Case Nos. 85525 & 85656

In the Supreme Court of Nevada

UNITED HEALTHCARE INSURANCE COMPANY; UNITED HEALTH CARE SERVICES, INC.; UMR, INC.; SIERRA HEALTH AND LIFE INSURANCE COMPANY, INC.; and HEALTH PLAN OF NEVADA, INC., Appellants, *vs.* FREMONT EMERGENCY SERVICES (MANDAVIA), LTD.; TEAM PHYSICIANS OF NEVADA-MANDAVIA, P.C.; and CRUM STEFANKO AND JONES, LTD., Respondents.	Case No. 85525
UNITED HEALTHCARE INSURANCE COMPANY; UNITED HEALTH CARE SERVICES, INC.; UMR, INC.; SIERRA HEALTH AND LIFE INSURANCE COMPANY, INC.; and HEALTH PLAN OF NEVADA, INC., Petitioners, *vs.* THE EIGHTH JUDICIAL DISTRICT COURT of the State of Nevada, in and for the County of Clark; and the Honorable NANCY L. ALLF, District Judge, Respondents, *vs.* FREMONT EMERGENCY SERVICES (MANDAVIA), LTD.; TEAM PHYSICIANS OF NEVADA-MANDAVIA, P.C.; and CRUM STEFANKO AND JONES, LTD., Real Parties in Interest.	Case No. 85656

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CERTIFICATE OF SERVICE

I certify that on April 18, 2023, I submitted the foregoing appendix for filing *via* the Court's eFlex electronic filing system.

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logically dictate that we only -- there should only be at most 3.1 hours of additional testimony, given what the Special Master ruled and what plaintiffs sought -- 3.1. And we put in our papers how we get to that 3.1 number. I'll say it really briefly here.

If you have 73 topics across three defendants -- one defendant, UHG, they're not getting any more testimony with that one. And then as to the 49 topics across two defendants, if you do the math on all of that across the seven hours, that would be 3.1 hours. Okay? I don't think anyone is taking issue with that math.

Secondly, though, there really is no basis for the vast majority, if not the entirety of the additional testimony they seek.

Again, plaintiffs only raised eight topics in their original motion as being deficiently addressed at the deposition. The Special Master, despite that, granted additional time on 49 of the 73 topics. I want to put -- focus on one witness's topics, in particular. And then I'll talk very briefly about some of the others. But just one in particular, because I think -- --

THE COURT: Mr. Levine.

MR. LEVINE: -- it's a stark example of what's going on here.

THE COURT: Mr. Levine.

MR. LEVINE: And that is --

THE COURT: Mr. Levine, we had half an hour for this hearing --

MR. LEVINE: Yes.

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THE COURT: -- and it's now 9:20. I have other matters at 9:30. How much longer will you need?

MR. LEVINE: Can I have five minutes, Your Honor?

THE COURT: Well, I have two short matters at 9:30, so I -- go ahead, and I will take -- I'll call the other two matters at 9:30. So go ahead.

MR. LEVINE: Okay. I appreciate that, Your Honor. If you -- if you would like my -- if you would like me to wrap it up quicker, I'll try to do that. But if you would allow five minutes, I would appreciate it.

THE COURT: Of course.

MR. LEVINE: Okay. Ms. Bradley prepared for 12 to 18 hours, is what she testified for her deposition. Plaintiffs in their Motion to Compel dedicated two sentences to Ms. Bradley. Okay? Two sentences. They're found on page 7 of their original Motion to Compel.

In their response to our objections to R&R, they dedicate nearly -- a little more than a half a page, okay? And what they say is that she was -- and this is on page 13 and 14 of their response -- they say -- they quote one excerpt from her deposition, and they say -- this is the excerpt -- it says: So what I can explain, looking at this document only, the Explanation of Benefits, was that the claim process was a D1 remark code. That remark code identifying that there was a plan discount taken for using a network provider.

Question: Did you do any research as to how many claims

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at issue in this case were paid pursuant to the D1 code, which indicates that it was a network provider, and there was an aspect of a particular agreement?

There was an objection made that this is outside the scope of her topic.

And she says she has not.

So it begs the question, is the research regarding whether a claim is paid pursuant to a D1 code actually part of one of the topics she should have prepared for?

Plaintiffs in their original motion don't cite any topic for that proposition. None.

In their response filed yesterday, they do cite -- four topics, they list, okay? And this is on page 14 of their brief. They list topics 1, 3A, 3E, and 18. And I'll end that for this, Your Honor.

Those are the four topics. Well, let's think, let's look at those. First of all, 3E. That's the third of four. I'll start there. That's not one they sought to compel. They don't seek to compel additional testimony on 3E; nor does the Special Master grant it. So 3E is a nonsensical topic to raise here, okay? Not addressed by their motion or the Special Master, okay. Obviously doesn't relate to D1 code -- the D1 code.

3A, what is 3A? It says claims identified -- it starts, With respect to claims identified in the first amended complaint. And then it asks for information about those claims. Let's -- there are no claims -- there's no D1 code claim identified in the first amended

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complaint. And as plaintiffs well know, the claims identified in the first amended complaint are not claims -- are not identified with sufficient specificity that anyone could prepare for those topics, okay?

So Ms. Bradley was prepared to testify about those claims, to the extent they were included in the first amended complaint. But there -- there's nothing mentioned in the first amended complaint about a D1 code. Zero. Okay? So that topic doesn't apply here at all to the D1 code. Okay?

The next topic they list is topic one, which says: A description and explanation of your claims management systems and claims platforms, okay? That she was fully prepared to testify to. That doesn't say anything about, you know, how many claims are at issue in this case that were paid pursuant to the D1 code. Completely silent on that.

And then finally topic 8 -- 18 [indiscernible]. Topic 18 is probably the most attenuated topic to this. It says, The factual basis for your answer in this action. Nowhere in the answer does it mention a D1 code, no less how many claims at issue in this case were paid pursuant to D1 code. If they want to know how many claims at issue in this case were paid pursuant to a D1 code, they've had ample opportunity to obtain that information.

With that, Your Honor, I'll conclude, because I know I've been speaking for more time than we've had allotted. You know, I appreciate your time.

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I'll say this, you know, plaintiffs also are going to talk about, quote, unquote, gamesmanship. They spent the whole intro talking about gamesmanship. You know, that is what is done when the facts don't support your case. I'm happy to respond to any of those allegations of gamesmanship. If there's gamesmanship here, it has not been gamesmanship that defendants have engaged in. And I am confident that plaintiffs, when they speak after the break, are going to speak of gamesmanship, because it's one of their favorite topics.

Thank you, Your Honor. I appreciate your time.

THE COURT: Thank you, Mr. Levine.

And is the plaintiff comfortable going forward for five minutes and then taking a break to finish your argument?

MS. GALLAGHER: Good afternoon -- or good morning, Your Honor.

Would it be more beneficial for the Court to have -- to take the matters at 9:30 first, so that the presentation by plaintiffs is streamlined and then the reply by United thereafter?

THE COURT: If that's your preference, it's fine with me.

Ms. Gallagher, I have a hard time hearing you. Can you please get closer to your microphone?

MS. GALLAGHER: I will. Perhaps I'll call in through my phone, if we take a break here to allow for your other [indiscernible].

THE COURT: Good enough.

Thank you, both.

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[Recess taken from 9:26 a.m., until 9:36 a.m.]

THE COURT: Back to Fremont, please.

And Ms. Lundvall or Ms. Gallagher, your opposition, please.

MS. GALLAGHER: Yes, thank you, Your Honor. And hopefully you can hear me better.

THE COURT: I can. Thank you.

MS. GALLAGHER: At this time, I've switched over to the phone.

THE COURT: Very good.

MS. GALLAGHER: Thank you so much, Your Honor.

So this morning you're being asked not to undertake a *de novo* review of Report and Recommendation No. 8. But rather you're asking to be made a determination about whether Special Master Wall committed clear error when he recommended that the United defendants come back and answer questions on topics that their designees were either not prepared to talk about or did not want to talk about, and also to allow completion on deposition regarding certain other topics that are included in Report and Recommendation No. 8.

So as we heard, United forwards two main arguments as to why it objected to the Report and Recommendation. And the first is really an argument in seeking modification, not reversible of the Special Master's recommendation; right?

United is taking issue with the amount of time that Special

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Master Wall allocated for the completion of the deposition. He declined to adopt what the Health Care Providers requested, which was two full additional 7-hour days. He declined that, which is his right to do, based on the record he had before him. So he did recommend, though, what he had before him, is that an additional day of 7 hours would be appropriate.

So United's foundation for its objection rests on Report and Recommendation No. 1, which we know refers to the general proposition that's permitted under NRCP Rule 30(d) that depositions are limited to one day of 7 hours. That's the general rule. But we all know that that rule is not absolute. It allows a court or stipulation of the parties to extend that time.

We certainly also know that a 30(b)6 designation or any actual deposition where a witness is not prepared to answer questions or doesn't answer questions specifically within a 30(b)6 context as well, is that a Court is allowed to order, as a sanction under Rule 37, for that deponent to come back.

So those two rules aren't exclusive. In other words, 30(d) does not control a court and prohibiting the additional time if determined that that witness did not properly respond to questions.

So United also argues that the Health Care Providers are trying to avoid exceeding that 25 deposition limit per side that the Court has agreed upon. I want to make note that there -- the Health Care Providers took 23 depositions, so they really did have the opportunity to take two additional.

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The point of consolidation was really to make the examination efficient. I think what the mistake was with the Health Care Providers when they did that is that United then took advantage of that situation.

We detailed in our response to the objection some of those maneuvers that took place prior to the deposition. And it's important because on the night and the eve of the deposition, United then communicated even more maneuvers that they intended to set forth during the deposition, which is basically trying to manipulate the order by which the Health Care Providers were allowed access to people, allowed access to certain topics.

And you heard in United's presentation just a little bit ago, you know, they referred to -- what they referred to a mountain of topics, but, really, there are 15, Your Honor. The fact that United wanted to split them even among subparts, among witnesses, among designees, is really a strategy or a decision that they made themselves, which they're entitled to do, but they can't then turn back and try and make the topics more extensive than they are.

I'm getting a little feedback from someone. I think, Mr. Levine, your shuffling papers, and it's -- thank you.

And so those are issues that I think are inherent --

MR. LEVINE: I'm on mute, so it wasn't me. So I was on mute. So I'll go --

MS. GALLAGHER: Okay. Thank you.

So with respect to the number of topics and the subparts,

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that was really just meant to provide United the specificity that they had requested in early meet and confers.

Like I said, the fact that they have split them, even among certain people, even before subparts and then with the new subparts, I think just goes to the extent that United was looking to make this a protracted process. And they were successful at that.

So in the end, with respect to United's first argument about the number of hours, they urged the Court to reduce it to 3.1. But I think because Rule 53 requires that United identify clear error by Special Master Wall, and the Court will afford him deference to his findings on factual matters, I think that United has not carried its burden and that the Court should adopt Special Wall -- Special Master Wall's recommendation relating to the 7 hours with respect to those specific topics identified in the Report and Recommendation.

And I will note we did ask for an additional witness, United Health Group to come back, and Special Master Wall did decline that. So he certainly looked at the record beforehand and made determinations based on that record.

With respect to United's second basis for its objection, it has a flat denial, saying that the record developed in the briefing and at the hearing before Judge Wall -- saying it didn't establish that its designees could not answer, would not answer questions.

But I think if you look at their objection, it really is a nuanced denial. They certainly infer that Special Master Wall

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correctly found that some designees were not prepared. If you look at their objection on page 7, line 20, they talk about not being prepared on, quote, the vast majority of topics. I think that inherently indicates that they acknowledge that their witnesses could not and did not answer questions.

With respect to Ms. Bradley, United focuses quite a bit on her, with respect to saying that there's no evidence in the record that supports her to be recalled for deposition. She's been designated on topics 1; 3A to Z; 6, certain subparts; and then 18 as well.

But I think if you look at the transcript, with respect to the D1 remark code, it's interesting that United is trying to make it so narrow. This is what we've seen in a number of other matters where if you don't use a particular firm or reference or internal description that United has come up with, if we don't use it, they either say it doesn't exist or they say they don't know what we mean, and we'll see that in a little bit with respect to Ms. Paradise as well.

But the D1 remark code is subsumed within the Claims Administration. It hits on topics 3, 6, 18, and 19. And that can be gleaned from Ms. Bradley's deposition transcript, which is Exhibit 10, at page 12, lines 6 through 23.

So there was a discussion. You know, whether or not United agrees or disagrees -- but those are the topics that are implicated, which is exactly what Special Master Wall suggested and recommends those topics coming back to have continued examination upon.

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With respect to United's designee on topic 20, Mr. Yerich -- he was designated to talk about litigation holds, document retention policies, collection of discovery materials. He openly testified he wasn't prepared to talk about subparts B, F, and G. He also said he didn't know whether assigned shared drives of some of the very key witnesses in this case and custodians in this case were searched. He didn't know whether or not a certain data warehouse was searched. He also couldn't identify who was provided a litigation hold or when. He also didn't know when documents were first searched or collected.

And so these are, you know, really just basic key examples within topic No. 20, and with respect to why Special Master Wall indicated that he recommends that Mr. Yerich on those topics comes back to testify.

But I would like to spend a moment about United's argument regarding Rebecca Paradise and why that particular argument and the objection is so important. The Court is very familiar with the fact that we've had to take extended efforts to compel United's participation in discovery. And it ended up with an order to compulsion and a sanctions order before the Court.

I don't want to necessarily want to revisit all of that, but I think it's important during that presentation, during the sanctions motion, United represented that it didn't have a shared savings program. It told the Court that it was MultiPlan that had a shared savings program. And this was an effort to avoid the sanctions. It

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was an effort to avoid that discovery concerning its shared savings program.

So although United has produced documents, I will make a caveat that we do not think the production on that topic -- on those issues is complete. However, the documents that have been produced show that United generated, in 2018, $1.3 billion in revenue alone and this is with regard to the self-funded and [indiscernible] clients that United provides administrative services to. This program is really important to United. And we know that because it's embarked on a communications marketing, government affairs, and a legal campaign to protect that revenue; and in the meantime, also disparaging the Health Care Providers specifically during those efforts.

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And so, Your Honor, I won't go into that because you're going to be a little bit more about that in connection with United's objection to Report and Recommendation No. 5.

But it's important to give you the background with respect to Ms. Paradise. So when she was designated on topic 2, it does concern the shared savings program. When asked at deposition, she evaded questions about it. She either wouldn't or couldn't answer questions about profits or revenue generated by that program.

And what I find interesting is that in the objection, United forwards an argument that Ms. Paradise, who is a United vice president, that she was confused about the plural term shared savings program, and that our imprecise use of that language is to

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blame for not getting answers to their questions.

And so this, from the Health Care Providers perspective, is an obstruction, and it is unfortunately not new. We saw it just a moment ago with the D1 code. If we didn't put a D1 code in a topic, United indicated that it's outside the scope of any topic relating to claims administration or any of the identified topics.

We also saw that obstruction with respect to United and MultiPlan and Data iSights. United earlier took positions that it didn't know whether or not there was any reporting between those two companies. And as it turns out, there was a dedicated e-mail that it took us months, and we didn't learn that until a production in January of this year.

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And so Ms. Paradise didn't have the ability to talk about a program that is that important to United. She also didn't have the ability to answer questions about an outlier cross-management program, which is topic 11, about communications with MultiPlan, which is topics 13 and 14.

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So what we're seeing is something very similar to what we saw in discovery. United's goal is to prevent testimonial evidence on these issues that are quite relevant to this case.

So as a result, given Special Master Wall's diligence in reviewing the record beforehand, the fact that Rule 53 provides that, unless there is clear error, that deference be given to his factual findings.

And so we would ask that the Court adopt his

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recommendation in full, Your Honor. Thank you.

THE COURT: Thank you.

It's 9:48. Mr. Levine, you can have six minutes.

MR. LEVINE: Thank you, Your Honor.

And I actually -- my Internet did not work for the middle of Ms. Gallagher's presentation, so I'm now on the phone. Hopefully you can hear me okay.

THE COURT: We can. Thank you.

MR. LEVINE: Okay. And so I apologize. I didn't hear the middle of what she said. So I'm going to react to what she said at the beginning and at the end.

THE COURT: Do you want to tell us where she cut out? Because I don't want you to be disadvantaged.

MR. LEVINE: I mean, she cut out about three minutes into her presentation, and I got back in for the last probably five minutes.

So I missed the middle. I'll do the best I can under the circumstances, but --

THE COURT: No, no, no. That's not the way this works. You're entitled to hear her argument.

So, Ms. Gallagher, I'm going to ask you to go back and at least hit the highlights for Mr. Levine.

And I believe you're muted, Ms. Gallagher.

MS. GALLAGHER: Okay. Can you hear me now?

THE COURT: We can.

Mr. Levine?

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MR. LEVINE: I can hear her. Yes, thank you.

MS. GALLAGHER: Okay. Mr. Levine, did you hear my presentation with respect to United's Argument No. 1 with respect to the number of hours?

MR. LEVINE: Yes. I heard, I think, the completion of the argument with respect to hours. And that's when I cut off. Right when you said -- about the -- you made the comment about the paper shuffling. That's where I cut off.

MS. GALLAGHER: Okay. You're probably better suited to know exactly where that was. Do you recall me starting on United's second basis for its objection? Or is that where I should start?

MR. LEVINE: I think that's where you should start. That's where I cut off.

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MS. GALLAGHER: Okay. I will start there.

Okay. Your Honor, United's second basis for objection is a flat denial that the record developed in the briefing and at the May 27th hearing established that its designees could not answer questions. But within the denial and within the objection there is what I would consider to be an inferred admission that the Special Master correctly found that some designees were not prepared.

And I point the Court to United's objection on page 7, line 20. It starts that, quote, On the vast majority of topics for which the Report and Recommendation grants additional deposition time -- which infers that there are some that it knows that its designees were not prepared to talk about. And so United focuses a lot on

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Jolene Bradley in its presentation and its objection, and argues that there's no evidence that the Special Master could have found that the record supports her to be recalled for deposition on the topics identified in Report and Recommendation No. 8.

But the example that was provided about examination on the D1 remark code implicates topics 3, 6, 18, and 19. And so that is within the record that the Special Master reviewed and within the documents that the Health Care Providers filed. And Your Honor can see that at Exhibit 10, which is the Bradley deposition transcript. And that's at page 12, lines 6 through 23.

And the point about the D1 examination remark code, I also want to touch on, is that we heard in United's presentation that, you know, the D1 remark code isn't listed anywhere -- in the complaints; it's not listed in as topics in the 30(b)6 notice. And this is what I consider to be United's mantra, which is they take something that is internal to them; right, a D1 remark code. And then they say if we don't know what it is, if we can't identify it, if we can't explain it, we shouldn't be -- they shouldn't have to respond to it, and we shouldn't be able to ask questions about it.

But it's clear that this is part of claims administration, which falls within the implicated topics that I just mentioned. And so this idea that the Health Care Providers have all things knowing about United and its operations to be able to refer to a specific remark code is something that we've seen time and time again, which is an obstruction and a stepping around and trying to avoid

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discovery on topics that United has internally identified and internally termed.

And I'll get to that in a moment again with respect to Ms. Paradise.

With respect to United's designee on topic 20, Mr. Yerich, he was identified to talk about litigation holds, document retention policies, collection of discovery materials. He openly testified that he was not prepared on subparts B, F, and G. This witness also did not know whether or not the assigned shared drivers of key custodians were searched. And those custodians with Ms. Paradise, Mr. Dosedel, Mr. Haben, Mr. Jefferson, Ms. Nierman, Mr. Rosenthal, or Mr. Schumacher.

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This witness also did not know whether a United data warehouse was searched. He couldn't identify who was provided a litigation hold or when. He couldn't testify about when documents were first searched or collected.

So those obviously have sufficient identification and factual background for Special Master Wall's indication that those topics can be redeposed by the Health Care Providers.

So I'd like to spend a moment though about United's argument with respect to Rebecca Paradise and why this is so important and how they represent it and how they interpret her testimony in the objections.

So first I need to do a little bit of background. The Court is very familiar with the fact that we had to move time and time again

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to get United's compliance with discovery orders of this Court. And that culminated in a sanctions order because United had not complied with the orders of the Court.

So during that presentation at the Order to Show Cause hearing, United represented to this Court it did not have a shared savings program. It told the Court it was MultiPlan that had a shared savings program. And this was obviously an effort to avoid an order related to discovery concerning the shared savings program.

And although United has produced some documents relating to its shared savings program, I do want to make the caveat, we don't think it is complete. However, that shared savings program, the documents that have been produced indicate it is a pretty important program, and that it generated in 2018 over $1.3 billion in revenue for the company. And this is from its self-funded employer clients that United provides administrative services to.

So this program is so important that United has embarked on a communications, a marketing, a government affairs, and a legal campaign to protect its ability to generate this revenue, all the while disparaging the Health Care Providers as they do it.

And Your Honor will have an opportunity to hear more about that issue in connection can United's objection to Report and Recommendation No. 5.

So United designated Ms. Paradise, who is a vice president for the company, on topic 2, which specifically concerns

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United's shared savings program. So when asked at deposition, Ms. Paradise evaded questions about it, couldn't or wouldn't answer questions about profits or revenue generated.

In the objection, United forwarded what I call a semantics argument, now arguing that Ms. Paradise didn't understand what we were asking because she was confused about the plural of the term shared savings program.

So the Health Care Providers used imprecise terminology of United's internal documentation and terminology, and that's the reason to blame for why we couldn't get the answers to the questions.

So at bottom, this is an obstructionist tactic. Unfortunately, it's not new. We've seen this before with respect to a series of documents between United and MultiPlan using the Data iSight product. Your Honor may recall we spent considerable time in meet and confer efforts only to find out that there was a dedicated e-mail; there's an FTP site -- all the while United's feigned existence of such reporting made us try to identify those terminology that United uses internally before producing anything.

And so those early tactics are very similar here, which is Ms. Paradise not testifying about the shared savings program, which apparently is important because United has put up obstructionist tactics at every step of the way.

Ms. Paradise also did not have the ability to answer questions about the Outlier Cost Management program, which is

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topic 11. She couldn't answer questions about communications with MultiPlan, which is topics 13 and 14.

We also detailed in our papers that she often would say she answered a question, when in reality the transcript reveals she hadn't. So it seems like the goal is the same as it was in document discovery, which is trying to prevent us access to this information, testimonial evidence, at this point.

So as a result, the Health Care Providers are asking the Court to enter Report and Recommendation No. 8 in full. Rule 53 requires the Court to deem any factual findings by Special Master Wall, providing them deference. In this case, United has not established any clear error by the Special Master which would require any reversal or modification of the report.

Thank you, Your Honor.

THE COURT: Okay. Mr. Levine, it's 9:59. I have a 10 o'clock hearing that I don't think will be lengthy.

Are you willing to wait to argue around 10:15, your reply?

MR. LEVINE: Yes, Your Honor. Whatever suits your needs. That's fine.

THE COURT: Thank you.

[Recess taken from 9:59 a.m., until 10:07 a.m.]

THE COURT: Go now to page 1, Fremont versus United to hear Mr. Levine's reply.

MR. LEVINE: Thank you, Your Honor.

I'll make sure everyone is back on line here. I think they

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are.

Your Honor, first, I'll respond to Ms. Gallagher's argument as it relates to the 7-hour issue. As Ms. Gallagher points out, this is a request for a modification, not the full -- wholesale reversal of the Special Master's order. I would agree with that. But I think it is very much warranted, even if Your Honor was inclined to agree to the rest of the Special Master's order, which I'll address in a second.

As to several of the points she made, she says that -- you know, her primary point, and it's the primary point in their papers is that they asked for 14 hours, and the Special Master gave 7 hours, and there is nothing clearly erroneous about that. That's a conclusion. That's not a -- you know, that's not an argument. It's also an audacious request, when originally they were only entitled to 7 hours, and they asked for 14 hours. That is audacity.

They should not be entitled to 7 hours. That would be something to which they would be entitled had we not even shown up for the original 7 hours.

Secondly, they argue that the witnesses were not prepared to respond on the topics. They say that -- they argue that broadly -- Ms. Gallagher does. They don't point out that there was no debate that they were prepared to testify and did testify at length about many, many topics among the 73 that were noticed. And there were 73, Your Honor. If there's any doubt, I encourage an accounting of the 73.

She -- Ms. Gallagher then argues that the 7-hours is

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warranted as a sanction. This is something Judge Wall specifically found to not apply. No sanctions applied to this.

In their papers, I'll note that plaintiffs are not clear on this point. I think hoping to create an implication that there was a sanction applied here. They say, on the bottom of page 12, Special Master Wall's ruling to permit United deposition to be reopened for up to 7 hours is not at odds with the text of 30(d) as referenced in R&R No. 1. Moreover, Special Master Wall found that Health Care Providers established United's noncompliance with NRCP 30(b)6 triggering sanctions available under NRCP 37, which includes the well-recognized ability for a Court to reopen a deposition.

That is not what he found. He found that no sanctions are warranted. None. So that's -- that's not accurate.

She also suggests that plaintiffs collapsed the three depositions into one notice for efficiency's sake. Again, not true. They were collapsed because, had they been separated, it would have counted as three in this case, or eight when you take all defendants into the account -- depositions against their 25 deposition limit, okay? That was the rules we were playing under. And that's why Report and Recommendation No. 1 made clear that they were -- this -- you know, collapsing was not an unknown thing at the time. It was done. That's why it made clear that if it's collapsed, if you take -- you issue one notice to three defendants in this case you get 7 hours. That's why it's there.

And then lastly on the 7-hour point -- well, I'll leave it at

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that, on the 7-hour point.

Moving on then to some of the substantive testimony given. As to Ms. Bradley, Ms. Bradley, Ms. Gallagher says, failed to testify about the D1 -- you know, about the D1 code. Again, that's inaccurate. Okay? She testified about the D1 code. What -- if you look at the record -- not what Ms. Gallagher says -- what Ms. Gallagher -- what they put actually in their papers about her failure to testify, the question was, Did you do any research as to how many claims at issue in this case were paid pursuant to the D1 code?

They wanted a number. Okay. She didn't have the number. There was no topic that asked for that number. Okay. And then there's no witness who would just -- of all the many codes that -- that are in the claims data files, that that's the code that they wanted an actual number of claims. There are 22,000 claims at issue in this case. They wanted to know a number. She didn't know the number. Okay. That's the example they provide. And the only example they provide of Ms. Bradley not being able to answer a question.

From that, Ms. Gallagher argued that she wasn't able to testify about the D1 code. Not true.

And then the topics, she just said in her oral argument, that required testimony on the D1 code she said were -- and I'm quoting -- 3, 6, 18, and 19 -- 3, 6, 18, and 19. In her papers, on page 14, that they filed yesterday, they said the topics were 1, 3A, 3E,

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and 18. So another shift. In their papers they filed before Judge Wall, they didn't mention any topics on Bradley, so this keeps shifting.

In terms of what she's now said in oral argument, okay, topic 19 on its face is -- is not one that would require any further testimony from Ms. Bradley, because Judge Wall said that he -- there was additional testimony on topic 19 only as to national and local negotiations. Okay? That's the only thing that topic 19 -- additional testimony on topic 19 has been compelled on. Okay? So that -- did you want to apply it all to D1 codes in, you know, where claims are processed, okay?

Topic 3, she's now broadly alluding to topic 3. Many of the subtopics in topic 3 are also not subject to Judge Wall's order, okay? In fact, most of them are not subject to Judge Wall's order, okay?

Three of the topics that are subject to Judge Wall's order in topic 3, which now Ms. Gallagher broadly refers to -- three of them are prefaced with, with respect to -- here, and let me quote it for you -- yes, here it is: With respect to claims identified on Exhibit A, and then it asks for a series of questions related to those claims identified on Exhibit A. And it says parenthetically, to follow, that's 3 A through D. Judge Wall has ordered more testimony of them.

Plaintiffs never provided Exhibit A. Okay? This was pointed out to plaintiffs on March -- March -- not May -- March 18th, 2 months prior to the deposition. They never provided it, okay?

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So those -- when Ms. Gallagher refers to topic 3, those are three of the four subparts of topic 3 that Judge Wall ordered additional testimony.

And then the third -- the fourth one is 3A, which I already addressed in any original presentation.

And then the other topic she mentions is topic 6. She's never mentioned topic -- the plaintiffs have never mentioned topic 6 in connection with Ms. Bradley -- any deficiency with Ms. Bradley. And I can tell you it doesn't apply at all. I won't waste the Court's time going through topic 6. It's not even close.

Lastly, with regard to Ms. Paradise, Ms. Bradley argues that there's some -- something nefarious going on as it relates to shared savings programs. Okay? They argue in their papers, in fact, that, you know, Ms. Paradise was not prepared at all to talk about shared savings programs. They have no evidence of that.

They say she is a vice president -- you know, that she didn't prepare at all, and plaintiffs think -- and defendants think that's fine because she is a vice president. That's not what defendants said, okay. Defendants said she's a vice president in charge of out-of-network programs. For 25 years she's been at United, and in that position for many of those years. Okay. That's why she's qualified to testify about it.

And Ms. Bradley testified -- excuse me -- Ms. Paradise testified at length about shared savings programs. She knows exactly what they are. There is a distinction, however, which -- and

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far from being neglectful in requesting for a questioner to make this distinction, it, I think, is absolutely warranted.

There is a shared savings program that is capital S shared, capital S savings, capital P program. It is the name of a formal program which United clients can opt into. The plaintiffs know this. That's one shared savings program.

And then there is lower case shared savings programs, lower case shared saving programs which could be any program where a fee is measured through shared savings. That's much more ambiguous. Okay?

And to ask for clarification in a question, are you asking about shared savings programs broadly or shared savings programs, a specific program that United clients have access to, is a perfectly legitimate clarification to ask. And then to suggest that somehow she was not prepared to talk about a subject that is right in her wheelhouse, okay, that she talked about at length during her deposition is just completely and totally unsupported.

What plaintiffs really are alluding to when they talk about Ms. Paradise is a specific Q and A that they think she was unable to -- where they think she was unable to address the profits generated by shared savings.

Topic 2 of their notice says: The terms, conditions, and parameters of your shared savings programs with self-insured employers -- and it's the second part that they take issue with -- as well as the profits derived by you, in connection with any program.

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That's the topic. Okay.

The question they point to where she was unable to address this topic, which is on page 7 of the response they filed yesterday, was also in their Motion to Compel, says:

QUESTION: As a corporate representative for the two defendants here today, did you do any sort of research to determine the savings that were either projected or achieved by the OCM program?

And she says, I did not for that specific topic.

Okay. That's not profits for the shared savings programs -- or program, singular, which is a specific program -- or programs broadly which people can debate what exactly -- which programs are actually shared savings programs. But we could, you know, we -- United would have its view. And you know, and to the extent that information exists, it can be provided. But a clear question needs to be asked that's within the scope of the topic, and they get an answer, so -- to the extent there is a measurement of such numbers.

So profits and projections are not the same. They're not the same. And the conflation is emblematic of so much of what happens in this case -- out of context quotes; statements without support unpin much of the argument; and, of course, a recounting of irrelevant past time periods.

And you, I suspect, will never see a submission by plaintiffs again in this case that doesn't mention sanctions from

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several months ago.

Thank you, Your Honor. I appreciate your time. And I appreciate your putting up with some of these technical difficulties we've had.

THE COURT: All right. So this was the Defendant's Objection to the Special Master's Report No. 8, and a Request for Relief.

I'm going to overrule the objection. I don't find that the Special Master's report had -- contained clear error or was clearly erroneous.

The Nevada Supreme Court continually tells us that matters should be determined and go forward on the merits and that the request for 14 additional hours of deposition, which was reduced by the Special Master to 7, I don't find was unreasonable either.

I looked at the potential hardship to both parties, and I don't find undue hardship to the defendants. My -- and let me kind of explain my rationale. This case is scheduled for four weeks. Seven more hours of deposition will likely shorten the trial, not lengthen it. But if I denied -- if I granted the objection today and did not allow the deposition to go forward, more than likely the trial would be used as a deposition, and not everything might -- not everything might be relevant to the finder of fact.

So overall, I think the additional deposition time has the potential to decrease the expense of the trial for both sides. So for -- in a case of this size and the number of issues it presents, with

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22,000 claims, I just don't find that 7 hours is consequential.

So for those reasons, I overrule the objection. And the -- Ms. Gallagher and team to prepare the order. Mr. Levine and team to approve the form of that. I would not accept a competing order. It may be a simple order referencing the findings by -- just findings by reference.

And are there any questions?

MS. GALLAGHER: No, Your Honor. Not from the plaintiffs. Thank you.

MR. LEVINE: And Your Honor, we understand the 7 hours. Is the scope of the topic the same? Or is it just limited to the witnesses who did not -- were not -- they were not able to question at the first deposition?

THE COURT: It will be in accord with the ruling of the Special Master.

MR. LEVINE: Okay. Thank you, Your Honor.

THE COURT: All right. Thank you all for your professional courtesy. We started this hearing at 9:00. We're finally finishing at 10:25. Everybody stay safe and healthy until I see you next.

MS. GALLAGHER: Thank you, Your Honor.

MR. LEVINE: Okay. Thank you.

[Proceeding concluded at 10:22 a.m.]

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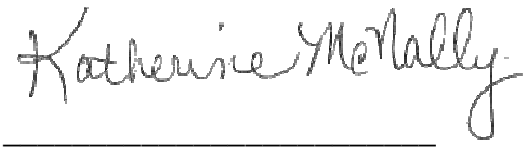
ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video proceedings in the above-entitled case to the best of my ability.



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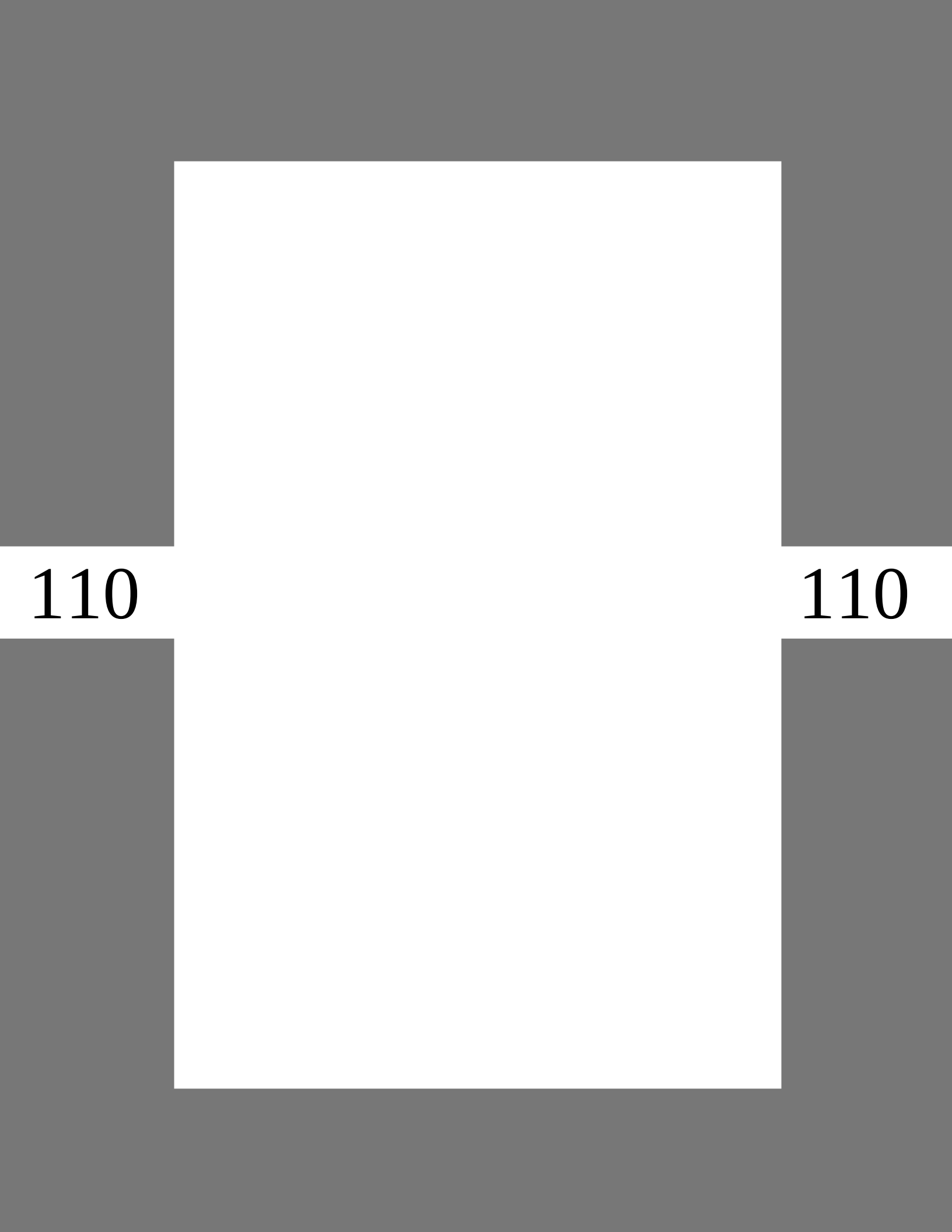
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CLARK COUNTY, NEVADA

FREMONT EMERGENCY SERVICES (MANDAVIA), LTD., a Nevada professional corporation; TEAM PHYSICIANS OF NEVADA-MANDAVIA, P.C., a Nevada professional corporation; CRUM, STEFANKO AND JONES, LTD. dba RUBY CREST EMERGENCY MEDICINE, a Nevada professional corporation, Plaintiffs, vs. UNITEDHEALTH GROUP, INC., a Delaware corporation; UNITED	Case No.: A-19-792978-B Dept. No.: XXVII **PLAINTIFFS' RESPONSE TO DEFENDANTS' OBJECTION TO SPECIAL MASTER'S REPORT AND RECOMMENDATION #7 REGARDING DEFENDANTS' MOTION TO COMPEL RESPONSES TO AMENDED THIRD SET OF REQUESTS FOR PRODUCTION OF DOCUMENTS**

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HEALTHCARE INSURANCE COMPANY, a Connecticut corporation; UNITED HEALTH CARE SERVICES INC., dba UNITEDHEALTHCARE, a Minnesota corporation; UMR, INC., dba UNITED MEDICAL RESOURCES, a Delaware corporation; OXFORD HEALTH PLANS, INC., a Delaware corporation; SIERRA HEALTH AND LIFE INSURANCE COMPANY, INC., a Nevada corporation; SIERRA HEALTH-CARE OPTIONS, INC., a Nevada corporation; HEALTH PLAN OF NEVADA, INC., a Nevada corporation; DOES 1-10; ROE ENTITIES 11-20,

Defendants.

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Plaintiffs Fremont Emergency Services (Mandavia), Ltd. ("Fremont"); Team Physicians of Nevada-Mandavia, P.C. ("Team Physicians"); Crum, Stefanko and Jones, Ltd. dba Ruby Crest Emergency Medicine ("Ruby Crest" and collectively the "Health Care Providers") file this response ("Response") to defendants UnitedHealth Group, Inc.; UnitedHealthcare Insurance Company; United HealthCare Services, Inc.; UMR, Inc.; Oxford Health Plans, Inc.; Sierra Health and Life Insurance Co., Inc.; Sierra Health-Care Options, Inc.; and Health Plan of Nevada, Inc.'s (collectively, "United") Objection to Report and Recommendation #7 Regarding Defendants' Motion to Compel Responses to Defendants' Amended Third Set of Requests for Production of Document ("R&R #7"). This Response to United's Objection is based upon the record in this matter, the points and authorities that follow, the pleadings and papers on file in this action, and any argument of counsel entertained by the Court.

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POINTS AND AUTHORITIES

I. INTRODUCTION AND FACTS RELEVANT TO THE DISPUTE

United's untimely-served Amended Third Set of Requests for Production of Documents ("Third Set of RFPs") is yet another attempt by United to inject irrelevant, non-commercial data into this commercial out-of-network reimbursement. Although United tries to portray its efforts to obtain market data as stretching back to December 2020 (United's Motion, Llewellyn Decl. at ¶¶ 6-7; Objection at 6:22-23), even a cursory review at United's timeline shows that between the time the Health Care Providers produced a market file (FESM001548) and the time United

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served the Third Set of RFPs on March 9, 2021, not a single time did United ask to meet and confer about the contents of the market file the Health Care Providers produced in January 2021. United's Motion, Llewellyn Decl. at ¶¶ 9-10. Not once did United complain about the alleged "masking of the service level data" (Motion at 11:19) or ask to discuss "the number of units associated with each claim" (*id.* at 11:21-22). United downplays this timeline in the Objection.

More importantly, however, United only initially asked for commercial payer data for in-network and out-of-network arrangements. *See* **Exhibit 1**, Plaintiffs' Responses to Second Set of Requests for Production of Documents at Nos. 87-88 (excerpts only). United did not ask for all of the non-commercial irrelevant data that it now seeks (government, workers' compensation, etc.) until the Third Set of RFPs served on March 9, 2021. Yet, United disingenuously frames the underlying Motion and Objection as necessary because it needs "data identifying actual charges and reimbursements Plaintiffs received for emergency services in Nevada ***from any payors***, at a level of detail sufficient to identify individual services and the units of service provided, as well as the 'charge masters,' or fee schedules, that Plaintiffs used to procure those rates." Objection at 4:7-10; *see also* Motion at 7:6-9. United's definition of "market data" includes "any payor" in Nevada; however, the Court has already ruled that non-commercial data is not relevant to this commercial rate of reimbursement case. *See* November 9, 2020 Order Setting Defendants' Production & Response Schedule Re: Order Granting Plaintiffs' Motion To Compel Defendants' List Of Witnesses, Production Of Documents And Answers To Interrogatories On Order Shortening Time at 2:27-28; Report & Recommendation #3 Regarding Defendants' Motion To Compel Responses To Defendants' Second Set of Requests for Production on Order Shortening Time at 4:13-5:5.

Nevertheless, United's Third Set of Requests for Production ("RFPs") asks for a litany of non-commercial data, as well as in-network reimbursement data, even though this case concerns an out-of-network arrangement:

> 156. Service-by-service level market and reimbursement data related to reimbursement rates received by Plaintiffs for emergency services in the Nevada market from any and all payers, including ***in-network commercial payers***, out-of-network commercial payers, ***Medicare Advantage, Managed Medicaid, Traditional Medicare,***

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> ***Traditional Medicaid, self-pay/uninsured, worker's comp, TRICARE, and automobile insurance***. For each service, include a separate line with the claim number, date of service, CPT code, modifier, the Federal Tax Identification Number, servicing facility information, servicing location information (including zip code), policy number, group number, a unique identifier for each Payer, the Payer line of business (Commercial, Medicare Advantage, etc.), the number of units, the charge billed, the allowed amount, the payment amount, the out-of-pocket patient responsibility, the amount collected from the patient, an indicator for whether the service was paid under a participating provider network agreement, and an indicator for whether the service was paid under a wrap/rental network agreement.

Exhibit 2, Plaintiffs' Responses to Third Set of Requests for Production at No. 156.[1]

Additionally, United seeks chargemasters for the three-year period prior to this action's relevant time period:

> 158. All documents reflecting any "charge masters" that were used by you that represent your full billed charges for any of the CPT codes related to the Claims from January 1, 2013 to June 30, 2017.

Id. at RFP No. 158. The Health Care Providers produced chargemasters from the relevant time period in FESM001456 (2017-2019). Even though United does not establish the relevancy of chargemasters for the 4-year period prior to the relevant period, the information has been produced if available to the Health Care Providers.

Ultimately, the Court should overrule the Objection and adopt R&R #7 not only because the Third Set of RFPs was untimely, but much of the information United seeks has already been determined to be irrelevant by the Court in this rate of payment case concerning commercial out-of-network claims or the Health Care Providers have produced the information.

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…

[1] Request No. 157 seeks:

> 157. All documents and information needed to understand any data produced in response to Request No. 156 or any prior Requests for Production including, but not limited to, data dictionaries and legends for any coded fields and detailed descriptions of parameters and filters used to generate data.

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II. LEGAL ARGUMENT

A. Applicable Legal Standards

1. The Standard Under NRCP 53(e)

NRCP 53(e) requires that a special master submit a report containing his or her rulings. A district court reviews the findings of fact in the report of a special master for clear error and applies de novo review to any conclusions of law. *Venetian Casino Resort, LLC v. Dist. Ct.*, 118 Nev. 124, 132, 41 P.3d 327, 331-332 (2002). "A finding is 'clearly erroneous' when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Unionamerica Mortgage & Equity Trust v. McDonald*, 97 Nev. 210, 211-12, 626 P.2d 1272, 1273 (1981). In other words, this Court affords deference to the Special Master with regard to factual matters within the scope of the retention.

United urges the Court to apply a *de novo* standard across the board on the basis that R&R #7 "was based on either the Special Master's legal interpretation of the Court's prior orders or the Special Master's own original legal interpretation." Objection at 6:5-7. However, *de novo* review is not applicable to United's Objection. The Special Master made factual determinations regarding the content of the RFPs, the untimeliness of service of the RFPs; after an *in camera* review, whether the market file produced by Health Care Providers' provides United the ability to sufficiently determine billed charges by CPT code; whether a unit of service is applicable to this case; and whether the chargemasters for the period requested by United 2013-2017 is applicable to this case. R&R #7 at ¶¶ 12. These decisions are better described as factual findings, not legal conclusions, and must be afforded deference because the findings are not clearly erroneous. To the extent the Court determines that Special Master Wall's determinations constitute conclusions of law, the Court can consider those under a *de novo* standard.

2. The Third Set of RFPs Do Not Meet the Requirements of NRCP 26

NRCP 26(b)(1) provides:

> Parties may obtain discovery regarding any nonprivileged matter that is ***relevant to any party's claims or defenses and proportional to the needs of the case***, considering the importance

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> of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.

NRCP 26(b)(1). A review of the relevant factors below demonstrates that United cannot meet this burden as to any of the RFPs that are the subject of the underlying motion to compel.

United poses an interesting argument to the Court, i.e. that it should be permitted to ignore its agreement to discovery procedures based on Nevada's policy for deciding cases on the merits. But the authority United points to makes it clear the merits-based policy is not absolute. For example, *Rodriguez v. Fiesta Palms, LLC*, 134 Nev. 654, 654, 428 P.3d 255, 256 (2018), holding modified by Willard v. Berry-Hinckley Indus., 136 Nev. Adv. Op. 53, 469 P.3d 176 (2020) discusses the competing interests of merits determinations compared to "the need to swiftly administer justice" promised by NRCP 1. And "[s]wiftly administering justice requires courts to enforce procedural requirements, even when the result is dismissal of a plaintiff's case." *Id.* Ultimately, the *Rodriguez* court affirmed denial of a Rule 60 motion where the litigant neglected procedural requirements.

United also relies on *Silvagni v. Wal-Mart Stores, Inc.*, 320 F.R.D. 237, 243 (D. Nev. 2017) for the proposition that counsel should cooperate. The case has no factual application here because the district court was adjudicating a motion to exclude plaintiffs' damages calculation. Nor does a parties' joint motion agreeing to extend discovery inform this Court's evaluation of United's Motion, as United contends. *Sitton v. LVMPD*, No. 2:17-cv-00111-JCM-VCF, 2020 WL 1531405, at *2 (D. Nev. Mar. 31, 2020) ("Defendants filed their joint motion to extend discovery…and plaintiff filed his motion after the expert disclosure deadline….Plaintiff is self-represented, and he also needs more time to take discovery to help prove his claims….All of the parties have acted in good faith to extend the discovery deadlines."). Finally, United points to *Mendez v. Fiesta Del Norte Home Owners Ass'n*, No. 2:15-cv-00314-RCJ-NJK, 2016 WL 1643780, at *3 (D. Nev. Apr. 26, 2016), but that case evaluated whether the moving party established excusable neglect in moving to extend discovery. As part of that evaluation, the district court determined that the movant met the excusable neglect factors (prejudice, length of

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delay and impact on the proceedings, the reason for the delay and good faith of the movant). United's reliance on the forgoing cases that discuss extending discovery suggests United is really trying to seek an extension of the April 15 document discovery deadline through the guise of a motion to compel. United is prohibited from seeking any extension of any case deadline. **Exhibit 3**, April 9, 2021 Hr'g. Tr. at 68:10-11.

Nor do the foregoing legal authorities provide the foundation for requiring the Health Care Providers to respond to discovery that was served too late, when United waited more than nearly two months after the Health Care Providers expressly communicated their position on the Third Set of RFPs and when the Court has already deemed non-commercial reimbursement data irrelevant. **Exhibit 4**, March 20, 2021 email. R&R #7 at ¶ 16.[2]

B. The Special Master Correctly Found United's Third Set of RFPs Were Untimely Served

United was well aware of the 45-day response time negotiated after remand,[3] but United did not serve its Third Set of RFPs in time to secure the Health Care Providers' responses before the April 15, 2021 close of document discovery. In order to meet the Court-ordered framework, United would have had to serve any final requests by March 1, 2021. United waited until March 9, 2021. In the Objection, United implies that the Health Care Providers have taken a questionable position, but there is no question that United operated under the same understanding throughout this litigation. R&R #7 at ¶ 14 ("It is undisputed that the parties agreed to 45 days to respond to written discovery, which made the responses to the instant RFPs due eight days after the document discovery cutoff date.").

United argues that its untimely served discovery should be saved by Nevada's policy of deciding cases on the merits and further contends that it is the Health Care Providers that should have to identify prejudice. Objection at 7:15. This is simply not the standard by which United's

[2] The Special Master considered United's argument that learned from its expert that the data was purportedly deficient (Motion at 11:10-13) in reaching his recommendations to the Court.

[3] Joint Case Conference Report dated July 17, 2020 at 17:22-23:4 ("Defendants are amenable to a 45-day response time for written discovery….").

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failure to serve discovery is judged. United would need to extend the discovery deadline and the Court has made it clear that it is not permitted to do so as a sanction for its discovery conduct in this case. Ex. 3, April 9, 2021 Hr'g Tr. at 68:10-11.

United also tries to use the Health Care Providers' April 30, 2021 supplemental production as a hook to require them to respond to the untimely RFPs. Objection at 8:3-6. But the supplemental production of three spreadsheets (FESM020909, 020910 and 020911) was a production of updated spreadsheets related to the at-issue claims and those claims that were subject to a wrap/rental agreement or allowed in full. This update is consistent with the Health Care Providers' obligation to supplement under NRCP 16.1 and 26(e), but does not trigger an obligation to respond to untimely requests or to produce information already deemed irrelevant by the Court.

United also contradictorily argues to the Court that it knew it needed commercial reimbursement data for six months, but United did nothing until now. Nor did United ever initiate a meet and confer concerning the substance of the Health Care Providers' market file so it is not clear how United can say that it had to issue another set of written discovery to secure commercial market data. United also could have raised any purported issue with the Health Care Providers' market file when it brough a motion to compel on April 1, 2021 which resulted in Report and Recommendation #3. United's current arguments are meant to gloss over this history because what United really asks for in RFP No. 156 is non-commercial data that United did not timely request and for which the Court has determined is irrelevant to this action.

Just after United served the untimely requests, United asked the Health Care Providers if it was going to assert a related objection. Ex. 4. The Health Care Providers responded that "[i]n addition to other objections, the Health Care Providers intend to object to the timeliness of United's third set of RFPs." *Id.* Instead of raising the issue with the Court then, United waited nearly two more months to seek relief. This is not demonstrative of diligence. Filing a motion to compel after the close of document discovery is too late where, as here, it could and should have been filed much earlier." *RKF Retail Holdings, LLC v. Tropicana Las Vegas, Inc.*, No. 2:14-cv-01232-APG-GWF, 2017 WL 2908869, at *5 (D. Nev. July 6, 2017) (citing *E.E.O.C. v. Pioneer*

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Hotel, Inc., 2014 WL 5045109, at *1-2 (D. Nev. Oct. 9, 2014)); R&R #7 at ¶ 15. Generally, motions to compel must be "filed and heard sufficiently in advance of the cutoff so that the Court grant effective relief within the allotted discovery time." *Gerawan Farming, Inc. v. Rehrig Pac. Co.*, No. 1:11-CV-01273-LJO, 2013 WL 492103, at *5 (E.D. Cal. Feb. 8, 2013).

Based on the foregoing, the Health Care Providers respectfully request that the Court deny the Motion.

C. The Special Master Correctly Determined that the Health Care Providers Produced a Market File That Responds to Relevant Commercial Market Data in RFP Nos. 156 and 157.

In addition to objecting to the timeliness of the Third Set of RFPs, the Health Care Providers set forth specific objections to the request for in-network reimbursement and non-commercial data (Medicare Advantage, Managed Medicaid, Traditional Medicare, Traditional Medicaid, self-pay/uninsured, worker's comp, TRICARE, and automobile insurance), based on the November 9 Order and Report and Recommendation ##2 and 3.[4] *See* Ex. 2 at RFP No. 156.

In the Objection and underlying Motion, United argues that it cannot determine what the Health Care Providers charge where there is more than one service performed. Objection at 9:13-16; Motion at 11:19-21. At the hearing before Special Master Wall, the Health Care Providers explained that their produced market data file provides blinded information about whether the claim is subject to an in-network contract, whether it is subject to a wrap/rental network agreement, or whether it is an out-of-network claim. For OON claims, United has the Health Care Providers' chargemaster which identifies the charges for each CPT code. With respect to a wrap/network arrangement, payment is typically at a percentage of billed charges. Because the at-issue healthcare claims in dispute are based on an out-of-network arrangement, United can use the chargemaster to inform this information. Moreover, the data in the market file allows a reviewer to perform a simple math equation to identify the charge for each CPT code. Special Master Wall reviewed the Health Care Providers' market file in reaching the factual

[4] "United shall exclude managed Medicare and Medicaid reimbursement rates from its production of market and reimbursement rates." November 9, 2020 Order at ¶ 4; *see also* Report and Recommendation #3 (finding non-commercial data irrelevant).

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determination "that Plaintiffs have already produced information sufficiently responding to the portions of RFPs 156 and 157 requesting relevant commercial market data." R&R #7 at ¶ 12.

Next, United argues that "the number of units associated with each claim" is preventing it from determining per-unit charges. Objection at 9:14-16. United does not offer the Court any explanation as what that information would provide them and the Health Care Providers understand this reference to be to anesthesia-related services, not emergency medicine services. United previously issued RFPs asking for anesthesia-related information and agreed to drop those requests once we brought the issue to its attention. It is not known why United continues to seek information not related to this action.

D. R&R #7 Properly Recommends that United's Request for Chargemasters Prior to the Relevant Period Should Be Denied

The Health Care Providers produced chargemasters from the relevant time period in FESM001456 (2017-2019). Additionally, the Health Care Providers produced chargemasters for Team Physicians (2013-2017), Ruby Crest (2015-2017) and Fremont (2016-2017) in FESM020885-20887. United has offered no explanation to the Court as to why information prior to the relevant time period would be discoverable. Even though United does not establish the relevancy of chargemasters for the 4-year period prior to the relevant period, much of the information has been produced.[5] Nevertheless, the Special Master correctly determined that chargemasters for any period before TeamHealth acquired the provider practice groups is not relevant under NRCP 26(b)(1). R&R #7 at ¶ 13; *see also* February 4, 2021 Order Denying United's Motion to Compel First and Second Requests for Production of Documents on Order Shortening Time at ¶¶ 10-11.

E. The United-Defined "Market File" is Not an Obligation Under NRCP 16.1, Nor Are Chargemasters From Prior Ownership

In the underlying Motion (9:8-10) (and less so in the Objection (5:10-12)), United contends that the Health Care Providers should have produced a "market file" that contains

[5] To the extent it was not produced, it is because the provider practices had different ownership.

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non-commercial and in-network reimbursement data, as well as chargemasters for 2013-2017 as a NRCP 16.1 obligation. The Health Care Providers' Rule 16.1 obligation do not encompass RFP Nos. 156 and 158. Rule 16.1 requires a party to produce:

> (ii) a copy — or a description by category and location — of all documents, electronically stored information, and tangible things ***that the disclosing party has in its possession, custody, or control and may use to support its claims*** or defenses, including for impeachment or rebuttal, and, unless privileged or protected from disclosure, any record, report, or witness statement, in any form, ***concerning the incident that gives rise to the lawsuit***;

The Health Care Providers have no intention of using non-commercial information or in-network information to support their claims that United failed to pay them appropriate reimbursement rates. Nor is non-commercial or in-network reimbursement data implicated in the First Amended Complaint's allegations.

As to chargemasters, the Health Care Providers do not intend on pointing to chargemasters that are outside the scope of the health care claims that are at issue in the litigation (generally from July 1, 2017 forward). As a result, United's argument that RFP Nos. 156 and 158 are Rule 16.1 obligations is unfounded.

III. CONCLUSION

For the foregoing reasons, the Health Care Providers respectfully request that the Court overrule the Objection and fully adopt R&R #7 for all of the reasons set forth herein and the Health Care Providers' Opposition to the underlying Motion.

DATED this 24th day of June, 2021.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of McDonald Carano LLP, and that on this 24th day of June, 2021, I caused a true and correct copy of the foregoing **PLAINTIFFS' RESPONSE TO DEFENDANTS' OBJECTION TO SPECIAL MASTER'S REPORT AND RECOMMENDATION #7 REGARDING DEFENDANTS' MOTION TO COMPEL RESPONSES TO AMENDED THIRD SET OF REQUESTS FOR PRODUCTION OF DOCUMENTS** to be served via this Court's Electronic Filing system in the above-captioned case, upon the following:

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EXHIBIT 1

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CLARK COUNTY, NEVADA

FREMONT EMERGENCY SERVICES (MANDAVIA), LTD., a Nevada professional corporation; TEAM PHYSICIANS OF NEVADA-MANDAVIA, P.C., a Nevada professional corporation; CRUM, STEFANKO AND JONES, LTD. dba RUBY CREST EMERGENCY MEDICINE, a Nevada professional corporation, Plaintiffs, vs. UNITEDHEALTH GROUP, INC., a Delaware corporation; UNITED HEALTHCARE INSURANCE COMPANY, a Connecticut corporation; UNITED HEALTH CARE SERVICES INC., dba UNITEDHEALTHCARE, a Minnesota corporation; UMR, INC., dba UNITED MEDICAL RESOURCES, a Delaware corporation; OXFORD HEALTH PLANS, INC., a Delaware corporation; SIERRA HEALTH AND LIFE INSURANCE COMPANY, INC., a Nevada corporation; SIERRA HEALTH-CARE OPTIONS, INC., a Nevada corporation; HEALTH PLAN OF NEVADA, INC., a Nevada corporation; DOES 1-10; ROE ENTITIES 11-20, Defendants.	Case No.: A-19-792978-B Dept. No.: 27 **PLAINTIFFS' RESPONSES TO DEFENDANTS' SECOND SET OF REQUESTS FOR PRODUCTION OF DOCUMENTS** ***CONTAINS CONFIDENTIAL INFORMATION & PROTECTED HEALTH INFORMATION***

Plaintiffs Fremont Emergency Services (Mandavia), Ltd. ("Fremont"); Team Physicians of Nevada-Mandavia, P.C. ("Team Physicians"); Crum, Stefanko and Jones, Ltd. dba Ruby Crest Emergency Medicine ("Ruby Crest" and collectively the "Health Care Providers") hereby respond

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billed charges" from "self-pay" or "uninsured" individuals, will not support or refute any of their claims or United's affirmative defenses. Subject to and without waiving the foregoing objections, the Health Care Providers decline to respond to the request.

86. Please produce all documents and communications of any type related to any cost to charge analysis performed on any emergency medical service you offer patients from July 1, 2017 to present.

RESPONSE:

Objection. This request is vague and ambiguous as to the phrase "any cost to charge"; potentially seeks documents protected by the attorney-client privilege and work product doctrine and/or are otherwise confidential; seeks information that is not relevant and proportional to the needs of the case as the Health Care Providers' costs have no import as to the Health Care Providers' allegations of underpayment, breach of an implied-in-fact contract, and civil racketeering, among other claims, nor does it have any bearing on or relationship to any of United's affirmative defenses; is a request designed to unreasonably further delay these proceedings; and is designed for an improper purpose to annoy, embarrass and oppress. For these reasons, the Health Care Providers decline to respond.

87. For each Commercial Payer (not including Defendants) with whom you have or had an in-network contractual relationship during the period July 1, 2017 to present, all documents showing, on an annual basis:

a) The identity of the Payer;

b) The total number of emergency-related services provided to members of each Payer;

c) The total charges you billed to each Payer;

d) The total amount allowed by each Payer;

e) The total amount paid by each Payer;

f) The total out-of-pocket patient responsibility related to each Payer's claims;

g) The total amount you collected from the Payer's members; and

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h) The average percentage of your billed charges that you received from each Payer.

RESPONSE:

Objection. The request seeks information that is not relevant and proportional to the needs of the case as information concerning payment of in-network claims has no import as to the Health Care Providers' allegations of underpayment, breach of an implied-in-fact contract, and civil racketeering, among other claims, nor does it have any bearing on or relationship to any of United's affirmative defenses. In addition, this request seeks documents not in the Health Care Providers' possession because the particularities of this request would require the Health Care Providers to create a document containing the requested information. In addition, the request seeks confidential, proprietary information by virtue of seeking the identity of each Payer along with the remaining information sought by this request. Subject to and without waiving the foregoing objections, the Health Care Providers respond as follows: Non-privileged responsive documents will be produced by the Health Care Providers following the Court's adjudication of United's Renewed Motion to Stay Proceedings Pending Resolution of Writ Petition on Order Shortening Time.

88. For each Commercial Payer (other than Defendants) with whom you do not have or did not have an in-network contractual relationship during the period July 1, 2017 to present, all documents showing, on an annual basis:

a) The identity of the Payer;

b) The total number of emergency-related services provided to members of each Payer;

c) The total charges you billed to each Payer;

d) The total amount allowed by each Payer;

e) The total amount paid by each Payer;

f) The total out-of-pocket patient responsibility related to each Payer's claims;

g) The total amount you collected from the Payer's members; and

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h) The average percentage of your billed charges that you received from each Payer.

RESPONSE:

Objection. The request seeks documents not in the Health Care Providers' possession because the particularities of this request would require the Health Care Providers to create a document containing the requested information. In addition, the request seeks confidential, proprietary information by virtue of seeking the identity of each Payer along with the remaining information sought by this request. Subject to and without waiving the foregoing objections, the Health Care Providers respond as follows: Non-privileged responsive documents will be produced by the Health Care Providers following the Court's adjudication of United's Renewed Motion to Stay Proceedings Pending Resolution of Writ Petition on Order Shortening Time.

89. For all emergency medical services you provided to patients covered by Medicare/Medicaid from July 1, 2017 to present, all documents showing, on an annual basis:

a) The identity of the Payer;

b) The total number of emergency-related services provided to members of each Payer;

c) The total charges you billed to each Payer;

d) The total amount allowed by each Payer;

e) The total amount paid by each Payer;

f) The total out-of-pocket patient responsibility related to each Payer's claims;

g) The total amount you collected from the Payer's members; and

h) The average percentage of your billed charges that you received from each Payer.

RESPONSE:

Objection. The request seeks information that is not relevant and proportional to the needs of the case as information concerning payment of by Medicare/Medicaid claims has no import as to the Health Care Providers' allegations of underpayment, breach of an implied-in-fact contract, and civil racketeering, among other claims, nor does it have any bearing on or relationship to any

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RESPONSE:

Objection. This request is vague and ambiguous as to the terms "date dictionaries," "legends" "detailed descriptions of parameters and filters used to generate data"; seeks information that would require the Health Care Providers to guess as to what United is asking for; seeks confidential and proprietary information. Subject to and without waiving the foregoing objections, the Health Care Providers are unaware of any documents responsive to this request.

DATED this 28th day of September, 2020.

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DISTRICT COURT

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corporation; OXFORD HEALTH PLANS, INC., a Delaware corporation; SIERRA HEALTH AND LIFE INSURANCE COMPANY, INC., a Nevada corporation; SIERRA HEALTH-CARE OPTIONS, INC., a Nevada corporation; HEALTH PLAN OF NEVADA, INC., a Nevada corporation; DOES 1-10; ROE ENTITIES 11-20,

Defendants.

Plaintiffs Fremont Emergency Services (Mandavia), Ltd. ("Fremont"); Team Physicians of Nevada-Mandavia, P.C. ("Team Physicians"); Crum, Stefanko and Jones, Ltd. dba Ruby Crest Emergency Medicine ("Ruby Crest" and collectively the "Health Care Providers") hereby respond to defendants UnitedHealth Group, UnitedHealthcare Insurance Company; United HealthCare Services, Inc.; UMR, Inc.; Oxford Health Plans, Inc.; Sierra Health and Life Insurance Co., Inc.; Sierra Health-Care Options, Inc.; and Health Plan of Nevada, Inc. (collectively "United" or "Defendants") Amended Third Set of Requests for Production of Documents served to Plaintiffs' counsel pursuant to NRCP 34.

REQUESTS FOR PRODUCTION OF DOCUMENTS

156. Service-by-service level market and reimbursement data related to reimbursement rates received by Plaintiffs for emergency services in the Nevada market from any and all payers, including in-network commercial payers, out-of-network commercial payers, Medicare Advantage, Managed Medicaid, Traditional Medicare, Traditional Medicaid, self-pay/uninsured, worker's comp, TRICARE, and automobile insurance. For each service, include a separate line with the claim number, date of service, CPT code, modifier, the Federal Tax Identification Number, servicing facility information, servicing location information (including zip code), policy number, group number, a unique identifier for each Payer, the Payer line of business (Commercial, Medicare Advantage, etc.), the number of units, the charge billed, the allowed amount, the payment amount, the out-of-pocket patient responsibility, the amount collected from the patient, an indicator for whether the service was paid under a participating provider network agreement, and an indicator for whether the service was paid under a wrap/rental network agreement.

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RESPONSE:

Objection. This request is untimely as the parties agreed to a 45-day response time and this third set of requests was served on March 9, 2021 (*see* Joint Case Conference Report at Section X(E)) and the deadline for document discovery was April 15, 2021; therefore the Health Care Providers are not obligated to respond because the third set of requests were not served sufficiently in advance. Further, the request seeks information that has been deemed irrelevant (government and self-pay data) by prior Court Orders. *See* November 9, 2020 Order Setting United's Production Schedule; Report and Recommendation #2 and #3. For the same reasons, requests for workers' compensation and automobile insurance reimbursements rates are not comparable and would not serve to inform the Health Care Providers' claims or United's defenses in this rate of payment case that involves United's commercial health insurance reimbursement rates. Subject to and without waiving the foregoing objections, the Health Care Providers have previously produced a market file containing in-network, out-of-network and wrap/rental network data.

157. All documents and information needed to understand any data produced in response to Request No. 156 or any prior Requests for Production including, but not limited to, data dictionaries and legends for any coded fields and detailed descriptions of parameters and filters used to generate data.

RESPONSE:

Objection. *See* Response to RFP No. 156.

158. All documents reflecting any "charge masters" that were used by you that represent your full billed charges for any of the CPT codes related to the Claims from January 1, 2013 to June 30, 2017.

RESPONSE:

Objection. This request is untimely as the parties agreed to a 45-day response time and this third set of requests was served on March 9, 2021 (*see* Joint Case Conference Report at Section X(E)) and the deadline for document discovery was April 15, 2021; therefore the Health Care Providers are not obligated to respond because the third set of requests were not served sufficiently in advance. Further, the request seeks information that is outside the relevant timeframe for the

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at-issue claims for reimbursement. Subject to and without waiving the foregoing objections, the Health Care Providers have produced chargemasters in the following: FESM001456; FESM020885-20888.

DATED this 23rd day of April, 2021.

McDONALD CARANO LLP

By: /s/ *Kristen T. Gallagher*

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Attorneys for Plaintiffs

004304

004304

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of McDonald Carano LLP, and that on this 23rd day of April, 2021, I caused a true and correct copy of the foregoing **PLAINTIFFS' RESPONSES TO DEFENDANTS' AMENDED THIRD SET OF REQUESTS FOR PRODUCTION OF DOCUMENTS** to be served to be served via this Court's Electronic Filing system in the above-captioned case, upon the following:

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Attorneys for Defendants

Judge David Wall, Special Master
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/s/ *Marianne Carter*
An employee of McDonald Carano LLP

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EXHIBIT 3

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4/12/2021 11:58 AM
Steven D. Grierson
CLERK OF THE COURT

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DISTRICT COURT

CLARK COUNTY, NEVADA

FREMONT EMERGENCY SERVICES (MANDAVIA) LTD., Plaintiff(s), vs. UNITED HEALTHCARE INSURANCE COMPANY, Defendant(s).	CASE NO: A-19-792978-B DEPT. XXVII

BEFORE THE HONORABLE NANCY ALLF, DISTRICT COURT JUDGE
FRIDAY, APRIL 9, 2021

RECORDER'S TRANSCRIPT OF PROCEEDINGS
RE: MOTIONS

APPEARANCES (Attorneys appeared via Blue Jeans):

For the Plaintiff(s): PATRICIA K. LUNDVALL, ESQ.
KRISTEN T. GALLAGHER, ESQ.
AMANDA PERACH, ESQ.
RACHEL LeBLANC, ESQ.
JUSTIN FINEBERG, ESQ.

For the Defendant(s): COLBY L. BALKENBUSH, ESQ.
LEE ROBERTS, ESQ.
DIMITRI PORTNOI, ESQ.
PAUL WOOTEN, ESQ.
BRITTANY M. LLEWELLYN, ESQ.

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

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e-mails until the night before.

RFP 30, there's been an insufficient production with regard to communications with other ER providers, groups, or hospitals, with regard to reimbursement rates and fees.

The fact that there's no privilege log at this point is shocking to me, because that is something that should have been maintained along the way and also provided on a rolling basis.

So while I'm not going to strike the answer in affirmative defenses, I am levying sanctions against the defendant as follows:

One, the defendant will not be allowed to seek additional extensions of any discovery cutoffs.

Number two, anything not provided by 5 p.m. on the 15th, there will be a negative inference, which may be -- which may be asked witnesses at the time of trial with regard -- the example would be, This information was requested. Did you ever provide it? No. And then there would be a jury instruction saying that the jury should infer that the information would be harmful to the position of the defendant.

So anything not produced by the 15th, negative inference.

The next thing is that with regard to the privilege log, should the plaintiff choose to challenge the privilege, that could be considered by separate motion.

The plaintiff will be awarded the attorney's fees for the bringing of this motion, as well as any costs.

The defendant will be sanctioned the amount of $10,000 to

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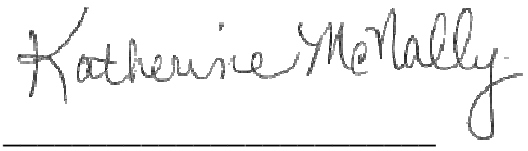
ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video proceedings in the above-entitled case to the best of my ability.



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

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EXHIBIT 4

Kristen T. Gallagher

From: Kristen T. Gallagher
Sent: Saturday, March 20, 2021 4:43 PM
To: 'Balkenbush, Colby'
Cc: Pat Lundvall; Amanda Perach; Roberts, Lee; Llewellyn, Brittany M.; Blalack II, K. Lee; Fedder, Natasha S.; Portnoi, Dimitri D.; Levine, Adam; 'Justin Fineberg'
Subject: RE: Defendants' Third Set of Requests for Production (Fremont v. UHC)

Colby,

In addition to other objections, the Health Care Providers intend to object to the timeliness of United's third set of RFPs.

-Kristy

Kristen T. Gallagher | Partner

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P: 702.873.4100 | **E:** kgallagher@mcdonaldcarano.com

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From: Balkenbush, Colby <CBalkenbush@wwhgd.com>
Sent: Monday, March 15, 2021 2:01 PM
To: Kristen T. Gallagher <kgallagher@mcdonaldcarano.com>
Cc: Pat Lundvall <plundvall@mcdonaldcarano.com>; Amanda Perach <aperach@mcdonaldcarano.com>; Roberts, Lee <LRoberts@wwhgd.com>; Llewellyn, Brittany M. <BLlewellyn@wwhgd.com>; Blalack II, K. Lee <lblalack@omm.com>; Fedder, Natasha S. <nfedder@omm.com>; Portnoi, Dimitri D. <dportnoi@omm.com>; Levine, Adam <alevine@omm.com>
Subject: Defendants' Third Set of Requests for Production (Fremont v. UHC)

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Kristy,

We served the attached requests for production on Plaintiffs on March 9, which request information that is necessary for our expert witnesses. However, as you know, the Parties stated in the Joint Case Conference Report ("JCCR") that each side would have 45 days to respond to written discovery requests. This would make Plaintiffs' responses to the requests due on April 23, which is after the April 15 document discovery cut-off. We would like to know if Plaintiffs intend to argue that the requests are untimely or whether Plaintiffs will agree to submit substantive responses (subject to any other objections Plaintiffs may have other than the 45 day issue) to the requests by no later than April 8. April 8 would be 30 days from the date these requests were served (i.e. the standard response time required under NRCP 34). If Plaintiffs do intend to issue a blanket objection to these requests and argue that they are untimely under the 45 day response time set forth in the JCCR, we request an opportunity to meet and confer on this issue this week so that we can have this issue resolved by the special master, if necessary, prior to the April 15 document discovery cut-off. We are open to other possible solutions to this issue as well but any solution would need to provide for substantive responses to these requests by Plaintiffs.

Best,

Colby

Colby Balkenbush, Attorney
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Attorneys for Plaintiffs

DISTRICT COURT

CLARK COUNTY, NEVADA

FREMONT EMERGENCY SERVICES (MANDAVIA), LTD., a Nevada professional corporation; TEAM PHYSICIANS OF NEVADA-MANDAVIA, P.C., a Nevada professional corporation; CRUM, STEFANKO AND JONES, LTD. dba RUBY CREST EMERGENCY MEDICINE, a Nevada professional corporation, Plaintiffs, vs. UNITEDHEALTH GROUP, INC., a Delaware corporation; UNITED HEALTHCARE INSURANCE COMPANY, a Connecticut	Case No.: A-19-792978-B Dept. No.: XXVII **NOTICE OF ENTRY REPORT AND RECOMMENDATION #9 REGARDING PENDING MOTIONS**

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corporation; UNITED HEALTH CARE SERVICES INC., dba UNITEDHEALTHCARE, a Minnesota corporation; UMR, INC., dba UNITED MEDICAL RESOURCES, a Delaware corporation; OXFORD HEALTH PLANS, INC., a Delaware corporation; SIERRA HEALTH AND LIFE INSURANCE COMPANY, INC., a Nevada corporation; SIERRA HEALTH-CARE OPTIONS, INC., a Nevada corporation; HEALTH PLAN OF NEVADA, INC., a Nevada corporation; DOES 1-10; ROE ENTITIES 11-20,

Defendants.

PLEASE TAKE NOTICE that the Report and Recommendation #9 Regarding Pending Motions was entered on July 1, 2021, a copy of which is attached hereto.

Dated this 1st day of July, 2021.

McDONALD CARANO LLP

By: */s/ Kristen Gallagher*

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CERTIFICATE OF SERVICE

I certify that I am an employee of McDonald Carano LLP, and that on this 1st day of July, 2021, I caused a true and correct copy of the foregoing **Notice Of Entry Of Report and Recommendation #9 Regarding Pending Motions** to be served via this Court's Electronic Filing system in the above-captioned case, upon the following:

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Judge David Wall, Special Master
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/s/ Beau Nelson
An employee of McDonald Carano LLP

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Special Master

DISTRICT COURT

CLARK COUNTY, NEVADA

FREMONT EMERGENCY SERVICES (MANDAVIA), LTD, et al., Plaintiffs, vs. UNITEDHEALTH GROUP INC., et. al., Defendants	Case No.: A-19-792978-B Dept. No.: 27 JAMS Ref. #1260006167 **REPORT AND RECOMMENDATION #9 REGARDING PENDING MOTIONS**

Report and Recommendation #9 Regarding Pending Motions

On June 25, 2021, the Arbitrator conducted a telephonic hearing on several pending Motions. Participating in the telephonic hearing were the Special Master, Hon. David T. Wall, Ret.; Pat Lundvall, Esq., Kristen T. Gallagher, Esq. Amanda M. Perach, Esq. and Rachel H. LeBlanc, Esq., appearing for Plaintiffs; D. Lee Roberts, Esq., Brittany M. Llewellyn, Esq., Abraham Smith, Esq., Nadia Farjood, Esq. and Marjan Hajimirzaee, Esq. appearing for Defendants.

The Special Master, having reviewed the pleadings and papers on file herein and having considered the arguments of counsel during the hearing, and pursuant to NRCP 53(e)(1), hereby sets forth the following Report and Recommendation regarding the pending Motions as follows:

Defendants' Motion for Protective Order Regarding Confidentiality Designations (filed 5/28/21)

During the telephonic hearing, Defendants' requested a continuance of the hearing on this Motion. The request was GRANTED by the Arbitrator, and the hearing on this Motion is continued to July 20, 2021, at 8:30 a.m. (Pacific). No additional briefing is necessary.

Defendants' Renewed Motion to Compel Further Testimony from Deponents Instructed Not to Answer Questions

Defendants' filed this Motion on June 8, 2021, with a request for an Order Shortening Time. Plaintiffs filed an Opposition on June 22, 2021.

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The Motion is styled as a Renewed Motion, as Respondents filed a Motion to Compel Further Testimony From Deponents Instructed Not to Answer Questions on May 21, 2021. That Motion was addressed in the Special Master's Report and Recommendation #6, which states in pertinent part as follows:

> During a status teleconference on April 22, 2021, the Special Master addressed an issue regarding counsel's ability to instruct a deponent not to answer questions on matters already deemed irrelevant in motion practice before the trial court. During that status conference, the Special Master ruled that pursuant to NRCP 30(c)(2), counsel would be permitted to instruct a deponent not to answer questions on topics already deemed irrelevant so as "to enforce a limitation ordered by the court." (NRCP 30(c)(2)).
>
> By the instant Motion, Defendants cite to four (4) instances during two depositions where Plaintiffs' counsel instructed the deponent not to answer questions that Defendants allege did not relate to topics deemed irrelevant by the court. As a result, Defendants allege that Plaintiffs are using NRCP 30(c)(2) to create an overbroad interpretation of the relevancy determinations of the trial court and the Special Master in this action. Therefore, Defendants request an Order compelling Plaintiffs to produce for second depositions all witnesses who have been instructed not to answer questions by Plaintiffs' counsel.
>
> It is the determination of the Special Master that none of the instances proffered by Defendants constitute inappropriate instructions from Plaintiffs' counsel to the deponent, given the prior Orders of the trial court and the Reports and Recommendations of the Special Master declaring certain issues irrelevant to these proceedings.
>
> As such, Defendants have failed to establish cause to re-depose these individuals. Additionally, it is the determination of the Special Master that a blanket order directing second depositions all of the witnesses that Plaintiffs' counsel has instructed not to answer a question would be an inappropriate remedy, even if any of the four instances cited by Defendants constituted an erroneous instruction under NRCP 30(c)(2).

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RECOMMENDATION

It is therefore the recommendation of the Special Master that Defendants' Motion to Compel Further Testimony from Deponents Instructed Not to Answer Questions be DENIED as set forth above.

Report and Recommendation #6 Regarding Defendants' Motion to Compel Further Testimony From Deponents Instructed Not to Answer Questions.

Defendants have brought this Renewed Motion, citing to seventy-three (73) purported examples of improper instructions from Plaintiffs' counsel to the deponent, including the same four (4) instances addressed in the original Motion.

NRCP 30(c)(2) provides that an attorney may instruct a deponent not to answer when necessary to enforce a limitation ordered by the court. Defendants allege in this Renewed Motion that counsel for Plaintiffs have instructed deponents not to answer questions on topics that did not relate to prior Orders of the trial court, thereby exceeding the scope of an appropriate application of NRCP 30(c)(2). Plaintiffs argue that all 73 instances addressed in the Renewed Motion fall squarely within the prior Orders of the trial court and/or the Reports and Recommendations of the Special

Master in this case.[1] Defendants argue that the Special Master's Reports and Recommendations cannot form the basis for a "limitation ordered by the court" under NRCP 30, as they have not yet been approved by the trial court. It is the determination of the Special Master that such Reports and Recommendations, until modified by the trial court, constitute the law of the case as to those matters that the Special Master has been delegated the authority to address. As such, Report and Recommendation #2 and #3, which address prior Orders of the trial court, may properly form a limitation to be enforced by a party by instructing a deponent not to answer pursuant to NRCP 30.

It is the determination of the Special Master, after reviewing the materials submitted by the parties, including deposition transcripts and detailed logs of each instruction not to answer, that Defendants have failed to sufficiently establish grounds to obtain further testimony from any of the deponents that Plaintiffs' counsel instructed not to answer certain questions from Defendants. Defendants challenges to the instructions not to answer fail for several reasons, including but not limited to the following:

- Some of the instances are the same as those addressed in Report and Recommendation #6 (see chart in Exhibit 1 to Plaintiffs' Opposition, items 50, 51, 60, 62), which were determined to be within the scope of prior Orders of the trial court and/or Reports and Recommendations of the Special Master;
- In some instances, the deponent actually provided a response which effectively ameliorated any potential error in being instructed not to answer (Id., e.g., items 28, 32);
- Many instances involved questions on topics already deemed irrelevant by the trial court and/or the Special Master in prior Orders or Reports and Recommendations, including:
    - The reasonableness of amounts Plaintiffs' bill for emergency services, as addressed in the trial court's February 4, 2021 Order (Id., e.g., item 8);
    - Plaintiffs' policies on balance billing, as addressed in the February 4, 2021 Order and Report and Recommendation #2 and #3 (Id., e.g., item 57);
    - Plaintiffs' contracts with other providers or government payors, as addressed in the February 4, 2021 Order and Report and Recommendation #2 and #3 (Id., e.g., items 21, 39, 70);

[1] Plaintiffs cite to Orders of the trial court dated June 24, 2020, October 26, 2020, February 4, 2021 and April 26, 2021, as well as the Special Master's Report and Recommendation #2 and #3 dated March 29, 2021 and April 14, 2021, respectively, as support for the limitations enforced by instructing deponents not to answer certain questions.

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- Complaints by patients, administrators or hospital employees regarding the actual amount charged for emergency medical services, as addressed in the June 24, 2020 Order, the October 26, 2020 Order, the February 4, 2021 Order and Report and Recommendation #2 and #3;
- TeamHealth's acquisition of Plaintiffs and or Blackstone's purchase of TeamHealth, as addressed in the prior Orders of the Court and Report and Recommendation #2 (Id., e.g., items 36, 47, 55, 73).

While not an exhaustive list, the above-referenced instances are examples of appropriate instructions by counsel not to answer questions so as to enforce limitations already promulgated by the trial court and the Special Master. None of the instances cited by Defendant are outside the scope of these prior rulings or present any prejudice to Defendants so as to justify additional questioning of the deponents in question.

It is therefore the recommendation of the Special Master that Defendants' Renewed Motion to Compel Further Testimony From Deponents Instructed Not to Answer Questions be DENIED.

Plaintiff's Objection to Notice of Intent to Issue Subpoena Duces Tecum to TeamHealth Holdings, Inc., Without Deposition and Motion for Protective Order

Plaintiffs filed this Objection and request for a Protective Order on June 15, 2021. Defendants filed an Opposition on June 23, 2021.

This request relates to a similar Objection and request for a Protective Order filed by Plaintiffs with respect to TeamHealth on March 12, 2021. The prior Objection addressed fifty-six (56) of fifty-eight (58) categories of documents sought by Defendants. The only exceptions to Plaintiffs' request for relief were regarding RFPs 14 and 51, wherein Plaintiffs stated, "The Health Care Providers do not object to No. 14 or 51." See, Objection to Notice of Intent to Issue Subpoena Duces Tecum to TeamHealth Holdings, Inc. Without Deposition and Motion for Protective Order, p. 4 at fn. 4. In the prayer for relief, Plaintiffs stated, "Accordingly, with the exception of Nos. 14 and 51, the Health Care Providers respectfully request that the Court quash the request as overbroad and not relevant or proportional to the needs of this case, while issuing a protective order because United's document requests have nothing to do with the Health Care Providers' claims against United." Id. at p. 7.

In that prior document request, Nos. 14 and 51 were as follows:

14. All internal communications about termination of Plaintiffs' provider participation contract with United.

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51. All agreements or contracts with any network, such as MultiPlan, which could potentially apply to services in Nevada.

The Special Master's Report and Recommendation #2 largely granted Plaintiffs' requests with respect to this subpoena, but noted in footnote 2 that "Plaintiffs did not object to Nos. 14 and 51."

In the instant Objection, Plaintiff now seeks to object to the same two document requests that were previously not objectionable. Defendants have issued a new subpoena, with the former request No. 14 now listed as request No. 1, and the former request No. 51 listed as request No. 2. As grounds for this change in position, Plaintiffs state as follows:

> Although the Health Care Providers did not initially object to Requests 1 and 2 (formerly 14 and 51, respectively) United's disregard of Report and Recommendation #2 through its re-issued subpoena to TeamHealth has prompted this current Objection and request for protective order.

See, Plaintiffs' Objection, p. 3.

However, the Special Master finds that position to be incorrect. Defendants did not ignore Report and Recommendation #2 with the instant subpoena duces tecum. Instead, they followed it to the letter by only requesting the documents excepted from that Report and Recommendation based on Plaintiffs' non-opposition to these two requests. Although Plaintiffs argued at the telephonic hearing that Report and Recommendation #2 was broader in scope than Plaintiffs' prior Objection and request for protective order, thereby necessitating this Objection, the record belies that contention.

It is the recommendation of the Special Master that Plaintiffs have not set forth sufficient grounds to modify Report and Recommendation #2, which specifically excepted these two requests. Therefore, the Special Master finds that Plaintiffs' Objections are not meritorious and that this Motion for Protective Order should be DENIED.

Defendants' Motion to Compel Compliance With Deposition Subpoena on Order Shortening Time

Defendants filed this Motion on June 16, 2021. Plaintiffs filed an Opposition on June 22, 2021, and Defendants filed a Reply brief on June 24, 2021.

At issue is Defendants' attempt to depose non-party witness John Henner. Defendants originally scheduled this deposition to occur on May 26, 2021, but encountered difficulties in serving Henner. On May 20 and 21, 2021, Defendants' process server spoke with Henner's wife, who indicated that Henner was leaving the country (or had already left the country), and that she was not authorized to accept service on Henner's behalf. On May 24, 2021, less then two days before the deposition, Defendants served a deposition subpoena on Henner's fifteen year-old daughter.

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Then, on May 25, 2021, less than one day before the deposition, Defendants served another deposition subpoena on a co-occupant of Henner's residence (apparently not related to Henner).

Henner did not appear for the deposition, and apparently had a conversation with counsel for Defendants after the original deposition date, indicating that he was at a residence in Mexico and would not appear for a deposition absent a court order.

Based on these facts, Defendants contend that Henner is evading service and therefore request an Order compelling Henner to appear for a re-noticed deposition.

Pursuant to NRCP 45, it is the recommendation of the Special Master that the Motion to Compel Compliance With Deposition Subpoena be DENIED. Defendants have failed to establish effective service on Henner for the prior deposition date. Even if service was substantially completed, it was less than one day prior to the time set for deposition. It is premature for the issuance of an Order compelling Henner to appear, given all of the facts set forth above.

Defendants' Motion to Compel Plaintiffs' Production of Documents About Which Plaintiffs' Witnesses Testified

Defendants filed this Motion on June 24, 2021, with a request for an Order Shortening Time. During the June 25, 2021 telephonic hearing on the motions set forth above, it was agreed that this Motion would be heard on July 20, 2021 at 8:30 a.m. (Pacific). Plaintiffs shall file any Opposition on or before July 6, 2021, and Defendants shall file any Reply brief on or before July 12, 2021.

Dated this 1st day of July, 2021.

Hon. David T. Wall (Ret.)

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PROOF OF SERVICE BY E-Mail

Re: Fremont Emergency Services (Mandavia), Ltd. et al. vs. UnitedHealth Group, Inc. et al.
Reference No. 1260006167

I, Michelle Samaniego, not a party to the within action, hereby declare that on July 01, 2021, I served the attached REPORT AND RECOMMENDATION #9 on the parties in the within action by electronic mail at Las Vegas, NEVADA, addressed as follows:

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I declare under penalty of perjury the foregoing to be true and correct. Executed at Las Vegas, NEVADA on July 01, 2021.

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DISTRICT COURT

CLARK COUNTY, NEVADA

FREMONT EMERGENCY SERVICES (MANDAVIA), LTD., a Nevada professional corporation; TEAM PHYSICIANS OF NEVADA-MANDAVIA, P.C., a Nevada professional corporation; CRUM, STEFANKO AND JONES, LTD. dba RUBY CREST EMERGENCY MEDICINE, a Nevada professional corporation,

Plaintiffs,

vs.

UNITEDHEALTH GROUP, INC., UNITED HEALTHCARE INSURANCE COMPANY, a

Case No.: A-19-792978-B
Dept. No.: 27

UNITED'S REPLY IN SUPPORT OF MOTION TO COMPEL PLAINTIFFS' PRODUCTION OF DOCUMENTS ABOUT WHICH PLAINTIFFS' WITNESSES TESTIFIED

Hearing Date: July 20, 2021
Hearing Time: 8:30 a.m.

Connecticut corporation; UNITED HEALTH CARE SERVICES INC. dba UNITEDHEALTHCARE, a Minnesota corporation; UMR, INC. dba UNITED MEDICAL RESOURCES, a Delaware corporation; OXFORD HEALTH PLANS, INC., a Delaware corporation; SIERRA HEALTH AND LIFE INSURANCE COMPANY, INC., a Nevada corporation; SIERRA HEALTH-CARE OPTIONS, INC., a Nevada corporation; HEALTH PLAN OF NEVADA, INC., a Nevada corporation; DOES 1-10; ROE ENTITIES 11-20,

Defendants.

Defendants UnitedHealth Group, Inc.; UnitedHealthcare Insurance Company; United HealthCare Services, Inc.; UMR, Inc.; Oxford Health Plans LLC (incorrectly named as "Oxford Health Plans, Inc."); Sierra Health and Life Insurance Company, Inc.; Sierra Health-Care Options, Inc. and Health Plan of Nevada, Inc. (collectively, "United" or "Defendants"), hereby submit the following Reply in Support of their Motion to Compel Plaintiffs' Production of Documents About Which Plaintiffs' Witnesses Testified ("Reply") on Order Shortening Time. This Reply is made and based upon the papers and pleadings on file herein, the following memorandum of points and authorities, and any arguments made by counsel at the time of the hearing.

Dated this 12th day of July, 2021.

/s/ Brittany M. Llewellyn

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MEMORANDUM OF POINTS AND AUTHORITIES[1]

I. INTRODUCTION

Plaintiffs do not seriously contest the critical relevance of the documents about which Kent Bristow and Lisa Zima testified (the "At-Issue Documents"). Instead, Plaintiffs' Opposition (the "Opposition" or "Opp.") leans heavily on the Special Master's findings in Report and Recommendation ("R&R") #9 that R&Rs, "until modified by the trial court, constitute the law of the case as to those matters that the Special Master has been delegated the authority to address." As United explained in its Motion (Mot. at 8:20–23), United has objected to several of the R&Rs, which still remain pending before the Court, and United intends to object to R&R #9.

The baselessness of Plaintiffs' other objections in their Opposition highlight why it would be inequitable to permit Plaintiffs to hide behind the R&Rs as a basis for refusing to produce the At-Issue Documents.[2] For example:

- **Data iSight Communications.** Plaintiffs assert that work product protection and attorney-client privilege shield from production Mr. Greenberg's and Ms. Zima's notes of their discussions with representatives from Data iSight. These arguments fail for various reasons, including that N.R.S. § 50.125 requires Plaintiffs to produce documents about which their witnesses testified *regardless* of their privileged status, and, in any event, Plaintiffs cannot claim privilege over factual communications with third parties that do not contain counsel's advice or mental impressions.

- **Wrap Network Summary Document.** Plaintiffs only refuse to produce this summary document because according to Plaintiffs' United's counsel did not lay a proper foundation for this document. But even a cursory review of the

[1] Capitalized terms not otherwise defined herein shall have the meaning ascribed to them in United's Motion to Compel Plaintiffs' Productions of Documents About Which Plaintiffs' Witnesses Testified ("Mot.").

[2] Plaintiffs also contend that, somehow, United "arguably" "did not satisfy its telephonic meet and confer obligations" by first providing the requests for production that support its requests for the At-Issue Documents. This is absurd. Plaintiffs first requested this information on June 7, 2021, and United set forth its positions on June 8, 2021, and June 11, 2021. *See* Exhibits 6 & 8. Plaintiffs had various opportunities to raise any issues they had with United's response, but never did. If anything, *Plaintiffs* are the parties that arguably did not meet and confer in good faith: as United already explained (Mot. at 10:8–10), United requested in its meet-and-confer correspondences that Plaintiffs identify the R&Rs on which Plaintiffs relied to withhold any At-Issue Documents (*see* Exhibit 6), but Plaintiffs never did this until they filed their Opposition.

deposition transcript reflects that United's counsel easily satisfied its obligation to lay a proper foundation for this document by asking about it and the related wrap network agreements.

- **"Contract Claim File."** Plaintiffs rely erroneously on R&R #2, which by its plain language does not foreclose United's entitlement to these data about which Mr. Bristow testified. And Plaintiffs' contention that United provided no foundation for seeking these documents lacks merit; in fact, two of United's requests for production (nos. 87 and 100) clearly entitle it to those data.

- **N.R.S. § 50.125.** Under N.R.S. § 50.125, Plaintiffs are required to produce any documents about which their witnesses testified and reviewed prior to their depositions. Though Plaintiffs contend the rule may only be invoked if it refreshed a witness's recollection, this is an improper attempt to circumvent the purpose of the rule.

- **NRCP 16.1.** Plaintiffs offer no substantive response to United's argument separate from its other arguments. Indeed, Plaintiffs *concede* that they intend to use Mr. Greenberg's and Ms. Zima's discussions with Data iSight to support their claims.

By testifying about documents that Mr. Bristow and Ms. Zima reviewed, or should have reviewed, in preparation for their depositions, Plaintiffs' witnesses have acknowledged that these documents are relevant to this case. This relevancy is not surprising. As United explained in its Motion, these documents relate directly to the core allegations in Plaintiffs' Complaint, including the fanciful implied contract between Plaintiffs and United, and that the alleged implied contract provided for a particular rate of reimbursement that Plaintiffs believe is reasonable. Indeed, Mr. Bristow and Ms. Zima would not have testified about those documents or used them to prepare for their depositions if they were *not* central to those core allegations. This is not the first time that Plaintiffs' refusal to produce documents has contravened courts' "strong preference for deciding cases on the merits whenever reasonably possible." *Silvagni v. Wal-Mart Stores, Inc.*, 320 F.R.D. 237, 243 (D. Nev. 2017). It would be patently inequitable for Plaintiffs' witnesses to rely on documents they reviewed, used to prepare for their depositions, and testified about—effectively conceding their relevance—only to then hide behind the R&Rs to claim that those documents are not relevant.

Accordingly, United requests that the Court overrule Plaintiffs' objections and order Plaintiffs to produce the At-Issue Documents.

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II. PLAINTIFFS' OBJECTIONS TO PRODUCING THE AT-ISSUE DOCUMENTS FAIL[3]

Plaintiffs assert few objections in their Opposition to producing the At-Issue Documents aside from their reliance on the Special Master's R&Rs. These additional arguments are addressed below, all of which have no basis under Nevada law.[4]

A. Data iSight Communications

Plaintiffs do not dispute that Mr. Greenberg's and Ms. Zima's notes about their calls with Data iSight are highly relevant to Plaintiffs' own allegations. Rather, Plaintiffs argue that these call notes are protected by both the work product privilege and attorney-client privilege. Both arguments are unfounded.

Plaintiffs' claim that the work product doctrine applies is misplaced for numerous reasons. First, summaries of communications with third parties merit work product protection *only* if those summaries are infused with a counsel's legal advice or opinions. *See Upjohn Co. v. United States*, 449 U.S. 383, 400 (1981) ("Rule 26 accords special protection to word product revealing the attorney's mental processes."). "[M]ere facts are not privileged, but communications about facts in order to obtain legal advice are." *Wynn Resorts, Ltd. v. Eighth Jud. Dist. Ct.*, 133 Nev. 369, 374 (2017) (citing *Upjohn*, 449 U.S. at 395–96); *see also Wardleigh v. Second Jud. Dist. Ct.*, 111 Nev. 345, 352 (1995) ("[R]elevant facts known by a corporate employee of any status in the corporation would be discoverable even if such facts were related to the corporate attorney as part of the employee's communication with counsel."); *Finjan, Inc. v. SonicWall, Inc.*, 2018 WL 4998149, at *3–4 (N.D. Cal. Oct. 15, 2018) ("merely

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[3] Plaintiffs produced their data on full-billed charges in response to United's request for that data based on United's requests for documents numbers 83 and 147. (*See* Mot. at 16:4–10). However, Plaintiffs assert that "United has not established entitlement to an order compelling [Plaintiffs'] production of additional data under RFP No. 83 and they respectfully request the Court deny United's Motion on this basis." (Opp. at 12). But neither the Court's February 4, 2021 Order nor R&R #7 preclude the production of documents reflecting *actual* billed charges.

[4] Plaintiffs' objections to producing their pre-acquisition chargemasters (Opp. at 14) and separate balance billing policy (*id.* at 15–16) rely exclusively on their position that the Special Master's R&Rs permit them to withhold those documents, which United addresses *supra* at 3–4. Plaintiffs' objections to producing their third-party insurer contracts also exclusively rely on the Special Master's R&Rs, specifically invoking R&R #7. (*Id.* at 15). R&R #7 makes no explicit reference to the types of contracts United seeks with this request, therefore, that R&R should not control.

verbatim summaries" or "neutral recording[s]" of communications with third parties are not granted protection). The party claiming that a document is subject to privilege has the burden to demonstrate that the material is actually privileged. *Canarelli v. Eighth Jud. Dist. Ct.*, 136 Nev. 247, 252 (2020).

Despite bearing the burden of proof, Plaintiffs have provided no evidence whatsoever that the content of Mr. Greenberg's or Ms. Zima's calls with representatives from Data iSight, or the content of the notes they took memorializing those phone calls, were informed by or consisted of legal advice. Mr. Bristow's and Ms. Zima's testimony concerning these calls are absent entirely of any information suggesting that the *content* of those calls consisted of *any* legal advice, let alone were "so interwoven with legal advice" that the work product doctrine should apply.[5] *Finjan*, 2018 WL 4998149, at *3. Indeed, the allegations in Plaintiffs' complaint concerning these calls makes no reference whatsoever to these calls being directed by Plaintiffs' counsel or that the content of those calls consisted of legal advice.[6]

The only evidence Plaintiffs provide in support of their privilege assertion is the terse paragraph in Plaintiffs' counsel's declaration attached to their Opposition. (Opp. Ex. 1 at ¶ 3.) Not only does that assertion fail to clarify what content within Mr. Greenberg's or Ms. Zima's notes relates to any "direction" provided by Plaintiffs' counsel (*id.* at 10), but this single paragraph in the declaration fails to provide any specifics at all. Neither United nor the trier of fact has any of the information necessary to determine whether Plaintiffs' claim that counsel provided "direction" to Mr. Bristow to contact Data iSight is even true, let alone that the alleged "direction" resulted in Mr. Greenberg's or Ms. Zima's notes reflecting anything other than the fact-gathering exercise set forth in Plaintiffs' allegations concerning these calls. Given Nevada's broad rules for producing relevant documents, if any portion of these call notes contain communications with, or memorialized impressions and advice by Plaintiffs' counsel, proper discovery practice is to produce these notes and redact the privileged text. *See generally Las Vegas Metro. Police Dept. v. Las Vegas Rev.-J.*, 478 P. 3d 383, 387 (Nev. 2020) ("complete

[5] *See generally* Exhibits 1, 2, and 4 to Motion.
[6] *See* FAC ¶¶ 136–141.

nondisclosure" was "inappropriate where redaction would address the relevant privacy concerns"); *McCurry v. Ocwen Loan Serv., Inc.*, 2016 WL 4926430, at *1 (D. Nev. Sep. 14, 2016) (citing *In re Roman Catholic Archbishop of Portland*, 661 F.3d 417, 425 (9th Cir. 2011) ("The sealing of entire documents is improper when any confidential information can be redacted while leaving meaningful information available to the public."); Michael T. Gebhart, "Privilege Logs in Nevada, Nev. Law," STATE BAR OF NEVADA, October 2003, at 9–10 ("[I]f a document may be redacted in a manner that would protect any privileged or immune information, the producing party is under an obligation to redact the document and immediately supply the redacted version to the opposing party.").

N.R.S. § 50.125 likewise forecloses Plaintiffs' assertion of work product protection because documents about which Plaintiffs' witnesses testified and relied on to prepare for their depositions must be produced *regardless* of whether those documents are privileged. *L.V. Dev. Assocs. v. Eighth Jud. Dist. Ct.*, 130 Nev. 334, 339 (2014) ("Nevada district courts lack discretion to halt the disclosure of privileged documents when a witness uses the privileged documents to refresh his or her recollection prior to testifying"); *see also Teck Metals, Ltd. v. London Mkt. Ins.*, 2010 WL 11507595, at *2 (E.D. Wash. Oct. 20, 2010) (analyzing Federal Rule of Evidence 612) ("[I]f otherwise discoverable documents . . . are assembled by counsel, and are put to a testimonial use in the litigation, then an implied limited waiver of the work product doctrine takes place, and the documents themselves, not their broad subject matter, are discoverable."). And so, even if Plaintiffs had any sound basis for asserting work product privilege over these call notes—and they do not—Plaintiffs waived that privilege when Mr. Bristow and Ms. Zima witnesses testified about these documents.

Plaintiffs' additional arguments that work product protection should apply to these call notes also fail. Plaintiffs offer no support for their contention that United's counsel's ability to cross-examine Mr. Bristow and Ms. Zima about these calls "equates to the substantial equivalent" of their call notes. (Opp. at 9 & n.6.) Rather, United's counsel was *deprived* of its ability to fully cross-examine these witnesses without access to these documents and their content, as both Mr. Bristow and Ms. Zima were unable to fully testify as to the contents of those

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notes without having the notes with them at the deposition.[7] Further, Plaintiffs make much ado about satisfying Nevada's "because of" test for the call notes being drafted in anticipation of litigation. But as noted above, there is no real way for United or the trier of fact to make this determination because Plaintiffs have offered virtually no evidence aside from a succinct and conclusory paragraph in their counsel's declaration about any possible attorney involvement in these calls or Plaintiffs' notes memorializing these calls. And Plaintiffs' invocation of Mr. Greenberg's testimony that his call did not occur in the ordinary course of business is irrelevant to the determination of whether Plaintiffs' counsel's advice or mental impressions had anything to do with these calls, let alone informed the content of their notes memorializing those calls. Even if Mr. Greenberg's testimony supports Plaintiffs' position that the "because of" test was satisfied, Plaintiffs have produced a conspicuous dearth of evidence that these calls occurred at the "direction" of counsel in anticipation of litigation. *See Phillips v. C.R. Bard, Inc.*, 290 F.R.D. 615, 635 (D. Nev 2013) ("[T]o be subject to work-product immunity, documents must have been created in response to a substantial and significant threat of litigation, which can be shown by objective facts establishing an identifiable resolve to litigate. Documents are not work-product simply because . . . there is a remote possibility of some future litigation." (internal quotations omitted)..

Separately, Plaintiffs also claim that these notes are protected by attorney-client privilege. But as Plaintiffs recognize, the communications must either "be between an attorney and client," or between a third-party necessary to transmit that communication. (Opp. at 10–11.) Plaintiffs' attempt to claim privilege over these notes because of the supposed privileged "nature of the subject matter sought in discovery" is simply inapposite: Plaintiffs fail to demonstrate that any part of Mr. Greenberg's or Ms. Zima's communications with representatives of Data iSight, and any notes memorializing those communications, were made "in furtherance of the rendition of

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[7] Plaintiffs assert baselessly that "because United did not undertake the proper analysis of the work product doctrine in the first place, it should not be able to raise new arguments in reply relating to any yet-asserted substantial hardship." (Opp. at 9 n.6.) Plaintiffs have this backwards. United had no obligation to conduct any work product doctrine analysis in its Motion because it is Plaintiffs, not United, who have the burden of asserting and supporting their claims for work product protection.

professional legal services to the client or those reasonably necessary for the transmission of the communication." N.R.S. § 49.055. Rather, as Plaintiffs acknowledge (Opp. at 11, citing *Phillips*), these witnesses' notes memorializing these calls appear to be mere facts that are not cloaked in privilege simply because those facts may have been communicated to their counsel. *See also Renner v. Chase Manhattan Bank*, 2001 WL 1356192, at *5 (S.D.N.Y. Nov. 2, 2001) (quoting Edna Selan Epstein, "The Attorney–Client Privilege and the Work–Product Doctrine" (Section of Litigation, American Bar Association, 4th ed. 2001)) ("Clients and their attorneys often assume, erroneously, that merely conveying something to an attorney will cloak the underlying facts from disclosure. It will not."). At most, the communication forwarding those facts would be privileged, but Plaintiffs would still be required to produce the unprivileged facts memorialized in their notes.

B. Wrap Network Summary Document

Plaintiffs do not contest that this summary document is relevant under NRCP 26 and United's Request No. 141. Instead, Plaintiffs' sole basis for objecting to producing the summary document listing the wrap network agreements that Plaintiffs entered into is that, according to Plaintiffs, United's counsel "did not lay a proper foundation to require production of the summary." (Opp. at 11.) This is wrong.

Plaintiffs' Opposition misrepresents that United failed to confirm that Mr. Bristow reviewed the summary document in preparation for his testimony. In fact, his testimony makes clear that he did review the summary prior to his deposition—testimony that Plaintiffs' Opposition fails to quote in full (*see* Opp. at 6):

> Q. Did you review the written agreements for all of those arrangements in preparation for your testimony today?
>
> A. I did not review the agreements themselves but a listing of the agreements that we've had in place to know who they were with and when they started and what the term -- the basic reimbursement terms are.
>
> Q. Some sort of summary document?
>
> A. Yes.

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Q. Okay. Do you know whether that summary document was produced in the litigation?

A. I'm not certain.[8]

Plaintiffs appear to think that Mr. Bristow was referring to his own notes. Rather, as his testimony makes clear, his notes (which were produced by Plaintiffs) are an entirely different document from the summary that he reviewed and relied on his testimony that Plaintiffs have refused to produce.[9] Given that Mr. Bristow was unable to testify about the topic without referring to his prepared notes, it is clear that the summary did influence his testimony and that he relied on it for his testimony.

C. <u>"Contract Claim File"</u>

Plaintiffs' objection to producing ASO claims data in Plaintiffs' "contract claim file" relies solely on the Special Master's R&R #2—an argument with which United disagrees and which should be rejected outright. In fact, R&R #2 does not cover the ASO claims in Plaintiffs' "contract claim file." As Plaintiffs acknowledge, that R&R deemed "[p]rovider participation *agreements* and wrap/rental network *agreements*" not discoverable. (Opp. at 13 (emphasis added).) United's request, however, seeks ASO *claims* data, not agreements. The plain language of R&R #2 should not apply here.

In any event, Plaintiffs do not even address, let alone refute, United's explanation that these data are highly relevant to United's requests for production numbers 87 and 100. (*See* Mot. at 17:4–18:7) Accordingly, Plaintiffs' assertion that "United has not provided any foundation for the Court to order production of a contract claim file" is plainly wrong. The Court should order Plaintiffs to produce the claims in this "contract claim file" on this basis as well.

[8] Team Physicians Dep. Tr. at 265:5–17.
[9] *Id.* at 265:18–266:23.

III. N.R.S. § 50.125 REQUIRES PLAINTIFFS TO PRODUCE THE AT-ISSUE DOCUMENTS

Plaintiffs attempt to dismiss the import of N.R.S. § 50.125 by putting forth a straw man argument about rules of discovery versus rules of evidence in an attempt to skirt the fact that Mr. Bristow relied on the At-Issue Documents—therefore refreshing his recollection.

Plaintiffs are technically correct that the Nevada Supreme Court has held that N.R.S. § 50.125 is a "rule of evidence" and not a rule of discovery. *See Las Vegas Sands v. Eighth Jud. Dist. Ct.*, 130 Nev. 118, 127 (2014). But that distinction is irrelevant here. In *Las Vegas Sands*, the witness referenced documents while testifying on the stand at trial. *Id.* at 121. By the time the opposing party moved to compel those documents, the hearing was over and the court had already ruled on the underlying dispute; therefore, the court held the issue moot because witness' credibility was no longer at issue. *Id.* at 122. The court emphasized that N.R.S. § 50.125 is not a discovery rule because the appropriate time to request the documents was at the hearing in question when the documents could have been used to impeach the witnesses credibility, not after the dispute was already resolved. *Id.* at 127. The facts here are clearly distinguishable: Mr. Bristow testified during his deposition in court and United had no ability to compel the documents during his actual deposition.

Instead, the facts here are more analogous to those in *L.V. Dev Associates v. Eighth Jud. Dist. Ct.*, a case that considered a motion to compel documents where a deponent testified that he had reviewed those documents prior to his deposition. *L.V. Dev Associates*, 130 Nev. at 337. In that case, the deposing party properly moved to compel the documents at issue after the deposition, and the Nevada Supreme Court held that the motion to compel was properly granted because N.R.S. § 50.125 applied equally to documents testified about in both depositions and at in open court. *Id.* at 342. The court did *not* hold that the motion to compel was moot once the deposition had concluded simply because N.R.S. § 50.125 is a rule of evidence. *Id.*

Plaintiffs also attempt to avoid the import of N.R.S. § 50.125 by arguing that United's counsel did not lay an adequate foundation to compel the wrap network summary document, but this argument is misleading. As articulated by the well-established Third Circuit test, a party may obtain documents, including privileged materials, reviewed by a witness before testifying at

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a deposition if "the witness [] use[s] the writing to refresh his memory." *Sporck v. Peil*, 759 F.2d 312, 317 (3rd Cir. 1985); *see also Nutramax Lab'ys, Inc. v. Twin Lab'ys Inc.*, 183 F.R.D. 458 (D. Md. 1998). In the context of a Rule 30(b)(6) corporate designee, this requirement "should be read broadly." *Adidas Am., Inc. v. TRB Acquisitions LLC*, 324 F.R.D. 389, 399 (D. Or. 2017). This is because

> even if the designee lacks independent knowledge of the noticed topics and is not having his or her own personal knowledge refreshed, because the corporation has an obligation to educate a witness regarding the noticed topics, it is the corporation that has the "prior knowledge of the facts contained in the documents" and thus it is the corporation's knowledge that is being "refreshed."

Id. For this reason, courts in the Ninth Circuit have been adopted an automatic wavier theory that any documents reviewed in preparation for a 30(b)(6) deposition are necessarily discoverable. *See, e.g.*, *Mattel, Inc. v. MGA Ent., Inc.*, 2010 WL 3705782, at 5 (C.D. Cal. Aug. 3, 2010) (finding that since the company did not explicitly include a declaration that the witness's recollection was not refreshed, the company must produce all documents reviewed prior to the witness's deposition). Here, Plaintiffs have not offered a declaration stating that Mr. Bristow's recollection was not refreshed.

As these cases make clear, "refreshing the recollection" of a witness is not a magic phrase that must be elicited through testimony. The proper foundation need only show that the witness "relied on any documents in giving his testimony, or that those documents *influenced* his testimony." *Sporck*, 759 F.2d at 317 (emphasis added). Plaintiffs arguments to the contrary lack merit.

IV. THE AT-ISSUE DOCUMENTS ARE RELEVANT UNDER NRCP 16.1

NRCP 16.1(a)(1)(A) required Plaintiffs to produce any documents, including the At-Issue Documents, that they may use to support their claims. NRCP 16.1(a)(1)(A) clearly applies to many of the At-Issue Documents. Indeed, Plaintiffs in their Opposition take the position that Mr. Bristow directed Mr. Greenberg and Ms. Zima to contact Data iSight "in anticipation of litigation adding additional claims related to United's market manipulation of reimbursement rates (as evidenced by the First Amended Complaint)." (Opp. at 10.) Clearly, Plaintiffs should have

produced any emails or other documents memorializing Mr. Bristow's, Mr. Greenberg's, and/or Ms. Zima's communications with Data iSight because Plaintiffs concede they will use the content from these calls to support their claims.

Plaintiffs' only substantive arguments against the import of NRCP 16.1 to the At-Issue Documents rely on their positions regarding R&Rs and attorney-client privilege/work product protection. But, as United explained in length in its Motion and again herein, these arguments do not control over documents about which witnesses testified and reviewed prior to their depositions.

V. CONCLUSION

For the foregoing reasons, United respectfully requests that its Motion be granted in full.

Dated this 12th day of July, 2021.

/s/ Brittany M. Llewellyn

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CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of July, 2021, a true and correct copy of the foregoing **UNITED'S REPLY IN SUPPORT OF MOTION TO COMPEL PLAINTIFFS' PRODUCTION OF DOCUMENTS ABOUT WHICH PLAINTIFFS' WITNESSES TESTIFIED** was electronically filed and served on counsel through the Court's electronic service system pursuant to Administrative Order 14-2 and N.E.F.C.R. 9, via the electronic mail addresses noted below, unless service by another method is stated or noted:

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DISTRICT COURT

CLARK COUNTY, NEVADA

FREMONT EMERGENCY SERVICES (MANDAVIA) LTD., Plaintiff(s), vs. UNITED HEALTHCARE INSURANCE COMPANY, Defendant(s).	CASE NO: A-19-792978-B DEPT. XXVII

004341

BEFORE THE HONORABLE NANCY ALLF, DISTRICT COURT JUDGE

THURSDAY, JULY 29, 2021

RECORDER'S TRANSCRIPT OF PROCEEDINGS
RE: MOTIONS HEARING

APPEARANCES (Attorneys appeared via Blue Jeans):

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

For the Defendant(s): ABRAHAM G. SMITH, ESQ. (in person)

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

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LAS VEGAS, NEVADA, THURSDAY, JULY 29, 2021

[Proceeding commenced at 1:00 p.m.]

THE COURT: Calling the case of Fremont versus United.

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

MS. GALLAGHER: Hi, good morning, Your Honor. Kristen Gallagher, on behalf of the plaintiff Health Care Providers.

THE COURT: Thank you.

MS. LUNDVALL: Good afternoon, Your Honor. This is Pat Lundvall of McDonald Carano, here on behalf of the Health Care Providers.

THE COURT: Thank you.

MS. GALLAGHER: Good afternoon, Your Honor. Amanda Perach, also appearing on behalf of the Health Care Providers.

THE COURT: Thank you.

And who do we have for the defendants?

MR. SMITH: Good afternoon, Your Honor. Abe Smith for the United defendants.

THE COURT: Thank you.

Are there other appearances?

MS. LLEWELLYN: Good afternoon, Your Honor. Brittany Llewellyn, also on behalf of defendants.

THE COURT: Thank you.

Any other appearances?

Okay. So this is the objection to the Commissioner's

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Report 6, 7, and 9, 69, 617, and 715. Let's take them in that order.

MR. SMITH: Your Honor, I just wanted to clarify. I think today is 2, 3, and 5.

THE COURT: Okay.

MR. SMITH: And then next week is 6, 7, and 9.

THE COURT: Okay. Well, that -- that's an issue. Let me look at it real quick.

We've had a crazy week, so I had to read everything last night. And I wasn't sure, so I also looked at 2, 3, and 5. I'm not as well prepared, so I'll ask you to go into more detail.

MR. SMITH: Okay. And I haven't spoken with any of my co-counsel, but if you wanted to just wrap today's hearing into next hearing, we could do that as well.

THE COURT: I think I'd rather move forward today.

MR. SMITH: Okay. All right.

So let me start kind of with a background. We're coming up -- obviously a lot has happened since Your Honor's February 4th order in front of the Special Master. And I do admire Judge Wall. He's done a lot of work in this matter.

I think where we've gotten a little bit off the rails though is in kind of the standard that we're applying in this discovery phase versus something that would be more appropriate in a Motion to Dismiss, a Summary Judgment, or something like that. So I feel like we've gotten a little bit off in mixing up ERISA concepts with the scope of discovery.

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Plaintiffs often return to this mantra that this is a rate of payment case, not a right of payment case, which of course draws from the ERISA arguments, about, you know, what's completely preemptive, what's not preemptive. And of course, the Supreme Court came down recently with the order of denying the writ petition on that basis.

But, of course, the Supreme Court didn't say, well -- and that means that the plaintiffs can proceed solely on their theory while defendants don't have an opportunity to muster the materials for their defense. In fact, the Court called some of their claims questionable, but it was on a Motion To Dismiss standard. So, of course, the Court appropriately, you know, took all of the allegations as true. We know that standard.

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In addition, there's been no Summary Judgment in this case. There's no -- been no official ruling taking any issues from the trial -- just that Motion To Dismiss.

So I want to return to what should be governing these questions that we're dealing with today, which is the discovery standard under Rule 26(b) which, of course, as we know allows a party to obtain discovery of all relevant evidence that's nonprivileged, that's relevant to a party's claims or defenses, and that's proportional to the needs of the case.

Well, just briefly on proportionality. I think we've set out in our papers that the United defendants have set up -- have disclosed over half a million pages of documents. We've gotten

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somewhere in the order of -- orders of magnitude less than that from the plaintiffs. I think it stands now somewhere in the 20,000 range of pages from plaintiffs. So to the extent that we're talking about proportionality, I don't think that the plaintiffs are at the stage yet where they can claim that they've been burdened by disproportionate discovery.

But I really want to turn more to the issue of relevance, and that is that this is not simply a case dealing with Plaintiffs' theory of an implied in fact contract. I know they have that theory. But there are other theories that go both to their case and also our defenses.

In terms of their case, they go far beyond this contract theory. They're asserted RICO claims, again, accusing us of criminal conduct under Nevada's RICO statute. And they say we've engaged in a fraudulent scheme to reduce reimbursement rates.

As well, they've said that -- and they've also accused us now of committing a fraud on the public with respect to certain actions taken before Congress.

But be that as it may, we still have a defense on the basis that although they've charged that we have engaged in this scheme of intentionally taking people off of the Provider Participant Agreements, the In-Network Agreements, and then trying to charge higher rates when we're negotiating a new In-Network Agreement.

We also allege that they have engaged in a similar scheme to try to increase the rate of reimbursement by means of going out

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of network and then trying to come back in network at drastically higher rates.

So I think we need to remember that we have several affirmative defenses in this case that we should be entitled to conduct discovery on, including our fourth affirmative defense on the duty, whether we ever had a duty running from Plaintiff's -- running from United to Plaintiffs under this implied in-contract theory. And our 6th and 9th affirmative defenses dealing with the excessiveness of their charges. And I think that this goes beyond simply what the plaintiffs would say is fair and reasonable. But we're entitled to test that certainly through discovery.

And then finally, our 25th affirmative defense on setoff and recoupment with respect to charges that exceeded the charges billed submitted to other payers. None of those affirmative defenses have been rejected or stricken or otherwise decided on some kind of Summary Judgment. They're still issues in this case.

So let me dive now into the actual Reports and Recommendations. Starting with No. 2, again, we've noted in our objection to the Report and Recommendation a few instances --

Sorry. Let me back up. I apologize, Your Honor.

Okay. So I do understand both in No. 2 and No. 3, there are examples where Judge Wall was applying your February 4th order -- at least he thought he was applying it, and in some cases we believe that he expanded on it. But, regardless, there are some instances, I think particularly with respect to Report and

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Recommendation No. 3, where we've conceded that, yes, under your prior order, certain categories of claims are barred.

But I do still want to address those today because I think, although in the particular context in which that prior ruling arose, the Court may have found it, you know, expedient to make the sort of general statement that, okay, this is a rate reimbursement case not a right of payment case. And, therefore, certain categories like the cost of payment, as well as the corporate structure and various wrap rental network agreements, they're just off the table. They're irrelevant.

And while that may perhaps have made sense at the time, I think the additional -- well, the way that the case has progressed, I think it is time to review some aspects of that order. So I would say even though there are some aspects of the Report and Recommendation that purport to conform with that February 4th order, we would still ask that you grant our objection to it on the basis that that order really has narrowed too much the scope of relevance in this case.

And I think it's far better to fix it at this juncture, where we still have an opportunity to kind of lay the cards on the table to get discovery on these issues, rather than to go through a trial based on these rulings, only to have to go up on appeal and then potentially reopen discovery after appeal.

All right. So going through No. 2, a number of these requests -- so there were kind of two broad sets of requests: One, a

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subpoena to TeamHealth and another to Collect Rx. TeamHealth, of course, is the entity that has the ownership stake in Plaintiffs themselves.

And so we were trying to get information about their agreements or contracts with the plaintiffs and other TeamHealth affiliates, which would, for example, help us determine how TeamHealth not just sets its rates, but also whether it had any decisional input in how the plaintiffs in this case were able to bill and also collect -- seek reimbursement from providers, from payers like United.

I think that that -- it's essential for us to be able to -- if we're talking about a fair market value for the services that these providers provided, we need to have some indication of what these providers themselves thought was that fair value and also whether they were directed by their owners to take a particular stance on what constitutes a fair value for those services as well.

Similarly, we've asked, from Collect Rx, for certain scripts related to collection efforts. So -- and by scripts, I mean literal telephonic scripts that an employee would have. I think that's also very important because that would tell us, for example, if -- and setting aside the process of just setting these rates initially -- whether the providers had agreed with someone like Collect Rx in advance, that, yes, even though we've set these very high rates as our bill, we, in fact, are willing to accept a much lower rate of reimbursement.

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And I think would be probative even if not -- I'm not -- we're not saying it's dispositive -- but I think that at least has some bearing on the question of what is, in fact, a reasonable rate -- would be the rate that they actually were willing to collect. And so if they had scripts going to that issue, we would want to know that.

Similarly, communications related to collections from private payers like United. Again, this information is necessary because we -- if there were communications with payers like United that talk about the process of collecting from those -- from those other payers, we would also want to know, for example, hey, if you go out into the marketplace and another payer refuses to pay this very high -- this very high bill, and you, as the providers, are, in fact, willing to accept a lower rate of reimbursement -- I think that goes to what we're ultimately looking for is some kind of arms-length transaction in a similarly situated circumstance.

I won't go through all of these. I do want to focus just briefly on -- let's see. On number -- Request 15 through 16. These are communications, policies, and procedures for excusing payment and balance billing.

Again, this is important because we've alleged that the plaintiffs have used the threat of balance billing as a basis to extract higher payment -- higher reimbursements from payers like United.

So if they had policies regarding those issues, I think we would be entitled to know that. If they had a policy of -- for example, of always -- they said that there is no balance billing policy or that

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there is no policy to balance bill United customers. But I think it's important to know on what conditions they would excuse payment from United customers or other customers to -- again, that goes towards setting an arms-length transaction.

In Plaintiffs' response, they talk about this idea that what medical providers negotiate with third-party payers is irrelevant to the reimbursement rate. And then they quote a case they -- this is the *Chamoun* case that Judge Silver decided I think back in 2012. It says that those negotiations do not accurately reflect the reasonable value of medical services provided.

But I think we have to step back and see what context we're talking about here, because I think it's a little tough to say that there's just this, you know, abstract concept of a fair market value for medical services divorced from who is actually being billed, who is paying, and whether there are insurers involved.

In that case, Judge Silver was making the point that the Supreme Court later made in the *Khoury versus Seastrand* case, which is that when you're talking about an individual plaintiff, they can't be expected to be bound by, for example, a write-down from -- that an insurance company negotiates with the provider, as that wouldn't necessarily reflect the reasonable value of those services to the plaintiff.

But I think when we're talking about those -- here we're not talking about the individual patients themselves. We're talking about what the insurer should be paying to those providers. So I

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think that is directly relevant to that transaction.

So we're not talking about just in the abstract, you know, what would an individual patient necessarily consider the fair market value for services, but what should an insurer be required to reimburse? And I think those negotiations are, in fact, relevant.

With regard to the TeamHealth subpoena, again I understand Your Honor has made some comments in the February 4th order regarding ownership structure. I do, however, feel like it's important. We need to know who is making the decisions with regard to rate setting. That's information that would be ordinarily available in the kinds of things we're asking for, just the -- the contracts, the ownership interest of TeamHealth in each of the plaintiffs' entities. That's the sort of stuff we would just ordinarily get in litigation in business court, where we're talking about entities that have come after United on the allegation that United has engaged in this unfair reimbursement practice.

Well, we, on the other hand, are arguing that the plaintiffs, under the umbrella of TeamHealth, have similarly engaged in unfair practices with respect to the negotiation of a in-network contract.

I will refrain from going through all of these examples. Let me -- I think there's a similar issue -- so this is a Request No. 17 to TeamHealth, as well as Request 18 to TeamHealth. These are communications that TeamHealth may have had between -- or information between TeamHealth and Blackstone, the ultimate -- it also has an ownership stake in TeamHealth which, in turn, has an

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ownership stake in Plaintiffs.

And I think it's important that we have information about who is actually directing the plaintiffs with regard to what kinds of reimbursement rates they'll actually accept so that we can get an idea of at least their subjective understanding of what constitutes an acceptable rate of reimbursement.

Oh, and final -- let me address briefly the other -- I'm sorry. This is, I believe, requests numbered 25 to 28. These are negotiations with other emergency practices using the former in-network contract with United.

So United obviously used to have an in-network contract with the plaintiffs. And we want to know whether that contract is used, or was used, with any other emergency practices for their billing purposes. The plaintiffs, in fact, admit that they thought discovery from United on these in-network negotiations to support their allegations of a, quote, multi-front effort to leverage Health Care Providers into accepting artificially low reimbursement rates.

But again, I think we have to look at both sides of this playing field. United has a similar allegation against plaintiffs. That plaintiffs have conducted a multi-front effort, at the urging of TeamHealth, to leverage United to accept artificially high reimbursement rates.

So I don't think at this point that it should matter whether the Court or the Special Master finds Plaintiffs' theory more compelling than Defendants', because unless we have -- you know,

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unless the Court is actually prepared to grant Summary Judgment on these issues and officially deprive United of a trial, I think we need to be able to conduct discovery on our theory that the plaintiffs have been using, at the urging of TeamHealth, imposing artificially high reimbursement rates on defendants like United.

Similarly, I think it's very important that we have information about the -- about allegations of billing fraud, coding fraud, with respect to Plaintiffs because that, in turn, goes to whether the rates that Plaintiffs are asking Defendants to pay are, in fact, reasonable or whether they've been tainted in some instances by issues of fraud.

Oh, and one last issue on the question of control by TeamHealth. I think it is important, not simply because it goes to the defense that we've asserted in this case, but I think it's also important to an issue of standing and whether all of the real parties' interests are, in fact, before the Court.

Standing, of course, is an issue of justiciability whether the Court, in fact, has the correct parties before it and has all of the information regarding those that have made -- that are making this claim of reimbursement. If there's, in fact, another party that's involved and that's controlling the actions of Plaintiffs, we would need to know about that.

I have some other issues, but I think they'll go more to the third Report and Recommendation. So if you'd like, I can kind of separate that.

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THE COURT: I'd like to hear all of your objections and then one response.

MR. ROBERTS: Okay. So all -- 2, 3, and 5. Okay. Very good.

So in the objection -- I'm sorry. In the response to our objection to Report and Recommendation No. 3, Plaintiffs go into what they call the, you know, reasonable and expected reimbursement rates. Yes, we understand that that's an issue in this case. And I understand that Your Honor has said that we can't get into the actual costs of providing those services.

I disagree with that ruling, but I'll set that aside. I mean, I think that the cost is at least a piece of what goes into a price that the market can bear.

But setting that aside, we've asked for -- in our request for production from Plaintiffs, we're asking not simply for the costs of providing services, but what they accepted -- so after they've billed.

So what -- I think of the cost as kind of this, you know, this precursor to a bill. You take the cost and then you add your expectation of profit, or what have you, and then you have the bill. And we are allowed to, you know, discover information about the bill itself.

And I'm talking about a process after that. So what did the providers actually accept? And in particular, this is important with respect to complaints about billing. Those don't have to do with costs or even what goes into setting those charges. That has to do

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with the reactions of patients, payers, employees, others, and administrators that object to those -- that object to those bills as too high. And I think it also goes to what the plaintiffs own physicians think is a fair rate.

So I think that we have to separate the issue of setting charges, which I understand this Court has kind of taken off the table, from the question of collection, which is very much on the table. I mean, this is really -- this is a collection case. This is the plaintiff saying that, you know, we've asked United for this reimbursement. They're not doing it. And you're coming to Court to now collect.

On our specific Request No. 51 -- I apologize. Let me turn to that real quick. Request 51, this was the business reports -- business consulting company -- any reports that they would have had or given to the plaintiffs regarding setting reimbursement rates. The Special Master -- he didn't say it was irrelevant. He said it was moot because he said that the plaintiffs had actually gone through and said that there was no responsive documents.

I think we would, at a minimum, need to know from the plaintiffs what sort of search they conducted, what measures were taken to ensure that there were, in fact, no responsive documents. It's just a little bit -- well, it struck us as odd that, you know, out of all the time that we are requesting, I believe it's more than four years, that there wouldn't have been a single consultation with a third-party to discuss reimbursement rates.

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56 and 57, these have to do, again, with the patient complaints, which I've talked about. These are, again, not talking about bill setting, but the complaints later on.

I would point out that the plaintiffs did get similar discovery from Defendants. They challenge -- they asked us to provide any challenges from other out-of-network emergency medicine groups regarding our reimbursement rates.

So I think if this is, you know, "a sauce for the goose, sauce for the gander" incidents where if we're required to produce our complaints against us that we've been billing too -- that we've been reimbursing at too low of a rate, I think we would be entitled to know whether Plaintiffs have also similarly been accused of billing at too high of a rate.

The Medicare and Medicaid reimbursement rates. I understand this is a little bit of a tricky issue because there are questions of federal law that go into the setting of those rates. I would point out, however, that the plaintiffs -- they've asked that United present its reimbursement rates as a percentage of Medicare rates. So I think even though -- so we're not saying that Medicare or Medicaid rates are, you know, the reasonable rate that would be charged in a situation like this.

But if we're -- again, if we're tying the rate that they are asking from us to a percentage of Medicare or Medicaid, I think it's important that we have that baseline to be able to discuss that.

Number 107, this is the vendor documents related to claim

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submission reimbursement and collection. Again, I think this fairly straightforward. This is a collection case. They're complaining that they didn't collect what they wanted. And it's not asking for any documents on the actual costs or the setting of charges. Again, it's just relating to the submission of claims and the reimbursement and the collection. So I think we would be entitled to those other documents.

And No. 9, finally, that's the contracts with reimbursement claims specialists. Plaintiffs, for their side, they -- they've used those collection companies to -- I won't say extort -- but they've used to get United to pay more money than -- on particular claims than we feel was appropriate. So we felt like we paid the claim as it was billed appropriately, but then we would get a call from one of these collection companies to pay more -- to pay for services that we didn't think were appropriately provided. And we would sometimes pay more than we thought was appropriate as a concession, frankly, to avoid the prospect of our members being balance billed for these inappropriate charges.

But when we're in a situation where the plaintiffs want to use the actual collected amounts as the basis for what it's setting as what it calls the reasonable reimbursement rate, I think we need to know what goes behind it. So that would be -- so getting those contracts with those reimbursement claims specialists with those collection agencies would be important to seeing what, in fact, is a fair reimbursement rate.

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Number 5 -- Report and Recommendation No. 5, it's a little bit different. So, you know, I will address it, but I would understand if we want to kind of take those separately.

This is on the issue of confidentiality designations. So there was a report from researchers at Yale. There was an article that was published. And I think there is agreement among the parties and the Special Master on at least three points about the e-mails and the drafts leading up to that published article.

United provided information to the authors of that study, and there was a confidentiality agreement between the study's authors and United. So -- and I should backup.

So we're asking that these drafts and these e-mails remain how we designated them, which was this "attorneys' eyes only" designation. Special Master Wall said, No, except for this one draft that contains certain rate information. All of the other drafts and e-mails would have to be produced -- sorry, not produced. We've already produced them -- would have to be the de-designated and allowed to go into the public domain.

So there's no question. The information is sensitive and would be detrimental to United's interest if it were made public. There's no question that there was a confidentiality agreement. And there's no question that because we've actually produced of this to plaintiffs' counsel that they have the information that -- and if it comes to, you know, whether something needs to be admitted into evidence or to go before a jury, I think that would -- you know, that

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could come up at the appropriate time. But to just, as a blanket matter while we're still in discovery, just saying, Okay. Well, I want all of these -- all of this information going to the public domain -- I think that's inappropriate.

And I think the error stems from, again, sort of a misunderstanding of the framework that should govern this analysis. So what -- you know, we have a protective order in place that allows parties to designate items as highly -- "confidential," "highly confidential," or "attorneys' eyes only" on the basis of whether the material is sensitive, whether it would be detrimental to a party's interest if it were made public. And I think it's clear that it does fall within that framework.

But instead we have this argument, both from the plaintiffs and in the Special Master's Report and Recommendation that almost applies sort of a sanction-type analysis, even though there's no -- there's been no allegation of, you know, Rule 37 violation or something like that. But rather, it seems to be this kind of punitive desire that because they feel like United somehow behaved badly in, you know, in academia by providing this information without that information being publicly credited as being sourced from United, that I guess -- I don't know what you want to call it -- an academic faux pas -- that that should be punished by publishing this information, this admittedly sensitive information in the public domain.

I think it's especially inappropriate here because we're still

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at the stages of allegations. Nothing's been proven. This isn't part of their claim that -- you know, their complaint that, oh, you know, United -- we are entitled to damages because United hid its involvement in this particular study.

But regardless, it's certainly not the case that they've proven whatever -- I suppose that they would say, you know, this is the supposed fraud on the public that I guess somehow leads Congress to act in a way that they don't like -- or sorry, not Congress -- but leads to this executive order that they don't like, and therefore would, you know, somehow justify this publication. They haven't proven that allegation by clear and convincing evidence that they would need to, if they're really make than this kind of fraud -- the fraud allegation.

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But I think perhaps most important -- so we're still at the allegation stage -- but I think most important, we're not just talking about United's own privacy interests. We're talking about the privacy interests of third parties. We have the author -- the authors of the study who have this expectation of confidentiality; and they understood that these communications with United would remain confidential. And we also have the impact that this would have on Plaintiffs' competitors. I understand why the plaintiffs aren't concerned about that. But understandably United does not feel the need that this information needs to go public simply to, you know, embarrass Plaintiffs' competitors.

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I don't think it makes sense to read the protective order as

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only protecting information that would be detrimental to United's competitors. I think it makes sense that when we're talking about United's interests, that United, of course, has an interest in, number one, maintaining its -- you know, keeping to its confidentiality agreements that it has with third parties; and two, not -- not needlessly undermining or presenting data of Plaintiffs' competitors just because the plaintiffs are -- you know, have a claim in this action.

I've spoken a lot. If Your Honor has any questions, I'd be happy to answer them. But I will for now sit down.

THE COURT: I don't.

And I have another hearing scheduled at 1:30.

So let's have the opposition, please.

MS. GALLAGHER: Thank you, Your Honor. This is Kristen Gallagher, on behalf of the Plaintiff Health Care Providers.

First, I just want to tell you that the Health Care Providers appreciate the fact that you offered Senior Judge Crockett to consider these matters while you were in trial. Obviously, that was not agreed upon by United, but we do appreciate that to try and move these along.

So let me start with the objection to No. 2.

And if you could hear me okay, Your Honor.

THE COURT: I can.

MS. GALLAGHER: Okay. Thank you.

So from a procedural perspective, we know that United

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waited months to bring this objection before the Court, and in the interim has repeatedly taken the position before the Special Master that they are of no legal consequence.

And I will say I'm getting a significant amount of feedback. If perhaps somebody can mute themselves, that would be appreciated. Thank you so much.

And so in the interim, United has taken the position that Special Master Wall's Reports and Recommendations are of no legal consequence and that the Health Care Providers have improperly relied on them during the course of discovery.

And so what we heard in the opening remarks from United today is essentially trying to convince the Court that a lot has happened, that perhaps you're not up to speed on what's been happening since the February 4th order.

But what I can tell you is that what has happened is a repeated attempt to disregard the Court's, not only the February 4th order, but their earlier orders that talked about clinical records being nondiscoverable, in addition to the Court's April order that granted -- or rather denied reconsideration of United's Cost Motion that they had sought.

And so this position, what we're seeing, is consistent with the fact that United -- is not consistent, rather, with United moving to put in place Special Master Wall. It was United who advocated for having a Special Master that would help efficiently, expeditiously move this case forward in the discovery.

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And so what we've experienced on our side is with each and every step United has sought to either ignore the Court's orders and disregard them or just try and run them over by virtue of a litany of requests that fall within the order.

And I'll be able to identify those specifically for Your Honor in a moment.

So the Health Care Providers -- we've had occasion to comment on this before, and I know I sound like a broken record, but unfortunately this position presents itself again -- which is what we're seeing is a litigation strategy that's rooted in attempts to delay the case. What I think I heard from United's presentation is that they were essentially asking the Court to go back to Day 1 and start over with respect to the limiting orders that have been in place.

This case is not new. It's not in its infancy. Your Honor is well aware we are past the point of document discovery and deposition discovery. And so this case is getting ready for trial. And so to suggest from United that you need to go back and start over and allow all of this discovery that is at issue today simply is a desire to sidestep everything that's happened from the beginning.

And so to the extent there was maybe -- you know, perhaps an oral request for modification or reconsideration, I would suggest that that was not briefed in any of the objections to Numbers 2, 3, or 5. And we would ask that your Court decline that request.

But what I really want to get to now is the substantive

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piece of Report and Recommendation No. 2.

So in light of the procedural packet, it's not going to fix the substantive deficiencies that United's objection brings. As the Court is well aware, it decided and deemed that discovery about Team Health's corporate structure and relationship that cost-related and hospital and facility contracts, and other related information, such as clinical records, are not going to be relevant and not discoverable. And that has been in place for quite some time and has really provided some of the guardrails that were necessary, based on the allegations in the first amended complaint, based on the motion practice that Your Honor had the opportunity to review after briefing and oral arguments.

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And so what happened after the February 4th order is that United went ahead and tried to circumvent and disregard that order and instead issued subpoenas directly to Team Health and to Collect Rx. And so that was done on February 23rd. This led obviously the Health Care Providers knew the limiting orders, didn't think that it was right to let that discovery go forward in light of the Court's guidance and input on those particular issues.

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And so we objected and filed a Motion for a Protective Order that Judge Wall, we think, correctly found with the requests were already within the scope of the Court's prior orders.

And not just the February 4th order. I want to be clear that Your Honor has had occasion over the course of this being remanded to have considerable input into the issues that the parties

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have raised before you and has deemed a number of things not discoverable, including the clinical records which we heard in the presentation here today, as a basis or foundation for documents.

So I want you to know that we're not just limited to that February 4th order in terms of the limiting orders that are at issue in this case.

So while United urges a *de novo* review of Report and Recommendation No. 2, Your Honor is familiar that you only need to determine whether or not he committed clear error in connection with any of his factual components and analysis as to whether or not any of the subpoena requests and the Report and Recommendation No. 2 fall within the Court's prior limiting orders. As you know, this requires the Court to provide deference to Special Master's findings. And I think that that is right in terms of especially the Team Health holding subpoena.

So I want to first point out an important threshold matter that United has conceded 24 of the 58 requests fall within No. 4 -- or the February 4th order. If it's helpful to the Court, I can run through those quickly. But it is set out in their briefing, where they drop a footnote every time that they agree that this falls within the Court's February 4th order.

Quickly, it's ownership and possession, profits and related documents, cost related documents, hospital facility documents, balance billing, in addition to market share or Team Health provider practices.

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So I think just by virtue of United's own documents, the Court is well within its right to affirm and adopt Special Master Wall's recommendations on those.

If it's helpful at the end, Your Honor, I'm happy to identify those specifically if need be, if that would be helpful to the Court.

So the other requests, although United does not admit that they fall within the scope, they do. If you look specifically -- and I'll just sort of gloss over this and happy to answer any particular question. But, for example, in Numbers 12 and 13, United is asking for preacquisition Provider Participation Agreements. Again, this is something that the Court considered in connection with the February 4th order. Anything relating to essentially corporate structure acquisitions has already been determined by the Court not to be relevant.

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And again what this case is about, it is United's rate of reimbursement. I'll get to the collection twist that United is trying to put on this in a way to sort of distance itself from the orders of this Court. But the semantics that it's employing certainly does not change what this case is about, what the -- first amended complaint allegations are, and importantly what the Court has agreed with in terms of limiting orders and parameters for this case.

So again, looking back to the categories that United is looking for in No. 2, Report and Recommendation No. 2, relating to Team Health -- talking again about charge factors or in setting the rates, the Court considered this and specifically deemed anything

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relating to what United's attempt to try and establish the charges are excessive are not relevant.

That also relates to the Blackstone-related documents that were requested in Nos. 17 and 18. One of the things I want to point out -- I'll get to a little more fulsome, when I talk about Report and Recommendation No. 5 -- but in the underlying briefing, United's point is to the Yale Study. It represented to the Court that it was a neutral study. It used that as a way to try and demonstrate that the Health Care Providers are egregious billers.

We'll talk a little bit more about this marketing strategy to portray the Health Care Providers in a bad light. But I note that this is something that has been a theme of United throughout the case and, in particular, to the Health Care Providers and Team Health. And so that is going to underscore the fact that our claims at issue relating to defective practices and deceptive conduct of United really relate to and is showcased by what happened with the Yale Study and an additional study that is now the subject of Report and Recommendation No. 10, which is not yet before Your Honor.

So then the next category of documents relating to other practices and Provider Participation Agreements, again, United doesn't provide an explanation how this would inform whether United's out-of-network reimbursement rates are appropriate. As we've alleged, they're deceptive. We've alleged that they are manipulated and that they are not reflective of the market. And so whether or not there is a prior Participation Agreement, we think

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falls outside of the four corners of the first amended complaint, and then certainly falls within the auspices of the Court's February 4th order and other limiting orders.

The same goes for Provider Participation Agreements, charge remitted requests.

And I wanted to focus and pause just a moment on the billing and the charges to noncommercial patients and complaints.

We've seen United try and get at this Medicare and Medicaid type of data and information and try and inject it into this case for quite some time now.

The Court had occasion back in the November 9th order that set the production schedule for United to say that, look, you can't inject this information into this case.

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We have seen this issue come up in nearly every briefing since then. We've provided Special Master Wall, and now the Court, with information relating to this. The Eighth Judicial District Court has decided that such Medicare and Medicaid data is not going to be relevant to a commercial rate. And so we've cited to that case, the Sennett [phonetic] case, I believe, is what it is, in our papers, and we believe that that provides the appropriate guidance.

I'll note that even though this issue comes up, United has yet to bring a single case to the Court's attention that would suggest that in a commercial payer case that such, you know, government Medicare, Medicaid -- such governmental type of data would be relevant. And so I just want to make that note that we have provided

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the Court with that, and Judge Wall found that to be compelling, at least in connection with Report and Recommendation No. 3.

I know I'm getting a little bit ahead, but just sort of -- these issues, you know, they're sort of permeated all -- because we're arguing the same issues over and over again. So my apologies, Your Honor, for jumping around a little bit there.

So back to the Team Health subpoena, the corporate structure collection related -- again, these are corporate structure questions about Team Health's ownership interests. These are things that the Court has already deemed not to be relevant and nondiscoverable.

With respect to the Collect Rx subpoena, similar type of questions wanting to know about whether or not Team Health would accept something lower -- some lower rate. Again, this is a focus that changes the dimension of the first amended complaint and is trying to take apparently a different burden of proof approach.

But regardless of the reason or the attempt to try and transmute the first amended complaint allegation, Your Honor has been correct that this case is about United. What is United paying? And so collection and what we might expect in terms of a compromise is certainly not going to be something that is going to be relevant. The Court has determined it's not relevant.

The *Chamoun* case, I think is specific. And even though United tries to distinguish it, it does indicate that what somebody might be willing to compromise is not going to be indicative of

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market rates. And so we think that the Report and Recommendations which, you know, evidences earlier limiting orders is appropriate on that as well.

I can probably go into more specific detail with respect to the self-pay collections, but that's going to be really similar. The self-pay is not analogous to a commercial situation like United, who is making profits by offering healthcare insurance.

So again, these limiting orders in place already sort of have already dictated the outcome of No. 2 -- Report and Recommendation No. 2, so we would ask that the Court affirm and adopt Special Master Judge Wall's recommendation.

I'll switch to Report and Recommendation No. 3. A lot of the argument is very similar. This is a little different in the sense that United is asking for what it's sort of touted as collection-related materials. They've said in the underlining briefing that they needed to know what rates the Health Care Providers were reimbursed by other payers.

So in that underlying briefing, what we came back with in the argument is, well, they had that information. It's called a market file. We produced it. They came back in their reply and said it wasn't sufficient for four reasons, which Special Master Wall did not find to be compelling. We were able to easily rebut that.

And so what we're seeing now in the objection is another attempt to recap those allegations and saying that they need information about what was collected. But when you look at the

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specifics of the underlying request for production, you'll notice that United's objection really steers clear from that text. And the reason is if you get into the text of what they're actually asking, it's not reflective of what they say they need.

So for example, they have broad categories about wanting expected rates or analysis of charges or setting of the charges. But again, this is -- they're seeking that information from a business consulting company.

Special Master Wall found the Health Care Providers had appropriately responded to that and did not find further discovery on that to be necessary, and plus the market file embodies that information about what they say that they need the information for.

Another example, and I'll just give one more perhaps, Requests for Production No. -98, these documents comparing billed charges to what reimbursement amounts by the CMS, Medicare and Medicaid. Again, looking back to the Sennett core, talking about rates do not reflect rates established by treatment providers in a free market, open competition system. In that particular case, the Court granted a Motion in Limine regarding expert testimony. That information is not going to be relevant, nondiscoverable.

So we think that that controls as well.

I'm happy to go through a number of these others, but I think the Court is familiar and is seeing a pattern here that these are the same RFPs that were asked early on, the same RFPs that were asked of Team Health and Collect Rx. And now United is trying to

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transform the similar type of questions into categories that the Court has already said are off limits.

Again with complaints about billed charges, how -- I don't really know how a complaint by a consumer or somebody else would have any relevance to what United is allowing for reimbursement, which the Court has made clear and it understands that is the auspices of the first amended complaints allegations.

So that is -- I think concludes on Report and Recommendation No. 3. We would ask that the Court overrule the objection.

I will say there is a small narrow modification. United pointed out a [indiscernible] error in the final recommendations, just to reflect that it was United's Motion to Compel, that it was -- that he was denied -- just a mistake saying that it was a granting of an objection. But other than we would ask that that be adopted in full.

And then the final piece is the Report and Recommendation No. 5, which is dealing with the Zack Cooper study. And I will say, the Health Care Providers think that Report and Recommendation No. 5 reflects an appropriate balance of allowing for the protection of a specified rate information, that while correctly ruling that United's manipulative marketing strategy is not entitled to AEO protection and is not entitled to confidentiality neither.

So although United tries to characterize all of the subject documents related to the Yale Study as containing rate information, the Special Master considered that argument. And with the benefit

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of reviewing those documents, he could readily determine that the documents that United seeks do not contain rate information. The exception is the one that he identified, which is Defendant's 101730, which we mains protected.

So as Your Honor may have been able to glean from review of the Health Care Providers' response and from the documents themselves, United commissioned the study with what they considered to be a friendly academic. And United spoon-fed him misleading data to reach a false conclusion about out-of-network Health Care Providers. And then taking that information, taking the false conclusions to Congress and to various courts -- which is important, including in this case. And they tried to pass off this Yale study as independent. They asked the Court for its [indiscernible] before those forms, before Congress, before this Court, and before other courts that we have seen.

So United has done this as part of a business plan in an effort to coerce some out-of-network emergency service providers to accept less than market rates. This is the proximate core of our deceptive claims against United. And since this part was part of this business plan, United contends that the documents that revealed this theme should be treated as AEO. We agree that these documents that are the subject of this motion do reveal part of this coordinated scheme that's critical to our -- and reflective of the allegations in the first amended complaint.

But this really isn't a matter of whether United

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overdesignated confidential business material. Instead, as United previewed, we considered this to be an issue that concerns a fraud on the public as being practiced by United through Zack Cooper and Yale University. And it specifically targets Team Health.

So United has been advocating for this Court's help in practicing that fraud on the public. One of United's goals in trying to keep this secret was realized that in the surprise billing legislation, the No Surprises Act that recently passed.

And so I want to give just a little bit of background just because I know Your Honor has been in trial and understand that there wasn't the opportunity to perhaps have some of the background, but I will try and be brief --

THE COURT: You know, you -- it just --

MS. GALLAGHER: -- understanding that you have another hearing.

THE COURT: We do. But just please be brief.

MS. GALLAGHER: So balance billing or surprise --

THE COURT: I've read everything, so please be brief.

MS. GALLAGHER: Okay. Your Honor, I will.

So from a high level, United has an Outlier Cost Management program in connection with a shared savings program. And so what happens is that it generates internal operating revenue for, on average, 35 percent of any savings that it secures for administrative services clients. So it calculates that as the difference between the providers billed charge and then the reimbursement

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rate as the bottom denominator -- which is the rate that United has -- as we have alleged, has manipulated and continues to bring that lower denominator down even more.

But the problem, and why the balanced billing is an issue, is that United has historically had to indemnify those members who were balance billed. And so if a provider balance billed, the insured became very unhappy with United.

And so with the help from MultiPlan, what started happening is reducing the bottom denominator of that calculation. In short what was happening is that they were following through on the threats that they made to Team Health representatives that they would be reducing reimbursement rates. And as we quoted in the first amended complaint, quote, because we can. So the balance bill issue remains. And so there's a full scale deliberate attack that United has undertaken, specifically toward Team Health and another out-of-network provider, another emergency room provider, aimed at eliminating the ability to invoice a patient. And so, as we've alleged in the complaint, this is the next iteration of a scheme that United already got caught doing back in 2009. And they were required -- United was required [indiscernible] that their health database for a certain period of time, and once that five years' time period expired under the settlement agreement, they started to use the help of MultiPlan to put up a deceptive front in order to claim that reimbursement rates were being paid at market rates.

So we know from documents produced by United that

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they know that the Data iSight product takes cuts that are lower than what is considered reasonable and customary. And so this study with Zack Cooper was instrumental in trying to deal with what they called provider noise, meaning people complaining about the fact that these rates are not reflective of market.

And so United's role is depicted in the documents that are the subject of Report and Recommendation No. 5. You can see Dan Rosenthal provided solutions for the piece that ended up being within the final version, which shows you that United has the ability to influence and spread misinformation.

So why this is so important right now is that just on July 1st, so a little less than a month ago, the Department of Health and Human Services, in connection with that No Surprises Act, it released an interim final rule, and so there's an ensuing period of public comment.

And so what the Health Care Providers have reasonable belief is that United is active again in its misinformation about out-of-network providers and the amount that they bill and that it's egregious. And this is important and we've provided a supplement for Your Honor to indicate that the interim final rule and then related documents that are posted on the CMS government website are specifically referring to this Yale Study. And you can find that at Exhibit F of our supplement. And this is posted on the CMS website.

And then even within the interim final rule itself, that Yale Study is repeatedly referred to in at least six or seven different

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places within that interim final rule. The Brookings Institute study, which I mentioned earlier, that is the subject of Report and Recommendation No. 10, is also in there.

And so what we think is that these studies are reflective of what United calls a surround sound approach, something that the -- that Congress and the public cannot know is that United is the source of information and orchestrated study, and we do not think that Special Master Wall made a misstep with respect to his evaluation and analysis under the various legal standards.

We pointed out Rule 26, SRCR 1, with respect to the public policy of information and open court records. And then we also have set forth the analysis in response to the *Russo versus Lopez* case, that we think Special Master Wall got exactly right in his analysis.

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And so for all of those reasons and in the underlying briefing, Your Honor, we would ask that you adopt and affirm recommendation No. 5 as well.

Thank you.

THE COURT: Thank you.

Mr. Smith, you have five minutes to wrap it up.

MR. SMITH: I will be very brief, Your Honor.

Let me take the last one first.

I think the most important line of that whole argument was Counsel's concession that this is not an issue of United overdesignating under the protective order. And it's true. This isn't

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an issue of overdesignation. It's proper designation under the protective order.

Instead what we heard was a 10 or 15-minute presentation on plaintiff's theory of this, what they called the manipulative marketing -- supposedly, using misleading data to have the study authors reach false conclusions that they take to Congress.

Of course, United disagrees with all of this. We don't think that we've done anything inappropriate. I think, in fact, it is -- there's nothing untoward about an industry member providing information to authors of a study, trying to study the very problem that United is dealing with. But none of that's relevant to the issue of whether it was an appropriate designation under the protective order. And certainly, since that's a cat that we can't put back in the bag, once those, you know -- once those confidentiality protections are removed and this is all made public, the confidentiality agreement we had with the study's authors goes away, the protection of the information of plaintiff's competitors goes away. All of that cannot be undone, even before Plaintiffs have proved their case. So.

I don't think this is the stage. If Plaintiffs have this sort of fraud on the public theme that they want to explore, I don't think the appropriate remedy is a discovery ruling that gets them everything they want, without having made that showing certainly by a preponderance of the evidence.

I think given the obligations it would have to be by clear and convincing evidence.

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So I would ask that the -- Your Honor, keep in place the "attorneys eyes only" designation, because as Plaintiffs concede, it's not an issue of overdesignation.

Back on the Report and Recommendation No. 2 and No. 3, I heard a couple of times counsel say that this isn't an issue -- you know, this isn't an issue of other people's rates, this is an issue of United's rates.

And I just -- I don't understand. It sound like we're trying to make United a market of one. We're asking about customary and -- usual and customary rates or reasonable market rates, you have to look at the entire market. You can't just look at United and preclude United from getting discovery on other providers.

I know they focused on the issue of the Medicaid versus -- the Medicaid/Medicare rates of reimbursement. I do think we're entitled to that. But setting that aside, most of our requests do not go to Medicaid and Medicare. They go to other -- other third-party payers, commercial payers, that we're entitled to information about that in order to get -- in order to at least be able to defend against the claim that we've paid an unreasonably low rate. And again, as we have, in our affirmative defenses, we believe that they're charging in excessive rates and we should be entitled to discovery on that.

I'll -- oh, just -- just a quick point on the procedure. I don't think this should influence Your Honor, but we've heard a lot of talk today about United supposedly nefariously going in front of Judge Wall with these repeated Motions to Compel and whatnot.

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We've conceded to Judge Wall that, yes, we understand what his reports and recommendations are. That's why we're -- you know, that's why we have this process. Judge Wall is there to make reports and recommendations. Your Honor is here to rule on the -- to ultimately make a decision that binds the parties.

And I don't think it's inappropriate for United to have gone back to Judge Wall on a Motion to Compel, even while one of these -- his Reports and Recommendations are pending before you. I think Your Honor has the final say. And that's what matters in this case, not some kind of allegation that we've, you know, somehow done something inappropriate.

I also disagree with the characterization --

THE COURT: You've used your five minutes. You've used your five minutes. Can you conclude now?

MR. SMITH: Okay. I don't think that granting our objections to the Report and Recommendations would amount to starting over. I think it would amount to giving us the discovery that we've always been entitled to. And that it is essential to have a fair trial and to avoid delay, by having a trial that's actually tried on fair evidence, as opposed to one that will have to go up and down. And from -- to the Supreme Court and back.

Thank you, Your Honor.

THE COURT: Thank you, both.

This is the Defendant's Objections to Special Master Reports and Recommendations 2, 3, and 5.

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And as I thought I made clear in the February 4, 2021, order, this just is not a cost case.

I previously denied discovery with regard to corporate structure, profitability, finances, costs, overhead, facility. And basically these new requests are a very nuanced effort to get the same information a different way.

Basically the defendant wanted to audit the operations of the plaintiff which I cut off in February. And then in April, I denied a reconsideration for.

So with regard to Report No. 2, it's reviewed *de novo*. There's no clear error by the Special Master. It's affirmed and adopted. The reason that the fair market value for services is irrelevant, collection efforts irrelevant, the policies and procedures about excluding payments or balance billing is irrelevant. Team Health subpoena unnecessary. How the rates were set is unnecessary. Communications with Blackstone is unnecessary. And negotiation with other ER groups or contracts was irrelevant. Billing fraud, coding fraud, irrelevant.

With regard to Special Master Report No. 3, it's reviewed *de novo*. There is no clear error by the Special Master.

I will make one amendment so that it reflects that United's Motion to Compel was denied, but it is otherwise affirmed and adopted.

With regard to Report No. 5, the same thing. I agree with Judge Wall that the "attorneys' eyes only" was not necessary in this

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case. And I did review the supplement with regard to the price billing and manipulative data. And I agree with Dave Wall with regard to all of his conclusions.

So the plaintiff to prepare the order.

Mr. Smith and Mr. Llewellyn -- I'm sorry -- Ms. Llewellyn will have the ability to approve and review the form. No competing orders.

If you have an objection to the form of order, file it as an objection. I take it from there.

And I believe that concludes the hearing.

MR. SMITH: Thank you, Your Honor.

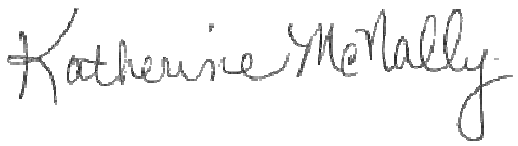
MS. LUNDVALL: Thank you, Your Honor.

MS. GALLAGHER: Thank you, Your Honor.

[Proceeding concluded at 2:08 p.m.]

* * * * * * *

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video proceedings in the above-entitled case to the best of my ability.



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CLARK COUNTY, NEVADA

FREMONT EMERGENCY SERVICES (MANDAVIA), LTD., a Nevada professional corporation; TEAM PHYSICIANS OF NEVADA-MANDAVIA, P.C., a Nevada professional corporation; CRUM, STEFANKO AND JONES, LTD. dba RUBY CREST EMERGENCY MEDICINE, a Nevada professional corporation,

Plaintiffs,

vs.

UNITEDHEALTH GROUP, INC., a Delaware

Case No.: A-19-792978-B
Dept. No.: XXVII

NOTICE OF ENTRY OF ORDER GRANTING PLAINTIFFS' RENEWED MOTION FOR ORDER TO SHOW CAUSE WHY DEFENDANTS SHOULD NOT BE HELD IN CONTEMPT AND FOR SANCTIONS

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corporation; UNITED HEALTHCARE INSURANCE COMPANY, a Connecticut corporation; UNITED HEALTH CARE SERVICES INC., dba UNITEDHEALTHCARE, a Minnesota corporation; UMR, INC., dba UNITED MEDICAL RESOURCES, a Delaware corporation; OXFORD HEALTH PLANS, INC., a Delaware corporation; SIERRA HEALTH AND LIFE INSURANCE COMPANY, INC., a Nevada corporation; SIERRA HEALTH-CARE OPTIONS, INC., a Nevada corporation; HEALTH PLAN OF NEVADA, INC., a Nevada corporation; DOES 1-10; ROE ENTITIES 11-20,

Defendants.

PLEASE TAKE NOTICE that an Order Granting Plaintiffs' Renewed Motion for Order to Show Cause Why Defendants Should Not be Held in Contempt and for Sanctions was entered on August 3, 2021, a copy of which is attached hereto.

Dated this 3rd day of August, 2021.

McDONALD CARANO LLP

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CERTIFICATE OF SERVICE

I certify that I am an employee of McDonald Carano LLP, and that on this 3rd day of August, 2021, I caused a true and correct copy of the foregoing **NOTICE OF ENTRY OF ORDER GRANTING PLAINTIFFS' RENEWED MOTION FOR ORDER TO SHOW CAUSE WHY DEFENDANTS SHOULD NOT BE HELD IN CONTEMPT AND FOR SANCTIONS** to be served via this Court's Electronic Filing system in the above-captioned case, upon the following:

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CLARK COUNTY, NEVADA

FREMONT EMERGENCY SERVICES (MANDAVIA), LTD., a Nevada professional corporation; TEAM PHYSICIANS OF NEVADA-MANDAVIA, P.C., a Nevada professional corporation; CRUM, STEFANKO AND JONES, LTD. dba RUBY CREST EMERGENCY MEDICINE, a Nevada professional corporation,

Plaintiffs,

vs.

UNITEDHEALTH GROUP, INC., a Delaware corporation; UNITED HEALTHCARE INSURANCE COMPANY, a Connecticut corporation; UNITED HEALTH CARE SERVICES INC., dba UNITEDHEALTHCARE, a Minnesota

Case No.: A-19-792978-B
Dept. No.: XXVII

ORDER GRANTING PLAINTIFFS' RENEWED MOTION FOR ORDER TO SHOW CAUSE WHY DEFENDANTS SHOULD NOT BE HELD IN CONTEMPT AND FOR SANCTIONS

Hearing Date: April 9, 2021
Hearing Time: 1:30 p.m.

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corporation; UMR, INC., dba UNITED MEDICAL RESOURCES, a Delaware corporation; OXFORD HEALTH PLANS, INC., a Delaware corporation; SIERRA HEALTH AND LIFE INSURANCE COMPANY, INC., a Nevada corporation; SIERRA HEALTH-CARE OPTIONS, INC., a Nevada corporation; HEALTH PLAN OF NEVADA, INC., a Nevada corporation; DOES 1-10; ROE ENTITIES 11-20,

Defendants.

This matter came before the Court on April 9, 2021 on Plaintiffs Fremont Emergency Services (Mandavia), Ltd. ("Fremont"); Team Physicians of Nevada-Mandavia, P.C. ("Team Physicians"); Crum, Stefanko and Jones, Ltd. dba Ruby Crest Emergency Medicine's ("Ruby Crest" and collectively the "Health Care Providers") Renewed Motion For Order To Show Cause Why Defendants Should Not Be Held In Contempt and For Sanctions ("Renewed Motion") against defendants UnitedHealth Group, Inc.; UnitedHealthcare Insurance Company; United HealthCare Services, Inc.; UMR, Inc.; Oxford Health Plans, Inc.; Sierra Health and Life Insurance Co., Inc.; Sierra Health-Care Options, Inc.; and Health Plan of Nevada, Inc.'s (collectively, "United"). Pat Lundvall, Amanda M. Perach and Kristen T. Gallagher, McDonald Carano LLP, and Justin Fineberg, Rachel LeBlanc, Lash & Goldberg LLP appeared on behalf of plaintiffs Fremont Emergency Services (Mandavia), Ltd. ("Fremont"); Team Physicians of Nevada-Mandavia, P.C. ("Team Physicians"); Crum, Stefanko and Jones, Ltd. dba Ruby Crest Emergency Medicine ("Ruby Crest" and collectively the "Health Care Providers"). D. Lee Roberts, Jr., Colby L. Balkenbush and Brittany M. Llewellyn, Weinberg, Wheeler, Hudgins, Gunn & Dial, LLC, and Dimitri Portnoi and Paul Wooten, O'Melveny & Myers LLP, appeared on behalf of United.

The Court, having considered the Health Care Providers' Renewed Motion, Errata, United's Opposition to the Renewed Motion, and the Health Care Providers' Reply in support of the Renewed Motion, the argument of counsel at the hearing on this matter and the record in this matter, makes the following findings of fact, conclusions of law and Order:

. . .

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FINDINGS OF FACT RELEVANT TO THE COURT'S DECISION

1. Based on earlier Orders of this Court, United was obligated to produce documents and answer interrogatories as set forth in the Court's October 27, 2020 Order Granting Plaintiffs' Motion To Compel Defendants' List Of Witnesses, Production Of Documents And Answers To Interrogatories On Order Shortening Time ("October 27 Order Granting Motion to Compel").

2. The Court overruled all of United's objections to the discovery that is the subject of the October 27 Order Granting Motion to Compel.

3. In a November 9, 2020 Order Setting Defendants' Production & Response Schedule Re: Order Granting Plaintiffs' Motion To Compel Defendants' List Of Witnesses, Production Of Documents And Answers To Interrogatories On Order Shortening Time ("November 9 Order Setting Production Schedule"), the Court set forth United's deadline for compliance with full and complete responses for each of the foregoing identified categories of documents and information subject to the October 27 Order Granting Motion to Compel.

4. When United did not comply with the Court's October 27 Order Granting Motion to Compel and others identified herein, the Health Care Providers filed a Countermotion for Order to Show Cause Why Defendants' Should Not Be Held in Contempt and for Sanctions ("Countermotion"). The Court denied the Countermotion without prejudice, but allowed the Health Care Providers the opportunity to renew the request in the event United did not provide an immediate response to those issues raised in the Countermotion.

5. When United did not provide an immediate response, the Health Care Providers filed the Renewed Motion on March 8, 2021, providing detailed information regarding United's deficient responses with respect to Request for Production ("RFP") RFP Nos. 5, 6, 7, 9, 10, 11, 12, 13, 15, 16, 18, 21, 27, 28, 30, 31, 32, 34 and Interrogatory Nos. 2, 3 and 10, as well as seeking relief in connection with United's failure to produce a privilege log. The Health Care Providers sought an order striking United's answer and affirmative defenses.

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Procedural History

6. In addition to the October 27 Order Granting Motion to Compel and November 9 Order Setting Production Schedule, the Court has issued the following orders that are relevant to the Renewed Motion:

a. September 28, 2020 Order Denying Defendants' Motion For Protective Order Regarding Electronic Discovery And To Compel The Entry Of A Protocol For Retrieval And Production Of Electronic Mail ("September 28 Order Denying Email Protocol");

b. September 28, 2020 Order Granting, In Part Plaintiffs' Motion To Compel Defendants' Production Of Claims File For At-Issue Claims, Or, In The Alternative, Motion In Limine ("September 28 Order Granting Production of At-Issue Claims File"); and

c. January 20, 2021 Order Granting In Part And Denying In Part Defendants' Motion To Clarify The Court's October 27, 2020 Order On Order Shortening Time And Order Denying Countermotion For Order To Show Cause Why Defendants Should Not Be Held In Contempt And For Sanctions Without Prejudice ("January 20 Order on Motion to Clarify/Countermotion").

7. In the September 28, 2020 Order Denying Email Protocol (at ¶ 6), the Court also found that "United also stated through counsel that it had already provided over 100,000 emails to its counsel for review." United did not produced these previously identified documents prior to the filing of the Renewed Motion and its document production in this regard remains deficient.

8. United previously offered to provide a witness to testify about methodology limited to a claims set of 10 claims that would operate to satisfy the Health Care Providers' requests seeking to understand United's claim processing methodologies, offering to fully explain the processing of 10 exemplar claims per claims platform. The Health Care Providers declined to respond to United's proposal.

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9. Despite the October 27 and November 9 Orders, United withheld Mr. Rosenthal's custodial documents from production until just prior to his March 23, 2021 deposition despite the fact that RFP No. 13 specifically refers to him:

> Regarding Mr. Rosenthal, we are unable to commit to making a full custodial production by March 8. We will continue to make document productions for Mr. Rosenthal before March 8th and even March 12th but we will not complete the production of all of his custodial documents by that date.
>
> ***
>
> Plaintiffs are on notice that they will be proceeding with Mr. Rosenthal's deposition when they do not possess many of his custodial documents and with many weeks left to complete fact depositions.

10. At the time the Health Care Providers filed the Renewed Motion, United had produced just three emails that identify Mr. Rosenthal as a custodian.

11. At a February 25, 2021 hearing, United stated that it was waiting for an ESI protocol to produce documents, despite the September 28 Order Denying Email Protocol (at 6:15-17) that made it clear that United was not permitted to use the ESI protocol to stay its production obligations:

> In particular, the parties only recently reached agreement on a protocol to govern electronic discovery. And while both parties had produced some e-mail prior to reaching agreement, e-mail discovery had not begun in earnest until recently. The parties are also in the process of negotiating a claims-matching protocol that would limit the scope of the discovery that is specific to the 22,153 health benefit claims at issue in this case.

February 25, 2021 Hr. Tr. at 10:9-15.

12. United made a similar statement about its delayed discovery participation in opposition to the Health Care Providers' original Countermotion on United's deficient document production where United stated that it "continues to work to produce responsive documents as fast as reasonably possible given Plaintiffs' numerous discovery demands, and given other competing priorities, such as negotiating an ESI protocol and a claims matching protocol as the Court has directed." *See* United's Reply in Support of Motion to Clarify and Opposition to Countermotion at 11:14-17.

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United Violated the Court's Orders Due to its

Incomplete and Deficient Responses to Written Discovery

13. As of the filing of the Renewed Motion, United had produced 97,901 pages of documents, 91,800 are at-issue claims files (which United refers to as the administrative record), leaving approximately 6,101 pages of non-administrative record documents. Of those 6,096 pages, at least 2,617 pages are contracts or benefit plan templates. United produced a total of approximately 3,484 non-administrative, non-contract pages of documents. As stated herein, the foregoing does not meet the Orders of this Court.

14. In opposing the Renewed Motion, United represented to the Court that it "has substantially complied with the Court's orders of September 28, 2020, October 27, 2020, November 9, 2020, and January 20, 2021, and has produced a massive amount of relevant documents." Opposition at 2:22-25.

15. At the hearing, United further stated that is has provided "fulsome discovery," represented that "with respect to the RFPs, our production is at this time complete" and further stated, "We all know what substantial compliance is. And we know that it is a term of art demonstrating near total compliance." United urged the Court to not levy sanctions based on its representations that it had substantially complied with the September 28, 2020, October 27, 2020, November 9, 2020 and January 20, 2021 Orders.

16. Based on the Health Care Providers' Renewed Motion, Reply and oral presentation at the April 9, 2021 hearing (each incorporated as if set forth in full herein), the Court finds that United's document production is deficient in connection with the following categories of documents and information identified by the Health Care Providers in the Renewed Motion, summarized as follows:

a. United's shared savings program (RFP Nos. 9, 16) and related financial documents (RFP No. 34): There has been no meaningful supplement, which was due October 22, 2020. United has not produced any agreement with any employer group related to its shared savings program, has not produced invoices or any documents relating to United's compensation or any other financial information.

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b. Documents related to United's relationship with MultiPlan, Inc. dba Data iSight and/or other third parties (RFP Nos. 11, 12 and 21). United's deadline to provide full and complete supplemental responses was October 22, 2020. United has not produced all reporting with MultiPlan and given the nature of the relationship, United has access to information that has not been provided. United has not produced documents regarding National Care Network LLC. United did not produced aggregated national data until March 22, 2021, the date it filed its Opposition to the Renewed Motion. United has redacted information that makes the aggregated data file difficult to use.

c. Documents related to United's decision making and strategy in connection with its out-of-network reimbursement rates and implementation thereof (RFP Nos. 6, 7, 18, and 32). United's deadline to provide full and complete supplemental responses was October 22, 20200. United's production is deficient and does not provide documents and information relating to decision made or reimbursement strategy or the methodology. This also applies to Interrogatory Nos. 2, 3, 10 and 12 RFP Nos. 5, 10, and 15.

d. Documents related to United's decision making and strategy in connection with its in-network reimbursement rates and implementation thereof (RFP No. 31). United's deadline to provide full and complete supplemental responses was October 22, 20200. United's production is deficient and does not provide documents and information relating to decision made or reimbursement strategy or the methodology. Further, no internal emails have been produced.

e. Methodology and sources of information used to determine amount to pay emergency services and care for out-of-network providers and use of the FAIR Health Database (Interrogatory Nos. 2, 3, 10 and 12 RFP Nos. 5, 10, 15). United's deadline to provide full and complete supplemental responses was October 22, 2020. United's production is deficient.

f. Documents concerning negotiations between United and the Health Care Providers' representatives (RFP Nos. 13, 27, 28). United's deadline to provide full and complete supplemental responses was October 26, 2020.

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g. Documents related to United's communications with other emergency medicine provider groups/hospitals relating to negotiations of reimbursement rates and fee schedules (RFP No. 30). United's deadline was October 22, 2020; however, United has made an insufficient production with regard to communications with other ER providers, groups, or hospitals, with regard to reimbursement rates and fees.

17. Additionally, to date, United has not produced a privilege log. In its opposition, United stated it has withheld or redacted 500 documents. The Court finds it shocking that United has not produced a privilege log in this action because United should have maintained a privilege log and provided it on a rolling basis.

18. After considering the Health Care Providers' Renewed Motion, the Court finds that United is not in compliance with the Court's September 28, 2020, October 27, 2020, November 9, 2020 and January 20, 2021 Orders because United has failed to produce and provide critical information and documents compelled by those Orders.

19. At the April 9, 2021 hearing on the Renewed Motion, United also admitted its lack of compliance with the Court's Orders, stating that it "continued to make further productions, and the discovery period is not over. And the discovery period will end next week, and by that time, there will be further substantial productions."

20. Also at the April 9, 2021 hearing, the Court asked United to quantify its alleged percentage of its represented substantial compliance with the Court's Orders and its discovery obligations. United did not provide the Court a responsive answer, instead stating "we are doing our absolute best to get there. And my hope is that we will." The Court asked the question again and United still did not answer the Court directly. The Court finds its finds shocking that two years into this litigation, with four days remaining before the April 15, 2021 document discovery deadline, United cannot quantify its represented substantial compliance.

21. The Court finds that United has shown a consistent pattern of practice of delay and obstruction in this case.

22. The Court finds that United's failure to comply with the Orders of this Court has resulted in needless waste of time and resources.

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23. The Court is also very concerned with the fact that the Health Care Providers have taken depositions without all of the documents being produced.

24. Any of the foregoing factual statements that are more properly considered conclusions of law should be deemed so. Any of the following conclusions of law that are more properly considered factual statements should be deemed so.

CONCLUSIONS OF LAW

Legal Standard

25. This Court has the "power to compel obedience to its…orders." NRS 1.210(3). Acts or omissions constituting contempt include "[d]isobedience or resistance to any lawful writ, order, rule or process issued by the court or judge at chambers." NRS 22.010(3).

26. NRCP 37 provides remedies and sanctions for a party's failure to comply with an order compelling discovery. In relevant part, NRCP 37(b)(1) and (3) provide:

> (1) *For Not Obeying a Discovery Order*. If a party…fails to obey an order to provide or permit discovery, including an order under Rule 35 or 37(a), the court may issue further just orders that may include the following:
>
> > (A) directing that the matters embraced in the order or other designated facts be taken as established for purposes of the action, as the prevailing party claims;
> >
> > (B) prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence;
> >
> > (C) striking pleadings in whole or in part;
> >
> > (D) staying further proceedings until the order is obeyed;
> >
> > (E) dismissing the action or proceeding in whole or in part;
> >
> > (F) rendering a default judgment against the disobedient party; or
> >
> > (G) treating as contempt of court the failure to obey any order except an order to submit to a physical or mental examination.
>
> ***

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> (3) *Payment of Expenses*. Instead of or in addition to the orders above, the court must order the disobedient party, the attorney advising that party, or both to pay the reasonable expenses, including attorney fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust.

27. While courts typically favor adjudication on the merits, where a party engages in "repeated and continued abuses, the policy of adjudicating cases on the merits" is not furthered and sanctions may be necessary "to demonstrate to future litigants that they are not free to act with wayward disregard of a court's orders." *Foster v. Dingwall*, 126 Nev. 56, 66, 227 P.3d 1042, 1049 (2010).

28. Prejudice from the unreasonable delay in failing to comply with a court order will be presumed. *Id*. at 65-66, 227 P.3d at 1048-1049.

29. In deciding an appropriate discovery sanction, courts consider, among other things: (1) the degree of willfulness of the offending party, (2) the extent to which the non-offending party would be prejudiced by a lesser sanction, (3) the severity of the sanction of dismissal relative to the severity of the discovery abuse, (4) whether any evidence has been irreparably lost, (5) the feasibility and fairness of alternative, less severe sanctions, such as an order deeming facts relating to improperly withheld or destroyed evidence to be admitted by the offending party, (6) the policy favoring adjudication on the merits, (7) whether sanctions unfairly operate to penalize a party for the misconduct of his or her attorney, and (8) the need to deter both the parties and future litigants from similar abuses. *Young*, 106 Nev. at 93, 787 P.2d at 780.

United's Conduct is Sanctionable

30. United's unquantifiable substantial compliance with the Court's September 28, October 27, November 9 and January 20 Orders and the rules of discovery in this jurisdiction warrants sanctions and relief to the Health Care Providers.

31. With respect to the first *Young* factor, the Court finds United's conduct to be willful. In evaluating the degree of United's willfulness, the Court finds that there has been a pattern of noncompliance by United. By omission, there has been an effort by United to keep

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the Health Care Providers from discovering information and having access to witnesses. United's willfulness lies with the United defendants and not its attorneys.

32. Based on the information currently known, the Court does not believe there has been any destruction or fabrication of evidence.

33. The Court has also considered United's representations to the Court of its substantial compliance to date.

34. As a result, the Court will not strike United's answer or affirmative defenses, but will sanction United as set forth below.

Accordingly, good cause appearing, therefor,

ORDER

IT IS HEREBY ORDERED that the Health Care Providers' Renewed Motion is GRANTED as set forth herein.

IT IS FURTHER ORDERED that United shall be sanctioned for its violation of the Orders of this Court as follows:

A. United shall not be allowed to seek additional extensions of any discovery deadline;

B. In connection with RFP Nos. 5, 6, 7, 9, 10, 11, 12, 13, 15, 16, 18, 21, 27, 28, 30, 31, 32, 34 and Interrogatory Nos. 2, 3 and 10, anything not produced by United by 5:00 p.m. Pacific time on April 15, 2021 will result in a negative inference which may be asked of witnesses at the time of trial or at any hearing and will be included in jury instructions stating that the jury should infer that the information would be harmful to United's position;

C. United's privilege log shall also be produced by 5:00 p.m. Pacific time on April 15, 2021. In the event the Health Care Providers choose to challenge any documents identified as withheld or redacted on the basis of privilege or work product can be done by separate motion. The Health Care Providers shall be awarded their attorneys' fees and costs for the bringing of this motion;

D. United shall be sanctioned in the amount of $10,000 to be paid to a Nevada *pro bono* legal services provider of its choice. and notify the Court when payment it remitted

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IT IS FURTHER ORDERED that, due to United's failure to produce documents as set forth herein, the Health Care Providers may apply to the Special Master to retake depositions after the May 31, 2021 deposition deadline based on any new information provided by United. And if allowed by the Special Master, the expense of those depositions, to include travel, shall be borne by United.

August 3, 2021

Dated this 3rd day of August, 2021

Nancy L Allf

TW

3B8 C8E 3411 D0A5
Nancy Allf
District Court Judge

Submitted by:
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DISTRICT COURT
CLARK COUNTY, NEVADA

Fremont Emergency Services (Mandavia) Ltd, Plaintiff(s) vs. United Healthcare Insurance Company, Defendant(s)	CASE NO: A-19-792978-B DEPT. NO. Department 27

AUTOMATED CERTIFICATE OF SERVICE

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

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If indicated below, a copy of the above mentioned filings were also served by mail via United States Postal Service, postage prepaid, to the parties listed below at their last known addresses on 8/4/2021

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DISTRICT COURT

CLARK COUNTY, NEVADA

FREMONT EMERGENCY SERVICES (MANDAVIA), LTD., a Nevada professional corporation; TEAM PHYSICIANS OF NEVADA-MANDAVIA, P.C., a Nevada professional corporation; CRUM, STEFANKO AND JONES, LTD. dba RUBY CREST EMERGENCY MEDICINE, a Nevada professional corporation,

Plaintiffs,

vs.

UNITEDHEALTH GROUP, INC., a Delaware corporation; UNITED HEALTHCARE

Case No.: A-19-792978-B
Dept. No.: XXVII

NOTICE OF ENTRY OF ORDER AFFIRMING AND ADOPTING REPORT AND RECOMMENDATION NO. 2 REGARDING PLAINTIFFS' OBJECTION TO NOTICE OF INTENT TO ISSUE SUBPOENA DUCES TECUM TO TEAMHEALTH HOLDINGS, INC. AND COLLECT RX, INC. WITHOUT DEPOSITION AND MOTION FOR PROTECTIVE ORDER AND OVERRULING OBJECTION

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INSURANCE COMPANY, a Connecticut corporation; UNITED HEALTH CARE SERVICES INC., dba UNITEDHEALTHCARE, a Minnesota corporation; UMR, INC., dba UNITED MEDICAL RESOURCES, a Delaware corporation; OXFORD HEALTH PLANS, INC., a Delaware corporation; SIERRA HEALTH AND LIFE INSURANCE COMPANY, INC., a Nevada corporation; SIERRA HEALTH-CARE OPTIONS, INC., a Nevada corporation; HEALTH PLAN OF NEVADA, INC., a Nevada corporation; DOES 1-10; ROE ENTITIES 11-20,

Defendants.

PLEASE TAKE NOTICE that an Order Affirming and Adopting Report and Recommendation No. 2 Regarding Plaintiffs' Objection to Notice of Intent to Issue Subpoena Duces Tecum to Teamhealth Holdings, Inc. and Collect RX, Inc. Without Deposition and Motion for Protective Order and Overruling Objection was entered on August 9, 2021, a copy of which is attached hereto.

Dated this 9th day of August, 2021.

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CERTIFICATE OF SERVICE

I certify that I am an employee of McDonald Carano LLP, and that on this 9th day of August, 2021, I caused a true and correct copy of the foregoing **NOTICE OF ENTRY OF ORDER AFFIRMING AND ADOPTING REPORT AND RECOMMENDATION NO. 2 REGARDING PLAINTIFFS' OBJECTION TO NOTICE OF INTENT TO ISSUE SUBPOENA DUCES TECUM TO TEAMHEALTH HOLDINGS, INC. AND COLLECT RX, INC. WITHOUT DEPOSITION AND MOTION FOR PROTECTIVE ORDER AND OVERRULING OBJECTION** to be served via this Court's Electronic Filing system in the above-captioned case, upon the following:

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CLARK COUNTY, NEVADA

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Defendants.

This matter came before the Court on July 29, 2021 on defendants UnitedHealth Group, Inc. ("UHG"); UnitedHealthcare Insurance Company ("UHIC") and United HealthCare Services, Inc.'s ("UHCS") (collectively, "United") Objection to the Special Master's Report and Recommendation No. 2 ("R&R #2") Regarding Plaintiffs' Objection To Notice Of Intent To Issue Subpoena Duces Tecum To TeamHealth Holdings, Inc. and Collect Rx, Inc. Without Deposition and Motion for Protective Order (the "Objection"). Pat Lundvall, Amanda M. Perach and Kristen T. Gallagher, McDonald Carano LLP, appeared on behalf of plaintiffs Fremont Emergency Services (Mandavia), Ltd. ("Fremont"); Team Physicians of Nevada-Mandavia, P.C. ("Team Physicians"); and Crum, Stefanko and Jones, Ltd. dba Ruby Crest Emergency Medicine ("Ruby Crest" and collectively the "Health Care Providers"). Brittany M. Llewellyn, Weinberg Wheeler, Hudgins, Gunn & Dial, LLC; and Abraham G. Smith and Daniel F. Polsenberg, Lewis Roca Rothgerber Christie LLP, appeared on behalf of United.

The Court, having considered R&R #2, Defendants' Objection to R&R #2, the Health Care Providers' Response to United's Objection ("Response"), the papers and pleadings on file herein, the argument of counsel at the hearing on this matter, and good cause appearing therefor,

IT IS HEREBY ORDERED that, for the reasons set forth on the record at the hearing and contained in the Response, R&R #2 is hereby affirmed and adopted in its entirety, as set forth in **Exhibit 1** attached hereto.

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IT IS FURTHER ORDERED that, for the reasons set forth on the record at the hearing and contained in the Response, United's Objection is overruled in its entirety.

August 9, 2021

Dated this 9th day of August, 2021

Nancy L Allf

TW

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Nancy Allf
District Court Judge

Submitted by:

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DISTRICT COURT
CLARK COUNTY, NEVADA

Fremont Emergency Services (Mandavia) Ltd, Plaintiff(s) vs. United Healthcare Insurance Company, Defendant(s)	CASE NO: A-19-792978-B DEPT. NO. Department 27

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CLARK COUNTY, NEVADA

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Plaintiffs,

vs.

UNITEDHEALTH GROUP, INC., a Delaware corporation; UNITED HEALTHCARE

Case No.: A-19-792978-B
Dept. No.: XXVII

NOTICE OF ENTRY OF ORDER AFFIRMING AND ADOPTING REPORT AND RECOMMENDATION NO. 3 REGARDING DEFENDANTS' MOTION TO COMPEL RESPONSES TO DEFENDANTS' SECOND SET OF REQUESTS FOR PRODUCTION ON ORDER SHORTENING TIME AND OVERRULING OBJECTION

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Defendants.

PLEASE TAKE NOTICE that an Order Affirming and Adopting Report and Recommendation No. 3 Regarding Defendants' Motion to Compel Responses to Defendants' Second Set of Requests for Production on Order Shortening Time and Overruling Objection was entered on August 9, 2021, a copy of which is attached hereto.

Dated this 9th day of August, 2021.

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CERTIFICATE OF SERVICE

I certify that I am an employee of McDonald Carano LLP, and that on this 9th day of August, 2021, I caused a true and correct copy of the foregoing **NOTICE OF ENTRY OF ORDER AFFIRMING AND ADOPTING REPORT AND RECOMMENDATION NO. 3 REGARDING DEFENDANTS' MOTION TO COMPEL RESPONSES TO DEFENDANTS' SECOND SET OF REQUESTS FOR PRODUCTION ON ORDER SHORTENING TIME AND OVERRULING OBJECTION** to be served via this Court's Electronic Filing system in the above-captioned case, upon the following:

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INSURANCE COMPANY, a Connecticut corporation; UNITED HEALTH CARE SERVICES INC., dba UNITEDHEALTHCARE, a Minnesota corporation; UMR, INC., dba UNITED MEDICAL RESOURCES, a Delaware corporation; OXFORD HEALTH PLANS, INC., a Delaware corporation; SIERRA HEALTH AND LIFE INSURANCE COMPANY, INC., a Nevada corporation; SIERRA HEALTH-CARE OPTIONS, INC., a Nevada corporation; HEALTH PLAN OF NEVADA, INC., a Nevada corporation; DOES 1-10; ROE ENTITIES 11-20,

Defendants.

This matter came before the Court on July 29, 2021 on defendants UnitedHealth Group, Inc. ("UHG"); UnitedHealthcare Insurance Company ("UHIC") and United HealthCare Services, Inc.'s ("UHCS") (collectively, "United") Objection to the Special Master's Report and Recommendation No. 3 ("R&R #3") Regarding Defendants' Motion to Compel Responses to Defendants' Second Set of Requests for Production on Order Shortening Time (the "Objection"). Pat Lundvall, Amanda M. Perach and Kristen T. Gallagher, McDonald Carano LLP, appeared on behalf of plaintiffs Fremont Emergency Services (Mandavia), Ltd. ("Fremont"); Team Physicians of Nevada-Mandavia, P.C. ("Team Physicians"); and Crum, Stefanko and Jones, Ltd. dba Ruby Crest Emergency Medicine ("Ruby Crest" and collectively the "Health Care Providers"). Brittany M. Llewellyn, Weinberg Wheeler, Hudgins, Gunn & Dial, LLC; and Abraham G. Smith and Daniel F. Polsenberg, Lewis Roca Rothgerber Christie LLP, appeared on behalf of United.

The Court, having considered R&R #3, Defendants' Objection to R&R #3, the Health Care Providers' Response to United's Objection ("Response"), the papers and pleadings on file herein, the argument of counsel at the hearing on this matter, and good cause appearing therefor,

IT IS HEREBY ORDERED that, for the reasons set forth on the record at the hearing and contained in the Response, R&R #3 is hereby affirmed and adopted in its entirety, as set forth in **Exhibit 1** attached hereto, except that ¶ 7 of the Recommendation shall be modified to

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address a scrivener's error as follows:

> 7. It is therefore the recommendation of the Special Master that Defendants' Motion to Compel should be DENIED in its entirety.

IT IS FURTHER ORDERED that, for the reasons set forth on the record at the hearing and contained in the Response, United's Objection is overruled in its entirety.

August 9, 2021

Dated this 9th day of August, 2021

Nancy L Allf

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District Court Judge

Submitted by:

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DISTRICT COURT
CLARK COUNTY, NEVADA

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DISTRICT COURT

CLARK COUNTY, NEVADA

FREMONT EMERGENCY SERVICES (MANDAVIA), LTD., a Nevada professional corporation; TEAM PHYSICIANS OF NEVADA-MANDAVIA, P.C., a Nevada professional corporation; CRUM, STEFANKO AND JONES, LTD. dba RUBY CREST EMERGENCY MEDICINE, a Nevada professional corporation,

Plaintiffs,

vs.

UNITEDHEALTH GROUP, INC., a Delaware corporation; UNITED HEALTHCARE

Case No.: A-19-792978-B
Dept. No.: XXVII

AMENDED NOTICE OF ENTRY OF ORDER AFFIRMING AND ADOPTING REPORT AND RECOMMENDATION NO. 2 REGARDING PLAINTIFFS' OBJECTION TO NOTICE OF INTENT TO ISSUE SUBPOENA DUCES TECUM TO TEAMHEALTH HOLDINGS, INC. AND COLLECT RX, INC. WITHOUT DEPOSITION AND MOTION FOR PROTECTIVE ORDER AND OVERRULING OBJECTION

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Defendants.

PLEASE TAKE NOTICE that an Order Affirming and Adopting Report and Recommendation No. 2 Regarding Plaintiffs' Objection to Notice of Intent to Issue Subpoena Duces Tecum to Teamhealth Holdings, Inc. and Collect RX, Inc. Without Deposition and Motion for Protective Order and Overruling Objection was entered on August 9, 2021, a copy of which is attached hereto.

Dated this 9th day of August, 2021.

McDONALD CARANO LLP

By: */s/ Kristen T. Gallagher*
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CERTIFICATE OF SERVICE

I certify that I am an employee of McDonald Carano LLP, and that on this 9th day of August, 2021, I caused a true and correct copy of the foregoing **AMENDED NOTICE OF ENTRY OF ORDER AFFIRMING AND ADOPTING REPORT AND RECOMMENDATION NO. 2 REGARDING PLAINTIFFS' OBJECTION TO NOTICE OF INTENT TO ISSUE SUBPOENA DUCES TECUM TO TEAMHEALTH HOLDINGS, INC. AND COLLECT RX, INC. WITHOUT DEPOSITION AND MOTION FOR PROTECTIVE ORDER AND OVERRULING OBJECTION** to be served via this Court's Electronic Filing system in the above-captioned case, upon the following:

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Judge David Wall, Special Master
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DISTRICT COURT

CLARK COUNTY, NEVADA

FREMONT EMERGENCY SERVICES (MANDAVIA), LTD., a Nevada professional corporation; TEAM PHYSICIANS OF NEVADA-MANDAVIA, P.C., a Nevada professional corporation; CRUM, STEFANKO AND JONES, LTD. dba RUBY CREST EMERGENCY MEDICINE, a Nevada professional corporation, Plaintiffs, vs. UNITEDHEALTH GROUP, INC., a Delaware corporation; UNITED HEALTHCARE	Case No.: A-19-792978-B Dept. No.: XXVII **ORDER AFFIRMING AND ADOPTING REPORT AND RECOMMENDATION NO. 2 REGARDING PLAINTIFFS' OBJECTION TO NOTICE OF INTENT TO ISSUE SUBPOENA DUCES TECUM TO TEAMHEALTH HOLDINGS, INC. AND COLLECT RX, INC. WITHOUT DEPOSITION AND MOTION FOR PROTECTIVE ORDER AND OVERRULING OBJECTION** Hearing Date/Time: July 29, 2021 at 1:00 p.m.

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Defendants.

This matter came before the Court on July 29, 2021 on defendants UnitedHealth Group, Inc. ("UHG"); UnitedHealthcare Insurance Company ("UHIC") and United HealthCare Services, Inc.'s ("UHCS") (collectively, "United") Objection to the Special Master's Report and Recommendation No. 2 ("R&R #2") Regarding Plaintiffs' Objection To Notice Of Intent To Issue Subpoena Duces Tecum To TeamHealth Holdings, Inc. and Collect Rx, Inc. Without Deposition and Motion for Protective Order (the "Objection"). Pat Lundvall, Amanda M. Perach and Kristen T. Gallagher, McDonald Carano LLP, appeared on behalf of plaintiffs Fremont Emergency Services (Mandavia), Ltd. ("Fremont"); Team Physicians of Nevada-Mandavia, P.C. ("Team Physicians"); and Crum, Stefanko and Jones, Ltd. dba Ruby Crest Emergency Medicine ("Ruby Crest" and collectively the "Health Care Providers"). Brittany M. Llewellyn, Weinberg Wheeler, Hudgins, Gunn & Dial, LLC; and Abraham G. Smith and Daniel F. Polsenberg, Lewis Roca Rothgerber Christie LLP, appeared on behalf of United.

The Court, having considered R&R #2, Defendants' Objection to R&R #2, the Health Care Providers' Response to United's Objection ("Response"), the papers and pleadings on file herein, the argument of counsel at the hearing on this matter, and good cause appearing therefor,

IT IS HEREBY ORDERED that, for the reasons set forth on the record at the hearing and contained in the Response, R&R #2 is hereby affirmed and adopted in its entirety, as set forth in **Exhibit 1** attached hereto.

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IT IS FURTHER ORDERED that, for the reasons set forth on the record at the hearing and contained in the Response, United's Objection is overruled in its entirety.

August 9, 2021

Dated this 9th day of August, 2021

Nancy L Allf

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Nancy Allf
District Court Judge

Submitted by:

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DISTRICT COURT
CLARK COUNTY, NEVADA

Fremont Emergency Services (Mandavia) Ltd, Plaintiff(s) vs. United Healthcare Insurance Company, Defendant(s)	CASE NO: A-19-792978-B DEPT. NO. Department 27

AUTOMATED CERTIFICATE OF SERVICE

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

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If indicated below, a copy of the above mentioned filings were also served by mail via United States Postal Service, postage prepaid, to the parties listed below at their last known addresses on 8/10/2021

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EXHIBIT 1

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EXHIBIT 1

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Hon. David T. Wall (Ret.)
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Special Master

DISTRICT COURT

CLARK COUNTY, NEVADA

FREMONT EMERGENCY SERVICES (MANDAVIA), LTD, et al., Plaintiffs, vs. UNITEDHEALTH GROUP INC., et. al., Defendants	Case No.: A-19-792978-B Dept. No.: 27 JAMS Ref. #1260006167 REPORT AND RECOMMENDATION #2 REGARDING PLAINTIFFS' OBJECTION TO NOTICE OF INTENT TO ISSUE SUBPOENA DUCES TECUM TO TEAMHEALTH HOLDINGS, INC. AND COLLECT RX, INC., WITHOUT DEPOSITION AND MOTION FOR PROTECTIVE ORDER

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On February 2, 2021, the Hon. Nancy L. Allf entered an Order Granting Defendants' Motion for Appointment of Special Master in the above-captioned matter, and appointed the undersigned to serve as Special Master in these proceedings.

On March 12, 2021, Plaintiff filed an Objection to Notice of Intent to Issue Subpoena Duces Tecum to TeamHealth Holdings, Inc., Without Deposition and Motion for Protective Order. A similar Objection and Motion was filed regarding a subpoena duces tecum for Collect Rx, Inc. Plaintiff's requests indicated that the matter should be referred to the Special Master for determination.[1] On March 19, 2021, Defendants filed a timely consolidated Opposition to both Motions.

[1] Although it appears that Notice of Hearing was issued by the District Court for these matters, counsel for all parties agreed, during a teleconference with the Special Master on March 22, 2021, to have this matter determined by the Special Master.

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This matter was presented for telephonic hearing on March 25, 2021. Participating were the Special Master, Hon. David T. Wall, Ret.; Pat Lundvall, Esq., Kristen T. Gallagher, Esq., Rachel H. LeBlanc, Esq. and Justin C. Fineberg, Esq., appearing for Plaintiffs; Colby L. Balkenbush, Esq., Dimitri D. Portnoi, Esq. and Brittany M. Llewellyn, Esq., appearing for Defendants.

Pursuant to NRCP 53(e)(1), the Special Master hereby sets forth the following Findings of Fact and Conclusions of Law and Recommendation:

FINDINGS OF FACT

1. The Hon. Nancy L. Allf has determined, in multiple Orders in this matter, that the allegations in Plaintiffs' First Amended Complaint do not involve the "right to payment" and, in connection with the breach of implied contract and related claims, the Plaintiffs only seek the proper reimbursement rate, making this a "rate-of-payment" case. (See, October 26, 2020 Order Denying Defendants' Motion to Compel Production of Clinical Documents for the At-Issue Claims and Defenses and to Compel Plaintiff to Supplement Their NRCP 16.1 Initial Disclosures on Order Shortening Time ("10/26/20 Order"), ¶1; February 4, 2021 Order Denying Defendants' Motion to Compel Responses to Defendants' First and Second Requests for Production on Order Shortening Time ("2/4/21 Order"), ¶1.)

2. In its 2/4/21 Order, the Court stated in ¶11:

> "The Court concludes that corporate structure, finances, and how the Health Care Providers' charges are determined are not relevant in this case. Further, financial information that United seeks with regard to the Health Care Providers' business and operations to purportedly establish the Health Care Providers' charges are excessive, as well as and United's monopoly argument, are not relevant to the claims or defenses in this case. None of the information sought by United in the Motion will lead to discovery of relevant information."

3. On March 2, 2021, counsel for Plaintiffs and Defendants conducted a meet and confer regarding Defendants' intent to serve subpoenas on TeamHealth Holdings, Inc. and Collect Rx, Inc. Counsel for Plaintiffs communicated Plaintiffs' objections to all of the items sought in the TeamHealth subpoena, with the exception of items 14 and 51, and all of the items sought in the Collect Rx subpoena, with the exception of items 5 and 6.

4. On March 12, 2021, Plaintiff filed an Objection to Notice of Intent to Issue Subpoena Duces Tecum to TeamHealth Holdings, Inc., Without Deposition and Motion for Protective Order, arguing that the

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subpoena includes categories of documents the Court has already considered and ruled are not relevant to this case, including the following:

a. Ownership, acquisition and due diligence documents, corporate structure documents (Nos. 1-13, 15, 20-22, 43, 54-58);

b. Cost-related and charge-related documents (Nos. 16-19, 23-24,28, 30-31, 35);

c. Billing/charges to non-commercial patients and complaints (Nos. 32-34, 52);

d. Hospital facility contracts and credentials (Nos. 45-50);

e. Provider participation agreement and wrap/rental network agreements (Nos. 25-27)[2];

f. Balance billing and appeals (Nos. 37-42, 44, 53).

5. With respect to Collect Rx, Plaintiffs objected to the following categories of documents for the same basis as set forth above regarding TeamHealth:

a. Ownership, corporate structure and relationship documents (Nos. 1-4);

b. Collection and balance-billing related documents (No. 12-17);

c. Scripts (Nos. 7-11)

6. Any of the foregoing factual statements that are more properly considered conclusions of law should be deemed so. Any of the following conclusions of law that are more properly considered factual statements should be deemed so.

1. CONCLUSIONS OF LAW

7. Pursuant to NRCP 26(b)(1), parties may obtain discovery regarding any non-privileged matter that is relevant to any party's claims or defenses and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.

8. The scope of allowable discovery also applies to third-party discovery under NRCP 45, and a party may object to a third-party subpoena if the party believes its own interest is jeopardized by discovery

[2] Within this category, Plaintiffs did not object to Nos. 14 and 51.

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sought from a third party. NRCP 45(c)(3); First American Title Insurance Co. v. Commerce Associates, LLC, 2017 WL 53704, *1 (D. Nev. Jan. 3, 2017).

9. The subpoena duces tecum for TeamHealth contains some of the identical categories of documents previously determined by the Court to be irrelevant to the core issue of rate of reimbursement and therefore not discoverable, or otherwise determined by the Special Master to not be relevant and discoverable, as follows:

   a. Documents related to ownership, acquisition and due diligence, pre-acquisition and corporate structure documents (Nos. 1-13, 15, 20-22, 43, 54-58), which category the Court in its 2/4/21 Order determined was not discoverable;

   b. Cost-related and charge-related documents (Nos. 16-19,23-24, 28, 30-31, 35), which category the Court in its 2/4/21 Order determined was not discoverable;

   c. Documents related to billing/charges to non-commercial patients and complaints (Nos. 32-34, 52), which category the Court in its 2/4/21 Order determined was not discoverable, given that this rate-of-payment case concerns the amounts United reimbursed (document request relates to amounts TeamHealth charges/collects from private pay patients);

   d. Hospital facility contracts and credentials (Nos. 45-50), which refer to cost-related and charge-related documents, which category the Court in its 2/4/21 Order determined was not discoverable;

   e. Provider participation agreements and wrap/rental network agreements (Nos. 25-27), seeking provider participation agreement documents and internal TeamHealth communications about negotiating a provider participation agreement with United, which is not relevant to reimbursement rates as determined by the Court to be the primary allegations in Plaintiffs' First Amended Complaint;

   f. Documents regarding balance billing and appeals (Nos. 37-42, 44, 53), which are essentially cost-related and charge-related documents and information related to billing matters, which category the Court in its 2/4/21 Order determined was not discoverable.

10. The subpoena duces tecum for Collect Rx contains some of the identical categories of documents previously determined by the Court to be irrelevant to the core issue of rate of reimbursement and

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therefore not discoverable, or otherwise determined by the Special Master to not be relevant and discoverable, as follows:

a. Documents related to ownership, relationship and corporate structure documents for Collect Rx (Nos. 1-4), which category the Court in its 2/4/21 Order determined was not discoverable;

b. Collection and balance billing related documents (Nos. 12-17), which relate to cost, which the Court in its 2/4/21 Order determined was not discoverable;

c. Documents related to scripts (Nos 7-11), which relate to the manner in which charges are collected. These are not limited to geography, are not limited to the at-issue claims, are not limited to the Health Care Providers herein, are not limited to emergency medicine services and generally seeks collection information not relevant to the allegations in Plaintiff's First Amended Complaint.

11. Having considered all of the arguments by both parties, it is the recommendation of the Special Master that the documents and information sought by Defendants in these Subpoenas Duces Tecum are not relevant and not discoverable, as they will not lead to the discovery of relevant information.[3]

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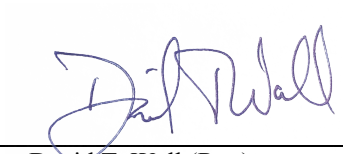
RECOMMENDATION

12. It is therefore the recommendation of the Special Master that Plaintiffs' Objections are meritorious and that Plaintiff's Motions for Protective Order should be GRANTED in their entirety.

Dated this 11TH day of March, 2021.



Hon. David T. Wall (Ret.)

[3] As set forth herein, the Special Master has relied in part upon the determinations of the Court in its Orders, including the 2/4/21 Order. Should the Court reconsider any of the provisions set forth in that Order, such reconsideration may affect one or more of the Recommendations herein.

PROOF OF SERVICE BY E-Mail

Re: Fremont Emergency Services (Mandavia), Ltd. et al. vs. UnitedHealth Group, Inc. et al.
Reference No. 1260006167

I, Michelle Samaniego, not a party to the within action, hereby declare that on March 29, 2021, I served the attached REPORT AND RECOMMENDATION #2 REGARDING PLAINTIFFS' OBJECTION TO NOTICE OF INTENT TO ISSUE SUBPOENA DUCES TECUM TO TEAMHEALTH HOLDINGS, INC. AND COLLECT RX, INC., WITHOUT DEPOSITION AND MOTION FOR PROTECTIVE ORDER on the parties in the within action by electronic mail at Las Vegas, NEVADA, addressed as follows:

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UnitedHealth Group Inc.
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I declare under penalty of perjury the foregoing to be true and correct. Executed at Las Vegas, NEVADA on March 29, 2021.

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Plaintiffs,

vs.

UNITEDHEALTH GROUP, INC., a Delaware corporation; UNITED HEALTHCARE

Case No.: A-19-792978-B
Dept. No.: XXVII

AMENDED NOTICE OF ENTRY OF ORDER AFFIRMING AND ADOPTING REPORT AND RECOMMENDATION NO. 3 REGARDING DEFENDANTS' MOTION TO COMPEL RESPONSES TO DEFENDANTS' SECOND SET OF REQUESTS FOR PRODUCTION ON ORDER SHORTENING TIME AND OVERRULING OBJECTION

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Defendants.

PLEASE TAKE NOTICE that an Order Affirming and Adopting Report and Recommendation No. 3 Regarding Defendants' Motion to Compel Responses to Defendants' Second Set of Requests for Production on Order Shortening Time and Overruling Objection was entered on August 9, 2021, a copy of which is attached hereto.

Dated this 9th day of August, 2021.

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CERTIFICATE OF SERVICE

I certify that I am an employee of McDonald Carano LLP, and that on this 9th day of August, 2021, I caused a true and correct copy of the foregoing **AMENDED NOTICE OF ENTRY OF ORDER AFFIRMING AND ADOPTING REPORT AND RECOMMENDATION NO. 3 REGARDING DEFENDANTS' MOTION TO COMPEL RESPONSES TO DEFENDANTS' SECOND SET OF REQUESTS FOR PRODUCTION ON ORDER SHORTENING TIME AND OVERRULING OBJECTION** to be served via this Court's Electronic Filing system in the above-captioned case, upon the following:

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Defendants.

This matter came before the Court on July 29, 2021 on defendants UnitedHealth Group, Inc. ("UHG"); UnitedHealthcare Insurance Company ("UHIC") and United HealthCare Services, Inc.'s ("UHCS") (collectively, "United") Objection to the Special Master's Report and Recommendation No. 3 ("R&R #3") Regarding Defendants' Motion to Compel Responses to Defendants' Second Set of Requests for Production on Order Shortening Time (the "Objection"). Pat Lundvall, Amanda M. Perach and Kristen T. Gallagher, McDonald Carano LLP, appeared on behalf of plaintiffs Fremont Emergency Services (Mandavia), Ltd. ("Fremont"); Team Physicians of Nevada-Mandavia, P.C. ("Team Physicians"); and Crum, Stefanko and Jones, Ltd. dba Ruby Crest Emergency Medicine ("Ruby Crest" and collectively the "Health Care Providers"). Brittany M. Llewellyn, Weinberg Wheeler, Hudgins, Gunn & Dial, LLC; and Abraham G. Smith and Daniel F. Polsenberg, Lewis Roca Rothgerber Christie LLP, appeared on behalf of United.

The Court, having considered R&R #3, Defendants' Objection to R&R #3, the Health Care Providers' Response to United's Objection ("Response"), the papers and pleadings on file herein, the argument of counsel at the hearing on this matter, and good cause appearing therefor,

IT IS HEREBY ORDERED that, for the reasons set forth on the record at the hearing and contained in the Response, R&R #3 is hereby affirmed and adopted in its entirety, as set forth in **Exhibit 1** attached hereto, except that ¶ 7 of the Recommendation shall be modified to

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address a scrivener's error as follows:

> 7. It is therefore the recommendation of the Special Master that Defendants' Motion to Compel should be DENIED in its entirety.

IT IS FURTHER ORDERED that, for the reasons set forth on the record at the hearing and contained in the Response, United's Objection is overruled in its entirety.

August 9, 2021

Dated this 9th day of August, 2021

Nancy L Allf

TW

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Nancy Allf
District Court Judge

Submitted by:

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DISTRICT COURT
CLARK COUNTY, NEVADA

Fremont Emergency Services (Mandavia) Ltd, Plaintiff(s) vs. United Healthcare Insurance Company, Defendant(s)	CASE NO: A-19-792978-B DEPT. NO. Department 27

AUTOMATED CERTIFICATE OF SERVICE

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

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If indicated below, a copy of the above mentioned filings were also served by mail via United States Postal Service, postage prepaid, to the parties listed below at their last known addresses on 8/10/2021

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EXHIBIT 1

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EXHIBIT 1

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DISTRICT COURT

CLARK COUNTY, NEVADA

FREMONT EMERGENCY SERVICES (MANDAVIA), LTD, et al., Plaintiffs, vs. UNITEDHEALTH GROUP INC., et. al., Defendants	Case No.: A-19-792978-B Dept. No.: 27 JAMS Ref. #1260006167 REPORT AND RECOMMENDATION #3 REGARDING DEFENDANTS' MOTION TO COMPEL RESPONSES TO DEFENDANTS' SECOND SET OF REQUESTS FOR PRODUCTION ON ORDER SHORTENING TIME

On April 1, 2021, Defendants filed a Motion to Compel Responses to Defendants' Second Set of Requests for Production on Order Shortening Time. The Order Shortening Time was executed by the Special Master, setting the matter for hearing on April 13, 2021. On April 9, 2021, Plaintiffs filed a timely Opposition and on April 12, 2021, Defendants filed a Reply Brief

This matter was presented for telephonic hearing on April 13, 2021. Participating were the Special Master, Hon. David T. Wall, Ret.; Pat Lundvall, Esq., Kristen T. Gallagher, Esq., Amanda M. Perach, Esq., Rachel H. LeBlanc, Esq. and Matthew Lavin Esq., appearing for Plaintiffs, along with in-house counsel and Plaintiffs' representative Carol Owen, Esq.; D. Lee Roberts, Esq., Jason Orr, Esq. and Brittany M. Llewellyn, Esq., appearing for Defendants.

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Pursuant to NRCP 53(e)(1), the Special Master hereby sets forth the following Findings of Fact and Conclusions of Law and Recommendation:

FINDINGS OF FACT

1. On February 4, 2021, the Hon. Nancy L. Allf issued an Order Denying Defendants' Motion to Compel Responses to Defendants' First and Second Requests for Production on Order Shortening Time ("2/4/21 Order"). The Order addressed certain RFPs within the first (served July 29, 2019) and second (served August 12, 2020) sets of requests propounded upon Plaintiffs. The Court specifically noted that "the relevant inquiry isn this action is the proper rate of reimbursement." (2/4/21 Order, p. 3). The Order specifically denied Defendants' Motion to Compel as it related to the following:
    a. Corporate structure / relationship documents (RFPs 61, 69, 95, 108, 132-134, 142-145);
    b. Cost-related documents (RFPs 68, 86, 92-94); and
    c. Hospital/facility contracts and credentials (RFPs 126, 137 and 146).
2. The 2/4/21 Order specifically held that "corporate structure, finances and how the Health Care Providers' charges are determined are not relevant in this case. Further, financial information that United seeks with regard to Health Care Providers' business and operations to purportedly establish the Health Care Providers' charges are excessive, as

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well as and United's monopoly argument, are not relevant to the claims or defenses in this case." (Id.) (Emphasis supplied).[1]

3. In the instant Motion, Defendants seek to compel Plaintiffs' responses to the following:

    a. RFPs 51, 98, 107, 109, 118, 119, 128, 129 and portions of 122 and 123 regarding expected reimbursement rates, analysis of charges, setting of charges and collections; and

    b. RFPs 56 and 57 regarding complaints about amounts charged.

4. Any of the foregoing factual statements that are more properly considered conclusions of law should be deemed so. Any of the following conclusions of law that are more properly considered factual statements should be deemed so.

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CONCLUSIONS OF LAW

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5. Pursuant to NRCP 26(b)(1), parties may obtain discovery regarding any non-privileged matter that is relevant to any party's claims or defenses and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.

6. With respect to the ten (10) RFPs regarding expected reimbursement rates, analysis of charges, setting of charges and collections, the Special Master recommends as follows:

[1] At a hearing on April 9, 2021, the Court announced its intention to deny Defendants' Motion for Reconsideration of this Order.

a. RFP 51, requesting reports from any business consulting company addressing the typical ratees at which Plaintiffs received payment, or should have expected payment was responded to by Plaintiffs, indicating that they possessed no documents responsive to the request. Although Defendants' Motion describes this RFP as requesting discovery regarding "the typical ratees at which Plaintiffs received payment, or should have expected payment," (Motion to Compel, p. 12) the actual RFP requests reports from business consulting companies. As Plaintiffs have responded by saying that no documents are responsive to this request, the Special Master hereby recommends that the Motion to Compel be DENIED AS MOOT as to RFP 51;

b. RFP 98, requesting documents comparing Plaintiffs' billed charges to reimbursement amounts set under Medicare and Medicaid, is irrelevant under NRCP 26(b) and applicable case law. In its November 9, 2020, Order Setting Defendants' Production & Response Schedule re: Order Granting Plaintiffs' Motion to Compel Defendants' List of Witnesses, Production of Documents and Answers to Interrogatories on Order Shortening Time ("11/9/20 Order"), the Court directed that Defendants exclude Medicare and Medicaid reimbursement rates from its production of market and reimbursement rates, but did not rule on the admissibility of such data. (11/9/20 Order, p. 2-3). Additionally, Plaintiffs have provided instructive authority regarding the lack of relevance of non-commercial payors such as Medicare and Medicaid to the reimbursement rate issues recognized by the Court in prior Orders (See, Stinnett v. Sanders, 2018 WL 6823221, at *1 (Nev. Dist. Ct. Oct. 25, 2018); and Gulf-to-Bay Anesthesiology Associates, LLC v.

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UnitedHealthcare of Florida, Inc., No. 17-CA-011207, December 1, 2020 Order Denying Defendants' Motion to Compel Discovery Regarding Managed Medicare and Medicaid (Fla. Cir. Ct.)). Given the foregoing, the Special Master hereby recommends that the Motion to Compel be DENIED as to RFP 98;

c. RFP 107, requesting documents, including contracts, showing services by any vendors provided to Plaintiffs related to billing or submitting claims, reimbursement, collections or the determination of the value of services, ostensibly relates to either TeamHealth and/or Collect Rx, which has already been addressed in Report and Recommendation #2.[2] Therefore, the Special Master hereby recommends that the Motion to Compel be DENIED as to RFP 107;

d. RFP 109, requesting contracts or agreements between Plaintiffs and any reimbursement claims specialists, including for pricing of emergency medical claims, has already been determined by the Court to be irrelevant under NRCP 26(b). As such the Special Master hereby recommends that the Motion to Compel be DENIED as to RFP 109;

e. RFP 118, requesting documents showing services which TeamHealth provided to Plaintiffs for billing, claim submission, reimbursement, collections and/or the determination of the value of services, has already been determined by the Court and the Special Master to be irrelevant under NRCP 26(b), and the Special Master hereby recommends that the Motion to Compel be DENIED as to RFP 118;

[2] Report and Recommendation #2 is hereby incorporated by reference herein.

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f. RFP 119, requesting documents showing services that any vendor provided to Plaintiffs for billing, claim submission, reimbursement, collections and/or the determination of the value of services, has already been determined by the Court (and the Special Master, to the extent this includes TeamHealth or Collect Rx) to be irrelevant under NRCP 26(b), and the Special Master hereby recommends that the Motion to Compel be DENIED as to RFP 119;

g. RFPs 122 and 123, requesting documents between Plaintiffs and TeamHealth (122) or any business entity (123) evidencing instructions, directives or guidance regarding pricing, has already been determined by the Court and the Special Master to be irrelevant under NRCP 26(b), and the Special Master hereby recommends that the Motion to Compel be DENIED as to RFPs 122 and 123;

h. RFPs 128 and 129, requesting documents demonstrating whether the physicians or other medical professionals that delivered at-issue services (128) or TeamHealth (129) had input into the amount that was charged or collected, is irrelevant under NRCP 26(b) to the issues presented in this "rate of payment" case. This is particularly true as it relates to collection, which has already been determined to be irrelevant. As such the Special Master hereby recommends that the Motion to Compel be DENIED as to RFPs 128 and 129;

i. RFPs 56 and 57, requesting documents relating to complaints by patients (56) and/or administrators or employees of hospitals or other facilities providing emergency medical services (57), are offered by Defendants as discoverable so as to establish that Plaintiffs' billed charges are unreasonable. However, the Court has already determined that the relevant inquiry in this action is the proper rate of

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reimbursement and not how billed charges are set. As such, the Special Master hereby recommends that the Motion to Compel be DENIED as to RFPs 56 and 57.

RECOMMENDATION

7. It is therefore the recommendation of the Special Master that Plaintiffs' Objections are meritorious and that Plaintiff's Motions for Protective Order should be GRANTED in their entirety.

Dated this 14TH day of April, 2021.

Hon. David T. Wall (Ret.)

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PROOF OF SERVICE BY E-Mail

Re: Fremont Emergency Services (Mandavia), Ltd. et al. vs. UnitedHealth Group, Inc. et al.
Reference No. 1260006167

I, Michelle Samaniego, not a party to the within action, hereby declare that on April 14, 2021, I served the attached REPORT AND RECOMMENDATION #3 REGARDING DEFENDANTS' MOTION TO COMPEL RESPONSES TO DEFENDANTS' SECOND SET OF REQUESTS FOR PRODUCTION ON ORDER SHORTENING TIME on the parties in the within action by electronic mail at Las Vegas, NEVADA, addressed as follows:

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I declare under penalty of perjury the foregoing to be true and correct. Executed at Las Vegas, NEVADA on April 14, 2021.

Michelle Samaniego
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DISTRICT COURT
CLARK COUNTY, NEVADA

FREMONT EMERGENCY SERVICES (MANDAVIA), LTD., a Nevada professional corporation; TEAM PHYSICIANS OF NEVADA-MANDAVIA, P.C., a Nevada professional corporation; CRUM, STEFANKO AND JONES, LTD. d/b/a RUBY CREST EMERGENCY MEDICINE, a Nevada professional corporation,

Plaintiffs,

vs.

UNITEDHEALTH GROUP, INC., a Delaware corporation; UNITED HEALTHCARE INSURANCE COMPANY, a Connecticut corporation; UNITED HEALTH CARE SERVICES INC., d/b/a UNITEDHEALTHCARE, a Minnesota corporation; UMR, INC., d/b/a UNITED MEDICAL RESOURCES, a Delaware corporation; SIERRA HEALTH AND LIFE INSURANCE COMPANY INC., a Nevada corporation; SIERRA HEALTH-CARE OPTIONS, INC., a Nevada corporation; HEALTHPLAN OF NEVADA, INC., a Nevada corporation; DOES 1-10; ROE ENTITIES 11-20,

Defendants.

Case No.: A-19-792978-B

Dep't 27

(Hearing Requested)

MOTION FOR ORDER TO SHOW CAUSE WHY PLAINTIFFS SHOULD NOT BE HELD IN CONTEMPT AND SANCTIONED FOR VIOLATING PROTECTIVE ORDER

MOTION FOR ORDER TO SHOW CAUSE WHY PLAINTIFFS SHOULD NOT BE HELD IN CONTEMPT AND SANCTIONED FOR VIOLATING PROTECTIVE ORDER

Plaintiffs violated this Court's protective order—an order that plaintiffs helped craft and to which they stipulated—by prematurely disclosing designated confidential and attorneys'-eyes-only documents to members of the press. These documents concern defendants' allowing a researcher access to data for the purposes of conducting an academic study and contain internal correspondence as well as drafts of an early work paper and a redlined project proposal. Following plaintiffs' challenge to defendants' confidentiality designation, the special master recommended that these documents be de-designated, a recommendation to which defendants filed an objection with this Court. This Court then heard defendants' objection and orally indicated that the Court intended to overrule defendants' objection. But before the Court entered a written order, while the documents still retained their confidentiality, plaintiffs willfully disclosed the still-designated documents to the press.[1] The publication of this confidential and sensitive business information was particularly prejudicial because defendants were contemplating seeking a stay and filing a writ petition with the Nevada Supreme Court to preserve the confidentiality protections of these documents. Plaintiffs' contemptuous act is a bell that cannot be unrung and destroys the object of such a petition.

[1] The disclosures occurred no later than August 2. (Ex. A, at 8/2/21, 1:07 p.m. E-mail from R. Adams to E. Hausman.) The written order adopting Report and Recommendation No. 5, which recommended removing the confidentiality designations of the underlying documents, was not entered until August 9.

POINTS AND AUTHORITIES

I.

PLAINTIFFS PREMATURELY PUBLICIZED DOCUMENTS DESIGNATED "ATTORNEYS' EYES ONLY," IN VIOLATION OF THE PROTECTIVE ORDER

A. The Court Can Issue Sanctions for Disclosing Confidential Information in Violation of a Protective Order

Disobeying any "lawful writ, order, rule or process issued by the court" is a contempt. NRS 22.010(3). "[A] court has inherent power to protect the dignity and decency of its proceedings and to enforce its decrees, and thus it may issue contempt orders and sanction or dismiss an action for litigation abuses." *Halverson v. Hardcastle*, 123 Nev. 245, 261, 163 P.3d 428, 440 (2007). In addition, NRCP 37(b) provides authority to impose sanctions for disobeying a court order. *Blanco v. Blanco*, 129 Nev. 723, 729, 311 P.3d 1170, 1174 (2013); *see also MDB Trucking, LLC v. Versa Products Co., Inc.*, 136 Nev., Adv. Op. 72, 475 P.3d 397, 402–03 (2020).[2]

That includes the ability to sanction or hold in contempt parties who violate the confidentiality provisions of a protective order. *Kaufman v. Am. Family Mut. Ins. Co.*, 601 F.3d 1088, 1094 (10th Cir. 2010) (applying similar federal rule and inherent authority). In *In re Bouchard Transportation Co.*, for example, the district court struck a defense expert with whom defense counsel had improperly shared attorneys'-eyes-only materials. No. 14 CIV. 0617 (PAC), 2018 WL 1581992, at *1 (S.D.N.Y. Mar. 28, 2018). As the court pointed out, had counsel wanted to provide such material to their expert, they could have asked to modify the protective order. *Id.* "Instead, they admittedly violated the order, and now ask the Court to excuse the violation." *Id.* The court declined. *Id.*

[2] The Supreme Court often looks to federal cases for the application of courts' sanction power under its inherent authority and Rule 37. *See MDB Trucking, LLC v. Versa Products Co., Inc.*, 136 Nev., Adv. Op. 72, 475 P.3d 397, 402–03 (2020) (adopting cases decided under federal counterpart).

Likewise, in *Kaufman v. American Family Mutual Insurance Co.*, the Tenth Circuit approved a sanction against plaintiffs' class counsel who used confidential contact information provided during discovery to solicit clients. 601 F.3d at 1094. The protective order merely defined how confidential files produced in discovery could be used, and counsel violated the terms of that order. *Id.*

B. Plaintiffs Violated the Protective Order

1. The Protective Order Keeps Information Confidential Until the Court Issues an Order

The protective order in this case is clear. It allows parties to designate information as "confidential" or "attorneys' eyes only." (June 24, 2020 Stipulated Confidentiality & Protective Order, at 2, § 2.) Parties, of course, can challenge the designation. (June 24, 2020 Stipulated Confidentiality & Protective Order, at 6, § 9.) But even after a challenge, the protective order unambiguously states that the information keeps its "confidential" or "attorneys' eyes only" designation until the parties agree in writing or this Court issues an order removing the designation:

> If a Party contends that any document has been erroneously or improperly designated or not designated Confidential or Attorneys' Eyes Only, the document at issue shall be treated as Confidential or Attorneys' Eyes Only under this Protective Order until (a) the Parties reach a written agreement or (b) *the court issues an order* ruling on the designation.

(June 24, 2020 Stipulated Confidentiality & Protective Order, at 7, § 9 (emphasis added).) The later provision that "[t]he protection afforded by this Protective Order shall continue until the court makes a decision on the motion" (*id.*) must be read in this context—requiring a written "*order* ruling on the designation." (Emphasis added.)

It is undisputed that the parties did not reach a written agreement and the Court did not issue a written order about the designations *before* plaintiffs

improperly sent the documents at issue into the public domain.

2. The Protective Order's Treatment of Confidential Designations Is Consistent with Nevada Law

The protective order's requirement that the Court "issue[] an order" before confidentiality protections are stripped is consistent with how Nevada treats oral pronouncements versus written orders generally. Because the Court has plenary authority to reconsider an oral ruling before its reduction to a written order, generally such a pronouncement takes effect only when memorialized in the written order.

a. THIS COURT'S JUDICIAL POWER IS EXERCISED THROUGH A WRITTEN ORDER BY THE DISTRICT JUDGE, NOT AN ORAL RULING OR MASTER'S RECOMMENDATION

Written orders from a constitutional judicial officer are important. The Supreme Court has held that oral orders from a district court are "impermanent" and "ineffective for any purpose." *Div. of Child and Family Servs. v. Eighth Judicial Dist. Court (J.M.R.)*, 120 Nev. 445, 451, 92 P.3d 1239, 1243 (2004) (*citing Rust v. Clark Cnty. Sch. Dist.*, 103 Nev. 686, 688, 747 P.2d 1380, 1382 (1987)). Any rulings that "deal with the procedural posture or merits of the underlying controversy"—as opposed to issues of courtroom administration or decorum—"must be written, signed, and filed before they become effective." *Id.* at 454, 92 P.3d at 1245.

The narrow exception proves the breadth of the general rule. The kinds of orders that are enforceable upon the court's oral ruling are solely those "dealing with summary contempt, case management issues, scheduling, administrative matters or emergencies that do not allow a party to gain a procedural or tactical advantage are valid and enforceable." *Nalder v. Eighth Judicial Dist. Court in & for County of Clark*, 136 Nev. 200, 208, 462 P.3d 677, 685 (2020) (quoting *J.M.R.*, 120 Nev. at 455, 92 P.3d at 1246) (enforcing a minute order granting a stay). Otherwise, the "court's oral pronouncement from the

bench, the clerk's minute order, and even an unfiled written order are ineffective." *Id.* (quoting *Millen v. Eighth Judicial Dist. Court*, 122 Nev. 1245, 1251, 148 P.3d 694, 698 (2006)).

The reason for the written-order requirement is that "[b]efore the court reduces its decision to writing, signs it, and files it with the clerk," "the court remains *free to reconsider* the decision and issue a different written judgment." *J.M.R.*, 120 Nev. at 451, 92 P.3d at 1243 (emphasis added); *accord Rust*, 103 Nev. at 688, 747 P.2d at 1382. Far from *barring* a district court from revisiting its oral ruling until after the entry of a written order, the rule recognizes that a district court may change its mind *before* signing the written order. *Rust*, 103 Nev. at 688, 747 P.2d at 1382 (citing *Tener v. Babcock*, 97 Nev. 369, 632 P.2d 1140 (1981); *Lagrange Constr. v. Del E. Webb Corp.*, 83 Nev. 524, 435 P.2d 515 (1967); *Rae v. All Am. Life & Cas. Co.*, 95 Nev. 920, 605 P.2d 196 (1979)).[3]

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The district court's inherent power to reconsider oral rulings permeates the Supreme Court's decisions in this area. In *Division of Child & Family Services (J.M.R.)*, the Supreme Court invalidated a district court's attempt to hold the Division in contempt for not obeying an oral order to release a child from a psychiatric treatment facility, recognizing that the district court could have reconsidered before entering a written order. 120 Nev. at 452, 92 P.3d at 1244. In *Rust*, similarly, the district court indicated its "intention" to affirm the school board's dismissal of a school principal, but nothing prohibited the district court from deviating from that intention before entering an order. 103 Nev. at 688–89, 747 P.2d at 1382.

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[3] The district court, in fact, "is empowered to correct erroneous rulings"—including written orders—"at any time prior to the entry of final judgment." *Ins. Co. of the W. v. Gibson Tile Co.*, 122 Nev. 455, 466 n.4, 134 P.3d 698, 705 n.4 (2006) (Maupin, J., concurring).

Likewise, "[t]he judge may not transfer his or her judicial decision-making power to a master." *In re Parental Rights as to L.L.S.*, 137 Nev., Adv. Op. 22, 487 P.3d 791, 797 (2021) (quoting *In re A.B.*, 128 Nev. 764, 771, 291 P.3d 122, 127 (2012)). That is why the special master issues recommendations, not orders. So while in many cases the parties may not disturb the status quo pending the judicial decision, it is the district *judge's* written decisions that ultimately bind the parties on substantive issues in the case, not the master's recommendation or the judge's oral ruling.[4]

b. THE PROTECTIVE ORDER CONFIRMS THE NECESSITY OF A WRITTEN ORDER

It would be unusual for a protective order to contradict all of this jurisprudence and specify that a court's oral ruling has immediate effect on the confidentiality of information, without the entry of a written order. Here, the protective order adheres to this jurisprudence: the Court's decision-making power is exercised through written orders, not oral rulings in a hearing. So it is only when the challenge to a confidentiality designation is finally accepted of in a

[4] This is consistent with *Bahena v. Goodyear Tire & Rubber Co.*, 126 Nev. 243, 247, 235 P.3d 592, 594–95 (2010). There, the question was not the treatment of confidential designations under a protective order but a discovery commissioner's recommendation requiring a Goodyear corporate representative to appear—before a date certain—at a deposition to authenticate documents. *Id.* Because the deadline for the deposition preceded the usual deadline for filing objection in the district court, Goodyear needed to "seek a stay of the ruling or an expedited review by the district court prior to the time to comply with the ruling," and if not, to send a representative to the deposition. *Id.* at 250-51, 235 P.3d at 597. Goodyear did neither, which "was tantamount to a violation of a discovery order as it relates to NRCP 37(b)(2)." *Id.* Here, in contrast, the special master's recommendation placed no obligation on defendants to produce a witness or otherwise take any affirmative act by a particular deadline. Instead, the protective order itself specifies how to treat confidentiality designations pending a challenge: the confidentiality continues "until (a) the Parties reach a written agreement or (b) the court issues an order ruling on the designation." (June 24, 2020 Stipulated Confidentiality & Protective Order, at 7, § 9.)

written order—or agreed to in writing by the parties—that the confidentiality protection falls away. Neither condition was met before plaintiffs' improper disclosure of the materials to the press was complete.

3. In Violation of the Protective Order, Plaintiffs Disclosed Information to the Press Before the Attorneys'-Eyes-Only Designation Was Removed

Here, plaintiffs violated this Court's protective order. True, this Court had indicated in a hearing its intent to sustain a challenge to defendants' designation of certain documents as "attorneys' eyes only." But before the entry of a written order, plaintiffs disclosed the materials to the press.[5]

Rose Adams, a reporter from The Intercept, an online publication, confirmed that she had received the materials that were the subject of Report and Recommendation No. 5 from "TeamHealth":

She described the documents she received as "internal UHG emails as part of a lawsuit discovery that demonstrated UHG's close involvement in the 2017 study, 'Surprise! Out-of-Network Billing for Emergency Care in the United States.'" (Ex. A, at 8/2/21, 1:07 p.m. E-mail from R. Adams to E. Hausman.) According to Adams, "[i]n the emails, UHG executives talk about providing the data for the study, send edits to the study's drafts, and discuss how they will leverage the paper's impact to their advantage." (Ex. A, at 8/2/21, 1:07 E-mail from R. Adams to E. Hausman.) Adams also suggests that "[t]he emails also indicate UHG's involvement in Cooper's HCCI study 'The Price Ain't Right.'" (Ex. A, at 8/2/21, 1:07 E-mail from R. Adams to E. Hausman.)

[5] The written order has since been entered, but this does not excuse plaintiffs' violation at the time of the disclosure.

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Adams confirmed plaintiffs as the source, relying on an apparent representation that the oral ruling was immediately effective to strip confidentiality:

> Last Thursday [July 29, 2021], the judge overruled United's motion to keep them sealed, and they were unsealed to the public. After they were unsealed, TeamHealth sent them to me

(Ex. A, at 8/5/21, 11:31 a.m. E-mail from R. Adams to E. Hausman.)[6]

Adams also announced plans to publish an article based on the attorneys'-eyes-only communications. (Ex. A, at 8/4/21, 7:22 p.m. E-mail from R. Adams to E. Hausman ("Planning to run the article sometime tomorrow afternoon.").)

That article was published this morning under the headline "UnitedHealthcare Guided Yale's Groundbreaking Surprise Billing Study." *See* Rose Adams, *UnitedHealthcare Guided Yale's Groundbreaking Surprise Billing Study*, THE INTERCEPT (Aug. 10, 2021, 8:02 a.m.), https://theintercept.com/2021/08/10/unitedhealthcare-yale-surprise-billing-study/. The article again confirms that "TeamHealth representatives sent [these communications] to The Intercept." *Id.* The article includes copies of several e-mails, each still bearing the "attorneys' eyes only" designation that they carried at the time of their disclosure to The Intercept. *Id.* (including links at https://www.documentcloud.org/documents/21039479-ys_oon_paper-). The article acknowledges that

> The emails do not invalidate the Yale study's conclusions. Since its publication, other research has replicated its findings using different datasets, and TeamHealth admitted to saddling patients with unexpected bills in 2017.

[6] *See also id.* at 8/5/21, 9:15 a.m. E-mail from R. Adams to E. Hausman:

> These are emails that were obtained in discovery during TeamHealth's lawsuit against United in Nevada, and that have seen been entered has exhibits in the case. They're a mixture of emails between United executives (and one between the executives and researcher Zack Cooper) regarding the plans for the Yale surprise billing study, and documents about the study itself, such as the study addendum.

Id. (hyperlink omitted).

II.

BECAUSE PLAINTIFFS' VIOLATION DESTROYED THE SUBJECT OF A PLANNED WRIT PETITION, THIS COURT SHOULD IMPOSE SANCTIONS

The disclosure was prejudicial and irreversible. Defendants understand that this Court was unlikely to reconsider its view of Report and Recommendation No. 5. But at least until the entry of a written order, defendants had the right seek a stay and file a writ petition with the Supreme Court to prevent the irretrievable disclosure of that attorneys'-eyes-only material.

With plaintiffs' blatant violation, that information now circulates in the public domain. Unlike information shared only among parties to the litigation, which can sometimes be remedied with a clawback, there is nothing the Supreme Court can do here to fix the damage. The object of a writ petition to protect defendants' information is forever lost.

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A. Defendants Were Considering a Writ Petition with the Nevada Supreme Court

1. The Nevada Supreme Court Often Hears Writ Petitions on Orders Removing Confidentiality Protections

The Nevada Supreme Court often hears writ petitions that seek to protect against the disclosure of sensitive information. *Columbia/HCA Healthcare Corp. v. Eighth Judicial Dist. Court*, 113 Nev. 521, 525–26, 936 P.2d 844, 847 (1997) (hospital occurrence reports); *Wardleigh v. Second Judicial Dist. Court*, 111 Nev. 345, 350–51, 891 P.2d 1180, 1183–84 (1995) (legal files asserted to be privileged); *Schlatter v. Eighth Judicial Dist. Court*, 93 Nev. 189, 193, 561 P.2d 1342, 1344 (1977) (medical records and tax returns). The Court does so because through disclosure, the purportedly protected information "would irretrievably lose its confidential and privileged quality and petitioners would have no effective remedy, even by a later appeal." *Wardleigh*, 111 Nev. at 350-51, 891 P.2d at 1183-84. "[T]he bell cannot be unrung . . . ." *Columbia/HCA Healthcare*

Corp., 113 Nev. at 525-26, 936 P.3d at 847.

Indeed, the Court generally *hears* the petition, even if it is skeptical of the merits or, as in the *Columbia/HCA Healthcare* case, the Court ultimately overrules the claim to confidentiality. *See id.*; *accord, e.g.*, *Wynn v. Eighth Judicial Dist. Court*, No. 74814, 134 Nev. 1035, 408 P.3d 573, 2018 WL 389334, at *1 (Jan. 11, 2018) (unpublished) (ordering full briefing and oral argument on the confidentiality of personal notes, but denying protection on the merits).

2. Defendants Were Considering a Writ Petition in Good Faith

In all of those cases, the question was just whether parties to the litigation were entitled to the documents or information in discovery, not the level of confidentiality to be accorded those documents once disclosed.

Here, the harm to defendants was comparatively greater—and the prejudice to plaintiffs weaker—because the information was already in possession of plaintiffs' counsel. The attorneys'-eyes-only designation merely prohibited plaintiffs from doing precisely what they ultimately did: disclose the designated information *outside* of the litigation. So defendants were contemplating filing just such a petition, which the Supreme Court likely would have heard on the merits. (Ex. B, Decl. of A. Smith, ¶ 6.)

3. Defendants Would Have Sought a Stay

A principal consideration in whether the Supreme Court will stay a district-court order pending review on a writ petition is "whether the object of the . . . writ petition will be defeated if the stay . . . is denied." NRAP 8(c)(1); *see also Mikohn Gaming Corp. v. McCrea*, 120 Nev. 248, 250, 89 P.3d 36, 38 (2004) (describing the "added significance" of this factor in appeals from orders denying arbitration). For that reason, when the writ petition seeks to preserve the confidentiality of documents or information, the Court will often issue a stay. *E.g.*, *Cotter v. Eighth Judicial Dist. Court*, 134 Nev. 247, 249 n.3, 416 P.3d 228,

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231 n.3 (2018).

Here, had plaintiffs not prematurely disclosed these documents to the press, defendants would have sought—and likely obtained—a stay of the Court's written order once entered to pursue the writ petition. (Ex. B, Decl. of A. Smith, ¶ 6.)

B. Because of Plaintiffs' Contempt, a Petition Would Be Moot

Now, however, plaintiffs have taken away defendants' opportunity to preserve the confidentiality of their documents. By violating the protective order, plaintiffs ensured that any petition to the Supreme Court would be a hollow exercise: the Supreme Court, after all, cannot now grant what defendants seek because the information is already in the hands of the press and other third parties not before the Court. Plaintiffs rang the bell long before this Court could even enter a written order.

C. The Contempt Merits Sanctions

Although nothing can undo the contempt of plaintiffs' premature disclosures, this Court can and should impose sanctions for the violation. NRS 22.100, NRCP 37(b), and this Court's inherent powers all provide authority to sanction plaintiffs.

For a willful violation of a court order that causes irreparable harm, as plaintiffs' violation did here, this Court has discretion to impose varying levels of sanctions, including the most severe case-concluding sanction—dismissing a complaint. *Young v. Johnny Ribeiro Bldg., Inc.*, 106 Nev. 88, 93, 787 P.2d 777, 780 (1990) (listing factors).

The Court need not go that far here, however. At a minimum, defendants are entitled to their "reasonable expenses, including, without limitation, attorney's fees, incurred by the party as a result of the contempt." NRS 22.100(3).

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CONCLUSION

This Court should issue an order to show cause why plaintiffs should not be held in contempt and sanctioned for violating § 9 of the Court's protective order.

Dated this 10th day of August, 2021.

LEWIS ROCA ROTHGERBER CHRISTIE LLP

By */s/ Abraham G. Smith*

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CERTIFICATE OF SERVICE

I hereby certify that on the August 10, 2021, service of the above and foregoing "*Motion for Order to Show Cause Why Plaintiffs Should Not Be Held in Contempt and Sanctioned for Violating Protective Order*" was made upon each of the parties via electronic service through the Eighth Judicial District Court's Odyssey E-file and Serve system.

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/s/ Emily D. Kapolnai
An Employee of Lewis Roca Rothgerber Christie

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EXHIBIT A

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EXHIBIT A

Helm, Jessica

From: Rose Adams <rose.adams@theintercept.com>
Sent: Thursday, August 5, 2021 8:34 AM
To: Hausman, Eric I
Subject: Re: MEDIA INQUIRY – UHG involvement in Yale study about surprise billing

Last Thursday, the judge overruled United's motion to keep them sealed, and they were unsealed to the public. After they were unsealed, TeamHealth sent them to me.

—

Rose Adams
718-483-2880
PGP: 5B10 3B80 C544 C949 BC3A B95A 5DCB D57C 0493 B222

> On Aug 5, 2021, at 11:31 AM, Hausman, Eric I <eric.hausman@uhg.com> wrote:
>
> My understanding is that the court in the Nevada litigation has not yet issued a written order permitting disclosure of the documents you are describing. Who provided them to you?
>
>
> On 8/5/21, 9:15 AM, "Rose Adams" <rose.adams@theintercept.com> wrote:
>
> These are emails that were obtained in discovery during TeamHealth's lawsuit against United in Nevada, and that have seen been entered has exhibits in the case. They're a mixture of emails between United executives (and one between the executives and researcher Zack Cooper) regarding the plans for the Yale surprise billing study, and documents about the study itself, such as the study addendum.
> —
>
> Rose Adams
> 718-483-2880
> PGP: 5B10 3B80 C544 C949 BC3A B95A 5DCB D57C 0493 B222
>
>
>
>> On Aug 5, 2021, at 10:01 AM, Hausman, Eric I <eric.hausman@uhg.com> wrote:
>>
>> Rose - can you let me know where you got the emails you're referring to?
>>
>>
>> On 8/4/21, 7:22 PM, "Rose Adams" <rose.adams@theintercept.com> wrote:
>>
>> Hi Eric,
>>
>> Just wanted to double check that United doesn't want to comment on the article. Does United have a response to the claims that it had a sway over Yale's study, and particularly its media framing, since United had to work with the researchers during the paper's media circuit and sign off the on the paper's publication after its completion, according to

the study's addendum? How does it respond to the claim that the study helped United's business interests and that United used it to their advantage?
>>
>> Planning to run the article sometime tomorrow afternoon.
>>
>> Thanks,
>> Rose
>>
>> —
>>
>> Rose Adams
>> 718-483-2880
>> PGP: 5B10 3B80 C544 C949 BC3A B95A 5DCB D57C 0493 B222
>>
>>
>>
>>> On Aug 2, 2021, at 5:40 PM, Hausman, Eric I <eric.hausman@uhg.com> wrote:
>>>
>>> Hi Rose -
>>>
>>> Probably best for you to connect with Zach on this one.
>>>
>>> Thanks,
>>> Eric
>>>
>>>
>>> On 8/2/21, 1:07 PM, "Rose Adams" <rose.adams@theintercept.com> wrote:
>>>
>>> Hi Eric,
>>>
>>> My name is Rose, and I'm a reporter with The Intercept. I left a voicemail on UHC's media line but haven't heard back; reaching out to you to make sure UHG gets the chance to respond to my inquiry.
>>>
>>> I received copies of internal UHG emails as part of a lawsuit discovery that demonstrated UHG's close involvement in the 2017 study, "Surprise! Out-of-Network Billing for Emergency Care in the United States." In the emails, UHG executives talk about providing the data for the study, send edits to the study's drafts, and discuss how they will leverage the paper's impact to their advantage.
>>>
>>> While I understand that the data use agreement required UHG to remain anonymous, UHG's editing privileges in the paper and the fact that their participation wasn't disclosed seem to raise some ethical questions. Was there a data use agreement, and did it ask the researchers not to name UHG in their study, to give UHG editorial privileges, and (initially) not to name EmCare and TeamHealth? What did Communications director Brenda Perez mean when she talked about United's "support of Zack"?
>>>
>>> The emails also indicate UHG's involvement in Cooper's HCCI study "The Price Ain't Right." What was UHG's role in that study?
>>>
>>> Feel free to reach me here or call me at 718-483-2880. I'd appreciate if you could get back to me by EOD today.
>>>
>>> Best,
>>> Rose
>>>

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>>> —
>>>
>>> Rose Adams
>>> 718-483-2880
>>> PGP: 5B10 3B80 C544 C949 BC3A B95A 5DCB D57C 0493 B222
>>>
>>>
>>>
>>>
>>> This e-mail, including attachments, may include confidential and/or
>>> proprietary information, and may be used only by the person or
>>> entity to which it is addressed. If the reader of this e-mail is not
>>> the intended recipient or his or her authorized agent, the reader is
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>> this e-mail is prohibited. If you have received this e-mail in error,
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> This e-mail, including attachments, may include confidential and/or
> proprietary information, and may be used only by the person or entity
> to which it is addressed. If the reader of this e-mail is not the
> intended recipient or his or her authorized agent, the reader is
> hereby notified that any dissemination, distribution or copying of
> this e-mail is prohibited. If you have received this e-mail in error,
> please notify the sender by replying to this message and delete this e-mail immediately.

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EXHIBIT B

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EXHIBIT B

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DISTRICT COURT
CLARK COUNTY, NEVADA

FREMONT EMERGENCY SERVICES (MANDAVIA), LTD., a Nevada professional corporation; TEAM PHYSICIANS OF NEVADA-MANDAVIA, P.C., a Nevada professional corporation; CRUM, STEFANKO AND JONES, LTD. dba RUBY CREST EMERGENCY MEDICINE, a Nevada professional corporation,

Plaintiffs,

vs.

UNITEDHEALTH GROUP, INC., a Delaware corporation; UNITED HEALTHCARE INSURANCE COMPANY, a Connecticut corporation; UNITED HEALTH CARE SERVICES INC., dba UNITEDHEALTHCARE, a Minnesota corporation; UMR, INC., dba UNITED MEDICAL RESOURCES, a Delaware corporation; SIERRA HEALTH AND LIFE INSURANCE COMPANY INC,, a Nevada corporation; SIERRA HEALTH-CARE OPTIONS, INC., a Nevada corporation; HEALTHPLAN OF NEVADA, INC., a Nevada corporation; DOES 1-10; ROE ENITITIES 11-20,

Defendants.

Case No.: A-19-792978-B

Dep't 27

DECLARATION OF ABRAHAM G. SMITH IN SUPPORT OF DEFENDANTS' "MOTION FOR ORDER TO SHOW CAUSE WHY PLAINTIFFS SHOULD NOT BE HELD IN CONTEMPT AND SANCTIONED FOR VIOLATING PROTECTIVE ORDER"

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DECLARATION OF ABRAHAM G. SMITH IN SUPPORT OF DEFENDANTS' "MOTION FOR ORDER TO SHOW CAUSE WHY PLAINTIFFS SHOULD NOT BE HELD IN CONTEMPT AND SANCTIONED FOR VIOLATING PROTECTIVE ORDER"

1. I am an attorney licensed to practice law in the State of Nevada, an attorney at Lewis Roca Rothgerber Christie LLP, counsel for Defendants in the above-captioned matter.

2. This Declaration is submitted in support of Defendants' "Motion for Order to Show Cause Why Plaintiffs Should Not Be Held In Contempt and Sanctioned for Violating Protective Order." I have personal knowledge of the matters set forth herein and, unless otherwise stated, am competent to testify to the same if called upon to do so.

3. On June 24, 2020, the Court entered a "Stipulated Confidentiality Agreement and Protective Order" (the "Protective Order") that governed the use of confidentiality designations of documents produced in discovery in the above-captioned matter and prohibited parties from disclosing documents designated "Confidential" or "Attorneys' Eyes Only" ("AEO").

4. Pursuant to the Protective Order, on April 15, 2021, Defendants filed a Motion for Protective Order Regarding Confidentiality Designations to protect the AEO designations of sixteen documents related to an academic study to which United contributed commercially sensitive data (the "documents") following Plaintiffs' challenge to these confidentiality designations.

5. Following a hearing on May 10, 2021, the Special Master issued Report and Recommendation No. 5, recommending that fifteen of the sixteen documents be de-designated. Defendants filed an objection to Report and Recommendation No. 5 with the Court, which the court heard on July 29, 2021.

6. Defendants were actively considering filing a writ petition with the Nevada Supreme Court, for which they would also have sought a stay of any written order adopting Report and Recommendation No. 5, if entered.

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7. It is my understanding that before the Court issued a written order adopting Report and Recommendation No. 5, however, Plaintiffs disclosed the documents—still designated AEO—to the press. On August 2, 2021, Rose Adams, a reporter from The Intercept, confirmed via email that the documents were disclosed to her.

8. On August 4, 2021, Rose Adams emailed concerning her intention to publish an article based on the disclosed documents.

9. On August 5, 2021, Rose Adams emailed concerning her belief that the documents were de-designated on July 29, 2021, the date the Court heard the Defendants' objection.

10. A true and accurate copy of the e-mails in this thread is attached as **Exhibit A** to the motion.

11. On August 9, 2021, the Court issued a written "Order Affirming and Adopting Report and Recommendation No. 5 Regarding Defendants' Motion for Protective Order Regarding Confidentiality Designations (Filed April 15, 2021) and Overruling Objection."

12. On August 10, 2021, the Intercept published an article, available at https://theintercept.com/2021/08/10/unitedhealthcare-yale-surprise-billing-study/, based on the disclosed documents. The article contains links to the disclosed documents, which still contain Defendants' "Attorneys' Eyes Only" designations.

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

Dated August 10, 2021

/s/ Abraham G. Smith
Abraham G. Smith

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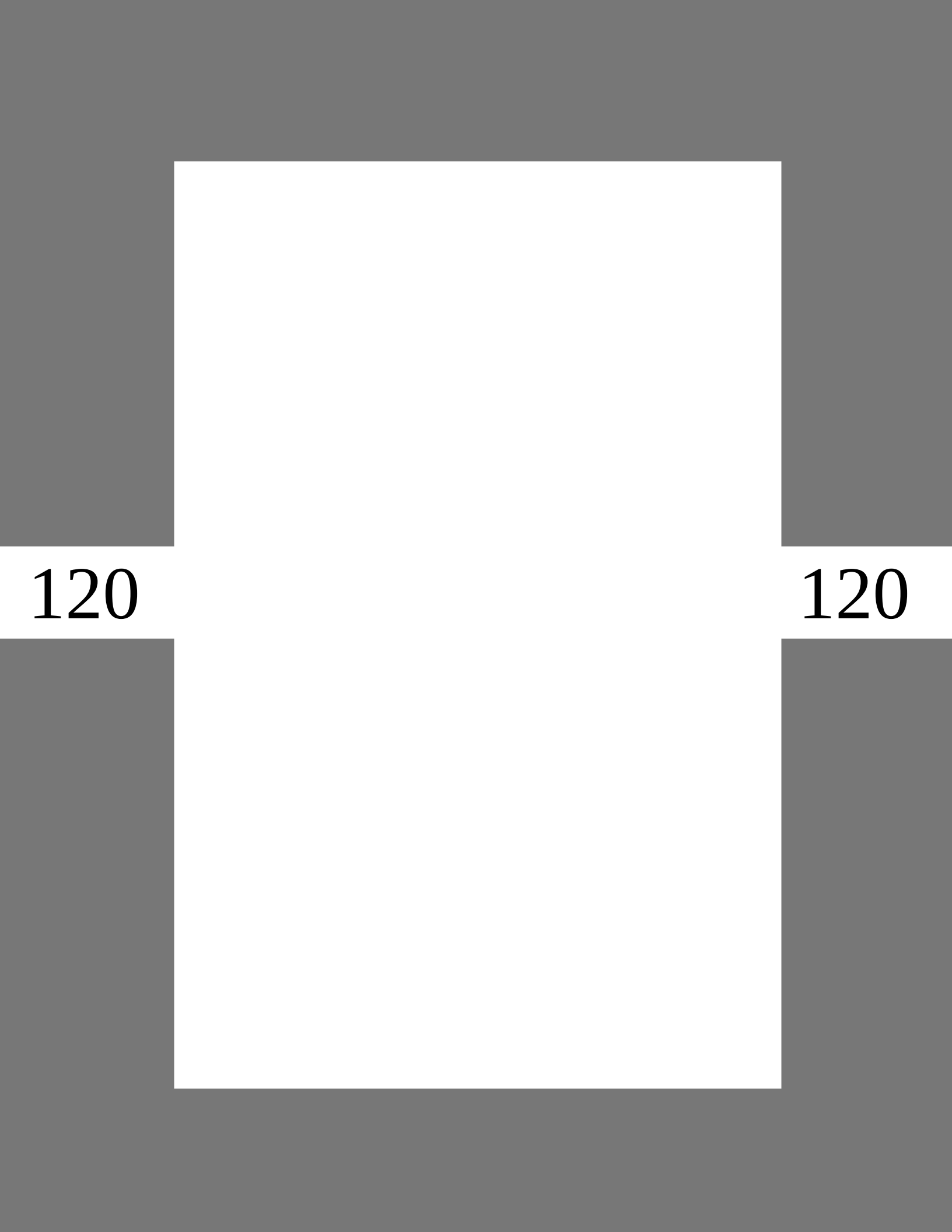
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Steven D. Grierson
CLERK OF THE COURT

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Louis Liao (admitted *pro hac vice)*
Jane L. Robinson (*pro hac vice* forthcoming)
P. Kevin Leyendecker (*pro hac vice* forthcoming)
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DISTRICT COURT

CLARK COUNTY, NEVADA

FREMONT EMERGENCY SERVICES (MANDAVIA), LTD., a Nevada professional corporation; TEAM PHYSICIANS OF NEVADA-MANDAVIA, P.C., a Nevada professional corporation; CRUM, STEFANKO AND JONES, LTD. dba RUBY CREST EMERGENCY MEDICINE, a Nevada professional corporation,

Plaintiffs,

vs.

UNITEDHEALTH GROUP, INC., a Delaware corporation; UNITED HEALTHCARE INSURANCE COMPANY, a Connecticut

Case No.: A-19-792978-B
Dept. No.: XXVII

NOTICE OF ENTRY OF REPORT AND RECOMMENDATION #11 REGARDING DEFENDANTS' MOTION TO COMPEL PLAINTIFFS' PRODUCTION OF DOCUMENTS ABOUT WHICH PLAINTIFFS' WITNESSES TESTIFIED

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corporation; UNITED HEALTH CARE SERVICES INC., dba UNITEDHEALTHCARE, a Minnesota corporation; UMR, INC., dba UNITED MEDICAL RESOURCES, a Delaware corporation; OXFORD HEALTH PLANS, INC., a Delaware corporation; SIERRA HEALTH AND LIFE INSURANCE COMPANY, INC., a Nevada corporation; SIERRA HEALTH-CARE OPTIONS, INC., a Nevada corporation; HEALTH PLAN OF NEVADA, INC., a Nevada corporation; DOES 1-10; ROE ENTITIES 11-20,

Defendants.

PLEASE TAKE NOTICE that Report and Recommendation #11 Regarding Defendants' Motion to Compel Plaintiffs' Production of Documents About Which Plaintiffs' Witnesses Testified was entered on August 11, 2021, a copy of which is attached hereto.

Dated this 11th day of August, 2021.

McDONALD CARANO LLP

By: */s/ Kristen Gallagher*

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PHONE 702.873.4100 • FAX 702.873.9966

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CERTIFICATE OF SERVICE

I certify that I am an employee of McDonald Carano LLP, and that on this 11th day of August, 2021, I caused a true and correct copy of the foregoing **NOTICE OF ENTRY OF REPORT AND RECOMMENDATION #11 REGARDING DEFENDANTS' MOTION TO COMPEL PLAINTIFFS' PRODUCTION OF DOCUMENTS ABOUT WHICH PLAINTIFFS' WITNESSES TESTIFIED** to be served via this Court's Electronic Filing system in the above-captioned case, upon the following:

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Attorneys for Defendants

Judge David Wall, Special Master
Attention: Mara Satterthwaite & Michelle Samaniego
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/s/ *Marianne Carter*
An employee of McDonald Carano LLP

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CLERK OF THE COURT

Hon. David T. Wall (Ret.)
JAMS
3800 Howard Hughes Pkwy
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Las Vegas, NV 89123
702-835-7800 Phone
Special Master

DISTRICT COURT

CLARK COUNTY, NEVADA

FREMONT EMERGENCY SERVICES (MANDAVIA), LTD, et al., Plaintiffs, vs. UNITEDHEALTH GROUP INC., et. al., Defendants	Case No.: A-19-792978-B Dept. No.: 27 JAMS Ref. #1260006167 **REPORT AND RECOMMENDATION #11 REGARDING DEFENDANT'S MOTION TO COMPEL PLAINTIFFS' PRODUCTION OF DOCUMENTS ABOUT WHICH PLAINTIFFS' WITNESSES TESTIFIED**

On June 24, 2021, Defendants filed a Motion to Compel Plaintiffs' Production of Documents About Which Plaintiffs' Witnesses Testified, on an Order Shortening Time. The Motion specifically addressed the issue to the attention of the Special Master. During a status teleconference on June 25, 2021, the parties agreed to a briefing schedule for this Motion. Plaintiffs filed a timely Opposition on July 6, 2021, and Defendants filed a timely Reply brief on July 12, 2021.

The matter was presented for telephonic hearing on July 22, 2021. Participating were the Special Master, Hon. David T. Wall, Ret.; Pat Lundvall, Esq., Kristen T. Gallagher, Esq., Amanda M. Perach, Esq. and Rachel H. LeBlanc, Esq., appearing for Plaintiffs; Colby Balkenbush, Esq., Daniel F. Polsenberg, Esq., and Abraham G. Smith, Esq., appearing for Defendants.

By the instant Motion, Defendants seek the production of documents that Defendants claim were requested by Defendants in written discovery requests, are relevant to Defendants' claims and defenses and were used by Plaintiffs' witnesses (including witnesses designated by Plaintiffs under NRCP 30(b)(6)) to prepare for deposition. Plaintiffs contend that they are under no obligation to produce documents that the Trial Court or the Special Master have previously determined to be non-discoverable.

The Defendants have classified the documents addressed in the instant Motion into seven separate categories, each of which is addressed separately below. The Special Master, having reviewed the pleadings and papers on file

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herein, including a review of the documents at issue, and having considered the arguments of counsel at the time of hearing, and pursuant to NRCP 53(e)(1), hereby sets forth the following Report and Recommendation regarding Defendants' Motion to Compel Plaintiffs' Production of Documents About Which Plaintiffs' Witnesses Testified:

1. Data iSight Communications

Defendants seek production of notes referred to in the depositions of Kent Bristow and Lisa Zima regarding communications that Plaintiffs' representatives Zima and David Greenberg had with Data iSight representatives. Defendants contend that certain portions of these communications are referenced in Plaintiffs' Amended Complaint. According to Plaintiffs, Greenberg and Zima were both deposed at length regarding the communications.

Defendants rely in part on NRS 50.125 as support for the production of these notes. However, it does not appear that Bristow or Zima used these notes to prepare for their deposition, and as such NRS 50.125 is inapplicable to the analysis.

Plaintiffs contend that the notes have not been produced as they are protected by the work product and attorney-client privilege. According to a Declaration by Plaintiffs' counsel, Bristow was directed by counsel to have Greenberg and Zima contact Data iSight representatives in July of 2019.

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It is the recommendation of the Special Master that Defendants' request for production of these notes be DENIED. Based upon the Declaration of counsel for Plaintiffs, the notes constitute attorney work product and/or constitute attorney-client privileged communications, and as such are protected from disclosure. See, NRCP 26(b)(3)(A); NRS 49.095; Wynn Resorts, Ltd. v. Eighth Judicial District Court, 133 Nev. 369, 374, 383 (2017). Defendants have been able to question witnesses as to the substance of the communications with Data iSight representatives in the depositions of Zima and Greenberg. This is consistent with Nevada law that the relevant facts are discoverable but the communications with counsel regarding those facts are not. See, Phillips v. C.R. Bard, Inc., 290 F.R.D. 615, 626 (D. Nev. 2013). As set forth above, Defendants have examined witnesses regarding the substance of the communications.

2. Wrap/rental summary document

Defendants seek production of a summary document that Bristow relied upon in preparation for his deposition as a corporate designee. The summary document relates to a summary of eight wrap/rental agreements. The parties agree that Plaintiffs have produced the eight agreements. Bristow testified that he reviewed a summary of the eight

agreements, and prepared notes from that summary. The notes have been produced but the summary has not. By this Motion, Defendants seek production of the summary.

Given that Bristow testified that he reviewed the summary in preparation for his deposition, Defendants rely in part on NRS 50.125 to support their request for production. Plaintiffs contend that Defendants failed to establish that Bristow's review of the summary refreshed his recollection. However, Bristow testified as follows:

> Q Did you review the written agreements for all of those [wrap/rental] arrangements in preparation for your testimony today?
>
> A I did not review the agreements themselves but a listing of the agreements that we've had in place to know who they were with and when they started and what the term – the basic reimbursement terms are.

Team Physicians Deposition Transcript, Ex. 1 to Defendants' Appendix, p. 265.

It is the determination of the Special Master that the foregoing excerpt from the deposition constitutes a sufficient foundation to establish that Bristow reviewed the at-issue summary to refresh his recollection prior to the deposition.

During the hearing on this Motion, counsel for Plaintiffs suggested that the summary itself was potentially subject to protection under the attorney-client privilege, as it was contained within communications between representatives of Plaintiffs and their counsel. As such, Plaintiffs were directed to submit the summary for an *in camera* review by the Special Master, which submission was made on August 2, 2021. Review by the Special Master has not provided any additional grounds for protection of the document.

Based on the foregoing, it is the recommendation of the Special Master that Defendants' request for production of this summary be GRANTED.

3. Data on Full Billed Charges for the Period 2015-2017

Defendants request production of documents evidencing that certain claims adjudicated by Defendants were paid in full during period beginning January 1, 2015 and June 30, 2017, as referenced by Bristow during his deposition. Although Plaintiffs challenge whether the requested documents actually fall within Defendants' written discovery requests, Plaintiffs note that they have produced the spreadsheet reviewed by Bristow in connection with his testimony. Defendants did not refute this contention in their Reply Brief.

As a result, it is the recommendation of the Special Master that Defendants' request for any further production of documents under this category is DENIED.

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4. Contract Claim File

Defendants request documents and data relating to approximately 4,000 claims from Defendant United's Administrative Services Only ("ASO") customers. In his deposition, Bristow described the claims as having been adjudicated by Defendant United but paid according to a direct agreement or some other agreement that Plaintiffs had with another party. Defendants have generally referred to these documents as "contract claim files."

It is the recommendation of the Special Master that Defendants' request for documents under this category be DENIED, as the requested documents fall within Report and Recommendation #2, which found that "provider participation agreement documents and internal TeamHealth communications about negotiating a provider participation agreement with United" are irrelevant to the core issue of rate of reimbursement and therefore not discoverable.[1]

5. 2013 to 2017 Chargemasters

Defendants seek production of chargemasters in effect prior to TeamHealth's acquisition of certain Plaintiff entities, given Bristow's testimony that it is TeamHealth's typical practice to maintain and retain prior chargemasters. Plaintiffs have produced chargemasters from the relevant time periods, including some chargemasters during the time period referenced in this request.

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Notably, the Special Master, in Report and Recommendation #7, addressed this very issue and determined that these additional prior chargemasters, in effect prior to the time period relevant in this matter, are not relevant under the provisions of NRCP 26(b)(1). As such, it is the recommendation of the Special Master that Defendants' request for documents under this category be DENIED.

6. Contracts with Third Party Insurers

Defendants seek production of Plaintiffs' contracts with third party insurers. It is the recommendation of the Special Master that Defendants' request for documents under this category be DENIED. The Trial Court's February 4, 2021 Order and the Special Master's Report and Recommendation #7 clearly set forth that the requested documents are not discoverable, especially with respect to in-network claims data and arrangements.

7. Separate Balance Billing Policies

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[1] On or about August 9, 2021, the Trial Court entered an Order affirming Report and Recommendation #2.

According to Defendants, Bristow testified that Plaintiffs possess a balance billing policy separate from the one already produced by Plaintiffs, describing the TeamHealth policy prohibiting balance billing. Plaintiffs have produced a balance billing policy during discovery.

It is the recommendation of the Special Master that Defendants' request for documents under this category be DENIED, given the determination in Report and Recommendation #2 that such balance billing documents were not relevant or discoverable.

This Report and Recommendation addresses all issues before the Special Master under this pending Motion.

Dated this 11th day of August, 2021

Hon. David T. Wall (Ret.)

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PROOF OF SERVICE BY E-Mail

Re: Fremont Emergency Services (Mandavia), Ltd. et al. vs. UnitedHealth Group, Inc. et al.
Reference No. 1260006167

I, Michelle Samaniego, not a party to the within action, hereby declare that on August 11, 2021, I served the attached REPORT AND RECOMMENDATION #11 on the parties in the within action by electronic mail at Las Vegas, NEVADA, addressed as follows:

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	UMR, Inc. dba United Medical Resources
	United Healthcare Insurance Company
	UnitedHealth Group Inc.
	UnitedHealthCare Services Inc dba UnitedHeal

I declare under penalty of perjury the foregoing to be true and correct. Executed at Las Vegas, NEVADA on August 11, 2021.

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Steven D. Grierson
CLERK OF THE COURT

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DISTRICT COURT

CLARK COUNTY, NEVADA

FREMONT EMERGENCY SERVICES (MANDAVIA) LTD., Plaintiff(s), vs. UNITED HEALTHCARE INSURANCE COMPANY, Defendant(s).	CASE NO: A-19-792978-B DEPT. XXVII

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BEFORE THE HONORABLE NANCY ALLF, DISTRICT COURT JUDGE

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TUESDAY, AUGUST 17, 2021

RECORDER'S PARTIAL TRANSCRIPT OF PROCEEDINGS
RE: MOTIONS HEARING (UNSEALED PORTION ONLY)

APPEARANCES (Attorneys appeared via Blue Jeans):

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

For the Defendant(s): ABRAHAM G. SMITH, ESQ.
DANIEL F. POLSENBERG, ESQ.
(Defendant's Attorneys appearing in person)

RECORDED BY: DELORIS SCOTT, COURT RECORDER
TRANSCRIBED BY: KATHERINE MCNALLY, TRANSCRIBER

LAS VEGAS, NEVADA, TUESDAY, AUGUST 17, 2021

[Proceeding commenced at 2:01 p.m.]

THE COURT: Thank you. Please be seated.

So we have some people in the courtroom today. Let me see, where are my notes from today? Just threw them away by mistake. There we go.

All right. Let me call the case of Fremont versus United. Let's take appearances first from the plaintiffs.

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

MR. LUNDVALL: Good afternoon, Your Honor. Pat Lundvall, also here on behalf of the Health Care Providers.

MS. PERACH: Good afternoon, Your Honor. Amanda Perach, appearing on behalf of the Health Care Providers.

THE COURT: And for the defendants, please?

MR. POLSENBERG: Good afternoon, Your Honor. Abe Smith and Dan Polsenberg for the defendants.

THE COURT: Thank you. Are there other appearances?

All right.

THE CLERK: There's more on the phone, I think.

THE COURT: Do we have more people on the phone or -- of course, observers are welcome.

But is there anyone who needs to enter an appearance? Okay.

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MR. LUNDVALL: The other two folks that are associated with the Health Care Providers are not going to be making an appearance, Your Honor, but they are observing the proceedings.

THE COURT: Very good. Thank you. And welcome.

All right. So we've got three objections today by the defendant. The first is to the report numbers -- recommendations and Report No. 6.

Mr. Smith.

MR. SMITH: Yes, Your Honor. And if you don't mind, I think I'll combine that with No. 9.

THE COURT: It overlaps.

MR. POLSENBERG: Right. We renewed our Motion to Compel citing the same examples as in No. 6, plus an additional 69, if I am doing my math correctly -- a total of 73.

Before I began, I just want to make sure -- some of these depositions are filed under seal. And I'd like to discuss some of the questions and answers in them. So I just want to make sure that nobody has a problem with me doing that in the courtroom, if we need to seal the courtroom or anything like that.

THE COURT: Normally, the court recorder has to go through a different procedure if we are going to seal part of today's hearing.

So is there any objection to that by the plaintiffs? You have to be very --

MS. GALLAGHER: Your Honor, this is Kristen Gallagher.

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