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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I'm having a little bit of difficulty with the audio in the courtroom. I don't know if anybody else is.

However, what I can tell -- what you indicated about discussion of deposition testimony, we have no objection.

THE COURT: All right. So if a portion of the record is going to be sealed, you have to very clearly delineate that for the court reporter.

MR. SMITH: Very good.

THE COURT: And then tell us when she can unseal.

MR. SMITH: Okay.

THE COURT: Good enough. So 6 and 9.

MR. SMITH: Thank you, Your Honor.

And I do appreciate where we were last time. We got some clarification with regard to the previous Reports and Recommendations 2, 3, and 5.

The issue in Nos. 6 and 9 have to do with instructions not to answer at a deposition. And I do want to stress the difference between a question asked at a deposition versus a question asked at trial or evidence that is admitted at trial.

During discovery obviously the scope is much broader. The parties are entitled to ask questions, and there should not be an instruction for the plaintiff just not to answer the question at all, unless there's a claim of privilege or unless there's a protective order in place that allows the witness to not answer the subject matter in question.

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Here -- there's no question that the plaintiffs did not have -- these aren't privileged objections. These aren't objections on the basis of work product or an invocation of somebody's Fifth Amendment right, something like that.

But we're talking solely about an interpretation of this Court's prior ruling and the Special Master's Report and Recommendations which state broad principles and apply them to particular documents -- those orders and recommendations being used to block questions in this action.

I don't think it's appropriate for Plaintiffs to have instructed their witnesses not to answer solely on the basis of an interpretive fight between the parties over whether this was, in fact, a subject ruled irrelevant under the Court's prior orders or, as we contend, was not.

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And it's particularly concerning when in the example -- in one example where we are threatened with sanctions if we persist in asking questions that are supposedly in contradiction with the Court's determinations on relevancy when we, in fact, disagree with that -- with the Plaintiff's interpretation of those guardrails.

So again, I think we would be in a different posture if we were talking about *Motions in Limine* or a question asked at trial. Yes, of course, at that point, if there's an objection to relevance, then certainly the Court would be, you know, entitled to enforce its orders. The Court is there to make that determination.

But when it's in deposition, and the Court's not there, and

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the parties are just having a disagreement among themselves as to what's relevant or not relevant, it's not appropriate to use the extreme mechanism of instructing a witness not to answer the question.

When we brought our motions to -- before Judge Wall, he rejected the Motions to Compel in full. And particularly with regard to the second Motion to Compel, the renewed motion, he went through a series of examples. He didn't go through everything.

And I think it's telling that he did not go through many of the examples that I cited in the oral argument. And I believe that that was an error. Judge Wall, had he actually wrestled with the examples that we provided to him during the argument on the renewed motion, I think would have had to conclude that, in fact, these aren't within the scope of the Court's prior -- Court's prior rulings -- prior orders, and, in fact, were appropriate questions to ask and should have been answered at the deposition.

I won't go through all of them today. But I do want to provide a few examples of questions -- again, I'm going to focus solely on examples that were not addressed in the Court's -- in the Special Master's Report and Recommendation No. 9, but rather those that he did not address and that I feel squarely fall outside the Court's prior orders.

In some examples, the plaintiffs did not, in fact, cite an order or a Report and Recommendation that the question supposedly violated. They rather suggested that we were

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overstepping the 30(b)(6) topics, and that that was an inappropriate use of the deposition time.

I take the point that you want -- that the plaintiffs want to limit the 30(b)(6) topics to the topics that were disclosed, but, again, that's an interpretive fight that should not be the grounds for an instruction not to answer the question.

Let me turn to -- and here, Court Reporter, I will be addressing a few specific examples. So if we could seal what I'm about to discuss.

THE REPORTER: Okay. Let me stop the record for now.

[Sealed hearing 2:09 p.m., until 2:20 p.m. -- transcribed separately.]

THE COURT: We're back on.

MR. SMITH: Thank you, Your Honor.

So I understand the burden that sometimes these motions can cause, when a lot of examples are raised to the Court. And I understand, Judge Wall was certainly dealing with a lot.

But I think it's important that the Court actually look at these examples that we've provided that were not the subject of Judge Wall -- or were not specifically discussed in Judge Wall's Report and Recommendation.

So that would be Nos. 2, 3, 4, 11, 18, 20, 22, 24, 30, 35, 41, 42, 48, 58, 68, and 71. And then I would refer the Court back to the subjects of the Report and Recommendation No. 6, particularly -- particular to Nos. 50, 51, and 52. I think those are key examples of

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questions that were either directly relevant to our defense or did not touch upon an issue that was deemed irrelevant by this Court and should, for that reason, have received an answer, not an instruction not to answer.

Again, I'll conclude here. I think without -- again, I don't want to go back off the -- or back into the sealed record, but I would also point to No. 20. When we have witnesses that are instructed not to answer simply because a topic was broached that was not covered in the Court's prior orders, I think it's problematic to say, well, because the Court didn't say that that was a relevant topic, that it, therefore, is off limits.

I think you can't box us in, simply because prior orders say that certain topics are relevant or not relevant, that we then can't explore the topics that weren't addressed in that prior order.

With that, I'll sit down and let plaintiffs talk.

THE COURT: Thank you.

And the opposition, please.

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

So United repeatedly tried to examine witnesses on topics that the Court had deemed irrelevant and, therefore, nondiscoverable.

Your Honor, I feel like a little bit of a Groundhog Day, that we are back before Your Honor on the same types of topics over and over again. Today we just heard topics about corporate structure.

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We heard topics about excessive charges.

Although United is trying to say that that is part of their defense, this Court has clearly, unambiguously, and repeatedly indicated that these types of requests in discovery is irrelevant and, therefore, nondiscoverable.

So as a result, the Health Care Providers were well within their right to instruct witnesses not to answer in order to enforce a limitation ordered by the Court under Rule 30(c)(2). And it's important, in United's presentation and also in their underlying papers, is that they really try and gloss over what 30(c)(2) allows for, which is a limitation order by the Court. And that's exactly what we have here.

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United has tried to recharacterize what the Health Care Providers did in terms of instruction, as what I would call a garden variety relevancy objection -- something that somebody raises at deposition; it's never been briefed; it's never been decided.

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And that's really the point of all of this briefing by United is trying to ignore the fact that we have this history in this case. It's important history -- history that the parties have, as you know, come before you, oftentimes come before Special Master Wall, in order to get the right ruling, so that we know what the scope of this case is about.

And Your Honor has been clear. Your Honor was clear last week again in some of these very same topics United objected based on the Report and Recommendations Nos. 2 and 3 that they

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indicated were not yet orders of the Court, and oftentimes based their objection on that solely.

Since they filed their objections on 6 and 9, obviously, the Court has had the opportunity to make rulings and affirmative adopt and overrule United's objections on Nos. 2 and 3. So that is going to be relevant for today's discussion as well.

But I think it's important that United is trying to gloss over and really disregard what the Court has spent a lot of time considering in terms of what the first amended complaint parameters are.

So the first Motion to Compel that United brought was really limited to four instances of the testimony by Mr. Bristow in his capacity as a Rule 30(b)6 designee and also Mr. Joe Carmen.

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And those four instances that were discussed fall well within the bounds of the Court's prior orders. They wanted to know things about internal Team Health communications, about failed in-network negotiations. Your Honor has had more than one occasion to decide that that is outside the scope of discovery and nondiscoverable.

They asked questions about Team Health's self-funded health plan that was administrated by United at one point. But then the examination is reviewed. That's what they say is at issue. But when you review that examination, there's really not a question about that.

Really what they're asking the Court is what Team Health's

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general philosophy is about negotiations and in-network contracting. Again, topics that the Court has already deemed to be not discoverable.

Mr. Carmen was asked about balanced billing and a willingness to accept compromised amounts. It's important to know that he did respond to the first question with regard to those issues that United raises, but, more importantly, it's going to be outside of the issues that are relevant and discoverable in this case.

In addition to the January 21st hearing transcript where Your Honor had occasion to comment, the Order adopting Report and Recommendation No. 3 is directly on point with respect to these issues.

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The second question posed to Mr. Carmen in that first Motion to Compel was about hospital subsidiary rates and rates that Team Health would accept from hospitals. Again, that was long ago deemed to be irrelevant with respect to hospital contracts and those arrangements. And that was subject to the Court's February 4th order.

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In United's renewed motion, which is the Objections Report and Recommendation No. 9, United included the same exact examples that they included in the first motion, and then they added 69 more that we've identified on Exhibit 1. Oftentimes I think it's important to note that United omitted -- in their recitation of what was at issue, they would omit the full examination.

So what we did is we went back. We looked to see if there

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was additional information, additional testimony. And oftentimes -- the Special Master found this to be true as well, that oftentimes they omitted the answer to the question.

And so to the extent that United thinks that it should be able to recall somebody based on testimony that it failed to provide to the Court, obviously we would ask Your Honor to look at the full testimony. And if, indeed, the witness did respond, I think that renders that particular issue moot.

The Special Master looked at the chart. He was mindful in terms of looking at the testimony and indicated in his Report and Recommendation that he too often found that the question would -- that was posed was answered, therefore rendering any basis to recall a witness to be moot.

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But I think the more important piece of this is that United often and routinely asked questions that the Court has already stated are not relevant. They talked about hospital contracts. They asked about acquisition documents again. They want to know about costs and profitability. They want to know about amounts charged or accepted. They want to know about complaints about amounts charged. They want to know about balanced billing. They asked more questions about agreements with third-party providers and government payors.

These are all subjects that have clearly, and without doubt, been before Your Honor before. And Your Honor has routinely indicated that they are just outside the scope of this case, therefore,

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they are deemed not discoverable. And the Health Care Providers were appropriately providing an instruction not to answer as permitted by Rule 30(c)(2).

The Special Master -- this was actually also an issue that came up even before depositions started. He also gave an indication that, yes, if there's a limiting order, it would well be within our rights to provide that instruction not to answer.

And so the Health Care Providers, in providing the chart in Exhibit 1 to the Special Master, and he took that opportunity to mindfully and thoughtfully go through what issues were raised by United and looked to see what was within a scope of potential examination that should be continued. And he found that not one of those examples were ones that were allowing the Health Care Providers to have to bring back a witness for United to further examine.

It's also important, I just want to note, that United tried to use their first Motion to Compel as an effort to open their door to every examination of every witness back open. And the Court obviously -- the Special Master declined that. I was just given the basis of the rules and basis for particular identification of examination topics that the Court deemed were not within available discovery.

And so I know in the presentation before you, Your Honor, United presented a number of examples. I'm going to try and just quickly go through those as best I can, not having those specifically

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before today.

But with respect to No. 51, Mr. Bristow, they made reference to some testimony regarding an e-mail about in-network discussions and whether or not there was a leverage. Again, that would fall within the Court's limitation order saying that in-network negotiations and those failed network negotiations, as a reminder, are outside the scope of discovery.

Number 52, again, is within the Court's prior orders about in-network leveraging.

Number 41 talks about clinicians and partners. Again, this goes to corporate structure issues that have been limited.

Number 3 talks about equity and healthcare, talking about Blackstone. Again, this is corporate structure that the Court has long ago deemed not to be relevant.

Along with No. 4, talking about physician owner, again just goes to the heart of the corporate structure issues that have been deemed irrelevant.

Also again, United talks about trying to approve a defense of excessive rates. Your Honor has put a limitation on that long ago as well, that they're -- trying to prove whether or not a rate is excessive is not within the bounds of this case.

If Your Honor has a particular question about any of the testimony identified in the chart, I'm happy to entertain that.

But, Your Honor, we would ask that you affirm and adopt Nos. 6 and 9 on this particular issue. I will just note for the record

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that No. 9 has a couple of other orders -- motions that were at issue.

So with respect to No. 9, it would be requesting to affirm and adopt on this particular issue, Your Honor.

THE COURT: Thank you.

And the reply, please.

MR. SMITH: Thank you. I'll be brief.

What we heard from plaintiffs is a kind of very broad strokes analysis. Understand, it's a lot of examples -- 73 examples.

If this Court is inclined to overrule the objection, I would ask Your Honor to take it under advisement and to go through the individual examples. What we got was a lot of -- plaintiff says that they've added context -- and I do appreciate that -- in their chart, but what we just heard was not context.

They say the -- you know, we went briefly through those examples. Number 51, plaintiff says, oh, this is a question about leverage, so it's out of the -- so it's off limits.

No. We're just asking the question. How is it that plaintiffs -- I'm sorry -- I should turn to the actual example -- we're just asking how to interpret a sentence in a document that they've given us. What is it that they mean when they say, when they use that word themselves, that they're going to leverage their out of market -- their out-of-network performance to leverage in higher -- higher in-network rates?

And again, when we say -- when she says that No. 3, No. 4 talk about a corporate structure -- what's missing there is that these

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are questions following up on information that the witness gave us. If they've used a term like a physician clinician or partner, we're entitled to ask what does that mean when you use that term.

And again, I think a good example for this Court to turn to would be No. 30. A question that's not asking anything about the corporate structure, not asking about balanced billing or charge masters or any of the other specific things that this Court has deemed irrelevant for the case.

It's just asking whether the witness would think that a reimbursement rate of 90 to 95 percent is high for emergency room services. A very simple question that got an instruction not to answer.

So again, I would ask Your Honor, if you are inclined to overrule the objection, to take the matter under advisement and to look at the specific examples.

Thank you.

THE COURT: Thank you.

I have reviewed everything. And I am going to overrule the objection and adopt the recommendations of the Special Master.

The defendant, in good faith, I believe, has continually tried to expand what you believe the definition of relevance is in this case. And you know, I've made -- made it consistently clear, I think, that the corporate structure, the rates, the excessive charges, their profitability, their business model, billings, agreements, negotiations, all of that is simply irrelevant to the defense in this

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case.

So for those reasons, I will go ahead and affirm and adopt 6 and 9.

Let's take up 7, please.

MR. SMITH: Thank you, Your Honor.

Report and Recommendation No. 7 has to do with a Motion to Compel market data. And again, I think on this issue, there's no question about the relevance of that data. We're not talking about noncommercial payors. We're not talking about comparing out-of-network to in-network payors. We're talking about out-of-network commercial payors -- their market data for charges and reimbursements.

So I don't think, even under the Court's recent rulings, the adoption of Reports and Recommendations No. 2, 3, or even 6 and 9 today --

THE COURT: And does that relate directly to 30?

MR. SMITH: I'm sorry.

THE COURT: Does that directly relate to 30 from your last argument, with regard to out-of-network -- commercial reimbursement rates versus noncommercial?

MR. SMITH: I think we might be talking about a different thing.

THE COURT: I know it's depositions and [indiscernible] --

MR. SMITH: Right, right.

THE COURT: -- but is it the same subject matter?

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MR. SMITH: No, I don't think so.

THE COURT: Okay.

MR. SMITH: Because I think No. 30, we're talking about how the plaintiffs determine their charges -- or at least that's how plaintiffs have characterized it.

I think with respect to this Motion to Compel, again, this is data, Special Master -- that Special Master Wall, his reasoning was not so much that the data was irrelevant, as that we had already received it in a form that was acceptable.

I'm certainly no expert. I can't read these records. And it certainly took our expert some time to go through it. But the form in which the plaintiffs produced their data made it impossible to determine -- to disaggregate the services.

So, you know, let me back up just a second.

The plaintiffs have said that, well, you know, they provided this market data. Again, we provided -- we also provided market data. So we're just asking from them what we gave to them.

And plaintiffs said, yeah, we did that. They said, you know, that we put multiple things on one line, and they put multiple things on one line, so what's fair is fair.

But I think the key difference is that what United put on a single line would be modifiers to a single service -- the CPT code, which again, I confess, I have very little knowledge of how this -- how medical billing works. But my understanding is that that modifier relates solely to that one service.

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So as a way of simplifying so that the codes don't have to necessarily have a separate code for every potential contingency, they have one code, and then there will be a modifier that explains how the code applies in a particular situation. But, nonetheless, we're still talking about a single service.

What plaintiffs did, in contrast, is they would aggregate multiple services on the same line, making it impossible for us to determine what exactly was a -- what the bill -- what the charge was for which they were seeking a reimbursement rate was for any particular service.

And again, I don't think that there's any dispute that the information is necessary. I think the main issue that plaintiffs raise has more to do with the timeliness of the motion itself. So I will address that.

But in terms of relevance, I don't think there's any question that the information is relevant. And respectfully, I think Mr. -- that Judge Wall was mistaken in his assessment that we had actually already received this information, because I think he misunderstood the difference between a modifier being on the same line as a single service versus multiple services being on the same line.

So timeliness -- I appreciate that plaintiffs cited to the case *RKF v. Tropicana* from the district of -- Federal District of Nevada, 2017 case, judge -- Magistrate Judge Foley, which I think is actually a fairly good template for analyzing when requests can be made after

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the close of discovery and when a motion to be compelled can be brought.

In that instance, the parties had brought -- served a discovery request just six days before the discovery cutoff. So clearly, untimely in the sense that any response to that would have fallen after the discovery cutoff.

But in the end, Magistrate Judge Foley grants the request or grants the Motion to Compel and goes through the issue of how do you determine whether timeliness precludes the Motion to Compel.

Essentially, you look at a number of factors, but among them are the prejudice to the party from whom the discovery is sought and the length of time that has passed since the expiration of the discovery deadline, as well as the disruption to the Court's schedule.

I would submit here that the plaintiffs have not suffered prejudice from what amounted to an eight-day delay.

Under the default Rules of Civil Procedure, our Motion to Compel would have, in fact, been timely, but because there's a discovery order in this case that says that the parties get 45 days to respond to discovery, our motion -- our discovery request went out eight days beyond the -- that 45-day deadline. But I don't think that there's any real genuine prejudice that plaintiffs suffered just from that eight-day delay. We agreed to give them the extra time so that they would be able to respond.

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Instead, plaintiffs are arguing that essentially to enforce the Court's prior sanction of precluding us from moving to extend the discovery deadlines, that they are excused from providing this information, this market data information in a usable form.

I understand the Court's prior sanction, but I don't think it -- I don't think that it should operate as a total bar in this case where the plaintiffs have not suffered prejudice, to allow us to get the discovery that we need on this market data.

And I believe we have good cause. If -- had we been allowed to file a Motion to Extend the Discovery, I believe that the Court would have needed to grant it, that there would have -- it would have been an abuse of discretion not to grant it, because of the complexity of the case, the fact that our experts had to analyze this data.

Plaintiffs say that, well, you had this -- you had our discovery responses in January, so you should have known that it didn't have what you needed, so that you would have made your motion -- so that you would have served your new requests timely before the expiration of the discovery deadline.

But I don't think there's been any dispute that we did serve our third amended Request for Production as soon as we received our expert analysis that actually determined that the responses were inadequate.

Again, this is not something that I think the lawyers would have been able to figure out on their own. That's why we needed to

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engage experts to decipher it.

In addition, I think it's fair because the plaintiffs have, themselves, added new claims after the discovery cutoff. They too have asked for discovery after the discovery cutoff, including the MultiPlan depositions and follow-up depositions from United representatives.

I agree with the Court's comment, in not this last hearing, but a couple hearings ago, that it makes sense just to collect the information in discovery, rather than having to hash everything out in the heat of trial.

Alternatively, I think that we can construe this as part of the plaintiff's own 16.1 obligations. Or to enforce the undisputedly timely second Request for Production, numbers, I believe it's 87 and 88.

Again, I think plaintiffs have understood that this information was relevant and necessary. It's not a question of whether we would be entitled to have it. It's really just a question of whether they're excused from providing it because of the eight-day delay.

Thank you, Your Honor.

THE COURT: Thank you.

And the opposition, please.

MS. GALLAGHER: Thank you, Your Honor.

So the Special Master correctly determined, both on procedural and substantive grounds, that United is not entitled to

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compulsion of its request for 157 -- 156, 157, and 158. So the third set of Requests for Production were not just untimely served, but United failed to establish sufficient reason for its delay in seeking the Court's relief.

And then on the substantive grounds, Special Master Wall also found that some of the information sought is subject to the Court's limiting orders again -- and that's with respect to noncommercial data and charge masters, and that the Health Care Providers have sufficiently produced relevant commercial market data. And they did so in their spreadsheet, which is the market data, which is at FESM 1538, I believe -- I'll correct that if I'm mistaken on that citation.

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So United's Request For Production Nos. 156 and 157 includes requests for noncommercial market data that the Court had repeatedly determined is not relevant. United further indicated that it needed information about service-by-service information and what it refers to as unit-level information. And what they say they need it for is quoted in their objection at page 5, which is, quote, Plaintiff's billed charges are excessive.

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So again, we're back to square one with respect to the proffered reason that United states that it needs this information. The Court has repeatedly said, for at least eight months and longer, that to show Plaintiff's charges are excessive is not relevant and, therefore, not discoverable in this case.

United's Request For Production No. 158 is just another

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iteration on this, which is asking for charge masters that the February 4th order has already deemed irrelevant and for which the Court reaffirmed at the recent July 29th hearing, stating again, quote, how the rates were set is unnecessary, end quote.

Your Honor, we think that Special Master Wall was mindful in his review of what the Health Care Providers have produced in terms of the market file. He had the benefit of that market file before him as he was reviewing and deciding Report and Recommendation No. 7.

The request for service-by-service level information can be gleaned from the market file that the Health Care Providers did produce. Special Master walked through that when you sort the data and how you can find the data with a simple comparison of a charge versus one that has -- that may have a service-by-service level.

The other issue that can be used -- or the other resource that can be used -- in using and looking at the market level file is the charge masters, which indicates -- which is particularly relevant -- and the only thing relevant in this case, Your Honor, with respect to reimbursement rates -- is out-of-network. And so United can look at the Health Care Providers' charge masters that were produced for the relevant time period in looking at that.

United also takes issue with what it calls unit-level issues. So far, in the underlying hearings and the underlying briefing, we have not heard exactly when United needs that information. We do know from meet and confer efforts, with respect to earlier requests

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for production, United, at least during those meet and confer efforts indicated that they agreed that was anesthesia-level information that was inadvertently included in a Request for Production.

We still have not heard with respect to this round of briefing why that unit level is important to this type of claim with respect to emergency room services. And I don't believe that appeared in United's objection either. We certainly didn't hear it in the initial presentation.

And so the Special Master had the opportunity to decide whether or not the market file was appropriately provided. And he deemed that it was. He also, on top of that -- which is a procedural posture of this case -- he didn't just only decide that the requests were too late.

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And Your Honor may recall, we had an excessive back and forth relating to the Joint Case Conference Report. The parties agreed that a 45-day turn around on Requests for Production is what they both agreed to.

And you know, unfortunately, United decided to file -- or to serve these Requests for Production, this third set, after the timeline that would have made a response required under that agreement.

I also think it's important that Your Honor understand that timeline is that United did issue a Request for Production earlier with respect to commercial level market data. We did respond to that.

At no time does United raise a meet and confer, or ask for

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a meet and confer, raising any of these service-by-service or unit-level issues with respect to that market file.

They only started to complain about it when they wanted to issue 156, which, as Your Honor can see, requests information that is well outside the bounds of this case; asks for, again, in-network commercial payor information; asks for Medicare, managed Medicaid, traditional Medicare, traditional Medicaid, self-pay uninsured, workers compensation, TRICARE, and automobile insurance, which is -- has all at this point been deemed to be outside of the relevant bounds of this case.

And so essentially what they're trying to do is use an earlier request for production as a way to try and push through these last ones that were served untimely.

With respect to the final, No. 158, with respect to charge masters, Your Honor -- again, Your Honor has had occasion to just talk about charge masters with the parties. We did produce charge masters for the relevant time, and those have been long produced.

What United is seeking is charge masters relating to claims from 2013 to 2017. A lot of that has to do with corporate structure and acquisition documents, again, which would fall within the auspices of the Court's earlier orders.

And so, Your Honor, we respectfully think Judge Wall mindfully and completely looked at this issue and determined that the Health Care Providers sufficiently provided the information as it relates to those issues as to market file. And he correctly identified

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the procedural issues that United has, as well as the substantive issues with those requests.

And we would ask that you affirm and adopt his report, Your Honor.

Thank you.

THE COURT: Thank you.

And the reply, please.

MR. SMITH: Thank you, Your Honor.

Let me just address the unit-level data first. Again, this is complex. This is why we need experts to look at this. I don't think that we, as law school graduates, necessarily understand the medical billing the way that our experts do. That's why it takes time to review this.

But just on this question of the multiple units, as I understand it -- which I concede I don't understand it very well -- but as I understand it that there are certain types of codes that come in units of one; there are other codes that come in units of more than one. It's not necessarily anesthesia; it's not necessarily a dose. It could be a service that's provided in multiple units.

So there's the E&M codes, the evaluation and management codes. Those are typically in units of one, as we point out on page 8 and 9 of our -- I believe it's our reply brief in front of Judge Wall. But it -- but there are other codes, non-E&M codes that can have multiple units. So that's why we require the unit-level data.

As to the actual relevance, again, I focused my argument

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today not on the charge masters, not on the issues of relating to noncommercial payors that this Court has deemed irrelevant. I'm focused just on the issue that even Judge Wall said constitutes relevant commercial market data.

He said, to the extent that they -- that we request relevant market data, which we did -- that the Special Master simply determined that what Plaintiffs had already provided was sufficient.

It isn't sufficient. I don't think that the -- I didn't hear any presentation that the eight-day delay caused any prejudice to Plaintiffs. And it would be prejudicial to Defendants who are unable to determine what these aggregate lines, what the services were, so that we can actually answer the central question, in this case, which is, What is a reasonable rate of reimbursement for a particular service?

Thank you, Your Honor.

THE COURT: Thank you.

This is the objection of the defendant to a Report and Recommendation of the Special Master denying the defendant's Motion to Compel Answers 156, 157, and 158 of the defendant's third set of interrogatories.

I'm going to overrule the objection, adopt and affirm the Report and Recommendation that is it is not clearly erroneous and arbitrary or capricious.

I do agree with the plaintiff that the Special Master got it right, and I would have ruled consistently with the way he did with

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regard to both procedure and substance.

These questions go to how the plaintiff sets its rates, the plaintiff's billing charges. And the information could be gleaned by what was provided service by -- at the service-by-service level. It just -- the questions went too far and farther than -- and I've been hopefully consistent with regard to what the scope of discovery of the defendant could do.

So for those reasons, I will also overrule the objection here.

I'll task the plaintiffs with preparing orders from today's hearing.

You'll have the ability to review and approve. I don't accept competing orders, so -- but if you have an issue with the form of the order, file an objection. And I'll take it from there.

Anything else to take up today?

MR. SMITH: Thank you, Your Honor.

THE COURT: Thank you, both.

MR. POLSENBERG: Thank you, Your Honor.

MS. PERACH: Thank you, Your Honor.

THE COURT: Thank you again for your professional courtesy last week. We ended up in a mistrial for a jury trial last week.

So I've now prepared three times for these.

Thanks, everybody.

MS. GALLAGHER: We appreciate it, Your Honor. Thank

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you.

[Proceeding concluded at 2:55 p.m.]

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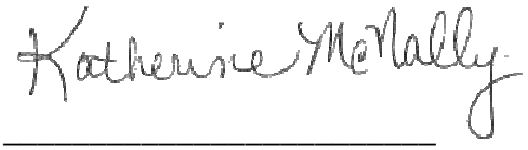
ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video proceedings in the above-entitled case to the best of my ability.



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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

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

PLAINTIFFS' OPPOSITION TO UNITED'S MOTION FOR ORDER TO SHOW CAUSE WHY PLAINTIFFS SHOULD NOT BE HELD IN CONTEMPT AND SANCTIONED FOR ALLEGEDLY VIOLATING PROTECTIVE ORDER

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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.

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") oppose 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") Motion For Order To Show Cause Why Plaintiffs Should Not Be Held In Contempt And Sanctioned For Allegedly Violating Protective Order ("Motion"). This opposition to the Motion ("Opposition") 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.

Dated this 24th day of August, 2021.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

United's approach to the Court's rulings has been decidedly consistent throughout the entirety of this case. Beginning day one whenever the Court has made a decision on a disputed issue, United has taken the position that the Court's decisions are meaningless, mere guidelines or suggestions rather than orders requiring United's compliance, or should not be enforced until the Health Care Providers complain. This has been true across the board, from the Court's decisions declining to find ERISA preemption, to the Court's repeated decisions regarding the scope of discovery, to the Court's decisions concerning United's lack of compliance with its discovery obligations, and so on. Never in the undersigned counsel's experience has a sophisticated litigant been so disrespectful of a district court's or special master's decisions.

The central issue presented by United's Motion is whether the Court's Decision issued and announced on the record at the July 29, 2021 hearing had any meaning or effect. United contends the Court's July 29 Decision which adopted and embraced Report and Recommendation #5 denying confidentiality to the at-issue documents meant nothing. To reach its conclusion United (1) misrepresents or misinterprets relevant Nevada Supreme Court authority on the issue of oral district court orders; (2) misrepresents the actual language from the Court's June 24, 2020 Stipulated Confidentiality and Protective Order (Protective Order) (Exhibit 1 attached hereto), falsely contending confidentiality attached until issuance of a **written** order; (3) defies standard rules of interpretation governing agreements like the one that lead to the Protective Order to suggest requirements not agreed to by the parties; (4) ignored the Court's Department Guidelines dealing with submission of written orders by suggesting United was entitled to submit argument and ask the Court to reconsider its July 29 Decision before issuance of a written order; (5) ignored the protections available to it and previously practiced by its Nevada counsel which would have prevented any of United's claimed prejudice; (6) presents a suspicious timeline that suggests it fabricated its claim

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of prejudice because it was well aware of the Health Care Providers' intent to disclose the obviously public at-issue documents and yet did absolutely nothing to prevent any such disclosure even though it had numerous opportunities to do so; and finally (7) asks the Court to endorse United's previous efforts of practicing a fraud upon Congress and various regulatory organizations concerning the "No Surprise Act", a balance billing piece of legislation adverse to emergency room providers. Each of these points is addressed below. Each individually—but certainly collectively—demonstrate why United's Motion should be denied.

II. THE COURT'S JULY 29, 2021 DECISION ON REPORT AND RECOMMENDATION #5 WAS ENFORCEABLE; THE HEALTH CARE PROVIDERS DID NOT VIOLATE THE PROTECTIVE ORDER.

The central issue on United's Motion is whether the Court's July 29 Decision had the effect of stripping confidentiality from the documents at-issue ("the Yale Study documents") after United's improper designations. Because the Court's answer to that question was "yes", the Health Care Providers did not violate the Protective Order by releasing the public documents after announcement and issuance of the July 29 Decision.

United begins its contrary position by ignoring the actual language of the Protective Order - - the very order United accuses the Health Care Providers of violating. That order was heavily negotiated and wordsmithed extensively by United before being entered as an order of this Court. Within that stipulated order, the parties did not agree that confidentiality continues until the Court issues a **written order** on a motion to preserve confidentiality. Instead, the parties expressly agreed and the Court expressly ordered that "[t]he protection afforded by [the] Protective Order shall continue until the court makes a **decision** on the motion." Protective Order ¶ 9.[1] United made a motion seeking to preserve its improperly claimed confidentiality treatment for the Yale Study documents. On July 29, 2021, the Court made a decision on that motion. The decision

[1] Contrast that language to other provisions of paragraph 9, in which the parties expressly negotiated for the requirement of a "written agreement," but NOT a written order. Clearly, when United sought an in-writing requirement, it knew how to draft one.

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made by the Court removed any and all of United's improperly assigned confidentiality treatment for the Yale Study documents. *See* Exhibit 2, July 29, 2021 Transcript.

Next, in each and every one of the cases cited by United wherein the Nevada Supreme Court denied the effectiveness of an oral order, the case involved an order or **judgment** within the scope of **NRCP 58(c)**, not a case management decision. *See Div. of Child & Fam. Serv., Dept. of Hum. Res., State of Nevada v. Eighth Jud. Dist. Co.,* 120 Nev. 445, 92 P.3d 1239 (2004) (citing to NRCP 58(c), oral **judgment** of contempt not enforceable since "[t]he court remains free to reconsider the decision and issue a different written **judgment**."); *Nalder v. Eighth Jud. Dist. Co.*, 136 Nev. 200, 462 P.3d 677 (2020) (examining relief from a **judgment** under NRCP 60(a)); *Rust v. Clark Cnty Sch. Dist.*, 103 Nev. 686, 747 P.2d 1380 (1987) (citing to NRCP 58(c), court held that an oral pronouncement of **judgment** is not valid for any purpose, therefore, only written **judgment** has any affect and only written judgment may be appealed); *Tener v. Babcock*, 97 Nev. 369, 632 P.2d 1140 (1981)("Under the statutory provisions for writs of habeas corpus, the discharge of the petitioner is a **judgment**, NRS 34.570, which must be memorialized in a **judgment**. Accordingly, we hold that until a written order discharging the habeas corpus petitioner is signed by the judge and filed with the clerk, s*ee* NRCP 58(c), the Eureka Bank rule does not apply[.]"); *Lagrange Construction v. Del Webb Corp.*, 83 Nev. 524, 435 P.2d 515 (1967)(relying upon NRCP 58(c), written judgment must be filed with court before a judge leaves office to be timely); *cf. Millen v. Eighth Jud. Dist. Co.*, 122 Nev. 1245, 148 P.3d 694 (2006) (oral pronouncement of attorney disqualification was enforceable since it concerned case management).

The policy concerns underlying United's cited cases do not apply here. NRCP 58(c) specifically requires a **judgment** to be signed by the district court and entered by the clerk and specifically notes the order is not effective until entered. *See* NRCP 58(b) ("all judgments must be approved and signed by the court and filed with the clerk"…and "the court should designate a party to serve written notice of entry of judgment") and (c) ("no judgment is effective for any purpose until it is entered."). The requirement of written

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order entering **judgment** makes sense since so many jurisdictional timeframes are triggered from notice of entry of judgment or service of notice of entry of judgment, and any other rule would wreak jurisdictional havoc among the various levels of the judiciary. *Rust*, 103 Nev. at 688, 747 P.2d at 1382; *see also* NRCP 59, 60, 62, NRAP 4(a). Moreover, each and every one of United's cited cases also notes that oral orders are enforceable for dealing with "case management issues". *See, for example, Nalder*, 136 Nev. at 201 ("[o]ral orders dealing with . . . case management issues, . . . are valid and enforceable."); *Div. of Child & Fam. Serv.*, 120 Nev. at 454 (stating that oral court orders pertaining to case management are enforceable and limiting holding concerning a written order to "**dispositional** court orders . . . [that] deal with the procedural posture or merits" (emphasis added)).

The parties in this case agreed upon a case management process for dealing with confidentiality designations. That case management process did not permit a party to enjoy confidentiality protections **after a decision was made by the Court**. The Court made its **decision** on July 29, 2021 at the hearing. If United wished to contest that **decision**, then it should have either made an oral motion for stay (even a temporary stay pending submission of a written motion) at the hearing or an immediate written motion for stay requesting resolution on an order shortening time. United did not make either motion.

III. UNITED MISREPRESENTS THE ACTUAL LANGUAGE FROM THE COURT'S PROTECTIVE ORDER.

United contends the Protective Order - - which United accuses the Health Care Providers of violating - - expressly requires issuance of a written order before confidentiality falls away. Motion 4:23-26. That contention is false.

Paragraph 9 of the Protective Order is the operative paragraph for review. It reads in full:

> 9. Burden of Proof and Challenges to Confidential Information. The party designating information as Confidential Information bears the burden of establishing confidentiality. Nothing in this Protective Order shall constitute a

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> waiver of any Party's right to object to the designation or non-designation of a particular document as "CONFIDENTIAL" or "ATTORNEYS' EYES ONLY." 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**. In the event that a Party disagrees with a Party's designation of any document or information as Confidential or Attorneys' Eyes Only, the objecting Party shall advise counsel for the designating Party, in writing, of the objection and identify the document or item with sufficient specificity to permit identification. Within seven (7) days of receiving the objection, the designating Party shall advise whether the designating Party will change the designation of the document or item. If this cannot be resolved between the Parties, after the expiration of seven (7) days following the service of an objection, but within twenty-one (21) days of service of the written objection, the designating Party may make a motion to the court seeking to preserve the confidentiality designation. It shall be the burden of the designating Party to show why such information is entitled to confidential treatment. **The protection afforded by this Protective Order shall continue until the court makes a decision on the motion**. Failure of the designating Party to file a motion within the 21-day period shall be deemed to constitute a waiver of that Party's confidentiality designation to material identified in the objecting Party's written objection.

The first set of bolded language is what United relies upon for its false contention that a written order is expressly required by the Protective Order before confidentiality falls away. Contrary to United's contention, in section (a) the parties negotiated for the requirement of an agreement between counsel to be reduced to a writing and only for agreements between counsel. Not surprisingly, verbal agreements between counsel are nearly always fraught with interpretation or plagued by memory failures or disputed as to intended consequences and therefore why writings are typically required. *See* DCR 16.

In contrast, section (b) of paragraph 9, which speaks to Court rulings, has no similar writing requirement. This makes sense. Court orders and decisions are backed by a transcript or JAV recording, and therefore rendering a writing is unnecessary to make them enforceable. *Id.* Further supporting this common sense reading, later in paragraph 9 (to the second set of bolded language) the parties made clear their understanding of when a claim of confidentiality was lifted: "The protection afforded by the Protective Order shall continue until the court makes a **decision** on the motion."

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Simply put, a court decision did not require a written order.

On July 29 the Court made a Decision on United's motion seeking confidentiality for the Yale Study documents. The Court's July 29 Decision rejected United's improper confidentiality designations for those documents. A simple application of the plain language of the Protective Order made manifest that the Yale Study documents no longer enjoyed confidentiality protection from the public.

IV. STANDARD RULES OF INTERPRETATION DICTATE THAT THE PROTECTIVE ORDER DID NOT REQUIRE A WRITTEN ORDER, BUT A DECISION FROM THE COURT.

The Protective Order was the product of a heavily negotiated agreement between the Health Care Providers and United. Standard principles of contract interpretation requires that it be interpreted based upon its plain language. *Sheehan & Sheehan v. Nelson Malley & Co.,* 121 Nev. 482 , 117 P.3d 219 (2005). The plain language and the punctuation make clear section (a) differed from section (b). Section (a) required a writing. Section (b) did not.

Also, the standard canon of construction, *expressio* (or *inclusio*) *unius est exclusio alterius),* which means the expression of one thing suggests the exclusion of others, applies perforce here. *See, for example, Bates v. United States*, 522 U.S. 23, 29-30 (1997) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion or exclusion.")(quotation marks and brackets omitted); *cf. Barry Levinson PC v. Milko*, 124 Nev. 355, 184 P.3d. 378 (2008).

In the Protective Order, the parties negotiated for the requirement of a writing for agreements between counsel in section (a), but declined to include such a requirement in section (b) involving court decisions. No matter of advocacy can graft that written requirement on the Protective Order concerning the Court's decision made on July 29, and therefore the Court should decline to find one, especially in the context of an allegation of contempt. *See, for example, Div. of Child & Fam. Services, Dept. of Human*

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Resources v. Eighth Jud. Dist., 120 Nev. 445, 92 P.3d 1239 (2004) ("The need for clarity and lack of ambiguity are especially acute in the contempt context. An order on which a judgment of contempt is based must be clear and unambiguous[.]") (quotations and citations omitted).

V. THE COURT'S DEPARTMENT GUIDELINES DO NOT ALLOW UNITED TO ATTEMPT TO CHANGE A DECISION THROUGH SUBMISSION OF OBJECTIONS TO A PROPOSED ORDER.

Curiously, United argues that the reason why the Court's July 29 Decision meant nothing is because United could ask the Court to reconsider the July 29 Decision through the process of submitting proposed written orders. Motion 6: 4-14. Such a position flatly contradicts the express language of the Court's Department Guidelines, which state in full:

- UNLESS OTHERWISE NOTED IN COURT, THE PREVAILING PARTY IS TO PREPARE THE ORDER. Department 27 requires proposed orders to be submitted to chambers within ten (10) days of notification of the ruling, pursuant to EDCR 7.21. Counsel designated to prepare the order is encouraged to provide a draft to opposing counsel(s), allowing at least a full day for review and comment, before delivery to the Court. Non-drafting counsel is not required to sign the order approved as to form prior to submission, unless the Court directs otherwise.
- **PLEASE NOTE – Any order that is inconsistent with the oral ruling of the Court or the Court Minutes will be returned unsigned for correction or will be corrected via interlineation**. Counsel should notify the Court of any perceived error in the Court Minutes by Motion pursuant to NRCP 60(a).
- All stipulations and orders for dismissal must comply with EDCR 2.75 or they will be returned.

Contested Orders

- In District Court Department 27, when counsel are unable to agree on the language of an order, counsel should present their competing positions in a word document hand delivered to the law clerk **with no additional argument or explanation**, merely stating that there is a "disagreement as to the wording of the Order," identifying the wording that is believed to be wrong, and directing the Court to the proposed alternate language. If a redline copy is available counsel may also submit that document. **Generally the Court will enter an order after reviewing the competing versions and any record of the hearing**. If after considering the proposed orders the court believes additional

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input from counsel is appropriate, the court may set a conference call or hearing to obtain additional information or argument from counsel.

- **Letters to the Court containing substantive argument on the merits of a contested issue are disfavored, viewed as improper ex parte communications, even if copied to opposing counsel, and will generally be disregarded**.
- Department 27 will not accept competing orders.
- In District Court Department 27, when counsel cannot agree on the language of an order, the Court reviews the competing orders and does one of the following:
  - a. Signs one
  - b. Interlineates the appropriate language and signs one, or
  - c. Conducts a telephonic hearing on the record.

(Emphasis added). Simply put, the Court's guidelines did not allow United to advocate for a change in Court's July 29 Decision. In fact, these guidelines make clear the written order may not differ from the Court's decision made and announced at the hearing of the matter, and the parties may not advocate for a different result after the Court's decision is announced. If such were permitted, then the Court's guidelines would conflict with other rules of procedure in this district, namely EDCR 2.24 (concerning rehearing of motions). In short, the July 29 Decision was final when issued from the bench.

VI. UNITED FAILED TO PROTECT ITSELF FROM ITS CLAIMED PREJUDICE.

United contends it was denied an opportunity to seek a stay or lodge a writ with the Nevada Supreme Court. Motion p. 10-12. That argument is specious. After the Court announced it July 29 Decision, if United wished to contest that Decision via writ, then United should have either made an oral motion to stay (even a temporary stay pending submission of a written motion) at the hearing or filed an immediate written motion for stay requesting resolution on an order shortening time.[2]

Making an oral motion for stay is not just best practice in our jurisdiction, but one with which Nevada counsel for United is well familiar. *See Quinn v. Eighth Jud. Dist. Court*, Supreme Court Case No. 74519, Petition for Writ of Prohibition or in the

[2] The Health Care Providers were fully prepared for United to make an oral motion for stay at the July 29 hearing and came prepared to respond.

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alternative, Writ of Mandamus, Motion to Extend District Court Stay Pending Writ Petition filed Nov. 21, 2017, fn. 3 (explaining how an oral motion to stay had been made in the district court and that "[t]he district court has not yet entered a [written] order on its ruling compelling the attorney depositions; however, Ms. Sinatra's counsel has submitted a proposed written order to the district court."). *See also In re Goldentree*, case no. A-16-742507-B, Dist. Ct. Clark County, Minutes May 3, 2018, J. Hardy presiding (district court had only issued oral decision on objection when written motion to stay decision on objection also decided).

VII. UNITED'S CLAIM OF PREJUDICE DOES NOT RING TRUE.

A review of the timeline of relevant events reveals United's Motion is based upon a fabricated claim of prejudice. United had multiple opportunities to seek relief from the Court clarifying that United intended to seek writ relief on the July 29 Decision and therefore a stay (temporary or otherwise) was necessary to foreclose the Health Care Providers from disclosing to the public the Yale Study documents.

- March 8, 2021 (DEF097902-100331) and March 18, 2021 (DEF100332-108805) - United produces in response to Health Care Providers' document requests the Yale Study Documents with AEO designation.
- March 25, 2021 - Health Care Providers challenge the AEO designation, explaining United has no reasonable basis for such protection.
- April 15, 2021 - United moves for a protective order to maintain AEO protection for the Yale Study documents.
- April 29, 2021 - Health Care Providers oppose that motion making clear the Yale Study documents are important to a regulatory process ongoing at the federal level for which the documents are highly relevant. Health Care Providers further oppose that motion making it clear they intend to immediately release the Yale Study documents if/when they are removed from confidentiality confines.
- May 10, 2021 - Special Master Wall holds a hearing on United's motion for protective order. During that hearing Special Master Wall inquires about a "data

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use agreement" between United and the author of the Yale Study documents. Health Care Providers make clear they have not received such an agreement from United. Health Care Providers also make clear they intend to release the documents publicly as soon as they are able.

- May 17, 2021 - Special Master Wall issues Report and Recommendation #5 recommending that the Yale Study documents were not entitled to confidentiality protection.
- June 1, 2021 - United files an objection to Report and Recommendation #5, to which the Health Care Providers respond. Once again the Health Care Providers make clear they intend to release the documents as soon as practical if the confidentiality confines are lifted.
- June 1, 2021 – July 2, 2021 – United manufacturers a delay in resolution of its objection to Report and Recommendation #5 by first not asking for a hearing, then submitting an ineffective request for a hearing, before properly requesting a hearing.
- July 29, 2021–The Court holds a hearing on United's objection to Report and Recommendation #5 and issues its Decision removing confidentiality confines for the Yale Study documents.
- August 2, 2021–A reporter reaches out to United via telephone asking about the Yale Study documents received from Health Care Providers.
- August 2, 2021 – A reporter reaches out to United via email clearly identifying the Yale Study documents she had received.
- August 2, 3, 4, 5, 2021–A reporter gives United ample opportunity to respond to her inquires and informs United that an article will be published making reference to the Yale Study documents.
- August 5, 2021–A reporter informs United specifically from who and when she received the Yale Study documents.
- August 10, 2021–An article is published in which it is clear that United has

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provided input to the reporter, including providing her with the data use agreement between United and the author of the Yale Study documents.

- August 10, 2021 at 9:59 p.m. - - United files its Motion.

See Motion, Exhibit A.

Reviewing that timeline begs various and multiple questions: Why did United wait so long to raise any issue with the Health Care Providers' disclosure of the Yale Study documents? Why didn't United reach out to the Health Care Providers, at minimum, on August 2 informing them of United's claimed position on enforcement of the July 29 Decision and either ask the Health Care Providers to withdraw the documents or ask the reporter not to use them? Why didn't United inform the Health Care Providers on August 2 that it intended to bring a writ on and seek a stay of the Court's July 29 Decision and ask them to withdraw the documents from the reporter? Why didn't United seek emergency relief from the Court on August 2 or at any time thereafter before publication? Why did United participate with the reporter from August 2 to August 9 in supplying information and quotes for the article published on August 10 without even making a request to the reporter not to use the documents? Why didn't United reach out to the publisher advising him/her that a reporter was intending to use allegedly ill-gotten information, if that was really its position?

In its Motion, United proffered a declaration from Abe Smith who claimed that United was "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 and Recommendation #5, if entered." United's counsel offers no clarification or explanation of what "actively considering" means. How much time did Mr. Smith bill to such consideration? Had Mr. Smith begun to draft a writ petition? Had Mr. Smith begun to draft a motion to stay? Had Mr. Smith reviewed the language of the Protective Order, the Court's Guidelines, the Nevada cases examining the enforceability of decisions made by district courts after briefing and hearing on the merits? The lack of detail to the description of what Mr. Smith did or did not do offers absolutely no help to the Court as it examines

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the legitimacy of United's claim of prejudice.

Moreover, United's request for relief is telling on the issue of its claimed prejudice. United acknowledges that no sanction similar to dismissal is appropriate. Motion 12:19-26. United makes no claim of business/reputational harm or business/reputational loss. *Id.* United only seeks to recover the attorneys fees it incurred in bringing its ill-conceived Motion. *Id.* In other words, all harm alleged by United for which a sanction of fees is requested has been self-inflicted.

VIII. THIS MOTION IS SIMPLY THE LATEST OF UNITED'S ATTEMPTS TO CONSCRIPT THE COURT INTO ENDORSING THE FRAUD UNITED IS PRACTICING ON CONGRESS AND VARIOUS REGULATORY BODIES.

The Health Care Providers do not intend to reargue the merits of the underlying Report and Recommendation #5 or the objection made by United and decided upon by the Court on July 29. However, some context is important to understand United's apparent goal in bringing its ill-conceived Motion. United's goal, it appears, is to deflect attention away from United and its fraud and onto a false claim of misconduct by the Health Care Providers.

On five separate occasions the Health Care Providers have been forced to challenge the improper designation of documents as Attorneys Eyes Only by United. On each occasion the Court has either decided that United did improperly designate or United has withdrawn the confidentiality designation in response to the challenge. The recent motion practice that lead to the Court's July 29 Decision concerned the Yale Study documents. The Yale Study purported to address third party pricing and reimbursement rates. The published study was an integral part of United's lobbying efforts to persuade legislatures —including the US Congress—to enact laws unfavorable to emergency room providers, including the recent "No Surprises Act". The study has also been cited by United in various litigations brought against United. The study posits that surprise out-of-network billing undercuts the functioning of health care markets and represents itself as a neutral academic analysis from a respected institution. Using publication of the Yale Study to garner political momentum, United lobbied for legislation outlawing

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"balanced billing" complimented with a federal rule to dictate favorable-to-United rates for emergency room providers, like the Health Care Providers. In other words, United used its self-conscripted and personally edited Yale Study to cast blame on emergency room providers in order to obtain legislative protection from balance billing which was the Health Care Providers only safety net against the drastic rate slashing practiced by United without acknowledging to the public or Congress any of its direct involvement in the study. Prohibition on balance billing is critically important to United's shared savings program wherein it earns revenue based on the difference between a provider's billed charge and the slashed reimbursement rate. United's shared savings program is an important component of the Health Care Providers' claims against United alleging deceptive practices.

Specifically, discovery in this case revealed that United fed the author of the Yale study his data, had a hand in drafting the study, and made strategic choices about referencing TeamHealth. Among other things, the Yale Study documents show:

a. United's desire to highlight the "positive early impact" of state-level legislation preventing balanced billing. (See Yale Study Documents, attached as Exhibit 1, at DEF101727.)

b. United's sharing of "collective feedback" with the author of the study and the mutual desire to ensure the study garnered as much news attention as possible. (See *id.* at DEF101728-29.)

c. United literally making substantive edits to the Yale Study in track changes. (*Id.* at DEF101825-27.)

d. United is the only source of data for the Yale Study. (*Id.* at DEF108336.)

e. United's desire to play a hidden, behind-the-scenes role in the study. (*Id.* at DEF102978.)

f. United's internal decision-making about whether to name Team Health in the Yale Study. (*Id.* at DEF108709.)

g. Proposals for "solutions" to the "problem" from Dan Rosenthal, President

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of UnitedHealthcare Networks (*Id.* at DEF108710.)

Against this backdrop it is clear why United hoped its game of fraud being practiced on the public would remain shrouded in darkness. And now that the Court has called United's bluff, it now hopes to change the public dialogue into one accusing the Health Care Providers of doing something wrongful. In other words, United's motto is the best defense is a good offense, but they need the Court to play quarterback to accomplish that re-direct. Respectfully, United's ruse should be shut down, the general public should be entitled to know of their game, and more important, the folks presently making regulatory recommendations at the federal level to enforce the No Surprises Act should be allowed to know the truth behind the Yale Study before those regulations are finalized. Health Care Providers simply sought to reveal the truth and engaged in no wrongdoing when they did so.

IX. CONCLUSION

Based upon the foregoing, the Health Care Providers respectfully request that the Court deny United's Motion.

Dated this 24th 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 24th day of August, 2021, I caused a true and correct copy of the foregoing 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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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; 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.: XXVII **STIPULATED CONFIDENTIALITY AND PROTECTIVE ORDER**

Plaintiffs Fremont Emergency Services (Mandavia), Ltd; Team Physicians of Nevada-Mandavia, P.C.; Crum, Stefanko and Jones, Ltd. dba Ruby Crest Emergency Medicine ("Plaintiffs") and Defendants UnitedHealth Group, Inc.; United HealthCare Insurance Company;

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United HealthCare Services, Inc.; UMR, Inc.; Oxford Health Plans, Inc.; Sierra Health and Life Insurance Company, Inc.; Sierra Health-Care Options, Inc. and Health Plan of Nevada, Inc. (collectively "Defendants") referred to individually as a "Party" or collectively as the "Parties," stipulate and agree as follows:

1. Scope and Applicability. Certain documents or electronically stored information discoverable under NRCP 26(b)(1) may contain confidential information, as described herein, the disclosure of which may be prejudicial to the interests of a Party, and non-party individuals' health information deemed private under state and federal law. Such information is referred to herein as "Confidential Information." The Parties may, however, produce certain Confidential Information subject to the terms of this agreement. This Stipulated Confidentiality and Protective Order ("Protective Order") is applicable to the Parties, any additional parties joined in this litigation, and any third parties subject to this Protective Order and/or otherwise agreeing to be bound by this Protective Order.

2. Designation of Information. Any document or electronically stored information produced in discovery may be designated as Confidential Information by marking it as "CONFIDENTIAL" or "ATTORNEYS' EYES ONLY" at the time of production. Such designation shall be made at the time that copies are furnished to a party conducting discovery, or when such documents are otherwise disclosed. Any such designation that is inadvertently omitted during production may be corrected by prompt written notification to all counsel of record.

a. A Party may only designate as "CONFIDENTIAL" any document or any portion of a document, and any other thing, material, testimony, or other information, that it reasonably and in good faith believes contains or reflects: (a) proprietary, business sensitive, or confidential information; (b) information that should otherwise be subject to confidential treatment pursuant to applicable federal and/or state law; or (c) Protected Health Information, Patient Identifying Information, or other HIPAA-governed information.

b. A Party may only designate as "ATTORNEYS' EYES ONLY" any document or portion of a document, and any other thing, material, testimony, or other

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information, that it reasonably and in good faith believes contains trade secrets or is of such highly competitive or commercially sensitive proprietary and non-public information that would significantly harm business advantages of the producing or designating Party or information concerning third-party pricing and/or reimbursement rates (i.e., reimbursement rates that providers other than Plaintiffs have charged or accepted and that insurers and payors other than the Defendants have paid for claims similar to those at issue in this case) and that disclosure of such information could reasonably be expected to be detrimental to the producing or designating Party's interests.

c. "CONFIDENTIAL" or "ATTORNEYS' EYES ONLY" information and/or materials shall not include information that either:

i. is in the public domain at the time of disclosure through no act, or failure to act, by or on behalf of the recipient, its counsel, its expert(s) or other consultant(s), or any other person to whom disclosure was authorized pursuant to this Protective Order, as evidenced by a written document or other competent evidence;

ii. after disclosure, becomes part of the public domain through no act, or failure to act, by or on behalf of the recipient, its counsel, its expert(s) or other consultant(s), or any other person to whom disclosure was authorized pursuant to this Protective Order, as evidenced by a written document or other competent evidence;

iii. the receiving Party can show by written document or other competent evidence was already known or in its rightful and lawful possession at the time of disclosure; or

iv. lawfully comes into the recipient's possession subsequent to the time of disclosure from another source without restriction as to disclosure, provided such third party has the right to make the disclosure to the receiving Party.

3. Designation of Depositions. The Parties may designate information disclosed at a deposition as Confidential Information by indicating on the record at the deposition that a specific portion of testimony, or any exhibit identified during a deposition, is so designated and subject to the terms of this Protective Order or, alternatively, any Party may so designate a

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portion of the deposition testimony or exhibit within 30 days of receipt of the deposition transcript by so stating in writing to opposing counsel. If designated during the deposition, the court reporter shall stamp the portions of deposition testimony or any exhibit designated as containing Confidential Information as "CONFIDENTIAL" or "ATTORNEYS' EYES ONLY," and access thereto shall be limited as provided herein. Following any deposition, both Parties agree to treat the entire deposition transcript and exhibits as "ATTORNEYS' EYES ONLY" until the 30-day window for designation following receipt of the transcript has passed. Confidential Information shall not lose its character because it is used as an exhibit to a deposition, regardless of whether the deposition or deposition transcript itself is later designated, in whole or part, as "CONFIDENTIAL INFORMATION" or "ATTORNEYS' EYES ONLY."

Documents or information designated as "CONFIDENTIAL" or "ATTORNEYS' EYES ONLY" may be used or disclosed in a deposition and marked as deposition exhibits; the Parties agree that, with the exception of the witness and court reporter, the only persons permitted under this Protective Order to be present during the disclosure or use of designated documents or information during a deposition, whether "CONFIDENTIAL" pursuant to paragraph 10 or "ATTORNEYS' EYES ONLY" pursuant to paragraph 11, as applicable, are those permitted pursuant to the terms of this Protective Order to review the information or material sought to be used. Absent an agreement between the Parties, if all persons present at the deposition are not permitted under this Protective Order to review the information or material sought to be used, any person not so permitted shall be instructed by the designating party to leave the room during the period(s) in which the "CONFIDENTIAL" and/or "ATTORNEYS' EYES ONLY" documents or information is being used and/or discussed, to the extent reasonably possible. During the course of a deposition, counsel may anticipate such disclosure and designate in advance certain deposition exhibits, deposition testimony and portions of any deposition transcript as "CONFIDENTIAL" or "ATTORNEYS' EYES ONLY."

4. In advance of a hearing in this matter, the Parties also agree to confer in good faith to reach an agreement regarding the appropriate protections in the event one or both parties seek to use "CONFIDENTIAL" or "ATTORNEYS' EYES ONLY" documents or information at

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the hearing. Nothing in this Order shall limit a Party's ability to use its own documents or information, however designated, at a hearing in this litigation or in any other proceeding, subject to the court's determination of the admissibility of the documents or information.

5. Protected Health Information. Additionally, certain Confidential Information may be Protected Health Information ("PHI") as defined by the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") and the regulations promulgated thereunder at 45 CFR § 160.103. Without limiting the generality of the foregoing, "PHI" includes, but is not limited to, health information, including demographic information, relating to either, (a) the past, present or future physical or mental condition of an individual, (b) the provision of care to an individual, or (c) the payment for care provided to an individual, which identifies the individual or which reasonably could be expected to identify an individual. All "covered entities" (as defined by 45 § CFR 160.103) are hereby authorized to disclose PHI to all attorneys in this litigation. Subject to the rules of procedure governing this litigation, and without prejudice to any Party's objection except as otherwise provided herein, the Parties are authorized to receive, subpoena, transmit, or disclose PHI relevant to the medical claims at issue in this litigation and discoverable under NRCP 26(b)(1), subject to all terms of this Protective Order. All PHI disclosed under this Protective Order must be designated as Confidential Information under paragraphs 2 and 3 above. To the extent documents or information produced in this litigation have already been exchanged or will again be exchanged between the Parties in the normal course of business, treatment of such documents prior to or after the conclusion of this litigation shall be governed by each Party's legal obligations.

6. Specific Provisions Concerning Disclosure of PHI. When PHI is disclosed between the Parties as authorized by this Protective Order, the names, dates of birth and Social Security numbers of any individuals whose medical claims are not at issue in this lawsuit and who are otherwise identified in the PHI may be redacted to protect the identity of the patients, if the disclosing Party believes that is warranted under the particular circumstances. Upon receipt of any PHI disclosed between the Parties during the course of this litigation, the receiving Party shall take all reasonable measures necessary for protecting the PHI from unauthorized disclosure

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as required under both state and federal law including, but not limited to, HIPAA. Such measures may include filing PHI under seal and redacting patient names, dates of birth and Social Security numbers from documents containing PHI.

7. Non-Waiver of Privilege. The production of documents and information shall not constitute a waiver in this litigation, or any other litigation, matter or proceeding, of any privilege (including, but not limited to, the attorney-client privilege, attorney work product privilege or common defense privilege) applicable to the produced materials or for any other privileged or protected materials containing the same or similar subject matter. The fact of production of privileged information or documents by any producing Party in this litigation shall not be used as a basis for arguing that a claim of privilege of any kind has been waived in any other proceeding. Without limiting the foregoing, this Protective Order shall not affect the Parties' legal rights to assert privilege claims over documents in any other proceeding.

8. Exercise of Restraint and Care in Designating Material for Protection.

a. Each party or non-party that designates information or items for protection under this Order (the "designating Party") must take care to limit any such designation to specific material that qualifies under the appropriate standards. To the extent it is practical to do so, the designating Party must designate for protection only those parts of material, documents, items, or oral or written communications that qualify – so that other portions of the material, documents, items, or communications for which protection is not warranted are not swept unjustifiably within the ambit of this Protective Order.

b. If it comes to a designating Party's attention that information or items that it designated for protection do not qualify for protection at all or do not qualify for the level of protection initially asserted, that designating Party must promptly notify all other parties that it is withdrawing the mistaken designation.

9. Burden of Proof and Challenges to Confidential Information. The party designating information as Confidential Information bears the burden of establishing confidentiality. Nothing in this Protective Order shall constitute a waiver of any Party's right to object to the designation or non-designation of a particular document as "CONFIDENTIAL" or

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"ATTORNEYS' EYES ONLY." 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. In the event that a Party disagrees with a Party's designation of any document or information as Confidential or Attorneys' Eyes Only, the objecting Party shall advise counsel for the designating Party, in writing, of the objection and identify the document or item with sufficient specificity to permit identification. Within seven (7) days of receiving the objection, the designating Party shall advise whether the designating Party will change the designation of the document or item. If this cannot be resolved between the Parties, after the expiration of seven (7) days following the service of an objection, but within twenty-one (21) days of service of the written objection, the designating Party may make a motion to the court seeking to preserve the confidentiality designation. It shall be the burden of the designating Party to show why such information is entitled to confidential treatment. The protection afforded by this Protective Order shall continue until the court makes a decision on the motion. Failure of the designating Party to file a motion within the 21-day period shall be deemed to constitute a waiver of that Party's confidentiality designation to material identified in the objecting Party's written objection.

10. Restrictions on Disclosure. All Confidential Information, including PHI, other than Confidential Information designated as "Attorneys' Eyes Only," produced or disclosed by either Party in this litigation shall be subject to the following:

a. such documents, information, and things shall be used only in this litigation and not for any other purpose whatsoever, except to the extent any documents, information, and things are exchanged in the normal course of business between the Parties and such exchange is more appropriately governed by the course of conduct observed between the Parties, the course of conduct shall control;

b. such documents, information, and things shall not be shown or communicated in any way inconsistent with this Protective Order or to anyone other than

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"Qualified Persons," defined below, which persons receiving Confidential Information shall not make further disclosure to anyone except as allowed by this Protective Order; and

c. no one except Qualified Persons identified in paragraph 12 shall be provided copies of any Confidential Information.

11. Restrictions on Disclosure of Confidential Information Designated as "Attorneys' Eyes Only." All Confidential Information designated as "ATTORNEYS' EYES ONLY," produced or disclosed by either Party in this litigation shall be subject to the following restrictions:

a. such documents, information and things shall be used only in this litigation;

b. such documents, information and things shall not be shown or communicated to anyone other than Qualified Persons identified in paragraphs 12(a), 12(b), 12(d), 12(e), 12(f) , 12(g), 12(h) and (12)(i) below, which persons receiving Confidential Information designated as Attorneys' Eyes Only shall not make further disclosure to anyone except as allowed by this Protective Order;

c. such documents, information and things shall be maintained only at the offices of such Qualified Persons identified in paragraphs 12(a), 12(b), 12(d), 12(e), 12(f) , 12(g), 12(h) and (12)(i) and only working copies shall be made of such documents; and

d. no one except Qualified Persons identified in paragraphs 12(a), 12(b), 12(d), 12(e), 12(f), 12(g), 12(h) and (12)(i) shall be provided copies of any Confidential Information designated as Attorneys' Eyes Only.

12. Qualified Persons. "Qualified Persons" means:

a. The court, court officials and authorized court personnel, jurors, stenographic reporters, and videographers at depositions taken in this action;

b. counsel of record for the Parties (including partners, associates, paralegals, employees and persons working at the law firms of the Parties' respective counsel), contract attorneys retained by counsel for the Parties to provide services in connection with this litigation, and two pre-identified in-house counsel ("Designated In-house Counsel") with no

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role, involvement in, or responsibility relating to contract negotiations, rate negotiations, negotiation of claim payment amounts, or decision-making concerning claim payment rates or amounts with respect to network contracting with any health plan or payor in the ordinary course of business (collectively "Rate Negotiations"). In the form of Exhibit B herein, each such in-house counsel will certify that he/she has no such role, involvement, or responsibility currently, and does not anticipate having any such role, involvement, or responsibility in Rate Negotiations during this litigation or any other litigation between the parties and/or their respective affiliates commenced during the pendency of this litigation, including appeals. To the extent each such in-house counsel acquires any such role, involvement, or responsibility during the litigation, that in-house counsel will recuse himself or herself from any matters involving or relating to the other party and may be replaced with an in-house counsel who meets the above criteria. Notwithstanding anything to the contrary contained herein, Rate Negotiations shall not include overseeing and/or managing all aspects (e.g., from evaluation, to filing, to discovery, to trial, to appeal and/or to settlement, etc.) of any type of litigation, including, without limitation, out-of-network litigation ("Litigation"), and this Protective Order specifically contemplates and permits in-house counsel who oversee and/or manage all aspects of Litigation to access Attorneys' Eyes Only information;

c. if the Party is an entity, current officers or employees of the Party;

d. third parties retained by counsel for a Party or by a Party as consulting experts or testifying expert witnesses;

e. with respect to a specific document, the document's author, addressee, or intended or authorized recipient of the Confidential Information and who agrees to keep the information confidential, provided that such persons may see and use the Confidential information but not retain a copy;

f. nonparties to whom Confidential information belongs or concerns;

g. witnesses who are appearing for deposition or other testimony in this case voluntarily or pursuant to a validly issued subpoena; and;

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h. a mediator or other settlement judge selected or agreed-upon by the Parties in connection with any attempted resolution of the litigation;

i. Clerical or ministerial service providers, including outside copying services, litigation support personnel, or other independent third parties retained by counsel for the Parties to provide services in connection with this litigation;

j. if the Party is an entity, former officers or employees of the Party; or

k. any other person by order of the court after notice to all Parties and opportunity to be heard, or as agreed between the Parties, except that the PHI shall only be disclosed in accordance with this Protective Order or further order of the court.

13. Acknowledgment. Any Qualified Person identified in paragraph 12(d)–(k) to whom the opposing Party's Confidential Information is shown or to whom information contained in such materials is to be revealed shall first be required to execute the attached Acknowledgement and Agreement To Be Bound To Stipulated Confidentiality Agreement And Protective Order (the "Acknowledgement"), the form of which is attached hereto as "Exhibit A" and to be bound by the terms of this Protective Order. As to each person to whom any Confidential Information is disclosed pursuant to the Acknowledgement and this Protective Order, such information may be used only for purposes of this litigation and may not be used for any other purpose.

14. Conclusion of the Litigation. Upon conclusion of this Litigation, whether by judgment, settlement, or otherwise, counsel of record and each Party, person, and entity who obtained Confidential Information or information claimed to be confidential shall assemble and return to the producing Party all materials that reveal or tend to reveal information designated as Confidential Information, except all such materials constituting work product of counsel. In the alternative, all such materials may be destroyed, with written certification of destruction or deletion provided to the producing Party, except that a Party may retain Confidential Information generated by it, unless such Confidential Information incorporates the Confidential Information of another Party in which case all such Confidential Information shall be destroyed or deleted. No originals or copies of any such Confidential Information will be retained by any

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person or entity to whom disclosure was made. However, counsel of record and Designated In-house Counsel for the Parties are permitted to retain copies of all pleadings, motions, depositions and hearing transcripts (and exhibits thereto), exhibits, and attorney work product that contain Confidential Information (other than PHI) consistent with his or her ordinary file management and/or document retention policies and/or those of his or her firm. In doing so, retaining Party agrees to execute an agreement that all such documents will be quarantined for record retention only and not for use in other matters involving the Parties or with any other client or shared outside of the organization.

15. Equal Application. This Protective Order may be applied equally to information obtained by a producer in response to any subpoena, including, in particular, information produced by non-parties. Any non-party that designates any information as "Confidential" or "Attorneys' Eyes Only" pursuant to this Protective Order may agree to submit to the Court's jurisdiction with regard to the determination of disputes involving such designations.

16. List of Names. All counsel shall maintain a list of the names of all third parties that are not parties to the underlying litigation to whom disclosure of Confidential Information or Attorneys' Eyes Only information was made.

17. Retroactive Designation. Confidential Information previously produced before the entry of this Order, if any, may be retroactively designated as "CONFIDENTIAL" or "ATTORNEYS' EYES ONLY" and subject to this Protective Order by notice in writing of the designated class of each document by Bates number within thirty (30) days of the entry of this Order.

18. Inadvertent Production or Disclosure of Confidential Information. In the event that a Party inadvertently produces Confidential Information, without the required "CONFIDENTIAL" legend, or Attorneys' Eyes Only information, without the required or "ATTORNEYS' EYES ONLY" legend, the producing Party shall contact the receiving Party as promptly as reasonably possible after the discovery of the inadvertent production, and inform the receiving Party in writing of the inadvertent production and the specific material at issue. Such inadvertent or unintentional disclosure shall not be deemed a waiver in whole or in part of

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the producing Party's claim of confidentiality, either as to specific documents and information disclosed or on the same or related subject matter. Upon receipt of such notice, the receiving Party or Parties shall treat the material identified in the notice as Confidential or Attorneys' Eyes Only under this Protective Order, subject to the provisions in paragraph 8 regarding any challenges.

19. Use of "ATTORNEYS' EYES ONLY" Material in Trial Preparation. No later than ninety days (90) prior to the first date of any trial setting, the Parties shall meet and confer in good faith for the purpose of developing a protocol for allowing trial witnesses to review documents designated "ATTORNEYS' EYES ONLY" to the extent that counsel believes it to be necessary for the witness to review the materials in connection with preparing the witness for his or her trial testimony which is reasonable and necessary in preserving, prosecuting and/or defending their respective interests in this matter. In the event the Parties cannot agree, either Party may submit an appropriate motion for relief with the Court. This provision shall not be construed as an agreement by either Party that a trial witness who is not qualified to review "ATTORNEYS' EYES ONLY" is entitled to do so prior to trial.

20. Use of Confidential Information at Trial. Nothing in this Order shall preclude a Party from disclosing or offering into evidence at the time of trial or during a hearing any document or information designated as "CONFIDENTIAL" or "ATTORNEYS' EYES ONLY," subject to the rules of evidence and any other Party's objections as to the admissibility or claims of confidentiality of the document or information. However, if a Party anticipates using or disclosing Confidential Information at a trial or during a hearing (except for purposes of impeachment), it shall give the Designating Party at least three (3) business days' notice prior to its use or disclosure. The Court may take such measures, as it deems appropriate, to protect the claimed confidential nature of the document or information sought to be admitted and to protect the Confidential Information from disclosure to persons other than those identified in paragraph 12 and who have signed Exhibit A, where necessary, under this Order. If a Party seeks to file unredacted Confidential Information or Attorneys' Eyes Only information, it shall file a motion with the Court for filing under seal, unless the producing Party otherwise agrees. Any disclosure

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of information designated "ATTORNEYS' EYES ONLY" to the Court under seal shall have limited dissemination to personnel of the Court under such safeguards as the Court may direct.

21. Pre-Existing Confidentiality Obligations. This Protective Order in no way modifies any prior agreement between the Parties that may be applicable.

22. Publicly Available Documents Excluded. The restrictions and terms set forth in this Protective Order shall not apply to documents or information, regardless of their designation, that are publicly available or that are obtained independently and under rightful means by the receiving Party.

23. No Waiver. This Protective Order does not waive or prejudice the right of any Party or non-party to apply to a court of competent jurisdiction for any other or further relief or to object on any appropriate grounds to any discovery requests, move to compel responses to discovery requests, and/or object to the admission of evidence at any hearing on any ground.

24. No Admission. Entering into, agreeing to, and/or complying with the terms of the Protective Order shall not operate as an admission by any Party that any particular document, testimony of information marked "CONFIDENTIAL" or "ATTORNEYS' EYES ONLY" contains or reflects trade secrets, proprietary, confidential or competitively sensitive business, commercial, financial or personal information.

25. Modification. This Protective Order may be modified or amended either by written agreement of the Parties or by order of the court upon good cause shown. No oral waivers of the terms of this Protective Order shall be permitted between the Parties.

26. Prior Protective Order. On May 14, 2019, Defendants removed this action to the United States District Court, District of Nevada (the "Federal Court"), Case No. 2:19-cv-00832-JCM-VCF. On October 22, 2019, the Federal Court entered a Stipulated Confidentiality Protective Order (ECF No. 31), pursuant to which the Parties produced documents. On February 20, 2020, the Federal Court remanded the action (ECF No. 78). The Parties agree that any documents previously produced under the protective order entered by the Federal Court shall continue to be subject to the terms of this Protective Order.

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27. Future Orders. Nothing in this Protective Order shall prohibit the Parties from seeking an order from the court regarding the production or protection of documents referenced herein or other materials in the future.

28. Good Cause. The Parties submit that good cause exists for entry of this Protective Order because (1) particularized harm will occur due to public disclosure of the Confidential Information to be protected under this Protective Order given the important privacy and business interests at issue here (2) when balancing the public and private interests, a protective order must issue because the public's interest in disclosure is substantially outweighed by the Parties' important privacy, proprietary and business interests and (3) allowing for the redaction of certain information, as contemplated by this Protective Order properly allows for the disclosure of information while protecting the important interests identified herein.

DATED this 23rd day of June, 2020.

McDONALD CARANO LLP

By: /s/ *Kristen T. Gallagher*
Pat Lundvall (NSBN 3761)
Kristen T. Gallagher (NSBN 9561)
Amanda M. Perach (NSBN 12399)
2300 West Sahara Avenue, Suite 1200
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Telephone: (702) 873-4100
plundvall@mcdonaldcarano.com
kgallagher@mcdonaldcarano.com
aperach@mcdonaldcarano.com

Attorneys for Plaintiffs

WEINBERG, WHEELER, HUDGINS, GUNN & DIAL, LLC

By: /s/ *Colby L. Balkenbush*
D. Lee Roberts, Jr. (NSBN 8877)
Colby L. Balkenbush (NSBN 13066)
Brittany M. Llewellyn (NSBN 13527)
6385 South Rainbow Blvd., Suite 400
Las Vegas, Nevada 89118
Telephone: (702) 938-3838
lroberts@wwhgd.com
cbalkenbush@wwhgd.com
bllewellyn@wwhgd.com

Attorneys for Defendants

ORDER

IT IS SO ORDERED.

Dated this 24th day of June, 2020

Nancy L Allf

DISTRICT COURT JUDGE

308 58E 8271 F977 JD

Nancy Allf

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Submitted by:

McDONALD CARANO LLP

By: /s/ *Kristen T. Gallagher*

Pat Lundvall (NSBN 3761)
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Attorneys for Plaintiffs

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EXHIBIT A

DISTRICT COURT

CLARK COUNTY, NEVADA

FREMONT EMERGENCY SERVICES (MANDAVIA), LTD., a Nevada professional corporation, et al. Plaintiffs, vs. UNITEDHEALTH GROUP, INC., et al., Defendants.	Case No.: A-19-792978-B Dept. No.: XXVII **ACKNOWLEDGEMENT AND AGREEMENT TO BE BOUND TO STIPULATED CONFIDENTIALITY AGREEMENT AND PROTECTIVE ORDER**

I, _____, hereby acknowledge receipt of a copy of the Stipulated Confidentiality Agreement and Protective Order ("Protective Order") entered in the above-referenced action, and agree as follows:

1. I acknowledge that I have read the Protective Order and agree to be bound by its terms and conditions and to hold any "Confidential" or "Attorneys' Eyes Only" information and/or materials disclosed to me in accordance with the Protective Order.

2. I will take all steps reasonably necessary to ensure that any secretarial, clerical, or other personnel who assist me in connection with my participation in this action will likewise comply with the terms and conditions of the Protective Order.

3. I further understand that I am to retain all copies of all documents or information marked pursuant to the Protective Order in a secure manner, and that all copies of such materials are to remain in my personal custody until termination of my participation in the above-referenced litigation, whereupon the originals or any copies of such materials, and any work product derived from said information and/or materials, will be returned to counsel who provided the under with such materials.

4. To assure my compliance with the Protective Order, I submit to the jurisdiction of the above-referenced Court for the limited purpose of any proceeding related to the enforcement of, performance under, compliance with or violation of the Protective Order and understand that the terms of the Protective Order obligate me to use materials designated as Confidential in accordance with the Protective Order solely for the purposes of the above-referenced litigation, and not to disclose any such Confidential Information to any other person, firm or concern.

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

Dated this ____ day of _____, 20___.

Signature: _____
Name (printed): _____
Title/Position: _____
Employer: _____
Address: _____

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EXHIBIT B

DISTRICT COURT

CLARK COUNTY, NEVADA

FREMONT EMERGENCY SERVICES (MANDAVIA), LTD., a Nevada professional corporation, et al. Plaintiffs, vs. UNITEDHEALTH GROUP, INC., et al., Defendants.	Case No.: A-19-792978-B Dept. No.: XXVII **AGREEMENT CONCERNING ATTORNEYS' EYES ONLY MATERIAL COVERED BY AGREED PROTECTIVE ORDER**

1. I have read the Agreed Protective Order entered in this action, and as may amended by the Court (the "Protective Order"). I understand the terms of the Protective Order, and agree to be bound by the terms thereof.

2. In addition, I certify that I have no role, involvement in, or responsibility relating to contract negotiations, rate negotiations, negotiation of claim payment amounts, or decision-making concerning claim payment rates or amounts with respect to network contracting with any health plan or payor in the ordinary course of business (collectively "Rate Negotiations"), currently, and do not anticipate having any such role, involvement, or responsibility in Rate Negotiations during this litigation or any other litigation between the parties and/or their respective affiliates commenced during the pendency of this litigation, including appeals. I further understand that to the extent I acquire any such role, involvement, or responsibility during the litigation, that I will recuse myself from any matters involving or relating to the other party and may be replaced with an in-house counsel who meets the above criteria. Notwithstanding anything to the contrary contained herein, I understand that Rate Negotiations shall not include overseeing and/or managing all aspects (e.g., from evaluation, to filing, to discovery, to trial, to appeal and/or to settlement, etc.) of any type of litigation, including, without limitation, out-of-network litigation ("Litigation"), and the Protective Order specifically contemplates and permits me to oversee and/or manage all aspects of Litigation and to access Attorneys' Eyes Only information.

By: _____

Name: _____
(Please print)

Date: _____

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From: Balkenbush, Colby <CBalkenbush@wwhgd.com>
Sent: Tuesday, June 23, 2020 11:32 AM
To: Kristen T. Gallagher
Cc: Pat Lundvall; Amanda Perach; Roberts, Lee; Llewellyn, Brittany M.
Subject: RE: Fremont Emergency Services (Mandavia) Ltd vs. UnitedHealth Group et al. - protective order

Kristy,

This looks good and we have no changes. You may insert my electronic signature and submit to the Court.

Colby Balkenbush, Attorney
Weinberg Wheeler Hudgins Gunn & Dial
6385 South Rainbow Blvd. | Suite 400 | Las Vegas, NV 89118
D: 702.938.3821 | F: 702.938.3864
www.wwhgd.com | vCard

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From: Kristen T. Gallagher [mailto:kgallagher@mcdonaldcarano.com]
Sent: Saturday, June 20, 2020 11:27 AM
To: Balkenbush, Colby; Roberts, Lee; Llewellyn, Brittany M.
Cc: Pat Lundvall; Amanda Perach
Subject: Fremont Emergency Services (Mandavia) Ltd vs. UnitedHealth Group et al. - protective order

This Message originated outside your organization.

Colby -

In order to finalize the PO, we will agree to revisit the trial-related provisions as the case progresses. Attached is the PO in Word and PDF format. Please do a final review and then respond to this email to provide authorization for insertion of your electronic signature and submission to the court.

Thanks,
Kristy

Kristen T. Gallagher | Partner

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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 Stipulated Protective 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:
Service Date: 6/24/2020

Audra Bonney	abonney@wwhgd.com
Cindy Bowman	cbowman@wwhgd.com
D. Lee Roberts	lroberts@wwhgd.com
Raiza Anne Torrenueva	rtorrenueva@wwhgd.com
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Kristen Gallagher	kgallagher@mcdonaldcarano.com
Amanda Perach	aperach@mcdonaldcarano.com
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EXHIBIT 2

Electronically Filed
7/30/2021 11:55 AM
Steven D. Grierson
CLERK OF THE COURT

RTRAN

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

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.

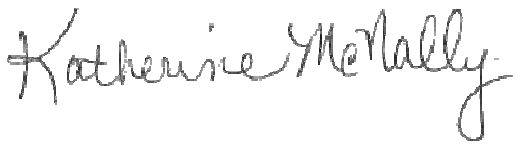
MS. LUNDVALL: Thank you, Your Honor.

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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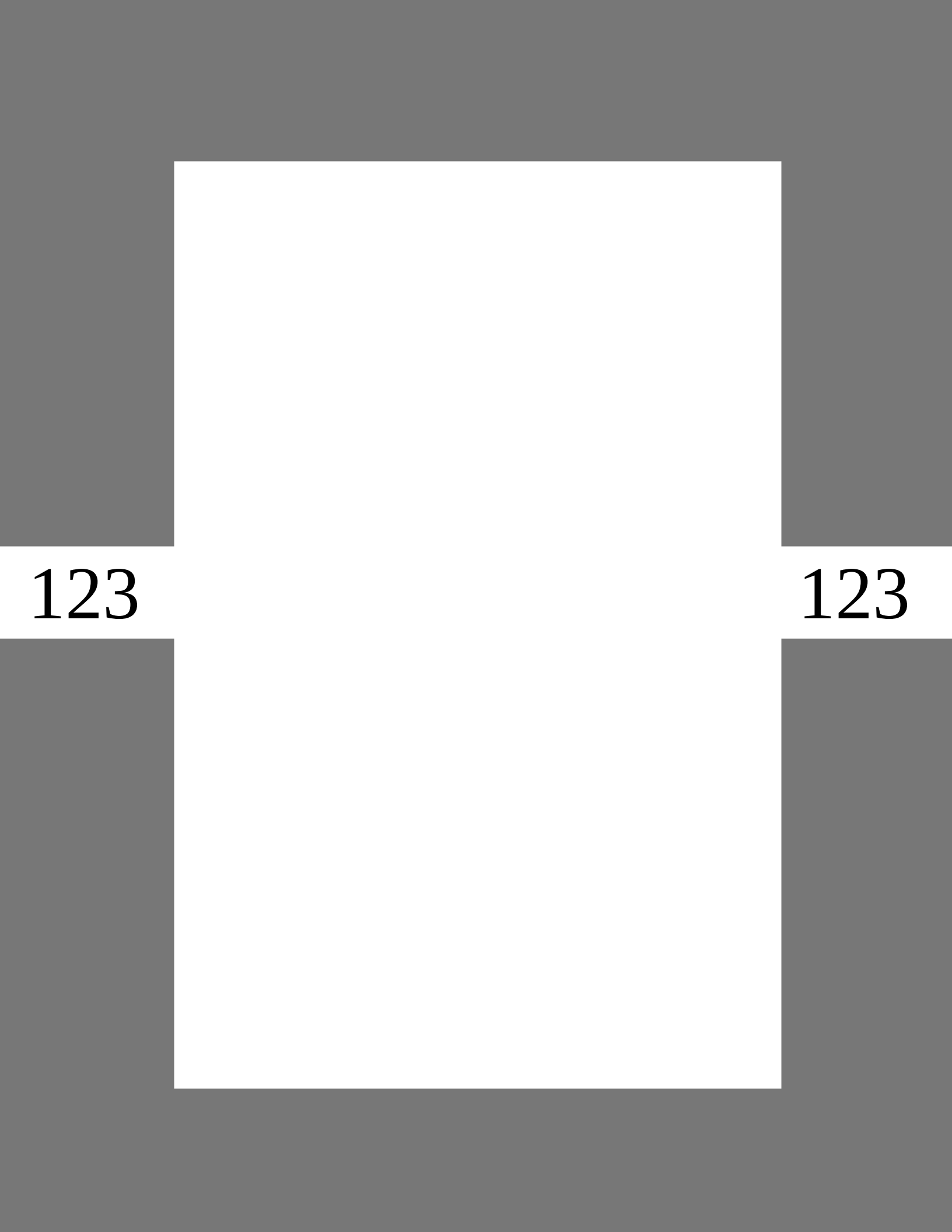
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DISTRICT COURT

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
THURSDAY, SEPTEMBER 2, 2021

RECORDER'S PARTIAL TRANSCRIPT OF PROCEEDINGS
RE: MOTIONS HEARING

APPEARANCES (Attorneys appeared via Blue Jeans):

For Plaintiff(s): PATRICIA K. LUNDVALL, ESQ. (in person)
KRISTEN T. GALLAGHER, ESQ.
AMANDA PERACH, ESQ.
P. KEVIN LEYENDECKER, ESQ. (pro hac)
JOHN ZAVITSANOS, ESQ.
JASON S. McMANIS, ESQ.
JOSEPH Y. AHMAD, ESQ.

For Defendant(s): COLBY L. BALKENBUSH, ESQ.
DANIEL F. POLSENBERG, ESQ.
K. LEE BLALACK, ESQ.

RECORDED BY: DELORIS SCOTT, COURT RECORDER
TRANSCRIBED BY: KATHERINE MCNALLY, TRANSCRIBER

LAS VEGAS, NEVADA, THURSDAY, SEPTEMBER 2, 2021

[Proceeding commenced at 10:27 a.m.]

THE COURT: Do we have everyone else -- is everyone else on the phone and ready to go forward?

MR. LEYENDECKER: Yes, Your Honor. This is Leyendecker, on behalf of plaintiffs, along with Ms. Lundvall.

THE COURT: Thank you.

And counsel for the defendant?

MR. BLALACK: This is Lee Blalack of O'Melveny & Myers, on behalf of the defendants.

THE COURT: And is there anyone else who we need to go forward because I am calling you a little early. It's 10:27.

MR. BLALACK: Not on the defense side, Your Honor. If Mr. Balkenbush is present and participating, I think we're ready.

THE COURT: Okay. So this was a request of the defendant to set some pretrial deadlines. And let me just get to the screen. I have your proposal with me here, but let me get to that screen.

All right. So with regard -- the first request was to set a deadline to submit a proposed jury questionnaire.

MR. BLALACK: That's correct.

THE COURT: Is Mr. Blalack going to be the spokesperson?

I can tell you that we're not able to do jury questionnaires at this time. There is a small one that goes out by e-mail to

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prospective jurors that simply goes to the qualification and ability to serve, availability, and health. But we're not able to do jury questionnaires right now.

So did you want to argue that?

MR. BLALACK: Your Honor, if it's not a feasible option, I don't know that we need to argue it.

The issue that the parties discussed during the meet and confer was limited to the question of when a jury questionnaire would be admitted, not whether one could be submitted. And then obviously we saw plaintiff's submission yesterday which indicated that they objected to a jury questionnaire which was the first we had heard of that. So -- but it may be moot, Your Honor, if you're telling us that it's not a feasibility to pursue a questionnaire.

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THE COURT: Okay. It's impossible right now. I don't know when we'll be able to do jury questionnaires again. My crystal ball is a little cloudy today. So that would take care of the jury questionnaire.

And then the second one with regard to objections.

Let's talk about NRCP 16.1(a)3 disclosures, starting first with the defendant, please.

MR. BLALACK: Your Honor, we had proposed to move those disclosures up by, I believe, three days to align with the close of fact and expert discovery, which I believe is on the 21st, under the existing schedule that no one is proposing to offer. And we thought that made sense to do and have those submitted in advance of filing

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in limine motions and the Daubert motions which, as the Court knows, in our submission, we've proposed to move back a few days. So that was the reason for that sequencing.

THE COURT: Thank you.

And for the plaintiff, please.

MS. LUNDVALL: Thank you, Your Honor. Pat Lundvall.

From our perspective, the only issue that had been proffered by the defense for moving those is that administratively it was going to be difficult for them -- but that difficulty extends on both sides. And one of the things that they've also tried to do is to change then the objection date similarly.

And from our perspective what we were trying to do is keep things in accord with what the original rule requires, as well as what the Court had ordered back in June.

THE COURT: Thank you.

And my inclination is to keep it on the September 24th date, because by the time that discovery closes, I think both sides are going to have -- need a chance to make any supplements. So I'm going to adopt -- keep the 9/24/21 date.

And let's now go to the last date to file dispositive motions. You both agree it's September 21st.

And then we have --

Did you have something to add, Mr. Blalack?

MR. BLALACK: No, Your Honor. That's correct. Both sides agree on that.

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THE COURT: Good enough.

The next was your EDCR 2.47 conference with regard to *Motions in Limine*.

Mr. Blalack?

MR. BLALACK: Your Honor, the day we had proposed was different than, I believe, the plaintiffs were proposing only because of the incompetence extension by four or five days -- six days, whatever it is we proposed -- I guess to the 26th or 27th for the deadline for *in limine* motions, so that was the only reason for the adjustment on the meet and confer date.

THE COURT: Thank you.

And plaintiff, please.

MS. LUNDVALL: Once again, Pat Lundvall.

This is where we have a major disagreement. And this is a change that the defense is proffering, and they proffered it for one single reason -- and I'll demonstrate that that single reason has no foundation. But more importantly it appears to be gamesmanship on their part because what it does is it causes a severe prejudice then to the plaintiffs. And I'll explain both these points.

First, the only argument that that they have proffered as to why they wanted to change and move by a full week the submission date for *Motions in Limine* is that they claim that the close of expert discovery was 9/21, and it was going to coincide then with the submission date for *Motions in Limine*.

Their argument was that they couldn't take a deposition

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on the same day, get a transcript, and prepare a motion on the same day.

Well, the only discovery that's being done during that period of time is experts. The experts that are being deposed are the experts then that have given full reports. Those reports have already been exchanged. The parties know what the contents of those reports are.

Moreover, the parties have reached agreement then dealing with the dates. The two dates for our expert depositions are 9/15 and 9/17. So that gives them more than ample period of time by which to think that if there's something new that comes up in a deposition that was not contained in a report that they can then make a decision as to whether or not a *Motion in Limine* may be necessary. So that foundation -- the sole and single foundation for changing the states is not valid.

Second, one of the things that when you look at they are suggesting -- not only do they push the submissions, but they push the oppositions and they push the hearing date.

The hearing date they propose for hearing on the *Motions in Limine* is two days -- two business days before we start trial. So to say or suggest that somehow that the plaintiffs are going to have ample time then to read and react, make changes to our demonstrative aids, make changes to opening statements, make changes to witness outlines, et cetera. We are severely prejudiced by that.

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This was -- the date of 9/21 for submission of *Motions in Limine*. This was highly negotiated back in June, and there was give and take by both sides, if the Court will recall. That date was agreed upon by United back in June. And it's now for a single reason that has no foundation do they want to change it. And it has the appearance or it has the feel that this is now strategic and gamesmanship on their part, especially because of the prejudices that will be suffered by the plaintiffs.

So, therefore, we would ask the Court, not only to keep the original date for the submissions which was 9/21, but also to take the opposition date, shorten it by a few days to 9/29, so that we could have a hearing sometime during the week of 10/4 or 10/8, sometime during that week, on *Motions in Limine,* so that both sides have ample time then to read and react.

I don't think that it's any secret that this case has got some unique discovery orders. It has some unique challenges by United in response to those discovery orders. There's been some unique pushback of the Court's orders by United.

And, therefore, I think that the *Motions in Limine* are going to be critically important so that we don't try to see similar conduct or similar behavior for exhibiting a lack of respect then to the Court's orders in the context of *Motions in Limine*. And that's an additional reason we think that the opposed dates that we have proffered make more sense for purposes of this case.

THE COURT: Thank you.

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Mr. Blalack, reply please.

MR. BLALACK: Yes, Your Honor. Thank you.

Just a few points of clarification in response to Ms. Lundvall's statements.

One, in our submission with our motion, we stated that there were two primary reasons for proposing different dates, with the deadline to file dispositive motions and deadlines to file *Motions in Limine* and challenges to expert testimony.

The first was the practical question of whether it would be feasible to file challenges to expert testimony on the 21st, when expert discovery did not close on the 21st -- until the 21st.

Second -- and obviously the practical issues with, you know, depositions, transcripts could be scheduled in the last day or few days of expert discovery.

And then the second issue was based on the meet and confer between the parties, it would appear -- and Ms. Lundvall's statements seemed to suggest this -- that we will be having very substantial *in limine* motion practice, probably on both sides, that will be a substantial undertaking for the parties and for the Court.

And for that reason, as we noted in our papers -- a separate reason, not just the expert question -- we're separating those two dates so that the parties could submit their dispositive motions on the 21st and then have a few extra days to prepare their *in limine* motions -- get those papers in a proper order and get them filed, and then have adequate time to prepare responses, so the

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Court has, you know, well briefed materials on the key evidentiary issues that will frame the trial presentation.

But that was the rationale we submitted to the Court. I won't respond to Ms. Lundvall's characterization of our motives and good faith. I'll let that stand. But those -- that rationale was -- our rationales were stated in our papers, and it was more than just one.

The parties, just as of this morning, have reached a tentative agreement on a schedule for expert depositions, with the exception of the one nonretained expert that's subject to a motion that's on calendar for today, where it appears that all of the experts of the other side of the plaintiffs will be completed the week -- I think the last is the 17th. And then our last expert will be deposed on the 20th.

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So while that's tight, Your Honor, I think we would agree with Ms. Lundvall that that reason is not something that we can't overcome. We'll be able to pull together our challenges to any evidentiary presentation -- or expert presentation by one of those experts by the 21st.

But the other reason still holds. It is going to be a practical challenge for the parties in all that needs to be done -- and for the Court, frankly, to have all of these emotions filed at exactly the same time.

This compressed briefing schedule that plaintiffs and Ms. Lundvall have referenced in the plaintiff's proposed -- for the first time to us, at least -- in the papers yesterday, the eight days to

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respond to these motions is something we would object to. We would request, you know, a normal briefing schedule for that many motions on those sorts of issues.

And in terms of the prejudiced question, we think the most efficient process for the Court to grapple with, you know, framing the case for trial is deciding which claims and parties are in the case, which dispositive motions will help to achieve. And then obviously address evidentiary questions to the *in limine* motions in the light of what those claims and parties are. And right now we have a very unwieldy case heading to trial.

We have eight defendants who do different things. Some are fully -- some are insurance companies; some are third-party administrators; some aren't either. They all have different relationships in varying ways with the different plaintiffs. There's three different plaintiff entities -- all owned by the same entity, but three different groups of plaintiffs with different -- mostly dealing different payment arrangements, different programs, et cetera.

And so it's a very complex case that we are hoping can be simplified somewhat and streamlined through the motions practice. And it would make sense, in our view, to grapple with the dispositive motions first and then grapple with the *in limine* motions, knowing, with confidence, which parties and issues are going to be presented to the jury. Because otherwise the Court and the parties will spend a great deal of time on issues that may not be relevant for trial.

So that's our response to Ms. Lundvall, Your Honor.

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THE COURT: Okay. This is the request of the defendant to move that deadline for the 2.47 conference on *Motions in Limine*.

I'm going to deny that request and keep the original date.

[Pause in the proceedings to address another issue.]

THE COURT: Thank you.

Let's go back then to Fremont versus United, on page 14.

The next issue is the deadline to file *Motions in Limine.* And the defendant proposes September 27th instead of September 21st.

Mr. Blalack.

MR. BLALACK: Yes, Your Honor. And I don't really have anything further to add on that issue beyond what I noted a moment ago. Ms. Lundvall and I -- we both agree that the conference deadline that you just addressed is tied -- on that day is tied to the deadline for the filing of the *Motions in Limine* and Challenges to Expert Testimony. So I don't really have anything substantive to add on that point, beyond what I've already said, Your Honor.

Glad to answer any questions the Court may have.

THE COURT: Thank you.

Ms. Lundvall?

MS. LUNDVALL: Your Honor, I'm not going to repeat myself concerning the issue of filing on the *Motions in Limine* because that is -- was our most important concern.

My only suggestion is to renew our request for trying to deal with putting this on calendar, putting those motions on

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calendar.

And what I did, you know, like most of us do, is we take a look at what the Court's calendar may be and then you try to work backwards as to when briefs may be due.

And so when we looked at the week of, you know, trying to get on the Court's calendar, the week of October 4th through the 8th, that would put them in opposition to *Motions in Limine* on 9/29, and we do think that is a reasonable opportunity.

And part of the reason I say that is this, the parties are obligated to meet and confer in advance of filing their *Motions in Limine.* So there's no real surprises, you know, nobody is going to get a *Motion in Limine* and be surprised as to what the contents are because we're going to already have discussed it. And so to the extent that the parties can even start pinning out -- and I know I've done it myself -- pinning out oppositions knowing, full well what the motions are going to be. And so I don't think that anyone is handicapped or hurt or prejudiced then by shortening the time frame for an opposition but by a few days.

And the parties do agree that, you know, pursuant to the rule, there is no need for reply briefs then for *Motions in Limine*.

THE COURT: All right.

MS. LUNDVALL: So our suggestion, just to make sure that it's clear, is to keep the agreed-upon and the ordered date of 9/21 for the submission of the motions; for oppositions to be filed 9/29; and then hopefully we can beg, borrow, and steal some time on the

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Court's calendar during that week of October 4th through October 8th. Thank you.

THE COURT: Thank you.

Mr. Blalack, do you have a reply?

MR. BLALACK: Your Honor, I want to address the fundamental question of the deadline. Again, as I've noted, I think that's been fully argued.

I do -- we do object to compressing the period permitted by of the Rule for responding to *in limine* motions. I think under the Rule, that deadline, if the Court were to maintain 9/21 as the deadline for *Motions in Limine* under the Rule, our oppositions would be due on 10/5.

And we think -- you know, obviously we prefer to move the initial deadline back by six days. But if the Court agrees with plaintiffs that it should maintain the existing schedule, then we would ask to maintain existing schedule or not make it even more onerous than it might end up being on, you know, motions that we both expect to file.

THE COURT: Being asked to change this deadline to give the defendant more time with regard to filing *Motions in Limine*, I just think it's inappropriate for me to intervene at this time based upon the scheduling order that was agreed to back in June.

I realize the potential for hardship for the defendant in compressing the response time, but given the fact that there will be significant participation in the 2.47, I'm going to deny the

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defendant's request.

And then let me also just kind of talk to you guys about the schedule. The motion -- the hearing that I interrupted to take your case, this pretrial motion is for a trial that starts on September 20th. I have it scheduled for two weeks. They're telling me they may need the third week. That third week is the week before your trial.

So -- I know. I've already -- I'm supposed to have settlement conferences on October 4th and October 8th. If my trial goes -- it's this jury trial goes longer, the chief judge will take those for me, which will make it easier to finish the Commissioner versus Chur trial.

But that week of October 4th, I'm not sure how we're going to get all of this done. I don't think that the Commissioner versus Chur case will resolve. I've felt that from the beginning of that case, and it's an old case.

So with regard to scheduling issues, we're going to have to -- and I know that you have out-of-town counsel. I know that there are a lot of moving parts here. We will do our best to make sure that we get those scheduled at a time that's most convenient for everyone.

So let's go back then to the agenda, which is the 2.67 conference.

Mr. Blalack?

MR. BLALACK: Yes, Your Honor. I believe that the parties -- and if I miss -- if I'm not mistaken, are in agreement on the

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2.67 conference unless Ms. Lundvall [indiscernible] otherwise.

MS. LUNDVALL: No, Your Honor. We -- as we set forth in our response, we were in agreement with scheduling the 2.67 conference then for September 29th.

THE COURT: Good enough. So there being agreement, we don't need to spend any more time on that issue.

Let's now get to the status check on trial readiness.

Mr. Blalack?

MR. BLALACK: I believe that is another deadline, Your Honor, where the parties have agreement on. I might be able to expedite this, Your Honor. Based on my review of the plaintiffs' response to our filing, I believe we have addressed all of the disputes, with the exception of the question of the deadline for *voir dire* questions being filed with the Court. And if that's the case, then I think all the other deadlines we've proposed, Your Honor, you've either ruled on or they're agreed to.

THE COURT: All right. So is that correct, Ms. Lundvall, that the only thing we need to talk about is *voir dire*?

MS. LUNDVALL: I'm going through --

THE COURT: Yeah. Take a moment.

MS. LUNDVALL: -- this list. Thank you, Your Honor.

I believe that the Court has addressed everything with the exception then of the proposed *voir dire* questions.

THE COURT: And I can tell both of you that in a typical jury trial, I require the parties to meet and confer. And then before

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we start jury selection, if there are objections, we deal with it then. But I realize that this is not a typical case.

So -- and, Mr. Blalack, you had asked for October 12th. And Ms. Lundvall wants that date to be, according to DCR, 10/22.

Let me hear from Mr. Blalack first.

MR. BLALACK: Yes, Your Honor. Our goal was basically to try to really achieve some -- give the Court the opportunity to really evaluate the parties proposed *voir dire* questions and give us feedback, you know, well in advance of *voir dire* period. We thought some additional time, particularly given the other issues that we were proposing occur in the week before trial, in terms of the various hearings, it would be prudent to have those issues bring by the parties so that it had been resolved a little earlier, just to make the -- hopefully the *voir dire* process proceed more smoothly.

And frankly, Your Honor, if there will not be a jury questionnaire submitted, as it appears that it's not possible, as plaintiffs noted in their submission last night, they anticipate a very -- and we would now concur -- very substantial *voir dire* exercise with the panel in this case.

So we think the sooner that the Court can receive the parties views and react, the more efficient it will be for us in terms of preparing. And that was the reason for proposing a slightly earlier day.

THE COURT: Thank you.

Ms. Lundvall?

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MS. LUNDVALL: Your Honor, from our perspective, there may be a middle ground based upon the Court's stated preference as how to want to deal with it, because there is no sense for the parties to submit things that are going to sit in chambers, for which that you're not going to be able to get to.

So this would be my suggestion. If the Court requires us to do a meet and confer, is that we do that on or before October 12th, which is the date that Mr. Blalack is suggesting that the parties do their proposed *voir dire* questions -- for us to meet and confer on that date. And then to set forth then whatever disagreements we have or submit those disagreements then to the Court, pursuant to the rule which would be 10/22.

That seems to be kind of the middle ground and accomplishes both parties goals.

I haven't discussed this with Mr. Blalack. This would be the first time he's heard it.

THE COURT: Thank you.

Mr. Blalack?

MR. BLALACK: I think that would be -- Your Honor, that would be acceptable to us.

THE COURT: Good enough.

MS. LUNDVALL: I think that would accommodate our desire to bring these issues sooner, and -- but still get it to Your Honor well enough in advance that we can get some clarity before -- early enough to plan *voir dire* appropriately.

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THE COURT: Good enough. So thank you, both, for your professional courtesy to each other on that issue.

You'll meet and confer by 10/12, and you'll submit the issues with regard to proposed *voir dire* by October 22nd.

So the only issue remaining now is when we can set you for your pretrial motions and give you enough time to do that, given my trial calendar, which is crazy. So -- and that just will have to be when I know more.

MS. LUNDVALL: May I make a suggestion, Your Honor?

THE COURT: Of course.

MS. LUNDVALL: Given -- I know that when we were before in June, you had asked for the parties to reduce their agreements in the Court's orders into writing and to submit them. And I think that, given kind of the little bit of the back-and-forth today, that maybe that we put together a document then that is a concise document so that the Court doesn't have to issue an order, and that we do it pursuant to stipulation given the Court's guidance on these particular issues. And we would leave open the date as to the hearings on both the dispositive motions, as well as the *Motions in Limine*.

THE COURT: Good enough.

Mr. Blalack, your response, please.

MS. LUNDVALL: If I am understanding, Your Honor, that Ms. Lundvall is proposing that we submit a stipulated order for Your Honor's consideration and entry. Is that what we're -- that would

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leave those days open? If that -- I'm not sure I'm following.

THE COURT: What I heard was that there would be a stipulation based upon the -- pretrial deadlines based upon the guidance that I have given this morning. And the only thing to be left open is the scheduling of pretrial motions; is that correct?

MS. LUNDVALL: That's correct, Your Honor.

THE COURT: Okay.

MR. BLALACK: Your Honor, I think we would be fine to expedite the process of Your Honor entering an order by [indiscernible] stipulation that the Court made these rulings.

THE COURT: Okay.

MR. BLALACK: If -- I think that would be fine. And I'm fine keeping the hearing dates open for Your Honor's schedule -- to accommodate Your Honor's schedule if it's, you know, possible. I think we're comfortable with that.

But we obviously -- we did have a preference for a particular schedule. And Your Honor has ruled on certain motions, so I think it would be prudent to at least enter an order to that effect.

THE COURT: Good enough.

MR. BLALACK: So long as that's where we end up, I think that's fine, Your Honor.

THE COURT: Given that the request for today's hearing was made by the defendant, I will task Mr. Blalack and Mr. Balkenbush to prepare that. And Ms. Lundvall will then review and approve the form.

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MS. LUNDVALL: Thank you, Your Honor.

MR. BLALACK: Perfect.

THE COURT: All right. Anything else to take up today?

MS. LUNDVALL: The additional issue that the Court needs to take up is the scheduling on the issue on the defense motion to strike or to take a deposition of Dr. Frantz. And my co-counsel, Kevin Leyendecker, is going to be handling that, Your Honor.

THE COURT: Good enough. All right. So please proceed on the Frantz motion.

MR. BLALACK: Your Honor, for the defense, I think Mr. Balkenbush will be addressing that issue for our team. So I'll defer to him.

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THE COURT: Good enough.

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MR. BALKENBUSH: I will be, Your Honor.

And just before we go on to the Frantz motion, I did have one additional issue I wanted to bring to the Court's attention in regard to Your Honor's trial schedule and the October 25th trial date of this matter.

It's come to my attention over the last couple of days that there is another trial -- we understand another case before Your Honor that is set for a firm trial date of November 1st. My colleague, Ryan Gormley, has a case with Matt Sharp before -- a separate case not before Your Honor, but it's come to his attention, in conversation with Mr. Sharp, that Mr. Sharp has a case set for a firm trial date of November 1st. The case is *Joan Calhoun versus Auto Club Group*

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Insurance Company.

I can give Your Honor the case number. But I just raise this potential conflict because the defense is getting ready to execute a number of contracts with trial vendors, trial techs, for putting on the trial, as well as contracts with our -- for our co-counsels' lodging in Las Vegas over the course of the trial, and those are going to be nonrefundable deposits.

And so I just wanted to raise the potential conflict with Your Honor to hopefully get your confirmation that the October 20th date is firm and is not going to move based on any potential conflict with this other case or any other cases.

THE COURT: As far as I know, it's firm. I know that the Calhoun case is double stacked after Ben Kelly. I'm aware of this issue.

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

I just wanted to raise that, in case the Court was not aware of it. It sounds like the Court is, though.

THE COURT: Right. And in the Ben Kelly case, there are a number of parties. About half of them are resolved at this point, so that's why I was comfortable double stacking.

All right. So let's talk about Dr. Frantz.

MR. BALKENBUSH: Sure. So I'm going to go ahead and do it for the defense, Your Honor.

I understand that generally today is more of a scheduling hearing, rather than arguing the merits of the motion. I think what I

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would just say as far as scheduling is we would prefer that the motion be heard as soon as possible. Obviously, we need to give the client some time to respond and the Court to process the papers.

But our concern is that, you know, we have a September 21 expert discovery cutoff. The rebuttal expert deadline has already expired. And so we're looking to have some certainty as far as either, one, whether or not Dr. Frantz will be permitted to testify. And if he will be permitted to testify, some certainty as to whether or not we will be able to depose him prior to that expert discovery cutoff of September 21st.

So our preference would be to have the motion heard as soon as possible, obviously within Your Honor's convenience of calendar, though.

THE COURT: Okay. And is there a response from the plaintiff?

MR. LEYENDECKER: Yes, Judge. This is Kevin Leyendecker.

We wholeheartedly agree that we need to get this to you as soon as possible. And so I have a suggestion for Your Honor on the scheduling. And that is we could have a very short, certainly only less than 10 pages, perhaps more like 5 pages, response by Tuesday.

And if the Court has time on its standard law and motion conference on Wednesday or Thursday, then we certainly could take it up then. And that would give the parties ample time to do

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whatever they need to do, based on that ruling.

THE COURT: All right. And when -- are you talking about the 8th/9th or the 15th/16th?

MR. LEYENDECKER: I'm talking about having a reply -- my suggestion would be we file a short reply on the 7th. And then if you had time on the 8th or the 9th, then that would be just fine by us to take the issue because we do agree we ought to resolve it sooner rather than later.

THE COURT: All right. And I normally don't broadcast my personal life in the courtroom, but I'm leaving tomorrow with my husband to go to a safe place for two weeks. So I can schedule it. And I'm happy to do that hearing remotely on my phone. But I don't know what we have scheduled on the 9th and 10th.

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So I have to -- I can tell you that we can do it the 9th or 10th. But I don't -- I just don't know yet when. And so the JA and I will review the calendar and we'll get something to you guys today.

MR. LEYENDECKER: Okay. That sounds fine.

THE COURT: Good. All right. Now, what else do we have to take up today?

MS. LUNDVALL: On behalf of Fremont, Your Honor, there's nothing else for us to do at the time or to take up.

THE COURT: All right.

And for the defense, do you agree that we've resolved everything that we had on calendar today?

MR. BLALACK: I do, Your Honor. I believe that was all we

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have on calendar for today.

THE COURT: Very good.

MR. BLALACK: Thank you for your time.

THE COURT: You guys stay safe and healthy. And I'll talk to you next week at the end of the week.

MS. LUNDVALL: Enjoy your trip.

MR. BLALACK: Thank you.

MR. BALKENBUSH: Thank you, Your Honor.

MR. BLALACK: Take care.

[Proceeding concluded at 11:01 a.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.

Katherine McNally

Katherine McNally
Independent Transcriber CERT**D-323
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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
Dep't 27

REPLY BRIEF ON "MOTION FOR ORDER TO SHOW CAUSE WHY PLAINTIFFS SHOULD NOT BE HELD IN CONTEMPT AND SANCTIONED FOR VIOLATING PROTECTIVE ORDER"

Hearing Date: September 15, 2021
Hearing Time: 9:00 a.m.

REPLY BRIEF ON MOTION FOR ORDER TO SHOW CAUSE WHY PLAINTIFFS SHOULD NOT BE HELD IN CONTEMPT AND SANCTIONED FOR VIOLATING PROTECTIVE ORDER

Plaintiffs admit that they provided defendants' documents, then marked attorney's-eyes-only, to members of the media—before this Court entered a written order removing the confidentiality designation. Plaintiffs likewise do not dispute that in so doing, they destroyed the object of any writ petition that would have challenged the de-designation.

Instead, to advance their *post hoc* interpretation of the protective order that unambiguously preserved confidentiality until "the court issues an order ruling on the designation," plaintiffs profess ignorance of decades of Nevada precedent defining what constitutes an effective order of the court. Plaintiffs also throw about legally irrelevant speculation that defendants were not as serious about pursuing a writ petition as they have in fact declared.

Because plaintiffs willfully violated this Court's protective order, eviscerating any opportunity for appellate review of the confidentiality question, this Court should grant the motion and impose sanctions.

I.

PLAINTIFFS CONCEDE THE ACTS THAT CONSTITUTE CONTEMPT

As plaintiffs confirm, the Intercept reporter received defendants' attorney's-eyes-only designated documents "from Health Care Providers." (Opp. 12:19-20.) Plaintiffs provided these documents at least by August 2,[1] a full week before the Court's August 9 order adopting Report and Recommendation No. 5. (*Id.*)

[1] Plaintiffs continue to conceal when they first disclosed these materials beyond their counsel in this case. Instead, they describe the disclosure in the passive voice, with August 2 merely the date the press first reached out to defendants asking about the documents "received from Health Care Providers." (*Id.*)

II.

THE PROTECTIVE ORDER PRESERVED THE CONFIDENTIALITY DESIGNATIONS UNTIL THE ISSUANCE OF A WRITTEN ORDER

Plaintiffs twist their own violations of the protective order into a harangue against defendants' supposed "disrespect[]" for this Court's "decisions." (Opp. 1:12.) Plaintiffs go so far as to falsely accuse defendants of treating this Court's decisions as "meaningless." (Opp. 1:7.) It is one thing to say that this Court made its position clear in oral comments at a hearing. It is quite another to say that that those comments—which included a direction to prepare a written order and anticipated review of that order—constituted a license for plaintiffs to violate the express terms of the written protective order.

A. As a Matter of Nevada Law, a Decision Removing Confidentiality Takes Effect Once Memorialized in a Written Order

Plaintiffs' interpretation of the protective order is bizarre. It rests on the false premise that the word "order," unless specified to be a *written* order, means an *oral* ruling that precedes the written order.

As "proof," plaintiffs point to the cases that defendants cited in the motion—all of which recite the principle that every Nevada practitioner knows: a "court's oral pronouncement from the bench, the clerk's minute order, and even an unfiled written order are ineffective" for any purpose. *Nalder v. Eighth Judicial Dist. Court*, 136 Nev. 200, 208, 462 P.3d 677, 685 (2020) (quoting *Millen v. Eighth Judicial Dist. Court*, 122 Nev. 1245, 1251, 148 P.3d 694, 698 (2006)). According to plaintiffs, "in each and every one . . . the case involved an order or **judgment** within the scope of **NRCP 58(c)**." (Opp. 5:3-5.)

But the first and second cases in plaintiffs' "proof" disprove the theory:

First, plaintiffs wrongly dismiss *Division of Child & Family Services, Department of Human Resources, State of Nevada v. Eighth Judicial District Court*, 120 Nev. 445, 451, 92 P.3d 1239, 1243 (2004) *(J.M.R.)* on grounds that it

involved an "oral **judgment** of contempt." (Opp. 5:7-9 (emphasis in original).) But that, in fact, was not the issue. Rather, the question was whether the state could be held in contempt (orally or otherwise) based on an oral ruling requiring the state to release a child from a psychiatric treatment facility. *J.M.R.*, 120 Nev. 445, 446, 92 P.3d 1239, 1240 (2004).[2] In answering "no," the Supreme Court rejected the precise argument that plaintiff is making—that the enforceability of an oral pronouncement depends on whether it constitutes an appealable judgment:

> While other courts have held that a mandate of the court need not be a formal written order to be effective, some Nevada precedent suggests that an order is not effective until the district court enters it.
>
> * * *
>
> Although J.M.R. maintains that *Rust* does not apply to this case because the district court's oral order to release J.M.R. was an injunction, not a judgment, we find this argument unpersuasive for two reasons. First, NRCP 65(f) states that district courts "may make prohibitive or mandatory orders" in child custody suits "with or without notice or bond, as may be just." However, J.M.R.'s permanency review did not constitute a "child custody suit" because there was no trial and no adverse parties sought to establish custody of J.M.R. Consequently, the district court's release order was not an injunction.
>
> Second, the *Rust* holding is broader than J.M.R. suggests. Although in *Rust* we focused on the ineffectiveness of the district court's oral pronouncements of judgment, we also expressly stated that "[t]he district court's oral pronouncement from the bench, the clerk's minute order, and even an unfiled written order are ineffective for any purpose." This language indicates that **we did not intend to limit the *Rust* holding**

[2] There, in contrast with the July 29, 2021 hearing here, the district court made clear that its oral ruling constituted the final order, and that it would not issue a subsequent written order:

> In open court with the parties present, the court orally ordered the DCFS to remove J.M.R. from Spring Mountain, to assign a social worker to J.M.R.'s case, and to prepare a plan for J.M.R.'s further treatment. The district judge declined to sign a written order, however, so no formal order was entered by the court clerk. When the DCFS inquired whether it should release J.M.R. against medical advice, the district court answered affirmatively. Mahoney stated that the DCFS would release J.M.R. later that same day.

Id. at 448, 92 P.3d at 1241.

to judgment pronouncements.

Id. at 451–52, 92 P.3d at 1243–44 (emphasis added).

Second, and just as incorrectly, plaintiffs wave away *Nalder* as simply "examining relief from a **judgment** under NRCP 60(a)." (Opp. 5:10 (emphasis in original).) Again, as in *J.M.R.*, the form of the judgment from which Rule 60(a) relief was granted[3] was not the issue. The issue in *Nalder* was whether the judgment violated an oral stay—itself *not* a judgment or appealable order. And there, the Supreme Court held that the oral stay was enforceable, precisely because it fell within the narrow exception to the requirement for written orders: "[o]ral orders 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." *Nalder*, 136 Nev. at 208, 462 P.3d at 685 (quoting *J.M.R.*).

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Although *J.M.R.* forecloses the argument that plaintiffs are making, a few recent examples further demonstrate that the Supreme Court is serious when it says that oral rulings on any issues that *do* affect a party's substantive or procedural rights are ineffective for any purpose:

- *Kogod v. Cioffi-Kogod*, 135 Nev. 64, 79, 439 P.3d 397, 409 (2019): In a divorce case, the Supreme Court reversed a district court that purported to terminate the marital community "when it orally pronounced the parties divorced" rather than when it entered the written divorce decree: "Under Nevada law, the district court's oral pronouncement of divorce did not terminate the community."
- *APCO Constr., Inc. v. Zitting Bros. Constr., Inc.*, 136 Nev., Adv. Op. 64, 473 P.3d 1021, 1025 n.2 (2020): The Supreme Court refused to directly entertain an appeal from a minute order granting a motion

[3] Both the judgment and order granting Rule 60(a) relief were written.

in limine, as that minute order was "ineffective for any purpose and cannot be appealed"; instead, it reviewed similar arguments as part of the appeal from the written final judgment.

- *Stetler v. Eighth Judicial Dist. Court*, 134 Nev. 1015, 417 P.3d 1118, 2018 WL 2272934, at *1 (Nev. May 15, 2018) (unpublished table disposition): The Supreme Court refused to hear a writ petition from an oral "order" excluding evidence and expert testimony where "petitioner has not provided a written, file-stamped district court order, which in itself precludes our review" (citing *Rust v. Clark Cty. Sch. Dist.*, 103 Nev. 686, 689, 747 P.2d 1380, 1382 (1987) as "providing that an oral pronouncement from the bench is not valid for any purpose").

B. The Protective Order Preserved the Confidentiality Designations until the Issuance of a Written Order

1. The Requirement of an Issued "Order," without Modification, Already Meant a Written Order Under Nevada Law

It is against this background, with which every Nevada practitioner is surely familiar, that this Court entered its protective order preserving a party's confidentiality designations 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.)[4]

Plaintiffs' *expressio unius* argument ignores the plain meaning of the word "order." Plaintiffs argue that the requirement of a *written* agreement

[4] After accusing defendants of "ignoring the actual language of the Protective Order," plaintiffs proceed to do just that, focusing solely on the language that "[t]he protection afforded by this Protective Order shall continue until the court makes a decision on the motion" (*id.*) and ignoring the earlier sentence that clarified how the court would "make[]" such a "decision," by "issu[ing] an order." Contrary to plaintiffs' misrepresentation, defendants transparently identified and addressed both aspects of the protective order in its motion. (Mot. 4:10-26.)

somehow proves that orders may be oral. This contention disregards that while valid private-party agreements may be written or oral (hence the specificity), a valid "order" in Nevada necessarily means a "written order," by definition.[5] In other words, it was not the Court or the parties who had to provide a "writing requirement" (Opp. 7:23) for orders, as plaintiffs now pretend to expect. The law already did that for them.

The parties, who understood this Nevada law, did not have to insert the redundant modifier "written" before the word "order" to give it the effect it already had under Nevada law.

2. The Court's "Decision" Is Made through an Order, Consistent with Nevada Law, Not by Departing from that Law

Plaintiffs also argue, without authority, that the language requiring a "decision on the motion" "made clear" that no written order was required. (Opp. 7:28.) This, too, misreads the relevant legal background and the context of the protective order.

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[5] *See, e.g.*, *Stockmeier v. Nevada Dept. of Corr. Psychological Review Panel*, 122 Nev. 385, 390, 135 P.3d 220, 223 (2006) (rejecting the *expressio unius* argument that the express provision of the open meeting requirement to "parole hearings" in NRS 213.130 exempted the psychiatric panel from other open-meetings requirements, because "[t]he open meeting law applies to meetings of all public bodies unless otherwise specified by statute"), *abrogated on other grounds by Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 181 P.3d 670 (2008); *Gibbons v. Carson City*, 480 P.3d 838, 2021 WL 689181, at *1 n.2 (Nev. Feb. 22, 2021) (unpublished table disposition) (rejecting the *expressio unius* argument that a height requirement for fences did not apply to single-family residences simply because another provision specified the goal of fostering quality design for other specified types of projects) (citing *State v. Koontz*, 84 Nev. 130, 139, 437 P.2d 72, 77 (1968), which explained that the doctrine of *expressio unius est exclusio alterius* at best "is a mere aid to interpretation" and that "[p]erhaps more accurately, it usually serves to describe a result rather than to assist in reaching it").

First, as just discussed, it would be highly unusual for the parties to agree to tie their substantive rights to an act (oral ruling) that, under Nevada law, would otherwise be ineffective to alter those rights.[6] It would be even more unusual for the Court to authorize such a departure. And it would be especially unusual to so deviate from well-established Nevada law by using just the word "decision," a word that does not clearly refer to an oral ruling.

Second, even assuming that this language, read alone, could bear this meaning separately, the language further requiring the Court to "issue[] an order" eliminates that possible interpretation. Rather than confirming an interpretation at odds with Nevada law, "issu[ing] an order" *consistent* with Nevada law is precisely how the Court "makes a decision on the motion." It is that decision, made effective through a written order, that alone can eliminate substantive rights and open previously confidential materials to the public.[7]

3. Overriding Confidentiality Is Not a "Case Management Order"

It is not clear whether plaintiffs are actually arguing that the determination to overrule defendants' attorneys-eyes-only designations is a kind of "case management order." They allude to the language in *J.M.R.* and *Nalder* allowing oral "case management" orders. (Opp. 6:5-11.) Then they refer to the "case management process" in the protective order "for dealing with confidentiality

[6] *Am. First Fed. Credit Union v. Soro*, 131 Nev. 737, 742, 359 P.3d 105, 108 (2015) ("A primary rule of interpretation is that [t]he common or normal meaning of language will be given to the words of a contract unless circumstances show that in a particular case a special meaning should be attached to it." (internal quotation marks and citation omitted)).

[7] In addition, the exercise of judicial discretion through a "decision" implies that the decision can be reviewed; yet until the entry of a written order, the Supreme Court cannot review the substance of the district court's ruling, only direct that the district court issue an order. *See Stetler v. Eighth Judicial Dist. Court*, 134 Nev. 1015, 417 P.3d 1118, 2018 WL 2272934, at *1 (Nev. May 15, 2018).

designations." (Opp. 6:12-15.)

To be clear, an order rendering previously confidential discovery materials open to public consumption is *not* a case-management order within the meaning of *J.M.R.*, any more than the oral requirement that the state release the minor in *J.M.R.* was a "case management" order. The standard is similar to that for *ex parte* requests: A judge can grant ministerial or scheduling requests (motions "of course")—such as a stay—on an ex parte basis, while "substantive matters or issues on the merits" ("special" motions) involve judicial discretion and must be noticed to opposing parties. *Crawford v. State*, 117 Nev. 718, 721, 30 P.3d 1123, 1125 (2001) (citing NCJC Canon 3(B)(7)(a)), *abrogated on other grounds by Stevenson v. State*, 131 Nev. Adv. Op. 61, 354 P.3d 1277 (2015); *Maheu v. Eighth Judicial Dist. Court*, 88 Nev. 26, 34, 493 P.2d 709, 714 (1972). Here, whether defendants' internal business documents could retain their confidentiality is a substantive legal determination similar to a decision overruling a claim of privilege, not merely a scheduling or ministerial request.

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4. This Court Insisted on the Preparation of a Written Order to which the Parties Could Object and that this Court Would Review before Issuing

Plaintiffs persist in mischaracterizing defendants' position that the Court's oral pronouncements "mean nothing." But the question is not whether the hearing "meant something." Rather, the question is whether the oral pronouncement had the *specific* effect of immediately, irrevocably eliminating confidentiality—and allowing plaintiffs to publish these materials to the world—rather than defining the contents of an eventual written order, as oral rulings ordinarily do.

Even if it were lawful for this Court to issue an oral ruling removing confidentiality by specifying that it had immediate effect, this Court tellingly did not do so. Instead, this Court directed that plaintiffs' counsel prepare a written order, and the Court even anticipated the possibility of an objection, which the

Court would review and resolve before entering a final, written order:

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

(Hr'g Tr., Ex. 2 to Opp., at 41:24-42:9.) This is precisely the process that played out,[8] and that would have allowed defendants to challenge the de-designation, had plaintiffs not prematurely published defendants' attorneys-eyes-only materials to the media before the entry of the order.

III.

IN ELIMINATING DEFENDANTS' RIGHT TO SEEK APPELLATE REVIEW, PLAINTIFFS CAUSED PREJUDICE

A. Defendants Had a Legal Right to Seek Appellate Relief, which Plaintiffs Eviscerated

Plaintiffs make unseemly comments questioning the seriousness of defendants' consideration of a writ petition (Opp. 13), despite the declaration of counsel that confirms this fact. (*See* Ex. B to Mot., ¶ 6.) Regardless, it is unnecessary here to dive, as plaintiffs seem to want, into the privileged conversations between defendants and their counsel.

The law gave defendants a *right* to seek appellate review to protect against the disclosure of their confidential materials. *See 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,

[8] *See* Defs.' Objection to Plaintiffs' Proposed Orders, filed Aug. 5, 2021.

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193, 561 P.2d 1342, 1344 (1977) (medical records and tax returns). The plaintiffs, by disclosing these materials before the confidentiality had been lifted, forever shut the door on that appellate review, depriving defendants of their appellate rights.[9]

Plaintiffs also distort defendants' efforts at reasonableness—by not demanding the dismissal of plaintiffs' complaint—into a supposed concession that defendants suffered no harm from the disclosure. (Opp. 14:2-7.) But defendants made clear in the motion that

> [f]or 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).

(Mot. 12:19-23.) Perhaps defendants' charity in requesting a lesser sanction was misguided. Defendants suffered a loss from the disclosure of their confidential materials to the press. That loss was not self-inflicted. It was caused by plaintiffs' disregard of the Court's protective order.

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B. Given the Provisions of the Protective Order, Defendants Were Not Required to Seek a Stay

Plaintiffs blame defendants for plaintiffs' contemptuous acts, arguing that it would have been "best practice" for defendants to seek a stay of the court's oral ruling. (Opp. 10.) Plaintiffs' sole support consists in two cases, presented without context.

The first, *Quinn v. Eighth Judicial District Court*, involved an order compelling counsel to sit for depositions. 134 Nev. 25, 28, 410 P.3d 984, 986–87 (2018). In that sense, the case was more similar to *Bahena v. Goodyear Tire &*

[9] Plaintiffs muddy the timeline, insisting that publication of the article was the critical disclosure and point of no return. In reality, it was already too late by August 2, when defendants learned that AEO documents were in the hands of reporters, and they had no real power to prevent the press from using them.

Rubber Co., 126 Nev. 243, 247, 235 P.3d 592, 594–95 (2010), which defendants discussed in the motion (at 7 n.4) and which plaintiffs have not argued applies here. Regardless, the oral stay in *Quinn* was not through the entry of a written order, but rather for a set period—regardless of when the order was entered—to allow the parties to pursue a writ petition.

As for the second, *In re Goldentree*, plaintiffs have not provided any sort of explanation or context—plaintiffs represent that it involved a stay of an "oral decision on [an] objection" (Opp. 11:5-8)—but regardless, it again appears that the stay would have extended through Supreme Court review on a writ petition, not merely through the entry of a written order. (*See* Ex. A, 5/3/18 Minute Order.)

At most, these cases simply underscore what defendants and this Court already understand: without a stay (whether from this Court or the Supreme Court), no protection for the confidentiality would have extended *beyond* the entry of a written order. But that does not eviscerate the protection that persisted, by the terms of the protective order, *until* the entry of that written order on the objection. In other words, by not seeking at the hearing a preemptive stay through the resolution of a yet-to-be-filed writ petition, perhaps defendants risked that their protection would evaporate if this Court acted quickly following the submission of a proposed order. But defendants had no reason to believe that protection would end on August 2, 2021, when they learned that plaintiffs had disclosed defendants' confidential materials to the press *before* proposing an order to defense counsel. (*See* Ex. B, 8/2/21 5:29 p.m. K. Gallagher E-mail; *compare* Ex. A to Mot., at 8/2/21 1:07 p.m. R. Adams E-mail.) And defendants were not required to seek a stay to secure the rights already granted them under the protective order.

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CONCLUSION

Plaintiffs admit that they shared defendants' confidential documents to the press, and they did so before this Court "issue[d] an order," while the confidentiality protections remained in place. Far from showing remorse for a genuine misunderstanding of the protective order or for having thwarted defendants' right to appellate review, plaintiffs have dug in, flinging further mud at defendants while misstating Nevada law, seemingly daring this Court to cross them.

This is the definition of contempt. This Court should impose appropriate sanctions.

Dated this 8th day of September, 2021.

LEWIS ROCA ROTHGERBER CHRISTIE LLP

By */s/ Abraham G. Smith*

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CERTIFICATE OF SERVICE

I hereby certify that on the September 8, 2021, service of the above and foregoing "*Reply Brief on '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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EXHIBIT A

To Reply Brief on Motion for Order to Show Cause Why Plaintiff Should Not be Held in Contempt

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EXHIBIT A

To Reply Brief on Motion for Order to Show Cause Why Plaintiff Should Not be Held in Contempt

Register of Actions

Case No. A-16-742507-B

Golden Tree Master Fund, Ltd., Plaintiff(s) vs. Howard Meyers, Defendant(s)	§	Case Type: **Other Business Court Matters**
	§	Date Filed: **08/26/2016**
	§	Location: **Department 13**
	§	Cross-Reference Case Number: **A742507**
	§	Supreme Court No.: **72369**
	§	**73111**
	§	
	§	

Related Case Information

Related Cases
A-16-745669-B (Coordinated - Certain Matters)

Party Information

Lead Attorneys

Defendant	**Meyers, Howard M.**	**Janet L. Chubb** *Retained* 7757865000(W)
Plaintiff	**Alcentra Global Special Situations Luxebourg S.a.r.l.**	**Patricia K. Lundvall** *Retained* 702-873-4100(W)
Plaintiff	**Alcentra MS S.a.r.l.**	**Patricia K. Lundvall** *Retained* 702-873-4100(W)
Plaintiff	**Arvo Investment Holdings S.a.r.l.**	**Patricia K. Lundvall** *Retained* 702-873-4100(W)
Plaintiff	**Clareant SCF S.a.r.l.**	**Patricia K. Lundvall** *Retained* 702-873-4100(W)
Plaintiff	**Golden Tree Master Fund, Ltd.**	**Patricia K. Lundvall** *Retained* 702-873-4100(W)
Plaintiff	**Grace Bay III Holdings S.a.r.l.**	**Patricia K. Lundvall** *Retained* 702-873-4100(W)
Plaintiff	**Kneiff Tower S.a.r.l.**	**Patricia K. Lundvall** *Retained* 702-873-4100(W)
Plaintiff	**Mount Kellett Master Fund II-A L.P.**	**Patricia K. Lundvall** *Retained* 702-873-4100(W)
Plaintiff	**Sound Point Credit Opportunities Master Fund, L.P.**	**Patricia K. Lundvall** *Retained* 702-873-4100(W)
Plaintiff	**Sound Point Montauk Fund, L.P.**	**Patricia K. Lundvall** *Retained* 702-873-4100(W)
Plaintiff	**SPC Lux S.a.r.l.**	**Patricia K. Lundvall** *Retained* 702-873-4100(W)

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Plaintiff	**Vista Fund I, L.P.**	**Patricia K. Lundvall** *Retained* 702-873-4100(W)
Plaintiff	**Vista Fund II, L.P.**	**Patricia K. Lundvall** *Retained* 702-873-4100(W)

Events & Orders of the Court

05/03/2018 **All Pending Motions** (9:00 AM) (Judicial Officer Hardy, Joe)

Minutes

05/03/2018 9:00 AM

- Present via CourtCall: Janet Chubb, Esq. on behalf of Defendants QXH II, Inc., Albert P. Lospinoso, and Howard M. Meyers; Andrew N. Goldman and Charles Platt, Interested Parties; and Neal Donnelly, Esq., representing GoldenTree in bankruptcy. DEFENDANTS' MOTION TO EXTEND DISCOVERY DEADLINES AND CONTINUE TRIAL AND APPLICATION FOR ORDER SHORTENING TIME...PLAINTIFFS' OBJECTIONS TO DISCOVERY MASTER'S REPORT AND RECOMMENDATION REGARDING PLAINTIFFS' MOTION TO COMPEL PRODUCTION OF HOWARD MEYERS INDIVIDUAL TAX RETURNS [REDACTED VERSION]...PLAINTIFFS' AND THIRD PARTY DEFENDANTS' MOTION FOR A STAY PENDING WRIT PETITION Ms. Pike Turner argued in support of Defendants' Motion to Extend Discovery Deadlines, stating that the Plaintiffs had ignored the Court's Order regarding production of evidence, which had deprived the Defendants of their ability to continue with discovery. Regarding the Plaintiffs' request to stay, Ms. Pike Turner stated that, if the Court was inclined to granted the stay, then the case must be granted in its entirety; however, Ms. Pike Turner made it clear the Defendants opposed the request to stay, as it would irreparably harm the Defendants. Ms. Lundvall argued in support of Plaintiffs' Motion for a Stay, stating that it was vital top maintain the integrity of the information during the pendency of the Writ. The Court inquired of both parties regarding their thoughts on the scope of the stay, if the Court were inclined to grant a temporary stay. Court recessed briefly to allow the parties to discuss the issue. Court reconvened. Ms. Lundvall stated that the parties had agreed that, if the Court were to stay the case, it must be stayed in its entirety. COURT ORDERED Plaintiffs' and Third Party Defendants' Motion for a Stay Pending Writ Petition was hereby GRANTED IN PART, and a TEMPORARY STAY of the entire case would be in effect for a period of FORTY-FIVE (45) DAYS from the instant hearing, in order to allow the Plaintiffs and Third Party Defendants to attempt to obtain stay relief from the Nevada Supreme Court. COURT FURTHER ORDERED a status check regarding the stay was hereby SET. Due to its ruling on the Motion for a Stay, COURT ORDERED Defendants' Motion to Extend Discovery Deadlines and Plaintiffs' Objections to Discovery Master's Report and Recommendation were hereby TAKEN OFF CALENDAR. Mr. Pisanelli requested the pending Motions to Associate Counsel be carved out of the stay, to allow all counsel to communicate with each other, and with the parties. Ms. Pike Turner stated there was no objection to the Latham and Watkins' attorneys coming into the case, noting that Judge Gonzalez incorporated language into Pro Hac Vice Orders, stating that when counsel

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withdraws, they agree to continuing jurisdiction related to their participation in the case as advocated. COURT ORDERED that the pending Motions to Associate would be CARVED OUT of the stay, and it would rely on EBH's counsel to file a brief stating that they did not oppose the Motions. 6/18/18 9:00 AM STATUS CHECK: STATUS OF CASE / STAY CLERK'S NOTE: Subsequent to the hearing in open court, COURT ORDERED that all pending Motions, with the exception of the Motions to Associate, were hereby VACATED.

Parties Present
Return to Register of Actions

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EXHIBIT B

To Reply Brief on Motion for Order to Show Cause Why Plaintiff Should Not be Held in Contempt

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EXHIBIT B

To Reply Brief on Motion for Order to Show Cause Why Plaintiff Should Not be Held in Contempt

From: Kristen T. Gallagher <kgallagher@mcdonaldcarano.com>
Sent: Monday, August 2, 2021 5:29 PM
To: Llewellyn, Brittany M.; Balkenbush, Colby; Roberts, Lee; Smith, Abraham; Polsenberg, Daniel F.
Cc: Pat Lundvall; Amanda Perach; Justin Fineberg
Subject: Fremont Emergency Services (Mandavia), Ltd, et al. v. UnitedHealth Group, Inc., et al. - orders re: R&R ## 2, 3 and 5
Attachments: Order Adopting Report and Recommendation #2 - version 1.docx; Order Adopting Report and Recommendation #3 - version 1.docx; Order Adopting Report and Recommendation #5 - version 1.docx

[EXTERNAL]

Please see the attached proposed orders in connection with the above reports and recommendations. Please provide any comments by noon on Wednesday or provide authority to insert your electronic signature for submission to the Court.

Thank you,
Kristy

Kristen T. Gallagher | Partner

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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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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. 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

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forth in **Exhibit 1** attached hereto.

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.

Submitted by:

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[Approved] [Disapproved] as to content:

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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. 3 REGARDING DEFENDANTS' MOTION TO COMPEL RESPONSES TO DEFENDANTS' SECOND SET OF REQUESTS FOR PRODUCTION ON ORDER SHORTENING TIMEAND OVERRULING OBJECTION

Hearing Date/Time: July 29, 2021 at 1:00 p.m.

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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

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forth in **Exhibit 1** attached hereto, except that ¶ 7 of the Recommendation shall be modified to 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.

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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

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

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

Hearing Date/Time: July 29, 2021 at 1:00 p.m.

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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. 5 ("R&R #5") Regarding Defendants' Motion for Protective Order Regarding Confidentiality Designations (Filed April 15, 2021) (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 #5, Defendants' Objection to R&R #5, 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 #5 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.

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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),	CASE NO: A-19-792978-B
vs.	DEPT. XXVII
UNITED HEALTHCARE INSURANCE COMPANY, Defendant(s).	

BEFORE THE HONORABLE NANCY ALLF, DISTRICT COURT JUDGE
THURSDAY, SEPTEMBER 9, 2021

RECORDER'S PARTIAL TRANSCRIPT OF PROCEEDINGS
RE: MOTIONS HEARING

APPEARANCES (Attorneys appeared via Blue Jeans):

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KRISTEN T. GALLAGHER, ESQ.
AMANDA PERACH, ESQ.
P. KEVIN LEYENDECKER, ESQ. (pro hac)
JOHN ZAVITSANOS, ESQ.
JASON S. McMANIS, ESQ.
JOSEPH Y. AHMAD, ESQ.

For Defendant(s): COLBY L. BALKENBUSH, ESQ.
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RECORDED BY: BRYNN WHITE, COURT RECORDER
TRANSCRIBED BY: KATHERINE MCNALLY, TRANSCRIBER

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LAS VEGAS, NEVADA, THURSDAY, SEPTEMBER 9, 2021

[Proceeding commenced at 11:01 a.m.]

THE COURT: This is the judge. I'm calling the case of Fremont versus United.

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

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

MS. GALLAGHER: Good afternoon, Your Honor. Kristen Gallagher, also on behalf of the plaintiff Health Care Providers.

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

MR. ZAVITSANOS: Your Honor, good afternoon. This is John Zavitsanos, also appearing on behalf of the Health Care Providers.

MR. AHMAD: Your Honor, Joe Ahmad, also from AZA, and appearing on behalf of the plaintiff Health Care Providers.

MR. LEYENDECKER: Your Honor, this is Kevin Leyendecker, on behalf of the plaintiffs, also with AZA.

MR. McMANIS: And Your Honor, Jason McManis with AZA, on behalf of the Health Care Providers.

THE COURT: Thank you.

For the defendants, please.

MR. BLALACK: Your Honor, this is Lee Blalack of

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O'Melveny & Myers, on behalf of the defendants. And I have various colleagues on who will also make an appearance.

MR. BALKENBUSH: Good afternoon, Your Honor. Colby Balkenbush, also on behalf of the defendants.

MR. POLSENBERG: Good afternoon, Your Honor. Dan Polsenberg and Abe Smith for defendants.

THE COURT: Thanks, everyone.

The first thing I show is a motion to associate out-of-state counsel. That's a defendant motion.

Is there any objection?

MS. LUNDVALL: Your Honor, we have no objection to that motion.

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THE COURT: Good enough. That motion can be granted.

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And I would ask that you send an order to the OIC inbox today so that I can get it signed.

The second thing I show is the defendant's motion to preclude or compel expert testimony of Dr. Frantz. And that's on an order shortening time.

I've reviewed everything. And so I'll ask you to be brief in your presentation.

MR. BALKENBUSH: Thank you, Your Honor. This is Colby Balkenbush on behalf of the defendants. I'll be arguing that motion.

I think you've read everything, Your Honor, and you have a good sense then of the history behind this dispute. But I do just want to go back to the genesis of it, because I think *ad laudem*, this

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is all about basic fairness to the defendants and allowing us to understand all the expert opinions that Dr. Frantz is going to offer at trial; or if we're not allowed that opportunity, then not allowing him to give testimony on those opinions.

This motion, the genesis of it, started with plaintiff's initial expert disclosure on July 30th, where they disclosed five separate nonretained experts. And under Nevada's rules, a nonretained expert is not required to submit a written report.

And so upon getting those, we immediately noticed their depositions and sent an e-mail to plaintiff's counsel telling them that we wanted to be flexible on the deposition dates, but we had to take these depositions prior to the August 31st rebuttal expert deadline, because we needed to know exactly what their opinions were going to be so that the defendants would have enough time to designate rebuttal experts in response.

After some meet and confer and back and forth, ultimately the plaintiffs agreed to revise their expert disclosure. And they withdraw three of their five nonretained experts, and only designated Dr. Crane and Dr. Frantz as nonretaining experts.

As to Dr. Crane, the plaintiffs did agree to produce him for deposition on September 3rd, and to give the defendants two additional weeks after that deposition to designate a rebuttal expert, given that September 3rd would be the first date that the defendants would know what expert opinions Dr. Crane is going to offer.

But as to Dr. Frantz, the plaintiffs refused to produce him

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for a deposition on any date. You know, there's some discussion in the papers on that, you know, the defendants should have offered additional days. They didn't offer three dates.

But in the correspondence attached to the motions, Your Honor, it is clear that the plaintiffs have simply refused to produce Dr. Frantz for an expert deposition on any day. So it's not an issue of defendants being flexible on dates.

We went ahead and -- given that the plaintiffs refused to produce him for a deposition, we went ahead and took it a nonappearance on August 25th. And then filed the motions before Your Honor seeking either, one, to have an order from this Court permitting us to depose Dr. Frantz on the opinions he intends to offer at trial; or two, seeking an order precluding him from testifying at trial, given that the plaintiffs have refused to produce him for an expert deposition.

Now, plaintiff's response to this is essentially that, well, back on May 27th, the defense took Dr. Frantz's fact witness deposition. That deposition lasted a little under four hours, and that, therefore, because of that, the defense should not be given an opportunity to take Dr. Frantz's expert deposition.

But again, back on May 27th, that was over a month before the plaintiffs had designated Dr. Frantz as a nonretained expert. On that date, we had not received the summary of his opinions that the plaintiffs later disclosed on July 30th. And they revised that description again of what Dr. Frantz would testify to at

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trial, on August 25th, when they submitted a revised expert disclosure.

And so we had no reason on that -- during that May 27th deposition, Your Honor, to ask questions like, Dr. Frantz, what are all the expert opinions you intend to offer at trial? And walk through those with him. And then after that, have an opportunity to designate rebuttal experts to his testimony, if appropriate.

So all we're seeking with this motion, Your Honor, is basic fairness. Either, one, we want an opportunity to depose Dr. Frantz, and we can be ready to depose him quickly. And then an opportunity after that, one to two weeks after that, to designate rebuttal experts to his expert testimony if needed.

Or two, an order precluding him from testifying, given that the plaintiffs are going to refuse to produce him for a deposition.

You know, the plaintiffs additional argument, Your Honor, is that, well, you know, they've produced this -- they say that his testimony is going to be limited to what was discussed in his fact witness deposition.

But if you look at their revised expert disclosure on August 25th, where they -- that they're relying on, that disclosure does not state that they're going to limit their questioning of Dr. Frantz at trial to only the questions that defense counsel asked Dr. Frantz during his deposition. They're leaving the door open to the -- the limit to the topics that may have been raised there. They're not stating that the only questions that are going to be asked were

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those that were asked during the deposition.

And again I think it goes without saying, Your Honor, that if we had their expert disclosure naming Dr. Frantz back on May 27th, it wouldn't have been a deposition that lasted under four hours. It probably would have gone the full 7 hours, so that's so we could understand everything he is going to testify to.

And I guess just in closing, Your Honor, I do want to note that we've offered to limit Dr. Frantz's deposition to four hours, if Your Honor grants us permission to take his deposition, his expert deposition. So we're not seeking the full 7 hours for the second deposition. We just want an opportunity to understand all of the expert opinions he intends to offer at trial.

THE COURT: Thank you.

And the opposition, please.

Okay. The opposition, please.

MR. LEYENDECKER: Thank you, Your Honor. I was on mute. I apologize.

This is Kevin Leyendecker, on behalf of the plaintiffs, with AZA.

This is a classic example, in my view, of what I consider no good deed goes unpunished. Oftentimes, when witnesses are deposed in an individual capacity, they'll give both answers that implicate knowledge of relevant facts, and sometimes they give answers that might implicate they may have some expertise in an area.

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And all we've done here, in order to eliminate confusion about where we intend to question Dr. Frantz about at trial is to very clearly say, Whatever the defendants asked him about in his deposition, that might have invoked his expert testimony, we're simply trying to protect ourselves later, that if we ask questions on those same topics, they don't say, mm-hmm, you never told us that qualified as experts. And therefore he can't -- he can't go into those same areas that I went into with him before during his deposition.

So I recognize that the original designation was a little loose. To cure that and to prevent what the defendants are saying is unfair, we very clearly stated that we're going to limit his testimony to the lines that were colored during that deposition.

And as a consequence of that, under Rule 26, you have the discretion to say, if a second deposition would be unreasonably cumulative or duplicative -- and I say it is now that we've clearly limited the scope of that to whatever they asked him about in the first deposition -- you have the discretion to say they're not entitled to a second deposition -- a second bite at the apple.

The reason that I went into the commentary about the -- not providing three dates is because the defendants have said they -- the Court should preclude Dr. Frantz from offering any testimony at trial that may have been implicated during his deposition and that might be covered by an expert point of view, because the plaintiffs have violated a court order.

And the reality is, I'm simply pointing out that we didn't

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violate any court order. They failed to comply with the report recommendation number one in Your Honor's order by only giving one date as opposed to three. And so Rule 37 and the preclusion relief they're seeking requires you to have found that the plaintiffs have violated a Court order.

We didn't violate a Court order. The reality is they violated the protocol and the orders related thereto, for noticing the depositions.

Now, having said that, the big picture here is we have said, as clearly as we can, we're not going to color outside the lines with Dr. Frantz, given what was established in his deposition.

[Indiscernible] I can only ask the questions that deposing counsel asked in the deposition. We're going to ask different questions, but on the same topics. And on those topics, the defendants had whatever opportunity they had to ask as many or as little questions as they wanted to on those topics. Given that we're limiting his testimony to those topics, any additional deposition would simply be duplicative and contrary to the spirit of Rule 26.

THE COURT: Thank you.

And the reply, please.

MR. BALKENBUSH: Just a few points, Your Honor, in response.

So the first is -- just to make clear, and we noted this in our motion -- we do not object to Dr. Frantz testifying as a fact witness, and we don't need to depose him a second time on any of the

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matters we already covered in the first deposition.

If the Court is inclined to order his deposition, rather than precluding him from testifying, we would be fine with the Court's order, including a provision stating that the defendants are prohibited from going over ground that they already covered -- questions they already covered in the first deposition.

But what we have to be permitted to do, Your Honor, is ask Dr. Frantz questions like, What are the expert opinions you're going to offer at trial in this matter? And then ask him to explain what the factual bases of those opinions are so we can understand them and then decide whether or not we need to designate a rebuttal expert to his testimony.

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And I think the unreasonableness of the plaintiff's position, you can understand it if you just think about what adopting their version or their interpretation of the rule would do.

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Under plaintiff's interpretation of Rule 26 and Rule 30, they could wait until the defendants depose, for example, six of their fact witnesses, make sure those depositions occur prior to the initial expert deadline. Then, after we've deposed them, they could name all six of those fact witnesses as nonretained experts. And under their interpretation of the rule, we would be prohibited from taking those six nonretained experts depositions because we already took their depositions as fact witnesses.

But obviously back when we took them under my hypothetical, we would have had no idea that they were going to be

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serving as expert witnesses and wouldn't have had any reason to cover all of the topics that we normally would if we knew they were experts.

So, you know, I think all we're asking for here is -- is basic fairness. Either, one, let us depose Dr. Frantz, limit it to four hours -- or two. If they're not going to allow that, then he shouldn't be permitted to offer expert testimony at trial.

Thank you, Your Honor.

THE COURT: Thank you.

This is the Defendant's Motion to Compel Testimony of Dr. Frantz.

The motion will be granted for the following reasons: He has already testified, but the defendant wants a chance to take further testimony. I will allow that to occur for four hours.

Dr. Frantz to be produced at the most immediate convenience of both the parties and Mr. Frantz.

And then if the defendant seeks to designate a rebuttal, that request must be made within two weeks.

And, of course, I would sign the order shortening time on that.

So Mr. Balkenbush to prepare the order. Someone from the plaintiff's team will review and approve the form of the simple order.

Now, with regard to the third matter, it's an order to show cause why the plaintiffs should not be held in contempt.

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I reviewed it and, frankly, I did not think that there was a violation. My inclination is to deny the motion.

But, of course, I'll give the defendants a chance to argue.

MR. BLALACK: Abe or Dan, will you be taking that?

MR. SMITH: Your Honor, this is Abe Smith. My understanding was that the hearing on the motion on the order to show cause is set for next Wednesday. Is that correct?

THE COURT: We had it for today, and I've briefed it. But I -- next Wednesday I will not be in the office. If you want me to hear the motion, and you don't want to go for it today, we'll have to set another time.

MR. SMITH: I can go forward today, but I just wanted to make sure that all parties were ready to argue it today.

THE COURT: Plaintiff, were -- if you guys want to reset this, I'm more than happy to do that.

MS. LUNDVALL: Your Honor, this is Pat Lundvall, on behalf of the Health Care Providers.

I have to say that I agree with Mr. Smith. It was our understanding that the Court Clerk had set this matter for a hearing on September 15. And therefore, technically did not come prepared.

But in the event that the plaintiff -- or in the event that the defendant wants to go forward, in light of the Court's inclination, we too will respond.

THE COURT: Okay. So then, Mr. Blalack, it's up to you and your team to tell me how we're going to proceed.

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MR. BLALACK: Your Honor, I think my inclination would be just to set it at a different date.

This is the -- as you know from our position, Your Honor, the injury has occurred. And so it's just a question of whether there's a violation, if there is the appropriate remedy, it doesn't affect any of the other scheduling issues associated with preparing for or trying the case.

So subject to Your Honor's views, I would -- and Mr. Smith's and Ms. Lundvall's views, I would be inclined to just set it at a time that's convenient for Your Honor, and have it heard at that time.

THE COURT: Good enough. How about the 15th then, at 1 p.m.? Does that work, based upon -- I know you guys are working really hard to get ready for trial.

MR. BLALACK: Abe, is that suitable for you? And --

MR. SMITH: [Indiscernible] the 15th at 1 p.m.

MS. LUNDVALL: [Indiscernible] work, Your Honor.

THE COURT: Very good.

MR. SMITH: Your Honor, I would ask -- we did file our reply brief last night, so if Your Honor hasn't had a chance to review that, I would ask that Your Honor do that.

THE COURT: I actually did. I read it this morning. I'm in a different time zone than you are.

That's fine. On the 15th at 1 p.m. Thank you everyone.

And get those orders to the OIC so I can turn them around

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for you.

MR. BLALACK: Thank you, Your Honor.

THE COURT: All right. Stay safe and healthy, everyone. Court's adjourned.

[Proceeding concluded at 11:18 a.m.]

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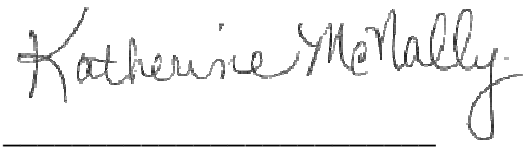
ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video proceedings in the above-entitled case to the best of my ability.



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DISTRICT COURT

CLARK COUNTY, NEVADA

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

BEFORE THE HONORABLE NANCY ALLF, DISTRICT COURT JUDGE
WEDNESDAY, SEPTEMBER 15, 2021

RECORDER'S PARTIAL TRANSCRIPT OF PROCEEDINGS
RE: MOTIONS HEARING
(Via Blue Jeans)

APPEARANCES:

For Plaintiff(s): PATRICIA K. LUNDVALL, ESQ. (in person)
KRISTEN T. GALLAGHER, ESQ.
AMANDA PERACH, ESQ.
JOHN ZAVITSANOS, ESQ.

For Defendant(s): COLBY L. BALKENBUSH, ESQ.
DANIEL F. POLSENBERG, ESQ.

ABRAHAM G. SMITH, ESQ.

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

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LAS VEGAS, NEVADA, WEDNESDAY, SEPTEMBER 15, 2021

[Proceeding commenced at 1:01 p.m.]

THE COURT: Calling the case of Fremont versus United. Let's take appearances, please, starting first with the plaintiff.

MS. LUNDVALL: Good afternoon, Your Honor. This is Pat Lundvall. I'm in the courtroom, with McDonald Carano, appearing on behalf of plaintiffs, the Health Care Providers.

THE COURT: Thank you.

MS. GALLAGHER: Good afternoon, Your Honor. Kristen Gallagher, also on behalf of the plaintiff Health Care Providers.

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

MR. ZAVITSANOS: John Zavitsanos, also on behalf of the Health Care Providers.

THE COURT: And for the defendants, please?

MR. SMITH: Good afternoon, Your Honor. Abe Smith, Dan Polsenberg, and it looks like Colby Balkenbush.

THE COURT: Okay. Very good.

So, Defendants, this was your motion for an Order to Show Cause.

MR. SMITH: Yes, Your Honor. And I'm sensitive to your comments at your -- at the last hearing, where you indicated that you were not inclined to grant the motion. If Your Honor has any particular direction you would like me to take the argument, I'd be

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happy to address your concerns at the outset. But otherwise, I can just -- I can start with the motion.

THE COURT: Go ahead, please. I don't want you to feel that you've been cut off. And I do keep an open mind, even when I form impressions.

MR. SMITH: Okay. And I certainly don't feel cut off. I just want to make sure that in the course of my argument, I'm hitting on the points that may have given Your Honor pause in deciding whether to award sanctions are not. But I'll proceed.

So, Your Honor, as you know, we were back here on July 29th on Report Recommendation No. 5, which was challenging the attorneys' eyes only designation to serve documents relating to a study that was published regarding surprisability.

United had designated those materials attorneys' eyes only, but the issue went before the Special Master who recommended that the designation be removed. Your Honor formally pronounced that you would be overruling the designation as well.

But the question was -- but the issue was put to the parties for a written order. Your Honor asked the plaintiffs to prepare a written order. And, again, according to your department's guidelines, we were not to file competing orders, but rather we would submit objections to the plaintiff's order.

In other words, it was contemplated that there would be an additional procedure beyond simply the Court's announcement of

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the oral ruling.

Plaintiffs admitted in their opposition that they did disclose these attorneys' eyes only designated materials before the entry of a written order -- At least a week before.

Plaintiffs still haven't come clean about when exactly they first disclosed the materials beyond counsel in this case, which would, of course, violate the attorneys' only -- attorneys' eyes only designation. So we still don't know whether that was, you know, right within minutes of this Court's oral pronouncement or whether it was on August 2nd. We know it was no later than August 2nd, because we received an e-mail from a reporter from The Intercept, saying that she already had these materials in hand. At that point, of course, it was too late. It was already in the public domain. There was no jurisdiction over The Intercept, so at that point the damage had been done.

In opposition, the plaintiffs dig in, rather than conceding a mistake or saying, Oh, we -- you know, we understood the order differently, but, you know, as a good faith mistake, they --- they've asserted that this was all United's faults. They advance an assertive interpretation of the Court's protective order that instead of bringing it in harmony with Nevada law would actually contradict Nevada law and would prematurely strip confidentiality into private parties of any effective public review.

So let me start with the interpretation of the order. The order -- in Section 9 of the protective order, the Court and the

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parties -- the language that the Court and the parties agreed to is clear that if a party designates a document as attorneys' eyes only, or if a party contends that a document that was not designated attorneys' eyes only should have been so designated, the document at issue shall be treated as 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. And then later in that same paragraph, it emphasizes that the protection afforded by this protective order shall continue until the Court makes a decision on the motion.

Now, the question that is really the issue in this motion is what is the definition of order. Nevada law already supplies the answer to that question. Nevada law clearly requires a written order on substantive issues in order for it to be an effective order. We have the *Rust* case, we have the *J.M.R.* case, both of which state that -- and the *Nalder* case that state that the Court's oral pronouncement from the bench, the Clerk's minute order, and even in unfiled written order, are ineffective for any purpose.

In the opposition, the plaintiffs try to claim that this is somehow limited to judgments under Rule 50(a) rather than orders on motions in the case. *J.M.R.* addressed that argument specifically and says, No, the language in the *Rust* case is broader than just judgments. And it indicates we did not intend to limit the *Rust* holding -- the judgment pronouncements.

And in fact, that's true both in that case and in the Nalder

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case, where the orders that issue -- the oral rulings at issue were not judgments. In the one case, it was an order to release a child from psychiatric care; in the other case it was an oral stay. In both of those cases, the Supreme Court did not have a problem applying this general rule to the orders at issue. The question was just whether those orders came within one of the narrow exceptions, but the general rule that orders must be written in order to be valid.

So it was against this background of Nevada law that the practitioners in this state can and do understand that the parties drafted this protective order and this Court entered the protective order.

In other words, when the Court says that the confidentiality continues until the Court issues in order, that already, by definition under Nevada law, means a written order, not oral pronouncement, which, as Nevada law would hold, is ineffective for any purpose.

That's in contrast to a -- the parties written agreement. Right? So there's -- A would be the parties' written agreement; B is the Court issues an order.

Under Nevada law, there's no presumption that an agreement has to be written in order to be valid. There are such things as valid oral agreements. So that's why the parties specify that there would be a written agreement.

But again, Nevada law already supplies the definition of an order so there was no similar need to specify that it be a written

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order.

So I think the *expressio unius* argument that the plaintiffs are making really falls flat. That's for a case when there really would be ambiguity without the modifier of written or oral. In this case, there is no ambiguity because Nevada law already supplies that definition.

And let me just go a bit further about the absurdity of their definition of order really referring to just an oral ruling. This creates a boundary drawing problem. If the parties were to -- if the Court were to make an oral pronouncement overruling the confidentiality designation, it's not clear whether in that case the party could just have their finger above the send button, ready to send these confidential documents to the world, as soon as this Court, you know, says the word overrule, without perhaps even waiting for, as the plaintiffs would request -- are suggesting the defendants had to do, some kind of oral stay motion or the like. It's not clear whether that would be a violation of the Court's protective order.

And it can't be that the parties would be allowed to sow, if they had any opportunity for appellate review, just by, you know, immediately rushing from this Court's oral pronouncement, especially when that pronouncement in this case was not -- did not specify that it had an immediate effect. Rather it asked the parties to go draft a written order.

The only clear line that creates certainty for the parties that the older materials remained confidential is the entry of a

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written order.

Now, the plaintiffs say, well -- they largely try to ignore that piece of the protective order. Instead they rely on the later language in the protective order that says, the protection shall continue until the Court makes a decision on the motion.

According to plaintiffs, this means, Ah-Ha, because it says decision, that must mean that you can have an oral ruling and that's enough. But that doesn't make any sense. Rather than reading the two provisions in harmony with one another and in harmony with the background of Nevada law, they're saying, Well, actually, this term decision shows that you can override Nevada law and disregard the ordinary meaning of the word order and have it extended to oral pronouncements.

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That, I think, would have the perverse effect at making a decision on confidentiality unreviewable -- effectively unreviewable by the Supreme Court, because the Supreme Court, of course, cannot review on the merits an oral decision. It requires the entry of a written order in order to be able to rule on the at issue -- issue of confidentiality or privilege or the like.

Plaintiffs also accused United of saying that, well, if you're going to say that this was a violation of the protective order, essentially that would render the Court's oral ruling meaningless. And I think we have a disagreement on what sort of meaning we're supposed to ascribe to these proceedings.

We're not saying that the [indiscernible] are meaningless.

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We just don't agree that they have the specific effect of disregarding a protective order that the parties entered into and had the immediate effect of removing [indiscernible] at the hearing. Rather, we understand it to have the meaning that every oral ruling has within the judicial district, which is it defines the parameters for an eventual written order.

Of course, we're not saying that we could go in [indiscernible] an order that would be completely at odds with the Court's oral ruling and expect the Court to sign it, rather the [indiscernible] show that -- say that you would need to propose an order that's in line with the Court's oral ruling. But that doesn't mean that the oral ruling itself has the effect of removing confidentiality at the moment that it's pronounced.

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And just to be clear, it wasn't clear from the plaintiff's opposition whether they're actually arguing whether this case would fall within one of the narrow exceptions. But to be clear, it does not. Although they refer to the protective order as a type of case management order, a decision that overrules a privilege or confidentiality designation effectively removing parties' substantive rights to keep information out of the public domain, that's a substantive ruling.

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It's not a case management order of the type that the cases talk about. They're talking about, you know, resetting a hearing date, rescheduling trial, reassigning the case to a new department. I don't think that could be accomplished, perhaps even

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ex parte, without jeopardizing the parties' substantial rights. But to be clear, certainly an issue of privilege or confidentiality cannot simply be treated as an issue that does not require a written order.

Lastly, let me talk briefly about the issue of what the appropriate sanction is and the prejudice from the plaintiff's violation. I think the plaintiffs are trying to shift the timeline a little bit. They say, well, you know, they didn't file the motion until the case had -- or the information had already gone out in a public article. But to be clear, it was already too late. By August 2nd, which was actually before -- earlier in the day then we got even the proposed written orders from plaintiff, the plaintiffs had already disclosed this information outside the counsel-only bubble that the information should've remained in, and it had extended to parties beyond on the jurisdiction of this Court. So it was already too late by August 2nd to claw back -- to claw back these materials. It was in the public domain. And, frankly, at that point, it didn't make sense for United to try to make [indiscernible] of trying to withdraw the documents that are clearly already [indiscernible].

Plaintiffs then accused defendants of not seeking an oral stay. And they refer -- of course, there's is no -- there is no published case law requiring such a thing. They instead refer to unpublished district court orders.

But if you look at those cases, they're talking about a stay that goes beyond [indiscernible] in the *Wynn* case, the [indiscernible] case, that was a stay pending a writ petition, and the parties agreed

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that the stay would extend for 14 days, and it was not tied to the entry of a written order.

In the *Goldentree* case, again, we don't have much context on that because the plaintiffs didn't provide any. But there -- it appears, again, that the stay was requested to extend through the resolution of a writ [indiscernible]. Again, that's not tied to the entry of a written order.

Here, all we're saying is that without a stay, we perhaps wouldn't have been able to expect protection to continue beyond the entry of a written order, but there was no reason to expect that the protection would evaporate before the entry of a written order, absent a stay, because the protective order already provided that confidentiality that it would continue through the entry of an order.

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And again, they question -- the plaintiffs question our sincerity in whether we actually would have filed a writ petition or not. I don't think I need to get into our privileged attorney-client conversations, but I did submit a declaration that, yes, we were seriously considering this. And then it became clear that the plaintiffs had eviscerated the object of such a writ petition by disclosing these materials to third parties, to the press.

So it was our right to seek a public review. There's no question that the Supreme Court would've taken a case like this seriously. The plaintiffs never argued that the -- that the designation was so frivolous that it could just be disregarded out of hand. I don't think this Court treated it as frivolous. Of course, there was a written

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confidentiality agreement that the Court had to override between United and Mr. Cooper. The Court decided that it was worth overriding it in overruling our objection to the Report Recommendation No. 5. But that doesn't mean that we didn't have a good faith argument.

And certainly the Supreme Court would have taken a look at -- a hard look at this, even if it ultimately decided that no -- there was no confidentiality. The Court -- even if the Supreme Court were eventually to agree with this, this Court -- that doesn't remedy the initial violation, our right to seek appellate review, and the fact that the confident -- that the protective order was [indiscernible] in this case afforded us precisely that action.

Does Your Honor have any questions for me?

THE COURT: I don't. Thank you. Did that conclude your argument?

MR. SMITH: It did, Your Honor.

THE COURT: All right. Let's hear the opposition, please.

MS. LUNDVALL: Thank you, Your Honor. Pat Lundvall, from McDonald Carano, again on behalf of the plaintiff, the Health Care Providers. I appreciate the opportunity to allow the parties to make their record. Since United has made theirs in full, I intend to make ours in full as well.

One of the things that the -- United does not do is it does not afford the Court any framework for the analysis on the motion that they had brought. This is a motion for an Order to Show Cause

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to find that we are in contempt, and in particular, find counsel in contempt.

What the Court must do, well, for that framework or for that analysis, before you can make such a finding, is, No. 1, you have to identify what the order is that's at issue; and, No. 2, you have to confirm that the order that was allegedly violated is clear and unambiguous.

And that's the decision in *Division of Child and Family Services versus 8th Judicial District Court.* It's a 2004 decision from the Nevada Supreme Court.

No question about the fact that the order that is at issue is the stipulated protective order. That stipulated protected order was a written agreement that was negotiated extensively by the parties before it was submitted to the Court then for consideration as a written order.

Paragraph 9 is the operative paragraph for the specific legal issue that's before you, and you need to, in fact, apply the classic contract interpretation analysis to paragraph 5 in order to determine, first, what parties -- what duties the parties had under the stipulated protective order, so as to determine then whether or not that there was some type of a breach of those duties.

Before I turn to paragraph 9, I would like to give some context, though, to this dispute and the protective order and the use of the protective order, or more appropriately the abuse of the protective order that has been practiced by United in this case.

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One of the things that is at issue is the documents that they had designated as attorneys' eyes only. Paragraph 2 of the protective order defined when a party in good faith may designate documents as attorneys' eyes only.

In this case, that definition turned on whether or not that the documents contained either a trade secret or that they were so sensitive that it would significantly harm the business of the party who had produced the documents.

And if you take a look then in this case -- I want to give the Court a few statistics. There have been 61,023 items that have been produced by United during the course of discovery. Of those 61,000, almost 40,000 have been designated as attorneys' eyes only. That's almost 63 percent of the documents. In addition, they have designated 15,744 as being held confidential protected and an additional 5,000 as being confidential. There is only 1,772 documents that United hasn't applied some form of confidentiality to. But the bulk of their confidentiality designations have been attorneys' eyes only.

So the issue becomes is whether or not that the documents that were at issue were properly designated in the first place.

Now, one of the things that I will tell you, you've got to first look then at the business of what United is, to determine whether or not that these Yale study documents could be a trade secret. There's absolutely no contention that has been made by

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United that these documents are trade secrets.

Number 2 is that they would have to demonstrate that the disclosure of these documents has significantly harmed their basic business.

So what is their basic business? It's the sale and administration of health insurance claims.

Has there been any contention made in this motion for order to show cause that would suggest that somehow that the disclosure of these documents has significantly harmed their basic business? Absolutely not. It is a concession and it is an admission that they overdesignated in the first place. And both Special Master Wall, as well as this Court, was proper in stripping away the designation of attorneys' eyes only to the documents.

I think the second point that is most important, and it underscores the fact that the stipulated protective order is a case management order -- and allow me to underscore this if you can for a bit. It allows the parties some protection for confidentiality during discovery, but it affords no protections during trial.

I think it's important to note that these documents were in our possession. They were relevant. They were discoverable. And United had an obligation and a duty then to turn these over to us. And so the stipulated protective order only identifies the time frame in which those documents made [indiscernible] or must be maintained as confidentiality.

Now, these documents, I think, are important to look at in

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this context. These documents [indiscernible] were the Yale study documents are clearly going to be exhibits at the time of trial. These documents underscore and illustrate the intentionality of the harm that United -- and the efforts that United took to intentionally harm the plaintiffs at issue in this case. They will demonstrate, then, the attempt that has been made by United -- and that goes directly then to the claims that have been asserted in this case. They will be exhibits at time of trial. And so, therefore, it was simply a matter of time before these documents would be made public.

And the simple reason that these documents will be made public, because you can't ask jurors sitting in the box to sign a confidentiality order. So to the extent that the parties have claims and litigation over those claims, the documents then that are relevant to those claims will be presented then to the jury.

When you examine and look at the timing aspect of this stipulated protective order, it underscores the fact that this issue before you is nearly identical to the oral order that was at issue in *Bahena versus Goodyear*, that the Nevada Supreme Court found to be enforceable. And because there was a violation of that oral order, counsel were sanctioned then as a result of that. And so our case then falls square within the scope then of *Bahena versus Goodyear* in demonstrating and underscoring the fact that this was a case management order.

I also think that the -- there's another point that underscores the fact that this is a case management issue, and not a

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substantive issue as Mr. Smith contends. They cited to this Court three cases claiming that the Nevada Supreme Court will bend over backwards to try to maintain the confidentiality of documents, and, therefore, they would have taken this case seriously or maybe writ seriously and likely afforded it writ review.

Each and every one of the cases that they cited dealt with documents that had not been produced in the case. In the *Columbia versus Healthcare* case, what was at issue was work product and peer review privilege. The opposing party did not have those documents. What was at issue was whether or not those documents had to be produced. In *Wardleigh,* what was at issue was a work product and an attorney-client privilege. What was at issue in *Schlatter* was a doctor-patient privilege. In each one of those cases, the opposing party did not have possession of the documents.

In our case, in stark contrast, we have possession of the documents. United had produced those documents to us. And it was only a matter of how long that those documents would enjoy some form of confidentiality.

So when you take a look then at the concession that was contained within their moving papers both, in their opening brief, as well as in the reply brief, they concede the case management orders -- oral case management orders are enforceable. And that's exactly how the parties have treated any of the Court's oral orders dealing with case management issues.

In a bit, I'll give the Court a few examples then of that. But

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let me turn specifically then to Paragraph No. 9 of the stipulated protective order. Paragraph No. 9, in two separate places, does not require a written order or a written decision. Instead, what United wishes the Court to do is to imply or to engraft or to put in and to insert, claiming that there was some failure on behalf of the parties then to include that.

But this is not the interpretation that is supposed to be afforded to the stipulated protective order, which is an agreement, and it violates then not only the plain meaning but the plain language then of the stipulated protective order.

Paragraph A -- Paragraph 9, Subsection A, expressly required a written agreement or an order. It doesn't say a written order. It says, A written agreement or an order.

And I'm going to use the language specifically: The Court issues an order ruling on the designation.

On July 29th, when we were before this Court, you issued an order ruling on the designation. You adopted the Report and Recommendation from Special Master Wall, and that Report and Recommendation stripped away any confidentiality designation.

When you go on to a little bit later within the Paragraph No. 9, you see a second reference. That second reference -- and once again I'm going to quote -- The protection afforded by this protective order shall continue until the Court makes a decision on the motion. Not a written decision, not issues a written decision, not issues a written order, but makes a decision on the motion. And the

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Court did exactly that then on July 29th. On July 29th then, under the plain language of the stipulated protective order, the -- any form as to the timing of the confidentiality protection was stripped away.

Now, as one way, I think, of testing whether or not that their interpretation that we believe is clear and unambiguous from the stipulated protective order, you can look to the parties' conduct in this case as to whether or not that we have waited until notice of injury of a written order before we begin to take action on the different tasks that were at hand as a result of the Court's oral rulings made at hearings.

And one of the things I think you could look at is bookends. The very first hearing that the Court held was on the motion to dismiss. And immediately after the hearing on the motion to dismiss, we were contacted and we began meet and confers on none other than the stipulated protective order, negotiated an e-mail protocol, et cetera, without waiting for written notice of entry of your order.

And the most recent example was just last week, the Court made an oral ruling on the issue of Dr. Frantz' deposition and whether or not Dr. Frantz' deposition then needed to be taken or whether or not that his previous testimony was sufficient then for his designation as a nonretained expert.

Immediately after issuance by the Court of your oral order, we were contacted then by United to begin scheduling. And I could give the Court umpteen examples of everything in between, as to the

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parties not waiting until notice of entry of a written order before acting upon the oral order.

One thing that I think is important to look at too is that when you look at or when you examine the motion that was filed by United in this case, they suggested that the purpose underlined, waiting until that there was notice of entry of order of a written order was that somehow it allows the Court the opportunity to change your mind between the hearing at which an oral decision or an oral pronouncement or an oral ruling is made and when, in fact, that the written order is issued.

We pointed out in our opposition that your guidelines absolutely prohibit that. Your guidelines made clear that the written order is supposed to match the oral order and that the parties have no opportunity then to argue for a different result or a different conclusion.

Noticeably, the reply brief that was filed by United didn't touch that argument. They were completely silent in response to that argument.

The next point I'd like to make for purposes of the record is this: United failed to protect itself from whatever that they claimed is a harm or a prejudice. And this is where I think a little bit of their argument, I'm going to label, as being specious.

We had a hearing on May 10th before Judge Wall -- before Special Master Wall. At that hearing -- there is a transcript of it -- we made clear, abundantly clear, that we were going to use if, in fact,

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the Yale study documents were stripped of their confidentiality in an effort to address then the regulatory issues that were ongoing in Washington, DC. We made that abundantly clear at that hearing.

The publication then -- the article that published these documents, was not issued until August 10. That's three months. Three months United had an opportunity to consider whether or not that it was going to take a writ, to consider what actions that it may need to take to protect itself. Three months to determine what course of action that it may need to take.

And in my opinion, it is best practice to -- if you've got an important issue for which that you perceive or you believe that you're going to need to take a writ, then you make an oral motion for stay.

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On July 29th, we came prepared to address an oral motion for stay, but no oral motion for stay was made. And, therefore, when the Court issued its order, it issued an order ruling on the designation and the language of the stipulated protective order. And when it made its decision, that's when the designation fell away, and that's when then that it no longer enjoyed any protection.

The other thing I think that is worth bearing, as to the good faith in which this claim of prejudice is made, is this: Under the papers that were filed by United, they were contacted on August 2nd by the reporter. Only the reporter was known to United as having those documents.

But three days later, after being contacted and knowing

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that, in fact, that the reporter had these documents, only then did they come forward and ask in the form of a draft order for there to be some type of a different date by which then the confidentiality be stripped away. And the Court rejected that. And there was no mention whatsoever in that submission that, in fact, that at that point in time that they were taking any actions then or taking any efforts then to protect themselves.

And when you look at the motion and look at the relief that they have requested, the only sanction that they sought was the form of a monetary sanction. And the monetary sanction that they asked for was in the form of an award of attorney's fees in having to bring the motion for an Order to Show Cause. In other words, any of the harm or the prejudice that they contend was self-inflicted.

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Now, I know that I've probably given a little overkill to our presentation and to making a record in this case, but I will confess, I don't think I've ever been accused of being in contempt of a court order. And so I appreciate the Court's indulgence in allowing it.

In summary, we believe that the Court made a decision, and you announced your decision and your order ruling on the designation on July 29th on a case management issue. That decision then stripped away any of the confidentiality protections that were for the documents that were at issue under plain language and plain meaning interpretation of the protective order. We believe that the stipulated protective order was clear in our favor.

But to the extent that there is considered a construed and

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ambiguity in that order, then, in fact, an ambiguous order cannot be the foundation for a finding of contempt. And, therefore, we would ask the Court then, unless you have further questions, to deny the motion for orders to show cause.

THE COURT: Thank you.

And, Mr. Smith, if you will confine your argument to five minutes, please, in reply.

MR. SMITH: Thank you, Your Honor.

I don't mean to make this personal against Ms. Lundvall. I don't think we ever accused her personally of being the one that shared the attorneys' eyes only materials with the press. Well, frankly, plaintiffs haven't told us that, although we would like to know.

What I do take personally, though, is the argument that the declaration that I submitted is somehow specious, which is the term we heard today, and that we weren't, in fact, considering a writ petition.

As Your Honor knows, there are a lot of factors that go into whether a party might file a writ petition, and those factors change depending on a number of issues, including the proximity to trial date, the likelihood that the petition will be heard, et cetera. So it's not fair to say that we had three months to decide whether to file a writ petition, when, in fact, we had to go through the process of having the issue heard by this court first.

And certainly -- and actually Ms. Lundvall brings up -- she

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perhaps inadvertently brings up a good point, which is at the hearing, our client wasn't present. So of course our client wouldn't have known the outcome, and we needed to consult with our client to be able to decide what course to take in the wake of that hearing. And again, we haven't heard whether, in fact, the send button was pushed moments after that hearing.

Let me also address the contention that because we sought a more limited sanction that that somehow constitutes a concession that this was a minor violation. It was not a minor violation. We were trying to be charitable in trying to narrowly tailor the sanction.

But to be clear, this is of -- this is a willful violation of a protective order, the kind of willful violation of a discovery order that in a case like *Johnny Ribeiro* would merit dismissal of the complaint. Just because we haven't asked the Court to take that extreme measure doesn't mean that the harm was not extensive and that the contempt was not extreme.

Let me also address what I think was perhaps an inadvertent misstatement. Ms. Lundvall refers to our interpretation of the order requiring that there be notice of entry in an order. We never said that there needed to be notice of entry within the meaning of, you know, of some of the deadlines for filing postjudgment motions in an appeal.

Instead, what we said is there needed to be issued an order.

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Ms. Lundvall says, oh, well, the Court, in fact, entered -- sorry -- issued the order at the hearing. No. Let me pull from the transcript of the hearing.

The Court said, With regard to Report No. 5, the same thing. I agree with Judge Wall that the attorneys' eyes only was not necessary in this case, and I did review the supplement with regard to the price billing and manipulated data. And I agree with Dave Wall, with regard to all his conclusions. Next sentence, So the plaintiff to prepare the order. There was no order written, or otherwise, at the hearing. And in fact, it was clear that there needed to be a written order for the objection to be finally and effectively overruled.

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We've got a bunch of arguments that, for the first time today, that were not addressed in the opposition, including a new argument that actually the protective order -- or rather that the protections within the protective order could be overruled orally because that was a case management order. We did not -- that was not clearly argued in the opposition. But, regardless, there is an abundance of support for the proposition that in order to overrule, any privilege or confidentiality designation needs to be written in order to be effective under Nevada law.

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They also bring up the *Bahena* with, of course, no context for that case. That case involved a party being compelled to sit for a deposition by a date certain. That date certain fell within the objection period to the Special Master recommendation. So in order

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to be in compliance with the Special Master's ruling, there needed to be a stay of that order before the deposition took place.

We don't have anything like that here. This is not any affirmative action that United needed to take. United wasn't in contempt. I mean, we're kind of flipping the script in a sense. But United would not have been in contempt for simply leaving the *status quo*.

And I resent the comparison that somehow we're entitled to less protection simply because we produce these materials in discovery. I think, if anything, that weighs in favor of being more careful with both parties' confidentiality. At least in the *Columbia* case, the parties had not turned over the hospital incident reports. But here, we had given our confidential information to the plaintiffs on the understanding that it would be accorded exactly the protection that is entitled to under the protective order.

My last point, I don't think that the analysis for whether there's been a violation of the protection order has anything to do with the substantive analysis of whether this Court correctly overruled -- overruled our objection to the Report and Recommendation No. 5. In fact, it's in that instance when the Court disagrees with us on the underlying substance that those protections become especially important, and the Court needs to be especially mindful and the parties need to be mindful of protecting the other side's opportunity for appellate review.

Of course, this Court agreed. You know, this Court is the

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one that issued -- ultimately issued the written order overruling our objection. But that doesn't mean that that's a license to override our opportunity to seek appellate review.

I don't think that this is -- and neither party argued that there was ambiguity in the [indiscernible]. It was clear, it required the issuance of an order under Nevada law that needs a written order.

Your Honor should grant the motion. Thank you.

THE COURT: Okay. Thank you, both.

This is the defendant's motion for an Order to Show Cause why Plaintiffs Should Not Be Held in Contempt and Sanctioned for Violating Protective Order.

While I understand the technical argument advanced by the defendant, the motion will be denied because I can't make the findings that would be required to grant the Order to Show Cause.

I think the plaintiffs had the right to rely on the oral record done on July 29, 2021, at the hearing, where I overruled the defendant's objections and affirmed and adopted the recommendations of the Special Master.

So for those reasons, the motion will be denied.

The plaintiff may prepare an order consistent with your brief and your arguments today in as much detail as you deem appropriate.

Defendants, if you object to the form of the proposed order, please file an objection, and I'll take it from there.

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Any questions?

MR. SMITH: Your Honor, can I just ask one clarification?

Are you finding that the oral ruling overruling the confidentiality designation -- that that constitutes a case management order as Ms. Lundvall --

THE COURT: That is correct.

MR. SMITH: Okay.

THE COURT: That is correct.

MR. SMITH: [Indiscernible.]

THE COURT: Okay. Anything else to take up today?

MS. LUNDVALL: Not today, Your Honor, from the plaintiffs.

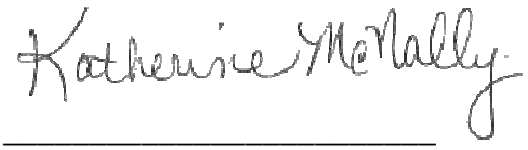
THE COURT: Very good. Thank you, everybody. Stay safe and healthy.

MR. POLSENBERG: Thank you, Your Honor.

[Proceeding concluded at 1:47 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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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 ORDER AFFIRMING AND ADOPTING REPORT AND RECOMMENDATION NO. 6 REGARDING DEFENDANTS' MOTION TO COMPEL FURTHER TESTIMONY FROM DEPONENTS INSTRUCTED NOT TO ANSWER QUESTIONS AND OVERRULING OBJECTION

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Defendants.

PLEASE TAKE NOTICE that an Order Affirming and Adopting Report and Recommendation No. 6 Regarding Defendants' Motion to Compel Further Testimony from Deponents Instructed Not to Answer Questions and Overruling Objection was entered on September 16, 2021, a copy of which is attached hereto.

Dated this 16th day of September, 2021.

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CERTIFICATE OF SERVICE

I certify that I am an employee of McDonald Carano LLP, and that on this 16th day of September, 2021, I caused a true and correct copy of the foregoing **NOTICE OF ENTRY OF ORDER AFFIRMING AND ADOPTING REPORT AND RECOMMENDATION NO. 6 REGARDING DEFENDANTS' MOTION TO COMPEL FURTHER TESTIMONY FROM DEPONENTS INSTRUCTED NOT TO ANSWER QUESTIONS 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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Plaintiffs,

vs.

UNITEDHEALTH GROUP, INC., a Delaware

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

ORDER AFFIRMING AND ADOPTING REPORT AND RECOMMENDATION NO. 6 REGARDING DEFENDANTS' MOTION TO COMPEL FURTHER TESTIMONY FROM DEPONENTS INSTRUCTED NOT TO ANSWER QUESTIONS AND OVERRULING OBJECTION

Hearing Date: August 17, 2021
Hearing Time: 2:00 p.m.

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Defendants.

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This matter came before the Court on August 17, 2021 on 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. (collectively, "United") Objection to the Special Master's Report and Recommendation No. 6 ("R&R #6") Regarding Defendants' Motion to Compel Further Testimony From Deponents Instructed Not To Answer Questions (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"). Abraham G. Smith and Daniel F. Polsenberg, Lewis Roca Rothgerber Christie LLP, appeared on behalf of United.

The Court, having considered R&R #6, Defendants' Objection to R&R #6, 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 #6 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.

September 15, 2021

Dated this 16th day of September, 2021

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Nancy Allf
District Court Judge

Submitted by:

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EXHIBIT 1

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EXHIBIT 1

Electronically Filed
5/26/2021 10:18 AM
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CLERK OF THE COURT

Hon. David T. Wall (Ret.)
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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 #6 REGARDING DEFENDANTS' MOTION TO COMPEL FURTHER TESTIMONY FROM DEPONENTS INSTRUCTED NOT TO ANSWER QUESTION

On May 21, 2021, Defendants filed a Motion to Compel Further Testimony From Deponents Instructed Not to Answer Questions on Order Shortening Time. The Motion specifically addressed the issue to the attention of the Special Master. Plaintiffs filed an Opposition on May 24, 2021.

The matter was addressed during a telephonic hearing on May 25 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; Dimitri Portnoi, Esq. and Brittany M. Llewellyn, 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 Defendants' Motion to Compel Further Testimony From Deponents Instructed Not to Answer Questions:

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

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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)).[1]

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.[2]

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.

Dated this 26TH day of May, 2021.

Hon. David T. Wall (Ret.)

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[1] Since this issue arose during a discussion of pending issues during a status conference, and not as a result of any motion, this ruling was not memorialized in a Report and Recommendation from the Special Master.

[2] The prior Orders of the trial court include the June 2020 Order Denying Defendants' Motion to Dismiss, the October 2020 Order Denying Defendants' Motion to Compel, the February 2021 Order Denying Defendants' Motion to Compel and the April 2021 Order Denying Defendants' Motion for Reconsideration. The prior Reports and Recommendations of the Special Master include Reports and Recommendations #2 (March 29, 2021) and #3 (April 14, 2021). Defendants note that they have objected to Reports and Recommendations #2 and #3, citing to the fact that these have not yet been adopted by the trial court. However, for purposes of the application of NRCP 30(c)(2), the Special Master has incorporated the substance of the rulings within #2 and #3 into limitations ordered by the court to be enforced under NRCP 30(c)(2).

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 May 26, 2021, I served the attached REPORT AND RECOMMENDATION 6 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 May 26, 2021.

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Marianne Carter

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Cc: Pat Lundvall; Amanda Perach
Subject: RE: Fremont v. United - orders re: R&R ## 6, 7 and 9

We are fine with the form and content. You may insert our signature block to that effect for each of those orders and submit to the Court.

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This Message originated outside your organization.

I am following up on the submission of the attached orders to the Court. If there is no objection planned, will you agree to the form/content? If an objection is planned, please let me know so that my office can convey that information to the Department when we resubmit the proposed orders. As of now, the Department has returned the orders based on a perception that there will be competing orders.

Thank you,
Kristy

Kristen T. Gallagher | Partner

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From: Kristen T. Gallagher
Sent: Wednesday, September 1, 2021 9:36 AM

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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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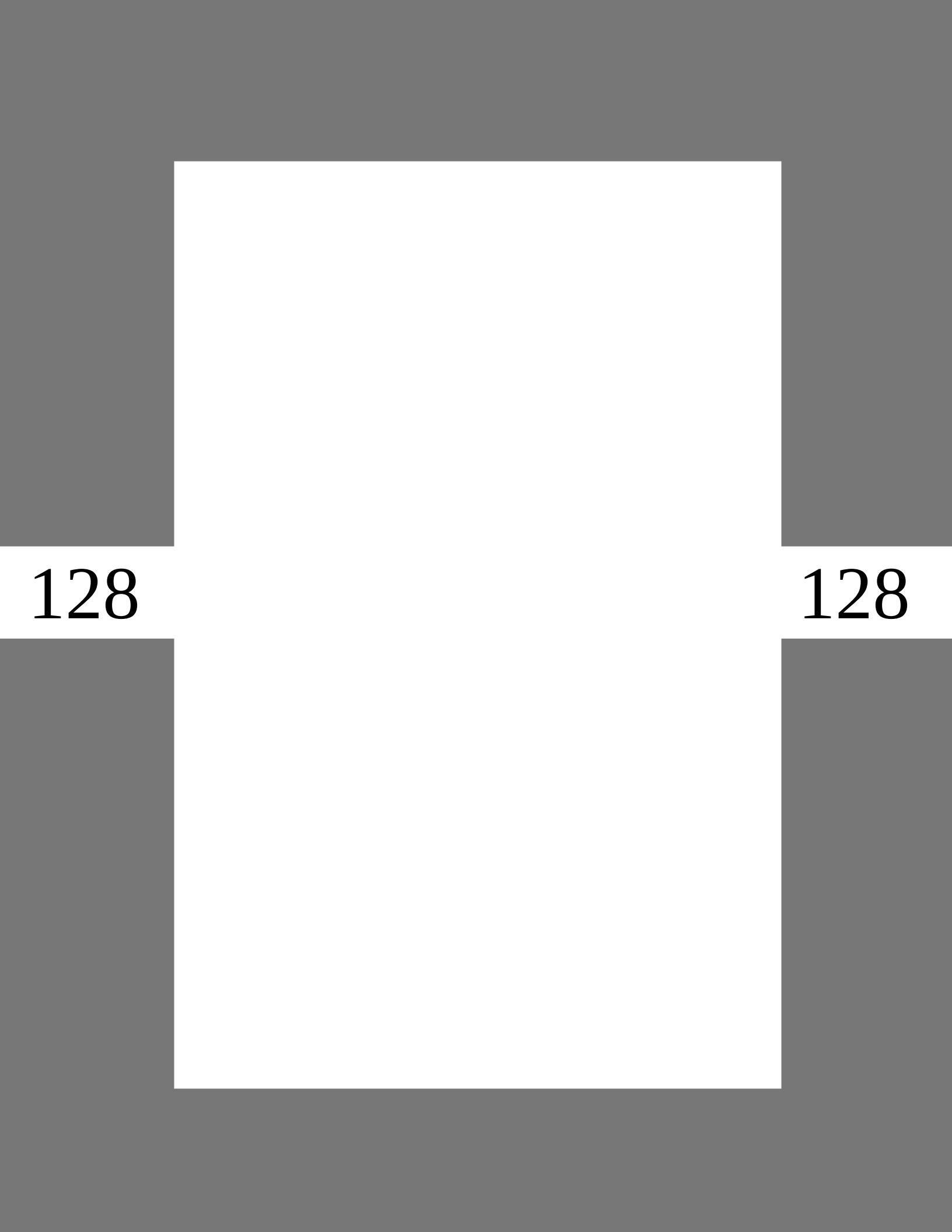
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CLARK COUNTY, NEVADA

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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 ORDER AFFIRMING AND ADOPTING REPORT AND RECOMMENDATION NO. 7 REGARDING DEFENDANTS' MOTION TO COMPEL RESPONSES TO DEFENDANTS' AMENDED THIRD SET OF REQUESTS FOR PRODUCTION OF DOCUMENTS AND OVERRULING OBJECTION

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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 an Order Affirming and Adopting Report and Recommendation No. 7 Regarding Defendants' Motion to Compel Responses to Defendants' Amended Third Set of Requests for Production of Documents and Overruling Objection was entered on September 16, 2021, a copy of which is attached hereto.

Dated this 16th day of September, 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 16th day of September, 2021, I caused a true and correct copy of the foregoing **NOTICE OF ENTRY OF ORDER AFFIRMING AND ADOPTING REPORT AND RECOMMENDATION NO. 7 REGARDING DEFENDANTS' MOTION TO COMPEL RESPONSES TO DEFENDANTS' AMENDED THIRD SET OF REQUESTS FOR PRODUCTION OF DOCUMENTS 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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Plaintiffs,

vs.

UNITEDHEALTH GROUP, INC., a Delaware

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

ORDER AFFIRMING AND ADOPTING REPORT AND RECOMMENDATION NO. 7 REGARDING DEFENDANTS' MOTION TO COMPEL RESPONSES TO DEFENDANTS' AMENDED THIRD SET OF REQUESTS FOR PRODUCTION OF DOCUMENTS AND OVERRULING OBJECTION

Hearing Date: August 17, 2021
Hearing Time: 2:00 p.m.

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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.

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This matter came before the Court on August 17, 2021 on 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. (collectively, "United") Objection to the Special Master's Report and Recommendation No. 7 ("R&R #7") Regarding Defendants' Motion To Compel Responses To Defendants' Amended Third Set Of Requests For Production Of Documents (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"). Abraham G. Smith and Daniel F. Polsenberg, Lewis Roca Rothgerber Christie LLP, appeared on behalf of United.

The Court, having considered R&R #7, Defendants' Objection to R&R #7, 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,

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IT IS HEREBY ORDERED that, for the reasons set forth on the record at the hearing and contained in the Response, R&R #7 is hereby affirmed and adopted in its entirety, as set forth in **Exhibit 1** attached hereto.

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.

September 15, 2021

Dated this 16th day of September, 2021

Nancy L Allf

TW

5C9 B1A 8F1F 6C6F
Nancy Allf
District Court Judge

Submitted by:

McDONALD CARANO LLP

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EXHIBIT 1

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EXHIBIT 1

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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 #7 REGARDING DEFENDANTS' MOTION TO COMPEL PLAINTIFFS' RESPONSES TO DEFENDANTS' AMENDED THIRD SET OF REQUESTS FOR PRODUCTION OF DOCUMENTS**

On May 18, 2021, Defendants filed a Motion to Compel Plaintiffs' Responses to Defendants' Amended Third Set of Requests for Production of Documents on Order Shortening Time. The Motion specifically addressed the issue to the attention of the Special Master. During a status teleconference on May 20, 2021, Plaintiffs were directed to file an Opposition on or before May 24, 2021, Defendants were directed to file any Reply Brief on or before May 26, 2021, and the matter was set for a telephonic hearing on May 27, 2021. Plaintiffs filed a timely Opposition on May 24, 2021 and Defendants filed a timely Reply brief on May 26, 2021.

The matter was addressed during the telephonic hearing on May 27 2021. Participating were the Special Master, Hon. David T. Wall, Ret.; Pat Lundvall, Esq., Kristen T. Gallagher, Esq. and Amanda M. Perach, Esq., appearing for Plaintiffs; Dimitri Portnoi, 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 Defendants' Motion to Compel Plaintiffs' Responses to Defendants' Amended Third Set of Requests for Production of Documents:

FINDINGS OF FACT

1. On or about July 7, 2020, the parties jointly filed a JCCR which provided for forty-five (45) days to respond to written discovery.

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2. On or about August 12, 2020, Defendants served their second set of Requests for Production of Documents (RFPs) requesting, among other things, production of Plaintiffs' "market data."

3. On or about January 6, 2021, Plaintiffs produced the market data, and on or about January 18, 2021, Plaintiffs served their second supplemental responses to Defendants' second set of RFPs, producing the same market data in response to RFPs 54, 55, 87 and 88.[1]

4. On or about March 9, 2021, Defendants served an Amended Third Set of RFPs with three additional RFPs:

    a. RFP 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, ou- 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.

    b. RFP 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.

    c. RFP 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.

[1] This market data was submitted *in camera* to the Special Master as Exhibit 6 to the instant Motion.

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5. On March 15, 2021, counsel for Defendants sent an email to counsel for Plaintiffs regarding the Amended Third set of RFPs. In the email, Defendants acknowledged the 45-day time period for responding to RFPs and noted that Plaintiffs' responses to the newest RFPs would become due on April 23, 2021, eight days after the documentary discovery cutoff of April 15, 2021, previously imposed by the Trial Court. Defendants requested that if Plaintiffs intended upon arguing that the RFPs were therefore untimely, to let Defendants know so that expedited relief could be requested before the Special Master.
6. On March 20, 2021, counsel for Plaintiffs responded to Defendants' email, indicating that "[i]n addition to other objections, the [Plaintiffs] intend to object to the timeliness of [Defendants'] third set of RFPs."
7. Defendants did not file the instant Motion to Compel until May 18, 2021.
8. 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

9. 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.
10. Defendants seek an Order compelling Plaintiffs to respond to the Amended Third Set of RFPs.
11. Plaintiffs argue that the instant RFPs include requests for irrelevant, non-commercial data already determined to be irrelevant to this action in prior Orders of the Trial Court and in Reports and Recommendations of the Special Master.[2] RFPs 156 and 157 in fact contain requests for irrelevant non-commercial data and in-

[2]Plaintiffs specifically reference the Trial Court's November 9, 2020 Order Granting Plaintiff's Motion to Compel and the Special Master's 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 and Report and Recommendation #3 on Defendants' Motion to Compel.

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network reimbursement data, including documents related to Medicare, Medicaid, TRICARE and Worker's Compensation, etc. Defendants do not dispute that some of the topics within RFP 156 have been deemed irrelevant by the Court, but note that other topics have not.

12. To the extent that RFPs 156 and 157 request relevant market data, it is the determination of the Special Master, after an *in camera* review of Exhibits 6, 11 and 13 to Defendants' Motion (comprising the market data already produced by Plaintiffs), and after full consideration of the arguments of counsel regarding the sufficiency of that data, that Plaintiffs have already produced information sufficiently responding to the portions of RFPs 156 and 157 requesting relevant commercial market data.

13. Plaintiffs argue that RFP 158, requesting chargemasters from 2013 to 2017, seeks documents outside of the relevant time period for the claims in the instant action. It is undisputed that Plaintiffs have already produced chargemasters for 2017 to 2019, as well as chargemasters for other related entities, some of which date back to 2013. Defendants argue that the prior chargemasters are relevant to show what Plaintiffs charged for services before being acquired by TeamHealth. It is the determination of the Special Master that the information is not relevant under the guidelines of NRCP 26(b)(1).

14. Plaintiffs argue that the instant RFPs, and the instant Motion to Compel responses thereto, are untimely. 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. It is also undisputed that Plaintiffs made known, upon Defendants' inquiry, their intention to object to the timeliness of the RFPs on March 20, 2021, nearly sixty (60) days before Defendants filed the instant Motion.

15. Although the Nevada Rules of Civil Procedure do not specify a time limit for filing a motion to compel, case law evidences a general rule that such motions, absent unusual circumstances, should be filed before the close of discovery. See generally, Gerawan Farming, Inc. v. Rehrig Pacific Co., 2013 WL 492103, *5 (E.D. Cal. Feb. 8, 2013); EEOC v. Pioneer Hotel, Inc., 2014 WL 5045109, *1-2 (D. Nev. Oct. 9, 2014).

16. Although fact discovery has been fervently proceeding in the instant case, Defendants failed to provide justification for the delay in filing the instant Motion to Compel. Defendants received Plaintiffs' market data in mid-January of 2021, and did not seek any meet and confer with Plaintiffs regarding the alleged insufficiency of that production before serving the amended third set of RFPs. Additionally, after recognizing the issue of untimeliness on March 9, 2021, and being notified that Plaintiffs would not waive that issue,

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Defendants sought no relief from the Special Master (as they suggested they would do) for another sixty (60) days.

17. Although the document discovery cutoff date is not a jurisdictional bar to filing a motion to compel, a determination of the untimeliness of such a motion is discretionary, based on a number of factors. See, RKR Retail Holdings, LLC v. Tropicana Las Vegas, Inc., 2017 WL 2908869, *5 (D. Nev. Jul. 6, 2017). The most salient factors include the length of time since the expiration of the deadline, an explanation for the delay, prejudice to the party from whom discovery is sought and disruption of the court's schedule for the case. Here, Defendants failed to establish a sufficient reason for the delay, necessitating consideration of the instant Motion more than forty-five (45) days after the document discovery cutoff date imposed by the Trial Court.

RECOMMENDATION

18. Based on the foregoing, and having considered all of the arguments by both parties, it is the recommendation of the Special Master that Defendants' Motion to Compel Plaintiffs' Responses to Defendants' Amended Third Set of Requests for Production of Documents be DENIED on the substantive and procedural grounds set forth above.

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Dated this 3rd day of June, 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 June 03, 2021, I served the attached Report and Recommendation #7 Regarding Defendants' Motion to Compel Plaintiffs' Responses to Defendants' Amended Third Set of Requestes for Production of Documents on theparties 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 June 03, 2021.

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Cc: Pat Lundvall; Amanda Perach
Subject: RE: Fremont v. United - orders re: R&R ## 6, 7 and 9

We are fine with the form and content. You may insert our signature block to that effect for each of those orders and submit to the Court.

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Cc: Pat Lundvall; Amanda Perach
Subject: RE: Fremont v. United - orders re: R&R ## 6, 7 and 9

This Message originated outside your organization.

I am following up on the submission of the attached orders to the Court. If there is no objection planned, will you agree to the form/content? If an objection is planned, please let me know so that my office can convey that information to the Department when we resubmit the proposed orders. As of now, the Department has returned the orders based on a perception that there will be competing orders.

Thank you,
Kristy

Kristen T. Gallagher | Partner

McDONALD CARANO

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From: Kristen T. Gallagher
Sent: Wednesday, September 1, 2021 9:36 AM

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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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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 ORDER AFFIRMING AND ADOPTING REPORT AND RECOMMENDATION NO. 9 REGARDING DEFENDANTS' RENEWED MOTION TO COMPEL FURTHER TESTIMONY FROM DEPONENTS INSTRUCTED NOT TO ANSWER AND OVERRULING OBJECTION

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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 an Order Affirming and Adopting Report and Recommendation No. 9 Regarding Defendants' Renewed Motion to Compel Further Testimony From Deponents Instructed Not to Answer and Overruling Objection was entered on September 16, 2021, a copy of which is attached hereto.

Dated this 16th day of September, 2021.

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CERTIFICATE OF SERVICE

I certify that I am an employee of McDonald Carano LLP, and that on this 16th day of September, 2021, I caused a true and correct copy of the foregoing **NOTICE OF ENTRY OF ORDER AFFIRMING AND ADOPTING REPORT AND RECOMMENDATION NO. 9 REGARDING DEFENDANTS' RENEWED MOTION TO COMPEL FURTHER TESTIMONY FROM DEPONENTS INSTRUCTED NOT TO ANSWER 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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