Case Nos. 85525 & 85656

# In the Supreme Court of Nevada

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| UNITED HEALTHCARE INSURANCE COMPANY; UNITED HEALTH CARE SERVICES, INC.; UMR, INC.; SIERRA HEALTH AND LIFE INSURANCE COMPANY, INC.; and HEALTH PLAN OF NEVADA, INC.,<br>Appellants,<br>*vs.*<br>FREMONT EMERGENCY SERVICES (MANDAVIA), LTD.; TEAM PHYSICIANS OF NEVADA-MANDAVIA, P.C.; and CRUM STEFANKO AND JONES, LTD.,<br>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.,<br>Petitioners,<br>*vs.*<br>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,<br>Respondents,<br>*vs.*<br>FREMONT EMERGENCY SERVICES (MANDAVIA), LTD.; TEAM PHYSICIANS OF NEVADA-MANDAVIA, P.C.; and CRUM STEFANKO AND JONES, LTD.,<br>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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MR. BLALACK: Thank you, Your Honor. Should I proceed, Your Honor?

THE COURT: No. I want to pause this hearing.

MR. BLALACK: Okay.

THE COURT: We're going to take up the Motion to Stay.

MR. BLALACK: Okay.

THE COURT: And then we'll take a recess. And you and Ms. Gallagher can talk about how you want to apportion your time the rest of the afternoon.

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

MR. POLSENBERG: Your Honor, Dan Polsenberg. I hate to be a nudge, but I've lost visual for the courtroom.

005501

THE COURT: And -- that's all right. We want you to have access.

005501

The court recorder can take a look at that. Don't all look at her. It's extra pressure.

MR. POLSENBERG: Thank you, Your Honor.

THE COURT: I will say, Mr. Polsenberg, it's all voice-activated. So when nobody is talking, you won't have a screen, I don't think.

MR. POLSENBERG: Well, this morning it was switching around from camera to camera. Now I just get a blue screen that says District Court, VARIJECT 27.

MR. BLALACK: And I'll give you a test, Dan, to see if you can hear me.



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MR. POLSENBERG: I can hear you, yes, thank you.
MR. BLALACK: But it did not switch to me?
MR. POLSENBERG: No. I get no visual whatsoever. And I don't know whether that's the court or me. But --
THE COURT: Let me suggest that -- let's go ahead and --
MR. POLSENBERG: You certainly don't need to take a break for this.
THE COURT: Well, I'm going to suggest that you log out and log back in. You might have turned off your video by error.
MR. POLSENBERG: My computer crashed so that may have been it. So I'll give it one more try. But I'll wait until after the stay motion.
THE COURT: All right.
So Mr. Roberts, go ahead, please.
MR. ROBERTS: Thank you, Your Honor.
THE COURT: Will you just recite the name of the motion for the court clerk, because I didn't find it on my list here. I know it's here, but -- it was Motion to Stay enforcement of the order regarding subpoenas.
THE CLERK: Motion to Stay enforcement of subpoenas issued to out-of-state witnesses pending resolution of writ petition on order.
THE COURT: Got it. That's it.

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THE CLERK: Is that correct?
MR. ROBERTS: That is it. That's exactly the name.
THE COURT: All right. Thank you.
MR. ROBERTS: Thank you, Your Honor.
I'm here on behalf -- Lee Roberts, on behalf of United Healthcare.
And I am here to request that the Court issue a stay on the enforcement of the subpoenas which this Court declined to quash in a recent hearing, which I also argued before the Court. And I'm going to not repeat the same arguments that I made there or the ones in the writ, but will instead would like to address the factors.
Is this annoying, Your Honor? Could you hear me better with this, just using this mic?
THE COURT: I could hear you guys without the microphone, so --
THE COURT REPORTER: It's just the recording doesn't pick it up well enough [indiscernible].
THE COURT: It's -- can you --
MR. ROBERTS: If I stay close to this, am I going to be okay on the recording?
THE COURT RECORDER: If you speak up, yes.
MR. ROBERTS: If I speak up. Okay. I'll try that, Your Honor.
THE COURT: Okay.

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MR. ROBERTS: So I wanted to address the factors which the Supreme Court ruled of Appellate Procedure Rule 8 generally say that the Supreme Court will address. And because the Rule 8 also requires us to seek a stay first in the district court, I believe those same factors should apply here.

The factors from NRAP 8 include, first, whether the object of the appeal or writ petition will be defeated if the stay or injunction is denied; whether the appellant, slash, petitioner will suffer irreparable or serious injury if the stay or injunction is denied; whether the respondent, slash, real party in interest will suffer irreparable or serious injury if the stay or injunction is granted; and finally, whether the appellant, slash, petitioner is likely to prevail on the merits of the appeal.

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The Supreme Court has recognized that the most important element is usually whether the object of the appeal or writ would be destroyed in the absence of the stay. And that squarely applies here, Your Honor.

We cite to *Micon Gaming 89 P.3d 36* at page 40, a 2004 decision. But we don't quote from it. And I think some of the key takeaways from that case -- which is also cited in the opposition -- is where the Court says in the context of an appeal seeking to compel arbitration, because the object of an appeal seeking to compel arbitration will be defeated if a



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stay is denied, and irreparable harm will seldom figure into the analysis, a stay is generally warranted.

And this is consistent with case law from the federal courts, which say that the -- defeating the purpose of the appeal or petition is usually the main factor, unless it's out -- unless it's counterbalanced by a strong showing on one of the other factors.

And as to the likelihood of success on the merits, I think it's important that the Court doesn't have to find that the Court was likely wrong and the Supreme Court will most likely find that the arguments we're raising justify a writ of mandamus back to this Court. And Micon is instructive on that purpose, where it says, Therefore, the party opposing the stay motion can defeat the motion by making a strong showing that appellant relief is unattainable, in particular if the appeal appears frivolous or if the appellant apparently filed the stay motion purely for dilatory purposes, the Court should deny the stay.

I think what you can take from that is the Court doesn't have to actually find that we're likely to written on the writ. You just have to find that there's a reasonable shot that there will -- that there's a good faith issue prevented -- presented to the appellate Court that it's not frivolous. And we think Your Honor that we meet that standard here.



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So looking first at whether the object of the writ will be defeated, if this is not stayed and the witnesses are compelled to show up at the beginning of their case in chief on November 1st, the writ will become moot. There is no relief that could then be granted by the Supreme Court.

In their opposition, they argued that, wait a minute, they're trying to win just by filing a Motion to Stay, and they waited too long and it's not timely. And I would like to address that issue, because the written order denying the Motion to Quash was not filed by this Court until October 13th. And a written order is generally required in order to appeal and have a timely appeal. And Mr. Polsenberg tells me is also required to file a valid writ petition.

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Notice of entry was filed the same day. The writ was filed the very next day, October 14th, although after 5 p.m. The file stamped copy was provided by the clerk on October 15th, and this Motion to Stay was filed on October 15th.

I think the record demonstrates that we filed the writ the day after the written order was issued, and you seek to stay immediately, the same day upon filing the writ, I think we've acted timely.

And looking at the issue of that likelihood of success and the arguable merit. Although I don't want to repeat the arguments that we raised in the writ petition, in fairness to



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the Court, I do want to point out one additional case that we cited in the writ petition.

THE COURT: So I don't take any offense that if you criticize my ruling. I understand that's your job.

MR. ROBERTS: Thank you, Your Honor.

In the writ petition, we cited one additional case that's *Spinosa v. Rowe*, because we thought it was particularly applicable to the Court's finding that we're -- we said you can't presume that you have authority to accept service of process of a cross-subpoena, simply because we had previously agreed to accept service of a deposition subpoena and had listed them in care of our office on a 16.1. And *Spinosa* -- it's an older case from 1971. But in the *Spinosa* case, the attorney for a party was served. And there was a letter that was relied upon in that case, where *Spinosa* claimed that Mr. Morris had agreed prior to the commencement of the action to accept service. So the lawyer for the party had allegedly agreed to accept service.

But then when service was actually made on him, he wrote a letter in footnote to July 8th. This is in reference to the complaint served upon me in the above matter, I hereby inform you, I have no authority to acknowledge service on the defendant Virginia Rowe. And the Court reversed the default judgment.

And what this case stands for is exactly what we

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argue, that you can't presume service. Even where an attorney allegedly says, I have authority to accept service. If once he got the service, he said, no, I don't have authority to accept this.

And the Supreme Court therefore reversed, because under the case that we cited, *Consolidated Generator*, authority to accept service of process has to be express. There has to be an actual point that they accept service. Authority to accept service cannot be implied from the facts and it cannot be implied from conduct. It has to be express.

And there's not any evidence in this case that we had actual authority to accept service of trial subpoenas on behalf of these out-of-state witnesses.

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And the arguments that we've made about *Quinn* are the same ones that we made here. We emphasized a little bit more that in *Consolidated Generator*, the subpoenas were served on counsel for the corporate party; and they were employees and officers of the corporate entity from out of state.

So the whole argument that there's this distinction between a nonparty witness, which counsel doesn't have authority to accept; or a party witness, which you automatically do, is rebutted by the *Consolidated Generator* case which found that even though they were officers, counsel was not assumed to be authorized to accept service for these out-of-state individuals.



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Going to the balancing of harms, we believe that's the least important factor, but the harms to the witnesses, once they travel here, it's going to be done. Whatever convenience, whatever burden, this travel to out of state will impose on them is going to be done, versus we believe there is no harm for the plaintiffs to have to put on their depositions, if they want to call them before the Court resolves this case.

That's why out-of-state depositions are taken to preserve trial testimony. People have to put on deposition testimony of unavailable witnesses all the time. Therefore, that harm is not so irreparable that it should overcome the fact that if these witnesses are forced to come before the Supreme Court can rule on the case, it's going to be a done deal. The purpose of the writ will be defeated.

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And therefore, we request that the Court issue a stay, just until the Court, the Supreme Court can rule on this issue.

THE COURT: Thank you.

MR. ROBERTS: Thank you, Your Honor.

THE COURT: And the opposition, please.

MS. LUNDVALL: Thank you, Your Honor. Pat Lundvall from McDonald Carano, again on behalf of the Health Care Providers.

What is at issue here, just simply to remind the



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Court, is can witnesses -- and whether or not that they're going to be obliged then to provide live testimony at the time of trial. These 10 witnesses for over two years were represented, not only to us, but to you, to the Court, to be only reachable by and through counsel. That's what that they repeated. I think there were 17 Rule 16.1 disclosures to us. And they were represented, like we said, not only to us, but to you, to only be reachable by and through counsel.

When it came time for us to serve deposition subpoenas, we were asked, Why are you doing this? Deposition subpoenas are issued pursuant to Rule 45, no different than trial subpoenas are. The defendant said, Why are you doing this? You don't need to. We can accept those, but they are party affiliated witnesses. And there doesn't need to be any type of a deposition subpoena that is needed.

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When you look at their trial disclosure, each and every one of these 10 witnesses is either on their may call or their will call list, to present live testimony to the jury at the time of trial.

And those same witnesses are on our either may or will call list.

Now, one of the things that our opposition -- and I would like to confirm that the Court did receive -- all right. I figured so, but just wanted to confirm.

But NRS 50.115, subsection 1 gives this Court



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considerable discretion over the mode and the order of presentation, not only of witnesses, but also of evidence at the time of trial.

And I will tell you that across 32 years of practice and between 75 and maybe 80 trials, each and every time that the issue came up as to whether or not a witness was supposed to grace the witness stand once versus twice, the trial court uniformly said, We want the witness on the stand one time. If, in fact, that witness is going to present testimony at the time of trial, that witness should grace the stand one time. Why? It's time efficient.

It is efficient not only for the Court's time, but also for purposes of the jury's time. This is in state courts. It's in federal courts. It is in state and federal courts across the nation.

It is something that is within the Court's discretion.

And so now, what they have done is they have tried to suggest that somehow you abused your considerable discretion by saying these witnesses will be presented once at the time of trial, and that these witnesses then should be presented in accord then with the subpoenas, that we had served.

So what you would like to do is to go through each one of the factors and can demonstrate why not one of the four factors inures to the benefit then of the defense in trying to obtain a stay of enforcement.

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The first one is whether or not that the object of their writ would be denied.

Now, first and foremost, the Nevada Supreme Court says that the object of your writ has to be a legitimate object. Not an illegitimate, but if it's an illegitimate object or an illegitimate purpose, then, in fact, that that's not a factor that's going to be evaluated then in affording a stay.

And what is the object of their writ? Their writ asks you to stay enforcement of your order.

What does that mean? They are asking you then to decide the writ. That's what they're asking you to do. They're asking you to say, the writ is meritorious, the writ has value, and therefore, we want you to grant the writ, by offering a stay, because they're not seeking a stay of the trial. They're seeking a stay of enforcement of your order not quashing the subpoenas.

And so really, when you look at it then, what does their writ do? And what does their motion for stay do? It's a reconsideration then of your order. And they're untimely then with their motion for reconsideration on that. Moreover, that they haven't met the high standard for reconsideration of your order. And when you consider -- think about the idea that your considerable discretion was somehow abused by denying their motion to quash, that's a pretty high standard by which that they're going to have to meet, and trying to do

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that on a motion for reconsideration, I think is next to impossible.

The next two factors are looked at typically by the Court in conjunction. The Court -- the Nevada Supreme Court then weighs what the prejudice is, both to the party who is seeking the stay, and against the party who is opposing the stay.

So let me take a look at the prejudice that is claimed then by the defense in their motion. And one of the things that struck me is this, when I look at their motion, their motion isn't brought on behalf of United. Their motion is brought on behalf of these witnesses. Think about that. They're claiming that to you, we don't have any control over these witnesses or we don't think that we do, but we're bringing in motion to quash the stay and our -- a motion to quash the subpoena and a Motion to Stay on behalf of these witnesses, because they argue no prejudice to United.

The only prejudice that they argue is the time, the inconvenience, and the money that would inure to the witnesses. That's the only prejudice that they claim. And if the Court looks at the *Hanson* case, the *Hanson* case has said unequivocally, those are not factors that constitute irreparable harm. So the fact that these witnesses, nor has United offered any harm by which they will suffer by reason then of requiring these witnesses to testify if called in

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during our case in chief.

Now, the comparison is what is the harm and what is the prejudice to the plaintiff by granting the Motion to Stay? By granting the Motion to Stay, you grant their writ. By granting the Motion to Stay, we lose the effectiveness of live testimony at the time of trial. And the Court sat through far too many probably jury trials to be able to not understand the fact that live testimony from the time of trial is far, far more effective. I sat on that witness stand just last week, reading deposition testimony. And I wanted to tap a couple people on the shoulder and say, Wake up.

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THE COURT: Well, in the old days we used to take the sleepers a glass of water, and now we can't do that. So --

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MS. LUNDVALL: And so from that perspective, there is just no substitute for the effectiveness of live testimony. So to the extent then that who gets harmed? We get harmed. And we are the only party that gets harmed.

Now, the last one is the likelihood of success then on the merits. Once again, I harken back then to considerable discretion that the Court has under NRS 50, subsection 115, subsection 1. And that is dealing with the order and the mode of the testimony then and the evidence to be presented.

What they have done then is to take a writ by which that it asks the Nevada Supreme Court to claim that you have abused your discretion. And that abuse of discretion for writ

purposes is nearly impossible for them to accomplish.

And then the one thing that I would offer is this, when I took a look at the writ papers, I scoured it for the neon sign that says, This is an emergency. We need your help now.

Very deep within their documents they say, Well, they -- these witnesses may be called as early as November 3rd or 2nd, something like that, they said. But they didn't ask for any emergency treatment. They didn't ask for any emergency relief. They didn't highlight it in the caption. They did nothing to bring attention to the fact that this was something that needed to be looked at and looked at quickly.

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And so therefore, with all due respect, Your Honor, I don't think that the likelihood of success is high. And we would ask then the Court to deny their motion for a stay. Thank you.

THE COURT: Thank you.

And the reply, please.

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

Your Honor, the error that we have asserted in the writ is not error in the court in exercising discretion to control your docket or to have witnesses called only once. As we pointed out in our original motion, even though these witnesses are listed on a may call and expect to call list, they are also all designated as people we may call by



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deposition, just as we've already received deposition designations from all these witnesses for the plaintiff.

Rather the error we allege in our writ is that the trial subpoena is enforceable despite the absence of personal service in the record.

That the implied authority of this -- of my firm, my firm, Weinberg Wheeler Hudgins Gunn & Dial, cannot be implied, and that there has been no actual appointment of my firm to accept service on behalf of these out-of-state witnesses. That is the error that we've alleged, along with the fact that the Court is attempting to exercise jurisdiction over witnesses that are beyond the subpoena power of the Court. And that's our argument based on *Quinn*.

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That is the error that we've alleged and the abuse of discretion that we have alleged.

The control issue, footnote 5 to the writ, says control is not the issue. The issue is the subpoenas are legally not enforceable. And that is the same argument that I made before the Court when we attempted to quash them, that that's a red herring. That's not the basis of our motion and it's not the basis of our writ.

Our basis of our writ is the actual legal authority, the exercise of jurisdiction over these witnesses, despite the absence of personal service, and despite the absence of no express appointment of my firm to accept trial subpoenas.



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Those deposition subpoenas -- they were for the witness's home state. They didn't require them to travel to Nevada. They didn't even require them to travel of their living room. They were Zoom depositions.

That simply cannot be viewed as if they were willing to sit in their living room and take a Zoom deposition, they were willing to appoint my firm to accept process to come to Nevada.

And as the *Consolidated Generator* case clearly said, Appointment to accept service of a subpoena cannot be implied. It cannot be presumed. It has to be are. And that's why we believe that the writ does have merit. And that the purpose of the writ, which is to prevent these witnesses from having to travel here, in compliance with the subpoena, it's going to be moot. That's our point. That's the object of the writ. Not some trial strategy to alter the order of the appearance of witnesses.

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THE COURT: Thank you. Thank you, both.

MR. ROBERTS: Thank you, Your Honor.

THE COURT: This is the defendant's Motion to Stay enforcement of an order denying a motion to quash subpoenas.

I'm going to deny the motion for stay. I do find that the object of the writ -- is not subject to -- would not be defeated. In weighing the prejudice, it weighs to the plaintiffs' benefit, simply because they relied on the Rule 16



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representations. And for those reasons -- and also because you have another remedy. You can go to the Supreme Court and ask them to stay the matter. And, of course, if they do, I will abide by any rule -- any order that they make. All right.

MR. ROBERTS: I understand. I have one alternative request from the Court --

THE COURT: Yes.

MR. ROBERTS: -- so that we don't have to apply for emergency relief in under 14 days and these witnesses could be compelled to be here theoretically, November 1st, the day we're currently scheduled to open.

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Whether we could have a 14- or 15-day temporary stay. That would only prevent the plaintiffs from calling them in the first several days of their case. And that would prevent the necessity to have to ask the Supreme Court to hear this on an emergency basis.

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THE COURT: And a brief response, please?

MS. LUNDVALL: Your Honor, I think they waited too long to make that request. They suggested it during their opening remarks, and somehow that they had to wait to bring any type of a writ until they received a written order. They did not. And in fact, they cite and they rely so heavily upon the *Quinn* case, the *Quinn* case was both Mr. Polsenberg's and my case. We went up on an oral order. And we were doing it



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on an emergency basis, and we headlined and hearalded it was an emergency basis. They know that. They understand. They appreciate that. And they've sat on this too long. What they're trying to do is to prevent us from being able to call these witnesses in the order by which that we would prefer.

So we would ask the Court then to deny that additional request.

THE COURT: Thank you.

And in reply?

MR. ROBERTS: Just to clarify that calculating it out, I think the 15 days would be November 3rd. Openings are scheduled for November 1st. That's all we're asking for for this alternate remedy.

Thank you, Your Honor.

THE COURT: You know, and I just think it's an inappropriate after I rule against the request, to then make a new oral request.

So I'm going to deny that as well.

Now, it is --

MR. ROBERTS: Your Honor --

THE COURT: Yes.

MR. ROBERTS: -- in order to get a written order on this as soon as possible --

THE COURT: I'm going to suggest that you guys get the it to me today, because I'll sign it today.

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MR. ROBERTS: -- would -- can we just say it's denied for the reasons stated on the report?

THE COURT: You may.

MR. ROBERTS: And that way there's no dispute over the language?

THE COURT: You may. And make sure that Ms. Lundvall has the ability to review and approve the form.

MR. ROBERTS: Thank you, Your Honor.

THE COURT: Good enough. All right.

It's to -- 3:28. Let's take a recess to 3:40, and that will be our last recess of the day. We'll end it today at 4:45.

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And Counsel, please discuss the order of that argument on the plaintiffs' *Motion in Limine*. Thank you.

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MALE SPEAKER: Yes, Your Honor.

[Recess taken from 3:28 p.m., until 3:45 p.m.]

THE COURT: So Ms. Gallagher, we were arguing your motion. Did you have a chance to speak to Mr. Blalack?

MS. GALLAGHER: I did, Your Honor. And what we've agreed is that Mr. Blalack is going to finish his presentation on Medicare rates, which was the second topic, and get into in-network agreements.

And then I will address those three in turn, so that would be clinical records, medical rates, and then the in-network agreements, Your Honor.



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THE COURT: Mr. Blalack; is that correct?

MR. BLALACK: That's correct, Your Honor. And then we'll just pick up and finish it thereafter.

THE COURT: Very good. Thank you.

MR. BLALACK: Thank you, Your Honor.

THE COURT: Please proceed.

MR. BLALACK: All right. Your Honor, when we broke, I was walking you through the evidence implicated by the portion of the omnibus *Motion in Limine* No. 3 relating to Medicare rates and explaining the extent to which Medicare rates are part of the ordinary operation of daily business by the plaintiffs and by the defendants, and in their [indiscernible] with each other.

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But I want to make clear on something critical. In this case, the defendants have an official corporate position on what constitutes the reasonable value for an out-of-network service, including the [indiscernible]. And that position is that the fair value or reasonable value of an out-of-network service is the Medicare rate plus a small margin. That's how the company described it.

And in fact, I'm showing you an excerpt of testimony from Mr. Schumacher, who is a -- you've heard about already was a senior United executive, where he was asked that question and he explained United's corporate position.

So this motion, if granted, would literally preclude



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me from asking one of my senior executives to turn to the jury and say, please, what is United's corporate position during the period of dispute? What constitutes the reasonable value of an out-of-network service or the out-of-network emergency service?

And if he -- if one of those witnesses was asked on cross, the witness could not honestly answer that question without disclosing that it is tied to a Medicare record. That is the official position of the company.

Now, with respect to the experts, Mr. Deal will -- if permitted, his primary opinion in this case is going to be about what constitutes the reasonable value of the disputed services? And it is his expert opinion. He's an economist. And we've shared with you his background.

His professional opinion is that to measure the reasonable value of an out-of-network [indiscernible] service, you have to measure what the value is observed in market transactions, actually market transactions, between a willing buyer and a willing seller in a noncompulsory environment. That's his expert opinion.

And he will, if permitted, render an expert opinion in this case that that is the proper reasonable value of the expert -- of the emergency services in this case.

But he also is of the view that the Medicare program that's the largest payor in the company -- it's TeamHealth's



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largest payor -- in fact, TeamHealth, 25 percent of its patient volume and claims is through Medicare -- that that Medicare rate, which is based on the cost and build up of the services under the RBRBS system [indiscernible] is a very useful barometer for measuring on an apples-to-apples basis, different forms of payment [indiscernible].

So he's not going to render an opinion that the Medicare fee schedule was the reasonable value of the service.

But he will, if permitted, say that, did he look at this information from the [indiscernible] plaintiffs and this information from the defendants and from these other sources and compare them on an apples-to-apples basis. Using the Medicare fee schedule as the barometer, you can compare those two sources. So for example, one might be 180 percent of Medicare; one might be 200 percent of Medicare; one might be 215, even though these underlying payment methodologies are different.

So that's the way in which his opinion would touch on expert proof by relying on Medicare. And in fact, to give you a sense, Your Honor, in this case, for the disputed services as shown here, the Medicare fee schedule will have an amount on average for these disputed claims of $150 per claim. So if the same people received the same services and had been paid under the Medicare program, they would have been paid on average $150 [indiscernible].

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The allowed amount that the defendants already allow that's in dispute that is the alleged underpayment is on average 248. So, you know, not quite 60, 70 percent more. And then the [indiscernible] 1143. That's the average amount of the charge for the disputed claim. So what you see there is the -- just the relative proportion of the charge to the allowed amount in dispute, to the Medicare fee schedule.

And that base information, Your Honor, is just the building block for any factfinder going through the exercise of looking at other data that's not on this chart about market rates, negotiated rates, average allowed amounts, and [indiscernible] to evaluate what constitutes a reasonable value for the disputed services. So it's a building block.

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Now, I want to move on to the next topic which we've agreed to cover before I'll hand the [indiscernible] back over to plaintiffs' counsel to respond to these first couple of issues, and we'll finish, I guess, tomorrow.

So the next issue that has been identified for network rates with other providers. And the issue here is the amount that both the defendants contracted to pay other emergency room providers, other than TeamHealth, in our market data on plaintiff. And the amount that is the TeamHealth plaintiffs contracted with other health insurers to accept for payment of those services -- classified by payors other than the defendant.



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That's what we're really talking here, when we talk about paying network rates.

And this has -- this motion was surprising me because Your Honor ordered the defendants, back in October of 2020, to produce market and reimbursement rates related to in-network reimbursement rates, including contracts [indiscernible]. And so defendants collected that information and produced contracts with other emergency room providers, produced market data showing where contracted rates are with other emergency room providers, not TeamHealth and the like. And plaintiffs did the same.

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You know, plaintiffs produced the same kind of information to us. They produced market data showing their contracted rates with a couple [indiscernible] not United, and they produced contracts with other payors and information about their rates with other payors.

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Now, -- and I'm noting here that in their order -- I mean, in the *Motions in Limine* they do not cite in this portion of their motion any specific order or R&R for the contention that network rates are irrelevant. What they do is they claim that on the November 9th, 2020, order, which I was just focusing on, as well as the August 3rd, 2021, order, R&Rs No. 2 and 3, and R&R No. 7 are the applicable prohibitions that would be extended [indiscernible].

It is our position, Your Honor, if you read -- go back



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and read those R&Rs, they don't say that in-network rates paid by defendants to other emergency room providers or in-network rates accepted by TeamHealth for other defendants are irrelevant and not [indiscernible].

And frankly, Your Honor, I don't really know how that could be the interpretation, given the case law in the state of Nevada that we cite in our brief for the proposition that offers to contract and contractual arrangements can be the basis for determining reasonable value of a disputed service.

And here is the September 16th, 2021, order. And it's referencing R&R No. 7. First of all, it didn't make the admissibility ruling, and then it relied on R&R No. 3 and R&R No. 2, which are referenced here, which again we believe do not bar the admissibility of network rates in this trial.

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Now, as I noted, it's undisputed that the TeamHealth plaintiffs, notwithstanding their interpretation of what the Court ruled, have produced their own market data for their network rates with other health insurers and other health [indiscernible]. And I'm citing to the Bates numbers there on the page, Your Honor, where they produced that data to us.

They also produced contracts and agreements with other payors, particularly located here in Clark County, who were clients of ours.

So after they went out-of-network, they then went to some of those clients and started negotiating direct



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agreements with them, that they had rates they would not extend to us. And they entered those contracts, including with the Las Vegas Police Department, with MGM. And they produced those contracts and those agreements, some of whom I'm referencing here, that had specific rates in it, that are dramatically less than what they're arguing to the jury in this case, arguing is the reasonable value, and which, again, they would not extend to the defendants when the defendants offered to contract at these amounts.

Here is the MGM agreement that references a case rate of $320 [indiscernible]. Again, this is a rate that was not that they refused to extend to the defendants.

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And then you remember that in discussion at this very important meeting that happened between Mr. Murphy and Mr. Schumacher and how -- you know, how important it is.

THE COURT: The April meeting before the complaint, right.

MR. BLALACK: Exactly. In connection with that meeting, before it happened, Mr. Murphy put together a PowerPoint and sent it to Mr. Schumacher. And in that PowerPoint, the purpose of that PowerPoint was for him to explain why he thought the United reimbursement rates were too low; why United should agree to contract at a higher rate. This is for a national contract, by the way. Not -- it wasn't focused exclusively, in fact, very much at all on Nevada. It



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was a nationwide proposed agreement. And in that presentation, he described a lot of information about TeamHealth's operations and their finances, their costs, their rates.

One of the things he sent to Mr. Schumacher was a chart here in the PowerPoint on page 12 that discussed their internal network and out-of-network rates for non Blue Cross® Blue Shield® payors. And then for Blue Cross® Blue Shield®, both in-network and out-of-network.

And again, the purpose of that communication, as Mr. Murphy described in his deposition, was to explain that the Blue Cross® Blue Shield® plans were paying rates that they didn't like, but they had accepted. And that United should be willing to pay higher rates to help subsidize their effort to tolerate the lower rates that the Blue Cross® Blue Shield® plan [indiscernible].

You understand, Your Honor, that the Blue Cross® Blue Shield® plans are United's biggest competitor. So that's like Macy's and Gimbels. Right? And so they -- basically Mr. [Indiscernible] Murphy was saying to Mr. Schumacher, I'm doing business with your biggest competitor, and your biggest competitor is paying, on average, between 170 and 190 percent of Medicare. You should be paying 300, 400, 500 percent of Medicare, because we don't have to a choice but to accept those low rates.

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And, of course, United's position was, okay, I understand. And we're willing to give you some relief. But we don't think it's our obligation to subsidize our biggest competitor who goes out and competes with us for business.

So that whole exchange is something that the TeamHealth plaintiffs put into the exchange in the course of dealing between the parties and introduced into the [indiscernible] and disclosed their own rate structure as part of the party's negotiations and what they were getting paid by other competing health insurance. And this was produced to us in discovery after the Court's orders.

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So in our view, Your Honor, if there's -- I don't think there's an order that precludes this from being admitted. But even if there was, the notion that this could be excluded when they are the one that produced it, one; and two, they are the ones that are talking about using this meeting as a key meeting and telling the story of the case. I do not follow.

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Now, network rates in the position of the defendants are going to be the only appropriate benchmark -- appropriate benchmark for measuring reasonable value in this case.

Now, the TeamHealth plaintiffs will disagree. They're going to present evidence and expert testimony that the appropriate benchmark is the billed charges, and the parties will dispute that. But the position, the defense position in



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this case is that the billed charge is just a made-up number, just a made-up number by the TeamHealth folks, with no basis in anything -- no evidentiary or empirical basis. And that the relevant measure of reasonable value is the agreed participating rates that the network TeamHealth plaintiffs agreed to with payors other than United, and that United agreed to with emergency room providers of TeamHealth. If you take those two, that gives you the range of reasonable value and that should be the measure.

I fully understand they disagree. I fully understand their experts disagree. I fully understand that they're going to argue that's not the right metric. But that's our defense and our expert, who I've shown you a portion of his report where he describes it. That is his considered and published opinion which he has given as an expert in cases involving out-of-network services dozens of times and has never once had it been excluded.

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And so the notion that -- I think Ms. Gallagher noted that somehow we went out and induced Mr. Deal to render an opinion that we knew would be prohibited by a prior discovery order is just not right. We retained an expert who is renowned in this space and who has very strong credentials and who has testified in other cases on this very issue, who has stated that this is his economic view as an economist, and what the proper measure of reasonable value is, and that --



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that is the case independent of any discovery rulings in the case. It certainly is not true that Mr. Deal was -- he was persuaded to offer an opinion for the purpose of contradicting any discovery orders.

All right. And here is basically a summary, Your Honor. Paragraph 57 of his report. Standard and accepted economic methodology for determining reasonable value, by observing a range of actual contracted rates between buyers and sellers in the marketplace.

In this situation, how the market data from both the buyer and the issuer, United defendant's market value, and the seller at issue, the TeamHealth market plaintiffs' market values. Both of those market data sources to develop the buyer/seller reasonable value estimates, which I -- which typically represent the range of reasonable value for the disputed services. This is the approach I have used dozens of times in my work as an expert on the reasonable value of healthcare services.

So at this point, yes, I'll tie it off here, Your Honor.

TeamHealth plaintiffs, I should note, also intend to offer evidence of our contracts with other ER providers. So this is Plaintiffs' Exhibit 286. This is a contract that we produced in response to the discovery order I showed you earlier from last fall, between one of the defendants and a

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competing emergency room provider.

So this is a network agreement between defendants and a competing -- competitor of TeamHealth with rates and everything in it, including for Nevada, that they have on [indiscernible]. So clearly they -- it is their intention to offer evidence of our network agreements and rates with other providers. And in fact, Mr. Phillips, will cite some of those in his rebuttal report.

Okay. I'm going to stop here, Your Honor, because we're moving into a new topic.

And I'll turn it over to Ms. Gallagher, unless you have any questions.

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THE COURT: I don't. Thank you.

MR. BLALACK: Okay. Thank you.

MS. GALLAGHER: Thank you, Your Honor. So before I get to the specific categories, I wanted to back up a little bit about some of the foundational blocks that Mr. Blalack tried to set the foundation on, because I think that there are misstatements in terms of the applicable elements and what may be looked at in terms of damages and course of conduct for the various buckets of claims that will be presented to the jury.

So with respect to implied in fact, United's presentation suggests that they think the course of conduct is going to be measured by in-network agreements. And there was that repeatedly stated, which is not accurate.



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The course of conduct is going to be out-of-network reimbursement rates, which is what the case is about. And so we heard throughout these presentations about in-network agreements, and I'll get to the specifics of those, but I just want to set that foundational block in terms of what will be needing to be presented to the jury from the Health Care Providers perspective and not allowing and objecting to, in fact, United trying to present evidence that it's something different -- a different kind of claim than what is actually at stake.

The other issue that I heard is with respect to the measure of damages for the unjust enrichment the *Certified Fire* case is very explicit in determining and splitting off the two causes of action and what those damaged models may be.

And so with respect to the implied, in fact, contract, that is obviously going to be a measure of billed charges set forth by the Health Care Providers. We also dispute, with respect to reasonable and customary, I think there was an inference that that -- everyone has agreed that that is the measurement. And there was some implication that there's Nevada law on what that measurement may be, that the Health Care Providers have made it clear that this billed charge or usual and customary rate, which is their Chargemaster, is what we believe that that measure of damages already.

But regardless of how you couch that term knowledge,

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it's all under the umbrella of out-of-network reimbursement. We are not talking about in-network agreements. We are not talking about people that have negotiated an arm's length transaction and reached an agreement. What we're talking about here is a different construct and one that's important and would be confusing to a jury to have those mixed, as we just heard in the presentation.

Because if you aren't familiar with the terminology, you just hear contract, you hear people were talking. You hear people agreed to things or maybe didn't reach an agreement, and that that should control then the outcome. But it doesn't.

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We do have a line of demarcation that is quite important in this case. And it's important enough that it's been before the Court many times from the very beginning, starting with some of the early motions, motions to compel, motions that we were opposing, because we were being asked to produce documents that we didn't think were relevant to this case.

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And so Your Honor -- and Judge Wall has spent considerable time with those issues, considering whether in-network agreements, in-network arrangements were informative of this case.

The rulings indicated that they weren't relevant. In other words, we didn't do discovery on them specifically.



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Now, whether or not documents were produced in the course of the case is not, again, an admission that they are relevant. It's not an admission that they should form the basis for the claims, the model of damages or any of the underlying elements that need to be proven at trial, because again, this dispute relates to what United pays on an out-of-network basis.

And it's clear from the documents that have been produced, this is a different model. United uses a model different for out-of-network that leads to some of the internal revenue that they generate, based on a provider like the Health Care Providers' charges.

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A moment ago -- and I don't want to get too ahead -- but a moment ago United called our billed charges basically a fabrication. But they're not so fabricated that United isn't using it as a way to earn money. In fact, there's a script that is part of all of these *Motions in Limine* that we have provided, and part, actually, I think of our further sanctions that what they do is they tell their people to respond -- if somebody calls in and they want you to use a so-called usual and customary rate, instead of the billed charge, can we do that in terms of calculating the shared savings?

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United's answer is no. They use the billed charge. It can't be something so outlandish that they're not willing to make money on it, Your Honor. So I wanted to address that



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just because that was sticking in my head.

So let me go back, now that I've sort of set the landscape in terms of the claims and what we're talking about in terms of out-of-network and in-network. I want to go back to the clinical records.

So we have fought this fight too from the very beginning. And United showed the Court an early order, the October 27th order, I believe it was, or October 26th, relating to clinical records. And Your Honor did say, I reserve admissibility determinations for later.

Well, later came in the course of discovery before we come here before you today, time and time again, because United wants to try and make this case a case about upcoding, trying to disparage to the Health Care Providers, trying to insinuate that the work that they did was not at the level that they billed for.

But we have to harken back to what this case is about. United allowed those payments at the CPT code that was billed. We're just saying they didn't pay enough.

They didn't deny the claim. They paid it. So they admitted that that was the level that was appropriate. Yet, we have been fighting this upcoding attempt throughout the litigation. Your Honor has -- and Judge Wall as well -- had opportunities to consider and reconsider United's position on this, which is they should be able to talk about whether or



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not the services were emergent; talk about whether or not the charges were excessive.

And time and time again, the Court has had consideration and looked at the cases that are even within this Eighth Judicial District Court that talks about that type of information, and decided that, no, this is not appropriate in this case. It is not an issue, and it is not relevant.

In the presentation today, United has pointed to a chart from Scott Phillips and his expert report. And I would encourage the Court to specifically look at that chart. It's Exhibit 4 on page 17 of his report. United did not attach it to its opposition, but I think attached it to a summary judgment opposition or motion, rather.

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And so what's important about the chart is all it is is distributing claims into buckets. Is it a 99285? Is it a 99281? There is not a single piece of opinion or discussion about the fact that perhaps these shouldn't have been emergent claims or perhaps these shouldn't have been coded at a particular level.

And so what United would like you to do is infer from a chart that's basically just listing out how many claims fall within each bucket that somehow there was an improper coding. That is not, Your Honor, before this case. That is a fact or attempt to try and inject an upcoding argument and to challenge the fact and apparently try to present to the jury



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that these were services not done properly or properly coded in an attempt to undercut the Health Care Providers.

So considering the consideration and the thoughtfulness that both Special Master Wall and this Court and Your Honor has looked at this issue with respect to clinical records, we think it's clear that those should not be referred to, related to, offered into evidence, with respect to anything that suggests that the services weren't done properly, that the Health Care Providers are charging more than other people, and one of the things, if you just think of sort of as, you know, when you drive around town and you see there's now Urgent Cares. You've got ER hospitals. And there is some reasonable explanation for why emergency rooms seem the most urgent situations because there are other options.

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In fact, companies like United urge their members to go to these other options, rather than an emergency room.

And so it doesn't mean anything to have more CPT levels at a 5 or a 4, especially without anybody giving an opinion about it specifically, and by asking the Court to make an inference based on one chart in Mr. Phillips' expert report.

So on the clinical records, Your Honor, we would ask that you uphold basically your former rulings on this issue, and not permit United to present or offer evidence in that regard.



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With respect to the second bucket, which is Medicare rates.

THE COURT: Hang on. Let's -- I would like to rule just on the clinical records so I can have a clear mind on Medicare.

I'm going to grant the plaintiffs' motion with regard to clinical records. The issues being brought up here as the defense were things that would have been done at claims review. So I just don't find them relevant here. The CPT codes -- that was the time to object to the CPT codes, not now.

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And if grandma goes to the ER with a hangnail, it's still the emergency room. So I'm going to grant -- I think it's consistent with my prior rulings.

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Let's talk about Medicare now, because I understand the relevance argument that you make. And I think I said once to you guys, during one of the motions, aren't all of the reimbursement rates tied to Medicare? And you guys all looked at me like I had four heads.

So I want to hear your reply, please.

MS. GALLAGHER: Thank you, Your Honor.

So with respect to Medicare rates, what we're hearing and what we're seeing in Mr. Deal's report is an attempt to try and say that that is somehow the standard rate, that Medicare is a reasonable rate. You heard United say that they



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want to offer evidence and testimony and argument that Medicare plus a little bit is a reasonable rate.

But what we know from United's internal documents is that they know billed charges are what they're obligated to pay. They may want to pay Medicare rates, but that isn't indicative of this out-of-network reimbursement rate case.

I mean, I don't know how far enough to go to explain Medicare rates in terms of it is a government program. It's set by statute. There is not a profit. In fact, it is oftentimes perhaps less -- paying less than what actually a service may be charged at. And so to suggest -- and there's no negotiation with the government on that.

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To suggest that the largest commercial insurance company in the United States should be able to get that statement rate, I think is living perhaps in a different world -- or at least a hopeful world that doesn't exist in this particular case.

And so United provides the Court one order, the November 9th order, with respect to Medicare. But the Court has considered this issue, as did Judge Wall, time and time again, because we saw it coming in, you know, even though there were orders suggesting that later the Court would determine admissibility. We saw a request in request for production. We saw requests again in the third set of requests for production that sought -- not only Medicare, but

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all other noncommercial type of information and data. And the Court was mindful, not only of its prior rulings leading up to that point because it had considered it already, but was also reconsidering it, if you will, anew, and determining that that Medicare information and Medicare rates do not inform this out-of-network reimbursement case.

I've mentioned the Eighth Judicial District Court rulings on that, that talks about that type of Medicare. Medicaid rates are not considered to be, you know, what's reasonable in the marketplace. There is no -- you know, like I said, there is no arm's length discussion with the government about Medicare.

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So to be able to then have an expert come in, and you know, the presentation was that he has provided information about Medicare using that willing buyer, willing participant. However, I'm not so sure that he has provided that opinion in the out-of-network context.

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And I'm hopeful I'll be able to provide a citation to that. So I'm looking at Mr. Deal's deposition transcript at pages 44, line 11. So the question is you're slicing it too thinly. I want to know how many times has an insurance company hired you to testify in a case like this one, where my clients who are ER doctors are saying United did not pay them the reasonable value of their services?

The answer on page 45, lines 3 to 5, I would say the



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significant majority of my cases are facility versus payor cases. But I have testified on physician versus payor cases. There are three that I can remember, none of them were staff ER doctors.

So now we're being asked -- thank you so much -- my apologies.

The Court is being asked to rely on Mr. Deal's testimony about willing buyer, willing seller, in terms of Medicare and using that as a reasonable basis, when he hasn't provided that type of deposition testimony or that type of opinion before. And although United suggests that he's provided an opinion in that context before in other cases, he hasn't been in this case before with the orders that inform this particular case.

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And that's important because part of that communication with your expert is, okay, what are the orders of the Court? What do I -- what are the parameters that are guiding me?

And so in an effort to try and seek reconsideration with respect to Medicare rates, and using that as a basis of reasonableness, the suggestion that these inform that is not on point, Your Honor.

I apologize just for a moment, Your Honor. I lost my spot.

Okay. So TeamHealth did offer reimbursement rates as



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a percentage of Medicare in the e-mails that United offered. But I think what's really important is the context of that -- that context where negotiations relating to whether or not there would be an in-network agreement that would have been reached. And those discussions about percentage of Medicare often come from the insurance company itself, asking for a provider to put it in that format.

But the jury does not necessarily need to hear a percentage of Medicare, because as the Court is aware, the Health Care Providers will be presenting damages in terms of their billed charges -- or a percentage of the FAIR Health database, which is a neutral database that talks about reimbursement rates for out-of-network providers.

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And so to suggest that this is infused within the document, such that it can't be extracted, I think just goes to the way United wants to present the case. In order to try and prejudice the jury by using percentages of Medicare, saying that it's 800 percent of Medicare, which may not mean anything to a jury, other than the fact that it sounds like a lot -- 800 percent of anything sounds like a lot.

But what the measurement of percentage of Medicare in terms of in-network negotiations that were infused in those e-mails that were presented just a moment ago is again in the in-network context. And so to suggest that that information somehow legitimizes the use of percentage of Medicare as it



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relates to out-of-network reimbursement is just not accurate, especially considering this isn't the first time we've been before Your Honor with respect to this issue, is that infusing that information not only is prejudicial to the jury, but it's already been decided. We have already gone down this path.

And although it's been presented as something new, the arguments I hear are the same. The arguments that are in the moving -- in the opposition papers on these issues are the same, Your Honor.

Your Honor has had the opportunity to consider them already. The fact that United has garnered its own discovery, asked for its own discovery to sort of circle back and try and say, look, this is what's happening in the market is not a legitimate way to get around the Court's orders that have indicated that these are not relevant to this case.

I also -- I want to make one more point, if I could, on Mr. Deal, and the indication that he says you have to have -- I'm sorry -- let me back up -- that you have to measure market transaction in a noncompulsory environment I think is really important to this case, because we are emergency room doctors.

Noncompulsory means that you have this willingness; right? You're a willing buyer; you're a willing seller. We're in a situation where we're guided by EMTALA, a Nevada state counterpart, which requires us to do that emergency

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service without regard to whether or not we will get paid.

And so because United has the obligation to provide this coverage to their members, they have an obligation to pay for the services that have been rendered. And so to be able to try and say that we should be held to a standard of willing arm's length transaction is just not applicable or proper for this case, Your Honor.

The last bucket is Number 3, in-network rates with other providers.

THE COURT: Let's stop here.

MS. GALLAGHER: Sure.

THE COURT: So I have a couple of questions, without holding you to it, does the plaintiff intend to get into the prior negotiations that ended and resulted in the lawsuit when putting on the case?

MS. GALLAGHER: We do not intend on talking about the rates that were negotiated, that did not result in, you know, the culmination of any sort of agreement. I think what we would --

THE COURT: Because if you do, I think you open the door to it, to Medicare, or you could.

MS. GALLAGHER: Well, and I think there's a difference, with a distinction, if I could try to explain.

So there's a difference between e-mails like you saw, going back and forth, saying, hey, here's 150 percent, here's



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280 percent, whatever those figures may be, and they never reach an agreement. That percentage, that negotiated amount that never reached fruition would be prejudicial and subject to the Court's orders with regard to in-network discussions.

But the distinction is when you have United using conversation to say we are going to unilaterally reduce these rates no matter what, if you don't enter into this agreement over here, that I think is the bucket of information that the Health Care Providers should be able to discuss without opening the door to the other in-network negotiations that were failed.

THE COURT: Okay. And do you intend to get into the budgets that went back to the defendant?

MS. GALLAGHER: The budgeting? We don't, Your Honor.

MALE SPEAKER: I'm sorry, Your Honor.

THE COURT: Plaintiffs' budgeting sent during those negotiations?

MS. GALLAGHER: No.

MALE SPEAKER: No.

MS. GALLAGHER: No, we do not.

THE COURT: Okay. All right. All right. So I'm going to grant the plaintiffs' motion here.

Non -- it's a noncompulsory market, Medicare. And even though it is a standard used by -- by everyone, it is not the same for-profit model. It doesn't take into account all

of the factors, and I am concerned that the jury will place undue relevance on Medicare numbers. So it's granted.

Now, let's go to the third bucket.

MS. GALLAGHER: So the third bucket is similar, and these all sort of run together, so I appreciate Your Honor taking them one-on-one in turn. So in network rates with other providers.

So United pointed to an order in October 20 -- on October 27, 2021, and talked about how we compelled United to produce certain in-network information. And that isn't accurate.

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But separately, this case -- we moved in terms of trying to avoid discovery with respect to in-network negotiations and in-network rates with other providers. And there is a distinction here that is important, because at the end of the day, where we're sitting in terms of going to the jury, the Court has already decided that in-network rates with other providers cannot inform an out-of-network reimbursement. It's similar to the Medicare situation, where you're trying to impose a rate that isn't applicable to the case.

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And so to suggest that an in-network rate with, for example, Blue Cross® Blue Shield®, which was referenced by -- in United's presentation, on an in-network basis would confuse the jury in terms of what should be a reasonable or usual and customary billed charge rate on an out-of-network basis?



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And so I think that distinction is critically important to uphold in terms of what presentation gets to the jury. And it should be something that falls in line with the other earlier Court orders, with respect to in-network negotiations and in-network provider agreements.

So what you -- you know, what United has and apparently my understanding is that there's been some discussion among counsel that both parties had discussed that they would not bring forward evidence of in-network agreements, regardless if it's United with somebody else and if it's us, you know, with somebody else, because those are not indicative or demonstrative of the arrangement that is at issue here.

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So for that reason, Your Honor, we would ask that you grant our motion on -- in that regard as well.

THE COURT: So Mr. Blalack made an argument that he needed this information so that his expert could testify. Does this cut him off from defending? Because I understand your argument. In-network just isn't relevant. It's out-of-network that matters here.

MS. GALLAGHER: Well, and candidly, when I read the report, I thought, well, this is going to be problematic for United because there were already orders entered in this case regarding those issues.

And so if a party goes out and secures an argument or



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an opinion based on something that the Court has already barred, you know, that's -- the unfortunate landscape and the lay of the land, and the strategy decision that was made in doing so.

And so I think it would be extremely prejudicial for Mr. Deal to come in and say the only reasonable relationship at all is in-network, given the Court's order.

And so, you know, if that is the outcome of the order, unfortunately I think that, you know, then that is what it will have to be.

THE COURT: Okay. I'll give you a chance to respond, Mr. Blalack.

MR. BLALACK: Thank you, Your Honor. I can speak here on that issue.

Your Honor, first of all, I don't know of any discussions with anybody representing the plaintiff regarding not offering any evidence of network agreements or rates. If that's happened, it hasn't happened to me, and that would be necessary for me to have any real traction, one.

Two, again, I don't know what discovery order is being referenced that precludes the use and finds irrelevant all network rates produced by the party. And that -- I don't believe there is for the reasons I noted in our presentation that there is an order that says that in that way.

And lastly, with respect to Mr. Deal, I want to make



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sure the record is clear on this, it is his position, as a matter of economics, simple, basic economics, with his training, that to measure the reasonable value of any service, whether -- of any kind, the way to do it and the only reliable way to do it is to measure observed transactions between two parties, you know a willing buyer, willing seller exchange. And he does not believe out-of-network services qualify because they are forced transactions -- that's his economic term of art. It's in his report. It's what he discusses in his deposition. He explains it. He's questioned about it.

They're forced transactions because neither party can walk away. And they don't qualify, therefore, under standard economic literature and research, as a free exchange between willing buyers and willing sellers, which is the definition of how you measure reasonable fair market value, which is what the case law says you should look to. So that's why his opinion is what I showed you, which is the way to measure reasonable value is what the network rates and agreements are between the providers and the payors, other than United. And between United and the providers other than the TeamHealth plaintiffs, and that's your measure and rate.

I fully understand that the plaintiffs disagree, and they have an expert that can disagree. And I fully understand they can come in and say that's crazy and that's not the right measure. But that's the measure that this expert, who has

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given testimony many times -- and I want to address the statement that he's never given expert testimony involving emergency rooms -- that's not accurate.

His testimony in that deposition was he had not given an expert opinion in a Court proceeding involving emergency staffing [indiscernible] before. But it -- he has testified as an expert in other cases involving emergency facilities many times. And involving the same dispute, which is an out-of-network service, billed where there's no agreed rate, and the question was, was there reasonable value? And he's used the same standard methodologies he's proposed to use in this case. It's been accepted and used in court after court.

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So I submit, Your Honor, that to grant this motion, in addition to not just having a basis if the Court's orders, it would really -- it would essentially mean we do not have a defense except to say we have to defend the case entirely on the charges. They are charge-based. And that's not our position.

There's nothing in United that agrees that charges are a reasonable basis for the measurement of the value of a service, as a corporate position or as the litigation position.

And I know that that's what they would prefer, that we have to litigate the case on their terms. But that's not our position, as a matter of prelitigation position or in the



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course of the litigation itself.

THE COURT: Okay. You know, I'm going to defer this to the time of trial, only because I want to see how the plaintiffs' evidence comes in.

I am inclined to say that the in-network just aren't relevant. But if I preclude your witness from testifying on that, I'll make sure you have an offer of proof on the record and an objection on the record, and we'll take it up outside of the jury's presence.

MR. BLALACK: Thank you, Your Honor.

THE COURT: Thank you.

All right. I think we're at a good stopping point for today.

Let me give you some updates on everything. I still don't have a courtroom for Monday. I need to know how long the plaintiff will take for jury selection.

MALE SPEAKER: Your Honor, I think I stand by my original estimate. I think I'm going to take -- having observed the way Your Honor does the jury selection and the order and given the importance of the case, gosh, I would say a day and a halfish. And I know that Mr. Blalack -- we don't agree on many things, but I think we do see eye to eye on the length of the jury selection in this case.

THE COURT: Any question is, I've got to know exactly how much time to allocate next week, and I have to let jury

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services know. So do you want me to block out Monday, Tuesday, Wednesday, or Monday through Thursday? Mr. Salve, and then Mr. Blalack.

MR. ZAVITSANOS: I would say the latter, Your Honor.

MR. BLALACK: We agree, Your Honor. I think --

THE COURT: Four days?

MR. BLALACK: -- it takes us through to the holiday.

THE COURT: Good enough.

All right. So I am trying to get a larger courtroom for Monday, because with us, it's 22 people, and we can only hold 41 in this room. So --

Okay. The next thing is, I am unavailable on November 4th and 5th. We bought expensive tickets for something. I have to do it. My husband will kill me.

And then you've also got Nevada day, Veterans Day, and those two holidays are intervening. Can you fit -- what -- how long do you need for trial?

MR. ZAVITSANOS: So Your Honor --

THE COURT: I know if your *Motions in Limine* were resolved, it would be an easier answer.

MR. ZAVITSANOS: Yeah. So I can give you a little bit more clarity now, because we have a little bit of guidance. And as you've been ruling, the length of the trial has been shortening, so I would say -- I would sail for the plaintiffs, of course, we still have a lot of limine issues to take up.

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THE COURT: We do.

MR. ZAVITSANOS: But I would say, I'm kind of guesstimating, seven days --

THE COURT: Because --

MR. ZAVITSANOS: Seven trial days, not including jury selection, not including openings, Your Honor.

THE COURT: And to let both of you know at this point I have --

MR. ZAVITSANOS: For witnesses, Your Honor. I'm sorry.

THE COURT: Oh, sorry.

MR. ZAVITSANOS: That includes the people we would call adverse.

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THE COURT: Got it.

MR. ZAVITSANOS: Yes.

THE COURT: So to let you know, at this point, I do not have any senior coverage. My week next week is totally blocked out for you, but I don't have senior coverage on Wednesdays and Thursdays, so I'll be doing my morning calendars. Does that affect your estimate?

MR. ZAVITSANOS: Your Honor, I -- my estimate is 7 full trial days. So if Wednesday, Thursday, is a half day each, that would count, by my estimate, as one trial day.

THE COURT: So you think you need eight days to put your case on?



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MR. ZAVITSANOS: Yes, Your Honor.

THE COURT: And defense?

MR. BLALACK: Your Honor, I agree, that depending on the how the in limine rulings go, it could shrink the case considerably, particularly ours. So I think we could be -- I think right now I would say we're about commence rate with plaintiffs. So let's assume seven full trial days. But again, I think -- again, depending on how tomorrow goes and the rulings on limine, that would be different -- more narrow, also based on what my colleague decides to do in terms of narrowing his case, it could narrow ours.

THE COURT: Well, if you both take eight days, then you would conclude your evidence on the 23rd of November, which is two days before Thanksgiving. So I'm willing to take shorter lunches if that'll make a difference. We can --

MR. BLALACK: And we have discussed some efforts there to help make that possible. I mean, I -- I think we'll be able to give you a much more firm view, Your Honor, after we finish the in limine process. And I'll give you an example.

THE COURT: Well, I have to tell the chief judge how long I need. I mean, we -- we're so calendared, we're having a big push from our Supreme Court to try more cases, which is great. And -- but I just -- she has -- I have to give her a deadline.

MR. BLALACK: My recommendation would be Your Honor



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that we go until Thanksgiving, even though I hope and pray we don't.

MR. ZAVITSANOS: Your Honor, if I may, as long as Your Honor doesn't penalize us for ending prior to then, I would say I'm going to -- what it, underpromise and overdeliver, I suppose. And so I -- as with all trials, after the first couple of witnesses, things start moving along much faster and other witnesses start dropping off. And so I -- I think there is a better than 50 percent chance we will be done considerably in advance of that, but I think out of an abundance of caution, I agree with Mr. Blalack that Thanksgiving is the safe choice.

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MR. BLALACK: I agree.

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THE COURT: Okay. I'm going to tell the chief that we will have a verdict by the 23rd, which is Tuesday. Because Wednesday will be a travel day. You'll Ms. -- you'll lose too many jurors if we tell them you're going to go until the 24th.

MR. ZAVITSANOS: Right, right.

THE COURT: Okay. Now, you have a number -- I think you have a number of temporary sale motions pending. Are there going to be any objections to any of them?

MR. BLALACK: None from the defense, Your Honor.

THE COURT: Okay. I'll let my law clerk know so he can process them before the trial. And I can only bring in 40



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to 45 jurors every day, so that's why it's so important. The chief will help me get a courtroom or assign somebody. We're trying to get people to agree. Courtroom sharing is not in our culture. So anyway, just to let you know. Okay.

MR. ZAVITSANOS: So is that, Your Honor, if I may, does that mean that as of right now, at least, we're here for trial?

THE COURT: Well, we'll find a bigger courtroom for Monday. But I won't be able to bring in more than one venire. And if, and what we've done in the past for jury selection is we find a courtroom to house the other people. So as we bring them in as we need to, they have to badge start from the beginning in jury selection.

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MR. ZAVITSANOS: I'm sorry, Your Honor, I was not clear. My apologizes. I mean, for the actual evidence portion of the trial, will we be in here or is Your Honor still looking for another courtroom for that as well?

THE COURT: I think we can probably do the trial in here, as long as we have 41 or less. That's what is posted in this courtroom. And usually we only have eight jurors. I'm going to suggest that you have four alternates, instead of two. And if you want more, ask. Think about it.

MR. BLALACK: Four is fine for us, Your Honor.

THE COURT: All right. Because I just finished a four week trial and we only had to excuse one person.



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MR. ZAVITSANOS: May I ask one other question, Your Honor?

THE COURT: Of course.

MR. ZAVITSANOS: Housekeeping, so what is -- what is Your Honor's practice, I guess, on when we would get the panel list of the potential jurors?

THE COURT: You get it that morning.

MR. ZAVITSANOS: That morning?

THE COURT: Yeah.

MR. ZAVITSANOS: Okay.

THE COURT: The marshal walks in with it.

MR. ZAVITSANOS: I see, okay.

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THE COURT: And there's a rule right now that all criminal juries are selected on Mondays and Tuesdays, and all civil are Wednesday and Thursday, and Friday is short trials. We're being accommodated by the chief judge, so -- and jury services. I don't know what time it will be Monday. I'm still waiting to hear back and to hear back from the other judges who I've asked to use their courtrooms.

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It's just part of our culture that we don't share, which is too bad.

All right. When we're off -- let me know what other questions you have.

MALE SPEAKER: One more clarification question, Your Honor, with regard to *voir dire*. There's the standard



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order that we provide for proposed *voir dire* to the Court.

THE COURT: Yes.

MALE SPEAKER: Do you interpret that to mean just what we want you to ask? Or do you really want a list of all of our proposed topics?

THE COURT: I want the two of you to do outlines of your proposed *voir dire* and let me know what your objections are to each others, before we start trial, so I can clarify if that.

In my civil bench book, I just have a short number of questions that I ask, which is how long have you been in Nevada, you know what to you do for employment? If you're married, does your spouse work. And it's only looking for conflicts, you know. I can add other questions that you ask me to do, but otherwise I turn it over to the lawyers. And usually, as long as the plaintiff gets, the defendant gets.

MALE SPEAKER: All right. Thank you, Your Honor.

THE COURT: So uh keep track of the time.

MR. BLALACK: Before we [indiscernible] Your Honor, just so I understand the plan, are we coming back tomorrow and then knocking out the rest of the *Motions in Limine* tomorrow? Is that what --

THE COURT: We are going to come back tomorrow, it's not on the calendar, but you can come back at 1 o'clock tomorrow.

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MR. BLALACK: Okay.

THE COURT: So it is on the calendar, my error. 11 o'clock, everybody.

MR. ZAVITSANOS: I'm sorry, Your Honor. You said 1 o'clock?

THE COURT: Yeah. And I have an evidentiary hearing Thursday at -- Thursday afternoon at -- well, I think it's on. I'm not seeing -- oh, I'm on the wrong day. I think I have an evidentiary hearing and another trial Thursday afternoon. I do have some time Friday, if you need it.

And then Monday we'll start the trial.

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

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THE COURT: Anything else?

MR. POLSENBERG: Judge.

THE COURT: Yes.

MR. POLSENBERG: Just to clarify, the jury selection will be next Monday through Thursday?

THE COURT: That's correct.

MR. POLSENBERG: And openings [indiscernible] the Monday after that?

THE COURT: Correct.

MR. POLSENBERG: Thank you, Your Honor.

THE COURT: And let me know when we're off.

[Proceeding adjourned at 4:44 p.m.]

* * * * *



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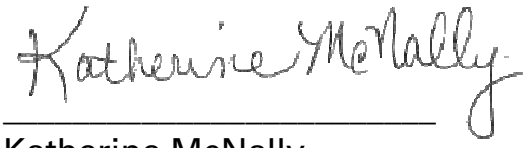
ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video proceedings in the above-entitled case to the best of my ability.



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

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**TRAN**

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). | ) | |



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BEFORE THE HONORABLE NANCY ALLF, DISTRICT COURT JUDGE

TUESDAY, OCTOBER 19, 2021

**AMENDED TRANSCRIPT OF PROCEEDINGS**

**RE: MOTIONS**

SEE PAGE 2 FOR APPEARANCES

**SEE PAGE 3 FOR MATTERS**

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

**A P P E A R A N C E S**

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KRISTEN T. GALLAGHER, ESQ.
AMANDA PERACH, ESQ.
JOHN ZAVITSANOS, ESQ.
JANE ROBINSON, ESQ.
JASON M. McMANIS, ESQ.
JOSEPH Y. AHMAD, ESQ.
P. KEVIN LEYENDECKER, ESQ.

FOR DEFENDANT(S):

D. LEE ROBERTS, JR., ESQ.
COLBY BALKENBUSH, ESQ.
K. LEE BLALACK, ESQ.
DIMITRI D. PORTNOI, ESQ.
DANIEL F. POLSENBERG, ESQ. (Blue Jeans)

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**LAS VEGAS, CLARK COUNTY, NEVADA**

**TUESDAY, OCTOBER 19, 2021 9:29 a.m.**

*** * * * ***

THE COURT: Good morning, everyone. Please be seated.

So is everybody here in person? Wow. Okay. Welcome.

Let me call the case, Fremont versus United.

Let's take appearances.

MS. GALLAGHER: Good morning, Your Honor. Kristen Gallagher, on behalf of the plaintiff Health Care Provider's.

MS. LUNDVALL: Good morning, Your Honor. Pat Lundvall from McDonald Carano, also here on behalf of the Health Care Providers.

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THE COURT: Thank you.

MR. ZAVITSANOS: Good morning, Your Honor. John Zavitsanos, on behalf of the Health Care Providers.

MR. AHMAD: Good morning. Joe Ahmad, also on behalf the Health Care Providers.

MR. McMANIS: Good morning, Your Honor. Jason McManis, on behalf of the Health Care Providers.

MR. LEYENDECKER: Good morning. At Kevin Leyendecker, on behalf of the Health Care Providers.

THE COURT: Thank you.

MS. ROBINSON: Good morning, Your Honor. Jane Robinson, on behalf of the Health Care Providers.



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THE COURT: Any other appearances on this side?

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

THE COURT: Thank you.

And Mr. Blalack?

MR. BLALACK: Good morning, Your Honor. Lee Blalack, on behalf of the defendants.

MR. ROBERTS: Good morning, Your Honor. Lee Roberts, also on behalf of the defendants.

MR. PORTNOI: Good morning, Your Honor. Dimitri Portnoi, on behalf of the defendants.

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

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THE COURT: Okay. Well, welcome everyone.

MR. POLSENBERG: And good morning, Your Honor. Not in person, Dan Polsenberg, for the defendant.

THE COURT: All right. Thank you. And welcome everyone.

Let's talk about today first. I know you have lots of questions about courtroom and jury selection.

Today we have to break at 11:45. I have to present at noon at the Civil Bench Bar. And then we stop at 4:45. I am moving some things in case you need more time tomorrow afternoon.

Now, jury selection. I am trying to find a bigger

courtroom. This room only holds 41 people. I don't have an answer on any of that yet. But when I do, I will let you know. I'm sure you have other questions before we get into the motions. No? All right.

Let's take then the plaintiffs' motion for further sanctions.

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

Your Honor, the Health Care Providers have been impacted by United's failure to produce documents in this case. Your Honor is well familiar with this. We have been before Your Honor on numerous occasions over the course of this case, that has resulted in the most recent August 3rd order that resulted in findings of willfulness against United for its failure to produce documents. And information that they presented during that presentation at that time, which was back in April, indicated to Your Honor that they had been substantially compliant with their obligations with respect to the prior orders.

And so United continues to reap the benefits of its conduct and its failure to produce documents during the course of this litigation. Without further sanction now, as we have explained in our papers and I will provide more detail here today, is that to allow United to have the last word, which would be simply that it is disregarding the orders of this



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Court.

Since the August 3rd order that the Health Care Providers brought, with respect to the Order to Show Cause, they have filed a second amended complaint which is a streamlined version of the earlier allegations.

What is not different in the second amended complaint is the underlying conduct that is being alleged, that United has orchestrated a plan to manipulate and lower reimbursement rates in a manner that capitalizes on its market power and because, as it threatened long ago, because they can.

The Health Care Providers have elected now to streamline the allegations and the causes of action that will be going to the jury next week, upon which the Court will provide instruction. This is no different than litigants do typically in a pretrial motion. Health Care Providers opted to do a second amended complaint.

The reason I raise this issue, Your Honor, of the second amended complaint, is because United has made much of the fact of the amendment, indicating that much of the discovery that is at issue today in this motion for further sanctions would not have been permitted.

But the Health Care Provider's perspective is that the discovery would have been permitted because the allegations are the same with respect to the underlying conduct, with a scheme to deflate the reimbursement rates that has been

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alleged and that we will intend to prove in trial next week.

The Health Care Providers did not move lightly to renew and bring this further motion for further sanctions. But it really is -- the reason we did it is because it is the exemplification of United's approach to this case, which has been to take the orders of this Court as mere suggestion and not something that they will follow that with actual sanctions.

United's philosophy will become quite evident as this day goes on. We will see numerous *Motions in Limine* that are really just reconsideration motions for the Court's prior motions that have been entered long ago and enter --

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THE COURT: Excuse me. Someone who was on the phone needs to mute. Thank you.

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Go ahead, please.

MS. GALLAGHER: So, Your Honor, will see that that is the philosophy that has preceded today and which continues and for which the reason why the Health Care Providers decided to move for further sanctions.

At the April 9th hearing, United represented that it was substantially compliant. It represented that it had completed the document production with respect to what we have defined as the negative inference categories in this particular motion.

United further denied at that April 9th hearing that



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any evidence had been lost or destroyed. As the Health Care Providers presented during the Order to Show Cause, they were concerned with, and they had a fear and -- on the receiving end of what we call the sophisticated form of fabrication -- a half-truth, Your Honor may recall as part of that presentation, with respect to missing information, with respect to not producing information, with respect to obstruction that we saw time and time again.

The most obvious example of that was with the e-mail protocol, where United was asking the Health Care Providers to basically identify the name of a document before they would admit that it existed.

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The Court was put, at that April 9th hearing, in a position of having to balance the moving Order to Show Cause with respect to -- and United's representations about substantial compliance. And there was significant back and forth, as Your Honor may recall, with respect to what does substantial compliance mean.

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At that time -- and this is in the August 3rd order at paragraph 15 -- United urged the Court not to limit sanctions based on its representations, that it had substantially complied with the September 8 -- 28th, excuse me, October 27th November 9th, and January 20th orders.

Also in the August 3rd order at paragraph 21, the Court has found that United has shown that a consistent

practice of delay and obstruction in this case. The Court also finds United conduct to be willful at paragraph 31.

Further, by omission, there has been an effort by United to keep the Health Care Providers from discovering information and having access to witnesses -- that was at paragraph 31 as well.

The Court also found that based on the information, it did not know whether or not there had been any fabrication or loss of evidence. The Court then entered those measured sanctions based on the information available, based on the representations that United made to this Court at that time.

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Only after the April 9th hearing did the Health Care Providers learn United had not been candid about its actual level of substantial compliance with its document production or that documents had not been preserved or that a litigation hold had not issued until at least two months after the commencement of this action.

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As to the purported level of completion of document production, United told this Court it was complete as to its RFP responses.

But it was not even a close call, Your Honor. What we learned after that is that United produced 81 percent of its overall document production after April 9th. As the Health Care Providers detailed in their motion for further sanctions, United produced documents that spanned a base range of 433,387



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after the April 9th hearing, which is not representative, as Your Honor is aware, of the actual number of pages. Your Honor is familiar with the fact that native productions also are -- are also very lengthy and sometimes don't represent the single Bates number that has been assigned to it.

You will likely hear today from United that it was simply trying to complete its ESI production. But this is a game of semantics, Your Honor. True, there is an ESI protocol in place. But the Court made it clear back in September of 2020 in the order denying United's motion for e-mail protocol, that that was not going to be an excuse from producing documents. It would not operate as a stay or any rebuttal of interference with United's obligation to produce documents.

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It certainly defies logic, now looking at that document production, that United could have been complete with the negative inference categories on April 9th, when 81 percent of the production was made after that time.

The challenge of this motion now is the fact that we are left with trying to identify what is missing. United says in its opposition that we have no remedy available.

And as we've explained in our papers and I will explain today, we don't agree with that. We think Your Honor has the ability under Rule 37, under NRS 47.250, and also within the Court's adherent power, to sanction parties and



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litigants for continually failing to follow orders of the Court, when the result is missing information -- missing information that will allow the Health Care Providers to prepare and now to present their case to the jury next week.

The Health Care Providers are requesting, as Your Honor knows from the papers, a sanction that precludes United from being able to contradict evidence that is already in the documentation, which is that it has an obligation to pay bill charges.

What United does in the opposition is something different. They say the testimony says the Health Care Providers aren't paying their bill charges. Those are two different things, Your Honor. What the obligation to pay and what United decides to pay is what the Health Care Providers are fighting about.

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And so if United internally has documents that say, they know they have an obligation to pay, and they have structured a program or a scheme or whatever label we want to call it, to pay something less so they don't have to pay bill charges, that is what this case is about.

As set forth in the motion, United did not preserve the found handwritten notebooks of Dan Schumacher. He was United Healthcare's then president and COO at the time. He testified that he kept his notes in books. He also testified that one of the meetings that is of the subject of much to



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do -- and you will hear more about it today -- that at one of the meetings, he took notes of that meeting when he met with representatives of TeamHealth, and they were discussing a national in-network contract that never came to fruition and those notes were not preserved.

Now, United indicates that, well, we didn't get served with a complaint yet. But we demonstrated in our moving papers that Mr. Schumacher indicated that he was well aware that TeamHealth would need to move to litigate this case because that was the only option left.

When United says they are going to do something and they do it, which is what this case is about, the only option left is to litigate. And so they knew at that time, yet they did not institute a litigation hold over those notebooks. Mr. Schumacher did not keep those notebooks. And we only know specifically of the one note with respect to TeamHealth. Perhaps there are others. Perhaps he was making notes in business strategy meetings and meetings about the outlier cost management program and meetings about shared savings, but we don't know because they weren't preserved.

United, in its opposition, comes forward and says, well, look we put it on privilege log. But the Health Care Providers should of reached out, should have challenged the log in order to get those factual summary notes. Your Honor is well familiar that has no privilege when there is a factual



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summary purportedly done by Mr. Schumacher.

And to place it on a privilege log which I, you know, obviously, I went to go see, What did it say? Was it obvious? It's not obvious, Your Honor. It's logged with a subject line of, quote, TeamHealth; and the second log entry is, quote, FW, dash, TeamHealth.

The person who is reviewing that would not know that that is Mr. Schumacher's translations, supposedly, of his handwritten notebook that was then later destroyed.

Some of the cases that United brings forward are just so factually not analogous to this particular case. The case specifically that they cite, *Hamilton versus Mount Sinai Hospital* is a case where it was a fight over literally whether or not handwriting transmuted to typewritten should have been a negative inference. Under those circumstances, the answer was no. There was no knowledge that there could have been litigation at the time. And then there was little translation and production on the typewritten notes.

This is a situation that is different. We have United now trying to cure itself from this failure on the notes only with respect to the game. We also have the issue of all the other notebooks. But with respect to this, they are trying to cure the situation by saying they produced it and put it on a log, but we don't have access to it. And so this is the type of gamesmanship that just shouldn't be happening with respect

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to a factual summary.

They did cc an attorney on it. But Your Honor is well aware that attorneys in-house wear many hats. A factual summary recitation is not one that would afford privilege. And it is United's obligation to indicate that they have that privilege available to them, but they cannot now hide behind that and say that they have cured the issue with the notebooks.

This also dovetails with the situation with the litigation hold which was not implemented until June, and this case was commenced in April. The 30(b)(6) representative for United designated on this particular topic indicated the hold wasn't an issue until June 7th.

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And so as a result, not only are these found notebooks were not preserved, we don't know what else might not have been preserved, given that time lapse, given that time lag, in between the time that the Health Care Providers commenced litigation.

And again, United will point to the time of service. But there was information in advance of that, or at least contemporaneously, with that timeline that United should have known and was on notice with the Health Care Providers would be seeking to enforce their rights to get a reimbursement based on their billed charges and the usual and customary rate based on those conversations.



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In the motion, Your Honor, the Health Care Providers have identified missing documents from United's production that constitutes missing links, missing folders that were not searched, missing reports, and then missing communications between MultiPlan and Data iSight.

We have established through our moving papers that United is in continuing violation of the Court's prior order and that United should not be permitted to gain a tactical advantage going into trial by virtue of its strategic decision to see if the Court would actually hold it to its prior orders.

We think the Court has authority to sanction United in the manner that we requested under Rule 37, under NRS 47.250, as well as the Court's inherent power.

And I want to spend a few minutes on United's opposition, Your Honor. United's opposition is typical. It blames the victim, the Health Care Providers, trying to point out issues that were never before the Court in any other motion practice.

This is similar to what we saw in the Yale Study documents, with respect to Surround Sound's strategic approach to disparage the Health Care Providers and other emergency Health Care Providers in the industry. This is no different. Bringing to the Court things that were never -- no meet and confers; no issues before the Court -- simply to distract the

Court from the situation at hand.

So what's important and what is missing from United's opposition is that there is no direct explanation for how United could have been substantially compliant at the April 9th hearing, given what we know about that post-April 9th production.

United does not affirmatively deny in the opposition that the documents identified in the motion exist. Instead, they take the tactic that we have not proven that they do exist.

United tries to downplay identified missing documents as not having any importance. They attached 25 volumes of documents in an effort to show what they did produce, which is not the issue at hand. The issue at hand is what is missing. What did they not produce that we are entitled to under the negative inference categories.

A list of what is produced is simply not a curative situation to how the Health Care Providers have structured this argument and what they are moving for in terms of the sanctions requested.

Using United's own figures from its opposition, it is notable that of the documents produced, 42 percent are administrative records. That's over 227,000 documents -- pages of documents. Of the 540,000 pages that United states that was produced are administrative records. The Court is



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familiar. We went round and round. That is all United wanted to produce was administrative records and that constitutes 42 percent.

This provides the Court perspective about what was produced and truly what could be missing from the production when there is ample evidence that there is a unilateral strategy to set low out-of-network reimbursement rates by United.

United also turns to blaming the Health Care Providers for not being able to identify documents that they withheld or perhaps put out a privilege log. The same tactic, again, was tried by United and rejected at the time of the e-mail protocol, when they wanted us to identify closure reports or performance reports that Data iSight made by name.

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Your Honor may remember that what happened is that United actually had a dedicated e-mail for those closure reports that was discovered later. Had we not pushed that issue, we never would have identified that.

What the Health Care Providers have been able to identify that has been omitted from United's document production is clear -- shared savings. The Court has heard a lot about shared savings.

At the April 9th hearing, United denied it was its program. But the documents demonstrate that the shared savings program yields 35 percent of the difference between



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what a Health Care Provider charges and what they set as the rate. So that the higher the rate, the higher the bill charged, the more United makes. So to suggest, that United does, that we are not entitled to bill charges just defies credibility because that is in the actual nature and the structure of the shared savings program.

So the Health Care Providers were able to secure some information from third parties as set forth in our moving papers. It is incredible the amount of money that employers are paying United on a monthly basis for their shared savings. You can imagine the revenue is one billion annually.

But those documents were not produced by United. Why? Well, we don't know. Certainly it would be helpful to know, but I think it is obvious that United does not want the Health Care Providers to have that information.

In opposition, United points to Exhibits 16 through 19 as demonstrative of what they say is a fulsome production on shared savings. But when you go and look at Exhibits 16 through 19, what Your Honor will see is, in Exhibit 16, there is three documents there that reflect the exact same MGM Fremont participating provider agreement. A single e-mail about MGM is Exhibit 17. An ASO, administrative services only, agreement and a renewal with Las Vegas Metro Police Department is Exhibit 18. And then there is one e-mail about purported rates -- it doesn't have a lot of other



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information -- in Exhibit 19.

Surely, this cannot be a complete production about United Shares Savings Program when it generates a billion dollars in internal revenue every year.

What's also compelling is that third parties that we subpoenaed came back and said, Look, we don't have this information. This is in United's possession. And then we go to the document production, it is not there, Your Honor.

United also points to two documents about client adoption of the Shared Shavings Extended Program, the SSPE. The first United refers to is Exhibit 41A, which is literally a list of who has adopted the shared savings program or perhaps they haven't adopted the shared savings program.

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What's interesting, if you look at that document in the right column, there is actually file cap that exists there, which obviously that is one of the issues in this motion that we are bringing is that there are documents that are there that have not been produced. United makes no mention of this file cap in its opposition.

But what is interesting of Exhibit 41A is line 93 of that spreadsheet says this -- and I will quote from it -- and I will leave out the person's name. But an employee, quote, Heard them on the call we had with them last week, and all of the additional materials we sent them to try to convince them. They do not believe it will be as big of a savings, compared



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to the member noise, which they feel outweighs the savings. And on today's call said, no, they are not moving to this, and they don't want to discuss it with us any further.

So what stood out to me is, as United is telling us that they have produced everything -- and they point to this one document with a list, I want to know where are, quote, all of the additional materials we sent to them to try and convince them.

That is the type of information that is missing, Your Honor.

The second document, Exhibit 41B, is a PowerPoint slide that includes slides that say exactly our position in this case, Your Honor. It says, With SSPE, the client benefits are: Offers, discounts on claims from noncontracted providers where billed charges would typically apply.

That is a document that they are putting in front of Your Honor saying that they have produced information with respect to shared savings, but it is also supportive of the evidentiary inference and sanction that we are looking for because that is exactly United's obligation to pay -- which is what this case is about. Not what they want to pay.

In opposition, United states that this slide deck is sent to customers. But it couldn't have been because it contains all the headnotes with instructions to the presenter about what to include or exclude depending on your audience.

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And so what we don't have are the actual materials that have been sent to their ASO customers.

The other thing we have identified are missing links. United tries to minimize the missing information and says that we have identified what they call obscure links. These links are not obscure, Your Honor. These links depict how United operates its business. They save information on shared drives where people can access, which is what I would expect. They update the information constantly and people know where to go to get the information.

The PIG drive that we identified through discovery contains significant information about out-of-network programs. It has numerous subfolders and contains weekly reports. It contains, we know, from one of the links that we provided to the Court, information about TeamHealth and other information about United's strategy.

Despite a weekly cash report that we have identified, United admits it produced but 17. This case has spanned the relevant period more than a few years, and we all know how many weeks are in a year, so we know just by virtue of their opposition that there are documents that are missing there.

And this is particularly important because they were looking to identify what kind of savings they were getting off of the Health Care Providers and other TeamHealth related entities. They were looking to find out how much they were

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saving between our billed charge and what they were deciding they were going to pay. That amount is their operating revenue.

The Health Care Providers also identified an e-mail where information about TeamHealth, in terms of cutting rates and implementing a negative communication strategy, was stored off the grid.

In opposition, United argues that off the grid means that it was just in MultiPlan's possession. But if you look at the document, there is nothing that can be gleaned with respect to that. That document says that it -- normally they should be on the main project, SharePoint. But this one is off the grid. Meaning it is stored somewhere different, because maybe not a lot of people knew about it; maybe they didn't want to a lot of people to know about what they were doing specifically to target TeamHealth and other emergency Health Care Providers.

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United offers no declaration or affidavit of that employee in their opposition, but rather points to some MultiPlan documents. But none of those offered in Exhibit 30, which is where they refer, say that MultiPlan is the custodian of any off-the-grid documents. This argument is crafted, Your Honor, without any support.

United also informs the Court that the corporate shared driver had two terabytes of data. That is a lot of



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data. One terabyte has about six and a half million pages, so two terabytes would've had about 13 million pages. So by way of example, if the document averages 10 pages, that is 1.3 million documents. United put in its opposition papers that from those shared drives, they produced just 4,000.

E-mails from MultiPlan -- the Health Care Providers pointed out PowerPoints that were in MultiPlan's production concerning their presentation to United. In opposition, United opposes this by saying that we haven't put proven they ever received them.

This is not an affirmative statement saying that they did not receive it. Again, it is shifting back to the Health Care Providers to basically identify documents without knowing whether or not they are there, whether they have been obstructed, whether they have been placed on a privileged log without any basis.

The Health Care Providers pointed out e-mails sent by two MultiPlan employees -- Emma Johnson and Kim Dugan -- to United and the lack of e-mail and testimony compared to their job duties.

So let me clarify that a little bit. These two employees were account -- assigned United as their account. And so their testimony indicated that they were communicating routinely, regularly. Emma Johnson indicated she would've sent tens of thousands of e-mails over the course of her

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tenure with MultiPlan.

So in opposition, United says, Well, she was only there through 2018. And, oh, by the way, you know, this case has a more narrow timeline in terms of document production.

So I thought about that. So let's assume for a minute, a two-year period of time, 2017/2018. And United, instead of looking at what we did, which is how many documents did Emma Johnson send to them? They looked at to and from, so they are providing the Court with a different comparison point, not an apples-to-apples comparison.

But just for a moment, let's take them at their word, to and from Emma Johnson, 1,200 e-mails. In a period of time that would encompass that, it equates to about 12 and a half e-mails per week. Given her testimony and how often she was communicating with them, and that she was in constant communication with them, 12 and a half e-mails doesn't seem to be realistic in terms of what you would expect. I think we all know when you get going on a particular project, even in a day, you may have more than 12 and a half e-mails.

So given that constant communication testimony, Health Care Providers do not think United has refuted that point in their opposition.

Salesforce Platform has also been identified as a potential source of information that we do not think has been properly reviewed. United does not deny that information is

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shared through the Salesforce Platform, only arguing again that we had not proven the existence of information on that platform.

United argues that we found an obscure e-mail. Exhibit 28 to our motion depicts an e-mail that MultiPlan routinely sent messages using that platform.

If you look at Exhibit 28 it says, quote, the message is mandatory for all clients who use DIS, which is Data iSight, for professional claims. And it needs to be sent through Salesforce so that we have a record of it.

There are also other e-mails that demonstrate MultiPlan used the Salesforce Platform to communicate with United. For example -- MPI 4707 says, quote, It's important that you send the messages through Salesforce so that legal has a record it was sent.

So we did not identify an obscure, random e-mail that would not reasonably be -- reasonably yield additional information, Your Honor. What we are seeing is that MultiPlan was using that platform routinely to communicate with United, which means that that platform is accessible to United; that information has been sent through Salesforce.

And their argument that they don't have possession of the doesn't go as far to say they don't have the ability to have custody of it or the ability to have control over it, given the contractual relationship that exists with MultiPlan.

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And finally, we also identified a Muddy Waters report, which may seem not particularly of interest, but the opposition was sort of interesting, Your Honor. United characterized its vice president of having a, quote, dim memory about whether or not she received the Muddy Waters investment-related report. So this report is basically depicting United's latest endeavor, which is to bring the work that MultiPlan and Data iSight do in-house through a new entity called Naviguard.

If this seems familiar, the Health Care Providers think it's a repeat of the Ingenix database that happened about 10 years ago, a little longer, with respect to manipulating reimbursement rates.

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But what is important is that what was clear from Ms. Paradise's testimony is that she testified she received it. She just didn't remember who she received it from. And so it is indicative, when United says that she has a dim memory, it doesn't deny that that document may exist within their documents, Your Honor.

We have been before your Court often on this issue. And I greatly appreciate the Court's attention to these matters because they are so important to the Health Care Providers in trying to present this case to a jury next week. We can't imagine what hasn't been produced or may be sitting on a privilege log behind some, you know, some description

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that isn't forthcoming.

But in either situation, we think the Court has sufficient evidence. We think we have provided the Court sufficient evidence to be able to establish the relief we are looking for, again, under the Rules 37 Nevada Rules of Civil Procedure, NRS 47.250, and the Court's inherent authority.

And we would ask that you impose those sanctions on United, Your Honor.

THE COURT: Okay. And the exact sanction you are asking me to impose.

MS. GALLAGHER: We are asking if United is found liable and owes the Health Care Providers money, that the compensatory damage model will be the billed charge is what United is obligated to pay.

THE COURT: Thank you.

MS. GALLAGHER: Thank you, Your Honor.

THE COURT: Opposition, please.

MR. ROBERTS: Good morning, Your Honor. Lee Roberts, for defendant United.

I'd like to start by addressing the issue of the sanction that has been requested, because I do believe that frames the rest of the Court's analysis here. And while I believe Ms. Gallagher may have stated that a little bit different, it sounds like the same relief that is requested in the brief.

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And I would submit that this is a case-terminating sanction at this point in the litigation. And here is why.

What Ms. Gallagher just said was if United is found liable, then the damages are the difference between what United paid and the full billed charges.

Well, as this Court knows, United tried to get discovery on medical records underlying the claims. We contended that we were entitled to put in issue whether the services were performed and whether the level of services performed actually met the CPT codes billed.

And we cited a Florida court that had found that when they sued for recovery, it put those issues in dispute, and United could contest its liability.

As this Court may recall, you disagreed with the Florida decision and you found that this was only a rate of payment case -- that because United had paid and paid something, and paid under a certain CPT code, that United could not contest whether the charges were actually due. United could not contest whether the charges met that CPT code that they were billed under, and found that this was only a rate of payment case. Under that court decision, the only thing left for trial is the rate of payment that the emergency room physician groups were entitled to.

Well, if this Court enters that sanction and finds that they are entitled to full billed charges, there is

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nothing left. The Court found that the only thing we can dispute is the rate of payment, and their sanction asked this Court to set the rate of payment at their full billed charges.

So this is case terminating. Make no mistake about it. And therefore, the *Young* factors apply. And we believe the requirement for an evidentiary hearing would also apply before the Court can enter that sanction, to determine whether there was willful violation by the client; to determine whether or not the client would be punished for the actions of the attorneys who were dealing with most of this document production after the Court's hearing on April 9th.

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You may recall that you asked Mr. Portnoi some very pointed questions about that. Wait a minute, is this the client or is this the lawyers? And he responded that at this point the client has turned over the database to us. They have given us the two terabytes of data. And now it is us and the third-party eDiscovery vendor and actually 100 attorneys in all, you know, through the eDiscovery vendor and also at O&M were involved in trying to get through that two terabytes.

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So we do believe that the Court would have to enter an evidentiary hearing on that issue before it could enter the sanctions requested.

And that is the only additional sanction requested because, in fact, the Court's order entered on August 3rd, based on the record made at the April 9th hearing, is



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self-executing.

In production, on the first page of the motion currently before the Court, United has violated yet another order of the Court, the August 3rd order granting a renewed motion for an Order to Show Cause. And they continually reference that throughout the motion, that they are seeking sanctions for a violation of the August 3rd order.

With due respect, Your Honor, there is nothing in the August 3rd order that United could possibly have violated.

Do we have the ability to display the order to the Court?

THE COURT: I was just pulling it up. So when I am up here clicking, I am not sneaking mail. I am looking at [indiscernible]. I am just pulling it up. Give me a second.

MR. ROBERTS: And I think Shane has it, if that would help. But if you can toggle to him, but otherwise --

THE COURT: I just get a better picture on my screen, but thank you.

MR. ROBERTS: Okay. And I would refer the Court to page 11 of 13, which is the Court's actual order, after it goes through the findings of fact and the conclusions of law.

So the first is the renewed motions granted. It is further ordered that United be sanctioned for its violation of the orders of this Court. And those are the prior four orders, which were the subject of the April 9th hearing.



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A, United should not be allowed to seek additional extensions of any discovery deadline. We have not been allowed to seek any extensions, and there is nothing there we could have violated. We didn't seek any.

B, there is a list of specific RFPs which says that anything not produced by United by 5 p.m., Pacific time, on April 15th, 2021, will result in a negative inference which may be asked of witnesses at the time of the trial, or at any hearing, and will be included in jury instructions stating that the jury should infer that the information would have been harmful to United's position.

This subparagraph B contains no affirmative obligation for United to perform. It says, if you don't do it, United, there is going to be a penalty which will be imposed at trial. Based on this, United, as I have said, made tremendous efforts to complete its document production and produce as many documents as possible by that April 15th deadline.

There is no violation of paragraph B. To the extent there were things that we could not produced by the deadline, they can ask for a negative inference, which is a self-executing sanction and no further sanction is necessary. To the extent they are asking for additional sanctions, they're really asking you to reconsider this order, and they haven't done that.

Paragraph C, United's privilege law shall be produced



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

The affirmative obligation here is for United to produce a privilege log. And there is no allegation that we violated that order and did not produce a privilege log.

And even though the Health Care Providers had the specific ability and permission to bring a Motion to Compel, those documents -- the privilege log was produced back in April, May, June, July, August, September. Now we are here in October, there has been no Motion to Compel. There has been no allegation that our privilege log is noncompliant or that we have improperly withheld any documents.

The Court heard some speculation that the lawyers could have hidden stuff and buried it in a privilege log through an improper designation, but there is no evidence of that. The Court can't speculate that the lawyers breached of their ethical duties, when they haven't brought a Motion to Compel -- a single Motion to Compel in connection with our privilege log. So there is no violation of paragraph C.

Paragraph D, United shall be sanctioned in the amount of $10,000 to be paid to a Nevada pro bono legal service of

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its choice and noticed by the Court. And they do include a footnote in their brief saying that we had not -- that United had not satisfied that obligation.

Since that time, we have filed a notice with the Court where United chose Southern Nevada Legal Services for their legal aid donation required by this order.

And as we have set forth in our brief, that was not in response to this motion. That check was requested on September 24th, a week before the motion was filed, and it was actually the FedEx'd out the same day the motion was filed, and the order was just entered on August 3rd. It doesn't set a date of compliance, but I would note that United has not violated that order of the Court.

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Finally on page 12 of 13, it is further ordered that due to United's failure to produce documents to set forth herein, that Health Care Providers may apply to the Special Master to retake depositions after the May 31st, 2021, deadline, based on any new information provided by United. We had not prevented the plaintiffs from taking any deposition or any deposition a second time that they wanted to, pursuant to this provision. We have not violated that last further order of the Court.

So I think if the Court looks at the August 3rd order, there could be no possible violation of this order. And the Health Care Providers opened their brief by saying that we

violated yet another order of the Court, August 3rd. And they represent that the August 3rd order requires us to do things that it does not require us to do.

I would, therefore, submit that to the extent this Court previously found violations of the four discovery orders at issue in the April 9th hearing, the Court has already considered those issues and issued a sanction, which penalizes United heavily at trial to the extent there are things that it did not produce.

Turning to -- I think maybe the most critical issue for this Court today is the argument that the Court would have somehow come to a different conclusion after the April 9th hearing, if United, and primarily its counsel, Mr. Portnoi, who is here today, had not misrepresented the level of compliance. And that United had misrepresented that they had substantially complied at the time of that hearing and the fact that United produced 400,000 documents after that hearing is proof that United had misrepresented the status of its productions.

And I'm going to go through the representations that were made in court, because I think this is key for the Court to understand.

During the hearing -- and this is at page 41 of the transcript -- Mr. Portnoi says, starting at line 9, Ms. Gallagher is absolutely correct. Though it is the case



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that at the end of this, at the end of discovery, discovery is not going to be measured in thousands of pages of documents; it is not going to be measured in tens of thousands of documents. It is going to be measured in hundreds of thousands of pages of documents, multiple hundreds of thousands.

If there were only 100,000 documents produced before that hearing, he is at least telling the Court there's going to be at least 100,000 more, hundreds of thousands. He is conveying to the Court this idea that production is going to be substantial. And he said that's necessarily incurred some delays. It has incurred delays because of many issues in discovery, because of priorities that have been placed by the plaintiffs, for instance, the administrative records.

But it is concurrent with the search through the electronic information stored on United systems was the provision of only administrative records, of 2,000 records a month, ordered by the Court. And the targeted responses to RFPs, because the Court had said, You can't wait for the ESI protocol to produce documents. You've got a duty to answer those RFPs to the best of your ability before the ESI protocols are agreed to and before the ESI searches are done.

So we are searching and producing 2,000 administrative records a month. We are doing targeted RFP searches, which are expedited based on depositions being taken. And we are



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also producing -- we are also searching through two terabytes with which -- that sounds about right to me, what Ms. Gallagher said -- that is about 13 million pages.

And he then says, beginning of line 20, and this -- and at the same time we continue to make further productions and the discovery period is not over. The discovery period will end next week. And by that time there will be further substantial productions.

So despite his argument that United had substantially complied with the Court's order, he was telling the Court, Hey, we are continuing to search through the electronic information. There are going to be hundreds of thousands of documents and further substantial productions are coming by next week.

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And that's where I think the Court needs to understand the contrast between the argument that the plaintiffs are making, which is essentially that United told the Court we substantially complied. And look at the number of documents that came after that representation, so it can't be true.

But it can be true, if you look at our briefing and the way that Mr. Portnoi described it to the Court, which is the Court ordered us to try to comply with the RFPs before the ESI is done. And we have completed that. And we think we substantially complied with that obligation to do the best we can and do those searches and produce documents pursuant to



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each one the RFPs in prior four orders of the Court.

That's the substantial compliance that has been represented, because this is a sanction hearing. And he is representing that your prior orders, we substantially complied with.

The prior orders didn't compel United to do search terms through all of its ESI, but that was going on parallel. And he fully disclosed to the Court that we substantially complied with this search to try to produce documents responsive to the RFPs. But by the way, there is also this ESI thing going on and it is hundreds of thousands of pages. And there are going to be substantial productions by April 15th. And we are trying to comply with that deadline.

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The Court then followed up on this and the Court asked Mr. Portnoi some questions beginning at page 51, line 14, In your brief you said your client had substantially complied.

Mr. Portnoi: Yes, Your Honor. And where --

The Court: And where, from 0 to 100, are we on that?

And Mr. Portnoi said: We're in a place right now, you know, document discovery deadline is April 15th. And it is our belief we are going to have completed -- you know, we are going to do our absolute best to get there. And my hope is that you will.

The Court: You didn't answer my question. How much has been provided of the entirety that will be provided?



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Half, three-fourths?

Mr. Portnoi said that he needed the Court to repeat.

The Court said: You guys responded by providing more documents in response to the motion. And your brief said you were at substantial compliance.

The Court: Quantify that for me.

Mr. Portnoi says: Your Honor, we had already provided at that time, the answer is, we believe to all of the RFPs.

So that's what he's talking about -- substantial compliance with Court ordering responses in RFPs. We were engaged in that time solely -- and as I believe the plaintiffs are as well right now -- in complying with the ESI protocol.

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Now, if I could back up for just a second here to Ms. Gallagher's argument that the ESI protocol is no excuse because this Court found that United couldn't wait on the ESI protocol. That is not the argument that we made or are making now. We did do targeted searches to comply with the RFP. And that is what we said we had substantially complied with -- the searches were done and the documents are produced. But we are still working on the ESI protocol.

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And after that September warning to United, which was referenced by Ms. Gallagher, this Court, on January 8th, 2021, did issue a stipulated order governing an ESI protocol, and United took that obligation seriously.

And frankly, Your Honor, when you're talking about two

terabytes of data and multiple custodians over multiple years, the only way to really thoroughly and rationally search that is through use of search terms and trying to narrow that down through electronic means. And that is customarily what's done in this jurisdiction, where you have databases this big that you're trying to search for all relevant documents on.

And Mr. Portnoi described what was going on here, that there is a third-party vendor; that there are multiple contract attorneys; that they need to take that database. They need to run search terms. They need to take those results and thread them, which means that if I send you an e-mail, you send me one, I send you one -- that's three e-mails, but they are all in one e-mail. So threading -- and that eliminates the manual review of three e-mails into one.

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And then there is de-duping so -- because the same custodian -- an e-mail would be both in our databases. It would be in there twice, and so the computer can de-dupe those. And all of those things resulted in narrowed number of documents, which then have to be manually reviewed to see, one, if they are relevant and responsive; and two, are they privileged. You can't just throw it all to the other side, because then you would be voluntarily producing privileged information. So that was a massive undertaking.

And we also argue that goes to willful compliance. You look at the *Young* factor. Did we just willfully disregard



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the Court? Did we just say no, we aren't going to do it?

My client hired 100 lawyers who spent 7,000 hours trying to meet the deadlines imposed by the Court, which resulted ultimately in over half a million documents produced.

Contrast that to the plaintiffs in this case who produced about 3,000 documents. A third of those were produced on August 15th. They were doing the same thing we were.

So ultimately, Mr. Portnoi then said, We've reached agreement on an ESI protocol. We've reached an agreement that ESI is going to be produced five days before each deposition, so we are pulling people out of order to try to make it so they wouldn't have to take depositions twice, even though they were permitted to by order of the Court.

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And our anticipation has been the goal to have all of the ESI pieces produced prior to the April 15th document discovery deadline, but with respect to the RFPs our production is complete.

And what did the Court take out of all this? If the Court goes to the order again, the Court found that United should be sanctioned because they were in not substantial compliance.

So to the extent that the basis of this hearing is that United had misrepresented substantial compliance, which I contend they did not do, based on the argument I've just



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presented. But the Court actually found in numbered paragraphs throughout the order that United had not substantially complied and, therefore, should be sanctioned. So the Court has already noted a lack of compliance.

The plaintiffs argue that the volume of productions is proof that we somehow violated an order, but the order required us to produce as much as we could by that deadline. The volume of documents is actually proof of the efforts that United went to in attempting to comply with this Court's order. And in fact, the sanctions here are still predicated, to some extent, on something that is missing.

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And Ms. Gallagher did raise some arguments, I will address a couple of those. But that is the key, not how many documents we produced, but what have they shown is missing? And if they show something is missing, the remedy is already in your sanctions order.

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And we start trial soon. And rather than seeking to prove that stuff was missing and asking this Court to enter an adverse inference, as contemplated by the current order, we are a week from trial and they are seeking to throw the order out with the trash and impose a whole new sanction that is case dispositive at this point in the litigation.

And Your Honor, that's just not fair and that is not proper. This Court issued an order telling United what would happen if it didn't produce things. This Court ordered United

to produce things, and that is what United attempted to do.

And plaintiffs criticize us for bringing up things which had never been brought before the Court, which where never subject to meet and confers. Motions to Compel about issues where we believe plaintiffs have interpreted their obligations similarly to ours.

But we are not seeking any relief here based on those violations. We are not bringing motions that we haven't met and conferred on. We are raising those documents to show that our actions were reasonable in light of their actions and certainly not justifying sanctions.

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But let's talk about matters that are not before the Court. This production was made April 15th. There are no motions to compel saying things still seem to be missing. Please give them to us.

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We are not allowed to produce things after April 15th. They certainly could have moved to compel additional things if they wanted to. Not a single motion. Not a single challenge to the privilege log, as I have admitted. And instead we are just getting sandbagged at the last minute with the casing-ending sanction motion.

There is a mention of 42 percent of the documents that have been produced deal with the ASOs, I believe what they referred to as the administrative record. Well, one, this Court ordered us to produce that, so it is not surprising that



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it is in there.

But second, that leaves 58 percent that is not administrative record. Over 200,000 documents that is not administrative record. Again, contrast that to the plaintiffs having produced 3,000 documents.

Mr. Schumacher -- they point out that one of the things that we failed to produce and that they didn't know about at the last hearing were some notebooks that Mr. Schumacher testified in his deposition that he would translate the notes and throw away every 30 days.

And I would point the Court to page 26 of our brief and note that this is an April 2019 [indiscernible]. And they claim that we should be sanctioned for not putting a litigation hold on that notebook, way back in April of 2019.

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But they have admitted that they had Mr. Murphy, the CEO of TeamHealth. Neil Simpkins and Bob Galvan did not receive a litigation hold on any notes from that either.

Now, this is not, well, they violated their obligations too. This goes to the reasonableness of their claim that we should have anticipated litigation and the relevance of that notebook and that meeting and preserved it even though he had transferred into notes to his attorney.

And I would submit that if they, looking at that meeting, decided that they didn't need to advise their attendees to put a litigation hold on any notes from that



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meeting, that it was also reasonable for United to think that they didn't need to do that at that time.

And we do believe the case law is applicable because he did say he translated those notes into a memo to his attorney. It is on a privilege log. They haven't moved to compel. They could have moved to compel. We would have given those notes in camera to the Court. But they didn't -- they didn't seek that relief. What they seek instead is case-terminating sanctions.

Shared savings -- you've heard a lot of shared savings. And our brief does address that, where we actually point out to the Court that we did searches in our database for the term, shared savings program, in order to try to find any documents that were responsive. And that search, as indicated in paragraph 19 of Mr. Portnoi's affidavit, resulted in 6,300 documents which have all been produced.

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Again, contrast that to the amount of documents the Court would expect. Plaintiffs have produced 3,000 documents to everything. We produced twice that volume, just having the term shared savings in the documents, by searching through our systems. The -- and the Court will see it in the brief, the billion dollars is exaggerated based on the testimony of the record.

But where is the prejudice here? This, according to the Court's orders, is a rate of payment case. They have



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admitted that the rate they're charging has to be reasonable. This has no relevance to whether that rate is reasonable.

The shared drives -- and Mr. Portnoi came here today in case the Court had any questions because he was the one personally supervising much of this effort on behalf of the client.

But in Mr. Portnoi's declaration, he indicates that defendants searched the corporate shared drive folder that houses the out-of-network programs teams documents and collected documents from SharePoint and locations identified by defendants' custodians. This folder on the shared drive contained over two terabytes of data. Defendants' production from the search sources is over 4,000 documents.

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And he specifically addresses the production from the UCH EI HCE PAM folder. And he addresses other specific documents that the plaintiffs claim were not produced or that United failed to do searches, which would have triggered them to find those documents.

The Emma Johnson -- Emma Johnson testified that she e-mailed United all of the time; right? But people's recollection of their volume of e-mails over years is often spotty. I think, based on the number that we produced in the period of time that she was sending e-mails, that was about two e-mails a week. Two e-mails a week could reasonably be considered, I am e-mailing them all the time. But ultimately,



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that's just speculation. You've got a witness that said, yeah, I sent them a lot of e-mails.

We've come up with about two a week. So can you really sanction United for doing a search for those e-mails, producing everything they find, but speculating that there is something that didn't come up on their searches? And I would submit there is something very compelling on this issue in the record. And that is that United, after searching its systems, identified 1,419 e-mails and attachments to or from Emma Johnson.

Nonparty MultiPlan, faced with a subpoena, produced 1,247 e-mails to or from Ms. Johnson and United. So you've got sort of verification that the volume is about right, by subpoena they have served on a third-party. They match up pretty well.

Salesforce. We've set forth in the brief that Salesforce is a system used by MultiPlan. And the argument that is being made by plaintiff demonstrates [indiscernible] to know how the Salesforce system works and what it is.

United doesn't use the Salesforce system. And I actually have been involved in a case with Ben Clower and Jacuzzi, where Judge Scotty ordered a forensic search of Jacuzzi -- Jacuzzi's Salesforce database. So I've got a pretty good understanding of the system.

And when you say send an e-mail through Salesforce, it



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doesn't somehow communicate to United Salesforce system which we didn't. Salesforce is a way for someone to document their client contacts and their business contacts. If someone calls you, you enter the phone call into Salesforce and it's stored. If you send an e-mail, you do it through Salesforce, and then you have a record in the Salesforce system of the e-mail. But the person on the receiving end just gets an e-mail which has been searched and produced.

They could try to verify that the all the e-mails sent through Salesforce by MultiPlan were found by United's e-mail searches, by going to Salesforce and asking to search their Salesforce program.

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We don't have a Salesforce database. We just got e-mails and we searched the e-mails. It is a fundamental misunderstanding of what Salesforce is. It is a platform, but there is absolutely nothing in the record which would demonstrate their claim that United or any of the defendants have access to MultiPlan's internal Salesforce database. We don't. There is no evidence of that.

The Court's indulgence just for a second.

So finally, in closing, I would again ask the Court as we do in closing our brief, to apply the *Young* factors in order to determine if case dispositive sanctions are appropriate here, and note that the Court should impose sanctions only in extreme circumstances where willful



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noncompliance of the court orders shown in the record or the adversarial process is halted by the unresponsive party.

The efforts -- the Herculean efforts that United made ultimately resulted in all of the searches being done electronically. The terms being used were disclosed to the plaintiffs. The searches were done. Half a million documents were produced. Justice has not been obstructed here. It is the exact opposite of willful noncompliance.

And I understand that given the extreme burden, United initially did not act as quickly as this Court thought was appropriate, and I understand the Court has criticized that before. And we are not here to dispute that part of the record. That is what it is.

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But after the Court issued these orders, United did go in and attempt to comply with the RFPs before the ESI protocols agreed to and before the tremendous electronic search was done. They did make rolling productions. They did have back up to the fact that they believe they had responded to the RFPs. And the only thing left was the completion of the ESI protocols, which are going to be hundreds of thousands of documents by next week. And we hope we can get there.

Ultimately, they did get there. And I would ask that the Court not penalize United for putting 7,000 attorney hours and 100 attorneys on this file in order to try to plow through two terabytes of data and make productions by the Court's



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deadline. I would ask you not to punish for that with further sanctions and consider the tremendous efforts which United did make, albeit late in view of the Court -- the Court's schedule. But we did make it, and we did comply by the April 15th deadline imposed by the Court. We didn't ask for any further extensions. We haven't fought any depositions they want to take.

And we are here. And we are a week from court. And we would ask the Court to allow us, to the extent possible, to try the case on the merits.

THE COURT: Thank you.

MR. ROBERTS: Thank you, Your Honor.

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THE COURT: And we're going to have to take a break this morning. I am so sorry, but the administrative orders require us to take frequent breaks because we have to keep our masks on the whole time.

It's 10:45. Let's be back at 10:55.

Thank you.

[Recess taken from 10:45 a.m., until 10:55 a.m.]

THE COURT: Thanks, everyone. Please be seated.

And the reply, please.

MS. GALLAGHER: Thank you, Your Honor.

I would like to start with just sort of a rhetorical question with respect to the presentation that we just heard. And is that if you think about their argument, since they



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produced 81 percent of their production after the April 9th hearing -- and it was in that production that causes us to be here today; it was in that production where we see the missing information. We found these examples after the last time we were here. And so there examples of noncompliance, of earlier orders, would basically under their theory -- would prevent us from being able to seek any relief from what we saw after we were here last time.

It is also important for the Court to hear what we heard from United in terms of everything they did to try and comply. But everything they did was after they were sanctioned, Your Honor.

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They talk about all the things that they did all the time and hours that they had to put in, but it was after, that we saw that production. Perhaps had the Court not sanctioned at all, maybe we wouldn't have seen any of that information, because they were waiting to see how serious the situation really was for them. And it was serious.

We heard the presentation about they tried to comply. They wanted to comply -- trying to make a distinction between the ESI protocol and request for production of documents.

But picking and choosing from the transcript from that day and putting in isolation certain things that were said by United's counsel is taken out of context from the Health Care Providers' viewpoint and recollection of what was discussed at



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that hearing.

United's counsel made it clear when it was said -- we all know what substantial compliance is. And we know that is a term of art demonstrating near total compliance. And that compliance in this case, it demonstrates that compliance will be done before the discovery period has been completed.

And there was an inference if -- at the least -- if not an outwardly expressed statement, that United was in near substantial completion, substantial compliance -- whatever term that they were trying to use at the time -- to get out of additional sanctions and more serious sanctions.

And the Court relied on those representations. The Court relied on the fact that United had not disclosed yet -- maybe had not uncovered yet that Mr. Schumacher's found notes were not retained. They were destroyed every 30 days.

And I think what is important about Mr. Schumacher is that this is the meeting where there was discussion about United unilaterally reducing its rates, because they can. Because testimony did not deny he said it. He didn't recall that he said it. But those notes are an instrumental piece of this case. This isn't some ancillary issue with no connection to the heart of the case.

One of the things too that needs to be pointed out is that Mr. Schumacher also testified that he took a photo of his notes. We do not have a photo, Your Honor.

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So there were ample opportunities for United to present this information, if they chose -- supposedly in the notes on the privilege log and a picture. We don't have those, Your Honor. And so because that is the crux of the case we are asking for a sanction that is commensurate with that destruction of evidence.

United tries to recharacterize this as case-terminating sanctions that we're seeing -- that we are seeking. However, our request for sanctions still requires United to put on a case with respect to liability. They have not stipulated to liability. So this is not a case-terminating sanction that would require the Court to undergo the *Young* factors.

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We do think that the *Young* factors can be met here. The Court has already found a willful noncompliance by United in its production and discovery efforts in this case. This failing to produce critical information is no different than those earlier decisions by this Court.

So United still must prove that liability at trial for the claims asserted in the second amended complaint. The remedy that we are seeking is directly related to the documents that we believe they withheld.

As for an evidentiary hearing, the Court is well familiar with the motion hearing like this satisfies that evidentiary requirement, Your Honor.



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So the relief that we seek in this motion is an application of an adverse inference relief that makes application of that inference specific to the damaged [indiscernible]. An adverse inference of document production is not a jury question of fact, but a determination if a party has complied with the court orders, which is why it is appropriate now and in these pretrial proceedings before this case proceeds to the jury trial next week.

Your Honor, what I heard in United's presentation was not of direct indication that we got it wrong. They didn't come to the Court and say, Wait a minute. All the documents you say you think are missing are actually here, and here they are. That is not United's presentation.

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United's presentation is that, again, we have to prove what is missing. We have sufficient evidence of what is missing, specifically by Mr. Schumacher. And that is an admission by an executive that he did not preserve those documents. He took a picture. We do not have those. United has purportedly placed that document on a privilege log. But they cannot use that argument as a way to cure their inability and their failure to produce that document.

Your Honor, given what we've presented in motion, the additional information that we have opposed here today with respect to United's opposition, we would ask that you grant the motion and enter the sanctions that we have requested.



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Thank you.

THE COURT: Thank you. This is the plaintiffs' motion for further sanctions.

And the motion will be denied for the following reasons: There wasn't a Motion to Compel the August order. It's asking for a negative inference for an adoption of the damage model. But the issue for the jury is the reasonableness of the reimbursement rates and that would be taking that away from the jury.

So the motion will be denied.

But let me caution the defendant that that August order is really very careful. If the plaintiff establishes that something wasn't turned over, there will be a negative inference instruction to the jury.

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So all right. That takes us to the defendant's motion for partial summary judgment, which also relates to *Motion in Limine* 32.

MR. PORTNOI: Thank you, Your Honor. Dimitri Portnoi for defendant.

We have a presentation that will come up in a moment that relates to this. I would also say opening on this subject is, you may have seen on Sunday night, there was a motion for leave to file a supplemental opposition that was filed by plaintiff. In fact, the motion for leave --

Thank you.



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The motion for leave actually included the substantive arguments they would like to make. We believe that is because plaintiffs improperly cited the federal rule of court under the Federal District of Nevada, as opposed to citing or applying the state court rule [indiscernible] which requires leave of Court before that brief was filed.

So we would like -- so one issue that is present here is the fact that there is an improper surreply for the Court right now. And we filed an opposition to that last night, so that the Court would have papers on that.

But I'm curious if the Court would like to hear argument on that, if the Court is seeking either plaintiffs' papers or defendants' papers.

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THE COURT: No. I just want to hear your motion today.

MR. PORTNOI: Okay. Thank you, Your Honor. So I will skip ahead in my presentation to the summary judgment motion itself.

So primarily as the Court knows at this stage there has been an amended complaint. A number of the issues that were present in the partial summary judgment motion are mooted by that.

In response to our Motion for Summary Judgment, plaintiffs dropped the RICO claim, plaintiffs dropped other claims. Plaintiffs dropped a number of carve-outs that were



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present, and that puts a number of what we are talking about here today.

However, what we still have as a result is punitive damages, and we also have a number of claims that are outside of the case. These are claims that were paid under Medicare or Medicaid. These are claims where United denied, disallowed part of the claims. And these are additionally -- additional carve-outs that we will address as we get there.

But I want to focus first on punitive damages.

Obviously, punitive damages is significant, you know, will terminally affect the presentation that can go to the jury, and especially, given the amendment. But really given the evidence the plaintiffs cited in their opposition brief, and even considering the evidence that was filed in the improper surreply that was filed on Sunday night. There is no basis for the Court to allow punitive damages to go to the jury.

I think the Court knows the punitive damages standard, which is that in an action not arising from contract, in Nevada law, where we have clear and convincing evidence of oppression, fraud, or malice. As the Court also knows, the Court is fine for the special gatekeeper role when it comes to punitive damages -- that the trial court has to make an initial determination as a matter of law as to whether the plaintiffs offered substantial evidence of oppression, fraud,

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or malice to support a punitive damages instruction. The Court expressed this well in the *Clare v. Rebel Oil* case that was affirmed by the Nevada Supreme Court [indiscernible].

We started here with plaintiffs, as you can see, that initially alleged in their second amended complaint that they were pursuing only a bad faith theory. In their motion for partial summary -- in their opposition brief, what they raised is oppression and fraud as their two prongs. In their surreply, they have expanded that now to argue oppression, fraud, and malice.

So we have a moving target in the sense that the second amended complaint doesn't even plead those. It only pleads bad faith, which would have been insufficient on its face to justify punitive damages.

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So it makes a note here as well. What we are looking for here is clear and convincing evidence, again, that the plaintiffs are guilty of oppression, fraud, or malice. And we need to remember that the Nevada Supreme Court has ruled that Your Honor, the Court has to consider that clear and convincing evidence standard on summary judgment. That means that there needs to be sufficient evidence for which a reasonable juror could find a clear and convincing evidence of either fraud, oppression, or malice.

These are all *mens rea* -- these all have certain a *mens rea* to them and they are a little bit different.



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Fraud requires two intentional findings: The intentional misrepresentation, deception, or concealment of material fact known to the person; and intention to deprive another person of his rights to property or to otherwise injure another person.

And in addition, with respect to oppression or malice, they have a conscious disregard standard, and that requires knowledge of the probable harmful consequences of a wrongful act and a willful or deliberate failure to act to avoid those consequences.

I want to point out, the claims that are currently in the case: Breach of implied contract, unjust enrichment, the Unfair Claims Settlement Practices Act, and the Prompt Payment Act -- none of these have these sort of *mens rea* here.

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And in fact, when we challenged the RICO claim on the inability to show reckless fraud, plaintiffs responded by dropping that and dropping the significant treble damages that come with it, because they were unable to put on a case for reckless fraud -- but have put in their opposition, without evidence, that there is intentional fraud and intent to harm.

Again in the opposition brief, we don't see an attempt to show conscious disregard which is necessary for oppression. The opposition brief doesn't use the term conscious disregard. And remember conscious disregard means that defendants need to know of a probable harmful consequence that would accrue to a



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plaintiffs and they need to proceed anyway, and then that consequent needs to actually happen. But there are no harmful consequences that have occurred in this case, other than the lost profits, which is remedied by compensatory damages and don't justify punitive damages.

And for that reason, the opposition brief does not mention a consequence. It does not mention that defendants should have known -- should have known is not good enough -- that the defendants knew of a harmful consequence and that they proceeded anyway and that room for consequence occurred.

These are basic -- these are basic facts that even reading the opposition for -- of summary judgment, we wouldn't even be able to pass muster pleading that. And we don't have a pleading with respect to punitive damages either in the second amended complaint.

In the improper surreply, TeamHealth plaintiffs used the word conscious disregard, though they still do not plead any -- they still do not claim that there is any intentional fraud in the case.

We have conscious disregard. And what you see here in the surreply for the first time is two facts that are the harmful consequences that we are now talking about. And those two facts are that they said in a meeting in July of 2019 there was a discussion with TeamHealth's CEO about the fact that hospitals would have to close and physician pay would



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have to come down as a result of certain contract terminations.

Those are the two facts and that's what we want to focus on. Those are the two negative consequences of that -- that defendants are alleged to have known. And those are the two consequences that they say are the harmful consequences that should go to the jury on punitive damages.

Here is the bottom line. The first problem is that's a national -- national negotiation. The states that they are talking about states that aren't in -- aren't Nevada. And if you look at the PowerPoint presentation here, you can see the exhibit that I am talking about.

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We are talking about the possibility that hospitals might close and physician pay might go down in Tennessee, in Texas, in Florida, in New Jersey, in Ohio. We are not talking about that in Nevada. The reason is they're talking about contract termination. Either a situation where in July 2019 certain United entities, that are not parties to this case, had terminated contracts with certain TeamHealth health subsidiaries that are not parties to this case in other states.

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It's not an issue at this time because the contracts between United entities and TeamHealth entities in Nevada had terminated long before it, and they terminate by choice of Fremont who terminated those contracts.

So what we have is -- here is we have allegations that maybe hospitals might close in the future in other states. And we have allegations that maybe might affect TeamHealth entities -- not Fremont, not Ruby Crest. Not to be glib, but you might call them their cousins. They are other subsidiaries of TeamHealth, and that is the harm that plaintiffs want before you today.

However, you can't do the harm to nonparties in other states, and there is an important reason. And this is why it is so troublesome that this argument -- the argument that is actually the only place where we are talking about the conscious disregard and what they are going to prove in front of the jury only comes up in an unapproved surreply.

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A court in Nevada is not permitted to issue punitive damages based on harmful consequences that occur in other states. This is something that has time and again been ruled on by the U.S. Supreme Court.

The cites are there. Unfortunately, we don't have leave to reply to their surreply, so we -- it is here that we again, we would ask that if the Court is going to consider their surreply, that we have an opportunity to respond to it.

But the mere fact is under the principles of economy, under principles of due process, a court in Nevada issues punitive damages only for consequences that occurred in Nevada.

There is also a problem of double recovery here, because, don't forget, these TeamHealth subsidiaries -- not Fremont, not [indiscernible] physicians, not Ruby Crest -- they also are suing United entities in these other states where they at times are asking for punitive damages.

They are asking this Court to allow punitive damages to go forward, for instance, with respect to the possibility that maybe hospitals closed in New Jersey, maybe physician pay when down in Texas. Well, they are also suing United entities in Texas and New Jersey. They are potentially seeking punitive damages in some of those suits. So it simply is an ill fit, and it also violates, very most, if not all, principles of constitutional law.

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Now, the key here to understand is in order to do this, in order to have a punitive damages case, it is predicated on what happened at national negotiations and harms that occurred in other states to party -- to entities that are not parties to the suit.

This case has to be what [indiscernible] does not want it to be, which is a case about the national entity TeamHealth. They aren't able to produce any evidence of harm to Fremont. They unable to produce any evidence of harm to physician group. They aren't able to produce any evidence of harm to Ruby Crest. So this has to by -- of necessity become evidence of harm to TeamHealth. And, more importantly, not



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just TeamHealth, Your Honor, but TeamHealth's subsidiaries in other states.

So now the only evidence of conscious disregard is you have comments made allegedly in national negotiations, referencing Florida, New Jersey, New York, Ohio, and Texas.

And they are being quite clear that they want to put TeamHealth at issue in this trial. If you actually look at the declaration of Kent Briscoe, which is attached to plaintiffs' motion -- well, opposition to the Motion for Summary Judgment that they want this Court to consider. They open with team physicians, Fremont, Ruby Crest are part of TeamHealth.

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They want to put TeamHealth front and center now in this trial. Again, the -- so then -- but however, it's a little late for that now.

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As Your Honor knows, TeamHealth plaintiffs prevented discovery [indiscernible], and they moved [indiscernible] to keep TeamHealth out of the case. They've also -- as they've said, it harms our physician pay and hospital closures. Defendants sought discovery on physician pay. We sought to find out, What is the component of their cost that is physician pay? And that would have shown us, does physician pay actually go down or not?

And plaintiffs moved for a -- moved for protection from this Court for discovery on that subject. Your Honor



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ordered that there would be no discovery on physician pay. And there's a *motion in limine*, as well, to prevent us from talking about physician pay.

So central to their argument on motion of damages is the idea that defendants knew that physician pay would have gone down, and that physician pay in fact did go down.

Again, it's not clear why that's harmed to -- to Fremont, Ruby Crest, and team physicians. But nonetheless, you gave credit to that argument. That has been kept out of this case. And this case would have to change fundamentally in order to go forward to trial next week, as a trial of punitive damages about physician pay.

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We also sought discovery related to plaintiffs' relationship to hospitals in order to understand, because plaintiffs are not hospitals, they are ER staffing companies. And plaintiffs moved to further protection from any discovery on their relationships with hospitals, and they moved *in limine* to prevent any presentation to the jury by defendants on their relationship with hospitals.

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And yet the fact that hospitals closed is now the center of their punitive damages claim, but we have not been able to -- we can't make that presentation. To be clear, there is not a statement. There is no statement from plaintiffs that physician pay went down in Nevada. There is no statement that hospitals closed in Nevada.



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It's all simply the fact, again, this may have happened in some unspecified state among this list of New Jersey, New York, Texas, Ohio, Florida, and a few others. But that's going to -- that is the center of their punitive damages presentation, as demonstrated by their improper server log.

So again, the only evidence against them to announce their oppression would relate to out-of-state hospital closures and physician pay, and perforce would violate the U.S. Supreme Court's constitutional holdings; and it would make this case about TeamHealth, about costs to pay physicians, and what caused hospitals to close in other states, if they did close in other states.

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I want to just, in thinking about conscious disregard, really understand how meager the evidence is in this case and how it has, you know, other cases related where the Nevada Supreme Court has held that a district court, by pure coincidence, Your Honor -- and honestly we --

THE COURT: That was one of my first jury trials as a judge that --

MR. PORTNOI: I'm going to be honestly, we -- I'm going to be honest, Your Honor, we put this in our reply brief. It was only in preparing for oral argument that I looked up and noticed that it was your decision.

But this -- in this case, this is from the Nevada



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Supreme Court's decision and how they characterized the evidence -- that what happened is that there was evidence that executives of the company knew that benzene was a dangerous carcinogen and the company did nothing -- did not monitor the atmospheric benzene at a Las Vegas terminal, or at -- or estimate the damage to cumulative benzene exposure.

And Your Honor properly, nonetheless -- even with that knowledge of a harmful consequence and in the actual occurrence of that harmful consequence -- that was not enough to go to a jury, because it was not enough to show clear and convincing evidence -- and I'm not sure that a reasonable juror could possibly find clear and convincing evidence of the kind of evil intent, the kind of conscious disregard that is necessary to go to a jury on oppression or malice.

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It is not enough to show that, as the Nevada Supreme Court ruled here, that it willfully and deliberately disregarded the risk such as to submit the punitive damages issue to the jury. Plaintiffs' evidence may have shown a negligence verdict. They failed to show an issue of fact that cumulative actions could support an award of punitive damages.

Here, with respect to the most analogous claims -- the racketeering claim, the RICO claim -- that was abandoned after we filed a motion for summary judgment. It wasn't enough to put up evidence to justify that.

They may say it was simply an attempt to streamline a



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case. Your Honor, very rarely do plaintiffs give up treble damages [indiscernible] to streamline a case. There simply was not enough evidence to afford on a racketeering case. They dropped those allegations -- and now are still saying that there is enough evidence for punitive damages on a clear and convincing evidence standard.

So, you know, again, just to -- now to move on to the final prong. Now, we have here the idea that TeamHealth is going to show that defendants intended to defraud them and intended to deprive them of rights or property or to otherwise injury.

Now, in their opposition brief, they're willing to say that there were fraudulent representations about using third-party vendors. They're unwilling in their opposition brief, they're unwilling in their improper surreply, to say that those representations were intentional or that they were made with an intent to harm. They're just unwilling to go there, even as a matter of argument.

Keep in mind, their only claim with respect -- in the opposition brief, in the surreply, that relates to fraud is MultiPlan, and our relationship with -- United's relationship with MultiPlan and Data iSight.

It's important to note that after -- again, after we moved for summary judgment, TeamHealth plaintiffs didn't only abandon the RICO claim; they deleted 168 paragraphs in the

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second amended complaint. Every single mention of MultiPlan was removed, because it's not relevant to any claim in this case. It's no longer relevant -- as Your Honor said, this isn't a rate of payment case. It's no longer relevant. It's not relevant to the implied in fact contract claim. And it's going to say, is there a contract? If we -- what are the terms of that contract? Did we breach it?

It's not relevant to an unjust enrichment claim, which is a rate of payment claim. Is the rate that we paid a reasonable rate? And experts can disagree on that, and I imagine the experts will disagree, as they have disagreed before.

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And again, the RICO action was removed in the face of an argument that they could not show reckless fraud. And now they -- nonetheless, there's a claim in here for intentional fraud.

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So let's talk about Data iSight. Data iSight is a tool that's operated by MultiPlan. It helps with calculated reimbursements. It also helps with negotiation after something is challenged.

So oftentimes, plaintiffs as -- sorry -- oftentimes, either insureds or the -- or providers will challenge the amount of something that was paid, and that will route through Data iSight who negotiates. And that's something that happens after the reimbursement has already -- after the reimbursement



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has already -- the initial reimbursement has already been calculated, after the reimbursement has already been made.

As plaintiffs' expert, David Leathers said, this is something other companies do. This is something other insurance companies hire MultiPlan for this. This is something that exists out there in the industry.

Really, what we've shown, and these are -- there are only three exhibits in the opposition brief relating to fraud -- three exhibits. Four exhibits total, that relate to punitive damages at all.

And what we have in that opposition brief is a discussion of two different topics -- two different things that data iSight does. The first thing is that there was a -- at a certain point, there was a negotiation cap. That's a word that we will probably hear, that you will hear from plaintiffs as well.

Now, again, remember what I just said, that you first calculate a reimbursement. And then if there's a disagreement with that, there's an appeal and you may negotiate what is -- what's going to happen afterwards.

And there was a point in which the defendants -- in response to getting a great deal, a large number of appeals, when the plaintiffs hired a separate company CollectRX to pursue a lot of those appeals -- to appeal them in an attempt to reimburse higher. And United at that point had a



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discussion, as other companies do when they work with MultiPlan, and set a cap of 350 -- a negotiation cap of 350 percent of Medicare, with respect to the -- excuse me -- 350 percent of Medicare with respect to what Data iSight was permitted to negotiate when negotiating when they agreed TeamHealth plaintiffs had issue in this case.

Separately, there was something called an ER override -- there's a few different names for this. And what the ER override was is that when Data iSight claims were -- what United actually did was to say, well, when Data iSight priced something too low, we don't want them to get too low of something, so we actually increased that amount automatically. And we directed Data iSight to increase it according to a particular percentage of Medicare.

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So these are the two elements that make up the intentional fraud claim -- one of which -- again, there has to be an intent to deprive the -- deprive someone of rights and property -- one of which was actually serves only to increase reimbursements; the other of which serves only to apply well after initial reimbursements have occurred, and only with respect to the practices of negotiating subsequent settlements.

Just, you know what we -- I could see that you are -- just again -- we put some more stuff in here that relates, again, to the fact that these are plaintiffs' exhibits --



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walking through them, so Exhibit 4, one of the exhibits on punitive damages. This only relates, again, to the fee negotiations, clinical negotiations. That's what those abbreviations mean in their exhibits, FNX and CNX.

Again, what we're talking about here has nothing to do with the initial rate of payment. It has only to do with the subsequent negotiation.

And with respect, looking at Exhibit 4, there's no evidence here of fraud or oppression -- only cost control to rein in exorbitant rates and egregious billing.

And again, what we see here is that contrary -- in depositions that were conducted by plaintiffs of defense witnesses, these were things that were -- these negotiation parameters, which didn't affect the initial reimbursements -- these were things that were being applied ultimately to many providers. They were being provided -- and as the witness from MultiPlan said -- these were something that other insurance companies also requested, or rather that United entities were requesting, not just with TeamHealth. But, in fact, that they were just fairly common. So yes, fairly common. In the industry, a fairly common practice.

Sorry. I'm going to push ahead in an effort to see what we can get done before Your Honor has to get out before lunch.

So to come to the summary of where we stand on

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punitive damages, again, with respect to fraud, reading through their opposition brief -- no evidence of a false statement, no evidence of intent to defraud. And in the opposition brief and in the surreply, not even the barest statement that there was an intent to defraud, and no evidence of an intent to harm.

Oppression -- again, there's no probable harmful consequences, be it on lost profits. There's no conscious disregard under any standard.

And again, that would -- the oppression claim, also based on the surreply would require evidence from other states and other entities. Malice, not alleged, nor is there anything to show that we have the sort of evil intent that is necessary for that.

And again, there's nothing. And where we have to -- where we want to stand here is on the exhibits to the opposition brief. There's nothing in any of those exhibits which show that defendants were doing anything other than attempting to control skyrocketing healthcare costs. Nothing that could get a jury to a clear and convincing evidence of oppression or fraud.

I'm going to move to the second set of subjects that are relevant here, unless you have questions on punitive damages, Your Honor.

THE COURT: I don't.



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MR. PORTNOI: Okay. So there are three sets of -- after we filed our Motion for Summary Judgment, in addition to dropping some [indiscernible], also plaintiffs conceded to a number of carve-outs, but there are three sets of carve-outs that remain. I call them carve-outs.

These are categories of claims that are outside the scope of the second amended complaint and would raise preemption problems if they were in the complaint.

And what we have are essentially claims that were paid under Medicare or Medicaid -- there's about 62 of them; claims that were denied by -- denied by the entity to which they were submitted; and claims that were actually not submitted to the defendants. In many cases, they were submitted to out-of-state entities. For instance, this will be -- as we'll talk about later, these are situations where they may have been submitted to, let's say, United Healthcare of North Carolina, because that's what the person was insured by. They weren't admitted by any of the defendants in this case.

So I had started with the Medicare and Medicaid claims. So what we have here with the Medicare and Medicaid claims, these are 62 at-issue claims. I'm not sure we're fighting about them when we're at over 10,000, but nonetheless, the 62 would -- are all claims that, based on our experts declaration, based on actually looking at the matching spreadsheet that was provided by plaintiffs -- what we have is

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one claim that was paid out according to Medicare, and 61 claims that were paid out according to Medicaid.

There's no specific evidence about these 62 claims in the opposition brief. And this does not come -- this subject does not come up in the surreply -- only evidence from one deponent and one declarant that they generally tried to get to get Medicare and Medicaid claims out. Not even a statement that these 62 claims that we're raising are not Medicare and Medicaid claims -- just simply that some folks tried and they did their best.

So we have Mr. Briscoe's [phonetic] declaration, which does not discuss the 62 claims, does not reference a single one of the 62 claims to say that they are not Medicare and not Medicaid claims.

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Likewise, we had the deposition of Eddie Accasio [phonetic]. He, likewise, does not mention the 62 claims, does not talk about them, and does not rebut any evidence that these 62 specifically identified at-issue claims were paid through Medicare or Medicaid.

As we -- you know -- when we -- when asked at deposition is it before we -- before we got to summary judgment obviously, we've narrowed to the 62 claims -- when asked whether there was any attempt to go through and really weed them out one by one, you know, they -- there was no statement in the depositions.

I'm only citing to the evidence that is cited by plaintiffs here, by the way, in assessing, as we have to, to assess the evidence that plaintiffs have put forward.

And so in terms of -- well, not talking about the 62 claims, but when asked is it possible that there are Medicare and Medicaid claims in here, the answer is, I'm pretty confident that we did our -- we tried to get them out, which is not to say that there are not 62 claims in here.

And in terms of what analysis Mr. Accasio did to make sure Medicare and Medicaid was out, he said, Well, I received information from the defendant -- from the plaintiffs. And whatever was given to me by them, I applied. That's not an independent analysis of whether these 62 claims are Medicare or Medicaid claims.

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So once again, these are 62 specific benefit claims that are there. And to understand, it's not surprising that we would have these. We've been through multiple iterations of claims-matching spreadsheets in order to get to -- to do our best for all parties, to get to a narrower list.

But plaintiffs' experts basically say that they accepted the representations that claims that weren't Medicare or Medicaid, were, in fact, not Medicare or Medicaid. No expert from plaintiffs did any independent analysis to get them out. And to understand, the claims-matching spreadsheet has changed six times as claims that were mistakenly included



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in there had to be pulled out.

And of the 23,000 claims that were initially included in the first claims-matching spreadsheet, 10,000 have already been deleted, because they were mistakenly placed there to begin with. That's 43 percent.

So again, it's not surprising that there might be 62 Medicare and Medicaid claims that are still on there. What is surprising that they would be the subject of dispute, when that's going to result in a claim-by-claim exercise with the jury to go through and get testimony on whether November was -- whether that particular claim was actually paid by Medicare or Medicaid.

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Now, kind of now going over to deny the benefit claims. This is the second category; this is a larger category. Defendants have identified over 1700 at-issue claims that were partially denied by defendants, and therefore not adjudicated as covered and not allowed as payable.

Again, we submitted an exhibit that had the 1791 at-issue claims that were partially denied. And yet, for even denied claims, TeamHealth plaintiffs are seeking to recover their full billed charges on claims that were denied and are seeking full bill of charges for denied claims.

Now, to understand how this happens, Your Honor, it's important to understand that when you seek a -- when a [indiscernible] seeks reimbursement -- somebody comes into the



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ER, and they may look for two different treatments or they may receive two different treatments. There may be an evaluation code. And then there may also be, maybe you've got a split; you got something set; you got some second type of procedure.

And so the single bill that goes to the insurance company, it may have those two claim lines on there. And what happens is if one is denied -- in this case, one may have been denied and one may have been reimbursed at a lower level than plaintiffs would like in this case, if -- in this case what we see, with respect to these 1791 claims, is seeking full billed charges on those claims that were disallowed a company that claimed that it was allowed.

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We put an example of one of these in our motion papers. And you can see, if you look at, you know -- it's at -- it's described here -- it's a little hard to put up as an image because it is -- we would be looking at an Excel spreadsheet.

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But when we go to Exhibit 38, we look at line 86. This is a situation where Fremont billed UHC a little over a thousand dollars, one charge for $508 under CPT code 992830, United paid that at $222.94.

Another code was submitted under 29105 for $496. United denied coverage for that.

With respect to that claim, the TeamHealth plaintiffs are seeking a full billed charges on the claim that was



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partially allowed and the claim that was fully denied.

And the problem with that is that for that claim that was partial -- that was fully denied, that claim was preempted by [indiscernible]. And that claim -- when something is disallowed, it can only -- then what we're talking about is not a rate of payment case, Your Honor. That's a right of payment case, because that is a claim that has not been paid yet.

And so if we have those, then we have the risk that we go through this -- this is true for the Medicare and Medicaid. We have this risk that we have a whole exercise where we go to trial, and then it turns out afterwards, well, some of these actually -- some of the claims in this case actually should never have been in it, because they are ERISA claims. They could have been brought in this court as ERISA claims. They could have been removed. They could have brought in federal court as ERISA claims. Whatever it is, we have a situation where we [indiscernible] know what the damages are because we have faulty ERISA claims that are sitting in the middle here.

And it's also worth noting that the U.S. District Court, when this case was removed, plaintiffs asserted to that Court that the claims at issue were not denied, but were fully covered and payable by defendants. And on that basis, that district court remanded the case. And so plaintiffs are also judicially estopped from today putting those claims at issue



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and putting those claims in front of the jury.

Now, going to the final claim category, the claims that were not submitted to the defendants to begin with.

So again, we have unrebutted evidence that 445 at-issue claims, for which there's no evidence that those benefit claims were submitted to defendants. Again, we put these at issue. Many of these we have found were submitted to UHC Insurance Company of Illinois, UHC Insurance Company of New York, and UHC Insurance Company of North Carolina.

These are -- some of them we cannot identify and may have been submitted to totally different insurance companies that have no relationship to United.

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We put on evidence of this fact. We put on evidence that actually identified these specific claims so that plaintiffs can look them up and provide evidence regarding them. We showed there was no record in defendants' claims database. We showed that there was evidence that confirms that many times that that evidence was submitted to a nondefendant insurance company using the legal entity number that is in their claims data spreadsheet. We put in declaration evidence that these were submitted to nondefendants from multiple witnesses.

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What we have, instead, is we have -- we don't -- we have the same kind of evidence that we had for Medicare and Medicaid when it comes back to -- or comes back from



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plaintiffs, which is essentially evidence of, look, we put in -- we made a spreadsheet of about 10,000 -- 23,000 claims. We reduced it to 10,000. We did our best to weed these out.

Can we say that these 445 claims were actually submitted to United? Their witnesses aren't asked about them. They don't talk about the 445 claims. And so there's no evidence in the record -- no testimony, no affidavits, nothing else -- that actually genuinely disputes the fact that these 445 claims were ever submitted to any defendant in this case.

And again, this will be -- unfortunately it will have to be a lengthy sideshow at trial where the jury is going to have the think about which of these claims was actually submitted to defendants, as opposed to having a clean list where we know that all of the claims are properly within the case.

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And so as a result, taking these three carve-outs, pulling them out means that we at least know that going to trial every claim was allowed; it was partially paid; and there's a dispute as to the amount.

With these carve-outs remaining in the case, what we would have is having to actually go through the 62 Medicare and Medicaid claims, the 1791 claims that are partially denied, and the 445 claims that were not submitted to defendants at all -- and have that as a disputed issue that the jury is going to have to find with respect to those



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disputed amounts.

Your Honor, with that, I would respectfully ask the Court to grant summary judgment with respect to punitive damages, and with respect to the listed carve-outs that I have raised today and that were raised in the countermotion.

THE COURT: Thank you.

It's 11:41. I want to go ahead and take our lunch break now. There's only one working elevator back here, and I waited six minutes the other day to get up to the 10th floor. So is 12:45 okay for everyone? I'll leave the other meeting early. Thank you.

Court's in recess.

[Recess taken from 11:42 a.m., until 12:49 p.m.]

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THE COURT: Thanks, everyone. Please remain seated.

And for your opposition in motion, please, will you please introduce yourself again.

MS. ROBINSON: Thank you, Your Honor. My name is Jane Robinson. Is this mic, [indiscernible]. Is that good?

THE REPORTER: Yes. Thank you.

THE COURT: It's fine either way.

MS. ROBINSON: Okay. Let me know if you can't hear me at any time.

THE COURT: We use them for jury trials so that everybody knows.

MS. ROBINSON: My name is Jane Robinson. And I am



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here on behalf of the Health Care Providers.

And Your Honor, I would like to echo what my colleague John Zavitsanos said the last time we were here that we are grateful for the opportunity to appear here in this court in Nevada. And we thank the Court for that opportunity.

So I would like to start by addressing the punitive damages claim. And I want to be clear, I just want to start with the simple point of clarification. We did not amend the complaint in response to the MSJ. The Health Care Providers amended the complaint to focus the trial on the most important causes of actions, the ones that we felt were the strongest and that were the most worthy of the Court and the jury's time.

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But as Ms. Gallagher said earlier this morning, although we have focused the causes of action, the underlying conduct and the evidence is the same.

This is no surprise to United. Everything that I am about to say is what we have been alleging all throughout this case. And so this -- you are going to see MultiPlan and Data iSight -- I know the Court mentioned -- I hear a lot of feedback. I know the Court mentioned an upcoming *Motion in Limine.* But I just wanted to assure the Court that MultiPlan and Data iSight are very much in this case as evidence. They are throughout our exhibits and they are throughout United's exhibits. So all of that is still relevant.



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New, as I said, we have been clear throughout this case. United is engaging in an intentional and purposeful campaign to drive down reimbursement rates for ERs and harm Nevada doctors.

United is intentionally manipulating reimbursement rates, and it is lying to everyone about it. It is telling the world that it is being fair and objective -- which I'm going to get to; it's telling its members that; it's telling its clients that; and it's telling doctors that. But our evidence is going to show that that is not true. This conduct is intentional. It is malicious, oppressive, and it's fraudulent.

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I apologize for the feedback.

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So I would like to give you a little background. I know you have heard a lot of this before, so please I'll try and keep it brief. I know the Court in [indiscernible].

THE COURT: You guys, I have been in a four-week trial. We just got a verdict Thursday. I only had two days to prepare, so I only read everything once.

MR. ROBERTS: And that's really all we can ask, Your Honor. Thank you very much.

So ER doctors have to treat everyone who comes. When you are -- when you go to an ER either because your life is in danger or because you believe your life is in danger, the ER does not say, Hold on, who is your insurance provider? And if



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you don't have one, you're going to have to go to the ER down the street. ERs and hospitals, they can't do that. And they treat everyone. And in fact, many of the patients they treat don't pay them anything.

And a lot, about 50 percent of the patients they treat pay them, but they pay them an amount that is not sustainable. It's maybe just at or often below the cost. So ERs, it's a very difficult economic situation for them, but they keep treating all of these patients.

Now, United is one of the largest private insurers in Nevada. And it is exploiting its market power and exploiting the fact that ER groups don't have a choice.

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Now, if somebody goes to United and asks for insurance, and they say -- and United says, Great, that will be $250 a month -- we should hope; right? And the person says, You know, I don't have $250 a month, but I would still like insurance, United can just tell them no.

We don't have that option. We just treat you. We save your life. Or we treat you, we stabilize you, and we assure you that, although you believed reasonably that your life was in danger, you are actually going to be okay. That's what we do every day.

Now, most ERs are staffed by small independent provider groups. And United has figured out that they really don't have much choice because they have to accept whatever



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people are willing to pay them. United thinks, Well, doctors pretty much have to take what we give them.

And so most of the others, because of the small independent practices, they don't have the resources to fight back. And that's why United is targeting us and that is what this evidence shows that TeamHealth affiliated practice groups -- excuse me -- that TeamHealth affiliated practice groups are being targeted specifically by United because we have the resources to fight back, and that makes us, the TeamHealth affiliated practice groups, Enemy Number 1 to United.

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And there is real harm at stake. It is more than just these claims at issue, because United's goal isn't just to underpay these claims. United's goal is to force us to accept contracts at rock bottom reimbursement rates. So they are targeting us, because once they get TeamHealth to agree -- the TeamHealth groups to agree to these rock bottom reimbursement rates, who else is going to say no to them? They can just drive down those rates as far as they want to.

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So their goal isn't to reduce the cost of healthcare. It is to send their profits and their share price skyrocketing.

Now, who benefits when they don't pay? When they underpay? For fully insured, United is as motivated as they could be to pay as little as possible, because they keep



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everything else. And for the ASO clients, United charges its customers. United makes its customers pay a percentage of what United takes from us. And that is often more than what the doctors are paid.

So you have the ER doctors -- and I know this because my dad was an ER doctor. They work nights. They work weekends. They work holidays. They give their lives to these practices. And they save people's lives.

And United will take a claim from an ER doc and pay itself for administering this claim more than the ER doctor made for saving that person's life.

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Now, that is the kind of conduct that we think shocks the conscience, and we think that that's something that deserves to go to the jury.

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So when United says that we are not being reasonable, I would like to know what is reasonable about them charging more to administer a claim than for us to do the actual work.

Now, that is the malice and oppression. So I would like to talk a little bit about the fraud.

United doesn't tell the world, we pay whatever we think we can get away with. Of course they don't say that. They tell the world, we use objective data. We use independent third parties. And that's what we use to come up with our reimbursement rates.

But that is simply not true. The evidence that we



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have offered and that we will show at trial is that United manipulated both its internal programs and its external sources to generate the reimbursement rate that United shows.

So there is a lot of discussion about conscious disregard. United says we can't show that.

Well, there is a little bit of mismatch because conscious disregard typically applies to unintentional fraud -- or excuse me -- unintentional torts.

What we can show is worse. What we allege is that United is targeting us and harming us intentionally. So it is more than just a conscious disregard; it is an intent to harm us.

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And I would distinguish this from the *Kinder Morgan* case, which I know the court is familiar with. The plaintiffs, as I understand it, in that case allege that their cancer was caused by exposure to gasoline. The evidence against the defendants was that their executives knew of the risk of raw benzene. And there was inference that the plaintiffs wanted, that knowledge of the risk of raw benzene was the same as gasoline, and the Court rejected that. Said that might be negligence, but it's not enough for punitive damages.

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That's not what we have here. We have specific intentional conduct that is specifically targeted at us. And the harm again is not just a lower rate. It is trying to



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force us to accept contracts going forward that will be unsustainable. This is significant. And it's damaging, not just to us, but will damage other doctors in Nevada as well.

After TeamHealth is driven into the basement, no other provider group will be able to push back.

Now, on the topic of the national conduct. There is going to be another *Motion in Limine* that is going to be argued later. But what I do want to say about that is if there is intentional conduct to harm Nevada plaintiffs, it doesn't matter if that conduct happens in the state or out of the state. It's intentional conduct that was intended to harm Nevada practice groups. That harms us here; we have a cause of action here.

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Now, United has spent a lot of time walking through the evidence.

We obviously have a story to tell about the evidence. United has a story to tell about the evidence. That's fine. That's a story we are going to talk to the jury about.

United wants to say there's only one way to interpret this evidence and that is that we are just simple insurers who are trying to avoid the skyrocketing costs of healthcare. That's fine. I expect to hear that at trial. But that's not a reason to grant summary judgment.

To the extent there are inferences to be drawn from this evidence, it should be drawn in our favor. But we think



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there is more than enough here to take this issue to the jury.

Now, on the other claims, I am going to talk a little bit about both types of claims. I'm just going to group together, for the sake of time, the claims that there was a government payor and claims that there was another United payor. And what's this really amounts to is a straightforward conflict of the evidence.

Our evidence is that we pulled data claims from our file. We reviewed them. We QC'd them. And I think, although United would like to characterize the fact that we had brought the claims as weakness or that we are not really serious about our claims -- I would submit that it is the exact opposite.

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We have narrowed our claims because we are showing good faith. We want to bring only those claims that we think are defensible to this court and this jury. And that is what we have done. And our evidence says that we have reviewed these claims and we stand by these claims. These came from our database. And we show that they were paid by defendants.

Now, they, I am sure, will have great deal of cross-examination, if they want. That is the function of cross-examination. But those conflicts of evidence are not intended to be resolved through summary judgment.

Now, on the question of the denied benefits, I think we have been crystal clear. I want to be crystal clear. We are only pursuing claims for line items that United paid. We



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are not pursuing claims for line items that United denied entirely and paid zero.

I looked through -- I mean, I think they interpreted something that one of our experts said to suggest the opposite. And I just want to be very clear right now. We are not seeking reimbursement for claims that United denied and paid zero -- only for the ones for the United paid something.

And I really think that's dispositive of this point. If they can find a way that we are claiming a line item that they paid zero, we will drop that. We do not want this case to get removed. And we understand that if we were to challenge our right to payment. That would be an ERISA issue. That is not our goal. We will drop those claims.

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Now, the *Barrero* case in the 11th Circuit talks about hybrid claims. To be clear, it's not talking about a situation where we have a line item that is paid and that is being targeted and a line item that is not paid and that's being dropped. That's talking about when somebody is claiming both rate and right to reimbursement, and it's mixed together. It's just not applicable here.

The example -- so, the example that they gave was an example of a line item that was not paid. But I still don't understand what the basis is for saying that we are seeking that, but that is certainly not our intention. I will just say that right now.



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Your Honor, do you have any questions? I'm sorry. I spent a little [indiscernible].

THE COURT: No.

MS. ROBINSON: All right. Thank you, Your Honor.

THE COURT: Just because I looked away doesn't mean I wasn't listening.

MS. ROBINSON: Oh, no. I was wrapping up. But it's always my -- I just wanted to give you an opportunity to ask some questions, if you had them, before I stepped away from the podium.

THE COURT: Okay. Thank you.

MS. ROBINSON: Thank you, Your Honor.

THE COURT: And your reply, please.

MR. PORTNOI: [Indiscernible.]

THE COURT: Take your time.

MR. PORTNOI: Likewise, let me know if I'm either too soft or too loud. We weren't using this before.

So let me start where Ms. Robinson finished, which is on the disallowed claims. So again, we put in the spreadsheet of 1791 claims that were the disallowed line items. We have no argument, here under Barrero for anything else that -- where there is a claim that is disallowed and a claim that is allowed. But they are not allowed to pursue the allowed claims.

We put in 1791 specific claims in our exhibits. And

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we also pointed out where their experts are using the disallowed amounts as part of their damages calculation. And that's all in our Motion for Summary Judgment. We had no opposition to that.

And there is not -- we went through an example here. And we said this is an example where it is a zero dollar payment, and they want full dollar -- full payable charges on the zero dollar payment. [Indiscernible] to evidence to respond to that would have picked -- would have showed even one of the 1791 claims, and said, well, that's a claim that -- where United paid zero dollars and where we said United paid zero dollars and they said, said, no, no. We got a check. It was $100, and we want more. And these are disallowed.

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If they want to stipulate to those 1791 claims dropping out of the case, the 1791 line items within a claim where they could be semantically different, then we will agree to that. That is not a problem.

We have no problem with the idea where you go to the ER and one of your two procedures -- one of your two codes says reimburse and the other one does not -- we have no problem that they can proceed with the one that's reimbursed, sl long as they are dropping the one that is not. And those are the 1791.

And it's important to note again what Ms. Robinson just said, which is that that is the clear ERISA preemption



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problem. If we don't resolve that before trial, if we go to trial with those uncertainties, then we have a risk that the entire trial should have been removed to federal court. So we really -- this is a very important issue that we have to figure out.

Likewise, what we did -- what Your Honor did here with the step -- that also applies with equal force to the claims that were submitted to entities that are not a Nevada United entity, because those are fees we did not pay. Perforce that creates the same problem.

And again, those are 445 claims. We listed them. We showed the receipts. We showed the spreadsheets. We showed evidence. And what their evidence does not show is any discussion whatsoever about even one of those 445 claims. One, two, three -- none of them -- do they actually present any evidence against what -- [indiscernible] summary judgment.

There's a discussion here that there is maybe -- these are just a conflict of evidence. But it's not a conflict of evidence. A summary judgment motion is a common tool. You put -- we put up some evidence; they put up some contrary evidence to create a genuine of disputed facts.

But with respect to these 62 Medicare and Medicaid claims, with respect to the 445 claims that were submitted to nondefendants, and with respect to the 1791 claimed line items that are disallowed claims -- there is a disputed issue of

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fact. And there's nothing that could create [indiscernible] arbitrary argument.

Now, I just want to say, turning to punitive damages, if you would for just one moment.

It's hard to talk through this mask for a long time. I don't know if you've had that same experience, having just gone through a trial.

What you didn't hear in that discussion of punitive damages was the reference to a single exhibit -- was a reference to a single piece of deposition testimony. You didn't hear -- you heard a lot of discussion about the heroes that ER doctors are. And they are. What you didn't hear was a -- was that, attached to the summary judgment opposition, is a declaration from an ER doctor talking about the harm that he had caused, because there isn't one. What you didn't hear was that there's actually some tangible harm in Nevada that has been caused.

I stood up here before, and I said, where are they -- you know, they're going to argue that hospitals have closed across the country. But they didn't actually even do that. We saw no evidence of a single hospital that was closed. We don't even have a piece of evidence [indiscernible] anything that the defendants did, that a single dollar was reduced in physician pay, which is the core of their argument -- that physician pay was reduced and hospitals closed.

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Nor was there any attempt to eliminate the problem under the Supreme Court's rulings in *State Farm v. VFW*, that the harm is outside of Nevada to [indiscernible]. We agree. This --

We don't disagree that if something was done or said in national negotiations, that that caused actual tangible harm in Nevada. That could be the case. But we have a *Motion in Limine* to preclude all evidence regarding what happened in national negotiations.

And as a result -- and for that matter, remember, that statement that is in their surreply, which is what they're relying on right now -- is about hospital closures and physician pay outside of Nevada. It is not enough about physician pay going down in Nevada; it's not about hospitals closing in Nevada. They cannot -- they have not said hospitals closed in Nevada. They cannot. They have not said physician pay has gone down in Nevada.

For them to say physician pay has gone down in Nevada, they would be required to put on evidence. And we would be allowed to decide whether or -- we would be allowed to present to the jury whether or not physician pay went down in Nevada, because they -- because Medicare and Medicaid rates were too low, because they're not -- what they received from Blue Cross was too low, or because too much profits was being sent up to their parent company, Blackstone.

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All of that would be at issue if what -- if the jury presentation was, was it these United entities that caused physician pay to go down.

Remember, the folks that decided physician pay goes down are the folks that are the paying physician. The ER staffing companies that are the plaintiffs. So it really goes to a question of are we going to be allowed to [indiscernible] evidence that the physician pay going down was -- what were the -- what were the factors that the TeamHealth has considered in making a decision to lower pay? Because that seems to be what they're putting at issue, is the out -- is the understanding that what they're saying now. They never paid, and that's someone else's fault. And it happens to be that that happened right after they were purchased by a major private equity company Blackstone.

The other thing I wanted to point out is there is a discussion that our use of Data iSight shocks the conscience. However, something to note about this case in terms of the tail wagging the dog here. There are 12,000 claims that were made in this case. 792 were decided by Data iSight.

This is not our -- this is largely not a case about Data iSight. There were more case -- there more claims regarding to Data iSight. They were dropped by plaintiffs. What we are left with is over 11,000 claims decided, not by Data iSight -- just decided in United's regular course of



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business, though using Data iSight is another regular course of business.

So I think it is important to recognize that that is not the gravamen of this case, and that as a result allowing this to go forward through trial about what we claimed through Data iSight will only cause a massive sideshow about a handful of claims that would result, again, in a sideshow about national conduct, conduct in Texas, conduct in New Jersey, harm in Texas, harm in New Jersey, as opposed to anything that has to do with a case taking place right here in Nevada.

They say that they have a story to tell about the evidence. That's fine. And they say we also have a story to tell about the evidence. That's fine.

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However, what they have done is put four exhibits in opposition. Those four exhibits do not prove enough to get up to the high standards that the Court has to find as a gatekeeper, that a reasonable jury would find by clear and convincing evidence entitlement to punitive damages on the basis of those four exhibits alone. If the Court decides to consider it a surreply, once again, we do believe we would be entitled to responded to that that surreply and would ask for three days to do so. That's in our papers that you have present.

THE COURT: Thank you.

I have one question for Ms. Robinson, and I'll give



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you a chance to respond.

MR. PORTNOI: Thank you, Judge.

THE COURT: Is there an actual factual dispute with regard to the denied claims?

MS. ROBINSON: So my understanding, Your Honor, is that we have a spreadsheet that shows that we are -- the claims we are seeking -- that there are many claims where there are two line items, and we are only seeking reimbursement for the claims that are -- that were part -- that were paid in part. We are not seeking reimbursement for claims that are zero.

And as you know, there was a little bit of a shoehorn there that if a different person paid it, then maybe that's going to be a right to reimbursement question. Well, if a different person paid it, then United doesn't have liability and it's just not going to be in the case.

And if United did pay it -- if we satisfy our burden to show that they did, then there's no preemption. I did just want to -- if I may just make one short point on the punitive damages. I think, to put in context the attack on our response -- and I didn't go through -- walk through all the exhibits because I know the Court has read our materials, and we do cite to them and we do have evidence.

THE COURT: There was a lot there. I don't want you to feel cut off.

MS. ROBINSON: Okay. Well, I just -- I know it's there. And I know that, you know, we have cited to evidence. We attached evidence.

But I think it's really important to say that in their Motion for Summary Judgment, they had four lines on punitive damages that were exclusively focused on the tortuous -- or excuse me -- with the breach -- the tortious breach of the good faith and fair dealing covenant. And I really have to emphasize it was exclusive, because the case that they rely on, the only reference it has to the punitive damages statute is to say that because that was a breach of contract case, that statute is not triggered.

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And the question before the Court was, is this a tortuous case when it's a breach of contract? And to trigger even the availability of punitive damages, you need to talk about, well, the special relationship and the vulnerable plaintiff and the perfidious conduct. And that is all specific to the tortious interference -- excuse me -- the tortious breach of the good faith and fair dealing. It did not even raise a challenge to the punitive damages for the insurance claim that we had.

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Nonetheless, we did respond. But I think what we were responding to was something that wasn't even in their MSJ. And so before that -- you know, we get -- I just want to put that -- use that as a context for our response. I think it

was more than adequate for a claim that wasn't even in their argument until a reply brief.

Thank you, Your Honor.

THE COURT: Thank you.

Mr. Portnoi, it's your motion. You get the last word.

MR. PORTNOI: Well, I prefer -- getting the last word is part of what we're looking for in order to be -- in order to reply to their surreplies. I do appreciate that.

They were on notice that we were challenging punitive damages. We know that they were on notice because that was most of their opposition brief. Their first opposition brief was relative to punitive damages, and it was arguing that oppression and fraud were present.

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It was unclear how they were not on notice.

Now, to be clear, what we did do was we put forth the idea that they were not entitled to punitive damages, and part of the reason we said that is because they hadn't shown bad faith. The reason we said bad faith was because their new second amended complaint only referenced bad faith as a basis for punitive damages that they had deleted -- malice, oppression, and fraud. But they said oppression and fraud in the opposition brief, so we went ahead and replied -- we replied to their argument.

That said, we don't think anything in the surreply may create the genuine issue of disputed fact. But we would --



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but however, what it does do is create profound constitutional problems, because not in their first amended complaint, not in their second amended complaint, not in their opposition brief do they raise extraterritorial allocation of Nevada's punitive damage statute. So it does warrant a response.

With respect to the 1791 claims, you may remember that I went through an example. That example was drawn from their expert report. That is actually cited at page 11 of our reply brief, we describe what's going on.

And that's the expert report of Scott Phillips. And in that expert report, Mr. Phillips says that they are looking for 100 percent full-blown charges for the line items where United paid and the line items where United did not pay. There's no question that that is what their expert report is showing. They have been -- they've been seeking that throughout this case. They're seeking it now, and that's on the basis solely of their expert report.

THE COURT: Thank you.

So let me tell you that it's my inclination to deny the motion in its entirety.

However, given the request for additional briefing, the defendant may have until Thursday at 5:00 to submit a brief. I'll review it Friday and issue a minute order Friday, so that at least you'll have some clarity before the trial.

MR. PORTNOI: Thank you, Your Honor.

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MS. ROBINSON: Thank you, Your Honor.

THE COURT: So the matter is technically taken under advisement, but you'll have a decision Friday.

Okay. That takes us to the plaintiffs' motion to strike. And we've got lots of briefs here. Okay.

MR. AHMAD: Your Honor, Joe Ahmad, if I'm being picked up.

THE COURT: I don't believe you are, but I can hear you.

MR. PORTNOI: I pushed the button off when I walked away.

MR. AHMAD: I mean, I don't need a lot, because I'm going to be very brief.

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Okay. There we go. Your Honor, we have a motion to exclude evidence regarding the effect of billed charges on premiums. We have a -- a corollary motion regarding a motion to strike such evidence as it pertains to the defendants' experts of Bruce Deal and Karen King.

We have an understanding with the defendants that we will withdraw those motions at this time. I call it an understanding, because essentially, the parties are agreeing to reserve their rights. We are -- have stated that we will reserve rights to challenge the evidence in the normal course as it comes up in trial.

We've taken their response to heart. And we will be



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asking, depending on how the evidence comes in -- we certainly want to be able to respond. And we want the motion -- you know, we want the evidence to work both ways.

The defendant doesn't necessarily agree. And therefore, we are simply agreeing at this time to reserve our rights. And we may be raising it at trial, of course, and perhaps later in one of the other *Motion in Limine*s.

THE COURT: Thank you.

And who is the spokesperson on this issue? Mr. Blalack?

MR. BLALACK: I will handle it, Your Honor.

Your Honor, Lee Blalack, on behalf of the defendants.

Mr. Ahmad accurately characterized our discussion. I think our position is they're withdrawing the motion. We are agreeing that they're not waiving their right to make objections to this evidence in the course of trial.

And we're not waiving any rights or arguments we might make on any other motions or issues in the case.

So I think it's just one less issue the Court has to resolve.

THE COURT: Thank you both for your professional courtesy.

The matter comes off calendar.

The next motion is the defendant's motion to strike the supplemental report and opinions of Leathers.



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MR. BLALACK: That's me, Your Honor.

All right. May it please the Court. Your Honor, I'm here to address our motion to strike plaintiffs' supplemental expert report for David Leathers. It's in the context of [indiscernible], Your Honor.

Mr. Leathers is an expert that plaintiffs retained in July to render opinions on the single issue which was the measure of damages for their RICO claim, and he submitted an affirmative report by the Court's deadline of July 30th. He did not submit a rebuttal report to any affirmative reports from the defense experts by the deadline of August 31st.

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However, starting around September 1st, so right after the rebuttal deadline, he began work on a new set of opinions which resulted in a report that was served on the defendants and disclosed, I believe, on September 9th -- and so 8 or 9 days after the rebuttal expert deadline, and about 12 to 13 days before the close of expert discovery.

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That report was framed and described as a supplemental report, implying that the opinions contained in there were supplementing his prior opinions from his affirmative report relating to RICO damages. However, when you review the report, it is clear on its face that it doesn't have anything to do with RICO damages or his prior opinions relating to RICO damages. And in point of fact it is a series of new opinions that are responsive to the expert opinions of one of our



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experts, Bruce Deal, who will be rendering expert testimony on the market rate for out-of-network emergency services.

So when we deposed Mr. Leathers, shortly after the service of the supplemental report, we questioned him about the report. And he was quite candid in his testimony that this report was, in fact, not related to the RICO damages opinion that he had rendered in his affirmative report and was instead a new set of opinions related to issues raised by Mr. Deal.

So on that basis, Your Honor, we move to strike that supplemental report on the grounds that it was an untimely rebuttal report that did not get served by the deadline of August 31st.

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So that's the background, Your Honor, for this argument. And so I'll just quickly take you through the relevant [indiscernible] --

THE COURT: And so you know, I have that screen up here.

MR. BLALACK: Oh, you do.

THE COURT: So if I'm not looking there, I'm still looking.

MR. BLALACK: Thank you, Your Honor.

So just to -- wait, how do I want to do this? It's like my remote on my TV.

Okay. So just to run through the undisputed facts,



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Your Honor. Deadline for the affirmative report July 30th. Again, Mr. Leathers submitted an affirmative report on that deadline.

Rebuttal report deadline, August 31st. Again, it's undisputed that he did not submit a rebuttal report by that deadline.

His deposition testimony, which I'll show you, confirms that he started working on his second report the day after the deadline for rebuttal reports, September 1st, which is when he received materials from the defendant -- plaintiffs' counsel, which was the foundation for the work he did on his supplemental report, including receiving Mr. Deal's rebuttal report on that date.

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He served his supplemental report on September 9th. And importantly, before we could be given the nature of the opposition, on September 14th, the day before his deposition, counsel sent to us two spreadsheets that night. And one was an updated version of an analysis from the supplemental report served on September 9th, and another one was a new analysis reflecting a different methodology related to calculating out the work rate. That was provided to us on the 14th, and he was deposed on the 15th. Expert discovery closed, I believe, on September 21st, if my memory serves.

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In their opposition, plaintiffs concede that Mr. Leathers' supplemental report was an untimely rebuttal



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report. And they noted, you know, correctly, and we pointed out, that his supplement at that time report was served after the 31st; and that Mr. Leathers conceded that if he was to do it again, he would have said that it was a supplemental and rebuttal opinion.

And in fact in his deposition, we asked him this, and he said, so it is supplement, in that way. Perhaps if I was to do this again, I may have said supplemental rebuttal [indiscernible] because essentially the genesis of this or part of the genesis of this is responsive to -- or the analysis would be responsive to Mr. Deal.

And in his testimony, in the same deposition, he explained that what became his supplemental report was the product of reviewing Mr. Deal's opinions, looking at the underlying analysis, and then conducting a new analysis unrelated to the RICO damages, unrelated to the prior opinion, for purposes of preparing the supplemental report.

Now, if you read their opposition, you know plaintiffs are candid that their sole basis for asking you to deny our motion is the absence of prejudice to the defendants. And we believe we have been prejudiced. And I'll address that in a minute.

But Your Honor, the Court doesn't get to the question of prejudice under the relevant rules, which is NRCP 60, until there's first a showing by plaintiffs of excusable neglect,

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which is the required showing toward any extension of a deadline that a party is going to miss in litigation.

I will note, Your Honor, that there was not a motion for relief filed to -- before the supplemental report was served, asking for permission to serve it in advance. It was just served.

And then there has never been any discussion in their briefs about complying with Rule 6 (b). In fact, if you read the brief, there's not even a reason for the noncompliance for the Court's deadline provided.

It's not a statement like Mr. Leathers was in Europe and didn't have a chance to see it; or critical data that he needed for the opinion wasn't available, and then it came in and we worked diligently to meet it. There's not even an explanation of what the reason for the noncompliance is; much less evidentiary submission justifying that that was a reasonable basis for missing the deadline.

So they just simply skipped to the end of the test in the rule to argue no prejudice. But prejudice is only relevant in the analysis, if the TeamHealth plaintiffs first established the other factors under Rule 6(b). And the key for those factors, Your Honor, which are stated in the *Mosley* case from 2008 are that the proponent of the evidence, the late evidence; acted in good faith; exercised due diligence; had a reasonable basis for not complying with the deadline,



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the Court deadline; and then that the defendant did not suffer prejudice. But if you don't make the showing of those other factors first, you don't even get to the question of prejudice.

And the Court in *Mosley* made that point, explaining and discussing the analogous federal rule that the party may obtain the extension of time to act under a particular rule. When the time to act has expired and the party seeking extension demonstrates good faith and a reasonable basis for not complying with the specified period and an absence of prejudice to the nonmoving party.

And it says, The key factor in the federal decisions is whether the plaintiff asserted a reasonable basis for not complying. Here, Your Honor, there's no basis for evaluating that question, because what basis has not been asserted for not complying, much less an evidentiary showing that there was a reasonable basis.

And again, *Mosley* then articulates the controlling standard for Rule 6(b) in the 2008 case, which just restates the elements of the rule that I've just discussed.

So Your Honor, in this case, plaintiffs cannot -- even if they were to offer that explanation now, which may be what's about to happen -- they can't make the evidentiary showing that they exercised diligence on a reasonable basis.

And here's why. Mr. Leathers testified in his



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deposition that all of the information that he relied on for his supplemental report was information that he received on September 1st. And all of that information existed well before the deadline of August 31st. And in fact, some of it existed and had been produced in discovery back in the spring, like, market data.

So, for example, the three key things he looked at were Mr. Deal's affirmative report and rebuttal report. The other thing he looked at was the defendant's market data; the payment data that the defendants had produced in the case; and a new list of disputed claims that plaintiffs had created, that had been created sometime in August.

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And we know all of this existed, because it either had been produced by the defendants earlier or one of the other experts had relied on it.

So for example, Mr. Phillips provided a rebuttal report on August 31st. He's one of the plaintiffs' other experts. In his report he relies on that market data. And he relies on the same list of disputed claims that Mr. Leathers didn't receive until September 1st.

So all of the information that Mr. Leathers relied on is information that was available, could have been provided to him earlier, and he could have prepared a rebuttal report if he wanted to do so in a timely way. And they did not provide that information to him until after the rebuttal report



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And here's his testimony, Your Honor, from the deposition, where he's describing when he received this information from plaintiffs' counsel. And I think you could see here it says, I asked him: So it sounds like the various reports that are listed in paragraph 30 -- which were the affirmative and the rebuttal reports -- were sent to you then as a group, as a collection, sometime around August 31st, September 1st, something like that.

Answer: Yes, that's correct.

And the United market data file that's described there was sent to you about the same time?

About the same time, yes, sir.

As well as the new list of disputed claims as referenced there.

Yes, was the answer.

So, Your Honor, there's just not -- whatever the explanation for why the deadline was not complied with, whatever the explanation for why a motion for leave was not filed, whatever that ends up being, it's not stated in the opposition. You can't satisfy the reasonable diligence standard because the information existed, could have been provided, and it wasn't. And thus, there's not a basis for satisfying 6(b).

Now, the last issue is this question of prejudice,

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unfair prejudice. And the basic argument that's presented is that they focus on the spreadsheets that were sent to the defense the night before the deposition. And the argument goes, they -- we got just work papers, that these were work papers, and, therefore, we got them and we had time to look at them. And they were gracious enough to allow Mr. Leathers to stay all night, if need be, to question him about that material. And I absolutely stipulate that opposing counsel was very gracious and would have been -- we could have gone into the morning hours, I'm sure, at that point.

That's not why there's prejudice, though, Your Honor.

The prejudice here is twofold. One, if they complied with the rule, we would have had 15 days to review those -- that report, have our experts dissect it, evaluate it, develop lines of examination and impeachment; and really come after Mr. Leathers new report, you know, [indiscernible].

Instead we had six days from the time the supplemental was served and to when the depo occurred. And obviously we were trying to get these depos done in a very tight calendar, Your Honor, by the September 21st deadline.

The second issue is that, unlike the suggestion -- and I'm quoting there from the -- from the opposition -- there was new analysis in those spreadsheets that were sent to us [indiscernible] -- in two ways.

There was new analysis related to the methodology that



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Mr. Leathers had been using for his first opinion, his affirmative opinion that was different than what he had used in his first opinion. And then for his supplemental report, which is one that had been served on the 9th and is the subject of this motion, that one was adjusted and rerun to reflect the new -- new claims that he thought that were still on the disputed claims list should be taken off, because they were not emergency claims.

So it is not accurate to say that the materials we got on the night before the deposition were just the work papers from the supplemental report. They reflected new work that Mr. Leathers had conducted since he had finished the supplemental report and the deposition.

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And the reason I know that is I asked him about where -- you know, how he had prepared these and when he prepared these. He said -- and I asked him the question:

And this was in part an effort by you to perform a damages analysis of the new list of disputed claims that you received sometime in September; correct?

Yes. It was part of my -- and he was very nice.

Candidly, it was part of my preparation for a deposition. I was looking at data and refreshing my memory, and I did some additional analysis. And as a result of that because I had a file, I felt that I had an obligation to provide it to counsel, which he did.



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So it -- what happened was he was preparing for his depo. He decided to do some additional work. And in fact, if you look at the file that he was working on, it was last modified at like 4:30 on the night before the deadline. He made some additional analysis. He introduced some additional methodology -- methodological changes to what he had done in his affirmative report. And then that was served on the night of the 14th, and then he was deposed on the night of the 15th.

Your Honor, so independent of the prejudice of prejudice of having such a compressed time to analysis the supplemental report, we submit we were unfairly prejudiced by receiving, you know, what I don't think can truly be called work papers, because they reflected new work that was not completed as of the date of the supplemental report.

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So Your Honor, with that background, I'll submit unless the Court has any questions.

THE COURT: I don't. Thank you.

And the opposition, please.

MR. LEYENDECKER: Yes, Your Honor. Kevin Leyendecker for the Health Care Providers, Your Honor.

Let me first address the issue of excusable neglect, because there really are two -- what I think are two elephants in the room. And the first is this excusable neglect concept. And here is the cold-hearted reality. We have assigned lots of different portions of preparing for this trial to the group



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that's here before you.

I have the principle responsibility on the experts. I also had principle responsibility for studying the complaint and figuring out how do we streamline the trial in the way that we've been describing to Your Honor today.

And so there was a lot going on that I was trying to handle and that's layered over the fact that what I realize is I had a case that I was trying, a similar case in another state, where I had an expert at the 13th hour, came down with an issue -- a health issue that prevented the case from going to trial. And the lesson that I learned from that case is, if your client is amenable and willing to afford it, it's a good idea to have two experts that can cover the same topic -- not that I would offer to, but I've got two of them, if one of them falls out unexpectedly.

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And so in that vein, all that's going on, studying that complaint, trying to figure out how to streamline this trial, it occurs to me that I should have Mr. Leathers work up essentially the same areas that Mr. Phillips has worked on for this reason.

And so I immediately, as soon as the thought occurred to me, got him working. I notified the defendants on Saturday the 4th, which is after the deadline, and we worked as quick as we could to get him ready.

So he -- Mr. Blalack is correct, the data was



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available. I could have had this thought three weeks earlier. But the reality is working very hard to do everything I can to figure out how to streamline a case and protect against the enormous energy and time that has been spent by the parties, to have this trial potentially going to naught if I had a problem with Mr. Phillips -- that I would have to come in here and say, Well, I need a different expert. So that's the reality of it.

Now, let me add context to that. The damages in this case are very straightforward. There's two competing methodologies for analyzing the damages -- one is comparing what was paid, slash, allowed to the billed charge. The second is comparing what was paid, slash, allowed to what United has paid/allowed other providers.

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There's no rocket science to either one of them. None whatsoever.

There may be some cleverness, if you will, in how you would get at what is the median or the average amount. And there's going to be some of that arm-wrestling going on during the trial.

But the reality is there's two methodologies that are very straightforward. There's nothing difficult or complex about those methodologies. Our experts started with the billed charge. And then when Mr. Deal said, I'm going to look at the analysis comparing it to what United pays other



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providers, then we responded to that.

So two very straightforward analyses. And my view is that the parties are better off, and the case would be better off, if I had the ability to not have the problem that I had just about one year ago, in a very similar kind of case.

On the prejudice front, I just -- it's -- here's the reality. They produced Mr. Deal's work papers to me on Friday night after 6 p.m., for a deposition that had been agreed to probably two weeks earlier, to occur three days later. So I got Mr. Deal's work papers -- and that's really what the lawyers want to look at. Reports -- fine, the report is one thing. I want to see how you're going the math. I got Mr. Deal's math on Friday at 6:45, before his Monday morning at 9 a.m. deposition.

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They got Mr. Leathers' math on Wednesday at 2:45 in the afternoon, about a week before the following Wednesday 9 a.m. deposition.

The suggestion that somehow they were deprived of the opportunity to study that information and sharpen their pencil on cross-examination, well, if that's true for six days, then what does it say about me for three days?

I'm not now complaining saying that I've somehow been prejudiced, even though the dates of these depositions had been agreed to. I'm not complaining that they did in in less than three days, sending it to me on a Friday the after work



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day ended. They got far more time than that.

I just -- so I guess to some degree I'm falling on my sword when it comes to the excusable neglect. That's the rubber on the road.

THE COURT: So now is Leathers the primary expert on the damages or the backup?

MR. LEYENDECKER: No. He was going -- he had focused simply on the RICO damages. And he also had analysis as it relates to the damages between the billed charge and the non-RICO damages. Mr. Phillips was not making an assessment of the RICO damages, but was also making an assessment of the damages between the billed charge and the allowed amount.

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THE COURT: Okay. And then what --

MR. LEYENDECKER: And then following the receipt of Mr. Deal, I said, I want to cover [indiscernible] from above.

THE COURT: And why did you not file a motion for leave? Because I freely grant those to everyone. So --

MR. LEYENDECKER: Pure oversight on my part. I have no legitimate explanation for why I didn't. I'm aware of that process. It's just pure oversight.

THE COURT: I've had to fall on my sword a few times as a lawyer. It's hard to do.

Did you have anything further?

MR. LEYENDECKER: I did. I often like to take notes of what other lawyers say that I think are good thoughts. And



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what I heard Mr. Roberts say to you in response to the motion for sanctions --

THE COURT: They were doing the same thing we were doing.

MR. LEYENDECKER: He said, Justice is not being obstructed here. That's what Mr. Roberts told Your Honor.

And in light of this relative simplicity of the two damage models, I acknowledge I'm late by a week or so. But justice is not being obstructed here by affording my side the opportunity to call one of those two witnesses in the event I have a problem with the other one.

Thank you, Judge.

THE COURT: Thank you.

And the reply?

MR. LEYENDECKER: Your Honor. Excuse me. I'm from Texas.

THE COURT: That's fine.

And reply, please, when you're ready.

MR. BLALACK: Yes, Your Honor.

Your Honor, just a quick point. I do think there's some important information shared there that is really relevant to the analysis.

Two damages experts on the other side; two affirmative reports in July from them -- one is Mr. Phillips who is -- I had been understood until today to be their lead damages

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expert what he's doing -- he did an analysis in July comparing the billed charge amount to the allowed amount, measuring the difference of the damage. It had nothing to do with RICO; nothing to do with any other theories -- just is there another payment and how much?

Expert report two, Mr. Leathers in July. Doesn't do anything like what Mr. Phillips did in July. Does an analysis with his Data iSight claims, come up with a discount percentage, and then backs into a new number and comes up with alleged RICO actual damages amount in July. And that's where we stood as of July 30th.

Until August 31st. Mr. Phillips files a rebuttal report and Mr. Leathers does not. The rebuttal report from Mr. Phillips says, I've read Mr. Deal's expert report -- our expert -- who does an analysis comparing the allowed amounts to what he calls his market benchmark, which is the average -- the range in the amounts between the average allowed reports that United pays other emergency room providers other than TeamHealth, and the average -- and the median that TeamHealth accepts with contracted rates with other health insurers other than United. That was the Deal affirmative report in July.

Mr. Phillips reviews that response and says, I disagree with that, and I'm giving an alternative damage number to the one I provided in July, based on looking at the amounts that United allows on an out-of-network only basis to

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help -- to providers other than TeamHealth. That should be the benchmark, and United underpaid, relative to that benchmark said that's an alternative damages number. So that's where we stood as of August 31st.

Then in September 9th, in the supplemental report, Mr. Leathers did the exact same thing in his supplemental report that Mr. Phillips did in his rebuttal report -- just called it a supplemental report -- and did the same kind of looking at the out-of-network rates that United paid to health -- to providers other than TeamHealth to come up with this benchmark.

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Mr. Leyendecker, I think, accurately characterized it as he basically has a backup expert giving the exact same opinion with the exact same analysis.

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The only real difference in those two opinions, Your Honor, is if Mr. Leathers removes certain claims that he contends aren't emergency claims, that Mr. Phillips kept in. Otherwise they basically do the same work.

So not only in our view did you not have compliance with Rule 6 -- and we think we have made a showing of prejudice based on the timing in which we got this material and how much time we had it and when we had to use it; but we've also just heard here that there's not really even any prejudice even to them because they've got their lead expert on damages for both the main calculation [indiscernible] no



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charge to be allowed and the fallback argument which is the difference between the average allowed for out-of-network claims to providers other than TeamHealth -- so they got that.

And so even if Mr. Leathers is excluded, they're still going to offer those same opinions that are in Mr. Leather's supplemental report. They're just not going to be coming from Mr. Leathers; they're going to be coming from Mr. Phillips.

And this notion that somehow they should be able to keep him in reserve, notwithstanding the lack of compliance with Rule 6, because Mr. Phillips may not show up, you know, we submit that's not a good enough reason to look away from noncompliance with the rule, Your Honor.

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So unless the Court has any questions on it --

THE COURT: So if I deny your motion, what relief would you want to alleviate any prejudice? Another deposition of Leathers at their expense?

MR. BLALACK: Well, Your Honor, I think -- obviously our position, and you know our position about our preference in terms of not -- I don't think the deposition will -- is the problem, that it would cure it. And I don't think they've made a showing that losing Mr. Leathers affects the presentation of their case because of Mr. Phillips' opinions.

But if that were the Court's preference, then I suppose we would want to have that option. I need to confer. Frankly, we're six days away from starting trial. And the



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notion of diverting critical time at this point before trial to taking another expert deposition would almost be worse.

So in my opinion, we would like the Court to exclude the supplemental report, and let them travel with Mr. Phillips.

THE COURT: All right.

MR. BLALACK: Thank you, Your Honor.

THE COURT: So this is the defendant's motion to strike the supplemental report of Leathers. The motion will be denied.

The Supreme Court always tells us to try matters on the merits when we can. I'm willing to alleviate any prejudice argued to the defendant here, based upon any recommendation you might make. I assume that jury selection will take at least a couple of days, because you guys have asked for a venire of 80. And I can only bring in 40 to 45 each day.

So if you ask for relief, I more than likely will grant it during the trial, as long as it's reasonable.

MR. BLALACK: Okay.

THE COURT: Okay? So that's that.

We've gone 50 -- well, we've got 65 minutes. I want to take a quick break. It's 1:50. Let's take a break until 2 p.m.

[Recess taken from 1:50 p.m., until 2:02 p.m.]

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THE COURT: Thanks, everyone. Please remain seated.

Okay. Are we ready with the plaintiffs' *Motion in Limine* 1 with regard to discovery orders?

MR. ROBERTS: Your Honor, may I just raise one issue with the Court?

THE COURT: Okay.

MR. ROBERTS: As the Court may -- I don't know if your clerk told you, but I actually had a prepaid flight tomorrow, and I'll be leaving tomorrow to go to Miami.

And I was assigned to argue the Motion to Stay Pending the Writ, which the Court set for this morning's calendar. I'm not asking you to take it out of order right now, but I am asking if the Court could hear that today, before the -- since I won't be here tomorrow.

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THE COURT: Certainly. There's no objection, is there?

MR. ZAVITSANOS: No, Your Honor. No.

THE COURT: Okay. So if you guys are ready to argue this, then I'll probably break to take the Motion to Stay.

MS. GALLAGHER: Very well, Your Honor.

THE COURT: Thank you.

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

So the Health Care Providers moved to this *Motion in Limine* to transform the Court's prior limiting discovery



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orders into evidentiary orders prior to trial.

We thought that this would be something that would potentially be met by stipulation, pending the Court's consideration, time and time again, if you will, on these particular matters. But what we learned during the meet and confer efforts is that United did intend to essentially use this opportunity as *Motions in Limine* for reconsideration of each and every one of the Court's prior orders.

So those prior orders encompass the October 26th, November 9th, February 4th, April 26th, August 3rd, and September 20 -- I'm sorry -- September 16th rulings that deemed information irrelevant.

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And just a broad list, Your Honor, and we can get into the specifics, as I go through and address United's opposition -- but underlying critical records and the coding of the at-issue claims, noncommercial and in-network reimbursement rates and agreements; in-network negotiations between the Health Care Providers and United; cost information relating to cost of services; corporate structure and relationship matters; hospital contracts; charge setting information relating to whether it or not the charges are, quote, excessive or not, as United has alleged; and so on.

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As Your Honor is well familiar, you have had the opportunity to consider each of these areas, not just once, but twice, often three or four times -- in connection with the

successive orders that each dealt with the prior orders of this Court.

The Court did not find United's arguments to be meritorious the first, second, or third time around.

At the August 17th hearing, which was with respect to Report and Recommendations No. 6, 7, and 9, the Court reiterated that it has been consistently clear that those foregoing categories of information are simply irrelevant to this case.

So despite those recent reminders that the Court has provided, United opted to file a series of *Motions in Limine* that obviously opposed this motion that encompasses all of those orders in its combined *Motion in Limine*.

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In urging the Court to reconsider its prior rulings, United cites to *Johnson v. State* for the proposition that a Court can admit evidence previously deemed irrelevant.

Johnson may stand for that general proposition, Your Honor, and the Court can make determinations of relevancy, but the facts there did not involve the district court's about-face, with respect to earlier relevancy determinations.

Instead, in that case, the defendant failed to preserve the record on an objection to the exclusion of evidence relating to a victim of crime, certain sexual conduct, pursuant to a statute. And the Nevada Supreme Court

further concluded that the evidence was irrelevant and properly excluded. The situation here bears no similarity, Your Honor, as United suggests.

Second, United argues that the earlier relevancy determines are not [indiscernible] the case. Your Honor is well familiar with what that doctrine means. It does not require the Court to reconsider its prior rulings, nor does it allow a party to completely ignore the fact that it has already objected or sought reconsideration on one and all of the issues that are before the Court today.

EDCR 2.24 also does not allow for continued attempts by a party to try and change the Court's mind, without regard to procedural requirements. Indeed, United has not offered any change in circumstance or any new information. If you Your Honor had the opportunity to read their opposition, you will see the same argument, the same cases that has been before this Court before.

The Court can grant the Health Care Providers' *Motion in Limine* and the decisions underlying the subject orders because they have already been thoroughly considered by yourself.

As to United's substantive arguments that they raise in their opposition, you'll notice it was quite dense with information, Your Honor. So I do want to have the opportunity to be able to respond to that, given that we agree not to do

replies with respect to *Motions in Limine*.

United argues that the Court's relevancy determinations do not apply to documents that the Health Care Providers produced voluntarily during the course of discovery. This is something that is a manufactured standard. We've seen that in earlier oppositions and objections that United has filed, in terms of saying, if we produced it, it must mean it's relevant; and therefore any argument as to its relevancy has been waived.

It's simply not the standard, especially because many of those documents were produced prior to many of the Court's rulings, making that determination that the subject area was not relevant for purposes of the case.

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United also seemingly makes the argument that production of a document waives the objection. And I want to also refer the Court to the stipulated confidentiality and protective order that has been entered in this case. With respect to paragraph 23, the parties actually specifically agreed that production of a document that would have been marked confidential or attorney's eyes only, does not waive any of that type of admissible evidence at the time.

Specifically categories that have already been deemed irrelevant by this Court include clinical documents. United confirms that it will not seek to offer clinical records to argue that they did not perform disputed emergency services.



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So with respect to that alone, the Court can grant the motion with respect to clinical records.

But then in opposition, United goes on to contend that it should be allowed to offer evidence that the Health Care Providers improperly recorded and upcoded many of the disputed claims it submitted for reimbursement. This is exactly the same issue that United forwarded in its Motion to Compel clinical records that resulted in the October 26 order.

United there also argued that it had the right to contest the value and performance of the underlying medical services. These are the same arguments forwarded by United now. The Court should abide by its prior ruling with respect to clinical records because they are not relevant; and United has deemed the services payable, has made a payment -- although we dispute the amount that United has paid.

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United also says information about coding is relevant to the Health Care Providers' charges, whether they be excessive, as United likes to describe. This too, with respect to excessiveness of the charge, is subject to the Court's earlier orders.

The next topic is noncommercial and in-network reimbursement rates. United is still trying to inject Medicare rates, opening in its opposition that it is the single largest payor in the country, and it is a reliable reference for considering the relative costs and the

reasonable value of emergency medicine services.

Your Honor is very familiar with United's attempt to inject that data into this litigation. It started early with respect to market data. And it followed throughout the course of discovery and resulted in several Reports and Recommendations that Your Honor affirmed indicating that Medicare rates, reimbursement rates are not relevant, and do not make a reasonable evaluation in terms of a comparison.

Those determinations were found in the August 9th order, affirming Report and Recommendation No. 2 and 3, and at paragraph 6(b). The finding specifically was documents comparing plaintiffs' billed charges to reimbursement costs that under Medicare and Medicaid is irrelevant.

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Also in connection with Report and Recommendation No. 7, United sought both noncommercial and in-network data in its third set of requests for production. Included within those requests were topics specifically geared at discovering in-network reimbursement rates, seeking both noncommercial and in-network data.

The September 16th order, which is affirming Report and Recommendation No. 7, reaffirmed that the data is not relevant to out-of-network claims at issue.

The district court -- the 8th Judicial District Court has previously agreed. We've cited this case multiple times, and it appears in several orders, *Stinnett versus Sanders*



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[phonetic], granting a *Motion in Limine* regarding expert testimony that relied on Medicare reimbursement rates.

In-network reimbursement rates, this Court has ruled that in-network reimbursement rates are not relevant in connection with Report and Recommendation No. 7 being affirmed.

United points to market data produced by the Health Care Providers earlier in the litigation, but this does not provide the Court a basis for essentially overruling its prior order. Nor do other in-network agreements -- they don't inform what United is obligated to pay the Health Care Providers. There is testimony regarding in-network relationships. The Court has heard argument on this.

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And the relationship is quite different when you have that transaction where people are agreeing and entering into an agreement. The Eighth Judicial District Court agrees with this. In *Shamon versus Universal Health Services* [phonetic], the Court found results of negotiated agreements between medical providers and third-party payors do not accurately reflect the reasonable value of medical services. That case has always been embodied within some of the Court's prior orders.

United seeks to introduce evidence of in-network contracts with Blue Cross® Blue Shield®, and a direct contract that the Health Care Providers have with MGM Resorts -- both



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of which are relevant based on the Court's prior orders that in-network agreements themselves are not relevant.

The next category, what other providers pay and how often the Health Care Providers receive their billed charges.

This type of testimony and argument is contradictory to the Court's prior discovery orders, including Report and Recommendation No. 9. There, United objected that defendants have a right to know reimbursement that plaintiffs typically receive from other insurance and other payors and what reimbursement levels they deemed acceptable.

The Court rejected this argument and instead adopted Report and Recommendation No. 9 in its entirety.

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Pointing to the Health Care Providers acceptance acceptance of less than their billed charges as purported proof of a market rate, or evidence of negotiated rates or agreements to accept a particular rate, is also an evidence of offers of compromise which would be excluded under NRS 48.105.

Next, United wants to introduce information about costs, hospital contracts, and credentialing, relating to those agreements. In addition, how charges are set.

United argues in its opposition that the process of how the Health Care Providers set their charges is relevant to determining if those charges are reasonable. And they point to expert Scott Phillips' testimony about costs.

But when you look at that deposition testimony that's



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cited, United left out critical testimony where Mr. Phillips stated the cost becomes, in many cases, not a terribly important factor. The Health Care Providers also objected to the questioning on the basis of the Court's limiting orders. So to allow United to try and extract information, and then use it to try and overrule the Court's earlier orders that we were already fighting about in terms of the deposition, simply isn't a sufficient basis to be able to have a new chance, a new bite at the apple, if you will, Your Honor.

United also argues that hospital contracts and credentials are important. But this, again, goes back to their cost argument, and simply what they're trying to do is use that argument with respect to getting costs.

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How charges are set. The Health Care Providers seek to exclude evidence that United intends to introduce aimed at the purported excessiveness of their charges.

Whether a hospital has an agreement with a provider, though, has no bearing on whether or not United has satisfied its payment obligation.

Your Honor, we have talked about that many times with respect to what this case is really about. It has been consistently through the orders of this Court that we're all aware that this case is about the rate of the payment that United is making.

The Health Care Providers seek exclusion of the



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process, deliberation, and decision making, and strategy, is not relevant under the Court's prior orders.

So I want to make this distinction because I think it's an important one in terms of trial presentation.

So with respect to the ultimate fact of the Chargemaster -- so the ultimate price that is being billed -- that is information that is the fact of the amount that should be admissible. The Health Care Providers should be able to talk about that.

But what Your Honor ruled earlier was that process, that deliberation, how the charges are set is something that is not relevant. But the actual end result is something that the Health Care Providers should be able to talk about.

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The next category of corporate ownership, structure, acquisition, is one that we have seen come up time and time again. United makes it clear and does intend to try to introduce information about TeamHealth and Blackstone. They want to introduce evidence in costs. They want to introduce evidence of what they say cash sweeps and things of that nature. But the Court has made it clear that that information has no relevancy to how much United reimbursed and whether that amount is satisfactory.

United also wants to inject irrelevant Medicare reimbursement rates through its references to TeamHealth and to Blackstone. That too would be improper and subject to the



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Court's prior orders.

The next category of documents in evidence that United has opposed as being excluded is provider participation agreements. United wants to point to earlier in-network contracts as indicative of the usual and customary rate. But the Court has already deemed that that information is not relevant in the August 9th, September 6th orders, that refer to the Report and Recommendation No. 2, 6, 7, and 9.

United argues that the Court's limitation was only with respect to a third-party subpoena. But the Court considered the issue in connection with a Motion to Compel deposition testimony, and when it sought that information through its third set of requests for production of documents.

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So that point in the opposition is not completely fulsome, Your Honor, with respect to that point.

The Court has properly deemed in-network agreements, regardless of whom they involve, as irrelevant. To allow United to point to prior in-network agreements would be prejudicial and also run afoul of the case that I cited earlier, *Shaman Versus Universal Health Services Foundation*.

United also wants to point to contracts with other insurers. They want to garner reconsideration through its expert, Bruce Deal, who wants to testify that in-network agreements represent a willing buyer and a willing seller. Indeed, United wants to offer an opinion that, quote, only



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payments from contracted services are relevant to determining reasonable value.

Your Honor, United garnered that opinion after knowing what the Court had already issued in terms of its limiting order. To now turn around and point to that as a reason for reconsideration, should not be considered, Your Honor.

Next is an issue that United has taken the opportunity to try and paint the Health Care Providers in a bad light. And that issue is known as the [indiscernible] issue within the documents. This is similar to the Yale study documents where United had tried to portray the Health Care Providers in a bad light.

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And so what they have said is that there's an agreement between Ruby Crest and Fremont, that they've described as fraudulent, manipulating, and potentially demonstrative of upcoding.

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The issue is that, one, the substantive issue -- because it's a provider agreement -- falls within the Court's limiting orders.

But it's also with respect to a factual issue that isn't as it seems, Your Honor. And what I mean by that, is that it's disingenuous to present to the Court that the Health Care Providers were charging something more than the service was provided in that location.

So for example, there's Chargemasters that the Health



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Care Providers have, that is dependent upon the location where the services were provided. And so when you look at services provided in -- at the ER, at Aliante, at Mountain View, and at Sunrise -- all the patients here in Clark County -- that Chargemaster rate is what is listed on the bill.

And so the representation to the Court that somehow there was an attempt to gain more money than what was expected or what was permissible or what was being charged based on the location of the services, is not accurate.

And so I want to give an example with respect to a date of service, January 12th, 2019, with a CPT code of 99285, which the Court is familiar -- is the most severe level that somebody would present to an emergency room.

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And the Chargemaster for the location at ER at Aliante was $1,353, and that's the amount that was billed. Now, Ruby Crest is listed on -- as the tent provider, if you will. But under that Chargemaster, the rate would have been $821.

And so that's consistent with those locations, is that where the service was being provided is what Chargemaster governed that particular charge.

And so not only does this issue fall within the Court's prior orders, it's also important for the Health Care Providers to explain that the location of the charge and the Chargemaster for that location was consistently applied in those circumstances.



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The last category, Your Honor, is billing and collection. And we've had quite a few instances to come before Your Honor with respect to billing and collection. Those matters have been in Report and Recommendations No. 2, 3, 6, and 9, that the Court has affirmed and adopted in addition to the February 4th order.

So United makes it clear it wants to offer evidence that the charges are purportedly excessive. Again, this goes back to the crux of that determination from the Court very early on, pointing to testimony that they want to say that the Health Care Providers were egregious, however, what is misleading is that while the Health Care Providers were labeled egregious, United was taking that opportunity to use their billed charges in an effort to gain net $1 billion in internal operating revenue.

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But regardless of that, that billing and collection that United wants to go down the road of, has already been determined by this Court not to be relevant to these issues. So the Health Care Providers would request that if the Court grants this *Motion in Limine* this resolves United's *Motions in Limine* 1, 3, 5, 7, 9, 11, 13, and 15, Your Honor.

Thank you.

THE COURT: Thank you.

And the opposition, please.

MR. BLALACK: Yes, Your Honor. May it please the



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Court, Your Honor, let me just set the table and try to preview what I hope to accomplish in this argument.

This is really an omnibus motion that the plaintiffs filed. And if I was to show you in this gallery, just walk through about 12 different categories of evidence that they contend should be excluded on the basis of prior discovery orders issued by the Court. We disagree.

As she notes, we filed a series of paired *Motions in Limine*. The ones she just ticked off, 1, 3, 5, 7, 9, 11, and 13 -- I don't know that I would include 15 in that, but- 1, 3, 5, 7, 9, 11, and 13, are our affirmative *Motions in Limine*, asking the Court to evaluate the admissibility of evidence that could arguably be implicated from prior discovery orders.

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And then for each of those, there is a companion *Motion in Limine*, which would be the even numbers of reports [indiscernible], which say that if our *Motion in Limine* is denied, we believe there are ramifications for what the plaintiffs' proof would be as a result.

I'm going to devote a significant amount of time in this argument to responding to Plaintiffs' *Motion in Limine* -- *Motion in Limine* No. 3, in taking the Court through the evidence on each of those categories that are implicated in that omnibus motion. It is my view that -- and I agree with Ms. Gallagher on this point -- I think depending on the Court's rulings with respect to the various components in



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*Motion in Limine* No. 3, it will mute some or all of these -- 1, 3, 5, 7, 9, 11, and 13.

It wouldn't resolve the companion pieces in terms of what's the effect on their case, but it would absolutely, we think, you know, resolve it.

So I'm going to devote most of the time, frankly, that I would have devoted to these motions, to responding to plaintiffs' *Motion in Limine* No. 3. So I just wanted to give the Court that preview, because I think this will be a longer argument than normal for that reason.

Okay. With that, Your Honor, let me try to set the table on where the pleadings stand and the dispute stands, going into trial before the Court rules here.

We have now, after the second amended complaint, five defendants left out of the original eight. Some of those defendants are fully insured, self-insurance companies. And as the Court knows from prior briefing that means, in return for paying a premium from an employer or a union or an insurance policy, the company sells an insurance policy that a company gets premium and basically is responsible for the risk of providing healthcare coverage to the employees or the union members [indiscernible].

THE COURT: So the trial I just finished Thursday was -- involved a failed risk retention group.

MR. BLALACK: Okay.



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THE COURT: And it was a receiver suing the operator.

MR. BLALACK: Okay.

THE COURT: So I have a really good -- right now, at least for a while --

MR. BLALACK: Okay.

THE COURT: -- understanding of how insurance works.

MR. BLALACK: Okay. Well, I just want to distinguish, because it will be relevant to some of these arguments, Your Honor, the difference between evidence related to a fully insured plan and the role that our clients play for a fully insured plan; and evidence related to a self-insured plan, and the role that our clients can play.

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For those plans -- and we have some defendants in this case, Your Honor -- clients of ours that do nothing but that. That's the only work they do. They never insure anything. And they never charge a premium or get paid a premium for anything. All they do is administer the health plan that is sponsored by an employer or a union member, union group. And they, for a fee, administer the plan with the employers accepting the risk of the health plan for their employees.

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So that's two different types of business that you're going to see come up in these documents that are being discussed. One, we lovely called ASO, administrative services only, or self-insured. The other is fully insured. And you've got defendants that do just one or sometimes will do

both. But from the defense side.

On the plaintiffs' side, as you know, we have three companies based here in Nevada that are staffing companies, that are owned by the TeamHealth organization. And the TeamHealth organization is the largest staffing company in the United States for emergency and other hospital based [indiscernible]. It's a very, very large [indiscernible] company. It's now private, because it was recently purchased by the Blackstone Group, which is a private equity company. So it's a big, big player in the staffing industry.

They -- those plaintiffs, those TeamHealth plaintiffs, based in Nevada and in the other states, they contract with physicians -- emergency room physicians on an independent contractor basis to staff the emergency departments of hospitals around the country. And in this case, there were eight hospitals based, during some period of time, where they staffed hospitals in Clark County. And they staffed one in Elko, and one in -- a Nevada hospital in -- team physicians in -- I can't remember the name of the community. But there's -- there's two smaller hospitals in the Northwest and Northeast Nevada.

I tell you that, Your Honor, because of the claims in dispute in this case and the damages in this case -- 90 percent of it relates to the practice group that staffs hospitals in Clark County. The other 5 percent each are



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affiliated with these two smaller practice groups in Northeast and Northwest Nevada.

We come to the trial, depending on where things settle out after today's arguments, with probably just under 2,000 disputed claims for -- allegedly for emergency services.

Up for which, United has already allowed payment -- and this part is not in dispute -- has already allowed payment of just about $3 million, for which plaintiffs are seeking to bill charges in the aggregate of around 14. And that may -- again, that may come down -- both of those numbers may come down slightly based on the final revisions of the disputed claims. We should be in that ballpark for [indiscernible].

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So the claim for damage in the first instance is the difference between those billed charges and the allowed amount, which is, give or take, $11 million and maybe a little less.

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All right. So the claims that remain, after -- so let me just -- as you know, Your Honor, these are the 12 topics that are subject to this omnibus *Motion in Limine* No. 3. And I want -- they're all different, so I'm going to go through them and show you the evidence that's implicated by these topics. Before we get there, I want to make sure we level some of the claims and the elements of the claims that are going to be at issue in the trial.

So after the second amended complaint when they



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dropped half of their causes of action, we had four left: Breach of implied contract; unjust enrichment, which had been their core lead accounts from the beginning; and then two remaining statutory claims: One for unfair claims, insurance claims settlement practice, which is Count 3; and then an alleged violation of the prompt pay statute, Count 4. That's where we go, going into trial.

Now, I want to talk real quick, Your Honor, just to level some of the elements for these, so that when we start talking about some of the evidence implicating, we can tie it back to some of these elements.

And the first, of course, is the implied in fact contract, which requires evidence of the party's conduct, and that's the key. This is a contract formed by conduct. It is undisputed in this case that there was no written contract between the parties during the period of dispute. And they just recently amended their discovery responses in the last few weeks to make clear there was no oral contract.

So to the extent there is a contract between the parties in this case, it has to be evidenced from their own behavior. That necessarily, Your Honor, means evidence of course of dealing and course of performance. So they had -- that course of performance and course of dealing has to manifest an intent to contract, has to show an exchange of [indiscernible] for promise in clear terms that was then



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breached. And the *Certified Fire Protections* case is a case both parties settle, which lays out those elements.

And then for unjust enrichment, it's showing that there was a benefit conferred on my clients from -- by the TeamHealth plaintiffs in rendering the services at issue; that our -- my clients received and accepted that benefit; and that would be inequitable under these circumstances for us to retain that benefit without compensation, which is defined under the same case law as the reasonable value of the service.

And I want to focus on that, real quick, Your Honor, because it is undisputed, I think, between the parties that the relevant standard here at -- under Nevada law that the jury is going to be asked to evaluate is the concept of reasonable value, as opposed to other potential terms, like usual and customary.

That's not reasonable value. Reasonable value is its own meaning within Nevada case law.

And so the parties agree that reasonable value is the tests shown for all of these claims. And so then the question becomes, What evidence is probative of reasonable value for any of these claims?

Now, unfair settlement practices.

In the complaints, the amended complaint, they rely on section -- Nevada Statute 686(A).3101(e), which is the element



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of the statute regarding failure to effectuate prompt, fair, equitable settlement of claims after -- after allowed, only when the claim has become reasonably clear to the defendant -- to the defendant insured.

So this will obviously get into questions of *mens rea*, state of mind, in terms of what defendants knew, when they knew it, and what the nature of their dealings with one another was regarding settlement of the disputed claim.

And then finally, the prompt pay statute -- this is a very simple statute that has to show that there was approval or denial of a claim within 30 days of receipt. And it was approved, it was paid within 30 days of approval, a straightforward claim, a much more direct [indiscernible].

Now, with that background, Your Honor, I want to talk about each of these categories. And what I -- let me start with a preface. Plaintiffs make a great deal of argument that this is, in fact, a motion for reconsideration in disguise. And I want to address that head on.

It is absolutely not that. It is true that there are prior discovery orders of the Court, implicated by this motion, where we willingly acknowledge that the Court's prior discovery order addresses the issue at hand. And the only question is whether it is appropriate to extend that reasoning to the admissibility of evidence that we possess, not evidence we're seeking in discovery, but that we possess to the trial.



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But for the bulk of the issues, those 12 issues I've listed above, we vigorously disagree that the Court's prior discovery orders address the question that's squarely presented with regard to this evidence, and resolved it.

So there definitely are some -- or were -- and this is one of them -- where I'm just going to say, yes, Your Honor, you had a prior ruling that said this. It applies to this body of evidence. We disagree, respectfully. But here's why we think it either doesn't apply to this evidence that's at issue, or we suggest that in light of what evidence has been produced in the case by the plaintiffs, and what the relevant claims and defenses are in the case, it should be admissible, and the Court's not bound by the prior discovery. But that's one class of argument.

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But there are others. -and this is also an example of it -- where the Court -- they're citing a discovery order, and the discovery doesn't even come near the issue -- anywhere near it. And they're asking you to just kind of blithely say that your prior discovery order precludes us from offering evidence. And I'll give you an example of this first one.

But I wanted to highlight that, Your Honor, because as we go through it, I want to try to identify the ones that I think fit into that first bucket where we [indiscernible] your order addresses the issue squarely. And here's why we think you should take a different position for admissibility of



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trial.

But then there are others where I'm going to try to explain that the Court's prior discovery order just doesn't reach the issue squarely presented.

All right. So first one is clinical records. And the easy part is we don't have clinical records if they weren't produced. We won't be offering them -- even any ones that we have in our possession -- to contest that the services were ever performed, which was the original reason for seeking them. We originally sought clinical records, because we thought we had a right to contest that performance had been satisfied and that they had performed the services they billed.

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That's not going to be an issue in the trial, so that's -- and that was the lead argument in the motion for this issue. So let's take that off the table.

But in their brief, they identified three other categories of evidence that they say is covered by this order: The improper coding of disputed claims, which means somebody, a doctor putting a code for reimbursement on a claim that triggers a higher level of reimbursement than is justified by what service was actually provided; the second is the actual process of submitting a disputed claim; and then whether the claims are emergency services.

And they contend that the discovery order related to



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clinical records precludes us from getting into those issues.

Now, Your Honor, on the first of those, our position is that if you look at the data, 75 percent of the claims, the disputed claims in this case, were E&M Codes 4 and 5. The highest intensity, most financially rewarding codes that are submitted -- can be submitted.

And their expert, Mr. Phillips, did an analysis of the intensity of that and the frequency with which the TeamHealth plaintiffs were using those high intensity codes and how frequently, relative to other providers, that was the case. We believe -- and our expert did the same thing, so both experts looked at this question.

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We believe the fact that both experts from both sides did an analysis of the intensity levels of the coding and the frequency with which high intensity, high reimbursement codes before submitted by these plaintiffs is fair game. Certainly it's not precluded by an order barring discovery of clinical records, because we're not going to offer any evidence about clinical records.

We would be offering the evidence from their own claims information that they produced on their own disputed claims spreadsheet; and the testimony of their own expert and the testimony of our expert regarding the frequency with which they were coding at the highest level of intensity of claims -- again, 75 percent across all the emergency codes



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belonged in two buckets, the two highest levels of reimbursement that were permitted under the system. That's one point.

Point two, submission of disputed claims. You just heard argument in summary judgment that our position is there are hundreds of claims that were not submitted to the defendants in this case.

If you accept their argument, we can't put on proof to contest that we never got the claim because what we're going to want to do is cross-examine their witnesses and have them impeach that they ever submitted those claims to us. And we're going to want to put on our witnesses to talk about what our systems received and whether we received the submitted claim or not. That's just core foundational evidence.

And yet, according to plaintiffs, that would be off limits under the Court's discovery order related to clinical record.

And finally, it's been axiomatic since the beginning of this case that the case is only about emergency medical services -- not about anything else. And plaintiffs, if you hear them, say your discovery order precludes us from challenging that any of these claims are not, in fact, emergency services.

Well, the problem is their own expert Mr. Leathers, who is now going to testify, has said that there are claims on



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the list of disputed claims that are not an emergency claims. In fact, he didn't include them in his analysis. Whereas, Mr. Phillips, the other expert, did include them.

So on the list of disputed claims we currently have, we've got claims that are not emergency claims, where one of their experts says there's not an emergency code on the claim. And the other says there is and is including it in his damages analysis.

So our position is, Your Honor -- and when you read the discovery order, which I'll show you in a moment -- there's nothing in that order about clinical records that touches these three issues.

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So frankly, if plaintiffs want to stipulate that they're willing to withdraw the 400-and-some claims that are covered by categories 2 and 3, we'll take those two issues off the table. And we won't have to put on any proof on it.

But if they're in dispute for the jury, we've got to be able to offer evidence about whether the claims were submitted, process for submitting them, why they believe they were submitted, and the fact that we didn't get them. And we need to be able to offer evidence, including from their own experts, that there are claims on their lists that aren't emergency claims. So that's our position on here.

So let me show what the base evidence is on this, Your Honor. This is your order from October of 2020. Here's



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the key passage.

And I submit to Your Honor there's nothing in this order that says anything that would touch or get near the question of whether we could offer evidence on the three topics described.

And the relevant key paragraph is paragraph 18, cited in our [indiscernible].

Now, improper coding and disputed claim. This chart I'm showing Your Honor is a chart from the expert report of Mr. Phillips, their expert, their damages expert. He did an analysis of both the TeamHealth plaintiffs and other nonparticipating claims to show the frequency with which high intensity codes -- which are the highest reimbursing codes -- show up in the data. And what we see here is that 75 percent of those are in the top two levels, and 95 percent cover the top 30. And Mr. Phillips, in his deposition testimony, specifically agreed that the charged amounts and the reimbursement amounts increase when you billed the higher level codes.

And Your Honor, we have an affirmative defense in this case that makes clear that plaintiffs' claims are barred in whole or in part, to the extent they seek to unjustly enrich the TeamHealth plaintiffs by allowing them to retain funds in excess of any amounts due for covered services.

They would not be entitled to high reimbursing

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recovery if, in fact, they were billing claims at Levels 5 and Levels 4, when they should be billed at Level 3 and Level 2. So that kind of analysis is relevant.

Improper submission, Your Honor -- this charge is from our expert's report, Mr. Deal, where he's showing the disputed claims that both parties agree do not show up in the defendant's data -- which is over 400 claims -- which we have the right, we believe, to submit evidence to contest that we were -- that they were submitted and that we received them.

And then services that are not emergency medicine.

This is deposition testimony from Mr. Leathers, their expert who we talked to you about earlier.

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QUESTION: You determined that some of chose claims should not be considered because they did not involve emergency services.

And the answer: Correct. They did not have an emergency service CPT code.

Okay. So you found that some of the disputed claims that have been pursued in this case did not reflect any emergency services of the claim?

ANSWER: Correct.

So Your Honor, I'm going to move on to Medicare rates next. But before I leave that, the point is you can fairly read your discovery order saying clinical records are out. But I don't think in fairness you can extend it to read



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touching these other issues. And I think that's emblematic of the entire motion, which is you take some snippet out of an R&R or an order, and then it's given this broad sweeping reach in the brief that we submit is unjustified and that would really unfairly hamper our ability to present a defense.

So I'll move on to the second item, the Medicare records. And Your Honor, in your order of November 2020, which related to whether the defendants would produce data for an included managed Medicare and Medicaid reimbursement death, plaintiffs asked for an order, saw an order, excluding that data from the productions, which Your Honor granted. But specifically in doing that -- and this is the order that you struck through and then signed -- you noted: Notwithstanding the foregoing, the Court does not make any admissibility ruling of this data at this stage of the litigation.

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So Your Honor, it was expressly contemplated, you weren't going to engage in prepare -- with the production of this government data for purposes of the claims analysis. But there was an expressed reservation on the question of whether you [indiscernible] would be a year later at trial.

And we submit that the evidence that was later produced in discovery in the spring and that the parties took depositions on proves why that was a prudent reservation for the Court to make, because frankly, Your Honor, these parties do business in the language of Medicare; they contract in the



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language of Medicare; they negotiate in the language of Medicare; they budget in the language of Medicare; they track their receivables in the language of Medicare. And so the notion that you could have a trial about the reasonable value of healthcare services, without the word Medicare rates being spoken or the Medicare B schedule, is just incomprehensible in our judgment and in my experience.

So let me show you why that is. And by the way, these are some other orders. This is -- Plaintiffs rely on R&R No. 2 which cites back to the Court's February 4, 2021, order. But if you review those materials, you're basically -- it does not add anything new to what the Court previously noted from the November hearing, which we just looked at. So basically it harkens back to the Court's prior ruling.

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All right. So Medicare rates and why are they relevant? They are relevant because they are one of the pieces of information that can inform what a willing buyer and a willing seller, in an arm's length transaction, would consider reasonable reimbursement.

And for that -- and that standard is a standard that the Nevada courts in cases have adopted, and it's a standard that courts across the United States have adopted. We cited to you in your brief, and I think, you know, plaintiffs cited as well, the *California Children's Hospital* case, which is one of the leading cases in an out-of-network emergency dealing



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with the exact same issue, which is out-of-network emergency services.

And that's a case where the trial judge excluded evidence of government rates from the admissible -- excluded evidence of contracted rates and PAR data, participating rate data for contracted agreements. Went to trial. The verdict for the emergency room provider was sent up on appeal, and it was reversed on appeal on the grounds that the discovery had improperly been too narrow, and admissible evidence has been excluded.

And I commend that case, Your Honor, because there's things in there that I don't agree with it. For example, it says that cost is not relevant, because in that case the standard is the going rate, which the Court concluded wouldn't necessarily mean market type data. But it also goes on to talk about the types of evidence that necessarily is prohibited of reasonable data. And it included a lot of things that are in this motion -- network agreements, participating data, market data, out-of-network payment data, offers to contract, negotiations, testimony by a party about what the value of their service is, and government payment data.

And in fact, I've got a quote here, Your Honor, from the case, where it says: The scope of the rates accepted by or paid to a medical provider by other payors or insurers

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indicates that the value of those services in the marketplace -- and is therefore relevant to the reasonable value analysis. Quote, all rates that are the result of contractor negotiation, including rates paid by government payors, are relevant to the determination of reasonable value.

Now, in this case, Your Honor, it is not the defendant's position that the reasonable value of the disputed services in this case is the Medicare rate. That is not our position.

Our position, as you'll see in a moment, is that there is a benchmark rate that could be measured based on the participating market data for the Team Health plaintiffs and the participating market data for the defendants that shows what do the defendants -- what is the most common rate that the defendants pay to other emergency room providers besides TeamHealth, and what is the rate that the Team Health plaintiffs most commonly accept from other payors besides United, and that gives you the market rate range to measure reasonable value.

But our expert will testify that Medicare is still a very useful reference point to use -- being able to have an apples-to-apples comparison across the different types of reimbursement.

Some of these contracts, the payment is based on a case rate, so $320 per visit. Sometimes it's based on a

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multiple Medicare -- 300 percent of Medicare; 200 percent of Medicare.

Sometimes it's going to be based on a prior negotiated agreement or a fee scale or a government fee scale.

So there are different inputs in using a standard format like Medicare as a way to have an apples-to-apples comparison across different rate payment methods is very important for the jury to understand how to look at the evidence; and frankly, how the parties looked at the evidence at the time.

So in this case, the TeamHealth plaintiffs documents that they produced showed that they relied on Medicare rates in the ordinary course of their business and in their course of dealing with the defendant. And I'm going to show you the ways in which they did that.

So first, when they set their billed charges, which is the basis of their measure of damages, this is their document describing the inputs to their Chargemaster; they specifically say that Medicare, the Medicare allowable or the Medicare fee schedule is one of the two primary inputs in their charges. And in the deposition of Mr. Briscoe, who will be in trial on this in all likelihood, he confirmed that -- that alone, with the FAIR Health database, which is a private nonprofit organization, provided the two primary inputs for determining the charges that are at issue in the case.

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Next, TeamHealth plaintiffs offered reimbursement rates to the defendants in this case during contract negotiations, based on the Medicare rates.

So I'm showing you just two examples. There's many.

This is an e-mail from 2017 from Rena Harris [phonetic] who is a trial witness in the case, who worked for TeamHealth. She negotiated with the defendants. And in this document, she says, per our discussion in our recent market intelligence homework, we need to be at 260 percent of input of Medicare -- which is what she said in her memo.

She then made a similar statement in another e-mail from 2019, in speaking with my VP, we can counter you with 300 percent of Medicare. So literally, Your Honor, the -- this motion would preclude us from telling the jury that the plaintiffs who are claiming and demanding billed charges had indicated that they considered 300 percent of Medicare a reasonable value that they would be willing to accept, and that they said it in documents during the party's course of dealing, which is going to be relevant to the implied in fact contract, not to mention the other elements of the claim.

Now, TeamHealth plaintiffs also had network contracts with the Fremont defendant -- the plaintiff, so TeamHealth -- of the three TeamHealth plaintiffs, two had been out-of-network from beginning to end. One had been a longstanding network provider for several of defendants in

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this case. And the prior agreements between the parties, basic reimbursement in the contract, as you can see it here, on Medicare rates, on the Medicare fee scale, 181 percent of the Medicare fee scale.

The e-mails produced by TeamHealth's plaintiffs also showed that when they did their budgeting to evaluate, you know, what they thought their schedule -- fee schedule and their charges should be, and what reimbursement they needed, and what they could demand from United, they used Medicare rates as the way to do that budget. And this e-mail is an e-mail from Mr. Briscoe to a Jason Newberger [phonetic] of TeamHealth, and is discussing the budget process for 2019, and talking about whether and how to keep certain claims in the budgeting -- receivables in the budgeting process, relative to Medicare.

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And then they track their AR and their collections based on Medicare, and specifically as to the defendants in this case. As this e-mail shows, they were looking at their payment receipts, and saying, you know, we were hoping and expecting to get about 244 percent of Medicare once we went out-of-network. But it looks like -- and we're -- he says, let's go ahead and record the 235 percent financial for now. And she says -- or excuse me -- Jason Newberger says, we were at 170 percent of Medicare for January to June, and up to 235 percent for July.



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So again, Your Honor, the language of this company -- and United is the same, all of the companies in the healthcare industry is. Medicare is the lexicon of reimbursement technology. People may [indiscernible] take a different rate.

So for example, I'm thinking of an analogy, like the prime rate. If you go to a bank, the bank -- you may get a rate that's 2 percent of prime, 3 percent of prime. The rate's not the prime rate you're borrowing, but it's pegged to a standard terminology that everybody in the industry understands.

That's what Medicare performs here. Medicare functions like the prime rate does in the healthcare industry and is the measure by which people negotiate, enter contracts, track budgeting, and do receivables.

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THE COURT: Now, I'm going to stop you only because we could argue the rest of the afternoon this motion.

And I want to see how you guys want to manage the time. I want Mr. Roberts to be able to argue his motion and fully -- get that fully done. And I'm wondering if maybe we shouldn't go subject by subject, so I can give you some clarity along the way.

MR. BLALACK: Okay.

THE COURT: So it -- you know, it's been an hour since we had a last -- our last break. But if everybody is willing to go forward, I'm happy to go forward. We're just supposed



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to give you every hour a break.

MR. BLALACK: I defer to your preference, Your Honor. I mean, I think -- I've probably got another probably 30 minutes, I can say, 30 or 40 minutes.

THE COURT: Okay. All right.

MR. BLALACK: But I would -- then [indiscernible].

THE COURT: All right. And Mr. Roberts, without holding you to it, how long do you think you'll need on that Motion to Stay?

MR. ROBERTS: Your Honor, 10 minutes, 15 minutes on the outside, longest.

THE COURT: Okay. And who will argue the Motion to Stay for the plaintiffs?

MS. LUNDVALL: 15 or 20 minutes is what we'll need, Your Honor. This is Pat Lundvall.

THE COURT: Okay. Thank you.

So let's not recess now, take up the other motion. And then we'll take a break. And you guys can talk about how you want to present the entirety of the motion.

MR. BLALACK: Perfect.

THE COURT: All right. Let's pivot back over to page 2. Let me find this. It's a Motion to Stay enforcement of the order. And I have seen the writ petition come through.

MR. ROBERTS: Thank you, Your Honor.

THE COURT: Okay. Thank you.

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MR. BLALACK: Thank you, Your Honor. Should I proceed, Your Honor?

THE COURT: No. I want to pause this hearing.

MR. BLALACK: Okay.

THE COURT: We're going to take up the Motion to Stay.

MR. BLALACK: Okay.

THE COURT: And then we'll take a recess. And you and Ms. Gallagher can talk about how you want to apportion your time the rest of the afternoon.

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

MR. POLSENBERG: Your Honor, Dan Polsenberg. I hate to be a nudge, but I've lost visual for the courtroom.

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THE COURT: And -- that's all right. We want you to have access.

The court recorder can take a look at that. Don't all look at her. It's extra pressure.

MR. POLSENBERG: Thank you, Your Honor.

THE COURT: I will say, Mr. Polsenberg, it's all voice-activated. So when nobody is talking, you won't have a screen, I don't think.

MR. POLSENBERG: Well, this morning it was switching around from camera to camera. Now I just get a blue screen that says District Court, VARIJECT 27.

MR. BLALACK: And I'll give you a test, Dan, to see if you can hear me.



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MR. POLSENBERG: I can hear you, yes, thank you.
MR. BLALACK: But it did not switch to me?
MR. POLSENBERG: No. I get no visual whatsoever. And I don't know whether that's the court or me. But --
THE COURT: Let me suggest that -- let's go ahead and --
MR. POLSENBERG: You certainly don't need to take a break for this.
THE COURT: Well, I'm going to suggest that you log out and log back in. You might have turned off your video by error.
MR. POLSENBERG: My computer crashed so that may have been it. So I'll give it one more try. But I'll wait until after the stay motion.
THE COURT: All right.
So Mr. Roberts, go ahead, please.
MR. ROBERTS: Thank you, Your Honor.
THE COURT: Will you just recite the name of the motion for the court clerk, because I didn't find it on my list here. I know it's here, but -- it was Motion to Stay enforcement of the order regarding subpoenas.
THE CLERK: Motion to Stay enforcement of subpoenas issued to out-of-state witnesses pending resolution of writ petition on order.
THE COURT: Got it. That's it.

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THE CLERK: Is that correct?

MR. ROBERTS: That is it. That's exactly the name.

THE COURT: All right. Thank you.

MR. ROBERTS: Thank you, Your Honor.

I'm here on behalf -- Lee Roberts, on behalf of United Healthcare.

And I am here to request that the Court issue a stay on the enforcement of the subpoenas which this Court declined to quash in a recent hearing, which I also argued before the Court. And I'm going to not repeat the same arguments that I made there or the ones in the writ, but will instead would like to address the factors.

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Is this annoying, Your Honor? Could you hear me better with this, just using this mic?

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THE COURT: I could hear you guys without the microphone, so --

THE COURT REPORTER: It's just the recording doesn't pick it up well enough [indiscernible].

THE COURT: It's -- can you --

MR. ROBERTS: If I stay close to this, am I going to be okay on the recording?

THE COURT RECORDER: If you speak up, yes.

MR. ROBERTS: If I speak up. Okay. I'll try that, Your Honor.

THE COURT: Okay.



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MR. ROBERTS: So I wanted to address the factors which the Supreme Court ruled of Appellate Procedure Rule 8 generally say that the Supreme Court will address. And because the Rule 8 also requires us to seek a stay first in the district court, I believe those same factors should apply here.

The factors from NRAP 8 include, first, whether the object of the appeal or writ petition will be defeated if the stay or injunction is denied; whether the appellant, slash, petitioner will suffer irreparable or serious injury if the stay or injunction is denied; whether the respondent, slash, real party in interest will suffer irreparable or serious injury if the stay or injunction is granted; and finally, whether the appellant, slash, petitioner is likely to prevail on the merits of the appeal.

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The Supreme Court has recognized that the most important element is usually whether the object of the appeal or writ would be destroyed in the absence of the stay. And that squarely applies here, Your Honor.

We cite to *Micon Gaming 89 P.3d 36* at page 40, a 2004 decision. But we don't quote from it. And I think some of the key takeaways from that case -- which is also cited in the opposition -- is where the Court says in the context of an appeal seeking to compel arbitration, because the object of an appeal seeking to compel arbitration will be defeated if a



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stay is denied, and irreparable harm will seldom figure into the analysis, a stay is generally warranted.

And this is consistent with case law from the federal courts, which say that the -- defeating the purpose of the appeal or petition is usually the main factor, unless it's out -- unless it's counterbalanced by a strong showing on one of the other factors.

And as to the likelihood of success on the merits, I think it's important that the Court doesn't have to find that the Court was likely wrong and the Supreme Court will most likely find that the arguments we're raising justify a writ of mandamus back to this Court. And Micon is instructive on that purpose, where it says, Therefore, the party opposing the stay motion can defeat the motion by making a strong showing that appellant relief is unattainable, in particular if the appeal appears frivolous or if the appellant apparently filed the stay motion purely for dilatory purposes, the Court should deny the stay.

I think what you can take from that is the Court doesn't have to actually find that we're likely to written on the writ. You just have to find that there's a reasonable shot that there will -- that there's a good faith issue prevented -- presented to the appellate Court that it's not frivolous. And we think Your Honor that we meet that standard here.



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So looking first at whether the object of the writ will be defeated, if this is not stayed and the witnesses are compelled to show up at the beginning of their case in chief on November 1st, the writ will become moot. There is no relief that could then be granted by the Supreme Court.

In their opposition, they argued that, wait a minute, they're trying to win just by filing a Motion to Stay, and they waited too long and it's not timely. And I would like to address that issue, because the written order denying the Motion to Quash was not filed by this Court until October 13th. And a written order is generally required in order to appeal and have a timely appeal. And Mr. Polsenberg tells me is also required to file a valid writ petition.

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Notice of entry was filed the same day. The writ was filed the very next day, October 14th, although after 5 p.m. The file stamped copy was provided by the clerk on October 15th, and this Motion to Stay was filed on October 15th.

I think the record demonstrates that we filed the writ the day after the written order was issued, and you seek to stay immediately, the same day upon filing the writ, I think we've acted timely.

And looking at the issue of that likelihood of success and the arguable merit. Although I don't want to repeat the arguments that we raised in the writ petition, in fairness to



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the Court, I do want to point out one additional case that we cited in the writ petition.

THE COURT: So I don't take any offense that if you criticize my ruling. I understand that's your job.

MR. ROBERTS: Thank you, Your Honor.

In the writ petition, we cited one additional case that's *Spinosa v. Rowe*, because we thought it was particularly applicable to the Court's finding that we're -- we said you can't presume that you have authority to accept service of process of a cross-subpoena, simply because we had previously agreed to accept service of a deposition subpoena and had listed them in care of our office on a 16.1. And *Spinosa* -- it's an older case from 1971. But in the *Spinosa* case, the attorney for a party was served. And there was a letter that was relied upon in that case, where *Spinosa* claimed that Mr. Morris had agreed prior to the commencement of the action to accept service. So the lawyer for the party had allegedly agreed to accept service.

But then when service was actually made on him, he wrote a letter in footnote to July 8th. This is in reference to the complaint served upon me in the above matter, I hereby inform you, I have no authority to acknowledge service on the defendant Virginia Rowe. And the Court reversed the default judgment.

And what this case stands for is exactly what we

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argue, that you can't presume service. Even where an attorney allegedly says, I have authority to accept service. If once he got the service, he said, no, I don't have authority to accept this.

And the Supreme Court therefore reversed, because under the case that we cited, *Consolidated Generator*, authority to accept service of process has to be express. There has to be an actual point that they accept service. Authority to accept service cannot be implied from the facts and it cannot be implied from conduct. It has to be express.

And there's not any evidence in this case that we had actual authority to accept service of trial subpoenas on behalf of these out-of-state witnesses.

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And the arguments that we've made about *Quinn* are the same ones that we made here. We emphasized a little bit more that in *Consolidated Generator*, the subpoenas were served on counsel for the corporate party; and they were employees and officers of the corporate entity from out of state.

So the whole argument that there's this distinction between a nonparty witness, which counsel doesn't have authority to accept; or a party witness, which you automatically do, is rebutted by the *Consolidated Generator* case which found that even though they were officers, counsel was not assumed to be authorized to accept service for these out-of-state individuals.



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Going to the balancing of harms, we believe that's the least important factor, but the harms to the witnesses, once they travel here, it's going to be done. Whatever convenience, whatever burden, this travel to out of state will impose on them is going to be done, versus we believe there is no harm for the plaintiffs to have to put on their depositions, if they want to call them before the Court resolves this case.

That's why out-of-state depositions are taken to preserve trial testimony. People have to put on deposition testimony of unavailable witnesses all the time. Therefore, that harm is not so irreparable that it should overcome the fact that if these witnesses are forced to come before the Supreme Court can rule on the case, it's going to be a done deal. The purpose of the writ will be defeated.

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And therefore, we request that the Court issue a stay, just until the Court, the Supreme Court can rule on this issue.

THE COURT: Thank you.

MR. ROBERTS: Thank you, Your Honor.

THE COURT: And the opposition, please.

MS. LUNDVALL: Thank you, Your Honor. Pat Lundvall from McDonald Carano, again on behalf of the Health Care Providers.

What is at issue here, just simply to remind the



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Court, is can witnesses -- and whether or not that they're going to be obliged then to provide live testimony at the time of trial. These 10 witnesses for over two years were represented, not only to us, but to you, to the Court, to be only reachable by and through counsel. That's what that they repeated. I think there were 17 Rule 16.1 disclosures to us. And they were represented, like we said, not only to us, but to you, to only be reachable by and through counsel.

When it came time for us to serve deposition subpoenas, we were asked, Why are you doing this? Deposition subpoenas are issued pursuant to Rule 45, no different than trial subpoenas are. The defendant said, Why are you doing this? You don't need to. We can accept those, but they are party affiliated witnesses. And there doesn't need to be any type of a deposition subpoena that is needed.

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When you look at their trial disclosure, each and every one of these 10 witnesses is either on their may call or their will call list, to present live testimony to the jury at the time of trial.

And those same witnesses are on our either may or will call list.

Now, one of the things that our opposition -- and I would like to confirm that the Court did receive -- all right. I figured so, but just wanted to confirm.

But NRS 50.115, subsection 1 gives this Court



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considerable discretion over the mode and the order of presentation, not only of witnesses, but also of evidence at the time of trial.

And I will tell you that across 32 years of practice and between 75 and maybe 80 trials, each and every time that the issue came up as to whether or not a witness was supposed to grace the witness stand once versus twice, the trial court uniformly said, We want the witness on the stand one time. If, in fact, that witness is going to present testimony at the time of trial, that witness should grace the stand one time. Why? It's time efficient.

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It is efficient not only for the Court's time, but also for purposes of the jury's time. This is in state courts. It's in federal courts. It is in state and federal courts across the nation.

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It is something that is within the Court's discretion.

And so now, what they have done is they have tried to suggest that somehow you abused your considerable discretion by saying these witnesses will be presented once at the time of trial, and that these witnesses then should be presented in accord then with the subpoenas, that we had served.

So what you would like to do is to go through each one of the factors and can demonstrate why not one of the four factors inures to the benefit then of the defense in trying to obtain a stay of enforcement.



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The first one is whether or not that the object of their writ would be denied.

Now, first and foremost, the Nevada Supreme Court says that the object of your writ has to be a legitimate object. Not an illegitimate, but if it's an illegitimate object or an illegitimate purpose, then, in fact, that that's not a factor that's going to be evaluated then in affording a stay.

And what is the object of their writ? Their writ asks you to stay enforcement of your order.

What does that mean? They are asking you then to decide the writ. That's what they're asking you to do. They're asking you to say, the writ is meritorious, the writ has value, and therefore, we want you to grant the writ, by offering a stay, because they're not seeking a stay of the trial. They're seeking a stay of enforcement of your order not quashing the subpoenas.

And so really, when you look at it then, what does their writ do? And what does their motion for stay do? It's a reconsideration then of your order. And they're untimely then with their motion for reconsideration on that. Moreover, that they haven't met the high standard for reconsideration of your order. And when you consider -- think about the idea that your considerable discretion was somehow abused by denying their motion to quash, that's a pretty high standard by which that they're going to have to meet, and trying to do

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that on a motion for reconsideration, I think is next to impossible.

The next two factors are looked at typically by the Court in conjunction. The Court -- the Nevada Supreme Court then weighs what the prejudice is, both to the party who is seeking the stay, and against the party who is opposing the stay.

So let me take a look at the prejudice that is claimed then by the defense in their motion. And one of the things that struck me is this, when I look at their motion, their motion isn't brought on behalf of United. Their motion is brought on behalf of these witnesses. Think about that. They're claiming that to you, we don't have any control over these witnesses or we don't think that we do, but we're bringing in motion to quash the stay and our -- a motion to quash the subpoena and a Motion to Stay on behalf of these witnesses, because they argue no prejudice to United.

The only prejudice that they argue is the time, the inconvenience, and the money that would inure to the witnesses. That's the only prejudice that they claim. And if the Court looks at the *Hanson* case, the *Hanson* case has said unequivocally, those are not factors that constitute irreparable harm. So the fact that these witnesses, nor has United offered any harm by which they will suffer by reason then of requiring these witnesses to testify if called in

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during our case in chief.

Now, the comparison is what is the harm and what is the prejudice to the plaintiff by granting the Motion to Stay? By granting the Motion to Stay, you grant their writ. By granting the Motion to Stay, we lose the effectiveness of live testimony at the time of trial. And the Court sat through far too many probably jury trials to be able to not understand the fact that live testimony from the time of trial is far, far more effective. I sat on that witness stand just last week, reading deposition testimony. And I wanted to tap a couple people on the shoulder and say, Wake up.

THE COURT: Well, in the old days we used to take the sleepers a glass of water, and now we can't do that. So --

MS. LUNDVALL: And so from that perspective, there is just no substitute for the effectiveness of live testimony. So to the extent then that who gets harmed? We get harmed. And we are the only party that gets harmed.

Now, the last one is the likelihood of success then on the merits. Once again, I harken back then to considerable discretion that the Court has under NRS 50, subsection 115, subsection 1. And that is dealing with the order and the mode of the testimony then and the evidence to be presented.

What they have done then is to take a writ by which that it asks the Nevada Supreme Court to claim that you have abused your discretion. And that abuse of discretion for writ

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purposes is nearly impossible for them to accomplish.

And then the one thing that I would offer is this, when I took a look at the writ papers, I scoured it for the neon sign that says, This is an emergency. We need your help now.

Very deep within their documents they say, Well, they -- these witnesses may be called as early as November 3rd or 2nd, something like that, they said. But they didn't ask for any emergency treatment. They didn't ask for any emergency relief. They didn't highlight it in the caption. They did nothing to bring attention to the fact that this was something that needed to be looked at and looked at quickly.

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And so therefore, with all due respect, Your Honor, I don't think that the likelihood of success is high. And we would ask then the Court to deny their motion for a stay. Thank you.

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THE COURT: Thank you.

And the reply, please.

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

Your Honor, the error that we have asserted in the writ is not error in the court in exercising discretion to control your docket or to have witnesses called only once. As we pointed out in our original motion, even though these witnesses are listed on a may call and expect to call list, they are also all designated as people we may call by



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deposition, just as we've already received deposition designations from all these witnesses for the plaintiff.

Rather the error we allege in our writ is that the trial subpoena is enforceable despite the absence of personal service in the record.

That the implied authority of this -- of my firm, my firm, Weinberg Wheeler Hudgins Gunn & Dial, cannot be implied, and that there has been no actual appointment of my firm to accept service on behalf of these out-of-state witnesses. That is the error that we've alleged, along with the fact that the Court is attempting to exercise jurisdiction over witnesses that are beyond the subpoena power of the Court. And that's our argument based on *Quinn*.

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That is the error that we've alleged and the abuse of discretion that we have alleged.

The control issue, footnote 5 to the writ, says control is not the issue. The issue is the subpoenas are legally not enforceable. And that is the same argument that I made before the Court when we attempted to quash them, that that's a red herring. That's not the basis of our motion and it's not the basis of our writ.

Our basis of our writ is the actual legal authority, the exercise of jurisdiction over these witnesses, despite the absence of personal service, and despite the absence of no express appointment of my firm to accept trial subpoenas.



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Those deposition subpoenas -- they were for the witness's home state. They didn't require them to travel to Nevada. They didn't even require them to travel of their living room. They were Zoom depositions.

That simply cannot be viewed as if they were willing to sit in their living room and take a Zoom deposition, they were willing to appoint my firm to accept process to come to Nevada.

And as the *Consolidated Generator* case clearly said, Appointment to accept service of a subpoena cannot be implied. It cannot be presumed. It has to be are. And that's why we believe that the writ does have merit. And that the purpose of the writ, which is to prevent these witnesses from having to travel here, in compliance with the subpoena, it's going to be moot. That's our point. That's the object of the writ. Not some trial strategy to alter the order of the appearance of witnesses.

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THE COURT: Thank you. Thank you, both.

MR. ROBERTS: Thank you, Your Honor.

THE COURT: This is the defendant's Motion to Stay enforcement of an order denying a motion to quash subpoenas.

I'm going to deny the motion for stay. I do find that the object of the writ -- is not subject to -- would not be defeated. In weighing the prejudice, it weighs to the plaintiffs' benefit, simply because they relied on the Rule 16

representations. And for those reasons -- and also because you have another remedy. You can go to the Supreme Court and ask them to stay the matter. And, of course, if they do, I will abide by any rule -- any order that they make. All right.

MR. ROBERTS: I understand. I have one alternative request from the Court --

THE COURT: Yes.

MR. ROBERTS: -- so that we don't have to apply for emergency relief in under 14 days and these witnesses could be compelled to be here theoretically, November 1st, the day we're currently scheduled to open.

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Whether we could have a 14- or 15-day temporary stay. That would only prevent the plaintiffs from calling them in the first several days of their case. And that would prevent the necessity to have to ask the Supreme Court to hear this on an emergency basis.

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THE COURT: And a brief response, please?

MS. LUNDVALL: Your Honor, I think they waited too long to make that request. They suggested it during their opening remarks, and somehow that they had to wait to bring any type of a writ until they received a written order. They did not. And in fact, they cite and they rely so heavily upon the *Quinn* case, the *Quinn* case was both Mr. Polsenberg's and my case. We went up on an oral order. And we were doing it



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on an emergency basis, and we headlined and hearalded it was an emergency basis. They know that. They understand. They appreciate that. And they've sat on this too long. What they're trying to do is to prevent us from being able to call these witnesses in the order by which that we would prefer.

So we would ask the Court then to deny that additional request.

THE COURT: Thank you.

And in reply?

MR. ROBERTS: Just to clarify that calculating it out, I think the 15 days would be November 3rd. Openings are scheduled for November 1st. That's all we're asking for for this alternate remedy.

Thank you, Your Honor.

THE COURT: You know, and I just think it's an inappropriate after I rule against the request, to then make a new oral request.

So I'm going to deny that as well.

Now, it is --

MR. ROBERTS: Your Honor --

THE COURT: Yes.

MR. ROBERTS: -- in order to get a written order on this as soon as possible --

THE COURT: I'm going to suggest that you guys get the it to me today, because I'll sign it today.

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MR. ROBERTS: -- would -- can we just say it's denied for the reasons stated on the report?

THE COURT: You may.

MR. ROBERTS: And that way there's no dispute over the language?

THE COURT: You may. And make sure that Ms. Lundvall has the ability to review and approve the form.

MR. ROBERTS: Thank you, Your Honor.

THE COURT: Good enough. All right.

It's to -- 3:28. Let's take a recess to 3:40, and that will be our last recess of the day. We'll end it today at 4:45.

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And Counsel, please discuss the order of that argument on the plaintiffs' *Motion in Limine*. Thank you.

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MALE SPEAKER: Yes, Your Honor.

[Recess taken from 3:28 p.m., until 3:45 p.m.]

THE COURT: So Ms. Gallagher, we were arguing your motion. Did you have a chance to speak to Mr. Blalack?

MS. GALLAGHER: I did, Your Honor. And what we've agreed is that Mr. Blalack is going to finish his presentation on Medicare rates, which was the second topic, and get into in-network agreements.

And then I will address those three in turn, so that would be clinical records, medical rates, and then the in-network agreements, Your Honor.



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THE COURT: Mr. Blalack; is that correct?

MR. BLALACK: That's correct, Your Honor. And then we'll just pick up and finish it thereafter.

THE COURT: Very good. Thank you.

MR. BLALACK: Thank you, Your Honor.

THE COURT: Please proceed.

MR. BLALACK: All right. Your Honor, when we broke, I was walking you through the evidence implicated by the portion of the omnibus *Motion in Limine* No. 3 relating to Medicare rates and explaining the extent to which Medicare rates are part of the ordinary operation of daily business by the plaintiffs and by the defendants, and in their [indiscernible] with each other.

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But I want to make clear on something critical. In this case, the defendants have an official corporate position on what constitutes the reasonable value for an out-of-network service, including the [indiscernible]. And that position is that the fair value or reasonable value of an out-of-network service is the Medicare rate plus a small margin. That's how the company described it.

And in fact, I'm showing you an excerpt of testimony from Mr. Schumacher, who is a -- you've heard about already was a senior United executive, where he was asked that question and he explained United's corporate position.

So this motion, if granted, would literally preclude



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me from asking one of my senior executives to turn to the jury and say, please, what is United's corporate position during the period of dispute? What constitutes the reasonable value of an out-of-network service or the out-of-network emergency service?

And if he -- if one of those witnesses was asked on cross, the witness could not honestly answer that question without disclosing that it is tied to a Medicare record. That is the official position of the company.

Now, with respect to the experts, Mr. Deal will -- if permitted, his primary opinion in this case is going to be about what constitutes the reasonable value of the disputed services? And it is his expert opinion. He's an economist. And we've shared with you his background.

His professional opinion is that to measure the reasonable value of an out-of-network [indiscernible] service, you have to measure what the value is observed in market transactions, actually market transactions, between a willing buyer and a willing seller in a noncompulsory environment. That's his expert opinion.

And he will, if permitted, render an expert opinion in this case that that is the proper reasonable value of the expert -- of the emergency services in this case.

But he also is of the view that the Medicare program that's the largest payor in the company -- it's TeamHealth's

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largest payor -- in fact, TeamHealth, 25 percent of its patient volume and claims is through Medicare -- that that Medicare rate, which is based on the cost and build up of the services under the RBRBS system [indiscernible] is a very useful barometer for measuring on an apples-to-apples basis, different forms of payment [indiscernible].

So he's not going to render an opinion that the Medicare fee schedule was the reasonable value of the service.

But he will, if permitted, say that, did he look at this information from the [indiscernible] plaintiffs and this information from the defendants and from these other sources and compare them on an apples-to-apples basis. Using the Medicare fee schedule as the barometer, you can compare those two sources. So for example, one might be 180 percent of Medicare; one might be 200 percent of Medicare; one might be 215, even though these underlying payment methodologies are different.

So that's the way in which his opinion would touch on expert proof by relying on Medicare. And in fact, to give you a sense, Your Honor, in this case, for the disputed services as shown here, the Medicare fee schedule will have an amount on average for these disputed claims of $150 per claim. So if the same people received the same services and had been paid under the Medicare program, they would have been paid on average $150 [indiscernible].

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The allowed amount that the defendants already allow that's in dispute that is the alleged underpayment is on average 248. So, you know, not quite 60, 70 percent more. And then the [indiscernible] 1143. That's the average amount of the charge for the disputed claim. So what you see there is the -- just the relative proportion of the charge to the allowed amount in dispute, to the Medicare fee schedule.

And that base information, Your Honor, is just the building block for any factfinder going through the exercise of looking at other data that's not on this chart about market rates, negotiated rates, average allowed amounts, and [indiscernible] to evaluate what constitutes a reasonable value for the disputed services. So it's a building block.

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Now, I want to move on to the next topic which we've agreed to cover before I'll hand the [indiscernible] back over to plaintiffs' counsel to respond to these first couple of issues, and we'll finish, I guess, tomorrow.

So the next issue that has been identified for network rates with other providers. And the issue here is the amount that both the defendants contracted to pay other emergency room providers, other than TeamHealth, in our market data on plaintiff. And the amount that is the TeamHealth plaintiffs contracted with other health insurers to accept for payment of those services -- classified by payors other than the defendant.



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That's what we're really talking here, when we talk about paying network rates.

And this has -- this motion was surprising me because Your Honor ordered the defendants, back in October of 2020, to produce market and reimbursement rates related to in-network reimbursement rates, including contracts [indiscernible]. And so defendants collected that information and produced contracts with other emergency room providers, produced market data showing where contracted rates are with other emergency room providers, not TeamHealth and the like. And plaintiffs did the same.

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You know, plaintiffs produced the same kind of information to us. They produced market data showing their contracted rates with a couple [indiscernible] not United, and they produced contracts with other payors and information about their rates with other payors.

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Now, -- and I'm noting here that in their order -- I mean, in the *Motions in Limine* they do not cite in this portion of their motion any specific order or R&R for the contention that network rates are irrelevant. What they do is they claim that on the November 9th, 2020, order, which I was just focusing on, as well as the August 3rd, 2021, order, R&Rs No. 2 and 3, and R&R No. 7 are the applicable prohibitions that would be extended [indiscernible].

It is our position, Your Honor, if you read -- go back



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and read those R&Rs, they don't say that in-network rates paid by defendants to other emergency room providers or in-network rates accepted by TeamHealth for other defendants are irrelevant and not [indiscernible].

And frankly, Your Honor, I don't really know how that could be the interpretation, given the case law in the state of Nevada that we cite in our brief for the proposition that offers to contract and contractual arrangements can be the basis for determining reasonable value of a disputed service.

And here is the September 16th, 2021, order. And it's referencing R&R No. 7. First of all, it didn't make the admissibility ruling, and then it relied on R&R No. 3 and R&R No. 2, which are referenced here, which again we believe do not bar the admissibility of network rates in this trial.

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Now, as I noted, it's undisputed that the TeamHealth plaintiffs, notwithstanding their interpretation of what the Court ruled, have produced their own market data for their network rates with other health insurers and other health [indiscernible]. And I'm citing to the Bates numbers there on the page, Your Honor, where they produced that data to us.

They also produced contracts and agreements with other payors, particularly located here in Clark County, who were clients of ours.

So after they went out-of-network, they then went to some of those clients and started negotiating direct



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agreements with them, that they had rates they would not extend to us. And they entered those contracts, including with the Las Vegas Police Department, with MGM. And they produced those contracts and those agreements, some of whom I'm referencing here, that had specific rates in it, that are dramatically less than what they're arguing to the jury in this case, arguing is the reasonable value, and which, again, they would not extend to the defendants when the defendants offered to contract at these amounts.

Here is the MGM agreement that references a case rate of $320 [indiscernible]. Again, this is a rate that was not that they refused to extend to the defendants.

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And then you remember that in discussion at this very important meeting that happened between Mr. Murphy and Mr. Schumacher and how -- you know, how important it is.

THE COURT: The April meeting before the complaint, right.

MR. BLALACK: Exactly. In connection with that meeting, before it happened, Mr. Murphy put together a PowerPoint and sent it to Mr. Schumacher. And in that PowerPoint, the purpose of that PowerPoint was for him to explain why he thought the United reimbursement rates were too low; why United should agree to contract at a higher rate. This is for a national contract, by the way. Not -- it wasn't focused exclusively, in fact, very much at all on Nevada. It



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