the likelihood of success then before the Nevada Supreme Court were each one of the points that this Court had already looked at, analyzed, reviewed, and expressly found against them based upon subsequent or more applicable or more analogous case law.

And therefore, when you look at then at bottom, even ignoring the totality of the circumstances here, but if you look at at

bottom, none of the four factors favors granting them a stay, not one. And so you can't even weigh or apply some type of a weight then to even one of those single factors so as to consider granting them a stay. And so we would ask the Court then to deny their request for a stay of proceedings and to allow this case then to continue a pace then as we have already laid out.

Thank you, Your Honor.

THE COURT: Thank you.

And the reply, please.

MR. ROBERTS: Thank you, Your Honor.

First, I'd like to start out in saying that I believe our arguments were successfully stated in my presentation to the Court. Ms. Lundvall was correct as there was some inconsistency in our briefing, and I can explain that with some assumptions that, perhaps, we were making.

The -- it is true that if our writ was granted and the complaint was dismissed based on ERISA conflict preemption, it is true that they would still have ERISA claims. However, the Court can review the complaint and see they had not brought ERISA claims. So therefore, the entire complaint would be dismissed, and it would be dismissed because there aren't any ERISA claims pled.

Now, based on the case law we cited to the Court, it would be appropriate for the dismissal to be without prejudice, and we acknowledge that they could bring a new complaint for -- under ERISA, which would not be dismissed. But this action would be

gone. They would have to plead a new ERISA complaint which has not been pled. And we don't know that they would do that, because it may be they had not pled ERISA because they know they'd be entitled to no additional money under the actual terms of the plans at issue.

In addition, our initial review has shown that only about 500 claims, we've determined, were actually appealed. Therefore, rather than dealing with over 22,000 claims, as we have discovery now pending on -- if this was re-pled in a new action under ERISA, the argument would be that they failed to exhaust administrative remedies in all but about 500 of those claims. And those 500 claims, which were appealed under the terms of the plans, would be able to proceed under ERISA, but it would be a vastly different lawsuit with a vastly different burden upon United in responding.

The -- we acknowledge the case they cite, which talks about the fact that discovery costs are not generally considered as irreparable harm, but, you know, I've mentioned before *International Game Technology v. Second Judicial District,* a 2008 Supreme Court case, where in that case the Court specifically found that an appeal was not an adequate and speedy remedy given the early stages of litigation and the policies of judicial administration. So it isn't a black-and-white issue. And if the case is early enough and discovery is extensive enough, then those factors can weigh in favor of the stay and if favor of the Court accepting a writ.

In our opposition to the Motion to Compel, which the Court

has probably read, we have included a declaration of Sandra Way, which generally goes through and says at two hours of claim, 22,000 claims would take four people earning $60,000 a year, five years to pull. That's $1.2 million in discovery costs which is going to have to be borne by somebody if the Court compels that discovery. This is not a typical case, and sound judicial economy weighs in favor of the Court staying the action in order to give the Supreme Court a chance to review our writ on ERISA preemption.

Thank you, Your Honor.

THE COURT: Thank you.

This is the Defendant's Motion for Stay due to a writ that was filed on about August 25th of this year. Motion will be denied for the following reasons: First, the case goes back to April 15 of 2019. You have a discovery cutoff of December 31 of this year, and I find that the objects of the appeal would not be defeated in -- by me not granting this motion. With all due respect to the defendants, I do think that there is a likelihood of success on the matter even being considered by the Nevada Supreme Court. I find that irreparable harm in this case would weigh in favor of the plaintiff and not the defendant.

Now, the Court's deny it; however, let me also say that, Mr. Roberts, if there is briefing requests, I would reconsider this. If the Supreme Court requests briefing on the issue, I'd consider a brief stay for that purpose. So --

MR. ROBERTS: Thank you, Your Honor. I understand.

THE COURT: So, Plaintiff, prepare the order. Mr. Roberts and his team will look at it, approve the form of it, and then it will be submitted, denying the stay. Of course, you still have your ability to seek a stay from the higher court.

The second question I have was the Plaintiff's Motion to Compel the Production of Claims Files or in the alternative Motion in Limine. Please proceed on that.

MS. LUNDVALL: Thank you, Your Honor. Once again, Pat Lundvall from McDonald Carano on behalf of the healthcare providers.

This is a motion that underscores the sword versus shield protections, the sword versus shield analogy that our Nevada Supreme Court has upheld since 1995 when it issued the decision in the *Wardlow v. Second Judicial District* case. In other words, a party, during the course of discovery, cannot say, no, no, no, no, you can't have a discovery because of one reason or another. In that case it was a principle of trying to apply privilege to certain documents, but then at the time of trial that they tried to defend using the same information or the same arguments that that discovery would have revealed and that discovery would have allowed them to explore the parameters of.

It's a simple basic proposition that -- I think that many of us learned as kids. And that is for every right that we have or every right that we enjoy, that there's an obligation that goes along with that. It's the same principle that we tried to teach our own children. You don't

make your bed; you don't get to go outside and play.

And in this particular circumstance, what we're trying to do is to apply standard, basic Nevada Supreme Court authority that's been the law since at least 1995 and probably long before that, and also seeks to underscore basic principles that not only that each of us probably learned as children, but that we also tried to teach our own kids.

Let me give you the context then for this because at every turn during the discovery process, United has taken the position that they don't have to give us anything but the administrative record because these claims that we are bringing are nothing but ERISA claims. And they have mounted that refrain and beat that like it's a drum. These are ERISA claims; all you get is the administrative record. All right. (Indiscernible) All right. Give us the administrative record at least (indiscernible). Oh, can't do that, it's too hard. It's an undue burden. We can't give that to you. It's going to take us too long to do that. It's going to take four years for us to give you the administrative record for the claims that you have brought or the claims that are at issue in this case.

And so, therefore, they have objected to giving us at administrative record, citing undue burden. So it's a classic situation wherein they say, All right, these are ERISA claims. They acknowledge the minimal discovery obligation that they have is the production of the administrative record. But when we ask for the administrative record, they say, We don't have to give it to you

because it's an undue burden. (Indiscernible) this case.

And part of the reason that they claim that it's an undue burden is because of the number of claims that are at issue in this case. And they point to the fact that there have been spreadsheets that have been offered then, by the plaintiff that detail in great -- and identify in great detail the claims for which that they have underpaid, and that they have (indiscernible) to an excess of 15,000 and have now risen to an excess of 20,000.

And so the question becomes, Why are there so many claims? Well, they are because United created a problem beginning in 2018, when they tried to coerce us into taking a written agreement that would have transmuted then our prior business relationship with them and that would have discounted them any payment to us by 50 percent. And they said, If you don't like that, then what we're going to do, is we're going to start underpaying your claims. And we're going to start at a 33 percent level by underpaying. We'll then move to a 50 percent level by underpaying them, and then we'll move even farther than that as time goes on. And that's exactly what they did.

And because they are the largest policy writer -- the largest underwriter then of health care here within the state of Nevada, the number of claims, the number of folks that come across the doorstep into our emergency room seeking emergency treatment for which that we are obligated to provide them services by law, those claims then are high in number. And so to the extent that you step back and

you look at this from the 30,000-foot level, and what do you have? You have United creating a problem by taking the position that we're going to use our financial might and our financial worth to try to push you around, and if you don't like it, then we're going to push even harder. And because of the numerosity of these claims, then we're going to go create a problem for you. And that's what they have done.

And then when we litigate, they point to the very problem that they created and said, Oh, by the way, I don't have to do any discovery. I don't have to give you that administrative record. Why? Because it's too hard. It's too much work. It's too much effort. It's going to go take us too long by which to accomplish that.

And so you sit back and you think about it -- what a swell kind of tool that one can employ if you were a litigant. First, you create a problem and then you use the very problem that you created in an effort to try to avoid a discovery obligations. And then you want to go to trial, but to be able to use that very administrative record, to claim or to try to defend then against the claims that have been brought against us.

And so what we did is we sat back and we thought about this. And it's like, wait a minute, you can't have it both ways. You can't use the argument of undue burden and not having to comply then with your discovery obligations in the production then of these administrative records at the very, very minimum. And then to be able to go to trial and to be able to use that same record then in an

effort to try to defend then against the claims.

And so what we've done then, is we tried to put them to the choice, either produce the claims to us or be foreclosed at the time of trial then from using any of the evidence then from these claims in order to defend then against the claims that we have asserted then against United.

So where we're going to in this particular circumstance, in this particular case, is that we ask for the production of the administrative record. They said, We don't have to give you that administrative record because it is that undue burden. Ignore the fact that we haven't met the standards for demonstrating that it's an undue burden or that you can likely get that same information then from other sources. But we're just going to claim undue burden and not give it to you.

And so we're asking for this, basically, either/or relief. Either require them to give us the administrative record at the very minimum and to do so within the time frame because this goes back now -- it dates back to a request for production that we served back in December -- December 8th of 2019, and that they have refused then by which to give us; or if they don't want to give us the administrative record, then to foreclose them from being able to use it at the time of trial. And we've identified the scope of that relief, it's found in our motion, and I can direct you specifically to where in the motion that that is laid out. But that's the choice that we would ask the Court then to put United to because they can't have it both ways.

And with that, Your Honor, we would submit.

THE COURT: Just got a couple of questions. When you said retrieve, review, produce, what do you anticipate there in claims files?

MS. LUNDVALL: Their claims files have been identified. I think they describe them -- let me find my notes, specifically, because they describe their claims file in pretty broad terms. And I believe it was that page -- oh, I'm not finding this quickly, but I believe it was at page 13 of the brief that identifies what their claims file would be.

But the claims file is identified within the motion as to at minimum what the contents are, and they're kind of your classic claims file information that you would find in your standard insurance file. One would expect then to find the claim itself, the reasons for the payment on the claim because these claims have already been adjudicated then as payable by United. But they are to be paid and that they are -- should be paid. They have just simply underpaid them. There also should be an identification as to why they were underpaid and the amount by which that they were underpaid. And there's a series of documents that would be found within those claims files, and that is what we had requested.

THE COURT: Good enough. Next question: I assume it's all electronic?

MS. LUNDVALL: We assume that it's electronic too, and I will tell the Court that the last time -- not against United, but in the context of another case, we learned that the electronic files and the electronic compilation of these files is very sophisticated by the

insurance companies and almost everything, unless there's some type of special rules that have been applied by these insurance companies, is all electronic adjudication that they -- they've got programs that have been written for the adjudication of these files.

If there's something separate and there's some special programming that they have strictly for team health files, then there may be some type of a manual file that would need to be looked at. But that manual file would only apply to special rules, which we think may be occurring in this case. But if, as they suggested, there's no special rules that are being applied then to team health then it should be all electronic.

THE COURT: And they would have to redact if I grant your motion?

MS. LUNDVALL: No, Your Honor. We have a protective order already in place that provides the HIPAA protections that would afford that. All they have to do is to be able to designate those as HIPAA protected. Moreover --

THE COURT: Last question is they say that -- they said that --

No, you go ahead, please.

MS. LUNDVALL: Just to clarify on the HIPAA protection, any of the health insurance or the health information then that would be found in these files would have been supplied then by the plaintiffs, healthcare providers themselves, who equally have a HIPAA obligation concerning maintaining the confidentiality of that

information. And that's why the HIPAA issues do not need to be specially accounted for or a special redaction then for that issue.

THE COURT: My last question is: They say in their opposition that you already have EOBs, appeal stocks, and the administrative record.

MS. LUNDVALL: And we had offered, Your Honor, to them to be able to remove those or to remove that information. The EOBs in particular and -- let me -- there were two pieces that we had offered them to say that we -- they did not need to provide. The two pieces that we had offered that they did not need to provide because -- that we were already in receipt of is the EOBs, the member explanation of benefits, and then the provider remittance advices, or was referred to as PRAs. And so those were the two that, in fact, we had offered and they had rejected that offer then from us.

THE COURT: Thank you.

And I'm ready to hear the opposition, please, Mr. Roberts.

MR. ROBERTS: Thank you, Your Honor.

I'd like to start out by pointing out that there is not a sufficient record before this Court where you could base your decision on the Motion to Compel on an argument that United is trying to put these providers out of business and that if somehow United is able to continue with this litigation, that it's going to drive these providers -- that they don't have the money, that they're going to be run into the ground. A footnote, page 8, we noted the TeamHealth Holdings is a subsidiary of Blackstone, which has

$360 billion under management. This is not a case of a big insurance company against a little doctor who can't fight. They have brought litigation affirmatively all over the country. They have been very aggressive. They are in no danger of going out of business, Your Honor. The --

THE COURT: You know, I'm not going to consider that anyway, Mr. Roberts, on either side -- your size -- you know, there's an equal protection clause. Everybody starts out equal.

MR. ROBERTS: Thank you, Your Honor. I'll move on then.

I would like to say however, you know, as Ms. Lundvall talked about some of the things you learned as a kid is, you know, that what's good for the goose is good for the gander and that obligations run both ways. And in this case, as we point out on page 2, we have served discovery to ask for all documents in their possession regarding the claims they are asserting and, in particular, production of all the clinical and cost records underlying each one of the claims. Which is perfectly relevant because they have claim in quantum meruit that is preceding.

They objected to that on the grounds that the burden and expense of gathering thousands of medical records adequately redacting confidential and information protected by HIPAA and producing this exceedingly large file, outweighs any benefit. In other words, they are a company that doesn't have to prove their case and produce all of the records to support their case, but United somehow has to comply with an impossible time frame to produce their

administrative records.

Ultimately, we've got no dispute with one thing that was argued by Plaintiffs. And that is that if United doesn't produce documents including administrative records pursuant to 16.1, they obviously can't use at trial, information which wasn't produced pursuant to 16.1. So we don't dispute that. And, in fact, as stated in our brief, we're currently diligently working to produce first, the 500 claims that were actually appealed under the administrative procedures.

And we're prepared to start rolling productions of those documents within 30 days; and although, we don't have a good handle on the additional claims which took us from 15- to 22,000 claims, we believe we'll be able to get that full production of appealed claims, which is only about 500 or so claims done completely by January 8th. And, certainly, we ought to be entitled that time to produce those records in a reasonable timeframe, given the burdens of research necessary for us to look for, download, review, and produce these extensive files.

Again, if we don't -- anything we don't produce, it's obviously going to be excluded. But there's no basis to compel us to either produce things, which are impossible to produce within 14 days, or face a sanction of exclusion or an admission that their spreadsheets are correct.

Even if United did not produce any administrative records, which is not going to happen, it doesn't relieve plaintiffs of their

burden of proof. And even if we produce no contrary evidence, the jury would be entitled to believe that they had not established that the reasonable value of their claims exceeded what United paid.

And there's a difference between United saying we're only going to pay the reasonable value of the claim and then disputing that versus whether they're ever going to be able to prove that United intentionally underpaid claims in the sense that United paid less than they knew was due.

It's not coincidental that there's a class action pending against these providers now, claiming that they vastly overcharged their patients for the cost of medical services, and they're one of the highest charging providers. Simply because they say this is how much we're owed in a bill, does not mean they've met their burden of proof, that that's the amount owed in a bill. That is the question for trial.

So ultimately, Judge, what we would ask for is if the Court is going to compel the production of all the administrative records, we receive an adequate time to do that, and that when we bring the appropriate motion, that TeamHealth be similarly compelled to produce all of their clinical and cost records supporting each and every claim.

Alternatively, as we intimated in our brief, this is not a problem that's unique to this case, and there are things that Courts and parties have done in order to try to relieve some of the necessary burden from producing every single one of the claims. I know that

Plaintiffs don't want to agree to a scientific sampling, but that was done, for example, in the CityCenter project with Judge Gonzales, where you had thousands and thousands of rooms with similar defects, and they did some sort of sampling there. United also generally opposes sampling because it's not appropriate for many cases.

But certainly between this great firm we've got on the other side and the firm we have on this side, we could come up with some way that both sides could get some relief on what they claim would be an unduly burdensome production while still getting to adequately try their case on the merits. If the parties can't do that, then the Court needs to consider, under the new amendments to the rules, not just the relevance of the documents but the extensive burden and hardship. And if either side insists on the production of 100 percent of these documents, then we think it's appropriate for the Court to consider some cost-shifting measures, where the party demanding the documents is bearing the burden of the unreasonable cost of production. And we also need to talk about some more realistic discovery timeframes, which would give both sides the time they need to produce the extensive discovery, which is currently been demanded on each side.

Thank you, Your Honor.

THE COURT: Does that conclude your argument? So, Mr. Roberts, you've been aware of a lawsuit probably since April of 2019. When did the effort start for the retrieval of review and

production of these claims files?

MR. ROBERTS: Mr. Balkenbush has been working with the client on these since this was filed. I can allow him to address that with leave of Court.

THE COURT: Because the request was made last December?

MR. BALKENBUSH: That's correct, Your Honor, and United's response to the request -- we objected. We made the exact same objection that we're making today and presenting to the Court. The attached -- the undue burden declaration of Sandra Way that we discussed extensively in our brief, and we stood on that objection that it was unduly burdensome, given the expense to produce administrative records for all 22,000 claims at issue.

And, essentially, what happened is, for whatever reason, the plaintiffs decided to not see this issue out until now with a Motion to Compel. But our objection -- they have had our undue burden objection and undue burden declaration since 30 to 40 -- whenever the deadline was for our response -- it was 30 to 45 days after their request was served on us.

THE COURT: Okay. And I need an explanation of why, if I grant the motion, you wouldn't be able to produce anything on a rolling basis for 30 days more.

MR. ROBERTS: Your Honor, we probably could begin producing on a rolling basis within 14 days. I think 30 days was our goal to have all of the administrative records produced of the claims

which had been appealed based on our records. But we could begin rolling productions earlier than that, especially if the Court were to order us to immediately begin producing administrative records and files other than those which had their administrative appellate rights exhausted.

THE COURT: Okay. And my next question is kind of compound, but I assume you have decided that you think the appeals are the most important. Are there general categories then of -- because there are so many analytic companies out there now who are doing this -- using artificial intelligence -- that I don't know why it would take so much effort on behalf of the defendant to compile this information.

MR. ROBERTS: And, Your Honor, that effort --

THE COURT: Is it something you (indiscernible) Mr. Roberts?

MR. ROBERTS: That effort is something which we've asked the same question and which has -- you know, is extensively explained in the process and the four or five different searches that have to be done. I will say that based on the affidavit and the estimates, for example, if the plaintiffs agreed to withdraw the request for the EOBs and the provider explanation benefits, I think that would almost cut this in half, reduce it at least 45 minutes, maybe more, because that would eliminate --

THE COURT: Mr. -- Hang on.

MR. ROBERTS: -- separate system. But --

THE COURT: Ms. Lundvall -- Hang on. Ms. Lundvall already said she agreed that they have the EOBs and the remittance advices.

MR. ROBERTS: Right. So that takes us from five years to two and a half years, so we're making progress. But --

THE COURT: No, that's -- I don't think you understand. That's not going to be good enough. It really isn't. And I'm going to both sides do discovery.

I know I cut you off.

MR. ROBERTS: And, Your Honor, simply because of the confidential nature of the health records, United typically does these without the use of third party vendors. And we've indicated that we could assign four employees in that department full time to pulling nothing but the records being asked for in this case. And we're prepared to do that, but more than that would simply impose an undue burden on United. That would be our contention here, Your Honor.

THE COURT: Okay. Did you have anything further?

MR. ROBERTS: The only thing I would just add is, I believe, we started pulling administrative records, at least in the claims which were appealed, as soon as the Court denied the Motion to Dismiss, and we've been working on that.

And that -- the reason that we have contended that those are probably the most important is because, according to our client, the claims that are appealed are much more likely to have correspondence indicating some narrative as to the issues in dispute

and the reasons why the claims were denied or were paid in the way that they were.

If a claim was simply submitted and an EOB was issued for less than the amount of the claim and it was never appealed, then the file would be much less likely to contain correspondence or other relevant information that would add to the EOBs and provider explanation of benefits, which the plaintiffs already possess.

THE COURT: Thank you.

And the reply, please.

MS. LUNDVALL: A couple comments in response to the presentation done by Mr. Balkenbush and Mr. Roberts.

Number one is that you ask Mr. Balkenbush when the process then began for gathering then these administrative records for each of the claims. And quite candidly, you didn't get a response from him. You kind of got a response from Mr. Roberts. And Mr. Roberts contended that while we started on that process, limited to the appeals after you denied the Motion to Dismiss.

And so recognize that earlier they told you that there's only about 500 that they contend are subject to appeal. And so, therefore, that all they want to do is to give us 500 administrative records from over 20,000 claims that are at issue in this case. And they want another 30 days by which to do that with no explanation and no offer or no suggestion as to when the balance or the rest of these may occur. There's point number one.

Point number two is this: We have offered, on three

separate occasions, various proposals or trying to bridge the gap between the tap dance that we get as to why they can't give us this information. We tried to suggest that they give us their own spreadsheets. We've tried to suggest that they do a comparison of the spreadsheets. We've tried to suggest that, in fact, they give us their own spreadsheets, and we will compare them against ours to determine which of the claims for which that there may be a discrepancy then into the amount that may be owed.

Each and every one of the proposals that we have put on the table in an effort to try to streamline resolution of this dispute has been rejected out of hand. And what they've done is they try to stand entirely upon this declaration of Ms. Way.

When you look at the declaration of Ms. Way, he doesn't even contend that she has tried to pull a single claim that is at issue in this case, not one. When we asked during our meet and confers as to whether or not the she had, it was acknowledged that she had not. So they don't even know, based upon the claims in the information that we have already supplied to them, which is vast and extensive -- we included that was within our motion as to how much information that we have actually supplied to them for each one of the claims that is at issue so that it narrowly defies then whatever search that they need to do from an electronic basis and each and every time that it has been rejected.

Our proposal to them as to why that they may not have to hinder the -- the EOBs, the employer Explanation of Benefits and the

Provider Review Admittance -- was in the event that they did not contend that there was some type of a discrepancy between their records and our records, that, in fact, that they did not need to provide those. But if they did contend that, they would need to provide that information.

Moreover, the PR -- the Provider Review Admittances, those would also identify whether or not that Data iSight had actually adjudicated those claims. And Data iSight is the third party for which, that we contend, has been involved in trying to do the whitewash, so to speak, of why it is that we are being underpaid on these claims that have been submitted and the methodology in the review that has been provided. And so having an understanding as to which of these claims have been reviewed by Data iSight is an important piece to us.

When what our offer was, is that simply in an effort that if they want to remove those issues from discrepancy, then don't turn over those to us. But if they do wish to dispute then the differential then that is owed by them, then they would have to turn that over.

So, in sum, the one last point, though, that I want to make, though, in reply is this, Your Honor. Back in February of 2020, they had asked us for what were all the clinical records that underlie -- or the medical records that underlie -- each one of those claims. And we had identified that they have absolutely no relevance to this dispute for the simple fact that United had already adjudged these claims as payable. They had already gone through their review of those clinical records, had already identified them as payable, and had already sent

us something for which that claim was payable, thereby making all of those clinical records irrelevant.

We realized that issue with them all the way back in February and stated that objection. And it wasn't until their opposition then to this motion, did they even raise the issue with us. It has not been the subject of a meet and confer. And when, in fact, that they bring a Motion to Compel on this particular point, we're happy to respond and to give, in full, the explanation to the Court as to why that we think that, number one, they're irrelevant and do not need to be produced.

But it is not a defense to any party's discovery obligation to say, Well, you haven't done what you're supposed to do, so I shouldn't have to do what I'm supposed to do. And to the extent that that's what they're contending by trying to advance this particular argument, we suggest that it's a red herring, number one. But, number two, we welcome the opportunity then to first have a meet and confer with them on this particular point; but also if they -- if that meet and confer then doesn't resolve any of the dispute then concerning our discovery obligations, to bring those to the Court then for review.

But, in sum, we go back to the basic premise and that is this: They acknowledge that these administrative records are their bare bones discovery obligation. We've asked for those, and we've asked for those since December 9th of 2019. And we haven't gotten any of those. And so to the extent that we ask the Court order them to have

them produced and to have those produced then within 14 days, notice of entry of an order. And if, in fact, that they are not going to produce these records, then they should be foreclosed from being able to rely upon them or the content of them in defending against the claims then in this case.

And with that we would submit, Your Honor.

THE COURT: Thank you. So define, again, for me the bare bones? Because they're focused on appeals, and then you mentioned discrepancies and the Data iSight review claims. So what is the bare bones?

MS. LUNDVALL: On page 5 of their opposition, they identify the administrative record consists of five categories of documents. That's their own identification.

And first and foremost, Your Honor, since I'm not a United representative and I'm not a United attorney, I have to, at least at this stage, rely upon what their description is of their own administrative record. And so it's those five categories of documents that we are asking for, for each of the claims that are at issue.

If they do not dispute the discrepancy that we've identified between the Explanation of Benefits and the Provider Remittance Advices statements, then they don't need to produce those. But if they do dispute those, then they must be produced. So all five categories would need to be a part of their production to us. That is what we're asking for.

THE COURT: And where does that Data iSight review come

in?

MS. LUNDVALL: The Data iSight review comes inin what is referred to by the parties as the Provider Remittance Advices, the PRAs.

THE COURT: I see. Okay.

MS. LUNDVALL: That's what -- where we understand the Data iSight review would be revealed in those documents. At least that's our current understanding based upon the information that we have.

THE COURT: All right. So Mr. Roberts or Mr. Balkenbush, (indiscernible) extensive questioning. I'm going to give you a chance to respond if you'd like to.

MR. ROBERTS: I would, Your Honor. I just heard something a little different than we don't have to produce the EOBs and the provider Explanation of Benefits, A and B category documents on page 5. Instead, it's we only have to produce them if we disagree with their number on their spreadsheets. I think we've established that they were given these documents. They have to be in their possession. They have to have already pulled them to create the spreadsheet.

Rather than put United through spending hundreds of thousands of dollars to try to pull the same document they already have, there should be no order compelling us to produce documents we already have. Rather, we should be able to serve discovery on them to get documents that have already been pulled and that the

cost of pulling those documents was substantially easier and less burdensome for them due to the way provider records are kept as opposed to insurer records.

THE COURT: Thank you.

And, Ms. Lundvall, it's your motion. You get the last word.

MS. LUNDVALL: Thank you, Your Honor.

What Mr. Roberts articulates and underscores is the fact that, once again, that they want to dispute or to contend that there is a discrepancy in the amount owed, but they don't want to offer the documents that they have by which to prove that. So it goes back to the basic premise of our motion. In the event that you wish to advance a defense, then you got to produce the documents that provide that defense or else that you should be foreclosed then from offering a defense. Plain, pure, and simple.

THE COURT: Okay. Thank you both.

This is the Plaintiff's Motion to Compel Production of Files to Require Retrieval, Review, and Production. It ends up -- it turns out that it will be granted. The categories on page 5 of the opposition with regard to administrative records, the defendant to provide, based upon those five categories, (indiscernible) only have to provide if there's a discrepancy between the EOB and the admittance. And we'll have a -- the Plaintiff will prepare the order.

But let me also reiterate to you guys -- I'm not going to consider the Motion in Limine at this point because it seems more right to me, after we do the production, to consider negative

inferences for things that aren't produced, rather than considering Motions in Limine at this point. I don't want to -- that part of the motion is denied without prejudice.

So the motion is to be granted then with regard to the five categories on page 5 of the opposition with the exception of discrepancies between the EOB and the remittance.

We'll do a status check in about three weeks to see how the defendant's coming along on that.

MR. ROBERTS: For clarification, Your Honor, are you ordering us to produce all five categories for all 22,000 claims within fourteen days as requested or just to begin those rolling productions and make our best efforts moving forward?

THE COURT: The Motion to Compel is granted with a status check on your performance in three weeks. And in three weeks you should be able to tell me exactly what you're going to be able to do and when.

MR. ROBERTS: Thank you, Your Honor.

THE COURT: All right. Nicole, may I have a three-week status?

THE CLERKk: That date will be September 30th at 9:30.

THE COURT: September 30 at 9:30. If you think you guys are going to need longer than a stacked calendar, we can give you a special setting. Do you think you will need a special setting? Because I hate to chop up these hearings like I had to do today.

MS. LUNDVALL: I hope, Your Honor, that we're going to

come to a status conference, and Mr. Roberts will be able to report that we have them all.

THE COURT: Good enough. If you find that you need more time --

Go ahead, please.

MR. ROBERTS: Your Honor, to the extent the Court is going to want some time to discuss everything that we've done and the progress we've made and get into the specifics of what we're doing, it may take a half an hour or more. And I would not be opposed to a 1:30 setting, but I don't think it's going to be nearly as long as our last two hearings before you have been.

THE COURT: All right. Any objection to a 1:30 hearing on that date?

MS. LUNDVALL: No, Your Honor. I'm reading between the lines, here.

THE COURT: Okay. So we will reconvene on this September 30th at 1:30.

And we still have one more motion to resolve today, which was the Defendant's Motion for Product Order -- a Protective Order (indiscernible) filed on the 13th of August with regard to e-discovery and (indiscernible) custodians.

And so let me hear from you, Mr. Roberts.

MR. ROBERTS: Actually, Your Honor, I'm going to defer to one of my colleagues to argue this, thinking you may have heard enough from me already.

Is that going to be you or (indiscernible) Colby?

MR. BALKENBUSH: That will be.

THE COURT: And I never tire of this, you guys, so don't ever worry about that.

All right. So, Mr. Balkenbush, go ahead, please.

MR. BALKENBUSH: Thank you, Your Honor.

So this is a motion that we've brought to accomplish two purposes: One is to deal with what we view as a number of very broad discovery requests seeking internal United emails from the plaintiffs. And, two, is to head off numerous additional discovery disputes that we see coming down the road in regard to the issue of both side's productions of their internal emails related to the claims at issue.

So what we've proposed is essentially a two-step process. One, the parties identify the custodians that they want emails from, from the other side. And then, two, that each party identify the search terms and the dates or date ranges that they'd like those search terms applied to for each of the custodians at issue.

And we believe this is appropriate, Your Honor, again, like I said, for a couple reasons. If you look at some of the examples of the Plaintiff's Request for Production that we've cited to and that we've also attached as Exhibit 3 on our motion -- or I'll just refer to a couple of them.

One is Request for Production 26. This is a request that asks for United to produce any and all documents and/or communications

regarding the provider charges and/or reimbursement rates that other insurers and/or payors have paid for emergency medicine services in Nevada to either or both participating or nonparticipating providers from January 1, 2016, to the present, including documents and/or communications containing any such data or information produced in a blind or redacted form and/or aggregated or summarized form.

And so this is seeking, for example, Your Honor, not only communications between the parties, but this seeks communications between other payors and other out-of-network providers other than the plaintiffs.

And so in response to this, we objected it was overbroad and vague. And instead of just standing on our objection, and our objection to other requests they have sent to us, we proposed this protocol where it said, Look, identify what custodians of United you want emails from, identify the search terms that you'd applied to their inboxes, and we'll run those. And we'd like to do the same for Fremont as well, propose the custodians we want emails from and the search terms. And they've just completely objected.

And the basis for the objection, as best we can tell, is just an argument that, Well, this motion and the email protocol is simply a delay tactic, that this isn't brought in good faith, that we're just trying to buy more time and delay production of emails.

But if you actually look at the protocol we proposed, attached as Exhibit 1 of our motion, it has dates in it that show this is not a delay tactic. We had proposed in that protocol that both parties

name the custodians that they would like emails from by July 24th, that the parties exchange search terms by August 14th, that any and all objections, whether it be the custodians or to search terms, be submitted no later than August 28th, and that both parties produce emails by November 15th, 2020, of this year.

So if you just look at the dates that we proposed in the protocol, it shows that this isn't a delay tactic. It's an attempt to streamline discovery and avoid numerous motions and disputes over what custodians our party pulled emails from and what search terms the party used and applied to that custodian's email inbox.

Now, I think that we spent a little time in our motion, I'll spend a little time now -- I think it's important (indiscernible) protocols like this are not unusual or unheard of. They're very common in complex commercial litigation like we have here. We cite extensively to The Sedona Conference Principles in our motion. And what those principles say is that it's a best practice for parties to agree on an ESI protocol for production of emails and other electronic information, especially in complex litigation where numerous claims are at issue.

And these principles that are set forth in The Sedona Conference -- these are principles that are relied upon by the Federal Rule Subcommittee when it was modifying the federal rules and coming up with guidelines for the production of electronically stored information. So these are highly respected by both the federal bar and in state courts around the country. And the protocol that we've

proposed is consistent with those principles and with federal case law interpreting those principles and putting them in place.

We cite to a couple cases in our motion where courts have ordered the parties to meet and confer and agree on an ESI protocol and essentially threatened to enter one if the parties would not agree on custodians and search terms and date ranges, especially when there's a large amount of information at issue. And those were the *Romero v. Allstate Insurance* case, a 2010 case out of the Eastern District of Pennsylvania and a *John B. v. Goetz*, a 2010 case out of the Middle District of Tennessee Federal Court. All of those cases discuss The Sedona Conference Principles and that protocols like the one we've proposed are appropriate.

We also attached some sample protocols as an exhibit to motion from the Northern District of California and the Southern District of New York. Both districts that are familiar with complex commercial litigation involving thousands and thousands of claims that we have here. And, again, the protocol that we've proposed is consistent with the model protocols that are put forward in those courts.

Now, another objection that the plaintiffs have raised is -- there's been some specific objections to the protocol. So, you know, one objection is, Well, you know, we've only -- United's only asked for five custodians and that's unfairly limited. There should be more custodians (indiscernible) emails (indiscernible). Well, we based that proposal based on -- not to (indiscernible) limited and make it

one-sided -- but based on the number of witnesses that the plaintiffs have identified in their disclosers.

They've identified five in health witnesses in their disclosers and United has identified four. And so rather than go four, which would have been one-sided on our side, we went with -- we went with five so they could name an additional United custodian if they -- if we named someone else on disclosers in the future or if they have someone else in mind. And if the Court believes that more than five custodians is appropriate, then the Court would be free to order the parties to collect emails from more than five custodians.

So the plaintiffs have just simply refused to negotiate on this issue. United is not necessarily opposed to agreeing to a higher number of custodians if there's a basis for that. Five was just what we based on, based on their disclosers.

They've also objected, just generally, to the use of search terms and gathering emails and electronic documents. But, again, if you look at The Sedona Conference Principles, it lists the use of key words and search terms as a best practice in gathering emails and other electronic documents. So that's consistent with what Courts around the country have found to be appropriate.

And, also, when you consider how broad some of these Requests for Production are that they've served, it's the plaintiffs who are in the best position to tell us exactly what they're looking for and narrow the scope of these requests, which is exactly what this protocol does. It says, Look, if you want communications with --

between United and other out-of-network providers other than the plaintiffs regarding rates of reimbursement and claims that have been challenged, then name the other out-of-network providers that these -- you believe there'd be emails between United -- between them and United. Name the, you know, specific types of claim challenges -- give us some key words we can use to search our emails to find what you want.

And their response has just been essentially, Well, it's your burden, you should go find this. And our objection is just, we don't know where to look. We need clarification, and that's why we've proposed this protocol.

And the last issue they raise is the privilege that they object to some of the provisions regarding -- each side producing a privilege log of electronically stored information as part of the protocol. And they argue that in the protocol that's currently written, there would be some kind of presumption that anything put in a privilege log is privilege. If you look at the protocol, Your Honor, that's not what it says.

What it says is that -- simply that the parties are entitled to do searches using the names of attorneys and that they should gather the emails from those searches that hit on emails where attorney's names are in them, and produce a log of all those emails to the other side, and that log is supposed to include certain metadata that's going to allow each side to assess whether or not this information is likely privilege or not privilege. And then the other side can request

additional information if they believe that, you know, improper privilege claim has been made on a particular email or document. So it's not inconsistent with Rule 26 and the requirements that are set forth there for claims privilege over electronic emails.

And, I guess, just in closing, Your Honor, I think it's just important to consider what the impact will be if the Court denies this motion. So if the Court denies this motion, both sides are still going to do the same thing. They're going to identify custodians that they think would have responsive emails, they're going to pull emails from those custodian's inboxes, and then due to the number of emails at issue, both sides are going to just select their own search terms and apply those to those inboxes.

The emails are going to be produced, and then, inevitably, both sides are going to challenge the other with the search terms the other side chose. They're going to say that, you know, United chose search terms that were unduly restrictive or didn't use search terms that it should have used. And, frankly, we're going to say the same thing probably about their production, if they choose search terms. We're going to argue that they probably didn't pull them from the custodians they should have and that they should've used other search terms that we would've requested if we had the opportunity.

And so this Court's going to be faced with multiple motions challenging each side's production of emails. And what we've proposed is a way to avoid all that. Each side proposes search terms and custodians that they want to the other side and that way

everything is transparent. And if there does need to be motion work, it can be taken care of up front in the very near future rather than down the line after the parties review, you know, rolling production of emails and decide that they don't think the other side's production was sufficient.

Thank you, Your Honor.

THE COURT: Thank you.

And the opposition, please.

MS. LUNDVALL: Yes, Your Honor.

Number one, I think I'd like to express my thanks to the Court for granting our Motion for Order Shortening Time to have this resolved -- this issue resolved as quickly as possible.

I think it's important to point out the context in which that this email protocol -- and I underscore email protocol -- because this is not an ESI protocol. You know, all The Sedona Conferences, they deal with ESI protocols and things of that nature. But the protocol that is being propounded by United is limited to email.

And this all started when we served our request for production, once again, back in December of 2019, and there was a dispute over two specific responses to requests for production, RFP 13 and RFP 27. Both of those RFPs are set forth in our opposition paper.

RFP 13 says, Give us the email communication from specific individuals that I -- that were involved in a specific meeting with the healthcare provider representatives in December of 2017. We

identified, with specificity, who at United was involved in this meeting. They would have been the very obvious custodians plus any folks that would have been up their chain of command or down their chain of command. And they objected to that.

And, similarly, we had asked them, under our Request for Production 27, to give us any of the email communications that went between the internal email communications and back and forth between United and Fremont -- that discussed then any of the requests then by the plaintiffs or out-of-network provider costs as of July of 2017. So two very specific dates. (Indiscernible) to that as well.

Now, beginning -- because this issue has been the subject of three separate meet and confers then between Ms. Gallagher and Ms. Perach, as well as Mr. Balkenbush at minimum on behalf of United. And there have been varying proposals, but one point that was fairly well made, though, by Mr. Balkenbush, is that they had already gathered responsive documents to those two requests and that there were about a hundred thousands emails that were at issue.

And at first, they said, yeah, they were reviewing those to determine which of them were going to be responsive to our request. Then they backtracked on that, and they started suggesting that, maybe they don't have to give it all to us, and maybe then we should come up with this email protocol instead. And they suggested that they were not going to turn over any these emails that were already in counsel's possession for which they had already done their own

searches, for which they had already gathered as being responsive to these requests until the parties agreed upon this email protocol. And if the parties couldn't agree upon this email protocol, until the Court had the opportunity for adjudication.

So that's how this dispute then came to the Court. Not because there were these broadened discussions about there was going to be a lot of email out there -- no, it was two very specific, very narrow requests for which they had already pulled the documents. And so let's take a look at them and at what their protocol offers and what, in fact, then that why it is that we have objection to their protocol.

First, what they're suggesting to the Court is this: That they shouldn't have to provide responses to our RFPs, particularly 13 and 27 at all; only that they should have to comply with this email protocol instead. And they cite then the two rules that allow them to make this request to the Court. So first and foremost, you go to the rules to see whether or not that they've made the appropriate showing to get the relief that they are asking for from the Court.

The first rule that they cite to is NRCP 26(b)(2)(C)(i). And they argue to you that you must limit their obligations to produce discovery if, in fact, that the responses can be obtained from some other source that is more convenient, less burdensome, or less expensive. That's what 26(b)(2)(C)(i) requires.

So did they make such a showing? No, they didn't even try. Moreover, they couldn't because what we're looking for is the

internal emails. What was the chatter back and forth among the United executives, the United representatives that were involved in this very narrow meeting on these very narrow issues? That was what we were interested in. There's no alternative source other than United that has this information.

So if, in fact, they have responsive emails -- which we know that they do because they've already identified that they've already gathered them, but they haven't given us a single one of them, then they can't point to any alternative source then for these internal emails. So they can't rely upon that rule then as a foundation for their requests that the Court must order the parties then to engage in this email protocol.

Number two is that they cite to Rule 26 (b)(2)(B), saying that they should be permitted a protective order because of some type of undue burden or cost. Both their motion as well as their reply is entirely silent on the issue of emails and any undue burden or cost for the review of the emails that are already in possession of counsel. They're entirely silent on that particular point. So in other words, they -- for the very two rules that they cite, they haven't made either one of the showings necessary to invoke the protection of those rules. And quite candidly, that should be the end of hunt.

But let me point, though, to the issues that we (indiscernible) with their email protocol. And one of the points that I want to try to underscore once again is -- this is an ESI protocol that The Sedona Conferences -- that frequently look at. This is an email

protocol and an email protocol only. (Indiscernible) the number of custodians that are found within this and who chooses those custodians.

So what they're suggesting to us is that that are nine different defendants and you only get to choose five custodians. And we're not going to tell you who the folks are that were involved in this internal chatter back and forth on these meetings that we have when we were trying to pressure then the healthcare providers into accepting these written contracts then that demanded a discount then on what they were billing. And for which at this very meeting when asked why it is that they were basically turning the economic screws then to the healthcare providers, the response was Because we can.

But what we're trying to do is to figure out who and what they said as a result, either going into that meeting or as a result of it. And what were the other internal emails by which that they had exchanged back and forth among themselves when other conversations were being held as of July of 2017 concerning any of the relationship then between United and the healthcare providers.

But what they want to do, though, is to say, In addition, to you only get five, we're not going to tell you what was involved in these conversations. We asked interrogatories or them to identify who the folks that were involved in setting the rates of payment, who were the folks that were involved in making determinations about Data iSight and which of these claim were going to be adjudicated by Data iSight versus, you know, internally then within United. They

say, we're not going to tell you that. They won't identify the folks that realistically that we could say that may be a custodian. What the (indiscernible) want us to do is they want to gather, they built this wall by refusing to answer any of our interrogatories around the identity of the health care representatives. And what they're asking us to do is basically to shoot an arrow over that wall and hope it's going to go land on somebody that may have many some relevant information. And then what they're saying is they're -- we're only going to give you five arrows in your quiver by which to do that. And if you land on the right people, great; if you don't, too bad so sad. And we, United, have no obligation to look for those emails. Even though that they're already in the possession of counsel at this point in time.

The next thing is, is that they want the search term protocol then not to be a function -- that they want us to come up with the search terms for which that they're obligated then by which to run. Even though we don't know what it is or the language that they've used or the terms they used or the programs that they labelled or identification of these programs -- nothing of that nature. We're still shooting in the dark as to internally what kind of a project that they utilized, and what they labelled the project, and what the results of this particular project may have been.

But I think one thing is important to recognize and that is United's wandered down this path before. As we set out in our First Amended Complaint, this isn't the first time that United has been

tagged with intentionally underbilling healthcare providers. They were investigated by the Attorney General in the state of New York, and they were also subject to a class action claim for which resulted in, like, $450 million of settlement claims. And don't you think that they may have learned a few things as to what terms to include and what terms not to include so as to ensure that whatever internal emails they may not (indiscernible). So from this perspective, what they're trying to do is once again make us guess at what terms they may have used to define these programs.

The last issue for which that we had major issue with the proposed protocol was this: If they contend that there should be a presumptive privilege to the entire family of emails for which that an attorney may have touched. So in other words if you got a long string of emails but the last person on that string that touched it -- that is an attorney, then the entire string is presumptively privileged.

And, second, what they want to do so to say that, Oh, by the way, we're not going to give you a privilege log, we're going to give you a summary privilege log. We're going to summarize the privilege, but we're not going to give you all of the terms that your (indiscernible) would require. So what they're trying to do is to say, All right, when it comes to attorney privilege, we're not going to give you enough of the tools for which that you can look at and evaluate whether or not our application of the privilege has been properly done or not. And, moreover, we're not going to even give it to you until 90 days after we give you the documents. Well, guess what?

We're not going to give you the documents until at best, 45 days before the disclose of discovery, and we're not going to give you the log until 90 days thereafter. So that means that that discovery is already closed, and, therefore, we can't go back then and to try to capture any of these documents to use during depositions.

So what they've done is to try to create a situation and try to offer a proposal that, in grand terms, sounds reasonable because they sometimes refer to it as an ESI protocol and not limited to an email protocol. But what they've done is they've put tasks into that protocol to shift the burden of their production to us to shoot in the dark and hope that we hit something before they have to produce it to us. Rather than for us to give a narrow request like we did in our request for production 13 and 27 and for them to give us the documents that are responsive to one thousand three hundred twenty-seven.

So, therefore, Your Honor, we would ask the Court then to -- not to embrace the protocol that they have proffered to the Court. Number one, they haven't made a showing for it. Number two, the protocol itself then, which is all of their discovery obligations, then to the healthcare providers. So we would ask the Court then to deny their motion. Thank you.

THE COURT: Thank you.

And the reply, please.

MR. BALKENBUSH: Thank you, Your Honor.

There are a few things that I want to respond to that

Ms. Lundvall just raised. The first is -- let's just address Request for Production 13 and 27. This argument that United have a hundred thousand responsive emails that are just holding back, that are ready to be produced and that we're just using this to delay that.

There's, I think, a little bit of misconception about the difference between emails that have been sent by a particular custodian and emails that are responsive to a discovery request. So if United pulls emails from a particular custodian for a particular date range, and (indiscernible) -- let's say it's 10,000 emails for that date range -- all of those 10,000 emails from that custodian are not responsive to the plaintiff's discovery request. The custodian sends emails about all kinds of things that have no relation to the claims at issue in this suit. And so there's two ways to produce responsive emails from a custodian's inbox like that. We can apply our own search terms to it and produce -- using the terms we appropriate. Or they can give us the search terms they believe are appropriate, and we avoid the dispute down the road where they take issue with those terms we choose.

So we're not holding back, you know, hundreds of thousands of responsive emails. What we're trying to do is, before we apply our own search terms and make a production, see if we can work out an agreement that will avoid disputes down the road. So I just wanted to make that clear to the Court -- that we're not just sitting on emails ready to produce that we know are responsive.

And, second, I wanted to raise the -- she mentioned that this

idea that we're -- this is all about United wanting to delay and not produce emails, but I think -- before this hearing, I spent some time -- because I wanted to make sure before I made this statement, that it's accurate -- but the healthcare providers in this case have themselves not produced a single internal email. None.

So if -- I mean, the idea that this is all about United is just inaccurate. And if the motion is denied and the protocol is not entered, certainly this Court can expect a Motion to Compel from United trying to force the providers to produce their own internal email correspondence. So, surely, internal emails have not been produced for either side.

So we have an interest in this protocol, not just in avoiding disputes on our own production, but in ensuring that the healthcare providers make an adequate production themselves and themselves are not choosing search terms and custodians that are going to unfairly shield their information that we believe we're entitled to, to prove that the bill charges were excessive and inflated and that the amounts paid by United were appropriate.

Second, Ms. Lundvall raised the issue of Rule 26 and, in particular, argued at length that United has not made a showing that the information -- these emails are not reasonably accessible. But if the Court will look at Rule 26, you'll notice the section that she didn't reference was Rule 26(c)(1)(C), which states that the Court may enter a protective order and that -- and list reasons one may issue. One is that an order may issued prescribing a discovery method other than

the one selected by the parties seeking discovery.

So Rule 26(c) expressly gives this Court the authority -- and The Sedona Principles that I mentioned earlier support this -- it gives the Court the authority to modify how discovery is conducted in this case and to ensure that it's done in a fair and transparent and streamlined manner. So Rule 26 absolutely provides authority for this Court to enter the protocol that we've proposed.

Next -- and Ms. Lundvall made the argument that what this is, is it's not an ESI protocol. And, I think -- although she didn't state this -- I think where this argument is coming from, Your Honor, is if you look at their briefing, they never address our extensive argument discussion of The Sedona Principles. And they know that if you look at The Sedona Principles and the cases interpreting those, that those principles strongly support entering the protocol we've proposed, or at least one similar to it, maybe with some minor modifications if there's some excuse about custodians or timelines and when things should be produced.

And so to get around The Sedona Principles and the case law supporting those, they tried to argue that this is not an ESI protocol. ESI is electronically stored information. Emails are ESI. So this is an ESI protocol. It clearly falls under The Sedona Principles and they support it being entered.

And then, you know, a couple other points -- Ms. Lundvall brought up this issue of, you know, prior lawsuits against United, investigations by attorney generals and saying beside the fact that --

THE COURT: I thought that was in the complaint, but I'm not considering that today.

MR. BALKENBUSH: Fair enough, Your Honor. The only point I wanted to make is that obviously we dispute all that, but let's -- even assuming that United is such a bad actor, they should want to select the search terms we're using. If we're such a bad actor, they should want to be the ones to, you know, selecting the custodians and search terms. And we want to be the ones selecting the search terms and custodians that they used. So both parties have very strong views of this case and each other's roles. And that's why we think having the parties selected search terms and custodians that they want from the other side, makes sense.

And then, I guess, just finally, Your Honor, this issue of the privilege log -- presumptive privilege that Ms. Lundvall raised -- you know, and the timeline for that -- we put a timeline in there for production of the privilege log. We're fine with shortening that, and we would have been happy to shorten that if the plaintiffs had negotiated the protocol with us. They just refused to engage at all on it. They refused to talk -- you know -- say, Well, what about 30 days or 15 days or 20 days? They just didn't engage so we put in there what we thought was appropriate. But if the Court believes a shortened time for production of the privilege log for ESI is appropriate, we would be fine with that.

That's all I have, Your Honor, thank you.

THE COURT: Thank you, both.

This is the Defendant's Motion for Protective Order with regard to e-discovery and to compel a protocol for the retrieval and production of email. Motion's going to be denied for the following reasons:

First, what I find is that it is the defendant's effort to avoid a Motion to Compel on those discovery requests one thousand three hundred seventeen. It really just is an email protocol and not an ESI protocol. It's -- it would unreasonably hamper the Plaintiff from obtaining information with regard to identity of custodians and information that, I believe, will be discoverable. But -- so I'm going to deny the motion, but I am going to order both parties to meet and confer with regard to a more comprehensive electronic discovery protocol and to report back at our continued hearing on the 30th.

It's not fair for the Plaintiff to determine those search terms and custodians before it has complete access to determine how to prioritize (indiscernible). The Plaintiff has the burden of proof here, and so I find that this was simply an effort to -- an unreasonable push to cutting off the Plaintiff from doing a meaningful discovery.

So, Ms. Lundvall, prepare the order. Mr. Balkenbush, I assume you wish to approve the form with that before it's submitted?

MR. BALKENBUSH: Yes, thank you, Your Honor.

MS. LUNDVALL: Thank you, Your Honor.

THE COURT: And you're both willing to negotiate in good faith with regard to a comprehensive ESI protocol?

MS. LUNDVALL: We are, Your Honor. But what I wanted to

try --

THE COURT: (Indiscernible).

MS. LUNDVALL: -- to confer is that the parties, both sides, still have a duty and an obligation to move forward with their discovery obligations, and they can't just sit back on their hands then and wait until there's been some type of a protocol that's been negotiated before having to tender then their responsive documents.

THE COURT: That is correct, Ms. Lundvall.

MS. LUNDVALL: Thank you, Your Honor.

THE COURT: And I do -- and then if you guys have Motions to Compel on either side, because I heard it from both sides, I would consider those also on the 30th.

MS. LUNDVALL: Thank you, Your Honor.

THE COURT: We might as well just tackle this.

MS. LUNDVALL: We appreciate that very much, Your Honor.

THE COURT: All right. So does -- do either of you have any questions or anything further to say before we adjourn for today? No?

MS. LUNDVALL: Not today, Your Honor.

THE COURT: Until I see you next, everybody stay safe and stay healthy.

MR. ROBERTS: Not from United. Thank you for all your time, Your Honor. We appreciate your indulgence and how much time you give us.

MS. LUNDVALL: Thank you very much.

MR. BALKENBUSH: Thank you, Your Honor.

[Proceedings adjourned at 3:26 p.m.]

* * * * * * * *

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video proceedings in the above-entitled case to the best of my ability.

Shannon Day
Independent Transcriber

EXHIBIT 3

EXHIBIT 3

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DISTRICT COURT

CLARK COUNTY, NEVADA

FREMONT EMERGENCY SERVICES (MANDAVIA), LTD., a Nevada professional corporation; TEAM PHYSICIANS OF NEVADA-MANDAVIA, P.C., a Nevada professional corporation; CRUM, STEFANKO AND JONES, LTD. dba RUBY CREST EMERGENCY MEDICINE, a Nevada professional corporation, Plaintiffs, vs. UNITEDHEALTH GROUP, INC., a Delaware corporation; UNITED HEALTHCARE INSURANCE COMPANY, a Connecticut corporation; UNITED HEALTH CARE SERVICES INC., dba UNITEDHEALTHCARE, a Minnesota corporation; UMR, INC., dba UNITED MEDICAL RESOURCES, a Delaware corporation; OXFORD HEALTH PLANS, INC., a Delaware corporation; SIERRA HEALTH AND LIFE INSURANCE COMPANY, INC., a Nevada corporation; SIERRA HEALTH-CARE OPTIONS, INC., a Nevada corporation; HEALTH PLAN OF NEVADA, INC., a Nevada corporation; DOES 1-10; ROE ENTITIES 11-20, Defendants.	Case No.: A-19-792978-B Dept. No.: XXVII **ORDER DENYING DEFENDANTS' MOTION TO STAY PROCEEDINGS PENDING RESOLUTION OF WRIT PETITION ON ORDER SHORTENING TIME**

This matter came before the Court on September 9, 2020 on defendants UnitedHealth Group, Inc.; UnitedHealthcare Insurance Company; United HealthCare Services, Inc.; UMR,

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Inc.; Oxford Health Plans, Inc.; Sierra Health and Life Insurance Co., Inc.; Sierra Health-Care Options, Inc.; and Health Plan of Nevada, Inc.'s (collectively, "United") Motion to Stay Proceedings Pending Resolution of Writ Petition ("Petition") on Order Shortening Time (the "Motion"). Pat Lundvall and Amanda M. Perach, McDonald Carano LLP, appeared on behalf of Plaintiffs Fremont Emergency Services (Mandavia), Ltd. ("Fremont"); Team Physicians of Nevada-Mandavia, P.C. ("Team Physicians"); Crum, Stefanko and Jones, Ltd. dba Ruby Crest Emergency Medicine ("Ruby Crest" and collectively the "Health Care Providers"). Lee Roberts and Colby L. Balkenbush, Weinberg, Wheeler, Hudgins, Gunn & Dial, LLC, appeared on behalf of United.

The Court, having considered the Motion, the Health Care Providers' opposition, and the argument of counsel at the hearing on this matter and good cause appearing therefor, makes the following findings of fact, conclusions of law and Order:

FINDINGS OF FACT

1. On April 15, 2019, Fremont filed the original Complaint against UnitedHealthcare Insurance Company; United HealthCare Services, Inc.; UMR, Inc.; Oxford Health Plans, Inc.; Sierra Health and Life Insurance Co., Inc.; Sierra Health-Care Options, Inc.; and Health Plan of Nevada, Inc. (collectively, "Removing Defendants") and asserted claims for breach of implied-in-fact contract, breach of implied-in-fact contract, tortious breach of the implied covenant of good faith and fair dealing, unjust enrichment, violation of NRS 686A.020 and 686A.310, violations of Nevada Prompt Pay statutes and regulations, violations of Nevada Consumer Fraud & Deceptive Trade Practices Acts, and declaratory judgment. *See generally* Compl.

2. On May 14, 2019, the Removing Defendants filed a Notice of Removal with this Court, contending that the state law claims asserted are completely preempted by Employee Retirement Income Security Act of 1974, as amended ("ERISA"), 29 U.S.C. § 1132(a)(1)(B). *See* Notice of Removal.

3. In the removed action in the United States District Court, District of Nevada (the "Federal District Court"), Case No. 2:19-cv-00832-JCM-VCF, on May 21, 2019, the Removing

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Defendants filed a Motion to Dismiss arguing, *inter alia*, that each of Fremont's claims are preempted by complete preemption and conflict preemption and that even if such claims are not preempted, they fail as a matter of law.

4. On May 24, 2019, Fremont filed a Motion to Remand (ECF No. 5) on the basis that this case, which only involves questions of the proper rate of payment, and not the right to payment, is not completely preempted by ERISA.

5. With the Federal District Court's permission, the Health Care Providers filed their First Amended Complaint (the "FAC") on January 7, 2020. The FAC added plaintiffs Team Physicians and Ruby Crest, defendant UnitedHealth Group, Inc. and a claim for violation of NRS 207.350 *et seq.* ("NV RICO")

6. Given the procedural posture of the action, the Federal District Court directed the Health Care Providers to file an amended motion to remand, which they did on January 18, 2020 (ECF No. 49).

7. After completed briefing, the Federal District Court granted the Amended Motion to Remand, expressly rejecting United's argument that the Health Care Providers' claims were completely preempted by ERISA. The Federal District Court recognized the Ninth Circuit has distinguished between claims involving the "right to payment" and claims involving the "proper "amount of payment." *Marin General Hosp. v. Modesto & Empire Traction Co.*, 581 F.3d 941, 948 (9th Cir. 2009); *Blue Cross of Cal. v. Anesthesia Care Assocs. Med. Grp., Inc.*, 187 F.3d 1045, 1051 (9th Cir. 1999). The Federal District Court found that the Health Care Providers' claims fall outside the scope of Section 502(a) of ERISA, failing the first prong of the test articulated by *Aetna Health Inc. v. Davila*, 542 U.S. 200 (2004) because they:

> [D]o not contend they are owed an additional amount from the patients' ERISA plans." Instead, they allege these claims arise from their alleged implied-in-fact contract with United.
>
> United attempts to distinguish the implied-in-fact contract from other types of contracts referenced in the case law. (ECF No. 64). However, Nevada courts have found that implied-in-fact agreements and express agreements have the same legal effects. *See Magnum Opes Constr. v. Sanpete Steel Corp.*, 2013 WL 7158997 (Nev. 2013); *Certified Fire Prot. Inc. v. Precision Constr.*, 283 P. 3d 250, 256 (Nev. 2012). Consequently, the court finds that plaintiffs'

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claims fall outside the scope of § 502(a) of ERISA, failing prong 1 of the Davila test.

See Notice of Entry of Remand Order, Remand Order at 5:4-13.

8. After remand and pursuant to a May 15, 2020 Order, the Health Care Providers filed the FAC in this state court action.

9. On May 26, 2020, United filed its Motion to Dismiss Plaintiffs' First Amended Complaint (the "Motion to Dismiss") and Supplemental Brief in Support of Motion to Dismiss Plaintiffs' First Amended Complaint Addressing Plaintiffs' Eighth Claim for Relief (the "Supplement") which sought dismissal of the Health Care Providers' claims for relief. The Health Care Providers filed oppositions to the Motion to Dismiss and Supplement.

10. On June 24, 2020, this Court entered an order denying United's Motion to Dismiss (the "Order Denying Motion to Dismiss"), finding, among other things, that the Health Care Providers' claims are not preempted by ERISA and, when taking all allegations in the FAC as true, the FAC states actionable claims for relief.

11. On August 25, 2020, United filed its Petition for Writ of Prohibition, or Alternatively, Mandamus (the "Writ Petition") which seeks a determination from the Nevada Supreme Court that the Health Care Providers' claims are subject to dismissal either under Nevada Rule of Civil Procedure 12(b)(5) or on ERISA preemption grounds.

12. United has filed the instant Motion which seeks a stay of all discovery pending resolution of its Writ Petition.

CONCLUSIONS OF LAW

1. This Court must consider four factors when evaluating a request for stay of discovery: (1) whether the object of the appeal or writ petition will be defeated if the stay or injunction is denied; (2) whether appellant/petitioner will suffer irreparable or serious injury if the stay or injunction is denied; (3) whether respondent/real party in interest will suffer irreparable or serious injury if the stay or injunction is granted; and (4) whether appellant/petitioner is likely to prevail on the merits in the appeal or writ petition. NRAP 8(c).

2. The Nevada Supreme Court "generally will not consider writ petitions challenging orders denying motions to dismiss." *Dignity Health v. Eighth Judicial Dist. Court in & for County*

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of Clark, 465 P.3d 1182 (Nev. 2020) (unpublished) ("we are not persuaded that an appeal from an adverse final judgment would be an inadequate legal remedy."). Exceptions to the general rule – where no disputed factual issues exist and clear statutory or rule-based authority obligates dismissal – do not exist here. *Nevada State Bd. of Nursing v. Eighth Judicial Dist. Court in & for County of Clark*, 459 P.3d 236 (Nev. 2020) (citing *Smith v. Eighth Judicial Dist. Court*, 113 Nev. 1343, 1345, 950 P.2d 280, 281 (1997)).

3. The Court has considered *Weisman v. Mediq, Inc.*, cited by United, and finds that it does not apply to the facts of this case as it concerned a stay of discovery pending adjudication of a motion to dismiss. CIV. A. 95-1831, 1995 WL 273678, at *2 (E.D. Pa. May 3, 1995).

4. After evaluating the factors set forth under NRAP 8(c), the Court finds that these factors weigh against a stay of discovery.

5. With respect to the first factor, the object of the Writ Petition will not be defeated if a stay of discovery is not issued. First, United's complete preemption argument will not result in dismissal of the FAC because it is a jurisdictional doctrine and cannot be used to obtain dismissal of a state law claim on a Rule 12(b)(5) motion to dismiss. *See, e.g., Owayawa v. Am. United Life Ins. Co.*, CV 17-5018-JLV, 2018 WL 1175106, at *3 (D.S.D. Mar. 5, 2018) ("[A]lthough complete preemption...can be used to invoke federal question jurisdiction, Defendants cannot use [the doctrine] as a ground for dismissing Plaintiffs' claims under Federal Rule of Civil Procedure 12(b)(6)."). Second, United acknowledges that there is a scenario where the Health Care Providers' pleading may not be dismissed in its entirety. Motion at 8:23-9:6. In that case, partial relief does not provide entitlement to a stay. *Sledge v. Eighth Judicial Dist. Court of State, ex rel. County of Clark*, 131 Nev. 1347, at *1 (2015) (unpublished) ("determining that intervention is not appropriate if it would not dispose of the entire controversy, since the avoidance of a needless trial is not possible"). Third, if United's Writ Petition is granted in full, such a determination will not obviate the need for discovery because, as United recognizes, the Health Care Providers may re-plead their claims as ERISA claims for benefits and would be entitled to limited discovery concerning the same. As such, the object of the Writ Petition would not be defeated by denial of the Motion.

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6. With respect to the second factor, the only irreparable harm United identifies is related to "the high potential for wasted resources and unnecessary expenses associated with continuing discovery...." Motion at 13:25-27. Litigation expenses such as "lengthy and time-consuming discovery, trial preparation, and trial...while potentially substantial, are neither irreparable nor serious." *Hansen*, 116 Nev. at 658, 6 P.3d at 986-987 (emphasis added). Accordingly, even "substantial" litigation costs are not sufficient to rise to the level of "irreparable harm." *Id.* Because United's only "irreparable harm" alleged concerns litigation costs, United has failed to establish any irreparable prejudice or harm.

7. United points to cases from other jurisdictions in effort to defeat Nevada's long-standing precedent that litigation costs do not constitute irreparable harm. *Id.* at 13:22-27 (citing *Hunt v. Check Recovery Sys., Inc.*, No. C 05 4993 SBA, 2008 WL 2468473, at *5 (N.D. Cal. June 17, 2008); *Rajagopalan v. Noteworld, LLC*, No. C11-5574 BHS, 2012 WL 2115482, at *1 (W.D. Wash. June 11, 2012)). The Court rejects this inapplicable legal authority in light of *Hansen's* decree. 116 Nev. at 658, 6 P.3d at 986-987

8. With respect to the third factor, the Court finds that the Health Care Providers could be irreparably harmed by a delay in these proceedings, satisfying the third factor. The *Hansen* court noted that, should "the underlying proceedings [] be unnecessarily delayed by a stay," then that could constitute irreparable or serious injury. *Id.* at 658, 6 P.3d at 987. The Health Care Providers will suffer prejudice if a stay is imposed given that there is a December 31, 2020 deadline for fact discovery. Therefore, because any stay of discovery here will delay the entire litigation and could require an extension of discovery deadlines and because this case has already been pending for over one year, the Health Care Providers have sufficiently established that they could be irreparably harmed by the issuance of a stay.

9. With respect to the fourth factor, the Court finds that United is not likely to prevail on the merits of its Writ Petition for the same reasons its Motion to Dismiss was unsuccessful. The Court incorporates its Findings of Fact and Conclusions of Law set forth in the Order Denying Motion to Dismiss into this Order. For all the reasons set forth in the Court's Order Denying Motion to Dismiss and in the Federal District Court's Remand Order, the Court concludes that

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United is not likely to prevail on the merits of its Writ Petition, such that this fourth factor weighs in favor of denying United's Motion. In addition, the portion of the Writ Petition challenging denial under NRCP 12(b)(5) will not likely be successful in light of the applicable legal standard governing motions to dismiss and the Court's specific findings that the FAC's allegations, if true, state actionable claims for relief.

Accordingly, good cause appearing, therefor,

ORDER

IT IS HEREBY ORDERED that United's Motion to Stay Proceedings Pending Resolution of Writ Petition on Order Shortening Time is DENIED.

IT IS FURTHER ORDERED that United shall be permitted to submit another request for stay to this Court in the event that the Nevada Supreme Court orders briefing on the Writ Petition.

IT IS SO ORDERED.

Dated this 23rd day of September, 2020

Nancy L Allf

DISTRICT COURT JUDGE

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Nancy Allf
District Court Judge

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Case No.: A-19-792978-B

Order Denying Motion to Stay Proceedings Pending Resolution of Writ Petition on Order Shortening Time

Submitted by:

McDONALD CARANO LLP

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CSERV

DISTRICT COURT
CLARK COUNTY, NEVADA

Fremont Emergency Services (Mandavia) Ltd, Plaintiff(s) vs. United Healthcare Insurance Company, Defendant(s)	CASE NO: A-19-792978-B DEPT. NO. Department 27

AUTOMATED CERTIFICATE OF SERVICE

This automated certificate of service was generated by the Eighth Judicial District Court. The foregoing Order Denying Motion was served via the court's electronic eFile system to all recipients registered for e-Service on the above entitled case as listed below:

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EXHIBIT 4

EXHIBIT 4

IN THE SUPREME COURT OF THE STATE OF NEVADA

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.; AND UNITEDHEALTH GROUP, INC.,
Petitioners,
vs.
THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE NANCY L. ALLF, DISTRICT JUDGE,
Respondents,
and
FREMONT EMERGENCY SERVICES (MANDAVIA), LTD.; TEAM PHYSICIANS OF NEVADA-MANDAVIA, P.C.; AND CRUM STEFANKO AND JONES, LTD.,
Real Parties in Interest.

No. 81680

FILED

SEP 21 2020

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER DIRECTING ANSWER

In this original petition for a writ of mandamus or prohibition, petitioners seek a writ directing the district court to vacate its order and enter an order dismissing real parties in interests' claims (1) as subject to conflict preemption under ERISA; (2) as subject to complete preemption; and (3) for failure to adequately allege claims under NRCP 12(b)(5).

Having reviewed the petition, it appears that an answer may assist this court in resolving this matter. Therefore, real parties in interest,

on behalf of respondents, shall have 28 days from the date of this order to file and serve an answer, including authorities, against issuance of the requested writ. In addition to addressing the merits of the petition in its answer, real parties in interest should also address the propriety of writ relief. Petitioners shall have 14 days from service of the answer to file and serve any reply.[1]

It is so ORDERED.

Pickering, C.J.

Hardesty, J.

Silver, J.

cc: Hon. Nancy L. Allf, District Judge
Weinberg, Wheeler, Hudgins, Gunn & Dial, LLC
McDonald Carano LLP/Las Vegas
Eighth District Court Clerk

[1]Good cause appearing, we also grant petitioners' motion to exceed word length. NRAP 32(a)(7)(D). In the interest of fairness, real parties in interest may likewise file an answer not to exceed 13,993 words—the length of petitioners' writ petition.

EXHIBIT 5-A

EXHIBIT 5-A

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DISTRICT COURT

CLARK COUNTY, NEVADA

FREMONT EMERGENCY SERVICES (MANDAVIA), LTD., a Nevada professional corporation; TEAM PHYSICIANS OF NEVADA-MANDAVIA, P.C., a Nevada professional corporation; CRUM, STEFANKO AND JONES, LTD. dba RUBY CREST EMERGENCY MEDICINE, a Nevada professional corporation,

Plaintiffs,

vs.

UNITEDHEALTH GROUP, INC., UNITED HEALTHCARE INSURANCE COMPANY, a Connecticut corporation; UNITED HEALTH CARE SERVICES INC. dba UNITEDHEALTHCARE, a Minnesota corporation; UMR, INC. dba UNITED MEDICAL RESOURCES, a Delaware corporation; OXFORD HEALTH PLANS, INC., a Delaware corporation; SIERRA HEALTH AND LIFE INSURANCE COMPANY, INC., a Nevada corporation; SIERRA HEALTH-CARE OPTIONS, INC., a Nevada corporation; HEALTH PLAN OF NEVADA, INC., a Nevada corporation; DOES 1-10; ROE ENTITIES 11-20,

Defendants.

Case No.: A-19-792978-B
Dept. No.: 27

HEARING REQUESTED

DEFENDANTS' RENEWED MOTION TO STAY PROCEEDINGS PENDING RESOLUTION OF WRIT PETITION ON ORDER SHORTENING TIME

Case Number: A-19-792978-B

Defendants UnitedHealth Group, Inc.; UnitedHealthcare Insurance Company; United HealthCare Services, Inc.; UMR, Inc.; Oxford Health Plans LLC (incorrectly named as "Oxford Health Plans, Inc."); Sierra Health and Life Insurance Company, Inc.; Sierra Health-Care Options, Inc. and Health Plan of Nevada, Inc. (collectively, "United" or "Defendants"), hereby file their Renewed Motion to stay this litigation pending resolution of their Petition for a Writ of Prohibition, or, Alternatively, Mandamus to the Supreme Court of Nevada. While this Court previously denied a similar motion to stay, a stay should now be granted because the Nevada Supreme Court has now ordered the Plaintiffs to respond to the Writ.

Dated this 23rd day of September, 2020.

/s/ Colby L. Balkenbush

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Attorneys for Defendants

DECLARATION OF COLBY L. BALKENBUSH, ESQ. IN SUPPORT OF APPLICATION FOR ORDER SHORTENING TIME

1. I am over the age of 18, have personal knowledge of the matters set forth herein and, unless otherwise stated, am competent to testify to the same if called upon to do so. I am an attorney at Weinberg, Wheeler, Hudgins, Gunn & Dial, LLC, counsel for Defendants in the above-captioned matter.

2. On August 25, 2020, Defendants filed a Petition for Writ of Prohibition, or alternatively, Mandamus ("Writ"), with the Nevada Supreme Court concerning this Court's denial of its motion to dismiss.

3. If the Nevada Supreme Court grants the relief requested by Defendants—a finding that Plaintiffs' claims are subject to dismissal either under Nevada Rule of Civil Procedure 12(b)(5) or on ERISA preemption grounds—in whole or in part, the scope of discovery in this matter would be significantly altered.

4. Specifically, if Plaintiffs' claims are found to be preempted, and Plaintiffs re-plead them as ERISA claims for benefits, they would be entitled only to the strictly limited discovery of the administrative record that applies to such claims.

5. Based on the above, Defendants filed a Motion to Stay the proceedings on August 25, 2020.

6. Defendants' Motion to Stay Proceedings came on for hearing before this Court on September 9, 2020.

7. After oral argument by the parties, this Court ordered Defendants' Motion to Stay denied, but stated that, "[i]f the Supreme Court requests briefing on the issue, I'd consider a brief stay for that purpose." (*See* Transcript from September 9, 2020 hearing on Motion to Stay, **Exhibit 1** at 19:22–24). Moreover, a key reason for this Court's denial of Defendants' Motion to Stay appeared to be a belief that the Nevada Supreme Court would not even order Plaintiffs to respond to the Writ. *Id.*

8. On September 21, 2020, the Nevada Supreme Court issued an order directing Plaintiffs Fremont Emergency Services (Mandavia), Ltd., Team Physicians of Nevada-Mandavia, P.C., Crum, Stefanko and Jones, Ltd. dba Ruby Crest Emergency Medicine

("TeamHealth" or "Plaintiffs") to respond to Defendants' Writ. (Order Directing Response, **Exhibit 2**).

9. TeamHealth's Response to Defendants' Writ is due on or before October 19, 2020.

10. Defendants' Reply in support of its Writ is due within fourteen days of TeamHealth's Response, on or before November 2, 2020.

11. In light of the Nevada Supreme Court having ordered TeamHealth to respond to Defendants' Writ, Defendants renew their request for a stay of this litigation, pending resolution by the Nevada Supreme Court.

12. Because discovery is ongoing, time-intensive, and costly, and because the pending Writ may curtail or eliminate entirely the need for the discovery currently pending and forthcoming in this action, there is good cause to hear this motion as soon as this Court deems practicable, and on shortened time, pursuant to EDCR 2.26.

13. Defendants request that this Motion be heard at the already scheduled **September 30, 2020** hearing as the two issues this Court will address at that hearing—(1) Defendants' compliance with this Court's recent order compelling Defendants to produce 22,153 administrative records and (2) Defendants' Motion to Compel Production of Clinical Documents—will be mooted if the Court grants this Motion.

14. There is no prejudice to Plaintiffs from setting this Motion for a **September 30, 2020** hearing as the issues raised in this Motion have already been briefed with the exception of the impact of the Nevada Supreme Court's order requiring Plaintiffs to Answer the Writ.

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

DATED: September 23rd, 2020

/s/ Colby L. Balkenbush
Colby L. Balkenbush Esq.

ORDER SHORTENING TIME

On application of the declaration of counsel for Defendants and good cause appearing,

IT IS HEREBY ORDERED that DEFENDANTS' RENEWED MOTION TO STAY PROCEEDINGS PENDING RESOLUTION OF WRIT PETITION ON ORDER SHORTENING TIME shall be heard on the 8 day of October, 2020 at 10 a.m./p.m. in Department XXVII of the above entitled Court.

Dated this 23rd day of September, 2020

Nancy L Allf

DISTRICT COURT JUDGE

DATED: September 23, 2020

9CA B18 A048 3368
Nancy Allf
District Court Judge

NB

Submitted by:

WEINBERG, WHEELER, HUDGINS, GUNN & DIAL, LLC

/s/ Colby L. Balkenbush

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WEINBERG WHEELER HUDGINS GUNN & DIAL

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

On August 25, 2020, Defendants filed a Writ in the Supreme Court of Nevada concerning this Court's denial of their motion to dismiss. *See* Defendants' Writ, **Exhibit 3**. Thereafter, Defendants moved for a stay of this litigation, pending resolution of the Writ by the Nevada Supreme Court. *See* Defendants' August 26, 2020 Motion to Stay Proceedings Pending Resolution of Writ Petition. On September 9, 2020, this Court denied Defendants' Motion to Stay Proceedings based on the following reasoning:

> This is the Defendant's Motion for Stay due to a writ that was filed on about August 25th of this year. Motion will be denied for the following reasons: First, the case goes back to April 15 of 2019. You have a discovery cutoff of December 31 of this year, and I find that the objects of the appeal would not be defeated in -- by me not granting this motion. With all due respect to the defendants, I do [not] think that there is a likelihood of success on the matter even being considered by the Nevada Supreme Court. I find that irreparable harm in this case would weigh in favor of the plaintiff and not the defendant.
>
> Now, the Court's deny[ing] it; however, let me also say that, Mr. Roberts, if there is briefing requests, I would reconsider this. **If the Supreme Court requests briefing on the issue, I'd consider a brief stay for that purpose.**[1]

On September 21, 2020, the Nevada Supreme Court issued an Order directing a response from the TeamHealth Plaintiffs. **Exhibit 2**. Plaintiffs' response is due on or before October 19, 2020; Defendants' Reply is due within fourteen (14) days of the response. Defendants now renew their Motion to Stay proceedings per this Court's indication that it would reconsider the Motion if and when the Supreme Court requested briefing on the Writ.[2]

During the period of time in which the Nevada Supreme Court is considering Defendants' Writ, Defendants request a stay of this litigation. As explained below, a stay should

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[1] Transcript of September 9, 2020 hearing on Motion to Stay, **Exhibit 1** at 19:22–24 (emphasis added).

[2] Defendants understand that they have a duty to continue participating in discovery unless a stay order is granted. Since the September 9, 2020 hearing, Defendants have been diligently working to collect the documents they were ordered to produce and are also seeking their own discovery via a motion to compel that was filed on September 21, 2020.

be granted because all of the factors for determining whether to enter a stay pending resolution of a writ petition weigh in favor of entering such a stay in this case. First, if the stay is not entered, the object of the Writ—obtaining a finding that Plaintiffs' claims are subject to dismissal either under Nevada Rule of Civil Procedure 12(b)(5) or on ERISA preemption grounds, and thereby either eliminating or limiting the need for discovery significantly—risks being defeated. Second, the Writ now has an even stronger likelihood of success than when Defendants' original Motion to Stay was filed, as is indicated by the fact that the Nevada Supreme Court ordered the Plaintiffs to respond to the Writ rather than simply denying it—the fate of most writ petitions, as Plaintiffs' own counsel has recognized.[3] Third, the stay does not pose any risk of irreparable harm to Plaintiffs, but there may be irreparable harm to Defendants if a stay is not granted. Finally, this Court has the inherent ability to control its docket for judicial economy and efficiency, both for itself and for the parties.

II. STATEMENT OF PERTINENT FACTS

As this Court is aware, this case presents a convoluted procedural history. Plaintiff Fremont Emergency Services filed this action in state court on April 15, 2019, alleging claims for Breach of Implied-in-Fact Contract, Tortious Breach of the Implied Covenant of Good Faith and Fair Dealing, Alternative Claim for Unjust Enrichment, Violation of NRS 686A.020 and 686A.310, Violations of Nevada Prompt Pay Statutes & Regulations, Consumer Fraud & Deceptive Trade Practices Acts, and Declaratory Judgment. Defendants thereafter removed to federal court on May 14, 2019 on the basis that all of Plaintiff's claims are completely preempted by the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001, *et. seq.*, and therefore raise federal questions under 28 U.S.C. § 1331.

Plaintiff filed a motion to remand the action on May 24, 2019. Thereafter, on June 5, 2019, Plaintiff filed a motion to stay the proceedings pending the resolution of the motion to

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[3] "While not dispositive, an order that directs the respondent to answer is a sign that the writ petition has at least withstood the fate of most requests for extraordinary relief." Paul Georgeson, Esq. & Debbie Leonard, Esq. of the law firm of McDonald Carano, *Taking the Mystery out of Writ Practice*, NEVADA LAWYER 15, 16 (March 2016), **Exhibit 7**.

remand, arguing that "the Court has the inherent ability to control its docket for judicial economy and efficiency, both for itself and the parties." *See* Plaintiff's Motion to Stay, **Exhibit 4**, at 7:19–20. The Honorable Cam Ferenbach denied Plaintiff's Motion to Stay in federal court, noting that he was "not convinced that Plaintiff will be successful in having the case remanded to state court." *See* Order Denying Plaintiff's Motion to Stay, **Exhibit 5**, at 7:3.

While Plaintiff's Motion to Remand was pending, Plaintiff filed a First Amended Complaint, incorporating additional Plaintiffs (now parties to this action) and thirty (30) additional pages of allegations, in support of a new claim for relief alleging a violation of NRS 207.350 *et seq.*, the Nevada civil RICO statute. Shortly after filing their First Amended Complaint, the action was remanded to state court. It nevertheless remained, and still remains, Defendants' position that Plaintiffs' sole remedy for the alleged underpayment of claims is to bring a statutory ERISA claim against Defendants under ERISA § 502(a)(1)(B).

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. *See id.* (citing NRAP 8(a)).

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.* (citing NRAP 8(c)). While the Nevada Supreme 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, the 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).

Courts commonly enter such stays where, as here, (i) engaging in discovery prior to resolution of a dispositive motion or appeal would be wasteful of court and party resources, and (ii) the opposing party will not be prejudiced by a stay. *See Tradebay, LLC v. eBay, Inc.*, 278 F.R.D. 597, 601 (D. Nev. 2011) (a stay of discovery furthers the goal of efficiency for the court and the litigants where a plaintiff will be unable to state a claim for relief); *Barnes v. Cty. of Monroe*, 2013 WL 5298574, at *1 (W.D.N.Y. Sept. 19, 2013) (staying discovery in part because "[i]n light of the pending dispositive motions, the need for further discovery is not inevitable"); *Buffalo Emergency Assocs., LLP v. Unitedhealth Grp., Inc.*, No. 19-CV-1148S, 2020 WL 3259252, at *1 (W.D.N.Y. June 16, 2020) (staying all discovery in a virtually identical case brought by Plaintiffs' affiliates during the pendency of United's motion to dismiss).[4] "A stay may also be granted in order to avoid inconsistent results . . . or avoid needless waste of judicial resources." *PersonalWeb Techs., LLC v. Apple Inc.*, 69 F. Supp. 3d 1022, 1027 (N.D. Cal. 2014).

B. A stay entered pending resolution of Defendants' Writ should be entered because each of the four factors weigh in favor of such a stay.

A stay of this case pending resolution of Defendants' Writ is warranted. As explained below, each of the factors weighs heavily in favor of such a stay.

1. 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, the 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 Defendants' Writ is to determine whether Plaintiffs' claims are subject to conflict and/or complete preemption under ERISA. The Writ challenges each of Plaintiffs' claims and provides multiple, meritorious bases for finding that Plaintiffs' claims are subject to

[4] Attached hereto as **Exhibit 4**.

both complete and conflict preemption under ERISA, and subject to dismissal for failure to state a claim. If the Nevada Supreme Court grants the relief requested by Defendants—a finding that Plaintiffs' claims are subject to dismissal either under Nevada Rule of Civil Procedure 12(b)(5) or on ERISA preemption grounds—in whole or in part, there may be no need for discovery at all. Even if the Complaint is not dismissed in its entirety, the Court's ruling may significantly reduce or alter the scope of discovery. *See Weisman v. Mediq, Inc.*, 1995 WL 273678, at *2 (E.D. Pa. May 3, 1995) ("By imposing a stay while ruling on the motion, when discovery proceeds the parties will have full knowledge as to which claims are viable and, correspondingly, as to what discovery need occur."). If, for example, the Nevada Supreme Court finds Plaintiffs' claims preempted, and Plaintiffs re-plead them as ERISA claims for benefits, they would be entitled only to the strictly limited discovery that is available for such claims. *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, the object of the writ petition itself would be defeated. This Court recently ordered Defendants to produce the administrative records for each of the approximately 22,153 at-issue claims for additional reimbursement for medical services.[5] If discovery is permitted to proceed on all of Plaintiffs' claims, it will be extraordinarily burdensome, expensive, and time consuming. As this Court is aware, Defendants submitted a burden declaration demonstrating that it would take, on average, 2 hours just to pull the administrative record for a single claim.[6] With 22,153 claims at issue, this means that it would take 44,306 hours just to pull the administrative records for each claim. In addition to these administrative records, Plaintiffs are seeking to prove their RICO claim by requesting the production of internal and external communications from Defendants with no defined search terms and no clear

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[5] *See* Order on Plaintiffs' Motion to Compel Production of Claims Files for At-Issue Claims.

[6] Declaration of Sandra Way, **Exhibit 6** at 6:3-11.

parameters, which will make the collection of emails by Defendants unduly burdensome and inefficient.[7]

As far as Defendants' own discovery, to investigate the merits of Plaintiffs' state law claims, Defendants have separately moved to compel Plaintiffs to produce the Clinical Records supporting each of the 22,153 claims for underpayment that Plaintiffs are asserting. Defendants have further moved for an order requiring the Plaintiffs to comply with NRCP 16.1 by producing certain documents that demonstrate (1) what was billed and paid for each of Plaintiffs' 22,153 claims in their Claims Spreadsheet, and (2) the values utilized by Plaintiffs for their computation of damages.[8] Additionally, Plaintiffs' RICO claim, which comprises approximately thirty (30) pages of their forty-seven (47) page First Amended Complaint, will require significant probing of Plaintiffs' allegations of racketeering.

Absent a stay, significant time and expense will be incurred by all parties on potentially needless discovery with amorphous boundaries. If the Nevada Supreme Court agrees either that Plaintiffs have failed to state a claim, or that their claims are ERISA-preempted, the need for discovery would be either ended completely or curtailed significantly. As noted above, if, for example, the Nevada Supreme Court finds Plaintiffs' claims preempted, and Plaintiffs re-plead them as ERISA claims for benefits, the only discovery that is permitted in ERISA "claims for benefits" cases is (1) identification of the at-issue plans, members, and claims; (2) any assignment forms that Plaintiffs allege they received from relevant plan participants that are relevant to the at-issue claims, and (3) the controlling administrative records, which would include the governing plan documents. *Ehrensaft*, 120 F. Supp. 2d at 1261–62 (In an ERISA case, evidence should be limited to administrative record). Discovery outside of these materials is not "relevant to any party's claim or defense and proportional to the needs," Fed. R. Civ. P. 26(b), of an ERISA "claims for benefits" case. Moreover, Plaintiffs must have fully exhausted

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[7] In response to these requests, Defendants moved for a Protective Order, and the parties have been ordered to meet and confer on an electronic protocol.

[8] *See* Defendants' Motion to Compel Production of Clinical Documents for the At-Issue Claims and Defenses and to Compel Plaintiffs to Supplement their NRCP 16.1 Initial Disclosures.

any claims they wish to pursue. *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, a plaintiff must exhaust administrative remedies under the relevant benefit plans). The scope of discovery would thus be markedly broader if permitted to include all of Plaintiffs' claims for relief.

The first factor soundly weighs in favor of granting the stay requested herein.

2. The fourth factor weighs in favor of a stay because Defendants' 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 the Nevada Supreme Court will consider 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).

The Nevada Supreme 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 issue is currently being litigated around the country.[9] As this Court is aware, the likelihood of

[9] The present lawsuit appears to be part of a coordinated strategy by TeamHealth-affiliated providers to file virtually identical cases in various jurisdictions around the country. *See e.g., Emergency Group of Arizona Prof'l Corp. v. United Healthcare Inc.*, No. 19-04687, ECF No. 18 (D. Az. filed Aug. 9, 2019) (appealed following court's grant of the United defendants' motion to dismiss and denial of the provider-plaintiffs' motion to remand and currently being briefed to the Ninth Circuit); *Emergency Care Services of Pennsylvania, P.C. et al. v. UnitedHealth Group, Inc., et al.*, No. 19-01195, ECF No. 1 (M.D.P.A. filed

Defendants' prevailing on the merits of its writ petition is significantly more probable now that the Nevada Supreme Court has ordered TeamHealth to respond to Defendants' Writ, a fact with which Plaintiffs' counsel's law firm partners evidently agree.[10]

Defendants have presented a substantial case on the merits of a serious legal question, and the balance of equities now weighs heavily in favor of granting the stay. Here, the health plans implicated by Plaintiffs' claims contain payment terms which specify the amount of reimbursement owed to out-of-network providers like Plaintiffs when those providers treat a plan member. Allowing Plaintiffs' state law claims to proceed would directly undermine the congressional intent behind ERISA—creating a uniform national administrative scheme that guides the processing of claims and disbursement of benefits for employee health plans. By bringing state law claims that seek to force the health plans to pay out-of-network providers at a higher rate than their plan terms require, the weight of authority provides that Plaintiffs are seeking a remedy that directly conflicts with ERISA's requirements. The Ninth Circuit, as well as Nevada federal courts, have repeatedly found that plaintiffs cannot plead around ERISA preemption by asserting an implied-in-fact contract claim, which is precisely what Plaintiffs have sought to do here. *See Aetna Life Ins. Co. v. Bayona*, 223 F.3d 1030, 1034 (9th Cir. 2000) ("We have held that ERISA preempts common law theories of breach of contract implied in fact, promissory estoppel, estoppel by conduct, fraud and deceit and breach of contract.") (internal citation omitted); *Parlanti v. MGM Mirage*, 2006 WL 8442532, at *6 (D. Nev. Feb. 15, 2006) (same).

Further, although this Court disagreed with Defendants' position, federal courts, including the Ninth Circuit, have agreed that once a medical provider accepts an assignment of

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July 11, 2019) (dismissed voluntarily by the provider-plaintiffs without prejudice); *Buffalo Emergency Associates, LLP, et al. v. UnitedHealth Group, Inc., et al.*, No. 19-01148, ECF No. 1 (W.D.N.Y. filed Aug. 26, 2019) (same); *Florida Emergency Physicians et al. v. United Healthcare of Florida, Inc.*, No. 20-60757, ECF No. 27 (S.D. Fla. filed Mar. 3 2020).

[10] "While not dispositive, an order that directs the respondent to answer is a sign that the writ petition has at least withstood the fate of most requests for extraordinary relief." Paul Georgeson, Esq. & Debbie Leonard, Esq. of the law firm of McDonald Carano, *Taking the Mystery out of Writ Practice*, NEVADA LAWYER 15, 16 (March 2016), **Exhibit 7**.

benefits from a plan member and asserts a claim for reimbursement to the insurer, that provider stands in the shoes of the plan member and its state law claims are just as susceptible to preemption under ERISA as a plan member's state law claims.[11] In fact, the Ninth Circuit has repeatedly stated that ERISA's preemption clause is "one of the broadest preemption clauses ever enacted by Congress." *Evans v. Safeco Life Ins. Co.*, 916 F.2d 1437, 1439 (9th Cir. 1990). The Nevada Supreme Court has never addressed this issue.

In addition, it remains Defendants' position that Plaintiffs have also failed to state claims under NRCP 12(b)(5). In particular, Plaintiffs have failed to state a claim for:

- implied-in-fact contract (*Smith v. Recrion Corp.*, 91 Nev. 666, 669, 541 P.2d 663, 665 (1975) ("[p]ast consideration is the legal equivalent to no consideration" and that services cannot be subject to an implied-in-fact contract unless the contract was created "before" the services were provided."));
- tortious breach of the implied covenant of good faith and fair dealing (*Aluevich v. Harrah's*, 99 Nev. 215, 216, 660 P.2d 986, 986 (1983) (holding that claim for tortious breach of the implied covenant of good faith and fair dealing does not extend to commercial leases between two sophisticated parties));
- unjust enrichment (*Peacock Med. Lab, LLC v. UnitedHealth Grp., Inc.*, 2015 WL 2198470, at *5 (S.D. Fla. May 11, 2015) ("a healthcare provider who provides services to an insured does not benefit the insurer."));
- violation of NRS 686A.020 and 686A.310 (*Gunny v. Allstate Ins. Co.*, 108 Nev. 344, 346, 830 P.2d 1335, 1336 (1992) (plaintiffs have no private right of action as a third-party claimant under Nevada Unfair Insurance Practices Act));
- violations of Nevada's Consumer Fraud and Deceptive Trade Practices Acts (*Rebel Oil Co. v. Atl. Richfield Co.*, 828 F. Supp. 794, 797 (D. Nev. 1991) (business competitors are not "victims" within the meaning of NRS 41.600 and thus lack standing to sue under the Act)); and
- violation of the Nevada civil RICO statute (*see, e.g., Allum v. Valley Bank of Nevada*, 109 Nev. 280, 286, 849 P.2d 297, 301 (1993) (affirming the district court's granting of a motion to dismiss a Nevada RICO claim because the plaintiff had failed to plead proximate cause, as Plaintiffs have done here); *Zavala v. Wal Mart Stores Inc.*, 691 F.3d 527, 540–41 (3d Cir. 2012) (affirming dismissal of RICO claim predicated on involuntary servitude and noting that "[m]odern day examples of involuntary servitude have been limited to labor camps, isolated

---

[11] *See e.g., Melamed v. Blue Cross of California,* 557 F. App'x 659, 661 (9th Cir. 2014) ("Here, [out-of-network provider's] breach of implied contract claim is completely preempted because through that claim, [the out-of-network provider] seeks reimbursement for benefits that exist 'only because of [the insurer's] administration of ERISA-regulated benefit plans.'") (internal citation omitted); *In Re Managed Care Litig.*, 298 F. Supp. 2d 1259, 1292 (S.D. Fla. 2003) (out-of-network providers' implied-in-fact contract claim was preempted).

religious sects, or forced confinement.")).

For these reasons, Defendants' Writ is meritorious, and is likely to prevail. This factor thus weighs in favor of granting a stay.

3. 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 Defendants' Writ would upend the entire scope of permitted discovery and likely end this case outright. A brief stay of discovery is warranted under the circumstances here.

Considering the first option, Plaintiffs will not be prejudiced if a stay of all discovery is granted. Given the time it generally takes for the Nevada Supreme 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 Defendants' 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 2, 2020. If this Court hears and grants Defendants' Renewed Motion to Stay on September 30, 2020, that would amount to a period of one month until briefing is complete, plus any additional time needed by the Nevada Supreme Court to issue a decision. 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.

Further, incurring unnecessary legal expenses, as detailed in § III.B.1, above, can constitute irreparable harm in the context of a stay pending appeal of an interlocutory order. *Hunt v. Check Recovery Systems, Inc.*, 2008 WL 2468473 at *3-4 (N.D. Cal. June 17, 2008); *Rajagopalan v. Noteworld, LLC*, 2012 WL 2115482 at *2-3 (W.D. Wash. June 11, 2012). Given the high potential for wasted resources and unnecessary expense associated with continuing discovery, these factors weigh in favor of a stay.

III.

RELIEF REQUESTED

Each factor in the test outlined by the Nevada Supreme Court in *Hansen* favors a stay. Furthermore, now that the Nevada Supreme Court has ordered Plaintiffs to answer the Writ, there is now good cause to grant a stay of this litigation. Based on the foregoing, Defendants request that this matter be stayed pending resolution of Defendants' Writ.

Dated this 23rd day of September, 2020.

/s/ Colby L. Balkenbush

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Colby L. Balkenbush, Esq.
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Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of September, 2020, a true and correct copy of the foregoing **DEFENDANTS' RENEWED MOTION TO STAY PROCEEDINGS PENDING RESOLUTION OF WRIT PETITION ON ORDER SHORTENING TIME** was electronically filed and served on counsel through the Court's electronic service system pursuant to Administrative Order 14-2 and N.E.F.C.R. 9, via the electronic mail addresses noted below, unless service by another method is stated or noted:

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EXHIBIT 1

EXHIBIT 1

Electronically Filed
9/11/2020 2:29 PM
Steven D. Grierson
CLERK OF THE COURT

RTRAN

DISTRICT COURT

CLARK COUNTY, NEVADA

FREMONT EMERGENCY SERVICES (MANDAVIA) LTD., Plaintiff(s), vs. UNITED HEALTHCARE INSURANCE COMPANY, Defendant(s).	CASE NO: A-19-792978-B DEPT. XXVII

BEFORE THE HONORABLE NANCY ALLF, DISTRICT COURT JUDGE

WEDNESDAY, SEPTEMBER 9, 2020

RECORDER'S TRANSCRIPT OF PROCEEDINGS
RE: PENDING MOTIONS

APPEARANCES (VIA VIDEO CONFERENCE):

For the Plaintiff(s): PATRICIA K. LUNDVALL, ESQ.
AMANDA PERACH, ESQ.

For the Defendant(s): D. LEE ROBERTS JR., ESQ.
COLBY L. BALKENBUSH, ESQ.

RECORDED BY: BRYNN WHITE, COURT RECORDER

has probably read, we have included a declaration of Sandra Way, which generally goes through and says at two hours of claim, 22,000 claims would take four people earning $60,000 a year, five years to pull. That's $1.2 million in discovery costs which is going to have to be borne by somebody if the Court compels that discovery. This is not a typical case, and sound judicial economy weighs in favor of the Court staying the action in order to give the Supreme Court a chance to review our writ on ERISA preemption.

Thank you, Your Honor.

THE COURT: Thank you.

This is the Defendant's Motion for Stay due to a writ that was filed on about August 25th of this year. Motion will be denied for the following reasons: First, the case goes back to April 15 of 2019. You have a discovery cutoff of December 31 of this year, and I find that the objects of the appeal would not be defeated in -- by me not granting this motion. With all due respect to the defendants, I do think that there is a likelihood of success on the matter even being considered by the Nevada Supreme Court. I find that irreparable harm in this case would weigh in favor of the plaintiff and not the defendant.

Now, the Court's deny it; however, let me also say that, Mr. Roberts, if there is briefing requests, I would reconsider this. If the Supreme Court requests briefing on the issue, I'd consider a brief stay for that purpose. So --

MR. ROBERTS: Thank you, Your Honor. I understand.

MS. LUNDVALL: Thank you very much.

MR. BALKENBUSH: Thank you, Your Honor.

[Proceedings adjourned at 3:26 p.m.]

* * * * * * * *

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video proceedings in the above-entitled case to the best of my ability.

Shannon Day
Independent Transcriber

EXHIBIT 2

EXHIBIT 2

IN THE SUPREME COURT OF THE STATE OF NEVADA

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.; AND UNITEDHEALTH GROUP, INC.,
Petitioners,
vs.
THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE NANCY L. ALLF, DISTRICT JUDGE,
Respondents,
and
FREMONT EMERGENCY SERVICES (MANDAVIA), LTD.; TEAM PHYSICIANS OF NEVADA-MANDAVIA, P.C.; AND CRUM STEFANKO AND JONES, LTD.,
Real Parties in Interest.

No. 81680

FILED

SEP 21 2020

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER DIRECTING ANSWER

In this original petition for a writ of mandamus or prohibition, petitioners seek a writ directing the district court to vacate its order and enter an order dismissing real parties in interests' claims (1) as subject to conflict preemption under ERISA; (2) as subject to complete preemption; and (3) for failure to adequately allege claims under NRCP 12(b)(5).

Having reviewed the petition, it appears that an answer may assist this court in resolving this matter. Therefore, real parties in interest,

on behalf of respondents, shall have 28 days from the date of this order to file and serve an answer, including authorities, against issuance of the requested writ. In addition to addressing the merits of the petition in its answer, real parties in interest should also address the propriety of writ relief. Petitioners shall have 14 days from service of the answer to file and serve any reply.[1]

It is so ORDERED.

Pickering, C.J.

Hardesty, J.

Silver, J.

cc: Hon. Nancy L. Allf, District Judge
Weinberg, Wheeler, Hudgins, Gunn & Dial, LLC
McDonald Carano LLP/Las Vegas
Eighth District Court Clerk

[1]Good cause appearing, we also grant petitioners' motion to exceed word length. NRAP 32(a)(7)(D). In the interest of fairness, real parties in interest may likewise file an answer not to exceed 13,993 words—the length of petitioners' writ petition.

EXHIBIT 3

August 25, 2020 Writ Petition to Nevada Supreme Court. Exhibit omitted for brevity

EXHIBIT 3

EXHIBIT 4

EXHIBIT 4

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Attorneys for Plaintiff Fremont Emergency Services (Mandavia), Ltd.

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

FREMONT EMERGENCY SERVICES (MANDAVIA), LTD., a Nevada professional corporation, Plaintiff, vs. UNITED HEALTHCARE INSURANCE COMPANY, a Connecticut corporation; UNITED HEALTH CARE SERVICES INC., dba UNITEDHEALTHCARE, a Minnesota corporation; UMR, INC., dba UNITED MEDICAL RESOURCES, a Delaware corporation; OXFORD HEALTH PLANS, INC., a Delaware corporation; SIERRA HEALTH AND LIFE INSURANCE COMPANY, INC., a Nevada corporation; SIERRA HEALTH-CARE OPTIONS, INC., a Nevada corporation; HEALTH PLAN OF NEVADA, INC., a Nevada corporation; DOES 1-10; ROE ENTITIES 11-20, Defendants.	Case No.: 2:19-cv-00832-JAD-VCF **MOTION TO STAY PROCEEDINGS PENDING RESOLUTION OF MOTION TO REMAND** **Request for Order Shortening Time Pursuant to LR IA 6-1(d)**

Plaintiff Fremont Emergency Services (Mandavia), Ltd. ("Fremont") respectfully requests that this Court to stay these proceedings until it has had an opportunity to determine whether it has subject matter jurisdiction. As explained in Fremont's motion to remand this action to the Eighth Judicial District Court for Clark County, Nevada, Fremont sets forth the reasons why Defendants' removal based on ERISA preemption was improper and therefore why this Court does not have subject matter jurisdiction. ECF No. 5. Until this Court determines if subject

matter jurisdiction exists, it is within the Court's discretion to stay all other matters. Accordingly, pursuant to LR IA 6-1(d), Fremont requests the Court consider this Motion to Stay on order shortening time. A statement of good cause supporting Fremont's request for order shortening time is contained in the Declaration of Kristen Gallagher submitted herewith. Exhibit 1, Gallagher Declaration at ¶¶ 3-5. Specifically, Fremont respectfully requests that the Court set an expedited briefing schedule on the Motion to Remand and stay all other proceedings until it has had an opportunity to adjudicate the Motion to Remand. Fremont's response to Defendants' motion to dismiss is June 18, 2019.

This Motion is based upon the record in this matter, the points and authorities that follow, the pleadings and papers on file in this action, and any argument of counsel entertained by the Court.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION AND PROCEDURAL POSTURE.

Plaintiff Fremont Emergency Services (Mandavia), Ltd. ("Fremont") asserted claims against defendants United HealthCare Insurance Company ("UHCIC"), United HealthCare Services, Inc. dba UnitedHealthcare ("UHC Services"), UMR, Inc. dba United Medical Resources ("UMR"), Oxford Health Plans, Inc. ("Oxford" and with UHCIC, UHC Services and UMR, the "UH Parties"), Sierra Health and Life Insurance Company, Inc. ("Sierra"), Sierra Health-Care Options, Inc. ("Sierra Options") and Health Plan of Nevada, Inc. ("HPN" and, collectively with the UH Parties, "United HealthCare") based entirely on United HealthCare's statutory and common law duties. ECF No. 1-1, Complaint. Nothing in Fremont's Complaint concerns United HealthCare's obligations under any employee benefit plan that it provides to its members. *Id.* Prior to United Health Care's removal to this Court, counsel for Fremont explained to United Healthcare's counsel that no obligation under any employee benefit plan was at issue under the Complaint.

Nevertheless, United HealthCare removed this action on the basis of federal question jurisdiction, specifically asserting that Fremont's claims are completely preempted by Section 502(a) (29 U.S.C. § 1132(a))) of the Employee Retirement Income Security Act of 1974, as

amended ("ERISA") claiming the subject claims relate to an employee benefit plan. (ECF No. 1). Thereafter, United HealthCare filed a motion to dismiss invoking pursuant to Fed. R. Civ. P. 12(b)(6), arguing that Fremont's statutory and common law claims are completely preempted by ERISA and subject to dismissal. ECF No. 4.

Fremont filed a Motion to Remand disputing ERISA preemption exists because this action involves disputes concerning the ***rate of payment*** rather than the ***right to payment***. ECF No. 5. As set forth in the Motion to Remand, disputes about the rate of payment are not governed by ERISA and are not subject to complete preemption under *Aetna Health, Inc. v. Davila*, 542 U.S. 200 (2004) and its progeny. Pertinent to this Motion and the Motion to Remand, United HealthCare paid all of the claims at issue in the litigation, making the question of coverage under the respective plans a nonissue. The ***only*** issue here is the amount of payment that was tendered to Fremont and whether that rate of payment is adequate under Nevada statutes and common law. As is detailed below, Ninth Circuit precedent dictates that disputes concerning the ***rate of payment*** rather than the ***right to payment*** are not governed by ERISA and are not subject to complete preemption under *Davila* and its progeny. Because the Court does not have subject matter jurisdiction over this dispute, Fremont moved for remand. *Id.* Given the existence of a threshold issue of concerning subject matter jurisdiction, Fremont respectfully requests that the Court stay all proceedings, including the briefing schedule on United HealthCare's motion to dismiss, until the Court has had an opportunity to adjudicate the Motion to Remand.

II. STATEMENT OF RELEVANT FACTS.

Fremont is a professional practice group of emergency medicine physicians and healthcare providers that provides emergency medicine services to patients presenting to the emergency departments at eight hospitals and other facilities in Clark County, Nevada staffed by Fremont. *See* Notice of Removal, Ex. 1 (ECF No. 1-1) (hereinafter "Compl.") at ¶ 14. Fremont and the hospitals whose emergency departments it staffs are obligated by both federal and Nevada law to examine any individual visiting the emergency department and to provide stabilizing treatment to any such individual with an emergency medical condition, regardless of the individual's insurance coverage or ability to pay. *Id.* at ¶ 15; *see also* Emergency Medical Treatment and Active Labor

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Act (EMTALA), 42 U.S.C. § 1395dd; NRS 439B.410. Fremont fulfills this obligation for the hospitals which its staffs. ECF No. 1-1, Compl. at ¶ 15. In this role, Fremont's physicians provide emergency medicine services to all patients, regardless of insurance coverage or ability to pay, including to patients with insurance coverage issued, administered and/or underwritten by United HealthCare. *Id.*

United HealthCare is responsible for administering and/or paying for certain emergency medical services provided by Fremont which are at issue in the litigation. *Id.* at ¶¶ 3-9. United HealthCare provides, either directly or through arrangements with providers such as hospitals and Fremont, healthcare benefits to its members. *Id.* at ¶ 16. There is no written agreement between United HealthCare and Fremont for the healthcare claims at issue in this litigation; Fremont is therefore designated as "non-participating" or "out-of-network" for all of the claims at issue in this litigation. *Id.* at ¶ 17. Notwithstanding the lack of a written agreement, an implied-in-fact agreement exists between the parties. *Id.*

Despite not participating in United HealthCare's "provider network" for the period in dispute, Fremont has continued to provide emergency medicine treatment, as required by law, to patients covered by United HealthCare's plans (the "Members") who seek care at the emergency departments where they provide coverage. *Id.* at ¶ 22. In emergency situations, patients are likely to go to the nearest hospital for care, particularly if they are transported by ambulance. *Id.* at ¶ 23. Patients facing an emergency situation are unlikely to have the luxury of determining which hospitals and physicians are in-network under their health plan. *Id.* United HealthCare is obligated to reimburse Fremont at the usual and customary rate for emergency services Fremont provided to its Patients, or alternatively for the reasonable value of the services provided. *Id.*

From July 1, 2017 through the present, Fremont has provided emergency medicine services to United HealthCare's members; however, commencing July 1, 2017, the UH Parties arbitrarily began drastically reducing the rates at which they paid Fremont for emergency services for some claims, but not others. *Id.* at ¶¶ 19-20. The UH Parties paid some of the claims for emergency services rendered by Fremont at far below the usual and customary rates, yet paid other substantially identical claims submitted by Fremont at higher rates. *Id.* at ¶ 20.

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Relevant to this Motion, for each of the healthcare claims at issue in this litigation, United HealthCare has already determined that each claim is payable; however, it paid the claim at an artificially reduced rate. *Id.* at ¶ 27. Thus, the claims at issue involve no questions of whether the claim should be covered under a health plan or whether it is payable; rather, the questions at issue in this case involve only a determination of whether United HealthCare paid the claim at the required usual and customary rate or, alternatively, for the reasonable value of services rendered.

On April 15, 2019, Fremont filed its Complaint against United HealthCare for breach of implied in fact contract, tortious breach of the implied covenant of good faith and fair dealing, alternative claim for unjust enrichment, violation of NRS 686A.020 and 686A.310, violations of Nevada Prompt Pay statutes and regulations, Consumer Fraud & Deceptive Trade Practices Acts and for declaratory judgment. *See* Complaint, Notice of Removal (ECF No. 1) at Exhibit 1. On May 14, 2019, United HealthCare filed its Notice of Removal with this Court, contending that the state law claims asserted are completely preempted by ERISA because the subject claims relate to an employee benefit plan. (ECF No. 1). As detailed herein, the claims arise not from an employee benefit plan, but United HealthCare's statutory and common law duty to pay for its Members' emergency services at usual and customary rates or, alternatively, for the reasonable value of services rendered. Binding precedent in the Ninth Circuit makes clear that cases, such as this, which concern the rate of payment only, do not relate to employee benefit plans, are not preempted by ERISA and, therefore, do no give rise to federal question jurisdiction. *Marin Gen. Hosp. v. Modesto & Empire Traction Co.*, 581 F.3d 941, 985 (9th Cir. 2009); *see also California Spine & Neurosurgery Inst.*, 2019 WL 1974901, at *3 ("Under Ninth Circuit law, ERISA does not preempt claims by a third party [medical provider] who sues an ERISA plan not as an assignee of a purported ERISA beneficiary, but as an independent entity claiming damages.") (citing *Catholic Healthcare West-Bay Area v. Seafarers Health & Benefits Plan*, 321 Fed. App'x 563, 564 (9th Cir. 2008)). Although United HealthCare has made and lost these same arguments before

another federal court, it again pursued its frivolous[1] removal and motion to dismiss for, what appears to be, no other purpose than to delay and unnecessarily expand these proceedings.

II. ARGUMENT.

A. The Court Should Stay the Proceedings Until it Determines Whether Subject Matter Jurisdiction Exists.

"[A] federal district court is obligated to ensure it has jurisdiction over an action, and once it determines it lacks jurisdiction, it has no further power to act." *Deleo v. Rudin*, 328 F. Supp. 2d 1106, 1115 (D. Nev. 2004) (citing *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94 (1998) ("Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause."). Even though not raised by the parties, lack of jurisdiction may be considered by the court, at any stage of the proceedings. *Libhart v. Santa Monica Dairy Co.*, 592 F.2d 1062, 1064 (9th Cir. 1979).

It follows that "[a] motion to remand should be determined before deciding a motion to dismiss" because a federal court that lacks subject matter jurisdiction cannot rule on other pending motions. *In re Bear River Drainage District*, 267 F.2d 849, 851 (10th Cir. 1959) (declining to consider pending motion to dismiss upon remand); *Illinois v. Sadder-Bey*, No. 17-CV-4999, 2017 WL 2987159, at *4 (N.D. Ill. July 13, 2017) (a federal court lacking subject matter jurisdiction over a removed case must remand it to the state court from whence it came, and cannot rule on other pending motions) (citing *Nichols v. Se. Health Plan of Alabama, Inc.*, CIV.A. 93-0481-P-C, 1993 WL 726249 (S.D. Ala. 1993)); *Macro v. Indep. Health Ass'n, Inc.*, 180 F. Supp. 2d 427, 431 (W.D.N.Y. 2001) ("[I]f removal [based on ERISA preemption] was inappropriate, the court must

[1] The frivolous nature of United HealthCare's removal of this action is explained in the Motion to Remand (ECF No. 5 at 5 n.1). By way of example, prior to removal, Fremont made it clear that ERISA does not apply by highlighting, "the claims at issue concern a dispute over the amount paid, not whether the claim was payable because defendants already determined the subject claims were payable. As a result, there is no basis to remove the action to federal court under federal question jurisdiction." *Id.* Further, other federal district courts have rejected UHCIC's ERISA preemption arguments.

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remand for lack of subject matter jurisdiction, notwithstanding the pendency of the other motions.").

In *Harden v. Field Memorial Community Hosp.*, 516 F. Supp. 2d 600 (S.D. Miss. 2007), aff'd, 265 Fed. Appx. 405 (5th Cir. 2008), the district court refused to adjudicate a motion to dismiss before deciding the issue of subject matter jurisdiction raised in a motion to remand. Similarly, in *Hammer v. Amazon.com*, 392 F. Supp. 2d 423 (E.D.N.Y. 2005), the court first determined whether it had subject-matter jurisdiction before ruling on a Rule 12(b)(6) motion. *See also Akhlaghi v. Berry*, 294 F. Supp. 2d 1238 (D. Kan. 2003); *Hearns Concrete Const. Co. v. City of Ypsilanti*, 241 F. Supp. 2d 803 (E.D. Mich. 2003); *Ren-Dan Farms, Inc. v. Monsanto Co.*, 952 F. Supp. 370 (W.D. La. 1997) (courts must determine subject-matter jurisdiction before personal jurisdiction or venue); *Nichols v. Southeast Health Plan of Alabama, Inc.*, 859 F. Supp. 553 (S.D. Ala. 1993) (federal court lacking subject-matter jurisdiction over a removed case cannot rule on other pending motions) (citing § 3739.1 Remand Subject-Matter Jurisdiction Grounds, 14C Fed. Prac. & Proc. Juris. § 3739.1 (rev. 4th ed.)); *Univ. of S. Alabama v. Am. Tobacco Co.*, 168 F.3d 405, 411 (11th Cir. 1999) ("federal court must remand for lack of subject matter jurisdiction notwithstanding the presence of other motions pending before the court.").

Here, Fremont challenged United HealthCare's removal based on ERISA preemption grounds. A determination of whether the Court has subject matter jurisdiction must be decided before United HealthCare's motion to dismiss. Because the Court has the inherent ability to control its docket for judicial economy and efficiency, both for itself and the parties, and because the Court is required to first determine whether it has subject matter jurisdiction over the case, Fremont requests a stay of the proceedings, including the remaining briefing schedule on United HealthCare's motion to dismiss, until the Court can make that determination. To allow otherwise would require completion of the briefing schedule on United HealthCare's Rule 12(b)(6) dispositive motion that seeks dismissal of Fremont's entire Complaint based on complete and conflict ERISA preemption. Motion to Dismiss (ECF No. 4) at 3:2-7.

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As set forth in full in Fremont's Motion to Remand, "removal on ERISA grounds is only appropriate if ERISA completely preempts a state law claim."[2] *California Spine & Neurosurgery Inst. v. Boston Sci. Corp.*, No. 18-CV-07610-LHK, 2019 WL 1974901, at *3 (N.D. Cal. May 3, 2019) (citing *Marin Gen. Hosp. v. Modesto & Empire Traction Co.*, 581 F.3d 941, 944-45 (9th Cir. 2009)). In determining whether a claim for payment falls within the purview of ERISA's civil enforcement provision, the Ninth Circuit distinguishes between claims that implicate the *right* of payment, which are preempted by ERISA, and claims that implicate the *rate* of payment, which are not preempted. *Blue Cross of California v. Anesthesia Care Assocs. Med. Grp., Inc.*, 187 F.3d 1045, 1051 (9th Cir. 1999) (noting that ERISA did not preempt the state law claims because "[t]he dispute here is not over the right to payment, which might be said to depend on the patients' assignments to the Providers, but the amount, or level, of payment, which depends on the terms of the provider agreements."); *Windisch v. Hometown Health Plan, Inc.*, No. 3:08-cv-00664-RJC-RAM, 2010 WL 786518, at *5 (D. Nev. Mar. 5, 2010) ("Plaintiff has affirmatively taken the position that he is only challenging Defendants' adjudication and payment of claims that have already been determined to be covered...ERISA does not preempt Plaintiff's claims because they do not require the Court to interpret ERISA plans."). Federal courts in other states likewise have determined that ERISA does not completely preempt claims based on statutory or other common law rate-payment obligations. *E.g., Coast Plaza Doctors Hosp. v. Ark. Blue Cross & Blue Shield*, No. CV 10-6927 DDP (JEMx), 2011 WL 3756052, at *4 (C.D. Cal. Aug. 25, 2011); *Med. & Chirurgical Faculty of Md. v. Aetna U.S. Healthcare, Inc.*, 221 F. Supp. 2d 618, 619 & n.1 (D. Md. 2002); *Emergency Servs. of Zephyrhills, P.A. v. Coventry Health Care of Fla., Inc.*, --- F. Supp. 3d ----, Case No. 16-25193, 2017 WL 6548019, at *5 (S.D. Fla. Apr. 5, 2017) (remanding out-of-network provider's claims for underpayment, breach of implied in fact contract and unjust enrichment where plaintiff alleged violation of Florida rate payment statute); *Lone Star*

[2] Ordinarily, federal preemption is merely a defense to the merits of a claim and does not provide federal question jurisdiction or a basis to remove an action to federal court. *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987). Complete preemption, if it exists, is a "narrow exception" to the well-pleaded complaint rule that "converts" state-law claims into federal law ones, and thereby allows removal to federal court. *Aetna Health, Inc. v. Davila*, 542 U.S. 200, 209 (2004).

OB/GYN Assocs., 579 F.3d at 530 ("A claim that implicates the rate of payment as set out in the Provider Agreement, rather than the right to payment under the terms of the benefit plan, does not run afoul of *Davila* and is not preempted by ERISA."). The case law is clear on this issue, and United HealthCare is well-informed of the outcome given it has tried to remove on the same grounds, but the arguments rejected.[3]

United HealthCare also argues that conflict preemption provides for an alternate basis for dismissal. Notably, however, ERISA conflict preemption does not provide a basis for removal and would require Fremont to address arguments that presupposes the Court has subject matter jurisdiction.[4] A defense of conflict preemption under ERISA § 514(a) does not provide a basis for federal question jurisdiction under either § 1331(a) or § 1441(a). The Supreme Court has explained that:

> federal law becomes relevant only by way of a defense to an obligation created entirely by state law, and then only if [the Hospital] has made out a valid claim for relief under state law. The well-pleaded complaint rule was framed to deal with precisely this situation.
>
> ... [S]ince 1887 it has been settled law that a case may not be removed to federal court on the basis of a federal defense including the defense of preemption....

Marin Gen. Hosp. v. Modesto & Empire Traction Co., 581 F.3d 941, 949 (9th Cir. 2009) (citing *Franchise Tax Bd. of Cal. v. Constr. Laborers Vacation Trust for S. Cal.*, 463 U.S. 1, 13 14, 103 (1983)); *see also Met. Life Ins. Co. v. Taylor*, 481 U.S. 58, 64 (1987) ("ERISA preemption [under § 514], without more, does not convert a state claim into an action arising under federal law.").

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[3] *See e.g. Gulf-To-Bay Anesthesiology Associates, LLC v. UnitedHealthcare of Florida, Inc.*, No. 8:18-cv-00233-EAK-AAS, 2018 WL 3640405, at *3 (M.D. Fla. July 20, 2018) ("The Court finds unavailing UHIC's attempt to recast through an ERISA lens [plaintiff's] entitlement to full payment."); *Low-T Physicians Service, P.L.L.C. v. United HealthCare of Texas, Inc., et al.*, No. 4:18-cv-00938-A, 2019 WL 935800, at *2 (N.D. Tex. Feb. 26, 2019) ("the question here is not as to the right to ERISA benefits under a particular plan but on the amount of payment due under certain provider agreements. Such claims are not preempted by ERISA.").

[4] But "if the doctrine of complete preemption does not apply, even if the defendant has a defense of 'conflict preemption' within the meaning of [§ 514(a)] because the plaintiff's claims 'relate to' an ERISA plan, the district court[is] without subject matter jurisdiction." *Marin Gen. Hosp. v. Modesto & Empire Traction Co.*, 581 F.3d 941, 945 (9th Cir. 2009).

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While United HealthCare would be free to assert a defense of conflict preemption in state court under § 514(a), it cannot rely on that defense to establish federal question jurisdiction. As a result, it is more efficient for the Court to rule on the issue of subject matter jurisdiction first. Further, In the event the Court remands the action, the Court and parties have not unnecessarily expended time and resources to briefing issues that the Court cannot consider. Conversely, in the event the Court denies the Motion to Remand, the stay would be lifted and Fremont would respond to the United HealthCare's motion to dismiss. Fremont respectfully requests that the Court first determine whether United HealthCare properly removed the case before United HealthCare can proceed with such arguments.

B. Legal Standard for Exercise of Inherent Power to Stay Proceedings.

A district court has the inherent power to stay its proceedings. *Landis v. North American Co.*, 299 U.S. 248, 254 (1936); *see also Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1109 (9th Cir. 2005). This power to stay is "incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Id.*; *see also Gold v. Johns–Manville Sales Corp.*, 723 F.2d 1068, 1077 (3d Cir.1983) (holding that the power to stay proceedings comes from the power of every court to manage the cases on its docket and to ensure a fair and efficient adjudication of the matter at hand). This is best accomplished by the "exercise of judgment, which must weigh competing interests and maintain an even balance." *Landis*, 299 U.S. at 254-55. In determining whether to stay a case, courts must weigh "competing interests which will be affected by the granting or refusal to grant a stay[.]" *Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1110 (9th Cir. 2005) (citing *CMAX, Inc. v. Hall*, 300 F.2d 265, 268 (9th Cir. 1962)). The movant bears the burden of establishing the need to stay the case. *Clinton v. Jones*, 520 U.S. 681, 708 (1997).

Motions to stay are often considered in the context of other pending proceedings and, in those cases, the competing interests courts consider (known as the *Landis* factors) include: "(1) the possible damage which may result from the granting of a stay; (2) the hardship or inequity which a party may suffer in being required to go forward; and (3) and the orderly course of justice measured in terms of the simplifying or complicating of issues, proof, and questions of law which

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could be expected to result from a stay." *Thomas v. Smith-Palluck Associates Corp.*, No. 2:17-cv-02001-MMD-CWH, 2019 WL 1586750, at *1 (D. Nev. Apr. 12, 2019); *Singer v. Las Vegas Athletic Clubs*, No. 2:17-cv-01115-GMN-VCF, 2019 WL 1338384, at *5 (D. Nev. Mar. 25, 2019) (citing *CMAX*, 300 F.2d at 268). If there is a "fair possibility" that a stay could impact the non-moving party, then the moving party has to demonstrate a clear case of hardship or inequity if granting that stay would prejudice the non-moving party. *Id.* at 255. These factors weigh in favor of a targeted stay until the Court determines if it has subject matter jurisdiction.

As to the first factor, there will be no damage to United HealthCare if the Court first determines Fremont's Motion to Remand. Once that determination has been made, if the case is remanded then United HealthCare can proceed with its defenses there. Importantly, the main basis for its motion to dismiss – ERISA complete preemption – will not exist if the Court remands the action. Second, if Fremont is required to go forward with responding to the motion to dismiss, Fremont it presupposes that the Court has jurisdiction under ERISA Section 502(a). This is the proverbial putting the cart before horse. The Court is required to determine subject matter jurisdiction first, not assuming there is, as United HealthCare would prefer. Third, deciding the Motion to Remand puts the threshold issue of subject matter jurisdiction before the Court first. This promotes the orderly course of justice because a stay will allow the Court the opportunity to adjudicate the Motion to Remand before deciding whether Fremont's claims should be dismissed due to ERISA complete or conflict preemption. Each of these *Landis* factors weighs in favor of a stay.

III. CONCLUSION.

Fremont respectfully requests that the Court stay the litigation until it has had an opportunity to adjudicate Fremont's Motion to Remand.[5] If the remand motion is granted, the Court will have determined it lacks subject matter jurisdiction over the matter and will remand the

...

[5] Fremont has inquired with United HealthCare about a stay of proceedings. United HealthCare's counsel declined to consider a stay pending resolution of Fremont's Motion to Remand or a discovery stay. Ex. 1 at ¶ 6.

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matter to the Eighth Judicial District Court, Clark County, Nevada, and the Court will not need to employ judicial resources in connection with the Rule 12(b)(6) motion.

DATED this 5th day of June, 2019.

McDONALD CARANO LLP

By: /s/ *Kristen T. Gallagher*

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of McDonald Carano LLP, and that on this 5th day of June, 2019, I caused a true and correct copy of the foregoing **MOTION TO STAY PROCEEDINGS PENDING RESOLUTION OF MOTION TO REMAND** to be served via the U.S. District Court's Notice of Electronic Filing system ("NEF") in the above-captioned case, upon the following:

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An employee of McDonald Carano LLP

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INDEX OF EXHIBITS

Description	Exhibit No.
Declaration of Kristen T. Gallagher, Esq.	1

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EXHIBIT 1

DECLARATION OF KRISTEN T. GALLAGHER, ESQ.

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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

FREMONT EMERGENCY SERVICES (MANDAVIA), LTD., a Nevada professional corporation, Plaintiff, vs. UNITED HEALTHCARE INSURANCE COMPANY, a Connecticut corporation; UNITED HEALTH CARE SERVICES INC., dba UNITEDHEALTHCARE, a Minnesota corporation; UMR, INC., dba UNITED MEDICAL RESOURCES, a Delaware corporation; OXFORD HEALTH PLANS, INC., a Delaware corporation; SIERRA HEALTH AND LIFE INSURANCE COMPANY, INC., a Nevada corporation; SIERRA HEALTH-CARE OPTIONS, INC., a Nevada corporation; HEALTH PLAN OF NEVADA, INC., a Nevada corporation; DOES 1-10; ROE ENTITIES 11-20, Defendants.	Case No.: 2:19-cv-00832-JAD-VCF **DECLARATION OF KRISTEN T. GALLAGHER, ESQ. IN SUPPORT OF MOTION TO STAY PROCEEDINGS PENDING RESOLUTION OF MOTION TO REMAND** **Request for Order Shortening Time Pursuant to LR IA 6-1(d)**

I, KRISTEN T. GALLAGHER, declare as follows:

1. I am an attorney licensed to practice law in the State of Nevada and am a partner in the law firm of McDonald Carano LLP, counsel for Fremont.

2. This declaration is submitted in support of Fremont Emergency Services (Mandavia), Ltd.'s Motion to Stay Proceedings Pending Resolution of Motion to Remand on

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order shortening time ("Motion to Stay") and is made of my own personal knowledge, unless otherwise indicated. I am over 18 years of age, and I am competent to testify as to same.

3. Fremont respectfully submits that good cause exists for the Court to consider its Motion to Stay pending resolution of Fremont's Motion to Remand (ECF No. 5) on shortened time because the threshold issue of subject matter jurisdiction is at issue.

4. As explained in Fremont's Motion to Remand this action to the Eighth Judicial District Court for Clark County, Nevada, Fremont sets forth the reasons why Defendants' removal based on ERISA preemption was improper and therefore why this Court does not have subject matter jurisdiction. Until this Court determines if subject matter jurisdiction exists, it is within the Court's discretion to stay all other matters, including the briefing and adjudication of Defendants' motion to dismiss (ECF No. 4) as that motion presupposes that the Court has subject matter jurisdiction. However, if the Court does not have subject matter jurisdiction over this action, the remaining briefing on the motion to dismiss and the Court's use of judicial resources in connection with that motion will be unnecessary.

5. Accordingly, Fremont respectfully requests that the Court set an expedited briefing schedule on the Motion to Remand and stay all other proceedings until it has had an opportunity to adjudicate the Motion to Remand.

6. Prior to filing the Motion to Stay Proceedings, I inquired with Defendants' counsel whether Defendants would agree to stay proceedings to allow the Motion to Remand to be adjudicated. After conferring with his client, Mr. Balkenbush indicated that Defendants declined to stay the proceedings or to stay discovery.

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

Executed: June 5, 2019. /s/ *Kristen T. Gallagher*

Kristen T. Gallagher

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EXHIBIT 5

EXHIBIT 5

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

***

FREMONT EMERGENCY SERVICES (MANDAVIA), LTD., Plaintiff, vs. UNITED HEALTHCARE INSURANCE COMPANY, *et al.*, Defendants.	2:19-cv-00832-JAD-VCF **ORDER** MOTION TO STAY [ECF NO. 14]

Before the Court is Plaintiff Fremont Emergency Services' Motion to Stay Proceedings Pending Resolution of Motion to Remand. (ECF No. 14). For the reasons discussed below, Plaintiff's motion is denied.

BACKGROUND

As alleged in the operative complaint, Plaintiff is "is a professional emergency medicine services group practice that staffs [] emergency departments ...throughout Clark County, Nevada." (ECF No. 1-1 at 2). Defendants are entities, including several named "United Healthcare," related to paying for and administering healthcare. (*Id.* at 2-3). Plaintiff's "physicians provide emergency medicine services to all patients, regardless of insurance coverage or ability to pay, including to patients with insurance coverage issued, administered and/or underwritten by United HealthCare." (*Id* at 4). "There is no written agreement between United HealthCare and [Plaintiff] for the healthcare claims at issue in this litigation ... Notwithstanding the lack of a written agreement" Plaintiff alleges that "an implied-in-fact agreement exists between the parties." (*Id.* at 5). "Beginning on July 1, 2017, [Defendants] arbitrarily began

drastically reducing the rates at which they paid [Plaintiff] for emergency services for some claims, but not others." (*Id.*). Plaintiff alleges that,

> 38. Through the parties' conduct and respective undertaking of obligations concerning emergency medicine services provided by Fremont to the UH Parties' Patients, the parties implicitly agreed, and Fremont had a reasonable expectation and understanding, that the UH Parties would reimburse Fremont for non-participating claims at rates in accordance with the standards acceptable under Nevada law and in accordance with rates the UH Parties pay for other substantially identical claims also submitted by Fremont.
>
> 39. Under Nevada common law, including the doctrine of quantum meruit, the UH Parties, by undertaking responsibility for payment to Fremont for the services rendered to United HealthCare Patients, impliedly agreed to reimburse Plaintiffs at rates, at a minimum, equivalent to the reasonable value of the professional emergency medical services provided by Fremont.
>
> 40. The UH Parties, by undertaking responsibility for payment to Fremont for the services rendered to the UH Parties' Patients, impliedly agreed to reimburse Fremont at rates, at a minimum, equivalent to the usual and customary rate or alternatively for the reasonable value of the professional emergency medical services provided by Fremont.

(*Id.* at 8). Plaintiff brings claims against Defendants for breach of implied-in-fact contract, tortious breach of the implied covenant of good faith and fair dealing, unjust enrichment, violation of NRS 686A.020 and 686A.310, violation of Nevada prompt pay statutes and regulations, consumer fraud and deceptive trade practices, and declaratory judgment. (*Id.* at 8-17).

Plaintiff filed its complaint in Nevada state court. (ECF No. 1-1). Defendants removed the case to this Court. (ECF No. 1). Defendants argue that Plaintiff's claims are preempted ERISA due to "the fact that numerous employee welfare benefit plans are implicated." (*Id.* at 3). Plaintiff has filed a motion to remand the case to state court, which is currently pending before Judge Dorsey. (ECF No. 5).

Plaintiff has also filed a motion to stay. (ECF No. 14). Initially, Plaintiff asked that the motion to remand be decided on an expedited basis and that all other proceedings be stayed until the Court ruled on

the motion to remand. (*Id.* at 2). Judge Dorsey denied the motion to expedite briefing and referred the remained of the motion to me. (ECF No. 17). As an initial matter, I am now construing the motion to stay as a motion to stay discovery. The motion to stay discusses staying a pending motion to dismiss. (ECF No. 14). The motion to dismiss (ECF No. 4) is also before Judge Dorsey. I make no recommendation regarding what order Judge Dorsey will use to address the motion to dismiss and motion to remand.[1] The only remaining issue in the case is a potential stay of discovery.

In its motion to stay, Plaintiff argues that "this action involves disputes concerning the rate of payment rather than the right to payment" and "disputes about the rate of payment are not governed by ERISA and are not subject to complete preemption." (ECF No. 14 at 3). "[T]he claims arise not from an employee benefit plan, but [Defendants'] statutory and common law duty to pay for its Members' emergency services at usual and customary rates or, alternatively, for the reasonable value of services rendered." (*Id.* at 5). "Given the existence of a threshold issue of concerning subject matter jurisdiction, [Plaintiff] respectfully requests that the Court stay all proceedings...until the Court has had an opportunity to adjudicate the Motion to Remand." (*Id.* at 3).

In response, Defendants argue that "the granting of a motion to remand does not obviate the need for discovery." (ECF No. 20 at 4). Defendants asserts discovery is needed into the types of medial claims that were denied or underpaid. (*Id.* at 7-8). Finally, Defendant argues that the motion to remand will likely not be granted because "the only legal duties owed by Defendants (if any) flow from the rights [Plaintiff] has as the assignee of Defendants' plan members. Since those rights are directly based on and related to employee benefit plans governed by ERISA, [Plaintiff's] claims are completely preempted." *Id.* at 11).

In its reply, Plaintiff asserts that, "if discovery proceeds, [Plaintiff] will be at a disadvantage because it will not have the benefit of [Defendants'] answer and affirmative defenses and will be unduly

[1] In addition, the only briefing left to be completed on the motion to dismiss is by Defendants, who are not moving to stay the case.

hampered in prosecuting this action." (ECF No. 24 at 5). Plaintiff argues that a motion to remand is dispositive, no discovery is needed to resolve the jurisdictional issue, and the motion to remand will be granted. (*Id.* at 6-12).

ANALYSIS

The Rules do not provide for automatic or blanket stays of discovery when a potentially dispositive motion is pending. *Ministerio Roca Solida v. U.S. Dep't of Fish & Wildlife*, 288 F.R.D. 500, 502 (D. Nev. 2013). Whether to grant a stay is within the discretion of the court. *Munoz-Santana v. U.S. I.N.S.*, 742 F.2d 561, 562 (9th Cir. 1984). "[A] party seeking a stay of discovery carries the heavy burden of making a strong showing why discovery should be denied." *Ministerio Roca Solida*, 288 F.R.D. at 503.

Courts in the District of Nevada apply a two-part test when evaluating whether a discovery stay should be imposed. *See TradeBay, LLC v. Ebay, Inc.*, 278 F.R.D. 597, 600 (D. Nev. 2011). First, the pending motion must be potentially dispositive of the entire case or at least the issue on which discovery is sought. *Id.* Second, the court must determine whether the pending motion to dismiss can be decided without additional discovery. *Id.* When applying this test, the court must take a "preliminary peek" at the merits of the pending dispositive motion to assess whether a stay is warranted. *Id.*

There has been some differing opinions in this Court regarding whether a motion to remand is a dispositive motion in the context of a motion to stay. *See Anoruo v. Valley Health Sys., LLC*, No. 2:18-cv-00105-MMD-NJK, 2018 WL 1785866, at *3 (D. Nev. Apr. 13, 2018) ("a motion to remand is not sufficient grounds to grant a stay of discovery... discovery will proceed regardless of the outcome of the District Court's remand decision"); *Grammer v. Colorado Hosp. Ass'n Shared Servs., Inc.*, No. 2:14-cv-1701-RFB-VCF, 2015 WL 268780, at *2 (D. Nev. Jan. 21, 2015) (granting a temporary discovery stay pending a ruling on a motion to remand regarding diversity jurisdiction). I will not deny this motion to stay purely on the basis that it relates to a pending motion to remand. However, the fact that the case will

continue even if the motion to remand is granted is a factor that weighs in favor of denying the motion to stay discovery.

Without prejudging the outcome of the motion to remand, I am not convinced that the motion can be granted without further discovery. The main issue in Defendants' removal of the case and Plaintiff's motion to remand the case to state court is preemption under ERISA. Plaintiff asserts that its rate of payment claims "arise not from an employee benefit plan," which would be preempted by ERISA and grant this Court jurisdiction over at least some of the claims, "but [Defendants'] statutory and common law duty to pay for its Members' emergency services at usual and customary rates or, alternatively, for the reasonable value of services rendered." (ECF No. 14 at 5). However, the caselaw on this issue and the facts of this case in particular are not settled.

Courts have held that when "rate of payment" claims are brought "under quasi-contractual theories of liability," the claims are not preempted by ERISA. *REVA, Inc. v. HealthKeepers, Inc.*, No. 17-24158-CIV, 2018 WL 3323817, at *4 (S.D. Fla. July 6, 2018). However, these cases state that the amount of payment must be connected to a duty outside of an ERISA plan, such as a contract or a state statute. *See Marin Gen. Hosp. v. Modesto & Empire Traction Co.*, 581 F.3d 941, 948 (9th Cir. 2009) ("the asserted obligation to make the additional payment stems from the alleged oral contract"); *Port Med. Wellness Inc. v. Connecticut Gen. Life Ins. Co.*, No. CV-13-03604 BRO PLAX, 2013 WL 5315701, at *6 (C.D. Cal. Sept. 18, 2013) (rate of pay claims are "typically construed as independent contractual obligations"); *Hialeah Anesthesia Specialists, LLC v. Coventry Health Care of Fla., Inc.*, 258 F. Supp. 3d 1323, 1328 (S.D. Fla. 2017) (discussing implied-in-law right to payment). When a defendant's duty "to reimburse for emergency services... was necessarily dependent on the fact that plaintiff was a participant in an ERISA-governed plan," courts have held that the claims are preempted under ERISA. *In re WellPoint, Inc. Out-of-Network UCR Rates Litig.*, 903 F. Supp. 2d 880, 929–30 (C.D. Cal. 2012); *see also Torrent & Ramos, M.D., P.A. v. Neighborhood Health Partnerships, Inc.*, No. 04-20858-CIV, 2004 WL 7320735, at

*4 (S.D. Fla. July 1, 2004) (holding the case was "a suit for benefits under an ERISA plan where a provider rendered certain emergency services to an ERISA provider...and failed to receive the payment it expected" and Plaintiff's "attempt to recast its claim as one of implied contract does not change this reality") (internal quotations omitted).

In this case, Plaintiff asserts Defendants "impliedly agreed to reimburse [Plaintiff] at rates, at a minimum, equivalent to the usual and customary rate or alternatively for the reasonable value of the professional emergency medical services provided" "[t]hrough the parties' conduct" and "[u]nder Nevada common law." (ECF No. 1-1 at 8). Plaintiff does not cite any specific common law principle or Nevada statute[2] obligating Defendants to pay a certain amount to Plaintiff for the services rendered. Plaintiff's complaint is also vague regarding what conduct resulted in any implied-in-fact contract—Plaintiff merely alleges that (1) it regularly provides services to Defendants' health plan members, (2) Defendants "were aware that [Plaintiff] was entitled to and expected to be paid at rates in accordance with the standards established under Nevada law," and (3) "by undertaking responsibility for payment to [Plaintiff]" Defendants "impliedly agreed to reimburse [Plaintiff] at rates, at a minimum, equivalent to the usual and customary rate or alternatively for the reasonable value of the professional emergency medical services provided by [Plaintiff]." (ECF No. 1-1 at 5, 8). Further discovery will likely be needed to resolve Plaintiff's implied contract assertion, as it relates to the conduct of the parties and their expectations. In addition, there is caselaw suggesting that if interpreting an implied-in-fact contract requires interpretation of an ERISA plan's terms,[3] claims based on the contract are preempted. *Sharp Mem'l Hosp. v. Regence*

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[2] The statutes cited in the complaint, such as NRS 686A.310, deal with the timing of payments rather than the obligation to pay.

[3] One of the allegations in the complaint is that Defendants "generally pay lower reimbursement rates for services provided to members of their fully insured plans and authorize payment at higher reimbursement rates for services provided to members of self-insured plans or those plans under which they provide admini strator services only." (ECF No. 1-1 at 5-6).

BlueCross BlueShield of Utah, No. 16-CV-2493-JM-RN), 2018 WL 3993359, at *8 (S.D. Cal. Aug. 21, 2018).

I am not convinced that Plaintiff will be successful in having the case remanded to state court. Should Judge Dorsey find that any of Plaintiff's seven claims are preempted by ERISA, the Court will then have grounds to exert supplemental jurisdiction over the remaining claims. Allowing the parties to engage in discovery at this time will assist in the progress of the case, even if it is subsequently remanded. I am not persuaded that Plaintiff will be prejudiced at engaging in discovery before Defendants have filed an answer. Plaintiff knows the allegations in its complaint and can direct its discovery towards those allegations. On the other hand, Defendants will struggle defending this case without further information from Plaintiff regarding its allegations.

Accordingly, and for good cause shown,

IT IS HEREBY ORDERED that Plaintiff's Motion to Stay Proceedings Pending Resolution of Motion to Remand (ECF No. 14) is DENIED.

IT IS FURTHER ORDERED that the parties engage in a Rule 26(f) conference no later than July 12, 2019 and submit a proposed discovery plan and scheduling order no later than July 26, 2019. These deadlines will be stayed should a party object to this order.

DATED this 27th day of June, 2019.

CAM FERENBACH
UNITED STATES MAGISTRATE JUDGE

EXHIBIT 6

EXHIBIT 6

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Attorneys for Defendants Unitedhealth Group, Inc., United Healthcare Insurance Company, United Health Care Services, Inc. dba Unitedhealthcare, UMR, Inc. dba United Medical Resources, Oxford Health Plans, Inc., Sierra Health and Life Insurance Company, Inc., Sierra Health-Care Options, Inc., and Health Plan of Nevada, Inc.

WEINBERG WHEELER HUDGINS GUNN & DIAL

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

FREMONT EMERGENCY SERVICES (MANDAVIA), LTD., a Nevada professional corporation; TEAM PHYSICIANS OF NEVADA-MANDAVIA, P.C., a Nevada professional corporation; CRUM, STEFANKO AND JONES, LTD. dba RUBY CREST EMERGENCY MEDICINE, a Nevada professional corporation Plaintiff, vs. UNITEDHEALTH GROUP, INC., a Delaware corporation; UNITED HEALTHCARE INSURANCE COMPANY, a Connecticut corporation; UNITED HEALTH CARE SERVICES INC. dba UNITEDHEALTHCARE, a Minnesota corporation; UMR, INC. dba UNITED MEDICAL RESOURCES, a Delaware corporation; OXFORD HEALTH PLANS, INC., a Delaware corporation; SIERRA HEALTH AND LIFE INSURANCE COMPANY, INC., a Nevada	Case No.: 2:19-cv-00832-JCM-VCF **DECLARATION OF SANDRA WAY IN SUPPORT OF DEFENDANTS' OBJECTIONS TO FREMONT'S REQUESTS FOR PRODUCTION, INTERROGATORIES AND REQUESTS FOR ADMISSIONS**

corporation; SIERRA HEALTH-CARE OPTIONS, INC., a Nevada corporation; HEALTH PLAN OF NEVADA, INC., a Nevada corporation; DOES 1-10; ROE ENTITIES 11-20,

Defendants.

I, Sandra Way, declare under penalty of perjury that the foregoing is true and correct:

1. I am employed as the Claim & Appeal Regulatory Adherence Business Manager for United Healthcare Employer & Individual. I have worked for United for 10 years. My job responsibilities include providing oversight of regulatory related functions for E&I Claim & Appeal Operations.

2. I understand that, according to Fremont, there are approximately 15,210 claims at issue in this litigation which are identified in a spreadsheet produced by Fremont that is bates numbered FESM000011.

3. For each of the claims at issue, I understand that Fremont has submitted written discovery requests to Defendants, including requests for production, interrogatories and requests for admissions. While each request often asks for a slightly different piece of information related to the claims, taken together, the requests ask for any and all information related to the claims at issue, including all documents and communications related to the claims.

4. Many of Fremont's requests essentially ask for information that collectively constitutes what is often called the "administrative record" for each claim.

5. To produce the administrative record for each claim, United must locate and produce the following categories of documents from their records for each individual claim, to the extent that any such documents exist:

a. Member Explanations of Benefits ("EOBs");

b. Provider EOBs and/or Provider Remittance Advices ("PRAs");

c. Appeals documents;

d. Any other documents comprising the administrative records, such as correspondence or clinical records submitted by Plaintiffs;

e. The plan documents in effect at the time of service.

6. These documents are not stored together and are spread across at least four separate systems within United.

7. The documents from categories *a*; and *b*, are stored on a United electronic storage platform known as EDSS. "EDSS" stands for Enterprise Data Storage System. The documents from category *d* may be stored in another United electronic storage platform known as IDRS. "IDRS" stands for Image Document Retrieval System. When using EDSS or IDRS, documents must be individually searched for and pulled. The process for doing so looks like this:

First, a United employee must access EDSS or IDRS from their computer.

Second, the employee must select the type of document that they wish to pull from a drop down menu: claim form, letter, EOB, etc.

Third, the employee must run a query for that document for each individual claim at issue, based on some combination of claim identifying information (e.g., the claim number, member ID number, dates of services, social security number, provider tax identification number, etc.).

Fourth, the employee must download the documents returned by their query.

Fifth, the employee must open and review the downloaded documents to confirm that they pertain to one of the at-issue claims.

Sixth, if the documents do pertain to an at-issue claim, the employee must migrate those documents to a United shared drive specific to this litigation, from which the documents will be transferred to United's outside counsel for this matter.

8. Documents from category *c* are located on a United electronic escalation tracking platform known as ETS. "ETS" stands for Escalation Tracking System. Pulling documents from ETS, which is done on an individual claim-by-claim basis, substantially mirrors the process for pulling documents from EDSS and IDRS.

9. My team has previously pulled documents from categories *a*, *b*, *c*, and *d* in connection with other provider-initiated litigation. Based on the documents that we pulled previously, we have developed estimates of the average time that it takes to pull each category of document: