

Case No. _____

IN THE SUPREME COURT OF NEVADA

UNITE HERE HEALTH, a multi-employer health and welfare plan, as defined in ERISA Section 3(37); and NEVADA HEALTH SOLUTIONS, LLC, a Nevada limited liability company,

Petitioners,

vs.

EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN
AND FOR THE COUNTY OF CLARK, THE HONORABLE TARA CLARK
NEWBERRY, DISTRICT COURT JUDGE,

Respondent,

- and -

STATE OF NEVADA EX REL. COMMISSIONER OF INSURANCE,
BARBARA D. RICHARDSON, IN HER OFFICIAL CAPACITY AS
STATUTORY RECEIVER FOR DELINQUENT DOMESTIC INSURER,
NEVADA HEALTH CO-OP; and GREENBERG TRAURIG, LLP,

Real Parties in Interest.

District Court Case No. A-15-725244-C, Department XXI

**APPENDIX TO PETITION FOR EXTRAORDINARY WRIT RELIEF
VOLUME 16 OF 19**

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February 25, 2021

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VOLUME 16 OF 19

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TAB 41

TAB 41

Exhibit 9

1	TRAN
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2 | IN THE EIGHTH JUDICIAL DISTRICT COURT

3 CLARK COUNTY, NEVADA

4

NEVADA COMMISSIONER OF
INSURANCE,

6 | Plaintiff,)

7 | vs.)

CASE NO.

8 MILLIMAN, INC., et al.,)

A-17-760558-B

9 Defendants.)

DEPT. NO. 16

10

11 REPORTER'S TRANSCRIPT OF PROCEEDINGS

12 | BEFORE THE HONORABLE TIMOTHY C. WILLIAMS

13 TUESDAY, OCTOBER 1, 2019

14

15 | APPEARANCES:

16 For the Plaintiff:

17	MARK FERRARIO, ESQ. DONALD L. PRUNTY, ESQ.
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19 | For the Defendants:

20	JOHN R. BAILEY, ESQ. SUZANNA C. BONHAM, ESQ.
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ANGELA CHUNG, ESQ.

MATTHEW PRUITT, ESQ.

—

25 | REPORTED BY: DANA J. TAVAGLIONE, RPR, CCR No. 841

1 LAS VEGAS, NEVADA, TUESDAY, OCTOBER 1, 2019

2 * * * * *

3
4 THE COURT: Okay. We're going to move on.

5 Next up, page 10, Nevada Commissioner of
6 Insurance vs. Milliman, Inc., et al.

7 THE REPORTER: Counsel, would you like your
8 matter reported?

9 MS. BONHAM: Yes, please.

10 MS. CHUNG: Good morning, Your Honor.

11 Angela Chung, on behalf of the management
12 defendants.

13 MR. PRUITT: Good morning, Your Honor.

14 Matthew Pruitt, on behalf of Insure Monkey
15 and Alex Rivlin.

16 MR. BAILEY: Good morning, Your Honor.

17 John Bailey and Suzanna Bonham, on behalf of
18 Unite Here Health and Nevada Health Solutions.

19 MR. FERRARIO: Good morning, Your Honor.

20 Mark Ferrario and Don Prunty for the plaintiffs.

21 THE COURT: All right. Once again, good
22 morning, everyone. And I guess this would be a
23 continuation of a prior hearing in this matter; is
24 that correct?

25 MR. FERRARIO: That is correct.

1 THE COURT: With a little bit more
2 supplementation as far as briefing is concerned.

3 MS. BONHAM: Yes, Your Honor.

4 THE COURT: All right. And, ma'am, you
5 have the floor.

6 MS. BONHAM: Thank you, Your Honor.

7 Your Honor, as you can tell from the
8 substantial briefing that has been filed in this
9 case, with respect to Defendants' Motion to Stay,
10 this is not your typical case. It's rare to have a
11 case in state court that will directly be impacted
12 by a U.S. Supreme Court decision. The original
13 right to even be formed for the Nevada Health Co-Op
14 originates from federal law, the Affordable Care
15 Act. And the right to receive federal receivables
16 is based on federal statute.

17 Your Honor, plaintiff is seeking significant
18 damages against defendants, a substantial amount of
19 which are based on federal regulations and statutes.
20 In particular, as we talked about on August 27th, at
21 the last hearing, Table 8 in Plaintiff's Expert
22 Report for Mark Fish identifies three different
23 assumptions, based on a different ruling in "Moda."
24 Either 100 percent of the risk corridor payment be
25 made and recovered by plaintiff; 12.6 percent of the

1 risk corridor payment having been paid to the
2 plaintiff; or, in fact, no additional federal
3 receivable funds being paid to plaintiff. Each of
4 those three scenarios are going to be decided by
5 "Moda" and the following CFC, Court of Federal
6 Claims case.

7 "Moda" and the CFC case are absolutely
8 outcome determinative for the issue of causation and
9 thus liability and any resulting damages related to
10 these federal receivables. Only one of these
11 alternatives though is, in fact, plaintiff's alleged
12 damages. Fish had to make assumptions, which he
13 stated expressly in his report, only one. Plaintiff
14 cannot currently argue that each of these alternative
15 scenarios were allegedly caused by defendants.
16 Again, it's only one. There's only one damage
17 amount.

18 THE COURT: Tell me, is liability discovery
19 completed?

20 MS. BONHAM: No, Your Honor. Liability
21 discovery is still absolutely -- is still absolutely
22 going on currently.

23 THE COURT: Okay. And so my question is
24 this: we're requesting a stay.

25 why would we stay the entire case?

1 MS. BONHAM: Your Honor, we would absolutely
2 be amenable to proceeding forward with discovery
3 while we wait for the "Moda" decision.

4 THE COURT: Let me see this case.

5 MS. BONHAM: But, ultimately, expert
6 opinions are going to be impacted by the "Moda"
7 decision. So as to fact-witness depositions to
8 plaintiff's point that memories fail, you know, over
9 time, we can certainly move forward and continue
10 fact-witness depositions in order to maintain
11 memories of witnesses during this period of time.

12 Additionally, Your Honor, the U.S. Supreme
13 Court has already set for oral argument the "Moda"
14 decision. It's set for December 10th. It's
15 approximately two months away, and a decision will
16 be rendered in this term by June. So our request
17 for a stay of the ultimate trial is not indefinite.
18 And, in fact, to plaintiff's credit, they have
19 already filed, in the CFC case, a Motion for Summary
20 Judgment on all other matters, all of their other
21 issues because they're legal issues, once the "Moda"
22 decision is made.

23 Additionally, Your Honor, plaintiffs have
24 argued that there's a proposed sale of the risk
25 corridor receivables. Your Honor, it's immaterial

1 to the issue before the Court today. The fact is is
2 that, again, we're not talking about plaintiff's
3 mitigation of damages, which is how they're
4 positioning themselves with respect to this sale in
5 which they're going to receive, initially, an
6 upfront amount of \$10 million. But, again, the
7 ultimate decision as to what was their alleged
8 damage is ultimately going to be decided by "Moda,"
9 not by their sale of these risk corridor receivables.

10 Further, Your Honor, and actually it proves
11 our point is that they claim that now they're going
12 to be seeking, you know, a credit, mitigation of
13 \$10 million. Well in, fact, the sale does not fix
14 that amount at \$10 million.

15 In fact, plaintiff, depending upon the
16 "Moda" decision and the recoverable, the recoveries
17 from that "Moda" decision, they're going to be
18 entitled to a waterfall scale of additional amounts
19 over and beyond the 10 million. And so even with
20 that sale, the amount of damages is still not fixed.

21 Your Honor, they also -- plaintiff also
22 raises that we have not identified hardship and
23 inequities. By staying this matter, the Court will
24 reduce and will simplify certain evidentiary
25 hearings related to causation and the amount of

1 damages plaintiff can rightfully stand before this
2 Court and the jury, stating that it has incurred as
3 an alleged damage.

4 Inequities exist because defendants are
5 having to defend against these issues that are
6 speculative in nature at this point, that will be
7 decided on or before June of 2020. In less than six
8 to eight months, we're going to have a decision on
9 this very issue.

10 This is already a complex case. By waiting
11 for a decision in "Moda," we are simplifying at
12 least one of the many issues that's going to be
13 tried. A stay will promote judicial economy, reduce
14 confusion and prejudice and prevent inconsistent
15 resolutions. If we proceed forward with trial
16 before the "Moda" decision, there will likely be
17 reversible error, and then we're going to have to go
18 back before the Court.

19 THE COURT: Depends if we're lucky or not.

20 MS. BONHAM: You're right.

21 THE COURT: One-in-three shot; right?

22 MS. BONHAM: I have to say I don't have
23 that sort of luck, and so I have to consider the
24 possibility that it's not going to be in our favor.

25 But, Your Honor, if "Moda" is decided and

1 the U.S. Supreme Court rules that, in fact, the
2 government is not required to pay any additional
3 amounts of money, then plaintiff -- any amount of
4 money that plaintiff claims right now as a damage
5 could not have been caused by defendants because
6 they would never have ultimately recovered that
7 amount, that money from the government.

8 You know, we stated within our reply a
9 proposed stipulation that, to the extent that
10 plaintiff can stipulate that it will not seek to
11 recover any amount of recovered federal receivables
12 as part of its damages, then defendants agree a stay
13 is not necessary. But by their supplemental
14 response, it is clear that they absolutely are
15 seeking these federal receivables in their damage
16 calculation. They're proving our point.

17 And to be clear, Your Honor, the federal
18 receivables, their recoverable -- unrecoverable
19 federal receivables are those amounts of federal
20 receivables that are included within Fish's
21 calculations in his Table 8 and Table 7, as well as
22 wazowski's calculations of the federal receivables
23 damages that they're seeking against -- that he's
24 claiming should be sought against defendants.

25 Your Honor, do you have any questions with

1 respect to --

2 THE COURT: No, not yet.

3 MS. BONHAM: -- all of our supplemental
4 briefing?

5 THE COURT: Not yet, but I will have some.
6 I have some questions.

7 Are you done, ma'am?

8 MS. BONHAM: I am.

9 MR. FERRARIO: Your Honor, I'd prefer to go
10 right to your thoughts because, quite frankly, I'm
11 sitting here just biting my tongue listening to
12 false premise, upon false premise, upon false
13 premise to justify this request for a stay, which is
14 really driven by the fact that the defendants have
15 really done nothing in this case up to this point.
16 And all of a sudden it's: Oh, my God, we're on the
17 virge of trial and now we've got to come in and ask
18 for a stay."

19 False premise No. 1: That "Moda" is going
20 to directly impact this case. False.

21 False premise No. 2: That the "Moda" is
22 going to decide -- "Moda" case is going to be decide
23 damages. False. We're suing these folks, as I said
24 the last time and as I'm saying here today again,
25 for damages directly caused by them.

1 Now, I would suspect -- and I haven't seen
2 it yet because they asked for delay in producing
3 their expert's opinion -- but I'm willing to bet you
4 right now that they will not proffer an expert that
5 will say that, as a result of "Moda" or "Moda" is
6 going to be case dependent here in terms of damages
7 or case determinative in terms of damages. That
8 will not happen because that's not what we're suing
9 them for.

10 We're not suing them because the government
11 didn't pay us. And, in fact --

12 THE COURT: This my recollection -- and you
13 could tell me if I'm incorrect on this,
14 Mr. Ferrario -- part of it dealt with specific claims
15 that were never filed and mismanagement and all
16 those types of things; right?

17 MR. FERRARIO: Yes. Absolutely.

18 What we said is because of their failure,
19 okay, and in particular --

20 THE COURT: Administratively and in
21 management roles; right?

22 MR. FERRARIO: Absolutely. That this
23 company, the insurance, you know, the Co-Op, went
24 under, and our expert said -- he gives different
25 dates, okay, depending on the what the jury -- you

1 know, the jury may say, "Hey, you know, we'll give
2 you a pass. As of 2014, you were okay. But you
3 know what, as of 2015, you folks over here should
4 have pulled the plug on this company or raised the
5 red flag," and then we get alternative damage
6 calculation.

7 And, Judge, I guess probably the easiest
8 thing to do, as I was going through this this
9 morning, in the financial statements, okay, which
10 some of the defendants were responsible for
11 creating, we gave them full credit, they got full
12 credit for the receivable, and even with full
13 credit, the company was insolvent.

14 So and I think what we're really talking
15 about here are legal issues. They're going to come
16 in, I would say on the verge of trial when we're
17 doing motions in limine or we're hashing out what
18 damages can be recovered, and I suspect the
19 defendants will come in with a motion, and they're
20 going to say: "Your Honor, we're not responsible
21 for the government's failure to pay NHC, that we are
22 not the proximate cause of those damages; it's the
23 government on that risk corridor amount."

24 And Your Honor is going to have that
25 briefing and Your Honor is going to look at it and

1 you're going to decide whether or not their
2 arguments meet the legal standard for proximate
3 cause. That's what this is all about. And to come
4 in and ask for a stay, which isn't supported by any
5 case that they cite which, by its nature, is going
6 to be indefinite because we don't know when the
7 Supreme Court is going to render its decision.

8 Not only that, we don't know, when the
9 decision is rendered, whether or not congress then
10 is going to act or whether they're going -- whether
11 the government is going to adopt some other strategy
12 not to pay. Okay. So by definition, the stay is
13 indefinite. So what we have here is really nothing
14 more than you see in many other cases where someone
15 is going to come in and say, "You know what, you're
16 trying to ding me with this pot of damages. It's
17 really not my fault, okay, I didn't cause that.
18 Someone else did."

19 But here we're not even seeking those
20 damages from the defendants. So at the end of the
21 day, you can't cure a deficient position with
22 volumes of material. It's a fascinating read about
23 "Moda" and it's a fascinating read about the
24 Supreme Court case. But as we pointed out in our
25 brief, there are solvent -- there's a solvent

1 insurer that's going after their funds. We would be
2 going after the government whether we were insolvent
3 or solvent because they didn't pay us.

4 So what should happen here, Judge, is we
5 should continue on with the case. Let them get
6 their experts tuned up. I think that date -- we
7 just agreed to extend it a few days because of the
8 holidays. Let them put their expert reports out
9 here, and let's see how this damage thing hashes
10 out. Let's not stay this case based on their
11 speculation, false premises, and supposition as to
12 what might happen.

13 THE COURT: So I want to make sure I'm
14 clear, from the plaintiff's perspective, you will
15 not be seeking damages caused by or proximately
16 caused by the government's failure to pay
17 reimbursements.

18 MR. FERRARIO: You're right. Your Honor,
19 to say it another way, I'm only seeking damages
20 caused by these folks. Okay? I can't be any
21 clearer. That's what we've said. That's what our
22 experts said. That's it.

23 If the government didn't pay us, okay, and
24 it was not because it was their fault, right, I
25 mean, if they had nothing to do with it, how could I

1 get the damages from them? How could I get those
2 damages from them?

3 THE COURT: I understand.

4 MR. FERRARIO: I mean, I suspect you'll
5 probably tell me I couldn't anyhow if we filed the
6 type of motions that we were filed -- or that I
7 suspect will be filed.

8 THE COURT: I guess, in a very basic
9 fundamental way, that would be akin to an
10 independent alternative causation.

11 MR. FERRARIO: Exactly. And on top of it,
12 Judge, what they're going to argue, they're going to
13 come in, and maybe their expert will say, "Hey,
14 wait, you wouldn't have failed if you'd have got
15 your payments." I expect we're probably going to
16 have to deal with that. And they're going to
17 challenge the compromise that we're trying to
18 achieve in front of Judge Cory, where we're
19 compromising that receivable. I suspect we're going
20 to have to hash all that out.

21 But that is something that will play itself
22 out once their experts come forward, once we see
23 what their response is going to be to our expert
24 reports. Now is not the time to jump into that and
25 stay this case. Certainly not time to stay the

1 expert deadlines and not time to stay liability
2 discovery.

3 And so I think, in our opposition, we did
4 about as good a job we could of deconstructing all
5 of their arguments. I'll be happy to answer any
6 questions that you have. But at the end of the day,
7 this was, from our perspective, kind of a Hail Mary
8 pass to avoid a day of reckoning on a case that they
9 know they can't defend.

10 MR. BAILEY: Your Honor, two points. The
11 first point is you asked the question of
12 Mr. Ferrario, of the plaintiffs. You said: "well,
13 you've got these claims against the defendants about
14 how they handled the claims and how they -- whether
15 or not they timely submitted claims which relate to
16 risk corridor payments and relate to the 3R's.
17 Absolutely the correct question to ask.

18 And Mr. Ferrario couldn't answer the
19 question of: If the "Moda" decision says that the
20 government does not have to pay anything, then
21 whether or not we filed claims timely or untimely or
22 completely or incompletely doesn't matter because,
23 as a matter of causation, Nevada Health Co-Op could
24 not recover those funds. The issue is when will we
25 know that? Because the Supreme Court could say:

1 "Yes, you can recover those funds"; "No, you cannot
2 recover those funds"; or something in between. All
3 of us sitting here today will never know that until
4 the "Moda" decision is rendered.

5 what we do know is that the decision is set
6 for oral argument in two months. We do know,
7 despite their arguments to the contrary, that the
8 U.S. Supreme Court renders decisions in the same
9 term that it hears the oral argument.

10 So we will know by June of next year
11 whether or not the Supreme Court is going to allow
12 Nevada Health Co-Op to recover some amount of funds
13 or not. If not, then from a causation standpoint,
14 those claims that you asked about -- whether we
15 filed them timely, untimely, or whatever --
16 completely forecloses their ability to get damages
17 on those. That's my first point. They did not
18 answer that question.

19 THE COURT: So I want to make sure: Are we
20 like two ships in the night? Is the sole source of
21 reimbursement under the facts of this case vis-a-vis
22 the Nevada Co-Op limited to risk corridor government
23 payments?

24 MR. BAILEY: Well, if you look at their
25 expert report, that's where all of those assumptions

1 come from. Okay. So we're talking plus or minus
2 \$60 million, and they are making their assumptions
3 from their expert based directly on whether or not
4 the U.S. Supreme Court allows for a recovery or not,
5 and then they have the 12.6 percent pro rata. So
6 they can stand here and say, "Geez, it really
7 doesn't matter what the U.S. Supreme Court does. It
8 doesn't affect this case."

9 THE COURT: Because I mean, from a damage
10 perspective, assuming I have the correct handle on
11 it, it's a fairly easy analysis when it comes to
12 proximate causation. And the reason why I say that
13 is this: Either all of the funds, from a
14 reimbursement perspective, that the Co-Op could
15 acquire, based upon claims being filed, is that
16 limited solely to risk corridor?

17 MS. BONHAM: No, Your Honor. Separately,
18 from these damages --

19 THE COURT: You see what I'm saying?

20 MS. BONHAM: -- that we're talking about
21 today, Your Honor, plaintiffs have additional
22 experts who have also calculated very specific,
23 identified specific claims where an overpayment was
24 allegedly made or a payment made outside of
25 eligibility, and they have calculated a separate

1 amount of damages as result of that conduct.

2 what we're talking about today is not those
3 damages.

4 THE COURT: I understand.

5 MS. BONHAM: It is regarding federal
6 receivables.

7 THE COURT: And but my point is this,
8 because there's some claims, it's my understanding,
9 being made as it relates to the failure to file the
10 claims. And so is it a two-tier process?

11 For example, and I haven't done this yet,
12 but it's my understanding you have like Medicare,
13 Part A and B, and "A" might pay some stuff; "B"
14 might pay other stuff. And so my question is this:
15 what is the source of reimbursement? What is the
16 universe of reimbursement? And I need to know that.

17 MR. FERRARIO: Your Honor --

18 THE COURT: You see where I'm going?
19 Because it's really --

20 MR. FERRARIO: No, you're actually right.
21 Here's what we're suing them for. We paid claims we
22 shouldn't have because they screwed up. Okay?
23 That's something you can address right now. It has
24 nothing to do with "Moda." Let's get it on.

25 The next thing is you failed to process

1 claims, and our receivable would have been higher at
2 the government, but we missed the deadlines to do
3 it. So we were damaged there as well because they
4 screwed that up.

5 These are the claims. It has nothing to do
6 with what the Supreme Court is going to do. Zero.

7 THE COURT: And I guess the next way to
8 look at that, we're talking about prospective, I
9 guess, in this respect, for a lot of these claims,
10 the payments have been made, right, or should have
11 been made? Is that true or not?

12 MR. FERRARIO: Some claims were made
13 that -- we paid claims we shouldn't have because
14 they didn't process them correctly, which
15 contributed to the demise of the company.

16 MS. BONHAM: Your Honor, there are certain
17 amounts of money that they're seeking against
18 defendants that would never -- that depending upon
19 the ruling in "Moda," will never -- plaintiff would
20 never be able to recover or be rightfully entitled
21 to because there is no additional funds available
22 from the government.

23 THE COURT: So were there two buckets of
24 funds?

25 MS. BONHAM: Yes.

1 THE COURT: That's what I'm trying to get
2 to.

3 MS. BONHAM: Yes, Your Honor.

4 THE COURT: There is two buckets.

5 MS. BONHAM: Yes, there are. And so with
6 respect to the buckets of funds that are from the
7 federal government, those damages we have to wait
8 for a decision from "Moda."

9 MR. FERRARIO: Your Honor, I'll tell you
10 the fallacy in that: If "Moda" comes down -- are
11 they saying that if "Moda" goes against us, that
12 they're liable for those funds? I'll flip it on
13 them.

14 MS. BONHAM: No. In fact --

15 MR. FERRARIO: Is that what they're saying?

16 MR. BAILEY: The answer is no, Your Honor.

17 MR. FERRARIO: Yeah, because they're going
18 to argue no matter what.

19 MR. BAILEY: well, the answer is no,
20 because we don't believe we're liable in the first
21 instance.

22 MR. FERRARIO: Then let's get that on.

23 MR. BAILEY: We're happy to get that on at
24 the proper time. Let me -- let me address --

25 MR. FERRARIO: Now is the proper time to

1 address --

2 THE MARSHAL: One at a time, Counsel.

3 MR. FERRARIO: I'm sorry. You're right.
4 well, I'm getting double-teamed. So I get to talk
5 twice as much.

6 MR. BAILEY: I'm used to Mr. Ferrario
7 interrupting me.

8 THE COURT: So we got two buckets. Tell me
9 about the first bucket, the nonfederal bucket.

10 what does that involve? Because actually,
11 I mean, we have all this briefing, but the concepts
12 are very straightforward. As far as damages, it
13 doesn't matter what type of court case it is. But
14 it has to be a proximate cause. I mean, for
15 example, even malpractice is a great example. If
16 you don't have your tort within the tort, there's no
17 recovery. I get that.

18 And so my point is this, and it's really
19 this simple: When it comes to proximate cause in
20 this case, I just want to make sure I understand
21 potentially what would be the avenues of recovery;
22 right? It's like that in every case.

23 MS. BONHAM: Your Honor, currently there is
24 nothing preventing the case moving forward with
25 respect to plaintiff's claims that I identify being

1 their allegation, which we wholly disagree with and
2 dispute, that UHH made overpayments on claims or
3 that UHH paid claims outside of eligibility simply
4 because the plaintiff was the sole one in control of
5 identifying, identifying who was eligible, an
6 eligible member. Those types of claims absolutely
7 can proceed forward.

8 It is the claims related to federal
9 receivables, which amount to a significant amount of
10 the damages that they're seeking in this case, that
11 is impacted by "Moda." The breach of contract claim
12 itself, with respect to whether in fact UHH
13 overpaid, whether in fact paid outside of
14 eligibility, those types of items are paid in
15 duplicate claims. Those are much straightforward,
16 are very straightforward and can move forward with.

17 THE COURT: How much time do we anticipate
18 it will take to try this case?

19 MS. BONHAM: I believe, Your Honor, that
20 one of the last hearings, it was six to eight weeks.

21 THE COURT: That's probably low.

22 MR. FERRARIO: I think that's probably
23 right.

24 THE COURT: You think so? I'm thinking
25 more three months.

1 MS. BONHAM: I actually believe,
2 Your Honor, that it's going to take longer.

3 MR. FERRARIO: Well, you know, how do
4 you -- how much of the days do we get? I mean, I
5 was in front of Judge Jones the other day, and a
6 week is really like two days or three days or
7 something.

8 THE COURT: I mean, I try to have full days
9 on Mondays and Fridays; and Tuesdays and Wednesdays
10 and Thursdays, a minimum of half a day sometimes.
11 It depends on how the calendars go.

12 But here's my point. I'm sitting here
13 looking at it, and I do believe in efficiency. The
14 first thing I asked my court clerk to do is
15 determine when was the Complaint filed in this case.
16 The Complaint was filed on August 25th, 2017. For
17 this type of case, I think this case is moving
18 quicker than most. I will say that. It is.

19 And so unless the plaintiff -- I mean, the
20 plaintiff, and Mr. Ferrario, you have to answer this
21 question for me because this is my concern: No. 1,
22 I don't want to stay anything; right? I don't. I
23 don't mind telling you that because I think it's
24 important to conduct discovery. Because when you
25 stop conducting discovery, the slowdown is

1 multiplied. That's probably the best way I can say it
2 because if you're taking depositions, you're moving
3 and moving; things are being accomplished.

4 But I would anticipate the plaintiff is not
5 willing to stipulate -- I probably wouldn't do this
6 either -- that you're not going to seek any damages
7 that would be proximately caused by or related, in
8 some manner, to federal reimbursements; right?
9 You're not going to give that up. I wouldn't.

10 But --

11 MR. BAILEY: well, hold on a second, Judge.
12 He may.

13 MR. FERRARIO: Like I said before, okay,
14 and I think that what --

15 THE COURT: Because I'm looking at
16 efficiency. But go ahead.

17 MR. FERRARIO: You know, I'll tell you what
18 the efficient way to do this is, and I suspect that
19 and I've been in front of you enough to know you're
20 going to give them the chance to do discovery.
21 Here's what we should do. Okay. Let's let the
22 expert reports come forward. Okay? I'm willing to
23 bet you, all right, what I said that their experts
24 are not going to say that they have no damages
25 because of what's at stake in the "Moda" case.

1 Okay. If their experts say that we're
2 going to have a legal issue you're going to have to
3 decide and it's a proximate cause issue -- maybe I'm
4 answering your question in a different way. If the
5 reason we're not getting money, okay, or arrear
6 damage is the government is not paying us, okay,
7 then I'm not going after them for that. I'll state
8 that right here.

9 Okay. I'm going after them for what I just
10 said.

11 THE COURT: Now, here's my question though.
12 What do you do in this regard, and I kind of get
13 that. You're saying "Look" -- you're saying, as a
14 matter of law, you can't seek that. I get that.

15 But don't we have somewhat of potentially a
16 moving target because what happens if the government
17 says: You know what, the risk corridor is funded at
18 100 percent.

19 MR. FERRARIO: We're still damaged, and
20 we've accounted for that.

21 THE COURT: Oh, no, no. I think you would
22 be damaged, but I think the damage figure would
23 potentially go up.

24 MR. FERRARIO: No. We've given them credit
25 for that in our damage calculation. That's the

1 point. We're giving them credit for what the
2 government should have paid us.

3 MR. BAILEY: Judge, let me --

4 MR. FERRARIO: Just like we did when we
5 analyzed --

6 THE COURT: I'm trying to figure that out.
7 If they were dilatory in filing a claim that would
8 have been covered by the risk corridor --

9 MR. FERRARIO: That's a different issue
10 there. That's --

11 THE COURT: That's what I'm talking about.

12 MR. FERRARIO: But time out, no. And I'll
13 tell you why that's different. We've lost the
14 ability to recoup that. We lost the ability to
15 recoup that. So that's not coming back to us from
16 the government.

17 THE COURT: Okay. But here's my question
18 though, Mr. Ferrario, and I think -- I get that, and
19 I would not -- I mean, I would think you wouldn't
20 give that up either.

21 MR. FERRARIO: I'm not giving that up.

22 THE COURT: But, hypothetically, the amount
23 of reimbursement has to be firmed up; right? It
24 could be --

25 MR. FERRARIO: No. We know what the amount

1 is. It's fixed. The government has agreed to it.
2 It's fixed.

3 THE COURT: Is that true or not?

4 MR. FERRARIO: Absolutely true.

5 MS. BONHAM: No, Your Honor. It's not
6 fixed. "Moda" is going to decide that.

7 MR. PRUNTY: If I may, Your Honor.

8 MR. FERRARIO: Judge, let me --

9 MR. PRUNTY: The amount of money that the
10 government owes us, they're not disputing they owe
11 us the money. They're just saying -- you see
12 messages saying "I don't have the allocation of
13 funds to pay you."

14 And as counsel over here said, in the
15 Federal Court of Claims case, we've agreed on it,
16 there are no material facts at issue. We've agreed
17 on the amount of money that should have been paid to
18 us, and that number is fixed because it impacts
19 every other insured that's out there because it's a
20 percentage of the total population.

21 And so the amount of money that the
22 government owes to NHC is a fixed number that both
23 the government and NHC has agreed on, and there is a
24 Motion to Dismiss and a Countermotion for Summary
25 Judgment in which both sides agree to the number.

1 MR. FERRARIO: Exactly.

2 MR. BAILEY: Judge, can I offer --

3 THE COURT: Of course you can.

4 But what's the impact? Are you saying that
5 we'll have a finite figure as far as what the total
6 reimbursements would be as a result of that case
7 there?

8 MR. FERRARIO: We know that. We know what
9 our total potential recovery could be, and as we've
10 said in our pleading -- and we filed it; it's a
11 matter of public record -- we're seeking to now
12 compromise that unknown, that receivable, down to
13 \$10 million, and that's proceeding in front of
14 Judge Cory and I think will be heard 6/16.

15 So all of -- and, again, their experts --
16 presuming Judge Cory approves that, let's just play
17 that out -- he approves it, compromise 10 million
18 bucks. Their experts will now figure that into
19 their calculation.

20 And they may come in and maybe their
21 experts are going to say, "Hey, you know, what we
22 didn't cause you any damage. The reason you failed
23 was because the government didn't pay you, because
24 the government wouldn't fund the risk corridor.
25 That's it. That's why you failed." That's a fight

1 we're going to have because, you know what, I can't
2 dispute that the government didn't fund it.

3 Now, they're going to say that the cause of
4 your failure is the government's failure to fund.
5 I'm going to say the cause of our failure was you
6 failed to fulfill your contractual obligations and
7 do your job. That's how this plays out, Judge.
8 what's happening in the "Moda" case has no impact on
9 what we're doing here. None.

10 MR. BAILEY: Judge, may I be heard?

11 THE COURT: Of course, Mr. Bailey.

12 MR. BAILEY: Let me talk about two things.
13 One, cutting to the chase, I'm talking about
14 practically what happens if we go to trial prior to
15 the "Moda" decision, and then let me offer a
16 solution that I think will meet your objective of
17 efficiency and, at the same time, be efficient for
18 the parties.

19 So let me start with, let's assume we go to
20 trial before the "Moda" decision comes down. What
21 will happen, we will go to trial, and one party will
22 lose, and that party -- doesn't matter which party
23 it is; that party will lose -- and that party will
24 appeal to the Nevada Supreme Court. In fact, both
25 sides may be aggrieved by the decision and there may

1 be a cross-appeal to the Nevada Supreme Court.

2 As this matter is before the Nevada Supreme
3 Court, then the "Moda" decision will come down, and
4 that decision will answer whatever happens in the
5 Court of Federal Claims, and the Nevada Supreme
6 Court will be looking at this case saying: "You
7 guys knew this decision had an impact on your
8 decision, yet you went to trial anyway. Why would
9 you do that?"

10 And they will do that, "they" being the
11 Nevada Supreme Court, by looking at the jury
12 instructions and saying: "These jury instructions
13 are inconsistent with what the United States Supreme
14 Court said in 'Moda.'" And one or both parties,
15 whether there's an appeal and/or a cross-appeal,
16 will be making similar types of arguments.

17 And ultimately -- and I say "ultimately,"
18 Judge -- and I put this to you because I've been
19 practicing for 35 years; I know you've been
20 practicing before you ascended to the bench for
21 35 years as a practitioner, and Mr. Ferrario has
22 been practicing for over 30 years. We've been to
23 this rodeo. And the Nevada Supreme Court will say:
24 "Well, given what the United States Supreme Court
25 said in 'Moda,' these jury instructions do not

1 represent what the law is, and there are issues
2 regarding damages; there's issues regarding
3 causation. We're going to send the case back down
4 to you, Judge Williams, so that you can retry this
5 case based on the decision that was rendered in
6 'Moda'."

7 And so where does that leave us? We're
8 going to end up trying this case twice, assuming
9 that we try this case before the "Moda" decision
10 comes down.

11 THE COURT: I don't think I've had to do
12 that yet. But go ahead.

13 MR. BAILEY: Well, this could be your first
14 time. Okay. So we're going to try this case twice,
15 and where does that leave us?

16 Well, it leaves us with parties who are not
17 happy because they're spending twice as much on
18 attorneys' fees. And, of course, there's some
19 attorneys that would say "What's wrong with that?"
20 I'm not one of those attorneys. I don't think that
21 your client should be spending twice when we're
22 sitting here today knowing that the U.S. Supreme
23 Court has granted Cert.

24 We know that there is a oral argument on
25 December 10th. We know that we'll have a decision

1 by the middle of next year in "Moda," and we'll know
2 what we're all doing. We don't know what the
3 Supreme Court will do, but it could do many things.
4 And trust me, us, the counsel for the parties, will
5 look at that decision and tell you what the impact
6 of that decision has on the claims that have been
7 filed against us.

8 So is it really smart, does it make sense
9 for us to try this case before we know what the
10 U.S. Supreme Court says in "Moda"? The answer is
11 obviously no.

12 But let me cut to what you're trying to
13 accomplish, appropriately, which is how do we
14 continue to move this case forward and, at the same
15 time, not try this case before we know what the
16 U.S. Supreme Court says, and the answer to that, I
17 think -- and I offer this as a suggestion to the
18 Court -- is fact witnesses are fact witnesses. The
19 U.S. Supreme Court's decision in "Moda" is not going
20 to change fact witnesses or their testimony. Let's
21 move forward with the fact witnesses, get all of the
22 information we can through their depositions,
23 testimony and so forth, which solves whatever issue
24 the plaintiffs have asserted regarding memories and
25 so forth.

1 Once we get that information, we will
2 probably be, you know, halfway or a quarter of the
3 way through next year. We wait until we hear what
4 the U.S. Supreme Court has to say, and then we take
5 that information -- because it will impact what
6 we're doing -- and that will provide us the basis
7 for making sure that we can proffer our expert
8 reports consistent with what the U.S. Supreme Court
9 says.

10 That way, this case continues to move
11 along, and as you've indicated, we've only -- this
12 case was filed in 2017. I think we were brought in
13 last year, in 2018. The case continues down an
14 appropriate track of depositions and discovery as it
15 relates to fact witnesses. We will get the decision
16 in "Moda," by latest, June of next year, and then we
17 can take that decision, analyze it, see how it
18 impacts the causes, causes of actions that have been
19 asserted, how it impacts our affirmative defenses,
20 then offer our expert reports and go to trial.
21 We're happy to go to trial.

22 But that is the logical, least expensive
23 judicial-resource-saving way to approach this, and I
24 understand it's a compromise, but it seems to me --

25 THE COURT: Well, for me, you know --

1 MR. BAILEY: -- it makes perfect sense.

2 THE COURT: I just want to tell everybody
3 this, I don't necessarily see it as a compromise in
4 this regard; I see it more as a pragmatic approach
5 as to how to handle this matter.

6 MR. BAILEY: Of course.

7 THE COURT: And here's the reason why I
8 bring that up, Mr. Ferrario, I looked at the trial
9 date. I don't want to stay this matter, but if
10 "Moda" potentially can have an impact --

11 MR. FERRARIO: It can't, Judge. That's the
12 point. And Mr. -- at the point very end of his
13 ten-minute dissertation, he said, "Let's see what
14 the decision says and see how it impacts."

15 MR. BAILEY: Well, I'm sorry. I misspoke.
16 The decision will impact.

17 MR. FERRARIO: It will not, and he can't
18 articulate how it will. They haven't done it in
19 their pleadings, and this is what should happen,
20 okay. I know you're going to give us relief from
21 the trial date because I think it's coming up like
22 January 20th.

23 THE COURT: Exactly. It's right around the
24 corner.

25 MR. FERRARIO: So here's what we should do,

1 keep their feet to the -- I want to see what their
2 expert say about "Moda." Let's see what their
3 experts say, how it weaves into it. Let's see how
4 they respond to us. We gave them credit for the
5 "Moda" payments. This is nothing more than a
6 smokescreen to avoid a trial. With all due respect
7 to Mr. Bailey, who I respect tremendously, that's
8 all this is. Okay.

9 THE COURT: We can't avoid a trial
10 ultimately. It's kind of like this --

11 MR. FERRARIO: Let's get through -- no,
12 and I think we should keep the same schedule because
13 Judge Cory is going to hear something on the 16th
14 that's going to probably result in another round of
15 motion practice here.

16 Okay. As I indicated to the Court, this is
17 really about causation and proximate causation. All
18 that is going to get played out once we know what
19 their experts are going to say. So let's continue
20 on with expert discovery. Okay. They've already
21 had -- we've had to listen to them the other day ask
22 for a year's continuance for their experts to even
23 look at the underlying data, which was absurd.

24 So if you look at their pattern of behavior
25 here, it's all about delay-delay-delay. Okay.

1 "Moda" is not going to change one thing. We will
2 have a trial regardless of how "Moda" comes down,
3 and we've already taken into account the what-ifs of
4 "Moda" in our damage scenario.

5 As I said before, if they want to argue to
6 the jury: "This thing wouldn't have failed but for
7 the government not paying," they have that argument.
8 Okay. The "Moda" decision isn't going to change
9 what we're claiming against them, one way or the
10 other.

11 THE COURT: So I guess, back to my earlier
12 question, your client is not seeking receivable
13 damages proximately caused by the government's
14 failure to pay in this matter.

15 MR. FERRARIO: Exactly. But there's a
16 thing in there that --

17 MR. BAILEY: "But."

18 MR. FERRARIO: No, listen. The "but" is
19 really simple. If they deprived us the opportunity
20 to claim that from the government, we are seeking
21 that. Okay. Now, what will happen is when we
22 compromise our claim, if Judge Cory approves it,
23 they're going to argue that --

24 what was that, 6 million bucks?

25 MR. PRUNTY: (Inaudible response.)

1 MR. FERRARIO: They're going to say that
2 that shouldn't be 6 million; it should be a reduced
3 amount. That will be another fight.

4 THE COURT: But here's my question. Now,
5 I'm following the legal logic on this. Now we're
6 talking about, well, I'm not giving that up as it
7 relates to a deprived opportunity.

8 MR. FERRARIO: That's all.

9 THE COURT: Okay. How do we calculate the
10 deprived opportunity?

11 MR. FERRARIO: I'll tell you how it's going
12 to -- I'll tell you exactly what they're going to
13 say. They're going to say, "You compromised
14 this, let's see, our claim" -- let's make the math
15 easy so I don't have to --

16 THE COURT: Let me --

17 MR. FERRARIO: No. Our claim is
18 \$30 million. Let's say we're settling it for ten.
19 Okay. So we're settling it for what? One third.

20 MR. BAILEY: well, you're not settling that
21 for ten because there's a waterfall provision in it
22 that there is additional funds to be had depending
23 upon what happens in "Moda."

24 MR. FERRARIO: That's de minimus on that.

25 MR. BAILEY: Money is money.

1 MR. FERRARIO: What they're going to
2 argue --

3 THE MARSHAL: One at a time, Gentlemen.

4 MR. FERRARIO: What they're going to argue,
5 Your Honor, is you settled for one third. So your
6 \$6 million claim is really what? Do the math.
7 \$2 million. That's what they're going to say.

8 Is that right?

9 MR. BAILEY: Yes.

10 MR. FERRARIO: Did I get it right?

11 MR. BAILEY: You're in the ballpark.

12 MR. FERRARIO: All right. I'm in the
13 ballpark. That's all I'm trying to do.

14 Okay. So that's what they're going to say,
15 but that's another argument we'll have. You're not
16 going to hold up a multimillion-dollar case where
17 we're seeking damages in excess of \$20 million,
18 okay, based upon this one element of our claim.

19 THE COURT: But tell me this though, and I
20 don't know the answer to this. But, I mean,
21 hypothetically, if they're attacking one element of
22 the claim, do they have the right to do so? And I
23 can't make the determination that --

24 MR. FERRARIO: Absolutely. Let their
25 expert come out and let them pack it. Let us have

1 motion practice in front of you.

2 THE COURT: But here's the thing though, I
3 mean, but at the end of the day, damages can't be
4 speculative.

5 MR. FERRARIO: You're right. That's what
6 they're going to argue. You're going to decide
7 that.

8 THE COURT: Well, then isn't the proper
9 vehicle to decide this vis-a-vis Motion in Limine or
10 motions for --

11 MR. FERRARIO: Absolutely. Let's get the
12 expert. Let it all hash out. You're going to
13 decide this. You're not going to let speculative
14 theories go to the jury. I agree with you. That's
15 what I said at the beginning. They just want to
16 stop this now -- and let me make this clear. We
17 represent a failed company. We represent a
18 receiver.

19 Okay. I think, personally, the folks on
20 the other side are trying to drag this out because
21 they know, from our other filing, that to keep this
22 thing going, it has cost a tremendous amount of
23 money. The estate is hemorrhaging. Okay. So it's
24 like drag it out, drag it out, and maybe they'll
25 just go away. Well, that's not going to happen,

1 Judge.

2 THE COURT: Well, I never anticipate that
3 happening.

4 MR. BAILEY: Of course not.

5 MR. FERRARIO: But that's what -- and so we
6 have to keep in mind what's going on, who we
7 represent. There's another judge here that's
8 monitoring how we spend money and what we do. So
9 I'm not here trying to do something inefficient.

10 But the one thing I do know is delay is
11 against what's in the best interest of this estate,
12 the best interest of the creditors and the claims,
13 and the best interest of the people that Judge Cory
14 is to protect.

15 So I think this Court has to strike a
16 balance, and you've already struck one balance by
17 giving them until the beginning of December to do
18 their expert reports. Let's see what their experts
19 have to say. You're going to continue the trial
20 date. Let's pick a new date. Okay? I'm okay with
21 that.

22 THE COURT: Balance.

23 MR. BAILEY: Here's the fallacy in that
24 argument. The question is if "Moda" has no
25 relevance to this case, why is it that their expert

1 did three different damage calculations based on --

2 THE COURT: "Moda."

3 MR. BAILEY: -- "Moda"?

4 MR. FERRARIO: He didn't.

5 MR. BAILEY: And the other point,

6 Your Honor, he tends to suggest to you that we're
7 trying to just use up funds or inappropriately cause
8 the expenditure of funds. We're asking for a stay,
9 in part, because of the efficiency that's involved
10 in waiting for that decision.

11 Remember, Your Honor, we represent a
12 nonprofit. Nobody is interested in spending money
13 if we don't have to.

14 MR. FERRARIO: Your Honor, I haven't heard
15 how they -- they have not articulated, in one way,
16 how they will be efficient -- how "Moda" will impact
17 and make this -- the decision will make it more
18 efficient. Not once have they done that.

19 THE COURT: Well, here's my question
20 though, as far as Mark Fish is concerned, is it true
21 that he has one of three scenarios: "Assuming CMS
22 funded the risk corridor payments at 100 percent;
23 two, assuming CMS funded the risk corridor payments,
24 pro rata, at 12.6 percent; or assuming no 2015 3Rs
25 credits." Is that what he says?

1 MR. FERRARIO: You're right. What he is
2 saying is he's giving them credit for that. Okay?
3 They're not getting --

4 THE COURT: Didn't he have to pick one?

5 MR. FERRARIO: Well, no. The reason the
6 12.6 is in there is because that was what the
7 government was reimbursing. Okay. That was the
8 normal -- that was what they were doing up to that
9 point in time. They're going to argue --

10 THE COURT: Okay. Then but if it's
11 12.6 percent, wouldn't that be the figure he would
12 rely upon, if that was reasonable and customary?

13 MR. PRUNTY: The 12.6 percent, I believe,
14 was already paid. It's the balance of it that's at
15 issue in "Moda."

16 MR. BAILEY: Your Honor, you're hitting the
17 nail on the head. They have to pick one. They
18 can't pick one, understandably, because they don't
19 know what "Moda" is going to say.

20 So in other words, you're going to find
21 yourself, if we go to trial before the "Moda,"
22 they're going to be in front of the jury saying
23 "It's one of these three. We don't know which one
24 it is because the Supreme Court hasn't ruled."

25 And we're going to be up yelling and

1 screaming saying, "You can't do that. You're
2 prejudicing us with the jury." Of course, that's
3 going to be an issue on appeal, depending upon how
4 things work out.

5 Exactly the reason, you've honed in on the
6 question: Why is it that your expert is providing
7 three different alternative damage theories assuming
8 what "Moda" does? Well, the answer to that, even
9 though Mr. Ferrario respectfully is speaking out of
10 both sides of his mouth: "Moda" doesn't mean
11 anything to us, but our expert says, "Oh, yes, it
12 does because our assumptions are based upon what
13 comes down in "Moda."

14 MR. FERRARIO: Our expert is giving him
15 credit for that. He's taking away an argument they
16 would make. He's anticipating their argument and
17 saying "I'm giving you credit for it." How are they
18 ever going to be hurt for that? They will never do
19 better.

20 THE COURT: But here's my -- but where does
21 he say that?

22 MR. BAILEY: He doesn't.

23 MR. FERRARIO: By the bottom line number.
24 Giving them credit for 100 percent of the risk
25 corridor payment, our damages are 115 million, if

1 the jury believes that we should have shut this down
2 12/31/2014.

3 If the jury says: "No, you know what,
4 these guys hadn't screwed up enough, but they
5 definitely should have shut it down 4/30/2015," our
6 damages are 69.7 million.

7 The next one is our damages --

8 THE COURT: How does that impact the
9 reimbursement rate? That's what I'm really trying
10 to figure out.

11 MR. FERRARIO: It doesn't. That's the
12 point. We're giving them full credit for that.
13 They're going to stand up -- that's what I've been
14 saying. I can't ding them for the government not
15 paying us. I can't be any clearer.

16 THE COURT: Do you think the issue is how
17 he's presenting this --

18 MR. FERRARIO: It is. It's confusing. I'm
19 going to tell you right now it's confusing as hell.

20 THE COURT: Okay.

21 MR. FERRARIO: I'm putting that on the
22 record, and you know what --

23 MR. BAILEY: And we will stipulate to that,
24 Your Honor.

25 MR. FERRARIO: It is confusing. I mean,

1 I've yelled at Mr. Prunty here for the last week
2 about how he could let this go out this confusing.

3 THE COURT: That's my point. I'm trying to
4 figure out, because for me, it's --

5 MR. FERRARIO: You know what, Judge, here,
6 I've got a solution. You gave them a chance to
7 throw a bunch of volume at you. So here's what I'm
8 going to propose: I'm going to go back, and I'm
9 going to make Mr. Fish make this clear. Okay? And
10 I'm going to submit a supplemental report, and I
11 need --

12 Two weeks? Where is this guy at?

13 Don is an accountant, which is part of the
14 reason this is so screwed up. But I'll go -- I will
15 submit a supplemental report -- and let's do this,
16 Judge. Let's even make it one better. Let's put
17 this over to the end of the month because, by then,
18 Judge Cory will have heard our motion on the 16th
19 and we'll have more color on this.

20 But what I don't want to do is move any
21 dates at this point. You gave them a chance to come
22 in and give you lots of volume. I'm going to come
23 in and give you clarity. That's all I'm asking for
24 because I agree it's a confusing chart.

25 THE COURT: Because I mean, potentially,

1 it's a moving target.

2 MR. FERRARIO: It isn't going to be --

3 MR. BAILEY: It is because if you look at
4 their schedule, at the very bottom, it says
5 "Damages," and they've got, what, 3, 6, 12 different
6 sets and amounts of damages. It is a moving target.
7 It's not our responsibility that it's a moving
8 target.

9 MR. FERRARIO: It's not a moving target,
10 Judge. It's anticipating, it's going into the jury,
11 we're going to say -- I'll tell you what I'm going
12 to argue. I'm going to argue that, on 12/31/2014,
13 we should have pulled the plug on this so my damages
14 are 115 million bucks. That's what I'm going to
15 start with. Now --

16 MR. PRUNTY: And there is no effect.

17 MR. FERRARIO: And there is no effect.
18 They're going to say, "Oh, no. We didn't have
19 enough." Okay. So our expert anticipated other
20 possible dates and came up with alternate damage
21 theories, which is perfectly acceptable,
22 anticipating arguments they might make.

23 I'm only asking -- I'll clarify this chart.
24 Okay? I'll clarify this report because it is
25 confusing. I'm asking to the end of the month. By

1 then, we'll have Judge Cory's decision. Let's not
2 tamper with any dates at this point. I can't make
3 it any clearer. I'm not going after them for what
4 the government didn't pay us.

5 MR. BAILEY: The only two things I'm asking
6 for, Your Honor, is this: One, that we not try the
7 case before we know what the U.S. Supreme Court
8 says. And at the rate things are going, probably
9 won't happen in any case because the Supreme Court
10 will render its decision, at the latest, in June of
11 next year. So, you know, I'm asking for that. As a
12 practical matter, it doesn't sound like that would
13 happen anyway. But that's what we're asking for.

14 The second thing we're asking for is we
15 want specificity and clarity on what our expert has
16 to do in response to their expert, and we would like
17 to know what the U.S. Supreme Court and the
18 Court of Federal Claims has to say on this because
19 it will impact on what our expert opines on, and the
20 only way we can do that is to hear those decisions.

21 The point is we should not be spending
22 money, resources over and over with our expert.
23 This is, you know, expensive because what they've
24 provided is not clear. They're going to go back and
25 redo it again; and we would like to know, with

1 clarity, and it will be with clarity from the
2 U.S. Supreme Court. You know, you can't appeal from
3 there. They will tell us what the law is, what's
4 recoverable, what isn't, why, and they'll probably
5 say a lot of other things that will be meaningful to
6 both sides. That's really what we're asking for.

7 MR. FERRARIO: Your Honor --

8 MR. BAILEY: Call it a Motion to Stay or
9 something else, but that's what we're asking for.
10 That's efficiency at its finest.

11 MR. FERRARIO: Your Honor, the false
12 premise there, and with all due respect, the
13 Supreme Court's decision is going to have zero
14 impact on this case. And you know what, if their
15 experts think it does, then you know what they're
16 going to say? They're going to come in and they're
17 going to say:

18 "Okay. The government didn't pay. They
19 didn't pay \$35 million," or whatever the number is,
20 okay. "We're not responsible for that and, oh, by
21 the way, that's what caused the demise of this
22 company." That's what they're going to argue. That
23 event has already occurred. Okay. The failure to
24 pay, the causation that resulted from that, as it
25 relates to the government, has already occurred.

1 Nothing will change.

2 THE COURT: When do you think your expert
3 is going to have this report done, Mr. Ferrario, the
4 supplemental?

5 MR. FERRARIO: The report is done. I just
6 need -- I'm just going to have him clarify that
7 chart.

8 And I can't be any clearer, Judge. We're
9 giving them credit. They're not being hurt by this.
10 We're already assuming that "Moda" -- no. We're
11 already assuming we get that money from "Moda" in
12 these damage calculations.

13 THE COURT: Well, I'd like to see the new
14 supplemental report so I --

15 MR. FERRARIO: I will get you something
16 supplemental.

17 THE COURT: -- so I can have some clarity.
18 Just as important too, where are we at,
19 from a defense perspective, as relates to expert
20 disclosures?

21 And was this one of those cases where we
22 staggered experts?

23 MS. BONHAM: Your Honor, recently,
24 Your Honor signed an order, based on the last
25 hearing, which allows for defendants to designate

1 experts on December 5th. We have a status
2 conference on November 6th --

3 THE COURT: That's what I'm looking at.

4 MS. BONHAM: -- in order to talk about
5 because there is significant amounts of production,
6 despite plaintiff's representations, that has not
7 been produced that absolutely goes to the very heart
8 of their claims that we need in order for our
9 experts to arrive at even the calculations for the
10 overpayments.

11 MR. FERRARIO: Your Honor, I'm not going to
12 deal with that now. We'll deal with that then. I
13 think we just continued that 5th date, if memory
14 serves me correctly.

15 THE COURT: This is what I'm going to do,
16 and I think this is probably a practical way to
17 handle this: No. 1, and from my perspective, the
18 judge doesn't have positions, but I think it's
19 important to point out that due process has a
20 significant impact and overriding importance in
21 every case; right? It does.

22 And so I'm looking at it in this regard,
23 and I can't say this is a case where somebody has
24 been sitting on their hands. It's not that case.
25 And I want to efficiently handle this matter. I

1 think, in all likelihood, what we want to do is this
2 because I think we'll probably end up moving the
3 January trial date. How far we're going to move it,
4 I don't know.

5 But I'll have a much better barometer as to
6 what has to be done as of November 6, 2019. I think
7 you can assume right now we're not going to trial in
8 January. This case isn't ready for trial.

9 MR. BAILEY: Yes.

10 THE COURT: I'm just telling you that. So
11 that's not the concern.

12 And maybe what we should do, at that point,
13 and Mr. Ferrario, would your report have been
14 submitted by then?

15 MR. FERRARIO: I'll get it supplemented by
16 then and sooner, well in advance.

17 THE COURT: And so what we're going to do
18 with the status check, it just has issues. One of
19 the issues of paramount significance would be this:
20 what's a realistic scheduling order at that point.

21 And I don't know for sure what's going to
22 happen, but maybe "Moda" will still be an issue on
23 the table I have to grapple with, maybe not.

24 So but what I want to do is we have to
25 still move this case along. And we all agree on one

1 point, I think we can, and I don't think this is
2 that case necessarily because it probably has to be
3 tried. I don't even know if a settlement even is
4 feasible, but trial dates do help things get done
5 and accomplished, and so that's what I want to do.

6 So for the record, I will say this: The
7 January 27th, 2020, trial date will be off the
8 table.

9 One of the things I'm going to look at too,
10 and understand this, and this is -- like, for
11 example, today we have a calendar call at 10:30, and
12 some of the cases aren't going to go to trial.
13 Because we have trials, right, I want to try to --
14 wherever I put this, I'm going to try to
15 strategically put it in a place where it's going to
16 go to trial.

17 Interestingly, it would have been nice if
18 it would have been a business court case. It's not.
19 I looked at that. It's a "C." It's not a "B,"
20 believe it or not. If it was a "B," I could give it
21 some priority. I don't know how --

22 MR. FERRARIO: Maybe we should file a
23 motion and make it a "B."

24 THE COURT: I don't know how you do that.
25 But I'm quite sure you could figure that out. But

1 this is business court, and if it's a "B," we give
2 it more priority; right? Everybody understands
3 that.

4 And so that's what we'll do, and we'll
5 change the status check. For the record, it's going
6 to be more than issues; it's going to be the
7 supplemental disclosures as relates to experts.

8 And, No. 2, based upon the current status
9 of the case, you're going to update me what would be
10 a realistic and achievable trial date.

11 MR. FERRARIO: Thank you, Your Honor.

12 MS. BONHAM: Your Honor, for which hearing
13 date? I want to make sure I --

14 THE COURT: This is November 6th.

15 MS. BONHAM: The November 6.

16 I just wanted to make sure and confirm that
17 it was on the November 6th hearing date.

18 THE COURT: It's November 6 we have status
19 check issues. We're going to expand issues. We're
20 going to talk about the supplemental expert report
21 by Mr. Ferrario.

22 And make sure I get a copy of that.

23 MR. FERRARIO: I will, Your Honor.

24 THE COURT: And so I can be educated on it.
25 And just as important too, and we don't need any

1 briefing on it. We can talk about it.

2 MR. FERRARIO: Okay.

3 THE COURT: We don't. And then if there's
4 some discovery issues outstanding -- there appear to
5 be -- and I would hope you could work it out without
6 court intervention.

7 And just as important too, this still is a
8 "C" case. So, ideally, you would go to the
9 Discovery Commissioner for all those problems;
10 right? But I guess I'll handle it in such a manner
11 where it's akin to a "B" case and discovery issues
12 come up, I'll take care of those. That way it will
13 be a quicker resolution. There won't be a delay.

14 So anyone else want to add anything?

15 MR. BAILEY: Perfect, Your Honor.

16 MR. PRUITT: Your Honor, I thought it was a
17 "B" case because it moved over from --

18 MS. BONHAM: Judge Delaney.

19 MR. PRUITT: -- Judge Delaney.

20 MR. PRUNTY: I thought so too.

21 MS. BONHAM: I really believe, Your Honor,
22 that it is a business court case.

23 MR. PRUNTY: I think it is, Judge.

24 THE COURT: I thought I had saw some
25 C-stuff. Maybe it is a "B" case.

1 Is a it a "B" case?

2 THE CLERK: Yeah.

3 THE COURT: Okay. All right. Good. It's
4 a "B" case.

5 MR. BAILEY: Your Honor, just for the
6 record, on our Motion to Stay, you are staying your
7 ruling on that motion, subject to further rulings in
8 the future; correct?

9 THE COURT: Well, yeah. And I don't mind
10 telling you this, I don't think a stay would be
11 appropriate. It would be more akin to continuing
12 the matter and put it at a proper trial date.

13 MR. BAILEY: Perfect.

14 THE COURT: That's kind of how I see that
15 because we want to keep things moving forward, from
16 a discovery perspective. And because I think the
17 problem with the stay is essentially this, and
18 sometimes you have to do it, but everything stops
19 and the case isn't moving forward.

20 Even if you have a trial date further down
21 the road, you continue with your expert disclosures
22 and move the case along; you come in front of me
23 with potential discovery disputes as relates to
24 document productions and all those other things.

25 MR. BAILEY: And as you heard, we clearly

1 have no issue with moving forward with a lot of the
2 discovery that needs to take place.

3 MR. FERRARIO: Thank you, Your Honor.

4 MR. BAILEY: Thank you, Your Honor.

5 MS. BONHAM: Thank you, Your Honor.

6 THE COURT: We're going to vacate the trial
7 date. I'm going to give you a new trial date.

8 MR. FERRARIO: That's what I thought.
9 Thank you, Your Honor.

10 THE COURT: All right. Everyone enjoy your
11 day.

12 MR. BAILEY: Thank you, sir.

13

14 (The proceedings concluded at 10:19 a.m.)

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CERTIFICATE OF REPORTER

STATE OF NEVADA)
)SS:
COUNTY OF CLARK)

I, Dana J. Tavaglione, a duly commissioned and licensed Court Reporter, Clark County, State of Nevada, do hereby certify: That I reported the proceedings had in the above-entitled matter at the place and date indicated.

That I thereafter transcribed my said shorthand notes into typewriting and that the typewritten transcript of said proceedings is a complete, true and accurate transcription of said shorthand notes.

IN WITNESS HEREOF, I have hereunto set my hand, in my office, in the County of Clark, State of Nevada, this 25th day of October 2019.

/s/Dana J. Tavaglione

DANA J. TAVAGLIONE, RPR, CCR NO. 841