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 II

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Docket 81680 Document 2020-42549

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

Exhibit	Description	Vol. No.	Page No.
1.	A: Defendants' Motion to Stay Proceedings Pending Resolution of Writ Petition on Order Shortening Time	1	00001-00058
	B. Plaintiffs' Opposition to Defendants' Motion to Stay Proceedings Pending Resolution of Writ Petition on Order Shortening Time	1	00059-00069
2.	Hearing Transcript 09/09/2020	1	00070-00135
3.	Order Denying Defendants' Motion to Stay Proceedings Pending Resolution of Writ Petition on Order Shortening Time 09/23/2020	1	00136-00146
4.	Order Directing Answer	1	00147-00149
5.	A. Defendants' Renewed Motion to Stay Proceedings Pending Resolution of Writ Petition on Order Shortening Time	1-2	00150-00217
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	C. Defendants' Reply in support of Renewed Motion to Stay Proceedings Pending Resolution of Writ Petition on Order Shortening Time	2	00233-00242
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7.	Hearing Transcript 10/08/2020	2	00254-00338
8.	Order Granting, in Part, Plaintiffs' Motion to Compel Defendants' Production of claims file for At-Issue Claims, or, In the Alternative, Motion in Limine, 09/28/2020	2	00339-00351
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10.	Declaration of Sandra Way	2	00355-00363
11.	Order Granting Plaintiffs' Motion to Compel Defendants' Defendants' List of Witnesses, Production of Documents and Answers to Interrogatories on Order Shortening Time, 10/27/2020	2	00364-00373

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 (FESM0000011), 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.

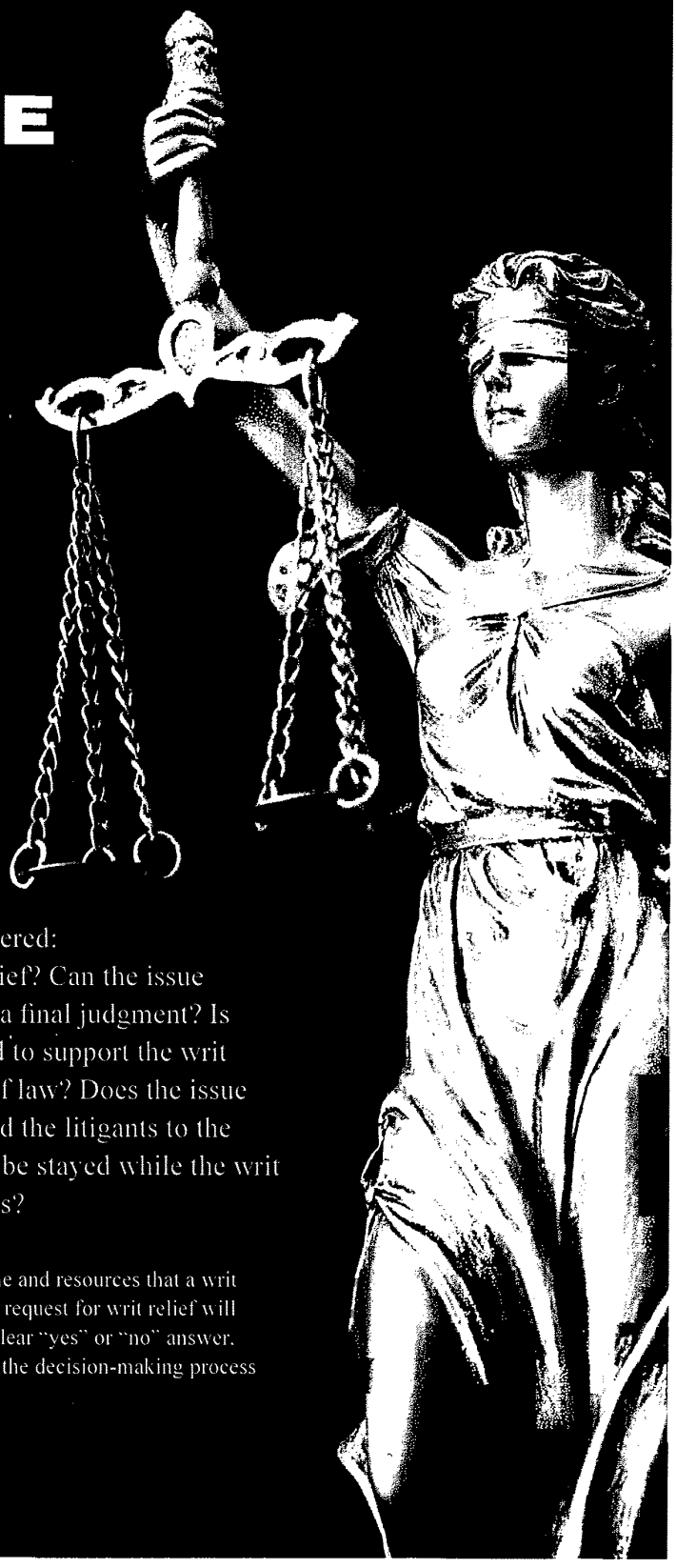
Executed on January 29th, 2020 in Moline, Illinois

SANDRA WAY
Business Manager
Claim & Appeal Regulatory Adherence
United Healthcare

EXHIBIT 7

EXHIBIT 7

TAKING THE MYSTERY OUT OF WRIT PRACTICE



BY PAUL GEORGESON, ESQ., AND DEBBIE LEONARD, ESQ.

An ubiquitous question that often plagues lawyers is whether it is worthwhile to file a petition for writ of mandamus or prohibition to seek review of an erroneous interlocutory district court decision. Many factors should be considered: Does the issue warrant extraordinary relief? Can the issue be sufficiently reviewed on appeal from a final judgment? Is the factual record adequately established to support the writ petition? Is the issue purely a question of law? Does the issue have statewide public importance beyond the litigants to the case? Can the district court proceedings be stayed while the writ petition is pending in the appellate courts?

If the answer to these questions is "yes," the time and resources that a writ petition will consume may be worthwhile. If "no," a request for writ relief will unlikely be successful. Because there is usually no clear "yes" or "no" answer, this article is designed to assist the practitioner with the decision-making process to determine whether or not to file a writ petition.

Source and Scope of Authority

Article 6, Section 4 of the Nevada Constitution provides the Nevada Supreme Court and Court of Appeals with original jurisdiction to issue writs of mandamus and prohibition. NRS Chapter 34 and NRAP 21 set forth the applicable procedures.[1] A writ of mandamus is available to compel the performance of an act that the law requires or to control an arbitrary or capricious exercise of discretion. A writ of prohibition is the counterpart to a writ of mandamus; it can be used to stop the district court (or another tribunal, corporation, board or person exercising judicial functions) from acting when such proceedings are either without, or in excess of, the court's jurisdiction.[2]

These types of writs are considered extraordinary remedies. The court has complete and exclusive discretion to consider and issue them. In applying for a writ, the petitioner must strictly comply with all requirements in NRAP 21 and meet its burden to demonstrate that extraordinary relief is warranted.

Extraordinary writ relief is only available if there is no plain, speedy and adequate remedy in the ordinary course of law. The right to appeal a final judgment is generally considered an adequate legal remedy that precludes writ relief. Therefore, the court generally declines to entertain writ petitions where the decision from a lower court is appealable. That is true even when immediate appeal is not available (such as with an interlocutory order), but the order at issue may ultimately be challenged on appeal from a final judgment. The court will generally refuse to consider a writ petition that would resolve only part of the underlying action. Notwithstanding all of these general pronouncements, the court can and does intervene when there is special urgency or strong necessity.

Writ Statistics

Nevada's appellate courts publish annual statistics regarding their case load and case disposition. The Supreme Court resolved 396 writ petitions in 2015. Of those, 161 were filed by pro se litigants and 235 were filed by attorneys. The Supreme Court denied 312, dismissed 24 and granted (or granted in part) 38 writ petitions. In 2015, its first year of existence, the Court of Appeals resolved 30 original proceedings, nine of which were filed by attorneys and 21 of which were pro se. It granted only one of those petitions. For the past decade, the percentage of writ petitions granted by the Supreme Court has hovered around 10 percent, making writ relief truly extraordinary. As these statistics demonstrate, on the basis of raw numbers, the likelihood that a writ petition might be heard by the court, much less granted, is not very high.

When the court places the writ petition on its en banc track, the odds of the writ being granted increase considerably.

However, a few observations are worth noting. When the court places the writ petition on its en banc track, the odds of the writ being granted increase considerably. This is because the en banc court only considers matters of first impression or of statewide public

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TAKING THE MYSTERY OUT OF WRIT PRACTICE

importance. If the court believes the subject matter of the writ could settle existing law or establish new law, writ relief is more likely.

Similarly, nearly half of the writ petitions in which the court hears oral argument are successful. The court will only schedule argument in those cases that matter the most to the state as a whole, rather than to the individual litigants. If your writ petition is scheduled for oral argument, it is a good sign that the court deems the subject matter important.

The court summarily denies most writ petitions without any discussion or analysis. 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.

If your writ petition is scheduled for oral argument, it is a good sign that the court deems the subject matter important.

Recent Decisions

It is difficult, if not impossible, to predict whether or not the court will hear or issue a writ. A review of the court's recent jurisprudence, however, can provide some guidance as to the types of cases that the court is more inclined to consider worthy of writ relief.

- **Judicial Economy**
  The court has noted that the interests of judicial economy are of primary importance in deciding whether or not to issue a writ.[3] Therefore, the court is more likely to consider and issue a writ if judicial resources will be wasted absent the grant of extraordinary relief.

- **Substantial Legal Issues of General Importance**
  The court may be reluctant to entertain a writ petition that will only affect the specific issues of the parties to a lawsuit. Therefore, you will increase your chances of having your writ heard if you demonstrate that issuance of the writ will provide guidance to the lower courts on issues of general importance affecting other current and future litigants.[4]

- **Clarification of the Law**
  The court is more likely to act upon a writ when it believes that an important issue of law needs clarification.[5] Therefore, if the legal issues that underlie your writ are matters of first impression, you will increase your chances of having your writ heard and considered.

- **Conflicting Decisions in Lower Courts**
  Just as the U.S. Supreme Court looks to conflicts among the circuits in determining whether to grant certiorari, the Nevada appellate courts are more likely to issue a writ when there is a conflict among the state's district courts.[6] When different district courts have reached different conclusions of statewide importance, the Nevada Supreme Court may decide to step in to resolve the issue.

- **Purely Legal Issues**
  Even though the court has original jurisdiction to issue writs, the court generally prefers not to wade into disputed issues of fact. As the court regularly acknowledges, the district courts are in a better position to resolve factual disputes. Therefore, in addressing writ petitions, the court prefers to address pure questions of law.[7]

- **Irreparable Injury**
  A showing of irreparable harm is not technically a requirement for obtaining a writ. However, the court is more likely to issue a writ if the petitioner will be irreparably injured absent the court's extraordinary relief.[8] Litigation expenses and delay do not constitute irreparable harm to justify writ relief.[9]

- **Discovery Issues Involving Privileged Communications**
  The court typically refuses to issue writs for discovery issues. However, an exception lies when there are issues of attorney-client privilege at hand.[10]

Conclusion

Writ relief is extraordinary and is granted only in limited circumstances. Make sure to carefully analyze the order you want reviewed to ensure that it is a good candidate. Follow the proper procedures and review the case law to help guide you in the petition drafting process. **NL**

Many thanks to Scott Lachman of Weinberg Wheeler Hudgins Gunn & Dial in Las Vegas for his compilation of court statistics related to writ petitions.

1. *See generally*, NRS 34.150-310 (writs of mandamus); NRS 34.320-350 (writs of prohibition).
2. *See generally* the following cases that discuss the applicable standards for writ relief: *Oxbow Constr., LLC v. Eighth Judicial Dist. Court*, 130 Nev. Adv. Op. 86, 335 P.3d 1234 (2014); *Pan v. Eighth Judicial Dist. Court*, 120 Nev. 222, 88 P.3d 840 (2004); *Smith v. Eighth Judicial Dist. Court*, 107 Nev. 674, 818 P.2d 849 (1991).
3. *Helfstein v. Eighth Judicial Dist. Court*, 131 Nev. Adv. Op. 91, 362 P.3d 91, 94 (2015); *Smith v. Eighth Judicial Dist. Court*, 113 Nev. 1343, 1345, 950 P.2d 280, 281 (1997).
4. *See Poulos v. Eighth Judicial Dist. Court*, 98 Nev. 453, 455, 652 P.2d 1177, 1178 (1982).
5. *Smith*, 113 Nev. at 1345, 950 P.2d at 281.
6. *See State v. Eighth Judicial Dist. Court*, 116 Nev. 127, 134, 994 P.2d 692, 697 (2000).
7. *Poulos v. Eighth Judicial Dist. Court*, 98 Nev. 453, 455, 652 P.2d 1177, 1178 (1982).
8. *Id.*
9. *Fritz Hansen A/S v. Eighth Judicial Dist. Court*, 116 Nev. 650, 658, 6 P.3d 982, 986-87 (2000).
10. *See Coyote Springs Inv., LLC v. Eight Judicial Dist. Court*, 131 Nev. Adv. Op. 18, 347 P.3d 267, 268 (2015); *C.S.A.A. v. Eighth Judicial Dist. Court*, 106 Nev. 197, 198, 788 P.2d 1367, 1368 (1990).

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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 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 5-B

EXHIBIT 5-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' RENEWED MOTION TO STAY PROCEEDINGS PENDING RESOLUTION OF WRIT PETITION ON ORDER SHORTENING TIME** Hearing Date: October 8, 2020 Hearing Time: 10:00 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 Renewed Motion to Stay Proceedings Pending Resolution of Writ Petition ("Petition") on Order Shortening Time (the "Renewed 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

Our legal system is repeatedly described as the best in the world largely due to three principal factors: The quality and diligence of our jurists, the dueling advocacy of parties wherein the truth and the law can be properly discerned ONLY after giving both sides notice and a full opportunity to be heard, and diligent policing of the duty of candor required by legal advocates permitted to practice in our courts. If/when any one of those hallmarks of due process are absent, then our legal system is not quite as sterling – especially when the opposing party has not had an opportunity to be heard or when the moving party has been less than candid in its presentation to a court.

In its Renewed Motion for stay, United claims that given the Nevada Supreme Court's request for an answering brief after only have reviewed United's 75- page submission its chances of "prevailing on the merits of its writ petition is significantly more probable now." Baloney. As was its motion to dismiss, United's writ petition is dismally lacking in candor and scholarship. As was its motion to dismiss, United's writ petition is flat out dishonest with its recitation of relevant caselaw. This Court—and the Honorable James C. Mahan—had the benefit of the Health Care Provider's opposition to United's ERISA arguments. But the Nevada Supreme Court has not. In other words United's boast of likely success on its writ petition based upon a dishonest, one-sided presentation is pure sophistry.

Notable and unique to the specific order from the Nevada Supreme Court in this matter

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is its request to brief "the propriety of writ relief" at all, which underscores the cautious approach practiced by the Nevada Supreme Court concerning whether writ relief may even be available. Against that caution, in part, the Nevada Supreme Court uniformly denies stay requests where the request arises from denial of a motion to dismiss or when the only claimed prejudice to the party seeking stay is the saving of either time or money or when a party's stay requests impermissibly seeks delay. This Court knows well the lengths to which United has gone to avoid having its conduct/actions fully evaluated and the delays United has practiced. This Court knows well the only prejudice claimed by United is the expenditure of money and time. This Court knows well how dishonest United was in its motion to dismiss practice evaluating the propriety of ERISA preemption and now two well-respected Nevada jurists have found United's attempt to hide its conduct from evaluation behind an ERISA wall unavailing. For these reasons and those fully explored herein, the Health Care Providers urge this Court to stand by its original denial of United's stay request, particularly since nothing has changed in the factors or facts undergirding its request.

II. LEGAL ARGUMENT

A. Applicable Legal Standard.

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 largely form the only basis for United's Renewed Motion. Renewed Motion at 4:10-13 ("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, 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

[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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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.

While United correctly cites NRAP 8(c) and the four-part test that this Court must consider in evaluating a request for a stay (Renewed Motion at 8:21-25), 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 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. Renewed Motion at 9:4-15. *Tradebay*, *Barnes* and *Buffalo Emergency Assoc.* 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

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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 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.

In the Renewed Motion, United focuses on the supposed merits of its Petition now that the Nevada Supreme Court has asked for an answering brief; therefore, the Health Care Providers have re-ordered discussion of the stay factors accordingly.

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

United argues that the Nevada Supreme Court's request for an answering brief makes the merits of its Petition somehow greater, declaring that "prevailing on the merits of its writ petition is significantly more probable now." Renewed Motion at 13:1-3. In support, United points to a four-year-old article written by two former law partners of the Health Care Providers' counsel, that says: "While not dispositive, an order that directs the respondent to answer is a sign that the

[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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writ petition has at least withstood the fate of most requests for extraordinary relief." Renewed Motion at 13 n.10, Ex. 7 at p. 16.

Because United's counsel puts so much reliance on the article (*id.*), they should also be aware that "the likelihood that a writ petition might be heard by the court, much less granted, is not very high." Renewed Motion, Ex. 7 at p. 15. And it is important to understand the phrase "likely to succeed" in the proper context. Based on the article, even those writs that are selected for oral argument are only successful "nearly half" of the time – meaning more than 50% are denied. According to the article, even selection for oral argument means the Nevada Supreme Court deems the "subject matter" important, not that the Petition itself is meritorious. Renewed Motion, Ex. 7 at p. 16 ("If your writ petition is scheduled for oral argument, it is a good sign that the court deems the subject matter important."). This hardly supports United's argument that it is "significantly more probable" that it will succeed on the merits of its Petition. United's argument is not mere advocacy, it is not being faithful to the underlying source. The Health Care Providers suspect that once the Nevada Supreme Court is fully apprised of United's lack of candor with respect to many of the cited cases and their current precedential value, it is likely that the Nevada Supreme Court will reach the same conclusions as this Court and deny the 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 (Renewed Motion at 12:12-15), but the mere existence of that argument does not bestow automatic merit to United's Petition. This is especially so because United continues to refer to 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. Renewed Motion at 14:3-5.

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." Renewed Motion at 14:3-5. But United's reliance

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is so wholly misplaced. It is hard to imagine the Nevada Supreme Court will decide differently than this Court:

> 33. The United States Supreme Court and more recent Ninth Circuit Cases ***have declined to adopt*** a literal interpretation of the "relates to language....
>
> 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 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 ¶¶ 33-34 (emphasis added). This Court further rejected United's reliance on a vast array of inapplicable legal authority:

> 15. The Court does not find *Pilot Life Ins. v. Dedeaux,* 481 U.S. 41, 57, 107 S. Ct. 1549, 1558 (1987), a case cited by United, to be analogous or persuasive in light of the FAC's allegations.
>
> 27. Other jurisdictions have also made it clear that § 514(a) claims by third-party providers arising out of analogous circumstances to those asserted by Health Care Providers here, are not preempted. (citations omitted).
>
> 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. (citations omitted).
>
> 68. The Court does not find merit to United's argument that *Gunny v. Allstate Ins. Co.*, 108 Nev. 344, 346, 830 P.2d 1335, 1336 (1992) stands for the proposition that Nevada's Unfair Insurance Practices Act "does not create a private right of action against insurers in favor of third party claimants like Fremont." Motion [to Dismiss] at 23:16-17. Nor is *Gunny* analogous because the Health Care Providers allege the existence of an implied-in-fact contract with United and, consequently, a claim asserted by a medical services provider under NRS 686A.020 and 686A.310 is actionable. The absence of a contract between Gunny and the insurer makes this case distinguishable.
>
> 118. The Court has also considered and rejected United's argument that the civil racketeering claims should be dismissed because the Health Care Providers "lumped" the United Defendants together (Supplement at 9:18-23). The Court concludes that the cases on which United relies involve allegations that are not analogous.

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> 128. The Court has considered and rejected the cases United relied upon [in the Supplement] and concludes that the cases are not analogous. Supplement at 11:17-26.

June 24 Order at ¶¶ 15, 27, 35, 68, 118, 128.

The foregoing are not isolated incidents as United continues to point 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). Given the materially distinguishable characteristics of these cases, it is difficult to conceive that the Nevada Supreme Court will decide differently than this Court with respect to *Bayona* and *Parlanti*:

> 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.

No less important, United's effort to distinguish implied-in-fact contracts is contrary to well-settled Nevada law that places these agreements on equal footing with other contracts:

> 14. The Court ***does not find merit in United's argument that the claims asserted in the FAC are preempted because an implied-in-fact agreement is different than a written, oral or quasi contract***. In Nevada, implied-in-fact agreements and express agreements stand on equal footing. *See Certified Fire Prot. Inc. v. Precision Constr.*, 128 Nev. 371, 379, 283 P.3d 250, 256 (2012) (an implied-in-fact contract "is a true contract that arises from the tacit agreement of the parties."); *Smith v. Recrion Corp.*, 91 Nev. 666, 668, 541 P.2d 663, 665 (1975) ("Both express and implied contracts are founded on an ascertained agreement."); *Magnum Opes Const. v. Sanpete Steel Corp.*, 2013 WL 7158997 (Nev. Nov. 1, 2013) (quoting 1 Williston on Contracts § 1:5 (4th ed. 2007) (noting that the legal effects of

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> express and implied-in-fact contracts are identical); *Cashill v. Second Judicial Dist. Court of State ex rel. Cty. of Washoe*, 128 Nev. 887, 381 P.3d 600 (2012) (unpublished) ("The distinction between express and implied in fact contracts relates only to the manifestation of assent; both types are based upon the expressed or apparent intention of the parties."). As a result, the Court concludes that implied-in-fact agreements are treated the same as written, oral and quasi contracts in Nevada and, consequently, the caselaw rejecting ERISA preemption for claims arising out of such contracts equally applies to implied-in-fact agreements.

FAC ¶ 14 (emphasis added). The Nevada Supreme Court would need to reverse course and overrule long-standing precedent to reach United's conclusion on this issue. In light of the overwhelming precedent that contradicts United's arguments, these arguments will fail before the Nevada Supreme Court.

As a result, the Health Care Providers respectfully submit that the Nevada Supreme Court will 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 standard governing motions to dismiss and the Court's specific findings that the FAC's allegations, if true, state actionable claims for relief.

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

The Court has already ruled that United's identified "object" of its Petition – "whether Plaintiffs' claims are subject to conflict and/or complete preemption under ERISA[]" (Renewed Motion at 9:24-25) – would not be defeated. *See* September 23, 2020 Order Denying Defendants' Motion to Stay Proceedings Pending Resolution of Writ Petition on Order Shortening Time, Conclusions of Law ¶ 5. 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,

[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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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. Renewed Motion at 10:5-13. 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"). 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. Renewed Motion at 10:9-11 ("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

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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.").[5] 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.

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

United admits that the irreparable harm factor "play[s] less of a role" (Renewed Motion at 15:5) – meaning the factor does not tip in its favor. The only irreparable harm to which United directs the Court's attention 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 an 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.

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[5] The Nevada Supreme Court's FAQs make this clear:

> **May I file a writ petition if I have the right to appeal?**
>
> No. If you want to seek review of a final judgment or another order that may be appealed, i.e., if you have a plain remedy such as an immediate appeal to the Nevada Supreme Court, the supreme court will not entertain a writ petition. *See Columbia/HCA Healthcare v. Dist. Ct.*, 113 Nev.521, 936 P.2d 844 (1997).

(bold in original) (available at: https://nvcourts.gov/Supreme/Court_Information/Frequently_Asked_Questions/#writs).

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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.

4. 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." Renewed Motion at 15:19-20. 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, 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. Now that the Nevada Supreme Court has asked for an answering brief, the resolution of United's Petition will still 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.

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III. CONCLUSION

All in all, the factors weigh heavily against granting United's Renewed Motion, especially with respect to the merits of the Petition such that that 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 Renewed Motion. 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.

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

DATED this 6th day of October 2020.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 6th day of October, 2020, I caused a true and correct copy of the foregoing **PLAINTIFFS' OPPOSITION TO DEFENDANTS' RENEWED 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 5-C

EXHIBIT 5-C

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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

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

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 Reply in Support of their Renewed Motion to stay this litigation pending resolution of their Writ Petition to the Supreme Court of Nevada. This Reply 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.

Dated this 7th day of October, 2020.

/s/ Colby L. Balkenbush

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

TeamHealth's Opposition to United's Renewed Motion for Stay argues that "nothing has changed in the factors or facts undergirding its request," and thereby ignores a glaring and critical point: this Court stated at the September 9, 2020 hearing that "**[i]f the Supreme Court requests briefing on the issue, [the Court would] consider a brief stay for that purpose**."[1] So although TeamHealth deems it "baloney" (Opposition at 2:21), this Court, United, "two former law partners of the Health Care Providers' counsel," (Opposition at 5:20) and countless other Nevada attorneys acknowledge that a request for briefing by the Nevada Supreme Court (rather than an outright denial) is a critical next step in the process of writ review. The Court's comments, at minimum, signaled that a request for briefing might change its analysis relative to a stay, and United has renewed its request on that basis.

II. LEGAL ARGUMENT

A. The Nevada Supreme Court will consider writ petitions where they seek to clarify an important issue of law

TeamHealth relies on *Dignity Health v. Eighth Judicial Dist. Court in & for County of Clark*, 465 P.3d 1182 (Nev. 2020), an unpublished, single-paragraph decision, for the proposition that "the Nevada Supreme Court 'generally will not consider writ petitions challenging orders denying motions to dismiss.'" Opposition at 4:5–7; *Dignity Health v. Eighth Judicial Dist. Court in & for County of Clark*, 465 P.3d 1182 (Nev. 2020) (unpublished).[2] TeamHealth argues that "United glosses over [this]" (Opposition at 4:4–5), but to the contrary, United offered a published case that addressed this very issue.

In *W. Cab Co. v. Eighth Judicial Dist. Court of State in & for Cty. of Clark*, the Nevada

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

[2] The issue in *Dignity Health* concerned a petition for a writ of mandamus challenging a district court order denying a motion to dismiss in a medical malpractice action. There is little information on the underlying case because the decision was only a paragraph long. But it could be assumed that, in a standard medical malpractice action, there are likely no novel issues of law. Further, while an appeal may be an adequate legal remedy in a medical malpractice action, that is not true in the matter at hand.

Supreme Court made clear that there are indeed exceptions to the "rule" that it "generally will not consider writ petitions challenging orders denying motions to dismiss." *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). In fact, this case made clear that the issue of whether ERISA preempts state law is one such notable exception. *See id.* ("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) (emphasis added).[3] TeamHealth's Opposition fails entirely to address the *W. Cab Co.* case, and the fact that it belies their position regarding the likelihood of consideration by the Nevada Supreme Court.

Furthermore, and again, the Nevada Supreme Court has never addressed the scope of ERISA preemption as applied to an out-of-network provider's state law claims against an insurer/plan administrator, and this issue is currently being litigated around the country. The Nevada Supreme Court appears to recognize the value in clarifying a question of law courts around the country are considering, which may be one of the reasons that it has ordered a response to Defendants' Petition. At minimum, the Nevada Supreme Court has clearly evinced an initial interest in resolving the issues of law involved in the petition.

B. United's writ petition is likely to prevail on the merits

The parties agree that Nevada Rule of Appellate Procedure 8 governs the issuance of a stay pending appeal or resolution of an original writ proceeding, agree on the factors to be considered, and agree that "if one or two factors are especially strong, they may counterbalance other weak factors." *See Hansen v. Eighth Judicial Dist. Court ex rel. Cty. of Clark*, 116 Nev. 650, 657, 6 P.3d 982 986 (2000); *Mikohn Gaming Corp. v. McCrea*, 120 Nev. 248, 251, 89 P.3d 36, 38 (2004). The parties otherwise disagree on the analysis of those factors relative to the issues here.

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[3] *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).

In evaluating the first factor, "when 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). United has undoubtedly presented a substantial case on the merits of a serious legal question. Notably, while TeamHealth disputes that certain cases are analogous here, TeamHealth **could not** and **did not** distinguish the two cases offered in United's Motion which support its position:

- *Melamed v. Blue Cross of California*, 557 F. App'x 659, 661 (9th Cir. 2014) where an "[out-of-network provider's] breach of implied contract claim [was] completely preempted because through that claim, [the out-of-network provider sought] reimbursement for benefits that exist 'only because of [the insurer's] administration of ERISA-regulated benefit plans.'"; and

- *In Re Managed Care Litig.*, 298 F. Supp. 2d 1259, 1292 (S.D. Fla. 2003), where an out-of-network providers' implied-in-fact contract claim was preempted by ERISA.

TeamHealth's failure to address this legal authority underscores the strength of United's presentation, and the balance of equities weighs heavily in favor of granting the stay.

C. The Object of the Writ Petition will be defeated absent a stay

Although TeamHealth argues that the *Tradebay*, *Barnes*, and *Buffalo* cases do not "inform adjudication of the instant Motion" (Opposition at 5:10), Plaintiffs do not otherwise offer any legal authority purporting to dispute the principle that they stand for: that a brief stay of discovery may eliminate concerns of significant wasted resources where the need for further discovery is not inevitable.

As this Court is aware, the object of Defendants' Writ Petition is to determine whether Plaintiffs' claims are subject to conflict and/or complete preemption under ERISA. If the relief sought by Defendants is granted, this case will likely be over. At a minimum, the need for discovery would be curtailed significantly, at the very least, but more likely not needed at all.

Although TeamHealth offers *Owayawa v. Am. United Life Ins. Co.* for the proposition

that "Defendants cannot use [complete preemption] as a ground for dismissing Plaintiffs' claims" (Opposition at 10:2–3), the holding of *Owayaya* fundamentally supports United's position. The *Owayaya* court ultimately ruled that "ERISA preempt[ed] plaintiff's state law causes of action [because] Plaintiff's claims 'relate[d] to' the plan in this case, 29 U.S.C. § 1144(a), because they have 'a connection with' an ERISA plan." *Owayawa v. Am. United Life Ins. Co.*, 2018 WL 1175106, at *6 (D.S.D. Mar. 5, 2018). The *Owayawa* court granted the defendants' motion to dismiss, with a footnote stating that "[b]ecause it is unclear how Plaintiff's complaint would be amended to state a claim for relief under ERISA, the Court will grant Defendants' motion to dismiss and dismiss this action without prejudice." *Id. Owayawa* affirms once more that United has presented a substantial case for dismissal.

But even if this lawsuit is not dismissed outright, and the Nevada Supreme Court allows Plaintiffs to re-plead their claims as ERISA claims for benefits, they would be entitled only to the strictly limited discovery of the administrative record that is available for such claims: (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 v. Dimension Works Inc. Long Term Disability Plan*, 120 F. Supp. 2d 1253, 1261–62 (D. Nev. 2000).[4] TeamHealth does not disagree with *Ehrensaft* or United's characterization of the limited scope of discovery that would be available under these circumstances (Opposition at 10:9 – 15), which is markedly narrower than the discovery United is currently undertaking in this action. *See generally*, United's Opposition to Plaintiffs' Motion to Compel. Plaintiffs would only be entitled to assert ERISA claims for reimbursement for claims where they exhausted their administrative remedies by completing the appeal process set forth in each health plan,[5]—which

[4] *See also Wilkins v. Baptist Healthcare Sys., Inc.*, 150 F.3d 609, 618 (6th Cir. 1998) (noting that a district court may not ordinarily consider new evidence outside of the administrative record in an ERISA case); *Klund v. High Tech. Sols., Inc.*, 417 F.Supp.2d 1155, 1159 (S.D. Cal. 2005) (ERISA discovery is not as "broad and overreaching ... as in other types of litigation.").

[5] *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).

would likely be a mere fraction of the current 22,153 at-issue claims.

Because the outcome of the Writ Petition could have a sweeping impact on this litigation as a whole, this factor soundly weighs in favor of granting the stay requested herein.

D. The likelihood of irreparable harm weighs in favor of a stay

As United pointed out in its Motion, 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. TeamHealth's argument that "United's only 'irreparable harm' alleged concerns litigation costs" is incorrect (Opposition at 11:17–18). Litigation efforts encompass more than just financial costs. For example, as United described in its most recent Opposition to Plaintiffs' Motion to Compel (at 3:1–5), absent a stay, United's in-house and outside counsel and its businesspeople, all of whom face competing demands, will be devoting time to engaging in discovery that, depending on the outcome of Defendants' Writ, may ultimately no longer be necessary, or may require redoing.

Further, Plaintiffs cannot—and do not—seriously contend that the limited stay United seeks will prejudice them. Instead, Plaintiffs offer only that United "owes the Health Care Providers" their alleged damages, which they contend "ha[ve] remained unpaid for years." (Opposition at 12:21–22). Plaintiffs do not explain, much less offer evidence to prove, how obtaining discovery from United now would end this alleged harm.

United has requested a stay for only the period of time in which the Nevada Supreme Court is considering Defendants' Writ petition. While TeamHealth contends that "the resolution of United's Petition will still likely take more than a year," (Opposition at 12:20–21), the length of an appellate stay in and of itself has no bearing on the irreparable harm analysis, and TeamHealth cites no authority to the contrary. Furthermore, the time frame for appellate review TeamHealth identifies is eminently reasonable for that kind of judicial activity, and they articulate no reason why the Nevada Supreme Court's resolution of this case would take any longer than average. In short, TeamHealth's predicted timetable for appellate review has no bearing on whether the entry of a stay in this case is any more or less appropriate than a stay in

any other case pending review by the Nevada Supreme Court, nor does it speak to irreparable harm.

III. CONCLUSION

Defendants respectfully request that this matter be stayed pending resolution of Defendants' Writ Petition.

Dated this 7th day of October, 2020.

/s/ Colby L. Balkenbush

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CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of October, 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 6

EXHIBIT 6

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

This matter came before the Court on October 8, 2020 on defendants UnitedHealth Group, Inc.; 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.'s (collectively, "United") Renewed Motion to Stay Proceedings Pending Resolution of Writ Petition ("Petition") on Order Shortening Time (the "Renewed Motion"). Pat Lundvall, Kristen T. Gallagher 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 Renewed 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. On August 26, 2020, United filed a Motion to Stay Proceedings Pending Resolution of the Writ Petition (the "First Motion") which sought a stay of all discovery pending resolution of its Writ Petition. After briefing and a hearing, the Court denied the First Motion. *See* September 23, 2020 Order Denying Defendants' First Motion. As provided for in the Order Denying Defendants' First Motion, the Court permitted United to submit another request for stay in the event the Nevada Supreme Court ordered briefing on the Writ Petition.

13. On September 21, 2020, the Nevada Supreme Court issued an Order Directing Answer wherein it stated: "In addition to addressing the merits of the petition in its answer, real parties in interest should also address the propriety of writ relief."

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14. On September 23, 2020, United filed the Renewed Motion which renewed its request to stay 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 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. With respect to United's argument that the Nevada Supreme Court's Order Directing Answer suggests United's Writ Petition presents an important issue of law that will ultimately be successful, the Court has considered *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) and finds that it does not support United's argument that its Writ Petition is likely to succeed.

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

6. With respect to the first factor, the object of the Writ Petition will not be defeated

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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. Renewed Motion at 10:5-6. 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 Renewed Motion.

7. 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...." Renewed Motion at 15:26-28. 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.

8. United points to cases from other jurisdictions in effort to defeat Nevada's long-standing precedent that litigation costs do not constitute irreparable harm. Renewed Motion at 15:23-26 (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

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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.

9. 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.

10. 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, as well as the September 23, 2020 Order Denying Defendants' First Motion, the Court concludes that 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 Renewed 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,

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Case No.: A-19-792978-B

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

ORDER

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

Dated this 21st day of October, 2020

Nancy L Allf

DISTRICT COURT JUDGE

82B 919 DCAF 3925
Nancy Allf
District Court Judge

Submitted by:

McDONALD CARANO LLP

By: */s/ Kristen T. Gallagher*
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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 7

EXHIBIT 7

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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

THURSDAY, OCTOBER 8, 2020

RECORDER'S TRANSCRIPT OF PROCEEDINGS
RE: MOTIONS (via Blue Jeans)

APPEARANCES (Attorneys appeared via Blue Jeans):

For the Plaintiff(s): PATRICIA K. LUNDVALL, ESQ.
KRISTEN T. GALLAGHER, ESQ.

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

RECORDED BY: BRYNN WHITE, COURT RECORDER
TRANSCRIBED BY: KATHERINE MCNALLY, TRANSCRIBER

LAS VEGAS, NEVADA, THURSDAY, OCTOBER 8, 2020

[Proceeding commenced at 1:30 p.m.]

THE CLERK: Good afternoon. This is Fremont Emergency Services versus United Healthcare.

If I could please have all counsel please mute yourself until it is your turn to speak. And if you could please state your name each time you speak, so we can have a clear record.

Thank you.

THE COURT: Hello, everyone. This is the judge. And I'm calling the case of Fremont Medical versus United Healthcare.

Let's take appearances, starting first with the plaintiff.

MS. GALLAGHER: Good afternoon, Your Honor. Kristen Gallagher, on behalf of the plaintiff Health Care Providers.

THE COURT: Thank you.

Other appearances for the plaintiff, please.

MS. LUNDVALL: Your Honor, can you hear me?

THE COURT: Yes.

MS. LUNDVALL: This is Pat Lundvall.

THE COURT: Yes.

MS. LUNDVALL: I'm sorry. You may not have heard my appearance before. But Pat Lundvall, with McDonald Carano, on behalf of the plaintiff Health Care Providers.

THE COURT: Thank you.

Is that all of the plaintiffs' counsel?

All right. Let's have defense counsel, please.

MR. ROBERTS: Good afternoon, Your Honor. This is Lee Roberts, for the defendants.

THE COURT: Thank you.

MR. BALKENBUSH: Good afternoon, Your Honor. Colby Balkenbush, also for the defendants.

THE COURT: Thank you.

All right, you guys. You know the drill. I'm in the courtroom today, so no computer -- the computer doesn't have a camera, so I -- it's voice-activated. So when I am speaking to you, I try to look at one of the cameras. But your faces appear on the screen, so when I'm looking away, it means I'm really looking at you.

So it makes sense to me to take the motion -- the renewed motion for a stay, first.

MR. ROBERTS: Thank you, Your Honor. Lee Roberts. I'll be addressing this on behalf of the defendant.

I apologize that you cannot see me on video. Blue Jeans would not let me join the meeting on video, so I had to call in.

The Court previously heard and denied United's --

Did you say something, Your Honor?

THE COURT: No. I shuffled some paper. Sorry.

MR. ROBERTS: Okay. No problem.

Your Honor, as you know, the Court previously heard United's motion for stay pending their writ in the Nevada Supreme Court. And the Court denied that motion.

However, we've included a citation of the transcript where this Court did say that if there was a briefing the Court would reconsider the motion for stay -- if the Supreme Court requested briefing on the issue, I would consider a brief stay for that purpose.

And although we had the opportunity to seek a stay from the Nevada Supreme Court after this Court denied the stay, the Court's comments struck us as reasonable. We understood that the Court did not feel that our chances of success were very high, and that even a request for briefing would not be ordered.

So we decided to wait to see if the Supreme Court did request briefing on the writ, and if it did, make a renewed motion for a stay in this court, rather than going up to the Nevada Supreme Court at the time.

As we have set out for the Court, the Supreme Court has indicated that an answering brief would be helpful to them in their analysis.

We believe that, based on what the Court itself said at the last hearing, that this does change the analysis on the likelihood of success. And even though, just looking at general statistics, we acknowledge that this doesn't mean that, based on statistics, we have a 50/50 chance of success; we do believe that it increases the likelihood of success greatly that the Supreme Court wants briefing from the plaintiffs on the issues outlined in our writ petition.

In addition, you know, addressing some of the issues raised in the opposition to our renewed motion, we don't believe

that those changed the analysis.

Again, the plaintiffs raise the fact that writ petitions are rarely granted for an order denying a motion to dismiss, but obviously the Nevada Supreme Court knew that this was a writ petition seeking review of a Motion to Dismiss, and still ordered briefing.

The opposition argues that our arguments misrepresent the case law -- and it's fairly insulting, Your Honor, but we don't need to get into that. But what they say simply isn't true. They say, Oh, well, all you've seen are United's misrepresentations of the cases.

Certainly the Supreme Court has the ability to read those cases for themselves, before they order briefing. And even more critically, the arguments raised below were all in front of the Supreme Court. Our motion to dismiss and the opposing briefs filed by the plaintiffs, which raise the very arguments they claim are going to change the Supreme Court's mind, are all before the Supreme Court as part of the record that went up with our writ petition.

The Nevada Supreme Court is well aware of the context in which the Court's order was issued. They're well aware of the plaintiffs' arguments with regard to the case law we cited. And they still ordered an answering brief.

In these circumstances, we believe that it would be appropriate to issue a brief stay, and if nothing else, for purposes of

judicial economy. We've obviously been continuously seeking the intervention of this Court to resolve discovery disputes. This Court has spent an inordinate amount of time hearing issues from the parties and will continue to spend an inordinate amount of time on matters that will likely be resolved and never have to be considered by this Court, if the Supreme Court grants the stay.

The argument that the Supreme Court is busy and this stay is going to last a year, that's certainly not our experience. And if, indeed, our arguments are so frivolous and can be summarily disposed of by the plaintiffs with their answering brief, then certainly it will not take that long for the Supreme Court to dispose of them, if indeed they're correct.

But we don't believe they're correct. We think we have an excellent chance of success, because ERISA is an area that the Supreme Court has expressed interest in. This is an area of ERISA which has not previously been dealt with by the Nevada Supreme Court. It is an area that needs to be clarified.

And the argument that all of the discovery is going to be needed any way really doesn't ring true, Your Honor. While they do raise the possibility of discovery that would be allowable under ERISA, the fact is they haven't pled ERISA claim -- that if the Supreme Court grants the writ, the Supreme Court -- grants the power to completely dispose of this lawsuit with leave for them to amend. But whether or not they would amend to allege ERISA is speculation at best.

If they believe that they had good claims under ERISA, if they believe that they had exhausted their administrative remedies under ERISA, and that the administrative records supported the claim for the $20 million which they put forward, they certainly could have claimed that, either directly or in the alternative. And they have not done so.

The discovery, even if they chose to amend and plead under ERISA, would be significantly curtailed over what is going on now.

And the idea that the Court can look at the sign that the Supreme Court has now accepted the writ to the extent that they've ordered an answer, but that this Court should ignore that issue and presume that we still had very little likelihood of success -- it's simply belied by the record.

The fact that an answering brief would -- was argued is an indication that we do have significantly more success than the average writ. And the fact that they filed an answering brief, despite the posture of this case, is an indication that they're interested in the issues. And even if the Court were to remand on less than all the issues, judicial economy would still dictate that we have a brief period of time.

And perhaps, Your Honor, if you feel that a year is simply too long, this Court would certainly have the power to grant a stay for, say, three months or six months; and if the Court has not ruled at the end of that time, to lift the stay.

It's not a Hobson's choice where you either have to deny the stay or issue an indefinite stay for however long the Supreme Court may take to consider the writ issues.

And therefore, Your Honor, based on the analysis set forth in our original Motion to Stay and in our renewed Motion to Stay, we would ask that the Court issue a stay of these proceedings pending the decision of the Supreme Court on writ or alternatively for a set period of time at which -- the end of which period of the time the stay would exhaust, subject to our motion before this court or the Nevada Supreme Court to extend it.

THE COURT: Thank you.

And the opposition, please.

MS. LUNDVALL: Thank you, Your Honor. Pat Lundvall on behalf of the plaintiffs, the Health Care Providers.

What the Court has before it is essentially a Motion for Reconsideration. That Motion for Reconsideration continues to [indiscernible] analyzed under the Rule of Appellate Procedure 8(c) for determining whether or not a stay should issue. And when you scour the briefs that have been presented then by United, you don't have any different facts before you today, with one exception, than you did the last time that we were before you. And so to the extent that the law hasn't changed and the facts haven't changed, there is no grounds then by which then to grant a Motion for Reconsideration.

One of the things that I think is unique about the oral

presentation that was just made by Mr. Roberts is that he suggested somehow that if the Court thought that a stay of a year was too long, then the Court has the power by which to order a three-month stay instead. And I have to confess, nowhere in its moving papers or in its reply papers do they advance such an argument.

And I'm going to rely now, as far as on my own experience before the Nevada Supreme Court, but I don't believe that there is any legal foundation [indiscernible] for the business court saying, well, if the Nevada Supreme Court hasn't done its job within a three-month period of time and [indiscernible] a stay doesn't work [indiscernible] that foundation of how expression by which the Court should act, and they've given you no legal standard by which then to do so.

The one thing that I want to address is a couple of the arguments that they made in their reply brief, and that were at least tangentially addressed then by Mr. Roberts.

One of the things that, in their reply brief, is that United contended that we never addressed any of the exceptions to the general rule that the Nevada Supreme Court has employed -- and that is it will not renew or review on a writ a denial of a Motion to Dismiss. [Indiscernible] not only did we address that -- not only did [indiscernible] renewed [indiscernible] findings of conclusion of law as to how those exceptions did not apply in this case.

And the two exceptions that were previously discussed in the original briefing is whether or not that there -- this was a case

where there were no disputed facts and where clear statutory or rule baked authority of the dismissal -- and this is discussed in the briefing [indiscernible] with prejudice.

So if you take a look then at our opposition brief, and to the renewed motion on page 4, we discussed both of those exceptions. If you look at your order denying the Motion to Stay, you discuss both of those exceptions. And you made specific findings, specific Conclusions of Law No. 2 and No. 3. And if you look at our original opposition, we addressed both exceptions.

So what I did is I tried to scour then the renewed motion that had been filed by United, as well as their reply brief.

And do they contend anywhere within either of those briefs, or before you now on oral argument, that somehow that this case involves no disputed factual issues? No. They haven't given you any argument, any contention. They haven't [indiscernible] as far as any set statement of facts by which that are undisputed before the parties and upon which the Nevada Supreme Court then could review under a pure issue of law.

If you go to your order denying the Motion to Dismiss, I could go through probably about 40 different findings of fact and conclusions of law that you made in the original Motion to Dismiss identifying the factual issues that have been alleged in our complaint for which United disputes.

And so to the extent that the Court has already made extensive findings that there are disputed issues of fact, that limited

exception that has been recognized in a handful of cases by the Nevada Supreme Court does not exist.

And so if you take a look at their second argument that they claim, or second exception that they claim, it is whether or not that there is clear statutory or rule-based authority that obligates dismissal.

Once again, we address this in our opposition to their renewed motion. The Court addressed this issue in denying their Motion to Stay, and we address it in our original opposition brief. There is not clear statutory or rule-based authority that obligates a dismissal with prejudice of the claims that have been asserted by the Health Care Providers in this case.

And even United acknowledges that any dismissal, even if they were 100 percent successful before the Nevada Supreme Court, that any remand would give opportunity then to the Health Care Providers by which to replead their claims. And so therefore, this case is not over. And the repleading of the claims then would fall within the scope of ERISA claims and that those discovery issues are front and center before the court, have been before, and are again today, and so to the extent that those discovery disputes will continue, even if they are 100 percent successful before the Nevada Supreme Court.

One of the things I think is a helpful tool also the look at, and that is the case that they cited in their reply brief contending that somehow that we didn't address in any form or the issues raised in

any form. And it's the *Western Cab case versus Eighth Judicial*, is the 2017 case, that was decided then by Judge Bare, went below, and that was reviewed then by the Nevada Supreme Court.

One of the things that I found interesting about that analysis in the case that they brought to the Court's attention was the fact that the Nevada Supreme Court found that the minimum wage amendment was not ERISA preempted. And when you look at the analysis that was employed by the Nevada Supreme Court in finding that the Nevada's Minimum Wage Amendment was not preempted by ERISA, and look at the case law that they employ, it is the very case law that we have utilized in arguing against their Motion to Dismiss. It's the very case law that the Court embraced in denying their motion to dismiss. And it's the very case law upon which that demonstrates that they do not have a likelihood of success before the Nevada Supreme Court. Why? Because the Nevada Supreme Court expressly rejected in the *Western Cab Company* case, the analysis that United wishes to employ defined conflict preemption for the claims that we have asserted.

And so I find that their recitation and their bringing to the Court's attention that case to be a bit perplexing because it underscores the fact that the Nevada Supreme Court has employed the same conflict preemption argument that this Court embraced and relied upon in denying their Motion to Dismiss.

And I could go through the cases that they cite and the cases that were rejected and the analysis that was expressly rejected

by the Nevada Supreme Court, if you wish for me to walk you through it. But in sum --

THE COURT: You know, it's a --

MS. LUNDVALL: I guess the point -- I'm sorry.

THE COURT: I guess the point is, if you feel you need to make a record on it, feel free to take the time. But I did read everything, and I'm a good listener.

MS. LUNDVALL: Thank you, Your Honor.

I guess, in sum, what I would say is this, is that, Did United embrace or address or try to argue against the -- the exceptions that occasionally are recognized by the Nevada Supreme Court? Did they bring to you the fact or the contention that somehow there are undisputed factual predicate upon which the Nevada Supreme Court could review this case? No.

And did it bring to you then any clear statutory authority or rule-based authority that mandates a dismissal of our claims? No.

In fact, what it did is it brought to you the case law that embraced the authority and the analysis that was employed by the Court.

So what did they actually do in their brief? They did give you a couple of new additions. And those new admissions are a helpful tool then in the analytical framework then so the Court can reach the same conclusion in denying this renewed Motion for Stay, as it did in the original Motion for Stay.

United acknowledges that there's four factors to be

analyzed. And number one, that first factor is whether or not that there's a likelihood of success on appeal. We've already identified that in the very case that they cite and they embrace and that they suggested somehow that helps them in arguing then for a stay the -- the *Western Cab* case, that is a case then that embraces the same analysis the Court did.

Number 2, what they entirely do is that they gloss over the fact that complete preemption is a jurisdictional tool. And complete preemption is a tool that was employed by Judge Mahan to deny -- or to grant our Motion for Remand and to state that the federal court did not have jurisdiction over this case.

So what is United actually asking our Nevada Supreme Court to do? The same thing that they asked you to do, and that is to overturn Judge Mahan and to state that the federal court does have jurisdiction over this case.

And I think this Court is well aware of the case law and the basic premise that a state court doesn't have the authority to define or determine the jurisdictional parameters of the federal court, and it doesn't have the authority by which to overrule a federal court.

And the simplest way of looking at that is what is the procedural vehicle by which that this case could ever get back to federal court? And if there is no procedural vehicle for this case to get back to federal court, a complete preemption is not an argument that is available to United.

So let's turn then, as far as to the second issue, and that is

whether or not that the object of the writ would be defeated if a stay was denied.

Now, this is where United makes two admissions. And I'm going to quote both of these admissions, because I think that they're helpful tools for the Court to look at.

In their reply brief at page 5, lines 21 through 23, United takes the position, and I'm going to quote here -- that a brief stay of discovery may eliminate concerns of significant wasted resources.

So in other words, what are they trying to do? They're trying to save some money.

What did they include in their declaration asking for this Court to order or to enter an order shortening time then? I go to Paragraph No. 12 from the declaration that was offered by Mr. Balkenbush to the Court in support of an order shortening time. And once again I quote, Because discovery is ongoing, time intensive and costly, and because of the pending writ, it may curtail the need for discovery.

So in other words, once again, what is United admitting? That they're trying to save money.

So if the object of their writ is to try to save them some money and to curtail, in their words [indiscernible] discovery, what this Court would have to do then is you would have to overturn or reject two decisions from our Nevada Supreme Court, that state that if that is the object of their writ or if, in fact, that that is the prejudice that is claimed by seeking a stay, then that is insufficient and may

not be considered whether it be by the district court or by the Nevada Supreme Court in determining whether to issue a stay.

The two cases that I cite that the Court would have to either reject or overturn -- I guess reject is the proper terminology -- would be the *Micon* case and the *Fritz Hansen* case. And the *Micon Gaming* case, it was a case involving Charlie McCray [phonetic] and his employment agreement. And the District Court had determined that his employment agreement was subject to arbitration, and there was an attempt then by which to seek a stay in that case.

And in *Micon Gaming* -- I'm going to quote from the Nevada Supreme Court, finding the *Fritz Hansen* case, the Nevada Supreme Court says, We have previously explained that litigation costs, even if significant, are not irreparable harm. And then they go on to say that it is not a reason then by which to grant a stay.

And if you take a look at the *Fritz Hansen* case, our Nevada Supreme Court more extensively then looked at and evaluated whether or not the saving of money or the saving of time was a sufficient reason by which to grant a stay. In *Fritz Hansen*, the Court could not -- the Nevada Supreme Court could not have been more clear saying, no, it may not.

That was a case involving a contest as to whether or not that there was personal jurisdiction then over the defendant. And the defendant contended that he should not have to be required to participate in the expense of a lengthy and time-consuming discovery, trial prep, and trial. And the Nevada Supreme Court says,

Such litigation expenses, while potentially substantial, are neither irreparable or serious. And they refused to use that as a foundation then for granting a stay.

In making that holding, they cited to three other Nevada Supreme Court cases, as well as cases from other jurisdictions, that enforced that same proposition.

Now, United tries to contend that somehow it's trying to do more than save money because its business people are very busy and that they should not have to be taken from their business task to focus on litigation. But that's nothing but a cost of litigation. And if, in fact, that there's any suggestion to the contrary, all you have to do is to look at the *Fritz Hansen* case because the Nevada Supreme Court goes on to identify that the time associated with litigating that case, or the business people having to litigate a case, that's nothing but a cost of litigation, and it is not a foundation then for the granting of the stay.

So one of the things that I think is another helpful acknowledgment, or helpful admission, that comes from their pleadings is that that they acknowledge that this case is not even over if the writ is granted in full.

And this is where I think that the real sophistry comes in the argument that is being advanced by United. Before you, they take the position that it is just going to take too long to do discovery and to pull all these administrative records for the claims that are at issue in this case and, therefore, they shouldn't have to do that. And

then they go on to say, well, we should get a reprieve or a recess from having to perform that task. But we acknowledge that if the Health Care Providers replead their claims, we're going to have to do that anyway.

And so one way versus another, the discovery demands or the discovery requests that have perpetuated this case and which you're going to hear about for the balance of this hearing, those discovery disputes are going to continue, even if United is 100 percent successful on its motion.

THE COURT: Okay. Looks like we lost --

Ms. Lundvall, you're back?

MS. LUNDVALL: My apologies, Your Honor, I didn't mean to --

THE COURT: No problem.

MS. LUNDVALL: -- but the one last point, I guess that I'd like to make about that is this -- there are two additional factors that United didn't even address in their -- either in their renewed motion or, in fact, in their reply papers as to whether or not that there was some type of irreparable harm to United or the irreparable harm that was found by this Court then in granting or in denying their Motion for Stay in the first place. They didn't even touch those two factors. And so there's nothing really new for this Court to reconsider.

The only thing that is really before you is better admissions and a better record underscoring what it is and why it is that United wants to have this case stayed.

And so therefore, Your Honor, we would ask for the same result that the Court had issued when you denied their original Motion to Stay.

Thank you, Your Honor.

THE COURT: Thank you.

And Mr. Roberts, your reply, please.

MR. ROBERTS: Thank you, Your Honor.

Addressing first the point raised by Ms. Lundvall that there is no proper basis for reconsideration, I'm going to say again that we're relying on this Court's own words that said, If there is a briefing request, I would reconsider this. This is why we delayed seeking a stay from the Supreme Court, and this is what we believe does change the Court's calculus.

In denying the Motion for Stay, this Court stated that with all due respect to the defendants, I do not think there's a likelihood of success on the matter even being considered by the Nevada Supreme Court. And the fact that the Nevada Supreme Court has requested briefing, and they have requested briefing with knowledge of all of the issues, which plaintiffs continue to raise as to the unlikelihood of success, does considerably change the calculus.

Going to the argument on the irreparable harm, this Court did find that the irreparable harm [indiscernible] on defendants in denying the original Motion to Stay. And therefore, I think it would be appropriate to take at least another look at those arguments in -- with regard to the length of the stay, because while plaintiffs argue

that the only irreparable harm United can point to is money and the fact that we're going to have to spend money -- in essence, the only irreparable harm the plaintiffs are alleging is money -- money that this Court has not even found that they're entitled to.

And therefore, to the extent that the Court does think that an indefinite stay of a year or longer would be too long, I know of no prohibition that would prevent this Court from ordering a shorter stay to minimize any harm to the plaintiffs from a stay in the case.

But while plaintiffs minimize it, United doesn't argue something that merely the cost of discovery. In the affidavit with regard to the discovery that was sought by the plaintiffs in their Motion to Compel that was heard at the last hearing by the Court, we outline that even in order to comply with a delayed schedule for production of those documents, it would take four of our employees, working full time. That is a significant disruption of United's business. These are not people whose only job is to do discovery in connection with litigation. It is harming United and their attempts to continue their business under these strained circumstances that everyone is currently going through. Therefore, there is something merely beyond litigation costs.

But I think the Court can also consider that really, the factor, as far as irreparable harm, which is the Court is considering now, is very parallel to the irreparable harm in connection with whether or not a party has a speedy and adequate remedy.

And typically, yes, the Nevada Supreme Court says, hey, if

you've got a future appeal, that's a sufficient adequate speedy remedy. And the fact that you have to do discovery doesn't alter that.

But in this case, the Supreme Court, nevertheless, has requested briefing on the stay. And in our writ to the Supreme Court, at page 21, we cited to *International Game Technology*, where the Court noted that an appeal is not adequate and speedy, given the early stages of litigation and the policies of judicial administration. In other words, it's not an absolute rule.

And in this case, where we're so early in the litigation, and a Supreme Court order on the dismissal could dispose of the entire matter, the analysis is a little bit different. And the Supreme Court has recognized that if there is complex litigation and you're early in the litigation, and the writ could dispose of the case and eliminate all of those costs, it can change that analysis.

And while Ms. Lundvall did a very nice job of pointing out words in our brief that were less than unconditional, but that doesn't change the fact that we do contend in our briefing that we're entitled, if we win at the Supreme Court, to a complete dismissal of the entire case.

It's something that we have asked for. We have cited authority to the Court in supporting that that is a potential remedy that we could get. And the mere fact that they could potentially replead after a complete dismissal to assert ERISA claims doesn't alter the fact that as the litigation currently stands before this Court,

if the Supreme Court grants our writ petition, all of the plaintiffs' claims could be dismissed.

As far as Judge Mahan's decision, as this Court is well aware, in a decision on a Motion to Remand, there are no appellate rights. We had no right to appeal that decision to the Ninth Circuit. And Judge Mahan's analysis with regard to complete preemption is not binding in any way on this Court, and it also does not go to the issue of conflict preemption which is one of the primary bases of our writ to the Supreme Court.

In summary, Your Honor, we believe that this Court recognized at the prior hearing that it would change the way of the four factors under Rule 8 if the Supreme Court requested briefing; that it would indicate that we have a higher probability of success than this Court found at the prior hearing. And we believe that that factor would weigh in favor of granting a stay in this case, a brief stay, simply to give the Supreme Court a chance to resolve the writ on the merits, if they intend to do so.

Thank you, Your Honor.

THE COURT: Thank you, both.

The matter is now submitted, and this is the ruling of the Court. I read everything. I listened with an open mind, but for all of the reasons that I denied the stay previously, I'm going to deny this motion.

The Supreme Court orders talked about propriety of writ relief. And the *Dignity Health* case is law in Nevada where they've

already said they rarely grant writs on motions to dismiss.

I don't find that the object of the litigation would be defeated without a stay. I think still the defendant has a low likelihood of success on the merits on the writ.

I'm concerned about the delay in this case. I do not believe that the motion was filed for any dilatory purpose. But clearly the extensive litigation doesn't equal irreparable harm in Nevada. I'm concerned about the delay in the case itself. April 15 of 2019 is when the complaint goes back to. It is already a year and a half old.

So for those reasons, I am going to deny the motion, Mr. Roberts.

Ms. Lundvall to prepare the order. See if you can agree as to form. If you can't, outline your issues for me. This may be a simple order -- and let me know if you can't agree on the form of an order. But I don't accept any competing orders.

Any questions, with regard to the ruling?

MS. LUNDVALL: No questions, Your Honor. Thank you.

THE COURT: All right.

MR. ROBERTS: No questions, Your Honor.

THE COURT: Thank you.

So the next motion I have briefed is the Defendant's Motion to Compel the political documents.

MR. ROBERTS: Yes, Your Honor. This is Lee Roberts. I'll be handling that motion for the defendant.

The plaintiffs in this matter seek to foreclose United from taking discovery and offering proof with regard to the clinical records which describe the services that are actually -- that were actually performed for which the plaintiffs are now taking additional payment.

The clinical records, the medical records, will demonstrate what services were performed. Perhaps they will demonstrate the need for those services, the medical necessity of those services. They will demonstrate how long it took in order for those services to be performed in certain cases. And it will also demonstrate whether or not the services for which the plaintiffs seek payment are indeed the services that are identified in the claims they submitted to United for payment.

Based on our meet and confers and the papers filed by plaintiffs, plaintiffs seem to be essentially arguing that because United has partially paid those claims, that United cannot now dispute whether the services were performed, that United cannot dispute how the services were coded, and that United cannot defend in any way whether or not those services were necessary or properly coded.

The opposition to the Motion to Compel is essentially asking this Court to grant summary judgment on United's defenses and to grant summary judgment on whether or not United can dispute at this point in the litigation whether the services were performed and whether they were properly submitted for payment.

And one of the factors that the Court should consider is the public policy of encouraging insurers to pay claims based on the representations of the providers who perform medical services. Under the Prompt Payment Act -- and which would not necessarily apply if these were ERISA claims -- but the argument which is being asserted is that they're not ERISA claims, and therefore you would have to look to the Prompt Payment Act.

But regardless, it's the public policy in Nevada to encourage insurers to pay high volumes of claims in a short period of time. And it's the public policy to encourage those claims to be paid based on the representations made by the providers when they submitted claim for pay.

In this case, we know that part of what is in dispute here is emergency room services. And we know that emergency room services are subject to significant abuse in the industry for upcoding. We know, based on the sampling, that it would appear that a very large percentage of claims are coded Level 4 and 5 for emergency services, which are subjective standards based on whether or not the illness for which the patient is being treated was life threatening, whether or not it involves a moderate or high complexity of medical reasoning. There are lots of things that are in the medical records which would be relevant to determine the reasonable value of the services.

And in this case, the Court cannot ignore the fact that plaintiffs have pled *quantum meruit*. They have pled the unjust

enrichment of United. And without admitting that the -- those claims are valid, at this point in the litigation, the Court has to recognize that in an unjust enrichment claim, the Court can look at a number of different factors, such as the reasonable value of the services that are performed. And the Court is entitled to know, and we're entitled to know, what services were actually performed, even if we never requested those records in the beginning.

Just because an insurance company pays a certain amount under the representation that services were properly coded to a certain CPT code does not mean that everything is not back opened when the plaintiffs refuse to accept that payment and move to compel a reasonable payment of a reasonable value.

Once they refuse to accept our payment, they place the reasonable value of the services in dispute. And while there's not a lot of case law on this issue in the country, we have cited the case to -- the Court to a case in Florida, which outlines the logic of that exact issue.

Now that they have placed their entitlement to be paid more than what they were paid, they have put at issue whether the work was performed, whether the services are the same as that were identified in their claim form, and whether or not they were billed and coded appropriately.

There is one argument which was not reached in the brief, but I think it is somewhat applicable by analogy, and that is NRS 48.105, which they said accepting or offering or promising to accept

a valuable consideration and compromising or attempting to compromise a claim which was disputed either as to validity or amount, is not admissible to prove liability for or invalidity of the claim for its amount.

And really that's exactly what they're asking the Court to do. We disputed the amount of the claim that they submitted. We paid a lower amount. And now they're trying to use that payment, which Nevada policy encourages, to estop us from contesting the validity of the claim itself. And that's just not proper, and they have not gotten summary judgment on that issue. They have not precluded us from asserting that defense.

And this is a discovery motion, and as long as that defense still exists, then they have not file that had motion and the Court has not grant that had relief, it is inappropriate for the Court to refuse to order relevant discovery on the basis -- on their claim that they will be able to get summary judgment on the actual coding of the claims for services and that it was proper and that the services were performed.

They haven't gotten that yet, and United is entitled to discovery on this issue. And there's a claim that this is simply retaliatory for the Motion to Compel that was filed by the plaintiffs, but the fact is that this discovery was requested long before they moved to compel discovery from us. We put this at issue because we thought it was relevant to the value of the services that were performed, that whether or not we requested medical records in

initially paying a smaller amount is simply not relevant or probative to whether or not we're entitled to see the records of what they did now that they are claiming that our payment was insufficient.

So we would ask the Court to compel the clinical records for the claims that they are seeking. And as we said before, to the extent that the plaintiffs contend this would be overly burdensome and time-consuming, we are more than willing to meet and confer with them with regard to sampling methodologies or other mediums that would allow both sides to prove or to defend their case in a statistically significant reasonable manner. But at this point in the litigation, these items are relevant, and they are likely to lead to admissible evidence. And United is entitled to receive.

THE COURT: I just have --

MR. ROBERTS: Thank you, Your Honor.

THE COURT: Just one question, Mr. Roberts. Are you asking for EOBs in addition to clinical records?

MR. ROBERTS: Yes. And I was focused on the clinical records. But we are asking for all of the records which would support their spreadsheets. They have created around the spreadsheet. They have asked the Court do deem that everything in the spreadsheet is accurate, if United doesn't dispute it.

But the fact is, Your Honor, a chart, a spreadsheet is only admissible at trial and is only admissible in evidence to the extent that it is based on admissible evidence and the other party is offered an opportunity to review and copy the information summarized in

the spreadsheet.

And in this case, we have been provided a spreadsheet, but the plaintiffs have not provided any of the underlying data or documents from which those spreadsheet entries are drawn. We believe that should have been provided initially, under Rule 16.1. And we are asking that the Court compel all documents upon which the spreadsheet is drawn so that we can review those and verify that the spreadsheet entries are correct.

THE COURT: Thank you.

MR. ROBERTS: And in going through -- and the Court may hear more of this with regard to Plaintiffs' Motion to Compel, which is on today -- but in going through and trying to compile clinical records and trying to match claims, United has already found many errors in the spreadsheets, which have made it difficult to research and align the issues. So we are asking for the COBs and all other documents which plaintiffs intend to use to show that the spreadsheet is admissible and that it correctly reflects and correctly summarizes is underlying admissible documents.

THE COURT: Thank you.

And the opposition, please.

MS. GALLAGHER: Good afternoon, Your Honor. This is Kristen Gallagher. And I'll be responding in connection with the clinical records.

What I'd like to start with is just an overview.

THE COURT: Hang on just a second.

MS. GALLAGHER: What we heard is really just United conflating this case into something it's not. This is consistent with what we [indiscernible] from the beginning.

THE COURT: Ms. Gallagher, Ms. Gallagher, hang on just a second.

I just need the court reporter to change the screen so that I can see you on the screen. Can you -- you can't increase. Okay. Sorry. Good enough.

So go ahead then again, please.

MS. GALLAGHER: Sure. Thank you, your Honor.

So as I was saying, is that this is a consistent effort by United to conflate what this case is actually about. We know from our first amended complaint in paragraph 1 that this case is specific. This is not a right-to-payment case. This is a rate-of-payment case.

And so what you're seeing with the clinical records is language and using terminology that is trying to transform this into a right-to-payment case.

And we saw that in the moving papers, but particularly with Mr. Roberts's presentation today. And I'd like to hit on a few points and then the rest I'll address as we go forward.

But when Mr. Roberts talks about the top case statutes as being something that they denied part of a payment or made a partial payment, that is actually a misnomer of what this case is about. What happened is that United accepted the emergency department services at the level coded. They paid the claim. They

either asked for information or they didn't, as they're entitled to do under the prompt case statutes in Nevada, and then they paid the claim. But what they represented when they paid the claim is that it was full payment for the claims that had been submitted.

Now what we're hearing in an effort to try and expand this case to something it's not, now they're saying what they did is they made partial payment. And so that's important if they want to stand on that, saying that they made partial payments under Nevada law, we'll certainly take that admission. But what we're seeing is language being used inappropriately and not forthcoming in terms of how these claims are adjudicated and how they're paid. So this case, make no mistake about it is the rate of payment.

So what has happened is that United accepted the claims. They processed them at the level coded. And then they paid them based on that level -- based on documentation.

We know from United's declaration of standard way, that they do have clinical records. They've represented to the Court they have clinical records. They have produced, although it's only nine claims to date. We have produced clinical records. So we know that United has that in their possession. And if they asked for it, they have it.

But what I want to make clear as I go through my opposition is that the terminology being used about clinical records and how we have to prove our claims because they have been partially paid is an inaccurate description of this case, Your Honor.

And it's important for the lay of the land because as the plaintiffs we are entitled to bring certain claims. Had we wanted to challenge denied claims, that would be a different action, but this is clear. We have received -- well, let me go back, United has accepted and allowed at the level that has been paid. There's no denial of the level that's been paid. There's no partial payment because they thought it should have been paid at a different level.

And so to suggest that somehow this is different than the prompt pay statute or that this somehow opens the door to clinical records, I just want to make that record clear that it is an opportunity to United is trying to use this language and morph this case into something it's not.

But before I get too far down the road, I wanted to start by providing the Court an update on the meet and confer efforts. We did raise this issue in our opposing papers, because we thought it was significant that we had provided these responses more than a year ago now, I believe -- somewhat a year ago. We did not hear from United in terms of them having any issues with our responses until there became other discovery disputes in the federal -- while the case was pending in federal court.

At that time, the issue was raised specific to No. 6, which is the subject of this particular motion. And it's important in terms of timing, because at the time that the request was asked, United did not have an answer on file. United did not have any affirmative defenses that were provided, and so when we went to the meet and

confer, what we were brought forward with is, well, you have a claim for unjust enrichment, and so as a result the clinical records are required.

Then sometimes after that, not too long ago, in July of this year, United filed their answer, which included the recruitment or an option. And so that timing is really important because United is trying to cut off our objections by virtue of this timing that they're trying to take advantage of.

So it's important for the Court to see sort of that timing, when the meet and confer came forward, what the lay of the landscape was at the time we made objections. And when we went to the meet and confer, what we were confronted with or what we were told is that, well, it's your unjust enrichment claim, you have to show the value of services.

And so those were the conversations that is we were having, subsequently then United filed an answer, and then brought this motion without regrouping with the Health Care Providers. And why that's important is you have a declaration indicating that had there been a reconvening on the meet and confer, perhaps United expected that there would be some outcome of compromise. We heard Mr. Roberts talk about perhaps a phantom compromise.

However, what's important is that that's the first that we've heard of it. We didn't hear about it before. And in fact, when United saw our opposition, they reached back out to us to say, Would there be an opportunity for a compromise?

And our response was, well, you suggested that there was in -- in your moving papers, and so if you have a compromise that you had in mind when you filed your moving papers suggesting you had a compromise in mind, we would be open to discussing that.

And so we received information that counsel was going to be talking with United on Tuesday, I believe it was, and expected to be able to chat with us on Wednesday with regard to what an acceptable compromise might be.

The timing is important because it just goes to show that there was actually no reasonable compromise that United had in its mindset when it filed the motion, even though it sort of suggested that it had one.

I hate to say we have not been contacted since then, Your Honor. So the first we're hearing of this sampling potential compromise is with the presentation today. At this point, I'll leave that as it is, just because we haven't had the opportunity and it hasn't been presented to us. But that meet and confer is important, because it does set the landscape for where we were in terms of the meet and confer in our objections and opposition and sort of the forthcoming nature of how we got here today.

THE COURT: And can I -- can I interrupt?

MS. GALLAGHER: So now [indiscernible].

THE COURT: I'm going to interrupt. You know, this motion was only filed on September 21. My inclination is to give you guys a chance to try to work this out and come back. Is that

something the plaintiff is amenable to?

MS. GALLAGHER: Well, Your Honor, I would like to finish the presentation in terms of why we think that this discovery is not appropriate and why it shouldn't be permitted.

THE COURT: I'll allow you to complete your entire argument. I just want to hear if the parties are amenable -- plaintiff and then defendant.

MS. GALLAGHER: And Your Honor, of course, depending on your outcome, we will definitely consider a compromise. We have often reached out. As you know, we've had a compromise pending since February that would have addressed a lot of these matters, that United has not responded to. And unfortunately, it seems evident with this moving papers and the reply that the reason they haven't responded is because they simply want to try and press the Health Care Providers for discovery that isn't necessary.

As Your Honor may recall, we have proposed a protocol where United would match our data points for the very reason that was raised by Mr. Roberts. If there is a data point that doesn't match, that then tells the parties they need to further discuss it. If the data points match, then it's clear the Health Care Providers submitted a claim and United paid it at the level based on the information it had.

So definitely we are open to compromise positions as may be appropriate, given the Court's ruling.

And I appreciate the opportunity to address the

substantive piece of it, Your Honor.

THE COURT: Thank you.

Mr. Roberts, are -- is the defendant, or are the defendants, amenable to trying to resolve this?

MR. ROBERTS: Your Honor, the defendants are amenable to trying to resolve this. However, if we are only amenable if the plaintiffs indicate that they're willing to discuss a reasonable way to relieve the burden on both sides.

THE COURT: I think that's --

MR. ROBERTS: And so the -- the Court --

THE COURT: -- that's what she just said.

MR. ROBERTS: The Court may recall that part of our moving papers in the Motion to Compel, our documents, indicated and mentioned in argument that one way to resolve it might be to order the parties to meet and confer on some sort of sampling that could allow the parties to prove their case. And that's been rejected.

And we would not be willing to meet and confer on a sampling methodology that would relieve the burden on plaintiffs, unless they were willing to entertain the same relief for us on our claims.

THE COURT: Okay. All right.

So then, Ms. Gallagher, let me hear the rest of your argument.

MS. GALLAGHER: Thank you, Your Honor.

And I could just note, you know, the timing of a request for

relief for United's discovery -- it obviously comes long after we've had to Move to Compel, long after the Court has ordered them to produce documents.

So but with respect to the specific clinical records at issue, United tries to convince the Court that there are three reasons why clinical records are needed.

And if I could just spend a moment discussing clinical records -- so those are going to be the doctor's notes on the ground, the nurse's notes on the ground. Those are, you know, actually what is taken at the hospital, at the time that the services are provided.

As this Court is aware, the Health Care Providers are obligated to treat -- not only treat, but to evaluate and -- take a look at and evaluate when somebody presents to the emergency room what is happening and then treat them accordingly. They don't have the luxury of turning somebody away or only treating them and not evaluating them when somebody presents with a heart -- you know, heart chest pain or, you know, something that looks to be an emergency situation -- they are eligible and required to evaluate those situations.

And so when a United member presents to the emergency room, that essentially is the triggering piece of when a claim is right. And a claim then becomes something that if the United member is going to be obligated by United to pay.

And so if United says that we have to establish the burden of proof that the claims are even valid. However, that is trying to

revise history, in terms of what has happened already. So United's member already presented, the professional services were already provided. And then what happens after that is the appropriate billing forms are filled out and submitted to United.

And then United has their procedures in terms of what they review, how quickly they're supposed to review, and guided by Nevada Prompt Payment statutes.

And so when they look at claims and they see them allowable, the allowable piece of it is at the level -- CPT code level that has been submitted.

We know from United that they may deny a claim. We know that they may partially pay a claim based on perhaps multiple CPT codes that are submitted based on the services provided.

But what we're not dealing with in this case and what we made clear in our complaint and in our list of claims is that those claims we are seeking payment of are ones that United already deemed allowable at the level -- they were not denied based on the level. And United represented that that was full payment, based on prevailing market rates.

Well, what we've uncovered is that that is not accurate in terms of full -- the full payment.

So now they're trying to say it's a partial payment. But that's not actually true, based on the allegations in the complaint. It was full payment -- representative full payment, but to which the Health Care Providers had uncovered is not full payment because

they have allegedly manipulated market rates with some of their third-party friends that we've identified in the complaint.

The next reason that United tries to convince the Court that clinical records are needed is that they say that it's important for the reasonable value of services. But in our opposition, we've identified that the case law indicates that is not the case.

What a market rate is, is what are people willing to pay for that level of service? So, for example, the most emergent care is coded at a CPT code 99285. What is the prevailing market rate? What is the usual and customary rate for that in the market that's applicable?

We know here we're going to have a dispute in a little bit about what should be the appropriate geography because we have alleged that even though Data iSight and United are saying that rates are market or a specific geographic locations, we know, in fact, based on data, that it's a national data. So we're going to have a little bit of a dispute about what the right geographic area is.

However, the reasonable value of services is going to be the market value. What are people willing to pay for a level 99285? That has nothing to do with the underlying clinical records, because United has already made that determination.

Again, I sound like I'm beating a dead horse, but our complaint, at paragraph 1, makes that abundantly clear. And we know that United consistently tries the change this into an ERISA claim. And they're doing it here by trying to categorize or

characterize or try and classify it as something that is a denial of a claim or a partial payment because of levelling -- and that is a right to benefits, not a rate of payment.

So for that reason, we think, under the reasonable value of services, the Health Care Providers don't have a burden of proof issue with respect to producing underlying clinical records.

The last category that United tries to indicate that it's entitled to clinical records are in connection with its recruitment defense.

We know from the opposition, where we indicated that recruitment means something -- first of all, they can't recover more than what they paid, so it sort of seems like if they want to revisit every CPT code, that is outside the bounds of what recruitment is permitted from a legal perspective.

The other piece of it is that, again, we have framed this case, specifically -- which we are entitled to do, which means that this is a right to the amount of the payment because United has manipulated that payment reimbursement rate. And so that's what this case is about, not about a denial of any of the claims, but about the manipulation of the rate that is being paid.

And so it's important to know that United has already said in its answer, in Paragraphs 26, 193, 194, and 196, that it has paid for covered services.

And so that is really the end of the inquiry for the Court, because if there is an admission that that piece of what they are now

claiming, which is they want to revisit levelling, has been closed -- foreclosed by their own admissions.

They also make a similar statement in answer to Interrogatories Nos. 6 and 7. And so the Court should be able to rely on their statement in terms of what the state of affairs and what the history is, and them trying to turn this into an ERISA case, essentially, by asking for clinical records and revisiting every level -- CPT level.

I wanted to address a couple of points if I could, Your Honor, still.

The other point of the recruitment piece that I wanted to talk about is about how United is trying to circumvent the Prompt Pay statutes with its recruitment defense. Now they said that it's due process and that they need to be able to go back and revisit these claims. But it's important that the only case that they -- that they point to is an unpublished decision from Florida. And it involves a government payer and it involves a contracted or a network hospital facility.

And so we're dealing with a different set of circumstances. The Court in that case discussed that there was a right to a post-audit review of claims that were submitted. And so it seems as though the Court was simply interpreting [indiscernible] contract between those -- those two entities in terms of the due process.

But here United has gotten due process. They had that opportunity to either deny a claim or ask for additional documents

before deeming a claim allowable, pursuant to the Nevada Prompt Pay statute. And so that due process that they now claim that they're entitled to is something that they already received and were able and aptly able to follow that in terms of whether to allow a claim or not. Again, only allowable claims are part of this particular claim -- litigation.

THE COURT: Did that conclude your argument, Ms. Gallagher?

MS. GALLAGHER: Just one point I wanted to revisit on Mr. Roberts's presentation, if I could, just in terms of, you know, trying to characterize this as a denial or a partial payment.

With respect to the statutes, I think it's, you know, cautious on their part. They should be cautious about basically saying that they're circumventing by partially paying. But again, like I said, we will take any admission that they want to make.

And I guess the last point is with respect to the settlement statute that Mr. Roberts referred to. Sort of a little bit of a head scratcher in terms of how United partially paying a claim in the normal course of business would have any sort of coverage under Nevada's statutory scheme for evidentiary compromise in terms of submission to the Court for liability. And also I think it gives the Health Care Providers a little bit of pause if United is purposely short-paying or partial-paying claims that they've allowed, knowingly. I think that speaks volumes.

So again, I would just like to close that we think that

clinical records are not appropriate in this case. This is not in terms of what the Health Care Providers as burden of proof or in terms of what United is entitled to on a defense, in light of the admissions made and in light of United trying to transform this into what it has tried to do from the beginning -- which is something different than what the Health Care Providers have alleged. And for that reason we would ask that you deny the claim -- or deny the motion, Your Honor.

THE COURT: Okay. I would like your response to something Mr. Roberts said -- that he claims that in the compilation that you provided that some of the CPT codes are incorrect. He wanted to match up with the EOBs and the CPTs.

Can you respond to that?

MS. GALLAGHER: Yes, Your Honor.

So with respect to any issue about matching data points, certainly that was an opportunity that we tried and we made that offer of compromise back on February 10th of this year. United has given every reason why they can't substantively respond to it. I find it interesting that it's raised now, but we certainly had offered that.

But yes, we want to engage in a data point comparison. If they find one they think isn't right, then we are certainly willing to have that discussion. That's what discovery is all about.

But one point I do want to make about the EOBs and the PRAs and Mr. Roberts's attempt to try and get the Health Care Providers to produce those is that United has already been ordered

to produce those, I believe, as part of the administrative record. I imagine that comes along with it.

But I also find it interesting that those are United generated documents. United generates the explanation of benefits. United generates the provider [indiscernible] forms.

So to try and put it on the Health Care Providers just seems to be another effort to try and circumvent its discovery obligations and certainly try and avoid a court order that is already -- that it is already facing and is in the process of trying to comply with.

THE COURT: Thank you, Ms. Gallagher.

Mr. Roberts, your response, please.

MR. ROBERTS: On everything or just on the question the Court just asked?

THE COURT: Everything.

MR. ROBERTS: Okay. Very good. Thank you, Your Honor.

The first point I would like to address is the mischaracterization of my argument that United has somehow admitted they made partial payment in the sense of paying less than the amount United believes was due. That's a complete mischaracterization of my argument.

Under NRS 48.105, where a claim, which they submitted to us, was disputed as to either validity or amount is paid, then the evidence of payment is not admissible to prove liabilities for the claim. So what we are saying is that we disputed the amount of the

claim that was submitted to us by the plaintiffs. We paid less than the amount submitted, which was the amount we thought was due, based on the certifications they provided in their claim forms. There is not an admission that United paid less than the amount due.

United paid less than the amount claimed. And now they're trying to use the fact that we paid something promptly, in reliance on their representations in the claim form, as an admission that their representations in the claim form were correct and accurate.

Now that they have put in issue whether or not we paid a proper amount for these claims, they should be required to demonstrate that they performed the services and that they were correctly coded in order to get paid. That's certainly part of their burden.

Now, I don't blame them for not wanting to prove they performed services. I don't want to blame them for not wanting to avoid proving that the services were accurately coded on their claim forms. But now that they have placed the issue of the amount they were entitled to be paid for those services, as part of this litigation, they can't be relieved of their burden of proving all elements of their cause of action, including their cause of action for unjust enrichment.

The answer filed by United -- and counsel mentioned that we had filed an answer -- I would point the Court to Affirmative Defense No. 9 where the defendants stated, To the extent that plaintiffs have any right to receive plan benefits, that right is subject

to basic preconditions and prerequisites that have not been established, such that patients are members of United on the date of service, that the coordination of benefits have been applied, that the services were medically necessary, that an emergency medical condition was present, that plaintiffs timely submitted correctly coded claims, and that all necessary authorizations were obtained. United reserves all rights with respect to asserting any and all such defenses, once plaintiffs have adequately identified the specific claims they contend were underpaid.

Again, their argument seeks to have the Court disregard this affirmative defense, grant summary judgment on this affirmative defense, and find that they don't have to prove that they performed any service or that they performed the service at the level for which they are seeking pay. And that simply is not appropriate at this stage of the litigation.

THE COURT: So I --

MR. ROBERTS: All of this information goes to the proof of that.

THE COURT: Okay. Go ahead, sorry.

MR. ROBERTS: And I may have misspoken, Your Honor. And I believe that the problem we're having is that the insurance provider and the employee -- the patient's benefit plan was incorrectly identified in some of the spreadsheets which have had us searching multiple databases.

The CPT issue was not that it doesn't match on their

spreadsheet versus what's on their claim form. The CPT issue is that what we're saying is we're entitled to the clinical records to see if, indeed, the services were provided at the appropriate level and at the appropriate CPT code for which we were billed.

And now that they put in issue whether or not they were underpaid, they should have to prove that -- and we -- even as they don't want to have to prove it, we should be able to do discovery to assert the defense that the services were not provided.

THE COURT: Right.

MR. ROBERTS: And if, for example, discovery reveals that they were overpaid by millions of dollars because what we paid at Level 5 should have been submitted at Level 3 or 4, we submit a right to recoupment. And that's still an affirmative defense. It's still what we've raised. And we're entitled to discovery on that issue.

THE COURT: Right. All right. So Mr. Roberts --

MR. ROBERTS: I think that the issue of the chart --

THE COURT: I'm sorry. I keep interrupting.

MR. ROBERTS: -- and the summary, I need to address that again, Your Honor.

The whole idea that if we dispute something in their chart, that we can raise that and they'll try to prove it, is just totally contrary to Nevada law. NRS 52.275 summaries says that the contents of voluminous writings, recordings, or photographs, which cannot be conveniently examined in Court may be presented in the form of a chart summary for calculations. Item 2 is, The originals

shall be made available for examination or copy or both -- both parties at a reasonable time and place.

So it essentially would be the same thing as me standing up in Court with a big chart, and them objecting to it because they haven't gotten the underlying documents. And -- and I would point to them and say, which one do you dispute? And I'll get you that document, but otherwise it's admissible.

That's not the way evidence goes, and that doesn't comply with 16.1. If they want to use this chart in support of their claims, we are entitled to a copy of every document upon which they base that chart. And the fact that we may be able to dig out documents and our own records and attempt to match those up ourselves, doesn't relieve them of their obligation under 16.1 to give us the documents that they obviously have already compiled in order to prepare that chart. They don't get to hide those documents from us. They don't get to refuse to produce those documents. They must be already compiled. Assuming they just didn't make up this chart out of thin air, they already have those documents compiled and in a form that allowed them to compare it. And we are seeking to have the Court to compel them to what they should have already done in their initial disclosures, without us even asking for it.

And unless the Court has any questions, [indiscernible].

THE COURT: No. Well, I guess my question is, the plaintiff in its bills gave the CPT codes. And this is a rate of pay case. There is no counterclaim.

If you are trying to recover money from them, you had the ability to do that when you filed your answer. I just don't see how the records you're seeking here are relevant to the plaintiffs' complaint. So if -- one last bite at the apple.

MR. ROBERTS: Yes, Your Honor. I think those are two separate issues. We've raised an affirmative defense of recoupment that if we overpaid on one claim, we should be able to use that to offset amounts owed on another claim. That's an affirmative defense and not a counterclaim.

But I would go further and just say again, Your Honor, the fact that they say it's a rate of payment case, doesn't mean that's all it is. The fact that they want to avoid the need to prove that they performed the services for which they're seeking to be paid should not eliminate the requirement to prove that. The simple due process entitles us to have them prove their entire case and not simply the one element that they want to place at issue -- the rate of pay, because you never get to the rate of payment, if you haven't proved that the services were performed and that they were performed at the level for which they were coded.

And the fact that United chose not to request those documents and make a payment instead, doesn't mean United waived the right to challenge it once they brought this lawsuit. You could make the same time argument as waiver, that their quiet acceptance for years of the payments they now dispute should preclude them from contending that they were underpaid.

The fact that the -- they submitted a claim in reliance on that coding we paid the amounts they now dispute should not prevent United from requiring them to prove their entire case, not just the part of their case which they would like to focus on.

THE COURT: Thank you, Mr. Roberts. This is the Defendant's Motion to Compel clinical documents.

The motion will be denied without prejudice. However, the parties will be required to meet and confer meaningfully, and within the next two weeks on a protocol to match data points, and for the reasons that I've brought up in my questions to both of you.

Mr. Roberts, I do see it as a rate-of-pay case. The two of you are trying completely different theories -- the defendant, of course, continues to resist the plaintiffs' grounds for its complaint.

But I just don't see -- when the plaintiff bills the CPT codes, it doesn't put a burden on the defendant to make the plaintiff prove what was actually done clinically. On a rate of -- in the rate of payment type of case, it's the plaintiffs' burden to prove that the rate was wrong.

So I don't see where the clinical records matter. Everything here is based upon the bills that were provided by the plaintiff.

Now, that takes us to the Plaintiffs' Motion to Compel. And then we have a status check.

MR. ROBERTS: Your Honor, just to clarify for the record, are you also refusing to compel them to give us the documents that

they relied upon to compile their spreadsheet?

THE COURT: At this time, yes. And that's why it's without prejudice so that you have a meaningful meet and confer with regard to a protocol to match data points.

And I'm looking for the next hearings we have for a report on that. It can be individual or status -- joint status reports. I believe that there -- well, we've got two other hearings set on October 29th, November 4th. I'm not sure that either of these is going to go forward. So I can give you a return date in three weeks, if that's amenable to everyone.

MR. ROBERTS: Yes, Your Honor.

MS. GALLAGHER: That's agreeable, Your Honor.

THE COURT: You know, I am supposed to go to the American College of Business Court Judges. If I get up the nerve to board an airplane on the 28th and 29th of this month. So can we set it -- let's set it on Wednesday, November 4th on the -- just on a -- at 10:30 a.m., just a stacked calendar for status?

And Nicole McDevitt, did you get that date?

THE CLERK: November 4th at 10:30 for status.

THE COURT: Very good. All right.

So I believe next is the Plaintiffs' Motion to Excel.

MS. GALLAGHER: Yes, Your Honor. Thank you.

This is Kristen Gallagher. So this is our Motion to Compel witnesses, answers to interrogatories, and responsive documents.

As Your Honor has probably seen, through the

declarations submitted, that we have engaged in multi-hour meet and confers with United in order to try and just basically move this case forward and get information that we need in order to prosecute this case.

As you know, we have significant specific allegations in the first amended complaint that are not, you know, general in the sense. We know what we're looking for, and we have been opposed in trying to get that information.

You know, I wish in some regards you could sit in on some of these, because I feel like I'm on a merry-go-round. We get on a call. Think that things are moving forward. United's going to -- council is going to talk to United and then when we get back on the next call, it sort of is like we've started over again.

So the frustration level, I don't know if it came through our papers. I'm expressing it now that it has been frustrating because --

THE COURT: Well, I can tell you -- whoa, whoa -- hang on.

THE WITNESS: -- we know there's information about certain strategies --

THE COURT: I'm going to stop you, Ms. Gallagher. I have never seen the word sophistry and baloney in the same pleading, ever, in 10 years of the bench or 27 years of being a lawyer on top of that.

Anyways, so go ahead, please.

MS. GALLAGHER: Well, and I'll follow along to that, I certainly haven't been practicing as long as in the context of being a

judge, but, you know, I engage in commercial litigation, and generally speaking this is probably the most frustrated I've been in terms of trying to get substantive information. And I don't say that lightly.

You know, certainly, I like to get along with my opposing counsel. I look to work forward on merits, and you know, have that as a legal discussion. But some of this isn't just advocacy, unfortunately, what we've seen.

We identified a few instances in our opening papers, in terms of sort of the unbelievable position that United will take, like, for example, the fair health database. We all know that it has [indiscernible] that along with some other payers. It uses it. It says it uses it on its legal web site, and then we get into meet and confer efforts, and we get responses like, oh, you want us to ask if they're using it? And oh, we didn't understand that's what you requested when your request for production asked if you stopped using it, why did you stop using it?

So that's just but one example. I certainly don't want to belabor the point, because I think our motion lays it out. But I would like to respond because there was an opposition that was filed, I would like to make sure that I have an opportunity to respond to that.

So with respect to witnesses, United as indicated that they've taken some moves at this point because since we filed the motion, they have supplemented with five new witnesses, which

simply isn't sufficient. We know that United has a significant number of people that are involved, both at the strategy and decision-making level, all the way down to claims representatives who have information about the methodology, the procedures, the Data iSight interplay. And none of these people have been identified for us. One of the five new witnesses that were identified just a few days ago, on September 30th, there -- it's former employee, no information about how to contact that person.

I also note that United doesn't tell us what that witness may have information about. What we see is a generalized statement about this person may have [indiscernible] information relating to the claims and defenses. So it doesn't help us in terms of targeting -- you know, do we really need to talk to this person that they just disclosed or not?

We also with respect -- with respect to Answer to Interrogatory No. 8, we've identified that. We have asked for specific witness information regarding methodology and two other categories of information. United has refused to provide us that information.

We've had multiple meet and confers on it. At this point, I don't know, other than maybe [indiscernible] on the same information, but, you know, then we're just sort of into gamesmanship. You know, we've asked the question. We are entitled to know who has information about certain things that are squarely within our first amended complaints.

You know, we're not asking for information outside the four corners. We're asking for who knows about how reimbursement data methodologies are set? Who has information about the particular claims? So we think that the issue is not moot. And we would ask that Your Honor order them to identify not only the full extent of United witnesses, but also, as we've asked, third parties like the iSight. We certainly know that they have a long-term relationship that dates back at least 10 years. We know that there's interplay and that iSight is becoming an even more important part of United's business in terms -- and obviously with respect to the allegations we've made in terms of the scheme, the alleged scheme to basically rewrite, reimbursement rates as they please and as United announced that it would, because they can.

So we would like that information. We need to know who they are talking to so that we can test and find the evidence that will support our pleadings, because this information is squarely within the -- you know, within themselves. This is not something that we can go out and identify otherwise. So we would ask that they be compelled to identify those witnesses without any further delay.

With respect to the second temporary market data. United says that they're going to produce it in 14 days. They say it's going to be Las Vegas market data, and it simply isn't going to do, Your Honor.

We have one entity that's Churchill. We have another entity that's Elko County. So to limit it to Las Vegas, which means

even maybe more narrow than even a Clark County market data, simply isn't something that we've agreed to. You know, I think they're just trying to more narrowly narrow what we're entitled to.

We also are concerned, in terms of, you know, the Nevada market data, because again, it's important for us to know the national data, because as we have alleged, there is no difference between the different markets -- even though they say there are. The PRAs that have Data iSight. Data iSight says that it's based on geographic, but it's not, based on our information. So it's important that we have information outside of just the scope of [indiscernible] trying to Las Vegas. So we would ask for all information related to just market data be produced.

And the frustrating part is United has made a couple of different arguments about that -- you know, they're in the process of doing it [indiscernible] we should have brought this Motion to Compel. But they're at the point where, you know, we just shouldn't have to [indiscernible]. These were originally due in early January. They provided substantive responses at the end of January. And so here we are in October, [indiscernible] end of the year cutoff, and I don't know how much patience there can be.

I'm afraid maybe we've been too patient, based on timing. But to hear continually that we will be going to, just at this point doesn't cut it.

With respect to the third category of requests and answers to interrogatories, the methodology is really an important piece of

this. United tries to hide behind a plan. And we've heard this, you know, they refer to the administrative marker, they refer this plan, the plans are their guide. But we know that that's not actually true.

There are a few documents that we've managed to get. And the administrative document from United -- is not plan specific in the sense that for each of the 20,000 claims there's going to be a different language in there. No. United has different plans, you know, a gold plan, a choice plan. And so within their type of plan, they may offer information about, you know, what they're going to pay.

But the methodology of how they determine what they're going to pay is not plan specific. In fact, some of the documents that United has produced, talks about, the iSight and the methodology. If you choose this plan, you're going to have this methodology. So the methodology is how do they calculate? What is the data? What information? What market they are using? Are they using information that is complete? Are they skewing the information that's in their data set? That's methodology.

We also want the strategy making, decision making, behind how United has set up methodology. This is the largest, if not the largest, public insurance carrier in the nation. And so to think that there are no documents that have detailed or set out or recorded what the plan is, there is a plan here. There is a structured plan that has taken years to implement, and we know that from just the [indiscernible] agreement that we've gotten, and so we are

entitled to that information because it falls squarely within the allegations in the complaint.

We also know that the PRAs -- that the provider remittance advise forms -- that United issues and generates does refer to cost data or paid data, when they indicated using Data iSight. But again, this methodology is something that can't be hidden behind at undue burden declaration of Sandra [indiscernible]. It doesn't need to be down to the claim-by-claim level. This is a higher level look at what United's plan strategy is that we certainly know is at play.

And that reference that I missed, Your Honor, to the cost [indiscernible] and multiplan data information is at our Exhibit 8, just for your reference, so that you can see that there is discussion about Data iSight's patented reference to based methodology. Apparently United is not using Data iSight without knowing what that methodology is. There's some indication that United is directing and dictating that methodology as well. So we would expect to have those documents produced as soon as possible.

That leads me into the next section, which is still decision making and strategy. They say it's in the process of applying those terms. To me this means they haven't done anything.

And again, the time line, I don't want to, you know, [indiscernible] it too often, but we are here many months of these were due. And for them to be just in the process of applying search terms tells me they haven't done anything. United also tries to use the ESI protocol as a way for sort of allowing them to continue to

push this out.

However, I think the Court was very clear at the last hearing, that the ESI protocol discussion that the parties are in process with would not alleviate anybody's discovery obligations. Just to hear that they don't even -- they're not even reviewing, there's not even an imminent rolling production is a little bit disconcerting, so we would ask that the Court compel production of documents and interrogatories in those categories.

United makes a distinction between in-network and out-of-network. And I would like to say that it's a distinction that is not something that is appropriate in terms of at this discovery stage. Certainly if they want to make that argument later, let them. But it's informative that United has asked us for both in-network and out-of-network reimbursement data. We are in the process of getting that information and producing it. And so I think United recognizes that the commercial payer data, as sort of a general description, is what is going to be -- at least what the parties are going to look at, whether or not, you know, down the road in terms of evidentiary perspective, we can deal with that later. But we are entitled to both in-network and out-of-network. And that was -- [indiscernible] Request For Production No. 87 is where they asked for in-network data.

United also objects to some -- some of the issues with respect to trade secrets under the Nevada statute, and it's proprietary information as well as their customer information. I

think, you know, we're well established at this point that we have a protective order. United is not shy about identifying things that is attorneys' eyes only. So I think that provides the most protection. We did discuss during meet and confer efforts that we might do a blinded exchange where its blinded and attorney's eyes only set and then perhaps a confidential set, and then maybe an unblinded set that would be attorney's eyes only. Those were discussions we had. Obviously United hasn't gone forward and produced any information, so we haven't gotten to that point.

The next section is rental, wrap, and shared savings program. United has now used the delay of a retained consultant to indicate that they have matched data points and trying to figure out whether or not there's any information on whether or not there should have been a wrap or shared savings program applied to the litigation claims.

This is sort of a distraction and perhaps not understanding what the request is. But we'd asked United to tell us if you -- if any of the litigation claims you didn't pay because you think there's a shared savings or a rental or rent network, let us know.

We have actually produced a second set of data that provides information about, in the same time period, claims that were paid by a shared savings program or pursuant to a shared savings program. So United actually already has the data. We just wanted them to come forward and say, hey, if there's any in this litigation set, tell us now or forever hold your peace.

So to transform it into that they need to look at each line I don't think is necessarily accurate. I think they know what's in this market with respect to these particular emergency departments, if they have access to a shared network, that they would know that, and they don't need to look line by line.

But regardless, we would ask that they also be required to produce information if they have any. If they don't, we're sort of looking to say -- for them to say, no, we don't have that information or we don't have that applicability to the litigation claims. Everything that had a network shared savings program is appropriately listed in your other spreadsheet. It's --

Again, it's -- just sometimes we're just looking for simple information that we just are getting one roadblock after the other after the other. United, I think now, has used the consultant explanations for several different rounds of motions. I'm not sure exactly how many -- how many days at this point that we're waiting for the consultant to finish looking at the data points, but I guess we'll find out in the meet and confer effort sort of where that expert is at.

Okay. The next section are the Data iSight-related documents. Obviously, this is really one of the core issues of our complaint in terms of, you know, what are they doing? What have they done? What have they strategized? What have they decided to do? What plans have they implemented?

We've gotten really just the paucity of information. We've

gotten the network access agreement, and I think eight or nine pages of documents that were identified as attorney's eyes only, but what I would describe as like a science preference checklist, nothing really substantive. We have asked for a list of how many claims have been processed by Data iSight. We've offered to have them run a time period so that we can then go back and pull which ones.

None of those offers of compromise have been met with, you know, any sort of engagement by United.

But at the end of the day, we have all their documents, and we would like them. We would like them whether they're in meeting minutes, whether they're in e-mails, whether they're in -- you know, whatever form or format they're in, we know they exist, and we would like that information as soon as possible.

The other point I would make with regard to the Data iSight is they often are talking about, We're not entitled to information because it's national data, and that this is just a Nevada case. Again, I want to reiterate, those are squarely within the allegations that we're saying that we need to be able to prepare. If they're saying this is Nevada and that this is the same as national market data, that's important. That goes directly to our claims, and so we would be entitled to that and they shouldn't be able to omit just because they're calling something national data.

And that's an important piece too, when we finally got the unredacted multiple plan agreement, you know, I won't go into it because it's AEO, and I want to be very cautious, but there really

were some -- there was some information in there that was on this national level that sort of was sleight of hand, if you will, in terms of why they said we shouldn't have been able to get it in the first place.

Okay. So the next category of documents regarding the at issues claims, United said they're already producing administrative records.

Again, you know, we take issue with this term administrative records every time.

And it's important, though, because I want to quote from a case, a Ninth Circuit case, it says quote, In the ERISA context, the administrative record consists of the papers the insured had when [indiscernible] claim, end quote. And I'm quoting from a case called *Montour versus Hartford Life*, 588 F.3d 623 at 632. Ninth Circuit 2009. And that's really important. You know, we've sort of belabor this point, but. It just goes to show you how important when United keeps referring to the administrative record, this is very specific. If they -- and in this case they had to deny the claims. We're not after any claims that are being denied.

So they keep hiding behind this administrative records. We think that are other platforms, [indiscernible] administrative policeman forms, claims management system -- other documents and information that exists outside of what would be considered an ERISA administrative record.

And so in terms of when United says it's already producing administrative records, we need more information than

from that. We haven't asked for just administrative records, and we go round and round on this in meet and confer efforts, but it's important again, because this is our case and this is not an administrative ERISA case.

And so in that context, I also want to bring out perhaps the status on United's production, which they have produced nine administrative records, detailing, like, nine dates of service for their numbers. As of the Court's last hearing, we think that the point that they are not in compliance with the order, because they were supposed to have produced documents by September 23rd. I realize that we will take this up perhaps in a status check at another time.

However -- I think it's important for the Court to know that in a month, almost exactly, since the last hearing, we've gotten nine administrative and nothing else. We know that United has 100,000 e-mails that it had been reviewing. We haven't received any of those. And so, you know, it also is interesting to see, you know what we're getting. We thought maybe we'd see it in order, how it appeared on a spreadsheet or maybe [indiscernible] intuitive like last name, date of service. It doesn't appear to be that way, so we're interested to see, you know, sort of how it plays out. You know, are these the only documents that United is going to find favorable? Does it favor -- you know, what the situation? So, you know, we're just sort of holding -- holding by, but just for the Court to understand that we certainly haven't gotten a lot of information since the last hearing.

Negotiations, United says it's working to [indiscernible] -- United says it's working to collect and search. This is actually a retreat from what it told us before. And this is my reference to the hundred thousand e-mails that back in June we understood counsel had on a platform and was reviewing.

To now say that it's working to collect and search, certainly is disheartening because it suggests that, you know, one of the two situations wasn't accurate at the time. So we just -- we would like the documents. We're entitled to them about the negotiations. It's not just between our client and United, even though that's how they framed it in the opposition. We asked for documents relating to the negotiations.

So we want to know, you know, in addition what was their -- what were the e-mails going back and forth offline, you know, internally, not forward facing to the representatives of the plaintiffs. So we would ask for an order compelling that as well, Your Honor.

I know there's a lot here. I appreciate your time, Your Honor. But this sort of tells you that we haven't gotten a lot of information that we've been asking for -- document --

Next category of documents about complaints that other network providers performing emergency department services have made on United. We think this is important. I mean, we think this is a nationwide plan and scheme to reduce reimbursement rates. And we would be surprised to -- if there weren't other providers in our same situation making the same complaints and would be interested

in that information. We think it's relevant, and we think it goes to the allegations that are in the complaint.

Next are prompt settlement claims. United refers again to the administrative records in an attempt to limit the records that we are entitled to get. So we want information about, you know, I'm sure they have some reporting. Are they, you know, meeting the Nevada prompt payment statutes in terms of asking for information, getting information, and making claims. That's what we would expect to see out of a company like United. We haven't gotten anything. And again, the administrative record is not the only personal information that United has, and we continue to object to it trying to use that as the framework for this case.

Finally, United's affirmative defenses, they have basically said they're not really working on it right now because they're working on the administrative record piece of it. I don't think those two go hand in hand. We had [indiscernible] meet and confer discussions about how only Sandra [indiscernible] and her department could handle the administrative record piece of it.

We had actually asked if there were other departments, other people that could work on pulling information about these things. And so when we were told only this one department can do it, that suggests to me, well, only they're working on it. That means there's, you know, other teams and is other groups that can work on the e-mails, that work on the strategy and those sort of documents.

So Your Honor, we would respectfully ask that you order

everything that we've asked for because it all falls squarely within the allegations. And we really would just like to get to the heart of the matter and start looking at documents, and -- and moving this case forward. Thank you.

THE COURT: Thank you.

And Mr. Roberts, Mr. Balkenbush, before I hear the opposition to this motion, we've gone for about two hours. I need a five-minute break for my personal comfort so that I can continue to attentively listen to all of the arguments.

So court will be in recess until about, let's say 3:33. Thank you.

[Recess taken from 3:28 p.m., until 3:34 p.m.]

THE COURT: Okay. I'm recalling the case of Fremont versus United. And I note the presence of all counsel.

I believe we are ready to hear the Defendant's Opposition to the Plaintiffs' Motion to Compel.

MR. BALKENBUSH: Thank you, Your Honor. And this is Colby Balkenbush for the defendants. I'll be presenting the opposition on this motion.

You know, this is a difficult motion to respond to because the truth is, as we set forth in our opposition papers, we have agreed to produce 90 or 95 percent of what they are seeking to compel us to produce.

The dispute is really over timing and the argument that United should just be doing this faster than it has been.

So let me address the timing issue, and then I'll address the few areas where there is a dispute as far as whether or not the Team Health Providers are entitled to the information they're seeking.

As to the timing issues, so what United has been attempting to do is respond to multiple requests and prioritize things that the Court has ordered it to produce already. So for example, this Court has ordered United to produce the administrative records for all 22,000-plus claims. We've been trying to prioritize that and a lot of these other requests -- the other information that we had hoped to produce sooner, but frankly we've fallen a little behind on because of some of the other discovery we're being pressed to produce.

What we've tried to do in our opposition is give dates when we believe we'll be able to produce those documents to Team Health. So, for example, we've listed the Data iSight closure reports. We state we believe we'll be able to produce those by October 23rd. For the market data for in-network and out-of-network reimbursement rates, we've stated we should be able to produce that in 14 business days.

And so we've tried to give some dates to show the Court that we are trying to comply with our discovery obligations. But frankly, there are a lot of documents at issue --

THE COURT: Mr. Balkenbush, Mr. Balkenbush, let me -- Mr. Balkenbush, I'm sorry, but I have to interrupt you. It doesn't

appear as though your client is taking a rational approach to its obligation to engage in discovery. Why couldn't things have been produced already?

MR. BALKENBUSH: So let me address -- I mean, there's a number of different document requests that are at issue, Your Honor. Let me just address some of them then, specifically.

So for example, they're looking for documents that would show the methodology that was used to determine the amount of reimbursement paid on each of the claims at issue. Those documents would essentially -- the documents that show that would essentially be, one, the administrative records that this Court has already ordered United to produce. We produced approximately 1800 pages of those on September 30th. And we believe we're going to be able to produce another 35 administrative records next week. That production we believe will also be in the thousands of pages.

But one of the issues we've run into that has slowed things down is when we're trying to match this claims data -- match Team Health's claims data to our own is that there are errors in their spreadsheet. So for example, we've found instances where a patient will be listed with a date of service, and their spreadsheet will list in different places that patient being enrolled in different health plans. And so to find the data underlying that claim, the administrative records, for example, we have to look in the database that corresponds to the health plan the member was enrolled in.

And so we have had instances already as we've been trying to do this is that, you know, we've looked under a particular plan's database and haven't found the documents and have had to go look at another plan's database to try to find it. So that has slowed things down. That's one issue we're facing.

You know, another is just that this -- there is litigation all over the country very similar to this, between United and the Team Health Providers. And so United's business units that are tasked with trying to find and gather these documents aren't just dealing with requests from this case. Based on my conversations with our client, I believe that United is working hard to gather these documents and is putting pressure where it needs to be put to accelerate this process, but it is difficult given the number of documents at issue and the number of different requests, so I think that's, I guess, part of the explanation.

Another is just that these documents, many of these documents are not stored in a format that is easily -- easy to access -- the access and then produce.

As an example, Your Honor, the administrative records are not even stored in a TIF or PDF format. My understanding is they're actually -- the only way we can retrieve them is either to take a screenshot of the screen showing the record, or to essentially print the TIF or PDF, and then produce them. And so that also has slowed down the process.

So let me go into some of these, I guess, topics that

they've raised. A lot of these would be resolved with United producing a claim-matching spreadsheet and the administrative records. The methodology used to determine payment is going to be shown either by a claims spreadsheet, which should have a column showing essentially whether or not what plan was at issue and whether or not any wrap or shared savings program impacted the amount of reimbursement on that claim.

There should be a column for each of the claims that could show that, and the amount of reimbursement, how it was calculated, would also be shown in the administrative records we are trying -- we're in the process of producing or have started producing.

Another issue that they have raised are the negotiations between United and Fremont. More information on Data iSight. That's -- that information would be in custodian's e-mail inboxes. We have started gathering those and working on producing those. It's just frankly, Your Honor, there's so many discovery requests at issue here, it has -- we have been slowed down a little bit by the order to produce the administrative records.

Let me address the -- let me address some of the issues we dispute, because, again, a lot of the arguments Ms. Gallagher raised, we haven't argued that these documents are irrelevant or not discoverable. We just said we need more time. But there are a few where we do stand on our objections and are refusing to produce documents because we believe our objections have merit.

The first one is Request For Production 31. This is a

request where Fremont is seeking documents related to strategy and discussions regarding reimbursement rates. And we've agreed to produce those, but we've asked that it be limited to only documents that relate to plaintiffs' claims.

Their request, as written, seeks documents not only related to discussions about reimbursement rates for the plaintiffs, but for any other out-of-network providers. And that's just overbroad and seeks irrelevant information. So again, we're not refusing to produce, we just believe that request should be limited in that way.

The other issue that -- the other request we take issue with is in regard to certain Data iSight documents. So we've agreed to produce the closure reports. We've already produced the contracts with Data iSight. And we've produced the preference checklist.

But we have objected to producing national level multi[indiscernible] Data iSight data. And the reason we've objected is that there is no way to use that national level data and extrapolate to Nevada and the claims that are at issue here.

This data doesn't show reimbursement data for specification regions, like focused on Nevada; and it doesn't show reimbursement data focused on specific out-of-network providers like plaintiffs. This is national aggregate level data, and so our objection is just it would be -- that that would be irrelevant information for purposes of this lawsuit, would be meaningless because the rates shown there can't be extrapolated to the claims

that are at issue here.

The third discovery request that we object to is Request For Production 41. And so this seeks documents related to challenges to United's rate of reimbursement by other out-of-network emergency medicine groups. And our objection is that this does not relate to the claims at issue. This is seeking documents for any challenges by other nonparty out-of-network providers.

Now, again, if they are asking for documents, we're not objecting to producing documents from Team Healths, you know, or Fremont's challenges to United's rate of reimbursement. But they're asking something much broader. They're asking for any out-of-network provider that we be ordered to produce all documents related to challenges those providers have brought. Obviously, that would be an enormous number of documents. And it would also be difficult to limit -- and in fact, I think the request is not limited -- it's also not limited to the full time frame at issue here, which is July 2017 to present. It goes back beyond that.

So we do have limited objections to those three issues, Your Honor. But for the other ones, we essentially have agreed to produce the documents. We're just struggling to produce them as fast as plaintiffs would like us to produce them. And we're trying to give dates to the plaintiffs and to the Court when we think we can comply with our discovery obligations, but it's just difficult given the number of documents at issue and the different types of documents.

THE COURT: Thank you, Mr. Balkenbush.

The reply then in support, please.

MS. GALLAGHER: Thank you, Your Honor. So I wanted to address those points in terms of the timing. You know, Mr. Balkenbush indicated that United is focusing on its production obligations for the administrative record.

As Your Honor knows, that order came out last month. And so we have this long period of time since January when these were originally due and most of the meet and confers where, you know, they're saying now, they've agreed to produce 90 to 95 percent, but sort of not, as indicated, the state of affairs. We've gotten push back and narrowing that we heard just a moment ago, as well, unilaterally narrowing what we've asked for.

So the timing, I just don't see how there's been an effort before now to try and comply and get us the information that we asked for. One point about the closure reports that's now being -- with respect to data iSight, now being promised on October 23rd. We've had meet and confer efforts back in June that said that we would have them by September 5th. We never got any. Now they're promised to 10/23.

You know, we just see this line in the sand being pushed further and further back until there's an actual order, you know, compelling United to participate reasonably in the discovery process, and not trying to just put a box around anything other than the administrative record, which we've heard again here in

opposition.

You know, United talks about market data in 14 business days. It would have been nice to have that information or that commitment before now; right? We had to bring a Motion to Compel before now. The spreadsheet on [indiscernible], you know, certainly if there's a particular issue, they've had our spreadsheets, the original ones, since last fall. So now we're just getting into a discussion on data points and had that compromise offered a while ago.

But what I'm hearing that's concerning is the methodology, and again trying to point to the plan. We know United's methodology is not in the plan. We know that when Dan -- Dennis [*sic*] Schumacher said, you know, because we can -- in response to why are you going to reduce reimbursement rates, we know that that is not in the plan. United does not look to the plan when it had negotiations with the health providers, when it says it was going to reduce the reimbursement rates. That's because it's a high level decision and strategy that is implemented. And that is the information that we want and that we're entitled to get, based on the allegations in the complaint.

So again, when you're hearing it firsthand, Your Honor, the administrative record is their go-to for everything. And I can tell you that it is only limited under federal law as to why an insurer denied a claim that has no application in this case. And to so suggest that there are e-mails about strategy, suggest that there's

information involving highest levels at United that's going to be in the administrative record is just -- it's not accurate, and it's not what we've limited our complaints to. It's not what we've limited these requests and interrogatories to. And so when representations that we've gotten some Data iSight information, it is so limited, Your Honor -- like the fact that we're getting a closure report is probably only because we accidentally hit on that name of a report.

And meet and confer efforts, we -- you know, we were met with, Well, you know, we don't know what you need. What do you think we might have? You know, and those are things that -- why we also objected to the e-mail protocol is we don't know what United calls them. We have a little bit more information from the multiplan agreement, because there are reports that are called out. We haven't gotten those reports, Your Honor.

So we know this exists. We know that when there is, you know, lots of money -- I won't use the exact amount because I don't want to be revealing anything -- but there is a lot of money involved in the multiplan and independent agreement. And so there is no chance that money is exchanged without reporting and without e-mails and without discussion about how it's going and what they should do to change it.

In fact, there's [indiscernible] in that agreement that tells us that we think plans were changed to accommodate the iSight entities.

And so to sit here and tell us that there isn't information,

other than a closure report, is simply not accurate, and not being even honest to the documents that we have gotten, which aren't very many.

So we would expect a full disclosure, not just limited to what United as indicated as closure reports. We know that there are performance reports, and they've actually objected to those as not being relevant. I don't know how they're not relevant. We have placed this scheme at issue and directly with specific allegations, and so we should be entitled to see what sort of performance reports, because as part of the scheme, they are shared, right, they are sharing in the profits when they artificially identify what they want the reimbursement rate to be.

And so any of that information relating to that would be related to [indiscernible].

With respect to Request for Production No. 31, that Mr. Balkenbush indicated, again, this is the high-level strategy. Plaintiffs' claim, you know, he only wants it with respect to plaintiffs' claims. That simply isn't going to work for us, Your Honor. We need the high level. We know that this isn't planned level specific. This is strategy at the highest levels of this company -- and its affiliates. I mean, really, all of these affiliates, Data iSight, and we expect that there is information.

With respect to Request For Production 41, I believe is the other one Mr. Balkenbush indicated, is relating to any challenges and complaints by other out-of-network emergency department service

providers -- this is absolutely relevant. We think this is a plan that would -- has been set out across the nation.

If there are other providers that are having similar experiences and making the same complaints that they can't believe or asking why that these reimbursement rates have been all of a sudden reduced without any demonstrable data to support it, I think that's relevant. And I think that we should be entitled to that, Your Honor.

So I think overall, you're seeing a little bit -- hearing a little bit of that administrative record talk again. Really, that is one piece of this case. It's important. I don't want to minimize the information that we're going to get. But it's also a misnomer. We want, like we said in our claims, Motions to Compel claims filed, we want all claims information -- not just what United is deeming is an administrative record.

We want e-mails. We know they exist. They haven't been produced on any level.

And we're just ready to get this information so we can get moving.

THE COURT: Okay.

MS. GALLAGHER: Thank you.

THE COURT: Just a couple of questions, Ms. Gallagher.

Have you ever prioritized for the defendant what you want to have produced first, next, last?

MS. GALLAGHER: I have not, Your Honor.

THE COURT: You have not?

MS. GALLAGHER: I have not, you know, prioritized for --

THE COURT: Okay.

MS. GALLAGHER: -- United. You know, I certainly haven't made that request either.

THE COURT: And how long would it take you to prioritize it?

MS. GALLAGHER: By tomorrow or Monday.

THE COURT: I was going to say the 13th or 14th. Today is the 8th.

MS. GALLAGHER: I can meet that.

THE COURT: Which day?

MS. GALLAGHER: I can meet that, Your Honor.

THE COURT: Which day?

MS. GALLAGHER: I'll go with the earlier of the two, the 13th.

THE COURT: October 13th. Thank you.

All right. This is the Plaintiffs' Motion to Compel.

The motion will be granted in all respects.

I overrule the objections to RFP 31, the objection to providing national Data iSight data; and overrule the objections to rule -- Request For Production 41. So all of the objections are overruled. The motion is granted in its entirety.

The plaintiff will incorporate into the order the deadlines in the opposition with regard to willingness and the defendant will be

held to those deadlines.

By the 13th of October, the plaintiff will prioritize the remaining issues for the defendant, and the defendant will respond by the 20th of October -- that gives you a week, Mr. Balkenbush. And this will be back on calendar on October 22 at 10 a.m.

And I am not usually so forthcoming, but with COVID I feel like these business court cases you need to know what I'm thinking.

Mr. Balkenbush, if your client can't meet the deadlines, I will have no choice to make -- but to make negative inferences.

I don't fault you in any way. I understand that it is a problem with your client, and I don't blame you in any respect.

But this case has just gone on too long with not enough effort.

So Ms. Gallagher to prepare the order.

Mr. Balkenbush, you will approve the form of that order, if you can. If you can't, explain why. I'll either sign, interlineate, or hold a telephonic. But you'll have to have a reasonable time, and I will not accept a competing order.

Any questions from either of you on that?

MS. GALLAGHER: No, Your Honor. Thank you.

MR. BALKENBUSH: Your Honor, no question in regards to the process of submitting the order or objecting to the proposed order.

I guess in regard to the October 22nd status check, would the Court take into consideration if a rolling production has been

made of, I guess, the categories of documents that Ms. Gallagher identifies for us in her, I guess, October 13th e-mail or letter to us? Or is it the Court's position that everything needs to be produced?

What I'm trying to get -- understand is that, for example --

THE COURT: Sure.

MR. BALKENBUSH: -- you know, a rolling production of e-mails is one thing. Producing every single responsive e-mail, I do think would be unworkable by October 22nd.

THE COURT: It's not my intent to require all of the production by the 22nd, but to determine what the priority is and set deadlines for each category. And that will be set in stone as of the 22nd.

MR. BALKENBUSH: Understood, Your Honor. Thank you for that clarification.

THE COURT: Okay. And your timeline, Mr. Balkenbush, should say when things can be done and explain, based upon the order of priority given to you by the plaintiff.

Now, anything further?

MR. BALKENBUSH: Understood, Your Honor. Thank you.

THE COURT: Okay. Now, I -- we have on calendar today a motion -- the Defendant's Motion for a Protective Order with regard to protocols, retrieval, and production of e-mail? Is that still on?

MR. BALKENBUSH: So, Your Honor, that motion, the Court denied without prejudice, I believe. And then ordered the parties to meet and confer on an ESI protocol.

THE COURT: Mm-hmm.

MR. BALKENBUSH: We have spoken with plaintiffs' counsel about that. They've requested some additional information from us regarding the format, certain files are stored in that we have.

And I believe the next step there is that plaintiffs are going to send us a draft ESI protocol that they are comfortable with, and then we'll respond to that. I don't believe we've received that yet.

So I think that is an issue that can probably be maybe tabled and brought up again at the October 22nd status check.

THE COURT: Thank you, Mr. Balkenbush.

The plaintiff, is there a response to that?

MS. GALLAGHER: Just a brief response. That's generally accurate in terms of our discussions. And we are taking the laboring or the Health Care Providers in drafting the ESI.

I think what would be helpful is just additional information from United. We have engaged in the discussion about their claims management system and where we might find additional information. And we sort of were stalled in that regard and got only information, again, regarding where administrative records may be kept. So it would be helpful.

We're trying to craft something, not knowing what United's various platforms are, you know, and we ask -- they either, you know, didn't know at the time and we haven't gotten that follow-up.

So I think if there could be just a push for additional

information that we can fill in so that we can get it going and perhaps have an agreement by the 22nd, that would be helpful.

THE COURT: Thank you.

Is there a reply, Mr. Balkenbush?

MR. BALKENBUSH: Yeah. I think it would just be helpful -- once we have the draft ESI protocol from the plaintiffs, and we will expedite our review of that, I think it's -- we just need to receive that to know, you know, how close we are apart, as far as terms, instead -- but would the Court rejected our ESI protocol or e-mail protocol in the prior motion. So we've essentially asked the plaintiffs to give us something that they're -- they're comfortable with.

THE COURT: Okay. Do both of you think you can give me an update on the 22nd of October on this issue?

MS. GALLAGHER: Yes, Your Honor.

MR. BALKENBUSH: Yes, Your Honor.

THE COURT: Thank you, both.

This Motion for Protective Order then will be continued for status only on October 22nd.

And we also have a status check, and I did see a status report this morning from the plaintiff.

Is it necessary to discuss that today?

MS. GALLAGHER: Your Honor, I was able to weave that in with the argument about the status of the administrative record production to date. Thank you.

THE COURT: Good enough.

And will Mr. Balkenbush, or Mr. Roberts, do you both agree that we don't need to have the status check in lieu of the fact that we've already argued everything else?

MR. BALKENBUSH: I agree, Your Honor.

THE COURT: Okay. Very good.

So I guess I'll be seeing you guys a lot in October and November. So until then, stay safe and healthy.

And are you guys working full time on this case?

Don't answer that. Okay.

MS. GALLAGHER: Appreciate your time this afternoon. Thank you.

THE COURT: Never make -- never should make an attempt at humor. Thank you both.

MS. GALLAGHER: All right.

MR. BALKENBUSH: Thank you, Your Honor.

[Proceeding concluded at 4:02 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.

Katherine McNally

Katherine McNally
Independent Transcriber CERT**D-323
AZ-Accurate Transcription Service, LLC

EXHIBIT 8

EXHIBIT 8

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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

NOTICE OF ENTRY OF ORDER GRANTING, IN PART PLAINTIFFS' MOTION TO COMPEL DEFENDANTS' PRODUCTION OF CLAIMS FILE FOR AT-ISSUE CLAIMS, OR, IN THE ALTERNATIVE, MOTION IN LIMINE

PLEASE TAKE NOTICE that an Order Granting, In Part Plaintiffs' Motion To Compel Defendants' Production Of Claims File For At-Issue Claims, Or, In The Alternative, Motion In Limine was entered on September 28, 2020, a copy of which is attached hereto.

DATED this 28th day of September, 2020.

McDONALD CARANO LLP

By: */s/ Kristen Gallagher*

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of McDonald Carano LLP, and that on this 28th day of September, 2020, I caused a true and correct copy of the foregoing **NOTICE OF ENTRY OF ORDER GRANTING, IN PART PLAINTIFFS' MOTION TO COMPEL DEFENDANTS' PRODUCTION OF CLAIMS FILE FOR AT-ISSUE CLAIMS, OR, IN THE ALTERNATIVE, MOTION IN LIMINE** to be served via this Court's Electronic Filing system in the above-captioned case, upon the following:

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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 GRANTING, IN PART PLAINTIFFS' MOTION TO COMPEL DEFENDANTS' PRODUCTION OF CLAIMS FILE FOR AT-ISSUE CLAIMS, OR, IN THE ALTERNATIVE, MOTION IN LIMINE**

This matter came before the Court on September 9, 2020 on 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's ("Ruby Crest" and collectively the "Health Care Providers") Motion to Compel Defendants' Production of Claims File for At-Issue Claims Or, In the Alternative, Motion in Limine on Order Shortening Time (the "Motion"). Pat Lundvall and Amanda M. Perach, McDonald Carano LLP, appeared on behalf of the Health Care Providers. Lee Roberts and Colby L. Balkenbush, Weinberg, Wheeler, Hudgins, Gunn & Dial, LLC, appeared on behalf of defendants UnitedHealth Group, Inc.; 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.'s (collectively, "United").

The Court, having considered the Motion, United's opposition, and the argument of counsel at the hearing on this matter, finds and orders as follows:

1. The Health Care Providers propounded their First Set of Interrogatories ("Interrogatories") and First Set of Requests for Production of Documents ("RFPs") on United on or around December 9, 2019.

2. In response to 19 RFPs, Resp. to RFP Nos. 3-7, 11-13, 15-20, 24, 37, 39-40, 42 (collectively, the "At-Issue RFPs"), United repeats the following objection with variation to acknowledge the request at issue (in bold):

> Fremont has asserted 15,210 CLAIMS where it alleges that Defendants did not reimburse Fremont for the full amount billed. **To produce the documents and communications related to any decision to reduce payment on a CLAIM**, Defendants would, among other things, have to pull the administrative record for each of the 15,210 individual CLAIMS, review the records for privileged/protected information and then produce them. As explained more fully in the burden declaration attached as Exhibit 1, this would be unduly burdensome as Defendants believe it will take 2 hours to pull each individual claim file for a total of 30,420 hours of employee labor.
>
> Fremont has asserted 15,210 claims where it alleges that Defendants did not reimburse Fremont for the full amount billed. **To produce the documents and communications that relate to the methodology used to calculate the amount of reimbursement paid on Fremont's claims**, Defendants would, among other things, have to pull the administrative record for each of the 15,210 individual claims, review the records for privileged/protected information and then produce them. As explained more fully in the burden declaration attached as Exhibit 1 to, this would be unduly

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> burdensome as Defendants believe it will take 2 hours to pull each individual claim file for a total of 30,420 hours of employee labor.

NLA

~~3. With respect to 5 Interrogatories, Answers to Interrog. Nos. 1, 5, 7, 8, 12 (collectively, the "At-Issue Interrogatories"), United repeats the same objection with the same variation to account for the question:~~

> Assuming those are the claims Fremont intended to refer to, Defendants object to this Interrogatory on the basis that it is unduly burdensome and seeks information that is not proportional to the needs of the case. Fremont has asserted 15,210 CLAIMS where it alleges that Defendants did not reimburse Fremont for the full amount billed. To determine how the amount of reimbursement for each CLAIM was determined, Defendants would, among other things, have to pull the administrative record for each of the 15,210 individual CLAIMS and analyze it. As explained more fully in the burden declaration attached as Exhibit 1, this would be unduly burdensome and not proportional to the needs of the case as Defendants believe it will take 2 hours to pull each individual administrative record for a total of 30,420 hours of employee labor.

NLA

4. Each of these objections is based on United's assertion that it is unduly burdensome to retrieve and produce what United refers to as the "administrative record."

5. On February 10, 2020, counsel for the Health Care Providers offered to reduce United's burden of producing certain Explanation of Benefits forms ("EOBs") and Providers Remittance Advice forms ("PRAs") by matching data contained in the Health Care Providers' at-issue claims spreadsheets:

> In advance of Wednesday's hearing, below is a discovery proposal that would result in an expedited ability for the parties to agree on the health care claims data and would eliminate or greatly reduce the need for United to collect and produce provider remittance forms/provider EOBs except for where the parties identify a discrepancy in the billed amount or allowed amounts or as specified below. Similarly, it would eliminate or greatly reduce the need for Fremont to collect and produce HCFA forms and related billing documents. Please review and let me know in advance of Wednesday's hearing whether United will agree to the following:
>
> The Health Care Providers have already produced a spreadsheet that includes member name and Defendants' claim no. (to the extent available in Health Care Providers' automated system), in addition to other fields:
>
> - Within 14 days, United provides matched spreadsheets and identifies any discrepancy in billed or allowed amounts fields;
> - Within 7 days thereafter, for claims upon which the billed and allowed data match, parties stipulate that there is no need for further production of EOBs and provider remittances for evidentiary purposes related to establishing the existence of the claim, services

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provided, amount billed by Health Care Providers and amount allowed by United.

- Approximately every quarter, this process will take place again with any new claims included in the Litigation Claims Spreadsheet that accrued after the previous spreadsheet was submitted.

United produces all EOBs/provider remittances for all Data iSight processed NV claims submitted by the Health Care Providers; and

United and the Health Care Providers respectively agree to provide a market file, i.e. a spreadsheet of payments from other payers (Health Care Providers) or a spreadsheet of payments to other providers (United) in the market which de-identifies the specific payer or provider, as applicable (for the time period 2016-Present). The parties agree to meet and confer promptly to agree on specified fields.

6. Counsel for United and the Health Care Providers engaged in meet and confers on these objections on June 9, 15 and 23 (addressing RFP Nos. 11, 12, 13, 21, 27, 37 and 44) and July 20, 21 and August 3, 2020 (addressing RFP Nos. 3-7, 11-13, 15-20, 24, 37, 39-40, 42 and Interrog. Nos. 1, 5, 7, 8 and 12)

7. United representative Sandra Way ("Way") provided a declaration (the "Way Declaration") setting forth the contention that it would take four full-time United representatives working for three years to pull records for the at-issue claims in this litigation. The Way Declaration does not state she has tried to review or retrieve any information in connection with this litigation.

8. During meet and confer efforts, United's counsel stated that the only responsive documents that existed with respect to the At-Issue RFPs appeared in the "administrative record" and that it was standing on its undue burden objection.

9. Thereafter, the Health Care Providers filed the subject Motion.

10. The Health Care Providers have disclosed spreadsheets which list each of the at-issue claims (the "At-Issue Claims") in FESM00344 and intend to supplement these spreadsheets on a regular basis (collectively the "Claims Spreadsheets").

11. In opposition to the Motion, United states that the documents relating to the At-Issue Claims that would be responsive to the At-Issue RFPs consist of the "administrative record" for each claim and that the "administrative record" consists of five categories of documents:

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

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

c. Appeals documents;

d. Any other documents comprising the administrative record, such as correspondence or clinical records submitted by the provider with its claim for reimbursement;

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

(collectively, the "Administrative Record")

12. The party from whom discovery is sought, must show that the information is not reasonably accessible because of undue burden or cost. NRCP 26(b)(2)(B). "[T]he fact that discovery may involve some inconvenience or expenses is not sufficient, standing alone, to avoid the discovery process." *Martinez v. James River Ins. Co.,* No. 2:19-cv-01646-RFB-NJK, 2020 WL 1975371, at *1 (D. Nev. Apr. 24, 2020).

13. The Way Declaration does not assert that claim information is not reasonably accessible because of undue burden, nor does she assert any particular cost associated with retrieving and producing the information.

14. As a result, the Way Declaration does not meet the considerations under NRCP 26(b)(2)(B).

15. Even if United could make that showing, the Court "may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C)." NRCP 26(b)(2)(B).

16. There is no basis for the Court to limit the claim-file discovery under NRCP 26(b)(2)(C) because (1) the discovery sought is not unreasonably cumulative or duplicative, and cannot be obtained from a source other than United, much less from another source that is more convenient, less burdensome, or less expensive; (2) the Health Care Providers have not had ample opportunity to obtain the information by discovery in the action; and (3) the proposed discovery is not outside the scope permitted by Rule 26(b)(1).

17. The Court has considered United's argument that the Motion should be denied based on the Doctrine of Unclean Hands. The Court finds that that argument has no merit.

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18. The Court has also considered United's argument that the method of production of the Administrative Records would not be proportional to the needs of the case. United's proposal to employ statistical sampling methodology, require the parties to employ experts to attempt to match each party's claims data, and/or only require the parties to produce documents related to a smaller set of the at-issue claims does not sufficiently address the discovery needed for the Health Care Providers to prosecute this case. ~~The Court further finds that the discovery sought in the Motion is proportional to the needs of this case considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information,~~ the ~~parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.~~ NLA

Accordingly, good cause appearing, therefor,

ORDER

IT IS HEREBY ORDERED that the Health Care Providers' Motion to Compel Defendants' Production of Claims File for At-Issue is GRANTED.

IT IS FURTHER ORDERED that the Health Care Providers' alternative Motion in Limine is premature and is therefore DENIED WITHOUT PREJUDICE.

IT IS FURTHER ORDERED that United's objections based on undue burden for the At-Issue RFPs and At-Issue Interrogatories are hereby OVERRULED.

IT IS FURTHER ORDERED that United shall produce all Administrative Records for each of the At-Issue Claims on or before September 23, 2020. NLA ~~In the event United does not dispute certain claim information contained in the Claim Spreadsheets, United shall not be required to produce EOBs or PRAs for the particular At-Issue Claims which are undisputed.~~

~~**IT IS FURTHER ORDERED** that United shall timely supplement its production of Administrative Records for each of the At-Issue Claims upon disclosure of new Claim Spreadsheets by the Health Care Providers.~~ NLA

IT IS FURTHER ORDERED that there will be a Status Check on the performance of United's production of those documents set for three weeks from the entry of this order to inform the Judge what production will be possible and when.

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~~**IT IS FURTHER ORDERED** that a status check on United's compliance with this Order shall take place on September 30, 3030 at 1:30 p.m.~~.

IT IS SO ORDERED.

Dated this 28th day of September, 2020

Nancy L Allf

DISTRICT COURT JUDGE

15B A6E F22F E3DA NB

Nancy Allf

District Court Judge

Submitted by:

McDONALD CARANO LLP

By: */s/ Amanda Perach*

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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 Granting was served via the court's electronic eFile system to all recipients registered for e-Service on the above entitled case as listed below:

Service Date: 9/28/2020

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EXHIBIT 9

EXHIBIT 9

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

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

v.

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

and

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

DECLARATION OF JANE STALINSKI 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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COLBY L. BALKENBUSH, ESQ.
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Attorneys for Petitioners

I, Jane Stalinski, declare under penalty of perjury under the law of the State of Nevada that the foregoing is true and correct:

1. I am an adult resident of Cuyahoga County in the state of Ohio, over 18 years of age, and I have personal knowledge of the facts set forth herein, except as stated upon information and belief, which matters I believe to be true.
2. I am a Senior Legal Service Specialist for United Healthcare Insurance Company ("UHIC") and its affiliates.
3. I submit this declaration in support of Petitioners' Motion to Stay the Underlying District Court Case.
4. Based on Plaintiffs' claim spreadsheet (FESM000344), I understand that Plaintiffs are asserting 22,153 claims for underpayment in this litigation.
5. Based on the analysis Petitioners have conducted, less than 2,000 of the 22,153 asserted claims have been administratively appealed.

Executed on November 16th, 2020

Jane Stalinski

Jane Stalinski
Senior Legal Service Specialist
UnitedHealthcare Insurance Company

EXHIBIT 10

EXHIBIT 10

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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

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[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

EXHIBIT 11

EXHIBIT 11

ELECTRONICALLY SERVED
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CLERK OF THE COURT

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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 GRANTING PLAINTIFFS' MOTION TO COMPEL DEFENDANTS' LIST OF WITNESSES, PRODUCTION OF DOCUMENTS AND ANSWERS TO INTERROGATORIES ON ORDER SHORTENING TIME**

This matter came before the Court on October 8, 2020 on the Motion to Compel Defendants' List of Witnesses, Production of Documents and Answers to Interrogatories on

Order Shortening Time (the "Motion") filed by 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"). Pat Lundvall, Kristen T. Gallagher and Amanda M. Perach, McDonald Carano LLP, appeared on behalf of the Health Care Providers. Lee Roberts and Colby L. Balkenbush, Weinberg, Wheeler, Hudgins, Gunn & Dial, LLC, appeared on behalf of defendants UnitedHealth Group, Inc.; 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.'s (collectively, "United").

The Court, having considered the Motion, United's opposition, and the argument of counsel at the hearing on this matter and good cause appearing therefor, makes the following findings and Order:

FINDINGS OF FACT

1. On August 9, 2019, prior to remand to this Court, United made its initial disclosures pursuant to FRCP 26(a). On August 13, 2020 and August 31, 2020, United served its first and second supplement to initial disclosures. United's initial list of witnesses (detailed in the Joint Case Conference Report) did not include a single United representative. After the Health Care Providers pointed this out, United supplemented, listing only three United representatives on its Second Supplement to NRCP 16.1 list of witnesses. United identified one additional United witness in its Third Supplement to NRCP 16.1 list of witnesses.

2. On December 9, 2019, the Health Care Providers propounded their First Set of Interrogatories ("Interrogatories") and First Set of Requests for Production of Documents ("RFPs") on United.

3. On January 29, 2020, United served its objections and responses to the Health Care Providers' RFPs and answers to Interrogatories. On July 10, 2020, United served its Third Supplemental Responses to RFPs.

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4. As set forth in the Motion, the Health Care Providers discharged their meet and confer obligations pursuant to EDCR 2.34.

5. The scope of permissible discovery is broad. NRCP 26 permits parties to "obtain discovery regarding any nonprivileged matter that is relevant to any party's claims or defenses and proportional to the needs of the case…." *See* NRCP 26(b)(1). A party may move to compel disclosure of documents and electronically stored information and if a party fails to produce documents responsive to a request made pursuant to NRCP 34; as well as an answer to interrogatories. NRCP 37(a)(3)(B)(iii)-(iv). Furthermore, "an evasive or incomplete disclosure, answer, or response must be treated as a failure to disclose, answer, or respond" NRCP 37(a)(4).

6. The Health Care Providers moved to compel United to identify witnesses, as well as answer interrogatories and produce documents in connection with the following categories of information:

- The identity of United representatives and other third parties that have information about the allegations in the First Amended Complaint (NRCP 16.1 and Interrogatory No. 8);
- Market and reimbursement data related to out-of-network reimbursement rates and related documents and analyses (Interrogatory Nos. 12; RFP Nos. 14, 19, 20, 22, 23, 24, 33, 34, 35, 38,[1] 43);
- Methodology and sources of information used to determine amount to pay emergency services and care for out-of-network providers and use of the FAIR Health Database (Interrogatory Nos. 2, 3, 4, 10, 12; RFP Nos. 5, 8, 10, 15, 36, 38);
- Documents related to United's decision making and strategy in connection with its out-of-network reimbursement rates and implementation thereof (RFP Nos. 6, 7, 18, 32);
- Documents related to United's decision making and strategy in connection with its in-network reimbursement rates and implementation thereof (RFP Nos. 31);
- Rental, wrap, shared savings program or any other agreement that United contends allows it to pay less than full billed charges (Interrogatory Nos. 5, 7; RFP Nos. 9, 16);
- Market and reimbursement data related to in-network reimbursement rates and related documents and analyses (RFP Nos. 25, 26, 29, 30);

[1] RFP No. 38 is listed twice because it seeks documents concerning for both out-of-network and in-network adjudication of emergency services.

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- Documents related to United's relationship with Data iSight and/or other third parties (Interrogatory Nos. 9; RFP Nos. 11, 12 and 21);
- Documents and communications about the at-issue claims (RFP Nos. 3, 17);
- Documents regarding negotiations between United and the Health Care Providers' representatives (RFP No. 13, 27, 28);
- Documents regarding challenges from other out-of-network emergency medicine groups regarding reimbursement rates paid (RFP No. 41);
- Documents reflecting United's failure to effectuate a prompt settlement of any of the at-issue claims (RFP No. 42); and
- Documents relating to United's affirmative defenses (RFP No. 45).

7. For the reasons set forth in the Motion and at the hearing, the Court finds that the Health Care Providers have established grounds to compel United to supplement its list of witnesses, answers to Interrogatories, responses to RFPs and production of documents as requested in the Motion and set forth herein.

8. United's objections set forth in its Opposition and at the hearing are overruled in their entirety.

9. The Court finds that United has not participated in discovery with sufficient effort and has not taken a rational approach to its discovery obligations.

10. In the event that United does not meet the deadlines of the Court, the Court will have no choice but to make negative inferences.

Accordingly, good cause appearing, therefor,

ORDER

IT IS HEREBY ORDERED that the Health Care Providers' Motion to Compel Defendants' List of Witnesses, Production of Documents and Answers to Interrogatories on Order Shortening Time is GRANTED IN ITS ENTIRETY.

IT IS FURTHER ORDERED that United is hereby compelled to fully and completely supplement its list of witnesses, provide full and complete supplemental answers to Interrogatories and responses to Requests for Production of Documents and produce documents, as follows:

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- The identity of United representatives and other third parties that have information about the allegations in the First Amended Complaint (NRCP 16.1 and Interrogatory No. 8);

- Market and reimbursement data related to out-of-network reimbursement rates and related documents and analyses (Interrogatory Nos. 12; RFP Nos. 14, 19, 20, 22, 23, 24, 33, 34, 35, 38,[2] 43);

- Methodology and sources of information used to determine amount to pay emergency services and care for out-of-network providers and use of the FAIR Health Database (Interrogatory Nos. 2, 3, 4, 10, 12; RFP Nos. 5, 8, 10, 15, 36, 38);

- Documents related to United's decision making and strategy in connection with its out-of-network reimbursement rates and implementation thereof (RFP Nos. 6, 7, 18, 32);
- Documents related to United's decision making and strategy in connection with its in-network reimbursement rates and implementation thereof (RFP Nos. 31);

- Rental, wrap, shared savings program or any other agreement that United contends allows it to pay less than full billed charges (Interrogatory Nos. 5, 7; RFP Nos. 9, 16);

- Market and reimbursement data related to in-network reimbursement rates and related documents and analyses (RFP Nos. 25, 26, 29, 30);

- Documents related to United's relationship with Data iSight and/or other third parties (Interrogatory Nos. 9; RFP Nos. 11, 12 and 21);

- Documents and communications about the at-issue claims (RFP Nos. 3, 17);

- Documents regarding negotiations between United and the Health Care Providers' representatives (RFP No. 13, 27, 28);

- Documents regarding challenges from other out-of-network emergency medicine groups regarding reimbursement rates paid (RFP No. 41);

- Documents reflecting United's failure to effectuate a prompt settlement of any of the at-issue claims (RFP No. 42); and

- Documents relating to United's affirmative defenses (RFP No. 45).

IT IS FURTHER ORDERED that United's Objections, both written and oral, to each of the foregoing interrogatories, requests for production of documents and initial disclosure obligations are OVERRULED in their entirety.

[2] RFP No. 38 is listed twice because it seeks documents concerning for both out-of-network and in-network adjudication of emergency services.

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IT IS FURTHER ORDERED that United shall produce documents identified in, and committed to, in its Opposition to the Motion on the following schedule:

- Market and reimbursement data for out-of-network and in-network providers for the Las Vegas, Nevada market by October 26, 2020 and for all other responsive Nevada and national level market and reimbursement data as set by the Court at the October 22, 2020 status check;
- Documents in support of United's affirmative defenses by November 6, 2020; and
- Data iSight closure reports by October 23, 2020.

IT IS FURTHER ORDERED that, by October 13, 2020, the Health Care Providers shall provide United a prioritization schedule of the remaining categories of information and documents subject to this Order; and by October 20, 2020, United shall respond with proposed dates of production and an explanation for same.

IT IS FURTHER ORDERED that the Court will hold a status check on October 22, 2020 at 10:00 a.m. to discuss United's compliance with this Order, the Health Care Provider's prioritization schedule and to set deadlines by which United shall supplement and produce the following:

- The identity of United representatives and other third parties that have information about the allegations in the First Amended Complaint (NRCP 16.1 and Interrogatory No. 8);
- Market and reimbursement data related to out-of-network reimbursement rates and related documents and analyses (Interrogatory Nos. 12; RFP Nos. 14, 19, 20, 22, 23, 24, 33, 34, 35, 38, 43);
- Methodology and sources of information used to determine amount to pay emergency services and care for out-of-network providers and use of the FAIR Health Database (Interrogatory Nos. 2, 3, 4, 10, 12; RFP Nos. 5, 8, 10, 15, 36, 38);
- Documents related to United's decision making and strategy in connection with its out-of-network reimbursement rates and implementation thereof (RFP Nos. 6, 7, 18, 32);
- Documents related to United's decision making and strategy in connection with its in-network reimbursement rates and implementation thereof (RFP Nos. 31);

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- Rental, wrap, shared savings program or any other agreement that United contends allows it to pay less than full billed charges (Interrogatory Nos. 5, 7; RFP Nos. 9, 16);
- Market and reimbursement data related to in-network reimbursement rates and related documents and analyses (RFP Nos. 25, 26, 29, 30);
- Documents related to United's relationship with Data iSight and/or other third parties (Interrogatory Nos. 9; RFP Nos. 11, 12 and 21);
- Documents and communications about the at-issue claims (RFP Nos. 3, 17);
- Documents regarding negotiations between United and the Health Care Providers' representatives (RFP No. 13, 27, 28);
- Documents regarding challenges from other out-of-network emergency medicine groups regarding reimbursement rates paid (RFP No. 41); and
- Documents reflecting United's failure to effectuate a prompt settlement of any of the at-issue claims (RFP No. 42).

IT IS SO ORDERED.

Dated this 27th day of October, 2020

Nancy L Allf
DISTRICT COURT JUDGE

32A 40D 89AE 2AC4
Nancy Allf
District Court Judge

Submitted by:

McDONALD CARANO LLP

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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. NO. Department 27

AUTOMATED CERTIFICATE OF SERVICE

This automated certificate of service was generated by the Eighth Judicial District Court. The foregoing Order Granting 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:

Service Date: 10/27/2020

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