

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.

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

JOINT APPENDIX Volume 2 of 18

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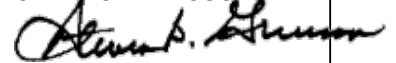
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IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF CLARK

SANDRA L. ESKEW, as Special
Administrator of the Estate of
William George Eskew,

Plaintiff,

vs.

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

Defendants.

Case No. A-19-788630-C

Dept. No. 4

JOINT PRE-TRIAL MEMORANDUM

The parties jointly submit this Pre-Trial Memorandum. On February 15, 2022, Matthew Sharp for the Plaintiff and Ryan Gormley for the Defendant discussed the provisions of EDCR 2.67 and this Court's pretrial order. The parties have a subsequent EDCR 2.67 conference scheduled for February 25, 2022 at 9:00 AM PST. Before completing the Pre-Trial Memorandum, the parties have exchanged exhibit lists as required by NRCP 16.1(a)(3). The parties have exchanged objections to exhibits and are continuing to work on the exhibits. The parties have exchanged jury instructions.

1 They have tentatively agreed to a set of instructions that are undisputed. At the EDCR 2.67, the
2 parties will continue to discuss exhibits and jury instructions and believe it will be of more assistance
3 to this Court and staff to supplement the Pre-trial Memorandum with a joint exhibit list, joint
4 undisputed jury instructions and the parties' respective proposed jury instructions. The parties plan
5 on making that submission by no later than Monday February 28, 2022 at noon.

6 **1. Brief Statement of Facts of the Case**

7 Plaintiff alleges that, on February 5, 2016, Defendants wrongfully denied a prior
8 authorization claim for proton beam therapy. Defendants deny all material facts. The contentions of
9 both parties have been set forth in the pre-trial motions.

10 **2. List of Claims**

11 Plaintiff asserts a claim for breach of the implied covenant of good faith and fair dealing.

12 **3. Affirmative Defenses**

13 Defendants have asserted the following affirmative defenses:

- 14 1. Plaintiffs' First Amended Complaint (FAC) fails to state a claim against Defendants
15 upon which relief can be granted.
- 16 2. Necessary and indispensable parties may not have been joined and/or parties may
17 have been improperly joined, including Defendant.
- 18 3. Plaintiffs have failed to mitigate their damages.
- 19 4. Defendants did not owe a duty to Plaintiffs and to the extent Defendants owed a duty
20 to Plaintiffs, did not breach that duty.
- 21 5. Defendants, at all times relevant to the allegations contained in Plaintiffs' FAC, acted
22 with reasonable care in the performance of any and all duties, if any.
- 23 6. Plaintiffs failed to exercise ordinary care, caution or prudence for their own safety,
24 thereby proximately causing or contributing to the cause of their own damages, if
25 any, through their own negligence.
- 26 7. Damages sustained by Plaintiffs, if any, were caused by the acts of third persons who
27 were not acting on the part of Defendants in any manner or form, and as such, De-
28 fendant is not liable.

- 1 8. The liability, if any, of Defendants must be reduced by the percentage of fault of oth-
- 2 ers, including Plaintiffs.
- 3 9. The Court does not possess personal jurisdiction over Defendants.
- 4 10. Plaintiffs are barred from recovering any special damages herein for failure to specif-
- 5 ically allege items of special damage claimed, pursuant to Nevada Rule of Civil Pro-
- 6 cedure 9(g).
- 7 11. Plaintiffs' claim for punitive damages cannot be sustained because an award of puni-
- 8 tive damages that is subject to no predetermined limit, such as a maximum multiple
- 9 of compensatory damages or a maximum amount of punitive damages that may be
- 10 imposed, would: (1) violate Defendants' Due Process rights guaranteed by the Fifth
- 11 and Fourteenth Amendments to the United States Constitution; (2) violate Defend-
- 12 ants' right not to be subjected to an excessive award; and (3) be improper under the
- 13 Constitution, common law and public policies of Nevada.
- 14 12. As it has been necessary for Defendants to employ the services of an attorney to de-
- 15 fend this action, Defendants seek to recover a reasonable amount of attorney fees and
- 16 costs incurred in defending this action.
- 17 13. The Plan does not provide coverage for the requested proton beam therapy treatment.
- 18 14. There is a genuine dispute of whether the Plan provides for coverage of proton beam
- 19 therapy treatment.
- 20 15. Whether the Plan provides for coverage of proton beam therapy treatment is fairly
- 21 debatable.
- 22 16. The equitable doctrines of waiver, laches, estoppel, and unclean hands bar Plaintiffs'
- 23 claims.
- 24 17. Pursuant to NRCP 11, as amended, all possible affirmative defenses may not have
- 25 been alleged herein insofar as facts were not available after reasonable inquiry upon
- 26 the filing of Defendants' Answer to Plaintiffs' FAC, and therefore, Defendants re-
- 27 serve the right to amend their Answer to allege additional affirmative defenses if sub-
- 28 sequent investigation warrants

1 **4. Abandoned Claims**

2 Plaintiff has elected not to pursue the common law claim for breach of contract and the
3 private right of action under NRS 686A.310(2). Defendants have not abandoned any affirmative
4 defenses as of this time but will continue to evaluate them prior to trial.

5 **5. Trial Exhibits**

6 The parties have exchanged exhibits as required by NRCP 16.1(a)(3) and have exchanged
7 tentative objections to those exhibits. The parties intend to supplement the Joint Pretrial
8 Memorandum with a joint exhibit list.

9 **6. Agreement Regarding Limitation or Exclusion**

10 Not applicable.

11 **7. Witnesses and Length of Testimony (Items 5-8 to the Court's Pretrial Order)**

12 The parties' list of witnesses and a good faith estimate of time have previously been provided
13 in the Joint Pretrial Information for Trial Scheduling per the Court's Request filed on February 16,
14 2022.

15 **8. Brief Statement of Issues of Law**

16 From Defendants' perspective, among other issues:

- 17 • Whether the requested proton therapy was a covered service under the insurance contract.
- 18 • Whether Defendants are liable for breach of the implied covenant of good faith and fair
19 dealing.
- 20 • Whether the Court has personal jurisdiction over United Healthcare, Inc.
- 21 • Whether Plaintiff has standing to pursue a claim for breach of the implied covenant of
22 good faith and fair dealing against United Healthcare, Inc.
- 23 • Whether the joint venture exception can apply to United Healthcare, Inc.
- 24 • Whether punitive damages are available.
- 25 • The scope of admissible evidence as it relates to the reasonable basis inquiry.

26 **9. Estimate of Time Required for Trial**

27 This Court set aside 16 trial days.

28 ///

1 **10. Others Matter for the Court's Attention**

2 **a. Proposed Jury Instructions and Verdict Forms**

3 The parties have exchanged jury instructions and proposed verdict forms. They have agreed
4 on a tentative set of stipulated jury instructions. Each side will submit proposed jury instructions
5 that are in dispute and proposed verdict forms if the parties cannot agree on a verdict form. At
6 EDCR 2.67, the parties intend to further discuss jury instructions and proposed verdict forms.

7 **b. Voir Dire Questions**

8 The Court had requested four areas from each side that the parties wish the Court to ask the
9 jury:

10 **Plaintiff:**

11 1. Has any potential juror or a close family member or friend worked in the
12 insurance industry? If so, what type of insurance? Who did he/she work for? What were
13 their responsibilities?

14 2. Has any potential juror or a close family member or friend worked in the
15 health care industry? If so, what type of work? Who did he/she work for? What were
16 their responsibilities?

17 3. Has any potential juror or a close family member been insured by United
18 Healthcare, Health Plan of Nevada or Sierra Health & Life? If so, when?

19 4. Has any potential juror or a close family member or friend served in the
20 military? If so, please describe the branch of service and how long your served?

21 Plaintiff objects to the Defendants' question 4 as one being asked by the Court. It is not a neutral
22 question. Plaintiff would suggest that an appropriate question from the Court is whether the juror
23 has an experience with health insurance that he/she feels can impact the ability to be fair and
24 impartial.

25 **Defendants:**

26 1. Have you or a close family member or friend ever been diagnosed with
27 cancer?
28

1 2. Have you or a close family member or friend ever received any form of
2 radiation therapy for cancer?

3 3. Have you or a close family member or friend ever received a recommendation
4 from a treating doctor for a medical treatment or procedure that your insurance company
5 denied coverage for?

6 4. Have you ever felt that a health insurance company treated you or a close
7 family member or friend unfairly?

8 **c. Opinion Testimony**

9 Plaintiff anticipates offering opinion testimony from Dr. Zhongxing Liao, Dr. Andrew
10 Chang, Stephen Prater, and Elliott Flood. Defendants object to certain portions of the anticipated
11 opinion testimony from each witness on the grounds of qualifications, relevance, and NRS 41.035,
12 among others and as generally discussed in the pre-trial motions.

13 Defendants anticipate offering opinion testimony from Dr. Amitabh Chandra, Dr. Andrew
14 Cohen, Dr. Gary Owens, and Dr. Parvesh Kumar. Plaintiff objects to certain portions of the
15 anticipated opinion testimony from each witness on the grounds of qualifications, relevance, and
16 NRS 41.035, among others and as generally discussed in the pre-trial motions.

17 **d. Previous Court Orders**

18 The parties will provide formal orders to this Court. With respect to Plaintiff's pretrial
19 motions, the Court has issued the following orders:

- 20 • Plaintiff's Motion for Partial Summary Judgment denied.
- 21 • Plaintiff's Motion in Limine Nos. 1, 2 and 6 were granted in part and denied in part.
- 22 • Plaintiff's Motion in Limine No. 3 was granted.
- 23 • Plaintiff's Motion in Limine No. 4 was denied as moot.
- 24 • Plaintiff's Motion in Limine No. 5 was denied.

25 With respect to Defendant's pretrial motions, the Court has issued the following orders:

- 26 • Defendants' Motion for Summary Judgment Re: Claims, Motion for Partial Summary
27 Judgment Re: Damages, Motion for Summary Judgment re: UHC were denied.

- 1 • Defendants’ Motions in Limine Nos. 1, 3, 7, 14, 17, 18, were denied in part and
2 granted in part.
3 • Defendants’ Motions in Limine Nos. 4, 6, 8, 9 10, 12, 19, 20 and 21 were denied.
4 • Defendants’ Motions in Limine Nos. 5, 11, 13, 15, 16 were granted.
5 • Defendants’ Motion in Limine No. 2 was deferred until phase 2.

6 DATED: February 22, 2022

DATED: February 22, 2022

7 MATTHEW L. SHARP, LTD.

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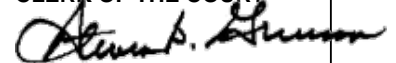
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IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF CLARK

SANDRA L. ESKEW, as Special
Administrator of the Estate of
William George Eskew,

Plaintiff,

Case No. A-19-788630-C

Dept. No. 4

vs.

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

Defendants.

JOINT PRE-TRIAL MEMORANDUM (FIRST SUPPLEMENT)

The parties jointly submit this Pre-Trial Memorandum (First Supplement). On February 25, 2022, Matthew Sharp and Douglas Terry for the Plaintiff and Ryan Gormley and Lee Roberts for Defendants held the EDCR 2.67 conference. The parties supplement their Joint Pretrial Memorandum as follows:

1 **Exhibits:**

2 The parties continue to work on the joint exhibit list. Exhibit 1 is Plaintiff's list of exhibits to
3 date. Exhibit 2 is the Defendants list of exhibits to date.

4 **Jury Instructions:**

5 Exhibit 3 is the agreed to jury instructions with citations. Exhibit 4 is the agreed to jury
6 instructions without citations. Exhibit 5 is the Plaintiff's additional proposed jury instruction with
7 citations. Exhibit 6 is Defendant's additional proposed jury instructions with citations. Exhibit 7 is
8 Plaintiff's proposed verdict forms for phase one and two. Exhibit 8 is Defendants' proposed verdict
9 forms for phase one and two.

10 DATED: February 28, 2022

DATED: February 28, 2022

11 MATTHEW L. SHARP, LTD.

WEINBERG WHEELER HUDGINS
GUNN & DIAL LLC

12
13 /s/ Matthew L. Sharp
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An employee of Matthew L. Sharp, Ltd.

EXHIBIT 1

PLAINTIFF'S TRIAL EXHIBITS

The following documents and/or exhibits are expected to be presented at trial:

Exhibit No.	Description	Objection
1.	William Eskew SHL Membership card	
2.	Eskew Insurance Policy, Eskew 00001-52	R
3.	UHC Insurance Policy No. 1, SHL 00001-98	F, R, C, MIL
4.	UHC Insurance Policy No. 2, SHL 02587-2688	
5.	Proton Beam Therapy File, SHL 00320-378	
6.	Radiation Planning Images, UTMDACC 00035-36	C
7.	Radiation Plan Summary Sheet, UTMDACC 00905-909	C
8.	External Beam Planning (Dose Volume Histogram), UTMDACC 00102	C
9.	Radiation Plan Evaluation (with Images), UTMDACC 00108	C
10.	Radiation Plan Evaluation (with Images), UTMDACC 00109	C
11.	Summary of Comparison of Radiation Modalities	F, R, C
12.	Denial Library Text, SHL 02536	R
13.	MBO Partners Invoice, MB 00563	
14.	The New York Proton Center Material (Eskew 485-795)	R
15.	Photographs of William Eskew per Judge Krall's Order	F, R, MIL

The following documents and/or exhibits may be offered if the need arises:

Exhibit No.	Description	Objection
16.	Holland-Williams Text Messages, HW 00115-118	F, H, R, MIL, C
17.	Holland-Williams Text Messages, HW 00122-131	F, H, R, MIL, C
18.	Holland-Williams Text Messages, HW 00135-141	F, H, R, MIL, C
19.	Holland-Williams Text Messages, HW 00148-151	F, H, R, MIL, C
20.	United Healthcare Policy & Procedure – SHL001915-1920)	
21.	Utilization Management Policy, SHL 00512-586	
22.	UHC Proton Beam Radiation Therapy Policy;	R
23.	UHC Proton Beam Radiation Therapy Medical Policy No 2011T0132K, Effective Date 12/01/2011, SHL 01755-1774	R
24.	UHC Proton Beam Radiation Therapy Medical Policy No. 2012T0132L, Effective Date 12/01/2012, SHL 01775-1796	R
25.	UHC Proton Beam Radiation Therapy Medical Policy No. 2013T0132M, Effective Date 04/01/2013, SHL 01797-1817	R
26.	UHC Proton Beam Radiation Therapy Medical Policy No. 2013T0132M, Effective Date 04/01/2013, SHL 01818-1839	R
27.	UHC Medical Policy, Proton Beam Radiation Therapy, Policy No. 2014T0132O, Effective Date 01/01/2014, SHL 00587-0608	R

28.	UHC Medical Policy, Proton Beam Radiation Therapy, Policy No. 2014T90132P, Effective Date 06/01/2014; SHL 00609-0630	R
29.	UHC Medical Policy, Proton Beam Radiation Therapy, Policy No. 2017T90132Q, Effective Date 09/01/2014, SHL 00631-0655	R
30.	UHC Medical Policy, Proton Beam Radiation Therapy, Policy No. 2015T0132R, Effective Date 01/01/2015, SHL 00656-0678	R
31.	UHC Medical Policy, Proton Beam Radiation Therapy, Policy No. 2015T0132S, Effective Date 10/01/2015, SHL 00679-0702	R
32.	UHC Medical Policy, Proton Beam Radiation Therapy, Policy No. 2015T0132T, Effective Date 12/01/2015, SHL 00703-0728	
33.	UHC Medical Policy, Proton Beam Radiation Therapy, Policy No. 2016T0132U, Effective Date 10/01/2016, SHL 00729-0747	R
34.	UHC Medical Policy, Proton Beam Radiation Therapy, Policy No. 2016T0132V, Effective Date 11/01/2016, SHL 00748-0766	R
35.	UHC Medical Policy, Proton Beam Radiation Therapy, Policy No. 2017T0132W, Effective Date 09/01/2017, SHL 00767-0786	R
36.	UHC Medical Policy, Proton Beam Radiation Therapy, Policy No. 2018T0132X, Effective Date 01/01/2018, SHL 00787-0805	R
37.	UHC Medical Policy, Proton Beam Radiation Therapy, Policy No. 2018T0132Y, Effective Date 03/01/2018, SHL 00806-0823	R
38.	UHC Medical Policy, Proton Beam Radiation Therapy, Policy No. 2018T0132Z, Effective Date 07/01/2018, SHL 00824-0842	R
39.	UHC Medical Policy, Proton Beam Radiation Therapy, Policy No. 2019T0132AA, Effective Date 01/01/2019, SHL 00843-0861	R
40.	UHC Medical Policy, Proton Beam Radiation Therapy, Policy No. 2019T0132AA, Effective Date 01/01/2019, SHL 00862-0881	R
41.	UHC Medical Policy, Proton Beam Radiation Therapy, Policy No. 2019T0132AA, Effective Date 01/01/2019, SHL 00082-0901	R
42.	SHL/HPN Proton Beam Radiation Therapy Policy;	R
43.	SHL Protocol, Proton Beam Radiation Therapy, Protocol ONC004, Effective Date 07/08/2013, SHL 01113-1136	R
44.	SHL Protocol, Proton Beam Radiation Therapy, Protocol ONC004, Effective Date 03/10/2014, SHL 01137-1161	R
45.	SHL Protocol, Proton Beam Radiation Therapy, Protocol ONC004, Effective Date 08/11/2014, SHL 01162-1185	R
46.	SHL Protocol, Proton Beam Radiation Therapy, Protocol ONC004, Effective Date 11/10/2014, SHL 01186-1212	R
47.	SHL Protocol, Proton Beam Radiation Therapy, Protocol ONC004, Effective Date 03/01/2015, SHL 01213-1239	R

48.	SHL Protocol, Proton Beam Radiation Therapy, Protocol ONC004, Effective Date 12/01/2015, SHL 01240-1270	
49.	SHL Protocol, Proton Beam Radiation Therapy, Protocol ONC004, Effective Date 02/01/2016, SHL 01271-1303	R
50.	SHL Protocol, Proton Beam Radiation Therapy, Protocol ONC004, Effective Date 12/01/2016, SHL 01304-1337	R
51.	SHL Protocol, Proton Beam Radiation Therapy, Protocol ONC004, Effective Date 01/11/2017, SHL 01338-1370	R
52.	SHL Protocol, Proton Beam Radiation Therapy, Protocol ONC004, Effective Date 04/01/2019, SHL 01371-1397	R
53.	Proton Beam Radiation Therapy Evidence Grid, SHL 01868	C
54.	Proton Beam Radiation Therapy Data, SHL 02723	C
55.	MBO Contractor Agreement, SHL 01660-1664	R
56.	MBO/Physician Legal Contractor Agreement, MBO 00490-520	R
57.	2011-08-20 Independent Contractor Referral, MBO 00430-431	R, H
58.	2016-11-16 Independent Contractor Referral, SHL 01845-1846	R, H
59.	2017-01-05 Independent Contractor Referral, MBO 00449-450	R, H
60.	2017-02-28 Independent Contractor Referral, SHL 01847-1848	R, H
61.	2017-05-01 Independent Contractor Referral, SHL 01851-1852	R, H
62.	2018-02-29 Independent Contractor Referral Template, SHL 01852-1853, MBO 00438-439	R, H
63.	MBO Work Orders, MBO 00561	R
64.	Dr. Ahmad Excel Spreadsheet, SHL 01840	R
65.	Dr. Ahmad MBO Ledger, MBO 00236-418	R
66.	UHC/MBO Master Services Agreement, SHL 01679-1754	R
67.	UTMDACC 00046	R, C
68.	UTMDACC 00393-394	
69.	UTMDACC 24-229	
70.	MPAC Agenda 9/13/16 (SHL 2716-2717)	R
71.	MPAC Minutes 9/13/16 (SHL 2718-2722)	R
72.	Proton Beam Radiation Therapy Data Summary (SHL 2723)	Same as #10 C
73.	UHC Responses to Plaintiffs' Fourth Set of Requests for Production	F, H, R, ID
74.	2019 Annual Statement for Sierra Health (Eskew 1387-1458)	F, H, R
75.	2020 Annual Statement for Sierra Health (Eskew 1459-1561)	F, H, R
76.	AM Best's Credit Report for UnitedHealthcare (Eskew 1562-1612)	F, H, R
77.	2015-2020 10K's for UnitedHealth Group (Eskew 1613-2321)	F, H, R
78.	UHC IMRT Medical Policy:	R
79.	UHC Medical Policy, Intensity-Modulated Radiation Therapy, Policy No. 2013T0407L, Effective Date 12/1/13 (SHL 902-29)	R

80.	UHC Medical Policy, Intensity-Modulated Radiation Therapy, Policy No. 2014T0407M, Effective Date 7/1/14 (SHL 930-57)	R
81.	UHC Medical Policy, Intensity-Modulated Radiation Therapy, Policy No. 2015T0407N, Effective Date 1/1/15 (SHL 958-77)	R
82.	UHC Medical Policy, Intensity-Modulated Radiation Therapy, Policy No. 2015T0407O, Effective Date 8/1/15 (SHL 978-96)	R
83.	UHC Medical Policy, Intensity-Modulated Radiation Therapy, Policy No. 2016T0407P, Effective Date 12/1/13 (SHL 997-12)	R
84.	New York Proton Center Website last accessed February 16, 2021	F, H, R, ID

EXHIBIT 2

DEFENDANTS' LIST OF EXHIBITS

R = Relevance

A = Authenticity

H = Hearsay

D = Duplicative

No.	Description	Bates Nos.	Use	Obj
1.	Protocol ONC006-Fecal DNA Testing	SHL 0311-0319	May	
2.	Proton Beam Request File, Case No. 160340910	SHL 320-378	Exp.	
3.	Case History, Case No. 160360744	SHL 393-397	May	
4.	Correspondence, Reference No. 160360744	SHL 478	May	
5.	Utilization Management Policy, HCO 100.00.00, Revision Date 10/22/2015	SHL 512-586	May	R
6.	UHC Medical Policy, Proton Beam Radiation Therapy, Policy No. 2014T0132O, Effective Date 01/01/2014	SHL 587-608	May	R
7.	UHC Medical Policy, Proton Beam Radiation Therapy, Policy No. 2014T90132P, Effective Date 06/01/2014	SHL 609-630	May	R
8.	UHC Medical Policy, Proton Beam Radiation Therapy, Policy No. 2017T90132Q, Effective Date 09/01/2014	SHL 631-655	May	R
9.	UHC Medical Policy, Proton Beam Radiation Therapy, Policy No. 2015T0132R, Effective Date 01/01/2015	SHL 656-678	May	R
10.	UHC Medical Policy, Proton Beam Radiation Therapy, Policy No. 2015T0132S, Effective Date 10/01/2015	SHL 679-702	May	R
11.	UHC Medical Policy, Proton Beam Radiation Therapy, Policy No. 2015T0132T, Effective Date 12/01/2015	SHL 703-728	Exp.	R
12.	UHC Medical Policy, Proton Beam Radiation Therapy, Policy No. 2016T0132U, Effective Date 10/01/2016	SHL 729-747	May	R
13.	UHC Medical Policy, Proton Beam Radiation Therapy, Policy No. 2016T0132V, Effective Date 11/01/2016	SHL 748-766	May	R
14.	UHC Medical Policy, Proton Beam Radiation Therapy, Policy No. 2017T0132W, Effective Date 09/01/2017	SHL 767-786	May	R

No.	Description	Bates Nos.	Use	Obj
15.	UHC Medical Policy, Proton Beam Radiation Therapy, Policy No. 2018T0132X, Effective Date 01/01/2018	SHL 787-805	May	R
16.	UHC Medical Policy, Proton Beam Radiation Therapy, Policy No. 2018T0132Y, Effective Date 03/01/2018	SHL 806-823	May	R
17.	UHC Medical Policy, Proton Beam Radiation Therapy, Policy No. 2018T0132Z, Effective Date 07/01/2018	SHL 824-842	May	R
18.	UHC Medical Policy, Proton Beam Radiation Therapy, Policy No. 2019T0132AA, Effective Date 01/01/2019	SHL 843-861	May	R
19.	UHC Medical Policy, Proton Beam Radiation Therapy, Policy No. 2019T0132AA, Effective Date 01/01/2019	SHL 862-881	May	R
20.	UHC Medical Policy, Proton Beam Radiation Therapy, Policy No. 2019T0132AA, Effective Date 01/01/2019	SHL 882-901	May	R
21.	UHC Medical Policy, Intensity-Modulated Radiation Therapy, Policy No. 2016T0407P, Effective Date 02/01/2016	SHL 997-1012	May	R
22.	SHL Protocol, Proton Beam Radiation Therapy, Protocol ONC004, Effective Date 07/08/2013	SHL 1113-1136	May	R
23.	SHL Protocol, Proton Beam Radiation Therapy, Protocol ONC004, Effective Date 03/10/2014	SHL 1137-1161	May	R
24.	SHL Protocol, Proton Beam Radiation Therapy, Protocol ONC004, Effective Date 08/11/2014	SHL 1162-1185	May	R
25.	SHL Protocol, Proton Beam Radiation Therapy, Protocol ONC004, Effective Date 11/10/2014	SHL 1186-1212	May	R
26.	SHL Protocol, Proton Beam Radiation Therapy, Protocol ONC004, Effective Date 03/01/2015	SHL 1213-1239	May	R
27.	SHL Protocol, Proton Beam Radiation Therapy, Protocol ONC004, Effective Date 12/01/2015	SHL 1240-1270	May	R
28.	SHL Protocol, Proton Beam Radiation Therapy, Protocol ONC004, Effective Date 02/01/2016	SHL 1271-1303	May	R
29.	SHL Protocol, Proton Beam Radiation Therapy, Protocol ONC004, Effective Date 12/01/2016	SHL 1304-1337	May	R
30.	SHL Protocol, Proton Beam Radiation Therapy, Protocol ONC004, Effective Date 01/11/2017	SHL 1338-1370	May	R

No.	Description	Bates Nos.	Use	Obj
31.	SHL Protocol, Proton Beam Radiation Therapy, Protocol ONC004, Effective Date 04/01/2019	SHL 1371-1397	May	R
32.	SHL Protocol, Intensity-Modulated Radiation Therapy, Protocol RAD026, Effective Date 10/01/2015	SHL 1492-1514	May	R
33.	Response of Mountainview Hospital to Subpoena Duces Tecum	MV 1-3536	May	R
34.	Response of Walmart Pharmacy to Subpoena Duces Tecum	WP 1-24	May	R
35.	Response of Bone & Joint / Dr. Manning to Subpoena Duces Tecum	BJM 1-98	May	R
36.	Response of Hand Center of Nevada to Subpoena Duces Tecum	HCN 1-16	May	R
37.	Response of Clark County Coroner to Subpoena Duces Tecum, no records	CCC 1-13	May	R
38.	Response of B. Berelowitz, MD to Subpoena Duces Tecum	BB 1-64	May	R
39.	Response of Comprehensive Cancer Center to Subpoena Duces Tecum	COMP 1-149	Exp.	
40.	Response of Nevada Cardiology Associates to Subpoena Duces Tecum	NCA 1-49	May	R
41.	Response of Kidney Specialists of So. Nevada to Subpoena Duces Tecum	KSSN 1-90	May	R
42.	Response of Internal Medicine Specialists to Subpoena Duces Tecum	IMS 1-20	May	R
43.	Response of Steinberg Diagnostic Medical Imaging to Subpoena Duces Tecum. Disk of films available upon request.	SDMI 1-21	May	R
44.	Agreement between MBO Partners, Inc. and Physician & Legal Consultants	SHL 1660-1664	May	
45.	Dr. Ahmad Affirmative Statement about Incentives Records	SHL 1665-1675	May	
46.	Job Description	SHL 1676-1678	May	
47.	MD Anderson - Medical Records (Response of MD Anderson to Subpoena Duces Tecum)	UTMDACC 00001-18	May	R

No.	Description	Bates Nos.	Use	Obj
48.	MD Anderson - Patient Radiation Prescription (Response of MD Anderson to Subpoena Duces Tecum)	UTMDACC 00019	May	
49.	MD Anderson - Clinical Treatment Plan (Response of MD Anderson to Subpoena Duces Tecum)	UTMDACC 00020-21	May	
50.	MD Anderson - Simulation Complex (Response of MD Anderson to Subpoena Duces Tecum)	UTMDACC 00022-23	May	
51.	MD Anderson - Radiation Oncology IMRT Planning Note (Response of MD Anderson to Subpoena Duces Tecum) (some scrambled text)	UTMDACC 00024-100	May	
52.	MD Anderson - Radiation Oncology Proton Treatment Planning Note (Response of MD Anderson to Subpoena Duces Tecum) (some scrambled text)	UTMDACC 00101-229	May	
53.	MD Anderson - Appeals Policy (Response of MD Anderson to Subpoena Duces Tecum)	UTMDACC 00230-235	May	R H
54.	MD Anderson - Patient Notes (Response of MD Anderson to Subpoena Duces Tecum)	UTMDACC 00236-248	May	R H
55.	MD Anderson - Organizational Chart (Response of MD Anderson to Subpoena Duces Tecum)	UTMDACC 00249	May	R H
56.	MD Anderson - Clinical Program Manager Job Description (Response of MD Anderson to Subpoena Duces Tecum)	UTMDACC 00250-252	May	R H
57.	MD Anderson - Dr. Liao's CV (Response of MD Anderson to Subpoena Duces Tecum)	UTMDACC 00253-323	May	
58.	MBO – Ahmad Full Ledger Details (received from MBO)	MBO0001-79	May	
59.	MBO – Ahmad Full Time Review Details (received from MBO)	MBO00080-235	May	
60.	MBO – Ahmad Ledger for 3/1/16-3/31/16 (received from MBO)	MBO000333	May	
61.	MBO – Ahmad Requalification Survey (received from MBO)	MBO000419-422	May	R
62.	MBO – Ahmad Work Order Update (received from MBO)	MBO000423-429	May	R
63.	MBO – Ahmad American Background Summary Sheet (received from MBO)	MBO000489	May	R

No.	Description	Bates Nos.	Use	Obj
64.	MBO – Ahmad Vendor Services Contractor Agreement, signed July 28, 2017 (received from MBO)	MBO000490-520	May	
65.	MBO – Ahmad Amendment No. 1 to the Contractor Agreement, signed October 4, 2011 (received from MBO)	MBO000521-524	May	
66.	MBO – Ahmad Contractor Agreement (received from MBO)	MBO000525-529	May	
67.	MBO – Ahmad Contractor Questionnaire (received from MBO)	MBO000542-544	May	
68.	MBO – Ahmad Work Order (received from MBO)	MBO000561	May	
69.	Master Services Agreement between United HealthCare Services, Inc. and MBO Partners, Inc. (“MSA”) (confidential and redacted)	SHL 1679-1721	May	
70.	Amendment One to MSA (confidential and redacted)	SHL 1722-1723	May	
71.	Addendum A to MSA (confidential)	SHL 1724-1725	May	
72.	Amendment Two to MSA (confidential)	SHL 1726-1727	May	
73.	Amendment Three to MSA (confidential)	SHL 1728-1729	May	
74.	Amendment Four to MSA (confidential)	SHL 1730-1737	May	
75.	Amendment Five to MSA (confidential)	SHL 1738-1741	May	
76.	Amendment Six to MSA (confidential)	SHL 1742-1744	May	
77.	Amendment Seven to MSA (confidential)	SHL 1745-1747	May	
78.	Amendment Eight to MSA (confidential)	SHL 1748	May	
79.	Amendment Nine to MSA (confidential and redacted)	SHL 1749-1751	May	
80.	Amendment Ten to MSA (confidential and redacted)	SHL 1752-1754	May	
81.	UHC Medical Policy, Proton Beam Radiation Therapy, Policy No. 2011T0132K, Effective Date 12/01/2011	SHL 1755-1774	May	R
82.	UHC Medical Policy, Proton Beam Radiation Therapy, Policy No. 2012T0132L, Effective Date 12/1/2012	SHL 1775-1796	May	R
83.	UHC Medical Policy, Proton Beam Radiation Therapy, Policy No. 2013T0132M, Effective Date 04/01/2013	SHL 1797-1817	May	R

No.	Description	Bates Nos.	Use	Obj
84.	UHC Medical Policy, Proton Beam Radiation Therapy, Policy No. 2013T0132N, Effective Date 05/01/2013	SHL 1818-1839	May	R
85.	Dr. Shamooun Ahmad_2015-2019 (Excel Spreadsheet) (confidential)	SHL 1840	May	
86.	Fieldglass Contractor Data – Dr. Ahmad (Excel Spreadsheet) (confidential)	SHL 1841	May	R
87.	Worker_Invoice_Detail_Standard (Excel Spreadsheet) (confidential)	SHL 1842	May	R
88.	Independent Contractor Referral Template, dated 09/01/2011 (confidential)	SHL 1843-1844	May	
89.	Independent Contractor Referral Template, dated 11/01/2016 (confidential)	SHL 1845-1846	May	
90.	Independent Contractor Referral Form, dated 02/28/2017 (confidential)	SHL 1847-1848	May	
91.	Independent Contractor Referral Form, dated 02/28/2017 (confidential)	SHL 1849-1850	May	
92.	Independent Contractor Referral Form, dated 05/01/2017 (confidential)	SHL 1851-1852	May	
93.	Independent Contractor Referral Form, dated 02/29/2018 (confidential)	SHL 1853-1854	May	
94.	MTAC August 6, 2015 Meeting, Agenda (confidential)	SHL 1855-1857	May	R
95.	MTAC August 6, 2015 Meeting, Minutes (confidential)	SHL 1858-1867	May	R
96.	MTAC August 6, 2015 Meeting, Evidence Grid (Excel Spreadsheet) (confidential)	SHL 1868	May	
97.	MTAC August 6, 2015 Meeting, Draft Proton Beam Radiation Therapy v4 (confidential)	SHL 1869-1896	May	R
98.	MTAC August 6, 2015 Meeting, Proton Beam Radiation Therapy Status Form v4 (confidential)	SHL 1897-1900	May	R
99.	MPIA August 11, 2015 Meeting, Agenda (confidential)	SHL 1901-1902	May	R
100.	MPIA August 11, 2015 Meeting, Minutes, Attachment A (Excel Spreadsheet) (confidential)	SHL 1903	May	R

No.	Description	Bates Nos.	Use	Obj
101.	MPIA August 11, 2015 Meeting, Attachment B (Excel Spreadsheet) (confidential)	SHL 1904	May	R
102.	Response of Summerlin Hospital to Subpoena Duces Tecum	SH 1-539	May	R
103.	MD Anderson – Medical Records (First Supplemental Response of MD Anderson to Subpoena Duces Tecum)	UTMDACC Med 00001-624	May	R
104.	MD Anderson – Medical Literature (First Supplemental Response of MD Anderson to Subpoena Duces Tecum)	UTMDACC 00324-388	May	R H
105.	MD Anderson – Opening Article (First Supplemental Response of MD Anderson to Subpoena Duces Tecum)	UTMDACC 00389	May	R H
106.	HW – William G. Eskew Insurance Card (Response of Holland-Williams, Inc. to Subpoena)	HW000002	May	D
107.	HW – William G. Eskew Insurance Application (Response of Holland-Williams, Inc. to Subpoena)	HW000003-6	May	R
108.	HW – William G. Eskew Agent/Agency Agreement (Response of Holland Williams, Inc. to Subpoena)	HW000008-18	May	
109.	Invoice 723599 (received from MBO)	MBO 563	May	
110.	MD Anderson – Emails (Second Supplemental Response of MD Anderson to Subpoena)	UTMDACC 00390-395	May	R H
111.	MD Anderson – First Amendment to Management Services Agreement and Consent of Limited Partners of the Proton Therapy Center-Houston LTD., LLP (Second Supplemental Response of MD Anderson to Subpoena)	UTMDACC 00396-398	May	R H
112.	MD Anderson – Entity Chart (Second Supplemental Response of MD Anderson to Subpoena)	UTMDACC 00399	May	R H
113.	MD Anderson – Entity Chart, updated August 6, 2015 (Second Supplemental Response of MD Anderson to Subpoena)	UTMDACC 00400	May	R H
114.	MD Anderson – Limited Partnership Agreement of The Proton Therapy Center – Houston LTD. LLP By and Among PTC – Houston Management, LP, PTC – Houston Investors, LLC, and The University of Texas M.D. Anderson Cancer Center, dated December 19, 2002 (Second Supplemental Response of MD Anderson to Subpoena)	UTMDACC 00401-494	May	R H

No.	Description	Bates Nos.	Use	Obj
115.	MD Anderson – PTC – Houston Investors, LLC Limited Liability Company Agreement, dated December 19, 2002 (Second Supplemental Response of MD Anderson to Subpoena)	UTMDACC 00495-537	May	R H
116.	MD Anderson – Amended and Restated Limited Partnership Agreement of The Proton Therapy Center-Houston LTD., LLP By and Among PTC – Houston Management, LP, PTC – Houston Investors, LLC, and The University of Texas M.D. Anderson Cancer Center, dated March 30, 2010 (Second Supplemental Response of MD Anderson to Subpoena)	UTMDACC 00538-601	May	R H
117.	MD Anderson – PUT Agreement (Second Supplemental Response of MD Anderson to Subpoena)	UTMDACC 00602-614	May	R H
118.	MD Anderson – Cash Participation Rights Agreement (Second Supplemental Response of MD Anderson to Subpoena)	UTMDACC 00615-621	May	R H
119.	MD Anderson – Agreement Among Members (Second Supplemental Response of MD Anderson to Subpoena)	UTMDACC 00622-638	May	R H
120.	MD Anderson – Investment Agreement (Second Supplemental Response of MD Anderson to Subpoena)	UTMDACC 00639-659	May	R H
121.	MD Anderson – Utilization Rates Information (Second Supplemental Response of MD Anderson to Subpoena)	UTMDACC 00808	May	R H
122.	MD Anderson – Utilization Rates Information (Second Supplemental Response of MD Anderson to Subpoena)	UTMDACC 00809	May	R H
123.	MD Anderson – Utilization Rates Information (Second Supplemental Response of MD Anderson to Subpoena)	UTMDACC 00810	May	R H
124.	MD Anderson – Medical Records (contains unscrambled versions of the documents previously produced as UTMDACC 147-158, 209-220, and 226-228) (Third Supplemental Response of MD Anderson to Subpoena)	UTMDACC 00811-913	May	
125.	MD Anderson – Clinical Rationale Recommendations (Third Supplemental Response of MD Anderson to Subpoena)	UTMDACC 00914-917	May	R H
126.	MD Anderson – Huddle Guidelines (Third Supplemental Response of MD Anderson to Subpoena)	UTMDACC 00918-921	May	R H

No.	Description	Bates Nos.	Use	Obj
127.	MD Anderson – P2P Decision Tree (Third Supplemental Response of MD Anderson to Subpoena)	UTMDACC 00922	May	R H
128.	MD Anderson – Peer to Peer Packet Cover Page (Third Supplemental Response of MD Anderson to Subpoena)	UTMDACC 00923	May	R H
129.	June 20, 2018 Article in Journal of Clinical Oncology by Dr. Feng-Ming (Spring) Kong	SHL1905-1909	May	R H A
130.	July 1, 2018 Article in Journal of Clinical Oncology by Dr. Zhongxing Liao and Radhe Mohan	SHL1910-1911	May	R H
131.	MD Anderson – Proton Machine Information (Fourth Supplemental Response of MD Anderson to Subpoena)	UTMDACC 00924-925	May	R H
132.	UHC Policy & Procedure, Hierarchy of Clinical Evidence, effective date 3/15/13 (operative as of February 2016)	SHL1912-1914	Exp.	R
133.	UHC Policy & Procedure, Hierarchy of Coverage Review, effective date 6/5/13 (operative as of February 2016)	SHL1915-1920	Exp.	
134.	UHC Policy & Procedure, New Medical Policy Development, effective date 5/7/15 (operative as of February 2016)	SHL1921-1924	Exp.	R
135.	UHC Policy & Procedure, Medical Policy Update and Revision, effective date 5/7/15 (operative as of February 2016)	SHL1925-1928	Exp.	R
136.	UHC Policy & Procedure, Medical Technology Assessment Committee – Function and Structure, effective date 5/7/15 (operative as of February 2016)	SHL1929-1932	Exp.	R
137.	UHC Policy & Procedure, Specialty Society Review of Draft Medical Policies, effective date 5/7/15 (operative as of February 2016)	SHL 1933-1934	Exp.	R
138.	Standards and Guidelines for the Accreditation of Health Plans, NCQA (confidential)	SHL 1935-2534	May	R
139.	Accreditation Summary Report, dated 8/25/16 (confidential)	SHL 2535	May	R
140.	Spreadsheet of Denial Text (Excel Spreadsheet) (confidential (redacted))	SHL 2536	May	

No.	Description	Bates Nos.	Use	Obj
141.	Utilization Management Department 2016 Program Description	SHL 2537-2586	May	R
142.	William G. Eskew Plan Benefit Information (includes Agreement of Coverage with no typographical errors)	SHL 2587-2688	Exp.	
143.	Sample Delivery Postcard	SHL 2689-2690	May	R
144.	HW – Text Messages (Second Supplemental Response of Holland-Williams, Inc. to Subpoena)	HW000049-104	May	R
145.	HW – Text Messages (Second Supplemental Response of Holland-Williams, Inc. to Subpoena)	HW 000105-158	May	R for some
146.	Response of PTC Remainco to Subpoena	PTCR 1-3	May	R H
147.	Houston Chronicle Article, dated October 23, 2005	SHL 2691-2713	May	R H
148.	Response of MD Anderson to Subpoena, dated November 8, 2021	MDA 1-4	May	R H
149.	1/11/2017 Email Chain regarding Dr. Ahmad IRR testing (confidential)	SHL 2714-2715	May	R
150.	MPAC Agenda, dated 9/13/2016 (confidential)	SHL 2716-2717	May	R
151.	MPAC Minutes, dated 9/13/2016 (confidential)	SHL 2718-2722	May	R
152.	Proton Beam Radiation Therapy Data Summary, dated 9/13/2016 (confidential and redacted) (produce in native format)	SHL 2723	May	R
153.	William Eskew, Individual Applicant Enrollment Form, dated 12/11/15	SHL 2724-2726	May	R

2. Documents Disclosed by Plaintiffs

No.	Description	Bates Nos.	Use	Obj
166.	Insurance Policy	Eskew-000001-41	May	
167.	Schedule of Benefits	Eskew-000042-51	May	

No.	Description	Bates Nos.	Use	Obj
168.	Insurance Card	Eskew-000052	May	
169.	Letter dated January 20, 2016	Eskew-000054	May	R
170.	Urgent Letter of Medical Necessity dated February 3, 2016	Eskew-MD Anderson-000146-147	May	D
171.	Letter dated February 5, 2016 – Proton	Eskew-000055-57	May	D
172.	Letter dated February 5, 2016 – IMRT	Eskew-000058	May	D
173.	Letter dated February 12, 2016 -Chemo	Eskew-000059-60	May	R
174.	Letter dated February 12, 2016 – Chemo	Eskew-000061-62	May	R
175.	Sierra HLC Financials	Eskew-000216-217	May	
176.	Sierra HLC Company Overview	Eskew-000218-220	May	
177.	Sierra HLC NAIC Listing	Eskew-000221-223	May	
178.	Medical records from Galen Kim, MD	Eskew-Dr Kam-000001-55	May	R
179.	Medical records from James Manning, MD	Eskew-Dr Manning-000001-78	May	R
180.	Medical records from Clark S. Jean, MD	Eskew-Dr. Jean-000001-124	May	R
181.	Medical records from Brian Berelowitz, MD	Eskew- Dr Berelowitz-000001-63	May	R
182.	Medical records from George Gluck, MD	Eskew-Dr Gluck-000001-20	May	R
183.	Medical records from Robert Whipper, MD	Eskew-Dr. Whipper-000001-18	May	R
184.	Medical records from Vincent Yang, MD	Eskew-Dr Yang-000001-81	May	R

No.	Description	Bates Nos.	Use	Obj
185.	Medical records from MD Anderson	Eskew-MD Anderson-000001-153	Exp.	R
186.	Radiation Oncology Records from MD Anderson	Eskew-MD Anderson-000154-261	May	R
187.	Medical records from Mountain View Hospital	Eskew-Mtn View Hosp-000001-1637	May	R
188.	Radiology records from Mountain View Hospital	Eskew-Mtn View Hosp-Radiology Reports-000001-44	May	R
189.	Medical records from Mountain View Hospital for DOS April 22, 2014 and April 26, 2014	Eskew-Mtn View Hosp-1638-2486	May	R
190.	Medical records from Foad Moazez, MD	Eskew-Dr Moazez-000001-39	May	R
191.	Pharmacy records of Optum RX	Eskew-Optum RX-000001-23	May	R
192.	Medical records from Steinberg Diagnostic	Eskew-Steinberg Diagnostic-000001-6	May	R
193.	Medical records from Summerlin Hospital	Eskew-Summerlin Hosp-000001-491	May	R
194.	Summerlin Hospital Visit Care Summaries	Eskew-Summerlin Hosp 492-578	May	R
195.	Summerlin Hospital Radiology	Eskew-Summerlin Hosp 579-652	May	R
196.	Summerlin Hospital Docs	Eskew-Summerlin Hosp 653-744	May	R
197.	Summerlin Hospital Health Profile	Eskew-Summerlin Hosp 745-747	May	R
198.	Pharmacy records of Walmart Pharmacy	Eskew-Walmart Pharmacy-000001-	May	R

No.	Description	Bates Nos.	Use	Obj
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199.	Death Certificate	Eskew-000233	May	R
200.	Estate of William Eskew Pldg P-19-098037-E	Eskew 291-306	May	R
201.	Assurant Letter dated June 22, 2015	Eskew-000315-000316	May	R
202.	Letter dated February 5, 2016 – Proton	Eskew-000317-000331	May	D
203.	MD Anderson Emails	Eskew-000332-000393	May	R
204.	GMS Job Description	Eskew-000479-480	May	R
205.	NY Health Committee Agenda re: New York Proton Center Inc.	Eskew-000485-795	May	
206.	Form 5500 Searches	Eskew-001053-1089	May	
207.	2019 Annual Statement for Sierra Health	Eskew-001387-1458	May	
208.	2020 Annual Statement for Sierra Health	Eskew-001459-1561	May	
209.	AM Best's Credit Report for UnitedHealthcare	Eskew-001562-1612	May	

3. Deposition Exhibits Not Included Above

No.	Description	Bates Nos.	Use	Obj
210.	Dr. Chang Dep. – Ex. 2 – Website Bio		May	
211.	Dr. Chang Dep. – Ex. 3 – Clinical Trial Description		May	R H
212.	Dr. Chang Dep. – Ex. 4 – SAH Global Article		May	R H

No.	Description	Bates Nos.	Use	Obj
213.	Dr. Chang Dep. – Ex. 10 – Report to the Congress, Medicare and the Health Care Delivery System, MEDPAC, dated June 2018		May	R H
214.	Dr. Chang Dep. – Ex. 13 – Widesott et al., Proton therapy in lung cancer: Clinical outcomes and technical issues. A systematic review (2008)		May	R H

4. Expert Materials

No.	Description	Bates Nos.	Use	Obj
166.	Expert reports, supplements, exhibits, supporting documentation, data, and literature, CV, fee schedule, and testimony list of Dr. Parvesh Kumar		May	R H
167.	Expert reports, supplements, exhibits, supporting documentation, data, and literature, CV, fee schedule, and testimony list of Dr. Gary Owens		May	R H
168.	Expert reports, supplements, exhibits, supporting documentation, data, and literature, CV, fee schedule, and testimony list of Amitabh Chandra, Ph.D		May	R H
169.	Expert reports, supplements, exhibits, supporting documentation, data, and literature, CV, fee schedule, and testimony list of Dr. Andrew L. Chang		May	R H
170.	Expert reports, supplements, exhibits, supporting documentation, data, and literature, CV, fee schedule, and testimony list of Stephen Prater		May	R H
171.	Expert reports, supplements, exhibits, supporting documentation, data, and literature, CV, fee schedule, and testimony		May	R H Except

No.	Description	Bates Nos.	Use	Obj
	list of Elliott S. Flood			Exhibits 3-7 to report

EXHIBIT 3

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DISTRICT COURT
CLARK COUNTY, NEVADA

SANDRA ESKEW, as the Special
Administrator of the Estate of William
George Eskew,

Plaintiff,

vs.

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

Defendants.

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

AGREED TO JURY INSTRUCTIONS
(with citations)

The parties reserve the right to amend, revise, and/or supplement these Agreed to Jury
Instructions.

1 MEMBERS OF THE JURY:

2 It is my duty as judge to instruct you in the law that applies to this case. It is your duty
3 as jurors to follow these instructions and to apply the rules of law to the facts as you find them
4 from the evidence.

5 You must not be concerned with the wisdom of any rule of law stated in these
6 instructions. Regardless of any opinion you may have as to what the law ought to be, it would
7 be a violation of your oath to base a verdict upon any other view of the law than that given in
8 the instructions of the court.

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27 Authority:

28 Nevada Jury Instructions: CIVIL (2018 Ed.) (hereinafter “NEV. J.I”): 1.1

1 If, in these instructions, any rule, direction or idea is repeated or stated in different ways,
2 no emphasis thereon is intended by me and none may be inferred by you. For that reason, you
3 are not to single out any certain sentence or any individual point or instruction and ignore the
4 others, but you are to consider all the instructions as a whole and regard each in the light of all
5 the others.

6 The order in which the instructions are given has no significance as to their relative
7 importance.

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27 Authority:
28 NEV. J.I. 1.2

1 Although you are to consider only the evidence in the case in reaching a verdict, you
2 must bring to the consideration of the evidence your everyday common sense and judgment as
3 reasonable men and women. Thus, you are not limited solely to what you see and hear as the
4 witnesses testify. You may draw reasonable inferences from the evidence which you feel are
5 justified in the light of common experience, keeping in mind that such inferences should not be
6 based on speculation or guess.

7 A verdict may never be influenced by sympathy, prejudice or public opinion. Your
8 decision should be the product of sincere judgment and sound discretion in accordance with
9 these rules of law.

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27 Authority:
28 NEV. J.I. 1.5

1 If during trial, I have said or done anything which has suggested to you that I am inclined
2 to favor the claims or position of any party, you will not be influenced by any such suggestion.

3 I have not expressed, nor intended to express, nor have I intended to intimate, any
4 opinion as to which witnesses are or are not worthy of belief, what facts are or are not
5 established, or what inference should be drawn from the evidence. If any expression of mine
6 has seemed to indicate an opinion relating to these matters, I instruct you to disregard it.

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27 Authority:
28 NEV. J.I. 1.6

1 The defendants in this case are corporations. A corporation is entitled to the same fair and
2 unprejudiced treatment as an individual would be under like circumstances, and you should decide
3 the case with the same impartiality you would use in deciding a case between individuals.

27 Authority:

28 NEV.J.I. 1.3 (modified)

1 Throughout the following instructions, I instruct that a party must prove certain claims or
2 allegations by either a preponderance of the evidence or by clear and convincing evidence. The
3 meaning of these terms is as follows.

4 “Preponderance of the evidence” means such evidence as, when considered and weighed
5 against that opposed to it, has more convincing force and produces in your mind a belief that what
6 is sought to be proved is more probably true than not true.

7 “Clear and convincing evidence” means such evidence that will produce in your mind a
8 firm belief or conviction as to the allegations sought to be established. It is an intermediate degree
9 of proof, being more than a mere preponderance but not to the extent of such certainty as is
10 required to prove an issue beyond a reasonable doubt. Proof by clear and convincing evidence is
11 proof which persuades you that the truth of the contentions is highly likely.

12 In determining whether a party has met either burden, you must consider all the evidence,
13 whether introduced by the plaintiff or defendants.

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27 Authority:

28 NEV.J.I. 2.1 (modified) and NEV.J.I. 2.2 (modified)

1 The evidence which you are to consider in this case consists of the testimony of the
2 witnesses, the exhibits, and any facts admitted or agreed to by counsel.

3 There are two types of evidence: direct and circumstantial. Direct evidence is direct proof
4 of a fact, such as testimony by a witness about what the witness personally saw or heard or did.
5 Circumstantial evidence is the proof of one or more facts from which you could find another
6 fact. The law makes no distinction between the weight to be given either direct or circumstantial
7 evidence. Therefore, all of the evidence in the case, including the circumstantial evidence, should
8 be considered by you in arriving at your verdict.

9 Statements, arguments and opinions of counsel are not evidence in the case. However, if
10 the attorneys stipulate (meaning to agree) to the existence of a fact, you must accept the
11 stipulation of evidence and regard that fact as proved.

12 Questions are not evidence. Only the answer is evidence. You should consider a question
13 only if it helps you understand the witness's answer. Do not assume that something is true just
14 because a question suggests that it is.

15 You must also disregard any evidence to which an objection was sustained by the court
16 and any evidence ordered stricken by the court. Anything you may have seen or heard outside
17 the courtroom is not evidence and must also be disregarded.

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27 Authority:

28 NEV. J.I. 2.3

1 You must decide all questions of fact in this case from the evidence received in this trial
2 and not from any other Authority. You must not make any independent investigation of the facts
3 or the law or consider or discuss facts as to which there is no evidence. This means, for example,
4 that you must not on your own visit the scene, conduct experiments or consult reference works
5 for additional information.

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27 Authority:
28 NEV.J.I. 1.8

1 The credibility or “believability” of a witness should be determined by his or her manner
2 upon the stand, his or her relationship to the parties, his or her fears, motives, interests or feelings,
3 his or her opportunity to have observed the matter to which he or she testified, the reasonableness
4 of his or her statements and the strength or weakness of his or her recollections.

5 If you believe that a witness has lied about any material fact in the case, you may
6 disregard the entire testimony of that witness or any portion of this testimony which is not proved
7 by other evidence.

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27 Authority:
28 NEV. J.I. 1.9

1 Discrepancies in a witness's testimony or between his testimony and that of others, if there
2 were any discrepancies, do not necessarily mean that the witness should be discredited. Failure
3 of recollection is a common experience, and innocent mis-recollection is not uncommon. It is a
4 fact, also, that two persons witnessing an incident or transaction often will see or hear it
5 differently. Whether a discrepancy pertains to a fact of importance or only to a trivial detail
6 should be considered in weighing its significance.

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27 Authority:

28 NEV. J.I. 2.08 (1986)

1 During the trial, deposition testimony was provided to you. A deposition is the
2 testimony of a person taken before trial. At a deposition, the person took the same oath to tell
3 the truth that would be taken in court and is questioned by the attorneys. You must consider
4 the deposition testimony that was presented to you in the same way as you consider testimony
5 given in court.

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26 Authority:
27 NEV. J.I. 2.8 (modified to include second paragraph and first sentence to second paragraph
28 modified).

1 Certain evidence was admitted for a limited purpose. At the time this evidence was
2 admitted it was explained to you that it could not be considered by you for any purpose other than
3 the limited purpose for which it was admitted. You may only consider that evidence for the limited
4 purpose that I described and not for any other purpose.

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27 Authority:
28 NEV.J.I. 2.6 (2018)

1 During the course of the trial you have heard reference made to the word “interrogatory.”
2 An interrogatory is a written question asked by one party of another, who must answer it under
3 oath in writing. You are to consider interrogatories and the answers thereto the same as if the
4 questions had been asked and answered here in court.

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Authority:
NEV.J.I. 2.9 (modified); CACI 209

1 The parties may have shown you charts and summaries to help explain the facts. The
2 charts or summaries themselves, however, are not evidence or proof of any facts. Charts and
3 summaries are only as good as the underlying evidence that supports them. You should therefore
4 give them only such weight as you think the underlying evidence deserves.

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27 Authority:
28 NEV.J.I. 2.13

1 An attorney has a right to interview a witness for the purpose of learning what testimony
2 the witness will give. The fact that the witness has talked to an attorney and told that attorney
3 what he or she would testify to does not reflect adversely on the truth of the testimony of the
4 witness.

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27 Authority:
28 NEV.J.I. 2.14

1 A witness who has special knowledge, skill, experience, training or education in a
2 particular science, profession or occupation is an expert witness. An expert witness may give his
3 or her opinion as to any matter in which he or she is skilled.

4 You should consider such expert opinion and weigh the reasons, if any, given for it.
5 You are not bound, however, by such opinion. Give it the weight to which you deem it entitled,
6 whether that be great or slight, and you may reject it, if, in your judgment, the reasons for it are
7 unsound.

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27 Authority:
28 NEV. J.I. 3.1

1 An expert witness has testified about his or her reliance upon information that have not
2 been admitted into evidence. Reference by the expert witness to this material is allowed so that
3 the expert witness may tell you what he or she relied upon to form his or her opinions. You may
4 not consider the material as evidence in this case. Rather, you may only consider the material to
5 determine what weight, if any, you will give to the expert's opinions.

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27 Authority:
28 NEV.J.I. 3.2 (modified); NRS 50.285; NRS 50.305

1 A hypothetical question has been asked of an expert witness. In a hypothetical question,
2 the expert witness is told to assume the truth of certain facts, and the expert witness is asked to
3 give an opinion based upon those assumed facts. You must decide if all of the facts assumed in
4 the hypothetical question have been established by the evidence. You can determine the effect of
5 that assumption upon the value of the opinion.

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27 Authority:
28 NEV.J.I. 3.3

1 A legal cause of injury, damage, loss, or harm is a cause which is a substantial factor in
2 bringing about the injury, damage, loss, or harm.

27 Authority:
28 NEV. J.I. 4.5

1 I have given you instructions embodying various rules of law to help guide you to a just
2 and lawful verdict. Whether some of these instructions will apply will depend upon what you
3 find to be the facts. The fact that I have instructed you on various subjects in this case including
4 that of damages must not be taken as indicating an opinion of the court as to what you should
5 find to be the facts or as to which party is entitled to your verdict.

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27 Authority:

28 NEV. J.I. 11.00 (1986)

1 It is your duty as jurors to consult with one another and to deliberate with a view toward
2 reaching an agreement, if you can do so without violence to your individual judgment. Each
3 of you must decide the case for yourself, but should do so only after a consideration of the case
4 with your fellow jurors, and you should not hesitate to change an opinion when convinced that
5 it is erroneous. However, you should not be influenced to vote in any way on any question
6 submitted to you by the single fact that a majority of the jurors, or any of them, favor such a
7 decision. In other words, you should not surrender your honest convictions concerning the
8 effect or weight of evidence for the mere purpose of returning a verdict or solely because of
9 the opinion of the other jurors. Whatever your verdict is, it must be the product of a careful
10 and impartial consideration of all the evidence in the case under the rules of law as given you
11 by the court.

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27 Authority:
28 NEV. J.I 1.14

1 If, during your deliberations, you should desire to be further informed on any point of law
2 or hear again portions of the testimony, you must reduce your request to writing signed by the
3 foreperson. The officer will then return you to court where the information sought will be given
4 you in the presence of the parties or their attorneys. Remember, the court is not at liberty to
5 supplement the evidence.

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27 Authority:
28 NEV.J.I. 1.15; NRS 16.140

1 When you retire to consider your verdict, you must select one of your number to act as
2 foreperson, who will preside over your deliberation and will be your spokesman here in court.

3 During your deliberation, you will have all the exhibits which were admitted into
4 evidence, these written instructions and a special verdict form which has been prepared for your
5 convenience.

6 In civil actions, three-fourths of the total number of jurors may find and return a verdict.
7 This is a civil action. As soon as six or more of you have agreed upon each answer required by
8 the directions in the special verdict form, you must have the verdict signed and dated by your
9 foreperson, and then return with it to this room.

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27 Authority:
28 NEV. J.I 1.14

DISTRICT COURT JUDGE

JA288

EXHIBIT 4

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DISTRICT COURT
CLARK COUNTY, NEVADA

SANDRA ESKEW, as the Special
Administrator of the Estate of William
George Eskew,

Plaintiff,

vs.

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

Defendants.

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

AGREED TO JURY INSTRUCTIONS

The parties reserve the right to amend, revise, and/or supplement these Agreed to Jury
Instructions.

MEMBERS OF THE JURY:

It is my duty as judge to instruct you in the law that applies to this case. It is your duty as jurors to follow these instructions and to apply the rules of law to the facts as you find them from the evidence.

You must not be concerned with the wisdom of any rule of law stated in these instructions. Regardless of any opinion you may have as to what the law ought to be, it would be a violation of your oath to base a verdict upon any other view of the law than that given in the instructions of the court.

1 If, in these instructions, any rule, direction or idea is repeated or stated in different ways,
2 no emphasis thereon is intended by me and none may be inferred by you. For that reason, you
3 are not to single out any certain sentence or any individual point or instruction and ignore the
4 others, but you are to consider all the instructions as a whole and regard each in the light of all
5 the others.

6 The order in which the instructions are given has no significance as to their relative
7 importance.

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1 Although you are to consider only the evidence in the case in reaching a verdict, you
2 must bring to the consideration of the evidence your everyday common sense and judgment as
3 reasonable men and women. Thus, you are not limited solely to what you see and hear as the
4 witnesses testify. You may draw reasonable inferences from the evidence which you feel are
5 justified in the light of common experience, keeping in mind that such inferences should not be
6 based on speculation or guess.

7 A verdict may never be influenced by sympathy, prejudice or public opinion. Your
8 decision should be the product of sincere judgment and sound discretion in accordance with
9 these rules of law.

1 If during trial, I have said or done anything which has suggested to you that I am inclined
2 to favor the claims or position of any party, you will not be influenced by any such suggestion.

3 I have not expressed, nor intended to express, nor have I intended to intimate, any
4 opinion as to which witnesses are or are not worthy of belief, what facts are or are not
5 established, or what inference should be drawn from the evidence. If any expression of mine
6 has seemed to indicate an opinion relating to these matters, I instruct you to disregard it.

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1 The defendants in this case are corporations. A corporation is entitled to the same fair and
2 unprejudiced treatment as an individual would be under like circumstances, and you should decide
3 the case with the same impartiality you would use in deciding a case between individuals.

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1 Throughout the following instructions, I instruct that a party must prove certain claims or
2 allegations by either a preponderance of the evidence or by clear and convincing evidence. The
3 meaning of these terms is as follows.

4 “Preponderance of the evidence” means such evidence as, when considered and weighed
5 against that opposed to it, has more convincing force and produces in your mind a belief that what
6 is sought to be proved is more probably true than not true.

7 “Clear and convincing evidence” means such evidence that will produce in your mind a
8 firm belief or conviction as to the allegations sought to be established. It is an intermediate degree
9 of proof, being more than a mere preponderance but not to the extent of such certainty as is
10 required to prove an issue beyond a reasonable doubt. Proof by clear and convincing evidence is
11 proof which persuades you that the truth of the contentions is highly likely.

12 In determining whether a party has met either burden, you must consider all the evidence,
13 whether introduced by the plaintiff or defendants.

1 The evidence which you are to consider in this case consists of the testimony of the
2 witnesses, the exhibits, and any facts admitted or agreed to by counsel.

3 There are two types of evidence: direct and circumstantial. Direct evidence is direct proof
4 of a fact, such as testimony by a witness about what the witness personally saw or heard or did.
5 Circumstantial evidence is the proof of one or more facts from which you could find another
6 fact. The law makes no distinction between the weight to be given either direct or circumstantial
7 evidence. Therefore, all of the evidence in the case, including the circumstantial evidence, should
8 be considered by you in arriving at your verdict.

9 Statements, arguments and opinions of counsel are not evidence in the case. However, if
10 the attorneys stipulate (meaning to agree) to the existence of a fact, you must accept the
11 stipulation of evidence and regard that fact as proved.

12 Questions are not evidence. Only the answer is evidence. You should consider a question
13 only if it helps you understand the witness's answer. Do not assume that something is true just
14 because a question suggests that it is.

15 You must also disregard any evidence to which an objection was sustained by the court
16 and any evidence ordered stricken by the court. Anything you may have seen or heard outside
17 the courtroom is not evidence and must also be disregarded.

1 You must decide all questions of fact in this case from the evidence received in this trial
2 and not from any other Authority. You must not make any independent investigation of the facts
3 or the law or consider or discuss facts as to which there is no evidence. This means, for example,
4 that you must not on your own visit the scene, conduct experiments or consult reference works
5 for additional information.

1 The credibility or “believability” of a witness should be determined by his or her manner
2 upon the stand, his or her relationship to the parties, his or her fears, motives, interests or feelings,
3 his or her opportunity to have observed the matter to which he or she testified, the reasonableness
4 of his or her statements and the strength or weakness of his or her recollections.

5 If you believe that a witness has lied about any material fact in the case, you may
6 disregard the entire testimony of that witness or any portion of this testimony which is not proved
7 by other evidence.

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Discrepancies in a witness's testimony or between his testimony and that of others, if there were any discrepancies, do not necessarily mean that the witness should be discredited. Failure of recollection is a common experience, and innocent misrecollection is not uncommon. It is a fact, also, that two persons witnessing an incident or transaction often will see or hear it differently. Whether a discrepancy pertains to a fact of importance or only to a trivial detail should be considered in weighing its significance.

1 During the trial, deposition testimony was provided to you. A deposition is the
2 testimony of a person taken before trial. At a deposition, the person took the same oath to tell
3 the truth that would be taken in court and is questioned by the attorneys. You must consider
4 the deposition testimony that was presented to you in the same way as you consider testimony
5 given in court.

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1 Certain evidence was admitted for a limited purpose. At the time this evidence was
2 admitted it was explained to you that it could not be considered by you for any purpose other than
3 the limited purpose for which it was admitted. You may only consider that evidence for the limited
4 purpose that I described and not for any other purpose.

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1 During the course of the trial you have heard reference made to the word “interrogatory.”
2 An interrogatory is a written question asked by one party of another, who must answer it under
3 oath in writing. You are to consider interrogatories and the answers thereto the same as if the
4 questions had been asked and answered here in court.

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1 The parties may have shown you charts and summaries to help explain the facts. The
2 charts or summaries themselves, however, are not evidence or proof of any facts. Charts and
3 summaries are only as good as the underlying evidence that supports them. You should
4 therefore give them only such weight as you think the underlying evidence deserves.

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1 An attorney has a right to interview a witness for the purpose of learning what testimony
2 the witness will give. The fact that the witness has talked to an attorney and told that attorney
3 what he or she would testify to does not reflect adversely on the truth of the testimony of the
4 witness.

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1 A witness who has special knowledge, skill, experience, training or education in a
2 particular science, profession or occupation is an expert witness. An expert witness may give
3 his or her opinion as to any matter in which he or she is skilled.

4 You should consider such expert opinion and weigh the reasons, if any, given for it.
5 You are not bound, however, by such opinion. Give it the weight to which you deem it entitled,
6 whether that be great or slight, and you may reject it, if, in your judgment, the reasons for it are
7 unsound.

1 An expert witness has testified about his or her reliance upon information that have not
2 been admitted into evidence. Reference by the expert witness to this material is allowed so that
3 the expert witness may tell you what he or she relied upon to form his or her opinions. You may
4 not consider the material as evidence in this case. Rather, you may only consider the material to
5 determine what weight, if any, you will give to the expert's opinions.

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1 A hypothetical question has been asked of an expert witness. In a hypothetical question,
2 the expert witness is told to assume the truth of certain facts, and the expert witness is asked to
3 give an opinion based upon those assumed facts. You must decide if all of the facts assumed in
4 the hypothetical question have been established by the evidence. You can determine the effect of
5 that assumption upon the value of the opinion.

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1 A legal cause of injury, damage, loss, or harm is a cause which is a substantial factor in
2 bringing about the injury, damage, loss, or harm.

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1 I have given you instructions embodying various rules of law to help guide you to a just
2 and lawful verdict. Whether some of these instructions will apply will depend upon what you
3 find to be the facts. The fact that I have instructed you on various subjects in this case including
4 that of damages must not be taken as indicating an opinion of the court as to what you should find
5 to be the facts or as to which party is entitled to your verdict.

1 It is your duty as jurors to consult with one another and to deliberate with a view toward
2 reaching an agreement, if you can do so without violence to your individual judgment. Each of
3 you must decide the case for yourself, but should do so only after a consideration of the case
4 with your fellow jurors, and you should not hesitate to change an opinion when convinced that
5 it is erroneous. However, you should not be influenced to vote in any way on any question
6 submitted to you by the single fact that a majority of the jurors, or any of them, favor such a
7 decision. In other words, you should not surrender your honest convictions concerning the effect
8 or weight of evidence for the mere purpose of returning a verdict or solely because of the opinion
9 of the other jurors. Whatever your verdict is, it must be the product of a careful and impartial
10 consideration of all the evidence in the case under the rules of law as given you by the court.

1 If, during your deliberations, you should desire to be further informed on any point of law
2 or hear again portions of the testimony, you must reduce your request to writing signed by the
3 foreperson. The officer will then return you to court where the information sought will be given
4 you in the presence of the parties or their attorneys. Remember, the court is not at liberty to
5 supplement the evidence.

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1 When you retire to consider your verdict, you must select one of your number to act as
2 foreperson, who will preside over your deliberation and will be your spokesman here in court.

3 During your deliberation, you will have all the exhibits which were admitted into
4 evidence, these written instructions and a special verdict form which has been prepared for your
5 convenience.

6 In civil actions, three-fourths of the total number of jurors may find and return a verdict.
7 This is a civil action. As soon as six or more of you have agreed upon each answer required by
8 the directions in the special verdict form, you must have the verdict signed and dated by your
9 foreperson, and then return with it to this room.

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DISTRICT COURT JUDGE

EXHIBIT 5

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DISTRICT COURT
CLARK COUNTY, NEVADA

SANDRA ESKEW, as the Special
Administrator of the Estate of William
George Eskew,

Plaintiff,

vs.

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

Defendants.

) Case No. A-19-788630-C
)
) Dept. No. 4
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PLAINTIFF'S PROPOSED JURY
INSTRUCTIONS (subject to revision)

INSTRUCTION NO. _____

1 In every insurance contract there is an implied covenant of good faith and fair dealing that
2 neither the insurance company nor the insured will do anything to injure the rights of the other
3 party to receive the benefits of the agreement.

4 The relationship of an insured to an insurer is one of special confidence and akin to that
5 of a fiduciary. A fiduciary relationship exists when one has the right to expect trust and confidence
6 in the integrity and fidelity of another. This special relationship exists in part because, as
7 insurance companies are well aware, consumers contract for insurance to gain protection, peace
8 of mind, and security against calamity. To fulfill its implied covenant of good faith and fair
9 dealing, an insurance company must give at least as much consideration to the interests of the
10 insured as it gives to its own interests.

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19 Authority:

20 Nevada Jury Instructions: Civil (2018): 11.4 (modified to replace “obligation” with covenant
21 and remove the last sentence).

22 *Powers v. United Services Auto Ass’n*, 114 Nev. 690, 962 P.2d 596 (1998) (regarding fiduciary
23 like duty).

24 *Ainsworth v. Combined Ins. Co. of America*, 104 Nev. 587, 592, 763 P.2d 673 (1988) (same).

25 *Allstate Ins. Co. v. Miller*, 125 Nev. 300, 311, 212 P.3d 318, 325 (2010) (equal consideration)

26 *Rawlings v. Apodaca*, 151 Ariz. 149, 154, 726 P.2d 565, 570 (1970) (equal consideration in first
27 party context)

28 *Silberg v. Cal. Life Ins. Co.*, 11 Cal. 3d 452, 461, 51 P.2d 1103, 1109 (1974) (equal consideration
in first party context)

Egan v. Mut. of Omaha Ins. Co., 24 Cal.3d 809, 820, 620 P.2d 141, 145 (1979) (equal consideration
in first party context)

INSTRUCTION NO. _____

1 In order to establish a breach of the implied covenant of good faith and fair dealing, Plaintiff
2 Sandra Eskew, as the Special Administrator of the Estate of William George Eskew, must prove
3 the following by a preponderance of the evidence:

- 4 1. The proton beam therapy for William Eskew that Sierra Health and Life denied on
5 February 5, 2016 was medically necessary under the terms of the agreement of coverage.
- 6 2. Sierra Health and Life had no reasonable basis for its February 5, 2016 denial of the prior
7 authorization claim.
- 8 3. Sierra Health and Life knew, or recklessly disregarded, the fact that there was no
9 reasonable basis for the February 5, 2016 denial of the prior authorization claim; and,
- 10 4. Sierra Health and Life's unreasonable conduct was a legal cause of harm to William
11 Eskew.

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27 Authority:

28 Nevada Jury Instructions: Civil (2018): 11.5 (modified to reflect elements of this case)

INSTRUCTION NO. _____

1 An insurer has a duty to evaluate and approve a claim for prior authorization fairly and
2 in good faith.

27 Authority:
28 Nevada Jury Instructions: Civil (2018): 11.13 (modified to substitute prior authorization claim).

INSTRUCTION NO. _____

1 The agreement of coverage is an insurance contract.

2 An insurance contract is a contract of adhesion that is written by the insurer on a take it or
3 leave it basis. The insured has no choice as to the terms of the insurance contract. The
4 interpretation of an insurance contract is subject to legal standards:

- 5 1. The terms of the insurance contract are construed in their plain, ordinary and popular
6 meaning.
- 7 2. Any clause within the insurance contract that provides coverage is interpreted broadly to
8 afford the greatest possible coverage to the insured.
- 9 3. An exclusion or restriction to coverage in the insurance contract must be interpreted
10 narrowly against the insurer.
- 11 4. If it is unambiguous, the insurance contract is construed as written.
- 12 5. If the insurance contract is ambiguous, any ambiguity must be construed in favor of the
13 insured and to effectuate the insured's reasonable expectations.

14 The insurance contract is ambiguous if a provision at issue is subject to more than one
15 reasonable interpretation.

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22 Authority:

23 *Farmers Ins. Group v. Stonik*, 110 Nev. 64, 867 P.2d 389 (1994) (an insurance policy is a contract
24 of adhesion).

25 *Obstetrics & Gynecologists Wixted v. Pepper*, 101 Nev. 105, 107, 693 P.3d 1259 (1985)
(description of contract of adhesion).

26 *National Union Fire Ins. Co. v. Reno's Executive Air*, 100 Nev. 360, 364, 682 P.3d 1380, 1382
27 (1984). (regarding the rules for interpreting an insurance contract)

28 *Anvui, LLC v. G. L. Dragon, LLC*, 123 Nev. 213, 215-16, 163 P.3d 405 (2007) (defining
ambiguity).

INSTRUCTION NO. _____

1 The Defendants' Proton Beam Radiation Therapy Policy was not part of the agreement of
2 coverage.

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27 Authority:

28 Agreement of Coverage including Section 10.11

INSTRUCTION NO. _____

1 The defendants had a duty to deliver the agreement of coverage to William George Eskew.
2 If you find that the defendants did not deliver the attachment B to William George Eskew, you
3 must find the defendants had no authority to conduct a prior authorization review.

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Authority:

NAC 687B.145(1)

National Union Fire Ins. Co. v. Reno's Executive Air, 100 Nev. 360, 364, 682 P.3d 1380, 1382 (1984).

INSTRUCTION NO. _____

1 An insurer breaches the implied covenant of good faith and fair dealing if it unreasonably
2 interprets the insurance contract or relies upon an ambiguous provision of the insurance contract
3 as the basis for denying a claim.

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24 Authority:

25 Nev. J.I. (2011) 11.15 (modified to add to “unreasonable interpretation.”)

26 *Ainsworth v. Combined Ins. Co. of America*, 104 Nev. 587, 591-92, 763 P.2d 673, 675-76 (1988);

27 *Albert H. Wohlers & Co. v. Bartgis*, 114 Nev. 1249, 1260, 969 P.2d 949, 956 (1998) (bad faith
28 where an insurer engaged in an unreasonable interpretation of the policy).

INSTRUCTION NO. _____

1 An insurer breaches its implied covenant of good faith and fair dealing if it fails to
2 determine a proper cause within the insurance contract to deny a claim.

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26 Authority:

27 *Pemberton v. Farmers Insurance Exchange*, 109 Nev. 789, 858 P.2d 380 (1993) (bad faith where
28 no proper cause for failing to pay benefit due on an insurance policy)

INSTRUCTION NO. _____

1 An insurer is required to adequately protect the insured's interest.
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26 Authority:

27 *Allstate Ins. Co. v. Miller*, 125 Nev. 300, 311, 212 P.3d 318, 326 (2010) citing to *Powers v.*
28 *United Servs. Auto Ass'n*, 114 Nev. 690, 701-02, 969 P.2d 596, 603 (1998), modified on other
grounds, *Powers v. United Servs. Auto Ass'n*, 115 Nev. 38, 979 P.2d 1286 (1999)

INSTRUCTION NO. _____

1 An insurer has a duty to investigate a claim filed by its insureds. When investigating a
2 claim, an insurer has a duty to diligently search for, and to consider, evidence that supports an
3 insured's claimed loss. An insurer may not reasonably and in good faith deny a prior
4 authorization claim without thoroughly investigating the claim.

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26 Authority:

27 Nevada Jury Instructions: Civil (2018): 11.8 (modified to remove payment and delay and
28 substitute for prior authorization)

INSTRUCTION NO. _____

1 In determining whether an insurer acted reasonably and in good faith in denying a claim,
2 you should consider the information that the insurer actually relied upon when it denied the claim
3 or the information it reasonably should have known through a reasonable investigation.

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25 Authority:

26 *Fernandez v. State Farm Mut. Auto. Ins. Co.*, 338 F. Supp.3d 1193, 1200 (D. Nev. 2018)

27 *Austero v. National Casualty Company of Detroit, Michigan*, 84 Cal. App.3d 1, 33, 148 Cal.
28 Rptr. 653, 673 (1978) (hindsight test)

INSTRUCTION NO. _____

1 It is not a breach of the implied covenant of good faith and fair dealing for an insurer to
2 deny a prior authorization claim if the prior authorization claim was fairly debatable. A denial
3 of a claim is not fairly debatable if the insurer acted unreasonably in the evaluation, investigation
4 and processing of the claim.

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25 Authority:

26 *Zilisch v. State Farm Mut. Auto. Ins. Co.*, 196 Ariz. 234, 238, 995 P.2d 276, 280 (2000)

27 *Albert H. Wohlers & Co. v. Bartgis*, 114 Nev. 1249, 1260, 969 P.2d 949, 956 (1998) (an insurer's
28 interpretation of its insurance policy does not provide for an absolute defense)

INSTRUCTION NO. _____

1 There is a law in the State of Nevada called the Nevada Unfair Insurance Practice Act
2 which prohibited defendants from doing any one of the following:

3 1. Misrepresenting to an insured pertinent facts or insurance policy provisions
4 relating to any coverage at issue.

5 2. Failing to adopt and implement reasonable standards for the prompt investigation
6 and processing of claims arising under insurance policies.

7 3. Failing to effectuate a prompt, fair and equitable settlements of claims in which
8 liability of the defendants has become reasonably clear.

9 4. Failing to provide promptly to an insured a reasonable explanation of the basis in
10 the insurance policy, with respect to the facts of an insured's claim and the applicable law, for
11 the denial of the claim.

12 The violations of any provision to Nevada Unfair Insurance Practice Act may be evidence
13 of a breach of the implied covenant of good faith and fair dealing.

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24 Authority:

25 Nevada Jury Instruction Civil (2018), 11.21

26 NRS 686A.310(1)(a), (c), (e) and (l) (modified to reflect Mr. Eskew as the insured and
defendants as the insurer).

27 *Hart v. Prudential Prop. & Cas. Ins. Co.*, 848 F. Supp. 900 (1994) (a violation of NRS
28 686A.310(1) may be evidence of a breach of the implied covenant of good faith and fair dealing)

INSTRUCTION NO. _____

1 At all relevant times, there existed a law in Nevada that provided as follows:
2 1. No insurer may not deny a claim on the grounds of a specific policy provision,
3 condition or exclusion unless reference to that provision, condition or provision is
4 included in the denial.

5 Violation of the above laws may be considered by you in determining whether the
6 Defendant has breached the implied covenant of good faith and fair dealing.

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26 Authority:

27 Nevada Jury Instructions (2018) 11.14 (modified to reflect regulation at issue)

28 NAC 686A.675(1)

INSTRUCTION NO. _____

1 If an insurer breaches the insurance contract or its duty of good faith and fair dealing when it denies
2 a claim, the insured is discharged from any duty he has to the insurer.

24 Authority:

25 *Andrew v. Century Surety*, 134 Nev. 819, 432 P.3d 180 (2018) (legal principles applicable to a
26 contract generally are applicable to insurance policies)

27 *Cain v. Price*, 134 Nev. 193, 196, 415 P.3d 25, 29 (2018) (“When parties exchange promises to
28 reform, one party’s material breach of its promise discharges the non-breaching party’s duty to
perform.”)

INSTRUCTION NO. _____

1 MD Anderson and Dr. Liao were not parties to insurance contract. They owed no duty to
2 Sierra Health and Life Insurance Company or United Healthcare.

25 Authority:

26 *Gunny v. Allstate Ins. Co.*, 108 Nev. 344, 830 P.2d 1335 (1992) (a third-party to the contract has
27 no standing to assert an interest in the contract)

28 *Rd. & Highway Builders, LLC v. Northern Nev. Rebar, Inc.*, 128 Nev. 384, 284 P.3d 377 (2012)
(duty of good faith and fair dealing applies to the parties to the contract)

INSTRUCTION NO. _____

1 If you find that Sierra Health and Life Insurance Company and United Healthcare were
2 involved in a joint venture of providing insurance, United Healthcare is liable for any breach of
3 the duty of good faith and fair dealing.

4 In assessing whether a joint venture exists, you may consider extent of control United
5 Healthcare had over the insurance business including United Healthcare's administrative
6 responsibilities, its role over the administration of prior authorization claims, any pecuniary
7 interest United Healthcare in the operation of the insurance business and the nature of its
8 relationship with Sierra Health and Life Insurance Company.

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27 Authority:

28 *Albert H. Wohlers & Co. v. Bartgis*, 114 Nev. 1249, 1262-63, 969 P.2d 949, 959 (1998)

INSTRUCTION NO. _____

1 An insurer cannot delegate its duty of good faith and fair dealing.

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26 Authority:

27 Nev. Jury Instructions (2011) 11 FD.6

28 *Albert H. Wohlers & Co. v. Bartgis*, 114 Nev. 1249, 969 P.2d 949 (1998)

INSTRUCTION NO. _____

1 An insurer is charged with the knowledge of the information present in its own files.
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27 Authority:

28 *Violin v. Fireman's Fund Ins. Co.*, 81 Nev. 456, 461, 406 P.2d 287, 290 (1965)

INSTRUCTION NO. _____

1 A substantial factor is a factor that a reasonable person would consider to have
2 contributed to harm. It must be more than a remote or trivial factor. It does not have to be the
3 only cause of the harm.

27 Authority:

28 Nevada Jury Instructions: Civil (2018): 4.5 (bracketed portion)

INSTRUCTION NO. _____

1 In determining the amount of losses, if any suffered by William Eskew as a legal result
2 of the conduct by Sierra Health & Life and/or United Healthcare breached the implied covenant
3 of good faith and fair dealing, you will take into consideration the nature, extent and duration of
4 the damage Mr. Eskew has sustained, and you will decide upon a sum of money sufficient to
5 reasonably and fairly compensate for the physical pain, mental suffering, anguish, disability, loss
6 of enjoyment of life and emotional distress.

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22 Authority:

23 Nevada Jury Instructions: Civil (2018): 5.1

24 NRS 41.100

25 *Guaranty Nat'l. Ins. Co. v. Potter*, 112 Nev. 199, 912 P.2d 267, 272 (1996) (damages for anxiety
and humiliation recoverable for bad faith)

26 *Albert H. Wohlers & Co. v. Bartgis*, 114 Nev. 1249, 1261, 969 P.2d 949, 956 (1998) (emotional
distress as recoverable damage for bad faith)

27 *Republic Ins. Co. v. Hires*, 107 Nev. 317, 320, 810 P.2d 790 (1991) (upholding emotional distress
28 damages of \$410,000 for insurance bad faith)

INSTRUCTION NO. _____

1 No definite standard is prescribed by law by which to fix reasonable compensation for
2 physical pain, mental suffering, anguish, disability, loss of enjoyment of life and emotional
3 distress. Nor is the opinion of any witness required as to the amount of such reasonable
4 compensation. You must use your judgment to decide upon a reasonable amount based on the
5 evidence and your common sense.

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26 Authority:

27 Nevada Jury Instructions: Civil (2018): 5.2 (modified to reflect specific general damages alleged
28 in this case)

INSTRUCTION NO. _____

1 If you find that Plaintiff Sandra Eskew as the Special Administrator for the Estate of
2 William George Eskew, has proved that either Sierra Health and life or United Healthcare
3 breached the implied covenant of good faith and fair dealing, you may then consider whether
4 you should award punitive damages against the defendant, for the sake of example and by way
5 of punishment. You may in your discretion award such damages if, but only if, you find by clear
6 and convincing evidence that either defendant acted with fraud, malice, or oppression in the
7 conduct upon which you base your finding of liability.

8 “Fraud” means an intentional misrepresentation, deception or concealment of a material
9 fact known to Sierra Health & Life and/or United Healthcare with the intention, on either one’s
10 part, of thereby depriving William Eskew of property or legal rights or otherwise causing injury.

11 “Malice” means conduct which is carried on by Sierra Health & Life and/or United
12 Healthcare with a conscious disregard of the rights of William Eskew.

13 “Oppression” means subjecting William Eskew to cruel and unjust hardship in conscious
14 disregard of his rights.

15 “Conscious disregard” means knowledge of the probable harmful consequences of a
16 wrongful act and a willful and deliberate failure to act to avoid those consequences.

17 The purposes of punitive damages are to punish a wrongdoer that acts with fraud,
18 oppression and/or malice in harming a plaintiff and deter similar conduct in the future, not make
19 the plaintiff whole for her injuries. Consequently, a plaintiff is never entitled to punitive damages
20 as a matter of right and whether to award punitive damages against a defendant is entirely within
21 your discretion.

22 At this time, you are to decide only whether defendant engaged in wrongful conduct
23 causing actual harm to the plaintiff with the requisite state of mind to permit an award of punitive
24 damages against the defendant, and if so, whether an award of punitive damages against the
25 defendant is justified by the punishment and deterrent purposes of punitive damages under the
26 circumstances of this case. If you decide an award of punitive damages is justified, you will
27 later decide the amount of punitive damages to be awarded, after you have heard additional
28 evidence and instruction.

INSTRUCTION NO. _____

1 Authority:
2 NEV. J.I 2.2 (definition of clear and convincing evidence)
3 Nevada Pattern Jury Instructions Civil (1986), 10.20 (modified at the opening phrase and
modified to remove the word “guilty”)
4 Nevada Pattern Jury Instructions Civil (1986), 10.21 (definition of conscious disregard)
5 NRS 42.005 (regarding the use of the common law definitions of fraud, malice, oppression and
conscious disregard for cases involving insurance bad faith)
6 Nevada Jury Instructions – Civil 2011 Edition, 12PD.1 (modified to reflect correct definitions
7 for insurance bad faith)
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INSTRUCTION NO. _____

1 PHASE TWO IN THE EVENT THAT FRAUD,
2 MALICE OR OPPRESSION IS FOUND
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INSTRUCTION NO. _____

1 The law provides no fixed standards as to the amount of a punitive damage award, but
2 leaves the amount to the jury's sound discretion, exercised without passion or prejudice and in
3 accordance with the following governing principles.

4 The amount of a punitive damage award is not to compensate William Eskew for harm
5 suffered but what is reasonably necessary in light of the defendants' financial condition and fairly
6 deserved in light of the blameworthiness and harmfulness inherent in the defendants' conduct to
7 punish and deter the defendants and others from engaging in conduct such as that warranting
8 punitive damages in this case. Your award cannot be more than otherwise warranted by the
9 evidence in this case merely because of the wealth of the defendants. Your award cannot either
10 punish defendants for conduct injuring others who are not parties to this litigation or financially
11 annihilate or destroy the defendants in light of the defendants' financial condition.

12 In determining the amount of your punitive damage award, you should consider the
13 following guideposts:

14 1. The degree of reprehensibility of the defendants' conduct, in light of (a) the culpability
15 and blameworthiness of the defendants' fraudulent, oppressive and/or malicious misconduct
16 under the circumstances of this case; (b) whether the conduct injuring William Eskew that
17 warrants punitive damages in this case was part of a pattern of similar conduct by the defendants;
18 and (c) any mitigating conduct by the defendants.

19 2. The ratio of your punitive damage award to the actual harm inflicted on William Eskew
20 by the conduct warranting punitive damages in this case, since the measure of punishment must
21 be both reasonable and proportionate to the amount of harm to William Eskew and to the
22 compensatory damages recovered by William Eskew in this case.

23 3. How your punitive damages award compares to other civil or criminal penalties that
24 could be imposed for comparable misconduct, since punitive damages are to provide a means by
25 which the community can express its outrage or distaste for the misconduct of a fraudulent,
26 oppressive or malicious defendant and deter and warn others that such conduct will not be
27 tolerated.

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INSTRUCTION NO. _____

1 Evidence has been presented concerning William Eskew's conduct outside Nevada and/or
2 conduct injuring others who are not parties to this litigation. You cannot use such evidence to
3 award William Eskew punitive damages for conduct outside Nevada, or conduct injuring others
4 who are not parties to this litigation, or conduct that does not bear a reasonable relationship to the
5 conduct injuring William Eskew that warrants punitive damages in this case. You may consider
6 such evidence only with respect to the reprehensibility of William Eskew's conduct and only to
7 the extent the conduct is similar and bears a reasonable relationship to William Eskew's conduct
8 injuring William Eskew that warrants punitive damages in this case.

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27 Authority:
28 Nevada Jury Instructions – Civil 2011 Edition, 12PD.1

INSTRUCTION NO. _____

EXHIBIT 6

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EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY, NEVADA

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

Plaintiff,

vs.

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

Defendants.

Case No.: A-19-788630-C

Dept. No.: 4

**DEFENDANTS' PROPOSED JURY
INSTRUCTIONS (DISPUTED)**

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Jury Instruction No. _____

You must decide the case for or against each defendant separately as if it were a separate lawsuit. Each defendant is entitled to separate consideration of its own claims and defenses. Unless I tell you otherwise, all instructions apply to each defendant.

Source/Authority:

NEV.J.I. 1.13 (2018) (modified to replace “should” with “must”)

The purpose of trial is to ascertain the truth.

Your purpose as jurors is to find and determine the facts. Under our system of civil procedure, you are the sole judge of the facts. You determine the facts from the testimony you hear and the other evidence, including exhibits introduced in court. It is up to you to determine the inferences which you feel may be properly drawn from the evidence. It is especially important that you perform your duty of determining the facts diligently and conscientiously, for ordinarily, there is no means of correcting an erroneous determination of facts by the jury.

Source/Authority:

Nevada Jury Instructions 1GI.1 and 1GI.5 (2011) (modified).

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Jury Instruction No. _____

In this action, Plaintiff Sandra L. Eskew, as special administrator of the Estate of William G. Eskew, seeks to establish liability for breach of the implied covenant of good faith and fair dealing, otherwise known as bad faith, against Sierra Health and Life Insurance Company, Inc. and/or United Healthcare, Inc. I will now instruct you on the law pertaining to this claim.

Source/Authority:
NEV.J.I. 2.1 (2018) (modified).

To prevail on her claim for breach of the implied covenant of good faith and fair dealing against Sierra Health and Life Insurance Company, Inc. and/or United Healthcare, Inc., Plaintiff must prove the following elements by clear and convincing evidence:

1. The requested proton therapy qualified as a covered service under William G. Eskew's insurance contract with Sierra Health and Life Insurance Company, Inc.
2. Sierra Health and Life Insurance Company, Inc. and/or United Healthcare, Inc. had no reasonable basis for denying William G. Eskew's prior authorization request for proton therapy.
3. Sierra Health and Life Insurance Company, Inc. and/or United Healthcare, Inc. knew or recklessly disregarded the fact that there was no reasonable basis for the denial; and
4. Sierra Health and Life Insurance Company, Inc.'s and/or United Healthcare, Inc.'s bad faith denial was a legal cause of harm to William G. Eskew.

Source/Authority:

NEV.J.I. 11.5 (2018) (modified); NEV.J.I. 11.6 (2018) (modified); *Powers v. United Serv. Auto. Ass'n*, 114 Nev. 690, 962 P.2d 596, 604 (1998) ("To establish a prima facie case of bad-faith refusal to pay an insurance claim, the plaintiff must establish that the insurer had no reasonable basis for disputing coverage, and that the insurer knew or recklessly disregarded the fact that there was no reasonable basis for disputing coverage."); *Goodrich v. Garrison Prop. & Cas. Ins. Co., Inc.*, 526 F. Supp. 3d 789, 802 (D. Nev. 2021) ("However, evidence that an insurer failed to properly investigate is only probative insofar as it supports the ultimate conclusion that an insurer denied a claim without a reasonable basis to do so."); *Molfetta v. Time Ins. Co.*, No. 207CV01240JCMLRL, 2010 WL 2041703, at *2 (D. Nev. May 17, 2010) (explaining that whether an insurer does not breach its contract with an insured, the insurer "could not, as a matter of law, have breached the implied covenant of good faith and fair dealing"); *Pioneer Chlor Alkali Co. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pennsylvania*, 863 F. Supp. 1237, 1244 (D. Nev. 1994) ("Nevada's Supreme Court has consistently announced

1 and ruled that bad faith involves the denial of an insured's claim without any reasonable basis.”);
2 *Benavides v. State Farm General Ins. Co.*, 136 Cal.App.4th 1241, 1250 (2006) (“[A]n insured
3 cannot maintain a claim for tortious breach of the implied covenant of good faith and fair
4 dealing absent a covered loss. If the insurer’s investigation – adequate or not – results in a
5 correct conclusion of no coverage, no tort liability arises for breach of the implied covenant.”);

6 *Wolfe v. Allstate Prop. & Cas. Ins. Co.*, 790 F.3d 487, 497 (3d Cir. 2015) (providing that
7 on a common law bad faith action under Pennsylvania law, an insurer’s bad faith must be proven
8 by clear and convincing evidence); *Freidline v. Shelby Ins. Co.*, 774 N.E.2d 37, 40 (Ind. 2002)
9 (“To prove bad faith, the plaintiff must establish, with clear and convincing evidence, that the
10 insurer had knowledge that there was no legitimate basis for denying liability.”).

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Jury Instruction No. _____

An insurance policy is a contract. The contract should be considered as a whole and given a reasonable and harmonious reading. If the language in the policy is clear and unambiguous, the language is enforced as written in order to accomplish the intent of the parties.

The language of the contract should be viewed from the perspective of one not trained in the law and plain and ordinary meaning of the terms should be used.

Source/Authority:

NEV.J.I. 11.17 (2018) (modified); *Goodrich v. Garrison Prop. & Cas. Ins. Co., Inc.*, 526 F. Supp. 3d 789, 797 (D. Nev. 2021) (laying out Nevada law when it comes to interpretation of an insurance contract); *Century Sur. Co. v. Casino W., Inc.*, 130 Nev. 395, 398, 329 P.3d 614, 616 (2014) (“And we consider the policy as a whole to give reasonable and harmonious meaning to the entire policy.”).

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To preclude coverage under an insurance policy’s exclusion provision, an insurer must (1) draft the exclusion in obvious and unambiguous language, (2) demonstrate that the interpretation excluding coverage is the only reasonable interpretation of the exclusionary provision, and (3) establish that the exclusion plainly applies to the particular case.

Source/Authority:

Century Sur. Co. v. Casino W., Inc., 130 Nev. 395, 398–99, 329 P.3d 614, 616 (2014) (“To preclude coverage under an insurance *399 policy's exclusion provision, an insurer must (1) draft the exclusion in “obvious and unambiguous language,” (2) demonstrate that the interpretation excluding coverage is the only reasonable interpretation of the exclusionary provision, and (3) establish that the exclusion plainly applies to the particular case before the court.”).

A defendant is entitled to deny a prior authorization request on the basis of debatable law or facts and will not be liable for bad faith for denying a claim if its position has any reasonable basis.

Source/Authority:

Powers v. United Servs. Auto. Ass’n, 114 Nev. 690, 728, 962 P.2d 596, 620 (1998), opinion modified on denial of reh’g, 115 Nev. 38, 979 P.2d 1286 (1999) (“A mere incorrect or “improper” denial of a claim is not tortious. A company may, in the utmost of good faith and propriety, deny a claim, only to have it proven later, in court, that its denial of the claim was improper and that the claimant was, indeed, entitled to indemnity.”); *Brewington v. State Farm Mut. Auto. Ins. Co.*, 96 F. Supp. 3d 1105, 1109 (D. Nev. 2015) (“In other words, if a coverage position by an insurer with respect to a legal interpretation of a policy provision is fairly debatable, a denial of coverage cannot constitute bad faith where there is no contrary, controlling authority in the jurisdiction.”).

There are no hard and fast rules for what constitutes a reasonable basis. Whether a defendant had a reasonable basis depends on the circumstances of each case.

Source/Authority:

Albert H. Wohlers & Co. v. Bartgis, 114 Nev. 1249, 1260, 969 P.2d 949, 957 (1998), as amended (Feb. 19, 1999) (“Based on these facts, we conclude that Allianz’s [actions] were unreasonable.”); *U. S. Fid. & Guar. Co. v. Peterson*, 91 Nev. 617, 620, 540 P.2d 1070, 1071 (1975) (holding that “[t]he record supports a finding that the insurance company exercised bad faith in its dealings” and further specifying individual facts from the record supporting that decision); *James River Ins. Co. v. Hebert Schenk, P.C.*, 523 F.3d 915, 923 (9th Cir. 2008) (“The first element of this test [which is whether an insurer “act[ed] unreasonably toward the insured”] is objective and asks whether the insurer acted in a “manner consistent with the way a reasonable insurer would be expected to act under the circumstances.”); *Amadeo v. Principal Mut. Life Ins. Co.*, 290 F.3d 1152, 1161 (9th Cir. 2002) (citations and quotation marks omitted) (“[T]he reasonableness of an insurer’s claims-handling conduct is ordinarily a question of fact.”); *Phillips v. Clark Cty. Sch. Dist.*, 903 F. Supp. 2d 1094, 1104 (D. Nev. 2012) (holding that “the Court concludes that Defendant’s denial was, at least, reasonable in light of the facts and circumstances of this particular claim and the injury incurred”).

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Evidence of conformance with industry standards goes to show that an insurer acted with a reasonable basis.

Source/Authority:

Hangarter v. Provident Life & Acc. Ins. Co., 373 F.3d 998, 1016 (9th Cir. 2004) (“While Caliri’s testimony that Defendants deviated from industry standards supported a finding that they acted in bad faith . . .”); *RSUI Indem. Co. v. Vision One, LLC*, No. C08-1386RSL, 2009 WL 5125420, at *2 (W.D. Wash. Dec. 18, 2009) (explaining that a expert could testify as to the reasonableness of the insurer’s actions in terms of whether or not insurer complied with or deviated from industry standards).

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Jury Instruction No. _____

An insurer has a duty to investigate a claim filed by its insured. When investigating a claim, an insurer has a duty to diligently search for and consider evidence that supports an insured’s claimed loss.

However, evidence that an insurer failed to properly investigate is only probative to the extent that it supports the ultimate conclusion that an insurer denied a claim without a reasonable basis to do so.

Source/Authority:

NEV.J.I. 11.8 (2018) (modified); *Goodrich v. Garrison Prop. & Cas. Ins. Co., Inc.*, 526 F. Supp. 3d 789, 802 (D. Nev. 2021) (“However, evidence that an insurer failed to properly investigate is only probative insofar as it supports the ultimate conclusion that an insurer denied a claim without a reasonable basis to do so.”).

An incorrect or improper denial of coverage does not amount to breach of the implied covenant of good faith or fair dealing as long as the defendant had a reasonable basis to take the position that it did.

Source/Authority:

Goodrich v. Garrison Prop. & Cas. Ins. Co., Inc., 526 F. Supp. 3d 789, 801 (D. Nev. 2021) (“Poor judgment or negligence on the part of an insurer does not amount to bad faith.”); *Goodrich v. Garrison Prop. & Cas. Ins. Co., Inc.*, 526 F. Supp. 3d 789, 801 (D. Nev. 2021) (“The insurer is not liable for bad faith for being incorrect about policy coverage as long as the insurer had a reasonable basis to take the position that it did.”); *Goodrich v. Garrison Prop. & Cas. Ins. Co., Inc.*, 526 F. Supp. 3d 789, 801 (D. Nev. 2021) (“Instead, bad faith involves something more than an unreasonable action, a negligent action, by the insurer.”); *Allstate Ins. Co. v. Miller*, 125 Nev. 300, 317, 212 P.3d 318, 330 (2009) (“Thus, if the insurer’s actions resulted from an honest mistake, bad judgment or negligence, then the insurer is not liable under a bad-faith theory.”); *Pioneer Chlor Alkali Co. v. Nat’l Union Fire Ins. Co. of Pittsburgh, Pennsylvania*, 863 F. Supp. 1237, 1243 (D. Nev. 1994) (“While bad faith involves the absence of any reasonable basis to deny coverage, bad faith is not a reasonableness of conduct standard. (citation omitted). Thus, bad faith involves something more than an unreasonable action, a negligent action, by the insurer. That is, bad faith does not directly address the manner in which an insurer processes a claim as does NRS 686A.310. Bad faith requires an awareness that no reasonable basis exists to deny the insured’s claim.”).

An honest mistake, poor judgment, or negligence on the part of the defendant does not amount to breach of the implied covenant of good faith or fair dealing. Breach of the implied covenant of good faith or fair dealing involves something more than an unreasonable or negligent action by the defendant.

Source/Authority:

Goodrich v. Garrison Prop. & Cas. Ins. Co., Inc., 526 F. Supp. 3d 789, 801 (D. Nev. 2021) (“Poor judgment or negligence on the part of an insurer does not amount to bad faith.”); *Goodrich v. Garrison Prop. & Cas. Ins. Co., Inc.*, 526 F. Supp. 3d 789, 801 (D. Nev. 2021) (“The insurer is not liable for bad faith for being incorrect about policy coverage as long as the insurer had a reasonable basis to take the position that it did.”); *Goodrich v. Garrison Prop. & Cas. Ins. Co., Inc.*, 526 F. Supp. 3d 789, 801 (D. Nev. 2021) (“Instead, bad faith involves something more than an unreasonable action, a negligent action, by the insurer.”); *Allstate Ins. Co. v. Miller*, 125 Nev. 300, 317, 212 P.3d 318, 330 (2009) (“Thus, if the insurer’s actions resulted from an honest mistake, bad judgment or negligence, then the insurer is not liable under a bad-faith theory.”); *Pioneer Chlor Alkali Co. v. Nat’l Union Fire Ins. Co. of Pittsburgh, Pennsylvania*, 863 F. Supp. 1237, 1243 (D. Nev. 1994) (“While bad faith involves the absence of any reasonable basis to deny coverage, bad faith is not a reasonableness of conduct standard. (citation omitted). Thus, bad faith involves something more than an unreasonable action, a negligent action, by the insurer. That is, bad faith does not directly address the manner in which an insurer processes a claim as does NRS 686A.310. Bad faith requires an awareness that no reasonable basis exists to deny the insured’s claim.”).

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Jury Instruction No. _____

A defendant’s speed in handling a claim could indicate that it had not adequately investigated, but efficiency does not prove inadequacy.

Source/Authority:

Goodrich v. Garrison Prop. & Cas. Ins. Co., Inc., 526 F. Supp. 3d 789, 802 (D. Nev. 2021) (“[A]n insurer’s speed in handling a claim could indicate that it had not adequately investigated, but efficiency does not necessarily prove inadequacy.”).

In determining whether a defendant acted with no reasonable basis, you may consider whether the defendant did any of the following:

- (a) Misrepresenting to insureds or claimants pertinent facts or insurance policy provisions relating to any coverage at issue.
- (b) Failing to acknowledge and act reasonably promptly upon communications with respect to claims arising under insurance policies.
- (c) Failing to adopt and implement reasonable standards for the prompt investigation and processing of claims arising under insurance policies.
- (d) Failing to affirm or deny coverage of claims within a reasonable time after proof of loss requirements have been completed and submitted by the insured.
- (e) Failing to effectuate prompt, fair, and equitable settlements of claims in which liability of the insurer has become reasonably clear.
- (f) Compelling insureds to institute litigation to recover amounts due under an insurance policy by offering substantially less than the amounts ultimately recovered in actions brought by such insureds, when the insureds have made claims for amounts reasonably similar to the amounts ultimately recovered.
- (g) Attempting to settle a claim by an insured for less than the amount to which a reasonable person would have believed he or she was entitled by reference to written or printed advertising material accompanying or made part of an application.
- (h) Attempting to settle claims on the basis of an application which was altered without notice to, or knowledge or consent of, the insured, or the representative, agent or broker of the insured.
- (i) Failing, upon payment of a claim, to inform insureds or beneficiaries of the coverage under which payment is made.
- (j) Making known to insureds or claimants a practice of the insurer of appealing from arbitration awards in favor of insureds or claimants for the purpose of compelling

1 them to accept settlements or compromises less than the amount awarded in
2 arbitration.

3 (k) Delaying the investigation or payment of claims by requiring an insured or a
4 claimant, or the physician of either, to submit a preliminary claim report, and then
5 requiring the subsequent submission of formal proof of loss forms, both of which
6 submissions contain substantially the same information.

7 (m) Failing to provide promptly to an insured a reasonable explanation of the basis in the
8 insurance policy, with respect to the facts of the insured's claim and the applicable
9 law, for the denial of the claim or for an offer to settle or compromise the claim.

10 (n) Advising an insured or claimant not to seek legal counsel.

11 (o) Misleading an insured or claimant concerning any applicable statute of limitations.

12 The presence or absence of any of these factors alone is not enough to determine whether the
13 defendant's conduct was or was not in bad faith. You must consider the defendant's conduct as a
14 whole in making this determination.

15 **Source/Authority:**

16 NEV.J.I. 11.21 (2018) (used list of unfair practice); California Civil Jury Instructions
17 2337 (2020) (used language for opening and closing paragraph).

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Jury Instruction No. _____

It is not enough to show that, in hindsight, a defendant acted with no reasonable basis; the plaintiff must show that the defendant knew or recklessly disregarded that there was no reasonable basis for its conduct.

Source/Authority:

Igartua v. Mid-Century Ins. Co., 262 F. Supp. 3d 1050, 1053 (D. Nev. 2017) (“It is not enough to show that, in hindsight, an insurer acted unreasonably; the plaintiff must show that the insurer knew or recklessly disregarded that it was acting unreasonably.”).

An insurer has a reasonable basis to deny coverage if the insured's claim is fairly debatable either on a matter of fact or law. A claim is fairly debatable when it is open to dispute on any logical basis. And so, if reasonable minds can differ on the coverage-determining facts or law, then the claim is fairly debatable.

Source/Authority:

Sloan v. Country Preferred Ins. Co., No. 212CV01085APGPAL, 2014 WL 12788197, at *6 (D. Nev. May 15, 2014), adhered to on reconsideration, No. 212CV01085APGPAL, 2015 WL 13674185 (D. Nev. Mar. 5, 2015) ("An insurer's belief that the validity of an insured's claim is 'fairly debatable' is a defense to a bad faith claim. The existence of that subjective belief, however, is a question of fact for the jury.") (citing *Albert H. Wohlers & Co. v. Bartgis*, 114 Nev. 1249, 1259, 969 P.2d 949, 957 (1998), as amended (Feb. 19, 1999)); *Telligen, Inc. v. Atl. Specialty Ins. Co.*, 454 F. Supp. 3d 843, 845-46 (S.D. Iowa 2020) ("An insurer has a reasonable basis to deny coverage if the insured's claim is fairly debatable either on a matter of fact or law. A claim is fairly debatable when it is open to dispute on any logical basis. And so, if reasonable minds can differ on the coverage-determining facts or law, then the claim is fairly debatable.").

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Jury Instruction No. _____

A legal cause of injury, damage, loss, or harm is a cause which is a substantial factor in bringing about the injury, damage, loss, or harm.

Source/Authority:

NEV.J.I. 4.5 (2018).

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Jury Instruction No. _____

A substantial factor is a factor that a reasonable person would consider to have contributed to harm. It must be more than a remote or trivial factor. It does not have to be the only cause of the harm.

Conduct is not a substantial factor in causing harm if the same harm would have occurred without that conduct.

Source/Authority:

NEV.J.I. 4.5 (2018); California Civil Jury Instructions 430 (2020).

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A mere possibility of causation does not satisfy the requirement of legal cause.

Source/Authority:

Bergman v. United States, 579 F. Supp. 911, 921 (W.D. Mich. 1984 (“A ‘mere possibility’ of causation does not satisfy the requirement of proximate cause.”) (citing *Brown Mechanical Contractors, Inc. v. Centennial Insurance Company*, 431 So.2d 932, 942 (Ala. 1983); *Ex Parte Travis*, 414 So.2d 956 (Ala. 1982))).

If you find that Sierra Health and Life Insurance Company, Inc. and/or United Healthcare, Inc. breached the implied covenant of good faith and fair dealing, also known as bad faith, then Plaintiff Sandra L. Eskew, as the Special Administrator of the Estate of William G. Eskew, can recover all consequential damages that William G. Eskew incurred or sustained before his death caused by Sierra Health and Life Insurance Company, Inc.’s and/or United Healthcare, Inc.’s breach of the implied covenant of good faith and fair dealing. In determining this award of damages, if any, from the evidence presented, you will take into consideration the nature, extent, and duration of the damages that you believe William G. Eskew incurred or sustained.

Source/Authority:

NRS 41.100(3) (“Except as otherwise provided in this subsection, when a person who has a cause of action dies before judgment, the damages recoverable by the decedent’s executor or administrator include all losses or damages which the decedent incurred or sustained before the decedent’s death, including any penalties or punitive and exemplary damages which the decedent would have recovered if the decedent had lived, and damages for pain, suffering or disfigurement and loss of probable support, companionship, society, comfort and consortium. This subsection does not apply to the cause of action of a decedent brought by the decedent’s personal representatives for the decedent’s wrongful death.”).

U. S. Fid. & Guar. Co. v. Peterson, 91 Nev. 617, 619–20, 540 P.2d 1070, 1071 (1975) (“We approve and adopt the rule that allows recovery of consequential damages where there has been a showing of bad faith by the insurer.”).

NEV.J.I. 5.1 (2018) (modified opening sentence from model instruction is reflected in last sentence).

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Jury Instruction No. _____

“Consequential damages” are damages that can fairly and reasonably be considered to arise naturally from a breach of the implied covenant of good faith and fair dealing.

Source/Authority:

Century Sur. Co. v. Andrew, 134 Nev. 819, 825, 432 P.3d 180, 186 (2018)
 (“Consequential damages ‘should be such as may fairly and reasonably be considered as arising naturally, or were reasonably contemplated by both parties at the time they made the contract.’”).

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Jury Instruction No. _____

Plaintiff seeks to recover damages for the physical and mental pain, suffering, emotional distress, and anxiety that William G. Eskew allegedly incurred from the date of the breach of the implied covenant of good faith and fair dealing to the date of his death caused by the breach.

Plaintiff does not allege that Sierra Health and Life Insurance Company, Inc. or United Healthcare, Inc. caused or contributed to William G. Eskew’s death.

Source/Authority:

NEV.J.I. 5.1 (2018); Plaintiff’s Fifth Supplement to NRCP 16.1(a) Disclosures (identifying categories of damages sought).

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Jury Instruction No. _____

No fixed standard exists for deciding the amount of physical and mental pain, suffering, emotional distress, and anxiety damages. Nor is the opinion of any witness required as to the amount of such reasonable compensation. You must use your judgment to decide upon a reasonable amount based on the evidence and your common sense.

Source/Authority:

NEV.J.I. 5.2 (2018); Plaintiff’s Fifth Supplement to NRCP 16.1(a) Disclosures (identifying categories of damages sought).

Jury Instruction No. _____

A party cannot recover damages for losses it could have avoided by reasonable efforts. The burden is on the party whose wrongful acts resulted in the damages to prove that the damages might have been lessened by reasonable diligence and expenditures on the part of the party seeking damages. Reasonable diligence does not require that the party seeking damages ask the party whose wrongful conduct resulted in the damages to remedy the injury, detriment, harm or loss resulting from the alleged wrongful act.

Source/Authority:

NEV.J.I. 13.49 (2018) (modified); *Cordova v. Am. Fam. Mut. Ins. Co.*, No. 2:13-CV-1111-KJD-VCF, 2016 WL 4060304, at *2 (D. Nev. July 28, 2016) (explaining that a plaintiff had a duty to mitigate consequential damages arising from a bad faith claim).

Plaintiff alleges that Sierra Health and Life Insurance Company, Inc. and United Healthcare, Inc. were involved in a joint venture. Plaintiff has the burden to show the existence of a joint venture by a preponderance of the evidence.

If a third party claims administrator is engaged in a joint venture with an insurer, the administrator may be held liable for its bad faith in handling the insured's claim, even though the organization is not technically a party to the insurance policy.

A joint venture exists where the third party claims administrator handles the insured's claim, shares in the insured's profits, and engages in administrative responsibilities with respect to the insurer, such as developing promotional material, issuing policies, billing and collecting premiums, paying and adjudicating claims, and assisting in the development of policies.

Source/Authority:

Albert H. Wohlers & Co. v. Bartgis, 114 Nev. 1249, 1262, 969 P.2d 949, 959 (1998), as amended (Feb. 19, 1999) ("However, according to a well-established exception to this general rule, where a claims administrator is engaged in a joint venture with an insurer, the administrator 'may be held liable for its bad faith in handling the insured's claim, even though the organization is not technically a party to the insurance policy.'").

Albert H. Wohlers & Co. v. Bartgis, 114 Nev. 1249, 1263, 969 P.2d 949, 959 (1998), as amended (Feb. 19, 1999) ("In the instant case, and in similar fashion, we conclude that the evidence sufficiently established that Wohlers and Allianz were involved in a joint venture to an extent sufficient to expose Wohlers to all policy-based contractual claims and bad faith liability. Here, the evidence proffered at trial indicated that Wohlers developed promotional material, issued policies, billed and collected premiums, paid and adjudicated claims, and assisted Allianz in the development of the ancillary charges limitation provision. Further, because Wohlers shared in Allianz's profits, it had a direct pecuniary interest in optimizing Allianz's financial condition by keeping claims costs down. Indeed, Wohlers's administrative responsibilities and its special relationship with Allianz are more indicative of the existence of

1 a joint venture than the situation presented in Farr.”).

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Plaintiff seeks punitive damages against Sierra Health and Life Insurance Company, Inc. and United Healthcare, Inc. Therefore, if you find that Sierra Health and Life Insurance Company, Inc. and/or United Healthcare, Inc. are liable for breach of the implied covenant of good faith and fair dealing you may then consider whether you should award punitive or exemplary damages against the Defendant or Defendants you found liable.

Punitive or exemplary damages are used to make an example of or punish wrongful conduct. You have discretion to award such damages, only if you find by clear and convincing evidence that the Defendant was guilty of oppression, fraud or malice in that Defendant's conduct that breached the implied covenant of good faith and fair dealing.

"Malice" means conduct which is intended to injure a person or despicable conduct which is engaged in with a conscious disregard of the rights or safety of others.

"Oppression" means despicable conduct that subjects a person to cruel and unjust hardship with conscious disregard of the rights of that person.

"Fraud" means an intentional misrepresentation, deception or concealment of a material fact known to a Defendant to which William G. Eskew relied upon to his detriment.

"Conscious disregard" means knowledge of the probable harmful consequences of a wrongful act and a willful and deliberate failure to avoid these consequences.

At this time, you are to decide only whether an award of punitive damages is justified. If you decide an award of punitive damages is justified, you will later decide the amount of punitive damages to be awarded, after you have heard additional evidence and instruction.

Source/Authority:

NEV.J.I. 12.1 (2018) (modified); Nevada Jury Instructions 12PD.1 (2011) (modified); NRS 42.005; *Wyeth v. Rowatt*, 126 Nev. Adv. Op. 44, 244 P.3d 765 (2010); *Countrywide Home Loans, Inc. v. Thitchener*, 124 Nev. 725, 192 P.3d 243 (2008); *Evans v. Dean Witter Reynolds, Inc.*, 116 Nev. 598, 5 P.3d 1043 (2000); *Clark v. Lubritz*, 113 Nev. 1089, 944 P.2d 861 (1997); *see also State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 123 S.Ct. 1513 (2003); *White v. Ford Motor Co.*, 312 F.3d 998 (9th Cir. 2002); *Betsinger v. D.R. Horton, Inc.*, 126 Nev. Adv.

1 Op. 17, 232 P.3d 433 (2010); *Bongiovi v. Sullivan*, 122 Nev. 556, 138 P.3d 433 (2006); *Dillard*
2 *Dep't. Stores, Inc. v. Beckwith*, 115 Nev. 372, 989 P.2d 882 (1999), *cert. denied*, 530 U.S. 1276
3 (2000); *Albert H. Wohlers & Co. v. Bartgis*, 114 Nev. 1249, 969 P.2d 949 (1999), *cert. denied*,
4 527 U.S. 1038 (1999); *Guaranty Nat'l Ins. Co. v. Potter*, 112 Nev. 199, 912 P.2d 267 (1996);
5 *Ace Truck & Equip. Rentals, Inc. v. Kahn*, 103 Nev. 503, 746 P.2d 132 (1987); *Phillip Morris*
6 *USA v. Williams*, 549 U.S. 346 (2007); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S.
7 408 (2003); *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996).

8 NRS 42.005(5) ("For the purposes of an action brought against an insurer who acts in bad
9 faith regarding its obligations to provide insurance coverage, the definitions set forth in NRS
10 42.001 are not applicable and the corresponding provisions of the common law apply.");
11 *Ainsworth v. Combined Ins. Co. of America*, 105 Nev. 237, 774 P.2d 1003, 1012 (Nev.1989)
12 (internal quotation marks and citations omitted), abrogated on other grounds by *Powers*, 114
13 Nev. 690, 962 P.2d 596 (providing that oppression occurs when the plaintiff is subjected to
14 "cruel and unjust hardship in conscious disregard of his rights"); *Granite Construction Co. v.*
15 *Rhyne*, 107 Nev. 651, 817 P.2d 711, 713 (1991) (providing that malice refers to conduct which is
16 intended to injure a person or conduct with a conscious or deliberate disregard of the rights or
17 safety of others); *see also Coughlin v. Tailhook Ass'n*, 112 F.3d 1052, 1055–56 (9th Cir. 1997);
18 *J.A. Jones Constr. Co. v. Lehrer McGovern Bovis, Inc.*, 120 Nev. 277, 89 P.3d 1009, 1017
19 (2004) (providing that fraud is found where a party intentionally makes a false representation to
20 a plaintiff who relies upon that false statement to his detriment).

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Jury Instruction No. _____

A breach of the implied covenant of good faith and fair dealing alone does not mean that a defendant acted with oppression, fraud, or malice. Instead, you must separately find oppression, fraud or malice by clear and convincing evidence.

Source/Authority:

United Fire Ins. Co. v. McClelland, 105 Nev. 504, 512, 780 P.2d 193, 198 (1989) (providing that “proof of bad faith, by itself, does not establish liability for punitive damages”); *U. S. Fid. & Guar. Co. v. Peterson*, 91 Nev. 617, 621, 540 P.2d 1070, 1072 (1975) (concluding that while the record supported a finding of bad faith, “the necessary requisites to support punitive damages [were] not present”).

Acts or conduct by Sierra Health and Life Insurance Company, Inc. and/or United Healthcare, Inc. that took place outside the state of Nevada, whether lawful or unlawful, cannot be relied on to award punitive damages.

Source/Authority:

Nevada Jury Instructions 12PD.2 (2011) (“Evidence has been presented concerning a defendant’s conduct outside Nevada and/or conduct injuring others are who not parties to this litigation. You cannot use such evidence to award plaintiff punitive damages for conduct outside Nevada, or conduct injuring others who are not parties tot his litigation, or conduct that does not bear a reasonable relationship to the conduct injuring plaintiff that warrants punitive damages in this case.”); California Civil Jury Instructions 3945; BAJI 14.71.1; *Philip Morris USA v. Williams*, 549 U.S. 346, 353–354 (2007) (holding the United States Constitution requires an instruction that punitive damages may not be awarded for a party’s conduct related to non-parties); *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408, 422 (2003) (holding the United States Constitution requires an instruction that punitive damages may not be awarded for a party’s conduct that occurred in another State); *White v. Ford Motor Co.*, 312 F.3d 998 (9th Cir. 2002) (holding Nevada jury was required to be instructed that a defendant cannot be punished for conduct, lawful or unlawful, that occurred in another state).

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Acts or conduct by persons or entities that are not parties to this lawsuit cannot be relied on to award punitive damages.

Source/Authority:

Nevada Jury Instructions 12PD.2 (2011) (“Evidence has been presented concerning a defendant’s conduct outside Nevada and/or conduct injuring others are who not parties to this litigation. You cannot use such evidence to award plaintiff punitive damages for conduct outside Nevada, or conduct injuring others who are not parties tot his litigation, or conduct that does not bear a reasonable relationship to the conduct injuring plaintiff that warrants punitive damages in this case.”); California Civil Jury Instructions 3945; BAJI 14.71.1; *Philip Morris USA v. Williams*, 549 U.S. 346, 353–354 (2007) (holding the United States Constitution requires an instruction that punitive damages may not be awarded for a party’s conduct related to non-parties); *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408, 422 (2003) (holding the United States Constitution requires an instruction that punitive damages may not be awarded for a party’s conduct that occurred in another State); *White v. Ford Motor Co.*, 312 F.3d 998 (9th Cir. 2002) (holding Nevada jury was required to be instructed that a defendant cannot be punished for conduct, lawful or unlawful, that occurred in another state).

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PHASE 2 INSTRUCTIONS REGARDING PUNITIVE DAMAGES AWARD

There are no fixed standards for determining the amount of a punitive damage award; the amount, if any, is left to your sound discretion, to be exercised without passion or prejudice and in accordance with the following governing principles.

The amount of a punitive damage award is not to compensate the plaintiff for harm suffered but what is reasonably necessary and fairly deserved (in light of the blameworthiness and harmfulness inherent in the defendant's conduct) to punish and deter the defendant and others from engaging in conduct such as that warranting punitive damages in this case. Your award cannot be more than otherwise warranted by the evidence in this case merely because of the wealth of the defendant. Your award cannot either punish the defendant for conduct injuring others who are not parties to this litigation.

In determining the amount of your punitive damage award, you should consider the following guideposts:

1. The degree of reprehensibility of the defendant's conduct, in light of (a) the culpability and blameworthiness of the defendant's fraudulent, oppressive and/or malicious misconduct under the circumstances of this case; (b) whether the conduct injuring plaintiffs that warrants punitive damages in this case was part of a pattern of similar conduct by the defendant; and (c) any mitigating conduct by the defendant, including any efforts to settle the dispute.

2. The ratio of your punitive damage award to the actual harm inflicted on William G. Eskew by the conduct warranting punitive damages in this case, since the measure of punishment must be both reasonable and proportionate to the amount of harm to William G. Eskew and to the compensatory damages recovered by the plaintiff in this case.

3. How your punitive damages award compares to other civil or criminal penalties that could be imposed for comparable misconduct, since punitive damages are to provide a means by which the community can express its outrage or distaste for the misconduct of a fraudulent, oppressive or malicious defendant and deter and warn others that such conduct will not be tolerated.

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Source/Authority:

Nevada Jury Instructions 12PD.2 (2011) (modified to remove affirmative defense of annihilation and financial condition, which Defendants are not asserting).

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There is no right to punitive damages. Accordingly, you need not award punitive damages even if you find that the standard for imposing punitive damages has been satisfied.

Source/Authority:

Smith v. Wade, 461 U.S. 30, 52 (1983) (punitive damages “are never awarded as of right, no matter how egregious the defendant’s conduct. ‘If the plaintiff proves sufficiently serious misconduct on the defendant’s part, the question whether to award punitive damages is left to the jury, which may or may not make such an award.’”); *Smith Food & Drug Centers, Inc. v. Bellegarde*, 114 Nev. 602, 958 P.2d 1208 (1998).

Any individuals other than William G. Eskew who might claim to have been harmed by the defendant have the right to bring their own lawsuit seeking compensatory and punitive damages for the wrong, if any done to them. Therefore, in determining the amount of punitive damages, if any, that is necessary for punishment and deterrence, you may consider only the wrong done to William G. Eskew in this case. You may not award any punitive damages for the purpose of punishing or deterring defendant's conduct toward anyone else or any conduct outside the State of Nevada.

Source/Authority:

Philip Morris USA v. Williams, 549 U.S. 346, 354 (2007) ("the Due Process Clause forbids a state to use a punitive damage award to punish a defendant for injury that it inflicts upon non parties or those whom they directly represent i.e. injury that it inflicts upon those who are essentially, strangers to the litigation"); *State Farm Ins. Co. v. Campbell*, 538 U.S. 408, 426 (2003) ("Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis.... Punishment on these bases creates the possibility of multiple punitive damages awards for the same conduct; for in the usual case nonparties are not bound by the judgment some other plaintiff obtains."); *id.* at 421-22 (2003) ("Nor, as a general rule, does a State have a legitimate concern in imposing punitive damages to punish a defendant for unlawful acts committed outside of the State's jurisdiction" * * * out of state conduct "must have a nexus to the specific harm suffered by the plaintiff").

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Jury Instruction No. _____

A defendant’s dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages. A defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business.

Source/Authority:

State Farm Mut. Auto. Ins. Co. v. Campbell, 123 S.Ct. 1513, 1523 (2003).

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Your award of punitive damages must be based solely on the conduct that by clear and convincing evidence was shown to constitute fraud, oppression, or malice.

Source/Authority:

14A STEVEN PLITT ET AL., COUCH ON INSURANCE § 207:73 (3d ed. June 2021 update) (“In most instances, unless the insured would be entitled to a directed verdict on the underlying insurance claim, an arguable reason to deny the claim exists, precluding the imposition of punitive damages.”); *Pioneer Chlor Alkali Co. v. Nat’l Union Fire Ins. Co.*, 863 F. Supp. 1237, 1250–51 (D. Nev. 1994) (acknowledging “difficulty constructing a factual situation where an insurer who violated [NRS 686A.310] could have done so with an oppressive or malicious intent yet not denied, or refused to pay, the claim”).

A defendant's conduct in litigation before trial may not be used to impose punitive damages.

Source/Authority:

Bahena v. Goodyear Tire & Rubber Co., 126 Nev. 243, 259 n.1, 235 P.3d 592, 603 n.1 (2010) (Pickering, J., dissenting) (explaining that the district court's discovery sanction extended only to striking Goodyear's answer as to liability; Goodyear was allowed to defend on punitive damages without the presumption of liability: "Goodyear avoided punitive damages in this case by arguing that a road hazard, rather than design or manufacturing defect, caused the tire failure from which this accident resulted."); *see also* Nev. J.I. 2.5 (2018); NRS 47.250(3); *Bass-Davis v. Davis*, 122 Nev. 442, 448, 134 P.3d 103, 106-07 (2006); *Bosack v. Soward*, 586 F.3d 1096, 1105 (9th Cir. 2009) ("Absent an abuse of process or malicious prosecution, 'a defendants trial tactics and litigation conduct may not be used to impose punitive damages in a tort action.'" (quoting *De Anza Santa Cruz Mobile Estates Homeowners Assn. v. De Anza Santa Cruz Mobile Estates*, 114 Cal. Rptr. 2d 708, 730 (App. Ct. 2001))); *Palmer v. Ted Stevens Honda, Inc.*, 238 Cal. Rptr. 363, 369 (App. Ct. 1987) ("Not only was admission of this evidence of defendant's litigation conduct . . . error, we conclude it undermines the integrity of the punitive damage award" because it "inflamed the jury so as to disregard the court's admonitions about its limited purpose"); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 422-23 (2003) (restricting punitive damages to punish the defendant for "the acts upon which liability was premised," not independent or subsequent misconduct); *Simmons v. Southern Pac. Transportation Co.*, 133 Cal. Rptr. 42, 58 (Cal. App. 1976) (citing *Noe v. Kaiser Foundation Hospitals*, 435 P.2d 306 (Cal. 1967)) (refusing to allow punitive damages based upon railroad's willful destruction of evidence because "[e]ven assuming that the railroad engaged in file-stripping, evidence suppression, and willful refusal to file accident reports, these matters occurred long after the accident and could not have had any bearing on the accident itself"; thus, "[i]nconsistencies, evasions and untruths made subsequent to the occasion have been considered by this court to be only evidence of an attempt to avoid responsibility for past actions rather than evidence of previous disregard for

1 consequences”); *Brito v. Gomez Law Group, LLC*, 658 S.E. 2d 178, 184-85 (Ga. App. 2008) (no
2 authority supports punitive damages “as a sanction for spoliation of evidence, and the record
3 contains no evidence of intentional actions by [defendant] going beyond mere spoliation”);
4 *Schenk v. HNA Holdings, Inc.*, 613 S.E.2d 503, 24 A.L.R.6th 919 (N.C. App. 2005) (that
5 engineer directed asbestos specialist to destroy memorandum and provide only verbal reports of
6 asbestos removal was insufficient to establish that corporate owner’s officer, director, or
7 manager participated in willful or wanton conduct that resulted in third-party maintenance
8 workers’ asbestos-related injuries; no evidence that destruction of memorandum resulted in
9 workers' injuries); *cf. also Reeves v. Alyeska Pipeline Service Co.*, 56 P.3d 660 (Alaska 2002)
10 (destruction of evidence was not presented to the jury as separate tort theory, “and it would be
11 improper to speculate that the jury found that these torts were established, much less that they
12 warranted an award of punitive damages”).

1 **[NOTE: Defendants object to the introduction of its financial condition at trial.]**

2 Jury Instruction No. _____

3 The wealth of a defendant does not diminish its entitlement to all the protections of the
4 law on which you have been instructed. A defendant's financial resources do not justify a large
5 punishment, or even any punishment. Moreover, you may not punish a defendant simply on the
6 basis of its size.

7 **Source/Authority:**

8 Nevada Jury Instructions 12 PD.2 (2011) (modified) ("Your award cannot be more than
9 otherwise warranted by the evidence in this case merely because of the wealth of the
10 defendant."); *State Farm Ins. Co. v. Campbell*, 123 S. Ct. 1513, 1525 (2003) (the wealth of the
11 defendant cannot justify an otherwise unconstitutional punitive damages award); *BMW of N. Am.*
12 *v. Gore*, 517 U.S. 559, 585 (1996) ("the fact that BMW is a large corporation rather than an
13 impecunious individual does not diminish its entitlement to fair notice of the demands that the
14 several states impose on the conduct of its business"); *see also Bongiovi v. Sullivan*, 122 Nev.
15 556, 582-83, 138 P.3d 433, 452 (2006) (adopting federal guideposts set forth in *State Farm* and
16 *BMW of N. Am.*).

In contrast to compensatory damages, punitive damages rest on justifications similar to those for criminal punishment. Because exemplary damages resemble criminal punishment, they require appropriate substantive and procedural safeguards to minimize the risk of unjust punishment.

One of these safeguards is that, in contrast to your verdict on compensatory damages, your verdict as to the amount of punitive damages must be unanimous.

Source/Authority:

State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 417 (2003) (stating that punitive damages “serve the same purposes as criminal penalties”); *Austin v. Stokes-Craven Holding Corp.*, 691 S.E.2d 135, 150 (S.C. 2010) (“[P]unitive damages are quasi-criminal in nature.”); *George Grubbs Enters., Inc. v. Bien*, 900 S.W.2d 337, 339 (Tex. 1995) (“In contrast to compensatory damages, exemplary damages rest on justifications similar to those for criminal punishment.”); *Grisham v. Philip Morris, Inc.*, 670 F. Supp. 2d 1014, 1036 (C.D. Cal. 2009) (there are “heightened due process considerations surrounding punitive damages awards” under the Fourteenth Amendment); *see Campbell*, 538 U.S. at 417 (basing the Court’s decision on the fact that “defendants subjected to punitive damages in civil cases have not been accorded the protections applicable in a criminal proceeding[, which] increases our concerns over the imprecise manner in which punitive damages systems are administered”); *George Grubbs*, 900 S.W.2d at 339 (“Because exemplary damages resemble criminal punishment, they require appropriate substantive and procedural safeguards to minimize the risk of unjust punishment.”); *Austin*, 691 S.E.2d at 150 (“Because punitive damages are quasi-criminal in nature, the process of assessing punitive damages is subject to the protections of the Due Process Clause of the Fourteenth Amendment of the United States Constitution.”). *See generally, e.g., Philip Morris USA v. Williams*, 549 U.S. 346 (2007); *BMW of N. Am., Inc. v. Gore*, 517 U. S. 559 (1996); *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443 (1993); *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991); KIRCHER, PUNITIVE DAMAGES: LAW AND PRACTICE 2D § 3.03 (2000); *Ramos v. Louisiana*, 140 S. Ct. 1390, 1397 (2020) (requiring a unanimous verdict in state-court criminal

1 trials); NRS 175.481 (“The verdict shall be unanimous. It shall be returned by the jury to the
2 judge in open court.”); NRS 175.191 (“A defendant in a criminal action is presumed to be
3 innocent until the contrary is proved; and in case of a reasonable doubt whether the defendant’s
4 guilt is satisfactorily shown, the defendant is entitled to be acquitted.”); NRS 175.211 (“1. A
5 reasonable doubt is one based on reason. It is not mere possible doubt, but is such a doubt as
6 would govern or control a person in the more weighty affairs of life. If the minds of the jurors,
7 after the entire comparison and consideration of all the evidence, are in such a condition that they
8 can say they feel an abiding conviction of the truth of the charge, there is not a reasonable
9 doubt. Doubt to be reasonable must be actual, not mere possibility or speculation. 2. No other
10 definition of reasonable doubt may be given by the court to juries in criminal actions in this
11 State.”).

EXHIBIT 7

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3
4 **IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**
5 **IN AND FOR THE COUNTY OF CLARK**
6

7 SANDRA L. ESKEW, as Special
8 Administrator of the Estate of William
George Eskew,

9 Plaintiff,

10 vs.

11 SIERRA HEALTH AND LIFE INSURANCE
12 COMPANY, INC., and UNITED
HEALTHCARE, INC.

13 Defendants.
14

Case No. A-19-788630-C

Dept. No. 4

15 **VERDICT**

16 We, the empaneled jury in the above-entitled case, return the following special verdict on the
17 questions submitted to us:

18 1. Do you find that Sierra Health and Life breached the implied covenant of good faith and fair
19 dealing?

20 YES _____ NO _____

21 2. Do you find that United Healthcare breached the implied covenant of good faith and fair
22 dealing?

23 YES _____ NO _____

24 If you answered "yes" to question 1 or 2, please proceed to questions 3 and 4. If you
25 answered "no" to questions 1 and 2, you have completed this verdict form. The foreperson should
26 sign it and inform the bailiff that you have reached a verdict.

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3. What amount of money do you find for the damages to William Eskew caused by the breach of the implied covenant of good faith and fair dealing?

\$ _____

4. Do you find that punitive damages are appropriate?

YES _____ NO _____

DATED this ____ day of March 2022.

FOREPERSON

1
2
3 **IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**
4 **IN AND FOR THE COUNTY OF CLARK**
5

6 SANDRA L. ESKEW, as Special
7 Administrator of the Estate of William
8 George Eskew,

9 Plaintiff,

10 vs.

11 SIERRA HEALTH AND LIFE INSURANCE
12 COMPANY, INC., and UNITED
13 HEALTHCARE, INC.

14 Defendants.

Case No. A-19-788630-C

Dept. No. 4

15 **VERDICT**

16 We, the empaneled jury in the above-entitled case, return the following special verdict on the
17 questions submitted to us:

- 18 1. What amount of money do you finding for punitive damages?

19 \$ _____

20 DATED this ____ day of March 2022.

21
22 _____
23 FOREPERSON
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EXHIBIT 8

1 **VER**

2 **EIGHTH JUDICIAL DISTRICT COURT**
3 **CLARK COUNTY, NEVADA**
4

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

7 Plaintiff,

8 vs.

9 SIERRA HEALTH AND LIFE INSURANCE
10 COMPANY, INC.; UNITED HEALTHCARE,
11 INC.

12 Defendants.

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

**DEFENDANTS' PROPOSED SPECIAL
VERDICT FORM**

13 **JURY VERDICT**
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1 We, the jury in the above-entitled action, find the following:

2 **Question 1:**

3 Did the requested proton therapy qualify as a covered service under William G. Eskew's
4 insurance contract?

5 _____ Yes

6 _____ No

7 *If your answer to question 1 is yes, then answer question 2. If you answered no, stop*
8 *here, have the presiding juror sign and date this form, and inform the bailiff that you have*
9 *reached a verdict.*

10 **Question 2:**

11 Do you find that there was no reasonable basis for the denial of William G. Eskew's prior
12 authorization request for proton therapy?

13 _____ Yes

14 _____ No

15 *If your answer to question 2 is yes, then answer question 3. If you answered no, stop*
16 *here, have the presiding juror sign and date this form, and inform the bailiff that you have*
17 *reached a verdict.*

18 **Question 3:**

19 Did Sierra Health and Life Insurance Company, Inc. know or recklessly disregard the fact
20 that there was no reasonable basis for the denial of William G. Eskew's prior authorization
21 request for proton therapy?

22 _____ Yes

23 _____ No

24 *If your answer to question 3 is yes, then answer question 4. If you answered no, skip*
25 *question 4 and go to question 5.*

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1 **Question 4:**

2 Was Sierra Health and Life Insurance Company, Inc.'s bad faith denial a legal cause of
3 harm to William G. Eskew?

4 _____ Yes

5 _____ No

6 *Proceed to question 5.*

7 **Question 5:**

8 Were Sierra Health and Life Insurance Company, Inc. and United Healthcare, Inc.
9 involved in a joint venture?

10 _____ Yes

11 _____ No

12 *If your answer to question 5 is yes, then answer question 6. If you answered no, skip*
13 *questions 6-7 and go to question 8.*

14 **Question 6:**

15 Did United Healthcare, Inc. know or recklessly disregard the fact that there was no
16 reasonable basis for the denial of William G. Eskew's prior authorization request for proton
17 therapy?

18 _____ Yes

19 _____ No

20 *If your answer to question 6 is yes, then answer question 7. If you answered no, skip*
21 *question 7 and go to question 8.*

22 **Question 7:**

23 Was United Healthcare, Inc.'s bad faith denial a legal cause of harm to Mr. Eskew?

24 _____ Yes

25 _____ No

26 *Proceed to question 8.*

27 *///*

1 **Question 8:**

2 If you answered yes to question 4 and/or 7, fill in the amount of damages to William G.
3 Eskew caused by the breach of the implied covenant of good faith and fair dealing:

4 \$_____

5 *If you filled in any amount of damages, proceed to question 9. If you did not fill in any*
6 *amount of damages, stop here, have the presiding juror sign and date this form, and inform the*
7 *bailiff that you have reached a verdict.*

8 **Question 9:**

9 If you answered yes to question 4, do you find, by clear and convincing evidence, that
10 Sierra Health and Life Insurance Company, Inc. is guilty of oppression, fraud, or malice to
11 justify an award of punitive damages?

12 _____ Yes

13 _____ No

14 *Proceed to question 10.*

15 **Question 10:**

16 If you answered yes to question 7, do you find, by clear and convincing evidence, that
17 United Healthcare, Inc. is guilty of oppression, fraud, or malice to justify an award of punitive
18 damages?

19 _____ Yes

20 _____ No

21 *Have the presiding juror sign and date this form and inform the bailiff that you have*
22 *reached a verdict.*

23 DATED this _____ day of _____ 2022.

24
25 _____
26 JURY FOREPERSON
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