IN THE SUPREME COURT OF THE STATE OF NEVADA

Supreme Court Case No. 81680
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.

PETITIONER'S MOTION TO STRIKE, OR, IN THE ALTERNATIVE, RESPONSE TO REAL PARTIES IN INTEREST'S NOTICE OF SUPPLEMENTAL AUTHORITY

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On December 16, 2020, Real Parties in Interest, 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") (hereinafter the "TeamHealth Parties") filed a notice of supplemental authority (the "Notice"), advising this Court of the recent decision in *Rutledge v. Pharm. Care Mgmt. Ass'n*, 2020 WL 7250098, 141 S. Ct. 474 (2020).

In response to this filing, Petitioners UnitedHealth Group, Inc., United Healthcare Insurance Company, United Health Care Services, Inc., UMR, Inc., Oxford Health Plans, LLC (incorrectly named in District Court Complaint as Oxford Health Plans, Inc.), Sierra Health and Life Insurance Company, Inc., Sierra Health-Care Options, Inc., and Health Plan of Nevada, Inc. ("Petitioners" or "United") hereby file the instant Motion to Strike the Notice of Supplemental Authority, pursuant to NRAP 28(j), and upon the predicate that the Notice contains argument and is therefore not in compliance with NRAP 31(e). Alternatively, Petitioners ask that this Court consider their response to the TeamHealth Parties' argument.

NRAP 31 sets forth that:

> When pertinent and significant authorities come to a party's attention after the party's brief has been filed, but before a decision, a party may promptly advise the Supreme Court or Court of Appeals by filing and serving a notice of supplemental authorities, setting forth the citations.

> The notice shall provide references to the page(s) of the brief that is being supplemented. The notice shall further state **concisely and without argument** the legal proposition for which each supplemental authority is cited. The notice may not raise any new points or issues. Any response must be made promptly and must be similarly limited.

NRAP 31(e) (emphasis added). The brief submitted by the TeamHealth Parties does not comply with this rule, as it contains a substantial amount of argument—more than a page and a half—in relation to the *Rutledge* case. NRAP 28(j) provides that "[b]riefs that are not in compliance may be disregarded or stricken, on motion or sua sponte by the court, and the court may assess attorney fees or other monetary sanctions." NRAP 28(j). On this authority, Petitioners respectfully request that this Court strike the Notice of Supplemental Authority based on its failure to comply with NRAP 31(e).

As an alternative to striking the Notice of Supplemental Authority, Petitioners respectfully submit the following brief response to the Notice for the Court's consideration. The TeamHealth Parties argue that *Rutledge* "is directly analogous to the Nevada state common law and statutory claims at issue in this case" (Notice at 1). However, as set forth below, *Rutledge* addressed a state law that only indirectly impacted health plans whereas Plaintiffs' state law claims directly impact health plans by seeking to force them not only to pay a higher rate of reimbursement than is set forth by the plan terms, but to cover whatever services they provide.

In *Rutledge,* pharmacy benefit managers (PBMs) argued that an Arkansas law requiring that PBMs make higher payments to pharmacies for prescription drugs was preempted by ERISA. *Rutledge*, 141 S. Ct. 474, 479. PBMs act as intermediaries between prescription drug plans and the pharmacies that plan beneficiaries use. *Id.* at 478. The PBM reimburses the pharmacy for the prescription, less the amount of the plan beneficiary's copayment. The prescription-drug plan, in turn, reimburses the PBM, often at an amount that exceeds the PBM's reimbursement to the pharmacy, which allows the PBM to make a profit. *Id.* To protect pharmacies from unreasonably low PBM reimbursement rates, Arkansas passed a law requiring that PBMs pay pharmacies for drugs at a price equal to or higher than the price the pharmacy paid to buy the drug from a wholesaler. *Id.* at 478–79. A group of PBMs then brought suit arguing that the Arkansas law was preempted by ERISA. *Id.* at 481–82. The argument proffered by the PBMs was that, because the Arkansas law was forcing PBMs to pay higher rates of reimbursement to pharmacies, the law was also indirectly forcing the prescription drug plans with whom PBMs contract to pay higher rates and thus the law interfered with health plan administration and was preempted by ERISA § 514(a). *Id.*

First, it should be noted that *Rutledge* was a decision about preemption under ERISA § 514(a), and therefore that ruling has no application to United's

alternative preemption argument under ERISA § 502(a), or any of its arguments concerning the legal sufficiency of Plaintiffs' state law claims.

Second, *Rutledge* does not apply to prevent § 514 preemption of Plaintiffs' claims. The U.S. Supreme Court rejected the PBMs' argument because, at bottom, the Arkansas law did not attempt to *directly* regulate or interfere with the rates of reimbursement paid by prescription drug plans. *Id.* at 480–82. Indeed, the Arkansas law only addressed rates paid by PBMs and did not reference or regulate ERISA governed health plans. *Id.* To the extent the law created some indirect cost impact on ERISA governed health plans that contracted with PBMs, the Court found this was not sufficient to cause the law to be preempted. *Id.*

Here, in contrast to *Rutledge*, Plaintiffs' state law claims seek to *directly* force the Petitioner health plans to increase the rate of reimbursement paid to out-of-network providers, and cover all the services that Plaintiffs claim they provided to members of plans insured or administered by United. Thus, unlike in *Rutledge* where the state law only *indirectly* impacted the cost of health plans, Plaintiffs' claims seek a court order requiring the Petitioners to pay for particular healthcare services, and at a higher rate of reimbursement than is provided for by the health plan terms. That is, Plaintiffs' causes of action would not have a mere "indirect" effect on ERISA plans, but would "effectively dictate plan choices," and are thus

clearly preempted by ERISA. *See e.g.*, Writ Petition at 2. *Id.* at 481. ERISA does not permit that result, and nothing in *Rutledge* suggests otherwise.

Dated: January 14, 2021

/s/ Colby L. Balkenbush

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25, I hereby certify that I am an employee of Weinberg, Wheeler, Hudgins, Gunn & Dial, LLC and that on January 14, 2021, I filed PETITIONER'S MOTION TO STRIKE, OR, IN THE ALTERNATIVE, RESPONSE TO REAL PARTIES IN INTEREST'S NOTICE OF SUPPLEMENTAL AUTHORITY via the Nevada Supreme Court's eFlex electronic filing system and served a copy to the addresses shown below (in the manner indicated below). Electronic notification will be sent to the following:

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The Honorable Judge Nancy L. Allf
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