

# In the Supreme Court of Nevada

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Elizabeth A. Brown  
Clerk of Supreme Court

SIERRA HEALTH AND LIFE INSURANCE  
COMPANY, INC.,

Appellant,

*vs.*

SANDRA L. ESKEW, as special administrator of  
the Estate of William George Eskew,

Respondent.

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Appeal from the Eighth Judicial District Court, Clark County  
The Honorable Nadia Krall, District Judge  
District Court No. A-19-788630-C

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## JOINT APPENDIX Volume 1 of 18

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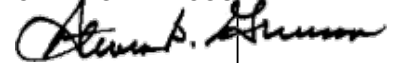
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IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA  
IN AND FOR THE COUNTY OF CLARK

SANDRA L. ESKEW, individually and  
as Special Administrator of the Estate  
of William George Eskew; TYLER  
ESKEW; and WILLIAM G. ESKEW, JR;

Case No. A-19-788630-C

Dept. No. Department 14

Plaintiffs,

vs.

SIERRA HEALTH AND LIFE INSURANCE  
COMPANY, INC.; and DOES I through XXX,  
inclusive,

**COMPLAINT and JURY DEMAND**  
**Exemption Requested:**  
**Damages Exceed \$50,000.00**

Defendants.

Plaintiffs, by and through their attorney, Matthew L. Sharp, hereby allege and complain  
as follows:

**I. JURISDICTION**

1. Plaintiff Sandra L. Eskew (“Sandy”) is the Special Administrator of the Estate  
of William George Eskew (“Bill”). She is the surviving spouse of Bill. As his surviving  
spouse, Sandy has standing under NRS 41.085 and NRS 41.100.

2. Plaintiffs Tyler Eskew (“Tyler”) and William George Eskew, Jr. (“BJ”) are the  
surviving children of Bill. Tyler and BJ have standing under NRS 41.085.

3. Plaintiffs are residents of Clark County, Nevada.

4. At all relevant times, the injuries to Bill, and his death, occurred while Bill was  
a resident of Clark County, Nevada.



5. Defendant Sierra Health and Life Ins. Co., Inc. (“SHL”) is an insurance company residing in Nevada with its principal place of business in Clark County, Nevada.

6. Defendants DOES I through XXX are persons, firms, corporations, and/or business organizations whose true identities are presently unknown. Plaintiffs allege Defendants DOES I through XXX engaged in wrongful and tortious conduct. When the true names of DOES I through XXX are discovered, Plaintiffs will request leave to amend the complaint. Plaintiffs allege that Defendants DOES I through XXX engaged in conduct that caused injury to and/or the death of Bill. Defendants DOES I through XXX are responsible for the acts of SHL. They engaged in conduct to assist, authorize, or direct SHL to engage in the tortious conduct as alleged in this complaint, including the refusal to authorize and pay policy benefits for proton beam therapy. Defendants DOES I through XXX were responsible for establishing policies and procedures that lead to the denial of or refusal to authorize proton beam therapy.

## II. FACTS

7. Bill and Sandy Eskew purchased an individual health insurance policy from SHL with an effective date of January 1, 2016.

8. Beginning in or about 2015, Bill was diagnosed with lung cancer.

9. Bill received treatment for his lung cancer at the hands of various medical professionals in the State of Nevada before traveling to the University of Texas, MD Anderson Cancer Center in Houston, Texas (“MD Anderson”) for further evaluation and treatment.

10. Bill's highly-trained and eminently qualified treating physicians at MD Anderson recommended that Bill undergo radiation treatment for his cancer in the form of proton beam therapy.

11. Unlike other types of radiation therapy that use x-rays or photons to destroy cancer cells, proton beam therapy uses a beam of special particles (protons) that carry a positive charge.

12. There is no significant difference in the biological effects of protons versus photons. In other words, both protons and photons are equally effective in killing cancer cells.

1           13.     However, proton beam therapy can deliver a dose of radiation in a more  
2 confined way to the tumor tissue than traditional photon-based radiation therapy, which is  
3 called “intensity modulated radiation therapy” or “IMRT.”

4           14.     In cases where a patient’s cancer is adjacent to healthy critical structures, IMRT  
5 can cause devastating side-effects which can be avoided or significantly lessened through the  
6 use of proton beam therapy.

7           15.     After they enter the body, protons release most of their energy within the tumor  
8 region and, unlike photons, deliver only a minimal dose beyond the tumor boundaries.

9           16.     The greatest energy release with photon-based radiation is at the surface of the  
10 tissue (when it first enters the body) and decreases exponentially the farther it travels through  
11 the body.

12          17.     Photons, by their very physical nature, travel all the way through the body, not  
13 stopping at any defined point.

14          18.     In contrast, the energy of a proton beam is released at the end of its path, a  
15 region called the Bragg peak. Treating physicians and their supporting personnel are able to  
16 precisely control the location of the Bragg peak so that they can control the precise location of  
17 the release of the energy of a proton beam. Therefore, the energy of a proton beam can be  
18 delivered precisely to the cancer site.

19          19.     Accordingly, the use of proton beam therapy results in the precise delivery of  
20 radiation energy to the cancer site while minimizing the delivery of radiation energy to healthy  
21 tissues, decreasing the chances of side effects associated with delivering radiation energy to  
22 healthy tissues.

23          20.     Because of proton beam therapy’s physical properties, it is safe, effective, and  
24 particularly useful when the targeted tumor site is in close proximity to one or more critical  
25 structures in the patient’s body and sparing the surrounding healthy tissue cannot be adequately  
26 achieved with photon-based radiation therapy.

27          21.     Proton beam radiation was appropriate for treatment of Bill’s cancer because it  
28 provided the best chance of delivering the beneficial impact of radiation treatment, coupled

1 with the best chance of avoiding the potentially devastating side effects associated with using  
2 IMRT.

3 22. Bill's cancer was in close proximity to one or more critical structures.

4 23. On Bill's behalf, a request for coverage for proton beam therapy was submitted  
5 to SHL.

6 24. Without any reasonable basis and without an objective and fair investigation  
7 and evaluation, SHL denied the subject request for coverage on or about February 5, 2016.

8 25. As a result of SHL's denial of coverage for proton beam therapy, Bill was  
9 forced to undergo the less-precise radiation modality, photon-based IMRT, thus making it  
10 more likely radiation energy would be applied to healthy tissues in close proximity to his  
11 cancer.

12 26. When SHL denied the request for coverage, SHL knew or proceeded in  
13 conscious disregard for the fact Bill would not receive the treatment that gave him the best  
14 chance to survive and/or extend his life.

15 27. When SHL denied the request for coverage, SHL knew or proceeded with  
16 conscious disregard for the fact Bill would be subjected to IMRT and its potentially  
17 devastating side effects.

18 28. As a result of SHL's denial of coverage for proton beam therapy, Bill was  
19 forced to undergo the less-precise radiation modality, photon-based IMRT, thus making it  
20 more likely radiation energy would be applied to healthy tissues in close proximity to his  
21 cancer.

22 29. Without the proton beam therapy, Bill died on March 12, 2017.

23 30. During Bill's life he incurred personal injuries and physical and mental pain,  
24 suffering, emotional distress, and anxiety because of SHL's conduct including:

- 25 • The side effects from the IMRT that caused physical injury, physical pain,  
26 mental suffering, emotional distress, and anxiety.
- 27 • Physical pain, mental suffering, emotional distress, and anxiety because SHL  
28 interfered with his physicians' advice and precluded him access to the therapy that gave

1 him the best opportunity to survive and because he knew that he was not able to access  
2 the therapy recommended by his doctor.

- 3 • Bill lost any chance of survival.
- 4 • Bill's life was shortened.
- 5 • Bill's quality of life was negatively affected.

6 31. SHL's conduct caused Bill to lose any chance of survival, shortened his life, and  
7 resulted in his death.

### 8 **III. FIRST CAUSE OF ACTION**

#### 9 **(Breach of Contract)**

10 32. Plaintiffs incorporate the allegations of paragraphs 1 through 31 as if fully set  
11 forth herein.

12 33. An insurance contract existed between Bill and SHL. That contract provided  
13 coverage for the proton beam therapy requested to treat Bill.

14 34. SHL breached the contract by wrongfully denying coverage for proton beam  
15 therapy.

16 35. As a direct and proximate result, Bill has sustained damages in an amount in  
17 excess of Fifteen Thousand Dollars (\$15,000.00). Sandy, as the administrator of Bill's estate,  
18 has standing to recover those damages.

### 19 **IV. SECOND CAUSE OF ACTION**

#### 20 **(Bad Faith)**

21 36. Plaintiffs incorporate the allegations of paragraphs 1 through 35 as if fully set  
22 forth herein.

23 37. There is an implied covenant of good faith and fair dealing in the insurance  
24 contract that Defendants will not do anything to injure the rights of Bill as their insured.

25 38. By failing to authorize, approve, and pay for the proton beam therapy; by failing  
26 to conduct an objective investigation and evaluation of Bill's claim for proton beam therapy;  
27 by treating its interests above that of Bill's interests; by failing to adopt reasonable standards  
28 for claims handling practices relating to approval and authorization of treatment; and by other

1 wrongful conduct, SHL breached its duty of good faith and fair dealing by engaging in  
2 unreasonable conduct with knowledge of there being no reasonable basis for its conduct.

3 39. As a legal and proximate cause of SHL's conduct, Bill suffered special and  
4 general damages including personal injuries, physical and mental pain and suffering, anxiety,  
5 and emotional distress in an amount in excess of Fifteen Thousand Dollars (\$15,000.00).

6 40. As a legal and proximate cause of SHL's conduct, Bill lost the chance of  
7 survival, his life was shortened, and he sustained conscious pain and suffering in an amount in  
8 excess of Fifteen Thousand Dollars (\$15,000.00).

9 41. Pursuant to NRS 41.100, Plaintiff Sandy, as the administrator, has standing to  
10 recover Bill's damages incurred or sustained before his death.

11 42. In the alternative and pursuant to NRS 41.085, Sandy, Tyler, and BJ, as the  
12 heirs of Bill, have standing to recover Bill's pain, suffering, anxiety, and emotional distress  
13 incurred or sustained before his death.

14 43. Pursuant to NRS 41.085, Sandy, Tyler, and BJ have sustained grief, sorrow, loss  
15 companionship, society, and comfort because of Bill's death and in an amount in excess of  
16 Fifteen Thousand Dollars (\$15,000.00).

17 44. In engaging in its bad faith conduct, SHL has acted fraudulently, oppressively,  
18 and in malicious disregard for the rights of Bill. Sandy, as the Special Administrator of the  
19 Estate, seeks punitive damages by way of punishment and deterrence in an amount to be  
20 determined at trial.

## 21 **V. THIRD CAUSE OF ACTION**

### 22 **(Breach of Nevada Unfair Claims Settlement Practices Act)**

23 45. Plaintiffs incorporate the allegations of paragraphs 1 through 44 as if fully set  
24 forth herein.

25 46. SHL is and at all times mentioned herein was an entity regulated by Title 57 of  
26 the Nevada Revised Statutes.

27 47. SHL has violated NRS 686A.310(1) by failing to pay for proton beam therapy  
28 where SHL's liability to make such payments was reasonably clear; by misrepresenting

1 pertinent facts of an insurance policy provision relating to coverages at issue; by failing to  
2 adopt and implement reasonable standards for the investigation of claims involving proton  
3 beam therapy; by failing to affirm coverage for proton beam therapy within a reasonable time;  
4 and by other wrongful conduct.

5 48. As a legal and proximate cause of SHL's conduct, Bill suffered damages,  
6 including personal injuries, physical and mental, pain and suffering, anxiety, and emotional  
7 distress in an amount in excess of Fifteen Thousand Dollars (\$15,000.00)

8 49. As a legal and proximate cause of SHL's conduct, Bill lost the chance of  
9 survival, his life was shortened, and he sustained conscious pain and suffering in an amount in  
10 excess of Fifteen Thousand Dollars (\$15,000.00).

11 50. Pursuant to NRS 41.100, Plaintiff Sandy, as the administrator, has standing to  
12 recover Bill's damages incurred or sustained before his death for injuries arising from SHL's  
13 violations of NRS 686A.310(1).

14 51. In the alternative and pursuant to NRS 41.085, Sandy, Tyler, and BJ, as the  
15 heirs of Bill, have standing to recover Bill's pain, suffering, anxiety, and emotional distress  
16 incurred or sustained before his death for injuries arising from SHL's violations of NRS  
17 686A.310(1).

18 52. Pursuant to NRS 41.085, Sandy, Tyler, and BJ have sustained grief, sorrow, loss  
19 of companionship, society and comfort because of Bill's death and in an amount in excess of  
20 Fifteen Thousand Dollars (\$15,000.00).

21 53. In violating NRS 686A.310, SHL has acted fraudulently, oppressively, and in  
22 malicious disregard for the rights of Bill. Sandy, as the Special Administrator of the Estate,  
23 seeks punitive damages by way of punishment and deterrence in an amount to be determined at  
24 trial.

#### 25 **PRAYER FOR RELIEF**

26 WHEREFORE, Plaintiffs prays for judgment against Defendant as follows:

27 1. Contractual, special, general and punitive damages, according to proof but in  
28 excess of Fifteen Thousand Dollars (\$15,000.00);

2. Pre- and post-judgment interest as provided by law on contract;
3. An award of attorney's fees and costs of suit incurred; and
4. For such other and further relief as the Court deems just and proper.

**AFFIRMATION**

**Pursuant to NRS 239B.030**

The undersigned does hereby affirm that the preceding document does not contain the Social Security number of any person.

DATED this 1<sup>st</sup> day of February 2019.

MATTHEW L. SHARP, LTD.

/ s/ Matthew L. Sharp

Matthew L. Sharp  
Nevada State Bar #4746  
432 Ridge Street  
Reno, NV 89501  
(775) 324-1500  
Attorney for Plaintiffs

**JURY TRIAL DEMAND**

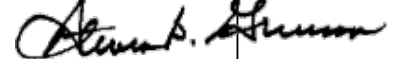
Plaintiffs hereby demand trial by jury of all issues so triable.

DATED this 1<sup>st</sup> day of February 2019.

MATTHEW L. SHARP, LTD.

/ s/ Matthew L. Sharp

Matthew L. Sharp  
Nevada State Bar #4746  
432 Ridge Street  
Reno, NV 89501  
(775) 324-1500  
Attorney for Plaintiffs



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432 Ridge St.  
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(775)324-1500  
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*Attorney for Plaintiffs*

IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF CLARK

SANDRA L. ESKEW, individually and  
as Special Administrator of the Estate  
of William George Eskew; TYLER  
ESKEW; and WILLIAM G. ESKEW, JR.;

Case No. A19-788630-C

Dept. No. 1

Plaintiffs,

vs.

SIERRA HEALTH AND LIFE INSURANCE  
COMPANY, INC.; UNITED HEALTHCARE,  
INC.; and DOES I through XXX,  
inclusive,

**FIRST AMENDED COMPLAINT**  
**and JURY DEMAND**  
**Exemption Requested:**  
**Damages Exceed \$50,000.00**

Defendants.

Plaintiffs, by and through their attorney, Matthew L. Sharp, hereby allege and complain  
as follows:

**I. JURISDICTION**

1. Plaintiff Sandra L. Eskew ("Sandy") is the Special Administrator of the Estate of  
William George Eskew ("Bill"). She is the surviving spouse of Bill. As his surviving spouse,  
Sandy has standing under NRS 41.085 and NRS 41.100.

2. Plaintiffs Tyler Eskew ("Tyler") and William George Eskew, Jr. ("BJ") are the  
surviving children of Bill. Tyler and BJ have standing under NRS 41.085.

3. Plaintiffs are residents of Clark County, Nevada.

4. At all relevant times, the injuries to Bill, and his death, occurred while Bill was a  
resident of Clark County, Nevada.



1           5.       Defendant Sierra Health and Life Ins. Co., Inc. (“SHL”) is an insurance company  
2 residing in Nevada with its principal place of business in Clark County, Nevada.

3           6.       At all relevant times, SHL, in communications with its insured and the public,  
4 holds itself out as a UnitedHealthcare Company.

5           7.       Defendant UnitedHealthcare, Inc. (“UHC”) is an insurance company with its  
6 principal place of business in St. Paul, Minnesota.

7           8.       At all relevant times, UHC owns, controls and manages SHL.

8           9.       At all relevant time, UHC is responsible for the management for all insurance  
9 subsidiaries of UnitedHealth Group, Inc. including SHL.

10          10.      At all relevant times, UHC has adopted and implemented all commercial medical  
11 policies used by all insurance subsidiaries of United Health Group including SHL.

12          11.      At all relevant times, UHC and SHL were engaged in the joint venture of  
13 providing health insurance and handling claims including preauthorization requests for citizens  
14 of the State of Nevada.

15          12.      Defendants DOES I through XXX are persons, firms, corporations, and/or  
16 business organizations whose true identities are presently unknown. Plaintiffs allege Defendants  
17 DOES I through XXX engaged in wrongful and tortuous conduct. When the true names of  
18 DOES I through XXX are discovered, Plaintiffs will request leave to amend the complaint.  
19 Plaintiffs allege that Defendants DOES I through XXX engaged in conduct that caused injury to  
20 and/or the death of Bill. Defendants DOES I through XXX are responsible for the acts of SHL.  
21 They engaged in conduct to assist, authorize, or direct SHL to engage in the tortious conduct as  
22 alleged in this complaint, including the refusal to authorize and pay policy benefits for proton  
23 beam therapy. Defendants DOES I through XXX were responsible for establishing policies and  
24 procedures that lead to the denial of or refusal to authorize proton beam therapy.

## 25                                   **II. FACTS**

26          13.      Bill and Sandy Eskew purchased an individual health insurance policy from UHC  
27 and SHL with an effective date of January 1, 2016.

1           14.     At the time UHC and SHL issued the policy, they knew Bill had had been  
2 diagnosed with lung cancer and was receiving treatment for lung cancer.

3           15.     When it issued the policy, UHC and SHL entered into a special relationship with  
4 Bill that was akin to that of a fiduciary duty.

5           16.     UHC and SHL had adopted a Managed Care Program to control the medical care  
6 its insureds receive.

7           17.     UHC and SHL required that the insured participate in the Managed Care Program.

8           18.     UHC and SHL knew that if services for cancer are not pre-authorized it is unlikely  
9 the insured will go forward with the treatment recommended by the treating physician.

10          19.     UHC and SHL represented that a service was medically necessary if it was needed  
11 to improve a specific health condition or to preserve the insured's health and was consistent with:  
12 (1) the diagnosis or treatment of the insured; (2) the most appropriate level of service that can be  
13 safely provided to the insured; and (3) not solely for convenience of the insured, the provider or  
14 the hospital.

15          20.     UHC and SHL represented that its Managed Care Program consisted of medical  
16 peer review committees, Utilization Review Committees and Medical Directors.

17          21.     UHC and SHL represented that the Managed Care Program was intended to direct  
18 care to the most appropriate settings to provide healthcare in a cost-effective manner.

19          22.     At all relevant times, UHC and SHL knew that it owed a duty of good faith and  
20 fair dealing to its insured and the implementation of the Managed Care Program had to be  
21 consistent with its duty of good faith and fair dealing including:

- 22           • UHC and SHL had a duty to promptly approve pre-authorization when the request for  
23 services was medically necessary.
  - 24           • UHC and SHL had a duty to conduct prompt, thorough and objective investigation and  
25 evaluation of a request for pre-authorization of service.
  - 26           • UHC and SHL had a duty to consider its insured's interest at least equal to its own interest.
  - 27           • UHC and SHL had a duty to assist its insured in obtaining the benefits of the policy.
- 28

- 1 • UHC and SHL had a duty to deal fairly honestly with its insured including disclosing the
- 2 policy benefits and conditions relevant to the pre-authorization request.
- 3 • UHC and SHL had a duty to interpret its insurance policy in a reasonable manner and
- 4 consistent with Nevada law including to interpret a coverage provision to provide the
- 5 greatest possible coverage to its insureds.
- 6 • UHC and SHL had a duty to provide a reasonable explanation for the factual basis and
- 7 basis within the policy to deny a claim for pre-authorization.

8 23. At all relevant times, UHC and SHL knew that a preauthorization request

9 constitutes a notice of claim pursuant to NAC 686A.622 and requires compliance with NAC

10 686A.660 et. al. including:

- 11 • UHC and SHL had a duty to disclose all benefits, coverage or other provisions relating
- 12 to the request for preauthorization.
- 13 • UHC and SHL had a duty to provide an insured with reasonable assistance so the insured
- 14 can comply with policy conditions and any reasonable requirements of the insured.

15 24. At all relevant times, UHC and SHL knew that in processing a preauthorization

16 request it owed a duty to comply with NRS 686A.310(1) including:

- 17 • UHC and SHL cannot mispresent to insured pertinent facts or policy provisions relating
- 18 to a coverage at issue.
- 19 • UHC and SHL must adopt and implement reasonable standards for the prompt
- 20 investigation and processing of claims.
- 21 • UHC and SHL must effectuate a prompt, fair and equitable settlement where liability was
- 22 reasonably clear.

23 25. Bill needed treatment for his lung cancer, and he received treatment from various

24 medical professionals in the State of Nevada.

25 26. Bill went to the University of Texas, MD Anderson Cancer Center in Houston,

26 Texas (“MD Anderson”) for evaluation and treatment.

27 27. MD Anderson Cancer Center is a center of excellence, and one of the highest-

28 ranked (if not the top ranked) cancer treatment centers in the world.

1           28.     Among the services provided by its radiation oncology department, MD  
2 Anderson provides radiation treatment for cancer in the form of a radiation therapy called proton  
3 beam therapy (“PBT”).

4           29.     PBT is not new or novel. PBT has been utilized to treat cancer in human beings  
5 since the 1950s.

6           30.     The FDA approved PBT for treating cancer decades ago.

7           31.     Hundreds of published medical studies have demonstrated PBT is safe and  
8 effective for treating cancer in humans, and PBT is used in almost thirty (30) currently active  
9 proton centers in the United States and dozens more worldwide. More proton centers are  
10 currently being constructed in the United States and around the world.

11          32.     M.D Anderson and other qualified facilities have developed overwhelming  
12 clinical evidence that PBT is safe and clinically effective to improve or preserve the health of  
13 cancer patients.

14          33.     Unlike other types of radiation therapy that use x-rays or photons to destroy  
15 cancer cells, PBT uses a beam of special accelerated particles (protons) that carry a positive  
16 charge.

17          34.     There is no significant difference in the biological effects of protons versus  
18 photons in treating cancer. In other words, both protons and photons are equally effective in  
19 killing cancer cells.

20          35.     However, proton beam therapy can deliver a dose of radiation in a more confined  
21 way to the tumor tissue than traditional photon-based radiation therapy, which is called “intensity  
22 modulated radiation therapy” or “IMRT.”

23          36.     In cases where a patient’s cancer is adjacent to healthy critical structures, IMRT  
24 can cause devastating side-effects by unintentionally radiating (and potentially necrosing) those  
25 healthy critical structures. This unintended radiation of health structures can be avoided or  
26 significantly lessened through the use of PBT.

27          37.     After they enter the body, protons release most of their energy within the tumor  
28 region and, unlike photons, deliver only a minimal dose beyond the tumor boundaries.

1           38.     The greatest energy release with photon-based radiation is at the surface of the  
2 tissue (when it first enters the body) and decreases exponentially the farther it travels through  
3 the body.

4           39.     Photons, by their very physical nature, travel all the way through the body, not  
5 stopping at any defined point.

6           40.     In contrast, the energy of a proton beam is released at the end of its path, a region  
7 called the Bragg peak. Treating physicians and their supporting personnel are able to precisely  
8 control the location of the Bragg peak so that they can control the precise location of the release  
9 of the energy of a proton beam. Therefore, the energy of a proton beam can be delivered  
10 precisely to the cancer site.

11          41.     Accordingly, the use of PBT results in the precise delivery of radiation energy to  
12 the cancer site while minimizing the delivery of radiation energy to healthy tissues, decreasing  
13 the chances of side effects associated with delivering radiation energy to healthy tissues.

14          42.     Because of PBT's physical properties, it is safe, effective, and particularly useful  
15 when the targeted tumor site is in close proximity to one or more critical structures in the patient's  
16 body and sparing the surrounding healthy tissue cannot be adequately achieved with photon-  
17 based radiation therapy.

18          43.     Bill's highly-trained and eminently qualified treating physicians at MD Anderson  
19 recommended that Bill undergo proton beam therapy.

20          44.     Bill's cancer was in close proximity to one or more critical structures.

21          45.     PBT was appropriate for treatment of Bill's cancer including the treatment  
22 provided the best chance of delivering the beneficial impact of radiation treatment, coupled with  
23 the best chance of avoiding the potentially devastating side effects associated with using IMRT.

24          46.     Bill's eminently qualified radiation oncologist made the clinical decision that Bill  
25 would benefit most from PBT.

26          47.     Treatment with proton beam therapy was needed to improve and/or preserve  
27 Bill's health because it would precisely target the tumor while minimizing damages to adjacent  
28 health tissue.

1           48.     Treatment with proton beam therapy was consistent with diagnosis and treatment  
2 of Bill's lung cancer.

3           49.     M.D Anderson could provide the PBT services to Bill on an outpatient basis and  
4 consistent with the most appropriate level of service that could be safely provided to Bill.

5           50.     PBT was not solely for the convenience of Bill or M.D Anderson.

6           51.     On Bill's behalf, MD Anderson submitted a request for preauthorization to SHL  
7 to approve treatment with proton beam therapy.

8           52.     At all relevant times, UHC and SHL knew or recklessly disregarded the fact that  
9 the use of PBT is effective to improve or preserve the health of insureds who, like Bill, are  
10 diagnosed with cancer, including lung cancer.

11          53.     At all relevant times, UHC and SHL knew or recklessly disregarded that facilities  
12 like M.D Anderson could safely provide PBT to an insured who, like Bill, was diagnosed with  
13 cancer, including an insured with lung cancer.

14          54.     At all relevant times, UHC and SHL knew or recklessly disregarded the PBT  
15 being sought by Bill was not solely for the convenience of Bill or M.D Anderson.

16          55.     UHC and SHL had adopted a policy and plan to disapprove PBT treatment for its  
17 insureds suffering from cancer if at all possible, regardless of the opinions of highly qualified  
18 treating physicians and the weight of scientific and medical information supporting the use of  
19 PBT on such insureds.

20          56.     UHC and SHL implemented a system by which it consciously refused to consider  
21 the basis for a treating physician's recommendation of PBT or the reasons that the physician  
22 believed the patient would benefit from PBT when deciding to deny its insureds' requests for  
23 coverage for PBT treatment.

24          57.     UHC and SHL implemented a system by which it would deny a request for  
25 coverage for PBT without a fair, thorough and objective investigation, evaluation or reasonable  
26 consideration by appropriately qualified and trained personnel of the legal issues involving  
27 insurance coverage and the medical issues involving the clinical judgment of the treating  
28 physician and clinical condition of the insured.

1           58.     UHC and SHL implemented its system of considering its insureds' requests for  
2 coverage as part of a plan to favor its financial interest over the well-being of its insured.

3           59.     Specifically, IMRT is less expensive than PBT.

4           60.     UHC and SHL developed its bad faith system for handling insureds' requests for  
5 coverage for financial reasons and to place its own financial interests ahead of the health and  
6 well-being of its insureds.

7           61.     UHC and SHL was willing to subject Bill to the devastating side effects of IMRT  
8 rather than pay for its insured to receive the PBT Bill's MD Anderson physicians recommended  
9 would be superior to IMRT.

10          62.     Through its policy and procedures, UHC and SHL, without disclosure to the  
11 insured within the terms of the policy and in known violation of the insurance policy and Nevada  
12 law relating to good faith and fair dealing and the interpretation of an insurance contract, chose  
13 to exclude PBT from coverage.

14          63.     After receiving M.D Anderson's request for coverage for PBT on Bill's behalf,  
15 UHC and SHL acted consistently with its system of handling insureds' requests for coverage  
16 described above.

17          64.     UHC and SHL immediately denied the request for coverage.

18          65.     UHC and SHL intentionally and knowingly failed and refused to conduct a  
19 prompt, thorough and objective investigation or evaluation of Bill's request for coverage for  
20 PBT.

21          66.     In denying the request for coverage, UHC and SHL misrepresented and  
22 manipulated pertinent facts to manufacture a pretextual basis to deny that request:

- 23           • It represented that PBT was clinically unproven when in fact it is not.
- 24           • It represented that there is no evidence of "definitive" conclusions "about the safety and  
25 efficacy of PBT" when in fact there are.
- 26           • It represented there is "limited" clinical evidence that directly compares PBT to other  
27 types of radiation, when in fact there is such evidence.

28          67.     At all relevant times, UHC and SHL knew that PBT was clinically proven.

1           68.     At all relevant times, UHC and SHL knew “definitive conclusion” is an inherently  
2 ambiguous term and is not something required by the insurance policy.

3           69.     At all relevant times, UHC and SHL knew “limited clinic evidence” is an  
4 inherently ambiguous term and not relevant to the terms of the insurance policy.

5           70.     At all relevant times, UHC and SHL knew there was clinical evidence supporting  
6 the use of proton beam therapy as a more medically effective therapy providing less risk of side-  
7 effects than other types radiation, including IMRT.

8           71.     At all relevant times, UHC and SHL further knew that it was the role of doctors  
9 in consultation with patients to utilize clinical judgment to decide which radiation therapy is in  
10 the clinical interest of the patient.

11          72.     At all relevant times, UHC and SHL further knew that if a doctor’s recommended  
12 treatment is the treatment providing the best chance of the best outcome to the patient, and that  
13 treatment was well-established as safe and effective, UHC and SHL should not substitute its  
14 clinical judgment for that of qualified doctors in consultation with his/her patients to decide  
15 which radiation therapy is in the clinical interest of the patient.

16          73.     In denying the request for coverage, UHC and SHL failed to properly disclose  
17 Bill’s appeal rights to him.

18          74.     Based upon information and belief, UHC and SHL failed to disclose Bill’s appeal  
19 rights to him because it knew any appeal of the denial for the request for coverage would be a  
20 sham and automatically, without any meaningful review, result in upholding the denial of the  
21 original request for coverage.

22          75.     Based upon information and belief, Bill’s treating radiation oncologist from MD  
23 Anderson attempted to convince the medical director for UHC and SHL that PBT was the best  
24 and most appropriate treatment for Bill, but the medical director, who is not a radiation  
25 oncologist, refused to consider the MD Anderson radiation oncologist’s opinion.

26          76.     UHC and SHL’s denial of Bill’s claim for PBT was signed by Dr. Shamoan  
27 Ahmad on behalf of UHC. The denial was based on a “Commercial Medical Policy” which was  
28 written and issued by home office personnel at UHC. This “Commercial Medical Policy” is



1 designed and implemented by UHC as a tool to wrongly and dishonestly deny the claims of its  
2 insureds.

3 77. The “Medical Policy” referenced in the letter sent to Bill by Dr. Ahmad is a UHC  
4 policy.

5 78. Dr. Ahmad is not a radiation oncologist.

6 79. Dr. Ahmad is not qualified by education, training or experience to make a clinical  
7 decision about what radiation therapy modality is in the clinical interest of a patient and is not  
8 qualified to have made such a decision about Bill’s treatment.

9 80. Dr. Ahmad is not qualified by education, training or experience to render a legal  
10 opinion about whether insurance coverage for PBT for Bill under the circumstances presented  
11 to him in Bill’s case existed or not under the terms and provisions of Bill’s insurance policy  
12 issued to him by UHC and SHL.

13 81. Based upon information and belief, MD Anderson had knowledge of UHC and  
14 SHL’s practice of denying PBT even when such denials were inaccurate and unsupported, and  
15 thus also requested preauthorization of IMRT.

16 82. Pursuant to its policies and practices, UHC and SHL approved the IMRT without  
17 investigation and without consideration of whether IMRT was in Bill’s interest.

18 83. UHC and SHL hold PBT to a different standard than IMRT when determining if  
19 there is coverage under its insurance policies issued to its insureds.

20 84. UHC and SHL consciously placed Bill in the position of either undergoing IMRT  
21 or delaying PBT with the hope that SHL would reverse its denial.

22 85. Bill chose to undergo IMRT therapy because doing so under the circumstances,  
23 where SHL had denied the best and most appropriate treatment for him, was his only viable  
24 option.

25 86. As a result of UHC and SHL’s denial of coverage for PBT, Bill was forced to  
26 undergo the less-precise radiation modality, photon-based IMRT, thus making it more likely  
27 radiation energy would be applied to healthy tissues in close proximity to his cancer.  
28

1           87.     When UHC and SHL denied Bill's request for coverage, UHC and SHL knew or  
2 proceeded in conscious disregard for the fact Bill would not receive the treatment that gave him  
3 the best chance and opportunity to extend his life by curing his cancer while also giving him the  
4 best chance at the best possible quality of life following radiation treatment. By virtue of its  
5 actions, UHC and SHL deprived Bill of the radiation treatment he needed (according to his MD  
6 Anderson doctors) to maximize his chances of survival while minimizing the possibility of  
7 potential devastating and even fatal side effects.

8           88.     When UHC and SHL denied the request for coverage, UHC and SHL knew or  
9 proceeded with conscious disregard for the fact Bill would be subjected to IMRT and its  
10 potentially devastating or even fatal side effects under Bill's clinical condition.

11          89.     As a result of the denial of coverage for proton beam therapy, Bill was forced to  
12 undergo the less-precise radiation modality, photon-based IMRT, thus making it more likely  
13 radiation energy would be applied to healthy tissues in close proximity to his cancer.

14          90.     During Bill's life he incurred personal injuries and physical and mental pain,  
15 suffering, emotional distress, and anxiety as a legal cause of UHC and SHL's conduct including:

- 16           •       The side effects from the IMRT that caused physical injury, physical pain, mental  
17 suffering, emotional distress, and anxiety.
- 18           •       Physical pain, mental suffering, emotional distress, and anxiety because of, but  
19 not limited, to the fact SHL interfered with his physicians' advice and precluded him  
20 access to the therapy that gave him the best opportunity to survive and because he knew  
21 that he was not able to access the therapy recommended by his doctor.

22          91.     Without the PBT, Bill died on March 12, 2017.

23          92.     UHC and SHL's conduct in denying the PBT was a legal cause of Bill's death on  
24 March 12, 2017.

25          93.     UHC and SHL's conduct in denying the PBT was a legal cause of Bill's mental  
26 suffering and emotional distress. UHC and SHL's denial of the PBT Bill needed legally caused  
27 Bill's survival from cancer to be shortened and caused him to die prematurely on March 12,  
28 2017. As such, UHC and SHL's conduct caused Bill's death.

1           94.     When UHC and SHL denied the request for coverage, Bill suffered an economic  
2 loss. He lost the economic value of the benefits of his policy to pay for PBT treatment.

3           95.     The value of that benefit is in the amount of the cost of the PBT treatment and in  
4 excess of \$15,000.

5           96.     In addition, as a result of SHL's denial of the claim for PBT treatment, Bill and  
6 his Estate have suffered other economic losses including:

- 7           • Bill incurred expenses related to the IMRT therapy including boarding expenses and  
8 expenses for pain medications.
- 9           • Bill was forced to purchased a different vehicle as a cause of the side-effects of IMRT  
10 and the ongoing effects of the cancer that PBT could have avoided and/or treated.
- 11          • A portion of a family business was sold because Bill, following IMRT and without PBT,  
12 required more assistance from family members.
- 13          • Bill purchased additional equipment to deal with the side-effects of IMRT, including a  
14 chair.
- 15          • Expenses, for things such as food items intended to deal with the malnutrition Bill  
16 suffered from, in response to the IMRT side effect
- 17          • The cost of filing this lawsuit.

### 18                               **III. FIRST CAUSE OF ACTION**

#### 19                               **(Breach of Contract)**

20           97.     Plaintiffs incorporate the allegations of paragraphs 1 through 96 as if fully set  
21 forth herein.

22           98.     An insurance contract existed between Bill and UHC and SHL. The contract  
23 provided coverage for the proton beam therapy requested to treat Bill.

24           99.     The PBT recommended by M.D Anderson was covered under the terms of the  
25 subject insurance policy issued by UHC and SHL to Bill.

26           100.    UHC and SHL breached the contract by wrongfully denying coverage for PBT.

27    ///

28    ///

1           101. As a legal and proximate cause of UHC and SHL's conduct, the Estate, pursuant  
2 to NRS 41.100, has standing to recover the lost value of the benefits of Bill's policy to pay for  
3 PBT treatment.

4           102. As a legal and proximate result, Bill, through his estate, has sustained damages in  
5 an amount in excess of Fifteen Thousand Dollars (\$15,000.00). Sandy, as the administrator of  
6 Bill's estate, has standing to recover those damages.

7                                   **IV. SECOND CAUSE OF ACTION**

8                                   **(Bad Faith)**

9           103. Plaintiffs incorporate the allegations of paragraphs 1 through 102 as if fully set  
10 forth herein.

11           104. There is an implied covenant of good faith and fair dealing in the insurance  
12 contract that Defendants will not do anything to injure the rights of Bill as their insured.

13           105. As set forth herein, Defendants breached its duty of good faith and fair dealing to  
14 Bill including: (1) unreasonably refusing to authorize and pay for PBT; (2) failing to conduct a  
15 prompt, fair and through investigation and evaluation of Bill's claim for PBT; (3) failing to take  
16 steps to reasonably assist Bill in obtaining the benefits of his insurance policy; (4) interpreting  
17 its insurance policy in an unreasonable manner and inconsistent with law of Nevada; (5) adopting  
18 and implementing an unreasonable, unfair, bad faith system by which it systematically and  
19 without just cause excludes PBT from the coverage for its insureds, including Bill; (6) failing to  
20 consistently consider it insured's interests as at least equal to its own interests; and (7) other  
21 wrongful conduct.

22           106. The denial of the request for coverage caused economic loss including as more  
23 specifically set forth at paragraphs 94-96.

24           107. As a legal and proximate cause of UHC and SHL's conduct, Bill suffered special  
25 and general damages including personal injuries, physical and mental pain and suffering,  
26 anxiety, and emotional distress in an amount in excess of Fifteen Thousand Dollars (\$15,000.00).

1           108. As a legal and proximate cause of UHC and SHL's conduct, Bill lost the chance  
2 of survival, his life was shortened and he died, and he sustained conscious pain and suffering in  
3 an amount in excess of Fifteen Thousand Dollars (\$15,000.00).

4           109. Pursuant to NRS 41.100, Plaintiff Sandy, as the administrator, has standing to  
5 recover Bill's special and general damages sustained before his death.

6           110. If the jury finds that UHC and SHL's conduct was a legal or proximate cause of  
7 Bill's death and pursuant to NRS 41.085, Sandy, Tyler, and BJ, as the heirs of Bill, have standing  
8 to recover Bill's conscious pain, suffering, anxiety, and emotional distress incurred or sustained  
9 before his death.

10           111. In engaging in its bad faith conduct, UHC and SHL has acted fraudulently,  
11 oppressively, and in malicious disregard for the rights of Bill. Sandy, as the Special  
12 Administrator of the Estate, has standing pursuant to NRS 41.085 and NRS 41.100 to recover  
13 punitive damages by way of punishment and deterrence in an amount to be determined at trial.

#### 14                                   **V. THIRD CAUSE OF ACTION**

##### 15                                   **(Breach of Nevada Unfair Claims Settlement Practices Act)**

16           112. Plaintiffs incorporate the allegations of paragraphs 1 through 111 as if fully set  
17 forth herein.

18           113. UHC and SHL are and at all times mentioned herein entities regulated by Title  
19 57 of the Nevada Revised Statutes.

20           114. UHC and SHL violated NRS 686A.310(1) include:

- 21           • They violated NRS 686A.310(1)(e) by failing to authorize and pay for proton beam  
22 therapy where UHC and SHL's liability to make such payments was reasonably clear
- 23           • They violated NRS 686A.310(1)(a) by misrepresenting pertinent facts of an insurance  
24 policy provision relating to coverages at issue including as set forth more specifically at  
25 paragraphs 55-62, 66-73.
- 26           • They violated NRS 686.310(1)(c) failed to adopt and implement reasonable standards for  
27 the investigation of claims involving proton beam therapy.

1           115. As a legal and proximate cause of UHC and SHL's conduct, Bill suffered special  
2 and general damages including personal injuries, physical and mental pain and suffering,  
3 anxiety, and emotional distress in an amount in excess of Fifteen Thousand Dollars (\$15,000.00).

4           116. Pursuant to NRS 41.100, Plaintiff Sandy, as the administrator, has standing to  
5 recover Bill's damages sustained before his death.

6           117. If the jury finds that UHC and SHL's conduct was a legal or proximate cause of  
7 Bill's death and pursuant to NRS 41.085, Sandy, Tyler, and BJ, as the heirs of Bill, have standing  
8 to recover Bill's conscious pain, suffering, anxiety, and emotional distress incurred or sustained  
9 before his death.

10          118. If the jury finds that UHC and SHL's conduct was a legal or proximate cause of  
11 Bill's death and pursuant to NRS 41.085, Sandy, Tyler, and BJ have sustained grief, sorrow, loss  
12 companionship, society, and comfort because of Bill's death and in an amount in excess of  
13 Fifteen Thousand Dollars (\$15,000.00).

14          119. In engaging in its bad faith conduct, UHC and SHL have acted fraudulently,  
15 oppressively, and in malicious disregard for the rights of Bill. Sandy, as the Special  
16 Administrator of the Estate, has standing pursuant to NRS 41.085 and NRS 41.100 to recover  
17 punitive damages by way of punishment and deterrence in an amount to be determined at trial.

18                                   **PRAYER FOR RELIEF**

19          WHEREFORE, Plaintiffs prays for judgment against Defendant as follows:

20          1. Contractual, special, general and punitive damages, according to proof but in  
21 excess of Fifteen Thousand Dollars (\$15,000.00);

22          2. Pre- and post-judgment interest as provided by law on contract;

23          3. An award of attorney's fees and costs of suit incurred; and

24          4. For such other and further relief as the Court deems just and proper.

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**AFFIRMATION**

**Pursuant to NRS 239B.030**

The undersigned does hereby affirm that the preceding document does not contain the Social Security number of any person.

DATED this 15<sup>th</sup> day of July 2019.

MATTHEW L. SHARP, LTD.

      / s/ Matthew L. Sharp        
Matthew L. Sharp  
Nevada State Bar #4746  
432 Ridge Street  
Reno, NV 89501  
(775) 324-1500  
Attorney for Plaintiffs

**JURY TRIAL DEMAND**

Plaintiffs hereby demand trial by jury of all issues so triable.

DATED this 15<sup>th</sup> day of July 2019.

MATTHEW L. SHARP, LTD.

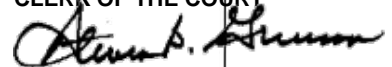
      / s/ Matthew L. Sharp        
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Attorney for Plaintiffs

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 Ryan T. Gormley, Esq.; [rgormley@wwhgd.com](mailto:rgormley@wwhgd.com)  
 WEINBERG WHEELER HUDGINS GUNN & DIAL LLC  
 6385 S. Rainbow Blvd., Ste. 400  
 Las Vegas, NV 89118  
*Attorneys for Defendant SHL*

/s/ Cristin B. Sharp  
An employee of Matthew L. Sharp, Ltd.





ODM  
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*Attorney for Plaintiffs*

IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA  
IN AND FOR THE COUNTY OF CLARK

SANDRA L. ESKEW, individually and  
as Special Administrator of the Estate  
of William George Eskew; TYLER  
ESKEW; and WILLIAM G. ESKEW, JR.;

Case No. A-19-788630-C

Dept. No. 1

Plaintiffs,

vs.

SIERRA HEALTH AND LIFE INSURANCE  
COMPANY, INC., et. al.,

Defendant.

**ORDER DENYING AND GRANTING IN PART DEFENDANT SHL'S MOTION TO  
DISMISS FOR FAILURE TO STATE A CLAIM**

On June 18, 2019, a hearing was held on Defendant Sierra Health and Life Insurance Company's Motion to Dismiss for Failure to State a Claim. This Court has considered the Motion and Reply filed by the Defendant, the Opposition brief filed by the Plaintiffs, and the arguments of the attorneys. For the reasons provided by the Plaintiffs in their briefing and argument, Defendant's Motion to Dismiss for Failure to State a Claim is DENIED except as to Plaintiffs' claim for violation NRS 686A.310(1)(d). For the reasons provided by the Defendant in their briefing and argument, the motion to dismiss is granted as to NRCP 686A.310(1)(d).

This Court further Orders the Plaintiffs to file an amended complaint within 20 (twenty) <sup>VP</sup> days from June 18, 2019.

///

1 IT IS SO ORDERED.

2 DATED this 15 day of July 2019.

3  
4 Kenneth R. O'Byrne  
5 DISTRICT JUDGE  
6 VP

7 Approved as to form and content :

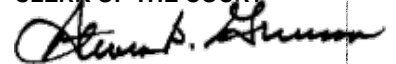
8 WEINBERG, WHEELER, HUDGINS,  
9 GUNN & DIAL, LLC

10 /s/ Ryan Gormley  
11 D. Lee Roberts, Jr. Esq.  
12 Marisa Rodriguez, Esq.  
13 Ryan T. Gormley, Esq.  
6385 S. Rainbow Blvd., Ste. 400  
Las Vegas, NV 89118  
*Attorneys for Defendant, SHL*

14 Submitted by:

15 MATTHEW L. SHARP, LTD.

16 /s/ Matthew L. Sharp  
17 Matthew L. Sharp  
18 Nevada State Bar #4746  
19 432 Ridge Street  
20 Reno, NV 89501  
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8 Telephone: (702) 938-3838  
Facsimile: (702) 938-3864  
9

10 *Attorneys for Defendants*  
11

12 **DISTRICT COURT**  
13 **CLARK COUNTY, NEVADA**  
14

15 SANDRA L. ESKEW, individually and as  
special administrator of the Estate of William  
16 George Eskew; TYLER ESKEW; AND  
WILLIAM G. ESKEW, JR.,  
17

18 Plaintiffs,

19 vs.

20 SIERRA HEALTH AND LIFE INSURANCE  
COMPANY, INC.; UNITED HEALTHCARE,  
INC.; and DOES I through XXX, inclusive,  
21

22 Defendants.  
23

Case No.: A-19-788630-C  
Dept. No.: 1

**ANSWER TO FIRST AMENDED  
COMPLAINT**

24 **DEFENDANTS SIERRA HEALTH AND LIFE INSURANCE COMPANY, INC.**  
25 **("SHL") and UNITED HEALTHCARE, INC. ("UHC")** (collectively "Defendants"), by and  
26 through their attorneys of the law firm of WEINBERG, WHEELER, HUDGINS, GUNN & DIAL, LLC,  
27 hereby file their Answer to Plaintiffs' First Amended Complaint ("FAC").  
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**ANSWER**

Defendants deny generally the FAC's allegations and further deny that they are responsible for, or liable for, any of the happenings or events mentioned in the FAC. To the extent that Defendants do not affirmatively admit an allegation, Defendants deny the allegation.

**JURISDICTION**

Responding to the individual allegations of the FAC, Defendants answer:

1. Answering paragraph 1 of the FAC, Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in this paragraph and, therefore, cannot admit or deny these allegations.

2. Answering paragraph 2 of the FAC, Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in this paragraph and, therefore, cannot admit or deny these allegations.

3. Answering paragraph 3 of the FAC, Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in this paragraph and, therefore, cannot admit or deny these allegations.

4. Answering paragraph 4 of the FAC, Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in this paragraph and, therefore, cannot admit or deny these allegations.

5. Answering paragraph 5 of the FAC, Defendants admit that SHL is an insurance company residing in Nevada with its principal place of business in Nevada.

6. Answering paragraph 6 of the FAC, Defendants admit that SHL identifies itself as a UnitedHealthcare Company. Defendants deny the remaining allegations contained in this paragraph.

7. Answering paragraph 7 of the FAC, Defendants admit the UHC is an insurance healthcare company with its principal place of business in Minnesota.

8. Answering paragraph 8 of the FAC, Defendants admit SHL is a subsidiary of UHC. Defendants deny the remaining allegations contained in this paragraph.

///



1           9.       Answering paragraph 9 of the FAC, Defendants deny the allegations contained in  
2 this paragraph.

3           10.      Answering paragraph 10 of the FAC, Defendants deny the allegations contained  
4 in this paragraph.

5           11.      Answering paragraph 11 of the FAC, Defendants deny the allegations contained  
6 in this paragraph.

7           12.      Answering paragraph 12 of the FAC, Defendants are without knowledge or  
8 information sufficient to form a belief as to the truth of the allegations contained in this  
9 paragraph regarding any “DOE” defendant and, therefore, cannot admit or deny these  
10 allegations. Defendants deny the remaining allegations in this paragraph. .

## 11                                   II. FACTS

12           13.      Answering paragraph 13 of the FAC, Defendants admit Bill Eskew and Sandy  
13 Eskew purchased an individual health insurance policy from SHL with an effective date of  
14 January 1, 2016 (referred to hereinafter as the “Plan”). Defendants deny of the remaining  
15 allegations contained in this paragraph.

16           14.      Answering paragraph 14 of the FAC, Defendants are without knowledge or  
17 information sufficient to form a belief as to the truth of the allegation that “they knew Bill had  
18 had [sic] been diagnosed with lung cancer and was receiving treatment for lung cancer.”  
19 Defendants deny the remaining allegations contained in this paragraph.

20           15.      Answering paragraph 15 of the FAC, Defendants deny the allegations contained  
21 in this paragraph.

22           16.      Answering paragraph 16 of the FAC, Defendants admit that the Plan discusses  
23 SHL’s Managed Care Program. The Plan’s discussion of SHL’s Managed Care Program speaks  
24 for itself. Defendants deny the remaining allegations contained in this paragraph.

25           17.      Answering paragraph 17 of the FAC, Defendants admit that the Plan discusses  
26 SHL’s Managed Care Program. The Plan’s discussion of SHL’s Managed Care Program speaks  
27 for itself. Defendants deny the remaining allegations contained in this paragraph.

28       ///



1           18.     Answering paragraph 18 of the FAC, Defendants deny the allegations contained  
2 in this paragraph.

3           19.     Answering paragraph 19 of the FAC, Defendants admit the Plan defines the term  
4 “Medically Necessary.” That definition speaks for itself. Defendants deny the remaining  
5 allegations contained in this paragraph.

6           20.     Answering paragraph 20 of the FAC, Defendants admit that the Plan discusses  
7 SHL’s Managed Care Program. The Plan’s discussion of SHL’s Managed Care Program speaks  
8 for itself. Defendants deny the remaining allegations contained in this paragraph.

9           21.     Answering paragraph 21 of the FAC, Defendants admit that the Plan discusses  
10 SHL’s Managed Care Program. The Plan’s discussion of SHL’s Managed Care Program speaks  
11 for itself. Defendants deny the remaining allegations contained in this paragraph.

12          22.     Answering paragraph 22 of the FAC, Defendants deny the allegations contained  
13 in this paragraph.

14          23.     Answering paragraph 23 of the FAC, Defendants deny the allegations contained  
15 in this paragraph.

16          24.     Answering paragraph 24 of the FAC, Defendants deny the allegations contained  
17 in this paragraph.

18          25.     Answering paragraph 25 of the FAC, Defendants are without knowledge or  
19 information sufficient to form a belief as to the truth of the allegations contained in this  
20 paragraph and, therefore, cannot admit or deny these allegations.

21          26.     Answering paragraph 26 of the FAC, Defendants are without knowledge or  
22 information sufficient to form a belief as to the truth of the allegations contained in this  
23 paragraph and, therefore, cannot admit or deny these allegations.

24          27.     Answering paragraph 27 of the FAC, Defendants are without knowledge or  
25 information sufficient to form a belief as to the truth of the allegations contained in this  
26 paragraph and, therefore, cannot admit or deny these allegations.

27     ///

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28. Answering paragraph 28 of the FAC, Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in this paragraph and, therefore, cannot admit or deny these allegations.

29. Answering paragraph 29 of the FAC, Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in this paragraph and, therefore, cannot admit or deny these allegations.

30. Answering paragraph 30 of the FAC, Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in this paragraph and, therefore, cannot admit or deny these allegations.

31. Answering paragraph 31 of the FAC, Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in this paragraph and, therefore, cannot admit or deny these allegations.

32. Answering paragraph 32 of the FAC, Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in this paragraph and, therefore, cannot admit or deny these allegations.

33. Answering paragraph 33 of the FAC, Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in this paragraph and, therefore, cannot admit or deny these allegations.

34. Answering paragraph 34 of the FAC, Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in this paragraph and, therefore, cannot admit or deny these allegations.

35. Answering paragraph 35 of the FAC, Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in this paragraph and, therefore, cannot admit or deny these allegations.

36. Answering paragraph 36 of the FAC, Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in this paragraph and, therefore, cannot admit or deny these allegations.

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37. Answering paragraph 37 of the FAC, Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in this paragraph and, therefore, cannot admit or deny these allegations.

38. Answering paragraph 88 of the FAC, Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in this paragraph and, therefore, cannot admit or deny these allegations.

39. Answering paragraph 39 of the FAC, Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in this paragraph and, therefore, cannot admit or deny these allegations.

40. Answering paragraph 40 of the FAC, Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in this paragraph and, therefore, cannot admit or deny these allegations.

41. Answering paragraph 41 of the FAC, Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in this paragraph and, therefore, cannot admit or deny these allegations.

42. Answering paragraph 42 of the FAC, Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in this paragraph and, therefore, cannot admit or deny these allegations.

43. Answering paragraph 43 of the FAC, Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in this paragraph and, therefore, cannot admit or deny these allegations.

44. Answering paragraph 44 of the FAC, Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in this paragraph and, therefore, cannot admit or deny these allegations.

45. Answering paragraph 45 of the FAC, Defendants deny the allegations contained in this paragraph.

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1           46.     Answering paragraph 46 of the FAC, Defendants are without knowledge or  
2 information sufficient to form a belief as to the truth of the allegations contained in this  
3 paragraph and, therefore, cannot admit or deny these allegations.

4           47.     Answering paragraph 47 of the FAC, Defendants deny the allegations contained  
5 in this paragraph.

6           48.     Answering paragraph 48 of the FAC, Defendants deny the allegations contained  
7 in this paragraph.

8           49.     Answering paragraph 49 of the FAC, Defendants are without knowledge or  
9 information sufficient to form a belief as to the truth of the allegations contained in this  
10 paragraph and, therefore, cannot admit or deny these allegations.

11          50.     Answering paragraph 50 of the FAC, Defendants are without knowledge or  
12 information sufficient to form a belief as to the truth of the allegations contained in this  
13 paragraph and, therefore, cannot admit or deny these allegations.

14          51.     Answering paragraph 51 of the FAC, Defendants admit that MD Anderson  
15 submitted to SHL a request for preauthorization for proton beam therapy on behalf of William  
16 Eskew.

17          52.     Answering paragraph 52 of the Complaint, Defendants deny the allegations  
18 contained in this paragraph.

19          53.     Answering paragraph 53 of the Complaint, Defendants deny the allegations  
20 contained in this paragraph.

21          54.     Answering paragraph 54 of the Complaint, Defendants deny the allegations  
22 contained in this paragraph.

23          55.     Answering paragraph 55 of the Complaint, Defendants deny the allegations  
24 contained in this paragraph.

25          56.     Answering paragraph 56 of the Complaint, Defendants deny the allegations  
26 contained in this paragraph.

27          57.     Answering paragraph 57 of the Complaint, Defendants deny the allegations  
28 contained in this paragraph.



1           58.     Answering paragraph 58 of the Complaint, Defendants deny the allegations  
2 contained in this paragraph.

3           59.     Answering paragraph 59 of the Complaint, Defendants are without knowledge or  
4 information sufficient to form a belief as to the truth of the allegations contained in this  
5 paragraph and, therefore, cannot admit or deny these allegations.

6           60.     Answering paragraph 60 of the Complaint, Defendants deny the allegations  
7 contained in this paragraph.

8           61.     Answering paragraph 61 of the Complaint, Defendants deny the allegations  
9 contained in this paragraph.

10          62.     Answering paragraph 62 of the Complaint, Defendants deny the allegations  
11 contained in this paragraph.

12          63.     Answering paragraph 63 of the Complaint, Defendants deny the allegations  
13 contained in this paragraph.

14          64.     Answering paragraph 64 of the FAC, Defendants admit that SHL received a  
15 request for preauthorization for proton beam therapy on behalf of William Eskew on February 3,  
16 2016; after considering and reviewing such request, SHL sent a letter, dated February 5, 2016,  
17 stating that proton beam therapy was not covered. Defendants deny the remaining allegations  
18 contained in this paragraph.

19          65.     Answering paragraph 65 of the FAC, Defendants deny the allegations contained  
20 in this paragraph.

21          66.     Answering paragraph 66 of the FAC, Defendants deny the allegations contained  
22 in this paragraph.

23          67.     Answering paragraph 67 of the FAC, Defendants deny the allegations contained  
24 in this paragraph.

25          68.     Answering paragraph 68 of the FAC, Defendants deny the allegations contained  
26 in this paragraph.

27          69.     Answering paragraph 99 of the FAC, Defendants deny the allegations contained  
28 in this paragraph.



- 1           70.     Answering paragraph 70 of the FAC, Defendants deny the allegations contained
- 2 in this paragraph.
- 3           71.     Answering paragraph 71 of the FAC, Defendants deny the allegations contained
- 4 in this paragraph.
- 5           72.     Answering paragraph 72 of the FAC, Defendants deny the allegations contained
- 6 in this paragraph.
- 7           73.     Answering paragraph 73 of the FAC, Defendants deny the allegations contained
- 8 in this paragraph.
- 9           74.     Answering paragraph 74 of the FAC, Defendants deny the allegations contained
- 10 in this paragraph.
- 11           75.     Answering paragraph 75 of the FAC, Defendants deny the allegations contained
- 12 in this paragraph.
- 13           76.     Answering paragraph 76 of the FAC, Defendants admit that the letter, dated
- 14 February 5, 2016, stating that proton beam therapy was not covered was signed by Dr. Shamoon
- 15 Ahmad. Defendants deny the remaining allegations contained in this paragraph.
- 16           77.     Answering paragraph 77 of the FAC, Defendants deny the allegations contained
- 17 in this paragraph.
- 18           78.     Answering paragraph 78 of the FAC, Defendants are without knowledge or
- 19 information sufficient to form a belief as to the truth of the allegations contained in this
- 20 paragraph and, therefore, cannot admit or deny these allegations.
- 21           79.     Answering paragraph 79 of the FAC, Defendants deny the allegations contained
- 22 in this paragraph.
- 23           80.     Answering paragraph 80 of the FAC, Defendants deny the allegations contained
- 24 in this paragraph.
- 25           81.     Answering paragraph 81 of the FAC, Defendants are without knowledge or
- 26 information sufficient to form a belief as to the truth of the allegations contained in this
- 27 paragraph and, therefore, cannot admit or deny these allegations. To the extent that this
- 28 allegation implies any wrongdoing by Defendants, deny.



1           82.     Answering paragraph 82 of the FAC, Defendants deny the allegations contained  
2 in this paragraph.

3           83.     Answering paragraph 83 of the FAC, Defendants deny the allegations contained  
4 in this paragraph.

5           84.     Answering paragraph 84 of the FAC, Defendants deny the allegations contained  
6 in this paragraph.

7           85.     Answering paragraph 85 of the FAC, Defendants deny that SHL denied the best  
8 and most appropriate treatment for Bill. Defendants are without knowledge or information to  
9 form a belief as to the truth of the remaining allegations contained in this paragraph and,  
10 therefore, cannot admit or deny these allegations.

11          86.     Answering paragraph 86 of the FAC, Defendants deny the allegations contained  
12 in this paragraph.

13          87.     Answering paragraph 87 of the FAC, Defendants deny the allegations contained  
14 in this paragraph.

15          88.     Answering paragraph 88 of the FAC, Defendants deny the allegations contained  
16 in this paragraph.

17          89.     Answering paragraph 89 of the FAC, Defendants deny the allegations contained  
18 in this paragraph.

19          90.     Answering paragraph 90 of the FAC, Defendants deny the allegations contained  
20 in this paragraph.

21          91.     Answering paragraph 91 of the FAC, Defendants are without knowledge or  
22 information to form a belief as to the truth of the allegation that “Bill died on March 12, 2017,”  
23 and, therefore, cannot admit or deny this allegation. Defendants deny the remaining allegations  
24 contained in this paragraph.

25          92.     Answering paragraph 92 of the FAC, Defendants deny the allegations contained  
26 in this paragraph.

27          93.     Answering paragraph 93 of the FAC, Defendants deny the allegations contained  
28 in this paragraph.



94. Answering paragraph 94 of the FAC, Defendants deny the allegations contained in this paragraph.

95. Answering paragraph 95 of the FAC, Defendants deny the allegations contained in this paragraph.

96. Answering paragraph 96 of the FAC, Defendants are without knowledge or information to form a belief as to the truth of the allegations pertaining to the expenses incurred by William Eskew related to IMRT therapy, and, therefore, cannot admit or deny these allegations. Defendants deny the remaining allegations contained in this paragraph.

### **III. FIRST CAUSE OF ACTION**

#### **(Breach of Contract)**

97. Answering paragraph 97 of the FAC, Defendants incorporate by reference their responses and defenses to paragraphs 1 through 96 of Plaintiffs' FAC as if fully set forth herein.

98. Answering paragraph 98 of the FAC, Defendants admit the existence of Plan, which was an SHL plan, not a UHC plan. Defendants deny the remaining allegations contained in this paragraph.

99. Answering paragraph 99 of the FAC, Defendants deny the allegations contained in this paragraph.

100. Answering paragraph 100 of the FAC, Defendants deny the allegations contained in this paragraph.

101. Answering paragraph 101 of the FAC, Defendants deny the allegations contained in this paragraph.

102. Answering paragraph 102 of the FAC, Defendants deny the allegations contained in this paragraph.

### **IV. SECOND CAUSE OF ACTION**

#### **(Bad Faith)**

103. Answering paragraph 103 of the FAC, Defendants incorporate by reference their responses and defenses to paragraphs 1 through 102 of Plaintiffs' FAC as if fully set forth herein.

///



1           104. Answering paragraph 104 of the FAC, Defendants admit that the Plan contains an  
2 implied covenant of good faith and fair dealing. Defendants deny the remaining allegations in  
3 this paragraph.

4           105. Answering paragraph 105 of the FAC, Defendants deny the allegations contained  
5 in this paragraph.

6           106. Answering paragraph 106 of the FAC, Defendants deny the allegations contained  
7 in this paragraph.

8           107. Answering paragraph 107 of the FAC, Defendants deny the allegations contained  
9 in this paragraph.

10          108. Answering paragraph 108 of the FAC, Defendants deny the allegations contained  
11 in this paragraph.

12          109. Answering paragraph 109 of the FAC, Defendants are without knowledge or  
13 information sufficient to form a belief as to the truth of the allegations contained in this  
14 paragraph and, therefore, cannot admit or deny these allegations. To the extent this allegation  
15 implies any wrongdoing by Defendants, deny.

16          110. Answering paragraph 110 of the FAC, Defendants deny the allegations contained  
17 in this paragraph.

18          111. Answering paragraph 111 of the FAC, Defendants deny the allegations contained  
19 in this paragraph.

## 20                                   **V. THIRD CAUSE OF ACTION**

### 21                                   **(Breach of Nevada Unfair Claims Settlement Practices Act)**

22          112. Answering paragraph 112 of the FAC, Defendants incorporate by reference their  
23 responses and defenses to paragraphs 1 through 111 of Plaintiffs' FAC as if fully set forth herein.

24          113. Answering paragraph 113 of the FAC, Defendants deny the allegations contained  
25 in this paragraph.

26          114. Answering paragraph 114 of the FAC, Defendants deny the allegations contained  
27 in this paragraph.

28          ///



1 115. Answering paragraph 115 of the FAC, Defendants deny the allegations contained  
2 in this paragraph.

3 116. Answering paragraph 116 of the FAC, Defendants are without knowledge or  
4 information sufficient to form a belief as to the truth of the allegations contained in this  
5 paragraph and, therefore, cannot admit or deny these allegations. To the extent this allegation  
6 implies any wrongdoing by Defendants, deny.

7 117. Answering paragraph 117 of the FAC, Defendants deny the allegations contained  
8 in this paragraph.

9 118. Answering paragraph 118 of the FAC, Defendants deny the allegations contained  
10 in this paragraph.

11 119. Answering paragraph 119 of the FAC, Defendants deny the allegations contained  
12 in this paragraph.

13 **PRAYER FOR RELIEF**

14 120. Responding to the last unnumbered paragraph of Plaintiffs' FAC, including the  
15 "WHEREFORE" statement and all subparts thereto, Defendants deny that they are liable to  
16 Plaintiffs in any fashion or in any amount.

17 **AFFIRMATIVE DEFENSES**

18 **FIRST AFFIRMATIVE DEFENSE**

19 Plaintiffs' FAC fails to state a claim against Defendants upon which relief can be granted.

20 **SECOND AFFIRMATIVE DEFENSE**

21 Necessary and indispensable parties may not have been joined and/or parties may have  
22 been improperly joined, including Defendant.

23 **THIRD AFFIRMATIVE DEFENSE**

24 Plaintiffs have failed to mitigate their damages.

25 **FOURTH AFFIRMATIVE DEFENSE**

26 Defendants did not owe a duty to Plaintiffs and to the extent Defendants owed a duty to  
27 Plaintiffs, did not breach that duty.

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**FIFTH AFFIRMATIVE DEFENSE**

Defendants, at all times relevant to the allegations contained in Plaintiffs' FAC, acted with reasonable care in the performance of any and all duties, if any.

**SIXTH AFFIRMATIVE DEFENSE**

Plaintiffs failed to exercise ordinary care, caution or prudence for their own safety, thereby proximately causing or contributing to the cause of their own damages, if any, through their own negligence.

**SEVENTH AFFIRMATIVE DEFENSE**

Damages sustained by Plaintiffs, if any, were caused by the acts of third persons who were not acting on the part of Defendants in any manner or form, and as such, Defendant is not liable.

**EIGHTH AFFIRMATIVE DEFENSE**

The liability, if any, of Defendants must be reduced by the percentage of fault of others, including Plaintiffs.

**NINTH AFFIRMATIVE DEFENSE**

The Court does not possess personal jurisdiction over Defendants.

**TENTH AFFIRMATIVE DEFENSE**

Plaintiffs are barred from recovering any special damages herein for failure to specifically allege items of special damage claimed, pursuant to Nevada Rule of Civil Procedure 9(g).

**ELEVENTH AFFIRMATIVE DEFENSE**

Plaintiffs' claim for punitive damages cannot be sustained because an award of punitive damages that is subject to no predetermined limit, such as a maximum multiple of compensatory damages or a maximum amount of punitive damages that may be imposed, would: (1) violate Defendants' Due Process rights guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution; (2) violate Defendants' right not to be subjected to an excessive award; and (3) be improper under the Constitution, common law and public policies of Nevada.

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**TWELFTH AFFIRMATIVE DEFENSE**

As it has been necessary for Defendants to employ the services of an attorney to defend this action, Defendants seek to recover a reasonable amount of attorney fees and costs incurred in defending this action.

**THIRTEENTH AFFIRMATIVE DEFENSE**

The Plan does not provide coverage for the requested proton beam therapy treatment.

**FOURTEENTH AFFIRMATIVE DEFENSE**

There is a genuine dispute of whether the Plan provides for coverage of proton beam therapy treatment.

**FIFTEENTH AFFIRMATIVE DEFENSE**

Whether the Plan provides for coverage of proton beam therapy treatment is fairly debatable.

**SIXTEENTH AFFIRMATIVE DEFENSE**

The equitable doctrines of waiver, laches, estoppel, and unclean hands bar Plaintiffs' claims.

**SEVENTEENTH AFFIRMATIVE DEFENSE**

Pursuant to NRCP 11, as amended, all possible affirmative defenses may not have been alleged herein insofar as facts were not available after reasonable inquiry upon the filing of Defendants' Answer to Plaintiffs' FAC, and therefore, Defendants reserve the right to amend their Answer to allege additional affirmative defenses if subsequent investigation warrants

WHEREFORE, having fully responded to the allegations of the FAC, Defendants respectfully pray:

1. that Plaintiffs take nothing by their FAC;
2. that Defendants be discharged from this action without liability;
3. that the Court award to Defendants all their costs and attorneys' fees in defending action; and,

///  
///






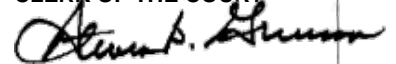
**CERTIFICATE OF SERVICE**

I hereby certify that on the 29<sup>th</sup> day of July, 2019, a true and correct copy of the foregoing **SIERRA HEALTH AND LIFE INSURANCE COMPANY, INC.'S ANSWER TO FIRST AMENDED** 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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18 **DISTRICT COURT**  
19 **CLARK COUNTY, NEVADA**

20 SANDRA L. ESKEW, individually and as  
21 special administrator of the Estate of William  
22 George Eskew; TYLER ESKEW; AND  
23 WILLIAM G. ESKEW, JR.,

24 Plaintiffs,

25 vs.

26 SIERRA HEALTH AND LIFE INSURANCE  
27 COMPANY, INC.; UNITED HEALTHCARE,  
28 INC.; and DOES I through XXX, inclusive,

Defendants.

Case No.: A-19-788630-C  
Dept. No.: 4

**Hearing Requested**

**DEFENDANTS' MOTION IN LIMINE  
NO. 3: EXCLUDE EVIDENCE,  
ARGUMENT, AND/OR TESTIMONY  
RELATING TO PRE-CONTRACT  
COMMUNICATIONS CONCERNING  
COVERAGE**

Defendants Sierra Health and Life Insurance Company, Inc. ("SHL") and United Healthcare, Inc. ("UHC") submit this Motion in Limine No. 3: Exclude Evidence, Argument, and/or Testimony relating to Pre-Contract Communications Concerning Coverage based on the attached Memorandum of Points and Authorities, the papers and pleadings on file in this action, and any oral argument this Court may allow.





## MEMORANDUM OF POINTS AND AUTHORITIES

The issue presented in this motion is whether the Court should exclude evidence, argument, and/or testimony relating to pre-contract communications concerning insurance coverage, such as interactions between Mr. Eskew's wife, Sandra Eskew, and the Eskews' insurance broker, Janet Holland-Williams, that occurred prior to Mr. Eskew entering into his health plan with SHL. Exclusion is warranted because such evidence constitutes inadmissible parol evidence and is irrelevant and unfairly prejudicial and misleading. The insurance contract between Mr. Eskew and SHL is unambiguous—there is no basis to admit pre-contract discussions or interactions in an attempt to modify the terms of the contract, create ambiguities where none exist, or cast aspersions against SHL.<sup>1</sup>

### **BACKGROUND**

Plaintiffs, whom consist of the estate and heirs of decedent William G. Eskew, have asserted three claims against Defendants SHL and UHC: (1) breach of contract, (2) bad faith, and (3) violation of NRS 686A.310(1). Plaintiffs seek to recover damages under NRS 41.085 and NRS 41.100, and punitive damages.

### **EVIDENCE AT ISSUE**

***The Contract.*** Mr. Eskew entered into a healthcare plan issued by SHL, effective January 1, 2016 ("Plan"). As detailed in Defendants' Motion for Summary Judgment re: Claims, the Plan unambiguously only provides coverage for services determined to be "Medically Necessary" under the Plan.

***Pre-Contract Interactions.*** Sandra Eskew testified during her deposition that in 2015 she set out to find a new insurance plan for Mr. Eskew. S. Eskew Dep. (Ex. 1) at 73. In doing so,

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<sup>1</sup> Trial courts are permitted to handle evidentiary issues prior to trial, in furtherance of several useful purposes, including helping avoid attempts to "unring the bell" during trial, reducing sidebars and disruptions during trial, and permitting more careful consideration outside the "heat of battle during trial." EDCR 2.47; *Sheehan & Sheehan v. Nelson Malley & Co.*, 121 Nev. 481, 492, 117 P.3d 219, 226 (2005); *R & B Auto Ctr., Inc. v. Farmers Group, Inc.*, 44 Cal. Rptr. 3d 426, 462 (Cal. Ct. App. 2006) (Rylaarsdam, Acting P.J., concurring); *Blanks v. Seyfarth Shaw LLP*, 89 Cal. Rptr. 3d 710, 741 (Cal. Ct. App. 2009) (internal citation omitted). The parties conferred in good faith regarding the subject matter of this motion in accordance with EDCR 2.47(b) and were unable to reach an agreement. See Declaration of Ryan T. Gormley (included herein below).



1 she worked with an insurance broker named Janet Holland-Williams. *Id.* Mrs. Eskew testified  
2 that she told Ms. Holland-Williams that she wanted a PPO plan that covered Mr. Eskew's  
3 existing doctors, had a low deductible, and that would cover proton therapy. *Id.* at 76-78. Mrs.  
4 Eskew testified that Ms. Holland-Williams provided her with a spreadsheet, identifying various  
5 potential plans. *Id.* at 78. Mrs. Eskew "assumed what she [Ms. Holland] had sent [her] were  
6 plans that covered [proton therapy]." *Id.* at 88:5-6; *see id.* at 87-88. Mrs. Eskew based this  
7 assumption on her "conversation with [Ms. Holland]." *Id.* at 88:7-10.

8 After the deposition of Mrs. Eskew, Ms. Holland-Williams was deposed in this matter.  
9 Ms. Holland-Williams testified that she never communicated to the Eskews that proton therapy  
10 was a covered service under the Plan. J. Holland-Williams Dep. (Ex. 2) at 32:19-24; 53:16-54:5.  
11 Ms. Holland-Williams further testified that Mrs. Eskew had asked her via text if SHL would  
12 cover "procedures like proton therapy, not done here, or cyber knife, which is done here in Las  
13 Vegas." *Id.* at 59:25-60:3. In response to this inquiry, Ms. Holland-Williams called either  
14 "member services" or a "service rep" at SHL, who sent her a 2015 version of the Plan and  
15 Attachment A Benefit Schedule, which Ms. Holland-Williams then provided to Mrs. Eskew. *Id.*  
16 at 55:5-17; 59-63.

17 On cross-examination, Plaintiffs' counsel tried to score points by pointing out that the  
18 Plan was a "platinum" plan:

19 Q. And so from what I understand, is it fair to say that Mrs. Eskew  
20 was looking for the best possible coverage that she could buy for  
Mr. Eskew?

21 [objection]

22 A. Yes.

23 Q. And we've gone through this one says gold, bronze, and  
24 platinum. Can you tell us what the difference is between those  
three things?

25 A. When the Affordable Care Act came out, it set levels of  
26 coverage, and they would be based on the co-insurance levels. So  
platinum would have 10 percent. So, basically, the company, after  
27 you meet your deductible, you would pay 10 percent. The  
company as an insurance company would pay 90. A gold plan  
28 would cover – you'd pay 20. The insured would pay 20. They  
would pay 90 percent. The silver, 30 percent for the insured, and



1 70 percent for the company. And the bronze plan would be 40  
2 percent for the member, and 60 percent for the insurance company.

3 Q. And I take it the – the higher the – the –the higher the mineral –

4 A. Yeah. Well –

5 Q. Platinum – platinum is more expensive than gold, and gold is  
6 more expensive than bronze; is that right?

7 A. Yes.

8 Q. So Mrs. Eskew went to you to buy the best coverage and which  
9 obviously would require the ---the higher price?

10 A. Right.

11 *Id.* at 64:7-65:15.

12 Plaintiffs' counsel then attempted to criticize SHL for their response to Ms. Holland-

13 Williams' inquiry, although Ms. Holland-Williams rejected such attempts:

14 Q. And so if United Healthcare or Sierra Health and Life had a  
15 policy in place where they did not cover proton beam therapy, you  
16 would expect them to tell you that?

17 [objection]

18 A. You know, since the person you talk to, she sends over the EOC  
19 [refers to health plan], I'm assuming she doesn't know the answer  
20 either so that's why she sent me over more information. It's very  
21 complex.

22 *Id.* at 89:25-90:8.

23 Q. And it would be fair to say that your expectation is that if Sierra  
24 Health and Life had a policy that proton beam therapy was not  
25 covered, that that would have been communicated to you in  
26 response to your question?

27 [objection]

28 A. Not necessarily.

*Id.* at 91:11-18.

**ARGUMENT**

**A. INADMISSIBLE PAROL EVIDENCE**

The parol evidence rule precludes "the admission of evidence that would change the contract terms when the terms of a written agreement are clear, definite, and unambiguous." *Ringle v. Bruton*, 120 Nev. 82, 91, 86 P.3d 1032, 1037 (2004). Further, even when such an



1 ambiguity exists, courts can only utilize parol evidence to clear up what those ambiguous words  
2 mean but they cannot use parol evidence “to add to, subtract from, vary, or contradict” the words  
3 of the contract itself. *M.C. Multi-Fam. Dev., L.L.C. v. Crestdale Assocs., Ltd.*, 124 Nev. 901,  
4 913, 193 P.3d 536, 544 (2008). “[P]arol evidence may not be used to contradict [express] terms.”  
5 *Galardi v. Naples Polaris, LLC*, 129 Nev. 306, 309, 301 P.3d 364, 366 (2013). Thus, even when  
6 admissible (i.e., only when there's an ambiguity), parol evidence is only meaningful to the extent  
7 that it clarifies and does not contradict or re-write the plain words of the contract itself. *Id.*  
8 Likewise, parol evidence cannot be used for the purposes of creating an ambiguity. *Kaldi v.*  
9 *Farmers Ins. Exch.*, 117 Nev. 273, 282, 21 P.3d 16, 22 (2001); *Port of Portland v. Water Quality*  
10 *Ins. Syndicate*, 796 F.2d 1188, 1194 (9th Cir. 1986). The parol evidence rule applies to  
11 insurance contracts, as it does any other contract. *Port of Portland v. Water Quality Ins.*  
12 *Syndicate*, 796 F.2d 1188, 1194 (9th Cir. 1986).<sup>2</sup>

13 Here, to the extent that Plaintiffs want to introduce evidence of any pre-contract (i.e., pre-  
14 January 1, 2016) communications concerning insurance coverage, the parol evidence rule bars  
15 such evidence. The Plan is unambiguous—it only provides coverage for services determined to  
16 be “Medically Necessary” under the Plan. To the extent that Plaintiffs want to introduce any  
17 pre-contract communications in an effort to modify or create ambiguity as to such terms, such  
18 evidence should not be allowed.

## 19 B. IRRELEVANT

20 For evidence to be admissible, it must be relevant. NRS 48.025(1). Evidence is relevant  
21 if it has “any tendency to make the existence of any fact that is of consequence to the  
22 determination of the action more or less probable than it would be without the evidence.” NRS  
23 48.015.

24  
25 <sup>2</sup> It is worth noting that the parol evidence rule applies whether the final document is integrated or not: if a  
26 contract is integrated then it may neither be supplemented nor contradicted by any additional evidence of  
27 any kind. If a contract is not integrated, then it may be supplemented by “consistent additional terms” but  
28 it still may never be contradicted by any extrinsic evidence. John D. Calamari & Joseph M. Perillo,  
Contracts § 3-2, “The Parol Evidence Rule”, 135-36 (3d ed. 1987) (text cited as authority in *Matter of*  
*Kern*, 107 Nev. 988. 991, 823 P.2d 275, 277 (1991).





1 Here, to the extent the evidence and arguments detailed above are not prohibited by the  
2 parol evidence rule, they should be excluded as irrelevant. Take, for instance, Plaintiffs' "best  
3 coverage"/ "platinum" line of inquiry: Mrs. Eskew's intent to obtain the "best coverage" has no  
4 bearing on the issues at hand. Whether Mrs. Eskew sought the best or worst coverage, the Plan  
5 provides for what the Plan provides. Likewise, Plaintiffs' counsel's failed attempts to criticize  
6 SHL's response to Ms. Holland-Williams' inquiry also make no sense—how could a service  
7 representative tell someone whether proton beam is covered without so much as a diagnosis?  
8 The fact that Ms. Holland-Williams reached out to a service representative at SHL and then  
9 provided a copy of a prior version of the Plan to Mrs. Eskew has no bearing on the issues at  
10 hand.

### 11 C. UNFAIRLY PREJUDICIAL AND MISLEADING

12 In bad faith actions, "there is a heightened concern about the potential of prejudice to the  
13 insurer." *Mosley v. Arch Specialty Ins. Co.*, 626 S.W.3d 579, 592 (Ky. 2021). The trial court  
14 "should be on high alert when deciding what evidence may be admitted." *Id.*

15 Relevant evidence is not admissible if its probative value is substantially outweighed by  
16 the danger of unfair prejudice, of confusion of the issues or of misleading the jury or undue  
17 delay, waste of time, or needless presentation of cumulative evidence. NRS 48.035(1)-(2).  
18 Determining "probative value" "turns on the actual need for the evidence in light of the issues at  
19 trial and the other evidence available." *Harris v. State*, 134 Nev. 877, 881, 432 P.3d 207, 211  
20 (2018) (internal quotation marks omitted). "Unfair prejudice" is defined "as an appeal to the  
21 emotional and sympathetic tendencies of a jury, rather than the jury's intellectual ability to  
22 evaluate evidence." *State v. Dist. Ct. (Armstrong)*, 127 Nev. 927, 933, 267 P.3d 777, 781 (2011).

23 Here, to the extent the evidence and arguments detailed above are not prohibited by the  
24 parol evidence rule and are found to have any probative value, such value is substantially  
25 outweighed by the danger of unfair prejudice and misleading the jury. The "best coverage"  
26 argument is misleading because it tries to create the illusion that the different levels of plans  
27 (platinum, gold, etc.) would impact a medical necessity determination—they do not. As  
28 explained by Ms. Holland-Williams, the different plan levels relate to deductibles and other



aspects of that nature, not medical necessity. Ex. 2 at 64:7-65:15. Similarly, the failed attempts to criticize SHL for its service representative not providing a coverage determination are misleading because a service representative is not the appropriate person to make a coverage determination, not to mention that no pertinent information was provided. These arguments do not get to the substance of the matter, they are only meant to upset and mislead the jury into thinking that SHL somehow “hid the ball.” Such tactics should not be permitted.

### CONCLUSION

Based on the foregoing, Defendants respectfully request that the Court grant this Motion and issue an order excluding any evidence, argument, and/or testimony relating to pre-contract communications concerning insurance coverage, such as interactions between Mr. Eskew’s wife, Sandra Eskew, and the Eskews’ insurance broker, Janet Holland-Williams, that occurred prior to Mr. Eskew entering into his health plan with SHL.

DATED: December 29, 2021.

WEINBERG, WHEELER, HUDGINS,  
GUNN & DIAL, LLC

/s/ Ryan T. Gormley

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Las Vegas, Nevada 89118

*Attorneys for Defendants*



**RULE 2.47 DECLARATION OF RYAN T. GORMLEY, ESQ.**

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

2. On December 23, 2021, D. Lee Roberts, Jr. and I met and conferred via telephone with Plaintiffs' counsel, Matthew L. Sharp and Douglas A. Terry, regarding the issue(s) presented by this motion, but could not reach agreement, thus necessitating this motion.

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

DATED: December 29, 2021

/s/ Ryan T. Gormley  
RYAN T. GORMLEY, ESQ.



**CERTIFICATE OF SERVICE**

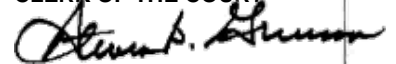
I hereby certify that on the 29th day of December, 2021, a true and correct copy of the foregoing **DEFENDANTS' MOTION IN LIMINE NO. 3: EXCLUDE EVIDENCE, ARGUMENT, AND/OR TESTIMONY RELATING TO PRE-CONTRACT COMMUNICATIONS CONCERNING COVERAGE** was electronically filed and served on counsel through the 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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19 **DISTRICT COURT**  
20 **CLARK COUNTY, NEVADA**

21 SANDRA L. ESKEW, individually and as  
22 special administrator of the Estate of William  
23 George Eskew; TYLER ESKEW; AND  
24 WILLIAM G. ESKEW, JR.,

25 Plaintiffs,

26 vs.

27 SIERRA HEALTH AND LIFE INSURANCE  
28 COMPANY, INC.; UNITED HEALTHCARE,  
INC.; and DOES I through XXX, inclusive,

Defendants.

Case No.: A-19-788630-C  
Dept. No.: 4

**Hearing Requested**

**DEFENDANTS' MOTION IN LIMINE  
NO. 6: EXCLUDE EVIDENCE,  
ARGUMENT, AND/OR TESTIMONY  
RELATING TO THE NEW YORK  
PROTON CENTER**

Defendants Sierra Health and Life Insurance Company, Inc. ("SHL") and United Healthcare, Inc. ("UHC") submit this Motion in Limine No. 6: Exclude Evidence, Argument, and/or Testimony relating to the New York Proton Center based on the attached Memorandum of Points and Authorities, the papers and pleadings on file in this action, and any oral argument this Court may allow.





## MEMORANDUM OF POINTS AND AUTHORITIES

The issue presented in this motion is whether the Court should exclude evidence, argument, and/or testimony relating to the New York Proton Center (“NYPC”). Exclusion is warranted because such evidence is irrelevant, constitutes inadmissible hearsay, and is unfairly prejudicial, misleading, confusing, and will result in undue delay. The NYPC is a proton therapy treatment center in New York that has a relationship with a subsidiary of Optum—the center’s existence, relationship with Optum, and statements on its website are of no relevance here.<sup>1</sup>

### **BACKGROUND**

Plaintiffs, whom consist of the estate and heirs of decedent William G. Eskew, have asserted three claims against Defendants SHL and UHC: (1) breach of contract, (2) bad faith, and (3) violation of NRS 686A.310(1). Plaintiffs seek to recover damages under NRS 41.085 and NRS 41.100, and punitive damages.

### **EVIDENCE AT ISSUE**

**The NYPC.** The NYPC is a facility in New York, New York that offers proton therapy. It first opened in 2019. Its website provides that it is operated by four partners: (1) Memorial Sloan Kettering Cancer Center; (2) Montefiore Health System; (3) Mount Sinai Health System; and (4) ProHEALTH. Its website further provides the following with respect to lung cancer:

When lung cancer is treated with conventional radiation, it is difficult to deliver a high enough radiation dose to control the cancer without also damaging the normal lung, esophagus, heart and spinal cord.

Proton therapy can more effectively treat these tumors—particularly larger ones—while better protecting critical structures from radiation. As a result, protons can minimize side effects such as lung inflammation (pneumonitis) or scarring (fibrosis), difficulty swallowing, heart complications, hospitalizations, and

<sup>1</sup> Trial courts are permitted to handle evidentiary issues prior to trial, in furtherance of several useful purposes, including helping avoid attempts to “unring the bell” during trial, reducing sidebars and disruptions during trial, and permitting more careful consideration outside the “heat of battle during trial.” EDCR 2.47; *Sheehan & Sheehan v. Nelson Malley & Co.*, 121 Nev. 481, 492, 117 P.3d 219, 226 (2005); *R & B Auto Ctr., Inc. v. Farmers Group, Inc.*, 44 Cal. Rptr. 3d 426, 462 (Cal. Ct. App. 2006) (Rylaarsdam, Acting P.J., concurring); *Blanks v. Seyfarth Shaw LLP*, 89 Cal. Rptr. 3d 710, 741 (Cal. Ct. App. 2009) (internal citation omitted). The parties conferred in good faith regarding the subject matter of this motion in accordance with EDCR 2.47(b) and were unable to reach an agreement. *See* Declaration of Ryan T. Gormley (included herein below).



1 other side effects that are commonly seen with conventional lung  
2 cancer treatment.

3 The following is what discovery has revealed regarding the NYPC. In 2015, the N.Y.  
4 State Department of Health, Center for Health Care Facility Planning, Licensure and Finance  
5 approved a license for the NYPC. The documentation associated with that approval, dated  
6 February 4, 2015 (Ex. 1), states that the NYPC would do the following:

7 enter into an administrative service and license agreement with  
8 New York Proton Management, LLC (NYPM), a to-be-formed  
9 New York limited liability company, to provide the facility  
10 equipment and day-to-day administrative/non-clinical support.  
11 NYPM will own or lease the 'hard assets' of NYPC, including the  
12 building improvements, medical equipment, business equipment,  
13 furniture and fixtures. NYPM will also provide non-clinical  
14 business services to NYPC (e.g., billing/collections, HR, IT,  
15 accounting))."

16 *Id.* It further provides that the proposed members of NYPM are: (1) MSKCC Proton, Inc.  
17 (36.31%); (2) Mount Sinai Management Services, Inc. (23.04%); (3) Montefiore Proton  
18 Acquisition, Inc. (7.02%); and (4) ProHEALTH Proton Center Management, LLC (33.63%)  
19 ("ProHealthPCM"). With respect to ProHealthPCM, it provides that "[ProHealthPCM], an  
20 affiliate of United Health Group, Inc., will be NYPC's manager." *Id.*

21 The organizational chart for United Health Group Incorporated shows that  
22 ProHealthPCM is a subsidiary of ProHEALTH Medical Management, LLC, which is a  
23 subsidiary of Collaborative Care Holdings, LLC, which is a subsidiary of OptumHealth  
24 Holdings, LLC, which is a subsidiary of Optum, Inc., which is a subsidiary of United HealthCare  
25 Services, Inc., which is a subsidiary of UnitedHealth Group Incorporated. Plaintiffs' purported  
26 corporate structure expert, Elliott Flood, agrees with this breakdown.

27 By way of background, UnitedHealth Group Incorporated is a diversified health care  
28 company trading on the New York Stock Exchange. According to its 10-K, it generally consists  
of two lines of business referred to as Optum and UnitedHealthcare, where UnitedHealthcare  
offers a full spectrum of health benefit programs and Optum delivers health services to  
consumers, providers, and payers, among others.

***Plaintiffs' References to the NYPC.*** During discovery, Plaintiffs' have invoked the  
NYPC and its website in various ways. Plaintiffs' radiation oncology expert, Dr. Andrew



1 Chang, quoted the portion of the NYPC website recounted above and stated “[f]rom a medical  
2 standpoint, I agree with these statements.” Dr. Chang Report (Ex. 2) at p. 7. Plaintiffs’  
3 insurance expert, Dr. Stephen Prater, stated in his report that the denial of the prior authorization  
4 request at issue and the statements on the NYPC website are “particularly concerning and  
5 inconsistent with fair claims handling practices.” Prater Report (Ex. 3) at p. 28. Likewise,  
6 Plaintiffs’ counsel asked a UHC 30(b)(6) designee, Dr. Ana Bhatnagar, if she “[e]ver heard of  
7 the New York Proton Center,” to which she responded “No.” UHC 30(b)(6) Dep. (Dr.  
8 Bhatnagar) (Ex. 4) at 187:11-14.

## 9 ARGUMENT

### 10 A. IRRELEVANT

11 For evidence to be admissible, it must be relevant. NRS 48.025(1). Evidence is relevant  
12 if it has “any tendency to make the existence of any fact that is of consequence to the  
13 determination of the action more or less probable than it would be without the evidence.” NRS  
14 48.015.

15 Here, information pertaining to the NYPC and its website is not relevant. This case  
16 concerns whether Mr. Eskew’s health plan provided coverage for proton therapy for his lung  
17 cancer; whether SHL had a reasonable basis for denying the prior authorization request; and  
18 whether SHL acted in contravention of NRS 686A.310(1) in the handling of the prior  
19 authorization request. The advertising information on the NYPC website has no bearing on these  
20 issues. Further, even if it did, there is no basis to impute such information to SHL. While SHL  
21 and ProHealthPCM are distant affiliates under the UnitedHealth Group Incorporated umbrella  
22 that does not mean that the knowledge of ProHealthPCM is imputed to SHL, or UHC for that  
23 matter. See *Masimo Corp. v. Wireless*, No. 19-CV-01100-BAS-NLS, 2020 WL 7260660, at \*10  
24 (S.D. Cal. Dec. 10, 2020) (providing that a parent/subsidiary relationship is not enough to impute  
25 a subsidiary’s knowledge to a parent corporation). Without that connection, the NYPC website  
26 has as little connection to the facts at issue in this case as any other proton beam facility website  
27 engaging in sales talk: none.  
28





**B. HEARSAY**

Hearsay is inadmissible except as allowed by statute. NRS 51.065(1). “Hearsay” refers to “a statement offered in evidence to prove the truth of the matter asserted.” NRS 51.035. While an expert may rely on “facts or data [that] need not be admissible in evidence,” such as hearsay, that exception is limited to information that is “of a type reasonably relied upon by experts in forming opinions or inferences upon the subject.” NRS 50.285(2).

Here, to the extent that Plaintiffs attempt to introduce the contents of the NYPC website, such information constitutes inadmissible hearsay. To that end, not even Plaintiffs’ experts can rely on the website because it is not “of a type reasonably relied upon by experts in forming opinions or inferences upon the subject.” NRS 50.285(2). Experts do not rely on website sales talk when it comes to the basis for the use of a medical treatment.

**C. UNFAIRLY PREJUDICIAL, MISLEADING, CONFUSING, AND UNDUE DELAY**

In bad faith actions, “there is a heightened concern about the potential of prejudice to the insurer.” *Mosley v. Arch Specialty Ins. Co.*, 626 S.W.3d 579, 592 (Ky. 2021). The trial court “should be on high alert when deciding what evidence may be admitted.” *Id.*

Relevant evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues or of misleading the jury or undue delay, waste of time, or needless presentation of cumulative evidence. NRS 48.035(1)-(2). Determining “probative value” “turns on the actual need for the evidence in light of the issues at trial and the other evidence available.” *Harris v. State*, 134 Nev. 877, 881, 432 P.3d 207, 211 (2018) (internal quotation marks omitted). “Unfair prejudice” is defined “as an appeal to the emotional and sympathetic tendencies of a jury, rather than the jury’s intellectual ability to evaluate evidence.” *State v. Dist. Ct. (Armstrong)*, 127 Nev. 927, 933, 267 P.3d 777, 781 (2011).

Here, to the extent that the NYPC and its website offer any probative value, such marginal value is substantially outweighed by the danger of unfair prejudice, misleading the jury, confusing the jury, and risks of undue delay. Plaintiffs want to use the NYPC information to portray Defendants as inconsistent and/or self-serving—denying proton therapy on one hand and selling it out of the other hand. While such an argument amounts to powerful rhetoric to inflame



the jury, it lacks any substantive probative value. Over 300,000 people work under the UnitedHealth Group Incorporated umbrella. Using a statement on the website of one entity to impute knowledge or discredit the views of a distant separate entity is impermissible and of little to no probative value of anything. It is also misleading because the jury might not grasp the breadth and scope of the UnitedHealth Group Incorporated corporate structure, which consists of hundreds of entities—the organizational chart is 22 pages long. Finally, allowing Plaintiffs to delve into such matters will bring with it needless delay in order to attempt to clarify and show the impertinent nature of the evidence.

### CONCLUSION

Based on the foregoing, Defendants respectfully request that the Court grant this Motion and issue an order excluding any evidence, argument, and/or testimony relating to the NYPC.

DATED: December 29, 2021.

WEINBERG, WHEELER, HUDGINS,  
GUNN & DIAL, LLC

/s/ Ryan T. Gormley  
D. Lee Roberts, Jr., Esq.  
Marjan Hajimirzaee, Esq.  
Ryan T. Gormley, Esq.  
6385 South Rainbow Blvd., Suite 400  
Las Vegas, Nevada 89118

*Attorneys for Defendants*



**RULE 2.47 DECLARATION OF RYAN T. GORMLEY, ESQ.**

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

2. On December 23, 2021, D. Lee Roberts, Jr. and I met and conferred via telephone with Plaintiffs' counsel, Matthew L. Sharp and Douglas A. Terry, regarding the issue(s) presented by this motion, but could not reach agreement, thus necessitating this motion.

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

DATED: December 29, 2021

/s/ Ryan T. Gormley  
RYAN T. GORMLEY, ESQ.



**CERTIFICATE OF SERVICE**

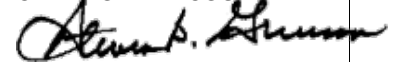
I hereby certify that on the 29th day of December, 2021, a true and correct copy of the foregoing **DEFENDANTS' MOTION IN LIMINE NO. 6: EXCLUDE EVIDENCE, ARGUMENT, AND/OR TESTIMONY RELATING TO THE NEW YORK PROTON CENTER** was electronically filed and served on counsel through the Court's electronic service 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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*Sandra L. Eskew, Tyler Eskew and*  
*William G. Eskew, Jr.*

/s/ Cynthia S. Bowman

An employee of WEINBERG, WHEELER,  
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11 WEINBERG, WHEELER, HUDGINS,

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13 6385 South Rainbow Blvd., Suite 400

14 Las Vegas, Nevada 89118

15 Telephone: (702) 938-3838

16 Facsimile: (702) 938-3864

17

18 *Attorneys for Defendants*

19

20 **DISTRICT COURT**

21 **CLARK COUNTY, NEVADA**

22 SANDRA L. ESKEW, individually and as  
23 special administrator of the Estate of William  
24 George Eskew; TYLER ESKEW; AND  
25 WILLIAM G. ESKEW, JR.,

26 Plaintiffs,

27 vs.

28 SIERRA HEALTH AND LIFE INSURANCE  
COMPANY, INC.; UNITED HEALTHCARE,  
INC.; and DOES I through XXX, inclusive,

Defendants.

Case No.: A-19-788630-C  
Dept. No.: 4

**Hearing Requested**

**DEFENDANTS' MOTION IN LIMINE  
NO. 17: EXCLUDE EVIDENCE,  
ARGUMENT, AND/OR TESTIMONY  
RELATING TO LITIGATION CONDUCT**

Defendants Sierra Health and Life Insurance Company, Inc. ("SHL") and United Healthcare, Inc. ("UHC") submit this Motion in Limine No. 17: Exclude Evidence, Argument, and/or Testimony Relating to Litigation Conduct based on the attached Memorandum of Points and Authorities, the papers and pleadings on file in this action, and any oral argument this Court may allow.





## MEMORANDUM OF POINTS AND AUTHORITIES

The issue presented in this motion is whether the Court should exclude evidence, argument, and/or testimony relating to litigation conduct in this case, such as Defendants’ handling of the pleadings, discovery, and pre-trial motions. Exclusion is warranted because such evidence is irrelevant and unfairly prejudicial, misleading, confusing, and will result in undue delay. Nothing that has transpired in the legal and procedural course of this litigation should be presented to the jury—allowing such information to reach the jury would undermine the litigation process and an insurer’s right to fully defend itself in litigation.<sup>1</sup>

### **BACKGROUND**

Plaintiffs, whom consist of the estate and heirs of decedent William G. Eskew, have asserted three claims against Defendants SHL and UHC: (1) breach of contract, (2) bad faith, and (3) violation of NRS 686A.310(1). Plaintiffs seek to recover damages under NRS 41.085 and NRS 41.100, and punitive damages.

### **EVIDENCE AT ISSUE**

This litigation, like most if not all litigation, has had its share of meet and confers, deposition objections, and discovery disputes. But through it all, the parties have worked in good faith to reach the close of discovery and eventually trial. Between an initial motion to dismiss and the instant motions for summary judgment and motions in limine, no motions were filed in this matter. With respect to written discovery, Plaintiffs did not serve any requests for admission or interrogatories, only requests for production.

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<sup>1</sup> Trial courts are permitted to handle evidentiary issues prior to trial, in furtherance of several useful purposes, including helping avoid attempts to “unring the bell” during trial, reducing sidebars and disruptions during trial, and permitting more careful consideration outside the “heat of battle during trial.” EDCR 2.47; *Sheehan & Sheehan v. Nelson Malley & Co.*, 121 Nev. 481, 492, 117 P.3d 219, 226 (2005); *R & B Auto Ctr., Inc. v. Farmers Group, Inc.*, 44 Cal. Rptr. 3d 426, 462 (Cal. Ct. App. 2006) (Rylaarsdam, Acting P.J., concurring); *Blanks v. Seyfarth Shaw LLP*, 89 Cal. Rptr. 3d 710, 741 (Cal. Ct. App. 2009) (internal citation omitted). The parties conferred in good faith regarding the subject matter of this motion in accordance with EDCR 2.47(b) and were unable to reach an agreement. *See* Declaration of Ryan T. Gormley (included herein below).



## ARGUMENT

### A. IRRELEVANT

For evidence to be admissible, it must be relevant. NRS 48.025(1). Evidence is relevant if it has “any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence.” NRS 48.015.

Courts have refused to allow the introduction of various types of litigation conduct on the basis of irrelevance, including things such as obtaining witness statements, taking depositions, preparing for trial, filing motions to dismiss, objecting to discovery, not taking depositions at suggested times, making mistakes in scheduling meetings, issuing written discovery, and rejecting a request for mediation. *Sims v. Travelers Ins. Co.*, 16 P.3d 468 (Ok. Civ. App. 2000); *O'Donnell ex rel. Mitro v. Allstate Ins. Co.*, 734 A.2d 901 (Pa. Super. Ct. 1999); *Palmer v. Farmers Ins. Exch.*, 861 P.2d 895 (Mont. 1993).

Here, evidence, argument, or testimony regarding or referencing any of the litigation conduct in this case by Defendants, or Plaintiffs for that matter, is not relevant. This case concerns whether Mr. Eskew’s health plan provided coverage for proton therapy for his lung cancer; whether SHL had a reasonable basis for denying the prior authorization request; and whether SHL acted in contravention of NRS 686A.310(1) in the handling of the prior authorization request. Objections to written discovery, objections during deposition, or discussions during meet and confers between counsel, and other examples of litigation conduct, which are naturally part of the adversarial process, have no bearing on the issues at stake.

### B. UNFAIRLY PREJUDICIAL, MISLEADING, CONFUSING, AND UNDUE DELAY

In bad faith actions, “there is a heightened concern about the potential of prejudice to the insurer.” *Mosley v. Arch Specialty Ins. Co.*, 626 S.W.3d 579, 592 (Ky. 2021). The trial court “should be on high alert when deciding what evidence may be admitted.” *Id.*

Relevant evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues or of misleading the jury or undue delay, waste of time, or needless presentation of cumulative evidence. NRS 48.035(1)-(2).



Determining “probative value” “turns on the actual need for the evidence in light of the issues at trial and the other evidence available.” *Harris v. State*, 134 Nev. 877, 881, 432 P.3d 207, 211 (2018) (internal quotation marks omitted). “Unfair prejudice” is defined “as an appeal to the emotional and sympathetic tendencies of a jury, rather than the jury’s intellectual ability to evaluate evidence.” *State v. Dist. Ct. (Armstrong)*, 127 Nev. 927, 933, 267 P.3d 777, 781 (2011).

Courts have recognized that allowing the introduction of litigation conduct into evidence in a bad faith matter “undermine[s] an insurer’s right to contest questionable claims and to defend itself against such claims.” *Timberlake Const. Co. v. U.S. Fid. & Guar. Co.*, 71 F.3d 335, 341 (10th Cir. 1995). “[P]ermitting allegations of litigation misconduct would have a chilling effect on insurers, which could unfairly penalize them by inhibiting their attorneys from zealously and effectively representing their clients within the bounds permitted by law.” *Id.* (internal quotation marks omitted). “To permit the jury to pass judgment on the defense counsel’s trial tactics and to premise a finding of bad faith on counsel’s conduct places an unfair burden on the insurer’s counsel, potentially inhibiting the defense of the insurer.” *Knotts v. Zurich Ins. Co.*, 197 S.W.3d 512, 523 (Ky. 2006). That is, “[a]llowing evidence of litigation strategies and tactics would expose the insurer’s entire defense in a coverage action to scrutiny by the jury, unless the insurer won the underlying suit. The jury then, with the assistance of hindsight, and without the assistance of insight into litigation techniques, could second guess the defendant’s rationales for taking a particular course.” *Palmer by Diacon v. Farmers Ins. Exch.*, 861 P.2d 895, 914 (Mont. 1993) (internal quotations omitted).

Here, although discovery has proceeded without any motion work and in good faith, the admission of litigation tactics into evidence would still result in the same prejudice as discussed in the above cases. Plaintiffs could attempt to portray objections as stonewalling or motions as evading responsibility. Indeed, jurors would be enticed into making improper inferences and decisions based on the litigation tactics “without the assistance of insight into litigation techniques,” thus “second guess[ing] the defendant’s rationales for taking a particular course.” *See Palmer*, 861 P.2d at 914. Any attempts to cure such prejudice will result in undue delay and implicates attorney client privilege and work product concerns. Accordingly, to the extent that





1 evidence of litigation tactics offers any probative value, the Court should conclude that such  
2 value is substantially outweighed by the danger of unfair prejudice, misleading the jury,  
3 confusion, and/or undue delay.

#### 4 CONCLUSION

5 Based on the foregoing, Defendants respectfully request that the Court grant this Motion  
6 and issue an order excluding evidence, argument, and/or testimony relating to litigation conduct  
7 in this case, such as Defendants' handling of the pleadings, discovery, and pre-trial motions.

8 DATED: December 29, 2021.

9 WEINBERG, WHEELER, HUDGINS,  
10 GUNN & DIAL, LLC

11 /s/ Ryan T. Gormley  
12 D. Lee Roberts, Jr., Esq.  
13 Marjan Hajimirzaee, Esq.  
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15 6385 South Rainbow Blvd., Suite 400  
16 Las Vegas, Nevada 89118

17 *Attorneys for Defendants*  
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**RULE 2.47 DECLARATION OF RYAN T. GORMLEY, ESQ.**

1           1.       I am over the age of 18, have personal knowledge of the matters set forth herein  
2 and, unless otherwise stated, am competent to testify to the same if called upon to do so. I am an  
3 attorney with Weinberg, Wheeler, Hudgins, Gunn & Dial, LLC, counsel for Defendants in this  
4 matter. I make this declaration in support of the above motion.  
5

6           2.       On December 23, 2021, D. Lee Roberts, Jr. and I met and conferred via telephone  
7 with Plaintiffs' counsel, Matthew L. Sharp and Douglas A. Terry, regarding the issue(s)  
8 presented by this motion, but could not reach agreement, thus necessitating this motion.  
9

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

12          DATED: December 29, 2021

13                               /s/ Ryan T. Gormley  
14                               RYAN T. GORMLEY, ESQ.  
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**CERTIFICATE OF SERVICE**

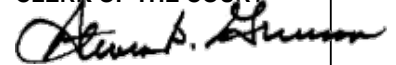
I hereby certify that on the 29th day of December, 2021, a true and correct copy of the foregoing **DEFENDANTS' MOTION IN LIMINE NO. 17: EXCLUDE EVIDENCE, ARGUMENT, AND/OR TESTIMONY RELATING TO LITIGATION CONDUCT** was electronically filed and served on counsel through the Court's electronic service 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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*Sandra L. Eskew, Tyler Eskew and*  
*William G. Eskew, Jr.*

/s/ Cynthia S. Bowman

An employee of WEINBERG, WHEELER,  
HUDGINS, GUNN & DIAL, LLC



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*Attorney for Plaintiffs*

**IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**  
**IN AND FOR THE COUNTY OF CLARK**

SANDRA L. ESKEW, individually and  
as Special Administrator of the Estate  
of William George Eskew; TYLER  
ESKEW; and WILLIAM G. ESKEW, JR.;

Plaintiffs,

vs.

SIERRA HEALTH AND LIFE INSURANCE  
COMPANY, INC., UNITED HEALTHCARE,  
INC.

Defendants.

Case No. A-19-788630-C

Dept. No. 4

**NOTICE OF WITHDRAWAL OF CLAIMS**

Sandra L. Eskew as Special Administrator of the Estate of William George Eskew hereby  
files this notice withdrawing its claims for breach of contract which is the First Cause of Action and  
the private right action under Nevada Unfair Claims Settlement Practices Act (NRS 686A.310)

///

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1 which is the Third Cause Action. The remaining cause of action is the Breach of the Implied  
2 Covenant of Good Faith and Fair Dealing which is the Second Cause of Action.

3 DATED this 14<sup>th</sup> day of January 2022.

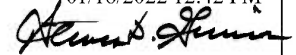
4 MATTHEW L. SHARP, LTD.

5  
6 /s/ Matthew L. Sharp  
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*Attorneys for Defendants*

/s/ Cristin B. Sharp  
An employee of Matthew L. Sharp, Ltd.

  
CLERK OF THE COURT

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*Attorney for Plaintiffs*

**IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**  
**IN AND FOR THE COUNTY OF CLARK**

SANDRA L. ESKEW, individually and  
as Special Administrator of the Estate  
of William George Eskew; TYLER  
ESKEW; and WILLIAM G. ESKEW, JR.;

Plaintiffs,

vs.

SIERRA HEALTH AND LIFE INSURANCE  
COMPANY, INC., UNITED HEALTHCARE,  
INC.

Defendants.

Case No. A-19-788630-C

Dept. No. 4

**STIPULATION AND ORDER TO DISMISS CLAIMS UNDER NRS 41.085**

Plaintiffs, SANDRA L. ESKEW, individually and as Special Administrator of the Estate of William George Eskew, TYLER ESKEW, and WILLIAM G. ESKEW, JR., through their counsel of record, MATTHEW L. SHARP, ESQ. and DOUG TERRY, ESQ., and Defendants, SIERRA HEALTH AND LIFE INSURANCE COMPANY, INC. and UNITED HEALTHCARE, INC., by and through their counsel of record, WEINBERG, WHEELER, HUDGINS, GUNN & DIAL, LLC, hereby stipulate and agree as follows:

- 1           1. Plaintiffs Sandra L. Eskew, individually and as the administrator of the Estate of William  
2           George Eskew, Tyler Eskew, and William G. Eskew, Jr., have asserted claims for dam-  
3           ages against Defendants pursuant to NRS 41.085.  
4           2. The claims for damages pursuant to NRS 41.085 asserted by Plaintiffs Sandra L. Eskew,  
5           individually and as the administrator of the Estate of William George Eskew, Tyler  
6           Eskew, and William G. Eskew, Jr., are hereby dismissed with prejudice; each party shall  
7           bear their own costs and fees.  
8           3. Upon the order granting this stipulation, Sandra L. Eskew, individually, Tyler Eskew,  
9           and William G. Eskew, Jr are no longer parties to the case.  
10          4. This stipulation does not affect the claims of Plaintiff Sandra L. Eskew as the special ad-  
11          ministrator of the Estate of William George Eskew asserted pursuant to NRS 41.100.

12 DATED: January 18, 2022

DATED: January 18, 2022

13 MATTHEW L. SHARP, LTD.

WEINBERG WHEELER HUDGINS  
GUNN & DIAL LLC

14 /s/ Matthew L. Sharp  
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21 *Attorneys for Plaintiffs*

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*Attorneys for Defendants*




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**ORDER**

Upon good cause showing, the Court grants the Stipulation and Order to Dismiss Claims Under NRS 41.085. The claims for damages asserted by Plaintiffs Sandra L. Eskew, individually and as the administrator of the Estate of William George Eskew, Tyler Eskew, and William G. Eskew, Jr., under NRS 41.085 are hereby dismissed with prejudice each party to bear their own costs and fees. Sandra L. Eskew, individually, Tyler Eskew, and William G. Eskew, Jr are no longer parties to the case. This stipulation does not affect the claims of Plaintiff Sandra L. Eskew as the special administrator of the Estate of William George Eskew asserted pursuant to NRS 41.100.

DATED this \_\_\_\_ day of January 2022.

Dated this 18th day of January, 2022  
  
DISTRICT JUDGE  
EFA 8CA D801 3A79  
Nadia Krall  
District Court Judge

Submitted by:  
MATTHEW L. SHARP, LTD.

\_\_\_\_\_  
/s/ Matthew L. Sharp  
Matthew L. Sharp  
432 Ridge St  
Reno, NV 89501  
Phone: (775) 324-1500  
Fax: (775) 284-0675  
[matt@mattsharpplaw.com](mailto:matt@mattsharpplaw.com)  
Attorney for Plaintiffs

**Subject:** RE: Eskew  
**Date:** Thursday, January 13, 2022 at 2:13:56 PM Pacific Standard Time  
**From:** Gormley, Ryan  
**To:** Matt Sharp, Doug Terry  
**CC:** Roberts, Lee  
**Attachments:** image001.png, REVISEE-sig2020\_5801a862-4942-4e3a-94ab-425c0ea8e329.png, 2021-01-11 Stip to dismiss wrongful death claim doc edits.doc

Thank you both. Yes on the dismissal stipulation. It is attached with a few minor redlines. If those redlines look agreeable, you can proceed with adding my e-signature and filing.

---

**From:** Matt Sharp <matt@mattsharplaw.com>  
**Sent:** Thursday, January 13, 2022 1:37 PM  
**To:** Doug Terry <doug@dougterrylaw.com>; Gormley, Ryan <RGormley@wwhgd.com>  
**Cc:** Roberts, Lee <LRoberts@wwhgd.com>  
**Subject:** Re: Eskew

**This Message originated outside your organization.**

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That is fine we will plan on the opposition to motion for sanctions being filed on Monday. We may need extra time to reply to motion.

Can we also confirm that UHC is in agreement to a stipulation to dismiss with wrongful death claim?

Matthew L. Sharp  
Law Office of Matthew L. Sharp  
432 Ridge St.  
Reno, NV 89501  
[Matt@MattSharpLaw.com](mailto:Matt@MattSharpLaw.com)  
775-324-1500  
Member American Association for Justice Leaders Forum  
Board of Governors American Association for Justice  
Board of Governors Nevada Justice Association

---

**From:** Doug Terry <doug@dougterrylaw.com>  
**Date:** Thursday, January 13, 2022 at 1:33 PM  
**To:** "Gormley, Ryan" <RGormley@wwhgd.com>, Matthew Sharp <matt@mattsharplaw.com>  
**Cc:** Lee Roberts <LRoberts@wwhgd.com>  
**Subject:** RE: Eskew

Hope your family is bouncing back from the virus, Ryan.

---

**From:** Gormley, Ryan <[RGormley@wwhgd.com](mailto:RGormley@wwhgd.com)>  
**Sent:** Thursday, January 13, 2022 3:32 PM  
**To:** Matt Sharp <[matt@mattsharplaw.com](mailto:matt@mattsharplaw.com)>  
**Cc:** Doug Terry <[doug@dougterrylaw.com](mailto:doug@dougterrylaw.com)>; Roberts, Lee <[LRoberts@wwhgd.com](mailto:LRoberts@wwhgd.com)>  
**Subject:** RE: Eskew

Thank you for the well-wishes. If we could change the deadline to Monday that would be appreciated. If you want to discuss further, please feel free to call me on my cell phone at 702-525-6366 or let me know when you want to discuss.

---

**From:** Matt Sharp <[matt@mattsharplaw.com](mailto:matt@mattsharplaw.com)>  
**Sent:** Wednesday, January 12, 2022 8:56 AM  
**To:** Gormley, Ryan <[RGormley@wwhgd.com](mailto:RGormley@wwhgd.com)>  
**Cc:** Doug Terry <[doug@dougterrylaw.com](mailto:doug@dougterrylaw.com)>; Roberts, Lee <[LRoberts@wwhgd.com](mailto:LRoberts@wwhgd.com)>  
**Subject:** Re: Eskew

**This Message originated outside your organization.**

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Ryan,

I am sorry to hear about your family. If you and Lee cannot get the opposition to the motion for sanctions done by Friday because of your family health issues we will work something out.

Please touch base with us as to where things stand.

In the meantime, I will hold back on filing the stipulation.

I hope all is well with you and your family.

Matthew L. Sharp  
Law Office of Matthew L. Sharp  
432 Ridge St.  
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775-324-1500  
Member American Association for Justice Leaders Forum  
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Board of Governors Nevada Justice Association

---

**From:** "Gormley, Ryan" <[RGormley@wwhgd.com](mailto:RGormley@wwhgd.com)>  
**Date:** Tuesday, January 11, 2022 at 12:29 PM  
**To:** Matthew Sharp <[matt@mattsharplaw.com](mailto:matt@mattsharplaw.com)>  
**Cc:** Doug Terry <[doug@dougterrylaw.com](mailto:doug@dougterrylaw.com)>, Lee Roberts <[LRoberts@wwhgd.com](mailto:LRoberts@wwhgd.com)>  
**Subject:** RE: Eskew

Thank you, scheduling stipulation is attached with one redline. If that looks acceptable, please feel free to add my e-signature to file. I feel more comfortable with the footnote because we may move to extend the deadline to Monday. I am trying to make Friday work, but along with the other work obligations I mentioned to you, current Covid diagnoses of family members have multiplied from 1 to 5 in the past couple days, which does not help the schedule. I should know by end of day or tomorrow if we will need to file a motion to extend.

I will follow up on the stipulation to dismiss.



**LITIGATION DEPARTMENT**  
**OF THE YEAR** ALM'S DAILY REPORT  
2020 - 2019 - 2018 - 2017 - 2016 - 2014

Ryan Gormley, Attorney  
**Weinberg Wheeler Hudgins Gunn & Dial**  
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**From:** Matt Sharp <[matt@mattsharp.com](mailto:matt@mattsharp.com)>  
**Sent:** Tuesday, January 11, 2022 9:04 AM  
**To:** Gormley, Ryan <[RGormley@wwhgd.com](mailto:RGormley@wwhgd.com)>; Roberts, Lee <[LRoberts@wwhgd.com](mailto:LRoberts@wwhgd.com)>  
**Cc:** Doug Terry <[doug@dougterrylaw.com](mailto:doug@dougterrylaw.com)>  
**Subject:** Eskew

**This Message originated outside your organization.**

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Ryan and Lee,

Here is a stipulation on the motion for sanctions moving the hearing date and applying the same briefing schedule as all other motions.

We also have authority to dismiss the wrongful death claims. We have attached a proposed stipulation to dismiss.

Matthew Sharp  
432 Ridge St.  
Reno, NV 89501  
[matt@mattsharp.com](mailto:matt@mattsharp.com)  
775-324-1500  
Past-President Nevada Justice Association  
Board of Governors American Association for Justice  
Leaders Forum American Association for Justice

The information contained in this message may contain privileged client confidential information. If you have received this message in error, please delete it and any copies immediately.

1 **CSERV**

2  
3 DISTRICT COURT  
4 CLARK COUNTY, NEVADA

5  
6 Sandra Eskew, Plaintiff(s)

CASE NO: A-19-788630-C

7 vs.

DEPT. NO. Department 4

8 Sierra Health and Life Insurance  
9 Company Inc, Defendant(s)

10  
11 **AUTOMATED CERTIFICATE OF SERVICE**

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

Service Date: 1/18/2022

15 Audra Bonney

abonney@wwhgd.com

16 Cindy Bowman

cbowman@wwhgd.com

17 D. Lee Roberts

lroberts@wwhgd.com

18 Raiza Anne Torrenueva

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19 Matthew Sharp

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20 Cristin Sharp

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21 Ryan Gormley

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Maxine Rosenberg

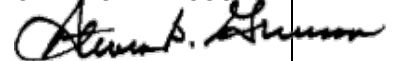
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1 RTRAN

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5

DISTRICT COURT

6

CLARK COUNTY, NEVADA

7

SANDRA ESKEW, ET AL.,

8

Plaintiffs,

9

vs.

10

SIERRA HEALTH AND LIFE  
INSURANCE COMPANY, INC., ET  
AL.,

11

12

Defendants.

13

14

BEFORE THE HONORABLE NADIA KRALL  
DISTRICT COURT JUDGE

15

THURSDAY, FEBRUARY 10, 2022

16

**RECORDER'S TRANSCRIPT OF ALL PENDING MOTIONS**

17

18

**APPEARANCES**

19

For the Plaintiffs:

MATTHEW L. SHARP, ESQ.  
DOUGLAS A. TERRY, ESQ.

20

21

For the Defendants:

RYAN GORMLEY, ESQ.  
D. LEE ROBERTS, JR., ESQ.  
STEPHANIE GLANTZ, ESQ.

22

23

24

25

RECORDED BY: MELISSA BURGNER, COURT RECORDER



1 Las Vegas, Nevada, Thursday, February 10, 2022

2  
3 [Case called at 9:37 a.m.]

4 THE COURT: So for Eskew, the Court sees that we have Mr.  
5 Sharp, Mr. Roberts, Mr. Gormley, and Ms. Glantz, and Mr. Terry, and Ms.  
6 Bonney.

7 Can the parties hear the Court?

8 MR. ROBERTS: Yes, Your Honor. I can hear the Court and  
9 just for the record, Ms. Audra Bonney is our paralegal and not counsel.

10 THE COURT: Thank you. So because we have so many  
11 attorneys, when you do speak, if you can just say who is speaking,  
12 otherwise the recorder will not know, and the transcript won't be clear.

13 So we have Defendants' motions in limine, Defendants'  
14 motions for a summary judgment and partial summary judgment. We  
15 have Plaintiffs' motions in limine, Plaintiffs' motion for partial summary  
16 judgment, and Plaintiffs' motion for sanctions.

17 The Court wants to thank both of the parties for providing the  
18 binders. I know it was a lot of work, but the Court personally read all the  
19 exhibits and all of the pleadings. And given the thousands and  
20 thousands of pages of documents, it's much easier to do with paper. So  
21 the Court thanks the parties for providing that in advance of this hearing.

22 So the Court wants to start with Defendants' motions first.  
23 So we'll start with Defendants' motion in limine number 1: To limit the  
24 testimony of Plaintiffs' bad-faith expert Stephen Prater. So, Mr. Gormley  
25 or Mr. Roberts, this is your motion.

1 MR. GORMLEY: Thank you, Your Honor. I think this was, as  
2 you could probably guess for Defendants here, there's three attorneys so  
3 we are going to splitting it up a little bit and this was one that I was  
4 anticipating to argue. So I don't want to spend so much time rehashing  
5 anything that you're already familiar with and that you already read. I  
6 know you have a lot to get through today.

7 I just want you to know this is motion in limine number 1, to  
8 limit the opinions of their bad faith or insurance standards expert  
9 Stephen Prater. The motion went through various opinions. It's our  
10 position that it's improper under Nevada law. In the motion its cited to  
11 an Arizona case that also limited Mr. Prater's testimony. They cited other  
12 various cases that had limited his testimony before.

13 I think it's our position that this Court should follow the  
14 Arizona Federal Courts lead and essentially adopt that same court's  
15 order. And if applying that order here, that would result in the exclusion  
16 of all of the opinions that are raised in the motion. And those opinions  
17 are improper, as they relate to insurance contract interpretation. They  
18 get to the ultimate issue in the case, whether there's bad faith or whether  
19 Defendant acted without a reasonable basis or a good faith.

20 And all of that's detailed in the briefs, but I think the  
21 summary of the point is that if the Court follows the Arizona Court's lead  
22 and then the motion should be granted and the opinions at issue  
23 excluded.

24 THE COURT: Thank you, Mr. Gormley.

25 Mr. Sharp or Mr. Terry?

1 MR. SHARP: Thank you, Your Honor. I think this case is  
2 essentially the *Hangarter* [phonetic] case that both parties have cited to  
3 is the -- not necessarily controlling precedent, but certainly persuasive  
4 precedent on the application of the concept of legal conclusion. And  
5 what is unique, I suppose, in the insurance cases is that the industry  
6 standards because of the nature of the relationship derive both on the  
7 law from certain case law and relating to the duty of good faith and fair  
8 dealing, as well as statute.

9 And what the *Hangarter* case stands for is essentially the  
10 same testimony that Mr. Prater has set forth in his report and it's in  
11 relation to industry standards. I mean, if the industry standard, for  
12 example, is that an insurance company has to evaluate the insurance  
13 policy. And then in order to do that they have to conform with the  
14 standards, which are also similar, you know, or similar to the same as  
15 what's set forth in the case law, but that doesn't make it a legal  
16 conclusion.

17 The legal conclusion in this case would be that Sierra Health  
18 and Life acted in bad faith. That's not something Mr. Prater intends to  
19 say or can say. He can't instruct the jury on what bad faith -- the  
20 elements to bad faith are. That's the legal conclusion.

21 We're certainly cognizant of the -- of the -- of the issue here,  
22 but certainly Mr. Prater's testimony about industry standard is well  
23 supported. He's extensive expert in the field. He's been recognized as  
24 an expert. And I will point -- you know, to the Arizona case, I'm not clear  
25 from the Arizona case what specifically the Arizona judge said was a

1 legal conclusion, but I can represent to the Court that our intent is to  
2 provide testimony in the context of industry standards and to not reach a  
3 legal conclusion of bad faith. And I'd be happy to answer any questions  
4 that the Court may have.

5 THE COURT: The Court does have a question. So when Mr.  
6 Prater says that the insurance company did not act in good faith, how is  
7 that different from saying they acted in bad faith?

8 MR. SHARP: Well, the bad -- I mean, here's the --- here  
9 would be the difference, Your Honor, is bad faith -- the elements of bad  
10 faith will be set forth by the Court, but generally speaking, as existence  
11 of unreasonable conduct and knowledge of the unreasonable conduct.  
12 Now, if Mr. Prater says the insurance company acted in bad faith  
13 because it acted unreasonably with knowledge of unreasonable conduct,  
14 that's the legal conclusion.

15 Now, the ultimate issue would be -- which is permissible  
16 under Nevada law, would be the insurance company acted unreasonably  
17 with knowledge of unreasonable conduct. So I think the fact is there is a  
18 duty of good faith and fair dealing. It's an industry standard to employ  
19 that duty. So the testimony would be, with regard to an ultimate issue.  
20 In fact, I'm not here -- I mean, if the Court has concern of Mr. Prater  
21 saying the words the insurance company violated the duty of good faith  
22 and fair dealing, I mean, we just won't offer it. It's not -- it's not material  
23 to his opinion.

24 And I understand the Court -- you know, I understand the  
25 issue and it's frankly unique in insurance, in some respects.

1 THE COURT: Thank you. Mr. Gormley, any rebuttal?

2 MR. GORMLEY: Just a little bit, Your Honor. Thank you. It is  
3 a unique issue in bad faith cases in insurance. I think that's why it's  
4 important to consider the cases cited in the motion that are specific to  
5 this issue. And I think you hit on one of the most important points in the  
6 briefing of this idea that somehow they're saying he's not opining as to  
7 breach of the implied covenant or the acting in bad faith when he says,  
8 and this is a quote that is literally the ultimate summation of his report.  
9 It says, "It is my opinion, based on documents reviewed to date, as well  
10 as my education, background, training, and experience, that Mr. Eskew's  
11 claim was not handled fairly, honestly, reasonably, and in good faith."

12 I don't think that slight change gets around what all the  
13 courts have concluded is that you cannot opine as to whether a party  
14 acted in bad faith or not. I think another way of looking at this is if  
15 you -- if you looked at Mr. Prater's report and how it's shown in the  
16 motion. It reads exactly like a closing argument script would read on a  
17 transcript on appeal.

18 I mean, he is laying out what the law would say. He's laying  
19 out what the jury instructions would say about the nature of the implied  
20 covenant. The nature of insurance. What duties an insurer is supposed  
21 to have. And then he's discussing all of the facts in the case. And then  
22 he's reaching conclusions and arguments saying that the insurer  
23 breached the implied covenant, and the insured didn't act in good faith.

24 I just think it's clear that these are legal conclusions and the  
25 type of opinions that have been precluded by many courts before and

1 aren't consistent with the 9th Circuit precedent out of *Hangarter* about  
2 that an expert can only opine on industry standards and compliance with  
3 industry standards. An example of what Mr. Prater would be allowed to  
4 testify to would something to the extent of based on his experience in  
5 the industry these are the type of steps that should be taken to  
6 invest -- properly investigate a claim and whether the medical director  
7 Dr. Ahmad [phonetic] took such steps. And if he did, then he wouldn't  
8 have an opinion. And if he didn't, he would say that fell below industry  
9 standard.

10 Likewise, he could say -- we would dispute it, but he could  
11 say something to the effect because Dr. Ahmad was an oncologist and  
12 not a radiation oncologist, in his opinion it would have been industry  
13 standard for Dr. Ahmad to refer the request to a radiation oncologist, as  
14 opposed to reviewing it himself. I mean, I think it's telling that he didn't  
15 give those opinions. I think it shows that that's not the industry  
16 standard, but those are the types of opinions that an insurance industry  
17 standard's expert are allowed to have, under *Hangarter*. And it's -- I'm  
18 sure that's the same standard the Nevada Supreme Court would adopt if  
19 the issue came before them.

20 Mr. Prater goes well beyond that. Turns it into a closing  
21 argument. And I think when you look at the other -- it's not just the one  
22 about saying they did an act in good faith. I mean, they say there's no  
23 legal conclusions, but in the heading, "Insurance Contract Interpretation",  
24 he opines that, "The policy language in section 5 of attachment A is  
25 broad enough to cover the proton beam therapy requested. And there

1 are no stated limitations. The Sierra Health and Life policy covers proton  
2 beam therapy, based on a fair reading of the policy."

3 And these are -- these are questions of contract interpretation  
4 and he's deciding that he's going to be the expert and the judge and jury  
5 on. So for all these reasons, Your Honor, it's our view that all the  
6 opinions in the motion should be excluded. That doesn't eliminate him  
7 as an expert. He could give those industry standard type of opinions that  
8 are permissible under *Hangarter*. But the ones challenged just aren't  
9 those, Your Honor.

10 THE COURT: Thank you. I think the Court needs to go  
11 through section by section because if the Court makes a ruling that's  
12 unclear and the Court feels that the parties are going to be arguing about  
13 the order from today. So we just need to go over it section by section so  
14 no one has any doubts.

15 So under Section B, looking at Defendants' motion in limine  
16 number 1, under alleged improper opinions, number one is insurance  
17 contract interpretation opinions. So if we can just go section by section,  
18 Mr. Gormley, if you can start there and then Mr. Sharp can respond.

19 MR. GORMLEY: Yes, Your Honor. I think all of these fall  
20 within prohibited opinions. They go right to what the insurance contract  
21 says. It's a matter of contract interpretation. It's a matter for the Court to  
22 determine, unless there's ambiguity, in which that ambiguity would then  
23 go to the jury as a question of fact, but there's been no argument that  
24 any aspect of the agreement was ambiguous or that there's any  
25 questions that a jury asked its interpretation. And even then, I think that

1 would be suspect, whether what role Mr. Prater could have on helping  
2 them make that interpretation, but here it's simply he's doing a plain  
3 language interpretation of the contract. And it's our position that all of  
4 those opinions are improper.

5 THE COURT: Thank you. Mr. Sharp.

6 MR. SHARP: Yes, Your Honor. I mean, first of all,  
7 interpreting insurance contracts is what insurance companies do. I  
8 mean, that's the essence of the claims' handling practice is a person who  
9 is responsible for the claim interprets the contract in application to the  
10 facts. That is the essence of the claims handling aspect.

11 In *Hangarter*, the issue was, was the particular insured  
12 disabled, under the terms of the contract. In a fair reading and in order  
13 for the jury to understand what's reasonable under the circumstances,  
14 there has to be testimony about what the reasonable standards are for  
15 interpreting the insurance contract. We're not -- that's not interfering  
16 with the Court's role in any respect.

17 The issue in this case is the application of the facts to the  
18 terms of the policy. And Mr. Prater is qualified. His testimony is  
19 designed to assist the jury. And there's no legal conclusion offered.  
20 He's not saying that the contract was breached. He's not saying it was  
21 bad faith. He's saying that if you apply the standards within the industry,  
22 a fair reading is it's covered. And they can offer cross-examination and  
23 testimony to counter that, but it's fair under *Hangarter*. And it doesn't  
24 invade the jury's -- this Court's province.

25 THE COURT: Thank you. So the record is clear, we're still on



1 Defendants' motion in limine number 1 regarding Dr. Prater. With  
2 respect to Section 1, insurance contract interpretation opinions, the  
3 motion is denied. With respect to Section 2, bad-faith opinions, that  
4 portion of the motion is granted. Section Number 3, peace of mind  
5 opinions, Mr. Gormley, if you could argue that section, please.

6 MR. GORMLEY: Yes, Your Honor. That one -- so it's an  
7 opinion that insurance involves the sale of peace of mind, security, and  
8 freedom from financial worry. Why they need an expert to discuss that  
9 it's unclear. It seems like presenting such testimony under the guise of  
10 expert testimony only serves one purpose and that's to inflame the jury.

11 To the extent that information is relevant, there can be a jury  
12 instruction that discusses the nature of insurance. I mean, they -- in their  
13 response they argue that our argument is improper because there's  
14 Nevada case law discussing the nature of insurance referring to it as a  
15 promise and peace of mind. But I think a less inflammatory and a more  
16 appropriate way is for there to be a jury instruction that -- that to the  
17 extent it's relevant and necessary that would give some guidance on the  
18 nature of insurance, as opposed to Mr. Prater being able to testify about  
19 all these things in his view about the nature of insurance and why it's  
20 important and all these type of things that seem to only serve one  
21 purpose: to appeal to the jury's emotional reaction.

22 And that's all I have on that point right now, Your Honor.

23 THE COURT: Thank you. Mr. Sharp.

24 MR. SHARP: Well, the issue in the case is Sierra Health and  
25 Life and United Healthcare's performance under the contract in the

1 context with both the terms of the contract and the duty of good faith  
2 and fair dealing. When evaluating industry standards and how those  
3 standards arise, they arise because of the unequal relationship that  
4 exists between the insurer and the insured.

5           And that unequal relationship exists because it's a truism  
6 that insurance companies are in the business of providing financial  
7 security and peace of mind. So this testimony is relevant because it  
8 gives context to how the industry standards develop. And it gives  
9 context because those industry standards and how they're implemented  
10 arise from an accepted principle that insurance is a promise, and it is  
11 provided for financial security and peace of mind.

12           So it's certainly not a legal conclusion. It's relevant. It's  
13 certainly not inflammatory because it's -- I mean, it's the truth.

14           THE COURT: Thank you.

15           MR. SHARP: Unless you have any other questions, I don't  
16 have anything to add, Your Honor.

17           THE COURT: Thank you. So subsection 3, regarding peace  
18 of mind, will be denied. Subsection 4, good faith eyeglass opinions, Mr.  
19 Gormley.

20           MR. GORMLEY: Thank you, Your Honor. This is, I think, a  
21 unique one and an important one, Your Honor. And the opinion is that  
22 claim handlers should wear good faith eyeglasses and look for ways to  
23 approve and/or payoff covered claims that are honestly made at the  
24 earliest possible moment. I mean, in my reading, this is the expert  
25 coming in and essentially setting his own standard for how the claims

1 should be reviewed outside of what the law provides for.

2 I think it is prejudicial testimony. It comes across -- it can  
3 come across very one sided. I mean, he's basically building this  
4 standard during his deposition he admitted that it's a concept that he  
5 made up. And then he just goes on to say, you know, in my opinion,  
6 based on all the facts that apparently Sierra Health and Life didn't have  
7 their good faith eyeglasses on. They had bad faith eyeglasses on I  
8 guess.

9 And it just -- it seems like it's just another way of him getting  
10 to the bad faith conclusion, but even doing so under a more favorable  
11 standard to their own position because if he doesn't render the opinion  
12 or reach the issue of whether they had good faith eyeglasses on or not,  
13 then why is he even talking about this test. The natural result of  
14 discussing this made up test is that they have bad faith eyeglasses on,  
15 which is no different than the bad faith opinions that you already  
16 excluded.

17 So I think for those reasons, this opinion should be excluded.

18 THE COURT: Thank you, Mr. Gormley. Mr. Sharp.

19 MR. SHARP: Yes, Your Honor. Hold on. I'm sorry. I wasn't  
20 sure if I was still muted. Sorry.

21 THE COURT: That's okay.

22 MR. SHARP: You know, I mean, here is the -- here is the  
23 concept that Mr. Prater has developed and it's up to Your Honor whether  
24 it meets the discretionary test under *Hallmark*. Mr. Prater teaches  
25 insurance companies on how to handle a claim. It's what he's done for

1 many years. And the concept that he's developed to explain to  
2 insurance adjusters the concept of good faith and fair dealing is the use  
3 of the good faith eyeglasses.

4 So it's not a test that's been made up. It's the application of  
5 the test. There's no question that the insurance company, as a standard,  
6 has to act fairly and in good faith. That's the standard. How they go  
7 about doing that in the course of an investigation is what's at issue. So  
8 that's the concept of the good faith eyeglasses.

9 If the Court has concern that the good faith eyeglasses is  
10 something that could confuse the jury, or constitutes a legal opinion, I  
11 mean, that's fine. I mean, it's really up to Your Honor.

12 THE COURT: The Court just wants to look at one more thing  
13 before it makes its ruling on the good faith eyeglasses.

14 Mr. Gormley, do you dispute that Mr. Sharp has to prove that  
15 the insurance company did not act in good faith, as one of the elements  
16 for his bad faith claim?

17 MR. GORMLEY: [Indiscernible]

18 THE COURT: And that they have a -- the insurance company  
19 has a duty of good faith and fair dealing to the insured, do you dispute  
20 that?

21 MR. GORMLEY: No. There's no dispute that the duty of  
22 good faith and fair dealing exists and that -- if I heard you right, that the  
23 Plaintiffs would have to show that the duty of good faith and fair dealing  
24 was breached in order to prevail on their claim.

25 THE COURT: All right. So subsection 4, good faith

1 eyeglasses will be denied. Number 5, other improperly conclusions. Mr.  
2 Gormley.

3 MR. SHARP: Your Honor, could I interrupt on one point, so  
4 we can -- the reference to the California Supreme Court case. I spoke to  
5 Mr. Prater yesterday and we're not going to reference that case. So just  
6 to speed things along.

7 THE COURT: Okay. So other improperly conclusions, the  
8 references to the California Supreme case will be granted.

9 MR. GORMLEY: Your Honor, I think our argument on this is  
10 very similar to our argument on the first section related to insurance  
11 contract interpretation -- or insurance contract interpretation being a  
12 question of law and improper. So if the Court wants me to go through  
13 each of these bullet points, I am happy to. If the Court has questions  
14 over, I could. But my view is that if the Court disagreed with us on the  
15 first one, I'm not sure if I can convince you as to these bullet points. And  
16 if that's the case, then I can let the Plaintiffs argue, but I think the legal  
17 principle is really much the same that these are just opinions, where he's  
18 going through and reaching a legal interpretation as to what the law  
19 provides and what they failed to do under the law.

20 I hope that makes sense, Your Honor. I think if I went  
21 through each of them, I think it would take 30 minutes. I don't know if  
22 we'd want to do that.

23 THE COURT: Thank you, Mr. Gormley. Mr. Sharp.

24 MR. SHARP: Sorry, Your Honor. If the Court has specific  
25 questions on any of the bullet points, I can go through each one. I think

1 they're all consistent with *Hangarter*. Some aren't even involving any  
2 legal issues. It's just background information. But I think everything that  
3 he says it's fair. It's in conformance with *Hangarter* and the limitations in  
4 *Hangarter*. If you have any questions, I'm happy to address each one.

5 THE COURT: No ,that's okay. So with respect to subsection  
6 6, the first bullet point, California Supreme Court case, that will be  
7 granted. The second subsection regarding custom practice, that will be  
8 denied. The next subsection regarding the PPO plan will be denied. The  
9 subsection regarding contract of adhesion will be granted. That's a legal  
10 conclusion. Mr. Prater will not be allowed to conclude that it is a  
11 contract of adhesion. He can discuss what a contract of adhesion is, but  
12 that's for the jury to decide. The next subsection --

13 MR. SHARP: Your Honor, can I just ask clarification on that  
14 point. So he can't say it's a contract of adhesion, but he can explain the  
15 concept of a contract adhesion?

16 THE COURT: Yes. He summarily has said this is a contract  
17 of adhesion. He could say that --

18 MR. SHARP: Yeah. I agree with that.

19 THE COURT: Yeah.

20 MR. SHARP: And if that is -- I just want to know what the  
21 concept is because obviously it is important for the jury to understand  
22 the concept of a contract of adhesion because that's what it is. And the  
23 fact --

24 THE COURT: He can say that --

25 MR. SHARP: -- that it's a contract of adhesion leads to

1 certain industry standards.

2 THE COURT: He can say that it's his opinion based upon the  
3 elements, but not conclusory that it actually is. It just --

4 MR. SHARP: Okay.

5 THE COURT: -- does that make sense?

6 MR. SHARP: Yeah, it does -- it does.

7 THE COURT: Okay. The subsection regarding experimental  
8 investigation on proven as determined by Sierra Health and Life will be  
9 denied. And the remaining sections will be denied. Next is subsection 6,  
10 other improper application of the law to the facts. Mr. Gormley.

11 MR. GORMLEY: And this, Your Honor, is based on the  
12 Arizona cases decision that the insurance industry expert is not  
13 permitted to apply law to facts, so essentially if you look at the second  
14 one he's saying a reasonable insurer objectively evaluating Mr. Eskew's  
15 request for preauthorization would refer to Dr. Liao's medical judgment.  
16 And then that seems to just be another way of giving an opinion on  
17 acting in bad faith.

18 SHL has no right to requiring an insured to file an appeal in  
19 order to obtain insurance benefits, especially when it's here, the  
20 insurance policy does not require an appeal and involves a treatment  
21 decision regarding cancer. That's contract interpretation.

22 I think the last bullet point Charlene Sweet's [phonetic]  
23 testimony confirmed that Sierra Health and Life did not comply with the  
24 standards for better claims handling, as set forth in my initial report.  
25 That's just another way of saying acted in bad faith.

1                   So along the same lines, we'd move to exclude these  
2 opinions, but unless the Court has any specific questions, I can pass it to  
3 Mr. Sharp.

4                   THE COURT: Thank you, Mr. Gormley.

5                   Mr. Sharp.

6                   MR. SHARP: Yeah. Again, I think each of these opinions is  
7 consistent with *Hangarter*. I mean, just one distinction I think that I'd like  
8 to make, there's nothing improper with testimony on an ultimate issue.  
9 It's the legal conclusion and that's why *Hangarter* goes back to that.  
10 What Mr. Caliri [phonetic] could not say in *Hangarter* was the ultimate  
11 opinion that Paul Revere acted in bad faith -- say they acted  
12 unreasonably with no reasonable basis. I mean, that's the ultimate  
13 issue, which is admissible.

14                  But here -- I mean, I don't think Mr. Prater even reaches that  
15 issue, but generally, for example the point that Mr. Gormley raised with  
16 regard to bullet point 2, I mean, that is the exact application of industry  
17 standards to the facts of the case, which is exactly what we allege Sierra  
18 Health should have done. So that's a fair opinion.

19                  I mean, again, if you'd like, I could go through each one of  
20 them.

21                  THE COURT: No, that's okay. So subsection --

22                  MR. SHARP: Otherwise, I'll -- sorry.

23                  THE COURT: Okay. Subsection 6 will be denied. And  
24 subsection 7 is similar so that will be denied.

25                  Next is Defendants' motion in limine number 2 to excuse



1 evidence, argument, and/or testimony relating to the financial condition  
2 of the non-party UnitedHealth Group, Incorporated. Mr. Gormley.

3 MR. ROBERTS: Your Honor, this is Lee Roberts for the  
4 Defendants, and I'll be handling this motion.

5 THE COURT: Mr. Roberts, good morning.

6 MR. ROBERTS: Good morning, Your Honor. I'd like to start  
7 out by correcting maybe an incorrect use of terminology in our motion.  
8 It's entitled, "The motion to exclude evidence of the financial condition of  
9 non-party UnitedHealth Group, Incorporated", but it's actually not quite  
10 that broad. And I would direct the Court to Exhibit 1, which is the report  
11 of the Elliott S. Flood, at page 6 he includes an organizational chart. And  
12 that shows UnitedHealth Group as the ultimate parent holding company.  
13 And then you can see that where it splits off as UnitedHealthcare, Inc.,  
14 has a separate tree from Optum, Inc.

15 The UnitedHealthcare, Inc. tree is the insured's business.  
16 The Optum tree is a different business that is not an insurance company,  
17 and it provides medical services and other services that are non-  
18 insurance businesses.

19 So then if we turn to Exhibit 2, the Best credit report that is  
20 proposed by the Plaintiffs to show to the jury, you can see that this is a  
21 credit report for UnitedHealthcare Companies. And that is just the  
22 insurance tree of UnitedHealth Group. So it does not appear that they're  
23 intending to put the entire revenues or net worth in of UnitedHealth  
24 Group, only the ultimate parent company and all subsidiaries of the  
25 insurance side.

1                   At Exhibit 2, page 1, you can see that Sierra Health and Life  
2 Insurance Company, Inc., is listed as one of the rating unit members of  
3 the UnitedHealthcare Companies. And the 21 million that they seek to  
4 put in can be found --

5                   THE COURT: Do you mean billion?

6                   MR. ROBERTS: 21 billion, Your Honor, with a B. And that's  
7 at page 4 under, "Ending capital and surplus", for the last time of 2019 on  
8 this report.

9                   So that \$29 billion, Your Honor, is the net worth of all of the  
10 insurance companies listed on page A1 of the AM Best report, according  
11 to the AM Best Service. The source for that 21 billion is listed as being  
12 Best link, Best's financial suite. So this is not a representation that  
13 United made. This is a credit rating from an ultimate -- from a credit  
14 reporting service that people in the industry rely upon to asset credit  
15 worthiness. Now, there's nothing in this report that says that Sierra  
16 Health and Life represents its net worth to be that 21 million, it's simply  
17 part of a consolidated report.

18                  And what else does this say? In looking at the balance sheet  
19 strength on page 2, the AM Best report says that liquidity is enhanced by  
20 credit facilities with the parent for the larger insurance subsidiaries. So  
21 the most this says is all of these companies together have 21 billion of  
22 net worth and that the subsidiaries have the ability to borrow from the  
23 parent when they need it.

24                  So now let's look at where this is possibly relevant. And I  
25 don't think there's any argument that this comes in anywhere but the

1 punitive phase.

2 And the net worth of non-party affiliates and parents is  
3 simply not relevant to anything in this case. And it's prejudicial and it's  
4 inflammatory. And it could only be intended to inflame the jury into  
5 finding an unreasonably high punitive damages amount.

6 The only potential admissibility or relevance of this would be  
7 if the main parties in the punitive phase contended that an amount being  
8 sought by the Plaintiffs would annihilate or destroy them. Then it might  
9 be relevant to say, well, isn't it true that you have a credit facility with  
10 your parent company; is it true that if you had a judgment entered  
11 against you for this amount, you could draw down on that credit facility.

12 It's possible that we could open the door, but I would -- I will  
13 represent to the Court now that we will not argue if this case goes to a  
14 punitive phase that any amount sought by the Plaintiffs would annihilate  
15 or destroy Sierra Health and Life. And you can't punish or issue punitive  
16 damages and treat someone differently merely because of their wealth.

17 And there's simply -- if we don't argue that any particular  
18 number requested by Plaintiff will annihilate or destroy Sierra. There's  
19 simply no basis to allow this peripheral evidence in because  
20 UnitedHealth Group, UnitedHealthcare, UnitedHealthcare Services, and  
21 all of the other dozens of companies listed on page 1 of the AM Best  
22 reports are non-parties. And the financial condition of a non-party is  
23 simply not relevant, unless somehow we put it at issue, which we do not  
24 intend to do.

25 Moreover, if you look at the report that's attached as Exhibit

1 1 from Plaintiffs' expert, at page 7, he actually points out that Sierra  
2 Health files annual financial statements with insurance regulators. And  
3 the net worth or surplus for Sierra Health and Life in 2019 was reported  
4 to be 1.9 billion. Again, that's a B, billion, Your Honor. And in 2020, 2.6  
5 billion. These numbers, to the extent the Court allows wealth at all,  
6 these numbers are not misleading and certainly are sufficient for the jury  
7 to know in determining how much punitive damages to be assessed, if  
8 any.

9 Admitting evidence of affiliates net worth of 21 billion is  
10 inflammatory. It's not probative. And we would ask that it be excluded.  
11 Thank you, Your Honor.

12 THE COURT: Thank you, Mr. Roberts. Mr. Sharp.

13 MR. SHARP: Well, a couple of points. I would agree -- one, I  
14 would agree that the Plaintiffs do not intend to introduce the financial  
15 condition of UnitedHealthcare or Sierra Health and Life, until the punitive  
16 damage phase. In that context, if the Court wishes, it can defer ruling.

17 I do think there's an open issue as to how UnitedHealthcare  
18 is defending the case, which may lead to its financial condition. But that  
19 having been said, the specific issue in this case is the financial condition  
20 of the Defendant. That's what NRS 42.005 specifies. It does not specify  
21 financial net worth. It's financial condition.

22 And to the public, through AM Best, which is an accepted  
23 industry standard for rating insurance companies. The insurance  
24 companies participate in the rating. UnitedHealthcare or Sierra Health  
25 and Life represented their financial condition to be the \$21 billion figure.

1 So the basis of Mr. Flood's opinion is based in fact, and it's based in  
2 industry standards.

3 So on that basis, for the limited purpose that we intend to  
4 use the financial conditions for, it's admissible. Whether the jury accepts  
5 it or not is up to the jury. But I mean, the counter to that is Mr. Flood  
6 explains in his report, the 2.6 billion is misleading to the jury because it  
7 doesn't take into account what Sierra Health and Life is actually doing in  
8 the real world. So with that, I'll rest, unless you have any questions,  
9 Your Honor.

10 THE COURT: No. Thank you. Mr. Roberts, any final  
11 rebuttal?

12 MR. ROBERTS: Yes, just briefly, Your Honor. It seems to me  
13 that, you know, one of the points of punitive damages is often argued  
14 that look at the profits that they made from misconduct. You need to  
15 take those profits away to deter them. And in assessing punitive  
16 damage, the Court -- it would be improper and unconstitutional for the  
17 jury to consider profits made by affiliates in 50 states all over the  
18 country, in determining how much to punish these Nevada companies  
19 for their Nevada conduct.

20 And I do believe that it would raise constitutional  
21 proportional issues for this evidence to be admitted. Thank you, Your  
22 Honor.

23 THE COURT: Thank you. On Defendants' motion in limine  
24 number 2, the Court is going to defer ruling until prior to any punitive  
25 damages phase and allow the parties to do additional briefing and

1 argument before the Court makes a ruling on this issue.

2 The next motion is Defendants --

3 MR. ROBERTS: Thank you, Your Honor.

4 THE COURT: Thank you. Defendants' motion in limine  
5 number 3 regarding excluding evidence, argument, and testimony  
6 relating to pre-contract communications concerning coverage. Mr.  
7 Gormley.

8 MR. GORMLEY: Thank you, Your Honor. Excuse me, this  
9 one is back with me, Your Honor. Mr. Gormley speaking.

10 This motion, Your Honor has mentioned it seeks to exclude  
11 the pre-contract communications concerning the insurance coverage,  
12 such as the interaction between Mr. Eskew's wife Sandra Eskew and the  
13 Eskew's insurance broker Janet Holland-Williams that occurred prior to  
14 Mr. Eskew entering into his health plan with Sierra Health and Life.

15 The grounds are the parol evidence rule and relevance and  
16 also unfairly prejudicial and misleading. And, you know, just look at  
17 each of those quickly, so looking at the parol evidence rule, based on  
18 their response arguments, the argument in the motion was that the  
19 communications create ambiguity or inconsistent with the contract, then  
20 they're barred by the parol evidence rule.

21 The response argument is, well, that's not a concern because  
22 their communications were consistent with the contract. But if the  
23 communications were consistent with the contract, then the evidence  
24 serves no purpose because you already have the written agreement. So  
25 either way, it shouldn't be admissible. It's either violet -- it's either

1 barred by the parol evidence rule or it's unnecessarily duplicative and  
2 isn't the best evidence of the terms of the contract that should be just  
3 relied on by the contract.

4           Then I think from a relevance standpoint, it's our position it's  
5 not relevant. And if there's any relevance, that it's very attenuated and  
6 lacks -- offers little or no probative value because on the relevance side  
7 they're saying that it supports their claim for bad faith and also supports  
8 their claim for punitive damages. But these are communications  
9 between an insurance broker and a company member or representative  
10 or service representative regarding a non-insured.

11           The person wasn't insured by Sierra Health and Life at the  
12 time. There's no duty of good faith or fair dealing. There isn't even any  
13 evidence that Sierra Health and Life knew who was being discussed  
14 during these conversations. It was just an insurance broker reaching out  
15 to an insurance company and relaying some basic information.

16           So when it comes to the claim for bad faith and to their  
17 damages, considering a duty didn't even exist at the time, and punitive  
18 damages have to arise out of conduct that violated the duty of good faith  
19 and fair dealing. It just doesn't seem like they offered any relevance or  
20 probative value as to breach of the duty of good faith and fair dealing, or  
21 as to malice fraud, or oppression.

22           And if there's any there, a little bit, we would say it's unfairly  
23 prejudicial and misleading and is improper on those grounds, Your  
24 Honor.

25           THE COURT: Thank you, Mr. Gormley. Mr. Sharp.

1                   MR. TERRY: Your Honor, I'm going to take that one. That is  
2 Doug Terry. Can you hear me okay, Judge?

3                   THE COURT: I can hear you very well. Thank you.

4                   MR. TERRY: Okay. Thank you. I think it bears some context  
5 factually. There's some talk about that before you make a -- base it on  
6 what we think is a very important issue in this case, Judge. And I don't  
7 want to belabor you with facts that you're real familiar with because it  
8 sounds like you've spent a lot of time reading this file, but there's a few  
9 things I want to point to that I think are important for you to think about.

10                  So just to kind of contextualize the issue here, Mr. Eskew was  
11 diagnosed with lung cancer in the summer of 2015. And his wife Sandy,  
12 who is the Plaintiff in this case now, knew that his health insurance  
13 company was leaving the State of Nevada at the end of 2015. So she  
14 knew that it was going to be very important for her to get health  
15 insurance in place for Mr. Eskew for the battle that he and his family had  
16 with cancer.

17                  She had done her research, like so many others do these  
18 days to try to figure out what the best treatment for him would be. And  
19 she had -- and where the best place to get such treatment would be. And  
20 she had -- based on that research, had concluded that MD Anderson was  
21 the top cancer center in the world, is what she thought. And that proton  
22 therapy, which is heavily at issue in this case, as you know, was the best  
23 modality of radiation treatment for his lung cancer.

24                  So with that knowledge, she went looking for an insurance  
25 policy and she went to Janet Holland-Williams in Las Vegas, who is a



1 duly licensed agent of UnitedHealthcare. She has -- she has permission  
2 of UnitedHealthcare to solicit and sell their policies in Nevada.

3 And she wanted to get, obviously, the very best coverage  
4 that she could get for her husband because she knew the severity of  
5 what they were facing. So when she went to Ms. Holland-Williams, she  
6 specifically asked the agent, does -- I need a -- I need a policy that covers  
7 proton therapy and I need to take Bill to MD Anderson to get it. That's  
8 what I'm seeking to do.

9 And so the agent gave her some options. One of them was a  
10 Sierra Health and Life policy. And Sandy wanted to know specifically  
11 does this policy provide coverage for what Bill needs -- protons at MD  
12 Anderson. And so the agent says, well, I'm not sure, I don't know. Let  
13 me ask the company, talking about UHC or Sierra Health and Life. So  
14 she called somebody at the company and said, does this policy provide  
15 coverage for what this insured wants. And the response was something  
16 along the lines of, well, I'm not sure, let me send you a copy of the policy  
17 that we would issue and a copy of the schedule of benefits to go along  
18 with that policy.

19 And so, you know, the policy is 100 pages long or there  
20abouts. And there's a schedule of benefits that goes along with it. Both  
21of those documents said that, "Therapeutic radiation is covered under  
22the policy." Therapeutic radiation -- it's undisputed -- that therapeutic  
23radiation includes proton therapy and nothing in either of those  
24documents specifically excludes proton therapy. The words "proton  
25therapy" are never used in there.

1                   And so since there was no specific exclusion and it says  
2 therapeutic radiation was covered and nobody tells Sandy that there was  
3 no coverage for proton therapy at MD Anderson, she buys the policy and  
4 spends her hard earned money on premiums to buy the policy. And  
5 proceeds on to MD Anderson and inquiries about proton therapy, as  
6 you've read. And that's where the rubber met the road, so to speak.

7                   So what we know for sure is that nobody from either Sierra  
8 or the agent told Sandy there's no coverage for proton therapy under  
9 this policy. But what they did not tell Sandy is that there was this proton  
10 beam therapy medical policy, separate and apart from the health  
11 insurance policy. They didn't provide Sandy a copy of the proton beam  
12 therapy medical policy. They sent her a sort of an example copy of the  
13 insurance policy. Those are two different things.

14                  But what they didn't tell Sandy is that this proton beam  
15 therapy policy specifically says, there's no coverage for lung cancer or  
16 proton beam therapy for lung cancer. It says so right there in it. That  
17 proton beam therapy for lung cancer is not medically necessary. So at  
18 the time that they are creating the impression, at least in Sandy Eskew,  
19 that there is coverage for proton beam therapy at MD Anderson for her  
20 husband's lung cancer, unbeknownst to her, they have this hidden  
21 exclusion -- this document that says there is no coverage for that  
22 treatment at that place.

23                  And so it is akin, Your Honor, to the bait and switch really.  
24 And so the reason that that ties together with the bad faith allegation, in  
25 this case, is that -- and as the evidence will be in this case, that an

1 insurance company has a duty to investigate fully and get all of the facts  
2 about the coverage -- or about the claim, including facts related to the  
3 issuance of the coverage and the relationship -- or the communications  
4 between the policyholder and the agent at the time that they decide  
5 whether there's coverage under the policy or not.

6 And so if it is in fact the case that the insurance company  
7 created the impression in Sandy that there was coverage under the  
8 policy, then the -- and then they pull the rug out from under Sandy and  
9 Bill, when they get all the way to the MD Anderson in Houston and say,  
10 no, there's no coverage for that therapy, well, then that's relevant to the  
11 way in which the claim was handled as well. In addition to the fact that  
12 it's just a flat out misrepresentation.

13 So the idea that somehow that should be kept from the jury  
14 is just simply -- it's not fair. And it is relevant information. It is relevant  
15 evidence that goes directly to the way in which UnitedHealthcare  
16 investigated and evaluated the claim for coverage of proton therapy.  
17 That's all I have, Judge.

18 THE COURT: Thank you, Mr. Terry. Mr. Gormley.

19 MR. GORMLEY: Your Honor, you know, I think it's fair to say  
20 we dispute Mr. Terry's characterizations of the evidence, but the  
21 undisputed is that at the time is that Mr. Eskew was not an insured.  
22 There was no duty of good faith and fair dealing at the time so they're  
23 attempting to use conduct before the existence of a duty in order to  
24 support breach of that duty.

25 Mr. Terry talked about the therapeutic radiation was covered

1 under the documents that were provided to Mrs. Eskew, but now we're  
2 getting in the contract interpretation. If in the summary judgment  
3 briefing, or at trial, the determination is that it was not a covered service  
4 because it was determined not to be medically necessary, and Sierra  
5 Health and Life discretion and determine that it was a necessity in order  
6 to determine if the service was covered.

7           Their argument is akin to one where they're attempting to  
8 modify the contract terms or create ambiguity, based on pre-contract  
9 communications would then make all those communications barred by  
10 the parol evidence rule. And to the extent that it was covered -- and  
11 that's a determination -- then it's just unnecessary and duplicative and  
12 only serves to inflame the jury, as Mr. Terry, I think, skillfully  
13 demonstrated with the bait and switch type narrative is powerful. And  
14 that is meant to appeal to the jury's emotional and sympathetic reaction.

15           And so if you have the contract, where they're saying that it's  
16 covered and if they're saying what was provided before the contract was  
17 entered into, it was covered. There's no reason to allow this evidence of  
18 this, you know, fairly attenuated and fairly unsupported bait and switch  
19 theory.

20           And so based on that just Mr. Terry's representation, I think,  
21 on the undisputed facts that it should be barred either under the parol  
22 evidence rule, either for being duplicative, or for being unfairly  
23 prejudicial and misleading. Unless you have any questions, Your Honor.

24           THE COURT: No. Thank you, Mr. Gormley.

25           MR. ROBERTS: Your Honor, this is Mr. Roberts. I apologize

1 for interrupting. Out of -- our next motions in limine, the only one I have  
2 between now and number 13 is number 6. I did have another hearing,  
3 which was initially taken off calendar and they just put back on calendar  
4 yesterday in another department before Judge Barisich. And I would  
5 just ask to be excused with Mr. Gormley and Ms. Glantz handling  
6 argument until I return.

7 THE COURT: Of course. Thank you.

8 MR. ROBERTS: Thank you so much, Your Honor.

9 THE COURT: Thank you. With respect to Defendants'  
10 motion in limine number 3, to exclude evidence, argument, and/or  
11 testimony relating to pre-contract communications concerning coverage,  
12 the motion will be granted, pursuant to the parol evidence rule; however,  
13 nothing in the Court's order will prohibit Ms. Eskew -- Mrs. Eskew from  
14 discussing her belief, based upon the reading of the policy and the steps  
15 that she took to secure coverage. However, the conversations she had  
16 with Ms. Holland will not come in at trial, but she can testify as to  
17 her -- what she believed coverage would be and what she was seeking.

18 Do the parties have any questions regarding the Court's  
19 ruling on that motion in limine?

20 MR. TERRY: Your Honor, I guess -- I guess I would have a  
21 little bit of a question about clarification. Matt, maybe you should step in  
22 and ask the question. I see that you've jumped back on. Why don't you  
23 do that?

24 MR. SHARP: Yes. I mean, Your Honor, the clarification I  
25 would also ask is that in the motion for summary judgment that

1 Defendants filed, and in fact, has been a -- has been an issue that has  
2 been raised by the Defense is Sandy's -- in effect that there was  
3 something nefarious about what Sandy did because she studied proton  
4 beam therapy and that she intended to use the policy for proton beam  
5 therapy.

6 And the concern we have is that if we're not allowed to  
7 present the full story, it seems like Mrs. Eskew is doing something  
8 improper and when, in fact, the truth was she told UnitedHealthcare  
9 exactly what she was going to do, which was he had a -- Mr. Eskew had  
10 lung cancer and she was going to seek treatment from the proton beam  
11 center. So I would assume within your ruling that the Defendants  
12 certainly cannot infer that -- you know, present the same evidence that  
13 would also be parol evidence.

14 So I just want to make sure we're all on the same page.

15 THE COURT: Yes. Nothing in the Court's order is going to  
16 stop Ms. Eskew from saying that she was researching proton therapy.  
17 She researched this company. She -- it was her understanding proton  
18 therapy was covered and that's why she had selected this policy. And  
19 that she made the insurance company aware this is why she was seeking  
20 this policy. Nothing is going to --

21 MR. SHARP: Okay. So I guess what I'm confused then is  
22 what -- is somebody -- nobody is contending that Ms. Holland-Williams  
23 represented that the proton beam therapy was covered. I mean, we're  
24 not saying that. So that's why I'm confused because her understanding  
25 of coverage is based upon her communications with Ms. Holland-

1 Williams, where she was given the insurance policy. And she was given  
2 other things that I don't think we've presented in front of you. And I just  
3 don't want to run afoul of the Court's ruling, but I mean, that's where her  
4 understanding came from. It's not that we're saying that Ms. Holland-  
5 Williams represented it was covered. She didn't. She just provided the  
6 policy.

7 THE COURT: The portion of Ms. Holland's testimony, where  
8 she says that she spoke with someone regarding the policy itself is not  
9 coming into evidence. What could come into evidence is that Ms. Eskew  
10 was provided the policy and she believed that it was covered, because  
11 that is what she was requesting. There's just a portion of Ms. Holland's  
12 testimony that's not coming in.

13 MR. SHARP: Okay. And that would be that she contacted the  
14 company?

15 THE COURT: Yes.

16 MR. SHARP: So let me -- and I guess what I would want to  
17 know is, would we be able to put into evidence that -- I mean, the reason  
18 why she was given the policy -- Sandy was given the policy was at the  
19 direction of Sierra Health and Life. It wasn't on Ms. Holland-Williams'  
20 own volition. So would that come into evidence?

21 THE COURT: Yes. The Sierra Health and Life gave them the  
22 policy because she wanted to know if it covered proton therapy.

23 MR. SHARP: Okay. I got you. I got you.

24 THE COURT: So they're just a carve out that's not coming in.

25 MR. SHARP: I understand.

1 THE COURT: Mr. Gormley, do you understand?

2 MR. GORMLEY: Yes, Your Honor.

3 THE COURT: Okay.

4 MR. TERRY: Thanks, Judge.

5 THE COURT: Thank you. So we'll take a ten-minute break  
6 and come back. And we'll start with Defendants' motion in limine  
7 number 4 when we come back. So you're welcome to use the restroom.  
8 I know you've been on the line for an hour and a half.

9 MR. GORMLEY: Thank you.

10 THE COURT: All right.

11 MR. SHARP: Thank you.

12 [Recess taken from 10:37 a.m. to 10:48 a.m.]

13 THE COURT: Are the parties ready?

14 MR. GORMLEY: Guess so, Your Honor.

15 THE COURT: Okay. So next is Defendants' Motion in Limine  
16 Number 4 to exclude evidence, argument, and/or testimony relating to  
17 the preparation of the denial letter. Mr. Gormley.

18 MR. GORMLEY: Your Honor, this is Ryan Gormley again, will  
19 argue this one. I just want to be sure on Plaintiffs side if Mr. Sharp is  
20 opposing, if he's back or if this is Mr. Terry? I just --

21 MR. TERRY: It's me -- it's me, Ryan. Thanks.

22 MR. GORMLEY: Okay. Great. So I'll go ahead then. Motion  
23 in limine number 4 seeks to exclude evidence, argument, and/or  
24 testimony relating to the preparation of the letter sent by Sierra Health  
25 and Life to Mr. Eskew, Dr. Liao, and the proton center that in quote the



1 reasons for denying the prior authorization request at issue, which in a  
2 lot of the briefing it's referred to as the denial letter. So this is seeking to  
3 exclude essentially those efforts of Mr. Gustavo Guerrero [phonetic]  
4 related to preparing this denial letter.

5 The motion explains and provides irrelevant and unfavorable  
6 prejudice and misleading. I think at this time we would just rest on the  
7 briefing on this, Your Honor, unless you have any further questions and  
8 I'll just stand by.

9 THE COURT: No questions. Thank you, Mr. Gormley. Mr.  
10 Terry.

11 MR. TERRY: Yes, Your Honor. Thank you. I'll try to move  
12 quickly too. I know we've got a full plate here.

13 THE COURT: Okay.

14 MR. TERRY: But I want to just sort of reiterate that the  
15 case -- the issue in this case is the reasonableness and the fairness of  
16 UHC's conduct in denying the Plaintiffs' claim for coverage. And part of  
17 the duty of good faith and fair dealing is to openly and honestly  
18 communicate with your policyholder. That's part of the industry  
19 standard for good faith claim handling.

20 And so one of the ways in which we can demonstrate that  
21 UnitedHealthcare did not do that is by showing that the denial letter that  
22 was written to Mr. Eskew and to his treating physician was not true.  
23 There were falsehoods reflected in the letter, which violates the duty to  
24 openly and honestly communicate with your policyholder. And the  
25 falsehood is basically revolved around what the stated basis in the -- in

1 the letter for the denial.

2           The denial letter claims that part of the basis of the denial  
3 was the insurance policy itself. The evidence is that nobody who  
4 handled the claim or interacted with the claim on UFC's [sic] side ever  
5 read the insurance policy. They never did. And that's clear in Dr.  
6 Ahmad's deposition and the others.

7           Instead, there is a denial library, is what UHC calls it, a  
8 spreadsheet that we've received a heavily redacted copy of in discovery,  
9 that has language that is cut and pasted by a clerical person at UHC.  
10 And a denial letter is cobbled together without the input -- without the  
11 review of Dr. Ahmad, who actually denied the claim. And then his  
12 signature is stamped on the letter, and it's sent out to the policyholder.

13           And so I think it's telling. I think UHC admits in their -- in  
14 their reply brief that -- actually at page 2 of their reply brief -- if the denial  
15 letter misstated the basis for SHL's determination of the claim, then it  
16 may be a different story, with regard to the admissibility of the -- of this  
17 information. And it does misrepresent the basis of the denial.

18           So I think, Judge, it's important -- it's important to put this  
19 into the context that it deserves to be in, for purposes of the -- of your  
20 decision. And one of the things that the Defendant relies on is that they  
21 claim that Dr. Liao didn't rely on the denial letter. Frankly, I've had a  
22 hard time figuring out why that would matter. But the truth is, the denial  
23 was relied on by Liao and Eskew because they went forward with a  
24 different treatment plan than protons, as requested.

25           So there's no prejudice to UHC for the jury to know the way

1 in which they interact with their policyholder, including how they  
2 cobbled together and cut and paste these denial letters and stamp  
3 someone -- a doctor's name on them that did not review the claim and  
4 misrepresent the way in which the claim was actually looked at. So  
5 that's our position, Judge.

6 THE COURT: Thank you. Any rebuttal, Mr. Gormley?

7 MR. GORMLEY: Yes, Your Honor, just quickly. Looking at it  
8 from a relevance perspective and then also if there's any relevance, the  
9 little probative value that it would offer. Mr. Terry didn't like the idea  
10 that there's a duty to communicate open and honestly. I would submit,  
11 Your Honor, this -- their bad faith case is about whether there was a  
12 reasonable basis for Dr. Ahmad's denial and a related duty upon which  
13 they could potentially seek damages is whether the investigation was  
14 reasonable. The preparation of the letter has nothing to do with either of  
15 those.

16 So then it's a question whether this duty of open and honest  
17 communication whether their case -- if that was the only breach they  
18 were alleging, whether their case could stand on that alone. And that's  
19 just not a theory that their case could stand on -- this idea that -- if they  
20 conceded that the denial was the correct decision and that there was a  
21 reasonable basis for it, as a matter of law, under the agreement of  
22 coverage and they conceded that Dr. Ahmad's investigation was  
23 reasonable, they would not be able to go to the jury on a theory seeking  
24 damages, oh, well, the letter you sent saying that it was denied, you  
25 know, said something in it that in our view wasn't accurate.

1                   And that's especially true because Dr. Liao didn't look at the  
2 letter. Didn't rely on the letter. So if there was something inaccurate in it  
3 and she relied on it to make a decision, then maybe that would be da  
4 claim for fraud or some other type of cause of action. But it wouldn't be  
5 a basis for a bad faith claim. And there's no facts that support that  
6 anyone detrimentally relied on any aspect of this letter. So when it  
7 comes to the theories upon which their case is premised, for the bad  
8 faith relief, the preparation of the letter offers no probative value and  
9 isn't relevant.

10                   It would have been a little closer if they still had their unfair  
11 claims handling cause of action. They alleged that cause of action under  
12 three subsections of the latter subsection that was briefed in our motion  
13 for summary judgment related to misrepresentations to the insured.

14                   In that, our argument hinges on the idea that there were no  
15 misrepresentations in the denial letter because it correctly stated the  
16 reasons for denial. They can say our reasons are wrong, but that doesn't  
17 make the representations of the letter providing notice incorrect. That  
18 was our base -- that was the argument on that subsection under the  
19 Unfair Claims Handling Practices Act, but then they dropped that cause  
20 of action in response to our motion. So they're only cause of action left  
21 is bad faith. And this preparation of the denial letter just simply isn't  
22 relevant or even probative of the theories upon which they're claiming is  
23 premised, Your Honor. So for that reason, we think that evidence should  
24 be excluded.

25                   THE COURT: Thank you. Defendants' motion in limine

1 number 4 to exclude evidence, argument, and/or testimony relating to  
2 the preparation of the denial letter is denied.

3 Next motion is Defendants' motion in limine number 5 to  
4 exclude evidence, argument, and/or testimony relating to the opinions  
5 from Judge Scola. Any argument, Mr. Gormley. The Court's read  
6 everything.

7 MR. GORMLEY: Okay. And so I'm sure that this one you're  
8 familiar with it. I'd assume it's a fairly memorable one, Judge Scola's  
9 recusal order related to immoral and barbaric. I mean, I just reiterate  
10 that that was a case that relates to prostate cancer, not lung cancer. I  
11 mean, this was a judge that recused himself from the case because he  
12 viewed himself as -- I would say sua sponte recused himself from the  
13 case because he viewed himself as too biased in order to oversee that  
14 proceeding.

15 I mean, that -- he didn't want his biased opinion to interfere  
16 with that case. I don't think his biased opinion should interfere with this  
17 case and so it's our position that it's not admissible on any ground and  
18 should be excluded.

19 THE COURT: Thank you, Mr. Gormley. Mr. Terry.

20 MR. TERRY: Your Honor, just very quickly. We do not intend  
21 to introduce the evidence of Judge Scola's ruling in our case-in-chief, but  
22 we could see -- we could foresee circumstances in which UHC's defense  
23 of the case could open the doors to such things being mentioned  
24 because we anticipate that their defense of the case is going to be that,  
25 based on what their experts say, is that UHC's decision making is

1 consistent with industry standard and that the industry standards are  
2 well established and certified by all these -- by the NCQA and URAC.  
3 And make it appear as though there's never been any attack or any sort  
4 of question about whether or not their practices and their policies are fair  
5 and reasonable.

6 And so I would only say, Judge, we -- they may open the  
7 door to this, but as far as case-in-chief, we would not intend to introduce  
8 Judge Scola's order.

9 THE COURT: Thank you. Defendants' motion in limine  
10 number 5 to exclude evidence, argument, and/or testimony relating to  
11 the opinions from Judge Scola is granted. Even if the Defendants open  
12 the door, the opinions of Judge Scola are not coming into the jury. The  
13 Plaintiffs can use other evidence.

14 The next one -- do we have Mr. Roberts back on Defendants'  
15 motion in limine number 6 to exclude evidence, argument, and/or  
16 testimony relating to the New York Proton Center?

17 MR. ROBERTS: Yes, Your Honor, I am back.

18 THE COURT: Okay. Thank you. Do you have any argument?

19 MR. ROBERTS: Yes, Your Honor. In addition to our briefing,  
20 I would like to point out a fundamental misunderstanding regarding the  
21 basis of their motion. At page 3 of their opposition to our motion,  
22 Plaintiffs represent to the Court that UHC is a partial owner and the  
23 primary operator of the New York Proton Center. That's simply  
24 inconsistent with the evidence and it's untrue.

25 As we discussed in my prior motion, UHC is

1 UnitedHealthcare, which is an insurance company and all of the  
2 affiliates, including the Defendants in this case, are insurance companies  
3 under an ultimate parent UnitedHealthcare. But as set forth in our  
4 motion, the partial minority owner of 33 percent is an affiliate of  
5 UnitedHealth Group -- the ultimate parent. But more specifically,  
6 ProHealth Medical Management is a subsidiary of Collaborative Care  
7 Holdings, LLC, which is a subsidiary of OptumHealth Holdings, which is a  
8 subsidiary of Optum.

9 Now, what's the point of that? The point is that, as I  
10 explained before, UnitedHealth Group has an insurance side and a  
11 provider side. This connection -- this minority stake in a proton beam  
12 center in New York is held by an affiliate of Optum, which is the provider  
13 side. It's not held by any insurance company, including this insurance  
14 company or any of its affiliates or its ultimate parent insurance company.  
15 And that's what makes this so misleading and dangerous.

16 The fact that UnitedHealthcare has an ultimate parent  
17 UnitedHealth Group that has a separate provider subsidiary that's simply  
18 too remote to be imputed to this insurance company in Nevada the way  
19 that they're trying to impute it. And going beyond that, Your Honor, as  
20 everyone has acknowledged, the policies and the state of the art on  
21 proton beam therapy used to treat various cancers has evolved over  
22 time. Studies have evolved over time.

23 And therefore, it's unduly prejudicial to point out a statement  
24 from a New York Proton Beam Center in 2019 to impute knowledge to us  
25 years earlier of that position, which had not yet even been taken yet.

1 Ultimately, Your Honor, this is simply a very limited, if any, probative  
2 value. There's a danger of confusion. It's unduly prejudicial. And some  
3 website hearsay from a remote affiliate on the providers out of  
4 UnitedHealth Group should not be admissible in this case against these  
5 Defendants. Thank you, Your Honor.

6 THE COURT: Thank you, Mr. Roberts. Mr. Terry.

7 MR. TERRY: Mr. Sharp is going to handle this one, Judge.

8 THE COURT: Thank you. Mr. Sharp.

9 MR. SHARP: Yes, Your Honor. Let me just address in  
10 response to Mr. Roberts' points, as I lay them out. First,  
11 UnitedHealthcare Services is the common entity that manages both the  
12 insurance arm and the medical arm, as set forth in Mr. Flood's report.  
13 The employees of -- well, neither have employees. I mean they're all  
14 basically one entity. So there is a -- there is a connection.

15 But I think the bigger issue, which in our mind goes both to  
16 the credibility of UnitedHealthcare and the reasonableness of their  
17 position is first in 2015, as they were denying Mr. Eskew's claim, they  
18 were investing -- UnitedHealthcare, UnitedHealthcare Group, through  
19 Optum, was investing in the proton beam center to treat lung cancer. 13  
20 percent of its anticipated revenue was from lung cancer.

21 So the question then begs if this is such an esoteric or, you  
22 know, medically unnecessary procedure, why would UnitedHealthcare  
23 be involved in providing that care? That was the intent of the company.  
24 And that's set forth in the New York Proton Center review by the State of  
25 New York, which was actually relied upon by UnitedHealthcare in its own



1 motion for summary judgment. So that's the primary issue.

2           Secondly, in this case, the insurance company  
3 UnitedHealthcare intends to introduce evidence, through, I believe, Dr.  
4 Kumar, the radiation oncologist, that even as today, lung  
5 candidate -- proton beam therapy for lung cancer is not medically  
6 necessary. In fact, their position is it's -- the case is stronger today than  
7 it was in 2016. So that goes to their own credibility.

8           All of that is fair game. I mean, whether or not Sierra Health  
9 and Life or UnitedHealthcare or the people actually involved in the claim  
10 knew that or the people involved in creating the policy knew all of this,  
11 that goes to the credibility of the evidence. But it would be entirely  
12 misleading to the jury for UnitedHealthcare to stand up and say proton  
13 beam therapy for lung cancer is always medically unnecessary, when in  
14 fact, they're in the business of providing that care. So with that, if you  
15 have any questions, I'm happy to address them.

16           THE COURT: Thank you, Mr. Sharp. Mr. Roberts, any  
17 rebuttal?

18           MR. ROBERTS: Yes, Your Honor. Again, the connection here  
19 is just too attenuated. There are no statements being offered by Sierra  
20 Health and Life Insurance Company, Inc., or UnitedHealthcare, Inc. A  
21 hearsay statement is being offered on the provider's side. And they  
22 already have an expert, who is going to opine and who says, yes, those  
23 are consistent with my opinion. It's cumulative evidence and it's simply  
24 unfairly prejudicial and not fair to impute a distant subsidiary's  
25 statements or beliefs in a hearsay website statement to these Defendants

1 in Nevada without any knowledge that these Defendants -- excuse me,  
2 Your Honor -- any evidence that these Nevada Defendants were aware of  
3 any statement being made by this distant affiliate.

4 There is no allegation in the complaint of altered ego.  
5 There's no allegation that these are the same company in the complaint.  
6 There's no allegation appears to corporate veil. Prejudice definitely  
7 outweighs probative here and it's going to create a little mini trial on  
8 these issues related to the proton beam center. Thank you, Your Honor.

9 THE COURT: Thank you. Defendants' motion in limine  
10 number 6 to exclude evidence, argument, and/or testimony relating to  
11 the New York Proton Center is denied.

12 Next, we'll move on to Defendants' motion in limine number  
13 7 to exclude certain photos. Mr. Gormley or Mr. Roberts.

14 MS. GLANTZ: Good morning, Your Honor. This is Stephanie  
15 Glantz for Defendants. I'm going to be handling motion in limine  
16 number 7 here. Since Your Honor is familiar with the briefing, I won't go  
17 through what each of these photos are, but basically Defendants  
18 disclosed a group of photos in this case, which would like to exclude as  
19 irrelevant and unfairly prejudicial.

20 All these photos are photos of Mr. Eskew, either with his  
21 family or with his animals. The Nevada Supreme Court has consistently  
22 given some guidance for when photos might be relevant. Those are  
23 when it accurately shows a scene, when it shows the cause of death, or  
24 when a photo could reflect the severity of wounds or the manner of their  
25 infliction.

1           These photos here don't fit into any of these categories. Not  
2 one of these is a photo of Mr. Eskew without his animals or his dogs. I  
3 think that these photos are -- or that might make sense in this case if  
4 these were photos, you know, showing Mr. Eskew's tumor or something  
5 of the like, but that's just not what these photos are.

6           To the second point, these are unfairly prejudicial. As I  
7 mentioned, these are photos of Mr. Eskew with a newborn baby, with his  
8 toddler-age granddaughter, with a puppy. There's no question that  
9 these were produced and would be used to appeal to the jury's  
10 emotional and sympathetic tendencies. And in fact, when opposing this  
11 motion, Plaintiff doubled down on that and said that these were relevant  
12 because they show that Mr. Eskew was a Las Vegas family man trying to  
13 live a happy and content life. Even if that statement were relevant here,  
14 there's other evidence at issue that Plaintiff could use to show,  
15 specifically the testimony from Mr. Eskew's family.

16           Along those same lines, to the extent that these photos show  
17 Mr. Eskew's condition, again, there's plenty of evidence in this case  
18 related to Mr. Eskew's medical condition both from the physicians, his  
19 medical records, and additional from his family. So with that, we would  
20 request that this Court exclude these photos. Thanks.

21           THE COURT: Thank you, Ms. Glantz. Mr. Sharp or Mr. Terry.

22           MR. SHARP: Yes, Your Honor. We'll do with it whatever  
23 Your Honor would like. I've never been involved in a case where you  
24 don't get to present the person who is the plaintiff to the jury, whether  
25 it's a wrongful death case, a survival case, or a regular personal injury

1 case. So we've demonstrated why the photos could be potentially  
2 relevant. And the problem sometimes with these kind of motions in  
3 limine is -- I mean, Mr. Terry and I haven't even made decisions what, if  
4 any, of those photos come into evidence, but I'd say defer ruling, but  
5 again, I mean, we'll do whatever you'd like, Your Honor.

6 THE COURT: Thank you. Ms. Glantz, any rebuttal?

7 MS. GLANTZ: Yeah, I mean, I think if they produce a photo  
8 just Mr. Eskew, that might be a different story. Again, not one of these  
9 photos is just of Mr. Eskew. Every single one of them has a member of  
10 his family in it or has him with his dogs in it. If Plaintiffs wanted to  
11 present a photo of Mr. Eskew that wasn't unfairly prejudicial, they could  
12 have done that, but these were clearly produced to provoke the  
13 sympathetic tendencies of the jury. Thank you.

14 THE COURT: Thank you. All right. Motion in limine number  
15 7 -- Defendants' Motion in Limine to exclude certain photos will be  
16 denied in part and granted in part. The photos relating to Mr. Eskew  
17 involving other people or animals, the motion will be granted; however,  
18 it will be denied because Plaintiffs will be allowed to use photos of Mr.  
19 Eskew himself during the time of trial, as he is deceased. Do the parties  
20 have any questions regarding the ruling?

21 MS. GLANTZ: I don't have any questions.

22 MR. TERRY: I don't have any, Your Honor.

23 THE COURT: Okay. And so that means that if you shade out  
24 other people in the photo, these photos will be allowed.

25 MR. SHARP: And I'm wondering if the Court -- I mean, we

1 had just, as you probably can expect, Your Honor, we just asked our  
2 clients to give us photos and we didn't really anticipate this kind of  
3 argument. I guess if there is a photo -- I mean, we could Photoshop the  
4 ones we've done --

5 THE COURT: Yes.

6 MR. SHARP: -- but I'm also wondering if we have, like, a  
7 clean photo if that would be okay, if we produced it to the other side? I  
8 mean --

9 THE COURT: Yes. They can be blurred out so you can't see  
10 the other family members, or you could just use one regular photo that  
11 just has him.

12 MR. SHARP: Yeah.

13 THE COURT: Okay. Next, is Defendants' motion in limine  
14 number 8 to preclude argument or questioning relating to comparing  
15 testimony preparation time with prior authorization review time. Ms.  
16 Glantz, Mr. Gormley, Mr. Roberts.

17 MR. GORMLEY: Thank you, Your Honor. This is Ryan  
18 Gormley again and I'll be arguing this one. So for this one, pretty  
19 straightforward issue about whether the argument would be Dr.  
20 Ahmad's spent 30 minutes on this review and he spent whatever it ends  
21 up being preparing for his testimony at trial. Let's call it four hours. And  
22 he'll get up and say, oh, he spent 30 minutes on this prior authorization  
23 review and 4 hours preparing to testify at trial. So clearly he values this  
24 case and liability much more than he valued Mr. Eskew's safety and  
25 security or well-being, in performing the review.

1           But, Your Honor, it's just our position that that's just a false  
2       equivalency. Certain things -- certain tasks take different amount of time.  
3       Dr. Ahmad is a trained physician, who performs prior authorization -- has  
4       performed many prior authorization reviews in addition to his clinical  
5       practice and years of experience. Just because that takes less time than  
6       preparing to testify at trial, something that he's inexperienced in,  
7       something that he doesn't do all the time, and is a completely different  
8       task, I think drawing that false equivalency is not irrelevant, but it's also  
9       unfairly prejudicial and misleading to the jury.

10           And also, as pointed out in the brief, there's case law that  
11       supports the idea that such an argument would hinder or cut against or  
12       maybe provoke a defendant from preparing for trial adequately because  
13       maybe he wouldn't want to allow them to have that argument so it  
14       would stop us from being able to prepare him as we otherwise would,  
15       which is just a public policy reason for disallowing such types of  
16       argument. So for that reason, Your Honor, we think -- we submit that  
17       motion in limine number 8 should be granted.

18           THE COURT: Thank you. Any opposition, oral argument, Mr.  
19       Sharp or Mr. Terry. The Court obviously has read the opposition in  
20       written format.

21           MR. SHARP: Yes, Your Honor. I mean, I think that the one  
22       problem with the motion is that it presupposes what we're going to  
23       argue to the jury. And those types of motions always concern me  
24       because we don't know what the evidence is going to be before the jury.

25           That having been said, the jury should be allowed to evaluate

1 the credibility of Dr. Ahmad, who I think the evidence is, really spent  
2 about 12 minutes reviewing this claim, although, he testified that he  
3 claimed he spent 30 to 60 minutes. Perhaps he can explain that in his  
4 examination.

5 But then the fact that he would need to basically re-review  
6 the PBT policy and that would take him whatever it is -- six, seven, eight  
7 hours -- that clearly goes to his credibility. I mean, if this is such a simple  
8 task, he wouldn't have that kind of preparation. I mean, this is the kind  
9 of testimony that comes in on every witness. You know, same thing with  
10 Mrs. Eskew.

11 So I would just say I think these kind of things should be  
12 deferred for ruling because we don't even know what the evidence is  
13 going to say, but if the Court wants to make a ruling, I would say deny.

14 THE COURT: Thank you, Mr. Sharp. Mr. Gormley.

15 MR. GORMLEY: Just quickly, Your Honor. Of course they  
16 can evaluate the amount of time Dr. Ahmad spent on the prior  
17 authorization review and then they can ask him, as you would any other  
18 witness, you know, did you prepare for your testimony today; how long  
19 did you spend preparing; things of that nature. But it's the false  
20 equivalency, which is irrelevant and unfairly prejudicial. And I don't  
21 know if they're going to make it or not for sure, but in a prior case it was  
22 an argument they made and so I think that it's a legitimate motion in  
23 limine to seek to preclude that ahead of time, as opposed to waiting to  
24 bring it down in front of the jury.

25 THE COURT: Thank you. Defendants' motion in limine

1 number 8 to preclude the argument or questioning relating to comparing  
2 testimony preparation time with prior authorization review time will be  
3 denied. Nothing in the motion will prohibit Defense counsel from  
4 making its own arguments regarding those times.

5 Next, is Defendants' motion in limine number 9, to exclude,  
6 argument, and/or testimony relating to generalized patient numbers or  
7 studies. Mr. Gormley.

8 MR. GORMLEY: Thank you, Your Honor. Number 9 is about  
9 the idea that this case is specific to lung cancer and there's been  
10 testimony that's been elicited and expert -- in statements in expert  
11 reports that have been provided by Plaintiff concerning the idea all the  
12 patient -- all the -- the patients that have been treated with proton  
13 therapy with any type of cancer and not just -- and then also not just  
14 studies related to lung cancer, but all the studies out there concerning  
15 proton therapy for any type of cancer. And I think the effect -- the benefit  
16 they get from that is obvious. It's the more is better approach. The  
17 higher the number, the more emotional reaction and more benefit you  
18 might get from the jury.

19 But it's misleading because even United's policy, just looking  
20 at that, does not determine that proton therapy is not medically  
21 necessary for all forms of cancer. So even when United, in their  
22 handling of claims, is distinguishing. And then to come in and point the  
23 numbers that address across the board all forms of cancer, whether it's  
24 patients or studies, it just is both irrelevant and unfairly prejudicial and  
25 misleading. And for that reason, we submit it should be excluded, Your



1 Honor.

2 THE COURT: Thank you. Mr. Sharp.

3 MR. TERRY: I'll take this one, Judge, if that's okay.

4 THE COURT: Thank you.

5 MR. TERRY: UHC's defense in this case, Judge, is going  
6 to -- they're going to attempt to make it seem as though proton therapy  
7 is some fringe thing, some cutting edge thing, some newly developed  
8 thing or some experimental or investigational, or unproven, and not  
9 medically necessary and minimize it and marginalize it. And act as  
10 though the jury should conclude, along with them, that proton therapy is  
11 not widely used and widely recognized as being safe and effective.

12 Their proton policy -- proton medical policy refers to all  
13 different kinds of cancer, but only says that it's medically necessary for a  
14 very short list, but what we would like to show the jury -- because it's  
15 true -- is that proton therapy is not some kind of fringe treatment for  
16 cancer. Instead, it's been used to treat cancer in humans since the  
17 1950s. It's been FDA approved since the 1980s. Medicare pays for it.  
18 There's dozens of proton beam centers -- treatment centers around the  
19 world. They're all over the US and around the world. One of them is  
20 owned by UHC. Thousands and thousands -- hundreds of thousands of  
21 patients have been treated with proton therapy safely and effectively.

22 And we also intend to show that there are literally hundreds  
23 of articles out there that support the use -- the safe and effective use of  
24 proton beam therapy to treat cancer patients. So it's a -- we believe that  
25 it's sort of a fair -- a fair thing for us to be able to say that proton therapy

1 is widely accepted in the medical world. Look around. There wouldn't  
2 be all these cancer -- or these proton treatment centers if not for that fact.

3           So I guess our suggestion about this, Judge, would be that,  
4 you know, if they want to -- if they want to cross-examine our evidence  
5 in that regard, then certainly they can. They're capable of that for sure.  
6 And so we believe that this kind of evidence is definitely relevant, as to  
7 the issue of what is proton therapy; where has it been; what's the  
8 historical nature of it; and how much is it used. It seems like something  
9 the jury ought to understand. To tell any less than story would be  
10 misleading.

11           THE COURT: Thank you, Mr. Terry. Mr. Gormley.

12           MR. GORMLEY: Thank you, Your Honor. Just quickly, I  
13 mean, I think we're right down to the crux of the issue. It's just that the  
14 imprecise nature of this evidence is misleading when this is a case about  
15 lung cancer. And even though we could elicit cross-examination  
16 testimony that maybe dampens or weakens, you know, if they there's  
17 been 200,000 patients that have been treated with this -- with proton  
18 therapy and then the follow up is how many were treated for lung  
19 cancer. And then the follow up with how many were treated for stage  
20 four lung cancer and how many of those were treated for stage four lung  
21 cancer, not on a clinical trial. I don't know -- maybe there's somebody.

22           And then -- yeah, cross-examination goes so far, but I think  
23 that more is better approach of these significant numbers is just the  
24 probative value is too little and prejudicial value of those significant  
25 numbers coming out initially is too high for it to be admissible.

1 THE COURT: Thank you. Defendants' motion in limine  
2 number 9 to exclude evidence, argument, and/or testimony relating to  
3 generalized patient numbers or studies is denied.

4 Next, is Defendants' motion in limine number 10 to exclude  
5 evidence, argument, and/or testimony relating to Medicare coverage.  
6 Mr. Gormley.

7 MR. GORMLEY: This one is similar to number 9, Your Honor,  
8 in that we don't take a position that it's relevant, but it's unfairly  
9 prejudicial and misleading because the Medicare coverage  
10 determination for proton therapy is entirely distinct than the  
11 determination here and that would beg to question from the jury well,  
12 why would Sierra Health and Life have a more stringent standard than  
13 the federal government. And I think that comparison that the -- the fact  
14 that question is triggered in the mind of the jury that would be paying  
15 attention to that evidence, I think views it with a particularly prejudicial  
16 and misleading effect, when you're comparing why would the private  
17 insurance company have a higher standard than the federal government.

18 I don't think the fact of what the insurance contract says is  
19 on -- is at issue. So for that reason, it just seems to lead the juror down a  
20 road that's unfairly prejudicial and misleading and could result in  
21 deciding the case on grounds other than what's been presented.

22 THE COURT: Mr. Gormley, what about --

23 MR. GORMLEY: Nothing further on that, Your Honor.

24 THE COURT: Sorry to interrupt you. What about the report  
25 of Dr. Chandra, your expert, where she talks about keeping costs down?

1 MR. GORMLEY: And how does that relate to this, Your  
2 Honor?

3 THE COURT: Yes.

4 MR. GORMLEY: I think he offers an opinion to help mitigate  
5 the effects of this type of evidence. He explains that Medicare coverage  
6 turns on an -- on a different standard and less stringent criteria. He goes  
7 into some of the economic and policy reasons why Medicare operates on  
8 a different type of standard than the -- than typically private insurance  
9 and Sierra Health and Life in this case.

10 So I think he gives an opinion that if this testimony is let in,  
11 that helps us refute this testimony and refute the probative value of this  
12 evidence. So I think his opinion is relevant, as to this, but if they're  
13 excluded from discussing Medicare coverage, then of course there  
14 would be no reason for Dr. Chandra to opine as to the differences  
15 between Medicare coverage determinations and Sierra Health and Life  
16 coverage determinations and private insurance in general.

17 THE COURT: Thank you, Mr. Gormley. Mr. Terry or Mr.  
18 Sharp.

19 MR. TERRY: Thanks, Judge. I believe that the fairest  
20 way -- well, let me back up. What we intend to tell the jury and explain  
21 to the jury is that in face of UnitedHealthcare saying that proton therapy  
22 is not medically necessary and that, you know, it's a fringe type of  
23 treatment, and that kind of thing, despite the evidence that they have  
24 their own proton center. We can say truthfully that both FDA and -- FDA  
25 has approved proton therapy -- the machines that provide proton

1 therapy for use on humans and Medicare pays for it.

2           So the two largest public health agencies in the country have  
3 concluded that proton therapy is proven, safe, and effective. Not  
4 investigational, experimental, or anything like that. That's compelling  
5 evidence on our side. And if they think they can refute that in some  
6 way -- in some admissible way, then I suppose they can give that a shot,  
7 but the idea that -- the fact that Medicare pays for it has no relevance is  
8 certainly -- we ought to be able to tell the jury that so that the jury can  
9 see that this is not some unproven, not medically necessary mode of  
10 treatment. That's the bottom line. So I guess that's what I'd offer you,  
11 Judge.

12           THE COURT: Thank you, Mr. Terry. Mr. Gormley.

13           MR. GORMLEY: I would just correct that the -- it's not our  
14 provision the evidence isn't relevant. It's unfair prejudice, misleading,  
15 confusing argument. I understand why they want the evidence in. I  
16 understand how it can be construed as relevant. I think the probative  
17 value is low, given the different standards. And so not to repeat myself,  
18 but for those reasons, we think it should be excluded.

19           THE COURT: Thank you. Defendants' motion in limine --

20           MR. TERRY: Well, Your Honor, if I may say one -- if I may say  
21 one more thing, Judge. If Mr. Eskew had been just a couple of years  
22 older, he would have been -- had proton therapy paid for by Medicare.  
23 Isn't that -- and so I mean that's pretty probative of the idea that proton  
24 therapy is not some wacky treatment modality. I'm sorry. I do -- you  
25 were -- I hope I didn't interrupt you. I may have. I apologize, if so.

1 THE COURT: That's okay.

2 MR. GORMLEY: Can I make one comment on that, Your  
3 Honor?

4 THE COURT: Yes, Mr. Gormley, of course.

5 MR. GORMLEY: Just real quick. And my understanding  
6 is -- and this is just why it's going to get confusing, is just that  
7 there's -- my understanding is there's no national coverage  
8 determination for proton therapy, when it comes to Medicare. There's  
9 local coverage determinations that handle them in different ways. So it's  
10 just going to get into all of these nuances and distinguishing features  
11 about how Medicare works, what's the national coverage determination,  
12 what's a local coverage determination, and, you know, how the  
13 standards of those are different and why, from an economic and public  
14 policy viewpoint, it's okay for Medicare to have a, you know, more open  
15 and easily met standard of do no harm than what private insurance  
16 applies. And why that's okay too, and why all of these things exist. So I  
17 just think it goes down a long winding road, but nothing further from  
18 me, Your Honor.

19 THE COURT: Thank you, Mr. Gormley. Defendants' motion  
20 in limine number 10 to exclude evidence, argument, and/or testimony  
21 relating to Medicare coverage is denied.

22 Next motion is Defendants' motion in limine number 11 to  
23 exclude evidence, argument, and/or testimony relating to unqualified  
24 opinions regarding medical causation. Mr. Gormley.

25 MR. GORMLEY: Your Honor, this is Mr. Gormley again. This

1 one's pretty straightforward. During her deposition, Mr. Eskew's wife  
2 Sandra Eskew testified that it was her opinion that Mr. Eskew starved to  
3 death. I think the importance of this motion -- it played a more important  
4 role, when they still had their wrongful death claim pending because the  
5 idea was they -- we thought the experts they had did not support their  
6 causation theory for wrongful death so we didn't think they should then  
7 be allowed to latch on to Mrs. Eskew's testimony in order to have a  
8 wrongful death claim reach the jury.

9 Now that they've dropped that claim, I think sort of the  
10 magnitude of this motion has diminished, but I would still say to the  
11 extent she would offer some causation related viewpoints that those  
12 should be precluded just as improper lay witness opinions. She's  
13 allowed to testify of her observations of Mr. Eskew's health and his state  
14 of well-being following the treatment, but I think going that one step  
15 further is improper lay witness opinion and unfairly prejudicial.

16 So even though it's not quite as informed without the  
17 wrongful death, I still think that the motion should be granted at this  
18 time.

19 THE COURT: Thank you, Mr. Gormley. Mr. Terry.

20 MR. TERRY: Your Honor, this Doug Terry. We do not intend  
21 to offer any evidence that -- from Mrs. Eskew or any of her family  
22 members about the cause of Mr. Eskew's death. We don't have a  
23 wrongful death claim remaining in this case, so we won't be offering that  
24 evidence.

25 We simply want to offer evidence from their personal

1 observation of Mr. Eskew's condition following his treatment with the  
2 IMRT form of radiation and the way in which they observed his condition  
3 change over time, just from a -- their own observation of him. Not any  
4 sort of medical testimony. So I guess really this motion is -- I assume it's  
5 moot. I don't know exactly what they're moving to exclude, but that's  
6 the nature of the evidence that we intend to offer.

7 THE COURT: Defendants' motion in limine number 11 to  
8 exclude evidence, argument, and/or testimony relating to unqualified  
9 opinions regarding medical causation will be granted. So Mrs. Eskew  
10 will not be able to testify that her husband starved to death. She will be  
11 able to testify that he was eating less, due to the scar tissue in his  
12 esophagitis.

13 MR. TERRY: Thank you, Your Honor.

14 THE COURT: Defendants' motion in limine number 12 to  
15 exclude evidence from Dr. Liao regarding matters outside the course and  
16 scope of her treatment of Mr. Eskew. Mr. Gormley.

17 MR. GORMLEY: Thank you, Your Honor. This is Ryan  
18 Gormley again for Defendants. So Dr. Liao -- and just to give a little  
19 context again and to be brief. Dr. Liao was Mr. Eskew's treating  
20 physician at MD Anderson. It's the -- and you can see their -- at least  
21 their expert agrees that her treatment of Mr. Eskew ended in July. Then  
22 during that time, as reflected in the medical records, and which is I think  
23 agreed to, the medical records only reflect that she ever diagnosed him  
24 with a grade 2 level of esophagitis. The grades, as was mentioned, it  
25 refers to the severity. One is the least severe and five is the most severe.



1           So her medical records show that she only diagnosed him  
2 with a grade 2 esophagitis. Then their expert has an opinion that  
3 because of a hospital admission four months later in November, that it's  
4 his view that that rating moved from a grade 2 to a grade 3. And they  
5 noticed and deposed Dr. Liao in this matter. And during her deposition  
6 she opined that he's -- that Mr. Eskew suffered from grade 3 esophagitis.  
7 So that opinion is based on facts outside -- it is not based on the course  
8 and scope of her treatment.

9           So the rule would require, and Nevada law would require  
10 them to provide an expert report discussing that. They didn't provide an  
11 expert report discussing that opinion. And it's our view under Nevada  
12 law that then that opinion from Dr. Liao should be precluded.

13           And to the extent she can offer it, it could also be  
14 excluded -- and this exclusion is not really prejudicial to Plaintiffs  
15 because they have their expert Dr. Chang, who is going to be offering the  
16 same opinion so if anything, if it's -- if it -- if they're allowed to present it  
17 as an expert opinion -- a belated expert opinion, now it's a duplicative  
18 expert opinion, as offered by Dr. Chang. So on either ground, we would  
19 submit it should be excluded, Your Honor.

20           THE COURT: Thank you, Mr. Gormley. Mr. Terry.

21           MR. SHARP: Excuse me, Your Honor, this one is my motion.  
22 A couple of points that I -- one, I want to clarify because I think the timing  
23 is in confusion. Dr. Liao, as we know, treated Mr. Eskew with IMRT.  
24 During that treatment he developed what she believed to be grade 2  
25 esophagitis.

1           After he returned from Rena to Las Vegas -- Houston -- she  
2 continued to have discussion -- Dr. Liao did with Mrs. Eskew. Based  
3 upon those discussions, she reached the opinion that it was grad 3  
4 esophagitis. And this is set forth in Dr. Liao's deposition at pages 77,  
5 line 1 through line 12. So these were opinions formed in the course of  
6 her treatment. And we're talking all within about a month. And there's  
7 actually email correspondence that's been produced confirming that  
8 these discussions occurred.

9           So it was undoubtedly these are opinions formed during the  
10 course of treatment. So there was no report required.

11           And to the extent that her opinions are different than her  
12 records, that goes to the credibility of her opinions. And I would note,  
13 Your Honor -- I mean, Dr. Liao clearly was always the treating physician.  
14 I mean, the Defense cited to her testimony, where she would not give  
15 opinion on cause of death because she hadn't reviewed any of the  
16 records. So this is not a type of expert that's going beyond what her  
17 role. She very strictly was a treater.

18           Secondly, I mean, the opinion was disclosed I believe a year  
19 plus ahead of expert reports. Nobody ever complained to us that this  
20 should have required an expert report. We complied with our  
21 obligations under 16.1, where we disclosed in detail the testimony that  
22 would be offered by Dr. Liao. So I just don't -- I mean, this is just not a  
23 situation where anybody is trying to do anything but be upfront.

24           These are the -- this is the testimony she provided. The  
25 Court's discovered her role as a treating physician. And with that, if the

1 Court has any specific questions about the timing, anything like that, I'd  
2 be happy to answer them.

3 THE COURT: No. Thank you, Mr. Sharp. Mr. Gormley.

4 MR. GORMLEY: I just want to say, we're not -- I don't think  
5 our motion -- and if it does, I would say that wasn't the intent to impute  
6 any type of bad motives or anything. I think it's just following what  
7 Nevada law is and I think it is outside the course and scope of her  
8 treatment. And so then it becomes, we knew about it. We attended the  
9 deposition. And we knew about it. And they disclosed a non-  
10 written -- non-retained expert report, as opposed to a written report.

11 But it is expert testimony and then that just means it's  
12 cumulative. So now you have Dr. Liao and Dr. Chang giving the same  
13 opinion as an expert -- the very narrow same opinion as an expert. And  
14 that reason alone warrants that its exclusion.

15 But then I would say, just to discuss why it was a -- not  
16 within the course and scope of treatment. I was looking at page 77. I  
17 looked at it earlier today of Dr. Liao's deposition transcript. And that  
18 says that "Mr. Eskew started having problems towards the end of the  
19 radiation because of the esophagitis he had pain. He was having  
20 difficulty swallowing.

21 So he started to make sure that he got hydration during the  
22 treatment before he went home. I recall that after he went home, we  
23 started the pain medication for him, as well, where he was still in  
24 Houston and doing the treatment. I recall that he went home and then  
25 he'd still have, like, symptoms progress to the point that he couldn't eat.

1 He lost significant amount of weight. I wasn't clear whether he was  
2 admitted to the local hospital or not, but he had pretty severe, what I  
3 would say, grade 3 esophagitis after he went home, so that's what I  
4 recall."

5           So when we said the treatment ended in July, he received  
6 the IMRT and that -- the administration of that treatment ended in March.  
7 And then he did go home. But then he had follow-up appointments with  
8 MD Anderson through July of that same year over the next four months.  
9 But after July, he had no follow-up appointments. And so to the extent  
10 or opinions based on any information after July, then it require -- it  
11 would require there be disclosed -- and it should be considered an expert  
12 opinion and then cumulative of Dr. Chang.

13           THE COURT: Thank you, Mr. Gormley.

14           Defendants' motion in limine number 12 to exclude  
15 testimony from Dr. Liao regarding matters outside the course and scope  
16 of her treatment of Mr. Eskew is denied. The reason for the denial is the  
17 Court did read the emails that Dr. Liao was having with Mrs. Eskew after  
18 Mr. Eskew came home and so as a treating physician, she was actually  
19 still treating Mr. Eskew at the time, even though it was remotely. So  
20 that's the basis for the reason. And the cumulative issue, doctors -- for  
21 continuity, frequently testify to similar facts.

22           Next motion is Defendants' motion in limine number 13 to  
23 exclude evidence, argument, and/or testimony relating to questioning  
24 attempting to alter the scope of the jury's inquiry. Mr. Gormley.

25           MR. ROBERTS: Your Honor, this is Lee Roberts. I'll be

1 handling this one.

2 THE COURT: Thank you, Mr. Roberts.

3 MR. ROBERTS: What we've taken a line of questioning from  
4 a deposition of our medical director and filed a motion to prevent that  
5 same line of questioning from being made at trial. And it's very specific.  
6 It's not hypothetical. The first question that we cite is where Dr. Ahmad  
7 was asked would you agree with me that an insurance company should  
8 not deny a preauthorization request based on life of medical necessity  
9 without a good reason to do so. And essentially, Your Honor, this is  
10 asking him a question to opine a matter of law.

11 This Court is going to instruct the jury what the obligation of  
12 an insurance company is. And the Plaintiffs should not be able to  
13 substitute their own standard or ask lay witnesses' opinions, as to  
14 matters of law that are inconsistent with Nevada law on the subject. And  
15 I think everyone is going to agree that the case law in Nevada talks about  
16 having any reasonable basis for the denial. Our no reasonable basis is  
17 the standard for a finding of bad faith.

18 And what the jury -- excuse me -- what these questions try to  
19 do is substitute the standard of a reasonable basis for a good reason.  
20 And those are different standards, Your Honor. And they might be  
21 interpreted by the jury in different ways. You can just look in the  
22 dictionary at the difference between reasonable and good.

23 Reasonable, you know, has one definition and good has a lot  
24 of different connotations. One from the online dictionary.com is  
25 good -- the very first one is good means to be desired or approved of. I

1 had a good time. It means you enjoyed it. What does a good reason  
2 mean? One that's -- one that's approved by the Plaintiff.

3 It has another meaning, morally right, righteous. Good has  
4 all sorts of connotations, which are nowhere in the law and therefore  
5 these questions are simply not relevant to the jury's determination, as to  
6 whether United had any reasonable basis. They are not relevant to any  
7 question that's going to be put for the jury. And they have the danger of  
8 misleading and confusing the jury by putting to the witnesses' questions  
9 which are inconsistent and have no relevance to the actual standard  
10 that's going to be instructed upon by this Court. Thank you, Your Honor.

11 THE COURT: Thank you, Mr. Roberts.

12 Mr. Sharp or Mr. Terry.

13 MR. SHARP: Excuse me, Your Honor. I guess I would point  
14 out that the opposite of good is bad. And the violation of the duty of  
15 good faith and fair dealing is bad faith. That's what having instructions  
16 will instruct the jury on. The question is, as the jury is -- you will instruct  
17 Your Honor -- Your Honor will instruct the jury as basically we have to  
18 prove that UnitedHealthcare had no reasonable basis for its conduct.  
19 We acknowledge that it no reasonable basis. I mean, the fact that that's  
20 what we have to prove. So the absence of a good reason is relevant to  
21 that consideration.

22 What is reasonable conduct? I mean, that's going to be a  
23 dispute that the jury will have to decide. One of which, and we'll present  
24 through Mr. Brader [phonetic] is you have to have a good reason -- one  
25 based on logic. And does it mean the right reason? It means a good

1 reason. And that's supported by the case law.

2           So I don't think there's anything -- certainly not prejudicial  
3 about the question. It certainly doesn't invoke anything along the lines  
4 of a legal conclusion. It's simply what was this man's state of mind, Dr.  
5 Ahmad, when he denied this claim. And that's clearly a relevant inquiry.  
6 What were the standards he was using. So with that, if you have any  
7 other question, I'm happy to answer them.

8           THE COURT: No. Thank you, Mr. Sharp. Mr. Roberts, any  
9 rebuttal?

10           MR. ROBERTS: No, nothing further, Your Honor. We'll rest  
11 on the briefing.

12           THE COURT: Thank you. Defendants' motion in limine  
13 number 13 to exclude evidence, argument, and/or testimony relating to  
14 questioning attempting to alter the scope of the jury's inquiry will be  
15 granted. Pursuant to *Guaranty National Insurance Company v. Potter*,  
16 the standard is an insured acts in bad faith where, one, the insured has  
17 no reasonable basis for its conduct. The standard is not a good reason.  
18 So the motion will be granted to the extent that Plaintiffs will not be  
19 allowed to ask at trial regarding a good reason; however, they will be  
20 allowed to ask reasonable basis.

21           Do the parties have any questions regarding that ruling?

22           MR. ROBERTS: None for the Defendants, Your Honor.

23           THE COURT: Thank you. Next is Defendants' motion in  
24 limine number 14 to exclude evidence, argument, and/or testimony  
25 relating to inflammatory questions regarding personal opinions. Mr.

1 Gormley or Mr. Roberts.

2 MR. ROBERTS: Your Honor, I'll also be taking this. And once  
3 again, we've listed specific questions from the deposition, which we seek  
4 to exclude at trial because they're irrelevant and intended to inflame the  
5 jury. The first one that we cite is on page 2 of 7 of our brief, where Dr.  
6 Ahmad was asked, "Are you proud of the way you worked on this  
7 claim?" And his response was, "I don't think that's a fair question. Proud  
8 is not a word I would use. I made a medical determination for medical  
9 necessity and that was a decision. So I don't have emotions about it."

10 So what's the relevance if he says he's proud or if he says he  
11 doesn't proud. Other than to inflame the jury and cause an emotional  
12 reaction. The question is whether he had a reasonable basis for a  
13 decision. Not whether he's proud of it.

14 And then it gets worse when they ask him about his feelings  
15 for the family. What they're trying to imply is that he has no feelings for  
16 the family because he made a medical determination under the terms of  
17 a medical necessity policy. And his emotions about the family, his  
18 feelings about the family, whether he felt bad to deny this guy his proton  
19 beam coverage is totally irrelevant and very prejudicial and  
20 inflammatory, and we would ask that it be excluded. Thank you, Your  
21 Honor.

22 THE COURT: Thank you, Mr. Roberts. Mr. Sharp or Mr.  
23 Terry.

24 THE CLERK: Mr. Sharp, you're muted.

25 MR. SHARP: Sorry about that, Your Honor. I was just going



1 to go through each of items -- sub items that Mr. Roberts addressed.

2 With regard to the questions about whether Dr. Ahmad was proud of his  
3 work or not, I mean, that -- we're not going to ask that question. It's  
4 moot. If he opens up the door, so be it.

5 With regard to his feelings, I mean, this is a different issue.  
6 And one that we see, well, first of all, the duty of the equal consideration,  
7 I mean, they have to consider Mr. Eskew's interests, number one.

8 But number two, we often hear in these case opening  
9 statement, jury's question, what have you, that we feel sorry for what  
10 happened to Mrs. Eskew or words to that effect. Well, you can't have it  
11 both ways. Because if they -- did they feel that way when they were  
12 handling the claim. I mean, as it stands right now, we're not intending to  
13 ask that question about Ahmad. I mean, it's what we said in our  
14 opposition. But I think there's areas where that can be -- the door can be  
15 opened.

16 Then Mr. Roberts did not address Ms. Sweet's testimony and  
17 so I don't -- that means he's -- I presume that there's still serving that as  
18 something that should be excluded. And her testimony is entirely  
19 different, which is she testified nobody had trained her or even informed  
20 her about the duty of good faith and fair dealing. And that obviously  
21 goes to UHC's state of mind, UHC's -- the reasonableness of UHC's  
22 conduct. The fact is, that's the standard. They did have a duty because  
23 [indiscernible]. So with that, if you have any questions, Your Honor,  
24 specifically as to the motion, I'm happy to address them.

25 THE COURT: Thank you, Mr. Sharp. No. Mr. Roberts, any

1 rebuttal?

2 MR. ROBERTS: No. We do contend still seek to exclude that  
3 evidence, Your Honor, as to Charlene Sweet, but we were simply  
4 standing on the argument in the briefs on.

5 THE COURT: Thank you.

6 MR. ROBERTS: We're not asking to preclude them from  
7 asking about her training, only about to the specific question in the brief.  
8 Thank you, Your Honor.

9 THE COURT: Thank you. Defendants' motion in limine  
10 number 14 to exclude evidence, argument, and/or testimony relating to  
11 inflammatory questioning regarding personal opinions will be denied in  
12 part and granted in part. It will be granted with respect to whether or not  
13 a witness was proud or their feelings, unless the Defense opens the door  
14 on those issues, those issues will be precluded from being examined at  
15 the time of trial.

16 With respect to policies and procedures on the insured and  
17 fairness to the insured, the motion will be denied, as the law does find  
18 that there has to be a duty of good faith and fair dealing. So whether or  
19 not an insured was treated fairly is relevant to the inquiry in this case.  
20 So the motion is denied in part and granted in part.

21 MR. ROBERTS: Thank you, Your Honor. And if I could ask  
22 for a clarification. And I apologize if I didn't address each point  
23 specifically enough. There is a question about fair, which I understand  
24 the Court has denied, but there are also a series of questions about what  
25 would have been fairer. And fairer is not -- is not the law and it is not

1 what the jury is going to be instructed on. As long as it's reasonable and  
2 it's fair, it's irrelevant whether there was a fairer way to do something.

3 Thank you, Your Honor.

4 THE COURT: Yes. It's what's fair, not fairer.

5 MR. SHARP: Your Honor, can I just address that?

6 THE COURT: Yes.

7 MR. SHARP: I was the one who asked that question and it  
8 wasn't very well articulated so I don't intend to ask that, but I mean, I've  
9 heard the Court in the last motion, which I think would be the same. I  
10 mean, what is the more reasonable approach, you know, something  
11 along those lines. What is fairer, you know, the jury probably wouldn't  
12 understand what that means either. So with that, I mean, I have no  
13 intention of asking that precise question.

14 THE COURT: Thank you. Okay. The next motion is  
15 Defendants' motion in limine number 15, exclude evidence, argument,  
16 and/or testimony relating to hypothetical questioning regarding what  
17 would be fairer. This seems related to number 14 and so the Court's  
18 ruling would be the same, unless the parties have any argument they'd  
19 like to put on the record.

20 MR. ROBERTS: Nothing further, Your Honor.

21 THE COURT: All right. So the motion will be granted that  
22 what is fairer is not going to be allow at the time of trial. Just what's  
23 reasonable or fair.

24 The next motion is Defendants' motion in limine number 16  
25 to exclude evidence, argument, and/or testimony relating to misleading

1 questioning regarding the nature of insurance and personal experience  
2 with insurance. Mr. Roberts or Mr. Gormley.

3 MR. ROBERTS: That will be me again, Your Honor.

4 THE COURT: Yes. Thank you, Mr. Roberts. Go ahead. It  
5 appears your screen is frozen, Mr. Roberts.

6 MR. ROBERTS: Your Honor, let me try to turn off --

7 THE COURT: Oh, I hear you now.

8 MR. ROBERTS: Okay. Very good. Can you hear me now,  
9 Your Honor?

10 THE COURT: Yes, Mr. Roberts.

11 MR. ROBERTS: Okay. I apologize for the technical  
12 difficulties. The first question, which we seek to exclude is, "Would you  
13 agree, Dr. Ahmad, that an insurance company sells its policyholder a  
14 promise?" And anyone who went to law school knows a contract is a  
15 mutual exchange of promise. We're not disputing that that's the law, but  
16 you shouldn't be able to ask a question if he agrees with a statement of  
17 the law. That should come from the Court and be addressed during  
18 argument by counsel at the end of the case. But and it's simply not fair  
19 to a lay person to ask him questions about the law and the  
20 characterization of an insurance policy under the law.

21 In addition, we agree that the Nevada Supreme Court has  
22 made a statement that policy holders buy insurance for protection, peace  
23 of mind, and security. But then, again, asking a medical director, whose  
24 expertise is in medicine, to be familiar with or agree with the Supreme  
25 Court's characterization of it, why people buy insurance. It is unfair and

1 irrelevant to this case.

2           These questions are only intended to make a lay witness look  
3 bad by asking him questions beyond his expertise. And then they went  
4 on to ask him questions about his own personal experience with  
5 insurance. His own personal experience with insurance is simply not  
6 relevant to anything in this case. It's not a question before the jury. And  
7 it's misleading and confusing to have him asked about his own personal  
8 experience with his own insurance policies. So we would ask to exclude  
9 this line of questioning, as identified in our briefing.

10           THE COURT: Thank you. The Court has a mandatory  
11 meeting it has to attend at noon and it's just before noon. So we're  
12 going to have to take a break and come back at 1:30. Are the parties able  
13 to do that?

14           MR. ROBERTS: Your Honor, Lee Roberts. I am probably not  
15 able to do that. I have two motions on calendar with Judge Allf  
16 beginning at 12:50 and potentially continuing throughout the afternoon,  
17 but I can advise the Court. We've asked that the hearing be reset for an  
18 evidentiary hearing next week. If the Court allows that and doesn't hear  
19 additional argument, I may be able to make it back and can advise the  
20 parties, but right now I'd be unable to do that.

21           THE COURT: Thank you. Mr. Sharp.

22           MR. SHARP: Yes, Your Honor. We are available at 1:30.

23           THE COURT: Okay. So what we'll do is -- Mr. Roberts, can  
24 you reach out to Mr. Sharp to see if you're available at 1:30? Or when  
25 will you know if you're available at 1:30?

1                   MR. ROBERTS: I imagine that with the first two motions  
2 we're hearing, I should know about 1:15 to 1:20 if I'm going to be  
3 available at 1:30, but I can let Ms. Bonney know. She'll attend the  
4 hearing with me and communicate with Mr. Sharp in real time.

5                   MR. SHARP: Do you want to -- having been in position that  
6 Mr. Roberts in, and whatever works for Your Honor, but do we want to  
7 move it until like 2:30 or -- I mean, I don't want to put pressure on Mr.  
8 Roberts because, you know, forgetting anything, but I also don't want to  
9 interfere with the Court's -- your own calendar. Just trying to make -- see  
10 if we can streamline it.

11                  THE COURT: Well, let's see at 1:30 if he's not available, we  
12 can just check in again.

13                  MR. SHARP: Fair enough.

14                  THE COURT: So he can just let you know and then we can  
15 just make a determination based upon what he tells you. Because the  
16 Court's concerned if we start at 2: 30, we're not going to get anywhere  
17 near done, concerning we're only on 16 of 33. We've only done half.

18                  MR. SHARP: Good point.

19                  THE COURT: All right.

20                  MR. ROBERTS: And, Your Honor, regardless, I do, as a  
21 contingency plan, have pretty much all day tomorrow available if we  
22 wanted to continue to tomorrow morning, afternoon, or both.

23                  THE COURT: The Court's available tomorrow at 1, but not in  
24 the morning.

25                  MR. SHARP: Your Honor, from our end, we'll make whatever

1 the Court calendar works.

2 THE COURT: Okay. So at 1:15 or 1:20, Mr. Roberts, you can  
3 just let Mr. Sharp know if you're available today. If not, we'll continue it  
4 to Friday at 1.

5 MR. ROBERTS: Very good. Thank you, Your Honor. I  
6 appreciate the indulgence.

7 THE COURT: Okay. No problem. And we'll monitor Allf as  
8 well. So if we see you still in there, we'll know where you are.

9 MR. ROBERTS: Thank you, Your Honor.

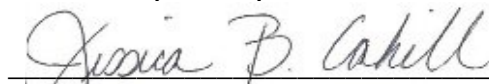
10 THE COURT: All right. Thank you.

11 MR. SHARP: Thank you, Your Honor.

12 THE COURT: Thank you.

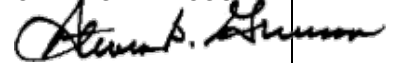
13 [Proceedings adjourned at 11:58 a.m.]  
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20 ATTEST: I do hereby certify that I have truly and correctly transcribed the  
21 audio-visual recording of the proceeding in the above entitled case to the  
22 best of my ability.

23 

24 Maukele Transcribers, LLC

25 Jessica B. Cahill, Transcriber, CER/CET-708



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DISTRICT COURT

6

CLARK COUNTY, NEVADA

7

SANDRA ESKEW, ET AL.,

CASE#: A-19-788630-C

8

Plaintiffs,

DEPT. IV

9

vs.

10

SIERRA HEALTH AND LIFE  
INSURANCE COMPANY, INC., ET  
AL.,

11

12

Defendants.

13

14

BEFORE THE HONORABLE NADIA KRALL  
DISTRICT COURT JUDGE  
FRIDAY, FEBRUARY 11, 2022

15

16

**RECORDER'S TRANSCRIPT OF ALL PENDING MOTIONS**

17

18

**APPEARANCES**

19

For the Plaintiffs:

MATTHEW L. SHARP, ESQ.  
DOUGLAS A. TERRY, ESQ.

20

21

For the Defendants:

RYAN GORMLEY, ESQ.  
D. LEE ROBERTS, JR., ESQ.  
STEPHANIE GLANTZ, ESQ.

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23

24

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RECORDED BY: MELISSA BURGNER, COURT RECORDER



1 Las Vegas, Nevada, Friday, February 11, 2022

2

3 [Case called at 1:02 p.m.]

4 THE MARSHAL: -- is now in session, the Honorable Judge  
5 Nadia Krall, presiding.

6 THE COURT: Good afternoon. Please be seated, Counsel.  
7 All right. So, we are back on the record with Eskew vs. Sierra Health and  
8 Life, A-19-788760-C. Counsel, if you just want to make your appearances  
9 for the record?

10 MR. SHARP: Yes, Your Honor, I'm Matthew Sharp, and Doug  
11 Terry for Mrs. Eskew.

12 THE COURT: Good afternoon.

13 MR. ROBERTS: Good afternoon, Your Honor, Lee Roberts,  
14 for the Defendants.

15 THE COURT: Good afternoon.

16 MR. GORMLEY: This is Ryan Gormley, for Defendants.

17 MS. GLANTZ: And Stephanie Glantz, for Defendants.

18 THE COURT: Good afternoon. So, we were on Defendants'  
19 motion in limine 16.

20 [Parties confer]

21 THE COURT: So, we were on Defendants' motion  
22 number 16. And it was Mr. Sharp, who was going to argue.

23 MR. SHARP: Yes. Your Honor, on motion in limine  
24 number 16, I mean, my -- only issue with Mr. Roberts' argument is his  
25 characterization of Dr. Ahmad. I mean, Dr. Ahmad is not a lay person.

1                   He was the one who chose to deny the claim. When he did  
2 so, he accepted that he would do so in accordance with the obligations  
3 of an insurance company, including the duty of good faith and fair  
4 dealing. That having been said, this case is not going to -- we're not  
5 going to win or lose this case based upon a series of questions about  
6 whether or not Dr. Ahmad thinks insurance is a promise. I mean, it is,  
7 so, if Your Honor wants to grant the motion in limine, that's fine with us.  
8 If it wants to deny it, that's fine with us. Really, I have no -- it's fine either  
9 way.

10                   THE COURT: Okay. Mr. Roberts?

11                   MR. ROBERTS: Nothing further, Your Honor.

12                   THE COURT: Well, if Plaintiff is fine either way, then the  
13 Court will, Defendants' motion number 16, exclude evidence, argument,  
14 or testimony relating to misleading questions, questioning regarding the  
15 nature of insurance and personal experience with insurance, the Court  
16 will grant it.

17                   MR. SHARP: The only thing I would, I would add, Your  
18 Honor, is -- and I guess I should have specified, is if it's the specific  
19 questions involved, we have no issue. The problem with these motions  
20 in limine is they're very broad. We don't intend to ask Dr. Ahmad if  
21 insurance is a promise, presuming that he isn't going to volunteer that  
22 on his own accord. But the scope of these things, that's the only concern  
23 I have. So, I have no objection to not asking him a question that says, do  
24 you believe insurance is a promise.

25                   THE COURT: Okay. that will be the Court's order. Next, is

1 Defendants' motion number 17, exclude evidence, argument, or  
2 testimony related to litigation conduct.

3 MR. ROBERTS: Thank you, Your Honor. The question for the  
4 jury in this case is whether the insurance company acted in bad faith in  
5 denying the claims, whether there was a breach of contract in denying  
6 the claims, is the underlying conduct that the jury is going to be asked to  
7 determine, whether it's reasonable or not. And, therefore, injecting  
8 litigation issues, discovery issues into the trial has no probative value to  
9 the jury and is highly prejudicial. Litigation conduct is the exclusive  
10 province of this Court. There is a motion for sanction pending here. The  
11 appropriate action, if you think there's been litigation misconduct, is to  
12 seek sanctions or other appropriate relief. Interjecting those issues in a  
13 jury trial is improper, confusing and prejudicial.

14 THE COURT: Thank you.

15 MR. ROBERTS: Thank you, Your Honor.

16 MR. SHARP: Your Honor, really, I don't mean to be flippant,  
17 but I really don't understand the purpose of this motion. The issue in  
18 this case is did United Healthcare act reasonably when they denied the  
19 claim on February 5, 2016, period. Normally, in bad faith cases, we get  
20 into this issue about litigation conduct when it, when it's a delay case.  
21 For example, a typical underinsured motorist claim. Evidence is deduced  
22 during litigation which arguably supports the plaintiff. What's the  
23 insurance company's responsibility during litigation.

24 Now, the cases in that context say that you can't comment  
25 upon how, for example, one of the cases that Defendant cites to says,

1 you can't comment upon how the Plaintiff was treated in the deposition.  
2 And we're not going to do that. That's different than facts deduced  
3 during discovery. For example, I mean, a motion for sanctions is  
4 something that will be addressed separately. But one example in this  
5 case is United Healthcare can't even produce to us proof of the insurance  
6 policy that was actually delivered to Mr. Eskew. That's relevant. Not  
7 litigation conduct, but it's relevant.

8           Aside from that, and I think this will be dealt with in Plaintiff's  
9 motion in limine number three, and that concerns after-acquired  
10 evidence and what comes in or doesn't come in, as to the  
11 Reasonableness of the conduct by United Healthcare. For example, if  
12 the Court were to deny that motion, certainly, we can argue that  
13 United Healthcare's use of Dr. Kumar to give post-denial justification for  
14 his conduct is further evidence of bad faith. Again, I mean, I -- so, I don't  
15 really have a problem with the concept of litigation conduct if not going  
16 to be introduced into evidence. That's fine, I just want to provide the  
17 Court some direction in terms of the usage that may come up.

18           THE COURT: Thank you. Mr. Roberts?

19           MR. ROBERTS: Thank you, Your Honor. I think that's the  
20 exact example that I'm talking about. The *Timberlake* case cited in our  
21 brief from the 10th Circuit says that allowing evidence like that and  
22 argument like that undermines an insurer's right to contest questionable  
23 claims and to defend itself against such claims. If there's no reasonable  
24 defense, a party gets summary judgment.

25           If you go to Court, they can't say hiring an expert to express

1 opinions which have not been excluded is further evidence of bad faith,  
2 and a reason why you should find the initial decision was in bad faith.  
3 That's totally improper. You can't say, isn't it true your attorneys  
4 objected to this request for production? We asked for this and your  
5 attorneys objected; isn't that true? The jury doesn't know if it's  
6 appropriate to object on the grounds we objected. These issues have no  
7 place before a jury, and they're routinely granted in this jurisdiction.  
8 Thank you.

9 THE COURT: Mr. Sharp, can you respond to that?

10 MR. SHARP: Yeah. I think if he was, I mean, if you look at  
11 the -- *Timberlake* case, that what actually is said in that case, it involves  
12 tactical decisions regarding -- in *Timberlake*, if I remember right, there  
13 was a nasty letter written by the defense counsel. And that was  
14 introduced into evidence about how bad the insurance company is.  
15 I mean, that's clearly a tactical issue. But if you're going to put into  
16 evidence, and in my example, Dr. Kumar comes into evidence and says,  
17 well, now, I've looked at this policy, I've looked at everything, and the  
18 claim didn't meet the terms in the insurance policy, which is essentially  
19 what he said. That's a position that's been taken by the Defendant and,  
20 clearly, that is fair game to comment upon. I mean, it's no different than  
21 positions I take, I mean, you're commenting upon the evidence.

22 With regard to the insurance policy, I'm not commenting  
23 upon the litigation conduct of Mr. Roberts, I'm commenting upon the fact  
24 that they have not produced evidence that the policy was delivered.  
25 That's clearly relevant to this case. You can't bind Mr. Eskew to

1 provisions in the contract that you never disclosed to him. That's -- so  
2 that's the distinction. That's why I kind of raised this as an issue, Your  
3 Honor. It's like, this really isn't a litigation conduct case. Like I said, I'm  
4 not, we're not going to come in and say, you know, Mr. Roberts was  
5 mean to our expert, or somebody was mean to Mrs. Eskew. None of  
6 that, again, none of that comes into evidence. But the parties' respective  
7 positions, that's fair game for the Jury.

8 THE COURT: With respect to Defendants' motion in limine  
9 number 17 to exclude evidence, argument, or testimony relating to  
10 litigation conduct will be granted in part and denied in part. It'll be  
11 granted in part with respect to actual litigation conduct. You know,  
12 commenting on what Mr. Roberts did or did not do during the discovery  
13 period will not be allowed to be brought into evidence, however, nothing  
14 will preclude Plaintiff from arguing facts and arguing the -- alleged  
15 unreasonableness of an expert's position. Do the Parties have any  
16 questions on that?

17 MR. SHARP: I have --

18 MR. ROBERTS: Just a slight clarification, Your Honor. In  
19 the -- Dr. Kumar, the expert example, obviously, the attorneys  
20 interviewed and selected experts. It's directed to Counsel. So, I think  
21 saying the fact that we chose to put this doctor on the stand is litigation  
22 conduct and is a decision by Counsel, and that doesn't prevent Mr. Sharp  
23 from saying, can you believe that guy, he's totally unreasonable.

24 THE COURT: Well, he can call Dr. Kumar unreasonable.

25 MR. ROBERTS: Right.

1 THE COURT: But -- not you unreasonable. MR. ROBERTS:  
2 Yes.

3 THE COURT: For calling him as a witness.

4 MR. SHARP: I mean --

5 THE COURT: Mr. Sharp?

6 MR. SHARP: I also want to clarify, hang on a minute.

7 I mean, we're not going to win a bad faith case, first of all, by calling  
8 Mr. Roberts unreasonable. I think that's not -- he's not a party to the  
9 case. But it is fair game to say, for example, when United Healthcare  
10 denied the claim, they spent 12-and-a-half minutes. After they denied  
11 the claim, they spent, whatever it is, we've spent on Mr. Kumar, to say  
12 things to cover themselves. That's not a comment upon Mr. Roberts, but  
13 United Healthcare is a defendant and if they're going to interject their  
14 post-denial conduct into evidence to justify the reasonableness of their  
15 conduct, then it's fair game for us to rebut that and comment upon it.

16 THE COURT: But the Court's ruling is just regarding  
17 Mr. Roberts himself, litigation conduct. Any letters he may have sent or  
18 any conduct he may have done, or his counsel at counsel table. Next is  
19 Defendants' motion in limine number 17, exclude evidence, argument, or  
20 testimony relating to -- or actually, number 18, relating to other cases.

21 MS. GLANTZ: Oh, good afternoon, Your Honor.  
22 Stephanie Glantz for the Defendants. This motion involves our evidence,  
23 argument, and testimony related to other proton therapy cases. We  
24 believe those should be excluded as they are irrelevant and also unfairly  
25 prejudicial and misleading. These cases are very fact-specific. They're

1 dependent upon the policies at issue, the type of cancer. So, references  
2 to any other cases pertaining to proton beam therapy should be  
3 excluded as well as they're all unfairly prejudicial.

4 THE COURT: Thank you. Mr. Sharp.

5 MR. SHARP: I mean, the issue, Your Honor, is, I think it's the  
6 managed care expert, particularly, is going to testify about how  
7 essentially everything United Healthcare did is fine because it's  
8 conformance with industry stand -- industry standards, as he interprets  
9 them. And that's in primary part because other insurance companies  
10 exclude proton beam therapy.

11 So, it makes it seem like that industry's standard is not  
12 subject to any challenge. And it seems to me if they open that door, then  
13 it's fair game for us to bring in appropriate other cases to go to the  
14 credibility of the expert. I mean, if they don't open the door, then, yeah,  
15 we don't have any intention of -- doing that. But I don't see how it's fair  
16 for them to say it's industry standard, and then we can't rebut and say,  
17 well, the industry standard has not been accepted by judges, juries,  
18 whatever.

19 THE COURT: Thank you. Ms. Glantz.

20 MS. GLANTZ: Yeah, I think that goes straight to the heart of  
21 why this is irrelevant. What other insurance companies did in those  
22 other cases is irrelevant to whether Defendants here in the way they  
23 acted was consistent with what is accepted in the industry. Again, the  
24 jury's not going to have any information regarding those other cases,  
25 they're not going to have the evidence that might have been presented



1 in those cases, what was at issue there, what the policy said. It's just, as  
2 a presiding argument that because those other cases went one way, the  
3 Jury should also run their expert at that same way. And for that reason,  
4 it should be excluded.

5 THE COURT: Defendants' motion number 18 to exclude  
6 evidence, argument, or testimony relating to other cases will be denied  
7 in part and granted in part. It'll be granted to the extent that Defendant  
8 does not bring up these issues. But if the Defendant opens the door, the  
9 Plaintiff will be able to refute that. The next is Defendants' motion  
10 number 19 to exclude evidence, argument, or testimony related to finally  
11 day in court assertions. Ms. Glantz?

12 MS. GLANTZ: Thank you, Your Honor. This one is  
13 pertaining to evidence, argument, and testimony related to assertions  
14 that Plaintiffs will finally have their day in court and others like it. This is  
15 a civil -- a complex civil case. They typically take some time. It would be  
16 irrelevant to the ultimate issues how long this case took to come, to get  
17 to trial. And, initially, it is unfairly prejudicial and misleading for the  
18 Jury.

19 THE COURT: Thank you. Mr. Sharp.

20 MR. SHARP: The problem I have with these types of motions  
21 in limine, Your Honor, is one, the breadth, the scope. And two, none of  
22 us know what the evidence is actually, how it's actually going to come in  
23 at trial. And so, at this point in time as I'm sitting here in front of you, I  
24 don't think Mr. Terry and I are going to say something like, finally have  
25 their day in court. But then, the order in limine says, and others like it?

1                   So, I don't know what it is they're trying to like limit to us  
2 without full knowledge of the evidence. So, that's the purpose of having  
3 objections during trial. So, again, I mean, this is another one, I don't  
4 need to belabor any of this. None of this is going to make a difference in  
5 the outcome of the case. So, again, I'll defer -- your -- it's your court,  
6 Your Honor, and you tell us how, how you would like us to proceed. And  
7 that's fair game as long as both sides are subject to the same rule.

8                   THE COURT: Thank you. Ms. Glantz.

9                   MS. GLANTZ: Yeah, I think, you know, that his main concern  
10 is that, and others like it, but we don't want to limit ourselves to just the  
11 simple word-for-word statement of Plaintiffs will finally have their day in  
12 court. I think we cited a case in our briefing where the language was,  
13 Plaintiff has waited a long time for his day in court. We just don't want  
14 any insinuation to the Jury that this is, this is finally their day,  
15 we're finally here, things of that nature. That type of statement, I think, is  
16 inflammatory and should be excluded.

17                  THE COURT: This motion in limine 19 to exclude evidence,  
18 argument, or testimony related to finally day in court assertions will be  
19 denied. However, nothing will prevent the Defense from stating to the  
20 Jury that they want to be in court as well. And if the Parties would like,  
21 because this has come up in other cases, the Court can tell the Jury any  
22 delays in the trial will be to COVID, and not related to any of the Parties'  
23 conduct.

24                  The last two motions, the motion, Defense motion  
25 number 20 to exclude evidence, argument, or testimony relating to the

1 need for industry change assertions, and further, the motion number 21  
2 to include -- preclude improper inflammatory reptile tactics and  
3 arguments, these are really not motions in limine, these are essentially  
4 *Lioce vs. Cohen* issues. And the parties simply just need to refresh their  
5 recollection of what *Lioce vs. Cohen* states, and not go outside those  
6 bounds. So, the Court's inclined to deny these to the extent that these  
7 are not actual evidence. It's just counsel needs to follow *Lioce vs.*  
8 *Cohen*.

9 MS. GLANTZ: Your Honor, I think that is consistent with the  
10 purpose of these motions. The issue I'd have is that, you know, Plaintiffs  
11 did oppose these saying that certain assertions were okay to make within  
12 the bounds of *Lioce vs. Cohen*. We want to preserve our right to have  
13 those excluded, particularly, the -- you know, our purpose of the motions  
14 in limine is to not have to un-ring a bell, if we get these taken care of  
15 today. And, further, they cannot make arguments related to send a  
16 message, things of that nature, that we would be --

17 THE COURT: Well, the Court's -- the Court's order on these  
18 two motions is going to be, the Parties need to re-read *Lioce vs. Cohen*,  
19 and neither party can violate that. Otherwise, there's going to be  
20 sanctions.

21 MS. GLANTZ: Okay.

22 THE COURT: So, Defendant will prepare the orders on  
23 Defendants' motions in limine one through 21. And the next -- we're just  
24 going to put this aside. And the next is Defendants' motions for  
25 summary judgment and partial summary judgment.

1           The first one is on claims. And it's the Court's understanding  
2 that the only outstanding claim is the breach of the covenant of good  
3 faith and fair dealing with the Unfair Claims Practices Act, a breach of  
4 contract and wrongful death claim that have been dismissed. It's  
5 stipulated, is that the Parties' understanding, Mr. Sharp.

6           MR. SHARP: Yeah, that's right. This is a rival cause of action  
7 for the breach of the duty of good faith.

8           THE COURT: Okay. Do the parties want to argue at all on  
9 Defendant's motion for summary regarding claims? Because the only  
10 claim left is the breach of covenant of good faith and fair dealing.

11          MR. GORMLEY: Your Honor, that one was going to be mine  
12 in the time remaining. I have some argument prepared. Reading the tea  
13 leaves, it sounds like maybe we should save time on it?

14          THE COURT: Okay.

15          MR. GORMLEY: Judging by your reaction.

16          THE COURT: We're not reading tea leaves.

17          MR. GORMLEY: Do you have any questions on it?

18          THE COURT: No.

19          MR. GORMLEY: No questions? Let me, can I just look in,  
20 look at my outline real quick and see if there's a point to make. I think all  
21 the points are probably made in the briefing, as it's quite long. But let  
22 me just look real quick if there's anything for preservation purposes.

23          THE COURT: Thank you guys for providing the binders.  
24 Otherwise, it would have been --

25          MR. GORMLEY: Yeah, so, we --

1 THE COURT: -- not able to do.

2 MR. GORMLEY: -- included binders as well. I mean, I would  
3 just reiterate the point from, from the motion, that I believe that the  
4 Minnesota Supreme Court decision in *Linn* [phonetic] gives a road map  
5 for the Court to follow here to grant summary judgment in Defendants'  
6 favor, in that you don't ever reach -- you don't need to reach a decision  
7 whether the determination of medical necessity that covers  
8 determination of the medical necessity as to proton therapy, whether  
9 that was right or wrong, or whose expert's right or wrong, or which  
10 study is right or wrong.

11 I don't think you ever need to get there because to get there,  
12 you have to rewrite the plan, the contract, to eliminate Sierra Health and  
13 Life's discretion to make that determination. I think the focus is on  
14 because they have that discretion, which is enforceable and appropriate,  
15 did Sierra Health and Life follow the correct process in exercising that  
16 discretion?

17 And under the contract, I think it's understood that they did,  
18 because they, they've reviewed the prior authorization request. And  
19 then under the definition of medical necessity, they had the opportunity  
20 to review, they're relying on various types of documents and materials in  
21 order to make that determination. They relied on some of those they  
22 also provide on the proton policy which is, you know, one of the --  
23 heavily disputed items in this case. And that proton policy consists of  
24 the type of materials that they were allowed to rely on, clinical evidence,  
25 other resources, national guidelines, and things of that nature.

1                   So, they relied on what they were supposed to rely on. They  
2 exercised their discretion consistent with the contract. So, there's no  
3 breach of contract. And if there's no breach of contract, by matter of law,  
4 there's a reasonable basis for the decision. And then there can be no  
5 bad faith. So, you never even have to get to who's right on all the  
6 medical stuff. I think just the contract alone gives the basis for summary  
7 judgment. And I think *Linn* from the Minnesota Supreme Court supports  
8 that. But nothing further from me, Your Honor.

9                   THE COURT: Thank you, Mr. Gormley. Mr. Sharp.

10                  MR. SHARP: Just a couple points. And first before I forget  
11 this, Your Honor, I would like to thank you, and I'm sure the Defense  
12 would as well, for your compliments on the binders, because as you  
13 know, we didn't do that. And often times, staff members kind of get  
14 ignored, if you will. And I'm not saying consciously. So, it's greatly  
15 appreciated to my staff, and I'm sure Mr. Roberts'.

16                  THE COURT: I can --

17                  MR. SHARP: That having been said --

18                  THE COURT: -- I can tell.

19                  MR. SHARP: -- the only issue I'm going to make is this whole  
20 concept of discretion. I mean, of course, an insurance company has the  
21 discretion to evaluate its policies, and that's the point of the duty of good  
22 faith and fair dealing. It's a contract of adhesion. Every insurance  
23 company processing every claim, they're the ones that make the  
24 decision. The fact that they get to make the decision does not allow  
25 them to violate the contract, or the duty of good faith and fair dealing.

1           In this case, evidence is overwhelming that they didn't even  
2 consider the contract. That they violated the contract, both with respect  
3 that they promised Mr. Eskew that any prior authorization request would  
4 be evaluated in accordance with the contract. That didn't happen. They  
5 didn't have the authority under attachment B to even conduct a prior  
6 authorization. And then the manner in which they conducted the prior  
7 authorization was inconsistent with every conceivable industry standard  
8 that exists for the fair handling of claims.

9           The Minnesota case, the total red herring, one is from  
10 Minnesota, and two, as I recall in that case, the actual policy had been  
11 incorporated expressly into the contract. It didn't happen in this case. In  
12 fact, every witness that's testified about this, says they couldn't rely upon  
13 the medical policy as the sole basis for the denial of the claim. Yet, the  
14 February 5th, 2016 letter has the basis for the denial of the claim was the  
15 proton beam therapy cost. So, in any event, I mean, I don't mean to be,  
16 to get too emotional, Your Honor. I mean --

17           THE COURT: That's okay.

18           MR. SHARP: -- this is a case that clearly is a question of fact  
19 for the Jury on the question of duty of good faith and fair dealing. And  
20 I will leave it at that.

21           THE COURT: Thank you. Mr. Gormley.

22           MR. GORMLEY: I don't think, nothing further from me, Your  
23 Honor. I have some response arguments, but I think it's okay to rest at  
24 this point.

25           THE COURT: Okay. Thank you. Defendants' motion for

1 summary judgment regarding claims will be denied as to the breach of  
2 the covenant of good faith and fair dealing.

3 With respect to the Defense argument regarding medical  
4 necessity, Dr. Ahmad testified in his deposition that he would not  
5 substitute his medical judgment for that of Dr. Liao. And so, that is one  
6 of the major reasons why the Court is going to deny the motion with  
7 respect to the medical necessity argument. The Court understand  
8 Defendant's position, but when the Court reads Dr. Ahmad's deposition,  
9 he deferred to Dr. Liao what was medically best.

10 On the breach of the contract and Unfair Claims Practices  
11 Act, those have been dismissed. So, the motion will be granted. Well,  
12 Plaintiff did not oppose that, so those will be granted in that regard.  
13 Next, is Defendants' --

14 MR. SHARP: Well --

15 THE COURT: Go ahead.

16 MR. SHARP: Your Honor, the only thing I would say is, we  
17 dismissed the claim. I mean, I just want to be clear. Like, for example,  
18 on the question of breach of contract, I mean, there are no damages. So,  
19 it's not that we conceded that the contract wasn't breached.

20 THE COURT: Okay.

21 MR. SHARP: Similarly, on the Unfair Claims Practices Act,  
22 we just elected not to go forward with a private right of action. That was  
23 a tactical decision. We're not conceding that the -- provisions weren't  
24 violated. In fact, I mean, I think, and we detailed that certain provisions  
25 were violated, which is relevant under the *Hart* case to whether or not



1 they acted in bad faith.

2 THE COURT: Well, then, the motion is denied with respect to  
3 the breach of the covenant of good faith and fair dealing, and with  
4 respect to the breach of contract. However, when it comes to the Unfair  
5 Claims Practices Act, Counsel needs to argue that because the Court,  
6 without argument, was inclined to grant the motion with respect to the  
7 Unfair Claims Practices Act, because the Unfair Claims Practices Act  
8 relates to what happens after the claim is denied.

9 Here, in this case, the claim was denied, the authorization  
10 was sent, they have a 72-hour policy, they responded within 48 hours.  
11 They told the Plaintiff, you can appeal, or you can have a peer-to-peer  
12 conversation with Dr. Ahmad. The Plaintiff chose not to do that. So,  
13 with respect to the Unfair Claims Practices Act, the Court's inclined to  
14 grant the motion as to that. Because the Court did not see anything  
15 that's pursuant to the statute. So, Mr. Sharp, you're going to have to  
16 argue that.

17 MR. SHARP: Well, okay. So, first of all, the statute deals with  
18 claims handling. It's not, the statute does not deal with events after a  
19 claim is denied. That would defeat the whole purpose of the statute. So,  
20 as an example, an insurance company cannot misrepresent facts or  
21 policy provisions relating to the claim. That's N.R.S. 686A.310, I believe,  
22 it's 1(a). And I've paraphrased it.

23 In this case, there clearly were misrepresentations relating to  
24 the policy. First of all, the letter said we considered the policy. The fact  
25 is, they didn't. That's -- confirmed by Dr. Ahmad, who testified three

1 different times, I never considered the policy. The insurance policy,  
2 I should say. Second, they've misrepresented the context of what  
3 Mr. Eskew had to demonstrate under the terms of the insurance policy.  
4 The policy itself, in defining medical necessity, is very broad. And the  
5 insurance company has to interpret that clause, because it's an insuring  
6 clause, broadly. And all the insurance contract requires is a showing that  
7 the proposed treatment is consistent with the diagnosis. That's basically  
8 what the heart of the issue is. And under any interpretation under a  
9 light, the facts most favorable to us, Dr. Liao's recommendation of  
10 proton beam therapy was consistent with the diagnosis of cancer.

11 So, that's one example. Another example is  
12 N.R.S. 686A.310(1)(n), I believe, it is. And we cited this, to this provision  
13 in our briefs. That provision says that you have -- when you deny a  
14 claim, you have to provide both the policy provision relied upon and a  
15 reasonable explanation with respect to the facts and the policy provision.  
16 That didn't happen in this case. There is absolutely no reference to the  
17 insurance contract, let alone a reference or an analysis as to why the  
18 proposed treatment did not meet the terms of the insurance contract.

19 Why is that important? Because that's what we're litigating.  
20 Why is it within the terms of this contract, did this company have a basis  
21 to deny the claim? The other analysis would be 686A(1), I believe, it's (f),  
22 that a claim has to be accepted when liability is reasonably clear. And  
23 that goes back to you can't interpret things in your favor.

24 So, those are, those are several of them. And when I,  
25 I guess, I would propose, Your Honor, at this point -- and it must have

1 been my fault on this issue -- is that in the course of Mr. Prater's  
2 testimony, he's going to talk about some of these provisions and how  
3 they applied to his claim. And, you know, if it's not sufficient to Your  
4 Honor's belief, then the Jury won't be instructed upon those provisions.  
5 But under Part B, Prudential, the evidence of a violation of the Unfair  
6 Claims Practices can be used by the jury to determine whether or not a  
7 company acted in bad faith.

8 THE COURT: Anything, Mr. Sharp -- Mr. Gormley?

9 MR. GORMLEY: Thank you, Your Honor. So, from a  
10 procedural standpoint, my understanding is the Plaintiffs withdrew the  
11 claim? So, I think the question would be two-fold, whether -- it's, you  
12 know, properly situated at this time for summary judgment to be entered  
13 against it. But I think even beyond that now with the understanding of  
14 what Mr. Sharp is saying that they're intending to sort of, you know, get  
15 rid of the claim, but then wrap those back into their -- bad faith claim and  
16 use those allegations as evidence, I think you could also view this as a  
17 motion in limine to exclude reference to the statute or to exclude  
18 allegations that it's been violated, to keep that evidence out.

19 And he said a few different sections, but when you look at  
20 their complaint, their first amended complaint in what was briefed, they  
21 only referenced three subsections. They referenced subsections (a), (c),  
22 and (e). So, I would say at this point, any subsections beyond that are no  
23 longer fair game for introduction into evidence or commentary, or as a  
24 cause of action, you know, they withdrew it.

25 So, I think they should be limited to subsections (a), (c), and

1 (e). Looking at (a), that's the misrepresentation subsection that  
2 Mr. Sharp started on. I think your first sense on this one was correct,  
3 Your Honor, that there's no actionable misrepresentation for the  
4 purposes of subsection (a). I mean, I can go over all those points again,  
5 if you'd like me to. But I just don't think there's any actionable  
6 misrepresentation. They point to things in -- the letter. The letter's  
7 simply, you know, telling what the reason was.

8           A misrepresentation, there would be actionable, there would  
9 be something to the effect of, if someone's trying to get something  
10 covered, and they call their insurance company. And their insurance  
11 company says like, oh, no, like don't do that, do this. And then what the  
12 insurance company tells them to do ends up harming them. There's no  
13 evidence of anything like that occurring in this case. So, I think your first  
14 sense was correct in terms of the misrepresentations.

15           I didn't hear Mr. Sharp the whole -- during his whole  
16 argument. There was just -- my hearing didn't pick up a couple of things  
17 he said, but I didn't hear him directly address Section C, which relates to  
18 promptness. I haven't heard of any evidence or allegations that support  
19 that theory. And I also didn't hear him address Section E, which relates  
20 to handling after -- sort of handling after-the-fact, after liability's become  
21 reasonably clear, there's just no facet even bring Section E sort of into  
22 the fold in this case.

23           So I would submit, Your Honor, that summary judgment was  
24 appropriate on this claim, and even though they withdrew it, if now  
25 they're trying to fold it into their bad faith claim, then any argument or

1 evidence -- not evidence related to it, because the evidence would be  
2 related to other issues, that would be overbroad, but any argument  
3 related to violations of the statute should be excluded.

4 THE COURT: On Defendant's motion for summary judgment  
5 on claims with respect to breach of contract and breach of the covenant  
6 of good faith and fair dealing, it's going to be denied. With respect to the  
7 Unfair Claims Practices Act, the Court will defer the ruling until trial, and  
8 if the parties want to file a new brief on that issue, they can, but  
9 otherwise we can address it at trial. The Court's just going to need more  
10 information on that. Next is Defendant's Motion for Partial Summary  
11 Judgment on damages. Mr. Gormley.

12 MR. GORMLEY: For damages, okay. So, Your Honor, this  
13 motion started out as focusing on wrongful death damages and punitive  
14 damages, and then there was this stipulation to dismiss the wrongful  
15 death damages, so that doesn't exist with punitive damages.

16 You know, I understand it's a fact -- you know, based on your  
17 ruling on the prior motion, there's fact intensive inquiry that needs to  
18 take place, but on the punitive damages I think what the evidence shows,  
19 not to try to go over all the evidence again, but what the evidence  
20 essentially shows is that you had a process that was created, and it was  
21 followed. The process complied with industry standards consistent with  
22 NCQA and URAC, sort of these governing bodies that lay out standards.

23 I mean, I know that's going to be -- there's going to be  
24 argument about that in terms of the Motions In Limine, but I think those  
25 lay out a standard that should be followed and that standard process

1 was followed. There's no evidence that in following that process that  
2 anyone did anything -- there's no evidence of fraud, first off, because  
3 there's no actual misrepresentation at any -- at any turn, but in terms of  
4 malice or oppression, there's no evidence anyone did anything with  
5 malice or oppression or intentionally deviated from that standard  
6 process in order to harm the Eskews in this case.

7 I think in -- I think it's the *Powers* case where punitive  
8 damages were affirmed on appeal in a bad faith case. In that case, the  
9 fact that the Nevada Supreme Court focused on was the idea that there's  
10 an intentional deviation which harmed the insured. In this case it was  
11 doing everything consistent with sort of national standard policy maybe  
12 that -- maybe after this case, the way insurance companies act will need  
13 to change, but doing -- acting consistent with that, I think eliminates the  
14 basis for punitive damages in this case. So do you have any questions,  
15 Your Honor?

16 THE COURT: No questions, Mr. Gormley. Thank you.  
17 Mr. Sharp.

18 MR. SHARP: Yeah. I mean, the only thing I would offer, and  
19 we laid out our arguments in detail, but I just -- my only thought is the  
20 health insurance industry is perhaps the only industry in the world that  
21 thinks you don't have to follow a contract. I mean, that's the essence of  
22 this case and they never considered the contract at any point in any  
23 decision they made. That's number one. Number two, the investigation,  
24 such as it is, took approximately 12 minutes, consisted of two e-mails  
25 saying denied. Obviously I'm paraphrasing that.

1           There was no objective evaluation of the actual proton beam  
2 therapy policy as applied to Mr. Eskew, because had there been, there  
3 was substantial evidence even within the policy itself that this proposed  
4 treatment was medically necessary. They just -- the whole formation of  
5 the proton beam therapy policy itself is subject to scrutiny, as they were  
6 making business decisions not medical decisions. I think all of those  
7 things collectively, in addition to the -- to the expectation that was  
8 created with the Eskews both in terms of the sale of the policy and the  
9 information they were provided, this case is pretty akin to *Wohlers*  
10 *versus Bartgis*, except at least in *Wohlers*, the insurance company  
11 pretended to actually rely upon something in the insurance policy.

12           In *Wohlers* they misrepresented, misled their insured, did so  
13 deliberately, and that was the same thing in this case. And it's not a  
14 defense to say, well, the entire industry operates in violation of the duty  
15 of good faith and fair dealing. I mean that's the essence of what the jury  
16 has to decide. They say our industry standard is great, we say it isn't.  
17 That's what the jury needs to decide.

18           THE COURT: Thank you, Mr. Sharp. Mr. Gormley.

19           MR. GORMLEY: Just on a couple points. This idea of never  
20 considering the contract, I mean, for one, I would think that would be  
21 disputed factually, but just legally the law is clear that for punitive  
22 damages to exist in a bad faith case there has to be something beyond  
23 just the initial bad faith. Just because you have the bad faith doesn't  
24 mean you -- the punitive damages are automatically obtainable. So  
25 there needs to be evidence beyond that. I would think that this idea of

1 not considering the contract would sort of be the minimum for the bad  
2 faith claim to prevail, so I don't think then that really lends itself to  
3 punitive damages. I'd say factually it's also not accurate.

4           The testimony's clear that Luann Amauglin [phonetic]  
5 reviewed the contract before referring the claim to Dr. Ahmad in order to  
6 do his review that he always partakes in. I mean, the analogy in the  
7 briefing is there'd be akin to the Nevada Supreme Court saying that a  
8 district court judge would use their discretion because before ruling on a  
9 summary judgment they didn't re-read *Wood v. Safeway*. I don't -- I  
10 mean, I think the Court is familiar with the summary judgment standard  
11 and doesn't have to re-read *Wood v. Safeway* every time before ruling  
12 on summary judgment. I'm sure Mr. Sharp disagrees with that analogy,  
13 but I think it's consistent with -- with Dr. Ahmad reviewing for medical  
14 necessity, which he did frequently.

15           Also, the time of the investigation, the review, that's disputed  
16 fact how long, but whether it was 12 minutes or the approximately half  
17 an hour, I mean, materials that were provided were reviewed. I don't see  
18 why the speed gives a basis for punitive damages. And so I would just  
19 reiterate the point that this is -- this is a case where they followed their  
20 procedures. In our view, they followed the contract, and there was no  
21 intentional malice, no intentional oppression towards the Eskews.

22           I think *Wohlers*, *Powers*, these other cases, there's facts  
23 where people sort of did one off intentionally bad acts to the detriment  
24 of the insured, and that's what took the case from just a mere bad faith  
25 case to a bad faith case with punitive damages. And I just don't think



1 there's any facts here that support that, particularly given the burden  
2 that, you know, they need to be able show at summary judgment that  
3 they can put on such evidence by clear and convincing evidence at trial.

4 So I think because of that heightened burden at this point, it's  
5 particularly true that they haven't been able to meet it to survive  
6 summary judgment.

7 THE COURT: Defendant's Motion for Summary Judgment,  
8 partial summary judgment regarding damages with respect to punitive  
9 damages, will be denied without prejudice, and the wrongful death  
10 damages are moot, since it was stipulated to. Next is Defendants'  
11 motion for partial summary judgment regarding UHC. Mr. Gormley.

12 MR. GORMLEY: Thank you, Your Honor. So on this motion,  
13 the idea in this motion is should -- there's two Defendants, Sierra Health  
14 and Life Insurance Company and United Healthcare, Inc. The idea of this  
15 motion is should United Healthcare, Inc., be a defendant to this case.  
16 Because they dropped -- withdrew two of their claims, the analysis sort  
17 of simplifies from what was in the initial motion. They just have the bad  
18 faith claim left. And then there's also the idea of personal jurisdiction.  
19 So the question is whether they can pursue a bad faith claim against  
20 United Healthcare, Inc., and whether this Court has personal jurisdiction  
21 over United Healthcare, Inc.

22 So focusing on the bad faith claim first, they just simply don't  
23 have standing to pursue the claim against United Healthcare. The  
24 Nevada Supreme Court is very clear that contractual privity is required in  
25 order to maintain a claim for breach of the implied covenant, good faith

1 and fair dealing against a party, and in this case against -- arising out of  
2 an insurance contract. The insurance contract was with Sierra Health  
3 and Life Insurance, so they have standing against Sierra Health and Life,  
4 but they just don't have standing against United Healthcare to maintain  
5 the claim. In their response they bring up this idea that United  
6 Healthcare might qualify. They said there's a question of fact if it  
7 qualifies as an insurer under a generic definition of insurer in the Nevada  
8 Revised Statutes.

9           Whether there's a question of fact they are not qualifying as  
10 an insurer under, I think, NRS 679, maybe 100, doesn't make you a party  
11 to the contract, the contract between Sierra Health and Life and  
12 Mr. Eskew. So I think that's just a red herring and doesn't help them  
13 keep United in the case. Then so to that there is one exception that we  
14 recognize they put it in their complaint, so we addressed it head on in  
15 the motion, is the exception -- this joint venture exception that originates  
16 out of the *Wohlers* case.

17           *Wohlers* didn't come up with the exception. It's found in  
18 other jurisdiction, but in *Wohlers*, the Nevada Supreme Court adopted it.  
19 But that exception's very clear that it applies to third-party claim  
20 administrators who deal directly with the insured. I think that's a key  
21 difference. There's no allegation United is a third-party claim  
22 administrator. They're not. But they want to treat them as one based on  
23 some, you know, esoteric facts about profits and different  
24 considerations. But *Wohlers* is very clear that it's about a third-party  
25 administrator engaging in claims handling with the insured. There's no

1 allegation of facts that United did any of that. They're not a third party  
2 claims handler. They didn't engage -- people from United didn't engage  
3 with the insured differently than Sierra Health and Life.

4           So the exception from *Wohlers* doesn't apply for that reason,  
5 Your Honor. I mean, to apply it to United here, I think that's an argument  
6 that they can make on appeal to the Nevada Supreme Court to sort of try  
7 to expand the exception. But I think based on *Wohlers* and how the  
8 exception currently exists under Nevada law, I don't think there's any  
9 basis to apply it to United in this case. And then -- so for that reason --  
10 for those reasons, United should no longer be a party to this case.

11           And then even looking to personal jurisdiction, their  
12 response on that point is somewhat flippant or brief, in that they say,  
13 well, there's a question of the fact as to the insurer thing or the joint  
14 venture thing, then -- and then there's a question of fact as to personal  
15 jurisdiction, but that's just not the case. They argue there's general  
16 jurisdiction, but for general jurisdiction you have to be at home in the  
17 jurisdiction which, you know, typically requires principal place of  
18 business or State of incorporation. They agree that United Healthcare,  
19 Inc., is neither of those in Nevada. Its principal place of business is  
20 Minnesota. It's incorporated in Delaware.

21           So the Court has no general jurisdiction over United  
22 Healthcare, Inc. So that leaves them with specific jurisdiction. They  
23 tacitly concede the argument that Sierra Health and Life's contacts with  
24 Nevada can't be imputed to United Healthcare. If they could be imputed,  
25 then there probably would be personal jurisdiction, but they can't be

1 imputed to United Healthcare. They don't even oppose that argument in  
2 their response.

3           So then the question is whether the Court has specific  
4 jurisdiction over United Healthcare for its own acts and contacts with  
5 Nevada for which Plaintiff's claims arise out of. And the answer is no,  
6 because the only contact I can even candidly think of that they tried to  
7 link this case to is the creation of the proton policy.

8           One, on sort of a factual contention is if you look at that  
9 proton policy, it doesn't even have United Healthcare, Inc., on it. It has  
10 United Healthcare Services, Inc. That's one point. But beyond that is  
11 this idea that the contact of creating that policy, which they would allege  
12 their claim arises out of, is the exact type of contact that from *Walden v.*  
13 *Fiore* from the United States Supreme Court, and then it was also  
14 adopted by the Nevada Supreme Court in -- if I can say it right --  
15 *Tricarichi* in 2019. That's a type of contact that's not specifically targeted  
16 at the jurisdiction. That's the type of contact that sort of follows the  
17 plaintiff around, which is not a contact for which specific jurisdiction can  
18 arise.

19           For instance, if they're going to say creating the policy is the  
20 basis for specific jurisdiction and Mr. Eskew lived in Nevada and the  
21 claim was denied when he was in Nevada, they would say, oh, there's  
22 the -- there's the direct contact, the direct in contact with Nevada and the  
23 claim arises out of that, so that's specific jurisdiction. But if he was in  
24 MD Anderson at the time when the claim -- when the denial happened,  
25 which I think factually would be correct, I could be wrong on that, but I

1 think factually is correct, then that contact, if during the policy had been  
2 used, would be directed at Texas.

3 So it's the type of -- moving type of contact that *Walden v.*  
4 *Fiore* pointed out that can't serve the basis for specific personal  
5 jurisdiction. So even with that one argument, that's still not enough for  
6 the -- for the Court to exercise specific jurisdiction. So either for lack of  
7 standing or lack of personal jurisdiction, Your Honor, United Healthcare,  
8 Inc., should no longer be a party to this action. There's no prejudice.  
9 Sierra Health and Life is a big company. They can recover whatever  
10 judgment they get. You heard Mr. Roberts talk there won't be any  
11 argument about annihilation or anything like that.

12 So there's no fair play considerations or anything else that  
13 should lead to keeping United in this case. There's just a legal lack of  
14 standing and then a legal lack of personal jurisdiction. So unless Your  
15 Honor has any question, that's all I have.

16 THE COURT: Thank you, Mr. Gormley. Mr. Sharp.  
17 Mr. Sharp.

18 MR. SHARP: I'm sorry, Your Honor. I would just point to  
19 *Wohlers*. I'm just looking at *Wohlers* right now as we're talking, and I  
20 think the Defense position is really form over substance. I mean, it  
21 doesn't make any logical sense if you operate the company, which is  
22 essentially what United Healthcare did, is they meet all of the same  
23 standards that *Wohlers* met. *Wohlers* developed a functional material  
24 issued policy. That's what United Healthcare did. Although, in this case,  
25 we don't even know if they issued the policy. They billed and collected

1 premium. They paid an adjudicated claim. I mean, that is what this is.  
2 It's a preservice claim, according to their own insurance contract, and  
3 they adjudicated a preservice claim. I'm looking at the denial letter. It's  
4 signed by Dr. Ahmad as -- on behalf of United Healthcare.

5           So under *Wohlers* this clearly is a question of fact over the  
6 joint venture. As to this question on personal jurisdiction, I mean, if the  
7 jury finds that United Healthcare and Sierra Health and Life were  
8 engaged in a joint venture of providing insurance in Nevada, it would  
9 seem that jurisdiction flows logically therein, since this is a Nevada  
10 insurance policy governing a Nevada resident, with a Nevada resident  
11 paying premium. So with that, if the Court has any further questions, I'm  
12 happy to address them.

13           THE COURT: No. Thank you, Mr. Sharp. Mr. Gormley.

14           MR. GORMLEY: Your Honor, Mr. Sharp's sort of  
15 characterization of *Wohlers* would essentially mean that every parent  
16 entity in a chain -- for insurance companies would then be subject to the  
17 joint venture exception. I don't think there's any evidence in this case of  
18 it's United Healthcare, Inc., accepting premiums or doing anything like  
19 that. This whole notion of sort of the financial interconnectedness is just  
20 solely based on Mr. Flood's [phonetic] report, which Mr. Roberts  
21 discussed yesterday. That's based on an AM Best credit report that  
22 discusses the United Healthcare Company is not even a real entity, that  
23 AM Best sort of put together.

24           That's not a, you know, critical forensic accountant overview  
25 of where finances are being used and who's paying for premiums and

1 how things are being traced through the corporate -- through the various  
2 corporate entities. There's no allegations of alter ego. There's no  
3 allegations of piercing the corporate veil. They're trying to use the joint  
4 venture exception as a work around that, essentially be a piercing of the  
5 corporate veil to trace this case up the corporate structure, and there's  
6 just no support for that idea.

7 I think trying to read out the language in -- in *Wohlers* that  
8 this exception is limited to claims -- third-party administrators who  
9 engage in claims handling with the insured, in that case that was -- he  
10 didn't -- the person didn't deal with the insurance company. He only  
11 dealt with the third-party administrator, which is normal. I just don't  
12 think it would be appropriate to expand *Wohlers* to basically what would  
13 be an alternative piercing of the corporate veil theory. So I just -- there's  
14 no legal basis for the joint venture exception to apply here.

15 And then on personal jurisdiction, again, I mean, I think that  
16 sort of highlights of you saying his theory of joint venture would  
17 establish, I think, specific personal jurisdiction. He's arguing for alter  
18 ego, personal jurisdiction, which was -- which is no longer a valid basis  
19 under due process. I think the either Nevada -- I think the Ninth Circuit  
20 might have done away with it, and then the Nevada Supreme Court  
21 adopted that view.

22 So there's just -- there's no basis for that argument anymore  
23 and it's basically one and the same, which I just think goes to show, you  
24 know, the lack of a legal basis for how they're applying the joint venture  
25 exception. So unless Your Honor has any questions.

1 THE COURT: Thank you, Mr. Gormley. As to Defendant's  
2 Partial Motion for Summary Judgment regarding UHC, the motion will  
3 be denied. So the Defendant can prepare the order on all three of those  
4 motions and run it by Mr. Sharp. The Court would appreciate it. We'll  
5 take a ten-minute recess, and then we'll get into Plaintiff's Motions In  
6 Limine then Plaintiff's Motion for Summary Judgment.

7 MR. GORMLEY: And, Your Honor, did you say that on that  
8 motion the Defendants or Plaintiff would prepare the orders?

9 THE COURT: I said the Defendant will prepare Defendant's  
10 orders.

11 MR. GORMLEY: Okay. For all the Defendant's motions.  
12 Okay.

13 THE COURT: Yeah. And then just run it by Plaintiff's  
14 counsel.

15 MR. GORMLEY: Okay.

16 THE COURT: So we'll do the opposite for Plaintiffs. On  
17 Plaintiff's motions, he'll draft the order and submit it to you.

18 MR. GORMLEY: And I guess one point of clarification on  
19 that. Is the Court saying affirmatively that it does have personal  
20 jurisdiction over United Healthcare, Inc., or is it saying that the question  
21 of fact exists as a personal jurisdiction?

22 THE COURT: It can be a question of fact.

23 MR. GORMLEY: So could that be something we can raise at  
24 trial then in a separate hearing?

25 THE COURT: You can.



1 MR. GORMLEY: Okay.

2 THE COURT: Outside the presence of the jury. All right.  
3 We'll take a ten-minute recess and come back, and we'll get to Plaintiff's  
4 Motions In Limine.

5 [Recess taken from 1:59 p.m. to 2:10 p.m.]

6 THE MARSHAL: -- Court come to order. Back on the record.

7 THE COURT: Are the parties ready to proceed? Please be  
8 seated. Please be seated. Are the parties ready? I can't hear. Okay.  
9 Back on the record for now Plaintiff's motion number one to exclude  
10 evidence of appeal. Mr. Terry.

11 MR. TERRY: You're muted, Matt.

12 MR. SHARP: Oh, sorry. Okay. Your Honor, on this motion --  
13 and I spent this morning going over some of the Motions in Limine to try  
14 and cut through the real issue.

15 In viewing the opposition to the Defense, I think it's fair game  
16 if we handled this evidence of why Dr. Liao didn't appeal the denial. I  
17 mean, I think it's fair game for him to rebut that. What I don't think is fair  
18 game is for the insurance company to say they had a duty, they, you  
19 know, should have -- because the contract says they may and, I mean,  
20 that's what governs. Also, if the denial is improper under *Andrew versus*  
21 *Century Surety*, insurance companies are subject to the same general  
22 terms that any other party as common contracts hold. If they breach the  
23 contract by denying the claim, that's a material breach, would discharge  
24 our client from any obligation.

25 So that's kind of where I stand. I mean, specifically, the

1 argument that was made in the opposition -- or the Motion for Summary  
2 Judgment and also in the opposition that effectively says Mr. Eskew had  
3 a duty to file the appeal, that's the type of argument and evidence I don't  
4 think that should be allowed.

5 THE COURT: Thank you. Mr. Gormley.

6 MR. ROBERTS: That would be me, Your Honor.

7 THE COURT: Oh.

8 MR. ROBERTS: It sounds like we have an agreement. We  
9 agree that the AOC says he made a deal. We will not argue he had a  
10 duty to appeal or should have appealed, or that it would have been  
11 reversed if he appealed.

12 Addressing the section of our motion for partial summary  
13 judgment, the section that's quoted by Plaintiffs is our response to a  
14 motion for summary judgment and refers to the breach of contract  
15 theory, which is no longer part of the case, so we won't be making that  
16 argument as part of these proceedings.

17 THE COURT: Thank you, Mr. Roberts.

18 MR. ROBERTS: Thank you, Your Honor.

19 THE COURT: Mr. Sharp.

20 MR. SHARP: Well, I mean, whether or not the contract that's  
21 followed is still part of the case because that's part of the bad faith case,  
22 so I'm not quite sure -- but if they're not going to make the argument  
23 that's represented in the briefing, I'm fine with that.

24 MR. ROBERTS: We will not, Your Honor, to clarify. I have no  
25 objection to the order prohibiting us from arguing that Mr. Eskew had a

1 duty to appeal.

2 THE COURT: All right. That will be the Court's order on  
3 Plaintiffs' motion in limine number 1 regarding evidence of appeal. The  
4 next is Plaintiffs' motion in limine number 2 regarding evidence of the  
5 proton beam therapy policy. Mr. Sharp.

6 MR. SHARP: Just a moment, Your Honor.

7 THE COURT: Of course. Take your time.

8 MR. SHARP: Okay. So here's the issue that troubles me.  
9 The question before the jury is the reasonableness of United  
10 Healthcare's conduct. That's the issue. And the conduct that led to the  
11 February 5, 2016, denial and the reasonableness of that denial. That's  
12 the core issue in this case. And we don't have any foundational  
13 evidence, period, about why United Healthcare thought the literature  
14 cited into its brief was appropriate -- or into its policy. That's one  
15 example.

16 And so like, for example, I think it's Dr. Kumar, or one of the  
17 experts talks about the literature and the reasonableness of the  
18 literature, et cetera, but that -- that testimony's not relevant because the  
19 issue is United Healthcare's state of mind. And in that regard, I mean, I  
20 would recognize the same thing with our expert, Dr. Chang [phonetic]. I  
21 mean, he wouldn't testify about the reasonableness of the literature.  
22 But, you know, we disclose experts without knowing how you're going  
23 to rule on the evidence.

24 But that's kind of -- I mean, that's the troubling aspect of this;  
25 is we have this policy, and this policy is being held out as an expert. I

1 mean, that's what it is. That's what's being held out as an expert. And  
2 we have nobody at United Healthcare that we can cross-examine about  
3 that policy, none. We took Dr. Bhatnagar's deposition. She was not  
4 prepared to answer any of the questions specific to the policy. Yet they  
5 want to come in and say this policy is an evidence-based creation that  
6 was engaged to ensure consistent coverage determination. Yet we have  
7 no evidence leaking that that policy was actually followed in  
8 implementing the proton beam therapy policy. It's akin to me saying I  
9 have a policy to do a background check before I hire an employee, but  
10 I'm not going to tell you whether I did that in this case. So the policy's  
11 not relevant unless you can demonstrate it was followed.

12               So that's -- I mean, it's prejudicial to us for them to allow -- to  
13 put in any evidence on this proton beam therapy policy other than what  
14 was actually relied upon, and that's the highlighted provisions in their  
15 administrative file. I mean, otherwise, United Healthcare gets to create  
16 their own narrative, and that's not fair and it's not -- that's not -- it's not  
17 conforming with the rules of evidence. And it's their defense so they  
18 should have come forward with the evidence to establish the foundation  
19 of their medical policy.

20               It would be no different than a *Hallmark* hearing. An expert  
21 doesn't get to come in and not be subject to examination about why he  
22 actually relied upon the documents he relied upon. And I guess that's  
23 how I would analogize it. And I hope I'm not making it too confusing  
24 but, I mean -- but anyway, that's where I stand.

25               THE COURT: Thank you, Mr. Sharp. Mr. Roberts.

1                   MR. ROBERTS: Thank you, Your Honor. Your Honor, it's a  
2 question -- disputed question of fact whether or not the medical director  
3 relied only on the first two pages of the policy. The file contained a  
4 highlighted version of the first two pages of the policy, and the  
5 highlighted -- the highlights match the language that was quoted in the  
6 letter. Since nothing else in the policy was quoted in the letter, it makes  
7 sense that you'd only attach the highlighted portions quoted in the letter.  
8 But the letter referred to the policy. The policy is the entire policy. Even  
9 the first two pages, which Mr. Sharp concedes should come into  
10 evidence and concedes were relied upon, has a table of contents for the  
11 first -- at the top of it, covering 26 pages, including page 1 says  
12 references on page 19.

13                   So it's clear that they relied on the policy, and we disagree  
14 that he only relied on the first two pages. But in addition, the references  
15 and the subsequent pages provides specific detailed support for the  
16 conclusions that are relied upon in the first two pages. And when we're  
17 talking about bad faith and we're talking about whether we had a  
18 reasonable basis, and whether it was reasonable for Dr. Ahmad to rely  
19 upon this medical policy in part to deny preauthorization in this case, this  
20 is what it's all about.

21                   It's not about whether or not these citations should be  
22 admitted into evidence for the matter asserted under the hearsay rule,  
23 whether or not the jury should be shown this reference to prove that  
24 proton beam therapy has no benefit over IMRT for lung cancer. But what  
25 it does do is it shows that we had a reasonable basis and that we had

1 scientific evidence that was consistent with our opinion.

2           Now, the policy itself is not being cited as a learned treatise  
3 justifying our decision. It shows this is the basis of our decision, is it  
4 reasonable. But you don't need to cross-examine the guy who wrote this  
5 to test whether it's reasonable. There are studies, peer review journals  
6 with citations. If the Court will -- would look at the policy, which is  
7 actually attached to -- maybe it's not here. The full policy's in there  
8 somewhere. I can get the citation to it, Your Honor. But somewhere  
9 around page 18 of the policy it does start talking specifically about lung  
10 cancer and articles that support that lung cancer -- that proton beam  
11 therapy has not been clinically shown to have benefits over traditional  
12 radiation therapy and is, therefore, not medically necessary.

13           Now, if you want -- he says, okay, this is hearsay, some  
14 unknown person summarized that treatise. How do they prove we acted  
15 in bad faith? Put someone up on the stand, their expert, to say whoever  
16 transcribed this treatise, misrepresented what it said, that's not true, that  
17 study doesn't say that. They can put someone up to say this is obviously  
18 selected citations to support a position they wanted to implement. There  
19 are a -- a majority of the studies out there contradict these studies. There  
20 are all sorts of ways to attack the credibility of this study without  
21 deposing the person who chose these citations.

22           Are the citations accurate? That's an objective standard. Do  
23 they misrepresent the state of the science at the time the policy was  
24 dated? That's a -- that's a subject for expert testimony. And the other  
25 pages should not be excluded because it's part of the entire document,

1 which the doctor says that he relied in part on for his decision. We've  
2 addressed some of the specific issues in more detail, Your Honor, in our  
3 motion, but unless you have a further question, I'll rest there.

4 THE COURT: Thank you, Mr. Roberts. The Court doesn't  
5 have any questions.

6 MR. ROBERTS: Thank you, Your Honor.

7 THE COURT: Mr. Sharp.

8 MR. SHARP: Yeah. Let me -- I mean, maybe -- let me give  
9 you a brief example of where my concern draws from. Let's say we had  
10 a basic uninsured motorist claim involving a [indiscernible]. The  
11 adjuster gets the medical records, says I'm confused about causation,  
12 hires a medical examiner to evaluate it, gets the medical examiner back  
13 and says, okay, based upon this medical examination, I'm going to deny  
14 a claim. Now, it would be fair to have an expert come in and comment  
15 about that insurance adjuster's actual conduct and say, yeah, it was  
16 reasonable for him to rely upon the defense medical exam.

17 Now, take my example and there is no predicate testimony  
18 that the adjuster, in fact, relied upon a medical examiner to do that.  
19 Then it would be improper for an expert to come in and say, well, the  
20 medical examiner provided a reasonable opinion because he's not  
21 commenting upon what the company actually did.

22 And so if you take that to this policy -- and let me like give  
23 you a basic example. When he asked the question -- and this is just one  
24 example. The policy reads ICER concluded that PBT is comparable to  
25 alternative treatment options for patients with lung cancer. Why did

1 United Healthcare make that conclusion based upon the ICER report?

2 Who do I ask that question of? There's not a witness that's been  
3 identified that can answer that question, and that's the key predicate.

4 It's United Healthcare's subjective reliance upon that study as  
5 one example, and whether or not that subjective analysis is reasonable.  
6 I mean, I appreciate that there would be other ways to cross-examine it,  
7 and we're certainly prepared to do that, but the proper inquiry is United  
8 Healthcare's state of mind, which they have no evidence of. That's the  
9 problem here and -- I mean, they could have provided that evidence. It  
10 was available. They just didn't.

11 And so I think that puts us -- it's not relevant without that tie-  
12 in, and that's what I'm getting at. And I hope I'm not going on into  
13 something that just -- that doesn't make sense, but I hope that helps you.

14 THE COURT: It does. Thank you, Mr. Sharp. So Plaintiff's  
15 motion number 2 to exclude evidence of the proton beam therapy policy  
16 will be granted in part and denied in part. It will be granted with respect  
17 to any policy that was not actually relied upon by United Healthcare, or  
18 Sierra Health and Life, at the time that the denial was made. And it will  
19 be granted -- or denied regarding what they did rely on.

20 So when the Court read the deposition transcripts, it  
21 appeared that there were a lot of questions that 30(b)(6) deponents were  
22 not able to answer. And so if a 30(b)(6) deponent wasn't able to answer  
23 the question at the time of the deposition, they're not going to be able to  
24 now answer the question at the time of trial because they're bound by  
25 the answers. And if it was not actually relied upon at the time of the



1 denial, any portion of the policy if it wasn't relied upon, is not going to  
2 come in at trial. Does that make sense, Mr. Sharp? I can't -- the Court  
3 can't hear you.

4 MR. SHARP: Sorry. I keep muting myself. Yeah, I think that  
5 makes sense from our part.

6 THE COURT: Okay. Mr. Roberts, does that make sense?

7 MR. ROBERTS: It does. You're essentially saying it's not  
8 going to come into evidence until a proper foundation is laid that it was  
9 -- laid that it was relied upon?

10 THE COURT: Yes. But that had to have been done at the  
11 time of the 30(b)(6) deposition.

12 MR. ROBERTS: Well, Your Honor, I would submit that the  
13 decision was made by Dr. Ahmad and, therefore, Dr. Ahmad is the  
14 relevant person to testify to what portion of the policy he relied upon.  
15 He's the one that made the decision. He's the one who quoted sections,  
16 highlighted sections. If he can say I relied on the entire policy, then I  
17 would submit there's no basis to exclude it.

18 MR. SHARP: Well, wait a second.

19 THE COURT: Well --

20 MR. SHARP: Your Honor, if I can --

21 THE COURT: The Court read -- the Court read his deposition.  
22 He didn't say he relied upon the entire policy. In fact, he denied it. He  
23 didn't actually -- he only looked at one section, saying that the MIRT (sic)  
24 was allowed, but the proton beam therapy was not allowed. And so  
25 what he did to prepare for his deposition is not relevant. It's what he did

1 at the time he made the denial, and what he relied on, that's what he can  
2 testify to.

3 MR. ROBERTS: I understand, Your Honor.

4 THE COURT: Okay. The next is Plaintiff's motion number  
5 three to exclude evidence not relied upon UHC at the time of the subject  
6 claim denial. I'm sure that the parties can understand where the Court's  
7 going on this issue. Mr. Sharp, it's your motion.

8 MR. SHARP: Hold on, Your Honor.

9 THE COURT: Of course. Because this is related to Motion In  
10 Limine number two.

11 MR. SHARP: Yeah, I was just looking for my notes, but that's  
12 okay. I have this fairly committed to memory.

13 THE COURT: You can look at your notes. We have time.

14 MR. SHARP: I think everybody's in agreement --

15 THE COURT: We have time. The Court has you blocked out  
16 all afternoon.

17 MR. SHARP: Okay. Well, thank you.

18 THE COURT: There's no other place the Court would rather  
19 be than with you counsel, all five of you, and the great court staff we  
20 have.

21 MR. SHARP: Okay. I did find them. Thank you, Your Honor.

22 THE COURT: Great. You're welcome.

23 MR. SHARP: I don't think there's any -- I mean, there's  
24 dispute on the standard that's employed in these cases. It's -- I think  
25 Your Honor articulated, it's the evidence that was based -- that was

1 available -- or was relied upon at the time of the denial or reasonably  
2 available through a proper investigation, and the scope of the  
3 investigation is a question of fact. So I didn't with -- on light of that, I  
4 think the motion should be granted. I mean, if there's specific issues  
5 you'd like me to address, I'm happy to address it, but as a conceptual  
6 issue, I really don't think it's in dispute.

7 THE COURT: Thank you, Mr. Sharp. Mr. Gormley.

8 MR. GORMLEY: I'm not exactly sure what Mr. Sharp is  
9 saying is not in dispute. I think, you know, the basic notion of the bad  
10 faith standard is not in dispute, that a reasonable basis is needed, but the  
11 rule that they base Motion in Limine number three on is certainly in  
12 dispute. I mean, I don't think they have a single case that supports it.  
13 They don't cite any Nevada case, and none of the cases they cite support  
14 any of the relief they seek in number three. I think it's simply the case  
15 they initially based the motion on, basically stands for the basic  
16 proposition that you can't come into trial and change the contractual  
17 basis of the denial.

18 So this claim was denied, lack of medical necessity,  
19 unproven. We can't come in and say, you know, well, you know, now  
20 that we've looked at it again, it's also -- there's another exclusion under  
21 the contract that also serves as a basis for denial. We can't do that trial.  
22 But you can certainly look at documents or evidence that didn't exist at  
23 the time that the denial was made in order to help the jury evaluate the  
24 reasonableness of the determination.

25 You know, they have two theories. They say there's no

1 reasonable basis for the coverage determination on medical necessity,  
2 and they also say the investigation was not reasonable. But the very  
3 case they cite, the *Banister* [phonetic] case, affirmed summary judgment  
4 because of evidence not relied upon at the time because it showed that  
5 any further investigation would have ended in the same result.

6           The *Powers* Nevada Supreme Court case in 1998 supports  
7 that same reasoning. The court held there was substantial evidence that  
8 had USAA undertaken an objective investigation, USAA would have  
9 discovered evidence to show that the claim should have been paid. So  
10 just as *Banister* points out, the inverse of that is also the law; that if you  
11 look at further evidence and it shows that a further investigation  
12 wouldn't have changed the result, then that theory fails as a matter of  
13 law.

14           So Nevada law cases they cite cuts against their argument in  
15 the motion, and that's with the investigative theory. That goes to the  
16 causation of the -- of the alleged lack of investigation. But then speaking  
17 to the reasonableness of the coverage determination, whether it was  
18 right or wrong, basically, the clinical evidence cited in the proton policy,  
19 for instance, the Whitestock [phonetic] paper that's cited there, says that  
20 this treatment, the benefits are theoretical. So if the benefits are  
21 theoretical, then it doesn't meet the definition of medical necessity.

22           Then Dr. Liao, in 2018, so -- well, I'll take a step back. So  
23 that's what the paper says, that's what the policy says. If that's  
24 presented to the jury, they're going to say, oh, yeah, but look at this at  
25 the same time, there's something that says something else. So how's a

1 jury supposed to determine which is true, which is false; you know, is  
2 there a reasonable basis. But then that's why you can look at future  
3 evidence that speaks to the reasonableness of what was considered at  
4 the time and the conclusions that were drawn.

5           So Dr. Liao, the treating physician here, wrote a paper in  
6 2018, really an article, responding to an article commenting on her study,  
7 where she said the benefits are still theoretical. So the jury's being  
8 posed with the question --

9           THE COURT: Well, Mr. Gormley, that's impeachment  
10 evidence. So if Dr. Liao's going to get on the stand and say X and you  
11 have the document that says the opposite of X, you're allowed to use  
12 anything you want for impeachment. That's a different issue.

13           MR. GORMLEY: I agree it's impeachment evidence and you  
14 can use it to impeach her, but I would also say it goes beyond that and  
15 speaks to the reasonable -- the reasonableness of the basis that  
16 underlined the decision back in 2016 as well.

17           So it works on both ends. It can be -- it's admissible to  
18 impeach. It's also admissible to show the reasonableness of the  
19 decision. Because if the jury's just deciding between, you know, this  
20 paper -- this is what they decided, their expert says that is not accurate,  
21 we should be allowed to bring in things after it. They could then raise  
22 the argument, oh, well, the view in 2016 was like it was stronger then,  
23 and then further evidence came out and it became weaker. That's an  
24 argument they can make. I asked Dr. Liao that. We've asked the doctors  
25 that. No one's said that's the position.

1           So they can certainly, you know, attack the credibility of that  
2 argument, but we definitely can look at post-denial evidence in order to  
3 judge the reasonableness of the evaluation at the time. I think that -- I  
4 mean, this motion is written, in my opinion, so vague and overbroad it  
5 doesn't really identify any specific evidence. It criticizes some expert  
6 comments that sort of tries to cobble together a rule that I don't think  
7 exists and I don't think it's supported by the cases cited.

8           But then I think it's targeted, those type of pieces of evidence,  
9 like the 2018 article and some of these other studies, but they -- I mean,  
10 they're some of the most highly probative evidence in the case, they  
11 speak directly to the reasonableness of the conclusions that were  
12 reached. You know, these weren't studies bought and paid for by  
13 United. These are independent -- the New York State Department of  
14 Health reached the same conclusion. I mean, I don't know how there can  
15 be any basis to keep those out, and so for that reason the Motion in  
16 Limine number three should be denied, Your Honor.

17           THE COURT: Thank you, Mr. Gormley. Mr. Sharp.

18           MR. SHARP: Yeah. I'm kind of taken aback that the Defense  
19 would suggest that there's disagreement on the state of the law. I mean,  
20 they cited in their own briefing for *Hernandez vs. State Farm Mutual*  
21 *Auto*, Federal District Court opinion written by Judge Dorsey, which  
22 explicitly references the hindsight test that we represented -- that we  
23 referenced from the *Ostero* [phonetic] case.

24           So the standard is unequivocally that the decision the jury --  
25 that the question the jury evaluates is the decision made on February 5,

1 2016. How a study that's done in 2018 bears on the reasonableness of  
2 Healthcare's conduct is -- I don't even understand that analysis. I agree  
3 with you and I -- that that study, I mean, it's fair to question Dr. Liao  
4 about because that goes to other issues such as causation. I mean, I get  
5 all that. But they can't come in and say, which they are doing, that  
6 because of all these other studies, none of which were ever considered,  
7 many of which didn't even exist, we acted reasonably on February 5,  
8 2016.

9           This seems to be a relatively simple motion. What did you  
10 rely upon, and the jury then determines whether that's reasonable.  
11 Obviously there's questions about what they could have done and  
12 should have done, and we'll present evidence, they'll refute that, but  
13 they can't come in and say, oh, look, we relied upon this study, the study  
14 itself, when they -- there's no evidence they did. And that's what we're  
15 getting at. I think it's -- as I said, I mean, I think this should be  
16 uncontested.

17           THE COURT: Thank you, Mr. Sharp. Plaintiffs' motion  
18 number 3 regarding evidence not relied upon by UHC at the time of the  
19 subject claim denial is granted.

20           Next is Plaintiffs' motion number 4 regarding expert  
21 testimony of Dr. Gary M. Owens. Mr. Sharp.

22           MR. SHARP: You'll like this one, Your Honor. We're going  
23 to withdraw this motion. We'll deal with it at the time of trial. I mean,  
24 we're not conceding things are relevant, but I think it, in fairness, Your  
25 Honor should hear all of the evidence before making these evidentiary

1 decisions. And I understand that what an expert writes, you know, in an  
2 expert opinion report is not necessarily the same way they'll say it in  
3 front of the jury. So if he appears, if he's vouching, I'll object, or  
4 Mr. Terry will object, at the time of trial.

5 THE COURT: Thank you. So Plaintiffs' motion number 4  
6 regarding expert testimony of Dr. Gary M. Owens is withdrawn. Next is  
7 Plaintiffs' motion number 5, regarding expert testimony of Amitabh  
8 Chandra.

9 MR. SHARP: Okay, Your Honor. This is a difficult area  
10 because his testimony -- his report is so broad. So I've gone back. I  
11 think based upon yesterday's rulings, I think it's fair game for  
12 Dr. Chandra to testify about the CMS issues and the scope of that, you  
13 know, could be subject to relevancy objections at the time of trial. If we  
14 introduce Medicare, it seems fair that they should be able to rebut that.  
15 The number of proton beam therapy centers, same thing. I mean, if we  
16 introduce evidence saying proton beam therapy is widely accepted  
17 because there's so many therapy centers around the country, I mean, it's  
18 fair that he could come in and rebut that.

19 Where I have concerns is these kind of policy decisions that  
20 he's talking about because that seems to me to border into the area of  
21 nullification. And, I mean, I can go through item-by-item, and it's very  
22 difficult. I mean, he talks about, you know, the cost -- you know, if we do  
23 a utilization management, the premium's cheaper. I mean, that's not -- I  
24 don't know why that would be relevant to any consideration or why he  
25 would have the basis to conclude that in this case. I mean, the problem



1 is he doesn't link anything in his opinions to what United Healthcare  
2 actually did in this case.

3           So I would say, to assist the Court, that he be allowed to  
4 testify about CMS, he be allowed to testify about the proton beam  
5 therapy centers, but other matters, that it's just not relevant, it's not  
6 going to assist the jury. I mean, for example, in his rebuttal report he  
7 goes on about criticizing Mr. Prater. Well, he's not a -- he's an  
8 economist, he's not a claims handling expert. So those are the kind of  
9 things. I hope that assists Your Honor.

10           THE COURT: Thank you, Mr. Sharp. Mr. Gormley.

11           MR. GORMLEY: I'm just trying -- I mean, the motion was to  
12 exclude him entirely, so I think it should be denied. I think they  
13 conceded it should be denied, and now they changed to limiting certain  
14 theories. I'm not exactly sure which ones they're specifically attacking,  
15 but I would just say, you know, generally, in looking -- their First  
16 Amended Complaint alleges that UHC and SHL developed its bad faith  
17 system for handling insureds' request for coverage for financial reasons  
18 and to place its own financial interests ahead of the health and well-  
19 being of its insureds.

20           So their case revolves around attacking the whole creation of  
21 the system. Dr. Chandra's -- so the jury's going to be like, well, why does  
22 this system exist. They're saying it's terrible, the whole thing, why is it --  
23 why would you ever have this. Dr. Chandra's coming in from one -- from  
24 his expertise giving a basis for the creation of that. I think this whole --  
25 all of his opinions are admissible on that ground.

1 THE COURT: Thank you, Mr. Gormley. Mr. Sharp, any  
2 rebuttal?

3 MR. SHARP: I would only address two things. I mean,  
4 nobody on our side is saying an insurance company can't engage in  
5 utilization management. I mean, obviously they can. It's in the contract.  
6 I mean, that's never been a case. I mean, they have to do so in a  
7 reasonable manner. That's the essence of the case.

8 In their opposition they list four or five different points that --  
9 that Dr. Chandra is intending to rebut, none of which he ties to United  
10 Healthcare. You know, it doesn't matter that he believes doctors engage  
11 in defensive medicine and there's too many malpractice suits. I mean,  
12 that's one of the -- one of the opinions he intends to a certain. I mean, I  
13 guess we can go line-by-line, but I think the easiest way is just let's keep  
14 him to where subject matters are relevant, Medicare and Proton Beam  
15 Therapy Centers.

16 THE COURT: Thank you, Mr. Sharp. Plaintiffs' motion  
17 number 5 regarding expert testimony of Dr. Amitabh Chandra is denied.

18 The next motion is Plaintiff's Motion in Limine number six  
19 regarding the testimony of Dr. Parvesh Kumar.

20 MR. SHARP: I think that the testimony that he -- that  
21 Dr. Kumar provides relative to the terms of the policy is after our  
22 evidence subject to MIL number 3, and I think that would also apply to  
23 our expert, Dr. Chang . The rest of the motion we can, you know --

24 THE COURT: Thank you.

25 MR. SHARP: That's fine. We'll withdraw the rest of the stuff.

1 I mean, we can object at the time of trial if he mischaracterizes or  
2 vouches for an expert.

3 THE COURT: Thank you.

4 MR. GORMLEY: I guess -- I guess there's no -- so am I -- all  
5 of it's withdrawn except for what was covered by number three, is the  
6 understanding?

7 THE COURT: Yes. So -- and anything that Dr. Kumar relied  
8 upon in his report and in his testimony, that was not relied upon by UHC  
9 at the time would not come in at trial, but everything else comes in.

10 MR. GORMLEY: And could we, I guess -- I'll let you rule on  
11 this one, but then I was going to have a question about number three  
12 again.

13 THE COURT: So Plaintiffs' motion number 6 regarding  
14 expert testimony of Dr. Parvesh Kumar, we denied in part and granted in  
15 part. We denied with respect to general testimony. It will be granted  
16 with respect to anything that UHC did not rely upon when it made its  
17 denial.

18 MR. GORMLEY: For number three, could I ask a question --

19 THE COURT: Of course.

20 MR. GORMLEY: -- of clarification of that, Your Honor? So in  
21 your question to us you pointed out how we could use that -- that study,  
22 that 2018 one where Dr. Liao refers to it as theoretical for impeaching  
23 her, but when I hear that number three is granted, I feel like that's  
24 excluded so now we can no longer use that for impeachment? I'm trying  
25 to understand.

1 THE COURT: Well, anything can be used to impeach  
2 someone. So that's just a rule of impeachment. So if she gets on the  
3 stand and says something and you have a document that shows that  
4 she's taken a counter position, you can impeach her. It's for what  
5 purpose it's being used.

6 MR. GORMLEY: Okay. So it's not -- things aren't being  
7 excluded for impeachment --

8 THE COURT: No, not for impeachment.

9 MR. GORMLEY: And --

10 THE COURT: You can use anything for impeachment.

11 MR. GORMLEY: I guess -- it's just --

12 THE COURT: And if there's an issue, we can take a break or  
13 we can have a bench conference.

14 Just so the parties know, because this is a COVID courtroom,  
15 none of the bench conferences are recorded during trial. So if you want  
16 a bench conference recorded, we have to take a break outside the  
17 presence of the jury and then put your objections on the record, just so  
18 you're aware. It's this courtroom and then Judge Holthus' courtroom, is  
19 the only courtrooms. And we can't change it. So did you have any other  
20 questions, Mr. Gormley?

21 MR. GORMLEY: Yes. For number 3, is the evidence that's  
22 being excluded the items they reference in the motion or was a rule laid  
23 down that is excluding broader swaths of evidence?

24 THE COURT: It's honestly what's in their motion. It's  
25 what -- it's excluded with respect to what the witnesses testified to that

1 they relied upon when they made their decisions. So it's a factual-based  
2 inquiry.

3 MR. GORMLEY: So there will be no expert testimony from  
4 either side, then, about, like, the reasonableness of the determination?

5 THE COURT: It can be. Yes, there will be expert testimony  
6 on that. It's just there won't be any expert testimony regarding a 2021  
7 study because UHC didn't rely upon that, if that makes sense.

8 MR. GORMLEY: Okay. So it's just none of the future -- but I  
9 mean, their motion, you know, doesn't -- UHC didn't have -- and they  
10 didn't have their experts at the time, either, right? Dr. Kumar wasn't  
11 whispering in Dr. Ahmad's ear, and he didn't have the benefit of Dr.  
12 Leal's testimony in the review. So Dr. Leal's testimony on the benefits  
13 and things of that nature about proton therapy is excluded as well,  
14 correct?

15 THE COURT: No, because she relied -- if she relied upon that  
16 to make her recommendation that he get proton therapy instead of  
17 photon therapy, that comes in. It's a --

18 MR. GORMLEY: Even if it wasn't communicated to United?

19 THE COURT: Yes, because the conduct at issue is not Dr.  
20 Leal's conduct. It's UHC's conduct. Does that make sense?

21 MR. GORMLEY: I understand what you're saying, but --

22 THE COURT: So for -- yeah. For example, in an  
23 underinsured motorist coverage claim, a UIM claim, if the insurance  
24 company denied the UIM claim for a reason and then later they said,  
25 well, you know, we're actually denying it as well because of another

1 issue, that other issue doesn't come because they didn't rely at the time.

2 MR. GORMLEY: I don't know. It's like, I hate reopening  
3 arguments, but it's -- what if they deny it for a reason -- I'm trying to  
4 think on my feet here -- saying that the light was red based on witness  
5 interview at the scene and they deny it. And then a video -- they get a  
6 video played in discovery. A different person recorded it and they get  
7 that during discovery that shows the light is red and the other side is  
8 saying our case rests on that light being green. Would they not -- they  
9 wouldn't be allowed to use that video confirming the correctness of their  
10 decision?

11 THE COURT: No, because they didn't rely upon it.

12 MR. GORMLEY: Okay. Okay. I understand.

13 THE COURT: In a bad faith case.

14 MR. GORMLEY: Okay.

15 THE COURT: Okay. The next are Plaintiffs' motion for partial  
16 summary judgment. Mr. Sharp?

17 MR. SHARP: Well, I think I know where Your Honor is going,  
18 but I do want to point something out because I think this is an issue  
19 that's going to continue through the course of the trial. And you know, I  
20 mean, ultimately, considered as rulings during trial and with jury  
21 instructions. And in my career -- and I've represented insureds for  
22 longer than I want to think of in bad faith cases. I mean, that's my  
23 specialty.

24 This is the first instance I've ever had where an insurance  
25 company literally testified, we did not review the insurance policy. The

1 denial doesn't even reference the specific terms of the insurance policy.  
2 There's not a case in Nevada that says an insurance company has a  
3 reasonable basis to deny a claim when they never considered the  
4 contract. That's really a part of our motion. And I understand it can be, I  
5 guess questions of fact. I mean, the insurance company says that Dr.  
6 Ahmad really did read the insurance policy. And I -- three separate times  
7 in his deposition, he said he never considered the insurance policy.

8 So I mean, that's the issue. And I -- Your Honor is -- you  
9 know, that's the issue before Your Honor and I'll just leave it at that. If  
10 you have any specific questions about our motion, I'm happy to answer  
11 them.

12 THE COURT: Well, thank you, Mr. Sharp. Mr. Gormley, Mr.  
13 Roberts, any --

14 MR. ROBERTS: That would be me, Your Honor. And did you  
15 want argument on this one, Your Honor?

16 THE COURT: I don't need argument.

17 MR. ROBERTS: Okay. Thank you, Your Honor.

18 THE COURT: Plaintiff's motion for partial summary  
19 judgment is denied. Thank you. The last one is Plaintiff's motion for  
20 sanctions. Mr. Sharp?

21 MR. SHARP: I mean, I guess it partially has in some way  
22 been muted in light of the motion in limine. But I mean, you've read all  
23 of the briefing, Your Honor. And the proton beam policy is obviously the  
24 key part of the defense of United Healthcare. I mean, that is the defense.  
25 I've referred to it as their own expert. And we tried discovery on it. And

1 United Healthcare knew that this policy folder exists, which would  
2 explain the research, adoption, and implementation of the policy. And  
3 there's no question United Healthcare knew about it.

4 Dr. Bhatnagar, who's now currently in charge of the proton  
5 beam therapy policy, she utilizes this folder in her day-to-day work  
6 activities, and it wasn't produced. And the defense back is, well, I didn't  
7 request it correctly. You know, if that's the case, it's the case. But I don't  
8 know how I could have requested a folder that I didn't know existed.  
9 And part of what's the frustration on my end is that United Healthcare  
10 knew. I'm not suggesting that Mr. Roberts and Mr. Gormley knew. I  
11 would not suggest that.

12 But there's no question United Healthcare knew. And at the  
13 same time they're answering discovery responses, saying we're not  
14 withholding any documents in response to this request, they're  
15 producing what I now know are documents from the policy folder. Other  
16 policies, minutes from other meetings, all of this stuff comes from the  
17 policy folder. So on the one hand, here we are, they're trying to benefit  
18 from the existence of this folder while concealing it from the Plaintiffs.  
19 And you know, that's not fair. It just isn't.

20 And the other aspect that's troubling to me, and I think what  
21 is unfair, this goes to the example on November 17th, where they  
22 produced the spreadsheet -- and I apologize, Your Honor, I can't  
23 remember the exact exhibit, but it is before you. But it's a 45-page  
24 spreadsheet.

25 THE COURT: The Court saw it.



1           MR. SHARP: And they produced the corporate minutes with  
2 that. Well, why did they produce that on the last day of discovery  
3 pursuant to NRCP 16.1? If that's not -- that's just -- I mean, that's not an  
4 accident. That really can't be an accident. And that came from the policy  
5 folder. And so why is it we were not told about this policy folder? That  
6 isn't the nature of NRCP 1 and the rules of discovery.

7           Now, the other issue that I think prejudices us, particularly, is  
8 that the insurance company gets to define their own defense. They get  
9 to come in and say, well, now, we're going to define the medical policy  
10 the way we want it to be defined. Whereas the fact is the evidence as to  
11 how they actually implemented, what they actually did, is in their  
12 possession and it hasn't been disclosed. And that's not fair to us.

13           So I understand. I mean, clearly, you're not going to grant  
14 the -- well, I hope you will. But I mean, given where we've been at this  
15 point, I don't think you're going to grant the request that they have no  
16 reasonable basis to rely upon the PVT policy. But something has to be  
17 done. I mean, this is not fair gamesmanship. I just really isn't.

18           And I -- and the level of frustration I have is we took their  
19 medical policy, and we took the exact terminology from their medical  
20 policy where they said the Coverage Determination Committee is the  
21 one who has researched, developed, and implemented that policy. For  
22 that, took the name of their committee, put it in a request, and said give  
23 me all the documents that were relied upon by that committee. How  
24 would I know that committee didn't exist?

25           I apologize. It's just due to the level of frustration. And then

1 we spend eight months waiting for our 30(b)(6) deposition. And when I  
2 show up with specific questions to be asked regarding these policies,  
3 and the person that's prepared is not prepared to testify. And I mean,  
4 that's fine. I mean, that's the decision they made. But at the same time, I  
5 keep going back in my mind and saying, look, if that PVT policy folder  
6 was helpful to them, that would have been Exhibit 1 under 16.1. And on  
7 the last day of discovery, they pull a bunch of stuff from that very policy  
8 folder. And you know, with that, I'll leave it. I mean, we're prepared to  
9 try this case either way, but I think that what United Healthcare has done  
10 in discovery is just not fair.

11 THE COURT: Thank you, Mr. Sharp. Mr. Roberts.

12 MR. ROBERTS: Thank you, Your Honor. Your Honor, before  
13 I make my arguments, I do want to start off with sort of an offer of good  
14 faith here. And that is that I want to tell the Court that despite Mr.  
15 Sharp's assumptions that he drew from the facts he knows, our firm did  
16 not select discovery out of this policy folder. We did not have the policy  
17 folder until the last ten days. It had never been provided to us. We  
18 didn't peruse it for things that were good or bad for us. And policy  
19 folder makes it sound like there's a manila folder like we used to have 20  
20 years ago.

21 THE COURT: The Court read the deposition.

22 MR. ROBERTS: It's a colloquial term. It's simply part of all of  
23 the ESI that these big companies have on their massive computers. And  
24 the way that we did things is under the 16.1, we give them what we  
25 intend to rely on. Then we get their discovery requests. We send those

1 discovery requests to our client, who then sends us responsive  
2 documents. If they have questions about whether something applies or  
3 doesn't, yes. But if you look at the two specific requests for production  
4 that were signed by the Plaintiffs, they don't ask for everything in this ESI  
5 drive. They simply don't. And until we look at that ESI drive, we don't  
6 know if there's anything in there yet that's responsive or not to actual  
7 things that were served.

8 But I will say this. We took this deposition within the  
9 discovery period, on the 26th. There was time left in the discovery  
10 period. And we don't -- we're not here arguing about them serving us  
11 with a request for production which we refused to comply with. We're  
12 talking about an oral request for something that was made after the  
13 close of discovery.

14 But before I get into the argument we made in the brief; I  
15 want to say we've got this folder now. Now, it's not clear it's all relevant.  
16 It's not clear it's all, you know, related to this case. There may be  
17 attorney things in there. We're willing, though, to provide a big camera  
18 to you or the discovery commissioner. We're willing to produce it  
19 subject to a privilege log and review it. And we'd be happy to do that.  
20 And frankly, the reason we didn't, perhaps it was a little tit for tat where  
21 Mr. Gormley and I were both in trial, Mr. Gormley for three weeks, me  
22 for five weeks, in jury trials and discovery is coming up. And we asked  
23 for a short extension of discovery. Now, they had the right to tell us no.  
24 But now, discovery is over because they refused to extend it and they're  
25 making new document requests. So yeah.

1 But there wasn't really ever a sufficient meet and confer on  
2 this. We're willing to open -- reopen discovery for the limited purposes  
3 of allowing them to get into this if that's what the Court thinks is fair. But  
4 frankly, we complied with their discovery requests. And they  
5 didn't -- they knew about this within discovery. They never served a  
6 formal discovery request. There still is not a formal discovery request.  
7 There's no order from a discovery commissioner compelling us to  
8 produce it or a court order we refuse to comply with.

9 And there are -- I think sanctions are totally inappropriate,  
10 but I want to be fair here. And we're willing to have the Court order us to  
11 do what's right. But what's right isn't the fact that it's late and discovery  
12 is over, so now you got to waive all your objections and you got to waive  
13 privilege and you got to waive the general requirements and the  
14 balancing of the rules as to proportionality. Well, that's not fair, either.

15 THE COURT: Thank you, Mr. Roberts.

16 MR. ROBERTS: Thank you.

17 THE COURT: Mr. Sharp, any rebuttal?

18 MR. SHARP: Yeah. One point. I think I made this point, but I  
19 want to be clear. I mean, I've never accused Mr. Roberts or Mr. Gormley  
20 of -- I mean, I was clear in that in the motions, and I respect both of them.  
21 But the idea that United Healthcare did not know about this policy folder  
22 is just simply not credible. And usually, if that's the position they're  
23 going to take, you submit a declaration from a corporate officer  
24 explaining that. That never happened.

25 I asked the question, "The documents relied upon by the

1 United Healthcare Coverage Determination Committee to approve the  
2 proton beam radiation therapy policy." How can a reasonable person at  
3 United Healthcare not know that that triggers information in the policy  
4 folder? And why wasn't that disclosed? The fact that there was a policy  
5 folder. They knew it. I didn't hear anything during the briefing or in the  
6 argument as to why on the last day of discovery, they produced  
7 information from that folder.

8           So I appreciate that, you know, things happen, and things are  
9 overlooked. But we found out about that policy folder on October 21 or  
10 whatever that date of the deposition was. Never received a call saying,  
11 hey, sorry, we're going to produce this folder. In fact, it was the  
12 opposite. And so now, here we are, the clock was ran out. The clock ran  
13 out. I mean, Mr. Prater hasn't had the opportunity to review that folder.  
14 His opinions might be significantly different.

15           And I keep coming back to the question of, look, if the policy  
16 folder was -- contained only helpful information, it would have been  
17 produced. We know that. And I don't know, you know, Your Honor,  
18 what you're going to do. But there's a level of frustration on our part  
19 that I think it's justified, and for them to then come in and bring in  
20 experts and Dr. Bhatnagar to then come and say, hey, this is policy. It  
21 was created based upon peer-reviewed medicine. We did all this great  
22 stuff, yet the evidence that would show whether that would be true or  
23 not has been concealed by them. And that's just -- it's not the way we do  
24 business in a court of law, and it just shouldn't be allowed in this case.

25           And with that, Your Honor, I'm happy to answer any

1 questions. I apologize for my level of frustration. And as I said, I didn't  
2 intend -- and I hope my comments didn't infer that I'm suggesting Mr.  
3 Roberts or Mr. Gormley did anything wrong.

4 THE COURT: Okay. You don't have to apologize, Mr. Sharp.  
5 The Court understands.

6 MR. ROBERTS: Your Honor, I know Mr. Sharp is still going to  
7 get to go last, but he did point out that I forgot to address the late  
8 production of documents. I would like to offer that explanation to him  
9 and the Court. And that is when there were those specific requests, the  
10 ESI, my client was searched, and we produced notes from two meetings  
11 of the committee. And they came early in response to those document  
12 requests. They may have come from these particular computer drives;  
13 they may not have. They came from an ESI search.

14 But then, in Dr. Bhatnagar's deposition, she testified that  
15 there was a third meeting of the committee. We realized we only  
16 produced notes for two. We had a duty to supplement the actual  
17 requests for production which were made. So therefore, we asked for  
18 our client to look to see if there were any notes of the third meeting Dr.  
19 Bhatnagar testified to in her deposition. We identified those documents  
20 and we produced them. That's why there was the late production. It  
21 wasn't because we had some policy file on our desk and we're flipping  
22 through it looking for good information.

23 THE COURT: Thank you.

24 MR. ROBERTS: And I agree with Mr. Sharp. Discovery is not  
25 a game, and it isn't a got you. If we're trying to get justice and search for

1 the truth, then let's do that, not deny us a trial on these issues. Thank  
2 you, Your Honor.

3 THE COURT: Thank you. Mr. Sharp, do you need to put  
4 anything on the record?

5 MR. SHARP: Well, I'd only add the one point that has been  
6 made. I mean, Dr. Bhatnagar made very clear this folder was readily  
7 accessible, and that's probably repeating what I've already said. So you  
8 know, with that, Your Honor, if you have any questions, I'm happy to  
9 answer them.

10 THE COURT: The Court doesn't have any questions. On  
11 Plaintiff's motion for sanctions, it's going to be denied. And the only  
12 reason it's actually being denied is on procedural grounds because a  
13 motion to compel was not done once the deposition was taken and once  
14 everyone realized there was this policy folder with potentially tons of  
15 information in it. And so had that been done, the Court probably would  
16 have ordered sanctions in this case. But since that wasn't done  
17 procedurally, the Court feels it cannot grant the motion for sanctions.  
18 So --

19 MR. SHARP: Your Honor, can I be heard upon that issue?

20 THE COURT: You can.

21 MR. SHARP: And I appreciate that. But general  
22 inherent -- well, there's two points. First, this Court has a general  
23 inherent authority to issue sanctions based upon the conduct whether  
24 there's a motion to compel filed or not. But the problem and the  
25 prejudice to us is the clock had been run out. I mean, we get the

1 information in a best case several weeks before discovery ends, at a  
2 point where our experts have already set forth their reports. And that's  
3 the nature of the prejudice. I don't think it's -- I mean, if sanctions are  
4 warranted, sanctions are warranted. I don't think it's a procedural issue.

5 THE COURT: The problem --

6 MR. SHARP: -- I mean, I appreciate what you're coming from  
7 and you've clearly --

8 THE COURT: The problem is --

9 MR. SHARP: -- put a lot of thought in that and I understand.

10 THE COURT: It doesn't appear that Mr. Gormley or Mr.  
11 Roberts were intentionally trying to hide anything from you. And if they  
12 were, that would be a different inquiry. You know, under *MDB Trucking*,  
13 and the Court is very familiar with the Court's inherent authority. But the  
14 Court has to look at the conduct of counsel, and the conduct of Defense  
15 counsel doesn't appear to be anything but professional in this case. And  
16 once they found out about it, it was at the end of discovery.

17 But the Court feels that the Plaintiff still had a duty to request  
18 it and if it wasn't received, file the motion to compel. Because otherwise,  
19 the Court can be in a situation where everyone just straight files a  
20 motion for sanctions without any chance for Defense counsel to remedy  
21 a situation when it's not intentional by the attorneys. So the Court  
22 understands the inherent authority, but the Court just cannot award  
23 sanctions on this case because it could have been cured and your  
24 experts could have filed supplemental reports based upon new  
25 information. And the Court would have granted that request.



1 MR. SHARP: I get it, Your Honor. I just -- NRCP 1 applies to  
2 the parties. And you know, if a party withholds evidence but their  
3 attorneys don't know about it, seems -- I mean, seems to me they're still  
4 withholding evidence. But I understand and we're ready to try this case.  
5 And I respect your ruling.

6 THE COURT: Thank you. The last one is Plaintiffs' motion to  
7 file exhibits under seal. The Court is going to grant that motion. It's  
8 unopposed. Are there any other motions that the Court may have  
9 overlooked in the 34 motions that were filed?

10 MR. GORMLEY: None come to mind for me, Your Honor. I  
11 don't know if Mr. Sharp can think of any.

12 THE COURT: Thank you, Mr. Gormley.

13 MR. SHARP: Your Honor, I --

14 MR. GORMLEY: I can think of a new one right now.

15 MR. SHARP: -- I have two questions.

16 THE COURT: Two questions? Okay.

17 MR. SHARP: I have two questions and I have five more  
18 motions I'm going to file. I'm kidding.

19 THE CLERK: We have a bad connection.

20 MR. SHARP: The first question I have is can you tell us what  
21 your court times are, like when you're starting each day? Because we've  
22 been directed by the clerk to fill in our predicted schedule --

23 THE COURT: Yes. So --

24 MR. SHARP: -- for the trial. So I'm just trying to get an idea  
25 of what our times will be.

1                   THE COURT: So how long is your trial expected to last if you  
2 had full trial days?

3                   MR. SHARP: I would think -- I mean, it's probably going to  
4 go into the third week if there are punitive damages. I would hope that  
5 we -- I would hope it moves quicker, but typically I've not seen bad faith  
6 cases move quicker. I mean, I would anticipate our case, if we have jury  
7 selection on Monday, opening statements, we're probably going to  
8 finish, you know, everything moving smoothly, we'd probably finish that  
9 Monday at the end of the second week. Depending on your times, of  
10 course. I'm assuming full court days. And I would think that Defense  
11 has probably got a similar time frame.

12                  THE COURT: So you're saying five full trial days for your  
13 presentation of evidence?

14                  MR. SHARP: I would think, but I don't want to be totally, you  
15 know, I mean, five to six full trial days for our case.

16                  THE COURT: Okay. Mr. Roberts, how long do you anticipate  
17 if you had full trial days?

18                  MR. ROBERTS: I'm a little bit more pessimistic about the  
19 getting it done, just based on experience with cases like this. I would  
20 think it's going to take a full three weeks, going into a fourth week if  
21 there's a punitive phase. And part of that is based on the fact that even  
22 with the Judge limiting voir dire more than would be normal, we -- my  
23 last jury trial back in October, we had so many hardships and so many  
24 people, you know, getting sick and starting over. And I just think it may  
25 take three or four days just to pick a jury in this case, given the issues.

1 But --

2 THE COURT: How long --

3 MR. ROBERTS: -- I might be wrong. I'll try.

4 THE COURT: We're not going to spend four days picking a  
5 jury. But --

6 MR. SHARP: I'm not, either.

7 THE COURT: How long do you -- excluding voir dire, how  
8 long is the Defendant's case?

9 MR. ROBERTS: It depends on how many of our witnesses  
10 they call in their case. But I'm guessing it's about the same, five full trial  
11 days of testimony.

12 THE COURT: And if there's a punitive damage phase, how  
13 long do you think that will be?

14 MR. SHARP: Oh, a day at the most.

15 MR. ROBERTS: Maybe a --

16 MR. SHARP: I mean, a day meaning instructing the jury and  
17 concluding the punitive phase.

18 MR. ROBERTS: A couple of hours of financial testimony,  
19 instructions, and final argument, right? One day?

20 THE COURT: That goes with, then, the jury instructions and  
21 closings. You know, that can be lumped into that time. So realistically,  
22 each party needs one week. And if we add three extra days for voir  
23 dire/closings. The Court is just looking at the calendar. So we're on a  
24 civil overflow system, and you're not the oldest case this Court has, but  
25 you're actually -- of the oldest cases, you're the most complicated. So

1 the Court would actually keep your case and not put you into a different  
2 court. So this case is too complicated for you to go to another judge. So  
3 you're going to stay here no matter what. So the Court is just looking at  
4 the calendar.

5           So the stack starts on March 14th. And generally, for civil  
6 trials, we've been getting our jury panel at around 10:30 in the morning  
7 on Mondays. We asked for an earlier time, but the criminal has priority,  
8 so the criminals take the early slots. So usually ends up being around  
9 10:30, might even be 10:45 on Monday the 14th. So then, on the 15th of  
10 March -- the Court is just going to look at the calendar because Mr. Sharp  
11 asked for start times -- we probably start around 9:30 or 10:00. Maybe  
12 9:00. It depends. But no later than 10:00, probably 9:30.

13           On the 16th, we would -- we could start at 9:00 a.m. And we  
14 go until about 4:40. If we go later than 4:40 or 4:45, then the staff ends  
15 up getting overtime. So we have to just stop about 15 minutes before  
16 5:00 so there's no overtime issues. And depending on the day, we can  
17 take as short as a 30-minute break or as long as an hour lunch break,  
18 depending on how we're doing. So we can take shorter lunch breaks if  
19 we need to, if we need to speed things up. Otherwise, we can take an  
20 hour lunch break.

21           The Court is dark on the 17th and 18th, that's a Thursday,  
22 Friday. The next week, Monday, we'd start at 9:00, Tuesday, we'd start  
23 at 9:30, Wednesday, we'd start at 9:00, Thursday, we'd start at 9:30, and  
24 Friday, we'd start at 9:00. And again, we'd end at the same time, about  
25 4:45. So that's eight days.

1           The next week would be March 28th. We would start at 9:00.  
2   March 29th, we'd start at 9:00, March 30th, we'd start at 9:00. And then  
3   the 31st and April 1st, the Court is actually going to be in a conference.  
4   So that's 8, 9, 10 -- that's 11 days. And then the next week of the stack is  
5   April 4th. We'd start at 9:00. April 5th, we could start at 9:30. The Court  
6   has calendar calls. If it appears that we need that time, the Court can do  
7   something with those calendar calls. Those calendar calls are at 11:00.  
8   So we could potentially move those up and maybe start at ten o'clock  
9   that day.

10           And that would give us the 6th, start at 9:00, the 7th, start at  
11   9:30, and the 8th, start at 9:00. So that would give us 18 days. The  
12   Court's just going to recount. Sixteen days. So that should be more  
13   than enough time.

14           MR. ROBERTS: I agree, Your Honor.

15           THE COURT: The Plaintiff takes five, Defense takes five. We  
16   have three days for voir dire, a day for closings, punitives, and  
17   argument, and we have one buffer day just in case. And so that -- but we  
18   have to finish on the 8th. So it would be four weeks, four calendar  
19   weeks.

20           The Court, surprisingly, has been able to get juries to sit even  
21   for a couple week trial, so. The last jury trial the Court had, the jurors  
22   wanted to know when they could come back on Monday and sit for  
23   another jury trial. Surprisingly. So right now, we're getting batches of  
24   45 jurors at a time. So we had been getting 65 jurors at a time. It was  
25   just reduced to 45. So we could ask for more that morning, but there's

1 no guarantee we'll actually get some that morning. But we would  
2 always get more the next day. So if we don't have enough people on  
3 Monday, we'll get an extra 45 on Tuesday, no problem.

4 Also, lots of counsel want to know how we do jury selection,  
5 and Mr. Sharp, you're not in the courtroom. But if you could imagine if  
6 you walked into the courtroom, you would be in the chairs to your left  
7 and you'd be closest to the jury. If you're facing the jury, there's going to  
8 be five rows of chairs. The last two rows are furthest away from you,  
9 against the wall, and there's going to be 20 black chairs. Those are the  
10 20, and we go left to right.

11 MR. SHARP: Got it.

12 THE COURT: So Juror Number 1 is in the left-most seat, to  
13 10. And then the second row, it's 11 to 20. And we do -- we have a set of  
14 green chairs. And if the person in slot number 3 gets struck because he  
15 has to take care of his children and pick them up at 3:00 p.m., we'll put  
16 the person who's in the first green chair in that third slot.

17 And so the Court starts voir dire. And the Court asked for  
18 voir dire of what you plan on asking. You can just give me your top four  
19 areas. So the Court will incorporate that. We'll have a meeting prior to  
20 the jury coming in. So even though we're going to start at 10:30, plan on  
21 being here at 9:30, 9:15, because we'll talk about your voir dire. The  
22 Court will type it up, put it on the Elmo so the jury can see it.

23 So the Court asks how long have you been here, are you  
24 married, do you work, does your spouse work, do you have any children,  
25 do they work, have you ever been a juror before? You know, if this was

1 a car accident case, have you ever been injured in a car wreck? Have  
2 you ever been a plaintiff before? Have you ever been a defendant  
3 before? So the Court just wants your top four voir dire so the Court can  
4 start the voir dire and weed out anyone who clearly would not be able to  
5 sit as a juror in your case. And then, once the Court's done, then Plaintiff  
6 will do his voir dire. And then once Plaintiff is done, then Defense will do  
7 their voir dire.

8 MR. SHARP: So in the pretrial order when you ask for  
9 specific jury questions, is that dealing with the questions you're going to  
10 ask or what we ask?

11 THE COURT: Yeah. I just want -- yeah. Just tell me -- give  
12 me four questions you want the Court to ask.

13 MR. SHARP: Okay. Okay. That's helpful. And then, I should  
14 know this, but do we get a list of jurors before Monday? Or do we get  
15 them on Monday?

16 THE COURT: I've only received them on Monday, so.

17 MR. SHARP: Okay. That's --

18 THE COURT: And my marshal is shaking his head Monday.

19 THE MARSHAL: Yeah, Monday.

20 MR. SHARP: Yeah. And I mean, that kind of is my  
21 recollection, as well. So then, on the times, obviously, you know, I'm  
22 assuming that this is our best estimate in terms of, like, if we're trying to  
23 rotate -- and I'm sure that Mr. Roberts is the same way -- so that we have  
24 experts in blocks, so we don't have to bring them back the next day. So  
25 in other words, if I say Mr. Prader is my first witness, am I bound to that

1 or is this just the best estimate?

2 THE COURT: It's your best estimate, but I want counsel to  
3 work with each other, so you know who you're calling on Monday and  
4 Tuesday. Because otherwise --

5 MR. SHARP: Totally.

6 THE COURT: -- you know, some counsel don't get along and  
7 then they don't know. So on that first day, I'm going to meet with you  
8 and want to go over who you're calling on which day. And during  
9 calendar call, in the form you were given, I kind of want you at least  
10 loosely to estimate when you expect calling people, so then the Court  
11 can make sure that we have enough time for each person and that the  
12 other side knows who you're going to call on which day. But that's just a  
13 loose estimate. And we always have to be flexible during trial about  
14 witness availability.

15 And so if Dr. Prater is on the stand and it looks like we're not  
16 going to get done with him unless we take a 30-minute lunch break, we'll  
17 take a 30-minute lunch break so we can get Prader on and off the stand  
18 in the same day. So we'll just have to be flexible and mindful of the  
19 experts' schedules. And we take a break every 90 minutes or so.

20 MR. SHARP: Okay. I take it when -- if, for example, we take  
21 Dr. Ahmad in our case in chief, that the Defense would then in their cross  
22 include questions from their case in chief as well?

23 THE COURT: Yes. Please --

24 MR. SHARP: Okay. All right.

25 THE COURT: -- just call the witness once. Otherwise, it's



1 going to take too long.

2 MR. SHARP: Yeah. You'd be surprised. Some judges -- I  
3 agree with you. Some judges don't like doing that. So that's why I was  
4 asking.

5 THE COURT: Really?

6 MR. SHARP: Yeah. And particularly in medical malpractice  
7 cases, for some reason.

8 THE COURT: No. We do med mal here. We want them one  
9 and done.

10 MR. SHARP: Okay. And then the other issue I had, I saw that  
11 our stuff that we need to do for the pre-trial, the jury instructions, the  
12 voir dire questions, we already have given you our list of potential  
13 witnesses. That is due, I think, on -- I have it on February 18th. And I  
14 was just wondering if we would be able to get until the 22nd?

15 THE COURT: That's fine. Just email Ms. Everett and tell her  
16 that I told you you could have until the 22nd, because otherwise, she'll  
17 be --

18 MR. SHARP: Okay.

19 THE COURT: -- emailing you.

20 MR. SHARP: And then in terms with jury instructions, I  
21 would think that you want us to submit a Word form to your department  
22 directly with the jury instructions that are agreed to and ones that are  
23 disputed?

24 THE COURT: Yes. Because that way if there's any changes,  
25 Ms. Everett can make the changes here, potentially, if your staff is not

1 able to, if there's any small issues.

2 MR. SHARP: Okay. That's --

3 THE COURT: So we just need one set that's agreed upon,  
4 and then one set is Plaintiffs proposed and another set is Defendant's  
5 proposed if you can't agree. And the Court would also like one set of  
6 exhibit binders, so a joint tab, a Plaintiff tab if they're not agreed to, and  
7 a Defendant tab if they're not agreed to. So one set, because we can't  
8 have Defendant produce all the documents and then Plaintiff produce all  
9 the documents. Then we're just in a sea of documents here.

10 MR. SHARP: And do you want all those binder exhibits by  
11 February 22nd? Or is that something we can provide to you at the time  
12 of trial?

13 THE COURT: In jury trials, bring them the morning of trial.  
14 In a bench trial, it needs to be done ahead of time because the Court  
15 needs to review the documents in a bench trial ahead of time.

16 MR. SHARP: And do you prefer everything being numbered  
17 consecutively? Like, if Plaintiffs stop at 9, then Defendants go 10? Or do  
18 you want a spacing in between?

19 THE COURT: No spacing in between, but you can do the  
20 joint, if it's joint 1 through 10, and then Plaintiffs proposed 11, and then  
21 Defense proposed A.

22 MR. SHARP: Yeah. I'm just thinking in this case, there's a lot  
23 of exhibits that may come into evidence. We may not need to mark  
24 them. I mean, we can list them as potential exhibits. I'm just working on  
25 our rule 16.1, you know, pre-trial disclosures, and I'm noting that, that

1 really --

2 THE COURT: I just want you to agree to as many exhibits as  
3 possible.

4 MR. SHARP: Sure. Sure.

5 THE COURT: That way if you agree to them, you can publish  
6 them during opening statements, you can reference them as you wish.  
7 But that way, they're already admitted during trial.

8 MR. SHARP: Okay. Thank you, Your Honor. I don't have  
9 anything else.

10 THE COURT: Oh, and one verdict form, please.

11 MR. SHARP: Okay.

12 THE COURT: Obviously, the punitive damages is separate.  
13 But sometimes, people give a defense verdict form and then a plaintiff's  
14 verdict form. But we need one. We need it all together. You know,  
15 section one. If yes, then complete section two. If no, then go to the end  
16 and sign. Any other questions?

17 MR. SHARP: No.

18 MR. GORMLEY: And just real quick, that was 2/22 for the jury  
19 instructions, verdict form, voir dire questions, right? Matt, that's what  
20 you said and --

21 THE COURT: Yes.

22 MR. GORMLEY: Yes. Okay.

23 THE COURT: So just email Ms. Everett and tell her that  
24 during this hearing, you asked for more time and the Court granted it,  
25 and so it'll be due by -- is there a certain time? Noon or 5:00 p.m.?

1 MR. SHARP: 5:00 p.m. is probably easiest.

2 THE COURT: All right. 5:00 p.m. So email her and tell her  
3 5:00 p.m. on Tuesday, February 22nd, the Court agreed to that based on  
4 your schedule.

5 MR. SHARP: Okay.

6 THE COURT: And if you do end up settling, please let the  
7 Court know. I don't know if there's any chance. If there's not, you can  
8 tell me that, too.

9 MR. SHARP: Probably going to trial.

10 THE COURT: All right.

11 MR. SHARP: I don't know. Maybe that changes, but.

12 THE COURT: Okay. Well, that's good. Then the Court let the  
13 reassignment program know that all the other trials need to be  
14 reassigned. So that's helpful. Any other questions?

15 MR. SHARP: No. Thank you very much.

16 MR. GORMLEY: No, thank you. Thank you very much, Your  
17 Honor. And my kids will be glad to know you know the 8th is the first  
18 day of spring break, so.

19 THE COURT: That is why there's no trial in Courtroom 4 the  
20 week of spring break, because the Court has been snookered many times  
21 with counsel having children and unable to do anything during the week  
22 of spring break. So yeah, we won't have jurors that week. We won't  
23 have counsel available, so.

24 THE CLERK: You won't have a reporter.

25 THE COURT: We won't have a recorder available, so we're

1 not going to be in trial the week of spring break.

2 MR. GORMLEY: Very good.

3 MR. SHARP: There's nothing like setting a time deadline for  
4 a lawyer.

5 THE COURT: That's right. A time deadline. Well, it's a  
6 pleasure. It's been a pleasure, both of you. You both are very  
7 professional.

8 [Proceedings adjourned at 3:27 p.m.]

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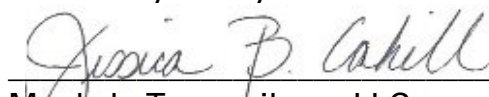
19

20 ATTEST: I do hereby certify that I have truly and correctly transcribed the  
21 audio-visual recording of the proceeding in the above entitled case to the  
22 best of my ability.

23

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